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IN THE SUPREME COURT OF CALIFORNIA

BRUCE L. SCHECHTER, et al.

Defendants and Appellants,

vs.

MONSTER ENERGY COMPANY

Plaintiff and Respondent.

ANSWER BRIEF ON THE MERITS

After a Decision by the Court of Appeal, Fourth Appellate District,
Division Two, Case No. E066267
Riverside County Superior Court, Case No. RIC 1511553
Hon. Daniel A. Ottolia

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I.
ISSUES PRESENTED

In granting Monster Energy Company's petition for review, the Court limited the issues to be briefed as follows:

(1) When a settlement agreement contains confidentiality provisions that are explicitly binding on the parties and their attorneys, and the attorneys sign the agreement under the legend "APPROVED AS TO FORM AND CONTENT," have the attorneys consented to be bound by the confidentiality provisions?

(2) When evaluating the plaintiff's probability of prevailing on its claim under Code of Civil Procedure section 425.16, subdivision (b), may a court ignore extrinsic evidence that supports the plaintiff's claim, or accept the defendant's interpretation of an undisputed but ambiguous fact over that of the plaintiff?

II.
INTRODUCTION

This case is a very public vendetta by a publicly-traded, multi-million-dollar energy drink corporation. Monster Energy Company brings this action against plaintiffs' attorneys who have repeatedly sued the company for defects in their highly-caffeinated drinks that have resulted in the deaths of children

across the country. Under the guise of "enforcing" a confidentiality provision in a settlement agreement to end litigation with the parents of a deceased child—to which the attorneys were neither signatories nor parties—Monster Energy has carried this breach of contract action against the attorneys all the way to this Court—effectively publicizing to all and sundry that it has settled a case with the parents of a 14-year-old child who died after consuming their dangerous products. And, what was the parents' attorney's asserted offense? A month after the settlement, he responded to a question from one reporter that the highly publicized case had settled confidentially, without disclosing the name of the parties or the amount of the settlement. Based on the attorney's response to the reporter, Monster Energy has relentlessly pursued the attorneys, claiming breach of *the parties'* settlement agreement, abandoning any pretense of concern about confidentiality.

This appeal involves the second prong of the anti-SLAPP statute and Monster Energy's burden to establish a probability of prevailing on the merits of its breach of contract claim against the attorneys. (Code Civ. Proc., § 425.16, subd. (b)(1).) As the Court of Appeal properly concluded, Monster Energy failed to meet this burden both as a matter of law and because of the absence of evidence.

As a matter of law, at the time *the parties* entered into the settlement agreement, case law in California and other jurisdictions routinely held (and continues to hold) that an

attorney's signature as an attorney for his or her client under a legend "approved as to form and content" was non-substantive, did not constitute an actionable representation to the other party to the contract, and did not and *could not* contractually bind the attorney to the other party to the contract. Instead, the well-settled law and custom and practice of the legal community established that such a provision indicated only that the parties had been separately advised by counsel, the attorney for each party had reviewed the agreement, in the attorney's opinion the agreement was in proper form and embodied the parties' deal, and the attorney gave his or her professional approval to his or her client for *the client* to execute and become bound to the agreement.

Here, following a mediation, Monster Energy and the deceased child's parents entered into a written settlement agreement that included confidentiality provisions that were signed *only* by the parties to the action. None of the attorneys were parties to the agreement and none signed the agreement as a party—there was not even a line provided for attorney initials for the confidentiality provisions. In conformity with the common understanding and practice of the legal community as to the effect of "approved as to form and content," the attorneys only approved the form and content of the settlement agreement for their clients' signatures. By this approval, the attorneys did not agree to be contractually bound to Monster Energy. Allowing an entity to enforce all or part of a settlement agreement against an attorney approving solely as to form and content would be a sea change in

the law.

None of the attorneys agreed to be contractually bound to the parties by approving the settlement agreement for their clients' signatures, or in any other manner. California case law provides that consent to be bound by an agreement requires an *objective outward manifestation of consent that is communicated to the other party to the contract.* Apart from the attorney's signature approving the agreement "as to form and content," which does not constitute consent to be contractually bound as a matter of law, Monster Energy presented *no* evidence that the attorneys outwardly manifested any consent to be contractually bound to the settlement agreement communicated to Monster Energy prior to or during the signing of the settlement agreement. Nor could Monster Energy ever produce any such evidence, because the words and conduct of attorneys and clients at a mediation at which a settlement was initially reached, are protected by the unqualified mediation privilege.

In addition, Monster Energy's assertion that it submitted ambiguous extrinsic evidence strays far afield. This case is not about the interpretation of ambiguous provisions in a written settlement agreement to which all parties agree they have consented. To the contrary, this case is about consent to be contractually bound at all. Monster Energy failed to present a shred of the required objective evidence of the attorneys' outward manifestation of consent communicated to Monster Energy prior

to or during the signing of the settlement agreement. That the attorneys knew the settlement agreement was confidential between the parties is not evidence that *the attorneys consented* to be contractually bound to Monster Energy.

In accord with existing case law and in conformity with the understanding and expectations of the legal community, the Court of Appeal properly concluded that, although the attorneys had ethical and professional obligations to maintain the confidentiality of the terms of their clients' settlement, the attorneys' approval of the settlement agreement "as to form and content" in their capacity as attorneys representing their clients did not constitute the attorneys' consent to be contractually bound to Monster Energy. Monster Energy failed to submit any other evidence of consent. For these reasons, Monster Energy failed to establish a probability of prevailing on its breach of contract cause of action against the attorneys.

Accordingly, this Court should affirm the judgment of the Court of Appeal ordering the trial court to grant the attorneys' anti-SLAPP motion in full.

III.
FACTUAL AND PROCEDURAL BACKGROUND

On December 23, 2011, 14-year-old Anais Fournier of Maryland died from cardiac arrythmia due to caffeine toxicity after

drinking two 24-ounce Monster Energy drinks containing 480 milligrams of caffeine—the equivalent of 14 cans of Coke. (CT 37.)[1] Months thereafter, the death of Anais was still being widely reported in the media. (See, e.g., CT 37-40.)

On October 17, 2012, Anais's parents, Wendy Crossland and Richard Fournier, filed a products liability and wrongful death action against Monster Energy in Riverside County, where Monster Energy is headquartered. (Aug. 2.)

On July 29, 2015, shortly before trial and during a mediation, Anais's parents and Monster Energy settled the litigation. (Aug. 2; RB 7.) At the time of the settlement, attorneys Michael E. Blumenfeld and Jonathan Singer of the Maryland law firm of Miles & Stockbridge P.C. and local counsel Bruce Schechter of the Parris Law Firm[2] represented Anais's parents. (SSCT 31-33.) Apparently, the Miles & Stockbridge Maryland law firm were the parents' primary attorneys, because the written settlement agreement directed the settlement funds to be paid to Miles &

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[1] CT refers to the Clerk's Transcript. Aug. refers to the Augmented Record. SSCT refers to the Sealed Supplemental Clerk's Transcript. Opn. refers to the Court of Appeal Opinion. RB refers to Monster Energy's Respondent's Brief in the Court of Appeal. PRH refers to Monster Energy's Petition for Rehearing in the Court of Appeal. OBOM refers to Monster Energy's Opening Brief on the Merits in this Court. ABOM refers to this Answer Brief on the Merits.

[2] The Parris Law Firm was formerly known as the R. Rex Parris Law Firm.

Stockbridge P.C. (SSCT 24.) After the mediation, Attorney Blumenfeld for Anais's parents and Monster Energy's attorney exchanged a number of different drafts of a written settlement agreement. (CT 115.) It was attorney Blumenfeld who spoke with Anais's parents about their obligations concerning the confidentiality provisions of the settlement agreement. (CT 117.)

Crossland and representatives of Monster Energy executed a written "Confidential Settlement Agreement and Release" ("Settlement Agreement") on August 3, 2015, and Fournier executed the Settlement Agreement the next day on August 4, 2015. (SSCT 31-32.) On August 4, 2015, the Settlement Agreement also was "approved as to form and content" by Attorney Blumenfeld of Miles & Stockbridge P.C. as attorneys for the plaintiffs. (SSCT 31.) And on August 5, 2015, the Settlement Agreement was "approved as to form and content" by Monster Energy's attorney as attorneys for the defendants. (SSCT 33.) The Settlement Agreement was also "approved as to form and content" by Attorney Schechter of the Parris Law Firm as attorneys for the plaintiffs, but his signature is undated. (SSCT 33.)

The Settlement Agreement defined the Parties to the agreement as the actual plaintiffs and defendants in the lawsuit—Crossland, Fournier and Monster Energy—and provided that the Settlement Agreement was effective as of the date it was *signed by the Parties*. (SSCT 22, 30.) The Settlement Agreement did not require the Parties' attorneys' approval in order to be effective.

Thus, the effective date of the Settlement Agreement was August 4, 2015, the date of Fournier's signature, the last Party to sign.

The Settlement Agreement included confidentiality and non-disparagement provisions. Specifically, section 11.1 of the Settlement Agreement required confidentiality for the existence, amount, terms and conditions of the settlement. (Opn. 4.)[3] Section 11.3 limited comments on the settlement to "This matter has been resolved" or "words to their effect." (Opn. 5; SSCT 28.) Section 11.4 included a standard non-disparagement provision but excluded from the confidentiality and disparagement provisions statements by the parents' attorneys in connection with other or future litigation against Monster Energy. (Opn. 5.)

Pursuant to the Settlement Agreement, a couple of weeks later, Crossland and Fournier dismissed their complaint against Monster Energy.

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[3] The unredacted Settlement Agreement was filed under seal in the trial court. (CT 84-85.) On August 13, 2018, the Court of Appeal unsealed the Settlement Agreement to the extent it was quoted in the Court of Appeal Opinion: "All portions of the settlement agreement that are quoted in this court's opinion are unsealed. However, the physical settlement agreement shall remain sealed, as the quotations in the court's opinion are sufficient to identify [and] to disclose to the public the unsealed portions." (Court of Appeal docket.) Following Monster Energy's lead (see OBOM 13-14, 21-22), Attorneys refer to portions of the Settlement Agreement in this Answer Brief on the Merits that were not quoted in the Opinion but bear no indicia of confidentiality, such as the amount of the settlement.

On September 15, 2015, an online newspaper published on its website a reporter's September 4, 2015 interview of Attorney Schechter, which included alleged statements by Schechter in response to questions confirming that litigation involving a 14-year-old who died after drinking Monster Energy's drinks had been confidentially resolved for "substantial dollars." (Aug. 4; CT 45, 97, 154.) Attorney Schechter's response to the reporter's questions did not include any names or any specific settlement amounts. (Aug. 4; CT 45, 97, 154.) Attorney Schechter also allegedly discussed with the reporter other litigation he was handling against Monster Energy and in that connection allegedly opined on the health issue that the synergistic effects of the ingredients in Monster Energy's drinks made them deadly. (Aug. 4.)

Ten days later, Monster Energy sued Attorney Schechter and his law firm (the "Attorneys") for breach of the Settlement Agreement, breach of the implied covenant, unjust enrichment, and promissory estoppel. (Aug. 1.) The Attorneys filed an anti-SLAPP motion pursuant to Code of Civil Procedure section 425.16. (CT 1.) Monster Energy opposed the motion. (CT 88.)

With respect to the second prong of the anti-SLAPP statute and its burden of establishing a probability of prevailing on the merits, Monster Energy relied almost exclusively on the provisions of the Settlement Agreement and Attorney Schechter's

signature under the legend "approved as to form and content." Monster Energy submitted as evidence only the Settlement Agreement, the reporter's article, the reporter's deposition testimony and her affidavit, and deposition testimony of Attorney Schechter. (CT 93, fn. 1, 112-154.) Specifically, Monster Energy argued the Attorneys were bound by the Settlement Agreement based solely on the language of the Settlement Agreement, the Attorneys' "approval as to form and content," Attorney Schechter's review of the Settlement Agreement, Attorney Schechter's understanding that Monster Energy would not settle if *Anais's parents* did not agree to keep the settlement confidential, and Attorney Schechter's statement to the reporter that he could not reveal the terms of the settlement. (CT 103-105.)

The trial court granted the Attorneys' motion to strike the breach of the implied covenant, unjust enrichment and promissory estoppel causes of action, but denied the motion as to the breach of the Settlement Agreement, concluding Monster Energy had met its burden to show a probability of prevailing on the merits of its contract cause of action. (CT 196.) The Attorneys appealed from the order to the extent it denied their motion to strike the breach of the Settlement Agreement cause of action. (CT 198.) Monster Energy did not cross-appeal.

In its Respondent's Brief on appeal, Monster Energy never argued it had satisfied its evidentiary burden to establish the Attorneys' consent with "extrinsic evidence," and instead relied

entirely on the Settlement Agreement and Attorney Schechter's signature under the legend "approved as to form and content." The Court of Appeal reversed the denial of the anti-SLAPP motion on breach of contract as to this ground. (Opn. 21-22.) The Court of Appeal concluded there was no evidence the Attorneys agreed to be contractually bound by the Settlement Agreement and "approval as to form and content" did not constitute the Attorneys' consent to be contractually bound to Monster Energy. (Opn. 13-21.)

IV.
LEGAL ARGUMENT

A. Monster Energy Failed to Demonstrate A Probability Of Prevailing On Its Breach Of Contract Claim Or That Its Claim Had Even Minimal Merit

Monster Energy failed to persuade the Court of Appeal and fails to persuade in its Opening Brief on the Merits in this Court that it met its burden under the second prong of the anti-SLAPP statute (Code Civ. Proc., § 425.16, subd. (b)(1)) to present evidence that its breach of contract cause of action against the Attorneys was legally sufficient and had at least minimal merit. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819-820 (*Oasis*); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89 (*Navellier*) [in opposing an anti-SLAPP motion, a plaintiff must demonstrate its cause of action is legally sufficient and supported by a prima-facie showing].) Monster Energy presented not a

scintilla of evidence that the Attorneys consented to be contractually bound to Monster Energy. An appellate court reviews an order granting an anti-SLAPP motion de novo. (*Oasis*, *supra*, 51 Cal.4th at p. 820.)

To begin, an attorney's approval of an agreement for a client "as to form and content" does not constitute the attorney's consent to be contractually bound to the other party. (ABOM, IV, B.) Second, Monster Energy presented no evidence of any outward manifestation of the Attorneys' consent to be bound that was communicated to Monster Energy. (ABOM, IV, D.) Third, the Attorneys were not Parties to the Settlement Agreement pursuant to the express provisions of the agreement. (ABOM, IV, E.) Fourth, the mediation privilege precludes Monster Energy from disclosing any words or conduct of the Attorneys, or inferences therefrom, that occurred in connection with the mediation. (ABOM, IV, G.) Fifth, Monster Energy presented no clear and compelling evidence that the Attorneys voluntarily relinquished their First Amendment right to speak. (ABOM, IV, C.) Sixth, the Attorneys did not sign a writing as a Party that would satisfy the statute of frauds. (ABOM, IV F.) Finally, Monster Energy has waived its argument that extrinsic evidence was admissible and, in any event, presented no evidence (extrinsic or otherwise) that demonstrated an outward manifestation of the Attorneys' consent to be bound that was communicated to Monster Energy at the time of the Settlement Agreement. (ABOM IV, G.)

Contrary to Monster Energy's argument, there is no evidence that the Attorneys being sued negotiated the Settlement Agreement. To the contrary, the only evidence is that it was negotiated between Monster Energy's attorney and Anais's parents' Maryland attorneys. (CT 115.) As Attorney Schechter stated, and the Court of Appeal agreed, the Settlement Agreement was confidential and the Attorneys had ethical and professional obligations to maintain its confidentiality—but the Attorneys did not owe contractual obligations to Monster Energy. (Opn. 16 & fn. 2.) Simply put, Monster Energy's breach of contract cause of action is legally insufficient as a matter of law—there is no conflicting evidence and there are no conflicting inferences, and the Court of Appeal made no credibility determinations.

B. The Attorneys' Signature On The Settlement Agreement Under The Legend "Approved As To Form And Content" Does Not Constitute Consent To Be Contractually Bound To Monster Energy

In accord with existing case law in California and other jurisdictions, the Court of Appeal concluded that, when an attorney approves an agreement as to form and content, the attorney is not agreeing to be contractually bound. (Opn. 17-20.) Specifically, the Court of Appeal held: "The only reasonable construction of this wording ["Approved as to form and content"] is that [the 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. 17.)

In reaching this conclusion, the Court of Appeal relied primarily on two cases, one from California and the other from the Nebraska Supreme Court—each case concluding that an attorney's signature under the legend "approved as to form and content" does not bind the attorney to the agreement. There is no conflict in the law.

In *Freedman* v. *Brutzkus* (2010) 182 Cal.App.4th 1065, 1068 (*Freedman*), the parties were attorneys who had represented opposing clients (licensors and an apparel manufacturer) in negotiating a trademark license agreement. (*Ibid.*) The license agreement included a signature block for the attorneys under the legend approved as to form and content. (*Ibid.*) A dispute later arose between the licensors and the apparel manufacturer, which declared bankruptcy after entering into the agreement. (*Ibid.*) The licensors, previously represented by the apparel manufacturer's attorney in other matters, alleged they had relied on the apparel manufacturer's attorney's representation that the manufacturer would be able to pay them. (*Ibid.*) The apparel manufacturer's attorney then brought suit against the licensors' attorney, alleging that in approving the agreement as to form and content, the licensors' attorney had made an actionable misrepresentation to him regarding the agreement's accuracy. (*Ibid.*)

The *Freedman* Court of Appeal affirmed the trial court's dismissal on demurrer and rejected the apparel manufacturer attorney's argument, explaining, "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 this particular party, and that the document is in the proper form and embodies the deal that was made between the parties." (*Freedman, supra,* 182 Cal.App.4th at p. 1070.) Further, "this recital indicates that an attorney has advised or is advising his or her own client of the attorney's approval of the document's form and content, and does not, by itself, operate as a representation to an opposing party's attorney that can provide a basis for tort liability." (*Id.* at p. 1067.) Such an approval is given solely to the attorney's client. (*Id.* at p. 1070.) "An attorney cannot approve an agreement or give a legal opinion on behalf of an opposing party." (*Ibid.*) Holding an attorney liable to the opposing party under these circumstances "would upend the meaning of a common legal practice, and potentially interfere with attorneys' absolute duty of loyalty to their own clients." (*Id.* at p. 1071, citing *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg* (1994) 30 Cal.App.4th 1373, 1383 ["'Because of the inherent character of the attorney-client relationship, it has been jealously guarded and restricted to only the parties involved.' [Citation.]"].)

Similarly, in *RSUI Indem. Co. v. Bacon* (2011) 282 Neb. 436, 437-38 [810 N.W.2d 666] (*RSUI*), the Nebraska Supreme

Court applied the reasoning of *Freedman* to a settlement agreement. (*Ibid.*) There, a general contractor entered into a settlement with an injured employee of a subcontractor. (*Id.* at p. 438.) The settlement agreement provided that, in the event the employee subsequently settled with the subcontractor, the employee and his attorney would pay the general contractor's insurer a specified amount. (*Id.* at pp. 437-438.) The employee's attorney signed the settlement agreement under a legend "Agreed to in Form & Substance." (*Id.* at p. 438.) Later, the employee received a settlement from the subcontractor but neither the employee nor the employee's attorney paid the general contractor's insurer the specified amount. (*Id.* at p. 439.) The insurer then sued the employee and the employee's attorney for breach of contract and obtained a judgment against them. (*Ibid.*) The Nebraska Supreme Court reversed the judgment against the attorney, explaining the attorney's "signature under the legend 'Agreed to in Form & Substance' demonstrates only that he was [the employee's] attorney and that 'the document [was] in the proper form and embodie[d] the deal that was made between the parties.'" (*Id.* at pp. 440-444.)

Cases in other contexts have similarly construed the language "approved as to form and content" as a non-substantive provision indicating that the client is represented by counsel and, counsel has approved the content of the document as to the client's interests, and any agreement was reached on an arms-length basis. (See *In re Marriage of Hasso* (1991) 229 Cal.App.3d 1174,

1181-1182 [marital settlement agreement with signature line for parties' attorneys to sign as to form and content is enforceable between the parties even without attorney's signature]; *Ahrenberg Mechanical Contracting, Inc. v. Howlett* (Mich. 1996) 545 N.W.2d 4, 5-6 [court order approved by losing party's attorney as to form and content does not waive the losing party's right to appeal]; *Krin v. Ioor* (Mich. 1934) 253 N.W. 318 [same where the language was approved as to substance and form]; *Albright v. District Court of Denver* (1962) 150 Colo. 487, 490-491 [court rule requiring attorney to approve order as to form and content valid because it does not constitute approval of the order's legal effect or application of the substantive law]; *CIC Property Owners v. Marsh* (5th Cir. 2006) 460 F.3d 670, 672-673 [agreement was fair and reasonable where each party had opportunity to consult with counsel, voluntarily executed the agreement after consulting with counsel, agreement was reviewed by counsel, and counsel approved the agreement as to form and content].)

In sum, the case authority is well settled that an attorney's signature under the legend "approved as to form and content" is non-substantive and does not constitute the attorney's consent to be contractually bound. Neither in the Court of Appeal nor in this Court has Monster Energy cited a single case holding to the contrary. Instead, Monster Energy relies on forms in practice guides, an attorney's blog post, and sample agreements, none of which address the consent question at issue here and are

in any event not legal precedent. (OBOM 9-10.)[4] Nothing in these secondary sources suggests this Court should change the prevailing legal principle and the effect attorneys have relied upon as a matter of custom. Applying general principles of contract law, the Court of Appeal properly held an attorney who approves an agreement for his or her client "as to form and content" does not agree to be contractually bound to the other party.

C. A Waiver Of A Person's First Amendment Right To Speak Must Be Clear And Compelling

Moreover, distorting the effect of an attorney's signature under the legend "approved as to form and content" would be particularly inappropriate in the context of a waiver of the fundamental First Amendment right to speak. The law is clear that a person may waive his, her or its First Amendment free speech rights only by a clear and compelling relinquishment of them. (*ITT Telecom Products Corp. v. Dooley* (1989) 214

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4 Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2017), Form 15: C is a form settlement agreement that has a legend for the attorney to approve as to form and content, with no statement on what legal effect this provision has on the attorney. Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2017), Form 16: A is another form settlement agreement that does not even include the approved as to form and content legend. 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) is an attorney blog that does not mention whether the attorney signed the settlement agreement. Lewis, Settlement Template www.mediatorjudge.com/pg13.cfm is an inactive site.

Cal.App.3d 307, 319; *Ferlauto v. Hamisher* (1999) 74 Cal.App.4th 1394, 1399-1400; *City of Glendale v. George* (1989) 208 Cal.App.3d 1394, 1398; *Sanchez v. County of San Bernardino* (2009) 176 Cal.App.4th 516, 528 (*Sanchez*).) In this regard, an attorney's waiver of his or her First Amendment free speech rights is akin to a party's waiver of his or her right to a jury trial by agreeing to arbitration. As the case law requires, a person waives such important constitutional rights only by a clear relinquishment of them. (*Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 790 (*Esparza*).)

Monster Energy's reliance on three cases for the proposition that a *contract party* may waive his, her or its right to speak by validly contracting not to speak is misplaced. (OBOM 31-32.) Unlike this case, each of the cases upon which Monster Energy relies involves parties to agreements. (*Navellier, supra,* 29 Cal.4th at p. 90 [defendant allegedly breached release of claims agreement to which he was a party by filing counterclaims in a federal action]; *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 858, 869 [attorney representing 11 clients, where attorney personally entered into a confidentiality agreement prior to a mediation, allegedly breached the agreement]; *Sanchez, supra,* 176 Cal.App.4th at p. 528 [county allegedly breached confidentiality provision of severance agreement to which it was a party].) The Attorneys are not Parties to the Settlement Agreement.

Here, Monster Energy presented no evidence of the

Attorneys' clear relinquishment of their First Amendment rights. To the contrary, the evidence is undisputed that the Attorneys signed the Settlement Agreement only under the legend "approved as to form and content" and, at the time of Attorney Schechter's signature, well settled legal authority held that such language did not constitute an attorney's consent to be contractually bound by an agreement. Under these circumstances, the attorneys could not have manifested a clear intent to waive their First Amendment constitutional free speech rights.

D. There Is Also No Evidence That The Attorneys Otherwise Objectively Manifested Consent To Be Bound By The Confidentiality Provisions Of The Settlement Agreement

In addition to the non-substantive effect of the Attorneys' "approval as to form and content," there also is no evidence of any communication to Monster Energy of the Attorneys' consent to be contractually bound. As the Court of Appeal noted, the Settlement Agreement stated, "Plaintiffs and their counsel agree that they will keep completely confidential all of the terms and contents of this Settlement Agreement." (Opn. 14.) "Plaintiffs and their counsel of record ... agree and covenant, absolutely and without limitation, to not publicly disclose" the terms of the Settlement Agreement. (Opn. 14.) And the Settlement Agreement stated, "the Parties and their attorneys ... hereby agree that neither shall make any statement about the Action ... in the media...." (Opn. 14.)

But as the Court of Appeal correctly concluded, the Attorneys did not consent to be contractually bound by the Settlement Agreement. (Opn. 14, 20.) "An essential element of any contract is the mutual consent of the parties." (*Harshad & Nasir Corp. v. Global Sign Systems, Inc.* (2017) 14 Cal.App.5th 523, 537 (*Harshad*); see also *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811 (*Weddington*); *Pinnacle v. Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236; *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 270-271; Civ. Code, §§ 1550, 1565.) "Without mutual assent, there is no contract." (*Merced County Sheriff's Employees' Ass'n v. County of Merced* (1987) 188 Cal.App.3d 662, 670.)

Nor did the Attorneys ever communicate to Monster Energy any consent to be bound. (Opn. 13-14.) "Further, the consent of the parties to a contract must be communicated by each party to the other." (*Esparza, supra,* 2 Cal.App.5th at p. 788; *Harshad, supra,* 14 Cal.App.5th at p. 539; Civ. Code, § 1565.) Consent must be objectively communicated. (*Weddington, supra,* 60 Cal.App.4th at p. 811.) "'The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe.' [Citation.] Outward manifestations thus govern the finding of mutual consent required ... for contract formation. [Citation.] The parties' outward manifestations must show that the parties all agreed 'upon the same thing in the same sense.'" (*Ibid.*)

When one person does not objectively consent to be bound, there can be no contract between that person and the other entity. "If there is no evidence establishing a manifestation of assent to the 'same thing' by both parties, then there is no mutual consent to contract and no contract formation. [Citations.]" (*Weddington, supra,* 60 Cal.App.4th at p. 811; see also *Harshad, supra,* 14 Cal.App.5th at p. 537.) Mutual assent is determined by "the reasonable meaning of [the parties'] words and acts, and not their unexpressed intentions or understandings." (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141, disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 524; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 173.)[5]

It is well established that "a party cannot bind another to a contract simply by so reciting in a piece of paper. It is

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[5] The cases upon which Monster Energy relies are completely inapposite to the issue of evidence of the objective manifestation of consent necessary for an agreement to be formed. Rather, these cases involve the interpretation of ambiguous contract provisions (*Beard v. Goodrich* (2003) 110 Cal.App.4th 1031, 1038 [interpretation of ambiguous percentage provision in contingency fee agreement]; *Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal.3d 494, 499 [interpretation of ambiguous phrase "giving notice"]), or have nothing to do with contract interpretation at all (*Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1376-1377 [general contract principles not applicable to Code of Civil Procedure section 998 offers].)

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 (*Mitsui*) [shipper's boilerplate on bill of lading that buyer was jointly liable with seller for freight not binding on buyer]; see also *Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, 822-823 [parties to an agreement may not bind non-parties]; *Esparza, supra,* 2 Cal.App.5th at pp. 787-790 [though employee handbook included an arbitration agreement and stated the employee agreed to arbitration, employee's signature on an acknowledgement of receipt of the handbook did not constitute an agreement to arbitrate, where no reference to an agreement by the employee to abide by the handbook's arbitration agreement provision appeared in the acknowledgement]; *Mitri v. Arnel Management Co.* (2007) 157 Cal.App.4th 1164, 1167-1171)

In addition, Anais's parents also could not bind the Attorneys to the Settlement Agreement. It is well settled that a principal cannot contractually bind an agent. (See *Jensen v. U-Haul Co. of Cal.* (2017) 18 Cal.App.5th 295, 302 (*Jensen*) [arbitration provision in an equipment rental agreement that purported to bind employees of lessee not enforceable against lessee's employee injured by the rented truck].) And signing a contract does not mean one is a party to the contract. (E.g., *Carlesimo v. Schwebel* (1948) 87 Cal.App.2d 482, 486-488 [where a person signed as agent for a disclosed principal, he was not personally liable]; *Freedman, supra,* 182 Cal.App.4th at p. 1071; *Filippo Industries, Inc. v. Sun Ins. Co.* (1999) 74 Cal.App.4th 1429,

1442.)

Monster Energy presented no evidence of any objective outward manifestation of the Attorneys' consent to be bound by the confidentiality provisions of the Settlement Agreement communicated to Monster Energy. There is no evidence of Attorney Schechter's role at the mediation. Nor could Monster Energy disclose anything said or done at the mediation. (Evid. Code, § 1119; *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 118 [client may not sue attorney for malpractice for coercing him to settle a case in mediation for less than it was worth]; *Amis v. Greenberg Traurig LLP* (2015) 235 Cal.App.4th 331, 338-339, 342 [client may not circumvent mediation privilege by advancing inferences about former attorney's supposed acts or omissions during mediation].)

There is no evidence that Attorney Schechter even negotiated the Settlement Agreement. In fact, the evidence is to the contrary—the Settlement Agreement was negotiated by Anais's parents' Maryland counsel. As such, the only evidence on which Monster Energy relies to establish an objective manifestation of consent to the Settlement Agreement is that Attorney Schechter reviewed it for his clients and his signature under the legend "approved as to form and content." As noted, that is not an objective manifestation of Attorney Schechter's consent to be contractually bound as a matter of law. "No matter how plainly the contract provided that the Attorneys were bound, they

could not actually be bound unless they manifested their consent." (Opn. 14.)

In sum, there is no evidence of the Attorneys' consent to be contractually bound as a matter of law. (1) Attorney Schechter's signature under the legend "approved as to form and content" does not manifest consent to be contractually bound by the terms of the Settlement Agreement. (ABOM IV, B.) (2) The Attorneys' clients as principals could not bind their attorneys as agents to the terms of the Settlement Agreement. (*Jensen, supra,* 18 Cal.App.5th at p. 302.) (3) The Parties could not bind the Attorneys simply by reciting it in the Settlement Agreement. (*Mitsui, supra,* 72 Cal.App.4th at p. 212.) (4) Monster Energy could not meet its burden of establishing a probability of prevailing by disclosing any statements or conduct of the Attorneys in the mediation. (Evid. Code, § 1119.)

Thus, there is no substantial evidence of any objective manifestation of the Attorneys' consent to be contractually bound by the provisions of the Settlement Agreement that was communicated to Monster Energy. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651-652 ["'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value," requiring the Court to review the entire record, not merely isolated bits of evidence]; see also, *Harshad, supra,* 14 Cal.App.5th at pp. 537-538 [the Court will draw only those inferences reasonable in light of the context and

the entire record].

E. The Settlement Agreement Expressly Limits "Parties To The Agreement" To Anais's Parents And Monster Energy; The Attorneys Are Not Parties To The Settlement Agreement And Are Not Bound As Parties

In addition to the absence of any outward manifestation of consent to be bound by the Settlement Agreement, the Attorneys were not Parties to the Agreement. In that regard, the Settlement Agreement expressly defined the parties to the agreement: "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.'" (Opn. 2.)[6] The Attorneys were not included in this definition of Parties.

The Settlement Agreement also included representations by the Parties of their authority to enter into the agreement on their own behalf and on behalf of their insurers, not

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6 The Settlement Agreement also recited it was entered into on behalf of the Parties, as well as their "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." (Opn. 2-3.)

their attorneys: "That each [Party] expressly has the authority to execute this Settlement Agreement, and that this Settlement Agreement as so executed will be binding upon each of them...." (Opn. 3.) "[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...." (Opn. 3, emphasis added.)

In addition, the Settlement Agreement provided it was binding on the Parties: "The Parties acknowledge that this Settlement Agreement ... is ... wholly binding on them...." (Opn. 4.) Demonstrating that the Parties' respective counsel were not Parties, the Settlement Agreement also acknowledged it was "the result of extensive good faith negotiations between the Parties through their respective counsel...." (Opn. 4.) And the Settlement Agreement provided that each Party had cooperated in drafting the agreement and for that reason, the Settlement Agreement could not be construed against either Party. (SSCT 27.)[7]

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[7] The Settlement Agreement also contained mutual releases of the *Parties'* claims by each Party against the other, as well as the Parties' "successors, divisions, affiliates, units, parents,

Parties are an essential element of any contract. (Civ. Code, § 1550.) The parties to a contract must be identified. (See Civ. Code, § 1558 ["It is essential to the validity of a contract, not only that the parties should exist, but that it should be possible to identify them."].) Where a written contract names the parties to the contract, those are the parties to the agreement. (*Performance Plastering v. Richmond American Homes of Cal., Inc.* (2007) 153 Cal.App.4th 659, 666-667 (*Performance Plastering*).)

Here, the Settlement Agreement named the Parties to the agreement as Anais's parents and Monster Energy—the Attorneys were not named as Parties or named at all in the body of the Settlement Agreement, they were not defined by class as a Party to the Settlement Agreement, the Settlement Agreement was not conditioned on their signature or approval, and there was no signature line for the Attorneys as parties to the Settlement Agreement (or even any lines for initials). Because the Attorneys were not Parties to the Settlement Agreement, they cannot be contractually bound as parties to a written agreement. (See *Performance Plastering, supra,* 153 Cal.App.4th at p. 667.)

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subsidiaries, related companies/entities, shareholders, officers, directors, employers, employees, subcontractors, agents, insurers, attorneys and representatives of all kinds." (Opn. 3; SSCT 23-24.)

F. The Attorneys Did Not Sign The Settlement Agreement As Parties And Thus It Is Unenforceable Against Them Under The Statute Of Frauds

Not only did Monster Energy fail to present substantial evidence of the Attorneys' objective manifestation of consent to be contractually bound, Monster Energy presented no evidence that any such claimed Attorneys' consent to be bound was in writing. Because the Settlement Agreement and its confidentiality and non-disparagement provisions continued indefinitely after the completion of the settlement, the agreement "by its terms [was] not to be performed within a year from the making thereof." (Civ. Code, § 1624, subd. (a)(1); *Harshad, supra,* 14 Cal.App.5th at p. 537.)

"Under California's statute of frauds, when, as here, a contract is not to be performed within one year it 'or some note or memorandum thereof, [must be] in writing and *subscribed by the party to be charged* or by the party's agent.'" (Civ. Code, § 1624, subd. (a), emphasis added.) The writing need not contain all of the contract's terms; it is sufficient if it identifies the subject of the parties' agreement, shows that they entered into a contract, and states the essential contract terms with reasonable certainty. The purpose of this requirement is to provide reliable evidence of the existence and terms of the contract and to prevent enforcement through fraud or perjury of contracts never in fact made. (*Harshad, supra,* 14 Cal.App.5th at pp. 537.)

Here, the Attorneys' signature as their clients' counsel under the legend "approved as to form and content" and their status as non-Parties to the Settlement Agreement mean that there is no writing subscribed by them as Parties to the Settlement Agreement and therefore the Settlement Agreement is unenforceable against them under the statute of frauds. This demonstrates yet again Monster Energy's failure to prove any probability of prevailing under the second prong.

G. Monster Energy Has Waived Its Claim Of Extrinsic Evidence And In Any Event Points To No Extrinsic Evidence Of Consent

Monster Energy contends there is "extrinsic evidence" that is relevant to whether the Attorneys consented to be contractually bound to Monster Energy by the Settlement Agreement. (OBOM 11, 12, 23, 28, 38.) To begin, Monster Energy has waived any claim in this Court that it presented extrinsic evidence supporting a finding that the Attorneys consented to be contractually bound. Monster Energy's Respondent's Brief in the Court of Appeal did not once include the phrase "extrinsic evidence," and the Court of Appeal Opinion does not mention the phrase either. Instead, Monster Energy argued solely that the Attorneys were bound by provisions of the Settlement Agreement "expressly binding on or [that] benefitted the [A]ttorneys." (RB 21, 22.) The Court of Appeal properly rejected this argument.

For the first time in its Petition for Rehearing,

Monster Energy argued there was extrinsic evidence of "the intent and understanding of the parties and their attorneys" (PRH 6) and extrinsic evidence the Attorneys "agreed to be bound by the confidentiality provisions in the settlement agreement" (PRH 7; see also PRH 9, 13-14). Monster Energy asserted for the first time that Attorney Schechter's deposition testimony that he knew Monster Energy would not have entered into the settlement if Anais's parents had not agreed to confidentiality, was extrinsic evidence of his consent to be contractually bound himself. (PRH 14.) Also, for the first time, Monster Energy asserted that Attorney Schechter's statement to the reporter that he could not reveal the terms of the settlement, together with his subsequent deposition testimony stating that he owed an ethical duty to his clients was extrinsic evidence of his consent, weeks earlier, to be contractually bound to Monster Energy. (PRH 14.)

As the Court of Appeal impliedly recognized in denying Monster Energy's petition for rehearing, Monster Energy cannot raise the issue of extrinsic evidence for the first time on rehearing after an Opinion has been issued. (*County of Sacramento v. Loeb* (1984) 160 Cal. App.3d 446, 459, fn. 5.) Nor can Monster Energy raise the issue in this Court. (Cal. R. Ct. 8.500(c)(1) ["As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal."].) Therefore, the Court should not reach this issue.

In addition, the extrinsic evidence on which Monster Energy relies is not relevant to the issue of consent. As discussed above, consent requires *an objective outward manifestation that is communicated to the other party.* (*Weddington, supra,* 60 Cal.App.4th at p. 811.) That Attorney Schechter believed in his own mind that Monster Energy would not have settled if Anais's parents had not agreed to confidentiality (OBOM 8, 14) is not an outward manifestation of his consent at all, and certainly was not communicated to Monster Energy. Nor did it establish he considered *himself* to be contractually bound. Similarly, that Attorney Schechter told the reporter more than a month after the agreement was entered into that he could not reveal the terms of the settlement (OBOM 11, 16, 22) is not an objective manifestation of *his* consent to be bound that was communicated to Monster Energy. Nor was consent to be contractually bound to Monster Energy manifested by Attorney Schechter's subsequent deposition testimony that he had an ethical duty to his clients to maintain the confidentiality of *their* Settlement Agreement. (OBOM 19, 23.)

As the Court of Appeal properly concluded, Monster Energy presented *no* evidence the Attorneys outwardly manifested their consent to Monster Energy to be contractually bound by the confidentiality provisions in the Parties' Settlement Agreement. (Opn. 14, 20.)

As noted previously, the issue here is not one of contractual interpretation to which extrinsic evidence may be

relevant. (Opn. 14.) The cases upon which Monster Energy relies are therefore completely unrelated to the issue of an objective manifestation of consent to be bound communicated to the other party. For example, one of Monster Energy's cases does not involve the use of extrinsic evidence to interpret a written agreement at all. (*Scott v. Pacific Gas & Elec. Co.* (1995) 11 Cal.4th 454, 463 [employer's course of conduct and representations admissible as to existence of an *implied-in-fact contract* not to demote an employee without good cause], disapproved on other grounds in *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 352, fn. 17.) Another case involves a negotiated criminal plea agreement stated on the record in open court. (*People v. Shelton* (2006) 37 Cal.4th 759, 767 [circumstances of ambiguous on-the-record plea agreement considered in determining whether the agreement permitted defendant to argue for a lesser term].)

Still other inapposite cases involve the use of extrinsic evidence to interpret the meaning of ambiguous provisions in written agreements between parties to contracts. (*Powerine Oil Co. v. Superior Court* (2005) 37 Cal.4th 377, 390 [interpreting unambiguous language in an insurance policy for a potential for coverage]; *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 37 [extrinsic evidence admissible to prove a meaning of which the language of a contractual indemnity clause was reasonably susceptible]; *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1346, 1351 [extrinsic evidence admissible as to whether term "gross receipts" in a royalty

agreement was reasonably susceptible to meaning in-kind consideration]; *Hebberd-Kulow Enterprises, Inc. v. Kelomar, Inc.* (2013) 218 Cal.App.4th 272, 283 [extrinsic evidence admissible as to whether an interest provision in invoice was intended to be part of the contract].) Monster Energy cites not a single case in which post-contractual statements of a non-party to a contract were sufficient to establish that the non-party objectively communicated consent to be bound by an agreement at the time the agreement was entered.

Both Attorney Schechter and the Court of Appeal properly concluded that an attorney owes practical and ethical obligations to a client not based on contracts with third parties. (Opn. 16, 21.) For example, an attorney has statutory obligations to maintain the confidentiality of mediation communications and the terms of a settlement agreement entered into pursuant to a mediation. (Evid. Code, §§ 1119, subd. (c) ["All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."], 1123 [written settlement agreement entered into at a mediation protected from disclosure in the absence of written agreement to the contrary], 1124 [oral settlement agreement entered into at a mediation protected from disclosure in the absence of agreement on the record to the contrary].) And these obligations continue after the mediation ends. (Evid. Code, § 1126; see also Evid. Code, § 1152 [offers to compromise and negotiations inadmissible to establish liability].)

An attorney also has ethical and professional responsibilities to maintain the confidentiality of the terms of a written settlement agreement that the client has agreed to keep confidential. (See *McPhearson v. Michaels Co.* (2002) 96 Cal.App.4th 843, 848-850; Bus. & Prof. Code, § 6068, subd. (e)(1); Rules of Prof. Conduct, rule 3-100; *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621; State Bar of Cal. Standing Comm. On Prof. Resp. and Conduct, Formal Opn. Interim No. 13-0005, p. 4.)8

As the Court of Appeal concluded, attorneys who have reviewed an agreement and signed the agreement under a legend "approved as to form and content" in their capacity as attorneys for their clients are "giv[ing] their clients their professional approval to sign [the agreement]. In our experience, this is the wording that the legal community customarily uses for this purpose." (Opn. 17.) It is a "professional thumbs-up." (Opn. 20.) Because the legal community has always understood that an attorney does not agree to be contractually bound to the other party under these circumstances, this Court should not transform "approvals as to form and content" into an objective manifestation of the attorney's consent to be contractually bound to the opposing party and distort the accepted meaning as Monster Energy

8 As Monster Energy acknowledged, Attorney Schechter apparently felt that under these ethical duties "he was only obligated not to disclose the amount of the settlement." (OBOM 11, fn. 3.)

requests. Certainly, such a wholesale change in the law should have no applicability to the Attorneys in this case who approved the Settlement Agreement for their clients with the expectation and understanding of the legal community that they would not be contractually bound to Monster Energy by the provisions of the Settlement Agreement.

In the end, there is nothing about the Court of Appeal's Opinion that undermines (to the extent one even exists) any asserted public policy in favor of confidentiality provisions in settlement agreements. Indeed, to the extent any such public policy exists or should be promoted in the context of product liability cases at the expense of the public's health and safety, "It seems easy enough ... 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. 20.) Accordingly, the Court of Appeal Opinion promotes—rather than undermines—any such public policy together with the mediation privilege, by providing clear guidelines for enforceable written contracts with attorneys.

V.

CONCLUSION

This Court should affirm the judgment of the Court of Appeal ordering dismissal of Monster Energy's complaint against the Attorneys.

DATED: February 15, 2019

GRIGNON LAW FIRM LLP

BREMER WHYTE BROWN & O'MEARA LLP

By Margaret M. Grignon
Margaret M. Grignon
Attorneys for Defendants and Appellants Bruce L. Schechter, et al.

CERTIFICATE OF WORD COUNT
CRC SECTIONS 8.204(c)(1)

On behalf of Appellant, I, Margaret M. Grignon, certify that in compliance with California Rules of Court, rule 8.204(c)(1), the above brief is comprised of 8449 words. To verify this number, I employed the word count feature made part of the Microsoft Word processing program used by my firm's offices.

DATED: February 15, 2019

By Margaret M. Grignon
Margaret M. Grignon

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Tiffany Singer, declare that I am, and was at the time of service of the papers herein referred to, over the age of 18 and not a party to the within action or proceedings. My business address is 6621 E. Pacific Coast Highway, Suite 200, Long Beach, California 90803, which is located in the county in which the within-mentioned mailing occurred.

On February 15, 2019, I served: **ANSWER BRIEF ON THE MERITS** in the manner specified below on the interested parties listed on the SERVICE LIST.

[X] BY U.S. MAIL: I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice such sealed envelope(s) would be deposited on the date listed below with the United States Postal Service with postage thereon fully prepaid, at Long Beach, California.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on February 15, 2019, at Long Beach, California.

Tiffany Singer

SERVICE LIST

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