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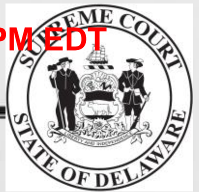

IN THE

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 REPLY BRIEF

(caption cont'd)

OF COUNSEL:

William H. Narwold
Mathew P. Jasinski
MOTLEY RICE LLC
One Corporate Center
20 Church St., 17th Floor
Hartford, Connecticut 06103
(860) 882-1681

W. Scott Simmer
BARON & BUDD, P.C.
600 New Hampshire Ave., N.W.
Suite 10-A
Washington, D.C. 20037
(202) 333-4849

ROSENTHAL, MONHAIT & GODDESS, P.A.
Jessica Zeldin (Del. Bar No. 3558)
919 N. Market Street, Suite 1401
P.O. Box 1070
Wilmington, Delaware 19899
(302) 656-4433

Attorneys for Relator-Appellant JKJ Partnership 2011 LLP

September 20, 2019

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INTRODUCTION

This case is not about whether Plavix causes injury or death, as alleged in the personal injury cases described by Defendants. (Defs. Br. at 6.) Rather, Relator JKJ Partnership 2011 LLP ("JKJ") is seeking to hold Defendants accountable under the False Claims Act ("FCA") for causing the government to pay tens of millions of dollars in Medicare and Medicaid reimbursements for prescriptions for Plavix, despite knowing that it would be completely ineffective for tens of thousands of people. The government's decision not to intervene says nothing about the strength of JKJ's claim. *See, e.g., U.S. ex rel. Berge v. Bd. of Trustees of the Univ. of Alabama*, 104 F.3d 1453, 1458 (4th Cir. 1997) ("the Government will not necessarily pursue all meritorious claims; otherwise there is little purpose to the *qui tam* provision"), *cert. denied*, 522 U.S. 916, 118 (1997).

The questions before this Court are narrow. Their answers are governed by the Delaware Revised Uniform Partnership Act ("DRUPA") and JKJ's Partnership Agreement. Under DRUPA, a partnership may choose not to be "a separate legal entity which is an entity distinct from its partners." 6 *Del. C.* § 15-201(a). DRUPA does not, however, provide that a partnership that chooses to be indistinct from its partners becomes an "aggregate partnership" that has opted out of the balance of DRUPA, such that the partnership automatically dissolves upon the withdrawal or admission of a new partner. Nor does DRUPA preclude a

partnership agreement from providing *both* that the partnership is indistinct from its partners *and* that the withdrawal of a partner shall not cause its dissolution. Indeed, the specific terms of JKJ's Partnership Agreement evidence an intent to do exactly that.

However, even if JKJ is an aggregate partnership that dissolved upon a change in membership, the fact that the partners identified in the Second Amended Complaint reflect this change is not legally dispositive of the partnership's status. Regardless, such pleading issues can be rectified and are not issues for this Court. The questions before this Court involve the Uniform Partnership Act ("UPA") and DRUPA, under which the original partners may prosecute the *qui tam* action to its conclusion. It is the partnership's unfinished business, irrespective of whether the "various present and former partners" have agreed to divide the proceeds.

ARGUMENT

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

The first certified question is as follows:

> 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.)

Defendants do not dispute that a partnership governed by DRUPA does not dissolve upon the withdrawal or admission of a partner. (*See* Defs. Br. at 25.) Instead, Defendants maintain that JKJ converted itself into an aggregate partnership—such that DRUPA does not apply—by electing not to be "a separate legal entity which is an entity distinct from its partners," pursuant to 6 *Del. C.* § 15-201(a). Having dispensed with DRUPA, Defendants proceed to offer a fulsome explanation on a point that nobody contests—that, under the (abrogated) common law and the (repealed) UPA, partnerships dissolved when a partner withdrew.

The threshold question, however, is whether the common law or the UPA, rather than DRUPA, controls. Tellingly, Defendants do not meaningfully engage with this issue; rather, they assume the answer. Defendants simply announce that DRUPA § 201(a) allows partnerships "to opt into the aggregate theory" of

partnership in the UPA. (Defs. Br. at 12 n.4 and accompanying text.) This begs the question: is that what it means to be an indistinct partnership under § 201(a)? No, it is not. Choosing to be a partnership indistinct from its members pursuant to § 201(a) does not render JKJ an "aggregate" partnership under pre-DRUPA law.

A. JKJ did not opt out of DRUPA's dissolution provisions.

"As authorized by Section 15-201(a) of [DRUPA]," JKJ elected not to be "a separate legal entity distinct from its Partners" (A111) in order, should it have been necessary,[1] to satisfy the original source exception applicable to FCA claims arising before Congress amended the public disclosure bar in 2010.[2] Defendants assert that, "[i]t is with this context—JKJ's desire to be a partnership indistinct from its partners to avoid certain statutory bars—that this Court must construe the terms of the Partnership Agreement." (Defs. Br. at 15 (quoting *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013), for proposition that "courts

[1] The district court subsequently concluded that the public disclosure bar does not apply to JKJ's claim.

[2] This does not mean that JKJ attempted to "*evade* one of the FCA's statutory bars on private suits" (Defs. Br. at 1, 13 (emphasis added).) As Defendants acknowledge, individuals filing an FCA case may "choose to organize as a corporation or other business association to shield their personal identities" (*id.* at 13 n.5), and "[a]n unincorporated association's knowledge . . . may be 'direct' when the association is legally indistinct from its members" (*id.* at 14 (quoting *Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1049-50 (8th Cir. 2002)).)

must construe partnership agreements 'in accordance with their terms to give effect to the parties' intent'").)

It does not follow, however, that JKJ intended to be an "aggregate" partnership for all purposes or to opt out of DRUPA *in toto*. As explained in JKJ's opening brief, absent a statutory provision to the contrary—Defendants identify none—JKJ's status as an "indistinct" entity does not mean that JKJ's change in membership created a new partnership. (Pl. Br. at 15.)

DRUPA does not provide that a partnership that chooses to be indistinct from its partners under § 201(a) becomes an "aggregate" partnership that has opted out of the balance of DRUPA. DRUPA does not provide that such a partnership must dissolve upon the withdrawal or admission of a new partner. *See* 6 *Del. C.* § 15-801 (omitting withdrawal or admission from list of events causing dissolution). Nor does DRUPA provide that a new partner may not be "admitted as a partner." *See* 6 *Del. C.* § 15-306(b) (providing that a "person admitted as a partner into an existing partnership is not personally liable for any obligation of the partnership incurred before the person's admission as a partner"); 6 *Del. C.* § 15-401(i) (requiring consent of existing partners to admit new partner).

Moreover, nothing in DRUPA precludes a partnership agreement from providing *both* that the partnership is indistinct from its partners *and* that the withdrawal of a partner shall not cause a dissolution of the partnership.

See 6 *Del. C.* § 15-103(b) (listing limitations on partnership agreements). As discussed below, in Part I.B, the aggregate and entity theories are not mutually exclusive. (*See also* Pl. Br. at 17-18.)

Defendants embrace the district court's assertion that it would be "'absurd'" to allow JKJ both "'to proceed as a relator because it is legally indistinguishable from, and therefore directly possesses the knowledge of, its members'" and "'to change its membership without becoming a different legal entity because it is legally independent and []distinguishable from its present members.'" (Defs. Br. at 15 (quoting *In re Plavix Mktg., Sales Practices and Prods. Liab. Litig. (No. II)*, 315 F. Supp. 3d 817, 832 (D.N.J. 2018)).) But that possibility is no less true in the context of an unincorporated association, which undoubtedly will lose and gain members during the course of litigation. *See Allina Health*, 276 F.3d at 1049-50 (concluding that unincorporated trade association may qualify as original source under FCA). Just as an unincorporated association may persist in litigation despite changes in its membership, a limited liability partnership formed under DRUPA may be both indistinct for purposes of the original source exception to the FCA's public disclosure bar and a jural entity for purposes of bringing suit.

B. JKJ did not choose to dissolve upon a change in membership.

DRUPA "give[s] maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements." 6 *Del. C.* § 15-103(d).

Contrary to Defendants' argument, JKJ's Partnership Agreement does not provide that the withdrawal of one partner and the addition of another partner triggers dissolution. (Defs. Br. at 16.)

Section 8.01 of the Partnership Agreement governs dissolution. Subject to § 1.07—which states that "the Partnership shall continue until the final resolution or settlement of the Action without further right of appeal" (A112)—§ 8.01 provides that "the Partnership shall be terminated and dissolved upon at [*sic*] such time and on the happening of such events as shall be determined by the Partners" (A114). Section 8.01 does not provide that either the withdrawal or admission of a partner automatically triggers dissolution. Concomitantly, § 7.02 allows for the admission of new partners upon written consent (A114), and § 7.03 allows for the withdrawal or dissociation of a partner (*id.*).

Defendants point out that § 8.01 also expressly provides that the "death, incapacity, bankruptcy or any other incapacity or withdrawal of a Partner shall not cause a dissolution of the Partnership" (A114), but does not similarly account for the addition of a partner. (Defs. Br. at 19.) Again, however, § 8.01 describes when dissolution occurs, namely, when the partners say so. (*See* A114.) Section 8.01 does not set forth an exhaustive list of events that do *not* cause dissolution. Put another way, the fact that § 8.01 expressly states that dissolution does not occur

upon the departure of a partner does not mean that it does occur upon the admission of one.

At any rate, this asymmetry makes sense when one considers that the UPA itself defined "dissolution" as "the change in the relation of the partners caused by any partner *ceasing to be associated* in the carrying on . . . of the business," 6 *Del. C.* § 1529 (repealed 1999) (emphasis added), but did not include the addition of a partner in its lists of the causes and grounds for dissolution, 6 *Del. C.* §§ 1531-32 (repealed 1999); *see also* Alan R. Bromberg, *Partnership Dissolution-Causes, Consequences, and Cures*, 43 Tex. L. Rev. 631, 636 (1965) ("Not listed is the admission of a new partner, which is often said to be a cause of dissolution, but usually on dubious authority or with little force.").[3]

Moreover, by stating that dissolution does not occur upon the departure of a partner, § 8.01 of the Partnership Agreement expressly disclaims the aggregate theory of partnership embodied in UPA §§ 29, 31, and 32. This eviscerates Defendants' argument that "under the plain language of the Partnership Agreement," JKJ elected "the aggregate model." (Defs. Br. at 16.) Because JKJ did not choose "the aggregate model," the effects of a partner coming or going is

[3] With this background in mind, Defendants overstate their position by insisting that it is beyond cavil that, under the aggregate model, the existing partnership is dissolved and a new partnership formed upon the admission of a new partner. (*See* Defs. Br. at 16 n.8 and accompanying text.)

not to create a new partnership. (*Id.* at 20.) Defendants' Venn diagrams and citations to cases applying the old rule are beside the point. (*Id.* at 16-18.)

Noting that § 1.03 of the Partnership Agreement "shall control" in the event of a conflict, Defendants next argue that § 8.01—which, again, states that the withdrawal of a partner shall not cause a dissolution of the Partnership (A114)—conflicts with § 1.03, which 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) (Defs. Br. at 22.) It does not.

First, these provisions are easily harmonized. When it filed this suit, JKJ was indistinct from Partners A, B, and C. After Dr. Gurbel replaced Partner B, JKJ became indistinct from Partner A, Dr. Gurbel, and Partner C. Nevertheless, JKJ remained the same "limited liability partnership formed and operated pursuant to the terms" of its Partnership Agreement. (A111.) Second, none of DRUPA's three limitations on the ability of a partnership agreement to dictate the terms of dissolution applies. *See* 6 *Del. C.* § 15-103(b)(6) (providing that partnership agreement may not vary requirements contained in 6 *Del. C.* §§ 15-801(4)-(6)).

Defendants' response is that § 15-801 "contemplates the circumstances for dissolution of an entity partnership, and not—as is the case here—a partnership that elected to be indistinct from its partners." (Defs. Br. at 25.) Nothing in

DRUPA, however, limits § 15-801 to partnerships that do not elect to be indistinct from their partners under § 201(a).

Indeed, Defendants rely upon commentary describing the old UPA rule. (*See* Defs. Br. at 25 (citing 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.) (explaining that, under UPA § 29, "a partnership is dissolved every time a partner leaves").) Under DRUPA, in contrast, "a partnership is dissolved . . . only upon the occurrence of one of the events listed in Section 801."[4] *See* Hillman, *supra*, § 801 cmt. 1. To be sure, the old rule "reflect[ed] the aggregate nature of the partnership under the UPA," and the new rule reflects "RUPA's move to the entity theory." *Id.* Yet, this hardly tells us that a partnership that is indistinct from its partners under DRUPA § 201(a) becomes an "aggregate" partnership governed by the repealed UPA.

Defendants posit that a partnership that is indistinct from its partners must be an aggregate partnership because the aggregate and entity theories are mutually exclusive. (Defs. Br. at 22.) This argument is belied by the UPA itself. As the

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[4] As a back-up argument, Defendants assert that "[t]he election of the aggregate model in the Partnership Agreement . . . constitutes an agreement as to a dissolution event within the meaning of Section 15-801(3)." (Defs. Br. at 25-26.) This is just another way of saying that § 1.03 of the Partnership Agreement conflicts with § 8.01. If JKJ were an entirely aggregate partnership, then the death, bankruptcy, or any other incapacity or withdrawal of a partner would always cause the partnership's dissolution.

commentary to the UPA notes, the UPA "adopted an entity theory for some purposes" although "the aggregate theory predominated." Hillman, *supra*, § 201 cmt. 1. Even before Delaware enacted DRUPA, the Third Circuit observed that "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. Manchester Partners, L.P.*, 95 F.3d 1185, 1192 (3d Cir. 1996).

Defendants misplace their reliance upon a law review article coauthored by Chief Justice Strine. (Defs' Br. at 21-22 (citing Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 Wis. L. Rev. 451, 453 (2019)).) Chief Justice Strine and his coauthor argue that, in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the United States Supreme Court "confuse[d] the *traditional general partnership* form of business organization, which is an association of partners whose individual rights and responsibilities are indistinguishable from those of the entity, with the corporate form of business organization, which is a separate juridical entity with distinct rights and responsibilities." Macey & Strine, *supra*, at 462 (emphasis added). This statement provides no commentary on the modern partnership law embodied in DRUPA. Indeed, elsewhere, the authors acknowledge that "modern law treats

partnerships as entities *for some legal purposes*." *Id.* at 462-63 n.41 (emphasis added).

Moreover, according to the article, the "key distinction" between corporations and traditional general partnerships is that "[s]tockholders are liable only for the equity they provided to the corporation," but "partners have full liability for any obligation owed by the general partnership." *Id.* Yet, in the present case, JKJ is a limited liability partnership, which means that its partners are not personally liable for an obligation of a partnership. *See* 6 *Del. C.* § 15-306(c). Although "limited liability is a consequence of *the entity theory* of the corporation," Macey & Strine, *supra*, at 480 (emphasis added), DRUPA expressly permits a limited liability partnership to structure itself as an entity indistinct from its partners.[5] *See* 6 *Del. C.* § 15-201(b) (cross-referencing 6 *Del. C.* § 15-1001, which governs LLPs, and requiring an LLP to include opt-out language permitted by § 15-201(a) in statement of qualification).

Thus, under DRUPA, the aggregate and entity models of partnership are not mutually exclusive, and a partnership may elect to be indistinct from its members under § 201(a), while still retaining aspects of the entity model. This includes the

[5] It bears noting that Defendants have offered no response to this point, which JKJ included in its opening brief (Pl. Br. at 17).

ability to survive any change in membership pursuant to the terms of the partnership agreement.

II. THE SECOND AMENDED COMPLAINT DOES NOT ALLEGE A NEW PARTNERSHIP.

The second certified question asks:

> 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.)

When it commenced the underlying *qui tam* action on November 4, 2011, JKJ consisted of three partners: Partner A, Partner B, and Partner C. Even if JKJ did dissolve upon the withdrawal or replacement of Partner B, that dissolution did not extinguish the *qui tam* claim. Defendants do not dispute this fact. Instead, they attempt to avoid the second certified question by insisting that it is "based on a premise that is factually false." (Defs. Br. at 27.) Specifically, Defendants contend that it is "clear that the Second Amended Complaint was filed by the new partnership"—which they maintain constituted an impermissible intervention under the FCA[6]—because the Second Amended Complaint alleges that JKJ's partners are Partner A, Dr. Gurbel, and Partner C. (*See* Defs. Br. at 28.)

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[6] This is an issue of federal law that has been fully briefed in the Third Circuit and does not bear upon the discrete questions certified to this Court. Suffice it to say, JKJ disagrees with Defendants' position (Def. Br. at 19-20 n.9). *See, e.g.*, *U.S. ex rel. Boise v. Cephalon, Inc.*, No. 080287, 2014 WL 5089671, at

This allegation does not "answer[] the question" as a matter of law regarding "whether the 'old' partnership existed long enough to file the Second Amended Complaint or not." (*Id.*) It reflects the change in membership that generated the question in the first place. And, if any factual conclusion can be drawn from this allegation, it is that the partners did not intend to dissolve the "old" partnership or form a "new" partnership upon a change in membership. Indeed, the document in which Partner A (Wood, née Evans) and Partner C (Stahl) consented to the withdrawal of Partner B (Venditto) and admission of Dr. Gurbel makes it clear that the partners intended for Dr. Gurbel to "join" an already existing partnership as a "substitute" for Partner B. (A119-20.) The Second Amended Complaint simply reflects this understanding; it does not tell us that this change terminated the existing partnership, that it created a new partnership, or that a "new" partnership filed the Second Amended Complaint.[7]

Moreover, Defendants fail to explain how a limited liability partnership may change its membership without being treated as an entity if, under the aggregate theory, "the withdrawal or admission of a partner dissolves the former partnership and creates a new partnership with a new aggregation of partners." (Defs. Br.

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*4 (E.D. Pa. Oct. 9, 2014) ("the first-to-file rule does not apply to the voluntary addition of relators by amended complaint in a pending action").

[7] It bears remembering that two of the three partners—Partner A and Partner C—are the same. Thus, the question is simply whether the Second Amended Complaint correctly identifies Dr. Gurbel as a partner of JKJ.

at 16.) JKJ filed the Second Amended Complaint, just as JKJ filed the original and first amended complaint. Thus, if JKJ is an aggregate partnership that dissolved upon Partner B's withdrawal (or Dr. Gurbel's admission), then the Second Amended Complaint is simply incorrect when it alleges that JKJ's partners are Partner A, Dr. Gurbel, and Partner C.[8] Instead, JKJ is a dissolved partnership of Partner A, Partner B, and Partner C—a fact that JKJ would have had to live with for purposes of the original source exception, if it applied.

[8] This is no basis for dismissal. *See, e.g.*, Fed. R. Civ. P. 17(a)(3) ("The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action.").

III. EVEN IF JKJ DISSOLVED, THE ORIGINAL PARTNERS MAY CONTINUE TO PROSECUTE THIS LAWSUIT.

The third certified question asks:

> 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.)

Assuming that "the old partnership dissolved," Defendants contend that "the original partners did not and could not prosecute the *qui tam* action as part of the winding-up process" because (1) "the original partnership gave sole responsibility of litigating the lawsuit to the new partnership," (2) "when a partnership's sole business is to file and prosecute a lawsuit, the partnership cannot continue to prosecute that action under the guise of winding-up its business," and (3) allowing for the original partners to prosecute the underlying *qui tam* action to completion would not bring the partnership's affairs to a conclusion as soon as reasonably possible. (Defs. Br. at 29-33.) None of these arguments is well taken.

A. JKJ did not transfer the *qui tam* claim to a new partnership.

Defendants first argue that, "even if the original JKJ partnership could wind up its affairs by prosecuting the *qui tam* action, it did not do so. Instead, the original partnership gave sole responsibility of litigating the lawsuit to the new partnership." (Defs. Br. at 29.) Here again, however, Defendants principally rely upon the fact that the Second Amended Complaint alleges that JKJ's partners are

Partner A, Dr. Gurbel, and Partner C. (*See* Defs. Br. at 29.) Even assuming that these three individuals formed a new partnership, the foregoing allegation alone does not tell us that the old partnership yielded the lawsuit to the new partnership.[9]

"Where a firm dissolves by a change in its membership and a new firm is formed, the property interests of the old firm belong to the old firm and do not become the property of the new firm without a clear agreement to that effect." 68 C.J.S. Partnership § 304 (2019). There is no such agreement here. (*See* Pl. Br. at 20-21.) Defendants point to the fact that Partner B's notice of withdrawal states that "the partnership has no liabilities and no value as of the date of this withdrawal" (A119) as evidence that "[t]he old partnership . . . has already completed its winding-up." (Defs. Br. at 30.) But a partnership winds up *after* dissolution, not before. *See Paciaroni v. Crane*, 408 A.2d 946, 952 (Del. Ch. 1979). The fact that Partner B did not assign value to JKJ does not mean that JKJ had transferred its *qui tam* claim.

Defendants also question "how, if [JKJ's] theory were correct that the old partnership survived to litigate the *qui tam* suit as a part of winding-up, governance of litigation decisions could be effected or any proceeds split among the various

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[9] Again, if the issue is one of naming the wrong plaintiff, that can be remedied. *See supra*, n.8.

present and former partners." (Defs. Br. at 30.) On these issues, the UPA and DRUPA are in accord. The original partners may continue to prosecute the action, irrespective of whether or how the "various present and former partners" have agreed to divide the proceeds.

First, regarding governance, UPA § 33—which JKJ cited on page 22 of its opening brief—allowed the partners of a dissolved partnership to act for the partnership "so far as may be necessary to wind up partnership affairs *or to complete transactions begun but not then finished*." 6 *Del. C.* § 1533 (repealed 1999) (emphasis added). DRUPA similarly provides that "[a] partner at the time of dissolution, *including a partner who has dissociated* but not wrongfully, may participate in winding up the partnership's business or affairs . . . ." 6 *Del. C.* § 15-803(a) (emphasis added).

Second, with respect to the division of proceeds, the UPA allowed a partner to transfer his or her economic interest, in which case the assignee would be entitled "to receive the assignor's interest" upon dissolution, 6 *Del. C.* §§ 1527(a)-(b) (repealed 1999). So, too, under DRUPA, when a partner transfers his or her economic interest, "the transferor retains the rights and duties of a partner other than the economic interest transferred," 6 *Del. C.* § 15-503(d), but the transferee will be entitled "[t]o receive upon the dissolution and winding up of the partnership

business or affairs, in accordance with the transfer, the net amount otherwise distributable to the transferor," 6 *Del. C.* § 15-503(b)(2).

B. Completing unfinished business is different from conducting business.

Defendants next argue that the original partners may not continue to prosecute the action because doing so would require it to conduct the partnership's business, rather than close its affairs. (Defs. Br. at 31.) By this logic, however, a dissolved partnership could never finish business already begun. This position conflicts with the UPA. *See* 6 *Del. C.* § 1533 (repealed 1999) (conferring authority "to complete transactions begun but not then finished"). Although "[i]t is not generally contemplated that new business will be generated or that new contractual commitments will be made," *Paciaroni v. Crane*, 408 A.2d 946, 955 (Del. Ch. 1979), "the partnership continues until all preexisting matters are terminated," *Lebanon Trotting Ass'n v. Battista*, 306 N.E.2d 769, 772 (Ohio Ct. App. 1972). *See also Scholastic, Inc. v. Harris*, 259 F.3d 73, 85 (2d Cir. 2001) ("Following dissolution, the thrust of the partnership shifts from fulfilling prospective obligations, to winding-up the partnership's existing business affairs and devising a method to distribute its assets.").

The cases cited by Defendants are not to the contrary. Defendants quote *Caines Landing Wildlife Pres. Association v. Kirkpatrick*, 633 A.2d 369 (Table), 1993 WL 397606 (Del. 1993), for the proposition that "the business of a dissolved

general partnership should continue only if doing so is consistent with the objective of winding up its affairs." (Defs.' Br. at 31 (quoting *id.* at *2).) Here, the *qui tam* action "represents unfinished business of the partnership, which continues in the winding up phase until the litigation is brought to a close . . . ." Hillman, *supra*, § 802 cmt. 2. Thus, prosecuting the *qui tam* action to its conclusion "is consistent with the objective of winding up its affairs."[10] *Caines*, 1993 WL 397606, at *2. For their part, *Johnson v. Helicopter & Airplane Servs. Corp.*, 404 F. Supp. 726 (D. Md. 1975), and *Gamble v. Penn Valley Crude Oil Corp.*, 104 A.2d 257 (Del. Ch. 1954), are inapposite. Both involved a statute, 8 *Del. C.* § 278, which provides three years to wind up a corporation.[11] There is no equivalent provision in either the UPA or DRUPA.

Defendants' better argument is that, if "the old partnership is prosecuting the action as part of its winding-up process," then "there would be no role for the new

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[10] In contrast, the partners in *Caines* "failed to take any steps to wind up the partnership" business—the operation of a hunt club—after dissolution. 1993 WL 397606, at *2. Instead, the "remaining" partners "took steps to continue the hunt club's operations for their own benefit," including approving the imposition of a "capital improvement assessment" to be paid by each of the partners, the purchase of supplies needed to continue the hunt club, the continuation of liability insurance, and the creation of a number of "memberships" to the club. *Id.*

[11] In *Johnson*, the court held that the corporation "lost the capacity to sue and be sued *in new actions* upon the conclusion of that three-year period. 404 F. Supp. at 735 (emphasis added). In *Gamble*, the court concluded that the power to wind up did not include "the right to issue additional capital stock," because "[g]enerally speaking, the acquisition of additional capital would seem to be the very antithesis of winding up." 104 A.2d at 260.

partnership." (Defs. Br. at 32.) But this outcome, however anomalous, reflects the fact that JKJ intended to replace one of its partners, not to create a new partnership. Even if JKJ unwittingly did create a new partnership, it did not surrender its *qui tam* claim. *Cf. Merrill Lynch Pierce Fenner & Smith, Inc. v. N. European Oil Royalty Tr.*, 490 A.2d 558, 563 (Del. 1985) ("equity abhors a forfeiture").

C. Completing unfinished business is different from indefinite continuation.

Finally, Defendants argue that "[a]llowing for the original partners to prosecute the underlying *qui tam* action to completion would hardly constitute the prompt liquidation of business." (Defs. Br. 33) But as described in Part III.B, JKJ is entitled to continue prosecuting this *qui tam* action so long as "doing so is consistent with the objective of winding up its affairs." *Caines*, 1993 WL 397606, at *2. It is.

Although Defendants are correct that "a partnership must bring its affairs 'to a conclusion as soon as reasonably possible'" (Defs. Br. at 32 (quoting *Paciaroni*, 408 A.2d at 956 (emphasis omitted)), Delaware law does not impose a deadline for concluding business already begun. Rather, DRUPA § 15-802(a) provides that a partnership continues after dissolution "for the purpose of winding up its business or its affairs," and is terminated when "the winding up of its business or affairs is completed." 6 *Del. C.* § 15-802(a); *accord* 6 *Del. C.* § 1533 (repealed 1999).

DRUPA recognizes that the settling of a partnership's business may be gradual. 6 *Del. C.* § 15-803(c).

Simply stated, "the lapse of time between the date of dissolution and the termination of a partnership by completed winding up of its affairs is not of great importance, nor is there authority for setting specific deadlines in the wind up of a partnership . . . ." 59A Am. Jur. 2d Partnership § 696 (2019); *see also 8182 Md. Assocs., Ltd. P'ship v. Sheehan*, 14 S.W.3d 576, 581 (Mo. 2000) ("dissolved partnerships may continue in business for a short, long or indefinite period of time" (internal quotation marks omitted)).

None of Defendants' cases supports the notion that prosecuting an existing lawsuit is incompatible with winding up a partnership's business within a reasonable time, or that there is a *per se* reasonable period in which a dissolved partnership must conclude the winding-up process. To the contrary, in *Paciaroni* (*see* Defs. Br. at 32), the court permitted "the business [to] continue to the degree necessary to preserve or enhance its value upon liquidation, provided that such continuation is done in good faith with the intent to bring affairs to a conclusion as soon as reasonably possible."[12] 408 A.2d at 956.

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[12] The other cases are inapposite. *See Sutherland v. Mayer*, 271 U.S. 272, 289 (1926) (addressing effect of a World War I nonintercourse rule on partnership's ability to wind up affairs); *Heller Ehrman LLP v. Davis Wright Tremaine LLP*, 411 P.3d 548, 555 (Cal. 2019) (addressing issue of whether

Nor does the Partnership Agreement fix such a deadline. (*See* Defs. Br at 33.) Section 8.02 provides that "[t]he liquidation of Partnership property shall be carried out as *promptly as is consistent with obtaining the fair value thereof*." (A114 (emphasis added).) JKJ's prosecution of its *qui tam* case to its natural conclusion is consistent with the goal of promptly concluding the partnership's business—obtaining a "final resolution or settlement of the Action without further right of appeal" (A112)—in a manner that allows JKJ to obtain the value of any recovery.

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dissolved law firm has post-dissolution property interest in fees and profits associated with unfinished hourly work in the context of bankruptcy proceeding).

CONCLUSION

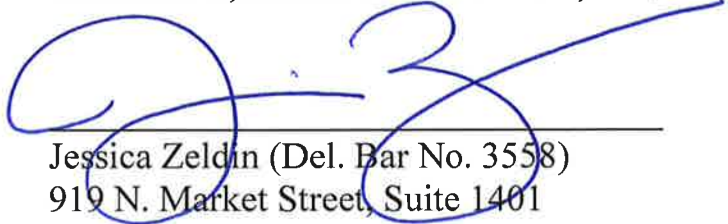
For these reasons and those set forth in JKJ's opening brief, this Court should answer the certified questions as follows:

1. Irrespective of a change in its membership, JKJ remains the same partnership;

2. Even if a "new" partnership was created, the "old" partnership continues to exist for purposes of winding up; and

3. The original partners may prosecute the *qui tam* lawsuit to its conclusion as part of the winding-up process.

ROSENTHAL, MONHAIT & GODDESS, P.A.



Jessica Zeldin (Del. Bar No. 3558)
919 N. Market Street, Suite 1401
P.O. Box 1070
Wilmington, Delaware 19899
(302) 656-4433

Attorneys for Relator-Appellant JKJ Partnership 2011 LLP

OF COUNSEL:

William H. Narwold
Mathew P. Jasinski
MOTLEY RICE LLC
One Corporate Center
20 Church St., 17th Floor
Hartford, Connecticut 06103
(860) 882-1681

W. Scott Simmer
BARON & BUDD, P.C.
600 New Hampshire Ave., N.W.
Suite 10-A
Washington, D.C. 20037
(202) 333-4849

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