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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

APPELLEES' AMENDED ANSWERING BRIEF

MORRIS, NICHOLS, ARSHT &
TUNNELL LLP
Kenneth J. Nachbar (#2067)
Coleen W. Hill (#6287)
1201 N. Market Street
Wilmington, DE 19801
(302) 658-9200
KNachbar@MNAT.com
CHill@MNAT.com

Attorneys for Defendants-Appellees

OF COUNSEL:

ARNOLD & PORTER KAYE
SCHOLER LLP
Anand Agneshwar
250 West 55th Street
New York, NY 10019
(212) 836-8000

John P. Elwood
Kirk Ogrosky
Daniel S. Pariser
Murad Hussain
Anna K. Thompson
601 Massachusetts Avenue NW
Washington, DC 20001
(202) 942-5000

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NATURE OF THE PROCEEDINGS

JKJ Partnership 2011 LLP ("JKJ") deliberately chose to be indistinct from its partners as a means of prosecuting a *qui tam* lawsuit under the federal False Claims Act ("FCA"). To protect that litigation strategy, JKJ's Partnership Agreement specified that its election to be indistinct controls over any conflicting provision of the agreement. The basic issue in this appeal, which presents as certified questions from the U.S. Court of Appeals for the Third Circuit, is whether JKJ can be indistinct from its partners and, at the same time, be an entity separate and distinct from its partners, allowing for the coming and going of partners at will without creating a new partnership. The answer is no.

Three partners formed JKJ for the sole purpose of bringing a *qui tam* action. Just a week after it formed, JKJ filed an action under the FCA and related state laws, alleging that Defendants-Appellees fraudulently marketed the prescription drug Plavix. In an effort to evade one of the FCA's statutory bars on private suits, JKJ opted to be indistinct from its partners so it could use its partners' knowledge of the alleged fraud to file the suit. That is because under the FCA, unless the plaintiff-relator has "direct and independent knowledge" of the alleged fraud, it cannot bring a *qui tam* action concerning fraud that has already been disclosed to the public. JKJ therefore purposefully rejected the "entity" model of partnership, instead adopting the "aggregate" model and making known its intent to be

indistinct from its partners—in the Partnership Agreement, in the Statement of Qualification, in the complaint, and in briefing throughout this litigation.

After the federal and state governments all declined to intervene in the *qui tam* lawsuit, however, the partnership changed: One of JKJ's partners withdrew and a new partner joined. This new partnership—now consisting of a different aggregation of partners—filed an amended complaint in federal court. The federal district court properly dismissed the action, concluding, as relevant here, that the changes in membership dissolved the original partnership and created a new partnership that improperly intervened in the lawsuit.

Having chosen an aggregate partnership model to gain a litigation advantage, JKJ now runs from that choice because it is unhappy with the litigation consequences of that decision. It is black letter law that when a partnership and its partners are indistinct, the withdrawal and addition of a partner dissolves that partnership and a new partnership forms. Yet JKJ claims that the membership changes did not dissolve the partnership or create a new one, relying largely on a provision in the Partnership Agreement that purportedly allows for a partner to withdraw without dissolving the partnership (the "Dissolution Provision").

To begin with, that provision does not address the situation here, where a new partner is also ***admitted*** to the partnership. But even if the change in membership had been limited to the withdrawal of a partner, thus implicating the

Dissolution Provision, Section 1.03 of the Partnership Agreement explicitly states that JKJ's decision to be indistinct from its partners controls over any conflicting provision in the agreement. Here, the notion that partners can come and go at will without dissolving the partnership and creating a new one is fundamentally at odds with the aggregate partnership that JKJ purposefully elected, and so the election of that model must prevail.

There is also no merit to JKJ's secondary argument—that even if the membership changes created a new partnership, the original partnership can prosecute the *qui tam* action as part of its winding-up process. As a factual matter, the original partnership did not continue with the underlying *qui tam* action. The Second Amended Complaint explicitly identified the new partnership as the putative plaintiff-relator. What is more, the original partnership was formed for the sole purpose of litigating the *qui tam* action. If the original partners could continue to prosecute the action in the name of winding-up, it would render the whole concept of dissolution meaningless.

On these facts, this Court should conclude that the withdrawal and admission of a partner dissolved the original partnership and created a new one, and that the original partners—who formed the partnership for the sole purpose of litigating the *qui tam* action—did not and cannot continue to prosecute the action as part of the winding-up process.

SUMMARY OF ARGUMENT

1. Denied. To gain an advantage in litigation, JKJ elected to be a partnership indistinct from its partners, as opposed to being a separate and distinct legal entity. As a necessary corollary, any change in its membership—here, the addition of Dr. Paul Gurbel and the withdrawal of Dr. John Venditto as partners—dissolved the partnership and created a new partnership. Although the Partnership Agreement's Dissolution Provision states that the ***withdrawal*** of a partner will not dissolve the partnership, it does not address whether the ***admission*** of Dr. Gurbel as a partner dissolves the original partnership or creates a new partnership. JKJ's election under the aggregate model therefore governs, and the admission of the new partner creates a new partnership.

Even if the Dissolution Provision could be read to govern this situation, it would conflict with JKJ's election to be a partnership indistinct from its partners, as it would undo the core feature of the aggregate partnership model that JKJ consciously and pointedly chose to adopt. In such a situation, the Partnership Agreement provides that JKJ's decision to be legally indistinct from its members controls.

2. Denied. When JKJ changed its membership, the original partnership—consisting of Dr. John Venditto, Ms. Kelly Wood, and Dr. Jeffrey Stahl—dissolved and explicitly ceded control of the *qui tam* litigation to the new

partnership. The Second Amended Complaint specifically named each member of the new partnership—Dr. Gurbel, Ms. Wood, and Dr. Stahl—when it pleaded the identity of the partnership pursuing the action as the plaintiff-relator.

3. Denied. When JKJ changed its membership, the original partners did not, and could not, continue to prosecute the lawsuit as part of the winding-up process. The original partnership here indisputably ceded control of the litigation to the new partnership, identifying the new partnership (including its members) as the plaintiff-relator in the Second Amended Complaint. In any event, when the sole business purpose of a partnership is to prosecute a *qui tam* action, the original partners cannot continue to prosecute the litigation following dissolution—and thereby indefinitely conduct the sole business of the partnership as if nothing had happened—under the guise of "winding-up."

STATEMENT OF FACTS

The *qui tam* action at issue in this appeal is one of the last remaining cases in what had been a nationwide litigation concerning the prescription antiplatelet drug Plavix. Virtually every one of the thousands of personal injury plaintiffs in the federal multi-district litigation ("MDL"), of which this case is a part, have been dismissed either by the court or voluntarily without settlement payment. The federal government and states have all declined participation in this *qui tam* action, which—aside from a few *pro se* personal injury cases—is all that remains of the federal Plavix MDL.

This case had its beginning on October 26, 2011, when Dr. John Venditto, Ms. Kelly Wood, and Dr. Jeffrey Stahl formed the "JKJ" partnership (**J**ohn, **K**elly, and **J**effrey) to prosecute the underlying *qui tam* action. *See* A112 ("The purpose and business of the Partnership is to file and prosecute the Action."). As relevant here, the Partnership Agreement states:

> **Section 1.03 No Separate Legal Entity**. As authorized by Section 15-201(a) of the Act, the Partnership shall not be a separate legal entity distinct from its Partners. In the event of any conflict between the terms of Section 1.03 and the terms of any other Section of this Agreement, the terms of this Section 1.03 shall control.
>
> * * *
>
> **Section 1.07 Term.** The term of the Partnership shall commence on the date of filing of the Statement of Qualification, and the Partnership shall continue until the

> final resolution or settlement of the Action without further right of appeal.
>
> * * *
>
> **Section 7.02 Admissions.** No transferee of an Interest shall be admitted as a Partner of the Partnership without the written consent of the Partners. . . .
>
> **Section 7.03 Withdrawals.** No Partner shall have the right to withdraw or dissociate from the Partnership . . . except . . . with the written consent of the non-withdrawing Partners(s). . . .
>
> **Section 8.01 Dissolution Events.** Subject to Section 1.07, the Partnership shall be terminated and dissolved upon at such time and on the happening of such events as shall be determined by the Partners. The death, incapacity, bankruptcy or any other incapacity or withdrawal of a Partner shall not cause a dissolution of the Partnership.
>
> **Section 8.02 Liquidation.**
>
> **(a) Winding Up.** Upon the dissolution of the Partnership, the Partnership's business shall be liquidated in an orderly manner. The Partners shall determine which Partnership property shall be distributed in-kind and which Partnership property shall be liquidated. The liquidation of Partnership property shall be carried out as promptly as is consistent with obtaining the fair value thereof.

A111, A112, A114. As part of its formation, JKJ also filed a Statement of Qualification, which states: "No Separate Legal Entity. As authorized by Section 15-201(a) of the Act, the Partnership shall not be a separate legal entity distinct

from its partners." A117; Appellant's Opening Br. at 9 [hereinafter "Opening Br."].

On November 4, 2011, JKJ filed a Complaint on behalf of the United States and various state governments related to Defendants-Appellees' marketing of Plavix. A087-88; B001-170.[1] Like the Partnership Agreement and the Statement of Qualification, the Complaint included language emphasizing that the partnership "is not distinct from its partners." B020, ¶ 21("JKJ PARTNERSHIP 2011 is not distinct from its partners, who have personal knowledge of the aforesaid false claims, statements, concealments, and receipts."). JKJ repeatedly explained that the decision to be indistinct from its partners was deliberate: Doing so would allow the partnership to bring an action under the FCA without running afoul of the statute's public disclosure bar. *See id.*; Opening Br. at 2, 11-12, 15.

Following the decisions of the United States and state governments declining to intervene in the *qui tam* action, *see* A089-90, on December 8, 2016, Dr. Venditto withdrew from the partnership. A119. Dr. Paul Gurbel joined as a new partner shortly thereafter on January 7, 2017. A119-20. A month later, on February 22, 2017, this new partnership—consisting of Dr. Gurbel, Ms. Wood, and Dr. Stahl—filed the Second Amended Complaint. B183, ¶ 27 ("There are three JKJ partners: Paul A. Gurbel, M.D., Jeffrey A. Stahl, M.D., and Kelly D.

[1] Pursuant to Rule 13(a)(iii), citations to Defendants-Appellees' Appendix are denoted "B__."

Evans."); B183-85, ¶¶ 28-30 (including biographical information on Dr. Gurbel, Dr. Stahl, and Ms. Wood).[2]

On May 30, 2018, the federal district court dismissed the *qui tam* action under the FCA's provision that prohibits private parties from intervening in existing *qui tam* actions.[3] *In re Plavix Mktg., Sales Practices & Prods. Liab. Litig. (No. II)*, 315 F. Supp. 3d 817, 834-35 (D.N.J. 2018) (attached as Ex. A to Opening Br.). Among other things, the court concluded that Dr. Venditto's withdrawal from the original partnership and Dr. Gurbel's admission as a partner created a new partnership under Delaware law. *Id.* at 831-32, 834.

After the district court denied JKJ's motion for reconsideration, *see* Ex. C to Opening Br., JKJ appealed to the Third Circuit, which certified the following questions to this Court:

> (a) A limited liability partnership is formed to file and prosecute a specific lawsuit. Its formational

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[2] Between the filing of the original complaint and the Second Amended Complaint, Partner Kelly Wood appears to have changed her name to Kelly D. Evans. JKJ has repeatedly represented that only Dr. Venditto withdrew from the partnership and was replaced by Dr. Gurbel—thus, Ms. Wood and Dr. Stahl continued as partners. *See, e.g.*, Opening Br. at 9; A119-20. The Second Amended Complaint, however, describes the partners as Dr. Paul Gurbel, Dr. Jeffrey Stahl, and Kelly D. Evans, *see* B183-85, ¶¶ 27, 30, suggesting that Ms. Wood changed her name. For simplicity, this brief refers to her as Ms. Wood.

[3] The bar on private intervention, part of the better-known "first-to-file" bar, provides that "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) (2010) (emphasis added).

> 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; *see also* B330-35 (describing the procedural history and facts of the case).

ARGUMENT

I. BECAUSE JKJ ELECTED TO BE A PARTNERSHIP INDISTINCT FROM ITS PARTNERS TO EVADE A STATUTORY BAR TO ITS LAWSUIT, A CHANGE IN MEMBERSHIP CREATES A NEW PARTNERSHIP.

A. Question 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?

B. Scope of Review

This Court reviews certified questions in the context in which they arise. *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 661 (Del. 2014). The issue here arises from a motion to dismiss, and presents as a question of law to be reviewed *de novo*. *See, e.g.*, *City of Wilmington v. Nationwide Ins. Co.*, 154 A.3d 1124, 1127 (Del. 2017); *see also, e.g.*, *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 231 (Del. 2008).

C. Merits of Argument

Because JKJ elected to adopt the aggregate model of partnership, both the withdrawal of a partner and the addition of a new partner each create a new

partnership. Under the common law's aggregate model, partnerships are a "collection of persons with aggregate rights," *Sillman v. DuPont*, 302 A.2d 327, 331 (Del. Super. Ct. 1972), rather than separate legal entities. By contrast, the entity approach views the partnership as a distinct legal entity separate and apart from the individual partners. *E.g.*, *In re Ginsberg*, 219 F.2d 472, 473 (3d Cir. 1955) (explaining that "in bankruptcy a partnership is treated as an entity separate from the individual partners, and its estate is administered separately" (citations omitted)).

Effective on January 1, 2000, Delaware enacted the Delaware Revised Uniform Partnership Act ("DRUPA"), 6 Del. Code §§ 15-101 *et seq.*, which is modeled after the Revised Uniform Partnership Act of 1997 ("RUPA"). As relevant here, Delaware adopted RUPA's entity theory provision, but specifically permitted partnerships to opt into the aggregate theory: "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.***" *Id.* § 15-201(a) (emphasis added).[4]

Here, it is undisputed that JKJ elected to be a partnership that is legally indistinct from its partners. *See, e.g.*, Opening Br. at 2, 9, 11, 15; A111, A117; B020, ¶ 21. Because it is indistinct from its partners, the JKJ partnership is simply

[4] Prior to the enactment of DRUPA, Delaware partnership law followed the Uniform Partnership Act's ("UPA") aggregate theory of partnership.

a reference or shorthand way to describe that particular grouping of partners. Any change in the group of partners necessarily dissolves the old partnership and creates a new partnership.

1. JKJ chose to be a partnership indistinct from its partners to evade the FCA's public disclosure bar.

JKJ repeatedly has explained that it decided to be legally indistinct from its partners to take advantage of the original source exception to the FCA's public disclosure bar.[5] *See, e.g.*, Opening Br. at 2 ("In order to secure JKJ's status as an original source of the information known to its partners, JKJ's partnership agreement . . . provides that . . . 'the Partnership shall not be a separate legal entity distinct from its Partners.'" (citations omitted)); *see also id.* at 11, 15 (similar).

The public disclosure bar prohibits a relator from bringing a *qui tam* action alleging fraud that has already been disclosed to the public. *See* 31 U.S.C. § 3730(e)(4)(A) (2010).[6] But the statute provides an exception to that rule. Even if the allegations were previously disclosed, a relator may be able to avoid dismissal by being an original source of the allegations. *Id.* An original source is

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[5] Nothing in the FCA requires a *qui tam* relator to bring the action as a corporation or other business association. Individuals routinely file such actions, but sometimes instead choose to organize as a corporation or other business association to shield their personal identities.

[6] JKJ's claims against Defendants-Appellees cover a period both before and after Congress's amendment of the FCA in 2010. For simplicity, this brief will cite to the pre-amendment version of the statute, which covers the bulk of the allegations.

"an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing [the action]." *Id.* § 3730(e)(4)(B).

Applying this exception, courts have held that a corporate relator formed for the purpose of bringing an FCA action cannot be an original source because only the shareholders, and not the corporation itself, have the direct and independent knowledge of the fraud. *See, e.g.*, *Fed. Recovery Servs., Inc. v. United States*, 72 F.3d 447, 452 (5th Cir. 1995); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 554 (10th Cir. 1992). An unincorporated association's knowledge, however, may be "direct" when the association is legally indistinct from its members. *See Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1049-50 (8th Cir. 2002).[7]

Here, the alleged fraud long pre-dated JKJ's formation. Therefore, if the alleged fraud had been previously disclosed to the public, JKJ could only bring the lawsuit if it were an original source with "'knowledge' of the fraud for which it claims to serve as a whistleblower, if at all, only through its constituent members." *In re Plavix*, 315 F. Supp. 3d at 831. Having purposefully made the election to be

[7] The Third Circuit has not addressed whether a business association indistinct from its members can proceed as a *qui tam* relator on the basis of its members' knowledge of the alleged fraud. However, for purposes of this brief only, Defendants-Appellees will assume, as JKJ posits, that as a partnership indistinct from its partners, JKJ could serve as an original source under the FCA.

an aggregate partnership so that its partners' knowledge would be imputed to it, the federal district court correctly concluded that JKJ could not walk that decision back:

> Any finding to the contrary would lead to the absurd result that JKJ would be permitted to proceed as a relator because it is legally indistinguishable from, and therefore directly possesses the knowledge of, its members, but would also be permitted to change its membership without becoming a different legal entity because it is legally independent and indistinguishable from its present members. Put simply, JKJ cannot have it both ways. As part of a litigation strategy to maintain their anonymity, JKJ's original partners formed a non-entity partnership arguably capable of serving as a source of information concerning events which transpired before its formation on the basis of its partners' personal knowledge. Having obtained these benefits at filing, JKJ cannot now be treated as an entity partnership capable of persisting in the litigation through a change in membership.

Id. at 832.

It 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. *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013) (courts must construe partnership agreements "in accordance with their terms to give effect to the parties' intent").

2. The plain language of the Partnership Agreement provides that the withdrawal of one partner and the addition of another partner triggers dissolution.

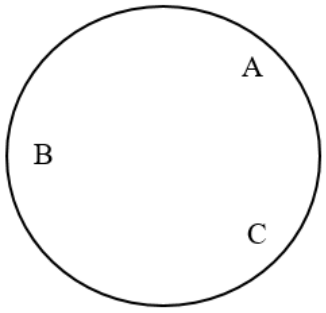
Under the plain language of the Partnership Agreement, JKJ's election of the aggregate model—under which a partnership is dissolved both when a partner leaves and when a new partner joins—should control.

It is well-established that if a partnership decides to be indistinct from its partners, the withdrawal or admission of a partner dissolves the former partnership and creates a new partnership with a new aggregation of partners. *See, e.g.*, *Evans v. Gunnip*, 135 A.2d 128, 130 (Del. 1957) ("Upon [a partner's] withdrawal from the partnership, a new partnership was immediately formed between [the remaining partners]."); *Fike v. Ruger*, 754 A.2d 254, 257 (Del. Ch. 1999) (noting that at common law, "each partner may at any time withdraw and cause a dissolution"); *Liability of Incoming Partner for Existing Debts*, 45 A.L.R. 1240 § I (1926) ("[I]t is settled beyond all question . . . that, upon what we in common parlance designate 'the admission of a person into a partnership,' there is, ipso facto, . . . a dissolution of the existing copartnership and the formation of a new one.").[8]

[8] *See also, e.g.*, *Troupe v. Seby*, 416 F.2d 514 (9th Cir. 1969) ("It is a well-established general rule tha[t] an existing partnership is dissolved and a new partnership is formed whenever a partner retires or a new one is admitted." (citation omitted)); *In re Taylor & Assocs., L.P.*, 249 B.R. 448, 473 (E.D. Tenn. 1998) ("[T]he addition of a partner to, or the removal of a partner from, a

Put another way, if a partnership is the aggregation of partners, graphically, the solid circle surrounding Partners A, B, and C represents that partnership (*see Figure 1*):

Figure 1
Partnership A-B-C



As depicted below, if Partner B leaves (*Figure 2*) or if Partner D joins (*Figure 3*), a different aggregation of partners and, thus, a new partnership—each represented by the dotted circle—necessarily forms. *Figure 4* represents where both Partner B leaves and Partner D joins.

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partnership dissolves the partnership that existed prior to the addition or removal, and if the business continues, creates a new partnership."); *Citizens Bank v. Parham-Woodman Med. Assocs.*, 874 F. Supp. 705, 708 (E.D. Va. 1995) ("[A]t common law, admission of a new partner dissolved the old partnership and created a new one."); *Fairway Dev. Co. v. Title Ins. Co.*, 621 F. Supp. 120, 123-24 (N.D. Ohio 1985) (change in partners created a new partnership, despite the latter's use of the prior partnership's name); *Weeks v. McMillan*, 353 S.E.2d 289, 291 (S.C. Ct. App. 1987) ("The common law rule is that both the admission of a partner and the withdrawal of a partner will effect a dissolution.").

Figure 2
Partner B withdraws
Partnership A-B-C dissolves and new Partnership A-C is formed

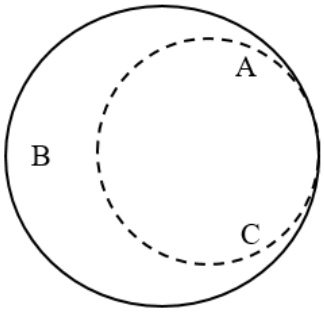


Figure 3
Partner D is admitted
Partnership A-B-C dissolves and new Partnership A-B-C-D is formed

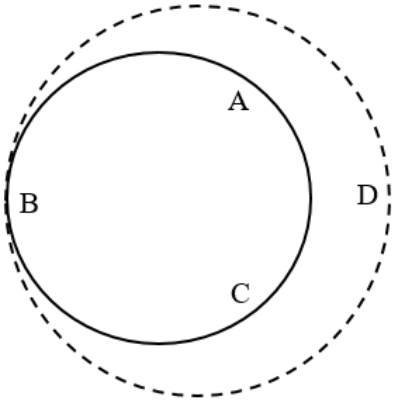
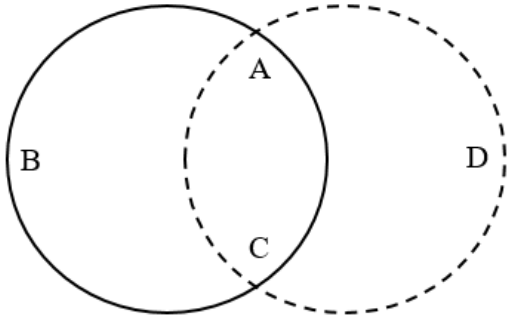


Figure 4
Partner B withdraws; Partner D is admitted
Partnership A-B-C dissolves and new Partnership A-C-D is formed



Here, JKJ's election to be indistinct from its partners means that Dr. Venditto's withdrawal and Dr. Gurbel's subsequent admission, *see Figure 4*, dissolved the old partnership and created a new partnership with a different aggregation of partners. JKJ does not seriously dispute that this is the proper outcome under the aggregate model, but instead claims that the Partnership Agreement altered that outcome by allowing for the partnership to survive the membership changes. *See* Opening Br. at 13. That argument is wrong for several reasons.

First, the Partnership Agreement provides no exception from the aggregate model where a new partner ***joins*** the partnership. JKJ relies on Section 8.01 of the Partnership Agreement, *see* Opening Br. at 14, but that section provides that the "death, incapacity, bankruptcy or any other incapacity or ***withdrawal*** of a Partner shall not cause a dissolution of the Partnership." A114 (emphasis added). By its terms, this Dissolution Provision addresses only the death, incapacity, bankruptcy, or other incapacity or withdrawal of a partner—all events outside the control of the remaining partners—and provides that those acts will not dissolve the partnership. Section 8.01 nowhere sanctions the deliberate act of ***adding*** a partner to the partnership (an act requiring consent of the remaining partners).[9]

[9] Indeed, JKJ could easily have drafted Section 8.01 to account for the addition of a partner. The fact that JKJ included the "withdrawal of a Partner" in Section 8.01 but did not include the "addition of a Partner" suggests that the

In addition, although JKJ cites provisions in the Partnership Agreement that "permit a change in membership," *see* Opening Br. at 13 (citing the definition of "Partners" and Sections 7.02 and 7.03), those provisions do not address the ***effect*** of that membership change. As explained above, it is well-established that under the aggregate model that JKJ chose, the effect of a partner coming or going is to create a new partnership. *See supra* note 8 and accompanying text. And if JKJ were anything but a *qui tam* relator, as a new partnership, it could continue the business of the old partnership. *See supra* note 3 (discussing the private intervention bar to the FCA). The conclusion that a new partnership is formed as a

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exclusion was intentional. Moreover, limiting Section 8.01 to a "withdrawal of a Partner" makes sense given the partnership's sole purpose of bringing this *qui tam* litigation. Under the FCA's first-to-file and public disclosure bars, a partner's withdrawal—unlike the addition of a partner—does not offend the statute's underlying policy considerations. These statutory bars in the FCA create a "race to the courthouse" by "encouraging *qui tam* plaintiffs to report fraud promptly" before another relator (or a public disclosure) can do so first. *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998). A partner's withdrawal would not allow any new individual to circumvent the first-to-file bar, nor would it expand the partnership's aggregate knowledge in a way that bolsters its claim to "original source" status under the public disclosure bar. By contrast, the addition of new partners would belatedly expand the partnership's knowledge, allowing the new partners to participate in a *qui tam* suit that they could not otherwise file on their own, *see* 31 U.S.C. § 3730(b)(5) (2010), and would defeat the first-to-file bar's purpose of incentivizing relators to "promptly alert the government to the essential facts of a fraudulent scheme." *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d 111, 117 (1st Cir. 2014) (quotation marks and brackets omitted).

result of membership changes, therefore, does not somehow "render [Sections 7.02 and 7.03] nugatory." Opening Br. at 13.

Similarly, Section 1.07—captioned "Term," and which explains that the term of the partnership begins at the filing of the Statement of Qualification and continues until the resolution of the *qui tam* action—merely provides the outer limits of the partnership's existence. *See* Opening Br. at 14; A112. Again, it does not address how the withdrawal or admission of a partner affects the partnership, nor does it purport to exempt the partnership from ordinary principles of law governing changes in membership.

Second, even if the admission of Dr. Gurbel somehow were governed by Section 8.01's Dissolution Provision (which addresses only withdrawals), JKJ has specified that its decision to be indistinct from its partners controls. Concerned that the public disclosure bar could prevent the partnership from bringing an action under the FCA, JKJ drafted Section 1.03 to provide that the partnership "shall not be a separate legal entity distinct from its Partners." A111; *see also* Opening Br. at 2, 11, 15. The second sentence of Section 1.03—which JKJ nowhere cites in its Opening Brief—provides that "[i]n the event of any conflict between the terms of Section 1.03 and the terms of any other Section of this Agreement, ***the terms of this Section 1.03 shall control***." A111 (emphasis added).

Here, to the extent Section 8.01 of the Partnership Agreement could be read to allow for the partnership to survive in the face of a membership change, it directly conflicts with Section 1.03. Reading the agreement to provide that a partnership would survive the withdrawal of one partner and addition of another would be fundamentally at odds with the concept of an aggregate partnership. "[T]he legal conceptions of [a business organization] as either a distinct entity or simply an aggregation of its stockholders are ***mutually exclusive***. As a matter of logic, [an organization] may be conceptualized by law as either an entity or an aggregate, but it ***cannot rationally be conceptualized simultaneously as both***. The entity theory and the aggregate theory are ***not complements; they are substitutes***." Jonathan Macey & Leo E. Strine, Jr., Citizens United *As Bad Corporate Law*, 2019 Wis. L. Rev. 451, 464 (2019) (discussing corporations) (emphases added). Put another way, having no identity separate from the individual partners is the defining feature of an aggregate partnership; purporting to allow partners to come and go without affecting that identity is to say that the partnership is distinct from its partners after all.

Accordingly, there is a clear conflict between Section 1.03 of the Partnership Agreement (providing that the partnership "shall not be a separate legal entity distinct from its partners") and Section 8.01 of that agreement (providing that the withdrawal of a partner shall not dissolve the partnership). A111; A114. The

parties to the Partnership Agreement stipulated that, in such circumstances, Section 1.03 of the agreement controls. A111.

JKJ nevertheless argues that under "freedom of contract" principles, it can include in the Partnership Agreement terms that "allow JKJ to survive change in membership," *see* Opening Br. at 12-13, and can "mix" elements of an aggregate and entity partnership, *see id.* at 16-17. But the question here is not whether JKJ can contract for such provisions, or even whether the partnership can combine ***any*** elements of the aggregate and entity models. The issue here is whether JKJ can combine ***these*** specific provisions—namely, can a partnership both be legally indistinct from its partners and survive a change in membership? As explained above, these concepts cannot be reconciled. Because the provisions conflict, the freedom of contract principles upon which JKJ relies mandate that JKJ's choice to employ the aggregate model must be honored—its contract provides that in the event of a conflict, the terms of Section 1.03 (aggregate entity) will control. And the two pre-DRUPA cases and one treatise that JKJ cites are inapposite. *See* Opening Br. at 16-17. None of those authorities address whether a partnership that has explicitly elected to be indistinct from its partners can continue to exist when a partner withdraws or a new partner joins.[10]

[10] *In re Imperial "400" National, Inc.*, 429 F.2d 671 (3d Cir. 1970), involved a bankruptcy court's jurisdiction over an entity-type partnership (not an aggregate partnership as here), and its partners. The court explained that in the unique

Under the plain language of the Partnership Agreement, then, JKJ's election to be indistinct from its partners controls. *See* A111. As one appellate court explained under similar circumstances:

> When a partner withdraws from a firm, the partnership is dissolved. Although the remaining partners may choose to carry on the business of the firm as a new partnership ***and the partnership agreement may provide that the withdrawal of a partner does not terminate the business of the partnership, the fact remains that, in continuing the business, the partnership operates as a new entity distinct from the former partnership.***

Joseph, Babener & Carpenter v. Emp't Div., 737 P.2d 628 (Or. Ct. App. 1987) (emphasis added; citation omitted).

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context of bankruptcy proceedings, "the artificial concept of a separate entity should not hinder the reorganization of the debtor in a single proceeding," because "[t]he Bankruptcy Act contemplates jurisdiction of the partners and the partnership in the same court," so the fact that the partnership was a separate entity could not frustrate that legislative purpose. *Id.* at 679. *HB General Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185 (3d Cir. 1996), held merely that although a partnership had "interests as an entity" in a lawsuit among its partners, it was not an essential party to the suit because its entity interests were adequately represented by its partners, "all of whom [we]re before the court." 95 F.3d at 1193. Neither case addresses the addition or withdrawal of a partner, let alone how to reconcile competing provisions in a partnership agreement that adopt the aggregate model yet purportedly provide for the continued survival of the partnership when a partner withdraws. JKJ's cited treatise discussion (and the cases it cites) is similarly inapposite. It merely states a general proposition that a partnership may sometimes be considered a hybrid organization for purposes "such as ownership of property." *See* 68 C.J.S. Partnership § 100 (2019). It nowhere addresses if a partnership can be a hybrid entity with respect to changes in membership.

Finally, JKJ argues that the original partnership was not dissolved because none of the dissolution events listed in DRUPA, 6 Del. Code § 15-801, applies. *See* Opening Br. at 15-16. But that statutory provision contemplates the circumstances for dissolution of an entity partnership, and not—as is the case here—a partnership that has elected to be indistinct from its partners. RUPA § 801 cmt. 1 ("Under UPA Section 29, a partnership is dissolved every time a partner leaves. That reflects the aggregate nature of the partnership under the UPA. Even if the business of the partnership is continued by some of the partners, it is technically a new partnership. . . . RUPA's move to the entity theory is driven in part by the need to prevent a technical dissolution nor its consequences. . . . Only certain departures trigger a dissolution."). Where the aggregate model is chosen, withdrawal of a partner and addition of a new one indisputably triggers dissolution. *See supra note* 8 and accompanying text (citing cases and other authority). This is particularly appropriate here, where the identity of the specific partners, and the knowledge of those partners, was fundamental to the decision to elect the aggregate theory.

In addition, Section 15-801(3) of DRUPA provides that a partnership is dissolved 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. Code § 15-801(3). The election of the aggregate model in the Partnership

Agreement, with the natural consequence of such election being that the partnership would dissolve upon a change in the membership, constitutes an agreement as to a dissolution event within the meaning of Section 15-801(3). This construction is supported by Section 1.03 of the Partnership Agreement, which provides that the decision to proceed as an aggregate partnership controls over any inconsistent provisions in the Partnership Agreement.

In short, JKJ has chosen to be indistinct from its partners to fulfill a litigation need. Having made that choice in an effort to derive a benefit in litigation, JKJ should be held to the consequences of its decision.

II. THE NEW PARTNERSHIP FILED THE SECOND AMENDED COMPLAINT.

A. Question 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?

B. Scope of Review

As the Third Circuit framed it, the question is an issue of law, which this Court reviews *de novo*. *See, e.g.*, *CA, Inc.*, 953 A.2d at 231; *Lincoln Nat'l Life Ins. Co. v. Joseph Schlanger 2006 Ins. Tr.*, 28 A.3d 436, 438 (Del. 2011).[11] However, as noted below, the question seems to be based on a premise that is factually false.

[11] JKJ's reference to and inclusion of a report by Professor Hamermesh is improper, and this Court should refuse to consider it. Opening Br. at 5 n.5; A127-37. As JKJ concedes, the federal district court declined to consider the report as untimely because JKJ submitted the report after the case was already dismissed. Opening Br. at 5 n.5; Ex. C to Opening Br. at 3-4; Sup. Ct. R. 14(e) ("Unless otherwise ordered by the Court, the appellant's appendix shall contain such portions of the trial transcript as are ***necessary*** to give this Court a fair and accurate account of ***the context in which the claim of error occurred*** and must include a transcript of all evidence relevant to the challenged finding or conclusion." (emphases added)). To the extent this Court considers the substance of the report, Professor Hamermesh fails to consider the specific facts of this case. In particular, the report nowhere addresses how the old partnership relinquished control of the litigation to the new partnership, which specifically identified the new partnership's members in the Second Amended Complaint as the plaintiff-relator,

C. Merits of Argument

As shown in Argument, Section I, the changes in membership—and, in particular, the addition of Dr. Gurbel as a new partner—created a new partnership. The Third Circuit asks whether, if this is the case, a dissolved partnership terminates immediately or whether it can continue to exist long enough in the winding-up process to file the Second Amended Complaint. The answer here is clear based on the amended *qui tam* complaint itself. The Second Amended Complaint does not mention Dr. Venditto or the former partnership, and instead explains that "Plaintiff/Relator, a Delaware limited liability partnership, is named JKJ PARTNERSHIP 2011 LLP . . . . ***There are three JKJ partners: Paul A. Gurbel, M.D., Jeffrey A. Stahl, M.D., and Kelly D. Evans***." B183, ¶ 27 (emphasis added); *see also* B183-85, ¶¶ 28-30 (describing each of the partners). This fact alone answers the question presented—whether the "old" partnership existed long enough to file the Second Amended Complaint or not—by making clear that the Second Amended Complaint was filed by the new partnership.

Moreover, as explained in more detail below in Argument, Section III, the original partners could not have prosecuted the *qui tam* action as part of the winding-up process.

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or how the continued prosecution of the *qui tam* action by the winding-up partnership would render dissolution meaningless. *See infra* Argument, Section III.C.

III. UPON DISSOLUTION, THE ORIGINAL PARTNERS CANNOT CONTINUE TO PROSECUTE THE *QUI TAM* 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?

B. Scope of Review

As presented, the question is an issue of law, which this Court reviews *de novo*. *See, e.g.*, *CA, Inc.*, 953 A.2d at 231; *Lincoln Nat'l Life Ins. Co.*, 28 A.3d at 438.

C. Merits of Argument

After the old partnership dissolved, the original partners did not and could not prosecute the *qui tam* action as part of the winding-up process.

First, 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. The new partnership—not the original partners—filed the Second Amended Complaint. B183, ¶ 27 (stating that partnership bringing suit was composed of "three JKJ partners: Paul A. Gurbel, M.D., Jeffrey A. Stahl, M.D., and Kelly D. Evans").

Consistent with the notion that the old partnership ceased to exist, Dr. Venditto withdrew from the partnership for no consideration. Dr. Venditto's notice of withdrawal explicitly states that the partnership has "no liabilities and no value as of the date of this withdrawal." A119. The terms of this withdrawal foreclose JKJ's suggestion that the original partners could then prosecute the *qui tam* action as a means of "liquidating" the business or "complet[ing the] ongoing partnership business." *See* Opening Br. at 20-23.

The old partnership therefore has already completed its winding-up, and the reason for allowing Dr. Venditto to withdraw for no consideration and ceding prosecution of the lawsuit is clear: to make a "clean break" without two competing partnerships vying for control over the suit or any proceeds obtained from that suit. Tellingly, JKJ does not even attempt to explain how, if its 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 present and former partners. In fact, Dr. Venditto renounced any claim to proceeds of the *qui tam* suit upon his withdrawal from the partnership. A119.

Indeed, the federal district court found:

> [E]ven if JKJ partnership could continue to prosecute this lawsuit, it has chosen not to do so. In fact, the Second Amended Complaint only names the new JKJ partnership, with Dr. Gurbel as an added partner, as the sole relator in this lawsuit. Nowhere in that Complaint does Plaintiff suggest[] that the original JKJ partnership

> is a part of this action, or that the now-dissolved partnership is winding up its business by continuing with this case until conclusion. Instead, the opposite is true; JKJ took conscious steps to replace a partner in the partnership for the sole purpose of pursing this litigation as a newly-formed entity. . . . ***[T]hat the original, dissolved JKJ partnership is still a part of this case simply contradicts the record***.

Ex. C. to Opening Br. at 4 (emphasis added). This conclusion was clearly correct on the facts here.

Second, 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. A corporation "may not conduct the business for which it was originally incorporated" as part of its winding-up. *See Johnson v. Helicopter & Airplane Servs. Corp.*, 404 F. Supp. 726, 731 (D. Md. 1975) (citations omitted); *Gamble v. Penn Valley Crude Oil Corp.*, 104 A.2d 257, 260 (Del. Ch. 1954) (under Delaware law, a dissolved corporation "has the power to close its affairs but not to carry on the business for which it is established"). So too with a partnership. *E.g.*, *Caines Landing Wildlife Pres. Ass'n v. Kirkpatrick*, 633 A.2d 369, 1993 WL 397606, at *2 (Del. 1993) (tbl.) ("As with a corporation in dissolution, the business of a dissolved general partnership should continue only if doing so is consistent with the objective of winding up its affairs."). To find otherwise would merge the concept of dissolution with the carrying out of a partnership's business, rendering dissolution meaningless. In other words, if the sole business purpose of the

partnership is to prosecute the action, *see* A112, and the old partnership is prosecuting the action as part of its winding-up process, there would be no role for the new partnership.

JKJ's citation to cases that permit a partnership to prosecute and defend lawsuits as part of winding-up, *see* Opening Br. at 23, are not to the contrary. Those cases involve partnerships that had other business functions, and litigation was simply a by-product of ordinary business dealings. None involve the situation here, where a partnership was created for the sole business purpose of filing and prosecuting the litigation. *See also* Ex. C of Opening Br. at 4 ("Plaintiff cites no authority, and the Court cannot find any, that stands for the proposition that the original partnership of JKJ—formed for the main purpose of purs[u]ing this litigation as a relator—can continue as a viable entity in the same litigation *after* the partnership has dissolved." (emphasis in original)).

Third, upon dissolution, a partnership must bring its affairs "to a conclusion ***as soon as reasonably possible***." *Paciaroni v. Crane*, 408 A.2d 946, 956 (Del. Ch. 1979) (emphasis added); *see also Sutherland v. Mayer*, 271 U.S. 272, 289 (1926) ("Upon the dissolution of a partnership, the general rule is that the liquidating partner or partners must settle up the partnership affairs within a reasonable time."); *Heller Ehrman LLP v. Davis Wright Tremaine LLP*, 411 P.3d 548, 557-58 (Cal. 2018) ("Winding up implies the conclusion of a firm's business, not its

indefinite continuation." (citation omitted)). Consistent with these principles, Section 8.02(a) states that "[u]pon the dissolution of the Partnership, the Partnership's business shall be liquidated in an orderly manner" and 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). Allowing for the original partners to prosecute the underlying *qui tam* action to completion would hardly constitute the prompt liquidation of business.

Accordingly, this Court should find that the original partners had neither the capacity nor the intent to prosecute the underlying *qui tam* action.

CONCLUSION

For the aforementioned reasons, this Court should find that (1) as a consequence of JKJ's election to be indistinct from its partners, Dr. Venditto's withdrawal from and Dr. Gurbel's admission to the partnership necessarily dissolved the partnership and created a new partnership, (2) the original partners did not file the Second Amended Complaint, and (3) the original partners may not, and did not, continue to prosecute the *qui tam* action as part of the wind-up process.

Respectfully submitted,

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

By: */s/ Kenneth J. Nachbar*
Kenneth J. Nachbar (#2067)
Coleen W. Hill (#6287)
1201 N. Market Street
Wilmington, DE 19801
(302) 658-9200
KNachbar@MNAT.com
CHill@MNAT.com

Attorneys for Defendants-Appellees

OF COUNSEL:

ARNOLD & PORTER KAYE SCHOLER LLP
Anand Agneshwar
250 West 55th Street
New York, NY 10019
(212) 836-8000

John P. Elwood
Kirk Ogrosky
Daniel S. Pariser
Murad Hussain
Anna K. Thompson
601 Massachusetts Avenue NW
Washington, DC 20001
(202) 942-5000

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CERTIFICATE OF SERVICE

I hereby certify this 10th day of September, 2019, that I caused to be served a copy of Appellees' Answering Brief upon the following in the manner indicated:

VIA E-FILING

Jessica Zeldin
Rosenthal, Monhait & Goddess, P.A.
919 N. Market Street, Suite 1401
P.O. Box 1070
Wilmington, DE 19899

/s/ Kenneth J. Nachbar
Kenneth J. Nachbar (#2067)