February 8, 2022

Lillian Brown
Wilmer Cutler Pickering Hale and Dorr LLP

Re: Moderna, Inc. (the “Company”)
   Incoming letter dated December 17, 2021

Dear Ms. Brown:

  This letter is in response to your correspondence concerning the shareholder proposal (the “Proposal”) submitted to the Company by Oxfam America, Inc. and Domini Impact Equity Fund for inclusion in the Company’s proxy materials for its upcoming annual meeting of security holders.

  The Proposal asks the board to commission a third-party report to shareholders analyzing the feasibility of promptly transferring intellectual property and technical knowledge (“know-how”) to facilitate the production of COVID-19 vaccine doses by additional qualified manufacturers located in low- and middle-income countries, as defined by the World Bank.

  We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal transcends ordinary business matters and does not seek to micromanage the Company.

  Copies of all of the correspondence on which this response is based will be made available on our website at https://www.sec.gov/corpfin/2021-2022-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: Robert Silverman
    Oxfam America, Inc.
December 17, 2021

Via E-mail to shareholderproposals@sec.gov

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street, NE
Washington, DC 20549

Re: Moderna, Inc.
Exclusion of Shareholder Proposal by Oxfam America, Inc.

Ladies and Gentlemen:

We are writing on behalf of our client, Moderna, Inc. (the “Company”), to inform you of the Company’s intention to exclude from its proxy statement and proxy to be filed and distributed in connection with its 2022 annual meeting of shareholders (the “Proxy Materials”) the enclosed shareholder proposal and supporting statement (collectively, the “Proposal”) submitted by Oxfam America, Inc. (“Oxfam”) and co-filer Domini Impact Equity Fund (“Domini” and, together with Oxfam, the “Proponents”). The Proposal requests that the Company commission a report “analyzing the feasibility of promptly transferring intellectual property and technical knowledge (‘know-how’) to facilitate the production of COVID-19 vaccine doses by additional qualified manufacturers located in low- and middle-income countries, as defined by the World Bank.”

The Company respectfully requests that the staff of the Division of Corporation Finance (the “Staff”) of the Securities and Exchange Commission (the “Commission”) advise the Company that it will not recommend any enforcement action to the Commission if the Company excludes the Proposal from its Proxy Materials for the reasons discussed below.

Pursuant to Rule 14a-8(j) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), and Staff Legal Bulletin No. 14D (November 7, 2008) (“SLB 14D”), the Company is submitting electronically to the Commission this letter, and the Proposal and related correspondence (attached as Exhibit A to this letter), and is concurrently sending a copy to the Proponents, no later than eighty calendar days before the Company intends to file its definitive Proxy Materials with the Commission.
Background

On November 4, 2021 and November 9, 2021, the Company received the Proposal from Oxfam and Domini, respectively, which states as follows:

RESOLVED that shareholders of Moderna Inc. (“Moderna”) ask the Board of Directors to commission a third-party report to shareholders, at reasonable expense and omitting confidential and proprietary information, analyzing the feasibility of promptly transferring intellectual property and technical knowledge (“know-how”) to facilitate the production of COVID-19 vaccine doses by additional qualified manufacturers located in low- and middle-income countries, as defined by the World Bank.

SUPPORTING STATEMENT

Widespread vaccination is critical to achieving herd immunity and preventing the development of more transmissible and vaccine-resistant variants. Vaccine administration has been strikingly unequal. As of October 21, 2021, high-income countries have administered 134 doses, while low-income countries have administered only four doses, per 100 residents.1 Vaccine inequity could cost the global economy over $2 trillion.2

Moderna touts its agreement to sell 500 million doses to COVAX,3 and 110 million doses to the African Union.4 This is insufficient compared to global need. High-income countries account for a larger share of doses shipped by Moderna than any other manufacturer.5

Independent estimates indicate that Moderna will miss its 2021 production target of one billion doses by 33%. To ensure equitable access, Moderna should transfer the intellectual property and know-how associated with its vaccines to allow manufacture in low- and middle-income countries. Pressure, including by the U.S. government, is intensifying on Moderna to make such transfers.6

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Moderná has committed not to enforce its COVID-19 vaccine patents during the pandemic, but other manufacturers cannot produce Moderná’s vaccine quickly without full technology transfer, including know-how regarding the manufacturing process. An effort to replicate Moderná’s vaccine by the World Health Organization’s mRNA Vaccine Technology Transfer Hub, which was recently established to facilitate technology transfer, has stalled because Moderná has not responded to requests to share know-how.

Though CEO Stephane Bancel has said other companies would take 12 to 18 months to produce Moderná’s vaccine, quicker production is possible with full technology transfer: Lonza began producing it within six months after the transfer was announced. Moderná’s former director of chemistry estimates that modern factories could start manufacturing mRNA vaccines within a few months if sufficient know-how is transferred. The New York Times has identified ten emerging market manufacturers that can produce the vaccine.

Moderná has not yet selected a country for its announced African mRNA vaccine plant, and Bancel has said that it would take two to four years to construct and validate. Thus, it will not ameliorate current supply challenges.

We believe backlash from Moderná not sharing information needed to manufacture its vaccine in low- and middle-income countries could tarnish its reputation, threaten its social license to operate, and undermine relations with the U.S. government. We urge Moderná to analyze the feasibility of providing know-how to qualified manufacturers that could independently increase supply and help end the pandemic.

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10 https://www.nature.com/articles/d41586-021-02383-z
11 https://jamanetwork.com/journals/jama/fullarticle/2781756
Basis for Exclusion

*The Proposal may be excluded pursuant to Rule 14a-8(i)(7) because the subject matter of the Proposal directly concerns the Company’s ordinary business operations.*

Rule 14a-8(i)(7) permits a company to exclude a shareholder proposal if the proposal “deals with a matter relating to the company’s ordinary business operations.” The underlying policy of the ordinary business exclusion is “to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.” SEC Release No. 34-40018 (May 21, 1998) (the “1998 Release”). An exception to this principle may be made where a proposal focuses on significant policy issues (e.g., significant discrimination matters) that transcend the day-to-day business matters of the company. See 1998 Release. The Staff most recently discussed its interpretation of how the Staff will consider whether a proposal “transcends the day-to-day business matters” of a company in Staff Legal Bulletin 14L (November 3, 2021) (“SLB 14L”), noting that it is “realign[ing]” its approach to determining whether a proposal relates to ordinary business with the standards the Commission initially articulated in 1976 and reaffirmed in the 1998 Release. Under this realignment, the Staff will “no longer take a company-specific approach to evaluating the significance of a policy issue under Rule 14a-8(i)(7)” but rather will consider only “whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.”

As set out in the 1998 Release, there are two “central considerations” underlying the ordinary business exclusion. One consideration is that “[c]ertain tasks are so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.” The other consideration is that a proposal should not “seek[] to ‘micro-manage’ the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.” The Proposal implicates both of these considerations and does not raise a significant policy issue that transcends the ordinary business of the Company.

Framing a shareholder proposal in the form of a request for a report does not change the underlying nature of the proposal. The Commission has long held that the Staff evaluates proposals requesting dissemination of a report by considering the underlying subject matter of the proposal when applying Rule 14a-8(i)(7), and that such proposals are excludable when the substance is within the ordinary business of the company. See Release No. 34-20091 (August 16, 1983) (“[T]he staff will consider whether the subject matter of the special report or the committee involves a matter of ordinary business; where it does, the proposal will be

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14 SLB 14L also explicitly rescinded prior Staff Legal Bulletins 14I, 14J and 14K, which set out a company-specific approach to the significant policy issue analysis (the “Rescinded SLBs”).
A. The Proposal may be excluded because it relates to ordinary business matters of how the Company manages its day-to-day operations, specifically with regard to the development, production and distribution of the Company’s products.

The Proposal may be excluded in reliance on Rule 14a-8(i)(7) because the matters to be addressed in the requested report – namely, the feasibility of transferring intellectual property and technical knowledge to facilitate the production of COVID-19 vaccine doses – relate to the Company’s ordinary business operations. Managing the development, production and distribution of particular products requires complex and extensive analysis that is not appropriate for shareholders and should be left to management. The analysis that would be required by the Proposal is exactly the type of analysis that Rule 14a-8(i)(7) recognizes as a proper function of management, who have the requisite knowledge and resources to appropriately analyze and weigh the various financial, contractual, regulatory, operational and reputational considerations and consequences relating to the development, production and distribution of the Company’s products, including any transfer of the Company’s intellectual property.

The Staff has consistently taken the position that decisions by companies as to the products and services that they sell and the manner in which those products and services are designed, developed, produced, distributed and marketed are a fundamental part of a company’s ordinary business operations and are excludable under Rule 14a-8(i)(7) as relating to ordinary business operations. For example, in AT&T Inc. (January 4, 2017), the Staff concurred in exclusion of a proposal that urged the company to report on progress towards providing internet service and products for low-income customers, noting that the proposal “relates to the products and services offered by the company.” In addition, in International Business Machines Corp. (January 22, 2009), the Staff concurred in exclusion of a proposal requesting that the company adopt a policy or take appropriate steps to further the advance of open source standards, as relating to “ordinary business operations (i.e., the design, development and licensing of IBM’s software products).” See also Pfizer Inc. (March 1, 2016) (concurring in exclusion of a proposal requesting a report describing the steps the company has taken to prevent the sale of its medicines to prisons for the purpose of aiding executions, noting that the proposal “relates to the sale or distribution of [the
The Company believes that mRNA-based medicines have the potential to help patients in ways that could equal or exceed the impact of traditional approaches to medicine, and its strategy is designed to deliver on the full scope of the mRNA opportunity over the long term. Reaching patients with mRNA medicines, including the Company’s COVID-19 vaccine, requires management to make complex choices, including: how much capital the Company should devote to technology creation, drug discovery, drug development, commercial and global marketing and infrastructure; which programs to advance and how; whether to advance programs along with strategic collaborators; and which capabilities to build internally versus outsource. Decisions relating specifically to the Company’s COVID-19 vaccine, the Company’s only commercial product at this time, and the methods by which the Company determines to make such vaccine (and related intellectual property) available to its customers, partners and the public are all clearly matters that fall within the purview and expertise of the Company’s management and do
not lend themselves to shareholder evaluation, and are therefore all inherently and undeniably related to the ordinary business operations of the Company. In making such decisions, the Company’s management regularly considers a wide variety of factors and risks that may affect the Company’s operations and financial condition.

Further, decisions by the Company with respect to which contract manufacturing partners are best-suited to make the Company’s COVID-19 vaccine, which involves novel and complex technology for the production of mRNA-based medicines, is appropriately left to the judgment of management. The Company has limited personnel who are trained in the manufacturing processes to make its medicines, and management is best-suited to assess how those personnel should be deployed and which third parties should be trained to maximize the production of its vaccine. The COVID-19 vaccine is not only the Company’s first product, but it is also one of the first commercial medicines to use mRNA-based technology. As a result, ensuring the integrity of manufacturing processes and protecting the reputation for quality of the Company’s medicines, which may be compromised if the Company has no oversight role in the manufacturing of its products, as contemplated by the Proposal, are matters relating to the Company’s ordinary business operations that should be left to management. Accordingly, the Company may exclude the Proposal under Rule 14a-8(i)(7) as it relates to the ordinary business of the Company.

B. The Proposal may be excluded because it relates to ordinary business matters of how the Company uses and protects its intellectual property.

The manner in which the Company uses and protects its intellectual property, including “know-how” and technical information, related to its COVID-19 vaccine, are fundamental to the Company’s ordinary business operations and cannot be delegated to shareholders. Consistent with prior Staff precedent, the Company’s ability to control decisions related to disclosure of highly confidential and proprietary information is precisely the type of ordinary business operation addressed in Rule 14a-8(i)(7). For example, in Peregrine Pharmaceuticals, Inc. (July 28, 2006), the Staff concurred in exclusion of a proposal requesting that the company provide on a monthly basis highly detailed information concerning each and every one of their clinical trials, as it related to the company’s “ordinary business operations (i.e., disclosure of ordinary business matters).” In Peregrine, the company noted that the information requested to be disclosed was highly confidential and sensitive, and related to the conduct of the company’s ordinary business matters. See also AmerInst Insurance Group, Ltd. (April 14, 2005) (concurring in exclusion of a proposal requesting the board provide each quarter a full, complete and adequate disclosure of the accounting of the line items and amounts of the operating and management expenses of the company, as relating to “ordinary business operations (i.e., presentation of financial information).”
Similarly, the Proposal requests not just the disclosure, but the transfer, of the Company’s intellectual property and technical knowledge of its COVID-19 vaccines, which is highly confidential and proprietary information of the Company, to qualified manufacturers located in low- and middle-income countries. The Company is a platform company, and the production of its medicines depends upon a few key components and the lipid nanoparticle delivery technology to deliver it into the human body. This technology is consistent across the platform, and, as such, sharing the technology risks undermining protections for other programs far beyond the Company’s COVID-19 vaccine. The Company has devoted significant resources to advance its platform technology and its intellectual property. The Company intends to sustain its investment in its platform in the future because it believes it can establish new modalities and continue to make meaningful improvements in the performance of its current modalities. Transferring the intellectual property associated with this technology, without any guarantee with respect to whether future intellectual property rights will be respected, risks undermining the investments that have been made in this technology over the past decade, not only for the Company’s COVID-19 vaccine, but for all of the medicines that the Company may seek to develop and produce in the future.

The Company has already stated that it will not enforce its intellectual property rights during the COVID-19 pandemic. The Proposal, however, would require the Company to go a step further, dictating that the Company not just refrain from enforcing its intellectual property rights, but also actively transfer the Company’s most valuable asset – the “know-how” for the Company’s only commercial product – to third parties without any assurances regarding protection and use of, or consideration for, the transfer of such highly sensitive and proprietary information. The decisions relating to how the Company uses and protects its intellectual property fall squarely within ordinary business matters best left to the Company’s management. Given the importance of intellectual property to the Company’s business and the specialized nature of protecting such intellectual property, the transfer of any such intellectual property (or any analysis of the feasibility of such transfer) should not, as a practical matter, be subject to direct shareholder oversight. Accordingly, the Company may exclude the Proposal under Rule 14a-8(i)(7) as it relates to the ordinary business of the Company.

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C. The Proposal does not focus on a significant social policy issue that transcends the Company’s ordinary business operations.

The Commission has distinguished proposals pertaining to ordinary business matters from those involving “significant social policy issues.” See 1998 Release. When assessing proposals under Rule 14a-8(i)(7), the Staff considers the terms of the resolution and its supporting statement as a whole. See Staff Legal Bulletin No. 14C, part D.2 (June 28, 2005) (“In determining whether the focus of these proposals is a significant social policy issue, we consider both the proposal and the supporting statement as a whole.”). While “proposals . . . focusing on sufficiently significant social policy issues . . . generally would not be considered to be excludable,” the Staff has indicated that proposals relating to both ordinary business matters and significant social policy issues may be excludable in their entirety in reliance on Rule 14a-8(i)(7) if they do not “transcend the day-to-day business matters” discussed in the proposals. 1998 Release.

The Staff has long permitted exclusion of shareholder proposals where the proposal focuses on ordinary business matters notwithstanding that it references a potential significant policy issue. This approach predates the Rescinded SLBs and relies on a different analysis than that addressed by SLB 14L – it does not focus on whether a particular policy is broadly significant versus significant for a particular company, but rather on whether the Proposal is fundamentally about day-to-day operations versus any significant policy issue that may be referenced in the proposal. For example, in McDonald’s Corp. (March 22, 2019), the Staff concurred in exclusion of a proposal that touched on concerns about animal cruelty because the proposal was “focus[e]d primarily on” the company’s ordinary business operations. See also AT&T Inc. (December 28, 2015) (concurring in exclusion of a proposal seeking establishment of a program to educate company employees on health matters relating to HIV/AIDS, as relating to an ordinary business matter); Papa John’s International, Inc. (February 13, 2015) (concurring in exclusion of a proposal encouraging the company to add vegan options to its menu, which touched on issues such as animal welfare and sustainability, because the proposal related to the company’s ordinary business and “[did] not focus on a significant policy issue”); PetSmart, Inc. (March 24, 2011) (concurring in exclusion of a proposal calling for suppliers to certify that they have not violated certain laws regarding the humane treatment of animals); CIGNA Corp. (February 23, 2011) (concurring in exclusion of a proposal when, although the proposal addressed access to affordable health care, it asked the company to report on expense management, an ordinary business matter); JPMorgan Chase & Co. (March 12, 2010) (concurring in exclusion of a proposal that requested the adoption of a policy banning future financing of companies engaged in a particular practice that impacted the environment because the proposal addressed “matters beyond the environmental impact of JPMorgan Chase’s project finance decisions”); Apache Corp. (March 5, 2008) (concurring in exclusion of a proposal requesting the implementation of equal employment opportunity policies based on certain principles and noting that “some of the
principles relate to Apache’s ordinary business operations”); and Capital One Financial Corp. (February 3, 2005) (concurring in exclusion of a proposal when, although the proposal addressed the significant policy issue of outsourcing, it also asked the company to disclose information about how it manages its workforce, an ordinary business matter).

The Company does not disagree that COVID-19 is an issue of global magnitude and importance and has made significant commitments as part of its strategy to ensure that people around the world have access to its COVID-19 vaccine as quickly as possible. However, the Proponents are seeking to prevent the Company’s board and management from exercising their discretion in how to effectively address this issue. Since before its COVID-19 vaccine was even authorized in any jurisdiction, the Company’s board and management have understood the Company’s social responsibility to fight the pandemic and have carefully considered what steps the Company can take to help end the pandemic. In October 2020, the Company announced that, while the COVID-19 pandemic continues, it will not enforce its COVID-19-related patents against those making vaccines intended to combat the pandemic. Since then, the Company has contracted with the COVAX Facility, a global risk-sharing mechanism for pooled procurement and equitable distribution of COVID-19 vaccines for low- and middle-income countries, to supply up to 650 million doses of its COVID-19 vaccine beginning in 2021 and through 2022.16 The Company has also announced an agreement with the African Union to supply up to 110 million doses of its vaccine during the same time period.17 Additionally, as part of its comprehensive plan to bring vaccines to as many people as possible around the world, the Company has engaged with various countries, including many European governments, as well as the United States government, to facilitate donations from these countries to low- and middle-income countries.18 The Company has also announced its plan to build a state-of-the-art mRNA manufacturing facility in Africa with the goal of producing up to 500 million doses of vaccines each year to help guarantee the local supply of vaccines for any future pandemics.

Although the Proposal addresses COVID-19, and, in particular the Company’s COVID-19 vaccine, the true focus of the Proposal is on the Company’s ordinary business matters of the development, production and distribution of the Company’s products and the use and protection of the Company’s intellectual property. The Proposal seeks to substitute the Proponents’ assessment of the most effective way to address a complicated issue for that of the Company’s board and management, who have been laser-focused on combating the pandemic for nearly two years. The Proposal does not touch on an issue that transcends the ordinary business of the Company, but strikes at the heart of day-to-day decisions regarding how to best manage the Company’s assets and business. Accordingly, and consistent with the precedent cited above, the Company may exclude the Proposal under Rule 14a-8(i)(7) as it relates to the ordinary business of the Company.

D. The Proposal may be excluded because it seeks to micromanage the Company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.

In addition to interfering with management’s day-to-day operations, the Proposal also seeks to micromanage the Company with regard to the details of how and to whom the Company should transfer intellectual property relating to its COVID-19 vaccine. As the Staff explained in SLB 14L, in considering arguments under the micromanagement exclusion, the Staff will focus on “the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management.” The Proposal would dictate which third parties the Company should transfer its intellectual property to (i.e., not just those manufacturing partners already selected and vetted by the Company’s management), where such third parties should be located (i.e., only in low- and middle-income countries), and on what terms the intellectual property should be transferred (i.e., without regard for the liability posed to the Company or the competency of the transferees to ensure the production of safe and effective vaccines), which would directly limit management’s discretion to determine how to use and protect the Company’s intellectual property.

Additionally, the Company’s determinations about how to use and protect its intellectual property require a deep understanding of the Company’s business, strategy, risk profile and operating environment as well as an assessment of a variety of complex factors and risks, including costs, protection of intellectual property, feasibility of manufacture and financial results, among others. Determining whether to disclose or transfer, and the timing and extent of any such disclosure or transfer of, sensitive and confidential intellectual property relating to the Company’s COVID-19 vaccine is clearly probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment. In considering whether a proposal is too complex to enable shareholders to be in a position to make an informed judgment, the Staff “may consider the sophistication of investors generally on
the matter, the availability of data, and the robustness of public discussion and analysis on the topic.” SLB 14L. Intellectual property use and protection are highly sophisticated topics for which there is not robust public discussion or analysis or broad-based understanding. Accordingly, the Proposal is excludable under Rule 14a-8(i)(7) because it seeks to micromanage the Company.

Conclusion

For the foregoing reasons, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its Proxy Materials pursuant to Rule 14a-8(i)(7), on the basis that the Proposal relates to the Company’s ordinary business operations.

If the Staff has any questions with respect to the foregoing, or if for any reason the Staff does not agree that the Company may exclude the Proposal from its Proxy Materials, please do not hesitate to contact me at lillian.brown@wilmerhale.com or (202) 663-6743. In addition, should the Proponents choose to submit any response or other correspondence to the Commission, we request that the Proponents concurrently submit that response or other correspondence to the Company, as required pursuant to Rule 14a-8(k) and SLB 14D, and copy the undersigned.

Best regards,

Lillian Brown

Enclosures

cc: Shannon Klinger, Chief Legal Officer and Corporate Secretary
    Brian Sandstrom, Vice President, Associate General Counsel, Securities
    Moderna, Inc.

    Robert Silverman, Oxfam America
    Mary Beth Gallagher, Domini Impact Investments LLC
EXHIBIT A
Re: Shareholder proposal for 2022 Annual Shareholder Meeting

Dear Ms. Thyme Klinger,

Enclosed please find a proposal of Oxfam America, Inc. ("Oxfam America") and other co-filers to be included in the proxy statement of Moderna (the "Company") for its 2022 annual meeting of shareholders.

Oxfam America has continuously held, for at least one year as of the date hereof, at least $25,000 worth of the Company's common stock. Verification of this ownership will be forthcoming. Oxfam America intends to continue to hold such shares through the date of the Company's 2022 annual meeting of shareholders.

Oxfam America is the lead filer for this proposal and may be joined by other shareholders as co-filers. Oxfam America as lead filer is authorized to engage with the company and negotiate on behalf of each co-filer any potential withdrawal of this proposal.

Oxfam America welcomes the opportunity to discuss this proposal with representatives of the Company. We are available on Tuesday, November 16 between 3 and 5pm ET; Wednesday, November 17 between 4 and 5pm ET; and Friday, November 19 between 1 and 3pm ET. I can be contacted on [Redacted] or by email at [Redacted] to schedule a meeting. Please feel free to contact me with any questions.

Sincerely,

Robert Silverman
Oxfam America
RESOLVED that shareholders of Moderna Inc. ("Moderna") ask the Board of Directors to commission a third-party report to shareholders, at reasonable expense and omitting confidential and proprietary information, analyzing the feasibility of promptly transferring intellectual property and technical knowledge ("know-how") to facilitate the production of COVID-19 vaccine doses by additional qualified manufacturers located in low- and middle-income countries, as defined by the World Bank.

SUPPORTING STATEMENT

Widespread vaccination is critical to achieving herd immunity and preventing the development of more transmissible and vaccine-resistant variants. Vaccine administration has been strikingly unequal. As of October 21, 2021, high-income countries have administered 134 doses, while low-income countries have administered only four doses, per 100 residents.1 Vaccine inequity could cost the global economy over $2 trillion.3

Moderna touts its agreement to sell 500 million doses to COVAX,3 and 110 million doses to the African Union.4 This is insufficient compared to global need. High-income countries account for a larger share of doses shipped by Moderna than any other manufacturer.5

Independent estimates indicate that Moderna will miss its 2021 production target of one billion doses by 33%. To ensure equitable access, Moderna should transfer the intellectual property and know-how associated with its vaccines to allow manufacture in low- and middle-income countries. Pressure, including by the U.S. government, is intensifying on Moderna to make such transfers.6

Moderna has committed not to enforce its COVID-19 vaccine patents during the pandemic,7 but other manufacturers cannot produce Moderna’s vaccine quickly without full technology transfer, including know-how regarding the manufacturing process. An effort to replicate Moderna’s vaccine by the World Health Organization’s mRNA Vaccine Technology Transfer Hub, which was recently established to facilitate technology transfer,8 has stalled because Moderna has not responded to requests to share know-how.9

Though CEO Stephane Bancel has said other companies would take 12 to 18 months to produce Moderna’s vaccine, quicker production is possible with full technology transfer: Lonza began producing it within six months after the transfer was announced. Moderna’s former director of chemistry estimates that modern factories could start manufacturing mRNA vaccines within a few months if sufficient know-how is transferred. The New York Times has identified ten emerging market manufacturers that can produce the vaccine.

Moderna has not yet selected a country for its announced African mRNA vaccine plant, and Bancel has said that it would take two to four years to construct and validate. Thus, it will not ameliorate current supply challenges.

We believe backlash from Moderna not sharing information needed to manufacture its vaccine in low- and middle-income countries could tarnish its reputation, threaten its social license to operate, and undermine relations with the U.S. government. We urge Moderna to analyze the feasibility of providing know-how to qualified manufacturers that could independently increase supply and help end the pandemic.

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10 https://www.nature.com/articles/d41586-021-02383-z
11 https://jamanetwork.com/journals/jama/fullarticle/2781756
November 9, 2021

Via email: [Redacted]

Moderna, Inc.
Attn: Shannon Thyme Klinger
Chief Legal Officer and Corporate Secretary, Chief Governance Counsel

Re: Shareholder proposal for 2022 Annual Shareholder Meeting

Dear Corporate Secretary:

I am writing to you on behalf of the Domini Impact Equity Fund (the Fund), a long-term Moderna shareholder. The attached shareholder proposal is submitted for inclusion in the next proxy statement in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934.

As of November 9, 2021, the Fund beneficially owned, and had beneficially owned continuously for at least one year, shares of Moderna’s common stock worth at least $25,000. The Fund will maintain ownership of the required number of shares through the date of the next stockholders’ annual meeting.

A letter verifying our ownership of shares from our portfolio’s custodian is enclosed. A representative of the filers will attend the stockholders’ meeting to move the resolution as required by SEC Rules. We recognize Oxfam America as the lead filer of this proposal and authorize Oxfam to negotiate its withdrawal on our behalf. In its submission letter, Oxfam will provide dates and times of ability to meet. We designate the lead filer to meet initially with the Company but may join the meeting subject to our availability.

We strongly believe the attached proposal is in the best interests of our company and its shareholders and
welcome the opportunity to discuss the issues raised by the proposal with you. I can be reached at [Redacted] or at [Redacted].

Sincerely,

Mary Beth Gallagher
Director of Engagement
Domini Impact Investments LLC

Encl.
RESOLVED that shareholders of Moderna Inc. (“Moderna”) ask the Board of Directors to commission a third-party report to shareholders, at reasonable expense and omitting confidential and proprietary information, analyzing the feasibility of promptly transferring intellectual property and technical knowledge (“know-how”) to facilitate the production of COVID-19 vaccine doses by additional qualified manufacturers located in low- and middle-income countries, as defined by the World Bank.

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Moderna touts its agreement to sell 500 million doses to COVAX,³ and 110 million doses to the African Union.⁴ This is insufficient compared to global need. High-income countries account for a larger share of doses shipped by Moderna than any other manufacturer.⁵

Independent estimates indicate that Moderna will miss its 2021 production target of one billion doses by 33%. To ensure equitable access, Moderna should transfer the intellectual property and know-how associated with its vaccines to allow manufacture in low- and middle-income countries. Pressure, including by the U.S. government, is intensifying on Moderna to make such transfers.⁶

Moderna has committed not to enforce its COVID-19 vaccine patents during the pandemic,⁷ but other manufacturers cannot produce Moderna’s vaccine quickly without full technology transfer, including know-how regarding the manufacturing process. An effort to replicate Moderna’s vaccine by the World Health Organization’s mRNA Vaccine Technology Transfer Hub, which was recently established to facilitate technology transfer,⁸ has stalled because Moderna has not responded to requests to share know-how.⁹

Though CEO Stephane Bancel has said other companies would take 12 to 18 months to produce Moderna’s vaccine, quicker production is possible with full technology transfer: Lonza began producing it within six months after the transfer was announced. Moderna’s former director of chemistry estimates that modern factories could start manufacturing mRNA vaccines within a few months if sufficient know-how is transferred. The New York Times has identified ten emerging market manufacturers that can produce the vaccine.

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10 https://www.nature.com/articles/d41586-021-02383-z
11 https://jamanetwork.com/journals/jama/fullarticle/2781756
January 5, 2022

Via e-mail at shareholderproposals@sec.gov

Securities and Exchange Commission
Office of the Chief Counsel
Division of Corporation Finance
100 F Street, NE
Washington, DC 20549

Re: Request by Moderna, Inc. to omit proposal submitted by Oxfam America, Inc.
and Domini Impact Equity Fund

Ladies and Gentlemen,

Pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, Oxfam America, Inc. and Domini Impact Equity Fund (together, the “Proponents”) submitted a shareholder proposal (the “Proposal”) to Moderna, Inc. (“Moderna” or the “Company”). The Proposal asks Moderna to commission a third-party report to shareholders analyzing the feasibility of promptly transferring intellectual property (“IP”) and technical knowledge to facilitate the production of COVID-19 vaccine doses by additional qualified manufacturers located in low- and middle-income countries.

In a letter to the Division dated December 17, 2021 (the "No-Action Request"), Moderna stated that it intends to omit the Proposal from its proxy materials to be distributed to shareholders in connection with the 2022 annual meeting of shareholders. Moderna argues that it is entitled to exclude the Proposal in reliance on Rule 14a-8(i)(7), on the ground that the Proposal relates to Moderna’s ordinary business operations. As discussed more fully below, Moderna has not met its burden of proving its entitlement to exclude the Proposal on that basis, and the Proponents ask that its request for relief be denied.
The Proposal

The Proposal states:

RESOLVED that shareholders of Moderna Inc. (“Moderna”) ask the Board of Directors to commission a third-party report to shareholders, at reasonable expense and omitting confidential and proprietary information, analyzing the feasibility of promptly transferring intellectual property and technical knowledge (“know-how”) to facilitate the production of COVID-19 vaccine doses by additional qualified manufacturers located in low- and middle-income countries, as defined by the World Bank.

Ordinary Business

Moderna argues that the Proposal relates to the Company’s ordinary business operations, and is thus excludable in reliance on Rule 14a-8(i)(7), because it addresses the “development, production and distribution” of the Company’s products and the protection of its IP.1 The Proponents acknowledge that the Division has generally regarded those subjects as ordinary business matters; however, if a proposal focuses on a significant social policy issue, the fact that it implicates a company’s products or IP matters does not justify exclusion on ordinary business grounds.

For example, the Staff did not agree with Johnson & Johnson’s2 (“J&J’s”) claim that a proposal asking the company to establish and implement standards of response to the HIV/AIDS pandemic in developing countries was excludable as relating to the company’s ordinary business because it addressed product development, research and testing; the proponent had urged that the proposal addressed the significant policy issue of the HIV/AIDS pandemic. In a similar no action request filed by Gilead,3 the Staff rejected Gilead’s argument that a proposal seeking a report on risks related to rising pressures to contain specialty drug prices was excludable on ordinary business grounds, observing that the proposal addressed a significant policy issue, even though Gilead had argued that the clear link to its products and pricing decisions justified exclusion. And in Denny’s Inc. no

1 See No-Action Request, at 5-8.
2 Johnson & Johnson (Feb. 7, 2003)
3 Gilead Sciences Inc. (Feb. 23, 2015); see also Celgene Corporation (Mar. 19, 2015); Vertex Pharmaceuticals Inc. (Feb. 25, 2015). Almost 30 years ago, the Staff declined to allow exclusion on ordinary business grounds of a proposal asking Eli Lilly to adopt a policy of pharmaceutical price restraint. Eli Lilly and Company (Feb. 25, 1993) (declining to allow exclusion on ordinary business grounds of a proposal asking the company to adopt a policy of pharmaceutical price restraint); Bristol-Myers Squibb Company (Feb. 21, 2000) (same); Warner Lambert Company (Feb. 21, 2000) (same).
action response, the Staff was unpersuaded by the company’s claim that a proposal asking it to sell at least 10% cage-free eggs by volume was excludable on ordinary business grounds as implicating the sale of particular products, siding with the proponent’s characterization of the proposal’s subject as the significant policy issue of “[r]educing cruel confinement conditions for egg-laying hens” (i.e., animal cruelty).

Here, Moderna’s narrow characterizations of the Proposal disregard the larger context of the COVID-19 pandemic. Over 5.5 million people have already died from COVID-19, and global GDP growth fell to -3.2% in 2020. According to the Congressional Research Service, “the prolonged nature of the health crisis is affecting the global economy beyond traditional measures with potentially long-lasting and far-reaching repercussions.” The world is now grappling with a fourth wave of COVID-19 infection caused by the emergence of yet another variant of the virus, illustrating the dangers of leaving large numbers of people unvaccinated, and the important role of those entities with the know-how in vaccine production to facilitate increased manufacturing. Despite the importance of widespread vaccination in ending the pandemic, only 8.4% of people living in low-income countries have received at least one vaccine dose. Producing enough vaccine doses to supply low- and middle-income countries, many experts urge, requires the establishment of local manufacturing capacity. Doing so entails vaccine manufacturers sharing their IP—not only licensing the right to produce their products but also sharing production processes and other informal knowledge—with manufacturers located in those countries.

The Proposal Addresses a Consistent Subject of Widespread Public Debate, the Role of IP Protections in Limiting the Supply of COVID-19 mRNA Vaccines

Ensuring equitable access to vaccines, including the role of IP protections, is a consistent subject of widespread public debate, the standard applied by the Division in determining whether a proposal’s subject transcends ordinary business

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4 Denny’s Inc. (Mar. 17, 2009)
8 See https://www.cnn.com/2021/12/02/politics/covid-vaccine-patents-what-matters/index.html
operations. Media have intensively covered the shortage of vaccine supply and manufacturing capacity in low- and middle-income countries, the economic impact of inequitable access, the prolonged wrangling over a proposed emergency waiver of the World Trade Organization’s IP rules (the so-called “TRIPS waiver”), the World Health Organization’s (“WHO’s”) COVID mRNA technology transfer hubs and technology access pool (“C-TAP”), and patent conflicts between Moderna and the federal government. Most directly relevant to the Proposal, there has been extensive reporting on the pressures on vaccine makers to share technology.

Moderna has been a major target of pressure, and news coverage, in part because the U.S. government funded 100% of the cost of developing the Company’s vaccine and Moderna is thus viewed as having greater responsibility to promote the public good.²⁰ Those pressures have even provided fodder for jokes by late-night talk show hosts.²¹

U.S. public opinion supports measures, including requiring IP sharing, to promote more equitable access to vaccines and treatments. A poll conducted in April-May 2021 found that 59% of Americans favored “compel[ling] Moderna to share its vaccine technology with manufacturers around the world to increase vaccine production and end the global vaccine shortage.” The same proportion also supported “waiving patent protections on life-saving medicines,” such as those for COVID-19, “so drug makers can produce cheaper, generic versions that can be widely distributed around the world.”²²

Legislators, regulators and inter-governmental organizations have also focused on the sharing of IP in order to scale up vaccine manufacture. The “Nullifying Opportunities for Variants to Infect and Decimate Act,” introduced in

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the House and Senate in June 2021, would require the director of a newly-established pandemic preparedness and response program to “encourage and facilitate technology sharing and the licensing of intellectual property as much as is necessary to ensure an adequate and timely supply” of vaccine and “consider the potential benefit of regional manufacturing hubs in South America, Africa, and South Asia for the future of global health.”

A group of Senators sent Moderna a letter in April 2021 asking a series of questions designed to “help [them] better understand what steps Moderna will take to expand global access to COVID-19 vaccines in India and elsewhere,” including whether Moderna has shared IP, data and other information with C-TAP or the WHO’s technology transfer hub and whether Moderna has lobbied against the TRIPS waiver. In October, a group of Senators and Representatives urged the Biden Administration to “dramatically expand global vaccine access and manufacturing capabilities as quickly as possible” and sought information about the federal government’s IP rights under its contract with Moderna. The following month, the House Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies held a hearing on the “U.S. Role in Global Covid-19 Vaccine Equity,” at which Chairwoman Rep. Rosa DeLauro opined that “it is shocking to me that we have not received full and unfettered cooperation from all of our partners in this effort [to increase global vaccine equity], including the private companies such as Moderna, making billions of dollars from US taxpayers.” Senator Angus King also sent a letter to both Moderna and Pfizer in November, exhorting them to license their vaccines to the Medicines Patent Pool to allow other manufacturers to produce them and increase global supply.

Lobbying on the TRIPS waiver has been intense, with over 100 lobbyists dispatched in the first quarter of 2021 to oppose the proposal. The waiver request,
which was initially proposed by India and South Africa,\textsuperscript{30} is supported by hundreds of advocacy groups,\textsuperscript{31} hundreds of members of European Parliament,\textsuperscript{32} over 100 countries,\textsuperscript{33} U.S. Members of Congress,\textsuperscript{34} and the Biden Administration.\textsuperscript{35} The Biotechnology Innovation Organization, which counts Moderna as a member,\textsuperscript{36} opposes the waiver.\textsuperscript{37}

The Biden Administration has also pressed Moderna to share its IP. Dr. David Kessler, chief scientific officer for the White House’s COVID-19 response, has pushed Moderna to share know-how to permit manufacturers to supply the Company’s vaccine to parts of the world that now have little or no access.\textsuperscript{38}

Activists have staged protests against Moderna, Johnson & Johnson, and Pfizer demanding that they share technology to increase global production.\textsuperscript{39} A group of doctors from Harvard Medical School participated in a protest at the Cambridge, Massachusetts home of Moderna’s CEO.\textsuperscript{40} One protest organizer

\textsuperscript{30}https://docs.wto.org/dol2fe/rectdoc.aspx?filename=q:/IP/C/W669R1.pdf&Open=True
\textsuperscript{33}https://thebrick.house/senators-against-generic-covid-19-vaccines-have-gotten-2x-pharma-cash/
\textsuperscript{34}https://www.warren.senate.gov/imo/media/doc/SenateTRIPSLetter4.15.21.pdf
\textsuperscript{36}https://www.modernatx.com/sites/default/files/content_documents/Moderna%20Political%20Giving%20Principles%20%20Disclosures%20%28June%202021%29.pdf
\textsuperscript{37}https://www.bio.org/press-release/support-trips-waiver-sets-dangerous-precedent;
\textsuperscript{38}https://www.bio.org/press-release/proposed-trips-waiver-wrong-way-attack-global-access-vaccines-developing-countries
explained, “We’re never going to get out of the global pandemic if these [drug] companies don’t start sharing vaccines and supporting other countries around the world to get everybody vaccinated.” Medecins sans Frontieres (“MSF”) launched a public campaign, called “Share the Tech—Save Lives,” urging Pfizer/BioNTech and Moderna to share the technology for their mRNA vaccines with manufacturers in Africa. MSF commissioned an analysis by Imperial College of London that identified at least seven manufacturers now producing injectable medicines and based in African countries that could produce mRNA COVID-19 vaccines, assuming full IP transfer and access to supplies.

Medical and scientific journals have published many articles addressing IP sharing and COVID-19 vaccine access. One such article in the Journal of the American Medical Association stated, “With the pandemic escalating in [low- and middle-income countries], a broad, simple IP waiver that covers all IP, including patents and trade secrets, and extends to all COVID-19 technologies is urgent.” The authors noted that the “extensive public funding” of Moderna’s vaccine bolsters the case for technology transfer: “Public funding should come with ethical obligations to share knowledge for the global public good.” Similarly, a recent British Medical Journal article stated: “It makes ethical, epidemiological, and economic sense to redistribute doses from high income countries, which have more than they can use and a disproportionate share of global supply, to low and middle income countries facing severe shortages. So does proactively transferring vaccine technology to help scale-up production in all regions so that no country has to go without.” It would be difficult to conceive of a topic that constitutes a more significant policy issue right now than inequitable access to COVID-19 vaccines.

The existence of a significant social policy issue distinguishes the Proposal from those analyzed in the determinations Moderna cites on pages 5-7 of the No-Action Request. All of those proposals sought to affect the kind of matters that are, in the Commission’s words, “fundamental to management’s ability to run a company on a day-to-day basis” and thus poorly suited for shareholder input.

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41 https://www.aidshealth.org/2021/09/protestors-push-moderna-to-drop-vaccine-prices-share-technology/
43 https://msfaccess.org/sharing-mrna-vaccine-technologies-save-lives
45 https://jamanetwork.com/journals/jama/fullarticle/2781756
46 https://jamanetwork.com/journals/jama/fullarticle/2781756
47 https://www.bmj.com/content/374/bmj.n2256
In three of the determinations—Abbott,\textsuperscript{49} IBM (2005),\textsuperscript{50} and IBM (2009)\textsuperscript{51}—
the proponents did not even respond to the companies’ no-action requests, so no
significant policy issue was identified. In Peregrine\textsuperscript{52} and AmerInst Insurance,\textsuperscript{53} the
proponents responded but did not identify significant policy issues transcending
ordinary business. The other proposals addressed matters ranging from off-label use
of prescription drugs for lethal injection\textsuperscript{54} to policies/plans regarding phase-out of
mercury amalgams from the company’s products\textsuperscript{55} to progress toward providing
Internet service and products for low-income customers.\textsuperscript{56} The Staff found the
proponents’ arguments that those subjects were significant policy issues
unpersuasive. Unlike those topics, the Proposal’s subject is clearly a significant
policy issue: It affects global public health and the global economy and has attracted
a great deal of attention and debate in the media and among elected officials,
regulators and the general public. In sum, the determinations on which Moderna
relies do not stand for the proposition that any proposal dealing with company
products or IP is excludable on ordinary business grounds; rather, they illustrate
that such a proposal may be excluded if it does not address a significant social
policy issue. Accordingly, they do not support exclusion of the Proposal.

Finally, the Proposal does not focus on ordinary business matters despite
touching on or referencing a significant policy issue, as Moderna claims.\textsuperscript{57} Instead,
access to Moderna’s products and its protection of IP are integral elements of the
significant policy issue on which the Proposal focuses. Several of the
determinations Moderna cites involved proposals that raised a significant policy
issue, but grafted on elements that implicated day-to-day management. In contrast,
the sole focus of the Proposal is a significant policy issue. This is distinct from the
determinations Moderna relies upon:

- In PetSmart,\textsuperscript{58} the proposal asked the company to require its suppliers to
  attest that they had not violated certain laws related to animal cruelty.
  PetSmart pointed out that the laws in question governed not only animal
cruelty, a significant policy issue, but also mundane matters such as record
keeping. The Staff concurred and granted relief, citing the breadth of the
laws referenced in the proposal. (It is worth noting that the Staff did not
concur with PetSmart’s more sweeping argument, which is similar to the one

\textsuperscript{49} Abbott Laboratories (Mar. 9, 2006).
\textsuperscript{50} International Business Machines Corp. (Jan. 6, 2005).
\textsuperscript{51} International Business Machines Corp. (Jan. 22, 2009).
\textsuperscript{52} Peregrine Pharmaceuticals Inc. (July 28, 2006).
\textsuperscript{53} AmerInst Insurance Group Ltd. (Apr. 14, 2005).
\textsuperscript{54} Pfizer Inc. (Mar. 1, 2016).
\textsuperscript{55} DENTSPLY International Inc. (Mar. 21, 2013)
\textsuperscript{56} AT&T Inc. (Jan. 4, 2017).
\textsuperscript{57} No-Action Request, at 9-10.
\textsuperscript{58} PetSmart, Inc. (Mar. 24, 2011).
Moderna makes here: that even if animal cruelty is a significant social policy issue, the selection of suppliers is an ordinary business matter, essentially negating significant social policy issue status.)

- The proposal in CIGNA asked the company to report on how it was “responding to regulatory, legislative and public pressures to ensure affordable health care coverage” as well as “the measures our company is taking to contain the price increases of health insurance premiums.” CIGNA argued that the second part of the resolved clause focused on the ordinary business matter of expense management, rather than health care reform, as shown by the supporting statement’s discussion of the relationship between administrative costs and premiums. The Staff concurred with CIGNA’s view that the proposal was excludable because it addressed “the manner in which the company manages its expenses.”

- In JPMorgan Chase, the proposal asked the company to assess “(i) the impact of [mountaintop removal (“MTR”)] mining by JPM’s clients on the environment and people of Appalachia, and (ii) the adoption of a policy barring future JPM financing of companies engaged in MTR mining.” The Staff agreed with the company that the second part of the proposal addressed the ordinary business matter of “decisions to extend credit or provide other financial services to particular types of customers.”

- The Staff concurred with Apache that it could exclude a proposal asking it to adopt a policy that not only barred discrimination against employees based on sexual orientation or gender identity, a significant policy issue, but also required that those topics be included in corporate diversity/inclusion training and prohibited discrimination in recognition of employee groups, corporate advertising and marketing policy, sale of goods and services, and charitable contributions based on sexual orientation or gender identity. The Staff’s determination stated that “some of the principles” the proposal asked Apache to include in the policy “relate to Apache’s ordinary business operations.”

- Capital One successfully argued that a proposal went beyond addressing the arguably significant policy issue of outsourcing to include several ordinary business matters such as “estimated or anticipated cost savings associated with job elimination actions taken by the company over the past five years.”

In other determinations on which Moderna relies, the proposal’s request was too remote from the putative significant policy issue:

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59 CIGNA Corporation (Feb. 23, 2015).
60 JPMorgan Chase & Co. (Mar. 12, 2010).
61 Apache Corporation (Mar. 5, 2008).
62 Capital One Financial Corp. (Feb. 3, 2005).
The proposal in McDonald’s asked the company to report on “the economic risks it faces as a result of campaigns targeting the Company over concerns about cruelty to chickens.” McDonald’s argued that “the assessment and management of the potential economic consequences on the Company—including additional costs—of consumer campaigns concerning the Company’s products implicates central considerations for the Company’s management of its business operations.” The proponent urged that the proposal’s subject was animal cruelty, and the Staff granted relief without explaining its reasoning. Given that the proposal did not ask McDonald’s to take any actions to minimize animal cruelty in its supply chain, it seems likely that the request for an analysis of the economic fallout was deemed too far afield from animal cruelty.

The Staff apparently agreed with the company that the proposal in AT&T—which asked the company to establish a program “to educate their employees about the lethal lifestyle in which, according to CDC data the disease known as HIV/AIDS is flourishing”—addressed workforce management, though the proponents’ failure to respond to AT&T’s request meant that the significant policy issue of the HIV/AIDS pandemic was never identified or discussed.

In Papa John’s, the significant policy issues identified by the proponent—“the environment, animal welfare and human health”—were likely viewed as both too general and too remote from the proposal’s request that Papa John’s “expand its menu offerings to include vegan cheeses and vegan meats,” though the Staff did not explain its reasoning in allowing exclusion.

Unlike the determinations discussed above, the Proposal makes a request that is in no way remote from the significant policy issue, but squarely addresses it in the resolved clause: studying the feasibility of transferring mRNA technology to manufacturers in low- and middle-income states to boost access to COVID-19 vaccines.

Last season, J&J unsuccessfully advanced an argument similar to Moderna’s in an effort to exclude a proposal seeking disclosure regarding the role of public funding in the company’s decisions affecting access to its COVID-19 products. Citing many of the same determinations as Moderna, J&J claimed that the proposal addressed the ordinary business matter of its pricing decisions in addition to an unidentified “potential significant policy issue” (presumably the COVID-19 pandemic or access to vaccines and therapeutics). The proponent, Oxfam, contended that access to COVID-19 vaccines and therapeutics, including the role of public funding in decisions regarding such access, was a significant policy issue despite the connection to pricing of J&J’s products. The Staff declined to grant relief.

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63 McDonald’s Corp. (Mar. 22, 2019).
64 AT&T Inc. (Dec. 28, 2015).
65 Papa John’s International (Feb. 13, 2015).
66 Johnson & Johnson (Feb. 12, 2021).
*The Proposal Would Not Micromanage Moderna Because it Requests a Feasibility Analysis and Would Not Dictate Whether or How Moderna Should Share IP*

Moderna contends that the Proposal would micromanage the Company because it seeks to control “the details of how and to whom the Company should transfer intellectual property relating to its COVID-19 vaccine” and because shareholders would not be sufficiently sophisticated to understand the information elicited by the Proposal. Moderna’s first claim is easily dispatched, as it rests on a misleading framing of the Proposal. The Proposal does not dictate that Moderna share IP but instead asks Moderna to analyze the feasibility of doing so. In the words of the recent Staff Legal Bulletin 14L (“SLB 14L”), the Proposal would not “limit discretion of the board or management.” Thus, Moderna’s argument that shareholders should not be permitted to make decisions about IP sharing is misplaced.

Moderna’s second argument is undermined by the extensive public debate regarding the Proposal’s subject, a factor SLB 14L states should be taken into account in determining whether a proposal micromanages. Contrary to Moderna’s assertion that “[i]ntellectual property use and protection are highly sophisticated topics for which there is not robust public discussion or analysis or broad-based understanding,” the media coverage, legislative and regulatory initiatives, and activism discussed in the previous section show that the Proposal’s subject is a matter of robust public debate not confined to legal or scientific specialists. There is no reason to believe that shareholders are less capable of understanding the factors that go into decisions about IP sharing than the non-specialists involved in the current debate. Voting on the Proposal would not require a shareholder to parse the finer points of patent law, production processes, or good manufacturing practices, and the feasibility report the Proposal requests could be written in such a way as to be understandable by non-specialists. We note that shareholders had the opportunity in the 2021 proxy season to vote on proposals addressing access to COVID-19 vaccines and therapeutics at widely-held pharmaceutical companies, and the Staff found that shareholders were sufficiently able to understand these topics. Accordingly, shareholders are in a position to make an informed judgment on the subject of the Proposal.

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67 No-Action Request, at 11.
69 See, e.g., Definitive Proxy Statement of Johnson & Johnson filed on Mar. 10, 2021, at 105 (shareholder proposal asking for a report on whether and how J&J subsidiary Janssen’s receipt of government financial support for development and manufacture of COVID-19 products is taken into account when taking actions that affect access); Definitive Proxy Statement of Pfizer Inc. filed on Mar. 12, 2021, at 102 (same)
Arguments much like the one Moderna makes here have been rejected by the Staff in determinations involving proposals addressing access. In J&J,\textsuperscript{70} the proposal asked for a report on whether and how public funding was taken into account when taking actions affecting access to COVID-19 vaccines and therapies, such as setting prices. The company unsuccessfully claimed that the proposal would micromanage because shareholders would not be in a position to understand the complexities of the factors affecting J&J’s pricing decisions. Similarly, in Gilead, the company claimed that the proposal would micromanage it, arguing that information on risks created by the relationship between prices and “clinical benefit, patient access, the efficacy and price of alternative therapies, drug development costs and the proportion of those costs borne by academic institutions or governments” was too complex and difficult for shareholders to understand.\textsuperscript{71} The Staff found this argument unpersuasive.

In sum, Moderna is not entitled to exclude the Proposal on ordinary business grounds because:

1. The role IP protections play in impeding access to COVID-19 vaccines is a significant social policy issue transcending ordinary business, as evidenced by the consistent and widespread public debate in the media and among policy makers. Unlike the proposals in the determinations Moderna cites, the sole subject of the Proposal is a significant social policy issue, and no other ordinary business matters are included.

2. Because the Proposal operates at a high level, asking for an analysis of the feasibility of sharing IP, rather than specifying the steps Moderna should take, and shareholders would be in a position to understand the disclosure it would elicit, the Proposal would not micromanage Moderna.

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For the reasons set forth above, Moderna has not satisfied its burden of showing that it is entitled to omit the Proposal in reliance on Rule 14a-8(i)(7). The Proponents thus respectfully request that Moderna’s request for relief be denied.

The Proponents appreciate the opportunity to be of assistance in this matter. If you have any questions or need additional information, please contact me at (907) 713-4963.

Sincerely,

\textsuperscript{70} Johnson & Johnson (Feb. 26, 2021).
\textsuperscript{71} Gilead Sciences, Inc. (Feb. 23, 2015).
Robert Silverman
Oxfam America

cc:  Lillian Brown, Esq.
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