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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

J-M seeks to use the Rules of Professional Conduct strategically as a sword to escape an arbitration award requiring it to pay for over 10,000 hours of legal work of undisputed quality. The problems with J-M's gambit extend far beyond unfairness to Sheppard Mullin. The self-serving rules J-M proposes would both jeopardize the viability of arbitration as an efficient means of dispute resolution and significantly disrupt the practice of law in California.

J-M contends that the California Arbitration Act imposes "no limitation" on the ability of courts to invalidate an entire contract containing an arbitration provision as against "public policy." (ABOM at p. 9.) Accepting that interpretation would spawn burdensome and uncertain litigation over arbitrability, and effectively preclude arbitration in many circumstances, including, for example, an alleged violation of any aspect of the comprehensive regulatory scheme embodied by the Rules of Professional Conduct.

Equally problematic is J-M's interpretation of Rule 3-310, which is completely divorced from the realities of the modern legal marketplace. J-M wants to replace a necessarily fact-specific assessment of informed consent with a one-size-fits-all disclosure standard that ignores the client's sophistication, representation by counsel, and actual understanding of a conflict waiver.

J-M takes a similarly absolutist approach to fee forfeiture, brushing off circumstances and context as legally irrelevant. But requiring complete fee forfeiture regardless of the facts would contravene due process and basic fairness and create perverse incentives that would encourage litigation between attorneys and clients.

J-M makes these arguments even though it does not contest that it agreed to arbitrate all disputes with Sheppard Mullin. Nor does J-M contest that its agreement permitted Sheppard Mullin to represent parties adverse to J-M in unrelated matters so long as confidentiality was preserved. J-M also does not contest that its General Counsel and CEO adeptly negotiated a comprehensive agreement, including a deep fee discount, for Sheppard Mullin's services in the qui tam action and any other future matters. Yet having agreed to this contract, J-M now seeks to nullify it to obtain a nearly $4 million windfall.

In J-M's view, a minimal amount of unrelated labor advice by a different lawyer in a different office provided to one of nearly 200 qui tam plaintiffs is all that matters here. That the parties undisputedly agreed to binding arbitration of all disputes is irrelevant to J-M because that unrelated labor advice supposedly rendered the entire engagement agreement illegal. J-M also deems irrelevant its written consent to a comprehensive waiver of conflicts with "current," "existing," "former," and "future" clients of Sheppard Mullin; J-M argues such a waiver is per se invalid even where a sophisticated client represented by independent counsel fully understands the scope, risks, and consequences of the waiver. And equally irrelevant to J-M is the finding by a distinguished panel of arbitrators that Sheppard Mullin at all times acted "honestly and in good faith" (3AA674), the absence of any evidence of injury, and the fact that the firm neither obtained nor used any confidential information. For J-M, the extraordinary and draconian penalty of complete fee forfeiture should be automatic, regardless of the surrounding circumstances.

This Court should reject J-M's effort to obtain an unwarranted windfall through formalism and absolutism, and allow reason, practicality, and proportionality to prevail.

ARGUMENT

I. Courts Cannot Vacate Arbitration Awards Based on Non-Legislative Expressions of Public Policy

Until now, the source for judicial nullification of arbitration awards under the illegality exception has been limited to *legislative* expressions of public policy. Even J-M concedes that illegality challenges to a provision of a contract cannot be based on the Rules of Professional Conduct. J-M nevertheless asserts that "there is no limitation" on the source of illegality if the challenge is directed to the entire contract. (ABOM at p. 9.) This arbitrary and impractical distinction, which has never been adopted by this Court, is contrary to the text and purpose of the California Arbitration Act ("CAA").

A. J-M's "Entire v. Provision" Illegality Distinction Cannot Justify Using the Rules of Professional Conduct to Vacate Arbitration Awards

J-M admits that *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1 (*Moncharsh*) "prohibited judicial review based on violation of the Rules of Professional Conduct," but says that this limitation applies only to situations involving "provision-illegality." (ABOM at p. 16.) According to J-M, "where the question is legality of the entire contract, judicial review is not limited," and illegality challenges can be based on *any* source of public policy, including the Rules of Professional Conduct. (*Id.* at pp. 10, 16.) In other words, J-M contends the definition of "illegality" under the CAA is dramatically different depending on how much of an agreement is challenged. That is not and should not be the law.

1. *Moncharsh* did state that courts, rather than arbitrators, should decide challenges to arbitration awards when it is "claimed [that] the entire contract or transaction was illegal." (*Moncharsh*, *supra*, 3 Cal.4th at p. 32.)

But nothing in *Moncharsh* suggests that this rule applies to illegality challenges premised on *non-legislative* expressions of public policy. Such a rule would make no sense given *Moncharsh*'s instruction that, because "the Legislature has already expressed its strong support for private arbitration and the finality of arbitral awards," "courts should be reluctant to invalidate an arbitrator's award" on illegality grounds unless there is "an explicit legislative expression of public policy." (*Ibid.*)

The Legislature's "strong support for private arbitration" does not magically evaporate if a contract is challenged in its entirety rather than partially. Yet J-M's approach would permit expansive illegality challenges untethered to any legislative enactments—the precise sort of challenges *Moncharsh* held were contrary to the legislative intent behind the CAA—whenever a party purports to challenge the whole of a contract.

The distinction that *Moncharsh* actually made "crystal clear" (ABOM at p. 11) was *not* between entire- and provision-illegality, but between illegality claims based on legislative enactments and those that are not. Indeed, all of the illegality challenges referenced in *Moncharsh* involved assertions of *statutory* violations. (See *Moncharsh*, *supra*, 3 Cal.4th at pp. 29-32.) For example, *Loving & Evans v. Blick* (1949) 33 Cal.2d 603 (*Loving*) involved a "clear violation of the statutes regulating the contracting business." (*Id.* at p. 607.) *Moncharsh* also cited *All Points Traders, Inc. v. Barrington Associates* (1989) 211 Cal.App.3d 723 (*All Points Traders*), which concerned an illegality challenge premised on the "direct contravention of the statute" regulating real estate brokers. (*Id.* at pp. 737-738.)

This Court's post-*Moncharsh* decisions have consistently linked challenges of arbitration awards to the protection of *statutory* rights. (*Richey*

v. AutoNation, Inc. (2015) 60 Cal.4th 909, 916 (*Richey*) ["Arbitrators may exceed their powers by issuing an award that violates a party's unwaivable *statutory rights* or that contravenes an explicit *legislative* expression of public policy"], italics added; *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 982-983 [judicial review permitted where an "agreement to arbitrate contravened both plaintiff's *statutory rights*" and "the public policy underlying the *statute*"], italics added; *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 276-277 [judicial review permitted because "granting finality ... would be inconsistent with a party's *statutory rights*"], original italics.)

Unlike the Court of Appeal here, *Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405 (*Cotchett*) correctly rejected a challenge to an arbitration award based on the Rules of Professional Conduct. J-M trivializes *Cotchett* by claiming that "the only issue was provision-illegality—not entire illegality." (ABOM at p. 17.) But *Cotchett* expressly held that an arbitration award was *not* "reviewable" even if the "underlying contract or transaction was illegal in its entirety," because the source of the claimed illegality was not a legislative enactment, but "a public policy set forth in the Rules of Professional Conduct." (*Cotchett, supra*, 187 Cal.App.4th at p. 1417, fn. 1.)

2. J-M's attempt to tether its distinction between "entire-illegality" and "provision-illegality" to the text of the CAA is baseless. (ABOM at pp. 10-13.) J-M notes that different provisions govern petitions to compel arbitration (sections 1281 and 1281.2) and vacatur/correction of arbitration awards (sections 1286.2 and 1286.6).[1] But those provisions say nothing

[1] Statutory references are to the Code of Civil Procedure unless specified.

about illegality challenges at all, much less J-M's distinction between "entire-illegality" and "provision-illegality."

Equally unavailing is J-M's related argument that "[c]ourts adjudicate entire illegality based on ... sections 1281 and 1281.2, governing petitions to compel arbitration—not the vacatur statute." (ABOM at p. 12.) Both *Loving* and *All Points Traders*, the two "entire-illegality" decisions cited in *Moncharsh*, involved attempts to vacate arbitration awards, *not* petitions to compel arbitration. (See *Loving*, *supra*, 33 Cal.2d at pp. 609-610; *All Points Traders*, *supra*, 211 Cal.App.3d at pp. 736-737.) In fact, the very cases J-M cites as examples of "courts devot[ing] a substantial amount of analysis to whether the legality of the entire contract really is at issue" (ABOM at p. 15)—*Epic Medical Management, LLC v. Paquette* (2015) 244 Cal.App.4th 504 (*Epic Medical*) and *Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21 (*Ahdout*)—concerned whether judicial review of final arbitration awards was appropriate under section 1286.2, the vacatur statute.

This Court's linkage of the Legislature's "strong support for private arbitration" with the entirety of "title 9 of the Code of Civil Procedure"—including sections 1281 and 1281.2—also dooms J-M's approach. (*Moncharsh*, *supra*, 3 Cal.4th at p. 32; see also *id.* at p. 9 [describing the "comprehensive statutory scheme regulating private arbitration in this state"].) Like the rest of the CAA, "[s]ections 1281 and 1281.2, which govern petitions to compel arbitration, reflect a 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.'" (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 25, quoting *Moncharsh*, *supra*, 3 Cal.4th at p. 9.) J-M's suggestion that the Legislature's strong support of arbitration is somehow limited *only* to the vacatur provision is both illogical and contrary to this Court's jurisprudence.

J-M further argues that courts can "look to all sources of law" in resolving "entire-illegality" challenges because sections 1281 and 1281.2 provide that an arbitration agreement need not be enforced where there are "grounds" for its "revocation." (ABOM at pp. 12-13.) This argument conflicts with *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322-323 (*Ericksen*), which held that even though fraudulent inducement is a ground to revoke a contract, such claims are nonetheless "subject to arbitration" unless they are specifically "directed to the arbitration clause itself." (*Id.* at p. 323.) *Ericksen* refused to broadly construe the "revocation" language of the CAA because doing so would have violated "this state's strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution"—"particularly ... where parties of presumptively equal bargaining power have entered into an agreement containing a commitment to arbitrate by a procedure of unchallenged fairness." (*Ibid.*)

J-M's interpretation of sections 1281 and 1281.2 similarly would frustrate the "strong public policy in favor of arbitration" by committing the time-consuming and expensive adjudication of "preliminary issues" relating to arbitrability "to the courts." (*Ericksen*, *supra*, 35 Cal.3d at pp. 322-323.) If J-M were correct, parties contractually bound to arbitrate their claims could, under the guise of illegality, "assert all possible legal or procedural defenses in court proceedings before the arbitration itself can go forward," and "'the arbitral wheels would very soon grind to a halt.'" (*Id.* at p. 323, citation omitted.) To be sure, *Ericksen* and *Moncharsh* distinguished claims of fraudulent inducement from claims of *statutory* illegality recognized in *Loving*. (*Ericksen*, *supra*, 35 Cal.3d at p. 316, fn. 2; *Moncharsh*, *supra*, 3 Cal.4th at p. 30, fn. 13.) But neither decision addressed an illegality claim of the sort J-M has raised here—one based on a non-legislative expression of

public policy and requiring a fact-intensive analysis akin to a claim of fraudulent inducement.

Even if J-M were correct that its view of the illegality exception is supported by the CAA's provisions governing petitions to compel arbitration (it is not), that would not make any difference here because J-M did not challenge on appeal the trial court's order compelling arbitration. Instead, J-M argued only that the trial court "erred in confirming the arbitration award" under section 1286.2. (J-M's Court of Appeal Opening Br. at p. 1; see also *id.* at pp. 13-28; Opn. at p. 11, fn. 3.) In fact, J-M's briefs in the Court of Appeal did not even *cite* sections 1281 and 1281.2—even though J-M now contends that those provisions are the "statutory reason" for the "two different standards" governing illegality challenges. (ABOM at p. 14.)

3. There is a reason why J-M barely addresses the practicalities of its proposed rule—it would threaten arbitration as an effective means of resolving disputes between attorneys and clients. (OBOM at pp. 17-18, 20-21.) Unlike J-M, this Court has "not close[d]" its "eyes to the practical consequences" of proposed interpretations of the CAA, and has rejected interpretations that would "undermin[e] the advantages of arbitration." (*Ericksen, supra*, 35 Cal.3d at pp. 322-323.) That's exactly what will occur if J-M's view of the illegality exception were adopted. Courts deciding whether to compel arbitration or enforce arbitration awards will become mired in disputes over difficult, fact-intensive questions—including whether a claim of illegality actually goes to the whole or part of an agreement, and whether an attorney has violated the Rules of Professional Conduct. The efficiency of arbitration will be lost.

The policy concerns recognized in *Ericksen* apply here with particular force because J-M's illegality challenge is virtually indistinguishable from a

claim of fraudulent concealment. Indeed, in a transparent effort to avoid *Ericksen*, J-M has simply repackaged the fraudulent inducement claim it initially asserted into an illegality challenge based on an asserted violation of the Rules of Professional Conduct. (See 1RA20-37; 1AA54-58.) J-M's brief to this Court—with its repeated allegations of "concealment"—confirms that J-M's illegality challenge is a thinly veiled claim of fraudulent concealment.[2] J-M's gamesmanship is proof that, if it prevails, others will likewise strategically label their claims to avoid arbitration, thereby undermining *Ericksen*.

Finally, contrary to J-M's assertions, expanding the illegality exception to cover the Rules of Professional Conduct "would thwart arbitration in a wide variety of attorney-client cases." (ABOM at p. 17.) Opening the illegality exception to a set of rules that effectively govern the entirety of the attorney-client relationship would mire myriad attorney-client arbitrations in extensive threshold litigation over arbitrability. Trying to side-step that major flaw in its argument, J-M suggests that only Rule 3-310 would be a permissible basis for an illegality challenge. But there is no principled distinction between alleged violations of Rule 3-310 and the other rules, which clients equally could argue "invalidate an *entire* engagement agreement." (*Ibid.*)

For example, Rule 4-200 prohibits an attorney from "*enter[ing]* into an agreement for ... [an] unconscionable fee." (Italics added.) Under J-M's reasoning, an agreement would be entirely invalid if Rule 4-200 were violated. It is not particularly difficult for a client to argue that the fees it

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[2] Sheppard Mullin disputes any allegation of concealment. The arbitrators found that Sheppard Mullin at all times acted "honestly and in good faith." (3AA674.)

was charged were unconscionable, and that as a result the entire engagement was "illegal." The only way to avoid such a result would be for courts to arbitrarily deem some Rules of Professional Conduct more important than others. The development of such a hierarchy would spawn significant ancillary litigation, undermining the ability of attorneys and clients to efficiently resolve disputes through arbitration.

B. J-M's Illegality Challenge Does Not Relate to the Entire Agreement

Even assuming J-M's interpretation of the CAA were correct, the Court of Appeal's decision still should be reversed because J-M's illegality challenge is not directed to the entire engagement agreement. (OBOM at pp. 25-26.)

J-M asserts that its illegality challenge "vitiates the entire agreement" because Sheppard Mullin's "duty of loyalty" in the qui tam litigation was the "subject of the agreement." (ABOM at p. 18.) But the "subject of the agreement" was much broader than that—it set out terms to govern not just the qui tam litigation, but also any "other engagements for [J-M]." (1AA199.) And those terms included provisions that "survive[d] ... termination of [Sheppard Mullin's] representation of [J-M]," as well as a broad arbitration agreement covering any "claim of any kind regardless of the facts or the legal theories." (1AA200-202.)

J-M dismisses those terms as necessarily linked to the "qui tam engagement" (ABOM at pp. 19-20), but that simply isn't the case given that those terms (and all of the other terms in the agreement) would have applied to *any* representation of J-M. That fact is also fatal to J-M's attempt to distinguish *Ahdout* and *Epic Medical*, which involved broad, multifaceted

agreements similar to the engagement agreement here. (OBOM at pp. 25-26.)

But even if, contrary to its text, the engagement agreement concerned only the qui tam representation, J-M's illegality challenge still would relate only to a particular provision of the agreement: the allegedly insufficient conflict waiver. Unlike *Loving* and *All Points Traders*, where the entirety of the contract never could have been legal because of the lack of appropriate licenses, the engagement agreement undisputedly would have been entirely proper under Rule 3-310 if the conflict waiver provision were sufficient. J-M's illegality challenge thus hinges only on the enforceability of a single contractual provision; it is not the sort of challenge that would have made *any* transaction with J-M inherently impermissible, as would be the case with, for example, an *unlicensed* broker, contractor, or lawyer.

Accordingly, J-M's illegality challenge does not go to the entire agreement and therefore, by J-M's own admission, was properly resolved in arbitration. (ABOM at p. 16.)

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

Even if judicial review were proper, this Court should reverse the judgment because J-M—a sophisticated client represented by independent counsel—gave its informed written consent to waive any conflict with Sheppard Mullin's current, former, and future clients.

A. J-M Understood the Scope of the Waiver It Signed and the Conflicts It Covered

Because J-M and its General Counsel plainly understood what J-M was waiving—"any conflict of interest" with Sheppard Mullin's "current, former, and future" clients in unrelated matters, including "in litigation or arbitration" (1AA201, 204)—J-M's consent to any conflict arising from

Sheppard Mullin's unrelated labor counseling for South Tahoe was fully informed.

The engagement agreement informed J-M that Sheppard Mullin "may *currently* or in the *future* represent one or more other clients (including *current*, former, and *future* clients) in matters involving [J-M]." (1AA201, italics added.) Sheppard Mullin disclosed that it "has many attorneys and multiple offices" and sought the conflict waiver "to allow [Sheppard Mullin] to meet the needs of *existing* and *future* clients, to remain available to those other clients and to render legal services with vigor and competence." (*Ibid.*, italics added.) And the agreement limited the permitted adversity to unrelated matters and those in which Sheppard Mullin had "not obtained confidential information" of J-M that would be "material to representation of the other client." (*Ibid.*) Within these parameters, J-M agreed Sheppard Mullin could represent other clients "even if the interests of the other client are adverse to [J-M] (including appearance on behalf of another client adverse to [J-M] in litigation or arbitration)." (*Ibid.*)

J-M does not dispute that the conflict at issue—arising from 12 hours of unrelated labor counseling, periodically over 16 months, by a different Sheppard Mullin lawyer in a different office—fell well within the scope of the waiver. There is also no doubt that J-M understood the significance of the conflict waiver. J-M's General Counsel was familiar with such waivers, having refused another firm's request to waive conflicts the very same day J-M agreed to the conflict waiver language in the engagement agreement with Sheppard Mullin. Indeed, before agreeing to that waiver language, "JM had never waived any conflict for any of its other (past or present) attorneys." (1AA192.) And when she executed the engagement agreement on J-M's behalf, J-M's General Counsel confirmed she had "read and underst[ood] this engagement letter and agree[d] that it ... waived *any* conflict of interest

on the part of [Sheppard Mullin] arising out of the representation described above." (1AA204, italics added.) In this context, J-M and its General Counsel certainly understood that J-M was permitting Sheppard Mullin to provide unrelated labor counseling to clients like South Tahoe.

J-M nonetheless asserts, based solely on the self-serving declaration of its General Counsel, that its consent was not informed because a Sheppard Mullin lawyer supposedly said there were no existing conflicts at the outset of the representation. (ABOM at p. 5, citing 1AA191.) But J-M concedes that its General Counsel reviewed, edited, understood, and signed the agreement indicating explicitly that Sheppard Mullin "may *currently* or in the future represent one or more other clients (including *current*, former, and future clients) in matters involving [J-M]." (1AA201, italics added.) It violates bedrock legal principles to allow anyone (much less a lawyer) to knowingly sign a document but then claim she was told the exact opposite of what the document stated. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 ["If contractual language is clear and explicit, it governs"].)[3]

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[3] If J-M's General Counsel really had been told there were no current conflicts, she would not have signed a waiver expressly including conflicts with "current" and "existing" clients. Another reason to discount the veracity of her declaration is that it includes other demonstrably false assertions. For example, she claimed that Sheppard Mullin "never disclosed" that it "was offering ... continued representation to South Tahoe to avoid disqualification." (1AA195.) That is indisputably contradicted by an email wherein Sheppard Mullin told J-M's General Counsel and its CEO that it planned to offer South Tahoe "some free labor law advice" in exchange for its agreement to waive conflicts. (MJN Decl., Ex. D.) Resolution of this case does not depend on determining the veracity of the declaration, but notably, J-M continues to repeat this falsehood in its briefing. (ABOM at p. 6.)

J-M also says that it would not have hired Sheppard Mullin had it known about the South Tahoe representation. But the facts prove otherwise. Sheppard Mullin undisputedly told J-M's General Counsel that the firm had previously represented, and had a strong relationship with, the Los Angeles Department of Water and Power—another qui tam intervenor with an exponentially greater stake in the litigation. Far from balking, J-M's General Counsel said that relationship and others like it would be useful in attempting to resolve the qui tam action. (2AA474-475; 2AA490-492.) J-M's post-hoc, litigation-driven claim that it would have been concerned about Sheppard Mullin's past, present, or future relationships with its qui tam adversaries is simply not credible.

Under the circumstances here, J-M gave its "informed written consent" within the meaning of Rule 3-310(C)(3). Rule 3-310(C)(3) allows a lawyer to "[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" as long as the lawyer obtains "the informed written consent of each client." (Rules Prof. Cond., rule 3-310(C)(3).) "'Informed written consent,'" in turn, "means the client's ... written agreement to the representation following written disclosure" of "the *relevant circumstances* and of the actual and reasonably foreseeable adverse consequences to the client[.]" (*Id.*, rule 3-310(A)(1)-(2), italics added.) The informed-consent inquiry must therefore focus on the particular client's understanding of the scope of the waiver, the nature of the conflicts it covers, and the risks it carries.

The Court of Appeal, however, held that informed consent *always* requires specifically identifying any adverse party that the waiver may cover, even if the sophisticated client and its counsel fully understand the scope of the waiver. (Opn. at pp. 21-22.) The ABA, other leading bar associations,

the Restatement, scholars, and numerous courts have all refused to impose such a requirement in situations involving sophisticated clients represented by independent counsel. (OBOM at pp. 29-31.) This consensus recognizes the modern legal marketplace and the current reality that sophisticated, well-represented corporate clients—like J-M here—can fully understand the significance of comprehensive conflict waivers and thus are able to give informed consent to them as part of the contractual bargaining process. (*Id.* at pp. 37-40.)

B. J-M's Attempts to Invalidate the Conflict Waiver Fail

Despite its clear understanding of the scope and significance of the conflict waiver, J-M nonetheless asks this Court to invalidate its contract for a variety of unpersuasive reasons. The Court should reject each of them.

1. J-M assumes that the conflict with South Tahoe was an "existing [or] impending conflic[t]." (See, e.g., ABOM at p. 22.) But the Court of Appeal reached its decision based on the *opposite* assumption—that "Sheppard Mullin was *not* representing South Tahoe at the time it entered into the agreement with J-M." (Opn. at p. 18, italics added.) At most, this is a disputed (and unresolved) issue of fact, and J-M's assertion that the conflict with South Tahoe was a current conflict obviously is not conclusive.

J-M also erroneously suggests that Sheppard Mullin "acknowledged" that South Tahoe was an "existing client" when it started representing J-M. (ABOM at p. 6, citing 2AA284.) J-M's only support for this claim is a hearsay statement in a declaration filed by South Tahoe's counsel in the qui tam action that Sheppard Mullin disputes. (See MJN, Ex. G at p. 160, fn. 6.) In any event, as explained further below, resolution of this factual dispute is not necessary to uphold the validity of the conflict waiver.

2. Even if J-M were correct that the conflict with South Tahoe existed when J-M's General Counsel executed the conflict waiver (which no court has found), the Restatement, the ABA Model Rules, and ethics opinions of the Washington, D.C. and New York bar associations do *not* "expressly reject" a waiver under those circumstances regardless of "how sophisticated the client is." (ABOM at pp. 20-22.)

Both the Restatement and the ABA Model Rules make clear that the focus of the informed-consent inquiry must train on whether the specific client is sufficiently informed to appreciate the scope, nature, and risks of the conflicts it is waiving, and that whether a client is sophisticated and independently represented necessarily bears on that inquiry. The Restatement provides that a client's "[i]nformed consent" to waive a conflict "requires that the client ... have *reasonably adequate information* about the material risks of such representation to that client." (Rest.3d Law Governing Lawyers (2000) § 122(1), italics added.) The comment J-M highlights (ABOM at pp. 22-23) similarly recognizes that "clients differ as to their sophistication," and that "[a] client independently represented—for example by inside legal counsel ... —*will need less information* about the consequences of a conflict." (Rest.3d § 122, cmt. c(i), italics added.) Comment 22 to ABA Model Rule 1.7 likewise provides that an "experienced user of ... legal services" who is "independently represented by other counsel" can better appreciate "the material risks that the waiver entails." (ABA Model Rules of Prof. Conduct, rule 1.7, com. 22.)

There is no reason why the fundamental principle endorsed by both the Restatement and the ABA Model Rules—that client sophistication and independent representation impacts the informed consent analysis—should be limited to situations involving waivers of future conflicts. J-M so asserts, but again has offered no explanation or justification. There is none. As

Professor Lawrence C. Marshall opined in this case, "[o]nce 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" because if "the adverse representations fit within the scope of the waiver ... the timing of whether the other client is already on the firm's roster or shows up later is of no moment." (MJN Ex. C at p. 133.)

While both the Restatement and the ABA Model Rules address client sophistication and independent representation in the context of *future* conflicts, those authorities by no means suggested that they would view those factors as irrelevant when assessing waivers of *existing* conflicts. Nothing in the reasoning of the Restatement or the ABA Model Rules suggests they were differentiating between current and advance conflict waivers.

As for the Washington, D.C. and New York bar associations, their ethics opinions refute J-M's claim that they prohibit comprehensive waivers of conflicts covering current conflicts. The sample waiver within the D.C. Bar's opinion specifically waives conflicts with "*current or future* clients," and allows the firm "to continue to represent, or undertake in the future to represent, *existing or new* clients in any [unrelated] matter, including litigation." (D.C. Bar Assn., Ethics Opn. 309 (2001), italics added.) The New York City Bar's opinion likewise includes in one of its sample "blanket waivers" the waiver of conflicts "*now or in the future*." (N.Y.C. Bar Assn. Com. on Prof. & Jud. Ethics, Formal Opn. 2006-1 (2006), italics added.)

3. J-M also argues that "[a] sophisticated client, even one with in-house counsel, is in no better position to evaluate the risks of an existing or impending conflict" that is not specifically disclosed because "[n]o amount of experience makes a client more knowledgeable about something they know nothing about." (ABOM at p. 26.) But the waiver unambiguously

disclosed that it covered "current" and "existing" conflicts. Moreover, J-M's reasoning would apply equally to every unknown *future* conflict—another analytical flaw in J-M's argument that it fails to explain.

J-M relatedly claims that "in-house counsel are sometimes unsophisticated, young and inexperienced." (ABOM at p. 30.) But J-M doesn't dispute that its own General Counsel is sophisticated and experienced, including with respect to conflict waivers. Indeed, J-M's General Counsel successfully "demanded ... a 15% discount off Sheppard Mullin's hourly rates," "insisted on a 7% prompt-pay discount," and extracted a limitation on the charging of interest. (2AA477.) And putting aside J-M's unprecedented idea of parsing the sophistication of members of the bar, the fact remains that the in-house legal position attracts very talented people; it "'typically carries a senior title within the corporate hierarchy, and is associated with significant prestige within the legal profession.'" (Lipson et al., *Foreword: Who's in the House? The Changing Nature and Role of In-House and General Counsel* (2012) 2012 Wis. L.Rev. 237, 243, citation omitted.)

J-M doubts that a sophisticated client's "bargaining power" can ever have a "practical impact," "even for highly-experienced in-house counsel." (ABOM at p. 30.) That ignores the reality of the legal marketplace in the 21st century. "[S]ophisticated clients have substantial bargaining power—often greater than the lawyer—and, aided by independent counsel, can negotiate the terms of the agreement, including the terms of the prospective conflicts waiver, at arm's-length." (Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox* (2001) 29 Hofstra L.Rev. 971, 1011.) And a "sophisticated client, especially with the assistance of independent counsel, ... is perfectly capable of allocating a 'conflicts' risk in

selecting outside counsel the same way it allocates business risks in running its business," and "can readily appreciate the potential impact of agreeing to forego objections to lawyers from the same firm from being directly adverse in any unrelated case." (*Id.* at p. 1007; see also Kobak, *Dealing with Conflicts and Disqualification Risks Professionally* (2015) 44 Hofstra L.Rev. 497, 529-530 [noting that some clients have created "engagement letters of their own" with specific conflicts terms].)

4. J-M also wrongly suggests that Rule 3-310 forbids "generalized, open-ended" waivers of existing or future conflicts. (ABOM at p. 31.) J-M argues that whereas the ABA and D.C. rules are "relativistic," focusing on what is "adequate" and "reasonabl[e]" for informed consent, "[t]he California Rules are strikingly different." (*Id.* at pp 32-33.) Rule 3-310, J-M asserts, is framed "in absolute terms," with "nothing relativistic about it." (*Id.* at p. 33.) But the plain text of Rule 3-310—with its focus on the "relevant circumstances" and "reasonably foreseeable adverse consequences"—does not impose a one-size-fits-all standard. What it takes to sufficiently inform an unrepresented individual with a high school education of the "relevant circumstances" and the "reasonably foreseeable adverse consequences" of a waiver cannot possibly be the same as what is necessary for a sophisticated client represented by an experienced lawyer.

Indeed, J-M ignores that the 1989 ethics opinion interpreting Rule 3-310 recognized that blanket conflict waivers can satisfy the informed written consent requirement "in appropriate circumstances and with knowledgeable and sophisticated clients." (State Bar Standing Com. on Prof. Responsibility & Conduct, Formal Opn. No. 1989-115.) Contrary to J-M's absolutist view of Rule 3-310, the opinion emphasized that "[w]hether a client's waiver of the protections provided by rule 3-310 ... is 'informed' is obviously a fact-

specific inquiry," and concluded that a waiver can be appropriate depending on the circumstances, such as the client's sophistication. (*Ibid.*)

5. Finally, J-M erroneously contends that "[t]he California State Bar's currently-pending, proposed advance-waiver rule ... rejects the ABA's decision to recognize generalized, open-ended advance waivers for sophisticated clients." (ABOM at p. 34, italics omitted.) Not so. The California Rules Revision Commission's latest draft of its proposed Rule 1.7 adds the following to its Comment 10, which addresses client consent: "The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably understands the risks involved in giving consent." (Cal. Rules Revision Com., Rule 1.7 [3-310] Draft 5.1, <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000016077.pdf>, at p. 3.)

Moreover, the State Bar's Committee on Professional Responsibility and Conduct has endorsed the view that "informed written consent to a future conflict ... should be permitted by [Rule 1.7] and that the key criterion should be whether the client understands the risks involved." (Com. On Prof. Responsibility & Conduct Letter (Aug. 12, 2016) <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000015721.pdf>, at p. 14.) According to the Committee, "consistent with [ABA] Model Rule 1.7, Comment [22], national authorities (ABA Formal Opinion 05-436), and basic principles of contract and fiduciary law, the Comment should recognize that the experience and sophistication of the client, including whether the client is independently represented by counsel in giving consent, is relevant to determining whether or not the understanding required to enforce the waiver is present." (*Ibid.*)

J-M challenges this compelling rationale by once again questioning the sophistication of clients and the competency of their in-house counsel. (ABOM at pp. 25-31.) Those attacks ring hollow here, where J-M—a billion-dollar company—negotiated a 22% fee reduction and made numerous edits to the engagement agreement. (2AA475-477.) Despite its ability to extract significant concessions, J-M readily agreed to waive conflicts for Sheppard Mullin's "current, former, [or] future clients" (1AA201), a waiver J-M obviously understood would cover conflicts like the one arising from a minimal amount of unrelated labor counseling for South Tahoe.

* * *

J-M's arguments regarding the sufficiency of the conflict waiver have nothing to do with the purposes of the ethics rules or its understanding of what conflicts it agreed to waive. They have everything to do with J-M's desire for a nearly $4 million windfall, even though J-M concedes the quality of Sheppard Mullin's legal work, there is no evidence of any injury, and a distinguished arbitration panel found the firm had acted "honestly and in good faith." (3AA674.)[4]

III. The Court Should Reject J-M's Per Se Rule Requiring Automatic and Complete Fee Forfeiture for Any Actual Conflict

J-M contends that *any* actual conflict of interest (1) requires automatic disgorgement of all earned fees and (2) precludes quantum meruit recovery of any unpaid fees. In J-M's view, "[f]orfeiture is mandatory in the per-se serious situation when an attorney represents one client in litigation against another client"—irrespective of any injury to the client, no matter how minor

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[4] J-M erroneously asserts that the arbitration award was a "nullity." (ABOM at p. 46.) This Court has considered an arbitrator's findings even where an "arbitrator erred" in a way that "could serve as a basis for vacating an arbitration award." (*Richey*, *supra*, 60 Cal.4th at p. 920.)

or unrelated the conflicting representations were, regardless of when or how the conflict arose, and even if the attorney acted in complete good faith. (ABOM at p. 38.) This Court has never recognized such a per se rule, and it should not do so now.

A. J-M's Failure to Prove Injury Precludes Its Claim for Disgorgement

Under *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 (*Frye*), fee disgorgement is not available where a client has suffered no injury or damages resulting from a violation of the rules governing the practice of law. (OBOM at pp. 41-44.) J-M's position that *Frye* permits "disgorgement without proof of damages" is wrong. (ABOM at p. 48.)

Frye repeatedly emphasized the client's lack of injury. (*Frye*, *supra*, 38 Cal.4th at p. 48 [agreeing that "failure to register with the State Bar" was not "a cause of any injury to Frye"]; *ibid.* ["there was no damage"]; *id.* at p. 49 ["Frye did not suffer injury"].) *Frye* also noted that disgorgement would have been disproportionate under the circumstances because the client had not suffered any injury or damages. Indeed, as both *Frye* and this case illustrate, allowing disgorgement without *any* proof of damages would result in disproportionate, unfair forfeitures—"totally unwarranted windfall[s]." (*Id.* at p. 50.) It also would create perverse incentives for uninjured clients to bring suits against their lawyers.

J-M's attempt to limit *Frye* to its specific facts conflicts with *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518 (*Slovensky*), which held that under "the *Frye* rule" a "disgorgement claim fails" in the absence of evidence of damages because if an attorney's conduct "has caused the client no damage, disgorgement of fees is not warranted." (*Id.* at p. 1536.) J-M does not attempt to defend the Court of Appeal's effort to distinguish

Slovensky as supposedly not involving "a serious ethical breach." (See Order Modifying Opn. at pp. 1-2; OBOM at p. 43.) Instead, J-M suggests only that *Slovensky* "should be disapproved." (ABOM at p. 49, fn. 14.) But *Slovensky* is entirely consistent with *Frye*, and the rule established by both cases—that disgorgement of attorney's fees is unavailable absent proof of damages—is sound policy.

J-M's other arguments for a windfall are unpersuasive.

First, J-M suggests that disgorgement without damages is "appropriate as a contract remedy," even if it is not available for a tort claim. (ABOM at p. 47.) Nothing in *Frye* limited its holding to tort claims, and doing so would simply enable any litigant to repackage any breach of fiduciary duty claim into a substantively identical breach of contract claim. Moreover, contract claims, like tort claims, require proof of damages. (*Oasis W. Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820-821.)[5] The two cases J-M cites do not say what J-M contends. In fact, J-M's cases did not even involve common law contract claims; they addressed claims for disgorgement based on statutory violations. (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1336-1337 [Government Code section 1090]; *Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1153 [Probate Code section 16004].)

Second, J-M notes that a handful of other jurisdictions have permitted fee disgorgement without requiring proof of damages. (ABOM at p. 48.) But as *Frye* and *Slovensky* make clear, California has a different rule—one

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[5] Sheppard Mullin focused on J-M's tort claims in its opening brief because in the arbitration J-M sought disgorgement only under its cross-claim for "breach of fiduciary duty." (3AA705.)

that requires proof of damages, so as to avoid awarding "disproportionate" and "unwarranted windfall[s]." (*Frye*, *supra*, 38 Cal.4th at pp. 49-50.)

Third, J-M contends that it did suffer injury. (ABOM at pp. 36-37.) But J-M "stipulated" in the arbitration that it was not challenging "the value or quality of Sheppard Mullin's work" and was not pursuing "any claim for costs (fees included) associated with replacing Sheppard Mullin [as counsel]." (Opn. at p. 9; see also 3AA580-581; 3AA677-678.) Indeed, this case was litigated both in arbitration and in the courts based on J-M's contention that full fee forfeiture was mandated irrespective of its damages, as the Court of Appeal's opinion makes clear. (Opn. at p. 29 ["J-M's actual damages as result of Sheppard Mullin's breach are irrelevant"].)

As a result, J-M affirmatively declined to introduce evidence that it suffered any injuries. J-M nevertheless asserts that "transition costs" related to replacing Sheppard Mullin were "inevitable" (ABOM at pp. 36–37), but there is nothing inevitable about it. For example, J-M—which the record shows is adept at negotiating discounted fees—may well have been able to convince its replacement counsel to waive costs related to getting up to speed. J-M may also have paid its new counsel rates less than what it paid Sheppard Mullin, and thus may have actually saved money by the transition. The point is not that these things necessarily happened, but that J-M decided not to create a record on this issue. J-M cannot simply ignore all of this and declare that the purported obviousness of its claimed injury excuses its failure.[6]

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[6] Even if this Court assumed that J-M suffered *some* injury, there is no evidence establishing the extent of any such injury, and thus no basis for requiring disgorgement of *all* fees Sheppard Mullin received. (See, e.g., Rest.3d Law Governing Lawyers (2000) § 37, com. b [explaining that

B. A Conflict of Interest Does Not Require the Automatic Forfeiture of All Unpaid Legal Fees

Although J-M concedes that "exacerbating factors are required to show the seriousness of other types of violations" and that fee forfeiture is *not* automatic for "potential conflicts," it nonetheless contends that the "unvarying California rule" holds that "[f]orfeiture is mandatory" in any case involving "actual conflicts." (ABOM at pp. 38-40, italics omitted.) No such rule exists. Despite J-M's claims to the contrary, multiple Court of Appeal decisions, as well as the Restatement, have rightly refused to require automatic fee forfeiture.

1. This Court in *Huskinson & Brown, LLP v. Wolf* (2004) 32 Cal.4th 453 (*Huskinson*) did not hold "that in actual-conflict cases, forfeiture must apply." (ABOM at p. 43.) J-M seizes on this Court's statement that it had "found cases in which courts have disallowed quantum meruit recovery to attorneys" where an attorney had violated "the rule prohibiting attorneys from engaging in conflicting representation." (*Huskinson*, *supra*, 32 Cal.4th at p. 463, citing *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 (*Goldstein*); *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6 (*Jeffry*).) That *Huskinson* acknowledged the existence of cases denying fee recovery due to conflicts is by no means an endorsement of an automatic rule of complete fee forfeiture in any case involving an actual conflict. This Court had no opportunity to consider, much less adopt, such a rule because there was no conflict (actual or otherwise) at issue in *Huskinson*.

Huskinson actually held that the availability of quantum meruit recovery of attorney fees in situations where an attorney has violated the

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"total forfeiture" of fees may not be warranted where the ethical violation "d[id] not significantly harm the client"].)

Rules of Professional Conduct turns on what the particular rule "seeks to accomplish" and whether allowing recovery of fees "would undermine compliance with the Rules of Professional Conduct." (*Huskinson*, *supra*, 32 Cal.4th at pp. 458-459.) J-M argues that permitting quantum meruit recovery where an actual conflict exists is impermissible because that would supposedly "violate the purpose of the ethical rule." (ABOM at p. 44.) That assertion makes no sense even under J-M's logic. Rule 3-310 prohibits not only representation of clients whose interests actually conflict, but *also* representations where the "interests of the clients potentially conflict." (Rules Prof. Cond., rule 3-310(C)(1).) Yet J-M does not contend that *Huskinson* precludes fee recovery where potential conflicts were not adequately waived.

While there are some situations involving egregious behavior where allowing fee recovery could frustrate the purpose of, and undermine compliance with, Rule 3-310, that is not true in all circumstances, as this case demonstrates. J-M would have this Court deprive Sheppard Mullin of *any* compensation for over 10,000 hours of work, even though: (1) Sheppard Mullin made substantial, good faith efforts to comply with Rule 3-310 and believed that it had obtained valid conflict waivers from both South Tahoe and J-M (2AA475-476; 2AA538-540; 3AA674); (2) the asserted conflict arose from a minimal amount of unrelated labor counseling by a different Sheppard Mullin lawyer in another firm office (2AA512-514); (3) no Sheppard Mullin lawyer worked for both J-M and South Tahoe, and no confidential information regarding J-M was ever disclosed to South Tahoe (2AA513-514); (4) there is no evidence of any injury to J-M from the conflict; and (5) J-M rejected the federal court's reasonable proposal that would have allowed Sheppard Mullin to continue to represent J-M as to the vast majority of claims at issue in the qui tam action (2AA400; 2AA506-507;

1AA234-237; 1AA196-197). Under these circumstances, allowing Sheppard Mullin to recover its fees would hardly frustrate what Rule 3-310 "seeks to accomplish." (*Huskinson*, *supra*, 32 Cal.4th at p. 458.)

J-M is also wrong that automatic fee forfeiture, regardless of the circumstances, is necessary to ensure "compliance" with Rule 3-310. (ABOM at pp. 44-46.) J-M suggests that absent a per se rule, attorneys will have no "financial incentive" to comply. (*Id.* at p. 45.) But that ignores the direct financial consequences of a failure to comply with Rule 3-310, which can lead to disqualification and, in turn, the loss of business from the impacted client (in addition to potential lawsuits, disciplinary action, and adverse publicity). Moreover, an attorney who willfully violates Rule 3-310, such as by making no attempt to obtain a valid conflict waiver, risks denial of any fee recovery. This Court thus can "logically assume" that attorneys will "remain fully motivated" to comply with Rule 3-310 even if complete fee forfeiture is not automatic. (*Huskinson*, *supra*, 32 Cal.4th at p. 460.)

2. J-M asserts that the Court of Appeal in *Goldstein* and *Jeffry* "distinguishe[d] between different *types* of conflicts," and held that "[f]orfeiture is mandatory in the per-se serious situation" of "*actual conflicts*," but that "violations regarding *potential conflicts* require exacerbating factors to be serious." (ABOM at p. 38.) Neither decision distinguished between actual and potential conflicts. Rather, they turned on the overbroad proposition that *any* violation of an ethical duty requires complete fee forfeiture. (*Goldstein*, *supra*, 46 Cal.App.3d at p. 618; *Jeffry*, *supra*, 67 Cal.App.3d at p. 9.) Even J-M does not defend that expansive forfeiture rule, and for good reason: it is contrary to *Clark v. Millsap* (1926) 197 Cal. 765, which held that "there must be a serious violation of the attorney's responsibilities before an attorney who violates an ethical rule is required to forfeit fees." (*Pringle v. La Chapelle* (1999) 73 Cal.App.4th

1000, 1006 (*Pringle*).) The same is true with *A.I. Credit Corp. v. Aguilar & Sebastinelli* (2003) 113 Cal.App.4th 1072, as it too applied a similarly overstated forfeiture rule. (*Id.* at p. 1079.)

The better rule, as a line of Court of Appeal decisions beginning with *Pringle* makes clear, requires courts to assess whether "the purported violation of the rules was serious," including whether the "interests" of the clients "diverged," whether the attorney had "obtained or would expect to obtain confidential information which might have been harmful to one client, but helpful to another," and whether the representation was "incompatible with the faithful discharge of [the attorney's] duties." (*Pringle*, *supra*, 73 Cal.App.4th at pp. 1006-1007.) J-M's claim that this line of cases concerned only "potential" or "technical" conflicts is incorrect. (ABOM at pp. 40-41.) *Sullivan v. Dorsa* (2005) 128 Cal.App.4th 947 held that fee forfeiture was not "*automatic[]*" even where it was claimed that "a conflict of interest *had* arisen." (*Id.* at pp. 964-965, second italics added.) *Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257 held that, with respect to *both* "actual or potential conflicts," the issue is "whether such conflicts are sufficiently egregious to require forfeiture of fees." (*Id.* at p. 278.)

J-M suggests that *Rodriguez v. Disner* (9th Cir. 2012) 688 F.3d 645 (*Rodriguez*), which applied federal common law, held that actual conflicts are "inherently" serious. *Rodriguez* in fact held that, even where an actual conflict exists, a district court still should consider "the extent of the misconduct, including its gravity, timing, willfulness, and effect on the various services performed by the lawyer, and other threatened or actual harm to the client" before ordering fee forfeiture. (*Id.* at p. 655.)

3. J-M acknowledges that "the Restatement and Sheppard's out-of-state cases make clear that full forfeiture is not automatically appropriate for

every ethical rule in the book," but claims the Restatement endorses "an absolute rule ... when the attorney violates the rule against undertaking a conflicted representation." (ABOM at pp. 41-43.) It does not. J-M cites the Restatement's comment that a "lawyer is not *entitled* to be paid for services rendered in violation of the lawyer's duty to a client," but ignores that it later provides that "[f]orfeiture of fees ... *is not justified* in each instance in which a lawyer violates a legal duty." (Rest.3d Law Governing Lawyers (2000) § 37, com. a-b, italics added.)

In other words, the Restatement makes clear that nothing is automatic in either direction: a lawyer does not have an automatic entitlement to fees when he has violated an ethical duty, but there is also no automatic rule requiring the complete forfeiture of fees. Rather, "[a] lawyer's violation of duty to a client warrants fee forfeiture only if the lawyer's violation was clear" and "serious." (Rest.3d Law Governing Lawyers (2000) § 37, com. d.) The Restatement calls for an analysis of "several factors," including the "extent of the misconduct," whether "the breach involved knowing violation or conscious disloyalty to a client," and whether forfeiture is "proportionate to the seriousness of the offense." (*Ibid.*) The Restatement also recognizes that "[s]ometimes forfeiture for the entire matter is inappropriate" and that the appropriate amount of any forfeiture turns on considerations of "fairness in view of the seriousness of the lawyer's violation" and "the gravity, timing, and likely consequences to the client of the lawyer's misbehavior." (*Id.*, com. e.)

This Court should confirm that California follows the Restatement's sensible approach, which has been adopted in numerous jurisdictions. (OBOM at pp. 47-48.)

CONCLUSION

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

DATED: November 2, 2016 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c)(1), the undersigned certifies that this Reply Brief on the Merits contains 8,388 words as counted by the word count feature of the Microsoft Word program used to generate this brief, not including the tables of contents and authorities, the court of appeal's order, the cover information, the signature block, and this certificate.

DATED: November 2, 2016 By: _____
Kevin S. Rosen

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 November 2, 2016, I served the following document(s):

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on the parties stated below, by the following means of service:

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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 November 2, 2016, at San Francisco, California.

Teresa Motichka

Teresa Motichka

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