SUPREME COURT NO. S251392

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.

REPLY IN SUPPORT OF 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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I. INTRODUCTION

An attorney negotiates a settlement agreement for a client that contains a confidentiality provision expressly binding on both the attorney and the client. What language – if any – is necessary to bind the attorney to the confidentiality provision? Is it unnecessary for the attorney to sign the settlement agreement as a party, as indicated by the available authority (albeit unpublished) before Court of Appeal's decision?[1] Is it sufficient for the attorney to sign the settlement agreement under a legend approving the form of the agreement, as indicated by the settlement template of a prominent California mediator?[2] Is it sufficient for the attorney to sign (as here) under the legend "Approved as to Form and Content" as proposed in a Rutter Group treatise on California law?[3] The Court of Appeal's decision sends a message that the answer to each of these questions is No.

Defendants ("Attorneys") argue review should be denied. They assert that Monster "never explain[s]" how the Opinion threatens to undermine the policy in favor of settlement. (Ans. at 8.) But Attorneys do not dispute that confidentiality provisions are crucial to

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[1] (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 Oct. 17, 2018].)

[2] (Lewis, Settlement Template <www.mediatorjudge.com/pg13.cfm> [as of Oct. 17, 2018].)

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

many settlements in a broad range of litigation. They do not disagree that a confidentiality provision is usually worthless if it is not binding on the settling parties' attorneys. And they do not dispute that in this case the inclusion of confidentiality provisions binding on both the parties and their attorneys was material to the underlying settlement.

Attorneys build their opposition to review on four principal arguments. But none supports their position against review. First, they argue the Court of Appeal's decision is really anchored in *Freedman v. Brutzkus* (2010) 182 Cal.App.4th 1065 (hereafter *Freedman*) rather than *RSUI Indemnity Co. v. Bacon* (2011) 282 Neb. 436 (hereafter *RSUI*). (Ans. at 9.) But *Freedman* did not address the issue of whether an attorney is bound by a provision in a settlement agreement. The Opinion adopts and endorses the rule of *RSUI*. (Opn. at 19, 20.) This means that even the addition of "Agreed" to the legend above an attorney's signature is not sufficient to bind the attorney to a confidentiality provision.

Second, Attorneys dismiss the factual and procedural differences between this case and *RSUI* and *Freedman* as insignificant. (Ans. at 10.) But *Freedman* did not concern the issue of whether an attorney is bound by a contractual provision the attorney negotiated for a client. *RSUI* did not address the dismissal of a plaintiff's action or the impact of extrinsic testimony on interpretation of a contractual provision.

Third, Attorneys discount the significance of the extrinsic evidence cited by Monster as irrelevant. (Ans. at 10.) But in the face of the parties' conflicting positions on application of the confidentiality provisions to Attorneys, this evidence was relevant to

resolution of their dispute over whether Attorneys were bound by these provisions.

Finally, Attorneys discount the resources available prior to the Court of Appeal's decision to guide California attorneys and mediators in drafting settlement agreements as "unsupported by law on the relevant issue." (Ans. at 10.) But these are the sources of guidance that have shaped forms of settlement agreements resolving California litigation in recent years – forms that fail to meet the new *RSUI* standard adopted by the Court of Appeal.

The Court of Appeal's adoption of the rule of *RSUI* marks a dramatic and unprecedented departure from the previous guidance available to California lawyers, mediators, and courts. It threatens to unwind enforcement of confidentiality provisions in many settlement agreements entered into with the expectation that both the parties and their attorneys would respect and be bound by these provisions. It invites litigation over this issue. At a minimum, the Court of Appeal's Opinion presents an important issue of law that merits review.

II. THE COURT OF APPEAL'S ADOPTION OF THE *RSUI* STANDARD IS CONTRARY TO SOUND POLICY AND THREATENS TO UNDERMINE MANY CALIFORNIA SETTLEMENTS.

In apparent recognition that the adoption of *RSUI* represents a radical change that threatens the viability of confidentiality provisions in many settlement agreements, Attorneys attempt to back away from *RSUI* and tie the Court of Appeal's Opinion to *Freedman*. They suggest the standard adopted in the Opinion is based on *Freedman* rather than *RSUI*. (Ans. at 6 ["the Opinion is completely consistent with the *Freedman* case, . . ."].) They argue there is no inconsistency between the legend in the *Freedman* case and CACI No. 302 (2018 ed.) because the *Freedman* legend did not contain the word "Agreed." (Ans. at 9.) They dismiss the factual and procedural distinctions between this case and *RSUI* and *Freedman* as irrelevant. (Ans. at 10.)

Attorneys also deride the guidance available to California attorneys set out in the attorney blog and proposed forms of settlement agreements cited in the Petition (Pet. at 8, fn. 1) as "blog posts and forms of agreement that are unsupported by law on the relevant issue." (Ans. at 10.) And Attorneys reject the relevance of extrinsic evidence on their intent or the materiality of the confidentiality provisions in this case on the ground it is unnecessary to resolve the issue of whether they are bound by these provisions. (*Ibid.* [Monster "does not explain why [extrinsic evidence] matters when interpreting the plain language of an agreement"].) (*Ibid.*) These arguments lack merit and demonstrate the need for review to resolve the issue of what

language is necessary to bind an attorney to the terms of a settlement agreement.

The different factual and procedural issues in *Freedman* and *RSUI* undercut application of these cases to the question of whether Attorneys should be held to the confidentiality provisions in the settlement agreement they negotiated for their clients in this case. *Freedman* did not concern the issue of whether an attorney's signature under the legend "Approved as to Form and Content" in a settlement agreement binds the attorney to a provision in the agreement that is expressly binding on the attorney. There was no provision in the settlement agreement at issue in *Freedman* that purported either to bind or benefit the defendant attorney. Other than *RSUI*, no published case has cited *Freedman* on the issue of what language is necessary to bind an attorney to a provision in a settlement agreement, or has cited it on any other issue. *Freedman* focused on whether the legend "Approved as to Form and Content" was sufficient to support a fraud claim against the signing attorney, and the Court of Appeal acknowledged *Freedman* is "not on point." (Opn. at 17.)

RSUI concerned a motion for summary judgment. Its decision reversing a summary judgment against the defendant attorneys did not necessarily end the case. In contrast to here, there was no reference to potential extrinsic evidence on whether the defendant attorneys had acknowledged they were bound by the settlement terms.

Attorneys' attempt to dismiss or distinguish the Court of Appeal's reliance on *RSUI* on the ground it is *Freedman* – and the legend at issue in *Freedman* – that is relevant here (Ans. at 9) is based on a misreading of the Opinion. The Court of Appeal explicitly found

that *RSUI* involved "a situation almost exactly like ours" and concluded: "We agree with *RSUI*." (Opn. at 19, 20.) With its endorsement of *RSUI*, the Court of Appeal's decision adopts a standard that means even a legend with language expressing an attorney's agreement to the substance of the terms of a settlement agreement (i.e., "Agreed to in Form & Substance") will not be sufficient to bind the attorney to a confidentiality provision in the agreement. Contrary to Attorneys' argument, the Opinion adopts the standard of *RSUI*.

Attorneys dismiss the significance of extrinsic evidence as unnecessary to interpret the language of the settlement agreement. (Ans. at 10.) This is inconsistent with the approach they took in the trial court, where they pointed to extrinsic evidence in the form of Mr. Schechter's statement that he could not reveal the terms of the settlement agreement to the blog reporter because of his ethical obligations to his client. (Clerk's Transcript at 188-189.) Even the Nebraska Supreme Court in *RSUI* admitted there was ambiguity in the application of the legend in that case. (*RSUI, supra*, 282 Neb. at p. 442.) And Attorneys do not dispute that where there is conflicting evidence about the application of a contractual provision, the issue of whether the parties have reached agreement on the provision is for a fact finder to determine. (*Hebberd-Kulow Enterprises, Inc. v. Kelomar, Inc.* (2013) 218 Cal.App.4th 272, 283; CACI Nos. 302 and 309 (2018 ed.).)

Attorneys ignore the Court of Appeal's suggestion, in a self-styled "dictum," that Monster's remedy lies with a lawsuit against their clients, the Fourniers. (Opn. at 21.) The suggestion that Monster

pursue litigation against Attorneys' clients may turn on whether Attorneys were still counsel for the Fourniers on the date of Mr. Schechter's post-settlement statement to Ms. Craig of LawyersandSettlements.com that the underlying wrongful death case had settled for "substantial dollars." If anything, this invitation to new litigation underscores the mischief threatened by the Court of Appeal's Opinion.

Neither *Freedman* nor *RSUI* provides an appropriate standard or analytical basis for determining whether an attorney is bound by confidentiality (or other) provisions in a settlement agreement negotiated by the attorney. The Court should grant review to determine and clarify the correct standard.

III. THE COURT OF APPEAL'S OPINION DILUTES THE MINIMAL-MERIT STANDARD.

Attorneys assert the issue of whether the Court of Appeal properly ignored the extrinsic evidence in support of Monster's interpretation of the settlement agreement is not worthy of review because it is "so evidence and fact specific." (Ans. at 11.) But the problem with the Court of Appeal's decision runs deeper. It dilutes the substantive rule set out by this Court that the probability-of-success prong under the anti-SLAPP statute should be subject to a minimal-merit test that is the equivalent of a summary judgment in reverse. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385.) It undercuts this Court's holding that a trial court addressing an anti-SLAPP motion is required to accept as true the evidence favorable to the plaintiff and to evaluate a defendant's evidence only to determine

whether it defeats the plaintiff's claim as a matter of law. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.)

Here, Monster's position that Attorneys agreed to be bound by the confidentiality provisions in the settlement agreement was supported by Mr. Schechter's statement to the blog reporter that he could not disclose the terms of the settlement. Monster contended this was an admission that Attorneys were bound by the confidentiality provisions in the settlement agreement. (Respondent's Brief at 17.) It also cited Mr. Schechter's awkward attempt in deposition testimony to explain that his signature on the settlement agreement under the legend "APPROVED AS TO FORM AND CONTENT" signified approval only of the content of the settlement agreement as it applied to his clients, but not approval of the content as it applied to Attorneys. (*Id.* at 11.) But the Court of Appeal gave no weight to this evidence. It ignored this testimony. And neither the Court of Appeal's Opinion nor Attorneys address the issue of whether a trier of fact could reasonably conclude that an attorney's approval of the content of the settlement agreement – the content of which imposes obligations on the attorney – conveys agreement to be bound by those provisions.

The Opinion sends a message that an anti-SLAPP motion may be granted without giving consideration, let alone weight, to a plaintiff's opposing evidence. This is underscored by Attorneys' argument that a plaintiff facing an anti-SLAPP motion must do more than show the plaintiff's claim has minimal merit. (Ans. at 12 [the burden on a plaintiff "is not an insignificant burden"].) But even Attorneys acknowledge Monster's burden in opposing their anti-

SLAPP motion was analogous to opposing a motion for summary judgment. (*Ibid.*) This would have required the Court of Appeal to at least consider and give weight to Monster's evidence in support of its breach-of-contract claim. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) Attorneys do not dispute that the Court of Appeal ignored this evidence.

The Court of Appeal's unquestioning acceptance of Attorneys' characterization of Mr. Schechter's statements to the blog reporter and its failure to give any consideration or weight to Monster's position on this evidence signals a significant dilution of the minimal-merit standard.

IV. THE COURT OF APPEAL'S OPINION ESTABLISHES AN INAPPROPRIATE SUCCESS-BASED TEST FOR DETERMINING WHETHER SPEECH IS COMMERCIAL.

Attorneys contend the commercial-speech issue is also an evidence-specific question that is not worthy of review. (Ans. at 13-14.) Their argument misinterprets the Court of Appeal's decision and the underlying record. It overlooks the potential impact of the success-based test announced in the Opinion for determining whether speech is commercial.

Attorneys argue the Opinion merely concludes there was no substantial evidence that Mr. Schechter's purpose or intent in making statements to the blog reporter was commercial. They argue the Opinion "certainly does not articulate a bright-line rule or test that commercial speech has to be successful to be exempted commercial

speech." (Ans. at 15.) This ignores the substance of the Court of Appeal's decision on the issue of whether Attorneys engaged in exempt commercial speech.

The Court of Appeal construed the trial court's comments to mean that "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." (Opn. at 12.) The Court of Appeal misread the trial court record. It appears the trial court was referring to the issue of whether Attorneys had placed an ad immediately below the blog statement rather than whether the ad had generated any leads for them. (Pet. at 27-28.) The Court of Appeal concluded, nonetheless, that the issue of whether the commercial-speech exemption applies turned on the ad's lack of success – its purported failure to produce any leads for Attorneys. (Opn. at 12.)

The Court should grant review to clarify that determination of whether speech is commercial and exempt from the anti-SLAPP statute should not be based on whether it is successful in generating business for the speaker.

V. CONCLUSION

The Court of Appeal's Opinion raises important issues of law that merit review. What is the language necessary to bind an attorney to confidentiality provisions in a settlement agreement the attorney negotiates on behalf of a client? Should California's trial courts and attorneys be bound by the standard set by the Nebraska Supreme Court in *RSUI*? In applying the minimal-merit standard to determine whether a plaintiff has shown a probability of success in responding to

an anti-SLAPP motion, is a court free to disregard the plaintiff's evidence or to construe it in a manner favorable to the moving defendant? Should the commercial-speech exemption under Code of Civil Procedure section 425.17 turn on whether the challenged speech is successful in generating business for the speaker?

Monster respectfully submits the Court should grant review to address these issues.

Dated: October 18, 2018

Respectfully submitted,

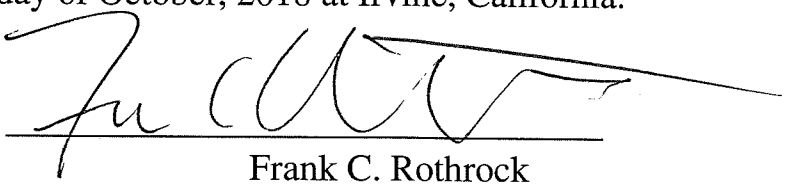
SHOOK, HARDY & BACON L.L.P.

By: _____
Frank C. Rothrock
Attorneys for Plaintiff, Respondent, and Petitioner Monster Energy Company

CERTIFICATE OF WORD COUNT

The foregoing Petition contains 2541 words (excluding tables and this Certificate). In preparing this Certificate, I relied on the word count generated by Microsoft Word 2010.

Executed this 10th day of October, 2018 at Irvine, California.



Frank C. Rothrock

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 October 18, 2018, I served on the interested parties in said action the within:

REPLY IN SUPPORT OF PETITION 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 October 18, 2018, at Irvine, California.

Deborah Hohmann
(Type or print name)

D. Hohmann
(Signature)

SERVICE LIST

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

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