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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)

REPLY 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"), submits this Reply Brief in further support of its appeal of the Superior Court's Memorandum Opinion which granted the Defendants-Below/Appellees' motion to dismiss Jarden's Amended Complaint.[1]

Solera II[2] has no application to this case. In their Answering Brief (cited herein as "AB at p. __"), the Defendants[3] continue to argue that this case should be viewed through the lens of this Court's decision in *Solera II* and that some element of "wrongdoing" must be present in order for there to be coverage for the Appraisal Action.[4] The Jarden D&O Policy at issue has completely different policy language. While the relevant policy in *Solera II* required a violation of some law in order for there to be coverage, the Jarden D&O Policy simply requires *an act actually committed, allegedly committed or even attempted* by Jarden.[5]

This is a simple contract interpretation case. And the reading of the Jarden

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[1] *Jarden, LLC v. ACE Am. Ins. Co.*, 2021 WL 3280495 (Del. Super. July 30, 2021).
[2] *In re Solera Ins. Coverage Appeals*, 240 A.3d 1121 (Del. 2020) ("*Solera II*").
[3] The Defendants-Below/Appellees ("Defendants") 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.
[4] In its Reply Brief, Jarden continues the use of the terms defined in the Opening Brief.
[5] The Superior Court acknowledged that *Solera II* did not interpret the phrase "for a Wrongful Act." *Jarden*, 2021 WL 3280495, at *5 n. 36; *see also Solera II*, at n. 45.

D&O Policy, giving effect to its plain terms and ordinary meanings, establishes that the Appraisal Action, including the Appraisal Demands, is a covered claim that relates to acts attempted or committed within the Policy Period.

The three bases of Defendants' argument on appeal, and the Superior Court's holding, are that (i) the Appraisal Action must "seek redress in response to, or as requital of" the act giving rise to coverage (the Superior Court thus implicitly concluded that redress or requital must require some type of "wrongdoing"); (ii) Jarden agreed with the terminology adopted by the Superior Court; and (iii) the Appraisal Action was not for an act taking place prior to the end of the Policy Period. These bases fail. Defendants' argument and the Superior Court's holding ignore the plain language of the Policy, and improperly and unnecessarily either add or omit the clear terms and definitions in that Policy.

First, this Court's standard of review is *de novo*. Accordingly, it must follow traditional principles of contract interpretation and give effect to the plain meaning of the Jarden D&O Policy's terms notwithstanding the findings of the court below, and in so doing, there is coverage under the policy.

Second, while Jarden's counsel at oral argument agreed that a definition of "for" could mean to "seek redress in response to, or as requital of," this is not a judicial admission or a concession of a factual issue. Jarden consistently argued that the Jarden D&O Policy does not require any "wrongdoing" in the colloquial sense

for there to be a "Wrongful Act," as defined by the Policy. (A0421). Therefore, it was clear at oral argument that Jarden's position was that the Jarden D&O Policy only required an "act" giving rise to coverage, which act, like the Appraisal Action itself, can be neutral and need not involve wrongdoing. Moreover, it is well-established Delaware law that the judicial admissions doctrine does not apply to theories of law, such as contract interpretation.

Finally, even if "for" must be defined as "seeking redress in response to, or as requital of," there is still coverage because "redress" simply means a "remedy." The Appraisal Action was a remedy for the Merger and the acts leading up to the Merger.

These acts include: (i) when Jarden executed the Merger Agreement and the Merger was announced on December 13, 2015 (A0038-39); and (ii) when Jarden filed the proxy statement with the Securities Exchange Commission and included the impending Merger in the filing on March 18, 2016 (A0042). As a direct consequence of these acts, the Jarden shareholders submitted their Appraisal Demands from April 7 through April 14, 2016, which perfected their rights to seek appraisal of their shares. (A0060).

In sum, under Insuring Agreement C, 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.

Jarden incurred a Loss in defending itself and paying the interest award in the Appraisal Action – a claim made against Jarden by shareholders in their capacity as such. The Appraisal Action was filed during the Extended Reporting Period. And the "acts" giving rise to the Appraisal Demands and their associated Appraisal Action occurred during the Policy Period. These "acts" attempted or actually committed include the Merger and the steps Jarden took to effectuate it.

Accordingly, under the explicit language of the Jarden D&O Policy, and giving all terms their plain and ordinary meaning, there is coverage under the Jarden D&O Policy and the decision of the Superior Court must be reversed.

ARGUMENT

I. THE APPRAISAL ACTION IS A COVERED CLAIM UNDER THE JARDEN D&O POLICY'S CLEAR AND UNAMBIGUOUS TERMS.

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 (A0348-51, A0423-26).

B. Scope of Review

The parties agree that 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). "At the motion to dismiss stage, [the Court] accept[s] as true all of the plaintiff's well-pleaded facts, and draw[s] all reasonable inferences in plaintiff's favor. Further, a motion to dismiss should be denied if the facts pled support a reasonable inference that the plaintiff can succeed on his claims." *Id*. (internal quotation marks and citations omitted).

This Court reviews questions of contract interpretation *de novo*. *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011) (citations omitted).

C. Merits

"This Court has adopted traditional principles of contract interpretation. One such principle is to give effect to the plain meaning of a contract's terms and provisions when the contract is clear and unambiguous." *ConAgra Foods, Inc.*, 21 A.3d at 68-69. The Court interprets insurance policies similarly:

> Clear and unambiguous language in an insurance contract should be given its ordinary and usual meaning. Where the language of a policy is clear and unequivocal, the parties are to be bound by its plain meaning. In construing insurance contracts, we have held that an ambiguity does not exist where the court can determine the meaning of a contract without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends. An insurance contract is not ambiguous simply because the parties do not agree on its proper construction. 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.

Id. (citations and internal quotation marks omitted).

If an ambiguity in an insurance policy does exist, "the doctrine of *contra proferentem* 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) (citing *Steigler v. Ins. Co. of N. Am.*, 384 A.2d 398, 400 (Del. Super. 1978).

1. The Appraisal Action Is a Securities Claim Covered by the Jarden D&O Policy.

The Jarden D&O Policy provides that the Defendants agreed to pay on behalf of Jarden:

> [A]ll **Loss** for which the **Company**[6] 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). 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).[7]

"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).

The plain language of the Jarden D&O Policy establishes that coverage exists for all acts actually committed, allegedly committed or even attempted, by Jarden. This broad definition encompasses not only the Merger at issue in the

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[6] Under the Primary Policy, the term "Company" includes Jarden. *See* Primary Policy, §§ II(C) (defining "Company" as "the Named Insured and any Subsidiary[.]") (A0047; A0128).

[7] The Appraisal Demands, i.e., written demands for monetary or nonmonetary relief, meet the definition of "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).

Appraisal Action, but also the underlying complained-of process and other underlying acts including 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.

These are all acts, *committed or attempted*, by Jarden which gave rise to the Appraisal Demands and the Appraisal Action. Because these are "acts" under the policy, they are "Wrongful Acts" under Insuring Agreement C and the definition of that term.[8]

The Defendants defined "Wrongful Act" in the policy as "any error, misstatement, misleading statement, act, omission, neglect, or breach of duty." (A0130). "Error," "misstatement," "misleading statement," "omission," "neglect" and "breach of duty" all connote an element of wrongdoing or wrongfulness. "Act," however, does not. The Defendants chose to include "act" in the definition of "Wrongful Act" and, by doing so, chose to provide coverage for any "act," without any element of wrongdoing. It was not until this litigation commenced that Defendants decided to improperly add language to the Jarden D&O Policy and require an element of wrongfulness.

The Jarden D&O Policy also specifically provides coverage for Merger

[8] Unlike in *Solera II*, the Superior Court noted that the Defendants concede that the Appraisal Action is a Securities Claim under the Jarden D&O Policy. *Jarden*, 2021 WL 3280495, at *3.

Objection Claims – which is precisely what the Appraisal Action was. To be clear, the Jarden D&O Policy defines Merger Objection Claims 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).

2. The Appraisal Action Is a Claim for a Wrongful Act 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). The Jarden shareholders made their Appraisal Demands in response to the Merger Agreement, the announcements of the Merger in December and the joint proxy statement, and the impending closing of the Merger, all of which occurred pre-Merger and all of which are "acts" within the Policy Period.

The Superior Court incorrectly held that the only act for which the Appraisal Action arose was the execution of the Merger. This ignores the explicit policy language that provides coverage for any attempted act and ignores the fact that the Appraisal Demands, clearly made in response to actions taken during the Policy Period, were the claims that triggered a legal process culminating in the Appraisal Action.

The Defendants contend that the "allegedly" and "attempted" language in the Wrongful Act definition "make[] no difference" and that "[a]ny 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.'" (*See* AB at p. 38-39). This argument fails.

In order to have standing to bring the Appraisal Action, the Jarden shareholders were statutorily required to submit the Appraisal Demands *before* the closing of the Merger. *See* 8 *Del. C*. § 262(d)(1) ("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[.]"). The Appraisal Demands were part of a statutorily required process which continued with the filing of the Appraisal Action and concluded once the Appraisal Action reached a final resolution.

Hypothetically, if Jarden had sought coverage upon receipt of the Appraisal

Demands (prior to the Merger closing), there would have been coverage. The Appraisal Demands meet the definition of "claim" under the Jarden D&O Policy, and they were made in response to acts occurring during the Policy Period. However, if the Superior Court's reasoning is applied, there would not have been coverage because, according to the court, the only act which would give rise to coverage would be the closing of the Merger. *Jarden*, 2021 WL 3280495, at *6. The Superior Court's reasoning, and Defendants' arguments, ignore the broad definition of Wrongful Act, render the "attempted" language superfluous, and disregard the fact that the ultimate Appraisal Action was the culmination of a legal process resulting from claims first made during the Policy Period that were triggered by actions committed or attempted by Jarden during the Policy Period, i.e., interrelated wrongful acts. These claims triggered coverage under the Jarden D&O Policy, regardless of the exact timing of the Merger.

Finally, by contending that acts allegedly committed or attempted by Jarden prior to the Merger date "cannot have been what the Appraisal Action was 'for,'" Defendants are reading out the "Interrelated Wrongful Acts" provision of the Jarden D&O Policy. (AB at p. 38-39). The Jarden D&O Policy defines Interrelated Wrongful Acts" as "all **Wrongful Acts** that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes." (A0128) (emphasis in

original). The Jarden D&O Policy further provides that:

> All **Claims** arising out of the same **Wrongful Act** and all **Interrelated Wrongful Acts** of the **Insureds** shall be deemed to be one **Claim**, and such **Claim** shall be deemed to be first made on the date the earliest of such **Claims** is first made, regardless of whether such date is before or during the **Policy Period**. All **Loss** resulting from a single **Claim** shall be deemed a single **Loss**.

(A0134) (emphasis in original).

As Jarden contended at oral argument on the motion to dismiss, the legal process for the Appraisal Action was statutorily required to commence before the Merger. (A0430). Consistent with this fact, at oral argument, Jarden contended that the acts giving rise to the Securities Claim are interrelated and bridge from before the Merger through its closing. (A0437-38) ("[I]f the claim didn't start before the merger … [and the] policyholder sues later or asserts a claim later, the insurance company is going to say that these are interrelated wrongful acts because they started before the merger…. So these are *interrelated wrongful acts*.") (emphasis added).

Accordingly, the acts allegedly committed or attempted leading up to the Merger and the closing of the Merger, which all share a common nexus, are interrelated wrongful acts and constitute a single claim (and therefore, a Securities Claim) under the Jarden D&O Policy.

3. The *Zale* Case Is Inapplicable.

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).

As set forth in more detail in Jarden's Opening Brief, the difference between the policy language in *Zale* and in this case is critical. The *Zale* policy required the act giving rise to coverage to have *fully* occurred. Jarden's policy allows for the act to be actually committed *or attempted*. Therefore, once Jarden announced the Merger Agreement, this triggered the "act" and at the time the Jarden shareholders submitted the Appraisal Demands, the Merger was an attempted act by the company. This triggered coverage under 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*.[9] The Appraisal Action was the continuation of a legal process that commenced prior to the Merger date and well within the Policy Period.

Reviewing this appeal *de novo* and applying this Court's well-established standards for interpreting insurance contracts, the only logical conclusion is that the Jarden D&O Policy provides coverage for the Appraisal Action.

[9] The Appraisal Demands are "Securities Claims" under the Jarden D&O Policy. *See supra* at p. 7 n. 8; Op. Br. at p. 17.

II. THE APPRAISAL ACTION IS A "CLAIM" THAT WAS "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 (A0348-51, A0423-26).

B. Scope of Review

This Court's standard of review is set forth in Argument § I.B. above.

C. Merits

1. Jarden Did Not Concede the Definition of "For."

The Defendants contend that "[t]he [t]rial [c]ourt [c]orrectly [a]dopted and [a]pplied the Parties' [a]greed-[u]pon [u]nderstanding of "for any Wrongful Act[.]" (AB at p. 15). As Jarden pointed out in its Opening Brief (cited herein as "OB at p. __"), "[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* OB at p. 24; A0423-27). Furthermore, a full reading of the transcript demonstrates that Jarden's consistent focus on oral argument, similar to its briefing, was that the Jarden D&O Policy did **not** require any "wrongdoing" in

the colloquial sense in order for there to be coverage. Rather, all that was required was an "act actually or allegedly committed or attempted."

For example, counsel argued:

- "What the insurance companies are now doing is conflating the Solera II's holding concerning a violation and trying to say that in effect was a ruling on the definition of wrongful acts, and the Supreme Court on the contrary did not determine what a wrongful act was." (A0419-20).
- "[A]ll we need under this policy is any act, and that's a wrongful act." (A0420).
- "The Supreme Court has not -- definition has not spilled over into wrongful acts such that wrongful act definition, such that it requires wrongdoing in order to fall under wrongful act. The wrongful act definition clearly does not require wrongdoing…." (A0421).

In responding to the court's question as to whether "for" means the claim must be seeking redress or reprisal, Jarden's counsel responded:

> We are looking for strict construction of the language that the parties agree to, that the insurance company wrote. We don't want any stretch of "for," and we don't want any addition to the wrongful acts definition of wrongful conduct because the Court in Solera II never even reached the wrongful acts definition, certainly not wrongful acts definition in this case.

(A0424-25).

Regardless of the Defendants' characterizations, the hearing transcript

demonstrates that Jarden's argument was that *Solera II* did not control the Superior Court's ruling because, unlike *Solera II*, the Jarden D&O Policy does not require any element of wrongdoing or wrongfulness for coverage. Jarden's focus is and has been that the clear and unambiguous language of the policy provides coverage and that the court (Superior Court or Supreme Court) need not look anywhere but within the policy to conclude that there is coverage.

2. The Superior Court Incorrectly Applied the Defendants' Construction of "For" in Determining that the Appraisal Action Was Not "For a Wrongful Act."

The Superior Court defined "for" in the Jarden D&O Policy to mean 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.
>
> …. 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.

As is set forth in more detail above, this Court should reject the Superior

Court's decision to improperly add language to the Jarden D&O Policy. If the Defendants wanted redress, reprisal, or requital in the Jarden D&O Policy, they had the opportunity and were free to include it in the policy's many defined terms. They did not. It was not until this litigation began that the Defendants attempted to add language to the Jarden D&O Policy to limit its coverage. And now the Defendants want this Court to also add this language to the policy's terms.

This Court must follow Delaware's well-settled principles of contract interpretation, and the doctrine of *contra proferentem*, and construe the Jarden D&O Policy against the Defendants; and the Court must construe it broadly in favor of coverage. *See Conduent State Healthcare, LLC v. AIG Specialty Ins. Co.*, 2019 WL 2612829, at *5 (Del. Super. June 24, 2019); *Hampton v. Titan Indem. Co.*, 2017 WL 2733760, at *6 (Del. Super. June 23, 2017); *U.S. Underwriters Ins. Co. v. The Hands of our Future, LLC*, 2016 WL 4502003, at *2 (Del. Super. Aug. 19, 2016) (citing *Steigler*, 384 A.2d at 400).

The Superior Court's holding improperly narrowed the Jarden D&O Policy and improperly added words to the policy to reach its conclusion.

First, "for" has many meanings.[10] (*See* OB at p. 22-23).

Second, regardless of any statements made during oral argument, the Jarden

[10] *See also 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," "[b]y means of, or growing out of."

D&O Policy does not define "for." It should, therefore, 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."); *Rhone-Poulenc Basic Chems. Co.*, 616 A.2d at 1195-96 ("Clear and unambiguous language in an insurance policy should be given its ordinary and usual meaning.").

The court's opinion is devoid of any independent analysis of the definition of "for." Indeed, there is no reference to any dictionary definition or analysis of the plain and ordinary meaning of "for;" nor is there any independent analysis or explanation as to how "for a Wrongful Act" must mean to seek redress, reprisal or requital. The Defendants improperly added language to the Jarden D&O Policy to change its plain and ordinary meaning and to narrow coverage, and the Superior Court's opinion simply adopts this improper reading without sufficient reasoning or justification. This Court should ignore this improper rewriting of the Jarden D&O Policy.

Accordingly, giving effect to the plain and ordinary meaning of the Jarden D&O Policy, there is coverage.

3. The Superior Court's and Defendants' Definition of "For" Provides Coverage to Jarden.

Finally, even if the Superior Court's interpretation is correct, a common definition of "redress" is simply a "remedy." *See* https://www.merriam-webster.com/dictionary/redress (last visited November 26, 2021).[11]

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, in this instance an act actually or allegedly committed or attempted by Jarden, and during the Policy Period. There was nothing before the trial court to permit it to equate "redress" with wrongfulness, and "redress" does not imply wrongfulness or wrongdoing.

Moreover, in their Answering Brief, the Defendants fail to address the fact that "redress" means "remedy." The only reference is that the Appraisal Action is a "legislative remedy." (AB at p. 3). This reference, however, is fatal to the Defendants' argument.

Notwithstanding the trial court's improper interpretation, applying any of the definitions above, including the trial court's, the Appraisal Action at issue here was

[11] "Reprisal" and "requital" are synonymous with "redress." *See* https://www.merriam-webster.com/dictionary/redress#synonyms (lasted visited November 26, 2021). The Superior Court cited no reasoning but, by adding these words to the "Wrongful Acts" definition, implicitly concluded that wrongfulness was required in a policy definition that did not include such language.

"for" the acts actually or allegedly committed or attempted by Jarden, and accordingly, because there is coverage based on the Superior Court's interpretation of "for a wrongful act," this Court must reverse the decision below.

III. JARDEN'S ARGUMENTS ON APPEAL ARE NOT BARRED BY THE JUDICIAL ADMISSIONS DOCTRINE.

A. Question Presented, Affirmatively Stated

The Superior Court committed reversible error in holding that "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 (A0348-51, A0423-26).

B. Scope of Review

This Court's standard of review is set forth in Argument § I.B. above.

A tribunal's consideration of a party's judicial admission is reviewed for abuse of discretion. *Merrit v. United Parcel Serv.*, 956 A.2d 1196, 1203 (Del. 2008) (citations omitted).

C. Merits

1. The Judicial Admissions Doctrine Does Not Apply to Legal Theories Such as Contract Interpretation.

Defendants correctly note that judicial admissions are "[v]oluntary and knowing concessions of fact made by a party during judicial proceedings (e.g., statements contained in pleadings, stipulations, depositions, or testimony; responses to requests for admissions; counsel's statements to the court)." *Merrit*, 956 A.2d at 1201. And they "are traditionally considered conclusive and binding upon the party against whom they operate, and upon the court." *Id*. at 1201-02

(footnote omitted).

Judicial admissions, however, "are limited to ***factual*** matters in issue and not to statements of legal theories or conceptions." *BE & K Eng'g Co., LLC v. RockTenn CP, LLC*, 2014 WL 186835, at *7 (Del. Ch. Jan. 15, 2014) (citing *Levinson v. Del. Comp. Rating Bureau, Inc.*, 616 A.2d 1182, 1186 (Del.1992)) (emphasis added). "The scope of a judicial admission by counsel is restricted to unequivocal statements as to matters of fact which otherwise would not require evidentiary proof; it does not extend to counsel's statement of his conception of the legal theory of a case, i.e., legal opinion or conclusion." *AT&T Corp. v. Lillis*, 953 A.2d 241, 257 (Del. 2008) (citing Michael Graham, Handbook of Federal Evidence, 801:26 at 906 (6th ed. 2006)). Moreover, judicial admissions apply only to admissions of fact, ***not to theories of law, such as contract interpretation***." *Id*. (emphasis added). *See also Levinson*, 616 A.2d at 1186 ("This Court has held that judicial admissions which are binding on the tendering party are limited to factual matters in issue and not to statements of legal theories or conceptions. Furthermore, when counsel speaks of legal principles[,] he makes no judicial admission which would prevent the court from applying to the facts disclosed by the proof, the proper legal principles as the court understands them.") (citations and internal quotation marks omitted); *Blinder, Robinson & Co., Inc. v. Bruton*, 552 A.2d 466, 474 (Del. 1989) (same); *HOMF II Inv. Corp. v. Altenberg*, 2020 WL 2322973, at *1 (Del. Ch. May 8, 2020) (same);

MVC Capital Inc. v. U.S. Gas & Electric, Inc., 2021 WL 4486462, at *4 (Del. Super. Oct. 1, 2021) (finding that because amendments to a pleading "relate to a theory of law (*i.e.*, contract interpretation), the judicial admissions rule doesn't apply."); *Bank of N.Y. Mellon v. Commerzbank Capital Funding Trust II*, 2011 WL 3360024, at *8 (Del. Ch. Aug. 4, 2011) ("judicial admissions apply only to admissions of fact, not to theories of law, such as contract interpretation.").

"The proper construction of any contract is purely a question of law." *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1266-67 (Del. 2017) (citations and internal quotation marks omitted). Further, a party's "misconception of the legal theory of his case does not work a forfeiture of his legal rights." *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 24-25 (4th Cir. 1963).

Defendants' position that Jarden waived its argument as to the definition of "for" or "for a Wrongful Act" has no basis in and is contrary to Delaware law.

First, under Delaware law, judicial admissions do not apply to theories of law such as contract interpretation. The construction of a contract is a question of law and counsel's arguments regarding contract interpretation relate to a theory of law and not a factual issue. This Court made that explicit holding in the *AT&T* case and other Delaware courts have reached this same conclusion as cited above.[12] The

[12] Defendants cite to the *AT&T* case in their Answering Brief; however, they omit the portion which forecloses their argument.

entire briefing on the underlying motion to dismiss, the oral argument, and the Superior Court's Memorandum Opinion focused on interpreting the Jarden D&O Policy – a theory of law to which the judicial admissions doctrine *does not apply*.

Second, as is set forth in more detail above, the focus of Jarden's argument at the hearing was on the element of "wrongfulness" or "wrongdoing."

Accordingly, there is no waiver of Jarden's arguments as to the definition of "for" or "for a Wrongful Act."

Moreover, the Superior Court abused its discretion in applying the judicial admissions doctrine against Jarden in reaching its decision. The judicial admissions doctrine does not apply to questions of contract interpretation and the Court should have ascribed the plain and ordinary meaning of "for" in construing the Jarden D&O Policy.

For these reasons, the decision of the Superior Court should be reversed.

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 hold that the Appraisal Action constitutes a covered "Securities Claim" under the Jarden D&O Policy. For these reasons, this Court should rule that the language in the Jarden D&O Policy provides coverage. 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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