No. S232946

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP
Plaintiff and Respondent,

vs.

J-M MANUFACTURING CO., INC.,
Defendant and Appellant.

After a Decision of the Court of Appeal of the State of California, Second Appellate District, Division Four, Case No. B256314;
The Superior Court of Los Angeles County,
Case No. YC067332 The Honorable Stuart M. Rice, Presiding

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFF/RESPONDENT SHEPPARD, MULLIN, RICHTER & HAMPTON LLP; THE AMICI CURIAE BRIEF OF THE AMICI LAW FIRMS

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APPLICATION

Pursuant to the California Rules of Court, rule 8.520(f), the 51 law firms identified on Exhibit A hereto (the "Amici Law Firms") respectfully request leave to file an amicus curiae brief in support of Plaintiff and Respondent, Sheppard, Mullin, Richter & Hampton, LLP ("Sheppard Mullin"), and in opposition to Defendant and Appellant J-M Manufacturing Company, Inc. ("J-M").

STATEMENT OF INTEREST

The Amici Law Firms include firms with a single California office, multiple California offices, multiple offices in multiple states, and in some instances multiple international offices. These firms range in size from two lawyers on up, and their practices cover a broad range of civil and criminal litigation, alternative dispute resolution, legal ethics counseling, and business and transactional matters.

The Amici Law Firms respectfully submit that the ability of clients and lawyers to order their relationships would be compromised on the important issues of arbitrability, informed consent to conflicts, and fee forfeiture if the novel positions of J-M and the court of appeal were accepted by this Court. The purpose of California's ethical rules—"to protect the public and to promote respect and confidence in the legal profession"—would be undercut rather than advanced by limiting the free choice of California clients and lawyers. The Amici Law Firms' collective experience is that arbitration provisions and informed consent provisions are commonplace in engagement letters, are necessary in the modern world, and are understood and negotiated by clients and their lawyers.

J-M's proclamation that the duty of loyalty "goes to the very heart of the attorney-client relationship" (J-M Answer Brief at 1) does not justify upsetting settled law and expectations governing the arbitration of lawyer-

client disputes, adopting unworkable and unfair requirements for informed consent, or imposing fee forfeitures without regard to lawyer good faith or the extent, if any, of client harm. If the absolutist view of J-M and the court of appeal were to prevail in this State, the detriment to California clients and lawyers would be far-reaching:

- Clients of California lawyers could no longer depend upon the confidentiality, efficiency and other benefits of agreed-upon (and legislatively encouraged) arbitration.

- Clients of California lawyers would be uniquely restrained from negotiating and relying on consents to conflicts that allow clients to engage the lawyers of their choice on the matters of their choice and that allow lawyers to accept representations on the strength of such consents.

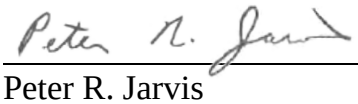
- Clients of California lawyers would be encouraged to magnify even innocent, remote and harmless conflicts in order to assert that they should not have to pay for the valuable services they have received.

The Amici Law Firms respectfully request leave to file the attached amici curiae brief for each of these reasons and for the reasons set forth in the brief itself.

In accordance with the requirements of the California Rules of Court, rule 8.520(f), Peter R. Jarvis and his law firm, Holland & Knight LLP, are the authors of this brief, and no other person or entity have made or will make any monetary contribution towards the preparation and filing of this brief. Mr. Jarvis is a co-author of Hazard, Jr., Hodes, and Jarvis, The Law of Lawyering (4th Ed. 2015). He is also the Co-Leader of Holland & Knight LLP's Legal Profession Team, which primarily counsels lawyers, law firms and corporate and government legal departments on lawyer professional responsibility and risk management issues. Mr. Jarvis has written and spoken extensively on the California Rules of Professional Conduct and the ABA Model Rules, including with respect to conflicts of interest and informed consent to conflicts waiver issues, for decades.

Dated: December 2, 2016

Respectfully submitted,



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INTRODUCTION

I. Summary and Overview

The Amici Law Firms request that this Court reverse the court of appeal and: reject J-M's assault on the arbitrability of lawyer-client disputes; clarify the standards for the validity of informed consent to conflicts; and confirm that the harsh remedy of fee forfeiture requires much more than a *post hoc* assertion of an allegedly "serious" conflict. The Amici Law Firms submit that the position taken by J-M and the court of appeal on each of these issues is inconsistent with current, accepted practices in California and elsewhere.

A rule allowing assertions of conflicts of interest to defeat agreed-upon arbitration provisions would prevent lawyers and clients from securing the predictability and confidentiality they elected at the outset of their relationship when they knowingly and intentionally chose arbitration as the forum for resolution of disputes. A great many clients welcome arbitration and, indeed demand arbitration clauses in their engagement agreements because they know that if a lawyer-client relationship does degenerate, their privileged communications will be kept from the public record and the dispute will be resolved without intrusive and expensive discovery.

Even were it within this Court's purview to create an exception to the legislative policy in favor of arbitration, such an exception would be ill-advised. There is no evidence that the results of arbitrated lawyer-client disputes are skewed against clients. There also is no evidence that clients are compelled by law firms to accept arbitration provisions as contracts of adhesion, and Amici Law Firms' experience is to the contrary. This case is devoid of any suggestion that J-M did not want an arbitration provision in its engagement agreement (the "Agreement").

It is also the longstanding experience of the Amici Law Firms that informed consent to both present and future conflicts play a critical role in allowing clients of all sizes to hire lawyers of their choice from firms of all sizes and on matters of the clients' choice. Consent or waivers of pure duty-of-loyalty conflicts, where there is no realistic risk of prejudice or leakage of confidential information, are particularly commonplace. Requests for such waivers are also easy for clients to understand—especially where, as here, the client from whom consent was sought was sophisticated and represented by independent counsel. A rule that increases the risk of unenforceability of clear and agreed-upon conflicts waivers, whether present or future, would adversely affect both California lawyers and present and prospective clients. Moreover, no such rule exists in other jurisdictions.

The Amici Law Firms can readily agree that truly unsophisticated clients who do not have the benefit of independent counsel may need more disclosure than sophisticated and separately-represented entities. Nonetheless, it is also true that sophisticated consumers of legal services (some hiring scores of law firms each year in numerous matters) equipped with ever-growing ranks of in-house and outside counsel do not need the protection of singular California-imposed vetoes of such consents. The Amici Law Firms agree with the commentators who have studied the relationship between outside and inside counsel and concluded that inside counsel's "once-inferior status has been elevated and [inside counsel] now allocate, guide, control and supervise the work of outside counsel." (Whelan and Ziv, *Privatizing Professionalism: Client Control of Lawyers' Ethics* (May 2012) 80 Fordham L.Rev. 2577, 2583.) The commentators also note that "OC [Outside Counsel] Guidelines [from corporate clients], requirements, and procedures are commonplace." (*Id.* at 2585.)

Finally, no state has imposed the equitable remedy of fee forfeiture, let alone full fee forfeiture, without considering such factors as the presence

or absence of lawyer good faith and client harm. This Court should not put California in a class by itself and, in so doing, destabilize thousands of existing and future lawyer-client relationships as clients are presented with arguments that might encourage them to try to avoid contractual obligations to pay their lawyers as agreed for services provided.

II. Public Policy Does Not Invalidate an Agreement to Arbitrate A Case In Which A Violation of the Professional Rules Is Alleged.

This Court should not create a rule that lawyer-client arbitration clauses are unenforceable whenever a violation of the Rules of Professional Conduct ("RPCs") in general or the conflicts rules in particular is alleged to exist or, indeed, is found to exist. "[T]hose who enter into arbitration agreements expect that their dispute will be resolved without necessity for *any* contact with the courts," and "when the allocation of a matter to arbitration or the courts is uncertain, we resolve all doubts in favor of arbitration." (*Sandquist v. Lebo Automotive, Inc*. (2016) 1 Cal.5th 233, 247 [205 Cal.Rptr.3d 359, 376 P.3d 506] [emphasis in original, internal citations omitted].) Arbitration provisions such as the one contained in the Agreement must be enforced in accordance with their terms.

Even the court of appeal did not purport to find that there was an insufficiently waived conflict which would "illegalize" the Agreement until three weeks after the document was consummated. (Opn. at p. 17.) Not even fraudulent inducement destroys arbitrability, and it would overturn the expectations of sophisticated commercial actors everywhere if findings of *post hoc* ethical conflicts could render arbitration provisions void *ab initio*.

Under section 1598 of the Civil Code, it is only "Where a contract has but a single object, and such object is unlawful" that "the entire contract is void." (Civ. Code § 1598.) As is true of lawyer-client engagement agreements in general, this Agreement had the unquestionably lawful—and

common—primary objective of setting the terms and conditions under which Sheppard Mullin would provide legal services to J-M for the lawful defense of the *qui tam* matter and any other matters on which J-M might hire Sheppard Mullin. The informed consent/conflict waiver portion of the Agreement—the only clause attacked by J-M—had a lawful objective as well: compliance with RPC 3-310, with the arbitrators having found that Sheppard Mullin acted "honestly and in good faith" at all times. The arbitrators manifestly did not find that either J-M or Sheppard Mullin was pursuing an illegal objective in any sense.

Even if this Court *were* to conclude that a legally sophisticated client that was independently represented by counsel could not have understood the plain meaning of Sheppard Mullin's informed consent/conflicts waiver language (and it should not), the absolute worst that could then be said is that Sheppard Mullin's effort to obtain informed consent only failed because Sheppard Mullin did not expressly call attention to a then-inactive relationship with South Tahoe that Sheppard Mullin reasonably believed was subject to its own effective conflicts waivers.[1] As noted by the Ninth Circuit

[1] In fact, and as is not infrequently true, Sheppard Mullin's resumption of work for South Tahoe was only one of a series of events that led to J-M's attempt to invalidate its agreement with Sheppard Mullin. In addition, South Tahoe filed a motion to disqualify; South Tahoe then rejected Sheppard Mullin's offer to pay more than the value of South Tahoe's claim in order to eliminate any claimed conflict; J-M then rejected the option presented to it by the federal court and Sheppard Mullin that the South Tahoe claim be severed and handled by separate counsel at Sheppard Mullin's expense; and the federal court then decided to order disqualification in what it considered a close case without clear precedent. And because J-M seeks to rely upon the alleged statement by two Sheppard Mullin lawyers that they told J-M that there were "no conflicts," the Amici Law Firms also wish to note that it is accepted usage for lawyers, and courts, to use the words "no conflicts" when they mean "no unwaived conflicts." (See, e.g., *Richardson v. Defazio* (N.J.Super.Ct.App.Div. 2016) 2016 WL 854520 at *2 [Not Reported in A.3d] ["BE also contends there is no conflict in the firm representing

in another context, "The very fact that the public policy regarding fee collection by unethical lawyers is so fact-specific suggests that it is not sufficiently 'well defined and dominant' to fall within the public policy exception." (*Arizona Elec. Power Co-op, Inc. v. Berkeley* (9th Cir. 1995) 59 F.3d 988, 992.)

J-M concedes that there are RPC violations including those for unconscionable fees and lawyer fraud, that may be arbitrated. (J-M Answer Brief at 17.) These violations can strike at the duty of loyalty just as much—indeed more so—than a purported failure to obtain fully informed consent. In other words, the dividing line that J-M presents to this Court does not exist. Worse still, any attempt to draw such a line would seriously burden clients and lawyers who would have to wait for the seriatim development of case law on whether arbitration can be halted, as well as wait for a court determination of where the particular factual circumstances in which they find themselves would fit into the case law.

The destruction of arbitration as an agreed-upon and certain remedy would be accompanied by delay and increased expense for clients as well as lawyers. When a dispute is removed from arbitration to a court, the court needs to allow discovery, request briefs, hold a hearing and issue a reasoned decision. In at least many instances, the court would conclude that arbitration could proceed as to some or all issues, with the result that the parties would then have to start over in a second forum. Multiple, collateral litigation would be the new order, striking at the core of the State's public policy favoring the efficiency (and lower judicial burden) associated with arbitration.

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defendants and IMG because all of the defendants have consented to BE's joint representations."].)

The arbitrators in this case did exactly what a court would have been called on to do—weigh the facts and the full range of equities to determine whether, under these particular circumstances, the remedy of fee forfeiture or disgorgement was appropriate. If J-M's position were to be accepted, a client could conceivably await the result of an arbitration and then, if the result is unpalatable, seek to relitigate *de novo* what the arbitrators had already decided by claiming "illegality." This is not a permissible ground for reversal of a decision in arbitration, and it should not be a ground for avoiding arbitration in the first instance. "Absent an express and unambiguous limitation in the contract or the submission to arbitration, an arbitrator has the authority to find the facts, interpret the contract, and award any relief rationally related to his or her factual findings and contractual interpretation." (*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1182 [77 Cal.Rptr.3d 613, 184 P.3d 739].) [2]

[2] As mentioned, the experience of the Amici Law Firms includes numerous instances in which it is the clients who insist on the arbitration of all disputes with their lawyers, contradicting any claim that the obligation of this Court to protect the public and promote confidence in the legal profession requires particular skepticism toward the arbitration of disputes involving lawyers. For example, one major client with far-flung operations in this country and abroad mandates in its outside counsel guidelines that: "Any dispute or controversy arising under or in connection with this [engagement agreement] shall be settled by arbitration before a panel of three (3) arbitrators in accordance with the commercial arbitration rules of the American Arbitration Association then in effect. Judgment may be entered on the arbitral award in any court having jurisdiction. Each party will be responsible for selecting one (1) arbitrator, and then the two (2) selected arbitrators shall jointly select the third arbitrator to be a member of the arbitration panel. The place of arbitration shall be chosen by the Company. The arbitral award shall be final and binding."

III. Disclosure for Informed Consent Must Focus on the Client's Reasonable Understanding, Not Perfection.

A. When It Comes to Informed Consent, Reasonable Disclosure and Understanding Is the Only Viable or Appropriate Test.

The Amici Law Firms welcome the opportunity to bring their practical experience to bear on the discussion of the quality and quantity of disclosure and informed consent necessary to make conflict waivers enforceable.

The Amici Law Firms and countless other lawyers seek consents to present and future conflicts in order to serve, not harm, their clients. The development and use of such written waivers was part of a necessary response to the broad duty of undivided loyalty as it began to develop in relatively recent decades.[3] Such waivers allow clients to opt out of the full duty of undivided loyalty when they determine it is in their interest to do so.[4]

The criteria adopted for disclosure and informed consent by the court of appeal would also disadvantage California lawyers vis-a-vis non-

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[3] See, e.g., Bussel, *No Conflict* (2012) 25 Geo. J. Legal Ethics 207, 217-18 ("Not until 1982 in [ABA] Informal Opinion 1495 did the ABA explicitly interpret DR 5-105 to bar concurrent representation of clients adverse in unrelated matters.").

[4] In the collective experience of the Amici Law Firms, many clients have adopted written policies governing the use of present and future conflicts waivers. (See, e.g., Kobak, *Dealing with Conflicts and Disqualification Risks Professionally* (2015) 44 Hofstra L.Rev. 497, 529-530 [noting practice of clients drafting engagement letters with conflict terms]; Whelan and Ziv, *Privatizing Professionalism: Client Control of Lawyers' Ethics* (May 2012) 80 Fordham L.Rev. 2577, 2588 & fn. 60 [noting use of outside counsel guidelines covering conflicts of interest].) The Amici Law Firms also have experience with many corporate counsel organizations that offer myriad forms for conflict waivers and arbitration provisions.

California lawyers and firms in other states and countries without such limits.[5] In *Howard v. Babcock* (1993) 6 Cal.4th 409, 421, 423 [25 Cal.Rptr.2d 80, 863 P.2d 150], this Court noted the need to keep abreast of "sweeping changes in the practice of law" and asserted that "the contemporary changes in the legal profession to which we have already alluded make the assertion that the practice of law is not comparable to a business unpersuasive and unreflective of reality." Here, "[p]utting aside lofty assertions about the uniqueness of the legal profession" (*id*. at 422-23), experience shows that both clients and lawyers need to be able to execute, and then rely upon, conflicts waivers in California as they are elsewhere.

Although it may be tempting to default to a one-size-fits-all approach, the fact is that many clients are sophisticated business entities supported by other counsel, are bargaining heavyweights in the purchase of legal services, and neither want nor accept extended conflict waiver letters that exhaustively catalog all potentially relevant details. In *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 622 [180 Cal.Rptr. 177, 639 P.2d 248] (*Maxwell*), disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390 [87 Cal.Rptr.3d 209, 198 P.3d 11], this Court cautioned that the "[w]aiver of the consequences of potential conflicts was not inadequate simply because neither the court nor the agreement undertook the impossible burden of explaining separately every conceivable ramification." The leading practical treatise in the State describes "reasonably foreseeable consequences" as requiring that the attorney:

> [E]xplain, in terms the client can reasonably understand, how the problem might affect the client or the attorney's representation. It is not necessary, however, to disclose and

[5] See also RPC, rule 1-100(D) (requiring California attorneys to obey the California RPCs unless the RPCs of another jurisdiction require a different result).

> explain every possible consequence of a potential or actual conflict for a consent to be valid.

(Vapnek et al., Cal. Prac. Guide: Professional Responsibility (The Rutter Group 2016 Update) ¶ 4:10.)

If informed consent can be based on a waiver of a current conflict without a need to meet an unrealistic burden of explaining every conceivable ramification, the same must be true for informed consent to future conflicts. The Amici Law Firms respectfully submit that the test suggested in these authorities—reasonableness of disclosure in light of the client's level of comprehension and access to information—is the only proper test. The experience of the Amici Law Firms also informs us that client who consent to present and future conflicts waivers believe it is in their interest to do so in order keep their lawyers of choice on their matters of choice. There should be strict limits on judicial "discretion to intrude on defendant's choice of counsel in order to eliminate potential conflicts, ensure adequate representation, or serve judicial convenience." (*Maxwell, supra*, 30 Cal.3d at 613.)

The authorities relied on by Sheppard Mullin to defend the prospective waiver signed by J-M express this policy, and this case of first impression should be informed by their logic. This Court refers to the ABA Model Rules in aid of its interpretation of the RPCs, eschewing the brand of California isolationism advocated by J-M. (*City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771, 135 P.3d 20] (*Corba Solutions*).) In *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4th 410, 429, 433 [78 Cal.Rptr.3d 37] (*Sharp*), the court of appeal cites *Cobra Solutions* for support in looking to the ABA Model Rules of Professional Conduct, including the definition of informed consent contained in ABA Model Rule 1.0(e), which provides that:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

The test of disclosure is adequacy or sufficiency, not length. As explained by the Official Comment [6] to ABA Model Rule 1.0:

> The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. . . . A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

Official Comment [6] thus makes clear that disclosure does not fall short if the client reasonably understands what is at issue—regardless of the source of the understanding—and that when the client has other counsel review the disclosure, the client "should be assumed to have given informed consent." This is consistent with *Ferguson v. Yaspan* (2014) 233 Cal.App.4th 676, 680-81 [183 Cal.Rptr.3d 83], which held that the presence of independent counsel is highly pertinent to questions of fairness and the sufficiency of disclosure in the context of Probate Code section 16004.

As Sheppard Mullin has pointed out, the Official Comment [22] to ABA Model Rule 1.7 provides that "if [a] client is an experienced user of the legal services and is reasonably informed regarding the risk that a conflict may arise," an advance conflict waiver "is more likely to be effective, particularly if, *e.g.,* the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation." This is the critical wording now contained in the draft Comment [22] proposed for our State; as shown by the cases cited above, this prescription aligns perfectly with existing law.

California courts have likewise cited with approval the definition of informed consent in the Restatement (Third) of The Law Governing Lawyers. (*Sharp*, *supra*, 163 Cal.App.4th at 429 ["Informed consent requires that the client or former client have *reasonably adequate* information about the material risks of such representation to that client or former client."] [citing Rest.3d Law Governing Lawyers (2000) § 122(1)] [emphasis added].) Restatement Comment c(i) explains:

> The client must be aware of information reasonably adequate to make an informed decision. . . . A lawyer who does not personally inform the client assumes the risk that the client is inadequately informed and that the consent is invalid. . . . The requirements of this Section are satisfied if the client already knows the necessary information or learns it from other sources. A client independently represented—for example by inside legal counsel or by other outside counsel—will need less information about the consequences of a conflict but nevertheless may have need of information adequate to reveal its scope and severity.

(Rest.3d Law Governing Lawyers, § 122, com. c(i).) The Restatement's test, as that of other authorities, is whether the client has enough information from all available sources, including other counsel, to be reasonably able to assess the consequences of what the client is being asked to waive. (Accord, Hazard, Jr. et al., The Law of Lawyering (4th Ed. 2015) §12.34 ["Less

sophisticated or less knowledgeable clients will require not only more disclosure, but also disclosure that is tailored to their apparent level of sophistication"], §12.35 ["[R]eview by independent counsel . . . will drastically reduce the risk that a conflicts waiver will not be upheld"].)

Based on their extensive experience, the Amici Law Firms submit that there are generally no more than five factors to be considered when evaluating present or future unrelated matter conflicts consents or waivers. First is the question posed in *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284 [36 Cal.Rptr.2d 537, 885 P.2d 950] (*Flatt*), whether respect has been paid to the "primary value at stake in cases of simultaneous or dual representation" in otherwise unrelated matters, which is "the attorney's duty—and the client's legitimate expectation—of *loyalty*, rather than confidentiality" (italics in original). In other words, the client must be adequately informed by the lawyer that the lawyer or her law firm as a whole (because, due *inter alia* to specialization, waivers of the duty of loyalty often involve matters being handled by different lawyers) will not have undivided loyalty to that client but may adversely represent others in factually and legally unrelated matters.

The second factor, as mentioned in *Flatt* (and the Restatement[6]), is the potential effect on confidential client information. If a conflict creates a risk that a client's confidential information would be improperly used or disclosed, a client has the right to expect that to be disclosed, and procedures such as ethical walls will be implemented to mitigate any risk.

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[6] See, e.g., Rest.3d Law Governing Lawyers, §121, com. b ("The prohibition against lawyer conflicts of interest is intended to assure clients that a lawyer's work will be characterized by loyalty, vigor and confidentiality" and informed clients have the right to elect "less than the full measure of protection that the law otherwise provides. For example, . . . a client might consent to a conflict where that is necessary to obtain the services of a particular law firm.").

The third factor is whether there has been disclosure of the extent of the potential client group covered by the consent or waiver—for example, whether it is limited to specific clients or is open-ended.

The fourth factor is whether there has been disclosure of the types of work that the lawyer seeks to undertake—for example, whether a waiver is sought only for transactional work or also for litigation work and, if the latter, whether only some kinds of litigation are permissible while others are not.

The fifth factor is the sufficiency of the lawyer's explication of the potential effect on a client if the lawyer is unable to continue.[7]

The Amici Law Firms need not dispute that truly extreme situations may require greater disclosure. The Amici Law Firms submit, however, that it makes no sense for the extent of required disclosure in more or less typical situations to be based on what might be thought necessary in truly extreme situations. The overwhelming majority of conflicts waiver situations addressed by the Amici Law Firms and other counsel who use conflicts waivers, like the situation from which the current case arises, do not involve these kinds of extreme circumstances.

In the context of this case, for example, J-M—a sophisticated client with sophisticated in-house counsel—has not asserted that it failed to understand what Sheppard Mullin asked to be able to do. This is consistent with the everyday experience of the Amici Law Firms as well: given reasonable disclosure, sophisticated clients comprehend the extent of the situations in which requested waivers will apply. Lawyers do not go about

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[7] These same factors emerge, albeit in somewhat different settings, in the context of the joint representation of a number of clients in a single matter. For example, multiple plaintiffs, multiple defendants or multiple would-be incorporators must be or become informed about the effects that sharing a lawyer may have on individual client confidentiality and on the ability of the lawyer to advocate for what is in the interests of less than all of the clients. (See generally, Hazard, Jr. et al., *supra*, at §§12.34-12.36.)

trying to trick their clients into consents and waivers—a sure recipe for failure.

It would also be untenable to require that consent be obtained again each time a specific conflict arises. The authorities addressing this question have rejected this argument for the simple reason that the need to obtain subsequent consents would in practice prohibit future conflicts waivers altogether. (See, e.g., *Maxwell*, *supra*, 30 Cal.3d 606; *Visa U.S.A., Inc. v. First Data Corp.* (N.D.Cal. 2003) 241 F.Supp.2d 1100, 1106.) In the particular context of this case, J-M was entitled to ask which of the named plaintiffs in the *qui tam* action (including but not limited to South Tahoe) Sheppard Mullin might recently have represented or might anticipate representing in the future, but J-M never did so. Similarly, the Amici Law Firm clients who execute waivers typically do not ask for that information. The only reasonable inference is that as long as the representations are on factually and legally unrelated matters and client confidences are preserved, the clients are content to proceed on that basis.

As in *Galderma Laboratories, L.P. v. Actavis Mid Atlantic LLC* (N.D.Tex. 2013) 927 F.Supp.2d 390, 399, 406 (*Galderma*), which relied on ABA Formal Ethics Opinion No. 05-436 (2005), the waiver that J-M signed was sufficient according to the "circumstances pertaining to the [particular] client;" despite being "general" and "open-ended," it was adequate disclosure for "a sophisticated client who has experience engaging multiple large law firms," and had the "benefit of its own independent counsel to advise [it] on what the language meant."[8] The possible coming and going of

[8] The *Galderma* waiver was less extensive than the one in this case:

> We [the law firm] understand and agree that this is not an exclusive agreement, and you [the client] are free to retain any other counsel of your choosing. We recognize that we shall be disqualified from representing any other client with interest

other Sheppard Mullin clients adverse to J-M in wholly unrelated matters was, and necessarily would appear to Sheppard Mullin to be, something that J-M, a separately-represented and experienced user of legal services, knew and understood. In *Desert Outdoor Advertising v. Superior Court* (2011) 196 Cal.App.4th 866, 872 [127 Cal.Rptr.3d 158], the court of appeal rejected the contention that a lawyer had committed fraud in the execution by failing to inform a client that an agreement with the lawyer's new firm contained an arbitration provision that the prior firm's agreement did not, "[a] cardinal rule of contract law is that a party's failure to read a contract, or to carefully read a contract, before signing it is no defense to the contract's enforcement." In this instance, J-M and its counsel did read the "contract" with Sheppard Mullin, have never claimed that they did not understand the contract that it signed and have never claimed that the representation of South Tahoe went in any respect beyond the contractual language accepted by J-M and its counsel.

B. Clients Grant Informed Consent for Good Reasons.

If neither clients nor lawyers can rely on sufficiently and reasonably clear conflicts waivers—particularly those made by legally sophisticated and

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> materially and directly adverse to yours (i) in any matter which is substantially related to our representation of you and (ii) with respect to any matter where there is a reasonable probability that confidential information you furnished to us could be used to your disadvantage. You understand and agree that, with those exceptions, we are free to represent other clients, including clients whose interests may conflict with yours in litigation, business transactions, or other legal matters. You agree that our representing you in this matter will not prevent or disqualify us from representing clients adverse to you in other matters and that you consent in advance to our undertaking such adverse representations.

(*Id.* at 393.)

independently represented clients—both clients and lawyers are unlikely to be willing to say "yes" to such arrangements. Client choice of counsel will be correspondingly restricted, and the many clients, of all sizes and levels of sophistication, who wish to split their work between firms will have far less opportunity to do so. Indeed, there are multiple reasons why and situations in which many clients seek and consent to conflicts waivers. By way of illustration and limiting the field for the moment to consents to unrelated matter conflicts, clients do in fact consent to current and future conflicts waivers for the following reasons:

- They are indifferent to who is adverse to them on some or all unrelated matters and would prefer to be able to grant consent at the outset rather than having to do so each time a matter arises because it is less disruptive to their internal operations to proceed on this basis.

- They want the specialized knowledge or expertise of a particular lawyer or group of lawyers at a firm for a particular matter but are aware that that firm has other clients that it also needs to serve without the risk of subsequent conflicts claims or motions to disqualify.

- They want to be able to hire a lawyer or firm that has a longstanding client with whom they are sometimes adverse but that lawyer or firm needs to be able to assure the longstanding client that it will not lose the representation of its longstanding counsel because of the new representation.

- They want to do business with other clients of their lawyers under circumstances that might otherwise be problematic (*e.g.*, a bank that uses employment law lawyers from a firm but wants other firm lawyers to have their clients borrow money from the bank).

- They know that opposing parties will find competent counsel on unrelated matters and would prefer to have adverse counsel whom they know and believe to be reputable and reasonable rather than someone they do not know at all.

The Amici Law Firms, like lawyers throughout the country, regularly encounter these and other situations. When clients and lawyers are able to understand and agree on the terms and conditions for consent and a waiver, the representation proceeds. When the clients and the lawyers cannot agree, the clients turn to other counsel. The absence of an avalanche of informed consent/future conflicts waiver cases before this Court shows that by and large, this system works extremely well. While it can be cumbersome at times, this structure has become the functional reality on which the business and legal worlds rely. Furthermore, it is effectively policed by forces including but not limited to the unfettered right of clients to fire their own lawyers, the lawyers' knowledge that their reputations precede them, as well as the occasional judicial disqualification decisions (and fee forfeiture decisions under the totality of the circumstances test discussed below).

IV. The Law of Fee Forfeiture Should Be Based on the Totality of Circumstances

A. Fee Forfeiture Requires Consideration of the Surrounding Circumstances

The arbitrators in this case addressed the extent to which the conflict of interest alleged to be at its core should require fee forfeiture or prevent a *quantum meruit* claim by asking whether any breach by Sheppard Mullin was "serious or egregious." The arbitrators concluded that, to the contrary, Sheppard Mullin had acted "honestly and in good faith" at all times. Nonetheless, J-M asserts that actual conflicts must always result in total gross fee forfeiture or disgorgement regardless of presence or absence of bad intent, client harm, quality of legal work, preservation of client confidences, or any other facts or circumstances. This is not and should not be the law.

As stated in authorities including the Restatement (Third) of The Law Governing Lawyers and the court of appeal's decision in *Pringle v. La*

Chapelle (1999) 73 Cal.App.4th 1000, 1006, fn. 5, "[i]n determining whether and to what extent forfeiture is appropriate, relevant considerations include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies." (Rest.3d Law Governing Lawyers (2000) § 37.) Alternatively stated, no finding of egregiousness sufficient to require total forfeiture/disgorgement can be made solely based on the abstract concept of the seriousness of a type of conflict. Instead, it is necessary to consider the extent to which disclosure was made, the extent to which consent was otherwise "informed," the state of mind of the lawyers, the circumstances surrounding the conflict, the extent of any harm to the client, and any other relevant factors. (Cf. *Rodriguez v. Disner* (9th Cir. 2013) 688 F.3d 645, 654 (citing *In re E. Sugar Antitrust Litig.* (3d Cir. 1982) 697 F.2d 524, 533 as "upholding the disgorgement of attorneys' fees where [the] 'breach of professional ethics is so egregious that the need for attorney discipline and deterrence of future improprieties of that type outweighs' the concerns of providing 'the client with a windfall' and depriving the 'attorney of fees earned while acting ethically'").)

In this instance, Sheppard Mullin plainly did a great deal of wholly ethical work and believed in good faith that it did not have an unconsented conflict. This case also illustrates that it can be very difficult for a lawyer or firm reliably to determine which of its recently-served clients are entitled to consider themselves "current clients" of the firm—as the existence of an attorney-client relationship depends in substantial part upon the putative client's reasonable expectations. (See, e.g., Hazard, Jr. et al., *supra,* §2.05.)

One illustration of the unfairness of J-M's approach is to consider some of the questions that this approach would make irrelevant in the analysis of whether fee forfeiture is appropriate:

- Whether the lawyer proceeded without any waiver at all, or whether there was an attempt to obtain a waiver—even if the attempt, when judged after the fact, proved insufficient.

- Whether the conflicts and disqualification questions presented were clear-cut or instead involved disputed questions or inferences of fact and/or equitable or legal decisions that could non-frivolously have gone either way.

- Whether the lawyer acted in bad faith.

- Whether the lawyer alerted the client to the risk of what might happen if the lawyer subsequently had to withdraw.

- Whether, and to what extent, the client was benefitted or harmed. And

- Whether or to what extent the client seeking forfeiture or disgorgement may be responsible for any harm that it may have suffered since one who seeks equity must do equity. (See *Dool v. First Nat. Bank* (1929) 207 Cal. 347, 351 [278 P. 233]; see also *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1043 [6 Cal.Rptr.3d 441, 79 P.3d 556] ["The community's notions of fair compensation to an injured plaintiff do not include wounds which in a practical sense are self-inflicted."] [internal citations omitted].)

J-M's approach lacks any internal logic, consistency or practicality. For example, as J-M concedes, full fee forfeiture or disgorgement is not automatically required for potential conflicts, as distinct from actual conflicts, or for a number of other RPC violations. J-M Answer Brief at 38.[9] Both actual and potential conflicts of interest can be waived under RPC rule

[9] This Court's caselaw on *quantum meruit* recovery compels this result. (See, e.g., *Huskinson & Brown, LLP v. Wolf* (2004) 32 Cal.4th 453, 458 [9 Cal.Rptr.3d 693, 84 P.3d 379] ["Quantum meruit refers to the well-established principle that the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered"] [internal citation omitted]; *Calvert v. Stoner* (1948) 33 Cal.2d 97, 105 [199 P.2d 297] [even "assuming the invalidity of the entire contract by reason of the inclusion of the provision, the defendant would be entitled to compensation based on the reasonable value of services performed"].)

3-310(C), and it can often be difficult to determine the difference between the two. In addition, a conflict that starts as potential may become actual over time—thereby creating further complexity. (See, e.g., Cal. Ethics Opn. No. 1989-115.)

There certainly are circumstances in which forfeiture or disgorgement may be appropriate. The Amici Law Firms submit, however, that the inflexible J-M approach is the wrong approach. J-M's approach would also tend to destabilize attorney-client relationships, as clients would be incented to look for loopholes in conflicts waivers to justify non-payment or a full refund. Lawyers, in turn, would have to be far more suspicious and less trusting of their clients.

B. Automatic Fee Forfeiture Violates Fundamental Fairness and Other Important Doctrines

Following the Anglo-American legal maxim that "equity abhors a forfeiture," forfeitures are traditionally disfavored by California law. (See *People v. United Bonding Ins. Co.* (1971) 5 Cal.3d 898, 906 [98 Cal.Rptr. 57, 489 P.2d 1385].) In *Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489 [85 Cal.Rptr.3d 268], for example, a law firm sought to recover contingency fees under its retainer agreements with the defendant. The defendant argued that the agreements were unenforceable because the law firm acquired attorney's liens on the recovery proceeds in the retainer agreements without complying with the disclosure and consent requirements in rule 3-300 of the Rules of Professional Conduct. (*Id.* at 1522.) The court rejected the defendant's argument, even assuming that the charging liens were invalid, because to hold otherwise would result in an unjust forfeiture and violate the severability principles of contracts:

> We are also persuaded that granting recovery under a contingent fee arrangement although the charging lien may be invalid is consistent with the law of severability of contracts. The need to void contracts in violation of the law

> must be tempered by the countervailing public interest in preventing a contracting party from using the doctrine to create an unfair windfall.

(*Id.* at 1523 [internal citations omitted]; see also *id.* [explaining that severability allows courts "[t]o implement the fundamental rule of law that forfeiture is disfavored"].)

Similarly, in *Latipac, Inc. v. Superior Court of Marin County* (1966) 64 Cal.2d 278, 279-80 [49 Cal.Rptr. 676, 411 P.2d 564], the defendant sought to avoid its contractual obligation to the plaintiff, to whom it owed roughly $430,000 for unpaid labor and costs furnished under their contract, "by reason of plaintiff's failure to strictly comply with the statutory provisions which govern the licensing of contractors." Those provisions, in particular section 7031 of the Business and Professions Code, "den[y] to unlicensed contractors the use of the courts for the recovery of sums owed to them for contracting services." (*Id.* at 279.) To avoid an unjust forfeiture, this Court concluded that the plaintiff had substantially complied with the statute such that it could still obtain payment for the services it provided, despite the fact that it was unlicensed at certain times. This Court wrote that "[u]nder all the circumstances of this case, we cannot doubt that it is one in which the policy of the licensing statute has been effectively realized, and that defendant has received in full measure the protection intended by the Legislature. Fidelity to precedent and considerations of equity each preclude us from requiring the wholly gratuitous enrichment of defendant at the expense of plaintiff and its creditors." (*Id.* at 287.)

It also cannot be denied that fee forfeitures are a form of punishment. As already noted, for example, Restatement (Third) of the Law Governing Lawyers § 37 and *Pringle*, *supra*, 73 Cal.App.4th 1000, describe the rule for fee disgorgement as calling for "forfeiture." (*See also*, *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, 49 [40 Cal.Rptr.3d 221, 129 P.3d

408] [asserting that "The remedy of disgorgement is grossly disproportionate to the asserted wrongdoing on THC's part and would constitute a totally unwarranted windfall to Frye" even though the Court assumed the existence of a statutory violation].)[10] As a matter of California and federal due process, "[t]he imposition of grossly excessive or arbitrary awards is constitutionally prohibited, for due process entitles a tortfeasor to fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." (*Simon v. Sao Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1171 [29 Cal.Rptr.3d 379, 113 P.3d 63] [internal citations omitted] (*Simon*); see also *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416-17 [123 S.Ct. 1513, 155 L.Ed.2d 585]; *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 574 [116 S.Ct. 1589, 134 L.Ed.2d 809] (*BMW*).)

As noted in *Simon*, *supra*, 35 Cal.4th at 1172, the single most important factor in deciding whether such awards are grossly excessive or

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[10] See also *Chism v. Tri-State Const., Inc*. (2016) 193 Wash.App. 818, 840-41 [374 P.3d 193] (describing fee disgorgement as a way to discipline breaches of the rules of professional conduct, as disciplinary penalties and as punishment); *In re Koliba* (N.D.Ohio 2006) 338 B.R. 48, 52 ("The goal of disgorgement is not to compensate, but is rather punitive, designed to discourage behavior and punish attorneys for their violations"); *Agostini-Knops v. Knops* (N.Y.Sup.Ct. 2003) 2003 WL 1793054 at *9 [Not Reported in N.Y.S.2d] ("the court finds that the relief of disgorgement of fees or 'punishment' sought by plaintiff is not available in this particular case"); *Berkeley Ltd. Partnership v. Arnold, White & Durkee* (D. Md. 2000) 118 F.Supp.2d 668, 674 ("Compensatory damages are intended to make the plaintiff whole for any losses they suffered. Whereas, disgorging the legal fees is in the nature of a punitive measure designed to discourage behavior and punish attorneys for their violations."). Similarly, *Burrow v. Arce* (Tex.Sup.Ct. 1999) 997 S.W.2d 229, 239, fn. 36, combines a discussion of fee forfeiture and fee disgorgement cases into the same footnote.

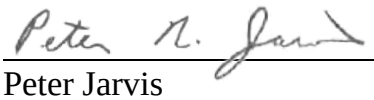
arbitrary is the reprehensibility of a defendant's conduct. Indeed, the California Legislature has limited punitive damages so that they can only be awarded when "it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice." (Civ. Code § 3294(a).) No one has found that here.

The issue becomes even more problematic upon consideration of the other due process limitations on punitive damages. For example, the *BMW* court noted the excessiveness of the $2 million punitive damage award in that case in light of the fact that the maximum civil penalty under applicable state law was $2,000 and that other states had maxima ranging from $5,000 to $10,000. (*BMW,* 517 U.S. at 584.) Here, there are no pertinent statutory penalties. In addition, no argument can be made that the amount of forfeiture ordered in this case bears a permissible or reasonable relationship to actual harm even if one were to assume, contrary to the arbitrators, that Sheppard Mullin had not acted honestly and in good faith. For example, J-M chose not to present any evidence of actual harm. (Cf. *Johnson v. Ford Motor Co.* (2005) 135 Cal.App.4th 137, 150 [37 Cal.Rptr.3d 283] [stating, in a case involving fraud and other reprehensible conduct, that "in the absence of proof that the potential for harm was realized on a large scale, we do not find a special justification for punitive damages exceeding a single-digit ratio"].)

V. CONCLUSION

This Court should clarify the rules regarding arbitrability, informed consents to conflicts and fee forfeitures. Arbitration should be encouraged, and the standards for informed consent should both be realistic and take into consideration the client's legal sophistication and retention of other counsel. Finally, the equitable remedy of fee disgorgement should only be imposed after a full assessment of all facts and circumstances; it should not be employed as a form of limitless and disproportional punishment.

Dated: December 2, 2016 Respectfully submitted,



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Attorneys for the Amici Law Firms

EXHIBIT A

1. Allen Matkins Leck Gamble Mallory & Natsis LLP
2. Alston & Bird LLP
3. Arnold & Porter LLP
4. Baker & McKenzie LLP
5. Bryan Cave LLP
6. Carlsmith Ball LLP
7. Cooley LLP
8. Cozen O'Connor
9. Davis Wright Tremaine LLP
10. DLA Piper LLP (US)
11. Doll Amir & Eley LLP
12. The Dominguez Law Firm
13. Dykema Gossett PLLC
14. Early Sullivan Wright Gizer & McRae LLP
15. Faegre Baker Daniels LLP
16. Fish & Richardson P.C.
17. Glaser Weil Fink Howard Avchen & Shapiro LLP
18. Goodwin Procter LLP
19. Greenberg Traurig LLP
20. Hanson Bridgett LLP
21. Holland & Knight LLP
22. Horvitz & Levy LLP
23. Hughes Hubbard & Reed LLP
24. Hunton & Williams LLP
25. Isaacs Clouse Crose & Oxford LLP
26. Jenner & Block LLP
27. Kendall Brill Kelly LLP
28. Kirkland & Ellis LLP
29. Knobbe, Martens, Olsen & Bear, LLP
30. Latham & Watkins LLP
31. Lewis Brisbois Bisgaard & Smith LLP
32. Lowenstein Sandler LLP
33. Manatt, Phelps & Phillips, LLP
34. Morgan, Lewis & Bockius LLP
35. Munger, Tolles & Olson LLP
36. Newdorf Legal
37. O'Melveny & Myers LLP
38. Pachulski, Stang, Ziehl & Jones LLP
39. Perkins Coie LLP
40. Pircher, Nichols & Meeks
41. Proskauer Rose LLP
42. Reed Smith LLP
43. Seyfarth Shaw LLP
44. Sidley Austin LLP
45. Spertus, Landes & Umhofer, LLP
46. Steptoe & Johnson LLP
47. Troutman Sanders LLP
48. Umberg Zipser LLP
49. Venable LLP
50. Wilson Sonsini Goodrich & Rosati PC
51. Womble Carlyle Sandridge & Rice LLP

PROOF OF SERVICE

State of California)
) ss.
County of Los Angeles)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 400 South Hope Street, 8th Floor, Los Angeles, California 90071.

On **December 2, 2016,** I served the document described as **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFF/RESPONDENT SHEPPARD, MULLIN, RICHTER & HAMPTON LLP; THE AMICI CURIAE BRIEF OF THE AMICI LAW FIRMS** on the interested parties in this action, enclosed in a sealed envelope, addressed as follows:

☒ **BY FIRST CLASS MAIL**

Following ordinary business practices, I placed the document for collection and mailing at the offices of Holland & Knight LLP, 400 South Hope Street, 8th Floor, Los Angeles, CA 90071, in a sealed envelope. I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service, and, in the ordinary course of business, such correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

Kevin S. Rosen Theane Evangelis Bradley J. Hamburger Andrew G. Pappas **GIBSON, DUNN & CRUTCHER, LLP** 333 South Grand Avenue Los Angeles, CA 90071 Tel: (213) 229-700 Fax: (213) 229-7520 Email: krosen@gibsondunn.com Attorneys for Plaintiff and Respondent	Kent L. Richland Barbara W. Ravitz Jeffrey Edward Raskin **GREINES, MARTIN, STEIN & RICHARD LLP** 5900 Wilshire Boulevard, 12th Floor Los Angeles, CA 90036 Tel: (310) 859-7811 Fax: (310) 276-5261 Email: krichland@gmsr.com Attorneys for Defendant and Appellant
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **December 2, 2016,** at Los Angeles, California.

Ericka Mendez