S251392

SUPREME COURT NO. _____

IN THE SUPREME COURT OF CALIFORNIA

MONSTER ENERGY COMPANY,

Plaintiff, Respondent, and Petitioner,

v.

BRUCE L. SCHECHTER, R. REX PARRIS LAW FIRM,

Defendants and Appellants.

PETITION FOR REVIEW

From the Opinion of the Court of Appeal of the State of California,
Fourth Appellate District, Division Two, Case No. E066267
on Appeal from The Superior Court of California,
County of Riverside, Case No. RIC1511553
(Hon. Daniel A. Ottolia)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

In accordance with Rules 8.208 and 8.488 of the California Rules of Court, the undersigned, as counsel of record for plaintiff, respondent, and petitioner Monster Energy Company, certifies that the following entity has an ownership interest of more than 10 percent in Monster Energy Company: Monster Beverage Corporation. With this exception, the undersigned knows of no other entity or person other than the parties to this proceeding who has a financial or other interest in its outcome.

Executed this 20th day of September 2018, at Irvine, California.

Frank C. Rothrock

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PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Monster Energy Company ("Monster") respectfully petitions for review following the decision of the Court of Appeal, Fourth Appellate District, Division Two, filed on August 13, 2018, which reversed the denial of an anti-SLAPP motion brought under Code of Civil Procedure section 425.16. A copy of the Court of Appeal's decision ("Opn.") is attached as Exhibit A.

ISSUES PRESENTED FOR REVIEW

1. An attorney for one of the parties to a settlement agreement signs it under the legend "APPROVED AS TO FORM AND CONTENT." The settlement agreement contains confidentiality provisions that are explicitly binding on the parties and their attorneys. Is the attorney bound by these provisions or does the attorney's signature merely convey professional approval for the attorney's client to sign the agreement?

2. Code of Civil Procedure section 425.16, subdivision (b) provides that an anti-SLAPP motion should be denied if the plaintiff establishes a probability it will prevail. In ruling on the plaintiff's probability of success, may a court ignore extrinsic evidence that supports the plaintiff's claim? Here, for example, the defendant

attorney advised a reporter for a plaintiffs' legal blog that he could not disclose the terms of a confidential settlement. Was it appropriate for the Court of Appeal to accept his explanation that this statement reflected his ethical obligations to his client and to disregard plaintiff Monster's contention that this statement could reasonably be construed by a trier of fact as an admission that the attorney and his law firm were bound by the confidentiality provisions in the parties' settlement agreement?

3. In determining whether statements qualify as commercial speech exempt from an anti-SLAPP motion under Code of Civil Procedure section 425.17, subdivision (c), is it appropriate – as determined by the Court of Appeal in this case – to resolve this issue based on whether the challenged speech is successful in generating business for the speaker?

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

California courts have recognized the important role of confidentiality in fostering California's policy in favor of settlement. (See, e.g., *Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court* (1996) 51 Cal.App.4th 233, 241, disapproved on another ground in *Williams v. Superior Court* (2017) 3 Cal.5th 531, 558, fn. 8.) And there should be no dispute that a confidentiality provision in a settlement agreement has little value if it is not binding on both the parties and their attorneys.

Prior to the Court of Appeal's decision in this case, there was no published California appellate authority addressing what language

is necessary to bind parties' attorneys to a confidentiality provision in a settlement agreement. To the extent guidance existed, it suggested that an attorney for a settling party should be bound by a confidentiality provision irrespective of whether the attorney signed the settlement agreement as a party or expressed approval of its form.[1]

Here, parties settled a wrongful death action against Monster based on allegations the plaintiffs' daughter died after ingestion of Monster's energy drinks. The parties entered into a settlement agreement that contained confidentiality provisions expressly binding on the parties and their attorneys. The attorneys for the parties signed the settlement agreement under the legend "APPROVED AS TO FORM AND CONTENT."

Monster contends one of the attorneys for the plaintiffs in the wrongful death action violated the terms of the confidentiality provisions by stating to a reporter for a plaintiffs' blog that the case had settled for "substantial dollars." Monster sued the defendant attorneys ("Attorneys") for the plaintiffs in the settled case for breach of the confidentiality provisions in the settlement agreement. The trial court denied, in part, an anti-SLAPP motion brought by the Attorneys.

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[1] (See, e.g., Rutan & Tucker LLP, *First amendment/anti-Slapp did not insulate law firm from liability for violation of confidentiality clause in mediated settlement agreement* (July 2, 2013) <http://www.lexology.com/library/detail.aspx?g=93f3f0cb-e179-42dd-9797-7615443a3f8e> [as of Sept. 16, 2018] [attorney's breach of a confidentiality provision is not protected by Code of Civil Procedure section 425.16; cited in Respondent's Br. at 23] (hereafter Rutan & Tucker First Amendment/anti-SLAPP article);

Lewis, Settlement Template <www.mediatorjudge.com/pg13.cfm> [as of Sept. 16, 2018] (hereafter Lewis Settlement Template);

Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2017) Form 15:C, pp. 15-252 to 15-254 (hereafter Croskey Settlement Form).)

The Court of Appeal reversed this order with directions to the trial court, on remand, to enter an order granting the anti-SLAPP motion in its entirety. (Opn. at 22.)

The Court of Appeal placed singular reliance on a decision by the Nebraska Supreme Court in a case involving a different procedural issue and factual setting – *RSUI Indemnity Co. v. Bacon* (2011) 282 Neb. 436 (hereafter *RSUI*). It concluded, "The only reasonable construction of this wording [i.e., APPROVED AS TO FORM AND CONTENT] is that [Attorneys] were signing solely in the capacity of attorneys who had reviewed the settlement agreement and had given their clients their professional approval to sign it. In our experience, this is the wording that the legal community customarily uses for this purpose." (Opn. at 17.) But it provided no references or examples on which this "experience" is based.

The Court of Appeal failed to adhere to the rule that, in addressing the probability-of-success prong under the anti-SLAPP statute, it was required to accept as true the evidence favorable to Monster and to evaluate the Attorneys' evidence only to determine if it defeated Monster's evidence as a matter of law. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 (hereafter *Oasis West*).) There was no dispute that, before telling a reporter for a plaintiff's blog the case had settled for substantial dollars, defendant Bruce L. Schechter (a member of Attorneys' firm) admitted to the reporter that he could not disclose the terms of the settlement. (Clerk's Transcript at 45.)[2] But the Court of Appeal simply accepted the Attorneys'

[2] Mr. Schechter apparently felt – mistakenly – that he was only obligated not to disclosure the amount of the settlement.

explanation that this statement was based on some ethical duty to their clients. It ignored the alternative explanation – that this statement reflected an admission by the Attorneys that they were bound by the confidentiality provisions in the parties' Settlement Agreement. (Opn. at 16, fn. 2.)

The Court of Appeal also failed to consider the issue of whether a trier of fact could reasonably conclude that an attorney who approves the content of an agreement – the content of which contains provisions expressly binding on the attorney – is consenting to be bound by these provisions. Finally, it gave no consideration to how a trier of fact would react to Mr. Schechter's awkward attempt to explain that he approved only the content of the confidentiality provisions as they applied to his firm's clients, but not their content as they applied to him and his law firm. (CT at 117-118.)

The Court of Appeal's Opinion sends a message that an attorney may negotiate a settlement agreement and approve its content – the content of which imposes a duty of confidentiality on the attorney – and then simply ignore this provision. And the only way the attorney can be called to account, according to the Court of Appeal, is through a lawsuit against the attorney's client. (Opn. at 21.)

The Court of Appeal's decision raises additional problems that call for review. Its reliance on *RSUI* (Opn. at 19) is at odds with California authority on the language necessary to convey a party's agreement to be bound by a contract. *RSUI* held an attorney's signature under the legend "Agreed to in Form & Substance" was insufficient to bind an attorney and his law firm to the terms of a

settlement agreement. (*RSUI, supra*, 282 Neb. at p. 437.) But the Judicial Council's jury instruction on formation of a contract includes the following element: "That the parties ***agreed*** to the terms of the contact." (CACI No. 302 (2018 ed.), emphasis added.)

Finally, the Opinion resolved the commercial-speech exemption issue based on the fact there was no evidence Mr. Schechter's statement to the reporter that the case against Monster had settled for "substantial dollars" generated any leads for the Attorneys. (Opn. at 12-13.) The question of whether speech is commercial or protected speech that involves an issue of public interest should not turn on whether it is successful in generating business for the speaker.

This petition meets the criterion of California Rules of Court, rule 8.500(b)(1) because it presents important questions of law. What contractual language is necessary to bind an attorney to a confidentiality (or other) provision in a settlement agreement that imposes obligations on the attorney? In the context of an anti-SLAPP motion, to what extent is a plaintiff entitled to the benefit of the doubt in weighing and construing evidence that may be considered by a trier of fact to determine whether a defendant has agreed to be bound by a contractual provision? What is the appropriate test for application of the commercial-speech exemption in Code of Civil Procedure section 425.17, subdivision c?

BACKGROUND

A. The Fourniers' Wrongful Death Action

Wendy Crossland and Richard Fournier ("Fourniers") filed a lawsuit against Monster in 2012 for the alleged wrongful death of their daughter based on claims of product liability. (OB at 7.)[3] Attorneys (Bruce L. Schechter and his law firm, R. Rex Parris Law Firm) represented the Fourniers in the wrongful death suit. (*Ibid.*)

B. The Settlement Agreement

The Fourniers and Monster entered into a Confidential Settlement Agreement and Release ("Settlement Agreement") on July 29, 2015. (SSCT at 22-33.) The Settlement Agreement included provisions acknowledging that it was the result of "extensive good faith negotiations between the Parties through their respective counsel" and that it was entered into on behalf of the "settling parties, individually, as well as on behalf of their . . . attorneys, . . . " (SSCT at 26 [§ 7.01] and 22 [p. 1, second ¶].) The parties released all claims

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[3] "AR" will refer to the materials attached to Attorneys' Motion to Augment the Record, which was granted by the Court of Appeal on December 5, 2016.

"CT" will refer to the Clerk's Transcript.

"OB" will refer to the Opening Brief to the Court of Appeal by Attorneys (defendants and appellants Bruce L. Schechter and the R. Rex Parris Law Firm).

"RB" will refer to the Respondent's Brief to the Court of Appeal by Monster.

"RT" will refer to the Reporter's Transcript of the proceedings in the trial court on June 15, 2016.

"SSCT" will refer to the Sealed Supplemental Clerk's Transcript.

against each other and the other side's attorneys. (SSCT at 23-24 [§§ 1.1, 1.2].)

The Settlement Agreement contained comprehensive confidentiality provisions under which the Fourniers "and their counsel of record" (i.e., Attorneys) agreed that the "terms, conditions and details" of the Settlement Agreement, "including its existence are to remain confidential." (SSCT at 27 [¶ 11.1].) They further agreed not to make any statements about the settlement in the media, including to an entity identified as "Lawyers & Settlements," and that any comments made regarding the settlement would be limited to "this matter has been resolved" or "words to their effect." (SSCT at 27-28 [§§ 11.1, 11.2, and 11.3].)

The Settlement Agreement was signed on behalf of Attorneys by Mr. Schechter under the legend "APPROVED AS TO FORM AND CONTENT." (SSCT at 32-33.)

C. Attorneys Breach The Settlement Agreement

Less than two months after the Settlement Agreement was signed, an article appeared in LawyersandSettlements.com on September 15, 2015, regarding the settlement of the Fourniers' wrongful death action. The article was titled " 'Substantial Dollars' for Family in Monster Energy Drink Wrongful Death Suit." (CT at 149.) LawyersandSettlements.com is a lead-generating website for attorneys that touts itself as having "forwarded hundreds of thousands of requests for legal representation directly to lawyers." (CT at 156.)

The LawyersandSettlements.com article referred to Mr. Schechter as "a veteran attorney with a lot of experience dealing

with executives and taking depositions from executives from the Monster Energy drink company. Schechter's most recent case resulted in 'substantial dollars' for the family of a 14-year old that went to a mall with girlfriends in the summer of 2011, drank two Monster Energy drinks and died of cardiac arrest." (CT at 149.) The article went on to describe Mr. Schechter as "a master litigator in the fight for compensation on behalf of a number of families who have had loved ones injured or die after consuming the highly caffeinated beverage." (*Ibid.*) Below the article was an advertisement offering "Monster Energy Drink Injury Legal Help" at no cost. (*Ibid.*)

The author of the article, Brenda A. Craig, was deposed and provided a sworn affidavit that established Mr. Schechter was interviewed by her on September 4, 2015. She confirmed the accuracy of the statements attributed to Mr. Schechter in the September 15, 2015, LawyersandSettlements.com article. (CT at 141-144, 149-150, 153-154.)

D. Attorneys' Anti-SLAPP Motion

Monster filed this case on September 25, 2015. (AR at 1.) Monster alleged causes of action for breach of contract, breach of covenant of good faith, unjust enrichment, and promissory estoppel against Attorneys on the ground Mr. Schechter's statements to Ms. Craig regarding the settlement of the Fourniers' lawsuit breached the confidentiality provisions in the Settlement Agreement. (AR at 3-12.)

On October 23, 2015, Attorneys filed a Special Motion to Strike Monster's Complaint under Code of Civil Procedure section

425.16. (CT at 1.) Attorneys argued that Monster's Complaint constituted a strategic lawsuit against public participation and that Mr. Schechter's statements to Ms. Craig regarding the settlement of the Fourniers' wrongful death action constituted protected activity in furtherance of Mr. Schechter's constitutional right of free speech related to an issue of public interest. They further contended Monster could not establish a probability that it will prevail on its claims. (CT at 3, 6-18.)

The gist of Attorneys' argument was that they were not parties to the Settlement Agreement, but merely gave approval for their clients to sign it. (CT at 12-13.) They acknowledged that Mr. Schechter told Ms. Craig he could not disclose the terms of the settlement, but tried to explain that this statement was motivated by his desire to protect his clients and avoid potential litigation against them. (CT at 128, 129.)[4]

The trial court held a hearing on Attorneys' anti-SLAPP motion on June 15, 2016. (RT 1-24; CT at 207-232.) It denied the motion as to Monster's cause of action for breach of contract, but granted the motion as to Monster's other claims for breach of covenant of good faith, unjust enrichment, and promissory estoppel. (RT 23:5-12; CT at 230, 235-236.)

The trial court found that Attorneys had met their initial burden of showing the statements allegedly in violation of the confidentiality provisions of the Settlement Agreement were protected speech addressing the public interest in safety. (RT 3:1-4:20; CT at 210-

[4] Although Mr. Schechter did not deny stating to Ms. Craig that the Fourniers' action had settled for "substantial dollars," he claimed that he had no memory of using this language. (CT at 45.)

211.) But the trial court also found Monster had met its burden of establishing a probability of success with respect to its cause of action for breach of contract. (RT 4:21-7:18; CT at 211-214.)

The trial court's order denying the anti-SLAPP motion as to Monster's cause of action for breach of contract was entered on June 15, 2016. (CT at 196.) Attorneys filed a Notice of Appeal the same day. (CT at 198.)

E. The Court Of Appeal's Opinion

The Court of Appeal's Opinion poses and answers the core question in this case as follows: "When a settlement agreement provides that the '[p]laintiffs and their counsel agree' to keep the terms of the agreement confidential, and when the plaintiffs' counsel signs the agreement under the words, 'Approved as to form and content,' can the plaintiffs' counsel be liable to the defendant for breach of the confidentiality provision? We answer this question, 'No.' " (Opn. at 1-2, brackets in original.) The balance of the Opinion describes the circuitous route taken by the Court of Appeal to support this conclusion.

The Opinion quotes some of the terms of the Settlement Agreement, including its confidentiality provisions. (Opn. at 2-5.) It notes the Settlement Agreement was signed by Mr. Schechter on behalf of the R. Rex Parris Law Firm under the words " 'Approved as to form and content' " and that Mr. Schechter "later admitted, 'I knew that Monster would not settle the case if [the Fourniers] did not agree to keeping it confidential.' " (Opn. at 5-6.) The Opinion then identifies the facts supporting Monster's claim that Attorneys

breached the terms of the confidentiality provisions. (Opn. at 6-7.)

The Opinion next addresses the merits of Attorneys' anti-SLAPP motion. Its decision is anchored in two conclusions: (1) Monster failed to show that Mr. Schechter's comments to LawyersandSettlements.com fall within the commercial-speech exemption from the anti-SLAPP statute (Opn. at 9-13) and (2) Monster did not show a probability of prevailing on its cause of action for breach of contract because the Attorneys did not agree to be bound by the Settlement Agreement. (Opn. at 13-21.)

The Court of Appeal's analysis of the commercial-speech exemption is premised on several grounds. First, the Opinion states that the commercial-speech exemption turns on the speaker's "purpose" and "intent," and these ordinarily present questions of fact to be determined by a trial court. (Opn. at 11.) Noting that the trial court was in a superior position to make credibility determinations, the Opinion concludes: "we accept the trial court's credibility determinations even though we review the legal effect of those determinations independently." (Opn. at 12.)

Second, the Opinion notes that "the trial court found insufficient evidence that the Attorneys were 'advertising' because there was no evidence they received any leads that the [LawyersandSettlements.com] article generated." (Opn. at 12.) Third, the Opinion concludes the issue of whether Attorneys received any leads from the article or Mr. Schechter's statements to Ms. Craig raises "a credibility issue, and the trial court resolved it in favor of finding no intent to solicit." (Opn. at 12.)

The Opinion then moves to the issue of whether Monster showed a probability of success on its cause of action for breach of contract. It acknowledges that the confidentiality provisions "did at least purport to bind the Attorneys." (Opn. at 14.) But there is no analysis of whether a trier-of-fact could reasonably find that Attorneys' approval of the content of the Settlement Agreement included approval and acceptance of the content that placed a duty of confidentiality on them. The Opinion concludes, without analysis, that the "only reasonable construction of this wording [i.e., Approved as to form and content]" is that the Attorneys had given their clients their professional approval to sign the Settlement Agreement. (Opn. at 17 ["In our experience, this is the wording that the legal community customarily uses for this purpose"].) The Opinion does not identify any source for this "experience."

The Opinion focuses on a case discussed extensively by the parties in their briefs, *Freedman v. Brutzkus* (2010) 182 Cal.App.4th 1065 (hereafter *Freedman*), and on a case that neither side mentioned in their briefs – *RSUI, supra,* 282 Neb. 436. The Opinion acknowledges that *Freedman* is "not on point," but describes it as "the only relevant California case we have found." (Opn. at 17.) The Opinion also concedes that, although the settlement agreement in *Freedman* contained the legend "Approved as to Form and Content" above the defendant attorney's signature, there were no provisions in the settlement agreement purporting to bind or benefit the attorney. It also concedes *Freedman* concerned a claim of fraud rather than breach of contract against the attorney. (Opn. at 18-19.) Instead of relying on *Freedman*, the Opinion relies on and adopts the holding in

RSUI. In *RSUI*, the Nebraska Supreme Court found an attorney's signature under the words "Agreed to in Form & Substance" in a settlement agreement was insufficient to bind him and his law firm to obligations placed on them under the terms of the agreement. (*RSUI, supra*, 282 Neb. at pp. 437-438.)

In its concluding comments, the Opinion seems to recognize the important role of confidentiality as a material term in many settlement agreements, and it concedes that a settlement may be forestalled if the "party's attorneys are free to blab about it." (Opn. at 20.) But its suggested remedy, which implies Monster just sued the wrong defendant, is that Monster may be able to state a cause of action against Attorneys' clients – the Fourniers. (Opn. at 21.)

Monster's Petition for Rehearing was denied by the Court of Appeal on August 29, 2018.

LEGAL DISCUSSION

I. THE COURT OF APPEAL'S ADOPTION OF *RSUI* SETS A STANDARD AT ODDS WITH CALIFORNIA'S POLICY IN FAVOR OF SETTLEMENT.

The Court of Appeal's Opinion threatens to undermine California's policy in favor of settlement. Endorsing and adopting the Nebraska Supreme Court's decision in *RSUI, supra*, 282 Neb. 436, the Opinion adopts a standard inconsistent with the Judicial Council's jury instructions on the formation of a contract. (Compare *RSUI, supra*, 282 Neb. at p. 437 ["Agreed to in Form & Substance" insufficient to bind attorney to settlement agreement] with CACI

No. 302 (2018 ed.) [third element to prove creation of a contract requires "[t]hat the parties agreed to the terms of the contract"].)

Prior to this case, as acknowledged in the Opinion (Opn. at 17), there was no published California appellate decision that addresses the issue of what language is necessary to bind an attorney to provisions in a settlement agreement that place obligations on the attorney. But the guidance available to California lawyers indicates that, where an attorney negotiates a settlement agreement on behalf of a client, the attorney is bound by a provision that places an obligation of confidentiality on the attorney. This obligation arises regardless whether the attorney signs the agreement as a party (Rutan & Tucker First Amendment/anti-SLAPP article), the attorney signs the agreement under the words "Approved as to Form" (Lewis Settlement Template), or the attorney signs it under the words "Approved as to form and content" (Croskey Settlement Form). (*Ante*, fn. 1.)

Ignoring this prior guidance, the Opinion endorses and adopts the decision of the Nebraska Supreme Court in *RSUI*. Under the *RSUI* standard, even an attorney's signature under the words "Agreed to in Form & Substance" will be insufficient to bind the attorney to a provision in a settlement agreement. (Opn. at 19.) And it is irrelevant whether the attorney negotiated the terms of the settlement agreement.

RSUI was neither cited nor discussed in the briefs filed with the Court of Appeal. This was for good reasons. *RSUI* concerned factual and legal issues distinct from those presented by Attorneys' appeal from the denial of their anti-SLAPP motion. *RSUI* came before the Nebraska Supreme Court on a grant of summary judgment against the defendant attorneys. The issue was whether a signature under the

heading "Agreed to in Form & Substance" meant the attorneys were bound by a provision in a settlement agreement under which they and their client had agreed to reimburse the plaintiff insurance companies if the attorneys' client later obtained a settlement payment from a third party. (*RSUI, supra*, 282 Neb. at pp. 437-438.)

The plaintiff insurance companies filed a breach of contract action against both the attorneys and their client and obtained summary judgment against each for $437,500. (*RSUI, supra*, 282 Neb. at p. 439.) Although the summary judgment against the attorneys was reversed, the summary judgment against their client was affirmed. (*Id.* at pp. 443, 448.) Distinct from the situation presented by Monster's claim against Attorneys, the *RSUI* defendant attorneys' potential ability to escape liability did not nullify or render worthless their client's obligations under the settlement agreement. Their client had received $1.25 million from the third party identified in the settlement agreement and presumably had sufficient funds from which to satisfy the judgment against him. (*Id.* at p. 439.) And the decision of the Nebraska Supreme Court did not end the case against the attorneys. To the extent the *RSUI* plaintiffs still had a claim for compensation under the settlement agreement, they were free to pursue it against the attorneys in the trial court.

RSUI is distinguished on additional grounds. In contrast to this case, there was no mention of extrinsic evidence on the issue of whether the attorneys had agreed to be bound by the terms of the settlement agreement. And nothing in *RSUI* suggests introduction of extrinsic evidence would be foreclosed on remand if the plaintiffs continued to pursue their case against the attorneys. The decision's

reference to the contractual language at issue as "ambiguous" (*RSUI, supra*, 282 Neb. at p. 442) suggests extrinsic evidence would be admissible.

It appears the Court of Appeal was led to *RSUI* by the parties' citations to *Freedman, supra*, 182 Cal.App.4th 1065. Attorneys emphasized *Freedman* in their briefs (see, e.g., OB at 22-24). Although the Nebraska Supreme Court in *RSUI* cited *Freedman* for its conclusion that the legend "Agreed to in Form & Substance" demonstrated only that the defendant's attorneys approved the form of the agreement (*RSUI, supra*, 282 Neb. at p. 442 & fn. 8), it gave no analysis of *Freedman* and cited it only in a bare footnote. (*Ibid.*) Moreover, the legend at issue in *Freedman* did not contain the word "agreed." (*Freedman, supra*, 182 Cal.App.4th at p. 1070 [legend stated "Approved as to form and content"].)

As acknowledged by the Court of Appeal, *Freedman* is "not on point" (Opn. at 17) and it did not address the issue of whether an attorney who approves the content of a settlement agreement is bound by a provision in that content that places an obligation such as confidentiality on the attorney. Similar to *RSUI*, *Freedman* is further distinguished because its holding was limited to the language of the contract and did not involve extrinsic evidence of the signing attorney's intent. (*Freedman, supra*, 182 Cal.App.4th at p. 1067 ["Approved as to form and content . . . does not, ***by itself***, operate as a representation . . . that can provide a basis for tort liability." Emphasis added.].)

But the problems with *RSUI* run deeper than its inapposite facts and procedural setting and its citation to *Freedman*. Neither the

Nebraska Supreme Court in *RSUI* nor the Court of Appeal's Opinion explains why the word "agreed" was not given its ordinary meaning or why it failed to bind the attorneys in *RSUI*.[5] This is the word used by the Judicial Council in California's standard jury instructions for the third element to prove creation of a contract. (CACI No. 302 (2018 ed.) ["That the parties agreed to the terms of the contract"]; see also CACI No. 309 (2018 ed.) [creation of a contract requires that a party "agreed to be bound by the terms of the offer"].)

The Opinion adopts a rule that, as a matter of law, this language (i.e., agreed) is insufficient to bind an attorney to contractual provisions that expressly apply to the attorney. It takes away from the trier of fact the determination of whether this language discloses an understanding by the attorney to be bound. This is inconsistent with the anti-SLAPP minimal-merit standard (Section II, *post*) and is contrary to the rule that, in the face of conflicting evidence about whether a contract exits, the issue of whether parties have reached a contractual agreement is for a fact finder to determine. (*Hebberd-Kulow Enterprises, Inc. v. Kelomar, Inc.* (2013) 218 Cal.App.4th 272, 283; see also *Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1376-1377.) But even if this were solely an issue of contractual interpretation (which it is not), the word "agreed" is consistent with an agreement to be bound by the confidentiality provisions in the Settlement Agreement.

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[5] The closely allied word "agree" means "1. To unite in thought; to concur in opinion or purpose. 2. To exchange promises; to unite in an engagement to do or not do something." (Black's Law Dict. (9th ed. 2009) p. 78, col. 1.)

Adoption of *RSUI* threatens to undermine the expectations and understanding of the California bar on what is necessary to bind an attorney to the terms of a settlement agreement or other contract negotiated by the attorney on behalf of a client. It also raises the bar to a point that will threaten enforcement of many settlement agreements, foster unnecessary litigation, and undermine the strong policy in favor of settlement, which is fostered by confidentiality provisions.

II. THE COURT OF APPEAL'S OPINION FAILS TO APPLY THE MINIMAL-MERIT RULE.

This Court and the Courts of Appeal have established guidelines to follow in addressing the probability-of-success prong under the anti-SLAPP statute. These have been described as a minimal-merit test and the equivalent of a summary judgment in reverse. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385; *Ralph's Grocery Co. v Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 261.) This means courts should not weigh the credibility or compare the weight of the evidence in ruling on an anti-SLAPP motion. Instead, a court should accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it defeats the plaintiff's case as a matter of law. (*Oasis West, supra*, 51 Cal.4th at p. 820.)

Here, as acknowledged by the Court of Appeal, Mr. Schechter conceded Monster would not have entered into the Settlement Agreement without a confidentiality provision. (Opn. at 6.) And there was no dispute that the confidentiality provisions in the

Settlement Agreement had little – if any – value if they were not binding on the parties' attorneys. (See, e.g., Opn. at 20 [parties "may not be willing to settle at all" if a "party's attorney is free to blab about it"].)

There was extrinsic evidence that Mr. Schechter had told Brenda Craig, a reporter for LawyersandSettlements.com, that he could not disclose the terms of the settlement. (CT at 45.) Monster contended this language was consistent with an admission by Mr. Schechter that Attorneys were bound by the confidentiality provisions in the Settlement Agreement. (See, e.g., RB at 17.) But the Court of Appeal simply accepted Attorneys' excuse that Mr. Schechter's statement was motivated by a duty to his clients. (Opn. at 16, fn. 2.)

Monster pointed to Mr. Schechter's deposition testimony, in which he made a tortured attempt to explain that he only approved the content of the Settlement Agreement as it applied to his clients, but not the content to the extent it imposed any obligations on him or his law firm. (CT at 117-118, [cited in RB at 11].) The Opinion does not discuss this testimony or its potential impact on a trier of fact.

Instead of giving Monster the benefit of the doubt on this evidence, the Court of Appeal chose to adopt the Attorneys' interpretation of it. If a trier of fact were to accept Monster's construction of this evidence, it could reasonably find that the Attorneys agreed to be bound by the confidentiality provisions in the Settlement Agreement. A judge or jury could reasonably conclude that when the Attorneys, acting through Mr. Schechter, approved the content of the Settlement Agreement, that approval included

agreement to the entire content of the Settlement Agreement – including the content that imposed obligations of confidentiality on the Attorneys.

The Opinion fails to apply the minimal-merit standard. Rather than accept as true the evidence favorable to Monster, it either ignores this evidence or accepts Attorneys' spin on it.

III. THE COMMERCIAL-SPEECH EXEMPTION SHOULD NOT TURN ON WHETHER THE CHALLENGED SPEECH IS SUCCESSFUL IN GENERATING BUSINESS FOR THE SPEAKER.

The Opinion's analysis of the commercial-speech exemption issue rests on assumptions that are not supported by the record. And it articulates a success-based test unsupported by precedent or logic.

Code of Civil Procedure section 425.17, subdivisions (c)(1) and (c)(2), provides that commercial speech is exempt from the anti-SLAPP statute. The Opinion affirms the trial court's conclusion that Mr. Schechter's statements, as expressed in the article published in LawyersandSettlements.com (CT at 149), were not exempt commercial speech. (Opn. at 11-13.)

The Opinion cites several grounds for this conclusion. First, it states that the commercial-speech exemption turns on the Attorneys' "purpose" and "intent" and that these ordinarily present questions of fact to be determined by a trial court. (Opn. at 11.) After noting that the trial court was in a superior position to make credibility determinations, the Opinion concludes: "we accept the trial court's credibility determinations, even though we review the legal effect of

these determinations independently." (*Id.* at 12.) Second, the Opinion states: "the trial court found insufficient evidence that the Attorneys were 'advertising' because there was no evidence that they received any leads that the article generated." (*Ibid.*) The Opinion concludes that the issue of whether Attorneys received any leads from Mr. Schechter's statements to Ms. Craig raises "a credibility issue, and the trial court resolved it in favor of finding no intent to solicit." (*Ibid.*)

But neither of these grounds is supported by the record. There was no conflicting testimony regarding the article and advertisement that appeared in LawyersandSettlements.com. And there was no conflicting evidence on whether the article or ad resulted in generating leads for the Attorneys. The parties disputed whether Mr. Schechter's statements to Ms. Craig amounted to commercial speech (see, e.g., CT at 9-12, 99-102, 184-187), but there was no dispute over what Mr. Schechter said to Ms. Craig. (See *ante*, fn. 4.) The credibility of Mr. Schechter or Ms. Craig's testimony was not in issue.

And it does not appear that the trial court was referencing the issue (or non-issue) of whether the article or ad resulted in any leads for the Attorneys. Although the Opinion gives no citation in support of its statement that the trial court found insufficient evidence that Attorneys were advertising "because there was no evidence that they received any leads that the article generated" (Opn. at 12), its tentative opinion cited RT 4 for this statement. But there is no statement on RT 4, or elsewhere in the Reporter's Transcript of the hearing on the anti-SLAPP motion in the trial court, that indicates the trial court addressed or made any conclusions about whether the article or ad or

Mr. Schechter's statements to Ms. Craig resulted in any leads for the Attorneys. It appears the trial court's statement at RT 4 referred to whether the ad immediately below the article (CT at 149) had been placed by the Attorneys.

But regardless of whether the trial court's comments can be construed reasonably to address the issue of whether the article, ad, or Mr. Schechter's statements resulted in any leads for the Attorneys, this should be irrelevant to the issue of whether they constituted commercial speech. No California court has suggested that the question of whether a sales pitch for products or services constitutes commercial speech should turn on whether it is successful in generating business for the speaker. Here, the Opinion offers no reason why this should make a difference.

Moreover, the fact that Mr. Schechter's statements to Ms. Craig concerned claims of injury or death from caffeinated energy drinks, does not entitle them to protected status. The fact that a general subject (e.g., public heath) may be a matter of public interest does not necessarily mean statements about specific products or conduct fall within the area of protected speech. For example, *Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595, rejected an argument that statements about a dietary supplement (Grobust) touted as "a revolutionary breakthrough that provides a 100 natural alternative to breast implants" constituted protected speech for purposes of Code of Civil Procedure section 425.16. The Court of Appeal affirmed the denial of the defendant's anti-SLAPP motion and explained: "If we were to accept Trimedica's argument that we should examine the nature of the speech in terms of generalities

instead of specifics, then nearly any claim could be sufficiently abstracted to fall within the anti-SLAPP statute." (*Id.* at p. 601; see also *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 47-48 [defendant's claims about its weight-loss supplement were targeted at increasing sales rather than participation in public dialogue about weight-management issues].)

It is implausible to treat Mr. Schechter's statements to LawyersandSettlements.com as anything but an attempt to promote Appellants' commercial interests. The article focused on the "substantial dollars" settlement achieved by Mr. Schechter, and praised him as "a master litigator in the fight for compensation" by alleged victims of highly caffeinated drinks. (CT at 149.) These statements reflect Mr. Schechter's efforts at self-promotion. As explained by the Court of Appeal in *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34: "Just because you are selling something that is intrinsically important does not mean that the public is interested in the fact that you are selling it."

The Opinion's analysis of the commercial-speech exemption is unsupported by the record. It sets forth a success standard for addressing the issue of commercial speech that is unsupported by precedent or logic.

IV. CONCLUSION

The Court of Appeal's Opinion places singular reliance on and adopts the Nebraska Supreme Court's decision in *RSUI, supra*, 282 Neb. 436. It overlooks the fact that *RSUI* addressed distinct procedural and factual issues. More importantly, *RSUI* reached a conclusion at odds with California authority on what language should be sufficient to express agreement to be bound by a contract. Adoption of *RSUI* will disrupt the widely held understanding and expectations of parties and attorneys in California who have entered into settlement agreements that contain confidentiality provisions.

The Opinion fails to apply the minimal-merit standard and – if anything – turns this standard on its head by giving weight and credibility to the evidence presented in support of an anti-SLAPP motion rather than the evidence in opposition to the motion. Finally, the Opinion misinterprets the trial court's ruling on the commercial-speech exemption and creates a novel test of whether the speech at issue is successful in generating business for the speaker.

Monster respectfully submits that the Court should grant this Petition for Review.

Dated: September 20, 2018

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

By: _____

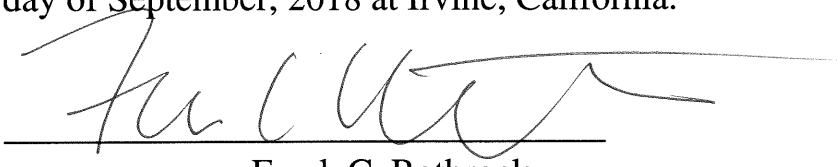
Frank C. Rothrock

Attorneys for Plaintiff, Respondent, and Petitioner Monster Energy Company

CERTIFICATE OF WORD COUNT

The foregoing Petition contains 6330 words (excluding tables and this Certificate). In preparing this Certificate, I relied on the word count generated by Microsoft Word 2010.

Executed this 20th day of September, 2018 at Irvine, California.



Frank C. Rothrock

EXHIBIT A

Filed 8/13/18

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MONSTER ENERGY COMPANY, Plaintiff and Respondent, v. BRUCE L. SCHECHTER et al., Defendants and Appellants.	E066267 (Super.Ct.No. RIC1511553) OPINION

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge. Affirmed in part, reversed in part, and remanded with directions.

Bremer Whyte Brown & O'Meara, Keith G. Bremer, Jeremy S. Johnson, and Benjamin L. Price; Grignon Law Firm and Margaret M. Grignon for Defendants and Appellants.

Shook, Hardy & Bacon, Frank C. Rothrock, and Gabriel S. Spooner for Plaintiff and Respondent.

When a settlement agreement provides that the "[p]laintiffs and their counsel agree" to keep the terms of the agreement confidential, and when the plaintiffs' counsel

signs the agreement under the words, "Approved as to form and content," can the plaintiffs' counsel be liable to the defendant for breach of the confidentiality provision? We answer this question, "No."

I

FACTUAL BACKGROUND

A. *The Settlement Agreement.*

Richard Fournier and Wendy Crossland (collectively the Fourniers) filed an action (the Fournier case) against Monster Energy Company (Monster) and a related defendant. The Fourniers were represented by the R. Rex Parris Law Firm (Parris) and Bruce Schechter (collectively the Attorneys).

On July 29, 2015, the Fourniers and Monster entered into an agreement to settle the Fournier case. The settlement agreement provided, among other things:

Recitals: "This Settlement Agreement and Release ('Settlement Agreement') is entered into as of July 29, 2015, by and between Wendy Crossland and Richard Fournier . . . ('Plaintiffs'), on the one hand, . . . and Monster Energy Company [and its co-defendant] ('Defendants'), on the other hand. Sometimes hereinafter, all of the above-named persons and entities shall be collectively referred to as the 'Parties' and/or individual settling persons and entities are referred to as a 'Party.'

"Said Settlement Agreement shall be on the behalf of the settling Parties, individually, as well as on the behalf of their, without limitation, respective beneficiaries, trustees, principals, *attorneys*, officers, directors, shareholders, employers, employees,

parent company(ies), affiliated company(ies), subcontractors, members, partners, subsidiaries, insurers, predecessors, successors-in-interest, and assigns.

"The settling Parties represent . . . : [¶] . . . That each expressly has the authority to execute this Settlement Agreement, and that this Settlement Agreement as so executed will be binding upon each of them . . . ." (Capitalization altered, italics added.)

Paragraph D: "[T]he Parties represent and warrant that each individual and/or Party executing this Settlement Agreement is duly authorized to execute this Settlement Agreement and expressly has the authority to execute this Settlement Agreement on behalf of all Parties and/or Insurers he/she/it represents as identified by his or her signature line, that it is binding in accordance with its terms, and that this Settlement Agreement as so executed will be binding upon him/her/it/them . . . ."

Paragraph 1.1: " . . . Plaintiffs, individually and on behalf of themselves and their principals, beneficiaries, trustees, agents, *attorneys*, servants, representatives, parents, spouse, dependents, issue, heirs, insurers, predecessors, successors-in-interest and assigns (all of the foregoing, past, present or future) (the 'Releasing Parties') hereby completely release and forever discharge Defendants, together with their respective successors, divisions, affiliates, units, parents, subsidiaries, related companies/entities, shareholders, officers, directors, employers, employees, subcontractors, agents, insurers, *attorneys*, and representatives of all kinds (collectively 'Released Parties') from any and all claims . . . ." (Italics added.)

Paragraph 7.0: "[T]his Settlement Agreement . . . is the result of extensive good faith negotiations between the Parties through their respective counsel . . . ."

Paragraph 8.0: "The Parties acknowledge that this Settlement Agreement . . . is . . . wholly binding upon them, as well as inure [*sic*] to the benefit of the Released Parties, inclusive of, but not limited to, their respective successors, devisees, executors, administrators, affiliates, representatives, insurers, spouse, dependents, successors, heirs, issue, assigns, officers, directors, partners, agents, subcontractors, *attorneys*, employers, and employees." (Italics added.)

Paragraph 11.1: "The Parties understand and acknowledge that all of the terms, conditions and details of this Settlement Agreement including its existence are to remain confidential. *Plaintiffs and their counsel agree* that they will keep completely confidential all of the terms and contents of this Settlement Agreement, and the negotiations leading thereto, and will not publicize or disclose the amounts, conditions, terms, or contents of this Settlement Agreement in any manner . . . .

"Specifically, and without limitation, Plaintiffs *and their counsel of record* . . . agree and covenant, absolutely and without limitation, to not publicly disclose to any person or entity, including, but not limited to, newspapers, magazines, television, fliers, documentaries, brochures, *Lawyers & Settlements*, VerdictSearch (or the like), billboards, radio, newsletters, or the Internet . . . :

"a) The Settlement Agreement and its existence, terms, conditions, and details; . . . c) any amounts paid in settlement of this Action . . . ." (Italics added.)

Paragraph 11.2: "In regard to any communication concerning the settlement of this Action, the Parties *and their attorneys* and each of them hereby agree that neither shall make any statement about the Action . . . in the media, including but not limited to print, television, radio, or Internet." (Italics added.)

Paragraph 11.3: "Any comment made regarding the settlement of this Action shall be limited to the following, or words to their effect: 'This matter has been resolved.'"

Paragraph 11.4: "Plaintiffs, including those acting at Plaintiffs' request, shall not . . . make, express, transmit, speak, write, verbalize or otherwise communicate in any way . . . any remark, comment, message, information, declaration, communication or other statement of any kind . . . that is derogatory, defamatory, critical of, or negative toward the Defendants and/or Defendants' products . . . . Nothing herein, however, shall be construed as a limitation on, or prohibition of . . . Plaintiffs' attorneys' ability to disparage (within the confines of the law) Defendants or Defendants' products in connection with other current or future litigation against the Released Parties . . . ."

There was a signature block signed by the Fourniers and Monster. Under that were the words, "Approved as to form and content" (capitalization altered), and under that was another signature block signed by the parties' respective attorneys. Schechter signed as follows:

"R. REX PARRIS LAW FIRM

"By: [Schechter's signature] [¶] . . . [¶] . . .

"Attorneys for Plaintiff [*sic*] WENDY CROSSLAND and RICHARD FOURNIER . . . ."

Schechter later admitted, "I knew that Monster would not settle the case if [the Fourniers] did not agree to keeping it confidential."

B. *The Alleged Breach of the Settlement Agreement.*

Brenda Craig was a reporter for Lawyersandsettlements.com. Lawyersandsettlements.com "provide[s] a source of information about [readers'] legal rights" and also "help[s] lawyers reach out to the clients they seek."

On September 4, 2015, Craig interviewed Schechter. She said she wanted to talk to him about cases his office was handling that involved energy drinks. In general, Schechter discussed other cases against Monster, as well as what he viewed as the negative health effects of Monster's products. In particular, he said:

1. The recent case of a 14-year-old girl — who was at a mall with friends, had two Monster energy drinks, went into cardiac failure, and died — had been resolved.

2. In response to a question about what the resolution was, "[S]ubstantial dollars for the family."

3. Monster "wants the amount to be sealed."

4. Regarding Monster's energy drinks, "It is not the individual ingredients, it is the synergistic effect of these 26 ingredients" that is "deadly."

It is undisputed that the first three of these statements refer to the Fournier case.

On September 15, 2015, Lawyersandsettlements.com published an online article that included all four statements listed above.

The end of the article stated: "**Monster Energy Drink Injury Legal Help** [¶] If you or a loved one have suffered losses in this case, please click the link below and your complaint will be sent to a drug and health supplements lawyer who may evaluate your Monster Energy Drink Injury claim at no cost or obligation."

Lawyersandsettlements.com sent the leads that it generated to attorneys who had signed up to be "advertisers." It had "forwarded hundreds of thousands of requests for legal representation directly to lawyers." One employee of Lawyersandsettlements.com was also a non-lawyer employee of Parris.

II

PROCEDURAL BACKGROUND

Monster filed this action against the Attorneys, asserting causes of action for: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) unjust enrichment, and (4) promissory estoppel.

The Attorneys filed a special motion to strike under Code of Civil Procedure section 425.16 (SLAPP motion). They argued, among other things, that Monster could not show a probability of prevailing on its breach of contract claim because they were not parties to the settlement agreement.

In opposition, Monster argued, among other things: (1) Schechter's statements were commercial speech and therefore unprotected, and (2) the Attorneys were "[c]learly" bound by the settlement agreement.

The trial court denied the motion with respect to the breach of contact cause of action but granted it with respect to the other causes of action. It explained, in part: "[T]he settlement clearly contemplates counsel as being subject to the agreement because . . . plaintiffs had the authority to execute the settlement agreement on behalf of their counsel, and counsel is clearly allowed and not allowed to do certain things in the settlement. [¶] In addition, counsel signed the document." It added that Schechter's "suggestion that he is not a party to the contract merely because he approved it as to form and content only is beyond reason."

III

MONSTER FAILED TO SHOW A PROBABILITY OF PREVAILING

A. *General Principles Applicable to a SLAPP Motion.*

"Under California's anti-SLAPP statute, a defendant may bring a special motion to strike a cause of action arising from constitutionally protected speech or petitioning activity. (Code Civ. Proc., § 425.16, subd. (b)(1).)" (*Barry v. State Bar of California* (2017) 2 Cal.5th 318, 320.)

"The analysis of an anti-SLAPP motion . . . involves two steps. 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity. [Citation.] If the court finds such a

showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute — i.e., that arises from protected speech or petitioning *and* lacks even minimal merit — is a SLAPP, subject to being stricken under the statute.' [Citation.] We review an order granting or denying a motion to strike under [Code of Civil Procedure] section 425.16 de novo. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819-820.)

"To show a probability of prevailing on his claims, '"the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.] . . . [T]hough the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim."' [Citation.]" (*Daniel v. Wayans* (2017) 8 Cal.App.5th 367, 388.)

B. *Monster Failed to Show that Schechter's Comments Were Within the Commercial Speech Exemption.*

The trial court ruled that Schechter's statements were "in furtherance of the . . . right of . . . free speech" within the meaning of Code of Civil Procedure section 425.16. Schechter contends that this ruling was correct. Monster does not dispute that the statements, if made by a different lawyer to a different reporter, could be protected

speech. It does argue, however, that under the circumstances here, the statements were "commercial speech" and therefore not protected.

Under prevailing United States Supreme Court authority, commercial speech that concerns lawful activity and that is not misleading is protected by the First Amendment, even though it is subject to an intermediate level of scrutiny rather than strict scrutiny. (*Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York* (1980) 447 U.S. 557, 566.) Thus, even assuming Schechter's speech was commercial, it could still be in furtherance of his right to freedom of speech. (*Dean v. Friends of Pine Meadow* (2018) 21 Cal.App.5th 91, 106.)

There is, however, a statute expressly exempting commercial speech from SLAPP procedures. As relevant here, it provides:

"[Code of Civil Procedure s]ection 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling . . . goods or services, . . . arising from any statement or conduct by that person if both of the following conditions exist:

"(1) The statement or conduct consists of representations of fact about that person's . . . business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services . . . .

"(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer . . . ." (Code Civ. Proc., § 425.17(c).)

"The commercial speech exemption . . . 'is a statutory exception to section 425.16' and 'should be narrowly construed.' [Citations.]" (*Simpson Strong-Tie Company, Inc. v. Gore* (2010) 49 Cal.4th 12, 22.) "The burden of proof as to the applicability of the commercial speech exemption . . . falls on the party seeking the benefit of it — i.e., the plaintiff." (*Id.* at p. 26.)

As already mentioned, we ordinarily review the grant or denial of a SLAPP motion independently. However, the typical two-prong SLAPP analysis presents purely legal issues. "[T]he analysis of the first prong focuses on the allegations of the complaint." (*Ralphs Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 256.) And the analysis of the second prong is a summary-judgment-like standard that does not involve any credibility determinations. (*Id.* at p. 261.)

By contrast, the determination of whether the commercial speech exemption applies turns, in part, on the defendant's "purpose" and "inten[t]." (Code Civ. Proc., § 425.17, subds. (c)(1), (c)(2).) "[Q]uestions of 'intent' and 'purpose' are ordinarily questions of fact to be determined by the trial court." (*Redke v. Silvertrust* (1971) 6 Cal.3d 94, 103.)

Particularly when the First Amendment is involved, "'[i]ndependent review is not the equivalent of de novo review "in which a reviewing court makes an original appraisal

of all the evidence to decide whether or not it believes" the outcome should have been different. [Citation.] Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review .... [Citations.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 36.) Thus, we accept the trial court's credibility determinations, even though we review the legal effect of those determinations independently.

"[A] lawyer may be said to be 'primarily engaged in the business of selling or leasing goods or services' [citation], because providing legal advice and representation is a service." (*Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 490.)

Here, however, the trial court found insufficient evidence that the Attorneys were "advertising" because there was no evidence that they received any of the leads that the article generated. Arguably, one could infer that Parris did receive leads from the fact that a Parris employee also worked for Lawyersandsettlements.com;[1] or one could infer that Schechter expected at least some people who read the article to contact Parris directly, without going through Lawyersandsettlements.com. At the same time, however, Monster did not conclusively prove that Parris did, in fact, receive leads. Thus, this is a credibility issue, and the trial court resolved it in favor of finding no intent to solicit.

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[1] Of course, one could equally infer the opposite — that due to this personal connection, Schechter was willing to give Lawyersandsettlements.com material for an article without expecting anything in return.

"When the trier of fact has expressly or implicitly concluded that the party with the burden of proof failed to carry that burden and that party appeals, the substantial evidence test does not apply. Instead, 'the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law.' [Citation.] '"Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' [Citations.]"' [Citation.]" (*Petitpas v. Ford Motor Company* (2017) 13 Cal.App.5th 261, 302-303.) On this record, the trial court's finding that Monster's evidence was insufficient to prove commercial purpose and intent was perfectly reasonable.

C. *The Attorneys Did Not Consent to Be Bound by the Settlement Agreement.*

The Attorneys contend that Monster failed to show a probability of prevailing on its cause of action for breach of contract because they were not parties to the settlement agreement. In our view, this issue breaks down into two subissues:

1. Whether the Fourniers could bind the Attorneys to the settlement agreement without the Attorneys' consent; and

2. Whether the Attorneys consented to be bound by the settlement agreement by signing it.

"An essential element of any contract is the mutual consent of the parties. [Citation.]" (*Harshad & Nasir Corporation v. Global Sign Systems, Inc.* (2017) 14 Cal.App.5th 523, 537.) "Further, the consent of the parties to a contract must be

communicated by each party to the other. [Citation.]" (*Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 788.)

Monster focuses on the provisions of the contract. We agree that the confidentiality provisions of the settlement agreement did at least purport to bind the Attorneys. They provided, "Plaintiffs and their counsel agree that they will keep completely confidential all of the terms and contents of this Settlement Agreement . . . ." They also provided, "Plaintiffs and their counsel of record . . . agree and covenant, absolutely and without limitation, to not publicly disclose" the provisions of the settlement agreement. Finally, they provided, "the Parties and their attorneys . . . hereby agree that neither shall make any statement about the Action . . . in the media . . . ."

However, the immediate issue is not one of contractual interpretation. "[A] party cannot bind another to a contract simply by so reciting in a piece of paper. It is rudimentary contract law that the party to be bound must first *accept* the obligation." (*Mitsui O.S.K. Lines, Ltd. v. Dynasea Corp.* (1999) 72 Cal.App.4th 208, 212; see also *Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, 822-823.) No matter how plainly the contract provided that the Attorneys were bound, they could not actually be bound unless they manifested their consent.

There are a handful of exceptions to these general rules. An agent can, under appropriate circumstances, enter into a contract that is binding on the principal. (Civ. Code, § 2337.) And an attorney is, at least in some respects, the agent of the client (*Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107

Cal.App.4th 54, 69), even though in other respects, the attorney is an independent contractor (*Channel Lumber Co., Inc. v. Porter Simon* (2000) 78 Cal.App.4th 1222, 1227-1232). Hence, there are instances in which an attorney can bind his or her client to a contract. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403-404.) However, this does not work in reverse — the client cannot bind the attorney.

The trial court relied on the provisions in which "the Parties" represent and warrant that they have the authority to execute the settlement agreement. "The Parties," however, were defined as the parties to the Fournier case. Only Paragraph D extended this representation by "the Parties" to other persons or entities; in it, each of "the Parties" represented that he, she, or it had "the authority to execute this Settlement Agreement on behalf of all Parties and/or Insurers he/she/it represents as identified by his or her signature line . . . ." The Attorneys were not "Parties" or "Insurers" and were not identified in the Fourniers' signature line.

Even if the Fourniers did expressly represent that they had the authority to execute the settlement agreement on behalf of the Attorneys, that would not be binding on the Attorneys. It is hornbook law that "[t]he declarations of an [alleged] agent are not admissible to prove the fact of his agency or the extent of his power as such agent. [Citations.]" (*Howell v. Courtesy Chevrolet, Inc.* (1971) 16 Cal.App.3d 391, 401.)

For the sake of completeness, we note that, in the somewhat recondite context of arbitration agreements, "[t]here are cases in which an employee is held to be bound by an arbitration agreement entered into by his or her employer, even though the employee did

not sign on to the agreement." (*Jensen v. U-Haul Co. of California* (2017) 18 Cal.App.5th 295, 302, fn. omitted.) However, "the mere fact that parties are employees of a corporation 'does not mean they were bound' by an arbitration clause in an agreement between the corporation and a third party. [Citation.]" (*Id.* at p. 303.) Rather, "the proper inquiry is not only whether there is any sort of preexisting agency relationship with one of the signatories to the arbitration agreement — whether employer-employee, or another form of agency — but also whether that preexisting relationship is of such a nature that it supports a finding of 'implied authority for [one of the signatories] to bind [the nonsignatory] by their arbitration agreement.' [Citation.]" (*Ibid.*) Even assuming these cases are not limited to the arbitration context, here there is no evidence of such implied authority so as to take this case outside the general rule that the principal cannot contractually bind the agent.

Accordingly, the provisions in the settlement agreement stating that the Fourniers' attorneys agree to keep the settlement agreement confidential, if valid at all, mean that *the Fourniers* agree to *direct* their attorneys to keep the settlement agreement confidential. If their attorneys fail to do so, however, Monster's only claim for breach of the settlement agreement is against the Fourniers. (We need not decide whether the Fourniers would have some claim against their attorneys.)[2]

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[2] Consistent with this view, Schechter testified that, while he had no contractual duty to Monster, he did have a duty to his clients "not to cause or create any potential litigation for them."

We turn, then, to whether it makes any difference that the Attorneys did actually sign the settlement agreement. It is possible to sign a contract without becoming a party to the contract. For example, a person who signs a contract as the agent for a disclosed principal is not a party. (E.g., *Carlesimo v. Schwebel* (1948) 87 Cal.App.2d 482, 486-488.)

Here, the settlement agreement identified the "Parties" as the Fourniers and Monster. The Attorneys then signed under the words, "Approved as to form and content." Moreover, the signature block identified them as "Attorneys for [the Fournier] Plaintiff[s]." The only reasonable construction of this wording is that they were signing solely in the capacity of attorneys who had reviewed the settlement agreement and had given their clients their professional approval to sign it. In our experience, this is the wording that the legal community customarily uses for this purpose.

Freedman v. Brutzkus (2010) 182 Cal.App.4th 1065, though not on point, is the only relevant California case we have found. There, two corporations, Teddi and CAI, entered into a trademark licensing agreement. Freedman, who was Teddi's attorney, and Brutzkus, who was CAI's attorney, both signed the agreement under the words, "Approved as to Form and Content." (*Id.* at p. 1068.) Freedman had previously represented CAI, but the agreement provided that CAI waived any resulting conflict of interest. (*Ibid.*)

CAI sued Teddi, which went into bankruptcy. CAI then sued Freedman; it alleged that, during the contract negotiations, he had represented to CAI that Teddi would pay the

amount due under the agreement. In discovery, Brutzkus confirmed that CAI had relied on this representation due to its long-standing professional relationship with Freedman. (*Freedman v. Brutzkus*, *supra*, 182 Cal.App.4th at p. 1068.)

Freedman settled with CAI, then sued Brutzkus. (*Freedman v. Brutzkus*, *supra*, 182 Cal.App.4th at p. 1068.) He alleged that, by signing the agreement under "Approved as to Form and Content," Brutzkus had falsely represented that CAI was not relying on its relationship with Freedman or any representations by him. (*Id.* at pp. 1068-1069.)

The appellate court held that "Brutzkus's signature approving the document as to form and content was not an actionable representation to [Freedman]. [Citation.]" (*Freedman v. Brutzkus*, *supra*, 182 Cal.App.4th at p. 1070.) It conceded, "We find little authority in California or elsewhere addressing the meaning of this recital. [Citations.]" (*Ibid.*) However, it concluded that "the only reasonable meaning to be given to a recital that counsel approves the agreement as to form and content, is that the attorney, in so stating, asserts that he or she is the attorney for his or her particular party, and that the document is in the proper form and embodies the deal that was made between the parties." (*Ibid.*)

The Attorneys argue — correctly — that *Freedman*'s construction of the words "approved as to form and content" is inconsistent with a conclusion that an attorney signing under such words is agreeing to be bound. However, Monster argues — also correctly — that *Freedman* is arguably distinguishable because "there is no indication the trademark license agreement at issue in *Freedman* contained any provisions that were

expressly binding on or benefitted the attorneys." The trial court further distinguished *Freedman* "because the issue is not a fraud claim, but whether counsel is a party to the agreement, which *Freedman* did not address."

There is an out-of-state case, however, which applied *Freedman* in a situation almost exactly like ours.

In *RSUI Indem. Co. v. Bacon* (2011) 282 Neb. 436 [810 N.W.2d 666], a general contractor entered into a settlement agreement with Bacon, the injured employee of a subcontractor, Ridgetop. (*Id.* at p. 438.) The settlement agreement provided that, in the event that Bacon entered into a settlement with Ridgetop, "Bacon and his attorneys" would pay the general contractor's insurer a specified portion of that settlement. (*Id.* at pp. 437-438, capitalization altered.) Harris, Bacon's attorney, signed the settlement agreement under the words, "Agreed to in Form & Substance." (*Id.* at p. 438.) Later, Bacon received a $1.25 million settlement from Ridgetop. (*Id.* at p. 439) Liberty Mutual, the general contractor's insurer, then sued Bacon, Harris, and Harris's law firm for breach of contract; it obtained a judgment against them for $437,500. (*Id.* at p. 439.)

The appellate court reversed the judgment against Harris and his firm; it held that they were not personally liable. (*RSUI Indem. Co. v. Bacon, supra*, 282 Neb. at pp. 440-444.) Citing *Freedman*, it said: "Harris' signature under the legend 'Agreed to in Form & Substance' demonstrates only that he was Bacon's attorney and that 'the document [was] in the proper form and embodie[d] the deal that was made between the parties.'" (*RSUI Indem. Co. v. Bacon, supra,* at p. 442.)

We agree with *RSUI*. As already discussed, the language in the settlement agreement purporting to impose obligations on the Attorneys was a nullity, unless and until the Attorneys consented to it. And while *Freedman* is not precisely on point, it does stand for the proposition that an attorney's signature under words such as "approved as to form and content" means only that the document has the attorney's professional thumbs-up. It follows that it does not objectively manifest the attorney's intent to be bound.

Monster points to the fact that, in the settlement agreement, it released its claims against the Fourniers' attorneys, and vice versa. However, the mutual release of claims provisions included the broadest list of released and releasing entities imaginable. There was a signature block for the Attorneys, but not for these other entities. This confirms that the Attorneys signed in their capacity as attorneys, and not as released or releasing parties.

We recognize that confidentiality is often a material term of a settlement agreement. If a party is willing to keep the settlement agreement confidential, but that party's attorney is free to blab about it, the other party may not be willing to settle at all. Thus, it would be contrary to the public policy favoring settlement (see generally *Leung v. Verdugo Hills Hospital* (2012) 55 Cal.4th 291, 304) to hold that there is no way to require the attorneys for the parties to keep a settlement agreement confidential.[3] It

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[3] While nondisclosure agreements have come under fire recently (see End of the Nondisclosure Agreement? Not So Fast, Wall Street Journal (Mar. 26, 2018), available at <https://www.wsj.com/articles/end-of-the-nondisclosure-agreement-not-so-fast-1522056601>, as of Aug. 9, 2018), so far the California Legislature has not taken any action to redefine existing public policy by limiting or prohibiting them.

seems easy enough, however, to draft a settlement agreement that explicitly makes the attorneys parties (even if only to the confidentiality provision) and explicitly requires them to sign as such.

Even regarding settlement agreements that lack such explicit provisions, such as the one in this case, our holding does not necessarily mean that a party in Monster's position has no remedy. At the risk of indulging in dictum, we have already suggested that Monster may have a cause of action against the Fourniers. We also note that the sole cause of action that Monster has stated against the Attorneys for breach of contract is on the settlement agreement. Arguably, however, it could state a cause of action as a third-party beneficiary of the attorney-client contract between the Fourniers and the Attorneys. (See, e.g., *Paul v. Patton* (2015) 235 Cal.App.4th 1088; *Biakanja v. Irving* (1958) 49 Cal.2d 647.) In any event, an attorney who discloses confidential settlement provisions faces practical and ethical risks (see fn. 2, *ante*), even aside from the possibility of getting sued by the party on the other side, so we would expect the issue to arise only rarely.

In sum, then, we conclude that the Attorneys were not parties to the settlement agreement, including its confidentiality provisions. Accordingly, Monster could not show that it had a probability of prevailing against the Attorneys on its cause of action for breach of contract.

IV

DISPOSITION

The order appealed from, to the extent that it denied the SLAPP motion with respect to the first cause of action, is reversed; in all other respects, the order is affirmed. We direct the trial court, on remand, to enter an order granting the SLAPP motion in its entirety and granting the Attorneys their attorney fees and costs. (Code Civ. Proc., § 425.16, subd. (c)(1).) The Attorneys are awarded costs on appeal, likewise including attorney fees, against Monster.

CERTIFIED FOR PUBLICATION

RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 5 Park Plaza, Suite 1600, Irvine, California 92614.

On September 20, 2018, I served on the interested parties in said action the within:

PETITION FOR REVIEW

☒ (MAIL) I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

☐ (E-MAIL) I caused such document(s) to be served via email on the interested parties at their e-mail addresses listed.

☐ (FAX) I caused such document(s) to be served via facsimile on the interested parties at their facsimile numbers listed above. The facsimile numbers used complied with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a report of the transmission, a copy of which is attached to the original of this declaration.

☐ (HAND DELIVERY) By placing a true and correct copy of the above document(s) in a sealed envelope addressed as indicated on Service List attached and causing such envelope(s) to be delivered by hand to the addressee(s) designated.

☐ (BY FEDERAL EXPRESS, AN OVERNIGHT DELIVERY SERVICE) By placing a true and correct copy of the above document(s) in a sealed envelope addressed as indicated above and causing such envelope(s) to be delivered to the FEDERAL EXPRESS Service Center, and to be delivered by their next business day delivery service to the addressee designated.

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

Executed on September 20, 2018, at Irvine, California.

Deborah Hohmann
(Type or print name)

D. Hohmann
(Signature)

SERVICE LIST

Monster Energy Company v. Bruce L. Schechter, et al.
Court of Appeal 4th Appellate District, Div. 2 – Case No.: E066267
Riverside Superior Court – Case No.: RIC 1511553

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(Updated 9/4/18)