Louis Rambo
Partner
d 202.416.6878
f 202.416.6899
lrambo@proskauer.com
www.proskauer.com

February 5, 2024

Via Online Submission Form

Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street, N.E.
Washington D.C. 20549

Re: *Shake Shack Inc.*
Stockholder Proposal of The Accountability Board, Inc.
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

On behalf of Shake Shack Inc. ("Shake Shack" or the "Company"), and pursuant to Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), we hereby request confirmation that the staff (the "Staff") of the Securities and Exchange Commission (the "Commission" or the "SEC") will not recommend enforcement action if the Company excludes a shareholder proposal received on November 3, 2023 (together with the supporting statement, the "Proposal") by The Accountability Board, Inc. (the "Proponent") from the proxy materials (the "2024 Proxy Materials") for Shake Shack's 2024 annual stockholders' meeting (the "2024 Annual Meeting") on the basis of (i) Rule 14a-8(i)(7) because the Proposal relates to the Company's ordinary business, (ii) Rule 14a-8(i)(10) because Shake Shack has substantially implemented the Proposal, and (iii) Rule 14a-8(i)(3) because the Proposal is materially false and misleading.

Pursuant to Rule 14a-8(j), a copy of the Proposal is attached hereto as Exhibit A, and a copy of this letter is being sent to notify the Proponent of the Company's intention to omit the Proposal from the 2024 Proxy Materials. Pursuant to Exchange Act Rule 14a-8(j) and Staff Legal Bulletin No. 14D (November 7, 2008), the Company is submitting this letter to the Commission electronically.

THE PROPOSAL

The Proposal requests that the Company's stockholders approve the following resolution:

"RESOLVED: Shareholders ask Shake Shack to confirm its chicken is "100% hormone-free" with "no hormones" ever, providing details about how its "culinary

innovation" achieved that milestone, and what the Board's and management's oversight responsibilities are regarding its hormone-free chicken sourcing. If the company cannot confirm its chicken is hormone-free, then shareholders ask it to disclose the precise meaning of its repeated claims to that effect, along with a risk analysis about the impacts of those claims—including risks to public health."

BASIS FOR EXCLUSION

The Company hereby respectfully requests that the Staff concur in its view that the Proposal may be properly excluded from the 2024 Proxy Materials pursuant to:

- Rule 14a-8(i)(7) because the Proposal relates to the Company's ordinary business operations;
- Rule 14a-8(i)(10) because the Company has already substantially implemented the Proposal; and
- Rule 14a-8(i)(3), on the basis that the Proposal is materially false and misleading in violation of Rule 14a-9 of the Exchange Act.

ANALYSIS

I. The Proposal May be Excluded Under Rule 14a-8(i)(7) Because it Deals with Matters Relating to the Company's Ordinary Business Operations

A. *Background on Rule 14a-8(i)(7)*

Rule 14a-8(i)(7) permits a company to omit from its proxy materials a shareholder proposal that relates to the company's "ordinary business" operations. According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the term "ordinary business" "refers to matters that are not necessarily 'ordinary' in the common meaning of the word," but instead the term "is rooted in the corporate law concept providing management with flexibility in directing certain core matters involving the company's business and operations." Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release").

In the 1998 Release, the Commission explained that the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting," and identified two central considerations that underlie this policy. As relevant here, the first was that "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." Examples of the tasks cited by the Commission include "management of the workforce, such as the hiring, promotion, and

termination of employees, decisions on production quality and quantity, and the retention of suppliers." 1998 Release.

As discussed below, the Staff has consistently agreed that proposals, like the Proposal here, relating to a company's marketing and consumer relations are related to ordinary business. Further, a shareholder proposal being framed in the form of a request for a report, analysis or other information, including requesting a report about certain risks, does not change the nature of the proposal. The Commission has stated that a proposal requesting the dissemination of a report may be excludable under Rule 14a-8(i)(7) if the subject matter of the proposed report is within the ordinary business of the issuer. *See* Exchange Act Release No. 20091 (Aug. 16, 1983); *Johnson Controls, Inc.* (avail. Oct. 26, 1999) ("[Where] the subject matter of the additional disclosure sought in a particular proposal involves a matter of ordinary business . . . it may be excluded under [R]ule 14a-8(i)(7)."); *see also Ford Motor Co.* (avail. Mar. 2, 2004) (concurring with the exclusion of a proposal requesting that the company publish a report about global warming/cooling, where the report was required to include details of indirect environmental consequences of its primary automobile manufacturing business).

Moreover, in Staff Legal Bulletin No. 14E (Oct. 27, 2009) ("SLB 14E"), the Staff explained how it evaluates shareholder proposals relating to risk:

> [R]ather than focusing on whether a proposal and supporting statement relate to the company engaging in an evaluation of risk, we will instead focus on the subject matter to which the risk pertains or that gives rise to the risk . . . . [S]imilar to the way in which we analyze proposals asking for the preparation of a report, the formation of a committee or the inclusion of disclosure in a Commission-prescribed document—where we look to the underlying subject matter of the report, committee or disclosure to determine whether the proposal relates to ordinary business—we will consider whether the underlying subject matter of the risk evaluation involves a matter of ordinary business to the company.

Consistent with its positions in SLB 14E, the Staff has repeatedly concurred in the exclusion of shareholder proposals seeking risk assessments when the subject matter concerns ordinary business operations. *See, e.g.*, *Dollar Tree, Inc.* (avail. May 2, 2022) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting a report on risks to the company's business strategy from increasing labor market pressure); *BlackRock, Inc. (National Center for Public Policy Research)* (avail. Apr. 4, 2022) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting a report on the potential risks associated with omitting "viewpoint" and "ideology" from the company's written equal employment opportunity policy); *The TJX Companies, Inc.* (avail. Mar. 29, 2011) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting an annual assessment of the risks created by the actions the company takes to avoid or minimize U.S. federal, state and local taxes and provide a report to shareholders on the assessment); *Amazon.com, Inc.* (avail. Mar. 21, 2011) (same); *Wal-Mart Stores, Inc.* (avail. Mar. 21, 2011) (same); *Lazard Ltd.* (avail. Feb. 16, 2011) (same); *Pfizer Inc.* (avail. Feb. 16, 2011) (same).

B. *The Proposal May be Excluded Under Rule 14a-8(i)(7) Because it Relates to the Manner in which the Company Advertises its Products*

The Staff has consistently determined that a company's marketing and consumer relations decisions are part of its ordinary business operations. For example, in *The Coca-Cola Co.* (Jan. 21, 2009, recon. Denied Apr. 21, 2009), the Staff permitted the exclusion under Rule 14a-8(i)(7) of a proposal that requested a report on how the company could provide information to customers regarding the company's products. In granting the company's request, the Staff noted that the proposal "relat[ed] to Coca-Cola's ordinary business operations (i.e., marketing and consumer relations)." *See also Tootsie Roll Industries Inc.* (Jan. 31, 2002) (concurring in the exclusion of a proposal asking the company to identify and disassociate from any offensive imagery to the American Indian community in product marketing and advertising because the proposal related to "the manner in which a company advertises its products"). In *Amazon.com, Inc.* (avail. Mar. 23, 2018), the Staff concurred with the exclusion of a shareholder proposal requesting that "the board take the steps necessary to establish a policy that will ensure that the [c]ompany does not place promotional or other marketing material on online sites or platforms that produce and disseminate content that expresses hatred or intolerance for people on the basis of actual or perceived race, ethnicity, national origin, religious affiliation, sex, gender, gender identity, sexual orientation, age or disability" as relating to the company's ordinary business operations. The Staff's response noted that the proposal "relates to the manner in which the [c]ompany advertises its products and services." Similarly, in *Ford Motor Co.* (avail. Feb. 2, 2017), the Staff agreed with the company that it could exclude a shareholder proposal requesting that the company assess the political activity resulting from its advertising and any resulting risk. Ford argued that the "advertising function and any potential 'risks' resulting from the chosen media channels fall well within the scope of normal business operations and well outside the scope of normal shareholders' expertise." The Staff concurred, noting that "[t]here appears to be some basis for your view that Ford may exclude the proposal under rule 14a-8(i)(7), as relating to Ford's ordinary business operations." *See also General Electric Co.* (avail. Jan. 18, 2005) (concurring with the exclusion of a proposal prohibiting the company from advertising through mediums that carry statements advocating firearm control legislation); *General Mills, Inc.* (avail. Jul. 14, 1992) (concurring with the exclusion of a proposal prohibiting the company from advertising on television programs that were "insulting to people of any racial, ethnic or religious group"); and *Hershey Foods Corp.* (avail. Dec. 27, 1989) (concurring with the exclusion of a proposal directing the company to discontinue advertising the company's products on MTV following the company's sponsorship of an allegedly sexually explicit video). *See also FedEx Corp. (Trillium)* (avail. Jul. 7, 2016) (concurring with the exclusion of the proposal under Rule 14a-8(i)(7) because it addressed the manner in which the company advertises its products and services); *The Walt Disney Co.* (avail. Nov. 30, 2007) (concurring with the exclusion of a proposal requesting a report regarding what actions the company is taking "to avoid the use of negative and discriminatory . . . stereotypes in its products"); *Nike, Inc.* (avail. Jun. 19, 2020) (concurring with the exclusion under Rule 14a-8(i)(7) of a shareholder proposal requesting a report "…detailing any known and any potential risks and costs to the Company that would arise from company involvement in the debate about state policies on abortion or other related hot-button social issues about which consumers, employees and Americans generally are deeply interested and deeply split" when the company noted that the proposal sought to improperly

involve shareholders in the company's management of public relations decisions); *Johnson & Johnson* (avail. Jan. 31, 2018) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company prepare a report detailing the known and potential risks and costs to the company caused by pressure campaigns from outside "activists" seeking to dictate the company's free speech and freedom of association rights where the company argued, among other things, that the proposal related to its public relations activities); *Best Buy Co. Inc.* (avail. Feb. 23, 2017) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company prepare a report detailing the known and potential risks and costs to the company caused by pressure campaigns to oppose certain laws, including religious freedom laws, freedom of conscious laws and public accommodation laws); *Johnson & Johnson* (avail. Feb. 23, 2017) (same); *The Home Depot, Inc.* (avail. Feb. 23, 2017) (same); *Johnson & Johnson* (avail. Jan. 12, 2004) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting a review of pricing and marketing policies and a report disclosing how the company intended to respond to "public pressure to reduce prescription drug pricing" where the Staff noted that "marketing and public relations" are ordinary business matters); *E.I. du Pont de Nemours and Co.* (avail. Feb. 23, 1993) (concurring with the exclusion under the predecessor to Rule 14a-8(i)(7) of a proposal requesting that the company take an active role against the environmental movement because the proposal related to the company's "advertising and public relations policy"); *Apple Computer, Inc.* (avail. Oct. 20, 1989) (concurring with the exclusion under the predecessor to Rule 14a-8(i)(7) of a proposal requesting that the company create a committee to regulate public use of the company's logo because the proposal related to the company's ordinary business operations, specifically "operational decisions with respect to advertising, public relations and related matters").

There is no more of a "core" ordinary business management function than marketing and public relations. As with the precedents cited above, the Proposal focuses on the Company's advertising and public presentation, here the marketing and public presentation of its chicken products, including on social media, in press releases, on the Company's website and in other public presentations. Submitting the Proposal, which is focused on the Company's marketing and public relations activities, to the Company's shareholders would result in inappropriate shareholder involvement in the Company's management of its marketing and public relations. The Company's decisions on how to conduct its public relations activities, including how to market its products, are core matters fundamental to the Company's business, strategy and corporate purpose objectives. By seeking to influence how the Company markets its products, and requesting that the Company prepare a report on the "risks" relating to this marketing, the Proposal seeks to improperly introduce shareholder involvement in the Company's management of its marketing and public relations activities. The Company is in the fine-casual dining business, and marketing its products, including its beef burgers, crispy chicken, and hand-spun milkshakes, is fundamental to the day-to-day management of the Company's ordinary business, and the Company's marketing is not an appropriate subject for shareholders. Accordingly, the Proposal may be appropriately excluded under Rule 14a-8(i)(10).

C. *The Proposal Does Not Focus on a Significant Policy Issue that Transcends the Company's Ordinary Business Operations.*

In the 1998 Release, the Commission reaffirmed the standards for when proposals are excludable under the "ordinary business" exception that the Commission had initially articulated in Exchange Act Release No. 12999 (Nov. 22, 1976) (the "1976 Release"). In the 1998 Release, the Commission also distinguished proposals relating to ordinary business matters that are excludable under Rule 14a-8(i)(7) from those that "focus on" significant social policy issues. The Commission stated, "proposals relating to [ordinary business] matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote." 1998 Release. When assessing proposals under Rule 14a-8(i)(7), the Staff considers the terms of the resolution and its supporting statement as a whole. *See* Staff Legal Bulletin No. 14C, part D.2 (June 28, 2005) ("In determining whether the focus of these proposals is a significant social policy issue, we consider both the proposal and the supporting statement as a whole.").

In contrast, shareholder proposals that focus on ordinary business matters and only touch upon topics that might raise significant social policy issues—but which do not focus on such issues—are not transformed into a proposal that transcends ordinary business. As a result, such proposals remain excludable under Rule 14a-8(i)(7). Notably, in *PetSmart, Inc.* (avail. Mar. 24, 2011), the proposal requested that the board require the company's suppliers to certify that they had not violated "the Animal Welfare Act, the Lacey Act, or any state law equivalents." The Staff concurred with exclusion, noting that "[a]lthough the humane treatment of animals is a significant policy issue, we note your view that the scope of the laws covered by the proposal is 'fairly broad in nature from serious violations such as animal abuse to violations of administrative matters such as record keeping.'" *See also Amazon.com, Inc. (Domini Impact Equity Fund)* (avail. Mar. 28, 2019) (concurring with the exclusion of a proposal that requested that the board annually report to shareholders "its analysis of the community impacts of [the company's] operations, considering near- and long-term local economic and social outcomes, including risks, and the mitigation of those risks, and opportunities arising from its presence in communities," noting that "the [p]roposal relates generally to 'the community impacts' of the [c]ompany's operations and does not appear to focus on an issue that transcends ordinary business matters"); *Mattel, Inc.* (avail. Feb. 10, 2012) (concurring with the exclusion of a proposal that requested the company require its suppliers to publish a report detailing their compliance with the International Council of Toy Industries Code of Business Practices, noting that the ICTI Code encompasses "several topics that relate to . . . ordinary business operations and are not significant policy issues").

In SLB 14L, the Staff stated that it "will realign its approach for determining whether a proposal relates to 'ordinary business' with the standard the Commission initially articulated in [the 1976 Release], which provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release." As such, the Staff stated that it will focus on the issue that is the subject of the shareholder proposal and determine whether it has "a broad societal impact, such that [it] transcend[s] the ordinary business of the company," and noted that proposals "previously viewed as excludable because

they did not appear to raise a policy issue of significance for the company may no longer be viewed as excludable under Rule 14a-8(i)(7)."

Here, the Proposal does not focus on a significant social policy issue that transcends the ordinary business of the Company, as the manner in which the Company markets its products (the focus of the Proposal) is not a significant policy issue. The Proposal is not focused on matters of animal health (i.e., whether added hormones are included) – in fact, it is a premise of the Proposal that there are no added hormones in the Company's chicken, leaving no doubt that the Proposal's central focus is on the Company's marketing and advertising of its products. Accordingly, the Proposal does not transcend the ordinary business of the Company and is excludable under Rule 14a-8(i)(7) because it relates to ordinary business matters.

II. **The Proposal may be excluded under Rule 14a-8(i)(10) because the Company has substantially implemented the Proposal**

A. *Rule 14a-8(i)(10) Background*

Rule 14a-8(i)(10) permits a company to exclude a shareholder proposal if the company has already "substantially implemented" the proposal. The Commission adopted the "substantially implemented" standard after determining that the "previous formalistic approach" of the rule defeated its purpose, which is "to avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by management." *See Exchange Act Release No. 34-20091* (Aug. 16, 1983) (the "1983 Release"); *Exchange Act Release No. 34-12598* (July 7, 1976). Accordingly, the actions requested by a proposal need not be "fully effected," provided that they have been "substantially implemented" by the company. *See the* 1983 Release.

The Staff has noted that "a determination that the company has substantially implemented the proposal depends upon whether [the company's] particular policies, practices and procedures compare favorably with the guidelines of the proposal," *Texaco, Inc.* (Mar. 28, 1991). The Staff has further consistently taken the position that a proposal has been "substantially implemented" and may be excluded under Rule 14a-8(i)(10) when a company can demonstrate that it has already taken actions to address the essential elements of the proposal. *See,* e.*g.*, *Eli Lilly and Co.* (Jan. 8, 2018); *NETGEAR, Inc.* (Mar. 31, 2015); *Pfizer, Inc.* (Jan. 11, 2013, recon. Mar. 1, 2013); *Hewlett-Packard Co.* (Dec. 11, 2007). A company can satisfy the substantial implementation standard under Rule 14a-8(i)(10) by satisfactorily addressing the underlying concerns and essential objective of a proposal even where the company's actions do not precisely adopt the terms of such proposal. *See e.g. Exxon Mobil Corp.* (Mar.23, 2018) (concurring with exclusion of a proposal requesting that the company issue a report "describing how the company could adapt its business model to align with a decarbonizing economy by altering its energy mix to substantially reduce dependence on fossil fuels" where the company had previously issued a report providing examples of how the company was adapting its business model to reduce greenhouse gas emissions); *Walgreen Co.* (Sept. 26, 2013). Even if a company's actions do not go as far as those requested by the stockholder proposal or exactly match what the proposal has

sought, they nonetheless may be deemed to "compare favorably" with the requested actions. *See e.g., Advance Auto Parts, Inc.* (Apr. 9, 2019) (permitting exclusion under Rule 14a-8(i)(10) of a proposal requesting that the company issue a sustainability report "in consideration of the SASB Multiline and Specialty Retailers & Distributors standard," on the basis that the company's "public disclosures compare favorably with the guidelines of the Proposal and that the Company has, therefore, substantially implemented the Proposal," where the company argued that a combination of its existing disclosures sufficiently addressed the core purpose of the proposal, acknowledging that the disclosures deviated in certain respects from the SASB standard); *Applied Materials, Inc.* (Jan. 17, 2018) (permitting exclusion under Rule 14a-8(i)(10) of a proposal requesting that the company "improve the method to disclose the Company's executive compensation information with their actual compensation," on the basis that the company's "public disclosures compare favorably with the guidelines of the Proposal and that the Company has, therefore, substantially implemented the Proposal," where the company argued that its current disclosures follow requirements under applicable securities laws for disclosing executive compensation).

Under Rule 14a-8(i)(10), the Staff has also consistently permitted companies to exclude proposals requesting that the company take action when the company planned to take such actions on substantially similar terms in the future. *See Korn/Ferry International (July 6, 2017)* (concurring with exclusion of a proposal under Rule 14a-8(i)(10) where the proposal requested that the board take actions to eliminate any greater than simple majority voting standards in the company's governing documents and replace them with a majority of the votes cast voting standard, where the company represented that it planned to present a proposal to allow shareholders to approve amendments to the certificate of incorporation to replace the supermajority voting provisions in its governing documents with a majority of the outstanding shares voting standard).

B. *The Company's Policies Satisfy the Proposal's Essential Objectives*

The Company has started the process of updating its marketing and advertising materials with respect to its chicken products. As the Proponent well knows, it is well understood in the market that the phrase "hormone free" in the context of chicken or other meat products refers to no *added* hormones, and does not mean that the chicken used in the Company's sandwiches does not have any naturally occurring hormones. However, in order to fully communicate the steps the Company takes towards animal safety and the health of the Company's consumers, the Company has started to revise its public statements, including updating the Company's U.S. Animal Welfare Policy, as well as a blog post on its website, to clarify that the Company's chicken and other meat products has "…no **added** hormones."[1] In addition, the Company is in the process of updating its menu boards, signage and other publications that include marketing and advertising

[1] See e.g. the Company's updated U.S. Animal Welfare Policy available here: https://shakeshack.com/us-animal-welfare-policy#/, and the updated blog post available here: https://shakeshack.com/blog/our-food/shake-shacks-commitment-to-cage-free-eggs#/.

materials with respect to its chicken products to update how it advertises and markets the standards it applies to its meats, including specifying that there are no **added** hormones.

The Proposal is framed as asking the Company to "confirm" that its chicken is "100% hormone" free, or to provide a "risk analysis." However, as clearly set forth in the Proposal's supporting statement, the ultimate goal of the Proposal is not to have the Company make additional claims about its products or to provide an analysis, but to have the Company change how it advertises its products. And as noted above, the Company has already revised its blog post on its website and U.S. Animal Welfare Policy, and is updating its other public disclosure documents to revise how it advertises and markets its products. Accordingly, prior to the 99Company's 2024 Annual Meeting, the goals of the Proposal will have been fully satisfied and there would be no benefit to the Company's shareholders to having the Proposal submitted for a shareholder vote, as there will be no further action for the Company to take at that time.

Based on the above, the Company's policies, procedures and related disclosures compare favorably to the guidelines of the Proposal and satisfy the Proposal's essential objective. Accordingly, the Company has substantially implemented the Proposal, and the Proposal may be excluded pursuant to Rule 14a-8(i)(10).

III. The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(3) of the Exchange Act Because It Contains Materially False and Misleading Statements in Violation of Rule 14a-9 of the Exchange Act.

The Proposal also suffers from fundamental defects: rather than asking for the Company to take a concrete action, it attempts to confuse shareholders in an apparent attempt at sarcastic humor. The Proposal on its face asks the Company to confirm that its chicken is "100% hormone-free." As the Proponent knows, the Company's chicken is "100% hormone-free" as that term is fully understood, as the Company sources chicken with no added hormones. But as the Proponent notes in its supporting statement, all meat contains naturally occurring hormones, and the Proposal appears to be asking the Company to confirm that it has somehow sourced chicken without naturally occurring hormones, which the Proponent knows is not the case, and is not what the Company has claimed. So shareholders would have to try to parse whether they are being asked to (i) have the Company confirm something that is both not an issue and already clearly understood in the market (and required by U.S. law), i.e., that it sources chicken without added hormones, or (ii) have the Company confirm something that is self-evidently false, i.e. that it has sourced chicken without naturally occurring hormones. Shareholders will have no basis to determine which of these two choices they are being asked to approve, and regardless, either one would be non-sensical and have no actual effect, and fall outside the actual, underlying objectives of the Proposal. The Proponent has phrased the Proposal to make an oblique point through sarcasm (i.e., that it does not like the Company's marketing or that of much of the rest of the food service industry), rather than in a direct way that shareholders can understand and ask the Company to implement. While the Company is in a position to understand the true meaning and intent of the Proposal, shareholders at large will be confused.

Rule 14a-8(i)(3) permits a registrant to omit a proposal from its proxy materials where the proposal violates the Commission's proxy rules, including rules that prohibit "materially false or misleading statements," because the proposal is "so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires. . . ." Staff Legal Bulletin No. 14B (Sept. 15, 2004) ("SLB 14B"). *See also Dyer v. SEC*, 287 F.2d 773, 781 (8th Cir. 1961) ("[I]t appears to us that the proposal, as drafted and submitted to the company, is so vague and indefinite as to make it impossible for either the board of directors or the stockholders at large to comprehend precisely what the proposal would entail."); *Capital One Financial Corp.* (Feb. 7, 2003) (permitting the exclusion of a proposal under Rule 14a-8(i)(3) where the company argued that its shareholders "would not know with any certainty what they are voting either for or against").

In accordance with SLB 14B, the Staff has permitted companies to exclude shareholder proposals under Rule 14a-8(i)(3) as vague and indefinite where the proposal is susceptible to multiple interpretations or where the proposal fails to sufficiently define or explain key terms or phrases. *See, e.g.*, *The Boeing Co.* (Mar. 2, 2011) (permitting exclusion under Rule 14a-8(i)(3) of a proposal regarding executive compensation where the term "executive pay rights" was not sufficiently defined and thus subject to multiple reasonable interpretations). *See also AT&T Inc.* (Feb. 21, 2014) (permitting exclusion under Rule 14a-8(i)(3) of a proposal requesting that the board review the company's policies and procedures relating to "directors' moral, ethical and legal fiduciary duties and opportunities" to ensure the protection of privacy rights, where it was unclear how the term "moral, ethical and legal fiduciary" applied to the directors' duties and opportunities); *Abbott Laboratories* (Jan. 13, 2014) (permitting exclusion under Rule 14a-8(i)(3) of a proposal requesting that the board adopt a bylaw to provide for an independent lead director with the standard of independence defined as someone "whose directorship constitutes his or her only connection" to the company, where the Staff agreed that the proposal was vague and indefinite and the term "connection" was so broad that "neither shareholders nor the company would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires"); *USA Technologies, Inc.* (Mar. 27, 2013) (permitting exclusion under Rule 14a-8(i)(3) of a proposal requesting a policy that the chairman of the board be an independent director who has not served as an executive officer of the company, where the proposal directly conflicted with the company's existing bylaws, which specifically required that the company's chairman serve as its chief executive officer, such that it was unclear whether the board would have been required to apply the company's bylaws or the policy requested in the proposal). *See also Newell Rubbermaid, Inc.* (Feb. 21, 2012) (permitting exclusion under Rule 14a-8(i)(3) the Staff noted that "neither shareholders nor the company would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires." *See also The Western Union Co.* (Feb. 21, 2012) (same); *Danaher Corp.* (Feb. 16, 2012) (same); *Verizon Communications Inc.* (Feb. 21, 2008) (permitting exclusion under Rule 14a-8(i)(3) of a proposal that included a specific requirement and general requirement regarding the size of compensation awards, which were not adequately defined and inconsistent with each other).

Given the failure of the Proposal to reconcile the conflicting interpretations and clearly define the goals of the Proposal, as described above, the Proposal is susceptible to multiple

different interpretations, none of which would be appropriate for the Company's shareholders to consider. As a result, neither shareholders voting on the Proposal, nor the Company in implementing the Proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the Proposal requires. Thus, any action taken by the Company upon implementation of the Proposal could be significantly different from the actions envisioned by shareholders voting on the Proposal.

Accordingly, consistent with other precedent described above, the Proposal may be excluded from the 2024 Proxy Materials pursuant to Rule 14a-8(i)(3) as impermissibly vague and indefinite and materially false and misleading.

CONCLUSION

For the foregoing reasons, the Proposal relates to the Company's ordinary business, has been substantially implemented by the Company, and is impermissibly vague and indefinite and materially false and misleading. As such, on behalf of the Company, we respectfully request that the Staff confirm that it will not recommend enforcement action if the Company excludes the Proposal from its 2024 Proxy Materials in reliance on Rule 14a-8(i)(7), Rule 14a-8(i)(10), and Rule 14a-8(i)(3).

If you have any questions, or if the Staff is unable to concur with our view without additional information or discussions, we respectfully request the opportunity to confer with members of the Staff prior to the issuance of any written response to this letter. Please do not hesitate to contact the undersigned, Louis Rambo, at (202) 416-6878 or lrambo@proskuaer.com.

Very truly yours,

Louis Rambo

Enclosures

cc: Matt Prescott, The Accountability Board, Inc.
Ronald Palmese, Jr., Shake Shack Inc., Chief Legal Officer
Ann Robertson, Shake Shack Inc., Vice President, Associate General Counsel

Proskauer

Exhibit A

[Shareholder Proposal]

THE
ACCOUNTABILITY
BOARD

November 3, 2023

Shake Shack, Inc.
ATTN: Corporate Secretary
225 Varick Street, Suite 301
New York, NY 10014

And delivered via email: [redacted]; [redacted]

To Whom it May Concern:

Enclosed is a shareholder proposal submitted by The Accountability Board, Inc. (TAB) for inclusion in the proxy statement for the company's next annual meeting.

Regarding our eligibility:
As of the date of this submission, TAB has continuously held at least $25,000 in market value of the company's securities entitled to vote on the proposal for at least one year, and attached is a statement from our broker, RBC Wealth Management, confirming our holdings. TAB will continue to hold at least that amount through the date of the next annual meeting.

Instructions for inclusion:
We ask: 1) that the proposal and supporting statement be treated as an integrated whole, which may not be altered in text or structure, including by maintaining the order in which the Resolved clause and supporting statement are arranged in our submission; 2) that any special formatting (e.g., bolding, underlining, and/or italics) be retained; and 3) that the image (our logo) be formatted as it appears in the submission (e.g., that its size/position in relation to the text remain the same). We're happy to provide a separate image file upon request.

Engagement about this proposal:
As well, TAB is available to discuss this proposal via teleconference at your earliest convenience. SEC rules require that we provide you with some dates and times of our availability between 10 and 30 calendar days from the date of this proposal submission. To make identifying a meeting time easier for the company, I can confirm that TAB can actually be available to speak with you between 12:00 noon and 2:00 p.m. in the time zone of your principal executive office on *any* business day between 10 and 30 days from today. And if there are times outside of those options that you would prefer, please let us know and we will do our best to accommodate.

We ask that you please reply to confirm receipt of the proposal submission package. For environmental reasons we are submitting this proposal by email, though we will mail you a paper copy of our submission upon request. And we further ask that you please send all correspondence about this submission to us *via electronic mail only* at the email addresses below.

Respectfully,

Matt Prescott

Matt Prescott, President & COO
[redacted]; [redacted]

Cc: Matt Penzer, Chief Legal Counsel, TAB ([redacted])
Cc: Josh Balk, Chief Executive Officer, TAB ([redacted])
Cc: Jeff Amoscato, SVP Supply Chain & Menu Innovation, Shake Shack ([redacted])

THE
ACCOUNTABILITY
BOARD

Dear fellow shareholders,

Starting with its 2016 10-K, dozens of Shake Shack SEC filings have touted its use of hormone-free chicken, unequivocally describing it as "100% hormone-free" and containing "no hormones." Starting in its 2017 10-K, the company began touting this in its "culinary innovation" section and noting it within its "signature" item descriptions. As well:

- On social media, Shake Shack's touted its suppliers meet the "highest" standards, including being 100% "hormone free." One post says: "Did ya know our Chick'n Shack" has "no hormones…EVER?"
- The company's press releases, Nutritional Information document, and Allergen Guide say its chicken has "no hormones" in it "ever."
- And its blog has touted how Shake Shack is "flying *above the flock*," saying: "So, what puts *our* Hot Chick'n sandwich above that *other* fowl play? All *our* chicken is real…with *no hormones*." [Emphasis added]

For context though, *zero* chicken produced or sold domestically (by *any* company) has *added* hormones—because that's been illegal for decades. Federal law even requires that any poultry labels touting "no added hormones" must clarify that "Federal regulations prohibit the use of hormones."

But as a matter of biological science, all meat contains *naturally occurring* hormones. As one study reports, "hormones cannot be completely avoided in food of animal origin, since they are part of animal metabolism" and "all foodstuffs of animal origin contain…hormones." That study links this issue to public health concerns, noting, "the presence of hormones in food has been connected with several human health problems."[1]

This makes the company's claims difficult to understand.

Indeed, since chicken with *added* hormones doesn't even *exist* domestically, avoiding *that* kind of chicken couldn't be attributable to "culinary innovation" or legitimately be used to differentiate from competitors.

It also raises concerns about the integrity of Shake Shack's hormone-free chicken statements, and governance concerns about the quality of oversight of its disclosures. After all, unless the company's achieved the unlikely scientific advancement of eliminating *naturally* occurring hormones from chicken, any touting of "hormone-free" chicken simply doesn't make sense. Yet company executives and Board members have repeatedly—and for years—signed off on these claims.

Moreover, if Shake Shack *has* achieved a scientific breakthrough that eliminates naturally occurring hormones from chicken, that'd be important for business reasons and for its public health implications. Thus, shareholders would be right to seek clarity.

RESOLVED: Shareholders ask Shake Shack to confirm its chicken is "100% hormone-free" with "no hormones" ever, providing details about how its "culinary innovation" achieved that milestone, and what the Board's and management's oversight responsibilities are regarding its hormone-free chicken sourcing. If the company cannot confirm its chicken is hormone-free, then shareholders ask it to disclose the precise meaning of its repeated claims to that effect, along with a risk analysis about the impacts of those claims—including risks to public health.

Contact: [redacted]

[1] P. Regal, A. Cepeda & C. Fente (2012), from *Food Additives & Contaminants: Part A*, 29:5, 770779