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No. _____

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

PETITION FOR REVIEW

*KEVIN S. ROSEN (SBN 133304)
THEANE EVANGELIS (SBN 243570)
BRADLEY J. HAMBURGER (SBN 266916)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Ave.
Los Angeles, CA 90071
Tel: (213) 229-7000
Fax: (213) 229-7520
krosen@gibsondunn.com

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

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GIBSON, DUNN & CRUTCHER LLP
333 South Grand Ave.
Los Angeles, CA 90071
Tel: (213) 229-7000
Fax: (213) 229-7520
krosen@gibsondunn.com

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

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ISSUES PRESENTED FOR REVIEW

1. May a court rely on non-legislative expressions of public policy to overturn an arbitration award on "illegality" grounds?

2. Can a sophisticated consumer of legal services, represented by independent counsel, give its informed consent to an advance waiver of conflicts of interest?

3. Does a conflict of interest that undisputedly caused no damage to the client and did not affect the value or quality of an attorney's work automatically (i) require the attorney to disgorge all previously paid fees, and (ii) preclude the attorney from recovering the reasonable value of his unpaid work?

WHY REVIEW SHOULD BE GRANTED

When J-M Manufacturing, the world's largest plastic pipe manufacturer, faced a qui tam action seeking more than $1 billion in damages, it sought Sheppard Mullin's representation. Advised by independent counsel, J-M agreed to waive conflicts of interest arising from the firm's work for other clients on unrelated matters. But after a Sheppard Mullin client with a minor claim in the qui tam action successfully moved to disqualify the firm, J-M refused to pay approximately $1.1 million in outstanding fees it owed, and sought disgorgement of $2.7 million it previously paid. The parties arbitrated this fee dispute; the arbitration panel ruled in Sheppard Mullin's favor; and the trial court confirmed the award.

The Court of Appeal, however, overturned the arbitration award after holding, contrary to numerous decisions of this and other courts, that the conflict waiver was invalid and that the conflict of interest rendered the engagement agreement "illegal" in its entirety. And again departing from

existing authority, the Court of Appeal ruled that, as the result of the conflict, Sheppard Mullin was automatically precluded from retaining or recovering any fees for the 16 months it represented J-M.

This closely watched case presents three legal questions that are of great importance to attorneys in California and their clients and on which the Courts of Appeal are divided.

First, the Court of Appeal dramatically expanded the limited judicial review of arbitration awards by endorsing a broad interpretation of the "illegality" exception to the finality of such awards. Because the "Legislature has already expressed its strong support for private arbitration," an "arbitrator's decision should be the end, not the beginning, of the dispute," absent "an explicit *legislative* expression of public policy" or a violation of "a party's *statutory* rights." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10, 32, italics added.) The Court of Appeal's decision, however, gives trial courts license to vacate arbitration awards based on expressions of public policy that the Legislature never promulgated, including those in the Rules of Professional Conduct. It upends an important area of the law, defies the intent of the Legislature, and cripples the ability of lawyers and their clients to efficiently resolve disputes through private arbitration.

Second, this Court should clarify whether and how a sophisticated consumer of legal services that is represented by independent counsel—like J-M here—may agree to advance conflict waivers. Businesses and their lawyers routinely and voluntarily agree to such waivers, yet existing California case law provides them scant guidance. The decision below, which likely will become the leading case on this critical issue absent this Court's review, fails to account for the realities of the modern legal

marketplace and casts doubt on the viability of a widespread solution to the challenges faced by savvy clients who want to hire counsel of their choosing. The Court of Appeal's decision also empowers sophisticated clients to avoid paying legal fees if any conflict arises during the course of the representation, even if they agreed to waive future conflicts at the outset.

Third, the Court of Appeal announced a per se rule that any conflict of interest that arises at any point in the attorney-client relationship automatically (i) requires disgorgement of all fees for legal work after the conflict arose and (ii) precludes the attorney from recovering for the reasonable value of any unpaid work. This new categorical rule—under which Sheppard Mullin was denied recovery of its $1.1 million in unpaid fees and ordered to disgorge $2.7 million as a remedy for J-M's tort claims, even though J-M conceded it suffered no damages and that there were no issues with the quality of Sheppard Mullin's work—unsettles California law on this issue. The Court of Appeal's decision also will encourage opportunistic litigation against lawyers and lead to unwarranted windfalls.

FACTUAL AND PROCEDURAL BACKGROUND

I. Sheppard Mullin's Representation of J-M

Sheppard Mullin represented J-M in a qui tam action alleging that J-M misrepresented the strength of its plastic pipe and sold defective pipe to more than 200 governmental entities. (Opn. at p. 3; 1AA53B; 2AA417, 490-491.) One of those entities was South Tahoe Public Utility District, which held 0.0004% of the potential claims at issue. (2AA480.)

After J-M fired its previous law firm (whom it later sued), it reached out to Sheppard Mullin. (2AA473-474, 494-495.) At that time, South Tahoe was not a plaintiff or real party in interest in the qui tam action, but

was listed only as one of hundreds of "Cities & Public Water Agencies" that had allegedly purchased J-M pipe during the relevant period. (Richardson Decl. in Support of Request for Judicial Notice ("RJN Decl."), Exh. A at pp. 61-67.) A conflict check revealed that a different lawyer in a separate Sheppard Mullin office had finished an unrelated labor arbitration for South Tahoe five months earlier, and the firm had done no work for South Tahoe since. (2AA512-514, 538-540.) South Tahoe had consented twice to advance conflict waivers with Sheppard Mullin, on which the arbitration panel found Sheppard Mullin had relied in good faith. (2AA516-526; 3AA673-674.)

J-M valued the considerable expertise of the two former Assistant U.S. Attorneys who would lead the defense effort. (2AA471, 474-475, 488, 490-492.) J-M's General Counsel also believed that the firm's relationships with some of J-M's potential adversaries in the qui tam action—such as the Los Angeles Department of Water and Power (which had exponentially greater claims than South Tahoe)—would be very useful in attempting to resolve the qui tam action. (2AA474-475, 490-492.)

Sheppard Mullin provided a draft engagement agreement to J-M, and its lead partner discussed the agreement—which included various provisions, including an arbitration clause—at a two-hour meeting with J-M's General Counsel. (Opn. at p. 5.) J-M's General Counsel then took several days to consider and edit the agreement with her CEO. (*Id.* at pp. 5-6; 2AA475-478.)

The agreement contained an advance conflict waiver that 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]," and that 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*)." (1AA201, italics added.) The advance waiver explicitly limited the permitted adversity to matters unrelated to the qui tam action, and ensured that Sheppard Mullin would maintain the confidentiality of any information from J-M. (1AA201.)

J-M's General Counsel and CEO had no comments or revisions to the conflict waiver. (Opn. at pp. 5-6; 2AA477-478, 493.) J-M did, however, negotiate a 22% discount on Sheppard Mullin's rates. (2AA477.) J-M's General Counsel never denied reading or understanding the conflict waiver, and she has never suggested that the provision should be construed contrary to its plain text. (1AA191-197.)

Roughly 16 months after Sheppard Mullin's engagement, South Tahoe moved in federal court to disqualify Sheppard Mullin. (Opn. at p. 6.) Relying in good faith on both South Tahoe's and J-M's advance conflict waivers, Sheppard Mullin had provided approximately 16 hours of unrelated labor advice to South Tahoe while representing J-M. (2AA512-514.) No confidential information concerning either client was ever disclosed or used. (3AA677, 2AA513-514.) The federal court indicated that, under certain modest conditions, it would "permit[] Sheppard Mullin to continue to represent J-M ... because of [South Tahoe's] 'minor' role in the Qui Tam Action." (2AA484-485.) The court suggested the parties reach an arrangement so that Sheppard Mullin could continue to defend J-M. (2AA501-503.)

J-M encouraged Sheppard Mullin to continue working on the case and to fight disqualification. (2AA482-483, 502-506.) J-M even authorized Sheppard Mullin to propose a settlement to South Tahoe for

more than the value of South Tahoe's claims at Sheppard Mullin's expense, which Sheppard Mullin did. (2AA483-484, 502-504, RJN Decl., Exh. D at pp. 138-139.) But J-M shifted course after its General Counsel received advice that J-M might obtain disgorgement of its previously paid fees if Sheppard Mullin were disqualified. (1AA196-197; 2AA254.) After receiving this advice, J-M refused to resolve the matter with South Tahoe or agree to the federal court's conditions for Sheppard Mullin to remain as counsel. (1AA196-197.) The federal court then was forced to disqualify Sheppard Mullin. (1AA197.)

Sheppard Mullin completed approximately 10,000 hours of work for J-M in the qui tam action over 16 months. (Opn. at p. 4.) J-M has stipulated that there were no issues with "the value or quality of Sheppard Mullin's work." (*Id.* at p. 9.) J-M also has stipulated that it "waived ... any claim for costs (fees included) associated with replacing Sheppard Mullin [as counsel]." (*Ibid.*)

II. The Arbitration Panel Rules in Sheppard Mullin's Favor, and the Superior Court Confirms the Panel's Award

When J-M refused to pay its outstanding fees, Sheppard Mullin moved to compel arbitration. (1AA41-53.) J-M initially opposed arbitration, arguing that the engagement agreement was unconscionable and fraudulently induced because Sheppard Mullin had not disclosed its relationship with South Tahoe. (1RA20-37.) After Sheppard Mullin demonstrated that fraud in the inducement and unconscionability are not grounds to avoid arbitration (1RA42-44), J-M repackaged the same arguments and evidence into a claim that the agreement was "illegal." (1AA54-58.) The trial court rejected J-M's arguments and compelled arbitration. (Opn. at pp. 8-9; 1AA59-65.)

Before the arbitration panel—which included a retired federal judge and a retired California Court of Appeal justice—Sheppard Mullin sought recovery of its unpaid fees, while J-M asserted tort cross-claims and, as a remedy, sought disgorgement of all paid fees. (3AA670-672.) The panel decided in Sheppard Mullin's favor. (3AA670-679.)

The panel ruled that even assuming (but not deciding) that there was a conflict of interest, there is no "automatic" rule that an attorney cannot recover its fees; instead, an "equitable weighing test" applies. (3AA674-676.) The panel found that Sheppard Mullin at all times "acted honestly and in good faith believed that no conflict existed," and that any ethical violation "was not so serious or egregious as to make appropriate a disgorgement or forfeiture of fees." (3AA674, 677.) It further found that the conflict did *not*: (1) cause J-M any damage; (2) result in disclosure of J-M's confidences; (3) render Sheppard Mullin's representation less effective; (4) adversely affect the value of its services; (5) prejudice J-M's defense in the qui tam action (nor did Sheppard Mullin's disqualification); nor (6) "pervade [Sheppard Mullin's] whole relationship" with J-M. (3AA677-678.)

The trial court, in a written opinion, granted Sheppard Mullin's petition to confirm the arbitration award and denied J-M's petition to vacate it. (3AA824-829.)

III. The Court of Appeal Vacates the Arbitration Award and Orders Sheppard Mullin to Disgorge Its Fees

On January 29, 2016, the Court of Appeal issued a published opinion reversing the trial court's order confirming the arbitration award. The Court of Appeal refused to defer to the panel's award because J-M supposedly "challenged the legality of the contract as a whole," thereby

requiring judicial review. (Opn. at pp. 13-15.) The Court of Appeal held the engagement agreement was "illegal" because a conflict of interest arose "three weeks after J-M signed the agreement," and the advance conflict waiver was not "informed written consent" to that conflict. (*Id.* at pp. 17-18.) It also held that the power of courts to vacate arbitration awards on illegality grounds "is not limited to an explicit expression of public policy by the Legislature." (*Id.* at p. 25.)

Based solely on its conclusion that Sheppard Mullin violated Rule 3-310(C)(3), the Court of Appeal vacated the award and further held that J-M is entitled as a matter of law to disgorgement for its tort claims and Sheppard Mullin is not entitled to any quantum meruit recovery. (Opn. at pp. 26-30.)

The Court of Appeal modified its opinion and denied rehearing on February 26, 2016.

DISCUSSION

I. This Court Should Clarify When Courts Are Permitted to Vacate Arbitration Awards on "Illegality" Grounds

A. The Court of Appeal's Unprecedented Expansion of "Illegality" Creates a Gaping Exception to the Statutory Limitations on Judicial Review of Arbitration Awards

The Court of Appeal's decision creates a broad loophole to the "comprehensive statutory scheme regulating private arbitration in this state." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 (*Moncharsh*).) Departing from the approach of other Courts of Appeal, and disregarding this Court's warning against exceptions that "swallow the rule of limited judicial review" of arbitration awards (*id.* at p. 28), the Court of Appeal

here exponentially expanded the previously narrow "illegality" exception to the finality of arbitration awards.

1. "[J]udicial review of private arbitration awards" is limited "to those cases in which there exists a *statutory* ground to vacate or correct the award." (*Moncharsh*, *supra*, 3 Cal.4th at p. 28, italics added.) Code of Civil Procedure section 1286.2, subdivision (a), provides the exclusive grounds for vacating an arbitration award. J-M's petition to vacate the arbitration award was premised solely on the ground that "[t]he arbitrators exceeded their powers." (Code Civ. Proc., § 1286.2, subd. (a)(4).)

Loving & Evans v. Blick (1949) 33 Cal.2d 603 (*Loving*) first recognized "illegality" as falling within the statutory grounds to vacate an arbitration award. This Court held that an arbitrator exceeds his powers when acting pursuant to "contracts which are expressly declared by law to be illegal and against the public policy of the state." (*Id.* at pp. 609-610.) *Loving* involved a construction contract that was illegal because the contractor had violated statutory licensing requirements. (*Id.* at p. 604.) An arbitration award based on this contract could not "be reconciled with the settled public policy of this state as expressed in our *statutory* law," because there was "a clear violation of the *statutes* regulating the contracting business." (*Id.*, at pp. 604, 607, italics added.) Denying judicial review and confirming the arbitration award "would be tantamount to giving judicial approval to acts which are declared unlawful by *statute*." (*Id.* at p. 612, italics added.)

This Court, four decades later in *Moncharsh*, reaffirmed that illegality may be an appropriate basis for vacating an arbitration award, but clarified that this exception applies only in those "rare cases when according finality to the arbitrator's decision would be incompatible with

the protection of a *statutory* right." (*Moncharsh*, *supra*, 3 Cal.4th at p. 33, italics added.) Grounding the illegality exception in statutory violations and "explicit legislative expression[s] of public policy" is necessary because "the Legislature has already expressed its strong support for private arbitration and the finality of arbitral awards." (*Id.* at p. 32.) Thus, as this Court recently reiterated, "[a]rbitrators 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." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 916 (*Richey*), italics added; accord *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327, 334.)

2. The Rules of Professional Conduct undoubtedly are important regulations of the conduct of attorneys in California, but they are "not intended to create new civil causes of action" or to "create [or] augment ... any substantive legal duty of lawyers or the *non-disciplinary* consequences of violating such a duty." (Rules Prof. Conduct, rule 1-100(A), italics added.) Because those rules "are approved by the Supreme Court, not the Legislature," they do not "reflect[] an explicit expression by the *Legislature* of its public policy objectives." (*Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21, 39 (*Ahdout*), italics in original.) This Court thus held in *Moncharsh* that "judicial review of [an] arbitrator's decision [was] unavailable" where a contract allegedly violated the Rules of Professional Conduct. (*Moncharsh*, *supra*, 3 Cal.4th at p. 33.) Similarly, *Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405 (*Cotchett*) concluded that "[t]o permit judicial review of [an] arbitrator's award" based on a violation of the Rules of Professional Conduct "would be contrary to the strong policy favoring the finality of arbitration awards" that the Legislature has adopted. (*Id.* at p. 1418.)

The Court of Appeal's decision is a stark departure from this case law. It holds that the "determination of relevant public policy is not limited to an explicit expression of public policy by the Legislature." (Opn. at pp. 13-14, 25.) And despite this Court's emphasis on the need for "an explicit legislative expression of public policy" (*Richey*, *supra*, 60 Cal.4th at p. 916; *Moncharsh*, *supra*, 3 Cal.4th at p. 32), the Court of Appeal held that illegality may be "implied" based on "the language of [a] statute *or rule*." (Opn. at p. 25, quotation marks and citation omitted; italics added.) Based on this sweeping view of illegality, the Court of Appeal overturned the arbitration award based on "the public policies embodied in the California Rules of Professional Conduct." (Opn. at p. 23.)

To justify this result, the Court of Appeal relied on a slew of inapposite cases having nothing to do with arbitration. (Opn. at pp. 23-26.) For example, it invoked *Altschul v. Sayble* (1978) 83 Cal.App.3d 153 (*Altschul*), which stated that "courts have been invested with wide latitude in determining what constitutes public policy," and held that the Rules of Professional Conduct "serve as an expression of public policy" that can render a "contract void as contrary to public policy." (*Id.* at pp. 163-164.) But *Altschul* did not involve an arbitration award, and thus it did not address whether a more limited formulation of illegality applies in that context.

The arbitration context makes all the difference, as *Cotchett* confirms. The Court of Appeal suggested that *Cotchett* supported its decision because the court there had noted that "'[f]ee agreements that violate the Rules of Professional Conduct may be deemed unenforceable on public policy grounds.'" (Opn. at p. 25, quoting *Cotchett*, *supra*, 187 Cal.App.4th at p. 1417.) But *Cotchett* actually *rejected* the proposition that a "court, rather than an arbitrator, [must] finally determine whether a fee is

unconscionable under the Rules of Professional Conduct," in light of the "the strong policy favoring the finality of arbitration awards." (*Cotchett, supra*, 187 Cal.App.4th at p. 1418; see also *Ahdout, supra*, 213 Cal.App.4th at p. 39.) The Court of Appeal's opinion thus conflicts with the foregoing decisions that have refused to overturn arbitration awards based on a violation of the Rules of Professional Conduct.[1]

3. While this case involves the Rules of Professional Conduct, the Court of Appeal's expansion of the illegality exception actually extends considerably further. According to the Court of Appeal, arbitration awards can be overturned based on "public policy" found in "a variety of sources," not just statutes, including anything "perceived to be contrary to the public welfare." (Opn. at p. 25, quotation marks and citation omitted.) But "'[p]ublic policy' as a concept is notoriously resistant to precise definition," and thus "courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch." (*Cel-Tech Communications, Inc. v. L.A. Cellular Telephone Co.* (1999) 20 Cal.4th 163, 185, quotation marks and citation omitted.) The Court of Appeal refused to heed this warning, and as a result, judges presumably now have "wide latitude" (*Altschul, supra*, 83 Cal.App.3d at p. 163) to second-guess the final decisions of arbitrators.

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[1] The remaining arbitration cases cited by the Court of Appeal—*Loving* and two decisions applying *Loving* (Opn. at pp. 13-15)—involved violations of statutes. (See *Loving, supra*, 33 Cal.2d at pp. 604, 607 [statutory licensing requirements for contractors]; *Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 891-892 [statutory licensing requirements for real estate brokers]; *All Points Traders, Inc. v. Barrington Associates* (1989) 211 Cal.App.3d 723, 737-738 [same].)

At minimum, the Court of Appeal's decision will greatly impact disputes between attorneys and their clients. Although it focused on conflicts of interest, the Court of Appeal's reasoning applies equally to any violation of the Rules of Professional Conduct, particularly because it concluded that a conflict that arose *after* Sheppard Mullin was retained retroactively rendered the entire engagement agreement illegal. (Opn. at p. 17.) Thus, arbitration awards in a wide range of attorney-client disputes—including suits alleging *post*-retention legal malpractice, breach of fiduciary duty, or the charging of excessive fees—will be subject to challenge on illegality grounds. (See, e.g., Rules Prof. Conduct, rule 3-110(A) ["A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."]; *id.*, rule 4-200(A) ["A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee."].)

Even if this new rule were limited to cases involving alleged conflicts of interest (which necessarily would create an arbitrary hierarchy among the Rules of Professional Conduct), that would still significantly expand judicial review of arbitration awards in attorney-client disputes. Arbitration will be pointless whenever a client alleges a conflict existed at *any* point in the representation. The Court of Appeal's decision would even require judicial review where a conflict arose through no fault of the attorney, such as a "thrust-upon" conflict in which "an adverse party in one representation acquires the law firm's client in another matter that is not related." (Mallen et al., *Legal Malpractice* (2016) § 17:24 (hereafter Mallen).)[2]

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[2] The Court of Appeal's rule also creates an irrational distinction: evidence that gives rise to a nondisclosure claim is addressed by

B. The Court of Appeal's Decision Also Creates Significant Confusion Over the Meaning of *Moncharsh* and the Scope of "Illegality" Challenges to Entire Contracts

The Court of Appeal claimed that *Moncharsh* authorized its approach to illegality because J-M supposedly had "challenged the legality of the contract as a whole." (Opn. at pp. 13-15.) But J-M never challenged the *entire* engagement agreement as illegal; nor could it, as the engagement agreement was not limited to Sheppard Mullin's representation of J-M in the qui tam action. Even if this case did involve an illegality challenge to the contract as a whole, *Moncharsh* never suggested that such challenges can be based on notions of public policy that the Legislature has never expressly endorsed.

J-M did not challenge the entire agreement, but instead the supposed illegality of a single provision—the advance conflict waiver. J-M argued that the "retainer agreement [was] illegal" because "[i]ts unlawful object" was "to waive the attorneys' duty of loyalty." (AOB at p. 1.) J-M's brief elsewhere similarly premised its illegality challenge on the conflict waiver. (E.g., *id.* at pp. 16, 37.) Indeed, the Court of Appeal's illegality analysis, which focused on the conflict waiver, confirmed that J-M had challenged that specific provision, not the contract as a whole. (Opn. at pp. 18-22.)

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arbitrators if couched as fraudulent inducement (see *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 316, fn. 2), but if that same evidence is framed as illegality, judicial review is required. That is precisely what occurred here, as J-M repackaged the same arguments and evidence it initially claimed constituted fraudulent inducement into a claim of illegality in a transparent effort to avoid arbitration.

Moreover, the challenge was not to the agreement as a whole because the agreement reached far beyond Sheppard Mullin's supposedly "illegal" representation of J-M in the qui tam action. Its terms expressly "appl[ied] to other engagements for [J-M]." (1AA199.) These general terms included Sheppard Mullin's fees for its services (1AA199-200), and how the parties could terminate their relationship. (1AA201.) The agreement also outlined general document retention practices (1AA202), and included a provision governing the possibility that Sheppard Mullin could be "required to produce documents or appear as witnesses" in other disputes or investigations involving J-M. (1AA200.) The arbitration provision similarly extended beyond the single qui tam representation to cover any "claim of any kind regardless of the facts or the legal theories." (1AA202.)

Despite these multiple, distinct objectives, the Court of Appeal held that "judicial determination [was] required" because supposedly "the entire agreement was challenged" as illegal. (Opn. at pp. 15-16.) This watered-down view of what constitutes a challenge to a contract as whole under *Moncharsh* conflicts with other appellate decisions. For example, *Ahdout* held that an illegality challenge was directed only to "a portion of the underlying contract" because that contract had "a broad scope" and covered a range of topics, such as "capitalization requirements," "the rules for distribution and management," "the procedure for the eventual dissolution and liquidation," and "the requirement to arbitrate disputes." (*Ahdout*, *supra*, 213 Cal.App.4th at p. 36.) In *Epic Medical Management, LLC v. Paquette* (2015) 244 Cal.App.4th 504, the court rejected the contention that an allegedly illegal payment method for patient referrals implicated the "entirety of the contract" where the agreement at issue covered topics beyond referrals. (*Id.* at p. 513.) Given this conflict, this Court should

grant review to clarify what constitutes an illegality challenge to the whole of a contract.

Review also would be warranted even if the Court of Appeal were correct that this case involved an illegality challenge to the entire engagement agreement. Under the Court of Appeal's reading, *Moncharsh* adopted alternative definitions of illegality, one where "a party has alleged that only a portion of an otherwise enforceable contract ... is illegal or unenforceable," but another significantly broader definition if the illegality challenge is to "the contract as a whole." (Opn. at p. 13.) But applying a different definition of illegality depending on how much of a contract is claimed to be illegal is both unworkable and contrary to the Legislature's "strong support for private arbitration and the finality of arbitral awards." (*Moncharsh*, *supra*, 3 Cal.4th at p. 32.) Nor can it be reconciled with the cases above, including *Cotchett*, which rejected a challenge to an arbitration award based on "a public policy set forth in the Rules of Professional Conduct," even though the party challenging the award argued the contract at issue was "illegal in its entirety." (*Cotchett*, *supra*, 187 Cal.App.4th at p. 1417, fn. 1.)

II. This Court's Guidance Is Needed Regarding Whether and How Sophisticated Clients Represented by Counsel Can Provide Informed Consent to the Waiver of Conflicts

The Court of Appeal held that the advance conflict waiver that J-M signed was insufficient, as a matter of law, for J-M to understand that when it permitted Sheppard Mullin to represent clients "adverse to [J-M] (including ... in litigation or arbitration)," a Sheppard Mullin lawyer in a different office could provide a small amount of labor counseling to South Tahoe that had nothing to do with J-M or the qui tam action. The Court of Appeal's decision is so sweeping that it casts doubt on the viability of *all*