

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GENUTEC BUSINESS SOLUTIONS,
INC.,

Plaintiff and Appellant,

v.

STEPHEN A. WEISS et al.,

Defendants and Respondents.

G044744

(Super. Ct. No. 07CC07918)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jamoa A. Moberly, Judge. Affirmed.

Law Offices of M. Candice Bryner and M. Candice Bryner for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Gordon J. Calhoun, and Ryan C. Gill for Defendants and Respondents.

Genutec Business Solutions, Inc., (Genutec) appeals from the judgment entered after the trial court granted summary judgment in favor of his former attorney Stephen A. Weiss, a partner at Gersten Savage LLP (referred to collectively and in the singular as Weiss, unless the context indicates otherwise). The trial court found the one-year statute of limitations set forth in Code of Civil Procedure section 340.6, subdivision (a),¹ barred Genutec's complaint alleging a single cause of action for professional negligence against Weiss. Finding none of Genutec's arguments on appeal have merit, we affirm the judgment.

I

Genutec provides emergency notification services and voice broadcasting services for businesses, charities, and other entities. Genutec generates the requested telephone calls for its customers by using sophisticated computer equipment and software. Genutec is controlled by a board of directors who report to the company's many shareholders. In addition, Genutec is operated by a chief executive officer (CEO), Lee Danna, a chief financial officer (CFO), Farzad Hoorizadeh, a chief operating officer (COO), Matt Pekarek, and a chief development officer (CDO), Mike Fannin. In addition, Genutec had corporate counsel named Mark Skaist.

In 2004, Genutec acquired Sound Media Group (SMG) to grow its business and started making plans for a public offering. That same year, it began investigating whether to also acquire Smart Development Corporation (SD), owned by Johan Hendrik Smit Duyzentkunst (referred to as "Smit" by the parties, and thus to avoid confusion and for consistency, we will adopt the same abbreviation, with no disrespect intended). Genutec was specifically interested in acquiring SD's automatic dialing software (called DS3s) that could potentially increase Genutec's dialing capacity and efficiency. In addition, Genutec wished to acquire SD's customer contacts, including its largest

¹ All further statutory references are to the Code of Civil Procedure.

customer (Instant Response Marketing) who paid approximately \$500,000 per month for dialing services.

In May 2005, Genutec retained Weiss to do securities work for a flat fee of \$50,000. In September 2005, Genutec retained Weiss for \$75,000 to represent it in the merger and acquisition of SD and “deal with all the legal due diligence involved.” Genutec obtained financing for the acquisition through two hedge fund lenders, Technology Capital Corporation (TICC), and Seaview Mezzanine Fund (Seaview) (hereafter collectively referred to as the Lenders unless the context indicates otherwise).

Weiss explained the SD acquisition required a substantial amount of due diligence investigation and documentation. He declared, “Because the financing was coming from TICC, nothing could proceed until and unless it was completely satisfied with the disclosures made by both Genutec and [SD]. The due diligence process involved the joint efforts of attorneys from at least four law firms and the results of investigations conducted by each of the law firms was shared to a great degree with attorneys from the other firms. Gersten Savage and Stradling, Yocca, Carlson & Rauth (‘Stradling Yocca’) conducted legal due diligence investigation of [SD] for Genutec. Nixon Peabody LLP (‘Nixon Peabody’) conducted legal due diligence investigation of [SD] and Genutec for TICC. Clark & Trevithick PC (‘Clark & Trevithick’) conducted . . . legal due diligence investigation of Genutec for [SD]. Each law firm had certain duties and the information gained in the performance of each law firm’s due diligence was shared between the law firms.”

Genutec’s CDO, Fannin, oversaw the technology due diligence. He visited SD’s facility to evaluate the software and hardware being purchased and met with SD’s software engineer, Olaf Guers, to discuss the systems.

Weiss recalled Danna was eager to close the deal and told the attorneys he was concerned SD’s owners would walk away rather than deal with “this pain and suffering” of due diligence. Danna suggested they reduce the due diligence inquiry. To

lesson Danna's anxiety about the deal, Weiss wrote to Danna, stating he would seek to reduce the burden caused by a legal due diligence investigation. However, Weiss attested he did not intend to actually decrease the level of investigation (as demonstrated by later e-mail and document exchanges) because he understood "the deal would not close unless the information requested was provided to all the parties. . . . [TICC] required access to the information." And "after the heat of the moment had passed, [Weiss] explained to . . . Danna" and SD's counsel the due diligence was necessary, and moreover, it was required by TICC's counsel Nixon Peabody.

In early August 2005, an associate of Nixon Peabody, Kanika Provost, sent an e-mail discussing various items of intellectual property and stated she discovered some discrepancies "[w]hile performing [TICC's] due diligence."

That same month, Weiss sent a due diligence request list, spanning nine pages, to SD and its attorneys at Clark & Trevithick. Weiss requested the company's corporate records, financial statements, material contracts, tax returns, and documentation of intellectual property rights. He specifically requested any licensing agreements. SD wrote in response there were "none." Weiss declared that when he asked about the licensing, he was told the software was "owned and developed by Smit and Ion, and therefore, they don't license--that we bought proprietary software that was owned by the entities that we acquired."

Weiss's associate, Peter Bilfield, sent a letter to Danna, Hoorizadeh, and two attorneys at Nixon Peabody (Phil Haber and Kanika Provost) stating a legal due diligence memorandum would be prepared when SD completed schedules for the merger agreement and provided information about SD's "intellectual property and software."

At the end of August, Provost sent an e-mail to Bilfield concerning several due diligence issues, including a "[l]ist of IP licensed to 3rd parties" and to "[c]onfirm governmental licenses and permits is N/A." She again noted there were discrepancies

with the intellectual property. Bilfield forwarded the e-mail to Hoorizadeh, Weiss, Gupta, and Fomari asking they respond to her query.

Weiss inquired as to the licensing of SD's software and was informed it was owned and developed by SD and, therefore, it did not require a license. Weiss did not independently verify this representation and later explained he was not a technology expert and it was Genutec's job to verify SD's statements about licensing.

On September 16, 2005, Weiss issued an opinion letter describing the due diligence they performed. He stated, "As to certain factual matters relevant to this opinion, we have relied on" various certificates of the parties, organizational documents, documents delivered on the closing date, and "the accuracy and completeness of the representations and warranties contained in the Financing Documents, the Acquisition Agreement, [and] the other Acquisition Documents." Weiss disclosed, "Except to the extent expressly set forth herein, we have made no independent investigation with regard thereto, and accordingly, we do not express any opinion or belief as to matters that might have been disclosed by independent verification." The Lenders received a copy of this letter.

Genutec borrowed \$20 million from the Lenders. As a condition of the financing agreement, the Lenders required Genutec to retire all of its existing debt and pay several employees owed salaries. Genutec repaid nearly \$700,000 that Danna and his wife loaned the company. Thereafter, Genutec acquired SD for \$14 million (\$7 million in cash and \$7 million in stock shares), and hired new legal counsel from Stradling Yocca. It terminated Weiss on September 28, 2005. Stradling Yocca finalized the filing and registration documents for Genutec's public offering. The following month, in October 2005, Danna purchased a home in Dana Point.

All did not proceed as planned. Genutec soon learned there were problems integrating SD's software into Genutec's dialing system. Genutec determined SD's software was using unlicensed and pirated software as a part of its dialing platform, and it

learned Smit was attempting to rewrite the software. The cost to purchase the software (called VOS/CT-ADE, hereafter VOS) would have been approximately \$1,000,000. In January 2006, Smit finished rewriting the software and integrated it with Genutec's system. Genutec began experiencing serious performance and reliability problems due to the rewritten software. Customers began to complain of system crashes and refused to pay their bills. Genutec started to lose customers because of the company's performance problems.

In mid 2006, Genutec's board began investigating Danna's competence and whether he was mismanaging the company. He was exonerated. However, Genutec continued to experience great financial difficulties.

A. The 2006 Fraud Lawsuit

On December 8, 2006, Genutec filed a lawsuit against SD and Smit alleging causes of action for fraud, breach of contract, and rescission. Genutec sought damages allegedly caused by the fact SD's technology was incompatible and unlicensed. The complaint alleged SD misrepresented information about its largest customer, did not disclose VOS was pirated software, and failed to disclose "the C++ software was not fully operational and needed significant modifications."

B. Restructuring of Genutec

In February 2007, after Genutec defaulted on its loans, Genutec and the Lenders entered into a restructuring agreement authorizing the Lenders to become the primary shareholders of the company. Danna and the entire board of directors were forced to resign as a condition of the agreement.

C. The Lender's Lawsuit

On July 10, 2007, Genutec (now controlled by the Lenders) filed a complaint against Danna and the other officers and directors for breach of fiduciary duty, breach of contract, and breach of the implied covenant of good faith and fair dealing. The defendants named in lawsuit were Genutec's former directors, Danna, Michael Tuas,

Edith Martin, Paul Abramowitz, Lawnae Hunter, Joseph LaTorre, Leonard Makowka, Farzad Hoorizadeh and Smit (who became a director of Genutec after the SD acquisition).

On February 26, 2008, Genutec's first amended complaint (FAC) raised a claim for legal malpractice against Weiss and his law firm Gersten Savage. The complaint also raised a cause of action against Genutec's accountants (Lewak Greenbaum & Goldstein).

Weiss successfully demurred to the FAC and second amended complaint. Weiss filed a motion for summary judgment against the third amended complaint (TAC) filed in September 2008.

Genutec alleged the following facts regarding the alleged malpractice: "Prior to the closing of the [SD] acquisition, [the Genutec directors and Weiss] failed to perform practically any technology due diligence of [SD's] dialing platform . . . [but] knew of serious performance issues . . . because Genutec had utilized [SD's] dialing platform on multiple occasions prior to the acquisition during which time customers complained of poor dialing performance." Genutec alleged that "prior to the [SD] acquisition Genutec's [COO] Matt Pekarek, reported to Danna the poor performance of the dialing platform and strongly recommended that Genutec not buy [SD] for this reason. Additionally, Genutec's [CDO], Mike Fannin . . . communicated to Hoorizadeh specific requirements for technology due diligence which needed to be conducted prior the [SD] acquisition. This information was shared with Taus, Hunter, Abramowitz, LaTorre, . . . and Weiss."

The complaint alleged that prior to the SD acquisition, Weiss "complied with" Danna's and Hoorizadeh's "instructions to ensure a rapid closing of the [SD] acquisition without regard to the necessary technology due diligence of [SD's] dialing platform and without inconvenience to Smit. Not only did Weiss . . . comply with [the] instructions, [he also] did so without fully and fairly disclosing these instructions to

Genutec's [b]oard of [d]irectors" Genutec alleged the instructions created a conflict of interest in Weiss's representation of the company and Weiss should have told Danna and the board that Danna had a conflict of interest.

Genutec alleged that after the acquisition, "Genutec discovered that the [SD] dialing platform used analog lines that failed to meet minimum Federal Communication Commission ('FCC') requirements applicable to telemarketers, such as the requirement that a caller transmit its caller identification. Additionally, Genutec learned that the [SD] software was not compatible with Genutec's existing dialers. These are issues which could have been discovered through the necessary, but not performed, technology due diligence of the [SD] dialing platform and software."

The TAC asserted that, "As a result of the technical and compatibility issues with the [SD] dialing platform—both pre-existing issues and issues unknown to Genutec which technology due diligence would have revealed—Genutec suffered decreases in revenue, damage to good will, loss of acquisition and business opportunities and penalties payable to [the Lenders] as a result of an acquisition . . . which should have never happened." Genutec admitted that in July 2006, several shareholders learned from Genutec employees that Genutec would be insolvent by the end of 2006 and Danna was incompetent. The shareholders immediately conducted a meeting with the board of directors about the financial crisis. Genutec alleged that in August 2006 the board informed the shareholders that their concerns were unfounded but the board would continue its investigation. In September 2006, Genutec's board received financial statements indicating the company had been operating at a loss since May 2006. By December 2006, Genutec could no longer pay its debts and the company became insolvent. The complaint does not mention the fraud lawsuit filed against SD and Smit on December 8, 2006.

In the seventh cause of action of the TAC, Genutec alleged Weiss failed to exercise reasonable care and skill when he: (1) "negligently advised and encouraged

Genutec's [o]fficers, without disclosing the same to the . . . [b]oard of [d]irectors, to greatly reduce the amount of due diligence of [SD] in order to effectuate the rapid closing of the [SD] [a]cquisition without incident or inconvenience to . . . Smit[;]" and (2) "negligently failed to disclose to [Genutec] the requests made by Genutec's [o]fficers which facts Weiss . . . knew to materially affect [Genutec's] rights and interests." The complaint also alleged Weiss knew or should have known "of the personal benefits Danna would receive" if the SD acquisition closed but failed to report the conflict of interest to Genutec's board of directors.

In the TAC, Genutec maintained it relied on Weiss's "advice and encouragement and thereby ignored Pekarek's recommendation that [Genutec] not acquire [SD] and Fannin's recommendation that specific technology due diligence needed to be conducted of [SD's] dialing platform prior to the [SD] [a]cquisition." Consequently, Genutec alleged it closed the acquisition "without the necessary technology due diligence" of SD's dialing platform. Genutec asserted it would not have proceeded with the acquisition if Weiss had exercised proper care and skill.

Genutec alleged it "could not and did not discover" the negligence until August 2007 when Weiss released his files to Genutec and Genutec saw "the extent of Weiss's . . . communications with [Genutec's] [o]fficers regarding due diligence at which time [Genutec] discovered the material facts essential to this action."

D. Motion for Summary Judgment

Weiss moved for summary judgment arguing inter alia, the one-year statute of limitations applied. (§ 340.6.) He asserted Genutec had possession of the documents from which it claims to have learned about the alleged malpractice years before the suit was filed. Moreover, Weiss alleged Genutec learned of the alleged harm in 2005 and it had "all the means necessary to determine that [Weiss] had breached [his] duties as alleged in the TAC." In addition, Weiss asserted that by January 2006, Genutec knew of the harm suffered and sought legal counsel, triggering inquiry notice of the cause

of potential remedies to that harm. Weiss argued the limitations period was not tolled and the delayed discovery allegations were disingenuous. Alternatively, he maintained it was undisputed e-mails about the quality and quantity of due diligence were sent to Genutec's officers and therefore this knowledge was imputed to Genutec. Moreover, the e-mails were on Danna's computer's hard drive, which had always been in Genutec's possession.

Genutec opposed the motion, contending the limitations period commenced upon the discovery of misconduct, not the discovery of injury. It asserted the knowledge of an officer who acts adversely to the company cannot be imputed to the company. And finally, it argued Weiss failed to establish the e-mails alerting Genutec to malpractice were available for Genutec before February 28, 2007.

In their reply brief, Weiss argued the lawsuit Genutec filed against SD in December 2006 put it on inquiry notice as to the claims of attorney malpractice. Weiss also pointed out that "virtually all of the documents in [his] file, particularly those Genutec contends put it on notice (85 [percent]), were e-mails . . . Danna or Hoorizadeh or both received from [Weiss] from July through September 2005," and therefore, the evidence had always been on Genutec's hard drives.

Weiss filed additional evidence to support the summary judgment motion. Weiss filed a lengthy supplemental declaration discussing the e-mails available to Genutec before February 2007. He also submitted declarations of a malpractice expert, Eric C. Castro, and a computer forensics expert, Daniel Libby, in support of the motion. Weiss's counsel, Erin L. Hiley, also filed a lengthy declaration and approximately 400 pages of exhibits to establish Genutec did not take proper steps to preserve their electronically stored information. Hiley discussed the e-mails that alerted Genutec to the fact it had a malpractice claim.

In the days leading to the summary judgment hearing, Hiley filed several supplemental declarations with additional evidence about the issue of preserving

electronic information and a supplemental compendium of federal authorities. Weiss also submitted a second declaration from Libby and a declaration from Steven C. Chiu, another trial attorney representing Weiss.

Genutec's counsel objected and moved to strike much of the supplemental evidence, calling the paper assault an "evidentiary blitzkrieg." Counsel argued admission of the supplemental evidence was unfair because Genutec did not have an adequate opportunity to respond.

The court granted the summary judgment motion on the grounds the malpractice claim was barred by the one-year statute of limitations. It noted Weiss was formally terminated on September 28, 2005, and he was not sued until February 26, 2008. The court concluded none of the tolling provisions applied and the allegations of delayed accrual were unsupported by any argument or evidence in Genutec's opposition.

Specifically, the court determined: (1) Genutec's opposition provided no explanation as to why it could not obtain a copy of its officers' files containing correspondence from Weiss until August 2007; (2) the opposition did not explain why the information in the file could not have been discovered from other sources; and (3) the opposition alleges facts contrary to those alleged in the TAC that its excuse for delayed discovery was that it could not have discovered Weiss's wrongdoing until it restored the hard drives from Danna's and Hoorizadeh's computers.

The court determined several undisputed facts supported the conclusion Genutec was aware it had been harmed. Genutec learned the SD software was not compatible soon after the September 2005 acquisition because the problems caused decreases in revenue, damage to goodwill, loss of business, and penalty payments to the Lenders. In November 2005, Genutec discovered SD's dialing platform used lines that failed to meet FCC requirements and were not compatible with Genutec's existing dialers. In April 2006, SD's largest customer terminated its relationship. In July 2006, the board of directors was apprised of the financial crisis in a teleconference and a July

11, 2006, memorandum. In September 2006, the board of directors learned Genutec had been operating at a loss since May 2006.

The court also concluded that as of December 2006, Genutec knew of the facts, or through the use of reasonable diligence should have known the facts, constituting the alleged legal malpractice. It reasoned, Genutec demonstrated it was aware of sufficient facts to trigger the statute of limitations when it commenced suit against Smit alleging compatibility and licensing issues caused Genutec damages. The court concluded, “At least some of the injuries for which Genutec sued Smit in December 2006 are being asserted against [Weiss] in this action both in the operative TAC and even more so in the [p]roposed [fourth amended complaint].”

The court noted the fraud complaint against Smit alleged the dialing machines began to malfunction in 2005, and Genutec soon discovered the problem was caused by the fact SD’s VOS software was not licensed and Smit had not fully developed or integrated the C++ software. The fraud complaint alleged Genutec was damaged by the loss of customers due to the malfunctions. The court determined some of the same allegations were made in the legal malpractice action against Weiss years later. Genutec alleged due to the failure to conduct or insist upon technology due diligence, Genutec learned the SD software was incompatible. The malpractice complaint alleged the software issues could have been discovered through proper due diligence, and if the issue had been timely discovered, Genutec would not have lost customers due to the dialing software malfunctioning. In addition, the court stated the claims against Smit included fraud, which “should have led Genutec to seek out all communications regarding the [SD] acquisition. A reasonable investigation of the claims in the Smit [c]omplaint would have uncovered the misconduct Genutec” alleges in its malpractice claim against Weiss.

On September 29, 2010, the court entered judgment in favor of the attorneys. The court sustained Genutec’s objections to new evidence filed after its reply papers were filed, sustaining evidentiary objections Nos. 1-15 and 19 to Chiu’s

declaration. It also sustained evidentiary objections Nos. 1-2, 12, 15, 18, 19, 23, 27, and 34 to Weiss's declaration.

II

On appeal, Genutec asserts the court erred because Weiss did not satisfy his burden of showing Genutec either knew or should have discovered the alleged misconduct prior to February 27, 2007. It asserts there was no reason Genutec should have distrusted its executives or attorneys in 2006, and no evidence Genutec did not make a reasonable investigation into the source of its injury. It alleges it is a question of fact whether the duty to investigate included sending its former executives' computer hard drives to a data recovery center. Genutec argues that if such "extreme measures" are required as a matter of law, the evidence of e-mails on the hard drives was submitted after Genutec filed its opposition papers and therefore could not be considered. And finally, if Genutec knew or should have known of misconduct before February 27, 2007, the statute of limitations was tolled because at the time it was under the control of "rouge executives and directors who were acting adversely to the interests of Genutec" within the meaning of section 340.6, subdivision (a)(4) (tolling when plaintiff's legal disability restricts ability to file a lawsuit). As we will explain, all of these contentions lack merit.

A. Summary Judgment Standard of Review

"Summary judgment is appropriate only if there is no triable issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. [Citation.] . . . A defendant moving for summary judgment . . . must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. [Citation.] The defendant can satisfy its burden by presenting evidence that negates an element of the cause of action or evidence that the plaintiff does not possess and cannot reasonably expect to obtain evidence needed to support an element of the cause of action. [Citation.] If the defendant meets this burden, the burden shifts to the plaintiff to set forth 'specific facts' showing that a triable issue of material

fact exists. [Citation.] ¶ We review the trial court’s ruling de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opposing party. [Citation.] We will affirm an order granting summary judgment . . . if it is correct on any ground that the parties had an adequate opportunity to address in the trial court, regardless of the trial court’s stated reasons.

[Citations.]” (*Securitas Security Services USA, Inc. v. Superior Court* (2011) 197 Cal.App.4th 115, 119-120.)

Moreover, “While resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper. [Citation.]” (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112.)

B. Statute of Limitations for Legal Malpractice

As relevant here, “An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. . . . [I]n no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: ¶

(1) The plaintiff has not sustained actual injury. ¶ (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred. ¶ (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation. ¶ (4) The plaintiff is under a legal or physical disability which restricts the plaintiff’s ability to commence legal action.”

(§ 340.6, subd. (a).)

“Thus, the limitations period is one year from actual or imputed discovery, or four years (whichever is sooner), unless tolling applies.’ [Citation.] Although the language of the statute is ambiguous on the point, ‘[t]he tolling provisions of section 340.6 apply to both the one-year and the four-year provisions.’ [Citations.]” (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1145-1146.)

Here, it is undisputed Weiss provided no legal services after he was terminated on September 28, 2005. Genutec brought its claim against Weiss over two years later on February 26, 2008. Based on these facts alone, a malpractice claim would be barred by the one-year statute of limitations absent evidence of delayed discovery or tolling.

C. Issue of Delayed Discovery

As a general rule, “a cause of action accrues “““upon the occurrence of the last element essential to the cause of action.””” [Citation.] The common law delayed discovery rule is an exception to the general rule and provides that a cause of action does not accrue until a plaintiff discovers, or reasonably should discover, the cause of action. ‘A plaintiff has reason to discover a cause of action when he or she “has reason at least to suspect a factual basis for its elements.” [Citations.]’ [Citation.] The elements that the plaintiff must suspect are the generic elements of wrongdoing, causation, and harm. [Citation.] A plaintiff who suspects that he or she has suffered an injury caused by the wrongdoing of another is charged with the knowledge that a reasonable investigation would reveal, and the limitations period begins to run at that time. [Citation.]” (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 66, fn. omitted (*Ovando*).)²

² “In so using the term “elements,” we do not take a hypertechnical approach to the application of the discovery rule. Rather than examining whether the plaintiffs suspect facts supporting each specific legal element of a particular cause of action, we look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them.’ [Citation.]” (*Ovando, supra*, 159 Cal.App.4th at p. 66, fn. 10.)

“While ignorance of the existence of an injury or cause of action may delay the running of the statute of limitations until the date of discovery, the general rule in California has been that ignorance of the identity of the defendant is not essential to a claim and therefore will not toll the statute. [Citations.] As we have observed, ‘the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her.’ [Citation.] Aggrieved parties generally need not know the exact manner in which their injuries were ‘effected, nor the identities of all parties who may have played a role therein.’ [Citation.]” (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 932 (*Bernson*)).

These same rules apply when the plaintiff is a corporation. The knowledge of a corporation’s agents is generally imputed to the corporation, with a few exceptions. “It is settled California law that ‘[k]nowledge of an officer of a corporation within the scope of his duties is imputed to the corporation. [Citations.] ‘On the other hand, an officer’s knowledge is not imputed to the corporation when he has no authority to bind the corporation relative to the fact or matter within his knowledge. [Citations.]’ [Citation.] Nor is a corporation chargeable with the knowledge of an officer who collaborates with outsiders to defraud the corporation. [Citations.]” (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 679 (*Peregrine Funding*)).

Genutec was not owned and operated by one person. Rather, the TAC alleged Genutec had a board of directors, which included Danna, Hoorizadeh, Taus, Hunter, LaTorre, and Abramowitz. The original complaint and board of director meeting minutes (included as exhibits supporting the summary judgment motion), indicate there were other directors on the board before and after the SD acquisition. The TAC alleged Genutec was also operated by a CEO (Danna), a CFO (Hoorizadeh), a COO (Pekarek),

and a CDO (Fannin). In addition, Genutec had corporate counsel, Mark Skaist, who was involved in aspects of the SD acquisition.

We note the TAC does not contain any fraud allegations, and its lawsuit against seven former directors does not assert any of these agents collaborated with outsiders to defraud the corporation. Rather, the complaint alleges the six directors breached their fiduciary duty to the company in different ways.³ Moreover, none of these directors had full control of the corporation. (Cf. *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 225 (*Favila*) [knowledge of corporate counsel's wrongful conduct by fraudulent corporate president who was *sole director* of corporation will not be imputed to corporation for purposes of ascertaining statute of limitations].) Genutec's CDO, Fannin, the COO, Pekarek, and corporate counsel, Skaist, are not named defendants in the TAC. Evidence these agents had knowledge of wrongdoing can be imputed to the corporation for purposes of ascertaining when the statute of limitations was triggered. Moreover, the shareholders having knowledge of wrongdoing may independently bring a derivative suit on behalf of the corporation to protect its interests. (See *Frederick v. First Union Securities, Inc.* (2002) 100 Cal.App.4th 694, 697.)

D. Analysis

The elements of a cause of action for legal malpractice are “(1) the attorney's duty to use a level of skill, prudence, and diligence commonly possessed and exercised by attorneys; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; (4) actual loss or damage resulting from the attorney's negligence; and (5) actual innocence of the former criminal defendant. [Citation.]” (*Ovando, supra*, 159 Cal.App.4th at p. 67.)

³ We recognize the seventh defendant director, Smit, was sued for fraud in a separate action for his conduct before he became a director. For this reason, we agree knowledge of his own wrongdoing would not be imputed to the corporation.

Genutec's malpractice action asserted Weiss breached his professional duty of care by encouraging Genutec's officers to reduce the amount of due diligence of SD to ensure a rapid acquisition. It alleged Weiss also breached his duty by failing to report Danna's purported conflict of interest in that the acquisition meant Danna's personal loans to the company would be repaid. Genutec maintains these breaches caused Genutec to acquire SD without first conducting an adequate technology due diligence of SD's dialing platform. Genutec claims proper due diligence would have uncovered the software was unlicensed and was incompatible with its own dialing system and Genutec would not have proceeded with the acquisition. Genutec alleged it discovered the above malpractice in August 2007 when it requested discovery of Weiss's files after suing the eight former executives.

We agree with the trial court that Genutec's allegation of delayed discovery in August 2007 is unsupported by the record. To the contrary, the undisputed material facts submitted by Weiss in his moving papers established the cause of action accrued soon after the SD acquisition in late 2005, or at the latest, in December 2006, when Genutec pursued a legal remedy against SD and Smit. Thus, the one-year statute of limitations expired sometime between November 2006 and December 2007. The February 2008 malpractice action was properly dismissed as untimely.

Simply stated, the limitations period began when Genutec suspected or should have suspected it had been wronged, even if it did not know whom to sue. The record plainly reveals *when* Genutec sustained actual injury from the manner in which Weiss conducted his due diligence. As stated in the TAC, Genutec learned soon after acquiring SD in September 2005 that SD's software was unlicensed and incompatible with Genutec's dialing platform. It essentially paid \$14 million for what turned out to be a useless product. In January 2006, Genutec discovered the software was being rewritten before it could be integrated and used. Genutec must have suspected or reasonably should have questioned why these problems were not uncovered during the course of due

diligence before the acquisition. And because the TAC suggests that Genutec was well aware, prior to the acquisition, of potential problems with SD's software, the need for a complete and adequate due diligence was recognized by many of Genutec's executives to be necessary and of key importance.

The TAC also alleges that in July 2006 the Genutec board and shareholders were informed there was a financial crisis. Genutec experienced reliability problems and lost clients due to the SD software issues. Recognizing it had been harmed, Genutec hired legal counsel to prepare a lawsuit. On December 8, 2006, Genutec filed a fraud action against SD and Smit, asserting there had been misrepresentations made about the licensing and software *during the period of due diligence* investigation.

Thus over a 13-month period (from November 2005 to December 2006) Genutec realized it had been damaged by the SD acquisition, suspected legal wrongdoing, and filed a lawsuit.⁴ There is ample undisputed evidence supporting the conclusion many of Genutec's key officers, executives, and directors suspected or should have suspected wrongdoing between November 2005 and December 2006, triggering the one-year statute of limitations.

The trial court correctly concluded the undisputed problems with SD's technology, which had not been uncovered during due diligence before the acquisition, should have put Genutec on inquiry notice Weiss's due diligence investigation may have been negligent. In investigating fraud claims against SD, Genutec offered no evidence it

⁴ Genutec asserts it was erroneous for the trial court and Weiss to say the date a plaintiff discovers it has been injured triggers the statute of limitations, because it is the discovery of *misconduct* that is the trigger date. True, but in this case the discovery of the injury and misconduct occurred on the same date. When a patient wakes up from surgery and discovers the wrong leg was amputated, the injury and discovery of misconduct occur simultaneously. Similarly, when the software failed to work as promised and was uncovered as pirated, Genutec was financially harmed and immediately knew the harm was caused by misconduct. It had been wronged by the seller and also potentially by the attorney hired to protect its interests and conduct due diligence.

could not have also looked into Weiss's communications with the parties. After determining it was the victim of fraud, there appears no reason why Genutec would not have looked into why its counsel, retained to conduct legal due diligence before the acquisition, failed to uncover the fraud. The TAC asserts that but for Weiss's failure to conduct adequate due diligence the software problems would have been uncovered.

“It is well settled that the one-year limitations period of section 340.6 “‘is triggered by the client’s discovery of ‘the facts constituting the wrongful act or omission,’ not by his discovery that such facts constitute professional negligence, i.e., by discovery that a particular legal theory is applicable based on the known facts. ‘It is irrelevant that the plaintiff is ignorant of his legal remedy or the legal theories underlying his cause of action.’” [Citation.]’ [Citations.]” (*Peregrine Funding, supra*, 133 Cal.App.4th at p. 685.) We conclude the undisputed facts regarding the type of financial harm in this case, plus Genutec’s knowledge they had been defrauded by Smit during the period of due diligence, would have alerted a reasonable person “‘to the necessity for investigation and pursuit of [his or] her remedies.’ [Citation.]” (*McGee v. Weinberg* (1979) 97 Cal.App.3d 798, 803.) In other words, Genutec was not ignorant of the need for a remedy to address the damage, they were only unaware of the identities of all the parties involved.

As aptly stated by Weiss in the respondent’s brief, the allegations in the action against SD “are inextricably intertwined with those in the TAC” against him. The core claim against Weiss is he conducted an inadequate due diligence investigation of SD’s technology that enabled Smit to conceal problems with software. That same concealment is the basis for the claim against SD, i.e., the software problems were not disclosed during due diligence. In investigating the claims of fraud against Smit, Genutec should have sought out all communications regarding the acquisition, including those generated by the attorneys conducting the due diligence of Smit and his company. It had a duty to investigate once it suspected that “someone has done something wrong.”

(Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 397-398.) As Genutec asserts and admits, the electronic communications between the lawyers and the parties plainly establish the negligent parties. We conclude Weiss met his burden of showing the statute of limitation period was triggered soon after the SD acquisition and Genutec was obligated to conduct a reasonable investigation once it suspected someone had done something wrong, and if it had done so, it would have discovered the facts underlying the alleged malpractice.

Genutec maintains the statute of limitations was not triggered because Weiss's alleged misconduct was concealed by Danna due to a conflict of interests, and the information was otherwise unavailable to Genutec. Such speculation is immaterial given that Danna was not the sole owner and operator of Genutec. Weiss aptly points out his letters and e-mails regarding due diligence were sent to other Genutec agents (who did not have a purported conflict of interest). Indeed, the board, shareholders, Lenders, and other officers of the company all knew the newly acquired software was causing the company to sustain huge losses, and clearly none of the lawyers who conducted due diligence before the acquisition uncovered the licensing and technology problems.

Moreover, Genutec retained independent counsel (M. Candice Bryner from the Law Offices of M. Candice Bryner and David E. Outwater from the law firm Outwater & Pinckes) to investigate the wrongdoing relating to damages arising from the acquired unlicensed software. Bryner filed a lawsuit on Genutec's behalf on December 8, 2006. There is no evidence Bryner was refused access to all correspondence relating to the acquisition during their investigation, or that information was purposefully withheld at that time by Danna or other Genutec directors involved in the SD acquisition. The Lenders did not restructure and force Danna and the other directors to resign until several months after the fraud lawsuit was filed. Genutec alleged it did not attempt to look for evidence of Weiss's wrongdoing until after the Lenders took over the business and decided to sue the former Genutec directors.

As stated above, Genutec knew it had been damaged as early as November 2005, triggering its duty to investigate the identity of the wrongdoers and the statute of limitations. “[T]he rationale for distinguishing between ignorance of the wrongdoer and ignorance of the injury itself appears to be premised on the commonsense assumption that once the plaintiff is aware of the injury, the applicable limitations period (often effectively extended by the filing of a Doe complaint) normally affords sufficient opportunity to discover the identity of all the wrongdoers.” (*Bernson, supra*, 7 Cal.4th at p. 932.)

Alternatively, Genutec maintains its case is analogous to the case authority holding separate acts of malpractice lead to separate actionable injuries. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797 (*Fox*)). We disagree. In the *Fox* case, plaintiff sued for medical malpractice after her gastric bypass surgery resulted in complications. She learned in discovery that a medical device used during the surgery may have malfunctioned, causing her injury. She amended her complaint to add a products liability cause of action against the manufacturer of the device. Our Supreme Court held the action was not barred by the statute of limitations. It reasoned that if a reasonable inquiry would not have revealed a factual basis for the cause of action, the statute of limitations would not be triggered until the delayed discovery. (*Fox, supra*, 35 Cal.4th at p. 803.)

Our Supreme Court rejected the rule that all claims arising from an injury accrue simultaneously, even if based on different types of wrongdoing. (*Fox, supra*, 35 Cal.4th at pp. 804-805.) Instead, the court held “that, under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action.” (*Id.* at p. 803.) The court concluded it was proper to allow plaintiff to amend her complaint to allege she did not discover or

suspect, and could not have through reasonable diligence, that the stapler was the cause of her injury until she learned of the device during a deposition. (*Id.* at p. 811.)

The case is distinguishable on several grounds. First, the case is factually distinguishable: The plaintiff in *Fox* had no knowledge of the medical device that allegedly caused her injury until she learned of it during discovery. (*Fox, supra*, 35 Cal.4th at p. 811.) Here, Genutec was aware SD's illegal software was causing it to sustain financial losses. The direct cause of this damage was not hidden. Unlike the *Fox* case, the factual basis for Genutec's legal malpractice claim was reasonably discoverable through diligent investigation. Because the problems with the software was not *disclosed or discovered* during the due diligence investigation prior to SD's acquisition, it would be reasonable to suspect wrongdoing with both the parties responsible for disclosure and the parties responsible for discovery.

Second, the case is procedurally different. In *Fox*, the case was before the court on a demurrer and the court was required to assume the delayed discovery allegations were true. (*Fox, supra*, 35 Cal.4th at p. 811.) The case before us arises from summary judgment and the record contains a detailed record of when Genutec discovered its injury, the cause of its injury, and whether it exercised reasonable diligence to investigate its claims. This court was not bound by Genutec's allegation it could not actually discover the e-mail communications between Weiss and Genutec's officers until conducting discovery in August 2007. As stated earlier, Genutec was on *inquiry* notice it had a duty to conduct a reasonable investigation of all the parties involved in SD's acquisition after becoming aware of its injury beginning in November 2005.

More on point is *Peregrine, supra*, 133 Cal.App.4th 658. In *Peregrine Funding*, investors in a corporation declared bankruptcy, and the bankruptcy trustee alleged they sustained investment losses arising out of a Ponzi scheme disguised as a mortgage lending business. The investors and the trustee later filed a legal malpractice action against the law firm that had represented the corporation. Plaintiffs asserted they

did not realize the law firm owed a professional duty to them until after they reviewed documents produced in discovery indicating a direct attorney-client relationship. (*Id.* at p. 684.) The court rejected this argument concluding plaintiffs realized they were damaged by the corporation, and it was represented by the law firm, more than one year before they filed suit. “That [the law firm] may have owed an implied duty of care to the investors based on the foreseeability of harm to them is a *legal theory*, not an essential fact necessary to establishing liability. It is well settled that the one-year limitations period of section 340.6 “is triggered by the client’s discovery of ‘the facts constituting the wrongful act or omission,’ not by his discovery that such facts constitute professional negligence, i.e., by discovery that a particular legal theory is applicable based on the known facts. ‘It is irrelevant that the plaintiff is ignorant of his legal remedy or the legal theories underlying his cause of action.’” [Citation]’ [Citations]” (*Id.* at p. 685.)

The *Peregrine Funding* court concluded, plaintiffs “knew or should have known all the facts alleged in the complaint concerning [the law firm’s] wrongful conduct more than a year before they filed their complaint” and the only fact discovered after filing the complaint was ancillary to the allegations of misconduct already in the complaint. (*Peregrine Funding, supra*, 133 Cal.App.4th at p. 685.) Similarly, here Genutec knew or should have known all the facts alleged in the complaint concerning Weiss’s wrongful conduct more than one year before they filed their complaint. It filed suit against Smit for wrongdoing arising out of the same transaction and for which Weiss was responsible for conducting due diligence. As a result of Weiss’s purported failure to conduct adequate due diligence, Genutec purchased unlicensed and incompatible dialing software and fell prey to fraud.

In summary, we affirm the judgment because of the undisputed facts supporting the conclusion Genutec was on inquiry notice of a potential legal malpractice action as early as November 2005 (and certainly before December 6, 2006). The statute of limitations are “practical and pragmatic devices to spare the courts from litigation of

stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and the evidence has been lost.’ [Citation.]” (*Adams v. Paul* (1995) 11 Cal.4th 583, 603.) If we were to accept Genutec’s theory it could delay investigating the adequacy of Weiss’s legal representation, and postpone looking into whether he performed reasonable due diligence until the Lenders took over control of the corporation, we would give Genutec unilateral control over the limitations period. There is no reason to give corporations preferential or different treatment from other plaintiffs. We conclude that in this case, the nature of the Genutec’s damages in 2005 and 2006 were sufficient to cause a reasonable person to suspect the legal representation during the due diligence period was suspect.

For this reason, we need not address the alternative theories presented in the summary judgment that Genutec’s corporate agents had *actual* knowledge of the alleged malpractice in 2005 (having possession of the e-mails) or could have recovered data from the computer hard drives earlier. We recognize the parties dispute whether the actual knowledge of two purported “rogue” officers Danna and Hoorizadeh, can be imputed to the company. They also dispute whether the trial court improperly relied on evidence submitted after the reply brief was filed in violation of Genutec’s due process rights. However, because our review of a summary judgment ruling is *de novo*, we need not issue an advisory opinion on these issues. As described in great detail above, we affirm the summary judgment based on the undisputed facts timely presented that support the conclusion Genutec was on inquiry notice, triggering the one-year statute of limitations as early as November 2005, but no later than December 8, 2006. In reaching this decision, this court did not need to consider Weiss’s untimely supplemental evidence.

E. Tolling

Genutec raises on appeal two tolling arguments that were not raised in the trial court. It asserts it was under a “disability” as defined in section 340.6, subdivision (a)(4), restricting its ability to sue, and that equitable tolling applies. We disagree.

Section 340.6, subdivision (a)(4), provides a legal malpractice action will be tolled during the time “[t]he plaintiff is under a legal or physical disability which restricts the plaintiff’s ability to commence legal action.” Although section 340.6 does not define “legal disability,” the case law provides tolling typically occurs when, due to circumstances beyond the plaintiff’s control (such as incarceration, minority, or illness), the plaintiff cannot file a lawsuit. (See *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1209-1210.) It is also settled the statute of limitations is not tolled under any provision of section 340.6 when a company lacks standing to sue because its powers are suspended by the State. (*Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App.4th 394, 402-403.)

Genutec presents the novel theory (unsupported by legal authority) that it was unable to commence legal action due to “adverse domination” by its corporate officers. This argument is simply a weakly disguised variation of its delayed discovery argument previously rejected by this court. Genutec argues that in *Favila, supra*, 188 Cal.App.4th at p. 225, the court held the statute of limitations does not begin to run on a company’s malpractice claim during the time within which the company was solely controlled by the president who was acting adversely to the company. However, the *Favila* case did not address when a corporate plaintiff is deemed disabled under section 340.6. Rather, the *Favila* case, like the *Fox* case described earlier, involved plaintiffs discovering two distinct wrongdoings arising from the same injury. In both cases, the plaintiffs’ reasonable investigation only disclosed the claim for one type of tort, and through no fault of the plaintiffs, facts supporting an entirely different type of tort action came to light later.

In *Favila*, the executor of the estate of the founder of a closely held corporation brought an action against the corporation’s other shareholders and later moved for leave to amend the complaint to allege a shareholder derivative action against

the law firm representing the corporation. (*Favila, supra*, 188 Cal.App.4th at pp. 201-202.) The executor alleged she “did not know any attorneys had assisted in the [purportedly illegal] transactions and did not learn of [the law firm’s] involvement, and thus its malpractice” until depositions taken during the individual action. (*Id.* at pp. 224-225.) The attorneys disputed the veracity of these allegations. Given this dispute of material facts at the demurrer stage of the proceedings, the court determined the issue must be resolved on summary judgment or at trial. (*Id.* at p. 225.) In the case before us, there is no dispute all parties were aware of Weiss’s role as Genutec’s legal counsel and that he was retained to conduct due diligence before SD’s acquisition. The *Favila* case’s holding regarding delayed discovery of attorney malpractice at the demurrer stage of the proceedings is inapt factually. More importantly, the case utterly fails to support Genutec’s novel theory a corporation is legally disabled whenever one of its officers acts inappropriately or has a conflict of interest.

In its reply brief, Genutec asserts *Bledstein v. Superior Court* (1984) 162 Cal.App.3d 152, 165 (*Bledstein*), held the exclusive tolling provisions listed in section 340.6 also incorporate delayed discovery case law such as *Favila*. Not so. The *Bledstein* case involved a plaintiff who was imprisoned and waited four years to initiate a legal malpractice action against his attorney. The court determined the Legislature in enacting the legal disability exception (section 340.6, subd. (a)(4)), intended to incorporate the general tolling provisions found in the Code of Civil Procedure. (*Id.* at p. 166.) “[T]he general provisions concern legal and physical impediments to a plaintiff’s ability to institute a suit, such as absence of the defendant from California (§ 351), minority and insanity (§ 352, subd. (a)), the existence of a state of war (§ 354), and the existence of a prohibitive injunction (§ 356).” (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 548 [holding legal disability includes absence from the state], citing *Bledstein, supra*, 162 Cal.App.3d at pp. 161-162.) The *Bledstein* court found

support for its conclusion in the legislative history of section 340.6. (*Bledstein, supra*, 162 Cal.App.3d at pp. 164-166.)

Genutec's characterization of the legislative history discussion in *Beldstein* borders on the disingenuous. Genutec asserts the drafters proposed section 340.6 "*would codify the existing case law*" on the circumstances under which statute of limitations are tolled. (Italics added.) Not so. The Senate Committee on the Judiciary commented the statute of limitations for legal malpractice are tolled by sections 351 and 352 (the general tolling provisions) and "AB 298 would codify *this* existing case law on the specific circumstances" permitted for tolling. (*Beldstein, supra*, 162 Cal.App.3d at p. 165, italics added.) The court did not hold case law, including delayed discovery cases such as *Favila*, is incorporated into the tolling provisions of section 340.6. And if there was any doubt as to the drafter's intent, we note *Beldstein* was decided before *Laird, supra*, 2 Cal.4th at page 618, in which our Supreme Court held the tolling provisions stated in section 340.6 are exclusive and the "Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute."

Returning to the case before us, there is no evidence Genutec was legally disabled from timely filing a lawsuit against Weiss. It is undisputed Genutec filed a lawsuit against SD and Smit on December 8, 2006, and it filed a lawsuit against former officers on July 10, 2007. Genutec's ability to commence legal action was unrestricted by the presence or absence of those executives. Indeed, the board of directors resigned in early 2007, several months *before* Genutec filed the second lawsuit filed on July 10, 2007. Genutec was not hampered by any legal disability as defined by the statutes.

Moreover, contrary to Genutec's contention on appeal, "equitable tolling" of the statute of limitations is unavailable for legal malpractice claims. The specific tolling provisions of section 340.6 are exclusive. (*Laird, supra*, 2 Cal.4th at p. 618 ["[T]he Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute"]; *Gordon v. Law Offices of Aguierre & Meyer* (1999)

70 Cal.App.4th 972, 980 [“the ‘[i]n no event’ language of section 340.5 makes its enumerated tolling provisions exclusive”].)

III

The judgment is affirmed. We deny Genutec’s motion to augment the record with documents relating to Danna’s motion for summary judgment. These documents were not relevant to our de novo review of Weiss’s motion for summary judgment. Weiss shall recover his costs on appeal.

O’LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.