UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANNA K. NUPSON, Plaintiff, v. SCHNADER HARRISON SEGAL & LEWIS LLP, and BRUCE A. ROSENFIELD, ESQ., Defendants.	)	Case No. 2:18-cv-02505-NIQA

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

DILWORTH PAXSON LLP
Lawrence G. McMichael, Esquire
Patrick M. Northen, Esquire
Patrick M. Harrington, Esquire
Atty. ID Nos. 28550 / 76419 / 317998
1500 Market Street, Suite 3500E
Philadelphia, PA 19102-2101
P: (215) 575-7000 / F: (215) 575-7200
lmcmichael@dilworthlaw.com
pnorthen@dilworthlaw.com
pharrington@dilworthlaw.com
Attorneys for Defendants Schnader Harrison Segal & Lewis LLP, and Bruce A. Rosenfield, Esquire

Date: February 1, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES

RULES AND REGULATIONS

I. INTRODUCTION

The central focus of Plaintiff Anna Nupson's Second Amended Complaint ("SAC") is a transaction that took place in late February 2003 ("2003 Stock Sale Transaction"), over fifteen years before she filed this lawsuit, in which Defendants Bruce A. Rosenfield and Schnader Harrison Segal & Lewis LLP (collectively, "Schnader") represented Ms. Nupson in connection with the sale of her stock in a family-owned corporation, Bradford Holdings, Inc. ("Bradford"). [SAC, ¶¶ 5-6, 42-43]. Schnader previously moved to dismiss Plaintiff's First Amended Complaint ("FAC") on the basis that all of Plaintiff's purported claims are plainly barred by the applicable statute of limitations. After reviewing that Motion, and submitting her Brief in Opposition thereto, Plaintiff abruptly changed counsel and filed her SAC, which attempts to restate Plaintiff's theory of the case to cure the statute of limitations problem that was clearly evident on the face of her FAC. Plaintiff's SAC is equally futile. No amount of creative draftsmanship can alter the fundamental fact that this lawsuit is based on events and legal advice that occurred in 2003 and earlier, and is therefore time-barred.

As a result of the 2003 Stock Sale Transaction, Bradford redeemed all shares not owned by Plaintiff's brother, John S. Middleton ("John"), so that John became the sole owner of the company. [SAC at ¶ 7]. The fundamental basis of Plaintiff's lawsuit remains that Schnader allegedly counseled Plaintiff to proceed with the 2003 Stock Sale Transaction, and led her to believe that it was in her best interests, when the Transaction actually benefited John because the price Bradford paid to redeem the shares was allegedly far less than its actual value. [SAC at ¶ 7]. Plaintiff further alleges that Schnader's advice was driven by Schnader's alleged "undisclosed conflicts of interest," because Schnader also represented John and his company, Bradford. [*Id.*]. Because it is clear that Plaintiff's purported causes of action center on events that occurred in 2003, she argues to toll the statute of limitations by claiming that she was not

aware of ***all*** the relevant facts until recently. Pennsylvania case law is clear that "the statute of limitations in a legal malpractice claim begins to run when the attorney breaches his or her duty, and is tolled only when the client, ***despite the exercise of due diligence***, cannot discover the injury or its cause." *Wachovia Bank, N.A. v. Ferretti*, 935 A.2d 565, 573 (Pa. Super. Ct. 2007) (emphasis added).

Schnader's Motion to Dismiss should be granted. It is evident on the face of the SAC alone that Plaintiff's purported causes of action are barred by the two-year statute of limitations applicable to professional negligence and breach of fiduciary duty actions in Pennsylvania.[1] Such conclusion becomes even more unmistakable when viewed in light of Plaintiff's verified filings in litigation against John in the Montgomery County Orphans' Court ("Orphans' Court Litigation"). This Court can take judicial notice of these filings, which contain judicial admissions that Plaintiff had ***actual knowledge*** of her alleged claims against Schnader at least three years before filing this lawsuit. Her verified pleadings filed in 2015 make allegations against Schnader that are substantively identical to those she makes in this case. Among other things, as discussed in detail below, Plaintiff specifically alleged in 2015 that "[i]n trying to accommodate all of the competing interests of multiple clients with direct and indirect conflicts, Bruce A. Rosenfield, Esq. was limited by prior representations and personal interests and was not able to zealously and independently represent each of his clients," thus "Schnader was in the position of having multiple clients with conflicting goals."

These pleadings echo allegations made in a letter from Ms. Nupson's General Counsel dated **June 5, 2014**, which was attached as an Exhibit to a pleading filed by Plaintiff in the

[1] Plaintiff also appears to assert a breach of fiduciary duty claim arising out of Rosenfield's role as Trustee of the 2001 Trust for the benefit of Plaintiff, yet Plaintiff does not allege how Rosenfield breached such duties. Regardless, Plaintiff admits that Rosenfield did not become Trustee until February 2005, two years after the 2003 Stock Sale Transaction. [SAC at ¶ 41].

Orphans' Court. That letter stated: "We do feel that Anna is the victim of actions taken by Bruce Rosenfield as an attorney, who represented other family members while purporting to represent Anna's interest in drafting documents, counseling her pertaining to various Trusts, and securing her sale of family interests. As a result of ignoring these various conflicts of interest, Anna has been locked away from control of her assets and has been severely damaged without benefit to her. **Accordingly, we have determined to proceed against [Schnader]**."[2] (emphasis added.)

Thus, by her own admission, Ms. Nupson not only knew of (*i.e.* had discovered) her alleged claims, but had already decided to sue Rosenfield and Schnader at least as early as June 2014. She then waited more than four years to file this lawsuit, presumably to suit her litigation strategy against John, but certainly not because she was unable to discover her alleged claims. Ms. Nupson and John eventually settled their disputes. On February 27, 2018, John filed a Petition to Approve Settlement Agreement, which the Court approved by Order dated April 11, 2018. Ms. Nupson received $22 million and released all claims against John. Plaintiff was, of course, free to choose which potential defendants to sue and with whom to settle. However, she cannot through her selection of defendants unilaterally toll the statute of limitations on claims against those parties she chose not to include in her previous lawsuit. Plaintiff has had substantial resources and independent counsel for years; she has been making these same accusations for years; and there is no reasonable or legally cognizable excuse why she should have waited this long to bring these claims.

Plaintiff cannot save her stale claims by alleging that she "recently discovered" additional facts underlying her purported causes of action. As the Superior Court recently reaffirmed in a

[2] The letter was an exhibit to Ms. Nupson's Verified Petition For Declaratory Relief And A Citation Directing The Trustee [John] To Show Cause Why He Should Not Be Ordered To File An Account And Timely Distribute Trust Principal [of the 1994 Anna Nupson Trust] filed October 31, 2014 in Orphans' Court No. 2014-X3827.

May 2018 decision involving an attorney professional negligence action, "[u]nder the occurrence rule, the statute of limitations period ***is triggered by the first act of alleged malpractice, not the last***…. There is no 're-set' button to start the limitations period all over again." *Communications Network International, Ltd. v. Mullineaux,* 187 A.3d 951, 965 (Pa. Super. Ct. 2018) (emphasis added). Plaintiff's allegations regarding newly discovered evidence are implausible. For present purposes, they describe, at most, additional evidence Plaintiff wishes to present in support of her overarching theme that Schnader did not adequately represent her interests in connection with the 2003 Stock Sale Transaction because it had conflicted loyalties. Plaintiff's current litigation strategy of placing significant weight on a grantor retained annuity trust ("GRAT I") entered in 2001, which she describes as "previously undisclosed," no more tolls the statute of limitations than her previous unmerited contention that the statute of limitations should be tolled by Schnader's purported 2016 "confirmation" that Bradford had paid the invoices Schnader submitted for its work in connection with the 2003 Stock Sale Transaction. In both cases, Plaintiff simply describes additional facts she contends support her alleged claims, rather than a separate and discrete cause of action.[3]

Finally, Plaintiff's SAC asserts for the first time that her claims should be governed by Pennsylvania's four-year statute of limitations applicable to breach of contract actions. Plaintiff is plainly wrong as a matter of law. As discussed in detail in Section III.E of this Brief, Plaintiff's professional negligence claims clearly sound in tort, not breach of contract, and therefore the two-year tort statute applies. Moreover, it is clear from the facts alleged in the SAC, as well as the pleadings and exhibits in the Orphans' Court Litigation of which this Court

[3] Additionally, Plaintiff cannot plausibly articulate how the modification of GRAT I caused any harm to her, given that she acknowledges it was superseded by a subsequent GRAT ("GRAT II"), of which Plaintiff did have knowledge. [SAC, ¶ 40]. Plaintiff had been excluded as a beneficiary of GRAT I, but under GRAT II, which was approved by the 2003 Stock Sale Transaction, Plaintiff was made a beneficiary of one-third of her mother's shares.

may take judicial notice, that all of Plaintiff's claims accrued well more than four years before she instituted this action. Accordingly, such claims are stale and the SAC should be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. FACTUAL AND PROCEDURAL HISTORY

A. Schnader's Representation of the Middleton Family

Plaintiff Anna K. Nupson and her siblings, John Middleton and Lucia Middleton Hughes ("Lucia"), are the adult offspring of Herbert Middleton, Jr. ("Herbert") and Frances Middleton ("Frances"). [SAC, ¶ 8.] The Middleton family owned a very successful tobacco business, which was first known as John Middleton, Inc. Plaintiff asserts that the business was started by Herbert's father, Herbert Middleton, Sr ., and eventually became a subsidiary of Bradford.[4] [*Id.* at ¶ 8.] The business generated "vast wealth" for the Middleton family. [*Id.* at ¶ 9.]

Schnader began its representation of the Middleton family and their company prior to 1994. [SAC, ¶ 11.] Over the course of the following decades, Schnader "represented the Company, Herbert, Frances, John, and Plaintiff, as well as a host of other Middleton Family and Bradford-related entities." [*Id.*] Sometimes, Schnader represented the Company or individual Middleton family members, while other times it represented the interests of the family as a whole. [*Id.*] In October 2002, Plaintiff executed a conflict waiver addressed to her, John and Frances ("2002 Conflict Waiver"). [SAC, ¶ 46]. The 2002 Conflict Waiver specifically discloses that "in the past we have represented each of you individually in estate planning matters and various trusts of which you are trustees and beneficiaries."[5] Plaintiff alleges that the

[4] All citations to the Factual History are taken from Plaintiff's SAC, which is assumed to be true for the purposes of this Motion to Dismiss and for no other purpose. Certain factual allegations in the SAC are incorrect. For example, the assertion that Plaintiff's grandfather started the family business is plainly wrong.

[5] The 2002 Conflict Waiver is specifically referred to in paragraphs 46-49 of the SAC, but is not attached. The letter can be located within Exhibit F to Schnader's Motion to Take Judicial Notice (as exhibit G thereto) [Docket No.7] and is also attached here as Exhibit A, for the Court's convenience.

2002 Conflict Waiver was inadequate because it failed to address each matter as a separate representation; to identify the client for each separate representation; or to identify and address other potential and actual conflicts of interest. [*Id.* at ¶¶ 11, 48-49].

B. The 2003 Stock Sale Transaction

The crux of the SAC is the 2003 Stock Sale Transaction, in which Schnader represented Plaintiff and her mother, Frances. [SAC, ¶¶ 5-7, 42.] Plaintiff admits that the negotiations leading to this transaction took place **"[i]n late 2002 and early 2003."** [*Id.*] As a result of the 2003 Stock Sale Transaction, John became the sole owner of Bradford. [*Id.* at ¶ 5]. Plaintiff further alleges that "[a]t the time of the negotiations for the sale of the stock" she was misled about her rights with respect to Bradford stock, as well as the value of that stock. [*Id.* at ¶ 5]. She further claims that Schnader led her "to believe that selling her interest in the Bradford shares was in her best interests and … counseled her to proceed with the transaction" and that Defendants were "motivated by their own conflicts of interest and their recent, undisclosed representation of John in a secret transfer of 258,029 Bradford shares to a trust for John's benefit." [*Id.* at ¶ 7].[6]

Plaintiff alleges that as a result of the 2003 Stock Sale Transaction: (a) she sold the Bradford shares she owned, and (b) because her mother, Frances, also sold all of her shares, Plaintiff gave up the one-third interest in those shares she allegedly would have received upon her mother's death in 2013. [SAC, ¶¶ 42, 45; Motion for Judicial Notice, Ex. A at ¶ 7].[7] Plaintiff asserts the purchase price was far less than the actual value. [*Id.* at ¶ 45.] She claims

[6] Notably, the "secret transfer" refers to GRAT I, which was superseded by GRAT II, resulting in a benefit to Plaintiff. *See* footnote 3, *supra*.

[7] In making this allegation, Plaintiff implausibly assumes that absent the 2003 Stock Sale Transaction and the contemporaneous Family Settlement Agreements, her mother (a) would have abandoned her intent to use a GRAT to give away her shares in a tax efficient way, (b) would not have given away or sold the shares in another estate planning transaction, and (c) would have included Plaintiff as a full beneficiary of her estate.

that this result was inconsistent with a 1982 Shareholders Agreement, in which Schnader represented the Middleton family, and several other family agreements predating the 2003 Stock Sale Transaction. [*Id.* at ¶¶ 14-18]. According to the SAC, the purported "net effect" of these family agreements was that any transfer of Bradford shares required John, Lucia and Plaintiff "to retain proportional ownership in Bradford and or fair value for relinquishing that proportional ownership." [*Id.* at ¶¶ 14, 21.]

C. 2015 Orphans' Court Litigation

Beginning in 2015, John filed declaratory judgment actions in the Orphans' Court. [SAC, ¶ 52.] Like the instant case, the Orphans' Court Litigation involved the 2003 Stock Sale Transaction. [*Id.*]. John took the position that the Transaction was valid. [*Id.* at ¶ 53]. Specific allegations made by Plaintiff in the Orphans' Court Litigation – of which this Court can take judicial notice for the purpose of showing that Plaintiff had actual knowledge of her alleged claims against Schnader – will be discussed in the next subsection of this Brief.

The SAC alleges that during the course of discovery in the Orphans' Court Litigation, Plaintiff learned for the first time a series of alleged "facts" that she contends were concealed by Schnader. These alleged newly disclosed facts relate to the creation of GRAT I in 2001 and its subsequent replacement by GRAT II in 2003. [SAC, ¶¶ 66-68]. Specifically, Plaintiff alleges that in 2000, Schnader represented John in a transaction that resulted in Plaintiff's mother transferring her Bradford shares to a trust whose sole beneficiaries were John and his family, thereby excluding Plaintiff and her sister, Lucia. [*Id.* at ¶ 24.] As part of the transaction, Schnader discussed an *inter vivos* transfer of Frances's Bradford shares to John, using a GRAT as a vehicle to avoid substantial gift taxes. [*Id.* at ¶ 26]. On November 19, 2001, Frances signed the GRAT I document prepared by Schnader, but such document was backdated to February 1,

2001.[8] [*Id.* at ¶ 32]. Plaintiff claims Lucia learned of the GRAT I transaction in approximately 2002 and challenged it. [SAC, ¶ 37.] As a result, GRAT I was modified by GRAT II, which was also backdated to February 1, 2001. [*Id.* at ¶ 40].

Plaintiff claims that she did not learn of GRAT I until it was disclosed in the Orphans' Court in October 2016. [*Id.* at ¶¶ 37, 54]. Tellingly, however, Plaintiff does not deny knowledge of GRAT II, which modified and superseded GRAT I to Plaintiff's benefit. To the contrary, Plaintiff expressly pleads that "[u]nder the terms of GRAT II, in 2005, Defendant Rosenfield assumed his role as Trustee of the Anna Nupson 2001 Trust," thereby indicating her knowledge, as of 2005 at the latest, that a GRAT was in place.[9] [*Id.* at ¶ 41]. As will be discussed in the argument section of this Brief, Plaintiff does not attempt to explain how the formation of GRAT I, which transferred all of her mother's shares to John, and was replaced by GRAT II, which transferred her mother's shares equally to the three siblings well more than a decade before she filed this lawsuit, could possibly have caused or contributed to her alleged injuries.

D. Facts Judicially Noticed from Plaintiff's Filings in the Orphans' Court Litigation

The allegations made in the SAC are sufficient by themselves to determine the dispositive question of when Plaintiff's cause of action against Defendants accrued, because they demonstrate that Plaintiff's alleged claims are based on Schnader's supposed professional misconduct in connection with the 2003 Stock Sale Transaction for which Plaintiff announced

[8] Although not relevant for the purposes of this Motion, Schnader denies the intended negative connotation from the use of the word "backdated." GRAT I was executed in November 2001 and confirmed an earlier oral trust.

[9] Plaintiff's prior knowledge of the existence of a GRAT is confirmed on page 9 of her verified "Answer to Petition for Declaratory and Other Relief of John S. Middleton and Bradford Holdings, Inc. and New Matter" filed in the Orphans' Court Litigation on June 23, 2015, in which "Ms. Nupson admits that Frances S. Middleton established an annuity trust on February 1, 2001[.]" Such pleading is attached to Defendants' Motion for Judicial Notice as Exhibit E. In other words, Plaintiff has long known of the existence of a GRAT and fails to explain how her purported discovery of a prior, superseded GRAT, containing terms less favorable to her, could possibly give rise to a discrete cause of action.

her intent to sue Schnader on June 5, 2014. Moreover, in numerous pleadings Plaintiff filed in the Orphans' Court Litigation, Ms. Nupson repeatedly made allegations against Rosenfield and Schnader that compel the conclusion that she has had actual knowledge of her alleged claims for over two years and, therefore, this action is time-barred.[10] Indeed, these verified pleadings largely repeat what was stated in a **June 5, 2014** letter from Ms. Nupson's General Counsel, Thomas J. Budd Mucci, which was attached to an October 31, 2014 filing in Orphans' Court No. 2014-X3827. That letter stated explicitly that Nupson "**ha[s] determined to proceed against Schnader Harrison Segal & Lewis LLP**" based upon Schnader's "ignoring… various conflicts of interest," which allegedly left Anna "severely damaged."[11] [Ex. B at p. 1. (emphasis added.)]

In Plaintiff's "Counterclaim and Petition for Declaratory and Other Relief"[12] filed **June 23, 2015** ("2015 Counterclaim"), Plaintiff states that "[i]n October of 2002, Bruce A. Rosenfield, Esq. prepared a Waiver of Conflict Agreement … among Schnader, Anna K. Nupson, John S. Middleton and Frances S. Middleton," [Ex. C, ¶ 40], which Plaintiff alleges was "presented to and signed by Anna K. Nupson in February 2003." [Ex. C, ¶ 41.] Ms. Nupson was obviously already well aware that Rosenfield had represented her parents, her brother, and the company,

---

[10] Defendants have previously filed a Motion for Judicial Notice requesting this Court to take Judicial Notice of pleadings filed in the Orphans' Court. *See U.S. ex rel. Spay v. CVS Caremark Corp.*, 913 F. Supp. 2d 125, 139 (E.D. Pa. 2012) ("[w]here a party requests judicial notice and supplies the necessary information, a court must take judicial notice.") Moreover, the SAC specifically references the prior litigation in a section entitled "The Orphans' Court Litigation" [SAC, ¶¶ 52-70], which provides an additional reason for this Court to consider them. *See In re Rockefeller Ctr. Properties, Inc. Securities Litig.*, 184 F.3d 280, 287 (3d Cir. 1999) (holding that "we and other courts of appeals have held that a court may consider certain narrowly defined types of material without converting the motion to dismiss [to a motion for summary judgment]," such as a "document integral to or explicitly relied upon in the complaint," or an "undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." The *Rockefeller* court sagely advised that the rationale for these exceptions is that "the primary problem raised by looking to documents outside the complaint—lack of notice to the plaintiff—is dissipated where plaintiff… has relied upon these documents in framing the complaint." *Id.*

[11] A true and correct copy of this letter from Attorney Mucci is attached both to Defendants' Motion for Judicial Notice and hereto as Exhibit B.

[12] A true and correct copy of the "Counterclaim and Petition for Declaratory and Other Relief" is attached to Defendants' Motion for Judicial Notice and relevant pages are attached hereto as Exhibit C.

but the waiver letter makes that explicit. (The waiver letter also discloses that Rosenfield was a board member of a Bradford subsidiary and states that Larry Laubach of Cozen and O'Connor was representing John in the transaction.) Plaintiff further alleges that "[i]n trying to accommodate all of the competing interests of multiple clients with direct and indirect conflicts, Bruce A. Rosenfield, Esq. was limited by prior representations and personal interests and was not able to zealously and independently represent each of his clients. … Schnader was in the position of having multiple clients with conflicting goals." [Ex. C, ¶ 47]. These allegations are substantively identical to those that form the core of Plaintiff's current lawsuit.

In her verified "Answer and New Matter to Petition for Declaratory Relief and Other Relief of John S. Middleton and Bradford Holdings, Inc."[13] filed in the Orphans' Court on **June 23, 2015**, Plaintiff similarly alleged that although Rosenfield was Ms. Nupson's "purported" counsel in connection with the 2003 Stock Sale Transaction (referred to in that document as the "2003 Redemption"), he had "years earlier begun to orchestrate the transaction in favor of [John] and had at all times an [sic] unwaivable conflicts of interest." [Ex. D at p. 3.] Plaintiff also denied that "she was properly advised or represented by" Rosenfield. [Ex. D, ¶ 64.] Finally, Ms. Nupson stated precisely the cause of action she now asserts three years later: "Mr. Rosenfield would purport to represent Anna K. Nupson in negotiations against Mr. [John] Middleton relating to the Bradford shares. Mr. Rosenfield continued to represent Mr. Middleton as the Trust's legal counsel throughout these negotiations. Mr. Rosenfield and his firm had numerous and substantial conflicts in this multi-faceted representation and was clearly not in a position to zealously and independently represent Ms. Nupson in negotiating against Mr. Middleton and Bradford." [Ex. D, ¶ 124; *see also id.* at ¶ 141 (alleging that Schnader had duty to Plaintiff to

[13] A true and correct copy of the "Answer and New Matter to Petition for Declaratory Relief and Other Relief of John S. Middleton and Bradford Holdings, Inc." is attached to Defendants' Motion for Judicial Notice and relevant pages are attached hereto as Exhibit D.

obtain highest possible price for her Bradford stock, while under a conflicting duty to John to have Bradford pay lowest price.)]

Legal arguments made by Plaintiff's counsel in the Orphans' Court Litigation make it even more clear that Plaintiff has long been aware of the claims she is currently making against Schnader. Indeed, the "Introduction" section to one such Orphans' Court filing is virtually indistinguishable from what she alleges in her SAC. Specifically, Plaintiff contended on **May 20, 2015**, in relevant part:

> This matter involves the systematic dissection and concealment of a beneficiary's interest in two generations of a family's estate plan for the purpose of carrying out the purchase and sale, by a trustee [John], of the family's trust property, primarily to enrich the trustee at the expense of other beneficiaries.
>
> The destruction of the Middleton family's estate plan and thwarting of Herbert Sr. and Anna Middleton's intent and Herbert Jr. and Frances Middleton's intent was carried out by a series of transactions culminating in two agreements: the 2003 Family Settlement Agreement (herein "FSA") and 2003 Master Settlement Agreement (herein "MSA"). These agreements accomplished two objectives: (1) the dismantling and amendment of seven irrevocable Middleton family trusts without court approval as required by law; and (2) ***the acquisition by a trustee of all of the shares of the Middleton family's holding company [Bradford], at less than fair market value***, for the eventual sale of the family's tobacco company at 17 times the purchase price paid by the Trustee for the tobacco company as well as two other family holdings.
>
> ***The concealment of the diminution of Ms. Nupson's share occurred by having the attorney, who represented the trustee-brother leading up to this complex transaction, then purport to represent one of the beneficiaries, Anna K. Nupson, in the sale of her interest in the family's trust property and reorganization of those trusts,*** and then return to representing the trustee-brother following the sale of stock, as well as serve as co-trustee of a remaining Trust in which Ms. Nupson is the beneficiary.

See "Anna K. Nupson's Response to John Middleton's Motion to Strike her Objections to the Petition for Adjudication of the Account and Proposed Distribution of the Anna Bauer Trust, FBO Middleton Subtrust and the FBO Hughes Subtrust and the John Middleton, Inc. Trust," at 1-2 (relevant pages attached hereto Exhibit E) (emphasis added).

Finally, in the verified "Petition For Discovery By Anna K. Nupson"[14] filed **June 23, 2015**, three years prior to this action, Plaintiff represented that "[t]he disputed facts and areas in which discovery is needed involve the following matters…(f) [w]hether Bruce A. Rosenfield, Esq. had conflicts of interest while purporting to represent Anna Nupson… which prevented him from reasonably concluding that [he] could zealously represent Ms. Nupson, or worse, whether Mr. Rosenfield remained the agent of John S. Middleton in structuring this transaction to accomplish Mr. Middleton's goal of consolidating his ownership and control of all of the Bradford stock…" [Ex. F, ¶ 18.] Having expressly declared a need for discovery on these issues, any argument that Plaintiff was not required as of that time to act with reasonable diligence to investigate her alleged claims against Schnader is disingenuous.[15]

III. ARGUMENT

A. Legal Standard

A court should grant a Rule 12(b)(6) motion to dismiss where the complaint fails to state a claim upon which relief can be granted. Fed. R .Civ. P. 12(b)(6). When ruling on a motion to dismiss, the court must accept all factual allegations as true and draw all reasonable inferences in

[14] A true and correct copy of the verified "Plaintiff's Petition For Discovery By Anna K. Nupson" is attached to Defendants' Motion for Judicial Notice and relevant pages are attached hereto as Exhibit F.

[15] Plaintiff made similar allegations in other filings submitted in the Orphans' Court Litigation, including her "Answer to John S. Middleton's Motion for Sanctions, Counterclaim and Petition for Declaratory and Other Relief" (relevant pages are attached hereto as Exhibit G) and "Anna K. Nupson's Second Supplemental Answers to First Set of Interrogatories of John S. Middleton and Bradford Holdings, Inc." (relevant pages attached hereto as Exhibit H). True and correct copies of each of these documents are included in the previously submitted Motion to Take Judicial Notice. For the purpose of brevity, such allegations will not be discussed at length here.

a light most favorable to the plaintiff. *Evancho v. Fisher*, 423 F.3d 347, 351 (3d Cir. 2005). A well-pleaded complaint must contain more than mere labels and conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

Courts conduct a two-part analysis to determine whether dismissal is appropriate. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). First, the factual and legal elements of a claim are separated. *Id.* The court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. *Id.* at 210-11. Second, the court must determine whether the facts alleged in the complaint are sufficient to show that plaintiff has a "plausible claim for relief." *Id.* at 211; *see also Iqbal*, 556 U.S. at 679; *Twombly*, 550 U.S. at 570. Factual allegations must be sufficient to conclude that plaintiff's right to relief is more than speculative. *Twombly*, 550 U.S. at 545. The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570). This inquiry is context-specific and "require[s] the reviewing court to draw on its experience and common sense." *Id.* at 679 (citation omitted).

In this case, the Court need not reach the question of whether the alleged claims are plausible – although they plainly are not – because the case can be dismissed on statute of limitations grounds. Third Circuit cases consistently hold that when the complaint on its face demonstrates noncompliance with the limitations period, a motion to dismiss will be granted as a matter of law. *See Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014) ("In this circuit… we permit a limitations defense to be raised by a motion under Rule 12(b)(6)"); *Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt.*, 435 F.3d 396, 400 n. 14 (3d Cir.

2006); *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n. 1 (3d Cir. 1994). "The 'Third Circuit Rule' 'permits a limitations defense to be raised by a motion under Rule 12(b)(6)… if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.'" *Martin v. Ford Motor Co.*, 765 F.Supp.2d 673, 686 (E.D.Pa.2011) (quoting *Robinson*, 313 F.3d at 135). Here, Plaintiff's claims clearly arose more than a decade ago and thus are barred by Pennsylvania's two-year statute of limitations.

B. Plaintiff's Tort Claims are Barred by the Statute of Limitations.

1. Pennsylvania's Two-year Statute of Limitations on Professional Negligence Claims Governs this Matter and Bars Plaintiff's Claims.

Pennsylvania favors strict application of statutes of limitations. *See Communications Network*, 187 A.3d at 961; *Wachovia*, 935 A.2d at 572-73; *Glenbrook Leasing Co. v. Beausang*, 839 A.2d 437, 441 (Pa.Super. Ct. 2003), *aff'd* 881 A.2d 1266 (Pa. 2005) ("we are mindful of the Pennsylvania courts' policy favoring the strict application of statutes of limitation.") Actions based on tortious conduct, including legal malpractice actions, are governed by the two-year statute of limitations set forth in 42 Pa.C.S.A. § 5524[16]. *See Thompson v. Hens-Greco*, 2017 WL 3616672, at *12 (W.D. Pa. 2017) ("Pennsylvania imposes a two-year statute of limitations on tortious conduct, including legal malpractice actions. 42 Pa. C.S.A. § 5524"); *Edwards v. Thorpe*, 876 F. Supp. 693, 695 (E.D. Pa. 1995) ("Plaintiff's [legal malpractice] claims are subject, at most, to a two year statute of limitations"); *O'Kelly v. Dawson*, 62 A.3d 414, 420 (Pa. Super. Ct. 2013) ("the question of when a statute of limitations runs is a matter typically decided by the trial judge as a matter of law" and "it is undisputed that the statute of limitations in this

[16] An action "to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud" must be commenced within two years. 42 Pa. C.S.A. § 5524(7).

[legal malpractice] case is two years.") The two-year statute of limitations also applies to claims for breach of fiduciary duty. 42 Pa. Cons.Stat. Ann. § 5524(7); *Schmidt*, 770 F.3d at 250; *All. Indus. Ltd. v. A-1 Specialized Servs. & Supplies, Inc.*, 2015 WL 4943471, at *19 (E.D. Pa. 2015).

Under Pennsylvania law, "the trigger for the accrual of a legal malpractice action, for statute of limitations purposes, is not the realization of actual loss, but the occurrence of a breach of duty." *Wachovia*, 935 A.2d at 572. Specifically, "the statute of limitations in a legal malpractice claim begins to run when the attorney breaches his or her duty, and is tolled only when the client, despite the exercise of due diligence, cannot discover the injury or its cause." *Id* at 573. The *Wachovia* court observed that unlike some other jurisdictions where "a malpractice claim accrues at the time of the damage. …this is not the law in Pennsylvania," where "the occurrence rule governs." *Id.* at 574.

2. The Allegations of Plaintiff's SAC Make Clear That Plaintiff's Claims Accrued Well More Than Two Years Ago.

When Pennsylvania's occurrence rule is applied to the facts alleged in the SAC, it is clear that the trigger for Plaintiff's potential legal malpractice claim was the 2003 Stock Sale Transaction. Plaintiff alleges that Schnader, driven by its alleged conflicts of interest, counseled her to agree to sell her interests in Bradford for less than they were worth. [SAC, ¶ 7]. Plaintiff specifically contends that, as a result of the 2003 Stock Sale Transaction, she received "an annuity trust of approximately $24,917,767 for her 1/3 portion of Frances's Estate, a fraction of its actual value, and something she would have received through Frances [sic] existing estate plan." [SAC, ¶ 45]. Because Plaintiff's cause of action accrued on the date of the alleged malpractice, not on the date she suffered an actual loss, *Wachovia*, 935 A.2d at 574, the restated allegations contained in her SAC serve only to clarify that Plaintiff's cause of action against Schnader, if any, accrued in 2003.

Although the untimeliness of Plaintiff's claims under the occurrence rule is established on the face of the SAC alone, the grounds for dismissal become even stronger when the Court considers previous documents filed in the Orphans' Court Litigation, of which the Court should take judicial notice. [17] *See Schmidt*, 770 F.3d at 249 (court may take judicial notice of public records in determining whether to dismiss a complaint as time-barred). Plaintiff's verified filings in these cases demonstrate unmistakably that Ms. Nupson had actual knowledge of her potential claims against Defendants several years before she instituted this litigation, but chose not to bring them.

In a 2015 filing in the Orphans' Court Litigation, Plaintiff placed her potential malpractice claim squarely at issue, notwithstanding her strategic decision not to include Rosenfield and Schnader as parties. Specifically, Ms. Nupson sought declaratory relief that Schnader "[i]n trying to accommodate all of the competing interests of multiple clients with direct and indirect conflicts… was limited by prior representations and personal interests and was not able to zealously and independently represent each of [their] clients. …Schnader was in the position of having multiple clients with conflicting goals." [Ex. C, ¶ 47.] Such allegations echoed her General Counsel's **June 5, 2014** letter, included as an exhibit to her October 31, 2014 filing in Orphans' Court No. 2014-X3827, stating that Ms. Nupson "ha[s] determined to proceed against Schnader Harrison Segal & Lewis LLP" based upon Schnader's "ignoring… various conflicts of interest," which allegedly left her "severely damaged." [Ex. B.]

[17] The Court need not evaluate the truth of the facts asserted in Ms. Nupson's prior pleadings in the 2015 litigation, but merely consider that such allegations were made, and therefore demonstrate her knowledge of her potential claims many years before she instituted this litigation. *See Burton v. Nationstar Mortg. LLC*, 255 F. Supp. 3d 616, 619 (E.D. Pa. 2015) (discussing that "a court may take judicial notice of a filing in a prior case in ruling on a motion to dismiss… to establish the existence of that filing."); *Ross v. Meyer*, 2014 WL 2800748, at *5 (E.D. Pa. June 19, 2014) ("A court may also take judicial notice of the record from a previous court proceeding between the parties, not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.")

In other 2015 pleadings in the Orphans' Court Litigation, Plaintiff made clear that the focal point of her grievance against Schnader was its handling of the 2003 Stock Sale Transaction and Schnader's alleged undisclosed conflicts. For instance, Plaintiff alleged that "Mr. Rosenfield had years earlier begun to orchestrate the transaction in favor of the trustee [John], and had at all times an [sic] unwaivable conflicts of interest" [Ex. D, ¶ 124]; that "Mr. Rosenfield and his firm had numerous and substantial conflicts in this multi-faceted representation and was clearly not in a position to zealously and independently represent Ms. Nupson in negotiating against Mr. Middleton and Bradford" [*id.]*; and that Schnader had clients with conflicting interests because Plaintiff and other trust beneficiaries had an interest in "obtain[ing] the highest price for their Bradford stock, while John's interest was "for Bradford to pay the lowest possible price for the shares." [*Id.* at ¶ 141].

These allegations made in June 2015 are substantively identical to those asserted in this action, which was not instituted until June 2018, in which Plaintiff alleges that Schnader represented Plaintiff in connection with the sale of Bradford stock [SAC, ¶ 5]; that the net effect of the 2003 Stock Sale Transaction was that John became the sole owner of Bradford [SAC, ¶¶ 5, 42]; that Defendants counseled Plaintiff to believe selling her interest in Bradford was in her best interests; [SAC, ¶ 7]; and that, at the time of the 2003 Stock Sale Transaction, Schnader was under a conflict of interest due to its representation of John, for which Schnader failed to obtain informed consent. [SAC, ¶¶ 46, 48];

In short, it could not be any more obvious that when Ms. Nupson's attorney sent a letter on June 5, 2014 threatening to sue Schnader, and Plaintiff later filed pleadings in the Orphans' Court Litigation in 2015 asserting that Schnader was conflicted when it represented her in connection with the 2003 Stock Sale Transaction, she knew all of the component elements of the

claims she alleges in the SAC. Plaintiff's previous sworn statements are a proverbial bell that cannot be un-rung. No amount of amendment of the pleadings, or rhetoric regarding Schnader's alleged concealment and/or nondisclosure of the facts, suffice to wipe away her previous statements demonstrating actual knowledge of her purported claims more than four years before she filed this lawsuit.

C. Plaintiff is Judicially Estopped from Now Asserting a Position Inconsistent With Her Previous Filings.

Plaintiff's effort to avoid her previous judicial admissions is also barred by the doctrine of judicial estoppel, which the Third Circuit originally discussed more than a half-century ago in *Scarano v. Cent. R. Co. of N.J.*, 203 F.2d 510, 513 (3d Cir. 1953). In *Scarano*, the court stated that litigants' use of "inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate." Since then, this Court has opined succinctly that "judicial estoppel is a judge-made 'doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding.'" *Barley v. Fox Chase Cancer Ctr.*, 46 F. Supp. 3d 565, 574 (E.D. Pa. 2014) (quoting *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996).) *See also In re Kane*, 628 F.3d 631, 639 (3d Cir. 2011) ("[J]udicial estoppel is a fact-specific, equitable doctrine, applied at a court's discretion.").

"[J]udicial estoppel… is applicable when three elements are met: (1) the party to be estopped must have taken irreconcilably inconsistent positions, (2) the party to be estopped acted in bad faith, and (3) the remedy is tailored to address the harm." *G-I Holdings, Inc. v. Reliance Ins. Co.*, 586 F.3d 247, 262 (3d Cir. 2009). The crux of the doctrine is that a party is estopped from taking a position before a court, and then turning around and taking an "irreconcilably inconsistent" position later on. *See Murray v. Silberstein*, 882 F.2d 61, 66-67 (3d Cir.1989) (in

affirming the district court's decision based on judicial estoppel, the Third Circuit held that a litigant may not contend "correctly or not" a certain position, and then "reverse his position"). Here, Plaintiff has taken irreconcilably inconsistent positions. Throughout her pleadings in the Orphans' Court Litigation, Plaintiff alleged her actual knowledge of the conduct that is the basis of the current claims against Schnader. Further, her denial in the SAC that she had such knowledge establishes the requisite bad faith for the application of judicial estoppel. Finally, dismissal of the SAC with prejudice is a specifically tailored remedy to address the harm to Schnader of being required, years later (and well past the expiration of the applicable limitations period), to defend these stale allegations.

D. No Equitable Tolling Principles Apply To Delay Commencement Of The Statute Of Limitations In This Case.

The allegations of the SAC and the verified pleadings in the Orphans' Court Litigation conclusively demonstrate that Plaintiff knew of her claimed injury and its alleged cause well more than two years before she sued Schnader. However, recognizing that she is suing for injuries that occurred as the result of a transaction that closed fifteen years before she filed her lawsuit, Plaintiff strains to argue that her claims are based upon evidence that she purportedly discovered "for the first time" in the course of the Orphans' Court Litigation. Specifically, Plaintiff contends she was unaware: (1) of the existence of GRAT I, purportedly revealed in October 2016 [SAC, ¶ 54]; (2) that GRAT I, which had been solely for John's benefit, "had been amended to benefit all siblings equally, as consideration for Plaintiff in the [2003] Bradford Stock Sale Transaction," [*id.* at ¶ 57]; and (3) that the trust had been an "oral trust" until November 2001, when GRAT I was executed and was backdated to February 2001 [*id.* at ¶ 57]. Plaintiff also asserts that facts regarding Schnader's alleged conflict of interest were fraudulently

concealed from her. However, none of the equitable tolling principles that Plaintiff seeks to invoke have any application on these facts.

1. Plaintiff Knew Of Her Claimed Injury and Its Alleged Cause More Than Two Years Before She Sued The Defendants.

Although plaintiff, by her general counsel, wrote a letter on June 5, 2014 asserting knowledge of her claimed injury and its supposed cause, she waited more than four years, until after she concluded her litigation with her brother, to sue the Defendants. She tries to invoke equitable tolling to excuse her delay, claiming to have learned of additional facts supporting her claim while litigating with her brother, but doctrines that toll the limitations period are "narrow exception[s] and should be applied in only the most limited circumstances." *Spade v. Star Bank*, 2002 WL 31492258, at *9 (E.D. Pa. Nov. 6, 2002). Accordingly, "Courts must use equitable tolling sparingly, and must evaluate whether a plaintiff 'has shown that he or she exercised reasonable diligence in investigating and bringing [the] claims.'" *McClain v. Golden*, 2017 WL 3226471, *6 (E.D. Pa. July 28, 2017) (Quinones Alejandro, J.) (citation omitted). Whether a plaintiff has offered sufficient facts to support the applicability of a tolling doctrine, such as fraudulent concealment or the discovery rule, may be determined as a matter of law at the motion to dismiss stage. *Doe v. E. Hills Moravian Church, Inc.*, 2013 WL 5050593, at *4-5 (E.D. Pa. Sept 13, 2013).

Under Pennsylvania law, the statute of limitations in a legal malpractice claim is tolled "only when the client, despite the exercise of due diligence, cannot discover the injury or its cause." *Wachovia*, 565 at 573. The doctrine of fraudulent concealment serves to toll the running of the statute of limitations only if the defendant, through fraud or concealment, causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts. *Fine v. Checcio*, 870 A.2d 850, 860 (Pa. 2005). As the Pennsylvania Supreme Court made clear in *Fine*, "[t]he

standard of reasonable diligence, which is applied to the running of the statute of limitations when tolled under the discovery rule, also should apply when tolling takes place under the doctrine of fraudulent concealment." *Id.* at 861.

Here, rather than establishing that Plaintiff was affirmatively misled, her allegations demonstrate quite the opposite. Through the allegations of her SAC, her general counsel's June 5, 2014 letter and her sworn pleadings in the Orphans' Court Litigation, Plaintiff admits that she knew of her claimed injury and its alleged cause more than two years before she sued Schnader. That ends any argument that she was misled. Moreover, to the extent Plaintiff argues additional facts only recently discovered motivated her finally to sue Schnader in 2018, such argument is both legally irrelevant and demonstrates that she failed to exercise the required level of reasonable diligence.

The *Fine* Court noted that the reasonable diligence standard "will serve one of the overarching tenets in this area of our jurisprudence—the responsibility of a party… to be reasonably diligent in informing himself of the facts upon which his recovery may be based." *Id.* Application of this principle of reasonable diligence dictates that the "statute of limitations that is tolled by virtue of fraudulent concealment begins to run when the injured party knows or reasonably should know of his injury and its cause." Thus, the *Fine* court considered and rejected the "higher threshold" that "plaintiff's actual knowledge of his injury and its cause" was required for a tolled limitations period to begin to run. *Id. See also Baselice v. Franciscan Friars Assumption BVM Province, Inc.*, 879 A.2d 270 (Pa. Super. Ct. 2005) (holding that the statute of limitations begins to run when the injured party "possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress.")

In *Baselice*, for instance, the Pennsylvania Superior Court held that the neither the discovery rule nor the doctrine of fraudulent concealment applied to toll the statute of limitations in a civil action brought against the Archdiocese of Philadelphia and other affiliated defendants by a parishioner who had been the victim of sexual abuse by a priest. The Court found that because the plaintiff had knowledge of the abuse and the identity of his abuser, allegations that defendants had been complicit in the misconduct did not suffice to invoke the discovery rule. Finding that the facts demonstrating the case was time-barred were so clear that reasonable minds could not differ, the Court affirmed judgment on the pleadings in favor of defendants. *Id.* at 276, 279. So, too, in this case the 2003 Stock Sale Transaction that forms the primary basis of Plaintiff's alleged cause of action occurred approximately 15 years before she initiated this lawsuit. Plaintiff had knowledge that Schnader had represented her in connection with that 2003 Stock Sale Transaction, and has long alleged that the Transaction caused her to suffer harm. Accordingly, it was incumbent upon Plaintiff to act with reasonable diligence to investigate Schnader's role in causing the alleged harm.

Moreover, any argument by Plaintiff for tolling commencement of the statute of limitations beyond June 5, 2014 – or June 2015 at the latest – is conclusively defeated by the statements made in the June 5, 2014 letter from Plaintiff's general counsel *and* in sworn pleadings in the Orphans' Court Litigation. The Superior Court's decision in *Trice v. Mozenter*, 515 A.2d 10 (Pa. Super. 1986) is on all fours with this case. In *Trice*, plaintiff had argued ineffective assistance of counsel in appealing a previous criminal conviction, in which he was represented by defendant-attorney. In connection with that appeal, plaintiff submitted an affidavit describing the ineffective assistance. After his criminal conviction was overturned by the Third Circuit, plaintiff brought a civil action against his former attorney, arguing that

defendant's negligence had caused plaintiff to be unjustly convicted and deprived of his freedom for many years.

In the *Trice* civil action, the defendant-attorney filed a motion for judgment on the pleadings, arguing that his former client's claim was barred by the two-year statute of limitations. In response, plaintiff asserted that his complaint was timely because: (a) he could not have discovered his cause of action until the Third Circuit's August 11, 1982 decision reversing his conviction based on ineffective assistance; and (b) the complaint was filed less than two years later, on August 9, 1984. 515 A.2d at 11. The Court rejected plaintiff's argument, reasoning: "[s]uffice it to say … the plaintiff knew or should have known that he had sustained an injury by the date he signed the Motion, Affidavit and Memorandum in support of his contention that trial and appellate counsel was ineffective." *Id.* at 14-15. By that time, plaintiff "had lost all confidence in counsel's stewardship, [which] should have prompted him to act." *Id.*

Similarly, in this case, when Ms. Nupson terminated Schnader and hired independent counsel, who sent a letter explicitly stating that Plaintiff had "determined to proceed against Schnader Harrison Segal & Lewis LLP" based upon Schnader's "ignoring… various conflicts of interest," which allegedly left Anna "severely damaged," Plaintiff clearly expressed that she had "lost all confidence in counsel's stewardship" and was required to act on her concerns. *Trice*, 515 A.2d at 15. Plaintiff's obligation to act became even stronger in 2015, when she verified and submitted court documents, in which she accused Schnader of, among other things: trying to accommodate all of the competing interests of multiple clients with direct and indirect conflicts; failing to zealously protect Plaintiff's interests as a result; and causing her to suffer millions of dollars of damages as a result of entering into the 2003 Stock Sale Transaction, in which Plaintiff was represented by Schnader.

There can be no reasonable disagreement that, as of this time, Plaintiff "possesse[d] sufficient critical facts to put [her] on notice that a wrong has been committed and that [s]he need investigate to determine whether [s]he is entitled to redress." *Baselice*, 879 A.2d at 276. Indeed, having expressly declared a need for discovery on issues relating to Schnader's alleged conflicts in her Petition For Discovery, filed in the Orphans' Court Litigation on June 23, 2015, [Ex. F , ¶ 18], Plaintiff cannot credibly contend that she was not, as of that point in time, on notice that she was required to act with reasonable diligence to investigate her alleged claims. Indeed, despite having had the benefit of reviewing Schnader's Motion to Dismiss her FAC, Plaintiff's SAC still fails to offer any facts demonstrating that she exercised reasonable diligence. Consequently, Plaintiff was required to act against Schnader within the limitations period or forever to lose her right to do so.

2. Plaintiff's Allegations of Other Alleged Misconduct, Which Purportedly Was Not Disclosed, Is at Most Additional Evidence Of Her Already Accrued Legal Malpractice Claim.

Plaintiff's effort to invoke equitable tolling principles fails for the independent reason that the alleged undisclosed and "newly discovered" facts she cites are, at most, additional evidence being offered in support of her already accrued professional negligence claims, rather than independent causes of action. As noted by the Third Circuit, "[t]he discovery rule does not delay the running of the statute of limitations until a plaintiff is aware of all of the facts necessary to bring its cause of action." *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1125 (3d Cir. 1997); *cf. Sherman Industries, Inc. v. Goldhammer*, 683 F. Supp. 502, 509 (E.D. Pa. 1988) ("the discovery rule ordinarily is applied in cases in which a plaintiff is unaware initially that it has been harmed, but is inapplicable where the plaintiff knows of the harm, but not the extent of it … [e]ven late discovery of a major increase in the extent of harm does not toll the limitations period") (citations omitted).

The Superior Court's May 2018 decision in *Communications Network, supra,* is directly on point. In that case, the Court affirmed a decision granting summary judgment based on the statute of limitations in a professional negligence action against an attorney. In so doing, the Court rejected a variety of tolling arguments similar to those advanced by Plaintiff in this case. Of particular importance, the Court disagreed with plaintiff's theory that the statute of limitations was tolled by an attorney's ongoing concealment of information relevant to the claims against him. The Superior Court held that "[u]nder the occurrence rule, the statute of limitations period is triggered by the first act of alleged malpractice, not the last … [t]here is 'no re-set' button to start the limitations period all over again." 187 A.3d at 964.

The Superior Court further explained that permitting the limitations period to be restarted by new or continuing acts of alleged misconduct, including the alleged ongoing nondisclosure of important facts, "would defeat the fundamental purpose of the statute of limitations' scheme, which is to avoid stale claims." *Id.; see also Baselice,* 879 A.2d at 279 ("to postpone the accrual of causes of action until [appellant] completed [his] investigation of all potential liability theories would destroy the effectiveness of the limitations period.") (brackets in original); *Glenbrook Leasing Co.*, 839 A.2d at 441–42 (declining to adopt the "continuous representation rule," whereby "the continuous representation of a client by an attorney tolls the running of a statute of limitations."); *Wachovia,* 935 A.2d at 574-75 (discussing that extending the limitations period to permit the commencement of a legal malpractice action almost eleven years after the breach that would have triggered the limitations period "would not serve the policy underlying statutes of limitation.")

Moreover, Plaintiff's SAC fails to distinguish between her purported causes of action for professional negligence and breach of fiduciary duty and the evidence that supports the claims.

Plaintiff's claims are based on Schnader's alleged misconduct in causing her to enter into the 2003 Stock Sale Transaction, during a time when Schnader purportedly had undisclosed conflicts of interest. The SAC does not, and cannot, specify how the circumstances surrounding the creation of GRAT I in 2001, and its subsequent modification, caused her damages or created a separate and distinct cause of action. Plaintiff's theory seems to be that the oral trust and the modification of the GRAT I *could* have resulted in significant tax liability *for John and Frances,* but she does not allege that it has caused any increase in *Plaintiff's tax liability*, nor has she identified any other cognizable harm. [SAC, ¶ 65]. Further, Plaintiff concedes that "as consideration for Plaintiff in the [2003] Bradford Stock Sale Transaction….", GRAT I was replaced by GRAT II, which was more favorable to Plaintiff. [SAC, ¶ 57]. In other words, Plaintiff has benefited because GRAT I is no longer an operative legal document. Plaintiff's reliance on the alleged "recent discovery" of the superseded grantor retained annuity trust, which by her own admission was less favorable to her than GRAT II that replaced it, is plainly a contrivance intended to escape the fact that her claims against Schnader are obviously time-barred.

In short, Plaintiff's allegations about GRAT I, or any other allegedly newly-discovered evidence, do not plead a separate and distinct cause of action. They are, at most, a footnote detail that is part and parcel of the larger story that Plaintiff has repeatedly told since 2014 about Schnader's purported negligent and conflicted conduct in representing her. Because Plaintiff's alleged claims against Schnader were "triggered by the first act of alleged malpractice, not the last," *Communications Network,* 187 A.3d at 964, and the core of her claims against Schnader relate to a 2003 Stock Sale Transaction, such additional allegations are immaterial to the dispositive legal question of when her cause of action against Schnader accrued.

3. The Facts Alleged In The SAC Do Not Sufficiently Allege Fraudulent Conduct.

Finally, the fraudulent concealment doctrine is inapplicable for the additional reason that Schnader's alleged statements and nondisclosures do not rise to the level of conduct sufficient to toll the statute of limitations. Plaintiff rhetorically characterizes the 2002 Conflict Waiver as "false" and states that the Conflict Waiver "concealed" certain alleged conflicts of interest, but fails to allege any particular affirmative statements or acts of Defendant that would serve as the basis for such tolling. [SAC, ¶ 48-49]. Plaintiff also contends that Rosenfield failed to disclose facts concerning the alleged execution, backdating and replacement of GRAT I. However, the failure to disclose facts is not a basis for tolling under Pennsylvania law.

Fraudulent concealment requires that there "be an ***affirmative*** and independent act of concealment that would divert or mislead the plaintiff from discovering the injury." *Mest v. Cabot Corp.*, 449 F.3d 502, 517 (3d Cir. 2006) (emphasis added.) Finding the doctrine of fraudulent concealment inapplicable in a legal malpractice case, the Pennsylvania Superior Court recently held that "[t]he defendant must have committed some ***affirmative independent act of concealment*** upon which the plaintiffs justifiably relied." *Namani v. Bezark, Lerner, & Devirgilis, P.C.*, 2017 WL 57153, at *3 (Pa. Super. Ct. 2017) (emphasis added) (citing *Lange v. Burd*, 800 A.2d 336, 339 (Pa. Super. Ct. 2002), *appeal denied*, 818 A.2d 504 (Pa. 2003).) "[M]ere silence in the absence of a duty to speak cannot suffice to prove fraudulent concealment." *Id. See also Sevin v. Kelshaw*, 611 A.2d 1232, 1236 (Pa. Super. Ct. 1992) (same).

Even if the SAC could be construed to allege that Rosenfield, through his silence, implicitly assured Plaintiff that "all was well," courts in this district have held that a defendant's general statements, such as that "everything was fine, and that [the plaintiffs] should not worry" are insufficient to estop the defendant from raising the statute of limitations, because "such

general reassurances do not rise to the level of ... specific representations" necessary to constitute fraudulent concealment. *Ciprut v. Moore*, 540 F. Supp. 817, 821 (E.D.Pa.1981), *aff'd without opinion*, 688 F.2d 819 (3d Cir.1982).

Despite having had the benefit of reviewing Schnader's Motion to Dismiss her FAC, Plaintiff still fails to plead any facts that would suffice to allege an affirmative act of concealment. Here, as in *Doe, supra,* 2013 WL 5050593 (E.D. Pa. 2013), Plaintiff makes no allegation that Schnader made any affirmative statements that caused Plaintiff to relax her vigilance or deviate from her right of inquiry into the facts. To the contrary, as discussed above, the SAC and the sworn pleadings from the Orphans' Court Litigation make clear that Plaintiff has believed for many years that the documents Schnader drafted, and the advice Schnader provided, did not appropriately benefit her and that she has long been concerned about Schnader's alleged conflicts of interest. Even assuming for the sake of argument that Rosenfield knew of additional conflicts of interest, but made a conscious decision not to fully disclose them, such fact would not excuse Plaintiff from exercising any diligence in following up regarding this issue – *e.g.* by asking Rosenfield more pointed questions about whom Schnader represented and then continuing to follow up until she received the information requested. This Court has previously held that "[r]eliance on the conduct of the defendant must be reasonable and justifiable in order to invoke tolling principles." *Arndt v. Johnson & Johnson*, 67 F. Supp. 3d 673, 678 (E.D. Pa. 2014)(internal citation omitted.) Further, "[r]eliance on the defendant's conduct ***when the plaintiff has reason to believe otherwise*** is not reasonable reliance and will not toll the statute of limitations." *Id.* (emphasis added.) There is simply no fraud or concealment sufficient to toll the statute of limitations.

E. Plaintiff's Claim for Breach of Contract Should Be Dismissed.

Plaintiff's SAC asserts for the first time that Schnader's alleged legal malpractice constitutes a breach of contract, in addition to a tort. The motivation behind Plaintiff's new theory is no mystery: she is seeking to gain a longer statute of limitations, so as to avoid the consequences of her pleading actual knowledge of her malpractice claims against Schnader in sworn Orphans' Court filings submitted in 2015. However, it is clear from the allegations of the SAC that Plaintiff's claims sound in tort, rather than breach of contract. Furthermore, even if Plaintiff could maintain a valid breach of contract claim, it would still be time-barred. The letter from her General Counsel specifically outlining the claims against Schnader is dated June 5, 2014, more than four years before she filed this action.

1. The Facts Alleged Do Not Give Rise to a Breach of Contract Claim.

In pleading a breach of contract claim, Plaintiff cites to the Pennsylvania Superior Court's decision in *Garcia v. Community Legal Servs. Corp.*, 524 A.2d 980, 982 (Pa. Super. Ct. 1987) for the proposition that "[a]n action for legal malpractice may be brought in either contract or tort." [SAC, ¶ 82]. Numerous Pennsylvania district court cases have clarified that a plaintiff "may not repackage a negligence-based malpractice claim under an assumpsit theory to avoid the statute of limitations." *See, e.g.*, *Knopick v. Downey*, 963 F. Supp.2d 378, 390 (M.D. Pa. 2013); *Javaid v. Weiss*, 2011 WL 6339838, * 5 (M.D. Pa. Dec. 19, 2011); *Stacey v. City of Hermitage*, 2008 WL 941642, *5 (W.D. Pa. April 7, 2008); *Edwards v. Thorpe*, 876 F.Supp. 693 (E.D. Pa. 1995). *See also Sherman Indus*, 683 F. Supp. at 506 (holding that plaintiff cannot "sidestep" the

two-year statute of limitations by pleading a claim based on attorney negligence as a breach of contract claim).[18]

As the District Court explained in *Kohn, Savett, Klein & Graf, P.C. v. Cohen*, 1990 WL 42244, *5 (E.D. Pa. April 10, 1990):

> Of course, virtually all legal representation occurs within the scope of a contract between lawyer and client. ***This does not, however, mean that the contractual limitations period automatically applies.*** Rather, the courts have looked to the terms of the contract allegedly breached and to the nature of the injury asserted. ***If the damages requested stem from negligence or other tortious misconduct, then the action sounds in tort and the two-year statute of limitations applies.*** If the damages arise from a breach of an explicit contractual term, and if the request is only for compensatory damages appropriate in contract, then the action sounds in contract.

Id. at * 5 (emphasis added; citations omitted). *See also Sherman Indus.*, 683 F.Supp. at 506 ("if allegations of a contractual relationship between plaintiff and defendants, and of an express or implied term of the contract establishing an obligation to exercise reasonable care, were to suffice to state a breach-of-contract malpractice case, the two year limitations statute for tort actions would be a dead letter in ... malpractice cases.")

Determining whether a legal malpractice claim sounds in contract or tort requires the Court to consider the "gist of the action." In *Bruno v. Erie Ins. Co.*, 106 A.3d 48 (Pa. 2014), the Pennsylvania Supreme Court discussed the difference between breach of contract and tort claims. Among other things, the Court found that "a negligence claim based on the actions of a

[18] This concept was muddied in the Superior Court's 2002 opinion in *Gorski v. Smith*, 812 A.2d 683 (Pa. Super. Ct. 2002) *appeal denied*, 856 A.2d 834 (Pa. 2004), wherein the Court held that a plaintiff's "successful establishment of a breach of contract claim against an attorney does not require proof… that an attorney failed to follow a specific instruction of the client," but rather "that an attorney has breached his or her contractual duty to provide legal service in a manner consistent with the profession at large[.]" *Id.* at 697. However, *Gorski* has not been followed in Pennsylvania or in this Circuit. *See Seidner v. Finkelman*, 2018 WL 4178147, at *5 (Pa. Super. Ct. 2018) ("In light of more recent case law, we decline to read *Gorski* as standing for Appellant's proposition that attorney malpractice and breach of contract require the exact same elements, and that, in a breach of contract action, only an allegation of negligent performance is required"); *Knopick*, 963 F. Supp.2d at 390 (finding that *Gorski* is not controlling and has not been followed by Pennsylvania district courts)

contracting party in performing contractual services is not viewed as an action on the underlying contract itself, since it is not founded on the breach of any of the specific executory promises which comprise the contract." *Id.* at 70. Because Plaintiff has not alleged, and cannot allege, any conduct constituting a breach of contract, it is clear that her purported claims sound only in tort.

In *New York Cent. Mut. Co. v. Edelstein*, 637 Fed. Appx. 70, 72-73 (3d Cir. 2016), the Third Circuit applied *Bruno* to a case involving allegations of legal malpractice, holding that allegations that an attorney provided plaintiff with "incorrect and erroneous legal advice" and "misleading" counsel did ***not*** state a valid claim for breach of contact. The Court of Appeals noted that the complaint did not "identify a specific contractual obligation that Appellees failed to perform or point to an explicit agreement or instruction that Appellees breached." *Id.* at 73. Therefore, the gravamen of the complaint was that the defendant improperly performed his undertaking as a lawyer, which sounded in tort and was barred by the applicable two-year statute of limitations. *Id.*

Consistent with this analysis, subsequent federal cases applying Pennsylvania law have noted that "when plaintiff's cause of action is based on the attorney's failure to exercise due care, it will sound in contract only if the attorney fails to follow the client's specific instructions or, by her negligence, breaches a specific provision of the contract." *Brenco Oil, Inc. v. Blaney*, 2017 WL 6367893 (E.D. Pa. Dec. 13, 2017). *See also Admiral Insurance Group v. Winikoff*, 2016 WL 8732386, *5 (W.D. Pa. Sept. 20, 2016).

In this case, Plaintiff's SAC plainly fails to meet the requirements for stating a valid breach of contract claim. Far from alleging that Schnader breached a particular contract term or ignored a specific client instruction, Plaintiff contends only that "Defendants breached their

contractual duty to render legal services to Plaintiff in a manner that comports with the legal services rendered by the profession at large." [SAC, ¶ 86]. However, this exact argument was rejected by the Court of Appeals in *New York Cent. Mut.*, where it stated:

> Appellants argue that their Second Amended Complaint alleges a ***"breach of the implied contractual term to perform [Appellees'] services in a manner consistent with the profession at large."*** Appellants' Br. at 21. Appellants primarily rely on *Bailey v. Tucker*, 533 Pa. 237, 621 A.2d 108 (1993), in which the Pennsylvania Supreme Court, during a discussion of breach of contract claims, observed that "an attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large." *Id.* at 115; see Appellants' Br. at 23–27. However, given the Pennsylvania Supreme Court's delineation of contractual and tort claims in *Bruno*—according to which a claim sounding in contract is founded on the breach of "specific executory promises"—we decline to read the Court's dicta in *Bailey* as establishing a distinct contractual promise upon which a breach of contract claim may be premised.

637 Fed. Appx. at 74 (emphasis added). *See also Admiral Insurance Group*, 2016 WL 8732386, at *5 (relying upon *Bruno* and *New York Cent. Mut.* to dismiss breach of contract claim grounded in allegation that attorney failed to abide by appropriate professional standard of care).

For these reasons, Plaintiff's professional malpractice claim clearly sounds in tort rather than breach of contract and is subject to a two-year statute of limitations.

2. Even if Plaintiff's Claim Sounded in Contract, It Is Untimely.

Even if Plaintiff's claim sounded in contract, which it does not, it would still be untimely under Pennsylvania's four-year statute of limitations for breach of contract actions. As described above, Plaintiff's claims relate to alleged conduct that occurred in connection with the 2003 Stock Sale Transaction, which occurred fifteen years before she filed this lawsuit.

The principles discussed above relating to the accrual of a cause of action apply with equal force to a claim styled in breach of contract. As the Superior Court held in *Wachovia,*

supra, the "legal malpractice ***and breach of contract causes of action***… accrue[] at the time [the a]ttorney allegedly breached a duty owed to Wachovia." 935 A.2d at 574 (emphasis added). Simply, the limitations period for a legal malpractice claim, whether brought in negligence or breach of contract, commences based on the "occurrence rule," in that the claim accrues upon the occurrence of a breach of the duty owed by counsel.

Such conclusion is bolstered by Plaintiff's actual knowledge of Schnader's alleged misconduct and her purported harm, as evidenced by her General Counsel's June 5, 2014 letter, of which this Court can take judicial notice because Plaintiff attached it as an exhibit to her previous pleadings in the Orphans' Court Litigation. That letter specifically alleges that Plaintiff was the "victim of actions taken by Bruce Rosenfield as an attorney, who represented other family members while purporting to represent Anna's interest in drafting documents, counseling her pertaining to various Trusts, and securing her sale of family interests." Plaintiff further contended that she had been "severely damaged" by Mr. Rosenfield's alleged actions and, accordingly, had **"**determined to proceed against" Schnader. Because her decision to proceed against Schnader was not implemented until she filed this lawsuit on June 15, 2018 – more than four years after Plaintiff first announced that she intended to sue Schnader – whether a two- or four-year statute of limitations applies is ultimately immaterial. Under either, Plaintiff's alleged cause of action is plainly time-barred.

IV. CONCLUSION

For the reasons discussed above, Plaintiff has failed to state a claim in her Second Amended Complaint, the applicable limitations period having expired. Therefore, the Court should dismiss this action with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

By: */s/ Lawrence G. McMichael*

DILWORTH PAXSON LLP
Lawrence G. McMichael, Esquire
Patrick M. Northen, Esquire
Patrick M. Harrington, Esquire
Atty. ID Nos. 28550 / 76419 / 317998
1500 Market Street, Suite 3500E
Philadelphia, PA 19102-2101
P: (215) 575-7000 / F: (215) 575-7200
lmcmichael@dilworthlaw.com
pnorthen@dilworthlaw.com
pharrington@dilworthlaw.com
Attorneys for Defendants Schnader Harrison Segal & Lewis LLP, and Bruce A. Rosenfield, Esquire

Date: February 1, 2019