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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ISN SOFTWARE CORPORATION, Plaintiff Below, Appellant vs. 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]

REPLY BRIEF FOR APPELLANT ISN SOFTWARE CORPORATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

ISN Software Corporation ("ISN") retained Delaware law firm Richards Layton & Finger (collectively "RLF") to provide legal advice. Despite their extensive experience, ISN's attorneys at RLF made and then acknowledged what later turned out to be a costly mistake.

When lawyers make mistakes, a system is in place to try to ensure that the innocent client can be made whole. On the other hand, sometimes clients are wrong in their belief that their lawyer made a mistake, which is why the system includes safeguards to only compensate meritorious claims.

Delaware, much like its sister-states, developed a system that required a legal malpractice claimant to establish three elements: a) the employment of the attorney; b) the attorney's neglect of a professional obligation; ***and c) a resulting loss***. If a client can plead these three elements, Delaware law permits the client to file a lawsuit within three years. After three years, the client's option to file a malpractice claim expires to protect attorneys from stale claims, misremembered facts, or discarded evidence. This system worked in Delaware and continues to work in the many states cited in ISN's Opening Brief.

At issue, here, is a drastic rewriting of Delaware's legal malpractice law. It is a bedrock principle of Delaware law that "[a] cause of action accrues with the

occurrence of the wrongful act."[1] This Court has held that for tort claims, the wrongful act is a tortious act causing injury, and the cause of action accrues at the time of injury.[2] Ignoring all of this Court's precedents requiring an actual **"resulting loss"** to file a malpractice claim, the Superior Court created a new standard that requires a client to file a malpractice claim when she is subjected only to a mere **"risk of loss."** In the short term, this new law will retroactively penalize one client (ISN) that relied upon this Court's clear precedents requiring an actual "resulting loss" to file a claim. In the long term, however, this new law will significantly increase the number of viable malpractice claims against Delaware attorneys. It is far easier to plead that an attorney has placed a client at "risk" of a loss than it is to plead that an attorney actually caused some quantifiable harm. Arguably, every decision a litigator or deal counsel makes places their client at "risk of loss." As explained in ISN's Opening Brief and below, the trial court's rewriting of Delaware law is unwarranted.

In their Answering Brief, RLF seeks only to preserve the short-term victory that it received from the trial court's new law, regardless of the unsustainable consequences. Unable to justify the rationale behind the trial judge's ruling, RLF

[1] *Kaufman v. C.L. McCabe & Sons, Inc*., 603 A.2d 831, 834 (Del. 1992).
[2] *Id*.

deliberately ignores the fact that the trial judge has created a new standard. Nowhere in its brief does RLF address this Court's binding precedents requiring a claimant to establish a "**resulting loss**." That standard was stated most clearly in *Tarrant v. Ramunno*, *Oakes v. Clark*, *Tsipouras v. Szambelak*, *Lorenzetti v. Enterline*, and *Flowers v. Ramunno.*[3] The trial judge's decision cannot be reconciled with those controlling precedents; so, RLF does not address *any* of these cases.

Similarly, RLF cannot rebut the rationale behind the litany of non-Delaware cases that have squarely addressed the question at bar. As demonstrated in ISN's Opening Brief, the highest courts from Alaska, California, Iowa, Kansas, Massachusetts, Montana, New Jersey, New Mexico, North Dakota, Pennsylvania, Tennessee as well as the trial or intermediate courts from several other states have all had occasion to address the question of: ***when does a legal malpractice claim accrue where a client learns of a legal mistake but has not suffered any actual damages.*** ISN explained in its Opening Brief that most of the states to confront this issue have relied upon the California Supreme Court's well-reasoned opinion in *Budd v. Nixen*.[4] That opinion was issued nearly fifty years ago in 1971, and many

[3] 171 A.3d 138 (Del. 2017); 69 A.3d 371 (Del. 2013); 58 A.3d 984 (Del. 2012); 44 A.3d 922 (Del. 2012); 27 A.3d 551 (Del. 2011).
[4] *See* ISN Br. at 19-23 (citing *Budd v. Nixen,* 491 P.2d 433 (Cal. 1971)).

other states have adopted and refined the *Budd* court's analysis in the interim. Unable to rebut those courts' well-reasoned decisions, RLF ignores them entirely or dismisses them because they are not Delaware cases.

RLF similarly ignores the Restatement (Third) of the Law Governing Lawyers' directly relevant explanation of the common law. RLF has no answer for that treatise's compelling example highlighted in ISN's Opening Brief:

> For example, if a lawyer negligently drafts a contract so as to render it arguably unenforceable, the statute of limitations does not start to run until the other contracting party declines to perform or the client suffers comparable injury. *Until then, it is unclear whether the lawyer's malpractice will cause harm*. Moreover, *to require the client to file suit before then might injure both client and lawyer by attracting the attention of the other contracting party to the problem*.[5]

RLF cannot contest the other states' or the Restatement's reasoning. Rather than engage in the intellectual analyses that other states and treatises have already had occasion to address, RLF ignores it entirely.

Instead, RLF's Answering Brief is a collage of cherry-picked quotes from cases bearing no resemblance to the facts at bar. RLF relies extensively (if not entirely) on cases where the legal malpractice caused immediate or concurrent actual damages. RLF's Answering Brief is predicated on the erroneous presumption that

[5] Section 54 cmt. g, at 406 (2000).

all legal malpractice claims look the same and the facts of each individual case are irrelevant in determining when a legal malpractice claim accrues. According to RLF, it is "crystal clear" Delaware law that a client's legal malpractice claim accrues on the date the attorney makes a mistake, irrespective of whether the mistake ever causes the client to suffer harm. Under RLF's view, a client would have a valid legal malpractice claim against their attorneys even if the attorneys' incorrect legal advice ultimately ***benefitted the client***.

RLF *has to* make that argument because, after they misstated Delaware law in January 2013, they explicitly advised ISN that it could very well benefit from the incorrect advice. Under this Court's precedents, that meant ISN did not have a ripe malpractice claim at the time. RLF advised ISN as much in the Consent Letter and should be held to that representation. It was only when the Court of Chancery issued its Appraisal Opinion that RLF reversed course to escape liability for the harm that resulted from its mistake. As shown below and in ISN's Opening Brief, this Court must reject RLF's efforts to rewrite history and the law.

This Court must reject the notion that a mere "risk of loss" suffices to create a cause of action for legal malpractice. In accordance with decades of precedents requiring an actual "resulting loss," this Court should follow *Budd v. Nixen* and its

many progeny in holding that there must be "***appreciable and actual*** harm flowing from the attorney's negligent conduct."[6]

[6] 491 P.2d at 436. All emphasis added, unless otherwise noted.

ARGUMENT

I. ISN'S MALPRACTICE CLAIM DID NOT ACCRUE UNTIL IT SUFFERED A RESULTING LOSS

A. A Client Cannot Have "Actual Notice" of a Claim that Does Not Exist

RLF's primary argument is that "ISN admits that it had actual notice of its claim" in January 2013. RLF incants this mantra throughout its brief, but – to state the obvious – to have "actual notice" of a "claim" requires there to actually be a "claim." RLF does not and cannot dispute the fact that this Court has repeatedly stated that the three necessary elements to a legal malpractice claim are: a) the employment of the attorney; b) the attorney's neglect of a professional obligation; ***and c) resulting loss***.[7] Without a "resulting loss" a client does not have a claim. While it is possible for a client to know that its attorney has made a mistake, that does not equate to a client having an actionable legal malpractice claim and cannot logically equate to a client having "actual notice" of a "claim."

The best support RLF can find for its incorrect contention that ripeness "has no relevance to accrual"[8] is a Delaware District Court case in which Pennsylvania

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[7] *See*, *e.g.*, *Tarrant*, 171 A.3d 138; *Oakes*, 69 A.3d 371; *Tsipouras*, 58 A.3d 984 ; *Lorenzetti*, 44 A.3d 922; *Flowers*, 27 A.3d 551.
[8] RLF Br. at 25.

procedural law was incorrectly adopted and applied. In *Mukasa v. Balick & Balick*,[9] the plaintiff filed her malpractice claim "prior to an actual injury," and thus the claim was "not ripe for decision."[10] Citing U.S. Supreme Court authority, the District Court acknowledged that the claim "could therefore be dismissed for lack of justiciability."[11] After erroneously concluding that "Delaware courts have not addressed this issue," the District Court relied on an unreported Eastern District of Pennsylvania case applying Pennsylvania law as authority to stay – rather than dismiss – the nonjusticiable claim.[12]

However, in that case, *Spillman v. Wallen*, the court relied on a footnote from a 1993 Pennsylvania Supreme Court opinion addressing trespass actions against criminal defense attorneys.[13] As a threshold matter, trespass actions have completely different elements than ISN's claim here.[14] Further, in *Bailey*, the Pennsylvania Supreme Court held that one of the elements of a criminal defendant's legal

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[9] 2002 WL 1971921 (D. Del. Aug. 27, 2002), order clarified, 2002 WL 31230813 (D. Del. Sept. 26, 2002).
[10] *Id*. at *4.
[11] *Id*. (citing *Anderson v. Green*, 513 U.S. 557, 559 (1995)).
[12] *Id*.
[13] 1996 WL 379553, at *8 (E.D. Pa. June 28, 1996), aff'd, 111 F.3d 127 (3d Cir. 1997) (citing *Bailey v. Tucker*, 621 A.2d 108, 113 n.13 (Pa. 1993).
[14] *See Bailey*, 621 A.2d at 115.

malpractice claim is the exhaustion of all post-trial remedies.[15] Reasoning that this requirement raised "a procedural question" – *i.e.*, "what is to be done with a civil action filed prior to the completion of the post-conviction process?" – the court answered that a lawyer served with such a complaint should "interpose a preliminary objection on the grounds of demurrer" pursuant to a specific Rule of Pennsylvania Civil Procedure.[16]

Setting aside that the Pennsylvania Rules of Civil Procedure are inapplicable here, courts nationwide widely reject the notion that ripeness raises a "procedural question."[17] More importantly, this Court has explicitly confirmed that "Delaware courts *decline to exercise jurisdiction* over a case unless the underlying controversy is ripe, *i.e.*, has 'matured to a point where judicial action is appropriate.'"[18] "[A] dispute will be deemed not ripe where the claim is based on 'uncertain and contingent events' that may not occur, or where 'future events may obviate the need'

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[15] *Id*.

[16] *Id*. ("The trial court shall then reserve its ruling on said objection until the resolution of the post-conviction criminal proceedings.").

[17] *See, e.g.*, *Wayside Church v. Van Buren Cty.*, 847 F.3d 812, 816 (6th Cir.), cert. denied sub nom. *Wayside Church v. Van Buren Cty.*, Mich., 138 S. Ct. 380, 199 L. Ed. 2d 278 (2017) ("Ripeness is more than a mere procedural question; it is determinative of jurisdiction."); *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990) (same).

[18] *See XI Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1217 (Del. 2014).

for judicial intervention."[19] As the Delaware Court of Chancery has held, "[r]ipeness, the simple question of whether a suit has been brought at the correct time, *goes to the very heart of whether a court has subject matter jurisdiction*."[20]

Every single case cited by RLF supports the basic and undeniable legal principle that a client cannot have actual notice of a legal malpractice claim unless that client has suffered some resulting loss. Knowing that an acknowledgment of that fact is fatal to its defense, RLF attempts to conflate the provision of incorrect advice with resulting damages.

In each of the cases cited by RLF, based on the specific facts of those unique cases, the client was damaged immediately upon the provision of erroneous legal services. For instance, RLF cites *Albert v. Alex Brown Mgmt. Servs. Inc.*, writing a "claim accrues as soon as the wrongful act occurs…[w]hether or not the plaintiffs could have sued for damages…."[21] RLF fails, however, to provide this Court with the very next sentence from the *Albert* opinion, which states: **"This is so because plaintiffs were harmed as soon as the alleged wrongful acts occurred."**[22]

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[19] *Id*.
[20] *Solak v. Sarowitz*, 153 A.3d 729, 736 (Del. Ch. 2016).
[21] RLF Br. at 10 (citing 2005 WL 1594085 (Del. Ch. June 29, 2005)).
[22] *Albert*, 2005 WL 1594085 at *18.

Similarly, RLF relies on *Isaacson, Stolper & Co. v. Artisan's Sav. Bank* but ignores that in that particular case, ***the amount of*** the client's tax deficiency, ***not the existence of*** it, was in dispute.[23] As in *Albert*, the damages immediately existed.

A review of the specific facts of all the remaining cases cited by RLF reveals that there was some form of immediate damage to the client upon the provision of the incorrect legal services. As a result, in those factual scenarios both the second and third elements of a claim of legal malpractice were met concurrently. RLF cherry-picks sentences (devoid of context) from those cases in an effort to convince this Court that it is a bright line rule that the provision of incorrect legal advice, in and of itself, constitutes a "wrongful act" and thus satisfies all elements of a legal malpractice claim. That is not Delaware law. Under Delaware law, in a negligence case the "wrongful act" is when the plaintiff is damaged as a result of the defendant's breach of its duty of care.[24] As a result, a claim for legal malpractice only exists when a client has suffered a resulting loss, and determining whether a client has suffered a resulting loss is a factually intensive inquiry based on the unique circumstances of each individual matter.

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[23] RLF Br. at 13 (citing 330 A.2d 130 (Del. 1974)).

[24] *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *7 (Del. Ch. Jan. 24, 2005); *see also Silverstein v. Fischer*, 2016 WL 3020858, at *4 (Del. Super. 2016).

B. Delaware Law Requires a "Resulting Loss"

In addition to attempting to blur the material lines between knowledge of a mistake and the existence of a claim, RLF alternatively attempts to validate the trial court's conclusion that a mere "risk of loss" is sufficient to state a legal malpractice claim. RLF's cannot square the trial court's novel theory with this Court's repeated statements that a legal malpractice claim requires a "resulting loss." RLF recognizes that it was illogical for the trial court to conclude that ISN's claim accrued at a time when the trial court acknowledged that it was not determined "***whether damages ultimately would be suffered***."[25]

Although this Court has not yet addressed the explicit question at bar of ***when does a legal malpractice claim accrue where a client learns of a legal mistake but has not suffered any actual damages***, two Superior Court cases previously reached the right conclusion and this Court can and should follow the guidance of the many state supreme courts that have had occasion to address this question.

Delaware courts have previously determined that a speculative risk of harm does not constitute "resulting loss" sufficient for a malpractice claim to accrue. Indeed, in *Balinski v. Baker*, the Superior Court wrote that "[t]he mere breach of

[25] Ex. A to ISN Br. at 6-8.

professional duty, causing only ... ***speculative harm, or the threat of future harm – not yet realized – does not suffice to create a cause of action for negligence[.]***"[26] The *Balinski* Court relied upon the well-settled and often adopted reasoning from *Budd v. Nixen*, noted above and addressed below.

Young Conaway Stargatt & Taylor, LLP v. Oki Data Corp. is also indistinguishable from the instant matter and reflects another instance of the Superior Court reaching the right conclusion.[27] RLF contends that in *Oki Data Corp.*, "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."[28] RLF asserts that Oki-Data did not have actual notice of a claim when it knew that its attorney had provided incorrect legal advice, but the effect of that incorrect legal advice was unknowable until the ALJ issued its ruling. RLF argues that this is somehow different than the facts in the present case because "Stockholder D's right to appraisal was not at issue."[29] RLF completely ignores that the results of the appraisal action might have put ISN in an even better position than it anticipated by allowing it to buy back more shares of stock – *and* for less money – than anticipated.

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[26] 2013 WL 4521199, at *3 (Del. Super. Ct. 2013).
[27] 2014 WL 4102139 (Del. Super. Ct. 2014).
[28] RLF Br. at 30.
[29] *Id*.

In both *Oki-Data* and the present case, it was "not ascertainable" whether a malpractice claim existed until a court issued a ruling establishing a resulting loss due to the attorneys' incorrect legal advice.

While RLF criticizes ISN's use of case law from other jurisdictions, those cases represent nearly fifty years of the nation's brightest jurists' efforts to answer the question posed to this Court. Courts in Pennsylvania, California, New Jersey, North Dakota, Alaska, Iowa, Arizona, California, Illinois, Kansas, Massachusetts, Montana, Nevada, New Mexico, Tennessee, and Wisconsin are all in agreement that a legal malpractice claim does not arise until actual injury results.[30] Unable to rebut their reasoning, RLF makes the obvious but immaterial observation that those cases did not decide Delaware law.

RLF cannot debate the rationale behind the *Budd* Court's conclusion that a cause of action *can* accrue "before the client sustains all, or even the greater part, of the damages occasioned by his attorney's negligence[,]" *but* there must be "***appreciable and actual*** harm flowing from the attorney's negligent conduct."[31]

[30] *See* ISN Br. at 24-25, n. 92.
[31] 491 P.2d at 436.

Nor can RLF dispute that "the determination of the time when plaintiff suffered damage raises a question of fact."[32]

C. ISN Adequately Pled that it Did Not Suffer a Resulting Loss Until the Court of Chancery Issued its Appraisal Opinion

For the first time – and contrary to the conflict waiver letter – RLF denies that it gave ISN incorrect legal advice. As undeniable as it is that RLF did indeed give ISN incorrect legal advice, it matters not at this stage of the proceedings as ISN has pled adequately that it did receive incorrect legal advice from RLF in January of 2013. Importantly, however, whether ISN would suffer a resulting loss due to RLF's incorrect legal advice was completely speculative and unknown until April 11, 2016.

RLF makes the deliberate misrepresentation in its brief that: "ISN also incurred additional legal fees after the merger as a consequence of the 'Erroneous Advice' in litigating with an additional, unanticipated appraisal claimant, and developing ISN's expert arguments in the appraisal litigation."[33] RLF cites to paragraphs 17 and 28 of ISN's Complaint. To highlight the absurdity of RLF's representation and for ease of reference, those paragraphs are copied in full below:

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[32] *Id*. at 437-38.
[33] RLF Br. at 16.

> 17. RLF advised ISN that, under the Merger, only the 356 cashed-out shares held by Stockholders A, B and C would obtain appraisal rights (the "Advice").
>
> …
>
> 28. RLF recommended and ISN retained Daniel Beaulne of Duff and Phelps to perform an expert valuation of ISN. Beaulne valued ISN at $29,360 per share. At $29,360 per share, the Merger cost to ISN would be less than $28 million - well below ISN's $34 million Merger reserve.[34]

Nothing in those paragraphs or elsewhere in ISN's Complaint supports RLF's claims that ISN incurred additional litigation costs due to the incorrect advice. To the contrary, the record demonstrates ISN incurred ***less*** litigation costs following the incorrect advice because RLF "didn't send any bills" for several months.[35]

RLF also argues that "ISN sought to leave Stockholder D as a stockholder" and that "[t]he moment Stockholder D acquired appraisal rights, and shortly thereafter exercised them, ISN was injured."[36] RLF is incorrect and can point to no

[34] A022, A027.
[35] A219.
[36] RLF Br. at 16.

actual or appreciable damages at that moment – or any time thereafter – until the Appraisal Opinion.

RLF's baseless assertions also highlight the absurdity of the fact that ISN was never given its entire file. This injustice will be addressed fully below, but it is worth noting here that RLF is asking this Court to affirm the dismissal based upon allegedly increased costs that were ***never billed to ISN***. This Court must reject all of RLF's arguments and allow the factual record to be explored and developed.

D. Public Policy Requires Reversal

As with this Court's precedents requiring a "resulting loss," other states' handling of the question at bar, and learned treatises on the topic, RLF fails to rebut the reasoning of *Connelly v. State Farm Mut. Auto. Ins. Co.*[37] Instead, RLF merely deflects and again states the obvious that *Connelly* was not a legal malpractice case. RLF ignores the public policy reasons for not requiring claimants to file "premature" placeholder claims. This reasoning applies equally to "premature" legal malpractice claims that not only could be filed but *must* be filed under the trial judge's conclusion that exposure to the "risk" of a future loss triggers the statute of limitations.

[37] *See generally* 135 A.3d 1271 (Del. 2016).

RLF does not and cannot rationalize the fact that the trial court's novel interpretation of Delaware law would have required ISN to sue RLF in Superior Court while either firing RLF or expecting RLF to zealously defend ISN's interests in the Court of Chancery appraisal action. There can be no justification for requiring ISN (the innocent client) to argue in the Superior Court malpractice action that it was likely that the Vice Chancellor would value ISN in excess of $38,317 per share, while arguing the opposite in the Court of Chancery appraisal proceedings. RLF does not even attempt to address this inequity or any of the other policy reasons underlying *Connelly* and requiring reversal in this case.

There is simply no way for RLF to dispute that a plaintiff would not have a valid cause of action for negligence in any other context, when there is just an increased risk of damages as a result of a party's breach of its duty of care. A personal injury plaintiff could not have an actionable negligence claim against the driver of a car when that driver *could have* injured the plaintiff but did not. A medical malpractice plaintiff could not have an actionable negligence claim against a physician when that physician's actions *might have* caused the patient harm. A client of an attorney cannot have an actionable legal malpractice claim when the attorney's conduct *might* cause the client to suffer a resulting loss. In all of these

scenarios, a plaintiff must suffer some damage or some *resulting loss*, to have a claim for negligence.

II. ALTERNATIVELY, RLF'S CONCEALMENT OF ISN'S ENTIRE FILE TOLLED THE STATUTE OF LIMITATIONS

ISN adequately pled that RLF's suppression of ISN's rightful property tolled the statute of limitations. ISN pled and argued this tolling theory ***in the alternative***, if the trial court rejected ISN's accrual argument. Rather than confront ISN's arguments, RLF again cherry-picks an isolated quote from a hearing as some sort of admission.[38] RLF knows very well that the context of that statement was that ISN believed it should survive the motion to dismiss because its claim did not accrue until the Appraisal Opinion.[39]

ISN articulated exactly the information it believed to be in the entire file that would support a fraudulent concealment tolling theory and further articulated the inequity ISN would suffer should the Superior Court dismiss its claims without ever allowing it to inspect its entire file.[40] For example, ISN informed the trial court that RLF advised ISN that continuing with the merger, rather than trying to undo it, was

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[38] RLF Br. At 36.

[39] *See* A104 ("So as to accrual argument, no we don't need the file. We definitely don't need the file. We think we defeat the motion to dismiss without the file. But if we are even going to come close to addressing arguments two and three of RLF's motion to dismiss, we have to have the file.").

[40] A177-240, at 40-45.

the best course of action.[41] ISN argued to the trial court that it was seeking its entire file to determine whether that advice was in ISN's best interests or RLF's best interests.[42]

ISN demonstrated that it would be unfairly prejudiced and unable to respond meaningfully to RLF's Motion to Dismiss without its entire file. RLF contends that ISN's request and, thereafter, motion to retrieve its entire file was a run of the mill "fishing expedition."[43] ISN is not seeking to nose through RLF's property – ISN was doing everything it could to gain access to its ***own*** bought and paid for property.

ISN's efforts to recover its entire file, which included its rebuffed efforts through the Office of Disciplinary Counsel, were not a "fishing expedition." ISN requested that RLF return its entire file pre-litigation. Despite their return of thousands of pages ISN already had, it is indisputable that RLF failed to return ISN's entire file. ISN then filed suit against RLF and, in its Complaint, clearly and succinctly articulated that RLF had failed to return its entire file despite multiple requests. ISN simultaneously issued narrowly tailored discovery requests to RLF requesting the return of its file. RLF refused to respond. ISN then filed a Motion to

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[41] *Id*.
[42] *Id*.
[43] RLF Br. at 37.

Compel its entire file, and, despite being informed of the exact documents being sought and the purpose for which they were being sought, the Superior Court denied ISN's motion.

RLF continues to argue that its return of less than ISN's entire file is supported by both ABA and DSBA opinions that far predate the clear and well-reasoned decision by the Court of Chancery in *TCV VI, LP, et al. v. Tradingscreen Inc.*[44] At best, those antiquated and insular advisory opinions give RLF a non-frivolous reason not to turn over ISN's files. Importantly, however, ISN is not appealing from ***RLF's*** decision or even from the ODC's decision. ISN is appealing from the Superior Court's decision.

ISN respectfully submits that the Vice Chancellor's analysis in *Tradingscreen* is entirely correct and this Court should adopt it in full. The fact that the Vice Chancellor may not have been presented with the non-binding DSBA materials is irrelevant, as the Court was presented with other states' advisory opinions that took the same position (the so-called "end product" approach). The Vice Chancellor considered the merits of the DSBA's "end product" approach and rejected it as out

[44] RLF Br. at 38-41.

of line with both the majority of jurisdictions and the Restatement (Third) of the Law Governing Lawyers.[45]

Importantly, the Vice Chancellor also explained:

> The Delaware Supreme Court has stated that "[i]n all relations with his client, an attorney is bound to the highest degree of fidelity and good faith. Strict adherence to this rule of conduct is required by time-honored, deeply rooted concepts of public policy." The preamble to the Delaware Lawyers' Rules of Professional Conduct calls for the rules to be "interpreted with reference to the purposes of legal representation and of the law itself." …[T]he entire-file approach best comports with an attorney's heightened duties to his or her clients and the candor and transparency that characterize the attorney-client relationship.[46]

ISN and its counsel respectfully agree with the Vice Chancellor, as these are the axiomatic principles that control the privilege of being a Delaware attorney.

RLF attempts to distinguish *Tradingscreen* by claiming that it only applies to cases of "ongoing litigation, in which the turnover of drafts and other uncompleted work might be necessary."[47] RLF is demonstrably incorrect, as *Tradingscreen* explicitly rejected this proposition. The Vice Chancellor explained at length the ABA's "modified end-product" approach that created an exception for "when a

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[45] *TCV VI, L.P. v. Tradingscreen Inc.*, 2018 WL 1907212, at *4 (Del. Ch. Apr. 23, 2018).
[46] *Id*. (quoting *Melson v. Michlin*, 223 A.2d 338, 344 (Del. 1966) *and* Del. Lawyers' R. Prof'l Conduct pmbl. ¶ 14.).
[47] RLF Br. at 43.

lawyer has been representing a client on a matter that is not completed and the representation is terminated."[48] His Honor then rejected the "modified end-product" approach and held that "the cases applying the entire-file approach are more persuasive and consistent with other aspects of Delaware law governing the attorney-client relationship."[49] *Tradingscreen* is indistinguishable from this matter.

RLF's attempts to convince this Court to allow RLF to withhold forever ISN's entire file, which it paid for, should be sufficient for this Court to find, as a matter of law, that RLF fraudulently concealed information that would support a tolling of the statute of limitations in this matter. As the trial court noted, ISN merely needed to allege an "affirmative act of concealment by a defendant – an actual artifice that prevents a plaintiff from gaining knowledge of the facts or some misrepresentation that is intended to put a plaintiff off the trail of inquiry."[50] Withholding ISN's file was an "affirmative act of concealment" that "prevent[ed] [ISN] from gaining knowledge of the facts." The Superior Court stated the rule correctly but misapplied it.

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[48] *Tradingscreen*, 2018 WL 1907212, at *6.
[49] *Id*.
[50] Ex. A to ISN Br. at 8.

ISN adequately pled its alternative tolling theory. At the very least, if the Court believed that ISN's Complaint lacked particularity, ISN should have been allowed to amend its allegations. The Court's dismissal with prejudice without any explanation for doing so remains perplexing. To attempt to buttress that untenable decision by the trial court, RLF resorts to citing to decisions from the Court of Chancery.[51] As this Court knows (as does RLF), the Court of Chancery's rules on amendments and dismissals with prejudice are explicitly different than the Superior Court's rules. The very case cited by RLF explains the import of Court of Chancery Rule 15(aaa):

> When defendants filed their motions to dismiss MCG had a choice to make under Court of Chancery Rule 15(aaa). It could either seek leave to amend its complaint or stand on its complaint and answer the motion to dismiss. Having chosen the latter course of action, it is bound to the factual allegations contained in its complaint. It cannot supplement the complaint through its brief.[52]

The Superior Court does not have or apply a rule similar to Rule 15(aaa).[53] It was reversible error to dismiss ISN's Complaint with prejudice.

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[51] *See* AB at 23, n.28.
[52] *MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *5 (Del. Ch. May 5, 2010).
[53] *See, e.g.*, *Otto Candies, LLC v. KPMG, LLP*, 2019 WL 1856766, at *3 (Del. Ch. Apr. 25, 2019) ("Plaintiffs initially filed their complaint in the Delaware Superior Court, which has no corollary to Rule 15(aaa).").

CONCLUSION

As shown above, this Court should reverse the Superior Court's decision granting RLF's Motion to Dismiss. This Court should reaffirm that a legal malpractice claim does not accrue until the claimant can plead a prima facie case, which requires the existence of a "resulting loss." This Court should further reaffirm that the mere risk of future damages that may never occur does not constitute a "resulting loss" and cannot trigger accrual. Specifically, this Court should hold that the record evidence demonstrates that ISN's claims did not accrue until, at the earliest, August 11, 2016, when the Court of Chancery issued the Appraisal Opinion.

This Court should also hold that a legal malpractice claim cannot be dismissed on limitations grounds where a client has requested but been refused its entire file – including but not limited to internal memoranda, billing records, and internal emails – and then filed a motion to compel based on the defendant's failure to comply with discovery. At the very least, this Court should conclude that a Superior Court action cannot be dismissed with prejudice based solely on a curable lack of pleading particularity.

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