EFiled: Jan 28 2025 03:00PM EST
Filing ID 75423018
Case Number 470,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JONATHAN SAUNDERS, Plaintiff Below Appellant, v. LIGHTWAVE LOGIC, INC., and BROADRIDGE FINANCIAL SOLUTIONS, INC., Defendants Below Appellees.	)	No. 470,2024 Court Below: Superior Court of the State of Delaware C.A. No. N23C-05-120 PRW [CCLD] **PUBLIC VERSION** **FILED JANUARY 28, 2025**

CORRECTED APPELLANT'S OPENING BRIEF

MORRIS JAMES LLP

Albert H. Manwaring, IV (#4339)
Kirsten Zeberkiewicz (#4573)
Barnaby Grzaslewicz (#6037)
500 Delaware Avenue, Suite 1500
Wilmington, DE 19801-1494
302.888.6800

Attorneys for Plaintiff Below Appellant Jonathan Saunders

Dated: January 13, 2025

TABLE OF CONTENTS

EXHIBITS

TABLE OF AUTHORITIES

Page(s)

Cases

NATURE OF PROCEEDINGS

The Superior Court, in its October 17, 2024 Memorandum Opinion and Order (the "SJ Opinion"),[1] incorrectly found Plaintiff Dr. Jonathan Saunders' ("Dr. Saunders") negligence and conversion claims relating to the January 2017 escheatment of his 55,000 Lightwave common shares ("Lightwave Stock") were barred by the statute of limitations.

Dr. Saunders purchased the Lightwave Stock in 2013. Because the Lightwave Stock was not publicly listed, he could not find a broker to hold it—therefore, he kept his stock certificate in his house safe. From that point forward, neither Defendant Lightwave Logic, Inc. ("Lightwave"), nor its transfer agent, Defendant Broadridge Financial Solutions, Inc. (together, "Defendants") sent Dr. Saunders a single mailing. Thus, it was a shock to Dr. Saunders when he learned – in 2021 – his Lightwave Stock had been escheated to the Delaware Office of Unclaimed Property ("OUP") *and* sold in 2017. After attempting to reclaim the Lightwave Stock from Lightwave and OUP, he filed this action (the "Complaint").

Defendants responded with a motion to dismiss, laying blame on Dr. Saunders. They argued Dr. Saunders' claims accrued at the time of escheat (2017), and his 2022 Complaint was too late, because of the three-year statute of limitations.

[1] Cited as "SJ Op. at __"and attached as Exhibit A.

But, until 2021, Dr. Saunders had no reason to think his shares were anywhere other than his safe. Defendants never sent him notice of escheat as required by law (neither did OUP), and the inherently unknowable injury doctrine thereby tolled the limitations period until he discovered the escheat in 2021. The Superior Court denied the Defendants' motions to dismiss noting in its July 28, 2023 Letter Opinion and Order (the "MTD Opinion"), "[o]ur Supreme Court has set a 'low threshold for the use of the doctrine of inherently unknowable injury'" and that Dr. Saunders had satisfied that threshold. A0308. The Superior Court instructed that "key factual questions" relating to tolling should be resolved through "limited discovery." A0308-309.

The parties conducted tolling-related discovery[2] and Defendants moved for summary judgment (the "SJ Motion"). The Superior Court granted the SJ Motion finding (1) "the reporting and escheatment of shares to the state and their subsequent liquidation isn't the type of injury that can be deemed 'inherently unknowable'" as a matter of law,[3] and (2) even if the inherently unknowable injury exception were available, it did not apply to the facts of this case because "multiple efforts—both

[2] This included the depositions of (1) Dr. Saunders, (2) Francis Rudden, Broadridge's 30(b)(6), (3) James Marcelli, Lightwave's 30(b)(6); and (4) State Escheator, Brenda Mayrack.

[3] SJ Op. at 14.

via mail and publicly--were made to warn Dr. Saunders" about the escheatment, and the summary judgment record established that Dr. Saunders was not "blamelessly ignorant".[4]

The Superior Court committed two reversible errors. *First*, contrary to Delaware precedent and its MTD Opinion, the Superior Court found the inherently unknowable exception was "unavailable to a cause of action alleging negligence and conversion relating to the escheatment of stock" as a matter of Delaware law. However, as the MTD Opinion explicitly noted, Delaware precedent sets a "low threshold" for the application of the inherently unknowable injury doctrine and that threshold does not categorically exclude claims for negligence and conversion relating to escheatment.

Second, the Superior Court improperly weighed the summary judgment record and failed to make reasonable inferences in the light most favorable to Dr. Saunders, the nonmovant. The Superior Court made several findings of fact that are contradicted by the record, including that notice was sent to Dr. Saunders by Broadridge on behalf of Lightwave and by Delaware and that there was publicly available information that should have placed Dr. Saunders on notice. The Superior Court made improper determinations of credibility and credited certain record

[4] *Id*. at 19-20.

evidence while discounting other evidence demonstrating a material factual dispute. Additionally, the Superior Court improperly considered evidence relating to Lightwave's annual meeting notices and/or proxies, despite denying Dr. Saunders discovery into Lightwave's pre-2016 mailings.

SUMMARY OF ARGUMENT

1. The Superior Court, relying on federal and out-of-state precedent, erred in finding the inherently unknowable injury exception should not apply, as a matter of law, to claims like Dr. Saunders' that "affect[ed] financial instruments and transactions," because of policy concerns that the doctrine "could disrupt [] subsequent commercial transactions or expose a corporation to additional liability when there is no suggestion that it has done anything but follow state law and well-accepted norms of keeping record of its shares." SJ Op. at 17. This holding disregards controlling Delaware precedent and misstates Dr. Saunders' claims.

2. *First,* Delaware courts routinely apply the inherently unknowable injury doctrine to circumstances involving commercial instruments and transactions, so long as the party claiming the exception can establish the claim was practically impossible to ascertain and he/she was blamelessly ignorant. The Superior Court already held in the MTD Opinion that Dr. Saunders' claims met the low threshold for the application of inherent unknowability.

3. *Second,* the Superior Court also mischaracterized Dr. Saunders' negligence and conversion claims when it stated "there is no suggestion that [Defendants] ha[ve] done anything but follow state law and well-accepted norms of keeping record of its shares." Dr. Saunders alleges Defendants failed to "account

properly for the status of [the Lightwave Stock], exercise due care and diligence in exercising control over the disposition of Dr. Saunders' shares, and manage and handle Dr. Saunders' shares in a manner that complied fully with Delaware law."[5] This includes Defendants' failure to send a statutorily required dormant account letter to Dr. Saunders to notify him of escheatment. Statutory notice requirements recognize a Plaintiff cannot discover his/her claims, absent the statutory notice being provided. In other words, the escheatment was "practically impossible" to discover without the statutory notice. Thus, claims based on the escheatment of stock, where there has been a failure of statutory notice are covered by the inherently unknowable injury exception – as the Superior Court already held.

4. The Superior Court also erred in finding there were no disputed issues of material fact regarding whether Dr. Saunders was on notice of his claims, prior to 2021.

5. *First*, the Superior Court erroneously found: (1) Broadridge, on behalf of Lightwave, sent a dormant account letter to Dr. Saunders dated October 5, 2016, (2) the OUP sent an owner outreach letter in March of 2017, (3) Broadridge mailed Lightwave's annual meeting notices and instructions to Dr. Saunders in 2014, 2015 and 2016, (4) from February 2017 through September 2021 the OUP listed Dr.

[5] A0055 ¶ 48.

Saunders' escheated Lightwave shares on its public website; and (5) Dr. Saunders' failure to update his address following his 2014 move demonstrated that he was not blamelessly ignorant of the 2017 Lightwave Stock escheatment.

6. *Second,* in concluding that there were no material factual disputes regarding whether Dr. Saunders was ever sent the above-listed mailings and other notifications by the Defendants and the OUP, the Superior Court misapplied the standard of review on summary judgment by failing to make reasonable inferences in the light most favorable to Dr. Saunders and improperly weighing evidence.

7. *Third*, the Superior Court improperly considered evidence of Lightwave's 2014-2015 notices of annual meetings after denying Dr. Saunders' motion to compel mailings allegedly made by Lightwave prior to January 1, 2016, based on Lightwave's representation that it did not intend to rely on these documents for summary judgment.

STATEMENT OF FACTS

I. Dr. Saunders' Lightwave Stock

A. Dr. Saunders' 2013 Purchase of Lightwave Stock

Dr. Saunders is not a sophisticated investor. Outside of his 401K, he only held four "pink sheet" or OTC stocks in his individual name—inclusive of the Lightwave Stock. A0958 at 7:3-21(Saunders).

In 2008, Dr. Saunders learned about Lightwave through Michael Queen, an individual well-known to Lightwave as he took Lightwave's predecessor public in 2008. A0959-60 at 10:23-11:2, 15:3-16:20 (Saunders); A1017-18 80:6-82:25 (Marcelli). Dr. Saunders decided to invest $55,000 for 55,000 Lightwave shares in 2013. A0960 at 16:9-17:20 (Saunders). The Lightwave Stock certificate was sent to 114 Belmont Drive, Wilmington, DE – his address at the time.

Dr. Saunders kept his Lightwave stock certificate in an at-home safe. A0959 at 10:2-11 (Saunders); A1242. He was unable to "get brokers" to hold his Lightwave shares because they were "penny stocks". A0593 at 10:12-16 (Saunders); A1240.

B. Dr. Saunders Monitors the Lightwave Stock

In April 2014, Dr. Saunders moved to 159 Odyssey Drive, Wilmington, DE where he continues to reside to this day. A0595 at 20:3-21:5 (Saunders). Dr. Saunders' mail was forwarded to his Odyssey Drive address for at least a year following his move. A0595-96 at 21:9-22:19 (Saunders). Because Dr. Saunders is

friends with the couple that purchased his Belmont Drive home, following the expiration of the forwarding order, Dr. Saunders was (and continues to be) provided with mail addressed to him at Belmont Drive. A0597 at 27:11-29:13 (Saunders).

Following his move, Dr. Saunders continued to monitor his Lightwave investment. He would occasionally google "Lightwave" to keep track of where the stock was trading and whether the Company made any public announcements. A0593 at 11:3-29 (Saunders). He also periodically discussed his investment with Mr. Queen, Dr. Ross Fasick (former Lightwave Board member), Tom Zelibor (Lightwave's CEO) and Jim Marcelli (Lightwave's COO). A0595 at 18:8-19:23 (Saunders).

Other than receiving his Lightwave stock certificate, Dr. Saunders never received any mailings from Lightwave. He never received an annual report or a proxy statement. A0605 at 58:8-59:24 (Saunders). Dr. Saunders never voted his shares in any of his OTC investments and he certainly did not imagine that by opting not to vote he was at risk of having his shares escheated. A0593 at 12:3-17 (Saunders).[6]

[6] Dr. Saunders' shares in his other OTC investments were never escheated. A0592 at 8:1-9:24, A0605-06 at 61:7-63:1 (Saunders).

C. Dr. Saunders Discovers His Lightwave Stock Has Been Escheated

In early 2021, the value of Lightwave stock sky-rocketed and Dr. Saunders learned Lightwave was planning to uplist to NASDAQ. A1242. But when he tried to get a broker to hold his soon-to-be uplisted Lightwave Stock in June 2021, Dr. Saunders learned that they had been escheated to OUP. A1244, A0964 at 31:11-33:17 (Saunders). When Dr. Saunders then contacted OUP for the return of his shares, he was told they had been sold in June 2017. Instead of his shares, OUP cut him a check for $69,298.43 on September 30, 2021[7]—an amount far less than the contemporaneous value of the stock.[8]

Assuming an oversight, Dr. Saunders (through his wife, Charlene Williams), reached out to Mr. Marcelli at Lightwave in Fall of 2021 seeking to have his stock reissued. A1246. After contacting Broadridge, Lightwave's transfer agent, Mr. Marcelli's assistant wrote to Ms. Williams stating that Dr. Saunders' shares were escheated on January 10, 2017, so the matter was now between Dr. Saunders and OUP and that "[a] due diligence letter would have been mailed to the address of record in November 2016." A1249; A1254; A0965 at 35:17-25 (Saunders).

---

[7] The check (that he never cashed) included the liquidation value of the Lightwave Stock, and was approved on September 30, 2021. A0967 at 44:16-45:7 (Saunders).

[8] Lightwave stock was trading at 10.2 per share on September 30, 2021. https://finance.yahoo.com/quote/LWLG/history. Thus, the Lightwave Stock would have been worth $663,000 had he sold them on that day.

Frustrated with Lightwave's response, Dr. Saunders reached back out to OUP and on May 16, 2022, OUP's Deputy Director, Devashree Singh, sent a closure letter to Dr. Saunders. A1261-62. The letter stated that OUP had conducted an "extensive internal review" of Dr. Saunders' claim. *Id.*

But the evidence shows that Singh's "extensive review" consisted of a single email inquiry to fellow employee, Nakia Carter, on May 13, 2022. A1265-66. Less than an hour after receiving the inquiry, Carter responded to Singh with a bulleted list of points for the closure letter including the date that the State allegedly mailed an "owner outreach letter" to Dr. Saunders: "March 6, 2017". *Id.* Singh did nothing to confirm this date. A1189 at 104:10-23 (Mayrack).[9] In fact, the closure letter is a cut-and-paste of Carter's email. *Compare* A1263-72 with A1256-62.

II. Defendants And OUP Did Not Send Notice Of Escheat

A. Lightwave/Broadridge Never Sent Notice

1. The October 5, 2016 Dormant Account Letter Was Never Sent to Dr. Saunders

The Superior Court found that Broadridge sent an October 5, 2016 form "dormant account" letter to Dr. Saunders. The record does not support this finding.

[9] Carter obtained the March 6 date in an email from another OUP employee in September 2021, but in that same email, a third OUP employee provided March 13, 2017 as the owner outreach date. A1301-02. Mayrack could not explain the discrepancy. A0756 at 116:5-117:5.

As stated in the 2015 Escheat Handbook, pursuant to 15 DE Reg. 1330, all holders with securities related property considered dormant and valued at over $250.00 were required to conduct a due diligence mailing or dormant account letter, "in order to attempt to reunite the owner with their property."[10] In its Interrogatory Responses, Broadridge claimed that it sent a dormant account letter "on or about October 5, 2016".[11] But during Defendants' depositions, this date and any evidence of mailing fell apart.

As Rudden testified, to facilitate the due diligence process, Broadridge supplied its vendor, Keane Corporation ("Keane"), data including the date of last contact and the address of record for a particular shareholder and Keane would determine whether and when the property in question required a due diligence mailing. A1079 at 59:6-25, A1080-81 at 62:5-67:24. Broadridge then provides the issuer with a list of shareholders potentially subject to receipt of a due diligence mailing, giving the issuer "three to four weeks" to review the list to see if any of the listed accounts should be removed prior to mailing. A1082-83 at 70:11-74:11 (Rudden). If any listed shareholders were removed, they would not receive due

[10] A0124.

[11] A1275.

diligence mailings and their shares would not be escheated. A1082 at 71:6-73:3 (Rudden).

While the dormant account letter produced by Broadridge was dated October 5, 2016, Lightwave (the issuer) did not receive the list of shareholders, which included Dr. Saunders, until October 11, 2016. A1288; A1102 at 150:8-15(Rudden). Per Broadridge's "written policy," Lightwave would have "three or four weeks" to review the list before the due diligence mailings were sent. When shown these contemporaneous communications at their depositions, Defendants admitted that it was unlikely and Broadridge "***probably [did] not***" send a dormant account letter on October 5, when on October 11, Broadridge had just provided Lightwave with a list of stockholders (including Dr. Saunders) to be mailed letters sometime in the future. A1102 at 150:8-151:21 (Rudden); A1024-25 at 109:4-110:11, A1022-23 at 101:13-102:16 (Marcelli).

Furthermore, it makes no sense that the due diligence letter was sent on some other date in October as, when providing for the three-to-four-week review period, the soonest the letter could have been sent was in November.[12] Despite later representing to Lightwave that a dormant account letter "would have" been sent in

[12] In a 2021 communication to Lightwave, Broadridge stated that the due diligence letter to Dr. Saunders would have been sent in ***November*** of 2016. A1291.

November 2016, Broadridge admitted at its deposition that it has no record of a November 2016 letter and the representation was an assumption. A1103-04 at 157:5-158:9 (Rudden); A1291.

There is no evidence that any due diligence letter was ***ever*** sent to Dr. Saunders. Rudden admitted that Broadridge did not "track whether the dormant account letter to Dr. Saunders was delivered." A1099 at 139:4-7. Nor does "Broadridge have any record of the dormant account letter to Dr. Saunders being returned." *Id.* at 139:8-11 (Rudden). Marcelli also admitted that he had "no idea" whether the October 5 notice was mailed and noted that Lightwave would not have received a copy of any such communication. A1009 at 46:8-47:4. Indeed, the ***only*** record Broadridge has of the October 5 due diligence letter is an after-the-fact pdf copy. The associated metadata reflects it was created on October 10, 2022—*six years* after the letter was allegedly sent.[13]

2. There Is No Evidence That the Notices of Annual Meetings/Proxy Statements Were Ever Sent to Dr. Saunders

The Superior Court also found that "Lightwave, through Broadridge, mailed annual meeting notices and instructions to Dr. Saunders in 2014, 2015, and 2016." SJ Op. at 4. The record does not support this finding.

[13] Broadridge cannot produce a copy with metadata from October 2016. A1097-98 at 131:11-136:17 (Rudden).

In deposition testimony, Broadridge admits there is no evidence that notices or proxy statements were sent to Dr. Saunders. Rudden, consistent with Broadridge's interrogatory response, first answered that Broadridge sent proxy "materials" which were "typically printed, enclosed and mailed," A1075 at 43:3-7, to Lightwave shareholders. When presented with the proxies themselves which stated they would not be mailed, he then testified perhaps Broadridge only sent "notice of internet availability of proxy materials" to Lightwave shareholders. A1090 at 102: 22-104:24. Rudden next admitted that he did not know if Broadridge sent proxy statements/notices of annual meetings to Dr. Saunders in the relevant years, nor if Broadridge sent a notice of internet availability of those materials. A1090 at 102:6-13; A1091 at 109:9-15; A1092 at 111:12-15. There is no record of a proxy statement or any other notice related to the annual meeting being sent to Dr. Saunders. A1090 at 105:14-21 (Rudden).[14]

[14] Rudden also did not know if the proxy statements and notices of annual meetings are on Lightwave's webpage. A1093 at 114:2-19.

B. The State of Delaware Did Not Provide Notice to Dr. Saunders

1. There is No Evidence That the State of Delaware Sent Dr. Saunders Notice That His Lightwave Stock Had Been Escheated

The Superior Court found "OUP sent at least one outreach notice in March of 2017 to notify Dr. Saunders that his shares had been escheated." SJ Op. at 4. The record does not support this finding.

In February 2017, the unclaimed property statute was amended to require the State to mail owner outreach letters. A0742-43 at 61:20-62:8 (Mayrack). While Dr. Saunders' shares were escheated in January 2017, the "date the State reconciled" the report of information from Lightwave to the [redacted]—after the effective date of the new legislation. A0734 at 27:15-21 (Mayrack). In March 2017, when the Superior Court found an owner outreach letter was sent to Dr. Saunders, the new statutory outreach program was in its infancy. A1296-97; A0745 at 72:3-10 (Mayrack).

To assist with the new process, OUP used a vendor, Kelmar & Associates ("Kelmar"). A0743 at 63:17-65:20 (Mayrack). Kelmar would "pull information from [OUP] databases of all properties reconciled" in a given period and "that information would be pulled into a data file" that would "be merged into a template [owner outreach] letter" which would then "be mailed". *Id*. To determine the date

that an owner outreach letter was sent, OUP would look at the Kelmar Abandoned Property System ("KAPS") database where it could find "a line . . . that describes the State's [] mail batch, and the date, and the mailing of the letter." A0748 at 85:2-8 (Mayrack).

There is internal confusion and disagreement at OUP regarding the date that notice was allegedly sent to Dr. Saunders – and other contemporaneous evidence shows ***no*** mailing at all. To begin, the documents and the testimony reference three different dates. First, as discussed above, OUP's May 2022 closure letter states that an owner outreach letter was sent on March 6, 2017 – a date that was haphazardly chosen, later disclaimed by Mayrack,[15] and contradicted by other OUP records.

Second, on September 20, 2021, another OUP employee stated the letter was sent on March 13, 2017. A1301-02. Mayrack could not account for the discrepancy in the dates identified by the employees. A0756 at 116:5-117:5. In fact, three separate dates--March 6, 2017, March 7, 2017 and March 13, 2017—all appear as "batch dates" associated with Dr. Saunders in screenshots taken from the KAPS database. A1305-18. Adding further confusion, the column entitled "batch date" is "the date the batch was created" ***but not necessarily*** the date the outreach letter was

[15] Mayrack testified she would have used March 13, 2017 rather than March 6, not because that was more likely to be the date the letter was sent, but to give the claimant "the benefit of the doubt". A0758 at 122:17-123:20.

mailed. A0758 at 125:3-12 (Mayrack). And next to the "batch date" column is a "mail date column." That column is ***not populated*** for the letter allegedly created for Dr. Saunders, a fact Mayrack could not explain. A1309; A0758-59 at 125:13-126:8.

A third date—May 8, 2017—is identified in a contemporaneous internal document as the date the owner outreach letter was to be sent to Dr. Saunders. In an email chain between Kelmar and OUP employees extending from late March into April 2017, a Kelmar employee represents 14,218 letters will be sent and she "asked the vendor to mail" those letters "on May 8th." A1296. The attached Excel file listed Dr. Saunders' name in Row 13,364 of the 14,218 line spreadsheet.[16] Mayrack stated she did not know whether an outreach letter was sent to Dr. Saunders on May 8, 2017. A0750 at 91:23-92:2. At no time did Mayrack testify multiple owner outreach letters were ever sent to the same claimant by OUP.

2. There is No Evidence that OUP's Database Provided Notice

The Superior Court found "[f]rom February 2017 through September 2021, the OUP [] listed Dr. Saunders' escheated Lightwave shares on its searchable, publicly accessible website." SJ Op. at 4-5. In support, the Superior Court cites

[16] The Excel spreadsheet attached to A1298 will be delivered to the Court via flash drive.

Mayrack's testimony "explaining the website contents, posting process, and that the OUP website-published notice would include 'the owners name, city and state, holder name, and then over or under $50'". *Id.* at 5 n.26 (citing Mayrack at 117 (A0756), and 127-30 (A0759-60)). However, other than OUP's self-serving representation, there is no evidence in the record that the database provided notice to Dr. Saunders.

For starters, Dr. Saunders testified that he was not aware of the website until he discovered his shares had been escheated in 2021. A0602 at 46:15-23. Defendants acknowledged in their depositions that they were either unfamiliar with the database or would not expect the database to provide adequate notice of escheatment. Marcelli testified that he was "not familiar at all" with Delaware's unclaimed property database. A1027 at 119:11-23. Rudden testified that he did not know whether members of the general population generally checked unclaimed property databases. A0676 at 181:7-13. He also stated that he "had no idea" if Dr. Saunders' name was published on OUP's unclaimed property database in 2017 and admitted that even if Dr. Saunders' name had been published on the database, Lightwave was still obligated to provide notice by mail because notice on public databases is insufficient. A0673 at 168:2-24.

Neither Defendants, nor OUP produced screenshots reflecting what was on the OUP's database in 2017.

III. The Superior Court Denies Discovery Into Lightwave's Pre-2016 Proxy Mailings

Dr. Saunders commenced this suit on September 30, 2022 a little over a year after he discovered from his broker that his shares had been escheated to the State of Delaware and four months after he received a closure letter from the OUP regarding the Lightwave Stock.[17]

Defendants moved to dismiss on May 31, 2023, and on July 28, 2023, the Court denied the Defendants' motions to dismiss and instructed the parties to take limited, tolling-related discovery.

During the hearing on Defendants' motions to dismiss, the Superior Court suggested that in order to determine whether the statute of limitations should be tolled until July 2021, the parties could take discovery relating to (1) "the company itself and whether or not there were records that they sent notices out," (2) "the State

[17] The complaint was originally brought in the Court of Chancery and included a breach of fiduciary duty claim against Lightwave's Secretary. *See Saunders v. Lightwave Logic, Inc., et al*., C.A. No. 2022-0882-MTZ (Del. Ch. Sept. 30, 2022). After the Vice Chancellor raised questions regarding subject matter jurisdiction, the parties stipulated to dismissal of the breach of fiduciary duty claim and transferred the action to the Superior Court on May 11, 2023.

Escheators file," and (3) depositions on whether the company or the State provided notice to Dr. Saunders.[18]

Because Defendants stated in their interrogatory responses[19] that Broadridge sent annual meeting notices and other proxy materials to Dr. Saunders starting in 2014 and the failure to receive such materials should have put him on notice of his claims, Dr. Saunders sought discovery into documents sent by Defendants to Dr. Saunders from 2013-2017. Lightwave, however, refused to provide materials predating January 1, 2016 prompting Dr. Saunders to move to compel the production of such materials. In its January 8, 2024 decision denying the motion to compel, the Superior Court found that pre-2016 documents went beyond the scope of the limited discovery ordered by the court relying on Lightwave's representation that "they do not intend to rely on any documents prior to January 1, 2016".[20]

[18] A0278-79 at 23:14-24:10.

[19] A1275-78.

[20] *See* January 8, 2024 Transcript of Motion to Compel Hearing, at 34-36 attached hereto as Exhibit B and cited herein as "MTC Tr at __".

ARGUMENT

I. The Trial Court Erred By Finding That The Inherently Unknowable Injury Exception Was Unavailable To Toll Dr. Saunders' Claims As A Matter Of Law

A. Question Presented

Is the inherently unknowable injury doctrine unavailable to toll Dr. Saunders' claims as a matter of Delaware law? This issue has been preserved. A0940-46; SJ Op. at 14-18.

B. Standard and Scope of Review

"A trial court's decision on a motion for summary judgment is subject to a *de novo* standard of review on appeal." *AeroGlobal Capital Management, LLC v. Cirrus Industries, Inc*., 871 A.2d 428 (Del. 2005).

C. Merits of Argument

To establish the applicability of the "inherently unknowable injuries" tolling exception, a plaintiff must demonstrate "blameless[] ignoran[ce] of the wrongful act and the injury complained of,"[21] and that "it would be practically impossible . . . to discover the existence of a cause of action." *In re Tyson Foods, Inc*. 919 A.2d 563, 584 (Del. Ch. 2007). If a plaintiff satisfies this standard, "[t]he statute of limitations will begin to run only upon the discovery of facts constituting the basis of the cause

[21] *ISN Software Corp. v. Richards, Layton & Finger, P.A*., 226 A.3d 727, 733 (Del. 2020) (internal quotations and citation omitted).

of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of such facts." *Boyce v. Blenheim at Bay Pointe*, *LLC*, 2014 WL 8623125, at *3 (Del. Super. Dec. 30, 2014) (internal quotations, citation and emphasis omitted).

In granting the Defendants' motion for summary judgment, the trial court found that "the reporting and escheatment of [the Lightwave Stock] to the State and their subsequent liquation isn't the type of injury that can be deemed inherently unknowable" and thus "[t]he inherently unknowable injury doctrine is not available for Dr. Saunders' causes of action as a matter of law". SJ Op. at 14, 18. The trial court noted that applying the exception to Dr. Saunders' negligence and conversion claims would be an "exten[sion]" of what was intended to be a "narrow[]" and "limited" exception.[22] *Id.* at 16. Citing federal law and law from other states, the

[22] The trial court cites a trio of older Delaware cases--*Mastellone v. Argo Oil Corp*., 82 A.2d 379, 380 (Del. 1951), *Leibowitz v. Hicks*, 207 A.2d 371, 372-74 (Del. Ch. 1965) and *Artesian Water Co. v. Lynch*, 283 A.2d 690, 692 (Del. Ch. 1971) in support of the proposition that the inherently unknowable injury standard does not apply as a matter of law to claims like Dr. Saunders'. Two of the three cases—*Mastellone* and *Leibowitz*—were decided prior to *Layton v. Allen*, 246 A.2d 794 (Del. 1968)—the earliest of the Delaware cases recognizing and applying the inherently unknowable injury doctrine. *See, e.g., Krahmer v. Christie's Inc*., 903 A.2d 773, 779 (Del. Ch. June 2, 2006) (noting that "[i]n *Layton v. Allen*, the Delaware Supreme Court established the inherently unknowable injury exception to the statute of limitations."). *Artesian Water Co*., the only one of the three cited cases decided post-*Layton*, is similarly inapt as no tolling doctrine was invoked by the plaintiff and it was decided many decades ago without the benefit of the Delaware

trial court posited that the inherently unknowable injury exception should not be available for certain categories of claims such as "claims affecting financial instruments and transactions" and "actions for conversion of negotiable instruments."[23] *Id.* The trial court reasoned that the inherently unknowable injury exception should not apply to these types of cases because "to permit the inherently unknowable injury exception to extend as asked could disrupt [] subsequent commercial transactions or expose a corporation to additional liability when there is

---

doctrinal developments regarding the application of the inherently unknowable injury standard discussed herein.

[23] The cases cited by the trial court for this proposition of law are inapposite. In addition to the fact that the cases are from outside of Delaware and apply another state's laws, they involve conversion claims against banks after employees or agents embezzled funds via checks and do not stand for the broad proposition that the inherently unknowable exception should not apply, as a matter of law, to "financial instruments and transactions" or "conversion of negotiable instruments". *See Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 622 (Tenn. 2002) (applying Tennessee law and refusing to extend the statute of limitations for a conversion claim against a bank based on the bank's acceptance of embezzled checks); *Kuwait Airways Corp. v. Am. Sec. Bank, N.A.*, 890 F.2d 456, 461 (D.C. Cir. 1989), *on reh'g* (Jan. 10, 1990) (applying the law of the District of Columbia and refusing to extend the statute of limitations for a claim brought under UCC § 3-419 (Instruments Signed for Accommodation) against a bank for accepting embezzled checks from an employee of plaintiff); *Menichini v. Grant*, 995 F.2d 1224, 1231 (3d Cir. 1993) (applying Pennsylvania law and refusing to extend the statute of limitations for a conversion claim against a bank based on its acceptance of embezzled checks). Furthermore, stock is not a "negotiable instrument," so even if these cases did stand for such a broad proposition, that proposition is irrelevant to Dr. Saunders' claims here.

no suggestion that it has done anything but follow state law and well-accepted norms of keeping record of its shares." *Id.* at 16-17. The trial court's decision is contrary to how Delaware courts determine whether the inherently unknowable injury doctrine is applicable as a matter of law and misconstrues the nature of Dr. Saunders' claims.

1. Delaware Courts Do Not Limit the Application of the Inherently Unknowable Injury Exception in the Manner Suggested by the Superior Court

In concluding that the inherently unknowable injury exception did not apply to Dr. Saunders' claims for negligence and conversion related to the escheatment of the Lightwave Stock ***as a matter of law***, the trial court disregarded the evolution of Delaware case law regarding the applicability of the doctrine. It is true, as the trial court notes, that "Delaware courts first found and have recognized the possibility of inherently unknowable injuries in certain medical and other professional malpractice cases." *Id.* at 15 n.83 (citing *Layton v. Allen*, 246 A.2d 794, 798 (Del. 1968); *Isaacson, Stolper & Co. v. Artisan's Sav. Bank*, 330 A.2d 130, 132-33 (Del. 1974); *Child, Inc. v. Rodgers*, 377 A.2d 374, 377 (Del. Super. Ct. 1977), *aff'd sub nom. Pioneer Nat'l Title Ins. Co. v. Child, Inc.*, 401 A.2d 68, 72 (Del. 1979)); *see also Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *8 (Del. Ch. Jan. 24, 2005) (noting that the inherently unknowable injury doctrine "originally addressed

situations where surgeons left items within the bodies of their patients"). However, Delaware courts have expanded the application of the doctrine far beyond medical and professional malpractice cases. In fact, the lower court, in its decision denying Defendants' motions to dismiss for failure to plead a viable tolling exception ***in this case***, noted that "[o]ur Supreme Court has set a 'low threshold for the use of the doctrine of inherently unknowable injury'".[24] A0308, (quoting *Certainteed Corp*., 2005 WL 217032, at *9 (Del. Ch. Jan. 24, 2005) (citing *Wal-Mart v. AIG Life Ins. Co.,* 860 A.2d 312 (Del. 2002))).

In fact, recent Delaware case law suggests that there are no types of injuries that are categorically exempt as a matter of law from the potential application of the

[24] The Superior Court's motion to dismiss ruling that the facts, as pled, constituted a viable legal basis to invoke the inherently unknowable exception is the "law of the case." *See Delaware State Sportsmen's Association v. Garvin*, 2020 WL 6813997, *3 (Del. Super. Nov. 18, 2020) (finding that the court's decision on Defendants' motion to dismiss that the plaintiff's allegations established standing was the "law of the case" because "[t]he legal underpinning of the Court's decision" remained the same and that issue could not be "re-litigated on summary judgment"); *American Bottling Company v. BA Sports Nutrition, LLC*, 2021 WL 6068705, *8 (Del. Super. Dec. 15, 2021) (finding that the court's previous holding that plaintiff's interpretation of a contract provision was reasonable in decision denying defendant's motion to dismiss was the law of the case). Following the trial court's ruling, the nature of Dr. Saunders' claims did not change. While the trial court may have subsequently found the facts developed during discovery did not ultimately support the application of the doctrine as a matter of ***fact***, as a matter of ***law***, the trial court had already found the doctrine applied to Dr. Saunders' claims and resources were expended completing court-ordered tolling-related discovery in support of that legal theory.

inherently unknowable injury doctrine, so long as the party seeking to toll the statute of limitation demonstrates "blameless[] ignoran[ce] of the wrongful act and the injury complained of,"[25] and that "it would be practically impossible . . . to discover the existence of a cause of action." *In re Tyson Foods, Inc*., 919 A.2d at 584. While the trial court notes policy concerns that applying the inherently unknowable injury doctrine to claims such as Dr. Saunders' could "disrupt [] subsequent commercial transactions or expose a corporation to additional liability,"[26] Delaware courts have applied the inherently unknowable injury exception to numerous situations involving complex corporate commercial transactions between sophisticated corporate actors.

For example, in *Jacam Chemical Company 2013, LLC v. Jacam Chemical Co.*, 2024 WL 960180 (Del. Ch. Mar. 1, 2024), the Court of Chancery, applied the inherently unknowable injury exception to plaintiffs' claims, filed in July 2021, relating to the categorization of certain formulas as trade secrets in an asset purchase agreement entered into in 2013 in connection with the $240 million purchase of a petrochemical company. While, following tolling-related discovery, the Court ultimately found that the claims were untimely because the plaintiffs were on inquiry

[25] *ISN Software Corp.*, 226 A.3d at 733 (internal quotations and citation omitted).
[26] SJ Op. at 17.

notice of their claims prior to the analogous three-year statutory period, it did not find that the tolling exception was, as a matter of law, inapplicable to plaintiffs' claims. *See also Certainteed Corp*, 2005 WL 217032, at *9 (noting that the doctrine could (as a matter of law) be applied to claims for breach of certain representations and warranties made to "a sophisticated, multi-billion dollar corporation" in an asset purchase agreement).

Delaware courts have also applied the exception to claims (1) for "tortious interference and civil conspiracy" relating to defendant's alleged improper interference with an attempt by plaintiff, the broker of a potential transaction, to broker the sale of defendant's stock[27], (2) breach of obligations set forth in a letter of intent relating to exclusivity and notice procedures[28], and (3) negligent misrepresentations made by an accounting firm in a company's financial statements to a company's bondholders and creditors[29]. In fact, this Court has found that the doctrine was applicable in a case where "one of America's largest corporations, despite having a huge legal department and access to the best outside legal advice

[27] *BTIG LLC v. Palantir Technologies, Inc*., 2020 WL 95660, at *3 (Del. Super. Ct. Jan. 3, 2020)

[28] *Serviz, Inc. v. ServiceMaster Co.*, 2022 WL 1164859 (Del. Super. Ct. Apr. 19, 2022).

[29] *Otto Candies, LLC v. KPMG LLP*, 2019 WL 994050 (Del. Ch. Feb. 28, 2019).

money could buy," was unable to discover "that its utilization of a tax-avoidance strategy advocated by insurance brokers might be ruled by the Internal Revenue Service to be improper." *See Certainteed Corp.*, 2005 WL 217032, at *9 (discussing the holding in *Wal-Mart Stores*, 860 A.2d 312). Thus, the trial court's holding that the inherently unknowable injury doctrine is categorically inapplicable to Dr. Saunders' claims as "a matter of law" is contrary to Delaware precedent.

2. The Inherently Unknowable Injury Doctrine Should Apply to Dr. Saunders' Claims because Negligence and Conversion Claims Involving a Statutory Failure to Notify a Potential Plaintiff Are Inherently Unknowable

The trial court's concern that applying the inherently unknowable injury doctrine to claims like Dr. Saunders' could "expose a corporation to additional liability when there is no suggestion that [the corporation] has done anything but follow state law and well-accepted norms of keeping records of its shares," is not an accurate reflection of the allegations or the evidence in this case. SJ Op. at 17. The very premise of Dr. Saunders' complaint for conversion and negligence is that Defendants did not provide notice of their intent to escheat the Lightwave Stock in violation of statutory requirements. *See, e.g.,* A0055-58 ¶¶ 45-61. As set forth in Argument II(C) below, evidence in the summary judgment record suggests that there are disputed issues of material fact as to whether Defendants sent the statutorily required notice to Dr. Saunders. Dr. Saunders contends that it was Defendants'

failure to provide the statutorily required notice that resulted in not only the improper escheatment itself, but also Dr. Saunders' inability to discover the escheatment. Thus, not only would applying the inherently unknowable injury doctrine here be appropriate; ***not*** permitting the inherently unknowable injury doctrine to apply to claims like Dr. Saunders' *as a matter of law* would be unfairly punitive to individual, passive investors like Dr. Saunders who rely on corporate actors to comply with statutory notice requirements before escheating their property.

Moreover, if, as happened here, a company can negligently escheat shares to the state without providing statutory notice, a draconian rule strictly applying a three-year statute of limitations could disincentivize investors from investing in start-up, pink sheet companies like Lightwave. *That* – not application of a tolling doctrine – would create the chilling effect on commercial transactions the Superior Court fears.

In fact, case law suggests that when there is a contractual requirement that one party provide notice to another party before taking a specific course of action and then the party obligated to provide notice fails to do so, that failure supports a finding that the injury that occurred was inherently unknowable. *See Serviz, Inc.* 2022 WL 1164859 (finding that where the agreement itself required counterclaim defendant to immediately notify counterclaim plaintiff "of any discussions implicating

[counterclaim plaintiff's] exclusivity obligations," the agreement "implicitly recognized that Defendants were not in any reasonable position to discover such discussions themselves"). Here, there is a statutory requirement that the Defendants provide notice of their intent to escheat a shareholder's shares and the Defendants themselves concede that such notice is necessary to alert a shareholder of potential escheatment. A0673 at 168:16-24 (Rudden).

II. There Are Material Issues Of Disputed Fact Regarding Notice That Preclude Summary Judgment On The Tolling Issue

A. Question Presented

Were there material issues of disputed fact precluding summary judgment relating to: (1) whether notice was sent by Broadridge on behalf of Lightwave; (2) whether notice was sent by the OUP; (3) whether annual meeting notices were sent to Dr. Saunders and, if so, whether it was appropriate for the court-below to rely on those notices; (4) whether information relating to the escheatment of Dr. Saunders' shares was published on the OUP's website and, if so, whether that public notice was enough to place Dr. Saunders on notice of his claims; and (5) whether the fact that Dr. Saunders did not contact Lightwave to change his address rendered him incapable of being deemed "blamelessly ignorant" for purposes of determining the applicability of the inherently unknowable injury doctrine. This issue has been preserved. A0925-48; SJ Op. at 2-11, 19-21; MTC Tr. at 25-37.

B. Standard and Scope of Review

See Argument at I(B).

C. Merits of the Argument

In granting the SJ Motion, the Superior Court credited Defendants' assertions that 1) notice of the escheatment was sent to Dr. Saunders by the OUP in March 2017; 2) Broadridge sent a dormant account letter to Dr. Saunders dated October 5,

2016; 3) Broadridge sent notices of annual meetings and instructions to Dr. Saunders in 2014, 2015 and 2016; and 4) information regarding the escheatment of the Lightwave Stock was published on the OUP's website "from February 2017 through September 2021". SJ Op. at 4-5. The Superior Court noted that "the most salient facts on practical impossibility would relate to the content, timing and ***sending*** of the notices provided by Lightwave, Broadridge and OUP—***not whether they were actually received***," and suggested that "Dr. Saunders avers that he never ***received*** any of the mailings sent by Lightwave, Broadridge or the OUP" but that it was not "enough to simply deny (or even facilitate non-)***receipt*** and plead ignorance." *Id.* at 19 n.95 (emphasis added). However, the SJ Opinion also acknowledges that "Dr. Saunders maintains that Lightwave ***never mailed*** annual meeting notices, Broadridge ***never sent*** the Dormant Account Letter, the OUP ***never mailed*** its outreach letter, and the OUP ***never published*** notice," *Id*. at 11 (emphasis added). Despite this acknowledgment, the SJ Opinion did not address any of the record evidence Dr. Saunders offered regarding the "salient fact" of whether any form of notice ***was sent*** to Dr. Saunders, aside from a footnote dismissively characterizing Dr. Saunders' cited evidence as a "vain attempt[]" to "sow doubt as to each information-providing document or event mentioned." *Id.* at 19 n.95.

"If material issues of fact exist or if a court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate." *Motorola, Inc. v. Amkor Tech., Inc*., 849 A.2d 931, 935 (Del. 2004). "The trial court shall examine the factual record and make reasonable inferences therefrom in the light most favorable to the nonmoving party to determine if there is any dispute of material fact." *AeroGlobal Capital Management, LLC*, 871 A.2d at 444. Thus, "'[t]he test is not whether the judge considering summary judgment is skeptical that plaintiff will ultimately prevail,' but whether the evidence, when viewed in the light most favorable to the nonmoving party, presents any dispute of material fact." *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002) (citing *Cerberus Int'l, Ltd. v. Apollo Management, L.P*., 794 A.2d 1141, 1150 (Del. 2002)).

In determining whether there is a material issue of disputed fact in the summary judgment record, "a trial court shall not weigh the evidence or resolve conflicts presented by pretrial discovery." *AeroGlobal Capital Management*, 871 A.2d at 444; *see also Telxon Corp.*, 802 A.2d at 262 ("In evaluating the record on a motion for summary judgment, a trial judge is not permitted to weigh the evidence or resolve conflicts presented by the pretrial discovery."). That is because "[t]he

trier of fact may weigh the evidence and resolve disputes only after hearing all the evidence, including live witness testimony." *Telxon Corp.*, 802 A.2d at 262.

As set forth below, the summary judgment record demonstrates that there were numerous material issues of disputed fact in the summary judgment record that should have precluded summary judgment. To the extent that the court-below determined otherwise, those determinations were the result of the improper weighing of the evidence produced in pretrial discovery and/or the failure to view the evidence in the light most favorable to Dr. Saunders as the non-moving party.

1. There are Material Issues of Disputed Fact Regarding Whether Lightwave or Broadridge Sent the Statutorily Required Notice to Dr. Saunders

The court-below found that "Broadridge sent Dr. Saunders a dormant account letter dated October 5, 2016" that "warned him of a then-looming escheatment and how to avoid it." SJ Op. at 4. The trial court relied upon a form letter dated October 5, 2016 and addressed to Dr. Saunders[30] and Rudden's deposition testimony in support of this finding. The summary judgment record, including the evidence cited by the court, demonstrates that there is a disputed issue of material fact regarding whether Broadridge ever sent a dormant account letter to Dr. Saunders:

- Despite Broadridge's representation in its sworn interrogatory responses that it sent a dormant account letter "on or about October 5, 2016", Defendants

[30] A0877.

admit that it was unlikely and Broadridge "***probably [did] not***" send a dormant account letter to Dr. Saunders in October because the timing does not make sense, in light of other contemporaneous evidence. A1102 at 151:4-152:9 (Rudden); A1022-23 101:13-102:16 (Marcelli).

- The letter is dated October 5, 2016, but Lightwave did not receive a list of shareholders potentially subject to a receipt of a due diligence mailing until October 11, 2016. A1288. Lightwave would have had "three to four weeks" to review the list to see if any of the listed accounts should be removed prior to sending the due diligence mailing. A1082-83 at 71:10-74:11, A1102 at 151:4-21 (Rudden); A1024-25 at 109:4-110:11, A1022-23 at 101:13-102:16 (Marcelli). Thus, the soonest the letter could have been sent was in November and Broadridge would not have created the due diligence letter before sending out the shareholder list. A1082 at 73:6-12 (Rudden).

- Broadridge represented to Lightwave that notice was mailed to Dr. Saunders in "November 2016"—not October. A1291. Rudden later admitted Broadridge has no record of a November 2016 dormant account letter to Dr. Saunders and the representation was an assumption. A1103-04 at 157:5-158:9.

- Marcelli stated he had "no idea" if the October 5, 2016 dormant account letter—or any other dormant account letter was mailed. A1009 at 46:8-47:4.

- Broadridge has no record that any dormant account letter was ever delivered to Dr. Saunders. A1099 at 139:4-7 (Rudden).

- The October 5, 2016 form letter has metadata reflecting that it was created on October 10, ***2022*** and Broadridge cannot produce a letter with metadata reflecting the supposedly original 2016 date. A1097-98 at 131:11-136:17 (Rudden).

The evidence demonstrates Defendants, after stating in their sworn interrogatory responses that the dormant account letter was sent "on or about October 5, 2016," admit that it could not have been sent on that date and then admit

they cannot identify ***any*** date the notice was sent. The proper inference from the evidence at this stage is that neither Broadridge, nor Lightwave sent notice. *Bryant v. Fed. Kemper Ins. Co*., 542 A.2d 347, 351 (Del. Super. Ct. 1988) (testimony indicating that a party failed to "recall" whether an event occurred created an inference that event did not occur when "[v]iewing the evidence in a light most favorable to the nonmoving party…"); *In re Asbestos Litig*., 2014 WL 605844, at *3 (Del. Super. Ct. Feb. 14, 2014) (rejecting argument that plaintiff's failure to recall the specific manufacturers of pumps he had worked with established an inference at the summary judgment stage that plaintiff worked with a specific brand of pump that was present on vessels where he was working). At minimum, the evidence demonstrates there is a disputed issue of material fact regarding whether Broadridge sent the dormant account letter on October 5, 2016 ***or at any other time***. *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99-100 (Del. 1992) ("The role of a trial court when faced with a motion for summary judgment is to identify disputed factual issues whose resolution is necessary to decide the case, but not to decide such issues . . . [while] view[ing] the evidence in the light most favorable to the non-moving party ... [which] means [the court will] ... accept the non-movant's version of any disputed facts.").

2. There are Disputed Issues of Material Fact Regarding Whether the OUP Sent the Statutorily Required Notice to Dr. Saunders

The court-below stated "OUP sent at least one outreach notice in March of 2017 to notify Dr. Saunders that his shares had been escheated." However, the summary judgment record, including the evidence the court cites in support of its finding, demonstrates there is a disputed issue of material fact regarding whether OUP ever sent notice to Dr. Saunders:

- The Superior Court relies on the OUP's closure letter to Dr. Saunders dated May 16, 2022 which represents OUP sent an owner outreach letter on March 6, 2017. However, as explained above, the evidence shows the closure letter was quickly cobbled together with little review or verification. A1265-66. Mayrack did not know where the letter drafter obtained the March 6, 2017 date (A1189 at 104:10-23), confirmed OUP does not have a copy of a March 6 letter (A1180 69:2-25) and that there was internal conflict at the OUP regarding whether the March 6 date was the date that an owner outreach letter was sent, which Mayrack could not explain. A1301-02; A1192 at 116:5-117:5 (Mayrack).

- The trial court relied on unaddressed and undated templates for owner outreach letters produced by OUP. *See* A0883, A0885. Neither template is dated, nor addressed to Dr. Saunders, let alone dated in March of 2017. All the templates establish is that OUP has an outreach letter template.

- The trial court relied [redacted] in support of its finding that OUP sent an owner outreach letter in March 2016, however the screenshots actually demonstrate that there are a number of different "batch dates" associated with Dr. Saunders but no actual "mail date" and Mayrack could not identify the date that any letter was sent by the OUP, nor could she explain the absence of a mail date associated with Dr. Saunders' letter. A0758-59 at 125:13-126:8.

- In an email chain between Kelmar and OUP employees extending from late March into April 2017, a Kelmar employee represents that 14,218 letters will be sent and she "asked the vendor to mail" those letters "on May 8th." (A1296). The attached Excel file listed Dr. Saunders name in Row 13,364 of the 14,218 line spreadsheet. Mayrack did not know whether an outreach letter was sent to Dr. Saunders on May 8, 2017, nor why he appeared on the list. A0750 at 91:5-92:2.

The summary judgment record demonstrates that there is a disputed issue of material fact regarding whether the OUP ever sent an owner outreach letter to Dr. Saunders and the trial court's conclusion that "at least one" outreach letter was sent by the OUP is either the result of the impermissible weighing of evidence or an improper inference in favor of the Defendants.

3. There are Material Issues of Disputed Fact Regarding Whether Annual Meeting Notices and Instructions Were Sent to Dr. Saunders in 2014, 2015 and 2016 and the Trial Court Should Not Have Relied on That Evidence

The court-below states that "Lightwave, through Broadridge, mailed annual meeting notices and instructions to Dr. Saunders in 2014, 2015 and 2016." SJ Op. at 4. However, the summary judgment record, including the evidence that the court cites in support of this finding, demonstrates that there is a disputed issue of material fact regarding whether annual meeting notices were ever sent to Dr. Saunders:

- Rudden, in response to the question "did Broadridge mail a proxy statement/notice of annual meeting to Dr. Saunders on July 24, 2014" answered, consistent with Broadridge's sworn interrogatory response, "yes." A1088 at 95:6-9. However, Rudden later admitted that he actually "d[id] not know" whether Broadridge mailed "a proxy statement/notice of annual

meeting on July 24th, 2014, to Dr. Saunders," given language in the proxy itself reflecting the proxy would not be mailed. A1090 at 102:6-13.

- Rudden never states that Broadridge mailed annual meeting notices and instructions to Dr. Saunders in 2015, but, instead, he states that he "ha[d] no idea" and he "d[idn't] know" whether "Broadridge mail[ed] a proxy statement" or "a notice of internet availability of proxy materials" in 2015. A1091 at 109: 9-15.

- Rudden also never states that a proxy statement was sent to Dr. Saunders in 2016. Instead, he states that he "d[idn't] know" if "Broadridge sen[t] a proxy statement/notice of annual meeting to Dr. Saunders" in 2016. A1092 at 111:12-15.

- The Superior Court also cites printed copies of Lightwave's 2014 and 2015 Proxy Statements. There is, however, no evidence that either of those proxy statements (or any documents connected to those proxy statements) were ever sent to Dr. Saunders. In fact, Rudden admitted that language in the Proxy Statements themselves indicates ***no*** Lightwave stockholders were sent Proxy Statements. A1090 at 102:22-104:24.

Considering the record evidence above, in order to reach the conclusion that the 2014, 2015 and 2016 notices of annual meeting were sent to Dr. Saunders, the court-below must have either credited Rudden's initial assertion that annual meeting notices were sent and disregarded the contrary evidence (which would constitute an impermissible weighing of evidence on summary judgment), or any inferences drawn from Rudden's lack of knowledge must have been made in favor of the Defendants (when any inferences should have been made in favor of Dr. Saunders as the nonmovant).

Furthermore, even if the notices were sent (again, the evidence suggests that they were not), the court-below held that Lightwave could not rely on evidence of the annual meeting notices and instructions in support of its motion for summary judgment in connection with its denial of Dr. Saunders' motion to compel discovery relating to those notices predating January 1, 2016. During argument on the motion to compel, Lightwave took the position that the request for pre-2016 documents was outside of the scope of limited discovery relating to tolling because it did not "intend to use any representations or statements that were alleged to have put Dr. Saunders on notice prior to [] January 1, 2016." MTC Tr. at 33:22-34:6; *see also* A1005 at 31:14-24 (Marcelli) (stating that Lightwave was not intending to rely on the proxy statements or notices of annual meetings in arguing that Dr. Saunders was on notice that his shares would be escheated). The court-below denied discovery into Lightwave's pre-2016 mailing due to Lightwave's representation that it did not intend to rely on anything allegedly sent to Dr. Saunders prior to January 2016, noting "I am going to hold Lightwave to its representation." MTC Tr. at 35:12-15. Thus, even if there was evidence that the annual meeting notices and proxies were sent to Dr. Saunders, the Superior Court's reliance on that evidence was improper, where the record is incomplete and Dr. Saunders was denied the ability to develop the record further. *City of Roseville Employees' Retirement System v. Ellison*, 2013

WL 3976650, at *1 (Del. Ch. July 31, 2013) ("defendants cannot limit fair discovery into a subject matter and then use selective evidence regarding that subject matter offensively"); *Shelton v. Bledsoe,* 775 F.3d 554, 568 (3d Cir. 2015) ("If discovery is incomplete, a district court is rarely justified in granting summary judgment, unless the discovery request pertains to facts that are not material to the moving party's entitlement to [summary judgment]").

4. There Are Disputed Issues of Material Fact Regarding Whether Dr. Saunders Was on Notice of His Claims Due to Alleged Public Disclosure of the Escheatment of the Lightwave Stock on the OUP's Website

The trial court found that "from February 2017 through September 2021, the OUP [] listed Dr. Saunders' escheated Lightwave shares on its searchable publicly accessible database." SJ Op. at 4-5. The trial court cites Mayrack's testimony explaining, generally, the contents of the website and that Dr. Saunders' information on the website (assuming it was there) would include "the owner's name, city and state, holder name, and then over or under $50". A0756 at 117, A0759-60 at 127-30. However, the summary judgment record, including the evidence that the court cites in support of this finding, demonstrates that there is a disputed issue of material fact regarding whether the escheatment of the Lightwave Stock was published on OUP's public database at the relevant time and whether that publication provided notice to Dr. Saunders:

- Marcelli testified that he was "not familiar at all" with Delaware's unclaimed property database. A1027 at 119:11-23.

- Rudden testified that he did not know whether members of the general population generally checked unclaimed property databases. A0676 at 181:7-13. He also stated that he "had no idea" if Dr. Saunders' name was published on Delaware's unclaimed property database anytime in 2017 and he admitted that even if his name had been published on such a database, Lightwave was still obligated to provide notice because notice on public databases is insufficient. A0673 at 168:2-24.

- Neither Defendants nor the OUP produced screenshots reflecting what was on the OUP's database in 2017, the relevant period.

The summary judgment record demonstrates that there is a disputed issue of material fact regarding whether the escheatment of the Lightwave Stock was published on OUP's public database at the relevant time and whether that publication provided notice to Dr. Saunders and the trial court's conclusion otherwise is either the result of the impermissible weighing of evidence or an improper inference in Defendants' favor.

Moreover, even if such evidence existed, the mere existence of a public database from which one could, theoretically, discern the basis of a claim if he/she happened to search that database is not enough by itself to preclude tolling. *See, e.g.*, *Boyce,* 2014 WL 8623125 (denying summary judgment where defendants argued that the existence of publicly available information was enough to put a potential plaintiff on notice of his claims, reasoning that the mere fact information

could possibly be gleaned from public records was not enough, on its own, to constitute constructive notice). Thus, even if the escheatment of the Lightwave Stock was published on the OUP's database in 2017, because of the OUP's and Broadridge's failure to provide the statutorily required notice to Dr. Saunders, Dr. Saunders did not question the ownership of his shares and had no reason to check the database. Therefore, the OUP's public website could not have provided Dr. Saunders with adequate notice of his claims.

5. The Fact That Dr. Saunders Did Not Contact Lightwave To Change His Address Did Not Render Him Incapable of Being Deemed "Blamelessly Ignorant"

The trial court held that Dr. Saunders was not blamelessly ignorant for purposes of determining whether the inherently unknowable injury exception tolled the statute of limitations because he "admit[ted] that he didn't tell Lightwave that he changed addresses in 2014." SJ Op. at 20. It is undisputed that Dr. Saunders did not update his address. But the reason he did not feel a need to do so was because, other than when he received the stock certificate in 2013, he was never sent, and therefore never received, ***a single mailing*** from Lightwave. Thus, as this Court noted in its MTD Opinion when rejecting Defendants' argument that Dr. Saunders was not blamelessly ignorant due to his failure to update his address, "it doesn't matter whether Dr. Saunders' address was correct given his assertion that no mail at

all was ever sent or received from Lightwave." A0306-07. As set forth in detail above, there is still nothing in the record demonstrating that Dr. Saunders was sent mailings from Defendants during the relevant time-period, thus, he had no reason to believe that it was necessary to update his address with Lightwave.

CONCLUSION

For the foregoing reasons, the Court should reverse the Superior Court's judgment.

MORRIS JAMES LLP

/s/ Albert H. Manwaring, IV
Albert H. Manwaring, IV (#4339)
Kirsten Zeberkiewicz (#4573)
Barnaby Grzaslewicz (#6037)
500 Delaware Avenue, Suite 1500
Wilmington, DE 19801-1494
302.888.6800

Attorneys for Plaintiff Below Appellant Jonathan Saunders

Dated: January 13, 2025