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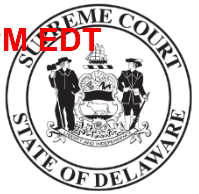

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JARDEN LLC, f/k/a and as successor by merger to JARDEN CORPORATION, Plaintiff Below, Appellant, v. ACE AMERICAN INSURANCE COMPANY, ALLIED WORLD NATIONAL ASSURANCE COMPANY, BERKLEY INSURANCE COMPANY, ENDURANCE AMERICAN INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY, and NAVIGATORS INSURANCE COMPANY, Defendants Below, Appellees.	No. 273, 2021 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE C.A. No. N20C-03-112 AML (CCLD)

OPENING BRIEF ON APPEAL OF
PLAINTIFF-BELOW/APPELLANT JARDEN LLC

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NATURE OF PROCEEDINGS

Plaintiff-Below/Appellant Jarden LLC, f/k/a and as successor by merger to Jarden Corporation ("Jarden") appeals the Superior Court's Memorandum Opinion which granted the Defendants-Below/Appellees' motion to dismiss Jarden's Amended Complaint.[1]

Jarden commenced the proceedings below on March 12, 2020, seeking insurance coverage under its directors' and officers' liability insurance policies (the "Jarden D&O Policy") for losses resulting from four securities price appraisal lawsuits (the "Appraisal Action") filed in the Delaware Court of Chancery by certain Jarden stockholders pursuant to 8 *Del. C.* § 262. (A0019-20). Jarden sought declaratory relief pursuant to 10 *Del. C.* § 6501, *et seq*., as well as damages for breach of contract and anticipatory breach of contract resulting from Defendants' failure to fulfill their obligations to Jarden under the Jarden D&O Policy in connection with the Appraisal Action. (A0020).

In the original complaint, Jarden alleged that the Appraisal Action was a "Securities Claim" under the Jarden D&O Policy and was, therefore, covered pursuant to this Court's decision in *Solera Holdings, Inc. v. XL Specialty Insurance*

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[1] The Defendants-Below/Appellees are ACE American Insurance Company, Allied World National Assurance Company, Berkley Insurance Company, Endurance American Insurance Company, Illinois National Insurance Company, and Navigators Insurance Company.

Co., 213 A.3d 1249 (Del. Super. 2019) ("*Solera I*").

On May 15, 2020, the parties filed a joint motion to stay the proceedings pending resolution of the actions captioned: *In re Solera Ins. Coverage Appeals*, Del. Supr. Consol. C.A. Nos. 413, 2019 and 418, 2019.

On October 23, 2020, this Court reversed *Solera I*, holding that the subject policies did not cover the appraisal action at issue because the appraisal action was *not for a violation of law*, which was required under the policy at issue. *See In re Solera Ins. Coverage Appeals*, 240 A.3d 1121 (Del. 2020) ("*Solera II*").

After reviewing the narrow holding of *Solera II*, Jarden filed its Amended Complaint, asserting that the Appraisal Action is a covered insurance claim as both a "Securities Claim" and a "Merger Objection Claim." (A0049-50). Jarden asserted claims for: declaratory judgment: duty to indemnify Jarden for the Interest Award, defined *infra* (Count I); breach of contract or anticipatory breach of contract: indemnification for the Interest Award (Count II); declaratory judgment: duty to pay defense costs in the Appraisal Action (Count III); and breach of contract or anticipatory breach of contract: payment of defense costs. In total, Jarden sought to recover its defenses costs associated with defending the Appraisal Action and interest it was required to pay to the shareholders. (A0055-56).

On January 29, 2021, Defendants moved to dismiss the Amended Complaint on the grounds that: (i) the Appraisal Action was not a claim for a Wrongful Act and

(ii) the Appraisal Action was not a claim for a Wrongful Act committed by Jarden before the run-off date.[2] The motion to dismiss was fully briefed and the Superior Court heard oral argument on April 20, 2021.

On July 30, 2021, the Superior Court issued its Memorandum Opinion dismissing the Amended Complaint in its entirety.

In the Memorandum Opinion, the Superior Court improperly inserted language into the Jarden D&O Policy and, by doing so, the court narrowed the scope of coverage. Contrary to the Superior Court's holding and pursuant to the specific Jarden D&O Policy Insuring Agreement, the Defendants agreed to provide coverage to Jarden:

1. For all losses arising from a claim made against Jarden (brought by one or more shareholders in their capacity as such);

2. Made during the Policy Period or the Extended Reporting Period;

3. For *any "act"* actually or alleged committed or attempted by Jarden taking place prior to the end of the Policy Period.

This is precisely what occurred. Jarden incurred a loss in defending itself and paying the interest award in the Appraisal Action (which is part of the legal proceeding commenced by the Appraisal Demands) – the "claim" under the policy. The Appraisal Action was filed during the Extended Reporting Period of

[2] The "Run-Off Date" is April 15, 2016. (A0390).

the Jarden D&O Policy.[3] And the "acts" giving rise to the Appraisal Demands and their associated Appraisal Action include the Merger and the steps Jarden took to effectuate it.

The Superior Court, incorrectly, chose the *closing* of the Merger as the only relevant "act" and determined that the "for a Wrongful Act" language in the Jarden D&O Policy required redress for some type of wrongdoing. By doing so, the court essentially rewrote the policy to provide less coverage. The Jarden D&O Policy, however, provides broad coverage. "Wrongful Act" under the policy can be any "act" actually or allegedly committed or even attempted by Jarden. The definition of "Wrongful Act" in the policy simply requires an "act" with no associated requirement that that "act" be a violation or somehow be "wrongful." Furthermore, the Superior Court improperly added language to the definition of "Wrongful Act" by finding that it required an act for redress or requital. That language is not found in the Policy, but if it were, an Appraisal Action satisfies that definition, because "redress" simply means, under its common definition, a "remedy" – precisely what an Appraisal Action is.

There is no permissible reason under Delaware's well-recognized rules of

[3] The Extended Reporting Period is April 15, 2016 to April 12, 2022. The Appraisal Demands were made prior to the expiration of the Policy Period. Thus, both the Appraisal Demands and the Appraisal Action were timely made during the reporting period provided under the Jarden D&O Policy.

policy interpretation to adopt the Superior Court's limited construction of the word "for" as "seeking redress." To be sure, "for" has several possible definitions that would comport with Delaware law, including "because of," "resulting from," "by reason of," or "on account of." Pursuant to any of *these* meanings, the Appraisal Action is "for" the act(s) committed and/or attempted by Jarden leading up to the Merger.

Jarden timely filed its Notice of Appeal on August 30, 2021. This is Jarden's Opening Brief on Appeal.

SUMMARY OF ARGUMENT

1. Jarden properly asserted a claim sufficient to survive a motion to dismiss under the Superior Court's pleading standards and under this Court's decision in *Solera II*.

2. The Jarden D&O Policy provides coverage for the Appraisal Action pursuant to its explicit and unambiguous language.

3. The Appraisal Actions are covered under the Jarden D&O Policy as Merger Objection Claims.

4. The Superior Court erred in its determination that "an appraisal action is a statutory proceeding that does not seek redress in response to any corporate act …." *Jarden, LLC v. ACE Am. Ins. Co.*, 2021 WL 3280495, at *1 (Del. Super. July 30, 2021). This determination, however, was made through the lens of this Court's decision in *Solera II* and still focuses on some component of "wrongdoing," based on the premise that "for a wrongful act" must mean "redress" for a perceived wrong. This improperly narrows the policy language at issue, which differs significantly from the policy language that was at issue in *Solera II*. "For" can mean because of or pertaining to. And, even if it is to be narrowly interpreted as "redress," redress can simply mean "remedy." Using these interpretations, and applying the defined terms of the Jarden D&O Policy, the Appraisal Action is a remedy which arose because of acts actually or allegedly committed or attempted by Jarden.

5. The Superior Court erred again by holding that the "act" giving rise to Jarden's claim for coverage must be the Merger itself, which occurred a few hours after the Policy Period expired. This again improperly narrows the language of the Jarden D&O Policy. The Policy provides coverage for any act actually or allegedly committed or attempted by the Company, and for any Claim that arises during the Policy Period or during the Extended Reporting Period.

6. The Superior Court exceeded its authority by making a public policy decision that, in Delaware, there can be no D&O coverage for appraisal actions.

STATEMENT OF FACTS

A. The Differences Between the Jarden D&O Policy and the *Solera* Policy

The policy in *Solera II* defined "Securities Claim" more narrowly and differently than Jarden's policy (emphasis added):

Solera	Jarden
"Securities Claim" [defined] as a claim: (1) made against [Solera] ***for any actual or alleged violation of any federal, state or local statute, regulation, or rule or common law regulating securities***, including but not limited to the purchase or sale of, or offer to purchase or sell, securities, which is: (a) brought by any person or entity resulting from, the purchase or sale of, or offer to purchase or sell, securities of [Solera]; or (b) brought by a security holder of [Solera] with respect to such security holder's interest in securities of [Solera.]	Securities claims means any claims: 1) brought by one of more securities holders of the Company in their capacity as such including derivative actions brought by one or more shareholders to enforce a right of the Company; ***<u>or</u>*** 2) alleging violation of any federal, state, local or foreign regulation, rule or statute regulating securities, including but not limited to the purchase or sale of…; any securities issued by of the Company[.]

This Court's holding in *Solera II* hinged on the determination that an appraisal action did not constitute a "Securities Claim" under the *Solera* policy because there was no actual or alleged **violation** of law as required by the policy at issue. The Jarden D&O Policy, however, does not require a violation.

The definition of "Securities Claim" is not at issue here. The Superior Court's Memorandum Opinion noted that the Defendants conceded that Jarden satisfied the

requirement for a Securities Claim. *Jarden*, 2021 WL 3280495, at *3. The language at issue here is the language in Insuring Agreement C of the Primary Policy, which provides: that the Defendants agreed to pay on behalf of Jarden:

> [A]ll **Loss** for which the **Company**[4] becomes legally obligated to pay by reason of a **Securities Claim** first made against the **Company** during the **Policy Period** or, if elected, the **Extended Reporting Period**, and reported to the **Insurer** pursuant to the terms of this **Policy**, *for any **Wrongful Acts** taking place prior to the end of the **Policy Period**.*

(A0047-48) (bold emphasis in original) (italics emphasis added).

"Wrongful Act" is defined as any error, misstatement, misleading statement, ***act***, omission, neglect, or breach of duty ***actually or allegedly committed or attempted*** by Jarden. (A0130). This broad definition encompasses not only the Merger at issue in the Appraisal Action but also all acts actually committed, allegedly committed or even attempted by Jarden.

Unlike *Solera II*, "Wrongful Act" does not require a violation of any law, it requires only an *act allegedly or actually committed or attempted* by Jarden. Not only is there no requirement for a "violation," there is no requirement in the Jarden D&O Policy for wrongdoing or wrongfulness relating to that "act." All that is required is any act, and the act need not be committed or completed. This

[4] Under the Primary Policy, the term "Company" includes Jarden. *See* Primary Policy, §§ II(C) (defining "Company" as "the Named Insured and any Subsidiary[.]").

broad language is critical to coverage, Jarden's expectations for coverage and why the decision of the Superior Court must be reversed.

B. The Jarden D&O Policy

The Defendants issued insurance policies to Jarden providing primary and/or excess executive and corporate liability insurance coverage for claims arising during the Policy Period from April 12, 2015 to April 15, 2016, with Extended Reporting Period to April 12, 2022. (A0045). The Extended Reporting Period was put in place on April 12, 2015 as part of the planning for the Merger, and obviously in part to protect Jarden from claims relating to the Merger. (A0172).

Defendant-Below/Appellee ACE American Insurance Company ("Ace") issued primary policy no. DON G25592888 005 with an aggregate limit of $10 million (the "Primary Policy"). (A0046). The remaining Defendants issued excess policies with varying limits. (A0046-47). The policies issued as excess of the Primary Policy are collectively referred to as the "Excess Policies." (A0047).

Except as otherwise expressly provided in the Excess Policies, those policies "follow form" to the terms and conditions of the Primary Policy, meaning that they adopt those terms and conditions as if fully set forth in their policy language. (A0047).

As stated above, Insuring Agreement C requires the Defendants to pay on behalf of Jarden:

> [A]ll **Loss** for which the **Company** becomes legally obligated to pay by reason of a **Securities Claim** first made against the **Company** during the **Policy Period** or, if elected, the **Extended Reporting Period**, and reported to the **Insurer** pursuant to the terms of this **Policy**, for any **Wrongful Acts** taking place prior to the end of the **Policy Period**.

(A0047-48).

"Securities Claim" is defined in the Primary Policy as:

> [A]ny **Claim**, other than a civil, criminal, administrative or regulatory investigation of a **Company**, which in whole or in part is:
>
> 1. brought by one or more securities holders of the **Company**, in their capacity as such, including derivative actions brought by one or more shareholders to enforce a right of the Company[.]

(A0048).

"Claim" is defined to include:

> 1. a written demand for monetary damages or non-monetary or injunctive relief;
> 2. a civil, criminal, arbitration, administrative or regulatory proceeding for monetary damages or non-monetary or injunctive relief commenced by: (i) service of a complaint or similar pleading[.]

(A0048).

"Wrongful Act" is defined as:

> [A]ny error, misstatement, misleading statement, act, omission, neglect, or breach of duty … actually or allegedly committed or attempted by:
>
> …
>
> 2. Solely with respect to coverage under Insuring Agreement C, the **Company**, but solely with respect to a **Securities Claim**[.]

(A0130).

Pursuant to the Insuring Agreement of the Primary Policy, by Endorsement 16, the Defendants specifically included coverage for Merger Objection Claims, defined as:

> [A] **Claim**, including but not limited to a **Claim** alleging a violation of Section 14(a) of the Securities Exchange Act of 1934 or other federal securities law, based upon, arising from, or in consequence of any proposed or actual acquisition of all or substantially all of the ownership interest in, or assets of, the **Company**, and in which it is alleged that the price of or consideration paid or proposed to be paid for the acquisition or completion of the acquisition is inadequate or effectively increased.

(A0048-49). In fact, Endorsement 16 provides for a separate deductible and retention for Merger Objection Claims under Insuring Agreement C. (A0166).

"Loss" covered by the Primary Policy is also defined as:

> **"Loss"** means damages, judgments, any award of pre-judgment and post-judgment interest, settlements and **Defense Costs** which the **Insured** becomes legally obligated to pay on account of any **Claim** first made against any **Insured** during the **Policy Period**[.]

(A0049).

Finally, "Defense Costs" are further defined in the Primary Policy to include "reasonable and necessary costs, charges, fees and expenses incurred by any **Insured** in defending **Claims**[.]" (A0049).

C. The Merger

Jarden, a Delaware limited liability company, was acquired by Newell Rubbermaid Inc. ("Newell") in a merger transaction (the "Merger") pursuant to a

certain Agreement and Plan of Merger dated December 13, 2015 ("Merger Agreement"). (A0038-40). The terms of the Merger included a per-share price consisting of cash and Newell shares, which had a value of $59.21 per share price (the "Merger Price") as of the closing date of the Merger. (A0044). Jarden included the announcement of the Merger in a proxy statement filed with the Securities and Exchange Commission on March 18, 2016. (A0042).

D. Written Appraisal Demands from Jarden Shareholders

A collective of beneficial owners of over 10.5 million shares of Jarden common stock objected to the Merger. (A0059, A0084-85, A0099, A0107).

By letters dated April 7, 2016, April 8, 2016, April 11, 2016, April 12, 2016 and April 14, 2016, Cede & Co., the nominee for the Depository Trust Company and the holder of record of the shares, on behalf of the objecting shareholders, delivered to Jarden timely written demands for appraisal of their shares pursuant to 8 *Del. C.* § 262 (the "Appraisal Demands"). (A0060). The Appraisal Demands complied in all respects with Section 262 and all were delivered to Jarden prior to the special meeting vote on the Merger which was held on April 15, 2016. (A0060, A0086-87, A0099-100, A0109-110).

E. The Appraisal Action

Following the closing date of the Merger, April 15, 2016, and based on their pre-closure demands, Jarden shareholders, in their capacity as shareholders and in

accordance with the Appraisal Demands submitted prior to closing, filed the first of their appraisal actions in the Delaware Court of Chancery against Jarden seeking appraisal of their shares under 8 *Del. C*. § 262, in the matter styled *Merion Capital LP, et al. v. Jarden Corporation*, C.A. No. 12456-VCS (Del. Ch.), which was later consolidated with three other appraisal lawsuits and re-captioned *In Re Appraisal of Jarden Corporation*. (A0057-117).

After a four-day trial and post-trial briefing, on July 19, 2019, Vice Chancellor Slights issued a Memorandum Opinion and concluded that the fair value of the remaining petitioners' shares at the time of the Merger was $48.31 per share, which is $10.90 less per share than the actual Merger Price of $59.21 agreed to by Jarden. (A0044); *In re Appraisal of Jarden Corporation*, 2019 WL 3244085, at *2 (Del. Ch. July 19, 2019).

The court held that, pursuant to the statutory interest provisions in 8 *Del. C.* § 262, the petitioners were entitled to interest, compounded quarterly, on the appraised fair value of their shares "from the date of closing to the date of payment" (the "Interest Award"). (A0044-45).

On October 2, 2019, the court entered an Order and Final Judgment ordering Jarden to pay a judgment amount of $177,406,216.48 consisting of: (1) the value of the remaining petitioners' shares at $48.31 per share totaling $139,534,642.58; and (2) pre-judgment interest in the amount of $38,387,821.61. The Order also provided

for daily post-judgment interest in the amount of $36,453.33 and that interest "shall accrue at 5% over the Federal Reserve discount rate, compounded quarterly … from September 30, 2019 until payment by" Jarden. (A0045); *Appraisal of Jarden Corp.*, 2019 WL 4884109 at *1. Petitioners in the Appraisal Action appealed, and on July 9, 2020, this Court upheld the Order and Final Judgement. (A0045).

Jarden made payment as required by the Order and Final Judgment and incurred attorneys' fees and other costs, in excess of its self-insured retention, defending the Appraisal Action. (A0045).

F. Key Dates for the Court's Consideration

- April 28, 2015: the Jarden D&O Policy is executed with a Policy Period of 12:01 a.m. April 12, 2015 to 12:01 a.m. April 12, 2016. (A0125-126).

- December 13, 2015: Jarden executes the Merger Agreement and the Merger is announced. (A0038-39).

- March 18, 2016: Jarden files the proxy statement with the Securities Exchange Commission and includes the impending Merger. (A0042).

- April 7-14 2016: Jarden shareholders submit Appraisal Demands. (A0060)

- April 12, 2016: the Jarden D&O Policy is amended to extend the Policy Period to 12:01 a.m. April 15, 2016. (A0389).

- April 15, 2016: the Merger closes. (A0042).

- June 14, 2016 to August 12, 2016: the complaints in the Appraisal Action are filed. *Appraisal of Jarden Corp.*, 2019 WL 3244084, at *22.

ARGUMENT

I. THE APPRAISAL ACTION IS "FOR" A WRONGFUL ACT.

A. Question Presented, Affirmatively Stated

The Superior Court committed reversible error in holding that "[e]ven if, as Jarden argues, a "Wrongful Act" means any act Jarden committed, an appraisal action does not seek redress in response to, or as reprisal of, an act. Accordingly, giving the term "for" the meaning the parties jointly ascribe to it, there is no coverage under the [Jarden] D&O Policies." *Jarden*, 2021 WL 3280495, at *5 (citations omitted). Preserved on appeal at (A0348-351, A0423-426).

B. Scope of Review

This Court's standard of review of a decision granting a motion to dismiss is *de novo*. *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019).

C. Merits

1. The Appraisal Action Is a Covered Securities Claim Under the Explicit and Unambiguous Language of Insuring Agreement C.

Pursuant to the Insuring Agreement, the Defendants agreed to pay on behalf of Jarden:

> [A]ll **Loss** for which the **Company** becomes legally obligated to pay by reason of a **Securities Claim** first made against the **Company** during the **Policy Period** or, if elected, the **Extended Reporting Period**, and reported to the **Insurer** pursuant to the terms of this **Policy**, for any **Wrongful Acts** taking place prior to the end of the **Policy Period**.

(A0047-48). A "Securities Claim" is "any Claim" brought by a Jarden shareholder in their capacity as such. (A0048). A "Claim" is a "written demand" for monetary or nonmonetary relief. (A0048).[5]

Thus, a written demand, specifically the Appraisal Demands, for monetary or nonmonetary relief is a "Securities Claim" under the Jarden D&O Policy. *See* 8 *Del. C.* § 262(d) (the Appraisal Statute uses the term "written demand" in reference to the appraisal demand letters, which are mandated under the statute). The Appraisal Demands were first made during the Policy Period.

"Wrongful Act," as defined under the Jarden D&O Policy, can be any "error, misstatement, misleading statement, *act*, omission, neglect, or breach of duty … actually or allegedly committed or attempted" by Jarden. Neither *Solera I* or *II*, addressed the definition of "Wrongful Act." *See Solera II*, at 1125.[6]

Pursuant to the definition in the Jarden D&O Policy, "Wrongful Act" can be *any act actually or allegedly committed or attempted* by Jarden with respect to a Securities Claim covered under Insuring Agreement C. This broad definition encompasses not only the Merger at issue in the Appraisal Action, but also the

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[5] The definition of "Securities Claim" is not at issue here. *See supra* at p. 8; *Jarden*, 2021 WL 3280495, at *3.

[6] In *Solera II*, this Court specifically noted that it was not interpreting "Wrongful Act." *Solera II*, 240 A.3d 1121, 1129 n. 45; *see also Solera I*, 213 A.3d 1252 n. 2 ("this opinion does not address or resolve the effect, if any, of the 'wrongful act' language.")

underlying complained-of process and, more importantly: Jarden's agreement to effectuate the Merger, the announcements of the Merger, the filing of the proxy statement, and the impending closing of the Merger. The broad definition thus includes those acts, *committed or attempted*, by Jarden that gave rise to the Appraisal Demands and in the Appraisal Action..

The Jarden shareholders objected to the Merger and commenced their claims against Jarden via the written Appraisal Demands for monetary and/or nonmonetary relief based on acts attempted or committed during the Policy Period as explained in more detail above.

Accordingly, the Appraisal Demands and resulting Appraisal Action are covered under Insuring Agreement C of the Jarden D&O Policy because they constitute a Securities Claim based on acts attempted or committed during the Policy Period.

2. The Appraisal Action Is a Covered Merger Objection Claim.

In further support of Jarden's claim for coverage is the fact that the Appraisal Demands also constitute a "Merger Objection Claim" under the Jarden D&O Policy. A "Merger Objection Claim" is a:

> [A] **Claim** … based upon, arising from, or in consequence of any proposed or actual acquisition of all or substantially all of the ownership interest in, or assets of, the **Company**, and in which it is alleged that the price of or consideration paid or proposed to be paid for the acquisition or completion of the acquisition is inadequate or effectively increased.

(A0166). Jarden executed the Merger Agreement and announced the Merger in December 2015 and then included the announcement in a proxy statement filed with the Securities Exchange Commission on March 18, 2016. In response to the announcement of the Merger and facing its impending closing, Jarden shareholders made their Appraisal Demands by letters dated April 7, 2016, April 8, 2016, April 11, 2016, April 12, 2016 and April 14, 2016.

As is set forth above, a "claim" is any written demand for monetary or nonmonetary relief. The Appraisal Demands and resulting Appraisal Actions are, therefore, "claims" arising from or in consequence of the proposed, and later actual, acquisition of all of the ownership interests and assets of Jarden, and these claims included allegations that the price or consideration to be paid, or proposed to be paid, was inadequate. The "Merger Objection Claims" are, therefore, "Securities Claims" under Insuring Agreement C. This conclusion is further supported by the separate deductible and retention for "Merger Objection Claims" under the Insuring Agreement. (A0166).

The Memorandum Opinion fails to sufficiently address the fact that the Jarden "Merger Objection Claim" provision of the Jarden D&O Policy further supports Jarden's entitlement to coverage under Insuring Agreement I.C., which provides the Insurer will Pay for all Loss by reason of a Securities Claim.

It is illogical to conclude that, despite the fact that Jarden paid for coverage

for Merger Objection Claims, that appraisal claims would be excluded from coverage on the grounds underlying the Superior Court's ruling.

Accordingly, the decision of the Superior Court should be reversed.

3. The Superior Court Improperly Narrowed the Jarden D&O Policy Despite There Being No Ambiguity.

It is bedrock Delaware law that where any ambiguity exists in an insurance policy, Delaware courts interpret the policy in favor of coverage. *See Hampton v. Titan Indem. Co.*, 2017 WL 2733760, at *6 (Del. Super. June 23, 2017) ("The Court finds that the insurance contract language at issue in this case is fairly susceptible to two different interpretations. Hence, an ambiguity exists in this section of the contract. Where such an ambiguity in an insurance contract exists, the doctrine of *contra proferentem* requires the Court interpret the contract in favor of coverage."). "As a general rule, insurance contracts are construed strongly against the insurer." *U.S. Underwriters Ins. Co. v. The Hands of our Future, LLC*, 2016 WL 4502003, at *2 (Del. Super. Aug. 19, 2016) (citing *Steigler v. Ins. Co. of N. Am.*, 384 A.2d 398, 400 (Del. 1978)). An insurance policy "should be read to accord with the reasonable expectations of the purchase so far as the language will permit." *Steigler*, 384 A.2d at 401 (citations omitted).

"Under Delaware law, insurance policies are construed as a whole, to give effect to the intentions of the parties. When the language of an insurance policy is "clear and unambiguous, the parties' intent is ascertained by giving the language its

ordinary and usual meaning." *Solera II*, 240 A.3d at 1131 (citations omitted). Furthermore, Delaware courts consistently hold that "terms in an insurance contract generally are given their plain and ordinary meaning. Any ambiguity in the contract ***is construed against the insurer and in favor of coverage***." *Conduent State Healthcare, LLC v. AIG Specialty Ins. Co.*, 2019 WL 2612829, at *5 (Del. Super. June 24, 2019) (citing *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 73 (Del. 2011) (remaining citations omitted and emphasis added).

The Superior Court focused much of its decision on the issue of whether the Appraisal action was *for* a Wrongful Act. Applying the Defendants' interpretation of "for" the court found that "it must 'seek redress in response to, or as requital of,' that act." *Jarden*, 2021 WL 3280495, at *5 (citing *RSUI Indem. Co. v. Desai*, 2014 WL 4347821, at *4 (M.D. Fla. Sept. 2, 2014). The court elaborated:

> Although the D&O Policies define "Wrongful Act" to include any "act" committed or attempted by Jarden, the Securities Claim also must be "for" that act. The Insurers argued in their briefs and at oral argument that in order for a claim to be "for" a wrongful act, it must "seek redress in response to, or as requital of," that act. Jarden did not squarely address the meaning of "for" in its brief, but agreed at oral argument that "for" as used in the D&O Policies has the meaning advocated by the Insurers.
>
> …. Even if, as Jarden argues, a "Wrongful Act" means any act Jarden committed, an appraisal action does not seek redress in response to, or as reprisal of, an act. Accordingly, giving the term "for" the meaning the parties jointly ascribe to it, there is no coverage under the D&O Policies

Id.

By applying the Defendants' interpretation of "for," the court improperly narrowed the Jarden D&O Policy and improperly limited its coverage. The court also improperly held that the Defendants' interpretation of "for" is the only possible interpretation.

"For" simply means "because of." *See* https://www.merriam-webster.com/dictionary/for (last visited October 6, 2021); *see also* For, *BLACK'S LAW DICTIONARY* (6th Ed. 1990) ("for" is defined broadly to include "[b]y reason of" or "with respect to," "because of," "on account of," and "in consequence of."). "For" can also mean "[b]y means of, or growing out of." *Id.*

Other courts have defined "for" in the context of insurance policies in myriad ways. For instance, in *Guild & Ratner v. Vigilant Ins. Co.*, 782 N.E.2d 749 (Ill. App. Ct. 2002), the court concluded that the word "for," as used in an exclusion precluding coverage for "claims *for* rendering or failing to render" professional services, meant "because of" or "due to." *Id.* at 756 (emphasis in original) (stating that insured, in attempting to distinguish policies excluding claims "due to" rendering of professional services, was "arguing about a distinction without difference"). Similarly, in *Griffith v. State Farm Mut. Auto. Ins. Co.*, 697 N.W.2d 895 (Mich. 2005), the court noted that "for" means "by reason of" and implies a causal connection. *Id.* at 531, n.6. And in *Fox v. Rodel, Inc.*, 1999 WL 803885 (D. Del. Sept. 13, 1999), the Delaware District Court recognized that "the word 'for' has

many meanings, including 'before,' 'as a preparation toward,' 'a prerequisite to,' 'so as to secure as a result," and 'in connection with.'" *Id.* at *8 n.15; *see also Guild & Ratner*, 782 N.E.2d at 756 (noting that there are many definitions of "for"). To the extent there are multiple interpretations of "for a 'Wrongful Act,'" Delaware law is clear that the Jarden D&O Policy must be construed broadly in favor of coverage and consistent with an insured's reasonable expectations.

Because the Jarden D&O Policy does not define "for," it should be ascribed its plain meaning. *See Lorillard Tobacco Co. v. Am. Legacy Foundation*, 903 A.2d 728, 739 (Del. 2006) ("When interpreting a contract, the role of a court is to effectuate the parties' intent. In doing so, we are constrained by a combination of the parties' words and the plain meaning of those words where no special meaning is intended.") (citations omitted).

This Court has held:

> Clear and unambiguous language in an insurance policy should be given its ordinary and usual meaning. Absent some ambiguity, Delaware courts will not destroy or twist policy language under the guise of construing it. When the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented. To the extent that ambiguity does exist, the doctrine of *contra proferentum* requires that the language of an insurance contract be construed most strongly against the insurance company that drafted it.

Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co., 616 A.2d 1192, 1195-

96 (Del. 1992) (citations and internal quotation marks omitted.

None of the definitions of "for" confine it to seeking redress. The Superior Court did precisely what this Court proscribed in *Rhone-Poulenc*. It twisted the Jarden D&O Policy language, despite there being no ambiguity, to have it meet the Defendants' construction. This is reversible error. The terms of the Jarden D&O Policy should be ascribed their plain and ordinary meaning, consistent with Delaware jurisprudence.

The Superior Court relied heavily upon Jarden's purported agreement at oral argument to the Defendants' contention that the term "for" requires "redress." *Jarden*, 2021 WL 3280495, at *5. A full reading of the transcript, however, shows that while Jarden agreed that the Defendants offered *an* interpretation of "for," it did not agree that it is *the only* interpretation. (*See* A0423-427).

Furthermore, even if the Superior Court's inclusion of this additional language was proper, which it is not, a common definition of "redress" is simply a "remedy." *See* https://www.merriam-webster.com/dictionary/redress (last visited October 10, 2021).

Applying this common definition, the Appraisal Action falls squarely within the Superior Court's definition of "for" and "redress." The Appraisal Action is a remedy for an act. And, as explained in further detail below, the "act" can be actually or allegedly committed or even attempted by Jarden. (A0130).

In short, whether the Appraisal Action adjudicates alleged wrongdoing is irrelevant for determining whether the matter is a "'Claim for a 'Wrongful Act,'" as broadly defined by the Jarden D&O Policy. It is similarly irrelevant if the Appraisal Action requires redress, requital or reprisal. The Appraisal Action was filed *because of the acts* committed or attempted by Jarden to effectuate the Merger.

Using any of the commonsense definitions above, the Appraisal Action at issue here was "for" the conduct alleged in the Appraisal Demands and the appraisal petitions.

As discussed in more detail above, the Jarden D&O Policy also specifically provides coverage for Merger Objection Claims, which is precisely what an appraisal action is. This further undermines the Superior Court's improper interpretation of "for a Wrongful Act."

Accordingly, the Superior Court's decision should be reversed.

II. THE APPRAISAL ACTION IS A COVERED SECURITIES CLAIM UNDER THE JARDEN D&O POLICY BECAUSE THE "ACTS" GIVING RISE TO THE APPRAISAL ACTION OCCURRED PRIOR TO THE RUN-OFF DATE.

A. Question Presented, Affirmatively Stated

The Superior Court committed reversible error in holding that "[e]ven if the Appraisal Demands were a "Claim" under the Policies, the Appraisal Action was not for an act that occurred before the Run-Off Date." *Jarden*, 2021 WL 3280495, at *6 (citations omitted). Preserved on appeal at (A0348-350, A0351-355, A0426-431).

B. Scope of Review

This Court's standard of review of a decision granting a motion to dismiss is *de novo*. *Olenik v. Lodzinski*, 208 A.3d at 714.

C. Merits

The Appraisal Demands constitute "Securities Claims" under the Jarden D&O Policy[7] and the Superior Court and the Defendants acknowledged that the Appraisal Action is a "Securities Claim" under the Jarden D&O Policy. *Jarden*, 2021 WL 3280495, at *3.

Again, Insuring Agreement C provides coverage for:

> [A]ll **Loss** for which the **Company** becomes legally obligated to pay by reason of a **Securities Claim** first made against the **Company** during the **Policy Period** or, if elected, the **Extended Reporting**

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[7] A "Securities Claim" can simply be a "Claim" brought by Jarden shareholders in their capacity as such, and a "Claim" can be "a written demand for monetary damages or non-monetary or injunctive relief." (A0128-129).

> **Period**, and reported to the **Insurer** pursuant to the terms of this **Policy**, *for any **Wrongful Acts** taking place prior to the end of the **Policy Period**.*

(A0047-48) (bold emphasis in original) (italics emphasis added). "Wrongful Act" includes any act actually or allegedly committed or attempted by Jarden. (A0130). The Appraisal Demands and the Appraisal Action arise out of the same "acts" actually committed or attempted by Jarden. Thus, Insuring Agreement C provides coverage for claims made during the Policy Period and the Extended Reporting Period, provided that the acts giving rise to the claim occurred during the Policy Period. There is no question that the "Claims" were made during the Policy Period and the Extended Reporting Period.

The focus, therefore, is whether the "acts" occurred during the Policy Period. The Superior Court was wrong to hold that the only act from which the Claim could arise is the closing of the Merger. To reach that conclusion, the Superior Court: (i) ignored the explicit language of the Jarden D&O Policy which provides for acts actually committed or attempted by Jarden; (ii) improperly narrowed the scope of coverage; and (iii) disregarded the fact that the Appraisal Demands and Appraisal Action, which are steps in the same overall legal proceeding, specifically state that they were brought in response to pre-Merger acts.

1. The Appraisal Action[8] Arose from Acts Committed or Attempted During the Policy Period.

Jarden executed the Merger Agreement on December 13, 2015, and legally bound itself to the Merger at that time. (A0038). Jarden announced the Merger in December 2015 and included the announcement in a proxy statement filed with the Securities Exchange Commission on March 18, 2016. (A0042).

The Jarden shareholders made their Appraisal Demands by letters dated April 7, 2016, April 8, 2016, April 11, 2016, April 12, 2016 and April 14, 2016. (A0060).[9] The Jarden shareholders made their Appraisal Demands in response to: (i) the Merger Agreement, (ii) the announcements of the Merger in December and the joint proxy statement, and (iii) the impending closing of the Merger, all of which included the per share Merger Price – *and all of which occurred pre-Merger* and all of which are "acts" within the Policy Period.

Pursuant to Section 262(b), "a written demand for appraisal, executed by or for the shareholder of record, must be timely filed with the corporation in order to perfect appraisal rights. The written demand acts as a notification to the corporation of the stockholder's dissent, as well as a formal demand for appraisal." *Alabama By-*

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[8] The Appraisal Action is the culmination of the statutory appraisal proceedings that were commenced by the Appraisal Demands.

[9] These Appraisal Demands were attached to the Amended Complaint at Exhibits 1-4 and were incorporated by reference. *See Wilmington Sav. Fund Soc., FSB v. Stewart Guar. Co.*, 2012 WL 5450830, at *2. (Del. Super. Aug. 31, 2021)

Products Corp. v. Cede & Co on Behalf of Shearson Lehman Bros., Inc., 657 A.2d 254, 258 (Del. 1995) (citing 8 *Del. C.* § 262(b). Further, appraisal rights under Section 262 must be perfected:

> Each stockholder electing to demand the appraisal of such stockholder's shares shall deliver to the corporation, ***before the taking of the vote on the merger or consolidation, a written demand for appraisal of such stockholder's shares***[.]

8 *Del. C.* § 262(d)(1) (emphasis added). Indeed, in order for the Jarden shareholders to have standing to bring an appraisal claim, the written demands must have been made prior to the Merger because their ownership of Jarden stock ceased to exist upon closing. *See Alabama By-Products Corp.*, 657 A.3d at 264 (citations omitted).[10]

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[10] Standing was not an issue in the Appraisal Action because the Jarden shareholders in that case perfected their appraisal rights by submitting their written demands for appraisal *before the Merger date*, as required by the appraisal statute. *See Engel v. Magnavox Co.*, 1976 WL 1705, at *2 (Del. Ch. Apr. 22, 1976).

Moreover, the Appraisal Demands are sufficient to constitute "Securities Claims" under the Jarden D&O Policy. The Appraisal Demands state: "[i]n accordance with instructions received from [the Jarden shareholder] … we hereby assert appraisal rights with respect to the Shares and demand appraisal of the Shares pursuant to Section 262 of the [DGCL]." (A0064-66, A0073-79). This is not a threat of future litigation but a present demand for the appraisal of Jarden shares. *See e.g., Zurich Am. Ins. Co. v. Syngenta Crop Protection, LLC*, 2020 WL 5237318, at *9 (Del. Aug. 3, 2020) (finding that a letter did not constitute a demand for damages because it threatened future litigation, requested damages and lacked specificity of plaintiffs). *See also First Bank of Del. Inc. v. Fidelity Deposit Co. of Md.*, 2013 WL 5858794, at *4 (Del. Super. Oct. 30, 2013) (finding that a letter to the insured constituted a policy-triggering "claim" because it was a written demand for monetary damages);

The Jarden shareholders filed the Appraisal Action complaints between June 14, 2016 and August 12, 2016. In the Appraisal Action, the shareholders alleged that "***the sale process leading to the Merger*** was highly flawed because Jarden's lead negotiator was willing to sell Jarden on the cheap and the Jarden board of directors … failed to test the market ***before agreeing to sell the Company*** to Newell." *Appraisal of Jarden Corporation*, 2019 WL 3244085, at *3 (emphasis added). In addressing these pre-closing acts, the Court of Chancery noted that the alleged flaws in the sale process occurred "***before negotiations began in earnest***." *Id.*, *aff'd by Fir Tree Master Fund, LP v. Jarden Corp.*, 236 A.3d 313, 328 (Del. 2020) ("[T]he petitioners attacked the deal price as an unreliable indicator of fair value because of an imperfect negotiation process.") (emphasis added).

All of the above demonstrates that the Appraisal Action was brought not just in response to the Merger but in response to the acts that formed the *pre-Merger* sale process. Critically, each of the pre-closing "acts," whether characterized as actually or allegedly committed or attempted, and which gave rise to the Appraisal Action all took place prior to the end of the Policy Period.

The Appraisal Demands and the Appraisal Action are steps in the same legal

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Zurich Am. Ins. Co. v. Syngenta, 2020 WL 5237318, at *8 (a demand letter must contain "some demonstration by the potential claimant sufficient to put the potential defendant on notice that there is an *actual* person or persons who are intending to file a claim for damages.").

proceeding and arise out of the same "acts." Here, the acts (actually or allegedly committed or attempted) by Jarden formed the basis of the Appraisal Demands, and these "acts" (as noted above) meet the definition of "Wrongful Acts" under the Jarden D&O Policy. Furthermore, in this case, these "Wrongful Acts" occurred during the Policy Period. The fact that Appraisal Demands were made, and thus a Securities Claim was first made, during the Policy Period further establishes the fact that there were "acts" – actually or allegedly committed or attempted by Jarden – giving rise to coverage during the Policy Period.

The Superior Court dismissed Jarden's case in part because the Merger closed hours after the Policy Period purportedly ended. *See Jarden,* 2021 WL 3280495, at *6 ("Even if the Appraisal Demands were a "Claim" under the Policies, the Appraisal Action was not for an act that occurred before the Run-Off Date. This conclusion is compelled by the simple fact that, without the merger's execution, no appraisal right exists. If the merger had not closed, none of the dissenting stockholders who submitted Appraisal Demands would have had standing to pursue appraisal.") (citations omitted). The court elaborated that "if the Appraisal Action was for any act, the only act from which it arose or for which it sought redress was the merger's execution." *Id*.

This misses the mark and further demonstrates how the court improperly narrowed the scope of coverage. The Appraisal Demands alone are legally sufficient

to trigger coverage under the D&O Policy. Had the merger failed to close, and as a result no Appraisal Action had been filed, Jarden still would have been entitled to coverage; there simply would have been a lower or no "Loss." However, in its analysis, the Superior Court again improperly added language to the Jarden D&O Policy and limited its coverage.

The Appraisal Demands were made in response to *acts* actually or allegedly committed or attempted by Jarden *prior to* expiration of the Policy Period. The Appraisal Action was filed during the Extended Reporting Period, and was filed in response to acts actually or allegedly committed or attempted by Jarden during the Policy Period.

This Court should reject the Superior Court's construction of the Jarden D&O Policy that the "only act" for which coverage could arise is the closing of the Merger. The Jarden D&O Policy contains no such provision because such a reading is inconsistent with the terms of the policy.

2. The Superior Court's Reliance on the *Zale* Case Was Improper Because the Policy Language in *Zale* Required the "Act" to Fully Occur Prior to the Applicable Run-Off Date.

The Superior Court referenced this Court's citation "with approval" of the Texas Court of Appeals decision in *Zale Corp. v. Berkley Ins. Co*., 2020 WL 4361942 (Tex. Ct. App. July 30, 2020).

The Berkley policy in *Zale* had the following amendment to its run-off

endorsement:

> There shall be an extension of the coverage granted by this Policy with respect to any Claim first made during the period of 72 months, which period shall commence at 12:01 a.m. on May 29, 2014 and expire at 12:01 a.m. on May 29, 2020, but only with respect to any actual or alleged Wrongful Act fully occurring prior to May 29, 2014 and is otherwise covered by this Policy.

Id. at *3. The court in *Zale* found:

> The May 29, 2014, Liberty Policy Run-off Endorsement effectively ended Zale's insurance coverage policy period on May 28, 2014, and explicitly excluded claims "based upon, arising from or in any way related to any Wrongful Act committed or allegedly committed on or after May 29, 2014." Furthermore, the Berkley Policy Run-off Endorsement explicitly covers a "[w]rongful Act *fully* occurring prior to May 29, 2014." (emphasis added). As cited above, Berkley and Starr do not cover Zale's claims that arise from wrongful acts that occur on or after May 29, 2014.

Id. at *6.

The difference between the policy language in *Zale* and in this case cannot be overstated. The *Zale* policy required the act giving rise to coverage to have *fully* occurred. Jarden's policy has no such limitation. To the contrary, the "act" giving rise to coverage under Jarden's D&O Policy allows for the act to be actually committed *or attempted*. Therefore, once Jarden announced the Merger Agreement, this triggered the "act" and, more importantly, triggered coverage under the D&O Policy.

In discussing the *Zale* case, the Superior Court stated "[i]f the merger had not closed, none of the dissenting stockholders who submitted Appraisal Demands

would have standing to pursue appraisal." *Jarden*, 2021 WL 3280495, at *6. This reasoning misses the point and ignores the explicit language of the Jarden D&O Policy. The Appraisal Demands were made during the Policy Period in direct response to acts actually or allegedly committed or attempted by Jarden *during the Policy Period*. These demands triggered coverage under the Jarden D&O Policy as the "acts" giving rise to coverage occurred during the Policy Period. In this case, the Appraisal Action was the continuation of a legal process that commenced prior to the merger date and well within the Policy Period.

The contrast of the Jarden D&O Policy language with the requirement of the policy in *Zale* that the wrongful act must "fully" occur cuts against the Superior Court's reasoning that the closing of the Merger is "the only act" for which coverage would be available. It is also another example of the court improperly inserting language into the Jarden D&O Policy to narrow its scope of coverage.

Further emphasizing Jarden's expectations for coverage is the fact that on April 12, 2016 by Endorsement 24, the Policy Period was extended by three days (from 12:01 a.m. April 12, 2016 to 12:01 a.m. April 15, 2016). This was specifically done in order to extend coverage up to the day of the Merger. (A0389). And on April 15, 2016, the day of the Merger, the Jarden D&O Policy was further amended by Endorsement 26 to extend the Run-Off Period to April 15, 2022. (A0390-91). This shows that Jarden was making insurance decisions up to the date of the Merger

and demonstrates that the whole point of Jarden's purchase of coverage for a six-year Run-Off period was to protect against Merger-related claims.

III. THE SUPERIOR COURT EXCEEDED ITS AUTHORITY BY MAKING A PUBLIC POLICY DECISION REGARDING COVERAGE FOR APPRAISAL ACTIONS.

A. Question Presented, Affirmatively Stated

The Superior Court committed reversible to the extent it made a public policy decision that, in Delaware, there is no D&O coverage for appraisal actions. Preserved on appeal at (A0450-451).

B. Scope of Review

This Court's standard of review of a decision granting a motion to dismiss is *de novo*. *Olenik v. Lodzinski*, 208 A.3d at 714.

C. Merits

Though not explicitly stated within, the Superior Court's Memorandum Opinion appears to hold that, under *Solera II*, there can never be D&O coverage for an appraisal action. This is an example of a court improperly making a public policy decision. *See Sternberg v. Nanticoke Mem. Hosp., Inc.*, 62 A.3d 1212, 1217 (Del. 2013) ("Questions of public policy are best left to the legislature, and when it declares a public policy consistent with the constitution, we will apply it. But public policy considerations only empower courts to construct gap fillers when the statute is ambiguous, and unambiguous statutory text trumps the statute's purpose or broad public policy preamble.") (citations and internal quotation marks omitted); *Helman v. State*, 784 A.2d 1058, 1068 (Del. 2001) ("Courts are not super-legislatures and it

is not a proper judicial function to decide what is or is not wise legislative policy.") (citations omitted).

There is no statutory prohibition of D&O coverage for appraisal actions in Delaware. And, this Court did not make any broad proclamations to that effect in *Solera II*, it was merely interpreting the policy language at issue – which required a "violation" for coverage. In light of this, the Superior Court overreached its authority by improperly issuing a public policy decision.

To be clear, it is not Jarden's position that this Court should issue a decision bearing on Delaware public policy; nor does Jarden take the position that this Court should issue a decision about whether every D&O policy provides coverage for appraisal actions. Jarden's position is simple: the unambiguous Jarden D&O Policy language provides coverage for the Appraisal Actions and this Court should find accordingly.

Accordingly, the Superior Court committed reversible error in holding that only the filing of the Appraisal Action could trigger coverage under Jarden's policy.

CONCLUSION

WHEREFORE, the Superior Court committed reversible error by: (i) improperly narrowing the policy by holding that the Appraisal Action was not a claim "for a Wrongful Act;" and (ii) by narrowing the policy language by holding that the Appraisal Action did not arise out of an act committed before the Run-Off Date. This Court should hold that the "Wrongful Acts" provision of the Jarden D&O Policy does not bar coverage. The Appraisal Action constitutes a covered "Securities Claim" under the Jarden D&O Policy. For these reasons, the decision of the Superior Court should be reversed and this matter should be remanded for proceedings consistent with the Opinion of the Supreme Court.

Respectfully submitted,

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