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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

APPELLEES' ANSWERING BRIEF

OF COUNSEL:

BAILEY CAVALIERI LLC
Michael R. Goodstein
10 W. Broad Street, Suite 2100
Columbus, OH 43215
(614) 229-3231

DATED: November 10, 2021

John L. Reed (I.D. No. 3023)
DLA PIPER LLP (US)
1201 North Market Street, Suite 2100
Wilmington, DE 19801
(302) 468-5700
(302) 394-2341 (Fax)
john.reed@dlapiper.com

Attorneys for Defendant-Below/Appellee ACE American Insurance Company

OF COUNSEL:

WILEY REIN LLP
David H. Topol
Matthew W. Beato
1776 K Street, N.W.
Washington, D.C. 20006

Attorneys for Defendant-Below/ Appellee Navigators Insurance Company

SMITH KATZENSTEIN & JENKINS LLP
Robert J. Katzenstein (I.D. No. 378)
1000 West Street, #1501
P.O. Box 410
Wilmington, DE 19899
(302) 652-8400

Attorneys for Defendant-Below/Appellee ACE American Insurance Company and Navigators Insurance Company

OF COUNSEL:

KENNEDYS CMK LLP
Maurice Pesso
William Brennan
570 Lexington Ave., 8th Floor
New York, NY 10022
(212) 252-0004

WHITE & WILLIAMS LLP
Marc S. Casarino (I.D. No. 3613)
Courthouse Square
600 N. King Street, Suite 800
Wilmington, DE 19801
(302) 467-4520

Attorneys for Defendant-Below/Appellee Allied World National Assurance Company

OF COUNSEL:

ARNOLD & PORTER KAYE SCHOLDER LLP
Scott B. Schreiber
William C. Perdue
Andrew Tutt
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001-3743

HEYMAN ENERIO GATTUSO & HIRZEL LLP
Kurt M. Heyman (I.D. No. 3054)
Aaron M. Nelson (I.D. No. 5941)
300 Delaware Avenue, Suite 200
Wilmington, DE 19801
(302) 472-7300

Attorneys for Defendant-Below/Appellee Illinois National Insurance Co.

OF COUNSEL:

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
Ronald P. Schiller
Daniel J. Layden
One Logan Square
18th & Cherry Streets, 27th Floor
Philadelphia, PA 19103
(215) 568.6200

COOCH AND TAYLOR, P.A.
Carmella P. Keener (I.D. No. 2810)
The Nemours Building
1007 N. Orange Street, Suite 1120
P.O. Box 1680
Wilmington, DE 19899-1680
(302) 984-3816

Attorneys for Defendant-Below/Appellee Endurance Assurance Corporation as successor-in-interest to Endurance Reinsurance Corporation of America

OF COUNSEL:

TROUTMAN PEPPER HAMILTON SANDERS LLP
Jennifer Mathis
Three Embarcadero Center,
Suite 800
San Francisco, CA 94111
(415) 477-5706

Brandon D. Almond
TROUTMAN PEPPER HAMILTON SANDERS LLP
401 9TH Street, NW, Suite 1000
Washington, D.C. 20004
(202) 274-2864

TROUTMAN PEPPER HAMILTON SANDERS LLP
Joanna J. Cline (I.D. No. 5873)
Emily L. Wheatley (I.D. No. 6383)
Hercules Plaza, Suite 5100
1313 N. Market Street
P.O. Box 1709
Wilmington, DE 19899-1709
(302) 777-6500

Attorneys for Defendant-Below/Appellee Berkley Insurance Company

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NATURE OF PROCEEDINGS

Defendant-Below/Appellee ACE American Insurance Company ("ACE" or "Defendant," and collectively with the other Appellees, the "Defendants" or "Insurers") issued a primary directors' and officers' liability policy (the "Primary Policy") to Plaintiff-Below/Appellant Jarden LLC ("Jarden" or "Plaintiff"). Jarden was acquired on April 15, 2016 (the "Merger"), and former Jarden stockholders later filed separate (eventually consolidated) appraisal petitions pursuant to Section 262 of the Delaware General Corporation Law (the "Appraisal Action").

Jarden filed a coverage action against the Insurers on March 12, 2020, seeking coverage for the interest awarded and defense costs incurred in the Appraisal Action. In its complaint, Jarden alleged that the Appraisal Action was a "Securities Claim" because it was a Claim "for a violation" of a law "regulating securities," relying on *Solera Holdings, Inc. v. XL Specialty Insurance Co.*, 213 A.3d 1249 (Del. Super. 2019) ("*Solera I*"), which was then on appeal to this Court. The parties jointly moved to stay the coverage proceedings pending resolution of that appeal. On October 23, 2020, this Court reversed *Solera I*, holding that a statutory appraisal action is a "neutral" proceeding and "not for a violation of law." *In re Solera Insurance Coverage Appeals*, 240 A.3d 1121, 1133 (Del. 2020) ("*Solera II*").

Thereafter, Jarden amended its coverage complaint to allege that the Appraisal Action was ***still*** a Securities Claim because it was "brought by one or more securities holders of the Company, in their capacity as such," thus triggering a separate prong of the definition of Securities Claim. Under the Primary Policy, however, for any Securities Claim (or any other type of Claim) to be covered, it must also be "for any Wrongful Act taking place before the Run-Off Date" of April 15, 2016. The trial court correctly granted the Insurers' motion to dismiss by holding that the Appraisal Action was not "for any Wrongful Act taking place before the Run-Off Date."

The parties presented the trial court with three issues:

- Does the plain meaning of the word "for" in the phrase "for a Wrongful Act" mean seeking "redress, requital or reprisal" for an act, as the Insurers contend?
- Did the Appraisal Action seek "redress, requital, or reprisal" for any "act" of Jarden?
- If so, did that corporate act occur "before the Run-Off Date"?

As to the first issue, Jarden itself provided the answer when it repeatedly agreed that, as the Insurers argued, "for" means "seeking redress, requital, or reprisal." Twice during oral argument the trial court expressly asked if Jarden agreed with Defendants that "the definition of 'for'" means seeking redress, requital, or reprisal. (A0423-A0424.) Twice Jarden responded: "Yes, Your Honor." (*Id*.) Four more times the trial court confirmed with Jarden that it meant what it said. (A0424 ("So if we are on the same page that 'for' means seeking redress or reprisal …");

A0428 ("Let me just talk for another minute about this idea of what the act is for which the appraisal action seeks redress …"); A0443 ("But, again, if we are talking about what 'for a wrongful act' means, and you've conceded that it means redress or reprisal …"); A0445 ("So if you and I have agreed, and we did earlier, that 'for a wrongful act' under this policy means to seek redress or reprisal for an act …").) In reliance on Jarden's judicial admissions and, thus, the parties' joint and undisputed understanding of the term "for," the trial court was left with no issues of insurance policy interpretation and, appropriately, did not consider any other meaning of the word.

Answering the second question involved a straightforward application of this Court's reasoning in *Solera II*, which teaches that a petition for appraisal under Section 262 does not seek to redress any corporate conduct. Appraisal is a "legislative remedy" and "a narrow statutory right that seeks to redress the loss of the stockholder's ability under the common law right to stop a merger." 240 A.3d at 1133 & n.79 (Del. 2020) (quoting *Applebaum v. Avaya*, 812 A.2d 880, 893 (Del. 2002)). As a neutral valuation proceeding, an appraisal action does not seek to redress or remedy any corporate conduct, and thus, the Appraisal Action was not "for any Wrongful Act."

As to the third question regarding whether any supposed act occurred before the Run-Off Date, the trial court held that the Merger undisputedly closed and became effective *on* April 15, 2016, not "before" that date, as the Primary Policy requires. As the trial court's Opinion (cited as "Op.") explained, unless and until the Merger closed, the Appraisal Action could not proceed because, by statute, "none of the dissenting stockholders … would have had standing to pursue appraisal," the Appraisal Action "could not be filed," and the Court of Chancery could not make the required determination of the fair value of the relevant shares "as of the merger's effective date." (Op. at 16.) Any supposed Wrongful Acts taking place before the closing accordingly are statutorily insufficient to trigger an appraisal and cannot be what an appraisal action is "for."

Finally, contrary to Jarden's suggestion, which tellingly lacks any supporting citation, the Insurers never argued, and the trial court never held or suggested, that appraisal actions are uninsurable as a matter of public policy. Rather, the trial court faithfully applied the plain language of the Primary Policy, the parties' agreed-upon understanding of the word "for," and this Court's teaching about the fundamental nature of appraisal actions in *Solera II*.

Because the trial court correctly held that the underlying Appraisal Action was not a Claim "for any Wrongful Act," and independently was not a Claim "for" a Wrongful Act "taking place before the Run-Off Date," this Court should affirm.

SUMMARY OF ARGUMENT

1. DENIED. Jarden's amended complaint did not state a cause of action upon which relief could be granted as a matter of law. Accepting all of Jarden's allegations as true, and even assuming the Appraisal Action was a Securities Claim, it was not "*for* any Wrongful Act" based on the parties' mutual understanding that the plain meaning of the word "for" is to seek redress or reprisal.

2. DENIED. The Appraisal Action does not seek redress, requital, or reprisal for any act of Jarden consistent with this Court's holding of *Solera II*. There is thus no coverage under the Primary Policy for the Appraisal Action based on a straightforward application of the unambiguous language of the Primary Policy.

3. DENIED. The trial court correctly determined that the Appraisal Action is not covered under the Primary Policy. To assert that the Appraisal Action was a Merger Objection Claim, a type of Securities Claim, begs the relevant question, because all Claims, including all Securities Claims and Merger Objection Claims, still must be "for any Wrongful Act" in order to come within the scope of coverage provided by every Insuring Clause of the Primary Policy.

4. DENIED. Jarden cannot be heard to argue that "for any Wrongful Act" means anything other than to seek redress, requital, or reprisal for an act. Jarden repeatedly told the trial court that it understood the word "for" to mean seeking redress or reprisal. Its representations to the trial court did not leave open the

possibility that the word "for" might mean something else, as it now suggests a "full reading of the transcript shows." (OB at 24). Based on Jarden's binding judicial admissions, the trial court properly applied the parties' mutual understanding of the word "for" and correctly held that the Appraisal Action was not covered under the Primary Policy.

In addition, having confessed that its own understanding of the word "for" was the same as the Insurers' understanding, Jarden never argued or even suggested to the trial court that it understood the word "for" to have the numerous broad meanings it now advocates, ranging from "because of" to "on account of." (OB at 22.) This new argument is waived.

5. DENIED. The trial court correctly held that, even assuming *arguendo* that the Appraisal Action somehow could be a Claim "for any Wrongful Act," it still is not covered under the Primary Policy because it was not "for" a Wrongful Act "taking place before the Run-Off Date" of April 15, 2016. By statute, an appraisal action cannot proceed until after a merger closes. Any supposed Wrongful Acts that precede the closing thus are statutorily insufficient to trigger an appraisal and cannot be what an appraisal action is "for." Here, the Merger undisputedly closed <u>*on*</u> April 15, 2016, not "before" that date.

6. DENIED. The trial court simply never made any "public policy decision that, in Delaware, there can be no D&O coverage for appraisal actions." (OB at 7.) Rather, the trial court applied the plain language of the policy, the parties' agreed-upon understanding of the word "for," and this Court's holding in *Solera II*. Jarden does not quote or cite any language from the trial court's Opinion stating or even suggesting that appraisal actions are uninsurable as a matter of public policy, because there is none.

STATEMENT OF FACTS

A. The Merger

On December 13, 2015, Jarden, a consumer-products holding company then known as Jarden Corporation, entered into an agreement to be acquired by Newell Rubbermaid, Inc. ("Newell"). (A0038-39, ¶1; A0042, ¶15.) A special meeting of Jarden's stockholders was held on April 15, 2016, at 8:00 a.m. Eastern time, to vote on the proposed Merger. (Op. at 4.) Jarden's stockholders approved the Merger at the meeting, and it was effective as of the same date. (Op. at 4-5; A0043, ¶18.)

B. The Appraisal Action

Following the Merger, four groups of former Jarden stockholders filed separate appraisal actions. (A0043, ¶18; A0058-117.) The appraisal petitions were no more than twelve paragraphs and "sought an appraisal of their shares under 8 *Del. C.* § 262." (A0058-117.) The allegations of the appraisal petitions otherwise tracked the appraisal statute—*i.e.*, the Merger was proposed, the petitioners received notice of their appraisal rights and voted against the Merger, the petitioners made a timely written demand for appraisal of their shares, and the Merger closed. (A0058-117.) None of the appraisal petitions alleged that Jarden violated its statutory duties under 8 *Del. C.* § 262, nor did they seek any relief for Jarden's pre-Merger corporate conduct. The four appraisal actions were consolidated on October 3, 2016, under

the caption *In re: Appraisal of Jarden Corporation*, Consolidated C.A. No. 12456-VCS. (A0043, ¶18.)

After trial, the Court of Chancery "concluded that the fair value of 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 by Jarden[.]" (A0044, ¶24; A0119.) The Court of Chancery ordered Jarden to pay the petitioners $139,534,642.58 for the fair value of their shares on the Merger Date, plus pre-judgment interest of $38,387,821.61 and daily post-judgment interest. (A0045, ¶26; A0119-20.) This Court affirmed. *Fir Tree Value Master Fund, LP v. Jarden Corp.*, 236 A.3d 313, 315 (Del. 2020).

C. The Insurance Policies

Prior to the Merger, the Insurers collectively issued a directors' and officers' liability insurance program to Jarden consisting of the Primary Policy issued by ACE and excess policies issued by the other Insurers. (A0045-47, ¶¶29-31). The excess policies each "follow form" to the Primary Policy, meaning that they provide coverage pursuant to the same terms and conditions as the Primary Policy, unless otherwise stated. (A0047, ¶33; A0180-290.)

The Primary Policy had an original "Policy Period" of April 12, 2015 through April 12, 2016, which was later extended by endorsement to April 15, 2016. (*Id.*; A0389.) The Primary Policy was then converted to run-off coverage on April 15,

2016 by a "Run-Off Endorsement." (A0390-95.) The Run-Off Endorsement established a "Run-Off Date" of April 15, 2016 and a "Run-Off Period" from 12:01 a.m. on April 15, 2016 to 12:01 a.m. on April 15, 2022. (A0392.)

As amended, the Primary Policy provides coverage under four Insuring Agreements. (A0127; A0390.) Relevant here, Insuring Agreement I.C., as amended by the Run-Off Endorsement, provides:

> The Insurer shall pay on behalf of the Company all Loss for which the Company, or the Successor Company, solely in its capacity as successor-in-interest to the Company, becomes legally obligated to pay by reason of a Securities Claim first made against the Company during the Run-Off Period, and reported to the Insurer pursuant to the terms of the Policy, *for any Wrongful Acts taking place before the Run-Off Date*. In no event shall there be any coverage under this Insuring Agreement for Wrongful Acts of the Successor Company, except as set forth in the Run-Off Exclusion.

(A0390 (emphasis added).) The Run-Off Endorsement further states that "Coverage under this Policy will continue in full force and effect until termination of the Run-Off Period, but only with respect to Claims for Wrongful Acts taking place before the Run-Off Date." (*Id*.) But "[c]overage under this Policy will cease as of the Run-Off Date with respect to Claims for Wrongful Acts taking place on or after the Run-Off Date." (*Id*.)

Relevant here, the Primary Policy provides the following definitions:

- ***Securities Claim***: any Claim, "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; or

    2. alleging a violation of any federal, state, local or foreign regulation, rule or statute, or any common law regulating securities[.]" (A0147.)

- ***Merger Objection Claim***: "means 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." (A0166.)

- ***Wrongful Act***: "means any error, misstatement, misleading statement, act, omission, neglect, or breach of duty…actually or allegedly committed or attempted by…[s]olely with respect to coverage under Insuring Agreement C, the Company, but solely with respect to a Securities Claim[.]" (A0130.)

Thus, as relevant here, to come within the grant of coverage under Insuring Agreement I.C., a civil proceeding against Jarden must constitute (i) a Securities Claim, (ii) "for any Wrongful Act," (iii) "taking place before the Run-Off Date," which began at 12:01 a.m. on April 15, 2016.

D. The Coverage Dispute and Trial Court Ruling

On March 12, 2020, Jarden filed its complaint against the Insurers alleging, "upon information and belief," that the Insurers "will refuse to provide Jarden with the coverage" sought for the Appraisal Action. (A0020, ¶3.) Jarden's original complaint tracked the reasoning of *Solera I*, alleging that the Appraisal Action was a "Securities Claim" under subsection (2) of the Securities Claim definition because, in Jarden's view, "the petitioners alleged violations of Delaware's appraisal statute, which is a law regulating securities." (A0030, ¶43.)

Following this Court's decision in *Solera II*—which reversed *Solera I* and held that appraisal actions are "neutral" proceedings "not for a violation of law"—Jarden amended its complaint. (A0038.) Jarden's amended complaint alleged that the Appraisal Action was a Securities Claim under subsection (1) of the Securities Claim definition because it supposedly was "brought by one or more securities holders of the Company, in their capacity as such." (A0049, ¶42.) Jarden sought coverage for the pre-judgment interest award and its "Defense Costs" incurred in the Appraisal Action. (A0050, ¶45.)

The Insurers moved to dismiss the amended complaint because the Appraisal Action was not a Claim "for any Wrongful Act taking place before the Run-Off Date," as Insuring Agreement I.C. requires. (A0317-20.) The Insurers explained that for a Claim to be "for" a Wrongful Act, it must "seek redress in response to, or

as requital of" a Wrongful Act. (A0318.) Under the holding of *Solera II*, the Appraisal Action was not such a case. (A0318-19.) Regardless, the only hypothetical Wrongful Act that the Appraisal Action could be "for" is the closing of the Merger, which occurred *on* the Run-Off Date, not "before." (A0320-23.) Therefore, the Insurers concluded, Jarden could not establish that the Appraisal Action came within the scope of Insuring Agreement I.C. (A0323.)

The trial court granted the Insurers' Motion to Dismiss in the July 30, 2021 Opinion, 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 D&O Policies*.

(Op. at 3 (emphasis added).) The trial court's holding was, in its words, the "logical extension of [this] Court's decision in *Solera II* and other cases interpreting Section 262. An appraisal claim purely is a creature of statute." (*Id.* at 6.)

The trial court further agreed with the Insurers that, even if the Appraisal Action hypothetically were "for any Wrongful Act," any such act necessarily occurred *on* the Run-Off Date, not "before" that date, as the Primary Policy requires. (*Id.* at 6-7.) As the trial court explained, for an appraisal right to exist, the Merger must have first closed, which here did not occur until the Run-Off Date. (*Id.*)

On August 30, 2021, Jarden appealed to this Court.

ARGUMENT

I. THE APPRAISAL ACTION WAS NOT A "CLAIM" THAT WAS "FOR" A "WRONGFUL ACT"

A. Question Presented

Whether the trial court correctly held that the Appraisal Action was not a Claim "for any Wrongful Act" because an appraisal action is a neutral proceeding that does not adjudicate wrongdoing. (Preserved at A0316-320; A0266-A0368.)

B. Standard of Review

The parties agree that the trial court's decision to dismiss a complaint is reviewed *de novo*. *Clinton v. Enter. Rent-A-Car, Co.*, 977 A.2d 892, 895 (Del. 2009). It appears that a tribunal's consideration of a party's judicial admission is reviewed for abuse of discretion. *Merritt v. UPS*, 956 A.2d 1196, 1203 (Del. 2008).

C. Merits of Argument

The Appraisal Action is not covered under the Primary Policy because it is not a Claim "for any Wrongful Act," as the plain policy language requires. Jarden's repeated admission that the term "for any Wrongful Act" means "seeking redress or reprisal" for an act is—as the Opinion accurately stated—a "concession [] fatal to [its] coverage claim." (Op. at 12.) Despite numerous opportunities to argue alternatively, Jarden repeatedly agreed with the Insurers' accurate understanding of the term "for," and the trial court then properly adopted and applied the parties' agreed-upon understanding. Jarden's arguments on appeal are therefore barred by

settled contract interpretation principles, its judicial admissions, and waived.

1. The Trial Court Correctly Adopted and Applied the Parties' Agreed-Upon Understanding of "for any Wrongful Act"

Insurance policies "are construed as a whole, to give effect to the intentions of the parties." *Solera II*, 240 A.3d at 1131. Critically, "where the parties have attached the same meaning to a promise or agreement or term thereof, it is interpreted in accordance with that meaning." *Restatement (Second) of Contracts* § 201(1) (1981); *see also Wilmington Firefighters Ass'n, Local 1590 v. City of Wilmington*, 2002 WL 418032, at *42 n.63 (Del. Ch. Mar. 12, 2002) (citing § 201 of the Restatement as a proper rule of analysis). Thus, a court "will give legal effect to the words of a contract in accordance with the meaning actually given to them by one of the parties, if the other knew or had reason to know that he did so." *Wilmington Firefighters Ass'n,* 2002 WL 418032, at *42 (footnote omitted).

Here, the parties agreed on the meaning of the term "for any Wrongful Act," and the trial court properly adopted and applied that meaning. Specifically, in their briefing below, the Insurers argued in detail that "for any Wrongful Act" means seeking redress or reprisal for an act. (A0317-318; A0370-371.) In its opposition brief, Jarden offered no alternative understanding of that term. (Op. at 11-12.) At oral argument, the Insurers reiterated their position that "for a Wrongful Act" means "to seek redress or reprisal" for an act. (A0408-0411.) It was in that context that

the trial court twice asked Jarden if it agreed with the Insurers' interpretation of "for" as used in the phrase "for any Wrongful Act," and twice Jarden agreed:

> THE COURT: But the defendant's [sic] argument here is that it has to be, that the claim has to be for a wrongful act, and they argue that "for a wrongful act" means seeking redress in some way for that act. Okay. *So, first of all, do you agree with that definition of "for"*?
>
> MR. BALDWIN: *Yes, Your Honor*. I think all those cases that they cited that talk about, you know, people trying to -- *policyholders trying to add additional things to broaden the definition of "for" doesn't apply here. We are not trying to add additional language*.

(A0423 (emphasis added).) The trial court then repeated its question, this time asking if Jarden agreed that "for" means *only* what the Insurers say it means:

> THE COURT: You agree then that "for" means the claim *must* be seeking redress or reprisal?
>
> MR. BALDWIN: *Yes, Your Honor*. I would like to comment on the U.S. TelePacific case that Mr. Heyman mentioned. In that case, the policyholder was not trying to get coverage for. It was trying to get coverage for any claims that could arise by reason of, on account of or because of the complaint's allegations. *So these cases are not helpful to the insurance companies because the parties in those cases were trying to add and stretch the definition of "for," and that's just not what we're looking for*.

(A0424 (emphasis added).)

During the remainder of the argument, the trial court gave Jarden multiple chances to say that it did not agree that "for" only means to seek redress or reprisal for an act. Four times, the trial court repeated and confirmed Jarden's agreement,

directly asking Jarden to identify the act for which the Appraisal Action petitioners sought redress or reprisal:

> THE COURT: Okay. *So if we are on the same page that "for" means seeking redress or reprisal*, then what is the act that the appraisal demands seek redress or reprisal for?
>
> MR. BALDWIN: Well, the act is, you know, could be a number of things, but it's, of course, we know from the Supreme Court in Solera, that, you know, it doesn't have to be – that the appraisal, itself, is not about wrongdoing. It's not a violation.

(A0424 (emphasis added).)

> THE COURT: So I don't want to get too far afield. I want to go back to Zales. *Let me just talk for another minute about this idea of what the act is for which the appraisal action seeks redress* because without a merger, there is no appraisal action, right?
>
> MR. BALDWIN: Sure. That could be true for, I guess, a breach of fiduciary duty case.

(A0427 (emphasis added).)

> THE COURT: But, again, if we are talking about what "for a wrongful act" means, *and you've conceded that it means redress or reprisal*. The way I read Solera is that the only thing an appraisal action is seeking redress or reprisal for is the actual merger itself. Do you read Solera differently?
>
> MR. BALDWIN: I don't know that Solera talks about redress or reprisal. *That's what comes in under the wrongful act definition*. That was not – that the Supreme Court refused to address.

(A0443 (emphasis added).)

> THE COURT: *So if you and I have agreed, and we did earlier, that "for a wrongful act" under this policy means to seek redress or reprisal for an act*, how can that act be anything other than the merger being – the execution of the merger itself?
>
> MR. BALDWIN: Because the act is defined – you know, just because the policy terms says "wrongful act" in the title, you have to look at the definition, and the definition says any act.

(A0445, ll. 7-12 (emphasis added).) In sum, Jarden unequivocally, repeatedly, and without reservation told the trial court that, like the Insurers, it too understood "for any Wrongful Act" to mean "to seek redress or reprisal" for an act.

In its Opinion, the trial court properly adopted and applied the parties' mutual understanding of the Primary Policy. As the trial court explained:

> Given the parties' agreement that "for" means "seeking redress or reprisal of," the Court need not interpret the phrase, and simply can apply the parties' agreed-upon interpretation. *Making an interpretive ruling that may have precedential value is better left to a court that has the benefit of the parties' adversarial presentations on the issue*.

(Op. at 12 n.30 (emphasis added).)

The trial court then properly concluded that Jarden's "concession is fatal to [its] coverage claim" because "[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." (Op. at 12.) "This conclusion is the logical extension of [this] Court's decision in *Solera II* and other cases interpreting Section 262," which

hold that an "appraisal claim purely is a creature of statute…neutral in nature." (Op. at 12-13.)

Only once in its Opening Brief does Jarden mention its "*purported* agreement at oral argument" that "for" means "seeking redress or reprisal of." (OB at 24 (emphasis added).) According to Jarden, the trial court misunderstood what Jarden said and a "full reading of the transcript … shows that while Jarden agreed that the Defendants offered *an* interpretation of 'for,' it did not agree that it is the *only* interpretation." (*Id*. (italics in original).) Jarden does not, because it cannot, quote a single passage of the argument transcript remotely suggesting that Jarden merely agreed that the Insurers had offered one of many definitions of the word "for." In fact, the full transcript shows the opposite: Jarden agreed that "for means the claim *must* be seeking redress or reprisal[.]" (A0424 (emphasis added).)

2. Jarden's Contrary Argument on Appeal Is Barred by the Judicial Admissions Doctrine and Waived

Judicial admissions are "voluntary and knowing concessions of fact made by a party during judicial proceedings (e.g., statements contained in pleadings, stipulations, depositions, or testimony; response to requests for admissions; counsel's statements to the court)." *Merritt*, 956 A.2d at 1201. Judicial admissions are "traditionally considered conclusive and binding upon both the party against whom they operate, and upon the court." *Id*. at 1201-1202; *see also AT&T Corp. v.*

Lillis, 970 A.2d 166, 171-172 (Del. 2009) (withdrawn admissions, while not binding as admissions, remain probative of parties' intended meaning a contractual term).

The Fourth Circuit's decision in *In re McNallen*, 62 F.3d 619 (4th Cir. 1995), is instructive. There, a Texas jury found that the defendant willfully and maliciously committed intentional torts. *Id.* at 622. Thereafter, when the defendant filed for bankruptcy and sought to discharge the Texas judgment, the judgment creditor brought an adversary proceeding to prevent discharge. *Id.* Then, during the bankruptcy proceeding, the debtor's counsel admitted the issue of willfulness. *Id.* at 623, 625. The court held that the debtor's judicial admissions regarding willfulness were binding:

> We conclude … that McNallen procedurally defaulted in raising the issue of willfulness because his trial counsel conceded the issue of willfulness before the bankruptcy court: "I certainly don't dispute that [McNallen's] actions were willful." As though this concession left any doubt that the issue of willfulness was conceded, trial counsel repeated: "I think the only issue before this Court is whether there really is malice underlying [McNallen's] actions." Given these concessions, we find that the question of willfulness is not an issue in this litigation. McNallen, therefore, cannot be heard to complain with respect to the issue of willfulness.

Id. at 625 (internal citations omitted).

Here, Jarden repeatedly conceded to the trial court that it agreed with the Insurers' understanding that "for a Wrongful Act" means to seek redress or reprisal for an act. In so doing, Jarden conclusively established, as a matter of fact, that the

parties "attached the same meaning" (*Restatement (Second) of Contracts* § 201(1)) to the word "for." Stated differently, Jarden's judicial admissions foreclose the possibility that it had any other "reasonable expectation[]" regarding the meaning of that term. (OB at 23.)

Given Jarden's judicial admissions, the trial court did not violate "Delaware's well recognized rules of policy interpretation," as Jarden accuses (OB at 4-5), because it was not called upon to interpret the meaning of the word "for." Equally unfounded are Jarden's accusations that the trial court "twist[ed]" the policy language (OB at 23), "improperly inserted language" (OB at 3), "narrowed the scope of coverage" (OB at 3 & 22), and "rewrote the policy to provide less coverage" (OB at 4). No matter how aggressively Jarden mischaracterizes the trial court's Opinion, Jarden cannot overcome its repeated judicial admissions.

Jarden's judicial admissions foreclose the two arguments it now makes on appeal. First, Jarden argues that the plain meaning of "for" is extremely broad. (OB at 22-23). Below, Jarden represented the exact opposite. (A0423 (discussing cases about "policyholders trying to *add additional things to broaden the definition of 'for' doesn't apply here. We are not trying to add additional language*.") (emphasis added); A0424 ("So these cases are not helpful to the insurance companies because *the parties in those cases were trying to add and stretch the definition of 'for,' and that's just not what we're looking for*.") (emphasis added).)

Second, Jarden argues that the word "for" has at least a dozen alternative meanings besides redress or reprisal, including "based on," "because of," "resulting from," "by reason of," "on account of," "pertaining to," "gave rise to," "with respect to," "in consequence of," "by means of," "growing out of," and "due to." (OB at 5-6, 18, 22-23, 25.) Below, however, Jarden agreed that "for means the claim *must* be seeking redress or reprisal[.]" (A0424 (emphasis added).) Indeed, Jarden expressly eschewed several of the very other definitions of "for" that it now advances on appeal. (A0424 (explaining during oral argument that Jarden was not trying to "stretch" the meaning of the word "for" to mean it could "get coverage for any claims that could *arise by reason of, on account of or because of* the complaint's allegations.") (emphasis added).)[1]

[1] The three cases Jarden cites to support its new understandings of "for" either directly refute it or are inapplicable. Jarden cites *Fox v. Rodel, Inc*., 1999 WL 803885 (D. Del. Sept. 13, 1999), where 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.'" (OB at 22 (citing *Fox*, 1999 WL 803885 at *8 n.15).) But Jarden omits the court's very next sentence: "*However, within the context of the Budinger Call [to buy shares of stock], the word is used to denote* 'in exchange as the equivalent of ... or *in the requital of*.'" *Fox*, 1999 WL 803885 at *8 n.15 (emphasis added). The remaining two cases are inapplicable. *Gould & Ratner v. Vigilant Ins. Co.,* 782 N.E.2d 749 (Ill. App. Ct. 2002), involved the interpretation of a broad-form professional services exclusion and *Griffith v. State Farm Mut. Auto. Ins. Co.,* 697 N.W.2d 895 (Mich. 2005), involved a determination of legislative intent for the phrase "for an injured person's care, recovery, or rehabilitation" as used in a no-fault insurance act.

Independent of its judicial admissions, Jarden also failed to preserve its new arguments for appeal. "Only questions fairly presented to the trial court may be presented [to this Court] for review." Del. Supr. Ct. R. 8. This Court places "great value on the assessment of issues by our trial courts, and it is not only unwise, but unfair and inefficient, to litigants and to the development of the law itself, to allow parties to pop up new arguments … they did not fully present below." *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 363 (Del. 2017). Accordingly, "[t]his Court, in the exercise of its appellate authority, will generally decline to review contentions not raised below and not fairly presented to the trial court for decision." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). Here, Jarden never presented its new arguments to the trial court. In claiming that its arguments are preserved, Jarden cites four pages of its opposition to the Insurers' motion to dismiss and four pages of the oral argument transcript, but those pages are silent on these issues. (OB at 16 (citing A0348-351 and A0423-426).)

Indeed, because Jarden not only failed to make its new arguments below, but in fact affirmatively agreed with the Insurers that "for" in "for any Wrongful Act" means "seeking redress or reprisal," Jarden's argument "goes beyond being not fairly presented." *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 55 (Del. 2006). Rather, "[i]t borders on being *unfairly* presented, since [Jarden] [is] taking the trial court to task for adopting the very analytical approach that [Jarden itself]

used in presenting [its] position." *Id.* (emphasis added). Jarden has waived the right to make these new arguments for the first time on appeal.

3. Jarden's Arguments that the Appraisal Action Is "for any Wrongful Act" Fail on the Merits

Even if Jarden's new arguments regarding the meaning of the term "for any Wrongful Act" were not otherwise barred, the Appraisal Action still is not covered because Jarden's arguments fail on the merits. As the Insurers explained below, the preposition "for" is "[u]sed to indicate the object or purpose of an action or activity." *The American Heritage Dictionary* 329 (3d ed. 1994). To be "for any Wrongful Act," therefore, a Claim cannot merely involve, relate to, or be based upon a Wrongful Act in some generalized sense. Rather, the Wrongful Act must form the basis for the relief sought. As one court put it, the word "for" conveys that a lawsuit must "seek redress in response to, or as requital of" a wrongful act. *RSUI Indem. Co. v. Desai*, 2014 WL 4347821, at *4 (M.D. Fla. 2014); *see Employers' Fire Ins. Co. v. ProMedica Health Sys., Inc.,* 524 Fed. Appx. 241, 252–53 (6th Cir. 2013) (a claim that does not seek redress for the "Wrongful Act" at issue is not "for a Wrongful Act").

U.S. TelePacific Corp. v. U.S. Specialty Insurance Co., 2019 WL 2590171 (C.D. Cal. June 18, 2019), *aff'd*, 815 F. App'x 155 (9th Cir. 2020), is instructive. The court there held that an insured "contort[ed] the word 'for' in the phrase 'for an actual or alleged Employment Practices Wrongful Act' to argue that 'for' actually

means 'by reason of,' 'on account of,' or 'because of' the enumerated wrongful acts.'" *Id.* at *9 (quotation marks omitted). The court noted that certain policy provisions "appl[ied] to claims 'arising out of, based upon or attributable to facts or circumstances alleged,' while others [we]re limited to claims 'for [the/any/an] actual or alleged violation.'" *Id.* at *10. The court then explained that "[r]eplacing the word 'for' with [the insured]'s suggested broader construction would effectively widen coverage under the 'for' provisions to have the same scope as the 'arising out of, based upon or attributable to facts or circumstances alleged' provisions." *Id.* But that "would ... run counter to the maxim that [c]ourts must not rewrite any provision of any contract, including an insurance policy." *Id*. (quotation marks omitted). The Primary Policy here also contains provisions that apply to Claims "alleging, based upon, arising out of, or attributable to any Wrongful Act" (A0132-A0133), but Insuring Agreement I.C is limited to Claims "for any Wrongful Act" (A0390). Adopting Jarden's broad reading of "for" accordingly would impermissibly "rewrite" the policy.

Jarden's Opening Brief ignores these arguments. Instead, Jarden contends that the Appraisal Action must be "for a[] Wrongful Act" because it supposedly meets the Primary Policy's definition of a "Securities Claim." (OB at 17-18.) That contention misses the point. As the trial court explained, "although the Insurers concede that the Appraisal Action is a 'Securities Claim' …, they contend no

coverage was afforded under the policies because *Insuring Agreement I.C. provides that every claim, including a Securities Claim, must be 'for' a Wrongful Act*." (Op. at 8 (emphasis added).)[2] Indeed, every Claim, including every Securities Claim, must be "for a Wrongful Act" to come within the scope of coverage of the Insuring Clauses of the Primary Policy.

For this same reason, it does not matter whether the Appraisal Action is a "Merger Objection Claim" (OB at 18-20), which as relevant here is merely a type of Securities Claim. As the trial court correctly explained:

> Although an appraisal action may fit the definition of a Merger Objection Claim in the same way that it fits the definition of a Securities Claim, the D&O Policies' coverage nevertheless only applies to a claim "for" a Wrongful Act. *In other words, the requirement that an action be "for" a Wrongful Act applies whether the claim is a Merger Objection Claim or any other type of Securities Claim, and the same analysis therefore applies and defeats coverage for the Appraisal Action*.

(Op. at 14-15 (emphasis added).)

Jarden's assertion that "[i]t is illogical to conclude that, despite the fact that Jarden paid for coverage for Merger Objection Claims, … appraisal claims would be excluded" (OB at 19-20), is wrong and irrelevant. Jarden never "paid for

[2] Although immaterial to the outcome here, the Insurers did not "concede" that the Appraisal Action is a Securities Claim. (Op. at 2.) The Insurers argued that "even if" the Appraisal Action is a Securities Claim, it is not covered because it is not "for any Wrongful Act." (A0364.)

coverage for Merger Objection Claims." Insuring Agreement I.C provides entity coverage only for a "Securities Claim … for any Wrongful Act" (A0390), and there is no other grant of coverage for Merger Objections Claims. The only role Merger Objection Claims play in the Primary Policy is that Endorsement 16, called "Retention – Merger Objection Claims," increases the retention for such Claims. (A0166.) Logically, therefore, the Insurers never argued, and the trial court never concluded, that appraisal actions are "excluded" from coverage. Rather, the Appraisal Action is not covered because Jarden cannot carry its initial burden, *see E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.3d 1059, 1061 (Del. 1997), to show that it falls within the scope of Insuring Agreement I.C, including the requirement that a Claim must be "for any Wrongful Act."

II. THE APPRAISAL ACTION WAS NOT A CLAIM FOR ANY WRONGFUL ACT "TAKING PLACE BEFORE THE RUN-OFF DATE"

A. Question Presented

Whether the trial court correctly held that, even assuming *arguendo* that the Appraisal Action could be a Claim "for any Wrongful Act," it was not for any Wrongful Act "taking place before the Run-Off Date" of April 15, 2016, because if an appraisal action seeks redress or requital for anything, it is the merger itself, which here closed *on* the relevant date, not beforehand. (Preserved at A0320-22; A0379-82.)

B. Standard of Review

The scope of review on appeal from a trial court's grant of a motion to dismiss is set forth in Argument I.A above.

C. Merits of Argument

Assuming *arguendo* that the Appraisal Action somehow could be a Claim "for any Wrongful Act" (and, as explained, it is not), the Appraisal Action independently is not covered because it was not "for" any Wrongful Act "taking place *before* the Run-Off Date" of April 15, 2016. (Emphasis added.) If the Appraisal Action sought redress or requital, it would be for the Merger, which closed *on* April 15, 2016. Jarden's arguments centering on the appraisal demands preceding the Appraisal Action do not change the analysis, as the trial court correctly held.

1. The Appraisal Action Was Not "for" a Wrongful Act "Taking Place Before the Run-Off Date" Because the Merger Closed *on* the Run-Off Date

The Appraisal Action was not a Claim "for" any Wrongful Act "taking place before the Run-Off Date" of April 15, 2016, for a simple reason: the merger closed *on* April 15, 2016, not beforehand, and any acts by Jarden taking place before the merger closed are statutorily insufficient to trigger appraisal. As trial court explained, the "simple fact [is] that, without the merger's execution, no appraisal rights exist." (Op. at 16.) Unless and until the Merger closed, "none of the dissenting stockholders … would have had standing to pursue appraisal," the Appraisal Action "could not be filed," and the Court of Chancery could not determine the fair value of the dissenting stockholders' shares, since "the fair value ascribed to the shares was the fair value as of the merger's effective date." (*Id.*) "Accordingly, 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.*)

That holding is correct. By statute, appraisal is available only to a dissenting stockholder "who continuously holds such shares through the effective date of the merger or consolidation." 8 *Del. C.* § 262(a). Obviously, a stockholder cannot meet that requirement until "the effective date of the merger or consolidation" occurs. Likewise, a dissenting stockholder "may commence an appraisal proceeding by filing a petition in the Court of Chancery," but only "[w]ithin 120 days *after* the

effective date of the merger or consolidation"—not beforehand. *Id.* § 262(e) (emphasis added). Moreover, any interest awarded runs "from the effective date of the merger," and stockholders who demand appraisal lose certain voting, dividend, and distribution rights "[f]rom and after the effective date of the merger or consolidation." *Id.* § 262(h), (k).

Similarly, under this Court's case law, appraisal "is a remedy limited to the determination of the fair value of the dissenters' shares *as of the effective date of the merger or consolidation*." *Solera II*, 240 A.3d at 1132 (emphasis added). As this Court has explained, "[t]he time for determining the value of a dissenter's shares is the date on which the merger closes. Thus, if the value of the corporation changes between the signing of the merger agreement and the closing, then the fair value determination must be measured by the operative reality of the corporation at the time of the merger." *Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co.*, 240 A.3d 3, 17 (Del. 2020) (footnotes and quotation marks omitted). Plainly, the Court of Chancery cannot determine the corporation's value "at the time of the merger" until the merger takes place.

The underlying Appraisal Action petitions further reinforce that if an appraisal action hypothetically could be "for" any Wrongful Act at all, it would *only* be "for" the Merger closing. In general, the only facts alleged in the underlying petitions here are: (1) that Jarden and Newell entered into a merger agreement, (2) that Jarden

notified stockholders of their appraisal rights, (3) how many shares the petitioners held at the relevant time, (4) that the petitioners served timely appraisal demands, (5) that the Merger closed on April 15, 2016, and (6) that the petitioners did not vote in favor of the Merger or otherwise give up their appraisal rights. (A0058-61; A0084-87; A0098-101; A0107-10.) As in *Solera II*, the appraisal petitions are short, formulaic pleadings "that contain[] no allegations of wrongdoing" at all—let alone wrongdoing during the pre-Merger sale process. 240 A.3d at 1135. The petitions simply do not contain any allegations of any *pre-Merger* Wrongful Acts that the Appraisal Action possibly could be "for."

Solera II confirms that an appraisal action is not "for" any Wrongful Act predating the Merger closing. As this Court explained, the fact "[t]hat the valuation date under section 262 is as of the date of the execution of the merger, not the date the merger agreement is executed, further suggests that an appraisal action is not designed to address alleged wrongdoing *relating to the merger process*." *Id.* (emphasis added). "Rather, any such alleged wrongdoing is frequently addressed, as it was here, in a separate stockholder fiduciary litigation brought by stockholders against the target board's directors." *Id.*

In addition, *Solera II* favorably cited and quoted a Texas decision that rejected the same arguments Jarden makes here. In *Zale Corp. v. Berkley Insurance Co.*, 2020 WL 4361942, at *1 (Tex. App. July 30, 2020), a Texas court of appeals rejected

coverage for "a Delaware appraisal action" under "two excess director and officer liability policies" because the relevant wrongful act did not occur during the policy period. *Solera II*, 240 A.3d at 1135 n.90 (discussing *Zale*). As this Court explained, the insured in *Zale* "contended that the 'wrongful act' that triggered the appraisal action was the entire merger process," but the Texas court "disagreed, stating that, 'the instrumental act that confers appraisal litigation rights is not the merger process but the execution of the merger, which did not occur in this case until after Zale's excess insurance coverage policy period ended.'" *Id.* (quoting *Zale*, 2020 WL 4361942, at *6).

Jarden attempts to distinguish *Zale* on the ground that the policy there afforded coverage "only with respect to any actual or alleged Wrongful Act ***fully*** occurring prior to [the effective date of the merger]" (OB at 33 (emphasis added) (quoting *Zale*, 2020 WL 4361942, at *3)), whereas "Jarden's D&O Policy allows for the act to be actually committed or ***attempted***." (*Id.*) That misapprehends both the facts of *Zale* and its legal reasoning. Factually, *Zale* involved two excess policies, and the Texas court treated them alike even though only one used the "fully occurring" language Jarden invokes. *Zale*, 2020 WL 4361942, at *2-3. Legally, the critical paragraph in *Zale* reasons from the nature of Delaware appraisal actions, ***not*** the policy language Jarden now relies upon. *See Zale*, 2020 WL 4361942, at *6. Moreover, *Solera II* quoted and cited *Zale* with approval, agreeing that "the

instrumental act that confers appraisal litigation rights is not the merger process but the execution of the merger" without ever mentioning any policy language. 240 A.3d at 1135 n.90 (quoting *Zale*, 2020 WL 4361942, at *6). The trial court correctly recognized that "the *Zale* court's reasoning is persuasive" and supports the decision below. (Op. at 16-17.)

Jarden makes various arguments regarding supposed Wrongful Acts that took place during the "*pre-Merger* sale process." (OB at 30.) But Jarden never explains how, under the plain language of the appraisal statute, *Solera II*, and *Zale*, a Delaware appraisal action could be "for" any act, attempt, or omission taking place before the Merger closed. That is fatal to Jarden's position.

2. Jarden's Arguments Regarding the Appraisal Demands Are Unavailing

Rather than arguing that the Appraisal Action *itself* was a Claim "for" a Wrongful Act "taking place before the Run-Off Date," Jarden principally advances a convoluted argument centering on the appraisal demands that *preceded* the Appraisal Action (the "Appraisal Demands"). Jarden's view seems to be that the Appraisal Action is part of a larger Claim initiated by the Appraisal Demands served before the Run-Off Date, so therefore the Appraisal Action necessarily must have been "for" Wrongful Acts that preceded the closing. That argument fails for two independent reasons: the Appraisal Demands are not "Claims" as defined in the

Primary Policy, and in any event they do not change what Wrongful Act (if any) the Appraisal Action was "for."

a. The Appraisal Demands Are Not "Claims"

Jarden's arguments fail at the outset because they rest on the incorrect premise that the Appraisal Demands constitute "Claims" under the Primary Policy. (*See* OB at 29 n.10; *id.* at 31-32.) The Primary Policy defines "Claim" in relevant part as "a written demand for monetary damages or non-monetary or injunctive relief." (A0128.) Although the trial court did not reach whether the Appraisal Demands are Claims, it was dubious of Jarden's contention, describing it as "unlikely." (Op. at 16 n.44.) The trial court's doubts were well-taken; in fact, Jarden's position is irreconcilable with the appraisal statute.

Fundamentally, an appraisal demand is merely a statutory notice, not a request for monetary or non-monetary relief. The statute requires each stockholder wishing to pursue appraisal to "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). Although statutorily termed a "demand," an appraisal demand does not actually request anything from the corporation, but rather merely provides notice. The statute thus makes clear that a "demand will be sufficient if it *reasonably informs* the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such

stockholder's shares." *Id.* (emphasis added). Similarly, as this Court has explained, "[t]he written demand *acts as a notification* to the corporation of the stockholder's dissent" and "*places the corporation on notice* of the shareholders who are dissenting from the merger, as well as the total number of shares that will be subject to the appraisal." *Alabama By-Prod. Corp. v. Cede & Co.*, 657 A.2d 254, 258, 263 (Del. 1995) (emphases added).

Jarden asserts that because the Appraisal Demands here "assert appraisal rights" and "demand appraisal," they conveyed "not a threat of future litigation but a present demand for the appraisal of Jarden shares." (OB at 29 n.10.) That assertion is puzzling because "the appraisal of Jarden shares" is a *judicial* determination of fair value by the Court of Chancery. Jarden and its dissenting stockholders could not obtain or know the result of a judicial "appraisal of Jarden shares" without going through "litigation"—specifically, an appraisal action before the Court of Chancery. By their nature, appraisal demands do not seek relief of any kind, but rather are part of the statutory process by which appraisal rights are "perfected." 8 *Del. C.* § 262(d).

Furthermore, the Appraisal Demands were not "present" requests for anything because, by statute, an appraisal could not possibly take place when the Appraisal Demands were served before the closing, but rather necessarily would occur in the "future," post-closing. (OB at 29 n.10.) As explained above and by the trial court below, until the Merger actually closed, dissenting stockholders lacked standing to

seek appraisal, the Appraisal Action could not commence, and the Court of Chancery could not determine the corporation's fair value as of the Merger's effective date. (Op. at 16.)

For all these reasons, Jarden's assertion that "[t]he Appraisal Demands alone are legally sufficient to trigger coverage under the D&O Policy" (OB at 31-32) is incorrect. Because they are not "written demand[s] for monetary or non-monetary or injunctive relief" (A0128), the appraisal demands are not Claims, do not trigger coverage, and have no bearing on what Wrongful Acts (if any) the resulting Appraisal Action was "for."

b. The Appraisal Demands Do Not Change What the Appraisal Action Was "for"

Jarden's arguments independently fail because the Appraisal Demands cannot alter the fundamental nature of the resulting Appraisal Action. As the trial court explained, "[t]he fact that Jarden's dissenting shareholders lodged appraisal demands with the corporation before the Run-Off Date does not change the analysis." (Op. at 17.) The Appraisal Demands are nothing more than statutorily required notices that are an integral, "essential step in the appraisal procedure"—one of "[t]he statutory formalities … [that] furnish an orderly method for withdrawal from a corporation by shareholders who dissent from a merger." *Ala. By-Prod.*, 657 A.2d at 258, 263 (citation omitted). As Jarden explains, "[t]he Appraisal Demand and the Appraisal Action are steps in the *same* legal proceeding and arise out of the

same 'acts.'" (OB at 30-31 (emphasis added).) For that reason, the timing and contents of the Appraisal Demands cannot change what (if anything) the Appraisal Action was "for."

That conclusion is reinforced by the fact that the Appraisal Demands are devoid of any allegations or statements regarding the pre-Merger Wrongful Acts that Jarden now invokes. Indeed, the Appraisal Demands are even shorter and more formulaic than the subsequent appraisal petitions, discussed above. Each Appraisal Demand is a single page in length and contains just a single substantive sentence to the effect that the dissenting stockholders "assert appraisal rights" or "demand appraisal." (A0063-A0080, A0091, A0093.) The Appraisal Demands do not allege or describe any pre-Merger Wrongful Acts at all, much less assert a Claim "for" any such Wrongful Acts.

In the end, the trial court correctly concluded that, regardless of when the Appraisal Demands were served, what they say, or why the dissenting stockholders decided to serve them, the resulting Appraisal Action was not a Claim "for" any Wrongful Act "taking place before the Run-Off Date." As the trial court explained, "[t]he appraisal demands statutorily were required in order to perfect the petitioners' appraisal rights, but the demands themselves were not acts of the corporation, and the Appraisal Action did not arise from the demands nor seek redress for the demands." (Op. at 17.) Similarly, while the dissenting stockholders may have

decided to make the Appraisal Demands because they perceived flaws in the pre-Merger sale process, "the fact that the appraisal petitioners challenged aspects of the merger negotiation process, which took place before the Run-Off Date, does not tie the Appraisal Action to an act committed before the Run-Off Date." (*Id.*) Rather, "[t]hose challenges to the deal process related to the weight the trial court gave to the negotiated deal price in determining fair value." (*Id.*) As *Solera II* makes clear, "[t]he appraisal proceeding itself … is 'neutral in nature,'" and "[t]he only issue before the appraising court is the value of the dissenting stockholder's shares on the date of the merger." (*Id.* at 12-13 (quoting and citing *Solera II*, 240 A.3d at 1135-37).)

It does not matter that the Primary Policy defines "Wrongful Act" to include acts "actually or allegedly committed or attempted by Jarden." (OB at 9 (emphasis omitted); *see id.* at 27-28, 30-32 (similar).) To begin with, Jarden effectuated the Merger on the same day it allegedly attempted to do so: <u>on</u> April 15, 2016, and not beforehand. The "allegedly" and "attempted" language in the Wrongful Act definition accordingly makes no difference. Furthermore, both excess policies in *Zale* defined "Wrongful Act" to include acts "actually or allegedly committed or attempted," yet this Court in *Solera II* still favorably quoted *Zale*'s holding that "'the instrumental act that confers appraisal litigation rights is not the merger process but the execution of the merger.'" 240 A.3d at 1135 n.90 (quoting *Zale*, 2020 WL

4361942, at *6). Moreover, as explained, by statute, an appraisal action cannot go forward until after a merger closes. Any acts that Jarden "allegedly" committed or "attempted" to commit before the closing thus were statutorily insufficient to trigger appraisal rights and cannot have been what the Appraisal Action was "for."

Nor does it matter that, according to Jarden, the Merger closed mere "hours after the Policy Period purportedly ended." (OB at 31.) The timing of the relevant Wrongful Act is not a mere technicality to be overlooked. The Primary Policy's timing provisions are specific, precise, negotiated terms. For example, the Run-Off Endorsement defines the Run-Off Period as "12:01 a.m., April 15, 2016, to 12:01 a.m., April 15, 2020." (A0392.) It further provides that "[c]overage under this Policy will cease as of the Run-Off Date with respect to Claims for Wrongful Acts taking place <u>*on or after*</u> the Run-Off Date." (*Id*. (emphasis added).) In other words, the Primary Policy specifies the coverage period repeatedly, <u>*down to the minute*</u>. Regardless, this Court has made clear that it "will not destroy or twist the words of a clear and unambiguous insurance contract," but rather will "giv[e] the language its ordinary and usual meaning." *Solera II*, 240 A.3d at 1131 (quotation marks omitted). Here, "before the Run-Off date" means what it says—"before," not "on" or "after"—and the trial court enforced it accordingly. This Court should do the same.

III. THE TRIAL COURT DID NOT HOLD OR SUGGEST THAT APPRAISAL ACTIONS ARE UNINSURABLE AS A MATTER OF PUBLIC POLICY

A. Question Presented

Whether the trial court in fact "made a public policy decision that, in Delaware, there is no D&O coverage for appraisal actions." (OB at 36.) As to preservation, the Insurers did not argue below that appraisal actions are uninsurable as a matter of public policy, and the trial court did not so hold.

B. Standard of Review

The scope of review on appeal from a trial court's grant of a motion to dismiss is set forth in Argument I.A above. There is no applicable scope of review for a purported ruling that the trial court did not make.

C. Merits of Argument

For its final argument, Jarden asserts that the decision below "is an example of a court improperly making a public policy decision" because the trial court's order supposedly "appears to hold that, under *Solera II*, there can never be D&O coverage for an appraisal." (OB at 36.) In fact, nothing in the Opinion remotely suggests that appraisal actions are uninsurable as a matter of public policy in Delaware. Nor did the Insurers make any uninsurability argument below. Jarden itself admits that no statement about uninsurability is "explicitly stated" in the trial court's ruling. (*Id.*) Section III of Jarden's Opening Brief does not quote or cite any portion of the

Opinion at all, let alone a portion suggesting that appraisal actions are uninsurable. Jarden's statement that "[t]here is no statutory prohibition of D&O coverage for appraisal actions in Delaware" (OB at 37), accordingly is irrelevant. Jarden is challenging a purported "public policy decision" (*id.*) that the Insurers never sought and the trial court never made.

Jarden states that in *Solera II*, this Court "merely interpreted the policy language at issue." (*Id.*) The Insurers agree, and the trial court did exactly the same thing here. Because the trial court correctly concluded that the Appraisal Action is not a Claim "for a Wrongful Act," and independently is not a Claim "for" a Wrongful Act "taking place before the Run-Off Date," this Court should affirm.

CONCLUSION

For the foregoing reasons, Defendants-Below/Appellees request that the decision of the trial court be affirmed.

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OF COUNSEL:

BAILEY CAVALIERI LLC
Michael R. Goodstein
10 W. Broad Street, Suite 2100
Columbus, OH 4315
(614) 229-3231

DLA PIPER LLP (US)

/s/ John L. Reed
John L. Reed (I.D. No. 3023)
1201 North Market Street, Suite 2100
Wilmington, DE 19801
(302) 468-5700
(302) 394-2341 (Fax)
john.reed@dlapiper.com

Attorneys for Defendant-Below/Appellee ACE American Insurance Company

OF COUNSEL:

WILEY REIN LLP
David H. Topol
Matthew W. Beato
1776 K Street, N.W.
Washington, D.C. 20006

Attorneys for Defendant-Below/ Appellee Navigators Insurance Company

SMITH KATZENSTEIN & JENKINS LLP

/s/ Robert J. Katzenstein
Robert J. Katzenstein (I.D. No. 378)
1000 West Street #1501
P. O. Box 410
Wilmington, DE 19899
(302) 652-8400

Attorneys for Defendants-below/Appellees ACE American Insurance Company and Navigators Insurance Company

OF COUNSEL:

KENNEDYS CMK LLP
Maurice Pesso
William Brennan
570 Lexington Ave., 8th Floor
New York, NY 10022
(212) 252-0004

WHITE & WILLIAMS LLP

/s/ Marc S. Casarino
Marc S. Casarino (I.D. No. 3613)
Courthouse Square
600 N. King Street, Suite 800
Wilmington, DE 19801
(302) 467-4520

Attorneys for Defendant-Below/Appellee Allied World National Assurance Company

OF COUNSEL:

ARNOLD & PORTER KAYE SCHOLER LLP
Scott B. Schreiber
William C. Perdue
Andrew Tutt
601 Massachusetts Avenue, N.W.
Washington D.C. 20001-3743

HEYMAN ENERIO GATTUSO & HIRZEL LLP

/s/ Kurt M. Heyman
Kurt M. Heyman (I.D. No. 3054)
Aaron M. Nelson (I.D. No. 5941)
300 Delaware Avenue, Suite 200
Wilmington, DE 19801
(302) 472-7300

Attorneys for Defendant-Below/Appellee Illinois National Insurance Co.

OF COUNSEL:

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
Ronald P. Schiller
Daniel J. Layden
One Logan Square
18th & Cherry Streets, 27th Floor
Philadelphia, PA 19103
(215) 568.6200

COOCH AND TAYLOR, P.A.

/s/ Carmella P. Keener
Carmella P. Keener (I.D. No. 2810)
The Nemours Building
1007 N. Orange Street, Suite 1120
P.O. Box 1680
Wilmington, DE 19899-1680
(302) 984-3816

Attorneys for Defendant-Below/Appellee Endurance Assurance Corporation as successor-in-interest to Endurance Reinsurance Corporation of America

OF COUNSEL:

TROUTMAN PEPPER HAMILTON SANDERS LLP
Jennifer Mathis
Three Embarcadero Center,
Suite 800
San Francisco, CA 94111
(415) 477-5706

Brandon D. Almond
TROUTMAN PEPPER
HAMILTON SANDERS LLP
401 9TH Street, NW, Suite 1000
Washington, D.C. 20004
(202) 274-2864

TROUTMAN PEPPER HAMILTON SANDERS LLP

/s/ Joanna J. Cline
Joanna J. Cline (I.D. No. 5873)
Emily L. Wheatley (I.D. No. 6383)
Hercules Plaza, Suite 5100
1313 N. Market Street
P.O. Box 1709
Wilmington, DE 19899-1709
(302) 777-6500

Attorneys for Defendant-Below/Appellee Berkley Insurance Company