No. 14-16315

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HELLER EHRMAN LLP,

Plaintiff-Appellant,

v.

JONES DAY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of California, case no. 3:14-cv-01237-CRB, Judge Charles R. Breyer

BRIEF OF MORRISON & FOERSTER LLP AS AMICUS CURIAE IN SUPPORT OF APPELLEE

DOUGLAS L. HENDRICKS
LARRY ENGEL
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
Telephone: (415) 268-7000

BRADLEY S. LUI
BRIAN R. MATSUI
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue NW
Suite 6000
Washington, DC 20006
Telephone: (202) 887-8766
BLui@mofo.com

BRETT H. MILLER
ERICA J. RICHARDS
MORRISON & FOERSTER LLP
250 West 55th Street
New York, NY 10019
Telephone: (212) 468-8000

Counsel for Amicus Curiae Morrison & Foerster LLP

CORPORATE DISCLOSURE STATEMENT

Because Morrison & Foerster LLP is not a "nongovernmental corporate party," no corporate disclosure statement is required under Federal Rule of Appellate Procedure 26.1.

Dated: February 24, 2015 s/ Bradley S. Lui

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

Founded more than 130 years ago in San Francisco, amicus Morrison & Foerster LLP is a full-service law firm with a thousand lawyers collaborating across a global network of 17 offices located in key technology and financial centers in the United States, Asia, and Europe. Amicus's clients include some of the largest financial institutions, Fortune 100 companies, and leading technology and life sciences companies. Amicus also represents investment funds and startup companies, and over the years it has supported many in their growth and development as leading industry players and household brands.

Amicus Morrison & Foerster LLP has a substantial interest in the correct outcome of this case. Like amicus and appellee Jones Day, the former law firm Heller Ehrman LLP ("Heller") was once a global legal institution that was dedicated to providing outstanding client service. In countless cases and transactions, Heller attorneys and the Heller firm put their clients first—in this Court, the Supreme Court of the United States, and other courts throughout the Nation. As discussed below, appellant the Heller Plan Administrator's arguments subvert that legacy of client service. The Heller Plan Administrator's "unfinished

---

[1] All parties have consented to the filing of this amicus curiae brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

business" theory places a shuttered law firm's interest (i.e., its creditors) above that of the clients of the former law firm. But California law—both the legal rules that govern attorneys and that State's partnership law—precludes that result. The district court should be affirmed.

INTRODUCTION AND SUMMARY OF ARGUMENT

A law firm does not own its clients' legal matters. Clients own their own cases. While lawyers provide legal advice, clients make the critical decisions in those cases. One such critical decision is deciding who represents them. For that, the law is clear: clients can choose to hire and fire their lawyers, at any time, for any reason.

The Heller Plan Administrator's "unfinished business" theory cannot be reconciled with these bedrock attorney-client principles. According to the Heller Plan Administrator, a client's ongoing legal matter becomes the property of a law firm when it dissolves—i.e., 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) gets the profits. There is no reason for this windfall. As the district court correctly held, the Heller Plan Administrator's theory finds no support in California law. To the contrary, California partnership law permits former partners to compete for the very same matters the Heller Plan Administrator calls the property of the dissolved firm *immediately* upon dissolution.

More significantly, the Heller Plan Administrator ignores that a dissolved firm's abandoned clients will be harmed if their former law firm has an ongoing property interest in their matters. These clients already were harmed when Heller told them they needed replacement counsel for their matters. The Heller Plan Administrator's "unfinished business" theory compounds this harm. For many cases, a displaced client faces the least risk and minimizes additional legal costs by using some of the former lawyers from the defunct firm. After all, those lawyers know the case and what needs to be done. Yet that representation might not be possible if the dissolved firm is entitled to all the profits if those former lawyers (now at new firms) are retained to work on those matters. A third-party law firm is under no obligation to provide legal services, and it certainly does not need to do so for free. Indeed, amicus is unlikely to take on a non-pro bono matter where all the profits of the engagement could go to a now-shuttered competitor.

The Heller Plan Administrator's theory also is not good for the legal profession more generally. Even under the Heller Plan Administrator's theory, partners can join new firms without any fear of "unfinished business" liability prior to dissolution. It is only those partners who stay until the end and try to turn around their failing firm's fortunes who are saddled with this liability. That makes little sense—it encourages partners to leave their firms, clients in tow, at the first sign of financial trouble.

Finally, encumbering a client's "unfinished business" will not benefit creditors. In any law firm bankruptcy, the goal is to reduce expenses and maximize accounts receivable. The Heller Plan Administrator's theory is counter to this goal. It 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 due to the former partner's "unfinished business" liability. In addition, it makes it more difficult for clients during the difficult transition period in which they must find new representation—making it that much less likely that that client will pay on the already difficult to recover accounts receivable of a defunct firm. And it increases the likelihood that those clients will bring claims against the dissolved firm, if they believe they have suffered injury because work on their matters was not completed.

ARGUMENT

A. A Dissolved Law Firm Has No Property Interest In A Client's Unfinished Legal Matters

The Heller Plan Administrator's "unfinished business" theory is antithetical to the practice of law. Relying on the intermediate appellate court decision *Jewel v. Boxer*, 156 Cal. App. 3d 171 (1984), the Heller Plan Administrator contends that a client's "unfinished business"—i.e., future fees for work that has *not* been done in ongoing hourly fee matters—is forever the property of Heller, even though Heller could never have performed the work. According to the Heller Plan Administrator, a fraudulent transfer under 11 U.S.C. § 548 occurred when Jones Day acquired that so-called Heller "property" through retention by Heller's former clients.[2]

But as the district court correctly recognized, a client is not the property of a law firm or its partners. ER4. 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 controls the relationship. While the attorney provides advice and counsel (and can withdraw if that advice is ignored), the client decides whether to enter into the transaction, to bring the lawsuit, to settle the claim. *E.g.*, *Robinson v. Hiles*, 119 Cal. App. 2d 666, 672 (1953). The client, not the lawyer, controls (and can decided to waive) the attorney-client privilege. *See* Cal. Evid. Code § 953 (defining "holder of the privilege" to mean the client). Indeed, in recognition that the client ultimately makes the decisions, attorneys have the obligation of keeping

[2] The Heller Plan Administrator's action against Jones Day involved two steps. First, according to the Heller Plan Administrator, although a partnership's waiver of its unfinished business rights against its partners normally is enforceable under California law, Heller's eve-of-dissolution waiver of its unfinished business rights was a purported fraudulent conveyance that could be set aside because Heller was insolvent at the time the waiver was granted. That left the Heller Plan Administrator free to sue Jones Day to recover for the Heller "unfinished business" after Jones Day (which had admitted former Heller partners) was retained to work on former Heller matters.

their clients informed of all significant developments that occur in a matter. *E.g.*, Cal. R. Prof'l Conduct 3-500 ("A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed."). And, most importantly, the client can terminate the relationship with its attorneys, at any time, for any reason. Upon termination, the only obligation the client has to its lawyers is for fees for work *already* performed at the time of discharge.

This is not new law. It has long been the rule in California and elsewhere. The California Supreme Court has held that the client has the "absolute" right to terminate its relationship with its lawyer, for any reason, "with or without cause"—a principle that is fundamentally incompatible with the notion that the client-lawyer relationship is actually property of the lawyer. *Fracasse v. Brent*, 6 Cal. 3d 784, 790 (1972) (quoting *Gage v. Atwater*, 136 Cal. 170, 172 (1902)); *see also In re Thelen LLP*, 24 N.Y.3d 16, 28 (2014) ("In New York, 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 the fair and reasonable value of the *completed services*." (emphasis in original) (internal quotation marks omitted)); ABA Model Rules of Prof'l Conduct R. 1.16 cmt. 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.").

In *Fracasse*, the California Supreme Court held that it was not a breach of contract for a client to fire his lawyer. Nor was the client required to compensate its lawyer for services that were never performed, even though additional services had been contemplated by the original arrangement. *Fracasse*, 6 Cal. 3d at 790; *see also* Cal. R. Prof'l Conduct 3-700(D)(2); *Kallen v. Delug*, 157 Cal. App. 3d 940, 950-51 (1984). Simply stated: the client's interest in its own matter "is superior to that of the attorney, and [the client] has the right to employ such attorney as will in [its] opinion best subserve [its] interest." *Fracasse*, 6 Cal. 3d at 790. Thus, the attorney in *Fracasse* was entitled to only "the reasonable value of the services he has rendered up to the time of discharge." *Id.* at 791; *see Jalali v. Root*, 109 Cal. App. 4th 1768, 1777 (2003). Indeed, as the New York Court of Appeals has explained, "no law firm has a property interest in future hourly legal fees because they are too contingent in nature and speculative to create a present or future property interest." *Thelen*, 24 N.Y.3d at 28 (internal quotation marks omitted).

Moreover, contrary to the Heller Plan Administrator's contention, the Revised Uniform Partnership Act ("RUPA") is consistent with these principles. *Contra* Heller Plan Administrator Br. 21-24. The Heller Plan Administrator asserts that there is a fiduciary duty among partners to properly account for the property of a firm that is dissolving. Heller Plan Administrator Br. 1, 17 n.6; Cal. Corp. Code § 16404(b)(1). But that just begs the question—what is the property of a firm when it dissolves? RUPA is silent to that question, as "partnership property" is simply defined as "[p]roperty . . . acquired in the name of . . . [t]he partnership." Cal. Corp. Code § 16204(a). As the New York Court of Appeals has explained, uniform partnership laws (such as the Uniform Partnership Act ("UPA") and RUPA) "do[] not define property; rather, [they] suppl[y] default rules for how a partnership upon dissolution divides property as elsewhere defined in state law." *Thelen*, 24 N.Y.3d at 28 (emphasis omitted). These laws thus say "nothing" "about whether a law firm's 'client matters' are partnership property." *Id.*

Instead, RUPA *permits* former partners to compete for the very matters that the Heller Plan Administrator 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 cmt. 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." Cal. Corp. Code § 16404(b)(3) (emphasis added). Consistent with this provision, RUPA imposes no fiduciary obligation on third-party firms former partners join. Nor could it: Absent some express agreement, third-party law firms such as Jones Day (and amicus) have never agreed to be bound by Heller's partnership agreement. As third parties, other law firms owe no fiduciary duty to Heller. Indeed, far from owning an obligation *not* to compete, Heller was a competitor.

For this reason, among others, *Jewel* has no bearing on the outcome of this case. In *Jewel*, a four-partner law firm divided into separate two-partner firms, and "[t]he new firms represented the clients under fee agreements entered into between the client and the old firm." *Jewel*, 156 Cal. App. 3d at 175. The intermediate state court held that it would be a breach of fiduciary duty for the former partners not to share the profits of the old firm's "unfinished business." The basis for that conclusion was the state court's interpretation of the now-superseded UPA—that the former partners owed a fiduciary duty to the defunct firm "until the winding up of unfinished partnership business." *Id.* at 176. Even if that interpretation of the UPA were correct (and it is not, *see Thelen*, 24 N.Y.3d at 28), it has no bearing on California partnership law today. Under RUPA, the former partners in *Jewel* would have been permitted to compete with their old firm immediately upon its dissolution. RUPA § 404 cmt. 2.

B. Giving A Dissolved Law Firm An Ongoing Property Interest In A Displaced Client's Matters Would Have Significant Adverse Consequences On Law Firm Clients And The Practice Of Law

Not only is the Heller Plan Administrator's "unfinished business" theory contrary to established California law, its application also will 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 the Heller Plan Administrator'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, by definition, 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 and required them to look elsewhere. ER6; SER75. Thus, while 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 the Heller Plan Administrator's theory of California partnership law, however, abandoned clients will have *fewer* choices in their time of need. Law firms that accept former partners of a dissolved firm 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 *any* profits the new firm might make on that matter, regardless of who does the work. This is the case even though the new law firms use their own capital and resources to handle the matter and receive nothing from the now defunct firm. ER15. As other courts have aptly stated, "[t]he notion that law firms will hire departing partners or accept client engagements without the promise of compensation ignores common sense and marketplace imperatives." *Thelen*, 24 N.Y.3d at 32; *see* ER14 (same).

This concern is anything but inchoate. A third-party law firm is under no obligation to provide legal services to anyone, and it certainly is not required to do so where the entire profits from the engagement go to someone else (here, creditors of a shuttered competitor). Indeed, like other law firms, amicus would not generally take on a non-pro bono engagement without any expectation of remuneration.[3] To do so would be counter to amicus's own partners' interests—as each matter requires the investment of considerable firm resources, including attorney salaries, administrative support, office space, research fees, malpractice

[3] These concerns do not apply to pro bono matters. Amicus devoted more than 85,000 hours to pro bono matters in 2013, with no expectation of any fees. http://www.mofo.com/generalcontent/culture/pro-bono/overview.

insurance, and the opportunity costs of more lucrative engagements. ER15; *cf.* *Jacobson v. Wikholm*, 29 Cal. 2d 24, 31 (1946).[4]

Thus, if the Heller Plan Administrator's position is adopted, it will cause significant harm to the ones who should not bear any such burden the most—Heller's former clients. Heller's failure harmed its clients. The dissolution *required* these clients to obtain replacement counsel; they had no choice. Yet the Heller Plan Administrator seeks to impose a rule that would compound that harm. Undoubtedly, in the majority of matters, the most cost-effective way for a client to mitigate any harm from Heller's dissolution was to retain former Heller attorneys already familiar with its matters to finish them. The Heller Plan Administrator's "unfinished business" rule, however, will make those mitigation efforts very difficult. Former Heller partners at new firms might be well situated to protect the displaced clients' interests, but they would have to do so with the expectation that the Heller Plan Administrator was entitled to seize the profits from their work that Heller did not do and could never have done. In other words, if an abandoned client wanted the continuity that some of its former attorneys could only provide, it

[4] To be sure, there may be some longstanding clients for which law firms may be willing to make an exception. But that is not likely to be the norm, particularly as large multinational law firms are less dependent on any single client, and clients often spread their work to a large number of competing firms. And for extremely large non-pro bono matters that will occupy a significant number of a law firm's attorneys, no law firm is likely to take on the engagement without the expectation of being paid.

would need to find a law firm with those former attorneys that was willing to forgo any profits in the engagement. *See* Jones Day Br. 41. Simply put, it is amicus's view that such a firm does not likely exist.

This is the opposite of what the legal profession desires. When a law firm dissolves, former clients should have the option to continue working with attorneys already familiar with their pending matters. Displaced clients should not face additional obstacles when they seek to retain new firms that those attorneys have joined. Indeed, continuity often can be critical, as a client's former attorneys may have knowledge about a 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 may need to 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 be seeking temporary restraining orders or preliminary injunctions that cannot be delayed in order to prevent some irreparable harm. And even for matters that may not seem urgent, courts may be unwilling or unable to extend litigation deadlines in any given case. *See, e.g.*, Fed. R. Civ. P. 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).").

In short, the former partners of a dissolving 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, third-party firms would lack incentive to admit those partners or take on their former matters. As a result, displaced clients may need to transfer matters to firms with no attorneys who have prior knowledge of the cases, and these clients may be prejudiced and/or incur additional costs while the new firms familiarize themselves with the new matters. A displaced client already suffers as a result of a law firm dissolution. This detrimental impact on their interests should not be compounded by a rule that would allow the shuttered law firm's estate to interfere with the client's ability to obtain cost-effective representation.

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

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

Rather than preserve the assets of a distressed law firm, the "unfinished business" theory would have the opposite effect. The Heller Plan Administrator is correct that partners of a failing firm can leave before dissolution, without any unfinished business liability for their new firm. ER14; Jones Day Br. 22-23. Yet under the Heller Plan Administrator's theory, when those partners find new employment *after* their firm dissolves and their new firms are retained to handle "unfinished business" matters, the dissolved firm has a right to all the profit from those matters. ER14. Beyond making little sense, this rule is not good for the very law firms the Heller Plan Administrator purports to protect. It encourages partners to leave a law firm at the first signs of financial trouble, in order to maximize their own mobility and to find new homes for the clients that they serve. As the New York Court of Appeals has 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*, 24 N.Y.3d at 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 these partners may be able to take associates and staff with them to their new firms, provided that there are no significant obstacles to those partners being retained for client matters at their new firms. Indeed, other courts have recognized that the paramount interest in recent law firm dissolutions was to reduce the expenses of the partnership. *Thelen*, 24 N.Y.3d at 23-27 (discussing the Thelen and Coudert Brothers dissolutions).

Finally, as Jones Day has explained, the Heller wind down was designed to maximize concrete revenues for the firm—i.e., the accounts receivable of the firm and unbilled time. Jones Day Br. 5-6, 52. Unlike the speculative future revenue that Heller *might* have earned from an ongoing client matter if it had not dissolved, payment for work actually done was tangible property of the firm. But in any bankruptcy, just because the law firm is owed that money does not mean that it will get paid. Even outside the bankruptcy context, many law firms do not collect every dollar they bill. Indeed, some major law firms collect far less than what they charge even in the best of times. In 2013, for example, it was reported that law firms collected 83.5 cents for every dollar they billed, with the vast majority of law firm collections occurring in the last three months of the year. *See* Jennifer Smith, *Law Firms Press to Get Bills Paid by Year-End*, Wall St. J., Dec. 22, 2013, http://on.wsj.com/1ziP5mS. It is common sense that collections will become even more difficult when the law firm no longer exists.

The Heller Plan Administrator's "unfinished business" rule would make those collections even less likely in the future. Displaced clients unable to find fast and efficient replacement representation will be less willing to pay the dissolved firm due to the trouble and difficulties they have faced. *See supra* pp. 11-14. And without continuity in the attorney-client relationship, there may be no one available (or willing) to make a personal request for payment—as some bills are paid only after such a request is made to the client. *See Smith*, *supra*. As the Second Circuit has 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*, 736 F.3d 213, 217 (2d Cir. 2013).

Finally, when a law firm dissolves, it has an obligation to its partners to minimize potential liability. But the Heller Plan Administrator 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 law firm's (former) lawyers. As discussed above, these 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 the Heller Plan Administrator'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, the judgment of the district court should be affirmed.

Dated: February 24, 2015

Respectfully submitted,

s/ Bradley S. Lui
BRADLEY S. LUI
BRIAN R. MATSUI
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue NW
Suite 6000
Washington, DC 20006
Telephone: (202) 887-8766
BLui@mofo.com

DOUGLAS L. HENDRICKS
LARRY ENGEL
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
Telephone: (415) 268-7000

BRETT H. MILLER
ERICA J. RICHARDS
MORRISON & FOERSTER LLP
250 West 55th Street
New York, NY 10019
Telephone: (212) 468-8000

Counsel for Amicus Curiae Morrison & Foerster LLP

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 24, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 24, 2015

s/ Bradley S. Lui

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it is 4,175 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2010 in 14-point Times New Roman font.

Dated: February 24, 2015 s/ Bradley S. Lui