SUPERIOR COURT OF NEW JERSEY

HUDSON VICINAGE

CHAMBERS OF
MARY K. COSTELLO
JUDGE

WILLIAM J. BRENNAN COURTHOUSE
583 Newark Avenue
Jersey City, New Jersey 07306

FILED
NOV 01 2019
MARY K. COSTELLO, J.S.C.

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE COMMITTEE ON OPINIONS

OKLAHOMA FIREFIGHTERS PENSION AND RETIRMEENT SYSTEM, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

vs.

NEWELL BRANDS, INC., MICHAEL B. POLK, JOHN K. STIPANCICH, SCOTT H. GARBER, BRADFORD R. TURNER, MICHAEL T. COWHIG, THOMAS E. CLARKE, KEVIN C. CONROY, SCOTT S. COWEN DOMENICO DE SOLE, CYNTHIAS A. MONTGOMERY, CHRISTOPHER D. O'LEARY, JOSE IGNACIO PEREZ-LIZAUR, STEVEN J. STROBEL, MICHAEL A. TODMAN, RAYMOND G. VIAULT,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : HUDSON COUNTY

DOCKET NO.: HUD-L-3492-18

Civil Action

MEMORANDUM DECISION

Decided: November 1, 2019

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For Defendants

MARY K. COSTELLO, J.S.C.

FACTS AND PROCEDURAL HISTORY

This matter arises out of a business dispute between the parties centering around a merger of Newell Brands, Inc. and Jarden Corporation. Newell Brands, Inc. and Jarden Corporation announced their intent to merge in December 2015. In March 2016 they issued a joint Registration Statement and Prospectus (the "Offering Materials") under which Jarden shareholders would receive Newell stock and cash when the merger closed in April 2016. Jarden shareholders filed class 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 the Materials were false and misleading. Movants allege these challenges should be dismissed due to the claims being barred under the one year statute of limitations applicable to these claims; Plaintiff has not shown it has standing because it does not allege facts that it acquired stock traceable to the relevant offering or directly from Defendants; and none of the statements that Plaintiff

challenges are legally actionable, because they are protected "forward-looking" statements immune from liability, and because Plaintiff has not adequately alleged that they are materially false or misleading.

Newell, headquartered in Hoboken, NJ, is a major provider of consumer and commercial products under brands like Rubbermaid, Crock-Pot, and Elmer's Glue. Jarden was a similarly successful consumer products company of comparable size to Newell. On 12/14/15 Newell announced it planned to acquire Jarden, creating a $16 billion consumer goods company. Jarden shareholders would receive .862 shares of Newell common stock plus $21 in cash for each share of Jarden common stock, which at the time equaled about $60 per share. Defendants filed the Offering Materials with the U.S. Security Exchange Commission 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 the finalized version on 3/17/16 and the following day, 3/18/16, the SEC declared Newell's Registration Statement effective and Defendants filed a final Prospectus for the issued shares.

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

also enumerated the risk factors. Among the risks disclosed, Newell warned it "may be unable to successfully integrate the businesses of Newell … and Jarden successfully or realize the anticipated benefits of the merger transactions" because of "difficulty addressing possible differences in corporate cultures, management philosophies and the business models of the two companies …" The Offering Materials also incorporated other documents Newell had filed with the SEC such as its 2015 Form 10-K which warned investors, among other things, that the Company was "subject to risks related to its dependence on the strength of retail, commercial and industrial sectors of the economy," that it is subject to "intense competition" that "results in downward pricing pressures" and that a "loss of, or failure by, one of the Company's large customers could adversely impact the Company's sales and operating cash flows."

Shareholders filed class action suits challenging the Offering Materials shortly after the draft of the Registration Statement was filed in January 2016. The lawsuits were filed in February 2016 in the U.S. District Court for the Southern District of Florida and in March 2016 in the Circuit Court for Palm Beach County, Florida. They allege that defendants disseminated a materially false and misleading Registration Statement. Newell and Jarden issued the amended Registration Statement in March 2016 which contained supplemental disclosures

like the potential for difficulty integrating. The merger was completed on 4/15/16.

Following the merger, the newly-combined company performed above expectations in the second quarter of 2016. However, Newell still reported declining core sales growth throughout 2016. Analysts were cautious about the future performance of the combined company, telling investors in 2016, among other things:

- "core sales growth will likely slow in 2H, as legacy NWL faces tougher comps and Jarden business exists will begin to pressure the top-line."
- "Q117 will face significant headwinds from higher interest expense and share count, plus the seasonality of Jarden earnings."
- "Results posted by NWL in 3Q16 were mostly lackluster … core sales came in weaker than expected."
- "NWL shares are -10% since the election … stemming from … fallout from an unexpectedly weak top-line print in Q3."
- There were risks associated with the Jarden integration.

In the first two quarters of 2017, Newell's core sales growth remained at 2.5%, significant decline from the prior year. In September 2017 Newell announced that due to a resin shortage caused by Hurricane Harvey, the Company would cut its 2017 earnings-per-share ("EPS") guidance from $3-$3.20 to $2.95-

$3.05. The price of Newell shares dropped following this announcement. Newell's stock prices dropped again after a weak third and fourth quarter. A federal class action lawsuit was filed in the District Court of New Jersey in June 2018 alleging that Newell and its executives defrauded a class of stock purchasers between 2/6/17 and 1/24/18 by knowingly issuing misleading financial guidance. "The alleged omissions overlap with this case in that the plaintiffs there alleged that Newell misrepresented its ability to successfully integrate Jarden, and those integration issues negatively affected performance."

On 9/6/18 Plaintiff filed this suit alleging the Offering Materials were materially false and misleading because, first, Plaintiff alleged that Defendants should have disclosed that "Newell was completely unprepared to successfully integrate Jarden" and second, Plaintiff alleged Newell touted its core sales growth but "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."

CONTENTIONS OF THE PARTIES

In the original motion, returnable July 12, 2019, Movants argued that Plaintiff's allegations must satisfy federal pleading standards because there are federal causes of action. In federal court a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). This requires plaintiff to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" requiring "more than a sheer possibility that a defendant has acted unlawfully." Id. at 678.

Section 11 of the Securities Act allows recovery by acquirers of securities where "a registration statement, as of its effective date: (1) contained an untrue statement of material fact; (2) omitted to state a material fact required to be stated therein; or (3) omitted to state a material fact necessary to make the statements therein not misleading." In Re Suprema Specialties, Inc. Sec. Litig., 438 F.3d 256, 269 (3d Cir. 2006). "Section 12(a)(2) provides for civil liability for anyone who offers or sells a security 'by means of a prospectus or oral communication, which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading…'" Id.

A. Plaintiff's claims are time-barred.

Section 11 and 12(a)(2) claims must be brought "within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m. A Securities Act "claim accrues '(1) when the plaintiff did in fact discover, or (2) when a reasonably diligent plaintiff would have discovered, the facts constituting the violation - whichever comes first.'" Pension Trust Fund for Operating Eng'rs v. Mortg. Asset Securitization Transactions, Inc., 730 F.3d 263, 268 (3d Cir. 2013). A plaintiff is put on inquiry notice when a "reasonable investor of ordinary intelligence would have discovered the information and recognized it as a storm warning." DeBenedictis v. Merrill Lynch & Co., Inc., 492 F.3d 209, 216 (3d Cir. 2007). Storm warnings can include:

> [1] substantial conflicts between oral representations of the brokers and the text of the prospectus, … [2] the accumulation of information over a period of time that conflicts with representations that were made when the securities were originally purchased, or [3] any financial, legal or other data that would alert a reasonable person to the probability that misleading statements or significant omissions had been made. In Re NAHC, Inc. Sec. Litig., 306 F.3d at 1314.

The "level of specificity of the information about a fact that is available to a reasonably diligent plaintiff" will impact the determination of the point at which "a reasonably diligent plaintiff would have discovered the facts constituting the violation." Pension Trust, 730 F.3d at 275. The suit here was filed on 9/6/18 so if a diligent plaintiff would have discovered the basis for Plaintiff's claims prior to 9/6/17 those claims are now time-barred. The basis for Plaintiff's Sec. 11 and 12 claims is that the Offering Materials were false and misleading, the same allegations made over 2 years before by other Jarden shareholders. The February and March 2016 suits alleged defendants disseminated a false and misleading Registration Statement, the same one Plaintiff here claims was false and misleading. Furthermore, the publicly available complaints in those cases highlighted one of the same issues - the potential for integration issues. Both complaints detailed the differences in the companies' business models. As a result of that litigation Newell and Jarden agreed to issue supplemental disclosures addressing the issues raised by plaintiffs. Among those disclosures were clear warnings that integrating 2 companies may be impacted by difficulty addressing possible differences in the business models of both. "A reasonably diligent plaintiff would undertake an investigation based on", among other things, "the filing of related lawsuits."

Pension Trust, 730 F.3d at 277-78. "these lawsuits undoubtedly served a 'storm warnings'" and plaintiff would have been on at least inquiry notice of its integration-related claims as early as February 2016.

Even if those lawsuits weren't "storm warnings" Plaintiff had further notice via the analysts' reports issued in 2016, many which Plaintiff cites in the Amended Complaint. In its July 29, October 30, and December 20, 2016 reports Wells Fargo highlights the risks associated with investing in Newell including integration risks. The Third Circuit has held analyst reports like these are "storm warnings." Pension Trust, 730 F.3d at 277-78. Also, the fat that Newell used customer incentives like discounts and the cost of discounts was increasing were well known to the market prior to September 2017, which Plaintiff acknowledged in its Amended Complaint.

Plaintiff alleges Newell failed to disclose its declining core sales growth but there were a number of storm warnings known to the market prior to September 2017, many cited by Plaintiff in its Amended Complaint. For example - Plaintiff alleges a "a particularly important customer for Newell's writing segment" was experiencing problems "in early 2016." Plaintiff also alleges Newell's reported core sales growth was "slowing" as of 3/31/16 and that by October 2016 analysts were

already "characterizing Newell's core sales growth for the third quarter [of 2016] as 'lackluster.'" Also, Newell disclosed its core sales growth every quarter, thus the market was aware that it had declined through 2016 and remained constant in the first half of 2017. Investors are presumed to have reads prospectuses, quarterly reports, and other information relating to their investments, and as such, a reasonably diligent plaintiff would have been aware that "Newell was in the midst of a dramatic decline in core sales growth" well over a year before Plaintiff filed this case.

B. Plaintiff has not adequately alleged statutory standing to pursue its claims.

To have standing under Section 11 Plaintiff must show it acquired "shares in the offering for the registration statement" or, if it purchased shares in the aftermarket, that it "can trace [those] shares back to the relevant offering." In Re Century Aluminum Co. Sec. Litig, 729 F.3d 1104, 1106 (9th Cir. 2013). Plaintiff here asserts that Newell issued shares of its common stock directly to former shareholders of Jarden common stock. Nowhere does Plaintiff allege that it was one of these former Jarden shareholders or provide any details of its share acquisition or ownership. Plaintiff only provides the conclusory allegation that it "acquired Newell shares pursuant to the Registration Statement" which is insufficient to plead standing.

In In Re Cendant Corp. Litigation the court determined the plaintiff class had adequately pled Section 11 standing where they exchanged their stock of the company being acquired for stock in the combined company in connection with a merger. 60 F. Supp. 2d 354, 364-66 (D.N.J. 1999). In Cendant, unlike here, the plaintiff included extensive details about their ownership prior to the merger and after the merger in the complaint.

Section 12(a)(2) also requires Plaintiff to allege that it acquired a security, although for this claim it must have been acquired "directly from the defendants" by means of a prospectus. See Freidus v. Barclays Bank PLC, 734 F.3D 132, 141 (2d Cir. 2013).

C. The PSLRA Safe Harbor and the Bespeaks-Caution Doctrine Protect the Challenged Statements.

Under the PSLRA safe harbor, claims based on forward-looking statements are barred if the statement is: (1) identified as such and accompanied by meaningful cautionary language; (2) immaterial; or (3) not made with actual knowledge of its falsity. 15 U.S.C § 77z-2(c). The safe harbor is to be considered at the motion to dismiss stage. 15 U.S.C § 77z-2(e). all but one of the statements Plaintiff challenges in the Amended Complaint are forward-looking statements that fall within the protection of the safe harbor.

The PSLRA defines forward-looking statements to include, among other things, "a projection of revenues, income …, earnings … per share, capital expenditures, dividends," "plans and objectives of management for future operations," "future economic performance," or "assumptions underlying" any of the above. 15 U.S.C. § 77z-2(i)(1). Here, the majority of the challenged statements "are no more than optimistic projections about how Newell will perform in the future as a result of the combination with Jarden." Plaintiff also challenges a statement regarding Newell's expected "future economic performance," namely its anticipated future core sales growth.

Defendants' forward-looking statements were identified as such and accompanied by meaningful cautionary language. The documents incorporated into the Registration Statement also contained such language. The Offering Materials included an extensive discussion of risk factors. It first escribed the uncertainties and risks associated with the transaction that were considered by Newell's Board of Directors and then went on to provide extensive risk disclosures related to the transaction and integration of the businesses. With respect to anticipated core sales growth, the Company incorporated by reference Risk Factors listed in Newell's 2015 Form 10-K on file with the SEC which warned investors of specific risks and uncertainties which could cause actual results to differ materially.

Even if the challenged forward-looking statements were not protected under the safe harbor's first prong, they are nevertheless immaterial as a matter of law and thus protected under the second prong 15 U.S.C. § 77z-2(c)(1)(A)(ii). "The challenged forward-looking statements amount to nothing more than nonactionable opinions and immaterial 'puffery.'" For example, Plaintiff challenges statements describing the Company's belief that Newell's and Jarden's product portfolios were "complementary" and "would enable the acceleration of existing business plans and potential growth in its current business" that "cost savings and higher sales volumes resulting from the merger transactions will further strengthen and enhance the ability of the [the Company] to invest in innovation", that the Company's "operating model is working" and that it anticipates "strong core sales and earnings growth." These are 'the kind of common and vague statements rightly dismissed as immaterial corporate puffery." See In Re Newell Rubbermaid Inc. Sec. Litig., No, 99 C 6853, 2000 WL 1705279, at *7 (N.D. Ill. Nov. 14, 2000).

The challenged statements also communicate opinions, not facts. To determine if an opinion statement is actionable the court must analyze "whether an opinion itself constitutes a factual misstatement," and "when an opinion may be rendered misleading by the omission of discrete factual representations."

Omnicare, Inc. v. Laborers Dist. Council Constr. Ind. Pension Fund, 135 S. Ct. 1318, 1325 (2015). "Plaintiff must plead that each challenged opinion statement would mislead a reasonable investor by implying to it some factual basis for the opinion that does not actually exist." "Whether an omission makes an expression of opinion misleading always depends on context," and a reasonable investor would understand each statement "in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information." Id. at 1330. Here, the Offering Materials explicitly warned that Defendants' optimistic beliefs post-merger might be dashed by a number of risk factors.

Plaintiff also has failed to plead that Defendants had any actual knowledge that any of the forward-looking statements were false when made. Because the challenged statements are protected under the first and second prong of the safe harbor, as stated above, the Court does not need to consider Defendants' state of mind with respect to them as the statements are shielded from liability. Nevertheless, Plaintiff has also failed to plead any actual knowledge that the forward-looking statements were false when made. Only alleging that the statements lacked a reasonable basis will not suffice. Firefighters Pension & Relief Fund of the City of New Orleans v. Bulmahn, 53 F. Supp. 3d 882, 911 (E.D. La. 2014).

The challenged statements are also protected by the common law bespeaks-caution doctrine. See In re Adams Golf, Inc. Sec. Litig., 381 F.3d 267, 279 (3d Cir. 2004). Under this doctrine, meaningful cautionary statements can render an alleged omission or misrepresentation of forward-looking statements immaterial as a matter of law. See id. each challenged statement in this case was accompanied by meaningful cautionary language related to the potential risks with integration, expected cost savings, and future revenues related to the merger. Given these explicit warnings, a reasonable investor would not have assigned the requisite importance to these forward-looking statements.

D. Plaintiff has not adequately alleged falsity.

Plaintiff has failed to allege facts showing Defendants made any false or misleading statements. Rather, it alleges the challenged statements were misleading by omission because (1) Defendants made positive statements about Newell's ability to integrate Harden and create synergies and cost savings but failed to disclose that Newell was completely unprepared to successfully integrate Jarden; and (2) defendants made positive remarks about Newell's core sales growth but "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…"

However, the Securities Act "affords a cause of action only when an issuer's failure to include a material fact has rendered a published statement misleading." Omnicare, 135 S. Ct. at 1332. Plaintiff must, at a minimum plead facts to show that allegedly omitted facts both existed and were known or knowable at the time of the offering. Castlerock Mgmt. Ltd. V. Ultralife Batteries, Inc., 114 F. Supp. 2d 316, 323 (D.N.J. 2000). Plaintiff fails to demonstrate any facts known or knowable related to Newell's ability to integrate at the time the Offering Materials were issued. Defendants disclosed all that was known or knowable at that time - that there was a potential for integration issues and some of the potential factors that could impact integration. Same applies when it comes to Newell's core sales growth and discount practices. The Company warned investors that its future financial results could be impacted by several factors. Newell also disclosed its core sales growth every quarter as that information became available.

E. Plaintiff fails to adequately allege a violation of item 303.

Under Item 303, offering materials should "[d]escribe any known trends or uncertainties that … the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17

C.F.R. § 229.303(a)(3)(ii). Under Item 303, only trends that are known when the company files the report must be disclosed, it is not enough for a plaintiff to allege a company should have known of the existing trend, event, or uncertainty. Ind. Pub. Ret. Sys. V. SAIC, Inc., 818 F. Supp. 2d 480, 488 (D.N.J. 1999). Plaintiff has failed to plead the existence of any trends known to management at the time the Offering Materials were issued that were not disclosed.

Plaintiff argued the following points in opposition:

A. New Jersey's Notice Pleading Standard Applies and Is Readily Satisfied Here.

Contrary to Defendants' assertion, and as the New Jersey Supreme Court has held, if federal claims are brought in state court, "state rules of procedure and practice ordinarily control how the claims are processed." Maisonet v. N.J. Dep't of Human Servs., Div. of Family Dev., 140 N.J. 214, 221 (1995). The U.S. Supreme Court has affirmed that state court rules of judicial procedure apply in state court actions regardless of whether the claims at issue are federal. Howlett v. Rose, 496 U.S. 356, 372 (1990).

B. The Complaint Adequately Alleges Standing.

Plaintiff need only allege that it acquired the security "pursuant to a false or misleading registration statement." Shapiro v. UJB Fin. Corp., 964 F.2d 272, 286 (3d Cir. 1992).

Plaintiff is an institutional shareholder that was a Jarden stockholder at the time of the Acquisition and who received over 35,000 shares of Newell stock in the Acquisition, pursuant to the false and misleading Registration Statement issued in connection with the Acquisition. In Shapiro, the Third Circuit upheld plaintiffs' §11 standing, because plaintiffs alleged they had purchased shares "pursuant to" the registration statement and discovery could have revealed that the shares were directly purchased. Shapiro, 964 F.2d at 286. In Gargiulo v. Isolagen, Inc., 527 F. Supp. 2d 384, 392 (E.D. Pa. 2007) the Court similarly found that the plaintiffs had adequately pled §11 standing by alleging that they purchased stock "in, or traceable to" the relevant offering. Plaintiff pled that it acquired Newell stock "pursuant to" the misleading registration statement. This is all that was required to allege standing. As in Shapiro, Plaintiff alleged it purchased shares "pursuant to" the Registration Statement issued in connection with the Acquisition.

Defendants cited In re Ariad Pharm., Inc. Sec. Litig., 842F.3d 744, 755-56 (1st Cir. 2016) to suggest that Plaintiff's allegation of purchasing "pursuant to the Registration Statement" is insufficient because Plaintiff supposedly must plead more specific facts. However, in Ariad, the plaintiffs had conceded that they purchased their shares on the aftermarket,

rather than directly from the issuer pursuant to the relevant offering. Because the defendant corporation had issued shares in connection with more than one offering, the plaintiffs therefore had to plead specific facts suggesting that "their shares, although purchased in the aftermarket, can be traced back" to the relevant offering. Id. at 756.

Second, Defendants cited In re Cendant Corp. Litig., 60 F. Supp. 2d 354, 364-66 (D.N.J. 1999) for the proposition that Plaintiff supposedly needs to provide details of their ownership of Jarden stock prior to the Acquisition and of Newell stock after the Acquisition. However, Cendant did not condition the plaintiffs' §11 standing on plaintiffs' provision of details. Rather, Cendant reiterated the holding of Shapiro, which held that alleging a purchase of shares "pursuant to" a Registration Statement was sufficient. Id.

For standing under §12, Plaintiff must plead that it purchased a security from "a person who 'offers or sells' securities by means of a prospectus or oral communication that misrepresents or omits material facts." Shapiro, 964 F.2d at 286. Plaintiff must have directly purchased shares from Newell, which it did. Here, Plaintiff not only alleged purchase "pursuant to" the Registration Statement, but also purchase from Defendants "by means of the Prospectus."

C. Plaintiff Timely Filed the Complaint.

Under the Securities Act, Plaintiffs may bring §11 and §12(a)(2) claims within one year of the discovery of the untrue statement or omission. 15 U.S.C. §77m. "[T]he running of the statute of limitations is an affirmative defense[.]" Dynasty Bldg. Corp. v. Ackerman, 376 N.J. Super. 280, 286 (App. Div. 2005). The statute of limitations only "may be asserted as a 'failure (of the complaint) to state a claim upon which relief can be granted'" pursuant to Rule 4:6-2(e) where "the bar of the statute of limitations appears on the face of the complaint[.]" Prickett v. Allard, 126 N.J. Super. 438, 440 (App. Div. 1974).

On its face the Complaint pleads that Newell showed some signs for concern regarding the integration and core sales beginning on September 6, 2017, and only revealed the nature and extent of its weakness through its disclosures in November 2017 and January 2018. "Plaintiff filed its initial Complaint on September 5, 2018, less than one year before the beginning of the disclosure of the truth."

"Although Defendants claim that the statute of limitations bars this lawsuit, the only events they identify prior to September 6, 2017, were in Defendants' own terms no more than 'storm warnings.'" However, those reasons given by Defendants in fact did not arise to "storm warnings." Even if storm warnings are established, as the Supreme Court made clear in Merck, 559 U.S. at 653, they are only "useful to the extent that they

identify a time when the facts would have prompted a reasonably diligent plaintiff to begin investigating." However, "the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered 'the facts constituting the violation.'" Id. In other words, storm warnings are only the beginning of the investigation for the reasonably diligent plaintiff. Defendants must establish not only the existence of storm warnings, but also establish that a reasonably diligent plaintiff who began investigating at the time of the storm warnings would have discovered the violation, which defendants do not even attempt to do.

In Pension Trust, the Third Circuit's finding that defendant had established storm warnings was the beginning of the Circuit's analysis, not the end. The next step was to determine whether a reasonably diligent plaintiff would have discovered the violation more than one year before the complaint was filed. Pension Trust, 730 F.3d at 278. The Third Circuit held that §§11 and 12 plaintiffs in Pension Trust Fund had the "storm warning" of a prior lawsuit bringing "substantially similar" §§11 and 12 claims. Id. at 277-78. Accordingly, the Third Circuit had to determine how much time it would have taken the plaintiffs to discover the untrue statements and omissions if they had begun their investigation when the prior lawsuit was brought. Id. at

278-79. Here, Defendants make no argument about how long it should have taken Plaintiff to discover the facts underlying the violation after being alerted to the purported "storm warnings." "Moreover, as pled, the true extent of Newell's problems only began to emerge on September 6, 2017 and new information regarding these problems continued to be disclosed well into 2018 and even 2019."

Furthermore, the events Defendants described, are not "storm warnings." A "storm warning" must provide "sufficient information of possible wrongdoing" to suggest "culpable activity under the securities laws." In re Merck & Co., Inc. Sec., Deriv. & "ERISA" Litig., 543 F.3d 150, 164, 171 (3d Cir. 2008). "[T]he triggering data" must "'relate[] directly to the misrepresentations and omissions' alleged." Id. at 165. The prior lawsuits are not storm warnings because they involved different parties, factual allegations, and legal claims. In contrast to this Action, the two lawsuits cited by Defendants were filed to challenge the merger of Jarden and Newell on the basis that Jarden was being undervalued. Thus, the parties in this Action and the two merger lawsuits were different. The two merger lawsuits were filed against Jarden's board, Newell, and Newell's subsidiaries created to effect the merger in February and March 2016, before the Acquisition even closed. By contrast, this Action was filed against Newell and only the individuals

who signed the misleading Registration Statement. The merger lawsuits also assert different legal claims. Specifically, the February 2016 lawsuit alleges violations of §§14 and 20(a) of the Securities Exchange Act of 1934. The March 2016 lawsuit asserts common law claims of breach of fiduciary duty and aiding and abetting. By contrast, the Complaint here alleges violations of §11 and §12(a)(2) of the Securities Act. The factual allegations are also different. The February 2016 merger lawsuit alleged that Jarden's Board and Newell concealed the undervaluation of Jarden. The March 2016 merger lawsuit alleged that Jarden's Board breached its fiduciary duties and Newell aided and abetted such breach by undervaluing Jarden as part of a "flawed and self-serving sales process" and failing to disclose material information about that sales process. Meanwhile the Complaint here alleges that, in violation of §11 and §12(a)(2) of the Securities Act, Newell's executives and officers failed to disclose facts regarding Newell's businesses' weaknesses, which, irrespective of the true value of Jarden, made the Newell stock tendered in connection with the Acquisition less valuable than it was represented to be.

"Generally positive analyst reports are not storm warnings." While those analyst reports mentioned "Jarden integration risk" and "concerns about the Jarden integration", they also raised or maintained Newell's high valuation range and reiterated an

"Outperform" rating for Newell. These generally positive reports that simply mention risks do not constitute storm warnings. In In re Merck, 543 F.3d at 165, 169, the Third Circuit held that analyst reports that "continued to maintain strong growth ratings for Vioxx" and also reported as a possibility that Vioxx might increase cardiac risk did not constitute storm warnings that Merck had misrepresented Vioxx's safety. Like in In re Merck, the Newell reports are positive and simply acknowledge risk. After September 6, 2017 when the truth began to emerge, analysts were surprised at Newell's lowered guidance. Wells Fargo lowered its estimates significantly and expressed surprise that Newell could not "offset the unexpected resin headwinds/investments with accelerated cost savings or synergies"—synergies such as those expected to arise out of the Acquisition. Id. Further, they expressed shock when Newell disclosed the extent of its poor performance on November 2, 2017. Wells Fargo took it as a sign of "widespread" problems and a Jefferies analyst questioned whether the poor performance was because of the Acquisition and failure to integrate Jarden. Id.

"Newell's post-Acquisition financial data was not a storm warning of Newell's pre-Acquisition financial prospects." Plaintiff alleged that the statements of core sales growth in the Registration Statement were false and misleading because they "failed to disclose that Newell had hit a wall in its

growth and was in the midst of a long-term decline" hidden by "heavy reliance on discounting practices that temporarily boosted sales at the expense of Newell's bottom line." As alleged in the Amended Complaint, the impact of the Acquisition masked the significance of the core sales growth decline and the discounting. As such, an analyst at Wells Fargo admitted it had "limited visibility into near-term core sales growth" even after the decline began. Therefore, the core sales growth data following the Acquisition could be dismissed as the temporary result of the Acquisition itself and the "limited visibility" caused by such a large merger. In subsequent quarters, analysts continued to rate Newell's prospects very highly and predict high performance despite core sales decline. In direct contrast, after September 6, 2017, not only did analysts revise their evaluations of Newell significantly and express great shock at the results, but the market itself reacted negatively—particularly on November 2, 2017 and January 25, 2018, with price drops of 25% and 22% respectively.

Newell continued to make reassuring statements when it released its results for 2016 and the first half of 2017. As the District of New Jersey held in California Public Employees' Ret. Sys. v. Chubb Corp., the release of negative numbers or figures are not storm warnings when "nearly every negative figure or statement which could be perceived as a 'storm warning' was

followed by a positive outlook" on the success of the venture that plaintiff accuses defendants of misrepresenting. Civ. No. 00-4285, 2002 WL 33934282, at *26 (D.N.J. June 26, 2002).

D. The Complaint Adequately Pleads Violations of §§11 and 12(a)(2) of the Securities Act.

Section 11 of the Securities Act provides, "In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . [may] sue." 15 U.S.C. §77k(a). SEC regulation, Item 303 of Regulation S-K, requires the disclosure of "trends or uncertainties . . . that the registrant reasonably expects will have a material . . . unfavorable impact on . . . revenues or income from continuing operations." Litwin v. Blackstone Grp., L.P., 634 F.3d 706, 716 (2d Cir. 2011).

"A plaintiff need not plead fraud, reliance, motive, intent, knowledge or scienter under Section 11." In re MobileMedia Sec. Litig., 28 F.Supp.2d 901, 923. Thus, to establish a claim under Section 11, "[a] plaintiff need only plead a material misstatement or omission in the registration statement." Fresno Cty. Emps.' Ret. Ass'n v. comScore, Inc., 268 F. Supp. 3d 526, 557 (S.D.N.Y. 2017). Section 12(a)(2) of the Securities Act provides for liability against "[a]ny person who

. . . offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading[.]" 15 U.S.C. §77l(a). The person who offers or sells has the burden of proof that "he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission." Id.

"The Registration Statement contains two categories of materially false and misleading statements and omissions. First, it touted Newell's integration with Jarden, without disclosing that, at the time of the Acquisition, Newell lacked the resources, know-how and managers to effectively manage Jarden and achieve the predicted synergies that were a major rationale for the merger." Plaintiff properly alleged that these statements were materially false and misleading because, at the time they were made, Newell utterly lacked the management capacity and resources to integrate Jarden.

The second category of actionable misstatements and omissions involve Newell's core sales and positioning for growth at the time of the Acquisition. Defendants failed to disclose that Newell had hit a wall in its growth and was in the midst of a long-term decline, including a decline in core sales growth

that had already begun, but was not disclosed, at the time the Registration Statement was issued.

"The materially misleading statements and omissions alleged by Plaintiff were present statements and omissions, not forward looking." Defendants' sole argument for why the challenged statements are forward-looking is that they refer to predictions and expectations for the future. However, the challenged statements are alleged to be misleading on the basis of omitted present facts. In re MobileMedia Sec. Litig., 28 F. Supp. 2d 901, 930 (D.N.J. 1998). The omissions were of material information regarding the company's inability to integrate its new acquisition. Id. at 927-30. This parallel's Newell's statements and omissions here. In In re Enzymotec Sec. Litig., Civ. A. No. 14-5556, 2015 WL 8784065, at *12-13 (D.N.J. Dec. 15, 2015), statements and omissions regarding the viability of the company's Chinese business and the company's expectation of attracting new customers were not entitled to the safe harbor because plaintiffs alleged omissions of present facts about the Chinese market.

In order to dismiss Plaintiff's claim as based upon immaterial omissions, Defendants must meet the heavy burden of showing that the challenged omissions "are so obviously unimportant to an investor that reasonable minds could not differ on the question of materiality." In re Aetna, Inc. Sec.

Litig., 34 F. Supp. 2d 935, 945 (E.D. Pa. 1999). Defendants claim their misrepresentations are immaterial because they constitute inactionable puffery and opinion statements. MTD at 23-26. However, misstatements and omissions regarding the success and prospects of an integration have been considered material. Further, statements that might be considered "opinion" can be actionable if they "mislead[] investors by saying one thing and holding back another." Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1331 (2015). For example, in Aetna, 34 F. Supp. 2d at 944-45, statements touting the "rapid and successful integration of the health business and creating a winning strategy for the health business going forward" and stating that the integration was "on track" to meet goals set forth in the proxy materials could not be dismissed as immaterial because the plaintiffs had alleged that "the integration was rife with serious problems" omitted by the defendants. Likewise, Defendants here touted the integration's effects and omitted that Newell was unable to achieve those effects.

Moreover, in MobileMedia, the District of New Jersey held that a statement promising the success of an acquisition was material, holding that, "The statement "MobileMedia believes the MobileComm acquisition will enhance its competitive position" is not a general, non-specific statement. This statement

specifically draws a link between future success and the acquisition of MobileComm. This is not the type of statement that has been found to be inactionable puffery." MobileMedia, 28 F. Supp. 2d at 928. This is exactly the kind of statement Plaintiff challenges from Newell regarding its integration of Jarden. Defendants again have the burden of establishing that the omission of the decline in core sales growth and discounting is "so obviously unimportant to an investor that reasonable minds could not differ on the question of materiality." Aetna, 34 F. Supp. 2d at 945. They cannot do so. Omission of information regarding business weaknesses has been found to be material and misleading. Newell omitted any information regarding its decline in core sales growth or its acceleration of discounting practices to push sales at the expense of margins, and was later unable to achieve the promised synergies or meet its guidelines. In Enzymotec, 2015 WL 8784065, at *13-14, glowing statements regarding the defendant's sales (using language such as "strong brand recognition," "continuous growth and interest," "on track," and "good acceptance") could not be found immaterial where plaintiff had alleged that the statements "go to the heart of Enzymotec's financial stability and were made against the backdrop of a general decline in the infant formula industry." Here, Plaintiff has alleged that the omitted

core sales growth decline and the ramping up of discounting practices went to the heart of Newell's growth potential.

"A claim under the Section 11 of the Securities Act imposes strict liability and does not require a plaintiff to prove intent, knowledge or scienter. MobileMedia Sec. Litig., 28 F. Supp. 2d at 923. "A plaintiff need only plead a material misstatement or omission in the registration statement." Fresno, 268 F. Supp. 3d at 557." Additionally, there is a duty to disclose material facts where the failure to include them "render[s] a published statement misleading." Omnicare, 135 S. Ct. at 1332. Here, Plaintiff has alleged omissions of the kind that have been found to make statements like Newell's misleading. Newell's touting of the $500 million in synergies and other benefits from the Acquisition was materially misleading in light of Newell's lack of resources and management capacity to achieve such benefits. Therefore, Newell's statements on that subject triggered a duty to disclose Newell's lack of resources. Similarly, Newell's touting of its history of core sales growth was materially misleading in light of the fact that Newell had already begun a decline in core sales growth, and was moreover temporarily forestalling its business decline by aggressive discounting that hurt margins.

Defendants first argue that Plaintiff fails to identify any integration-related issues that (1) were not warned of in risk

disclosures and (2) materialized later. However, Plaintiff specifically argued that, at the time of the Acquisition, Newell lacked the resources to integrate Jarden and that this led directly to severe problems causing investor losses.

By way of reply, Defendants asserted that:

A. New Jersey's Notice Pleading Standard Applies and Is Readily Satisfied Here.

Contrary to Defendants' assertion, and as the New Jersey Supreme Court has held, if federal claims are brought in state court, "state rules of procedure and practice ordinarily control how the claims are processed." Maisonet v. N.J. Dep't of Human Servs., Div. of Family Dev., 140 N.J. 214, 221 (1995). The U.S. Supreme Court has affirmed that state court rules of judicial procedure apply in state court actions regardless of whether the claims at issue are federal. Howlett v. Rose, 496 U.S. 356, 372 (1990).

B. The Complaint Adequately Alleges Standing.

Plaintiff need only allege that it acquired the security "pursuant to a false or misleading registration statement." Shapiro v. UJB Fin. Corp., 964 F.2d 272, 286 (3d Cir. 1992). Plaintiff is an institutional shareholder that was a Jarden stockholder at the time of the Acquisition and who received over 35,000 shares of Newell stock in the Acquisition, pursuant to

the false and misleading Registration Statement issued in connection with the Acquisition. In Shapiro, the Third Circuit upheld plaintiffs' §11 standing, because plaintiffs alleged they had purchased shares "pursuant to" the registration statement and discovery could have revealed that the shares were directly purchased. Shapiro, 964 F.2d at 286. In Gargiulo v. Isolagen, Inc., 527 F. Supp. 2d 384, 392 (E.D. Pa. 2007) the Court similarly found that the plaintiffs had adequately pled §11 standing by alleging that they purchased stock "in, or traceable to" the relevant offering. Plaintiff pled that it acquired Newell stock "pursuant to" the misleading registration statement. This is all that was required to allege standing. As in Shapiro, Plaintiff alleged it purchased shares "pursuant to" the Registration Statement issued in connection with the Acquisition.

Defendants cite In re Ariad Pharm., Inc. Sec. Litig., 842F.3d 744, 755-56 (1st Cir. 2016) to suggest that Plaintiff's allegation of purchasing "pursuant to the Registration Statement" is insufficient because Plaintiff supposedly must plead more specific facts. However, however, in Ariad, the plaintiffs had conceded that they purchased their shares on the aftermarket, rather than directly from the issuer pursuant to the relevant offering. Because the defendant corporation had issued shares in connection with more than one offering, the

plaintiffs therefore had to plead specific facts suggesting that "their shares, although purchased in the aftermarket, can be traced back" to the relevant offering. Id. at 756.

Second, Defendants cite In re Cendant Corp. Litig., 60 F. Supp. 2d 354, 364-66 (D.N.J. 1999) for the proposition that Plaintiff supposedly needs to provide details of their ownership of Jarden stock prior to the Acquisition and of Newell stock after the Acquisition. However, Cendant did not condition the plaintiffs' §11 standing on plaintiffs' provision of details. Rather, Cendant reiterated the holding of Shapiro, which held that alleging a purchase of shares "pursuant to" a Registration Statement was sufficient. Id.

For standing under §12, Plaintiff must plead that it purchased a security from "a person who 'offers or sells' securities by means of a prospectus or oral communication that misrepresents or omits material facts." Shapiro, 964 F.2d at 286. Plaintiff must have directly purchased shares from Newell, which it did. Here, Plaintiff not only alleged purchase "pursuant to" the Registration Statement, but also purchase from Defendants "by means of the Prospectus."

C. Plaintiff Timely Filed the Complaint.

Under the Securities Act, Plaintiffs may bring §11 and §12(a)(2) claims within one year of the discovery of the untrue statement or omission. 15 U.S.C. §77m. "[T]he running of the

statute of limitations is an affirmative defense[.]" Dynasty Bldg. Corp. v. Ackerman, 376 N.J. Super. 280, 286 (App. Div. 2005). The statute of limitations only "may be asserted as a 'failure (of the complaint) to state a claim upon which relief can be granted'" pursuant to Rule 4:6-2(e) where "the bar of the statute of limitations appears on the face of the complaint[.]" Prickett v. Allard, 126 N.J. Super. 438, 440 (App. Div. 1974).

Here, on its face the Complaint pleads that Newell showed some signs for concern regarding the integration and core sales beginning on September 6, 2017, and only revealed the nature and extent of its weakness through its disclosures in November 2017 and January 2018. "Plaintiff filed its initial Complaint on September 5, 2018, less than one year before the beginning of the disclosure of the truth."

"Although Defendants claim that the statute of limitations bars this lawsuit, the only events they identify prior to September 6, 2017, were in Defendants' own terms no more than 'storm warnings.'" However, those reasons given by Defendants in fact did not arise to "storm warnings." Even if storm warnings are established, as the Supreme Court made clear in Merck, 559 U.S. at 653, they are only "useful to the extent that they identify a time when the facts would have prompted a reasonably diligent plaintiff to begin investigating." However, "the limitations period does not begin to run until the plaintiff

thereafter discovers or a reasonably diligent plaintiff would have discovered 'the facts constituting the violation.'" Id. In other words, storm warnings are only the beginning of the investigation for the reasonably diligent plaintiff. Defendants must establish not only the existence of storm warnings, but also establish that a reasonably diligent plaintiff who began investigating at the time of the storm warnings would have discovered the violation, which defendants do not even attempt to do.

In Pension Trust, the Third Circuit's finding that defendant had established storm warnings was the beginning of the Circuit's analysis, not the end. The next step was to determine whether a reasonably diligent plaintiff would have discovered the violation more than one year before the complaint was filed. Pension Trust, 730 F.3d at 278. The Third Circuit held that §§11 and 12 plaintiffs in Pension Trust Fund had the "storm warning" of a prior lawsuit bringing "substantially similar" §§11 and 12 claims. Id. at 277-78. Accordingly, the Third Circuit had to determine how much time it would have taken the plaintiffs to discover the untrue statements and omissions if they had begun their investigation when the prior lawsuit was brought. Id. at 278-79. Here, Defendants make no argument about how long it should have taken Plaintiff to discover the facts underlying the violation after being alerted to the purported "storm warnings."

"Moreover, as pled, the true extent of Newell's problems only began to emerge on September 6, 2017 and new information regarding these problems continued to be disclosed well into 2018 and even 2019."

Furthermore, the events Defendants described, are not "storm warnings." A "storm warning" must provide "sufficient information of possible wrongdoing" to suggest "culpable activity under the securities laws." In re Merck & Co., Inc. Sec., Deriv. & "ERISA" Litig., 543 F.3d 150, 164, 171 (3d Cir. 2008). "[T]he triggering data" must "'relate[] directly to the misrepresentations and omissions' alleged." Id. at 165. The prior lawsuits are not storm warnings because they involved different parties, factual allegations, and legal claims. In contrast to this Action, the two lawsuits cited by Defendants were filed to challenge the merger of Jarden and Newell on the basis that Jarden was being undervalued. Thus, the parties in this Action and the two merger lawsuits were different. The two merger lawsuits were filed against Jarden's board, Newell, and Newell's subsidiaries created to effect the merger in February and March 2016, before the Acquisition even closed. By contrast, this Action was filed against Newell and only the individuals who signed the misleading Registration Statement. The merger lawsuits also assert different legal claims. Specifically, the February 2016 lawsuit alleges violations of §§14 and 20(a) of

the Securities Exchange Act of 1934. The March 2016 lawsuit asserts common law claims of breach of fiduciary duty and aiding and abetting. By contrast, the Complaint here alleges violations of §11 and §12(a)(2) of the Securities Act. The factual allegations are also different. The February 2016 merger lawsuit alleged that Jarden's Board and Newell concealed the undervaluation of Jarden. The March 2016 merger lawsuit alleged that Jarden's Board breached its fiduciary duties and Newell aided and abetted such breach by undervaluing Jarden as part of a "flawed and self-serving sales process" and failing to disclose material information about that sales process. Meanwhile the Complaint here alleges that, in violation of §11 and §12(a)(2) of the Securities Act, Newell's executives and officers failed to disclose facts regarding Newell's businesses' weaknesses, which, irrespective of the true value of Jarden, made the Newell stock tendered in connection with the Acquisition less valuable than it was represented to be.

"Generally positive analyst reports are not storm warnings." While those analyst reports mentioned "Jarden integration risk" and "concerns about the Jarden integration", they also raised or maintained Newell's high valuation range and reiterated an "Outperform" rating for Newell. These generally positive reports that simply mention risks do not constitute storm warnings. In In re Merck, 543 F.3d at 165, 169, the Third Circuit held that

analyst reports that "continued to maintain strong growth ratings for Vioxx" and also reported as a possibility that Vioxx might increase cardiac risk did not constitute storm warnings that Merck had misrepresented Vioxx's safety. Like in In re Merck, the Newell reports are positive and simply acknowledge risk. After September 6, 2017 when the truth began to emerge, analysts were surprised at Newell's lowered guidance. Wells Fargo lowered its estimates significantly and expressed surprise that Newell could not "offset the unexpected resin headwinds/investments with accelerated cost savings or synergies"—synergies such as those expected to arise out of the Acquisition. Id. Further, they expressed shock when Newell disclosed the extent of its poor performance on November 2, 2017. Wells Fargo took it as a sign of "widespread" problems and a Jefferies analyst questioned whether the poor performance was because of the Acquisition and failure to integrate Jarden. Id.

"Newell's post-Acquisition financial data was not a storm warning of Newell's pre-Acquisition financial prospects." Plaintiff alleged that the statements of core sales growth in the Registration Statement were false and misleading because they "failed to disclose that Newell had hit a wall in its growth and was in the midst of a long-term decline" hidden by "heavy reliance on discounting practices that temporarily boosted sales at the expense of Newell's bottom line." As

alleged in the Amended Complaint, the impact of the Acquisition masked the significance of the core sales growth decline and the discounting. As such, an analyst at Wells Fargo admitted it had "limited visibility into near-term core sales growth" even after the decline began. Therefore, the core sales growth data following the Acquisition could be dismissed as the temporary result of the Acquisition itself and the "limited visibility" caused by such a large merger. In subsequent quarters, analysts continued to rate Newell's prospects very highly and predict high performance despite core sales decline. In direct contrast, after September 6, 2017, not only did analysts revise their evaluations of Newell significantly and express great shock at the results, but the market itself reacted negatively—particularly on November 2, 2017 and January 25, 2018, with price drops of 25% and 22% respectively.

Newell continued to make reassuring statements when it released its results for 2016 and the first half of 2017. As the District of New Jersey held in California Public Employees' Ret. Sys. v. Chubb Corp., the release of negative numbers or figures are not storm warnings when "nearly every negative figure or statement which could be perceived as a 'storm warning' was followed by a positive outlook" on the success of the venture that plaintiff accuses defendants of misrepresenting. Civ. No. 00-4285, 2002 WL 33934282, at *26 (D.N.J. June 26, 2002).

D. The Complaint Adequately Pleads Violations of §§11 and 12(a)(2) of the Securities Act.

Section 11 of the Securities Act provides, "In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . [may] sue." 15 U.S.C. §77k(a). SEC regulation, Item 303 of Regulation S-K, requires the disclosure of "trends or uncertainties . . . that the registrant reasonably expects will have a material . . . unfavorable impact on . . . revenues or income from continuing operations." Litwin v. Blackstone Grp., L.P., 634 F.3d 706, 716 (2d Cir. 2011).

"A plaintiff need not plead fraud, reliance, motive, intent, knowledge or scienter under Section 11." In re MobileMedia Sec. Litig., 28 F.Supp.2d 901, 923. Thus, to establish a claim under Section 11, "[a] plaintiff need only plead a material misstatement or omission in the registration statement." Fresno Cty. Emps.' Ret. Ass'n v. comScore, Inc., 268 F. Supp. 3d 526, 557 (S.D.N.Y. 2017). Section 12(a)(2) of the Securities Act provides for liability against "[a]ny person who . . . offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in

order to make the statements, in the light of the circumstances under which they were made, not misleading[.]" 15 U.S.C. §77l(a). The person who offers or sells has the burden of proof that "he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission." Id.

"The Registration Statement contains two categories of materially false and misleading statements and omissions. First, it touted Newell's integration with Jarden, without disclosing that, at the time of the Acquisition, Newell lacked the resources, know-how and managers to effectively manage Jarden and achieve the predicted synergies that were a major rationale for the merger." Plaintiff properly alleged that these statements were materially false and misleading because, at the time they were made, Newell utterly lacked the management capacity and resources to integrate Jarden.

The second category of actionable misstatements and omissions involve Newell's core sales and positioning for growth at the time of the Acquisition. Defendants failed to disclose that Newell had hit a wall in its growth and was in the midst of a long-term decline, including a decline in core sales growth that had already begun, but was not disclosed, at the time the Registration Statement was issued.

"The materially misleading statements and omissions alleged by Plaintiff were present statements and omissions, not forward

looking." Defendants' sole argument for why the challenged statements are forward-looking is that they refer to predictions and expectations for the future. However, the challenged statements are alleged to be misleading on the basis of omitted present facts. In re MobileMedia Sec. Litig., 28 F. Supp. 2d 901, 930 (D.N.J. 1998). The omissions were of material information regarding the company's inability to integrate its new acquisition. Id. at 927-30. This parallel's Newell's statements and omissions here. In In re Enzymotec Sec. Litig., Civ. A. No. 14-5556, 2015 WL 8784065, at *12-13 (D.N.J. Dec. 15, 2015), statements and omissions regarding the viability of the company's Chinese business and the company's expectation of attracting new customers were not entitled to the safe harbor because plaintiffs alleged omissions of present facts about the Chinese market.

In order to dismiss Plaintiff's claim as based upon immaterial omissions, Defendants must meet the heavy burden of showing that the challenged omissions "are so obviously unimportant to an investor that reasonable minds could not differ on the question of materiality." In re Aetna, Inc. Sec. Litig., 34 F. Supp. 2d 935, 945 (E.D. Pa. 1999). Defendants claim their misrepresentations are immaterial because they constitute inactionable puffery and opinion statements. MTD at 23-26. However, misstatements and omissions regarding the

success and prospects of an integration have been considered material. Further, statements that might be considered "opinion" can be actionable if they "mislead[] investors by saying one thing and holding back another." Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1331 (2015). For example, in Aetna, 34 F. Supp. 2d at 944-45, statements touting the "rapid and successful integration of the health business and creating a winning strategy for the health business going forward" and stating that the integration was "on track" to meet goals set forth in the proxy materials could not be dismissed as immaterial because the plaintiffs had alleged that "the integration was rife with serious problems" omitted by the defendants. Likewise, Defendants here touted the integration's effects and omitted that Newell was unable to achieve those effects.

Moreover, in MobileMedia, the District of New Jersey held that a statement promising the success of an acquisition was material, holding that, "The statement "MobileMedia believes the MobileComm acquisition will enhance its competitive position" is not a general, non-specific statement. This statement specifically draws a link between future success and the acquisition of MobileComm. This is not the type of statement that has been found to be inactionable puffery." MobileMedia, 28 F. Supp. 2d at 928. This is exactly the kind of statement

Plaintiff challenges from Newell regarding its integration of Jarden. Defendants again have the burden of establishing that the omission of the decline in core sales growth and discounting is "so obviously unimportant to an investor that reasonable minds could not differ on the question of materiality." Aetna, 34 F. Supp. 2d at 945. They cannot do so. Omission of information regarding business weaknesses has been found to be material and misleading. Newell omitted any information regarding its decline in core sales growth or its acceleration of discounting practices to push sales at the expense of margins, and was later unable to achieve the promised synergies or meet its guidelines. In Enzymotec, 2015 WL 8784065, at *13-14, glowing statements regarding the defendant's sales (using language such as "strong brand recognition," "continuous growth and interest," "on track," and "good acceptance") could not be found immaterial where plaintiff had alleged that the statements "go to the heart of Enzymotec's financial stability and were made against the backdrop of a general decline in the infant formula industry." Here, Plaintiff has alleged that the omitted core sales growth decline and the ramping up of discounting practices went to the heart of Newell's growth potential.

"A claim under the Section 11 of the Securities Act imposes strict liability and does not require a plaintiff to prove intent, knowledge or scienter. MobileMedia Sec. Litig., 28 F.

Supp. 2d at 923. "A plaintiff need only plead a material misstatement or omission in the registration statement." Fresno, 268 F. Supp. 3d at 557." Additionally, there is a duty to disclose material facts where the failure to include them "render[s] a published statement misleading." Omnicare, 135 S. Ct. at 1332. Here, Plaintiff has alleged omissions of the kind that have been found to make statements like Newell's misleading. Newell's touting of the $500 million in synergies and other benefits from the Acquisition was materially misleading in light of Newell's lack of resources and management capacity to achieve such benefits. Therefore, Newell's statements on that subject triggered a duty to disclose Newell's lack of resources. Similarly, Newell's touting of its history of core sales growth was materially misleading in light of the fact that Newell had already begun a decline in core sales growth, and was moreover temporarily forestalling its business decline by aggressive discounting that hurt margins.

Defendants first argue that Plaintiff fails to identify any integration-related issues that (1) were not warned of in risk disclosures and (2) materialized later. However, Plaintiff specifically argued that, at the time of the Acquisition, Newell lacked the resources to integrate Jarden and that this led directly to severe problems causing investor losses.

This court ruled that that the "storm warnings" merely pointed out a time period during which a reasonably prudent party would begin an investigation but that the factual bases for the claims in the Complaint could not have been discovered until at least September 6, 2017, November 2, 2017 and January 25, 2018 making the claims timely. This court also ruled that the pleading standard for New Jersey was applicable, that the claims were adequately pled and not so "forward-looking" so as to be not actionable. As to the Item 303 claim, this court found that such a claim was indeed alleged based on the allegation that Newell lacked the capacity to integrate Jarden and was facing problems with sales and knew this at the time. Finally, this court held that the allegations of Section 11 and Section 12(a)(2) claims were adequately pled. The Addendum to the August 1, 2019 Order sets forth in more detail the basis for these rulings.

In the present motion for reconsideration, Defendants request the Court to reconsider its August 1, 2019 Order denying Defendants' Motion to Dismiss. Defendant argues that the ruling that Plaintiff's claims are timely relies on an improper application of the discovery rule. A "reasonably diligent plaintiff" would have discovered enough information to plead the claims before September 6, 2017. Second, Defendant argues the conclusion that the challenged statements

are actionable is also incorrect in light of the PSLRA safe harbor, among other grounds. Defendant claims that claims under Sections 11 and 12 must be filed within one year after a "reasonably diligent plaintiff" would have discovered the basis for its claims, "irrespective of whether the actual plaintiff undertook a reasonably diligent investigation." *Pension Trust Fund for Operating Eng'rs v. Mortg. Asset Securitization Transactions, Inc.*, 730 F.3d 263, 275 (3rd Cir. 2013). The record indicates that over a year-and-a-half before Plaintiff claimed to "discover" the claim, in February 2016, "Jarden shareholders filed class action lawsuits alleging that the offering materials were false and misleading." Defendant argues that the Court correctly concluded that these lawsuits were "storm warnings" that "provide[d] enough information of possible wrongdoing because the two lawsuits directly alleged misrepresentations in the registration statement." Additionally, following the filing of these related lawsuits, "Newell and Jarden issued the amended registration statement . . ., which contained supplemental disclosures, such as the potential for the difficulty in integrating the two companies." Defendant maintains that these supplemental disclosures and "enumerated risk factors" highlighted the very risk that Plaintiff claims was hidden from Jarden shareholders: that Newell "may be

unable to fully integrate or successfully integrate" with Jarden due to "the difficulty addressing possible differences in . . . the business models of the two companies." Defendant argues that these statements and facts by the shareholders and Plaintiffs themselves show that a reasonably diligent plaintiff would have been aware of the potential integration issues in March of 2016.

Additionally, in December 2016 Defendant states that analysts were attributing Newell's declining performance to "fallout from an unexpectedly weak top line" and "risks associated with the Jarden integration." Defendant also notes other "storm warnings" as indicated by the Court related to the declining core sales growth, which Newell noted in their report each quarter. These negative trends continued into 2017, with the Court noting that "[i]n the first two quarters of 2017, Newell's core sales growth remained at 2.5 percent, which Newell noted represented a significant decline from 2016." Altogether, Defendant argues that all these factors would have tipped off a reasonably diligent Plaintiff that something was amiss with the current action. Defendant now argues that while the Court was correct to state the "storm warnings" indicate when an investigation should begin, Defendants argue that the Court misapplied the principle that regardless of Plaintiff's actual discovery, the limitations period lapses

after the facts necessary to bring an action have been discovered. Essentially, Defendant argues that when the "storm warnings" occurred a reasonably diligent Plaintiff would have had the necessary facts to institute the current action. In light of the fact that no new information necessary for a reasonably diligent plaintiff was disclosed in November 2017, Defendant asserts the Court's ruling assumes that a reasonably diligent plaintiff would have needed over a year and a half to complete its investigation after being put on inquiry notice in February 2016. Defendant claims this runs counter to the holding in *Pension Trust*. There the Court held that when information is "particularized" (*i.e.*, company specific), there is "a smaller temporal disparity between the start of the investigation and the discovery of the facts constituting the violation." *See* 730 F.3d at 275-76. Therefore, because sustained declining core sales growth and concerns about Newell's ability to integrate with Jarden were disclosed to the market by no later than December 2016, a reasonably diligent plaintiff's investigation would have ended within a short time after the disclosure of these two facts. Thus, Defendant argues that viewing all the facts in a light most favorable to Plaintiff, Newell had already reported "a significant decline" in core sales growth for "first two quarters of 2017," making it six consecutive quarters of

declining core sales growth versus the same periods the prior year.

Defendant's second argument is that the Court should reconsider its ruling on the Safe Harbor provision. Under the safe harbor, forward-looking statements are protected if the statement is: (1) identified as such and accompanied by meaningful cautionary language; (2) immaterial; or (3) not made with actual knowledge of its falsity. 15 U.S.C. § 77z-2(c). The "broad" statutory definition for forward-looking statements includes, among other things, "projections of future performance, plans and objectives for future operations, and assumptions underlying statements about future financial, economic or operational performance." *In re Aetna, Inc. Sec. Litig.* (*In re Aetna*), 617 F.3d 272, 279-82 (3d Cir. 2010); *see* 15 U.S.C. § 77z-2(i). Defendant argues the Court incorrectly concluded that the safe harbor did not apply because Plaintiff's challenge is "based upon omissions of existing fact." Defendant argues that the PSLRA expressly states that the safe harbor applies "in any private action . . . that is based on an . . . *omission of a material fact* necessary to make the statement not misleading." 15 U.S.C. § 77z-2(c)(1) (emphasis added). The key issue for analyzing the challenged statements, then, is not whether there is an alleged omission of present fact, but whether the challenged

statement is forward-looking or not. *See Castlerock Mgmt. Ltd. v. Ultralife Batteries, Inc.*, 114 F. Supp. 2d 316, 321, 325-26 (D.N.J. 2000) (noting that "a material and misleading omission can fall within the forward-looking safe harbor" in case alleging omission of "presently existing fact" that allegedly created an "implied forecast of smooth production") (citing *Harris v. Ivax*, 182 F.3d 799, 806 (11th Cir. 1999)). Defendant argues that five of the six challenged statements are unquestionably forward-looking and therefore squarely fall within the safe harbor.

Defendant also claims that Plaintiff here has failed to allege a single material omitted fact—existing at the time of the Offering Materials—that rendered any challenged statement false or misleading. To support this claim Defendant cites that in *In re MobileMedia Securities Litigation*, 28 F. Supp. 2d 901 (D.N.J. 1998), the plaintiff alleged that the offering materials at issue "failed to disclose [that the Company] ***was experiencing*** difficulties integrating [an acquired company] into its operations" and "falsely portrayed its growth strategy as successful when it was not." *Id.* at 916 (emphasis added). There, the merger at issue had already happened, the integration problems had arisen already, and defendants were aware of them when they issued the offering materials. *Id.* at 925-26. Defendant then argues that in the instant case, the

merger had not occurred when the Offering Materials were issued. Accordingly, any disclosure about future integration was inherently forward-looking and speculative.

In opposition to the motion for reconsideration, Plaintiff points out that Defendants argue that they are asking the Court to reconsider their decision in light of the fact that they believe the Court incorrectly gave too much weight to certain assertions and therefore reached an incorrect decision. Defendant still does not cite any new case law, nor do they raise any facts, but rather they attempt to highlight the flaw in Plaintiff's original arguments. Defendant repeatedly cites the same cases and the motion to dismiss hearing transcript.

LEGAL ANALYSIS

"Reconsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Chanc. Div. 1990). However, it is not appropriate for a litigant to "seek reconsideration merely because of dissatisfaction with decision of the Court" or if he wishes to reargue a motion, but should only be utilized for those cases which fall into that narrow corridor in which either 1) the Court has

expressed its decision based upon a palpably incorrect or irrational bases, or 2) it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent evidence. Ibid.

R. 4:49-2 requires the movant to explicitly identify the grounds for the motion to fit within one of the categories for which reconsideration is appropriate. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred. "The magnitude of the error cited must be a game-changer for reconsideration to be appropriate." Palombi v. Palombi, 414 N.J. Super. 274, 288-89 (App. Div. 2010). Essentially, a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process." D'Atria, 242 N.J. Super. at 401.

In the view of this court, Defendants are citing to the same cases, raise no new arguments or point out any matters or law that this court has overlooked or to which it has erred. For this reason, the motion for reconsideration is DENIED.