

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PARAVUE CORPORATION,

No. C 14-3887 CRB

Appellant,

**ORDER AFFIRMING BANKRUPTCY COURT**

v.

HELLER EHRMAN LLP,

Appellee.

Appellant Paravue Corporation appeals the Bankruptcy Court's grant of summary judgment for Heller Ehrman, Paravue's former counsel, on Paravue's Claim 1019 for professional malpractice and Claim 1020 for breach of fiduciary duty (the "Claims"). See Bankr. Ct. Order (dkt. 1-4). The Bankruptcy Court concluded that the one year California statute of limitations applicable to the Claims had run and granted summary judgment for Heller Ehrman. For the following reasons, this Court AFFIRMS.

**I. Background**

**A. Paravue Hires Heller Ehrman and Receives Financing from Acuity**

Paravue was a computer software start-up company founded in 2002 by Lauren Barghout under the name LizardEye Systems, Inc. See Barghout's Declaration in Opposition to Summary Judgment ("Barghout Decl.") ¶¶ 1–10 (dkt. 37-10). The start-up hired Heller Ehrman to handle corporate formation and other transactional legal matters. Barghout Decl.

1 ¶¶ 16–17. Heller Ehrman received part of its legal fees in stock, but the firm accepted stock  
2 without first receiving a signed letter from the start-up waiving any conflict of interest that  
3 Heller Ehrman's stock ownership might create. Id. ¶¶ 16–17, 22. Instead, Heller Ehrman  
4 received a waiver letter from the company after the stock transfer had been completed. Id.  
5 Around that same time, LizardEye changed its name to Paravue Corporation and was  
6 re-incorporated in Delaware by a Heller attorney. Id. ¶ 18.

7 Paravue then secured financing from the venture capital firm Acuity Ventures II,  
8 LLC. Id. ¶ 23. Paravue's executives, including Barghout, approved a loan agreement that  
9 authorized Acuity to "call in its debt at any time after the maturity date, and Paravue would  
10 be obligated to pay the amount within 30 days." Id. ¶ 24. The agreement specified that  
11 Acuity was entitled to convert, at any time, all or part of the outstanding principal into  
12 preferred stock at a specified price. See Loan Agreement of May 25, 2004 (dkt. 37-6) at 38.  
13 The loan terms also specified that "in the event of default," which included failure to comply  
14 with any covenant within 10 business days following written notice, "all unpaid principal and  
15 accrued interest becomes, at Acuity's option, immediately collectible by or on behalf of  
16 Acuity." See id. Heller Ehrman approved these contract terms. Barghout Decl. ¶ 24. Over  
17 the following months, Barghout reviewed and Paravue accepted additional loans that  
18 contained the same terms as Paravue's initial loan from Acuity. See Barghout Deposition  
19 (dkt. 41-4) at 65. As a condition of additional financing, Acuity required one of its partners,  
20 Laurence Hootnick, appointed to Paravue's board of directors. See Amendment to Loan  
21 Agreement (dkt. 37-6) at 76.

22 **B. Disputes Arise Between Paravue and Acuity**

23 Leading up to December 2006, in Acuity's view, Paravue had missed a number of  
24 deadlines and failed to deliver finished products. See Hootnick Deposition (dkt. 41-5) at 53.  
25 Paravue held a board meeting in December 2006 at which Barghout was informed that  
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1 employees were complaining about her management.<sup>1</sup> See Barghout Deposition (dkt. 41-4)  
2 at 90. The board then appointed Hootnick CEO of Paravue. Barghout Decl. ¶ 44. Heller  
3 Ehrman did not object to a partner in Paravue's largest creditor (Acuity) also becoming CEO  
4 and a board member of Paravue itself. Id. Paravue's board continued to approve additional  
5 financing from Acuity. Id. ¶ 46.

6 In March 2007, Hootnick attempted to terminate Barghout. Id. ¶¶ 54–56. The next  
7 month, on April 2, 2007, Acuity sent Paravue written notice of its election to convert the  
8 outstanding principle of Paravue's loans into preferred stock. See Conversion Notice (dkt  
9 41-5) at 183. On April 6, Heller attorney Stephen Thau sent an e-mail to Barghout attaching  
10 several documents for her signature, including written consents of Paravue's directors and  
11 stockholders to amend the company's Certificate of Incorporation to authorize issuance of  
12 preferred stock. See Barghout Deposition (dkt. 41-4) at 108. Barghout refused to authorize  
13 issuance of the stock. See Barghout Decl. ¶ 59. On April 13, 2007, Acuity sent Paravue a  
14 Notice of Default and accelerated the loans based on Paravue's failure to comply with the  
15 request to convert.<sup>2</sup> See id. ¶ 61. Barghout continued to refuse requests to authorize the  
16 issuance of preferred stock. See Barghout Deposition (dkt. 41-4) at 15–20.

17 **C. Heller Ehrman's Conflict of Interest and Barghout's Legal Representation**

18 On May 7, 2007, Acuity brought an action against Paravue and Barghout in Santa  
19 Clara Superior Court to force a conversion of Paravue's debt into preferred stock. Id. ¶ 68.  
20 At around this time, an internal memo from Heller Ehrman indicated that the firm had begun  
21 investigating whether it faced a conflict of interest that required it to withdraw from  
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24 <sup>1</sup> Barghout later testified that the board “extended the obligations under the Acuity II and  
25 Acuity III agreements until to November 30, 2007” at that meeting, see Barghout Decl. ¶ 45,  
26 although Heller Ehrman has identified evidence disputing that testimony. See Appellee's Br.  
(dkt. 41) at 6 n.8.

27 <sup>2</sup> Again, Barghout later testified that Acuity was not entitled to an issuance of preferred stock  
28 until after the loan's maturity date of November 2007, see Barghout Decl. ¶ 61, but Heller Ehrman  
responds that the loan agreements expressly stated that Acuity could convert all or part of its  
debt at any time, and that failure to comply with such a request entitled Acuity to accelerate the  
loans, see, e.g., Loan Agreement of May 25, 2004 (dkt. 37-6) at 38.

1 representing Paravue. Barghout Decl. Ex. 16 (dkt. 37-14) at 30–36. During May 2007,  
2 however, Heller Ehrman continued to represent Paravue as directed by Hootnick.

3 On May 22, 2007, Acuity moved for a temporary restraining order and preliminary  
4 injunction to stop Paravue and Barghout from convening a special shareholder meeting to  
5 address Acuity’s attempt to either convert its debt into equity or alternately to foreclose on  
6 Paravue. Barghout Decl. ¶ 70. An attorney representing Barghout, Jack Russo—rather than  
7 a Heller Ehrman attorney—opposed the motion. Id. Barghout submitted a declaration to the  
8 state court on May 23 noting that a shareholder meeting was necessary to, among other  
9 things, appoint a replacement for Heller Ehrman as corporate counsel for Paravue given the  
10 firm's conflict of interest. See Barghout State Court Decl. (dkt. 41-5) at 169–176.

11 The motion for a temporary restraining order was heard on May 25, 2007; a Heller  
12 Ehrman attorney appeared but offered no opposition to Acuity’s motion. Barghout  
13 Deposition (dkt 41-4) at 130–131. Instead, Russo opposed the motion. Id. At the June 25  
14 evidentiary hearing on the request for a preliminary injunction, Heller Ehrman attorneys  
15 appeared but there is no evidence that they opposed Acuity. See Order on Preliminary  
16 Injunction (dkt. 37-8) at 37–45. Barghout stated by declaration that “I firmly believe [Heller]  
17 is not neutral, is not doing what is required by applicable law, and is simply acting as an  
18 additional advocate for plaintiffs in this case.” See Barghout Deposition (dkt 41-4) at  
19 160–161. The state court denied the preliminary injunction and ordered a special  
20 shareholders meeting to be held at Russo's office within 15 days. Barghout Decl. ¶ 71.

21 In June 2007, Acuity sent Paravue a letter demanding that it assemble its assets for  
22 disposition at a public sale on July 18, 2007. Id. ¶ 75. Hootnick directed Paravue to cease  
23 operations, changed the locks at the Paravue facility, and hired most of the Paravue team to  
24 work for a newly formed company under Acuity's control. Id. ¶ 77. Russo and Barghout  
25 requested that Heller Ehrman oppose Acuity's actions. Id. ¶ 76. Heller Ehrman stated that it  
26 would not operate at Barghout's direction, and, if she or Russo believed they had the  
27 authority to act on behalf of Paravue, they should retain other counsel. See Email from R.  
28 Hawk (dkt. 37-8) at 54.

1           **D. Heller Ehrman Withdraws as Counsel**

2           After Heller Ehrman refused to act on behalf of Barghout, Russo filed an application  
3 for a temporary restraining order to block Acuity's foreclosure sale. See Russo Application  
4 (dkt. 37-8) at 56. On July 10, 2007, a state court judge issued the restraining order.  
5 Barghout Decl. ¶ 78. Barghout learned at the July 10 hearing that Hootnick had resigned as  
6 Paravue's CEO, and shortly thereafter she appointed herself CEO. Id. ¶ 79. At the July 10  
7 hearing, an attorney named Michael Ackerman appeared specially on Barghout's behalf and  
8 stated that he would step in to represent Paravue if Heller Ehrman withdrew. Id. ¶ 79.

9           Heller Ehrman sent an email to Barghout, Russo, and Ackerman that same day—July  
10 10, 2007—with an attached substitution of counsel form, requesting Barghout's consent to  
11 immediately withdraw as counsel. See First Withdrawal Email (dkt. 41-5) at 195. The next  
12 morning, on July 11, Heller Ehrman sent Russo another email confirming the law firm's  
13 intent to withdraw and inquiring again whether Paravue would accept. See Second  
14 Withdrawal Email (dkt. 41-5) at 205. Russo replied that before Barghout would consent to  
15 the withdrawal, she wanted to know the total fees paid to Heller Ehrman since its business  
16 relationship with Paravue began. See Barghout Deposition (dkt. 41-4) at 188. Barghout also  
17 wanted to know what portion of the fees and stock previously paid to Heller Ehrman by  
18 Paravue the law firm was willing to refund “as a condition of withdrawal.” Id.

19           On July 11, 2007, Heller Ehrman then filed an ex parte application in the state court  
20 for leave to withdraw as Paravue's counsel. See Ex Parte Application for Leave to Withdraw  
21 (dkt. 41-5) at 197. Russo appeared at the July 12 hearing on the motion to withdraw, and the  
22 state court set another hearing on the matter for July 17. See Santa Clara Superior Court  
23 Withdrawal Documents (dkt. 41-5) at 1119–20, 1128–29. The state court granted Heller  
24 Ehrman's motion to withdraw at that July 17 hearing. Id.

25           **E. Heller Ehrman Winds Up and New Counsel Represents Paravue**

26           Some evidence in the record indicates that Heller Ehrman continued to work on  
27 matters for Paravue between the time it made its initial request to withdraw on July 10, 2007,  
28 and the court's order granting its request to withdraw on July 17, 2007. Two Heller Ehrman

1 attorneys exchanged an email discussing Paravue's "cap tables" on July 13. See Barghout  
2 Decl. ¶ 82. Heller Ehrman entered an appearance on Paravue's behalf in state court at a July  
3 13 hearing over the temporary restraining order entered against Acuity's sale of Paravue. See  
4 id. ¶ 83; Hawk Letter (dkt. 37-14) at 72.<sup>3</sup> Additionally, two Heller Ehrman attorneys  
5 engaged in an email conversation from July 17 to July 19, discussing how the firm could  
6 effectively withdraw from an appeal over a preliminary injunction involving Paravue and  
7 Acuity. See Barghout Decl. ¶ 90. Attorney Ackerman substituted for Heller Ehrman on that  
8 appeal beginning on July 25, 2007. Id. ¶ 90. Heller Ehrman also returned a check to Paravue  
9 on July 19, 2007, stating that it had no authority to accept checks on behalf of the company  
10 because Paravue had only been represented by the firm until Tuesday, July 17, which was the  
11 date of the state court's order granting the firm's motion to withdraw. Id. ¶ 91.

12 **F. Paravue's Public Sale and the Parties' Tolling Agreement**

13 On August 16, 2007, the state court vacated a temporary restraining order against  
14 Acuity's planned sale of Paravue; Acuity held the public sale and then bought Paravue on  
15 October 31, 2007. See Appellant's Brief (dkt. 36) at 13–14; Appellee's Brief (dkt. 41) at 12.  
16 Heller Ehrman and Paravue then entered into an agreement, effective July 14, 2008, to toll  
17 the statute of limitations governing Paravue's potential claims against the law firm. See  
18 Tolling Agreement (dkt. 37-8) at 80. On October 27, 2008, the tolling agreement was  
19 extended to March 16, 2009. See Agreement to Extend (dkt. 37-8) at 85. The tolling  
20 agreement expressly excluded claims that were time-barred as of its effective date—July 14,  
21 2008. See Tolling Agreement (dkt. 37-8) at 80.

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25 <sup>3</sup> At that July 13 state court hearing, Ackerman appeared and requested that Acuity  
26 deliver all of Paravue's business records that had previously been removed from the Paravue  
27 facility to Ackerman's office. See Ackerman Decl. (dkt. 41-5) at 217. That same day, Ackerman  
28 attended a meeting of Paravue's board of directors, which now included Barghout following  
Hootnick's resignation, and the board adopted a resolution to indemnify Barghout for attorney's  
fees, costs, and expenses incurred for the services of Ackerman and Russo. See Kurtovic  
Deposition (dkt. 41-5) at 92. Another resolution adopted at that meeting authorized Barghout  
to negotiate with Heller Ehrman for the return of fees and to condition Paravue's consent to the  
firm's withdrawal on that reimbursement. Id.

1           **G.     Procedural Posture**

2           On December 28, 2008, Heller filed a bankruptcy petition in the United States  
3 Bankruptcy Court, Northern District of California. See In re Heller Ehrman, LLP, No.  
4 3:08-bk-32514 (Bankr. N.D. Cal.). Paravue filed the Claims at issue here (Claim 1019 for  
5 professional malpractice and Claim 1020 for breach of fiduciary duty) in the Bankruptcy  
6 Court on April 27, 2009. See Proof of Claim (dkt. 37-2); Appellee's Brief (dkt. 41) at 1.  
7 Heller Ehrman filed motions for summary judgment on the Claims on March 28, 2014. See  
8 Bankr. Ct. Order (dkt. 1-4). The Bankruptcy Court concluded that the Claims were time  
9 barred under the one year California statute of limitations applicable to legal malpractice  
10 actions, Cal. Civ. Proc. Code § 340.6 (West 2014). See id.

11           **II.    LEGAL STANDARD**

12           A district court reviews a bankruptcy court's findings of fact for clear error and its  
13 conclusions of law—including a grant of summary judgment—de novo. In re Int'l Fibercom,  
14 Inc., 503 F.3d 933, 940 (9th Cir. 2007). The Court draws "all reasonable inferences in favor  
15 of the non-movant to determine whether there exists any genuine issue of material fact  
16 precluding judgment in favor of the movant as a matter of law." In re W. Asbestos Co., 416  
17 B.R. 670, 691 (N.D. Cal. 2009), aff'd sub nom. Renfrew v. Hartford Acc. & Indem. Co., 406  
18 F. App'x 227 (9th Cir. 2010).

19           **III.   DISCUSSION**

20           The parties agree that the timeliness of the Claims here is governed by California  
21 Code of Civil Procedure Section 340.6, which provides a one year statute of limitations for  
22 attorney malpractice claims. See Cal. Civ. Proc. Code § 340.6 (West 2014). That section  
23 states that an "action against an attorney for a wrongful act or omission, other than for actual  
24 fraud, arising in the performance of professional services shall be commenced within one  
25 year after the plaintiff discovers, or through the use of reasonable diligence should have  
26 discovered, the facts constituting the wrongful act or omission . . ." Id. The parties do not  
27 contend that delayed discovery postponed the accrual of the Claims, see Appellee's Br. (dkt.  
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1 41) at 13, but rather agree that accrual began “when appellant[] sustained actual injury.” See  
2 Karno v. Biddle, 36 Cal. App. 4th 622, 627 (1995).

3 Paravue and Heller Ehrman each offer different dates for when Paravue sustained an  
4 “actual injury,” a dispute which decides the case given that the statute of limitations is tolled  
5 until that date, see § 340.6(a)(1). Thus, for the statute to have run on the claims here, actual  
6 injury must have occurred over a year before the July 14, 2008 effective date of the tolling  
7 agreement. See id.; Tolling Agreement (dkt. 37-8) at 80; see generally Karno, 36 Cal. App.  
8 4th 622 (indicating that California courts uphold tolling agreements).

9 Paravue further asserts that the statute was tolled during the time that Heller Ehrman  
10 “represent[ed] the plaintiff regarding the specific subject matter in which the alleged  
11 wrongful act or omission occurred,” see § 340.6(a)(2), arguing that Paravue’s relationship  
12 with the firm ended less than a year before July 14, 2008, so the claims are not time barred.  
13 For the following reasons, the Court finds that (1) actual injury occurred more than one year  
14 before the effective date of the tolling agreement, and (2) Heller Ehrman’s representation of  
15 Paravue ended more than one year before the tolling agreement went into effect.

16 **A. Paravue Suffered Actual Injury Over One Year Before the Effective Date**  
17 **of the Tolling Agreement**

18 According to the California Supreme Court, “actual injury” under Section 340.6(a)(1)  
19 “occurs when the client suffers any loss or injury legally cognizable as damages in a legal  
20 malpractice action based on the asserted errors or omissions.” Jordache Enterprises, Inc. v.  
21 Brobeck, Phleger & Harrison, 958 P.2d 1062, 1065 (Cal. 1998). The “existence of  
22 appreciable actual injury does not depend on the plaintiff’s ability to attribute a quantifiable  
23 sum of money to consequential damages.” Id. at 1070. Actual injury “may consist of  
24 impairment or diminution, as well as the total loss or extinction, of a right or remedy,”  
25 regardless of whether the injury is remediable. Id. Furthermore, “there is no requirement  
26 that an adjudication or settlement must first confirm a causal nexus between the attorney’s  
27 error and the asserted injury.” Id. at 1071.

28 Here, Paravue’s Claims assert that Heller Ehrman’s negligence and conflict of interest  
placed Acuity in a position to call in its loan and convert outstanding principal into preferred



1 stock on a timeline that would not have been possible if the law firm had drafted the loan  
2 agreements more diligently. See Proof of Claim (dkt. 37-2). This negligence “impaired or  
3 dimin[ished]” Paravue’s “rights or remedies” under the loan agreement, see Jordache, 958  
4 P.2d at 1070, and Acuity used the favorable lending terms to call in its loans and declare that  
5 Paravue was in default in April 2007. See Conversion Notice (dkt 41-5) at 183; Barghout  
6 Decl. ¶ 61. Acuity then filed a lawsuit in May 2007 to compel Paravue to comply with the  
7 terms of the loan agreement. Id. ¶ 68. Paravue was forced to “expend[] attorney fees as a  
8 direct result of its attorneys' alleged negligence,” and thus Paravue suffered actual injury at  
9 latest in May 2007. See Jordache, 958 P.2d at 1078; accord Sindell v. Gibson, Dunn &  
10 Crutcher, 54 Cal. App. 4th 1457, 1470 (1997) (noting that “the mere fact of . . . litigation”  
11 caused by attorney negligence can amount to actual injury).

12 Paravue responds that it did not suffer actual injury until Acuity bought the Paravue at  
13 a public sale in October 2007, arguing that the disputes and litigation between Paravue and  
14 Acuity that took place prior to the public sale gave rise to only a “speculative . . . possibility  
15 of future injury.” See Appellant Br. (dkt. 37) at 27; see also Fritz v. Ehrmann, 136 Cal. App.  
16 4th 1374 (2006); Callahan v. Gibson, Dunn & Crutcher LLP, 194 Cal. App. 4th 557 (2011).  
17 This argument fails because a client like Paravue may suffer actual injury “before the client  
18 sustains all, or even the greater part, of the damages occasioned by [the] attorney's  
19 negligence.” See Jordache, 958 P.2d at 1070. “Any appreciable and actual harm flowing  
20 from the attorney's negligent conduct establishes a cause of action upon which the client may  
21 sue.” Id. Here, the litigation initiated by Acuity in May 2007 caused Paravue to expend  
22 defense fees, both in paying Heller Ehrman and in indemnifying Russo and Ackerman. See  
23 Kurtovic Deposition (dkt. 41-5) at 92. The Court thus concludes based on the undisputed  
24 summary judgment record that, taking into account the “specific attorney errors the  
25 plaintiff . . . alleges,” Paravue suffered actual injury over one year prior to the July 14, 2008

1 effective date of the tolling agreement. See Jordache, 958 P.2d at 1078; Sindell, 54 Cal. App.  
2 4th at 1470; In re W. Asbestos Co., 416 B.R. at 691.<sup>4</sup>

3 **B. Heller Ehrman’s Representation of Paravue Ended Over One Year Before**  
4 **the Effective Date of the Tolling Agreement**

5 The parties agree that the Santa Clara County Superior Court granted Heller’s motion  
6 to withdraw as Paravue’s counsel on July 17, 2007. See Santa Clara Superior Court  
7 Withdrawal Documents (dkt. 41-5) at 1119–20, 1128–29. Paravue argues that this date was  
8 less than one year prior to the effective date of the parties’ tolling agreement—July 14,  
9 2008—and thus because Section 340.6(a)(2) tolls the limitations period during the time  
10 Heller Ehrman “represent[ed] the plaintiff regarding the specific subject matter in which the  
11 alleged wrongful act or omission occurred,” Paravue’s claims are not time barred. The Court  
12 concludes that this argument fails under the relevant California case law.

13 Section 340.6(a)(2) “does not expressly state a standard to determine when an  
14 attorney's representation of a client regarding a specific subject matter continues or when the  
15 representation ends, and the legislative history does not explicitly address this question.”  
16 Gonzalez v. Kalu, 140 Cal. App. 4th 21, 28 (2006). The section’s tolling rule “is not  
17 triggered by the mere existence of an attorney-client relationship. Instead, the statute's  
18 tolling language addresses a particular phase of such a relationship-representation regarding a  
19 specific subject matter” involving the attorney’s alleged misconduct. See Foxborough v. Van  
20 Atta, 26 Cal. App. 4th 217, 228–29 (1994). The rule “was adopted in order to avoid the  
21 disruption of an attorney-client relationship by a lawsuit while enabling the attorney to  
22 correct or minimize an apparent error, and to prevent an attorney from defeating a  
23 malpractice cause of action by continuing to represent the client until the statutory period has  
24 expired.” Laird v. Blacker, 828 P.2d 691, 698 (Cal. 1992) (en banc), as modified on denial  
25 of reh'g (July 16, 1992). California courts primarily employ “an objective standard to

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27 <sup>4</sup> Paravue appears to have omitted reference to when the actual injury asserted in Claim 1020  
28 arose, grouping its Claim 1020 arguments together with its Claim 1019 arguments. See, e.g.,  
Appellant’s Reply Br. (dkt. 43) at 10. Claim 1020 involves Heller Ehrman’s receipt of stock without  
first receiving a conflict waiver; the stock transfer occurred in May 2004, well over a year before July  
14, 2008. See Barghout Decl. ¶ 22.

1 determine whether an attorney's representation has ended,” taking into account the facts of a  
2 particular case. Worthington v. Rusconi, 29 Cal. App. 4th 1488, 1497 (1994).

3 California courts of appeal have provided additional guidance on when Section  
4 340.6(a)(2) representation ends. It may end “when the client actually has or reasonably  
5 should have no expectation that the attorney will provide further legal services. That may  
6 occur upon the attorney’s express notification to the client that the attorney will perform no  
7 further services, or, if the attorney remains silent, may be inferred from the circumstances.”  
8 Kalu, 140 Cal. App. 4th at 30–31. Here, the undisputed summary judgment record provides  
9 extensive evidence that Paravue could expect no further services from Heller Ehrman in its  
10 litigation with Acuity. See id. Paravue admits that when Acuity moved in May 2007 for a  
11 temporary restraining order to block Barghout’s and Paravue’s attempt to call an emergency  
12 shareholder meeting, a Heller Ehrman attorney appeared but offered no opposition to  
13 Acuity’s motion. See Barghout Deposition (dkt 41-4) at 130–131. Russo opposed the  
14 motion instead. Id. Barghout stated by declaration to the state court that “I firmly believe  
15 [Heller] is not neutral, is not doing what is required by applicable law, and is simply acting as  
16 an additional advocate for plaintiffs in this case.” See Barghout Deposition (dkt 41-4) at  
17 160–161.

18 The next month, when Acuity sent Paravue a letter demanding that it assemble its  
19 assets for disposition at a public sale on July 18, 2007, see Barghout Decl. ¶ 75, and  
20 Hootnick directed Paravue to cease operations, changed the locks at the Paravue faciity, and  
21 hired most of the Paravue team to work for a newly formed company under Acuity's control,  
22 Id. ¶ 77, Russo and Barghout requested that Heller Ehrman oppose Acuity's actions, Id. ¶  
23 76. Heller Ehrman stated that it would not operate at Barghout's direction, and, if she or  
24 Russo believed they had the authority to act on behalf of Paravue, they should retain other  
25 counsel. See Email from R. Hawk (dkt. 37-8) at 54. This undisputed record establishes that  
26 Paravue could not reasonably expect Heller Ehrman to “provide further legal services”  
27 related to the Acuity litigation. See Kalu, 140 Cal. App. 4th at 30–31.

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1 Furthermore, California courts have held that a client’s retention of “replacement  
2 counsel” indicates that the “die was cast and the tolling afforded under Code of Civil  
3 Procedure section 340.6, subdivision (a)(2) ended.” See, e.g., Hensley v. Caietti, 13 Cal.  
4 App. 4th 1165, 1172 (1993) (quoting Croce v. Kurnit, 565 F. Supp. 884, 892 (S.D.N.Y.  
5 1982) aff’d, 737 F.2d 229 (2d Cir. 1984)). This is so because “when the client consulted  
6 independent counsel ‘he was no longer the disadvantaged client unable to question or to  
7 pursue remedies for perceived wrongs’ hence ‘continuous representation tolling ended.’” Id.

8 Here, Paravue received advice and representation from independent counsel. As  
9 described above, Russo argued Paravue’s position at multiple hearings where Heller Ehrman  
10 attorneys remained silent. At a July 10 hearing, Ackerman appeared specially on Barghout's  
11 behalf and stated that he would step in to represent Paravue in the Acuity litigation if Heller  
12 Ehrman withdrew. Barghout Decl. ¶ 79. Heller Ehrman immediately communicated to  
13 Paravue, both on July 10 and on July 11, that it agreed to Ackerman’s request and that it  
14 intended to withdraw as counsel. See First Withdrawal Email (dkt. 41-5) at 195; Second  
15 Withdrawal Email (dkt. 41-5) at 205. Paravue delayed agreeing to substitution because it  
16 wanted a refund of attorneys’ fees from Heller Ehrman “as a condition of withdrawal.”  
17 Barghout Deposition (dkt. 41-4) at 188. Russo communicated this message to Heller  
18 Ehrman, and the only reasonable inference to be drawn from his communication is that he  
19 was acting on Paravue’s behalf. See id. This record shows that Paravue was far from “the  
20 disadvantaged client unable to question or to pursue remedies for perceived wrongs,” and  
21 “hence continuous representation tolling ended” at latest by July 11, 2007—more than one  
22 year before July 14, 2008. See Hensley, 13 Cal. App. 4th at 1172.

23 Paravue responds that Barghout opposed substitution of counsel, reasoning that  
24 Barghout did not subjectively consider the attorney-client relationship to be ended before  
25 July 17, 2007—a date which falls within one year of the effective date of the tolling  
26 agreement. This argument fails because California courts employ “an objective standard to  
27 determine whether an attorney's representation has ended,” rather than relying solely on the  
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1 subjective views of a client to make that determination. See Worthington v. Rusconi, 29 Cal.  
2 App. 4th 1488, 1497 (1994).

3 Finally, Paravue asserts that—less than one year prior to the effective date of the  
4 tolling agreement—Heller Ehrman attorneys (1) sent emails regarding Paravue’s “cap  
5 tables,” see Barghout Decl. ¶ 82, (2) appeared as attorneys of record for Paravue at a July 13  
6 hearing, id. ¶ 83; Hawk Letter (dkt. 37-14) at 72, (3) sent emails discussing how the firm  
7 could formally withdraw from an appeal involving Acuity and Paravue, see Barghout Decl. ¶  
8 90, and (4) returned a check to Paravue on July 19, 2007, stating that they had no authority to  
9 accept the check because the firm’s relationship with the company had concluded on  
10 Tuesday, July 17, id. ¶ 91. These facts do not bring Paravue within the limitations period  
11 because, as discussed above, the test for Section 340.6(a)(2)’s tolling rule “is not triggered by  
12 the mere existence of an attorney-client relationship.” See Foxborough v. Van Atta, 26 Cal.  
13 App. 4th 217, 228-29 (1994).

14 The evidence Paravue offers goes to the “mere existence” of an attorney-client  
15 relationship, which the parties agree was not formally severed until the state court’s July 17,  
16 2007 order. See id.; Santa Clara Superior Court Withdrawal Documents (dkt. 41-5) at  
17 1119–20, 1128–29. Section 340.6(a)(2) tolling could and did end well before the entry of  
18 that July 17 order given that (1) Paravue could not reasonably have expected Heller Ehrman  
19 to “provide further legal services” in opposition to Acuity, see Kalu, 140 Cal. App. 4th at  
20 30–31, and (2) Paravue had received advice and representation from independent counsel,  
21 see Hensley, 13 Cal. App. 4th at 1172 (1993).

22 The undisputed record thus shows that there is no “genuine issue of material fact”  
23 regarding whether the Section 340.6(a)(2) relationship here ended over one year before the  
24 effective date of the tolling agreement on July 14, 2008.<sup>5</sup> See In re W. Asbestos Co., 416  
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27 <sup>5</sup> Again, Paravue does not attempt to separately identify when Heller Ehrman’s representation  
28 ended for purposes of Claim 1020, grouping it together with Claim 1019. See, e.g., Appellant’s Reply  
Br. (dkt. 43) at 10. Given that the stock transfer at issue in Claim 1020 was completed on May 7, 2004,  
any “representation” Heller Ehrman provided with regard to that transfer would have ended May 7, well  
over a year before July 14, 2008. See Barghout Decl. ¶ 22.

1 B.R. at 691. This Court concludes that the Bankruptcy Court properly entered judgment for  
2 Heller Ehrman as a matter of law.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the Court AFFIRMS the Bankruptcy Court's order denying  
5 the Claims as time barred.

6 **IT IS SO ORDERED.**

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9 Dated: October 7, 2015



10 CHARLES R. BREYER  
11 UNITED STATES DISTRICT JUDGE

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