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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ISN SOFTWARE CORPORATION, Plaintiff Below, Appellant, v. RICHARDS, LAYTON & FINGER, P.A., RAYMOND J. DICAMILLO and MARK J. GENTILE, Defendants Below, Appellees.	)	No. 110, 2019 On appeal from the Superior Court, C.A. No. N18C-08-016 MMJ (CCLD)

[CORRECTED] ANSWERING BRIEF OF APPELLEES-DEFENDANTS RICHARDS LAYTON & FINGER, P.A., RAYMOND J. DICAMILLO, AND MARK J. GENTILE

MORRIS JAMES LLP

P. Clarkson Collins, Jr. (#739)
Carl N. Kunz, III (#3201)
Kathleen A. Murphy (#5215)
500 Delaware Avenue, Suite 1500
Wilmington, Delaware 19801
(302) 888-6990
pcollins@morrisjames.com
ckunz@morrisjames.com
kmurphy@morrisjames.com

Attorneys for Appellees-Defendants Richards, Layton & Finger, P.A., Raymond J. DiCamillo, and Mark J. Gentile

OF COUNSEL:

George M. Kryder
Melissa L. James
VINSON & ELKINS LLP
2001 Ross Avenue, Suite 3900
Dallas, Texas 75201-2975
(214) 220-7700
gkryder@velaw.com
mjames@velaw.com

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

NATURE OF PROCEEDINGS

This is an appeal from the Superior Court's order dismissing with prejudice Plaintiff ISN Software Corporation's ("ISN") suit alleging that Defendants below-Appellees, Richards, Layton & Finger, P.A. ("RLF"), Raymond J. DiCamillo, and Mark J. Gentile (collectively, "Defendants"), committed legal malpractice in January 2013 when they allegedly advised ISN incorrectly that "Stockholder D" did not have appraisal rights in a cash-out merger. A017 ¶¶ 1, 16-18. Although ISN admits that it believed on January 15, 2013 (mere days after the merger) that Stockholder D did have appraisal rights and that the advice was "erroneous" (A022 ¶ 18, A024-25 ¶¶ 23-24), ISN waited over five and one-half years before filing suit. Thus, its claim is barred by the three-year statute of limitations, which the Superior Court properly applied.

On appeal, ISN argues that its negligence claim accrued only after the Court of Chancery issued its August 11, 2016 opinion in appraisal litigation filed after the merger was consummated in January 2013. ISN also appeals the Superior Court's denial of its Motion to Compel the production of additional materials from Defendants – despite ISN's representation to the Superior Court that it did not need the "entire file" to defeat the Motion to Dismiss.

SUMMARY OF ARGUMENT

1. Denied. Contrary to paragraph 1, a negligence claim accrues at the time of the allegedly wrongful act – when there is a risk of loss.

2. Denied. Further, contrary to paragraph 2, ISN told the Superior Court that it did not need the "entire file" to defeat the Motion to Dismiss (A101), and Defendants complied with ISN's March 2018 request for its files.

Defendants otherwise deny ISN's Summary of Argument.[1] ISN is a sophisticated litigant in Delaware courts, formerly represented both by RLF and ISN's Texas-based counsel, who concurrently advised it at the time of the cash-out merger transaction and conflict waiver at issue and the later appraisal litigation. ISN claims that Defendants committed legal malpractice in January 2013 when they allegedly advised ISN incorrectly that "Stockholder D" would not have appraisal rights in a cash-out merger.[2]

It is well-settled that a legal malpractice claim accrues at the time of the wrongful act. In Delaware, legal malpractice claims are governed by a three-year

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[1] ISN's allegations are quoted as a procedural matter, solely for purposes of demonstrating that they do not state a claim under Rule 12(b)(6) of the Superior Court Rules. Defendants deny that they gave incorrect advice, breached the applicable standard of care or any professional obligations, and ask that this Court affirm the Superior Court's dismissal with prejudice of ISN's meritless, time-barred Complaint.

[2] A017 ¶ 1, A021-22 ¶¶ 16-17.

statute of limitations. Although the Superior Court considered ample Delaware authority (citing twelve cases) supporting dismissal, ISN cites only three of them to this Court, relying instead on cases from Alaska, Arizona, California, Iowa, and North Dakota which do not reflect Delaware law. Under any test, ISN's injury – a risk of loss from a known allegedly wrongful act – occurred in January 2013. Indeed, ISN alleges that it was injured on – and shortly after – the date it received the "Advice"[3] in 2013, including when: (i) ISN chose to proceed with the merger (A024 ¶ 21, A025 ¶¶ 24, 25(a)); (ii) Stockholder D perfected its appraisal rights (A026 ¶ 27); (iii) ISN became party to the appraisal litigation (A026 ¶ 26); and (iv) ISN retained legal and other advisors for the appraisal litigation and paid them in that case (A026 ¶ 26, A027 ¶¶ 28-29); which (v) could bankrupt ISN (A021 ¶ 13).

ISN also admits that it knew of the alleged malpractice by January 15, 2013 – before stockholders were notified of the merger and at a time when "cancellation" of the merger was an option – but chose to go forward with the merger.[4] ISN cannot pursue its time-barred suit ***five and one-half years after it***

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[3] *See* A022 ¶ 17.

[4] *See, e.g.*, A022 ¶¶ 18 ("Advice concerning the availability of appraisal rights in connection with the Merger was erroneous"); A024-25 ¶¶ 23-24 (admitting ISN knew on January 15 and 16, 2013, that Stockholder D would have appraisal rights); A128-29.

had actual notice of the alleged malpractice simply because it is dissatisfied with the Court of Chancery's judgment in the later appraisal litigation.

After representing to the Superior Court that ISN "do[es] not need the entire file to defeat [the] motion to dismiss"[5] – beyond the hundreds of thousands of pages RLF already turned over[6] – ISN now tells this Court that it is entitled to fish for documents to support a fraudulent concealment tolling theory. That theory, however, is subject to Rule 9(b)'s heightened pleading standard, and ISN did not plead it. Indeed, the words "tolling," "fraud," and "conceal" do not even appear in the Complaint. Nevertheless, Defendants complied with Delaware and other authority when RLF delivered hundreds of thousands of pages to ISN in response to ISN's March 2018 request for its files.

Thus, ISN's claim accrued and the statute of limitations started running by January 15, 2013, the date on which ISN admits it had ***actual notice*** of the alleged malpractice. ISN's claim is barred and the judgment below should be affirmed.

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[5] A101.

[6] A080.

STATEMENT OF FACTS

Defendants deny that they gave incorrect advice or breached the applicable standard of care or any professional obligations, and offer the following facts as ISN pled or admitted solely to demonstrate that ISN's claim is time barred:

RLF is a Delaware-based law firm. A018 ¶ 2. Mr. DiCamillo and Mr. Gentile are directors at RLF. A018 ¶¶ 3-4. ISN is a Delaware corporation with its principal place of business in Dallas, Texas. A018 ¶ 1.

In November 2012, "ISN engaged RLF to advise it on performing a cash-out merger." A020 ¶ 10. Thereafter, RLF provided ISN "[a]dvice concerning the availability of appraisal rights in connection with the Merger [which] was [allegedly] erroneous." A022 ¶ 18. Specifically, "RLF advised ISN that, under the Merger, only the 356 cashed-out shares held by Stockholders A, B and C would obtain appraisal rights" and that "Stockholder D did not have appraisal rights." A022 ¶ 17, A024-25 ¶ 23. Stockholder D had 544 shares. A021 ¶ 15. The cash price that ISN offered to Stockholders A, B, and C was $38,317 per share. A021 ¶ 16.

"[T]he Merger was consummated on January 9, 2013." A024 ¶ 21.

On January 15 and 16, 2013, an RLF "partner" "recognized RLF's mistake" and spoke about it with ISN's counsel, BNM.[7] A024-25 ¶¶ 23-24. "On January

[7] BNM is Bell, Nunnally & Martin, LLP. A024 ¶ 22.

16, 2013, ISN stockholders A, B, C and D were advised of their appraisal rights," with stockholders B, C, and D giving "preliminary indication[s] that [each] might seek appraisal" on its respective shares. A025-26 ¶ 25.

ISN and RLF entered into a conflict waiver letter on February 14, 2013, acknowledging that, "it appears there may be an issue concerning the Advice" given in January 2013. A026 ¶ 26. The conflict waiver letter states, "[t]his is an important decision, and we suggest that the Company consider consulting independent counsel to assist it in deciding whether to consent." A034.

In fact, ISN did have its own counsel, BNM, throughout the merger, negotiation of the conflict waiver, and appraisal action. ISN admits that it is a "pretty sophisticated company with competent legal counsel elsewhere in the country",[8] and that it "ha[d] legal counsel" at the time but "didn't file a lawsuit back in January or February or March of 2013 and . . . didn't seek a tolling agreement with RLF . . . because ISN did not believe there was a claim for malpractice for the very simple reason that it suffered no damages." A238.

In March 2013, Stockholders B, C, and D perfected their appraisal rights, and commenced the appraisal action in April 2013. A131; Ex. A at 3.

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[8] A218.

ISN was advised prior to the effectiveness of the merger that any appraisal action could result in a judgment that could bankrupt ISN. A021 ¶13.

The Court of Chancery issued its decision in the appraisal action on August 11, 2016, valuing ISN at $98,783 per share. A027.

ISN requested its file from RLF on March 16, 2018. A027 ¶ 32. "RLF, through an attorney in Texas, spent months carefully producing to Texas counsel for ISN over four-hundred thousand pages of documents . . . ." A080 ¶ 9.

On August 1, 2018, ISN sued Defendants, alleging the sole count of legal malpractice based on RLF's purported Advice to ISN in January 2013.

On September 18, 2018, Defendants filed their Motion to Dismiss for Failure to State a Claim (the "Motion to Dismiss"), arguing that ISN's legal malpractice claim was barred by the three-year statute of limitations. Concurrently, Defendants filed their Motion to Stay Discovery pending the resolution of Defendants' Motion to Dismiss.

On October 8, 2018, ISN opposed the Motion to Stay Discovery and filed a Motion to Compel RLF to turn over ISN's "entire file", including all internal communications. A081.

The Superior Court heard the Motion to Stay and the Motion to Compel on October 26, 2018. During the hearing, ISN's counsel represented to the trial court, "we do not need the entire file to defeat [the] motion to dismiss. We don't need

it."[9] The Superior Court denied ISN's Motion to Compel and granted Defendants' Motion to Stay all discovery.

On January 10, 2019, the Superior Court heard the Motion to Dismiss and issued its Opinion on February 18, 2019, finding, "Plaintiff's cause of action against Defendants accrued on the date Plaintiff explicitly was informed of Defendants' [allegedly] erroneous advice – January 15, 2013. At the very latest, the statute of limitations began to run as of the filing of the appraisal action in the Court of Chancery." Mem. Op. at 7. The court also found "there is no basis for tolling the statute of limitations on the grounds of fraudulent concealment"[10] – the only tolling doctrine on which ISN now relies but never pled.

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[9] A101.

[10] Mem. Op. at 9.

ARGUMENT

I. BECAUSE ISN ADMITS THAT IT HAD ACTUAL NOTICE OF ITS CLAIM OVER FIVE AND ONE-HALF YEARS BEFORE FILING SUIT, THE SUPERIOR COURT CORRECTLY HELD THAT ISN'S LEGAL MALPRACTICE CLAIM IS BARRED BY THE THREE-YEAR STATUTE OF LIMITATIONS

A. Question Presented

Whether the Superior Court correctly held that ISN's legal malpractice claim was barred by Delaware's three-year statute of limitations, when ISN pled that the alleged malpractice occurred in 2013, and that it was aware of the alleged wrongful act on January 15, 2013, over five and one-half years before filing suit? Mem. Op. at 7.

B. Scope of Review

This Court's review of a trial court's grant of a motion to dismiss is *de novo*. *Caspian Alpha Long Credit Fund, L.P. v. GS Mezzanine Partners 2006, L.P.*, 93 A.3d 1203, 1205 (Del. 2014). The trial court's decision that the applicable three-year statute of limitations, 10 *Del. C.* § 8106, barred a claim for legal malpractice brought more than five years after ISN admittedly learned of the allegedly wrongful act correctly applies settled Delaware precedent and should be affirmed on appeal.

C. Merits of the Argument

The Superior Court correctly dismissed ISN's suit because the alleged legal malpractice occurred on or before January 9, 2013, when ISN consummated the

merger, and ISN admits that it had actual knowledge of the alleged malpractice by January 15, 2013.

1. ISN's Legal Malpractice Claim is Barred by Delaware's Three-Year Statute of Limitations

In Delaware, the statute of limitations for a legal malpractice claim is three years. 10 *Del. C.* § 8106(a); *Rich Realty, Inc. v. Meyerson & O'Neill*, 2014 WL 1689966, at *3 (Del. 2014), *aff'd*, 103 A.3d 515 (Del. 2017). The three-year period "begins to run . . . at the moment of the wrongful act." *Maddox v. Collins*, 2015 WL 5786349, at *1 (Del. Super. Ct. Oct. 5, 2015).[11] The "claim accrues as soon as the wrongful act occurs . . . [w]hether or not the plaintiffs could have sued for damages..." *Albert v. Alex Brown Mgmt. Servs. Inc.*, 2005 WL 1594085, at *18 (Del. Ch. June 29, 2005).

Delaware courts conduct a three-part analysis at the motion to dismiss stage to determine whether a claim is time-barred. *Machala v. Boehringer Ingelheim Pharm., Inc.*, 2017 WL 2814728, at *6 (Del. Super. Ct. June 29, 2017). From the pleadings, the Court determines:

1. **The cause of action's accrual date**: here, ***no later than January 9, 2013*** – the effective date of the merger.

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[11] *See also Sammons v. Andersen*, 968 A.2d 492 (TABLE), 2009 WL 590381, at *3 (Del. Mar. 9, 2009) (the three-year period "begins to run at the time of the alleged malpractice.").

2. **Tolling**: Whether the plaintiff has pled facts sufficient to create a reasonable inference that the limitations period has been tolled. ***ISN pled no facts supporting any tolling theory and none applies.***

3. If a **tolling exception** has been adequately pled, ***when the plaintiff was on inquiry notice*** of its claim.[12] Here, ISN admits that it had ***actual notice*** of its claim over ***five and one-half years ago***, on January 15-16, 2013,[13] and February 14, 2013.[14]

The Complaint demonstrates that the cause of action accrued over five and one-half years before suit was filed. Accordingly, ISN's claim is time-barred, and the Superior Court properly granted Defendants' Motion to Dismiss.

(a) ISN Admits that it Had Actual Notice of its Claim No Later Than January 15, 2013, So its Claim is Time-Barred

ISN admits it had ***actual notice*** – not merely inquiry notice – of its claim as early as January 2013 based on the following events, which each ***independently*** establishes ISN's actual notice:

- January 15 and 16, 2013 – ISN alleges that an RLF "partner" "recognized RLF's mistake" and "told BNM that the Merger mistakenly gave Stockholder D's 544 shares appraisal rights . . . ." A025 ¶ 23. Then, ISN sent a letter to Stockholder D providing notice to it of its appraisal rights under Delaware law, which Stockholder D then perfected. *See* A025 ¶ 25, A026 ¶ 27.

- February 14, 2013 – ISN entered into the conflict waiver letter with RLF which stated that "it appears there may be an issue concerning the Advice" given in January 2013. A026 ¶ 26.

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[12] *Machala*, 2017 WL 2814728, at *6.

[13] A024-25 ¶¶ 23-25.

[14] A026 ¶ 26.

- "ISN was aware that RLF gave it Bad Advice well before any trial and subsequent judgment." A141.

These allegations alone demonstrate that ISN's claim is barred even if ISN had tried to plead a tolling exception – which it did not – because ISN had ***actual knowledge of the injury***. "Even where a tolling doctrine applies, the statute of limitations is tolled only until the plaintiff is on inquiry notice of the injury." *Silverstein v. Fischer*, 2016 WL 3020858, at *6, *8 (Del. Super. Ct. May 18, 2016). Thus, no tolling doctrine can extend commencing the statute of limitations beyond January 2013.

(b) The Superior Court Properly Found that ISN's Cause of Action Accrued in January 2013, When the Advice Was Given.

The Superior Court applied 10 *Del. C.* § 8106(a), holding that "Plaintiff's cause of action against Defendants accrued on the date Plaintiff explicitly was informed of Defendants' erroneous advice — January 15, 2013," and noting that "[e]xposure to the risk of loss is sufficient injury to create an actionable claim for application of the statute of limitations." Mem. Op. at 6-7. The Superior Court alternatively found that "[a]t the very latest, the statute of limitations began to run as of the filing of the appraisal action in the Court of Chancery []" in April 2013. *Id.*

ISN's cause of action is based on allegedly "erroneous advice to ISN concerning the availability of appraisal rights in connection with the merger of ISN

and 2013 Sub Inc." A030 ¶ 39(d).[15] The merger was consummated on January 9, 2013. *See* A024 ¶ 21. Alleged malpractice occurs when the "allegedly erroneous advice was given."[16] Therefore, ISN's claim accrued, at the latest, in January 2013.

This Court long ago addressed the "sole question" of "when the three-year period commenced to run, that is, when the [accounting malpractice] cause of action 'accrued'," and held, "the statute of limitations here involved begins to run at the time of the wrongful act." *Isaacson, Stolper & Co. v. Artisan's Sav. Bank*, 330 A.2d 130, 131-32 (Del. 1974). This Court explained, "the statute of limitations began to run when plaintiff first received notification from IRS of its [alleged] 'statutory deficiency'" caused by the defendant accountant's alleged omission – even though the plaintiff "contested the tax deficiency" for at least ten months after receiving the notice from the IRS and the total amount in dispute was not settled for another eighteen months. *Id.*[17]

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[15] *See also* A017 ¶ 1, A021 ¶ 16, A022 ¶ 18.

[16] *Oropeza v. Maurer*, 860 A.2d 811 (TABLE), 2004 WL 2154292, at *1 (Del. Sept. 20, 2004) ("The three-year statute of limitations . . . begins to run at the time of the alleged malpractice..."). *See also Estate of Stiles v. Lily*, 2011 WL 5299295, at *3 (Del. Super. Ct. Oct. 27, 2011) ("A legal malpractice claim begins accruing at the time of the alleged malpractice.").

[17] The court acknowledged the "general law" in Delaware that the statute of limitations "begins to run at the time of the wrongful act," but found that accrual of the plaintiff's claim began "when defendant's failure to comply with the law first manifested itself" because the underlying alleged negligence – the professional's

ISN argues that its legal malpractice claim did not accrue in January 2013 when the alleged Advice was given (and ISN understood it to be incorrect), but instead years later after "the disposition of the appraisal proceedings." ISN's Br. at 33. ISN is wrong. It is not subject to dispute that the Delaware three-year statute of limitations period "'begins to run when a plaintiff's claim accrues, which occurs at the moment of the wrongful act and not when the effects of the act are felt.'" *Maddox*, 2015 WL 5786349, at *1 (citations omitted); *see also Shea v. DelCollo and Werb, P.A.*, 977 A.2d 899 (TABLE), 2009 WL 2476603, at *2 (Del. 2009) (limitations period for legal malpractice "begins to run upon the commission of the act or omission giving rise to the cause of action."); *N. Del. Aquatic Facilities, Inc. v. Cooch & Taylor*, 2007 WL 4576347, at *3 (Del. Super. Ct. Dec. 10, 2007) (under Section 8106, "cause of action accrues upon the commission of the act or omission giving rise to the cause of action."), *aff'd*, 950 A.2d 659 (Del. 2008).

This result is consistent with the cases Defendants cited to the Superior Court and which ISN ignored in its Opening Brief to this Court. For example, in *Tuckman v. Aerosonic Corp.*, a plaintiff alleged that two accounting firms committed malpractice by negligently preparing financial statements in a proxy

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failure to obtain consent from the Secretary of Treasury for a change in accounting treatment – was "inherently unknowable." *Id.* at 134. Here, ISN admits its actual knowledge of the alleged malpractice by January 15, 2013.

statement discussing a proposed merger, on which the plaintiff relied. 1975 WL 1959, at *3 (Del. Ch. Oct. 21, 1975). In finding that the plaintiff's claim was time-barred, the court noted the date the proxy materials were distributed, when the merger was approved, and its effective date. The court held, the "causes of action alleged accrued not later than . . . the date of the merger, and, if the three year statute of limitations applies, the motion to dismiss is meritorious." *Id.* at *1, *3 (granting motion to dismiss based on three-year statute of limitations).

Similarly, ISN complains that it relied upon allegedly incorrect advice from RLF in structuring the merger. A022 ¶ 17, A024 ¶ 20, A029 ¶ 39. As in *Tuckman*, ISN's "cause[] of action alleged accrued not later than . . . the date of the merger" – on January 9, 2013 – and because "the three year statute of limitations applies, the motion to dismiss is meritorious." 1975 WL 1959, at *1.

ISN also ignores this Court's decision in *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831 (Del. 1992). There, plaintiffs asserted a negligence claim against a broker for negligently procuring insurance coverage, arguing that their claim did not accrue at the time of purchase but later when the fire occurred causing damages that were not covered by the policy. *Id.* at 834. This Court held that the claim accrued when the policy was delivered, and was not delayed until the uncovered loss occurred. *Id.*

This Court stated, "[a] cause of action in tort accrues at the moment when an injury, although slight, is sustained in consequence of the wrongful act of another..." *Id.* (citations and quotation omitted). "It is not required that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date." *Id.* This Court noted that the "injury first occurred at the moment [plaintiffs] entered into a contract which obligated them to pay a premium for stated coverage which was not the coverage they desired." *Id.*

Here, ISN sought to "leave Stockholder D as a stockholder."[18] The moment Stockholder D acquired appraisal rights, and shortly thereafter exercised them, ISN was injured. *See Kaufman*, 603 A.2d at 834. ISN also incurred additional legal fees after the merger as a consequence of the "Erroneous Advice" in litigating with an additional, unanticipated appraisal claimant,[19] and developing ISN's expert and arguments in the appraisal litigation.[20]

ISN also ignores the on-point *Rich Realty* cases – among nearly every other case cited by the Superior Court and Defendants. In *Rich Realty*, the Superior Court noted that the "three-year statute of limitations appli[cable] to legal

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[18] A021 ¶ 16.

[19] A022 ¶ 17.

[20] A027 ¶ 28.

malpractice claims . . . begins to run at the time of the alleged malpractice and even ignorance of the facts constituting a cause of action is no obstacle to the operation of the statute." *Rich Realty, Inc. v. Potter Anderson & Corroon LLP*, 2011 WL 743400, at *1 (Del. Super. Feb. 21, 2011) (internal quotations and citations omitted). The plaintiffs in *Rich Realty* alleged that the defendant committed legal malpractice when drafting stock subscription documents and by failing to obtain a waiver of a purported conflict of interest. *Id.* at *2. The court held that the plaintiff's claims were time-barred because it had been more than three years since defendants drafted the corporate documents at issue. *Id.* at *5-6.

Following dismissal, the trial court denied the plaintiffs' motion for leave to amend their complaint to add tolling allegations because one of the plaintiffs was at least on inquiry notice during the limitations period and an amendment would have been futile. *Rich Realty, Inc. v. Potter Anderson & Corroon LLP*, 2011 WL 1632338, at *3-4 (Del. Super. Ct. Apr. 26, 2011). Moreover, even if tolling doctrines applied, under all circumstances "the statute of limitations begins to run when the alleged malpractice is discovered." *Rich Realty, Inc.*, 2011 WL 743400, at *5. Here, it is undisputed that ISN had ***actual notice*** of the alleged malpractice by January 15, 2013.

Other Delaware cases involving alleged malpractice in connection with a transaction also hold that the three-year statute of limitations "begins to run ***at the***

time of the alleged malpractice and even ignorance of the facts constituting a cause of action is no obstacle to the operation of the statute." *Conaway v. Griffin*, 970 A.2d 256 (TABLE), 2009 WL 562617, at *2 (Del. Mar. 5, 2009) (emphasis added) (plaintiffs had three years after defendants prepared and filed quitclaim deed to file suit alleging improper preparation and claim was time-barred) (emphasis added); *see also Shea*, 2009 WL 2476603, at *1-2 (malpractice claim accrued on closing date although plaintiff did not discover omission in deed until two years later).[21]

In *Cooch & Taylor*, the former client alleged that the law firm negligently conducted a title search and prepared a faulty deed. 2007 WL 4576347, at *3. The court granted summary judgment for the firm based on its statute of limitations defense and charged the former client with inquiry notice as soon as its president "was aware that there was some kind of problem with [plaintiff's] deed" even though the client then "may not have known the exact legal significance of the [property] designation." *Id.* at *6. The statute of limitations also began to run even though the plaintiff "was still hopeful that the defect could be cured" and even though the firm still was representing the plaintiff at the time. *Id.* at *3.

[21] While the discovery rule applied to toll the limitations, the fact that plaintiff was "unaware of the injury" had no effect on the date of accrual of the claim. *Id.*

In *David B. Lilly Co. v. Fisher*, the malpractice claim involved allegations that "the transaction was improperly structured," which the court found "accrued at the closing of the deal" and thus was time-barred. 799 F. Supp. 1562, 1569 (D. Del. 1992), *aff'd,* 18 F.3d 1112 (3d Cir. 1994). The court explained that "[a]ny injury from [the attorney's] alleged malpractice accrued at the closing of the deal, when the restructuring became final and when the alleged advice was actually relied upon []" – not years later, when the defendants lost a significant government contract and incurred damages from the consequences of the improper structure. *Id.*

Similarly, in *Boerger v. Heiman*, the plaintiff sued defendants in 2005 for legal malpractice for services rendered in 1997. Plaintiff alleged that the defendants committed malpractice by failing to elect Subchapter-S status for the plaintiff's entities, and the statute of limitations was tolled until he first learned of his potential "materially higher" tax liability after receiving an offer on the property in 2004. 2007 WL 3378667, at *2, *5-6 (Del. Super. Ct. Oct. 31, 2007). The court rejected this argument and held that the statute of limitations "start[ed] to run from the time of the alleged malpractice" in 1997 and was not tolled beyond the time when plaintiff "was on notice of a potential tax problem," even though the tax liability had not been realized. *Id.* at *6.

These cases leave no doubt that malpractice claims in connection with a transaction accrue when the alleged malpractice occurs: (i) when the stock subscription documents were drafted;[22] (ii) when the transaction closed;[23] or (iii) when the refinancing was completed.[24] Likewise, ISN's claim accrued ***when the merger was consummated*** on January 9, 2013, and – contrary to the allegedly "Erroneous Advice" – Stockholder D acquired appraisal rights.

The result is no different for malpractice claims in connection with litigation matters. *See Maddox*, 2015 WL 5786349, at *1 (claim accrues "***at the moment of the wrongful act and not when the effects of the act are felt***") (emphasis added) (internal quotations and citations omitted). Likewise, *Williams v. Law Firm of Cooch and Taylor* holds "the cause of action accrues with the occurrence of the wrongful act." 1994 WL 234000, at *2 (Del. Super. Ct. May 11, 1994). The court in *Williams* also determined that the statute of limitations began to run no later than the date on which the plaintiff "wrote a letter . . . complain[ing] about various aspects of defendants' representation." *Id.* at *1-2. Similarly, ISN – represented at the time by BNM - executed the conflict waiver letter on February 14, 2013, acknowledging "[i]t appears there may be an issue with the Advice . . . concerning

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[22] *Rich Realty*, 2011 WL 743400, at *5-6.

[23] *Fisher*, 799 F. Supp. at 1569.

[24] *Boerger*, 2007 WL 3378667, at *6.

the availability of appraisal rights in connection with the merger . . . ." A033. That letter discussing the "wrongful act" that ISN is now suing over was signed more than five and one-half years before ISN filed its Complaint. *See* A034.[25]

(i) Delaware Law is "Crystal Clear" That a Plaintiff's Alleged Inability to Sue for Finally-Determined Damages Does Not Prevent Accrual

ISN argues that its claim did not accrue "until the Court of Chancery issued its Appraisal Opinion" because "the existence of ISN's damages claim was wholly – not partly – speculative until the disposition of the appraisal proceedings." ISN's Br. at 32-33. But "[t]he law in Delaware is ***crystal clear*** that ***a claim accrues as soon as the wrongful act occurs . . . [w]hether or not the plaintiffs could have sued for damages***..." *Albert*, 2005 WL 1594085, at *18 (emphasis added). Thus, ISN was required to file its claim before the statute of limitations expired, regardless of whether ISN believed at that time that it had suffered "no resulting loss from the Erroneous Advice." ISN's Br. at 33.[26]

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[25] ISN relies on two words in the conflict waiver letter – "if any" – to argue that "RLF and ISN[ ] agree[d] that ISN had no cognizable claim against RLF at that time." ISN's Brief at 8. This is a nonsensical argument unsupported by the plain language of that letter. Moreover, ISN admits that it did not request any tolling agreement, and there was none. A238.

[26] As noted elsewhere, ISN's argument fails because it pled damage at the time of the merger and immediately thereafter.

In *Albert*, the plaintiffs alleged that defendants' conduct resulted in a devaluation of their partnership units and argued that their claims did not accrue until the value of each unit was lowered because the plaintiffs "could not have suffered an injury or damages before he or she actually suffered a 'loss' relative to his or her initial investment." 2005 WL 1594085, at *18. The Court of Chancery rejected the plaintiffs' theory that "they are given the equivalent of a call option" to wait and see if it "works out" and sue only if the "strategy does not work out, and the value of the Funds falls . . . ." *Id.; cf.* A025 ¶ 24 (conceding ISN chose to go forward with merger after it had actual knowledge of alleged malpractice). The court explained that the plaintiffs' attempt to employ a call-option strategy with respect to its claim "clearly is not, and should not be, the law." *Id.*

ISN's argument also is based on an erroneous legal theory. ISN argues that any award in the appraisal action above the merger consideration constitutes "damages." *See* ISN's Br. at 36 ("the outcome of any Appraisal Action would determine whether damages would ultimately be suffered from the Erroneous Advice."). The Court of Chancery does not award damages in an appraisal action. Rather, the Court of Chancery "determine[s] the fair value of the shares." 8 *Del. C.* § 262. Here, in exchange for having to pay $98,783 per share, ISN received

shares which the Court of Chancery determined were worth $98,783 per share.[27] Accordingly, ISN's damages as a result of the judgment in the appraisal action were $0.

While ISN argues for the first time to this Court[28] that the conflict waiver letter was somehow an "agree[ment] by both parties that the outcome of any Appraisal Action would determine whether damages would ultimately be suffered,"[29] ISN represented to the trial court that it "didn't seek a tolling agreement with RLF". A238. The conflict waiver letter does not contain the word "tolling," explain what is tolled, against whom, for how long, or based on what contingencies, among other typical attributes of an actual tolling agreement.

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[27] This Court affirmed that judgment. *ISN Software Corp. v. Ad-Venture Capital Partners, L.P.*, 173 A.3d 1047 (TABLE) (Del. 2017).

[28] ISN is "bound to the factual allegations in its complaint" and cannot "supplement the complaint through its brief" filed in this Court or in response to the Motion to Dismiss. *See MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *5 (Del. Ch. May 5, 2010) (refusing to consider new facts alleged for first time in plaintiffs' opposition to motion to dismiss); *see also* Supr. Ct. R. 8. Thus, this Court should not review any arguments that ISN did not plead. *See e.g.*, ISN's Br. at 1 (alleging ISN and RLF agreed a malpractice claim did not yet exist when conflict waiver was signed); 8 (alleging "RLF assured that its interests and ISN's interests were in complete alignment."); 8 (alleging conflict waiver letter "clearly reflects RLF and ISN's agreement that ISN had no cognizable claim against RLF" given that "ISN had not been and might not ever be injured"); 10 (alleging "RLF advised ISN that this Court would likely reverse the Appraisal Opinion and strongly urged ISN to accept RLF's representation for an appeal.").

[29] ISN's Br. at 36.

Even if "accrual" did require the plaintiff to incur damage, ISN alleges that damages were incurred in 2013, including when: (i) ISN chose to proceed with the merger (A024 ¶ 21, A025 ¶¶ 24-25(a)); (ii) Stockholder D perfected its appraisal rights (A026 ¶ 27); (iii) ISN became party to the appraisal litigation (A026 ¶ 26); and (iv) ISN retained legal and other advisors for the appraisal litigation and paid them in that case (A026 ¶ 26, A027 ¶¶ 28-29); which (v) could bankrupt ISN (A021 ¶ 13). ISN's contrary argument to delay accrual to "allow[] a plaintiff to accrue more damages over time before filing an action – would, in effect, defeat the purpose of a statute of limitations." *E.I. DuPont de Nemours and Co. v. Medtronic Vascular, Inc.*, 2013 WL 261415 (Del. Super. Ct. Jan. 29, 2013).[30]

Finally, the United States District Court for the District of Delaware also has rejected the argument ISN raises here that a claim cannot accrue if it is not yet "ripe."[31] The court explained that in a legal malpractice claim, "compliance with the statute of limitations necessitated [plaintiff's] filing of a claim which [wa]s not yet ripe for disposition." *Mukasa v. Balick & Balick*, 2002 WL 1971921, at *1, *4

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[30] ISN's argument also would mean that limitations would automatically be tolled for years, permitting stale claims and lost evidence the statute of limitations is designed to avoid. For example, in *Viking Pump Inc. v. Liberty Mutual Insurance Co.*, an insurance coverage dispute was filed in the Court of Chancery in 2005 then transferred to the Superior Court, where it currently remains pending. C.A. No. N10C-06-141 PRW [CCLD].

[31] *See* ISN's Br. at 35-36.

(D. Del. Aug. 27, 2002) (applying Delaware law) (imposing stay of case and noting that "if [plaintiff] had waited until she had suffered an actual injury to file her complaint, her [legal malpractice] claim would be dismissed as untimely"). ISN's belabored discussion of ripeness therefore has no relevance to accrual. *Id.*

Thus, Delaware law forecloses ISN's argument for "delaying accrual of ISN's claims . . . depending on the outcome of the appraisal proceedings."[32] Indeed, ISN admits throughout the record before this Court that it had ***actual notice*** of RLF's alleged malpractice more than five and one-half years before filing its Complaint, and that ISN elected to go forward with the merger after becoming aware of the alleged malpractice in 2013.[33] The law does not provide ISN the "equivalent of a call option" to wait and see if it "works out" and then pursue its time-barred suit. *See Albert*, 2005 WL 1594085, *18.

(ii) Delaware Law Rejects the Continuous Representation Theory ISN Urges

ISN now claims – although it failed to plead – that its cause of action could not have accrued at the time of the allegedly bad advice – or even when ISN learned that advice was purportedly bad – because that would have put ISN in the "untenable position" of "requir[ing] ISN to sue RLF in Superior Court while either

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[32] ISN's Br. at 34.

[33] *See, e.g.*, A141 ("ISN was aware that RLF gave it Bad Advice well before any trial and subsequent judgment.").

firing RLF or expecting RLF to zealously defend ISN's interests in the Court of Chancery appraisal action."[34] This is effectively a "continuous representation" argument,[35] which Delaware has rejected. *See Shuttleworth v. Lynch*, 1995 WL 339071, at *3 (Del. Super. Ct. Apr. 25, 1995) (while courts in some states base statute of limitations on "termination of the attorney-client relationship," Delaware law looks exclusively at "the time of the wrongful act"); *see also Young Conaway Stargatt & Taylor, LLP v. Oki Data Corp.*, 2014 WL 4102139, at *3 (Del. Super. Ct. Aug. 1, 2014) (rejecting argument that "continuous representation rule tolled the statute until Plaintiff's representation of Defendants ended" because "the Court is not willing to stretch the statute of limitations to th[at] degree").[36] Further, ISN ignores the fact that the advice at issue in this suit is whether Stockholder D had appraisal rights, which was not disputed in the appraisal litigation. *See* A033.

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[34] ISN's Br. at 33-34.

[35] ISN misleadingly cites *In re Kaiser Group International Inc.* for the proposition that "[t]he continuous representation rule 'tolls the statute of limitations until the attorney ceases to represent the client in the matter.'" ISN's Br. at 24, n.102. ISN fails to tell the Court that *In re Kaiser* was explaining that "courts in D.C. recognize the 'continuous representation rule,'" – ***but courts in Delaware do not.*** 2010 WL 3271198, at *3 (D. Del. Aug. 17, 2010).

[36] Texas – where ISN is based – also rejects a continuous representation rule. *See Willis v. Maverick*, 760 S.W.2d 642, 643 (Tex. 1988).

(c) ISN Relies On Cases Which Do Not Involve the Statute of Limitations, Are Not Legal Malpractice Cases, Or Otherwise Are Inapposite.

ISN heavily relies on *Balinski v. Baker*, 2013 WL 4521199 (Del. Super. Ct. Aug. 22, 2013), which does not address any statute of limitations and does not support ISN's position. ISN represents to this Court that "[t]he *Balinski* Court dismissed the malpractice claim at issue because the plaintiff had not yet suffered any harm – *i.e.*, the plaintiff had only been exposed to a risk of future harm." ISN's Br. at 18. To the contrary, the *Balinski* Court expressly "assume[d] without deciding that the potential loss of [plaintiff's] . . . claim ***alleges sufficient harm***." 2013 WL 4521199 at *4 (emphasis added). The Court dismissed the plaintiff's claim based on its finding that plaintiff did not establish any breach of the lawyer's duty.

The *Balinksi* plaintiff sued her lawyer for advising her to sign a release on which the plaintiff "assume[d] she is barred" from now suing her doctor. *Id.* at *1. "Notably, [plaintiff] has never filed suit against [the doctor] . . ., therefore, neither party's representation of the viability of the medical negligence claim has been tested." *Id.* at *1. This Court granted the defendant attorney's motion to dismiss "[b]ecause the Court finds the Release does not cover [the doctor]..." – not because of any finding about ripeness or lack of harm, as ISN suggests. *Id.*

Further, the Court implicitly acknowledged that the statute of limitations ***would not be tolled*** until another court determined that the release barred plaintiff's potential claim against the doctor. Instead, the Court stated, "[plaintiff] is granted leave to pursue those legal malpractice claims, subject to the applicable statute of limitations, if it comes to pass that her medical negligence claim against [the doctor] . . . is prevented by the language of the Release." *Id.* at *6.

Similarly, ISN's other lead case, *Connelly v. State Farm Mutual Automobile Insurance Co.*, does not support its claims. 135 A.3d 1271 (Del. 2016). ISN claims that in *Connelly*, this Court "expressly disfavored" the Superior Court's application of the statute of limitations as it applies to this case because it would "require courts to address premature claims before the plaintiff can plead damages."[37] But *Connelly* has no application to a legal malpractice claim.

The "single issue" before the *Connelly* Court was "[w]hen does a claim that an insurer acted in bad faith by failing to settle a third-party insurance claim accrue for purposes of the statute of limitations?" 135 A.3d at 1271. There, State Farm rejected a pre-trial settlement offer that was within the applicable policy's limits. At trial, a judgment more than twice the amount of the policy was awarded. *Id.* at 1272. In response to the plaintiff's subsequent claim for bad faith failure to settle,

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[37] ISN's Br. at 30 (citations and internal quotations omitted).

State Farm moved to dismiss on statute of limitations grounds, claiming that limitations began running when the settlement demand was made more than three years before filing suit.

This Court rejected that argument and held that "a claim that an insurer acted in bad faith when it refused to settle a third-party insurance claim accrues when an excess judgment against an insured becomes final and non-appealable." *Id.* at 1281. Bad faith failure to settle claims, which are rooted in contract and are similar to indemnity claims, depend on certain contractual conditions and accrue after those conditions occur. *See id.* Thus, the Court's finding in *Connelly* was expressly limited to the insurance and indemnity contexts, which "both involve a contractual obligation" that is not triggered until "the underlying cause of action must be resolved." *Id.* at 1272.

The *Connelly* Court did not reject the application of *Albert v. Alex Management Services Inc.* in the circumstances present here, as ISN claims. *See* ISN's Brief at 27. Rather, the Court noted only that State Farm relied on *Albert* and other Delaware cases "outside of the insurance context where Delaware courts have held that claims of breach of fiduciary duty, tort, and breach of contract accrued at the time of the wrongful act or breach." *Connelly*, 135 A.3d at 1278-79. The Court explained, "those cases do not apply here because they do not involve a contractual obligation to make another party whole that only arises once certain

conditions are met." *Id.* at 1279. Neither does this case. In fact, the only commonality between *Connelly* and this case is the application of a three-year statute of limitations.

ISN relies on *Young Conaway*, which involves litigation malpractice. 2014 WL 4102139, at *3. There, the client alleged that its former attorneys committed litigation malpractice in a case pending before an administrative law judge by providing "incorrect legal advice to their expert [witness]." *Id.* at *2. In determining when the statute of limitations began to run, the court explained, "whether the alleged errors would constitute malpractice ***could not have been ascertained*** until the ALJ decision was issued." *Id.* at *3 (emphasis added). The alleged malpractice was not ascertainable before the ALJ's ruling because the former client was not "on notice of a possible claim" until that date. *Id.*

Here, the substantive allegedly deficient advice – Stockholder D's right to appraisal – was not at issue, or yet to be determined, in litigation. Indeed, it is uncontested that the appraisal litigation did *not* challenge Stockholder D's right to appraisal or ISN's obligation to pay fair value in exchange for the stock it received. Moreover, here, ISN pleads both its ***actual notice*** of its "possible claim" by January 15, 2013, and that it ***expressly confirmed*** its actual knowledge of its "possible claim" in writing shortly thereafter. *See* A033.

2. No Tolling Doctrine Applies: The Court Cannot Presume Fraud, and ISN Pled No Facts That Meet Rule 9(b)'s Heightened Pleading Standard Governing Fraudulent Concealment

ISN's actual notice of a potential claim in 2013 should end the inquiry and result in affirming the Superior Court's dismissal. No tolling exception can possibly apply in such circumstances. *Rich Realty, Inc.*, 2011 WL 743400, at *5 ("the statute of limitations begins to run when the alleged malpractice is discovered."); *Silverstein*, 2016 WL 3020858, at *6, *8 ("Even where a tolling doctrine applies, the statute of limitations is tolled only until the plaintiff is on inquiry notice of the injury.").

Although not supported by its Complaint – to which ISN is "bound"[38] – ISN argues that the Superior Court should have found that the statute of limitations was tolled based on fraudulent concealment. ISN's Br. at 43. Claims of tolling based on alleged fraudulent concealment are subject to the heightened pleading standard of Rule 9(b) and "must be pled with particularity." *See Begum v. Singh*, 2013 WL 5274408, at *6, n. 55. (Del. Super. Ct. Sept. 18, 2013) (citing Del. Super. Ct. Civ. R. 9(b)).

Directly contrary to Delaware authority, ISN tells this Court, "the [Superior] Court should have charged RLF with a presumption (at least at the pleadings stage)

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[38] *See supra* n.28.

that the wrongfully withheld files contained evidence that RLF intentionally misled ISN following the Erroneous Advice." ISN's Br. at 43.[39] But the "[plaintiff]-friendly inferences required in a 12(b)(6) analysis . . . ***do[] not govern assertion[s] of tolling exceptions*** to the operation of a statute of limitations." *Eni Holdings, LLC v. KBR Grp. Holdings, LLC*, 2013 WL 6186326, at *13 (Del. Ch. Nov. 27, 2013) (emphasis added) (internal quotations and citations omitted). Thus, the Court cannot ***presume fraud***, as ISN requests.

ISN's Complaint never even uses the words "toll," "fraud" or "conceal." The *Begum* court held that when the complaint did "not set out a specific claim of fraud, but relies only on two brief references to a potential, alleged fraudulent action," the statute of limitations could not be tolled because the allegations of fraud were "not sufficient to put Defendants on notice of Plaintiff's fraudulent concealment claim." 2013 WL 5274408 at *6 (granting motion to dismiss based on statute of limitations). Similarly, ISN did not sufficiently allege fraudulent concealment to toll limitations.

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[39] *See also* ISN's Br. at 43-44 ("At this stage, the Court must accept well pled allegations as true. ISN has adequately pled facts for tolling the statute of limitations on fraudulent concealment grounds . . . . [and] the Court should have credited those theories at the Motion to Dismiss stage.").

ISN did not request its file, including any internal billing records, maintained at RLF until March 16, 2018. A027 ¶ 32.[40] Even if RLF had deliberately concealed the documents in response to ISN's March 16, 2018 request – which it did not – the statute of limitations had ***already expired***. ISN's request came more than five years after ISN admits its actual knowledge of the allegedly bad advice, and would not toll already-expired limitations.

ISN failed to plead ***any*** facts that would support tolling here. When a plaintiff fails to plead sufficient facts to support tolling of its time-barred claim, no tolling exception is invoked and the statute of limitations bars the plaintiff's claim. *Yaw v. Talley*, 1994 WL 89019, at *6 (Del. Ch. Mar. 2, 1994) (dismissing claims as time-barred when the plaintiff "pled no facts sufficient to invoke the tolling exceptions").

3. The Superior Court Properly Dismissed ISN's Complaint with Prejudice, Because Repleading Would Be a Futile Attempt to Circumvent the Statute of Limitations

The trial court properly denied ISN's request for leave to amend its Complaint. Any attempt by ISN to replead would be an "improper attempt to circumvent . . . the statute of limitations" that would "require... the statutes of the Delaware legislature [to] go unenforced." *See Vick v. Khan*, 2018 WL 4026692, at

[40] RLF turned over to ISN what it believes to be the complete client file consistent with long-standing authority in opinions issued by the Delaware State Bar Association and the American Bar Association, as discussed further below.

*2 (Del. Super. Ct. Aug. 22, 2018); *see also Sadler-Ievoli v. Sutton Bus & Truck Co.*, 2013 WL 3010719, at *5 (Del. Super. Ct. June 4, 2013) (denying motion to amend complaint to add allegations after motion to dismiss revealed deficiencies and proposed amendment would be futile).

II. AFTER ISN REPRESENTED TO THE SUPERIOR COURT THAT IT DID "NOT NEED THE ENTIRE FILE TO DEFEAT [THE] MOTION TO DISMISS" – BEYOND THE HUNDREDS OF THOUSANDS OF PAGES ALREADY TURNED OVER – THE SUPERIOR COURT PROPERLY DENIED ISN'S MOTION TO COMPEL

A. Question Presented

Whether the trial court abused its discretion by denying ISN's Motion to Compel when Defendants' dispositive Motion to Dismiss was pending.

B. Scope of Review

The trial court's ruling on the Motion to Compel is reviewable on appeal under the abuse of discretion standard. *See Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1106 (Del. 2006) ("The standard of review with respect to pretrial discovery rulings is abuse of discretion."). This Court has explained judicial discretion as "the exercise of judgment directed by conscience and reason, and when a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused." *Id.* No abuse of discretion exists when well-established precedent supports denying discovery pending a potentially dispositive motion, when the plaintiff admittedly does not require such discovery to oppose the motion.

C. Merits of the Argument

1. ISN Failed to Articulate Any Reason for the Superior Court to Grant its Motion to Compel Before Considering Defendants' Motion to Dismiss

ISN's counsel represented to the trial court, "we do not need the entire file to defeat [the] motion to dismiss. We don't need it."[41] Yet ISN now tells this Court that the trial court somehow erred by "forc[ing] ISN to defend a motion to dismiss without even having an opportunity to review its entire file."[42] ISN requested the entire file only as ***an element of relief*** as part of any judgment on its dismissed malpractice claim. *See* A031 (asking for the court to "enter ***judgment*** against Defendants, jointly and severally, as follows…[t]he immediate delivery of the entire ISN file to ISN pursuant to *TCV VI, LP, et al. v. TradingScreen, Inc.*, April 23, 2018, C.A. No. 10164-VCL.") (emphasis added).

ISN has not, however, provided any authority supporting its attempt in this Court to obtain a remedy prayed for on a fully dismissed claim. And the law in an analogous situation – an action seeking access to books and records – is to the contrary. *See Maitland v. Int'l Registries, LLC*, 2008 WL 2440521, at *2 (Del. Ch. June 6, 2008) (plaintiff "cannot use the discovery process in a books and records case to gain access to the books and records ultimately at issue").

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[41] A101.

[42] ISN's Br. at 40.

Further, ISN is not without recourse outside of this appeal if it still seeks its entire file. ISN's counsel represented to the Superior Court, "ISN is still going to make every effort to get this file, dismissed claim or no dismissed claim. If we have to go back through ODC again, we'll do it." A104.

2. ISN Is Not Entitled to Discovery to Search for Documents Supporting a Tolling Argument It Never Pled

As discussed above, ISN asks the Court to presume fraud – citing no support for its improper request. ISN's Br. at 43. But "no Delaware precedent . . . permits a conclusory allegation to proceed on the basis that later discovery will fill in the purported gaps if only the pleading is allowed to survive a motion to dismiss." *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 988–89 (Del. Ch. 2000) (rejecting plaintiffs' "suggestion that their allegations c[ould] not be fully articulated in the absence of discovery" because such argument "belies the fraud-based pleading standard" in Delaware).

Further, the Motion to Dismiss is directed at ISN's Complaint ***as pled***. ISN is not entitled to engage in a fishing expedition in an attempt to find facts that might bolster its deficient Complaint. *See, e.g.*, *Nebenzahl v. Miller*, 1996 WL 494913, at *3 (Del. Ch. Aug. 26, 1996) ("Conclusory allegations alone cannot be the platform for launching an extensive, litigious fishing expedition for facts through discovery in the hope of finding something to support them.").

3. RLF's Turnover of Documents Complies with the Purpose of Rule 1.16 and Long-standing DSBA and ABA Authority.

RLF reasonably relied on long-standing authority in opinions by the Delaware State Bar Association ("DSBA") and the American Bar Association ("ABA") concerning what materials comprise the client's file that should be turned over upon request. RLF fully complied with its obligations under Rule 1.16(d) by delivering what ISN characterizes as "over four-hundred thousand pages of documents" to ISN. A080 ¶ 9.

Citing a single recent Court of Chancery decision, ISN claims that Rule 1.16(d) imposes more expansive obligations. ISN complains that RLF failed to turn over every piece of information relating to every matter in which RLF ever represented ISN over a period of almost ten years from 2008 through 2017. For the reasons discussed below, ISN's position is without merit, and RLF has fully complied with its professional obligation to turn over ISN's file.

Rule 1.16(d) states in pertinent part, "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . ." Rule 1.16(d) is intended to ensure that a lawyer, in the context of terminating an ongoing representation, will act reasonably to prevent harm to the client's interests.

In ABA Informal Op. 1376, issued in 1977 to address a lawyer's inquiry regarding the obligation to turn over files relevant to actual or potential trademark disputes, the ABA Committee on Ethics and Professional Responsibility advised:

> The attorney clearly must return all of the material supplied by the client to the attorney. DR 9-102(B)(4). He must also deliver the 'end product' – the certificates or other evidence of registration of the trademark which he was employed to procure and for which the client has paid . . . .
>
> On the other hand, in the Committee's view, the lawyer need not deliver his internal notes and memos which have been generated primarily for his own purposes in working on the client's problem.[43]

In 1997, the DSBA Committee took a similar view in DSBA Op. 1997-5, opining that "to the extent that the information includes the Inquiring Attorney's mental impressions and work product, it is not property to which [the former client] is automatically entitled."[44]

In 2002, the DSBA promulgated the DSBA Model Principles, which set forth guidelines on records management that are consistent with the end product view adopted in DSBA Op. 1997-5.[45] The DSBA Model Principles define "client documents" to include documents that were obtained from a client and final

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[43] B10.

[44] B16.

[45] While the DSBA Model Principles do not purport to vary a lawyer's obligations under the Rules, (*see* DSBA Model Principles § (n)), like DSBA ethics opinions they reflect the obligations of a Delaware lawyer under the Rules, as understood by the DSBA.

versions of documents that were generated by or at the direction of a lawyer in the course of the matter."[46] By contrast, "[l]awyer documents" are defined to include "internal administrative materials relating to a matter" and "a lawyer's notes, drafts, working copies, internal memoranda, legal research, and factual research documents including investigative reports, prepared by or for a lawyer for the use of a lawyer in the matter."[47] A lawyer "may dispose of lawyer documents at any time, without obtaining the consent of or providing notice to the client," provided that copies of documents required to be retained by Rule 1.15(a) and Rule 1.15(d), or by other law, are preserved by the lawyer.[48] This guidance, permitting a lawyer to dispose of drafts and other internal materials at any time without client notice or consent, is consistent with the end product approach and contrary to the entire file approach, under which such drafts would be considered the client's property.

More recently, in 2015, the ABA Committee issued ABA Formal Op. 471, reaffirming the position taken in ABA Informal Op. 1376 and clarifying the end product position. ABA Formal Op. 471 opined that draft documents and other internal materials "are viewed as generated primarily for the lawyer's own purpose in working on a client's matter, and, therefore, need not be surrendered to the client

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[46] B20.

[47] B21.

[48] B25.

under the end product approach."[49] The ABA Committee held that, "on the facts presented," the lawyer was required to turn over the same types of materials that RLF already has turned over to ISN.[50] In advising the inquiring lawyer that it was unlikely that the client was entitled to additional materials under Model Rule 1.16(d), the ABA Committee emphasized that "this is particularly true for matters that are concluded"[51] — which is true here.

RLF's efforts upon receipt of ISN's file request reflected the long-established view in Delaware and the ABA as to the scope of a lawyer's obligations under Rule 1.16(d).

(a) The Court of Chancery's *TradingScreen* opinion is not determinative and the trial court properly denied the Motion to Compel

ISN relied almost exclusively on *TCV VI, L.P. v. TradingScreen Inc.*, 2018 WL 1907212 (Del. Ch. Apr. 23, 2018) to support its claim to the "entire" file. ISN does not reference the Court of Chancery's note at the outset of its legal analysis that the parties had not identified any Delaware authorities addressing the scope of materials that counsel must turn over to a former client under Rule 1.16(d),[52] despite the Delaware (and ABA) authority discussed above. Thus, the Court of

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[49] B32 (footnote omitted).

[50] B33-34.

[51] B34.

[52] *TradingScreen*, 2018 WL 1907212, at *4.

Chancery presumably was not aware of DSBA Ethics Op. 1997-5 or the DSBA Model Principles. The court's citation to at least eleven ethics opinions from other jurisdictions in its analysis indicates that it would have carefully considered Delaware authority.

Moreover, *TradingScreen* did not involve a request (as here) to stay discovery.[53] ISN does not address that *TradingScreen* was appealed to this Court, which specifically declined to address the scope of a client's file. *See Buhannic v. Morris, Nichols, Arsht & Tunnell LLP*, No. 433,2018.

Fundamentally, the narrow, important issue of whether the Court of Chancery's *TradingScreen* decision requires production of the former client's "entire" file does not support finding that the Superior Court erred in denying the Motion to Compel. Instead, once the Superior Court determined that ISN failed to state a claim based on its sole cause of action for legal malpractice, there was nothing left for that court to consider.

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[53] The Superior Court properly granted the Motion to Stay. *See, e.g., Anderson v. Airco, Inc.*, 2004 WL 2828208, at *1 (Del. Super. Ct. Feb. 23, 2004) ("[a] stay of discovery is appropriate where a potentially case dispositive motion is pending, and there is no prejudice to the non-moving party.") (citations and internal quotations omitted).

(b) *TradingScreen* is factually distinguishable, was not binding on the Superior Court, and is not binding on this Court

The facts in *TradingScreen* are different from those here in significant ways. In *TradingScreen*, the law firm for several defendants was required to withdraw from representing two of them while litigation was pending. When the two former clients moved for an order compelling the firm to provide a copy of the litigation file, the court granted the motion and the firm produced what it believed it was obligated to provide.[54] Not satisfied, the two former clients filed another motion seeking the firm's "entire file."[55] Thus, *TradingScreen* involved ongoing litigation, in which the turnover of drafts and other uncompleted work might be necessary.[56] Here, all of the matters in which RLF represented ISN were concluded before ISN's March 2018 request to RLF for its client file. *See* A027 ¶ 32.

For all of these reasons, *TradingScreen* is readily distinguishable on both factual and legal grounds, and the Superior Court properly denied the Motion to Compel.

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[54] The initial production included all pleadings in the Delaware case, all invoices submitted to TradingScreen, and external emails in the possession of the firm to, from or cc'd to various persons involved in the litigation. *TradingScreen Inc.*, 2018 WL 1907212, at *3.

[55] *Id.* at *1-4.

[56] *See* B34.

CONCLUSION

Defendants respectfully request that this Court affirm the Superior Court's February 18, 2019 Memorandum Opinion dismissing the Complaint with prejudice and the Superior Court's January 10, 2019 denial of the Motion to Compel.

MORRIS JAMES LLP

/s/ Kathleen A. Murphy
P. Clarkson Collins, Jr. (#739)
Carl N. Kunz, III (#3201)
Kathleen A. Murphy (#5215)
500 Delaware Avenue, Suite 1500
Wilmington, Delaware 19801
(302) 888-6800
ccollins@morrisjames.com
ckunz@morrisjames.com
kmurphy@morrisjames.com

Attorneys for Appellees-Defendants Richards, Layton & Finger, P.A., Raymond J. DiCamillo, and Mark J. Gentile

OF COUNSEL:

George M. Kryder
Melissa L. James
VINSON & ELKINS LLP
2001 Ross Avenue, Suite 3900
Dallas, Texas 75201
(214) 220-7700
gkryder@velaw.com
mjames@velaw.com

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