UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

February 11, 2019

Marc S. Gerber
Skadden, Arps, Slate, Meagher & Flom LLP
marc.gerber@skadden.com

Re: Johnson & Johnson
Incoming letter dated December 11, 2018

Dear Mr. Gerber:

This letter is in response to your correspondence dated December 11, 2018 and January 16, 2019 concerning the shareholder proposal (the "Proposal") submitted to Johnson & Johnson (the "Company") by The Doris Behr 2012 Irrevocable Trust (the "Proponent") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders. We have received correspondence on the Proponent's behalf dated December 24, 2018, January 23, 2019 and February 1, 2019. We also have received correspondence from the Attorney General of the State of New Jersey dated January 29, 2019. Copies of all of the correspondence on which this response is based will be made available on our website at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml. For your reference, a brief discussion of the Division's informal procedures regarding shareholder proposals is also available at the same website address.

Sincerely,

M. Hughes Bates
Special Counsel

Enclosure

cc: Hal Scott
The Doris Behr 2012 Irrevocable Trust
hscott@law.harvard.edu

February 11, 2019

Response of the Office of Chief Counsel
Division of Corporation Finance

Re: Johnson & Johnson
Incoming letter dated December 11, 2018

The Proposal requests that the board take all practicable steps to adopt a bylaw provision to require disputes between a shareholder and the Company, its directors, officers or controlling persons relating to certain claims under the federal securities laws to be exclusively and finally settled by arbitration.

The Company requested that the staff concur in the Company's view that it may exclude the Proposal from its 2019 proxy materials pursuant to rule 14a-8(i)(2), which permits a company to exclude a shareholder proposal "[i]f the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." The Company argued that the Proposal would cause the Company to violate federal and state law.

As to state law, the Company argued that implementation of the Proposal would cause the Company to violate the state law of New Jersey, where it is incorporated, and provided a New Jersey legality opinion from counsel supporting its view. The Proponent raised arguments in rebuttal. We carefully considered the parties' submissions.

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.

In light of the submissions before us, including in particular the opinion of the Attorney General of the State of New Jersey that implementation of the Proposal would cause the Company to violate state law, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on rule 14a-8(i)(2). To conclude otherwise would put the Company in a position of taking actions that the chief legal officer of its state of incorporation has determined to be illegal. In granting the no-action request, the staff is recognizing the legal authority of the Attorney General of the State of New Jersey; it is not expressing its own view on the correct interpretation of New Jersey law. The staff is not "approving" or "disapproving" the substance of the Proposal or opining on the legality of it. Parties could seek a more definitive determination from a court of competent jurisdiction.

We are also not expressing a view as to whether the Proposal, if implemented, would cause the Company to violate federal law. Chairman Clayton has stated that questions regarding the federal legality or regulatory implications of mandatory arbitration provisions relating to claims arising under the federal securities laws should be addressed by the Commission in a measured and deliberative manner.[1]

Sincerely,

Jacqueline Kaufman
Attorney-Adviser

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[1] See letter from Chairman Jay Clayton to the Honorable Carolyn B. Maloney dated April 28, 2018, *available at* https://maloney.house.gov/sites/maloney.house.gov/files/MALONEY%20ET%20AL%20-%20FORCED%20ARBITRATION%20-%20ES156546%20Response.pdf; S. HRG. 115-176, Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, Feb. 6, 2018, *available at* https://www.govinfo.gov/content/pkg/CHRG-115shrg28854/pdf/CHRG-115shrg28854.pdf at 146-151; Remarks before the SEC Investor Advisory Committee (March 8, 2018), *available at* https://www.sec.gov/news/public-statement/statement-clayton-2018-3-8.

The Doris Behr 2012 Irrevocable Trust
Hal Scott, Trustee
Harvard Law School, Lewis 339, 1557 Massachusetts Ave., Cambridge, MA 02138
hscott@law.harvard.edu

February 1, 2019

Via email: shareholderproposals@sec.gov

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

Re: Shareholder Proposal to Johnson & Johnson from The Doris Behr 2012 Irrevocable Trust Regarding an Amendment to the Johnson & Johnson Bylaws

Ladies and Gentlemen:

This letter, sent pursuant to Rule 14a-8(k), supplements the letter submitted by The Doris Behr 2012 Irrevocable Trust (the "Trust") on January 23, 2019 (the "Supplemental Letter Response") in response to a supplemental letter submitted on January 16, 2019 (the "Supplemental Letter") by Skadden, Arps, Slate, Meagher & Flom LLP on behalf of Johnson & Johnson (the "Company") in support of a December 11, 2018 no-action request letter (the "Request") relating to the Trust's shareholder proposal (the "Proposal"). Specifically, this letter responds to the New Jersey Attorney General's (the "NJAG") January 29, 2019 letter (the "NJAG Letter") submitted to the Securities and Exchange Commission (the "Commission") in support of the Company's efforts to exclude the Proposal from its proxy materials.

Pursuant to Staff Legal Bulletin No. 14D (CF), Shareholder Proposals (November 7, 2008) ("SLB 14D"), Question C, this letter is being submitted via email to shareholderproposals@sec.gov. In accordance with Rule 14a-8(k) and SLB 14D, Question E, a copy of this submission is being forwarded simultaneously to the Company electronically. The Trust is also electronically forwarding this submission simultaneously to the NJAG's office.

The NJAG Letter asserts that the Proposal would, if implemented, violate New Jersey law and is thus excludable under Rule 14a-8(i)(2). It bases its assertion on two grounds. First, after acknowledging the absence of *any* controlling precedent under New Jersey law, the NJAG asserts that recent Delaware case law in *Sciabacucchi v. Salzberg*[1] (referred to hereinafter as "*Blue Apron*") and *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*[2] supports the conclusion that New Jersey law – which in the absence of its own precedents would look to Delaware law – does not authorize a corporation's bylaws to provide for mandatory arbitration of federal securities law claims. This argument is essentially the same one made in the Supplemental Letter. Second, the NJAG argues that 2018 amendments to the New Jersey Business Corporation

[1] C.A. No. 2017-0931-JTL (Del. Ch. Dec. 18, 2018).
[2] 72 A.3d 934 (Del. Ch. 2013).

Act (the "NJBCA") support the conclusion that the Proposal would, if implemented, violate New Jersey law. This second argument depends on the NJAG's incorrect and incomplete analysis of Delaware law, and in any event, *has not* been made by the Company.

There are three critical points that need to be emphasized before the Trust responds to the arguments made in the NJAG Letter. First, the Commission should not give the NJAG Letter any special weight. That is because the NJAG Letter relies entirely on the NJAG's interpretation of *Delaware* law to inform what New Jersey law is. The NJAG Letter expressly concedes (on page 3) that there is an "absence of controlling New Jersey authority" in favor of its conclusion that New Jersey law does not authorize a business corporation's bylaws to provide for mandatory arbitration of federal securities law claims and thus turns to Delaware case law. The NJAG letter is not opining on New Jersey law at all, but rather analyzing Delaware law – and incorrectly so in the Trust's view.

Second, the determination whether the Request should be granted must be decided based on an analysis of whether the *Company* has established that it is entitled to exclude the Proposal from its proxy materials. The Commission's proxy rules, specifically Rule 14a-8(g) as interpreted by Staff Legal Bulletin No. 14, Shareholder Proposals (July 13, 2001), require that the *Company* bears the burden of demonstrating that it is entitled to exclude the Proposal. Therefore, the NJAG Letter should not serve as a basis for exclusion. That is especially true with respect to arguments raised in the NJAG Letter that the Company has chosen not to raise, specifically the NJBCA amendments argument.

Third, the Trust reiterates that the state law arguments have been raised too late by the Company to serve as a basis for exclusion. Under Rule 14a-8(j), the *Company's* reasons for exclusion must be filed with the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. As detailed in the Supplemental Letter Response,[3] the Company raised the state law ground for exclusion 60 calendar days before the latest date that it historically has filed its proxy materials. Thus, none of the state law arguments, whether raised by the Company or the NJAG, should be considered.

Turning to the substance of the NJAG Letter, the analysis supporting the NJAG's conclusion that the Proposal, if implemented, would violate New Jersey law is flawed and does not in fact establish that the Proposal, if implemented, *would* violate New Jersey law, the standard for exclusion required by Rule 14a-8(i)(2).

The first argument raised in the NJAG Letter, that Delaware case law, to which New Jersey would look, establishes that federal securities law claims cannot be governed by a corporation's bylaws, was already raised in the Supplemental Letter and addressed in the Supplemental Letter Response.[4] As discussed in the Supplemental Letter Response, the Trust believes that the *Blue Apron* decision cited by the Company and the NJAG was wrongly decided under the controlling precedent of *ATP Tour, Inc. v. Deutsche Tennis Bund.*[5] The *Boilermakers* case provides, at most, only dicta as to the state law issues at play here, and even such dicta does not support the position of the Company and the NJAG. As discussed in the Supplemental Letter Response, the Trust believes that Delaware law allows for an "external" claim – one that does

[3] Supplemental Response Letter at 1-2.
[4] *Id.* at 3-8.
[5] 91 A.3d 554 (Del. 2014).

not arise out of state corporate law – to be the subject of a bylaw provision *when* the external claim is based on the relationship between the defendant corporation and the plaintiff in its capacity as a shareholder. As the Supplemental Letter Response stated, "it would be hard to conceive of a claim more central to the relationship between a corporation and its shareholders *qua* shareholders than a challenge to the very circumstances that either terminate or create that relationship,"[6] which is at the heart of a federal securities law claim.

Moreover, in *Blue Apron* preemption was not an issue either under the Federal Arbitration Act[7] (the "FAA") or federal securities laws. That is because the issue in that case involved selection of a judicial forum and not arbitration, and the outcome of the decision, which resulted in plaintiffs being able to bring suits in either federal or state court, was consistent with the U.S. Supreme Court's holding in *Cyan, Inc. v. Beaver County Employees Ret. Fund*[8] that Securities Act claims can be brought in either forum. In this matter, however, the issue is arbitration, and thus FAA preemption of state law that inhibits the ability of parties to agree to arbitrate is implicated. The Supplemental Letter Response explained why the Trust believes the FAA would preempt state law prohibiting arbitration of federal securities law claims.[9] The NJAG Letter does not address the issue of preemption.

The second argument raised in the NJAG Letter, that the 2018 amendments to the NJBCA support its conclusion that the Proposal, if implemented, would be invalid, is comprised of two parts, both of which again turn on the NJAG's analysis of *Delaware* law, which he has no special competence to interpret.

The NJAG first argues that because the *Blue Apron* decision held that forum selection bylaw provisions are not permitted with respect to federal securities law claims under Section 109(b) of the Delaware General Corporation Law (the "DGCL"), such provisions are not permitted under N.J.S.A. § 14A:2-9(4), which copies – nearly verbatim – the language of Section 109(b). N.J.S.A. § 14A:2-9(4) ("Subsection (4)") states:

> The by-laws may contain any provision, not inconsistent with law or the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or power or the rights or power of its shareholders, directors, officers or employees

The NJAG's argument is flawed because it rests on the assumption that the *Blue Apron* case was correctly decided. As discussed above and in the Supplemental Letter Response, the Trust believes that the Proposal would, if implemented, be valid under Delaware law, including Section 109(b) of the DGCL. Because Subsection (4) mirrors section 109(b) of the DGCL, it similarly should permit bylaw provisions governing federal securities law claims.

Under the second part of the argument, the NJAG asserts that new subsection (5) to N.J.S.A. § 14A:2-9 ("Subsection (5)") supports the NJAG's position because it only lists "internal affairs" claims as being permitted to be subject to a forum selection bylaw provision. Specifically, Subsection (5) states:

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[6] Supplemental Letter Response at 6.
[7] 9 U.S.C. §§ 1-16.
[8] 138 S. Ct. 1061 (2018).
[9] Supplemental Letter Response at 10-12.

> Without limiting [Subsection 4], the by-laws may provide that the federal and State courts in New Jersey shall be the sole and exclusive forum for:
>
> (i) any derivative action or proceeding brought on behalf of the corporation;
>
> (ii) any action by one or more shareholders asserting a claim of a breach of fiduciary duty owed by a director or officer, or former director or officer, to the corporation or its shareholders, or a breach of the certificate of incorporation or by-laws;
>
> (iii) any action brought by one or more shareholders asserting a claim against the corporation or its directors or officers, or former directors or officers, arising under the certificate of incorporation or the "New Jersey Business Corporation Act," N.J.S.A 14A:1-1 et seq.;
>
> (iv) any other State law claim, including a class action asserting a breach of fiduciary duty to disclose, or a similar claim, brought by one or more shareholders against the corporation, its directors or officers, or its former officers or directors; or
>
> (v) any other claim brought by one or more shareholders which is governed by the internal affairs or an analogous doctrine.

Because Subsection (5) states that it applies "without limiting" Subsection 4, it cannot be read to prohibit an arbitration bylaw provision applicable to "external" claims insofar as they are the types of "external" claims within the scope of Subsection (4). Subsection (5) is irrelevant to the Proposal because it deals with making sure that only courts located in New Jersey may be the exclusive forum for the enumerated, state law causes of action.

Before concluding, it is important to emphasize that the NJAG Letter makes no claim that the Company would face an adverse legal action by the state if the Proposal were implemented, nor does it cite any authority for the NJAG to bring any such action. Indeed, in a footnote on page 2 of the NJAG Letter, the NJAG cites to a New Jersey statutory provision to support its claim that the NJAG plays an "important role in the administration" of New Jersey corporate law. That provision, N.J.S.A. § 14A:12-6, provides that the NJAG may bring a court action to dissolve a corporation that: (a) has procured its organization through fraud; (b) has repeatedly exceeded the authority conferred upon it by law; or (c) has repeatedly conducted is business in an unlawful manner. None of those grounds would exist if the Proposal were implemented, even if it did violate New Jersey law, which the Trust does not believe it would. The ultimate legality of a New Jersey bylaw is a matter for the courts not the NJAG.

* * *

Despite the NJAG Letter, the Trust continues to believe that the Company has not met its burden of establishing that it is entitled to exclude the Proposal under Rule 14a-8(i)(2) on the grounds that it *would*, if implemented, violate state law. To the contrary, the Trust continues to believe that the Proposal, if implemented, would be lawful and that, at most, its validity under state law is unsettled, which is not sufficient to meet the Company's burden. Therefore, the Trust respectfully requests that the Company's request to exclude the Proposal from its 2019 proxy materials be denied.

As noted in the Trust's December 24, 2018 submission and its Supplemental Letter Response, if this matter is taken up by the Commission, and the Commission intends to reach a decision on the Request on grounds not asserted by the Company in its Request or Supplemental Letter, the Trust respectfully requests that the Commission identify those possible grounds and permit the Trust to respond before making a determination. Please do not hesitate to contact the undersigned at (857) 242-6589.

Respectfully submitted,

Hal S. Scott
Trustee

cc:

Thomas J. Spellman III, Assistant General Counsel and Corporate Secretary, Johnson & Johnson
Marc S. Gerber, Skadden, Arps, Slate, Meagher & Flom LLP
Victoria A. Manning, Deputy Attorney General, State of New Jersey, Department of Law & Public Safety, Division of Law

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PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

GURBIR S. GREWAL
Attorney General

January 29, 2019

Via Email to: shareholderproposals@sec.gov
U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street
Washington, DC 20549

Re: Johnson & Johnson – 2019 Annual Meeting – Omission of Shareholder Proposal of The Doris Behr 2012 Irrevocable Trust

Ladies and Gentlemen:

I write, as the Attorney General of the State of New Jersey, in support of the request by Johnson & Johnson that the staff of the U.S. Securities and Exchange Commission concur that the company may exclude from its 2019 proxy materials a shareholder proposal and supporting statement ("Proposal") submitted by the Doris Behr 2012 Irrevocable Trust. Johnson & Johnson, a New Jersey corporation, made its request for such a "no-action" letter in correspondence dated December 11, 2018, and submitted pursuant to Rule 14a-8(j).

The Proposal includes a resolution requesting that the company's "Board of Directors take all practicable steps to adopt a mandatory arbitration bylaw" governing "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." In addition to stating that such disputes shall be "exclusively and finally settled by arbitration," the proposed bylaw would provide, among other things, that "any disputes subject to arbitration may not be brought as a class and may not be consolidated or joined."

Johnson & Johnson's correspondence explains that the Proposal may be excluded from the company's proxy materials under Rule 14a-8(i)(2) because "the adoption of a bylaw as described in the Proposal would be contrary to the public policy interests underlying the federal securities laws and would cause Johnson & Johnson to violate federal law." I agree that the Proposal would be contrary to the public policy interests underlying the federal securities laws, and that it would seriously undermine the goals of investor protection and transparency on the part of those who issue and sell securities. I write separately, however, to advise the Commission that the Proposal is also excludable under Rule 14a-8(i)(2) for the additional reason that adoption of the proposed bylaw would cause Johnson & Johnson to violate applicable *state* law.

Longstanding principles of New Jersey law limit the subject matter of corporate bylaws to matters of internal concern to the corporation. Under New Jersey law, as under Delaware law, forum-selection provisions relating to claims under the federal securities laws do not address matters of internal concern, and bylaw provisions purporting to dictate the forum for such claims—including but not limited to mandatory arbitration provisions—are void. This conclusion is reinforced by recent amendments to the New Jersey Business Corporation Act ("NJBCA"), N.J.S.A. §§ 14A:1-1 *et seq.*, which specifically address forum-selection bylaws and do not authorize forum-selection bylaws relating to federal securities law claims. Thus, New Jersey law provides a sufficient and independent basis for Commission staff to concur with Johnson & Johnson's no-action request.[1]

A. State Law May Make a Shareholder Proposal Excludable from Proxy Materials

Analysis of whether a proposal is excludable from proxy materials requires an assessment of applicable state law. In particular, Rule 14a-8(i)(2) makes a proposal excludable "[i]f the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." 17 C.F.R. § 240.14a-8(i)(2). Rule 14a-8(i)(2) reflects the Commission's determination that it would not be "appropriate to allow the inclusion in proxy materials of any proposal which, if implemented, would violate an applicable law." *Adoption of Amendments Relating to Proposals by Security Holders*, 41 Fed. Reg. 52,994, 52,996 (Dec. 3, 1976).

Accordingly, Commission staff must consider applicable state law before advising a company whether a proposal is excludable under Rule 14a-8(i)(2). And, where state law provides an independent and adequate ground for excluding a proposal, it becomes unnecessary for the agency even to consider whether the proposal would be excludable as conflicting with federal law. *See, e.g.*, Johnson & Johnson, SEC No-Action Letter (Feb. 16, 2012), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/kennethsteiner021612-14a8.pdf (finding it unnecessary to address an alternative basis for omission after concurring that a proposal was excludable because it would cause the company to violate state law).

B. The Proposal Is Excludable Under Rule 14a-8(i)(2) Because It Would Cause Johnson & Johnson to Violate New Jersey State Law

The Proposal, if adopted, would cause Johnson & Johnson to violate the NJBCA and should be excluded from the company's 2019 proxy materials on that basis. *See id.* (concurring that Johnson & Johnson may omit a proposal from its proxy materials under Rule 14a-8(i)(2) because the proposal would cause the company to violate the NJBCA).

1. The New Jersey Business Corporation Act (Pre-2018 Amendment)

The NJBCA grants each business corporation the power "to make and alter by-laws for the administration and regulation of the affairs of the corporation," subject to any limitations imposed by the NJBCA or any other New Jersey statute or by the corporation's certificate of incorporation. N.J.S.A. § 14A:3-1. Section 14A:2-9 of the NJBCA addresses the making and altering of bylaws, and provides generally that "by-laws made by the board may be altered or repealed, and new by-laws made, by the shareholders." *Id.* § 14A:2-9(1). However, "[a] by-law or an amendment to a by-law which is repugnant to any part of our Corporation Act is illegal and void." *Penn-Tex. Corp. v. Niles-Bement-Pond Co.*, 34 N.J. Super. 373, 378 (Ch. Div. 1955).

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[1] The State of New Jersey and its Attorney General have a substantial interest in New Jersey business corporations' compliance with the NJBCA, and the Attorney General in particular plays an important role in the administration of the NJBCA. *See, e.g.*, N.J.S.A. § 14A:12-6.

Under longstanding New Jersey case law, the right to amend bylaws is "a limited rather than an absolute right." *Lambert v. Fisherman's Dock Co-op., Inc.*, 61 N.J. 597, 600 (1972). Among other limitations, "in general the exercise of such a right should be confined to matters touching the administrative policies and affairs of the corporation, the relations of members and officers with the corporation and among themselves, and like matters of internal concern." *Id.* (citing 8 Fletcher, Cyclopedia Corporations (Perm. Ed.) § 4177; 1 Hornstein, Corporation Law & Practice (1959) § 269).

Here, as discussed in greater detail below, the Proposal's provisions on mandatory arbitration of federal securities law claims are not ones which New Jersey law permits to be set forth in the bylaws of a business corporation. These provisions would not address the internal concerns of Johnson & Johnson, but rather would seek to regulate external relationships of the company that are governed by federal law. Accordingly, the proposed bylaw amendment would violate New Jersey corporate law.

2. Delaware Case Law

The conclusion that New Jersey law does not authorize a business corporation's bylaws to provide for mandatory arbitration of federal securities law claims finds support in case law from Delaware, to which New Jersey courts frequently look for guidance on matters of corporate law in the absence of controlling New Jersey authority. *See, e.g.*, *Pogostin v. Leighton*, 216 N.J. Super. 363, 373 (App. Div. 1987).

Just as New Jersey corporate law generally confines bylaw amendments to "matters of internal concern," Delaware corporate law generally limits bylaw amendments to provisions addressing the corporation's "internal affairs." *See, e.g.*, *Sciabacucchi v. Salzberg*, C.A. No. 2017-0931-JTL, 2018 Del. Ch. LEXIS 578 (Del. Ch. Dec. 18, 2018); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 952 (Del. Ch. 2013). This limitation is reflected in § 109(b) of the Delaware General Corporation Law ("DGCL"), which provides in pertinent part: "The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees." 8 Del. C. § 109(b). Section 102(b)(1) of the DGCL contains a substantially similar provision applicable to certificates of incorporation.

The Delaware Court of Chancery recently addressed, in the *Sciabacucchi* case, the validity of corporate charter and bylaw provisions—like the Proposal's mandatory arbitration bylaw—that would dictate the forum for litigation of claims arising under the federal securities laws. *See Sciabacucchi*, at *2. At issue in *Sciabacucchi* were provisions in three companies' certificates of incorporation, each of which required any claims under the Securities Act of 1933 to be filed in federal court. *Id.* Applying principles common to Sections 102(b)(1) and 109(b) of the DGCL – which, again, respectively govern certificates of incorporation and bylaws – the Court held the federal forum-selection provisions to be "ineffective and invalid." *Id.* at *8.

The basis for the holding in *Sciabacucchi* was the court's conclusion that "[t]he constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law." *Id.* Corporate charter and bylaw provisions may not bind a plaintiff to a particular forum with respect to a federal securities law claim, the court determined, because such a claim "does not arise out of the corporate contract and does not implicate the internal affairs of the corporation." *Id.* at *7. Indeed, with respect to purchases of a corporation's shares, "[a]t the time the predicate act occurs, the purchaser is not yet a stockholder and lacks any relationship with the corporation that is grounded in corporate law." *Id.* at *8. "Because the claim exists outside of the corporate contract," the court concluded that "it is beyond the power of state corporate law to regulate." *Id.* at *6. Put differently, "the corporate contract can only regulate claims involving the corporate contract. It cannot regulate external activities, nor the behavior of parties in other capacities." *Id.* at *46. "In light of these principles," the court concluded "there is no reason to believe that corporate governance documents, regulated by the law of the state of incorporation, can dictate mechanisms for bringing claims that do not concern corporate internal affairs, such as claims alleging fraud in connection with a securities sale." *Id.* (quoting Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 Geo. L.J. 583, 598 (2016)). Under *Sciabacucchi*, therefore, federal securities fraud claims are distinguishable from the kinds of state corporate law claims that may properly be addressed in forum-selection bylaw provisions.

The Court of Chancery's earlier decision in *Boilermakers* further illustrates the distinction between "internal affairs" claims, which may properly be addressed in forum-selection bylaw provisions, from "external" claims, which may not. The court in *Boilermakers* upheld a corporate bylaw provision which identified the Delaware Court of Chancery as the sole and exclusive forum for: (i) any derivative action or proceeding brought on behalf of the corporation; (ii) any action asserting a claim of breach of a fiduciary duty; (iii) any action asserting a claim arising pursuant to any provision of the DGCL; or (iv) any action asserting a claim governed by the internal affairs doctrine. *Id.* at 939. In reaching that result, the court distinguished this provision from bylaw provisions purporting to regulate "external matters," such as a forum-selection provision for tort or contract claims against the company, which would be beyond the permissible subject matter for bylaws under Section 109. *Id.* at 952. Indeed, the court emphasized that the bylaws at issue in *Boilermakers* did not purport "in any way to foreclose a plaintiff from exercising any statutory right of action created by the federal government." *Id.* at 962.[2]

Thus, Delaware law does not authorize bylaw amendments that dictate the forum for litigation arising under the federal securities laws.

3. 2018 Amendments to the NJBCA

Recent legislation amending the NJBCA should eliminate any doubt that New Jersey law, like Delaware law, does not permit forum-selection bylaw amendments relating to federal securities law claims. This legislation, which took effect on January 16, 2018, added two new subsections to N.J.S.A. § 14A:2-9, the section of the NJBCA on making and altering bylaws. *See* P.L.2017, c.356 (attached hereto as Exhibit A). Both new subsections support the conclusion that the Proposal should be excluded from Johnson & Johnson's proxy materials under Rule 14a-8(i)(2) because the proposed bylaw would be invalid under New Jersey law.

First, new subsection (4) incorporates – nearly verbatim – the first sentence of Section 109(b) of the DGCL. *See* N.J.S.A. § 14A:2-9(4) ("The by-laws may contain any provision, not inconsistent with law or the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or power or the rights or power of its shareholders, directors, officers or employees."). Thus, the New Jersey State Legislature borrowed, and adopted for the State of New Jersey, the very same statutory language that the Delaware Court of Chancery has interpreted to prohibit forum-selection provisions addressing federal securities law claims. *See* Exhibit A at 2 ("This language is based upon a provision of Delaware law.").

[2] Delaware later codified the holding of *Boilermakers*, providing that certificates of incorporation and bylaws may require "that any or all *internal corporate claims* shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State." 8 Del. C. § 115 (emphasis added); *see Sciabacucchi*, at *30.

Second, new subsection (5) identifies categories of forum-selection provisions that may permissibly be included in a New Jersey business corporation's bylaws. That new subsection states in relevant part:

> Without limiting [N.J.S.A. § 14A:2-9(4)], the by-laws may provide that the federal and State courts in New Jersey shall be the sole and exclusive forum for:
>
> > (i) any derivative action or proceeding brought on behalf of the corporation;
> >
> > (ii) any action by one or more shareholders asserting a claim of a breach of fiduciary duty owed by a director or officer, or former director or officer, to the corporation or its shareholders, or a breach of the certificate of incorporation or by-laws;
> >
> > (iii) any action brought by one or more shareholders asserting a claim against the corporation or its directors or officers, or former directors or officers, arising under the certificate of incorporation or the "New Jersey Business Corporation Act," N.J.S.A. 14A:1-1 et seq.;
> >
> > (iv) any other State law claim, including a class action asserting a breach of a duty to disclose, or a similar claim, brought by one or more shareholders against the corporation, its directors or officers, or its former directors or officers; or
> >
> > (v) any other claim brought by one or more shareholders which is governed by the internal affairs or an analogous doctrine.

Id. § 14A:2-9(5)(a). All of the actions and claims that may be subject to forum-selection bylaw provisions under new § 14A:2-9(5)(a) may be characterized as types of "internal affairs" claims—reinforcing § 14A:2-9(4)'s limitations on the subject matter appropriate for bylaws. *See* Exhibit A at 2 ("The bill specifically allows the by-laws of a New Jersey corporation to contain exclusive forum clauses to provide that the federal and State courts in New Jersey are the sole and exclusive forum for disputes related to the 'internal affairs' of the corproation").

In contrast, forum-selection provisions relating to actions or claims arising under the federal securities laws are notably absent from the list of permissible forum-selection provisions. This omission is significant for purposes of statutory construction because New Jersey courts traditionally recognize the "canon of statutory construction, *expression unius est exclusion alterius*—expression of one thing suggests the exclusion of another left unmentioned." *Brodsky v. Grinnell Haulers, Inc.*, 181 N.J. 102, 112 (2004); *see, e.g.*, *Feuer v. Merck & Co.*, 455 N.J. Super. 69, 85 (App. Div. 2018). Had the Legislature intended to authorize bylaws that would dictate the forum for federal securities law actions and claims, it would have said so when it amended the NJBCA just a year ago.

Thus, if there were any doubt as to whether New Jersey law permits a business corporation's bylaws to include a forum-selection provision governing federal securities law actions or claims, the 2018 amendments to the NJBCA provide a clear answer: "No."

* * *

Because the Proposal, if adopted, would cause Johnson & Johnson to violate New Jersey state law, in the opinion of my Office, the Proposal should be excluded under Rule 14a-8(i)(2). Accordingly, I respectfully request that the Commission take no action against Johnson & Johnson if the company excludes the Proposal from its forthcoming proxy materials.

Sincerely,

GURBIR S. GREWAL
ATTORNEY GENERAL

cc: The Honorable Jay Clayton
Chair, U.S. Securities and Exchange Commission

Thomas J. Spellman III
Assistant General Counsel and Corporate Secretary
Johnson & Johnson

Marc S. Gerber, Esq.
Skadden Arps Slate Meagher & Flom

Hal Scott
Trustee
The Doris Behr 2012 Irrevocable Trust

Exhibit A

Page 1 –	Chapter Law P.L.2017, c.356 (approved Jan. 16, 2018)
Page 2 –	A.2162 Assembly Commerce and Economic Development Committee Report (Nov. 30, 2017)
Page 4 –	A.2162 As Reported by the Assembly Commerce and Economic Development Committee with Technical Review (sponsorship updated Jan. 6, 2018)

CHAPTER 356

AN ACT concerning corporate by-laws and amending N.J.S.14A:2-9.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. N.J.S.14A:2-9 is amended to read as follows:

By-laws; making and altering.

14A:2-9 (1) The initial by-laws of a corporation shall be adopted by the board at its organization meeting. Thereafter, the board shall have the power to make, alter and repeal by-laws unless such power is reserved to the shareholders in the certificate of incorporation, but by-laws made by the board may be altered or repealed, and new by-laws made, by the shareholders. The shareholders may prescribe in the by-laws that any by-law made by them shall not be altered or repealed by the board.

(2) The initial by-laws of a corporation adopted by the board at its organization meeting shall be deemed to have been adopted by the shareholders for purposes of this act.

(3) Any provision which this act requires or permits to be set forth in the by-laws may be set forth in the certificate of incorporation with equal force and effect.

(4) The by-laws may contain any provision, not inconsistent with law or the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or power or the rights or power of its shareholders, directors, officers or employees.

(5) (a) Without limiting subsection (4) of this section, the by-laws may provide that the federal and State courts in New Jersey shall be the sole and exclusive forum for:

(i) any derivative action or proceeding brought on behalf of the corporation;

(ii) any action by one or more shareholders asserting a claim of a breach of fiduciary duty owed by a director or officer, or former director or officer, to the corporation or its shareholders, or a breach of the certificate of incorporation or by-laws;

(iii) any action brought by one or more shareholders asserting a claim against the corporation or its directors or officers, or former directors or officers, arising under the certificate of incorporation or the "New Jersey Business Corporation Act," N.J.S.14A:1-1 et seq.;

(iv) any other State law claim, including a class action asserting a breach of a duty to disclose, or a similar claim, brought by one or more shareholders against the corporation, its directors or officers, or its former directors or officers; or

(v) any other claim brought by one or more shareholders which is governed by the internal affairs or an analogous doctrine.

(b) The by-laws may provide that one or more shareholders who file an action in breach of a forum selection requirement of the by-laws shall be liable for all reasonable costs incurred in enforcing the requirement, including, without limitation, reasonable attorney's fees of the defendants. If the by-laws contain an exclusive forum provision, the directors and officers, and former directors and officers, shall be deemed to have consented to the personal jurisdiction of that forum. If the provision is not contained in the original by-laws but is adopted by an amendment, the provisions and the personal jurisdiction over directors and officers, and former directors and officers, shall apply only to actions brought by one or more shareholders after the date of the amendment of the by-laws and which assert claims arising after the date of the amendment.

2. This act shall take effect immediately.

Approved January 16, 2018.

ASSEMBLY COMMERCE AND ECONOMIC DEVELOPMENT COMMITTEE

STATEMENT TO

ASSEMBLY, No. 2162

STATE OF NEW JERSEY

DATED: NOVEMBER 30, 2017

The Assembly Commerce and Economic Development Committee reports favorably Assembly Bill No. 2162.

This bill concerns the scope of issues that may be addressed in the by-laws of a New Jersey corporation and provides that corporate by-laws may include a forum selection requirement.

The bill provides that the by-laws of a New Jersey corporation may contain any provision that is not inconsistent with law or the certificate of incorporation and is related to the business of the corporation, the conduct of its affairs, and its rights or power or the rights or power of its shareholders, directors, officers, or employees. This language is based upon a provision of Delaware law.

The bill specifically allows the by-laws of a New Jersey corporation to contain exclusive forum clauses to provide that the federal and State courts in New Jersey are the sole and exclusive forum for disputes related to the "internal affairs" of the corporation. This applies to the following types of actions:

- a derivative action or proceeding brought on behalf of the corporation;
- an action by one or more shareholders asserting a claim of a breach of fiduciary duty;
- an action brought by one or more shareholders asserting a claim against the corporation or its directors or officers, or former directors or officers, arising under the "New Jersey Business Corporation Act," or the certificate of incorporation; or
- any other State law claim or other claim brought by one or more shareholders which is governed by the internal affairs or an analogous doctrine.

The bill clarifies that the by-laws of a New Jersey corporation may provide that any shareholder who files an action in breach of a corporation's forum selection requirement would be liable for all reasonable costs incurred in enforcing the requirement. The bill also provides that if the by-laws contain an exclusive forum provision, certain directors and officers will be deemed to consent to the jurisdiction of the forum that is selected in the provision.

This bill was pre-filed for introduction in the 2016-2017 session pending technical review. As reported, the bill includes the changes required by technical review, which has been performed.

ASSEMBLY, No. 2162

STATE OF NEW JERSEY

217th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2016 SESSION

Sponsored by:
Assemblyman PATRICK J. DIEGNAN, JR.
District 18 (Middlesex)
Assemblyman GARY S. SCHAER
District 36 (Bergen and Passaic)
Assemblyman RAJ MUKHERJI
District 33 (Hudson)

SYNOPSIS

Clarifies scope of corporate by-laws; provides that by-laws may include forum selection clause.

CURRENT VERSION OF TEXT

As reported by the Assembly Commerce and Economic Development Committee with technical review.

(Sponsorship Updated As Of: 1/6/2018)

AN ACT concerning corporate by-laws and amending N.J.S.14A:2-9.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. N.J.S.14A:2-9 is amended to read as follows:

14A:2-9 (1) The initial by-laws of a corporation shall be adopted by the board at its organization meeting. Thereafter, the board shall have the power to make, alter and repeal by-laws unless such power is reserved to the shareholders in the certificate of incorporation, but by-laws made by the board may be altered or repealed, and new by-laws made, by the shareholders. The shareholders may prescribe in the by-laws that any by-law made by them shall not be altered or repealed by the board.

(2) The initial by-laws of a corporation adopted by the board at its organization meeting shall be deemed to have been adopted by the shareholders for purposes of this act.

(3) Any provision which this act requires or permits to be set forth in the by-laws may be set forth in the certificate of incorporation with equal force and effect.

(4) The by-laws may contain any provision, not inconsistent with law or the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or power or the rights or power of its shareholders, directors, officers or employees.

(5) (a) Without limiting subsection (4) of this section, the by-laws may provide that the federal and State courts in New Jersey shall be the sole and exclusive forum for:

(i) any derivative action or proceeding brought on behalf of the corporation;

(ii) any action by one or more shareholders asserting a claim of a breach of fiduciary duty owed by a director or officer, or former director or officer, to the corporation or its shareholders, or a breach of the certificate of incorporation or by-laws;

(iii) any action brought by one or more shareholders asserting a claim against the corporation or its directors or officers, or former directors or officers, arising under the certificate of incorporation or the "New Jersey Business Corporation Act," N.J.S.14A:1-1 et seq.;

(iv) any other State law claim, including a class action asserting a breach of a duty to disclose, or a similar claim, brought by one or more shareholders against the corporation, its directors or officers, or its former directors or officers; or

(v) any other claim brought by one or more shareholders which is governed by the internal affairs or an analogous doctrine.

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

<u>(b) The by-laws may provide that one or more shareholders who file an action in breach of a forum selection requirement of the by-laws shall be liable for all reasonable costs incurred in enforcing the requirement, including, without limitation, reasonable attorney's fees of the defendants. If the by-laws contain an exclusive forum provision, the directors and officers, and former directors and officers, shall be deemed to have consented to the personal jurisdiction of that forum. If the provision is not contained in the original by-laws but is adopted by an amendment, the provisions and the personal jurisdiction over directors and officers, and former directors and officers, shall apply only to actions brought by one or mores shareholders after the date of the amendment of the by-laws and which assert claims arising after the date of the amendment.</u>
(cf: N.J.S.14A:2-9)

2. This act shall take effect immediately.

The Doris Behr 2012 Irrevocable Trust
Hal Scott, Trustee
Harvard Law School, Lewis 339, 1557 Massachusetts Ave., Cambridge, MA 02138
hscott@law.harvard.edu

January 23, 2019

Via email: shareholderproposals@sec.gov

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

Re: Shareholder Proposal to Johnson & Johnson from The Doris Behr 2012 Irrevocable Trust Regarding an Amendment to the Johnson & Johnson Bylaws

Ladies and Gentlemen:

This letter, sent pursuant to Rule 14a-8(k), responds to the January 16, 2019 supplemental letter (the "Supplemental Letter") to a December 11, 2018 no-action request letter (the "Request") submitted by Skadden, Arps, Slate, Meagher & Flom LLP on behalf of Johnson & Johnson (the "Company") relating to the shareholder proposal (the "Proposal") of The Doris Behr 2012 Irrevocable Trust (the "Trust").

Pursuant to Staff Legal Bulletin No. 14D (CF), Shareholder Proposals (November 7, 2008) ("SLB 14D"), Question C, this letter is being submitted via email to shareholderproposals@sec.gov. In accordance with Rule 14a-8(k) and SLB 14D, Question E, a copy of this submission is being forwarded simultaneously to the Company electronically.

The arguments advanced in the Supplemental Letter to exclude the Proposal from the Company's proxy materials should fail on both procedural and substantive grounds.

I. The Arguments Advanced in the Supplemental Letter Are Untimely Under Rule 14a-8(j) and Should not be Considered

The SEC's proxy rules, specifically Rule 14a-8(j), establish procedural requirements that companies must adhere to when seeking to exclude a proposal. Rule 14a-8(j) states that "[i]f a company intends to exclude a proposal from its proxy materials, it must file *its reasons* with the Commission no later than *80 calendar days* before it files its definitive proxy statement and form of proxy with the Commission."[1]

The reasons for exclusion advanced in the Supplemental Letter were not raised in the Request, which was submitted on December 11, 2018. In its Request, the Company reasoned that it should be permitted to exclude the Proposal because, if implemented, it would violate the anti-

[1] Emphases added.

waiver provisions of federal securities law. In the Supplemental Letter, the Company reasons that it should be allowed to exclude the Proposal because, if implemented, it would violate state law.

Since 1994, the Company has filed its proxy materials with the U.S. Securities and Exchange Commission (the "Commission") between March 8 and March 17 each year. If it follows its past practice, for which there is no indication that it will not, the Supplemental Letter was submitted no more than 60 days before the date on which its proxy materials will be filed. The state law arguments advanced in the Supplemental Letter were therefore raised late under Rule 14a-8(j) and should not be considered.

Furthermore, under Rule 14a-8(j), when a company misses the deadline and wishes for the Commission to nevertheless consider its arguments, it must demonstrate "good cause" for missing the deadline. The Company's Supplemental Letter makes no attempt to demonstrate good cause. As such, no future arguments of the Company making such a claim should be entertained.

Finally, the Trust notes that the Company's Supplemental Letter did not address any of the arguments advanced in the Trust's December 24, 2018 reply letter to the Request. Given that the Company had 23 calendar days between the submission of the Trust's reply and the submission of its Supplemental Letter and responses are expected to be submitted "as soon as possible,"[2] the Company should be foreclosed from advancing any responses on the federal law arguments.

II. The Company Failed to Establish that the Proposal Can be Properly Excluded

Even if the arguments advanced in the Supplemental Letter are considered, they do not establish that the Company should be entitled to exclude the Proposal from its 2019 proxy materials. Rule 14a-8(g), as interpreted by Staff Legal Bulletin No. 14, Shareholder Proposals (July 13, 2001) ("SLB 14"), requires a company seeking to exclude a shareholder proposal to bear the burden of demonstrating that it is entitled to exclude the Proposal. Critically, under Rule 14a-8(i)(2), the Company must demonstrate that "the proposal *would*, if implemented, cause the company to violate" the law, in this case, according to the Supplemental Letter, state law.[3] Thus, the plain language of the rule makes clear that, contrary to the Company's assertion, the Proposal cannot be excluded if the law is unsettled or unclear.

The Supplemental Letter cites to no-action letters issued in 1993 and 1994 to assert that no-action relief can be granted if state law is unsettled or unclear. But those letters were issued under a predecessor rule to today's Rule 14a-8(i)(1), which is not the grounds for exclusion at issue.[4] In fact, the Company provides no similar citations under the relevant rule, 14a-8(i)(2) – for good reason – any such no-action letter would run afoul of the plain language of Rule 14a-8(i)(2). To the extent no-action letters were granted in the past where state law was unclear or unsettled, that practice should not be applied here. The Trust believes that the Proposal, if

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[2] *Cf.* Rule 14a-8(k); Staff Legal Bulletin No. 14 Shareholder Proposals (July 13, 2001) ("SLB 14") (proponent responses to company submissions should be submitted "as soon as possible").

[3] Emphasis added.

[4] Rule 14a-8(i)(1) permits exclusion of a proposal if it is not a proper subject of action by shareholders under the law of the state in which the issuer is organized. The Company has asserted it can exclude the Proposal under Rule 14a-8(i)(2).

implemented, would be lawful under state law, and, at worst, its legality under state law is unsettled.

The Supplemental Letter advances two lines of argument: (1) that under New Jersey corporate law a corporation may not mandate arbitration of federal securities law claims in its constitutive documents; and (2) an amendment to the Company's bylaws to include an arbitration provision applicable to federal securities law claims brought by shareholders would not have the requisite mutual consent of all current and future shareholders necessary to form an arbitration agreement. This letter will address each argument in turn and will also argue that if those positions were adopted by New Jersey courts, they would be preempted by the Federal Arbitration Act ("FAA").[5]

Before doing so it is important to note that the opinion on New Jersey law provided by the Company as part of its Supplemental Letter primarily relies on analyses of Delaware and Pennsylvania law,[6] which should be weighed in determining the persuasive value (or lack thereof) of the opinion.[7] Moreover, the necessity of counsel to rely on law from other jurisdictions to surmise what New Jersey law is clearly bears on whether implementation of the Proposal would clearly violate state law.

A. Inclusion of An Arbitration Provision in the Company's Bylaws under State Corporate Law

The Company's first state law argument is that under New Jersey corporate law, the Company's bylaws cannot include a mandatory arbitration provision governing federal securities law claims brought against the Company by its shareholders. The New Jersey legal opinion provided in the Supplemental Letter concedes that no New Jersey court has considered the question. It therefore looks to precedent from Delaware, which the opinion claims New Jersey courts look to when deciding unsettled or unresolved New Jersey corporate law matters, a proposition with which the Trust agrees.

The opinion of New Jersey counsel, however, conducts an incomplete analysis of Delaware law on this question. The opinion only looks to one Delaware case, *Sciabacucchi v. Salzberg*[8] (referred to hereinafter as "*Blue Apron*"), a recent Chancery Court decision. However, the Trust believes *Blue Apron* was wrongly decided under the relevant controlling precedent, the Delaware Supreme Court's decision in *ATP Tour, Inc. v. Deutscher Tennis Bund*, which held that

[5] 9 U.S.C. §§ 1-16.
[6] In particular, see page 4 of the opinion of New Jersey counsel in the Supplemental Letter ("No New Jersey court has considered the issue of whether a New Jersey corporation may lawfully mandate arbitration in its constitutive documents as the forum to resolve claims of shareholders for alleged violations of the federal securities laws," and so the opinion turns to Delaware law), and page 7 of the opinion ("No New Jersey court has considered the issue of whether current and future shareholders who did not approve an arbitration provision contained in a corporation's bylaws would be bound to arbitrate claims under federal securities laws" and so the opinion looks to the Third Circuit's interpretation of Pennsylvania law).
[7] SLB 14 and Staff Legal Bulletin No. 14B (CF), Shareholder Proposals (September 15, 2014), each states that in determining how much weight to afford an opinion of counsel one consideration is "whether counsel is licensed to practice law in the jurisdiction where the law is at issue." While the opinion is provided by New Jersey counsel, the opinion is effectively not an opinion on New Jersey law, but rather is an analysis of Delaware and Pennsylvania law, and, as demonstrated below, a faulty one at that.
[8] *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL (Del. Ch. Dec. 19, 2018) [hereinafter "*Blue Apron*"], available at https://courts.delaware.gov/Opinions/Download.aspx?id=282830.

bylaw provisions (specifically fee shifting provisions) governing "intra-corporate litigation" were legally permissible under Delaware law.[9]

The heart of the legal debate in Delaware about whether a corporation's charter or bylaws can provide for mandatory arbitration of federal securities law claims is whether an "external" claim – that is one that does not involve state corporate law such as a federal securities law claim – can be categorized as an "intra-corporate" claim (a term not expressly defined in *ATP*)[10] and thus can be governed by a provision in a corporation's constitutive document.

ATP makes clear that an external claim can be addressed in a charter or bylaw provision *if* it arises out of a relationship between the corporation and its shareholders *qua* shareholders. This certainly was the case for the federal antitrust claim at the heart of *ATP* and is also the case for a federal securities law claim, such as an alleged violation of Section 11 of the Securities Act or Rule 10b-5 under the Securities Exchange Act.

The *ATP* Court began its opinion as follows:[11]

> This Opinion constitutes the Court's response to four certified questions of law concerning the validity of a fee-shifting provision in a Delaware non-stock corporation's bylaws. The provision, which the directors adopted pursuant to their charter-delegated power to unilaterally amend the bylaws, shifts attorneys' fees and costs to unsuccessful plaintiffs in intra-corporate litigation. The United States District Court for the District of Delaware found that the bylaw provision's validity was an open question under Delaware law and certified four questions to this Court, asking it to decide whether, and under what circumstances, such a provision is valid and enforceable. Although we cannot directly address the bylaw at issue, we hold that fee-shifting provisions in a non-stock corporation's bylaws can be valid and enforceable under Delaware law. In addition, bylaws normally apply to all members of a non-stock corporation regardless of whether the bylaw was adopted before or after the member in question became a member.

The plaintiff in *ATP* was a member of a Delaware membership corporation (the defendant) that operated a global professional tennis tour. In 2006, the bylaws of ATP were amended to include a fee-shifting provision applicable to any claim by a member against the corporation whereby the member would be obligated to reimburse the corporation for all legal fees and other costs incurred in connection with litigating the claim if the member did not obtain

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[9] *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 557-59 (Del. 2014).
[10] *Id.* at 558 (holding that a bylaw that allocates risk between parties in "intra-corporate litigation" satisfies Delaware law requirements that the bylaws must "relat[e] to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees") (alteration in original) (quoting 8 Del. C. § 109(b)) (internal quotation marks omitted) .
[11] *Id.* at 555.

a judgment on the merits that substantially achieved, in substance and amount, the full remedy sought.[12]

In 2007, ATP changed the tour schedule in a manner adverse to the plaintiff member, which sued ATP based on both federal antitrust and Delaware fiduciary duty claims. After trial, ATP prevailed on both sets of claims. It then moved to recover its legal fees and other litigation costs, citing the fee-shifting bylaw. The District Court denied ATP's motion "because it found Article 23.3(a) [the bylaw in question] to be contrary to the policy underlying the federal antitrust laws."[13]

ATP appealed to the Third Circuit, which vacated the District Court's order. "The Third Circuit found that the District Court should have decided whether Article 23.3(a) was enforceable as a matter of Delaware law before reaching the federal preemption question."[14]

Finding the enforceability of Article 23.3(a) to be a novel question of Delaware law, the District Court certified four questions of law to the Delaware Supreme Court, of which the first question, repeated below, is the relevant one:[15]

> 1. May the Board of a Delaware non-stock corporation lawfully adopt a bylaw (i) that applies in the event that a member brings a claim against another member, a member sues the corporation, or the corporation sues a member (ii) pursuant to which the claimant is obligated to pay for "all fees, costs, and expenses of every kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses)" of the party against which the claim is made in the event that the claimant "does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought"?

With regard to this question, the Delaware Supreme Court held as follows:[16]

> A fee-shifting bylaw, like the one described in the first certified question, is facially valid. Neither the DGCL nor any other Delaware statute forbids the enactment of fee-shifting bylaws. A bylaw that allocates risk among parties in *intra-corporate litigation* would also appear to satisfy the DGCL's requirement that bylaws must "relat[e] to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees." The corporate charter could permit fee-shifting provisions, either explicitly or

[12] *Id.* at 555-56.
[13] *Id.* at 556.
[14] *Id.* at 556-57.
[15] *Id.* at 557.
[16] *Id.* at 558 (alteration in original) (emphasis added) (footnotes omitted).

> implicitly by silence. Moreover, no principle of common law prohibits directors from enacting fee-shifting bylaws.

There are two aspects of this holding that bear emphasis. First, one might ask why did the Court limit its holding to the *facial validity* of the bylaw? Critically, the Court's concern was *not* with the nature of the underlying claims – including a federal antitrust claim – but rather the possibility that the underlying motivation for the adoption of the bylaw could render it invalid. The Court discussed at length various Delaware cases involving allegations of entrenchment by management or a controlling shareholder as bases for finding an improper purpose or inappropriate circumstances.[17] Such concerns are not at issue here.

The second aspect of the Court's decision in *ATP* that is central to the issue of whether the Proposal would violate state law is whether the Court's holding of the fee-shifting bylaw's validity, which was limited to "intra-corporate" claims (a term not expressly defined in the opinion), can apply to a charter or bylaw provision insofar as it relates to an external claim. The very raison d'etre for certifying the question of bylaw validity was to determine whether a fee-shifting bylaw provision that applied to a federal antitrust claim was valid under state law. Therefore, it would have been an obvious waste of judicial resources for the Court to have concluded that the bylaw was facially valid if *no* bylaw addressing a federal antitrust claim could be valid under Delaware law on the grounds that Delaware law does not permit bylaw provisions (or charter provisions) that relate to external claims, such as a federal antitrust claim. Thus, it must be that a Delaware charter or bylaw provision that relates to an external claim is valid *if* the circumstances giving rise to the claim also make it an intra-corporate claim – *i.e.*, one based on the relationship between the corporation and its shareholders *qua* shareholders. This was precisely the case in *ATP*, where the underlying basis for the federal antitrust claim was the very operation of the corporation's business in controlling how and when its members, including the plaintiff, participated as tournament sponsors in the tennis tour.

In this matter, the question is the validity of a provision in the bylaws of a corporation that require resolution in an arbitral forum of a federal securities law claim by a shareholder against the corporation either for fraudulently inducing the shareholder to sell stock, thus terminating the corporation-shareholder relationship, or for fraudulently (or otherwise wrongfully) inducing the investor to purchase stock and thereby *become* a shareholder. Unquestionably such a federal securities law claim has a sufficient nexus to the corporation-shareholder relationship to qualify as an intra-corporate claim. Indeed, it would be hard to conceive of a claim more central to the relationship between a corporation and its shareholders *qua* shareholders than a challenge to the very circumstances that either terminate or create that relationship. This is readily distinguishable from examples of claims against a corporation by a plaintiff that happens to be a shareholder of the corporation for matters *unrelated* to that relationship, such as a product liability claim or slip-and-fall claim on the corporation's premises or a contract claim arising out of a commercial dispute.

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[17] *Id.* at 558-59 & n.31.

The recent decision by Vice Chancellor Laster in *Blue Apron,*[18] however, takes the contrary position – *i.e.*, a Delaware charter or bylaw can *never* regulate an external claim.[19] This is directly contrary to *ATP*.[20]

In *Blue Apron*, Judge Laster held invalid a forum selection provision in the charters of three IPO companies providing that claims under the Securities Act were required to be brought in federal, rather than state, court.

Judge Laster believed the *ATP* case to be controlling, but concluded that *ATP*'s references to "intra-corporate litigation" must be synonymous with internal claims (*i.e.*, those involving Delaware corporate law) and could not include *any* external claims.[21] Judge Laster cites no authority for his interpretation of this phrase, and as pointed out above, the *ATP* decision is plainly at odds with that conclusion since it involved a fee shifting provision being applied in a federal antitrust case.

The case Judge Laster primarily relies on in deciding *Blue Apron* is the 2013 Delaware Chancery Court decision in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*[22] In that case, then-Chancellor Strine held that forum selection clauses in bylaws of Delaware corporations, making Delaware courts the exclusive forum for resolving internal claims – those involving Delaware corporate law – were valid.[23] *Boilermakers* therefore did *not* address whether any external claims could be the subject of a bylaw, and anything in *Boilermakers* regarding that possibility was dicta. That said, even the dicta in *Boilermakers* regarding external claims does not support Judge Laster's narrow interpretation of *ATP*'s term "intra-corporate litigation," because the two examples of external claims given by Chancellor Strine in *Boilermakers* – a tort claim for personal injury suffered by the plaintiff on the premises of the company or a contract claim over a commercial contract[24] – obviously are entirely unrelated to the corporation-shareholder relationship. Those types of tort and contract claims could arise

[18] No. 2017-0931-JTL (Del. Ch. Dec. 19, 2018), available at https://courts.delaware.gov/Opinions/Download.aspx?id=282830.

[19] *Blue Apron*, slip op. at 5 ("The constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law.").

[20] Another source for the view that a Delaware charter or bylaw can *never* regulate an external claim is a paper (undated), entitled "Delaware Law Status of Bylaws Regulating Litigation of Federal Securities Law Claims," signed by 21 law professors (the "White Paper"), available at https://secureoursavings.com/wp-content/uploads/2018/11/Arbitration-bylaw-white-paper.pdf. The White Paper makes no new arguments, relying on an interpretation of *ATP* that falls for essentially the same reasons the Trust finds fallacious in Judge Laster's decision in *Blue Apron* (which was decided after the White Paper was published). The White Paper, however, relies on the *ATP* decision for an apparently significant statement purportedly made by the Court in addressing the principal certified question. According to the White Paper, "the Court was necessarily focused on 'suits brought by stockholders as stockholders in cases *governed by the internal affairs doctrine*.'" White Paper at 2 (emphasis added in White Paper) (quoting *ATP*, 91 A.3d at 556). Since the claim at issue in *ATP* was a federal antitrust claim, not one governed by the internal affairs doctrine, that quote seemed odd, and sure enough it does *not* come from *ATP* at all but from an earlier, Delaware Chancery Court decision discussed on the following page, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.,* 73 A.3d 934, 939 (Del. Ch. 2013).

[21] *See Blue Apron*, slip op. at 23-28.

[22] 73 A.3d 934 (Del. Ch. 2013).

[23] *Id.* at 942-43, 950-58.

[24] *Id.* at 952.

irrespective of whether the claimant was a shareholder and therefore do not "relate quintessentially to . . . the rights of [shareholders *qua* shareholders]."[25]

In sum, the only sensible interpretation of the term "intra-corporate litigation," in the context in which the Delaware Supreme Court was asked the certified questions it addressed in *ATP*, is that when an external claim is based on the relationship between the defendant corporation and the plaintiff in its capacity as a shareholder, as it plainly was for the federal antitrust claim in *ATP* (and as it would be for a challenge by a shareholder to the circumstances that caused it to cease to be, or to become,[26] a shareholder), it is a permissible subject of a bylaw provision.

It is therefore the Trust's position that the mandatory arbitration bylaw provision, if implemented, would be lawful under state law. However, it is at best unsettled how a New Jersey court would resolve any challenge to the validity of a mandatory arbitration bylaw provision applying to claims arising under federal securities law. As such, the Company has not established that the Proposal, if implemented, *would* violate state law.

B. The Formation of an Agreement to Arbitrate

The second argument advanced by the Company is that the Proposal would, if implemented, violate New Jersey law because it would subject shareholders who did not vote on the Proposal (*e.g.*, bought shares after the provision was adopted) and shareholders who did not vote for the Proposal (*e.g.*, voted against it) to mandatory arbitration. The Company argues that the bylaw provision could not form an agreement to arbitrate because it would lack the "mutual consent" requisite to form a contract.

The Company's argument is flawed for two reasons. First, it completely ignores basic principles of corporate law that bylaws are a contract between a company and its shareholders, the terms of which shareholders accept when they become shareholders, and which are subject to amendment. Second, the state law opinion cites no New Jersey authority to support its conclusion that New Jersey would subject the validity of a properly adopted arbitration bylaw

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[25] *Id.* at 951 (alternation in original) (internal quotation marks omitted). Judge Laster also tries to derive support for his conclusion that a Delaware charter or bylaw provision can *never* regulate an external claim by citing DGCL §115, which permits charter or bylaw provisions regarding the choice of a Delaware court as the exclusive forum to resolve internal corporate claims and prohibits any such provision purporting to oust the Delaware courts as a permissible forum to resolve such claims. *Blue Apron*, slip op. at 28-31. Judge Laster himself recognizes that §115 relates solely to internal corporate claims and thus says nothing with respect to external claims. *Id.* at 29. Indeed, the statutory provision was adopted after the *ATP* decision, and so continued statutory silence on whether external claims that in fact are "intra-corporate" in nature can be the subject of a charter or bylaw provision militates in favor of their validity under Delaware law.

[26] In *Blue Apron*, Judge Laster specifically questioned whether a federal securities law claim arising out of the purchase of stock could be said to relate to the corporation-shareholder relationship, because "the event giving rise to the claim takes place just before the plaintiff becomes a stockholder, before the corporate contract applies." *Blue Apron*, slip op. at 49. It is well settled, however, that claims of fraudulent inducement to enter into a contract are to be resolved in an arbitral forum where the contract in question has a mandatory arbitration provision. *See, e.g., S. Jersey Sanitation Co., Inc. v. Applied Underwriters Captive Risk Assurance Co.,* 840 F.3d 138, 144-45 (3d Cir. 2016) (citing *Prima Paint Corp. v. Flood & Concklin Mfg. Co.*, 388 U.S. 395, 396-97 (1967)); *Accord Rent-A-Car, W., Inc. v. Jackson*, 561 U.S. 63, 70-72 (2010). This settled aspect of the law of arbitration rests on the scope of the authority delegated to the arbitrators when the arbitration provision in question authorizes them to resolve *all* issues relating to the contract in question, including whether the aggrieved party was fraudulently induced to enter into the contract.

provision to a different standard than the validity of any other type of bylaw provision. Each is addressed in more detail below.

1. Bylaws are Valid Contracts

The Company's argument ignores a basic principle of corporate law that bylaws are contracts between a corporation and its shareholders. This proposition is well settled under New Jersey and Delaware law.[27] As such, it must be, particularly in the context of publicly-listed firms with ever changing shareholder bases, that shareholders impliedly agree to be bound by the bylaws when they become shareholders as well any bylaw amendments properly adopted according to the terms of the bylaws and applicable corporate law. If it were otherwise, the Company would be unable to amend its bylaws according to the terms of its bylaws and New Jersey's corporate law statute, each of which authorize the Company's board to unilaterally amend the bylaws without shareholder approval.[28]

Delaware law is particularly instructive on this point. Then-Chancellor Strine addressed and rejected an argument in the *Boilermakers* case that bylaw provisions not approved by shareholders are not a valid agreement because they lack the requisite consent of the shareholders. In that case, two publicly-listed firms, Chevron and FedEx, each had adopted forum selection bylaw provisions governing internal corporate affairs claims exclusively through board action.[29] Shareholder plaintiffs challenged the bylaw provisions as contractually invalid for lacking shareholder assent.[30] Then-Chancellor Strine held that the bylaw provisions did form a valid contract because by being shareholders, the Chevron and FedEx shareholders had "assented to a contractual framework established by the DGCL and the certificates of incorporation" that allowed the boards to unilaterally amend the bylaws.[31] He further reasoned that "[t]he plaintiffs' argument that stockholders must approve [the bylaw provision] for it to be contractually binding is an interpretation that contradicts the plain terms of the contractual framework chosen by stockholders who buy stock in Chevron and FedEx."[32]

The same legal reasoning would apply to the Proposal. Shareholders do not need to expressly agree to the terms contained in the bylaws. They agree to them when they purchase the Company's stock and they agree to be bound by any amendments, not just this particular one being proposed, validly adopted under the framework established by the applicable corporate law and constitutive documents, whether by the board or shareholder vote.

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[27] *Papalexiou v. Tower W. Condo*., 167 N.J. Super. 516, 531 (N.J. Super. Ct. Ch. Div. 1979) ("The by-laws of a corporation are a contract between the corporate entity and its stockholders as well as among the stockholders themselves."); *Faunce v. Boost Co*., 15 N.J. Super. 534, 538 (N.J. Super. Ct. Ch. Div. 1951) (same); *Baumohl v. Goldstein*, 95 N.J. Eq. 597, 599 (N.J. Ch. 1924). *See also ATP*, 91 A.3d at 558; *Airgas, Inc. v. Airgas Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010).
[28] *See* N.J. Rev. Stat. § 14A:2-9; Johnson & Johnson By-Laws, art. XI, available at https://www.sec.gov/Archives/edgar/data/200406/000020040616000069/exhibit31-byxlaws.htm.
[29] *Boilermakers*, 73 A.3d at 937.
[30] *Id.* at 955.
[31] *Id.* at 956.
[32] *Id. See also ATP*, 91 A.3d at 555 ("In addition, bylaws normally apply to all members of a non-stock corporation regardless of whether the bylaw was adopted before or after the member in question became a member.").

2. The Company Provides No Relevant Authority that the Valid Formation of an Arbitration Agreement through Adoption of a Mandatory Arbitration Bylaw Provision Would be Treated Any Differently than other Bylaw Provisions

Rather than challenge the basic principles of corporate law detailed above, the Company appears to argue, without expressly saying so, that the adoption of the Proposal should be subject to a different legal standard than other types of bylaw provisions in order to be deemed a valid contract. Specifically, the Company's position is that an arbitration provision creating an arbitration agreement between the Company and shareholders must be approved by all current and future shareholders to be valid.

Yet, the Company provides no New Jersey authority to support that claim. Rather, the Company offers the speculation and conjecture of New Jersey counsel masquerading as a legal opinion.

The state law opinion in the Supplemental Letter relies entirely on one case, *Kirleis v. Dickie, McCamey & Chilcote, P.C.*[33] to support the Company's position. But that decision has no precedential value in New Jersey. It was a case decided under *Pennsylvania* law.[34] Moreover, it was not even decided by a Pennsylvania court. It was decided by the U.S Court of Appeals for the Third Circuit, a federal court. That court was not making state law but rather trying to divine what the state court would decide in the matter, commonly referred to as an "*Erie* guess."[35] Indeed, the Third Circuit had sought (unsuccessfully) to certify the question in the case to the Pennsylvania Supreme Court because of the tension at issue in the case between corporate law principles and the state's arbitration contract principles.[36] So, in effect, the Company's arguments rest on a decision on Pennsylvania law, with no binding effect in Pennsylvania courts, to infer what the law would be in New Jersey.

In fact, the Company's Supplemental Letter fails to acknowledge that in New Jersey arbitration is "a favored means of dispute resolution"[37] and fails to cite New Jersey Supreme Court precedent providing that the state "cannot subject an arbitration agreement to more burdensome requirements than those governing the formation of other contracts."[38] The inference to be drawn from those statements is that New Jersey courts would analyze the validity of the formation of an arbitration agreement arising from an arbitration bylaw provision the same way that they would analyze the validity of any other contractual obligation arising from any other type of bylaw provision.

C. Preemption of the State Law Arguments by the FAA

Even if the Supplemental Letter's state law opinion is correct that New Jersey courts would either (i) hold that the bylaws cannot be used to mandate arbitration in federal securities law disputes between shareholders and the Company or (ii) require that a bylaw arbitration

[33] 560 F.3d 156 (3d Cir. 2009).
[34] *Id.* at 158.
[35] *See* Stephen E. Sachs, *Finding Law*, 107 Cal. L. Rev. (forthcoming April 2019) (manuscript at 38), available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6482&context=faculty_scholarship (explaining that federal courts deciding a state law issue must predict how the issue would come out in the state court of last resort).
[36] *Kirleis*, 560 F.3d at 158.
[37] *Hojnowski ex rel Hojnowski v. Vans Skate Park*, 901 A.2d 381, 392 (N.J. 2006).
[38] *Id.* (quoting *Leodori v. Cigna Corp*., 814 A.2d 1098, 1104 (N.J. 2003)) (internal quotation marks omitted).

agreement be consented to by all current and future shareholders to form a valid contract, such state law would be preempted by the FAA and be invalid.

First, the state law positions advanced by the Company would fail to treat arbitration agreements equally with other types of agreements between shareholders and corporations. The U.S. Supreme Court cases on FAA preemption of state law elucidate that the FAA "establishes an equal treatment principle."[39] This means that the FAA "preempts any state rule discriminating on its face against arbitration" and also "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that … have the defining features of arbitration agreements."[40] The equal treatment rule applies to state rules that discriminate either in the enforcement of an agreement to arbitrate or in the formation of an arbitration agreement[41] and the Supreme Court will examine the context and rationale of the state rule to determine its true intent.[42]

In 2017, the Supreme Court issued a decision directly relevant to this point. In *Kindred Nursing Centers Ltd. Partnership v. Clark*,[43] the U.S. Supreme Court reviewed a decision of the Kentucky Supreme Court that held that an attorney-in-fact could not enter into a valid arbitration agreement on behalf of its principals unless the power of attorney expressly granted the attorney-in-fact such authority.[44] The Kentucky Supreme Court had reasoned that such a clear-statement rule was necessary to protect Kentuckians' state constitutional rights of access to the courts and to jury trials.[45]

The U.S. Supreme Court reversed the state court decision. In doing so, the U.S. Supreme Court stated that the Kentucky rule failed to place arbitration agreements "on an equal plane with other contracts," subjected them to "uncommon barriers," and improperly "singl[ed] out those contracts for disfavored treatment."[46] Of special relevance to this matter, the decision also clarified that the FAA's equal treatment principle applies both to the enforcement of an arbitration agreement and to issues of contract formation.[47] Thus, "[a] rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made."[48] Because the state law positions the Company advances, under corporate law or contract law, would treat the validity of an arbitration bylaw provision differently than the validity of other types of bylaw provisions it would be preempted by the FAA. As a result, those could not be the legal standards that a New Jersey court would apply.

Second, regardless of whether the state law positions advocated by the Company would violate the equal treatment principle, they would vitiate the FAA's strong federal policy in favor of arbitration. The U.S. Supreme Court has stated that the FAA evinces "a national policy in favor or arbitration" and "withdrew the power of the states to require a judicial forum for the

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[39] *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017).
[40] *Id.*
[41] *Id.* at 1428-29.
[42] *Id.* at 1427-28 (state supreme court effort to "attempt to cast the rule in broader terms cannot salvage its decision").
[43] 137 S. Ct. 1421 (2017)
[44] *Id.* at 1425-26.
[45] *Id.* at 1426.
[46] *Id.* at 1427.
[47] *Id.* at 1428.
[48] *Id.*

resolution of claims which the contracting parties agreed to resolve by arbitration."[49] Time and again the U.S. Supreme Court has rejected state rules that have imposed barriers to arbitration.[50]

The state law positions advanced by the Company would, in effect, impose a blanket ban on the ability of publicly-listed firms and their shareholders to agree to arbitrate federal securities law claims. That would be completely at odds with the FAA's favorable treatment of the arbitral forum as a means to resolve legal disputes.[51]

* * *

Based on the foregoing analysis, the Trust believes that the Company has not met its burden of establishing that it is entitled to exclude the Proposal under Rule 14a-8(i)(2) on the grounds that it *would*, if implemented, violate state law. To the contrary, the Trust believes that the Proposal, if implemented, would be lawful but that, at a minimum, its validity under state law is unsettled, which is not sufficient to meet the Company's burden. Therefore, the Trust respectfully requests that the Company's request to exclude the Proposal from its 2019 proxy materials be denied.

As noted in the Trust's December 24, 2018 submission, if this matter is taken up by the Commission, and the Commission intends to reach a decision on the Request on grounds not asserted by the Company in its Request or Supplemental Letter, the Trust respectfully requests that the Commission identify those possible grounds and permit the Trust to respond before making a determination. Please do not hesitate to contact the undersigned at (857) 242-6589.

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[49] *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

[50] *See*, *e.g., Kindred Nursing Ctrs*., 137 S. Ct. 1421 (2017) (FAA preempts judicially developed rule making it more difficult for an agent to agree to an arbitration provision on behalf of a principal); *Marmet Healthcare Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (per curiam) (FAA preempts state rule against the arbitration of certain types of claims against nursing homes); *AT&T Mobility LLC v. Conception*, 563 U.S. 333 (2011) (FAA preempts state rule conditioning arbitration on ability to bring a class claim); *Preston v. Ferrer*, 552 U.S. 346 (2008) (FAA preempted state rule requiring certain claims be heard before a state agency before being submitted to arbitration); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (FAA preempted state law requiring arbitration provision be included on first page of contract); *Perry v. Thomas*, 482 U.S. 483 (1987) (FAA preempted state law requiring actions for the collection of wages be subject to litigation in state court regardless of an agreement to arbitrate).

[51] Judge Laster's ruling in *Blue Apron* does not directly address the preemption issue because in *Blue Apron* the charter provision in question was not with respect to mandatory arbitration but as to whether a forum selection provision requiring the choice of a federal court forum rather than a state court forum to resolve a Securities Act claim was valid under Delaware law. This issue did not raise any preemption issue at all because federal law permits a Securities Act claim to be brought in either federal or state court and the effect of the decision in *Blue Apron* is that plaintiffs retain the choice of forum provided for by the federal statute. *See Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061 (2018). Although *Cyan* was decided after the three initial public offerings involved in *Blue Apron*, the charter provisions in question were intended to deal with what, at the time of the initial public offerings, was an uncertain legal position

Respectfully submitted,

Hal S. Scott
Trustee

cc: Thomas J. Spellman III, Assistant General Counsel and Corporate Secretary, Johnson & Johnson
Marc S. Gerber, Skadden, Arps, Slate, Meagher & Flom LLP

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BY EMAIL (shareholderproposals@sec.gov)

January 16, 2019

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

RE: Johnson & Johnson – 2019 Annual Meeting
Supplement to Letter dated December 11, 2018
Relating to Shareholder Proposal of The
Doris Behr 2012 Irrevocable Trust

Ladies and Gentlemen:

We refer to our letter dated December 11, 2018 (the "No-Action Request"), submitted on behalf of our client, Johnson & Johnson, a New Jersey corporation, pursuant to which we requested that the Staff of the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission (the "Commission") concur with Johnson & Johnson's view that the shareholder proposal and supporting statement (the "Proposal") submitted by The Doris Behr 2012 Irrevocable Trust (the "Proponent") may be excluded from the proxy materials to be distributed by Johnson & Johnson in connection with its 2019 annual meeting of shareholders (the "2019 proxy materials").

This letter supplements the No-Action Request. In accordance with Rule 14a-8(j), we are simultaneously sending a copy of this letter and its attachment to the Proponent.

I. The Proposal May be Excluded Pursuant to Rule 14a-8(i)(2) Because Implementation of the Proposal Would Cause Johnson & Johnson to Violate State Law.

As described in the No-Action Request, Rule 14a-8(i)(2) permits a company to exclude a shareholder proposal if implementation of the proposal would cause the company to violate any state, federal or foreign law to which it is subject. For the reasons described below and based upon the legal opinion of Lowenstein Sandler LLP, attached hereto as Exhibit A (the "New Jersey Opinion"), Johnson & Johnson believes that implementation of the Proposal would cause Johnson & Johnson to violate New Jersey law. Accordingly, the Proposal is excludable under Rule 14a-8(i)(2) as a violation of law.

Johnson & Johnson is incorporated in the State of New Jersey and, as explained in both the No-Action Request and the New Jersey Opinion, adoption of a bylaw amendment requested by the Proposal would prohibit any shareholder from bringing claims arising under the federal securities laws in connection with the purchase or sale of any securities issued by Johnson & Johnson in court (including New Jersey courts) and instead require such persons to arbitrate such claims. For the reasons provided in the New Jersey Opinion, Johnson & Johnson believes that adoption of a bylaw amendment as described in the Proposal violates New Jersey law and that adoption of such a bylaw amendment would be subject to legal challenges. Johnson & Johnson believes that it should not be required to include a proposal to adopt such a bylaw amendment in the 2019 proxy materials where the bylaw amendment requested would, if adopted, likely be the subject of costly litigation. Furthermore, even if the Staff believes that the legality of the bylaw amendment requested by the Proposal is an open question, the Staff has previously concurred with the exclusion of shareholder proposals to amend a company's bylaws under Rule 14a-8(c)(1), the predecessor to Rule 14a-8(i)(1), a sister rule to Rule 14a-8(i)(2), where the Staff found that the proposed bylaw amendments were of "questionable validity." *See Radiation Care, Inc.* (Dec. 22, 1994) (permitting exclusion under Rule 14a-8(c)(1) of a proposal to amend the bylaws to, among other things, authorize the expenditure of corporate funds effected by shareholders without any concurring action by the board of directors, noting that even if the proposal were recast in precatory terms, it would nevertheless constitute an improper subject for shareholder action because the proposal contained a provision of questionable validity under Delaware law) and *Pennzoil Corp.* (Feb. 24, 1993, recon. denied, Mar. 22, 1993) (same).

As more fully described in the New Jersey Opinion, a New Jersey corporation's bylaws may not contain a provision that is inconsistent with law, and the New Jersey Opinion expresses the view that a New Jersey court, if presented the question, would likely conclude that New Jersey corporations may not lawfully mandate arbitration in their constitutive documents as the forum to resolve claims of shareholders for alleged violations of the federal securities laws. In addition, a New Jersey court presented with the question would likely conclude that shareholders who did not approve an arbitration provision in a New Jersey corporation's bylaws would not have provided the mutual assent required to enforce an arbitration agreement, as determined under customary principles of contract law, such that a mandatory arbitration bylaw would likely be held inconsistent with New Jersey law and, therefore, invalid. Accordingly, Johnson & Johnson believes that implementation of the Proposal would violate New Jersey law.

On numerous occasions, the Staff, pursuant to Rule 14a-8(i)(2), has permitted exclusion of shareholder proposals regarding bylaw amendments (either mandatory amendments or precatory proposals) that, if implemented, would cause the company to violate state law. *See*, *e.g.*, *Vail Resorts, Inc.* (Sept. 16, 2011) (permitting exclusion under Rule 14a-8(i)(2) of a proposal to amend the bylaws to "make distributions to shareholders a higher priority than debt repayment or asset acquisition" because the proposal would cause the company to violate state law); *Citigroup, Inc.* (Feb. 18, 2009) (permitting exclusion under Rule 14a-8(i)(2) of a proposal to amend the bylaws to establish a board committee on U.S. economic security because the proposal would cause the company to violate state law); *Monsanto Co.* (Nov. 7, 2008, recon. denied, Dec. 18, 2008) (permitting exclusion under Rule 14a-8(i)(2) of a proposal to amend the bylaws to require directors to take an oath of allegiance to the U.S. Constitution because the proposal would cause the company to violate state law); *Hewlett-Packard Co.* (Jan. 6, 2005) (permitting exclusion under Rule 14a-8(i)(2) of a proposal recommending that the company amend its bylaws so that no officer may receive annual compensation in excess of certain limits without approval by a vote of "the majority of the stockholders" because the proposal would cause the company to violate state law).

Finally, as noted in the New Jersey Opinion, Johnson & Johnson acknowledges that no 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. However, as is typically the case, the New Jersey Opinion uses legal reasoning from existing New Jersey statutes and case law, and 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. The Staff has previously allowed for the exclusion of shareholder proposals pursuant to Rule 14a-8(i)(2) where there was no case law directly on point. *See General Motors Corp.* (Apr. 19, 2007) (permitting exclusion under Rule 14a-8(i)(2) of a proposal requiring directors to oversee certain functional groups excludable even though the company's Delaware counsel expressly noted that there was "no Delaware case that specifically addresses the validity of the Proposed Bylaw or a similar bylaw"); *Citigroup Inc.* (Feb. 18, 2009) (permitting exclusion under Rule 14a-8(i)(2) of a proposal to amend the bylaws to establish a board committee on U.S. economic security excludable where the proponent argued that, because there had not been a court decision regarding the matters addressed in the Delaware law opinion related to the no-action request, the Staff should not grant no-action relief to the company).

Accordingly, consistent with the precedent described above, Johnson & Johnson believes the Proposal should be excluded from the 2019 proxy materials pursuant to Rule 14a-8(i)(2) because implementation of the Proposal would cause Johnson & Johnson to violate state law.

II. Conclusion

For the reasons stated above and in the No-Action Request, Johnson & Johnson respectfully requests that the Staff concur that it will take no action if Johnson & Johnson excludes the Proposal from the 2019 proxy materials.

Should the Staff disagree with the conclusions set forth in this letter, or should any additional information be desired in support of Johnson & Johnson's position, we would appreciate the opportunity to confer with the Staff concerning these matters prior to the issuance of the Staff's response. Please do not hesitate to contact the undersigned at (202) 371-7233.

Very truly yours,

Marc S. Gerber

Enclosure

cc: Thomas J. Spellman III
Assistant General Counsel and Corporate Secretary
Johnson & Johnson

Hal Scott
Trustee
The Doris Behr 2012 Irrevocable Trust

EXHIBIT A

(see attached)

January 16, 2019

Johnson & Johnson
One Johnson & Johnson Plaza
New Brunswick, New Jersey 08933

Re: Johnson & Johnson 2019 Annual Meeting of Shareholders;
Shareholder Proposal of The Doris Behr 2012 Irrevocable Trust

Ladies and Gentlemen:

You requested our opinion as to certain matters of New Jersey law in connection with a shareholder proposal (the "Proposal") submitted by The Doris Behr 2012 Irrevocable Trust (the "Shareholder") to Johnson & Johnson, a New Jersey corporation (the "Company"), for inclusion in the Company's proxy statement for its 2019 annual meeting of shareholders.

In rendering our opinions set forth herein, we have examined and relied on originals or copies, certified or otherwise identified to our satisfaction, of the following:

(a) the Restated Certificate of Incorporation of the Company, as filed with the Department of the Treasury of the State of New Jersey on February 19, 2016, and as currently in effect;

(b) the By-Laws of the Company, as currently in effect (the "By-Laws"); and

(c) the Proposal and the supporting statement thereto, attached to a letter dated November 9, 2018, submitted by the Shareholder to the Company.

In rendering our opinions contained herein, we have, with your approval, also relied without investigation or independent verification on information obtained from public officials and officers of the Company. We have assumed without investigation that the information upon which we have relied is accurate and does not omit disclosures necessary to prevent such information from being misleading. For purposes of our opinions contained herein, we have further relied, without investigation, upon the authenticity of all documents submitted to us as originals, the conformity to original documents of documents submitted to us as certified, conformed, photostatic, electronic or facsimile copies, and the completeness of all documents reviewed by us.

Members of our firm are admitted to the bar of the State of New Jersey. The opinions expressed herein are based on the New Jersey Business Corporation Act, N.J.S. 14A:1-1 et seq. (the "BCA"), and New Jersey law, each as in effect on the date hereof, which law is subject to change with possible retroactive effect. We do not express herein any opinion as to the laws of any other jurisdiction.

Factual Background

We understand, and for purposes of our opinions we have assumed, the relevant facts to be as follows:

On November 9, 2018, the Shareholder submitted the Proposal to the Company for inclusion in the Company's proxy materials in connection with its 2019 annual meeting of shareholders. The Proposal reads as follows:

> **Resolved**: The shareholders of Johnson & Johnson request the Board of Directors 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.

The Proposal includes a supporting statement that reads as follows:

Supporting Statement

The United States is the only developed country in which stockholders of public companies can form a class and sue their own company for violations of securities laws. As a result, U.S. public companies are exposed to litigation risk that, in aggregate, can cost billions of dollars annually. The costs (in dollars and management time) of defending and settling these lawsuits are borne by stockholders. Across the corporate landscape, this effectively recirculates money within the same investor base, minus substantial attorneys' fees. Lawsuits are commonly filed soon after merger or acquisition announcements, or stock price changes, based on little more than their happening.

We believe arbitration is an effective alternative to class actions. It can balance the interests and rights of plaintiffs to bring federal securities law claims, with cost-effective protections for the corporation and its stockholders.

The Supreme Court has held that mandatory individual arbitration provisions are not in conflict with any provision of the federal securities laws, and the SEC has no basis to prohibit mandatory arbitration provisions that apply to federal securities law claims. Furthermore, New Jersey law establishes that the bylaws of a corporation are to be interpreted as a contract between the corporation and its stockholders.

A bylaw providing for mandatory individual arbitration of federal securities law claims would permit stockholders and corporations to opt-out of a flawed system that often seems more about the lawyers than the claimants and invariably wastes stockholder funds on expensive litigation costs.

Analysis

If the Proposal is adopted by the Company's shareholders, the Company's board of directors would be asked to amend the By-Laws to require disputes between a shareholder of the Company and the Company 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 Company, to be exclusively and finally settled by arbitration under the Commercial Rules of the American Arbitration Association.

The Proposal presents two issues under New Jersey law: (i) whether a New Jersey corporation may lawfully mandate arbitration in its constitutive documents as the forum to resolve claims of shareholders for alleged violations of the federal securities laws, irrespective of whether all current and future shareholders have approved an arbitration provision; and (ii) whether current and future shareholders who did not approve an arbitration provision would be bound to arbitrate claims under federal securities laws.

A. New Jersey Business Corporation Act.

No New Jersey court has considered the issue of whether a New Jersey corporation may lawfully mandate arbitration in its constitutive documents as the forum to resolve claims of shareholders for alleged violations of the federal securities laws, irrespective of whether all current and future shareholders have approved the arbitration provision. However, the issue of modifying the concurrent jurisdiction of the federal and state courts respecting federal securities law claims by private plaintiffs through a constitutive document provision was very recently considered by the Court of Chancery of the State of Delaware in Sciabacucchi v. Salzberg, 2018 Del. Ch. LEXIS 578 (Dec. 19, 2018).

In Sciabacucchi, the defendant corporations adopted provisions in their respective certificates of incorporation that required any claims under the Securities Act of 1933, as amended (the "1933 Act"), to be filed in federal court, notwithstanding the state and federal courts' concurrent jurisdiction over claims by private plaintiffs under the 1933 Act. The Delaware Court of Chancery held that "[t]he constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law." Sciabacucchi, at *8. The Court of Chancery concluded that Delaware law only permitted forum selection provisions in constitutive documents to regulate the internal affairs of a Delaware corporation and that federal securities law claims do not fall within that category.

In so ruling, the Court of Chancery considered and relied on §§ 102(b)(1) and 109(b) of the Delaware General Corporation Law (the "DGCL"). Section 102(b)(1) of the DGCL provides that:

> (b) [i]n addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters: (1) [a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State. Any

> provision which is required or permitted by any section of this chapter to be stated in the bylaws may instead be stated in the certificate of incorporation.

Section 109(b) of the DGCL provides that:

> [t]he bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.

The Court of Chancery concluded that the authority granted to Delaware corporations under §§ 102(b)(1) and 109(b) of the DGCL is limited to the internal affairs of those corporations. The Court of Chancery recognized that "[t]he Boilermakers[1] distinction between internal and external claims answers whether a forum-selection provision can govern claims under the 1933 Act. It cannot, because a 1933 Act claim is external to the corporation. Federal law creates the claim, defines the elements of the claim, and specifies who can be a plaintiff or defendant. The 1933 Act establishes a statutory regime that applies when a particular type of property – securities – is offered for sale in particular scenarios that the federal government has chosen to regulate." Sciabacucchi, at *3-4. The Court of Chancery further found that "[a] claim under the 1933 Act does not turn on the rights, powers, or preferences of the shares, language in a corporation's charter or bylaws, a provision in the DGCL, or the equitable relationships that flow from the internal structure of the corporation." Sciabacucchi, at *4. Finally, the Court of Chancery held that "[w]hether a purchaser of securities may have bought shares in a Delaware corporation is incidental to a claim under the 1933 Act. That happenstance does not provide a sufficient legal connection to enable the constitutive documents of a Delaware corporation to regulate the resulting lawsuit. The claim does not arise out of the corporate contract and does not implicate the internal affairs of the corporation." Sciabacucchi, at *7.

While Sciabacucchi is a Delaware decision, the New Jersey courts have long looked to Delaware precedent when considering New Jersey corporate law matters. See, e.g., Seidman v. Clifton Savings Bank, S.L.A., 205 N.J. 150 (2011); Casey v. Brennan, 344 N.J. Super. 83 (App. Div.); certif. denied, 170 N.J. 389 (2001); Balsamides v. Protameen Chemicals, Inc., 160 N.J. 352, 372 (1999) ("In analyzing corporate law issues, we find Delaware law to be helpful."); Lawson Mardon Wheaton v. Smith, 160 N.J. 383 (1999); In re Prudential Ins. Co. Derivative Litigation, 282 N.J. Super. 256 (Ch.Div.1995); and Pogostin v. Leighton, 216 N.J. Super. 363 (App. Div. 1987), certif. denied, 108 N.J. 583 (1987), cert. denied, 484 U.S. 964 (1987).

Under the BCA, a corporation's certificate of incorporation may include provisions that are required or permitted to be set forth in the bylaws. N.J.S. § 14A:2-7(1)(f). In addition, the

[1] Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013).

BCA provides that a corporation's bylaws may not contain a provision inconsistent with law. N.J.S. § 14A:2-9(4).

Section 2-7(1)(f) of the BCA is comparable to § 102(b)(1) of the DGCL. Section 2-7(1)(f) provides that "(1) the certificate of incorporation shall set forth … (f) [a]ny provision not inconsistent with this act or any other statute of this State, which the incorporators elect to set forth for the management of the business and the conduct of the affairs of the corporation, or creating, defining, limiting or regulating the powers of the corporation, its directors and shareholders or any class of shareholders, including any provision which under this act is required or permitted to be set forth in the bylaws."

While § 2-7(1)(f) of the BCA is organized slightly differently than § 102(b)(1) of the DGCL, the import of both provisions is that corporations may include provisions in their certificates of incorporation that are not inconsistent with law for the management of the conduct or affairs of the corporation.

Section 2-9(4) of the BCA is identical to § 109(b) of the DGCL. Section 2-9(4) provides that "[t]he by-laws may contain any provision, not inconsistent with law or the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or power or the rights or power of its shareholders, directors, officers or employees."

The similarities between the applicable provisions of the BCA and of the DGCL are striking. We believe that given those similarities and the value placed by New Jersey courts on Delaware decisions, that a New Jersey court, if presented with the question, would likely find persuasive the conclusion in Sciabacucchi that a claim under the 1933 Act does not arise out of the corporate contract and thus does not implicate the internal affairs of the corporation. Thus, we believe that a New Jersey court would likely reach the same conclusion as the Sciabacucchi court did in interpreting parallel statutory provisions that New Jersey corporations may not lawfully mandate arbitration in their constitutive documents as the forum to resolve claims of shareholders for alleged violations of the federal securities laws, irrespective of whether all current and future shareholders have approved the arbitration provision.

B. Agreement to Arbitrate.

Under New Jersey law, "state contract-law principles generally govern a determination whether a valid agreement to arbitrate exists." Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006); see also Kernahan v. Home Warranty Adm'r of Fla., Inc., 2019 N.J. LEXIS 3 (2019). In New Jersey, "[a] contract arises from offer and acceptance, and must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.'" Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992), quoting West Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958). The New Jersey Supreme Court has also held that "[i]t is requisite that there be an unqualified acceptance to conclude the manifestation of assent." Weichert, 128 N.J. at 435, quoting Johnson & Johnson v. Charmley Drug Co., 11 N.J. 526, 539 (1953).

In the arbitration context, the New Jersey Supreme Court has held that as with other contracts, "[a]n agreement to arbitrate … must be the product of mutual assent, as determined under customary principles of contract law." Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 442 (2014). Put differently, as stated by the New Jersey Supreme Court, "[a]s a general principle of contract law, there must be a meeting of the minds for an agreement to exist before enforcement is considered." Kernahan v. Home Warranty Adm'r of Fla., Inc., 2019 N.J. LEXIS 3, *27 (2019). The New Jersey Supreme Court has also held "[t]hat recognition [of a right to a jury trial] informs our analysis given the importance of ensuring that a party has actually waived its right to initiate a claim in court in favor of submitting to binding arbitration." Hirsch v. Amper Financial Services, LLC, 215 N.J. 174, 194 (2013).

No New Jersey court has considered the issue of whether current and future shareholders who did not approve an arbitration provision contained in a corporation's bylaws would be bound to arbitrate claims under federal securities laws. However, the United States Court of Appeals for the Third Circuit held under contract principles similar to New Jersey's, that under Pennsylvania law a shareholder's constructive notice of an arbitration provision in the corporation's bylaws did not constitute the "explicit agreement" required to form an arbitration contract. See Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 163 (3d Cir. 2009).[2]

Under Pennsylvania law, "mutual manifestation of an intention to be bound" is a requirement to form a contract. Kirleis, 560 F.3d at 160. "The Pennsylvania Supreme Court has held that an agreement to arbitrate must [also] be 'clear and unmistakable' and cannot arise 'by implication.'" Kirleis, 560 F.3d at 161, quoting Emmaus Mun. Auth. v. Eltz., 416 Pa. 123 (1964). The Kirleis court recognized that "the material issue here is whether Kirleis agreed to be bound by the Firm's arbitration provision, not whether a document containing that provision was ever distributed to her. Even had she received such a document − which the uncontroverted evidence indicates she did not − a mere offer is insufficient to create a triable issue as to the existence of a contract to arbitrate." Kirleis, 560 F.3d at 162. Moreover, the Kirleis court recognized that "[h]ere … there was no explicit agreement; rather, the Firm seeks to derive one from corporate law principles, making its implied acceptance argument even more tenuous than

[2] In Century Indem. Co. v. Certain Underwriters at Lloyd's, 584 F.3d 513 (3rd 2009), the Third Circuit, rejected prior Third Circuit precedent in Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51 (3d Cir. 1980), aff'd on other grounds, 514 U.S. 938 (1995) that required that agreements to arbitrate be "express" and "unequivocal". The Kirleis court cited to Par-Knit and the "express" and "unequivocal" requirement that it had adopted. However, the Kirleis court relied on Pennsylvania contract law and not Third Circuit precedent in reaching its decision so that Century Indem. does not affect the continued applicability of the Kirleis decision.

the one rejected in Quiles[3]." Kirleis, 560 F.3d at 165. The Kirleis court, thus held that notwithstanding the accepted principle that shareholders are generally subject to the terms of a corporation's constitutive documents, an agreement to arbitrate cannot arise by implication and requires explicit agreement.

The similarities between New Jersey law regarding contract formation and agreements to arbitrate, as summarized above, and the principles of Pennsylvania law that form the lynchpin of the Kirleis decision are clear. We believe that given those similarities, if a New Jersey court were presented with the question, it would likely conclude that a shareholder of a New Jersey corporation whose bylaws provide for mandatory arbitration had not "waived its right to initiate a claim in court in favor of submitting to binding arbitration" for any claims under federal securities laws in connection with the purchase or sale of any securities issued by the corporation unless such shareholder "actually waived" its right to proceed in court or, put differently, that such a provision would not constitute "the product of mutual assent" to arbitrate. See Hirsch, 215 N.J. at 194 and Atalese, 219 N.J. at 442. Such a bylaw would likely be held to be inconsistent with New Jersey law and, therefore, invalid.

* * *

Based upon and subject to the foregoing analysis, it is our opinion that implementation of the Proposal would violate New Jersey law, and that a New Jersey court, if presented with the question, would likely so conclude. This letter and the opinions contained in it are furnished to you solely for your benefit in connection with the Proposal, and except as set forth in the next sentence, is not to be used, circulated, quoted or otherwise referred to for any other purpose or relied upon by any other person without our express written permission. We hereby consent to your furnishing a copy of this letter to the Staff of the Securities and Exchange Commission in connection with a no-action request with respect to the Proposal.

Very truly yours,

Lowenstein Sandler LLP

LOWENSTEIN SANDLER LLP

[3] See Quiles v. Fin. Exch. Co., 2005 PA Super 250 (Pa. Super. Ct. 2005).

The Doris Behr 2012 Irrevocable Trust
Hal Scott, Trustee
Harvard Law School, Lewis 339, 1557 Massachusetts Ave., Cambridge, MA 02138
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December 24, 2018

Via email: shareholderproposals@sec.gov

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

Re: Shareholder Proposal to Johnson & Johnson from The Doris Behr 2012 Irrevocable Trust Regarding an Amendment to the Johnson & Johnson Bylaws

Ladies and Gentlemen:

This letter, sent pursuant to Rule 14a-8(k), responds to the no-action request (the "Request") submitted by Skadden, Arps, Slate, Meagher & Flom LLP on behalf of Johnson & Johnson (the "Company") relating to the shareholder proposal (the "Proposal") of The Doris Behr 2012 Irrevocable Trust (the "Trust").

Rule 14a-8(g), as interpreted by Staff Legal Bulletin No. 14 (July 13, 2001), requires a company seeking to exclude a shareholder proposal under Rule 14a-8(i)(2) to bear the burden of demonstrating that, if implemented, the proposal would cause the company to violate the law, in this case, according to the Request, the federal securities laws. Put simply, the Company has not, and cannot, sustain that burden in the face of numerous decisions of the U.S. Supreme Court squarely holding that mandatory individual arbitration, under the auspices of the Federal Arbitration Act, does not conflict with the ability of an aggrieved party to vindicate rights provided under *any* federal statute absent "a clearly expressed congressional intention"[1] to the contrary.

This lack of conflict between mandatory individual arbitration under the Federal Arbitration Act and the rights provided under other federal statutes could not be more clearly confirmed than by the following statement of the law in *Epic*, the Supreme Court's most recent decision on this issue from May 2018, where the Supreme Court said as follows:

> In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save one temporary exception since overruled), with statutes

[1] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018) [hereinafter, "Epic"], (quoting Vinar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533 (1995)) (internal quotation marks omitted). And the *Epic* Court makes clear that the requisite congressional intention was not present in the passage of the Securities Act of 1933 or the Securities Exchange Act of 1934 (the "Exchange Act"), both of which were enacted after the 1925 adoption of the Federal Arbitration Act. *See* Epic, 138 S. Ct. at 1627.

> ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act. *Italian Colors*, 570 U.S. 228; *Gilmer*, 500 U.S. 20; *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95 (2012); *Rodriguez de Quijas* v. *Shearson/American Express Inc., 490 U.S. 477 (1989)* (overruling *Wilko* v. *Swan*, 346 U.S. 427 (1953)); *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220 (1987).[2]

How does the Company try to rebut this powerful support for the permissibility of mandatory individual arbitration?

First, it ignores *Epic* and every other Supreme Court case validating mandatory individual arbitration as an alternative forum for vindicating statutory rights. It only cites to *Shearson/American Express Inc.* v. *McMahon*, the 1987 decision upholding mandatory individual arbitration of Exchange Act claims in customer agreements with brokers. It is true, as pointed out by the Company, that the Supreme Court in *McMahon* cited, as a factor in its decision, U.S. Securities and Exchange Commission ("SEC") oversight of arbitration rules to be applied under the applicable brokerage agreements. However, critically, subsequent Supreme Court decisions highlighted in the *Epic* language quoted above, including *Gilmer*, *CompuCredit*, and *Italian Colors*, make clear that regulatory oversight is *not* a prerequisite to the validity of an arbitration agreement. In none of those cases was there a mention of the relevance of regulatory agency oversight of the arbitration rules to be applied under the Federal Arbitration Act, and in *Gilmer*, *CompuCredit*, and *Italian Colors*, there was not in fact oversight of the arbitration procedures or rules by a relevant government agency.[3] This is not surprising given the Supreme Court's statements, most recently reiterated in *Epic*, that the Federal Arbitration Act establishes "a liberal federal policy favoring arbitration,"[4] and "requires courts rigorously to enforce arbitration agreements according to their terms, including terms that specify . . . *the rules* under which that arbitration will be conducted."[5]

And in *Epic* the Supreme Court dealt specifically with the significance of regulatory agency oversight of agreements including arbitration provisions. There the Supreme Court considered whether the National Labor Relations Board, which had regulatory oversight and had actually used this oversight to rule that mandatory individual arbitration of employment disputes were impermissible under the National Labor Relations Act, should be given deference in this

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[2] Epic, 138 S. Ct. at 1627 (emphasis in original).
[3] In *Gilmer*, the Equal Employment Opportunity Commission, which oversees the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, under which the claims were brought, did not oversee the arbitration rules; in *CompuCredit*, the claims were brought under the Credit Repair Organizations Act, 15 U.S.C. §§ 1679-1679j, which does not provide any agency authority to oversee arbitration procedures; and in *Italian Colors*, the claims were brought under the Sherman Act and Clayton Act, 15 U.S.C. §§ 1-38, which also do not provide for regulatory oversight of arbitration procedures.
[4] Epic, 138 S. Ct. at 1621 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)) (internal quotation marks omitted).
[5] Epic, 138 S. Ct. at 1621 (quoting Italian Colors, 570 U.S. 228, 233 (2013)) (internal quotation marks omitted) (emphasis in original).

regard, and unequivocally rejected any such deference or the very relevance of NLRB oversight of the employer-employee relationship when dealing with the enforcement of the Federal Arbitration Act. How can oversight matter if the Supreme Court rejects it when it is actually exercised?

In sum, the Supreme Court decisions subsequent to *McMahon* make clear that regulatory agency oversight of arbitration provisions is not relevant to upholding mandatory individual arbitration under the aegis of the Federal Arbitration Act.

Moreover, insofar as the Request implies that mandatory *individual* arbitration of claims should constitute a waiver of statutory rights, it is critical to point out the Supreme Court's holding in *Epic* that "[i]n the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms – including terms providing for individualized proceedings."[6]

The Company next cites the no-action letters issued by the Staff of the Division of Corporation Finance (the "Staff") to Gannett (Feb. 22, 2012) and Pfizer (Feb 22, 2012) in which the Staff concluded, without explanation, that proposals similar to the Proposal could be excluded under 14a-8(i)(2) because "there appears to be some basis for your view that implementation of the proposal would cause the company to violate the federal securities laws." The focus there, like here, was whether implementation of the proposal would cause the company to violate the anti-waiver provision in Section 29(a) of the Exchange Act, citing *McMahon* and its reference to SEC oversight of arbitration provisions in brokerage agreements with customers. We cannot know whether this reference to SEC oversight, addressed above, may have persuaded the Staff, but whatever vitality the argument then may have had nearly six years ago has since been forcefully rejected by the Supreme Court in *Epic* and in the intervening cases the Supreme Court there cited.

Finally, the Company argues that public policy justifies its position, including long-standing Staff policy (never, it should be noted, endorsed by the SEC itself). The Trust, of course, disagrees as to what public policy should favor in this regard, as discussed briefly in the Supporting Statement. But as the Supreme Court in *Epic* fittingly concluded:

> The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be

[6] Epic, 138 S. Ct. at 1618. The Request, it should be noted, does not question whether the arbitration provision in the Proposal is in a written contract as required by the Federal Arbitration Act. Thus, this argument, and any other arguments not raised in the Request, cannot be considered by the Staff in acting on the no action request, pursuant to Staff Legal Bulletin No. 14, which states that the Staff will "not consider any basis for exclusion that is not advanced by the company." Nevertheless, it is settled law in New Jersey, where the Company is organized, that the bylaws are a contract between the corporation and its shareholders. *See, e.g.*, Baumohl v. Goldstein, 95 N.J. Eq. 597, 599 (N.J. Ch. 1924). Delaware and New York corporate law similarly treat bylaws as contracts between a corporation and its shareholders. *See, e.g.*, ATP Tour v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014); Buffalo Printers Supply, Inc. v. No. 1 Network, Inc., No. 10-CV-00605A(F), 2012 WL 1067856, at *9 (W.D.N.Y. Mar. 29, 2012); In re Am. Fibre Chair Seat Corp., 272 N.Y.S. 206, 210 (N.Y. App. Div. 1934), aff'd, 193 N.E. 253 (N.Y. 1934).

> enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA – much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies.[7]

In sum, whatever doubt may have existed about the scope of the Supreme Court's decision in *McMahon*, upholding arbitration as a permissible alternative forum for the resolution of claims under the federal securities laws, has been swept away by the emphatic holding of *Epic* that regulatory agency oversight, or an agency's views regarding arbitration in particular, are preempted by the Congressional mandate in favor of arbitration embodied in the Federal Arbitration Act. Accordingly, since the Company plainly has not met its burden of establishing that the Proposal, if implemented, would cause the Company to violate the federal securities laws, the Request should be denied.

If this matter is taken up by the Commission of the SEC, and the Commission intends to reach a decision on the Request on grounds not asserted by the Company (which the Staff itself is precluded from doing (see footnote 6)), the Trust respectfully requests that the Commission identify those possible grounds and permit the Trust to respond before making a determination.

Pursuant to Staff Legal Bulletin No. 14D (CF), Shareholder Proposals (November 7, 2008) ("SLB 14D"), Question C, this letter is being submitted via email to shareholderproposals@sec.gov. In accordance with Rule 14a-8(k) and SLB 14D, Question E, a copy of this submission is being forwarded simultaneously to the Company electronically.

Respectfully submitted,

Hal S. Scott
Trustee

cc: Thomas J. Spellman III, Assistant General Counsel and Corporate Secretary, Johnson & Johnson
Marc S. Gerber, Skadden, Arps, Slate, Meagher & Flom LLP

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[7] Epic, 138 S. Ct. at 1632.

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<u>BY EMAIL</u> (shareholderproposals@sec.gov)

December 11, 2018

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

RE: Johnson & Johnson – 2019 Annual Meeting
Omission of Shareholder Proposal of The
<u>Doris Behr 2012 Irrevocable Trust</u>

Ladies and Gentlemen:

Pursuant to Rule 14a-8(j) promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), we are writing on behalf of our client, Johnson & Johnson, a New Jersey corporation, to request that the Staff of the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission (the "Commission") concur with Johnson & Johnson's view that, for the reasons stated below, it may exclude the shareholder proposal and supporting statement (the "Proposal") submitted by The Doris Behr 2012 Irrevocable Trust (the "Proponent") from the proxy materials to be distributed by Johnson & Johnson in connection with its 2019 annual meeting of shareholders (the "2019 proxy materials").

In accordance with Section C of Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("SLB 14D"), we are emailing this letter and its attachments to the Staff at shareholderproposals@sec.gov. In accordance with Rule 14a-8(j), we are simultaneously sending a copy of this letter and its attachments to the Proponent as notice of Johnson & Johnson's intent to omit the Proposal from the 2019 proxy materials.

Rule 14a-8(k) and Section E of SLB 14D provide that shareholder proponents are required to send companies a copy of any correspondence that the shareholder proponents elect to submit to the Commission or the Staff. Accordingly, we are taking this opportunity to remind the Proponent that if the Proponent submits correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should concurrently be furnished to Johnson & Johnson.

I. The Proposal

The text of the resolution in the Proposal is set forth below:

Resolved: The shareholders of Johnson & Johnson request the Board of Directors 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.

II. Basis for Exclusion

We hereby respectfully request that the Staff concur in Johnson & Johnson's view that it may exclude the Proposal from the 2019 proxy materials pursuant to Rule 14a-8(i)(2) because implementation of the Proposal would cause Johnson & Johnson to violate federal law.

III. Background

On November 12, 2018, Johnson & Johnson received the Proposal, accompanied by a cover letter from the Proponent dated November 9, 2018, and a letter from Fifth Third Bank dated November 9, 2018, verifying the Proponent's stock ownership as of such date (the "Broker Letter"). Copies of the Proposal, the cover letter and the Broker Letter are attached hereto as Exhibit A.

IV. The Proposal May be Excluded Pursuant to Rule 14a-8(i)(2) Because Implementation of the Proposal Would Cause Johnson & Johnson to Violate Federal Law.

Rule 14a-8(i)(2) permits a company to exclude a shareholder proposal if implementation of the proposal would cause the company to violate any state, federal or foreign law to which it is subject. For the reasons discussed below, Johnson & Johnson believes that adoption of a bylaw amendment as described in the Proposal would be contrary to the public policy interests underlying the federal securities laws and would cause Johnson & Johnson to violate federal law. Accordingly, the Proposal is excludable under Rule 14a-8(i)(2) as a violation of law.

Johnson & Johnson believes that adoption of a bylaw amendment as described in the Proposal would be in violation of Section 29(a) of the Exchange Act. Section 29(a) of the Exchange Act broadly 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." In the context of arbitration, the U.S. Supreme Court has limited the broad scope of Section 29(a) of the Exchange Act to prohibit only waivers of the substantive obligations imposed by the Exchange Act and has concluded that in the narrow circumstance where the prescribed procedures are subject to the oversight authority of the Commission, an agreement to arbitrate does not constitute a waiver of the protections of the Exchange Act. *Shearson/Am. Exp. Inc. v. McMahon*, 482 U.S. 220, 228–29, 234 (1987). The Staff has previously concurred with the exclusion, pursuant to Rule 14a-8(i)(2), of a shareholder proposal relating to a bylaw amendment where the company argued that the bylaw amendment would, if implemented, cause the company to violate Section 29(a) of the Exchange Act. *See*, *e.g.*, *Gannett Co., Inc.* (Feb. 22, 2012) (shareholder proposal requesting that the company adopt a bylaw amendment to provide that certain controversies or claims, including those arising under the federal securities laws, shall be settled by arbitration); *Pfizer Inc.* (Feb. 22, 2012) (same); *see also Alaska Air Group, Inc.* (Mar. 11, 2011) (shareholder proposal requesting that the company initiate the appropriate process to amend its charter to provide for a partial waiver of the "fraud-on-the-market" presumption of reliance excludable pursuant to Rule 14a-8(i)(2) because the proposed charter amendment would violate Section 29(a) of the Exchange Act).

As in the precedent described above, adoption of a bylaw amendment as requested by the Proposal would weaken the ability of investors in Johnson & Johnson's securities to pursue a private right of action under Exchange Act Section 10(b) and Rule 10b-5. In particular, Section (e) of the bylaw amendment contained in the proposal in *Gannett* and *Pfizer* would have prevented any shareholder who had a claim subject to arbitration from bringing a claim in a representative capacity on behalf of a class of Gannett or Pfizer shareholders, effectively waiving shareholders' abilities to bring claims under Exchange Act Section 10(b) and Rule 10b-5. Similarly, in this instance, the second bullet point of the 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. In addition, the fifth bullet point of the 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. The expression in the supporting statement that "[the Proponent] believe[s] arbitration is an effective alternative to class actions" further emphasizes the Proposal's request for mandatory arbitration of certain claims and the prevention of shareholders from maintaining an arbitration in a representative capacity on behalf of similarly situated shareholders. Moreover, claims arbitrated under the bylaw amendment as described in the Proposal will be governed by the Commercial Rules of the American Arbitration Association, as supplemented by the Securities Arbitration Supplementary Procedures, none of which are subject to the Commission's oversight. Given the substantial similarities between the Proposal and the proposal in *Gannett* and *Pfizer*, including, the lack of any meaningful distinction between the two proposals with respect to the ability of investors to recover damages in a dispute alleging a violation of Exchange Act Rule 10b-5, it is clear that the Proposal should be excludable under Rule 14a-8(i)(2) because implementation of the Proposal would cause Johnson & Johnson to violate the federal securities laws.

The Staff has long taken the view that including arbitration clauses in the governing documents of U.S. public companies is contrary to public policy. *See* Thomas L. Riesenberg, *Arbitration and Corporate Governance: A Reply to Carl Schneider*, 4 Insights 8 (1990). Mr. Riesenberg, then Assistant General Counsel of the Commission, outlined his views that mandatory pre-dispute arbitration of shareholder claims would "be contrary to the public interest to require investors who want to participate in the nation's equity markets to waive access to a judicial forum for vindication of federal or state law rights, where such a waiver is made through a corporate charter rather than through an individual investor's decision." In addition, the U.S. Supreme Court "has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 308 (2007).

Furthermore, no indication has been given that this policy position has changed since 1990. In fact, in an April 24, 2018 response letter to Congresswomen Carolyn B. Maloney, Commission Chairman Jay Clayton provided a detailed account of his views on the idea of mandatory arbitration of shareholder claims, stating that the matter is "complex" and involves important issues under federal securities laws and state corporate laws, as well as "many public policy considerations."[1] Although Chairman Clayton noted that the U.S. Supreme Court has "affirmed the strong federal interest in promoting the arbitration of claims under federal laws," he expressed recognition that "[t]he federal securities laws provide a basis for private rights of action by investors" and that "[t]here is a long history of claims of this type" in federal and state courts, "including as class actions." Ultimately, Chairman Clayton explained that in his view a number of pressing and significant matters other than the inclusion of mandatory arbitration clauses in the governing documents of U.S. public companies more urgently require the Commission's limited rulemaking and other related resources. Accordingly, in light of the Staff's historical view and the various legal and policy considerations,

[1] Letter from Chairman Jay Clayton to The Honorable Carolyn B. Maloney (Apr. 24, 2018) is available at https://maloney.house.gov/sites/maloney.house.gov/files/MALONEY%20ET%20AL%20-%20FORCED%20ARBITRATION%20-%20ES156546%20Response.pdf.

Chairman Clayton stated that any review of a mandatory arbitration clause in the context of a U.S. company's initial public offering registration statement under the Securities Act of 1933, as amended, for example, "should be conducted in a measured and deliberative manner" and "the decision about whether to declare the filing effective should be made by the Commission, not the Division of Corporation Finance by delegated authority." Similar to Chairman Clayton's views with respect to an initial public offering of a U.S. company, Johnson & Johnson believes that its 2019 annual meeting proxy statement and the Staff's Rule 14a-8 no-action letter process is not the right forum to address the issue and instead believes the appropriate course of action is for the issue to be analyzed, debated and decided by Congress, through an amendment to the Exchange Act, or by the Commission, through the appropriate notice and comment rulemaking process.

Accordingly, consistent with the precedent described above, the Proposal should be excluded from Johnson & Johnson's 2019 proxy materials pursuant to Rule 14a-8(i)(2) because implementation of the Proposal would cause Johnson & Johnson to violate federal law.

V. Conclusion

Based upon the foregoing analysis, Johnson & Johnson respectfully requests that the Staff concur that it will take no action if Johnson & Johnson excludes the Proposal from its 2019 proxy materials.

Should the Staff disagree with the conclusions set forth in this letter, or should any additional information be desired in support of Johnson & Johnson's position, we would appreciate the opportunity to confer with the Staff concerning these matters prior to the issuance of the Staff's response. Please do not hesitate to contact the undersigned at (202) 371-7233.

Very truly yours,

Marc S. Gerber

Enclosures

cc: Thomas J. Spellman III
Assistant General Counsel and Corporate Secretary
Johnson & Johnson

Hal Scott
Trustee
The Doris Behr 2012 Irrevocable Trust

<u>EXHIBIT A</u>

(see attached)

Resolved: The shareholders of Johnson & Johnson request the Board of Directors 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.

Supporting Statement

The United States is the only developed country in which stockholders of public companies can form a class and sue their own company for violations of securities laws. As a result, U.S. public companies are exposed to litigation risk that, in aggregate, can cost billions of dollars annually. The costs (in dollars and management time) of defending and settling these lawsuits are borne by stockholders. Across the corporate landscape, this effectively recirculates money within the same investor base, minus substantial attorneys' fees. Lawsuits are commonly filed soon after merger or acquisition announcements, or stock price changes, based on little more than their happening.

We believe arbitration is an effective alternative to class actions. It can balance the interests and rights of plaintiffs to bring federal securities law claims, with cost-effective protections for the corporation and its stockholders.

The Supreme Court has held that mandatory individual arbitration provisions are not in conflict with any provision of the federal securities laws, and the SEC has no basis to prohibit mandatory arbitration provisions that apply to federal securities law claims. Furthermore, New Jersey law establishes that the bylaws of a corporation are to be interpreted as a contract between the corporation and its stockholders.

A bylaw providing for mandatory individual arbitration of federal securities law claims would permit stockholders and corporations to opt-out of a flawed system that often seems more about the lawyers than the claimants and invariably wastes stockholder funds on expensive litigation costs.

The Doris Behr 2012 Irrevocable Trust
Hal Scott, Trustee
Harvard Law School, Lewis 339, 1557 Massachusetts Ave, Cambridge, MA 02138

November 9, 2018

Mr. Thomas J. Spellman III
Assistant General Counsel and Corporate Secretary
Johnson & Johnson
One Johnson & Johnson Plaza
New Brunswick, NJ 08933

Dear Mr. Spellman:

The undersigned, as trustee of The Doris Behr 2012 Irrevocable Trust (the "Stockholder"), is providing this notice in accordance with Rule 14a-8 of the Securities Exchange Act of 1934, as amended ("Rule 14a-8"). The Stockholder offers the attached proposal (the "Proposal") for the consideration and vote of shareholders at the 2019 annual meeting of shareholders (the "Annual Meeting") of Johnson & Johnson (the "Company"). The Stockholder requests that the Company include the Proposal in the Company's proxy statement for the Annual Meeting.

Letters from the Stockholder's custodian and sub-custodian documenting the Stockholder's continuous ownership of the requisite amount of the Company's stock for at least one year prior to the date of this letter are attached. The Stockholder intends to continue its ownership of at least the minimum number of shares required by Rule 14a-8 through the date of the Annual Meeting.

I represent that the Stockholder or its agent intends to appear in person or by proxy at the Annual Meeting to present the attached Proposal.

Very truly yours,

Hal J. Scott

Hal Scott
Trustee

Enclosures: Shareholder Proposal
Custodian and Sub-Custodian Letters

goulston&storrs
counsellors at law

November 9, 2018

To whom it may concern:

Goulstorrs & Co., Inc., which is wholly owned by Goulston & Storrs LLP, is the custodian for the Doris Behr 2012 Irrevocable Trust and holds shares on behalf of the Doris Behr 2012 Irrevocable Trust in our account at Fifth Third Bank. This letter is in response to a request by the Doris Behr 2012 Irrevocable Trust and verifies that the Doris Behr 2012 Irrevocable Trust has been a beneficial owner of 1,050 shares of Johnson and Johnson (CUSIP 478160104) continuously for at least one year as of and including November 9, 2018. Verification of this ownership from a DTC participating bank (Number 2116), Fifth Third Bank, is enclosed.

Sincerely,

Michelle M. Porter
Assistant Secretary
Goulstorrs & Co., Inc.

400 Atlantic Avenue • Boston, Massachusetts 02110-3333 • 617.482.1776 Tel • 617.574.4112 Fax • www.goulstonstorrs.com

FIFTH THIRD
INSTITUTIONAL SERVICES

November 9, 2018

To whom it may concern:

Fifth Third Bank is the sub-custodian for Goulstorrs & Co., Inc., which in turn is the custodian for the Doris Behr 2012 Irrevocable Trust. This letter is in response to a request by the Doris Behr 2012 Irrevocable Trust regarding confirmation from Fifth Third Bank as sub-custodian. Per statement provided by Goulstorrs & Co, Inc., Doris Behr 2012 Irrevocable Trust has been a beneficial owner of 1,050 shares of Johnson and Johnson (CUSIP 478160104) stock continuously for at least one year as of and including November 9, 2018.

We verify, as custodian for Goulstorrs & Co, Inc., that as of November 9, 2018, the Doris Behr 2012 Irrevocable Trust held, and has continuously held for at least one year, 1,050 shares of Johnson and Johnson. Fifth Third Bank is a DTC participant 2116.

Sincerely,

Anoopa McKim

Anoopa McKim
Senior Relationship Manager
Fifth Third Institutional Services