UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THE DORIS BEHR 2012 IRREVOCABLE TRUST and HAL S. SCOTT,	:	Civil Action No. 3:19-cv-8828 (FLW) (LHG)
Plaintiffs,	:	**Oral Argument Requested**
v.	:	Motion Date: February 1, 2021 (Pursuant to ECF No. 70)
JOHNSON & JOHNSON,	:	
Defendant,	:	
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM and COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION,	:	
Intervenors.	:	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT JOHNSON & JOHNSON'S MOTION TO DISMISS

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Defendant Johnson & Johnson (the "Company") respectfully submits this Memorandum of Law in support of its Motion to Dismiss the Second Amended Complaint (the "SAC") filed by Plaintiffs The Doris Behr 2012 Irrevocable Trust (the "Trust") and its trustee, Hal S. Scott (collectively, "Plaintiffs").[1]

PRELIMINARY STATEMENT

Now on their third attempt to plead an actionable claim, Plaintiffs' Second Amended Complaint makes abundantly clear that there is no judiciable controversy before the Court. The Trust brought this action *twenty months ago*, on the eve of the Company's 2019 annual meeting of shareholders (the "2019 Annual Meeting"), seeking emergency relief compelling the Company to include the Trust's shareholder proposal (the "Proposal")[2] in the Company's 2019 annual proxy

[1] Mr. Scott not only is a plaintiff to this action, but also is counsel of record. Mr. Scott joined this action to avoid dismissal of the First Amended Complaint (ECF No. 57) on the ground that the Trust is not a legal entity with capacity to sue in its own name. (*See* ECF No. 59-1 at 12-13; ECF No. 25-1 at 12.) Although the caption appended to the Second Amended Complaint does not specifically denote the capacity in which Mr. Scott purports to act, it appears that Mr. Scott has joined this action in his capacity as trustee (and a beneficiary) of the Trust. (*See* SAC ¶ 5.) To the extent Mr. Scott instead (or in addition) attempts to assert personal claims, he has identified no basis to do so, as he alleges no personal stock ownership in the Company, and lacks standing to assert claims in his personal capacity.

[2] If adopted, the Proposal asks the Company's board of directors to adopt a mandatory arbitration bylaw that would require the Company's shareholders to submit any federal securities law claims to binding, individual (non-class)

materials.[3] The Company made the decision to exclude the Proposal from its proxy materials after obtaining a "no-action" letter from the Staff of the SEC on February 11, 2019, and mailed its proxy materials to shareholders on March 13, 2019, ahead of the annual meeting scheduled for April 25, 2019. The Trust waited until March 26, 2019, to apply for an order to show cause why a preliminary injunction should not issue requiring the Company to print and distribute new proxy materials that included the Proposal (the "OTSC").

The Court denied the Trust's request for emergent relief, finding that the Trust's inexcusable delay in "filing the OTSC undermine[d] any arguments of immediate irreparable harm." *Doris Behr 2012 Irrevocable Tr. v. Johnson & Johnson*, Civ. A. No. 19-8828 (MAS) (LHG), 2019 WL 1519026, at *4 (D.N.J. Apr. 8, 2019). The Court ordered this matter to proceed in the ordinary course, *see id.*, and the Proposal was not considered at the 2019 Annual Meeting.

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arbitration and also waive their appellate rights and rights to challenge any arbitration award in connection with such claims. (*See* SAC ¶ 17.)

[3] Under Rule 14a-8, promulgated by the U.S. Securities and Exchange Commission ("SEC") under section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), shareholders satisfying certain enumerated eligibility requirements are authorized to submit proposals to a registered company for consideration at the company's annual meeting of shareholders, which the company must include in the proxy statement it distributes to shareholders in advance of the shareholder meeting unless one or more of the exceptions enumerated in the rule apply. *See* 17 C.F.R. § 240.14a-8; *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 334-36 (3d Cir. 2015) ("*Trinity II*").

Thereafter, despite alleging in the original Complaint that the Trust "intends to submit its proposal again for the 2020 shareholder meeting" (the "2020 Annual Meeting") (ECF No. 1 ¶ 34), the Trust did not do so, and, as such, the Proposal was not considered at the 2020 Annual Meeting. Instead, the Trust filed the First Amended Complaint on May 21, 2020, adding a handful of allegations to create the appearance that the Trust intended to resubmit the Proposal to the Company in connection with some future annual shareholder meeting.[4]

Prior to moving to dismiss the First Amended Complaint, the Company informed the Trust that *the Company would include the Proposal in the 2021 annual proxy materials (the "2021 Proxy Materials") for consideration at the next annual shareholder meeting (the "2021 Annual Meeting") if the Trust timely submitted the Proposal and satisfied the requirements set forth in Rule 14a-8*. Notwithstanding the Company's agreement, certified to this Court under penalty of perjury prior to Plaintiffs' filing of the Second Amended Complaint and prior to the deadline for submission of shareholder proposals for consideration at the 2021 Annual Meeting, the Trust *did not submit the Proposal for inclusion in the 2021*

[4] The Trust surprisingly maintained its allegations that "there [was] still time for Johnson & Johnson to issue supplementary proxy materials that include the Trust's proposal *before the 2019 shareholder meeting*" and that the Trust "intends to submit its proposal again for the 2020 shareholder meeting," which was held one month before the Trust filed the First Amended Complaint. (ECF No. 57 ¶¶ 34-35 (emphasis added).)

Proxy Materials.

As set forth in the Second Amended Complaint, this case is no longer about having the Proposal submitted to a shareholder vote. Rather, Plaintiffs' sole objective in continuing to pursue this action is obtaining a judicial decision on the validity of mandatory arbitration bylaws—an academic crusade that Mr. Scott has pursued for years. Indeed, the gravamen of the Second Amended Complaint is the allegation that "the Trust wishes to re-submit its proposal for future shareholder meetings," but "it wants a judicial declaration that the proposal is legal under both federal and state law before it does so." (SAC ¶ 38.) However, it is well-established that this Court cannot issue an academic decision that would amount to no more than a hypothetical advisory opinion. The Second Amended Complaint should be dismissed because it is both moot and unripe at the same time.

First, Plaintiffs cannot obtain a judicial declaration that "Johnson & Johnson violated section 14(a) of the Securities Exchange Act by excluding the Trust's proposal from its 2019 proxy materials" (SAC ¶ 39) because the 2019 Annual Meeting has long since passed, and thus Plaintiffs' claim is now moot. *See CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 628 (3d Cir. 2013) (dismissing mooted declaratory judgment claim because a declaratory judgment is "by definition prospective in nature"). Plaintiffs do not seek any relief in connection with the 2020 Annual Meeting or the 2021 Annual Meeting, and, even if they had,

any such relief would also be moot because *the Trust did not resubmit its Proposal for consideration at those meetings*. The 2020 Annual Meeting occurred on April 23, 2020, and the deadline for shareholders to submit proposals for consideration at the 2021 Annual Meeting passed on November 11, 2020.

Second, Plaintiffs have not alleged any justiciable claim relating to the Company's future annual shareholder meetings. Plaintiffs acknowledge that the Company "will no longer exclude the Trust's proposal from its annual proxy materials if the Trust re-submits its proposal for consideration at a future shareholder meeting." (SAC ¶ 37.) Yet Plaintiffs do not so much as allege even an intention for the Trust to submit the Proposal in connection with any specified shareholder meeting, let alone the Trust's eligibility to even do so. To the contrary, the Second Amended Complaint alleges that the Trust *will not* submit its Proposal for consideration by the Company's shareholders without an advisory opinion from this Court. Accordingly, the Second Amended Complaint fails to present a justiciable controversy and should be dismissed. *See Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 646-47 (3d Cir. 1990).

In short, it has been more than two years since Plaintiffs submitted a Proposal for inclusion in the Company's proxy materials. Plaintiffs made the affirmative choice not to pursue a shareholder vote on the Proposal, notwithstanding having had every opportunity to do so. Plaintiffs should not be

permitted to continue to waste the resources of the Company and the Court. Mr. Scott's academic crusade should end here and now, and the Second Amended Complaint should be dismissed with prejudice.

FACTUAL BACKGROUND

A. The Company's Relevant Proxy Requirements

Johnson & Johnson is a publicly traded New Jersey corporation located in New Brunswick. (*See* SAC ¶ 6.) Since 1947, it has held its annual shareholder meeting on the fourth Thursday in April, as it did last year, on April 25, 2019, and this year, on April 23, 2020. In advance of such meetings, the Company publishes and circulates a proxy statement to its shareholders pursuant to section 14 of the Securities Exchange Act of 1934, 15 U.S.C. § 78n, and the rules promulgated thereunder. (*See* SAC ¶¶ 8-10.) Proxy statements include "information about items or initiatives on which the shareholders are asked to vote" and "can also include shareholder proposals—a device that allows shareholders to ask for a vote on company matters." *Trinity II*, 792 F.3d at 328 (citation omitted).

B. The Trust Submits Its Proposal

The Trust is a shareholder of the Company, and its trustee and beneficiary (and co-plaintiff and co-counsel) is Mr. Hal Scott, an out-of-state law professor. (SAC ¶¶ 4-5; *see* ECF No. 66-1 at 1.) On November 9, 2018, the Trust submitted to the Company a shareholder proposal asking the Company's board of directors "to adopt a mandatory arbitration bylaw" that would require Company stockholders

to bring claims arising under the federal securities laws against the Company or its officers or directors, in individual arbitration without the right to appellate review. (SAC ¶¶ 16-17.) The Trust requested that the Proposal be included in the Company's proxy materials for the 2019 Annual Meeting. (*Id.* ¶¶ 16-17.)

C. The Staff of the SEC Issues a No-Action Letter

On December 11, 2018, the Company requested that the Staff of the SEC issue a "no-action letter" to confirm that the Company had no obligation to include the Proposal in its proxy materials. Specifically, the Company explained that implementation of the Proposal would cause the Company to violate the law, and therefore exclusion of the Proposal was appropriate pursuant to Rule 14a-8(i)(2). (SAC ¶¶ 20-21; ECF No. 66-2.)

On February 11, 2019, the Staff of the SEC issued a no-action letter concluding that it would not recommend enforcement if the Company excluded the Proposal from its proxy materials. (*See* SAC ¶ 29; ECF No. 66-8.) The SEC's no-action letter followed several rounds of submissions to the Staff of the SEC by the parties and others, including the New Jersey Attorney General, who expressed the view that the Proposal, if adopted, would cause the Company to violate New Jersey law. (*See* SAC ¶¶ 24-28.) On February 18, 2019, the Trust sought full SEC review of the no-action decision. (*See* ECF No. 25-3.) On February 22, 2019, the SEC Staff denied a request from Mr. Scott for full-Commission review of its no-

action letter. (*See* ECF No. 25-6.)

D. The Company Excludes the Proposal from Its 2019 Proxy Materials, and the Trust Commences This Lawsuit

On March 13, 2019, the Company filed its proxy materials in advance of the 2019 Annual Meeting—without the Proposal—and distributed them to shareholders. (SAC ¶ 33.) The Trust commenced this action on March 21, 2019, challenging the Company's exclusion of its Proposal. (*See* ECF No. 1; SAC ¶ 34.) Specifically, the Trust alleged that "Johnson & Johnson violated section 14(a) of the Securities Exchange Act by excluding the Trust's proposal from its 2019 proxy materials," and requested declaratory and injunctive relief requiring the Company to "issue supplemental proxy materials that include the Trust's proposal before the shareholder meeting scheduled for April 25, 2019." (ECF No. 1 ¶¶ 35, 42.) Five days later, on March 26, 2019, the Trust filed a motion seeking expedited relief. (*See* ECF No. 7.)

E. The Court Denies the Trust's Motion for a Preliminary Injunction and Directs this Case to Proceed in the Ordinary Course

On April 8, 2019, this Court denied the Trust's request for a preliminary injunction, concluding that the Trust "failed to make a sufficient showing to justify emergent relief, and further failed to support its argument that it will suffer irreparable harm." (ECF No. 16 at 8; *see* SAC ¶ 34.) The Court directed this action to proceed in the ordinary course. (*See* ECF No. 16 at 8.)

On May 23, 2019, The California Public Employees' Retirement System and The Colorado Public Employees' Retirement Association (together, "Intervenors") moved to intervene in this action. (*See* ECF No. 21.)[5] On May 31, 2019, the Company and Intervenors each moved to dismiss the Trust's original Complaint. (*See* ECF Nos. 24-25.) The motions to dismiss were fully briefed on July 29, 2019. (*See* ECF Nos. 39-40, 42.)

On February 24, 2020, the Court entered a Memorandum Order (i) staying this matter pending the Delaware Supreme Court's resolution of *Salzberg v. Sciabacucchi*, No. 346,2019, (ii) directing the Clerk to administratively terminate the case and (iii) ordering that, upon the Delaware Supreme Court's resolution of *Sciabacucchi*, any party may e-file correspondence requesting the Court to lift the stay and reinstate the case. (*See* ECF No. 50.)

On March 26, 2020, Delaware Supreme Court issued a decision in *Sciabacucchi*. (*See* ECF No. 51.) On May 15, 2020, after meeting and conferring on proposed next steps for this action, the parties jointly requested that the Court lift the stay and reopen the case and proposed a schedule by which the Trust could submit an amended complaint and the Company and Intervenors would answer, move or otherwise respond to any such amended complaint. (*See* ECF Nos. 54-

[5] The Court granted Intervenors' motion to intervene on August 27, 2019. (*See* ECF No. 44.)

55.) The Court entered an Order approving the parties' proposed schedule on May 21, 2020, and, on June 10, 2020, lifted the stay. (*See* ECF Nos. 56, 58.)

F. The Trust Does Not Submit Its Proposal for Consideration at the 2020 Annual Meeting

Despite alleging in earlier pleadings that it "intends to submit its proposal again for the 2020 shareholder meeting" (ECF No. 1 ¶ 34), the Trust did not do so. (*See* ECF No. 59-2 ¶ 3.) Consequently, the Proposal was not considered at the 2020 Annual Meeting on April 23, 2020. (*See id.*)

G. The Trust Files the First Amended Complaint

On May 21, 2020, the Trust filed the First Amended Complaint. (*See* ECF No. 57.) The First Amended Complaint was nearly identical to the original Complaint. Indeed, the Trust even alleged that "there is still time for Johnson & Johnson to issue supplementary proxy materials that include the Trust's proposal *before the 2019 shareholder meeting*." (*Id.* ¶ 34 (emphasis added).) The Trust also continued to assert that it "intends to submit its proposal again for the 2020 shareholder meeting," which was held one month *before* the Trust filed the First Amended Complaint. (*Id.* ¶ 35.)

The Trust also maintained its requests for: (1) a declaration that (i) "Johnson & Johnson violated section 14(a) of the Securities Exchange Act by excluding the Trust's proposal from its 2019 proxy materials," (ii) "Johnson & Johnson will not violate federal [or New Jersey] law if it amends its bylaws in the manner described

in the Trust's proposal" and (iii) "any New Jersey law that purports to prevent a company from requiring its shareholders to arbitrate their federal securities law claims is preempted by the Federal Arbitration Act"; and (2) a permanent injunction preventing "Johnson & Johnson from excluding the Trust's proposal (or similar proposals) from its proxy materials in future years." (*Id.* ¶ 45(a)-(e)(i).)

The only changes made in the First Amended Complaint were the addition of several allegations to create the appearance that the Trust intended to "resubmit its shareholder-arbitration proposal to Johnson & Johnson" in connection with some future annual shareholder meeting. (*Id.* ¶ 42; *see id.* ¶¶ 43-44, 45(e).) In addition, the First Amended Complaint newly requested "that the court . . . issue a permanent injunction that:"

> (ii) prevent [sic] Johnson & Johnson from disparaging or questioning the legality of the Trust's proposal (or similar proposals) under either federal or state law in any of its future proxy materials;
>
> (iii) prevent [sic] Johnson & Johnson from opposing the Trust's proposal (or similar proposals) on the ground that the proposal, if adopted, may enmesh the company in costly litigation;
>
> (iv) require [sic] Johnson & Johnson to announce in any of its future proxy materials that include the Trust's proposal (or similar proposals) that the proposal is legal under both the law of New Jersey and under the law of the United States[.]

(*Id.* ¶ 45(e)(ii)-(iv).)

H. The Company Agrees to Include the Proposal in Its 2021 Proxy Materials

Notwithstanding the deficiencies in the First Amended Complaint, prior to moving to dismiss that pleading, the Company informed the Trust that it would include the Proposal in the 2021 Proxy Materials for consideration at the 2021 Annual Meeting, subject to the Trust satisfying the eligibility requirements for submitting a shareholder proposal set forth in Rule 14a-8. (*See* ECF No. 59-2 ¶¶ 4, 6; SAC ¶ 37.) Notwithstanding the foregoing, the Trust insisted on maintaining this action. Accordingly, on July 20, 2020, the Company moved to dismiss the First Amended Complaint for, among other things, failure to present a justiciable controversy. (*See* ECF No. 59-1 at 13-22.) The Intervenors joined the Company's motion. (*See* ECF No. 60.)

I. Plaintiffs File the Second Amended Complaint

In lieu of opposing the Company's motion to dismiss the First Amended Complaint, on September 18, 2020, the Trust sought an extension of its time to respond to the Company's motion to dismiss. (*See* ECF No. 62.) On September 24, 2020, the Trust filed a motion for leave to file the Second Amended Complaint, which the Court granted on October 13, 2020. (*See* ECF Nos. 64, 65.)

On October 20, 2020, Plaintiffs filed the Second Amended Complaint. (*See* ECF No. 66.) The Second Amended Complaint contains several notable changes from the First Amended Complaint:

First, in addition to being counsel of record, Mr. Scott joined this action as co-plaintiff, ostensibly because, unlike the Trust,[6] he has standing to maintain this action in his capacity as trustee (and a beneficiary) of the Trust. (*See* SAC ¶ 5.)

Second, Plaintiffs have removed all requests for injunctive relief; Plaintiffs now seek only the following declaratory relief from the Court:

> a. declare that Johnson & Johnson violated section 14(a) of the Securities Exchange Act by excluding the Trust's proposal from its *2019 proxy materials*;
>
> b. declare that Johnson & Johnson will not violate federal law if it amends its bylaws in the manner described in the Trust's proposal;
>
> c. declare that Johnson & Johnson will not violate the law of New Jersey if it amends its bylaws in the manner described in the Trust's proposal; [and]
>
> d. declare that any New Jersey law that purports to prevent a company from requiring its shareholders to arbitrate their federal securities law claims is preempted by the Federal Arbitration Act[.]

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[6] The Trust is a Massachusetts irrevocable trust (SAC ¶ 4), which is not a legal entity with capacity to sue in its own name. *See Soveral v. Franklin Tr.*, Civ. No. 90-2052 (CSF), 1991 WL 160339, at *2 (D.N.J. Aug. 12, 1991) (applying New Jersey law pursuant to Rule 17(b) of the Federal Rules of Civil Procedure and concluding that trust was "not amenable to suit in this state"); *see also Juniata Terminal Co. Profit Sharing Plan U/A/D 1/1/87 v. Gifis*, Civ. A. No. 16-5369 (MAS) (LHG), 2018 WL 4148467, at *7 n.8 (D.N.J. Aug. 30, 2018) (granting motion to dismiss amended complaint and holding that "[i]f Plaintiff elects to file a Second Amended Complaint Plaintiff must properly establish the trust's independent ability to sue or file through another appropriate party"). *Accord Americold Realty Tr. v. Conagra Foods, Inc.*, 136 S. Ct. 1012, 1016 (2016); *Morrison v. Lennett*, 616 N.E.2d 92, 94 (Mass. 1993) ("[A] trust is not a legal entity which can be sued directly.").

(*Id.* ¶ 45(a)-(d) (emphasis added).)

Third, Plaintiffs have removed any allegations that the Trust is currently eligible to submit a shareholder proposal to the Company for consideration at an annual shareholder meeting; Plaintiffs now allege only that the Trust *was eligible in 2019* when it originally submitted the Proposal for inclusion in the Company's 2019 proxy materials. (*See id.* ¶ 19; *see also id.* ¶ 12 (discussing shareholder eligibility requirements).)

Fourth, Plaintiffs allege that "Johnson & Johnson has informed the Trust *that it will no longer exclude the Trust's proposal* from its annual proxy materials if the Trust re-submits its proposal for consideration at a future shareholder meeting." (*Id.* ¶ 37 (emphasis added).)

Finally, Plaintiffs have removed any suggestion that the Trust intends to re-submit the Proposal for consideration at any specific shareholder meeting in the future; instead, Plaintiffs allege that "[a]lthough the Trust wishes to re-submit its proposal for future shareholder meetings," *it will not do so without* "a judicial declaration that the proposal is legal under both federal and state law." (*Id.* ¶ 38 (emphasis added).)

J. The Trust Does Not Resubmit the Proposal for Inclusion in the 2021 Proxy Materials

The deadline for the Trust to submit the Proposal for consideration at the 2021 Annual Meeting was November 11, 2020. (*See* ECF No. 59-2 ¶ 6.)

Notwithstanding the Company's sworn certification that it would include the Proposal in the 2021 Proxy Materials if the Trust timely submitted the Proposal in accordance with Rule 14a-8 (*see id.*), the Trust did not do so.

LEGAL STANDARD

Under Rule 8(a) of the Federal Rules of Civil Procedure, a complaint "must contain" "a short and plain statement of the grounds for the court's jurisdiction." Fed. R. Civ. P. 8(a)(1). An action cannot be maintained where, as here, the complaint "does not allege sufficient grounds to establish subject matter jurisdiction." *Camp v. Wells Fargo Bank, N.A.*, Civ. A. No. 16-2463 (MAS) (TJB), 2017 WL 3429344, at *2 (D.N.J. Aug. 9, 2017) (citation omitted). In evaluating whether it has subject matter jurisdiction, a Court is permitted to look behind the complaint, and "may consider and weigh evidence outside the pleadings." *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000); *accord Taylor Inv., Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1290 n.7 (3d Cir. 1993); *Med. Soc'y of N.J. v. Herr*, 191 F. Supp. 2d 574, 578 (D.N.J. 2002) ("trial court is free to weigh . . . evidence and satisfy itself as to the existence of its power to hear the case," including "sworn statement[s] of fact[]" (citation omitted)).

Plaintiffs bear the burden of demonstrating a justiciable controversy. *See N.J. Conservation Found. v. Fed. Energy Reg. Comm'n*, 353 F. Supp. 3d 289, 295 (D.N.J. 2018) (Wolfson, J.) ("[T]he burden of proving the existence of subject

matter jurisdiction always lies with the plaintiff."); *see also Mollett v. Leicth*, 511 F. App'x 172, 174 (3d Cir. 2013) (affirming dismissal of amended complaint as moot based on events that occurred after filing of original complaint, noting that "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction" (citing *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007))).

In addition, under Rule 8(a)(2), "a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). A complaint should be dismissed where it "fail[s] to state a claim upon which relief can be granted." *Haghighi v. Horizon Blue Cross Blue Shield of N.J.*, Civ. A. No. 19-20483 (FLW), 2020 WL 5105234, at *2 (D.N.J. Aug. 31, 2020) (Wolfson, J.) (citing Fed. R. Civ. P. 12(b)(6)). When deciding a motion to dismiss under Rule 12(b)(6), the court may consider "the allegations contained in the complaint, exhibits attached to the complaint and matters of public record," *City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 259 (3d Cir. 1998), as well as documents "'integral to or explicitly relied upon' in the complaint," *Fallon v. Mercy Cath. Med. Ctr. of Se. Pa.*, 877 F.3d 487, 493 (3d Cir. 2017) (citation omitted).

ARGUMENT

The Second Amended Complaint should be dismissed because it does not present a justiciable controversy. *See* Fed. R. Civ. P. 12(b)(1), (h)(3). "Article III, section 2 of the United States Constitution limits federal jurisdiction to actual 'cases' and 'controversies' . . . and stands as a direct prohibition on the issuance of advisory opinions." *Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 410 (3d Cir. 1992) (citing *Flast v. Cohen*, 392 U.S. 83, 96 (1968)); *see* U.S. Const. art. III, § 2 (federal courts can resolve only actual "cases" and "controversies"). "The case or controversy requirement must be met regardless of the type of relief sought, including declaratory relief," *Armstrong World Indus.*, 961 F.2d at 410 (quoting *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950)), and it "subsists through all stages of federal judicial proceedings," *Keitel v. Mazurkiewicz*, 729 F.3d 278, 279-80 (3d Cir. 2013) (citing *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). "'Courts enforce the case-or-controversy requirement through several justiciability doctrines,' which 'include . . . ripeness [and] mootness.'" *Id.* at 280 (citation omitted).

Here, Plaintiffs cannot carry their burden of establishing a justiciable controversy because they seek advisory opinions concerning (i) the "wrongfulness" of past conduct and (ii) an undefined and entirely hypothetical future dispute. *See, e.g.*, *Access Ins. Co. v. Carpio*, 861 F. Supp. 2d 539, 542-43 (E.D. Pa. 2012)

(dismissing action when issues raised in plaintiff's complaint were either "moot" or "not ripe for adjudication"). As set forth more fully below, this Court lacks subject matter jurisdiction over Plaintiffs' academic questions that are simultaneously moot and unripe. Accordingly, the Second Amended Complaint should be dismissed with prejudice.

I. THE SECOND AMENDED COMPLAINT IS MOOT

A. Plaintiffs' Sole Claim Concerning the 2019 Annual Meeting Is Moot

The Trust originally filed this action prior to the 2019 Annual Meeting to challenge the Company's decision to exclude the Proposal from its 2019 proxy materials and compel inclusion of the Proposal therein. (*See* ECF No. 1 ¶ 35.) Now, almost a year and a half after the 2019 Annual Meeting was held, the Second Amended Complaint seeks a declaration that the Company "violated Section 14(a) of the Securities Exchange Act by excluding the Trust's proposal from its 2019 proxy materials." (SAC ¶ 39; *see also id.* ¶ 45(a) (requesting a declaration that "Johnson & Johnson violated section 14(a) of the Securities Exchange Act by excluding the Trust's proposal from its 2019 proxy materials").)

No declaratory relief can remedy that which occurred in the past.[7] *See CMR*

[7] Plaintiffs do not seek damages in the Second Amended Complaint. (*See* SAC ¶ 45.) Nor would Plaintiffs be able to establish damages in connection with their claim. *See Gen. Elec. Co. ex rel. Levit v. Cathcart*, 980 F.2d 927, 933 (3d Cir. 1992) ("[D]amages are recoverable under Section 14(a) *only* when the votes for a specific corporate transaction requiring shareholder authorization, such as a

D.N. Corp., 703 F.3d at 628 (declaratory relief is "by definition prospective in nature"); *S.A. v. Davis*, Civ. A. No. 15-3565 (JLL), 2015 WL 7871167, at *5 (D.N.J. Dec. 4, 2015) ("Declaratory relief is prospective in nature, and therefore may not be used solely to address the propriety of past conduct."); *accord Ke v. DiPasquale*, No. 19-3308, 2020 WL 5641217, at *3 (3d Cir. Sept. 22, 2020); *Gochin v. Markowitz*, 791 F. App'x 342, 346 (3d Cir. 2019); *Parkell v. Senato*, 704 F. App'x 122, 125 (3d Cir. 2017); *Capozzi v. Bledsoe*, 560 F. App'x 157, 159 (3d Cir. 2014); *Policastro v. Kontogiannis*, 262 F. App'x 429, 433 (3d Cir. 2008). Indeed, granting Plaintiffs' requested relief now with respect to the 2019 Annual Meeting would "have [no] effect in the real world" and result in "no more than an advisory opinion regarding the 'wrongfulness' of past conduct." *Policastro*, 262 F. App'x at 433 (citations omitted).

Courts have dismissed claims arising under Rule 14a-8 in analogous circumstances. *See N.Y. City Emps.' Ret. Sys. v. Dole Food Co.*, 969 F.2d 1430, 1433 (2d Cir. 1992) (claims relating to shareholder proposal moot when "the contents of the proxy cannot now be changed or halted by any action [the court] might take"); *Lindner v. Am. Express Co.*, No. 10 Civ. 2228 (JSR) (JLC), 2011 WL 2581745, at *5 (S.D.N.Y. June 27, 2011) ("The meeting having already taken

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corporate merger, are obtained by a false proxy statement, and that transaction was the direct cause of the pecuniary injury for which recovery is sought." (emphasis added)).

place, the Court finds that as to Lindner's claims relating to the 2011 meeting, it cannot grant any form of relief to Plaintiff."), *report and recommendation adopted*, 2011 WL 3664356 (S.D.N.Y. Aug. 19, 2011).[8] Accordingly, because Plaintiffs' sole claim concerns an event that already has occurred, the Second Amended Complaint should be dismissed as moot.

B. Plaintiffs' Requested Prospective Relief Is Moot

Plaintiffs attempt to cure the mootness of the Second Amended Complaint by requesting imprecise forward-looking declaratory relief, untethered to any actual claim, concerning the legality of a shareholder proposal that the Trust *might* proffer for inclusion in the Company's future annual proxy materials. (*See* SAC ¶¶ 45(b)-(d).) This is insufficient and should be rejected. *See, e.g.*, *Davis*, 2015 WL 7871167, at *5 (rejecting attempt by plaintiff to "word his requests for

[8] The court in *Trinity Wall Street v. Wal-Mart Stores, Inc.,* 75 F. Supp. 3d 617 (D. Del. 2014) ("*Trinity I*"), *rev'd*, 2015 WL 1905766 (3d Cir. Apr. 14, 2015), *opinion issued*, 792 F.3d 323 (3d Cir. 2015), disagreed with the reasoning of these cases and concluded that a narrow exception to the mootness doctrine applied because the issue was "capable of repetition" and likely to "evade review" unless addressed. *Id.* at 625-29. The court reached this conclusion because it viewed an 80-to-120-day window to litigate (the gap between when a proposal must be presented and the holding of the meeting) insufficient to fully litigate the issue. *Id.* at 627. The Third Circuit reversed the district court, but did not address the mootness issue. Instead, the Third Circuit concluded that the claim was justiciable on other grounds, namely, that the proposal in question had been resubmitted for the next year's meeting. *See Trinity II*, 792 F.3d at 334. The Trust did not do so here in connection with the 2020 Annual Meeting or the 2021 Annual Meeting, and Plaintiffs' allegations belie any suggestion that the 2019 dispute is capable of repetition. (*See* SAC ¶ 38; *infra* §§ I(B), II.)

declaratory relief in prospective fashion" when his claim was "essentially backward looking").

Even assuming Plaintiffs' requests for prospective relief otherwise presented a ripe controversy (which they do not (*see infra* § II)), these requests would be moot in view of the Company's commitment to include the Proposal in its 2021 Proxy Materials if the Trust had submitted the Proposal in accordance with Rule 14a-8. (*See* ECF No. 59-2 ¶ 6; SAC ¶ 37.) *See also West v. Health Net of Ne.*, 217 F.R.D. 163, 176 (D.N.J. 2003) (defendant's "unequivocal[] represent[ation] to th[e] Court" of voluntary cessation in sworn declaration supported dismissal of claim for mootness); *accord Naimo v. US Bank for Asset Backed Sec. Corp. Home Equity Loan Tr.*, Civ. A. No. 16-7089 (FLW)(LHG), 2017 WL 3448109, at *2 (D.N.J. Aug. 11, 2017) (Wolfson, J.) ("[T]he central question of all mootness problems is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." (quoting *Am. Bird Conservancy v. Kempthorne*, 559 F.3d 184, 188 (3d Cir. 2009))). Indeed, the Company agreed to provide the Trust precisely the relief Plaintiffs previously sought from the Court, namely, inclusion of the Proposal in the Company's proxy materials. (*See* SAC ¶¶ 16, 39, 44, 45(a)-(d).) The Trust, however, chose not to

submit the Proposal for consideration at the 2021 Annual Meeting.[9] The Second Amended Complaint also admits the absence of any live controversy with respect to other future annual shareholder meetings, because Plaintiffs allege that the Company "will no longer exclude the Trust's proposal from its annual proxy materials if the Trust re-submits its proposal for consideration at a future shareholder meeting." (SAC ¶ 37.)

Because of the absence of any live controversy, the Second Amended Complaint should be dismissed. *See Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 216 (3d Cir. 2003) ("The availability of declaratory [and injunctive] relief depends on whether there is a live dispute between the parties." (alteration in original) (quoting *Powell v. McCormack*, 395 U.S. 486, 517-

[9] Based on the allegations in the Second Amended Complaint, it is unclear if the Trust still satisfies the eligibility requirements for submitting a shareholder proposal set forth in Rule 14a-8. Indeed, while Plaintiffs continue to allege that the Trust "owns stock in Johnson & Johnson" (SAC ¶ 7), the Second Amended Complaint conspicuously changed to the past tense all specific allegations regarding the eligibility of the Trust to submit a shareholder proposal. (*Compare id.* ¶ 19 ("The Trust *owned* 1,050 shares of Johnson & Johnson (with a market value well in excess of $2,000), and it held these shares for at least one year when it submitted its proposal on November 9, 2018. The Trust *continued to hold* these shares through the company's 2019 shareholder meeting. The Trust *was therefore eligible* to submit [its] proposal under Rule 14a-8(b)(1)." (emphasis added) (internal citation omitted)), *with* ECF No. 1 ¶ 18 ("The Trust *owns* 1,050 shares of Johnson & Johnson (with a market value well in excess of $2,000), and it held these shares for at least one year when it submitted its proposal on November 9, 2018. The Trust *will continue to hold* these shares through the company's 2019 shareholder meeting. The Trust *is therefore eligible* to submit [its] proposal under Rule 14a-8(b)(1)." (emphasis added) (internal citation omitted)).)

18 (1969))); *see also Davis*, 2015 WL 7871167, at *4 ("A case becomes moot where 'changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief.'" (quoting *Rendell v. Rumsfeld*, 484 F.3d 236, 240 (3d Cir. 2007))).

II. THE SECOND AMENDED COMPLAINT IS UNRIPE INSOFAR AS IT RELATES TO UNSPECIFIED FUTURE ANNUAL MEETINGS

The "ripeness" doctrine also compels dismissal of the Second Amended Complaint. That doctrine "determines when a proper party may bring an action," *Armstrong World Indus.*, 961 F.2d at 411, and functions to "prevent federal courts, 'through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Phila. Fed'n of Tchrs. v. Ridge*, 150 F.3d 319, 323 (3d Cir. 1998) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). A claim seeking "an opinion advising what the law would be upon a hypothetical state of facts" is not ripe for adjudication. *Step-Saver Data Sys.*, 912 F.2d at 647 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)).

Here, the Trust did not submit its Proposal for consideration at the 2020 Annual Meeting, notwithstanding that it twice represented an intention to do so to this Court. (ECF No. 1 ¶ 34; ECF No. 57 ¶ 35.) Now, in the Second Amended Complaint, Plaintiffs have abandoned the suggestion that the Trust intends to submit the Proposal for inclusion in the Company's proxy materials for any specific future shareholder meeting. Indeed, the Trust did not submit the Proposal

for inclusion in the Company's 2021 Proxy Materials even after the Company made a sworn commitment to include the Proposal if the Trust timely submitted it in accordance with Rule 14a-8.[10] Plaintiffs now allege that the "Trust *wishes* to re-submit its proposal for future shareholder meetings," but will not do so without "a judicial declaration that the proposal is legal under both federal and state law." (SAC ¶ 38 (emphasis added).)

This sequence demonstrates precisely why courts do not opine on hypothetical questions. Even assuming *arguendo* that the Trust has the present intention to re-submit the Proposal in the future (an intention it no longer alleges), there is no guarantee that it will do so, or even be in a position to do so. It is entirely possible that unforeseen financial issues could prompt the Trust to liquidate its holdings, or the Trust may (again) miss the applicable deadlines to submit its Proposal. Either circumstance would render the Trust ineligible to have its Proposal considered at the Company's future annual meetings. *See* 17 C.F.R. § 240.14a-8(b), (e).

Indeed, in each of the three complaints the Trust has now filed in connection with the Proposal it submitted in 2019, the Trust committed to holding the requisite

[10] As noted above, based on the changes reflected in the Second Amended Complaint (*see* ECF No. 64-1 ¶ 19), it is not clear that the Trust continues to be eligible to submit proposals to the Company based on the requirements set forth in Rule 14a-8. (*See* SAC ¶¶ 12-14; *see supra* note 8.)

number of Company shares only "through the Company's 2019 shareholder meeting." (ECF No. 1 ¶ 18; ECF No. 57 ¶ 18.) But the next possible submission would be in connection with the *2022* annual shareholder meeting, and the Second Amended Complaint is devoid of any allegations with respect to that shareholder meeting. The Trust did not submit a proposal for inclusion in the 2021 Proxy Materials, and the Company was not given the opportunity to evaluate inclusion of such proposal in those materials. (*See* ECF No. 59-2 ¶¶ 4-5.) Should the Trust submit a "similar" (but different) shareholder proposal next year, as it previously alleged it may do (*see* ECF No. 57 ¶¶ 43, 45(e)), that proposal may be excludable on grounds other than those relied on by the Company to exclude the Proposal from the 2019 proxy materials. *See* 17 C.F.R. § 240.14a-8(i)(1)-(13).

Thus, any controversy with respect to a proposal that the Trust *might* submit in connection with future shareholder meetings is entirely hypothetical at this juncture and contingent on future events. It is therefore unripe and should be dismissed. *See Novo Nordisk Inc. v. Mylan Pharms. Inc.*, Civ. A. No. 09-2445(FLW), 2010 WL 1372437, at *13 (D.N.J. Mar. 31, 2010) (Wolfson, J.) (granting motion to dismiss when it was "clear to th[e] Court" that plaintiff's "claim [wa]s not ripe for review in that it 'rest[ed] upon contingent future events that may not occur as anticipated, or indeed may not occur at all'" (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998))).

The court's reasoning in *Trinity I* is directly on point:

> Trinity's mere *intent* to submit [a proposal again before the next shareholder meeting] . . . does not (yet) present a live controversy for the Court. . . . Not only could Trinity's 2015 Proposal differ materially from the 2014 Proposal currently before the Court, but it is also possible that Wal-Mart would take a different approach to a revised proposal.

Trinity I, 75 F. Supp. 3d at 628-29. The same is true here.

Moreover, Plaintiffs do not allege, and cannot establish, that the mere fact that the Trust "remains concerned" about alleged "uncertainty" concerning "the legality of the proposal" (SAC ¶ 38) creates a controversy that is "real and substantial [and] 'of sufficient immediacy and reality to warrant the issuance of'" the relief it seeks. *Armstrong World Indus.*, 961 F.2d at 412 (citation omitted). To the contrary, as discussed above, the Trust initially commenced this action to compel inclusion of its Proposal in the Company's proxy materials, and the Company since agreed to include the Trust's Proposal in the 2021 Proxy Materials if the Trust submitted the Proposal in accordance with the requirements of Rule 14a-8. (*See* ECF No. 59-1 ¶ 6; *supra* § I(B).) The Trust did not do so for the 2021 Annual Meeting, and Plaintiffs no longer allege that the Trust *intends* to do so for future shareholder meetings. (*See* SAC ¶ 38.) Under these circumstances, there is no ripe "case or controversy" before the Court for this additional and independent reason. Accordingly, the Second Amended Complaint should be dismissed for lack of subject matter jurisdiction.

CONCLUSION

For all of the foregoing reasons, the Company respectfully requests that Plaintiffs' Second Amended Complaint be dismissed in its entirety with prejudice.

Dated: November 20, 2020

Respectfully submitted,

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