

SUPREME COURT COPY

Supreme Court Case No. S232946
(Court of Appeal, Second District, Division Four, Case No. B256314)
(Los Angeles County Sup. Court, Hon. Stuart Rice, Case No. YC067332)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SHEPPARD, MULLIN, RICHTER &
HAMPTON, LLP

Plaintiff and Respondent,

vs.

J-M MANUFACTURING CO., INC.,

Defendant and Appellant.

SUPREME COURT
FILED

DEC 13 2016

Jorge Navarrete Clerk

Deputy

**APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF,
AND AMICI CURIAE BRIEF OF EXPONENTIAL INTERACTIVE,
INC., HALSTON OPERATING COMPANY, LLC, HERBALIFE
INTERNATIONAL OF AMERICA, INC., JDI DISPLAY AMERICA,
INC., KIMBERLY-CLARK CORPORATION, LEAF GROUP LTD.,
NETGEAR, INC., NEWEGG INC., TURO INC., VARIAN MEDICAL
SYSTEMS, INC. AND VIDANGEL, INC. IN SUPPORT OF
DEFENDANT AND APPELLANT**

*Gordon M. Fauth, Jr. (Cal. Bar No. 190280)

Rosanne L. Mah (Cal. Bar No. 242628)

LITIGATION LAW GROUP

1801 Clement Avenue, Suite 101

Alameda, California 94501

Telephone (510) 238-9610

Facsimile (510) 473-0603

gmf@classlitigation.com

Counsel for Amici Curiae

Supreme Court Case No. S232946
(Court of Appeal, Second District, Division Four, Case No. B256314)
(Los Angeles County Sup. Court, Hon. Stuart Rice, Case No. YC067332)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SHEPPARD, MULLIN, RICHTER &
HAMPTON, LLP

Plaintiff and Respondent,

vs.

J-M MANUFACTURING CO., INC.,

Defendant and Appellant.

**APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF,
AND AMICI CURIAE BRIEF OF EXPONENTIAL INTERACTIVE,
INC., HALSTON OPERATING COMPANY, LLC, HERBALIFE
INTERNATIONAL OF AMERICA, INC., JDI DISPLAY AMERICA,
INC., KIMBERLY-CLARK CORPORATION, LEAF GROUP LTD.,
NETGEAR, INC., NEWEGG INC., TURO INC., VARIAN MEDICAL
SYSTEMS, INC. AND VIDANGEL, INC. IN SUPPORT OF
DEFENDANT AND APPELLANT**

*Gordon M. Fauth, Jr. (Cal. Bar No. 190280)

Rosanne L. Mah (Cal. Bar No. 242628)

LITIGATION LAW GROUP

1801 Clement Avenue, Suite 101

Alameda, California 94501

Telephone (510) 238-9610

Facsimile (510) 473-0603

gmf@classlitigation.com

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF	1
THE INTEREST OF AMICI CURIAE.....	1
AMICI CURIAE BRIEF	10
INTRODUCTION	10
ARGUMENT	12
I. If This Court Allows Boilerplate Advance Conflict Waivers To Substitute For Informed Consent Under Rule 3-310, The Ability Of Amici To Utilize Outside Legal Counsel Effectively Will Suffer, Harming Their Businesses.....	12
II. Amici And Other Similar Corporations Would Need To Know The Nature And Specifics Of The Conflict Before They Could Provide The Informed Consent Required By Rule 3-310.....	13
III. No Matter How Sophisticated, The Client Would Always Lack The Information Controlled By The Law Firm Necessary To Identify And Evaluate Conflicts.	14
IV. Because Most Clients Would Lack Sufficient Bargaining Power To Reject A Broad Advance Waiver, Such A Provision Is Unconscionable	15
V. The Court Should Reject This Cynical Attempt To Destroy A Fundamental Pillar Of The Attorney-Client Relationship, One That Has Helped Make California The Innovation Capital Of The World	17
VI. The Rule Proposed By Sheppard Would Promote Law Firm Profit But Would Irreparably Damage Public Trust In The Integrity Of The Legal Profession	17
VII. This Court Should Deny Sheppard Its Fees, And Should Set A Bright Line Rule Which Leaves No Doubt As To A Law Firm’s Duty Of Undivided Loyalty And The Consequences Of Concealing Known Conflicts From A Client	18
CONCLUSION	19
CERTIFICATE OF COMPLIANCE	20

TABLE OF AUTHORITIES

Cases

Flatt v. Superior Court

(1994) 9 Cal.4th 275, 36 Cal.Rptr.2d 53713, 14

Little v. Auto Stiegler, Inc.

(2003) 29 Cal.4th 1064, 130 Cal.Rptr.2d 892.....16

People v. SpeeDee Oil Change Systems, Inc

(1999) 20 Cal.4th 1135, 86 Cal.Rptr.2d 816 17-18

Rules

California Rules of Professional Conduct,

Rule 3-310 *passim*

Other

<http://www.sheppardmullin.com/about-facts.html>..... 14

**APPLICATION FOR LEAVE TO FILE
AMICI CURIAE BRIEF**

**TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF
JUSTICE OF THE CALIFORNIA SUPREME COURT:**

Pursuant to California Rule of Court 8.520(f), the undersigned, Exponential Interactive, Inc., Halston Operating Company, LLC, Herbalife International of America, Inc., JDI Display America, Inc., Kimberly-Clark Corporation, Leaf Group Ltd., NETGEAR, Inc., Newegg Inc., Turo Inc., Varian Medical Systems, Inc. and VidAngel, Inc., request leave to file the attached brief as Amici Curiae in support of Defendant and Appellant J-M Manufacturing Co., Inc. As explained below, applicants believe that their brief will aid this Court in reaching a decision in the present matter. As also set forth below, applicants believe that they will be adversely affected if this Court does not render a decision upholding the Court of Appeal ruling in this matter.

This application is timely made.

THE INTEREST OF AMICI CURIAE

Amici Curiae are gravely concerned about the outcome of the case before the Court. Amici are all business entities with inside counsel that utilize outside counsel at firms such as Sheppard, Mullin, Richter & Hampton, LLP, the Respondent in this case, on which they rely to represent them with undivided loyalty in many confidential and sensitive matters. Amici consider it of the utmost importance that any law firm they hire disclose any conflict of interest. A ruling in this case that allows a law firm to conceal known conflicts because of a broad advance waiver of conflicts that has become standard in many law firm engagement letters would deprive Amici of the undivided loyalty of their attorneys and place them at

the mercy of profit-focused law firms and unscrupulous outside counsel. Amici would no longer be able to repose trust in the integrity of the attorney-client relationship and their ability to utilize outside counsel would be fundamentally compromised. Instead, Amici would be left with mistrust and nagging suspicions that their law firms might be knowingly or unknowingly acting against their best interests.

Exponential Interactive, Inc. (“Exponential”), a Delaware corporation with its principal place of business in Emeryville, California, is a provider of digital media and advertising solutions to brands such as AT&T, Disney, HP, Lexus, Mastercard, Sony, and Verizon. Exponential delivers innovative advertising experiences that transform the way brands interact with audiences across desktop, in-stream, and mobile devices globally. Exponential was founded in 2001 and has locations in 21 countries worldwide, including a second California office in El Segundo.

As a medium-sized company with a small in-house legal team, Exponential relies heavily on law firms for expertise globally in areas such as civil litigation, employment/HR matters, and corporate governance. The company has a particular interest in the matter at hand because it cannot thoroughly review an outside law firm’s existing client base and lacks the bargaining power to impose outside counsel retainer guidelines on all of its law firms. As a result of this imbalance, Exponential has been forced to sign some retainer agreements in the past that contained advance conflict waivers. Exponential is very concerned about any ruling in this case that would allow law firms to use such waivers as justification to conceal known conflicts, particularly as the digital advertising space is both crowded and extremely competitive.

Halston Operating Company, LLC (“Halston”) is headquartered in Los Angeles, California. Founded in the 1960s, Halston today continues to evolve the Halston legacy through the Halston Heritage collection. The Company designs, manufactures, and retails apparel in California and throughout the United States, based on the strong codes developed by its founder Roy Halston Frowick, the creator of luxury American Fashion. Halston Heritage is an approachable luxury lifestyle brand – mixing legacy codes with a modern edge to create an effortless women’s collection of ready-to-wear, dresses, handbags, footwear and small leather goods. The Halston Heritage brand is marketed through some of the world’s most formidable retailers including Neiman Marcus, Bergdorf Goodman, Saks Fifth Avenue, Net-A-Porter and Harvey Nichols, as well as Halston Heritage stores. Halston has presently observed small- and medium-size law firms in California adopting broad advance conflict waivers substantially similar to the waiver at issue in the case, and thus is deeply concerned for the integrity of the attorney-client relationship and the entire legal profession, if concealment of a known, existing conflict of interest is permitted.

Herbalife International of America, Inc. (“Herbalife”) is headquartered in Los Angeles, California. For more than 36 years, the mission at Herbalife has been to change people’s lives by providing the best nutrition and weight-management products in the world and the best business opportunity for extra income. Herbalife products are available exclusively to and through dedicated Herbalife Independent Distributors. Herbalife is committed to fighting the worldwide problems of poor nutrition and obesity by offering high-quality products, one-on-one

coaching with an Herbalife distributor and a community that inspires customers to live a healthy, active life.

Herbalife supports the Herbalife Family Foundation and its Casa Herbalife programs to help bring good nutrition to children in need. Herbalife also sponsors more than 200 world-class athletes, teams and events around the globe, including Cristiano Ronaldo, the LA Galaxy and champions in many other sports. The company has more than 8,000 employees worldwide, and its shares are traded on the New York Stock Exchange (NYSE: HLF) with net sales of \$4.5 billion in 2015. Herbalife is represented by law firms in a variety of matters and depends on their undivided loyalty. It would expect outside counsel to notify it of any conflicts, and is deeply concerned about the outcome of this case.

JDI Display America, Inc. (“JDIDA”) is a display supplier to the mobile, automotive, medical, and other industries. JDIDA has in-house counsel, but from time to time, JDIDA engages outside counsel, including both large and small law firms. Being a smaller company, JDIDA often has little choice but to accept the broad advance conflict waivers of the type at issue here just to get legal representation, despite deep concerns about the potential for divided loyalties. In particular, JDIDA has many customers and indemnity obligations and depends on its outside counsel to be ethical and to fully inform it of actual and potential conflicts of interest.

Kimberly-Clark Corporation (“Kimberly-Clark”) (NYSE: KMB) is based in Irving, Texas. With a 144-year history of innovation, Kimberly-Clark has revenues of over \$20 billion, and employs approximately 43,000 persons. Kimberly-Clark and its well-known global brands are an indispensable part of life for people in more than 175 countries. Every day,

nearly a quarter of the world's population trust Kimberly-Clark's brands and the solutions they provide to enhance their health, hygiene and well-being.

Kimberly-Clark believes that a lawyer's duty of loyalty should require disclosure of a known conflict, and is concerned about the outcome of this case. In Kimberly-Clark's experience, while large corporations such as Kimberly-Clark might be able to achieve removal of advance waiver provisions from agreements with the law firms used regularly and for larger matters, they cannot always negotiate the waivers out for less frequent and more specialized representations. No company should ever be denied the opportunity to give informed consent.

Leaf Group Ltd. (formerly Demand Media, Inc.) ("Leaf") is a diversified Internet company headquartered in Santa Monica, California, that builds platforms across its media and marketplace properties to enable communities of creators to reach passionate audiences in large and growing lifestyle categories. Leaf's content studio and diverse advertising offerings also help brands and publishers find innovative ways to engage with their customers. Leaf has, on numerous occasions, declined to retain certain law firms due to actual and potential conflicts that were disclosed during the conflicts check process. Without such disclosure and a frank discussion with the disclosing law firms, Leaf might have unwittingly engaged counsel whose interests were not entirely aligned with Leaf's and also caused rifts in certain significant professional relationships. Leaf believes that conflicts of interest among current and/or past clients, including the potential for a conflict of interest, can undermine a firm's ability to properly represent a client's interest in an ethical and prudent manner.

NETGEAR, Inc., with headquarters in San Jose, California, is a global networking company that delivers innovative products to consumers,

businesses and service providers. The Company's products are built on a variety of proven technologies such as wireless (WiFi and LTE), Ethernet and powerline, with a focus on reliability and ease-of-use. The product line consists of wired and wireless devices that enable networking, broadband access and network connectivity. These products are available in multiple configurations to address the needs of the end-users in each geographic region in which the Company's products are sold. NETGEAR products are sold in approximately 28,000 retail locations around the globe, and through approximately 31,000 value-added resellers, as well as multiple major cable, mobile and wireline service providers around the world.

Newegg Inc. ("Newegg"), a Delaware corporation with headquarters at City of Industry, California, is one of the largest online retailers of electronic and technology products in the United States. Although it has its own legal department, it utilizes outside law firms for a wide variety of matters, including business disputes and patent litigation. Newegg operates in a highly-competitive field. The matters in which it is represented by outside counsel are confidential and sensitive. Newegg expects undivided loyalty from its outside counsel, and it views with alarm the possibility that, using broad, advance waivers of the kind at issue here, a law firm might conceal from it a known conflict of interest. Even with over \$2 billion in annual revenue, Newegg does not have the volume in purchasing legal services that would allow it to retain law firms for certain critical transactions and litigation matters without agreeing to the broad advance waivers being demanded now by most large law firms.

Turo Inc. ("Turo"), a Delaware corporation headquartered in San Francisco, California, is a peer to peer car sharing marketplace where travelers can rent any car they want, wherever they want it, from a vibrant

community of local car owners. Travelers choose from a totally unique selection of nearby cars, while car owners earn extra money and help fuel their adventures. A pioneer of the sharing economy and travel industry, Turo operates in over 2,500 cities in North America, providing a safe, supportive community where the car the consumer rents is part of a story, not a fleet. Turo utilizes the services of outside counsel for various matters, and is deeply concerned about a decision in this case that might allow a law firm to conceal known conflicts. As a start-up with a small legal budget and only one in-house attorney, Turo has been forced against its own interest and better judgment to sign advance conflict waivers in order to retain legal services from prestigious first tier law firms.

Varian Medical Systems, Inc. (“Varian”), of Palo Alto, California, is the world's leading manufacturer of medical devices and software for treating cancer and other medical conditions with radiation. The company provides comprehensive solutions for radiotherapy, radiosurgery, proton therapy and brachytherapy. The company supplies informatics software for managing comprehensive cancer clinics, radiotherapy centers and medical oncology practices. Varian is also a premier supplier of X-ray imaging components, including tubes, digital detectors, cables and connectors as well as image processing software and workstations for use in medical and industrial settings, as well as for security and non-destructive testing. Varian employs approximately 7,700 people who are located at manufacturing sites in North America, Europe, and China and has sales and support offices around the world.

Varian retains outside counsel from large law firms to represent it globally in civil litigation, patent litigation, acquisitions, transactional and regulatory matters. Varian appreciates that its outside counsel have, from

time to time, disclosed potential conflicts of interests, so that Varian can make an informed decision on whether to engage or continue the representation. Varian is very concerned about any ruling in this case that would allow law firms to use advance waivers as justification to conceal known conflicts of interests.

VidAngel, Inc. (“VidAngel”) is a Utah start-up company formed in 2013 that began to conduct business in 2014. It has had in-house counsel for less than four months and is defending two significant litigations with older and much larger companies seeking to suppress its disruptive technology that allows customers to purchase movies on line and have those movies filtered to remove any content they find objectionable and streamed to them to watch on a variety of devices. It is concerned that owing to its small size and recent market entry a firm might not treat its interests with paramount importance and care if that firm has business needs in conflict with those of VidAngel. VidAngel discovered an undisclosed business interest conflict of a firm it was planning to retain only when it conducted a UCC-1 search and discovered that the firm had an economic interest in its adversary. VidAngel strongly believes law firms should disclose known conflicts.

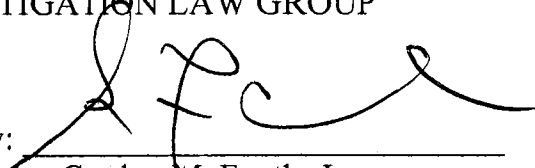
Amici’s brief will aid the Court in assessing the importance to the business community of enforcing the duty of lawyers to disclose conflicts. Amici’s experience as business entities with inside counsel which employ outside counsel is typical of many other companies engaged in commerce that would share Amici’s alarm and outrage at the prospect of a law firm using a boilerplate advance waiver to justify concealing a known, existing conflict.

Amici Curiae respectfully ask the Court to grant their application and accept their attached brief for filing, and to consider their arguments in favor of Defendant and Appellant.¹

Respectfully submitted,
LITIGATION LAW GROUP

Date: December 2, 2016

By:



Gordon M. Fauth, Jr.

Counsel for Amici Curiae Exponential Interactive, Inc., Halston Operating Company, LLC, Herbalife International of America, Inc., JDI Display America, Inc., Kimberly-Clark Corporation, Leaf Group Ltd., NETGEAR, Inc., Newegg Inc., Turo Inc., Varian Medical Systems, Inc. and VidAngel, Inc.

¹ No person or party or counsel for any party, other than Amici and counsel for Amici, have authored the proposed brief in whole or in part or funded the preparation of the brief.

AMICI CURIAE BRIEF

INTRODUCTION

Amici Curiae, as businesses engaged in commerce in California that utilize law firms such as Sheppard, Mullin, Richter & Hampton, LLP (“Sheppard”), the Plaintiff and Respondent in this case, know from their own situations and experiences that a ruling allowing law firms to use a boilerplate advance waiver of conflicts as justification not to disclose known conflicts would cause serious erosion of the attorney-client relationship and compromise their ability to utilize outside counsel effectively. Clients should not have to be on constant guard against not only their counterparties but against their own legal advocates as well.

Amici would not have expected Sheppard to use the broad advance waiver at issue here as justification to conceal a known and existing conflict. That is an extreme position completely at odds with widely accepted and long-standing canons of legal ethics. Because Sheppard failed to reveal the known South Tahoe Public Utilities District (“South Tahoe”) conflict to J-M Manufacturing Co., Inc. (“J-M”), there was simply no disclosure made that would have allowed Amici or any other responsible business entity to provide the informed consent required by Rule 3-310 of the California Rules of Professional Conduct (“Rule 3-310”).

Amici all consider it of the utmost importance that any law firm they hire disclose any conflict of interest. A ruling in this case that allowed a law firm to conceal a known conflict because of a boilerplate advance waiver in the retainer agreement would cause Amici to be uncertain as to the undivided loyalty of their attorneys and unable to depend on the integrity of the attorney-client relationship. Since they would never possess full

information regarding the law firm's other cases and clients, Amici could never themselves know of all potential conflicts of interest that might exist. Therefore, Amici would be forced into a position of doubt and mistrust vis-a-vis their own attorneys, and Amici's ability to depend on outside counsel as an extension of in-house legal resources would be greatly compromised.

The theoretical power of a client to reject a blanket advance waiver provision in the law firm's retainer agreement is a chimera. In Amici's experience, only the largest of business entities, such as Walmart, Google and Apple, are able to dictate such an exclusion to any law firm that wants their business. The vast majority of corporations do not possess that kind of bargaining power. As mentioned previously, even Newegg with its substantial annual revenues cannot as a practical matter negotiate out broad advance waiver language, because the number of law firms that provide certain types of high level legal representation (many of whom are advocating as amici in favor of Sheppard's position) is limited. If they needed the law firm's expertise or brand, Amici and most other business entities would be forced to accept the waiver provision.

For these and other reasons set forth herein, Amici respectfully urge this Court to find in favor of Appellant and to prevent further erosion of legal ethics rules in favor of the convenience and profitability of large law firms.

ARGUMENT

I. If This Court Allows Boilerplate Advance Conflict Waivers To Substitute For Informed Consent Under Rule 3-310, The Ability Of Amici To Utilize Outside Legal Counsel Effectively Will Suffer, Harming Their Businesses.

Amici find intolerable and indefensible the regime urged by Sheppard, which would fundamentally erode client rights and impair a corporation's ability to trust outside counsel. If law firms are allowed to use broad advance waivers to avoid their duty to disclose known and existing conflicts to clients, the ability of Amici to utilize outside counsel effectively will suffer, to the detriment of their businesses. Amici and many other companies depend on outside law firms to provide counsel as needed for litigation and other needs beyond the staffing capability and expertise of their own legal departments. They are able to do this seamlessly because of the assurance provided by the duty of loyalty, as exemplified by Rule 3-310, which requires law firms to inform the client of any known conflicts. If that assurance is withdrawn, Amici's ability to leverage their in-house counsel with trusted outside counsel will be greatly diminished, and significant efficiencies will be lost.

"The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel." *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282, 285, 36 Cal.Rptr.2d 537. Amici and other similar business entities cannot repose trust and confidence in attorneys unless assured of their undivided loyalty. Amici respectfully urge this Court to preserve the integrity of the attorney-client relationship by finding that advance conflict waivers cannot substitute for informed

written consent under Rule 3-310, and that law firms may not rely on such boilerplate waivers to conceal known conflicts from their clients.

II. Amici And Other Similar Corporations Would Need To Know The Nature And Specifics Of The Conflict Before They Could Provide The Informed Consent Required By Rule 3-310.

If in the place of J-M, Amici would not have interpreted the broad advance waiver at issue here to mean that Sheppard would conceal known conflicts. Because Sheppard failed to disclose its current, existing conflict to either J-M or South Tahoe, there was simply no disclosure upon which Amici or any responsible business entity could possibly provide the informed written consent contemplated by Rule 3-310. Amici struggle to understand how clients could possibly be well served if they have to constantly wonder whether their own outside counsel is loyal to them or instead is loyal to an undisclosed third party that may have directly adverse interests.

“A client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter wholly unrelated to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel [F]ew if any clients would be willing to suffer the prospect of their attorney continuing to represent them under such circumstances.” *Flatt* at 285.

In proper circumstances, Amici might consider waiving a conflict. However, at a minimum, Amici would need to know the identity of the party whose representation created the conflict, the nature of all matters for which representation was provided, and the duration of the relationship between the law firm and the other party. Without these specifics, Amici’s

officers and in-house counsel would lack the information required to make an informed decision on whether to waive the conflict.

In terms of safeguarding Amici's corporate interests, it would not have mattered to Amici whether or not Sheppard was actively representing South Tahoe at the moment. Amici would need to know of any such recurring client presenting a conflict with which the firm had a continuing relationship, even if there was no active representation going on at the time, in order to assess the danger and make an informed decision.

III. No Matter How Sophisticated, The Client Would Always Lack The Information Controlled By The Law Firm Necessary To Identify And Evaluate Conflicts.

There is no merit to Sheppard's suggestion that "sophisticated" corporations with in-house legal staff are somehow able by themselves to investigate and evaluate a law firm's potential conflicts. Even if that were possible, such a regime would place clients and attorneys into combative postures, allowing lawyers to conceal known conflicts while requiring clients always to mistrust their lawyers, seriously weakening the attorney-client relationship. However, a conflicts check by a corporate client is simply not practical. It is the law firm alone that possesses and controls the information regarding its many cases and clients needed to determine whether a conflict exists.

Sheppard itself provides a good illustration. According to Sheppard's website, it has 15 offices spread across North America, Europe and Asia, with some 750 lawyers. *See* SheppardMullin <<http://www.sheppardmullin.com/about-facts.html>> (as of Nov. 28, 2016). It would be impossible for a corporate client to obtain the information from Sheppard's files needed to do a competent conflicts check. Few corporate

entities in the world have legal operations teams with sufficient capacity to search even the publicly available records to determine a law firm's relationships—let alone all of the confidential, non-public clients that a law firm may have. Conversely, it is relatively easy for the law firm to perform the conflicts check, using available software to scan its database of clients and cases to identify potential conflicts.

Based upon their experience having retained large law firms, Amici recognize that Sheppard's argument that corporate clients are "sophisticated" is a red herring serving to obfuscate the imbalance of information that law firms have over clients with respect to who else they represent and how. No matter how "sophisticated" it is, at best a corporate legal department might be able to determine some of the law firm's public clients, but it would never be able to determine the law firm's confidential clients and matters unless the firm disclosed them. Accordingly, law firms such as Sheppard should not be allowed to evade their ethical duty to disclose conflicts and obtain informed written consent by pleading that a client is "sophisticated."

IV. Because Most Clients Would Lack Sufficient Bargaining Power To Reject A Broad Advance Waiver, Such A Provision Is Unconscionable.

Contrary to Sheppard's depiction, Amici and most other corporations would be unable to reject a presented boilerplate waiver of conflicts provision. Amici know this from their own experience, where they have sometimes had to accept boilerplate waiver clauses in order to obtain needed representation despite attempts to strike or modify such provisions. Sheppard's claim that the changing legal market means corporate clients now have symmetric bargaining power is at best misleading and at worst

offensive to Amici. This is not reality for most companies that retain law firms. In fact, for that reason, such a provision should be found to be not only a violation of California's professional ethics rules but also unconscionable under California law.

The broad advance waiver is procedurally unconscionable because, contrary to Sheppard's position, it is a "take it or leave it" proposition for most corporate clients. *See Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 130 Cal.Rptr.2d 892, 897-898. As Amici know from their own experiences, the reality of the legal marketplace is that only the largest of companies, like Walmart, Google and Apple, possess sufficient bargaining power and legal spend to negotiate advance waivers out of the retainer agreement for their regular "go-to" firms, and even they cannot always negotiate the waivers out for "one-off" or more specialized representations. The vast majority of companies simply lack that kind of clout. If this Court allows broad advance waivers to insulate law firms from liability for concealing known conflicts, corporate law firms will all impose non-negotiable boilerplate advance waiver clauses through their retainer agreements. Businesses such as Amici that need the services of a law firm because of its expertise or connections will either have to accept the waiver provision, or, forgo the legal representation that the business needs.

The broad advance waiver is substantively unconscionable because the result is both one-sided and harsh. *See id.* Although the law firm is a fiduciary of the client, the provision would allow the law firm, for its own benefit, to conceal a known, existing conflict from the client. Not knowing of the conflict, a client such as any of the Amici would be forced to subject itself to a potentially-dangerous conflict with possibly disastrous results.

V. The Court Should Reject This Cynical Attempt To Destroy A Fundamental Pillar Of The Attorney-Client Relationship, One That Has Helped Make California The Innovation Capital Of The World.

California is home to thousands of highly innovative and successful companies that have shaped the technological revolution. One of the things that has made California successful in attracting and nurturing innovation is the legal structure it offers new businesses, which provides them with the legal services and assurances they need that make it possible for them to grow and prosper. Key to the ability of Amici and other businesses to use law firms in leveraging their growth has been their ability to trust those law firms to represent them loyally and without undisclosed conflicts.

Amici believe that advance waiver of conflicts provisions are unconscionable and violate public policy in California, as well the basic tenets of the duty of loyalty and the attorney-client relationship, as reflected in Rule 3-310 and proposed Rule 1-7. The Court should hold that all such advance waiver of conflicts provisions are unenforceable in California.

VI. The Rule Proposed By Sheppard Would Promote Law Firm Profits But Would Irreparably Damage Public Trust In The Integrity Of The Legal Profession.

Sheppard's arguments are, to put it bluntly, fee-driven. The interpretation of Rule 3-310 urged by Sheppard would undeniably promote law firm profits, allowing law firms to maximize revenues by taking in all clients without regard for conflicts, but it would irreparably damage public trust in the integrity of the legal profession. "The paramount concern must be to preserve public trust in the . . . integrity of the bar." *People v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146, 86