

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.

**SUPREME COURT
FILED**

JUL 11 2016

Frank A. McGuire Clerk

Deputy

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

**JOINT MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT THEREOF;
DECLARATION OF KEVIN S. ROSEN**

*Kent L. Richland (SBN 51413)
Barbara W. Ravitz (SBN 86665)
Robert A. Olson (SBN 109374)
Jeffery E. Raskin (SBN 223608)
GREINES, MARTIN,
STEIN & RICHLAND LLP
5900 Wilshire Blvd., 12th Floor
Los Angeles, CA 90036
Tel: (310) 859-7811
Fax: (310) 276-5261
krichland@gmsr.com

Attorneys for Defendant and Appellant
J-M Manufacturing Company, Inc.,
dba JM Eagle

*Kevin S. Rosen (SBN 133304)
Theane Evangelis (SBN 243570)
Bradley J. Hamburger (SBN 266916)
Andrew G. Pappas (SBN 266409)
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

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

**JOINT MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT THEREOF;
DECLARATION OF KEVIN S. ROSEN**

*Kent L. Richland (SBN 51413)
Barbara W. Ravitz (SBN 86665)
Robert A. Olson (SBN 109374)
Jeffery E. Raskin (SBN 223608)
GREINES, MARTIN,
STEIN & RICHLAND LLP
5900 Wilshire Blvd., 12th Floor
Los Angeles, CA 90036
Tel: (310) 859-7811
Fax: (310) 276-5261
krichland@gmsr.com

Attorneys for Defendant and Appellant
J-M Manufacturing Company, Inc.,
dba JM Eagle

*Kevin S. Rosen (SBN 133304)
Theane Evangelis (SBN 243570)
Bradley J. Hamburger (SBN 266916)
Andrew G. Pappas (SBN 266409)
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

JOINT MOTION FOR JUDICIAL NOTICE

Sheppard Mullin filed a motion for judicial notice on June 27, 2016 in which it requested that this Court take judicial notice of certain documents of which the Court of Appeal had taken judicial notice pursuant to Sheppard Mullin's request. Because the parties agree that this Court should have before it all of the documents judicially noticed by the Court of Appeal, the parties file this joint motion, which requests that this Court also take judicial notice of those documents of which the Court of Appeal had taken judicial notice pursuant to J-M's request.

Accordingly, pursuant to Evidence Code section 452 and rule 8.520(g) of the California Rules of Court, Sheppard Mullin and J-M jointly move and respectfully request that this Court take judicial notice of the following documents attached as Exhibits 1 through 4 to the concurrently filed Declaration of Kevin S. Rosen (the "Joint MJN Declaration") in addition to the documents identified in Sheppard Mullin's motion for judicial notice filed on June 27, 2016:

1. The Declaration of K. Luan Tran in Support of Defendant's Petition to Vacate Arbitration Award (the "Tran Declaration"), filed in the trial court on February 24, 2014 (attached as Exhibit 1 to the Joint MJN Declaration);

2. Exhibit I to the Tran Declaration: Counter-Expert Report of Professor Geoffrey C. Hazard, Jr., submitted to the to the arbitration panel in *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc.*, No. 1220045609 (the "Arbitration Panel") on October 25, 2013 (attached as Exhibit 2 to the Joint MJN Declaration);

3. Exhibit J to the Tran Declaration: Supplemental Declaration of Camilla Eng in Support of J-M Manufacturing Company's Reply Arbitration

Brief submitted to the Arbitration Panel on October 25, 2013 (attached as Exhibit 3 to the Joint MJN Declaration);

4. Exhibit K to the Tran Declaration: Supplemental Declaration of K. Luan Tran In Support of J-M Manufacturing Company, Inc.'s Reply Arbitration Brief submitted to the Arbitration Panel on October 25, 2013 (attached as Exhibit 4 to the Joint MJN Declaration).

The parties agree that foregoing documents, in addition to the documents identified in Sheppard Mullin's June 27, 2016 motion for judicial notice, are appropriate subjects of judicial notice and comply with the criteria for judicial notice under the California Rules of Court:

1. These documents are relevant to the appeal for the purpose of giving this Court a complete accounting of the facts before the Arbitration Panel and the Court of Appeal. (See Cal. Rules of Court, rule 8.252 (a)(2)(A).)

2. Judicial notice of these documents is proper because each is a record filed in the trial court. (Evid. Code, § 452, subd. (d) [judicial notice may be taken of "[r]ecords of (1) any court of this state"].) These documents were also filed in the Court of Appeal, which took judicial notice of these documents. (See May 1, 2015 Order.)

3. These documents are an expert report and supplemental declarations that J-M filed with the Arbitration Panel that correspond to expert reports and supplement declarations that Sheppard Mullin filed with the Arbitration Panel (and which Sheppard Mullin asked this Court to take judicial notice of on June 27, 2016).

4. The parties agree that this Court should have before it all of the documents that the Court of Appeal judicially noticed. Accordingly, J-M does not oppose Sheppard Mullin's June 27, 2016 motion for judicial notice, and


Sheppard Mullin does not oppose this Court taking judicial notice of the documents submitted with this joint motion.

5. None of the documents submitted with this joint 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 ~~28~~²⁹, 2016

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

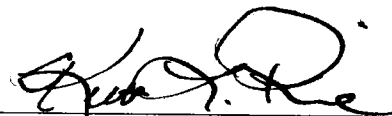
By: 
Kevin S. Rosen

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

DATED: June ~~28~~²⁸, 2016

Respectfully submitted,

GREINES, MARTIN, STEIN &
RICHLAND LLP

By: 
Kent L. Richland

Attorneys for Defendant and Appellant
J-M Manufacturing Company, Inc.,
dba JM Eagle

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. ARGUMENT.....	2
III. CONCLUSION.....	3
DECLARATION OF KEVIN S. ROSEN.....	4

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Ste. Marie v. Riverside County Regional Park & Open-Space District</i> (2009) 46 Cal.4th 282	2
--	---

Statutes

Evid. Code, § 452	1
Evid. Code, § 452, subd. (d)	2

Rules

Cal. Rules of Court, rule 8.252(a).....	1
Cal. Rules of Court, rule 8.252(a)(2)(A)	2
Cal. Rules of Court, rule 8.252(a)(2)(C)	2
Cal. Rules of Court, rule 8.520(g)	1

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court of Appeal took judicial notice of two sets of documents submitted to the Arbitration Panel, one submitted by Sheppard Mullin and the other by J-M. (See May 1, 2015 Order.) Sheppard Mullin filed a motion for judicial notice on June 27, 2016 in which it requested that this Court take judicial notice of the same documents it asked the Court of Appeal to judicially notice. Because the parties agree that this Court should have before it all of the documents judicially noticed by the Court of Appeal, so as to ensure that the record related to proceedings before the Arbitration Panel and the Court of Appeal is complete, the parties have agreed to file this joint motion, which requests that this Court take judicial notice of the remainder of the documents judicially noticed by the Court of Appeal. J-M does not oppose Sheppard Mullin's June 27, 2016 motion for judicial notice, and Sheppard Mullin does not oppose this Court taking judicial notice of the documents submitted with this joint motion.

This joint motion seeks judicial notice of documents that J-M filed in the trial court; specifically, the February 24, 2014 Declaration of K. Luan Tran in Support of Defendant's Petition to Vacate Arbitration Award, which was accompanied by an expert report and two supplemental declarations that J-M filed with the Arbitration Panel. 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; and they do not relate to proceedings occurring after the judgment that is the subject matter of this proceeding.

The parties therefore jointly move and respectfully request that this

Court take judicial notice of Exhibits 1 through 4 to the Declaration of Kevin S. Rosen.

II. ARGUMENT

The materials of which the parties seek 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).)

Because the attached materials were before the Court of Appeal when it issued its ruling, the parties request 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, judicial notice of these documents is proper because each is a record filed in the trial court. (Evid. Code, § 452, subd. (d) [judicial notice may be taken of “[r]ecords of (1) any court of this state”].)

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.

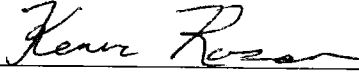
III. CONCLUSION

For these reasons, the parties respectfully request that the Court grant this Joint Motion for Judicial Notice.

DATED: June 29, 2016

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 
Kevin S. Rosen

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

DATED: June 28, 2016

Respectfully submitted,

GREINES, MARTIN, STEIN &
RICHLAND LLP

By: 
Kent L. Richland

Attorneys for Defendant and Appellant
J-M Manufacturing Company, Inc.,
dba JM Eagle

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 the parties' Joint Motion for Judicial Notice.

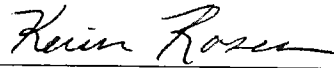
2. Attached hereto as Exhibit 1 is a true and correct copy of The Declaration of K. Luan Tran in Support of Defendant's Petition to Vacate Arbitration Award (the "Tran Declaration"), filed in the trial court on February 24, 2014.

3. Attached hereto as Exhibit 2 is a true and correct copy of Exhibit I to the Tran Declaration (Counter-Expert Report of Professor Geoffrey C. Hazard, Jr., submitted to the to the arbitration panel in *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc.*, No. 1220045609 (the "Arbitration Panel") on October 25, 2013).

4. Attached hereto as Exhibit 3 is a true and correct copy of Exhibit J to the Tran Declaration (Supplemental Declaration of Camilla Eng in Support of J-M Manufacturing Company's Reply Arbitration Brief submitted to the Arbitration Panel on October 25, 2013).

5. Attached hereto as Exhibit 4 is a true and correct copy of Exhibit K to the Tran Declaration (Supplemental Declaration of K. Luan Tran In Support of J-M Manufacturing Company, Inc.'s Reply Arbitration Brief 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 29th day of June, 2016.



Kevin S. Rosen

EXHIBIT 1

1 LEE TRAN & LIANG LLP
2 K. Luan Tran (Bar No. 193808)
3 601 S. Figueroa Street, Suite 3900
4 Los Angeles, CA 90017
5 Telephone: 213-612-3737
6 Facsimile: 213-612-3773

7
8 Attorneys for Defendant and Cross-Complainant
9 J-M MANUFACTURING COMPANY, INC.,
10 D/B/A/ JM EAGLE
11

COPY

CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles

FEB 24 2014

Sheri R. Carter, Executive Officer/Clerk
By M. Loretto-Pilarca, Deputy

12 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF LOS ANGELES
14
15 SOUTHWEST DISTRICT - TORRANCE COURTHOUSE
16

17 SHEPPARD, MULLIN, RICHTER &
18 HAMPTON, LLP,
19
20 Plaintiff and Cross-Defendant,
21

22 v.

23 J-M MANUFACTURING COMPANY, INC.,
24 D/B/A/ JM EAGLE,
25
26 Defendant and
27 Cross-Complainant.
28

Case No. YC067332

Judge: Hon. Stuart M. Rice
Department: B

**DECLARATION OF K. LUAN TRAN IN
SUPPORT OF DEFENDANT'S PETITION
TO VACATE ARBITRATION AWARD**

Hearing:
Date: March 18, 2014
Time: 8:30 a.m.

1 DECLARATION OF K. LUAN TRAN

2
3 I, K. Luan Tran, declare as follows:

4 1. I am a member of the State Bar of California, and a partner of Lee Tran & Liang
5 LLP, counsel for Respondent and Cross-Complainant J-M Manufacturing Company, Inc. ("JM").

6 I have been JM's lead counsel in previous proceedings in this matter before this Court and the
7 Court of Appeal, and in the underlying arbitration before JAMS ("Arbitration"). I state the facts in
8 this declaration based on the best of my own personal knowledge and/or documents I reviewed
9 and, if called upon to do so, could and would testify competently as to the following matters.

10 2. Attached as Exhibit A is a true and correct copy of the Declaration of K. Luan Tran
11 In Support of JM's Opening Arbitration Brief (and exhibits) filed in the Arbitration.

12 3. Attached as Exhibit B is a true and correct copy of the Declaration of Camilla Eng
13 In Support of JM's Opening Arbitration Brief (and exhibits) filed in the Arbitration.

14 4. Attached as Exhibit C is a true and correct copy of Plaintiff and Cross-Defendant
15 Sheppard, Mullin, Richter & Hampton, LLP's ("Sheppard") Demand for Arbitration (with
16 exhibits) filed in the Arbitration.

17 5. Attached as Exhibit D is a true and correct copy of JM's Petition for Writ of
18 Mandate filed with the Court of Appeal.

19 6. Attached as Exhibit E is a true and correct copy of the Court of Appeal's Order
20 Denying JM's Petition for Writ of Mandate.

21 7. Attached as Exhibit F is a true and correct copy of JM's Response and
22 Counterclaims filed in the Arbitration.

23 8. Attached as Exhibit G is a true and correct copy of JM's Opening Arbitration Brief
24 filed in the Arbitration.

25 9. Attached as Exhibit H is a true and correct copy of JM's Reply Arbitration Brief
26 filed in the Arbitration.

27 10. Attached as Exhibit I is a true and correct copy of the Counter Expert Report of
28 Professor Geoffrey Hazard filed in the Arbitration.

1 11. Attached as Exhibit J is a true and correct copy of the Supplemental Declaration of
2 Camilla Eng In Support of JM's Reply Arbitration Brief filed in the Arbitration.

3 12. Attached as Exhibit K is a true and correct copy of the Supplemental Declaration of
4 K. Luan Tran In Support of JM's Reply Arbitration Brief filed in the Arbitration.

5 13. Attached as Exhibit L is a true and correct copy of the Further Supplemental
6 Declaration of Camilla Eng submitted in the Arbitration. The arbitrators denied the permission to
7 file this document.

8 14. The arbitrators held a final hearing on December 9, 2013. Pursuant to the parties'
9 agreement, there was no live witness examination or cross-examinations at the final hearing, and
10 the arbitrators only entertained oral arguments by the parties' counsel. Attached as Exhibit M is a
11 true and correct copy of JM's Power Point presentation at the final hearing.

12 15. Attached as Exhibit N is a true and correct copy of the Final Award issued in the
13 Arbitration.

14 16. Attached as Exhibit O is a true and correct copy of the Stipulation Regarding
15 Accounting filed in the Arbitration.

16 I declare the above to be true and correct under penalty of perjury under California laws.

17 Executed in Los Angeles, California on February 24, 2014.

18 

19 _____
K. Luan Tran

EXHIBIT 2

EXHIBIT I

IN THE MATTER OF AN ARBITRATION - JAMS

SHEPPARD, MULLIN, RICHTER &
HAMPTON, LLP, a limited liability
partnership,

Co mplainant.

v.

J-M MANUFACTURING COMPANY,
INC., a Delaware Corporation, d/b/a JM
Eagle; and

DOES 1 through 20, inclusive,

Responde nt.

J-M MANUFACTURING COMPANY,
INC., a Delaware Corporation, d/b/a JM
Eagle,

Cr oss-Complainant,

v.

SHEPPARD, MULLIN, RICHTER &
HAMPTON, LLP, a limited liability
partnership, and DOES 21 through 40,
inclusive,

Cross-Respondent.

Reference No. 1220045609

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

**COUNTER-EXPERT REPORT OF
PROFESSOR GEOFFREY C.
HAZARD, JR.**

COUNTER-EXPERT REPORT OF PROFESSOR GEOFFREY C. HAZARD, JR.

A. Background

I am Distinguished Professor of Law *Emeritus*, Hastings College of the Law, University of California; Sterling Professor of Law *Emeritus*, Yale University; and Director (executive director) *Emeritus* of the American Law Institute. I was Reporter for the American Bar Association Model Rules of Professional Conduct; a member of the ABA Ethics2000 Commission which did a comprehensive review of the Model Rules; and supervisor and direct participant in the formulation of the Restatement (Third) of the Law Governing Lawyers.

I have been a member of the California bar since 1960, and previously was a member of the bars of Connecticut, Oregon and Pennsylvania. For nearly 50 years I have studied, done research, taught, and practiced in the field of professional ethics. I maintain an active consulting practice in matters of professional ethics and civil litigation. I am special counsel to several law firms in matters of ethics and Senior Advisor to the ABA Section of Business Law in matters of legal ethics.

Among my publications in the field of professional ethics include the following books or treatises: *Ethics in the Practice of Law* (1978); *The Legal Profession: Responsibility and Regulation* (3d ed. 1994; editor, with Deborah Rhode); *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (3d ed. 2000, with annual supplements, with William Hodes and Peter Jarvis); *The Law and Ethics of Lawyering* (4th ed. 2005; with Susan Koniak, Roger Cramton and George Cohen); *Professional Responsibility and Regulation* (Foundation Press, 2002) (with Deborah Rhode); *Legal Ethics: A Comparative Study* (Stan. U. Press.2004) (with Angelo Dondi). A copy of my resume is attached.

B. Scope of Engagement

I have been engaged by Lee Tran Liang & Wang LLP ("LTLW"), counsel for J-M Manufacturing Company, Inc. ("J-M"), to provide an opinion in this matter in response to the Expert Report by Professor Lawrence Marshall. I am being compensated for my work. Prior to my engagement on or about October 1, 2013, I have never been engaged by LTLW or J-M.

As the basis of the opinion, I have relied on the matters set forth in Sheppard, Mullin's Opening Brief With Related Declarations and in J-M's Opening Arbitration Brief. In particular I have relied on the Declaration of Mr. Ronald Ryland, General Counsel of Sheppard, Mullin, Richter & Hampton LLP ("Sheppard Mullin") and the Professor Marshall's Report.

C. Summary of Opinion

In summary, in my opinion the conduct of Sheppard Mullin was an egregious violation of its duties of loyalty to and communication with J-M, and that there is no basis for the contention that it acted in "good faith."

(I) Sheppard Mullin, in discussion with J-M as a prospective client in February 2010, about engagement in the *Qui Tam* case and in connection with its engagement letter, failed to disclose critically important facts about its relationship with South Tahoe Public Utility District ("South Tahoe"):

(i) That South Tahoe, which was a claimant on the opposing side of the litigation, was a long-time and current client of Sheppard Mullin;

(ii) That South Tahoe, as was known to Sheppard Mullin's lawyer handling the South Tahoe matters, was not a "sophisticated client";

(iii) That South Tahoe had provided only a general "advance waiver" some years earlier, without independent legal advice;

(iv) And hence that there was a real risk that, if Sheppard Mullin undertook representation of J-M, South Tahoe would seek disqualification on account of Sheppard Mullin's breach of the duty of loyalty under California Rule of Professional Conduct 3-310. Such a disqualification obviously would be seriously damaging to J-M.

(2) Sheppard Mullin failed to disclose the South Tahoe situation described above after J-M became a client in March 2010, when the engagement letter was signed.

(3) As part of the engagement letter Sheppard Mullin affirmatively deceived J-M by specifying an advance waiver of the conflict with South Tahoe, instead of a waiver of a present conflict. The advance waiver necessarily implied that there was no present conflict, which Sheppard Mullin knew to be false.

(4) Whether Sheppard Mullin believed that the advance waiver signed by South Tahoe was valid is irrelevant with respect to the firm's obligation to disclose South Tahoe to J-M. Sheppard Mullin had an independent duty to disclose all material information to J-M. The fact that Sheppard Mullin was concurrently representing an adverse party in the *Qui Tam* action was clearly material to the firm's representation of J-M.

(5) Sheppard Mullin kept the South Tahoe situation secret for over a year, until South Tahoe raised objection about the conflict. Even after South Tahoe raised the conflict issue, Sheppard Mullin kept this issue secret from J-M for about 50 days and only informed J-M about it when South Tahoe was about to file its Motion to Disqualify.

(6) In response to the Motion Sheppard Mullin gave J-M optimistic advice about the seriousness of the situation. In connection with Judge Wu's bifurcation proposal, Sheppard Mullin gave J-M contradictory advice about how to respond.

(7) All the foregoing maneuvers were conducted under the direction of direction of Sheppard Mullin's General Counsel, Mr. Ronald Ryland. Mr. Ryland's background and experience made him an expert in matters of legal ethics, according to which he necessarily knew or should have known about Sheppard Mullin's obligation to disclose South Tahoe to J-M prior to the engagement. He should have also realized the risks to J-M presented by the South Tahoe situation. Coupled with Sheppard Mullin's concealment of the conflict to its own partner in charge of the South Tahoe account, as well as the firm's subsequent concealment of the conflict when this issue was first brought up by South Tahoe, the Sheppard Mullin conduct must be considered deliberate as well as sustained deception.

(8) Accordingly, in my opinion forfeiture of fees is fully warranted, as provided in decisional law and the Restatement (Third) of the Law Governing Lawyers. Established case law, recently confirmed by the California and federal appellate courts (including the Ninth Circuit), made clear that a representation tainted by conflict of interest constitutes a serious breach of an attorney's duty of loyalty and thus, the attorney was not allowed to retain fees, even on a *quantum meruit* basis.

(9) The supposed remedy of allowing Sheppard Mullins to retain fees on a *quantum meruit* basis is further inappropriate, given the deliberate and sustained deception of J-M.

(10) Where the remedy sought is forfeiture of fees, as opposed to compensatory damages, the client is not required to show actual damages. Even so, J-M suffered actual damage in having the *Qui Tam* litigation derailed and having to find yet another successor law firm to handle its defense, and bring that counsel "up to speed."

(10) Sheppard Mullin's deception may also subject the firm's to punitive damages.

D. Discussion

Sheppard Mullin Breach Its Duty of Loyalty and Disclosure to J-M By Repeatedly Failing to Disclose the South Tahoe Representation

For some years prior to 2010 Sheppard Mullin represented South Tahoe Public Utility District ("South Tahoe") in matters of employment law. There had been no indication by either Sheppard Mullin or South Tahoe that the client-lawyer relationship had terminated. In fact, Sheppard Mullin continue to represent South Tahoe in general employment matters shortly after it was retained by J-M. In the matter involved in this Arbitration Sheppard Mullin proceeded on the basis that South Tahoe was a current client.

South Tahoe had signed an "advance conflict waiver" at the time Sheppard Mullin first represented that entity. South Tahoe was a small public corporation with modest legal needs; it had no internal legal department although it had access to other outside counsel. There was no indication that South Tahoe consulted outside counsel regarding the waiver; the waiver was part of an engagement letter signed by one of its non-lawyer officers.

J-M was sued in a *Qui Tam* action beginning in 2006. The lawsuit posed serious ("bet the ranch") financial risk for J-M. The defense had been handled by another firm until January 2010, when that firm was discharged after making a serious blunder concerning privileged documents. J-M interviewed several firms in seeking replacement counsel, focusing on Sheppard Mullin in February 2010. Intensive negotiations concerning the engagement were conducted between Sheppard Mullin and J-M's General Counsel, Camilla Eng.

Sheppard Mullin, aware that there were many claimants in the *Qui Tam* case, had done a conflicts check in connection with its prospective representation of J-M. The check showed that South Tahoe, one of the claimants, was a client, hence

presenting a conflict of interest problem. The conflicts problem was referred to Mr. Ryland, Sheppard Mullin's General Counsel. Mr. Ryland determined that the representation of J-M would be proper by reason of South Tahoe's advance waiver, assuming that a proper waiver was also obtained from J-M.

Sheppard Mullin never disclosed the South Tahoe representation to J-M, and also concealed the conflict check result to its own partner in charge of South Tahoe.

An advance waiver was included in the engagement letter between Sheppard Mullin and J-M. However, no waiver of present conflict was included in the engagement, even though a present conflict with South Tahoe would arise immediately upon Sheppard Mullin's entering the engagement with J-M. Presenting the problem to J-M as one of advance waiver was deceptive, implying that some unknown conflict problem might lie in the future, whereas in fact the conflict posed by South Tahoe was then and there.

In the engagement negotiations with Ms. Eng there was no disclosure about the South Tahoe situation. Any conflict waiver, present or future, requires "adequate disclosure" as the basis of a client's consent. The lack of disclosure compounded the deception that was involved in posing the South Tahoe situation as a potential future conflict rather than as a pending present conflict.

Here, even if the advance waiver is somehow considered to have covered the present conflict that was actually involved, in my opinion there was a serious breach of Sheppard Mullin's disclosure obligations concerning the conflict. The supposedly future conflict with South Tahoe was not hypothetical and conjectural: It was real and immediate. The fact that Sheppard Mullin was representing an adverse party to J-M, even an unrelated matter, is clearly a material fact that should have been disclosed to J-M because Sheppard Mullin's concurrent representation of adverse parties put it in a conflict of interest situation. *Freemont Indem. Co. v. Freemont General Corp.*, 143 Cal.App.4th 50, 64 (2006) ("An attorney's dual representation of parties in [the] circumstances [covered by Rule 3-310] presents a conflict of interest even if the two

matters are completely unrelated and there is no risk that confidences obtained in one matter could be used in the other”).

Whether Sheppard Mullin believed at the time that the advance waiver signed by South Tahoe was effective, the firm still had an independent and obvious obligation to inform its prospective client J-M that a conflict check had revealed that the firm was concurrently representing an adverse party in the *Qui Tam* action. As noted, this is clearly a material fact. Therefore, Sheppard Mullin’s failure, during the engagement negotiations in February 2010, to apprise J-M of the risks involved in the conflict was serious breach of Sheppard Mullins’ obligations of disclosure under California RPC 3-310 to J-M as a potential client and as a client thereafter. *See* California RPC 3-310 (A) (1) and (2) (defining “Informed Written Consent” as disclosing in writing “the relevant circumstances” and “reasonably foreseeable adverse consequences” to the client).

Moreover, the South Tahoe advance waiver was at risk of being ineffective, as explained above, and the J-M waiver was at risk of being technically ineffective (because framed as an advance waiver) and inoperative as a present waiver (because of inadequate disclosure).

In my opinion it was reasonably foreseeable that South Tahoe could move to disqualify Sheppard Mullins for conflict of interest, contending that its advance waiver was ineffective. South Tahoe threatened to do so in a year later, in March 2011, and filed such a motion a month later. In my opinion something like this chain of events was a risk reasonably foreseeable in February 2010 when Sheppard Mullin was negotiating its engagement with J-M. For that reason the firm had an obligation to disclose the South Tahoe situation to J-M. It had the same obligation when South Tahoe raised the issue of conflict in early 2011. Sheppard Mullins had not advised J-M about the conflict during the months following the engagement in March 2010, nor did it advise J-M when South Tahoe raised the conflict with Sheppard Mullin in March 2011. Disclosure was made only shortly

before South Tahoe's Motion to Disqualify was filed. In ensuing correspondence with J-M, Sheppard Mullin down-played the Motion as a litigation tactic and predicted that it would be defeated.

If the J-M waiver was ineffective, J-M directly suffered from a conflict of interest. In my opinion the J-M waiver could have been held ineffective because the conflict was a present one, not a future conflict, and because no disclosure had been made as a basis for J-M's informed consent.

I concur with Professor Marshall's opinion that a client could give a valid advance waiver if one had been properly solicited. But, as explained above, the situation was a present conflict. Even if the situation were considered as a prospective conflict, the prospect was immediately imminent and fully known to Sheppard Mullin. On either interpretation, disclosure to J-M of the South Tahoe situation was required for "informed consent." I also note that Sheppard Mullin did not even disclose this situation to its own partner in charge of the South Tahoe account.¹

One can ponder why Sheppard Mullin did not make these disclosures. An objective observer would note that J-M might well decline to engage Sheppard Mullin if it was apprised of the conflict situation. Ms. Eng, J-M's General Counsel, has said so, and that its general policy was against waivers. Also, J-M had just come off the

¹ Professor Marshall devotes a good portion of his report to challenge Judge Wu's finding that the advance waiver signed by South Tahoe was ineffective. Although I believe that Judge Wu was correct (see below), the effectiveness of the South Tahoe waiver is not relevant in determining whether Sheppard Mullin acted appropriately vis-à-vis J-M. Indeed, Sheppard Mullin still had an independent duty to disclose to J-M that the firm's conflict check had revealed that South Tahoe, an adverse party in the *qui tam* action, was a concurrent client of the firm.

Regardless, it is my opinion that the South Tahoe waiver is invalid. With respect, I do not believe, as Professor Marshall suggests, that California law has accepted that advance waivers are effective when open-ended in duration and scope, signed an unsophisticated client who is given no legal independent advice about its potential consequences. Rather, there were significant California authorities that South Tahoe could cite that would support its Motion for Disqualification. These include: *Fremont Indem. Co. v. Fremont Gene Corp.*, 143 Cal App.4th (2006), and *Sharp v. Next Entertainment, Inc.*, 163 Cal.App.4th 10 (2008), specifically on waivers, and *Flatt v. Superior Court*, 9 Cal.4th 275, 289 (1994), concerning the basic obligation of loyalty. These authorities all post-date 1989, the date on which Professor Marshall states that California had accepted the concept of advance waivers.

very unhappy experience of terminating the firm that previously had been handling the *Qui Tam* litigation.

Sheppard Mullin's conduct after South Tahoe raised the conflict issue and filed the Motion to Disqualify is equally problematic. In response to South Tahoe's raising the issue and then filing the Motion to Disqualify, Sheppard Mullin tried all kinds of maneuvers:

- Failing to disclose to J-M for nearly 50 days that South Tahoe had raised the conflict issue and threatened disqualification;
- Failing to disclose to J-M that Sheppard Mullin had voluntarily erected an ethical wall in response to South Tahoe's concerns;
- Suggesting that it drop South Tahoe as a client, as it had attempted in *American Airlines v. Sheppard Mullin*, 96 Cal.App.4th 1017 (2002) ("like a hot potato");
- Downplaying the Motion as a litigation tactic and predicting that it would be defeated;
- Proposing continued concurrent representation of South Tahoe (with 40 free hours of legal services) without disclosing the proposal to J-M;
- Engaging legal malpractice expert counsel to represent the firm without advising J-M to seek its own independent counsel; and
- After engaging malpractice counsel, Sheppard Mullin ignored its earlier advice and gave J-M contradictory advice about bifurcating the underlying litigation.

In sum, in my opinion it is a legitimate inference that the South Tahoe situation was not disclosed because it might have jeopardized the engagement with J-M. On that basis, the conduct of the firm was not simply in good faith reliance on the South Tahoe advance waiver. On the contrary, it was a studied and sustained effort to conceal from its client a conflict situation that obviously posed serious risk to the proper and loyal representation of J-M.