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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 **Original Version Filed: Jan. 27, 2025** **Public Version Filed: Feb. 11, 2025**

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January 27, 2025

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NATURE OF PROCEEDINGS

In the Court Below, Plaintiff Jonathan Saunders ("Plaintiff" or "Dr. Saunders") challenged the escheatment of stock that he previously owned in Defendant Lightwave Logic, Inc. ("Lightwave"). Plaintiff brought claims for negligence and conversion against Lightwave and its transfer agent, Defendant Broadridge Financial Solutions, Inc. ("Broadridge", and collectively with Lightwave, "Defendants").[1]

It is undisputed that (a) the escheatment occurred on January 26, 2017, and (b) Plaintiff commenced this action on September 30, 2022, over five years after the challenged escheatment. Because the applicable statute of limitations is three years (pursuant to 10 *Del. C*. § 8106), Plaintiff's claims are untimely unless Plaintiff can plead and prove that the statute of limitations pertaining to his claims should be tolled.

On October 17, 2024, after allowing discovery into tolling-related issues, and considering briefing and argument on Defendants' joint motion for summary judgment based upon the statute of limitations, the Court Below granted Defendants' motion, holding that Plaintiff's claims are untimely, both as a matter of law and on

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[1] Plaintiff initially commenced his lawsuit in the Court of Chancery, and also asserted a breach of fiduciary duty claim against a Lightwave officer, Andrew J. Ashton. After the Court of Chancery questioned the basis for subject matter jurisdiction in that Court, Plaintiff voluntarily dismissed his fiduciary duty claim, with prejudice, and started over in the Superior Court. A0041 n.1; A0063 ¶¶ 1-2.

the record presented. Specifically, the Court Below held that the only tolling doctrine invoked by Plaintiff – the "inherently unknowable injury" exception (sometimes referred to as the "time of discovery rule") – was inapplicable as a matter of law to Plaintiff's claims concerning an allegedly wrongful escheatment of securities. Memorandum Opinion and Order dated October 17, 2024 ("Op.") 14-18. The Court Below further held that, based upon the record before it, Plaintiff would be unable to meet his burden to prove the elements to establish tolling under the inherently unknowable injury exception, because Plaintiff failed to present evidence that it was "practically impossible" for him to have learned of the escheat of his Lightwave stock, or that Plaintiff was "blamelessly ignorant" of the escheat of the stock. Op. 19-21.

The Court Below's well-reasoned Opinion is fully consistent with Delaware law related to escheatment, tolling of the statute of limitations, and the standards applicable to granting summary judgment. The Court Below's Opinion should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Court Below properly determined that Plaintiff's claims, as plead and in light of the record before the Court, were untimely as a matter of law. The alleged injury complained of – the escheatment of securities to the Delaware Office of Unclaimed Property ("OUP"), a public agency of the State of Delaware – is an injury that, by its nature, cannot be "inherently unknowable." Contrary to Plaintiff's argument, there is no "controlling Delaware precedent" that the Court Below disregarded, and the Court Below's holding is fully consistent with this Court's holdings, and other trial courts' holdings, on the inherently unknowable injury exception.

2. Denied. No Delaware court has applied the inherently unknowable injury exception to an alleged negligent escheatment or conversion of stock. The Court Below's holding is consistent with applicable precedent, and consistent with this Court's holdings that the inherently unknowable exception is a narrow exception to a statute of limitations bar.

3. Denied. The Court Below did nothing to mischaracterize Plaintiff's claims, and Defendants' actions were fully consistent with statutory requirements. Even assuming, for the sake of argument only, that Defendants failed to mail a written notice of the escheatment of Plaintiff's Lightwave stock, such purported failure would not render the escheatment "practically impossible" to discover. A

failure of notice would go to the underlying claims of negligence and/or conversion; it would not render Plaintiff's claims timely.

4. Denied. There are no relevant disputed issues of material fact based on the record presented in the Court Below.

5. Denied. The record evidence presented in the Court Below establishes that:

- Broadridge mailed a dormant account letter to Plaintiff in October or early November 2016, prior to remitting the Lightwave stock to the State of Delaware in January 2017 (see below at 10-13, 36-37);
- OUP mailed an outreach letter to Plaintiff in March 2017 (see below at 13-16, 37-38);
- OUP published information concerning the escheat of Plaintiff's Lightwave stock on the State's searchable unclaimed property database from February 2017 through September 2021 (see below at 16-18, 38-39);
- Plaintiff failed to notify Lightwave or Broadridge of his mailing address at any point in time for seven years (see below at 8, 32) and
- Plaintiff failed take any action as a purported stockholder of Lightwave for seven years, and he should have expected during that time to receive routine stockholder communications, such as stockholder meeting notices (see below at 8-9, 33-34, 41-42).

Any dispute concerning the mailing of annual stockholder meeting notices is not material to the parties' dispute or Defendants' motion for summary judgment.

Plaintiff cannot satisfy his burden to prove that it was "practically impossible" for him to learn of the escheat of his Lightwave stock in January 2017.

6. Denied. The Court Below properly applied the standard of review applicable to summary judgment, particularly since Plaintiff (and not Defendants) bears the burden of establishing the elements for tolling under the inherently unknowable injury exception.

7. Denied. The Court Below's ruling on Defendants' motion for summary judgment is not affected or undermined by the Court Below's earlier ruling on Plaintiff's motion to compel production of documents from Lightwave.

STATEMENT OF FACTS

A. Tolling-Related Discovery in the Court Below

Because Plaintiff's claims were untimely based upon the face of his own Complaint, Defendants initially moved to dismiss the Complaint under Superior Court Civil Rule 12(b)(6). Plaintiff's Complaint does not make *any* allegation concerning tolling of the statute, and contains absolutely no allegation of fact warranting tolling of the statute of limitations. A0041-A0059. The Court Below nevertheless denied Defendants' motions to dismiss, finding that the Complaint satisfied the very low threshold to avoid dismissal under Rule 12(b)(6). *Saunders v. Lightwave Logistics, Inc*., 2023 WL 4851630, at *3-4 (Del. Super. July 28, 2023). The Court Below directed the parties to proceed with limited discovery on the issue of whether the statute of limitations should be tolled. *Id*. at *4.

Following the Court Below's ruling on Defendants' motions to dismiss, the parties engaged in tolling-related discovery. Plaintiff and Defendants produced documents related to the application of the statute of limitations and potential tolling exceptions, as did OUP. The parties conducted depositions of Dr. Saunders, Francis M. Rudden, Vice President of Operations of and a corporate representative for Broadridge, James Marcelli, Chief Operating Officer of and a corporate representative for Lightwave, and Delaware State Escheator Brenda Mayrack, a representative for OUP. Op. 7-8. The record facts as presented below are taken

from the tolling-related discovery conducted by the parties, and where appropriate, Plaintiff's Complaint.

B. The Parties

Dr. Saunders is a resident of the State of Delaware and a plastic surgeon. A0591-A0592, 4:10-12, 6:1-5 (Saunders). From July 8, 2013 until April 2014, Dr. Saunders resided at 114 Belmont Drive, Wilmington, Delaware (the "Belmont Drive address"). A0595, 20:3-18 (Saunders). In April 2014, Dr. Saunders moved to 159 Odyssey Drive, Wilmington, Delaware (the "Odyssey Drive address"). A0595, 20:19-23 (Saunders).

Lightwave is a Nevada corporation based in Englewood, Colorado. Lightwave designs and synthesizes organic chromophores for use in its own proprietary electro-optic polymer systems and photonic device designs. A0043 ¶ 5. Broadridge is the transfer agent for Lightwave. A0043 ¶ 6; A0638, 26:25-27:8 (Rudden).

C. Plaintiff's Acquisition and Ownership of Lightwave Stock

Plaintiff acquired 55,000 shares of Lightwave common stock on July 8, 2013 from a third party. A0044-A0045 ¶ 12; A0594, 17:14-22 (Saunders). Plaintiff received his share certificate by mail at his Belmont Drive address. A0595, 20:10-18 (Saunders).

In April 2014, Plaintiff moved from the Belmont Drive address to the Odyssey Drive address. A0595, 20:13-23 (Saunders). Plaintiff testified that he provided the United States Postal Service with a forwarding order, pursuant to which he expected to receive forwarded mail directed to him at the Belmont Drive address through April 2015. A0593-A0594, 13:23-14:9 (Saunders); A0049 ¶ 19. Plaintiff and his wife knew the couple who purchased his home at the Belmont Drive address in April 2014. Plaintiff contends that the couple arranged to bring him his mail for a period of years after he moved from the Belmont Drive address to the Odyssey Drive address. A0597, 27:11-29:20 (Saunders).

Although Plaintiff moved from the Belmont Drive address to the Odyssey Drive address in April 2014, he ***never*** notified Lightwave, Broadridge, or anyone else affiliated with Lightwave, of his new address. A0596, 25:18-25 (Saunders). Indeed, it never even occurred to him to notify Lightwave of his new address. A0596-A0597, 25:18-26:6 (Saunders). Notably, Plaintiff took a more prudent approach in communicating with other parties with whom he had a business relationship. For instance, he notified his broker of his updated address. A0597, 26:7-19 (Saunders).

From July 2013 when he acquired his Lightwave shares until his stock was escheated on January 26, 2017, Plaintiff was a stockholder of record of Lightwave. Lightwave was required under its bylaws to send him a notice of Lightwave's annual

stockholders meeting. A0069 § 2.4. As a stockholder of record, Plaintiff should have been mailed a notice of annual meeting for the years 2014, 2015 and 2016 at the address on record with Broadridge. Additionally, Lightwave publishes on its website all annual meeting notices and complete proxy materials for each meeting. A0584 ¶ 4. The notices of annual meetings sent to Plaintiff would have included directions for accessing complete proxy materials for each of Lightwave's stockholders' meeting on the internet. *See* A0658, 108:25-109:23 (Rudden); A0659, 111:12-25 (Rudden); A0803-A0806; A0836-A0838.

Plaintiff contends that he never received an annual meeting notice (or any meeting notices) from Lightwave or Broadridge. A0605, 58:11-16 (Saunders). From 2013 until his shares were escheated to the State of Delaware in January 2017, Plaintiff never voted any of his Lightwave shares. A0593, 12:12-17 (Saunders); A0605, 58:11-13 (Saunders).

D. The Escheatment of Plaintiff's Lightwave Stock

In the fall of 2016, Broadridge's vendor, Keane Corporation ("Keane"), determined that Plaintiff's Lightwave shares were subject to escheatment. Delaware law requires securities such as Plaintiff's Lightwave shares to be reported to OUP and escheated after three years during which the owner expresses no interest in the

securities. 12 *Del. C.* § 1133(13).[2] Broadridge relied upon Keane to determine which securities were eligible for escheatment under various state laws. A0644-A0645, 53:23-54:4, 54:16-55:15 (Rudden).

On October 11, 2016, Broadridge notified Lightwave of several stockholders of Lightwave, including Plaintiff, whose shares were eligible to be escheated due to lack of contact from the stockholders. A0667-A0668, 144:25-146:6 (Rudden); A0668-A0669, 146:24-150:18 (Rudden); A0868, A0871-A0875. By that date, Plaintiff had not communicated with Lightwave or Broadridge in writing concerning the shares he acquired in July 2013, had not notified Lightwave or Broadridge of his current address and had not voted any of his Lightwave shares.

As noted in Broadridge's October 11, 2016 email to Lightwave, Broadridge would send a diligence letter to Plaintiff (and certain other Lightwave stockholders). A0868. In October or early November 2016, Broadridge sent a "dormant account letter" to Plaintiff at his address of record, the Belmont Drive address. A0662-A0663, 123:22-128:9 (Rudden); A0877. Mr. Rudden, Broadridge's Vice President, pulled a copy of the letter from Broadridge's print production file shortly after

[2] The Escheat Statute was amended effective February 2, 2017, shortly after Plaintiff's Lightwave stock was escheated. *See* 81 Del. Laws, Ch. 1 (Feb. 2, 2017). Like the current statute, prior law provided for a three-year period of dormancy for securities, including Plaintiff's stock. *See* 12 *Del. C.* § 1198(9)a (Supp. 2016). *See also* A0048-A0049 ¶ 26.

Plaintiff filed his Court of Chancery Complaint. A0651, 79:16-80:14 (Rudden), A0664, 131:17-133:17 (Rudden).

The dormant account letter sent by Broadridge was dated October 5, 2016, but apparently mailed within a few weeks of that date. A0663, 126:2-127:9 (Rudden). The dormant account letter advised Plaintiff that his account was falling into a dormant status, and that his Lightwave shares were eligible for escheatment. A0877. The dormant account letter provided detailed instructions for Plaintiff to avoid the anticipated escheatment of his shares, including through contacting Broadridge via mail, via telephone or via the internet. A0877. Plaintiff contends that he never received the dormant account letter sent by Broadridge. A0604, 57:2-13 (Saunders).

Plaintiff attempts to undermine the evidence that Broadridge mailed him a dormant account letter in the fall of 2016, going so far as to contend that Broadridge's dormant account letter was "never mailed." Op. Br. 11-14. However, Mr. Rudden testified in detail concerning the mailing and Broadridge's procedures. Broadridge oversees a substantial mail operation, processing billions of pieces of mail annually. A0663, 126:2-13 (Rudden). Because Broadridge processes such a large volume of mail, diligence letters such as the one sent to Plaintiff are broken up into "batches" of 5,000 or 10,000 letters. A0663, 126:17-127:9 (Rudden). The mail files are transmitted by Broadridge's vendor (Keane) to Broadridge and then broken up into batches. A0663, 127:19-128:11 (Rudden). The letters then go to a

production area for "printing, folding and closing and then out the door." A0663, 128:14-24 (Rudden). Mr. Rudden testified concerning Broadridge's practices for mailing notice, including the use of a windowed envelope and the provision of a return envelope for the stockholder to contact Broadridge. A0652, 82:11-83:25 (Rudden); A0666, 138:8-139:3 (Rudden).

Mr. Rudden extracted the copy of the dormant account letter to Plaintiff produced in this action (A0877) from Broadridge's production file used to mail 5,000 to 10,000 letters.[3] Mr. Rudden pulled the letter on October 10, 2022, ten days after Plaintiff commenced his action in the Court of Chancery. A0664, 132:3-21 (Rudden). As Mr. Rudden explained, Broadridge did not also pull and produce thousands of other letters in the production file that do not involve Plaintiff and have no relationship to this action. A0664, 132:22-133:14 (Rudden).[4]

Although Plaintiff repeatedly states that the dormant account letter was "never sent" (*see* Op. Br. 2, 11-14, 33, 44), this assertion misstates the evidence:

[3] The production file is stored by Broadridge in electronic form and retained for a period of ten years or more. A0652, 82:20-83:6 (Rudden).

[4] The reason the metadata in the produced copy of the letter has "date created" as October 10, 2022, is because that is the date that Mr. Rudden pulled the copy from the larger pdf production file. A0664, 132:12-133:17 (Rudden). Plaintiff's insinuation that the metadata on the document raises concerns about its origin or authenticity is baseless. Op. Br. 14.

Q. Did Broadridge use the U.S. mail to send the Dormant account letter to Dr. Saunders?

A. Yes.

A0666, 138:24-139:3 (Rudden).

Thus, the testimony established that the letter produced and relied upon by Defendants (A0877) was pulled out of the *actual mail production file* used to mail it, and that the letter was sent to Plaintiff by U.S. mail. True, Broadridge, which processes billions of pieces of mail annually, does not track each individual piece of mail to secure a notice of delivery to each recipient. *See* Op. Br. 14; A0666, 139:2-11 (Rudden). Plaintiff makes no suggestion that Broadridge was required to use any transmission method other than the regular U.S. mail.[5]

Broadridge caused Plaintiff's Lightwave shares to be escheated to the State of Delaware on January 26, 2017. A0050 ¶ 30; A0879-A0880.

E. OUP's Outreach Letter to Plaintiff and Publication of Notice on the OUP Unclaimed Property Database

After Plaintiff's stock was escheated to the State of Delaware, OUP – consistent with its business practice at the time – reconciled the unclaimed property report on February 17, 2017. A0734, 26:10-27:21 (Mayrack). Thereafter, consistent

[5] OUP's Escheat Handbook, attached to Plaintiff's Complaint, states: "The due diligence mailing must be sent *via first class mail* and should occur no more than 120 days and no less than 60 days before filing the report." A0124 (emphasis added); *see also* A0049-A0050 ¶ 29.

with OUP's practice at the time, OUP mailed an outreach letter to Plaintiff in March 2017. A0750-A0751, 93:22-94:6 (Mayrack). The outreach letter sent by OUP was mailed to Plaintiff's address of record (the Belmont Drive address). It informed Plaintiff that unclaimed property was reported to the State of Delaware by Lightwave. The outreach letter advised Plaintiff that he could claim his property by contacting OUP by telephone or email, or by going to OUP's website, where the property was identified. Due to the volume of outreach letters OUP sends, and consistent with regular practice, OUP did not retain a copy of the specific letter pertaining to the Lightwave stock formerly owned by Plaintiff. However, the State has a template form of letter that has remained substantially the same since 2017. A0751, 95:13-96:3 (Mayrack). The template was produced by OUP. A0883, A0885. Ms. Mayrack testified concerning the form, confirming that the letter would have been sent to Dr. Saunders on or around March 6, or March 13, 2017, based upon OUP's records and OUP practice at the time. A0758, 122:17-123:13 (Mayrack).

As with the Broadridge dormant account letter, Plaintiff contends that he never received the OUP letter. At his deposition, Plaintiff was unable to testify that OUP did not send a letter. A0600, 40:17-41:22 (Saunders).[6] Yet his attorneys now

[6] Notably, Plaintiff was aware of OUP's statement that it mailed an outreach letter to Plaintiff in March 2017 when he filed his September 2022 Complaint. *See* A0879-

insist, contrary to the record, that there is "no evidence" that OUP mailed an outreach letter to Plaintiff's record address in March 2017. Op. Br. 16. In fact, Ms. Mayrack testified at length concerning how OUP's outreach letter to Plaintiff was prepared and mailed:

> Q. Okay. How was the owner outreach letter mailed to Dr. Saunders?
>
> A. [redacted]
>
> That information would be pulled into a data file. It would be merged into a template letter. Then those letters would be mailed – in the U.S., we have first-class mail which is what is required by our statute.

A0743, 63:17-64:14 (Mayrack). Ms. Mayrack further testified that the template letter has been essentially unchanged since 2017. A0751, 95:19-96:3 (Mayrack); A0883, A0885.

A0880 (May 16, 2022 correspondence from OUP to Plaintiff referencing the March 2017 mailing). Plaintiff elected not to mention or acknowledge OUP's statement about an outreach letter when he filed his Complaint. A0600, 41:23-42:16 (Saunders).

Based upon OUP records, Ms. Mayrack testified that the outreach letter to Plaintiff was sent on March 13, 2017, a week later than what had been stated in OUP's May 10, 2022 correspondence to Plaintiff. A0758, 122:17-123:6 (Mayrack); A0879-A0880.[7]

Plaintiff's efforts to create confusion about the fact of the OUP mailing fail (Op. Br. 17-18); the only confusion concerning the letter was an internal question within OUP about the specific date of mailing – *i.e.*, whether it was March 6, 2017 or March 13, 2017. Ms. Mayrack, reviewing OUP's records confirmed that the date of mailing was March 13, 2017. Most importantly, even if there were actual confusion about whether the letter was mailed on March 6 or March 13, that issue is immaterial. *See* A0758, 122:25-124:6 (Mayrack). The evidence establishes that OUP sent an outreach letter to Plaintiff in March 2017.

In addition to mailing an outreach letter to Plaintiff, OUP caused notice to be published on the State's unclaimed property database concerning the escheat of the [redacted] formerly held by Dr. Saunders. According to State Escheator Mayrack, the notice would have been posted to OUP's database shortly after

[7] Counsel for OUP later confirmed Ms. Mayrack's testimony that the date of mailing of the outreach letter to Plaintiff was the last "batch date" stated in OUP's records, which was March 13, 2017. *See* A1358-A1359; *see also* A0890. In granting Plaintiff's motion to strike, the Court Below did not consider counsel's letter in deciding Defendants' motion for summary judgment. Op. 9 n.57.

February 17, 2017 (when OUP reconciled the escheat of Plaintiff's shares), and would have remained continuously posted until September 30, 2021 ([redacted]). A0759, 127:18-128:17 (Mayrack). The website identifying the escheatment of Plaintiff's shares would have noted Dr. Saunders' name, address (city/state only), and the holder that reported the unclaimed property (Lightwave). A0759, 128:3-6 (Mayrack).

Ms. Mayrack testified extensively concerning OUP's practices with respect to the unclaimed property database, confirming that notice of the escheatment of Plaintiff's Lightwave stock would have been published to the public database:

> …So in this case, if we go back to the reconciliation date, which was February 17th, 2017, in addition to mailing notice to the owner, we were also publishing property to our website which we have found to be a much more effective way to reach our potential claimants all around the world.
>
> [redacted].

A0756, 117:10-23 (Mayrack).

> A. [redacted] which occurred on February 17th, 2017, for the [redacted], within one business day, if the property is marked claimable and publishable, it would appear on our website.

> And it would appear with the owner's name, city and state, holder name, and then over or under $50. And, again, that is as supplied by the reporting holder.
>
> [redacted] so that people can search for their property and have – particularly, if you have a very common name, try to discern whether that's your property to claim or not.
>
> And then – so, yes, my understanding would be that from – on or about February 18th, 2017, until September 30th, 2021, that property would have appeared on our website and been searchable.

A0759, 127:20-128:17 (Mayrack). Ms. Mayrack also confirmed that OUP's records indicated that Plaintiff's Lightwave stock was "claimable and publishable," meaning that notice of the escheat would be posted to the State's website. A0759, 129:7-19 (Mayrack); A0888.

Plaintiff does not credibly refute the State Escheator's testimony related to the publication of notice on the OUP database website. The evidence establishes that notice of the escheat of Plaintiff's stock was published to OUP's searchable public database.

On June 6, 2017, the State of Delaware sold Plaintiff's [redacted] for [redacted] which amounts to [redacted]. A0054 ¶ 42; A0879.

F. Plaintiff's Claims

In 2021, Plaintiff contacted a broker to set up an account for his Lightwave stock. Plaintiff learned on July 20, 2021, that his stock had been escheated to the State of Delaware over four years earlier. Plaintiff learned of the 2017 escheatment

of his stock just a few days after providing his stock certificate to his broker. A0598, 31:11-22 (Saunders). Plaintiff does not know what his broker did to ascertain the disposition of the Lightwave shares, and he could not identify any special skills or special access that his broker required to determine that the stock had been escheated more than four years earlier. *See* A059, 31:11-33:23 (Saunders). Plaintiff readily acknowledges that he could have just as easily called the broker in 2018, as he ultimately did in 2021. A0599, 34:11-18 (Saunders).

After learning of the escheat of his Lightwave shares, Plaintiff made further inquiries with OUP. A0054 ¶¶ 41-42. OUP closed its investigation into the escheat of Plaintiff's stock with a letter to Plaintiff dated May 16, 2022. A0879-A0880. OUP's letter informed Plaintiff that his Lightwave shares had been escheated to the State by Lightwave in January 2017 and that OUP had sent the outreach letter described above in March 2017. OUP's correspondence also identified [redacted] that were reported as unclaimed. On September 30, 2021, OUP sent Plaintiff a check for the proceeds of his Lightwave stock, and the other unclaimed property identified by OUP. *See* A0879.[8]

On September 30, 2022, five years and eight months after his Lightwave shares had been escheated, and fourteen months after he was informed of the January

[8] The [redacted] paid to Plaintiff represented a 25% profit on his initial $55,000 Lightwave investment. A0594, 17:14-19 (Saunders).

2017 escheat in July 2021, Plaintiff commenced his action in the Court of Chancery seeking relief related to the escheat of his Lightwave stock.

ARGUMENT

I. THE INHERENTLY UNKNOWABLE INJURY TOLLING EXCEPTION HAS NO APPLICATION TO PLAINTIFF'S CLAIM INVOLVING ESCHEATMENT OF HIS LIGHTWAVE STOCK, AS A MATTER OF LAW

A. Question Presented

Did the Court Below properly hold that the inherently unknowable injury exception is inapplicable to Plaintiff's claims for negligence and conversion as a matter of law? Defendants do not appeal the Court Below's ruling on this issue. Plaintiff preserved this issue for appeal in his Answering Brief opposing Defendants' motion for summary judgment in the Court Below. A0940-A0946.

B. Standard and Scope of Review

A trial court's grant of summary judgment is subject to *de novo* review in this Court. *See, e.g.*, *Employees' Ins. Co. of Wausau v. First State Orthopaedics, P.A.*, 312 A.3d 597, 606 (Del. 2024); *State Farm Auto. Ins. Co. v. Davis*, 80 A.3d 628, 632 (Del. 2013).

C. Merits of Argument

The Court Below determined that claims of negligence and conversion related to the escheatment of securities are not claims where the unknowable injury exception applies. Op. 14-18. The Court Below held that: "The escheatment of Dr. Saunders' Lightwave shares wasn't inherently unknowable as that is understood

under Delaware law." Op. 15. The Court Below's holding is consistent with Delaware law and should be affirmed.

The sole basis that Plaintiff asserted for tolling the statute of limitations is the inherently unknowable injury exception. "Under the 'discovery rule' a statute is tolled when the injury is 'inherently unknowable' and the claimant is blamelessly ignorant of the wrongful action or injury complained of.' Otherwise 'ignorance of the cause of action will not toll the statute[] absent concealment or fraud.'" *ISN Software Corp. v. Richards, Layton & Finger, P.A.*, 226 A.3d 727, 732 (Del. 2020) (citations omitted). In the absence of an *inherently unknowable* injury, the statute of limitations will run at the time of the wrongful act, and ignorance of a cause of action, absent concealment or fraud, will not stop it. *Id*. at 732 n.21.

As the Court Below recognized, the inherently unknowable injury exception, by its nature, is quite narrow. The exception has its origin in medical malpractice and other professional malpractice cases, where some professional knowledge or expertise is necessary for a plaintiff to recognize her injury. Op. 15. *See, e.g.*, *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).[9] The exception rests in part upon "the

[9] *Layton* involved the quintessential type of "unknowable" injury: the plaintiff alleged that a surgeon negligently left a medical instrument in her abdomen. 246 A.2d at 795.

inability of a layman to detect a professional's negligence." Op. 15 n.83 (citing *Isaacson, Stolper & Co*., 330 A.2d at 133).

Although the discovery rule has since been applied in other contexts, it remains an exception that can only be invoked in narrow, limited circumstances.

> At bottom, when available in a Delaware action, any "[a]pplication of the time of discovery rule delays the starter's gun for the statute of limitations [only] in *certainly narrowly carved out limited circumstances when the facts at the heart of a claim are so hidden that a reasonable plaintiff could not timely discover them*."

Op. 16 (emphasis added) (citing *AM Gen. Holdings v. Renco Group, Inc*. 2016 WL 4440476, at *15 (Del. Ch. Aug. 22, 2016)).

The Court Below recognized that, in cases involving financial instruments and transactions, there is an interest in finality and certainty that does not exist in cases where the inherently unknowable injury exception finds its origins, *i.e.*, cases of professional malpractice and cases involving "latent" injuries. In cases involving financial transactions and instruments, Delaware courts have refused to extend the statute of limitations. *See, e.g*., *Mastellone v. Argo Oil Corp*., 82 A.2d 379, 383 (Del. 1951) ("Plaintiff's long-maintained ignorance of what happened to his stock… gives him no aid"); *Artesian Water Co. v. Lynch*, 283 A.2d 690, 692 (Del. 1971) (plaintiff's lack of awareness that dividends were being sent to a different person at the wrong address not a basis to extend the statute of limitations). More generally, the Court Below recognized that requirements of certainty and finality applicable to

financial instruments are comparable in the context of the escheatment regime at issue in this case: It is important that holders of unclaimed property be able to follow the statutory requirements related to reporting unclaimed property to the State in a timely and efficient manner. *See* Op. 16-17.

Although the Court Below's decision is fully consistent with Delaware case law, the Court Below also considered persuasive authority from other jurisdictions. Op. 16-18; *see also Menichini v. Grant*, 995 F.2d 1224, 1231 (3d Cir. 1993) (applying Pennsylvania law, "…in a conversion claim against a party not engaging in fraudulent concealment, the policies of finality and certainty are best achieved by applying the statute of limitations without the discovery rule exception); *Kuwait Airways Corp. v. American Sec. Bank, N.A.*, 890 F.2d 456, 461 (D.C. Cir. 1989), *on reh'g* (Jan. 10, 1990) ("the injury…in a conversion case manifests itself at the time the wrongful act occurs…Thus, the *injury* in the case is not latent.") (emphasis in original); *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 623-24 (Tenn. 2002) ("The law therefore presumes that the plaintiff is not ignorant of the conversion. Unlike other situations in which the discovery rule has been applied, persons alleging conversion, and particularly conversion of a negotiable instrument, generally should be able to easily and quickly detect the loss and take appropriate action.").

Plaintiff notes that Delaware trial courts in some cases have applied the inherently unknowable injury exception to cases involving commercial relationships between sophisticated parties. *See* Op. Br. 27-28. Yet Plaintiff fails to cite the Court to any Delaware case in which the inherently unknowable injury exception was applied to a case involving an escheatment of property or the conversion of property, unaccompanied by fraud or concealment. The cases that Plaintiff does cite are inapposite. In *BTIG, LLC v. Palantir Techs., Inc.*, 2020 WL 95660, at *7 (Del. Super. Jan. 3, 2020), a case decided on a motion to dismiss, the plaintiff alleged that defendant kept secret documents from becoming public, thus engaging in concealment. No evidence of concealment is even hinted at by Plaintiff. In *Certainteed Corp. v. Celotex Corp*., 2005 WL 217032, at *8 (Del. Ch. Jan. 24, 2005), also a case decided on a motion to dismiss standard, the Court assumed given the procedural posture that plaintiff would be able to demonstrate "misrepresented environmental conditions" at specific facilities. Again, Plaintiff here can point to no misrepresentation or concealment by Defendants. In *Serviz, Inc. v. ServiceMaster Co., LLC*, 2022 WL 1164859, at *5 (Del. Super. Apr. 19, 2022), the Superior Court held (on a motion to dismiss a counterclaim and accepting the allegations of the counterclaim as true) that the only way counterclaimant could have discovered its cause of action would be to have had access to the private emails and text messages of its adversary. *Otto Candies, LLC v. KPMG LLP*, 2019 WL 994050, at *29 (Del.

Ch. Feb. 28, 2019), concerned allegations of a fraudulent scheme that was hidden until it was uncovered by governmental investigators.

As the Court Below found, Plaintiff's claimed injury in this case – the escheat of stock to a public agency of the State of Delaware pursuant to Delaware's unclaimed property laws – does not constitute the type of injury that can be deemed "inherently unknowable." In January 2017, Broadridge caused Plaintiff's Lightwave stock to be escheated to the State of Delaware. This was an act involving a Delaware public agency, OUP. By its nature, an escheatment is "knowable." In the ensuing five years, there was literally nothing that prevented Plaintiff from learning of the escheat. In fact, when he contacted a broker and provided the broker with his stock certificate in July 2021, he learned within a few days that his stock had been escheated years earlier. A0598, 31:11-22 (Saunders). Discovering the escheatment required no professional or expert knowledge or access to otherwise hidden information. *See* A0598, 31:11-33:23 (Saunders). Moreover, Plaintiff acknowledges that he could have just as easily called the broker in 2018, as he ultimately did in 2021. A0599, 34:11-18 (Saunders). In short, nothing about the escheat of Plaintiff's shares was or could be deemed "unknowable."

Plaintiff proceeds upon the unfounded assumption that, since he is an unsophisticated investor who simply placed a paper stock certificate in his home safe, there was no reasonable way for him to know that his stock would be subject

to escheat. *See* Op. Br. 2, 8. Plaintiff's overarching theme that he could not be expected to understand how unclaimed property laws work because he is unsophisticated as an investor fails, because "ignorance of the law is no excuse."

> Plaintiff's theory [claiming an inherently unknowable injury] ignores the maxim that ignorance of the law is no excuse. In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich*, the United States Supreme Court wrote "We have long recognized the common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally."

Caputo v. Kirkwood Fitness Clubs, Inc., 2011 WL 1465464, at *1 (Del. Super. Apr. 15, 2011) (citing *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 581 (2010)), *aff'd*, 72 A.3d 501 (Del. 2013) (Table).

Even putting aside the written notices that Broadridge and OUP provided to him, and the unrefuted evidence that the escheat of Plaintiff's stock was disclosed publicly via OUP's unclaimed property website, Plaintiff's contention that he was unable to learn of the escheatment is completely untenable. Guidelines published by OUP direct that corporate stock be treated as abandoned where, for three years, an owner has failed to cash a dividend or correspond *in writing* regarding the stock with the issuer. A0096. By his own admission, Plaintiff did nothing related to his

Lightwave stock for eight years, from the time he acquired it in 2013 until he contacted a broker in 2021, and quickly learned of the escheat.[10]

Plaintiff's effort to contend that the "law of the case" doctrine somehow precluded the Court Below from ruling the inherently unknowable injury exception unavailable, as a matter of law, is misplaced. *See* Op. Br. 24 n.23. As noted above, Plaintiff's Complaint failed to allege <u>*any*</u> basis to toll the statute of limitations. *See generally* A0041-A0059. Although in briefing on Defendants' motion to dismiss, Plaintiff relied on the inherently unknowable injury exception, his Complaint is open-ended. In denying Defendants' motion to dismiss, the Court Below noted that it "could not speculate" on whether Plaintiff could have discovered the escheatment in a relatively simple fashion. *Saunders*, 2023 WL 4851630, at *3. Moreover, because Plaintiff's Complaint was so vague as to the issue of tolling, the Court Below left open the possibility that Plaintiff might attempt to establish bad faith conduct or concealment. *See* Op. 7-8 ("The Court denied Defendants' motion to dismiss, reasoning that – *on the then-extant record and with the accusation of bad*

[10] Plaintiff asserted that he had a few casual conversations with executives of Lightwave at some point prior to 2017. *See* Op. 3-4. Even if some occasional conversations between Lightwave executives and Plaintiff occurred at a country club, they would have ceased in 2017, when Plaintiff's friend Ross Fasick passed away. *See* A0595, 18:13-16, 19:3-20:2 (Saunders). In any event, such informal, happenstance conversations are insufficient to prevent an abandonment of Plaintiff's stock under OUP guidance.

faith lingering – it was at least reasonably conceivable that Dr. Saunders might be able to carry his burden on a tolling exception.") (emphasis added).[11] Therefore, the Court Below directed the parties to engage in tolling-related discovery and develop a more complete record. Op. 8. It was permissible for the Court Below to allow for the creation of a more fulsome record on tolling before definitively deciding that Plaintiff's claims were barred as a matter of law (although Defendants would have preferred that the Court Below simply dismiss Plaintiff's defective Complaint outright). Ironically, Plaintiff – having been generously afforded an opportunity for discovery related to tolling the statute for his stale claims – now seeks to fault the Court Below for Plaintiff's subsequent inability to present any coherent basis for tolling. The law of the case principle comes into play "when a specific legal principle is applied to an issue presented by facts which remain constant throughout the course of the litigation." *Frederick-Conway v. Baird*, 159 A.3d 285, 296 (Del. 2017) (citation omitted). Nothing in the law of the case doctrine prohibits a court

[11] Plaintiff is completely unable to demonstrate that Defendants have acted in bad faith. In addition to preventing Plaintiff from tolling the statute of limitations, Plaintiff's inability to allege or prove bad faith ultimately dooms his claims as a substantive matter, since both Lightwave and Broadridge are immune for the good faith delivery of securities to OUP in accordance with the State's escheat requirements. 12 *Del. C*. § 1153(b); *accord* 12 *Del. C*. § 1203(b) (Supp. 2016); *A.W. Fin. Servs., S.A. v. Empire Resources, Inc.*, 981 A.2d 1114, 1128-31 (Del. 2009).

from revisiting a legal ruling on the basis of a more developed record. *Id*. at 296 (court can reconsider a prior decision based upon "changed circumstances").

The Court Below's holding that the escheatment of stock challenged in this case is not an injury subject to tolling under the inherently unknowable injury exception is well-reasoned, consistent with law, and should be affirmed.

II. THE COURT BELOW PROPERLY FOUND THAT DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT BASED UPON THE RECORD PRESENTED AND THE PROPER APPLICATION OF THE INHERENTLY UNKNOWABLE INJURY EXCEPTION

A. Question Presented

Did the Court Below properly conclude, based upon the record adduced by the parties through tolling-related discovery, that Defendants are entitled to summary judgment, even if the inherently unknowable exception applies? Defendants do not appeal the Court Below's ruling on this issue. Plaintiff preserved this issue for appeal in his Answering Brief opposing Defendants' motion for summary judgment in the Court Below. A0940-A0946.

B. Standard and Scope of Review

A trial court's grant of summary judgment is subject to *de novo* review in this Court. *See* Argument, Section I.B., above.

C. Merits of Argument

1. Plaintiff Failed to Present Evidence Supporting the Application of the Inherently Unknowable Injury Exception

In reviewing a trial court's order granting summary judgment, this Court will treat all facts in the light most favorable to the non-moving party. *Stroud v. Grace*, 606 A.2d 75, 81 (Del. 1992). "When the moving party sustains the initial burden of showing the nonexistence of any material issues of fact, the burden shifts to the non-moving party to substantiate its adverse claim by showing that there are material issues of fact in dispute… It is not enough for the opposing party merely to assert

the existence of such a disputed issue of fact." *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) (citation omitted). Where the movant carries its initial burden, the non-movant is required to "to present some specific, admissible evidence that there is a genuine issue for trial." *Barbosa v. Bob's Canine Academy, Inc.*, 2017 WL 2492042, at *5 (Del. Ch. May 19, 2017) (Master's Report) (citations omitted), *report adopted*, 2017 WL 2444813 (Del. Ch. June 5, 2017) (Order).

Critically for this case, it is ***Plaintiff***, and not Defendants, who must ultimately demonstrate the requirements for application of the inherently unknowable injury exception. "The party claiming that tolling applies has the burden of showing that there were 'no observable or objective factors to alert them of the injury and that they were blamelessly ignorant.'" *Altenbaugh v. Benchmark Builders, Inc.*, 2021 WL 1215828, at *2 (Del. Super. Mar. 26, 2021) (quotation omitted), *aff'd*, 271 A.3d 188 (Del. 2022) (Table). *See also*, *e.g.*, Op. 12 & n.69, 14 & n.78; *Nat. Union Fire Ins. Co. of Pittsburgh, PA v. Newark Recycling Co.*, 2019 WL 4751537, at *2 (Del. Super. Sept. 26, 2019) (citing *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999)), *aff'd*, 228 A.3d 409 (Del. 2020) (Table).

Plaintiff failed to provide evidence sufficient to establish, as a matter of record fact, that his claimed injury was "inherently unknowable." Plaintiff cannot establish that it was "practically impossible" for him to discover the escheat of his stock: ***All***

he needed to do was ask. In 2021, he inquired with a broker about his stock, and learned in a few days that the stock had been escheated in January 2017. As well stated by the Court Below: "Reasonable (or any) diligence on Dr. Saunders' part during that four year period [*i.e*., 2017 – 2021] surely would have revealed that his stock had escheated – discovery of the injury was, at most, ***a phone call or a mouse click away***." Op. 21 (emphasis added). Despite having ample opportunity to develop his claims, including through discovery, Plaintiff completely fails to provide evidence that it was "practically impossible" for him to learn the status of his Lightwave stock. *See, e.g.*, *In re Tyson Foods, Inc., Cons. S'holder Litig*., 919 A.2d 563, 582-85 (Del. Ch. 2007) (practical impossibility standard requires a showing that "[n]o objective or observable factors may exist that might have put the plaintiffs on notice of an injury"); *Krahmer v. Christie's, Inc*., 903 A.2d 773, 781-82 (Del. Ch. 2006) (tolling disallowed where plaintiffs "could have discovered" that painting was not authentic through reasonable diligence); *AM General Holdings*, 2016 WL 4440476, at *14 ("practical impossibility" not demonstrated where plaintiff had "ample opportunity and incentive to discover precisely the sort of injury it now alleges it has suffered"). "An injury is not 'inherently unknowable' where a plaintiff possesses all of the tools to discover it, but simply waits a while." *Smith v. Donald L. Mattia, Inc*., 2012 WL 252271, at *3 n.18 (Del. Ch. Jan. 13, 2012).

Nor has Plaintiff come forward with evidence that would establish that he was "blamelessly ignorant" concerning the escheat of his Lightwave stock. Plaintiff provides no explanation for his failure to notify Lightwave of his correct address after he moved in 2014, and during the ensuing seven years. A0596, 25:18-25 (Saunders). Plaintiff contends that the people who purchased his former residence at the Belmont Drive address still deliver mail to him sent to that address a decade after he moved. Op. Br. 8; A0597, 27:11-29:20 (Saunders). Notably, Plaintiff provided no documentation concerning these purported mail forwarding procedures he has with his friends. *See* A0597, 27:25-28:12 (Saunders). There is no affidavit from the people who purportedly collect and forward his mail; there are no written procedures for their purported handling of mail sent to Plaintiff's Belmont Drive address; and there is no written log of mail collected for Plaintiff during any period of time.

In short, Plaintiff could have undertaken the common sense tactic of telling Lightwave where he lived, at some point between 2014 and 2021. He took similar measures with other entities he did business with. A0597, 26:7-19 (Saunders). His failure to take ordinary measures to notify Lightwave (or Broadridge) of his current address deprives him of the ability to now contend that his failure to discover the escheat of his Lightwave stock was blameless.

Plaintiff's flawed attempt to assert that the escheat was unknowable is not salvaged by his repeated claim that he never received any mail from Lightwave or Broadridge from 2014 through 2021. Op. Br. 9.

As noted above, Lightwave's bylaws require Lightwave to mail notice of its annual stockholders' meeting. As a stockholder of Lightwave, Plaintiff is charged with knowledge of the contents of corporate bylaws. *See* 18 C.J.S., Corporations § 402; *cf. Schnell v. Chis-Craft Indus., Inc*., 285 A.2d 430, 436 (Del. Ch.) (citing New York authority observing that stockholders are presumed to have knowledge of the contents of bylaws), *rev'd on other grounds*, 285 A.2d 437 (Del. 1971). Public filings of Lightwave also referenced annual meetings of stockholders and included the notices and proxy materials distributed for such meetings. A0584 ¶ 4; A0802-A0833; A0835-A0865

Plaintiff had access to sufficient information that would cause him to question why he was not receiving the bylaw-mandated meeting notices. If Plaintiff *never* received any meeting notices or other information from Lightwave for seven years, as he contends, he should have investigated why. He did not do so. *See Weinbach v. Boeing Co*., 6 F.4th 855, 858 (8th Cir. 2021) (applying Missouri law, where stockholder did not receive annual Form 1099-DIVs for dividends for several years, she should have investigated, and would have discovered the escheatment of her stock), *cert. denied*, 142 S. Ct. 1190 (2022). A reasonably diligent stockholder, over

a period of seven years without having received any corporate communications, would look into why routine stockholder communications were not being received. *See Eluv Holdings (BVI) Ltd. v. Dotomi, LLC*, 2013 WL 1200273, at *10 (Del. Ch. Mar. 26, 2013) (failure to receive routine stockholder communications and meeting notices would put plaintiff on notice that adversary did not consider plaintiff to be a stockholder); *see also*, *e.g.*, *Rodriguez Canet v. Morgan Stanley & Co.*, 419 F. Supp. 2d 90, 95 (D.P.R. 2006) ("It is elementary that any reasonable investor would take steps to periodically ascertain the status of his/her account."); *Wu v. Bitfloor, Inc.*, 460 F. Supp. 3d 418, 428 (S.D.N.Y. 2020) (refusing to apply discovery rule where plaintiff's Bitcoin account shut down and plaintiff failed to discover injury for five years, while taking no action).

Because Plaintiff failed to adduce or present any evidence that it was "a practical impossibility" for him to discover the escheat of his Lightwave stock, or that his own conduct was blamelessly ignorant, Plaintiff's attempt to invoke the inherently unknowable injury exception fails.

2. There Are No Genuinely Disputed Issues of Material Fact That Preclude Summary Judgment in Defendants' Favor

a. Plaintiff's Claims Concerning the Mailings and Public Notice on the OUP Database Do Not Present a Disputed Issue of Material Fact

Unable to present any plausible claim that it was impossible to learn of the escheat of his Lightwave stock, Plaintiff focuses his appeal here on trying to

undermine the clear evidence that (1) Broadridge sent Plaintiff a dormant account letter in October or November of 2016, (2) OUP separately sent Plaintiff an outreach letter in March 2017, and (3) OUP posted notice of the escheat of Plaintiff's Lightwave stock on the State's searchable unclaimed property database. *See* Op. Br. 35-43.

As the Court Below recognized, a party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to material facts." Op. 19 n.95 (citing *Brown v. Dover Downs, Inc*., 2011 WL 3907536, at *2 (Del. Super. Aug. 30, 2011) (quoting *Brzoska*, 668 A.2d at 1364), *aff'd*, 38 A.3d 1254 (Del. 2012) (Table)). Here, Plaintiff's strained efforts to contend that Broadridge never mailed a notice, that OUP never mailed an outreach letter, and that OUP never posted notice of the escheat of the Lightwave stock to OUP's database in accordance with regular practice are exactly what the Court Below described: "Vain attempts….to disrupt the timeline." Op. 19 n.95. It is almost as if Dr. Saunders starts with the premise that everyone – the sworn witnesses from Broadridge and OUP – is just making stuff up, even though their testimony is corroborated by an extensive documentary record. Plaintiff tries to manufacture *some* "metaphysical doubt as to material facts." That is insufficient to stave off summary judgment. *See Brzoska*, 668 A.2d at 1364.

As summarized above, Broadridge's Vice President Mr. Rudden provided a copy of the dormant account letter that Broadridge sent to Plaintiff at his address of record (the Belmont Drive address). A0877. Mr. Rudden testified that he pulled the dormant account letter from Broadridge's stored mail production file, which was the source of Broadridge's mailings to Plaintiff and thousands of other stockholders. A0651, 79:16-80:14 (Rudden); A0554, 131:17-133:17 (Rudden). Contemporaneous with the mailing, Broadridge notified Lightwave via email that Plaintiff's stock was subject to escheat and that he would be provided a dormant account notice. A0868, A0871-A0875.

In his Opening Brief, Plaintiff points out that, although the dormant account letter was dated October 5, 2016, the letter may not have been mailed until early November 2016. Op. Br. 12-14. On October 11, 2024, Broadridge sent the list of Lightwave stockholders eligible for escheatment to Lightwave. A0868. Mr. Rudden testified that normally Broadridge would send the issuer notice of potentially escheated accounts three or four weeks before mailing dormant account letters. A0649-A0650, 73:6-74:8 (Rudden). Assuming the letter to Plaintiff was mailed three or four weeks after October 11, 2016, it would have been mailed in the early part of November 2016. Op. Br. 13-14. Further, when Plaintiff inquired about the escheat in 2021, a Broadridge representative informed Lightwave that "[a] due

diligence letter would have been mailed to the address of record in November of 2016." A1291.

Plaintiff's quibbling does not create a disputed issue of material fact. Whether the letter was mailed in October or early November 2016 is not material. Mr. Rudden testified clearly concerning Broadridge's mail practices, and that he pulled the dormant account letter directed to Plaintiff from the mail print production file. His testimony establishes that Broadridge mailed the letter. *See Hodges v. Hartford Underwriters Ins. Co*., 2008 WL 4152687, at *3-4 (Del. Super. Aug. 29. 2008) (granting summary judgment based in part upon affidavit that explained defendant's mailing procedures and appended a copy of a transmittal letter and amended declaration page, notwithstanding plaintiffs' denial of receipt of the mailing).

Plaintiff's attempt to twist the record evidence concerning OUP's mailing of an outreach letter is also unavailing. As State Escheator Mayrack testified, OUP's records indicate that OUP mailed an outreach letter to Plaintiff in March 2017. Ms. Mayrack explained that an outreach letter would be batched and mailed sometime after the reconciliation of the reported unclaimed property. Based upon review of OUP's records, Ms. Mayrack testified that the letter to Plaintiff would have been mailed on March 13, 2017, which was the last "batch date" associated with Plaintiff's Lightwave stock. A0758, 122:17-123:13 (Mayrack); A1309. The "batch dates" were the dates that recently reconciled escheatments were "batched" for

mailing of notices. An outreach mailing would have been gone out contemporaneous with the batch date in OUP's records (meaning within a day of the batch date). A0758, 125:2-12 (Mayrack). Ms. Mayrack further testified concerning the template letters that OUP used at the time. A0883, A0885.

In his Opening Brief, Plaintiff makes much of the fact that there are several different batch dates for the Lightwave stock listed in OUP's records, and there was some confusion in OUP's files concerning the specific date on which the outreach letter was mailed. Op. Br. 17-18. Plaintiff's speculation does not defeat the testimony concerning OUP's practices at the time, and the State Escheator's testimony that OUP mailed an outreach letter to Plaintiff in March 2017.[12]

Plaintiff does not seriously dispute that notice of the escheatment of his stock was posted on OUP's unclaimed property database. As discussed above, Ms. Mayrack provided clear and unequivocal testimony concerning OUP's practices related to posting on the OUP website. Once the property was reconciled, it was posted to OUP's public database, which was fully searchable by the public. A0759-A0760, 127:20-128:17 (Mayrack). In OUP's records, the escheatment of the Lightwave stock formerly owned by Plaintiff was marked "publishable" and

[12] As noted above, OUP's counsel provided an explanation for the records' referencing multiple "batch dates," and confirmed March 13, 2017 as the correct date for mailing of notice to Plaintiff. A1358-A1359.

"claimable" which indicates that it would have been listed on OUP's website. A0759-A0760, 129:3-130:11 (Mayrack); A0888.

Plaintiff offers no evidence to contradict the evidence that the escheat of his Lightwave stock was published on OUP's website. Plaintiff first contends that he "was not aware of the website until he discovered his shares had been escheated in 2021." Op. Br. 19. Of course, Plaintiff's lack of awareness is irrelevant.[13] Likewise, Plaintiff pointing out that witnesses from Lightwave and Broadridge did not know details concerning the OUP website fails to rebut the clear evidence provided directly from OUP. *See* Op. Br. 19.

In light of the unrefuted evidence concerning publication of the escheat to OUP's unclaimed property database, Plaintiff is completely unable to meet his burden to establish that learning of the escheat was a "practical impossibility." *Jepsco, Ltd. v. B.F. Rich & Co., Inc.*, 2013 WL 593664, at *11 (Del. Ch. Feb. 14,

[13] As established in the Court Below, [redacted] a frequently featured [redacted] in OUP's unclaimed property system. *See* A0760, 130:12-132:13 (Mayrack). Plaintiff failed to check the State's database even when evidence presented in this case illustrated that [redacted] on OUP's website. Although the [redacted] in the proceedings below in November 2022, Plaintiff never reviewed the website to confirm that the property was in fact related to him or to claim it. A0602-A0604, 46:15-57:1 (Saunders); A0585-A0596 ¶¶ 5-9; A0903-A0907; A0911-A0919; A1344 ¶¶ 5-6; A1382-A1385. Remarkably, all of the unclaimed property associated with Plaintiff and identified as of November 2022 remains listed as unclaimed, and associated with Plaintiff, on OUP's searchable database as of the date of this Brief.

2013) (statute of limitations not extended where claims based upon a publicly disclosed settlement, even though specific terms of settlement were sealed); *Marvel v. Clay*, 1995 WL 465322, at *4 (Del. Super. June 15, 1995) (refusing to apply time of discovery rule where Division of Motor Vehicles records provided public notice of ownership concerning disputed motorcycle), *aff'd*, 676 A.2d 905 (Del. 1996) (Table); *Seidel v. Lee*, 954 F. Supp. 810, 816-17 (D. Del. 1996) (declining to apply tolling exception to plaintiff's claims where public corporate filings with the SEC disclosed the matters to be challenged by plaintiff); *Brown v. Court Square Capital Mgmt., L.P.*, 2022 WL 841138, at *3 (Del. Ch. Mar. 22, 2022) ("…defendants cannot show that it was practically impossible to discover a publicly disclosed fact"), *aff'd*, --- A.3d ---, 2024 WL 4865947 (Del. Nov. 11, 2024) (Order); *accord Ocimum Biosolutions (India), Ltd. v. LG Corp.*, 2021 WL 931094, at *6 (D. Del. Mar. 11, 2021) (declining to apply inherently unknowable injury exception where alleged misuse of confidential material had been publicly disclosed through defendants' publication of scientific articles); *Yankton County, S.D. v. United States*, 135 Fed. Cl. 620, 630 (Fed. Cl. 2017) ("any matter of public record is by definition knowable") (internal citation omitted), *aff'd*, 753 F. App'x 905 (Fed. Cir.), *cert. denied*, 140 S. Ct. 115 (2019).

b. Plaintiff's Claims Concerning Lightwave's Annual Meeting Notices Do Not Present a Disputed Issue of Material Fact

Broadridge believes that notices of Lightwave's annual stockholder meetings conducted August 21, 2014, May 15, 2015, and May 20, 2016 would have been mailed to Plaintiff at the Belmont Drive address, the address of record for Plaintiff (and the address he used when he acquired his Lightwave stock in July 2013). During those years, Plaintiff was a stockholder of record of Lightwave. The annual meeting notices would have been accompanied with a notice of internet availability related to the proxy materials, directing Plaintiff to the complete proxy materials related to the meeting. *See* A0658-A0659, 109:16-110:9 (Rudden); A0659, 111:16-25 (Rudden). As noted above, the annual meeting notices, and related proxy materials, are all publicly posted on Lightwave's website as well. *See* A0584 ¶ 4. Plaintiff claims to have never received a mailed copy of an annual meeting notice. A0605, 58:14-16 (Saunders); Op. Br. 14-15.

While the parties dispute whether Broadridge mailed annual meeting notices and other proxy materials to Plaintiff from 2014 through 2016, that dispute is immaterial to Plaintiff's claims or the tolling of the statute of limitations.

As discussed above, accepting Plaintiff's assertion that neither Lightwave nor Broadridge sent him <u>*any*</u> correspondence from 2013 through 2021, that state of affairs would have caused a reasonable stockholder to inquire. The Lightwave

bylaws (which Plaintiff attached to his Complaint) unambiguously require Lightwave to send notices of annual meetings. A0069 § 2.4. Similarly, Lightwave's annual meeting proxy materials were prominently posted to Lightwave's website during all of the years that Plaintiff claims he never received any mailings related to Lightwave. A0584 ¶ 4. The publicly-filed proxy materials conspicuously state that Lightwave has mailed to its stockholders a notice of internet availability, with instructions concerning voting at the annual meeting. *See, e.g.*, A0836 ("On or about April 7, 2015, we mailed to our stockholders a Notice of Internet Availability of Proxy Materials containing instructions on how to access our 2014 Proxy Statement and Annual Report and vote online, by phone, in person or by mail."); A0839 ("We intend to mail the Notice on or about April 7, 2015 to all stockholders of record entitled to vote at the Annual Meeting."). Publicly available documents clearly stated that Lightwave would send an annual meeting notice to stockholders of record. These publicly available documents served to put Plaintiff on notice that either Lightwave-related mailings were failing to reach him, or the status of his ownership of Lightwave stock was in question. *See Seidel*, 954 F. Supp. at 816-17 (declining to apply tolling exception to plaintiff's claims where public corporate filings with the SEC disclosed the matters to be challenged by plaintiff). If Plaintiff were not receiving mailed notices, as he now contends, he should have inquired with Lightwave. He did not.

In short, Plaintiff's contention concerning the Lightwave annual meeting notices constitutes an irrelevant distraction. It does nothing to enhance Plaintiff's unsupportable claim that the escheat of his stock was "inherently unknowable."

Similarly, Plaintiff's contention that he was somehow unfairly deprived of discovery related to the annual meeting notices is meritless. Op. Br. 21. While Lightwave indicated that it would not be relying on certain pre-2016 communications sought by Plaintiff in his motion to compel, Broadridge's counsel explained during the same hearing that Broadridge would be relying on the Lightwave bylaws provisions related to annual meetings, as well as the publicly available meeting notices, in order to demonstrate Plaintiff's clear lack of diligence. A0535-A0536, 29:14-30:17 (Hearing Transcript). That is precisely the argument that was advanced in the Court Below, and that is advanced here. It requires no discovery – the proxy materials are public records, and Broadridge's representative testified concerning the mailings. *See* A0658-A0659, 109:16-110:9 (Rudden); A0659, 111:16-25 (Rudden). Plaintiff's contention that there is some aspect of his motion to compel that affects the arguments presented above, or the Court Below's ruling on summary judgment, is wrong.

CONCLUSION

For the reasons stated above, Plaintiff's claims are time-barred. This Court should affirm the Court Below's Order granting summary judgment in favor of Defendants in its entirety.

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