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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DAVID FINLEY, Plaintiff and Respondent, v. CLUB ONE, INC., Defendant and Appellant.	D058426 (Super. Ct. No. 37-2008-00096890-CU-PO-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Hayes and Joel M. Pressman, Judges. Reversed.

Defendant and appellant Club One, Inc. (Club One) appeals from a judgment entered after a jury trial on plaintiff and respondent David Finley's action for personal injuries he sustained after falling on a basketball court at Club One's health club. During trial, the court excluded surveillance video evidence of Finley participating in various activities, which the defendants proffered as impeachment evidence. In a bifurcated hearing after the verdict, the court ruled unenforceable a "Waiver of Claims/Arbitration"

provision (liability waiver provision) in a membership agreement Finley had signed in December 2006. The court entered judgment in Finley's favor including $25,000 in past medical expenses, an amount which Club One asserted was more than Finley's private insurer had paid.

Club One challenges each of the above referenced rulings. It contends the trial court erred by (1) relying on parol evidence to interpret the waiver provision and concluding it was inconspicuous, unclear, ambiguous, and internally inconsistent with other provisions of the membership agreement; (2) excluding the surveillance video as an evidence preclusion sanction and also on grounds it constituted marginal impeachment evidence; and (3) denying defendant's motion to reduce the verdict to the amount of Finley's medical expenses paid by his private health insurer.

We conclude the liability waiver provision within the membership agreement signed and initialed by Finley in December 2006 is enforceable even if Finley did not read the agreement and believed it only reduced his payment terms. Further, the trial court erred in concluding the provision is inconspicuous, unclear or ambiguous. Because the release is a complete bar to Finley's personal injury claims, we need not reach Club One's remaining contentions, and reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Finley's Injury

In December 2007, Finley, then a national baseball scout with the Boston Red Sox, injured his left ankle when he slipped and fell while playing basketball at Club One's facility. The prior evening, an employee of an outside janitorial service had inadvertently applied a stainless steel cleaner to the basketball court. After his fall, Finley went to see the orthopedic surgeon who had treated him in 1988 for another injury to his left ankle that had occurred when it was struck by a foul ball.[1] An MRI revealed Finley suffered a severe ankle sprain with injuries to the ligaments on the outside, inside and bottom of his ankle, and he also lost a piece of cartilage from his ankle joint.

Finley Files a Lawsuit for Negligence and Premises Liability

Finley sued Club One and two individuals doing business as ERM Janitorial Service (ERM), alleging causes of action for negligence and premises liability. The matter proceeded to a jury trial. Before trial, Club One moved in limine to exclude all evidence of liability against it on grounds Finley had signed a membership agreement containing a "Waiver of Claims/Arbitration" provision (the liability waiver provision). The court and counsel engaged in a lengthy discussion about the matter. Thereafter, the

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1 Finley testified that after that injury, his physician performed two surgeries and he had no further problems or pain in his left ankle during the next 17 years.

court bifurcated the issue of the liability waiver provision's legal effect for a bench trial based on stipulated facts to occur following the jury's verdict on liability and damages.

The Jury Enters a Special Verdict in Finley's Favor

In a special verdict, the jury found defendants were negligent, that their negligence was a substantial factor in causing harm to Finley, and that Finley was not negligent. It awarded Finley $1.8 million in damages, including $25,000 in past medical expenses. The jury allocated 68 percent fault to Club One.

The Court Conducts the Bifurcated Hearing on the Liability Waiver Provision

After the jury's verdict, the parties submitted briefing and evidence by way of written declarations, and the trial court conducted a hearing on the enforceability of the liability waiver provision. Thereafter, overruling Club One's objections to Finley's evidence, it ruled the provision was ineffective as a waiver of Finley's personal injury claim. Specifically, the court found the document was intended to accomplish a reduction in Finley's gym fees and not to affect or otherwise modify Finley's original contract with Club One, the liability waiver provision was not conspicuous or clear, and the document was internally inconsistent and ambiguous to a layperson.

Post-Trial Motions

After plaintiff's counsel submitted a proposed judgment,(AA 254, 256)! Club One objected and moved to reduce the jury's verdict. The trial court denied the motion. It entered judgment for the full amount of the verdict. The court also denied Club One's ensuing alternative motion for new trial or reduction in the verdict, in which Club One

challenged, among other rulings, the court's refusal to enforce the liability waiver provision.

Club One appeals from the judgment and the trial court's order denying its motion to reduce the special verdict.

DISCUSSION

I. *Background*

In connection with the bifurcated hearing on the enforceability of the liability waiver provision, Club One presented declarations from its chief operating officer Bill McBride, and Debonie Katz, its operations director at the time of Finley's injury. McBride stated that the membership agreement Finley signed on December 8, 2006, was the "operable" agreement on the date of Finley's injury. Katz averred she had assisted Finley and observed him sign the December 8, 2006 agreement, and signed and dated the agreement herself that day. She stated she recalled discussing with Finley that he could take advantage of lower monthly rates of membership by executing the agreement, gave him all the time he needed to read and review the document without interrupting him, and offered him a copy of the fully executed agreement for his records.

Finley also submitted a declaration from Katz in connection with the hearing. In that declaration, Katz averred that at some point during her employment with Club One, it began offering a promotional membership package to attract new members that provided a lower monthly rate in exchange for a one-year membership commitment. Previously, Club One's memberships had been exclusively month to month. Its policy was to extend the discount to existing members upon request. According to Katz, on

December 8, 2006, Finley asked her if she could offer him the lower rate and she agreed, then filled in the basic information on the document and gave it to Finley. She stated: "This document was not Mr. Finley's actual membership agreement with Club One and was not intended to create or bind him to any terms of membership other than the one year commitment at the lower monthly rate. [¶] . . . For this reason, I only asked him to initial and sign the document where indicated and then I took the document back from him. I never reviewed the details of the document with him. [¶] . . . I did not suggest he read the entire document, nor did I see him review the form. It was not necessary to the transaction taking place. To my recollection, Mr. Finley was on his way out of the club after his basketball games when I had him sign the financial portions of the document."

Finley submitted his own declaration, in which he stated he had joined Club One at the end of 2003 or beginning of 2004, and paid his membership via automatic debit. According to Finley, in early December 2006, he learned other members were paying a lower monthly fee, and asked Katz about it. She agreed Club One would reduce his monthly membership fee and on December 8, 2006, while he was in between basketball games or on his way out of the club, she gave him the document necessary to implement the change. He stated he was not asked to read the document and Katz did not suggest he do so. Rather, he was "specifically told that the only reason for me to sign it was to authorize a reduction in the amount deducted from my account." Finley concluded: "The signing of the document followed my earlier conversation with Ms. Katz about the lowering of the fee charged and therefore I understood my signature related solely to

future banking transactions. To the best of my recollection, the entire transaction took approximately less than a minute."

The single page, two-sided document at issue, entitled "Membership Agreement" on the upper left hand side, is signed and dated on the right hand side of the front page by both Finley and Katz under the sentence: "This is a month to month agreement and may be terminated as set forth herein."[2] The front page contains a "Membership Category" section with checked boxes indicating Finley was a "Reactivating member" with a "Single-site membership." An "Authorization for Payment" section on the first page contains the handwritten word "conversion" across it and is lined through, with Finley's signature appearing below additional handwriting filling in blanks for the date of the first monthly charge and amount. In the left hand corner both below and to the left of Finley's signature is a paragraph headed, "Agreement," which reads in part: "I have read the terms of this agreement on the front and reverse of this document and agree to abide by these terms . . . ."

The document's back page contains two columns of single-spaced fine print consisting of 31 paragraphs and three articles entitled: "Membership," "Rules and Regulations," and "Waiver of Claims; Arbitration." Finley initialed a box provided within a "Fees and Charges" section in the left hand column.

Article III, entitled "Waiver of Claims; Arbitration," is surrounded by a single-line box at the bottom of the right hand column of text. It contains two sections, and reads in

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2 Club One has lodged the original document with this court. The document is set forth in full in the attached Appendix.

part: "Section I. Assumption of Risk, Release and Waiver Of Liability; Indemnity [¶] Member knows, understands, and appreciates the risks of entry upon and use of fitness facilities and equipment, including but not limited to loss of or damage to personal property, serious or catastrophic personal injuries and death. Member confirms that he/she is voluntarily participating in Club One's fitness activities and entering upon and using Club One's facilities and equipment, and Member hereby expressly assumes all risk that he/she may suffer personal, bodily or mental injury or death, economic loss or damage as a result of his/her entry upon or use of Club One's facilities or equipment or participation in Club One activities. Member acknowledges and agrees that he/she is solely responsible for his/her safe and responsible entry upon and use of the Club One facilities and equipment, whether or not supervised by a Club One representative. [¶] . . . Member hereby releases and discharges Club One . . . from any and all claims, causes of action or liability for any damages to or loss of property, injuries or death Member may suffer in or about Club One, resulting from Member's participation in Club One activities, entry upon or use of Club One facilities or equipment, whether or not the same arises out of or results from any act, omission or conduct of any of the Club One Parties, negligent or otherwise."

In block capitals of approximately 16 characters per horizontal inch, section I concludes:

> MEMBER ACKNOWLEDGES THAT HE/SHE HAS CAREFULLY READ THIS AGREEMENT AND IS AWARE THAT IT CONTAINS A WAIVER AND RELEASE OF LIABILITY AND THAT MEMBER IS GIVING UP SUBSTANTIAL RIGHTS, INCLUDING HIS/HER RIGHT TO SUE. MEMBER IS SIGNING THIS AGREEMENT OF HIS/HER OWN FREE WILL AND INTENDS FOR HIS/HER SIGNATURE TO BE A COMPLETE AND UNCONDITIONAL RELEASE OF ALL LIABILITY TO THE GREATEST EXTENT ALLOWED BY LAW.

The "Arbitration" section reads: "Member agrees to resolve any and all claims, disputes or controversies arising out of or relating to membership with Club One exclusively by final and binding arbitration using the American Arbitration Association's (AAA) Commercial Arbitration Rules. This includes, but is not limited to, claims related to fee disputes, personal injury and any other claim which may be asserted under the law of contracts and/or law of tort and/or asserting a public policy or Constitutional claim. The laws of the state of California shall govern the dispute."

II. *Contentions*

Club One contends the trial court erred by ruling the liability waiver provision unenforceable. It argues such waivers are consistently enforced to bar actions for personal injuries, and the provision in the present case bars Finley's claim because his injuries were sustained while he was using its facilities. It criticizes the trial court's various findings in support of its ruling, arguing (1) the parol evidence offered by Finley was not admissible because it sought to "flatly contradict" the agreement; (2) the waiver provision is conspicuous because it is separated by a box and contains a caption in larger type than any other type on the page; and (3) the waiver provision was not ambiguous, nor was it inconsistent with an arbitration provision permitting the parties to arbitrate the enforceability of the waiver as well as numerous other types of disputes.

As we will explain, the parol evidence rule is inapplicable, and thus the trial court correctly considered extrinsic evidence as to the parties' intent and circumstances surrounding the signing of the agreement. However, we hold the court nevertheless erred by holding the liability waiver provision unenforceable, because Finley did not present

evidence of fraud or mistake, and he is bound by the provision, which is unambiguous, sufficiently conspicuous, and plainly redistributed to Finley the risk causing his injuries.

III. *The Parol Evidence Rule Does Not Apply*

The parol evidence rule " 'is not a rule of evidence *but is one of substantive law*.' " (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343.) It " 'does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on the probative value of such evidence or the policy of its admission. The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the "integration"), *becomes the contract of the parties*. The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement.' [Citation.] Thus, '[u]nder [the] rule[,] the act of executing a written contract . . . *supersedes* all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.' [Citation.] And '[e]xtrinsic evidence cannot be admitted to prove what the agreement was, not for any of the usual reasons for exclusion of evidence, but because as a matter of law the agreement is the writing itself.' " (*Id*. at p. 344.)

Accordingly, with certain exceptions, the parol evidence rule, which is codified in Code of Civil Procedure section 1856, prohibits the introduction of extrinsic evidence to contradict or add terms to an integrated agreement. (Code Civ. Proc., § 1856, subd. (a); 2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, § 65, p. 186; *Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 435; *Burch v. Premier Homes, LLC* (2011) 199 Cal.App.4th 730, 741.) " 'An integrated agreement is a writing or writings

constituting a final expression of one or more terms of an agreement.' " (*Alling v. Universal Manufacturing Corp*. (1992) 5 Cal.App.4th 1412, 1433.) Club One never claimed below, and does not squarely claim on appeal, that the membership agreement was integrated within the meaning of that term.[3] Thus, it misplaced reliance on the parol evidence rule to urge exclusion of Finley's and Katz's declarations.

The authorities on which Club One relies in invoking the parol evidence rule involve documents that were either expressly integrated or otherwise held not amenable to explanation by parol evidence due to the specific nature of the document. *Alling v. Universal Manufacturing Corp., supra*, 5 Cal.App.4th 1412 involved a purchase agreement with an integration clause. (*Id*. at p. 1435.) The appellate court stated: "Here, the trial court itself determined, and stated on the record more than once, that the Purchase Agreement was an integrated contract . . . . The trial court was correct in this determination." (*Ibid*.) In *Nelkin v. Marvin Hine & Co.* (1964) 228 Cal.App.2d 744, the document at issue served a dual purpose as a receipt and contract. Due to that dual nature, the Court of Appeal held it was governed by California Supreme Court authority

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3 Club One, however, does not expressly concede the point. Citing *Masterson v. Sine* (1968) 68 Cal.2d 222, it maintains in reply that if a contract is not integrated, "that just means its terms can be supplemented by a collateral agreement that is not inconsistent with the contract's express provisions." But *Masterson* does not stand for the proposition cited by Club One. At the point cited in *Masterson*, the California Supreme Court was addressing standards in determining whether a writing is an integration. (*Masterson*, *supra*, 68 Cal.2d at pp. 225-226; see *Singh v. Southland Stone, U.S.A, Inc.* (2010) 186 Cal.App.4th 338, 352-353.) The rules it expresses are directed to that inquiry, and have no relation to the question of whether extrinsic evidence may be admitted to explain, interpret, or limit the scope of a nonintegrated writing. (See *Singh*, 186 Cal.App.4th at p. 353, fn. 7.)

for the propositions that " '[w]ritings which are receipts, but which also contain contractual terms, have been held to be written contracts, not to be altered or added to, where either they purport to be, or the evidence shows that they are, the written memorial of the full understanding of the parties. Of this character is usually a bill of lading issued by a carrier acknowledging the receipt of the goods to be transported and specifying the terms of the transportation. But unless the receipt appears to be of this character, the "parol evidence" rule has no application to it.' " (*Nelkin*, at pp. 746-747.) In *Alameda County Title Ins. Co. v. Panella* (1933) 218 Cal. 510 the court applied the parol evidence rule to bar a contemporaneous oral agreement concerning a note and deed of trust. (*Id*. at pp. 513-517.) Problematically, the conclusions of *Nelkin* and *Alameda* appear to rely on the repudiated "face of the document" rule. (See *Brawthen v. H&R Block, Inc.* (1972) 28 Cal.App.3d 131, 137 [discussing *Masterson v. Sine, supra,* 68 Cal.2d 222, which distinguishes between integrated and unintegrated written agreements]; 2 Witkin, Cal. Evid. (4th ed. 2000) Documentary Evidence, § 69, p. 189.)

Even if a contract is deemed integrated, the parol evidence rule does not bar evidence regarding "the circumstances under which the agreement was made or to which it relates," evidence to explain an extrinsic ambiguity, or evidence to otherwise interpret the terms of the agreement. (Code Civ. Proc., § 1856, subd. (g); *Garcia v. Truck Ins. Exchange*, *supra*, 36 Cal.3d at p. 435; see *Burch v. Premier Homes, LLC*, *supra*, 199 Cal.App.4th at p. 742 [" 'The fact that the terms of instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms' " and thus " 'rational interpretation requires at least a preliminary

consideration of all credible evidence offered to prove the intention of the parties' " including the circumstances surrounding the making of the agreement and object, nature, and subject matter of the writing]; *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 350 ["[E]ven an apparently unambiguous general release is properly interpreted in light of the surrounding circumstances"].)

Under the principles discussed above, there was no impediment to the court's consideration of evidence concerning the circumstances surrounding Finley's execution of the membership agreement to shed light on the parties' mutual intent and the agreement's scope. (See Civ. Code, § 1647 ["A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates"].) Because the extent of Club One's argument is that the lower court's consideration of the evidence violated the parol evidence rule—that the declarations of Finley and Katz were inadmissible because they somehow contradicted the release in the membership agreement—the contention fails on the aforementioned grounds.

IV. *The Release is a Complete Bar to Finley's Personal Injury Claims Even Absent Evidence Finley Read the Agreement*

We nevertheless conclude the liability waiver provision operates as a complete bar to Finley's personal injury claims, requiring that the judgment be reversed in its entirety.

A contract in which a party expressly assumes a risk of injury is, if applicable, a complete defense to a negligence action. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308, fn. 4; *Sweat v. Big Time Auto Racing* (2004) 117 Cal.App.4th 1301, 1304; *Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1372.) " ' " 'The result is that . . . being no

duty, [the defendant] cannot be charged with negligence.' " ' " (*Paralift, Inc. v. Superior Court* (1993) 23 Cal.App.4th 748, 755.) And generally speaking, " 'a written release extinguishes any obligation covered by the release's terms, provided it has not been obtained by fraud, deception, misrepresentation, duress, or undue influence.' " (*Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1366.) When a person capable of reading and understanding such a release signs it, he or she is—in the absence of fraud and imposition—bound by its provisions and estopped from claiming they are contrary to his or her intentions or understanding. (*Ibid*.) But assent to a release agreement is necessary in order for it to be binding. Hence, if it can be established that the party did not in reality assent to it, he is not estopped from claiming the release is not binding for want of assent. (*Ibid*.; see also *Edwards v. Comstock Insurance Co.* (1988) 205 Cal.App.3d 1164, 1167-1168.)

Here, Finley maintains that his evidence, accepted by the trial court, shows that by signing and initialing the agreement, he agreed only to the change in membership rate and the month-to-month nature of the contract; that the parties' intent was to provide him with a reduction in monthly dues, and he is not bound by terms he and Katz did not consider to be part of the transaction and he did not read.

Absent evidence of fraud, deception, misrepresentation, duress, or undue influence, this assertion cannot stand. "If [Finley] signed the release on the mere unspoken belief that the release did not encompass such claims, despite express language in the release to the contrary, he may not now rely on his unspoken intention not to waive these claims in order to escape the effect of the release." (*Skrbina v. Fleming Companies*,

supra, 45 Cal.App.4th at p. 1367, citing *Edwards v. Comstock Insurance Co.*, *supra*, 205 Cal.App.3d at p. 1169.) " . . . 'Ordinarily, one who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms, and cannot escape liability on the ground that he has not read it. If he cannot read, he should have it read or explained to him.' " (*Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 Cal.App.4th 158, 163.)

Finley argues the circumstances are like those in *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516 and *Appleton v. Waessil* (1994) 27 Cal.App.4th 551, in which parol evidence was considered to limit the scope of releases. (*Hess*, at p. 526, [on uncontroverted extrinsic evidence that parties did not intend to release Ford Motor Company from liability, court interpreted release as excluding language "and all other persons, firms, corporations, associations, or partnerships" (italics omitted) due to mutual mistake stemming from use of standard form release]; *Appleton*, at pp. 555-556 [holding the term "all persons" within a release ambiguous; the release identified by name only General Motors Corporation and Norm Marshall & Associates and extrinsic evidence raised a triable issue of fact as to whether the settling parties intended to include respondent Waessil].)

But Finley did not seek rescission or reformation based on fraud or mistake based on the express statements of both contracting parties as in *Hess, supra*, 27 Cal.4th 516,[4]

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4 In *Hess, supra*, 27 Cal.4th 516, after Ford Motor Company moved for summary judgment on grounds of the release, the plaintiff filed a separate action against the other party involved in the automobile accident and his insurer for reformation of the release

and we conclude below that the language of the liability waiver provision is unambiguous, unlike the release language in *Appleton*. Finley's evidence does not show that at the time he signed the release either he or Katz actually discussed the release language and whether or not he would be bound by it. There is no evidence he and Katz expressly agreed to omit the release language from the membership agreement. Accordingly, the recital that Finley read the release and understood its legal consequences must be *conclusively* presumed true. (Evid. Code, § 622.) "When the public interest is not implicated, private parties are free among themselves to shift a risk elsewhere than where the law would otherwise place it. [Citations.] Such agreements, in the context of sporting or recreational activities, have consistently been enforced." (*Olsen v. Breeze, Inc.* (1996) 48 Cal.App.4th 608, 619-620.)

V. *The Release is Not Ambiguous*

The trial court separately determined the release was unenforceable because the liability waiver and arbitration provisions were "internally inconsistent and ambiguous . . . ." The court reasoned: "The language used seems on one hand to waive all personal injury claims of club members while at the same time calling for the submission of such claims to arbitration. While lawyers might not have difficulty understanding these provisions, the average layman would find them to be inconsistent and ambiguous."

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under Civil Code section 3399 on grounds of mutual mistake. (*Id*. at pp. 520-521.) Civil Code section 3399 provides in pertinent part that when, through "mutual mistake of the parties . . . , a written contract does not express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention."

The clarity and scope of the exculpatory provision itself is not at issue in this case. (Compare *Zipusch v. LA Workout, Inc.* (2007) 155 Cal.App.4th 1281, 1290-1291 [exculpatory clause stating it released the defendant from liability for injuries "from the negligence or other acts of anyone else using LA Workout" was held not to release the defendant from its own negligence or all liability caused by a third party, thus summary judgment was unavailable on grounds of liability release for claims that defendant negligently maintained its exercise equipment]; and *Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1484-1491 [release providing that signatory agreed to release " 'some but not all' " risks inherent in horseback riding "to assume responsibility for the risks identified herein and those risks not specifically identified" (italics omitted) held ambiguous as to whether release covered only unspecified risks inherent in horseback riding].) Thus, the trial court was not called upon to decide whether the release language itself was ambiguous or applied to Finley's injuries. Indeed, the express language of the release clause plainly encompasses Finley's injuries sustained while playing basketball on Club One's court: "Member hereby releases and discharges Club One . . . from any and all claims, causes of action or liability for any . . . injuries . . . Member may suffer . . . resulting from Member's participation in Club One activities . . . or use of Club One facilities . . . whether or not the same arises out of or results from any act, omission or conduct of any of the Club One Parties, negligent or otherwise." (Accord, *Randas v. YMCA of Metropolitan Los Angeles*, *supra*, 17 Cal.App.4th at pp. 160, 163-163 [release providing undersigned released YMCA from all liability for any loss or damage on account of injury due to or caused by the negligence of the YMCA neither unclear or

ambiguous, and applied to injury plaintiff suffered slipping on poolside tile after a swimming class] see also *Cohen*, 159 Cal.App.4th at p. 1485 ["The scope of a release is determined by its express language"].)

Rather, Finley's contentions as to ambiguity, both on appeal and below, are based only on the coexistence of the release and the binding arbitration provision encompassing claims for personal injuries, and the fact the document states it is a "month to month" contract but also requires the member to pay a substantial "exit fee" for cancelling the commitment within a year of signing. Finley maintained the latter deficiency was "reflective of the poor and ambiguous draftsmanship of the document as a whole"; he argued these alleged ambiguities related to the remedy for personal injury claims, and thus the language should be construed against Club One and the release held invalid.

"While ' "a release need not achieve perfection," ' it must, nonetheless, be clear, explicit and comprehensible 'to an ordinary person untrained in the law.' When examining a release, it must be 'clear, explicit, and comprehensible in itself and when considered and read in whole with the entire agreement.' If an alternative, ' "semantically reasonable" ' meaning exists the release is ambiguous. 'The threshold determination of whether a document contains ambiguities is subject to independent review.' " (*Zipusch v. LA Workout, Inc.*, *supra*, 155 Cal.App.4th at pp. 1287-1288 [footnotes omitted]; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.) "[I]f a release is ambiguous, and it is not clear the parties contemplated redistributing the risk causing the plaintiff's injury, then the contractual ambiguity should be construed against the drafter, voiding the purported

release." (*Zipusch v. LA Workout, Inc.*, 155 Cal.App.4th at p. 1288.) " ' "An ambiguity can be patent, arising from the face of the writing, or latent, based on extrinsic evidence." ' " (*Cohen v. Five Brooks Stable*, *supra*, 159 Cal.App.4th 1486.)

We do not perceive invalidating patent or latent ambiguity *in the meaning or scope of the release language* by virtue of the presence of the arbitration clause requiring final and binding arbitration of all "claims, disputes or controversies arising out of or relating to membership with Club One," including claims of personal injuries. Finley's evidence did not address the meaning of the language within the membership agreement, and thus there is no extrinsic evidence creating any latent ambiguity. (Compare *Sweat v. Big Time Auto Racing*, *supra*, 117 Cal.App.4th at pp. 1306-1307 [court considered undisputed extrinsic evidence that the general public was allowed to enter a restricted area and go onto bleachers after car races were over without signing a release, to draw the inference that the purpose of the release was to assume the risk of hazards relating to observation of the dangerous activity of automobile racing, not hazards of defective construction or maintenance of bleachers; release at issue did not say the speedway was released from liability whether or not race activity was occurring].)

Nor can we find patent ambiguity rendering the membership agreement invalid. The provision requiring binding arbitration of personal injury claims is not fatally inconsistent with a release of personal injury claims caused by Club One's actions or omissions, negligent or otherwise. As Club One points out, a release of claims based on willful misconduct is unenforceable under Civil Code section 1668, and the agreement would require such claims be resolved by binding arbitration. But even if the two clauses

are arguably inconsistent, the presence of an arbitration clause does not impact or reduce the clarity or scope of the liability release language.

We have found no case, and Finley cites none, in which a contract including a liability release was invalidated in its entirety by the inclusion of an agreement to arbitrate disputes or claims potentially subject to the release. Finley does not identify what alternative, semantically reasonable meaning is imparted to the release language by the presence of the arbitration clause or the exit fee provision. A release need not be perfect to be enforceable. (*Sweat v. Big Time Auto Racing*, *supra*, 117 Cal.App.4th at p. 1305, citing *National & Internat. Brotherhood of Street Racers, Inc. v. Superior Court* (1989) 215 Cal.App.3d 934, 938.) "It suffices that a release be clear, unambiguous, and explicit, and that it express an agreement not to hold the released party liable for negligence. This was accomplished here." (*National & Internat. Brotherhood of Street Racers, Inc. v. Superior Court*, at p. 938.)

VI. *The Release Provision is Not Unenforceable as Insufficiently Conspicuous*

We cannot uphold the trial court's ruling that the membership agreement's liability waiver provision is unenforceable as insufficiently conspicuous or readable.

As stated, an effective release must be clear, explicit and comprehensible. (*Hohe v. San Diego Unified Sch. Dist.* (1990) 224 Cal.App.3d 1559, 1565-1566; *Bennett v. United States Cycling Federation* (1987) 193 Cal.App.3d 1485, 1490; *Fritelli, Inc. v. 350 North Canon Drive, LP* (2011) 202 Cal.App.4th 35, 50.) It must be easily readable and placed in such a way to compel notice. (See *Conservatorship of Link* (1984) 158 Cal.App.3d 138, 141-142 (*Link*); *Leon v. Family Fitness Center (#107), Inc.* (1998) 61

Cal.App.4th 1227, 1232 (*Leon*) [" 'An express release is not enforceable if it is not easily readable' "].) " '[T]he important operative language should be placed in a position which compels notice and must be distinguished from other sections of the document. A [layperson] should not be required to muddle through complex language to know that valuable, legal rights are being relinquished.' [Citation.] An exculpatory clause is unenforceable if not distinguished from other sections, if printed in the same typeface as the remainder of the document, and if not likely to attract attention because it is placed in the middle of a document." (*Leon*, at p. 1232; see also *Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1731.)

Finley points out that the exculpatory language of the release appears at the end of the back page of the document, and that the signature lines are located only on the first page, without a place for the member to sign or initial the document in the vicinity of the waiver clause. He argues there is "no way" the clause at the end of the single-spaced, double-sided document can be deemed conspicuous. However, while important, point size is not dispositive on the adequacy of a release. (*Bennett v. United States Cycling Federation*, *supra*, 193 Cal.App.3d at p. 1489.)[5] Finley relies on cases such as *Leon*,

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5 "We do not read *Link*[, *supra*, 158 Cal.App.3d 138] as holding that every release printed in less than eight-point type is unenforceable as a matter of law. We believe that the *Link* case should be read in the context of the facts that it considered: a statement buried in the midst of a highly prolix sentence, which was itself surrounded by paragraphs of fine print. To the degree that *Link* may be read to state a rule of law denying effect to any release printed in less than eight-point type, regardless of other circumstances, we respectfully decline to follow it." (*Bennett v. United States Cycling Federation*, *supra*, 193 Cal.App.3d at p. 1489.)

supra, 61 Cal.App.4th 1227 and *Link*, *supra*, 158 Cal.App.3d 138. But these cases are not dispositive because they turn on facts not present here.

In *Link*, a purported release agreement required as a condition of entry to a racing event was held unenforceable "because it is printed in five-and-one-half-point type and cannot be easily read by persons of ordinary vision," and also "because it is unclear, not explicit and so lengthy and convoluted that it is not comprehensible." (*Link*, *supra*, 158 Cal.App.3d at p. 139.) The appellate court held the defendants' use of two release agreements framed in different language "created an ambiguous, confusing situation which must be resolved against defendants." (*Id*. at p. 143.) According to the court, the fact the release consisted of two documents with different terms, which were at best unclear, not explicit and so lengthy and convoluted as to be incomprehensible, invalidated the purported agreement. (*Ibid*.)

In *Leon*, *supra*, the appellate court held a health club's liability release waiver insufficient to bar a plaintiff's personal injury suit, where the exculpatory language was buried in the middle of the plaintiff's membership agreement; it was not prefaced by a heading alerting the reader that it was an exculpatory release; it was in the same smaller font size as the rest of the plaintiff's membership agreement; and it was ambiguously worded, as it did not contain a specific reference to negligence.[6] (*Leon*, *supra*, 61

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6 As described by the *Leon* court: "The release begins with language that participation in a sport or physical exercise may result in accidents or injury, and buyer assumes the risk connected with the participation in such. The release is followed by a statement in large print and bold, capital letters: 'Moderation is the Key to a Successful

Cal.App.4th at p. 1235.) Furthermore, the Court of Appeal reasoned that the risk of injury—from a collapsing sauna bench—was not the type of risk or negligence that was reasonably related to the purpose for which the release was given, that is, injuries resulting from participating in sports or exercise rather than from reclining on a sauna bench. (*Ibid*.)

Here, there is only one liability waiver provision set off by a surrounding box, the release language itself is clear and unambiguous, and the language plainly applies to the type of injury Finley sustained. The small type size does not render the words unreadable or unintelligible to a person with ordinary vision, contrary to the release in *Link*. Nor is it inconspicuously buried in other provisions as in *Leon*. (See *Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1359-1360 [distinguishing *Leon*].) In sum, the trial court had no basis to invalidate the liability waiver provision on grounds it is insufficiently visible, clear or comprehensible.

Fitness Program and Also the Key to Preventing Injuries.' Family Fitness placed the general waiver between these two statements which deal strictly with the risks inherent in an exercise or sports program without any mention that it was intended to insulate the proprietor from liability for injuries caused by its own negligence." (*Leon, supra,* 61 Cal.App.4th at p. 1235.)

DISPOSITION

The judgment is reversed. The parties shall bear their own costs on appeal.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.

Appendix

ENTERED

FROG'S Club One | CLUB ONE FITNESS

Membership Agreement

Membership # 3415979 home club # CMR

Name (Last, First, Middle) Finley, David

Home address 14578 Rutledge Sq.

City, State, Zip San Diego, CA 92128

Home phone 858 487-0205

Email (home) _____ (work) _____

Birthdate 11.30.65

Today's date 120806

Title _____

Company _____

Business address _____ Suite/floor _____

City, State, Zip _____

Business phone _____ Fax _____

Emergency contact & phone number 858 487-0205

Membership Category (check one from each column)

- ☐ New member
- ☐ Add-on member
- ☒ Reactivating member (old# 3415979)

- ☐ Full network membership
- ☐ Regional network membership (region _____)
- ☒ Single-site membership (home club CMR)

- ☐ Corporate member ☐ Capitated ☐ Full subsidized ☐ Partially subsidized ☐ Unsubsidized
- ☐ Smart Start member
- ☐ Term member (start date _____ end date _____)

Authorization for Payment

I authorize Club One to initiate a charge to the accounts noted below for both my dues and other recurring charges and the dues and recurring charges of all additional members added to my membership and my house charges for goods and services purchased in the club as well as my Smart Start Deferred Registration Fee, if applicable. ***This authorization is to remain in effect until Club One has received written notice from me of its termination as required by Article I, Section 5 on the back of this Agreement.*** I have the right to stop payment on an Electronic Funds Transfer debit by notifying my bank. This, however, does not void my contract with Club One to fulfill my payment commitment and I am obligated to pay by some other method. The processing date for debit cards may vary due to banking procedures and if charges are returned they will be subject to a Late Fee. I understand that my Supercharge Account information will be stored electronically and will not be present at the time of purchase.

Electronic Funds Transfer Account (for dues and recurring charges)

☐ MasterCard ☐ VISA ☐ American Express ☐ Debit Card (attach card imprint)

Account number _____ Exp. date ____/____

OR

☐ Checking or savings account (attach voided check)

Date of first monthly charge 01/01/07 Amount $ 36

SuperCharge Account (for house charges)

☐ Same card as above

☐ MasterCard ☐ VISA ☐ American Express ☐ Debit Card (attach card imprint)

Account number _____ Exp. date ____/____

Please allow all adult family additions on my membership to use this charge account.

☐ yes ☐ no

_____

Primary Member Signature (responsible for payment) Date

Agreement

I have read the terms of this agreement on the front and reverse of this document and agree to abide by these terms. This is a month-to-month agreement and may be terminated as provided in the initial 10-Day Cancellation Policy, and as set forth in Article I on the reverse side here of. Termination of Smart Start Membership may be subject to payment of an exit fee.

Initial 10-Day Cancellation Policy

You, the buyer, may cancel this agreement at anytime prior to midnight of the 10th calendar day after you have signed this agreement. To cancel this agreement, mail or deliver a signed and dated notice, or send a telegram which states that you, the buyer, are canceling this agreement, or words of similar effect. Such notice should be sent to the address listed below.

FOR OFFICE USE ONLY.

Join date 010107 Renewal date 123107

Membership type Standard - SS

Marketing source _____ Corporate ID# _____

Primary member _____ Member # _____

Membership Representative _____

Payment summary	Bill to member	Bill to company
Registration fee	$ 0	$
Dues		
For the month of _____	$	$
For the month of _____	$	$
For the month of _____	$	$
Prepayment _____ months	$ / (disc. _____)	
Recurring fees		
☐ Locker $ _____/mth	☐ Fitness	$ _____/mth
☐ Childcare $ _____/mth	☐ Parking	$ _____/mth
☐ Racquet $ _____/mth	☐ Pool	$ _____/mth
For the month of _____	$	$
For the month of _____	$	$
For the month of _____	$	$
Balance due (for reactivation)	$	$
Total received	$	$

____Cash received on ____/____/____

____Check received (check # _____)

____MasterCard ____VISA ____American Express

Entered by _____ Date ____/____/____

This is a month to month agreement and may be terminated as set forth herein.

_____ 12-8-06

Member Signature Date

_____

Parent/Guardian Signature (if member is under 18) Date

_____

Membership Representative Date

_____

Club General Manager Date

1479RM5HQALL

This Membership Agreement (this "Agreement") is between Club One, Inc. ("Club One") and the applicant for membership identified on the front of this Agreement ("Member").

Article I. Membership

Section 1. Eligibility for Membership
All membership agreements must be on forms prescribed by Club One and are subject to approval by Club One authorized personnel and payment of the required fees. Persons 18 years or older may become members. At the discretion of Club One, minors between the ages of 13 and 17 may join with written parental approval on the front of this Agreement. If approved, members under the age of 18, must be accompanied by a parent or guardian while using the Facilities (defined below).

Section 2. Nature of Membership
Membership confers solely the right to use and enjoy the Facilities of Club One in accordance with Club One's rules and regulations, as they may change from time to time. "Facilities" is defined as the Club One site or sites included in the membership privileges for the type of membership selected by Member on the front of this Agreement. Membership does not confer any interest in the property or assets of Club One or any right to participate in the management or operations of Club One, financially or otherwise.

Section 3. Fees and Charges
Registration Fees. As a condition of membership, Member shall pay a registration fee to Club One. The amount, manner and time of payment of such fee shall be established by Club One and may be changed from time to time. No portion of such fee will be refunded, except as provided in the Initial 10-Day Cancellation Policy as specified on the front of this Agreement.

Deferred Registration Fee. I agree to pay an exit fee of $150.00 to Club One if I decide to terminate or downgrade my membership before a full 12 months of dues has been paid. This fee will be deducted automatically from the EFT or Supercharge account on file that is used to pay dues and other charges on this membership. I do understand that if I put my membership on a hold status that those months will not be included in the full 12 months of dues.

_____ Member Initials if Smart Start

Dues. Member shall pay dues each month pursuant to an electronic funds transfer as set forth on the front of this Agreement and may terminate his/her membership in accordance with the resignation procedures outlined in Article I, Section 5 of this Agreement. The dues for each category of membership shall be subject to change. The amount of such dues will be automatically transferred from Member's bank account, credit card or debit card once each month on or after the due date for payment. The dues of any and all additional members added to Member's membership will be paid by Member. If Member elects to prepay his/her dues in advance at the end of the prepaid period, his/her membership dues may automatically revert to monthly dues billing.

House Charges. Member may elect to establish house charging privileges by providing a credit card or debit card account authorization where indicated on the front of this Agreement. Such account information is stored electronically by Club One for purchases by Member of in-house goods and services which are billed on the date of purchase and reflected on Member's credit or debit card statement.

Late or Returned Item Charges. A Late Fee will be assessed for returned checks, insufficient funds, closed accounts, frozen or declined credit cards or similar circumstances, which result in late or delayed payment to Club One. Member is responsible for providing accurate and updated information on their electronic funds account to insure timely receipt of payment. Club One reserves the right to re-attempt collection of Member's outstanding balance until such time as Member's account is current.

Section 4. Facilities/Access
Facility Privileges. Privileges to one or more Club One Facilities vary depending upon the type of membership selected by Member, which is set forth on the front of this Agreement and may be changed from time to time.

Inavailability of Facilities. The obligation to pay dues is not dependent on the availability of all Club One Facilities and sites at all times. Repairs, maintenance and other circumstances may make it necessary for Club One to restrict use of or close one or more of the Facilities or sites. Dues will not be reduced nor suspended during the time when one or more Facilities or sites are not available.

Section 5. Resignation/Termination
Voluntary Resignation. Member may resign from Club One by giving advance written notice to Club One, subject to the following terms and conditions. Resignation notices received by Club One between the first calendar day of the month and the 25th calendar day of the month will become effective 30 days after the date of receipt. The billing for the final calendar month will be prorated to exclude any days falling outside said 30 day period. Resignation notices received by Club One between the 26th calendar day of the month and the last calendar day of the month will become effective on the last calendar day of the following month. Dues will continue to accrue until the resignation is effective. No resignation will be effective and dues shall continue to be payable hereunder until all required payments have been received by Club One. After Member's resignation has become effective, he/she will not be subject to any further dues and all membership privileges will be terminated. Unless otherwise noted, all members on a family or corporate membership will be converted to individual memberships and subject to the dues of that category upon termination of this membership. If membership dues were prepaid, cancellation of membership within the prepaid time period cancellation of membership within the prepaid time period will negate any prepayment discount and any refund will be calculated accordingly. Thus, if Member prepays for a 12 month period and cancels after 9 months in accordance with the terms of this Agreement, Member will be refunded the total amount prepaid, less 9 months' worth of dues at the full, non-discounted rate in effect for such period.

Involuntary Termination. Club One reserves the right at any time to terminate the membership or privileges thereunder of any member for failure to comply with the terms of this Agreement or with any of the rules and regulations adopted by Club One or for any conduct Club One determines in its discretion to be improper or in any way contrary to the best interest of Club One and its membership. The membership may be terminated by notification in writing mailed to the last address shown on the records of Club One for the member being terminated. The terminated member will remain liable for all dues and other indebtedness incurred prior to the date of termination, which shall be three (3) business days following the date on which the termination notice is mailed by Club One.

Disability or Death. If Member is unable to use the Facilities as provided herein due to disability or death, he/she or his/her estate may terminate this Agreement and shall be relieved of the obligation to pay for services hereunder, and refunded any amounts prepaid for such services, other than those received prior to death or the onset of disability. As used herein, the term "disability" means a condition that precludes Member from physically using the Facilities as verified by a physician.

Relocation Out of Area. If Member changes his/her principal residence to a location more than twenty-five (25) miles from the nearest Facilities, then, upon written request, Member may terminate his/her membership and shall be relieved from the obligation of making payment for services other than those received prior to the move. In the event Member would otherwise be subject to an exit fee as set forth in Article 1, Section 3 above, he/she shall pay a fee of $100 or, if more than half the life of the contract has expired, $50. Upon written request to Club One, a prorated portion of the dues paid before the date of the move for services to have been used after such date, but not so used, shall be refunded to Member.

Resale of Membership. Member may not sell or otherwise transfer their membership to another party without the prior express written approval of Club One.

Section 6. Changes to Membership Status
Membership Type Conversion. Member may convert to another available type of membership by giving advance written notice to Club One, paying the difference of the two prevailing membership registration fees, if applicable, and commencing payment of the dues of the new membership type. Notices requesting conversion of membership type received by Club One on or before the first calendar day of the month will become effective on the last day of that month. Notices received by Club One on or after the second calendar day of the month will become effective on the last calendar day of the following month.

Temporary Hold or Alumni Status. Member may apply for a temporary "Hold" or "Alumni" status for a period of up to six (6) months and no more often then once every twelve (12) months by giving advance written notice to Club One and paying all dues and other unpaid charges. Approved requests received by Club One on or before the fifteenth calendar day of the month will become effective on the last day of that month. Approved requests received by Club One after the fifteenth calendar day of the month will become effective on the last calendar day of the following month. During an approved Hold status, Member may not use any Club One facilities and is subject to reduced membership dues. During an approved Alumni status, Member may use Club One facilities up to twice each month, and is subject to reduced membership dues. Member may return to regular membership status by notifying Club One in writing and commencing payment of the prevailing dues for their membership type. Availability and rate of Hold or Alumni status varies by club and membership type.

Article II. Rules and Regulations

Section 1. Registration
Member must check in and present his/her membership card each time he/she uses the Club One Facilities.

Section 2. Attire
Proper attire is required for participants using Club One. Shirts and shoes are required in all public and recreational areas. Club One may prohibit the use of any personal equipment on the premises.

Section 3. Damages
Any damage to Club One's property or to another person on Club One's premises by Member, Member's family members (including dependent children) or guests shall be paid for by Member.

Section 4. Hours of Operation
The hours of operation are adjusted seasonally and in accordance with the frequency of member usage. Club One reserves the right to change the operating hours.

Section 5. Minors and Children
Persons between the age of thirteen (13) and seventeen (17) must be accompanied by an adult member at all times while using Club One. Children through the age of twelve (12) are not allowed in Club One, except in designated childcare areas and only during posted childcare hours and with Club One staff supervision.

Section 6. Personal Business
Members may not use Club One premises for personal business without prior written approval by an authorized representative of Club One.

Section 7. Replacement Items
Lost or stolen membership cards and locker keys will be subject to a replacement fee.

Section 8. Amendment of Rules and Regulations
Club One may from time to time adopt rules, regulations or policies amending or supplementing those contained in this Agreement, and all members will be obligated to comply with such rules, regulations or policies. If new or amended rules or regulations are adopted, they will be published as "Additional or Substitute Rules and Regulations" unless they are of such a nature that publication would be inefficient or inappropriate, in which case notice shall be posted or members shall be otherwise advised of the amendment or supplement to the Rules and Regulations as necessary.

If any provision of this Agreement or any supplement hereto is ruled invalid or unenforceable as applied to any person or circumstance, all other provisions of this Agreement shall remain valid and enforceable as applied to all other persons and circumstances.

Modifications or additions to the pre-printed terms of this agreement, other than the completion of existing blanks, are unauthorized and will not be honored by Club One.

Article III. Waiver of Claims; Arbitration

Section 1. Assumption Of Risk, Release And Waiver Of Liability; Indemnity
Member knows, understands and appreciates the risks of entry upon and use of fitness facilities and equipment, including but not limited to loss of or damage to personal property, serious or catastrophic personal injuries and death. Member confirms that he/she is voluntarily participating in Club One's fitness activities and entering upon and using Club One's facilities and equipment, and **Member hereby expressly assumes all risk that he/she may suffer personal, bodily or mental injury or death, economic loss or damage** as a result of his/her entry upon or use of Club One's facilities or equipment or participation in Club One activities. Member acknowledges and agrees that he/she is solely responsible for his/her safe and responsible entry upon and use of the Club One facilities and equipment, whether or not supervised by a Club One representative.

In consideration for being permitted to enter upon and use Club One's facilities and equipment and participate in Club One activities, on behalf of him/herself and his/her spouse, unborn children, heirs, representatives, guardians, distributees, successors and assigns (the **"Member Parties") Member hereby releases and discharges** Club One, including its affiliated organizations, owners, partners, members, directors, officers, employees, contractors and agents (the **"Club One Parties") from any and all claims, causes of action or liability for any damages to or loss of property, injuries or death Member may suffer** in or about Club One, resulting from Member's participation in Club One activities, entry upon or use of Club One's facilities or equipment, whether or not the same arises out of or results from any act, omission or conduct of any of the Club One Parties, negligent or otherwise.

In addition, Member agrees to **hold harmless, indemnify and defend** the Club One Parties from all claims, demands, causes of action or liability for any loss, damage, or injury to persons or property arising from or relating to Member Parties' entry upon or use of Club One's facilities or equipment or participation in Club One activities, including without limitation attorney's fees, expenses, costs and all consequential damages, whether or not resulting from any act, omission or conduct of any of the Club One Parties.

MEMBER ACKNOWLEDGES THAT HE/SHE HAS CAREFULLY READ THIS AGREEMENT AND IS AWARE THAT IT CONTAINS A WAIVER AND RELEASE OF LIABILITY AND THAT MEMBER IS GIVING UP SUBSTANTIAL RIGHTS, INCLUDING HIS/HER RIGHT TO SUE. MEMBER IS SIGNING THIS AGREEMENT OF HIS/HER OWN FREE WILL AND INTENDS FOR HIS/HER SIGNATURE TO BE A COMPLETE AND UNCONDITIONAL RELEASE OF ALL LIABILITY TO THE GREATEST EXTENT ALLOWED BY LAW.

Section 2. Arbitration
Member agrees to resolve any and all claims, disputes or controversies arising out of or relating to membership with Club One exclusively by final and binding arbitration using the American Arbitration Association's (AAA) Commercial Arbitration Rules. This includes, but is not limited to, claims related to fee disputes, personal injury and any other claim which may be asserted under the law of contract and/or law of tort and/or asserting a public policy or Constitutional claim. The laws of state of California shall govern the dispute.