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

DIVISION OF
CORPORATION FINANCE

April 23, 2024

Louis Rambo
Proskauer Rose LLP

Re: Shake Shack Inc. (the "Company")
Incoming letter dated February 5, 2024

Dear Louis Rambo:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by The Accountability Board for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal asks the Company for details regarding its claims that its chicken is "hormone-free."

There appears to be some basis for your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal relates to ordinary business matters. Accordingly, 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)(7). In reaching this position, we have not found it necessary to address the alternative bases for omission upon which the Company relies.

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/2023-2024-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: Matt Penzer
The Accountability Board

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February 5, 2024

Via Online Submission Form

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

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

Ladies and Gentlemen:

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

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

THE PROPOSAL

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

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

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

BASIS FOR EXCLUSION

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

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Very truly yours,

Louis Rambo

Enclosures

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

Proskauer

Exhibit A

[Shareholder Proposal]

THE
ACCOUNTABILITY
BOARD

November 3, 2023

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

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

To Whom it May Concern:

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

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

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

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

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

Respectfully,

Matt Prescott

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

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

THE
ACCOUNTABILITY
BOARD

Dear fellow shareholders,

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

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

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

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

This makes the company's claims difficult to understand.

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

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

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

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

Contact: [redacted]

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

March 6, 2024

Via Online Submission Form

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

Re: Shake Shack Inc. – Shareholder Proposal submitted by The Accountability Board

Ladies and Gentlemen:

I am writing on behalf of The Accountability Board (the "Proponent"), who is the beneficial owner of common stock of Shake Shack Inc. (the "Company") and who has submitted a shareholder proposal (the "Proposal") to the Company. This correspondence replies to a letter dated February 5, 2024 (the "Company Letter") sent to the Staff of the Division of Corporation Finance (the "Staff"), in which the Company contends that the Proposal may be excluded from its 2024 proxy statement. A copy of this reply is being emailed concurrently to counsel for the Company.

SUMMARY

For years the Company has been making representations to stakeholders and the public—including, since 2017, in certified Form 10-K filings—that its chicken products are 100% "hormone-free." In its 10-K filings, the Company has even included these statements in a section titled "Culinary Innovation." Concerned about the accuracy of such statements, the documented public concerns about hormones in meat and transparency in the supply chain, and corporate governance questions regarding the Company's review and approval of statements on such significant issues, the Proponent submitted a Proposal to the Company requesting the following:

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

The full Proposal is attached as Exhibit 1.

The Company argues for exclusion of the Proposal on the basis of Rule 14a-8(i)(7), claiming both that the Proposal concerns matters of ordinary business, and that it does not involve a significant policy issue; Rule 14a-8(i)(10), claiming that it has substantially implemented the proposal; and Rule 14a-8(i)(3), claiming that while it understands the Proposal perfectly, shareholders wouldn't. The Company is incorrect on all counts. As explained below, the Company has not carried—and indeed could not carry—its burden to prove the Proposal may be omitted from its 2024 proxy materials and the Proponent, therefore, asks that the Company's no-action request be denied.

ANALYSIS

The Proposal May Not be Excluded under Rule 14a-8(i)(7).

The Proposal cannot be excluded under Rule 14a-8(i)(7) because it does not relate to "ordinary business practices" and, in any event, it raises significant policy issues that transcend the Company's ordinary business. *See* Release No. 34-40018 (May 21, 1998).

A. The Proposal raises significant policy issues that transcend the Company's ordinary business.

Although the Company glosses on it briefly toward the middle of its letter, the Proponent begins its analysis here because of the dispositive effect of significant policy issues that transcend the Company's ordinary business.

The circumstances giving rise to this Proposal spring from an increasing stakeholder and public interest in food health and quality concerns, supply chain transparency, and robust governance policies and practices where these significant issues intersect. Hormone levels and residues in meat have long been matters of strong public interest, and have become growing concerns in recent years as the

population and livestock industries continue to expand. *See* Mississippi State University Extension: *Chickens Do Not Receive Growth Hormones: So Why All the Confusion?*, Publication 2767 (2019); Cornell University Program on Breast Cancer and Environmental Risk Factors: *Consumer Concerns About Hormones in Food*, Fact Sheet #37 (2000). Additionally, research shows a substantial public interest in corporate transparency when it comes to meat supply chains. In 2022, a research study by Merck Animal Health found that fully two-thirds of consumers ranked transparency in animal protein supply chains to be extremely or very important. *Transparency in Animal Protein: A Quantitative Consumer Research Report*, Merck Animal Health (2022).

Given the increasing significance of hormone concerns and supply chain transparency, it is more important than ever that companies have sufficient governance policies and oversight in place to ensure clear and *accurate* communication about hormones in their meat supply chains. Yet when it comes to the issue of hormones in chicken, confusion is often the norm rather than the exception. *See* Business Insider: "Why you should ignore that 'hormone free' label the next time you buy pork or chicken," Julia Calderone (Mar 2, 2016). In fact, USDA's Food Safety and Inspection Service will not approve "hormone-free" claims on chicken packages and "no added hormones" will only be permitted if accompanied by the explanatory disclaimer that "federal regulation prohibits the use of hormones in chicken." USDA, Food Safety and Inspection Service – *Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submissions* (2019).

This is the backdrop against which the concerns raised in the Proposal must be viewed. The Company's years-long representations of "hormone-free" chicken, even suggesting it was part of some sort of culinary innovation, gave rise to significant questions that involved public interest about hormones and supply chain transparency, as well as the Company's governance quality (particularly in light of the claims being made in certified and Board-approved regulatory filings).

The Proposal asks at a high level that the Company either validate or explain its claims, to provide disclosures relating to its governance, and to assess the public impacts of its statements. As evidence of the widespread continued public interest in the issues raised by the Proposal, the Company's no-action letter was widely covered by both business and industry media outlets alike. *See* Bloomberg: "Shake Shack Asks SEC to Block Shareholder Proposal on Chicken," Deena Shanker (Feb. 6, 2024); Fortune: "'No hormones, ever,' Shake Shack says about its chicken. Activist shareholders say that's true for every other chicken sold in the U.S. too," Amanda Gerut (Feb. 6, 2024); QSR Magazine: "Shake Shack's Claim of 'Hormone-Free' Chicken Challenged by Activist Group," (Feb. 8, 2024). An editorial in a leading poultry industry publication provided a blunt and unmistakable assessment of the Proposal: The Accountability Board "called Shake Shack's hormone-free

chicken labeling 'misleading.' And they're right." WATTPoultry: "Shake Shack challenged over hormone-free chicken claims," Elizabeth Doughman (Feb. 13, 2024). The reason it was so critical that the issue be addressed, according to the author, is that "[t]oday's chicken consumer values transparency above all else." *Id.*

In the face of such sweeping public concern about hormones in meat, supply chain transparency, and governance oversight regarding statements made about such issues, the Company simply asserts that the Proposal relates to "the manner in which the Company markets its products" and, as such, doesn't focus on a significant policy issue. Company Letter, p. 7. The Company does not acknowledge or rebut the strong public interest and concern about hormones in meat, about transparency and clarity in communications about its food supply, of the Proposal's explicit reference to "governance concerns about the quality of oversight" implicated by the issues. In fact, the Company's letter doesn't mention the term "governance" at all, despite the Staff's long-established view of its role in risk management of significant policy issues:

> [W]e note that there is widespread recognition that the board's role in the oversight of a company's management of risk is a significant policy matter regarding the governance of the corporation. In light of this recognition, a proposal that focuses on the board's role in the oversight of a company's management of risk may transcend the day-to-day business matters of a company and raise policy issues so significant that it would be appropriate for a shareholder vote.
>
> Staff Legal Bulletin No. 14E (October 27, 2009).

At bottom, the Company is not free to disregard the actual text of a Proposal or its Supporting Statement in favor of a broad categorical stamp. *See* Staff Legal Bulletin No. 14C (June 28, 2005) (explaining that consideration of the focus of a proposal to determine whether it raises a significant policy issue includes "both the proposal and the supporting statement as a whole"); *see also* Staff Legal Bulletin No. 14E (explaining that "[t]o the extent a proposal and supporting statement have focused on a company minimizing or eliminating operations that may adversely affect the environment or the public's health, we have not permitted companies to exclude these proposals under Rule 14a-8(i)(7)").

To be clear, as discussed in the next section, the Proponent disagrees that the focus of the Proposal is the manner of the Company's marketing. But the relevant point for purposes of the significant policy issue analysis is that the Company cannot carry its burden of proof while simply ignoring the actual text of the Proposal and Supporting Statement.

Finally, the Proponent notes that the Staff determinations cited by the Company Letter to argue against a transcendent policy issue involved proposals that are readily distinguishable. Company Letter, p. 6. Some included a mix of significant policy issues and ordinary business. *See PetSmart, Inc.* (Mar. 24, 2011) (proposal called for disclosures on significant policy matters *and* minor administrative matters); *Mattel, Inc.* (Feb. 10, 2012) (proposal called for report that included "several topics that relate to the Company's ordinary business operations and are not significant policy issues"); *Amazon.com, Inc. (Domini Impact Equity Fund)* (Mar. 28, 2019) (proposal related "generally to 'the community impacts' of the Company's operations" and did not focus on a transcendent issue).

It is well-established that determining whether a proposal deals with an ordinary business matter does not turn on categorical groupings, but "is made on a case-by-case basis." *See* Staff Legal Bulletin No. 14E n. 4, citing Exchange Act Release No. 34-40018. Yet, here and throughout its letter, the Company makes no attempt to compare or connect a factual parallel between the proposals at issue in the cited Staff determinations with the instant Proposal. Given the Company's burden of proof under Rule 14a-8(g), the complete lack of argument to even speak to the significant policy issues raised by the Proposal or square them with the distinguishing aspects of the cited Staff determinations would alone preclude concurrence with the Company's position. But in light of the demonstrated broad and strong public interest in the health implications of hormones in meat, transparency in the supply chain, and adequate governance oversight on such issues, it is clear the Proposal raises significant policy issues that transcend ordinary business.

B. The Proposal does not involve the type of day-to-day business decisions that cannot practically be submitted to a shareholder vote.

The Commission has explained that "ordinary business matters" for purposes of rule 14a-8(i)(7) are those tasks that 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." Exchange Act Release No. 34-40018 (May 21, 1998). The purpose of the exception 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." *Id.* In its 1976 release, the Commission commented that the exclusion applied "where proposals involve matters that are mundane in nature and do not involve any substantial policy or other considerations." Exchange Act Release No. 34-12999 (Dec. 3, 1976).

The instant Proposal does not intrude on any routine day-to-day business practices, but instead focuses on high-level questions about the substance of

hormone-related statements, supply chain transparency, and the quality of governance over policy matters that implicate public concerns about health and other significant issues. Nonetheless, the Company asserts the Proposal is excludable because it "relates to the manner in which the Company advertises its products." Company Letter, p. 4 (capitalization removed). But the Proposal doesn't relate to the manner of advertising or marketing issues in any way. The text makes plainly clear that the Proposal is narrowly focused on the integrity and transparency the Company's concerning hormone statements, on disclosures to assess the adequacy of the Board and management's oversight of such statements (which, again, have been made in certified regulatory filings), and about the public health and other impacts of its "hormone-free" claims. Ex. 1. The Company remains free to advertise or market its products in whatever manner it chooses.

The Company fails to offer even a single specific example of how the Proposal *actually* infringes on management's ability to conduct any manner of advertising, marketing, or core business matters. Instead, the Company relies only on overbroad generalities, mischaracterizations of the Proposal, and lengthy string cites to inapposite Staff determinations, none of which are sufficient to carry its burden under Rule 14a-8(g).

As discussed in the previous section, determining whether a Proposal deals with an ordinary business matter does not turn on categorical groupings, but "is made on a case-by-case basis." *See* Staff Legal Bulletin No. 14E n. 4, citing Exchange Act Release No. 34-40018. Yet, without any factual analysis attempting to specifically compare them to the instant Proposal, the Company simply string cites a long list of Staff determinations that it argues categorically show that proposals relating to advertising and marketing are excludable. Company Letter, p. 4-5. But even if we set aside the inaccurate assessment of the Proposal, an examination of the proposals in the no-action determinations relied on by the Company quickly distinguishes them from any applicability here. Some, for example, called for companies to withhold advertising from certain media outlets or from certain types of television shows. *See, e.g.,* Company Letter, p. 4-5, citing *Hershey Foods Corp.* (Dec. 27, 1989); *General Mills, Inc.* (Jul. 14, 1992). The instant Proposal seeks no such restrictions.

Other determinations relied on by the Company sought analyses of financial and reputational risks "to the company" from advertising activities. *See, e.g., Ford Motor Co.* (Feb. 2, 2017); *Nike, Inc.* (Jun. 19, 2020); *Johnson & Johnson* (Jan. 31, 2018); *Best Buy Co. Inc.* (Feb. 23, 2017); *FedEx Corp. (Trillium)* (Jul. 7, 2016). The instant Proposal seeks no such analysis of financial or reputational assessments, but rather focuses on the accuracy and public impacts of the Company's concerning hormone statements.

Still others in the page and a half of citations were distinguishable for various reasons specific to the proposal involved. In *The Coca-Cola Co.* (Jan. 21, 2009, recon. Denied Apr. 21, 2009), the proposal sought evaluation of product labeling changes, internet dissemination, and other advertising mechanisms. The instant Proposal seeks no such evaluations. In *Amazon.com, Inc.* (Mar. 23, 2018), the proposal called for Amazon to hold its "marketing partners to the same standard" it applies to its own website. The instant Proposal, however, focuses on the Company's own conduct and governance, and the resulting public impacts.

The Company's sweeping categorical citations, without any comparative analysis, provide no basis as to why the proposals under consideration above (or others referenced in the Company Letter) have any relevance to the instant Proposal; in fact, they do not.

Finally, the Company offers a broadly generalized closing paragraph, again without any factual support, claiming in various iterations that advertising and marketing is "fundamental to the day-to-day management of the Company's ordinary business" and "is not an appropriate subject for shareholders." Company Letter, p. 5. What's lacking from the paragraph—and indeed the rest of the Company Letter—is any explanation of *how* any of the specific disclosures called for by the Proposal *actually* involve "complex" decisions fundamental to daily business operations (or of how they might impact the Company's ability to advertise or market its products in any way at all). The boilerplate generality of such a statement, which could just as easily be applied to any shareholder proposal that even *mentions* a company's public statements regardless of context, cannot be sufficient to meet a company's burden of proof under Rule 14a-8(g), lest that rule be swallowed away without even a modicum of proof.

Nothing about the Proposal's call for high-level disclosures on important matters of policy and governance is "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." Release No. 34-40018 (May 21, 1998). And the Company has not proven otherwise.

The Proposal has not been Substantially Implemented and so May Not be Excluded under Rule 14a-8(i)(10).

The Proposal cannot be excluded under Rule 14a-8(i)(10) because it has not been substantially implemented by the Company. In analyzing such claims, the staff has stated that "a determination that [a company] has substantially implemented the proposal depends upon whether its particular policies, practices and procedures compare favorably with the guidelines of the proposal." *Texaco, Inc.* (March 28, 1991). While substantial implementation does not require that a company have taken the exact measures requested in the proposal, it does demand that the

essential objective of a proposal be satisfied. *See, e.g., Quest Diagnostics, Inc.* (Mar. 17, 2016). Where, as here, a proposal contains multiple elements, substantial implementation may be found if a company demonstrates that it has taken actions to address each element. *See, e.g., Southwestern Energy* (March 15, 2011) (political contributions disclosure proposal that sought accounting of direct and indirect expenditures was not substantially implemented by disclosure of direct expenditures only).

The Company does not deny the Proposal contains multiple elements. Nor does it make any argument that it's substantially (or partially) implemented the confirmations, explanations, or analysis of public impacts called for by the Proposal. Instead, the Company rejects the explicit text of the Proposal, astonishingly arguing that the Proposal's "ultimate goal" is not to get additional information about its hormone-free claims, governance accountability, or a risk analysis, "but to have the Company change how it advertises its products." Company Letter, p. 9. In its claim of substantial implementation based on a counter-textual mischaracterization of the Proposal, the Company is wrong on both the facts and the law.

A. The Company did not provide the disclosures called for by the Proposal.

Consistent with its subject matter and essential objective, the Proposal calls on the Company to either confirm its claims that its chicken is "hormone-free" or to provide information about the precise meaning of the claims. Ex. 1. The supporting statement documents the varied and repeated dissemination of the claims, including, since 2017, their appearance the "Culinary Innovation" and other sections of the Company's certified (and Board-signed) Form 10-K filings. *Id.* Because the claims appeared to be highly questionable, the Proposal explains that concerns arise about their accuracy, about management and the Board's oversight roles, and the public impacts from the many years these claims have been approved and disseminated. *Id.* In light of such concerns, the Proponent believes shareholders deserve disclosures to assess these concerns (and to help assess whether the Company's governance is adequately recognizing and addressing such concerns).

The Company doesn't contend that it actually made any of the disclosures called for by the Proposal, but essentially argues that the Proposal doesn't really want what it asks for. Company Letter, p. 9. Instead, without citing or analyzing any specific text, the Company unilaterally declares the underlying goal of the Proposal is simply to get it to change its "advertising," which it then self-servingly argues it has "fully satisfied" by changing its claims to read "no **added** hormones." *Id.* at 8. The Company makes no attempt whatsoever to harmonize its remarkable opinion with the Proposal's express references to the governance concerns that arise from its repeated inaccurate hormone claims that should not have been signed off on by management or the Board on regulatory filings for so many years. Nor, conversely, does it make any effort to explain the fact that although concerns about governance

and public impacts are expressly referenced in the Proposal, not once is there any mention of concern about the Company's "advertising." *Id.*

As a factual matter, even a cursory reading of the Proposal's Supporting Statement shows the Company is simply wrong that changing its claims to "no added hormones" is the Proposal's ultimate goal. Ex. 1. In two discrete paragraphs, the Proposal notes that because federal law prohibits the use of added hormones in chicken, there is no valid reason for *any* company to tout such a claim. *Id.* It certainly couldn't demonstrate "culinary innovation" or serve "to differentiate from competitors." *Id.*

The Company has not made the disclosures called for by the Proposal, nor has it made even minimal attempts to wrestle with the logical contradictions of its mischaracterizations of the text. As such, the Company has not carried its burden of proof to establish substantial implementation of the disclosures called for by the Proposal.

B. The Company did not provide the risk analysis of the public impacts from its inaccurate hormone claims, as requested by the Proposal.

Because the Company did not confirm the accuracy of its hormone-free claims, the Proposal's express call for additional disclosures and a public impact risk analysis was triggered. The Company attempts to make a *qualified* version of the confirmation called for by the Proposal, arguing that its use of the term "hormone-free" is "well understood in the market" to mean no *added* hormones. Company Letter, p. 8. Despite having the burden of proof, the Company offers no evidence to support this strained contention: no case law or regulations recognizing "hormone-free" as an acceptable description of chicken, no independent legal opinion, no customer survey or other consumer study. Nor does the Company reconcile the evidence that the term is, in fact, not understood the way it claims, e.g., industry studies, trade publication op-eds, USDA's failure to approve such terms on chicken packaging. *See MSU Extension, WATTPoultry, FSIS Labeling Guidelines, supra p. 3-4.*[1]

In any event, the Company does not provide the actual confirmation called for by the Proposal, thereby triggering the additional disclosures and risk analysis of the public impacts of its representations. As noted above, the Company apparently

[1] The Company wrongly suggests that the Proponent "well knows" the term "hormone-free" is widely understood to mean no added hormones. Company Letter, p. 8. In fact, the Proponent believes—and the wealth of evidence demonstrates—that the opposite is true, which is all the more reason to seek precise disclosures from the Company on its policies and practices regarding this important issue.

acknowledges the issue is one relating to "the health of the Company's consumers." Company Letter, p. 8. And that is an expressly stated purpose of the analysis the Proposal asks shareholders to vote on. Ex. 1. In arguing for substantial implementation, the Company doesn't claim it conducted a risk analysis or otherwise examined the impacts of its hormone claims on public health. It simply pronounces—the explicit text to the contrary notwithstanding—that "the ultimate goal of the Proposal is not to have the Company make additional claims about its products or to provide an analysis." Company Letter, p. 9. But the Company cannot substitute its own speculation about what it views as an unstated goal of the Proposal for the actual guidelines expressly contained in the Proposal itself. *See, e.g., The Hershey Company* (Mar. 28, 2022).

The Proposal seeks to inform shareholders about the Company's specific policies and practices relating to a significant issue raising concerns about governance and public health. While the Company is free to attempt to harmonize its positions and practices in its assessment of risks, it is not free to ignore shareholder concern about the Company's impacts on such important issues.

Because the Company has not published the risk analysis called for by the Proposal—nor any that aligns with the Proposal's request—it may not rely on the substantial implementation exception to exclude the Proposal from its proxy materials.

The Proposal is Clear, Calls for Concrete Actions, and Cannot be Excluded under Rule 14a-8(i)(3).

The Company's final argument for exclusion, invoking Rule 14a-8(i)(3), involves an audacious blend of mischaracterizations, personal aspersions directed at the Proponent, and an unsupported—and rather astonishing—claim that its chicken really *is* hormone-free (so long as "hormone-free" doesn't *actually* mean free of hormones). What the Company once more omits entirely is any supporting evidence, which is critical in light of its burden to *objectively* prove its claims:

> [R]ule 14a-8(g) makes clear that the company bears the burden of demonstrating that a proposal or statement may be excluded. As such, the staff will concur in the company's reliance on rule 14a-8(i)(3) to exclude or modify a proposal or statement only where that company has demonstrated *objectively* that the proposal or statement is *materially* false or misleading.
>
> Staff Legal Bulletin No. 14B, September 15, 2004 (first emphasis added).

The Company first suggests that the Proposal does not ask for any "concrete action," yet fails to explain why the explicit disclosures and risk analysis (including risks to public health concerns) called for by the Proposal's Resolved clause aren't

concrete actions. Company Letter, p. 9. Then the Company repeats its claim—again without proof—that it's chicken really "is '100% hormone-free' as that term is fully understood." Not only does the Company offer no support for such a remarkable claim, it makes no attempt to reconcile the myriad evidence against it. *See MSU Extension, WATTPoultry, FSIS Labeling Guidelines, supra p. 3-4.* And, of course, if it really was so clearly understood, there'd be no reason for the Company to now be changing its hormone claims.

In any event, the Company is free to explain its position about the meaning of "hormone-free" in response to a favorable vote on the Proposal. But the Company resists this, instead arguing that even just the Proposal's request *itself* would be confusing to shareholders. Company Letter, p. 9. It's rather extraordinary that the Company is claiming confusion from a Proposal seeking an explanation for the exact words repeatedly used by the Company over a period of more than five years now. And yet again, despite bearing the burden of proof, the Company offers no support for its conclusion.

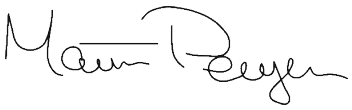
As in previous sections, the Company includes string cites of various Staff determinations involving Rule 14a-8(i)(3) that are clearly distinguishable. In *The Boeing Co.* (Mar. 2, 2011), the proposal called for relinquishment of "executive pay rights" without defining what constitutes an executive pay right. In the instant matter, it isn't the Proposal's words that need explaining, but the Company's own statements (which the Company has not disputed are quoted accurately). In *AT&T Inc.* (Feb. 21, 2014), the proposal called for Board to conduct a review of "policies and procedures relating to directors' moral, ethical and legal fiduciary duties and opportunities to ensure that the Company protects the privacy rights of American citizens protected by the U.S. Constitution." That's a decidedly different request than asking a company to explain its own words and their public impacts. The proposal in *Abbott Laboratories* (Jan. 13, 2014) called for an independent lead director "whose directorship constitutes his or her only connection to our company." What constitutes a "connection" wasn't explained. And the other determinations in the Company's string cite are equally distinguishable. All of them had clear internal problems of the proponents' own making; none of them were alleged to be confusing because, as in the instant Proposal's case, they asked a company to explain its own questionable words, which appeared in certified regulatory filings and numerous other channels, calling into question the company's governance oversight, policy concerns, and public impacts. Any confusion that exists in this matter is of the Company's own making, which only adds to the case to be made for the need to

provide shareholders with the disclosures and assessments the Proposal clearly requests.[2]

CONCLUSION

In conclusion, the Company has failed to carry its burden under Rule 14a-8(g) of establishing that the Proposal is excludable on any grounds. Accordingly, we request that the Company's request for no-action be declined. Thank you.

Respectfully,



Matt Penzer, Chief Legal Counsel
matt.penzer@accountabilityboard.org
(206) 778-8823

cc:
Louis Rambo

[2] While not legally relevant, the Proponent responds here to the disparaging (and meritless) remarks the Company improperly and inaccurately leveled accusing the Proponent of intentionally attempting to cause shareholder confusion and writing off the Proposal as "sarcastic humor." Company Letter, p. 9. The Proponent believes clarity and transparency regarding the hormone claims, governance issues, and public health interests raised in the Proposal are serious matters (as its source material referenced in this reply bear out), that these rationalizations and baseless personal attacks are an inappropriate response, and that shareholders are entitled to better.

Exhibit 1

THE ACCOUNTABILITY BOARD

Dear fellow shareholders,

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

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

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

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

This makes the company's claims difficult to understand.

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

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

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

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

Contact: SHAK@TABholdings.org

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

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April 16, 2024

Via Online Submission Form

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

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

Ladies and Gentlemen:

We refer to our letter dated February 5, 2024 (the "No-Action Request"), submitted on behalf of Shake Shack Inc. ("Shake Shack" or the "Company"), pursuant to which we requested that the Staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission (the "Commission" or the "SEC") concur with the Company's view that the shareholder proposal and supporting statement (the "Proposal") submitted by The Accountability Board, Inc. (the "Proponent") may be excluded from its proxy materials (the "2024 Proxy Materials") for Shake Shack's 2024 annual stockholders' meeting (the "2024 Annual Meeting"). On March 6, 2024, the Proponent submitted a letter to the Staff relating to the No-Action Request (the "Response Letter"). This letter supplements the No-Action Request. In accordance with Rule 14a-8(j), a copy of this letter is being sent to the Proponent.

In the No-Action Request, we outlined the basis for exclusion of the Proposal from the 2024 Proxy Materials in reliance upon (i) Rule 14a-8(i)(7), on the basis that the Proposal deals with matters relating to the Company's ordinary business operations, (ii) Rule 14a-8(i)(10), on the basis that the Company has substantially implemented the Proposal, and (iii) Rule 14a-8(i)(3), because the Proposal contains materially false and misleading statements in violation of Rule 14a-9 of the Exchange Act. Nothing in the Response Letter changes the determination that the Proposal may be excluded upon the bases set forth in the No-Action Request.

Rule 14a-8(i)(7) Analysis

As stated in the No-Action Request, the Proposal focuses on the Company's advertising and public presentation of its products on social media, in press releases, on the Company's website and in other public presentations. There is no more of a "core" ordinary business management function than marketing and public relations.

Contrary to the Proponent's claims, the Proposal is focused on ordinary business matters, and does not transcend ordinary business by focusing on hormone levels in meat, or communications about hormone levels in meat, or "governance and public health." As the Proponent acknowledges, the Proposal does not seek to change the hormone levels in the products sold by the Company, as the actual hormone levels in meat and any impact on public health is federally regulated. Rather, the Proposal relates, as the Proponent states, to company policies regarding "communication about hormones in their meat supply chains." As we discussed in depth in the No-Action Request, these communications are within the Company's core ordinary business functions. The academic journals cited by the Proponent and the news coverage of the Proponent's own activist activities do not support the Proponent's claims that the Company's advertising and public communications are "a significant policy issue" so that the Proposal transcends ordinary business. Absent any actual risk to public health and any serious contention about the actual hormone levels in the Company's products, the purported concerns raised by the Proponent do not support its claims that the Proposal is focused on a significant policy issue. The only real topic raised by the Proposal is the choice of words that Shake Shack employs when marketing its products to customers, a core business activity.

Further, the Staff has consistently granted relief under Rule 14a-8(i)(7) to companies seeking to exclude proposals that seek to micromanage the company. The Commission's release published in 1998 (Exchange Act Release No. 40018) (May 21, 1998) (the "1998 Release") states that "micromanagement may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific … methods for implementing complex policies." In SLB 14L, the Staff clarified that not all "proposals seeking detail or seeking to promote timeframes" constitute micromanagement, and that going forward 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." To that end, the Staff stated that this "approach is consistent with the Commission's views on the ordinary business exclusion, which is designed to preserve management's discretion on ordinary business matters but not prevent shareholders from providing high-level direction on large strategic corporate matters." SLB 14L (emphasis added). As noted above, contrary to the Proponent's claims in the Response Letter, while the Proposal does not focus on a significant social policy issue that transcends the Company's ordinary business operations, a proposal may be excluded under Rule 14a-8(i)(7) if it seeks to micromanage a company regardless of whether it implicates a significant policy issue or topic that transcends a company's ordinary business. See Staff Legal Bulletin No. 14E (Oct. 27, 2009), at note 8, citing the 1998 Release for the standard that "a proposal [that raises a significant policy issue] could be excluded under Rule 14a-8(i)(7), however, if it seeks 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 Staff has concurred with the exclusion of proposals addressing how companies interact with their shareholders on significant social policy issues because the proposals sought to micromanage how the companies addressed those policy issues. See *The Kroger Co. (Domini Impact Equity Fund)* (avail. Apr. 25, 2023) (concurring with the exclusion of a proposal that micromanaged the company even though the objective of the proposal was to "mitigate severe risks of forced labor and other human rights violations in the [c]ompany's produce supply chain"); *Amazon.com* (avail. Apr. 7, 2023), recon. denied (avail. Apr. 20, 2023) (concurring with the exclusion of a proposal addressing climate change goals due to micromanagement); *Chubb Limited (Green Century Equity Fund)* (avail. Mar. 27, 2023) (same). Here, the Proposal is seeking to micromanage the Company's marketing activities on a granular level, asking the Company's stockholders to consider line edits to the actual language of the Company's marketing materials.

For these reasons and the reasons set forth in the No-Action Request, the Proposal may be properly excluded from the Company's 2024 Proxy Materials pursuant to Rule 14a-8(i)(7).

Rule 14a-8(i)(10) Analysis

As set forth in the No-Action Request, the Proposal may be properly excluded from the Company's 2024 Proxy Materials pursuant to Rule 14a-8(i)(10) as the Company has already substantially implemented the Proposal by updating its public statements, including the Company's U.S. Animal Welfare Policy, blog posts, and other marketing and advertising materials. Since the submission of the No-Action Request, the Company has filed its Annual Report on Form 10-K with the SEC, which, consistent with its other public statements, confirms that the Company's chicken and other meat products have no added hormones.

Contrary to the Proponent's claims, the Company's basis for excluding the Proposal does not overlook nuances in the Proposal or the supporting statement and Response Letter, but actually highlights the inconsistencies between these statements – as the Proponent knows and has acknowledged repeatedly, all chickens have naturally occurring hormones, and the Company's revised marketing materials clarify that its chickens have no added hormones. Given the clarity in the Company's marketing materials and public communications on this point, no value would be obtained by asking stockholders to request the Company cause Shake Shack to "confirm" the hormone levels in its chicken, which are already known and described.

Further, the Proponent takes language out of context in order to misrepresent the Company's descriptions of its chicken, and therefore there is no value in providing details about Shake Shack's "culinary innovation" section as further mentioned in the Proposal and supporting statement. The Proposal and supporting statement both call out the fact that the "hormone-free" language appears in a "culinary innovation" section of the Company's public documents. The Proponent does so to misleadingly suggest that Shake Shack is claiming a "scientific breakthrough that eliminates naturally occurring hormones from chicken." In fact, the Company's "culinary innovation" section broadly describes the Company's food offerings and related innovations. A good-faith reading of the descriptions of any of the products in the section does not produce the inference that the Proponent is claiming. Further, the Company has substantially implemented the second half of the Proposal by its current marketing materials. A "risk analysis" about the use of "no hormones" would be a waste of money – as the Proponent acknowledges, the level of hormones in any chicken in the United States in its supporting statement is federally regulated.

For these reasons and the reasons set forth in the No-Action Request, the Proposal may be properly excluded pursuant to Rule 14a-8(i)(10) on the basis that the Company has substantially implemented the Proposal.

Rule 14a-8(i)(3) Analysis

As set forth above, the Proponent's Response Letter did not correct the flaws in its Proposal or supporting statement, or provide more clarity to shareholders seeking to determine how to vote on the Proposal, or the Company in seeking to implement the Proposal (if adopted) on exactly what actions or measures the Proposal requires. Accordingly, for the reasons set forth in the No-Action Request, the Proposal may be properly excluded pursuant to Rule 14a-8(i)(3).

CONCLUSION

For the reasons stated above and in the No-Action Request, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its proxy materials for the 2024 Annual Meeting. If you have any questions, or if the Staff is unable to concur with our view without additional information or discussions, we respectfully request the opportunity to confer with members of the Staff prior to the issuance of any written response to this letter. Please do not hesitate to contact the undersigned, Louis Rambo, at (202) 416-6878 or lrambo@proskuaer.com.

Very truly yours,

Louis Rambo

Enclosures

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

THE ACCOUNTABILITY BOARD

April 22, 2024

Via Online Submission Form

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel

Re: Shake Shack Inc. – Shareholder Proposal submitted by The Accountability Board

Ladies and Gentlemen:

The Accountability Board (the "Proponent") submits this correspondence in reply to a late-stage supplemental letter Shake Shack Inc. (the "Company") sent to us on the evening of April 16, 2024.

Despite having the burden of proof under Rule 14a-8(g), the Company's four-page supplement largely ignores, rather than refutes, our March 6 Reply's extensive fact evidence relating to the significant policy issues raised by the Proposal, the Company's failure to show any actual interference with day-to-day business operations, and the distinguishing analyses of the no-action proceedings on which the Company imprudently relied in its initial letter.

Further, the Company, for the first time, attempts to introduce a new basis for exclusion (micromanagement) not raised in its initial letter back on February 5. But even if the timeliness rule permitted such last-minute surprises—which it doesn't—the merits of the Company's one-paragraph argument on this issue would fail.

Finally, the Company includes two brief sections on substantial implementation and vagueness that add no new information to its February letter and no substantive response to the March 6 Reply.

The Proposal May Not be Excluded under Rule 14a-8(i)(7)

The Proposal raises questions about the Company's positions and communications about hormones in its meat products. Concerns about such issues, as we documented in our March 6 Reply, stem from a widespread, significant, and

increasing stakeholder and public interest in health and food quality concerns, supply chain transparency, and robust governance policies and practices where these significant issues intersect. *See* Reply, pp. 2-4. The Proponent included reference materials to a wide variety of sources, including academia, business publications, poultry industry media, and even the U.S. government. *Id.* Without explanation, the Company discounts (and mostly ignores) that evidence. *See* Supp. Letter, p. 2.

Instead of addressing the evidence of widespread public interest and concern about hormones, the Company suggests a showing of "actual risk to public health" is required before a Proposal may be deemed to transcend ordinary business. *Id.* If the suggestion is that shareholders must wait for global temperatures to significantly rise before raising concerns about a Company's climate policies and practices, that suggestion is wrong and not grounded in any authority or Staff guidance. Indeed, it would be a dangerous precondition to have to wait for such a threat to materialize before shareholders can seek analysis of risks implicated by policies and practices that are known to invoke public health concerns.

Separate from the significant policy issues, we included in our March 6 Reply a discrete section explaining why the Proposal does not involve actions that 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." *See* Reply, p. 5 (citing Exchange Act Release No. 34-40018 (May 21, 1998)). We expressly called attention to the Company's failure in its initial letter to provide any explanation or actual examples of *how* any of the specific disclosures called for by the Proposal *actually* involve decisions fundamental to daily business operations (or of how they might impact the Company's ability to advertise or market its products in any way at all). *See* Reply, p. 7. Despite bearing the burden of proof, the Company's Supplemental Letter still offers no such explanation or examples.

Instead, the Company reverts to its boilerplate generality that marketing and public communications are core ordinary business matters. *See* Supp. Letter, pp. 1-2. As we noted in our Reply, however, such generalities, which could just as easily be applied to any shareholder proposal that even *mentions* a company's public statements regardless of context, cannot be sufficient to meet a company's burden of proof under Rule 14a-8(g), lest that rule be swallowed away without even a modicum of proof. *See* Reply, p. 7.

Consider, for example, a company without climate change mitigation goals but publicly promoting itself as eco-friendly. That company couldn't exclude a Proposal seeking details about its climate change policies and governance practices simply because it elects to publicly promote itself as environmentally responsible. Nor can the instant Proposal be excluded for seeking a risk analysis that would provide

insight into governance practices and public health issues simply because the Company has communicated the issues in some public forum.

We next address the new micromanagement argument first raised by the Company 10 weeks after submitting its no-action letter on February 5. *See* Supp. Letter, pp. 2-3. Rule 14a-8(j)(1), which speaks to the timing of no-action challenges requires the Company to have submitted "*its reasons* … no later than 80 calendar days" before filing its proxy statement. (Emphasis added.)

Presuming the Company still intends to file its proxy statement later this month, it cannot timely raise a new "reason" for exclusion less than two weeks before issuing its proxy statement. But even if this late claim were considered, the Company's argument would fail on its merits.

Its new argument for exclusion depends on the Company's unfounded claim that the Proposal is an attempt to subject its marketing materials to "line edits." *See* Supp. Letter, pp. 2. But the Proposal dictates no such granularity, seeking only an explanation of the Company's oversight of the issue and a risk analysis of the impacts of its claims. As it did in its initial letter, the Company includes in this paragraph a number of string cites (with broad parenthetical conclusions), but without conducting any factual analysis comparing the proposals at issue with the instant proposal. Doing so would have shown the proposals at issue in the micromanagement proceedings cited by the Company were materially different in their prescriptiveness, and so distinguishable, from the instant Proposal.

The Proposal May Not be Excluded under Rule 14a-8(i)(10)

In its March 6 Reply, the Proponent noted that "where, as here, a proposal contains multiple elements, substantial implementation may be found if a company demonstrates that it has taken actions to address each element." *See* Reply, p. 8 (citing *Southwestern Energy* (March 15, 2011) (political contributions disclosure proposal that sought accounting of direct and indirect expenditures was not substantially implemented by disclosure of direct expenditures only)).

As in its initial Letter, the Company does not dispute in its new filing that the Proposal contains multiple elements. Nor does it make any argument that it's substantially implemented each element, particularly the governance disclosures or analysis of public impacts called for by the Proposal.

Instead, the Company makes a novel argument that, having confirmed its chicken isn't really hormone-free, the further disclosure and risk analysis called for by the Proposal would provide "no value" and "be a waste of money." *See* Supp. Letter, p. 3. First, whether a report that analyzes risk is worth conducting is a question for shareholders to decide, not a principle of law that would entitle the

Company to keep the matter from them entirely. And notably, again, despite bearing the burden of proof, the Company offers no authority to the contrary. Second, the Company misinterprets the subject of the report, which is designed to shed light for shareholders on the impact of its hormone-free claims, including on public health. Such analysis would also shed light for shareholders on the quality of the Company's governance over such matters and the substantive impacts of its policies on issues of significant concern.

The Proposal May Not be Excluded under Rule 14a-8(i)(3)

The final section of the Supplemental Letter consists of two sentences that essentially just refer Staff to other non-specific sections of the Supplemental and February letters for its arguments on Rule 14a-8(i)(3). *See* Supp. Letter, p. 3.

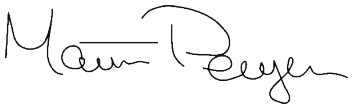
The section fails to refute or otherwise speak to any specific aspect of the March 6 Reply addressing this issue. *See* Reply, pp. 10-11. Remarkably, the Company doesn't even attempt to walk back or explain its claim—again, made without proof—that it's chicken really "is '100% hormone-free' as that term is fully understood." *See* February Letter, p. 11; *see also* Reply, p. 11.

In short, this section of the Company's Supplemental Letter doesn't *actually* supplement anything. As such, Proponent relies on its March 6 Reply explaining why the Company hasn't carried its burden of proof on this (or any other) issue. *See* Reply, pp. 10-11.

CONCLUSION

Except for an untimely and unsupported new claim of micromanagement, the Company's last-minute Supplemental Letter adds no new information to its February submission and, notably, fails to address or refute the detailed evidence and arguments presented in the Proponent's March 6 Reply. As such, the Company has failed to carry its burden under Rule 14a-8(g) of establishing that the Proposal is excludable on the bases of any grounds asserted.

Respectfully,



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cc: Louis Rambo