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March 14, 2022

BY ECF
Honorable Michael A. Shipp
United States District Judge
District of New Jersey
Clarkson S. Fisher Building &
U.S. Courthouse
402 East State Street
Trenton, New Jersey 08608

Re: The Doris Behr 2012 Irrevocable Trust v. Johnson & Johnson, No. 3:19-cv-8828-MAS-LHG

Dear Judge Shipp:

We are counsel to Johnson & Johnson ("Defendant" or the "Company") in the above-referenced action (the "Action"). We write concerning the Motion for Order to Show Cause Why a Preliminary Injunction Should Not Issue (Dkt. No. 91, the "Application"), filed by Plaintiffs The Doris Behr 2012 Irrevocable Trust (the "Trust") and Hal Scott (collectively, "Plaintiffs") this past Friday evening at approximately 6:15 p.m.—just weeks before the Company's 2022 annual meeting and after the proxy materials were substantially printed in anticipation of filing with the SEC and distribution on March 16, 2022.

Over the last *three years* in this Action, Plaintiff Hal Scott has attempted to advance his longstanding personal academic crusade to force a publicly traded U.S. company to adopt a bylaw that would require any federal securities claims asserted by any of the Company's stockholders against the Company or its directors or officers to be pursued exclusively in an individual arbitration (the "Proposal"). Far from involving any exigent circumstances, Plaintiffs' new request for a mandatory injunction that would impose on the Company an obligation to affirmatively opine

that Plaintiffs' Proposal is legal is not the first time that Plaintiffs have asked this Court to compel inclusion of the Proposal or demanded declarations regarding the Proposal's legality. Indeed, this Court previously denied Plaintiff Trust's attempt to disrupt the Company's 2019 annual meeting with a similar, last-minute application. (*See* Dkt. No. 16.) And this new Application seeks the same relief that was requested almost two years ago in the First Amended Complaint, (Dkt. No. 57 ¶ 44), before Plaintiff voluntarily withdrew that pleading and *removed* the request that Johnson & Johnson be required to speak. (*See* Dkt. No. 66.)

Despite the Company's commitment to present the Proposal in proxy materials more than 18 months ago, (Dkt. No. 59-2), Plaintiffs failed to submit any proposal for inclusion in the Company's 2021 proxy materials. Indeed, Plaintiffs delayed submitting their new Proposal for inclusion in the Company's proxy materials until September 11, 2021. The Company responded promptly and in accordance with the proxy regulations, confirmed that the latest Proposal would be included in the 2022 proxy materials and informed Plaintiffs of the Company's statement regarding that Proposal. Plaintiffs concede that the Company's response to the Proposal says nothing about the legality of the Proposal and in no way suggests that the Proposal is illegal. Perhaps that explains Plaintiffs' delay here (which has become a pattern): notwithstanding their claimed need for urgent action, Plaintiffs waited six months after submitting their Proposal and approximately four weeks after receiving the Company's response to bring this Application that now feigns "irreparable injury" unless it is able to force Johnson & Johnson to declare immediately that the Proposal is legal.

These issues have been litigated at a leisurely pace by Plaintiffs for years. And Plaintiffs do not (and cannot) support their meritless attempt to disturb the Company's upcoming annual meeting in April 2022 merely because they would like a judicial ruling on the legality of their new Proposal, which, as set forth below, they have no legal basis to obtain. In view of the improper and vexatious nature of the Application, the complete absence of any irreparable harm and Plaintiffs' delay in bringing the Application, we respectfully submit that the Court should deny the Application and decline to enter the proposed Order to Show Cause.

A. No Likelihood of Success on the Merits

Plaintiffs' Application should be denied for the simple reason that it cannot succeed on the merits, as Plaintiffs cite no legal authority in support of an extraordinary mandatory injunction requiring the Company to state affirmatively in its proxy materials that the Proposal is legal. The infirmities in Plaintiffs' arguments have been briefed multiple times over. (*See* Dkt. Nos. 10, 59, 81.1, 89.)

Plaintiffs spill much ink attempting to convince the Court that the Proposal is legal as a matter of New Jersey law in view of the Delaware Supreme Court's opinion in *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020), a decision that was issued during the pendency of this Action.[1] But Plaintiffs devote only a few paragraphs to their meritless contention that Johnson & Johnson must be required to speak regarding the Proposal's legality. (*See* Dkt. No. 92 at 20-21.) Plaintiffs cite no case law and rely entirely on the text of Rule 14a-9, which does not support their position. (*See id.*)

Rule 14a-9 prohibits proxy solicitation materials that make "any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading." 7 C.F.R. § 240.14a-9(a).

Here, there are no statements of material fact that are remotely false or misleading in the Company's soon-to-be-filed proxy materials. They include the entirety of Plaintiffs' statement in support of the Proposal and includes Plaintiffs' position with respect to the legality of the Proposal. (Dkt No. 92 at 10; Ex. A.)[2] Specifically, Plaintiffs aver:

> The U.S. Supreme Court has repeatedly held that mandatory individual arbitration provisions do not conflict with the federal securities laws, and the Delaware Supreme Court recently held that the bylaws of a corporation can include a provision regulating the forum for federal securities law claims between the corporation and its stockholders on grounds that would equally apply to arbitration.

(*Id.*)

The proxy materials also include the Company's statement in opposition to the Proposal, which does not challenge the legality of the Proposal, and indeed, says

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[1] The Company does not herein address these arguments, and reserves the right to do so in the event a full opposition to the Application becomes necessary.

[2] Despite its centrality to the instant dispute, Plaintiffs failed to include the Proposal as an Exhibit to its Application.

nothing whatsoever about the legality of the Proposal or the merits of Plaintiffs' statement in support of its Proposal:

> The Board of Directors does not believe that this proposal is in the best interests of Johnson & Johnson or its shareholders and recommends that shareholders vote against the proposal. We are committed to sound principles of corporate governance and have a track record of extensive shareholder engagement, with regular outreach to, and dialogue with, our investors to understand their concerns and perspectives on a broad range of corporate governance and other matters. Notably, other than the proponent of this shareholder proposal, none of our other shareholders have expressed to us an interest in having us adopt a mandatory arbitration bylaw.

(Dkt. No. 92-11.) This statement simply explains the board's position with respect to the Proposal, as it is expressly permitted to do. *See* 17 C.F.R. § 240.14a-8(l)(2). Indeed, the applicable rules specifically authorize the Company "to include in its proxy statements reasons why it believes shareholders should vote *against* [the] proposal." *Id.* § 240.14a-8(m)(1); *see also id.* ("The company is allowed to make arguments reflecting its own point of view, just as you may express your own point of view in your proposal's supporting statement.").

That the Company previously argued in submissions to the SEC and the Court that the Proposal "would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject," 17 C.F.R. § 240.14a-8(i)(2), does not entitle Plaintiffs to an affirmation from the Company that the Proposal is legal, nor does the absence of such an affirmation render anything in the proxy misleading. The Company's position does not contest the legality of Plaintiffs' current Proposal; Plaintiffs have made their position of the Proposal and its legality publicly known, and the decisions referenced by Plaintiffs in their statement are public and available to all shareholders. *See Bolger v. First State Fin. Servs.*, 759 F. Supp. 182, 193 (D.N.J. 1991) ("[T]he 'total mix' of information is identified with reference to all publicly disseminated information of which the shareholders are presumably aware." (collecting cases)); *see also Klein v. General Nutrition Co., Inc.*, 186 F.3d 338, 343 (3rd Cir. 1999) (declining to impose liability where information absent from disclosures was "public knowledge"); *Cartica Mgmt., LLC v. Corpbana, S.A.*, 50 F. Supp. 3d 477, 491 (S.D.N.Y. 2014) (public filing of a complaint presumably puts "much of the world" on notice of the pleading's contents).

Plaintiffs concede that "[a]ll of this is part of the public record," (Dkt. No. 92 at 21), but ignore that shareholders are capable of forming their own views as to the

legality of Plaintiffs' proposal. *See Ronson Corp. v. Liquifin Aktiengesellschaft*, 370 F. Supp. 597, 608 (D.N.J. 1974) ("It should be obvious that th[e] Court need not decide [the merits of the parties' respective opinions on the law], *but only whether these [] legal questions have been fully and fairly called to the attention of the [Company's] shareholders*." (emphasis added)), *aff'd*, 497 F.2d 394 (3d Cir. 1974).

Moreover, Plaintiffs offer no support for the proposition that the Company has a "duty to correct" statements that the Company did not make "*with respect to the solicitation of a proxy*," 17 C.F.R. § 240.14a-9(a). The Company made the statements of opinion regarding the law to the SEC and the Court regarding the Trust's 2019 proposal prior to a purported change in law. Thus, Rule 14a-9 simply is not implicated. *See also Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 335 (3d Cir. 2015) ("The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy *solicitation*." (quoting *J.I. Case v. Borak Co.*, 377 U.S. 426, 431 (1964)).

In any event, the duty to correct arises "when a company makes a *historical statement* that, at the time made, the company believed to be true, but as revealed by *subsequently discovered* information actually was not [true at that time]." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1431 (3d Cir. 1997) (citation omitted). The duty to correct is not implicated based on subsequent developments, including a perceived change in law. Requiring public companies to update shareholders whenever a case is decided that a litigant contends impacts another's legal arguments and expressions of opinion would have sweeping policy implications and impose tremendous burdens. *See U.S. v. Schiff*, 602 F.3d 152, 164-65, 171 (3rd Cir. 2010) (duty to update "is a narrow duty because of the potential to create a sweeping continuing obligation for corporations when they disclose information").[3]

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[3] A mandatory injunction requiring the Company to opine on the legality of the Proposal also would raise serious First Amendment concerns. *See, e.g., Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion") (citation omitted), and could expose the Company to other legal issues. *See In re Amarin Corp. PLC Sec. Litig.*, No. 13-CV-6663 (FLW) (TJB), 2015 WL 3954190, at *7 n.14 (D.N.J. June 29, 2015) ("an insincere statement of opinion" may be actionable under the federal securities laws (citing *Omnicare,*

Accordingly, Plaintiffs' Application should be denied because it has no likelihood of success on the merits.

B. Plaintiffs Fail to Establish Any Irreparable Harm

Similarly, Plaintiffs do not come close to making a showing of irreparable harm.[4] The Application dedicates a mere two sentences to the purported irreparable harm that would be suffered by Plaintiffs, baldly asserting that money damages could not remedy the supposed harm, and speculating that the Proposal might perform so poorly that it would be excluded for resubmission for three years. (Dkt. No. 92 at 22; *see also* Dkt. No. 91-1 ¶¶ 15-16.) And, Plaintiff Scott avers that he intends to continue submitting the proposal until it is adopted. (Dkt. No. 91-1 ¶ 16.)

This is not the first time Plaintiffs have filed a baseless challenge just weeks before the Company's annual meeting. In March 2019, Plaintiff Trust filed an application for an Order to Show Cause Why a Preliminary Injunction Should Not Issue (Dkt. No. 7, the "2019 Application"), asking this Court to require the Company to include the Proposal in the Company's proxy materials in connection with the scheduled April 25, 2019 annual shareholder meeting.[5] The Court denied the 2019 Application in a written opinion (Dkt. No. 16), explaining that Plaintiff: (i) failed to argue that emergent relief was warranted as required by Local Civil Rule 65.1(a), (ii) failed to demonstrate "it is entitled to the extraordinary remedy of a mandatory preliminary injunction," and (iii) delayed in filing the 2019 Application, thereby "undermin[ing] any arguments of immediate irreparable harm." (*See* Dkt. No. 16 at 5-8.) Just as in 2019, Plaintiffs' unadorned claims of hardship here are plainly inadequate given the ability to submit the Proposal in the future subject to applicable proxy rules. (*See* Dkt. No. 16 at 6 ("Plaintiff makes no reference as to why its shareholder proposal must be specifically included in the 2019 proxy materials.").)

Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 189 (2015)).

[4] *See Tracey v. Recovo Mortgage Mgmt. LLC*, 451 F. Supp. 3d 337, 341 (D.N.J. 2020) ("'[W]here the relief ordered by the preliminary injunction is mandatory and will alter the status quo, the party seeking the injunction must meet a higher standard of showing irreparable harm in the absence of an injunction.'" (citation omitted).)

[5] At that time, Plaintiff Scott was Plaintiff Trust's trustee, but not yet a plaintiff in this Action.

C. In the Face of Plaintiffs' Extreme Delay, They Cannot Show Exigent Circumstances

Moreover, the Application does not even attempt to establish any emergency circumstances that constitute "good and sufficient reasons why a procedure other than by notice of motion [under L.Civ.R. 7.1(d)(1)] is necessary." L.Civ.R. 65.1(a). Nor could it. After the Company committed to present the Proposal in proxy materials more than 18 months ago, (Dkt. No. 59-2), Plaintiff Trust chose not to submit the Proposal in connection with the 2021 meeting, and instead elected to litigate whether it is entitled to a declaration from this Court regarding the legality of the Proposal—the essence of the current Application—over the course of that extended period.

Indeed, the Application seeks the same relief that Plaintiff Trust requested almost two years ago in its First Amended Complaint, dated May 21, 2020. In that pleading, Plaintiff asserted (among other things) that it was entitled to "injunctive relief that will require Johnson & Johnson to announce in its future proxy materials that the Trust's proposal is legal under the law of New Jersey and under the law of the United States" in order "to remove [the] taint by informing shareholders that the Trust's proposal is lawful." (Dkt. No. 57 ¶ 44.)

After the Company certified that it would include the Proposal in the Company's 2021 proxy materials if proffered by Plaintiff Trust in accordance with the applicable rules, (Dkt. No. 59-2),[6] Plaintiff sought leave to file a Second Amended Complaint that *removed* the request that Johnson & Johnson be required to speak. (*See* Dkt. No. 66.) Instead, Plaintiffs requested a "judicial declaration that the proposal is legal under both federal and state law" before resubmitting the Proposal for inclusion in the Company's proxy materials. (*Id.* ¶ 38.) The Company moved to dismiss the Second Amended Complaint on the grounds (among others) that it failed to state a justiciable claim. (Dkt. No. 71.) On June 30, 2021, the Court issued a memorandum opinion dismissing the Second Amended Complaint. (Dkt. No. 77.)

Not to be dismayed, on July 13, 2021, Plaintiffs filed its *fourth complaint* in this matter—the Third Amended Complaint (Dkt. No. 79)—in which Plaintiffs rehashed the very same arguments and asserted that it "intend[ed] to resubmit its proposal for consideration at Johnson & Johnson's 2022 annual shareholder meeting"

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[6] Such certification was made in connection with moving to dismiss the First Amended Complaint on July 20, 2020. (Dkt. No. 59.)

and that "the most appropriate means of addressing the central issue of the legality of the Trust's proposal – necessary to provide shareholders with critical information about the proposal – is a judicial declaration that the proposal is legal under both federal and New Jersey law so the proposal can receive a fair and fully informed shareholder vote." (*Id.* ¶¶ 38-39.) The Company moved to dismiss the Third Amended Complaint on August 10, 2021. (Dkt. No. 81.) After Plaintiffs filed applications for two extensions of time,[7] briefing on the Company's motion to dismiss the Third Amended Complaint was completed on October 4, 2021.

Thus, Plaintiffs' litigation efforts seeking a judicial declaration regarding the legality of the Proposal have proceeded at a leisurely pace, with Plaintiffs regularly seeking extensions of time and voluntarily withdrawing and amending their pleadings. The motion to dismiss the Third Amended Complaint has been pending since October 4, 2021, with no indication of any urgency from Plaintiffs until its Friday evening request for emergency relief.

It bears emphasis that Plaintiffs submitted their Proposal on September 11, 2021, and filed this Application six months later. Further, they have known the exact content of the Company's statement in opposition to the shareholder proposal since February 14, 2022. (Dkt. No. 91-1 ¶ 14.) Yet, Plaintiffs took no action for an additional 25 days, during which time the Company continued to spend time and money preparing for the shareholder meeting on April 28, 2022, including printing the proxy materials with the opposition statement included. These proxy materials are scheduled to be mailed to shareholders on March 16— just two days from now.

Coupled with the fact that Plaintiffs have been seeking virtually the same relief *for years*, there is hardly better evidence of the absence of a need for immediate relief or irreparable harm than Plaintiffs' own conduct here. Indeed, these delays and general lack of urgency (which included lengthy ongoing litigation over the very issues on which Plaintiffs now seek emergency relief) are even more egregious than those that led the Court to deny the 2019 Application. (*See* Dkt. No. 16 at 8 ("Plaintiff's delay in filing the OTSC undermines any arguments of immediate irreparable harm.")); *see also MNI Mgmt., Inc. v. Wine King, LLC*, 542 F. Supp. 2d 389, 403 (D.N.J. 2008) ("inexcusable delay in seeking a preliminary injunction" defeats "assertion of irreparable harm."); *Chaves v. Int'l Boxing Fed'n*,

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[7] On August 12, 2021, Plaintiffs filed a Rule 7.1(d)(5) Letter for an automatic extension of time to file its opposition to the motion to dismiss (Dkt. No. 83) and thereafter filed a motion for a further extension of time for their opposition. (Dkt. No. 84.)

Civ. No. 16-1374 (JLL), 2016 WL 1118246, at *2 (D.N.J. Mar. 22, 2016) (no irreparable harm when "Plaintiffs waited until the last minute to file" for preliminary relief despite being on notice of claim "nearly four months ago"); *Shack v. Reinhard*, No. 08cv1950-WQH-JMA, 2008 WL 11337335, at *1–3 (S.D. Cal. Oct. 29, 2008) (denying temporary restraining order after two-month delay in seeking preliminary relief related to proxy proposal).

* * *

For all the foregoing reasons, the Court should deny the Application and decline to enter the proposed Order to Show Cause. We respectfully submit that the new Application constitutes a thinly-veiled and baseless effort by Plaintiffs to cause the Court to adjudicate the issues in the pending motion to dismiss notwithstanding Plaintiffs' lack of urgency in litigating the matter. Following a decision on the motion to dismiss, if any part of the case remains pending (and it should not), the litigation ought to proceed in the ordinary course.

We thank the Court for its consideration of this submission. We welcome the opportunity to address the foregoing at an in-person or telephonic conference with the Court. To the extent the Court enters an Order to Show Cause (which we respectfully submit it ought not to do), we respectfully request that the Court hear the matter on such accelerated basis so as to not prejudice the Company's April 2022 annual meeting.

Respectfully submitted,

s/ Andrew Muscato

Andrew Muscato

Cc: All Counsel (via ECF)