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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 BRIEF ON THE MERITS

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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TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY OF ARGUMENT IN REPLY 6

II. MONSTER SATISFIED THE MINIMAL MERIT TEST UNDER THE ANTI-SLAPP STATUTE 12

A. The Legend At Issue Is Consistent With Attorneys' Consent To Be Bound By The Confidentiality Provisions 13

B. The Evidence Presented By Monster Further Demonstrates That Attorneys Consented To Be Bound By The Confidentiality Provisions 17

C. The Definition Of "Parties" In The Settlement Agreement Is Irrelevant To The Issue Of Whether Attorneys Agreed To Be Bound By Its Confidentiality Provisions 22

D. Monster Was Entitled To The Benefit Of The Doubt In Application Of The Minimal Merit Standard 23

III. MONSTER MADE A PRIMA FACIE SHOWING THAT ATTORNEYS WAIVED THEIR FIRST AMENDMENT RIGHT TO DISCUSS THE TERMS OF THE SETTLEMENT. 26

IV. THE CONFIDENTIALITY OF STATEMENTS IN MEDIATION IS IRRELEVANT TO THE ISSUES BEFORE THE COURT. 28

V. THE STATUTE OF FRAUDS DOES NOT APPLY. 30

VI. MONSTER RELIED ON EXTRINSIC EVIDENCE IN SUPPORT OF ITS POSITION IN THE TRIAL COURT AND BEFORE THE COURT OF APPEAL. THERE WAS NO WAIVER. 31

VII. CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases

Ahrenberg Mechanical Contracting, Inc. v. Howlett
(1996) 451 Mich. 74 ..... 13, 14

Albright v. District Court of Denver
(1962) 150 Colo. 487 ..... 13, 14

Baral v. Schnitt
(2016) 1 Cal.5th 376 ..... 7, 23, 24

Briggs v. Eden Council for Hope & Opportunity
(1999) 19 Cal.4th 1106 24

Cassel v. Superior Court
(2011) 51 Cal.4th 113 28

CIC Property Owners v. Marsh
(5th Cir. 2006) 460 F.3d 670 ..... 13, 14

City of Glendale v. George
(1989) 208 Cal.App.3d 1394 ..... 26, 27

Esparza v. Sand & Sea, Inc.
(2016) 2 Cal.App.5th 781 ..... 26, 27

Ferlauto v. Hamsher
(1999) 74 Cal.App.4th 1394 ..... 26, 27

Freedman v. Bretzkus
(2010) 182 Cal.App.4th 1065 ..... 10, 12, 13

Goldstein v. Lees
(1975) 46 Cal.App.3d 614 29

Guz v. Bechtel National, Inc.
(2000) 24 Cal.4th 317 18

Guzman v. Visalia Community Bank
(1999) 71 Cal.App.4th 1370 ..... 18, 20

Harshad & Nasir Corp. v. Global Sign Systems, Inc.
(2017) 14 Cal.App.5th 523 ..... 20, 30

In re Marriage of Hasso
(1991) 229 Cal.App.3d 1174 ..... 9, 13, 14, 15

ITT Telecom Products Corp. v. Dooley
(1989) 214 Cal.App.3d 307 ..... 26, 27

Krin v. Ioor
(1934) 266 Mich. 335 ..... 13, 14

McPhearson v. Michaels Co.
(2002) 96 Cal.App.4th 843 ..... 28, 29

Morey v. Vannucci
(1998) 64 Cal.App.4th 904 19

Navellier v. Sletten
(2002) 29 Cal.4th 82 ..... 11, 24, 26

Oasis West Realty, LLC v. Goldman
(2011) 51 Cal.4th 811 ..... 23, 24

Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.
(1968) 69 Cal.2d 33 ..... 20, 21

People v. Sheldon
(2006) 37 Cal.4th 759 19

Powerine Oil Co. v. Superior Court
(2005) 37 Cal.4th 377 17

Ralph's Grocery Co. v. Victory Consultants, Inc.
(2017) 17 Cal.App.5th 245 ..... 23, 24

Roddenberry v. Roddenberry
(1996) 44 Cal.App.4th 634 20

RSUI Indemnity Co. v. Bacon
(2011) 282 Neb. 436 ..... 8, 10, 12, 13, 15, 16

Saelzler v. Advanced Group 400
(2001) 25 Cal.4th 763 ..... 7, 24

Sanchez v. County of San Bernardino
(2009) 176 Cal.App.4th 516 ..... 10, 26, 27

Scott v. Pacific Gas & Electric Co.
(1995) 11 Cal.4th 454 ..... 17, 20

Statutes

Civil Code section 1624 30

Code of Civil Procedure section 425.16 ..... 7, 23

Rules

California Rules of Professional Conduct, rule 3-100 28

Other Authorities

Chin et al., Cal. Practice Guide: Employment Litigation
(The Rutter Group 2017) Form 16:A 16

Croskey et al., Cal. Practice Guide: Insurance Litigation
(The Rutter Group 2017) Form 15:C 16

In re Johnson
(Rev. Dept. 2000) 4 Cal. State Rptr. 179,
2000 WL 1682427 29

Kuney et al., Cal. Law of Contracts (Cont. Ed. Bar 2018)
§ 5.1 20

Rutan & Tucker LP, *First Amendment/anti-Slapp did not insulate law firm from liability for violation of confidentiality clause in mediated settlement agreement*
(July 2, 2013) 16

State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion Interim No. 13-0005 29

REPLY BRIEF ON THE MERITS

Plaintiff Monster Energy Company ("Monster") respectfully submits the following Reply Brief on the Merits in response to defendants Bruce L. Schechter and R. Rex Parris Law Firm's ("Attorneys") Answer Brief on the Merits:

I. INTRODUCTION AND SUMMARY OF ARGUMENT IN REPLY

Attorneys present a harsh attack on Monster's motive for this action. They accuse it of launching a "vendetta" (i.e., blood feud) against them. (Ans. Br. 8.) But what alternative was available for Monster to enforce the confidentiality provisions in the Settlement Agreement, short of accepting the Court of Appeal's suggestion that it sue Attorneys' clients? (Opn. 21.)[1]

The Answer Brief is anchored to Attorneys' claim that they did not agree to be contractually bound to the confidentiality provisions in the Settlement Agreement. But they do not challenge the core facts that underlie Monster's claim against them. Attorneys do not dispute that they represented the plaintiffs (the "Fourniers") in the underlying

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[1] "Ans. Br." will refer to Attorneys' Answer Brief on the Merits.

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

"O. Br." will refer to Monster's Opening Brief on the Merits.

"Opn." will refer to the decision in this case by the Court of Appeal.

"Resp. Br." will refer to Monster's Respondent's Brief to the Court of Appeal.

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

lawsuit or that Mr. Schechter reviewed and approved the Settlement Agreement at issue and signed it under the legend "APPROVED AS TO FORM AND CONTENT." (CT 115, 118, 122-123; SSCT 32-33.) They do not contest that the confidentiality provisions were material to the settlement and that Monster would not have entered into the Settlement Agreement without them. (CT 119-120.) They do not dispute that the confidentiality provisions are worthless if not binding on both the parties and their attorneys, and they do not deny that the Fourniers and Monster intended Attorneys to be bound by the confidentiality provisions. Finally, the Answer Brief does not dispute that Mr. Schechter's "substantial dollars" statement to Ms. Craig of LawyersandSettlements.com violated these provisions.

Attorneys do not address the second issue specified by the Court for review: may a court, in evaluating a plaintiff's probability of success under Code of Civil Procedure section 425.16, subdivision (b), ignore extrinsic evidence supporting the plaintiff's claim or accept a defendant's interpretation of an undisputed but ambiguous fact over that of the plaintiff? Instead, they limit their discussion of the minimal merit standard to their assertion that Monster did not meet it. (Ans. Br. 18-20.) They never, for example, discuss the Court's analogy to the summary judgment procedure in explaining the minimal merit standard (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385) or address whether this means a plaintiff's evidence in opposing an anti-SLAPP motion should be given a liberal construction while the moving defendant's evidence is subject to a strict construction (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768).

Attorneys offer no analysis of the standard adopted by the Court of Appeal, under which even inclusion of the word "Agreed" in the legend above an attorney's signature is insufficient – as a matter of law – to signify the attorney's consent. (Opn. 19-20 [adopting decision of Nebraska Supreme Court in *RSUI Indemnity Co. v. Bacon* (2011) 282 Neb. 436 ("*RSUI*")].) They offer a short description of *RSUI* (Ans. Br. 22-23), but make little attempt to defend it.

Rather than address the second issue for review or defend the *RSUI* standard adopted by the Court of Appeal, Attorneys present a barrage of arguments on other issues. They contend Monster failed to present evidence of Attorneys' outward manifestation of consent to be bound by the confidentiality provisions in the Settlement Agreement. (Ans. Br. 11, 18-19 ["Monster Energy presented not a scintilla of evidence that the Attorneys consented to be contractually bound to Monster Energy"], 27-29, 31-32.) They also argue Monster waived any claim that extrinsic evidence is relevant to interpret whether Mr. Schechter's signature to the Settlement Agreement gave consent to be bound by its confidentiality provisions. (Ans. Br. 17-18, 37-38.)

But the record demonstrates that Monster relied both in the trial court and before the Court of Appeal on (1) the language of the Settlement Agreement (i.e., Mr. Schechter's approval of its content, which included the confidentiality provisions), (2) the circumstances surrounding its execution (i.e., Mr. Schechter's awareness that the confidentiality provisions were material to the settlement), and (3) Mr. Schechter's later admission that he could not disclose the terms of the settlement. (CT 45, 92, 103-105, 116-122; Resp. Br. 11, 14, 17.) Whether Monster formally labeled this evidence as

"extrinsic" is irrelevant.

Attorneys argue this case is not about the interpretation of an ambiguous writing. (Ans. Br. 11, 39-40.) But the first issue specified for review concerns the meaning of the legend "APPROVED AS TO FORM AND CONTENT." Attorneys do not dispute that a settlement agreement is a contract, which is subject to general principles of contract law. They cite no authority that a court should not consider evidence of the circumstances in which a contract was negotiated and executed, as well as an admission that one is bound by its terms. In fact, they cite authority that calls for consideration of the words of a contract and the circumstances surrounding its execution in interpreting the legend "Approval As To Form." (Ans. Br. 23 [citing *In re Marriage of Hasso* (1991) 229 Cal.App.3d 1174, 1181-1182].)

The Answer Brief contends there is no evidence in the record that Mr. Schechter negotiated the Settlement Agreement. (Ans. Br. 31.) But Attorneys do not dispute Mr. Schechter's admission that he reviewed and approved the Settlement Agreement. (CT 118, 122-123.) Monster does not believe Attorneys will deny Mr. Schechter's involvement in the negotiations that preceded the settlement and his reported statements to Ms. Craig confirm Attorneys acted as counsel for the Fourniers. (CT 96, 149.)

Attorneys assert Mr. Schechter did not disclose "any names or any specific settlement amounts" to Ms. Craig. (Ans. Br. 16.) But they do not dispute that his "substantial dollars" statement violated the terms of the confidentiality provisions. And the text of the LawyersandSettlements.com article leaves no doubt that he was talking about a settlement by Monster of a case that involved the death

of "a 14-year-old that went to the mall with girlfriends in the summer of 2011, drank two Monster Energy drinks and died of cardiac arrest." (CT 60, 149.)

Attorneys cite case authority, including *Freedman v. Bretzkus* (2010) 182 Cal.App.4th 1065 ("*Freedman*") and *RSUI, supra,* 282 Neb. 436, to support their argument that the legend at issue is "non-substantive" and simply reflects an attorney's approval for a client to sign an agreement. (Ans. Br. 21-24.) But, with the exception of the flawed *RSUI* decision, none of these cases concerned an agreement that contained provisions binding upon the signing attorney. None but *RSUI* holds that such a legend is insufficient to bind a signing attorney to such a provision.

Attorneys assert that the Court of Appeal properly applied "general principles of contract law" in holding that an attorney's signature under the legend at issue does not convey consent to be contractually bound. (Ans. Br. 25.) But the Court of Appeal's opinion contains no analysis of general principles of contract law. At most, it simply provides a conclusory statement that, based on the Court's "experience," the words "Approved as to form and content" convey only an attorney's professional approval for a client to sign an agreement. (Opn. 17.)

The Answer Brief argues that a waiver of First Amendment rights must be clear and compelling. (Ans. Br. 25-26.) But Attorneys do not dispute that consent to a confidentiality provision in a settlement agreement waives First Amendment rights as to the terms of the settlement. (*Sanchez v. County of San Bernardino* (2009) 176 Cal.App.4th 516, 528 ("*Sanchez*").) Because Attorneys consented to

be bound by the confidentiality provisions in the Settlement Agreement, they waived their First Amendment rights to disclose the settlement terms. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 94 ("*Navellier*").)

Attorneys note that the term "Parties" is defined in the Settlement Agreement to include only the Fourniers and Monster. (Ans. Br. 33-35.) But the confidentiality provisions expressly apply their obligations to both the Fourniers and their counsel. (SSCT 27 [¶ 11.1]; 28 [¶ 11.2]). The issue here is whether Monster presented a prima facie case that Attorneys consented to be bound by the confidentiality provisions, not whether they were included within the definition of parties in the agreement.

Finally, Attorneys assert the statute of frauds defeats Monster's claim for breach of contract because there is no writing subscribed by them as parties to the Settlement Agreement. (Ans. Br. 36-37.) But this begs the question of whether Mr. Schechter's signature to the Settlement Agreement conveyed Attorneys' consent to be bound by its confidentiality provisions. It should fail for the same reasons as Attorneys' claim that they did not consent to be bound by these provisions.

Neither the Court of Appeal nor Attorneys offer a cogent reason why an attorney's signature under the legend "APPROVED AS TO FORM AND CONTENT" in an agreement fails as a matter of law to bind the attorney to confidentiality provisions in the agreement that state they are binding on the attorney. Monster satisfied the minimal merit standard under the anti-SLAPP statute. The decision of the Court of Appeal should be reversed.

II. MONSTER SATISFIED THE MINIMAL MERIT TEST UNDER THE ANTI-SLAPP STATUTE.

The parties agree that the underlying issue in Monster's claim for breach of contract against Attorneys is whether they consented to be bound by the confidentiality provisions in the Settlement Agreement. (O. Br. 21-22; Ans. Br. 11.) Did Mr. Schechter's signature under the legend "APPROVED AS TO FORM AND CONTENT" and the evidence presented by Monster regarding the circumstances under which the Settlement Agreement was negotiated, as well as Mr. Schechter's statement that he could not disclose its terms, establish a prima facie case that Attorneys consented to be bound by the confidentiality provisions?

Attorneys present four principal arguments in support of their position that Monster failed to establish their consent to be bound by the confidentiality provisions. First, they claim California and other jurisdictions have held, as a matter of law, that an attorney's signature under the legend "APPROVED AS TO FORM AND CONTENT" is non-substantive and merely conveys an attorney's approval for a client to sign an agreement. (Ans. Br. 23-24.) In support, Attorneys cite California and out-of-state decisions, including *Freedman* and *RSUI*. (Ans. Br. 9-10, 21-24.)

Second, Attorneys contend the extrinsic evidence presented by Monster is irrelevant because this case does not involve interpretation of an ambiguous contractual provision but, instead, is only about whether Attorneys "outwardly manifested any consent to be contractually bound" by the confidentiality provisions in the

Settlement Agreement. (Ans. Br. 11.) Third, Attorneys argue Monster presented no evidence that they objectively manifested consent to be bound by the confidentiality provisions. (Ans. Br. 27-32.) Finally, Attorneys assert the Settlement Agreement is expressly limited to the "Parties," which are defined solely as the Fourniers and Monster. (Ans. Br. 33-35.)

None of these arguments should be persuasive. None defeats the prima facie case presented by Monster in support of its claim for breach of contract based on Attorneys' violation of the confidentiality provisions in the Settlement Agreement.

A. The Legend At Issue Is Consistent With Attorneys' Consent To Be Bound By The Confidentiality Provisions.

Attorneys cite five cases, in addition to *Freedman* and *RSUI*, in support of their argument that the legend "APPROVED AS TO FORM AND CONTENT" is non-substantive and simply indicates an attorney's approval for a client to sign an agreement. (Ans. Br. 22-24 [citing *In re Marriage of Hasso, supra*, 229 Cal.App.3d 1174; *Ahrenberg Mechanical Contracting, Inc. v. Howlett* (1996) 451 Mich. 74; *Krin v. Ioor* (1934) 266 Mich. 335; *Albright v. District Court of Denver* (1962) 150 Colo. 487; *CIC Property Owners v. Marsh* (5th Cir. 2006) 460 F.3d 670].) None of these cases involved a contractual provision that imposed obligations on the signing attorney. None supports Attorneys' attempt to dismiss the legend at issue in this case as a non-substantive phrase irrelevant to the issue of whether Attorneys agreed to be bound by the confidentiality provisions.

In re Marriage of Hasso, supra, 229 Cal.App.3d at pp. 1181-1182, concerned whether a husband's attorney's approval of the form of a dissolution agreement was a condition precedent. *Ahrenberg Mechanical Contracting, Inc. v. Howlett, supra,* 451 Mich. at pp. 77-78 and *Krin v. Ioor, supra,* 266 Mich. at pp. 337-338, involved the issue of whether an attorney's signature to an order signaled agreement with the court's ruling (i.e., a waiver of any objections) or simply conveyed that the order accurately reflected the decision of the court. *Albright v. District Court of Denver, supra,* 150 Colo. 487, similarly concerned the effect of an attorney's approval of a court order. The Colorado Supreme Court found the legend indicating approval of the order reflected only that it correctly recited "what transpired" at the hearing. (*Id.* at p. 491.) Finally, *CIC Property Owners v. Marsh, supra,* 460 F.3d 670, involved the issue of whether a release of claims in a settlement agreement extinguished a party's claim for breach of a contract. (*Id.* at pp. 671-672.)

In re Marriage of Hasso, supra, 229 Cal.App.3d 1174, does, however, provide guidance relevant here. It involved a settlement agreement disposing of property in a dissolution proceeding. The agreement contained signature lines for each of the parties' attorneys under the legend "Approved As to Form." (*Id.* at p. 1178.) The issue was whether the attorneys' approval of the agreement was a condition precedent such that the failure of the husband's attorney to sign justified repudiation of the agreement by the husband. The Court of Appeal noted that the language of the legend at issue "does not impose attorney approval as a condition precedent; at best, it raised an ambiguity on the issue which the trial court was entitled to resolve by

considering not only the words used in the document, but the circumstances surrounding its execution." (*Id.* at p. 1181.) If anything, *In re Marriage of Hasso* provides support for Monster's position that the issue of whether the legend in this case conveyed Attorneys' consent to be bound by the confidentiality provisions in the Settlement Agreement should be evaluated based on both the language of the legend and evidence concerning the circumstances of its negotiation.

Although Attorneys cite *RSUI, supra*, 282 Neb. 436, and describe its facts, they make little effort to defend the Nebraska Supreme Court's decision that the legend "Agreed to Form & Substance" was insufficient to bind the signing attorneys to their obligations under a settlement agreement to reimburse the plaintiff insurance companies if the attorneys' client later obtained a settlement payment from a third party. Attorneys do not acknowledge, let alone attempt to defend, the Court of Appeal's adoption of *RSUI* as the controlling standard in California. (Opn. 20 ["We agree with *RSUI*."].)

Attorneys recognize – but then dismiss – the practice guides and forms of settlement agreements cited by Monster (O. Br. 9 & fn. 9, 30) and available to California lawyers on the ground "none . . . address the consent question at issue here and [they] are in any event not legal precedent." (Ans. Br. 24-25 & fn. 4.) But these are the forms available to guide California practitioners in drafting hundreds or more settlement agreements in recent years. They at least impliedly address the consent issue. The Rutter Guides, for example, each present forms of settlement agreements that contain

confidentiality provisions binding on the settling parties and their attorneys. (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2017) Form 15:C, pp. 15-252 to 15-254; Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2017) Form 16:A, pp. 16-147 to 16-152 ("Rutter Employment Litigation Guide").) What would be the point of this language if the authors had not assumed these provisions will be binding on the parties' attorneys?

The attorney blog cited by Monster in its opening brief,[2] indicates an attorney's signature as a party is not required to bind the attorney to a confidentiality provision in a settlement agreement that is expressly binding on the attorney. Again, this is the guidance available to California attorneys in drafting settlement agreements. And it is consistent with the settlement form in the Rutter Employment Litigation Guide, which has no designated place for the attorneys' signatures. (*Id.* at p. 16-152.)

Attorneys cite no authority beyond *RSUI* that even suggests the legend 'APPROVED AS TO FORM AND CONTENT" in an agreement has no relevance to the issue of whether an attorney signing under it has approved and thereby consented to a provision that places obligations on the attorney. The authority they rely on is irrelevant to the underlying issue here: did Mr. Schechter's signature convey Attorneys' consent to be bound by the confidentiality provisions?

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[2] 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) (cited in O. Br. 9, fn. 3).

B. The Evidence Presented By Monster Further Demonstrates That Attorneys Consented To Be Bound By The Confidentiality Provisions.

Attorneys argue that extrinsic evidence is irrelevant because this case does not involve interpretation of an ambiguous contractual provision. (Ans. Br. 11, 29, fn. 5.) They also contend there is no substantial evidence of any objective manifestation of consent by Attorneys to be bound by the confidentiality provisions. (See, e.g., Ans. Br. 32.) But they do not dispute that Mr. Schechter reviewed and approved the Settlement Agreement or that the parties intended their attorneys to be bound by its confidentiality provisions. And they do not deny that the confidentiality provisions are worthless if not binding on the parties' counsel.

Attorneys' arguments raise the first issue for review specified by the Court. Attorneys and the Court of Appeal take the position that the legend "APPROVED AS TO FORM AND CONTENT" is not sufficient, as a matter of law, to bind a signing attorney to a provision in an agreement that states it is binding on the attorney. But Attorneys do not dispute that settlement agreements are contracts that should be analyzed in the same manner as other contracts or that the goal of contractual interpretation is to determine the parties' mutual intent. (*Powerine Oil Co. v. Superior Court* (2005) 37 Cal.4th 377, 390.) Although this involves interpretation of the language of a contract, evidence of the purpose and subject matter of the contract, as well as the parties' subsequent conduct, is relevant to establishing their intent and should be admissible. (*Scott v. Pacific Gas & Electric Co.* (1995)

11 Cal.4th 454, 463 ("*Scott*"), disapproved on other grounds in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 357, fn. 17.)

Mr. Schechter approved the content of the Settlement Agreement, which included its confidentiality provisions. The legend at issue did not distinguish his approval between the provisions binding on Attorneys' clients and those binding on Attorneys. At a minimum, Mr. Schechter's signature is evidence of an objective expression of consent to be bound by the confidentiality provisions. It provides a basis on which a reasonable person in the position of the parties to the Settlement Agreement would view it as an expression of Attorneys' consent to be bound. (*Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1376-1377.) It is consistent with the parties' undisputed intent that their counsel be bound by the confidentiality provisions.

Attorneys challenge Monster's citation to authority that considers extrinsic evidence, including post-contract conduct, to show that Mr. Schechter's signature conveyed Attorneys' consent to be bound by the confidentiality provisions. (Ans. Br. 40-41.) According to Attorneys, the authority cited by Monster supporting consideration of extrinsic evidence to interpret the meaning of ambiguous provisions in written contracts is "completely unrelated to the issue of an objective manifestation of consent to be bound communicated to the other party." (Ans. Br. 40.) They argue Monster fails to cite "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." (Ans. Br. 41.) Attorneys misread Monster's position and the authority cited by Monster.

Monster contends the language of the legend, which expressed Attorneys' approval of the content of the Settlement Agreement, is sufficient to meet the minimal merit standard under the anti-SLAPP statute. But to the extent Attorneys argue that it is not, this conflict in interpretation should open the door to evidence concerning the circumstances under which the Settlement Agreement was negotiated and the understanding of the parties, including Attorneys, on whether Attorneys are bound by the confidentiality provisions.

As explained by the Court in *People v. Sheldon* (2006) 37 Cal.4th 759, 767:

> "The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and *the subsequent conduct of the parties*. (Civ. Code, §§ 1635-1656; Code Civ. Proc., §§ 1859-1861, 1864 [citations].)"

People v. Sheldon, supra, 37 Cal.4th at p. 767, quoting *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912, emphasis added.)

Attorneys cite *Harshad & Nasir Corp. v. Global Sign Systems, Inc.* (2017) 14 Cal.App.5th 523 and *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, in support of their argument that there is no "substantial evidence" of an objective manifestation of their consent to be bound by the confidentiality provisions. (Ans. Br. 32.) But neither case concerned this issue in the context of an anti-SLAPP motion. Neither addressed the showing of consent necessary to satisfy the minimal merit test. And Attorneys' argument ignores the evidence of their consent to be bound by the confidentiality provisions.

To the extent there is a conflict over the reasonable interpretation of the language of the legend at issue, evidence of the circumstances of its negotiation is relevant to its interpretation and should be admissible. (*Scott, supra*, 11 Cal.4th at p. 463 [in seeking "to enforce the actual understanding of the parties to a contract" a court may inquire into their conduct]; *Guzman v. Visalia Community Bank, supra*, 71 Cal.App.4th at pp. 1376-1377.) This reflects the Court's "realistic approach" to contract interpretation. (*Scott, supra*, 11 Cal.4th at p. 463; Kuney et al., Cal. Law of Contracts (Cont. Ed. Bar 2018) § 5.1, p. 5-5 [noting that evidence of parties' conduct can support incorporation of additional, implied terms into a contract.].)

Attorneys argue that case law regarding admission of extrinsic evidence to aid in interpretation of ambiguous contract provisions, including *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33 ("*Pacific Gas & Electric*"), is irrelevant to the issue of whether they consented to be bound by the confidentiality provisions in the Settlement Agreement. (Ans. Br. 40-

41.) And they contend there is no evidence they ever communicated to Monster their consent to be bound by the confidentiality provisions. (Ans. Br. 28.)

But where, as here, the meaning of words used in a contract is disputed, a court should receive extrinsic evidence that is relevant to show whether the contract is reasonably susceptible of a particular meaning. (*Pacific Gas & Electric, supra,* 69 Cal.2d at pp. 39-40.) The evidence presented by Monster in opposition to Attorneys' anti-SLAPP motion included the legend at issue, Mr. Schechter's acknowledgment that the confidentiality provisions were material to the settlement and Monster would not have entered into the Settlement Agreement without them, and his acknowledgement to the blog reporter that he could not disclose the terms of the settlement. And Attorneys do not dispute that the parties, including both the Fourniers and Monster, intended Attorneys to be bound by the confidentiality provisions.

Monster agrees that consent is an essential element of a contract. (O. Br. 21-22.) But Monster presented strong evidence of Attorneys' consent to be bound by the confidentiality provisions. Monster made a prima facie case that Attorneys consented to be bound by and breached the confidentiality provisions in the Settlement Agreement.

C. The Definition Of "Parties" In The Settlement Agreement Is Irrelevant To The Issue Of Whether Attorneys Agreed To Be Bound By Its Confidentiality Provisions.

Attorneys' argue the "Parties," as defined in the Settlement Agreement, are limited to the Fourniers and Monster (Ans. Br. 33-35.) This argument misses the point. The key confidentiality provisions reach beyond this definition. They impose their obligations on "Plaintiffs [the Fourniers] and their counsel"; "Plaintiffs and their counsel of record"; and "the Parties and their attorneys." (SSCT 27-28 [¶¶11.1, 11.2].) The issue is whether Attorneys consented to be bound by these provisions, which explicitly reference them and were intended by the parties to apply to them.

Attorneys cite no authority that failure to include them in the Settlement Agreement's definition of the "Parties" should permit them to escape the obligations explicitly imposed on them in the confidentiality provisions. And their exclusion from the definition of "Parties" is offset by the Settlement Agreement's acknowledgment that it was made "on behalf of the settling parties, individually, as well as on behalf of their, . . . attorneys, . . . " (SSCT 22.) Finally, Attorneys give no explanation for why – if they intended their approval of the content of the Settlement Agreement to be limited only to those provisions placing obligations on their clients – they did not specify this limitation in the language of the Settlement Agreement.

D. Monster Was Entitled To The Benefit Of The Doubt In Application Of The Minimal Merit Standard.

The second issue specified for review asks whether a court, in determining if a plaintiff has demonstrated a probability of prevailing on its claim under Code of Civil Procedure section 425.16, subdivision (b), may ignore extrinsic evidence that supports the plaintiff's claim and, instead, accept the defendant's interpretation of an undisputed but ambiguous fact over the interpretation offered by the plaintiff. Attorneys ignore this issue. Their discussion of the minimal merit standard is limited to their assertion that Monster failed to meet it. (Ans. Br. 18-20.) They offer no analysis of the weight – if any – that should be given to conflicting evidence in support of and in opposition to a plaintiff's alleged causes of action under the probability-of-success prong of the anti-SLAPP statute.

This Court and the Court of Appeal have explained that an anti-SLAPP motion should be granted only where a plaintiff's claim lacks "even minimal merit." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 ("*Oasis West*"); see also *Baral v. Schnitt, supra,* 1 Cal.5th at p. 384 [anti-SLAPP statute "only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity"; emphasis in original]; *Ralph's Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 261.)

As emphasized in Monster's Opening Brief (O. Br. 33), the minimal merit standard reflects concern over the tension between the role of the anti-SLAPP procedure in protecting the exercise of constitutional rights and the risk that it may be used to extinguish meritorious claims and deprive parties of their right to a jury trial.

(*Navellier, supra,* 29 Cal.4th at pp. 93-94; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.) Reflecting these concerns, a court evaluating an anti-SLAPP motion is required to accept as true the evidence favorable to the plaintiff and to evaluate the defendant's evidence only to determine if it defeats the plaintiff's case as a matter of law. (*Oasis West, supra*, 51 Cal.4th at p. 820.) This means a court should not weigh the credibility of the evidence in ruling on an anti-SLAPP motion. (*Ibid.*)

The Court has analogized the minimal merit test to the showing necessary to defeat a motion for summary judgement. (*Baral v. Schnitt, supra*, 1 Cal.5th at pp. 384-385; see also *Ralph's Grocery Co. v. Victory Consultants, Inc., supra*, 17 Cal.App.5th at p. 261.) This means a court addressing an anti-SLAPP motion should not be free to ignore extrinsic evidence that supports a plaintiff's claim. When faced with an ambiguous contractual provision, or one susceptible to different interpretations, it should accept the plaintiff's reasonable, plausible interpretation. The plaintiff should be given the benefit of the doubt.

This is illustrated by the comparison between a plaintiff's minimal merit showing and the burden on a party opposing a motion for summary judgment. Just as the evidence submitted by a party opposing summary judgment is given a liberal construction (*Saelzler v. Advanced Group 400, supra,* 25 Cal.4th at p. 768), the evidence submitted by a plaintiff in opposition to an anti-SLAPP motion should be given liberal treatment.

Here, this rule should be applied to the conflicting interpretations of Mr. Schechter's statement to the blog reporter,

Ms. Craig, that he could not disclose the terms of the settlement. Attorneys argue, and the Court of Appeal accepted without analysis, that Mr. Schechter's statement reflected some ethical duty to his clients. (Ans. Br. 41-42; Opn. 16, fn. 2.) In support of this interpretation, Attorneys cite the confidentiality of discussions in a mediation and an attorney's duty to maintain the confidences of a client. (Ans. Br. 41-42.) But the issue here is disclosure of the terms of the settlement in violation of the confidentiality provisions in the Settlement Agreement. The evidence is that these provisions were included at the insistence of Monster. Mr. Schechter acknowledged his awareness that Monster would not settle without them. (CT 119-120.) There is no evidence in the record that the Fourniers insisted on these confidentiality provisions or that they had a personal interest in the confidentiality of the terms of the settlement beyond their contractual agreement not to disclose them.

Monster's position is that Mr. Schechter's statement that he could not disclose the terms of the settlement could reasonably be construed by a trier of fact as an admission that Attorneys were bound by the confidentiality provisions in the Settlement Agreement. But, in opposing Attorneys' anti-SLAPP motion, Monster was not required to prevail on this issue. At the anti-SLAPP stage, the trial court and the Court of Appeal were required to accept as true and give Monster the benefit of the doubt on this evidence. Monster was required only to present a reasonably plausible interpretation of Mr. Schechter's statement.

Monster was not required to win its case in response to Attorneys' anti-SLAPP motion. It was required only to present

sufficient evidence to create a triable issue of fact on whether Attorneys consented to be bound by and breached the confidentiality provisions in the Settlement Agreement. It met this test.

III. MONSTER MADE A PRIMA FACIE SHOWING THAT ATTORNEYS WAIVED THEIR FIRST AMENDMENT RIGHT TO DISCUSS THE TERMS OF THE SETTLEMENT.

Attorneys assert that a waiver of the First Amendment right to speak must be clear and compelling. (Ans. Br. 25-26.) But they do not challenge the rule that a party's agreement to a confidentiality provision in a settlement agreement waives First Amendment rights as to the terms of the settlement. (*Navellier, supra*, 29 Cal.4th at p. 94 ["a defendant who in fact has validly contracted not to speak or petition has in effect 'waived' the right to the anti-SLAPP statute's protection in the event he or she later breaches that contract"]; *Sanchez, supra,* 176 Cal.App.4th at p. 528.)

Attorneys argue, instead, that this rule applies only to parties to agreements. According to Attorneys, this rule is not controlling here because Attorneys never agreed to be bound by the confidentiality provisions in the Settlement Agreement. (Ans. Br. 26-27.) Attorneys cite a series of cases for the rule that a waiver of First Amendment rights must be clear and compelling. (Ans. Br. 25-26 [citing *ITT Telecom Products Corp. v. Dooley* (1989) 214 Cal.App.3d 307, 319; *Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1399-1400; *City of Glendale v. George* (1989) 208 Cal.App.3d 1394, 1398; *Sanchez, supra*, 176 Cal.App.4th at p. 528; and *Esparza v. Sand & Sea, Inc.*

(2016) 2 Cal.App.5th 781, 790].) With the exception of *Sanchez*, however, none of these cases concerned an anti-SLAPP motion or enforcement of a confidentiality provision in a settlement agreement. None of these cases holds that a party such as Attorneys may not waive First Amendment rights in a settlement agreement resolving an action for personal injury or wrongful death.

Sanchez, supra, 176 Cal.App.4th at p. 528, and *ITT Telecom Products Corp. v. Dooley, supra,* 214 Cal.App.3d at p. 319, recognized that First Amendment speech rights may be waived by contract. *Esparza v. Sand & Sea, Inc., supra,* 2 Cal.App.5th 781, concerned whether an employee had agreed to an arbitration provision in a handbook provided by her employer. (*Id.* at p. 790.) *City of Glendale v. George, supra,* 208 Cal.App.3d 1394, involved the issue of whether residential property tenants had waived in a consent decree their alleged First Amendment right to display Christmas ornaments. (*Id.* at pp. 1397-1398.) In *Ferlauto v. Hamsher, supra,* 74 Cal.App.4th 1394, the Court of Appeal found the confidentiality provision at issue was too imprecise to be enforceable against defendants charged with defaming the plaintiff. (*Id.* at p. 1398.) Here, Attorneys do not contend there is anything ambiguous about the restrictions imposed by the confidentiality provisions in the Settlement Agreement.

Attorneys' argument begs the underlying question. Did they agree to be bound by the confidentiality provisions in the Settlement Agreement? Monster submitted substantial evidence, including the language of the Settlement Agreement itself, which presented a prima facie case that Attorneys agreed to be bound by these provisions. If

Monster prevails on this issue, there should be no question that Attorneys waived any First Amendment right to disclose the terms of the settlement.

Monster satisfied the minimal merit standard. It presented a prima facie case that Attorneys' were bound by and breached the confidentiality provisions in the Settlement Agreement. Attorneys waived any First Amendment right to disclose the terms of the settlement.

IV. THE CONFIDENTIALITY OF STATEMENTS IN MEDIATION IS IRRELEVANT TO THE ISSUES BEFORE THE COURT.

Attorneys cite several cases, as well as a California State Bar opinion and former rule 3-100 of the California Rules of Professional Conduct, in an attempt to provide an alternative explanation for Mr. Schechter's statement to Ms. Craig that he could not disclose the terms of the settlement. There are several problems with Attorneys' argument.

First, the cases cited by Attorneys involved different situations and are irrelevant to Mr. Schechter's statements to Ms. Craig. *Cassel v. Superior Court* (2011) 51 Cal.4th 113 (cited at Ans. Br. 31), concerned the issue of evidence of conduct or statements at a mediation conference. Here, the issue is whether Mr. Schechter's signature to the Settlement Agreement signaled Attorneys' consent to be bound by the confidentiality provisions.

McPhearson v. Michaels Co. (2002) 96 Cal.App.4th 843 (cited at Ans. Br. 42) involved the issue of whether an attorney who

previously represented an employee in a discrimination action against an employer that resulted in a confidential settlement was disqualified from representing another employee in a similar action against the employer. (*Id.* at p. 845.) The Court of Appeal concluded there was no conflict of interest that precluded representation of the second employee. (*Id.* at pp. 851-852.) *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 (cited at Ans. Br. 42) concerned the issue of whether a shareholder and director of a corporation had access to corporate confidences and secrets. (*Id.* at pp. 620-621.) These cases are irrelevant to the issue of Mr. Schechter's motive for stating to Ms. Craig that he could not disclose the terms of the settlement.

Attorneys also cite *In re Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 2000 WL 1682427, and the State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion Interim No. 13-0005. (Ans. Br. 42.) Again, these opinions involve situations far-removed from Mr. Schechter's statement to Ms. Craig. *In re Johnson* concerned an attorney's disclosure to a client of another client's felony conviction. (*In re Johnson, supra*, 2000 WL 1682427, at *10.) The State Bar opinion concerned the issue of whether a lawyer could disclose publicly available information obtained during a professional relationship with a client that the client had requested be kept secret, and that might be embarrassing and detrimental to the client.

Second, the issue here is whether a trier of fact could reasonably conclude Mr. Schechter's statement to Ms. Craig that he could not disclose the terms of the settlement expressed his understanding that Attorneys had consented to and were bound by the

confidentiality provisions as opposed to expressing a need to preserve his clients' confidences. Attorneys offer no evidence that the Fourniers had an interest in keeping the amount of the settlement secret. The only evidence is that Mr. Schechter understood Monster required confidentiality and would not settle without it. (CT 119-120.)

Monster was not required to win its case on this issue in responding to Attorneys' anti-SLAPP motion. It was required only to present a prima facie case similar to that required to present a triable issue of fact sufficient to defeat a summary judgment motion. It met this burden.

V. THE STATUTE OF FRAUDS DOES NOT APPLY.

Attorneys argue that any agreement by them to be bound by the confidentiality provisions in the Settlement Agreement is unenforceable because it fails to comply with the statute of frauds. (Ans. Br. 36-37 [citing Civ. Code, § 1624, subd. (a)(1); *Harshad & Nasir Corp. v. Global Sign Systems, Inc., supra*, 14 Cal.App.5th at p. 537.) This argument rests on Attorneys' position that they did not consent to be bound by the confidentiality provisions in the Settlement Agreement. In other words, they claim they are not parties to the Settlement Agreement.

Attorneys do not claim that the Settlement Agreement itself fails to satisfy the requirement under Civil Code section 1624, subdivision (a), of a writing subscribed by the party to be bound. Because Monster presented a prima facie case supporting its claim for breach of contract against Attorneys, which showed that Attorneys

consented to be bound by the confidentiality provisions in the Settlement Agreement, the statute of frauds should have no application here.

VI. MONSTER RELIED ON EXTRINSIC EVIDENCE IN SUPPORT OF ITS POSITION IN THE TRIAL COURT AND BEFORE THE COURT OF APPEAL. THERE WAS NO WAIVER.

Monster relied on evidence beyond the Settlement Agreement itself at both the trial level and before the Court of Appeal in support of its position that it alleged a viable claim for breach of contract against Attorneys. (CT 45, 92 103-105, 116-122; Resp. Br. 11, 14, 17.) This included Mr. Schechter's acknowledgement that the confidentiality provisions were material (i.e., Monster would not have entered into a settlement without them) and his statement to Ms. Craig that he could not disclose the terms of the settlement. It included Mr. Schechter's awkward attempt to explain in his deposition that he only approved the content of the Settlement Agreement as it applied to his clients, but not the content as it applied to Attorneys.

Monster may not have explicitly labeled this testimony as "extrinsic," but this is a matter of form rather than substance. Monster cited and relied on this evidence to support its opposition to Attorneys' anti-SLAPP motion and in support of its position that Attorneys agreed to be bound by the confidentiality provisions in the Settlement Agreement.

The language of the legend "APPROVED AS TO FORM AND CONTENT" standing alone should be sufficient to establish a prima

facie case that Attorneys agreed to be bound by the confidentiality provisions. The evidence of Mr. Schechter's statements and concessions provides a further reasonable basis for a trier of fact to conclude that Attorneys consented to be bound by these provisions.

VII. CONCLUSION

The first issue specified by the Court for review concerns the meaning of the legend "APPROVED AS TO FORM AND CONTENT." Monster has demonstrated that where a settlement agreement contains confidentiality provisions that are explicitly binding on both a party and its attorney, the attorney's signature under this legend makes a prima facie showing that the attorney has consented to be bound by these provisions. This showing should be sufficient to satisfy the minimal merit standard under the anti-SLAPP statute.

The second issue specified for review asks whether a court, when faced with interpretation of an undisputed but ambiguous fact, should accept the defendant's interpretation over a plausible interpretation by the plaintiff in applying the probability-of-prevailing standard in the anti-SLAPP statute. Consistent with the case authority establishing and defining the scope of the minimal merit standard for weighing a plaintiff's probability of success, a plaintiff's plausible interpretation should be given the benefit of the doubt. Under the rule that the evidence favorable to a plaintiff should be treated as true and conflicting evidence presented by a defendant should be evaluated only to determine if it defeats the plaintiff's case as a matter of law, a plaintiff's reasonable interpretation should prevail at the anti-SLAPP

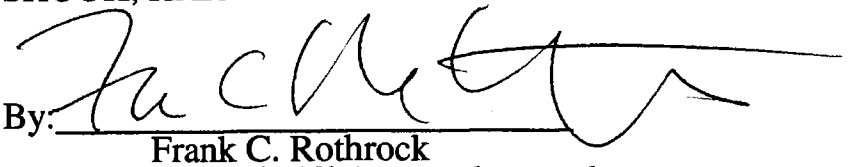
stage.

Monster met its burden of establishing a prima facie case for breach of contract against Attorneys. It presented substantial evidence in support of its claim, including the language of the legend at issue, the circumstances under which the confidentiality provisions were included within the Settlement Agreement, and Mr. Schechter's post-contract acknowledgement that he could not disclose the terms of the settlement. It met the minimal merit standard for establishing its breach of contract claim against Attorneys based on their consent to be bound by and their breach of the confidentiality provisions in the Settlement Agreement.

Dated: March 7, 2019

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

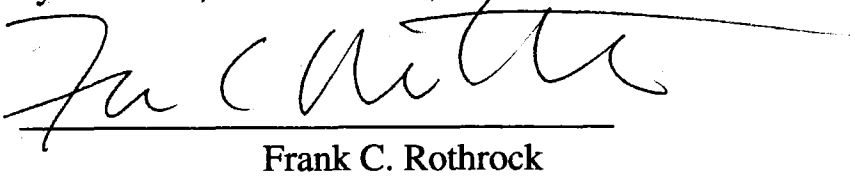


By: _____
Frank C. Rothrock
Attorneys for Plaintiff, Respondent, and
Petitioner Monster Energy Company

CERTIFICATE OF WORD COUNT

The foregoing Petition contains 6935 words (excluding tables and this Certificate). In preparing this Certificate, I relied on the word count generated by Microsoft Word 2010.

Executed this 7th day of March, 2019 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 March 7, 2019, I served on the interested parties in said action the within:

REPLY BRIEF ON THE MERITS

☒ (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 March 7, 2019, at Irvine, California.

Deborah Hohmann
(Type or print name)

D. Hohmann
(Signature)

SERVICE LIST

Monster Energy Company v. Bruce L. Schechter, et al.
Supreme Court of California – Case No.: S251392
Court of Appeal 4th Appellate District, Div. 2 – Case No.: E066267
Riverside Superior Court – Case No.: RIC 1511553

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