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Case Number 256,2019

IN THE

Supreme Court of the State of Delaware

UNITED STATES OF AMERICA, STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF ILLINOIS, STATE OF INDIANA, STATE OF IOWA, STATE OF LOUISIANA, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF MONTANA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW YORK, STATE OF NORTH CAROLINA, STATE OF OKLAHOMA, STATE OF RHODE ISLAND, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, STATE OF WASHINGTON, STATE OF WISCONSIN, *ex rel.* JKJ PARTNERSHIP 2011 LLP,

Relator-Appellant,

v.

SANOFI-AVENTIS U.S. LLC, SANOFI-AVENTIS U.S. SERVICES, INC., AVENTIS, INC., AVENTIS PHARMACEUTICALS, INC., BRISTOL-MYERS SQUIBB COMPANY, BRISTOL-MYERS SQUIBB PHARMACEUTICALS HOLDING PARTNERSHIP,

Defendants-Appellees.

C.A. No. 256, 2019

Certification of Questions of Law from the United States Court of Appeals for the Third Circuit

No. 18-2472

APPELLANT'S OPENING BRIEF

(caption cont'd)

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TABLE OF CONTENTS

EXHIBITS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

Rules

NATURE OF PROCEEDINGS

This proceeding addresses certified questions of law from the United States Court of Appeals for the Third Circuit. The underlying case arises out of a fraudulent scheme perpetrated by several pharmaceutical companies related to their blockbuster drug, Plavix, an antiplatelet drug used to prevent heart attack and stroke. (*See In re Plavix Mktg., Sales Practices and Prod. Liab. Litig. (No. II)*, 315 F. Supp. 3d 817, 821 (D.N.J. 2018).[1]) Relator JKJ Partnership 2011 LLP ("JKJ") alleges that these companies concealed the fact that Plavix had no demonstrable pharmacodynamic effect for many patients who had been prescribed the drug. (*Id.*) In 2011, two doctors and a sales representative for one of the pharmaceutical companies formed JKJ—a Delaware limited liability partnership—for the purpose of commencing and prosecuting a *qui tam* action against the pharmaceutical companies under the federal False Claims Act ("FCA").[2] (*Id.* at 820.)

Although the FCA bars *qui tam* cases based upon certain categories of publicly disclosed information, *see* 31 U.S.C. § 3730(e)(4)(A), it includes an exception when "the person bringing the action is an original source of the

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[1] Attached hereto as Exhibit A.

[2] The FCA, 31 U.S.C. § 2739 *et seq.*, imposes liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment" to the United States government. 31 U.S.C. § 2739(a)(1). The FCA also permits private citizens—or "relators"—to bring a "*qui tam*" action in the name of the United States. *Id.* at § 3730(b)(1).

information," *id.* Before an amendment in 2010, the FCA required an original source to have "direct and independent knowledge of the information," which some courts had read to prevent a corporation formed to bring a *qui tam* claim from satisfying the original-source exception, on the ground that the information was known by its stockholders rather than the corporation itself. *See Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1049 (8th Cir. 2002). In contrast, an unincorporated association's knowledge was deemed to be "direct" because such an association is legally indistinct from its members. *Id.* at 1049-50.

Under the Delaware Revised Uniform Partnership Act ("DRUPA"), "[a] partnership is a separate legal entity *which is an entity distinct from its partners unless otherwise provided* in a statement of partnership existence or a statement of qualification and in a partnership agreement." 6 *Del. C.* § 15-201(a) (emphasis added). In order to secure JKJ's status as an original source of the information known to its partners, JKJ's partnership agreement (A110-17) (the "Partnership Agreement") provides that, "[a]s authorized by Section 15-201(a) of [DRUPA], the Partnership shall not be a separate legal entity distinct from its Partners." (A111.)

When it filed its original complaint on November 4, 2011, JKJ consisted of three partners: Partner A, Partner B, and Partner C. (Ex. A, 315 F. Supp. 3d

at 821.) Thereafter, on December 8, 2016, Partner B withdrew from JKJ. (A119.) On January 7, 2017, he was replaced by Dr. Paul A. Gurbel. (Ex. A, 315 F. Supp. 3d at 821; A120.) JKJ filed a second amended complaint ("SAC") on February 22, 2017. (Ex. A, 315 F. Supp. 3d at 821; A179.)

At a status conference on August 9, 2017, the district court *sua sponte* instructed the parties to brief the issue of whether the change in JKJ's partners—specifically, the withdrawal of Partner B and addition of Dr. Gurbel—affected JKJ's viability as a relator under the FCA. (*See* A024.) Defendants filed a motion to dismiss, dated August 29, 2017 (A101), wherein they argued that the FCA's so-called "first-to-file bar"[3] prohibited JKJ from continuing to proceed as the relator on the ground that "Dr. Gurbel's replacement of 'Partner B'" created a new partnership. (*See* A025.) Relevant to the questions certified to this Court, JKJ countered that Dr. Gurbel's replacement of Partner B did not dissolve the existing JKJ partnership under Delaware law. (*See id.*) Instead—consistent with 6 *Del. C.* § 15-801, which sets forth the events that cause dissolution under DRUPA—JKJ's Partnership Agreement provides that the withdrawal of a Partner shall not cause a dissolution of the Partnership. (*See* A114.)

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[3] The FCA's "first-to-file bar" provides that, when a private party brings an FCA action, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5).

On May 30, 2018, the district court granted Defendants' motion to dismiss. (Ex. A, 315 F. Supp. 3d at 836; A120.[4]) The district court held that JKJ's change in membership—as reflected in the SAC—constituted an intervention by a new partnership under Delaware law. Relevant here, the district court concluded that "the current JKJ partnership of Partner A, Dr. Gurbel, and Partner C . . . is not the same relator partnership composed of Partners A, B, and C that filed the Original Complaint in this action." (*Id.* at 834.) The district court reasoned that JKJ opted out of the "entity model" of partnership enshrined in DRUPA § 15-201(a) and, thus, became an "aggregate" partnership governed by pre-DRUPA law, namely, Delaware's version of the Uniform Partnership Act of 1914 ("UPA"). (*See id.* at 833-34.) As a result, the district court refused to enforce the Partnership Agreement's provisions stating that the "term of the Partnership . . . shall continue until the final resolution or settlement of the Action without further right of appeal" (A112, § 1.07), and the "withdrawal of a Partner shall not cause a dissolution of the Partnership" (A114, § 8.01), finding these provisions "unpersuasive." (Ex. A, 315 F. Supp. 3d at 832.)

On June 26, 2018, JKJ filed a motion to alter or amend the district court's judgment pursuant to Federal Rule of Civil Procedure 59(e) (A121), which was

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[4] A copy of the Order of dismissal, *In re Plavix Mktg., Sales Practices and Prods. Liab. Litig. (No. II)*, No. 11-cv-6476, ECF Dkt. #84 (D.N.J. May 30, 2018), is attached hereto as Exhibit B.

supported by a report prepared by Professor Lawrence A. Hamermesh, an expert on business organizations. (*See* A127-37.) The district court denied JKJ's motion on August 8, 2018. (*In re Plavix Mktg., Sales Practices and Prods. Liab. Litig.*, No. 11-cv-6476, ECF Dkt. #91 (D.N.J. Aug. 6, 2018).[5]) In doing so, the district court rejected JKJ's position that JKJ could continue as relator in this action even if it dissolved upon Partner B's departure. (*Id.* at 4.) The court further concluded that JKJ had "chosen" not to continue the action as a dissolved partnership, reasoning that JKJ's change in membership constituted "conscious steps to replace a partner in the partnership for the sole purpose of [pursuing] this litigation as *a newly-formed entity*." (*Id.* (emphasis added).)

On appeal to the United States Court of Appeals for the Third Circuit, JKJ claimed that the district court erred by concluding that a change in the membership of JKJ precluded it from proceeding as the relator under the first-to-file bar for three reasons: (1) because, as a matter of federal law, the FCA permits the addition of relators by way of amendment; (2) because Delaware law permits the structuring of partnership agreements in a way that combines elements of the entity and aggregate models of partnership, as JKJ did here, such that the withdrawal of a

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[5] Attached hereto as Exhibit C. Although the court declined to consider Professor Hamermesh's report on the ground that it was untimely, the court acknowledged that JKJ's substantive arguments "track[ed] the expert's opinion," and considered those arguments. (*See* Ex. C, at 4.)

partner did not trigger JKJ's dissolution—or the intervention of a "new" partnership into the case; and (3) even if a change in membership of JKJ triggered its dissolution, the original—now-dissolved—JKJ partnership may continue on as the first-filed relator for purposes of winding up its business. (*See* A028-29.) The parties fully briefed the appeal on December 20, 2018. (*See* A138-77.)

In an order dated June 12, 2019, the Third Circuit concluded that "important and urgent reasons for an immediate determination" by this Court warranted certification under Delaware Supreme Court Rule 41. (A180.) Specifically, the court noted that the appeal raised questions of first impression in Delaware, on which no authority existed in state and federal courts elsewhere; the questions involve issues regarding Delaware law that should be settled by this Court; and these issues may be dispositive of the appeal. (*Id.*) Accordingly, the Third Circuit certified the following questions of law to this Court:

a. A limited liability partnership is formed to file and prosecute a specific lawsuit. Its formational documents say both that the partnership is not "a separate legal entity distinct from its Partners" under 6 Del. Code § 15-201(a) and that the "withdrawal of a Partner shall not cause a dissolution of the Partnership." If one of the partners leaves the partnership and a new partner joins, does it stay the same partnership? Or is it a new partnership?

b. If a "new" partnership was created upon the limited liability partnership's change in membership, was the "old" partnership terminated immediately such that it was actually the "new" partnership that filed the second amended complaint? Or did the "old" partnership continue to exist long enough in the winding-up process to file the second amended complaint?

c. If the "old" limited liability partnership did not survive the membership change, may the original partners continue to prosecute the lawsuit as part of the "winding up" process?

(A179-80.)

SUMMARY OF ARGUMENT

1. A change in the membership of JKJ did not create a new partnership because no dissolution-triggering events occurred under 6 *Del. C.* § 15-801, and the Partnership Agreement, which governs partnerships formed pursuant to Delaware law, 6 *Del. C.* § 15-103(a), provides that JKJ will survive changes in membership.

2. Even if a new partnership was created upon JKJ's change in membership, the original JKJ partnership did not terminate upon dissolution but rather continued to exist for purposes of winding up its business.

3. Even if the old JKJ partnership did not survive a change in membership, the original partners may continue to prosecute this lawsuit as part of the winding-up process because the lawsuit is the original partnership's unfinished business.

STATEMENT OF FACTS

In 2011, Partner A, Partner B, and Partner C formed JKJ, a registered Delaware limited liability partnership, for the purpose of prosecuting a *qui tam* action against the defendant pharmaceutical companies under the FCA. (Ex. A, 315 F. Supp. 3d at 820-21; A179.) JKJ is governed by DRUPA. (Ex. A, 315 F. Supp. 3d at 830.) Under DRUPA, the language of the partnership agreement governs the nature of the partnership. *See* 6 *Del. C.* § 15-103(a). DRUPA also provides that by default, a partnership is an entity distinct from its partners, unless otherwise provided in a statement of partnership existence or a statement of qualification and in a partnership agreement. 6 *Del. C.* § 15-201(a). JKJ's Partnership Agreement provides that, "[a]s authorized by Section 15-201(a) of [DRUPA], the Partnership shall not be a separate legal entity distinct from its Partners." (A111; A179.) JKJ's statement of qualification includes identical language (A117), while at the same time specifying that JKJ enjoys limited liability entity status, as endorsed by statute. 6 *Del. C.* §§ 15-201(a), 15-1001.

When JKJ was formed, and then subsequently filed its original and first amended complaints, JKJ was comprised of Partner A, Partner B, and Partner C. (Ex. A, 315 F. Supp. 3d at 820-21.) On December 8, 2016, Partner B withdrew from JKJ. (A119.) On January 7, 2017, Dr. Paul A. Gurbel was admitted as a JKJ Partner. (A119; A179.) The Partnership Agreement provides that the "withdrawal

of a Partner shall not cause a dissolution of the Partnership." (A114; A179.) JKJ—thus believing itself to be the same limited liability partnership that commenced the action, but one now comprised of Partner A, Partner C, and Dr. Gurbel—filed the SAC on February 22, 2017. (Ex. A, 315 F. Supp. 3d at 821; A179.)

ARGUMENT

I. A CHANGE IN THE MEMBERSHIP OF JKJ DID NOT CREATE A NEW PARTNERSHIP.

A. Questions Presented

A limited liability partnership is formed to file and prosecute a specific lawsuit. Its formational documents say both that the partnership is not "a separate legal entity distinct from its Partners" under 6 Del. Code § 15-201(a) and that the "withdrawal of a Partner shall not cause a dissolution of the Partnership." If one of the partners leaves the partnership and a new partner joins, does it stay the same partnership? Or is it a new partnership?

(A181.)

B. Scope of Review

This Court reviews certified questions of law *de novo*. *See CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 231 (Del. 2008).

C. Merits of Argument

Under Delaware law, partnerships are governed by partnership agreements. Partnerships have significant latitude to structure themselves in the most practical way for their own purposes. In the present case, JKJ structured itself as an entity indistinct from its partners—as DRUPA § 201(a) permits—in order to serve as an original source of the information known to its partners about Defendants' alleged fraudulent scheme. By doing so, however, JKJ did not elect to be an "aggregate" partnership for all purposes or otherwise adopt the old rule that a partnership dissolves whenever a partner ceases to be associated in the carrying on of the business. *See* 6 *Del. C.* § 1529 (repealed 1999). Absent a contractual or DRUPA

provision to the contrary, JKJ's status as an "indistinct" entity for the purpose of the FCA's public disclosure bar does not mean that JKJ's change in membership created a new partnership.

1. The Partnership Agreement provides that JKJ will survive changes in membership.

DRUPA provides that "relations among the partners and between the partners and the partnership are governed by the partnership agreement."[6] 6 *Del. C.* § 15-103(a). In this regard, Delaware gives "maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements." 6 *Del. C.* § 15-103(d). Section 15-103(d) of DRUPA is identical to 6 *Del. C.* § 17-1101(c), part of the Delaware Revised Uniform Limited Partnership Act ("DRULPA"). Accordingly, the following observation relating to limited partnerships applies as well to partnerships under DRUPA:

> The Act's basic approach is to permit partners to have the broadest possible discretion in drafting their partnership agreements and to furnish answers only in situations where the partners have not expressly made provisions in their partnership agreement. Truly, the partnership agreement is the cornerstone of a Delaware limited partnership, and effectively constitutes the entire agreement among the partners with respect to the admission of partners to, and the creation, operation and termination of, the limited partnership. Once partners exercise their contractual freedom in their partnership

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[6] The repealed Delaware UPA, which the trial court relied upon in concluding that JKJ could not survive a change in membership, contained a similar provision stating that the rules governing the "rights and duties of the partners in relation to the partnership shall be determined" "subject to any agreement" between the partners. 6 *Del. C.* § 1518 (repealed 1999).

> agreement, the partners have a great deal of certainty that their partnership agreement will be enforced in accordance with its terms.

See Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 291 (Del. 1999) (internal quotation marks omitted); *see also Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002) (explaining that DRULPA "furnish[es] answers only in situations where the partners have not expressly made provisions in their partnership agreement or where the agreement is inconsistent with mandatory statutory provisions." (internal quotation marks omitted)).

Here, the terms of the Partnership Agreement allow JKJ to survive changes in membership. *See Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013) (partnership agreements are contracts, and courts "construe them in accordance with their terms to give effect to the parties' intent").

First, various provisions of the Partnership Agreement permit a change in membership. The Partnership Agreement defines "Partners" as "the Partners, and *any person subsequently admitted as a partner in accordance with the terms of this Agreement*." (A111 (emphasis added).) Section 7.03 allows for the withdrawal or dissociation of a partner upon sixty-days written notice to the non-withdrawing partners, or with the written consent of the non-withdrawing partners. (A114.) Section 7.02 provides for the admission of new partners to JKJ upon the written consent of the partners. (*Id.*) To hold that a change in JKJ's membership dissolves the partnership would be to render these provisions nugatory. *Osborn ex rel.*

Osborn v. Kemp, 991 A.2d 1153, 1159 (Del. 2010) (Delaware courts will not "read a contract to render a provision or term meaningless or illusory." (internal quotation marks omitted)).

Second, not only does the Partnership Agreement permit a change in membership, but it also explicitly provides that JKJ will survive any such change. Sections 1.06 and 1.07 provide that the "purpose and business" of JKJ is "to file and prosecute the Action," and that "the Partnership shall continue until the final resolution or settlement of the Action without further right of appeal." (A112.) The Partnership Agreement further provides that JKJ will not dissolve until such time of the final resolution or settlement of this action without further right of appeal. (*Id.*; A114, § 8.01.) Most importantly, the Partnership Agreement also provides that the withdrawal of a partner shall not cause a dissolution of the partnership. (A114, § 8.01 ("The death, incapacity, bankruptcy or any other incapacity or *withdrawal of a Partner* shall not cause a dissolution of the Partnership." (emphasis added)).)

To conclude that the withdrawal of Partner B effectively triggered the dissolution of JKJ, and that the voluntary addition of Dr. Gurbel effectively resulted in the creation of a new partnership, would be to ignore the Partnership Agreement's plain language and the "policy" of DRUPA "to give maximum effect to the principle of freedom of contract and to the enforceability of partnership

agreements." 6 *Del. C.* § 15-103(d). Because the Partnership Agreement controls the legal status of JKJ, Partner B's withdrawal from JKJ did not cause a dissolution of the partnership, and Dr. Gurbel's replacement of Partner B did not create a new partnership.

2. JKJ's status as an "indistinct" entity does not mean that JKJ's change in membership created a new partnership.

"A partnership is a separate legal entity which is an entity distinct from its partners unless otherwise provided in a statement of partnership existence or a statement of qualification and in a partnership agreement." 6 *Del. C.* § 15-201(a). For purposes of the original source provision of the FCA, JKJ exercised its option under § 201(a) to include the following provision in its Partnership Agreement: "As authorized by Section 15-201(a) of [DRUPA], the Partnership shall not be a separate legal entity distinct from its partners." (A111.) Absent a statutory provision to the contrary, JKJ's status as an "indistinct" entity for that purpose does not mean that JKJ's change in membership created a new partnership.

Under DRUPA, "[a] partnership is dissolved, and its business must be wound up, *only* upon the occurrence" of specific, enumerated events. *See* 6 *Del. C.* § 15-801 (emphasis added); *see, e.g.*, 6 *Del. C.* § 15-801(2) (setting forth "[e]vents causing dissolution and winding up of partnership business or affairs" of a "partnership for a definite term or particular undertaking"). DRUPA does not provide that other dissolution-triggering events apply to partnerships that elect not

to be distinct from their partners under § 201, and none of the events listed in § 801 has occurred here. Although a partnership dissolves upon the occurrence of "[a]n event agreed to in the partnership agreement resulting in the winding up of the partnership business or affairs," 6 *Del. C.* § 15-801(3), as set forth above, JKJ's Partnership Agreement expressly states that withdrawal of a partner shall not cause a dissolution of the partnership.

Moreover, nothing in DRUPA suggests that, by electing not to be an entity distinct from its partners under § 201(a), JKJ became an "aggregate" partnership governed by the repealed UPA, as the district court concluded.[7] (*See* Ex. A, 315 F. Supp. 3d at 834.) Still, it bears noting that, although "the aggregate theory predominated," even the UPA "adopted an entity theory for some purposes." Robert W. Hillman *et al.*, *The Rev. Unif. P'ship Act* § 201 cmt. 1 (Nat'l Conf. Comm'rs on Unif. State Laws 2018-2019 ed.). "A partnership may be an entity for some purposes and not for others." *See In re Imperial "400" Nat'l, Inc.*, 429 F.2d 671, 679 (3d Cir. 1970) (considering whether a partnership, as an entity, or individual partner/debtor held assets at issue). "Delaware, like most states, has not adopted either a pure aggregate or pure entity theory of partnerships, but seems to treat partnerships differently for different purposes." *HB Gen. Corp. v.*

[7] The UPA defined dissolution as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." 6 *Del. C.* § 1529 (repealed 1999).

Manchester Partners, L.P., 95 F.3d 1185, 1192 (3d Cir. 1996); *see also* 68 C.J.S. *Partnership* § 100A (2019) ("A partnership is sometimes considered a hybrid organization which is viewed as an aggregation of individuals for some purposes and as an entity for others, such as ownership of property.").

So, too, under DRUPA, the aggregate and entity models of partnership are not mutually exclusive, as there is nothing to suggest that the adoption of DRUPA was intended to end the practice of "treat[ing] partnerships differently for different purposes." *Id.* Indeed, the very nature of a limited liability partnership, such as JKJ, is that of an "entity." *See, e.g.*, Hillman, *supra*, § 1001, cmt. 1 ("[A] limited liability partnership will limit, or eliminate, joint and several liability of partners for some, or all, of the partnership's debts or other obligations."); Black's Law Dictionary, *Partnership, Limited Liability* (11th ed. 2019) ("An obligation of the partnership incurred while the partnership is an LLP . . . is solely the obligation of the partnership."). Yet DRUPA permits a limited liability partnership to structure itself as an entity indistinct from its partners. *See* 6 *Del. C.* § 15-201 (cross-referencing 6 *Del. C.* § 15-1001, which governs limited liability partnerships, and requiring limited liability partnership to include opt-out language permitted by § 15-201(a) in statement of qualification).

Commentary to the Revised Uniform Partnership Act ("RUPA") confirms that the choice of entity or aggregate is not binary. To the contrary, "[a]lthough the

entity model predominates" in the revised act, "an aggregate approach continues for some purposes." *See* Hillman, *supra*, § 201, cmt. 2. For example, a "partnership agreement may govern the relations among partners and between the partnership and the partners according to an aggregate model"—a point Delaware made explicit in its version of § 201(a)—but the partnership remains an entity for purposes of litigation. *See id.* cmt. 3 (citing 6 *Del. C.* § 201(a)). Indeed, Delaware has long allowed unincorporated associations, "including a partnership," to sue and be sued using a common name. 10 *Del. C.* § 3904; *accord Haven Fund v. Thompson Door Co.*, 338 A.2d 574, 574 (Del. Super. 1975), *aff'd*, 351 A.2d 864 (Del. 1976).

Thus, rather than create two mutually exclusive models of partnership, DRUPA allows a partnership to combine elements of both the aggregate and entity models of partnership. As such, a partnership may elect to be indistinct from its members under § 201(a), while still retaining the ability to survive any change in membership pursuant to the terms of the partnership agreement. *See, e.g.*, 6 *Del. C.* § 15-603 (allowing for dissociation without dissolution); *see also* Hillman, *supra*, § 801, cmt. 1 ("Under RUPA, not every partner dissociation causes a dissolution of the partnership.").

II. IF A NEW PARTNERSHIP WAS CREATED UPON JKJ'S CHANGE IN MEMBERSHIP, THE OLD PARTNERSHIP CONTINUED TO EXIST LONG ENOUGH TO FILE THE SECOND AMENDED COMPLAINT.

A. Questions Presented

> If a "new" partnership was created upon the limited liability partnership's change in membership, was the "old" partnership terminated immediately such that it was actually the "new" partnership that filed the second amended complaint? Or did the "old" partnership continue to exist long enough in the winding-up process to file the second amended complaint?

(A181.)

B. Scope of Review

This Court reviews certified questions of law *de novo*. *See CA*, 953 A.2d at 231.

C. Merits of Argument—A Dissolved Partnership May Continue Until the Winding Up of the Partnership Affairs is Complete

Even if JKJ dissolved upon its change in membership, the original partnership survived Partner B's departure. Under DRUPA—and even under the old UPA—a partnership does not immediately terminate upon dissolution. Rather, "[t]he partnership is terminated when the winding up of its business or affairs is completed." 6 *Del. C.* § 15-802(a); *accord* 6 *Del. C.* § 1530 (repealed 1999); *Pacione v. Crane*, 408 A.2d 946, 952 (Del. Ch. 1979); *Hurley v. Hurley*, 91 A.2d 674, 675 (Del. Ch. 1952) ("[B]y Sec. 18U of [the UPA] the dissolution does not terminate the partnership, but it continues until the winding up of the partnership

affairs is completed."). Indeed, courts interpreting the UPA have recognized that "a dissolved partnership has legal existence." *Howe v. Horton, Davis & McCaleb*, 407 N.E.2d 766, 767 (Ill. App. Ct. 1980) (rejecting argument that dissolved partnership could not file probate claim to collect unpaid bills).

The revised uniform act "carries forward the U.P.A.'s principle that upon dissolution a partnership enters the winding up phase of its existence." Hillman, *supra*, § 802 cmt. 1. Under the UPA, "dissolved partnerships may continue in business for a short, long or indefinite period of time . . . so long as none of the partners insist[s] on a winding up and final termination." *8182 Md. Assocs., Ltd. P'ship v. Sheehan*, 14 S.W.3d 576, 581 (Mo. 2000) (internal quotation marks omitted).

To be sure, the continuation of a dissolved partnership's business in a new, successor partnership could constitute "the automatic winding up of the affairs of its predecessor" under the UPA. *See Wilzig v. Sisselman*, 442 A.2d 1021, 1028-29 (N.J. App. Div. 1982); *see also id.* at 1025 ("[t]he causes for dissolution . . . do not preclude the remaining partners from carrying on the business *pursuant to a prior agreement*" (emphasis added)). In the present case, however, § 8.02(a) of the Partnership Agreement requires—under the heading "Winding Up"—that, "[u]pon the dissolution of the Partnership, the Partnership's business shall be *liquidated* in an orderly manner." (A114 (emphasis added).) In this regard, even if a "new"

partnership was created upon JKJ's change in membership, the original partnership did not immediately terminate but rather continues to exist until the winding-up of partnership affairs—including the *qui tam* action—is complete.

III. IF JKJ DISSOLVED UPON ITS CHANGE IN MEMBERSHIP, THE ORIGINAL PARTNERS MAY CONTINUE TO PROSECUTE THIS LAWSUIT AS PART OF THE WINDING-UP PROCESS.

A. Question Presented

> If the "old" limited liability partnership did not survive the membership change, may the original partners continue to prosecute the lawsuit as part of the "winding up" process?

(A181.)

B. Scope of Review

This Court reviews certified questions of law *de novo*. *See CA*, 953 A.2d at 231.

C. Merits of Argument—Because the JKJ Partnership Retained the *Qui Tam* Claim, It May Continue This Litigation as Part of "Winding Up" the Partnership's Affairs.

As discussed above, if Partner A, Dr. Gurbel, and Partner C formed a new partnership, then the dissolved JKJ partnership continues to exist until "the winding up of its business or affairs is completed." 6 *Del. C.* § 15-802(a); *accord Pacione*, 408 A.2d at 952 ("the partnership continues until the winding up of partnership affairs is completed"). The Third Circuit's final question asks whether the winding-up process includes prosecuting JKJ's lawsuit. It does.

Winding up includes "the completion of ongoing partnership business." J. William Callison & Maureen A. Sullivan, *Partnership Law & Practice* § 16:20 (2018). This was true under the old UPA as well. *See* 6 *Del. C.* § 1533 (repealed

1999) (conferring authority "to complete transactions begun but not then finished"); *Burrus v. Fraser*, C.A. No. 87A-MY9, 1988 WL 90561, at *3 (Del. Super. Aug. 12, 1988) ("The first duty in winding up a partnership is to pay its debts and complete its unfinished transactions."); *In re Labrum & Doak, LLP*, 227 B.R. 391, 408 (Bankr. E.D. Pa. 1998) ("Only upon completion of the 'unfinished business' is the partnership . . . terminated." (citations omitted)). "[D]issolution affects future transactions, but as to all past transactions the partnership continues until they are concluded." *Wilzig*, 442 A.2d at 1024.

Winding up also includes litigation. "The persons winding up the partnership's business or affairs may, in the name of, and for and on behalf of, the partnership, prosecute and defend suits, whether civil, criminal or administrative . . .." 6 *Del. C.* § 15-803(c); *see also Cheyenne Oil Corp. v. Oil & Gas Ventures, Inc.*, 204 A.2d 743, 746 (Del. 1964) ("[T]he Uniform Partnership Act continues the existence of a partnership after dissolution for winding up purposes, including the prosecution and defense of actions."); *McRae v. Smith*, 159 F. App'x 336, 338 (3d Cir. 2005) (relying upon Delaware statute allowing dissolved corporation to maintain action and wind up affairs to conclude that dissolved corporation was real party in interest).

In the present case, JKJ's *qui tam* action—commenced before the "old" partnership's purported dissolution—is its unfinished business.[8] It is a transaction begun but not then finished. By way of analogy, "[c]onsider, for example, the law partnership retained to represent a plaintiff in a tort action. One month later, the firm dissolves. The tort action represents unfinished business of the partnership, which continues in the winding up phase until the litigation is brought to a close, perhaps years later . . .." Hillman, *supra*, § 802 cmt. 2. Likewise, here, even if the original JKJ partnership did not survive the membership change, JKJ's original partners may prosecute the *qui tam* case to its completion as part of the winding up of their partnership's affairs.

[8] A *qui tam* action is an asset of the relator, as reflected in the fact that it survives a relator's death. *See* Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 11:98 (2018); *see also United States ex rel. Estate of Botnick v. Cathedral Healthcare Sys., Inc.*, 352 F. Supp. 2d 530, 533 (D.N.J. 2005) (holding that *qui tam* action survives death of relator).

CONCLUSION

For all of the foregoing reasons, JKJ stayed the same partnership when one partner withdrew and a new partner was admitted. Even if a new partnership was created, the original JKJ partnership continues to exist, and the original partners may continue the *qui tam* lawsuit as part of the winding-up process.

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August 5, 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 5th day of August 2019 that I caused to be served a copy of APPELLANT'S OPENING BRIEF upon the following in the manner indicated:

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