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SUPREME COURT
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In the
Supreme Court
of the
State of California

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

v.

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

AFTER A DECISION BY THE COURT OF APPEALS OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR, CASE NO. B256314

SUPERIOR COURT OF LOS ANGELES COUNTY, CASE NO. YC067332
HONORABLE STUART M. RICE, JUDGE

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF and [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF DEFENDANT AND RESPONDENT J-M MANUFACTURING CO., INC.

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APPLICATION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, the Association of Corporate Counsel ("ACC") respectfully requests leave to file the attached *amicus curiae* brief in support of Defendant and Respondent J-M Manufacturing Co., Inc. in the above-captioned matter. This application is timely made pursuant to the briefing schedule set forth in California Rule of Court 8.520(f).

INTERESTS OF AMICUS CURIAE

ACC is a global bar association that promotes the common professional and business interests of in-house counsel who work for corporations, associations and other private-sector organizations through information, education, networking opportunities and advocacy initiatives. Its members include more than 40,000 in-house lawyers working for more than 10,000 organizations in over 85 countries. ACC has chapters located throughout the United States and other parts of the world, including four chapters located in California with more than 5,300 members.

One of the principal activities of ACC is advocacy on public policy matters affecting its members. As the largest international bar association comprised solely of in-house attorneys, ACC provides a unique and important perspective on public policy issues, and focuses on issues that directly affect the practice of law by its members in their capacity as in-house attorneys. ACC members, as in-house counsel for their organizations, are

responsible for negotiating engagements with law firms, which often include advance conflict waivers. Because ACC represents a significant number of in-house counsel from across the country, ACC offers a unique perspective on the broad, open-ended advance conflict waivers that are the subject of this appeal.

ACC'S PROPOSED *AMICUS CURIAE* BRIEF

ACC is familiar with the issues in this case and supports the position of Defendant and Respondent J-M Manufacturing Co., Inc. in this matter. ACC's brief will highlight the harm to clients from allowing law firms to enforce against their clients the broad, open-ended advance conflict waivers that are the subject of this appeal. In doing so, ACC will highlight certain authorities and arguments that the opening briefs did not fully address.

As set forth in greater detail in the brief filed herewith, ACC asserts that, while advance conflict waivers may be enforceable with appropriate disclosure and specificity, the general and open-ended advance conflict waiver that Plaintiff and Appellant Sheppard, Mullin, Richter & Hampton LLP ("Sheppard") insists on was invalid. In particular, Sheppard's conflict waiver did not comply with the disclosure and informed consent requirements of California law. If enforced, the advance conflict waiver would allow law firms to conceal facts relevant to existing or impending conflicts of interest. This would substantially erode the duty of loyalty and fiduciary responsibilities that are the hallmark of the attorney-client

relationship. ACC rejects Sheppard's arguments that there is a "national standard" that considers advance conflict waivers presumptively enforceable against sophisticated clients such as those represented by ACC's members.

No party or counsel for any party, other than counsel for ACC, has authored the proposed brief in whole or in part, or funded the preparation of the brief.

Dated: December 1, 2016

Respectfully submitted,
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STATEMENTS OF INTEREST OF AMICUS CURIAE AND SOURCE OF AUTHORITY TO FILE

Pursuant to Rule 8.520(f) of the California Rules of Court, this brief is filed with an accompanying Application for Leave to File which sets forth the interest of the Amicus in this matter.

INTRODUCTION

The Association of Corporate Counsel ("ACC") urges this Court to affirm the well-reasoned opinion of the Court of Appeal and find that the advance conflict waiver that was used by Sheppard, Mullin, Richter & Hampton LLP's ("Sheppard") is not enforceable against J-M Manufacturing Co., Inc. ("J-M"). Sheppard's interpretation of California Rule of Professional Conduct 3-310 ("Rule 3–310") and its obligations to J-M threaten to undermine an attorney's undivided duty of loyalty to the client. As the Court of Appeal correctly held, Sheppard cannot—without informed consent by its client—represent a defendant in a litigation matter, J-M, while simultaneously representing one of the plaintiffs in that matter, South Tahoe Public Utility District ("South Tahoe"), in other matters.

To aid the Court with the instant appeal, the proposed amicus brief by ACC will focus solely on the issue of whether a sophisticated consumer of legal services, independently represented by counsel, can give its informed consent to an advance waiver of conflicts of interest when its attorney

concealed basic information concerning potential and actual conflicts.[1] The answer is no. To be clear, ACC does not oppose all advance conflict waivers. Rather, and as further discussed below, ACC and its members believe that general and open-ended advance conflict waivers that do not specifically disclose known potential or actual conflicts of interest present serious problems. ACC and its members have grave concerns that the enforcement of such waivers would erode the duty of loyalty that all attorneys and law firms owe to their clients. Attorneys and law firms should have an ongoing duty to make a full and complete disclosure of all known potential and actual conflicts of interest to their clients because attorneys' candor to clients should be the rule, not the exception. Clients and their in-house counsel simply want to be informed so they can weigh the potential risks and benefits in deciding whether to retain a particular attorney or law firm.

Here, not only do the undisputed facts show that Sheppard failed to obtain J-M's informed consent concerning its concurrent representation of J-M and South Tahoe, they actually show that Sheppard had known about this

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[1] Sheppard's Opening Brief raises two other issues, which will not be addressed by ACC's proposed amicus brief, namely: (1) may a court rely on public policy to overturn an arbitration award on illegality grounds stemming from an attorney's violation of Rule 3-310; and (2) does a conflict of interest, in violation of an attorney's duties to the client, require the attorney to disgorge all previously paid fees and preclude the attorney from recovering the reasonable value of the unpaid work. (*See* Opening Br. at 1.)

conflict of interest all along, and had actively concealed these circumstances from J-M. Sheppard's advanced conflict waiver should be invalidated under these circumstances because J-M did not have the information needed to give informed consent.

Facing uncontroverted evidence of its failure to comply with Rule 3-310, Sheppard attempts to deflect the Court's focus from its own conduct by arguing that J-M was a sophisticated client with in-house counsel, and, as such, Sheppard was excused from its obligation under Rule 3-310 of disclosing a known conflict of interest. According to Sheppard, even though Sheppard knew but never informed J-M of its ongoing and open-ended relationship with South Tahoe (whose interest was directly adverse to J-M), it could continue representing South Tahoe because J-M was a sophisticated client and had signed Sheppard's retainer agreement with the advance conflict waiver. This cannot and should not be the law.

As J-M correctly points out in its Answer brief, the enforceability of the conflict waiver should not hinge on client sophistication or the presence of in-house counsel. Instead, the focus should be on whether an attorney or a law firm obtained informed consent under Rule 3-310. Regardless of their experience as consumers of legal services and representation by in-house counsel, sophisticated clients have no method by which to ascertain a law firm's client list and the potential and actual conflicts of interest hidden therein. Simply stated, clients cannot know what conflicts may or may not

exist without disclosure by attorneys or law firms. This asymmetry of information means that a client is at the mercy of its law firm to exercise its ethical duty to disclose conflicts of interest and obtain informed consent from the client. Moreover, because sophistication and bargaining power also vary widely among both individual and corporate clients, any rule based on these factors would lead to post-dispute debates and inconsistent decisions.

ACC would also like to point out that there is no merit in Sheppard's doom and gloom predications about the collapse of the legal marketplace if the instant conflict waiver is invalidated. If one law firm declines to represent a client for fear of a conflict of interest, another firm will be ready to service that client. It is true that ACC members may not have their first-choice lawyer. But if the Court adopts Sheppard's flawed arguments, these broad and open-ended conflict waivers would elevate law firm profits over the duty of loyalty—a critical component of any attorney-client relationship.

Finally, ACC believes that there is no "national standard" that presumes that advance conflict waivers are enforceable as to sophisticated clients who are represented by counsel. In fact, courts in both California and across the nation have invalidated similar waivers. These decisions reflect deep discomfort with Sheppard's view of modern legal services in which clients and lawyers engage in arms' length negotiations over conflict of interest disclosures. Indeed, a *caveat emptor* approach to the legal profession is anathema to the principle of always putting first the duty of loyalty to clients.

ARGUMENT

I. GIVEN THE FACTS OF THIS CASE, ENFORCING SHEPPARD'S ADVANCE CONFLICT WAIVER AGAINST J-M WOULD ERODE THE DUTY OF LOYALTY THAT IS CRITICAL TO CLIENTS

Sheppard argues that a general, open-ended advance conflict waiver is enforceable against a sophisticated client even though Sheppard had concealed the existence of an actual or impending conflict at the time the client signed the waiver. This is an alarming position. The problem with Sheppard's argument is that consent, under these circumstances, is not truly informed and cannot satisfy Rule 3-300.[2]

In particular, an attorney has the ethical duty to make a full and complete disclosure of all known conflicts of interest to a client before accepting or continuing with the representation of the client. *See, e.g.*, Cal. R. Prof. Conduct 3-310(b); ABA Model R. Prof. Conduct 1.7. This rule is founded upon the principal that an attorney should have an undivided duty

[2] There are many reasons why clients would not want their attorney simultaneously to represent an adverse party. For instance, clients may not want to grapple with the prospect of having its own law firm deposing their executives, or being on the receiving end of aggressive litigation tactics from its own attorneys. There may also be concerns that a law firm engaged in an adverse representation would have a tactical advantage in the representation. Further, a client facing its own firm as an adversary may devote more resources to the matter to make sure the firm is properly handling the client's confidential information and the matter does not grow to involve related matters.

of loyalty to his or her client. *See Flatt v. Superior Court*, 9 Cal. 4th 275, 284 (1994) ("The primary value at stake in cases of simultaneous or dual representation is the attorney's duty–and the client's legitimate expectation— of *loyalty*") (emphasis in original). In fact, this Court has held that:

> In evaluating conflict claims in dual representation cases, the courts have accordingly imposed a test that is more stringent than that of demonstrating a substantial relationship between the subject matter of successive representations. Even though the simultaneous representations may have nothing in common, and there is no risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be required. Indeed, in all but a few instances, the rule of disqualification in simultaneous representation cases is a per se or "automatic" one.

Id. at 284 (footnote omitted).

The duty of loyalty requires attorneys and law firms to make full and complete disclosures to their clients. A full and candid disclosure is critical because it allows clients to (i) evaluate whether their law firm's duty of loyalty has been compromised by the adverse representation, and (ii) make informed decisions on whether to continue using the law firm anyway. When a law firm (*e.g.*, Sheppard) conceals information about representing one adverse party (*e.g.*, South Tahoe), the client (*e.g.*, J-M) cannot give informed

consent to the representation because it did not have basic information needed to make an informed decision. To make matters worse, the fact that Sheppard disclosed its hope to be able to represent the Los Angeles Department of Water and Power ("LADWP") in the future—an entity which had interests adverse to J-M in the underlying litigation matters—shows that Sheppard knew that its duty of loyalty to its clients required specific disclosures. However, Sheppard's decision to disclose only certain conflicts, and to conceal others, prevented J-M from making an informed decision. (Answer Br. at 26.) Here, Sheppard's false assurances resulted in catastrophe for J-M. Sheppard was disqualified after J-M invested more than 16 months to work with Sheppard on litigation and spent millions of dollars to pay for more than 10,000 hours of work—any client's worst nightmare.

If Sheppard is correct, ACC and its members fear that the values of openness, integrity, trust, and loyalty, which are the hallmarks of the attorney-client relationship, would be undermined. Law firms would have license to conceal actual or impending conflicts of interest from clients to induce them into agreeing to an advance waiver that could later be enforced against them. Indeed, firms have every financial incentive to use these general and open-ended advance conflict waivers to their advantage. By doing so, law firms avoid the difficult conversations with clients about conflicts and ensure that they win or retain the business. These incentives would harm the attorney-client relationship and encourage secrecy by law

firms because there are limited downsides if the waivers are enforceable (despite the concealment), and tremendous upside for financial gain. For clients, unless an actual conflict surfaced, they would always have to wonder whether a conflict was the reason why its lawyers declined to advocate a certain position or persuaded the client not to depose a particular witness. If so, all clients would live with the constant fear of having to face the litigation nightmare that J-M confronted here—*i.e.*, being deprived of a party's counsel of choice, midway through a massive litigation matter, because counsel ignored its ethical duty and failed to inform the client of known potential and actual conflicts of interest.

This is not and cannot be the rule. Indeed, in cases where such flagrant violations have been found, courts have uniformly found against the conflicted counsel. *See, e.g.*, *State Compensation Insurance Fund v. Michael D. Drobot Sr., et al.*, 2016 WL 3524330, at *29 (C.D. Cal. 2016) (granting disqualification motion when a law firm simultaneously represented a plaintiff insurance company which was suing a group of doctors on alleged violations of the civil RICO statute, and one of the defendant doctors in a separate matter); *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 105 F. Supp. 3d 1100, 1118-19 (E.D. Cal. 2015) (finding advance waiver insufficient to avoid disqualification of firm that represented defendant and had done work for plaintiff's parent company); *Western Sugar Coop. v. Archer-Daniels-Midland Co.*, 98 F. Supp. 3d 1074, 1083-84 (C.D. Cal. 2015) (rejecting law

firm's argument that advanced waiver should be enforced due to client sophistication, and held that the advanced waiver did not amount to a full and reasonable disclosure of the potential conflict and was therefore unenforceable); *see also*, *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796 (N.D. Cal. 2004).

Informed consent, through full and complete disclosure by attorneys and law firms of known and foreseeable conflicts, preserves and advances the duty of loyalty. Such a rule would properly balance the competing interests of protecting clients from unknowingly entering into an agreement with attorneys and law firms to the clients' disadvantage, and ensuring that clients will still be able to retain counsel of their choice. This is particularly true with advance conflict waivers, where firms are both setting and interpreting the terms and scope of these waivers. In this context, attorneys must be held to the highest ethical standards, which will not only protect clients, but will also promote public confidence in the legal system.

For this reason, the disclosure of specific facts relating to any known, actual or impending conflict must be required as part of any advance waiver of conflicts to clients, regardless of their sophistication.

II. WHETHER AN ADVANCE WAIVER IS ENFORCEABLE SHOULD NOT DEPEND ON CLIENT SOPHISTICATION OR BARGAINING POWER

Sheppard contends erroneously that, for sophisticated users of legal services who are separately represented by counsel, law firms may obtain informed consent on a broad and open-ended advance waiver of conflicts simply by presenting the agreement to in-house counsel for review, without the need for any specific disclosures of known conflicts. (Opening Br. at 37.) According to Sheppard, such consent may be enforceable even when the law firm in question actively concealed known conflicts of interest from the client. (*Id.*) Not true. All clients—including sophisticated corporate clients—depend exclusively on their attorneys to identify and disclose to them potential and actual conflicts of interest.

The duty of loyalty requires an attorney to disclose to a client all facts relating to a known potential or actual conflict of interest, *without regard to client sophistication*. *See* Cal. R. Prof. Conduct 3-310. This time-honored rule is not founded merely on sound legal principles (which J-M has already explained in its Answer Brief, (Answer Br. at 25-31), but it is also founded on the practical realities of the legal industry. Attorneys and law firms jealously guard information pertaining to who they represent, and for which matters they have been hired. As such, clients are kept in the dark about these facts, and they must rely on their attorneys and law firms to identify

and disclose known conflicts of interest. *See* Lawrence J. Fox, *All's O.K. Between Consenting Adults: Enlightened Rule on Privacy*, Obscene Rule on Ethics, 29 HOFSTRA L. REV. 701, 716 (2001).

In recent years, this asymmetry of information has tilted even more sharply in favor of attorneys and law firms. Law firms have expanded across the country and around the world. This international growth means that many law firms have vastly expanded their practice areas and size to meet the growing demands of thousands of individual and corporate clients around the world. Indeed, many large law firms now have dedicated staff and computer systems to check for conflicts. Clients, on the other hand, simply do not have access to, or the capability of keeping track of, this information. Consequently, clients must rely on their attorneys to disclose to them (i) when their representation becomes substantially related to the work for another client; and (ii) when their confidential information might be used against them. This imbalance of information is precisely why attorneys and law firms are duty-bound to use the highest ethical standards as fiduciaries in identifying and disclosing conflicts of interest to their clients. This is a bed-rock principle on which the foundation of the attorney-client relationship rests.[3]

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[3] Sheppard argues that a broad advance conflict waiver is presumptively enforceable against an "experienced user of legal services" who is "represented by independent counsel." ABA Formal Opinion 05-436, May 11, 2005. But this argument ignores the fact that even a

Not only does the rule advanced by Sheppard weaken this principle by elevating an attorney's profits above the client's trust, it also ignores the practical reality that even sophisticated clients often have little bargaining power against a large law firm. New clients of a law firm are routinely presented with an advanced conflict waiver as a non-negotiable, take-it-or-leave-it option. This is particularly true for clients who may not have future matters with which to leverage. *See* W. Bradley Wendel, *Pushing the Boundaries of Informed Consent: Ethics in the Representation of Sophisticated Clients*, 47 U. TOL. L. REV. 39, 42 (2015). And long-time clients may agree to an advance waiver because of the enormous cost and burden of moving the work to a new firm without the institutional knowledge of that client. Designed to protect law firm profits, these law firm practices persist because clients have limited bargaining power to negotiate these terms. *See, e.g.*, Blake Edwards, *Gilead Sciences' GC is Sick of Conflict Waivers*, Bloomberg Big Law Business, Aug. 25, 2014, *available at* https://bol.bna.com/gilead-sciences-gc-is-sick-of-conflict-waivers/.[4]

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sophisticated client needs basic information concerning known conflicts before it can make an informed decision.

[4] When it comes to bargaining with outside counsel, even highly experienced in-house counsel are constrained by the practicalities of having limited resources at their disposal. For instance, many of ACC's members work for small companies in small legal departments that are dependent on outside firms for the bulk of their legal work. They cannot do more work in-house. *C.f.* Lipson, Engel and Crespo, *Symposium: The Changing Role and Nature of In-house and General Counsel: Foreword:*

Further, a sophisticated client that has agreed to an advance conflict waiver cannot predict when changes in circumstances of the representation would trigger additional disclosure requirements. For example, law firm mergers could expand the size and scope of a firm so that clients suddenly become adverse to one another. *See Western Sugar Coop.*, 98 F. Supp. 3d at 1083 (declining to enforce 16-year-old advance conflict waiver against client that had become adverse to another client after law firm merger). In this situation, law firms have an ethical responsibility to disclose the new circumstances and obtain informed consent from clients, regardless of their sophistication or the existence of an advance conflict waiver.

III. INVALIDATING THE CONFLICT WAIVER IN THIS CASE WILL NOT HAVE A DRASTIC IMPACT ON THE LEGAL INDUSTRY

Sheppard argues that, unless courts enforce advance conflict waivers against clients, law firms would not be able to operate in the current legal market. According to Sheppard, without enforcement of broad advance conflict waivers, law firms might not take on new clients out of the fear of losing existing clients, and law firms may even lose existing clients through disqualification motions based on the fact that the law firm represents

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Who's in the House? The Changing Nature and Role of In-house and General Counsel, 2012 WIS. L. REV. 237, 242-43 (Nov. 18-19, 2011).

adverse parties in unrelated matters. (Opening Br. at 37-40.) These concerns are unfounded. Indeed, ACC and its members certainly have not heard complaints from corporate entities that an inability to use their firm of choice is troubling.

This is not the first time that courts have been confronted with the issue of enforceability of advanced conflict waivers, and whether a law firm is required to disclose basic information concerning known conflicts of interest when obtaining informed consent from clients. In *Visa USA v. First Data Corp*, 241 F. Supp. 2d 1100 (N.D. Cal. 2003), the court upheld the enforceability of an advanced waiver of conflicts. In that case, Heller Ehrman represented First Data (client) in connection with a patent infringement matter. 241 F. Supp. 2d at 1102. Although no conflicts were revealed at the time of engagement, Heller Ehrman was aware that it had a significant client relationship with Visa, which was in the same industry as First Data. *Id.* at 1102-03. As a result, Heller Ehrman asked First Data specifically to agree to an advance waiver provision that would permit Heller to represent Visa in any future disputes, including any future litigation between First Data and Visa. *Id.* at 1102. Later when Visa sued First Data, Visa engaged Heller Ehrman as its counsel and First Data filed a motion for disqualification. *Id.* at 1103. The court upheld the advance conflict waiver because Heller Ehrman provided First Data with enough information

concerning *the matters potentially included in the waiver*. *Id.* at 1107-08. As such, the advanced waiver was enforceable.

In *In re Gabapentin Patent Litig.*, 407 F. Supp. 2d 607 (D.N.J. 2005), Kaye Scholer represented Pfizer in litigation matters. *Id.* at 609. Kaye Scholer later hired two attorneys who represented another client whose interests were adverse to Pfizer. *Id.* Before those two attorneys joined Kay Scholer, however, the firm informed the other client about Kay Scholer's relationship with Pfizer and obtained a specific waiver that would allow the firm to continue to "serv[e] as counsel of record for Pfizer in the Neurontin or Gabapentin matter," or in connection with any individual action or FDA issues relating to those matters. *Id.* at 610. Under these circumstances, the court upheld the validity of Kay Scholer's waiver. *Id.* at 612. *Visa USA* and *Gabapentin* demonstrate that advanced waiver of conflicts of interest can be enforceable, but only if the clients are given enough information concerning the matters potentially included in the waiver to make an informed decision.

More importantly, these cases that required attorneys to make basic disclosures did not bring about the demise of the legal market. And neither will affirming the Court of Appeal's decision. The reason is simple: for law firms, a client lost to conflicts for one firm is another firm's gain. There is no shortage of lawyers to serve paying corporate clients. While a conflict of interest may hurt an individual firm's bottom line, this is not a loss to the industry as a whole. Nathan M. Crystal, *Enforceability Of General Advance*

Waivers Of Conflicts Of Interest, The Sixth Annual Symposium on Legal Malpractice and Professional Responsibility, 38 ST. MARY'S L. J. 859, 888 (2007).

In short, law firms should be required to disclose to clients all circumstances concerning known conflicts of interest when attempting to obtain the clients' informed consent. ACC agrees with J-M that a full and complete disclosure by attorneys and law firms will only protect the clients' ability to make *informed* decisions as to whether to retain a particular law firm in light of conflicts. (Answer Br. at p. 25-31.) After all, the first step in making an *informed* decision is an understanding of the relevant facts. Thus, full disclosure of all relevant facts should be the default rule, not the exception.

IV. COURTS IN CALIFORNIA AND ACROSS THE COUNTRY HAVE REFUSED TO ENFORCE ADVANCE CONFLICT WAIVERS USING A SO-CALLED "NATIONAL STANDARD"

Relying heavily on the ABA Model Rules and D.C. Code of Professional Responsibility, Sheppard also claims that its conduct is justified under a so-called "national standard", which makes advance conflict waivers for sophisticated clients presumptively enforceable. (Opening Br. at 28-31; Reply Br. at 14-15.) However, courts around the country have rejected this so-called "national standard" for sophisticated clients that Sheppard Mullin urges this Court to adopt. *See In re Congoleum Corp.*, 426 F.3d 675 (3rd Cir.

2005); *Mylan Inc. et al. v. Kirkland Ellis LLP*, 2015 WL 12733414 (W.D. Pa. June 9, 2015); *Brigham Young Univ. v. Pfizer, Inc.*, 2010 WL 3855347 (D. Utah Sept. 29, 2010); *Brigham Young Univ. v. Pfizer, Inc.*, 2010 WL 11414472 (D. Utah Aug. 24, 2010); *Celgene Corp. v. KV Pharm. Co.*, 2008 WL 2937415 (D.N.J. July 29, 2008) (all invalidating advance conflict waivers for sophisticated clients); *see also*, W. Bradley Wendel, *Pushing the Boundaries of Informed Consent: Ethics in the Representation of Legally Sophisticated Clients*, 47 U. TOL. L. REV. 39, 56-57 (2015).

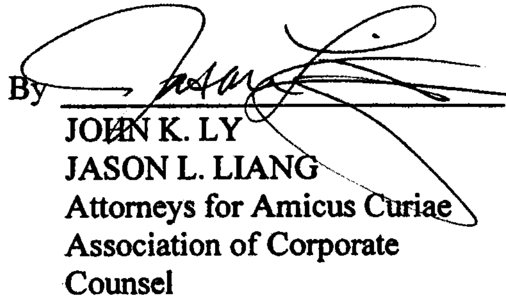
More importantly, even if Sheppard is correct about the existence of its "national standard," this argument has no application to California. The gravamen of Sheppard's argument is based on the ABA Model Rules and D.C. Code of Professional Responsibility. As one federal district court noted, "the Model Rules are *merely* persuasive authority." *Western Sugar Coop.*, 98 F. Supp. 3d at 1083 (emphasis added). J-M correctly points out in its brief that California has not adopted either standard and requires all of its attorneys to disclose conflicts and obtain informed consent. (Answer Br. at pp. 32-34.) Any new changes in the application of those ethical rules should come from the State Bar, after appropriate public input; it should not come from this case.

CONCLUSION

Sheppard advances a theory of attorney ethics that essentially excuses it from the duty of loyalty to sophisticated clients and allows it to conceal essential facts necessary to obtaining informed consent to a conflict of interest. Sophisticated clients such as those represented by ACC members are no more able to detect conflicts of interest within their law firms than are individual consumers – concealment of such conflicts cannot be tolerated for any type of legal consumer.

Dated: December 1, 2016

Respectfully submitted,
LIANG LY LLP



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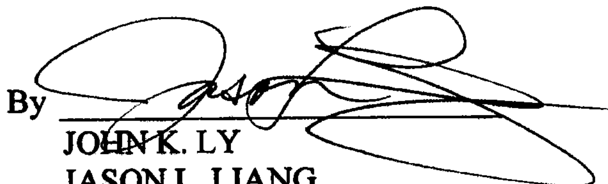
Counsel

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that, pursuant to Rule 8.204(c) of the California Rules of Court, the enclosed brief was produced using 13-point type, including footnotes, and contains approximately 5,250 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 1, 2016

Respectfully submitted,
LIANG LY LLP



By ______________________
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Attorneys for Amicus Curiae
Association of Corporate
Counsel

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the State of New York, County of New York. I am over the age of 18 and not a party to the within action. My business address is 7 West 36th Street, New York, New York 10018

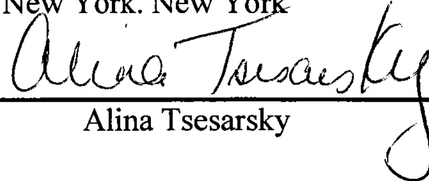
On December 1, 2016 I served the foregoing document described as **Application for Leave to File *Amicus Curiae* Brief and; [Proposed] *Amicus Curiae* Brief in Support of Association of Corporate Counsel in Support of Defendant and Respondent J-M Manufacturing Co., Inc.** on the interested parties in this action

I caused the above document(s) to be served on each person on the attached list by the following means:

[X] I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with the United States Post Office on December 1, 2016, following the ordinary business practice.

I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business. I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on 1st day of December, 2016, at New York. New York



Alina Tsesarsky

SERVICE LIST

Sheppard, Mullin, Richter & Hampton LLP v. J-M Manufacturing Co., Inc.
Supreme Court of the State of California, Case No. S232946
Second Appellate District, Division Four, Case No. B256314
Superior Court of Los Angeles County, Case No. YC067332

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S232946 SUPREME COURT COPY

In the

Supreme Court

of the

State of California

ORIGINAL WITH PROOF OF SERVICE

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP,

Plaintiff and Appellant,

v.

J-M MANUFACTURING CO., INC.,

Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEALS OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR, CASE NO. B256314

SUPERIOR COURT OF LOS ANGELES COUNTY, CASE NO. YC067332
HONORABLE STUART M. RICE, JUDGE

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF and [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF DEFENDANT AND RESPONDENT J-M MANUFACTURING CO., INC.

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On December 7, 2016 I served the foregoing document described as **Application for Leave to File *Amicus Curiae* Brief and; [Proposed] *Amicus Curiae* Brief in Support of Association of Corporate Counsel in Support of Defendant and Respondent J-M Manufacturing Co., Inc.** on the interested parties in this action

I caused the above document(s) to be served on each person on the attached list by the following means:

[X] I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with Federal Express Overnight Delivery on December 7, 2016, following the ordinary business practice.

I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business. I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

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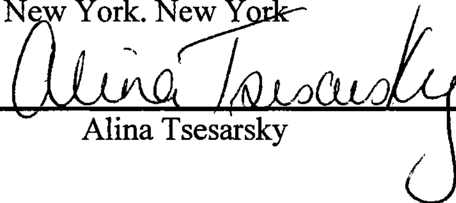

Alina Tsesarsky

S232946

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ORIGINAL
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SHEPPARD, MULLIN, RICHTER & HAMPTON LLP,

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AFTER A DECISION BY THE COURT OF APPEALS OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR, CASE NO. B256314

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF and [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF DEFENDANT AND RESPONDENT J-M MANUFACTURING CO., INC.

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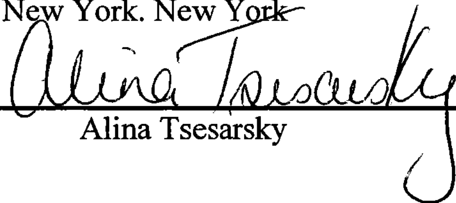

Alina Tsesarsky