

SUPREME COURT
FILED

No. S232946

JUN 27 2016

IN THE SUPREME COURT OF CALIFORNIA

Frank A. McGuire Clerk

Deputy

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP,

Plaintiff and Respondent,

v.

J-M MANUFACTURING CO., INC.,

Defendant and Appellant.

After a Decision of the Court of Appeal of the State of California,
Second Appellate District, Division Four, Case No. B256314

The Superior Court of Los Angeles County, Case No. YC067332
The Honorable Stuart M. Rice, Presiding

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

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MOTION FOR JUDICIAL NOTICE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DATED: June 27, 2016

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 
Kevin S. Rosen

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

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

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

II. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

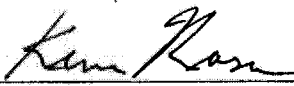
III. CONCLUSION

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

DATED: June 27, 2016

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 
Kevin S. Rosen

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

DECLARATION OF KEVIN S. ROSEN

I, Kevin S. Rosen declare as follows:

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

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

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

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

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

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

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

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

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

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

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

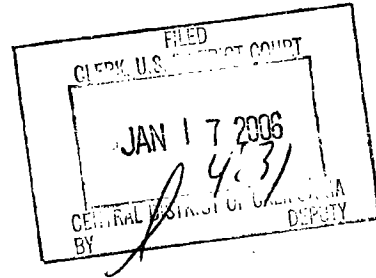


Kevin S. Rosen

Exhibit A

1 ERIC R. HAVIAN (State Bar No. 102295)
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3 PHILLIPS & COHEN LLP
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8 Attorneys for Qui Tam Plaintiff [Under Seal]



9 UNITED STATES DISTRICT COURT
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA

11 EDCV06_0055 SGL

12 UNITED STATES, THE STATES OF
13 CALIFORNIA, DELAWARE, FLORIDA,
14 NEVADA and TENNESSEE and THE
15 COMMONWEALTHS OF
16 MASSACHUSETTS AND VIRGINIA ex rel.
17 [UNDER SEAL]

18 Plaintiffs,

19 vs.

20 [UNDER SEAL]

21 Defendant.

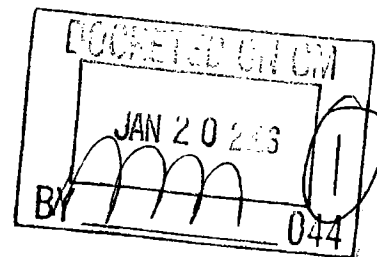
Civil No.:

COMPLAINT FOR VIOLATION OF
FEDERAL AND STATE FALSE CLAIMS
ACTS

JURY TRIAL DEMANDED

FILED IN CAMERA & UNDER SEAL
(AS REQUIRED BY 31 U.S.C. §
3730(b)(2))

NIS



1/18/2006 9:52:22 AM Receipt #: 81721
Cashier : ABELLAMY (LA 1-1)
Paid by: PHILLIPS AND COHEN
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2006-086900 5 - Civil Filing Fee(1)
Amount : \$60.00
5:CV06-00055
2006-510000 11 - Special Fund F/F(1)
Amount : \$190.00
Check Payment : 1044 / 250.00
Total Payment : 250.00

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5 Attorneys for Qui Tam Plaintiff John Hendrix

6
7
8 UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA
10

11 UNITED STATES, THE STATES OF
12 CALIFORNIA, DELAWARE, FLORIDA,
13 NEVADA and TENNESSEE and THE
COMMONWEALTHS OF
14 MASSACHUSETTS AND VIRGINIA ex rel.
JOHN HENDRIX,
15 Plaintiffs,
16 vs.
17 J-M MANUFACTURING COMPANY, INC.,
18 a Delaware corporation,
19 Defendant.

Civil No.:

COMPLAINT FOR VIOLATION OF
FEDERAL AND STATE FALSE CLAIMS
ACTS

JURY TRIAL DEMANDED

FILED IN CAMERA & UNDER SEAL
(AS REQUIRED BY 31 U.S.C. §
3730(b)(2))

I. INTRODUCTION

1
2 1. This is an action to recover damages and civil penalties on behalf of the United States,
3 the States of California, Delaware, Florida, Nevada and Tennessee, the Commonwealths of
4 Massachusetts and Virginia and numerous cities and public water agencies located within these
5 States/Commonwealths (collectively the "real parties in interest" or "Real Parties") arising from
6 false statements and claims made by defendant J-M Manufacturing Company, Inc. ("J-M") in
7 violation of the Federal False Claims Act, 31 U.S.C. §§ 3729 et seq., and the following State
8 False Claims Acts: California False Claims Act, Cal. Gov't Code §§ 12650 et seq., Delaware
9 False Claims And Reporting Act, 6 Del. C. §§ 1201 et seq., Florida False Claims Act, Fla. Stat.
10 Ann. §§ 68.081 et seq., Massachusetts False Claims Law, Mass. Gen. Laws ch. 12 §§ 5A et seq.,
11 Nevada False Claims Act, Nev. Rev. Stat. Ann. §§ 357.010 et seq., Tennessee False Claims Act,
12 Tenn. Code Ann. §§ 4-18-101 et seq., and Virginia Fraud Against Taxpayers Act, Va. Code Ann.
13 §§ 8.01-216.1 et seq. (collectively the "Acts"). The Real Parties defrauded by Defendant J-M
14 include without limitation, the United States, the States of California, Delaware, Florida, Nevada
15 and Tennessee, the Commonwealths of Massachusetts and Virginia, the cities and public water
16 agencies listed on Exhibit 1, all other cities, public water agencies and political subdivisions
17 within the States of California, Delaware, Nevada, Illinois and Tennessee and the
18 Commonwealths of Massachusetts and Virginia that purchased J-M's Polyvinyl Chloride
19 ("PVC") pipe between 1997 and present, all state agencies and departments in the States of
20 Illinois and Indiana that purchased J-M's PVC pipe between 1997 and present, and all state and
21 county agencies and departments in the State of Hawaii that purchased J-M's PVC pipe between
22 1997 and present.

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

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

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

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

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

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

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

11 II. PARTIES

12 7. Qui tam plaintiff John Hendrix ("Relator") is a resident of Clifton, New Jersey. After
13 graduating from college in December 2001, Relator began working for Defendant J-M on July 8,
14 2002 in its corporate headquarters in Livingston, New Jersey as an engineer in J-M's Product
15 Assurance Division. Throughout his employment at J-M, the majority of Relator's job duties
16 involved advising J-M on the technical aspects of claims brought by J-M's customers for failing
17 or non-conforming product. To a lesser degree, Relator's job also involved sales and customer
18 service work, including advising current and prospective customers (primarily fellow engineers)
19 on technical aspects of J-M's products. On November 9, 2005, a little over a week after Relator
20 wrote a memo to J-M management highlighting the fact that the tensile strength of J-M's PVC
21 pipe was below that required by Underwriters Laboratories ("UL") to qualify for the UL Mark
22 stamped on its pipes, J-M terminated Relator's employment.

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