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April 13, 2021

Submitted Electronically

Hon. Carol D. Codrington, Presiding Justice
Hon. Marsha G. Slough, Associate Justice
Hon. Michael J. Raphael, Associate Justice
California Court of Appeal
Fourth Appellate District, Division 2

Re: *Bledsoe v. Monster Beverage Corporation, et al.*,
Case No. E072569
Letter Requesting Publication

Dear Honorable Justices:

Under Rule 8.1120 of the California Rules of Court, Washington Legal Foundation (WLF) respectfully submits this letter in support of Respondent's request for publication of the Court's opinion in *Bledsoe v. Monster Beverage Corporation, et al.*, Case No. E072569.

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in California. WLF promotes free enterprise, individual rights, limited government, and the rule of law. To that end, WLF regularly appears as *amicus* in California state courts, as well as other federal and state courts, to address issues arising in products liability cases and other complex litigation.[1]

WLF supports publication because the Opinion meaningfully contributes to the case law on two significant and recurring issues: (1) a trial court's discretion to bifurcate issues of liability and causation by trying causation *first*; and (2) the trial court's crucial "gatekeeper" role in reviewing scientific expert evidence on causation

[1] No counsel for a party authored this letter in whole or in part. No person or entity other than WLF and its counsel made a monetary contribution intended to fund submission of this letter.

in a products liability case. (See Opn. at pp. 23-42, Parts II.A and B; Cal. Rules of Court, rule 8.1105(c)(2)-(4), (6).)[2]

1. A Trial Court's Discretion to Try Causation First Is Vital, Especially Given the Proliferation of Products Liability Cases in California.

Publication is warranted on the bifurcation issue. Although there are published decisions *generally* affirming a trial court's discretion to bifurcate issues, no recent case law applies those principles in this context—trying causation first in a products liability action. The lack of on-point state authority is confirmed by the Opinion itself, which cites only *federal* cases for specific examples of trying causation first. (See Opn. at pp. 25-26, citing cases decided by the Sixth and Eighth Circuits between 1977 and 1988.) The Opinion also provides helpful guidance by (a) rejecting generalized complaints that bifurcation interfered with plaintiff's presentation of his case and (b) finding that juror convenience is a relevant concern.

This procedural flexibility is particularly important given the proliferation of products liability actions in California. The state increasingly has become a magnet for tort claims—including claims filed by *out-of-state* plaintiffs seeking what they perceive to be a friendly forum. That is true of the plaintiff in this case (a Texas resident injured in Texas) and is true of many products liability JCCPs. To deal with this burden and manage their dockets, courts should adopt—and should be encouraged to adopt—procedures that streamline trial. Look no further than this case, in which trying causation first allowed the parties to cut the number of relevant witnesses.

2. The Opinion Provides a Helpful Discussion of *Sargon* and Its Application to Products Liability Causation.

As explained above, products liability cases in California are on the rise. These cases often raise questions of general or specific causation—often based on experts' developing novel theories in areas where a causal association has neither been established through "gold standard" (double-blind) clinical trials nor accepted by the scientific community.

The court's "gatekeeping" role under *Sargon Enters., Inc. v. University of Southern California* (2012) 55 Cal. 4th 747 is particularly important in such cases, as

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[2] Under Rule 8.1110, the Court may certify the Opinion for partial publication as to Parts II.A and B, along with the factual background in Part I. Part II.C, which addresses "Additional Claims of Error" and includes redacted information, need not be published.

the Opinion shows. The plaintiff's experts relied on materials that might seem official and persuasive to a lay jury: FDA adverse event reports, case studies, and a physician's anecdotal experience with another plaintiff in a different lawsuit. As the Court properly observed, however, such materials do not necessarily supply a reliable basis to opine on causation "because of all the unknowns and confounding factors." (Opn. at p. 39.) The Opinion confirms that such incident reports are unreliable if they involve mere unsubstantiated allegations or cannot sufficiently identify the underlying products or circumstances to ensure they apply to the claims at issue. (*Id.* at pp. 39-40.) Yet those are precisely the kinds of materials that, if presented to the jury, create the impression that mere correlation is causation.

Publishing the Opinion would provide courts and litigants much-needed guidance on applying *Sargon* in future cases. When similar circumstances arise in future cases, the expert testimony should be excluded, consistent with the result here. If expert testimony in a future case is distinguishable, then the plaintiff can identify those distinctions and explain the foundation for the testimony. Either way, publishing the Opinion will promote fair and predictable results.

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For these reasons, WLF urges publication of the Court's Opinion (at least as to Parts II.A and B) in *Bledsoe v. Monster Beverage Corporation, et al.*, Case No. E072569.

Respectfully submitted,

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