No. 15-16333
[Consolidated with 15-16326, 15-16327, 15-16328, 15-16329, 15-16330, 15-16331, 15-16332]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLAN B. DIAMOND, Chapter 7 Trustee for Howrey LLP,

Plaintiff-Appellant,

v.

JONES DAY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Case No. 3:14-cv-04889-JD, Judge James Donato

BRIEF OF APPELLEE JONES DAY

Robert A. Mittelstaedt
Jason McDonell
JONES DAY
555 California Street – 26th Floor
San Francisco, CA 94104
Tel: (415) 626-3939
Fax: (415) 875-5700

Shay Dvoretzky
Emily J. Kennedy
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Tel: (202) 879-3939
Fax: (202) 626-1700
sdvoretzky@jonesday.com

Counsel for Defendant-Appellee Jones Day

CORPORATE DISCLOSURE STATEMENT

Because Defendant-Appellee Jones Day is a partnership, no corporate disclosure statement is required under Federal Rule of Appellate Procedure 26.1.

/s/ Shay Dvoretzky
Shay Dvoretzky

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INTRODUCTION

Howrey's clients faced a crisis. The law firm that represented them was collapsing. Within a matter of months, Howrey would close its doors, terminate its staff, and liquidate its assets. Soon, its creditors would force it into bankruptcy. Howrey's demise was inevitable, but its clients' legal matters would go on. Those clients needed to find new representation. They could not continue to entrust their work to Howrey because Howrey could no longer handle it. So they did what clients have a right to do: They fired Howrey and retained other law firms to handle their matters.

Like any discharged firm, Howrey has no claim to hourly fees earned by other firms for work that clients chose those firms to handle. Indeed, clients may replace one firm with another for many reasons: The client may be dissatisfied with its current counsel; the law firm may no longer be able to handle the work; or a lawyer working on a matter may move to a different firm. Regardless of the reason, each firm is entitled to be paid for the work it actually performed—no more, no less.

Any other rule is incompatible with core principles governing the attorney-client relationship. Imposing liability on the client for these changes of counsel would restrict a client's right to fire his lawyer. So would imposing liability on the replacement firm: Why would a firm take on matters previously handled by another firm if it has to disgorge the profits it earns for its work? These concerns are particularly acute when the original firm goes bankrupt, forcing the client to find new counsel.

The Trustee's theory turns these principles on their head. He claims that Howrey—a law firm whose financial collapse prevented it from serving clients—is entitled to Jones Day's profits earned on matters that clients chose Jones Day to handle after firing Howrey. Common sense, precedent, statutory language, and equity all refute that irrational theory.

JURISDICTIONAL STATEMENT

The Bankruptcy Court had jurisdiction pursuant to 28 U.S.C. § 157(c). On September 29, 2014, it entered an order denying Jones Day's Motion to Dismiss the First Amended Complaint ("FAC"). ER396. Jones Day filed a timely Notice of Appeal, Statement of Election to Have Appeal Heard by District Court, and Motion for Leave to Appeal on October 14, 2014. Bankr. Ct. ECF 52, 53, 55; s*ee* Fed. R. Bankr. P. 8002, 8004, 8005.

The District Court had jurisdiction pursuant to 28 U.S.C. § 158(a)(3) and its November 20, 2014, Order Granting Leave to Appeal. *See* ER448 (Dist. Ct. Dkt.). The District Court entered a final order and judgment on June 3, 2015 (ER1, 20), and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Do the Trustee's claims fail as a matter of law because Howrey, a defunct law firm that dissolved in bankruptcy, has no right to profits earned by Jones Day on matters that clients retained Jones Day to handle after firing Howrey?

2. Do the Trustee's claims also fail as a matter of law for additional, independent reasons:

   a. The Trustee's fraudulent-transfer claims fail because neither Howrey nor its partners transferred any of Howrey's property to Jones Day; and

   b. The Trustee's unjust enrichment claims fail because clients, not Howrey, conferred any purported benefit on Jones Day, and the only just result allows Jones Day to keep the profits for work it performed.

STATEMENT OF THE CASE

A. Howrey Dissolves, Liquidates, And Is Forced Into Bankruptcy

Until it dissolved in 2011, Howrey LLP was an international law firm organized under D.C. law.[1] ER352 (FAC). Howrey failed its fundamental

[1] Solely for purposes of this appeal, Jones Day assumes that the factual allegations in the complaint are true, that D.C. law governs the Trustee's claims, and that Title 33 of the D.C. Official Code, which was repealed in 2011, governs the obligations of Howrey's former partners to one another. ER352, 379 (FAC).

obligation to manage itself so that it could effectively represent its clients.

Following the 2008 recession, "Howrey faced a consistently decreasing demand" for legal services. ER353 (*id.*). Its "flagship antitrust practice … saw a staggering 22% decline in hourly work in 2009," and another practice group "saw an astounding 95% drop" in hourly work. ER358 (*id.*). Howrey responded by borrowing more. ER355 (*id.*). In early 2009, unable to pay its mounting debts, Howrey began a pattern of breaching and then renegotiating its loan covenants with Citibank. ER356 (*id.*). This cycle "put Howrey into a death spiral," and by the second quarter of 2010, its "financial downfall" was "inevitable." ER353, 355 (*id.*). In December 2010, Howrey was operating on "life support," and its "financial condition was so structurally unsound that it had long passed the point where the firm would survive." ER357 (*id.*). At that point, Howrey was "reshuffling deck chairs on the Titanic." *Id.* The "final curtain fell on March 3, 2011," when Citibank prohibited Howrey from using its cash collateral without the bank's express consent. ER3 (Dist. Ct. Order ("*Howrey III*")); *see* ER366 (FAC). This prompted Howrey's partners to vote to dissolve the firm. ER366 (FAC).

Howrey's dissolution plan waived "any rights" Howrey or its partners "may have" under the doctrine of *Jewel v. Boxer*, 156 Cal. App. 3d 171 (1994). ER368 (*id*). *Jewel* required *former partners* to account to a dissolved firm for profits they earned in "winding up" their former firm's so-called "unfinished business." Until

2009, no court had extended *Jewel* to impose liability on a *third-party firm* that had no fiduciary duties to the dissolved firm. Only two major law firm bankruptcies, those of Brobeck, Phelger & Harrison LLP and Coudert Brothers LLP, had involved *Jewel* claims. Although neither of those bankruptcies involved D.C. law, early decisions in those cases created "uncertainty" for Howrey partners who, in light of Howrey's dissolution, contemplated moving to different law firms that might represent Howrey's former clients. ER367 (*id.*) (quoting Jewel Memo at 7 (citing *In re Brobeck, Phleger & Harrison LLP*, 408 B.R. 318 (Bankr. N.D. Cal. 2009) and ECF 28, *In re Coudert Bros.*, No. 1:08-ap-01494 (RDD) (Bankr. S.D.N.Y. Jan. 19, 2010))).

The *Jewel* provision alleviated this "uncertainty." It provided that Howrey and its partners had no claim or entitlement to "clients, cases or matters ongoing at the time of dissolution other than the entitlement for collections of amounts due for work performed by the Partners … on behalf of the Partnership prior to the earlier of their respective departure dates from the Partnership or the date of the dissolution of the Partnership." ER368 (FAC).

Howrey dissolved on March 15, 2011. *Id.* Shortly thereafter, Howrey's creditors filed an involuntary petition, forcing Howrey into bankruptcy. *See* ECF 1, *In re Howrey LLP*, No. 11-31376 (Bankr. N.D. Cal.).

B. Clients Choose Jones Day To Represent Them On Matters That Howrey Could No Longer Handle

During Howrey's "death spiral," Howrey's clients sought new law firms to represent them. ER355 (FAC). Some did so before Howrey formally dissolved, and others did so after. *See* ER12-13, 16 (*Howrey III*). Some of these clients chose Jones Day. *See* ER346 (FAC). Some former Howrey partners also joined Jones Day, both before and after Howrey dissolved. The Trustee does not contend that any former Howrey partners controlled any client's decision to retain Jones Day or any other firm. And he expressly disclaims any argument that Jones Day represented these clients under Howrey's pre-existing retention agreements. *See* ER429 (5/6/15 Tr.); Dist. Ct. ECF 23 at 18 (Trustee Br.).

C. The Trustee For Howrey's Estate Asserts Claims Against Jones Day

On May 10, 2013, the Trustee brought this adversary proceeding against Jones Day; he brought similar adversary proceedings against other law firms, including the appellees in the seven cases that have been consolidated with this appeal. ER55 (Orig. Compl.); *see* ECF 9. Although never articulated with clarity, the operative complaint appears to allege that:

- Partnership law imposes a duty on Howrey's former partners to "account" to Howrey for "any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property." ER352-53 (FAC) (citing D.C. Code §§ 33-104.04(b)(1), 106.03(b)(3)).

- Client matters that Howrey handled before it dissolved remain Howrey's "partnership business" or "partnership property," even after clients chose other firms to represent them. *See* ER369, 371, 373-74 (FAC). Matters that clients chose Jones Day to handle before Howrey dissolved are referred to as "pre-dissolution matters"; matters that clients chose Jones Day to handle after Howrey dissolved are referred to as "post-dissolution matters." ER346 (*id.*).

- Howrey therefore has a property interest in all profits from such matters (even if Jones Day did the work), and the former Howrey partners have a duty to account to Howrey for those profits. ER353-54, 369, 371, 373-74 (*id.*).

- Howrey is entitled to recover those profits from Jones Day (even though Jones Day never had any fiduciary duty to Howrey) because:

  - The *Jewel* provision fraudulently transferred Howrey's property interest in profits from post-dissolution matters to Howrey's former partners, who, in turn, transferred that interest in Jones Day. ER369-75 (*id.*).

  - Jones Day was unjustly enriched by keeping profits it earned from clients on the pre-dissolution matters. ER379-80 (*id.*).[2]

D. Based On Its Own Prior Decisions, The Bankruptcy Court Denies Jones Day's First Motion To Dismiss

Jones Day moved to dismiss the complaint. The Bankruptcy Court denied Jones Day's motion, finding that its decisions in the Heller and Brobeck bankruptcies, and the Southern District of New York's decision in the Coudert bankruptcy, "apply with equal force" here. ER116 (Op. re: MTD ("*Howrey I*")); *see* ER95, 103, 115-17 (*id.*) (citing *In re Heller Ehrman*, Adv. P. No. 10-3221,

[2] The Bankruptcy Court dismissed the Trustee's claims for accounting and turnover, and they are not at issue on appeal. *See* ER389-91 (Op. re: MTD FAC ("*Howrey II*")).

2013 WL 951706 (Bankr. N.D. Cal. Mar. 11, 2013); *In re Coudert Bros.*, 480 B.R. 145 (S.D.N.Y. 2012); *Brobeck*, 408 B.R. 318).

1. In *Brobeck*, the Bankruptcy Court held that law firms have a property interest in client matters pending at the time of dissolution; that partners must account to the dissolved firm for profits on those matters; and that the profits earned by the pre-existing, third-party firms that those partners joined belonged to the Brobeck estate. *See* 408 B.R. at 337-48. *Brobeck* was the first decision of its kind: No court had previously imposed liability on third-party law firms that clients chose to handle their matters when a defunct firm was incapable of doing so. *See Heller*, 2013 WL 951706, at *3. The parties subsequently settled their dispute, so *Brobeck* was never appealed. Nevertheless, *Heller* and *Coudert* adopted *Brobeck*'s reasoning. *See id.* at *3-6; *Coudert*, 480 B.R. at 165.

Although none of these cases involved D.C. law, the Bankruptcy Court found them dispositive of the Trustee's claims here. ER103, 108-09, 112-13, 115-17 (*Howrey I*). It accordingly denied Jones Day's motion to dismiss with respect to post-dissolution matters. ER117 (*id.*).

2. No previous decisions considered whether a dissolved firm had a right to profits that other firms earned on *pre-dissolution* matters. *See* ER113 (*id.*). Indeed, in *Heller*, the trustee expressly disavowed any such claim. *Heller*, 2013 WL 951706 at *3-4. The Bankruptcy Court nevertheless found that Howrey had a property interest in those matters and profits, too. ER113 (*Howrey I*). However, fraudulent-transfer law did not provide a viable theory for recovering those profits from Jones Day because Howrey no longer possessed an interest in them when it dissolved (so any such right was not "transferred" by the *Jewel* provision in Howrey's dissolution plan). ER113-14 (*id.*).

The Trustee filed an amended complaint on March 27, 2014, restating his previous claims and adding an unjust enrichment claim to recover profits that Jones Day earned on pre-dissolution matters. ER369-76, 379-80 (FAC).

E. The Bankruptcy Court Adheres To Its Prior Reasoning Even After The Decisions On Which It Relied Are Reversed

Jones Day moved to dismiss the Trustee's amended complaint. While that motion was pending, the U.S. District Court for the Northern District of California issued its opinion in the Heller bankruptcy, reversing the Bankruptcy Court and holding, as a matter of law, that a defunct firm has no property interest in profits earned by other firms on matters that clients no longer wanted the defunct firm to handle. *Heller Ehrman LLP v. Jones Day*, 527 B.R. 24 (N.D. Cal. 2014) (Breyer, J.). The New York Court of Appeals, addressing identical questions arising from the Thelen and Coudert bankruptcy proceedings, likewise held that "[a] law firm does not own a client or an engagement, and is only entitled to be paid for services actually rendered." *In re Thelen LLP*, 24 N.Y. 3d 16, 22 (2014). These two holdings reversed the very decisions that the Bankruptcy Court previously held were dispositive of the Trustee's claims here. *See supra* 7-9.

The Bankruptcy Court nevertheless adhered to its prior conclusion that Howrey is entitled to Jones Day's profits. Despite its earlier determination that the laws of California and New York are "a perfect proxy for analyzing D.C. law," ER96, 103, 116 (*Howrey I*), the Bankruptcy Court concluded in a single sentence that D.C. law differs from California and New York, ER387-88 (*Howrey II*). It further held that the Trustee had stated a claim for unjust enrichment under D.C. law. ER394 (*id.*).

Jones Day filed a motion for leave to appeal, which the District Court granted on November 20, 2014. *See* ER448 (Dist. Ct. Dkt.).

F. The District Court Enters Judgment In Favor Of Jones Day

The District Court dismissed the Trustee's claims. It held that "[w]hen a client decides to discharge a firm and hire a competing firm," D.C. law does not give "the old firm … a right to profit from the new firm's work." ER9 (*Howrey III*). "The bedrock of this conclusion," the District Court explained, "is the universally-accepted truth that a firm does not own new client matters taken on by other firms." ER10 (*id.*).

The District Court rejected the Trustee's reliance on state partnership law and cases applying the so-called unfinished business doctrine. ER6-7 (*id.*). Each of those cases "involved specific facts far removed from the ones" here; none "involved an attempt by a bankrupt law partnership to claim profits earned by preexisting third-party firms subsequently hired by its former clients." *Id.* And the only decisions that have "directly confronted" the relevant issue—the New York Court of Appeals' decision in *Thelen* and Judge Breyer's decision in *Heller*—reflect an "emerging consensus" that defunct firms have no right to such profits. ER7 (*id.*). The District Court agreed with *Thelen* and *Heller* that any other rule would conflict with the "fundamental truth" that "[c]lients have the unqualified right to hire and fire attorneys at will, with no obligation to the attorney at all except to pay for completed services." *Id.* It therefore refused to endorse a theory that would restrain client choice and attorney mobility, with "no potential upside." ER8 (*id.*).

The District Court's holding that "Howrey does not own substantively new representations undertaken by third-party firms" is "a definitive bar" to all of the Trustee's claims. ER16 (*id.*); *see* ER3 (*id.*). The District Court further held that the Trustee's *pre-dissolution* claims fail for additional, independent reasons, including that no duty to account extends to profits earned on work performed after a partner dissociates; that D.C. law does not recognize an unjust enrichment claim based on a benefit conferred by third parties (here, clients) rather than by Howrey itself; and that there is nothing unjust about letting Jones Day keep "the profits [it] earned by the sweat of [its] brow." ER16-18 (*id.*).

The Trustee appealed. ER23.

SUMMARY OF ARGUMENT

I. A law firm has a right to be paid only for the work that clients allow it to perform. When a client exercises its absolute right to fire one firm and hire another, the discharged firm has no claim—against the client or the firm that replaces it—for the resulting loss.

These well-settled, common-sense rules dispose of the Trustee's claims. Each claim hinges on the notion that Howrey has a property interest in profits earned by Jones Day for work clients chose Jones Day to handle after firing Howrey. Because Howrey has no interest in such profits, both theories of recovery alleged in the complaint fail: No property belonging to Howrey was fraudulently transferred to Jones Day, and Jones Day was not unjustly enriched by keeping the profits for the work it performed.

As the District Court explained, any other rule would conflict with the "fundamental truth," enshrined in D.C. law, that "[c]lients have the unqualified right to hire and fire attorneys at will, with no obligation to the attorney at all except to pay for completed services." ER7 (*Howrey III*). Indeed, "a rule that prevents third-party firms from earning a profit off of labor and capital investment they make in a matter previously handled by a dissolved firm" would "make it more difficult for partners leaving a struggling firm to find new employment" and would "limit the representation choices a client has available." *Heller*, 527 B.R. at 33; *see* ER8-9 (*Howrey III*). It would also unfairly grant the first firm to handle a matter a right to all profits from that matter in perpetuity—essentially, a risk-free annuity—even if a third party does the work. Nothing in D.C. law suggests such a bizarre result.

II. The Trustee goes to great lengths to concoct a theory that would allow Howrey to confiscate Jones Day's profits. Every step falls short. *First*, the state-law duty to account for partnership business of a dissolved firm is inapposite. The work on the matters at issue ceased to be Howrey's partnership business when clients retained Jones Day. From that point on, the work on the matters was Jones Day's partnership business, not Howrey's. Moreover, even when state law imposes a duty to account for partnership business, it does so only on former partners, not on third parties like Jones Day.

Second, *Beckman v. Farmer*, 579 A.2d 618 (D.C. 1990), *Jewel*, and other cases involving the so-called unfinished business doctrine do not support the Trustee's post-dissolution claims. Each decision imposed a duty to account on *former partners* for profits that *they earned themselves* on matters that *remained the business of the dissolving firm*. None of these cases supports imposing liability on Jones Day—a third-party firm—for profits it earned on work clients chose it to handle in the midst of Howrey's collapse. Jones Day performed this work using its own resources, capital, and expertise, and it did so pursuant to new retainer agreements with clients. Jones Day's work does not constitute *Howrey's* partnership business.

Furthermore, all of the cases on which the Trustee relies have been superseded by D.C.'s subsequent adoption of the Revised Uniform Partnership Act ("RUPA"). *Beckman* and its progeny involved breaches of fiduciary duties under the Uniform Partnership Act ("UPA"), and RUPA materially changes the fiduciary duties that were at issue. Unlike UPA, RUPA allows former partners to compete with the partnership, without limitation, immediately upon dissolution. Moreover, even if a client allows the dissolving firm to continue to represent it, RUPA—unlike UPA—grants partners "reasonable compensation" for their post-dissolution work.

Third, the Trustee concedes that no D.C. authority supports his claim to Jones Day's profits from pre-dissolution matters. D.C. law governing the attorney-client relationship refutes his theory, which would give the first firm to work on a matter a perennial right to all future profits, regardless of who performed the work.

Finally, the Trustee cannot justify his position on policy grounds. D.C. law—which expressly allows partners to dissociate at any time—does not bind law partnerships together for life at the expense of client choice and attorney mobility.

III. The Trustee's claims also fail for additional, independent reasons, which provide alternative grounds for affirming the District Court's judgment. *First*, the Trustee cannot recover post-dissolution profits under a fraudulent-transfer theory because neither Howrey nor its partners transferred any property interest to Jones Day. If the alleged property interest is defined as a right to future profits, then clients—not Howrey or its partners—transferred that right to Jones Day. And if the property interest is defined as a legal benefit—i.e., the *Jewel* waiver—that benefit remains with the former Howrey partners, who never transferred it to Jones Day.

Second, the Trustee cannot recover pre-dissolution profits under an unjust enrichment theory. Jones Day was not unjustly enriched by keeping profits that it earned for work that it performed. Moreover, D.C. law requires a plaintiff alleging unjust enrichment to itself confer a benefit on the defendant; here, any benefit that Jones Day received came from clients, not Howrey.

ARGUMENT

I. HOWREY HAS NO RIGHT TO PROFITS EARNED BY THIRD-PARTY FIRMS FOR WORK THAT HOWREY DID NOT PERFORM

Each of the Trustee's claims hinges on the premise that Howrey is entitled to profits earned by Jones Day on matters that clients chose Jones Day to handle instead of Howrey. Absent a property interest in such profits, the Trustee's claims fail as a matter of law: No property belonging to Howrey was transferred to Jones Day, and Jones Day was not unjustly enriched by any of Howrey's property.

The D.C. Court of Appeals, whose judgment this Court must anticipate, *see Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986), would not grant Howrey any such property right. D.C. law is clear that a law firm has a right to be paid only for the work that clients entrust to it. When a client exercises its unfettered right to terminate one firm and retain another, the discharged firm has no claim—against either the client or the firm that replaces it—for the resulting loss.

A. Client Matters Belong To Clients, Not Law Firms

A law firm has a right to be paid only for work its client has allowed it to perform. It does not have a property interest in client matters themselves. A law firm accordingly has no right to future profits, much less the right to future profits derived from work performed by another firm.

D.C. courts have long recognized that the attorney-client relationship requires that a client have "the highest trust and confidence" in his attorney, *Maxwell v. Gallagher*, 709 A.2d 100, 102 (D.C. 1998), and that "a client should not be forced to continue to employ an attorney with whom he no longer retains this rapport," *King & King, Chartered v. Harbert Int'l, Inc.*, 436 F. Supp. 2d 3, 12 (D.D.C. 2006), *aff'd*, 503 F.3d 153 (D.C. Cir. 2007). Clients therefore have an "unfettered right to discharge an attorney," and may do so "at any time, with or without cause." *In re Mance*, 980 A.2d 1196, 1203 (D.C. 2009); D.C. R. Prof'l Conduct 1.16 cmt. 4; *see also Neuman v. Akman*, 715 A.2d 127, 130-31 (D.C. 1998).

To safeguard this absolute right, D.C. law provides that lawyers can "earn[] fees only by conferring a benefit on or performing a legal service for the client." *Mance*, 980 A.2d at 1202; *Telecommunications Law Professionals PLLC v. T-Mobile US, Inc.* ("*T-Mobile*"), No. 1:13-cv-01178-GK, at 14-16 (D.D.C. Jan. 12, 2015); *see King*, 436 F. Supp. 2d at 11-12. As the D.C. Court of Appeals has explained, "a lawyer cannot earn a fee for doing nothing." *Mance*, 980 A.2d at 1203 (internal quotation marks and citation omitted); *see* D.C. R. Prof'l Conduct 1.16(d) (requiring terminated attorney to refund any fee "that has not been earned"); *cf. In re Cleaver-Bascombe*, 892 A.2d 396, 403 (D.C. 2006) ("charging *any* fee for work that has not been performed is *per se* unreasonable"); D.C. R.

Prof'l Conduct 1.5(e) (permitting fee splitting among lawyers in different firms only where the division "is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation"). Therefore, when a client exercises its unfettered right to fire an attorney, the client is not liable for the discharged attorney's resulting loss. *See King*, 436 F. Supp. 2d at 11-12; *T-Mobile*, at 14-15. And a terminated firm has no claim against the new firm the client selects to replace it for profits earned by that firm.

Any contrary rule would "substantially alter[] and economically chill[] the client's unbridled prerogative to walk away from the lawyer." *Mance*, 980 A.2d at 1204 (internal quotation marks omitted); *see T-Mobile*, at 13. It would also force the firm that the client selects to replace the discharged firm to choose between turning down the representation and disgorging its profits. *See Moskowitz v. Jacobson Holman, PLLC*, No. 1:15-cv-336, 2016 WL 356035, at *14-15 (E.D. Va. Jan. 28, 2016) (applying D.C. law). For these reasons, *T-Mobile* rejected a discharged firm's attempt to hold its client liable for prematurely terminating a retainer agreement. *T-Mobile*, at 16. And *Mance* sanctioned a discharged attorney who failed to return a flat fee for which he had performed no legal services. 980 A.2d at 1203-04.

Other rules governing the attorney-client relationship confirm the same basic principle. For example, D.C. law has long prohibited restrictions on professional autonomy that encroach upon “the freedom of clients to choose a lawyer.” *Neuman*, 715 A.2d at 130-31 (internal quotation marks omitted). Such restrictions—including ones that impose financial penalties on a lawyer for representing clients of his former firm—may “deter[] or discourage[]” attorneys “from continuing to represent former clients,” which, in turn, would impermissibly hamper client choice. *Moskowitz*, 2016 WL 356035 at *14. Thus, D.C. Rule of Professional Conduct 5.6(a) prohibits partnership agreements that “restrict[] the rights of a lawyer to practice after termination of the relationship.” *See Neuman*, 715 A.2d at 130; D.C. R. Prof’l Conduct 5.6 cmt. 1. And in a recent ethics opinion, the D.C. Bar explained that “agreement[s] imposing substantial damages—actual or liquidated—attributable to or because of work done by the departing lawyer (or her new firm) in competition with her former firm *after* she relocates” are impermissible because of their effect on client choice and attorney mobility. D.C. Legal Ethics Op. 368. *Moskowitz* similarly held that agreements imposing such restrictions are “unenforceable as a matter of [D.C.] law.” 2016 WL 356035 at *15.

B. The Only State High Court To Consider The Trustee’s Theory Rejected It Based On Universally Applicable Principles

Based on the same principles discussed above, the New York Court of Appeals recently held that a defunct law firm has no interest in profits earned by third-party firms on hourly-fee matters. *See Thelen*, 24 N.Y.3d at 22, 28-29, 33.

Thelen is the only decision from a state's highest court addressing claims involving the Trustee's far-fetched theory, and the reasons it gave for rejecting those claims apply equally under D.C. law.

Thelen explained that, as a matter of law, "a client's legal matter belongs to the client, not the lawyer." *Id.* at 29. Because clients have the "unqualified right to terminate the attorney-client relationship at any time without any obligation other than to compensate the attorney for the fair and reasonable value of the *completed services*," the court held that "no law firm has a property interest in future hourly legal fees." *Id.* at 28 (internal quotation marks omitted). Rather, the law firm's only interest is in "yet-unpaid compensation for legal services already provided." *Id.* at 29.

The court further held that any other rule "would have numerous perverse effects" and "would cause clients, lawyers, and law firms to suffer." *Id.* at 31-32. A rule granting the first firm to work on a matter a right to all future profits would create "a major inconvenience for … clients and a practical restriction on a client's right to choose counsel." *Id.* at 32. Unless the second firm to handle a matter were willing to disgorge its profits to the first firm (which few if any firms would be willing to do), a client would not be able to retain a new firm joined by its lawyer of choice. *See id.*

The court explained that these consequences would be particularly severe when the original firm has collapsed in bankruptcy, forcing both its clients and its partners to find new firms. In those instances, the departing attorneys would "find it difficult to secure a position in a new law firm because any profits from their work for existing clients would be due their old law firms, not their new employers." *Id.* And "[t]he notion that law firms will [take on] departing partners or accept client engagements without the promise of compensation ignores common sense and marketplace imperatives." *Id.* *Thelen* accordingly refused to endorse a rule that would unfairly grant a firm that clients fired a right to "windfall" profits "from work [it] d[id] not perform" while simultaneously penalizing the third-party firms that assisted clients in need. *Id.* at 31-32.

D.C. law follows these same principles. *See supra* Part I.A. Indeed, a recent D.C. legal ethics opinion recognized that the reasons *Thelen* gave for rejecting those claims apply universally across jurisdictions, including in D.C. *See* D.C. Legal Ethics Op. 368. Although the opinion addressed liquidated damages clauses rather than the so-called unfinished business doctrine, it endorsed *Thelen*'s reasoning and explained that the same "relevant" policy considerations control. *Id.*

*   *   *

In sum, "given the client's unfettered right to hire and fire counsel," "no law firm has a property interest in future hourly legal fees." *Thelen*, 24 N.Y.3d at 28. That rule applies regardless of whether the discharged firm is capable of continuing to perform the work. *See T-Mobile*, at 14-15. But it has particular force when, as here (ER353-66 (FAC)), the discharged firm's financial collapse prevents it from representing clients and leaves them "no choice but to seek new counsel," *Heller*, 527 B.R. at 29. Howrey has no right to confiscate the profits that Jones Day earned for work that clients chose Jones Day to perform.

II. THE TRUSTEE'S RELIANCE ON PARTNERSHIP LAW IS MISPLACED

In arguing to the contrary, the Trustee concocts a convoluted theory that fails at every step.

A. Partnership Law Does Not Create Any New Property Interests

The Trustee argues that partnership law gives Howrey a perennial property right to the matters at issue and to Jones Day's profits from those matters. He relies on the fiduciary duty *among partners* to "account" to one another for profits earned on "partnership business" and "partnership property," whether after dissociation or dissolution. D.C. Code § 33-104.04(b)(1); *see id.* § 33-106.03(b)(3) (emphasis added). But that begs the question whether client matters are the partnership property or business of a discharged firm. RUPA itself does not *create* property rights; it merely "supplies default rules for how a partnership upon dissolution *divides* property as elsewhere defined in state law." *Thelen*, 24 N.Y.3d at 28. "As a result, the Partnership Law itself has nothing to say about whether a [discharged] law firm's 'client matters' are partnership property." *Id.* For the reasons explained above, Howrey had no property interest in the matters or profits at issue, and its partnership business was completed when clients hired Jones Day instead of Howrey. *See supra* Part I.

In any event, RUPA imposes a fiduciary duty to account only on former partners, not on third parties like Jones Day. Jones Day therefore has no duty to account to Howrey for profits generated by Jones Day's work on matters that clients entrusted to it.

1. RUPA imposes a duty to account only for profits derived from the conduct of "partnership business." RUPA § 404(b)(1). When a client fires one firm and hires another, the work on the matter is no longer the discharged firm's "partnership business": From that point on, there is no more work for the discharged partnership to do. *See* ER11 (*Howrey III*); *supra* Part I.A. And there is no duty to account to the discharged firm for the new firm's profits.

To illustrate this point, imagine that Howrey had never dissolved, and that its former clients replaced it with a firm, "Smith & Smith," that never took on any former Howrey partners. Such a firm would face no liability under the Trustee's theory, which he acknowledges applies only to the extent that a fiduciary duty to account "follows" Howrey's former partners. App. Br., 34. Howrey would have no claim to profits earned by Smith & Smith on matters that clients no longer wanted Howrey to handle.

Indeed, as soon as clients discharged Howrey and retained Smith & Smith, work on the matters would cease to be Howrey's partnership business, and would become Smith & Smith's partnership business. Even if a Howrey partner were to join Smith & Smith *after* clients retained Smith & Smith, that partner would not have a duty to account for his new firm's profits. Those profits would simply not be a result of "service[] performed for the [Howrey] partnership." D.C. Code § 33-104.01(h). Likewise, if a Howrey partner joined Smith & Smith *before* a former Howrey client fired Howrey and retained Smith & Smith, that would not convert Smith & Smith's profits into profits from Howrey's partnership business.

Howrey's dissolution would not change this result: When clients fired Howrey and retained Smith & Smith, the work on the matters would cease to be Howrey's partnership business, and would become Smith & Smith's partnership business. Neither Howrey's former partners nor their new firm would have a duty to account to Howrey for Smith & Smith's profits. That is particularly true because Howrey was unable to continue representing clients. *See* ER353-66 (FAC). Howrey closed its doors, liquidated its assets, and terminated its staff; its lawyers joined at least 20 different firms. Because Howrey could no longer handle its engagements, its clients would *have* to take their work elsewhere. *See Heller*, 527 B.R. at 29. And when clients did so, Howrey's partnership business would have terminated—regardless of whether clients then hired Jones Day, Smith & Smith, or another firm. *See* ER11 (*Howrey III*).

2. Partnership law does not support the Trustee's claims against Jones Day for another reason: Any fiduciary duty to account to Howrey applies only to former partners. Nothing in RUPA binds, or imposes fiduciary duties upon, third parties like Jones Day, which never had a partnership with Howrey.

RUPA, as codified in D.C. law, creates "a series of 'default rules' that govern the relations *among partners* in situations they have not addressed in a partnership agreement." RUPA (1997), prefatory note (emphasis added). For example, RUPA requires partners to account to one another for the use of "partnership property," which it defines as "[p]roperty acquired by a partnership." D.C. Code § 33-102.03; *see id.* § 33-102.04. It likewise requires partners "[t]o account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property." *Id.* § 33-104.04(b)(1). These obligations of a fiduciary relationship go hand in hand with the benefits of partnership. *Cf. Jewel*, 156 Cal. App. 3d at 179 (noting that it is fair to impose the duty to account *on former partners* because they also "will receive … their partnership share of income generated by the work of the other former partners"); *Robinson v. Nussbaum*, 11 F. Supp. 2d 1, 6 (D.D.C. 1997) (same).

Thus, when courts have required an accounting for profits derived from partnership business, they have imposed the duty only on a partner, not a third-party law firm, because of the partner's fiduciary duties to the partnership. *See, e.g.*, *Beckman*, 579 A.2d at 636; *Young v. Delaney*, 647 A.2d 784, 792 (D.C. 1994); *Robinson*, 11 F. Supp. 2d at 5-6; *Jewel*, 156 Cal. App. 3d at 178-79; *cf. In re Labrum & Doak LLP*, 227 B.R. 391 (Bankr. E.D. Pa. 1998) (imposing a duty to account only on individual partners and only for profits they personally earned, not on the third-party firm that they joined for that firm's profits).

Likewise, under D.C. law, an accounting claim "can only be maintained" where there is a fiduciary relationship between the parties. *Haynes v. Navy Fed. Credit Union*, 52 F. Supp. 3d 1, 9 (D.D.C. 2014) (internal quotation marks omitted); *see* ER390-91 (*Howrey II*) (dismissing equitable accounting claim because of lack of fiduciary relationship). This requirement accords with the common law. *See* C.C. Langdell, *A Brief Survey of Equity Jurisdiction*, 2 HARV. L. REV. 241, 248 (1889).

It is undisputed that Jones Day never had any fiduciary duties to Howrey and never entered into any partnership agreement with Howrey. *See* ER390 (*Howrey*

II). To the contrary, before Howrey collapsed, Jones Day was its competitor. *See* ER13 (*Howrey III*). Accordingly, there is no basis to impose any fiduciary duty to account on Jones Day. ER389-91 (*Howrey II*).

B. *Beckman*, *Young*, And Related Cases Do Not Support The Trustee's Post-Dissolution Claims

To get around these basic principles of partnership law, the Trustee relies on *Beckman* and other cases involving the so-called unfinished business doctrine to support his post-dissolution claims. But those cases do not give Howrey any property interest in Jones Day's profits. They are inapplicable on their facts and, in any event, have been superseded by RUPA.

1. No D.C. authority grants a dissolved firm an interest in profits earned by a pre-existing, third-party firm under new retainer agreements with the dissolved firm's former clients

As the Trustee conceded before the District Court, "there is not a single D.C. case" that grants a dissolved firm an interest in profits earned by a pre-existing, third-party firm under a *new* retainer agreement with the dissolved firm's former clients. ER430 (5/6/15 Tr.).

In *Beckman*, a departing partner compelled liquidation of his three-partner law firm. The D.C. Court of Appeals held that he was entitled to an accounting by his former co-partners, who (upon forming their own, two-partner firm) continued to work on a contingent-fee matter on the *same* terms and under the *same* contract as before dissolution. The defendants were required to account to their former partner because "dissolution does not terminate or discharge *pre-existing contracts between the partnership and its clients*, and ex-partners who perform *under such contracts* do so as fiduciaries for the benefit of the dissolved partnership." *Beckman*, 579 A.2d at 636 (emphasis added); *see also Robinson*, 11 F. Supp. 2d at 6 (describing "[t]he crux of the *Beckman* opinion" as holding that "dissolution of a law partnership does not terminate existing contracts with its clients," and that "*former partners* who honor *these existing contracts* do so as fiduciaries for the benefit of the former partnership") (emphasis added). *Beckman* thus recognized an individual partner's duty to account for profits from "all work performed on *partnership business*." *See Beckman*, 579 A.2d at 639 (emphasis added).

Young and *Robinson* followed *Beckman*. In both cases, a law firm dissolved, and a subset of the former firm—consisting entirely of partners from the dissolved firm—continued to represent the dissolved partnership's clients. *Young*, 647 A.2d at 787; *Robinson*, 11 F. Supp. 2d at 2. There is no indication in either case that any of the clients signed new retainer agreements with the "new" firm. *See Young*, 647 A.2d at 787; *Robinson*, 11 F. Supp. 2d at 2. Nor is it surprising that the former partners continued to perform legal services under the same retainer agreement that the client had signed with the dissolved firm: The "new" firms that partners formed in those cases were merely scaled-down versions of the original firms, consisting of "[a]lmost all of the partners" from the original firms. *Robinson*, 11 F.

Supp. 2d at 2; *see Young*, 647 A.2d at 787. The only reason that those partners had to form "new" firms at all was the technicality that, under UPA (unlike RUPA), a partnership dissolved upon any partner's withdrawal. *Compare* UPA § 29 (1914) *with* RUPA § 801 & cmt. 1. Nothing else about the representations changed; the same lawyers continued to perform the same work. *See Young*, 647 A.2d at 787; *Robinson*, 11 F. Supp. 2d at 2.

Here, by contrast, the Trustee has never alleged that Jones Day performed the work at issue "pursuant to Howrey's preexisting engagement letters." ER429 (5/6/15 Tr.). Indeed, he has never disputed that Jones Day—a third party that never had any fiduciary obligations to Howrey—"got new retention agreements." Dist. Ct. ECF 23 at 18 (Trustee Br.); *see* ER390 (*Howrey II*). Those new agreements confirm that Jones Day's work on the client matters reflected new representations rather than "work performed on [Howrey's] partnership business." *Beckman*, 579 A.2d at 639. Clients engaged a different firm with different resources, capital, and expertise to represent them. Jones Day is not a "continuation" or "remnant[] of" Howrey that "came into existence directly out of [Howrey's] dissolution;" it is a "truly separate" firm. ER10, 12-13 (*Howrey III*). This situation is "far removed" from *Beckman*, *Young*, and *Robinson*, where the same attorneys continued to perform the same work under the same original agreement with their predecessor firm. ER6 (*id.*).

2. There is no basis for treating the work Jones Day performed as if it were done on Howrey's behalf

The Trustee argues that *Beckman* embraced decisions from other jurisdictions, which he claims undermine the significance of new retention agreements. App. Br., 29-30. As an initial matter, *Beckman* cited those cases for the issue that was before it—whether partners have a duty to account for profits from *partnership business*. That duty applied in *Beckman* because the post-dissolution work continued to be performed under the dissolved firm's retainer agreement. *See Beckman*, 579 A.2d at 636, 638-40, 651. The court's passing citation to these decisions hardly endorses everything they say on other issues.

In any event, none of those decisions supports the Trustee's claims here. In some of those cases (as in *Beckman*), a dissolved firm had an interest in profits earned by its former partners under the original retainer agreement with the dissolved law firm. In other cases, a former partner or subset of partners violated fiduciary duties under UPA by cutting off their former partners' right to profits and diverting profits to themselves. Under those circumstances, the courts, as a matter of equity, treated the work as if it were performed on behalf of the dissolved firm. In either scenario, an essential element of a firm's right to post-dissolution profits was that the profits were earned in performing work that (as a matter of either contract or equity) remained the business of the dissolving firm. That is not the case here.

a. In *Jewel*, a four-person partnership split into separate two-partner firms. 156 Cal. App. 3d at 175. "[E]ach former partner sent a letter to each client whose case he had handled for the old firm, announcing the dissolution [and enclosing] a substitution of attorney form." *Id.* The only apparent effect of the partners' actions was to "cut off the rights of the other partners in the dissolved partnership": The *same* attorneys continued to handle each matter under the *same* fee arrangements. *Id.* at 175, 178. Nothing changed about the representations except that two partners kept all the profits at the expense of the others. Under these circumstances, the court held that the former partners violated their "fiduciary duty not to take any action with respect to unfinished partnership business for personal gain." *Id.* at 178-79. It required *partners* to account for profits that it deemed in equity to have been earned on behalf of the dissolving partnership. Thus, the central premise of *Jewel* was that individual partners violated their fiduciary duties under UPA when they solicited clients during the dissolved firm's wind-up period, solely to cut off their co-partners' rights to profits and arrogate those profits to themselves. *See Heller*, 527 B.R. at 29.

b. *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200 (1983), involved a dispute about a dissolved partnership's interest in a contingency fee. Two partners from the original 17-partner firm handled the matter for many years, and the firm made substantial investments in the case. *Id.* at 209. But as the case neared its conclusion, the two partners handling it decided that they did not want to share *any* recovery with their co-partners. *Id.* at 209-10. Although the firm stood ready to continue handling the matter, the two partners forced its dissolution "for the very purpose" of cutting off their former co-partners' interest in any recovery. *Id.* at 210, 218. The two departing partners continued to perform the remaining work, and the only apparent intent and effect of the new retainer agreement that they signed with clients was to "cut off the rights of the other partners in the dissolved partnership." *Id.* at 219. In these circumstances, the court found "an obvious and essential unfairness in one partner's attempted exploitation of a partnership opportunity for his own personal benefit and to the resulting detriment of his copartners." *Id.* at 213. It therefore required the former partners to account for the profits that they earned. *See id.* at 210, 215-18.

c. *Frates v. Nichols*, 167 So. 2d 77 (Fla. Dist. Ct. App. 1964), likewise involved a dispute about a dissolved partnership's interest in contingency fees. After a nine-partner firm dissolved, five partners continued the original firm's practice as a "successor firm." *Id.* at 79. Two others formed their own firm, where one of them (Frates) continued his work on the same contingency-fee matters that he had handled at the original firm. *Id.* When those cases later generated substantial recoveries, Frates argued that "he [was] entitled to retain all of the fees" because clients had signed new retainer agreements with him that "superseded" the old partnership's rights. *Id.* at 80-81. The court rejected Frates's effort to cut off his former partners' interest in the recovery. *See id.* In doing so, it distinguished the facts before it—where the same attorney continued to perform the same work on the same matters that he had handled pre-dissolution—from situations in which a client "discharge[s]" one firm and "retain[s] new lawyers." *Id.* It accordingly required Frates to account for the profits he earned. *See id.*

d. The other cases on which the Trustee relies involve similar breaches of fiduciary duty by individual partners. In several of those cases, former partners violated their fiduciary duties by arrogating profits to themselves and cutting off their co-partners' interests. *See, e.g.*, *Vowell & Meeheum, P.C. v. Beddow, Erben & Bowen, P.A.*, 679 So. 2d 637, 639 (Ala. 1996); *Grossman v. Davis*, 28 Cal. App. 4th 1833, 1835-37 (1994); *Ellerby v. Spiezer*, 485 N.E.2d 413, 416-17 (Ill. App. Ct. 1985); *Resnick v. Kaplan*, 434 A.2d 582, 585 (Md. Ct. Spec. App. 1981); *Little v. Caldwell*, 101 Cal. 553, 557-58 (1894). Other cases involved individual partners who continued to perform the same work on the same matters that they had handled pre-dissolution; they were not situations in which clients retained a different third-party firm. *See, e.g.*, *Hurwitz v. Padden*, 581 N.W.2d 359, 360 (Minn. Ct. App. 1998); *Hammes v. Frank*, 579 N.E.2d 1348, 1356 (Ind. Ct. App. 1991). And in some cases, the work remained the business of the dissolved firm as a matter of contract, because it was performed under the original retainer agreement. *See, e.g.*, *LaFond v. Sweeney*, 343 P.3d 939, 947 (Colo. 2015); *Gast v. Peters*, 671 N.W.2d 758, 761 (Neb. 2003). Thus, in each case, the former firm's right to post-dissolution profits was based on the court's determination—as a matter of contract or equity—that the profits were earned in completing the work that remained the business of the dissolving firm.

e. Here, unlike the *Jewel* cases, clients did not retain individual former Howrey partners; they retained Jones Day and thereby entered into substantively new representations with a third-party firm that provided vast new resources, personnel, capital, and services. *See* ER15 (*Howrey III*). The new agreements that clients signed with Jones Day had nothing to do with wrongfully diverting profits from Howrey. This is not a situation where former Howrey partners sought to "cut off the rights of the other partners in the dissolved partnership by the tactic of entering into a 'new' contract" that merely diverted profits to those individuals without changing anything else about the representation. *Jewel*, 156 Cal. App. 3d at 178; *see* ER15 (*Howrey III*).

Moreover, clients *had* to engage new representation: Howrey could no longer represent them. When a firm closes its doors, liquidates its assets, and fires its staff, it "leav[es] clients with ongoing matters no choice but to seek new counsel." *Heller*, 527 B.R. at 29. Howrey had no rights or opportunities that could have been "cut off." Far from usurping an opportunity from Howrey (which Jones

Day would have been free to do anyway), Jones Day's conduct in responding to the needs of the clients that Howrey abandoned is beyond reproach.

Under these circumstances, there is no basis to treat Jones Day's work as if it were Howrey's partnership business. The Trustee would not have any right to Jones Day's profits if Jones Day had not taken on any former Howrey partners. There is no reason for a different result here merely because some Howrey partners joined Jones Day. When a former client terminates a dissolved partnership and enters a new contract with a new firm that has different management, partners, associates, resources, and expertise, there is no more partnership business for the dissolved partnership to handle.

3. RUPA supersedes all of the decisions on which the Trustee relies

If these distinctions were not enough, *Beckman*, *Young*, *Jewel*, and similar cases all applied UPA, which has been superseded by D.C.'s subsequent adoption of RUPA. Even under a proper understanding of UPA, the Trustee's claims would fail. *See Thelen*, 24 N.Y.3d 16 (applying UPA, which still governs in New York). The claims are all the more unsupportable under RUPA, which eliminated the statutory underpinnings of the *Jewel* line of cases. Indeed, no published decisions from any D.C. court applying RUPA cite *Beckman*, *Young*, *Robinson*, or *Jewel* for their unfinished business holding.

First, RUPA abrogated the fiduciary duty on which *Jewel*, *Beckman*, and similar cases are based. In those cases, courts held that former partners of a dissolving firm had a fiduciary duty under UPA "not to take any action with respect to unfinished partnership business for personal gain." *Jewel*, 156 Cal. App. 3d at 178-79; *see Beckman*, 579 A.2d at 651. RUPA § 404, which sets forth a "comprehensive and exclusive" list of partners' fiduciary duties, eliminates that duty once a partnership dissolves. RUPA § 404 cmt. 1. Specifically, § 404(b)(3) of RUPA provides that a partner must "refrain from competing with the partnership in the conduct of the partnership business *before the dissolution of the partnership*." *Id.* (emphasis added). As the drafters of RUPA explained, this provision means that "[t]he duty not to compete … does not extend to winding up the business, as do the other loyalty rules." RUPA § 404 cmt. 2. Accordingly, "a partner is free to compete immediately upon an event of dissolution." *Id.* The freedom to compete means that a former partner may solicit his former firm's clients, including by signing new retainer agreements regarding matters previously handled by the former firm.

Thus, even if an *individual* Howrey partner were to solicit a former Howrey client for a matter that Howrey had been handling, RUPA provides that this would not, as *Jewel* stated, violate the "fiduciary duty not to take any action with respect to unfinished partnership business for personal gain." *Jewel*, 156 Cal. App. 3d at

178-79. Under RUPA, the dissolved firm would have no right to demand an accounting for profits earned by its former partner under a new retainer agreement with the client. The new agreement *would* "transform[] the old firm's unfinished business into new firm business" and eliminate any duty to account. *Id.* at 176. And it is even more apparent that *Jewel* does not apply where Jones Day—a third party with no "fiduciary obligations" to Howrey—agreed to represent clients. *See* ER390 (*Howrey II*).

Second, RUPA allows partners to keep reasonable compensation for post-dissolution services that they perform on behalf of the dissolved firm. In the context of legal services, reasonable compensation is the hourly rate that a firm charges its clients. Accordingly, there are no remaining profits for which a former partner must account.

Specifically, RUPA provides that partners are entitled to "reasonable compensation" for services they provide in "winding up" the business of a dissolved firm. D.C. Code § 33-104.01(h). By contrast, UPA did not allow partners any extra compensation for providing services in "winding up" the partnership unless a partner had died. UPA § 18(f) (1914). This is significant because *Beckman* and *Jewel* make clear that, if not for UPA's no-compensation provision, the amount of work that a former partner actually did on the matters—not his partnership interest—would determine his compensation. *See Beckman*, 579 A.2d at 640; *Jewel*, 156 Cal. App. 3d at 176. That is precisely the rule that RUPA codifies by eliminating UPA's no-compensation provision and allowing partners reasonable compensation for post-dissolution work. RUPA thus supersedes any suggestion by *Beckman* and *Jewel* that a dissolved firm—rather than the partners who actually perform the work—is entitled to be compensated for post-dissolution legal services.

Moreover, in the competitive market for hourly-rate legal services, reasonable compensation is, by definition, the rate that a firm charges clients. *Cf. T-Mobile*, at 23-25. Cases involving partnership law have long understood reasonable compensation in this way. Even under UPA, the "reasonable compensation" to which a surviving partner was entitled for "services in winding up the partnership affairs" upon another partner's death included all profits attributable to the surviving partner's skill and services. *See* UPA § 18(f) (1914); *Weisbrod v. Ely*, 767 P.2d 171, 175 (Wyo. 1989); *Blut v. Katz*, 99 A.2d 785, 788 (N.J. 1953); *Jacobson v. Wikholm*, 29 Cal. 2d 24, 30-31 (1946). Partners who did not provide wind-up services could recover profits only to the extent attributable to the dissolved firm's capital (e.g., equipment, facilities, or other resources). *See* 55 A.L.R.2d 1391 § 32; *see also Hudson v. Kemper*, 153 A.2d 316, 318 (D.C. 1959). RUPA codified this understanding of "reasonable compensation," and in the context of legal services, all post-dissolution profits are attributable to the skill and services of the attorney who actually performs the work. The defunct firm therefore has no interest in those profits.[3]

For all of these reasons, "there is no provision of the RUPA that gives the dissolved firm the right to demand an accounting for profits earned by its former partner under a new retainer agreement with a client," much less under a new retainer agreement between a client and a third-party firm. *Heller*, 527 B.R. at 29-30.

C. The Trustee Has No Right To Profits That Jones Day Earned On Pre-Dissolution Matters

The Trustee acknowledges that no authority construing D.C. law supports his claim to Jones Day's profits from pre-dissolution matters, nor do any published decisions from any other jurisdiction. App. Br., 50. In fact, the same counsel who represents the Trustee here conceded in the Heller bankruptcy that a partner who leaves a law firm before dissolution has no duty to account, and that his former firm has no interest in future profits from matters that clients bring to the new firm. *Heller*, 2013 WL 951706 at *3-4. The Trustee's contradictory position is based on

[3] Reasonable compensation may be less than all profits in two circumstances, neither of which is at issue here. First, in the contingency-fee context, a former firm has an interest in being paid for risk it assumed, in addition to the quantum meruit value of work it actually performed. Second, in the hourly-fee context, a former firm has a right to compensation if its former partners generate post-dissolution profits using the former firm's capital (e.g., office space, computer equipment, etc.).

inapposite language and commentary under RUPA, and his unfounded interpretation of an unpublished decision involving Florida law.

1. The Trustee relies on a dissociated partner's duty to account to the partnership for any "profit[] or benefit derived by the partner in the conduct and winding up of the *partnership business*," which he says continues after dissociation "with regard to matters arising and events occurring before the partner's dissociation." D.C. Code §§ 33-104.04(b)(1), 106.03(b) (emphasis added). But that again begs the question whether matters for which clients retain a new firm after firing the previous firm still remain "partnership business" of the fired firm. D.C. law makes clear that they do not. *See supra* Part I.A.

In any event, the Trustee's contrary interpretation is irreconcilable with RUPA's plain text. Section 603(b)(3) provides that, upon dissociation, a partner's duty to account under § 404(b)(1) "continue[s] only with regard to matters arising and events occurring before the partner's dissociation, unless the partner participates in winding up the partnership's business." RUPA § 603(b)(3). In other words, a partner who dissociates without triggering a dissolution has a more limited duty to account than a partner whose dissociation triggers a dissolution. *See id.* § 603(b)(3) & cmt. 2. This makes sense: If a partnership dissolves, a partner can still participate in partnership business to the extent that he assists with the wind-up. *See id.* § 603(b)(1); *id.* § 803(a). In those instances, work that he performs *after dissociation* may be on behalf of the partnership and, accordingly, may be subject to the duty to account. *See id.* § 404(b)(1). By contrast, when there is no dissolution, a dissociating partner immediately loses the "right to participate in the management and conduct of the partnership business." *See id.* § 603(b)(1). Because he can no longer perform work on behalf of the partnership, there is no duty to account for profits from any post-dissociation work. *See id.* § 404(b)(1). As the District Court explained and the Author's Comment confirms, his only duty is to account for profits on "work [he] actually performed at the prior [partnership] before leaving." ER17 (*Howrey III*); *see* Robert W. Hillman, et al., *The Revised Uniform Partnership Act* § 603, Author's Cmt. 3a & n.6 (West 2014) (former partnership "has a claim to income attributable to pre-dissociation activities but should have no claim to income relating to post-dissociation services").

The Trustee's interpretation nullifies the key limitation on a dissociating partner's duty to account. Regardless of whether a partner's dissociation triggers a simultaneous dissolution, and regardless of whether the partner participates in winding up partnership business, the duty to account is exactly the same under the Trustee's approach: A partner must account for all profits earned at any time in the future on all client matters that were pending when he dissociated. It is no answer that § 603(b)(3)'s language might limit *other* duties addressed by that provision (the duty of care and the duty to refrain from adverse interests). *See* App. Br., 56.

Grammatically, the limitations in § 603(b)(3) modify all of the enumerated duties, and the Trustee's reading fails to give this language any meaning with respect to the duty to account.

Further undermining the Trustee's interpretation, RUPA expressly permits Howrey's former partners to "compet[e] with the partnership" without limitation upon dissociation. D.C. Code § 33-106.03(b)(2). Thus, unlike *other* fiduciary duties (including the duty to account), which continue upon dissociation "with regard to matters arising and events occurring before the partner's dissociation," the duty to refrain from competition terminates immediately and completely. *Id.* § 106.03(b)(2)-(3). Howrey's former partners were free to solicit Howrey's former clients immediately after dissociating, thereby terminating Howrey's "partnership business." And when they did so, Howrey had no claim against any partner or his new firm for any resulting loss. *See* D.C. Legal Ethics Op. 368; *supra* Part I.A.

2. The Trustee also improperly relies on a portion of RUPA's commentary discussing a brokerage partner's duty to account for fees received after dissociation from "completing on-going client transactions." RUPA § 603, cmt. 2. As an initial matter, this example assumes that the transaction at issue remains the former brokerage firm's partnership business. That assumption makes sense in many partnership contexts, where a partnership performs services pursuant to an exclusive contract that the client cannot terminate. A prospective home seller, for example, is typically bound by an exclusive agreement with a real estate firm. In that circumstance, it may well be that the former firm has a property interest in the exclusive contract so that a partner who closes the sale after dissociating must account to his former partnership for the profits. *Cf. Thelen*, 24 N.Y.3d at 31 (discussing contract expressly intended to survive architectural firm's dissolution). But contracts for legal services cannot infringe on a client's right to terminate counsel at will. *See Mance*, 980 A.2d at 1202-03; *King*, 436 F. Supp. 2d at 11-12; *T-Mobile*, at 14-15. Thus, when a client selects a firm joined by a departing partner to work on matters previously handled by that partner's former law firm, the work is no longer the former firm's "partnership business."

3. *Buckley Towers Condominium, Inc. v. Katzman Garfinkel Rosenbaum*, 519 F. App'x 657 (11th Cir. 2013) (per curiam), does not support the Trustee's position. That unpublished, nonprecedential decision does not explain how work on a case can remain the "partnership business" of a former partnership after the client changes counsel. It simply assumes its conclusion, perhaps because, in the contingency-fee context at issue there, some portion of the award collected by a successor firm was attributable to the partnership business of a prior firm that was never paid for its work. *See id.* at 659-60.

Buckley Towers is also internally inconsistent and contains as much support for Jones Day's position as it does for the Trustee's. For example, the court concluded that the second of three firms to handle the matter at issue was entitled to the quantum meruit value of its services. *Id.* at 665. That conclusion cannot be squared with the court's other conclusion that the third firm to handle the matter was entitled to a fee based on the departing partner's equity share in his former firm. *See id.* at 666. Likewise, the court determined that one of the partnership agreements at issue violated public policy because it gave a law firm a right to at least 50% of the post-dissociation fees on any matters pending when a partner dissociated. *Id.* at 664. Yet the decision does not explain why RUPA would create a default term in that same partnership agreement requiring a departing partner to remit *all* the post-dissociation profits on the same matter. *Id.* The D.C. Court of Appeals would not adopt the Trustee's interpretation of *Buckley Towers*.

4. Finally, imposing a duty to account on Jones Day for the profits it earned on pre-dissolution matters would exacerbate all of the policy concerns discussed above and create a sea change in the law governing the legal profession. *See supra* Part I. The Trustee's theory applies whether or not a firm dissolves: Any time a partner changes law firms for any reason, the new firm that he joins has a duty to account to the former firm for all profits it earns on matters previously handled by the old firm. On this logic, if a lawyer were to switch firms multiple times during the pendency of a particular matter, with the client deciding to engage each of the lawyer's new firms in succession, the first firm that represented the client on that matter would be entitled to all profits on the matter in perpetuity. This would be true no matter how little work the first firm did on the matter. Under the Trustee's theory, the first firm to touch the matter would have the right to all profits earned by any firm that handles the matter.

This rule would severely impede the ability of lawyers to move from one firm to another (including lateral moves between two financially stable firms). By forcing law firms to work for free on any matter previously handled by another firm, the Trustee's proposed rule would discourage firms from taking on such matters in the first place, impairing clients' access to the counsel of their choice. It would also launch countless lawsuits over professional moves that have always been considered ordinary and routine. That is irreconcilable with D.C. law and public policy favoring client choice and attorney mobility. *See supra* Part I.

D. The Trustee's Policy Arguments Are Wrong

The Trustee's attempts to minimize the adverse policy consequences of his theory are unavailing.

First, the Trustee asserts that some cases, including *Beckman*, *Robinson* and *Jewel*, rejected concerns about client choice and equity. App. Br., 15, 28-29, 45-47. Not so. In describing the scope of the so-called unfinished business doctrine, *Beckman* noted that "[t]he duty to wind up partnership business does not disable the former partners in a law firm from accepting employment from former clients of the dissolved partnership" on new matters. 579 A.2d at 638. But it said nothing about the implications of its holding for a client's choice of counsel on *pending* matters. And none of the Trustee's cases addresses the consequences of depriving a third-party firm of profits for work it performs on matters that Howrey was no longer capable of handling.

Depriving a third-party firm of profits for its work has particularly extreme consequences for a client's choice of counsel—especially when a firm's bankruptcy forces the client to find new representation. Third-party firms have no duty to take on any matters previously handled by a dissolving firm, and confiscating the profits from such matters would discourage firms from taking them on. That, in turn, would make it less likely that clients, left in the lurch by a firm like Howrey, could retain a new firm while simultaneously benefitting from the services of a partner already familiar with the pending matter.

This does not mean that a lawyer's "level of competence and commitment could rise or fall based on the level of profitability for a given client matter." App. Br., 47. Rather, it recognizes that "[l]aw firms accepting a new client, even for an hourly-fee matter, must be prepared to invest considerable resources: attorney salaries; malpractice insurance; administrative support; research fees; document preparation; space allocation; opportunity costs; and so on." *Heller*, 527 B.R. at 33. In light of these investments, "[n]o firm can be expected to contribute those resources if they are not entitled to retain the corresponding profits." *Id.* Thus, although the Trustee claims that his position has no effect on client choice (App. Br., 46), "[t]he notion that law firms will [take on] departing partners or accept client engagements without the promise of compensation ignores common sense and marketplace imperatives." *Thelen*, 24 N.Y.3d at 32.

Second, the Trustee notes that a third-party firm may keep "reasonable compensation" before remitting its profits to the dissolved firm. App. Br., 24, 41-42. But it is far from clear, on the Trustee's theory, that "reasonable compensation" is available at all for *pre-dissolution* matters. *See* D.C. Code § 33-104.01(h). In any event, the Trustee's approach would precipitate complex litigation over what reasonable compensation means. That alone is likely to deter many firms from taking on client matters previously handled by a dissolving firm. This is all the more true if the "reasonable compensation" those firms will ultimately receive is less than market billing rates and excludes many overhead expenses, as the Bankruptcy Court below has suggested. *See In re Heller Ehrman LLP*, Adv. P. No. 10-3221, 2014 WL 323068, at *6-7 (Bankr. N.D. Cal. Jan. 28, 2014). The prospect that third-party firms might secure future business from clients provides little consolation. *See* App. Br., 61. Future business is never a guarantee, and many clients do not have recurring legal needs.

Third, the Trustee surmises that his theory "affirm[s] … the fiduciary bonds between law partners." App. Br., 48. But partners already have incentives to devote their efforts to helping their partnership, including their substantial capital investments (which they stand to lose if the firm fails). The Trustee's position goes even farther: By imposing a duty to account whenever any partner changes law firms (including lateral moves between two financially stable firms), he binds partners together for the life of any matters they ever handle. D.C. law, which expressly allows partners "to dissociate at any time, rightfully or wrongfully," D.C. Code § 33-106.02(a), does not support this drastic result—particularly not at the expense of client choice. *See* D.C. Legal Ethics Op. 368.

Fourth, the Trustee's assertion that courts have had no trouble applying his proposed rule (App. Br., 36) is likewise unavailing. The Bankruptcy Court below is the only court that adheres to it. Moreover, that court has given no guidance as to how to determine when, if ever, a representation ceases to be the business of the old firm (e.g., what if a client chooses new counsel to handle an appeal, or what if an open-ended engagement spans multiple issues?). Nor has it clearly explained what constitutes "reasonable compensation." The protracted proceedings before that court in the Heller bankruptcy demonstrate the problems courts will face when drawing these lines. After the Bankruptcy Court denied Jones Day's motion to dismiss Heller's complaint, adversary proceedings against four law firms proceeded in the Bankruptcy Court for nearly two and a half years and included over 1,000 filings, nine hearings, 17,500 pages of substantive briefs and supporting documents, 40 depositions, over 230,000 documents, and 185 interrogatories. *See* Bankr. Ct. ECF 55-1 at 16-17 (Mot. for Interl. Appeal).

Finally, the Trustee notes that parties are free to contract around his proposed default rule. App. Br., 28, 49. But the theory that client matters are law firm "property" is incompatible with public policy, and thus creates "a deficiency" that cannot be "cure[d]" by agreements contracting around it. *Thelen*, 24 N.Y.3d at 33. And default rules are supposed to provide an equitable or efficient arrangement for the vast majority of cases, in the absence of an express agreement. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984). A default rule that the parties must routinely modify to comport with public policy and preserve client choice contravenes the purpose of default rules in the first place.

E. The Trustee's Criticism Of The District Court's Analysis Is Misplaced

1. The Trustee criticizes the District Court for purportedly creating an exception to the duty to account where partners join a pre-existing, third-party firm that enters a new retainer agreement with clients. App. Br., 21. But those factors distinguish this case from every other decision the Trustee cites because they signify a substantively new representation that was not the product of any wrongdoing. As described above, Howrey's former clients signed bona fide retention agreements with a third-party firm that brought different and additional resources, capital, lawyers, and expertise to bear on the representation. That makes this case unlike attempts—particularly surreptitious ones, *see Vowell*, 679 So. 2d at 639—by individual partners to cut off the rights of their former co-partners and divert profits to themselves, while changing nothing else about the representation provided to clients. *See supra* Part II.B.2. Indeed, given Howrey's financial collapse and involuntary bankruptcy, it had no more partnership business to cut off; its business was wound up when clients *had* to find new representation. This case thus does not involve any breach of fiduciary duty. And even if individual partners had some fiduciary duty to account in those circumstances (which they do not), the Trustee is not pursuing claims against individual partners here, and the District Court properly held that there is no basis for imposing such duties on Jones Day. *See* ER11-12 (*Howrey III*).

In light of the Trustee's insistence that new retainer agreements do not defeat Howrey's right to Jones Day's profits (*see* App. Br., 30-33), his assertion that the District Court improperly concluded that clients signed new agreements with Jones Day is perplexing (*id.* at 37). It is also incorrect: The District Court had to look no further than the Trustee's own concessions to conclude that "[Jones Day] got new retainer agreements." Dist. Ct. ECF 23 at 18 (Trustee Br.); *see also*

Bankr. Ct. ECF 22 at 25-26 (Trustee Br.); ER429 (5/6/15 Tr.) (conceding that complaint does not allege otherwise). And the District Court's determination that clients decided to retain Jones Day simply reflects settled D.C. law that clients, not law firms, decide who will represent them. *See supra* Part I.A.

2. The Trustee next faults the District Court for relying on *Thelen* and *Heller*. But those cases are the only ones addressing theories like the Trustee's. Both emphatically rejected the Trustee's contention that a defunct firm has a property interest in client matters, and they did so based on principles that apply universally across jurisdictions, including D.C.

Contrary to the Trustee's characterization, *Thelen* did not "change" New York law. App. Br., 40. "New York courts have *never* suggested that a law firm owns anything with respect to a client matter other than yet-unpaid compensation for legal services already provided." *Thelen*, 24 N.Y.3d at 29 (emphasis added). *Thelen*'s holding is a straightforward application of that settled rule. *See id.* at 28-29.

Nor is *Thelen* at odds with cases recognizing a cause of action against partners who improperly compete with their firm *before* dissociating. *See* App. Br., 41. Such cases merely recognize the unfairness that occurs when a partner "surreptitious[ly]" competes with his firm. *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 119 (1995). Here, as in *Thelen*, Jones Day did nothing wrong in taking on the former Howrey partners or agreeing to represent clients formerly represented by Howrey (and the Trustee does not allege otherwise). ER15 (*Howrey III*). Moreover, even where a partner does breach his fiduciary duty by soliciting clients before dissociation, the firm is entitled only to damages actually caused by the breach; if the client would have fired the firm regardless, the discharged firm cannot recover. *Meehan v. Shaughnessy*, 535 N.E.2d 1255, 1267 (Mass. 1989); *see Connors, Fiscina, Swartz & Zimmerly v. Rees*, 599 A.2d 47, 51 (D.C. 1991). These cases do not support the sort of guaranteed stream of windfall profits the Trustee seeks here.

The Trustee's assertion that *Heller* is wrong as a matter of California law fares no better. *Jewel* no more applies to the claims in *Heller* than it does to the similar claims at issue here. *See supra* Part II.B.2. The Trustee's contrary arguments merely echo his critique of the District Court's analysis in this case. *See* App. Br., 32, 43-45.

III. THE DISTRICT COURT'S JUDGMENT IS ALSO CORRECT FOR ADDITIONAL, INDEPENDENT REASONS

The Trustee's claims also fail for additional, independent reasons, which provide alternative grounds for affirming the decision below. *See e.g.*, *Franklin v. Terr*, 201 F.3d 1098, 1100 n.2 (9th Cir. 2000).

A. Neither Howrey Nor Its Partners "Transferred" Anything To Jones Day

The Trustee's fraudulent-transfer claims fail as a matter of law because he cannot trace any form of consistently identified property that Howrey or its partners transferred to Jones Day. The claims regarding post-dissolution matters therefore must be dismissed.

Indeed, the Trustee's transfer theory fails however the alleged property interest is defined. If the property interest is defined as a right to future profits from matters that Howrey could no longer handle, the Trustee's claims fail because neither Howrey nor its partners transferred that right to Jones Day. Instead, Jones Day's right to profits came from *clients* when they authorized Jones Day to work on their matters and paid the fees at issue directly to Jones Day. Only clients can convey the "right" to perform the client's legal work. *See Mance*, 980 A.2d at 1202; *supra* Part I.A. The Trustee does not allege that Howrey or its partners controlled any client's decision to retain Jones Day; and as a matter of law, that decision belongs exclusively to clients. *See Mance*, 980 A.2d at 1203-04; *supra* Part I.A.

The Trustee's claims fare no better if the property interest is defined as a legal benefit—i.e., the release of any duty to account for profits derived from work on matters that remained Howrey's "partnership business." Although the *Jewel* waiver transferred this purported benefit from Howrey to its partners, the partners never transferred that benefit to Jones Day. That is because the partners did not transfer this benefit to anyone. "The crux of the definition [of a transfer] is that the transferor no longer has the same rights that the transferor had prior to the transfer." *In re Feiler*, 218 B.R. 957, 961 (Bankr. N.D. Cal. 1998). The Howrey partners' rights, however, remained exactly the same both before and after the alleged "transfer" to Jones Day: At both points in time, the partners did not have to account to Howrey for profits they earned on Howrey's partnership business. Thus, there was no transfer of any legal benefit to Jones Day. *See id.* Nor would it make any sense to say that Jones Day benefitted from the release of a duty to account: As a third party that never owed Howrey any fiduciary duties, Jones Day could not have a duty to account to Howrey. *See supra* Part II.A.2.

B. The Trustee's Unjust Enrichment Claim Is Not Cognizable Under D.C. Law

The Trustee's claim regarding pre-dissolution matters also fails because, as the District Court correctly recognized, it is based on a theory of unjust enrichment that D.C. courts have rejected. Under D.C. law, "[u]njust enrichment occurs when: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust." *News World Commc'ns, Inc. v. Thompsen*, 878 A.2d 1218, 1222 (D.C. 2005). The Trustee cannot satisfy these elements.

As an initial matter, there is nothing unjust about a law firm keeping the profits that clients pay it for providing legal services. Jones Day earned the profits "by the sweat of [its] brow"; Howrey contributed nothing. ER18 (*Howrey III*). There would be no profits at all without Jones Day's considerable investments. *See Heller*, 527 B.R. at 33; *Thelen*, 24 N.Y.3d at 32. By contrast, granting Howrey a right to all future profits from matters that clients fired it from handling would be "an undeserved boon" that "loses all tether to the purposes of unjust enrichment law." ER18-19 (*Howrey III*).

The Trustee's unjust enrichment claim also fails because the Trustee concedes that *Howrey* did not confer any benefit on Jones Day. Any purported benefit came from third parties, namely clients. Courts applying D.C. law repeatedly have held that an unjust enrichment claim requires the plaintiff—not a third party—to have conferred a benefit on the defendant.

For example, *Nevius v. Africa Inland Mission International* dismissed an unjust enrichment claim because any benefit was "conferred by third parties" rather than by the plaintiff herself. 511 F. Supp. 2d 114, 123 (D.D.C. 2007). The plaintiff's employment contract "required her to raise sufficient money, through either fund-raising or her own funds, to cover the costs of her missionary work." *Id.* at 117. When she was wrongfully terminated, she argued that her employer was unjustly enriched by retaining donations intended for her personal use. *Id.* at

117, 122-23. Her claim failed because, despite plaintiff's role in soliciting the donations, the benefit was ultimately conferred by third-party donors—not the plaintiff. *See id.* at 117, 123.

Other D.C. cases similarly reject unjust enrichment claims in which a third party confers the benefit, even if the plaintiff plays some indirect role in the defendant's receipt of the benefit. *See Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz*, 82 F. Supp. 3d 344, 358-59 (D.D.C. 2015); *Int'l Bhd. of Teamsters v. Ass'n of Flight Attendants*, 663 F. Supp. 847, 854 (D.D.C. 1987); *Oceanic Exploration Co. v. ConocoPhillips, Inc.*, No. 04-332, 2006 WL 2711527, at *21 (D.D.C. Sept. 21, 2006).

Disregarding these authorities, the Trustee relies on *In re Lorazepam & Clorazepate*, 295 F. Supp. 2d 30 (D.D.C. 2003). But there is no indication of which state's law governed the plaintiffs' unjust enrichment claims in that case, and the plaintiffs expressly brought their other claims under Illinois, Minnesota, and Massachusetts law. *Id.* at 33-34, 37, 43. *Lorazepam* cited an Illinois case, *State Farm Gen. Ins. Co. v. Stewart*, 681 N.E.2d 625, 633 (Ill. App. Ct. 1997), that allows unjust enrichment claims where the benefit "was transferred to the defendant by a third party," but *Nevius* and other cases confirm that D.C. law is to the contrary.

Finally, the Trustee's reliance on § 48 of the Restatement (Third) of Restitution and Unjust Enrichment (2011) is also misplaced. No D.C. court has adopted this provision, and recent D.C. decisions that post-date the publication of § 48 require that a plaintiff alleging unjust enrichment confer a benefit directly on the defendant. *See Gaubatz*, 82 F. Supp. 3d at 358-59.

IV. THIS COURT SHOULD NOT RECOGNIZE THE TRUSTEE'S THEORY WITHOUT CERTIFYING THE ISSUE TO THE D.C. COURT OF APPEALS

The District Court correctly held that D.C. law does not recognize Howrey's alleged property interest in profits earned by Jones Day on matters that clients no longer wanted Howrey to handle. This Court should affirm that judgment. But if this Court has doubts about D.C. law, Jones Day respectfully submits that it would be appropriate to certify the state-law questions presented to the D.C. Court of Appeals. *See* D.C. Code § 11-723.

CONCLUSION

For these reasons, this Court should affirm the District Court's order dismissing the Trustee's claims in their entirety.

Respectfully submitted,

/s/ Shay Dvoretzky

Shay Dvoretzky
Emily J. Kennedy
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Tel: (202) 879-3939
Fax: (202) 626-1700
sdvoretzky@jonesday.com

Robert A. Mittelstaedt
Jason McDonell
JONES DAY
555 California Street – 26th Floor
San Francisco, CA 94104
Tel: (415) 626-3939
Fax: (415) 875-5700

Counsel for Defendant-Appellee Jones Day

STATEMENT OF RELATED CASES

Pursuant to 9th Circuit Rule 28-2.6, the undersigned counsel of record certifies that there are no related cases pending in this Court other than those identified by the Appellant.

/s/ Shay Dvoretzky
Shay Dvoretzky

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,636 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted using the word-count function on Microsoft Word 2007 software.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2007, in Times New Roman style, 14 point font.

April 4, 2016

/s/ Shay Dvoretzky
Shay Dvoretzky

CERTIFICATE OF SERVICE

I hereby certify that, on the 4th day of April 2016, I electronically filed the original of the foregoing Brief of Appellee Jones Day with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Shay Dvoretzky
Shay Dvoretzky

UNREPORTED DECISIONS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TELECOMMUNICATIONS LAW PROFESSIONALS PLLC, Plaintiff, v. T-MOBILE US, INC., Defendant.	Civil Action No. 13-1178 (GK)

MEMORANDUM OPINION

Law firm Telecommunications Law Professionals PLLC ("Plaintiff" or "TLP") brings this diversity action against its former client, T-Mobile US, Inc. ("Defendant" or "T-Mobile"), for breach of contract or, in the alternative, unjust enrichment. This matter is before the Court on Defendant's Motion to Dismiss [Dkt. No. 4].

The central question raised by Defendant's Motion is this: When an attorney enters into an agreement to perform legal services over a specified period, what, if any, claim may she bring against a client who discharges her before the end of the period? Upon consideration of the Motion, Opposition [Dkt. No. 10], Reply [Dkt. No. 14], and Surreply [Dkt. No. 16], and the entire record herein, the Court holds that, in such a situation, District of Columbia law precludes actions for breach of contract but permits attorneys to pursue unjust enrichment claims. Thus, for the reasons set forth below, Defendant's Motion to Dismiss shall be **granted in part** and **denied in part.**

I. BACKGROUND[1]

In October 2004, MetroPCS Communications, Inc. ("MetroPCS") engaged Carl Northrop ("Northrop") of law firm Paul Hastings LLP ("Paul Hastings") to represent MetroPCS in connection with an auction by the Federal Communications Commission ("FCC"). Compl. ¶¶ 6, 7. Subsequently, Northrop and Paul Hastings became MetroPCS's principal federal regulatory counsel for telecommunications issues. Id. ¶¶ 8, 9.

Over time, MetroPCS became concerned by the unpredictable rates Paul Hastings charged. Id. ¶ 11. In addition, conflicts of interest arose that limited the ability of Paul Hastings to represent MetroPCS in certain matters. Id. ¶ 12.

In light of these concerns, MetroPCS encouraged Northrop to establish a solo practice or form a boutique law firm to serve MetroPCS's telecommunications regulatory needs. Id. ¶ 13. On May

[1] For purposes of ruling on a motion to dismiss, the factual allegations of the complaint must be presumed to be true and liberally construed in favor of the plaintiff. Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc., 525 F.3d 8, 15 (D.C. Cir. 2008); Shear v. Nat'l Rifle Ass'n, 606 F.2d 1251, 1253 (D.C. Cir. 1979). Therefore, the facts set forth herein are taken from the Complaint ("Compl.") [Dkt. No. 1].

20, 2011, Northrop met with Mark Stachiw, Vice Chairman and General Counsel of MetroPCS, to negotiate the terms of a mutually acceptable arrangement for Northrop to create a new law firm. Id. ¶ 14. The terms offered by Stachiw persuaded Northrop and two other Paul Hastings attorneys to form TLP. Id. ¶ 16.

On July 8, 2011, TLP and MetroPCS executed a retainer agreement ("July 2011 Agreement"). Id. ¶ 16; see also id. Ex. 1. The July 2011 Agreement provided for a two-year initial term commencing on August 1, 2011. Compl. ¶¶ 16, 17(v). After the initial term of two years, the July 2011 Agreement could be terminated by either party upon six months' prior notice. Id. ¶ 17(v).

MetroPCS agreed to pay TLP a fixed amount per month to cover TLP's expenses, including attorney compensation, regardless of the work TLP attorneys did for MetroPCS. Id. ¶¶ 15, 17(i). MetroPCS would also make periodic payments to cover TLP's non-recurring expenses. Id. ¶ 17(iii). TLP would be able to provide non-conflicting legal services to other clients, but if any TLP attorney spent more than 150 hours on other clients, each hour beyond the initial 150 would reduce MetroPCS's monthly payments. Id. ¶¶ 17(vii), 18(iv).

In return, each of TLP's attorneys would anticipate working for MetroPCS full-time (up to 1,850 hours annually per attorney), and TLP gave the company "top priority client status." Id. ¶ 18(i), (iii); see also id. Ex. 1 at 1-2; id. Ex. 2 at 1-2. MetroPCS also paid approximately 40% less than the rates charged by Paul Hastings for the same or comparable attorneys and 30% less than the hourly fees TLP would charge its other clients. Id. ¶ 18(ii).

The July 2011 Agreement included a detailed change in control provision, establishing that TLP would be entitled to receive payments under the July 2011 Agreement even if MetroPCS underwent a change in ownership or control. Id. ¶ 17(vi); see also id. Ex. 1 at 5 ("Changes in Ownership or Control of MetroPCS or its Assets"). It also included a termination clause, setting forth five circumstances that would permit the parties to terminate the Agreement. Id. Ex 1 at 6.

On December 26, 2011, the parties made a minor amendment to the July 2011 Agreement. Id. ¶ 21. On or about May 9, 2012, TLP and MetroPCS reached an agreement in principle to extend the initial term of the Agreement and to modify several other terms. Id. ¶ 23. On May 17, 2012, the parties made another minor amendment to the July 2011 Agreement. Id. ¶ 21.

On September 4, 2012, the parties memorialized the modifications to the July 2011 Agreement in an amended and restated agreement ("September 2012 Agreement"). Id. ¶ 23; see also id. Ex. 2. The September 2012 Agreement set a new term commencing August 1, 2012, and ending December 31, 2014. Id. Ex. 2 at 2. Among other things, it adjusted the formula for MetroPCS's credits for work done for other clients, modified the change-in-control provision to clarify the procedures for evaluating conflicts of interest with an acquiring party, and increased the amount paid to TLP. Compl. ¶ 23.

On October 3, 2012, MetroPCS and Deutsche Telekom ("DT"), an international telecommunications company headquartered in Germany, executed a business combination agreement proposing a combination of MetroPCS and DT's company, T-Mobile, USA Inc. ("T-Mobile"). Id. ¶ 25. On January 20, 2013, TLP disclosed the September 2012 Agreement to T-Mobile's attorney, Tom Sugrue. Id. ¶¶ 26, 27. Subsequently, upon T-Mobile's request, TLP disclosed the September 2012 Agreement to T-Mobile's general counsel and a T-Mobile in-house attorney. Id. ¶ 27. Following the disclosure, T-Mobile's counsel had numerous interactions with TLP's principals, but never indicated any objection to the September 2012 Agreement. Id. ¶ 29.

On April 30, 2013, the business combination agreement between MetroPCS and T-Mobile closed, and DT acquired a majority interest in MetroPCS. Id. ¶¶ 28, 31.

On May 1, 2013, Sugrue informed TLP that T-Mobile would not honor the September 2012 Agreement and intended to terminate the agreement as of May 31, 2013. Id. ¶ 31. Sugrue further stated that because MetroPCS had prepaid through May, services provided by TLP to T-Mobile in May were considered to be without prejudice to T-Mobile's right to terminate. Id. TLP continued to provide services to T-Mobile that month at the request of individuals at T-Mobile. Id. ¶ 32.

On May 31, 2013, T-Mobile purported to terminate the September 2012 Agreement in a letter to TLP. Id. ¶ 33. As of the filing of the Complaint, T-Mobile had made no further payments to TLP. Id.

On August 1, 2013, TLP filed this Complaint. On October 4, 2013, Defendant filed a Motion to Dismiss [Dkt. No. 4]. On November 11, 2013, Plaintiff filed its Opposition [Dkt. No. 10]. On December 10, 2013, Defendant filed a Reply [Dkt. No. 14]. On December 26, 2013, with permission of the Court, Plaintiff filed a Surreply [Dkt. No. 16].

II. STANDARD OF REVIEW

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff need only plead "enough facts to state a claim to relief that is plausible on its face" and to "nudge [ ] [his or her] claims across the line from conceivable to plausible." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Id. at 563.

Under the Twombly standard, a "court deciding a motion to dismiss must not make any judgment about the probability of the plaintiff's success . . .[,] must assume all the allegations in the complaint are true (even if doubtful in fact) . . .[, and] must give the plaintiff the benefit of all reasonable inferences derived from the facts alleged." Aktieselskabet AF 21., 525 F.3d at 17 (internal quotation marks and citations omitted). A complaint will not suffice, however, if it "tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557) (alteration in Iqbal).

In deciding a motion under Rule 12(b)(6), "a court may consider 'the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint,' or 'documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by [the parties].' " Cannon v. Wells Fargo Bank, N.A., 952 F. Supp. 2d 1, 9 (D.D.C. 2013) (internal citation omitted) (alteration in original).

III. ANALYSIS

A. Applicable Law

This case is a diversity action for common law breach of contract and unjust enrichment. The parties do not dispute that District of Columbia ("D.C.") law governs these claims. Compl. ¶ 2; Def.'s Mem. of Law in Supp. of Def.'s Mot. to Dismiss ("Def.'s Mot.") at 14-15. Therefore, this Court must consider D.C. law as established by the District of Columbia Court of Appeals. Novak v. Capital Mgmt. & Dev. Corp., 452 F.3d 902, 907 (D.C. Cir. 2006) ("Our duty, then, is to achieve the same outcome we believe would result if the District of Columbia Court of Appeals considered this case."); Lee v. Flintkote Co., 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) (In diversity cases, the D.C. Circuit Court of Appeals looks "to the District of Columbia's courts to provide the applicable . . . substantive rules of decision."). When the D.C. Court of Appeals has not spoken directly to a particular question, the federal courts are "left to reason by analogy from D.C. cases[.]" Workman v. United Methodist Comm. on Relief of Gen. Bd. of Global Ministries of United Methodist Church, 320 F.3d 259, 262 (D.C. Cir. 2003).

B. Count I: Breach of Contract

In order to successfully state a claim for breach of contract in the District of Columbia, a plaintiff must allege: "(1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach." Tsintolas Realty Co. v. Mendez, 984 A.2d 181, 187 (D.C. 2009).[2] T-Mobile contends that,

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[2] T-Mobile contends that the July 2011 Agreement was replaced in its entirety by the September 2012 Agreement. Def.'s Mot. at 14. "The District of Columbia courts have long applied the hornbook principle of contract law that a contract may be discharged by the substitution of a new agreement for the prior agreement." La France v. Georgetown Univ. Hosp., 1988 WL 135066, at *2 (D.D.C. 1988). Consequently, T-Mobile asserts that all duties arising under the July 2011 Agreement were discharged by the September 2012 Agreement and that TLP's breach claim can rest only upon the September 2012 Agreement. Def.'s Mot. at 14-15.

TLP claims that the September 2012 Agreement merely "amend[ed]" and "restat[ed]" the terms of the July 2011 Agreement. Pl.'s Opp'n at 6. Because the Court holds that Plaintiff may not bring a breach of contract claim under either Agreement, the Court need not decide whether the September 2012 Agreement discharged the July 2011 Agreement.

Similarly, Defendant asserts that TLP cannot bring a claim of breach against T-Mobile because the September 2012 Agreement required any successor to MetroPCS to assume the company's obligations in writing and T-Mobile never executed such a writing. Def.'s Mot. at 31-33. TLP argues in its Opposition (but does not allege in its Complaint) that T-Mobile's failure to regardless of the facts TLP has alleged, TLP's breach of contract claim must fail because discharged attorneys may not sue their former clients for breach upon premature termination. Allowing such claims would unlawfully burden clients' right to discharge their attorneys.

The parties agree that T-Mobile had the right to discharge TLP as legal counsel. Opp'n at 14 ("TLP does not dispute T-Mobile's right to cease using its legal services."); Surreply at 3 ("TLP has consistently acknowledged T-Mobile's right of discharge."). D.C. law is clear that "a client may discharge his attorney for any reason at any time." Robinson v. Nussbaum, 11 F. Supp. 2d 1, 5 (D.D.C. 1997); accord King & King Chartered v. Harbert Int'l, Inc., 503 F.3d 153, 156 (D.C. Cir. 2007); In re Mance, 980 A.2d 1196, 1203 (D.C. 2009), as amended (Oct. 29, 2009); Restatement (Third) of Law Governing Lawyers § 32(1) (2000) ("[A] client may discharge a lawyer at any time[.]").

When a client exercises her "right to discharge a lawyer at any time," however, she remains "subject to liability for the lawyer's services." D.C. Rules of Prof'l Conduct, Rule 1.16 cmt. 4. Plaintiff contends that a client's liability for the

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formally assume MetroPCS's obligations was itself a breach of the September 2012 Agreement. Pl.'s Opp'n at 8-9. Again, because the Court holds that TLP may not pursue its breach of contract claim, the Court need not reach this issue.

lawyer's services entitles a discharged lawyer, under certain circumstances, to sue a former client for breach of contract. Plaintiff is mistaken.

Our Court of Appeals has stated plainly that "a client may discharge his attorney, with or without cause, and such a discharge will not constitute a breach of any agreement between them." King & King, Chartered, 503 F.3d at 156 (citing Skeens v. Miller, 628 A.2d 185, 187 (Md. 1993)). In Skeens, upon which King & King, Chartered relied, the court noted that "the modern rule is that if the client terminates the representation, with or without cause, the client does not breach the retainer contract, and thus, the attorney is not entitled to recover on the contract." Skeens, 628 A.2d at 187; see also Cohen v. Radio-Electronics Officers Union, Dist. 3, NMEBA, 679 A.2d 1188, 1200 (N.J. 1996) (holding that retainer agreement requiring six months' notice prior to termination was unenforceable).

While neither party points to any decision by the D.C. Court of Appeals explicitly adopting the "modern rule" discussed in Skeens, 628 A.2d at 187, D.C. law clearly supports our Court of Appeals' ruling in King & King, Chartered, supra. See In re Mance, 980 A.2d 1196, 1203 (D.C. 2009); D.C. Rules of

Professional Conduct, Rule 1.5(a); D.C. Bar Legal Ethics Committee, Op. 264 (1996).

Both parties acknowledge that In re Mance is the District of Columbia Court of Appeals' leading case on the treatment of flat-rate attorney's fees. In Mance, a father retained Robert Mance to represent his son in a criminal matter for a flat fee payable in two $7,500 installments. 980 A.2d at 1200. Before Mance had rendered substantial services, the father terminated him and requested return of the initial $7,500 payment. Id. The attorney failed to return the payment for several months. Id.

Holding that Mance improperly failed to promptly return the fee, the D.C. Court of Appeals ruled that "a flat fee is an advance of unearned fees because it is money paid up-front for legal services that are yet to be performed." In re Mance, 980 A.2d at 1202. The only fee a lawyer may earn upon receipt is an engagement retainer (also called a general retainer), which is a "fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required." Id. at 1202.

All other fees remain refundable until earned by the performance of legal services. Id. If this were not the case, attorneys could thwart clients' right of discharge with fee arrangements that impose forfeiture of advance fees upon early termination. "A fee arrangement that substantially alters and economically chills the client's unbridled prerogative to walk away from the lawyer strikes at the core of the fiduciary relationship[,]" and therefore, cannot stand. Id. at 1203-04 (internal brackets and quotation marks omitted). "To answer that the client can technically still terminate misses the reality of the economic coercion that pervades such matters." Id. at 1204 (internal quotation marks omitted).

D.C. Bar Legal Ethics Committee, Op. 264 (1996), cited in Mance, 980 A.2d at 1202, sheds additional light on the treatment of flat fees for legal services.[3] Opinion 264 considers whether a law firm could charge a non-refundable fixed fee of $4,500 in exchange for up to 40 hours of government contract legal services over the course of a year. Ethics Op. 264 at 1. The Committee found that such a fee must be refunded when a client chooses to discharge the attorneys before the end of the year. Id. at 2.

[3] Although not binding, Opinions of the D.C. Bar Legal Ethics Committee provide valuable guidance and have been cited favorably by our Court of Appeals and the District of Columbia Court of Appeals. See, e.g., In re Kagan, 351 F.3d 1157, 1164, n.7 (D.C. Cir. 2003); Griva v. Davidson, 637 A.2d 830, 840 n.10 (D.C. 1994).

Reciting the definition later adopted in Mance, the Committee explained that the only fees earned upon receipt are engagement retainers (also called general retainers), which must be "paid solely for availability and a promise of exclusivity." Id. Upfront or fixed fees that do not fall into the narrow engagement-retainer category are "special retainers," which are "tied to the performance of services" and remain refundable until earned. Id. at 2-3. Noting that "a lawyer's normal remedy for unpaid fees lies in *quantum meruit*[,]" the Committee stated, "[i]f the liability of the discharging client is only for payment for the services actually rendered by the lawyer, the client is not liable for the full amount of a special retainer designed to encompass services that have not yet been rendered." Id. at 2.

The D.C. Rules of Professional Conduct further demonstrate why TLP's breach of contract claim must fail. Rule 1.5(a) of the Rules requires that a "lawyer's fee shall be reasonable". The D.C. Court of Appeals has made it clear that "any fee for work that has not been performed is *per se* unreasonable." In re Cleaver-Bascombe, 892 A. 2d 396, 403 (D.C. 2006) (emphasis in original). If TLP were to recover damages to compensate it for work that it anticipated performing in light of its bargain with

T-Mobile -- but will never perform because of T-Mobile's decision to terminate -- TLP would effectively recover a fee for doing no work. See Mance, 980 A.2d at 1204 (requiring "return to the client of any unearned portion of advanced legal fees and unincurred costs.").[4] Accordingly, under D.C. law, TLP cannot recover its expectancy interest, that is, it cannot advance "claims that seek to give plaintiff the benefit of its bargain[.]" King & King, Chartered, 436 F. Supp. 2d at 9.

Plaintiff responds that a client's right to discharge should not "excus[e] a client from responsibility for the financial harm inflicted on a lawyer as a result of the client's

[4] District of Columbia courts do allow attorneys to recover under contingent fee agreements if they have substantially performed prior to termination. E.g., Kaushiva v. Hutter, 454 A.2d 1373, 1374 (D.C. 1983). A contrary rule would undermine the purpose of contingent fees, which "is to allocate the risk of non-occurrence of recovery to the attorney rather than the client." King & King, Chartered, 436 F. Supp. 2d at 12. If attorneys could not recover contingent fees following substantial performance, a client could wait until the eleventh hour, terminate her attorney, and pay only the reasonable value of the lawyer's services. No attorney would assume the risk of non-recovery if the reward upon recovery were limited to the reasonable value of her services. However, TLP does not face such a one-sided risk allocation. Under its agreement with T-Mobile, TLP was compensated on a monthly basis. If, as TLP alleges, it provided T-Mobile discounted rates in contemplation of the long-term agreement, TLP can recoup the reasonable value of its services by means other than a breach of contract claim. See infra pp. 27-28; Ethics Op. 264.

decision to terminate a legal services agreement[.]" Pl.'s Opp'n at 14.

Attorneys, however, are not without remedy upon early termination. As noted earlier, unless she is discharged for cause, a dismissed attorney may recover the "reasonable value of services already performed." Robinson, 11 F. Supp. 2d at 5; accord King & King, Chartered, 503 F.3d at 156; D.C. Rules of Prof'l Conduct, Rule 1.16 cmt. 4. Through its breach of contract claim, however, TLP seeks to enforce a fee agreement that would increase T-Mobile's liability for premature termination beyond the reasonable value of TLP's services. That, TLP cannot do.

TLP argues further that the general rule against breach of contract claims contains an exception for attorneys who have detrimentally relied on a client's promise. There is no law in this jurisdiction to support this argument. Plaintiff points to law from other jurisdictions in support of its purported exception for reliance damages. Pl.'s Opp'n at 17 (citing Atkins & O'Brien LLP v. ISS Int'l Service System, Inc., 252 A.D.2d 446 (N.Y. App. Div. 1998)); Id. at 20 (citing McQueen, Rains & Tresch LLP v. Citgo Petroleum Corp., 195 P.3d 35 (Okla. 2008)).

However, the cases Plaintiff cites -- from outside this jurisdiction -- simply do not square with Mance, which was decided after both Atkins and McQueen. As Mance pointed out, because clients are normally liable only for the value of an attorney's services, Rule 1.16 cmt. 4, a fee agreement imposing additional liability for an attorney's detrimental reliance would economically chill a client's right to discharge, Mance, 980 A.2d 1203-04.

Like any other "federal court in a diversity case[,]" this Court "is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." See Tidler v. Eli Lilly and Co., 851 F.2d 418, 424 (D.C. Cir. 1988).

Finally, TLP argues that attorneys may bring breach of contract claims to recover engagement retainers. However, none of TLP's fees constitute an engagement retainer.

Under District of Columbia law, an "engagement retainer," which is "earned when received," Mance, 980 A.2d at 1202 (quoting Restatement (Third) of Law Governing Lawyers § 34 cmt. e), "is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required." Id.

The very fact that TLP never received the payments it now seeks means that those fees did not constitute an engagement retainer. Id.; see also Provanzano v. Nat'l Auto Credit, Inc., 10 F. Supp. 2d 44, 51 n. 14 (D. Mass. 1998) (noting that if an "attorney was foolish enough to agree to payment [of an engagement retainer] only at the end of the term [of guaranteed availability]" and delivered no services during the term, a client could "escape from having to pay the attorney anything at all").

TLP's Complaint states, "Metro PCS' payments to TLP would be on a basis of [an engagement] retainer, i.e., unrelated to hours or any other measure of the volume of service provided . . ." Compl. ¶ 17.ii. In its Opposition at 16 n.4, TLP contends that it "was engaged on terms that ha[d] elements of an engagement retainer."

However, under the terms of both the July 2011 and September 2012 Agreements, TLP was free to allocate its time to other clients, subject only to a *post hoc* reduction in fees. July 2011 Agreement at 2 ("pricing in this Agreement is based upon the assumption, but not the commitment, that each of the Firm Attorneys will be available to provide up to 1850 hours of client service to MetroPCS annually[.]" (emphasis added)); September 2012 Agreement at 2 (providing for adjustment of MetroPCS's monthly fees "[i]f and when a TLP Attorney bills more than [anticipated number of hours] to one or more clients other than MetroPCS”). Thus, TLP’s characterization of its fees as an engagement retainer does not accord with the plain language of its unambiguous contract with T-Mobile. See Ethics Op. 264 (“merely stating in a contract that the retainer is an [engagement] retainer or nonrefundable does not necessarily make it so.”); Cannon v. Wells Fargo Bank, N.A., 952 F. Supp. 2d 1, 9 (D.D.C. 2013) (“court may consider . . . documents upon which the plaintiff's complaint necessarily relies” (internal citations and quotation marks omitted)).

Finally, neither Agreement even suggests which, if any, fees were paid “apart from other compensation” to ensure availability. Mance, at 1202; see July 2011 Agreement at 2-3 (providing fee structure); September 2012 Agreement at 2-3 (same). Therefore, even if there had been an exception for engagement retainers, TLP’s claim would not qualify for it. For all these reasons, TLP’s breach of contract claim must be dismissed.

C. Count II: Unjust Enrichment

In the alternative to its breach of contract claim, TLP brings a claim for unjust enrichment. Unjust enrichment is an equitable claim that “rests on a contract implied in law, that is, on the principle of quasi-contract." U.S. ex rel. Modern Elec., Inc. v. Ideal Elec. Sec. Co., 81 F.3d 240, 247 (D.C. Cir. 1996). In order to state a claim for unjust enrichment a plaintiff must allege that (1) she conferred a benefit on the defendant, (2) the defendant retains the benefit, and (3) under the circumstances, the defendant's retention of the benefit is unjust. Sabre Int'l Sec. v. Torres Advanced Enter. Solutions, Inc., 820 F. Supp. 2d 62, 76 (citing Armenian Assembly of Am., Inc. v. Cafesjian, 597 F. Supp. 2d 128, 134 (D.D.C. 2009)).

"When an express contract has been repudiated or materially breached by [a] defendant, restitution for the value of the non-breaching party's performance is available as an alternative to an action for damages on the contract." Lee v. Foote, 481 A.2d 484, 485 (D.C. 1984).[5] An attorney may pursue quasi-contractual claims when "discharged by the client without cause before he was able to complete performance or substantially perform." King & King, Chartered, 436 F. Supp. 2d at 14.

TLP alleges that without the long-term retainer Agreement, MetroPCS (and later, T-Mobile) would have had to pay

[5] While T-Mobile did not breach any contract by discharging TLP, see supra pp. 9-20, it has "repudiated" its agreement with the law firm, see Repudiate, Black's Law Dictionary (9th ed. 2009) (defining repudiate: "To reject or renounce (a duty or obligation; esp., to indicate an intention not to perform (a contract)'.").

substantially more for the type of legal services TLP provided. Compl. ¶¶ 17, 18, 20. Therefore, it argues that by discharging TLP and renouncing the retainer, T-Mobile unjustly retained the benefit of the discounted legal services, Id. ¶ 43, and TLP is, therefore, entitled to restitution in "the amount that MetroPCS would have paid under the hourly rate fees that TLP would have charged . . . absent a long-term retainer commitment [minus] the fees actually paid to TLP[.]" Id.

T-Mobile responds that TLP has asserted the wrong claim. Rather than unjust enrichment, T-Mobile insists that TLP should have brought a separate claim explicitly styled as "*quantum meruit*." Def.'s Reply at 24 (citing Robinson v. Nussbaum, 11 F. Supp. 2d 1, 5 (D.D.C. 1997)); see also Def.'s Reply at 7-8 (citing Modern Elec., 81 F.3d at 246).

Defendant's position apparently arises from "[t]he confusion, surrounding the term 'quantum meruit' [which] is by no means unique to the District of Columbia Courts." Perles v. Kagy, 362 F. Supp. 2d 195, 201 (D.D.C. 2005) aff'd in part, vacated in part, remanded sub nom. Steven R. Perles, P.C. v. Kagy, 473 F.3d 1244 (D.C. Cir. 2007). Courts do use the term *quantum meruit* in several, sometimes contradictory, senses. Some courts treat *quantum meruit* as "a measure of damages . . .

[that] encompasses both implied-in-law obligations ('quasi-contracts') as well as implied-in-fact contracts." Fred Ezra Co. v. Pedas, 682 A.2d 173, 176 (D.C. 1996). Other courts refer to *quantum meruit* not just as a measure of damages, but as a separate claim. See, e.g., Provanzano, 10 F. Supp. 2d at 53.

It is in the former sense (i.e., as a measure of damages) that this court used *quantum meruit* in Robinson, 11 F. Supp. 2d at 5 ("the discharged attorney's recovery is limited to *quantum meruit*, or the reasonable value of the services already performed."). There is no suggestion in Robinson that discharged attorneys are exclusively limited to claims under the heading *quantum meruit*.

Defendant points to our Court of Appeal's decision in Modern Electric, 81 F.3d at 246, as evidence that unjust enrichment and *quantum meruit* are distinct and mutually-exclusive claims. The Modern Electric court "distinguish[ed] between . . . two causes of action": a *quantum meruit* claim based on a contract implied in fact and a quasi-contract unjust enrichment claim. Id. The court stated that "[a]lthough the District of Columbia Court of Appeals uses the term '*quantum meruit*' to describe both forms of recovery, it distinguishes between these two causes of action." Id. (internal citations omitted).

Significantly, just four months after our Court of Appeals decided Modern Electric, the D.C. Court of Appeals confirmed that *quantum meruit* is a "measure of damages" and "may refer to either an implied contractual or a quasi-contractual duty requiring compensation for services rendered." Fred Ezra Co., 682 A.2d at 176. Accordingly, Defendant has shown no reason why Plaintiff should be limited to a claim styled as one for "*quantum meruit*."

At this early stage, TLP's complaint need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). Regardless of whether Plaintiff could have been more specific by using the term *quantum meruit* in its Complaint, TLP has made it sufficiently clear that, if its contract with T-Mobile is held to be unenforceable, it is pursuing a claim for restitution equal to "the difference . . . between the amount that MetroPCS would have paid under the hourly rate fees that TLP would have charged MetroPCS absent a long-term retainer commitment and the fees actually paid to TLP for the work performed by TLP attorneys between August 1, 2011 and April 30, 2013." Compl. ¶ 43.

T-Mobile also contends that TLP's unjust enrichment claim must fail because the July 2011 and September 2012 Agreements are contrary to public policy. Def.'s Mot. at 36 ("a party has no claim in restitution for performance he has rendered under or in return for a promise that is unenforceable on grounds of public policy unless denial of restitution would cause disproportionate forfeiture." (quoting Restatement (Second) of Contracts § 197 (1981)). The crux of Defendant's position is that because TLP's retainer agreement was unenforceable under D.C. law, TLP should be denied what it alleges to be fair compensation for the legal services it has rendered. Taking as true the facts alleged in Plaintiff's Complaint, as we must in a Motion to Dismiss, such an outcome would bring about disproportionate forfeiture: TLP would forfeit the alleged value of its legal services without receiving the benefit of guaranteed future employment it bargained for with a sophisticated business client.

Moreover, permitting attorneys to obtain the fair value of their services upon early termination does not contravene the District of Columbia's public policy. Rather, it <u>is</u> the

District's public policy that "[a] client has a right to discharge a lawyer at any time, with or without cause subject to liability for the lawyer's services." Rule 1.16 cmt. 4 (emphasis added). "The District of Columbia, like other jurisdictions, wants clients to 'compensate attorneys reasonably,' as a matter of 'fundamental fairness.'" King & King, Chartered, 503 F.3d at 156 (quoting Connelly v. Swick & Shapiro, P.C., 749 A.2d 1264, 1267-68 (D.C. 2000)).

Even when an attorney has "performed negligible services, of little actual benefit to the client, he is entitled to *quantum meruit* compensation." Id. at 156-57. Indeed, Defendant itself notes that "when a client discharges an attorney, the attorney may recover the fair value of his or her services," Def.'s Reply at 6 (citing Cohen v. Radio-Electronics Officers Union, Dist. 3, NMEBA, 679 A.2d 1188, 1199 (N.J. 1996)), and concedes that D.C. law permits attorneys to "recover in *quantum meruit* for unpaid services provided[,]" Def.'s Reply at 7.[6]

Ethics Opinion 264, heavily relied upon by Defendant in opposing Plaintiff's breach of contract claim, directly

[6] Defendant does argue that Plaintiff should not prevail on any equitable claim here because "it has already been compensated fairly for all services that it actually provided." Def.'s Reply at 7. That factual contention is inappropriate for resolution in a Motion to Dismiss.

addresses this issue. The Opinion considers how much of a pre-paid fee must be refunded "when the lawyer's services are terminated before completion of the professional engagement" anticipated in the retainer agreement. Ethics Op. 264 at 4. Opinion 264 states that "it would not be unreasonable for [a] law firm to deny the client the benefit of the original 'volume discount,' and charge the client . . . at its usual hourly rate." Id. TLP similarly seeks to deny T-Mobile the benefit of the discounted legal services it received in exchange for the repudiated long-term retainer Agreement. Pl.'s Compl. ¶¶ 17, 42, and 43. Defendant's attempt to transform the retainer Agreement's unenforceability into a bar to any and all relief for a discharged attorney would undermine, not further, the District's public policy.

Finally, T-Mobile contends that TLP's equitable claim is faulty because: 1) TLP cannot prove MetroPCS would have hired TLP to perform the same work at higher rates in the absence of an agreement; 2) TLP cannot calculate the difference between the discounted and undiscounted cost of legal services because it presumably did not track the hours worked by its attorneys; 3) MetroPCS's payment of TLP's start-up costs and other expenses casts doubt on any claim that TLP did not receive a reasonable fee for its work. Def.'s Mot. at 37-38. These factual disputes may not be resolved in a Motion to Dismiss. Aktieselskabet AF 21., 525 F.3d at 15.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is **granted in part** and **denied in part.** An Order shall accompany this Memorandum Opinion.

January 12, 2015

Gladys Kessler
Gladys Kessler
United States District Judge

Copies to: attorneys on record via ECF