NO. S236208

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HELLER EHRMAN LLP,

Plaintiff and Petitioner,

v.

DAVIS WRIGHT TREMAINE LLP, ET AL.,

Defendants and Respondents.

After a decision by the Ninth Circuit Court of Appeals,
Case Nos. 14-16314, 14-16315, 14-16317, 14-16318

AMICUS CURIAE BRIEF OF 32 NATIONAL AND INTERNATIONAL LAW FIRMS IN SUPPORT OF RESPONDENTS

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INTRODUCTION

This Court granted the United States Court of Appeals for the Ninth Circuit's request to address whether a dissolved law firm has an interest in unresolved legal matters the firm was retained to handle on an hourly basis. (*In re Heller Ehrman LLP* (9th Cir. 2016) 830 F.3d 964, 966.) This Court should answer that question in the negative.

A law firm does not own its clients' legal matters. Clients do. Although lawyers provide legal advice, clients make the critical decisions, one of the most critical being who represents them. For that, the law is clear — clients can choose to hire and fire their lawyers at any time and for any reason.

Heller's "unfinished business" theory cannot be reconciled with these bedrock attorney-client principles. Under its approach, a client's

ongoing legal matter becomes the property of a law firm when the firm dissolves — that is, it becomes something for the dissolved firm to barter rather than something for the client to control. If former partners of the dissolved firm are retained to handle those matters at new firms, the dissolved firm (not the new firm actually providing legal services) gets the profit.

There is no reason for this windfall. Because clients are always free to take their legal matters elsewhere without incurring an obligation to compensate a firm for legal work it has not yet performed, no firm ever has a property interest in the client's matter. Neither a firm's dissolution nor the partnership laws applied on dissolution can change that basic fact. Indeed, California partnership law permits former partners to compete *immediately* upon dissolution for the same matters Heller calls the property of the dissolved firm.

More significantly, Heller ignores the fact that a dissolved firm's abandoned clients will be harmed if their former law firm has an ongoing property interest in their matters. Having been harmed when they were told they needed replacement counsel for their matters, these clients would be further harmed by Heller's "unfinished business" theory. In many cases, a displaced client faces the least risk and minimizes additional legal costs by using lawyers from the defunct firm — lawyers who know the case and what needs to be done. Yet that representation might not be possible under Heller's proposal, where the dissolved firm is entitled to *all* the profits if the new firms joined by those former Heller lawyers are retained to work on those matters. The new firm is under no obligation to provide legal services at all and certainly not for free. Indeed, amici are unlikely to take on a non-pro bono matter where the profits of the engagement would go to a now-shuttered competitor.

Heller's theory is bad for the legal profession more generally. Although departing partners could join new firms without fear of "unfinished business" liability *before* dissolution, those partners who stay until the end to try to save their failing firm's fortunes would be saddled with "unfinished business" liability. That makes little sense — it encourages partners to leave their firms, clients in tow, at the first whisper of financial trouble.

Encumbering a client's "unfinished business" will not benefit creditors. To the contrary, Heller's theory makes it more difficult for former partners to find new firms (which could reduce overhead if they take associates and staff with them) because new firms may not want to sacrifice their profits to the former partner's "unfinished business" liability. It also makes it more difficult for clients during the transition period during which they must find new representation — diminishing the odds the clients will pay the amounts owed to the defunct firm while increasing the likelihood that those clients will bring claims against the dissolved firm for perceived injuries resulting from the fact their matters were not completed.

ARGUMENT

A. A dissolved law firm has no property interest in a client's unfinished legal matters.

1. Firms have no claim of entitlement to future fees for uncompleted work.

Heller's "unfinished business" theory is antithetical to the practice of law. Relying on *Jewel v. Boxer* (1984) 156 Cal.App.3d 171 and other decisions interpreting the pre-1997 Corporations Code, Heller contends a client's "unfinished business" — that is, future fees for work that has *not*

been done in ongoing hourly fee matters — is forever the property of Heller, notwithstanding that Heller could not have performed the work.

But neither clients nor their legal matters are the property of a law firm or its partners. As this Court has recognized (and as Heller concedes), an entity has a "property" interest in an asset only when it has a legitimate claim of entitlement to that asset. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 208; OBOM:44.) When an entity has only an "attenuated expectancy" in an asset — an interest entirely dependent on another party's exercise of its discretion — that mere expectancy cannot be "likened to 'property.'" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150; and see *Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment* (1986) 477 U.S. 41, 55 [where Congress retained power to change terms of agreement, modified provision "simply cannot be viewed as conferring any sort of 'vested right'" and thus "did not rise to the level of 'property'"].) Thus, a "permanent" state employee who may be fired only for "cause" has a property right in continued employment within the meaning of the state and federal Due Process clauses (*Skelly, supra*, 15 Cal.3d at pp. 207-208), but at-will employees have no such property right because they may be discharged at any time for any reason. (*Barthuli v. Board of Trustees* (1977) 19 Cal.3d 717, 721-723; *Hill v. California State University, San Diego* (1987) 193 Cal.App.3d 1081, 1088.)

A law firm has no "'legitimate claim of entitlement'" to the fees derived from future work for a client. (*Skelly, supra*, 15 Cal.3d at p. 208.) After all, an attorney's performance of future work is entirely at the discretion of the client because the client, not the attorney, has the absolute right to choose its own counsel. From the beginning of the attorney-client relationship to its end, the client has all the power. Although the attorney provides advice and counsel (and can withdraw if that advice is ignored),

the client decides whether to enter into a transaction, to bring a lawsuit, or to settle a claim. (*Robinson v. Hiles* (1953) 119 Cal.App.2d 666, 672.) The client, not the lawyer, controls (and can decide to waive) the attorney-client privilege. (Evid. Code, § 953.) And the client can terminate the relationship with its attorneys at any time, for any reason. (*Jalali v. Root* (2003) 109 Cal.App.4th 1768, 1777; ABA Model Rules Prof. Conduct, rule 1.16, com. 4 ["A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services"].)

Not only does the client have the absolute right to terminate the relationship, but upon termination the only obligation the client has to its lawyers is to pay fees for work *already* performed at the time of discharge. As this Court held in *Fraccasse v. Brent* (1972) 6 Cal.3d 784, 791, a terminated attorney is entitled to only "the reasonable value of the services he has rendered up to the time of discharge" even if his contract with the client provided for a contingent fee payment. (And see *Jalali*, *supra*, 109 Cal.App.4th at p. 1777 ["[A] client has the unilateral right to discharge his or her attorney with or without cause at any time — even on the courthouse steps — and the attorney only has a right to quantum meruit recovery."].) It "is a basic term of the contract, implied by law into it by reason of the special relationship between the contracting parties, that the client may terminate that contract at will," and it "would be anomalous and unjust to hold the client liable in damages for exercising that basic implied right." (*Fraccasse*, *supra*, 6 Cal.3d at p. 791.)

Because a client has an implied contractual right to fire a firm at any time without incurring any obligation to pay for the completion of existing (but not-yet-performed) legal work, it follows that no firm has a property interest in a client's unfinished legal matters. The New York Court of

Appeals recognized as much. Like California, New York does not recognize a property interest in the mere "expectation of any continued or future business" that is dependent on a third party's discretion and therefore "speculative." (*Verizon New England, Inc. v. Transcom Enhanced Servs., Inc.* (2013) 21 N.Y.3d 66, 71-72 [an agreement allowing a party to "terminate the relationship at any time without penalty, cannot support a finding that a transferrable property right existed"].) And in New York, as in California, clients enjoy "the 'unqualified right to terminate the attorney-client relationship at any time' without any obligation other than to compensate the attorney for 'the fair and reasonable value of the *completed services*." (*In re Thelen LLP* (2014) 24 N.Y.3d 16, 28.) Accordingly, the New York Court of Appeal held that a law firm's expectation of fees for future work is "too contingent in nature and speculative to create a present or future property interest." (*Ibid.*) This Court should reach the same conclusion.

2. RUPA does not confer any property interest on law firms.

Nothing in the Revised Uniform Partnership Act (RUPA) requires a different result. Indeed, RUPA says nothing about what constitutes the property of a firm. Under RUPA, "partnership property" is simply defined as "[p]roperty . . . acquired in the name of . . . [t]he partnership." (Corp. Code, § 16204, subd. (a).)[1] RUPA's silence makes sense because partnership laws do not create new property interests; rather, they set forth "default rules" for how otherwise-recognized property rights will be "divided" if and when acquired by the partnership. (*Thelen, supra*, 24 N.Y.3d at p. 28.) Because these are merely default rules, they may be

[1] Undesignated section references are to the Corporations Code.

overridden by the agreement of the partners. (*Jewel*, *supra*, 156 Cal.App.3d at p. 176; OBOM:34 [acknowledging that the "Unfinished Business Rule is a default rule that only applies absent a contrary agreement"].)

Heller relies on the default rule (§ 16404, subd. (b)(1)) governing a partner's duty to the partnership following dissolution. According to Heller, this rule embodies the default "unfinished business" requirement, pursuant to which the former partners of a dissolved firm who continue working on legal matters previously handled by the defunct firm (and the new firms they join) are required to remit all profits associated with that work to the dissolved firm. (OBOM:31.)

As explained below (*post*, pp. 12-14), Heller's argument is premised on a misreading of RUPA. Leaving that error to one side, Heller's argument fails for a more fundamental reason — even if RUPA established this purported "unfinished business" rule, it would not grant the dissolved firm a *property* interest in future legal matters.

That is because the legal matters remain entirely in the control of the client. Dissolution does not render a firm's expectancy of future fees any less "attenuated" or "contingent." (*Korea Supply Co.*, *supra*, 29 Cal.4th at p. 1150.) The client retains the unencumbered and "unilateral right" to choose the attorneys who will complete its legal work. (*Jalali*, *supra*, 109 Cal.App.4th at p. 1777.) If anything, the firm's dissolution renders the firm's expectation of receiving legal fees all the more speculative — even under Heller's theory, the firm would be entitled to fees only if the client brought its legal work to the firm now employing the dissolved firm's former partner.

For these reasons, the "*Jewel*" waiver did not transfer any property interest to its departing partners because the firm did not have any property interest to transfer. Instead, the firm simply agreed to override any RUPA-imposed default rule regarding which parties would be entitled to future hourly fees that might later be earned. Nothing about a firm's dissolution, the RUPA default rule that supposedly applies upon such dissolution, or the partners' decision to override that default rule could *create* a present property interest that did not otherwise then exist.

In any event, Heller's reading of section 16404, subdivision (b)(1) is incorrect. First, Heller's theory depends on the erroneous premise that *completing* unfinished hourly legal matters is part of the "winding up of the partnership business." (OBOM:1.) But as Respondents explain (e.g., Orrick ABOM:24-30), once a dissolved firm's former clients have elected to hire new firms to perform their legal work, the dissolved firm retains no unfinished business to "wind[] up."

Second, Heller's theory fails to account for the Legislature's revisions to the Corporations Code. *Jewel* (Heller's primary authority) held that "any income generated though the winding up of unfinished business" — including fees earned by former partners conducting legal work for the dissolved firm's clients — "is allocated to the former partners according to their respective interests in the partnership." (*Jewel*, *supra*, 156 Cal.App.3d at p. 176.) But as the Ninth Circuit highlighted in its certification order, *Jewel* was interpreting a *former* version of the Corporations Code that incorporated the Uniform Partnership Act (UPA). (*In re Heller Ehrman*, *supra*, 830 F.3d at p. 969.) *Jewel* was premised on former section 15018, which precluded partners in a dissolved firm from receiving "extra compensation for services rendered in completing unfinished business." (*Jewel*, *supra*, 156 Cal.App.3d at p. 176.) Because individual partners

could not be compensated for performing this work, *Jewel* reasoned that the dissolved firm itself must be compensated. (*Ibid.*)

But with the adoption of RUPA, California law now provides that every partner from a defunct firm is entitled to "reasonable compensation for services rendered in winding up the business of the partnership." (§ 16401, subd. (h).) For hourly-rate matters in particular, there is little reason to think that "reasonable compensation" should not be measured by the rate these partners actually charge the client. (OBOM:31-32; RBOM:10-11, 26-27, 31 [failing to address how "reasonable compensation" should be assessed at all].)

To be sure, *Jewel*'s approach may have made practical sense with regard to certain contingent-fee matters, the primary "unfinished business" *Jewel* itself addressed. (*Jewel*, *supra*, 156 Cal.App.3d at p. 176.) When a firm has handled a contingent-fee case for months or even years, it would be inequitable to allow departed partners to claim for themselves the entire return on that substantial investment of costs and labor. But hourly-rate matters are different — both the defunct firm and its since-departed partners can be fairly compensated for their efforts with payment corresponding to the time worked on a given legal matter before and after the firm's dissolution. RUPA's allowance for "reasonable compensation" to the former partners of a dissolved firm contemplates such equitable division. (§ 16401, subd. (h).) Consistent with Heller's *Jewel* waiver, payment for *future* hourly-rate work performed for a client need not go to the dissolved firm.

Other provisions of RUPA confirm this understanding. RUPA permits former partners to compete for the very matters Heller says are the "unfinished business" of the defunct firm. Recognizing that a law firm

does not control the client relationship, RUPA permits former partners "to compete immediately upon an event of dissolution." (RUPA, § 404, com. 2.) RUPA provides only that a partner must "refrain from competing with the partnership in the conduct of the partnership business *before* the dissolution of the partnership." (§ 16404, subd. (b)(3), italics added.) Consistently, RUPA does not impose a fiduciary obligation on the new firms joined by former partners of the dissolved firm. Nor could it: the new firms such as Respondents (and amici) never agreed to be bound by Heller's partnership agreement.

B. A rule giving a dissolved law firm a property interest in a displaced client's matters would have significant adverse consequences on clients generally and on the practice of law.

This Court's acceptance of Heller's contention that a dissolved firm has a property interest in its former clients' legal matters would harm clients and the legal profession without providing any tangible benefit to creditors.

1. Displaced clients will be harmed if a shuttered law firm maintains a property interest in the client's ongoing matters.

Adoption of Heller's "unfinished business" theory will have severe, concrete consequences on a displaced client's ability to select counsel at the time of a law firm's dissolution.

A shuttered law firm cannot provide any further legal services to clients. That is what happened here. Heller told its former clients that it would no longer be able to provide any legal services, which of course meant they had to look elsewhere. (ER:6; SER:75.) Although Heller's former clients had work that needed to be done, Heller no longer was

willing or able to provide legal representation. The abandoned clients *had* to replace Heller with new law firms, and the only question was which ones.

Under Heller's theory of California partnership law, abandoned clients may have fewer choices in their time of need. Its "unfinished business" theory produces the absurd consequence that a client of a dissolved firm could choose any firm in the world without any financial consequences for the firm hired *unless* it picks a firm that has picked up the dissolved firm's former partners who are already familiar with the client's case. Law firms accepting former partners of a dissolved firm — and *only* such firms — will be subject to "unfinished business" claims if they take on any of the dissolved firm's former matters. The potential liability for these "unfinished business" claims is staggering — the forfeiture of all profits the new firm might make on that matter, regardless of who does the work. This is so even though the new law firms use their own capital and resources to handle the matter and receive nothing from the now defunct firm. (ER:15.)

As a result, the very attorneys who would otherwise be best situated to help their defunct firm's former clients may be unwilling or unable to do so. In general, the new law firm is under no obligation to provide legal services to anyone. Amici (and other law firms across the country) would not generally take on a ***non***-pro bono engagement without an expectation of profits. Accordingly, under Heller's view of the law, firms would be incentivized either to refuse to take on former partners of defunct firms or, if they did take them on, to ensure that these former partners were extricated from all matters they worked on at the now-defunct firm (and likewise ensure that the firm does not otherwise take on these profitless matters). (Rules Prof. Conduct, rule 3-700 [governing an attorney's ability to withdraw from a case].) As other courts have noted, the "notion that law

firms will hire departing partners or accept client engagements without the promise of compensation ignores common sense and marketplace imperatives." (*Thelen*, *supra*, 24 N.Y.3d at p. 32.)

If Heller's proposal is adopted, it could cause significant harm to those who should not suffer at all — Heller's former clients, all of whom already suffered by reason of Heller's failure. Why adopt a rule that would compound that harm? In the majority of matters, the most cost-effective way for a client to mitigate the harm caused by Heller's dissolution was to retain the former Heller attorneys already familiar with the client's matters. But Heller's "unfinished business" rule would make those mitigation efforts more difficult or sometimes impossible. Former Heller partners at new firms might be well situated to protect the displaced clients' interests, but they (and their new firms) would have to accept the former Heller clients with the expectation that Heller could seize the profits from their work.[2]

This is the opposite of what the legal profession desires. When a law firm dissolves, there should be no obstacles interfering with a former client's ability to continue working with attorneys familiar with its pending matters. Displaced clients should not face additional burdens when they are forced by the dissolution of their former firm to retain the new firms that picked up the individual lawyers who were representing them. Continuity is often critical, particularly when a former attorney has knowledge about a

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[2] Clients might try to navigate the distorted legal market created by Heller's "unfinished business" rule by retaining firms that hired former Heller *associates* (not former Heller partners). That "unfinished business" liability would follow a defunct firm's partners but not its associates illustrates the irrationality of the theory.

case that cannot be easily or quickly replicated. And continuity may be the only way to ensure a client is not prejudiced in time-sensitive matters: Transactions must be closed by certain dates to avoid adverse consequences. Regulators may be unwilling to defer witness interviews in civil and criminal investigations. A client may need temporary restraining orders or preliminary injunctions that cannot be delayed without the probability of irreparable harm. Courts may be unwilling or unable to extend litigation deadlines. (Fed. Rules Civ. Proc., rule 6(b)(2) ["A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)"].)[3]

In short, former partners of a dissolved law firm may be in the best position to handle a client's matters with minimal disruption and cost. But because "unfinished business" liability would follow those former partners, other firms would lack incentive to admit those partners or take on their former matters. As a result, displaced clients would frequently be required to transfer their matters to firms with no attorneys with prior knowledge of the cases, potentially prejudicing these clients and causing them to incur additional costs while the new firms familiarize themselves with the new matters. The injury suffered by a displaced client should not be compounded by a rule allowing the shuttered law firm's estate to interfere with the client's ability to obtain cost-effective representation.

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[3] These issues are particularly acute with regard to litigation matters. While many pre-existing transactional matters may be more limited in scope and duration, complex litigation can last years and may involve proceedings in a variety of forums.

2. Law firms and the legal profession will suffer, with no benefit to creditors.

A rule giving a dissolved law firm a property interest in its former client's unfinished business would harm both law firms and the legal profession generally.

Rather than preserving the assets of a distressed law firm, the "unfinished business" theory would have the opposite effect. It is undisputed that the partners of a failing firm can leave *before* dissolution without incurring any unfinished business liability for their new firm. (ER:14.) Yet under Heller's theory, when those partners find new professional homes *after* their firm dissolves and their new firms are retained to handle "unfinished business," the dissolved firm has a right to receive all the profit from those matters. (ER:14.) This rule is not good for the very law firms Heller purports to protect. To the contrary, it encourages partners to leave a law firm at the first signs of financial trouble so they can maximize their own mobility and find new homes for the clients they serve. As the New York Court of Appeals recognized, the "unfinished business" rule "encourage[s] 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.)

Moreover, once a law firm's dissolution becomes a certainty, partners who are able to leave should be encouraged to do so. Their departure helps reduce the firm's overhead and liability expenses, thereby conserving the dissolved firm's remaining assets for distribution to its creditors. Some of the departing partners may take associates and staff with them to their new firms. Other courts have recognized that the paramount interest in recent law firm dissolutions was to reduce the

expenses of the partnership. (*Thelen, supra*, 24 N.Y.3d at pp. 23-27 [discussing the Thelen and Coudert Brothers dissolutions].)

As Respondents explained, the Heller wind down was designed to maximize the firm's concrete revenues (accounts receivable and unbilled time). (Jones Day ABOM:5.) Unlike the speculative future revenue that Heller *might* have earned from an ongoing client matter but for its dissolution, payment for work actually done was tangible property of the firm. But Heller's "unfinished business" rule would make the collection of these unpaid fees far more difficult. Displaced clients unable to find fast and efficient replacement representation will be less willing to pay the dissolved firm, spending their money instead on duplicative ramp-up costs associated with hiring new counsel unfamiliar with the matter. Without continuity in the attorney-client relationship, there may be no one available (or willing) to make a personal request for payment. As the Second Circuit explained, rejecting the unfinished business theory will "reduce expenses to the Partnership, and . . . assure that client matters are attended to in the most efficient and effective manner possible, and . . . help ensure collection of existing accounts receivable and unbilled time with respect to such clients." (*In re Thelen LLP* (2d Cir. 2013) 736 F.3d 213, 217.)[4]

When a law firm dissolves, it has an obligation to its partners to minimize potential liability. Heller would have the dissolving firm ignore these obligations. The sudden transfer of a matter because the law firm can no longer provide legal assistance has risks to both the client and the dissolved law firm's former lawyers. As discussed above, these matters

[4] This race to get out the door before the lights go out that Heller's rule would encourage would also be a further source of harm to clients, as it is likely to cause additional disruption in the handling of their matters.

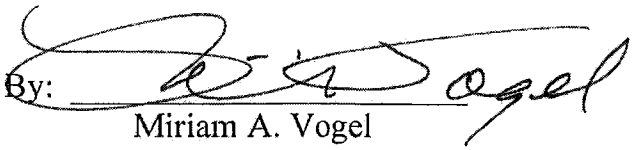
may have time-sensitive deadlines or require the expertise of certain lawyers with special types of experience. To encumber the client's matter with Heller's "unfinished business" theory would make it more likely that the client could not obtain the timely representation it requires, and that the dissolving firm would be liable for any attendant consequences of that failure.

CONCLUSION

For the reasons stated above, this Court should answer the Ninth Circuit's request by clarifying that, as a matter of California law, dissolved law firms have no property interest in uncompleted legal matters the firm was retained to handle on an hourly fee basis.

Dated: March 30, 2017

Respectfully submitted,

By: 

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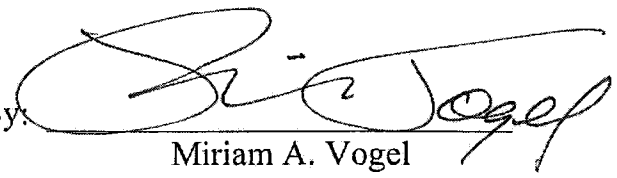
CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this brief, counsel certifies that this brief was produced using a 13 point font and contains 4487 words.

Dated March 30, 2017 By: 

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PROOF OF SERVICE

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Los Angeles, California, March 30, 2017.

Dawn D. Millner

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(signature)