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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 AND R. REX PARRIS LAW FIRM,

Defendants and Appellants,

APPLICATION TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER MONSTER ENERGY COMPANY

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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APPLICATION FOR LEAVE TO APPLY AMICUS CURIAE BRIEF

The International Association of Defense Counsel ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys, including in-house counsel, from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC respectfully applies for leave to file the accompanying amicus curiae brief in support of Monster Energy Company pursuant to rule 8.520(f) of the California Rules of Court. The IADC is familiar with the content of the parties' briefs.

The IADC is dedicated the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC has a particular interest in this case as its attorneys often resolve disputes by settlement pursuant to written agreements. The public policy in favor of settlement and the enforceability of settlement agreements is important for the effective representation of clients of IADC.

The IADC believes its views will assist the Court in resolving this case.

Respectfully submitted,

Dated: April 8, 2019

By:

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AMICUS CURIAE BRIEF OF IADC

STATEMENT OF INTEREST

The International Association of Defense Counsel (the "IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys, including in-house counsel, from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC has a particular interest in this case as its attorneys often resolve disputes by settlement pursuant to written agreements. The public policy in favor of settlement and the enforceability of settlement agreements is important for the effective representation of clients of IADC attorneys.[1]

STATEMENT OF ISSUES PRESENTED FOR APPELLATE REVIEW

By order dated November 14, 2018, this Court limited the issues to be briefed and argued to the following:

(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?

[1] No party or entity has made any monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF THE CASE

This case arises out of a dispute regarding a settlement agreement that resolved a wrongful death lawsuit brought by individual plaintiffs Wendy Crossland and Richard Fournier (the "Fourniers") against defendant Monster Energy Company ("Monster"). Among other things, the settlement agreement provided that plaintiffs "and their counsel," agreed to maintain confidentiality of the existence, terms, conditions, and details of the settlement agreement. Plaintiffs executed the agreement, and their counsel signed the agreement under the legend "APPROVED AS TO FORM AND CONTENT." Thereafter, plaintiffs' counsel disclosed the existence of the settlement agreement to the media and made statements to the media about the agreement, including a statement that the case had settled for "substantial dollars." Monster thereafter sued the attorney for breach of the settlement agreement, raising claims for breach of contract, breach of the covenant of good faith, unjust enrichment, and promissory estoppel.

The attorney responded by filing a motion to strike under California's Code of Civil Procedure Section 425.16, alleging that Monster's lawsuit constituted a strategic lawsuit against public participation. The attorney claimed that his statements to the media constituted protected activity under the First Amendment and that Monster could not establish a probability that it would prevail on any of its claims. The trial court denied the motion as to Monster's breach-of-contract claim but granted the motion as to Monster's other causes of action. On appeal, the Court of Appeal issued an opinion and order reversing the trial court's order denying the attorney's motion as to the breach-of-contract claim and directing the trial court to enter an order granting the attorney's motion to strike in its entirety. Monster now petitions this Court for relief, seeking

reversal of the Court of Appeal's order, and arguing that the trial court properly denied the attorney's motion as to Monster's breach-of-contract claim.

ARGUMENT

I. This Court Should Consider California's Longstanding Public Policy in Favor of Settlement in Analyzing the Enforceability of the Settlement Agreement's Confidentiality Provisions

A. This Court has Long Recognized California's Public Policy Favoring the Settlement of Disputes

Public policy favors the settlement of disputes. In short, "[t]he law favors settlements." *Village Northridge Homeowners Association v. State Farm Fire & Casualty Company*, 50 Cal. 4th 913, 930 (2010) (internal quotation marks and brackets omitted); *Zamora v. Clayborn Contracting Gr., Inc.*, 28 Cal. 4th 249, 260 (2002) (likewise observing that "the law favors settlements"); *Folsom v. Butte County Association of Governments*, 32 Cal. 3d 668, 677 (1982) ("Compromise has long been favored."). Settlement and compromise are valued not only because they increase efficiency and reduce the burden on the judicial system, but also because, as this Court has long recognized, they "reduc[e] the expense and persistency of litigation" and are "highly favored as productive of peace and goodwill in the community." *McClure v. McClure*, 100 Cal. 339, 343 (1893); *see also Armstrong v. Sacramento Valley Realty Co.*, 179 Cal. 648, 650 (1919) ("The law favors and encourages compromises and settlements of controversies made in or out of court . . . ."); *Rohrbacher v. Aitken*, 145 Cal 485, 488 (1904) ("[Settlement] agreements, in the absence of fraud, are favored and sustained by the courts, because they put an end to litigation, and tend to produce peace and goodwill.").

Settlement agreements are also a necessary component of the modern judicial system. According to California's 2018 Court Statistics Report on Statewide Caseload Trends, 5.8 million

cases were filed statewide in California Superior Court in Fiscal Year 2016-17. Judicial Council of California, 2018 Court Statistics Report, at *xiv*. Of those cases, 210,028 were civil cases in which the petitioner was seeking more than $25,000, and 78% of those 210,028 cases were disposed of prior to trial. *Id.* at *xiv*, 65. As this Court has stated, "The need for settlements is greater than ever before. 'Without them our system of civil adjudication would quickly break down.'" *Neary v. Regents of University of California*, 3 Cal. 4th 273, 277 (1992), superseded by statute on other grounds as stated in *City of Palmdale v. Board of Equalization*, 206 Cal. App. 4th 329 (Cal. App. 2d Dist. 2012), quoting Lynch, California Negotiation and Settlement Handbook (1991), p. vii (foreword by California Supreme Court Chief Justice Malcolm M. Lucas)).

B. The Commitment to Maintain the Confidentiality of a Settlement is Often an Important, Bargained-For Aspect of Agreements to Resolve Disputes Prior to Adjudication on the Merits

Confidentiality is often a key element of settlement agreements. There are many reasons why a civil defendant may seek to resolve a case by settlement, many of which do not bear upon the as-yet-untested merits of the underlying claim. There are also many reasons why a civil defendant may wish to keep details of the monetary value of the settlement confidential as between the parties. The monetary value of a settlement reflects many factors, including the potential cost of litigation, and does not necessarily reflect an assessment of the strength of a plaintiff's claims on the merits. One reason why a civil defendant might seek confidentiality is to avoid the very scenario that arose in this case: an effort by plaintiffs' attorneys to extrapolate, from one plaintiff's settlement, the potential for another plaintiff's recovery against the same corporate defendant, even though every case presents different facts and circumstances.

Confidentiality is a bargained-for provision, like any other in a settlement agreement. Importantly, a plaintiff need not consent to confidentiality in order to settle a case. In evaluating the enforceability of bargained-for provisions in settlement agreements, courts should remain mindful of the public policy in favor of settlement. The enforceability of settlement agreements is crucial to the continued success of pre-trial resolution by settlement. Without an ability to enforce agreements to settle, parties have little incentive to compromise. As one California appellate court has noted, "The privacy of a settlement is generally understood and accepted in our legal system, which favors settlement and therefore supports attendant needs for confidentiality." *Hinshaw Winkler v. Superior Court*, 51 Cal. App. 4th 233, 241 (Cal. Ct. App. 6th Dist. 1996).

C. In this Case, the Court of Appeal's Analysis Failed Adequately to Consider California's Policy Favoring Settlement in Prematurely Rejecting Monster's Breach-of-Contract Claim

In this case, the Court of Appeal acknowledged that the law favors settlement (*see* Op. at 20), but nevertheless issued an opinion arguably at odds with this public policy. Because public policy favors settlement, it also favors the enforceability of agreements to settle – just as, for example, the Federal Arbitration Act's policy in favor of arbitration favors the enforceability of agreements to arbitrate, *see, e.g.*, *Harris v. Green Tree Financial Corporation*, 183 F.3d 173, 178 (3d Cir. 1999). Here, given the parties' disputed characterizations of the facts, and the fact that, as the Court itself acknowledged, "the confidentiality provisions of the settlement agreement did at least purport to bind the Attorneys." (Op. at 14), the IADC respectfully submits that the Court of Appeal should have weighed the public policy in favor of settlement in considering whether Monster's breach of contract claim should have proceeded to adjudication on the merits. In analyzing the issues in this appeal, the IADC respectfully submits that this Court should consider

California's longstanding public policy favoring settlement when assessing the enforceability of the confidentiality provisions.

II. The Court of Appeal's Approach Threatens to Vitiate the Reasonable Expectations of Many Non-Party Defendants who are Parties to Existing Confidential Settlement Agreements

In this case, the Court of Appeal effectively recognized that an attorney has a First Amendment right to disclose details of a confidential settlement, even when: (1) the settlement agreement contains confidentiality provisions explicitly binding both the litigant and the attorney, (2) the settlement agreement was drafted with the assistance of counsel, (3) the attorney manually signed the settlement agreement indicating that the attorney "approved" the content of the document, and (4) it is undisputed that confidentiality was an essential component of the agreement. Many other settlement agreements, in California and elsewhere, share some or all of these same characteristics. The Court of Appeal's decision threatens to render those confidentiality provisions meaningless, and may have the unintended effect of granting plaintiffs' attorneys free license to disclose the terms of settlements even where the language of the agreement clearly evidences an intent that attorneys would be bound by confidentiality provisions, and even where the attorney was fully aware of that intention.

In holding that California Code of Civil Procedure Section 425.16 prohibits a party from maintaining a breach of contract action under these factual circumstances, the Court of Appeal gave no apparent consideration to an attorney's promise of confidentiality to his or her client. Absent client approval, a client's receipt of a particular sum from another person or entity in settlement of a dispute is the client's information. *See* Cal. Bus. & Prof. Code § 6068(e)(1) (noting a duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client"); Cal. R. Prof. Conduct 1.6 ("A lawyer shall not reveal information

protected from disclosure . . . unless the client gives informed consent."). If the client has made clear an intention that the fact or terms of the resolution were not to be disclosed, the attorney's duty of confidentiality requires the lawyer to follow that directive. No court has held that First Amendment considerations somehow trump the attorney's duty to maintain client confidences when so instructed by the client. *Cf. In re Sawyer*, 360 U.S. 622, 666 (1959) (Frankfurter, J., dissenting) (addressing attorney speech and observing that "[t]ime, place and circumstances determine the constitutional protection of utterance"); *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 825 (2011) ("Lawyers are officers of the court and, as such, may be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech." (quoting *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1081-82 (1991) (O'Connor, J., concurring)); *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 145 (2d Cir. 2016) ("The broader ethical duty to preserve a client's confidences, unlike the evidentiary privilege, exists without regard to the nature or source of the information or the fact that others share the knowledge.") (quoting *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 172 (5th Cir. 1979)) (internal quotation marks, punctuation and brackets omitted). Here, the lawyer received such a directive from the client as that element served as partial consideration for the settlement itself. First Amendment rights are neither threatened nor implicated by a lawyer's fulfillment of ethical duties to maintain client confidences when directed to do so by the client. These same considerations are at play for countless parties in California and elsewhere who are parties to existing settlement agreements.

By signing the agreement indicating that the agreement was "approved" not only as to its form, but as to its "content," the attorney in this case undoubtedly acknowledged that the content of the agreement required the attorney to maintain confidentiality. The fact that the agreement itself purported to impose an obligation on the attorney—as the Court of Appeal recognized—distinguishes this case from *Freedman v. Brutzkus*, 182 Cal. App. 4th 1065, 1070 (Cal. Ct. App. 2d Dist. 2010). The Court of Appeal in *Freedman* solely analyzed whether an attorney's signature under the recital "approved as to form and content" constituted an actionable misrepresentation. *See id.* At issue in this case, by contrast, is whether an attorney's signature under this same recital carries additional significance where the agreement itself purported to impose obligations on the attorney. As the court recognized in *Freedman*, an attorney's signature under "approved as to form and content" "means that counsel has read the agreement, that the recital formalizes counsel's involvement as attorney to one of the parties, and the recital adds solemnity to the contract's formation." *See id.* at 1070 (citing with approval the trial court's characterization). Thus, in this case, it cannot be disputed that, at the very least, the attorney confirmed by signing under "approved as to form and content," that (a) he had read the agreement and (b) he was involved in the matter as plaintiffs' attorney. The agreement itself imposed obligations on plaintiffs' attorneys, and by signing that agreement, the attorney indicated an understanding and assent to those obligations.

The primary case cited by the Court of Appeal, *e.g.*, *RSUI Indemnity Company v. Bacon*, 282 Neb. 436 (Neb. 2011), is distinguishable in several ways, but perhaps most importantly, because it simply did not deal with a confidentiality provision. Unlike in *RSUI*, in which the attorney was alleged to have promised to pay an insurer proceeds from a settlement – proceeds

that were received by the attorney's client, not the attorney himself – here, the only obligation at issue is an attorney's promise to remain silent. The court also specifically noted in *RSUI* that its holding was based "under the circumstances of th[at] case." *See* 282 Neb. at 441. In this case, Monster does not contend that the attorney, by his signature, acknowledged a personal obligation to pay money the attorney did not have; Monster contends only that the attorney, by his signature, acknowledged an obligation to remain silent. An attorney's obligation to remain silent regarding client information, where the client expresses an intention that the attorney do so, should not be not trumped by the attorney's desire or perceived right to reveal that information.

The IADC respectfully submits that in analyzing the issues on this appeal, this Court should consider the potential for adverse consequences for parties to existing confidentiality agreements, including concerns associated with the balancing of an attorney's First Amendment rights against the attorney's obligations to his or her client.

III. The Court of Appeal's Proposed Alternate Remedy – that a Defendant Should Sue an Attorney's Clients, to Remedy the Attorney's Breach of Confidentiality – is Likewise Inconsistent with California's Policy Favoring Settlements and Would Result in Unintended Adverse Consequences

The Court of Appeal's opinion suggested that "Monster's only claim for breach of the settlement agreement is against the Fourniers," (Op. at 16) and that Monster "may have a cause of action against the Fourniers." (Op. at 21). This proposed "solution" or "remedy" places both plaintiffs and defense counsel in a difficult position and would lead to unintended adverse consequences, particularly for individual plaintiffs.

Plaintiffs – who by entering into a settlement chose "peace and goodwill" over "the expense and persistency of litigation," *see McClure*, 100 Cal. at 343, and who may have done nothing themselves to violate the confidentiality provisions – will be forced not only to defend against further litigation, but also could be forced to bring a third lawsuit, against their attorneys, in order for the party at fault to be held legally responsible. Civil defendants, who may have been motivated to settle the underlying action in part to avoid further entanglement with the plaintiff and/or in part to resolve the reputational damage and unfavorable attention associated with litigation, are now in the position of reigniting disputes with individual plaintiffs to resolve an issue that, in reality, may have nothing to do with the individual plaintiffs themselves or the wrong that those plaintiffs originally claimed to have suffered.

The purpose of settlement is to achieve finality. The IADC respectfully submits that this Court should reject a result that would categorically require a settling defendant to sue a settling plaintiff in order to remedy a breach of confidentiality by the plaintiff's attorney. An attorney's breach of confidentiality need not rob an unwitting plaintiff of finality by re-opening a dispute between plaintiffs and defendants.

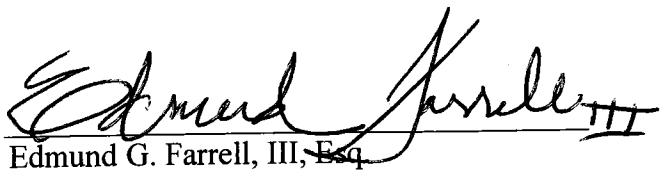
CONCLUSION

In summary, the IADC submits that in adjudicating this appeal, the Court should consider California's longstanding policy in favor of settlement, the importance of the enforceability of confidentiality provisions in settlement agreements, and the potential for unintended adverse consequences for civil defendants and individual plaintiffs who are parties to existing settlement agreements. The IADC believes that each of these factors weighs in favor of vacating the Order of

the Court of Appeal and permitting Petitioner Monster Energy Company's breach of contract claim to proceed on the merits.

Respectfully submitted,

Dated: April 8, 2019

By: 
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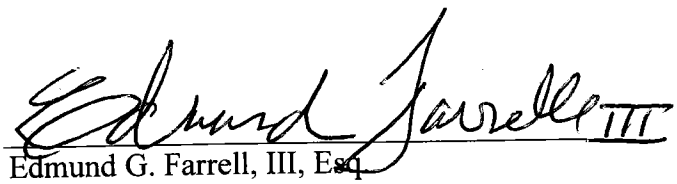
CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c), counsel of record hereby certifies, under penalty of perjury, the enclosed [PROPOSED] AMICUS CURIAE BRIEF OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER MONSTER ENERGY COMPANY is produced using 12-point Times New Roman type and contains approximately 4,353 words, including footnotes, less than the total words permitted by the rules of the Court. Counsel relies on the word count of the computer program used to prepare this brief.

Respectfully submitted,

Dated: April 8, 2019

By: 
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PROOF OF SERVICE

Jorge Perez vs. Jose Vasquez, et. al.
Bc622345

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 801 South Grand Avenue, Ninth Floor, Los Angeles, CA 90017-4613.

On April 5, 2019, I served true copies of the following document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER MONSTER ENERGY COMPANY** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Murchison & Cumming's practice for collecting and processing correspondence for mailing. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one business day after the date of deposit for mailing in this declaration.

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

Executed on April 5, 2019, at Los Angeles, California.

Michelle L. Fisher

SERVICE LIST
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Supreme Court Case No. S251392
Court of Appeal Case No. E066267
Superior Court Case No. RIC1511553

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