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.

OPENING 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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OPENING BRIEF ON THE MERITS

Monster Energy Company ("Monster") respectfully submits this Opening Brief on the Merits in support of its challenge to the Court of Appeal's decision in this case:

I. STATEMENT OF ISSUES

(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 a 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. OVERVIEW AND SUMMARY OF ARGUMENT

This case presents issues arising from a settlement agreement ("Settlement Agreement") reached in a wrongful death action brought against Monster by clients of Bruce L. Schechter and the R. Rex Parris Law Firm ("Attorneys"). The Settlement Agreement contains confidentiality provisions binding on both the settling parties and their attorneys. Mr. Schechter signed the agreement on behalf of Attorneys under the legend "APPROVED AS TO FORM AND CONTENT." There is no dispute that the confidentiality provisions were material to

the settlement. Mr. Schechter conceded that Monster would not have entered into the Settlement Agreement without them. (CT at 119-120.)[1] And there is no dispute the confidentiality provisions were worthless if not binding on both Attorneys and their clients. There should also be no disagreement Monster presented a prima facie case that Mr. Schechter violated the confidentiality provisions by stating to the reporter for a plaintiff's blog that the wrongful death case had settled for "substantial dollars."

The first issue before the Court is whether Mr. Schechter's signature to the Settlement Agreement is sufficient for a trier of fact to find that Attorneys were bound by its confidentiality provisions. Or, as contended by Attorneys and held by the Court of Appeal, did this merely convey Attorneys' professional approval for their clients to sign the agreement? No prior published California appellate decision has addressed this issue. But the guidance available to California attorneys in leading textbooks and legal commentary indicates this language should be sufficient to bind Attorneys to the confidentiality

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[1] "AR" will refer to the materials attached to Attorneys' Motion to Augment the Record, which was granted by the Court of Appeal on December 5, 2016.

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

"O.Br." will refer to the Opening Brief to the Court of Appeal by Attorneys.

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

"RT" will refer to the Reporter's Transcript of the proceedings in the trial court on June 15, 2016.

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

provisions.[2] The Court of Appeal's decision threatens to unwind or place in jeopardy confidentiality provisions in numerous settlement agreements resolving California-based litigation that were drafted consistent with this guidance.

For example, the Rutter Insurance Litigation Guide provides a form settlement agreement that contains a confidentiality provision binding on the parties and their counsel. It provides for the parties' attorneys to sign below the same "Approved as to form and content" legend used in the Settlement Agreement. (Rutter Insurance Litigation Guide, *supra*, Form 15:C at p. 15-260 [¶ 19 and signature block].) The Rutan & Tucker anti-SLAPP article and the Rutter Employment Litigation Guide indicate an attorney for a settling party should be bound by a confidentiality provision in a settlement agreement that purports to bind the attorney, regardless of whether the attorney signs the agreement as a party or otherwise. The Rutter Employment Litigation Guide, for example, contains a form

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[2] (See, e.g., Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2017) Form 16:A, pp. 16-147 to 16-152 (hereafter "Rutter Employment Litigation Guide");

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

Lewis, Settlement Template <www.mediatorjudge.com/pg13.cfm> [as of Sept. 16, 2018] (hereafter "Lewis Settlement Template");

Rutan & Tucker LLP, *First amendment/anti-Slapp did not insulate law firm from liability for violation of confidentiality clause in mediated settlement agreement* (July 2, 2013) <http://www.lexology.com/library/detail.aspx?g=93f3f0cb-e179-42dd-9797-7615443a3f8e> [as of Dec. 10, 2018] [attorney's breach of a confidentiality provision is not protected by Code of Civil Procedure section 425.16; cited in Respondent's Br. at 23] (hereafter "Rutan & Tucker anti-SLAPP article").)

settlement agreement with a confidentiality provision binding on a settling employee and his or her attorneys without a place for the attorneys to sign the agreement. (Rutter Employment Litigation Guide, *supra*, Form 16:A at pp. 150 [¶ 10] and 152.)

Monster contends that Attorneys violated the terms of the Settlement Agreement's confidentiality provisions when Mr. Schechter told a reporter for a plaintiffs' blog (LawyersandSettlements.com) that the case had settled for "substantial dollars." Monster sued Attorneys for breach of the confidentiality provisions. Attorneys responded with an anti-SLAPP motion that was denied, in part, by the trial court. Attorneys appealed and the Court of Appeal reversed the trial court's order with directions to enter an order granting the anti-SLAPP motion in its entirety. (Opn. at 22.)

The Court of Appeal held Mr. Schechter's signature on the Settlement Agreement under the legend "APPROVED AS TO FORM AND CONTENT" was not sufficient to bind Attorneys to the confidentiality provisions. It concluded the "only reasonable construction of this wording" is that Attorneys were "signing solely in the capacity of attorneys who had reviewed the settlement agreement and had given their clients professional approval to sign it." (Opn. at 17.) Relying on two cases – *RSUI Indemnity Co. v. Bacon* (2011) 282 Neb. 436 (hereafter "*RSUI*") and *Freedman v. Brutzkus* (2010) 182 Cal.App.4th 1065 (hereafter "*Freedman*") – the Court of Appeal concluded as a matter of law that Attorneys were not bound by the confidentiality provisions. But *RSUI* and *Freedman* involved different legal and factual issues. Neither applied established

principles of contract law or involved extrinsic evidence such as the evidence in this case that Attorneys agreed to be bound by the confidentiality provisions at issue.

This case also raises the issue of what weight, if any, should be given to this extrinsic evidence, which was presented in support of a breach of contract claim in response to an anti-SLAPP motion brought under Code of Civil Procedure section 425.16. Here, Monster presented evidence that Mr. Schechter, as a member of Attorneys' law firm, admitted to the blog reporter that he could not disclose the terms of the settlement, but then advised her the case had settled for "substantial dollars." (CT at 45.)[3] But rather than accept (or even address) Monster's argument that this statement was an admission that Attorneys are bound by the confidentiality provisions in the Settlement Agreement, the Court of Appeal accepted Attorneys' explanation that Mr. Schechter's comment was motivated by some ethical duty to their clients. (Opn. at 16, fn. 2.)

The Court of Appeal also failed to consider how potential application of principles of contract law could impact interpretation of Mr. Schechter's signature to the Settlement Agreement. It failed to address how a jury or trial court would react to Mr. Schechter's strained attempt to explain that he only approved the content of the confidentiality provisions as they apply to his firm's clients, but not their content as they apply to him and his law firm. (CT at 117-118.) And the Court of Appeal gave no consideration to whether a trier of fact could reasonably conclude that an attorney's approval of the

[3] Mr. Schechter apparently felt (mistakenly) that he was only obligated not to disclose the amount of the settlement.

content of a settlement agreement, the content of which contains provisions explicitly binding on the attorney, is evidence the attorney agreed to be bound by these provisions.

Previous decisions by this Court set out a substantive rule that the probability-of-success prong under California's anti-SLAPP statute should be subject to a minimal merit test that is the equivalent of a summary judgment in reverse. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385 (hereafter "*Baral*"); *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 (hereafter "*Oasis West*").) The Court of Appeal's failure to review or even acknowledge the evidence supporting Monster's breach of contract claim violates this rule. The evidence presented by Monster was entitled to the benefit of the doubt and was sufficient to establish a prima facie case for breach of contract. A court deciding an anti-SLAPP motion should not be free to ignore extrinsic evidence that supports the plaintiff's claim, or to accept the defendant's interpretation of an undisputed but ambiguous fact over a plausible interpretation offered by the plaintiff.

The trial court in this case properly found that Monster had satisfied the probability-of-success standard for its breach of contract claim against Attorneys. At a minimum, Mr. Schechter's signature on the Settlement Agreement under the legend "APPROVED AS TO FORM AND CONTENT," when coupled with his acknowledgement that he could not disclose the terms of the settlement, was sufficient to satisfy the minimal merit standard.

The Court should reverse the decision of the Court of Appeal. The trial court's denial of Attorneys' anti-SLAPP motion as to Monster's cause of action for breach of contract should be affirmed.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. The Underlying Wrongful Death Action

Wendy Crossland and Richard Fournier ("Fourniers") brought a lawsuit in 2012 against Monster for the alleged wrongful death of their daughter based on claims of product liability. (O.Br. at 7.) Attorneys (Bruce L. Schechter and his law firm, R. Rex Parris Law Firm) represented the Fourniers in their wrongful death action. (*Ibid.*)

B. The Settlement Agreement

The Fourniers and Monster reached a settlement of the wrongful death action and entered into the Settlement Agreement on July 29, 2015. (SSCT at 22-33.) The Settlement Agreement contains provisions acknowledging that it was the result of "extensive good faith negotiations between the Parties through their respective counsel" and was entered into on behalf of the "settling parties, individually, as well as on behalf of their . . . attorneys, . . . " (SSCT at 26 [§ 7.01] and 22 [p. 1, second ¶].) The Settlement Agreement contains a release of claims by each party against the other, as well as the other side's attorneys. (SSCT at 23-24 [§§ 1.1, 1.2].)

The Settlement Agreement also contains confidentiality provisions under which the Fourniers, "and their counsel" (i.e., Attorneys) agreed that "the terms, conditions and details" of the Settlement Agreement, "including its existence are to remain confidential" and they will not make any statements about the settlement to the media, including to an entity identified as "Lawyers & Settlements." (SSCT at 27 [§ 11.1].) The "Parties and their

attorneys" further agreed that any comments made about the settlement would be limited to the following: "This matter has been resolved" or "words to their effect." (SSCT at 28 [§§ 11.1, 11.2, and 11.3].)

The Settlement Agreement was executed on behalf of Attorneys by Mr. Schechter under the legend "APPROVED AS TO FORM AND CONTENT." (SSCT at 32-33; CT at 115.) Mr. Schechter conceded that he served as lead counsel for the R. Rex Parris Law Firm in the Fourniers' case and was never told that he was not authorized to sign the Settlement Agreement in that capacity. (CT at 114-115.) Before signing the Settlement Agreement, he reviewed it in its entirety, including the confidentiality provisions in sections 11.1, 11.2, and 11.3, which he approved. (CT at 116-124.) Mr. Schechter acknowledged he was aware that Monster would not have settled the Fourniers' action without these confidentiality provisions. (CT at 119-120.) The Settlement Agreement provides that each party "cooperated in [its] drafting and preparation." (SSCT at 27 [§ 9.0].)

C. Monster Sues Attorneys For Breach Of The Settlement Agreement

On September 15, 2015, an article appeared on LawyersandSettlements.com that described the settlement of the Fourniers' wrongful death action against Monster. The article was entitled " 'Substantial Dollars' for Family in Monster Energy Drink Wrongful Death Suit." (CT at 149.) LawyersandSettlements.com is a lead-generating website for attorneys that describes itself as having "forwarded hundreds of thousands of requests for legal representation

directly to lawyers." (CT at 156.)

Mr. Schechter is identified in the article as "a veteran attorney with a lot of experience dealing with executives and taking depositions from executives from Monster Energy Drink Company." The article reports that "Schechter's most recent case resulted in 'substantial dollars' for the family of a 14-year old that went to a mall with girlfriends in the summer of 2011, drank two Monster Energy Drinks and died of cardiac arrest." (CT at 149.)

The LawyersandSettlements.com article also describes Mr. Schechter as "a master litigator in the fight for compensation on behalf of a number of families who have had loved ones injured or die after consuming the highly caffeinated beverage." (CT at 149.) Immediately below the article is an advertisement that offers "Monster Energy Drink Injury Legal Help" at no cost. (*Ibid.*)

The author of the article, Brenda A. Craig, was deposed and provided a sworn affidavit that established she interviewed Mr. Schechter on September 4, 2015. She confirmed the accuracy of the statements attributed to Mr. Schechter in the article. (CT at 141-144, 149-150, 153-154.)

On September 25, 2015, Monster filed this case against Attorneys. (AR at 1.) Monster alleged causes of action for breach of contract, breach of covenant of good faith, unjust enrichment, and promissory estoppel. Each cause of action was based on the ground that Mr. Schechter's statements to Ms. Craig about the settlement of the Fourniers' lawsuit violate the confidentiality provisions of the Settlement Agreement. (AR at 3-12.)

D. Attorneys' Anti-SLAPP Motion

On October 23, 2015, Attorneys filed a Special Motion to Strike under Code of Civil Procedure section 425.16. (CT at 1.) Attorneys contended that Monster had brought a strategic lawsuit against public participation. They claimed Mr. Schechter's statements to Ms. Craig regarding the settlement of the Fourniers' wrongful death action amounted to protected activity in furtherance of Mr. Schechter's constitutional right of free speech related to an issue of public interest. They also argued that Monster could not establish a probability it will prevail on any of its claims. (CT at 3, 6-18.)

Attorneys' core argument in support of their anti-SLAPP motion was that they were not parties to the Settlement Agreement and had never agreed to be bound by its confidentiality provisions. Attorneys contended they simply gave approval for the Fourniers to sign the Settlement Agreement. (CT at 12-13.) Although Attorneys acknowledged Mr. Schechter had told Ms. Craig that he could not disclose the terms of the settlement, they attempted to excuse this statement as motivated by Mr. Schechter's desire to protect his clients and avoid potential litigation against them. (CT at 128-129.) Mr. Schechter did not deny telling Ms. Craig that the wrongful death action had settled for "substantial dollars," but claimed he had no memory of making this statement. (CT at 45.)

The record on the anti-SLAPP motion also contains deposition testimony by Mr. Schechter in which he attempted to narrow his approval of the content of the Settlement Agreement to only those provisions applicable to the Fourniers, excluding from his approval the content applicable to Attorneys:

Q. Did you approve the content of the confidentiality provisions in Section 11.1 of the agreement?

A. As it relates to my clients, yes.

Q. And if you take a look at that Section 11.1, more specifically, the second sentence of the first paragraph of Section 11.1 provides that "plaintiff and their counsel agree that they will keep completely confidential all of the terms and contents of this settlement agreement." Do you see that?

A. I see that.

Q. Did you approve that?

A. What do you mean did I approve it? Did I approve it as to this was written in English and that my client should understand it, yes. Did I sign off on it, no.

Q. Did you approve the content that I just read to you?

A. I approved this as to form, and I approved it as to content as it relates to my clients who are a party, as it says in the first sentence, which you did not discuss with me, "The parties understand and acknowledge that all of the terms."

And if you go back to the agreement where it starts with "Agreement, wherefore in consideration of the covenants and agreements expressed herein, and the recitals set forth above which form a part of and are incorporated into this agreement, the parties hereto agree as follows," I'm not a party to the agreement, sir.

(CT at 117-119.)

The trial court conducted a hearing on the anti-SLAPP motion on June 15, 2016. (RT 1-24; CT at 207-232.) It found Attorneys had met their initial burden of showing that Mr. Schechter's statements were protected speech addressing the public interest in safety. (RT 3:1-4:20; CT at 210-211.) The trial court also found, however, that Monster had met its burden of establishing a probability of success on its cause of action for breach of contract. (RT 4:21-7:18; CT at 211-214.) The trial court denied Attorneys' anti-SLAPP motion as to Monster's cause of action for breach of contract, but granted the motion as to Monster's other causes of action. (RT 23:5-12; CT at 196, 230, 235-236.)

E. The Court Of Appeal's Decision

The Court of Appeal filed its decision in this case on August 13, 2018. A copy is attached as Exhibit A to Monster's Petition for Review. The decision reversed the trial court's order denying Attorneys' anti-SLAPP motion as to Monster's cause of action for breach of contract. It directed the trial court, on remand, to enter an order granting the anti-SLAPP motion in its entirety. (Opn. at 22.)

The Court of Appeal concluded that, as a matter of law, an attorney's signature on a settlement agreement under the words "Approved as to form and content" is not sufficient to bind the attorney to the terms of a confidentiality provision in the agreement, regardless of whether this provision is explicitly binding on the attorney. (Opn. at 1-2, 17, 20-21.) It accepted the trial court's determination that Mr. Schechter's comments to LawyersandSettlements.com did not fall within the commercial-

speech exemption to the anti-SLAPP statute. (Opn. at 11-12.) It then moved to the issue of whether Monster had shown a probability of success on its cause of action for breach of contract.

The Court of Appeal concluded that Attorneys' approval of the content of the Settlement Agreement did not bind them to the terms of the confidentiality provisions. It found the "only reasonable construction" of the "APPROVED AS TO FORM AND CONTENT" legend was that it signaled Attorneys' "professional approval" for the Fourniers to sign the Settlement Agreement. The Court of Appeal noted that "[i]n our experience, this is the wording that the legal community customarily uses for this purpose." (Opn. at 17.)

The Court of Appeal did not explicitly discuss Mr. Schechter's statement to Ms. Craig that he could not disclose the terms of the Settlement Agreement. But it did note Mr. Schechter's claim that he had a duty to his clients not to expose them to potential litigation. (Opn. at 16, fn. 2.) The Court of Appeal gave no consideration to Mr. Schechter's awkward attempt in his deposition testimony to explain that he had only approved the content of the Settlement Agreement as it applied to his clients, but not the content as it applied to him and his law firm. (CT at 117-119.) And the Court of Appeal did not address the issue of whether an attorney's approval of the content of an agreement, the content of which includes provisions imposing obligations on the attorney, could reasonably be construed as an agreement by the attorney to be bound by these provisions.

The Court of Appeal's Opinion is anchored to *RSUI, supra*, 282 Neb. 436 and *Freedman, supra*, 182 Cal.App.4th 1065. The Court of Appeal acknowledged that *Freedman* is "not on point," but described

it as "the only relevant California case we have found." (Opn. at 17.) It appears that *Freedman* led the Court of Appeal to *RSUI*, a decision in which the Nebraska Supreme Court found an attorney's signature under the words "Agreed to in Form & Substance" in a settlement agreement was not sufficient to bind the attorney and his law firm to obligations placed on them under the terms of the agreement. (*RSUI, supra*, 282 Neb. at pp. 437-438.) As authority for this ruling, the Nebraska Supreme Court referred to *Freedman* in a bare footnote without analysis. (*Id.* at p. 442 & fn. 8.)

IV. WHETHER AN ATTORNEY HAS AGREED TO BE BOUND BY CONFIDENTIALITY PROVISIONS IN A SETTLEMENT AGREEMENT SHOULD BE DETERMINED BY ESTABLISHED PRINCIPLES OF CONTRACT LAW.

A. Principles Of Contract Law Support Monster's Claim That Attorneys Agreed To And Violated The Confidentiality Provisions In The Settlement Agreement.

Settlement agreements are contracts. They should be analyzed in the same manner as other contracts. (*Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1585; *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810-811; see also *Martinez v. Brownco Construction Co.* (2013 56 Cal.4th 1014, 1020 [applying general contract law principles to the offer and acceptance process under Code Civ. Proc., § 998].) This means a party such as Monster,

who seeks to enforce a contractual obligation in a settlement agreement, must establish the four elements of contract formation: (1) capacity to contract, (2) consent/agreement, (3) a lawful objective, and (4) consideration. (Civ. Code, § 1550; *Stewart v. Preston Pipeline, Inc., supra*, 134 Cal.App.4th at pp. 1585-1586; Kuney et al., Cal. Law of Contracts (Cont.Ed.Bar 2018) § 2.1, p. 2-4 (hereafter "Law of Contracts").)

Attorneys do not challenge the elements of capacity, lawful objective, or consideration. They do not disclaim the release given to them by Monster in the Settlement Agreement. (SSCT at 24 [§ 1.2].) Instead, they attack the element of consent or agreement. Attorneys contend they never agreed to be bound by the confidentiality provisions in the Settlement Agreement. (See, e.g., CT at 12-13; Opn. at 17.)

Consent to be bound by a contract requires mutual agreement "upon the same thing in the same sense." (Civ. Code, § 1580.) But here, there is no claim of ambiguity in the confidentiality provisions. These provisions explicitly bar statements about the settlement to the media, including "Lawyers & Settlements." (SSCT at 27-28 [§§ 11.1, 11.2].) They prescribe the text of any statements about the settlement: "This matter has been resolved" or "words to their effect." (SSCT at 28 [§§ 11.3].) The confidentiality provisions unambiguously impose their obligations on the Fourniers "and their counsel." (SSCT at 27 [§ 11.1].)

The issue here is whether Mr. Schechter's signature on the Settlement Agreement under the words "APPROVED AS TO FORM AND CONTENT" is a sufficient expression of consent or agreement

to support a prima facie case that Attorneys are bound by the confidentiality provisions. Acceptance of contractual obligations does not require any specific language. Instead, the test is whether there is an objective manifestation of intent to be bound. (*Beard v. Goodrich* (2003) 110 Cal.App.4th 1031, 1038; *Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1376-1377 ["the test of the true meaning of an acceptance or rejection is not what the party making it thought it meant or intended it to mean. Rather, the test is what a reasonable person in the position of the parties would have thought it meant"]; Law of Contracts, *supra*, at § 4.22, p. 4-24.) And where – as here – the issue is one of the existence of a contractual relationship and the evidence is susceptible to different interpretations, it is for a trier of fact to determine whether a contract exists. (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141, 147.)

Absent special requirements in a contract for acceptance, consent may be communicated by "any reasonable and usual mode." (Civ. Code, § 1582; *Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal.3d 494, 499.) Here, Mr. Schechter negotiated and signed the Settlement Agreement on behalf of Attorneys with awareness that the confidentiality provisions were material to the settlement. (CT at 119.) The language of these provisions leaves no doubt the parties intended them to apply to Attorneys. (SSCT 27-28 [§§ 11.1-11.3].) And the Fourniers' confidentiality obligations would be worthless if not binding on their counsel.

Monster presented evidence of Attorneys' agreement to be bound by the confidentiality provisions. Mr. Schechter acknowledged to the blog reporter, Ms. Craig, that he could not disclose the terms of

the Settlement. (CT at 45.) The legend at issue signaled Attorneys' approval of the content of the Settlement Agreement, which imposed a duty of confidentiality on Attorneys. Attorneys did not bargain for or require any language in the Settlement Agreement that restricted their approval to just the content applicable to the Fourniers. Finally, Mr. Schechter's deposition testimony unmasked his inability to offer any reasonable basis for distinguishing his approval of the content of the Settlement Agreement as it applies to the Fourniers and his approval of the content as it applies to Attorneys.

Despite this evidence, the Court of Appeal held as a matter of law that Attorneys did not agree to be bound by the confidentiality provisions. Its decision ignores general principles of contract law and is at odds with the guidance provided to California lawyers from multiple sources on the form of contract necessary to bind a settling party's attorneys to a confidentiality provision. (*Ante*, fn. 2.)

Although interpretation of a contract begins with the language of the contract, this Court has adopted a "realistic approach" to contractual interpretation. This permits extrinsic evidence of the purpose and subject matter of a contract and the parties' subsequent conduct. (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 463; see also *People v. Shelton* (2006) 37 Cal.4th 759, 767.) The goal is to determine the parties' mutual intent. (*Powerine Oil Co. v. Superior Court* (2005) 37 Cal.4th 377, 390.) If the language of a contractual provision is clear and unambiguous, it controls. But extrinsic evidence is admissible to prove a meaning to which the language of the contract is reasonably susceptible. (*Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d

33, 37; *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1346, 1351; Law of Contracts, *supra*, at § 5.1, pp. 5.4-5.5.)

Here, Attorneys' position demonstrates – at most – ambiguity whether Mr. Schechter's signature to the Settlement Agreement was intended to convey their agreement to be bound by its confidentiality provisions. This raises a question of credibility that should be determined by a trier of fact. (*Hebberd-Kulow Enterprises, Inc. v. Kelomar, Inc.* (2013) 218 Cal.App.4th 272, 283; *Wolf v. Superior Court, supra*, 114 Cal.App.4th at p. 1351; see also *Guzman v. Visalia Community Bank, supra,* 71 Cal.App.4th at pp. 1376-1377; CACI Nos. 302, 309 (2018 ed.).) The Court of Appeal's opinion forecloses this factual determination. It frustrates the goal of contractual interpretation, which is to give effect to the intention of the contracting parties. (*Powerine Oil Co., Inc., supra,* 37 Cal.4th at p. 390.) It preempts consideration of this issue by adopting a rigid rule that an attorney's signature under the legend "Approved as to Form and Content" is not sufficient to bind the attorney to provisions in an agreement.

B. The *RSUI* Standard Adopted By The Court Of Appeal Is Contrary To Basic Principles Of Contract Interpretation.

The Court of Appeal relied on two cases in determining that, as a matter of law, Mr. Schechter's signature to the Settlement Agreement is not sufficient to bind Attorneys to its confidentiality provisions: *RSUI, supra*, 282 Neb. 436; *Freedman, supra*, 182 Cal.App.4th 1065. Neither supports this conclusion.

Freedman did not address the issue of whether an attorney is bound by a provision in an agreement. Nothing in the agreement at issue in *Freedman* purported to bind or benefit the defendant attorney. Instead, *Freedman* involved a fraud claim between attorneys. The plaintiff (Freedman) had represented an apparel manufacturer (Teddi) in negotiating a trademark license agreement. The defendant (Brutzkus) represented the other party (CAI) to the agreement. Freedman had previously represented CAI and the license agreement contained a provision that Freedman was representing Teddi with CAI's consent. (*Freedman, supra*, 182 Cal.App.4th at p. 1068.)

A dispute arose between the parties and CAI filed an action against Teddi, which was forced into bankruptcy. CAI then sued Freedman based on his purported representation to CAI that Teddi would pay the amount due under the trademark license agreement. CAI's suit against Freedman settled prior to trial and Freedman then sued Brutzkus for fraud. Freedman's case against Brutzkus was based on the theory that, in approving the agreement "as to form and content," Brutzkus made an actionable representation to Freedman regarding the accuracy of the agreement. (*Freedman, supra,* 182 Cal.App.4th at pp. 1068-1069.) The Court of Appeal affirmed an order sustaining Brutzkus's demurrer without leave to amend. It construed Brutzkus's approval of the agreement as to form and content as an acknowledgement "that the document is in proper form and embodies the deal that was made between the parties." (*Id.* at p. 1070.)

The issue in *Freedman* was whether the legend "approved as to form and content," standing alone, supported a claim of fraud by an attorney for one party to the contract against the attorney for the other party. The Court of Appeal did not address whether this language might support a claim for breach of a contractual provision explicitly binding on the attorney. And the Court of Appeal acknowledged it was not deciding whether the plaintiff attorney's client might have a cause of action against the defendant attorney. (*Freedman, supra*, 182 Cal.App.4th at p. 1067, fn. 2.)

In contrast to the Settlement Agreement at issue here, nothing in *Freedman* indicates the trademark license agreement contained any provisions binding on or benefiting either of the attorneys. The Court of Appeal in *Freedman* found the "approved as to form and content" provision acknowledged that the parties' agreement "embodies the deal that was made between the parties." (*Id.* at p. 1070.) If anything, this supports the conclusion that Mr. Schechter's signature under the same legend in the Settlement Agreement signifies that the language in the confidentiality provisions imposing obligations on Attorneys "embodies" the agreement reached to settle the Fourniers' lawsuit.

The Court of Appeal adopted the rule set out by the Nebraska Supreme Court in *RSUI*. (Opn. at 19-20.) This means that even the words "Agreed to in Form & Substance" are not sufficient to bind an attorney to confidentiality (or other) provisions explicitly binding on the attorney in an agreement negotiated by the attorney. This holding is at odds with established California law and forecloses application of principles of contract interpretation.

On a textual level, *RSUI* rejects the sufficiency of language ("Agreed to in Form & Substance") that is consistent with California's standard jury instruction on formation of a contract. (CACI No. 302 (2018 ed.) [third element to prove creation of a contract requires "That the parties agreed to the terms of the contract"].) But the problems with the Court of Appeal's reliance on *RSUI* run deeper. *RSUI* concerned factual and legal issues different from those presented by Monster's breach of contract claim against Attorneys. *RSUI* involved the grant of summary judgment against the defendant attorneys. The issue was whether a signature under the heading "Agreed to in Form & Substance" bound the attorneys to a provision in the settlement agreement in which they and their client each agreed to reimburse the plaintiff insurance companies if the attorneys' client later secured a settlement payment from a third party. (*RSUI, supra*, 282 Neb. at pp. 437-438.)

The insurance companies filed a breach of contract action against the attorneys and their client and obtained summary judgment against each for $437,500. (*RSUI, supra*, 282 Neb. at p. 439.) The summary judgment against the attorneys was reversed. The summary judgment against their client was affirmed. (*Id.* at pp. 443, 448.)

In contrast to Monster's claim against Attorneys, the *RSUI* defendant attorneys' ability to secure reversal of the summary judgment against them did not nullify or render worthless their client's obligations under the settlement agreement. The client had received $1.25 million from the third party identified in the settlement agreement and presumably had sufficient funds from which to satisfy the judgment against him. (*RSUI, supra,* 282 Neb. at p. 439.) To the

extent the *RSUI* plaintiffs still had a claim for compensation under their settlement agreement, however, they were free to pursue it against the attorneys in the trial court. There was no mention of extrinsic evidence on the issue of whether the attorneys in *RSUI* had agreed to be bound by the terms of the settlement agreement. And the Nebraska Supreme Court's decision did not address whether extrinsic evidence would be admissible on remand if the plaintiffs continued to pursue their case against the attorneys. But the decision's reference to the contractual language at issue as "ambiguous" (*Id.* at p. 442) indicates extrinsic evidence would be admissible.

Although *RSUI* cited *Freedman* (*RSUI, supra*, 282 Neb. at p. 442 & fn. 8), it provided no analysis of *Freedman*. It failed to acknowledge that the word "agreed" was not in the legend at issue in *Freedman*. It did not discuss the fact that *Freedman* involved a fraud claim rather than an attempt to enforce a contractual provision against an approving attorney.

Here, the Court of Appeal commented that "[i]t seems easy enough, however, to draft a settlement agreement that explicitly makes the attorneys parties (even if only to the confidentiality provision) and explicitly requires them to sign as such." (Opn. at 20-21.) But the Court of Appeal's decision offers no analysis of why general principles of contract law should not be applied to determine whether an attorney has agreed to be bound by provisions in a settlement agreement negotiated by the attorney that are explicitly binding on the attorney. Its holding adopts a rigid rule that rejects the sufficiency of an express statement that an attorney has "Agreed to in Form & Substance" the provisions of a settlement agreement. Even

addition of the word "Agreed" is not sufficient to bind the attorney. (Opn. at 19-20.)

Neither *Freedman* nor *RSUI* supports the Court of Appeal's decision. Neither provides an appropriate standard for determining whether an attorney who approves the form and content of a settlement agreement is bound by provisions in the agreement that purport to bind the attorney. Neither provides an excuse for failing to apply principles of contract law to interpretation of the Settlement Agreement. Neither furnishes a basis to foreclose a trier of fact from addressing the issue of whether Mr. Schechter's signature to the Settlement Agreement signaled Attorneys' agreement to be bound by its confidentiality provisions.

C. The Test Proposed By The Court Of Appeal Is At Odds With California's Policy In Favor Of Settlement And Places In Jeopardy Many Confidential Settlement Agreements.

The Court of Appeal acknowledged the important role of confidentiality provisions in fostering California's policy in favor of settlement. (Opn. at 20.) But the Court of Appeal's decision threatens to undermine this policy. Its endorsement and adoption of *RSUI* challenges the expectations and understanding of California attorneys and mediators on the language necessary to bind an attorney to the terms of a settlement agreement or other contracts negotiated by the attorney on behalf of a client. Prior to this case, no California court held that any specific language is required to bind an attorney to provisions in a contract the attorney negotiates that are explicitly

binding on the attorney. But the guidance available suggested, at a minimum, that a legend such as "approved as to form and content" or "approved as to form" should be sufficient. (Rutter Insurance Litigation Guide, *supra*, at Form 15:C, pp. 15-252 to 15-254; Lewis Settlement Template.)

This guidance also indicated that where an attorney negotiates a settlement agreement on behalf of a client, the attorney should be bound by a provision that places an obligation of confidentiality on the attorney regardless of whether the attorney signs the agreement as a party or otherwise. (Rutan & Tucker anti-SLAPP article; Rutter Employment Litigation Guide, *supra*, at Form 16:A, pp. 16-147 to 16-152.) The decision by the Court of Appeal nullifies this guidance and threatens to abrogate or at least jeopardize many California settlement agreements with confidentiality provisions.

The *RSUI* standard adopted by the Court of Appeal means that even use of the word "agreed" is insufficient to bind an attorney to a confidentiality provision. Although "agreed" is the word used in California's standard jury instruction regarding formation of a contract (CACI No. 302 (2018)), and even though it appears relevant to interpreting a contract under principles of contract law, the Court of Appeal endorsed a standard that holds it is inadequate as a matter of law to bind the signing attorney.

The Court of Appeal's decision offers no basis in policy to foreclose application of principles of contract law in determining whether an attorney has agreed to be bound by contractual provisions in an agreement negotiated on behalf of a client. And it offers no basis for holding, as a matter of law, that the legend in the Settlement

Agreement is not sufficient to bind Attorneys to its confidentiality provisions.

V. IN RULING ON AN ANTI-SLAPP MOTION, A COURT SHOULD NOT IGNORE EVIDENCE SUPPORTING A PLAINTIFF'S CLAIM. IT SHOULD NOT BE FREE TO DISREGARD A PLAINTIFF'S REASONABLE INTERPRETATION OF AMBIGUOUS FACTS.

Neither Attorneys nor the Court of Appeal dispute that a party's agreement to a confidentiality provision in a settlement agreement waives First Amendment rights as to the terms of a settlement. (*Sanchez v. County of San Bernardino* (2009) 176 Cal.App.4th 516, 528.) Neither disagrees that an attorney's breach of a confidentiality provision is not protected by the anti-SLAPP statute. (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 869.)

But the Court of Appeal chose to ignore the evidence supporting Monster's position that Attorneys agreed to be bound by the confidentiality provisions in the Settlement Agreement. It failed to apply the minimal merit standard in determining whether Monster presented a prima facie case in support of it cause of action for breach of contract.

A. The Court Of Appeal Failed To Apply The Minimal Merit Rule.

An anti-SLAPP motion brought under Code of Civil Procedure section 425.16, subdivision (b) involves a two-step process. First, the moving defendant must demonstrate the challenged cause of action

arises from protected activity (i.e., the defendant's right of petition or free speech). If a defendant meets this requirement, the second step requires the plaintiff to demonstrate a probability of prevailing on its claim. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.) Here, the trial court found that Attorneys established the first step (i.e., protected activity), but that Monster demonstrated a probability of prevailing on its breach of contract claim. (CT at 210-214.)

The Court of Appeal acknowledged that an anti-SLAPP motion should only be granted where a plaintiff's claim lacks " 'even minimal merit.' " (Opn. at 9, quoting *Oasis West, supra*, 51 Cal.4th at pp. 819-820.) But it also cited *Daniel v. Wayans* (2017) 8 Cal.App.5th 367, 388, for the proposition that an anti-SLAPP motion should be granted where a defendant presents evidence that defeats a plaintiff's attempt to establish evidentiary support for its claim. (CT at 9.) Neither case supports the Court of Appeal's decision, which is at odds with the rationale for the minimal merit standard. The Court of Appeal's truncated description of the minimal merit standard omits important elements set out by this Court. And the Court of Appeal failed to apply these elements.

Under the minimal merit standard as described by this Court, Monster was required only to demonstrate that its cause of action for breach of contract was legally sufficient and was supported by a prima facie showing of facts sufficient to sustain a favorable judgment. (*Navellier v. Sletten, supra*, 29 Cal.4th at pp. 88-89.) A court should not weigh the credibility or compare the weight of the evidence in ruling on an anti-SLAPP motion. Instead, it should accept as true the evidence favorable to the plaintiff and should 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.) The Court has explained that the minimal merit test is the equivalent of a summary judgment in reverse. (*Baral, supra*, 1 Cal.5th at pp. 384-385; see also *Ralph's Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 261.) The Court of Appeal lost sight of this standard.

The minimal merit standard reflects concern that unrestricted application of the anti-SLAPP statute would adversely impact access to the courts. In *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106 (hereafter "*Briggs*"), the Court confirmed that a plaintiff faced with an anti-SLAPP motion is required only to have " 'stated and substantiated a legally sufficient claim.' " (*Id.* at p. 1123, quoting *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 412.) It also explained that the minimal merit standard reflects concern that use of the anti-SLAPP procedure against lawsuits brought primarily to chill the exercise of constitutional rights should be weighed against concern for the viability of meritorious claims and potential deprivation of the right to a jury trial. (*Briggs, supra,* 19 Cal.4th at p. 1123; see also *Rosenthal, supra,* 14 Cal.4th at p. 412.)

In *Oasis West, supra*, 51 Cal.4th at p. 811, the Court found the plaintiff had presented sufficient evidence to meet the minimal merit standard. (*Id.* at p. 826.) The defendant attorney had represented the plaintiff in obtaining approval for a redevelopment project. But he then became involved in a campaign against the project and solicited signatures on a referendum to overturn its approval. The plaintiff

sued the attorney for breach of contract and fiduciary duty. Although the plaintiff offered no direct evidence that the attorney used confidential information gained from it in formulating his opposition to the project, the Court found it could be reasonably inferred, at least for purposes of the minimal merit test, that he had obtained and used such information. (*Id.* at p. 822.) Here, the Court of Appeal's citation to *Oasis West* (Opn. at 8) highlights rather than explains or excuses its failure to apply the minimal merit standard to Monster's breach of contract claim.

In *Daniel v. Wayans, supra,* 8 Cal.App.5th at 367, an actor who worked on a movie sued the filmmaker for race-based harassment. He claimed that, during work on the movie, he was compared to a Black cartoon character and called "Nigga." (*Id.* at p. 374.) The Court of Appeal affirmed the grant of the defendant's anti-SLAPP motion. It noted that the plaintiff had failed to produce evidence showing an objectively reasonable Black actor in his situation would have found the language at issue offensive and had also failed to present any evidence that it adversely impacted his work. (*Id.* at pp. 391-392.) Although cited by the Court of Appeal here (Opn. at 9), nothing in *Daniel v. Wayans* supports its failure to give weight to the evidence supporting Monster's claim that Attorneys agreed to be bound by the confidentiality provisions in the Settlement Agreement.

In contrast to *Daniel v. Wayans*, Monster presented evidence supporting its breach of contract claim against Attorneys. The evidence that Attorneys agreed to be bound by the confidentiality provisions in the Settlement Agreement includes Mr. Schechter's acknowledgement to the blog reporter that he could not disclose the

terms of the settlement. (CT at 45.) But the Court of Appeal did not explicitly address this statement or Monster's position that it could reasonably be construed by a trier of fact as an admission that Attorneys were bound by the confidentiality provisions in the Settlement Agreement. It acknowledged this statement only obliquely in a footnote observing that Mr. Schechter testified he had a duty to his clients to avoid creating "potential litigation for them." (Opn. at 16, fn. 2.)

But the minimal merit standard requires a court to accept as true the evidence favorable to a plaintiff and to evaluate a 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 that courts should not weigh the credibility or compare the weight of the evidence in ruling on an anti-SLAPP motion. (*Ibid.*) Put somewhat differently, and as noted above, the Court has explained that the minimal merit test is the equivalent of a summary judgment in reverse. (*Baral, supra*, 1 Cal.5th at pp. 384-385; see also *Ralph's Grocery Co. v. Victory Consultants, supra,* 17 Cal.App.5th at p. 261.)

Here, the Court of Appeal ignored the evidence in the form of Mr. Schechter's deposition testimony in which he attempted (and failed) to explain that his approval of the content of the Settlement Agreement applied only to the content as it related to his clients and not to the content as it related to Attorneys. The Court of Appeal also failed to consider whether an attorney's approval of the content of an agreement, the content of which imposes obligations on the attorney, could reasonably be interpreted by a trier of fact as evidence that the attorney accepted these obligations.

The Court of Appeal offered no basis for diluting application of the minimal merit standard in this case. It failed to recognize the underlying rationale for the minimal merit test described by the Court in *Briggs, supra,* 19 Cal.4th at p. 1123. And it offered no explanation why it was appropriate to ignore Monster's interpretation of the evidence and accept, without analysis, Attorneys' spin on Mr. Schechter's statement to the blog reporter.

B. Monster Met The Reverse Summary Judgment Standard By Establishing A Probability Of Success On Its Breach Of Contract Claim.

Monster demonstrated a legally sufficient claim against Attorneys for breach of contract. The record shows that (1) Attorneys negotiated the Settlement Agreement on behalf of the Fourniers, (2) Attorneys were aware that the confidentiality provisions in the Settlement Agreement were material and Monster would not have entered into the settlement without them, (3) the confidentiality provisions were worthless if not binding on both the Fourniers and Attorneys, (4) Mr. Schechter violated the terms of the confidentiality provisions by stating to a blog reporter that the underlying case had settled for "substantial dollars," and (5) Mr. Schechter advised the blog reporter that he could not disclose the terms of the Settlement Agreement.

The language of the Settlement Agreement itself demonstrates that Mr. Schechter signed it on behalf of Attorneys under the legend "APPROVED AS TO FORM AND CONTENT." This content, which he approved, includes confidentiality provisions explicitly

binding on Attorneys. The record also includes evidence that Mr. Schechter was unable to provide a reasonable explanation for how his approval of the content of the Settlement Agreement did not include approval of its content as it applies to Attorneys.

Monster was not required to win its case in opposing Attorneys' anti-SLAPP motion. It was required only to satisfy the minimal merit test, which is analogous to the showing necessary to defeat a motion for summary judgment. It presented evidence that, at a minimum, showed a triable issue of fact on the issue of whether Attorneys agreed to be bound by the confidentiality provisions in the Settlement Agreement.

VI. CONCLUSION

The Court of Appeal found, as a matter of law, that Mr. Schechter's signature was not sufficient to bind Attorneys to the confidentiality provisions in the Settlement Agreement. This conclusion, which is based on its adoption of the rule of *RSUI*, is contrary to California law.

The issue of whether an attorney who negotiates a settlement agreement should be bound by confidentiality provisions in the agreement that are explicitly binding on the attorney should be determined based on established principles of contract law. The rule adopted by the Court of Appeal is at odds with these principles and the guidance available to California attorneys on the issue of what language – if any – is necessary to bind an attorney to confidentiality provisions in this context. It threatens to unwind or jeopardize

settlement agreements in a broad array of litigation settled consistent with this guidance.

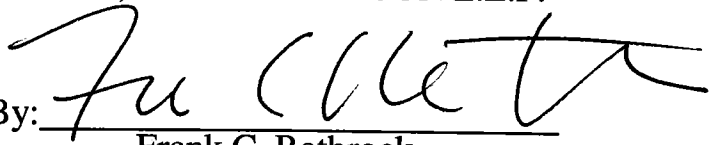
The Court of Appeal also failed to apply the minimal merit standard set forth by this Court for determining whether a plaintiff has met the probability-of-success requirement under Code of Civil Procedure section 425.16, subdivision (b)(1). A court should not be free to ignore extrinsic evidence that supports a plaintiff's claim for breach of contract. It should not be at liberty to accept a defendant's interpretation of an undisputed but ambiguous fact over a plausible interpretation offered by a plaintiff.

The decision of the Court of Appeal should be reversed. The trial court properly denied Attorneys' anti-SLAPP motion as to Monster's cause of action against Attorneys for breach of contract.

Dated: December 14, 2018

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

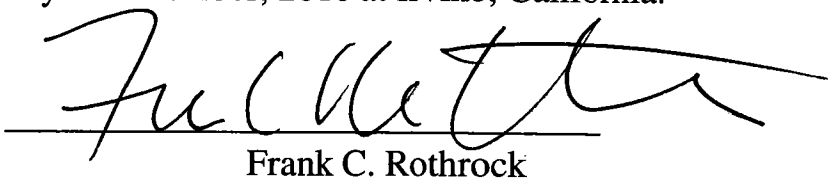
By: 

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

CERTIFICATE OF WORD COUNT

The foregoing Petition contains 8165 words (excluding tables and this Certificate). In preparing this Certificate, I relied on the word count generated by Microsoft Word 2010.

Executed this 14th day of December, 2018 at Irvine, California.



Frank C. Rothrock

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 5 Park Plaza, Suite 1600, Irvine, California 92614.

On December 14, 2018, I served on the interested parties in said action the within:

OPENING 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 December 14, 2018, 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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