UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON VICINAGE

The Doris Behr 2012 Irrevocable Trust and **Hal S. Scott**,

Plaintiffs,

v.

Johnson & Johnson,

Defendant,

and

California Public Employees' Retirement System; Colorado Public Employees' Retirement Association,

Intervenors.

Case No. 3:19-cv-8828-MAS-LHG

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

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The Doris Behr 2012 Irrevocable Trust ("the Trust") is one of many shareholders in Johnson & Johnson. The Trust wants Johnson & Johnson to amend its bylaws to require the company's shareholders to submit their federal securities law claims to arbitration. And since 2018, it has been attempting to get its shareholder-arbitration proposal on the ballot for a vote at Johnson & Johnson's annual shareholder meeting.

When the Trust first submitted its shareholder-arbitration proposal in November of 2018, Johnson & Johnson refused to include the proposal in the proxy materials that it issued to its shareholders, claiming (falsely) that the Trust's proposal would cause the company to violate federal law. In addition, the Attorney General of New Jersey sent a letter to the SEC Division of Corporation Finance claiming (falsely) that the Trust's proposal, if adopted, would cause Johnson & Johnson to violate New Jersey law. The Trust sued Johnson & Johnson after it refused to include the Trust's proposal in its proxy solicitation materials for the 2019 shareholder meeting, and Johnson & Johnson eventually relented and agreed not to oppose inclusion of the Trust's proposal in its proxy materials for future shareholder meetings.

Johnson & Johnson's Board of Directors is opposing the Trust's proposal and recommending that its shareholders vote against it at the upcoming 2022 shareholder meeting. Johnson & Johnson has also prepared a statement explaining its opposition. But Johnson & Johnson is refusing to correct its earlier misstatements disparaging the legality of the Trust's proposal, and the Trust's proposal cannot receive a fair vote unless Johnson & Johnson removes this taint in the statement describing its opposition to the Trust's proposal. It is well settled that the fairness of proxy materials—*i.e.*, whether they contain a material misstatement or omission—must be based on the total mix of information available to shareholders. Since that mix of information plainly includes Johnson & Johnson's very public disparagement of the legality of the Trust's proposal, and the case law has now rebutted Johnson & Johnson's position, it is incumbent on the company to set the record straight.

The Trust respectfully asks that the Court issue a preliminary injunction that instructs Johnson & Johnson to state in its proxy materials that the Trust's proposal is legal under the law of New Jersey and under the law of the United States, which will remove the taint caused by the baseless accusations of illegality that Johnson & Johnson and the New Jersey Attorney General have made against the Trust's proposal.

FACTS AND STATUTORY BACKGROUND

Johnson & Johnson holds annual shareholder meetings, where the company's shareholders vote on decisions relevant to the company's business. Because Johnson & Johnson is a large and publicly traded company, it is infeasible for each shareholder to attend this meeting. To deal with this problem, Johnson & Johnson sends "proxy solicitation materials" to each of its shareholders before the annual meeting. These proxy materials include: (1) a "proxy statement," which explains the issues to be voted on at the meeting and requests authority to vote on behalf of the shareholder in accordance with the shareholder's instructions; and (2) a "proxy card," which shareholders use to instruct those who will vote on the shareholder's behalf.

Section 14(a) of the Securities Exchange Act of 1934 requires proxy solicitation materials to comply with the SEC's rules and regulations. *See* 15 U.S.C. § 78n(a)).[1] Under the version of Exchange Act Rule 14a-8 in effect until January 2021, a shareholder could submit proposals for consideration at the company's annual shareholder meetings so long as the shareholder: (1) continuously held at least $2,000 (or 1%) of the company's stock for at least one year before submitting its proposal; and (2) continued to hold this required stock through the date of the annual shareholder meeting. *See* 17 C.F.R. § 240.14a-8(b)(1). Under Rule 14a-8 as amended effective January 2021, a shareholder may submit proposals for consideration at the company's annual shareholder meetings, so long as the shareholder: (1) continuously holds at least $25,000 of the company's stock for at least one year before submitting its proposal, at least $15,000 of the company's stock for at least two years before submitting its proposal, or at least $2,000 of the company's stock for at least three years before submitting its proposal; and (2) continues to hold this required stock through the date of the annual shareholder meeting. A shareholder proposal and its accompanying supporting statement are limited to 500 words,[2] and the proposal must be "received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting." *See* 17 C.F.R. § 240.14a-

1. The SEC rules governing proxy solicitations are codified at 17 C.F.R. § 240.14a-1 *et seq.* The text of Rule 14a-8, which governs shareholder proposals, is attached as Exhibit 9 to this brief.

2. *See* 17 C.F.R. § 240.14a-8(b)(1).

8(e)(2). If an eligible shareholder submits a proposal that meets these requirements, then the company must include that proposal in its proxy solicitation materials, unless the company shows that the proposal falls within one of the 13 exceptions listed in Rule 14a-8(i) (codified at 17 C.F.R. § 240.14a-8(i)). The company bears the burden of demonstrating that an exception in Rule 14a-8(i) applies. *See Trinity Wall Street v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 334 (3d Cir. 2015) ("[The company] bears the burden of establishing as a matter of law that it properly excluded the proposal under an exception to Rule 14a-8.").

One of these exceptions is Rule 14a-8(i)(2), which allows a company to exclude proposals that "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).

I. The Trust's Shareholder-Arbitration Proposal

On November 9, 2018, the Trust submitted its proposal to Johnson & Johnson's management. *See* Exhibit 1. The Trust's proposal, if adopted, would instruct the company's Board of Directors to "take all practicable steps to adopt a mandatory arbitration bylaw" that provides:

- for disputes between a stockholder and the Corporation and/or its directors, officers or controlling persons relating to claims under federal securities laws in connection with the purchase or sale of any securities issued by the Corporation to be exclusively and finally settled by arbitration under the Commercial Rules of the American Arbitration Association (AAA), as supplemented by the Securities Arbitration Supplementary Procedures;

- that any disputes subject to arbitration may not be brought as a class and may not be consolidated or joined;

- an express submission to arbitration (which shall be treated as a written arbitration agreement) by each stockholder, the Corporation and its directors, officers, controlling persons and third parties consenting to be bound;

- unless the claim is determined by the arbitrator(s) to be frivolous, the Corporation shall pay the fees of the AAA and the arbitrator(s), and if the stockholder party is successful, the fees of its counsel;

- a waiver of any right under the laws of any jurisdiction to apply to any court of law or other judicial authority to determine any matter or to appeal or otherwise challenge the award, ruling or decision of the arbitrator(s);

- that governing law is federal law; and

- for a five-year sunset provision, unless holders of a majority of Corporation shares vote for an extension and the duration of any extension.

See Exhibit 1. The Trust submitted this proposal within the time window provided in Rule 14a-8(e)(2), and the Trust was eligible to submit this shareholder proposal under the then-existing requirements of Rule 14a-8(b)(1).[3]

II. Johnson & Johnson's Initial Opposition To The Trust's Proposal

On December 11, 2018, Johnson & Johnson informed the SEC Division of Corporation Finance ("the Division") that it intended to exclude the Trust's proposal

3. The Trust owned 1,050 shares of Johnson & Johnson (with a market value well in excess of $2,000), and it had held these shares for at least one year when it submitted its proposal on November 9, 2018. *See* Exhibit 1. This rendered the Trust eligible to submit its proposal under the then-existing requirements of 17 C.F.R. § 240.14a-8(b)(1). The Trust continued holding these shares through the company's 2019 shareholder meeting.

from its proxy solicitation materials. *See* Exhibit 2. Johnson & Johnson claimed that the Trust's proposal was excludable under Rule 14a-8(i)(2) because it would cause the company to violate federal law. *See id.* Specifically, Johnson & Johnson asserted that the Trust's proposal would cause the company to violate Section 29(a) of the Securities Exchange Act, which states that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void." 15 U.S.C. § 78cc(a).

On December 24, 2018, the Trust wrote to the Division and explained that Johnson & Johnson's argument was irreconcilable with the Federal Arbitration Act and a series of Supreme Court decisions, including *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). *See* Exhibit 3.

In response to the Trust's letter, Johnson & Johnson sent a supplementary letter to the Division arguing for the first time that the Trust's shareholder-arbitration proposal would cause the company to violate New Jersey *state* law. *See* Exhibit 4. Johnson & Johnson admitted that no court in New Jersey has ever ruled on whether a corporation's bylaws may require arbitration of shareholder claims. *See id.* at 3. And Johnson & Johnson could not point to any statutory language that precludes New Jersey corporations from establishing an arbitration regime of this sort. Instead, Johnson & Johnson attached an opinion letter from Lowenstein Sandler, which cited cases interpreting Delaware and Pennsylvania law and predicted that the New Jersey courts would follow the rationale in those cases. *See* Exhibit 4, Ex. A at 4–8 (citing

Sciabacucchi v. Salzberg, 2018 WL 6719718 (Del. Ch. Dec. 19. 2018), and *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 163 (3d Cir. 2009)).

On January 23, 2019, the Trust wrote to the Division to refute the arguments in Johnson & Johnson's supplementary letter. *See* Exhibit 5. The Trust protested that New Jersey law was *at most* "unclear or unsettled" on the legality of shareholder arbitration, and that the company therefore could not carry its burden of showing that the Trust's proposal "*would*, if implemented, cause the company to violate any state, federal, or foreign law to which it *is subject*," as required by the text of Rule 14a-8(i)(2). *See* Exhibit 5 at page 8 (quoting 17 C.F.R. § 240.14a-8(i)(2) (emphasis added)). The Trust also argued that the opinion letter from Lowenstein Sandler had misinterpreted the requirements of Delaware, Pennsylvania, and New Jersey law. *See id.* at 3–10. Finally, the Trust noted that *even if* Johnson & Johnson were correct to assert that New Jersey law forbids the company to adopt shareholder arbitration, the Federal Arbitration Act would preempt state law and allow Johnson & Johnson to implement the Trust's proposal. *See id.* at 10–12.

On January 29, 2019, the Attorney General of New Jersey sent a letter to the Division opining that the Trust's proposal, if adopted, would cause Johnson & Johnson to violate New Jersey law. *See* Exhibit 6. The Attorney General, like Johnson & Johnson, was unable to identify any statutory language or any New Jersey court decision that prohibits a corporation from requiring its shareholders to arbitrate their federal securities law claims. *See id.* at 3 (acknowledging the "absence of controlling New Jersey authority"). The Trust responded to the New Jersey Attorney General's letter on February 1, 2019. *See* Exhibit 7. The Trust reiterated its claim that the Federal Arbitration Act preempts any provision of New Jersey law that purports to prevent Johnson & Johnson from requiring shareholder arbitration, and it noted that the Attorney General's letter did not even attempt to address the issue of FAA preemption. *See id.* at 3.

After considering all of these submissions, the SEC Division of Corporation Finance issued a "no-action letter" on February 11, 2019, announcing that it would *not* recommend enforcement action if Johnson & Johnson excluded the Trust's proposal from its 2019 proxy materials. *See* Exhibit 8. The no-action letter concluded that Johnson & Johnson could exclude the Trust's proposal under Rule 14a-8(i)(2), but only on the ground that the proposal would cause Johnson & Johnson to violate state law. *See id.* In reaching this conclusion, the Division put decisive weight on the letter submitted by the Attorney General of New Jersey.[4] The Division, however, emphasized that it was "not expressing its own view on the correct interpretation of New Jersey law," and that it was not "'approving' or 'disapproving' the substance of the Proposal or opining on the legality of it." *Id.* The Division also invited the parties to "seek a more definitive determination from a court of competent jurisdiction." *Id.*

4. *See* Exhibit 8 ("When parties in a rule 14a-8(i)(2) matter have differing views about the application of state law, we consider authoritative views expressed by state officials. Here, the Attorney General of the State of New Jersey, the state's chief legal officer, wrote a letter to the Division stating that 'the Proposal, if adopted, would cause Johnson & Johnson to violate New Jersey state law.' We view this submission as a legally authoritative statement that we are not in a position to question.").

The Division refused to express a view on whether the Trust's proposal would cause Johnson & Johnson to violate federal law.[5]

In reliance on the Division's no-action letter, Johnson & Johnson excluded the Trust's proposal from the proxy materials that it mailed to its shareholders on March 13, 2019. The Trust sued Johnson & Johnson on March 21, 2019, and sought a preliminary injunction that would require Johnson & Johnson to issue supplementary proxy materials that include the Trust's proposal before the 2019 shareholder meeting. The Court denied this request, and the 2019 shareholder meeting came and went without a vote on the Trust's proposal.

III. Johnson & Johnson Decides To Include The Trust's Proposal In Its Proxy Materials But Refuses To Remove The Taint Caused By Its Baseless Accusations Of Illegality

On March 18, 2020, the Supreme Court of Delaware announced its ruling in *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020), which reversed the Delaware Court of Chancery's decision in *Sciabacucchi v. Salzberg*, No. CV 2017-0931-JTL, 2018 WL 6719718 (Dec. 19, 2018). Both Johnson & Johnson and the New Jersey Attorney General had relied on the Delaware Court of Chancery's decision in *Sciabacucchi* to support their assertion that the Trust's shareholder-arbitration proposal would violate Delaware law (and therefore New Jersey law). In reversing that ruling, the Delaware Supreme Court eliminated any ground for asserting that the Trust's

5. *See id.* ("We are also not expressing a view as to whether the Proposal, if implemented, would cause the Company to violate federal law.").

shareholder-arbitration proposal is contrary to state law. The ruling of the Supreme Court of Delaware is attached as Exhibit 10.

After the Supreme Court of Delaware announced its ruling in *Sciabacucchi*, Johnson & Johnson 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. On September 11, 2021, the Trust resubmitted its proposal for consideration at Johnson & Johnson's 2022 annual shareholder meeting. Johnson & Johnson has agreed to include the Trust's proposal in its proxy materials but intends to include a statement of opposition from the Board of Directors that reads as follows:

> **The Board of Directors recommends a vote AGAINST the adoption of this proposal for the following reasons:**
>
> 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.
>
> **It is, therefore, recommended that shareholders vote AGAINST this proposal.**

Exhibit 11. Although this statement does not repeat the company's false accusations of illegality, it nonetheless fails to correct the earlier misstatements that falsely accused the Trust's proposal of violating federal and New Jersey law. The Trust seeks a preliminary injunction that would compel Johnson & Johnson to remove the taint of its prior statements disparaging the legality of Trust's proposal, to ensure that the proposal receives a fair vote at the upcoming shareholder meeting.

THE TRUST IS ENTITLED TO A PRELIMINARY INJUNCTION

A court must consider four factors when deciding whether to issue a preliminary injunction: (1) Whether the plaintiff is likely to succeed on the merits; (2) Whether the plaintiff will suffer irreparable injury absent a preliminary injunction; (3) The possibility of harm to other interested parties; and (4) The public interest. *See Eli Lilly & Co. v. Premo Pharm. Labs., Inc.*, 630 F.2d 120, 136 (3d Cir. 1980); *Constructors Ass'n of W. Pa. v. Kreps*, 573 F.2d 811, 815 (3d Cir. 1978). All four factors support preliminary relief.

I. The Trust Is Likely To Succeed On The Merits

Exchange Act Rule 14a-9 prohibits Johnson & Johnson's proxy solicitation materials from: (i) making false or misleading statements of material fact; or (ii) omitting statements of 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) (emphasis added). Johnson &

Johnson's earlier communications disparaging the legality of the proposal have become false or misleading in light of the ruling in *Sciabacucchi*, and the company is obligated to affirm the legality of the Trust's proposal in its proxy solicitation materials under section 240.14a-9(a)(ii).

A. The Trust's Proposal Is Indisputably Lawful Under Federal and State Law, And Johnson & Johnson's Claims Of Illegality Were False And Misleading

Johnson & Johnson's initial letter to the SEC claimed that the Trust's proposal would cause the company to violate Section 29(a) of the Securities Exchange Act. *See* Exhibit 2. But the SEC's no-action letter did not even attempt to argue that the Trust's proposal would violate Section 29(a). *See* Exhibit 8. And for good reason: the Federal Arbitration Act and the Supreme Court's ruling in *Epic Systems* squelch any possibility that a company would "violate" federal law by amending its bylaws to require arbitration of federal securities law claims. The corporate bylaws are a contract between the corporation and its shareholders,[6] and arbitration provisions in

6. *See Vergopia v. Shaker*, 922 A.2d 1238, 1249 (N.J. 2007) ("[T]he certificate of incorporation, constitution and bylaws of the corporation constitute *a contract* between the corporation and its stockholders and the stockholders *inter sese*" (quoting *Faunce v. Boost Co.,* 15 N.J. Super. 534, 538, 83 A.2d 649 (Ch. Div. 1951) (emphasis added in the *Vergopia* opinion)); *Rosenberg v. AT&T Employees Federal Credit Union*, 726 F. Supp. 573, 578 (D.N.J. 1989) ("It is well settled under common law that bylaws generally act as a contract between a corporation and its shareholders."); *see also Airgas, Inc. v. Air Prods. and Chems., Inc.,* 8 A.3d 1182, 1188 (Del. 2010) ("Corporate charters and bylaws are contracts among the corporation's shareholders").

contracts *must* be enforced in accordance with the FAA. Johnson & Johnson's previous claim that the Trust's proposal would "cause" Johnson & Johnson to "violate" this statutory provision was therefore false and misleading.

1. An agreement to arbitrate does not "waive compliance with" the governing law

Section 29(a) of the Securities Exchange Act provides:

> Any condition, stipulation, or provision binding any person to *waive compliance with* any provision of this title or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void.

15 U.S.C. § 78cc(a) (emphasis added). Johnson & Johnson claimed that the Trust's proposal would violate Section 29(a), but the problem with this argument is apparent from the text of Section 29(a): An *agreement to arbitrate* federal securities law claims does not *waive compliance with* the federal securities laws. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."). Far from "waiving compliance with" the securities laws, the Trust's proposal *preserves* a shareholder's right to enforce those laws in arbitration proceedings. This is no different from parties to a contract agreeing to arbitrate their disputes. A contract of that sort does not waive the parties' obligations to comply with the governing law; it simply channels the parties' disputes into a low-cost arbitral forum that enforces the same laws that the courts would apply.

Johnson & Johnson never attempted to explain how an agreement to arbitrate is a waiver of compliance with the law. Instead, the company asserted that the Trust's proposal "would weaken the ability of investors" to enforce the securities laws because it eliminates the possibility of class litigation.[7] But the Supreme Court enforces class-action waivers in arbitration agreements, and it has emphatically rejected the argument that class-action waivers prevent the effective vindication of statutory rights. *See American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 236 (2013) ("[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."); *id.* ("The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938." (citations omitted)).

Johnson & Johnson also claimed that the Trust's proposal "effectively waives" a shareholder's ability to bring securities law claims because it prohibits judicial review of the arbitrator's decision.[8] That claim was indefensible. Shareholders will retain their ability to "bring claims" under the Securities Exchange Act, but their claims will be resolved through arbitration rather than litigation. An agreement to

7. *See* Exhibit 2 at 4 ("[T]he Proposal seeks to prevent any shareholder who has a claim subject to arbitration from bringing the claim on behalf of a class of Johnson & Johnson shareholders or by consolidation or joinder in order to resolve the dispute.").

8. *See* Exhibit 2 at 4 ("[T]he Proposal provides a waiver of any right under the laws of any jurisdiction to apply to any court of law or other judicial authority to determine any matter or to appeal or otherwise challenge the award, ruling or decision of the arbitrator(s), thus effectively waiving shareholders' abilities to bring claims under Exchange Act Section 10(b) and Rule 10b-5.").

submit claims to binding arbitration does not waive compliance with the law—and it does not waive a shareholder's prerogative to enforce the law through private rights of action.

Finally, Johnson & Johnson contended that shareholder agreements to arbitrate securities law claims may be enforced only when the arbitration procedures are subject to SEC oversight. *See* Exhibit 2 at 3–4, 4–5. Johnson & Johnson relied on *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), which enforced an agreement to arbitrate securities law claims, but limited its holding to arbitration procedures established by entities within the SEC's regulatory jurisdiction.[9] *McMahon* limited its holding in this manner because an earlier ruling of the Supreme Court, *Wilko v. Swan*, 346 U.S. 427 (1953), had refused to enforce an agreement to arbitrate claims arising under the federal securities laws. Rather than overruling *Wilko*, the *McMahon* Court chose to distinguish it on the ground that the arbitration procedures in *McMahon* had been specifically approved by the SEC,[10] while the arbitration procedures in *Wilko* were not subject to SEC oversight.[11] Johnson & Johnson suggested

9. *See Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 234 (1987) ("We conclude that where, as in this case, the prescribed [arbitration] procedures are subject to the [SEC's] § 19 authority, an arbitration agreement does not effect a waiver of the protections of the Act.").

10. *See McMahon*, 482 U.S. at 234 ("[T]he SEC has specifically approved the arbitration procedures of the New York Stock Exchange, the American Stock Exchange, and the NASD, the organizations mentioned in the arbitration agreement at issue in this case.").

11. *See McMahon*, 482 U.S. at 233 ("Even if *Wilko*'s assumptions regarding arbitration were valid at the time *Wilko* was decided, most certainly they do not hold

that this dooms any agreement to arbitrate securities law claims *unless* the arbitration procedures are subject to SEC oversight, as they were in *McMahon*.

The problem with this argument is that the Supreme Court completely overruled *Wilko* in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). *See id.* at 484 ("*Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions."). Now that *Wilko* has been overruled, it no longer matters whether an agreement to arbitrate requires procedures that are subject to SEC oversight; federal courts must enforce the agreement regardless under the terms of the FAA.

2. The Federal Arbitration Act and *Epic Systems* require the enforcement of the proposed arbitration agreement

The second and more serious problem for Johnson & Johnson was the Federal Arbitration Act, which provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. No federal statute may be interpreted to depart from this regime unless its language is sufficiently emphatic to effectuate a partial implied repeal of the Federal Arbitration Act. *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). But implied repeals are heavily disfavored and will not

true today for arbitration procedures subject to the SEC's oversight authority.").

be found unless the repealing statute unambiguously conflicts with the earlier enacted language.[12] So it is not enough for Johnson & Johnson to show that Section 29(a) *could* be interpreted to forbid arbitration. It was required to show that Section 29(a) meets the demanding standard for a partial implied repeal—by evincing "a clear intention to displace the [Federal] Arbitration Act." *Id.* at 1632.

Johnson & Johnson never attempted to argue that the standard for a partial implied repeal has been met. *See* Exhibit 2. And the language of Section 29(a) comes nowhere close to an implied repeal of the Federal Arbitration Act. Section 29(a) does not even mention arbitration. *See Epic Systems*, 138 S. Ct. at 1627 ("[T]he absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act."). And the Supreme Court has already rejected the notion that an agreement to arbitrate "waives compliance" with the governing statutes.[13] So even if it were *possible* to construe Section

12. *See Epic Systems*, 138 S. Ct. at 1624 ("[W]e come armed with the 'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute." (citations omitted)); *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 381 (1996) ("The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue." (citation and internal quotation marks omitted)); *see also Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004) (Easterbrook, J.) ("[R]epeal by implication is a rare bird indeed.").

13. *See Mitsubishi Motors*, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."); *McMahon*, 482 U.S. at 233–34 (enforcing an agreement to arbitrate claims arising under the Securities Exchange Act of 1934 and rejecting the argument that

29(a) to forbid arbitration agreements (and it isn't, *see supra*, Section I.A.1), the proposal would remain legal under federal law, because there has been no showing that Section 29(a) so unambiguously forbids the enforcement of arbitration agreements as to effectuate a partial implied repeal of the Federal Arbitration Act.

B. The Trust's Proposal Is Indisputably Lawful Under New Jersey Law, And Johnson & Johnson's Claims Of Illegality Were False And Misleading

Johnson & Johnson's supplementary letter to the SEC asserted that the Trust's proposal would cause Johnson & Johnson to violate the law of New Jersey. *See* Exhibit 4. The Attorney General of New Jersey made a similar claim. *See* Exhibit 6. But neither Johnson & Johnson nor the Attorney General identified any *law*—such as a statute or court decision—that prohibits corporations and their shareholders from agreeing to arbitrate their securities law claims in a corporation's bylaws. Nor did they identify any New Jersey law that prohibits the judicial enforcement of a shareholder arbitration bylaw. Instead, their claim is based on an asserted belief that the New Jersey courts—if they were to be confronted with a hypothetical case involving a corporate bylaw requiring arbitration of securities law claims—would declare the bylaw unenforceable and allow shareholders to litigate their claims in court. *See* Exhibit 4 at 2–3; Exhibit 6 at 3–4.

Section 29(a) rendered the arbitration agreement unenforceable); *Rodriguez de Quijas*, 490 U.S. at 484 (overruling *Wilko* and enforcing agreement to arbitrate claims arising under Section 12(2) of the Securities Act of 1933).

Johnson & Johnson admitted that no New Jersey court has ever disapproved the shareholder arbitration agreement described in the Trust's proposal.[14] But it attempts to concoct a state-law prohibition by relying on an opinion from the *Delaware* Court of Chancery—which is not the law of New Jersey, and is not a law to which Johnson & "is subject." *See* Exhibit 4 Ex. A at 4–6 (citing *Sciabacucchi v. Salzberg*, 2018 WL 6719718 (Del. Ch. Dec. 19. 2018)). *Sciabacucchi* refused to enforce a forum-selection clause in a certificate of incorporation that would have required shareholders to litigate their claims under the Securities Act of 1933 in federal court. Johnson & Johnson claimed that New Jersey courts would reach the same result because they often consider Delaware precedent when ruling on corporate law matters.[15]

But the Supreme Court of Delaware pulled the rug from under this argument when it reversed the Chancery Court's ruling in *Salzberg v. Sciabacucchi*, 227 A.3d

14. See Exhibit 4 at 3 ("[N]o New Jersey court has considered the issue of whether a mandatory arbitration bylaw requiring shareholders to arbitrate claims under the federal securities laws would be legal as a matter of New Jersey law."
15. *See* Exhibit 4 at 3 ("[T]he New Jersey Opinion . . . analogizes to case law from Delaware and the U.S. Court of Appeals for the Third Circuit, to come to an opinion as to how a New Jersey court would likely view a novel question presented by adoption of a bylaw amendment as described in the Proposal."); Exhibit 4 Ex. A at 5 ("While Sciabacucchi is a Delaware decision, the New Jersey courts have long looked to Delaware precedent when considering New Jersey corporate law matters."). The New Jersey Attorney General makes a similar argument. *See* Exhibit 6 at 3 ("New Jersey courts frequently look [to Delaware cases] for guidance on matters of corporate law in the absence of controlling New Jersey authority.").

102 (Del. 2020), and eliminated any possible basis for Johnson & Johnson's argument that the Trust's shareholder-arbitration proposal violates Delaware law (and therefore New Jersey law).

C. Johnson & Johnson's Proxy Materials Must Declare The Trust's Proposal Lawful To Remove The Taint Of Its Past Statements Disparaging The Proposal's Legality

Rule 14a-9 prohibits false or misleading proxy solicitations. *See* 17 C.F.R. § 240.14a-9. A proxy solicitation is false or misleading if it: (i) makes false or misleading statements of material fact; or (ii) omits statements of 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) (emphasis added). Johnson & Johnson's earlier communications disparaging the legality of the proposal have become false or misleading in light of the ruling in *Sciabacucchi*, and the company is obligated to affirm the legality of the Trust's proposal in its proxy materials under both the law of New Jersey and the law of the United States.

The Trust's proposal has been tainted by the public assertions of illegality that Johnson & Johnson and the New Jersey Attorney General have made. *See* Exhibits 2, 4, and 6. To include the Trust's proposal against the backdrop of these baseless accusations—without informing shareholders that the Trust's proposal is lawful—will render the proxy materials misleading, in violation of Rule 14a-9. Johnson & Johnson is obligated to remove this taint by affirmatively informing shareholders of the Delaware Supreme Court's ruling in *Sciabacucchi*, which discredits the company's prior assertions that the Trust's proposal violates New Jersey law. It must also inform shareholders that its earlier communications disparaging the legality of the Trust's proposal have become false or misleading on account of *Sciabacucchi*.

First, Johnson & Johnson's past communications regarding the Trust's proposal have "become false or misleading" within the meaning of Rule 14a-9(a)(ii). Johnson & Johnson's letter of January 16, 2019, to the SEC Division of Corporation Finance declared that the Trust's proposal violates the law of New Jersey, and it relied on the now-repudiated decision of the Delaware Chancery Court in *Sciabacucchi v. Salzberg*, No. CV 2017-0931-JTL, 2018 WL 6719718 (Dec. 19, 2018), and *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 163 (3d Cir. 2009)). *See* Exhibit 4. The Delaware Supreme Court's ruling in *Sciabacucchi* has made the company's prior accusations of illegality "false and misleading," as they rested on a ruling from the Delaware Chancery Court that has been explicitly overruled.

Second, a statement from Johnson & Johnson affirming the legality of the Trust's proposal is "necessary to correct" these earlier misleading statements, as the company has never disavowed its previous position that the Trust's proposal violates both state and federal law—and the company obtained a no-action letter from the SEC on account of these now-discredited accusations of illegality. All of this is part of the public record, and the company must correct that record to ensure that the Trust's proposal receives a fair vote from the company's shareholders.

II. The Trust Will Suffer Irreparable Harm Absent A Preliminary Injunction

The Trust will suffer irreparable harm if the company fails to correct its earlier misstatements disparaging the legality of the Trust's proposal because it will not be able to obtain compensatory damages or retrospective relief if a vote occurs under the cloud of the past accusations of illegality. *See Int'l Dairy Foods Ass'n v. Amestoy,* 92 F.3d 67, 71 (2d Cir. 1996) ("Irreparable harm is injury for which a monetary award cannot be adequate compensation." (internal quotation marks omitted)). Worse, the company's public and misleading disparagements of the Trust's proposal could cause it to receive less than 5 percent of the vote at the 2022 annual shareholder meeting—an outcome that will bar the Trust from re-submitting its proposal for another three years. *See* 17 C.F.R. § 240.14a-8(i)(12).

III. The Balance Of Harms Favors Preliminary Relief

As compared to the undisputable irreparable harm that will befall the Trust in the absence of a preliminary injunction, there is no harm to Johnson & Johnson if the injunction is granted. The injunction will simply allow Johnson & Johnson's shareholders to vote on the Trust's proposal with full knowledge that the Trust's proposal is lawful, and a company cannot suffer harm from truthfully disclosing that a proposal offered by one its shareholders is compatible with state and federal law. And there is no legal risk to the company if the shareholders approve this proposal, as explained in section I.

IV. The Public Interest Favors a Preliminary Injunction

Johnson & Johnson is violating Rule 14a-9(a)(ii) by failing to correct its prior misstatements about the Trust's proposal, and an injunction enforcing these requirements of federal law is by definition in the public interest. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

CONCLUSION

The motion for order to show cause why a preliminary injunction should not issue should be granted.

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Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on March 11, 2022, I served this document by CM/ECF upon:

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