IN THE 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-08828-MAS-LHG

BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

JONATHAN F. MITCHELL*
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

WALTER S. ZIMOLONG
Zimolong LLC
P.O. Box 552
Villanova, Pennsylvania 19085
(215) 665-0842
wally@zimolonglaw.com

HAL S. SCOTT*
Harvard Law School
1557 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4590
hscott@law.harvard.edu

* admitted *pro hac vice*

Counsel for Plaintiffs

TABLE OF CONTENTS

Table of contents i

Table of authorities ii

I. The plaintiffs' claims are not moot 1

II. Johnson & Johnson's ripeness objections are without merit 5

A. The issues are fit for judicial decision because the issues presented are pure questions of law 5

B. The plaintiffs will face hardship if the court refuses to rule on the legality of the trust's proposal 7

C. The remaining ripeness considerations support resolution of the plaintiffs' claims 9

Conclusion 11

Certificate of service 12

TABLE OF AUTHORITIES

Cases

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 5, 6

Artway v. Attorney General of State of N.J.,
81 F.3d 1235 (3d Cir. 1996) 6

Century 21 Real Estate Corp. v. Lendingtree, Inc.,
425 F.3d 211 (3d Cir. 2005) 2

City of Mesquite v. Aladdin's Castle, Inc.,
455 U.S. 283 (1982) 1

Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.,
528 U.S. 167 (2000) 3

Khodara Environmental, Inc. v. Blakey,
376 F.3d 187 (3d Cir. 2004) 6

Phillips v. Pennsylvania Higher Education Assistance Agency,
657 F.2d 554 (3d Cir. 1981) 2

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014) 5

United States v. Gov't of Virgin Islands,
363 F.3d 276 (3d Cir. 2004) 1, 3

United States v. Grape,
549 F.3d 591 (3d Cir. 2008) 2

United States v. W.T. Grant Co.,
345 U.S. 629 (1953) 1

Wayne Land & Mineral Group LLC v. Delaware River Basin Commission, 894 F.3d 509 (3d Cir. 2018) 9

Johnson & Johnson seeks dismissal on mootness and ripeness grounds, but none of its arguments warrant dismissal.

I. The Plaintiffs' Claims Are Not Moot

Johnson & Johnson believes that it mooted the plaintiffs' claims when it declared it would no longer exclude the Trust's proposal from its annual proxy materials. *See* Def.'s Br. (ECF No. 71-1) at 21. But a defendant cannot moot a claim for prospective relief by unilaterally changing its ways after a plaintiff sues. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot."); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."); *United States v. Gov't of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004) ("[I]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" (citation and internal quotation marks omitted)).

When the Trust sued Johnson & Johnson in April of 2019, the company was excluding the Trust's proposal from its annual proxy materials and insisting that the Trust's proposal was unlawful. Johnson & Johnson changed its stance in 2020—while this litigation remained ongoing—and announced that it would no longer exclude the Trust's proposal from its annual proxy materials. This is a textbook exam-

ple of voluntary cessation, and it is incapable of mooting the plaintiffs' claims. Johnson & Johnson remains free to change its mind and return to excluding the Trust's proposal from its proxy materials at any point in the future, and a claim for prospective relief cannot be moot if dismissal would leave the defendant "'free to return to [its] old ways.'" *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 217 (3d Cir. 2005) (quoting *Iron Arrow Honor Soc. v. Heckler,* 464 U.S. 67, 72 (1983)); *see also Phillips v. Pennsylvania Higher Education Assistance Agency*, 657 F.2d 554, 570 (3d Cir. 1981) ("Present intentions may not be carried out, and, at any rate, they are not controlling on the issue of mootness.").[1]

Johnson & Johnson seems to believe that it can overcome the voluntary-cessation doctrine because it submitted a sworn declaration announcing that it would include the Trust's proposal in its 2021 proxy materials if the Trust re-submitted the proposal by November 11, 2020, a date that has now passed. *See* Def.'s Br. (ECF No. 71-1) at 24 ("[T]he Company made a sworn commitment to include the Proposal if the Trust timely submitted it in accordance with Rule 14a-8."); Certification of Matthew Orlando (ECF No. 59-2) ¶ 6. But a defendant who seeks to establish mootness through voluntary cessation of this sort bears an exceedingly heavy burden:

> The standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events *made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur*. Moreover, the party alleg-

1. *See also United States v. Grape*, 549 F.3d 591, 597 (3d Cir. 2008) ("[M]ootness is not presumed if the respondent has stopped the offending action, but may resume it at any time.").

> ing mootness bears the "heavy," even "formidable" burden of persuading the court that the challenged conduct cannot reasonably be expected to resume.

United States v. Gov't of Virgin Islands, 363 F.3d 276, 285 (3d Cir. 2004) (emphasis added) (citation and some internal quotation marks omitted); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). The declaration that Johnson & Johnson submitted does not make "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"; it promises *only* to include the Trust's proposal in the company's proxy materials *for 2021*:

> [P]rovided that the Trust remains eligible under the applicable rules of the Securities & Exchange Commission ("SEC") to submit a shareholder proposal for inclusion in Johnson & Johnson's 2021 proxy materials, and provided that the Trust submits its Proposal by November 11, 2020 and in accordance with the applicable SEC rules, Johnson & Johnson will include the Proposal in its 2021 proxy materials for consideration by Johnson & Johnson's shareholders at the 2021 Annual Meeting of Shareholders.

Certification of Matthew Orlando (ECF No. 59-2) ¶ 6. This does not commit Johnson & Johnson to including the Trust's proposal in proxy materials issued *after* the 2021 shareholder meeting. So the sworn statement does not prove that the Johnson & Johnson will never again exclude the Trust's proposal from its annual proxy materials, and the Trust's claims for declaratory relief remain live.

The sworn statement also does not prevent Johnson & Johnson from continuing to undermine the Trust's proposal by publicly questioning its legality—even as the company allows the Trust's proposal to receive a shareholder vote. Johnson & Johnson refuses to stipulate that the Trust's proposal is lawful, even in the wake of the

Delaware Supreme Court's *Sciabacucchi* ruling, and the Trust cannot obtain a fair shareholder vote on its proposal until the taint from the company's previous legal objections has been removed. An Article III case or controversy will continue to exist for as long as the parties continue to dispute the *legality* of the Trust's proposal. The plaintiffs remain injured by the taint that Johnson & Johnson has imposed on the Trust's proposal, and this taint will undercut shareholder support for the proposal until the taint is removed. Johnson & Johnson's professed willingness to allow a shareholder vote on the Trust's proposal does nothing to alleviate *that* Article III injury.

Johnson & Johnson also contends that the plaintiffs may no longer seek a declaratory judgment that it unlawfully excluded the Trust's proposal from its 2019 proxy materials. *See* Def.'s Br. (ECF No. 71-1) at 18–20. In Johnson & Johnson's view, this claim for declaratory relief became moot after the 2019 shareholder meeting, because the company will never again issue proxy materials for 2019. The problem with this argument is that the plaintiffs have specifically alleged that they intend to *resubmit* the Trust's proposal for consideration at a future shareholder meeting,[2] and they are

2. *See* Second Amended Complaint (ECF No. 66) at 2 ("The Trust wishes to resubmit its proposal for consideration at future shareholder meetings, and it seeks a declaratory judgment that Johnson & Johnson violated the federal securities laws by excluding the Trust's proposal from the 2019 proxy materials"); *id.* at ¶ 38 ("[T]he Trust wishes to re-submit its proposal for future shareholder meetings"); *id.* at ¶ 44 ("The Trust wishes to resubmit its shareholder-arbitration proposal to Johnson & Johnson, and it therefore seeks relief under the Declaratory Judgment Act").

seeking declaratory relief that will prevent Johnson & Johnson from *repeating* its decision to exclude the Trust's proposal from its annual proxy materials. The plaintiffs are not seeking a declaratory judgment to "remedy that which occurred in the past." Defs.' Br. (ECF No. 71-1) at 18. They are asking this Court to declare that Johnson & Johnson may not exclude the Trust's proposal from its annual proxy materials *in the future*, because *any* decision to exclude the Trust's proposal—whether past, present, or future—will violate section 14(a) of the Securities Exchange Act. Johnson & Johnson is wrong to assert that a declaratory judgment of this sort would "have [no] effect in the real world" and result in "no more than an advisory opinion regarding the 'wrongfulness' of past conduct." Defs.' Br. (ECF No. 71-1) at 19 (citation and internal quotation marks omitted). The declaratory relief that the plaintiffs request will establish the plaintiffs' right to resubmit the Trust's proposal without any fear of exclusion—and without any fear that Johnson & Johnson might continue to dispute the proposal's legality.

II. Johnson & Johnson's Ripeness Objections Are Without Merit

In determining whether a claim is ripe, a Court must consider: (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Each of these factors is easily satisfied.

A. The Issues Are Fit For Judicial Decision Because The Issues Presented Are Pure Questions of Law

A claim is "fit for judicial decision" if it presents a pure question of law. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (finding the "fitness" factor to

be "easily satisfied" because "petitioners' challenge to the Ohio false statement statute presents an issue that is 'purely legal, and will not be clarified by further factual development.'" (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985)); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967) (finding issues to be "appropriate for judicial resolution at this time" because "the issue tendered is a purely legal one"); *Khodara Environmental, Inc. v. Blakey*, 376 F.3d 187, 198 (3d Cir. 2004) (Alito, J.) (finding claim to be ripe when "[t]he crux of the issue on the merits . . . is purely legal"); *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235, 1249 (3d Cir. 1996) ("The more that the question presented is purely one of law, and the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe, and vice-versa.").

All of the plaintiffs' claims present pure questions of law. The plaintiffs are seeking judicial declarations that:

1. Section 14(a) of the Securities Exchange Act prevents Johnson & Johnson from excluding the Trust's proposal from its annual proxy materials;[3]

2. The Trust's proposal does not violate federal law;[4]

3. The Trust's proposal does not violate the law of New Jersey;[5]

3. *See* Second Amended Complaint (ECF No. 66) at ¶ 45(a).
4. *See* Second Amended Complaint (ECF No. 66) at ¶ 45(b).
5. *See* Second Amended Complaint (ECF No. 66) at ¶ 45(c).

4. Any law of New Jersey that purports to prevent a company from requiring its shareholders to arbitrate their federal securities law claims is preempted by the Federal Arbitration Act.[6]

When considering the first prong of the *Abbott Laboratories* test, it is apparent that each of these requests for declaratory relief present "pure questions of law," and they are meet for decision now without any need for further factual development. There is no need to wait for any additional facts to unfold before a court can rule on the merits of these purely legal questions.

B. The Plaintiffs Will Face Hardship If The Court Refuses To Rule On The Legality Of The Trust's Proposal

Although Johnson & Johnson claimed that it was willing to include the Trust's proposal in its 2019 proxy materials, the Trust's proposal cannot receive a fair vote from the company's shareholders because Johnson & Johnson has previously disparaged the legality of the proposal. And Johnson & Johnson refuses to remove this taint by stipulating to the legality of the Trust's proposal in its future proxy materials. The Trust's proposal is therefore unable to receive a fair vote from the company's shareholders, and that will remain the case until the Trust's proposal is declared lawful in a declaratory-judgment action that binds Johnson & Johnson. Refusing to rule on these issues will impose hardship on the plaintiffs by preventing the Trust's proposal from receiving a fair shareholder vote, untainted by the unfounded (and uncorrected) accusations of illegality that Johnson & Johnson has directed toward the Trust's proposal.

---

6. *See* Second Amended Complaint (ECF No. 66) at ¶ 45(d).

Johnson & Johnson criticizes the plaintiffs for declining to resubmit the Trust's proposal for consideration at the 2020 and 2021 shareholder meetings—and it insists that this somehow shows that the plaintiffs' claims for declaratory relief are *not* ripe. *See* Defs.' Br. (ECF No. 71-1) at 23–24. But the plaintiffs have explained *why* they refused to resubmit the Trust's proposal for the 2020 and 2021 shareholder meetings:

> The Trust, however, remains concerned that the uncertainty about the legality of the proposal and the refusal of Johnson & Johnson to stipulate to its legality will make it impossible for the proposal to receive a fair vote from Johnson & Johnson's shareholders. Although the Trust wishes to re-submit its proposal for future shareholder meetings, it wants a judicial declaration that the proposal is legal under both federal and state law before it does so and can get a fair vote.

Second Amended Complaint (ECF No. 66) ¶ 38. The plaintiffs did not "miss the applicable deadlines," as the defendant suggests. Defs.' Br. (ECF No. 71-1) at 24. Instead, the plaintiffs deliberately chose not to resubmit the Trust's proposal because it cannot get a fair vote from the company's shareholders given Johnson & Johnson's previous claims that the proposal was unlawful.

The plaintiffs sued to undo the damage from Johnson & Johnson's decision to exclude the Trust's proposal from its 2019 proxy materials. And the damage that Johnson & Johnson imposed consists of two parts. The first is the denial of a shareholder vote on the Trust's proposal. The second is the taint that Johnson & Johnson inflicted by disparaging the legality of the proposal. The plaintiffs initially sued to obtain: (1) An injunction to prevent Johnson & Johnson from excluding the Trust's proposal from future proxy materials; and (2) A declaratory judgment to remove the

"taint" caused by Johnson & Johnson's claims that the Trust's proposal was illegal. *See* Original Complaint (ECF No. 1) ¶ 44. Johnson & Johnson thinks that it can avoid a declaratory judgment—and leave in place the taint that it created—by partially surrendering and agreeing to include the Trust's proposal in its proxy materials, which subjects the Trust's proposal to a shareholder vote that is tainted by Johnson & Johnson's previous disparagement of the proposal's legality. Yet Johnson & Johnson refuses to give in by acknowledging the legality of the Trust's proposal, and it wants to preserve the taint that it created while simultaneously allowing the Trust's proposal to go before its shareholders for a vote. That arrangement is not acceptable because the plaintiffs are entitled to a *fair* vote on the Trust's proposal—a vote uninfluenced by the repeated and inaccurate claims from Johnson & Johnson and others that the Trust's proposal somehow violates federal or state law. Withholding declaratory relief will impose hardship on the plaintiffs by perpetuating this unwarranted taint that Johnson & Johnson and others have imposed, and preventing the Trust from ever obtaining a fair vote on its proposal from Johnson & Johnson's shareholders.

C. The Remaining Ripeness Considerations Support Resolution Of The Plaintiffs' Claims

The Third Circuit has set forth three additional "considerations" when applying the ripeness doctrine in the context of a declaratory judgment: "the adversity of the parties' interests, the conclusiveness of the judgment, and the practical utility of that judgment." *Wayne Land & Mineral Group LLC v. Delaware River Basin Commission*, 894 F.3d 509, 522 (3d Cir. 2018). Each of these factors cuts against Johnson & Johnson's ripeness objections.

The "adversity" factor asks whether "whether the claim involves uncertain and contingent events, or presents a real and substantial threat of harm." *Id.* As we have noted, the plaintiffs face a "real and substantial threat of harm" from the taint that Johnson & Johnson created by denying the legality of the Trust's proposal. And Johnson & Johnson's willingness to include the Trust's proposal in its proxy materials does not recant its earlier statements, which prevent the Trust's proposal from receiving a fair shareholder vote.

The "conclusiveness" factor asks whether "a declaratory judgment would in fact determine the parties' rights, as distinguished from an advisory opinion based on a hypothetical set of facts." *Id.* The plaintiffs have brought to suit to declare that the Trust's proposed shareholder-arbitration bylaw is legal, and a declaration of this sort *would* conclusively determine the plaintiffs' right to include this proposal in any future proxy materials and to obtain a fair vote on that proposal from company shareholders.

Finally, the "utility" prong is satisfied "when the judgment would materially affect the parties and serve to clarify legal relationships so that plaintiffs can make responsible decisions about the future." A ruling for or against the plaintiffs on their requests for declaratory relief would instantly clarify the legality of the Trust's proposal—a clarity that Johnson & Johnson should welcome as the plaintiffs would.

Johnson & Johnson never even addresses the ripeness factors that must be considered under *Abbott Laboratories* and Third Circuit precedent. And it has no basis for attacking the ripeness of the plaintiffs' claims under any of these decisions.

CONCLUSION

The defendant's motion to dismiss should be denied.

Respectfully submitted.

/s/ Walter S. Zimolong

JONATHAN F. MITCHELL*
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

HAL S. SCOTT*
Harvard Law School
1557 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4590
hscott@law.harvard.edu

WALTER S. ZIMOLONG
Zimolong LLC
P.O. Box 552
Villanova, PA 19085
(215) 665-0842
wally@zimolonglaw.com

* admitted *pro hac vice*

Dated: December 22, 2020

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on December 22, 2020, I served this document by CM/ECF upon:

ANDREW MUSCATO
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, New York 10036
(212) 735-3000 (phone)
(212) 735-2000 (fax)
andrew.muscato@skadden.com

Counsel for Defendant

/s/ Walter S. Zimolong
WALTER S. ZIMOLONG
Counsel for Plaintiffs