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In The
Supreme Court of the State of California

HELLER EHRMAN LLP,
Plaintiff-Petitioner,
v.
ORRICK, HERRINGTON & SUTCLIFFE LLP,
Defendant-Respondent.

Questions Certified by Request of the United States Court of Appeals for the Ninth Circuit in Case Nos. 14-01236, 14-01237, 14-01238, 14-01239

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CERTIFIED QUESTION

The Court accepted certification to answer the following question:

> Under California law, what interest, if any, does a dissolved law firm have in legal matters that are in progress but not completed at the time the law firm is dissolved, when the dissolved law firm had been retained to handle the matters on an hourly basis.

The answer is that a dissolved law firm has no cognizable interest in such matters.

INTRODUCTION

This case is about a law firm that had to fire its clients. Heller Ehrman LLP fell on hard times, and ultimately dissolved—announcing to the world that it would "cease providing legal services to all clients." (SER43.[1]) At that point, clients who once retained Heller were forced to hire new counsel. Some hired Orrick, Herrington & Sutcliffe LLP—one of Heller's former competitors, and also an established, San Francisco-based law firm—to work on hourly-fee cases that Heller once handled. None of that is particularly extraordinary. Sometimes firms go under; their lawyers and

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[1] We cite the trustee's opening brief as "OB"; the trustee's Ninth Circuit Excerpts of Record, Case No. 14-16318, as "ER"; and Orrick's Ninth Circuit Supplemental Excerpts of Record as "SER."

clients must then move on. What is unusual is this: The trustee for the estate of the defunct Heller firm now claims that Heller—having fired its clients because it no longer could serve them—is nonetheless entitled to the profits earned by Orrick and other firms on the hourly-fee matters that Heller could not handle.

This case is as easy as it sounds. Nothing gives Heller the right to profits that Orrick earned working on hourly-fee matters after Heller closed up shop. This Court should hold that Heller has no interest in fees earned by other firms on hourly-fee matters that were pending at the time Heller dissolved. This is true for multiple reasons.

First, clients may hire and fire their counsel whenever they want, for any reason or no reason. The client owns her matter; the lawyer does not. Thus, the law governing lawyers long has established that clients have absolute control over their matters. Because a client may terminate a contractual engagement with a lawyer at any time, the lawyer has nothing more than a hopeful expectation in continuing to work on a matter. But this Court repeatedly has held that the statutory provision defining "interests" in property, Civil Code section 700, means that a person who "merely foresees that he might receive" something does not have an "enforceable right" in that thing. So in an hourly-fee matter, the discharged firm's interest is limited to payment for services it already rendered. (*Infra* § A.)

Second, the trustee's invocation of partnership law does not change the result. Nothing in the partnership law confers upon a defunct firm a right to profits earned by a third-party firm on hourly-fee matters. The trustee's argument rests on Corporations Code section 16404(b)(1), which imposes a duty on a former partner "[t]o account to the partnership ... [for] any property, profit or benefit derived by the partner in the conduct and *winding up* of the partnership business." (Italics added.) Citing a host of cases dealing with contingency or other non-hourly-fee matters, he interprets "winding up of the partnership business" to entail completing every client matter pending at the time of dissolution. He labels this the "unfinished business doctrine."

But "winding up" the business of the partnership doesn't mean working on pending matters into the indefinite future; it means doing what is necessary to liquidate the partnership's interest in the matter. For contingency and fixed-fee matters, the firm's interest cannot be liquidated at the time of dissolution. But when a partnership has dissolved and been discharged by the client, completing a contractual engagement on an hourly-fee matter means facilitating the client's transfer of the matter to new counsel (by forwarding the file and the like), and obtaining payment for previously completed work. Once that happens, the matter is wound up. So when Orrick worked on hourly-fee matters that had once been handled by Heller, it was not winding up Heller's

partnership business. It was working on Orrick's partnership business for Orrick's clients. (*Infra* § B.)

Third, even if the work done by Orrick did constitute "winding up" Heller's partnership business, partnership law makes clear that Orrick is entitled to "reasonable compensation" for doing so. (Corp. Code § 16401(h).) And this Court has held that "reasonable compensation" is the compensation "attributable to the services and skill" of the partner who performs the work. (*Jacobson v. Wikholm* (1946) 29 Cal.2d 24, 30.) That is precisely what hourly-fee compensation *is*—a rate based on the lawyer's skill (experience, expertise, etc.), and payable for services rendered. So in any event, Orrick is entitled to the full hourly rates its clients negotiated to pay. (*Infra* § C.)

And *fourth*, the trustee's proposed rule is a policy nightmare. It is inherently unworkable, and would spawn endless collateral litigation over fees. It would harm client choice by restricting other firms' ability to profitably handle matters that were pending at a dissolved firm. It would destabilize firms by incentivizing lawyers to leave before dissolution gives rise to payment obligations into the indefinite future. And it would create tension with ethical rules, which forbid fees that bear no relationship to the services that counsel actually rendered. (*Infra* § D.)

With little in the statute, ethical rules, or common sense to support his position, ultimately the trustee's argument comes down to a series of old cases principally involving partners who breached their fiduciary duties and seized contingency-fee matters. Most prominent among these is the Court of Appeal's decision in *Jewel v. Boxer* (1984) 156 Cal.App.3d 171, and its facts are typical. A four-lawyer firm split into two two-lawyer firms. Two of the lawyers, it turned out, ended up with the more lucrative matters; the other two sued. The court agreed that the four should split the proceeds from these non-hourly-fee matters, which were pending at the time of dissolution, the same way they had during the life of the partnership. Whatever the merits of that decision in that context, it has no place here. Orrick is not Heller's fiduciary, and this case involves hourly-fee work done after Heller went belly-up.

Judge Breyer understood all this exactly. He recognized that this is a case about clients hiring "pre-existing third-party firms that provided substantively new representation" on hourly-fee matters. (ER8.) And he appreciated the absurd implications of a rule that would give the cold, dead hand of a defunct firm an unshakeable grip on work it is incapable of performing. (ER9-11.)

This Court should hold that a dissolved law firm's interest in an hourly-fee matter is limited to payment for the work it has already done.

STATEMENT OF FACTS

Heller Runs Into Financial Hardship.

Until 2008, Heller was a San Francisco-based international law firm. It was organized as a limited liability partnership under California's Uniform Partnership Act of 1994 (SER2-3), which was based on the Revised Uniform Partnership Act (RUPA). At the time of its dissolution, Heller had more than 700 attorneys (including over 200 "shareholders," i.e., partners), and nearly 500 other employees. (SER42, 47-48, 53.)

The circumstances leading to Heller's dissolution arose in 2007. Several large litigation matters settled, leaving "a hole in [Heller's] business." (SER48.) Revenues slipped. (SER48.) By early 2008, the firm was "not as busy as [it] needed to be." (SER108.) Between January and September of 2008, one-fifth of all shareholders left. (SER48-49.) After merger talks with Mayer Brown collapsed in mid-September, firm management "reached the understanding that the firm had lost too many shareholders and too much revenue to be able to continue as a going concern." (SER47, 94-95.)

On September 26, Heller announced to its attorneys and staff that it would dissolve, and the shareholders adopted a "Plan of Dissolution." (ER188-230.) Heller could no longer represent its clients: "With very few exceptions, Heller Ehrman will cease providing legal services to all clients on or

before October 31, 2008." (SER43.) Accordingly, the Plan provided that "all lawyers and client matters will have left all Firm premises within sixty (60) days." (ER190.) In an internal memorandum, the Dissolution Committee confirmed that it was actively winding down all pending matters by "transfer[ring] ... active client files ... to other law firms." (SER43.)

Heller Shareholders Work To Collect Outstanding Fees And Transition Clients To New Representation.

Heller's dissolution plan was "designed to provide for an orderly winding up of the business." (ER189.) It had three objectives: to ensure that "all work on ... client matters will continue uninterrupted"; that "all Firm personnel [be] placed with other organizations"; and that "the assets of the Firm [be] preserved and protected for the benefit of, first, the creditors of the Firm [and] others to whom the Firm is obligated." (ER189-190.)

These objectives were intertwined. The shareholders recognized that "the Firm [was] no longer in a position to continue to service its clients efficiently." (ER197.) Seamlessly transitioning client matters to other firms, pursuant to the clients' instructions, would both honor the shareholders' ethical obligations, and encourage other firms to hire Heller associates and staff. (SER113-114.) It also would benefit the firm's creditors by increasing Heller's ability to collect

outstanding fees for work it had already performed—for the simple reason that "clients that [are] happy with the firm tended to pay their bills better than clients who [are] unhappy." (SER236; see also SER97-98, 114.)

This was no idle concern. The Dissolution Committee "believed ... far and away the most important assets of the firm" to be its "accounts receivable" (fees for hours worked and billed, but not yet paid) and "work in progress" (fees for hours worked, but not yet billed). (SER97.) As of August 2008, Heller's balance sheet valued those assets at $118 million. The Committee believed that the Plan of Dissolution would allow Heller to maximize its collection of those fees, and that Heller would be able to pay its debts—indeed, they expected there would be capital remaining to return to shareholders. (ER145 [projecting a net surplus of $17 million]; SER62.)

As part of the effort to ensure a smooth transition of client matters, the Plan of Dissolution contained what the trustee calls a "*Jewel* waiver"—a waiver of "any rights and claims under the doctrine of *Jewel v. Boxer* ... to seek payment of legal fees generated after the departure date of any lawyer or group of lawyers with respect to non-contingency/non-success fee matters only." (ER197.)

From the perspective of maximizing the value of the estate, this was an easy decision. On the one hand, waiving such rights was actually waiving nothing at all. That is because *Jewel* was a doctrine rooted in non-hourly-fee

matters, and the Dissolution Committee believed that any attempt to extend *Jewel* to hourly-fee matters would be "legally very dubious." (SER106; see also SER100 [claims under *Jewel* for hourly-fee matters would be of "low and dubious value"].) Heller had always understood that when a shareholder went to another firm, it was the client's choice who would represent it thereafter, and that Heller had no claim to profits earned on hourly-fee matters after a shareholder left. (SER141-156.)

What's more, the waiver created value. The trustee of another defunct firm—Brobeck, Phleger & Harrison—had recently sought to seize profits from Heller on hourly-fee matters that had been handled at Brobeck before it went bankrupt. (SER109-110; see *In re Brobeck, Phleger & Harrison LLP* (Bankr. N.D. Cal. 2009) 408 B.R. 318.) As a result, some firms expressed reservations about hiring Heller attorneys. (SER112-113, 120.) So despite the shareholders' shared belief that such a theory was meritless, they included the waiver in an abundance of caution. (SER103-105, 111-113.) By making clear that Heller would not claim an interest in hourly-fee matters, shareholders believed the waiver would (1) "encourage Shareholders to move their clients to other law firms and to move Associates and Staff with them," which would "reduce expenses to the Firm-in-Dissolution"; (2) "assure that client matters are attended to in the most efficient and effective manner possible," and (3) "help ensure

collection of existing accounts receivable and unbilled time with respect to such clients." (ER197; SER119-120.)

The Banks Take Control And Force Heller Into Bankruptcy.

The shareholders never had a chance to carry out the Plan, because Heller's creditors pulled the plug.

Two of Heller's major creditors were Bank of America and CitiBank ("the Banks"). They had extended loans to Heller secured by a lien on collateral, including accounts receivable and work in progress. (SER60-61, 68-69.) At the end of September, the Banks took control of Heller's assets, and "refused to approve ongoing salary payments to the majority of the Firm's staff and attorneys." (SER63.) This accelerated the pace of layoffs, which in turn interfered with "collections from client [work in progress] and [accounts receivable]" and "transition of client matters." (SER68.)

The Heller shareholders continued to do their best to bill and collect from clients for work already performed. (SER162, 168, 174-175.) And they ensured that client files were promptly transferred to new firms so that Heller would not incur malpractice liability. (SER158-165, 170, 174; see SER98.) But without associates, staff, or an operating budget, Heller could no longer represent clients. (SER165.)

With Heller shuttered, its clients had to look elsewhere for representation, including to Heller's former competitors.

(SER165.) One natural choice was Orrick. Like Heller, Orrick is an international law firm based in San Francisco, where the firms had competed since the 1800s. At the time of Heller's dissolution, Orrick had 24 offices worldwide, staffed by nearly 1,000 lawyers (SER197), and like Heller, it was capable of handling complex matters for large clients. The same was true of the other Defendant-Respondents: Jones Day, a firm founded in Cleveland in the 1890s; Foley & Lardner, a Milwaukee-based firm founded in the 1840s; and Davis Wright Tremaine, a firm founded in Seattle in the 1940s. (SER194.) Orrick also hired numerous former Heller employees, and a group of former Heller shareholders. (SER219.)

The Trustee Brings Fraudulent-Transfer Claims Against Dozens Of Law Firms.

In December 2008, Heller's Dissolution Committee filed for bankruptcy in the Northern District of California. Shortly thereafter, the trustee filed the adversary proceedings underlying this appeal. He brought claims against dozens of law firms that former Heller shareholders had joined, seeking to "avoid" (i.e., void) allegedly fraudulent transfers under federal bankruptcy law. (ER178-185; see 11 U.S.C. § 548(a)(1).)

Specifically, the trustee maintained that, under *Jewel*, Heller "had an exclusive property interest in all profits and/or

benefits" that former Heller partners earned in "complet[ing]" hourly-fee cases formerly handled by Heller. (ER179.) And, he theorized, there was a fraudulent transfer from Heller to the shareholders when Heller waived its rights under *Jewel* to recover those profits. Thus, he argued, when Orrick hired Heller shareholders, this had the effect of "transferr[ing] certain Unfinished Business"—the hourly-fee matters—to Orrick as a subsequent transferee. (ER179.) In short, the trustee sought to take profits that Orrick earned representing clients in hourly-fee matters that Heller could not complete.

The case was assigned to Bankruptcy Judge Montali. Coincidentally, Judge Montali had handled the *Brobeck* bankruptcy noted above (at 9), where he became the first and only judge to endorse *Jewel*-based fraudulent-transfer claims.

The Bankruptcy Court Adopts The Trustee's Theory, The District Court Reverses, And The Ninth Circuit Certifies The Question Presented.

Many firms settled in the face of protracted litigation (ER4); others, including Orrick, challenged the trustee's theory. Orrick moved to dismiss the adversary proceeding (ER347), but Judge Montali followed his own decision in *Brobeck*—ultimately concluding that "matters in progress but not completed when [Heller] ... dissolved, regardless of whether the firm was retained to handle the matter on an hourly or contingency basis .... [were] property of Heller." (ER57-58.) The *Jewel* waiver, he concluded, effectuated a

fraudulent transfer of that property. (ER56-57.) The trustee then sought to recover tens of millions of dollars in fees for work done by Orrick between 2008 and 2011, three years after Heller shuttered. (ER413-414.)

Before damages proceedings were complete, the parties agreed that the district court should withdraw the bankruptcy reference, which Judge Breyer did. (ER339-340.) Following further briefing on the trustee's fraudulent-transfer theory, and lengthy oral argument, the district court reversed. The reason was as simple as it is fundamental: "A law firm—and its attorneys—do not own the matters on which they perform their legal services. Their clients do." (ER3.)

Judge Breyer identified multiple distinctions between *Jewel* and this case, including that the firm in *Jewel* had voluntarily dissolved; that the lawyers in *Jewel* continued to perform work under the dissolved partnership's existing fee agreements; that the new firms in *Jewel* consisted entirely of partners from the dissolved partnership; and that *Jewel* did not involve hourly-fee matters. (ER8.) Judge Breyer further recognized that *Jewel* was decided under the Uniform Partnership Act (UPA), not the "materially different" RUPA that replaced it. (ER8.)

Judge Breyer also emphasized the perverse consequences of the trustee's rule. That rule could "make it more difficult for partners leaving a struggling firm to find new employment, or ... limit the representation choices a

client has available, by ... prevent[ing] third-party firms from earning a profit off of labor and capital investment they make in a matter previously handled by a dissolved firm." (ER13-14.) Finding that the trustee provided "no justification, legal or otherwise," for entitling the Heller estate "to a share of all profits earned even on [hourly-fee] litigation lasting long after [it] ceased to function, into the indefinite future," Judge Breyer granted summary judgment to the defendants. (ER13-14.)

The trustee appealed to the Ninth Circuit, which certified to this Court. (*In re Heller Ehrman LLP* (9th Cir. 2016) 830 F.3d 964.) In so doing, the Ninth Circuit acknowledged *Jewel* and "[s]ubsequent court of appeal decisions [that] applied *Jewel*'s interpretation of [UPA] to contingency fee matter cases." (*Id.* at p. 967.) It observed, however, that only a single published Court of Appeal case "expressly applied *Jewel*[] ... to matters that the dissolved law firm had been handling on an hourly basis." (*Id.* at p. 968.)

The Ninth Circuit also noted that the law changed when "[i]n 1996, the California legislature revised its partnership law by replacing UPA with RUPA." (*Heller*, *supra*, 830 F.3d at p. 968.) The court explained that "RUPA changed the rule regarding partners' post-dissolution rights," by providing that "all partners are entitled to 'reasonable compensation for services rendered in winding up the business of the

partnership.' [Citation.]" (*Ibid.*, quoting Corp. Code § 16401(h).)[2] The court read that language to suggest that even if *Jewel* were extended to hourly-fee matters, the lawyers who actually did the work would "have a claim to some or all of their hourly rate" as "reasonable compensation." (*Id.* at p. 969, quoting *Jacobson*, *supra*, 29 Cal.2d at p. 30 [" 'reasonable compensation' means fees 'attributable to the services and skill' of the partner performing the work."].) Finding this statutory change to be "material," the panel certified the question of a dissolved law firm's interest in hourly-fee matters pending at the time of dissolution.

ARGUMENT

A DISSOLVED LAW FIRM HAS NO INTEREST IN HOURLY-FEE MATTERS IN PROGRESS AT THE TIME OF DISSOLUTION.

The trustee of the defunct Heller firm has sued Orrick in an effort to recoup profits that Orrick earned performing hourly-fee work that Heller—because it dissolved and went bankrupt—did not and could not do. This case does not involve fees for work that Heller performed. It does not involve contingency- or flat-fee matters in which Heller had some illiquid interest at the time of dissolution. It is solely about Heller's claim to hourly work performed by other

[2] Subsequent statutory references are to the Corporations Code unless otherwise indicated.

established firms after Heller went bankrupt. Heller has no interest in such work.

A. A Defunct Law Firm Has No Interest In Profits Earned On Matters It Could Not And Did Not Handle.

Lawyers serve at the pleasure of their clients. That is because, as Judge Breyer correctly held, "A law firm—and its attorneys—do not own the matters on which they perform their legal services. Their clients do." (ER3.) When a lawyer works on an hourly-fee matter, she has a right to be paid, at her agreed-upon hourly rate, for the work she performed. But she has no cognizable interest in the matter itself, and no entitlement to work on it going forward.

Let's start with basics. Clients retain law firms through contracts. These contracts give a lawyer the opportunity to work on a matter in exchange for an agreed-upon fee. A firm may hope to work on the matter until conclusion, but it is not entitled to do so, for "it is a basic term of the contract, implied by law into it by reason of the special relationship between [lawyer and client], that the client may terminate that contract at will." (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 791.) Thus, "[i]t has long been recognized in this state that the client's power to discharge an attorney, with or without cause, is absolute." (*Id.* at p. 790; see *Kallen v. Delug* (1984) 157

Cal.App.3d 940, 950 ["a client has an absolute right to substitute one attorney for another for any reason"].)[3]

The facts of *Fracasse* are instructive. The plaintiff was a lawyer discharged without cause. He sought "to recover as damages the full fee specified in the contract of employment, regardless of the reasonable value of his services or the extent of work performed." (6 Cal.3d at p. 786.) The court instead limited him to the value of work already performed. (*Ibid.*) This rule, the court explained, "preserve[s] the client's right to discharge his attorney without undue restriction, and yet acknowledge[s] the attorney's right to fair compensation for work performed." (*Id.* at p. 791.)[4]

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[3] Consistent with this established rule, Heller shareholders all agreed that a client was always free to discharge Heller, and that Heller "did not have any legal right to insist that the clients for whom [it was] handling hourly rate matters must stay with Heller." (E.g., SER151-152; see *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 511 ["When a lawyer leaves a firm and takes a client with him, the firm's representation of the client ceases."].)

[4] This guarantee of client autonomy is rigorously enforced, and a discharged lawyer cannot evade it by attempting to recover fees earned by the client's new lawyer. That is what occurred in *Kallen, supra*, 157 Cal.App.3d 940. After his discharge, the old lawyer retained the files until the new lawyer agreed to share a portion of his fees. (*Id.* at pp. 948-949.) The court refused to enforce this agreement because "a client has an absolute right to substitute one attorney for another for any reason." (*Id.* at p. 950.)

Thus, when a client fires a law firm and hires a new one, the old firm's interest is limited to "the reasonable value of services rendered before the discharge." (*Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 286; see Rules Prof. Conduct, rule 3-700(D)(2) [requiring a terminated lawyer to "[p]romptly refund any part of a fee paid in advance that has not been earned"].) The old firm does not "own" a client matter from which it has been discharged, nor have a right to keep working on and profiting from it. At most, a lawyer may *hope* that she will receive fees for future work. But if that expectation is frustrated—if the client hires another firm—the new firm is entitled to the fees for the services it renders. Heller's interest ceased when it told clients it no longer could represent them, and it therefore did not transfer a "property interest" (OB42) to Orrick and other competitor firms—the new firms had the right all along to earn profits for their work.

Simply put, Heller had no interest in future profits earned by other firms on hourly-fee matters Heller could no longer handle.

Of course, if one firm believes another firm intentionally interfered with its client relationship, it may have a claim sounding in tort. (*Frazier, Dame, Doherty, Parrish & Hanawalt v. Boccardo, Blum, Lull, Niland, Teerlink & Bell* (1977) 70 Cal.App.3d 331, 337-338.) There is no such allegation here.

The trustee nevertheless claims that there is a "property interest" in such profits if the firm that later earns them hired a former Heller partner. (OB42-46.) This claim is contrary to basic principles of property law. The Legislature has set forth a detailed taxonomy of "Interests in Property." (See Civ. Code §§ 678-703.) And, despite the trustee's assertion that "California law defines property rights broadly" (OB42), Civil Code section 700 makes clear that there is no "interest of any kind" in a "mere possibility" or an "expectancy"—i.e., " 'the interest of a person who merely foresees that he might receive a future beneficence.' " (*In re Marriage of Green* (2013) 56 Cal.4th 1130, 1140-1141, quoting *In re Marriage of Brown* (1976) 15 Cal.3d 838, 844-845, italics omitted.)

For example, the right to renew a term life insurance policy is a mere expectancy—and so not a property interest—if the employer may simply choose to stop offering the policy. (*In re Marriage of Spengler* (1992) 5 Cal.App.4th 288, 298-299.) And that's true even though the renewal right "has potential value." (*Id.* at p. 299.) On the other side of the line, there *is* a cognizable interest in a "contingent interest in property," i.e., a "right contingent upon future events." (*Brown, supra*, 15 Cal.3d at pp. 841, 847 & fn. 8; see also *Green, supra*, 56 Cal.4th at pp. 1140-1141.) The difference is clear: Whereas the holder of a contingent interest has a presently-existing (albeit contingent) legal right—like a

"contractual right"—"the defining characteristic of an expectancy is that its holder has no *enforceable right*." (*Brown, supra*, 15 Cal.3d at p. 845.) And that describes to a T the hourly-fee matters pending at the time of Heller's dissolution. Both legally and practically, Heller had "no enforceable right" to continue working on such matters. (*Supra* 16-18.)[5]

New York's highest court considered these same issues, and emphatically reached the same conclusion that the district court did here. (*In re Thelen LLP* (2014) 24 N.Y.3d 16.) The trustees in two law firm bankruptcies—*Thelen* and *Coudert Brothers*—sought to claw back profits that third-party law firms earned on hourly-fee matters previously handled by the bankrupt firms. (*Id.* at pp. 23-27.) Like here, the trustees asserted fraudulent-transfer claims grounded in fiduciary duties purportedly existing under state partnership law. (*Id.* at pp. 27-28.) The court squarely rejected the claims. It explained that "clients have always enjoyed the 'unqualified right to terminate the attorney-client relationship at any time' without any obligation other than to compensate the attorney for ... completed services." (*Id.* at p. 28, italics omitted.) Pending hourly-fee matters are not partnership

[5] This answers the trustee's citation (OB16) to section 16203 for the proposition that "[p]roperty acquired by a partnership is property of the partnership and not of the partners individually." A client matter isn't "property" in the first place, so principles about sharing property are inapplicable.

"property" because "[a] law firm does not own a client or an engagement." (*Id.* at p. 22.) Thus, "no law firm has a property interest in future hourly legal fees" because they are too" 'speculative to create a present or future property interest' [citation] given the client's unfettered right to hire and fire counsel." (*Id.* at p. 28.)

The same underlying principles apply with equal force in California. As this Court has held, "[t]he relation of attorney and client is one of special confidence and trust," and " 'the client is justified in seeking to dissolve that relation whenever he ceases to have absolute confidence in ... the capacity of the attorney.' " (*Fracasse, supra,* 6 Cal.3d at pp. 789-790, quoting *Gage v. Atwater* (1902) 136 Cal. 170, 172.) The attorney therefore has no enforceable interest in continued work or profits from the case.

Howard v. Babcock (1993) 6 Cal.4th 409, is not to the contrary. The trustee (OB26) relies heavily on that case's passing statement that "open files that required additional work that would be billed in the future" were an "asset" of the firm. (*Howard,* at p. 413; see also OB35 [asserting that "client business is a valuable asset of the partnership"].) But the term "asset" ordinarily includes work in progress and accounts receivable, not future billings. (See *In re Marriage of Kilbourne* (1991) 232 Cal.App.3d 1518, 1522 [non-"fixed" assets include accounts receivable, costs advanced, work in

progress, and work completed].) And, far from overturning bedrock principles of state law, the quoted statement in the background section of the opinion was not the issue before the Court.

Instead, *Howard* considered a partnership agreement that entitled departing partners to a share of the next year's profits—but not if the departing partner competed in the same geographic area. (6 Cal.4th at p. 412.) The court held only that such a contract is enforceable—it doesn't violate an ethical prohibition against "restrict[ing] the right of a member to practice law," and it wasn't "void on its face as against public policy." (*Id.* at pp. 428, 425.) Nothing in the decision turned on the meaning of "asset," or whether unfinished hourly-fee matters are assets. Certainly it did not address the question before the Court today. (See *People v. Knoller* (2007) 41 Cal.4th 139, 154-155 [" 'It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.' "].)[6]

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[6] Indeed, creating a property interest in prospective future work would lead to absurd results. If an hourly-fee matter is property, then a bankruptcy trustee authorized to "sell ... property of the estate" (11 U.S.C. § 363(b)(1)), could sell it "to the highest bidder." (*Geron v. Robinson & Cole LLP* (S.D.N.Y. 2012) 476 B.R. 732, 741, *affd. sub nom. In re Thelen LLP* (2d Cir. 2014) 762 F.3d 157; see Edson, *An Unworkable Result: Examining the Application of the Unfinished Business*

The record in this case confirms that prospective hourly-fee matters are not "assets." (ER145.) Heller's balance sheet did not list as assets future work that Heller expected to perform on any hourly-fee matter. It listed only hourly fees for work that *already* had been performed. By contrast, the balance sheet *did* list a contingency-fee matter. (ER145; SER60-61, 68-69.) That was with good reason. Heller shareholders universally confirmed their understanding that Heller had no interest in future hourly fees when a client retained a former partner's new firm. (SER142-143; SER146-147; SER151-152; SER154-155.) Heller's chairman swore, unrebutted, that "all clients were free to move their open matters to other firms" (SER151), and that "Heller did not have any contractual or other legal basis to insist that other law firms taking responsibility for such hourly rate matters would owe Heller any portion of the fees those other firms earned." (SER152.)

The rule that a discharged firm has no interest in profits earned by another firm is as sound as it is settled. It honors the client's "right to retain counsel of choice" (*Champion v. Superior Court* (1988) 201 Cal.App.3d 777, 783), a consideration that is all the more important when a law firm goes bankrupt. (See Committee on Professional Responsibility

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Doctrine to Law Firm Bankruptcies (2015) 32 Emory Bankr. Dev. J. 159, 184-186.)

and Conduct (COPRAC) Formal Opn. 1985-86 ["[T]he interests of the clients must prevail over all competing considerations if ... the firm's dissolution is to be accomplished in a manner consistent with professional responsibility."].) Here, Heller discharged its clients because without lawyers, it could not "continue to provide legal services in ongoing matters." (ER3; *supra* 6-7.) In that situation, clients must scramble to find new representation, and the defunct firm's dead-hand grip would only frustrate those efforts. Nothing in California law requires that result.

B. Winding Up Partnership Business Does Not Require Completing Hourly-Fee Matters.

The trustee does not dispute any of these bedrock principles. Instead, he asserts that under partnership law, "[a] dissolved law firm is entitled to recover ... the profits generated by any partners of the dissolved firm from completing hourly fee matters that were in progress but not completed when the firm dissolved." (OB1.) In his telling, this rule flows from section 16404(b)(1), which requires partners "[t]o account to the partnership and hold as trustee for it any property, profit or benefit derived by the partner in the conduct or *winding up* of the partnership business.' " (OB1, quoting § 16404(b)(1), italics added.) The trustee then attempts to transmute this fiduciary duty between partners

into an interest against the world, even third-party firms like Orrick.

But even if this doctrinal alchemy were possible, the trustee misreads the partnership law. He is wrong that "winding up … the partnership business" involves working indefinitely on an hourly-fee matter that the client has been forced to transition to another firm. Consistent with the plain meaning of the term, "winding up" means liquidating partnership assets, paying creditors, and distributing the remaining assets—i.e., doing what's necessary to bring the firm's engagements to a close. When it comes to hourly-fee matters, that means ramping down the engagement—following client instructions and ethical obligations to transition the file to a competent firm, and settling outstanding bills—not continuing to work on the matter indefinitely. The partnership law thus confirms that when a client discharges a firm from its hourly-fee matter, that is when the discharged firm's interest in continued work and profit ceases.

1. Winding up an hourly-fee engagement means collecting unpaid fees and transitioning the matter to new counsel.

In construing statutes, this Court looks to the "ordinary meaning of the statutory language, its relationship to the text of related provisions, terms used elsewhere in the statute, …

the overarching structure of the statutory scheme .... [and] extrinsic sources—such as legislative history ...." (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 155-156, citations omitted.) These sources show that, under section 16404(b)(1), "winding up" does not entail working on hourly-fee matters into the indefinite future.

As the trustee notes, under RUPA, "a partnership continues after dissolution." (OB12, citing § 16802(a).) But he fails to note that it does so "only for the purpose of winding up its business." (§ 16802(a).) And the ordinary meaning of "winding up" a partnership—"often referred to as liquidation"—is the process of liquidating a partnership's assets, paying its creditors, and distributing the remaining assets to the partners. (See Hurt et al., Bromberg and Ribstein on Partnership § 7.01[B]; Rutter Group, California Practice Guide: Corporations § 8:901 [noting that a better term for winding up is "really, 'wind down' "].)

Black's Law Dictionary, for instance, defines winding up as "[t]he process of settling accounts and liquidating assets in anticipation of a partnership's or a corporation's dissolution." ((10th ed. 2014) p. 1835, col. 2; see also Webster's 3d New Internat. Dict. (2002) p. 2621, col. 1 ["3a: to put in order for the purpose of bringing to an end <the companies are winding up their business affairs by retiring their capital stock and paying dividends> ... b: to put in order for the purpose of disposal and transferring title"].) In *Jacobson*, therefore, this

Court explained that winding up includes "fulfilling of contractual obligations of the partnership" and "selling the firm property, receiving money due to the firm, paying its debts, returning the capital contributed by each partner, and dividing the profits." (29 Cal.2d at pp. 28-29.)

This ordinary understanding is confirmed by other provisions of RUPA that use the same term. (See *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 643 ["[A] 'word or phrase … accorded a particular meaning in one part or portion of a law, should be accorded the same meaning in other parts or portions of the law.' "].) Section 16803(c) specifies activities that may constitute "winding up a partnership's business":

> [1] preserve the partnership business or property as a going concern for a reasonable time, [2] prosecute and defend actions and proceedings, whether civil, criminal, or administrative, [3] settle and close the partnership's business, [4] dispose of and transfer the partnership's property, [5] discharge the partnership's liabilities, [6] distribute the assets of the partnership pursuant to Section 16807, [7] settle disputes by mediation or arbitration, and perform other necessary acts.

(Bracketed numbers added.) Each of these items is about discharging the partnership's affairs. The first four involve protecting and liquidating a partnership's assets; five is paying the partnership's creditors; and six and seven are distributing any remaining assets to the partners, and

settling any disputes that arise in doing so. None contemplates continuing to work on a matter after a firm has been discharged and its interest in the matter has been liquidated.

This reading of "winding up" comports with an analogous provision of the Corporations Code governing corporate dissolutions. (See *People v. Tran* (2015) 61 Cal.4th 1160, 1167-1168 [" 'It is an established rule of statutory construction that similar statutes should be construed in light of one another and that when statutes are *in pari materia* similar phrases appearing in each should be given like meanings.' "].) In language substantially similar to section 16803's treatment of partnerships, section 2010(a) provides that a corporation continues for purposes of winding up its affairs. And, like section 16803, it specifies that winding up may require "prosecuting and defending actions by or against" the entity, "collect[ing] and discharg[ing] obligations," and the like. (§ 2010(a).) But, the entity does *not* continue "for the purpose of continuing business *except so far as necessary for the winding up thereof.*" (*Ibid.*, italics added). So winding up includes continuing work only to the extent necessary to liquidate assets, pay creditors, and distribute the remaining assets.

Finally, textual parallels in UPA and RUPA confirm that "winding up ... partnership business" means performing those acts necessary to liquidate and distribute the

partnership's assets. As the trustee correctly notes (OB15), the predecessor to section 16404(b)(1) was former section 15021(1), which provided: "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him ... from any transaction connected with the formation, conduct, or *liquidation* of the partnership or from any use by him of its property." (Italics added.) The word "liquidation" was replaced with "winding up," and on the trustee's own account (OB16) section 16404(b)(1) "ma[de] no substantive change from" former section 15021(1). (See RUPA (1997) § 404, cmt. 2.) If "liquidation" and "winding up" are synonymous, then "winding up ... partnership business" means completing "any transaction connected with the ... liquidation of the partnership"—i.e., actions necessary to liquidate the partnership's assets.

These authorities all make clear that winding up means discharging the partnership's obligations to others (for instance, completing contractually obligated services, or making contractually obligated payments), and safeguarding and distributing existing value. Presumably this includes transitioning a matter to a new firm to comply with ethical obligations. (E.g., Rules Prof. Conduct, rule 3-700; see ER13 ["The Court agrees that Heller should bill and be paid for the time its lawyers spent filing motions for continuances, noticing parties and courts that it was withdrawing as counsel, packing up and shipping client files back to the

clients or to new counsel, and getting new counsel up to speed on pending matters."].) But continuing to work on an hourly-fee matter after the client has discharged the dissolved partnership is something different entirely. It is not "fulfilling ... contractual obligations of the partnership" or "complet[ing] ... executory contracts." (*Jacobson*, *supra*, 29 Cal.2d at p. 29; see also OB19, quoting *Little v. Caldwell* (1894) 101 Cal. 553, 560 [discussing "unfinished contract[s]" and "contracts not fully performed"].) It is precisely the opposite.

The partnership's interest in an hourly-fee matter can be and is liquidated once the client has discharged the partnership and paid outstanding bills. Pursuant to an hourly-fee contract, "[t]he client pays a per-hour fee for the time that the lawyer devotes to the client's matter." (See Shepherd & Cloud, *Time and Money: Discovery Leads to Hourly Billing* (1999) 1999 U. Ill. L. Rev. 91, 101-102.) Once the hour is billed, it is payable. Upon dissolution and discharge, a firm's vested interest in an hourly-fee matter therefore can be liquidated immediately. All that remains is for the firm to bill for work completed, close the books, and transfer the file. Once Heller did that for its hourly-fee matters, those matters were wound up and any interest in them ended—they were not, as the trustee asserts, "Heller's hourly unfinished business." (OB2.)

2. Cases resolving disputes between former partners about non-hourly-fee matters do not establish the trustee's right to hourly-fee profits earned by third-party firms.

To prevail, the trustee must show that "winding up" a partnership includes working indefinitely into the future on hourly-fee matters. We've shown why the statute doesn't support his theory, and the cases he portrays as a long and unbroken history don't support it either. Instead, they involve disputes among former partners over their fiduciary duties; contingency- or flat-fee rather than hourly-fee cases; the rules under UPA rather than RUPA—or all three at once. The trustee fails to explain how an ex-partner's fiduciary duties can transform into a property interest recoverable against a third-party firm. He also doesn't take account of the fact that contingency- and flat-fee matters are different from hourly-fee arrangements, because the partnership cannot liquidate its interest in them at the time of dissolution. All that remains is a single Court of Appeal decision involving hourly-fee matters—*Rothman v. Dolin* (1993) 20 Cal.App.4th 755—that uncritically extended the contingency-fee rule to the hourly-fee context without considering the statutory text or these key distinctions.

a. The Court of Appeal's decision in *Jewel*, which the trustee calls "the most widely cited unfinished business decision" (OB21), is typical. As explained above (at 5), *Jewel*

involved a four-person firm that split into two two-person firms. (156 Cal.App.3d at pp. 174-175.) Two partners (Boxer and Elkind) had worked on personal injury and worker's compensation cases, and they continued to do so post-dissolution. (*Id.* at p. 175.) The other two (Jewel and Leary) sued, claiming an entitlement to fees later earned by Boxer and Elkind in finishing cases that had been pending at the time of dissolution. (*Ibid.*)

It was in this context—two pairs of former partners fighting over fees in non-hourly-fee matters[7]—that the Court of Appeal recognized a fiduciary duty to account. The court's holding was based on UPA, which established partners' fiduciary duty "to wind up and complete the unfinished business of the dissolved partnership." (Former §§ 15021, 15030.) Specifically, the court focused on the provision that "[n]o partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs." (Former § 15018(f); see

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[7] (*Jewel, supra*, 156 Cal.App.3d at p. 175.) That the decision discusses fees paid post-dissolution (e.g., *id.* at p. 177), for work that was performed both pre- and post-dissolution (e.g., *id.* at pp. 174, 175) strongly suggests that these were contingency- and flat-fee matters, where fees are not paid until the matter is completed. Hourly fees for work performed pre-dissolution would have been due and payable at the time of dissolution.

Jewel, *supra*, 156 Cal.App.3d at p. 176.) The court termed this the "rule precluding extra compensation" (*Jewel*, at p. 176), and interpreted it to mean that the former partners couldn't retain any compensation for work they did post-dissolution. (*Id.* at pp. 179-180.) Even if *Jewel* were correct in the context in which it was decided—for instance, on the theory that contingency- or fixed-fee matters are "executory contracts" that must be "completed" in order to liquidate the firm's interest (*Jacobson*, *supra*, 29 Cal.2d at p. 29)—the trustee has not explained how it applies here.

First, former section 15018 concerned "the rights and duties of the partners in relation to the partnership." But the trustee has not explained how fiduciary duties that bind partners in a partnership can transform into a property interest that is enforceable against a third-party firm like Orrick—which, far from being Heller's fiduciary, was its competitor for over a century. (*Supra* 11.) Fiduciary duties "do not create property rights where none would otherwise exist." (*United States v. Cherokee Nation of Okla.* (1987) 480 U.S. 700, 707.) That is because "[p]artnership [l]aw does not define property; rather, it supplies default rules for how a partnership upon dissolution *divides* property as elsewhere defined in state law." (*Thelen*, *supra*, 24 N.Y.3d at p. 28; see § 16103(a).) But *Jewel* relied explicitly on the partners' mutual duty to participate in winding up and to avoid taking

actions adverse to the partnership. (156 Cal.App.3d at p. 179.) Orrick does not owe those duties to Heller, nor Heller to Orrick. And the "*Jewel* waiver"—the putative source of the property interest (OB4-6)—didn't transfer anything to Orrick that Orrick didn't already have.

Second, the trustee has not explained why cases considering post-dissolution work on contingency- or flat-fee matters apply to hourly-fee matters. On the contrary, those cases are different in important ways. When a law partnership is discharged in the middle of a contingency-fee matter, its financial interest in that matter cannot be liquidated until "the contingency stated in the original agreement has occurred—i.e., the client has had a recovery by settlement or judgment." (*Fracasse*, *supra*, 6 Cal.3d. at p. 792.) In other words, the dissolving firm won't be wound up until its "share of the contingent fees pending at the time of [dissolution] was received and disbursed to the [former] partners." (*Gast v. Peters* (2003) 267 Neb. 18, 25.)

That is because on a contingency-fee contract, the client has no "obligation to pay" an attorney unless the litigation is successful and the client recovers. (*Fracasse*, *supra*, 6 Cal.3d at p. 792.) Thus, "the amount of damages suffered by the attorney" who is discharged in the middle of a contingency-fee matter cannot "be ascertained" until the amount of the recovery is known. (*Ibid.*) Because the lawyer's eventual recovery is a percentage of the client's award, zero award

means zero compensation. Moreover, when a recovery has been achieved, "one of the significant factors in determining the reasonableness of an attorney's fee" is "the result obtained." (*Ibid.*)[8] Similarly, in a flat-fee matter, compensation is conditioned on completing a final product that satisfies the terms of the engagement.

Thus, a firm that dissolves after having committed substantial resources to one of these matters has a real interest in seeing to it that the matter is appropriately completed so that it will be paid. (Cf. *Brown*, *supra*, 15 Cal.3d at p. 847 [recognizing a property interest in a "contingent interest in a suit pending on appeal"; "when community funds or effort are expended to acquire a conditional right to future income, the courts do not hesitate to treat that right as a community asset"]; *supra* 19-20 [discussing property rights].) By doing so, the firm safeguards the partnership's investment in the work it performed, and protecting (and ultimately liquidating) partnership assets is part of winding up. (See *supra* 26-27.)

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[8] (See *Cazares*, *supra*, 208 Cal.App.3d at pp. 287-288 ["[T]he reasonable value of services rendered in partial performance" of a contingency-fee contract cannot be arrived at simply by multiplying the "number of hours expended" by a reasonable hourly rate, because "a contingent fee involves economic considerations separate and apart from the attorney's work on the case."].)

To borrow an example from RUPA's commentary, such matters are similar to transactions involving brokerage firms, which are typically paid on commission. (See Greene, *Differential Commissions As A Material Fact* (1985) 34 Emory L.J. 507, 507.) The RUPA commentary suggests that, when work on the stock trade remains ongoing at the time of dissolution, the firm has an interest in finishing the transaction in order to get paid for work already performed. (See RUPA (1997) § 603, cmt. 2 ["[A] partner who leaves a brokerage firm ... must exercise care in completing on-going client transactions and must account to the firm for any fees received from the old clients on account of those transactions."].)

None of these considerations holds true for an hourly-fee matter, where no additional work need be performed to wind up a law partnership's interest. (See *supra* 29-30.) So whatever the merits of *Jewel* (and the trustee's other cases, which we address momentarily), working on an hourly-fee matter post-dissolution and post-discharge is not "winding up," and the dissolved partnership cannot claim an interest in a former partner's work stretching into the future. And, of course, our case is even further afield, because here an entirely different *firm* is handling the work. (ER8 ["Here, Defendants are pre-existing third-party firms that provided substantively new representation ... well beyond the capacity of either Heller or its individual Shareholders."]; cf. *Thelen*,

supra, 24 N.Y.3d at p. 29 [the trustee's cases "involved disputes between a dissolved partnership and a departing partner, not outside third parties"].) Orrick is not winding up Heller's hourly-fee matters—it is handling Orrick's matters.

b. The trustee's other cases do not fill these substantial gaps.

First he appeals to vintage, citing three nineteenth-century cases for the proposition that the "Unfinished Business Rule" is "extraordinarily long-established." (OB17.) But these cases did not address whether prosecuting an hourly-fee matter after the dissolved partnership has been discharged by the client constitutes "winding up" the former partnership's "unfinished" business. In *Osment v. McElrath* (1886) 68 Cal. 466, 469, a three-justice panel held that when a partnership between attorneys is dissolved, an agreement by one partner to wind up the business, and pay the other his portion of the proceeds, was not void for lack of consideration. *Little*, *supra*, 101 Cal. at p. 560, was a case in which a surviving partner agreed to pay his former partner's widow her share of a contingency fee, then signed a new contract with the client to cut her out. And *Denver v. Roane* (1878) 99 U.S. 355, 357, similarly affirmed enforcement of a partnership agreement providing that partners would share in fees earned after dissolution on cases previously handled by the partnership.

The trustee suggests that *Osment*—which speaks of "cases ... in some of which the fees were, and in others were not, contingent" (68 Cal. at p. 467)—involved hourly-fee matters and foretold the Court of Appeal's decision in *Rothman*. (OB25.) That is highly unlikely. In the nineteenth century, legal matters were not paid on an hourly basis. Historically, "legal services were sold at fixed fees that reflected relatively routinized and simple tasks." (Pardau, *Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of its Demise May Be Greatly Exaggerated* (2013) 50 Idaho L.Rev. 1, 2.) Drafting a will may have cost $100; an uncomplicated adoption, $500. (*Id.* at pp. 2-3.) These rates were originally codified by statute, with states "regulat[ing] what legal fees could be paid" for particular services. (*Id.* at p. 2.)

By the early twentieth century, billing methods included fixed fees for particular tasks, annual retainers, discretionary "eyeball" methods, and contingency fees. (Pardau, *supra,* 50 Idaho L.Rev. at p. 3.) It was not until the Supreme Court's decision in *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 775—which held that state bar minimum-fee schedules violate federal antitrust law—that hourly-fee contracts became widespread. (*Gisbrecht v. Barnhart* (2002) 535 U.S. 789, 801; see Ross, The Honest Hour: The Ethics of Time-

Based Billing By Attorneys (1996) pp. 16-18.) There is no way the trustee's old cases had the modern hourly-fee matter in mind.

In addition to age, the trustee appeals to volume, devoting many pages to case summaries and string cites. (OB19-25, 29-30, 39-40.) But over and over, these cases merely re-apply the same principles discussed above to often-ugly disputes between former fiduciaries over contingency-fee matters. Take, for example, *Rosenfeld, Meyer & Susman v. Cohen* (1983) 146 Cal.App.3d 200. (OB20-21.) That case concerned two partners who worked on a contingency-fee matter for five years as members of a 19-person partnership and then, shortly before settling the case for $33 million, dissolved the partnership and attempted to keep the fees for themselves. (*Id.* at pp. 209-211.) The court called foul, and held that the case was the "unfinished business" of the "dissolved partnership" and the two partners had "breached their fiduciary duties by failing to complete the case for the [benefit of the] dissolved partnership." (*Id.* at p. 216.)

Most of the trustee's cases are to similar effect. *Fox v. Abrams* (1985) 163 Cal.App.3d 610, applied *Jewel* to former members of a law corporation's continued work on non-hourly-fee cases. (*Id.* at pp. 612-615 & fn. 2.) *Grossman v. Davis* (1994) 28 Cal.App.4th 1833, likewise applied *Jewel* to a contingency-fee case; a former partner won a judgment post-

dissolution in a matter that had been pending at the time of dissolution, and then had to pursue funds from the insurer of the insolvent defendant. (*Id.* at pp. 1836-1837.)[9] And other cases are distinguishable entirely. Take *Anderson, McPharlin & Connors v. Yee* (2005) 135 Cal.App.4th 129 (cited at OB30). There, the court assessed a provision in a partnership agreement that required departing partners working on cases that had been pending at the firm to pay 25% of post-departure revenues on those matters back to the firm, for two years after the partner departed. (*Id.* at pp. 131-133.) But the court assessed this provision under the Rules of Professional Conduct, not as a matter of some "unfinished business doctrine." That such a provision does not violate the Rules of Professional Conduct says nothing whatsoever about whether that is what RUPA *requires*, much less on hourly matters.

c. Only a single decision of the Court of Appeal has considered whether the rule articulated in *Jewel* should be extended to hourly-fee matters: *Rothman v. Dolin.*[10] But *Rothman* is both distinguishable and unpersuasive.

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[9] The same is true of the cases the trustee cites to support his assertion that the "overwhelming majority of decisions in other states agree with California ... in holding that a dissolved law partnership is entitled to recover profits from unfinished *contingency* cases." (OB39, italics added.)

[10] The trustee contends (OB29-30) that *Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, also involved

First, *Rothman* actually *agreed* that hourly-fee cases are different: "[I]f the Firm's caseload had consisted of only hourly rate cases, it could have simply closed its books on the date of dissolution, and all work performed subsequently would have constituted new business of the respective parties." (20 Cal.App.4th at p. 758.) It was because "the Firm's business consisted of a mixture of hourly rate and contingency fee cases"—and all of appellant's clients paid hourly while all of respondent's clients paid on contingency—that the court thought *Jewel* should apply. (*Id.* at p. 759.) Here, only hourly-fee matters are at issue.

Second, *Rothman* did not consider the language of UPA (leave aside RUPA). Instead, the court simply thought that "policy reasons" underlying *Jewel* should be extended to hourly matters. (*Rothman, supra,* 20 Cal.App.4th at p. 758.) Otherwise, it speculated, attorneys could "shun[] contingency fee cases in anticipation of a possible dissolution of the law firm, and scrambl[e] to get the hourly rate cases rather than the contingency fee cases upon dissolution." (*Ibid.*)

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hourly-fee matters, but the opinion contains no discussion of whether or why *Jewel* should be extended to hourly-fee matters. The trustee also cites two out-of-state cases, *Robinson v. Nussbaum* (D.D.C. 1997) 11 F.Supp.2d 1, 4-5 and *In re Labrum & Doak, LLP* (Bankr. E.D. Pa. 1998) 227 B.R. 391, 408. (OB25, n.19.) Neither adds additional reasoning beyond *Rothman*.

That the court did not even consider the statute at issue here is enough to sap *Rothman* of persuasive force. And its reasoning is wrong in any event. There is no evidence that such a scramble for hourly-fee matters ever has occurred. And it is the trustee's rule that would rip firms apart. As *Thelen* explains, "because the trustee[] disclaim[s] any basis for recovery of profits from the pending client matters of a former partner who leaves a troubled law firm before dissolution, their approach would encourage partners to get out the door, with clients in tow, before it is too late, rather than remain and work to bolster the firm's prospects." (24 N.Y.3d at p. 32, italics omitted.)

So *Rothman* and its policy considerations, like all of the cases cited by the trustee, do nothing to undermine the bedrock rule that the firm that does the work is entitled to the profits it earns.

C. Even If Winding Up Partnership Business Did Include "Completing" Hourly-Fee Matters, The Firm That Actually Does The Work Is Entitled To Its Hourly Fee As "Reasonable Compensation."

There is another, independent reason that partnership law does not entitle the trustee to claw back profits that a third-party firm earned on hourly-fee matters. Even if (contrary to what we've just shown) "winding up" meant continuing to work on an hourly-fee matter into the indefinite

future—even after the client discharged the dissolved firm and paid its bills—section 16401(h) explicitly entitles a partner leaving a dissolving firm to "reasonable compensation" for work done "winding up". In the context of an hourly-fee matter, "reasonable compensation" is the rate for legal services that the client negotiated in the legal market and agreed to pay its new counsel. There is no sound basis for Heller to second-guess the fees that clients agreed to pay the defendant firms (and, as we discuss below, at 49-50, such a rule would invite endless litigation).

The modern rule—that partners are entitled to "reasonable compensation" for work done to wind up a partnership—reflects a departure from earlier partnership law underlying nearly all of the trustee's authorities. Former section 15018, part of UPA, provided that "[n]o partner is entitled to remuneration for acting in the partnership business, except that a *surviving partner* is entitled to reasonable compensation for his services in winding up the partnership affairs." (Italics added.) "Surviving partner" was a term of art, referring only to the limited situation in which a fellow partner had died. (*Jacobson, supra,* 29 Cal.2d at p. 29.) As the Ninth Circuit observed, *Jewel* was "primarily based" on its understanding of this no-compensation rule—specifically, that unless the partnership dissolved because a partner died, no partner was entitled to "extra" compensation, beyond their ordinary share of partnership profits, for

winding up pending matters. (*Heller*, *supra*, 830 F.3d at p. 974.)

RUPA abandoned that rule. As the trustee acknowledges (OB31), the partnership law now provides that all partners are entitled to "reasonable compensation for services rendered in winding up the business of the partnership." (§ 16401(h).) What the trustee does not acknowledge, however, is that this Court already has construed the term "reasonable compensation." "Reasonable compensation," this Court explained in *Jacobson*, is payment "attributable to the *services and skill* of the surviving partner." (29 Cal.2d at p. 30, italics added; see also *Painter v. Painter* (Cal. 1894) 36 P. 865, 870 ["prudence, skill, and industry"].) The only profits owed back to the former firm, if any, are those earned on the "capital invested in the business" of the former firm—for instance, in the example discussed by *Jacobson*, "the old firm's equipment." (*Jacobson*, *supra*, 29 Cal.2d at pp. 30-31 [discussing *Painter*]; see 14A Fletcher, Cyclopedia of the Law of Corporations (2016) § 6897 [defining "capital" as "the actual property or estate of the corporation"].)

In an hourly-fee matter, the fees charged post-dissolution are directly "attributable to the services and skill" of the counsel who did the work. Accordingly, reasonable compensation means the freely negotiated hourly rate. This is unlike compensation for contingency-fee matters—which is

based on a percentage of the client's eventual recovery, and takes into account the risk the firm bears before such recovery materializes, and thus the former firm's capital investment in the matter. For hourly matters, the market for legal services defines what compensation is "reasonable," and here, that value needs no approximation or proxy—each of the former Heller clients negotiated rates, in the open market, with each of the defendant law firms.

The trustee responds that Heller deserves a share of the hourly fees paid to Orrick as compensation for Heller's "invest[ment of] substantial resources into building [its] practice areas, marketing, developing lawyers, and related efforts, which are necessary to attract the hourly business matters the partnership is able to secure." (OB33-34.) But he cites neither case law nor record materials supporting this extraordinary contention, and he has matters backwards. Here, the hourly fees earned on these matters owe nothing to Heller's capital investment. Heller's capital investment failed, and Heller fired its clients. Instead, it is *Orrick's* investment in "building [its] practice areas, marketing, developing lawyers, and related efforts" that attracted clients to Orrick after Heller closed its doors. It was Orrick's resources—its "administrative support ... research fees ... document preparation ... [and] space allocation"—that the attorneys used when working on hourly-fee matters at Orrick. (ER14.) And it

is Orrick's capital investment that is appropriately built into Orrick's hourly rates.

D. Policy Considerations Weigh Heavily Against The Trustee's Proposed Rule.

According to the trustee, "sound policy reasons" support his proposed rule. (OB23, 40-41.) On the contrary, long-established public policies—including the very considerations discussed in *Jewel* and *Howard*—weigh heavily against the trustee's rule. Giving defunct law firms a cause of action to seize hourly-fee profits earned by firms that take on clients the defunct firm could not represent is a recipe for endless litigation. It would undermine client choice and attorney mobility, ultimately diminishing rather than increasing the assets available to future creditors; it would destabilize law firms; and it would run afoul of ethical provisions concerning attorney's fees.

1. The trustee's rule would spawn a cottage industry of fee litigation.

As an initial matter, the trustee's approach would spark a profusion of satellite litigation over fee apportionment among law firms. That is because it would be utterly unworkable in view of the innumerable fee arrangements, staffing formulas, and capital and compensation structures in today's legal market. And it would proliferate not just in the context of law firm bankruptcies, but all law firm dissolutions.

Start with the question of which *matters* the defunct firm is entitled to tax. (See *In re Thelen LLP* (2d Cir. 2013) 736 F.3d 213, 225 [If a law firm is entitled to post-dissolution profits from a client matter, "how does New York law define a 'client matter'?"].) Say that Heller was advising a client about compliance with environmental regulations. Following dissolution, a state brings an enforcement action against the former Heller client, and a new law firm (which employs a former Heller partner) is hired to defend the new lawsuit. Is this newly filed litigation part of the same matter? Does it depend on the scope of the matter as defined in Heller's original engagement letter? In the new firm's engagement letter? What if Heller didn't have an engagement letter specific to environmental advice, but instead received an annual retainer for all work on all cases? Or is this a question of state property law (or partnership law?), as opposed to a matter of contract? If so, which state?

Or, imagine instead that Heller was defending a patent-infringement suit. After dissolution, the litigation is handled by a new firm. Subsequently, Heller's former client files a complaint of its own, in a new court, asserting its own patents against the plaintiff. Are those part of the same matter? What if instead it strikes back with antitrust claims? Against additional parties? And does it matter if primarily non-Heller attorneys (for instance, antitrust specialists) staff the matter at the new firm? What about *only* non-Heller attorneys? What

if the former Heller attorney leaves the second firm and goes to a third firm? Is that one a defendant now too?

And how long will this last? Through trial? Through appeal? (See ER13 ["the Trustee suggests that Heller's estate is entitled to a share of all profits earned even on litigation lasting long after Heller ceased to function, into the indefinite future"].) This could mean ongoing bankruptcy supervision for decades. Judge Breyer invoked *Bleak House* (*id.*, fn. 9), but we need not look to fiction. There are matters on the trustee's list of "unfinished business" that remain active even today, more than eight years after Heller filed for bankruptcy. (E.g., compare ER424 [identifying "Florida Tax Litigation" for DIRECTV] with *Fla. Dept. of Revenue v. DIRECTV, INC.* (Fla. Sup. Ct., argued Apr. 6, 2016, No. SC15-1249).)

This analysis—complicated enough as it is, and having to be duplicated for every case—would only establish the relevant *matters*. Then the court would have to calculate how much profit the firm earned on each matter, and how much of that profit the trustee could seize. This would be a monumental task. The court would have to dig into the books of each defendant firm—here, some 50 defendants in all. The briefing below only confirms the complexity of the analysis. (E.g., Dkt. Nos. 253, 261, *In re Heller Ehrman LLP* (Bankr. N.D. Cal. Adversary No. 10-3234); ER17-40.)

Start with the trustee's "allocation of overhead." (OB1.) For each firm, and on each matter, the court would have to

assess the costs to deduct from revenues. But which ones? The portion of an associate's salary devoted to working on that case? Office overhead for attorneys who worked on the case, when they were working on it? The recruiting costs related to lateral attorneys who worked on it? An amortized proportion of overhead for photocopiers, secretarial services, and the like? According to the trustee, only certain costs actually incurred on the matter itself can be considered. (ER31-32.) But that would systematically undercompensate the firm for all of the costs without which it couldn't handle the client's matter, much less exist. Indeed, if we can draw any lesson from Heller's demise, it's that a law firm cannot continue to serve its clients if it can't balance its books.

Then there is the question of what constitutes "reasonable compensation" if not the negotiated hourly rate. (OB1.) Among the concepts the trustee urged the bankruptcy court to assess were each firm's "general goal" for profit margin; the actual "average profit margin" on all firm matters; and the profit margins earned by the firm on each matter. (*Heller* (Bankr. N.D. Cal. Adversary No. 10-3234), Dkt. 253, pp. 4-6.) He also urged scrutinizing the many different ways of compensating partners (as reflective of profitability), including how much of a firm's profits are distributed; the timing and percentage of distributions; and criteria for partner compensation. (*Id.* at pp. 7-9, 14-17.)

And how would a court judge how much profit is too much? Is the benchmark that firm's own prior performance? Heller's? Is it measured against the marketplace? How will a court get information about profitability from comparable firms that aren't party to the litigation, especially for smaller firms that don't publish their numbers? At the end of the day, even if all of these questions were answered, and susceptible of easy calculation, what possible principle would tell a court that a firm profited too much?

These questions point to the fundamental problem with a rule that treats reasonable compensation as something less than the market rate for hourly fees. Clients would not simply pay counsel the going rates on their matters; counsel would not simply recoup market rates for services rendered. Instead, matters would be encumbered by a patchwork of payment obligations, which would generate dispute after dispute over which piece of an hourly-fee matter is whose. (Cf. *Champion, supra,* 201 Cal.App.3d at p. 780 [disapproving a rule that creates a "web" of payment obligations that "reaches far into the community, entangling other former partners and former clients"].) The clearer rule is the fairer one: The firm that does the work gets paid for it.

2. The trustee's rule would impede client choice, limit lawyer mobility, and ultimately diminish the assets available to bankruptcy estates.

Next, the trustee's rule would run headlong into basic precepts of the law governing lawyers—ultimately to the detriment of bankruptcy estates. California places great value on "a client's right to chosen counsel." (*Kirk v. First Am. Tit. Ins. Co.* (2010) 183 Cal.App.4th 776, 792; see *Matter of Van Sickle* (Rev. Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989 [a retainer agreement prohibiting a client from substituting another attorney without cause, unless counsel consented, violated "fundamental public policy"].) That right is significantly strained, however, when a law firm closes its doors and announces that it no longer will represent its clients, forcing them to find new representation. When that happens, "the interests of the clients must prevail over all competing considerations if ... the firm's dissolution is to be accomplished in a manner consistent with professional responsibility." (COPRAC Formal Opn. 1985-86; see also *Champion*, *supra*, 201 Cal.App.3d at p. 783 [California "public policy" requires courts "to protect the interests of the partnership's former clients" over the interests of the partnership].)

The trustee's rule, by authorizing a defunct firm to exercise a dead-hand grip on its former matters, would limit

those clients' choice of counsel at a moment when they need it most. Effectively, the trustee's rule would place a tax on any client that hired a firm employing a partner that represented it previously. From the perspective of the client, they would have to wonder if they were receiving the same level of service. (*Thelen*, *supra*, 24 N.Y.3d at p. 32; see also *Cazares*, *supra*, 208 Cal.App.3d at p. 291 ["the ability of lawyers to perform their important professional function in society is in the long run dependent on assurances they will be fairly compensated for their work."].) From the perspective of the firm, this trustee tax would make every such client less profitable than every comparable client. Firms would thus find it financially unwise to take on those lawyers' former matters, because doing so would saddle them with the financial burden of paying profits to the defunct firm. As Judge Breyer explained:

> It is not in the public interest to make it more difficult for partners leaving a struggling firm to find new employment, or to limit the representation choices a client has available, by establishing a rule that prevents third-party firms from earning a profit off of labor and capital investment they make in a matter previously handled by a dissolved firm.

(ER13-14.) Ultimately, firms that take on the former partners of a dissolved firm may instead be compelled to inform potential clients: "Sorry—we just can't afford to take your case." Accordingly, "the Trustee's position would all but force

former Heller clients to retain new counsel with no connection to Heller or their matters." (ER14, fn. 10.) The client thus would be "deprived of representation by the very lawyer most familiar with the case and most desired by the client." (*Champion*, *supra*, 201 Cal.App.3d at p. 783.) That result would be "a major inconvenience for the client[] and a practical restriction on a client's right to choose counsel." (*Thelen*, at p. 32.)

The trustee does not dispute that his rule would impose just this sort of tax. Instead, he attributes the underlying policy concerns to *Thelen*—which, he says, "applies the law of New York, not California," and is "a 'no compensation' UPA jurisdiction," whereas California is a "reasonable compensation" RUPA jurisdiction. (OB38.) In short, his theory is that the "no compensation" rule in New York would lead to a harsher result that more significantly impedes client choice, and that California's public policy is different. But just how significant an impairment of client choice the trustee thinks this Court should tolerate, he does not say, and principles of client choice are equally important in California. (E.g., *Kirk*, *supra*, 183 Cal.App.4th at p. 792; *Champion*, *supra*, 201 Cal.App.3d at p. 783 ["as a practical matter, the client [would be] deprived of" counsel of choice if "[a]n attorney not formerly a partner may take the client's case" unencumbered by any duty to account, but a "former partner could take the case only as a partially paid volunteer"].)

As these authorities recognize, there is little sense to the trustee's contention that "the client's right to an attorney of one's choice and the rights and duties of partners regarding unfinished business do not conflict because once the client has paid fees to an attorney the client has no interest in the allocation of those fees." (OB23, citing *Jewel*, *supra*, 156 Cal.App.3d at p. 178; see also OB40-41 [dismissing the idea that attorneys would " 'find it difficult to secure a position in a new law firm' if they were forced to remit" future hourly-fee profits].) On the contrary, it would ignore "common sense and marketplace imperatives" to pretend that a law firm's decision to "hire departing partners or accept client engagements" from defunct partnerships would not be affected by its ability to earn a profit on that work. (*Thelen*, *supra*, 24 N.Y.3d at p. 32.)

According to the trustee, this "speculation is belied by the reality in these very cases," in which "[a]ll of these Law Firm Respondents brought on Heller partners knowing that the Unfinished Business Rule existed" and "[t]he risk of having to share profits with creditors did not stop them." (OB41.) On the contrary, at the time of Heller's demise, no court had ever accepted the trustee's novel bankruptcy theory, and Heller shareholders uniformly testified they did *not* believe Heller had any right to future hourly-fee profits earned by third-party law firms. (SER141-156; *supra* 23.)

Ultimately, by making it harder for clients and lawyers to find new homes, the trustee's rule would ensure less payment to creditors, not more. The trustee contends that for law firms in bankruptcy, the "Unfinished Business Rule ... is critical to marshalling the available assets for the benefit of the partnership's creditors." (OB32-33.) It surely is true that this trustee, at this moment in time, could grab more assets if a court were to adopt his rule, but that will just as surely diminish the assets available to bankruptcy estates going forward.

That is because serving clients well by seamlessly transitioning their matters to the firms of their choosing will maximize the estate's assets—and failing to do so can cause major losses. (SER75-77, 119.) Thus, one expert explained, "disruption to client matters" at the time of dissolution can cause "the value of accounts receivable and unbilled work-in-process [to] suffer[] a severe drop in value ... anywhere from 35%-75%." (SER77.) Put bluntly: "Clients will simply not pay [when there is] disruption of their matters." (SER73; accord SER97-98, 114, 236.) And this transition must be accomplished quickly; the value of the firm's existing "fee inventory degrades at 5%-10% per week." (SER76.)

Moreover, encouraging partners to move to other firms, along with associates and staff, reduces expenses and liabilities—it takes salaries off the books; eliminates the cost of storing client files; and reduces the risk of malpractice

claims. (ER197; SER77, 119-120, 169.) Accordingly, Heller's own shareholders understood that "facilitat[ing] the movement of lawyers and work" "reduc[es] ... cost[s] and maximize[s] the likelihood of collection" (SER119), thus "ensur[ing] that Heller's assets were preserved" (SER75) and placing the estate in the best position to pay its debts. (SER62, 77-78, 91-92.)

For all of these reasons, the trustee is incorrect that the firms that have chosen to defend against his claims are merely seeking to "elevate the financial interests of lawyers over the rights of largely non-lawyer creditors." Nor is it about law firms "changing the rules for their own financial benefit" or seeking some "exception" for "large law firms." (OB36, 39-40.) The simple, clear, and fair rule that we advocate here protects the rights of clients and preserves value for creditors.

3. The trustee's rule would destabilize law firms.

In *Howard v. Babcock*, this Court expressed concern for "preserv[ing] the stability of the law firm." (6 Cal.4th at pp. 419-420.) The trustee professes concern about this too (OB27-28, fn. 20), but his proposed rule would accomplish precisely the opposite, encouraging partners to jump ship at the first sign of difficulty.

In the bankruptcy court, the trustee candidly conceded that "predissolution," if a shareholder left Heller and "took ...

a big fat case" with him, the shareholder had no duty to account for future profits earned on the matter, and Heller had no interest in the case, the client, or the former shareholder. (SER202-203.)

As a practical matter, therefore, the trustee's argument means that when a firm is in business, partners are free to leave and clients are free to follow—but those who stay loyally until the end will be saddled with the trustee tax wherever they go. The consequence is simple: The trustee's "approach would encourage partners to get out the door, with clients in tow, before it is too late, rather than remain and work to bolster the firm's prospects." (*Thelen*, *supra*, 24 N.Y.3d at p. 32; see ER13 [district court order].) This makes quick work of the trustee's argument that his rule would "prevent[] partners from competing for the most lucrative client matters during the life of the partnership so that they may retain those matters in a dissolution." (OB23, citing *Jewel*, *supra*, 156 Cal.App.3d at p. 179.) It is the trustee's rule that would encourage competition and defection.[11]

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[11] The trustee similarly contends that his rule stabilizes law firms by " 'discourag[ing] former partners from scrambling to take physical possession of files and seeking personal gain by soliciting a firm's existing clients upon dissolution.' " (OB23, quoting *Jewel*, *supra*, 156 Cal.App.3d at p. 179.) Any concern about client files is answered by California Rule of Professional Conduct 3-700(D)(1), which requires lawyers to "promptly release ... at the request of the client, all the client

4. The trustee's rule is inconsistent with ethical rules.

Finally, the trustee's rule conflicts with longstanding ethical rules. California Rule of Professional Conduct 4-200(a) forbids members from "charg[ing], or collect[ing] an illegal or unconscionable fee." A fee to be paid by a former partner to his former partnership is unconscionable if it has "no relationship whatsoever to the amount of service provided or to be provided by the partnership to the client." (*Champion, supra,* 201 Cal.App.3d at p. 783.) In *Champion*, the former partner argued that "if his clients [were] required to turn over to the [partnership] most of the legal fees for pending cases formerly with the partnership, the partnership will be exacting an unconscionable fee within the meaning of rule 2-107." (*Id.* at p. 782.) The court agreed.

So too here—the trustee seeks to recover fees for work that Heller *did not and could not do.* Instead, attorneys at Orrick did the work after Heller fired its clients and shut its doors. Permitting Heller to nonetheless collect a fee that has "no relationship whatsoever to the amount of service" Heller provided—which was exactly zero—would conflict with Rule 4-200(A). (Cf. *Thelen, supra,* 24 N.Y.3d at pp. 31-32 ["By allowing former partners of a dissolved firm to profit from

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papers and property." And "soliciting a firm's clients upon dissolution" is expressly permitted by section 16404(b)(3).

work they do not perform, all at the expense of a former partner and his new firm, the trustees' approach creates an 'unjust windfall.' "].)

In this regard, this case is utterly different from cases like *Rosenfeld*, *Jewel*, and *Howard*. As the trustee recognizes, those "unfinished business cases" typically dealt with variations on the same situation: one or more partners who left an existing partnership to set up a competing practice, often under questionable circumstances, causing the partnership to dissolve.[12] A case like this presents far different policy and ethical implications than were at play in the trustee's cases. The former Heller shareholders did not withdraw from Heller to set up a competing practice. They loyally stayed until the end, working the phones after dissolution to find new jobs for associates and staff (SER158-59, 161-63, 167-69, 171-75); doing their best to bill and collect from clients for work already performed, all to the benefit of the Heller estate (SER162, 168, 174-75); and ensuring that

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[12] (E.g., *Rosenfeld*, *supra*, 146 Cal.App.3d at pp. 209-211 [two partners worked on a contingency-fee matter for five years as members of a 19-person partnership and then, shortly before settling the case for $33 million, dissolved the partnership and attempted to keep the fees for themselves]; *Fox*, *supra*, 163 Cal.App.3d at p. 612 [three shareholders left a four-person law corporation to set up a competing practice]; see also *Howard*, *supra*, 6 Cal.4th at p. 420 [criticizing the "propensity of withdrawing partners in law firms to 'grab' clients of the firm and set up a competing practice"].)

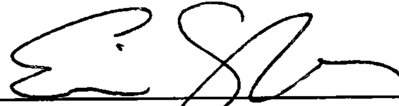
client files were promptly transferred to new firms so that Heller would not incur malpractice liability. (SER158-59, 165, 169, 174.)

And, unlike in the trustee's cases, the Heller shareholders did not appropriate a partnership opportunity for the simple reason that there was no partnership with which to compete. Heller not only dissolved; it locked its doors, fired its employees, and took back their computers. When the shareholders joined third-party firms, they were not competing with Heller or taking partnership opportunities that Heller could have realized. Heller could no longer compete or realize any opportunities at all. And under those circumstances, unlike in a case like *Jewel*, it would be inconsistent with ethical rules to require fee-sharing for work that Heller did not and could not do.

CONCLUSION

For the reasons stated above, this Court should hold that a law firm's interest in a pending hourly-fee matter ends when the client terminates the firm and pays its bills.

Respectfully submitted,



Eric A. Shumsky
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February 2, 2017

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Defendant-Respondent Orrick, Herrington & Sutcliffe LLP, pursuant to Rule 8.204(c)(1) of the California Rules of Court, certifies that Respondent's Answering Brief contains 13,659 words, as counted by the word count of the computer program used to prepare the brief.

Dated: Feb. 2, 2017 Orrick, Herrington & Sutcliffe LLP

Eric A. Shumsky
Attorney for Defendant-
Respondent Orrick, Herrington &
Sutcliffe LLP

PROOF OF SERVICE BY MAIL

I, Jeffrey Ball, am a citizen of the United States, over eighteen years old, and not a party to this action. My place of employment and business address is Orrick, Herrington & Sutcliffe LLP, 405 Howard Street, San Francisco, California 94105.

On February 2, 2017, I caused to be served the **DEFENDANT-RESPONDENT'S ANSWERING BRIEF** addressed to the following individuals:

Christopher D. Sullivan DIAMOND MCCARTHY LLP 150 California Street San Francisco, CA 94111	Plaintiff and Petitioner Heller Erhman LLP
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I am employed in the county from which the mailing occurred. On the date indicated above, I placed the sealed envelopes for collection and mailing at this firm's office business address indicated above. I am readily familiar with this firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the firm's correspondence would be deposited with the United States Postal Service on this same date with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 2, 2017 at San Francisco, California.

Orrick, Herrington & Sutcliffe LLP

JEFFREY BALL