SUPREME COURT COPY

No. S232946

IN THE SUPREME COURT OF CALIFORNIA

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP,

Plaintiff and Respondent,

v.

J-M MANUFACTURING CO., INC.,

Defendant and Appellant.

SUPREME COURT
FILED

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Deputy

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

CONSOLIDATED ANSWER TO BRIEFS OF AMICI CURIAE

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INTRODUCTION

The amicus briefs submitted in support of J-M are notable for what they don't say. They don't defend J-M's position that its engagement agreement with Sheppard Mullin was somehow rendered entirely "illegal" as the result of a supposedly invalid conflict waiver. The solitary brief arguing that any conflict of interest, irrespective of the circumstances, justifies the complete and disproportionate forfeiture of all fees doesn't address relevant case law nor provide any justification for that extreme view. And as for the issue that is the focus of J-M's amici's briefs—whether a sophisticated client represented by independent counsel can give informed consent to a comprehensive waiver of conflicts—they uniformly ignore Sheppard Mullin's written disclosures that plainly informed J-M's General Counsel of the scope of the waiver and its potential consequences.

What the briefs of J-M's amici do say is unpersuasive, contrary to authorities from across the nation, and divorced from the realities of the modern legal marketplace. They dispute the relevance of client sophistication and representation by independent counsel, even though the ABA Models Rules, the Restatement, legal scholars, and leading bar associations all emphasize the importance of those factors to informed consent. They assert that even sophisticated corporations lack bargaining power to refuse requests for comprehensive waivers of conflicts, even though J-M itself has refused to waive conflicts in other matters, and the contemporary legal market obviously is highly competitive. And they insist that a client can only give informed consent where the names of specific clients falling within the scope of the conflict waiver are disclosed, irrespective of whether such a disclosure would actually increase a client's capacity to make an informed decision.

In short, the amici supporting J-M have ignored much of what this case is about, the realities of law practice, and the harm that their absolutist approach to informed consent would have on the ability of clients to obtain the services of their preferred counsel.

ARGUMENT

I. No Amicus Supports J-M's Position Regarding Arbitration

None of the amicus briefs filed in support of J-M addresses, much less supports, J-M's contention that the California Arbitration Act permits courts to vacate arbitration awards based on alleged violations of the Rules of Professional Conduct and other non-legislative expressions of public policy. (See OBOM at pp. 12-26; RBOM at pp. 3-11.) A distinguished panel of arbitrators fully considered and rejected J-M's claims following an evidentiary proceeding—an arbitration to which J-M undisputedly agreed. This Court can and should reverse the Court of Appeal's judgment on the arbitration issue alone.[1]

II. J-M Gave Informed Written Consent to the Conflict Waiver

The arguments of J-M's amici fail because they (1) completely ignore Sheppard Mullin's written disclosures and the material edits to the engagement agreement made over several days by J-M's General Counsel in consultation with J-M's CEO, (2) trivialize the critical fact that J-M, an undisputedly sophisticated client, was represented by independent counsel in negotiating the agreement, and (3) ask this Court to depart from the

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[1] Consistent with the significance of the arbitration question presented here, this Court recently granted and held a petition for review in *Borisoff v. The Pullman Group, LLC*, No. S237730—a case that only involves arbitration-related issues—pending resolution of this case.

national standard upholding the validity of comprehensive conflict waivers signed by sophisticated corporations like J-M who are represented by counsel.

A. Amici's Claims of Concealment Ignore Sheppard Mullin's Written Disclosures

The arguments of J-M's amici are based on false assertions of supposed "concealment." (See ACC Br. at pp. 2-3, 5-8, 10, 18; Corporations Br. at pp. 1-3, 6-8, 10, 13-14, 18-19.) In reality, Sheppard Mullin provided written disclosures to J-M and its General Counsel about the nature of the conflicts J-M was waiving. Those disclosures satisfied Rule 3-310's "informed written consent" requirement because they allowed J-M to understand "the relevant circumstances" and "the actual and reasonably foreseeable adverse consequences" of the conflict waiver. (Rules Prof. Cond., rule 3-310(A)(1)-(2).)

Sheppard Mullin's written disclosures informed J-M that:

- Sheppard Mullin "has many attorneys and multiple offices" and "*may currently* or in the future represent one or more other clients (including *current*, former, and future clients) in matters involving [J-M]." (1AA201, italics added.)

- Sheppard Mullin's representation of J-M was "on the condition that [it] may represent another client in a matter in which [it did] not represent [J-M], even if the interests of the other client are adverse to [J-M]," *so long as* "the other matter is not substantially related to [Sheppard Mullin's] representation of [J-M]" and the firm had "not obtained confidential information of [J-M] material to representation of the other client." (1AA201.)

- The waiver covered Sheppard Mullin's "appearance on behalf of another client adverse to [J-M] in litigation or arbitration." (1AA201.)

- As part of "consenting to this arrangement," J-M was "waiving," with respect to the specified situations, the firm's "obligation of *loyalty* to [J-M] *so long as* [Sheppard Mullin] maintain[ed] confidentiality and adhere[d] to the foregoing limitations." (1AA201, italics added.)

- Sheppard Mullin was seeking the waiver to "meet the needs of *existing* and future clients" and to "remain available to those other clients and to render legal services with vigor and competence." (1AA201, italics added.)

- If "an attorney does not continue an engagement or must withdraw therefore, the client may incur delay, prejudice or additional costs such as acquainting new counsel with the matter." (1AA201.)

J-M's amici ignore these disclosures, as well as the detailed review and revision of the engagement agreement over several days by J-M's General Counsel and CEO. It is uncontested that J-M's General Counsel discussed the engagement agreement for two hours with Sheppard Mullin's lead partner (2AA476-477), and then took four days to confer with J-M's CEO about its terms and to revise it. (2AA477-478.) And before signing the agreement, J-M's General Counsel made material, hand-written edits to it, including to the paragraph preceding the conflict waiver. (Opn. at pp. 5-6; 1AA201.)

Yet J-M never voiced any objection to the conflict waiver or any of the disclosures quoted above. (2AA477-478.) Nor, significantly, has J-M ever argued that it did not understand those disclosures. Indeed, J-M's General Counsel signed the agreement just below her affirmation that "[t]he

undersigned has read and understands this engagement letter" and that J-M "has waived any conflict of interest on the part of this Firm arising out of the representation described above." (1AA204.) Because "[r]etainer agreements are enforced like any other contract if they are certain and unambiguous" (*Banning Ranch Conservancy v. Superior Court* (2011) 193 Cal.App.4th 903, 912), this Court should enforce that clear affirmation.

J-M's amici do not address these important facts that directly undermine the false narrative of concealment on which their arguments are premised. In fact, despite claiming Sheppard Mullin engaged in "concealment," J-M's amici do not address any of Sheppard Mullin's written disclosures or the arbitration panel's finding that Sheppard Mullin acted in good faith. (3AA674 ["The Arbitrators find the evidence does not support a finding of fraud, or a basis for punitive damages. The evidence weights on the side that the firm honestly and in good faith believed that no conflict existed when it undertook the Qui Tam defense."].)[2] While J-M's amici may believe that a law firm commits fraud unless it discloses each and every entity that is or might be covered by a conflict waiver, that is not and should not be the law—especially where, as here, a sophisticated client is represented by counsel and that client understands the waiver and appreciates its potential consequences.

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[2] This claim of concealment by J-M's amici regarding the engagement agreement was fully and properly vetted before the panel in the arbitration, which is particularly significant given this Court's holding that claims of fraudulent inducement are subject to arbitration under the California Arbitration Act. (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323 ["claims of fraud in the inducement of the contract (as distinguished from claims of fraud directed to the arbitration clause itself) will be deemed subject to arbitration"].)

B. Amici Trivialize the Importance of J-M's Sophistication and Representation by Counsel

J-M's amici essentially contend that J-M and its General Counsel were incapable of understanding "the relevant circumstances" and "the actual and reasonably foreseeable adverse consequences" of the waiver language. (Rules Prof. Cond., rule 3-310(A)(2).) They make this contention notwithstanding Sheppard Mullin's written discussion of the scope and implications of the conflict waiver, and despite J-M's consideration of the issue over multiple days and actual bargaining over the terms of the agreement containing the waiver.

The arguments of J-M's amici rest on the proposition that when J-M, a multi-billion dollar corporation, *and* its chief lawyer agreed Sheppard Mullin could currently or in the future represent any of J-M's adversaries—including the 200 qui tam plaintiffs—even in litigation against J-M, J-M nevertheless was not aware that Sheppard Mullin might provide one of those qui tam plaintiffs with a nominal amount of unrelated labor counseling. Instead, according to J-M's amici, a client's consent can never be sufficiently informed unless the law firm specifically identifies all of the other clients that are or may be covered by the waiver, even if the client signing the waiver or its counsel had no interest in the identities of those clients. (See, e.g., ACC Br. at pp. 10–13; Corporations Br. at pp. 13–15; Beverly Hills Bar Assn. Br. at pp. 6, 15–16; Murray Br. at pp. 4–5.)

This absolutist rule ignores the fact that what is actually necessary to "inform[] the client" of the "relevant circumstances" and the "actual and reasonably foreseeable adverse consequences" obviously depends on the surrounding circumstances, including the client's sophistication and its representation by independent counsel. (Rules Prof. Cond., rule 3-310(A)(1).) To hold otherwise would mandate an identical level of written

disclosures for large corporations represented by independent counsel and unrepresented individuals with only a high school education. Here, accounting for J-M's sophistication and representation by counsel, Sheppard Mullin's written disclosures were sufficient where J-M and its counsel were comfortable proceeding without having Sheppard Mullin identify its clients.

There is good reason to take into account client sophistication and representation by independent counsel. Sophisticated clients can meaningfully understand and balance the risks and potential consequences of agreeing to a comprehensive waiver of conflicts, and "can readily appreciate the potential impact of agreeing to forego objections to lawyers from the same law firm from being directly adverse in any unrelated case." (Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers As a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox* (2001) 29 Hofstra L.Rev. 971, 1007 (hereafter Lerner).) A sophisticated corporation like J-M "regularly allocate[s] risks in agreements" of all sorts, and is "perfectly capable of allocating a 'conflicts' risk in selecting outside counsel the same way it allocates business risks in running its business." (*Id.* at pp. 973, 1007.)

Representation by independent counsel is an equally, if not more important, factor, as it ensures that a client's consent is informed. As Professor Richard W. Painter, one of the leading experts on conflict waivers, has explained, "separate representation goes a long way toward educating the client about the types of conflicts that could arise in the future, the impact of such conflicts on the client, and alternatives to representation by a lawyer who seeks unreasonably broad waivers."

(Painter, *Advance Waiver of Conflicts* (2000) 13 Geo. J. Legal Ethics 289, 312.)[3]

In both transactional and myriad other settings lawyers provide critical advice to their clients regarding crucially important decisions. Indeed, representation by a lawyer in the negotiation of an agreement often itself is deemed sufficient to ensure that a party has made an informed decision. For example, the Legislature has deemed any spousal support provision in a premarital agreement to be unenforceable unless the spouse against whom enforcement is sought was "represented by independent counsel at the time the agreement containing the provision was signed." (Fam. Code, § 1612, subd. (c).) Similarly, in *American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, the Court of Appeal rejected a procedural unconscionability challenge to enforcement of an employment agreement in part because the employee "had the benefit of counsel." (*Id.* at pp. 1391-1392.)

In many other instances the law goes further and doesn't just deem parties sufficiently informed if they are advised by a lawyer, but actually empowers lawyers to bind their clients. In fact, "in ordinary civil actions, the 'general rule' is that counsel has authority to bind the client in virtually all aspects of litigation." (*People v. Blackburn* (2015) 61 Cal.4th 1113, 1124.) For example, a lawyer in a civil action can waive "the state constitutional right to a jury trial." (*Ibid.*) Courts likewise have recognized that a statement made by counsel can become a "binding judicial admission." (*Fassberg Construction Co. v. Housing Authority of City of*

[3] Professor Painter, along with five other legal scholars with particular expertise regarding conflict waivers, filed an amicus brief in support of Sheppard Mullin's position on this issue.

L.A. (2007) 152 Cal.App.4th 720, 752.) Accepting the importance of the lawyer's role in advising a client about a conflict waiver is far less dramatic than any of these examples.

The lawyer occupies a similarly significant role in criminal cases, even those involving the death penalty. As this Court has explained, "'[w]hen a defendant chooses to be represented by professional counsel, that counsel is 'captain of the ship' and can make all but a few fundamental decisions for the defendant.'" (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1320, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 376; see also, e.g., *People v. Taylor* (1982) 31 Cal.3d 488, 496 [explaining that in criminal cases "an attorney may waive his client's rights as to matters involving trial tactics" and that "courts should be reluctant to interfere with [those] decision[s]"]; *People v. Turner* (1992) 7 Cal.App.4th 1214, 1220 ["An attorney representing a criminal defendant generally has the right to control trial tactics and strategy, despite differences of opinion or even open objections from the defendant"].)

In a wide range of areas, then, well-settled legal doctrines recognize that lawyers adequately protect the interests of their clients (even unsophisticated clients), and the law often empowers lawyers to make critical decisions for their clients. Why then is a lawyer incapable of sufficiently advising and protecting the interests of a sophisticated client who is considering whether to agree to a comprehensive waiver of conflicts? Why is that lawyer per se incapable of understanding the plain language of that waiver and gathering all information he or she feels necessary to adequately counsel the client? The answer is that a lawyer *is fully capable* of performing those tasks. If a lawyer can even bind a client in other important situations, including in matters involving life or death, then surely the law should attribute great significance to the fact that a

lawyer was involved in a sophisticated client's negotiation, review, and execution of a conflict waiver.

J-M's amici nonetheless urge this Court to treat all clients the same when it comes to assessing informed consent. But there is no reason to interpret informed written consent under Rule 3-310 to require, in all circumstances, a list of every law firm client that a waiver might cover, even where neither the sophisticated client nor its independent counsel deem it necessary to receive such a list. Adopting such a requirement would generate unnecessary uncertainty and litigation about the adequacy of such a list and hence the enforceability of the waiver.

In part, this is because "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." (Law Firms Br. at p. 21.) This inquiry is made even more difficult because an attorney-client relationship can be "implied from the circumstances." (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1732-1733, quotation marks and citation omitted.) It also can be difficult to determine "whether a lawyer represents a corporate affiliate of a client" for conflict of interest purposes, as that determination "depends not upon any clearcut per se rule but rather upon the particular circumstances." (ABA Com. on Prof. Ethics, Opn. No. 95-390 (1995), p. 4; see also ABA Model Rules of Prof. Conduct, rule 1.7, com. 34 [explaining that a lawyer for an organization can be deemed to represent an affiliate where "the circumstances are such that the affiliate should also be considered a client of the lawyer"].) And in the case of unknown future clients, disclosure of the identities of such clients at the outset is by definition impossible.

Thus, there would be inevitable litigation about the adequacy of any "list" of entities or persons that a conflict waiver covers, as well as whether any *former* clients must also be included on the list. In turn, that would limit the ability of sophisticated clients with access to the advice of independent counsel from hiring the lawyer or law firm of their choice, because their preferred counsel may not be willing to take on a representation in the face of such uncertainty.

Rather than adopting the inflexible approach of J-M's amici, when the California State Bar's Standing Committee on Professional Responsibility addressed Rule 3-310 in its 1989 ethics opinion, it emphasized that "[w]hether a client's waiver of the protections provided by rule 3-310 . . . is 'informed' is obviously a fact-specific inquiry," and concluded that an "advance blanket waiver" may be valid "in appropriate circumstances and with knowledgeable and sophisticated clients." (State Bar Standing Com. on Prof. Responsibility & Conduct, Formal Opn. No. 1989-115.) That sensible, fact-specific view of Rule 3-310's informed written consent requirement cannot be reconciled with the approach advanced by J-M's amici.

As the foregoing demonstrates, representation by counsel regarding conflict waivers is not a hollow formality that can simply be ignored; nor can a client's level of sophistication, as J-M's amici attempt to do. For these reasons, the arguments of J-M's amici should be rejected.

C. Amici Provide No Justification for This Court to Reject the National Standard for Informed Consent

Multiple national authorities have recognized that sophisticated clients represented by independent counsel can give informed consent to comprehensive waivers of conflicts when accompanied by the sort of

disclosures provided by Sheppard Mullin. Yet J-M's amici ask this Court to reject that national standard for informed consent. There is no reason for this Court to make California an outlier on this important issue on which national uniformity is critical, especially where lawyers increasingly have multi-state practices in order to meet their clients' multi-state needs.

The ABA Model Rules, the Restatement, and two leading bar associations, among others, have all rejected the inflexible approach to informed consent that J-M's amici propose. Comment 22 to ABA Model Rule 1.7 makes clear that, where "an experienced user of the legal services is involved," an advance 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." (ABA Model Rules of Prof. Conduct, rule 1.7, com. 22; see also ABA Com. on Prof. Ethics, Opn. No. 05-436 (2005), p. 4.)[4] Comment d to Section 122 of the Restatement (Third) of the Law Governing Lawyers similarly instructs that "[a] client's open-ended agreement to consent to all conflicts" can be effective where the client "possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent." (Rest.3d Law Governing Lawyers (2000) § 122, cmt. d.) And the Washington D.C. and New York City Bar Associations have endorsed

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[4] The effort by some of J-M's amici to dismiss the relevance of the ABA's Model Rules conflicts with this Court's view that they are of persuasive value in interpreting California law. (See *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 (*Cobra Solutions*).) As such, by logical extension, they are worthy of some degree of deference under California law rather than the outright dismissiveness of J-M's amici.

similar rules. (See D.C. Bar Assn., Ethics Opn. 309 (2001); N.Y.C. Bar Assn. Com. on Prof. & Jud. Ethics, Formal Opn. 2006-1 (2006).)

None of the arguments that J-M's amici advance justifies departing from these national authorities and adopting a California-specific rule that would both limit client choice and disrupt the practice of law in this State.

The Beverly Hills Bar Association erroneously proclaims, based on a handful of federal district court cases, that "California" already has rejected the national approach to informed consent. (Beverly Hills Bar Assn. Br. at p. 6.) But its primary authority, *Concat LP v. Unilever PLC* (N.D.Cal. 2004) 350 F.Supp.2d 796, involved a conflict waiver signed by an individual who was not represented by independent counsel in negotiating the waiver. (See *id.* at pp. 801-802.) That two other federal district courts[5] have rejected the approach of the ABA Model Rules and the Restatement does not mean that "California" as a whole has done so; nor is it reason for this Court to depart from the State Bar Committee's 1989 ethics opinion or the "national standard set by the ABA Model Rules and the Restatement." (*Galderma Laboratories, L.P. v. Actavis Mid Atlantic LLC* (N.D.Tex. 2013) 927 F.Supp.2d 390, 404.)

The Beverly Hills Bar Association also erroneously asserts that the California Rules Revision Commission has declined to adopt the approach of the ABA Model Rules. (Beverly Hills Bar Assn. Br. at p. 10.) On the contrary, Comment 10 to California Proposed Rule 1.7 instructs that "[t]he experience and sophistication of the client giving consent, as well as

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[5] (See Beverly Hills Bar Assn. Br. at pp. 6, 11, citing *Lennar Mare Island, LLC v. Steadfast Insurance, Co.* (E.D.Cal. 2015) 105 F.Supp.3d 1100; *Western Sugar Corp. v. Archer-Daniels-Midland Co.* (C.D.Cal. 2015) 98 F.Supp.3d 1074.)

whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably understands the risks involved in giving consent." (Cal. Rules Revision Com., Rule 1.7 [3-310] Draft 5.1, <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000016077.pdf>, at p. 3; see also RBOM at p. 20.)[6] The Beverly Hills Bar Association strains to minimize the significance of this comment by focusing on inconsequential differences in wording between it and the corresponding comment in the ABA Model Rules. (See Beverly Hills Bar Assn. Br. at pp. 10, 14.) But there is no denying that proposed Comment 10 confirms that both client sophistication and representation by independent counsel are relevant to the informed consent inquiry.

This Court should not be distracted by the red herring posited by the ACC and the amici corporations that law firms are the ones that know "who they represent, and for which matters they have been hired" (ACC Br. at p. 10), and thus clients "would never be able to determine the law firm's confidential clients and matters unless the firm disclosed them." (Corporations Br. at p. 15). While it is true that a law firm will have more information about whom it represents, that is irrelevant to whether a sophisticated client represented by independent counsel can understand the scope and consequences of a comprehensive waiver of conflicts that is not limited to any specific clients.

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[6] While "the Commission's first version of Proposed Rule 1.7" did not include a comment "indicat[ing] that if a client is sophisticated, then a general, open-ended waiver is likely to be effective" (Beverly Hills Bar Assn. Br. at pp. 12-13), that is no longer the case, as proposed Comment 10 makes clear.

Rather, what matters to obtaining informed consent to such a waiver is whether the client understands that the waiver could potentially cover *any* entity or individual. That is something J-M obviously understood here, given (1) the plain language of Sheppard Mullin's written disclosures, (2) J-M's sophistication and use of independent counsel, (3) the absence of any claim by J-M or its General Counsel that they did not understand what was disclosed or what J-M was waiving, (4) J-M's review and editing of the agreement over four days, and (5) J-M's undisputed willingness to agree to the waiver without a list of Sheppard Mullin's clients.

Accordingly, the fact that a client may not be able to determine the specific identities of the particular law firm clients that might be covered by an open-ended waiver is beside the point, so long as the sophisticated client understands and chooses (with the advice of independent counsel) to broadly waive conflicts in a manner that is not limited to any particular client. If a sophisticated client and its independent counsel are comfortable agreeing to such a waiver even without a list of a firm's clients that might be covered by the waiver, they should be able to do so.

Of course, not all prospective clients will take the same approach. Some clients and their independent counsel may not be comfortable with a waiver at all, or only with a waiver that is limited to a particular conflict. Others may want any conflict waiver to be limited to a specific entity, or to certain types of matters (such as only transactional work, but not litigation). Or they may want a list of a firm's current, former, or potential clients before agreeing to a waiver. But the solution to these myriad scenarios is for sophisticated clients and their independent counsel to discuss limiting a proposed waiver as they deem appropriate with the lawyer they wish to hire.

This is the way that agreements are reached on all kinds of issues every day—including those involving lawyers and prospective clients, as J-M's fee negotiation with Sheppard Mullin shows. (See 2AA477.) In some circumstances, there will be a middle ground that would be acceptable to both the prospective client and the lawyer. When there is no such middle ground, the client can refuse to agree to any waiver at all, and instead obtain representation from alternative counsel.

The solution is thus not to blithely deem all comprehensive conflict waivers to be invalid. When a prospective client is both sophisticated and represented by counsel, there is no cause for imposing limitations that serve only to restrict intelligent choices, not to protect vulnerable individuals. The law instead should freely allow sophisticated clients to agree to a mutually acceptable conflict waiver, including comprehensive waivers like the one J-M agreed to here. This Court should adopt the approach of the ABA Model Rules, the Restatement, and leading bar associations, and align California with the national standard for informed consent.

III. Amici's Position Ignores the Realities of the Modern Legal Marketplace and Would Unnecessarily Restrict Client Choice

J-M's amici would prohibit the use of comprehensive waivers of conflicts—a well-established component of the contemporary practice of law both in California and throughout the nation—because such waivers supposedly can never be sufficiently informed absent disclosure of the names of all clients potentially covered by them. This paternalistic standard for informed consent would preclude sophisticated clients, advised by independent counsel, from voluntarily choosing to broadly waive conflicts in order to retain their preferred lawyer or law firm.

J-M's amici erroneously conflate a waiver of a limited aspect of the duty of loyalty, on the one hand, with the wholesale abandonment of that duty, on the other hand. Even when a client agrees to waive conflicts and any corresponding duty of loyalty as to the waived conflicts, the core aspects of the duty of loyalty remain in effect, including confidentiality and restrictions regarding adversity in the same or substantially related matters. Indeed, in recognition of this, the engagement agreement here expressly noted that those obligations would continue notwithstanding the waiver. (1AA201.)

Despite this, J-M's amici use this straw man as a reason to prohibit comprehensive conflict waivers because they supposedly "erode the duty of loyalty" (ACC Br. at p. 2) and "impair a corporation's ability to trust outside counsel." (Corporations Br. at p. 12). Yet this Court already has recognized that the duty of loyalty can be waived as to conflicts arising from unrelated matters. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 285, fn. 4 [noting that "most courts thus permit an attorney to continue the simultaneous representation of clients whose interests are adverse as to unrelated matters provided full disclosure is made and both agree in writing to waive the conflict"]; see also *Visa U.S.A., Inc. v. First Data Corp.* (N.D.Cal. 2003) 241 F.Supp.2d 1100, 1110 [holding that law firm "did not breach its duty of loyalty" to a client because it "receiv[ed] a valid prospective conflict waiver"].)[7] Rule 3-310's references to obtaining informed written consent to conflicting representations would make no sense if the duty of loyalty could not be waived concomitantly.

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[7] The amicus brief of Steven W. Murray is thus simply wrong in asserting that "Rule 3-310(C) . . . cannot be waived" and "[n]either can the duty of loyalty." (Murray Br. at p. 4.)

It is true that some clients place the utmost importance on the duty of loyalty, and they would not waive that duty even with respect to entirely unrelated representations where client confidences are maintained. But other clients care more about obtaining the services of a particular lawyer or law firm than they do about any limited impact on the duty of loyalty arising from a waivable conflict of interest (including conflicts like the imputed conflict at issue here, which arose from entirely unrelated labor counseling performed by a Sheppard Mullin attorney residing in a different office and completely unconnected to J-M).[8] J-M's amici nonetheless contend that all clients—even if represented by independent counsel and sophisticated—should be deprived of the ability to choose representation by a specific lawyer or law firm because of the potential impact on a limited aspect of the duty of loyalty. There is no reason to adopt such a rule, which would turn the duty of loyalty into a client straightjacket. (See Legal Scholars Br. at pp. 10–12 [explaining why inflexible conflict waiver rules can harm clients].)

The amici corporations strain to defend their proposed rule with hyperbole, claiming that "the reality of the legal marketplace is that only the largest of companies, like Walmart, Google and Apple, possess sufficient bargaining and legal spend to negotiate advance waivers out of the retainer agreement for their regular 'go-to' firms" and that the "vast

[8] Several of the cases that J-M's amici cite involved much more serious conflicts of interest. For example, both the ACC and Steven W. Murray rely on *State Compensation Insurance Fund v. Drobot* (C.D.Cal., June 24, 2016, Nos. SACV 13-0956, 15-1279) 2016 WL 3524330, which involved a law firm's attempt to "represent—at the same time, in the same litigation, in the same courthouse—a criminal and his victim." (*Id.* at p. *1; see ACC Br. at p. 8; Murray Br. at pp. 10-14.) The conflict at issue here is worlds away from the conflict in cases like *Drobot*.

majority of companies simply lack that kind of clout." (Corporations Br. at p. 16.) One need look no further than the facts of this case to conclude that argument is unfounded.

J-M clearly had significant "clout" over Sheppard Mullin, as it was able to negotiate a substantial 22% fee discount. (2AA477.) Yet despite this clout, J-M declined to negotiate any changes to the conflict waiver's scope or language. Instead, J-M accepted the waiver without expressing any concerns, even though J-M had rejected numerous waiver requests in the past, had "never waived any conflict for any of its other (past or present) attorneys," and had "refused to grant a conflict waiver to Morgan Lewis," another law firm, on the same day it signed the Sheppard Mullin engagement agreement. (1AA192; see also Law Firms Br. at p. 10, fn. 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"]; Prof. Liab. Insurers Br. at p. 12 ["sophisticated clients represented by counsel have the ability to negotiate the terms of an engagement agreement and revise, limit, or reject the conflict waiver if they so choose"].)

J-M's substantial bargaining power vis-a-vis its outside counsel is consistent with the well-recognized fact that corporations routinely "force outside law firms to compete for business" because "they have the economic leverage necessary to concentrate the attention of lawyers." (Wendel, *Pushing the Boundaries of Informed Consent: Ethics in the Representation of Legally Sophisticated Clients* (2015) 47 U.Tol. L.Rev. 39, 48-49.) Rather than sending all matters to a small number of firms, "in-house legal departments" regularly "break up legal work into discrete matters, which are then placed with a number of different outside law firms based on some combination of price and expertise." (*Id.* at p. 52; see also,

e.g., Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship* (2010) 78 Fordham L.Rev. 2067, 2082 [corporate clients increasingly "requir[e] firms to compete for every new piece of significant business and choos[e] the winner based on some combination of price and perceived expertise of the particular lawyers who would be working on the matter"].) Scholars also have recognized the "increased market power of corporate consumers of legal services" that has resulted from "better-staffed in-house legal departments, soft demand and entry of new players, and innovation in the pricing of legal services enabled by advances in project and information management." (Ratner, *Restraining Lawyers: From "Cases" to "Tasks"* (forthcoming 2017) Fordham L.Rev. <https://ssrn.com/abstract=2893354>, at p. 7 [as of Jan. 6, 2017].)[9]

Of course the practice of law is and should remain a profession despite these changes. But that does not mean the law should ignore modern realities when defining rules applicable to the profession. As this Court recognized over two decades ago, "the contemporary changes in the legal profession . . . make the assertion that the practice of law is not

[9] The fact that, unlike in previous generations, many corporate clients now employ scores (and in some cases hundreds) of law firms helps to explain why conflict waivers have become so significant within the last few decades. In the absence of a comprehensive conflict waiver, if a large corporation retains hundreds of law firms at any given time for various discrete matters, then any prospective client of those firms with a new matter adverse to that large corporation will likely be turned away. This result is hardly to the benefit of such prospective clients, or to those law firms that are forced to turn away a potentially important new representation (whether paid or pro bono) because it is representing a large corporation on a smaller, unrelated matter. Allowing sophisticated corporate clients to agree to a comprehensive waiver of conflicts would eliminate this problem, and there is no reason for the law to prevent that choice.

comparable to a business unpersuasive and unreflective of reality." (*Howard v. Babcock* (1993) 6 Cal.4th 409, 420 (*Howard*).) Indeed, "[c]ommercial concerns are now openly recognized as important to the practice of law" (*ibid.*), and those concerns—which impact both lawyers and clients—must be recognized in order to craft practical and fair approaches to the rules that govern the profession.

There simply is no basis for the amici corporations' assertion that if this Court upholds the conflict waiver in this case, "corporate law firms will all impose non-negotiable boilerplate advance waiver clauses through their retainer agreements." (Corporations Br. at p. 16.) That hyperbole rests on the false premise that law firms do not compete with each other, such that firms would not agree to represent a client without obtaining a comprehensive waiver of conflicts. Of course, that is not the reality of the contemporary marketplace for legal services. The modern "legal profession is a highly competitive one and there is no shortage of competent lawyers," and thus "[a]ny new client faced with a request who is unwilling to sign a prospective conflicts waiver can simply take their legal business elsewhere" if negotiations regarding the terms of a waiver are not successful. (Lerner, *supra*, 29 Hofstra L.Rev. at p. 1006.)

In fact, given their stated position in this case, the more than 5,600 members of the Beverly Hills Bar Association presumably would be willing to take on new clients without obtaining an advance waiver of conflicts. (Beverly Hills Bar Assn. Br. at p. 1.) Thousands of other lawyers in California surely would do the same. As the ACC admits, "[t]here is no shortage of lawyers to serve paying corporate clients." (ACC Br. at p. 15.)

But even if the amici corporations were correct that many lawyers would refuse to take on a representation unless a client agrees to a

comprehensive waiver of conflicts, prohibiting such waivers would not help. (Corporations Br. at p. 16.) Lawyers do not have "the duty to take any client who proffers employment," and "in the civil context" a client "has no 'right' to any attorney's services." (*Howard*, *supra*, 6 Cal.4th at p. 423.) Thus, lawyers who now may ask new clients to waive conflicts at the outset of the representation would simply exercise their right to decline a proposed representation if they could not obtain an enforceable conflict waiver. As the ACC readily concedes, the result will simply be that clients "may not have their first-choice lawyer." (ACC Br. at p. 4.)

The ACC also attempts to justify its position by claiming that the conflict waiver here "resulted in catastrophe for J-M" because Sheppard Mullin "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." (ACC Br. at p. 7.) The ACC, however, overlooks that this supposed "catastrophe" was nothing of the sort, given J-M provided no evidence that it suffered any injury or that it did not receive full value for that work. On the contrary, J-M stipulated in this action that it was neither challenging "the value or quality of Sheppard Mullin's work" nor making "any claim for costs (fees included) associated with replacing Sheppard Mullin [as counsel]." (Opn. at p. 9; see also 3AA580-581; 3AA677-678; RBOM at p. 24.)

It also should be noted that Sheppard Mullin's disqualification in the qui tam action was the direct result of J-M's own strategic choices. After being advised by other counsel that it might avoid paying Sheppard Mullin's fees if the firm was disqualified, J-M refused the district court's reasonable proposal that would have allowed Sheppard Mullin to continue

representing J-M with respect to the bulk of the qui tam claims. (See OBOM at pp. 9-10.)[10]

Equally unpersuasive is the ACC's claim that it has "not heard complaints from corporate entities that an inability to use their firm of choice is troubling." (ACC Br. at p. 14.) Common sense informs us that being deprived of the ability to hire their preferred lawyer or law firm would surely be troubling to a substantial number of corporations, particularly those facing bet-the-company litigation or high-stakes transactions. The fact that some corporations might be content with their second- or third-choice law firm is no reason to effectively foreclose other corporations that desire to hire their first-choice law firm from knowingly and voluntarily accepting the possibility that the law firm might undertake an "adverse" representation in an unrelated matter, such as providing unrelated labor counseling or other advice to another client.[11]

Finally, enforcing comprehensive waivers of conflicts given by sophisticated clients upon the advice of their independent counsel hardly benefits only large law firms. (See, e.g., Beverly Hills Bar Assn. Br. at pp.

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[10] Moreover, J-M was fully informed in the engagement agreement that it might incur "additional costs" if Sheppard Mullin was unable to "continue an engagement" (1AA201), yet nonetheless chose to broadly waive conflicts in order to obtain the considerable experience of the two former Assistant United States Attorneys it wanted to hire.

[11] Another reason the ACC may not have heard complaints about the inability of corporations to obtain counsel is due to the prevalence and importance of the type of conflict waiver that J-M signed here. Indeed, the fact that many corporate clients have waived conflicts increases the ability of other corporate clients, including those represented by members of the ACC, to hire their first-choice lawyers. The ACC would nonetheless eliminate those waivers, even though they play a significant role in expanding client choice.

2, 15; Corporations Br. at p. 11.) J-M's amici ignore both the significant restriction on client choice that would result from adopting their proposed rule, and its adverse impact on firms of all sizes. Indeed, for small firms dependent on a small number of clients, the inability to obtain a conflict waiver from other potential clients could be far more devastating if, as a result, they were precluded from handling a new matter for the small firm's long-standing client.

It is thus not surprising that law firms of all sizes, including those comprised of as few as two lawyers, filed an amicus brief in support of Sheppard Mullin. (See Law Firms Br. at p. 1.) Nor is it surprising that one of the amici corporations itself admits, "small- and medium-size law firms in California" have adopted "advance conflict waivers substantially similar to the waiver at issue in the case." (Corporations Br. at p. 3).

IV. The Amici Corporations' Conclusory Support for J-M's Bid for Complete Fee Forfeiture Ignores Applicable Law, Fairness, and Due Process

Of the four briefs submitted in support of J-M, only one addresses J-M's argument that complete fee forfeiture is required any conflict of interest regardless of the circumstances and irrespective of injury to the client. (Corporations Br. at pp. 18-19.) That brief's cursory argument does not even acknowledge, much less address, the authorities discussed in Sheppard Mullin's briefs that have rejected an absolute rule requiring complete fee forfeiture (no matter the circumstances) for any conflict of interest. (See OBOM at pp. 40-50; RBOM at pp. 25-29; see also Law Firms Br. at pp. 22-26.)

If anything, the amici corporations' argument confirms that what J-M really seeks is a punitive award designed to "send a message" to Sheppard Mullin. (Corporations Br. at p. 19.) But punishing Sheppard

Mullin without any showing that J-M actually suffered harm, and regardless of Sheppard Mullin's good faith, not only would be contrary to California law, but also would violate due process and run counter to this Court's and the U.S. Supreme Court's rejection of disproportionate punishments. Punitive awards must bear a "reasonable proportionality" to harm suffered, and take into account the "degree of reprehensibility" of the conduct at issue. (*Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1203, 1207; see also *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 426; OBOM at p. 49; Law Firms Br. at pp. 24-26.) Imposing complete fee forfeiture here, irrespective of any harm to J-M and good faith/reprehensibility, and subject to the vagaries of the amount of fees in a particular matter, would result in a vastly disproportionate, arbitrary, and unconstitutional punitive remedy.

This Court should decline to adopt an unfair and unnecessary rule that would automatically foreclose attorneys of any and all compensation for years of high quality legal work, irrespective of the attorneys' good faith, the lack of client injury, and other mitigating circumstances, whenever a conflict of interest arises in connection with a representation.

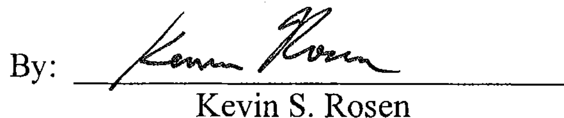
CONCLUSION

The Court should reverse the Court of Appeal's judgment.

DATED: January 17, 2017

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 
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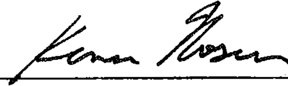
DATED: January 17, 2017 By: 

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CERTIFICATE OF SERVICE

I, Teresa Motichka, declare as follows:

I am employed in the County of San Francisco, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, San Francisco, CA 94105-0921, in said County and State.

On January 17, 2017, I served the following document(s):

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Executed on January 17, 2017, at San Francisco, California.

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