Supreme Court Case No. S251392

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Appellants and Defendants,

v.

MONSTER ENERGY COMPANY,

Petitioner, Respondent, and Plaintiff.

Court of Appeal of the State of California
Fourth Appellate District, Division Two, Case No. E066267
Hon. Manuel A. Ramirez, Presiding Justice
Hon. Art W. McKinster, Justice
Hon. Douglas P. Miller, Justice

Riverside County Superior Court Case No. RIC 1511553
Hon. Judge Daniel A. Ottolia, presiding

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

This case arises out of the settlement of a wrongful death action, in which the parents of a 14-year old girl alleged their daughter died after drinking the energy drinks of Petitioner, Respondent and Plaintiff Monster Energy Company ("Monster Energy"). In that settlement agreement, the *parties* agreed for consideration exchanged to maintain confidentiality of the terms of the agreement; however, the *attorneys* for the parties signed the settlement agreement only "Approved as to form and content." The Court of Appeal held that an attorney signing only in this manner is not binding himself or herself to the terms of the agreement. There is no conflicting California case law on this issue. Accordingly, Monster Energy's Petition for Review should be denied because it does not meet any of the strict requirements for this Court's review.

To begin, review cannot be justified by Monster Energy's strained claim that there is a need to secure unanimity of decision, as there is no conflict among the appellate districts as to the material issues raised in the appeal. In fact, the Court of Appeal Opinion is completely consistent with *Freedman v. Brutzkus* (2010) 182 Cal.App.4th 1065 (*Freedman*), the only California case cited in the briefing that explains the significance of an attorney signing an agreement as to form and content.

Review is also not necessary to settle an important question of law. Monster Energy first contends the Opinion threatens to undermine California's policy in favor of settlement. It bases this contention for the most part on criticism of a Nebraska Supreme Court decision, *RSUI Indem. Co. v. Bacon* (2011) 282 Neb. 436 [810 N.W.2d 666] (*RSUI*), whose reasoning the Opinion finds persuasive. Monster Energy then attempts to distinguish *RSUI* and *Freedman, supra*, 182 Cal.App.4th 1065, but its efforts are unavailing; the differences in facts and procedural postures have no impact on the meaning of "Approved as to form and content." Finally, Monster Energy worries settlements will now be

discouraged, yet the Opinion provides clear guidance on how to bind attorneys to confidentiality provisions in settlement agreements: by making them parties to the confidentiality provisions of the agreement, and by requiring them to sign as parties to those provisions. The Opinion does not create an issue of unsettled law, rather, it substantially clarifies the issue of binding attorneys contractually to confidentiality provisions in settlement agreements.

Monster Energy's contention that the Opinion fails to apply the correct standard on the second prong of a motion to strike under the anti-SLAPP statute is certainly not review worthy—it is entirely case specific and has no broader implications than this particular case. In any event, it has no merit. There is no evidence the attorney admitted to a contractual obligation to Monster Energy arising out of the settlement agreement. The only evidence on the issue consists of (1) the attorney's statements to a reporter indicating he could not reveal the terms of the settlement agreement, (2) the attorney's explanation that his confidentiality obligation was to his client due to his ethical duties, and (3) the settlement agreement itself, which does not reflect an intention by the attorney to be bound by the terms of the settlement agreement.

Finally, Monster Energy's contention that the Opinion fails to properly evaluate the commercial speech exemption to the anti-SLAPP statute is again entirely case specific and not review worthy. This contention too is without merit. The only evidence as to the parents' attorney's purpose or intent in mentioning harm from these energy drinks, was the article containing the subject communication itself, and its presence on a website that allegedly "generates leads for attorneys." That evidence did not demonstrate the attorneys themselves engaged in any advertising activity or the attorney's purpose or intent in granting the interview to the reporter. In an apparent effort to create an unsettled question of law out of whole cloth, Monster Energy raises the specter of a new "success-based test," i.e., commercial speech requires the speaker to advertise successfully.

This is not what the Court of Appeal holds. It merely determines there was no substantial evidence the attorney's purpose or intent in making the subject statements was commercial.

There simply is no basis for review, and the Court should deny the Petition.

LEGAL DISCUSSION

This Court may review a decision of the Court of Appeal "[w]hen necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Ct., rule 8.500(b)(1).)[1] There is no split of authority on the material issues raised in the appeal, or the Petition in particular. Similarly, there is no important question of law that is unsettled following the Court of Appeal Opinion.

I.

REVIEW IS NOT REQUIRED TO SECURE UNIFORMITY OF DECISION.

Review cannot be justified here by a purported need to secure unanimity of decision. (Cal. Rules of Ct., rule 8.500(b).) There is no conflict among the appellate districts as to the material issues raised in the appeal. In fact, the Petition does not identify any such conflicts. Further, the Opinion is completely consistent with the *Freedman* case, the only California case cited in the briefing that explains the significance of an attorney signing an agreement as to form and content. It is also consistent with the *RSUI* case, which was not cited by the parties in their briefing, but its reasoning was found persuasive by the Court of Appeal in reaching its decision.[2] Hence, review is not required to secure uniformity of decision.

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[1] The bases for review set forth in California Rules of Court, rule 8.500(b)(2)-(4) do not apply here and are not raised in the Petition.

[2] *RSUI* was cited in the Court of Appeal's tentative opinion that was distributed to the parties prior to argument and both parties had a full opportunity to address the case at oral

II.

THE OPINION IS CORRECTLY DECIDED AND THERE IS NO IMPORTANT LEGAL ISSUE FOR THIS COURT TO SETTLE.

Review is also not "necessary to settle an important question of law." (Cal. Rules of Ct., rule 8.500(b).) Although Monster Energy never articulates what "important question[s] of law" require settling by this Court, it identifies what it claims are three issues for review: (1) "Is the attorney bound by [confidentiality provisions in a settlement agreement] or does the attorney's signature [approving the agreement as to form and content] merely convey professional approval for the attorney's client to sign the agreement?"; (2) "Was it appropriate for the Court of Appeal to accept [the attorney's] 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?"; and (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?" (Petn. for Review, pp. 6-7.) None of these are important questions of law warranting settlement by this Court, and the latter two questions are entirely case specific and misconstrue the Opinion.

2.1. The Opinion Correctly Determines That an Attorney Is Not Liable for Breach of an Agreement If the Attorney Signed the Agreement Only under the Words "Approved as to Form and Content."

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argument. *RSUI* also relied on *Freedman*. Monster Energy also raised *RSUI* in its petition for rehearing, which the Court of Appeal denied.

Monster Energy apparently does not find fault with the Opinion's conclusion that the clients could not bind their attorneys to the settlement agreement without the attorneys' consent. Instead, it contends the Opinion "threatens to undermine California's policy in favor of settlement."[3] (Petn. for Review, p. 19.) How it does so is never explained.

Monster Energy's attack on the Opinion's reasoning is centered on the *RSUI* decision. (Petn. for Review, p. 19.) Its main criticism of the *RSUI* decision appears to be that in *RSUI* the legend below which the subject attorney signed, read "Agreed to in Form & Substance," and that the *RSUI* court's interpretation of "Agreed" is "inconsistent with the [California] Judicial Council's jury instructions on the formation of a contract." (Petn. for Review, p. 19.) In particular, Monster Energy points to CACI No. 302, which provides that the third element to prove creation of a contract is "[t]hat the parties agreed to the terms of the contract." (Petn. for Review, pp. 19-20; CACI No. 302 (2018 ed.).) Monster Energy tries to create a conflict by claiming that neither the *RSUI* decision 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*." (Petn. for Review, p. 23.)

The question here, however, is not whether the Nebraska Supreme Court's interpretation of "agreed" conflicts with a California jury instruction. The legend above the attorney's signature in *RSUI* read "Agreed to in Form & Substance." (*RSUI*, *supra*, 282 Neb. at p. 438.) But, the legend in *Freedman* read "*Approved* as to form and content." (*Freedman*, *supra*, 182 Cal.App.4th at p. 1067, emphasis

[3] Monster Energy purports to place a high value on confidentiality, but the true purpose underlying this litigation in general and the petition for review in particular is clearly not an interest in confidentiality. To begin, Monster Energy agreed the attorneys could make claims about its energy drinks in connection with other cases they were handling, and the so-called breach of confidentiality here was not a disclosure of the settlement amount. Second, Monster Energy's continuing pursuit of this case through this Court serves only to publicize the settlement—not to maintain its confidentiality.

added.) And, the legend in this case also read "*Approved* as to form and content." (Opn., p. 5.) So, even if the term "agreed" was used in the *RSUI* legend, it was not used in either California case—the *Freedman* legend or the legend used in this case. (*Freedman*, *supra*, 182 Cal.App.4th at p. 1067; Opn., p. 5.) Therefore, there is no inconsistency between the Opinion and CACI No. 302. Further, the Opinion discusses *RSUI* only because it is more on point factually with this case than the *Freedman* case. (Opn., p. 19.) *RSUI* cited *Freedman* with approval, and the Opinion does so as well. (*RSUI*, *supra*, 282 Neb. at p. 442, Opn., p. 19.)

Importantly, while the Opinion points to differences in the facts and procedure in *Freedman* from those in the instant case, it states *Freedman* "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." (Opn., pp. 19-20.)

There is no California authority to the contrary. Monster Energy claims to have found such "authority" by citing to what amounts to (1) an attorney's blog post[4], (2) a settlement agreement template prepared by a mediator[5], and (3) a settlement agreement form in a practice guide.[6] It claims the Opinion "[i]gnor[es] this prior guidance," but fails to explain why the Court of Appeal or this Court

[4] 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), Lexology, <http://www.lexology.com/library/detail.aspx?g=93f3f0cb-e179-42dd-9797-7615443a3f8e> (as of October 2, 2018) [discussing unpublished case and not addressing the significance of an attorney signing as to form and content].

[5] Lewis, Settlement Template, < http://www.mediatorjudge.com/pg13.cfm > (as of October 2, 2018) [form agreement with no analysis or citation to legal authority].

[6] Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2017) Form 15:C, pp. 15-252 to 15-254 [including a purported confidentiality agreement as to parties and attorneys, and a signature line for attorneys under "Approved as to form and content," but without any discussion or citation to authority as to the legal effect of such signature].

must be guided by what amount to blog posts and forms of agreements that are unsupported by law on the relevant issue. (Petn. for Review, p. 20.)

Monster Energy seeks to escape the plain explanation in *Freedman* of the effect of a signature under "approved as to form and content," approved by the Court of Appeal here and cited to in *RSUI*, by pointing to some irrelevant factual and procedural differences in *RSUI*. Importantly, the Opinion is mindful of the factual and procedural differences between *Freedman* and this case, nevertheless approving of the *Freedman* court's explanation for the meaning of a signature under "approved as to form and content." (Opn., pp. 19-20.)

As to these differences, Monster Energy first contends "[d]istinct 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." (Petn. for Review, p. 21.) How this distinction impacts the propriety of the Opinion's approval of the *RSUI* reasoning or the *Freedman* court's explanation for the meaning of a signature under "approved as to form and content" is not explained. There is no relationship between the two.

Monster Energy then contends *RSUI* is distinguishable because in *RSUI* 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." (Petn. for Review, p. 21.) It apparently presumes there was such extrinsic evidence here, yet does not explain why it matters when interpreting the plain language of an agreement. It further fails to explain how this impacts the Opinion's approval of *RSUI*'s reasoning or the *Freedman* court's explanation for the meaning of a signature under "approved as to form and content."

Finally, as for the stated concern that the Opinion threatens to "undermine" California's policy in favor of settlement, the Opinion expressly addresses this issue:

> 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. It 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.

(Opn., p. 20.)

The Opinion is clear on how to bind an attorney contractually to confidentiality provisions.[7] There is no inconsistent authority, and there is no settling of the issue required by this Court.

2.2. The Opinion Properly Applies the Relevant Standard in Ruling Monster Energy Did Not Establish a Probability of Prevailing on its Breach of Contract Claim

Monster Energy contends the Court of Appeal failed to apply the "minimal-merit rule." (Petn. for Review, p. 24.) Monster Energy, however, never explains why this asserted error is worthy of this Court's review, since it is so evidence and fact specific. (See *People v. Davis* (1905) 147 Cal. 346, 348 (*Davis*) [error

[7] The issue is unlikely to arise again given the clarity in the Opinion. Now that the Opinion has issued, parties to settlement agreements wishing to bind attorneys to certain provisions of the settlement will simply have them sign as parties to those provisions.

correction is not a basis for review].) In addition, while the burden on a plaintiff has been characterized as the "minimal merit" prong of the anti-SLAPP analysis, it is not an insignificant burden. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 675 (*Peregrine*); *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 710 (*Gallant*), overruled in part on other grounds by *Reid v. Google, Inc.* (2010) 50 Cal 4th 512, 532, fn. 7.) Here, Monster Energy could not have relied on pleadings alone, but must instead have submitted evidence establishing a sufficient prima facie showing of facts. (*Ibid*.) Therefore, Monster Energy's burden was similar to that of a party opposing a motion for summary judgment. (*Ibid*.) It quite simply did not meet that burden.

Monster Energy's contention that the Opinion fails to apply the correct standard centers on the Opinion's alleged failure to properly consider the attorney's testimony relating to the alleged disclosure of the terms of the settlement agreement. The attorney told the reporter during their interview that "the matter had been settled but I could not reveal the terms of the settlement." (CT 45.) The attorney later testified he felt compelled to keep the terms of the settlement agreement confidential, not because of a *contractual* obligation to *Monster Energy*, but because of an *ethical* obligation to *his client*. (CT 117.)

Monster Energy contends this is "extrinsic evidence" that the attorney admitted he was bound by the confidentiality provisions in the settlement agreement. On the contrary, the attorney admitted he owed a duty to his client to keep the terms of the agreement confidential. He did not admit to having any contractual obligation to Monster Energy.

Monster Energy calls this explanation "tortured," but presents no evidence to the contrary. The record is set and there is no evidence the attorney admitted to any contractual obligation to Monster Energy. The only evidence on the issue consists of (1) the attorney's statements to the reporter in the interview indicating

he could not reveal the terms of the agreement, (2) the attorney's explanation that his confidentiality obligation was to his client due to his ethical duties, and (3) the agreement itself, which does not reflect an intention by any of the attorneys to be bound. There is no evidence to the contrary. Not only does the Opinion apply the proper standard on the second prong of the anti-SLAPP statute, this straightforward interpretation of the law certainly raises no important legal question for this Court to settle.

2.3. The Opinion Correctly Evaluates the Commercial Speech Exemption

Again, failing to explain why this evidence-specific issue is worthy of review by this Court, Monster Energy next contends the Opinion erroneously evaluates the commercial speech exemption to the anti-SLAPP statute. Not so. To begin, the Opinion correctly opens its analysis by noting that "the determination of whether the commercial speech exemption applies turns, in part, on the defendant's "purpose" and "inten[t]." (Opn., p. 11, citing Code Civ. Proc., § 425.17, subd. (c).) This statute provides unmistakable guidance as to when the commercial speech exemption applies, only when both of the following have been established:

> (1) The statement or conduct consists of representations of fact about that person's or a business competitor'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, or the statement or conduct was made in the course of delivering 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, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue.

(Code Civ. Proc., § 425.17, subd. (c), emphasis added.)

The Court of Appeal correctly observes, and Monster Energy does not dispute, "[t]he 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." (Opn., p. 11, quoting *Simpson Strong-Tie Company, Inc. v. Gore* (2010) 49 Cal.4th 12, 26 (*Simpson*).) The commercial speech exemption is to be narrowly construed. (*Simpson*, *supra*, 49 Cal.4th at p. 22.)

Here, the attorney gave an interview to a reporter about cases he was handling against Monster Energy and the reporter posted an article about the interview on a website. The only evidence as to the attorney's purpose or intent in giving the interview was the reporter's article itself, and the article's presence on a website that allegedly "generates leads for attorneys." (CT 100, RT 4 ["Monster focuses on the fact that this is an advertising lead service."].) Therefore, the determination of the attorney's purpose or intent in making his statements depended solely on the content of the website.

The trial court considered the website content evidence and concluded that it "does not prove that it is the defendants [attorneys] who were advertising in this particular case." (RT 4:15-16.) The trial court stated at the hearing on the anti-SLAPP motion,

> Plaintiff contends that this is commercial speech. Monster focuses on the fact that this is an advertising lead service. I agree with plaintiff; it is an advertising lead service. There is an advertisement for Monster Energy drink legal help below the article. However, there is no evidence that this went to these defendants.

(RT 4:5-10.) The trial court first noted there was an advertisement on the webpage where the article appeared. The trial court then noted there was no evidence the advertisement led to the defendant attorneys. The trial court then concluded there was no evidence before indicating that the purpose or intent of the attorney's statements was to generate business. The Court of Appeal decided this finding by the trial court was perfectly reasonable. (Opn., p. 13.)

In an apparent effort to create an unsettled question of law, Monster Energy raises the specter of a new "success-based test" for commercial speech. This is not what the Court of Appeal holds. The Opinion merely concludes there was no substantial evidence the attorney's purpose or intent in making the subject statements to the reporter for her article was commercial. The Opinion certainly does not articulate a bright-line rule or test that commercial speech has to be successful to be exempted commercial speech.

In addition to the foregoing, Monster Energy raises only the issue of whether there was sufficient evidence as to the attorney's purpose under Code of Civil Procedure section 425.17(c)(1). There is no discussion in the Petition about the second requirement contained in the statute, which requires evidence establishing the intended audience is an actual or potential customer, or one likely to repeat the statement to such a customer. There was no such evidence presented in the trial court.

In sum, because Monster Energy bore the burden of proof on the issue of commercial speech, the Court of Appeal properly concludes it did not meet that

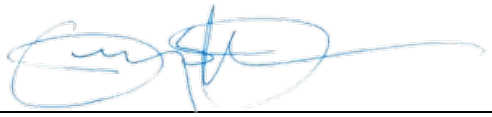
burden and the anti-SLAPP motion should have been granted. There is no unsettled question of law as to this issue worthy of this Court's review.

CONCLUSION

For all of the above reasons, Appellants Bruce L. Schechter and R. Rex Parris Law Firm request this Court deny the Petition for Review.

Respectfully submitted,

Dated: October 9, 2018



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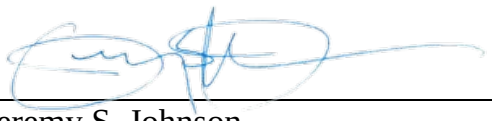
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204, subdivision (c)(1), of the California Rules of Court, attorney Jeremy S. Johnson, counsel for Appellants Bruce L. Schechter and R. Rex Parris Law Firm, hereby certifies and represents that this Appellants' Reply Brief was prepared using Microsoft Word 2016 software. The Brief (including the footnotes) consists of 3,675 words, excluding the cover, the Tables, and this Certificate. In making this certificate, Mr. Johnson is relying on the word count function of the computer program used to prepare this brief.

Dated: October 9, 2018



Jeremy S. Johnson,
Attorney for Appellants Bruce L. Schechter
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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 20320 S.W. Birch Street, Second Floor, Newport Beach, California 92660.

On October 9, 2018, I served the within document(s) described as:

ANSWER TO PETITION FOR REVIEW

on the interested parties in this action as stated on the attached mailing list.

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Executed on October 9, 2018, at Newport Beach, California.

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

Selene Harris	/s/ Selene Harris
(Type or print name)	(Signature)

MONSTER ENERGY COMPANY, a Delaware corporation v.

Case No. RIC 1511553 /Appellate Case No.: E066267

BWB&O CLIENT: Defendants, BRUCE L. SCHECHTER and R. REX PARRIS LAW FIRM

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STATE OF CALIFORNIA
Supreme Court of California

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

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/s/Jeremy Johnson

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Johnson, Jeremy (214989)

Last Name, First Name (PNum)

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Law Firm