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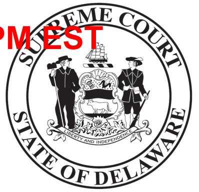

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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] **PUBLIC VERSION** **FILED FEBRUARY 26, 2025**

APPELLANT'S REPLY BRIEF

MORRIS JAMES LLP

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

Attorneys for Plaintiff Below Appellant Jonathan Saunders

Dated: February 11, 2025

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PRELIMINARY STATEMENT

This appeal asks the Court to address two questions: 1) are negligence and conversion claims relating to the escheatment of stock precluded from the inherently unknowable injury tolling doctrine as a matter of law; and 2) are there disputed issues of material fact in the record precluding summary judgment as to whether Dr. Saunders' injury was inherently unknowable.

Dr. Saunders submits that the answer to the first question is no—Delaware precedent does not support, and there is no policy rationale justifying the blanket exclusion of claims like Dr. Saunders' from the inherently unknowable injury doctrine. In their Answering Brief[1], Defendants[2] assert a number of theories—some new and some already considered and rejected by the Court below—as to why Dr. Saunders' claims were not inherently unknowable as a matter of law.

First, Defendants claim that it was "fully consistent with Delaware case law," for the Court-below to conclude Dr. Saunders' claims were not inherently unknowable as a matter of law because they involve "financial instruments and transactions" and there is some unique "interest in finality and certainty" in

[1] Cited herein as "AB at ___."

[2] Capitalized terms used but not defined herein shall have the meaning given to such terms in the Opening Brief (cited herein as "OB at ___").

connection with such instruments and transactions. This argument fails because the application of the inherently unknowable injury exception, which is applied by Delaware courts to complex commercial transactions between sophisticated parties, should apply with even greater force to an individual small investor claiming that a sophisticated corporation and its transfer agent were negligent in complying with escheat laws resulting in the wrongful conversion of his property.

Second, Defendants suggest Dr. Saunders' claims are not subject to the inherently unknowable injury exception "as a matter of law," because there are no allegations of fraud or concealment in the Complaint—but this argument ignores that while "fraud or concealment" are elements of an independent tolling doctrine (called (not by accident) fraudulent concealment), Delaware courts do not require a plaintiff to plead either fraud or concealment as part of the inherently unknowable injury exception.

Third, Defendants and OUP, in its *amicus curiae* submission"[3], argue that Dr. Saunders' basis for asserting the inherently unknowable injury doctrine is his ignorance of Delaware's Unclaimed Property Laws ("DUPL") and "ignorance of the law is not a defense." However, Dr. Saunders invoked the inherently unknowable injury doctrine—not due to his ignorance of DUPL, but due to his ignorance of the

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[3] Cited herein as "ACB at __."

injury which was ***caused by*** the Defendants' failure to comply with ***the very laws*** they repeatedly fault Dr. Saunders with not knowing. In fact, OUP goes a step further arguing *the mere existence* of DUPL (and other similar statutes) puts a potential plaintiff "on inquiry notice of any claims that may arise under such laws"—regardless of the circumstances. This argument would eviscerate the inherently unknowable injury doctrine altogether.

Dr. Saunders submits the second question—whether there are disputed issues of material fact precluding summary judgment—should be answered in the affirmative. The Answering Brief attempts to muddy the waters by misstating the summary judgment standard. Then Defendants posit (1) there are no disputed issues of material fact regarding whether either OUP or Defendants sent notice of escheatment, (2) public notice was provided on OUP's website and that notice was enough to render the inherently unknowable injury exception inapplicable to Dr. Saunders; and (3) while there may be disputed issues of fact regarding whether Defendants sent notices of annual meetings or other materials, that fact is "immaterial" because not receiving mailings—in and of itself—is adequate notice of escheatment. None of these assertions are supported by the summary judgment record or Delaware law.

ARGUMENTS IN REPLY

I. NEITHER DELAWARE PRECEDENT NOR POLICY CONSIDERATIONS SUPPORT A BLANKET PROHIBITION ON THE APPLICATION OF THE INHERENTLY UNKNOWABLE INJURY DOCTRINE TO DR. SAUNDERS' CLAIMS

A. Delaware Law Does Not Support the Prohibition, as a Matter of Law, of "Claims of Negligence and Conversion Related to the Escheatment of Shares" from the Application of the Inherently Unknowable Injury Doctrine

Defendants argue that the Superior Court's holding that the inherently unknowable injury exception should not apply to Dr. Saunders' negligence and conversion claims is consistent with Delaware precedent—but this assertion is not supported by their cited cases. Pointing to *Mastellone v. Argo Oil Corp*, 82 A.2d 379, 383 (Del. 1951) and *Artesian Water Co. v. Lynch*, 283 A.2d 690, 692 (Del. 1971), Defendants argue "[i]n cases involving financial transactions and instruments, Delaware courts have refused to extend the statute of limitations" because "there is an interest in finality and certainty that does not exist in cases where the inherently unknowable injury exception finds its origins." AB at 23. However, *Mastellone* was decided in 1951—***before*** Delaware first recognized the inherently unknowable injury exception[4] and *Artesian Water Co*. is equally inapt both because no tolling doctrine was invoked by plaintiff and because it was decided many

[4] The inherently unknowable injury doctrine was first applied in *Layton v. Allen*, 246 A.2d 794 (Del. 1968).

decades before the doctrine was expanded to apply in a variety of contexts—including cases involving "financial transactions and instruments"—so long as the plaintiff can establish that the injury was practically impossible to discover and he was blamelessly ignorant of his claims.[5]

Defendants dismiss the Delaware caselaw cited by Dr. Saunders wherein Delaware courts have found , as a matter of law, the inherently unknowable injury exception could be applicable in cases involving commercial transactions between sophisticated parties where the "interest in finality and certainty" would arguably be far more salient than in a case involving a small time investor claiming that a sophisticated corporation and its transfer agent were negligent in failing to comply with escheat laws leading to the wrongful conversion of his property.[6] Nonetheless, Defendants argue the caselaw cited by Dr Saunders is distinguishable because such cases were primarily decided on a motion to dismiss and many of the cases included

[5] Defendants also cite caselaw from other jurisdictions which, as explained in the Opening Brief, is similarly inapt and non-binding. OB at 24 n.23. Neither the Superior Court nor Defendants asserted that claims involving "financial transactions and instruments" AB at 23 or "claims involving the escheatment of property or the conversion of property" AB at 25 were categorically exempt, as a matter of law, from the inherently unknowable injury standard at the motion to dismiss stage.

[6] *See, e.g.*, *Jacam Chem. Co. 2013, LLC v. Jacam Chem. Co.,* 2024 WL 960180 (Del. Ch. Mar. 1, 2024); *Certainteed Corp. v. Celotex Corp*., 2005 WL 217032, at *8-9 (Del. Ch. Jan. 24, 2005).

allegations of "fraud or concealment." Neither is accurate.

To begin, the fact that many of Dr. Saunders' cases are in the motion to dismiss context is not surprising because that is where a court typically determines whether a claim is validly asserted "as a matter of law." Tellingly, Defendants try to relitigate the motion to dismiss, arguing "Plaintiff's Complaint failed to allege any basis to toll the statute of limitations," AB at 28 (emphasis omitted), and the Complaint was "open-ended" regarding what tolling exception applied.[7] This is incorrect. If Dr. Saunders "failed to allege any basis to toll the statute of limitations" the Court would have dismissed his Complaint.[8] Moreover, Dr. Saunders has

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[7] Defendants' gripe about the Complaint's "open-ended" tolling allegations is unfounded. A plaintiff does not have to make specific "allegations regarding tolling." *Lebanon Cnty. Emps.' Ret. Fund v Collis*, 287 A.3d 1160, 1214 n.23 (Del. Ch. Dec. 15, 2022). "All that a plaintiff must do is plead facts that support a reasonable inference that tolling applies." *Id.*

[8] The Superior Court's motion to dismiss ruling that the facts, as pled, constituted a viable legal basis to invoke the inherently unknowable injury exception is the "law of the case." *See, e.g., Del. State Sportsmen's Ass'n v. Garvin*, 2020 WL 6813997, at *3 (Del. Super. Nov. 18, 2020). Defendants contend that "[n]othing in the law of the case doctrine prohibits a court from revisiting a legal ruling on the basis of a more developed record." AB at 29-30. While it is true, the court should hesitate to do so unless the prior decision is "clearly wrong, produces an injustice, or should be revisited because of changed circumstances." *Frederick-Conaway v. Baird*, 159 A.3d 285, 296 (Del. 2017) (quotations and citation omitted). The Superior Court's decision was not "clearly wrong" (in fact, it was in keeping with Delaware precedent), it did not "produce an injustice" nor did the "circumstances" change. The nature of Dr. Saunders' claims relating to his stock's escheatment has remained the same.

consistently asserted only one tolling doctrine: the inherently unknowable injury exception. *See, e.g.*, A0197-206; A0239-51; A0299, A0308.

Defendants also try to distinguish Dr. Saunders' cases by arguing that allegations of "fraud or concealment" are necessary for the doctrine to apply. However, while there is an independent tolling doctrine called fraudulent concealment, neither fraud nor concealment is a necessary element of the inherently unknowable injury doctrine, nor do any of Dr. Saunders' cases so hold.[9] Furthermore, the MTD Opinion did not hold (or even consider) that the alleged failure to plead "concealment or fraud" rendered the inherently unknowable injury standard inapplicable.

[9] *See, e.g., BTIG, LLC v. Palantir Techs., Inc.*, 2020 WL 95660, at *4-6 (Del. Super. Jan. 3, 2020) (Where plaintiff alleged facts supporting both the inherently unknowable injury and fraudulent concealment tolling doctrines, the court analyzed the doctrines separately noting the "low threshold" for the application of the inherently unknowable injury doctrine and that the fraudulent concealment doctrine requires a defendant to commit "some actual artifice . . . intended to put the plaintiff off the trail of inquiry") (quotations and citation omitted); *Certainteed Corp.*, 2005 WL 217032, at * 8 (Finding that while plaintiff failed to allege facts that defendant made "misrepresentations . . . put[ting] plaintiff off the trail of inquiry," thereby precluding the application of fraudulent concealment, plaintiff satisfied the "low threshold for the use of the doctrine of inherently unknowable injury") (quotations and citation omitted).

B. The Contention that the Inherently Unknowable Injury Doctrine Should Not Apply to Injuries Relating to the Application of DUPL Has No Basis and Nullifies the Purpose of the Doctrine

OUP and Defendants contend the inherently unknowable injury doctrine should not apply to negligence and conversion claims relating to escheatment because "ignorance of the law is no excuse" (AB at 27) and DUPL "puts the public on inquiry notice the moment the statute is codified and publicly available" (ACB at 3).[10] This argument is a red herring. Dr. Saunders is not arguing his claims were inherently unknowable because of his "ignorance" of DUPL. Instead, he argues the failure of Defendants and OUP to provide notice ***as required by DUPL*** rendered his ***injury***--the negligent escheat of his stock-- inherently unknowable because, "Defendants had the cancellation and escheatment information, Dr. Saunders did

[10] None of Defendants' or OUP's cases regarding "knowledge of the law", stand for the proposition that, because of the existence of a publicly available statute pursuant to which a plaintiff's claims arise, a plaintiff's injury cannot, as a matter of law, be "inherently unknowable." *See, e.g., Caputo v. Kirkwood Fitness Clubs, Inc.*, 2011 WL 1465464, at * 1 (Del. Super. Apr. 15, 2011) (finding that plaintiffs' lack of knowledge of a statute pursuant to which his breach of contract claims arose, did not render the "injury" (which was so ill-defined that the Court invoked Rule 11) as "inherently unknowable" noting that it is "the injury" that needs to be demonstrated to be inherently unknowable, "not the cause of action") (emphasis omitted), *aff'd*, 72 A.3d 501 (Del. 2013). The OUP's cases do not even address tolling. *See, e.g., New York Tr. Co. v. Riley*, 16 A.2d 772 (Del. 1940); *In re Real Estate of Marta*, 1995 WL 130758 (Del. Ch. Mar. 16, 1995)*, aff'd sub nom. In re Marta*, 672 A.2d 984 (Del. 1996).

not."[11] It is uncontested DUPL required both Defendants and OUP to notify Dr. Saunders regarding the escheatment of his shares. What ***is*** contested (as will be discussed in Section II below) is whether they sent Dr. Saunders notice.

Delaware cases hold that when there is a contractual requirement that one party provide notice to another party before taking a specific action, and then does not provide such notice, that failure supports a finding the injury was inherently unknowable. *See Serviz, Inc. v. ServiceMaster Co.*, 2022 WL 1164859, at *5 (Del. Super. Apr. 19, 2022). Here, a statute requires Defendants provide notice of escheat and Defendants concede such notice is necessary to alert a shareholder of escheatment. A0673 at 168:16-24 (Rudden). Thus, DUPL's notice requirements operate as a recognition that Dr. Saunders was not in a reasonable position to discover his shares had been escheated without statutory notice—otherwise statutory notice would serve no purpose.

OUP's arguments that (1) the application of the inherently unknowable injury doctrine to Dr. Saunders' claims would affect the "on-going viability of the OUP and state unclaimed property programs overall," and (2) permitting the application of the doctrine "would effectively nullify Delaware's adherence to the rule that the statute of limitations begins to run upon inquiry notice of any injury and would thus,

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[11] A0304.

have the effect of indefinitely tolling the statute of limitations until such time as a potential claimant had actual and concrete knowledge of the alleged injury," are unfounded. ACB at 3. Dr. Saunders is not asserting the statute of limitations should be tolled because he was ignorant of DUPL. Dr. Saunders is asserting that the ***very reason*** his injury was unknowable is because of Defendants' ***failure to comply*** with the DUPL. Thus, OUP's fears can easily be assuaged so long as OUP and issuers of securities subject to DUPL adhere to its requirements.

Taken to its logical extreme, OUP's argument is that the existence of a publicly available statute, pursuant to which one may bring a claim, should bar a litigant from invoking the inherently unknowable injury doctrine. However, ***all*** claims are brought based on alleged violations of the law. These laws are ***all*** publicly available. Thus, by OUP's reasoning, all potential litigants should be on notice of their claims when they arise, regardless of the circumstances. This would nullify the entire purpose of tolling which is meant to prevent the draconian application of the statute of limitations when ***the injury*** (not the law pursuant to which the injury arises) is undiscoverable.[12] Here, even if Dr. Saunders knew every DUPL section,

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[12] OUP argues, unless the Court holds "DUPL, as a matter law, puts the public on inquiry notice the moment the statute is codified and publicly available," "ignorance of the injury" would be conflated "with ignorance of the law"—that is precisely what OUP's argument does.

he would have no reason to think that an injury had occurred because he was never sent notice.

II. THE COURT BELOW ERRED IN FINDING DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT ON TOLLING BASED ON THE FACTUAL RECORD

A. Defendants Misstate the Summary Judgment Standard and Misrepresent What Is Required to Establish an Inherently Unknowable Injury

In deciding a summary judgment motion, "[t]he trial court shall examine the factual record and make reasonable inferences therefrom in the light most favorable to the nonmoving party to determine if there is any dispute of material fact." *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005). Defendants attempt to sidestep this standard, citing *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995), for the proposition that "[w]hen a 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." This is true. However, Defendants did not meet this burden. As discussed at length in the Opening Brief, there are numerous disputed issues of material fact precluding summary judgment. Moreover, while Dr. Saunders "must ultimately demonstrate the requirements for application of the inherently unknowable injury exception," AB at 32, that is his burden ***at trial***. Nonetheless, Defendants argue that "Plaintiff failed to provide evidence sufficient to establish, as a matter of record fact, that his claimed injury was "inherently unknowable." AB at 32. That is not Dr. Saunders' burden on summary judgment.

Even if it were Dr. Saunders' burden to establish "as a matter of record fact" that the escheatment of his Lightwave Stock was "inherently unknowable," the test Defendants suggest he must satisfy would be impossible for *any* litigant. Defendants suggest Dr. Saunders' injury was not "inherently unknowable" because "[a]ll he needed to do was ask," to discover the injury. But Dr. Saunders had ***no reason*** to ask. Inherent unknowability does not require that under no conceivable set of circumstances could the injury have been discovered—the inquiry is contextual. There is a metaphysical possibility that ***any*** injury could be discovered within the statutory period, but without a "triggering factor" or red flag, there would be no reason to take affirmative steps to discover the injury.[13] Nonetheless, Defendants argue that because "[i]n 2021, [Dr. Saunders] inquired with a broker about his stock, and learned in a few days that the stock had been escheated in January 2017", he was obligated to have made this inquiry earlier because "discovery of the injury was, at most, a phone call or a mouse click away." AB at 33 citing SJ Op. 21 (emphasis omitted). Again, due to Defendants' and OUP's failure to satisfy their statutory notice obligations, there was ***no reason*** for Dr. Saunders to think that he

[13] Even the "quintessential" example of an inherently unknowable injury at issue in *Layton*, 246 A.2d at 798 where "the plaintiff alleged that a surgeon negligently left a medical instrument in her abdomen" (AB at 22), could, theoretically, have been discovered within the statutory period if only the patient had gotten an x-ray.

needed to make that phone call, because he had no reason to believe his shares had been escheated--nor do Defendants cite to any case law suggesting that he had a standing duty to make such a call.[14]

Defendants also point to Dr. Saunders' "failure to notify Lightwave of his correct address" as evidence establishing Dr. Saunders was not "blamelessly ignorant." AB at 34. However, as the Court-below noted, "Dr. Saunders says he received no mail [] from Lightwave," thus, "it doesn't matter whether Dr. Saunders' address was correct given his assertion that no mail at all was ever sent or received from Lightwave." A305-06. The evidence establishes that there is a disputed issue of material fact as to whether OUP or Lightwave ever sent Dr. Saunders mail ***at any address***—so his alleged "failure" to update his address would not have been the cause of his ignorance of his claims.

B. There Are Disputed Issues of Material Fact Precluding Summary Judgment

1. There Are Disputed Issues of Material Fact Regarding Whether OUP or Defendants Sent Notice of Escheat

Defendants contend there is "clear evidence" Broadridge sent Dr. Saunders a dormant account letter "in October or November of 2016" and that "OUP separately sent [Dr. Saunders] an outreach letter in March 2017." AB at 36-40.

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[14] None of the Defendants' cited cases involved claims relating to potential injuries that defendants were ***statutorily required*** to notify plaintiff about.

However, there are numerous disputed issues of material fact regarding whether OUP or Defendants sent the statutorily required notice, OB 11-14, 16-18, 35-39, and Defendants' attempt to cherry pick deposition testimony while ignoring the standard by which evidence regarding disputed factual issues is reviewed on summary judgment is unavailing.

Defendants claim there are no disputed issues of material fact regarding whether Broadridge sent Dr. Saunders a dormant account letter, pointing to the form letter, dated October 5, 2016, and addressed to Dr. Saunders, A0877, as undisputed evidence that Broadridge ***actually sent*** the letter. However, Defendants admitted that it was unlikely and Broadridge "***probably did not***" send a dormant account letter on October 5. A1102 at 150:8-151:21 (Rudden); A1024-25 at 109:4-110:1, A1022-23 at 101:13-102:16 (Marcelli). In a 2021 communication to Lightwave, Broadridge stated that the due diligence letter to Dr. Saunders would have been sent in November of 2016. A1291. Despite this contradictory evidence, Defendants argue that even if the letter was not mailed on October 5 that is "immaterial" because it "was mailed in October or early November 2016." AB at 39. The problem is there is ***no evidence*** of any letter other than that October 5 form letter that Defendants admit was "probably not" sent.[15]

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[15] Broadridge admitted at its deposition that it has no record of a November 2016

While Defendants characterize these inconsistencies as "immaterial" and "quibble[es]", AB at 39, the proper inference – at this stage – from the fact that Defendants cannot identify any date that notice was actually sent is that notice was not sent. *See, e.g., Bryant v. Fed. Kemper Ins. Co.*, 542 A.2d 347, 351 (Del. Super. 1988); *In re Asbestos Litig.*, 2014 WL 605844, at *3 (Del. Super. Feb. 14, 2014). At a minimum, the evidence demonstrates there is a disputed issue of material fact regarding whether Broadridge sent the dormant account letter on October 5, 2016 ***or at any other time***. *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (On a motion for summary judgment the court will "accept the non-movant's version of any disputed facts.").

Defendants also state there is no disputed issue as to whether OUP sent notice. Defendants contend that "Mayrack testified that [notice] to Plaintiff would have been mailed on March 13, 2017, which was the last 'batch date' associated with Plaintiff's Lightwave stock." AB at 39. This is not Mayrack's testimony. OUP's closure letter represented notice was sent on March 6, 2017. A1261-62. Mayrack, in her deposition, disclaimed this date saying she would have used March 13, 2017 rather than March 6--not because that was more likely to be the

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letter and the representation was an assumption. A1103-04 at 157:5-158:9 (Rudden).

date the letter was sent, but to give the claimant "the benefit of the doubt." A0758 at 122:17-123:20.[16] Moreover, Defendants still do not explain why the "mail date", *i.e.,* the date any owner outreach letter ***was actually mailed***, is not populated for Dr. Saunders' supposed letter. A1309; A0758-59 at 125:13-126:8.[17]

At a minimum, the evidence demonstrates there is a disputed issue of material fact regarding whether OUP sent the dormant account letter on March 6, March 13 or at any other time.

2. There Are Issues of Material Fact Regarding Whether Notice Was Provided on OUP's Database and, In Any Event, Such Notice Is Insufficient to Bar the Inherently Unknowable Injury Doctrine

Defendants argue Dr. Saunders' claims are not "inherently unknowable", because "Plaintiff offers no evidence to contradict the evidence that the escheat of his Lightwave stock was published on OUP's website." AB at 41. However, in

[16] Defendants twice mention the self-serving contents of an April 19, 2024 letter from OUP counsel, AB 15 n.7, 40 n.12, incorporated by reference into the *errata* sheet for Mayrack's deposition. The letter purported to "clarify" Mayrack's sworn testimony by providing entirely new responses to questions Mayrack was asked a month earlier. If anything, the letter demonstrates that there are issues of material fact relating to whether OUP sent notice. But the Court below also struck the letter and the *errata* sheet from the record under Rule 12(f). The letter is not part of the record and yet Defendants continue to reference its contents.

[17] Nor do Defendants explain why a third date, May 8, 2017, is identified in a contemporaneous internal document as the date the owner outreach letter was to be sent to Dr. Saunders. A1296, A0750 at 91:23-92:2.

addition to the fact that neither Defendants nor OUP produced evidence of what was on OUP's database in 2017 and the only evidence that Dr. Saunders escheated shares were listed on OUP's website was Mayrack's self-serving representation the stock "would" appear pursuant to OUP's practices, the "mere existence of documents accessible to the public will not automatically preclude tolling." *Ashland LLC v. Samuel J. Heyman 1981 Continuing Tr. for Lazarus S. Heyman*, 2018 WL 3084975, at *8 (Del. Super. June 21, 2018). Defendants argue that, even without any triggering event raising suspicions about the escheat of the stock, Dr. Saunders was somehow obligated--by his mere status as a property owner--to periodically check the State Escheator's public database. No such obligation exists.

Defendants cite to three Delaware cases as support for the argument that when something is a matter of public record it cannot be characterized as inherently unknowable. However, none of these cases stand for the broad proposition that if information is in the public domain, a plaintiff is required to preemptively search every public database for information that could support a potential (but unknown) claim and rely on other facts and circumstances that would have put the plaintiffs on notice of their claims. *See, e.g., Marvel v. Clay*, 1995 WL 465322 (Del. Super. June 15, 1995) (in addition to noting that a transfer

of title was a matter of public record, the court noted defendant took possession of the property at issue--*in the presence of plaintiff's parents and spouse*), *aff'd*, 676 A.2d 905 (Del. 1996); *Jepsco, Ltd. v. B.F. Rich Co.*, 2013 WL 593664 (Del. Ch. Feb. 14, 2013) (noting that the fact plaintiff was unaware of the specific terms of a settlement (the existence of which was a matter of public record) did not toll the statutory limitations period because plaintiff was aware *the settlement could implicate the asset at issue*); *Brown v. Court Square Cap. Mgmt., L.P.*, 2022 WL 841138 (Del. Ch. Mar. 22, 2022) (in case involving claims for breach of non-compete and non-solicitation provisions of separation agreement entered into in connection with ex-employee's departure to work for a competitor, the Court found that plaintiff was on notice of its claims where the competitor (*of whom plaintiff was aware*), issued a press release *explicitly disclosing the ex-employee's participation* in a transaction that *directly implicated* the terms of the separation agreement), *aff'd*, -- A.3d -- (Del. Nov. 22, 2024).

Unlike in *Marvel*, *Jepsco*, and *Court Square*, there are no facts in the record that could have triggered Dr. Saunders' suspicion that the status of his Lightwave investment was in doubt thereby giving him a reason to search OUP's website. In fact, Delaware courts have held that where there have not been "suspicious omissions or other prompts for inquiry," the mere existence of publicly available

documents does ***not*** render the "inherently unknowable injury" exception inapplicable. *See, e.g., Barbosa v. Bob's Canine Academy, Inc.* ("*Barbosa*"),[18] C.A. No. 7834-ML, op. at 11, 12 (Del. Ch. May 23, 2013) (Master's Report, attached hereto as Ex. A) (quoting *Acierno v. Goldstein*, 2005 WL 3111993, at *10 (Del. Ch. Nov. 16, 2005) (finding that the inherently unknowable injury could apply despite the fact that the plaintiff property owner could have discovered his claims by searching for his publicly available deed, because "the Complaint [did] not allege any [] fact that would reasonably cause [the plaintiff] to suspect that the Property had been improperly conveyed" and that "one with an interest in real property has no obligation to go to the Recorder's Office on a regular basis to assure herself that no documents adverse to her title have been recorded."); *Boyce v. Blenheim at Bay Pointe, LLC*, 2014 WL 8623125, at * 3 (Del. Super. Dec. 30, 2014) (rejecting argument that the existence of publicly filed lawsuits involving similar underlying allegations rendered the "inherently unknowable" exception inapplicable to the plaintiffs' claims reasoning that the mere fact that information

[18] Note that in a subsequent decision in *Barbosa* on summary judgment, 2017 WL 2492042, at *7 (Del. Ch. May 19, 2017), the Court found that there was record evidence that the plaintiff had notice that his ownership in the property was threatened and that the property had title issues and thus he "could no longer benefit from the inherently unknowable injury doctrine." That record evidence was ***not*** the mere existence of a publicly available deed.

could possibly be gleaned from public records was not enough, on its own, to constitute constructive notice). Here, there were no red flags that would have prompted Dr. Saunders to check the status of his investment on OUP's website because he was never sent the statutorily required notice that would have raised such suspicions.

3. Defendants Concede That There is a Disputed Issue of Fact Regarding Whether the Annual Meeting Notices Were Sent, and the Absence of Those Mailings Would Not Lead Dr. Saunders to Inquire About the Status of His Investment

Defendants concede that there is a disputed issue of fact regarding whether the annual meeting notices were sent but now argue that this "dispute is immaterial to [Dr. Saunders'] claims or the tolling of the statute of limitations." AB at 43. Instead, Defendants argue that Dr. Saunders' "contention concerning the Lightwave annual meeting notices constitutes an irrelevant distraction," because it does not matter if Lightwave or Broadridge ever ***actually*** sent any notices to Dr. Saunders as required by the Lightwave bylaws. Defendants seem to suggest that if a company fails to comply with its bylaws by sending out annual meeting notices to its shareholders, it would be *on the shareholders* to question that failure or they would not be deemed blamelessly ignorant if their shares were escheated. This position is untenable and not supported by caselaw.

Defendants contend that Dr. Saunders "is charged with knowledge of the contents of corporate bylaws" and that the "bylaws require Lightwave to mail notice of its annual stockholders' meeting," however Defendants do not explain how failure to receive notice of an annual stockholders' meeting—which he NEVER received—would trigger Dr. Saunders to inquire about whether his shares had been escheated. Dr. Saunders did not bring a claim against Lightwave for failure to comply with its bylaws—he brought a claim for the negligent escheatment and conversion of his Lightwave shares. There was no basis for Dr. Saunders to conclude that the continued absence of mailings from the Defendants triggered an obligation to ensure that his shares had not been escheated. Tellingly, the one escheat-related case that Defendants cite for this proposition, *Weinbach v. Boeing Co*, 6 F.4th 855, 858 (8th Cir. 2021), involved an "appellant [who] initially received an annual communication [from the company] only to have that communication cease." A305-06. As the Court Below noted, "even if [this case] was at the summary judgment stage, the complaint does not allege (nor is there any other indication) that Dr. Saunders initially received annual communication from Lightwave only to have that communication cease—thus supporting some notion that he was to blame for not following up." A306.[19] Thus, Defendants' contention that Dr. Saunders' failure to

[19] Defendants also cite one Delaware case (as well as similarly unavailing cases

receive communications from Defendants constituted adequate notice of Dr. Saunders' claims relating to the escheatment of his shares is unfounded.

Defendants also contend that "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," (AB at 44) and that this publicly available statement should have placed Dr. Saunders on notice—not just of the fact that he was not being sent materials that the company should have sent, but that Lightwave's failure to send these materials to him--(1) might mean they do not have his correct address which, (2) might, theoretically, lead to the escheatment of his shares. However, the connection between this alleged "notice" (or lack thereof) is far too attenuated to provide notice of any potential escheatment and the one case cited by Defendants in support of this novel contention does not support it.[20]

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from other jurisdictions), *Eluv Holdings (BVI) Ltd. v. Dotomi, LLC*, 2013 WL 1200273 (Del. Ch. Mar. 26, 2013), for the proposition that "failure to receive routine stockholder communications and meeting notices would put plaintiff on notice that adversary did not consider plaintiff to be a stockholder." AB at 36. The *Eluv Holdings* court, however, noted ***many*** reasons (none of which are present here) besides the "failure to receive routine stockholder communications," why plaintiff option holder was on notice that his status as a stockholder was in doubt.

[20] Defendants cite *Siedel v. Lee*, 954 F. Supp. 810, (D. Del. Dec. 30, 1996) where the court declined to apply a tolling exception to plaintiff's claims where the basis of the claims was disclosed in public filings with the SEC. Here, the Defendants'

CONCLUSION

For the foregoing reasons, Dr. Saunders respectfully submits that this Court should reverse the Superior Court's judgment.

MORRIS JAMES LLP

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

Attorneys for Plaintiff Below Appellant Jonathan Saunders

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intention to escheat the Lightwave Stock—the basis of Dr. Saunders' claims--was never disclosed (publicly or otherwise).