SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
HUDSON COUNTY
DOCKET NO. HUD-L-3492-18
A.D.# _____

OKLAHOMA FIREFIGHTERS PENSION AND RETIREMENT SYSTEM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

vs.

NEWELL BRANDS, INC., ET AL.,

Defendants.

TRANSCRIPT
OF
CLASS CERTIFICATION
HEARING

Place: Hudson County
(Heard Telephonically)

Date: August 7, 2020

BEFORE:

HONORABLE MARY K. COSTELLO, J.S.C.

TRANSCRIPT ORDERED BY:

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I N D E X

(The following takes place via teleconference.)

THE COURT: All right. Mr. Walker, whenever you're ready, let us know when we're on the record.

THE CLERK: On the record. The Court is now recording by Akeem Walker via conferenced now.

THE COURT: Thank you so much. Good morning, everyone. We are together on the line to hear plaintiff's motion to certify the class.

This is the matter of Oklahoma Firefighters Pension Fund versus Newell Brands and others. The Docket Number is HUD-L-3492-18.

I just heard someone else join the line. Who is with us? Did someone just join the call? No? Apparently not. Starting -- starting with the plaintiff, may I have counsel's appearance?

MR. PEARLMAN: Your Honor, on behalf of plaintiffs, Peter Pearlman; Cohn, Lifland Pearlman, Herrmann and Knopf and also Max Schwartz and Deborah Clark-Weintraub from the law firm of Scott and Scott and I believe that Mr. Schwartz is going to be handling the predominance of the argument.

THE COURT: Thank you. Good morning.

For the defense?

MS. REZEK: Good morning, Your Honor, you have Bethany Rezek from King and Spalding on behalf of

the defendants. On the line with me is Warren Pope and Elliott Foote, also from King and Spalding.

THE COURT: Okay. We'll be hearing specifically from you today, Ms. Rezek?

MS. REZEK: Yes, Your Honor.

THE COURT: Okay. Great. So I would like to put some facts and procedural history on the record. The case is known to the Court from prior motion practice. I won't -- I'm trying to pull out the most salient facts for today's purposes and not prolong this, but there are a lot of facts, so bear with me. It will also save you from doing so.

So, Newell Brands, Incorporated and Jarden Corporation expressed their attempt to merge in December, 2015. Some three or so months later in March 2016 they issued a joint registration statement and prospectus which I am going to refer to as the offering materials under which majority shareholders would receive Newell stock and cash when the merger closed in April 2016.

Jarden shareholders filed class collect action lawsuits alleging that the offering materials were false and misleading. Those suits were eventually dismissed.

Nearly two and a half years after the

offering materials were issued, plaintiff filed this class action suit alleging that the offering materials were false and misleading.

Newell is headquartered right here in Hoboken, New Jersey and they are a major provider of consumer and commercial products under brand names recognizable to the public as Rubbermaid, Crock Pot, Elmer's Glue.

Jarden was a similarly successful consumer products company of comparable size to Newell and as I had mentioned on December 14th, 2015 Newell announced into a prior Jarden creating a 16 billion dollar consumer goods company.

Jarden shareholders would receive .862 shares of Newell common stock plus $21 per share in cash for each share of Jarden's common stock which at the time equaled about $60 per share.

The defendants filed the offering materials with the United States FDC to issue about 223.8 million shares of Newell common stock to Jarden shareholders.

The draft version of the registration statement was filed in January 2016 and was finalized by another version on March 17th, 2016.

On March 18th, 2016 the SEC declared

Newell's registration statement effective and the defendants then filed a final prospectus for the issuance of shares.

Oklahoma Firefighters Pension and Retirement Pension acquired Newell common stock pursuant to the registration statement and the plaintiff is an institutional shareholder that was a Jarden stockholder initially at the time of the acquisition and then received over 35,000 shares of Newell stock in this acquisition and they allege it was done pursuant to false and misleading registration statement issued in connection with the merger or acquisition.

So, the offering materials set forth a summary of the merger between the two companies. The reason for the transaction and the recommendation of both boards of directors that their respective shareholders vote in favor of the transaction.

The offering materials also enumerate the risk factors among them -- among those that were disclosed I should say were was when Newell warned that it quote, "Maybe unable to successfully integrate the business of Newell and Jarden successfully or realize the anticipated benefits of the merger transactions," unquote, because of quote, "Difficulty

addressing possible differences in corporate culture, management philosophies, and the business models of the two companies," unquote.

The offering materials also incorporated by reference other documents which Newell had filed with the FDC among them being the 2015 Form 10K which in itself warned investors among other things that the company was quote, "Subject to the risks related to its dependents on the strength of resale, commercial and industrial sectors of the economy," unquote.

And that it is subject to quote, "intense competition," unquote, that quote, "results in downward pricing pressure," unquote, and that a quote, "Loss of or failure by one of the company's largest customers would adversely impact the company's sales and operating cash flows," unquote.

Procedurally, shareholders filed class action suits alleging that the offering materials were fraudulent and this was done shortly after the registration statement was filed in January 2016.

The lawsuits were actually filed in February 2016 in the U.S. District Court in the Southern District of Florida and again in March 2016 in Circuit Court in Palm Beach, Florida. These suits allege that the defendants disseminated materially false and

misleading registration statement.

These were discussed at length the last time we all got together in the defendant's motion to dismiss. The previous case is on a list to be unrelated and that they were -- and they involve claims by Jarden stockholders that Newell overvalued Jarden's value.

The plaintiff argued that these cases were unrelated because they were -- involved totally different legal claims and required a different factual analysis.

I may be asking you some more questions with regard to these cases and how it may or may not impact the quote unquote unique statute of limitations argument that I've been presented with today.

Newell and Jarden issued an amended registration statement in March 2016 which contained supplemental disclosure such the potential for difficulty integrating.

After all of these events, the merger was completed on April 15th, 2016 and following the merger the newly combined company can be said to have performed above expectations in the second quarter of 2016.

However, Newell still reported declining

core sales growth throughout the rest of 2016. Market analysts were cautious about the future performance of the newly formed company telling investors in 2016 among other things the following; number one, core sales growth was likely slow in 2H as the legacy company faced tougher competition and Jarden's business will begin to press offline.

I'm quoting from these analyst reports, so there's a lot of abbreviation and jargon that I am, you know, uncomfortable using but I'm quoting.

Secondly, 2117 will see significant headwinds from higher interest expense and share counts, less the seasonality of Jarden earnings.

Thirdly, results posted by NWL I guess that's the new company is the third quarter 2016 will mostly lack luster, core sales came in weaker than expected.

Fourth, Newell shares are below ten percent since the election or down ten percent since the election stemming from fallout from an unexpectedly weak top line print in Q3.

And the other warning or comment I chose to include here is that there are risks associated with the integration with Jarden.

So, in the first two quarters of 2017 the

papers indicate that Newell's core sales growth remained at 2.5 percent; a significant decline from the prior year.

By September of 2017, Newell announced that due to a resin shortage caused by Hurricane Harvey, the company cut its 2017 earnings per share guidance from $3 to $3.20 -- $3.20 down to an estimate of $2.95 or $3.05.

The price of the Newell shares dropped following this announcement; probably rather expectedly. Newell stock prices dropped again after a weak third and fourth quarter and a federal class action lawsuit was filed in District Court of New Jersey in June 2018 alleging that Newell and its executives defrauded class stock purchasers.

Between February 6th, 2017 and January 24th, 2018, by knowingly issuing depleting financial guidance, quote, "The alleged omissions overlapped with this case in that the plaintiff there alleged that Newell misrepresented its ability to successfully integrate Jarden and those integration issues negatively affected performance," unquote.

Now, by September 6th, 2018 the plaintiff filed this case alleging strict liability claims with reference to the offering materials that were

allegedly materially false and misleading.

It is the allegation here by plaintiff that the defendant should have disclosed quote, "That Newell was completely unprepared to successfully integrate Jarden," unquote.

Plaintiff next alleges that Newell touted its core sales growth but quote, "Failed to disclose that Newell had hit a wall in its growth and was in the midst of a long-term decline forestalled in part by heavy reliance on discounting practices that temporarily boosted sales at the expense of Newell's bottom line," unquote.

Plaintiff now makes this motion to certify the class action. It is opposed, and I'll hear your argument now -- I'm sorry, Mr. Schwartz.

MR. SCHWARTZ: Thank you, Your Honor.

So, -- and I'm just going to jump right into the class certification issues if that's okay. The courts have widely recognized by concerning that statements like this one are ideally suited for class certification and there is no real dispute here that the moving papers satisfy the standard elements of core class certification.

Defendant's opposition boils down to two tangential issues which are meritless. One involves a

purported unique defense. The other involves damages. So, unless Your Honor has questions about any of the other aspects of the class certification papers, I would like to turn right to those two issues.

THE COURT: Go ahead.

MR. SCHWARTZ: Thank you. When we first (indiscernible) since it's purely legal. It's again well established post the United States Supreme Court's Comcast decision that no model is needed in the class certification to link the statutory damages set by the Securities Act to the liability that the Securities Act creates.

THE COURT: All right, sir, I'm just going to need to just repeat your last point because you're -- I'm hearing a lot of static, and I didn't really follow you.

MR. SCHWARTZ: Okay.

THE COURT: Following the Supreme Court decision, what?

MR. SCHWARTZ: Sorry. Is this better, Your Honor?

THE COURT: Yes.

MR. SCHWARTZ: Okay. It's well established post Comcast that no model is needed in class certification to link statutory damages set by the

Securities Act to the Liability that the Securities Act creates.

And courts have widely rejected contrary claims such as those raised by defendants here. The courts have gone so far as to describe the precise argument that defendants make as a disregard of prevailing law.

The reply brief that we filed, Your Honor, cites a number of decisions going our way such as New Jersey Carpenters, Gainer (phonetic) Facebook and Royal Bank of Scotland.

And those decisions held defendant's argument depends on a failed attempt to grasp the Comcast decision onto Securities Act claims. Comcast simply doesn't apply here.

It involves claims that unlike here has no defined damages. Comcast, by contrast -- pardon me. Comcast held that in those circumstances in order to certify a class some model is needed to define the damage theory and show that it can be linked to liability.

That just doesn't apply here. And no damage model is needed here because the link at issue is embedded within the Securities Act itself. By definition, the statutory damages set by the

Securities Act reflect the liability that the Security Act -- that the Securities Act delineates.

So defendants are sort of trying to require a solution where there isn't a problem. Notably, defendants don't cite a single decision which apprised Comcast of the circumstances at issue here; that is the Securities Act claims involving common stock that trades on an exchange.

Virtually all of the cases they cite are anti-trust claims or fraud claims under the Securities Exchange Act, neither which have a statutory damages formula.

They do cite one case, Your Honor, Loritz (phonetic) which is also a fraud claims under the Securities Exchange Act and the Securities Act claim that if you read the actual Comcast argument there it's clearly only applying to the fraud claim and that's because it only discusses the fraud factors that attaches it to fraud.

The other -- the only case they cite that expressly deals with Securities Act claims is the Fort Worth case and unlike here, it didn't involve common stock traded on the exchange.

Rather, it involved complex asset backed securities that were not just sold in one-up

transactions, but that were liquid. So that's critical because with that number that in Fort Worth the issue wasn't the application of the statutory damages model itself on a class-wide basis but a fundamental inability to determine the value of the asset backed securities at all.

And we couldn't understand the value at all, there was -- it was impossible to link damages to the period of liability. By contrast here, Newell shares trade on a stock market and its commonly accepted and understood that their value is always known and set in a common manner by the market price.

The question that defendants ask about how the Securities Act statutory damages formula will apply in a class right basis are accordingly purely rhetorical.

Defendant's don't cite a single Securities Act case that has had any difficulty applying the statutory damages formula on a class right basis. And again, we cited several cases in our reply brief which hold that the statutory damages formula under the Securities Act is an ideal common damages formula that supports class certification.

The formula treats all class members the same way. It spells out simple, uniform rules for the

inputs that each class member should put into the statutory formula which is essentially, Judge, the price at which the stock is required minus the price in which it was sold.

And so you start attributing all drops in the stock price from the time of the offering to the time the complaint was filed in essence.

Similarly, courts regularly hold that application of any negative causation argument defendants may raise are common. Negative causation is defendant's burden.

It simply means that defendants have an opportunity to reduce the maximum statutory damages by showing that some portion of the drop in Newell stock captured by the statutory formula was not actually caused by the misstatements.

So, given that Newell shares traded on an exchange and that the price of those shares is set in common for all investors by the market, any argument that it dropped the Newell stock price was not attributable to the misstatements necessarily apprised to all investors and it affects them all in the same way.

So, to sum up on damages, Your Honor, this is an issue that courts have widely and uniformly

ruled under these circumstances in plaintiff's favor. The statutory damages formula itself creates the necessarily link and is all that is sufficient at classification to establish that predominant common issues with regard to damages will be the rule in this case.

Does Your Honor have any issues, any questions about the damages issue?

THE COURT: No. Keep going.

MR. SCHWARTZ: Okay. So, with regard to what is in the heart of defendant's argument they argue that there's a purported unique statutory, pardon me, a unique statute of limitation defense against plaintiff and so to sum that argument up, defendants claim that simply by proffering a supposed unique defense, they can defeat adequacy and that no matter how baseless their unique defense is, the Court cannot examine the legitimacy of such defenses or what is the impact those defenses would actually have on the case.

This can't possibly be correct, Your Honor.

THE COURT: Mr. Schwartz?

MR. SCHWARTZ: Because if the defendant -- yes?

THE COURT: Mr. Schwartz, why don't you just

get to the heart of it and clear up any misapprehensions that there may be out there as to the definition of the class.

Who is in, and who is out. I think that's the crux of their argument.

MR. SCHWARTZ: Okay, Your Honor. Well, just to -- I want to be abundantly clear that in terms of the definition of the class, there is no dispute there and my understanding that the definition of the class is a slightly different argument then adequacy issue.

With respect to the definition of the class, as we stated in the reply papers, there is no dispute that the definition only includes those investors who acquire Newell stock directly in the offering.

You know, we also make that clear on page five of our opening papers, and further in the plaintiff's affirmation in support of class certification the plaintiff also references the -- its acquisition of Newell stock that was directly in the offering and exchange for its then existing stock.

THE COURT: So --

MR. SCHWARTZ: So there is no -- yes.

THE COURT: All the people that were prior Jarden shareholders can now have Newell stock as a result of the acquisition, right?

MR. SCHWARTZ: That's it. Exactly.

THE COURT: All right. Go ahead with the part of the argument I interrupted you on.

MR. SCHWARTZ: Okay. And just to clarify, once you have -- once it's reduced to that definition, all of the arguments defendants raise about reliance and knowledge fall away and they don't even --

THE COURT: That's why I brought it up.

MR. SCHWARTZ: Okay. Perfect. That saves everybody time. Okay.

So, just going back as to the to the heart of defendant's case which is the adequacy argument, what I -- I think the simplest way to do this is just if it's all right to walk Your Honor through the documents that defendants claim create this unique defense because what you'll see is that just the rehash of arguments that Your Honor has twice rejected when moreover these -- this information was raised as to the entire class, it's entirely on public information and so it can't possibly be a leak, nor can it if the class certification here and to sort of to do that Your Honor gave a very effective recap of the case.

But I would also just like to point out Your Honor's holdings with regard to how the statute of

limitations defense is triggered in a Securities Act case and following the Supreme Court's Merck decision from 2010, Your Honor held on the motion to dismiss that in order to trigger the statute of limitations there actually has to be discovery or of the Securities Act violations at issue.

Storm warnings, inquiry notice is not sufficient and so what we're talking about is was there information that could have -- that could have reasonably led plaintiff to discover the misrepresentations here.

And again, as Your Honor has stated when we started here, that information didn't begin to come out until September of 2017 at the earliest and that information -- and so the misrepresentations here are about -- all about internal information to Newell's business, nothing to do with Jarden.

Specifically Newell's core sales growth, defendant's -- we allege that defendant's claim that the core sales were strong when, in fact, it faced substantial headwind, and also about Newell's personnel as of the time of the offering.

You know, we allege that Newell didn't actually have the requisite -- the basic personnel Newell had at the time of the offering, it was to

create substantial undisclosed risks with their ability to integrate Jarden.

So, in order for information to trigger the statute of limitations defense here, discovery of that undisclosed information, it hasn't been on those topics. So -- so, does Your Honor -- is it possible to open up the Exhibit E to the Schwartz declaration?

THE COURT: Go ahead.

MR. SCHWARTZ: Okay.

THE COURT: You can continue and I'll access that.

MR. SCHWARTZ: Okay. So, defendant's argument about a unique statute of limitation defense for plaintiff it really comes down to about four documents, four short documents none of which discuss any internal information regarding Newell, let alone its core sales or its personnel.

These documents cannot possibly trigger the statute of limitations defense under Your Honor's holding and the Merck case.

So, in the heart of -- talking about the heart, it's sort of the documents that all of defendant's arguments stem from and it is -- it consists of two parts.

THE COURT: Mr. Schwartz, let me do this.

Rather than have to characterize their argument and what you think it's going to be, let's hear from them and then I'll give you a chance to rebut, okay?

I think I should hear from them a little bit.

MR. SCHWARTZ: Okay. Okay, Your Honor.

THE COURT: All right. So, Ms. Rezek, go ahead.

MS. REZEK: Your Honor, first I just would like to touch on the class definition issue.

As Mr. Schwartz noted, we raise some arguments that the class definition led to some individual issue such as knowledge and reliance and the reason those were included in our opposition brief is based on the definition that plaintiff has asked this Court -- the definition of the class that the plaintiff has asked the Court to certify.

That definition is consistent with the definition that was included in the amended complaint and it includes persons who acquire Newell common stock traceable to the registration statement.

Now, that traceable language is not speaking to Jarden, former Jarden stockholders to receive Newell shares in the transaction. That's a reference to after market purchases.

So defendants do recognize on page five of their brief, their opening brief, they reference Jarden stockholders, but the actual proposed class definition is not that limited.

Defendants --

THE COURT: Ma'am? Ma'am, if I grant the motion, it will be -- it will be made clear in any order so to the extent that you reasonably relied on the pleadings and page five of their brief, I think their reply brief and their representations today on the record dispose of that issue.

So, why don't you move on to your more substantive issues.

MR. REZEK: Yes, Your Honor.

So speaking to directly to the statute of limitations and the defense here, it's plaintiff's burden to establish that they can fairly and adequately represent the proposed class.

But here the plaintiff is subject to a unique statute of limitations defense that is obviously likely to become a focus of the litigation. I think Your Honor can see just from the briefing here which is just based on a very small snippet of discovery, discovery which is ongoing that this is likely to become a distraction in this case.

Moreover, given that plaintiff is the only proposed class representative, there's a possibility that plaintiff will not be able to represent the class at all should defendant succeed in their statute of limitations defense.

And again, as we stated in our papers, it's important to note that the Court need not and should not reach the merits of the defense at this stage that's because the discovery is ongoing.

We expect additional discovery to be developed on the statute of limitations issue that can be addressed at the appropriate time. The Court's only inquiry today should be whether there is a potential that a unique defense that's why it shouldn't become the focus of the litigation exist.

So, as the Court recalls from, likely recalls from consideration of defendant's motion to dismiss the claims under the Securities Act must be brought within one year of discovery or after discovery should have been made by exercise of reasonable diligence.

So, here we know as you stated in your opening recitation of the facts plaintiff filed an initial complaint on September 6th, 2018. So plaintiff's claim here would be time-barred if they

either discovered or should have discovered the basis for their claim prior to September 6th, 2017.

As set forth in our papers, evidence data through discovery conducted to date suggests that this particular plaintiff was on notice in March of 2016 that it may have potential claims related to the offering materials at issue and that's more than two years before this case was actually filed.

So that mentions that that was ongoing but we just attached a sampling of evidence developed to date that shows that this particular plaintiff will be the subject of that unique defense.

So, I would like to specifically direct your attention to Exhibit 2 to our brief. That is a memo that plaintiff security's monitoring firm provided to plaintiff advising them on potential claims related to the merger and specifically relating to the very offering materials that plaintiff challenges here.

That memorandum while it references publicly available information included sophisticated legal analysis complaints outside counsel and specifically pointed out among other things that their release that the offering materials contain certain faults and misleading statements.

Plaintiff's representative admitted this

during his deposition. He admitted that the memorandum suggested that the offering materials in this case were potentially false and misleading and that this would be a Securities Act claim such as the one brought here.

In connection with this motion, plaintiff argues that this memorandum is irrelevant because if that memorandum is exclusively focused on claims against Jarden and it quote, "Never discusses misconduct by Newell, securities violations on Newell or even uses the words, false, misleading, or omit."

As an initial matter, plaintiff has cited no authority suggesting that certain magic words must have been used in order to put plaintiff on notice of their potential claim.

Indeed, that would be an unfair result. Plaintiff could and their attorneys could avoid using certain language inviting or I wasn't putting anything in writing at all simply to avoid triggering the statute of limitations.

That's just not the law. Second, the argument that the claims here are different than the claims that were being discussed in that memo is precisely the case in the case of Leroy versus Cahill, that's the case we cited in our papers. There the

plaintiff urged the Court to ignore an earlier writing from him discussing his potential claim because he said -- the potential claim he was discussing there are different than the claims he actually brought.

The Court in that case, rejected the argument and said while the statute of limitations defense may not be ultimately successful on those grounds that it was sufficient to the C Class certification.

That's precisely the situation we have here. In response, plaintiff also argues that, you know, defendants have raised the statute of limitations defense in connection with the motion to dismiss and that this Court has decided the issue.

And the initial matter as the Court is well aware, the Court's prior consideration of the statute of limitations defense is at the pleading stage, but that was if any evidence develops during discovery.

And the Court also may recall that it was plaintiff that argued at the motion to dismiss stage that consideration of the statute of limitations was premature at the pleading stage and could only be considered at summary judgment after discovery was conducted.

That's where we're headed. We are now past

the pleading stage. We have discovery already but will inform the Court to consideration of statute of limitations defense of summary judgment and as I said additional discovery could be developed.

But at this stage, unlike the pleading stage, it's no longer a question of when a quote, "Reasonably diligent plaintiff would have become aware of the claim." Rather, we have evidence here suggesting when this specific plaintiff was put on notice of its potential claim.

Plaintiff also argues that defendant's unique defense argument fails because the statute of limitations defense is common to the class, not unique to the plaintiff and that's because they claim it relies on publicly available information.

Now, plaintiff primarily relies on three cases in support of that argument; the Merrill Lynch case, the Residential Asset case and New Jersey Carpenters.

In Merrill Lynch, for example, the Court held that its news report government investigations, public hearings, and civil complaint attached as exhibit to defendant's moving papers were sufficient to place a reasonable investor on notice of defendant's alleged securities violation then the

claims of all class members are time barred.

And the Residential Asset and New Jersey Carpenters cases have similar facts. They're talking about defendants making a statute of limitations argument based solely on publicly available news stories and publicly available information.

But that's just not the case here. The evidence that we're discussing here is not publicly available. It's specific to this plaintiff and set forth in our moving -- or our papers before the Court our argument relies on confidential, legal memorandum that was prepared for this plaintiff and as well of confidential emails among this plaintiff as general counsel and as outside legal advisors among other things.

None of this information was available to any other members of the class and these documents all involve more than just simply a regurgitation of publicly available information.

Turning back to the legal memorandum Exhibit 2 to our opposition papers, this memo is addressed to this particular plaintiff. This is not a publicly available document.

It is authored by this particular plaintiff monitoring counsel that plaintiff hired to advise them

on potential causes of action related to its investment.

And plaintiff claims that this memorandum just regurgitates publicly available information. Defendants don't dispute that the memo discusses publicly available information, how could it not? But the contents of the memo don't discuss -- don't stop there.

The specific memo references plaintiff counsel's proprietary investigation; that is it contains sophisticated legal analysis that was prepared particularly for this plaintiff.

It advises that the offering materials, the very offering materials that are at issue in this case contain false and misleading information. The remaining pieces of evidence that we attach to our papers only bolster the document that this particular plaintiff is subject to a unique defense.

First, in defendant's exhibit 5 you have an email between plaintiff's monitoring counsel and plaintiff's general counsel regarding the memo. And in response to that memo, plaintiff's general counsel advised that they wanted to preserve any claim we may have related to the merger.

So, they recognized not only -- they said

plaintiff is correct in the claims they're bringing here, is different than the claims discussed in this memo, they were aware that other potential claims may be out there or were out there and they were taking action to preserve any claims that they had related to the transaction.

It's clear that this memo was discussed with the investment committee of plaintiff's order for (indiscernible) it was included as an agenda item and plaintiffs want to say that that was just related to a appraisal action, but the agenda item is federal securities class action against Jarden Corporation.

Again, it doesn't matter that they don't see and Newell Brands. They're not required to use any magic words to trigger the statute of limitations defense.

It's clear that they were discussing a federal securities class action related to very offering documents here.

So, in short, the evidence here is a far cry form the publicly available information that's discussed by plaintiff and cited in the cases and, in fact, in the cases cited by plaintiff.

This is confidential information based on a proprietary investigation conducted by this particular

plaintiff counsel.

THE COURT: All right. Thank you. I'm sorry. I thought you were finished.

MS. REZEK: Just one further point on that. Plaintiff wants to argue that even if they were subject to a unique statute of limitations defense, it's too insubstantial to the C class certification.

That's simply not the case. Plaintiff relies on two cases for this point; the Caulfield case and the Omnicon case. In Caulfield, the Court said they were going to decline to deny class certification on the grounds that plaintiff may be subject to a statute of limitation defense because defendant told the plaintiff in writing the deadline to file her claim, a deadline she complied with and then they tried to turn around and bring a statute of limitations defense.

That's not the case here. Omnicom similarly, the Court declined and denied class certification on the potential statute of limitation defense because they said the degree of the plaintiff.

The (indiscernible) was unclear and disputed. But that -- the Omnicom court cited that Leroy case that I mentioned earlier where the Court looked to plaintiff putting in writing that he had

potential claims related to the offering documents he was later challenging.

That's the situation we have here. Our case is not like Omnicom. Our case is like the Leroy case that the Omnicom -- Omnicom court cited and distinguished.

And again, plaintiff suggestion that the statute of limitations will not unacceptably diffract from the litigation that's simply untenable. Again, as just the moving papers here based on early discovery show it is going to be a major issue and focus and a determination that plaintiff can't pursue the claims on behalf of the class is -- is -- would be detrimental because they are the only proposed class representative.

There would be no one else to pursue the claims on behalf of the class. I'd be happy to answer questions you may have, Your Honor.

THE COURT: No thank you.

MS. REZEK: Do you want me to go ahead and address the damages at this point or do you --

THE COURT: Mr. Schwartz, I'll give you the last word on the statute of limitations issue and then we have to wrap this up.

MR. SCHWARTZ: Okay. I'll be very quick,

Your Honor. Defendant -- it's crucial that we just quickly look at the documents because defendants have now had (indiscernible) in their brief and at this hearing to actually go through the substance of the BLDG memo and they haven't done it. That's because it repeatedly discusses and exclusively discusses violations, breach of the fiduciary duty by Newell.

And I'll make this very, very simple, Your Honor. If you just go to Exhibit E to my declaration, just look at the introduction, the first paragraph of that memo.

It says quote, "We believe the members of the board of directors of Jarden have breached their fiduciary duty by agreeing to sell the company to Newell Rubbermaid for unfairly low price in order to provide those most senior officers and directors enormous personal profit.

If you walk through this memo, every single paragraph is focused but these -- those fiduciary duties, breach of a fiduciary duty by Jarden, by Jarden's board and it says nothing about Newell, Newell's core sales, Newell's personnel and this is all confirmed again, they make it very simple.

If you go to the -- to the conclusion on page five of the memo it's under the headline,

"Recommendation." It states, "Based on the foregoing, there is a significant basis to believe that Jarden's proposed merger with Newell was the product of significant breaches of fiduciary duty of Jarden's directors."

Then a little bit further down it discusses a case called Corwin versus KKR and it gives a Delaware cite, 125 A. 3d. 304, (indiscernible). And the whole point of this citation is that it talks about the rules that are necessary in Delaware to quote, "bring the fiduciary duty claim."

So, there is no question that this memo has nothing to do with the claims at issue here. The one paragraph that defendant focused on is on page four of the memo and it's the second to last paragraph from the bottom, the paragraph that begins, "The company is proxy filing," and this paragraph discusses conflict between various drawing board members.

As the defendants acknowledge, even this paragraph is based on publicly available information. The paragraph simply says that whereas -- that these conflicts, these apparent conflicts may not have been disclosed.

That's the entire basis of defendant's argument that this memo is discussing potentially

false claims regarding Newell. The paragraph has nothing to do with that.

It again, it's talking about Jarden's executives and breach of the fiduciary duty and conflict. There is simply no way to get from this argument in this paragraph -- in this memorandum to the idea that there was anything to do with the case at issue here.

And again, very quickly, Your Honor, but if you go to the cover email from this memorandum that defendant mentioned a moment ago, this would be H, the first page of the document and defendants mentioned how at the top of the email chain there's an April 12, 2016 email from a gentleman named Mark Edwards.

THE COURT: You're getting into minutia that I don't need at this point, Mr. Schwartz.

MR. SCHWARTZ: Okay. I apologize, Your Honor.

THE COURT: All right.

MR. SCHWARTZ: I can keep on going. We also know that it's the same -- that this is the exact same argument, the breach of fiduciary duty claims that were in the Jarden lawsuit that defendants attach to their motion to dismiss.

Also, for all of the reasons, they've got

this publicly available, it's not (indiscernible). It cannot possibly be a different classification. And lastly, I hear that because we talked about this in the memorandum it will consume litigation in reading to this.

We talked about a memorandum, that was the issue. I apologize.

THE COURT: Sir, you're being repetitive. Come now.

MR. SCHWARTZ: Okay.

THE COURT: All right. I've read the papers obviously and I appreciate the fact that both of you saw fit to address the notion that the securities exchange SEC claims can and should be considered as class action.

That was very nice as far as background goes but this Court and many, many others that have handled class action cases in this type of factual scenario and I agree with the defendant that that doesn't mean that just because it is a statutory strict liability claim that it doesn't have to meet the criteria that any class action case would.

So that bears mentioning. The Court is persuaded that the Court is persuaded that the four prongs of R. 4:23-1(a) on that specifically

numerosity, commonality, specificality and adequacy, this was appropriately addressed in the papers and thankfully not a lot of time was spent on it today in oral argument but I will say that the numerosity is clearly met by the fact that there are 200 plus million shares issued as a result of this acquisition transaction.

The named plaintiff has I think about 35,000 shares. It doesn't mean that the -- all the other shares are individual shareholders, but there's enough -- enough people to satisfy that prong as well as the reasoning in Strogo versus Ocean Shore Holding Company 457 N.J. Super 138 a 2017 Appellate Division case.

As for commonality, I'm satisfied that this has been met. If the crest is defined as the defendant suggested which has now been clarified, there would be an issue with this prong, but based on the reply brief and the representation I extracted from Mr. Schwartz today this is no longer an issue.

The alleged misleading statements and fraudulent statements or omissions would be the same for all this class of investors as it has been refined.

Specificality and adequacy also favor the moving party in this case referring to the Laufer case

often cited. I'll omit the citation at this point. Specificality requirement is not that demanding and simply requires that the class -- the claims for the class representative be typical to the claims of the entire class.

Again, with the clarified definition of this class, that is not an issue as far as I can see. There is a -- that refers to counsel and I only go there, that's not an issue in this case.

So, we turn now to the predominance issue which has to be considered under R. 4:23-1(d) again, with the limited class definition that we've clarified, I am confident that the claims of the class will predominate over the individual issues; specifically this statute of limitation and whether or not it's quote, unquote, unique in this case.

If everybody acquired their stock everyone in this class acquired their stock as a result of the merger then they are subject to the same statute of limitations argument.

The Exhibit E and I'm glad you made specific reference, both of you, to your attachments because that's what held up the oral argument of this motion was my inability to obtain them.

So, I have them. I have the binder. I have

the -- I have it in email form and I thank you for that. I would have hated to consider this and not have any specific reference made to those exhibits.

But let's turn to Exhibit E. I believe that yes, obviously, it's internal non-public document, but the subject matter it discusses all is generated and emanates from publicly available information.

So, I'm unimpressed with the uniqueness argument and I would also point out that as Ms. Rezek aptly did, there's one standard for a motion to dismiss and really the limit on my decision regarding the statute of limitations issue was it can't be resolved at the pleading stage, you need discovery.

Well, discovery is cement. The standard for a class certification motion like this is the rules which I specifically referenced and the cases that interpret those rules.

Let's not conflate a potential summary judgment motion on the issue of statute of limitation which I have to think when you conclude discovery it's probably still forthcoming.

So, for these reasons in sum, I find that the initial four prongs of the rule are fairly easily met here and that the predominance issue based on what I've heard during oral argument and the narrow

interpretation of definition of the class is also satisfied.

For those reasons, I'm granting the motion and I bid you good luck with the continued conduct of your discovery. I will review the proposed order and make any revisions or notations based on the ruling from the bench.

Thank you, everyone. You may all hang up. I'm going to stay on the record with the court clerk because we are ready to begin our next motion.

So, everyone related to Oklahoma Firefighters Pension case can leave the call.

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CERTIFICATION

I, LAUREN A. VOLLMIN, the assigned transcriber, do hereby certify the foregoing transcript of proceedings digitally recorded, Index Number 10:01:09 to 10:53:09 is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

Lauren Vollmin

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LAUREN A. VOLLMIN AD/T #469
G&L TRANSCRIPTION OF NJ Date: September 1, 2020