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.

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

PLAINTIFF-RESPONDENT'S MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF KEVIN S. ROSEN

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MOTION FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 452 and 459 and rule 8.520(g) of the California Rules of Court, Sheppard Mullin respectfully requests that this Court take judicial notice of the following documents attached as Exhibits A through I to the concurrently filed Declaration of Kevin S. Rosen (the "MJN Declaration"). These documents were before the Court of Appeal below, which had granted a similar request for judicial notice so that the record related to the arbitration would be complete:

1. The complaint in *United States ex rel. Hendrix v. J-M Manufacturing Company, Inc.*, No. 06-55-GW (C.D. Cal. filed Jan. 17, 2006) (the "Qui Tam Action"), submitted to the arbitration panel in *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc.*, No. 1220045609 (the "Arbitration Panel") on September 30, 2013 (attached as Exhibit A to the MJN Declaration);

2. The reporter's transcript of the June 6, 2011 hearing on South Tahoe Public Utility's Motion to Disqualify Sheppard Mullin as Counsel in the Qui Tam Action, submitted to the Arbitration Panel on September 30, 2013 (attached as Exhibit B to the MJN Declaration);

3. The expert report of Professor Lawrence C. Marshall, submitted to the Arbitration Panel on September 30, 2013 (attached as Exhibit C to the MJN Declaration);

4. June 7, 2011 email communications between Charles L. Kreindler of Sheppard Mullin and Camilla M. Eng of J-M, titled "Discussion re Motion to Disqualify" and Bates Stamped SMRH01316–01318, submitted to the Arbitration Panel on September 30, 2013 (attached as Exhibit D to the MJN Declaration);

5. The supplemental declaration of Bryan D. Daly, submitted to the Arbitration Panel on October 25, 2013 (attached as Exhibit E to the MJN Declaration);

6. The supplemental declaration of Jeffrey A. Dinkin, submitted to the Arbitration Panel on October 25, 2013 (attached as Exhibit F to the MJN Declaration);

7. The supplemental declaration of Charles L. Kreindler, submitted to the Arbitration Panel on October 25, 2013 (attached as Exhibit G to the MJN Declaration);

8. The supplemental expert report of Professor Lawrence C. Marshall, submitted to the Arbitration Panel on October 25, 2013 (attached as Exhibit H to the MJN Declaration); and

9. The supplemental declaration of D. Ronald Ryland, submitted to the Arbitration Panel on October 25, 2013 (attached as Exhibit I to the MJN Declaration).

The foregoing items are appropriate subjects of judicial notice and comply with the criteria for judicial notice under the California Rules of Court:

1. Exhibits A through I to the MJN Declaration are relevant to the appeal for the purpose of giving this Court a complete accounting of the facts before the Arbitration Panel in the event that this Court determines that the Arbitration Panel's award is subject to judicial review. (See Cal. Rules of Court, rule 8.252(a)(2)(A).)

2. Sheppard Mullin did not submit Exhibits A through I to the trial court as evidence with its petition to confirm the Arbitration Panel's award

because it took the position that the trial court could not review the award. Sheppard Mullin did, however, summarize the underlying facts to the trial court in an offer of proof. (See 3AA785-787; Cal. Rules of Court, rule 8.252(a)(2)(B).)

3. Although Exhibits A through I were not noticed by the trial court (Sheppard Mullin argued to the trial court that there was no legal basis for judicial review of the arbitration award, irrespective of the facts presented to the Arbitration Panel), Sheppard Mullin requests that this Court take judicial notice of these documents that were submitted to the Arbitration Panel. (See Cal. Rules of Court, rule 8.252(a)(2)(C); Evid. Code, § 452, subd. (h); see also Evid. Code, § 459.) Exhibits A and B are further judicially noticeable because they are federal court records. (Evid. Code, § 452, subd. (d).)

4. Sheppard Mullin made the same request to the Court of Appeal, which took judicial notice of these documents. (See May 1, 2015 Order.)

5. None of the items submitted with this motion relates to proceedings occurring after the judgment that is the subject of this appeal. (Cal. Rules of Court, rule 8.252(a)(2)(D).)

DATED: June 27, 2016

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: _____
Kevin S. Rosen

Attorneys for Plaintiff and Respondent
Sheppard, Mullin, Richter & Hampton LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This motion seeks judicial notice of (i) exhibits that where undisputedly submitted to the Arbitration Panel, including (ii) two exhibits that are federal court records. These materials—which the Court of Appeal judicially noticed—satisfy the requirements for judicial notice under the California Rules of Court, rules 8.252(a) and 8.520(g), because they are relevant to this proceeding; they are proper subjects of judicial notice under Evidence Code section 452 even though they were not submitted to the trial court; and they do not relate to proceedings occurring after the judgment that is the subject matter of this proceeding.

This appeal concerns, among other things, whether a final arbitration award is subject to judicial review. Sheppard Mullin argued to the trial court that there was no legal basis for judicial review of the arbitration award, irrespective of the facts presented to the Arbitration Panel. (3AA785-787.) Sheppard Mullin therefore did not file its arbitration briefs and declarations in the trial court. It did, however, make an offer of proof summarizing the facts that these materials establish. (See 3AA785-787.)

J-M, in contrast, relied extensively upon its arbitration briefs and declarations before the trial court. The trial court nevertheless ruled in Sheppard Mullin's favor and confirmed the arbitration award. Although J-M included some of the materials submitted to the Arbitration Panel in the Appellant's Appendix it filed in the Court of Appeal, it did not include all of the relevant submissions.

Sheppard Mullin therefore respectfully requests that this Court take judicial notice of Exhibits A through I to the Declaration of Kevin S. Rosen ("MJN Decl."). Each of these documents appears in the arbitration record

(MJN Decl. at ¶¶ 2-10) and supports Sheppard Mullin's offer of proof to the trial court (see 3AA785-787). Moreover, each of these documents is explicitly referenced, if not quoted verbatim, in the documents J-M included in its Appendix. (See, e.g., 2AA434; 2AA437-440; 2AA451-466; 2AA472-473; 2AA481-482; 2AA484; 3AA636-669). Judicial notice is proper because there can be no dispute that all of these documents were submitted to the Arbitration Panel and were before the Court of Appeal, which granted judicial notice. In addition, two of the exhibits are noticeable on the independent ground that they are federal court records. Sheppard Mullin filed a materially identical motion in the Court of Appeal on the same grounds, which that court granted. (See May 1, 2015 Order.)

II. ARGUMENT

The materials of which Sheppard Mullin seeks judicial notice meet all of the applicable requirements under the California Rules of Court:

First, they are relevant for the purpose of giving this Court a complete accounting of the facts before the Arbitration Panel (and before the Court of Appeal). (See Cal. Rules of Court, rule 8.252(a)(2)(A).) The materials in Exhibits A through I were all submitted to the Arbitration Panel and formed the basis for its award. Accordingly, when it became apparent from J-M's opening brief in the Court of Appeal that it would seek to re-litigate the Arbitration Panel's factual findings, Sheppard Mullin requested that the Court of Appeal take judicial notice of additional exhibits. The Court of Appeal granted Sheppard Mullin's request, which was in all material respects the same as this Motion. (See May 1, 2015 Order.)[1]

[1] In the Court of Appeal, J-M sought judicial notice of additional documents it filed in the arbitration in response to Sheppard Mullin's request, and

Because the attached materials were before the Court of Appeal when it issued its ruling, Sheppard Mullin requests that this Court take judicial notice of the same material to ensure that this Court considers all material before the Court of Appeal. (See *Ste. Marie v. Riverside County Regional Park & Open-Space District* (2009) 46 Cal.4th 282, 291, fn. 6 ["The Court of Appeal granted the District's first request for judicial notice .... Plaintiff recently filed a request for judicial notice of this same material in order to ensure this court considers it. We grant this request."].)

Second, although these materials were not presented to the trial court, they are subject to judicial notice under Evidence Code sections 452 and 459. (See Cal. Rules of Court, rule 8.252(a)(2)(C).) Evidence Code section 459, subdivision (a), provides that the "reviewing court may take judicial notice of any matter specified in Section 452." (Evid. Code, § 459, subd. (a).) In turn, Evidence Code, section 452, subdivision (h) allows the Court to take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).) Under this provision, the Court may take judicial notice of a document's existence, publication, or filing. (See, e.g., *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 808 ["the fact that news articles discussing [certain] topics ... were published is not reasonably subject to dispute" and is thus noticeable under section 452, subdivision (h)]; see also *Schweitzer v.*

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opposed Sheppard Mullin's request for judicial notice only to the extent that the Court of Appeal did not also take judicial notice of its additional documents. (See Appellant's Conditional Opp. at p. 3 ["[O]ur opposition to Sheppard's RJN is conditional, and is coupled with a condition motion for judicial notice of JM's own parallel documents. If the Court is inclined to grant Sheppard's RJN, then it should also grant JM's MJN."].) The Court of Appeal ultimately took judicial notice of both sets of documents.

Westminster Investments (2007) 157 Cal.App.4th 1195, 1203.)

Sheppard Mullin requests that this Court take judicial notice of the attached documents that were submitted to the Arbitration Panel. (Evid. Code, § 452, subd. (h).) Each of these documents appears in the administrative record of the arbitration proceeding. (MJN Decl. at ¶¶ 2-10.) These documents are all explicitly referenced and cited in documents included in J-M's Appendix, and J-M's briefing before the Court of Appeal likewise referred to and implicated the documents Sheppard Mullin seeks to have this Court notice. (See, e.g., 2AA434; 2AA437-440; 2AA451-466; 2AA472-473; 2AA481-482; 2AA 484; 3AA 636-669; see also Appellant's Br. at pp. 2, 4, 22.) Judicial notice is therefore proper under Evidence Code section 452, subdivision (h). (See *Walnut Producers of Cal. v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634, 649, fn. 6 [observing that "the fact of [two] filings [demands for arbitration] could be immediately verified with the American Arbitration Association (Evid. Code, § 452, subd. (h))," but denying the request for judicial notice on other grounds].)

Exhibits A and B to the MJN Declaration are additionally judicially noticeable as records of the federal qui tam action involving J-M, *United States ex rel. Hendrix v. J-M Manufacturing Company, Inc.*, No. 06-55-GW (C.D. Cal. filed Jan. 17, 2006). Evidence Code section 452, subdivision (d) allows the Court to take judicial notice of records of judicial proceedings. (See Evid. Code, § 452, subd. (d)) And records of related or collateral proceedings are particularly appropriate subjects of judicial notice. (See *In re Watford* (2010) 186 Cal.App.4th 684, 687, fn. 2 [granting judicial notice of records from related proceedings]; *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 483 [same].)

Finally, none of the materials to be noticed relates to proceedings that

have occurred after the orders and judgments that are the subject of this appeal. (See Cal. Rules of Court, rule 8.252(a)(2)(C)). The earliest order at issue here is the Arbitration Panel's January 30, 2014 award, but the materials to be noticed do not relate to any proceedings that took place after that date.

III. CONCLUSION

For these reasons, Sheppard Mullin respectfully requests that the Court grant its Motion for Judicial Notice.

DATED: June 27, 2016

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: _____
Kevin S. Rosen

Attorneys for Plaintiff and Respondent
Sheppard, Mullin, Richter & Hampton LLP

DECLARATION OF KEVIN S. ROSEN

I, Kevin S. Rosen declare as follows:

1. I am an attorney duly licensed to practice law in the State of California and am a partner at the law firm of Gibson, Dunn & Crutcher LLP, attorneys for Plaintiff-Respondent Sheppard, Mullin, Richter & Hampton LLP. I have personal knowledge of the facts stated herein, and if called as a witness, I could and would testify competently thereto. I make this declaration in support of Sheppard Mullin's Motion for Judicial Notice.

2. Attached hereto as Exhibit A is a true and correct copy of the complaint in *United States ex rel. Hendrix v. J-M Manufacturing Company, Inc.*, No. 06-55-GW (C.D. Cal. filed Jan. 17, 2006) (the "Qui Tam Action"), submitted to the arbitration panel in *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc.*, No. 1220045609 (the "Arbitration Panel") on September 30, 2013.

3. Attached hereto as Exhibit B is a true and correct copy of the reporter's transcript of the June 6, 2011 hearing on South Tahoe Public Utility's Motion to Disqualify Sheppard Mullin as Counsel in the Qui Tam Action, submitted to the Arbitration Panel on September 30, 2013.

4. Attached hereto as Exhibit C is a true and correct copy of the expert report of Professor Lawrence C. Marshall, submitted to the Arbitration Panel on September 30, 2013.

5. Attached hereto as Exhibit D is a true and correct copy of June 7, 2011 email communications between Charles L. Kreindler of Sheppard Mullin and Camilla M. Eng of J-M, titled "Discussion re Motion to Disqualify" and Bates Stamped SMRH01316–01318, submitted to the Arbitration Panel on September 30, 2013.

6. Attached hereto as Exhibit E is a true and correct copy of the supplemental declaration of Bryan D. Daly, submitted to the Arbitration Panel on October 25, 2013.

7. Attached hereto as Exhibit F is a true and correct copy of the supplemental declaration of Jeffrey A. Dinkin, submitted to the Arbitration Panel on October 25, 2013.

8. Attached hereto as Exhibit G is a true and correct copy of the supplemental declaration of Charles L. Kreindler, submitted to the Arbitration Panel on October 25, 2013.

9. Attached hereto as Exhibit H is a true and correct copy of the supplemental expert report of Professor Lawrence C. Marshall, submitted to the Arbitration Panel on October 25, 2013.

10. Attached hereto as Exhibit I is a true and correct copy of the supplemental declaration of D. Ronald Ryland, submitted to the Arbitration Panel on October 25, 2013.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on this 27th day of June, 2016, in Los Angeles, California.

Kevin S. Rosen

Exhibit A

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Attorneys for Qui Tam Plaintiff [Under Seal]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EDCV06-0055 SGL

UNITED STATES, THE STATES OF CALIFORNIA, DELAWARE, FLORIDA, NEVADA and TENNESSEE and THE COMMONWEALTHS OF MASSACHUSETTS AND VIRGINIA ex rel. [UNDER SEAL] Plaintiffs, vs. [UNDER SEAL] Defendant.		Civil No.: COMPLAINT FOR VIOLATION OF FEDERAL AND STATE FALSE CLAIMS ACTS JURY TRIAL DEMANDED **FILED IN CAMERA & UNDER SEAL (AS REQUIRED BY 31 U.S.C. § 3730(b)(2))**

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2006-086900 5 - Civil Filing Fee(1) $60.00
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2006-510000 11 - Special Fund F/F(1) $190.00
Amount :
Check Payment : 1044 / 250.00
Total Payment : 250.00

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Attorneys for Qui Tam Plaintiff John Hendrix

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES, THE STATES OF CALIFORNIA, DELAWARE, FLORIDA, NEVADA and TENNESSEE and THE COMMONWEALTHS OF MASSACHUSETTS AND VIRGINIA ex rel. JOHN HENDRIX, Plaintiffs, vs. J-M MANUFACTURING COMPANY, INC., a Delaware corporation, Defendant.		Civil No.: COMPLAINT FOR VIOLATION OF FEDERAL AND STATE FALSE CLAIMS ACTS JURY TRIAL DEMANDED **FILED IN CAMERA & UNDER SEAL (AS REQUIRED BY 31 U.S.C. § 3730(b)(2))**

I. INTRODUCTION

1. This is an action to recover damages and civil penalties on behalf of the United States, the States of California, Delaware, Florida, Nevada and Tennessee, the Commonwealths of Massachusetts and Virginia and numerous cities and public water agencies located within these States/Commonwealths (collectively the "real parties in interest" or "Real Parties") arising from false statements and claims made by defendant J-M Manufacturing Company, Inc. ("J-M") in violation of the Federal False Claims Act, 31 U.S.C. §§ 3729 et seq., and the following State False Claims Acts: California False Claims Act, Cal. Gov't Code §§ 12650 et seq., Delaware False Claims And Reporting Act, 6 Del. C. §§ 1201 et seq., Florida False Claims Act, Fla. Stat. Ann. §§ 68.081 et seq., Massachusetts False Claims Law, Mass. Gen. Laws ch. 12 §§ 5A et seq., Nevada False Claims Act, Nev. Rev. Stat. Ann. §§ 357.010 et seq., Tennessee False Claims Act, Tenn. Code Ann. §§ 4-18-101 et seq., and Virginia Fraud Against Taxpayers Act, Va. Code Ann. §§ 8.01-216.1 et seq. (collectively the "Acts"). The Real Parties defrauded by Defendant J-M include without limitation, the United States, the States of California, Delaware, Florida, Nevada and Tennessee, the Commonwealths of Massachusetts and Virginia, the cities and public water agencies listed on Exhibit 1, all other cities, public water agencies and political subdivisions within the States of California, Delaware, Nevada, Illinois and Tennessee and the Commonwealths of Massachusetts and Virginia that purchased J-M's Polyvinyl Chloride ("PVC") pipe between 1997 and present, all state agencies and departments in the States of Illinois and Indiana that purchased J-M's PVC pipe between 1997 and present, and all state and county agencies and departments in the State of Hawaii that purchased J-M's PVC pipe between 1997 and present.

2. For the past 22 years, J-M has been in the business of manufacturing and selling PVC pipe for the transmission and distribution of water. Federal military bases, State Roads and Highway Projects, cities and public water distribution agencies are the primary purchasers of J-M's PVC pipe. J-M sells to these entities by enlisting water works parts distributors to act as middlemen between J-M and its customers. J-M's PVC pipe products are designed almost exclusively for use in water distribution systems so that even parts sold to distributors are

eventually installed in these systems. J-M's PVC pipe products are used primarily in the "water main," the artery that typically runs down the middle of the street and carries water to the service laterals that branch off from the main and supply the individual homes and businesses, and the "transmission line," the trunk line that transports water from the water treatment plant to the water mains. PVC pipe for use in water mains is between four and 12 inches in diameter, whereas PVC pipe for use in the transmission line is between 14 and 48 inches in diameter.

3. To encourage and enable Real Parties to purchase J-M pipe, J-M provided Real Parties with copies of J-M's catalogs describing J-M's PVC pipe products. J-M's outside salespeople visited Real Parties regularly and brought new catalogs or updates to existing catalogs. J-M also provided Real Parties with copies of "new product bulletins" and other sales literature describing J-M's products. J-M also provided copies of its catalogs and sales literature to distributors, who in turn provided these materials to end-users, including Real Parties, to enable them to order J-M products through the distributor. In each of its sales documents, J-M made repeated representations that its PVC pipe products conform to applicable industry standards for PVC pipe.

4. Starting in at least 1997, J-M began knowingly to manufacture substandard PVC pipes, selling them through distributors to military bases, State Roads and Highway Projects, and public water distribution agencies as well as to contractors installing portions of the water distribution systems. J-M falsely represented to its customers, including Real Parties, that the PVC pipe products sold to them conformed to applicable industry standards for water works parts, when in fact the products were made using inferior materials, processing and tooling which resulted in their having substandard tensile strength. As a result, Real Parties have suffered, and will continue to suffer, substantial damage. Starting in at least 1997, more than half of the PVC pipe J-M supplied had tensile strengths below the minimum required by applicable industry standards and Real Parties' contracts and specifications. As a result of the diminished tensile strength, J-M's PVC pipe will have a shorter life span, is more likely to swell and leak, and will need to be replaced more quickly than pipe manufactured to specification.

5. The Federal and State False Claims Acts provide that any person who knowingly

submits or causes to be submitted a false or fraudulent claim to a governmental entity for payment or approval is liable for a civil penalty of up to $11,000 for each such claim, plus three times the amount of the damages sustained by the government. The Acts allow any person having information regarding a false or fraudulent claim against the government to bring an action on behalf of himself (the "qui tam plaintiff" or "relator") and the government and to share in any recovery.

6. Based on these provisions, qui tam plaintiff John Hendrix seeks to recover damages and civil penalties arising from Defendant J-M's actions in presenting false records and statements to its federal, state and local governmental customers and causing its distributors to submit false records, claims and statements to its federal, state and local governmental customers.

II. PARTIES

7. Qui tam plaintiff John Hendrix ("Relator") is a resident of Clifton, New Jersey. After graduating from college in December 2001, Relator began working for Defendant J-M on July 8, 2002 in its corporate headquarters in Livingston, New Jersey as an engineer in J-M's Product Assurance Division. Throughout his employment at J-M, the majority of Relator's job duties involved advising J-M on the technical aspects of claims brought by J-M's customers for failing or non-conforming product. To a lesser degree, Relator's job also involved sales and customer service work, including advising current and prospective customers (primarily fellow engineers) on technical aspects of J-M's products. On November 9, 2005, a little over a week after Relator wrote a memo to J-M management highlighting the fact that the tensile strength of J-M's PVC pipe was below that required by Underwriters Laboratories ("UL") to qualify for the UL Mark stamped on its pipes, J-M terminated Relator's employment.

8. Real Parties, on whose behalf Relator brings this suit, are the United States, the States of California, Delaware, Florida, Nevada and Tennessee, the Commonwealths of Massachusetts and Virginia, the cities and public water agencies listed on Exhibit 1, all of whom purchased J-M's PVC pipe between July 3, 2003 and August 31, 2005, all cities, public water agencies and political subdivisions within the States of California, Delaware, Illinois, Nevada and Tennessee and the Commonwealths of Massachusetts and Virginia who purchased J-M PVC pipe products

between at least 1997 and present, all agencies or departments of the State of Indiana who purchased J-M PVC pipe products between at least 1997 and present, and all state and county agencies and departments within the State of Hawaii who purchased J-M PVC pipe products between at least 1997 and present. Exhibit 2, incorporated herein, contains a partial list of federal projects for which the United States Armed Forces purchased J-M PVC pipe during the period between July 3, 2003 and August 31, 2005. Exhibit 3, incorporated herein, contains a partial list of projects for which the State of Florida purchased J-M PVC pipe during the period between July 3, 2003 and August 31, 2005.

9. At all times relevant to this Complaint, Defendant J-M Manufacturing Company, Inc. ("J-M") was a Delaware corporation with its headquarters at 9 Peach Tree Hill Road in Livingston, New Jersey. With $800 million in annual sales, J-M is the largest manufacturer of PVC pipe in the United States and the world. J-M manufactures its PVC pipe at 11 plants in the following locations: Fontana and Stockton, California; Pueblo, Colorado; Adel, Georgia; Wilton, Iowa; Batchelor, Louisiana; Winnebago, Minnesota; Butner, North Carolina; McNary, Oregon; Meadville, Pennsylvania; and Wharton, Texas. From its inception in 1982 until November 1, 2005, J-M was a wholly-owned subsidiary of Formosa Plastics Corporation, U.S.A. ("Formosa"). Formosa is largely controlled by the Wang family of Taiwan. Yung-ching Wang, known as "Y.C. Wang," is Formosa's Founder and Chairman of the Board. Each of Mr. Wang's ten children has served as an executive at either Formosa or one of its subsidiaries. Walter Wang, Y.C. Wang's youngest son, is the President of J-M.

III. JURISDICTION AND VENUE

10. This Court has jurisdiction over the subject matter of the Federal False Claims Act ("FCA") action pursuant to 28 U.S.C. § 1331 and 31 U.S.C. § 3732(a), which specifically confers jurisdiction on this Court for actions brought pursuant to 31 U.S.C. §§ 3729 and 3730. This Court has jurisdiction over the subject matter of the State False Claims actions pursuant to 28 U.S.C. § 1367 and 31 U.S.C. § 3732(b) because the State False Claims actions arise from the same transactions or occurrences as the Federal FCA action.

11. This Court has personal jurisdiction over Defendant J-M pursuant to 31 U.S.C. §

3732(a), which provides that "[a]ny action under section 3730 may be brought in any judicial district in which the defendant, or in the case of multiple defendants, any one defendant can be found, resides, transacts business or in which any act proscribed by section 3729 occurred." Section 3732(a) also authorizes nationwide service of process. During the relevant period, J-M operated a foundry in Fontana, California, at which many of the fraudulent practices occurred, and thereby transacted business in the Central District of California.

12. Venue is proper in this district pursuant to 31 U.S.C. § 3732(a) because J-M can be found in, resides in, and/or transacts business in the Central District of California and because many of the violations of 31 U.S.C. § 3729 described herein occurred within this judicial district.

IV. FRAUD AGAINST REAL PARTIES

A. Turnover in J-M's Upper Management

13. J-M was founded in 1982 when Formosa acquired the Pipe Division of Johns-Manville Corporation and created J-M. For its first 10 years, J-M's management was populated largely by former Johns-Manville employees. However, by the mid 1990s, most of the old Johns-Manville employees had either retired or left. In 1990, J-M's former parent company, Formosa Plastics Corporation, U.S.A. ("Formosa"), installed Walter Wang, the son of Formosa's Founder and Chairman of the Board, Y.C. Wang, as J-M's President. At the time he assumed this post, Mr. Wang was only 25 years old. Having just graduated from college, he had little to no practical experience in managing a company, let alone the world's largest manufacturer of PVC pipe. Shortly after naming Mr. Wang President, J-M moved its corporate headquarters from Stockton, California to Livingston, New Jersey, where it occupies the same office building in which Formosa and several other Formosa subsidiaries also have corporate offices.

14. Under Mr. Wang's leadership, J-M implemented a series of "cost-cutting" measures that undermined the quality of J-M's PVC pipe products. At Mr. Wang's direction, the outgoing former Johns-Manville managers were replaced by individuals with significantly less experience and fewer credentials. For instance, the Director of Production, who formerly had been a senior engineer, was replaced by Barry Lin, an accountant from Formosa's management center in Taiwan with no engineering background. The new Director of Engineering, Kaider Liao, did not have an

engineering degree. The new Quality Control Manager, Jack Hwang, was an electrical engineer with no experience or formal training in failure analysis. After Hwang left the Quality Control Manager post in 2004, the position was later filled in 2005 by a recent college graduate.

15. In filling these and other supervisory positions, J-M drew almost exclusively from two sources – Taiwanese nationals and recent college graduates (like Relator) – both of which garnered smaller salaries. Up until three years ago, Formosa owned and operated a boarding house near its Livingston, New Jersey headquarters to accommodate the large number of Taiwanese employees at J-M and its other subsidiaries who could not otherwise afford to live in the greater New York Metropolitan area on their modest J-M salaries.

16. Backed by this new crop of inexperienced managers, Mr. Wang shifted J-M's focus away from product quality to a single-minded mission of gaining market share and improving the bottom line irrespective of quality. Under the direction of Mr. Wang and his new managers, J-M implemented three "cost-cutting" measures that have seriously compromised the tensile strength of the majority of its PVC pipe.

B. Substituting Inferior Ingredients in PVC Compound

17. First, J-M began to substitute cheaper and lower quality ingredients in its PVC compound. While most PVC pipe manufacturers use for their compound a more expensive, pre-prepared stock formula published by the Plastic Pipe Institute, J-M uses a proprietary compound called "J-M 90" that it mixes itself. By making the compound itself, J-M can control the type of ingredients that go into it.

18. To save money, J-M replaced two primary ingredients – resin and additives (like wax and stabilizers) – with cheaper, lower grade brands. J-M replaced its more expensive, higher viscosity resin with a cheaper, lower viscosity resin. While J-M's previous resin had a viscosity rating of .92, the new resin had a rating of .88. In addition to being cheaper, the lower viscosity resin could be formed into pipe more quickly and with less processing, thereby allowing J-M to increase its production rates and output (as described in more detail below).

19. However, the effect of the lower viscosity resin and increased production rates was to decrease the compound's overall tensile strength. Because the lower viscosity resin was a more

ductile material, it required more processing to achieve the required tensile strength. However, instead of slowing its production rates to account for the lower viscosity resin, J-M increased its production rates to increase its output of PVC pipe. By switching other additives such as waxes and stabilizers to lower grade brands, J-M also decreased the tensile strength of its J-M 90 compound. Taken together, these substitutions accounted for a decrease in the tensile strength of the J-M 90 compound from nearly 8,000 pounds per square inch ("psi") to just above the minimum required tensile strength of 7,000 psi.

C. Accelerating Production Rates

20. With its J-M 90 compound hovering so close to the minimum tensile strength, J-M could not afford to make any mistakes in its manufacturing process. However, rather than use good manufacturing techniques, J-M began to make changes to its manufacturing process that further eroded the tensile strength and caused the finished PVC pipe to be out-of-specification.

21. PVC pipe is manufactured by extrusion. Broadly described, extrusion involves the following steps. The ingredients that comprise the PVC compound (e.g., base resin and additives like paraffin wax and calcium sterate) are weight-measured out of silos and poured into a hopper where they are mixed. The mixed PVC compound is then poured into the extruder where it is melted and formed by being forced (by a barrel and screw acting as an auger) through an orifice known as the die that creates the shape and dimensions of a pipe. Once out of the extruder and die, the hot PVC pipe is then cooled in a series of water cooling tanks.

22. To meet an ever increasing demand for PVC pipe, J-M began to increase production rates in each of its 11 plants that produce PVC pipe. Instead of investing in more extruders, replacing outdated extruders or building more plants, J-M started running its existing extruders (many of which are over 30 years old) at speeds that exceed the extruders' rated capacity. Each extruder has a recommended maximum output measured typically in pounds per hour, and J-M began running its extruders at 20 percent above the rated capacity.

23. As a result of the increased speed of J-M's production line, more torque and higher temperatures were needed to melt the J-M 90 compound and, once melted, the PVC material received less processing time in the extruder and die as it was being formed into pipe. The

temperature of the water being sprayed on the pipe in the cooling baths had to be lowered to counteract both the increased temperature of the pipe emerging from the extruder and the fact that the pipe was spending less time in the cooling baths. (Since the cooling baths occupy a fixed distance on the production line, the increased production rates had the pipe moving more quickly over this and all other parts of the production line.)

24. Not surprisingly, the effect of this accelerated manufacturing process (in addition to increased output) was to further decrease the tensile strength of J-M's PVC pipe. Like a cake baked for eight minutes at 800 degrees and then quickly cooled in a freezer, the PVC pipe being produced at the accelerated production rate was not as strong as pipe that was afforded proper processing time and conditions. Having been subjected to a quick burst of cooling, the surface of the outside of the pipe was hard whereas the portion of pipe below the surface, not having had adequate time to cool and form, was soft. The accelerated manufacturing process also created huge variations in the temperatures of the inside and outside diameter of the pipe and the rate at which each cooled. The effect of these differential temperatures and cooling rates was to further weaken the pipe and create locked-in stresses in the pipe that increase the likelihood the pipe will catastrophically rupture when it is tapped.

D. <u>Improper Tooling and Maintenance of Extruders</u>

25. With the exception of its newer plants in Adel, Georgia and Meadville, Pennsylvania, in each of its nine remaining PVC plants, J-M has many extruders that are over 30 years old. Rather than invest in new extruders, J-M placed a new, high-output die on the end of the older extruders to keep up with the accelerated production schedule set by President Wang. However, because J-M's lower quality PVC compound required more processing time and the older extruders were not able to work the PVC compound enough for the high-output die, the tensile strength of the pipe produced by the combination of older extruder and high-output die was further diminished.

26. In late 2004, J-M began receiving complaints from customers regarding a certain type of PVC pipe (IPS white pipe) produced at its plant in Stockton, California. Instead of the white color characteristic of this particular type of pipe, the combination of increased production rates,

higher temperatures and high-output dies on older extruders had caused the pipe to burn, turning it yellow in color. To remedy the problem, K.C. Yang, J-M's Corporate Quality Control Supervisor, instructed the Stockton plant to use a regular die for this product. In an email dated January 4, 2005, K.C Yang instructed Stockton's Superintendent of Production, Jim Reichert, that "PST [Plant Stockton] should use regular die for IPS white products when high-output die cause burning. If necessary, PST should request new IPS die." See Exhibit 4, incorporated herein.

27. By increasing its production rates to speeds exceeding the extruders' rated capacity, J-M accelerated the wear on its extruders. Moving parts like the extruders' screw and barrel were most affected by the added wear. However, rather than increase the amount of maintenance to account for more wear, J-M abandoned its former practice of regularly monitoring and replacing the screw and barrel unit when it fell below a certain tolerance and decided instead to amortize the unit over a one-year period and only replace it at the end of the 12 months.

28. J-M managers like Will Fassler, a senior engineer in J-M's Research and Development Department, began to observe that, under the increased production rates, the screw and barrel unit was exceeding the old tolerances and needing replacement after only six months. Nevertheless, under its new amortization policy, J-M continued to use the screw and barrel unit for another six months before it was replaced. Experienced J-M engineers like Will Fassler were well aware that the PVC material extruded in the second half of the unit's amortized life with the underperforming screw and barrel unit had reduced tensile strength. See Exhibit 5 (Relator's notes dated 11/3/05), incorporated herein.

29. In a discussion with Relator on November 3, 2005, Will Fassler explained that the reason for the decrease in tensile strength stems from the proximity of the screw and barrel. For instance, a new screw and barrel unit, which fits closely together, will generate more shear and yield better mechanical properties in the finished pipe. See Exhibit 5. However, as the unit wears, the fit loosens and the shear decreases, which compromises the processing and decreases the tensile strength of the PVC material. Id. Despite this knowledge, J-M failed to replace its underperforming screw and barrel units after the first six months of use and allowed them to be

used for an additional six months in spite of the detrimental effect on the pipe's tensile strength.

30. While none of these practices alone would have proven fatal, the combined effect of J-M's substitution of inferior ingredients, increased production rates and improper tooling and maintenance of its extruders caused J-M to produce PVC pipe that fails to meet the tensile strength requirements set forth by Underwriters Laboratories Inc. ("UL"), the American Water Works Association ("AWWA"), and ASTM International.

V. J-M'S SALE OF SUBSTANDARD PVC PIPE BEARING UL MARK DESPITE KNOWLEDGE THAT PIPE DOES NOT QUALIFY FOR UL LISTING

A. J-M PVC Pipe Does Not Meet UL's Longitudinal Tensile-Strength Requirement

31. Underwriters Laboratories Inc. ("UL") is a not-for-profit corporation that tests and certifies a wide range of products for public safety. Once a product is tested and found to conform to UL's safety requirements, that product becomes UL certified and is eligible to bear the UL Mark. The UL Mark has become synonymous with safety and a product bearing a UL Mark is universally accepted as being safe.

32. UL has promulgated a safety standard governing PVC pipe for use in underground, nonpotable fire service systems. UL Standard 1285 ("UL 1285") lists a variety of requirements that must be met for PVC pipe to be UL certified and bear the UL Mark. Specifically, UL 1285 requires that "[r]epresentative samples of each class, pressure rating and size of PVC pipe . . . shall be subjected to the tests described in Sections 11 – 20." Exhibit 6, incorporated herein. One of those tests, Section 17, is the Longitudinal Tensile-Strength Test which provides that "[m]achined specimens from the pipe shall have a minimum tensile strength of 7,000 psi." Id.

33. J-M has only undergone two rounds of Longitudinal Tensile-Strength Tests for UL on its PVC pipe products. The first round was on its founding in 1982 when J-M had to initially qualify its PVC pipe products for UL listing. The second round was in the mid-1990s when J-M sought to change its PVC pipe compound and begin making pipe out of its newly created J-M 90 compound. J-M passed both of these tests and received UL listing for its PVC pipe products.

34. Once it has certified a product, UL does not require that the product undergo the Performance Tests listed in Sections 11 through 20 of UL 1285, including the Longitudinal

Tensile-Strength Test, unless and until there has been a material change in the product's materials, design or processing. While UL requires manufacturers to "conduct the necessary production control, inspection, and tests" as they produce the pipe, these routine Manufacturing Tests are much less stringent than the Performance Tests UL 1285 requires to initially qualify the PVC pipe. Exhibit 6.

35. UL operates on an honor system. Once a product is UL listed, UL relies on manufacturers to notify it of any material changes to the product's materials, design or processing. In the absence of such notification, UL presumes the manufacturer is continuing to use the same materials, design and processing it used in preparing the samples UL tested as part of the Performance Testing to qualify the pipe. By requiring "***representative*** samples of each type of PVC pipe" for qualification testing, UL conditions its ongoing certification of the product on the understanding that all future pipe will be made in the same manner as the samples submitted to UL to qualify the pipe. Exhibit 6 (emphasis added). In the Foreword, UL 1285 specifically states that "[t]he observance of the requirements of this Standard by a manufacturer is one of the conditions of the continued coverage of the manufacturer's product." Id.

36. By at least 1997, J-M's "cost-cutting" practices of substituting inferior ingredients in its compound, accelerating production rates and improperly tooling its extruders were well-established and had seriously degraded the tensile strength of J-M's PVC pipe. By this time, J-M had begun to receive test results (from J-M's internal testing and testing performed by customers in connection with claims for failing pipe) showing that more than 50 percent of the time J-M's PVC pipe failed to meet the minimum longitudinal tensile-strength requirements set forth in UL 1285.

1. Results of Internal Testing Performed by CRT Laboratories

37. A couple of times a year, Will Fassler, a senior engineer in J-M's Research and Development Division in the Stockton, California plant, sends samples taken from J-M's finished PVC pipe to CRT Laboratories, Inc. in Orange, California for longitudinal tensile-strength testing. These tests are conducted for internal purposes only to allow J-M to monitor the longitudinal tensile strength of its PVC pipe. The results are not shared with anyone outside J-M.

38. By 1997, the test results from CRT Laboratories began to show that more than half of the samples taken from J-M's PVC pipe failed to meet 7,000 psi, the minimum longitudinal tensile strength required by UL 1285. From 1997 to present, the failure rate has continued to exceed 50 percent. Will Fassler, who has ordered and reviewed all of CRT's test reports over the past nine years, calculates that J-M's PVC pipe has failed tensile strength 70 percent of the time. See Exhibit 7 (Relator's notes dated 9/12/05), incorporated herein.

39. In 2002, while working on two large claims against J-M for failed PVC pipe, Relator was asked to review the results of all internal tests J-M had performed on PVC pipe manufactured between 1998 and 1999, the time period when the failed pipe was produced. In so doing, Relator was able to review the results from six of the longitudinal tensile-strength tests CRT Laboratories performed on J-M's PVC pipe. Of the six tests, Relator observed that four failed the tensile strength requirements and only two passed.

40. At various times, together and separately, Will Fassler, K.C. Yang, J-M's former Corporate Quality Control Supervisor, and Relator each have expressed concern to Barry Lin, J-M's Director of Production, about the large percentage of failing tensile strength results on J-M's PVC pipe. Each time, Mr. Lin has responded by saying that the failures were "an acceptable business risk" to meet company production goals, failures were normal, and not every piece of pipe would always meet specification. Exhibit 7 (Relator's notes dated 9/12/05), incorporated herein.

41. After seeing a subset of the results of CRT's longitudinal tensile-strength testing in which 60 percent of the samples failed and learning from Will Fassler that the collective results of the past nine years showed an overall failure rate of 70 percent, Relator was no longer comfortable signing his name to customer certifications and letters to claimants representing that J-M's pipe complies with the UL Standard. On August 23, 2005, Relator told Barry Lin about his concerns and said he would not sign any more letters without first seeing copies of all of the results of J-M's internal testing performed by CRT Laboratories.

42. Mr. Lin refused to provide Relator with the CRT results. Instead, he simply assured Relator that J-M's UL listed products meet all the requirements of UL and directed him to

continue to certify this to J-M's customers. Exhibit 8, incorporated herein, is a copy of Relator's August 25, 2005, email to Barry Lin asking him to acknowledge in writing his statements regarding J-M's compliance with the UL tensile-strength requirement despite CRT test results to the contrary. After having similar conversations with K.C. Yang, Kai Cheng, J-M's Director of Product Assurance, and Mai Huynh, J-M's Product Assurance Manager, Relator sent similar emails to each of them. See id. None of the recipients provided Relator a written acknowledgment.

2. Results of Testing Performed in Conjunction with Claims Against J-M

43. By at least 1997, J-M was also beginning to get test results for failing longitudinal tensile strength from its Product Assurance Department. J-M's Product Assurance Department handles all claims and complaints brought by J-M customers for failing pipe. Because longitudinal tensile-strength testing can only be performed by a certified independent laboratory and is expensive ($2,500 per specimen for the series of tests with which this test is packaged), it is typically only requested in the case of larger claims involving significant damages.

44. During Relator's three years in J-M's Product Assurance Department, longitudinal tensile-strength testing was only performed in 14 of the claims. Of those 14 claims, Relator saw 12 instances in which the tensile strength of J-M's PVC pipe was below the 7,000 psi minimum requirement and only two instances in which the PVC pipe met tensile strength. Exhibit 9, incorporated herein, contains copies of some of the test results documenting the following failing tensile strengths measured in pipe from four of the 14 claims:

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Number & Name of Claim	Longitudinal Tensile Strength Required by UL 1285	Longitudinal Tensile Strength Measured in Sample of J-M PVC Pipe	Independent Laboratory That Performed the Test	Test Date
Q00-H-41 Ferguson Cities Supply Brigman Construction	7,000 psi	Hobbs B: 6,600 psi	Law Engineering and Environmental Services, Inc.	09/28/00
Q00-H-14 Tec Utilities	7,000 psi	Sample 2: 6,680 psi Sample 3: 6,750 psi Sample 4: 6,940 psi	Modern Industries, Inc.	10/31/00
Q02-J-40 Westgate Resorts	7,000 psi	6,833 psi	Bodycote Broutman, Inc.	10/01/02
Q05-C-08 Sheldon	7,000 psi	Sample 1: 6,777 psi Sample 2: 6,775 psi	CRT Laboratories	6/9/05

45. In his Internal Recommendation and/or Authorization ("IRA") advising J-M on how it should handle the Sheldon claim referenced above, Relator noted that "CRT conducted testing on the pipe and found that the tensile strength of the pipe was below that required by the UL Listing Mark on the pipe on all samples tested." Exhibit 10, incorporated herein. Because of the pipe's substandard tensile strength, Relator recommended that J-M offer the customer a settlement of $30,000. Id.

46. Kai Cheng, J-M's Director of Product Assurance, disagreed with Relator's recommendation and instructed Relator to "find a way to deny the claim and follow his thoughts, that JM is not responsible even if we fail the test, and offer alternative theories as to the cause of failure for this case." Exhibit 11 (Relator's notes dated 11/1/05), incorporated herein. In his conversation with Relator, Mr. Cheng also stated that he "knew that probably half of our pipe did not meet this requirement of UL [UL 1285 longitudinal tensile strength] and for all of our pipe to meet the standard we would have to be perfect in production and we could not always do that." Id.

3. **Results of Internal Testing of J-M's 30- and 36-Inch Big Blue Pipe**

47. Beginning in approximately 1999 with the opening of its new plant in Adel, Georgia, J-M added two new products to its Big Blue PVC pipe product line. J-M began manufacturing Big Blue PVC pipe with a pressure rating of 165 psi in both the 30- and 36-inch sizes in its Adel, Georgia and Fontana, California plants. Shortly after starting to manufacture these two products, J-M sent specimens from both pipes to an outside laboratory for longitudinal tensile-strength testing to see if they could qualify for UL listing. However, all of the specimens failed to meet the minimum tensile strength of 7,000 psi required by UL 1285.

48. Once it established a customer base for these two products, J-M introduced a second pressure class – one with a pressure rating of 125 psi – in both its 30- and 36-inch Big Blue PVC pipe. Again, J-M subjected samples from these two new products as well (as the original two products) to longitudinal tensile-strength testing at an outside laboratory, and all of the samples had tensile strengths below 7,000 psi. Since that time, J-M has continued to test the longitudinal tensile strength of its 30- and 36-inch Big Blue PVC pipe and has received nothing but failing results. Without a passing result, J-M has been unable to approach UL about qualifying these products and they do not have a UL Mark.

49. Since J-M's 30- and 36-inch Big Blue PVC pipe is made using the same materials, equipment and processing as all of J-M's UL-listed Big Blue and Blue Brute pipe, the substandard tensile strengths reported on the 30- and 36-inch Big Blue pipes are representative of the tensile strengths of all J-M UL-listed pipe. Like the results of J-M's internal CRT testing and its claims testing, the failing results for its 30- and 36-inch Big Blue pipe are further proof that J-M's "cost-cutting" measures of substituting inferior ingredients in its J-M 90 compound, accelerating its production rates, and improperly tooling its extruders have had a negative effect on the longitudinal tensile strength of its PVC pipe.

B. J-M PVC Pipe Does Not Meet UL's Radial Tensile Strength Requirement

50. In August 2003, Relator proposed a change to the bell design of J-M's Blue Brute and Big Blue PVC pipe. The two ends on a length of PVC pipe are called alternately the barrell end and the bell end. Under J-M's existing design, the bell end had a greater wall thickness than the

remainder of the pipe. To make the bell walls, the extruder had to be slowed down and additional material added to increase the wall thickness. Under Relator's proposal, dubbed the "No Thickened Section" Project, the bell wall would not be thickened and would have the same dimensions as the remainder of the pipe, thereby allowing the extruder to run at a nearly continuous speed, increasing output and reducing the amount of material needed per length of pipe.

51. Relator found support for his proposed design change in the American Water Works Association ("AWWA") standards governing PVC Pipe for Water Transmission and Distribution, AWWA C900 and C905. Under Section 4.3.2.2 of both AWWA C900 and C905, the pipe's bell end must meet one of two requirements. It must have the same wall thickness as the barrel of the pipe, or it must be tested to ensure that the joint assembly qualifies for a hydrostatic design basis ("HDB") category of 4,000 psi. See Exhibit 12, incorporated herein. Whereas longitudinal tensile-strength testing measures the tensile strength of the lengthwise portion of the pipe from end to end, HDB testing is one of several ways of measuring the tensile strength of the radial, circular or hoop section of the pipe. From this Section, Relator concluded that the thickened bell could be omitted from the pipe design so long as a joint manufactured from the thinner bell could meet the required HDB category of 4,000 psi.

52. In his Project Initiation Form dated October 28, 2003, Relator estimated that by omitting the thickened bell section of its two most popular products, Blue Brute and Big Blue, J-M would save $3,000,000 a year in materials costs alone, not to mention the additional efficiencies to be gained from not having to slow down its extruders and running them at a continuous speed. See Exhibit 13, incorporated herein. Other managers, including Will Fassler, extolled the potential benefits of a "No Thickened Section" pipe. In an email to Jack Hwang, J-M's Quality Control Manager, dated September 3, 2003, Mr. Fassler wrote "The potential benefits are large: significantly reduced material usage; greatly reduced bell-end forming scrap; easier bell-end forming; better bell-end appearance." Exhibit 14, incorporated herein. On December 8, 2003, Walter Wang, J-M's President, approved the "No Thickened Section" Project with a budget of $65,000 to cover the costs of designing and developing the new bell end and

performing the various tests needed to gain UL listing. See Exhibit 13.

53. Since the thinner bell wall only involved a change in the pipe's design, as opposed to its materials or processing, J-M did not have to undergo many of the Performance Tests in UL 1285, including the Longitudinal Tensile-Strength Test, to qualify the newly designed pipe for UL listing. Instead, to qualify the new design, UL required J-M to pass the following three strength tests, each of which measures the radial tensile strength of the newly designed bell end of the pipe: (1) HDB Test (2,000 hour test); (2) Sustained Pressure Test (1,000 hour test); and (3) Quick Burst Test (60 second test).

54. Since the newly designed, no-thickened-section pipe was made from the same materials and process as the existing thickened-section pipe, J-M experienced many of the same problems with the new pipe as it had with the existing pipe. For instance, J-M's three "cost-cutting" practices (substitution of inferior materials, accelerated production rates and improper tooling of its extruders), which caused J-M's existing pipe to fail the Longitudinal Tensile-Strength Tests a majority of the time, also caused J-M to fail many of the above-referenced radial strength tests on the newly designed, no-thickened-section pipe.

55. To gain UL listing for the new pipe design in the face of such failures, J-M resorted to a number of fraudulent practices, including without limitation (1) specially producing the UL specimens using higher quality ingredients and reduced production rates that are not representative of J-M's actual materials and process; (2) concealing failing test results from UL; (3) where early results indicated a specimen ultimately would fail, stopping long-term tests before they were completed and substituting new specimens; and (4) making multiple specimens from one lot, testing a subset of the specimens in advance to ensure that when the remaining specimens are tested for UL, they will pass the tests.

1. HDB Testing

56. As discussed above, the two AWWA standards governing PVC pressure pipe – AWWA C900 and AWWA C905 – both state at Section 4.3.2.2(b) that the joint assemblies of the pipe's bell must "qualify for a hydrostatic design basis (HDB) category of 4,000 psi (27.58MPa) when tested in accordance with ASTM D2837 as modified in ASTM D3139." Exhibit 12.

ASTM D2837, in turn, provides the test method for obtaining the pipe's HDB. See Exhibit 15, incorporated herein.

57. The purpose of HDB testing is to determine the long-term radial strength characteristics of PVC pipe. Broadly described, HDB testing is performed by placing 10 specimens under varying degrees of pressure and recording the point in time, up to a maximum of 2,000 hours, when the joint fails. In a November 14, 2003, email to Jack Hwang, Will Fassler described the HDB test as "the most stringent test of PVC pressure pipe quality." Exhibit 16, incorporated herein. Because HDB testing lasts 83.3 days and requires special equipment, it must be performed at an independent, certified testing laboratory. Given the length of the test, UL does not require that a UL representative be present to observe the testing.

58. Once the testing is complete, Section 5.4 of ASTM D2837 requires that the following three calculations be performed to determine a pipe's HDB: (1) the hydrostatic strength at 100,000 hours; (2) the hydrostatic strength at 50 years; and (3) the percent of circumferential expansion. Each of these calculations measures the pipe's long-term hydrostatic strength. To obtain an HDB category of 4,000 psi, the smallest of these three values must have a long-term hydrostatic strength between 3,830 and 4,800 psi. Exhibit 15 (at Table 1). However, in Note 7, ASTM D2837 notes that the expansion measurement is not required in North America because expansion strengths taken from North American stress rated PVC materials have not been found to be "the limiting factor," i.e., the lowest of the three values described above.

59. From the beginning of the "No Thickened Section" Project, many of J-M's Quality Control managers expressed concern about the ability of J-M's pipe, thickened or no, to pass the required HDB category of 4,000 psi. In a November 14, 2003, email to Jack Hwang, Will Fassler listed first among the challenges J-M needed to overcome for the Project to succeed J-M's "increasing failure rates in long-term pressure tests." Exhibit 16. Mr. Fassler also cited three other obstacles: (1) the recent failure of J-M's pipe to pass sustained pressure tests at NSF International (formerly known as the National Sanitation Foundation), which provides product testing and certification services for products in contact with potable water, (2) failing HDB testing and (3) numerous joint specimen failures "where the pipe burst before the joint leaked."

Id.

60. Given its history of problems with the tensile strength of its PVC pipe, J-M was skeptical that no-thickened-section pipe produced at random on the same machinery using the same materials and process as its existing pipe would pass the HDB testing. To increase its odds of passing, J-M directed the Plant Managers preparing the no-thickened-section specimens to monitor the results of the daily Quick Burst tests being performed on its existing pipe and only produce the specimens when those results were favorable.

61. In a December 9, 2003, email, Will Fassler, who was heading up specimen preparation for the Project, informed Stephen Yang, the Plant Manager at J-M's Fontana, California plant, that the Quick Burst test data "is very useful in identifying pipe that has an elevated chance of failing HDB." Exhibit 17, incorporated herein. Mr. Fassler instructed Mr. Yang to consult that data in choosing when to produce the specimens. Id. ("We need to test the pipe before testing the joint because the pipe will limit the strength of the joint.") Similarly, in another email of the same date, Jack Hwang notified Mr. Yang that "We have to have a good test result within JM before we send out for HDB test." Id.

62. Once the initial specimens were produced (using the Quick Burst data to increase its odds of passing HDB), J-M sent specimens of its no-thickened-section Blue Brute pipe (in size 4-inch Dimension Ratio ("DR") 18) to Charles Stanley, the Director of Universal Laboratory, Inc. in Garland, Texas, for preliminary testing. Before incurring the cost of 2,000 hours of testing as required by full-scale HDB testing, J-M instructed Mr. Stanley to first subject 10 specimens to a shortened HDB test of only 100 hours to give J-M a preview of how the pipe would likely perform.

63. The results of this testing, which J-M managers dubbed "Accelerated HDB Testing," were mixed. Approximately half of the 10 specimens had hydrostatic strengths that were well below the confidence limit and caused the entire lot to fail the HDB test. Exhibit 18, incorporated herein, is a copy of the notes Relator took as Mr. Stanley reported on the results of the HDB testing. Under item number three, Relator notes that the Blue Brute specimen in size 4-inch DR 18 failed the confidence limit under the Accelerated HDB testing. Id.

64. Undeterred by these results, J-M instructed Mr. Stanley to begin the full-scale HDB testing. Early in the testing, J-M began to receive reports from Mr. Stanley that many of the specimens were exhibiting excessive swelling. While ASTM D2837 allows specimens to expand a maximum of five percent during HDB testing, several of J-M's specimens had swelled by as much as 33 percent. Having never seen such swelling before, Mr. Stanley sent several of the swollen specimens to Will Fassler and Relator for their review. (At the time Relator left J-M in November 2005, one of the swollen pipe specimens – a Blue Brute pipe in size 4-inch DR 18 -- was still in J-M's literature room.)

65. Despite the fact these specimens clearly showed a serious problem with excessive swelling, J-M continued to rely on Note 7 of ASTM D2837 (which provides that the expansion measurement is not required where the five percent expansion strengths are not the limiting factor) and refused to consider the expansion measurement in determining HDB. From the degree of swelling, J-M was aware that if Universal Laboratories had calculated it, the expansion measurement would have been the lowest value of the three calculations for determining long-term hydrostatic strength and would have caused the pipe to fail HDB. Instead, J-M continued to take only the lower of the first two calculations (hydrostatic strength at 100,000 hours and hydrostatic strength at 50 years) when calculating HDB.

66. Even with the advantage gained by omitting the expansion measurement, J-M repeatedly failed the HDB test when using the lower of the hydrostatic strength at 100,000 hours and at 50 years. Relator recalls four instances in which Blue Brute specimens failed HDB testing. Of the four sets of failing specimens, two were in size 8-inch DR 18, one was 4-inch DR 18, and one was 8-inch DR 14. See Exhibit 18. J-M had no reports documenting the failing results because it had instructed Mr. Stanley only to prepare reports for the passing results and to report the failing results orally. Relator recorded many of these failing results on a piece of paper as Mr. Stanley reported them to him. Id.

67. As discussed above, per ASTM D2837 (as modified by ASTM D3139), HDB testing is performed using 10 specimens that are subjected to varying pressures for varying lengths of time up to 2,000 hours. During its HDB testing at Universal Laboratories, J-M asked Mr. Stanley

to notify it when early indications revealed that one or more of the 10 specimens, if tested to completion, would cause the overall HDB test to fail. In such instances, J-M instructed Mr. Stanley to stop the testing of those particular specimens (in order to avoid getting any bad data points) and substitute in a new specimen for the continuation of the HDB testing.

68. If the substitutions were unable to produce a passing result and the 10 specimens produced a failing HDB, J-M instructed its managers at the plants preparing the specimens to destroy all other specimens made from the failing lot. As was the case with the initial set of specimens, J-M had its Quality Control staff, including Will Fassler and Armondo Martinez, oversee the production of additional specimens. To increase the odds of getting a passing result, J-M slowed its regular production rates and adjusted its typical temperatures and torque to allow for optimum processing of the specimens. To reduce the excessive swelling, J-M replaced the lower grade multiwax ordinarily used in its J-M 90 compound with a high quality calcium sterate.

69. On July 5, 2004, after seven months of testing, J-M got its first passing result for HDB with tests performed on Blue Brute specimens in size 8-inch DR 18. However, one month later on August 31, Will Fassler wrote an email to Relator stating that "The HDB testing so far has revealed material issues (excessive swelling) and workmanship issues (mid-wall void). The chances of two consecutive samplings passing HDB appear to be less than 50%." Exhibit 19, incorporated herein. Eight months later, in an Internal Recommendation and/or Authorization ("IRA") recommending that J-M proceed with the production of no-thickened-section pipe, Mr. Fassler summarized the HDB testing as follows: "J-M submitted DR 14 & DR 18 joint samplings to Universal Laboratories for HDB tests per ASTM D3139-98. Some early samplings failed. Later submittals passed – confirming that with suitable materials and workmanship the design meets the requirements." Exhibit 20, incorporated herein.

70. By January 2005, after many intermittent failures, J-M had achieved passing HDB results in all of the three pipe sizes that UL required for its qualification of the new pipe design. J-M provided the passing results to UL. In so doing, however, J-M concealed from UL the following material facts: (1) J-M had conducted other HDB tests on each of these pipe sizes, all of which had failed; (2) to achieve the passing results, J-M had consulted Quick Burst test results

in deciding when to produce the specimens, altered its regular materials and process, and prematurely stopped testing of specimens that would have produced failing results and substituted new specimens in their place.

2. Sustained Pressure Test

71. The Long-Term Hydrostatic-Pressure Test, also referred to within J-M as the "Sustained Pressure Test" or "1,000 Hour Test," is another test that measures the long-term radial tensile strength of PVC pipe. Unlike HDB testing, which measures 10 specimens at varying pressures for varying lengths of time up to 2,000 hours, the Sustained Pressure Test measures five specimens at the same test pressure for 1,000 hours. To pass, the specimens must not "rupture, permanently distort, or weep" when subjected to the specified pressure for 1,000 hours. Exhibit 6.

72. As described above, Sustained Pressure Testing is one of the three strength tests UL required J-M to perform to qualify its no-thickened-section pipe for UL listing. The requirements for Sustained Pressure Testing appear in Section 18 of the UL 1285 Standard. Like Longitudinal Tensile-Strength Testing, Sustained Pressure Testing is one of UL's Performance Tests and UL requires that the specimens tested must be representative of the manufacturer's materials, design and processing. Like HDB Testing, Sustained Pressure Testing requires special equipment and is typically performed by an independent, certified laboratory.

73. In outlining its requirements for qualifying the no-thickened-section pipe, UL informed J-M that it would observe J-M's Sustained Pressure Testing. Because of the length of the test, which lasts 1,000 hours/41.6 days, UL only required a UL observer to be present at the beginning, middle and end of the testing.

74. Because UL would be observing portions of the Sustained Pressure Tests, J-M wanted to ensure that the specimens it sent Charles Stanley at Universal Laboratories for testing would actually pass the test. To accomplish this, J-M made multiple specimens from each 20 foot section of no-thickened-section pipe it specially produced. J-M subjected the first 10 specimens from each lot to the HDB testing described above. If the specimens produced a passing HDB result, J-M would then send other specimens from that same lot to Universal Laboratories for the

Sustained Pressure Testing. Since the specimens had passed HDB testing, which is the most demanding of pipe quality, J-M could be confident that other specimens from that lot would also pass the less onerous Sustained Pressure Testing.

75. Once it had passed HDB testing for a particular size of non-thickened-section pipe, J-M sent Universal Laboratories for Sustained Pressure Testing additional specimens from the same lot as the passing HDB specimens. In that way, J-M was able to pass all of the Sustained Pressure Tests witnessed by UL observers for the two pipe sizes UL required – Blue Brute 4-inch DR 14 and 4-inch DR 18.

76. At no time during the course of these Sustained Pressure Tests did J-M disclose to the UL observer that J-M had specially produced each of the test specimens using materials and processing that were not representative of J-M's actual manufacturing process. J-M also concealed from UL the fact that the test specimens had not been chosen at random but instead were selected from lots that had produced passing HDB test results.

3. Quick Burst Test

77. The third and final strength test that UL required for J-M to qualify its no-thickened-section pipe was the Quick Burst Test. The Quick Burst Test is designed to measure the short-term radial strength characteristics of the pipe. The requirements for the Quick Burst Test are contained in Section 4.3.3.2 of the AWWA C900 Standard. Broadly described, Section 4.3.3.2 provides that a pipe specimen must be able to attain a hydrostatic stress of 6,400 psi within 60 to 70 seconds of being pressurized. See Exhibit 12.

78. The Quick Burst Test is a routine quality control test that J-M is required to perform daily at each of its plants at the start-up of the extruder and following any change in operating conditions. Given the frequency with which this test is required to be performed, J-M has test equipment in each of its plants and performs the tests itself.

79. In outlining the requirements needed to qualify J-M's no-thickened-section pipe, UL informed J-M that it would come to J-M's plant to observe each of the Quick Burst Tests on the various sizes of its Blue Brute DR 14 and DR 18 no-thickened-section pipe. Because a UL representative would be observing the tests, J-M again took steps to try and ensure that the

specimens would pass while UL was watching.

80. Because the Quick Burst Tests were the last of the three strength tests required for UL listing, at the time it performed the Quick Burst Tests, J-M had already received passing results in both the HDB and Sustained Pressure Testing. In choosing specimens for the Quick Burst Testing, J-M selected specimens from the same lots as the specimens that had produced the passing results on the HDB and Sustained Pressure Tests.

81. For added insurance, J-M also ran some internal Quick Burst Tests on a few of the specimens from the selected lots to be doubly certain that the specimens would pass while UL watched. Using this approach, J-M passed the Quick Burst Tests for all but one of the sizes of its Blue Brute DR 14 and DR 18 no-thickened-section pipe. In the case of the Blue Brute specimens in size 12-inch DR 14, however, J-M failed four consecutive Quick Burst Tests while UL observed before ultimately getting a passing result. On October 26, 2005, Will Fassler told Relator that J-M had only obtained the passing result using a thickened-, instead of a no-thickened-, section pipe. See Exhibit 21, incorporated herein. According to Mr. Fassler, the pipe was measured "while UL wasn't really paying attention and the test pressure calc[ulation] wasn't properly computed on the accurate measurements." Id. In short, J-M gained UL listing for the new design in size 12-inch DR 14 using a specimen from the old design.

82. To prevent UL from investigating the real source of these four failures (i.e., the three "cost-cutting" measures and their negative effect on tensile strength), J-M blamed the four failures on illusory problems with the test equipment. Specifically, J-M attributed the failures to the end caps that are inserted into either end of the specimen to create a seal so it can be pressurized. J-M told Jerry Kirkpatrick, UL's representative observing the tests, that the end caps had not sealed properly, were too old and were not good for the new pipe design. All of these statements were false.

83. At no time during the Quick Burst Testing did J-M inform UL's Jerry Kirkpatrick that it had prepared the specimens using materials and production rates that are not representative of J-M's manufacturing process or that it had not chosen the specimens at random but instead selected them based on the fact that they came from lots that had already passed the HDB and

Sustained Pressure Testing. Nor did J-M inform UL that it only passed the fifth test using the original thickened-section pipe design (and an improperly calculated test pressure) as opposed to the new design. J-M also concealed from UL the real reason for the four tensile strength failures, i.e., that J-M's "cost-cutting" measures had decreased the tensile strength of its pipe.

4. J-M Authorizes Production of No-Thickened-Section Pipe

84. In early 2005, shortly after he began raising concerns with J-M management about the excessive swelling and failing HDB test results of the no-thickened-section pipe and expressed doubts about the tensile strength of J-M's existing PVC pipe (which was made from the same process and compound), Relator was removed from the No-Thickened-Section Project. Over the intervening year before the Project was completed, Will Fassler and K.C. Yang continued to keep Relator apprised of the status of the Project, including the results of all of the testing performed since Relator was removed.

85. In the Spring of 2005, upon learning that J-M managers were about to recommend that J-M start to produce the no-thickened-section pipe in spite of all the failing results, Relator raised a series of objections to J-M management. Among other things, Relator cautioned that, at a minimum, the newly designed pipe should only be produced at the two plants that produced the passing results for UL and those two plants should use the same slow production rates and higher quality materials that they had used to specially produce the passing samples. Relator also insisted that, once it was produced and before it shipped, the new pipe must be subjected to a series of quality control tests to ensure its conformance to the tensile strength requirements. Given the force and strength of Relator's objections, some of Relator's managers ultimately were persuaded to include Relator's precautions in their recommendations for the production of the new no-thickened-section pipe.

86. On April 29, 2005, Will Fassler prepared an Internal Recommendation and/or Authorization ("IRA") recommending that J-M begin preparations to produce the no-thickened-section pipe starting May 16. See Exhibit 20. By April 29, UL had given J-M oral approval to start producing the no-thickened-section pipe in all sizes of Blue Brute DR 14 and DR 18, except for 12-inch DR 14, on May 16. Because J-M had received so many failing test results in the

process of obtaining the UL listing, Mr. Fassler was careful to point out that the no-thickened-section pipe only passed the tests because of "suitable materials and workmanship" and therefore those same materials and level of workmanship must be used as J-M begins to produce the newly designed pipe.

87. Barry Lin and Kaushal Rao, J-M's Director and Assistant Director of Production, were equally cautious in their approvals of the new pipe. Both men gave their approval on the condition that J-M would take certain precautions to protect against the tensile strength failures that the UL qualification testing had revealed. In the block provided on the IRA for his authorization and signature, Mr. Lin wrote "In consideration of several test failures to non-thick-section project do propose to have PWI [J-M's Wilton, Iowa plant] & PFO [J-M's Fontana, California plant] to produce non-thick-section product first. After both plants successfully produce C-900 product, then do will apply to all plants." Exhibit 20. Similarly, in his signature/authorization block, Mr. Rao wrote "R&D should also concentrate on one plant & test the pipe produced under different conditions such as regrind material used in prod.; various speeds & production rates for production & test the pipe on a continuous basis." Id.

88. On May 16, 2005, ignoring the reservations expressed by the three managers, J-M's President Walter Wang authorized production of no-thickened-section pipe for J-M's Blue Brute PVC pipe in size DR 18 at all of J-M's 11 PVC producing plants starting June 1, 2005. See Exhibit 20. Despite explicit advice from Will Fassler, Barry Lin and Kaushal Rao, President Wang did not limit the production to the two plants that had successfully produced the passing specimens. Nor did he seek to ensure that the pipe is produced using the same materials and processing that J-M had used in producing the qualifying specimens or make any provision for testing the new pipe as it is being produced to monitor quality. Despite the fact that its new pipe had failed many of the qualifying tensile strength tests, J-M began manufacturing the new pipe without implementing a single safeguard.

5. UL's Qualification of J-M's No-Thickened-Section Pipe

89. On May 19, 2005, UL issued J-M its formal written "Notice of Authorization to Apply the UL Mark." Exhibit 22, incorporated herein. In this authorization, UL expressly states

that its authorization to apply the UL Listing Mark only extends to those products that are constructed in an identical manner to the subject models that were submitted to UL for this investigation. Id. The letter goes on to say "Products that bear the UL Mark shall be identical to those that were evaluated by UL and found to comply with UL's requirements. If changes in construction are discovered, appropriate action will be taken for products not in conformance with UL's requirements and continued use of the UL Mark may be withdrawn." Id.

90. J-M began producing its Blue Brute DR 18 pipe on June 1, 2005. Although UL also had authorized J-M to apply the UL Mark to its Blue Brute PVC pipe in all sizes of DR 14 except for 12-inch, J-M decided to wait until it received UL authorization for the remaining size before it commenced production of any DR 14 pipe. In October 2005, UL provided J-M with its authorization for 12-inch DR 14 pipe and J-M began producing all sizes of no-thickened-section DR 14 immediately thereafter.

91. Having refused to adopt any of the precautions recommended by its managers, J-M began producing the new pipe using the same "cost cutting" measures it had employed with its existing pipe. As the various test results revealed, pipe created using inferior ingredients, accelerated production rates and improper tooling fails tensile strength testing more than 50 percent of the time. Had it been aware of the failing test results and J-M's tampering with the testing, UL would not have given the pipe UL listing in the first place and would have withdrawn any UL listing had it known that the precautions that had been taken to produce the passing results (slowing production rates and substituting higher quality ingredients) were not being taken with the everyday production of the pipe.

C. J-M's False Representations Regarding UL Listing and UL Compliance

92. Despite its knowledge (beginning at least in 1997) that well over half of its PVC pipe failed to meet the longitudinal tensile-strength requirements of UL 1285 and its knowledge (as of at least June 1, 2005) that its new no-thickened-section pipe had a similar failure rate, J-M continued to represent to its distributors and customers, including Real Parties, that its PVC pipe is UL listed. In its catalogs, J-M states for both its Blue Brute and Big Blue PVC Pipe that it "is Underwriters Laboratories Listed" and has a tensile strength of 7,000 psi. Exhibit 23,

incorporated herein. In the previous version of its website (dated 9/8/05), J-M stated that all classes of both its Blue Brute and Big Blue pressure pipe "are UL listed for water mains." Exhibit 24, incorporated herein. Except for those pipes painted purple for Reclaimed Water or green for Sewer, J-M has continued to mark the outside surface of each length of its Blue Brute and Big Blue pipe with the UL Mark. See Exhibit 25, incorporated herein.

93. J-M also has continued to provide certifications to its individual customers that its Blue Brute and Big Blue PVC pipe has been manufactured in accordance with the requirements of UL 1285. Exhibit 26, incorporated herein, contains examples of certification letters J-M provided its customers regarding Blue Brute's and Big Blue's compliance with the UL Standard and listing.

94. At all times relevant to this Complaint, Real Parties, like other governmental entities and water distribution systems, have required that all pipes for use in underground fire service systems be UL 1285 listed. Exhibit 27, incorporated herein, contains examples of specifications from various government entities in which UL listing is required for pipe used in fire services. In addition to requiring UL listing for PVC pipe used in fire services, many of the Real Parties, like other governmental entities and water distribution systems, also require that all PVC pipe for use in their water distribution mains or water transmission lines shall be approved by Underwriters Laboratories, Inc. and marked with the UL logo. Exhibit 28, incorporated herein, contains examples of specifications from governmental entities, including some Real Parties, for UL listing of PVC pipe used in water mains and transmission lines.

VI. J-M'S SALE OF SUBSTANDARD PVC PIPE THAT DOES NOT MEET AWWA REQUIREMENTS

95. The American Water Works Association ("AWWA"), an organization in which J-M has always been a member, has promulgated standards governing the physical and chemical properties, including required tensile strength, of PVC Pressure Pipe for water transmission and distribution. AWWA Standard C900 applies to 4-inch through 12-inch diameter PVC Pressure Pipe used for water distribution, and AWWA C905 applies to 14-inch through 48-inch diameter PVC Pressure Pipe used for water transmission and distribution. See Exhibit 12.

96. At all times relevant to this Complaint, Real Parties, like other governmental entities with water distribution systems, have required that all PVC pressure pipe for use in their water distribution systems comply with or exceed the standards described in AWWA Standards C900 and C905. See Exhibit 29, incorporated herein. AWWA Standards are the universal standard applied in the water distribution system industry. Compliance with AWWA requirements is so consistent and widespread in this country that the requirement of AWWA compliance is understood by domestic purchasers and sellers of water works products regardless of whether it is stated expressly.

97. Relator is unaware of any domestic PVC pipe manufacturer or distributor who openly offers to sell PVC pipe in sizes DR14, DR18, DR25, DR32.5, DR41 and DR51 for use in a water distribution system that does not comply with AWWA Standard C900 or C905. Nor is Relator aware of any domestic water distribution system that knowingly permits the purchase of PVC pipe for water transmission or distribution that does not comply with the tensile strength requirements of AWWA C900 or C905. Real Parties would never have knowingly purchased PVC pipe for use in their water distribution systems that did not comply with AWWA standards.

98. To be AWWA compliant, PVC pipe used for water distribution or transmission must satisfy certain strength and extrusion-quality tests set forth in AWWA C900 and C905, including without limitation (1) Cell Class Testing, (2) HDB Testing, (3) Sustained Pressure Testing, (4) Quick Burst Testing and (5) Acetone-Immersion Testing. Broadly described, the purpose of these tests is to ensure PVC pipe will withstand varying pressures over both short and long periods without leaking. However, because of its "cost cutting" and "productivity" measures described in section IV above, J-M has repeatedly failed each of these tensile strength tests from at least 1997 to the present.

A. Cell Class Testing

99. PVC compounds are identified by a numerical classification system in which each number corresponds to a cell in a Table that identifies the particular property and the minimum required value for that property. AWWA Standards C900 and C905 both require that the compound from which PVC pipe is made shall "equal or exceed cell class 12454-B as defined in

ASTM D1784." Exhibit 12. In describing the classification system, ASTM D1784 states that the third number in the designation corresponds to the compound's tensile strength requirements. See Exhibit 30, incorporated herein. For cell class 12454-B, the third number of the designation is 4, which translates to a required tensile strength of 7,000 psi. Id.

100. In addition to providing the physical properties that each cell class must have, ASTM D1784 also prescribes the method by which the specimens for testing compliance with these requirements shall be prepared. Until February 1997, ASTM D1784 only provided one way of preparing the specimens and that was by compression molding. See Exhibit 31, incorporated herein. To prepare a sample by compression molding, separate sheets of PVC compound or pipe are pressed together between two metal drums to form a laminate.

101. However, beginning in February 1997, ASTM D1784 was revised to include two additional specimen preparation methods. Instead of just compression-molded specimens, ASTM D1784 provided that compliance with the cell classification requirements "shall be determined with compression-molded, extruded, or injection-molded test specimens for . . . tensile strength." Exhibit 32 at Section 10, incorporated herein.

102. In the Spring of 1997, Doug Boitz, J-M's former Product Assurance Manager, contacted members of ASTM D20.15, the Committee responsible for amending ASTM D1784, for guidance regarding the proper interpretation of the amendments to Section 10, the section on specimen preparation. Following his consultation with the Committee members, Mr. Boitz wrote an internal memorandum to Barry Lin, J-M's Director of Production, discussing what he had learned. See Exhibit 33, incorporated herein.

103. In this memo, dated May 5, 1997, Mr. Boitz states that the Committee's intent for the change is "to create the ability for manufacturers of extruded or injection molded products to have samples of materials for testing that are representative of the products, which they are producing." Exhibit 33. In other words, the Committee intended that manufacturers of extruded products use an extruded sample for testing, while manufacturers of compression-molded products use a compression-molded test sample. The Committee's reasoning, Mr. Boitz said, was "that the processing can greatly affect the properties and quality of the material or

compound." Id. Since J-M produces its PVC pipe by extrusion, Boitz concluded that ASTM D1784 now required J-M also to prepare its specimens by extrusion "so that the results obtained from finished products are not significantly different than the tested specimens." Id. At the end of the memo, Mr. Boitz recommends to Mr. Lin that J-M's Research and Development Division be notified of this issue so that it can amend J-M's sample preparation methods to include extruded samples. Id.

104. Despite this clear statement from the ASTM Committee Members that J-M, as a manufacturer of extruded pipe, must use extruded specimens for purposes of cell class testing, Relator has information and believes that J-M has continued to use compression molding as the exclusive means of sample preparation for its cell class testing from February 1997 through the present. The reason for J-M's allegiance to the compression-molded specimens is that its J-M 90 compound performs better and yields higher tensile strength results under the compression-molding process than can be obtained via extrusion. With the use of compression-molded samples, J-M was able to artificially boost its tensile strength results and thereby conceal the fact that its actual tensile strengths are below the minimum 7,000 psi required by AWWA C900 and C905.

105. Two third-party certifiers, International Association of Plumbing and Mechanical Officials ("IAPMO") and NSF International ("NSF"), require J-M to submit to annual cell class testing, which includes tests to confirm that J-M's PVC pipe meets a minimum tensile strength of 7,000 psi. By contrast, AWWA, which operates on an honor system, does not require manufacturers to submit to testing or audits. Relying on the good faith of the manufacturers, AWWA operates on the assumption that a manufacturer that represents its parts as being AWWA-compliant will have regularly performed the necessary tests listed in AWWA C900 and C905 to ensure that its parts comply and will only sell compliant parts.

106. In preparing its samples for the annual IAPMO and NSF cell class testing, J-M followed many of the same practices it had used in preparing samples for UL qualification of its no-thickened-section pipe. That is, J-M followed a manufacturing process that was not representative of the actual conditions under which its PVC pipe is ordinarily made. J-M had

Will Fassler, a senior engineer in its Research and Development Department, specially prepare the samples using compression molding, as opposed to extrusion, with an extraordinary degree of care and precision. As with its UL qualification testing of the no-thickened-section pipe, J-M prepared multiple specimens from each lot and sent a subset of these samples to outside laboratories to confirm that when IAPMO or NSF tested the other samples they would meet the required minimum tensile strength of 7,000 psi.

107. Even with the advantages gained by special preparation and use of compression-molded samples, J-M only barely met the minimum requirement of 7,000 psi in the 2005 annual cell class test performed for IAMPO and had failed tensile strength in previous years' annual IAMPO and NSF testing. Exhibit 34, incorporated herein, is a copy of a test report from CRT Laboratories, Inc. describing cell class testing performed for IAPMO in June 2005 on J-M compression-molded samples. While the samples were found to meet the minimum cell class requirements of cell class 12464, the tensile strength results of 7,081 psi were only slightly above the minimum requirement of 7,000 psi. Exhibit 34.

108. On multiple occasions, including as recently as September 13, 2005, K.C. Yang, J-M's former Corporate Quality Control Supervisor, told Relator that, without the benefit of compression molding and special preparation, J-M's PVC pipe compound actually has a maximum tensile strength of approximately 6,700 psi. Yang cited "extrusion conditions" (i.e., J-M's accelerated production rate and improper tooling and maintenance of its extruders) as the reason for J-M's inability to satisfy the tensile strength requirements of cell class 12454. Exhibit 35 (Relator's notes dated 9/13/05), incorporated herein.

B. HDB Testing

109. As described herein at section V.B. (¶¶ 50-58), to qualify J-M's new, no-thickened-section pipe for UL listing, UL required J-M to satisfy the hydrostatic design basis ("HDB") requirements specified in Section 4.3.2.2(b) of AWWA C900 and C905. As described herein at section V.B.1. (¶¶ 50-70) and section V.B.4 (¶¶ 84-88), J-M began producing no-thickened-section pipe on June 1, 2005 despite the fact that it had test results showing that the pipe failed the HDB testing required by AWWA C900 and C905 more than 50 percent of the time. As a

result, it is more likely than not purchasers of J-M's no-thickened-section Blue Brute PVC pipe, including Real Parties, have received pipe that fails to comply with the HDB requirements of AWWA C900 and C905.

110. J-M's difficulties with satisfying the HDB requirements predate the production of its no-thickened-section pipe. J-M also has had difficulty satisfying the HDB requirements of AWWA C900 and C905 under its original pipe design (i.e., J-M's thickened-section Blue Brute and Big Blue PVC pipe). For instance, as discussed in paragraph 59, on November 14, 2003, Will Fassler cited as one of the impediments to the success of the No-Thickened-Section Project the fact that J-M had been experiencing failures in the HDB testing on its existing (i.e., thickened-section) pipe. See Exhibit 16. Relator has information and believes that despite these failing test results, J-M has never rejected or scrapped a PVC pipe for having failed HDB testing.

111. In the 1980s, the Plastic Pipe Section of Johns-Manville, the predecessor company to J-M, promulgated a series of product specifications, many of which were more stringent than applicable industry standards and customer specifications. Johns-Manville included assurances of adherence to these company specifications in its express warranty. When it was founded in 1982, J-M continued to maintain the company specifications Johns-Manville had created and included them in its warranty.

112. One of these product specifications, J-M Specification No. PL-25 for 4-inch through 12-inch PVC Plastic Blue Brute pipe, required the pipe to meet a minimum quick burst stress of 7,200 psi, which was significantly higher than AWWA C900's requirement of 6,400 psi. One of the primary reasons for the more stringent requirement was to ensure that J-M's PVC pipe would meet the required HDB tensile strength category. In other words, if the PVC pipe withstood a stress of 7,200 psi during the 60-second Quick Burst Test, it would be more likely to pass the required HDB category of 4,000 psi during the subsequent HDB testing. As described in paragraphs 60 through 61 above, since the Quick Burst testing always precedes the HDB testing, the Quick Burst results can provide an early indication of whether the pipe will pass HDB.

113. However, on November 19, 2004, J-M revised Specification No. PL-25 to lower the short-term burst pressure requirement to the 6,400 psi required by AWWA C900 because it

could no longer meet the higher J-M pressure requirement of 7,200 psi. Exhibit 36, incorporated herein, is a red-lined copy of Specification No. PL-25 reflecting the revision to the lower 6,400 psi requirement. J-M made this revision knowing that by lowering the quick burst pressure requirement it would no longer be able to meet the HDB test requirements of AWWA C900 and C905. Despite this knowledge, before making this revision, J-M did not perform any testing to determine its effect on HDB.

C. Sustained Pressure Testing

114. As described herein at section V.B.2. (¶¶ 71-76), to qualify J-M's new, no-thickened-section pipe for UL listing, UL required J-M to demonstrate the pipe could pass the Sustained Pressure Test specified in Section 18 of UL 1285. As further described in section V.B.2. ((¶¶ 71-76), J-M was only able to pass this test by resorting to the following fraudulent practices: (1) preparing its samples using materials and processing conditions that were vastly superior to those J-M actually used in its day-to-day manufacturing of pipe; (2) cherry picking samples from lots that had produced passing HDB test results to increase the likelihood they will pass in front of UL; and (3) concealing these facts from UL, other standards and certifying organizations and J-M's distributors and customers. Despite the fact it had improperly manipulated the test materials and conditions of the Sustained Pressure Testing to mask the underlying tensile strength problems with the pipe, J-M began producing no-thickened-section pipe on June 1, 2005.

115. The Sustained Pressure Test contained in Section 18 of UL 1285 is substantively identical to the Sustained Pressure Test required by sections 4.3.3.1 and 5.1.3 of AWWA C900. See Exhibits 6 & 12. Accordingly, in addition to violating UL 1285, J-M also violated AWWA C900 when it engaged in the three fraudulent practices described above while performing the Sustained Pressure Test on its new, no-thickened-section pipe. As a result of these practices, since June 1, 2005 (the date J-M began producing no-thickened-section pipe), it is more likely than not purchasers of J-M's no-thickened-section Blue Brute PVC pipe, including Real Parties, have received pipe that (when tested properly with representative samples) fails to comply with the Sustained Pressure Test requirements of AWWA C900.

116. Over a year before it performed the Sustained Pressure Tests described above on its no-thickened-section pipe, J-M had received reports of its existing (i.e., thickened-section) PVC pipe failing AWWA C900 Sustained Pressure Testing performed for NSF. As discussed in paragraph 59, on November 14, 2003, Will Fassler cited as one of the impediments to the success of the No-Thickened-Section Project the fact that "[r]ecently, pipe from some facilities has failed sustained pressure testing at NSF." Exhibit 16. Relator has information and believes that despite these failing test results, J-M has never rejected or scrapped a PVC pipe for having failed Sustained Pressure Testing.

D. Quick Burst Testing

117. As described herein at section V.B.3. (¶¶ 77-83), to qualify J-M's new, no-thickened-section pipe for UL listing, UL required J-M to demonstrate the pipe could pass the Quick Burst Test specified in Section 4.3.3.2 of AWWA C900. As further described in section V.B.2. ((¶¶ 71-76), J-M failed several of the Quick Burst Tests and ultimately was only able to pass this test by resorting to the following fraudulent practices: (1) preparing its samples using materials and processing conditions that were vastly superior to those J-M actually used in its day-to-day manufacturing of pipe; (2) cherry picking samples from lots that had produced passing HDB and Sustained-Pressure-Testing test results to increase the likelihood they will pass in front of UL; and (3) concealing these facts from UL, other standards and certifying organizations and J-M's distributors and customers. Despite the fact it had improperly manipulated the test materials and conditions of the Quick Burst Test to mask the underlying tensile-strength problems with the pipe, J-M began producing no-thickened-section pipe on June 1, 2005. As a result, it is more likely than not purchasers of J-M's no-thickened-section Blue Brute PVC pipe, including Real Parties, have received pipe that fails to comply with the Quick Burst requirements of AWWA C900.

118. Well over a year before it performed the Quick Burst Tests described above on its no-thickened-section pipe, J-M had knowledge that its existing (i.e., thickened-section) PVC pipe was failing the Quick Burst Tests performed daily for purposes of AWWA C900 at each of its 11 PVC pipe plants. By at least early 2004, Relator, K.C. Yang, and Will Fassler began to receive

word from the Quality Control Supervisors at J-M's 11 Plants producing PVC pipe that their respective Plant Managers were overriding reject tags and sending out PVC pipe that the Quality Control Supervisors had rejected for failing the daily Quick Burst tests required by AWWA C900. Relator personally had received three such complaints from Michael Henderson, the Quality Control Supervisor at the Butner, North Carolina Plant, Armondo Martinez, the Quality Control Supervisor at the Fontana, California Plant, and Joe Soliz, the Quality Control Supervisor at the Wharton, Texas Plant.

119. To try and address this and other burgeoning quality-control problems, K.C. Yang, at that time J-M's newly appointed Corporate Quality Control Supervisor, called a meeting of all of the Quality Control Supervisors from each of J-M's 11 PVC-pipe Plants. In addition to K.C. Yang and the 11 Quality Control Supervisors, the other attendees were Relator, Kaushal Rao, Will Fassler, and Beryl Nadia and Lenor Chang, both of whom worked for Fassler. At this meeting, which was held at J-M's Pueblo, Colorado Plant in the Spring of 2004, the Quality Control Supervisors told stories of having rejected PVC pipe for failing daily Quick Burst Tests and then being instructed by their respective Plant Managers to continue to test the pipe until they get a passing result. Since a pipe's tensile strength and other properties gradually increase or stabilize as it is allowed to cool and harden, it often took the Quality Control Supervisors several days and repeated testing to achieve a passing result. However, such repeated testing of individual samples is expressly prohibited by Section 5.1.4 of AWWA C900, which provides that specimens are to be tested "at the beginning of production of each specific material and each size" and thereafter every 24 hours. Exhibit 12.

120. Once a passing result was obtained, the Quality Control Supervisors said the Plant Managers would instruct them to release and ship the pipe despite the fact that it may have failed four out of five Quick Burst Tests. J-M Plant Managers, whose bonuses are based on the amount of pipe the plant produces, are loath to reject pipe since rejected pipe cannot be included in the plant's production figures and thereby has the effect of taking money out of their pockets.

121. At the Pueblo meeting, K.C. Yang and Frank Padilla provided the Quality Control Supervisors with a review of the proper test methods to be followed when performing the daily

Quick Burst Test contained in AWWA C900. (AWWA C900, in turn, states that the testing must be performed in accordance with ASTM D1599.) This presentation focused on the method prescribed in ASTM D1599 for determining the amount of test pressure to apply to the pipe sample in order to achieve the required 6,400 psi of quick-burst stress in the pipe wall (hereafter "Calculated Test Pressure"). To determine the Calculated Test Pressure, Yang emphasized that ASTM D1599 required the Quality Control Supervisors to measure the minimum wall thickness of the actual pipe sample. See Exhibit 37, incorporated herein.

122. After setting out these requirements, Yang quickly learned that except for Frank Padilla, Quality Control Supervisor at the Pueblo, Colorado Plant, the Quality Control Supervisors at the remaining 10 Plants were all doing the calculation wrong. Instead of measuring the wall thickness of the actual pipe sample, the Quality Control Supervisors at the other 10 plants were simply relying on the minimum wall thicknesses listed in Table 1 of AWWA C900 for a generic pipe of the same size and pressure class as the sample. However, the wall of the pipe J-M produces invariably is thicker than that of a generic pipe listed in Table 1. Therefore, by relying on the measurement supplied in Table 1 instead of actually measuring the wall thickness of the pipe sample, the Quality Control Supervisors of the 10 plants were subjecting the samples to a smaller Calculated Test Pressure than what is required by ASTM D1599.

123. When K.C. Yang informed the Quality Control Supervisors that they could no longer rely on the minimum wall thicknesses supplied in Table 1 and had to measure the actual pipe samples being tested, they strenuously objected. The Quality Control Supervisors admitted they had enough trouble achieving the required 6,400 psi of stress in the pipe wall even with the benefit gained from the smaller Calculated Test Pressure. If they performed the tests correctly (i.e., and measured the minimum wall thickness of the actual pipe samples), the Quality Control Supervisors complained, they would stand little to no chance of achieving 6,400 psi and passing the Quick Burst Tests. As the comments of the Quality Control Supervisors make clear, J-M routinely caused PVC pipe to be shipped to its customers, including Real Parties, that failed to meet the requirements of the Quick Burst Testing specified in AWWA C900.

124. Following this meeting, K.C. Yang sought to change the management structure to have the Quality Control Supervisors report to the Corporate Quality Control Supervisor instead of their respective Plant Managers. By so doing, Yang hoped to make it less likely that the Plant Managers would be able to override decisions by the Quality Control Supervisors to reject non-conforming pipe. Yang's request was denied. Despite the considerable problems raised by the Quality Control Supervisors at the Pueblo meeting regarding the short-term tensile strength of its PVC pipe, J-M did not take any steps to address the root cause of the problem and curb the "cost cutting" measures described herein at section IV. Yang left J-M in October 2005 out of frustration for repeatedly being stymied in his efforts to improve the quality of J-M's products.

E. Acetone Immersion Testing

125. AWWA C900 and C905 both require manufacturers to subject their PVC pipe to routine acetone-immersion testing as specified in ASTM D2152. Exhibit 12. Broadly described, Acetone-Immersion Testing measures "extrusion quality," i.e., how well the extruder processed the PVC compound in forming the pipe. Id. Under ASTM D2152, the pipe sample is required to be immersed in acetone that is at least 99.8 percent pure. See Exhibit 38, incorporated herein. If the sample has been processed well, the acetone will not attack it. However, if the sample has been processed poorly, the acetone will cause it to flake. A sample that shows at least 50 percent attack of the inside, outside, or mid-wall surface of the sample or at least 10 percent attack on more than one surface of the sample has failed the test. Id.

126. Because it rapidly absorbs moisture from the air, acetone can quickly become diluted if it is left out in an unsealed container and exposed to air. As acetone is diluted, its ability to attack pipe samples decreases. ASTM D2152 requires that the acetone used for testing contains no more than 0.2 percent water by mass. Exhibit 38. If a particular container of acetone has more than two percent water, the excess water can be removed with a drying agent.

127. J-M did not take adequate safeguards to ensure the integrity of the acetone used in its routine Acetone-Immersion Tests. For instance, J-M regularly stored its acetone in drums with the lids off. Instead of having no more than two percent water, the acetone J-M regularly used for its testing contained an excessive percentage of water. Although J-M easily could have

used a drying agent to remove the excess water, the Plant Managers typically did not want to spend the money for such reagents. Instead, by testing with diluted acetone, J-M was able to obtain passing test results for specimens that would have failed had they been tested using undiluted acetone.

128. Even with the benefit gained by using diluted acetone, J-M routinely failed its Acetone-Immersion Tests. At the Pueblo meeting described above, many of the Quality Control Supervisors reported repeated instances of their Plant Managers overriding reject tags and sending out PVC pipe that the Quality Control Supervisors had rejected for failing the routine Acetone-Immersion Tests required by AWWA C900 and C905. Relator has information and believes that despite these failing test results, J-M has never rejected or scrapped a PVC pipe for having failed Acetone Immersion Testing.

F. J-M's False Representations Regarding AWWA Compliance

129. As the world's leading supplier of PVC pipe, J-M is acutely aware of the importance of AWWA compliance to its customers, including Real Parties. In its product catalogs and sales literature and on its website, J-M repeatedly describes its PVC pipe as meeting AWWA requirements and a longitudinal tensile strength of 7,000 psi. In the section of its catalog dedicated to its Blue Brute PVC pipe, J-M references Blue Brute's compliance with AWWA C900 four times. On the cover page for this section, beside the words Blue Brute, J-M states "Meets AWWA C900." Exhibit 23. The first line of the first page states "J-M's Blue Brute Pipe conforms to the AWWA C900 specification . . ." Id. That same page has a box that prominently states "MEETS AWWA C900." Finally, in a table entitled "Typical Physical and Chemical Properties and Capacities," J-M cites AWWA C900 as the standard governing its Blue Brute PVC Pipe and notes AWWA C900's tensile strength requirement of 7,000 psi. The section of J-M's catalog relating to its Big Blue PVC pipe follow an identical format to Blue Brute's except that it references Big Blue's conformance with AWWA C905 as opposed to C900.

130. As alleged in detail above, the statements in J-M's catalogs, websites and sales literature regarding compliance with AWWA standards and the tensile strength requirement of 7,000 psi were patently false. At no time did J-M ever distribute a catalog or sales or advertising

literature that revealed its substandard tensile strength results in over half of the tensile strength tests performed since 1997. Nor did J-M otherwise inform its customers, including Real Parties, of its substandard tensile strength.

VII. EMPLOYMENT DISCRIMINATION FOR ACTS IN FURTHERANCE OF FALSE CLAIMS ACT ACTION

131. Relator began working for J-M on July 8, 2002 as an engineer in its Product Assurance Department with an annual salary of $45,000. From July 2002 until he started complaining to his superiors about the impropriety of the fraudulent practices described above, Relator was regularly commended by his superiors on his job performance and received regular pay raises and good performance reviews.

132. For instance, in the Summer and Fall of 2003, Relator received considerable praise and notice from his superiors, including J-M's President Walter Wang, for his work in proposing a design change to J-M's two most popular products, Blue Brute and Big Blue, that would save J-M $3,000,000 a year in materials costs and allow J-M to increase its efficiency and output. Throughout the early stages of his work on the design change, dubbed the "No Thickened Section Project," Relator's currency within J-M as a rising star continued to grow.

133. However, by 2004, as J-M received results from the first round of full-blown HDB testing on the no-thickened-section pipe, Relator began to raise concerns with his superiors about the pipe's excessive swelling and inability to pass the HDB testing more than 50 percent of the time. After questioning what these results meant for the tensile strength of J-M's thickened-section pipe, which was made from the same materials and process, Relator was removed from the Project in early 2005 and began to experience a dramatic change in his employment conditions. Where previously he had been treated as part of the team, Relator suddenly was being shunned by his co-workers. For instance, Relator's access to testing and other sensitive information was severely restricted. Barry Lin instructed staff in J-M's Research and Development and Corporate Quality Control Departments not to provide Relator any documents without first getting approval from Lin.

134. Over the intervening months, Relator became increasingly aware that J-M's

tensile strength problems were not the result of inadvertence but rather were part of a larger scheme to defraud its customers by implementing cost-cutting measures that decreased its pipe's tensile strength and then manipulating test methods, specimens and data to conceal these strength problems from its customers and third-party certifiers and standards organizations like UL, NSF, IAPMO, AWWA and ASTM. Throughout this time, Relator continued to raise concerns with his superiors about the propriety of J-M's fraudulent practices. As the strength of his objections grew, Relator was met by J-M with increasingly adverse employment action.

135. For instance, in December 2004, at the same time Relator was raising concerns with his superiors about the tensile strength of J-M's UL-listed products, an opening became available in Relator's Department for the position of Product Assurance Manager. This position, which involved overseeing the handling of claims and lawsuits against J-M for non-conforming PVC pipe, had greater pay and responsibilities than Relator's current position. With a masters degree in structural engineering, associates and bachelors degrees in civil engineering, bachelors degree in management and two years of experience handling PVC pipe claims and lawsuits for J-M, Relator was well-qualified for the job.

136. Relator was only one of two internal J-M candidates being considered for the job. The other candidate, Mai Huynh, had no engineering degrees or other formal training relevant to the job description and no experience with claims and lawsuits or PVC pipe. At the time he was being considered for the position, Mr. Huynh had only worked one year at J-M on tooling issues relating to J-M's high density polyethylene ("HDPE") pipe, the sales of which represent a small fraction of J-M's business. Despite his short tenure at J-M and complete lack of experience, J-M gave the position of Product Assurance Manager to Mr. Huynh.

137. In the Summer of 2005, Relator objected strongly to his managers' instructions that he deny a claim brought by customer Sheldon Site Utilities ("Sheldon") for defective Blue Brute pipe that had pinhole leaks and failed when it was pressurized. After sending samples from the two problem pipes to CRT Laboratories for testing, Sheldon presented J-M with test results showing that both samples had tensile strengths below the minimum requirement of 7,000 psi. See Exhibit 9. Despite Relator's recommendation that it should pay the Sheldon claim, Kai

Cheng, J-M's Director of Product Assurance, and Barry Lin, J-M's Director of Production, instructed Relator to deny the claim on the grounds that the test results did not show that the pipe failed to comply with AWWA C900. Cheng and Lin argued that the CRT test results showing substandard tensile strengths were not valid because, as they interpreted it, AWWA C900 required that tensile strength testing be performed on specimens prepared from PVC compound, not finished PVC pipe, and the CRT testing had been performed on finished pipe. On July 19, 2005, Relator sent Sheldon a letter stating that "Since no manufacturing defect or non-conformance with the AWWA C900 standard was found within the samples sent to us or to CRT Labs we are regretfully denying your claim." Exhibit 39, incorporated herein.

138. Sheldon responded to J-M's denial by threatening to sue J-M for supplying defective product if it did not reconsider and agree to pay Sheldon's claim for $36,707.61. In discussing how to handle Sheldon's renewed claim, Kai Cheng and Barry Lin again sought to minimize J-M's responsibility by interpreting AWWA C900 as requiring that tensile strength testing be performed on samples prepared from PVC compound and declaring the CRT tests invalid because they were performed on finished PVC pipe. Stating that the CRT results were "not sufficient enough to conclude the failure of pipe sample reason to be 100% fall on J-M," Mr. Cheng recommended offering Sheldon a maximum of $10,000. See Exhibit 10.

139. Relator, however, recommended that J-M settle the claim for $30,000 based on the findings of CRT. Relator argued that even if Cheng and Lin's interpretation of AWWA C900 was correct, J-M could not ignore the fact that UL 1285 expressly states that tensile strength testing is to be performed on finished pipe. At a minimum, Relator concluded, the CRT test results show that J-M's Blue Brute pipe failed to meet the tensile strength requirements of UL 1285. In his Internal Recommendation and/or Authorization ("IRA") discussing his recommendation for how to handle the Sheldon claim, dated October 28, 2005, Relator listed as his basis for settling the claim for $30,000 that "CRT conducted testing on the pipe and found that the tensile strength of the pipe was below that required by the UL Listing Mark on the pipe on all samples tested." Exhibit 10.

140. On November 1, 2005, two business days after Relator distributed his IRA, Kai

Cheng called Relator into his office and reprimanded Relator for portraying J-M's liability for the Sheldon claim in his IRA as being "black and white" instead of trying to find a way to deny the claim or pass the blame to Sheldon. See Exhibit 11. Mr. Cheng faulted Relator for not supporting Barry Lin's argument that the CRT testing was invalid under AWWA C900 because it was performed on samples prepared from finished PVC pipe as opposed to PVC compound. Id. When Relator tried to defend his position, Mr. Cheng told Relator that if he "could not find a way to deny the claim and follow his [Cheng's] thoughts that J-M is not responsible even if we fail the test, and offer alternative theories as to the cause of failure for this case, then you need to find another position in J-M where you will listen and follow instructions given and not disagree." Id.

141. The next day, Mr. Cheng again called Relator into his office to follow up on the previous day's discussion. See Exhibit 40 (Relator's contemporaneous notes dated 11/2/05), incorporated herein. Mr. Cheng advised Relator that he needed to be "more political" and to try harder to make more friends at J-M "by avoiding sensitive issues where conflict may occur such as was the case yesterday." Id. Mr. Cheng warned Relator that taking a close-minded position on issues, as he had done in the IRA on the Sheldon claim, was not appropriate and to be successful in J-M and in life Relator needed to "open his mind to all the possibilities, listen to others in the company more, regardless if he thinks they are right or wrong, and avoid conflicts by not questioning their judgments and actions." Id.

142. Two days later, on November 4, when Relator refused to follow Mr. Cheng's advice and change his recommendation on the Sheldon claim, Mr. Cheng informed Relator that J-M was conducting an investigation into purported allegations that Relator had accepted kickbacks from Billy Sheldon, the owner of Sheldon Site Utilities, in exchange for Relator's increasing the amount he recommended J-M should pay Sheldon for his claim. Mr. Cheng sent Relator home and instructed him not to report to work until the investigation was complete. That same day, in response to these charges, Relator provided J-M with a four-page statement denying his involvement in any such improprieties. See Exhibit 41, incorporated herein. However, three business days later, on November 9, J-M terminated Relator for the stated reason that it had concluded that the allegations against Relator were "credible, sustainable and substantiated."

Exhibit 42, incorporated herein.

143. As these circumstances clearly demonstrate, the reason J-M gave for terminating Relator – that Relator had increased the amount he recommended J-M pay to settle a claim as a result of having received a bribe from the claimant -- was a pretext. The real reason J-M fired Relator – as is belied by the close proximity between Relator's IRA stating that the J-M PVC pipe involved in the Sheldon claim had a tensile strength below that required by the UL Listing Mark on the pipe and J-M's charges of Relator accepting bribes from a claimant – was in retaliation for his investigating and raising concerns about J-M's fraudulent practices of knowingly selling PVC pipe with substandard tensile strength while falsely representing that it complies with industry standards.

COUNT I
Substantive Violations of Federal False Claims Act
31 U.S.C. §§ 3729(a)(1), (a)(2) and 3732(b)

144. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 143 of this Complaint.

145. This is a claim for treble damages and forfeitures under the Federal False Claims Act, 31 U.S.C. §§ 3729 et seq., as amended.

146. Through the acts described above, defendant J-M, its agents, employees and co-conspirators, knowingly presented and caused to be presented to the United States, including without limitation the Armed Forces of the United States and the federal military entities listed on Exhibit 2, (collectively "United States") and its officials false and fraudulent claims, and knowingly failed to disclose material facts, in order to obtain payment and approval from the United States and its contractors, grantees, and other recipients of its funds.

147. Through the acts described above, defendant J-M, its agents, employees and co-conspirators, knowingly made, used and caused to be made and used false records and statements, which also omitted material facts, in order to induce the United States and its contractors and grantees to approve and pay false and fraudulent claims.

148. The United States, unaware of the falsity of the records, statements, and claims made and submitted by defendant J-M, its agents, employees, and co-conspirators, and as a result

thereof, paid money that it otherwise would not have paid.

149. By reason of the payment made by the United States, as a result of defendant J-M's fraud, the United States has suffered millions of dollars in damages and continues to be damaged.

COUNT II
Substantive Violations of California False Claims Act
Cal. Gov't Code §§ 12651(a)(1) and (a)(2)

150. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 149 of this Complaint.

151. This is a claim for treble damages and forfeitures under the California False Claims Act, Cal. Gov't Code §§ 12650 et seq.

152. Through the acts described above, defendant J-M, its agents, employees and co-conspirators, knowingly presented and caused to be presented to the State of California and any political subdivision thereof that purchased J-M PVC pipe between 1997 and present, including without limitation the California political subdivisions listed on Exhibit 1, (collectively the "California Real Parties") and their officials false and fraudulent claims, and knowingly failed to disclose material facts, in order to obtain payment and approval from those California Real Parties and their contractors, grantees, and other recipients of their funds.

153. Through the acts described above, defendant J-M, its agents, employees and co-conspirators, knowingly made, used, and caused to be made and used false records and statements, which also omitted material facts, in order to induce the California Real Parties (and each of them) and their contractors, and grantees to approve and pay false and fraudulent claims.

154. The California Real Parties, unaware of the falsity of the records, statements, and claims made and submitted by defendant J-M, its agents, employees, and co-conspirators, and as a result thereof, paid money that they otherwise would not have paid.

155. By reason of the payment made by the California Real Parties, and each of them, as a result of defendant J-M's fraud, the California Real Parties, and each of them, have suffered hundreds of millions of dollars in damages and continue to be damaged.

156. The California Real Parties, and each of them, are entitled to the maximum penalty of $10,000 for each and every false or fraudulent claim made, used, presented or caused to be

made used or presented by defendant J-M.

COUNT III
Substantive Violations of California False Claims Act
Cal. Gov't Code § 12651(a)(8)

157. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 156 of this Complaint.

158. This is a claim for treble damages and forfeitures under the California False Claims Act, Cal. Gov't Code §§ 12650 et seq.

159. Through the acts described above, defendant J-M, its agents, employees and co-conspirators became the beneficiaries of the inadvertent submission of false claims to California Real Parties and subsequently discovered the falsity of the claims.

160. Defendant J-M failed to disclose the false claims to California Real Parties, or any of them, within a reasonable time after discovery that the claims were false.

161. By reason of defendant J-M's failure to disclose the false claims to California Real Parties, those Real Parties, and each of them, have suffered hundreds of millions of dollars in damages and continue to be damaged.

162. The California Real Parties, and each of them, are entitled to the maximum penalty of $10,000 for each and every false or fraudulent claim made, used, presented or caused to be made used or presented by defendant J-M.

COUNT IV
Substantive Violations of Delaware False Claims And Reporting Act
6 Del. C. §§ 1201(a)(1) and (a)(2)

163. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 162 of this Complaint.

164. This is a claim for treble damages and penalties under the Delaware False Claims And Reporting Act, 6 Del. C. §§ 1201 et seq.

165. Through the acts described above, defendant J-M, its agents, employees and co-conspirators, knowingly presented and caused to be presented to the State of Delaware and any

political subdivision thereof that purchased J-M PVC pipe between 1997 and present, including without limitation the Delaware political subdivisions listed on Exhibit 1, (collectively the "Delaware Real Parties") and their officials false and fraudulent claims, and knowingly failed to disclose material facts, in order to obtain payment and approval from those Delaware Real Parties and their contractors, grantees, and other recipients of their funds.

166. Through the acts described above, defendant J-M, its agents, employees and co-conspirators, knowingly made, used, and caused to be made and used false records and statements, which also omitted material facts, in order to induce the Delaware Real Parties (and each of them) and their contractors, and grantees to approve and pay false and fraudulent claims.

167. The Delaware Real Parties, unaware of the falsity of the records, statements, and claims made and submitted by defendant J-M, its agents, employees, and co-conspirators, and as a result thereof, paid money that they otherwise would not have paid.

168. By reason of the payment made by the Delaware Real Parties, and each of them, as a result of defendant J-M's fraud, the Delaware Real Parties, and each of them, have suffered millions of dollars in damages and continue to be damaged.

169. The Delaware Real Parties, and each of them, are entitled to the maximum penalty of $11,000 for each and every violation of 6 Del. C. § 1201 alleged herein.

COUNT V
Substantive Violations of Florida False Claims Act
Fla. Stat. Ann. § 68.082(2)(a) and (2)(b)

170. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 169 of this Complaint.

171. This is a claim for treble damages and penalties under the Florida False Claims Act, Fla. Stat. Ann. §§ 68.081 et seq.

172. Through the acts described above, defendant J-M, its agents, employees and co-conspirators, knowingly presented and caused to be presented to the Florida State Government, including without limitation the Florida State governmental entities listed on Exhibit 3, (collectively "Florida State Government") and its officials false and fraudulent claims, and knowingly failed to disclose material facts, in order to obtain payment and approval from the

Florida State Government and its contractors, grantees, and other recipients of its funds.

173. Through the acts described above, defendant J-M, its agents, employees and co-conspirators, knowingly made, used, and caused to be made and used false records and statements, which also omitted material facts, in order to induce the Florida State Government and its contractors, and grantees to approve and pay false and fraudulent claims.

174. The Florida State Government, unaware of the falsity of the records, statements, and claims made and submitted by defendant J-M, its agents, employees, and co-conspirators, and as a result thereof, paid money that it otherwise would not have paid.

175. By reason of the payment made by the Florida State Government as a result of defendant J-M's fraud, the Florida State Government has suffered millions of dollars in damages and continues to be damaged.

176. The Florida State Government is entitled to the maximum penalty of $10,000 for each and every violation of Fla. Stat. Ann. § 68.082 alleged herein.

COUNT VI
Substantive Violations of Massachusetts False Claims Law
Mass. Gen. Laws ch. 12 §§ 5B(1) and 5B(2)

177. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 176 of this Complaint.

178. This is a claim for treble damages and penalties under the Massachusetts False Claims Law, Mass. Gen. Laws ch. 12 §§ 5A et seq.

179. Through the acts described above, defendant J-M, its agents, employees and co-conspirators, knowingly presented and caused to be presented to the Commonwealth of Massachusetts and any political subdivision thereof that purchased J-M PVC pipe between 1997 and present, including without limitation the Massachusetts political subdivisions listed on Exhibit 1, (collectively the "Massachusetts Real Parties") and their officials false and fraudulent claims, and knowingly failed to disclose material facts, in order to obtain payment and approval from those Massachusetts Real Parties and their contractors, grantees, and other recipients of their funds.

180. Through the acts described above, defendant J-M, its agents, employees and co-

conspirators, knowingly made, used, and caused to be made and used false records and statements, which also omitted material facts, in order to induce the Massachusetts Real Parties (and each of them) and their contractors, and grantees to approve and pay false and fraudulent claims.

181. The Massachusetts Real Parties, unaware of the falsity of the records, statements, and claims made and submitted by defendant J-M, its agents, employees, and co-conspirators, and as a result thereof, paid money that they otherwise would not have paid.

182. By reason of the payment made by the Massachusetts Real Parties, and each of them, as a result of defendant J-M's fraud, the Massachusetts Real Parties, and each of them, have suffered millions of dollars in damages and continue to be damaged.

183. The Massachusetts Real Parties, and each of them, are entitled to the maximum penalty of $10,000 for each and every violation of Mass. Gen. Laws ch. 12 § 5B alleged herein.

COUNT VII
Substantive Violations of Massachusetts False Claims Law
Mass. Gen. Laws ch. 12 § 5B(9)

184. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 183 of this Complaint.

185. This is a claim for treble damages and penalties under the Massachusetts False Claims Law, Mass. Gen. Laws ch. 12 §§ 5A et seq.

186. Through the acts described above, defendant J-M, its agents, employees and co-conspirators became the beneficiaries of the inadvertent submission of false claims to the Massachusetts Real Parties and subsequently discovered the falsity of the claims.

187. Defendant J-M failed to disclose the false claims to the Massachusetts Real Parties, or any of them, within a reasonable time after discovery that the claims were false.

188. By reason of defendant J-M's failure to disclose the false claims to the Massachusetts Real Parties, those Massachusetts Real Parties, and each of them, have suffered millions of dollars in damages and continue to be damaged.

189. The Massachusetts Real Parties, and each of them, are entitled to the maximum penalty of $10,000 for each and every violation of Mass. Gen. Laws ch. 12 § 5B alleged herein.

COUNT VIII
Substantive Violations of Nevada False Claims Act
Nev. Rev. Stat. Ann. §§ 357.040(1)(a) and (1)(b)

190. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 189 of this Complaint.

191. This is a claim for treble damages and penalties under the Nevada False Claims Act, Nev. Rev. Stat. Ann. §§ 357.010 et seq.

192. Through the acts described above, defendant J-M, its agents, employees and co-conspirators, knowingly presented and caused to be presented to the State of Nevada and any political subdivision thereof that purchased J-M PVC pipe between 1997 and present, including without limitation the Nevada political subdivisions listed on Exhibit 1, (collectively the "Nevada Real Parties") and their officials false and fraudulent claims, and knowingly failed to disclose material facts, in order to obtain payment and approval from those Nevada Real Parties and their contractors, grantees, and other recipients of their funds.

193. Through the acts described above, defendant J-M, its agents, employees and co-conspirators, knowingly made, used, and caused to be made and used false records and statements, which also omitted material facts, in order to induce the Nevada Real Parties (and each of them) and their contractors, and grantees to approve and pay false and fraudulent claims.

194. The Nevada Real Parties, unaware of the falsity of the records, statements, and claims made and submitted by defendant J-M, its agents, employees, and co-conspirators, and as a result thereof, paid money that they otherwise would not have paid.

195. By reason of the payment made by the Nevada Real Parties, and each of them, as a result of defendant J-M's fraud, the Nevada Real Parties, and each of them, have suffered millions of dollars in damages and continue to be damaged.

196. The Nevada Real Parties, and each of them, are entitled to the maximum penalty of $10,000 for each and every violation of Nev. Rev. Stat. Ann. § 357.040 alleged herein.

COUNT IX
Substantive Violations of Nevada False Claims Act
Nev. Rev. Stat. Ann. § 357.040(1)(h)

197. Relator realleges and incorporates by reference the allegations made in Paragraphs

1 through 196 of this Complaint.

198. This is a claim for treble damages and penalties under the Nevada False Claims Act, Nev. Rev. Stat. Ann. §§ 357.010 et seq.

199. Through the acts described above, defendant J-M, its agents, employees and co-conspirators became the beneficiaries of the inadvertent submission of false claims to the Nevada Real Parties and subsequently discovered the falsity of the claims

200. Defendant J-M failed to disclose the false claims to the Nevada Real Parties, or any of them, within a reasonable time after discovery that the claims were false.

201. By reason of defendant J-M's failure to disclose the false claims to the Nevada Real Parties, those Nevada Real Parties, and each of them, have suffered millions of dollars in damages and continue to be damaged.

202. The Nevada Real Parties, and each of them, are entitled to the maximum penalty of $10,000 for each and every violation of Nev. Rev. Stat. Ann. § 357.040 alleged herein.

COUNT X
Substantive Violations of Tennessee False Claims Act
Tenn. Code Ann. §§ 4-18-103(a)(1) and (a)(2)

203. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 202 of this Complaint.

204. This is a claim for treble damages and penalties under the Tennessee False Claim Act, Tenn. Code Ann. §§ 4-18-101 et seq.

205. Through the acts described above, defendant J-M, its agents, employees and co-conspirators, knowingly presented and caused to be presented to the State of Tennessee and any political subdivision thereof that purchased J-M PVC pipe between 1997 and present, including without limitation the Tennessee political subdivisions listed on Exhibit 1, (collectively the "Tennessee Real Parties") and their officials false and fraudulent claims, and knowingly failed to disclose material facts, in order to obtain payment and approval from those Tennessee Real Parties and their contractors, grantees, and other recipients of their funds.

206. Through the acts described above, defendant J-M, its agents, employees and co-conspirators, knowingly made, used, and caused to be made and used false records and

statements, which also omitted material facts, in order to induce the Tennessee Real Parties (and each of them) and their contractors, and grantees to approve and pay false and fraudulent claims.

207. The Tennessee Real Parties, unaware of the falsity of the records, statements, and claims made and submitted by defendant J-M, its agents, employees, and co-conspirators, and as a result thereof, paid money that they otherwise would not have paid.

208. By reason of the payment made by the Tennessee Real Parties, and each of them, as a result of defendant J-M's fraud, the Tennessee Real Parties, and each of them, have suffered millions of dollars in damages and continue to be damaged.

209. The Tennessee Real Parties, and each of them, are entitled to the maximum penalty of $10,000 for each and every violation of Tenn. Code. Ann. § 4-18-103 alleged herein.

COUNT XI
Substantive Violations of Tennessee False Claims Act
Tenn. Code Ann. 4-18-103(a)(8)

210. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 209 of this Complaint.

211. This is a claim for treble damages and penalties under the Tennessee False Claim Act, Tenn. Code Ann. §§ 4-18-101 et seq.

212. Through the acts described above, defendant J-M, its agents, employees and co-conspirators became the beneficiaries of the inadvertent submission of false claims to the Tennessee Real Parties and subsequently discovered the falsity of the claims.

213. Defendant J-M failed to disclose the false claims to the Tennessee Real Parties, or any of them, within a reasonable time after discovery that the claims were false.

214. By reason of defendant J-M's failure to disclose the false claims to the Tennessee Real Parties, those Tennessee Real Parties, and each of them, have suffered millions of dollars in damages and continue to be damaged.

215. The Tennessee Real Parties, and each of them, are entitled to the maximum penalty of $10,000 for each and every violation of Tenn. Code. Ann. § 4-18-103 alleged herein.

COUNT XII
Substantive Violations of Virginia Fraud Against Taxpayers Act
Va. Code Ann. §§ 8.01-216.3(a)(1) and (a)(2)

216. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 215 of this Complaint.

217. This is a claim for treble damages and penalties under the Virginia Fraud Against Taxpayers Act, Va. Code Ann. §§ 8.01-216.1 et seq.

218. Through the acts described above, defendant J-M, its agents, employees and co-conspirators, knowingly presented and caused to be presented to the Commonwealth of Virginia and any political subdivision thereof that purchased J-M PVC pipe between 1997 and present, including without limitation the Virginia political subdivisions listed on Exhibit 1, (collectively the "Virginia Real Parties") and their officials false and fraudulent claims, and knowingly failed to disclose material facts, in order to obtain payment and approval from those Virginia Real Parties and their contractors, grantees, and other recipients of their funds.

219. Through the acts described above, defendant J-M, its agents, employees and co-conspirators, knowingly made, used, and caused to be made and used false records and statements, which also omitted material facts, in order to induce the Virginia Real Parties (and each of them) and their contractors, and grantees to approve and pay false and fraudulent claims.

220. The Virginia Real Parties, unaware of the falsity of the records, statements, and claims made and submitted by defendant J-M, its agents, employees, and co-conspirators, and as a result thereof, paid money that they otherwise would not have paid.

221. By reason of the payment made by the Virginia Real Parties, and each of them, as a result of defendant J-M's fraud, the Virginia Real Parties, and each of them, have suffered millions of dollars in damages and continue to be damaged.

222. The Virginia Real Parties, and each of them, are entitled to the maximum penalty of $10,000 for each and every violation of Va. Code Ann § 8.01-216.3 alleged herein.

COUNT XIII
Federal False Claims Act – Employment Discrimination
31 U.S.C. § 3730(h)

223. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 222 of this Complaint.

224. This is a claim for damages under the Federal False Claims Act, 31 U.S.C. §

3730(h).

225. Through the acts described above and otherwise, defendant J-M discriminated against Relator in the terms and conditions of his employment at J-M by, among other things, denying him a promotion and terminating his employment. Defendant J-M's stated reasons for terminating Relator regarding his accepting kickbacks from claimants were baseless and simply a pretext for the real reason for his termination – to retaliate against Relator for his investigation of defendant J-M's fraudulent practices in preparation for filing the above-captioned False Claims Act lawsuit.

226. By reason of defendant J-M's actions, Relator has been damaged in the amount of many thousands of dollars.

PRAYER

WHEREFORE, Qui Tam Plaintiff/Relator John Hendrix prays for judgment against the defendant J-M as follows:

1. That defendant J-M cease and desist from violating 31 U.S.C. §§ 3729 et seq. and the counterpart provisions of the state statutes set forth above;

2. That the Court enter judgment against defendant J-M in an amount equal to three times the amount of damages the United States has sustained as a result of defendant J-M's actions in violation of the Federal False Claims Act, as well as a civil penalty of $11,000 for each violation of 31 U.S.C. § 3729;

3. That the Court enter judgment against defendant J-M in an amount equal to three times the amount of damages sustained by the California Real Parties, and each of them, as a result of defendant J-M's actions in violation of the California False Claims Act, as well as a civil penalty of $10,000 for each violation of Cal. Gov't Code § 12651;

4. That the Court enter judgment against defendant J-M in an amount equal to three times the amount of damages sustained by the Delaware Real Parties, and each of them, as a result of defendant J-M's actions in violation of the Delaware False Claims And Reporting Act, as well as a civil penalty of $11,000 for each violation of 6 Del. C. § 1201(a);

5. That the Court enter judgment against defendant J-M in an amount equal to three

times the amount of damages the State of Florida has sustained because of defendant J-M's actions in violation of the Florida False Claims Act, as well as a civil penalty of $10,000 for each violation of Fla. Stat. Ann. § 68.082(2);

6. That the Court enter judgment against defendant J-M in an amount equal to three times the amount of damages sustained by the Massachusetts Real Parties, and each of them, as a result of defendant J-M's actions in violation of the Massachusetts False Claims Law, as well as a civil penalty of $10,000 for each violation of Mass. Gen. L. Ch. 12 § 5B;

7. That the Court enter judgment against defendant J-M in an amount equal to three times the amount of damages sustained by the Nevada Real Parties, and each of them, as a result of defendant J-M's actions in violation of the Nevada False Claims Act, as well as a civil penalty of $10,000 for each violation of Nev. Rev. Stat. Ann. § 357.040(1);

8. That the Court enter judgment against defendant J-M in an amount equal to three times the amount of damages sustained by the Tennessee Real Parties, and each of them, as a result of defendant J-M's actions in violation of the Tennessee False Claims Act, as well as a civil penalty of $10,000 for each violation of Tenn. Code Ann. § 4-18-103(a);

9. That the Court enter judgment against defendant J-M in an amount equal to three times the amount of damages sustained by the Virginia Real Parties, and each of them, as a result of defendant J-M's actions in violation of the Virginia Fraud Against Taxpayers Act, as well as a civil penalty of $10,000 for each violation of Va. Code Ann. § 8.01-216.3(a);

10. That Relator be awarded the maximum amount allowed pursuant to 31 U.S.C. § 3730(d) of the Federal False Claims Act, and the equivalent provisions of the state statutes set forth above;

11. That the Court enter judgment against defendant J-M as a result of its actions in violation of 31 U.S.C. § 3730(h) as well as all relief necessary to make Relator whole, including reinstatement with the same seniority status Relator would have had but for the discrimination, not less than two times the amount of back pay, interest on back pay, and compensation for any special damages sustained as a result of J-M's employment discrimination, including litigation costs and reasonable attorney's fees;

12. That Relator plaintiff be awarded all costs of this action, including attorneys' fees and expenses; and

13. That the Real Parties, and each of them, and Relator receive all such other relief as the Court deems just and proper.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Relator hereby demands trial by jury.

Dated: January 13, 2006

PHILLIPS & COHEN LLP

By: _____
Eric R. Havian
Attorneys for Qui Tam Plaintiff/Relator John Hendrix

1

Cities & Public Water Agencies (Listed Alphabetically by State/Commonwealth)
That Purchased J-M PVC pipe between 7/3/03 and 8/31/05

California

Adelanto, City of
Alameda County Water District
American Canyon, City of
Antioch, City of
Atwater, City of
Auburn, City of
Bakersfield, City of
Beaumont-Cherry Valley Water District
Benica, City of
Blythe, City of
Brentwood, City of
Buena Park, City of
Buttonwillow County Water District
Calexico, City of
Camarillo, City of
Carlsbad, City of
Carpinteria Valley Water District
Castaic Lake Water Agency
Ceres, City of
Chico, City of
Chino, City of
Chowchilla, City of
Clovis, City of
Coachella, City of
Coachella Valley Water District
Colton, City of
Contra Costa Water District
Corcoran, City of
Corona, City of
Costa Mesa, City of
Cotati, City of
Crescent City, City of
Daly City, City of
Davis, City of
Delano, City of
Desert Hot Springs, City of
Diablo Water District
Discovery Bay, Town of
Dublin San Ramon Services District
East Bay Municipal Water District
Eastern Municipal Water District

California (Continued)

El Centro, City of
El Toro Water District
Elk Grove Water Serivce
Elsinore Valley Municipal Water District
Elsinore Water District
Escondido, City of
Eureka, City of
Fairfield, City of
Folsom, City of
Fowler, City of
Fresno, City of
Fullerton, City of
Galt, City of
Greenfield, City of
Greenville, Town of
Guadalupe, City of
Hanford, City of
Hayward, City of
Helix Water District
Hemet, City of
Hesperia, City of
Hi-Desert Water District
Huntington Beach, City of
Imperial, City of
Indian Wells Valley Water District
Indio, City of
Irvine Ranch Water District
Jackson, City of
Kerman, City of
Kingsburg, City of
La Habra, City of
Laguna Beach County Water District
Lathrop, City of
Lemoore, City of
Lincoln, City of
Live Oak, City of
Livermore, City of
Livingston, City of
Lompoc, City of
Los Angeles County Water Works
Los Banos, City of
Madera, City of
Manteca, City of
Merced, City of

California (Continued)

Modesto, City of
Moulton Niguel Water District
Murrieta County Water District
National City, City of
Needles, City of
Newhall County Water District
Norco, City of
North Marin Water District
Oakdale, City of
Oceanside, City of
Ojai, City of
Olivenhain Municipal Water District
Orange Cove, City of
Otay Water District
Oxnard, City of
Padre Dam Municipal Water District
Palmdale Water District
Paradise Irrigation District
Parlier, City of
Paso Robles, City of
Patterson, City of
Perris, City of
Pittsburg, City of
Placer County Water Agency
Pleasanton, City of
Pomona, City of
Port Hueneme, City of
Portola, City of
Poway, City of
Quartz Hill Water District
Rancho California Water District
Red Bluff, City of
Redding, City of
Redlands, City of
Redwood City, City of
Ripon, City of
Riverbank, City of
Riverside, City of
Roseville, City of
Sacramento, City of
Sacramento County Water Agency
San Anselmo, Town of
San Bernardino, City of
San Bruno, City of

California (Continued)

San Clemente, City of
San Diego, City of
San Jose, City of
San Juan Capistrano, City of
San Leandro, City of
San Ramon, City of
Sanger, City of
Santa Ana, City of
Santa Barbara, City of
Santa Cruz, City of
Santa Fe Springs, City of
Santa Maria, City of
Santa Paula, City of
Santa Rosa, City of
Shafter, City of
Simi Valley, City of
Soledad, City of
South Coast Water District
South Tahoe Public Utility District
Stanton, City of
Stockton, City of
Sweetwater Authority
Tehachapi, City of
Thousand Oaks, City of
Tracy, City of
Trukee Donner Public Utility District
Turlock, City of
Ukiah, City of
Vacaville, City of
Vallejo, City of
Ventura, City of
Ventura County Water Works
Victorville, City of
Vista Irrigation District
Watsonville, City of
West Sacramento, City of
Western Municipal Water District
Whittier, City of
Willows, City of
Woodland, City of
Yountville, Town of
Yuba City, City of

Delaware

Bethany Beach, Town of
Bridgeville, Town of
Cheswold, Town of
Dagsboro, Town of
Delmar, Town of
Dover, City of
Felton, Town of
Frankford, Town of
Laurel, Town of
Lewes, City of
Middletown, Town of
Milford, City of
Millsboro, Town of
Millville, Town of
Milton, Town of
Newark, City of
Ocean View, Town of
Odessa, Town of
Rehoboth Beach, Town of
Selbyville, Town of
Smyrna, Town of
Townsend, Town of

Massachusetts

Auburn, Town of
Bellingham, Town of
Canton, Town of
Dighton Water District
East Longmeadow, Town of
Easton, Town of
Hamilton, Town of
Hyannis, Village of
Kingston, Town of
Mashpee, Town of
Scituate, Town of
Swansea Water District

Nevada

Big Bend Water District
Boulder City, City of
Carson City, City of
Las Vegas Valley Water District

Nevada (Continued)

North Las Vegas, City of
Pahrump, Town of
Truckee Meadows Water Authority
Vigin Valley Water District

Tennessee

Columbia, City of
Lawrenceburg, City of
Springhill, City of
White House Utility District

Virginia

Accomac, Town of
Ashburn, Town of
Bedford, City of
Bowling Green, Town of
Buchanan County Public Service Authority
Charlottesville, City of
Chesterfield, County of
Colonial Beach, Town of
Dickenson County Public Service Authority
Dumfries, Town of
Fredericksburg, City of
Loudoun, County of
Louisa, Town of
Mount Jackson, Town of
Newport News Waterworks
Norfolk, City of
Orange, Town of
Portsmouth, City of
Pulaski, Town of
Richmond, City of
Round Hill, Town of
Suffolk, City of
Surry, Town of
Virginia Beach, City of
Warrenton, Town of
West Point, Town of
Williamsburg, City of
Windsor, Town of
Wise County Public Service Authority
Wytheville, Town of

Virginia (Continued)

York, County of

Exhibit B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

THE HON. GEORGE H. WU, JUDGE PRESIDING

United States of America, et al., Plaintiff, vs. J-M Manufacturing Company, Inc., et al., Defendants.	No. EDCV 06-55-GW

CERTIFIED COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, June 6, 2011; 9:37 A.M.

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LOS ANGELES, CA.; MONDAY, JUNE 6, 2011; 9:37 A.M.

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THE COURT: Let me call the matter of United States versus J-M Manufacturing.

Let me have appearance of counsel on the telephone.

MS. SHER: Elizabeth Sher of Day Pitney for the relator and various other entities, and with me are my colleagues Stu Rennert and Jonathan Handler.

THE COURT: All right.

MR. LITMAN: This is Harry Litman for the same entities.

THE COURT: All right.

MS. STEWART: Susan Stewart for the State of Nevada.

MS. LASKOWSKA: Malgorzata Laskowska for the City of San Jose.

MS. WOO: Melissa Woo for Best Best & Krieger on behalf of various California water district interveners.

MS. ARNESON: Joan Arneson for Irvine Ranch Water District.

MR. WELCH: Clay Welch for the City of San Diego.

THE COURT: All right. In court we have for the plaintiffs?

MR. RUSHFORTH: Your Honor, Brent Rushforth. Good

morning, Judge Wu, from Day Pitney. And I have with me Claire Sylvia from Phillips and Cohen and Doreen Klein from Day Pitney.

THE COURT: All right.

MR. RYLAND: Your Honor, Ronald Ryland, Sheppard Mullin Richter & Hampton. I'm the general counsel. With me is Mr. Kreindler who, of course, is counsel along with Mr. Daly in this case. And back in the corner, should you have any questions, is our partner from Santa Barbara, Jeff Dinkin.

THE COURT: All right. We are here on a motion to disqualify Sheppard Mullin from this matter that was brought by South Tahoe Public Utility.

Let me just ask. The counsel for South Tahoe is?

MR. RUSHFORTH: We are counsel for South Tahoe.

THE COURT: Okay. All right. And let me indicate, I have prepared a tentative ruling on this matter. And I presume everybody's seen it?

MR. RUSHFORTH: Yes, Your Honor, we have.

MR. RYLAND: Yes, Your Honor.

THE COURT: Does anybody want to argue anything?

MR. RUSHFORTH: We would like to, and I would imagine that the other side would like to as well.

THE COURT: All right. Let me just ask. What more would South Tahoe want to argue?

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MR. RUSHFORTH: Well, Claire Sylvia will be speaking for South Tahoe, Your Honor.

MS. SYLVIA: Thank you, Your Honor. We would just like to address the two points you raised at the end of the opinion since we obviously agree with the first six pages.

THE COURT: Okay. Are you talking about Footnote 6?

MS. SYLVIA: Well, on the last page you raise two questions that you would like to hear from counsel on.

THE COURT: Oh, okay.

MS. SYLVIA: And so we'd like a minute to address that.

THE COURT: All right. Are you going to give me case citations?

MS. SYLVIA: Well, I can't give you case citations because there are very few cases raising any of these issues. The two issues that you present are, one, does it matter that South Tahoe is only one of multiple parties in this case, and as you correctly point out, there aren't cases like that.

THE COURT: Well, none that we could necessarily find, but we thought that with the expanded efforts of counsel for South Tahoe and also Sheppard Mullin you guys might find something that we've overlooked.

MS. SYLVIA: We don't believe you've overlooked

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anything. As the court in Flatt pointed out, there are very few concurrent representation cases to begin with. That rarely occurs.

THE COURT: But there are tons and tons and tons of disqualification motions.

MS. SYLVIA: There are tons and tons of disqualification motions, but concurrent representation motions are unique because they present a unique concern, which is the duty of loyalty, and that's a duty that's required by every lawyer and they owe it to every client, whether they are small or they are large or they are in the same case as many other people.

THE COURT: I understand all of that. That's in the tentative.

Let me do this. Let me have Sheppard Mullin people speak first because depending on what they say, obviously, the court will consider what it should do next.

All right. Let me hear from --

MR. RYLAND: Ronald Ryland, Your Honor.

THE COURT: Yes.

MR. RYLAND: Clearly, we would like the opportunity for further briefing. I mean, this would be a very --

THE COURT: But it would be limited to the two issues that I've talked about. I'm not going to obviously

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allow rebriefing of the principal contentions because both sides have gotten an opportunity to do that already.

MR. RYLAND: No. Understood.

We want that, of course, because of what this would mean to J-M. I can tell you, as an officer of the court, that particularly in the bankruptcy arena where you have either conflicts between debtors or more commonly conflicts between debtors and a multitude of creditors, for example, four dozen, you will see conflicts of counsel and that's in an arena where the courts are particularly scrupulous and indeed the court's supervise the appointment.

THE COURT: I understand the courts are scrupulous, but what happens in bankruptcy stays in bankruptcy.

MR. RYLAND: Well, my point being is not only do you have to follow the ethical rules, you have to have your employment as the lawyer for the debtor approved by the judge. So we would ask for leave to brief those two issues.

THE COURT: All right.

MR. RYLAND: Would you entertain at least a brief comment or two on the tentative?

THE COURT: Sure. Well, what I would entertain with the further briefing is the two issues.

MR. RYLAND: Understood.

THE COURT: In other words, the stuff that is

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otherwise contained in the tentative, argue now or forever hold your peace.

MR. RYLAND: Understood.

THE COURT: All right.

MR. RYLAND: Okay. You appreciate the harshness, you appreciate how much work has been done. I won't belabor that. The court knows that better than I.

We do talk about the delay, and I understand Your Honor focuses not on any knowledge on the part of the district, but plaintiff's counsel says we learned about this in January and we are here today in June and at least Judge Alsup up in the Northern District, my hometown, in an Openwave said that was too much, that the delay a few months in a case of this magnitude is too much.

Secondly, let me, if I may, the Zador case is clearly a serious case in California jurisprudence. It was a case where the waiver was much more specific. But in that case, the lawyer for a while defended this man. When that man revealed to the lawyer that he had lied, the lawyer then turned around and sued him.

So one would expect that a waiver when one represents a party for a while in a very same lawsuit and then says you've told me you've lied, I'm now suing you on a cross-complaint, that the waiver would be scrutinized and held to a very high standard.

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In Concat, indeed, the court found in favor of the client. But in that case, that particular person had come to the lawyer and said will you do my estate plan. Incident to that estate plan, had disclosed the IP that underlay his wealth, underlay his life's work, and the IP that was the subject of the subsequent lawsuit.

And I contrast that interrelationship with do you want to give up your rights of loyalty for your will preparation when it involves the very IP that's been your life's work in comparison to 2002 when this public agency with a general counsel has a decision to make with regard to labor counsel.

And the labor counsel says I've changed law firms. I'm happy to do your work, but we would like an advanced waiver and he lays it out in a three-page document in 2002, signed up again in 2006.

And let's think about that dialogue, and I appreciate this is not perfect, but when one talks about Flatt, one talks about the duty of loyalty as the expectations of the client. What did the client reasonably expect? Is it fair to that person, particularly a layperson, as it was in Flatt or even a sophisticated layperson as it was in the case of Concat with a public agency?

Had we been prescient and in 2002 said, hey, maybe

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in a decade some whistleblower will come up with a case involving plastic pipe. You have plastic pipe. You might join with 48 other parties in a lawsuit involving plastic pipe. We would seek your agreement that if that happens, we can defend that plastic pipe manufacturer.

Now, clearly, we didn't have that prescience, but I suggest to you that if one looks at reasonable expectations or whether you think it would be an imposition --

THE COURT: Let me stop you. The problem that I have with that line of argument is that it's not up to the court to set what the standards are. It's not up to the court to set the results that necessarily should transpire. While the court has some degree of discretion, however, the general rule is that if there is representation that is immediate and adverse, it is not to go forward.

And so that's the problem that the court has. I'm not blaming, necessarily, Sheppard Mullin for the situation, but once the situation arises, the normal course is for the firm to, let's put it this way, step aside at that point in time because of the conflict.

MR. RYLAND: And I appreciate, Your Honor, and I won't belabor this. But Flatt even in the footnote says that it contemplates the possibility of a waiver. The ABA rule in Comment 22 contemplates a waiver. The California

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jurisprudence decided that.

THE COURT: The problem is the waiver has to be specific, either specific or so obviously general that it applies -- it's clear to the layperson, be it a governmental entity or whatever, that in fact they cannot expect this duty of loyalty and they are going into this relationship with their eyes open.

MR. RYLAND: Well, I would respectfully suggest that in 2002 when the waiver even says, look, by doing this, by allowing us to be adverse to you in all of these things, you may even be criticized by your constituents. That's a pretty detailed, pretty fine disclosure. It's better than the model -- it's better than the DC thing, better than the ones that the plaintiffs use.

Finally, and I will -- I appreciate I'm imposing on the court.

THE COURT: Oh, no. Your client is a taxpayer like everyone else, hopefully.

MR. RYLAND: When one looks at the duty of loyalty -- and I agree, the courts, I think, should enforce the reasonable expectations of clients. I don't have any problem with that. I don't have any problem with Concat in terms of its result.

But look at this case. Action speaks louder than words. While this very motion was pending, the good people

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at the district are calling Mr. Dinkin for advice. They don't think of him as disloyal.

And in the context of a waiver when the client itself, when the people down at the district are calling up for advice, when the general manager who signed the waiver is notably silent, then I would respectfully suggest that their reasonable expectations are being honored, and particularly when the result is so harsh.

But with that, if all I can do is respond to the two points that Your Honor has raised, we would ask for time to do that.

THE COURT: All right. Let me ask the plaintiffs' counsel to respond to these two points that were raised by defense counsel. First, as to whether or not this is similar to the situation that Judge Alsup had in regards to delay and also, two, why the waiver, in particular the 2002 waiver doesn't cover this situation.

MS. SYLVIA: With' respect to the Openwave decision by Judge Alsup, this is nothing like that. In this case, counsel indicates that there's been a delay from January to June. But during that period, what was going on? There were extensive discussions between counsel for South Tahoe and counsel for J-M.

The letters that we included in the record show that we wrote to them and we raised the question, we asked

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what's the explanation, gave them a week to respond. They responded. We asked them again. We explained that that did not really respond to the issue. We gave them another week. There was a period of meet and confer in April and some additional information.

THE COURT: Let me ask this other question then. If this breach of the duty of loyalty is so sacrosanct here, why is the agency still calling Sheppard Mullin's employment guy for advice?

MS. SYLVIA: Well, it's not the agency. It's one employee in the agency. The agency itself which is governed by a board and by the general manager actually authorized this motion, that an employee called up the attorney that she's used to calling up does not mean that the agency itself doesn't think that the duty of loyalty has been violated.

THE COURT: All right. And then what about the language of the waiver?

MS. SYLVIA: Language of the waiver in 2002 isn't much more specific than the one in 2006, as we pointed out in our brief. And it is true that waivers, prospective waivers can be upheld, but the overriding issue is whether the waiver is informed. And neither the 2006 nor the 2002 waiver indicate that the client is informed.

Simply saying that your constituencies may be

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upset with you if you sign this waiver does not give the client the sense of what kind of conflict could arise in the future. And even the ABA opinions on which J-M relies make clear that a lawyer can't just say the coast is clear because they have a general waiver that was signed at some earlier point.

It's the lawyer's obligation to make sure that that consent is informed. And almost always it's a general waiver that doesn't talk about the specific kinds of conflicts that could arise. Not necessarily the pipe case, but cases of that nature, and almost always a second informed waiver will be required.

THE COURT: Let me ask this other question, and maybe this one should be directed more to the defense rather than plaintiffs' counsel, but let me ask you this first: At the time that Sheppard Mullin came in, it was clear that South Tahoe was a party in this case as plaintiff, right, against J-M?

MS. SYLVIA: That's correct.

THE COURT: And so a client conflict check could have easily discovered the fact that South Tahoe would create a problem insofar as concurrent representation in this situation?

MS. SYLVIA: That's also correct.

THE COURT: All right.

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MS. SYLVIA: As I understand it, the law firm did do a conflict check and they did discover that they had concurrent representation, and then they didn't tell anyone, including not even their lawyer representing South Tahoe. So that's exactly right that a conflict check would have discovered it. And they did discover it, they just didn't tell anyone.

THE COURT: All right. Thank you.

Let me ask. Anything else from defense?

MR. RYLAND: Just forty-five seconds, because in Openwave during those months, they actually litigated the conflict question in France, as I recall. So I think it was litigated at least as actively in Openwave as it was here.

And I think that the waiver that talks about litigation, administrative -- litigation, arbitrations, audits, examinations, inquiries, administrative appeals, and other adversary proceedings, informed the client in 2002, the client was told affirmatively that this could have an effect on loyalty and vigor, confidentiality was mentioned and appearance to constituency and risk of requirement to withdraw was all disclosed. But that's before, Your Honor.

Thank you.

THE COURT: All right. Let me ask. How long is it going to take? I presume -- let me do it this way. Let me have the supplemental brief, the first one, come from the

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defense, and then I will give the plaintiffs an opportunity to respond.

How long is it going to take for you to do this?

MR. RYLAND: Twenty days, Your Honor.

THE COURT: Twenty days. So that would be something filed by the 27th. That's fine. Let me have a response from the plaintiff by the 6th of July.

Is that doable?

MS. SYLVIA: It's definitely doable. We think that a much shorter period of time is all that's required. There's already been arguments that there's been tremendous delay. We don't think it's that hard to respond to these.

THE COURT: All right. I will shorten the time a little bit then. I will give the defense counsel until the 22nd of June and served on that day. And let me give the plaintiff's counsel to the 1st of July and I will have you guys back here on the 7th of July, and that will be at 8:30. Thank you.

MS. SYLVIA: Thank you.

MR. RUSHFORTH: Thank you, Judge.

THE COURT: All right.

UNKNOWN SPEAKER: Judge.

THE COURT: Yes.

UNKNOWN SPEAKER: I'm just wondering what happens in the interim time. We have numerous hearings,

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meet-and-confers, papers to be filed. I assume we are just going to go forward.

THE COURT: I presume you are going to go forward until I rule.

UNKNOWN SPEAKER: All right. Thank you, Your Honor.

THE COURT: Unless I hear something otherwise.

MR. RUSHFORTH: Your Honor, I'm Brent Rushforth. Can I be heard for 15 seconds?

THE COURT: Sure.

MR. RUSHFORTH: The reason that dividing off of South Tahoe is not going to work and we are not going to find any cases on the issue is because Sheppard Mullin will still be adverse to South Tahoe whether they are divided off or not.

THE COURT: That might very well be true in the end. I agree with you.

But let me just ask. In the larger scheme of things, I presume that the discovery that's going forward is general discovery. It's not discovery -- in other words, if there is discovery, for example, if somebody was being deposed from South Tahoe, I can understand, but if it's just general, for example, depositions that they are defending as to J-M's PMKs or something of that sort, you know.

MR. RUSHFORTH: Well, but here's the problem,

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Your Honor. We had a meet and confer a week ago or four or five days ago on how we bifurcate this case. And you can ask defendants themselves, they propose a bifurcation where they will make summary judgment motions on issues that cover all parties in the case.

THE COURT: Well, and I agree, that is, to my mind, one of the problems that I can see of trying to bifurcate out South Tahoe.

MR. RUSHFORTH: South Tahoe's interest will by definition be implicated in Sheppard Mullin's defense of their client.

THE COURT: Well, who knows, maybe between now and then the case will settle as to South Tahoe. It's already been settled as to other entities so maybe the matter will be settled out.

MR. RUSHFORTH: One could only hope, Your Honor.

THE COURT: I'm counting on it. Anything else?

MR. RUSHFORTH: Thank you, Judge Wu.

MR. RYLAND: Thank you, Your Honor.

(At 9:57 a.m. proceedings were adjourned.)

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CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: June 10, 2011

s/ Wil S. Wilcox

WIL S. WILCOX
U.S. COURT REPORTER
CSR NO. 9178

Los Angeles, California; Monday, June 6, 2011; 9:37 A.M.

Exhibit C

IN THE ARBITRATION BEFORE JAMS

SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP, Claimant and Cross-Respondent, v. J-M MANUFACTURING COMPANY, INC., D/B/A/ JM EAGLE, Respondent and Cross-Claimant.	REF. NO. 1220045609 Arbitrators: Hon. Gary L. Taylor (Ret.) Hon. Charles S. Vogel (Ret.) James W. Colbert, III, Esq.

EXPERT REPORT OF
PROFESSOR LAWRENCE C. MARSHALL

September 30, 2013

I have been asked to prepare a report setting forth my opinions, as an expert in the field of legal ethics, on whether the actions of Sheppard, Mullin, Richter & Hampton LLP ("Sheppard Mullin") with regard to its representation of J-M Manufacturing Company, Inc. ("J-M") give rise to disgorgement of fees Sheppard Mullin has been paid by J-M or forfeiture of fees J-M still owes Sheppard Mullin for professional services rendered.[1]

I. My Credentials as an Expert

I am a Professor of Law at Stanford Law School where I regularly teach in the field of legal ethics and professional responsibility. Since joining the Stanford faculty in

[1] With regard to the issues I address here, there is no difference between the governing standards for fee forfeiture and disgorgement. I have, thus, used the terms interchangeably throughout this Opinion.

2004, I have taught such courses on many occasions. During this upcoming year, I will teach two such courses: one for the 50 international graduate students pursuing LLM degrees and one for JD students. Because so many Stanford students choose to remain in California after graduation, I am careful to incorporate a focus on California rules and principles of legal ethics into my teaching.

Prior to my appointment to the Stanford faculty, I served on the faculty of Northwestern University School of Law in Chicago for 17 years. During that period, I taught courses in legal ethics or professional responsibility approximately 15 times. Like my courses at Stanford, I taught the material from a national perspective, but always being sure to discuss any different approaches that governed in the three jurisdictions most relevant to Northwestern students: Illinois, New York and California.

In addition to my regular teaching load at Stanford, I also served as an Associate Dean from the time of my arrival in 2004 until several months ago. In that capacity, I directed the Mills Legal Clinic, which employs approximately 20 attorneys/faculty and works with approximately 150 law students each year through its ten clinical programs. In that position I was responsible for, among other things, working with the lawyers and students to resolve the numerous ethical issues that arose in the course of their practice. This required extensive familiarity with the California Rules of Professional Conduct, state and federal precedents regarding California professional responsibility issues, and the broader spectrum of national rules, decisions and literature.

I began my career in law teaching in 1987, after completing clerkships with Supreme Court of the United States Justice John Paul Stevens and Chief Judge Patricia Wald of the United States Court of Appeals for the District of Columbia Circuit. From

1987 to 2004, I was a professor at Northwestern University School of Law in Chicago, Illinois.

During the mid-1990s, while serving on the Northwestern faculty, I was appointed to serve as the Reporter to the Illinois Supreme Court's Committee on Professional Responsibility for two years. That Committee has responsibility for proposing changes and reviewing changes others propose to the Illinois Rules of Professional Conduct.

In addition, over the past two decades, I have served as a consultant to scores of law firms facing ethical dilemmas and have been disclosed as an expert witness in approximately 20 cases. Many of these have involved California law and ethical principles. About 40% of the time my opinions have found fault with the attorneys' conduct, and about 60% of the time I have opined that the lawyers complied with their professional duties. There have been many occasions in which I have declined invitations to serve as an expert because I did not agree with the position of those who contacted me.

During the later 1980s and 1990s, I served as Of Counsel to the Chicago law firm of Mayer, Brown & Platt. Since January 2013, I have been serving as Of Counsel to the law firm of Kirkland & Ellis, through its Chicago headquarters. One of my primary responsibilities with Kirkland & Ellis is to work with the firm's General Counsel on particularly thorny ethical issues. Both Mayer, Brown & Platt and Kirkland & Ellis have had substantial California offices during the periods in which I have worked with them.

II. General Introduction

After reviewing the many pleadings, documents and declarations relevant to this case, as well as the governing rules, cases and authorities, it is my considered opinion that nothing about Sheppard Mullin's conduct comes close to supporting disgorgement or fee forfeiture. Indeed, it is my opinion that, given Sheppard Mullin's relationships and conflict-waiver-agreements with both J-M and the South Tahoe Public Utility Districts ("the District"), Sheppard Mullin acted in full accordance with the governing ethical rules and principles. But even were one to disagree with that conclusion, it would by no means follow that disgorgement or forfeiture of fees has any role here. California courts have made it clear that those severe sanctions are reserved for clear and egregious misconduct of the sort that equitably supports condemning an entire representation as worthless or fraudulent. Thus, the relevant question here is whether Sheppard Mullin engaged in any egregious misconduct through which it unambiguously and intentionally violated the governing ethical principles and its established duties to its clients. It is my opinion, offered without reservation, that it did not.

No California case (or other case I have found) has ever held that a law firm forfeits its right to the fees it has earned when the evidence shows that the firm had a reasonable, good faith basis to believe its conduct was proper. This point is dispositive here. Even today, it is my view, as indicated above and described below, that the waivers upon which Sheppard Mullin relied were valid and that Sheppard Mullin acted properly in concluding it had no disabling conflicts with regard to its representation of the District or J-M. But one need not accept that conclusion to recognize that disgorgement and fee forfeiture are not relevant here. For even if one were to decide that application of the

multi-pronged and murky factors used to assess the validity of advance conflict waivers supports a conclusion that the waivers executed by the District and/or J-M were invalid, there would still be no basis to conclude that Sheppard Mullin presciently knew that the waivers would be drawn into question and knowingly and intentionally breached any clear ethical rule to any client. Disgorgement and forfeiture are not mild remedies that follow from lawyers' good faith mistakes or even from ordinary violations of ethical rules—they are dramatic weapons designed to deter pernicious misconduct. In my opinion, this case does not come close.

Indeed, although there has been considerable litigation around the validity of various advance waivers, and although some of those cases have held a specific waiver invalid in the context of the particular case, no court has to my knowledge ever ordered disgorgement or fee forfeiture as a result of a firm's misjudgment about the validity of an advance waiver.

It also follows, necessarily, that because Sheppard Mullin was entitled to trust that it held a valid waiver from the District, there was no need or reason for Sheppard Mullin to inform J-M at the outset of the representation that there was a risk the District might move to disqualify the firm. Any firm in Sheppard Mullin's shoes would have been justified in concluding this was not a material risk. In this regard, this is one of those areas in which reading judicial opinions can provide a skewed sense of the on-the-ground realities. There are, to be sure, several decisions analyzing the validity of advance waivers; in some contexts they have been upheld and in others they have been invalidated. But for every one case in which an advance waiver has been challenged, there are thousands in which they have not. Advance waivers have become absolutely the norm in

law firms' retention agreements and, with rare exceptions, clients who have so consented readily accept the agreements into which they have entered and voice no objection to the law firm taking on a new matter in accordance with the terms of the waiver. For this reason, there was simply no reason for Sheppard Mullin to anticipate any material risk that the District would decide to challenge the validity of the waivers it had executed based on fully informed consent.

III. General Principles of Disgorgement and Fee Forfeiture.

There is clearly established law that an attorney or law firm that has engaged in clearly unethical conduct tantamount to fraud or to a profound corruption of the attorney–client relationship is not entitled to collect fees for services rendered to its client. It is just as clearly established, though, that disgorgement or fee forfeiture cannot be imposed where the alleged unethical behavior falls short of this sort of egregious misconduct. In this case, Sheppard Mullin's alleged breaches are not the type that any court has ever held warrants disgorgement or fee forfeiture. Sheppard Mullin proactively took affirmative efforts to comply with the conflicts of interest principles through securing an advance waiver. To deprive Sheppard Mullin of millions of dollars of fees it has fully earned based on what, at most, amounts to a mistaken judgment call about how the factors regarding the validity of advance waivers would be balanced by a later court or tribunal, would be plainly disproportionate to the nature of Sheppard Mullin's conduct. This is particularly true given the lack of any dispute here that Sheppard Mullin's fees were reasonable and that Sheppard Mullin provided value to J-M.

To meaningfully set forth my expert opinions about this matter, it is necessary to spend some time describing the state of California law on disgorgement and fee forfeiture.

I will then relate that law back to the facts presented here and the ways in which these specific legal principles have informed my opinions.

The general parameters of the law of disgorgement or fee forfeiture based on alleged attorney misconduct were set out well by the court in *Sullivan* v. *Dorsa*, 128 Cal. App. 4th 947 (2005). In that case, appellants sought to bar attorneys from securing fees based on a finding they had operated under a conflict of interest. The conflict involved the law firm's representing a referee overseeing a partition sale to a buyer even though the law firm had an ongoing relationship with the buyer. The court began its discussion by reiterating the principle that "while an attorney's breach of the rules of professional conduct *may* negate an attorney's claim for fees," this is by no means automatically the case. *Id.* at 965 (emphasis in original) (quoting *Pringle v. La Chapelle*, 73 Cal. App. 4th 1000, 1005 (1999)). Only particularly serious violations give rise to these remedies, such as instances "where the representation involved elements of fraud, unfairness, acts in violation or excessive authority, acts inconsistent with the character of the profession, or acts incompatible with the faithful discharge of the attorney's duties." *Ibid.* (quoting *Pringle*, 73 Cal. App. 4th at 1006). In the case before it, the court in *Sullivan* saw no evidence that the alleged conflict of interest was of the sort that rose to this level of egregious misconduct.

As indicated, the court in *Sullivan* referred several times to a 1999 decision by the Court of Appeal in *Pringle*. In that case, the court explained that the rule demanding serious misconduct as a predicate to disgorgement or fee forfeiture is consistent, not only with California law, but with general ethical principles. The court cited the then-proposed

final draft of the Restatement, which is in line with the Final Draft released in 2000, and which remains current today. According to the Restatement,

> A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, it's 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.

RESTATEMENT OF THE LAW (THIRD), THE LAW GOVERNING LAWYERS §37, at 270 (2000).

Of great significance to assessing the question of disgorgement or fee forfeiture relating to Sheppard Mullin, the Restatement also provides an example of where forfeiture should *not* be applied: "The sanction of fee forfeiture should not be applied to a lawyer who could not have been expected to know that conduct was forbidden, for example when the lawyer followed one reasonable interpretation of a client–lawyer contract and another interpretation was later held correct." *Id.* at 273, *Comment d.* This is in keeping with the Restatement's reference to the law of agency as providing that it is a "willful and deliberate breach" that supports forfeiture. *Id.* at Comment *b*. See also *id.* at Comment *d* ("Forfeiture is generally inappropriate when the lawyer has not done anything willfully blameworthy . . .").

The courts in *Sullivan* and *Pringle* also referred to a leading treatise on legal ethics, which explains that forfeiture is a "sanction for a gross abuse by the lawyer of obligations to the client, or other serious violations of the law of lawyering." J. HAZARD & W. HODES, THE LAW OF LAWYERING §1:5 at 108 (1998 Supp.).

In *Frye v. Tenderloin Housing Clinic*, 38 Cal. 4th 23 (2006), the California Supreme Court incorporated the factor of uncertainty about application of the law into its reasoning about why fee forfeiture was inappropriate despite a violation of the governing

ethical principle. *Frye* involved the failure of a non-profit legal corporation to register with the State Bar. The Court held this was a violation of the rules and ethical principles, but also recognized that violations of rules do not automatically give rise to disgorgement. In considering the propriety of that remedy, the Court noted there was widespread uncertainty about whether such registration was required and that "only five of the hundreds of non-profit organizations that offer legal services in this state have registered with the State Bar." *Id.* at 49. Given that (and other circumstances surrounding the misconduct), the Court declared, "the remedy of disgorgement is grossly disproportionate to the asserted wrongdoing." *Id.* at 50.

The decision in *Mardirossian & Assoc. v. Ersoff,* 153 Cal. App. 4th 257 (2007), is also quite instructive here. In that case, the attorney was accused of having represented two clients with conflicting interests, despite not having secured a waiver. The court recognized that, "under certain circumstances," fee forfeiture can be an appropriate remedy for violations of conflict of interest principles, but the court refused to order forfeiture of fees in the absence of egregious misconduct, which was not shown in that case. *Id.* at 278 ("Although the breach of the rules of professional conduct may warrant a forfeiture of fees, forfeiture is not automatic but depends on the egregiousness of the violation.").[2]

In analyzing the propriety of disgorgement, many courts have also considered whether the client suffered any injury as a result of the alleged attorney misconduct—an

[2] As demonstrated by the decisions just discussed (*Sullivan*, *Pringle*, *Frye*, and *Mardirossian*), as well as the other cited authorities, California law by no means imposes any presumptive (much less, automatic) rule that renders "illegal" (and thus unenforceable or rescindable) every contract that involves legal services later deemed to be inconsistent with the rules of professional conduct. There is always a focus on the particular behavior and culpability of the attorney.

issue of considerable relevance to this case (especially given the fact that J-M is not seeking compensation for any costs associated with its transition to new counsel in the *qui tam* case). In *Frye*, for example, the California Supreme Court observed that the attorneys' violation of the rule "was not a cause of any injury," and requiring disgorgement of fees would be "disproportionate to the wrong." *Frye*, 38 Cal. 4th at 48. Similarly, in *Slovensky v. Friedman*, 142 Cal. App. 4th 1518 (2006), the court summarily rejected a claim for disgorgement based on an alleged violation of conflict of interest rules. The court declared, "although disgorgement of fees is a recognized remedy for breach of fiduciary duty, it is available only if the alleged misconduct caused damage." *Id.* at 1527. And in *Olson v. Cohen*, 106 Cal. App. 4th 1209 (2003), the court rejected a claim of disgorgement based on a firm's failure to register with the State Bar. The court observed that the client was not able to show that the attorney's services had been "negligently rendered" in any way. *Id.* at 1216.[3]

In sum, the law is clear that showing a violation of a rule or duty is *only the first step* in addressing whether disgorgement or forfeiture of fees is in order. If that first step is satisfied, the focus turns to the egregiousness of the attorney misconduct, and the proportionality of forfeiture or disgorgement to the nature of the violation and the extret of the resulting harm.

Although this is the approach that has been applied consistently, there is language in some decisions suggesting a more automatic triggering of disgorgement or fee

[3] In *Fair v. Bakhtiari*, 195 Cal. App. 4th 1135 (2011), the court imposed no injury requirement, but affirmatively noted that the attorney in that appeal had cited no authority for the proposition that damage to the client is a required predicate for disgorgement or fee forfeiture. *Id.* at 1153-1154. Indeed, the briefs filed in *Fair* confirm that none of the cases discussed above (*Frye, Slovensky* or *Olson*), or any other case holding that injury is a required element, was ever brought to the court's attention. Given the court's observation that the attorney had failed to raise the issue properly, *Fair* cannot be said to hold generally that there is no injury requirement for disgorgement or fee forfeiture.

forfeiture when any violation is shown, including a violation of conflict-of-interest principles. Despite this broad language, examining the actual holdings in those cases demonstrates they are entirely consistent with the principles described above; each and every one of these cases involves very obvious and serious violations of the operative ethical principles. The body of California precedents demonstrates that showing a violation of a rule or ethical principle is a *necessary*, but *not sufficient*, predicate for imposing disgorgement or fee forfeiture. Where such a violation is shown, the focus then turns to the key issues of whether the violation is of a nature and magnitude that justifies that drastic sanction, and whether the equities of the situation support such action.

What emerges, then, is that no court in the history of California (or, as far as I can tell, any other state) has ordered disgorgement or fee forfeiture in instances in which the attorneys made a reasonable and good faith effort to comply with the rules. (As will be discussed below, this is a critical fact given the specific efforts Sheppard Mullin made to conform to the rules—by securing the waivers—and given the reasonableness of Sheppard Mullin's reliance on the advance waivers in the context of this case.)

The following cases illustrate the limited types of misconduct that have led California courts to order disgorgement or fee forfeiture.

> *Clark v. Millsap*, 197 Cal. 765 (1926). The attorney had developed a fraudulent scheme whereby his client would transfer property to the attorney to be held in the client's benefit, but the attorney would then appropriate the property to the attorney himself and to the attorney's wife. The Court described the attorney's conduct as "intermingled with fictitious and fraudulent acts." *Id.* at 785.
>
> *Goldstein v. Lees,* 46 Cal. App. 3d 614 (1975). The longtime attorney for a corporation, who held many secrets of the corporation, took on representation of a minority shareholder in a proxy fight for control of the corporation. The attorney secured the retention by holding himself out as having special insights into the facts that a stranger to the corporation would not have. The court found that this was "clearly" a conflict. *Id.* at 619, 621.

Jeffry v. Pounds, 67 Cal. App. 3d 6 (1977). The law firm was representing a client in a personal injury action but nonetheless, without any effort to secure consent, commenced representing the client's wife in her divorce action against the firm's client. The court cited authority for the proposition that this obvious breach constituted a "reprehensible breach of loyalty." *Id.* at 12 n. 5 (quoting *Grievance Comm. of Bar of Hartford County v. Rottner*, 203 A.2d 82, 85 n.4 (1964)).

In re Fountain, 74 Cal. App. 3d 715 (1977). The lawyer failed to file a timely appeal for the client in a criminal case and then, while continuing to represent the client, sought to deflect blame from himself and shift responsibility to the client. The court characterized the attorney's behavior as "egregious." *Id. at 718.*

Day v. Rosenthal, 170 Cal. App. 3d 1125 (1985). The attorney had given clients advice about investments for which the attorney was receiving kickbacks. The attorney also advised the clients to put money in investments he knew to be shams, commingled client' funds, and engaged in other fraudulent conduct. The court described this as a "brazen plot" involving "numerous, blatant and egregious violations of attorney responsibility." *Id.* at 1146-1147. The concurring judge wrote that the record disclosed a "course of conduct pursued by a votary of greed, who was insatiate in his avaricious appetite, lamentable in his judgment, and who engaged in a constant and deliberate usurpation of his noble office." *Id.* at 1180 (Arabian, J., concurring).

Cal Pak Delivery v. United Parcel Service, 52 Cal. App. 4th 1 (1997). The attorney had sought to "sell out" his clients by asking his adversary for a secret $8 to $10 million personal payout in return for which the attorney would abandon his clients and the case. The court found counsel's misconduct "egregious," and described it as a "colossal misdeed" and "indefensible betrayal." *Id.* at 9, 13.

A.I. Credit Corp. v. Aguilar & Sebastinelli, 114 Cal. App. 4th 1072 (2003). The law firm had represented an individual for many years in a wide variety of matters, which provided the firm with information about the location of the client's various assets. The firm later agreed to represent a new client who wished to locate assets through which to satisfy a judgment it had secured against the firm's former client. The firm was hired because the client understood that the firm knew what made its former client "tick." *Id.* at 1080. The court found that, despite the unmistakable and profound conflict involved, the law firm had made no effort whatsoever to secure a waiver. *Id.* at 1079.

Fair v. Bakhtiari, 195 Cal. App. 4th 1135 (2011). The attorney entered into numerous business transactions with his client in which it exercised "undue influence" on the client. *Id.* at 1166. In addition, the attorney had made no effort to comply with the Rule of Professional Conduct requiring a lawyer to advise a client in writing that the client may seek the advice of an independent lawyer of the client's choice," and the rule requiring that the client be given a reasonable opportunity to seek such advice. In addition, the attorney represented clients with

conflicting interests, and never made any effort to secure waivers. The court affirmed the trial court's ruling that due to the "nature or seriousness" of the various breaches, the case fit the description of a "serious violation of ethical rules," making the remedy of forfeiture appropriate. *Id.* at 1156.

These cases demonstrate the type of indefensible, egregious misconduct that has given rise to disgorgement and fee forfeiture.[4] As will be seen, the undisputed actions of Sheppard Mullin in this case are a far cry from any of the conduct involved in these cases.

IV. Sheppard Mullin's Conduct

With these principles in mind, it is my expert opinion that nothing in Sheppard Mullin's conduct constitutes the kind of misconduct that has ever justified disgorgement or forfeiture of fees. Unlike all of the cases in which such remedies have been ordered, this is a case in which Sheppard Mullin made an affirmative effort to comply with the governing Rules of Professional Conduct—it secured an advance waiver that was in keeping with common practice among hundreds of major law firms. Based on my experience with law firm's engagement letters and advance waivers, virtually identical waivers are secured and relied upon in thousands of cases each year.[5] It borders on the unthinkable to suggest that a law firm relying on such a waiver is guilty of egregious misconduct.

[4] In a different line of cases involving prohibited fee-splitting agreements, the courts have refused to enforce such agreements on the ground that doing so would implicate the courts in facilitating a prospective violation of the rules by affirmatively forcing an attorney to do the very act the rules prohibit—splitting fees in noncompliance with the rules. See *Chambers v. Kay,* 29 Cal 4th 142, 156-158 (2002). This principle has no relevance here, as there is no rule that remotely prohibits an attorney from being paid for work that was performed (even if it is later found that the attorney was laboring under some form of conflict).

[5] The use of these waivers is truly ubiquitous among law firms, but even if one assumes (very conservatively) that only 200 firms are routinely using them, and even if one then assumes (very conservatively) that each of those firm takes on only 100 new clients each year, that would equal 20,000 times the waivers are being executed every year.

It is my opinion that the waivers executed by the District and J-M were, in fact, valid under the governing law and principles. It is true, of course, that a judge eventually declined to enforce the advance waivers the District had executed. As I explain below, it is my view (although my opinion does not hinge on this view) that this disqualification order was based on a view of advance waivers that is not in keeping with the governing principles. Regardless, though, that decision on disqualification is obviously not a decision on fee forfeiture or disgorgement—just as a judicial decision on disqualification does not govern the independent question of whether a lawyer is subject to professional discipline. See generally *Great Lakes Construction Co. v. Burman*, 186 Cal. App. 4th 1347, 1356 (2010) (issues of disqualification and discipline are distinct). The reason a decision on disqualification does not resolve a question about whether there has been an actual violation of the governing rules is straightforward. Some judges, in an abundance of caution in order to avoid even a possible appearance of impropriety, may choose to disqualify counsel without necessarily finding that any rules have actually been violated. It would be wholly improper to then take that disqualification order and treat it as a determination that there has been a violation, much less that a drastic measure such as disgorgement or fee forfeiture is in order. And, of course, Judge Wu's decision most certainly does not begin to determine the central issue relating to disgorgement or fee forfeiture: whether Sheppard Mullin had a reasonable, good-faith belief at the time it undertook the representation of J-M that the District's waiver was valid.[6]

[6] Given Judge Wu's efforts to find creative ways for Sheppard Mullin to remain in the case, it is difficult to imagine that he saw this as some blatant conflict for which Sheppard Mullin should be punished to the tune of several million dollars.

As for the waiver J–M executed, no judge or authority has ever found this waiver to be invalid, and the case for its validity is, in many ways, even stronger than with regard to the waiver the District executed. In any event, as with the District's waiver, even if one were to conclude ultimately that the J-M waiver is unenforceable, that would not take away from the fact that Sheppard Mullin made a good-faith, reasonable effort to comply with the rules when it discussed the waiver with J-M's General Counsel and CEO and agreed on its terms with them, which was in keeping with industry best practices, and that Sheppard Mullin proceeded with the representation only because of the waiver. None of this behavior is remotely close to the kinds of misconduct that have triggered disgorgement and fee forfeiture.

A. The Role of Waivers Based on Informed Consent

A large law firm often finds itself facing a dilemma when asked to represent a new client. On the one hand, the firm has an interest in representing clients of all sorts, and the client most certainly has an interest in securing the kind of high quality legal services the firm can provide. On the other hand, though, the law firm is understandably reluctant to take on a client in some instances (particularly on small matters) if that might preclude every lawyer in the firm (including those in remote offices) from taking on some major matter in the future because it is adverse in some respect to the interests of the client it is representing on some wholly unrelated matter. See generally *Flatt v. Superior Court,* 9 Cal. 4th 275, 284-286 (1995) (discussing rule against simultaneous representation of clients with adverse interests); CALIFORNIA RULE OF PROFESSIONAL CONDUCT 3-310 (c)(3) (lawyer may not "[r]epresent a client in a matter and at the same time in a separate

matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter").

This is a particular problem with regard to smaller clients or clients with small matters (such as the District here)—as firms are hesitant to take on those kinds of representation when they would create a conflict that might preclude significant new business in the future. And it is a particular problem with regard to large law firms. Sheppard Mullin, for example, has 600 lawyers in 15 offices, including seven California offices, three other United States offices (Washington, D.C., New York, and Chicago), two offices in Europe (London and Brussels), and three offices in Asia (Beijing, Seoul, and Shanghai). Unlike a small practice where a current client might preclude a handful of lawyers from taking on some new matters, each current client in a large firm affects whether many hundreds (and in some major law firms, well more than a thousand) of lawyers are precluded from representing certain new clients. In addition, when a firm is handling cases (like the *qui tam* action here) with scores or hundreds of parties, the specter of being conflicted out is a fundamental concern.

As indicated above, this is not simply a problem that impacts large firm's ability to take on new matters. It has deep implications for clients who very much want to retain a firm but are precluded from doing so because of the firm's concern about potential conflicts of interest, even on matters unrelated to the firm's work for the putative client.

For the past decade or more, many law firms and clients have resolved this problem through clients' informed consent to allowing the firm to take on a particular category of matters, despite the conflicts that would exist in the absence of the informed consent. These waivers typically have nothing to do with conflicts of interest posed by the law

firm working on cases substantially related to the work the firm is doing for the client executing the waiver. Instead, they involve the client agreeing to waive conflicts arising from the firm taking on a representation that is completely unrelated to the work the firm is doing for that client and implicates no confidences the firm learned in representing that client. There are real benefits for clients in these agreements—as they are able to secure high quality counsel who would otherwise choose to forego the representation.

Advance waivers also serve an important interest in facilitating a client's consent in instances where the firm would otherwise be legally and ethically precluded from later securing contemporaneous consent from its clients. For example, if a new prospective client approaches a firm asking it to confidentially research the possibility of filing suit against one of the firm's current clients, the firm would be unable to ask its current client for consent given the confidential nature of the inquiry it received.

Initially, many courts and ethics committees were somewhat resistant to the idea of clients waiving future conflicts that could not yet be specifically identified. Views about these waivers have evolved significantly, however, over the past two decades or so. Reflecting this change, in 2002 the American Bar Association adopted Comment 22 to MODEL RULE OF PROFESSIONAL CONDUCT 1.7. That Comment states, in relevant part, as follows:

> The effectiveness of such [advance] waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is

> not reasonably likely that the client will have understood the material risks involved. On the other hand, *if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent 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.* In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Comment 22 to MODEL RULE 1.7 (emphasis added).[7]

This Comment creates parallel inquiries: one test governs agreements with clients who are "experienced user[s] of legal services" (particularly if the client is represented by independent counsel with regard to the agreement); and one test applies to clients who do not fit that description. The less sophisticated the client, the more elaborate the required disclosure. The more sophisticated the client, the less elaborate the required disclosure. This, of course, makes great sense. There is no need to tell a sophisticated client what it already knows; while there is a need to spell things out more carefully for those who are less sophisticated.

In a 2005 Formal Opinion, the American Bar Association drove home this point, explaining that Comment 22 "support[s] the likely validity of an 'open-ended' informed consent if the client is an experienced user of legal services, particularly if, for example, the client has had the opportunity to be represented by independent counsel in relation to such consent and the consent is limited to matters not substantially related to the subject of the prior representation." AMERICAN BAR ASSOCIATION FORMAL ETHICS OPINION 05-

[7] Although California has not adopted the ABA Model Rules, California courts recognize that these rules "may serve as guidelines" that illuminate the meaning of California law. See *City and County of San Francisco v. Cobra Solutions*, 38 Cal. 4th 839, 852 (2006).

436, *Informed Consent to Future Conflicts of Interest* (2005) (withdrawing 1993 Opinion that was more restrictive on the permissibility of advance waivers).

The Restatement adopts a similar approach. It endorses "a client's open-ended agreement to consent to all conflicts" if the "client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent." RESTATEMENT § 122, comment *d.* (It is often the case, of course, that the firm is working with the client's inside counsel or that the client is using outside counsel, which means the client does have independent representation.) This position reflects a strong trend toward increased acceptance of the need for, and value of, advance waivers. The decision earlier this year of the United States District Court for the Northern District of Texas in *Galderma Laboratories v. Actavis Mid Atlantic,* 927 F. Supp. 2nd 390 (N.D. Tex. 2013) is a good example of courts' acceptance of these waivers when they are the product of informed consent. See also *Macy's Inc. v. J.C. Penny Corp.,* 968 N.Y.S.2d 64 (App. Div. 2013).

This general approach has been accepted in California since at least 1989, when the State Bar of California Standing Committee on Professional Responsibility and Conduct issued FORMAL OPINION 1989-115 on the subject of client waivers. The Committee explained that waivers are not invalid simply because they involve matters or details that cannot be fully explained to the client. The Committee recognized the possibility that, despite a waiver, a conflict so severe could arise that it becomes impossible for a firm to continue on both matters. But, of great significance to this case, the Committee looked at a lawyer "simply representing two clients in entirely unrelated matters," to be an example of a conflict that was thoroughly amenable to advance waiver.

See generally *Zador Corp. v. Kwan*, 31 Cal. App. 4th 1285, 1301 (1995) (endorsing Formal Opinion 1989-115).

California law has developed in ways that confirm Sheppard Mullin's good faith belief in the validity of the advance waivers the District and J-M had executed. The leading case on the subject is *Visa U.S.A. Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. Cal. 2003) in which the federal court applied California law and declared, "[a]n advance waiver of potential future conflicts * * * is permitted under California law, even if the waiver does not specifically state the exact nature of the future conflict." *Id.* at 1105. The key, the court explained, is whether the waiver followed communication of information "reasonably sufficient to permit the client to appreciate the significance of the matter in question." *Id.* at 1106 (quoting AMERICAN BAR ASSOCIATION FORMAL OPINION 93–372). This standard grew out of the California Supreme Court's landmark decision in *Maxwell v. Superior Court*, 30 Cal. 3d 606 (1982), in which the Court rejected the view that informed waivers of conflicts "must separately explore each foreseeable conflict and consequence" and that the "waiver may extend only to matters discussed in detail." *Id.* at 621.

In approaching this issue, California courts have recognized that it is not only lawyers who benefit from enforcing informed consents, but that clients benefit as well. As the court in *Zador Corp. v. Kwan*, 31 Cal. App. 4th 1285 (1995) explained: "'Giving effect to a client's consent to a conflicting representation might rest either on the ground of contract freedom or on the related ground of personal autonomy of a client to choose whatever champion the client feels is best suited to vindicate the client's legal

entitlements.'" *Id.* at 1295 (quoting C. WOLFRAM, MODERN LEGAL ETHICS § 7.2 at 337 (1986)).

The court in *Visa U.S.A.* identified a series of factors as among those relevant to the informed consent inquiry, but the court never suggested that these factors are the only relevant inquiries or constitute a checklist of which some specific number of considerations need be satisfied. Rather, the inquiry always focuses on the ultimate question of whether, in light of the sophistication of the client and the role of its independent counsel, the client had sufficient information to understand the scope of the waiver.

B. The District's Waiver

1. The Waivers

Turning to the waivers executed by the District, there are two documents at issue here. The first is the 2002 letter, which spelled out the details surrounding the waiver and many of the pros and cons in relation to the District's decision on whether to consent to waivers for "all present and future engagements." The second document is the 2006 agreement, which included basically the same waiver, but did not repeat all of the particular details that had been transmitted in 2002. Both of these documents are relevant to the inquiry. Indeed, in his analysis, Judge Wu looked to both of these documents. See *United States of American ex re. Hendricks v. J-M Manufacturing Co.*, No. EDCV 06-55, Ruling of June 6, 2011, Doc. 428 at 4 (C.D. Cal. 2011). To the extent that a proper disclosure was made in 2002, that information had been conveyed to the client and necessarily informed the 2006 waiver. There is no requirement that the lawyer repeat the same information each time a functionally identical waiver is executed.

Sheppard Mullin provided the District with unusually extensive disclosures about the risks and benefits of the proposed waiver. Indeed, these disclosures appear to be more elaborate than any of those that have been considered by any California court or federal court applying California law—including those courts that have held advance waivers to be valid. And the information conveyed is more extensive than that set out in various model waiver forms that several state and local ethics committees have endorsed. Moreover, these disclosures are not buried in some long boilerplate of a retention agreement that a lay client might gloss over. Rather, the entirety of the three-page letter, titled "Consent to Representation of Parties Adverse to the District," is about the nature of the consent and the risks and benefits associated with it, and the letter is drafted in an easily comprehensible manner geared to a non-lawyer client. (This factor is significant with regard to the District—where the correspondence was with lay District officials. As will be seen, though, it is not significant with regard to the waiver with J-M, given that those waivers were reviewed and executed by sophisticated independent counsel.)

The letter begins by making it clear that it governs the District's general engagement of Sheppard Mullin with respect to employment matters, and applies "to all present and future engagements." The letter then explains that the requested consent only involves matters "not substantially related to any District Engagement." And, unlike many waivers that simply refer to general adversity, the letter enumerates the specific kinds of representations adverse to the District that Sheppard Mullin might undertake. It specifies that Sheppard Mullin might represent other parties in cases that

> involve seeking discretionary or ministerial approvals by the District or affiliated agencies or authorities in connection with land use, building, construction or other matters; appearances before governing body of the District, or regulatory or administrative agencies regarding political,

> legislative, administrative, enforcement and tax matters; representation of plaintiffs or defendants in civil actions; representation of defendants in civil or criminal enforcement actions; tax matters; and transactions between Private Parties and the District such as preparing and negotiating agreements, licenses, releases or other documents. SMRH may also represent Private Parties in litigation, arbitration, audits, examinations, inquiries, administrative appeals, and other adversarial proceedings in which the interests of the Private Parties are adverse to the interests of the District.

2002 Consent Letter at 2. This extensive delineation of the kinds of conflicts that might arise goes a long way toward ensuring the client understands the types of adverse representation to which it is consenting. (As discussed, this is very significant with regard to the District, but not with regard to J-M.)

The consent letter then proceeds to explain the general concerns a client might have with its lawyer accepting representation adverse to the client's interest, even on wholly unrelated matters. The letter states:

> concurrently representing more than one client with interests adverse to each other, although separate and unrelated matters, may have disadvantages to each other. Performance of the attorney's duties of loyalty, confidentiality and competence might be affected adversely, or may be perceived to be affected adversely, if the attorney represents a client in one matter while at the same time representing another client in a different matter. The interests of the multiple clients may vary, and as a result the attorney may be subjected to divided loyalties or have difficulties "serving more than one master.

Even had the consent letter stopped there and provided no further information, it still would have contained more discussion about the potentially negative effects of waiving conflicts than virtually all consent letters I have seen. In fact, though, the letter goes well beyond that general discussion. It sets forth five particular considerations the District should take into account in deciding whether to consent.

First, the letter contains a paragraph discussing the "*Possible Effect on Loyalty and Vigor*." This section explains that "[r]epresentation of multiple clients may result in less vigorous assertion or protection of one client's separate interests than if the attorney were to represent only that particular client."

Second, the next paragraph of the letter addresses the issue of "*Confidentiality*," explaining that although the firm will continue to maintain any confidences it learns in the course of representing the District, "our possession of such information may work to the disadvantage of the District if we represent Private Parties in matters in which the interests of the District are adverse to the interests of the Private Parties." The letter does not stop there—it provides an extremely direct illustration: "For example, knowledge of the District and its personnel and procedures may be useful in representing a Private Party even if no confidence of the District is disclosed."

Third, the letter contains a lengthy paragraph on the *"Risk of Requirement to Withdraw*." This paragraph discloses the possibility that, despite the waiver, a conflict could develop in a manner that would require the firm to withdraw from representing the District. In that case, the letter explains, "the District might incur additional expense, delay or other prejudice in connection with obtaining new counsel. The District agrees to our withdrawal under such circumstances."

Fourth, the letter contains a paragraph on "*Appearance to Constituencies*," explaining, "the District may be in a position, now or in the future, where its ability to respond to administrative or public constituencies is hampered by our representation of Private Parties in other matters. In other words, the appearance to constituencies may be

better if the District were represented by independent counsel who has no other client with an interest adverse to the District."

Fifth, the letter contains a paragraph entitled "*Representation Adverse to District*," that reiterates that in representing other clients on unrelated matters adverse to the District, "we will be bound to vigorously represent the interests" of those clients "even if that is adverse to the interests of the District." The letter further informs the District that the firm "would not be representing the interests of the District in any such Unrelated Matter."

In response to Sheppard Mullin's request for a written acknowledgment that these disclosures were made and that the District was waiving these conflicts, the General Manager of the District signed the letter. In so doing, he "acknowledge[d] the disclosures and grant[ed] the consents requested as set forth in the foregoing letter." This was all in keeping with the California Rule's requirement that the informed consent be in writing. And it bears noting that the District employed outside General Counsel throughout this period.

As mentioned above, these three pages of detailed disclosures about the nature of possible adverse representations and the various risks associated with consenting to such representations are quite remarkable in their specificity and style. They provided more than enough information, in my opinion, to sufficiently apprise the client of the nature of the conflicts it was waiving and the reasons it might choose to decline such consent.

Sheppard Mullin sent the 2006 document to the District "to confirm our engagement by South Tahoe Public Utility District (the "District") to represent it in connection with general employment matters." This letter deals primarily with issues of

fees, and also contains one paragraph pertaining to "Conflicts with Other Clients," which contains the basic points spelled out in more detail in the 2002 Consent Letter that applied to all "present and future engagement." Specifically, the 2006 letter informs the District that Sheppard Mullin "may currently or in the future represent one or more other clients" in pursuing interests adverse to the District so long as that representation does not involve maters substantially related to the firm's work for the District and so long as the firm never obtained any confidential information from the District that relates to representation of the other client. The letter is specific in stating that this representation may include "appearance on behalf of another client adverse to the District in litigation," as well as examining or cross-examining District personnel in such cases. The letter further mentions that consent is needed because of the "possible adverse effect on performance of our duties as attorneys to remain loyal and available to those other clients and to render legal services with vigor and competence." In addition, the letter explains that "if an attorney does not continue any engagement or must withdraw therefrom, the client may incur delay, prejudice or additional cost such as acquainting new counsel with the matter." The General Manager of the District signed this letter, again in a context in which the District was employing an outside General Counsel.

2. The validity of the waiver

It is my opinion that the District gave informed written consent to the specified conflicts.[8] The consent came after elaborate, detailed disclosure that specified the kinds

[8] It is quite telling that the District had also executed a waiver with the law firm representing it in the *qui tam* action—the same law firm that fought for Sheppard Mullin's disqualification based on the invalidity of such waivers. Doc. # 409-3, at 28. In fact, unlike the waiver with Sheppard Mullin, the District's waiver with its *qui tam* counsel contained none of the discussion about costs and benefits of waiving conflicts or the precise ways in which the firm may find itself adverse to the District. When confronted with this awkwardness, the District's *qui tam* counsel put forth the somewhat bizarre claim that

of contexts in which Sheppard Mullin might be adverse to the District and described in accessible language what risks the District would be incurring by waiving these kinds of conflicts. In other words, this was precisely the sort of waiver that satisfies the governing standard of being the product of communication "reasonably sufficient to permit the client to appreciate the significance of the matter in question." *Visa U.S.A.*, 241 F. Supp. 2d at 1106. As mentioned above, I have seen hundreds of advance waiver agreements over the years, but I do not believe I have ever seen one that contains the level of clearly presented detail and information as the one the District signed. Even as it sought to invalidate the waiver, the District never claimed it misunderstood what it had signed.

I reach this view notwithstanding Judge Wu's decision to disqualify Sheppard Mullin in the *qui tam* action. I have great respect for Judge Wu, but I believe that Judge Wu's holding was out of step with the weight of authority and reflected a once prevalent—but no longer controlling—view that advance waivers are inherently problematic and discouraged.

In my view, the factors the court identified in *Visa U.S.A* confirm this conclusion. Reasonable people could differ on this conclusion, as evidenced by Judge Wu's decision. But Judge Wu never concluded—nor could he have reasonably concluded—that these factors unmistakably would have put any lawyer on notice that the waiver was invalid. Indeed, it is clear to me that most other judges assessing these same factors would have

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it never really intended to rely on that waiver it had made part of its retention agreement. Doc. # 410 at 13 n. 5.

reached the exactly opposite conclusion about the validity of the waiver.[9] Under these circumstances, even if one were to agree thoroughly with Judge Wu's ruling, that would not suggest that Sheppard Mullin acted in some improper or unethical way, or even that it was misguided or unreasonable, in believing the waiver was valid. Sheppard Mullin's confidence that any court would uphold the waiver was obviously misplaced, given the way that Judge Wu chose to weigh the various considerations. But a lawyer's miscalculation of that sort (and failure to anticipate such a ruling) is light years away from the kind of misconduct that is a necessary predicate for fee forfeiture of disgorgement.

a. The breadth of the waiver

Turning to the factors mentioned in *Visa U.S.A.*, the first consideration is the breadth of the waiver. Here the waiver was, in one sense, quite broad—as it included all kinds of potential adverse representation in numerous specified contexts. On the other hand, though, the breadth of the waiver was significantly limited in that it did not include a waiver of all conflicts. With regard to matters substantially related to work the firm had ever done for the District, the District was not allowing Sheppard Mullin to ever represent interests adverse to the District (even if the District was no longer a firm client). Nor was the District allowing the firm to ever represent adverse interests if the firm had learned confidential information while representing the District that could be relevant to its representation of the other party. In these ways, the waiver avoided the core conflicts involving client confidences, but only waived the more ephemeral interest some clients

[9] Indeed, I believe there is a very good chance that, had an appeal been possible, an appellate court would have concluded that the waivers were valid and that no conflict existed. As it is, though no such appeal was possible.

have in preventing their lawyers from being adverse to them on any matter at all. See *infra* at 43-45 (discussing difference between categories of conflicts).

b. The temporal scope of the waiver

The second factor mentioned in *Visa U.S.A.* is the temporal scope of the waiver. In this case, the time limit on the waiver is that it only applied during the period in which the firm continued to represent the District. This is identical to the structure of virtually all advance waivers that are executed in California and throughout the country. As such, this factor most certainly does not cut against the validity of the waiver. Indeed, Judge Wu did not rely on this factor as supporting his decision.

c. The quality of the conflicts discussion

The third consideration mentioned in *Visa U.S.A.* is the "quality of the conflicts discussion between the attorney and the client." Given the extremely extensive consent letter in which the firm elaborately spelled out so many of the implications of the waiver, this factor strongly weighs in favor of the waiver's validity. As mentioned above, this was not some legal jargon buried in nine-point type in the footnotes of a long boilerplate document. It was a letter that focused exclusively on conflicts and advised the District in the clearest terms about the implications of executing the waiver. The letter also invited the District to ask the firm any questions. That the District felt no need to do that is indicative of the letter's clarity and cannot reasonably treated as evidence of less than informed consent or the absence of any "discussion."

d. The specificity of the waiver

With regard to the fourth *Visa U.S.A.* factor—the specificity of the waiver—there are ways in which the waiver was extraordinarily specific and other ways in which it was

not. As discussed above, the waiver was very specific with regard to the different types of contexts in which the firm might become adverse to the District. Critically for purposes of this case, that list explicitly included litigation. On the other hand, this was not a situation in which a client was being asked to waive conflicts vis-à-vis a particular identified potential adversary. There have been instances in which such identifiable matters and adversaries have been the focus of the waiver, but the law is clear that a lawyer's inability to specify the particular conflicts that might arise in the future does not damn a waiver. See *Maxwell*, 30 Cal. 3d at 621 (informed consent does not require particularized description so long as it generally apprises the client about the nature of the conflicts). To the contrary, the value and importance of advance waivers is precisely because future conflicts cannot typically be identified at the time the firm is requesting a waiver vis-à-vis cases that might arise in the future.

e. The nature of the actual conflict

The *Visa U.S.A.* court next considered the "nature of the actual conflict (whether the attorney sought to represent both clients in the same dispute or in unrelated disputes)." *Visa U.S.A.*, 241 F. Supp. 2d at 1106. There is no doubt that this factor strongly supports the validity of the waiver here. This was a classic case in which the firm would be representing a party adverse to the District (such as J-M in the *qui tam* action) in a matter that had absolutely nothing to do with the (employment) work the firm had been doing for the District. This is precisely the kind of conflict that is most amenable to waiver, and Judge Wu agreed that this factor weighed in favor of the legitimacy of the waiver.

f. The sophistication of the client

The court in *Visa U.S.A* next considered the "sophistication of the client." *Ibid.* This factor mirrors the one discussed extensively in the ethics literature and opinions, where it is recognized that there is no reason for a court to question the adequacy of the informed consent provided by a sophisticated client. See *supra* 17-20. In considering this factor, Judge Wu wrote that "the 'sophistication of the client' factor favors neither side—although South Tahoe is a government entity and is therefore presumably somewhat sophisticated, it also clearly lacks the type of sophistication First Data enjoyed in *Visa*." June 6, 2011 Op. at 4 n.6. This observation about the comparison with the client in *Visa U.S.A.* is quite perplexing. Given Judge Wu's conclusion that South Tahoe is "somewhat sophisticated," it is difficult to understand why it should matter whether it is every bit as sophisticated as the Fortune 500 company involved in *Visa U.S.A.* Nothing in the *Visa U.S.A.* decision or any other decision has ever suggested that only clients as sophisticated or more sophisticated than First Data are capable of executing an advance waiver.

The key here, then, is Judge Wu's conclusion about the sophistication of the District –a conclusion buttressed by the fact that the District is a governmental entity that employs over 100 workers and retains a variety of firms to serve its various legal needs. Indeed, most significantly, the District has long employed the services of a law firm to act as its General Counsel. See Jeffrey A. Dinkin Declaration, Doc. No 409-1 at 6; Charles Kreindler Declaration, Doc. 409-2 at 2. See generally RESTATEMENT § 22, commend *d* (looking at whether client has meaningful opportunity to receive independent legal advice). Given this finding, this factor is not neutral; it weighs forcefully in favor of the waivers' validity.

g. The interests of justice

The final factor mentioned in *Visa* is the "interests of justice." Judge Wu acknowledged that this factor supported Sheppard Mullin's position that the waiver was valid. In the context of this case, that conclusion seems beyond reasonable dispute. This was a case in which the District was a tiny player in a huge matter. It is undisputed that the District was one of almost two hundred real parties in interest and apparently had purchased just .0004% of the J-M pipes at issue in the case. In addition, Sheppard Mullin had done very little recent work for the District; it had billed the District a total of 12 hours from March 2010 to July 2011 and had done no work at all for the District between November 2009 and March 2010. The interests of justice most certainly weighed against disqualifying Sheppard Mullen—which had been deeply immersed in the *qui tam* case for at least 18 months and had been providing what Judge Wu characterized as able representation. See Decision on Disqualification at 7. Indeed, to this day, there is not a whiff of any alleged conflict having affected Sheppard Mullin's conduct for or against any party in the case. J-M has stipulated that is not the case.

3. Conclusions regarding the waiver

Given all these factors, it is my opinion that Sheppard Mullin was not acting unreasonably in believing it had secured a valid waiver from the District that negated any concern about a conflict of interest in its representation of J-M.

It has been suggested in some of the pleadings that, even if one assumes the validity of the waiver, Sheppard Mullin was required to approach the District and secure consent once it was contemplating representing J-M in the *qui tam* action. This argument ignores the point of an advance waiver, which is to eliminate the process of

contemporaneous consent, unless the new matter is outside the scope of the informed consent the client earlier provided. If a lawyer is bound to seek consent from the client each time a conflict emerges, there is no point to ever securing the advance waiver in the first place. Rather, the purpose of the advance waiver is to deal with the fact that the lawyer is only willing to represent the client (in this case, the District) if the client agrees *ahead of time* to waive the enumerated types of conflicts. Otherwise, the firm can find itself in precisely the position it was so adamant to avoid: having taken on '*client a*' and having secured a valid advance waiver only to find that *client a* is refusing contemporaneous consent and is (despite the advance waiver) precluding the firm from representing a whole array of other clients with interests adverse to *client a.*

The point here is to recognize that advance waivers are just that: they are waivers. They reflect informed consent. There is no duty to follow up a valid advance waiver with a new request in real time (which, in many cases simply cannot be done because of the duty to protect confidences, see *supra* at 17). Of course, in cases in which the initial advance waiver is deemed not to have provided sufficient information about the nature of conflicts being waived, courts have turned their focus to whether a second contemporaneous waiver was secured. See, *e.g.*, *Concat v. Unilever*, 350 F. Supp. 2d 796, 821 (N.D. Cal. 2004). But the need for a new waiver only arises if the advance waiver is deemed deficient in some manner.

For all of these reasons, it is my view that Sheppard Mullin committed no misconduct and breached no fiduciary duties when it relied upon the District's waiver and concluded that its representation of the District posed no obstacle to representing J-M in the *qui tam* action. Looking back to the time that Sheppard Mullen agreed to take on

the representation of the District, Sheppard Mullen had no incentive to use a waiver it believed to be invalid or considered risky. If the validity of the waiver was in any doubt, Sheppard Mullen could easily have declined to represent the District, which was a quite minor client. Sheppard Mullin clearly was willing to accept the District as a client only because the firm was securing informed consent in a manner that generated great confidence that such representation would not create disqualifying conflicts. See Kreindler Decl., Doc. # 409-1 at 3. This fact further supports the conclusion that Sheppard Mullin was acting in utter good faith when it determined the waivers were valid.[10]

J-M also claims that, aside from breaching duties to the District by relying on the informed consent, Sheppard Mullin breached its duties to J-M even before J-M retained the firm by not warning J-M of the risk that the District might secure Sheppard Mullin's disqualification by claiming the District's advance waiver was void. It is my opinion that this claim is without support in the governing rules and principles. A lawyer has a duty to communicate "significant information" to a client or prospective client. California Rule of Professional Conduct 3-500. But a lawyer who honestly and reasonably believes an issue to be insignificant has no duty to raise it with a prospective or actual client.

[10] The District also suggested that Sheppard Mullin's work for J-M was, in fact, "substantially related," to work Sheppard Mullin had performed in representing the District. This contention was based on the premise that Sheppard Mullin's request for public records from the District in the course of Sheppard Mullin's representation of J-M was "substantially related" to Sheppard Mullin's work for the District, which included having advised the District several times on how to respond to public records requests in various unrelated employment matters. This argument distorted the "substantial relationship" test beyond recognition. It is akin to saying that because a firm once represented a company in responding to discovery, the firm is forever barred from seeking any discovery from that company—no matter how disconnected the subject matters of the cases. This is most certainly not the law. See generally *H.F. Ahmanson & Co. v. Salomon Brothers*, 229 Cal. App. 3d 1445 (1991) ("substantial relationship" test focuses on the similarities between the substantive subject matters of the representations). Judge Wu never suggested this claim had any merit.

As described above, there are many thousands of advance waivers between clients and lawyers and it is, in my experience, an exceedingly rare occurrence in which clients raise any questions about their validity. One must remember that judicial opinions only emerge from those (few) cases in which conflicts about waivers' validity arise; reading those opinions alone does not provide an accurate reflection of the commonplace reality. Law firms proceed every day with well-founded assurance that such waivers are valid. To be sure, there is always some remote risk that a challenge will be forthcoming, but lawyers are hardly obliged to warn clients about every possible contingency that the lawyer honestly perceives to be remote and conjectural. For example, there is always some risk (no mater how remote) that a former client that is now an adverse party will make a far-fetched claim that the work the firm is now doing is "substantially related" to work the firm did for it or that client confidences are implicated. But a lawyer is not bound to disclose to its new client that there is a remote risk that a challenge—which the lawyer reasonably views as unlikely and unreasonable—could conceivably be advanced. Given the widespread use of advance waivers and the great detail in the waiver the District had executed, Sheppard Mullin was entirely justified in believing just that.

C. J-M's Waiver

Turning to the waiver that J-M executed (a subject that Judge Wu never had occasion to address), the inquiry once again turns on whether the client was given sufficient information with which to make an informed decision on whether to consent. As many of the authorities discussed above explain, the nature of this inquiry is deeply affected by the sophistication of the client and, particularly, whether the client is represented by independent counsel in making the decision about consent. When the

client is not so represented, it is critical to look carefully at the details of the disclosure and the various other factors that inform the question of meaningful consent. By contrast, when the client is represented by independent counsel in reaching the agreement (as J-M was here), the law recognizes that this counsel's participation is strong evidence of true informed consent.

For this reason, the emphasis of the inquiry into the validity of the J-M waiver is somewhat different than the inquiry with regard to the District's waiver. With regard to the J–M waiver, the evidence shows that the terms of the retention agreement (in which the waiver provision is found) were negotiated through a give-and-take with J-M's in-house General Counsel, Ms. Camilla Eng, in which she also consulted with J-M's CEO. Indeed, the General Counsel insisted on a number of substantive changes to various parts of the agreement. With regard to the waiver provision, though, the General Counsel accepted it without reservation. This is hardly surprising given the prevalence of such provisions in the modern market for legal services.

1. The waiver

The waiver provision in the engagement letter with J-M states as follows:

> Conflicts with other clients. Sheppard, Mullin, Richter & Hampton LLP has many attorneys and multiple offices. We may currently or in the future represent one or more other clients (including current, former, and future clients) in matters involving the Company. We undertake this engagement on the condition that we may represent another client in a matter in which we do represent the Company, even if the interests of the other client are adverse to the Company (including appearance on behalf of another client adverse to the Company in litigation or arbitration) and can also, if necessary, examine or cross-examine Company personnel on behalf of that other client in such proceedings or in other proceedings to which the Company is not a party provided the other matter is not substantially related to our representation of the Company and in the course of representing the Company we have not obtained confidential information of the Company material to representation of the other client. By

> consenting to this arrangement, the Company is waiving our obligation of loyalty to it so long as we maintain confidentiality and adhere to the foregoing limitations. We seek this consent to allow our Firm to meet the needs of existing and future clients, to remain available to those other clients and render legal services with vigor and competence. Also, if an attorney does not continue in engagement or must withdraw therefrom, the client may incur delay, prejudice or additional costs such as acquainting new counsel with the matter.

Engagement Letter of March 4, 2010, executed by J-M General Counsel Camilla M. Eng and Bryan Daly of Sheppard Mullin.

2. Validity of the waiver

This provision fits squarely into the category of lawyer-to-lawyer agreements in which there is no inequality of bargaining power or reason to fear that the waiver was either forced upon or not fully understood by the client. One of the primary roles of an in-house general counsel's office is to negotiate the terms of retention for outside counsel and, in this case, J-M's General Counsel interviewed several different firms as candidates to take over the case and negotiated aggressively on the terms of the engagement. As always, the question comes back to the fundamental issue of whether the client had sufficient information about the nature of what it was waiving so as to constitute an informed consent. Plainly that is the case here. And, yet more plainly, even if one disagrees with that conclusion, Sheppard Mullin's reliance on the J-M waiver cannot be characterized as gross or egregious misconduct, of misconduct of any sort.

As discussed above, the court in *Visa U.S.A.* listed some of the considerations to be considered in assessing whether a client provided informed consent. These factors are valuable tools, but it is essential to avoid falling into a trap of insisting that *x* number of them be satisfied. Rather, the inquiry is a holistic one that looks at the entire context. That said, analysis of the *Visa U.S.A.* factors provides support for the conclusion that the J-M

waiver was valid, and certainly that Sheppard Mullin was not guilty of any misconduct for believing it was (even if that belief is determined to have been erroneous).

a. The breadth of the waiver

With regard to the first consideration—the breadth of the waiver—the language of the provision is undoubtedly broad inasmuch as it applies to all kinds of matters. But it is narrowed substantially by its exclusion of conflicts involving matters substantially related to the Firm's work for J-M or matters in which confidences the firm learned in the course of representing J-M might be implicated.

b. The temporal scope of the waiver

As for the second consideration—the temporal scope of the waiver—there is no time limit here except that it only has force during the time in which the Firm continues to represent J-M. As mentioned above, though, this is true for virtually every advance waiver I have ever seen. It would be highly unusual for an advance waiver to set a specific expiration date on the validity of the client consent (other than having it apply only while the client remains a "current client"). Indeed, it is difficult to understand the reasoning that would lead any parties to adopt that limitation. The purpose of the advance waiver is for a firm to know that, by accepting the instant client, it is not foreclosing itself from taking on other matters adverse to this client. Given that goal, why would an artificial time limit of *x* years be adopted? Why would a client be willing to say, "I will waive my right to loyalty for the next *x* years, but after that I insist that you refrain from representing any clients in pursuing interests adverse to mine?" At least in the case of a sophisticated client being represented in the retention negotiations by experienced independent counsel, this factor has very little significance.

c. The quality of the conflicts discussion

With regard to the third factor—"the quality of the conflict discussion between the attorney and the client"—the role of J-M's General Counsel is dispositive here. See generally RESTATEMENT § 122, Comment *c(i)*(in-house counsel qualifies as independent counsel). As evidenced by the laborious details the firm provided to the District when it secured the District's informed consent, the firm understood that when dealing with a lay client directly there is more of a need to spell out the nuanced ramifications of a waiver. But, in keeping with common sense and the clear message of the ethics literature, the kinds of disclosures necessary when dealing with a client's independent counsel are far more relaxed.

It is simply unnecessary to engage in that kind of detailed series of explanations and extensive disclosure of risks and benefits when the person with whom the firm is negotiating is a lawyer who is clearly and fully aware of the implications of the waiver. Indeed, given the frequency with which lawyers in corporate general counsel offices deal with retention agreements, those lawyers are frequently better versed in issues relevant to advance waivers than are the individual law firm lawyers.

As the comments to the ABA rules explain,

> 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.

AMERICAN BAR ASSOCIATION MODEL RULE OF PROFESSIONAL CONDUCT 1.0, Comment 6). See generally *Visa U.S.A.*, 241 F. Supp. 2d at 110 (emphasizing that First Data has a substantial legal department that "routinely hires top-tier national law firms" and thus "should be expected to fully understand the full extent of what it waived"); *Zador*, 31 Cal. App. 4th at 1301 (noting that client had independent counsel in deciding whether to consent).

d. The specificity of the waiver

Focusing on the fourth *Visa U.S.A.* consideration—the specificity of the waiver—the waiver here is quite specific in disclosing to J-M that Sheppard Mullin may represent both current and future clients that are adverse to J-M in litigation. (Although, as with the District waiver, there was no delineation of specific clients who the firm might represent.) For purposes of this case, then, this was a specific waiver vis-à-vis the adversity that later materialized. (This factor might play out differently were Sheppard Mullin to undertake representation adverse to J-M in other contexts, but that is not at issue in this case.)

e. *Nature of the actual conflict*

With regard to the next factor, the "nature of the actual conflict," it is quite obvious that the conflict here, if any, was far from a severe one. In the context of this case, with the District being such a minor player, and being such a minor client, it is quite far-fetched to believe that Sheppard Mullin would be pulling punches in its representation of J-M because it felt some need to advance the interests of the District. (This is especially true given Sheppard Mullin's good faith belief that it had a valid waiver from the District.) The fact that J-M aggressively fought in District Court to continue to be

represented by Sheppard Mullin (even after it learned of the conflict), and the fact that even today, J-M does not claim any flaw, much less disloyalty, in Sheppard Mullin's representation, further attests to the relatively inconsequential nature of any conflict. This factor most assuredly weighs heavily in favor of the validity of the waiver J-M executed.

f. The sophistication of the client

The fifth factor—the "sophistication of the client"—is, in my opinion, very significant here, as discussed in detail above. This is particularly true when combined with the active role of the General Counsel in negotiating the agreement. As indicated above, there are compelling reasons to conclude —as many authorities have—that this factor is itself sufficient to prove that the client provided fully informed consent in waiving the conflicts. See *supra* at 16-18. This case is dramatically different than those involving individual clients, such as the client in *Concat*, where the firm gave a brief boilerplate waiver to an individual seeking estate planning advice. The client in *Concat was,* of course, neither sophisticated in navigating the law nor represented by independent counsel in signing the waiver. See *Concat*, 350 F. Supp. 2d at 801-802, 821.

g. The interests of justice

The final factor that *Visa U.S.A.* mentions—the "interests of justice"—also weighs heavily in favor of the waiver's validity. It is significant, in this regard, that J-M's earlier positions indicate its lack of concern that it would be prejudiced by any conflict. During the *qui* tam litigation, J-M itself took the position that Sheppard Mullin's advance waiver with the District was thoroughly valid. J-M, moreover, fought for the right to continue to be represented by Sheppard Mullin even after J-M became aware that the

Firm was also representing the District on unrelated employment matters.[11] Clearly, J-M was not concerned that Sheppard Mullin's unrelated representation of the District (through different lawyers in different offices) might have any negative impact on Sheppard Mullin's zeal, loyalty or aggressiveness in representing J-M. It goes without saying that the "interests of justice" would hardly be promoted by allowing J-M to now challenge the validity of a waiver which is at least as strong, if not stronger, than the waiver it fought to uphold. Nor is it consistent with the "interests of justice" for J-M to now challenge the validity of its own waiver with Sheppard Mullin in light of J-M's having strenuously argued that there was no conflict here at all.

In this regard, many courts and authorities have commented on the risk that parties will seek to disqualify opposing counsel for strategic reasons. There is surely at least as much of a risk that a party will use a claimed conflict to seek a windfall of disgorgement or fee forfeiture—even when the party, as is the case here, has no complaint with the quality of legal services the firm provided. The "interests of justice" would not seem to be advanced by allowing a client to contest the validity of a waiver as part of that strategy.

3. Other arguments advanced in support of the conflict claim

J-M also advances the argument that, even if J-M's general waiver was valid, Sheppard Mullin was duty-bound at the time JM retained Sheppard Mullin to inform J-M

[11] I understand that J-M was far into the litigation at that point and had interests, for that reason, in proceeding with Sheppard Mullin. But those reasons surely would not have trumped genuine concern that J-M would receive subpar, disloyal representation from Sheppard Mullin by virtue of the Firm's representation of the District. And, of course, J-M has stipulated it has no complaints with the quality of the services it received from Sheppard Mulling, despite the alleged conflict.

that Sheppard Mullin was currently representing the District.[12] This argument ignores the plain language of the waiver in which J-M, acting through its counsel, agreed to waive and then did waive any conflict arising from Sheppard Mullin's having current clients who are adverse to J-M. The second sentence of the conflict paragraph explicitly states, "We may *currently* or in the future represent one or more other clients (including *current*, former, and future clients) in matters involving" J-M (emphasis added). Despite the various revisions that J-M's General Counsel made to other parts of the agreement, including sections contained on the very page of the conflict provision, and despite the General Counsel's consultation with J-M's CEO and tough bargaining posture with Sheppard Mullin, J-M's General Counsel never sought to modify this provision or to inquire about the identity or specifics of any current clients the Firm already represented.

Given the nature of the type of conflicts being waived here, one can easily understand why J-M was willing to agree to the waiver vis-à-vis both current and future Sheppard Mullin clients. The conflict involved here is not one associated with the duty of confidentiality that plays out differently with relation to different matters; rather it deals with a client's generalized entitlement to insist that its lawyer be loyal and refrain from taking on any matters that are adverse to the client's interests. See *Flatt*, 9 Cal. 4th at 282 (rule is designed to protect "client's sense of trust and security"). Some clients care about

[12] I am assuming for purposes of this discussion that Sheppard Mullin was, in fact, representing the District at the time it agreed to represent J-M. This is not completely obvious. It appears that Sheppard Mullin had not done any work for the District for several months and had no open matters pending for the District at the time Sheppard Mullin was retained by J-M. On the other hand, there is some precedent establishing that episodic recurring work for a client makes that client a "current client" until something (time or otherwise) severs the relationship. It is unnecessary to resolve this question, given Sheppard Mullen's reasonable reliance on the District's waiver. But even leaving the waiver aside, Sheppard Mullin may well have been within the zone of reasonableness were it to have concluded that the District was not a "current client" at the time J-M retained the firm. What is certain is that such a conclusion would not have constituted egregious misconduct of the sort that supports disgorgement or fee forfeiture.

this particular aspect of loyalty and some do not (unlike concerns with confidentiality which are of universal or near universal concern to clients). The waiver that J-M executed (and that thousands of clients execute each year) reflected its willingness to tolerate that sort of relationship with its lawyers—one in which the firm would represent J-M in the *qui tam* case even though it was representing others who were adverse to J-M in unrelated matters. Hence, the waiver declares in no uncertain terms: "By consenting to this arrangement, the Company is waiving our obligation of loyalty to it so long as we maintain confidentiality and adhere to the foregoing limitations."

Clients' increased tolerance for its lawyers taking on representations adverse to them on unrelated matters reflects major changes in the ways in which legal services are provided today. There was a time (and still is in some settings that are irrelevant here) in which client typically looked to their lawyers as their all-purpose advocate and counselor and had a deep personal relationship with the lawyer. In that setting, a client might well feel a sense of deep betrayal if its own lawyer was doing anything adverse to the client's interest in any matter whatsoever. But in an era in which firms are huge (so much so that many lawyers in the firms have never even met), and in which clients will often employ dozens of firms on an a-la-carte, one-off basis, many clients have become more accepting of the idea that the law firm is a limited-purpose advocate and that the firm's taking positions in unrelated cases against the client is no cause for concern and, certainly, no basis for disqualification. See generally *UMG Recordings v. MySpace*, 526 F. Supp. 2d 1026, 1061 (C.D. Cal. 2006) (Noting "ever-escalating frequency of attorneys shifting firms, firms merging or being acquired by other firms, firms opening offices in numerous

cities and foreign jurisdictions, and firms expanding into "mega-firm" size, sometimes with more than a thousand lawyers.")[14]

None of this is to say that the law has abandoned protecting clients' interests in loyalty. It most certainly has not. Thus, absent a valid waiver, those interests continue to support concurrent representation conflicts. But these realities and the changes in the nature of legal practice do make it easy to appreciate why many clients are readily willing to waive this particular kind of conflict.

This brings us to the point at hand: the waiver of conflicts vis-à-vis current clients as well as future ones. Once a client has decided to forego its interest in generic loyalty, it matters not whether that deviation from absolute loyalty involves current clients, future clients, or both. So long as the adverse representations fit within the scope of the waiver—they do not involve matters substantially related to the work the firm is doing for the consenting client and do not implicate confidences of the consenting client—the timing of whether the other client is already on the firm's roster or shows up later is of no moment.

4. Conclusion regarding the validity of the J-M Waiver

All this explains why J-M would have sensibly accepted the waiver vis-à-vis both current and future clients. But regardless of whether one accepts this rationale, the plain fact is that J-M, acting through its General Counsel and CEO, did accept the waiver as so stated. J-M was not shy about demanding changes to the agreement and it could have insisted on learning the identity of current clients, or it could have insisted that the waiver

[14] Indeed, I have heard from some companies that, because it is clear that *some* lawyer will be taking on a matter adverse to the them, they actually prefer that it be a lawyer whom it has hired on a different matter as that provides some assurance that the lawyer is an reasonable and ethical practitioner.

exclude every class of current clients altogether. There is no basis, though, for it to have explicitly so agreed and now claim it was unaware that the Firm was then-currently representing any other clients who had interest adverse to J-M's. The plain terms of the agreement are wholly dispositive on this point. Nor is there a basis, given the explicit waiver signed by its General Counsel, for J-M to contend that it had made it clear to Sheppard Mullin that it was not the kind of client who tolerated conflicts even on unrelated matters. Again, the plain language of the agreement is dispositive.

It is my opinion, then, that Sheppard Mullin was justified in proceeding with confidence that J-M had agreed to waive and then had waived any conflict inherent in Sheppard Mullin's representation of the District on unrelated matters. But, as was the case with the District's waiver, even were one to weigh these various factors differently and conclude that the waiver was not enforceable, that would hardly show that Sheppard Mullin was guilty of any misconduct. And it would certainly not show that Sheppard Mullin was guilty of misconduct so egregious as to support the extreme measure of disgorgement or fee forfeiture.

4. Relationship to disgorgement and fee forfeiture

With regard to disgorgement or fee forfeiture, it also bears noting that this is not a case in which J-M is claiming it was damaged in any way by Sheppard Mullin having represented it while the District was a client on employment matters.[15] The District was a minor player in the case—one of almost 200 real parties in interest overall—with a relatively miniscule financial interest as compared to virtually all of the other parties. It

[15] To be sure, there may have been some costs associated with the transition to a new firm once Sheppard Mullin was disqualified. But that has nothing to do with disgorgement or fee forfeiture, and J-M has stipulated it is not pursuing relief for those costs in any event.

has never been suggested that the lawyers from Sheppard Mullin who were representing J-M actually held back in their zeal in fighting for J-M occasioned by another lawyer in the firm providing the District with sporadic employment advice.

Indeed, Judge Wu recognized that Sheppard Mullin had been providing able representation (despite the fact it was representing the District in providing advice on employment law issues). Significantly, even after the disqualification order, Judge Wu was prepared to allow Sheppard Mullin to continue in the case if the District was separated out. Were there truly a concern with the impact that Sheppard Mullin's relationship with the District might have on its zeal in representing J-M, this remedy would have made no sense (given the obvious implications the litigation would have on the District). Yet, the judge's endorsement of it is powerful proof that the conflict here (which was waived in any event) was not of the sort that impacted adversely on the representation J-M was receiving (and was not of the sort that supports drastic punitive measures). It bears repeating in this regard that J-M has stipulated that it received quality work from Sheppard Mullin throughout the representation.

According to some California courts, this absence of damages to J-M is dispositive on the question of disgorgement or fee forfeiture. See *supra* at 9-10. By contrast, some other courts have suggested that disgorgement and fee forfeiture are available as a sanction regardless of whether the client has been damaged. *Ibid.* Even under this latter view, though, the fact that no client was actually prejudiced by the alleged violation is a factor that goes to the intensity of the alleged breach and the extent to which it permeated the attorney-client relationship. Some of the courts that talk about disgorgement speak about the utter worthlessness of representation that is so deeply

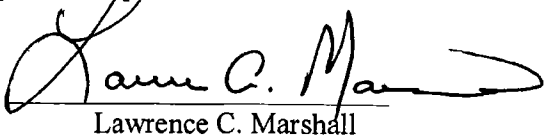
tainted by profound misconduct. See, *e.g.*, *Day*, 170 Cal. App. 3d at 162 (extensive misconduct rendered the attorney's services "valueless"). The cases discussed above, *supra* at 11-13, make clear (and confirm the common sense conclusion) that disgorgement or fee forfeiture are extreme remedies to be imposed only in cases of clear and severe misconduct. This was decidedly not the case here.

V. Conclusion

It is my opinion, as an expert in the field of legal ethics, that Sheppard Mullin violated no ethical principles and committed no misconduct when it undertook the representation of J-M against a group of nearly 200 real parties in interest, one of which was the District. Sheppard Mullin took on this representation only after assuring itself that both J-M and the District had executed waivers to this type of conflict, and Sheppard Mullin had every reason to believe these waivers were valid and enforceable (which I also believe to be the case). But the decision on whether J-M is entitled to disgorgement or fee forfeiture does not require that the ultimate validity of one or both waivers be decided. All that matters is that it is impossible to conclude that, by relying on the legitimacy of these waivers, Sheppard Mullin was guilty of willful, egregious misconduct of the sort that has always been demanded as a predicate for disgorgement or fee forfeiture.

AFFIRMATION

I confirm that, insofar as the facts stated in my Report are within my own knowledge, I have made clear which they are and I believe them to be true. I also confirm that the opinions I have expressed represent my true and complete professional opinion and are intended to assist the Panel in resolving the parties' dispute.



September 30, 2013 Lawrence C. Marshall

Exhibit D

To: 'Camilla Eng/Legal Department'[CamillaEng@JMEagle.com]; Bryan Daly[BDaly@sheppardmullin.com]
Cc: 'Walter Wang'[WalterWang@JMEagle.com]
From: Charles Kreindler
Sent: Tue 6/7/2011 2:17:37 PM
Subject: RE: Discussion re Motion to Disqualify

Walter/Camilla,

Bryan did speak with our Executive Committee last night (as well as our general counsel) and all agree that the best approach for us to take is for Sheppard Mullin to offer South Tahoe compensation in exchange for a waiver. The compensation would take the form of cash, some free labor law advice going forward, as well as an offer to use separate counsel to perform any discovery tasks (or trial work) that is directed specifically toward South Tahoe (at Sheppard Mullin's expense). We plan on making the offer immediately.

Specifically with respect to your 4 options outlined below, Option 1 is off the table. Option 2 is a possibility if all else fails, but there is a relatively small chance of success. Option 3 would be fine with us and the only way we could remain as counsel if South Tahoe refuses our offer. Option 4 is discussed above.

Please let us know if you have any other questions or concerns. We very much appreciate your support.

Chuck

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From: Camilla Eng/Legal Department [mailto:CamillaEng@JMEagle.com]
Sent: Tuesday, June 07, 2011 12:13 PM
To: Bryan Daly; Charles Kreindler
Cc: Walter Wang
Subject: Discussion re Motion to Disqualify

Bryan and Chuck,

This is to confirm our in-person discussion yesterday with Walter at our offices. During our discussion, you presented us with the following possible options in resolving what Judge Wu has tentatively indicated as the firm's conflict issue:

(1)JM settle with South Tahoe by compensating the agency for the pipe it bought during the relevant period which Sheppard estimates to be $97,000 in addition to 150 percent of what it would collect as a successful intervenor in the qui tam litigation. Bryan and Chuck indicated that this is their preferred course but confirmed that this would be only with the consent of JM. Such settlement would be public as South Tahoe is a public agency and we are still uncertain as to whether this is appropriate;

(2)Sheppard appeals Judge Wu's ruling through a writ process which would inevitably delay the December trial date. Judge Wu may issue a stay of the qui tam until this issue is resolved. Sheppard did indicate that they would foot the bill.

(3)Bifurcation of South Tahoe which entails Sheppard refraining from defending JM against South Tahoe, and hiring conflict counsel for JM for such representation. This is proposal is discussed in Judge Wu's tentative, however, this method is not well-tested and is novel. There are not very many examples of this approach in a qui tam action as it is more common in class action suits. Bryan and Chuck indicated that this would not be their preferred course.

(4)Purchase of a waiver from South Tahoe by Sheppard is what Chuck proposed. The group discussed that this is most likely the best approach as it would allow Sheppard to resolve its issue with South Tahoe without much involvement with JM. Bryan indicated this was a good idea and that he would speak to his executive committee that night. He further indicated that he would get back to us as to their decision and proposal.

Please advise as to the outcome of your subsequent research and discussions with your executive committee regarding option #4.

Thanks,

Camilla M. Eng

General Counsel

JM Eagle

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JM Eagle supports green initiatives in the manufacturing,

transportation, installation and use of its products.

Exhibit E

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Attorneys for Claimant and Cross-Respondent,
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IN THE ARBITRATION BEFORE JAMS

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP,

Claimant and Cross-Respondent,

v.

J-M MANUFACTURING COMPANY, INC., D/B/A/ JM EAGLE,

Respondent and Cross-Claimant.

REF. NO. 1220045609

Arbitrators: Hon. Gary L. Taylor (Ret.)
Hon. Charles S. Vogel (Ret.)
James W. Colbert, III, Esq.

SUPPLEMENTAL DECLARATION OF BRYAN D. DALY

I, Bryan D. Daly, declare as follows:

1. I am an attorney admitted to practice law before all courts of the State of California. I am a partner in the law firm of Sheppard, Mullin, Richter & Hampton LLP ("Sheppard Mullin"). I submit this Supplemental Declaration to provide additional information in response to certain issues raised in the Opening Brief of J-M Manufacturing Company, Inc. ("J-M") and the Declaration of Camilla Eng. Unless otherwise stated, the following facts are within my personal knowledge, and I can testify competently to them.

2. I have reviewed J-M's Opening Brief and the Declarations of Camilla Eng and K. Luan Tran, as well as the exhibits submitted with those declarations. I also re-read Sheppard Mullin's Opening Brief and all of the declarations and exhibits Sheppard Mullin submitted with its Opening Brief.

A. March 2010 Events

3. I take my responsibilities to my clients, including ethical obligations, very seriously. My ethics as a lawyer have never been questioned. I have never, and would never, conceal information from a client, especially information about potential or actual conflicts of interest. Whenever I have thought there was a potential conflict, I have always disclosed the situation and discussed it with the client. Therefore, I was dismayed to read J-M's unfounded assertions that I intentionally concealed an alleged conflict from them in March 2010. That is patently untrue.

4. In March 2010, when J-M sought to engage Sheppard Mullin to represent it in the Qui Tam Action, I was confident there was no conflict that precluded Sheppard Mullin from accepting the engagement. Before we agreed to represent J-M, I had a conflict check run using Sheppard Mullin's computer database. I learned that Sheppard Mullin had done some work for South Tahoe, one of the roughly two hundred real parties in interest identified on Exhibit 1 to the Complaint in the Qui Tam Action.[1] Based on information from the conflict check, I learned that South Tahoe had executed an advance conflict waiver that permitted Sheppard Mullin to represent adverse parties in matters not substantially related to the labor and employment work it did for South Tahoe. I believed that this

[1] Ex. V.

advance waiver was fully enforceable. I also learned as part of the conflicts check that the last time Sheppard Mullin had done any work for South Tahoe was in November 2009, which was an engagement related to a labor and employment arbitration that had ended. There had been no time billed to South Tahoe for the five months between November 2009 and March 2010. Based on these facts, I did not believe that South Tahoe presented any issue regarding representing J-M in the Qui Tam Action.

5. Nevertheless, to confirm my assessment that it was permissible for Sheppard Mullin to represent J-M in the Qui Tam Action, I spoke with Sheppard Mullin's General Counsel, Ronald Ryland. As I discussed at length in my prior Declaration, Mr. Ryland confirmed that it was also his judgment that Sheppard Mullin was not precluded from representing J-M in the Qui Tam Action.

6. I understand from reviewing J-M's submission that J-M's current position is that J-M never would have hired any lawyers that had previously done any work for an adverse party. That position is inconsistent with J-M's behavior throughout the course of our representation of J-M in the Qui Tam Action for several reasons.

7. First, J-M agreed to a conflict waiver and never expressed concern to us about the work we had done for South Tahoe until July 13, 2011 when Ms. Eng informed us that J-M had decided to have Sheppard Mullin disqualified. In March 2010, Ms. Eng signed the advance waiver in the engagement agreement without question or concern. During our multi-day discussion of the draft engagement agreement, Ms. Eng never told me that J-M had concerns about giving conflict waivers, or that J-M refused to work with any lawyers who were doing, or had done, unrelated (or any other) work for an adverse party. In March 2010, I had told Ms. Eng that I had a relationship with the Los Angeles Department of Water and Power ("LADWP"), which was adverse to J-M in the Qui Tam Action; that I had recently represented the LADWP in a False Claims Act case; and that I hoped to represent the LADWP again in the future. However, she never expressed any concern whatsoever about that representation. Similarly, in April 2011, when Mr. Kreindler and I informed Ms. Eng that J-M had threatened a disqualification motion, Ms. Eng again did not express any concern about the fact that Mr. Dinkin had done work for South Tahoe. Again, in June 2011, when Mr. Kreindler and I told Ms. Eng that we would like to obtain a supplemental conflict waiver from South Tahoe and that

we would be offering free labor and employment work to South Tahoe as part of the consideration, Ms. Eng did not express any concern about Sheppard Mullin offering to do additional work for South Tahoe while the Qui Tam Action was pending. On the contrary, she encouraged us to make the offer.

8. Second, J-M was constantly looking to develop contacts with current and former employees and representatives of the government entities that were real parties in interest. J-M believed that if it could create constructive lines of communication with the government entities, it would provide J-M with an opportunity to dissuade them from intervening, to persuade them to withdraw their intervention, convince them to dismiss their claims altogether, or otherwise to achieve a favorable resolution. In my experience in False Claims Act cases, this is a very common and productive defense strategy. Indeed, J-M hired several "public relations" consultants and former water district officials to attempt to create these contacts. Ms. Eng refers to this strategy in paragraph 5 of her Declaration in this Arbitration. Thus, it was my impression that, if anything, the fact that Sheppard Mullin had done labor work for South Tahoe (and certainly if South Tahoe was a current client as J-M has suggested) would have been viewed by J-M as a positive fact and another attribute of Sheppard Mullin.

9. Third, when Sheppard Mullin was disqualified, J-M replaced Sheppard Mullin with Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg, P.C. ("Bird Marella"). Bird Marella already had been representing the distributors of J-M's pipe that was directly at issue in the Qui Tam Action. Significantly, those distributors were potentially adverse to J-M. That is because the Qui Tam Action was based on the allegation that J-M's pipe was improperly manufactured, and one of J-M's possible damages defenses was that any problems with its pipe were caused by improper storage of that pipe by its distributors. This defense also gave J-M an indemnity claim against the distributors, which Ms. Eng told me J-M planned to assert at some point if necessary. When the relator's counsel sent subpoenas to J-M's distributors, we discussed the fact that because J-M's indemnity claims and defenses gave rise to a conflict, separate counsel should represent the distributors. Bird Marella ultimately represented the distributors. Nevertheless, despite these conflicts with the distributors, Ms. Eng hired Bird Marella to replace Sheppard Mullin as its counsel in the Qui Tam Action.

B. Communications with South Tahoe and the Disqualification Motion

10. In March 2011, Mr. Kreindler told me that he had received an inquiry from Mr. Rennert, one of the lawyers representing the relator and several of the intervenors (including South Tahoe) in the Qui Tam Action, about work that Mr. Dinkin had done for South Tahoe. Mr. Kreindler told me that his reading of Mr. Rennert's letter was that Mr. Rennert did not know about South Tahoe's conflict waivers and that providing a copy of the advance waiver to Mr. Rennert should end his inquiry. Based on Mr. Kreindler's description of the letter inquiry, I did not interpret Mr. Rennert to be threatening a motion for disqualification. I also confirmed that the letter did not say that.

11. I agreed with Mr. Kreindler's assessment of the situation. Even though I had not been directly involved in any discussions or communications with Mr. Rennert, I was confident, given the text of his letter, that Mr. Rennert could not be aware of South Tahoe's conflict waiver. Based on my experience, False Claims Act cases such as the Qui Tam Action are typically lawyer-driven, like many consumer class actions. Counsel for the relator develops a case theory, and he or she then attempts to persuade government entities to intervene. That in turn drives up the value of the case. These intervening government entities typically seek to avoid actively participating in the litigation. Because such intervenors try to limit as much as possible their involvement in the case, and because typically False Claims Act cases have a large number of real parties in interest and intervenors, the relator's counsel such as Mr. Rennert usually does not have much contact with, or knowledge of, the intervenor or real party in interest. This is especially the case for intevenors that are small public municipalities with minor monetary claims such as South Tahoe in the Qui Tam Action.

12. Given what I knew about the extremely limited contacts lawyers like Mr. Rennert have with minor intervenors like South Tahoe, I thought that Mr. Rennert's inquiries were uninformed and would be resolved simply by providing him a copy of South Tahoe's waivers. I was therefore very surprised when Brent Rushforth, another lawyer representing the relator and several intervenors, emailed Mr. Kreindler and me on April 11, 2011 telling us for the first time that South Tahoe was seriously contemplating a disqualification motion. Mr. Kreindler told me he had already sent two letters to Mr. Rennert explaining South Tahoe's conflict waiver, and so I thought this new

request from a new lawyer was simply the result of a lack of communication between Mr. Rennert and Mr. Rushforth and nothing more.

13. In order to determine whether Mr. Rushforth's position was based on a full understanding of the relevant facts, which I fully expected was *not* the case, I decided to participate in a conference call with Mr. Rushforth and Mr. Kreindler on April 19, 2011. That date of April 19 was the first date that worked for such a call among the three of us following Mr. Rushforth's April 11 letter. I thought that the April 19 call presented an opportunity to move past the exchange of letters and that a person-to-person dialogue more easily would confirm to Mr. Rushforth that this was a non-issue. I planned to explain simply to Mr. Rushforth that there was no issue because South Tahoe had waived any potential conflict arising out of our representation of J-M in the Qui Tam Action and that Mr. Dinkin's labor work for South Tahoe was completely unrelated to the Qui Tam Action. I also planned to mention to Mr. Rushforth that there was no confidentiality issue and that we had implemented an ethical wall as a courtesy to preempt any professed concern by Mr. Rushforth about confidentiality.

14. However, during that April 19 call, it became clear to me that Mr. Rushforth simply did not intend to honor South Tahoe's conflict waiver. This was the first time I believed that there was any material chance that a disqualification motion might be filed. Therefore, Mr. Kreindler emailed Ms. Eng the next day on April 20 to inform her about what we now believed was a material threat of a disqualification motion.

15. I also understand that J-M is asserting that we never suggested that J-M seek the advice of independent counsel after we notified Ms. Eng about the disqualification motion. This is also not true. From the time we informed Ms. Eng (who was, of course, a lawyer representing J-M) about the disqualification motion all the way through the end of our engagement, Mr. Kreindler and I had several in-person and telephonic meetings with Ms. Eng and Mr. Wang about that subject. During those conversations, we invited J-M to seek the advice of additional, outside counsel. We even told them that Sheppard Mullin was willing to pay for an outside attorney to provide J-M with a second opinion about our handling of the Qui Tam Action and the disqualification motion. I also was aware that Ms. Eng knew Thomas O'Brien of Paul, Hastings, Janofsky & Walker LLP and was

frequently in contact with him. Mr. O'Brien previously had served as the U.S. Attorney for the Central District of California. I therefore suggested to Ms. Eng at least once that she speak with him about the disqualification motion as well.

C. Responding To The Disqualification Motion

16. Ms. Eng and Mr. Wang both encouraged us to fight the disqualification motion from the moment we first informed Ms. Eng about it all the way through the July 7, 2011 hearing. They did not ever tell us during the briefing on the motion that they were concerned or upset regarding the labor and employment work Mr. Dinkin had done for South Tahoe.

17. Ms. Eng assisted us in drafting the opposition to the disqualification motion and the supplemental briefing that Judge Wu requested. She approved every document before it was filed, and she edited those documents significantly (including her own declaration). Ms. Eng's suggestion in her declaration in this Arbitration that we pushed her to sign a declaration that was against J-M's interests in the Qui Tam Action is untrue. Neither Mr. Kreindler nor I ever pushed her to sign the declaration, and she was heavily involved in drafting that declaration. Ms. Eng significantly edited her declaration, as a simple comparison between the draft Mr. Kreindler sent to her and the filed version shows (both of which are attached as Exhibit 9 to her declaration). Not only was Ms. Eng an active participant in the drafting of the briefs and declarations, she was also heavily involved in guiding our strategy in opposing the disqualification motion.

18. J-M's briefing in this Arbitration makes much about the issue of severance of South Tahoe's claims as part of Judge Wu's ruling that would have denied the motion for disqualification. Such severance would have had no material impact on J-M. The Qui Tam Action was going to be bifurcated anyway, as Mr. Kreindler and I repeatedly had informed Mr. Wang and Ms. Eng before March 2011. There already had been extensive discussions with plaintiffs' counsel and the Court regarding bifurcation. The parties to the Qui Tam Action had agreed that the Qui Tam Action would be bifurcated because it would have been impossible to try the claims of roughly two hundred intervenors and real parties in interest in one action. Before the disqualification issue, it had been discussed that the Qui Tam Action was to be tried through a series of bellwether cases focused on the claims of select intervenors. That is very common for False Claims Act cases. If J-M lost the initial

bellwether case, it would be bound by the negative ruling. That in turn typically allowed for a streamlined trial process for the remaining parties or, more frequently, settlement. If J-M won the initial bellwether case, the other intervenors could bring their own claims. But even then, a similar dynamic was applicable where that result would help to streamline the trial and precipitate settlement. Thus, severing South Tahoe's claim would only preclude South Tahoe from being a bellwether plaintiff; it would not negatively affect J-M. In fact, if South Tahoe's claims were strong, precluding it from being a bellwether plaintiff by bifurcating its claims would have been advantageous for J-M because South Tahoe would have been substantially less likely to pursue its claims. Moreover, J-M was also not facing any risk because Sheppard Mullin had agreed to pay for the cost of conflicts counsel and to indemnify J-M for any negative outcome favoring South Tahoe. Consequently, when severance of South Tahoe's claims later was identified in Judge Wu's tentative ruling (an outcome we had suggested in our opposition papers with Ms. Eng's approval), there was really *no* negative impact on J-M. That is plainly why South Tahoe's counsel (*i.e.*, relator's counsel) argued so strenuously against Judge Wu's tentative ruling as reflected in the transcript of the July 7 hearing. That also is consistent with why, as reported to me by Mr. Kreindler, South Tahoe's counsel was visibly upset after Judge Wu issued his ruling at that hearing.

D. Potential Resolution Of The Disqualification Motion

19. While we were actively opposing the disqualification motion at Ms. Eng's direction and with her assistance, we also had a number of conversations with Ms. Eng and Mr. Wang regarding potential ways to resolve the disqualification motion directly with South Tahoe.

20. One option that Mr. Kreindler and I discussed with Ms. Eng and Mr. Wang was to obtain South Tahoe's agreement to a specific, supplemental conflict waiver in view of Judge Wu's ruling regarding the advance waivers. We told Ms. Eng and Mr. Wang that Sheppard Mullin would offer consideration that included some free labor advice going forward to South Tahoe in exchange for the conflict waiver. We even confirmed in an email to Ms. Eng that we planned to "offer South Tahoe compensation in exchange for a waiver," including "some free labor law advice going

forward."[2] Ms. Eng and Mr. Wang encouraged us to make this offer. Neither Mr. Wang nor Ms. Eng ever expressed any concern that the offer included labor work for South Tahoe while Sheppard Mullin would be defending J-M in the Qui Tam Action. Nor did they ever indicate that the offer was contrary to any J-M policy against waivers (or even suggest that J-M had such a policy).

21. A second option we discussed with Ms. Eng and Mr. Wang was to offer to bifurcate (or really to sever) South Tahoe's claims from the rest of the Qui Tam Action and to have South Tahoe's claims defended by conflicts counsel. The only reason bifurcation was potentially not as desirable as obtaining a specific, supplemental conflict waiver from South Tahoe was because it would not immediately and conclusively resolve the disqualification motion, though that would not have hindered J-M's defense of the Qui Tam Action. Indeed, when Ms. Eng sent us an email suggesting that bifurcation was not a "preferred" option, Mr. Kreindler immediately emailed her back confirming that we "would be fine" with bifurcation.[3] As I discussed above, because the Qui Tam Action was going to be bifurcated irrespective of this issue, there really was no material difference to J-M if South Tahoe's claims were bifurcated/severed.

22. Neither I nor Mr. Kreindler ever told Ms. Eng that it was not in J-M's interests to have South Tahoe's claims bifurcated/severed. To the contrary, I believed (and repeatedly informed Ms. Eng) that bifurcation of South Tahoe's claims might eliminate those claims altogether. South Tahoe was a very small intervenor with a relatively modest potential recovery. South Tahoe also had not been actively involved in the Qui Tam Action. It did not have its own separate counsel representing it in the Qui Tam Action (it was represented by relator's counsel). Therefore, it was a remote possibility, at best, that South Tahoe even would pursue its own separate litigation, in which case bifurcating South Tahoe's claims (and precluding it from being a bellwether) would also be a benefit to J-M. And even if South Tahoe did pursue its own claims, Sheppard Mullin had agreed to fully indemnify J-M.

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[2] *See* Ex. RR.

[3] Ex. RR.

23. When Judge Wu ruled on July 7 that South Tahoe's claims would be bifurcated (and thus without the need for providing consideration to South Tahoe for that waiver, as Sheppard Mullin previously had offered with the express knowledge and authorization of Ms. Eng and Mr. Wang), Mr. Kreindler and I considered this to be a positive outcome for J-M. Naturally, then, I was very surprised when J-M refused to accept Judge Wu's offer regarding conflicts counsel and instead opted to force Judge Wu to disqualify Sheppard Mullin. Accepting Judge Wu's conditions would not have placed J-M in any worse strategic position in the Qui Tam Action for the reasons I have discussed. In addition, Sheppard Mullin had agreed to indemnify J-M for the costs of any appeal by South Tahoe, the cost of conflicts counsel, and any negative outcome in favor of South Tahoe in a severed action (as well as the fees associated with any severed action by South Tahoe).

24. I understand that J-M is arguing that its decision to decline Judge Wu's offer regarding conflicts counsel was based on advice from James Houpt. I have reviewed Mr. Houpt's memorandum (which is attached as Exhibit 13 to Ms. Eng's Declaration). His advice about the downsides of Judge Wu's ruling reflects a misunderstanding of the relevant facts and False Claim Act litigation.

25. First, Mr. Houpt asserts that the entire Qui Tam Action would be stayed pending South Tahoe's appeal. He misunderstands Judge Wu's ruling. Judge Wu's ruling never mentions a stay of the Qui Tam Action. At most Judge Wu would have stayed *only* South Tahoe's claims, but the rest of the Qui Tam Action would have proceeded. Based on my experience with False Claims Act cases and my familiarity with the Qui Tam Action, it was not surprising that Judge Wu was not suggesting a stay of a billion dollar case to await the appeal of a decision unrelated to the subject matter of the case by a minor intervenor with only $97,000 at issue. Thus, that portion of Mr. Houpt's analysis is wrong factually, and it likewise reflects an unfamiliarity with how False Claims Act cases are handled.

26. Second, Mr. Houpt cites as a downside the costs that J-M would incur in the appeal and bifurcated/severed action against South Tahoe. Apparently, he did not know that Sheppard Mullin had agreed to cover all of those costs, as I have noted above and in my earlier Declaration.

27. Third, Mr. Houpt states that South Tahoe would get a "second bite at the apple." This comment also reflects Mr. Houpt's unfamiliarity with False Claims Act cases. As I discussed above, the Qui Tam Action was going to be bifurcated, and South Tahoe was extremely unlikely to pursue its own claims.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed October 24, 2013 at Los Angeles, California.

Bryan D. Daly

Bryan D. Daly

Exhibit F

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IN THE ARBITRATION BEFORE JAMS

SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP,

Claimant and Cross-Respondent,

v.

J-M MANUFACTURING COMPANY, INC., D/B/A/ JM EAGLE,

Respondent and Cross-Claimant.

REF. NO. 1220045609

Arbitrators: Hon. Gary L. Taylor (Ret.)
Hon. Charles S. Vogel (Ret.)
James W. Colbert, III Esq.

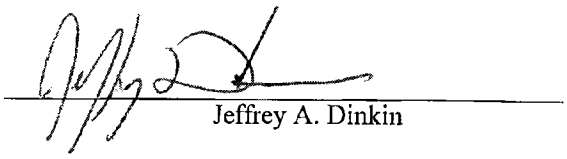
SUPPLEMENTAL DECLARATION OF JEFFREY A. DINKIN

I, Jeffrey A. Dinkin, declare as follows:

1. I am an attorney admitted to practice law before all courts of the State of California. I am currently a partner in the law firm of Stradling, Yocca, Carlson & Rauth. I provide this declaration to supplement my prior declaration submitted in this action. Unless otherwise stated, the following facts are within my personal knowledge, and I can testify competently to them.

2. I understand that in its Opening Brief in this Arbitration, J-M Manufacturing Company, Inc. ("J-M") has suggested that Sheppard Mullin lawyers, including Mr. Ryland, "concealed a conflicts match" from me in March 2010 regarding the work I previously had done for South Tahoe and the work others were considering taking on in what has been called the Qui Tam Action in this Arbitration. J-M's suggestion is factually inaccurate for two reasons: I did not believe (and do not believe) that anything was "concealed" from me, and in my view there was no "conflicts match." In March 2010, I recall being contacted by the Office of the General Counsel to discuss the advance waiver signed by South Tahoe as it pertained to a possible new matter in which South Tahoe was involved. I cannot recall at this time whether I had any specific understanding as to the nature of South Tahoe's involvement. However, I knew of the advance waivers that South Tahoe had provided as I described in my earlier Declaration in this Arbitration and did not believe there was any problem if Sheppard Mullin was retained for a new matter in light of the advance waivers. I communicated the fact of the advance waivers to the Office of the General Counsel, and that was relying on the Office of the General Counsel's advice regarding their enforceability. While I did not learn until much later that Sheppard Mullin had been retained and who at the Firm had been working on that new matter, I do not agree that anything was concealed from me. The inquiry that was made to me in March 2010, and the confirmation of the execution of an advance waivers by South Tahoe, was, in my experience, consistent with a conflict check inquiry. Also in my experience, I would not have expected people to follow up with me about the matter once it was determined that the Firm could proceed with the new matter, especially at such a large firm. For me, that was to be expected in light of the advance waivers.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed October 24, 2013 at Santa Barbara, California.



Jeffrey A. Dinkin

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Exhibit G

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IN THE ARBITRATION BEFORE JAMS

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Claimant and Cross-Respondent,

v.

J-M MANUFACTURING COMPANY, INC., D/B/A/ JM EAGLE,

Respondent and Cross-Claimant.

REF. NO. 1220045609

Arbitrators: Hon. Gary L. Taylor (Ret.)
Hon. Charles S. Vogel (Ret.)
James W. Colbert, III, Esq.

SUPPLEMENTAL DECLARATION OF CHARLES L. KREINDLER

I, Charles L. Kreindler, declare as follows:

1. I am an attorney admitted to practice law before all courts of the State of California. I am a partner in the law firm of Sheppard, Mullin, Richter & Hampton LLP ("Sheppard Mullin"). I have reviewed the Opening Brief of J-M Manufacturing Company, Inc.'s ("J-M") and the declarations of Camilla Eng and K. Luan Tran. Thereafter, I reviewed again Sheppard Mullin's Opening Brief and all of the declarations and documents submitted with it. Nothing I have read makes me question my prior testimony, and I provide this declaration solely to address misstatements made and issues raised by J-M in connection with its Opening Brief. Nothing in this Declaration is intended to change any of the statements in my prior Declaration. The following facts are within my personal knowledge, and I can testify competently to them, unless I state otherwise.

A. My Role In March 2010

2. When I first became involved in the Qui Tam Action in March 2010, the Complaint had just been unsealed. Mr. Daly handled the tasks associated with J-M's retention of Sheppard Mullin in March 2010, which included running and evaluating the conflicts check, negotiating with Ms. Eng about the Engagement Agreement, and securing approval from firm management for the fee concessions Ms. Eng demanded. Consequently, I did not learn about any potential issue involving South Tahoe at that time.

B. The Morgan Lewis/Formosa Waiver

3. Early on in our representation of J-M, I recall discussing with Ms. Eng whether J-M should give a conflict waiver to the law firm of Morgan Lewis & Bockius LLP ("Morgan Lewis") so that it could represent J-M's co-defendant, Formosa Plastics Corp. ("Formosa"). Ms. Eng told me that J-M used to be a subsidiary of Formosa, and during that time Morgan Lewis represented both of them. She also told me that Morgan Lewis had confidential information about J-M that was relevant to the Qui Tam Action because of that prior representation. Ms. Eng suggested to me that J-M was potentially adverse to Formosa and asked me what I thought. I told her that I agreed. I reminded Ms. Eng that Formosa was not interested in sharing defense counsel with J-M for precisely that reason. I also told her that, because Formosa provided the raw materials used in J-M's pipe, at a minimum, J-M likely had an indemnification claim against Formosa for losses in the Qui Tam Action and that this

future indemnification claim could affect how the parties litigated the Qui Tam Action. In addition, I told Ms. Eng that the fact that Formosa provided the raw materials used in J-M's pipe was a potential defense for J-M in the Qui Tam Action. Because Morgan Lewis had relevant confidential information about J-M, there was a real risk that that confidential information could be used to J-M's detriment in the Qui Tam Action. Ms. Eng ultimately declined to give Morgan Lewis a waiver.

4. Indeed, throughout our litigation of the Qui Tam Action, Mr. Daly, Ms. Eng and I discussed how to tailor our litigation strategy to best preserve J-M's potential indemnification claims against Formosa and J-M's defense regarding Formosa having provided the raw materials used in J-M's pipe.

C. March and April 2011 Communications Regarding South Tahoe

5. In early March 2011, I received a letter from Stuart Rennert of Day Pitney. Prior to receiving this letter, I had little, if any, contact with Mr. Rennert. His letter asserted that Sheppard Mullin had done work for South Tahoe and asked for information about the nature of that work. It also asked whether Sheppard Mullin had received a conflict waiver to represent J-M in the Qui Tam Action.[1] Mr. Rennert was one of numerous counsel who represented the Relator, Mr. Hendrix, and also numerous intervenors, including South Tahoe. In my experience with False Claims Act cases, counsel such as Mr. Rennert who represent plaintiffs and intervenors do not have much institutional knowledge about their clients; nor do they have much contact with their clients. When I first read Mr. Rennert's letter, my initial reaction was that there had to be a misunderstanding.

6. To respond to Mr. Rennert's March 4, 2011 letter, I investigated what the connection was between Sheppard Mullin and South Tahoe. I learned that a partner in Sheppard Mullin's Santa Barbara office, Jeffrey Dinkin, had done some unrelated labor and employment work for South Tahoe. I also learned that South Tahoe had agreed to an advance conflict waiver. During my investigation, I did not learn anything substantive about the work that had been done for South Tahoe, and certainly not any confidential information.

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[1] Declaration of Luan Tran ("Tran Decl.") ¶ 4, Ex. 16 (Declaration of Brent Rushforth ("Rushforth Decl."), Ex. E at 15).

7. I obtained a copy of the 2006 advance waiver from Sheppard Mullin's Office of the General Counsel and reviewed it in detail. The plain, clear language of the advance waiver permitted Sheppard Mullin to represent clients in matters that were not substantially related to the labor and employment work Mr. Dinkin did for South Tahoe. Because the allegations of the Qui Tam Action had nothing to do with labor and employment issues, I believed this waiver was enforceable and permitted us to represent J-M in the Qui Tam Action. I discussed all of this with Mr. Daly, who agreed with my assessment.

8. After I learned about the advance waiver, analyzed it, and was comfortable that it applied in this case, I thought that educating Mr. Rennert about the waiver would satisfy him and promptly conclude his inquiry. But, to give Mr. Rennert further comfort, I also arranged for an ethical wall to be created between Mr. Dinkin and anyone else working on South Tahoe's matters, on the one hand, and those of us working in the Los Angeles office on the Qui Tam Action, on the other hand. I did not think that an ethical wall was actually necessary because the lawyers who represented J-M and the lawyers who represented South Tahoe were in different offices; no individual lawyer worked for both clients; and the matters were totally unrelated. It was erected as an accommodation for Mr. Rennert.

9. I responded to Mr. Rennert's March 4, 2011 letter on March 11, 2011.[2] In my response, I explained that South Tahoe had agreed to an advance waiver, and I sent Mr. Rennert a copy of the 2006 waiver. I also explained why that waiver was enforceable and permitted Sheppard Mullin to represent J-M in the Qui Tam Action.

10. I received Mr. Rennert's next letter, dated March 17, 2011,[3] which again asked for the same information as his March 4 letter, but also asked for additional information about the ethical wall. It seemed to me that Mr. Rennert had not even read the advance waiver in South Tahoe's engagement agreement that I sent him on March 11. It also seemed to me that his focus may have been to ensure that those of us working on the Qui Tam Action had not had access to any of the

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[2] Declaration of Charles Kreindler ("Kreindler Decl.") ¶ 40, Ex. EE.

[3] Tran Decl. ¶ 4, Ex. 16 (Rushforth Decl. Ex. G at 18-19).

matters on which Mr. Dinkin had worked. In my March 24 response to Mr. Rennert's March 17 letter,[4] I again explained the nature and import of South Tahoe's advance waiver and provided additional information about the ethical wall. I believed that my March 24 letter would end Mr. Rennert's inquiry. When I received no response to this letter, I believed that the issue had been resolved. Other than these four letters, I had no communication regarding South Tahoe with Mr. Rennert or any of the lawyers representing South Tahoe until April 11, 2011.

11. On April 11, 2011, I received an email from a different lawyer representing South Tahoe and many of the other intervenors, Mr. Brent Rushforth, asking to discuss a potential disqualification motion that South Tahoe was "contemplating" filing.[5] This was the first time I had heard anything about a disqualification motion by South Tahoe. I was surprised by Mr. Rushforth's email, but believed that he either didn't know about or didn't understand South Tahoe's advance waiver. Like Mr. Rennert, I had little if any contact with Mr. Rushforth during the litigation. Thus, I was confident that if he was fully informed of the facts, he would conclude that the advance waiver had addressed the issue and that he could take comfort from the ethical wall we had erected. I also thought it would be helpful if Mr. Daly joined in any discussion that ensued. Accordingly, we scheduled a call with Mr. Rushforth for the first date that all of us (including Mr. Daly) were available – April 19, 2011.

12. When Mr. Daly and I had the call with Mr. Rushforth on April 19, 2011, he told us that he was aware of South Tahoe's advance waiver, and that he nonetheless planned to file the motion to disqualify. This was the first time that anyone from South Tahoe had mentioned disqualification where it was clear that they knew about but had dismissed the advance waiver that South Tahoe had signed. (Mr. Rushforth's April 11 email did mention "contemplating" a disqualification motion, but it did not refer to the advance waiver.) Accordingly, it was only after this April 19 call that I believed South Tahoe had made an informed decision to file a disqualification

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[4] Kreindler Decl. ¶ 40, Ex. FF.

[5] Tran Decl. ¶ 7, Ex. 19.

motion, although I still believed strongly that the advance waiver was enforceable and that South Tahoe's motion, if actually filed, would be denied.[6]

13. The next day (April 20, 2011), I told Ms. Eng via email that South Tahoe had threatened a disqualification motion.[7] In a phone conversation around that same time, I also told Ms. Eng that she could seek advice from other lawyers, or have them review the briefing or declarations in opposition to any such motion (she already had said, almost immediately, that she wanted us to oppose any such motion), if she or J-M wished. I also offered to have Sheppard Mullin pay for this third party counsel to advise J-M, and I repeated that offer periodically throughout the period before and during the pendency of the disqualification motion. In my July 8 Memorandum regarding the Court's ruling, I reiterated this offer to Ms. Eng: "[i]f you have any questions or concerns about any of the analysis set forth above, Sheppard Mullin would be happy to pay for third party counsel to provide you with another analysis."[8]

14. Between April 20 and May 9, 2011 (when South Tahoe filed its disqualification motion), Ms. Eng never expressed concern, disappointment, frustration, or outrage about the fact that Mr. Dinkin had done some labor work for South Tahoe. During that time period, I explained to Ms. Eng the nature and frequency with which Mr. Dinkin had done labor work for South Tahoe. I told her that Mr. Dinkin had handled a labor matter for South Tahoe that concluded in November 2009, and I told her that he had done a small amount of labor consulting beginning in late March 2010 and periodically thereafter to as late as March 2011. Not once did Ms. Eng ever suggest that she had been

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[6] I understand that J-M is referring to the declaration of Brent Rushforth that was submitted in the Qui Tam Action for the proposition that I knew in March 2010 that "the conflict check showed South Tahoe to be an existing client." (J-M's Opening Brief, p. 7.) As I discuss above, I had no knowledge in March 2010 about any work that Sheppard Mullin had done for South Tahoe. By the time I had the conversation with Mr. Rushforth on April 19, 2011, I had investigated the situation and learned that Mr. Dinkin had done some labor work for South Tahoe that had concluded by November 2009. I told that to Mr. Rushforth. I also told him that Mr. Dinkin had done some very modest additional labor work for South Tahoe since we had become involved in the Qui Tam Action. However, I did not refer to South Tahoe as an "existing" client, either in reference to March 2010 or April 2011.

[7] Declaration of Camilla Eng ("Eng Decl.") ¶ 15, Ex. 4.

[8] Kreindler Decl. ¶ 54, Ex. GGG.

or felt misled. Nor did she ever suggest that the prior work for South Tahoe should have been disclosed to her in March 2010. Nor did she mention any policy that J-M had about not working with counsel who had done work or were working for another client that was adverse to J-M in an unrelated matter.

D. Briefing On The Disqualification Motion

15. The disqualification motion was filed on May 9, 2011. When it was filed, we sent Ms. Eng a copy of the papers.

16. Ms. Eng was actively involved in all of the briefing on the disqualification motion.[9] She reviewed and approved every brief and declaration we filed. She was also engaged in making strategic judgment calls about the positions we took in the brief. Ms. Eng was also involved in drafting her own declaration. Although I put together the first draft of the declaration, Ms. Eng edited the draft significantly.

17. I have reviewed the two versions of the declaration Ms. Eng attached as Exhibit 9 to her declaration in this Arbitration. The first version (numbered SMRH01284-85) is the version I drafted and sent to Ms. Eng. The second version (which has "Case No. 5:06-00055-GW-PJW" printed on the top) is the version that was filed. Ms. Eng made all the changes between the draft I sent to her and the final version, without any input or advice from me.

18. Ms. Eng informed me that she discussed her draft and her changes with Mr. Wang, and they both approved the final version that was submitted to the Court.[10]

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[9] I understand that the parties have entered into a Stipulation in this Arbitration regarding an accounting of the fees and costs billed, paid, and unpaid in connection with the Qui Tam Action. Attached as Exhibit SSS to this declaration is a true and correct copy of that Stipulation. As I previously stated in my initial Declaration (*see* Kreindler Decl. ¶¶ 31-35), Sheppard Mullin did not bill J-M for any time it spent on the disqualification motion. I have confirmed that the amounts identified in the Stipulation are solely for work done by Sheppard Mullin to defend J-M in the Qui Tam Action. None of it relates to the disqualification motion.

[10] Kreindler Decl. ¶ 43, Ex. WW.

E. Offer To Provide Additional Labor And Employment Advice To South Tahoe In Exchange For A Conflict Waiver.

19. Ms. Eng and Mr. Wang were extensively involved in strategizing about how to resolve the disqualification motion as an alternative to an adjudication of that motion. The two principal options Mr. Daly and I discussed several times with them included consideration to South Tahoe for a supplemental waiver and severing South Tahoe's claims from those of the other intervenors. Neither option presented any material issue for J-M. Both Mr. Wang and Ms. Eng made it abundantly clear that they wanted Sheppard Mullin to continue representing J-M (calling us a "family").

20. When Mr. Daly and I met with Mr. Wang and Ms. Eng following the first hearing on the disqualification motion (on June 6, 2011), we informed them that we thought the best option to resolve the issue was for Sheppard Mullin to offer consideration to South Tahoe in exchange for a conflict waiver from South Tahoe. We believed this was the best option because it would immediately resolve all issues related to the alleged conflict. We specifically informed them that Sheppard Mullin's offer would include some free labor advice to South Tahoe. Neither Ms. Eng nor Mr. Wang expressed any concern that the consideration we were going to offer included free labor work for South Tahoe while the Qui Tam Action was still ongoing. To the contrary, they encouraged us to make this offer as soon as possible.

21. Paragraph 21 of Ms. Eng's Declaration states that she had no idea that Sheppard Mullin was offering free labor advice to South Tahoe in connection with a supplemental conflict waiver. She states: "Had JM or I known about such offer, we would not have agreed to it. This is so because, as discussed, we would never agree to waive any conflict..., and certainly not for a significant case like this..." That assertion is contrary to the facts – both what Ms. Eng and Mr. Wang said to me and email communications between us.

22. Not only did Mr. Daly and I discuss Sheppard Mullin's offer of free labor advice to South Tahoe during our June 6 meeting with Ms. Eng and Mr. Wang, I also confirmed that fact in an email to Ms. Eng the next day. That email specifically stated that Sheppard Mullin would be making

the offer to South Tahoe, and again made clear the offer would include free labor advice.[11] In a telephone call the same day, Ms. Eng again encouraged me to make the offer to South Tahoe that included free labor advice. She never expressed concern that Sheppard Mullin was offering to do labor work for South Tahoe. If she had, we never would have made the offer.

F. Severance Of South Tahoe's Claims And Bifurcation

23. In addition to our discussions about an agreement with South Tahoe regarding a specific conflict waiver, Mr. Daly and I discussed with Ms. Eng and Mr. Wang other possible options for resolution if South Tahoe refused our offer. Mr. Daly and I told Ms. Eng and Mr. Wang that severing out South Tahoe's claims in a separate proceeding (that would be handled by conflicts counsel at Sheppard Mullin's expense) would be the next best option with no real downside to J-M. This advice was consistent with the offer already made in the opposition to South Tahoe's disqualification motion (which Ms. Eng had reviewed and approved) that "the Court could sever South Tahoe's claims" to moot the conflict.[12]

24. Contrary to her Declaration, I never told Ms. Eng that severance of South Tahoe's specific claims was not in J-M's "best interests," or that severance of South Tahoe's claims would negatively impact J-M. To the contrary, Mr. Daly and I explained to Ms. Eng and Mr. Wang that severance of South Tahoe's claims would not place J-M in any different tactical or strategic position because the Qui Tam Action would have to be bifurcated anyway. Mr. Daly and I explained to Mr. Wang and Ms. Eng that all of the similar False Claims Act cases in our experience are bifurcated—meaning that some intervenors' claims would be tried first, and others would follow—and that the Qui Tam Action similarly would be bifurcated.

25. Because of the number of parties, False Claims Act cases are typically tried in a series of "bellwether" cases, in which individual intervenors are selected and their claims are tried first. If the bellwether intervenors win, all other intervenors can benefit from that favorable ruling. If the bellwether intervenors lose, other intervenors can bring their own separate cases (although as a

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[11] Kreindler Decl. ¶ 46, Ex. RR.

[12] Tran Decl. ¶ 9, Ex. 21 (J-M's Opposition to the Disqualification Motion, at 24).

practical matter, this rarely happens). In essence, the vast majority of intervenors are bifurcated from the actual trial. The only effect a severance of South Tahoe's claims would have is that South Tahoe would not be eligible to be a bellwether plaintiff—a result that would have no adverse effect on the litigation or JM's defense. Generally, the smaller intervenors have no interest in becoming a bellwether intervenor because of the great toll it takes on the resources of the municipality. There are extensive discovery and general litigation obligations to which bellwether plaintiffs are subject.

26. Nor was there any "sudden push" for bifurcation as stated in Ms. Eng's Declaration at paragraph 28. As early as September 2010, the parties jointly advised the Court that the action needed to be bifurcated.[13] In June 2011, the parties filed proposals regarding bifurcation.[14] In December 2011, the Court issued an order that bifurcated both discovery and trial by issues.[15] As I expected, the Court ultimately ordered a bellwether trial of five claims (to be selected by the Plaintiffs).

27. Moreover, South Tahoe was not an active intervenor in the Qui Tam Action. It was represented by counsel that represented the relator and numerous other intervenors. It never had anyone attend hearings or case management conferences exclusively on its behalf; it did not propound its own discovery; and it did not correspond directly with us (except for responding to our Public Records Act request, as I discussed in my original Declaration). In stark contrast, other intervenors, like the State of Nevada, had their own separate counsel that appeared at hearings and case management conferences, engaged with us directly on discovery and case management issues, and met with us to discuss potential resolution of their claims. Given that South Tahoe was not even

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[13] Attached hereto as Exhibit TTT is a true and correct copy of the Joint Report Rule 26(f) Discovery Plan filed on September 27, 2010 in the Qui Tam Action (Docket No. 275). This was obtained at my direction from the files of the United States District Court for the Central District of California and used by me throughout my work on the Qui Tam Action.

[14] Attached hereto as Exhibit UUU is a true and correct copy of Defendant J-M Manufacturing Company, Inc.'s Position Re Case Management, filed on June 17, 2011 in the Qui Tam Action (Docket No. 432). This was obtained at my direction from the files of the United States District Court for the Central District of California.

[15] Attached hereto as Exhibit VVV is a true and correct copy of the Order Addressing Bifurcation, entered on December 7, 2011 in the Qui Tam Action (Docket No. 551). This was obtained at my direction from the files of the United States District Court for the Central District of California.

actively litigating this case in which it was already a plaintiff, it simply was not realistic that South Tahoe would pursue its own independent claims if other intervenors lost irrespective of anything having to do with Sheppard Mullin. Finally, even if South Tahoe made the extremely unlikely decision to litigate its own claims after bellwether intervenors had lost, we told Ms. Eng and Mr. Wang that Sheppard Mullin would pay for any costs associated with this separate proceeding and would indemnify J-M for any damages awarded to South Tahoe. We made it clear to Ms. Eng and Mr. Wang that J-M would bear no financial cost or risk.

G. Analysis Of The Court's July 7 Conditions

28. At the July 7 hearing, Judge Wu ruled that Sheppard Mullin could remain as counsel to J-M in the Qui Tam Action, subject to certain conditions that did not adversely affect J-M.[16]

29. Following the July 7 hearing, Ms. Eng asked that I provide her with a memorandum analyzing Judge Wu's conditions. I drafted this memorandum and provided it to her the next day. Inasmuch as Ms. Eng requested the memorandum, her characterization of it as an effort to "basically implore JM" to keep Sheppard Mullin is false. It was exactly as she had requested.

30. As the memorandum reflects, I did not believe that there was any significant downside to any of Judge Wu's conditions. Bifurcation of South Tahoe's claims had no practical impact on J-M because, as discussed above, South Tahoe would be able to pursue its own claims anyway. And in any event, it was extremely unlikely that South Tahoe would do so. Moreover, J-M faced no financial risk because Sheppard Mullin had agreed to pay for all of the costs of any separate proceeding by South Tahoe (the appeal, the separate trial, etc.)

31. Ms. Eng later provided me with a memorandum prepared for her by another attorney, James Houpt, in which Mr. Houpt opined that Judge Wu's conditions were problematic for J-M. I strongly disagree with Mr. Houpt's analysis and his conclusion.

32. Mr. Houpt asserts that the Qui Tam Action—in its entirety—was likely to be stayed pending the resolution of any appeal of South Tahoe's claims.[17] This was not going to happen.

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[16] Kreindler Decl. ¶ 54, Ex. DDD.

[17] Eng Decl., Ex. 13 at SMRH00009.

Judge Wu's Order did not offer a stay of the Qui Tam Action; it only offered a stay of South Tahoe's claims. Moreover, a billion dollar case simply would not have been stayed because of an appeal on a ruling that was irrelevant to the substance of the case by a minor intervenor with only $97,000 at issue whose claims would not be foreclosed by the rulings made during the pendency of that appeal.

33. Mr. Houpt also identifies the costs J-M would incur in the appeal and separate trial against South Tahoe as a reason to decline Judge Wu's offer.[18] But Mr. Houpt apparently was unaware that Sheppard Mullin had agreed to cover all of those costs and to indemnify J-M against any damages awarded to South Tahoe.

H. J-M's New Counsel

34. After J-M decided to have Sheppard Mullin disqualified, J-M hired two different firms to represent it in the Qui Tam Action: Paul, Hastings, Janofsky & Walker LLP ("Paul Hastings") and Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg, P.C. ("Bird Marella").

35. I understand that Paul Hastings had been informally involved in advising Ms. Eng regarding the Qui Tam Action before they became counsel of record. Ms. Eng had frequent contact with Tom O'Brien from Paul Hastings (the former U.S. Attorney for the Central District), and it was my understanding that she had consulted with him repeatedly about the Qui Tam Action and the disqualification motion.

36. Bird Marella had also previously been involved in the Qui Tam Action as counsel to J-M's distributors in responding to subpoenas from the plaintiffs. The distributors were potentially adverse parties whose interests in the Qui Tam Action might not always be aligned with J-M's interests. The distributors could have been sued for any defective pipe they distributed and sought indemnity from JM, and vice-versa. Also, one of J-M's potential responses to plaintiffs' allegations about defects in J-M's plastic pipe was that any defects were caused by the way the distributors handled and stored the pipe.

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[18] Eng Decl., Ex. 13 at SMRH00010.

I. Sheppard Mullin's Retention of Mr. Rosen

37. Two days before the July 7 hearing (on July 5), I informed Ms. Eng that Sheppard Mullin planned to retain Kevin Rosen from Gibson, Dunn & Crutcher LLP. Mr. Ryland was unavailable to represent Sheppard Mullin at the July 7 hearing, so Mr. Ryland engaged Mr. Rosen to represent Sheppard Mullin in Mr. Ryland's place. Mr. Rosen did not work on any of the briefing, which had all been submitted by June 22, 2011 (before he was retained).

38. Although in my email to Ms. Eng about retaining Mr. Rosen, I inadvertently stated that "we would like to hire Kevin Rosen… to represent JM," I later clarified that Mr. Rosen was representing Sheppard Mullin. Ms. Eng told me she understood. Consistent with that understanding, she later emailed me: "Thanks for giving me the heads up on hiring Gibson. It's your firm's decision, but given it affects JM, I appreciate the advance notice."[19] Her Declaration in this Arbitration (paragraph 22) and J-M's Opening Brief (page 2) confirm that Mr. Rosen was hired to represent Sheppard Mullin. And I introduced Mr. Rosen as counsel specially appearing for Sheppard Mullin at the July 7 hearing.

39. I caused to be filed a notice of substitution of counsel on July 7, 2011, just before the hearing, to permit Mr. Rosen to appear on Sheppard Mullin's behalf. This notice specified that Mr. Rosen was "specially appearing in this matter for the limited purpose of representing Sheppard, Mullin, Richter & Hampton LLP in connection with South Tahoe Public Utility District's pending Motion to Disqualify."[20]

40. The first time I met Mr. Rosen in person was immediately before the July 7 hearing, in the hall outside Judge Wu's courtroom. I introduced Mr. Rosen to Ms. Eng when she was in the hall. I observed that Mr. Rosen and Ms. Eng had never met before, and they briefly exchanged

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[19] Attached hereto as Exhibit XXX is a true and correct copy of an email I received from Ms. Eng on July 5, 2011. (SMRH01353.) This email is maintained in the ordinary course of business on Sheppard Mullin's email servers and was used by me in connection with my work on the Qui Tam Action.

[20] Attached hereto as Exhibit YYY is a true and correct copy of the Notice of Limited and Special Appearance on Behalf of Sheppard, Mullin, Richter & Hampton LLP, filed on July 7, 2011 in the Qui Tam Action (Docket No. 451). This was obtained at my direction from the files of the United States District Court for the Central District of California.

pleasantries; nothing more. The three of us then entered the courtroom, though Mr. Rosen did not speak with Ms. Eng in the courtroom. After the hearing, Ms. Eng quickly left the courtroom without speaking to either me or Mr. Rosen. I did not observe Mr. Rosen have any substantive discussion at any time with Ms. Eng about the disqualification motion or the Qui Tam Action.

J. The Disqualification Motion Did Not Cause Any Delay In The Trial.

41. Neither the disqualification motion, nor the eventual disqualification of Sheppard Mullin, caused a delay in the trial of the Qui Tam Action. Shortly after Sheppard Mullin was disqualified, J-M represented in publicly-available court filings that its "clear preference would be for the parties to adhere to the December 6, 2011 trial date."[21]

42. Although J-M represented to the Court that it was ready for trial in December 2011, there were several developments (unrelated to Sheppard Mullin's disqualification) that ultimately delayed the trial. Among these developments were: (1) the pleadings as to Formosa were not resolved until November 7, 2011, when the Court ruled on Formosa's motion to dismiss the Fourth Amended Complaint[22]; (2) the Court did not rule on the motion to retrieve the privileged documents that had been produced by the vendor hired by McDermott until June 3, 2013[23]; and (3) the parties did not agree on how the case would be bifurcated until December 7, 2011.[24] The trial of the bifurcated Qui Tam Action eventually commenced in September 2013.[25]

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[21] Attached hereto as Exhibit ZZZ is a true and correct copy of the Joint Status Report, filed on August 4, 2011 in the Qui Tam Action (Docket No. 464). This was obtained at my direction from the files of the United States District Court for the Central District of California.

[22] Attached hereto as Exhibit AAAA is a true and correct copy of the Order re: (1) FPC-USA's Motion to Dismiss Relator's Fourth Amended Complaint, entered on November 7, 2011 in the Qui Tam Action (Docket No. 515). This was obtained at my direction from the files of the United States District Court for the Central District of California.

[23] Attached hereto as Exhibit BBBB is a true and correct copy of the Minutes of Post-Mediation Status Conference, dated June 3, 2013 (Docket No. 1014). This was obtained at my direction from the files of the United States District Court for the Central District of California.

[24] Ex. VVV (Docket No. 551).

[25] Attached hereto as Exhibit CCCC is a true and correct copy of the Minutes from the First Day of the Jury Trial (Docket No. 1640). This was obtained at my direction from the files of the United States District Court for the Central District of California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed October 25, 2013 at Los Angeles, California.

Charles L. Kreindler

Exhibit H

IN THE ARBITRATION BEFORE JAMS

SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP, Claimant and Cross-Respondent, v. J-M MANUFACTURING COMPANY, INC., D/B/A/ JM EAGLE, Respondent and Cross-Claimant.	REF. NO. 1220045609 Arbitrators: Hon. Gary L. Taylor (Ret.) Hon. Charles S. Vogel (Ret.) James W. Colbert, III, Esq.

SUPPLEMENTAL EXPERT REPORT OF PROFESSOR LAWRENCE C. MARSHALL

October 25, 2013

On September 30, 2013, I submitted a Report setting forth my opinions, as an expert in the field of legal ethics, on whether the actions of Sheppard Mullin with regard to its representation of J-M give rise to disgorgement of fees Sheppard Mullin has been paid by J-M or forfeiture of fees J-M still owes Sheppard Mullin for professional services rendered. I have now been asked to prepare a supplement to that report in light of the Brief and accompanying materials submitted by J-M in this matter on September 30, 2013. After carefully reviewing those materials, my conclusions remain the same: Nothing that Sheppard Mullin has done (or is alleged to have done) brings its conduct into the narrow category of egregious misbehavior that justifies the staggering penalty associated with disgorgement or fee forfeiture. Indeed, in my view, Sheppard Mullin did not breach any ethical duties. The suggestion that Sheppard Mullin ought to be deprived of approximately $4 million in

compensation for the more than 10,000 hours it worked—which all agree were performed properly and billed reasonably—has no basis in the governing law under the facts of this case.

I. My Credentials as an Expert

My credentials are set forth on pages 1-3 of my September 30 Report.[1]

II. Overview of Supplemental Report

The purpose of this Supplemental Report is not to repeat the various points covered in my September 30 Report. Rather, this Supplemental Report will address several issues raised in J-M's recent submission. These subjects relate to three time periods: (1) the period surrounding J-M's decision to retain Sheppard Mullin; (2) the period between when the District informed Sheppard Mullin of its conflict of interest concerns and when Sheppard Mullin discussed the issue with J-M; and (3) the period between when the District filed its disqualification motion and when Sheppard Mullin's representation of J-M ended.

Before addressing those issues, however, there is an overarching principle set forth in the J-M filing that bears comment. That Brief relies heavily on the claim that California law is "clear and unequivocal" in holding that any type of rules violation—no matter how minor, no matter whether it was taken in good faith, no matter whether the client was prejudiced in any way—triggers automatic forfeiture

[1] It is my understanding that counsel for J-M has inquired about the extent of my prior connections with Sheppard Mullin, or its counsel, Gibson, Dunn & Crutcher. The answer to that inquiry is as follows: I have had no connections in the past with Sheppard Mullin, either as co-counsel, client or party in a case in which I was involved as an attorney or expert witness. With regard to Gibson, Dunn & Crutcher, I have been contacted by that firm about serving as an expert witness on six occasions over the past 15 years or so. In four of those instances, I agreed with the positions the firm was advancing on behalf of its client and I agreed to serve as an expert witness. In the two other cases, I did not agree with the position the firm was taking on its client's behalf, and I declined to become involved.

and disgorgement. See J-M Br. at 17. As set forth in detail in my September 30 Report, this claim profoundly misstates California law, which follows the approach of the Restatement and other jurisdictions and does not impose draconian sanctions for good-faith violations. See L. Marshall's Sept. 30 Report at 6-13. This is, of course, the central point in my Report: Although one might reasonably argue that Sheppard Mullin could have and should have handled things differently, one cannot, in my view, reasonably conclude that Sheppard Mullin ever acted in so egregious way as to reduce the value of the representation to nothing. Nor can one reasonably conclude that Sheppard Mullin's conduct was of a nature so intentionally antithetical to the core norms of the profession that it would be unthinkable to allow it to recover its fees for the services it provided.

The idea of *per se* disgorgement and forfeiture upon a finding of any conflict, as J-M espouses, would mean that in each and every case in which any law firm is ever disqualified from a case based on a conflict, it would be required to forfeit every penny of the fees it had earned over the course of the representation—which often spans many years.[2] This is absolutely not the law. One can survey the hundreds of reported cases disqualifying law firms and not find any evidence that such orders trigger any presumption, much less a conclusive ruling automatically establishing, that disgorgement or forfeiture of the fees the law firm earned follows as a matter of course (as J-M suggests it does).

[2] Imagine how such a rule would play out in advance waiver situations. A client could first agree to a waiver in order to secure the services of a law firm it wants, but could then challenge that waiver later with the hope of securing a full refund if a court applying the various factors deems the waiver unenforceable. It goes without saying that such a result is unthinkable. Even if a court balances the relevant factors and declines to enforce a waiver, that does not transform the law firm into some awful rule breaker deserving of sanctions as extreme as those imposed for many intentional criminal offenses.

III. The period surrounding J-M's decision to retain Sheppard Mullin

J-M accuses Sheppard Mullin of impropriety for not alerting it, at the time J-M retained Sheppard Mullin, that the firm did periodic work for the District. J-M makes this claim even though the District had executed waivers and J-M was to execute a waiver as well. J-M contends it would never have agreed to retain Sheppard Mullin had it known about the District, because it has a hard and fast rule against ever waiving any conflicts under any circumstances. There is a grave problem in invoking any such general corporate policy in order to accuse Sheppard Mullin of breaching its ethical duties. That grave problem is that J-M, acting through its General Counsel and CEO, *undeniably did affirmatively agree to waive certain categories of conflicts.* The conflict involving Sheppard Mullin's representation of the District was exactly in the category that J-M explicitly waived.[3] That waiver, moreover, specified more than once that the conflicts being waived involved "current" and "future" Sheppard Mullin clients. It goes without saying that, having reviewed and signed the waiver, J-M cannot now claim that it has a policy against ever waiving any conflicts, much less that Sheppard Mullin knew of that policy despite the explicit written waiver. See generally *Desert Outdoor Advertising v. Superior Court*, 196 Cal. App. 4th 866 (2011) (client is bound by provisions of retainer agreement it signed, especially where it was provided to another of the client's attorneys and corrections were made to various provisions).

[3] Indeed, as discussed below, J-M was willing to allow Sheppard Mullin to offer the District 40 hours of free legal services as part of the effort to secure a new waiver from the District. *See infra* at 13-14.

What Sheppard Mullin knew, then, was that there was no issue vis-à-vis J-M objecting (or being entitled to object) to Sheppard Mullin representing the District because the District matter fell squarely into the waiver J-M was set to execute. Under these circumstances, there can be no basis for arguing that Sheppard Mullin breached any responsibility by not specifically reporting to J-M that the District (a very minor player in the *quit tam* suit) was a periodic Sheppard Mullin client on unrelated employment-law matters.

The other point J-M advances regarding the period of retention is that Sheppard Mullin never informed Jeffrey Dinkin, the partner representing The District on employment issues, that the District's name had come up during a conflict check on the J-M matter. J-M portrays this as evidence of some improper conduct. But this characterization ignores the nature and function of advance waivers. When the District's name came up in the conflict check, that necessitated examining whether any possible conflicts had been waived by the District. Sheppard Mullin determined they had been. As a result, there was no need to inform Mr. Dinkin or anyone else because there was no conflict that impacted Mr. Dinkin's representation of the District or Sheppard Mullin's representation of J-M (given the waiver J-M was to sign). In any event, whether Sheppard Mullin, as an internal law firm matter, did or did not notify Mr. Dinkin (who played no role in the representation of J-M) has nothing to do with any duties Sheppard Mullin owed to J-M.[4]

[4] J-M makes several arguments throughout its Brief about Sheppard Mullin's treatment of the District as a client. As indicated in the text, those questions have no bearing one way or the other on J-M's claims for disgorgement and fee forfeiture. It is important to note, though, the deep problem with J-

So too, when J-M argues that the point of a conflict check is to inform the client, J-M is only half right. The point of the conflict check is to inform the client if, upon inquiry, a conflict is spotted. If no conflict is identified, or if any possible conflict has been waived, there is no issue about which to inform a client.

IV. The period between the time the District informed Sheppard Mullin of its concerns and the time Sheppard Mullin discussed the issue with J-M.

J-M argues that Sheppard Mullin also acted improperly during the period between March 4, 2011 and April 19, 2011, when, without first notifying J-M, Sheppard Mullin conferred with the District in order to allay the concerns the District had expressed about a conflict of interest. It was during this period that Sheppard Mullin reminded the District of the advance waiver to which it had agreed. Sheppard Mullin then had multiple conversations with the District in an effort to have the District understand that no conflict existed. Although Sheppard Mullin considered it clear from the District's waiver that there was no impediment to representing J-M, Sheppard Mullin nonetheless made efforts to relax the District's lawyers by instituting a wall screening off any of the Los Angeles lawyers working on the J-M matter from the lawyer in Santa Barbara who periodically advised the District on employment matters.

M's suggestion that Sheppard Mullin "threw" the District "under the bus," when it fought the District's disqualification motion. To be sure, it is always unfortunate when a client and its law firm are engaged in a dispute over disqualification. But it is decidedly not the law that every time a client requests that a firm disqualify itself, that firm's duty of loyalty requires it to fold up its tent and acquiesce. Were that the case, any client could secure its firm's disqualification simply by whispering the word. Litigating over a client's demand for disqualification is by no means "throwing the client under the bus." Nor did Sheppard Mullin breach any duty to the District when, in a pleading filed with Judge Wu, it included the possibility of not representing the District as one of the many possible solutions for the judge and parties to consider.

There was, in my view, no ethical breach in Sheppard Mullin's having engaged in these conversations without involving J-M. As explained in my September 30 Report, it was entirely reasonable for Sheppard Mullin to assume the validity of the advance waiver with the District and, for that reason, to assume that the District would eventually concede it had no grounds to complain. And the screen that J-M put into place to increase the District's comfort level had no impact at all on anything to do with Sheppard Mullin's representation of J-M. The key here is that once it became clear to Sheppard Mullin on April 19 that the District would, in fact, be moving forward to seek disqualification, Sheppard Mullin informed J-M the very next day.

Examining the correspondence between Sheppard Mullin and the District's lawyers confirms that it did not become clear until April 19 that the District would actually file a motion to disqualify Sheppard Mullin. The original March 4 letter from Stuart Rennert simply asked for an explanation as to why no conflict existed. Sheppard Mullin responded on March 11, letting Mr. Rennert know that the District had executed a waiver, and also reporting that an ethical wall had been set up to allay any conceivable concerns. Mr. Rennert responded on March 17 asking for more information about Sheppard Mullin's representation of J-M and the ethical wall. At this point, there was still no suggestion of any planned judicial action to seek Sheppard Mullin's disqualification. On March 24, Sheppard Mullin responded, by referencing the District's waiver once again and describing the ethical wall, which it made clear was "not required." The next response on behalf of the District was from a different lawyer, Brent Rushforth, on April 11. Mr. Rushforth asked for a "meet and

confer" because the District was "contemplating" filing a disqualification motion. It was only at that "meet and confer" on April 19 that the District's lawyer (for the very first time) revealed his intention to file for Sheppard Mullin's disqualification. Upon learning that information, Sheppard Mullin informed J-M right away.

Lawyers make judgment calls every day on when a concern rises to the magnitude of justifying or requiring consultation with the client. See generally OFFICIAL COMMENT TO CALIFORNIA RULE OF PROFESSIONAL CONDUCT 3-500 (Rule is intended to "make clear that while a client must be informed of significant developments in the matter, a member will not be disciplined for failing to communicate insignificant or irrelevant information."); CALIFORNIA BUSINESS & PROFESSIONS CODE § 6068(m) (lawyer is to keep client "reasonably informed of significant developments"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20, *Comment b.* ("To the extent that the parties have not otherwise agreed, a standard of reasonableness under all the circumstances determines the appropriate measure of consultation.") Sadly, the practice of law often entails communications from opponents and others in which they complain about lawyers' conduct, whether by alleging conflicts of interest, discovery violations, or other potentially sanctionable conduct. In the overwhelming majority of such instances, the issue goes away when the lawyer provides the complaining party with an explanation, or when tempers calm. There is no rule to my knowledge that requires a lawyer to contact the client every time such statements or inquiries (or even threats) are made—and any such requirement would be wholly unworkable. Here, Sheppard Mullin achieved a reasonable balance: It tried, without involving J-M, to show the District that there

was no unwaived conflict. Once it became clear that this was no idle threat and that, even after both Mr. Rennnert and Mr. Rushforth were fully informed about the waiver, the District would be filing a disqualification motion, Sheppard Mullin immediately brought J-M into the discussions.

Significantly, J-M does not appear to allege that it experienced any sort of injury or prejudice from not learning of Sheppard Mullin's early efforts to derail any concern of a conflict. Once the Motion to Disqualify was filed, J-M fought it and worked to retain Sheppard Mullin as its counsel. There is no indication it would have acted differently in the slightest had it known of the District's inquiry in March, as opposed to April. It is far from clear, then, exactly how Sheppard Mullin's delay in informing J-M adversely affected J-M in any way. That fact drives home the extent to which this was not an issue that required immediate client consultation.

It is my view, then, that Sheppard Mullin did nothing improper in this regard. Even were one to differ with that conclusion, though, it seems unfathomable to conclude that the timing of Sheppard Mullin's telling J-M about the District's inquiries could give rise to forfeiture of more of $4 million in fees.

V. The period between when the District filed its disqualification motion and when Sheppard Mullin's representation of J-M ended.

The crux of J-M's claims about the period following the District's filing the disqualification motion is that Sheppard Mullin acted improperly when, without advising J-M to retain it own independent counsel, Sheppard Mullin brought in attorney Kevin Rosen on July 5, 2011 to help argue for Sheppard Mullin at the July 7, 2011 hearing before Judge Wu on possible alternatives to disqualification. J-M does not claim there was anything improper about Sheppard Mullin bringing in its own

counsel on this matter.[5] Nor does J-M claim it was ever confused about the fact that Mr. Rosen was appearing on its behalf, not on Sheppard Mullin's behalf. And J-M does not contend it was problematic for Sheppard Mullin to use any tool it could in the effort to help the firm and J-M achieve their mutual goal of enabling J-M to be represented by Sheppard Mullin in the *qui tam* action. Rather, J-M's claim involves Sheppard Mullin not having advised it explicitly to secure independent legal advice.[6]

This argument ignores one vital fact: ***J-M did have independent counsel at all times.*** The law is clear that an in-house General Counsel is every bit as much a lawyer for the client as is counsel retained from the outside. As the California Supreme Court has held:

> A corporation represented by in-house counsel is in an agency relationship, *i.e.*, it has hired an attorney to provide professional legal services on its behalf. * * * The fact that in-house counsel is employed

[5] At two points in its Brief, J-M speculates that, Sheppard Mullin "likely hired" Mr. Rosen at that time in order to help Sheppard Mullin defend against a potential malpractice action by J-M, and that Sheppard Mullin then proceeded to make decisions in its own interest, rather than in the interests of J-M. J-M Br. at 2, 11. J-M suggests also that it was with this goal in mind that (even before Mr. Rosen became involved) Sheppard Mullin secured a declaration from Ms. Eng about J-M's ongoing desire to go forward with Sheppard Mullin as J-M's counsel. From a legal standpoint, there is no question that a conflict would exist were a lawyer to stop worrying about his client's best interests, and, to the client's detriment, worry instead about his own. From a factual standpoint, though, there is nothing in J-M's filing that provides any support for an allegation that this occurred here. As J-M acknowledges, Mr. Rosen was brought in on the eve of the final hearing (following Judge Wu's June 6 ruling and after the completion of all the briefing), a time in which J-M was aggressively supporting efforts to convince Judge Wu to allow J-M to go forward with Sheppard Mullin as its counsel. At that time, the interest of the firm and J-M (as established by its General Counsel—an experienced and sophisticated attorney) were aligned. It was only later, when J-M opted to decline the bifurcation proposal, terminate Sheppard Mullin, and begin to threaten Sheppard Mullin, that the interests of the two diverged. Once that happened, there is no suggestion that Sheppard Mullin was barred from working with Mr. Rosen at that point.

[6] The declarations of Charles Kreindler and Brian Daly state that they also explicitly invited Ms. Eng to consult with independent counsel. This, of course, further negates the claim that J-M is making. In forming my opinion, however, I have not relied on any such conversations. Rather, the fact that Ms. Eng was representing J-M in the matter conclusively establishes that J-M was represented by independent counsel.

by the corporation does not alter the fact of representation by an independent third party.

PLCM Group v. Drexler, 22 Cal. 4th 511, 517 (2000). See also Restatement § 122 *Comment c.1.* (in-house counsel qualifies as independent counsel for the client).

In this case, J-M's independent counsel knew that Mr. Rosen had been brought in as counsel for Sheppard Mullin to advance the interests that the firm shared with J-M (as defined by J-M's in-house counsel): Allowing Sheppard Mullin to continue representing J-M in the *qui tam* action. J-M portrays the situation as it being an innocent, uninformed novice without capacity to have made a decision on whether to sever with Sheppard Mullin or whether to fight together with Sheppard Mullin for Sheppard Mullin to remain in the case. But this depiction thoroughly ignores the vital role that J-M's own lawyer (and General Counsel) was playing throughout and the law's treatment of that in-house counsel as independent counsel looking out for J-M's interests. This depiction also ignores the fact that the office of General Counsel is uniquely experienced and sophisticated in managing relationships with outside firms. And it ignores the fact that J-M found itself quite capable, when it chose, to secure the advice of two outside law firms and to terminate its relationship with Sheppard Mullin.

J-M also voices concerns with several other aspects of Sheppard Mullin's handling of the disqualification issue. For example, it seems to complain that in April and May 2011 communications with J-M, Mr. Kreindler characterized the District's concerns as a "tactical ploy," and predicted that its motion to disqualify would be denied. It is my opinion that there is nothing ethically troubling about those

characterizations. Indeed, had I been consulted by Sheppard Mullin at the time, I would have similarly concluded that the waiver with the District was valid and would be upheld. See L. Marshall September 30 Report at 21-35.

In addition, J-M claims that Sheppard Mullin's July 2011 advice to J-M on the issue of severing the District from the trial is further evidence of impropriety. According to J-M, when that idea first arose in early June, Sheppard Mullin advised J-M that it was not the preferred manner of dealing with the disqualification issue, but that other choices (specifically, trying to provide consideration to the District in return for a waiver) were better. Yet, in early July, after the effort to secure the District's waiver had failed, and after Judge Wu had ruled that severance (sometimes referred to as bifurcation) was the only way to avoid disqualification, Sheppard Mullin advised J-M that there was no downside to proceeding that way. J-M implies that this change of view is indicative of Sheppard Mullin's putting its interests ahead of J-M's. Again, it goes without saying, that were there any evidence that a law firm advised a client with the goal of promoting the law firm's interests to the client's detriment, that would be a serious ethical breach. But there is nothing, in my view, about the fact pattern J-M describes that raises any hint of that having happened.

From every indication, J-M and Sheppard Mullin shared the goal of proceeding with the representation. In June, when there were an array of possible approaches to effectuate that goal, it made sense for Sheppard Mullin to rank them and talk about which were more preferred and less preferred. At that point, as indicated in June 7 e-mail from Mr. Kreindler to Ms. Eng, Sheppard Mullin advised

that the best of the four proposed approaches was to seek to secure a waiver from the District. Mr. Kreindler then stated that one of the other four alternatives—what they called "bifurcation"—"would be fine with us." One of the other options was "off the table," and the other was "a possibility if all else fails, but there is a relatively small chance of success." Based on that ranking, Sheppard Mullin approached the District and offered it value in return for a new waiver. That effort to pursue the "preferred" method failed. A month later, Judge Wu then narrowed the available options to just one. At that point, there was no longer a question of ranking options from most-preferred to least-preferred—the only possible option was the one Sheppard Mullin had said *at the outset* would be "fine with us." Sheppard Mullin's advice in July, therefore, that the severance approach had no downside is entirely consistent with the its earlier advice and is hardly indicative of any motive other than the continuing one of seeking to effectuate J-M's desire to go forward with Sheppard Mullin as its counsel.

Finally, J-M attacks Sheppard Mullin for having offered during June and early July to pay the District for a waiver of the conflict. These offers included cash payments and an offer that Sheppard Mullin would provide the District with up to 40 hours of free labor and employment-law advice and services. According to J-M, it was never told that Sheppard Mullin was offering to represent the District on unrelated matter and, had it known, it would never have agreed. With regard to this claim, I have reviewed a June 7, 2011 e-mail in which Mr. Kreindler reports to Ms. Eng that Sheppard Mullin would be contacting the District to make an offer that "would take the form of cash, some free labor law advice going forward, as well as

an offer to use separate counsel to perform any discovery tasks (or trial work) that is directed specifically toward the District (at Sheppard Mullin's expense). We plan on making the offer immediately." Given that communication, it is difficult to understand J-M's claim that it was never told about the offer and would never had agreed had it been told. But even had these exact terms of the offer not been conveyed, that would not have established any ethical breach. Consistent with the advance waiver J-M had executed (and had never called into question at that point), J-M was obviously willing to waive any conflict associated with Sheppard Mullin continuing to do unrelated work for the District. The suggestion that the offer of free legal services to the District was a material fact that Sheppard Mullin had to communicate to J-M has no force under these circumstances. As indicated, though, this question is quite theoretical, given the clear evidence that the information was, in fact, communicated.

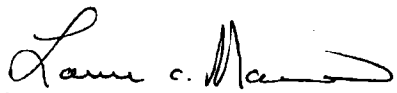
As with the other time periods, I see no evidence of impropriety here and certainly nothing that can come close to egregious misconduct to justify disgorgement or fee forfeiture.

V. Conclusions

For the reasons discussed in this Supplemental Report, and the Report I submitted on September 30, 2013, it is my view that Sheppard Mullin violated no ethical principles and committed no misconduct in its representation of the District. More essentially, for purposes of this proceeding, it is very obvious to me that Sheppard Mullin was not guilty of any willful, egregious misconduct of the sort that would justify disgorgement or fee forfeiture.

AFFIRMATION

I confirm that, insofar as the facts stated in my Supplemental Report are within my own knowledge, I have made clear which they are and I believe them to be true. I also confirm that the opinions I have expressed represent my true and complete professional opinion and are intended to assist the Panel in resolving the parties' dispute.



October 25, 2013

Lawrence C. Marshall

Exhibit I

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IN THE ARBITRATION BEFORE JAMS

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP,

Claimant and Cross-Respondent,

v.

J-M MANUFACTURING COMPANY, INC., D/B/A/ JM EAGLE,

Respondent and Cross-Claimant.

REF. NO. 1220045609

Arbitrators: Hon. Gary L. Taylor (Ret.)
Hon. Charles S. Vogel (Ret.)
James W. Colbert, III Esq.

SUPPLEMENTAL DECLARATION OF D. RONALD RYLAND

I, D. Ronald Ryland, declare as follows:

1. I am the General Counsel of Sheppard, Mullin, Richter & Hampton LLP ("Sheppard Mullin" or the "Firm"). I am submitting this Supplemental Declaration in response to arguments and issues raised by J-M Manufacturing Company, Inc. ("J-M") in its Opening Brief and supporting declarations. If called as a witness, I could and would testify based on personal knowledge as set forth herein. The terminology I use in this Supplemental Declaration follows both the terminology I used in my initial Declaration and the terminology that was used in Sheppard Mullin's Opening Brief to this Panel.

2. I have reviewed J-M's Opening Brief and the Declarations of Camilla M. Eng and K. Luan Tran, as well as all of the documents that accompanied J-M's submission. In addition, in connection with preparing this Supplemental Declaration, I reviewed again the Declaration I executed that was submitted with Sheppard Mullin's Opening Brief, as well as the Declarations of Bryan Daly, Charles Kreindler, and Jeffrey Dinkin that were submitted at that time as well. I hereby reaffirm what I stated in my Declaration. I therefore will not repeat what I said there, some of which is directly applicable and responsive to much of J-M's argument in its submission. The focus of this Supplemental Declaration is simply to respond to some of what J-M has stated.

3. I would like to begin by telling the Panel something with as much conviction as I can convey in a written declaration where I am fully and consciously aware that I am under oath—an oath that I take very seriously. I absolutely did not "conceal" anything from J-M nor anyone else in connection with the Firm's retention by J-M to handle the Qui Tam Action. There was no conspiracy or "scheme." In March 2010, I understood that J-M was comfortable with, agreed to, and was prepared to sign, an enforceable advance waiver involving both "current" and "former" clients adverse to J-M so long as the substance of their matter was not substantially related to Sheppard Mullin's work for J-M. It was (and is) clear to me that neither the labor arbitration that Mr. Dinkin had done 5 months earlier for South Tahoe, nor any future labor advice that Mr. Dinkin might provide, was substantially (or even marginally) related to the Qui Tam Action. As I have stated before, I knew South Tahoe had validly waived conflicts with other clients of Sheppard Mullin (including a waiver of the duty of loyalty), a waiver that I considered to be fully enforceable based on

my experience and knowledge of the law. I also understood that there was no confidential information about J-M that was relevant to any labor work that Mr. Dinkin might do from a different Sheppard Mullin office (Santa Barbara) for South Tahoe. That was my good faith judgment. I saw this as a classic situation for advance waivers because South Tahoe's involvement in the Qui Tam Action as one of two hundred real parties in interest had nothing to do with the modest employment matters Mr. Dinkin had handled. Accordingly, my judgment was that there was no conflict that affected Mr. Daly's ability to represent J-M in the Qui Tam Action, and that there was nothing to disclose to J-M. For these same reasons, J-M's suggestion that I "chose not to say anything" to Mr. Dinkin and that I "concealed the conflict match" from Mr. Dinkin is also untrue. Based on these facts, as with J-M, in my mind there was nothing to tell Mr. Dinkin.

4. I disagree with J-M's suggestion on page 20 of its brief that Sheppard Mullin opted to "throw [South Tahoe] under the bus to save its own skin." That is not how I viewed things for three basic reasons. First, whether Sheppard Mullin would handle any future matter for South Tahoe if asked was *not* presented as a *fait accompli*. I understood that when South Tahoe filed its disqualification motion, there was no pending matter that Mr. Dinkin was handling for South Tahoe, as paragraphs 14 and 15 of his Declaration in this Arbitration confirm. In that context, Sheppard Mullin stated in the opposition to the disqualification motion (Ex. 21 to Mr. Tran's Declaration at page 24) that "***if*** the Court believes it is necessary, Sheppard Mullin ***could*** terminate the agreement." (emphasis added.)[1] Similarly, when South Tahoe approached Mr. Dinkin on May 12, 2011 about some employment advice, he noted the pending disqualification motion and deferred action pending its outcome. *See* Dinkin Declaration in this Arbitration, ¶ 15 & Ex. D. Second, South Tahoe had filed a disqualification motion in the Qui Tam Action, effectively renouncing the advance waivers it had signed and claiming that Sheppard Mullin was in violation of the Rules of Professional Conduct.

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[1] I understood that the engagement agreements with South Tahoe expressly allowed either party to terminate the relationship. See Exhibits B and C to Mr. Dinkin's Declaration and my initial Declaration, especially paragraph 5 of Exhibit C. I also understood that this was Mr. Dinkin's view of those agreements, as he indicated in paragraphs 8 and 9 of his Declaration in this Arbitration and in paragraph 11 of his Declaration submitted with the disqualification motion, which is attached as Exhibit 3 to the Declaration of K. Luan Tran submitted in this Arbitration by J-M.

Therefore, absent some mutual agreement, it was apparent to me at that time that Sheppard Mullin would not likely be doing new work for South Tahoe. Third, I understood that South Tahoe had outside general counsel who had handled labor work on its behalf—the Brownstein law firm—which remained available to advise South Tahoe, as paragraph 3 of Mr. Dinkin's Declaration in this Arbitration confirms.

5. On June 30, 2010, *after* all of the briefing and supplemental briefing regarding South Tahoe's disqualification had been completed, and *after* I had attended the June 6 hearing before Judge Wu, I contacted Kevin Rosen at Gibson, Dunn & Crutcher LLP for the sole purpose of assisting Sheppard Mullin with the July 7 hearing. I did so because I knew that I would be unable to participate in that hearing due to a scheduling problem, and South Tahoe's counsel had declined to agree to a continuance. I did not retain Mr. Rosen to advise Sheppard Mullin in connection with any potential claims by J-M. I was not even contemplating any such claims. And to be clear, Mr. Rosen was hired by Sheppard Mullin only, and only to act on behalf of Sheppard Mullin, just as I had done at the June 6 hearing. I note that J-M's brief acknowledges this at page 11, as does Ms. Eng's Declaration at paragraph 22 (both acknowledging that Sheppard Mullin "retained Kevin Rosen of Gibson Dunn to represent Sheppard at the July 7 hearing). I also note that Mr. Kreindler introduced Mr. Rosen to Judge Wu at the July 7 hearing as "specially appearing on behalf of Sheppard, Mullin for purposes of the disqualification motion . . ." as page 6 of the transcript of that hearing (Exhibit FFF to Mr. Kreindler's Declaration) provides. Mr. Rosen also referred to himself that way when he addressed Judge Wu, as page 19 of that transcript confirms. It is simply not true that Mr. Rosen was hired because I or anyone else at Sheppard Mullin "was concerned about getting sued by JM for malpractice and ethical breaches" or that he was hired "to protect" Sheppard Mullin "against JM," J-M's unsupported statement to that effect notwithstanding.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was executed on October 23, 2013 at Chicago, Illinois.

D. Ronald Ryland

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 June 27, 2016, I served the following document(s):

PLAINTIFF-RESPONDENT'S MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF KEVIN S. ROSEN

on the parties stated below, by the following means of service:

SEE ATTACHED SERVICE LIST

Unless otherwise noted on the attached Service List, **BY MAIL:** I placed a true copy in a sealed envelope or package addressed as indicated above, on the above-mentioned date, and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service in the ordinary course of business in a sealed envelope with postage fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 27, 2016, at San Francisco, California.

Teresa Motichka

Teresa Motichka

SERVICE LIST

Kent L. Richland Barbara W. Ravitz Jeffrey E. Raskin Greines, Martin, Stein & Richland LLP 5900 Wilshire Boulevard, 12th Floor Los Angeles, California 90036	*Attorneys for Defendant and Appellant J-M Manufacturing Co., Inc.*
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