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

DIVISION OF
CORPORATION FINANCE

March 2, 2023

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

Re: Johnson & Johnson (the "Company")
Incoming letter dated December 12, 2022

Dear Marc S. Gerber:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by Mercy Investment Services, Inc. and co-filers for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal requests the Company's board of directors establish and report on a process by which the impact of extended patent exclusivities on product access would be considered in deciding whether to apply for secondary and tertiary patents.

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

Copies of all of the correspondence on which this response is based will be made available on our website at https://www.sec.gov/corpfin/2022-2023-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: Lydia Kuykendal
Mercy Investment Services, Inc.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
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BY EMAIL (shareholderproposals@sec.gov)

December 12, 2022

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

RE: Johnson & Johnson – 2023 Annual Meeting
Omission of Shareholder Proposal of
Mercy Investment Services, Inc. and co-filers[1]

Ladies and Gentlemen:

Pursuant to Rule 14a-8(j) promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), we are writing on behalf of our client, Johnson & Johnson, a New Jersey corporation, to request that the Staff of the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission (the "Commission") concur with Johnson & Johnson's view that, for the reasons stated below, it may exclude the shareholder proposal and supporting statement (the "Proposal") submitted by Mercy Investment Services, Inc. ("Mercy") and co-filers from

[1] The following shareholders have co-filed the Proposal: Benedictine Sisters of Mount St. Scholastica, Inc.; Benedictine Sisters of Virginia; Bon Secours Mercy Health, Inc.; CommonSpirit Health; the Daughters of Charity, Province of St. Louise; Dominican Sisters of Springfield Illinois; Providence St. Joseph Health; the Sisters of St. Francis of Philadelphia; and The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America. The co-filers' submissions and related correspondence are not relevant to this no-action request and have been omitted from the exhibits hereto but may be supplementally provided upon the Staff's request.

the proxy materials to be distributed by Johnson & Johnson in connection with its 2023 annual meeting of shareholders (the "2023 proxy materials"). Mercy and the co-filers are sometimes collectively referred to as the "Proponents."

In accordance with Section C of Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("SLB 14D"), we are emailing this letter and its attachments to the Staff at shareholderproposals@sec.gov. In accordance with Rule 14a-8(j), we are simultaneously sending a copy of this letter and its attachments to the Proponents as notice of Johnson & Johnson's intent to omit the Proposal from the 2023 proxy materials.

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

I. The Proposal

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

> **RESOLVED**, that shareholders of Johnson & Johnson ("JNJ") ask the Board of Directors to establish and report on a process by which the impact of extended patent exclusivities on product access would be considered in deciding whether to apply for secondary and tertiary patents. Secondary and tertiary patents are patents applied for after the main active ingredient/molecule patent(s) and which relate to the product. The report on the process should be prepared at reasonable cost, omitting confidential and proprietary information, and published on JNJ's website.

II. Basis for Exclusion

We hereby respectfully request that the Staff concur with Johnson & Johnson's view that the Proposal may be excluded from the 2023 proxy materials pursuant to Rule 14a-8(i)(7) because the Proposal deals with matters relating to Johnson & Johnson's ordinary business operations.

III. Background

Johnson & Johnson received the Proposal via FedEx on November 7, 2022, accompanied by a cover letter from Mercy, dated November 4, 2022, and a letter from The Northern Trust Company, dated November 4, 2022, verifying Mercy's continuous ownership of at least the requisite amount of stock for at least the requisite period preceding and including the date of submission of the Proposal. Copies of the Proposal and cover letter are attached hereto as Exhibit A.

IV. The Proposal May be Excluded Pursuant to Rule 14a-8(i)(7) Because the Proposal Deals with Matters Relating to Johnson & Johnson's Ordinary Business Operations.

Under Rule 14a-8(i)(7), a shareholder proposal may be excluded from a company's proxy materials if the proposal "deals with matters relating to the company's ordinary business operations." In Exchange Act Release No. 34-40018 (May 21, 1998) (the "1998 Release"), the Commission stated that the policy underlying the ordinary business exclusion rests on two central considerations. The first recognizes that certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. The second consideration relates to the degree to which the proposal 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. As demonstrated below, the Proposal implicates both of these two central considerations.

A. The Proposal relates to Johnson & Johnson's ordinary business matters.

The Commission has stated that a proposal requesting the dissemination of a report is excludable under Rule 14a-8(i)(7) if the substance of the proposal involves a matter of ordinary business of the company. *See* Exchange Act Release No. 34-20091 (Aug. 16, 1983) ("[T]he staff will consider whether the subject matter of the special report or the committee involves a matter of ordinary business; where it does, the proposal will be excludable under Rule 14a-8(c)(7)."); *see also Netflix, Inc.* (Mar. 14, 2016) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that requested a report describing how company management identifies, analyzes and oversees reputational risks related to offensive and inaccurate portrayals of Native Americans, American Indians and other indigenous peoples, how it mitigates these risks and how the company incorporates these risk assessment results into company policies and decision-making, noting that the proposal related to the ordinary business matter of the "nature, presentation and content of programming and film production").

In accordance with the policy considerations underlying the ordinary business exclusion, the Staff has consistently permitted exclusion under Rule 14a-8(i)(7) of shareholder proposals relating to the products and services offered for sale by a company. *See, e.g.*, *Wells Fargo & Co.* (Jan. 28, 2013, *recon. denied* Mar. 4, 2013) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company prepare a report discussing the adequacy of the company's policies in addressing the social and financial impacts of its direct deposit advance lending service as relating to the ordinary business matter of "products and services offered for sale by the company," stating in particular that "[p]roposals concerning the sale of particular products and services are generally excludable under rule 14a-8(i)(7)"); *Pfizer Inc.* (Mar. 1, 2016) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a report describing the steps the company has taken to prevent the sale of its medicines to prisons for the purpose of aiding executions, noting that the proposal "relates to the sale or distribution of [the company's] products"); *The Walt Disney Co.* (Nov. 23, 2015) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company's board of directors approve the release of a specific film on Blu-ray, noting that the proposal "relates to the products and services offered for sale by the company"); *FMC Corp.* (Feb. 25, 2011, *recon. denied* Mar. 16, 2011) (permitting exclusion under Rule 14a-8(i)(7) of a proposal seeking, among other things, an immediate moratorium on sales and a withdrawal from the market of a specific pesticide, as well as other certain pesticides, noting that the proposal "relates to the products offered for sale by the company"); *JPMorgan Chase & Co.* (Mar. 16, 2010) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the board implement a policy mandating that the company cease its current practice of issuing refund anticipation loans, noting that the proposal related to the company's "decision to issue refund anticipation loans" and that "[p]roposals concerning the sale of particular services are generally excludable under rule 14a-8(i)(7)").

More specifically, under those same policy considerations underlying the ordinary business exclusion, the Staff has recognized that decisions regarding intellectual property matters are fundamental to a company's day-to-day operations and cannot, as a practical matter, be subject to direct shareholder oversight. In *International Business Machines Corporation* (Jan. 22, 2009), for example, the proposal requested that the company take steps to further the advancement of open source software, which the company noted allows recipients to "freely copy, modify and distribute the program source code without paying a royalty fee." In permitting exclusion under Rule 14a-8(i)(7), the Staff noted that the proposal related to the company's "ordinary business operations (i.e., the design, development and licensing of [the company's] software products)."

In this instance, the Proposal focuses primarily on how Johnson & Johnson decides to safeguard and protect the intellectual property rights associated with the products it develops and sells, which is an ordinary business matter. Specifically, the Proposal's resolved clause asks Johnson & Johnson's board of directors (the "Board") to establish and report on a process by which Johnson & Johnson would consider the impact of extended patent exclusivities on one particular factor—product access—in deciding whether to apply for secondary and tertiary patents. The Proposal's supporting statement then goes into detail on aspects of Johnson & Johnson's intellectual property strategy. Read together, the Proposal's resolved clause and supporting statement clearly articulate a concern with the ordinary business matter of how Johnson & Johnson manages and protects the intellectual property rights associated with the products that it develops and sells.

Decisions with respect to how Johnson & Johnson safeguards and protects the intellectual property rights associated with the products it develops and sells are at the heart of Johnson & Johnson's business as a global healthcare company and are so fundamental to its day-to-day operations that they cannot, as a practical matter, be subject to direct shareholder oversight. These decisions involve numerous business and scientific considerations, along with the balancing of complex factors such as: whether patents meet the recognized standards of novelty, inventive step and utility; Johnson & Johnson's ability to use intellectual property rights to facilitate collaboration and enable partnerships with counterparts; laws and regulations relating to effective and fair competition; the potential for patent disputes and related legal, market and business uncertainty; economic incentives to continue to innovate and develop new treatments, cures and vaccines; and socio-economic challenges unique to different countries and markets. In administering its strategy with respect to developing intellectual property and safeguarding the associated intellectual property rights, Johnson & Johnson also must consider the timeframe and its future plans, since obtaining a patent often takes several years and requires passing through a robust and thorough process that involves extensive review by patent examiners and substantive responses by the patent applicant. Balancing the numerous and complex factors is plainly within the ambit of management's operations of Johnson & Johnson's ordinary business. Therefore, the Proposal may be excluded under Rule 14a-8(i)(7) as relating to Johnson & Johnson's ordinary business operations.

We note that a proposal may not be excluded under Rule 14a-8(i)(7) if it is determined to focus on a significant policy issue. The fact that a proposal may touch upon a significant policy issue, however, does not preclude exclusion under Rule 14a-8(i)(7). Instead, the question is whether the proposal focuses primarily on a matter of broad public policy versus matters related to the company's ordinary business operations. *See* 1998 Release; Staff Legal Bulletin No. 14E (Oct. 27, 2009). The Staff has consistently permitted exclusion of shareholder proposals where the proposal focused on ordinary business matters, even though it also related to a potential significant policy issue. For example, in *PetSmart, Inc.* (Mar. 24, 2011), the proposal requested that the company's board require suppliers to certify that they had not violated certain laws regulating the treatment of animals. Those laws affected a wide array of matters dealing with the company's ordinary business operations beyond the humane treatment of animals, which the Staff has recognized as a significant policy issue. In permitting exclusion under Rule 14a-8(i)(7), the Staff noted the company's 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, e.g., CIGNA Corp.* (Feb. 23, 2011) (permitting exclusion under Rule 14a-8(i)(7) when, although the proposal addressed the potential significant policy issue of access to affordable health care, it also asked the company to report on expense management, an ordinary business matter); *Capital One Financial Corp.* (Feb. 3, 2005) (permitting exclusion under Rule 14a-8(i)(7) when, although the proposal addressed the significant policy issue of outsourcing, it also asked the company to disclose information about how it manages its workforce, an ordinary business matter).

In this instance, even if the Proposal were to touch on a potential significant policy issue, the Proposal's overwhelming concern with how Johnson & Johnson decides to safeguard and protect the intellectual property rights associated with the products it develops and sells demonstrates that the Proposal's focus is on ordinary business matters. In particular, the Proposal's supporting statement demonstrates this focus by highlighting the economic effects of Johnson & Johnson's product development and associated intellectual property decisions. Therefore, even if the Proposal could be viewed as touching upon a significant policy issue, its focus is on ordinary business matters.

B. The Proposal seeks to micromanage Johnson & Johnson.

The Staff has consistently agreed that shareholder proposals attempting to micromanage a company by probing too deeply into matters of a complex nature upon which shareholders, as a group, are not in a position to make an informed judgment are excludable under Rule 14a-8(i)(7). *See* 1998 Release; *see also, e.g., The Coca-Cola Co.* (Feb. 16, 2022); *Deere & Co.* (Jan. 3, 2022); *JPMorgan Chase & Co.* (Mar. 22, 2019); *Royal Caribbean Cruises Ltd.* (Mar. 14, 2019); *Walgreens Boots Alliance, Inc.* (Nov. 20, 2018); *RH* (May 11, 2018); *Amazon.com, Inc.* (Jan. 18, 2018). As the Commission has explained, a proposal may probe too deeply into matters of a complex nature if it "involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies." *See 1998 Release*. Recently, in Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("SLB 14L"), the Staff explained that a proposal can be excluded on the basis of micromanagement based "on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management."

In this instance, the Proposal seeks to micromanage Johnson & Johnson by dictating the establishment of a particular intellectual property analysis that inappropriately limits discretion of the board and management. It does so by requesting that Johnson & Johnson establish a process by which the impact of extended patent protections on one particular factor—product access—would be considered, and reported on, in deciding whether to apply for secondary and tertiary patents. The Proposal thus seeks to direct how Johnson & Johnson develops and safeguards its intellectual property.

As described above, decisions concerning whether, when and how Johnson & Johnson applies for patents require complex business judgments by Johnson &

Johnson's management that must account for myriad factors. In making such decisions, Johnson & Johnson's management must consider and balance these factors, including the costs incurred in developing intellectual property, compliance and risk considerations, legal and regulatory factors and the characteristics of Johnson & Johnson's products, among other matters. By seeking to impose a specific process on Johnson & Johnson's management of its intellectual property, the Proposal attempts to micromanage Johnson & Johnson by probing too deeply into matters of a complex nature upon which shareholders, as a group, are not in a position to make an informed judgment.

Accordingly, the Proposal should be excluded from Johnson & Johnson's 2023 proxy materials pursuant to Rule 14a-8(i)(7) as relating to its ordinary business operations.

V. Conclusion

Based upon the foregoing analysis, Johnson & Johnson respectfully requests that the Staff concur that it will take no action if Johnson & Johnson excludes the Proposal from its 2023 proxy materials. Should the Staff disagree with the conclusions set forth in this letter, or should any additional information be desired in support of Johnson & Johnson's position, we would appreciate the opportunity to confer with the Staff concerning these matters prior to the issuance of the Staff's response. Please do not hesitate to contact the undersigned at (202) 371-7233.

Very truly yours,

Marc S. Gerber

Enclosures

cc: Marc Larkins
Worldwide Vice President, Corporate Governance & Corporate Secretary
Johnson & Johnson

Lydia Kuykendal
Director of Shareholder Advocacy
Mercy Investment Services, Inc.

Lydia Kuykendal, on behalf of Bon Secours Mercy Health, Inc., Daughters of Charity, Province of St. Louise, Providence St. Joseph Health and The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America

Rose Marie Stallbaumer, OSB
Benedictine Sisters of Mount St. Scholastica

Andrea Westkamp, OSB
Treasurer
Benedictine Sisters of Virginia

Laura Krausa, MNM
System Director Advocacy Programs
CommonSpirit Health

Sr. Marcelline Koch, OP
Dominican Sisters of Springfield Illinois

Tom McCaney
Director, Corporate Social Responsibility
The Sisters of St. Francis of Philadelphia

EXHIBIT A

(see attached)

November 4, 2022

Marc Larkins
Corporate Secretary
Johnson & Johnson
One Johnson & Johnson Plaza
New Brunswick, NJ 08933

Dear Mr. Larkins:

Mercy Investment Services, Inc. ("Mercy"), as the investment program of the Sisters of Mercy of the Americas, has long been concerned not only with the financial returns of its investments, but also with their social and ethical implications. We believe that a demonstrated corporate responsibility in matters of the environment, and social and governance concerns fosters long-term business success. Mercy, a long-term investor, is currently the beneficial owner of shares of Johnson & Johnson.

The enclosed proposal asks the Board of Directors to establish and report on a process by which the impact of extended patent exclusivities on product access would be considered in deciding whether to apply for secondary and tertiary patents. Secondary and tertiary patents are patents applied for after the main active ingredient/molecule patent(s) and which relate to the product.

Mercy is the lead filer for the enclosed proposal for inclusion in the 2023 proxy statement, in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934. As of November 4, 2022, Mercy has been a shareholder continuously for more than three years, holding at least $2,000 in market value and will continue to invest in at least the requisite number of shares for proxy resolutions through the annual shareholders' meeting. The verification of ownership by our custodian, a DTC participant, is included in this packet. One of the filers will attend the Annual Meeting to present the resolution as required by SEC rules.

We look forward to having productive conversations with the company. Per SEC requirements, I am available to meet with the company via teleconference on November 29 or November 30 at either 12 noon ET/11 am CT or 12:30 pm ET/11:30 am CT respectively. Co-filers will participate if available or authorize us to engage with the Company on their behalf, within the meaning of Rule 14a-8(b)(iii)(B). Please direct all future correspondence regarding this proposal to me via the information below.

Best regards,

Lydia Kuykendal
Director of Shareholder Advocacy
[redacted]

2039 North Geyer Road · St. Louis, Missouri 63131-3332 · 314.909.4609 · 314.909.4694 (fax)
www.mercyinvestmentservices.org

RESOLVED, that shareholders of Johnson & Johnson ("JNJ") ask the Board of Directors to establish and report on a process by which the impact of extended patent exclusivities on product access would be considered in deciding whether to apply for secondary and tertiary patents. Secondary and tertiary patents are patents applied for after the main active ingredient/molecule patent(s) and which relate to the product. The report on the process should be prepared at reasonable cost, omitting confidential and proprietary information, and published on JNJ's website.

SUPPORTING STATEMENT: Access to medicines, especially costly specialty drugs, is the subject of consistent and widespread public debate in the U.S. A 2021 Rand Corporation analysis concluded that U.S. prices for branded drugs were nearly 3.5 times higher than prices in 32 OECD member countries.[1] The Kaiser Family Foundation has "consistently found prescription drug costs to be an important health policy area of public interest and public concern."[2]

This high level of concern has driven policy responses. The Inflation Reduction Act empowers the federal government to negotiate some drug prices.[3] State measures, including drug price transparency legislation, copay caps, and Medicaid purchasing programs, have also been adopted.[4] The House Committee on Oversight and Reform (the "Committee") launched a far-reaching investigation into drug pricing in January 2019.[5]

Intellectual property protections on branded drugs play an important role in maintaining high prices and impeding access. When patent protection on a drug ends, generic manufacturers can enter the market, reducing prices. But branded drug manufacturers may try to delay generic competition by extending their exclusivity periods.

Among the abuses described by the Committee's December 2021 report is construction of a "patent thicket," which consists of many "secondary patents covering the formulations, dosing, or methods of using, administering, or manufacturing a drug"; they are granted after the drug's primary patent, covering its main active ingredient or molecule, has been granted.[6] In June 2022, citing the impact of patent thickets on drug prices, a bipartisan group of Senators urged

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[1] https://www.rand.org/news/press/2021/01/28.html

[2] https://www.kff.org/health-costs/poll-finding/public-opinion-on-prescription-drugs-and-their-prices/

[3] https://www.kff.org/medicare/issue-brief/explaining-the-prescription-drug-provisions-in-the-inflation-reduction-act/

[4] https://www.americanprogress.org/article/state-policies-to-address-prescription-drug-affordability-across-the-supply-chain/

[5] https://oversight.house.gov/sites/democrats.oversight.house.gov/files/DRUG%20PRICING%20REPORT%20WITH%20APPENDIX%20v3.pdf, at i.

[6] https://oversight.house.gov/sites/democrats.oversight.house.gov/files/DRUG%20PRICING%20REPORT%20WITH%20APPENDIX%20v3.pdf, at 79.

the U.S. Patent and Trademark Office to "take regulatory steps to . . . eliminate large collections of patents on a single invention."

JNJ sells Remicade, a branded biologic drug that treats inflammatory disorders. Although biosimilar competitors have now launched,[7] Remicade has been cited as an example of a patent thicket, with over 100 patents.[8] With AbbVie, JNJ jointly markets cancer treatment Imbruvica, which had 165 patent applications and 88 granted patents as of July 2020.[9]

In our view, a process that considers the impact of extended exclusivity periods on patient access would ensure that JNJ considers not only whether it can apply for secondary and tertiary patents but also whether it should do so. A more thoughtful process could, we believe, bolster JNJ's reputation and help avoid regulatory blowback resulting from high drug prices and perceptions regarding abusive patenting practices.

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[7] See https://www.sec.gov/ix?doc=/Archives/edgar/data/0000200406/000020040622000022/jnj-20220102.htm, at 25.

[8] See https://www.bloomberg.com/news/articles/2017-09-07/this-shield-of-patents-protects-the-world-s-best-selling-drug

[9] http://www.i-mak.org/wp-content/uploads/2020/08/I-MAK-Imbruvica-Patent-Wall-2020-07-42F.pdf

MERCY
INVESTMENT
SERVICES, INC

January 3, 2023

Via e-mail at shareholderproposals@sec.gov

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

Re: Request by Johnson & Johnson to omit proposal submitted by Mercy Investment Services Inc. and co-filers

Ladies and Gentlemen,

Pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, Mercy Investment Services, Inc. and nine co-filers (together, the "Proponents") submitted a shareholder proposal (the "Proposal") to Johnson & Johnson ("JNJ" or the "Company"). The Proposal asks JNJ to establish and report on a process by which the impact of extended patent exclusivities on patient access would be considered in deciding whether to apply for secondary and tertiary patents on JNJ's products.

In a letter to the Division dated December 12, 2022 (the "No-Action Request"), JNJ stated that it intends to omit the Proposal from its proxy materials to be distributed to shareholders in connection with the 2023 annual meeting of shareholders. JNJ argues that it is entitled to exclude the Proposal in reliance on Rule 14a-8(i)(7), on the ground that the Proposal relates to JNJ's ordinary business operations. Because the Proposal deals with the significant social policy issue of the impact of intellectual property ("IP") protections on patient access, JNJ has not met its burden of proving its entitlement to exclude the Proposal, and the Proponents respectfully ask that its request for relief be denied.

2039 North Geyer Road . St. Louis, Missouri 63131-3332 . 314.909.4609 . 314.909.4694 (fax)
www.mercyinvestmentservices.org

The Proposal

The Proposal states:

> **RESOLVED**, that shareholders of Johnson & Johnson ("JNJ") ask the Board of Directors to establish and report on a process by which the impact of extended patent exclusivities on product access would be considered in deciding whether to apply for secondary and tertiary patents. Secondary and tertiary patents are patents applied for after the main active ingredient/molecule patent(s) and which relate to the product. The report on the process should be prepared at reasonable cost, omitting confidential and proprietary information, and published on JNJ's website.

Background

Prescription drugs have assumed an increasingly important role in American health care: the proportion of health care spending attributable to retail prescription drugs rose from 7% in the 1990s to 12% in 2019.[1] Congress has carefully balanced incentivizing scientific innovation in pharmaceuticals with promoting competition in the name of affordability.[2] Obtaining a patent for a new drug gives the manufacturer exclusive marketing rights for a specified period, generally 20 years, to reward the company for the risk and expense involved in developing the drug.[3] Once the patent expires, manufacturers are free to make generic versions of the drug—or in the case of a biologic, a biosimilar version—which drives down prices.[4]

At least, that's how the system is supposed to work. Branded drug makers have powerful incentives to prolong exclusivity periods, especially those applicable to top-selling drugs. They exploit weaknesses in the U.S. patent and health care systems in several ways, including product hopping, or switching patients to a slightly different product with a later-expiring patent; pay-for-delay settlements, in which putative generic manufacturers receive something of value in exchange for not launching a generic competitor; and "evergreening" leading to so-called "patent thickets," numerous overlapping patents on a drug filed after the primary patent has been granted and the drug approved by the Food and Drug Administration ("FDA")—referred to as secondary and tertiary[5] patents--that are expensive and time-consuming for a potential generic manufacturer to challenge.[6]

Overpatenting keeps prices high, impeding access. That impact is particularly troubling given that U.S. drug prices are the highest in the world[7]; the rise in spending on prescription drugs

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1 https://www.gao.gov/prescription-drug-spending
2 https://www.healthaffairs.org/do/10.1377/forefront.20181106.217086/full/
3 https://sgp.fas.org/crs/misc/R46221.pdf, at 1.
4 https://www.fda.gov/files/drugs/published/Exclusivity-and-Generic-Drugs--What-Does-It-Mean-.pdf
5 A tertiary patent applies to a drug-device combination, such as the EpiPen. https://blog.petrieflom.law.harvard.edu/2018/04/30/tertiary-patents-an-emerging-phenomenon/
6 See https://sgp.fas.org/crs/misc/R46221.pdf, at 1-2. Secondary patents may address matters such as manufacturing methods, dosing, and methods of administering the drug. https://sgp.fas.org/crs/misc/R46221.pdf, at 9.
7 https://www.commonwealthfund.org/publications/podcast/2022/feb/its-the-patents-stupid-why-drugs-cost-so-much-in-us

outpaces increases in health care spending more generally[8]; and three in 10 Americans on a prescription drug report not taking their medicine as prescribed due to cost.[9] Studies show that the introduction of generic versions of a drug lead to significantly lower prices.[10] Over 100 patents have been granted on JNJ's Remicade, an anti-inflammatory biologic drug[11] that is one of the Company's top-selling prescription medicines.[12] The Proposal asks JNJ to take the impact on patient access into account when making decisions about applying for secondary and tertiary patents.

Ordinary Business

JNJ argues that the Proposal deals with the Company's ordinary business operations, and is thus excludable in reliance on Rule 14a-8(i)(7), because it relates to the Company's products and how JNJ "decides to safeguard and protect the intellectual property rights associated with the products it develops and sells."[13] JNJ also claims that the Proposal would micromanage it. Neither argument has merit.

It is true that the Division generally regards a company's product offerings and choices about IP protections as ordinary business matters. If a proposal focuses on a significant social policy issue, however, the fact that it implicates a company's products or IP does not support exclusion on ordinary business grounds.

Last season, the Staff recently considered and rejected arguments much like those JNJ now makes when determining that three different proposals to pharmaceutical firms addressing IP transcended ordinary business. First, JNJ sought to exclude a proposal asking for a report on the public health costs of its limited sharing of COVID-19 vaccine IP. As it does here, JNJ argued that the proposal's subject was the distribution of the company's products and services, the licensing of its technologies, and/or decisions about safeguarding its IP, all of which JNJ urged were ordinary business.[14] The proponent framed the proposal's topic as "whether companies should pursue profits in a manner that degrades critical environmental and social systems, with a focus on the Company's approach to guarding intellectual property involving COVID-19 vaccine technology." The Staff declined to grant relief.

Second, the Staff rejected two no-action requests making arguments nearly identical to JNJ's here about proposals focusing on the role of IP protections in impeding access to vaccines. The proposals, which were submitted to Pfizer and Moderna, asked the companies to report to shareholders on the feasibility of transferring intellectual property and technical knowledge to facilitate the production of COVID-19 vaccine doses in low- and middle-income countries. Both Pfizer and Moderna urged that the proposal addressed the ordinary business matters of the company's products and IP protections.[15] The proponent countered that the proposal's topic, ensuring equitable access to vaccines and the role of IP protections in maintaining inequity, was a

8 https://sgp.fas.org/crs/misc/R46221.pdf, at 2.
9 https://www.kff.org/health-costs/poll-finding/public-opinion-on-prescription-drugs-and-their-prices/
10 https://www.fda.gov/media/133509/download, at 2; https://www.fda.gov/media/161540/download, at 6; https://pubmed.ncbi.nlm.nih.gov/34904207/; https://www.cbo.gov/sites/default/files/105th-congress-1997-1998/reports/pharm.pdf; https://www.cbo.gov/publication/57772
11 www.bloomberg.com/news/articles/2017-09-07/this-shield-of-patents-protects-the-world-s-best-selling-drug
12 See https://www.sec.gov/ix?doc=/Archives/edgar/data/0000200406/000020040622000022/jnj-20220102.htm, at 24.
13 No-Action Request, at 3-4.
14 Johnson & Johnson (Feb. 8, 2022)
15 Pfizer, Inc. (Feb. 23, 2022); Moderna, Inc. (Feb. 8, 2022).

significant social policy issue. The Staff did not concur with either company, stating that the proposal "transcends ordinary business matters."

In the third set of determinations, the Staff declined to allow two pharmaceutical companies to exclude proposals dealing with anticompetitive practices on ordinary business grounds. The proposals asked the companies to report to shareholders on how their boards oversee risks related to anticompetitive practices. The supporting statements discussed patent thickets as well as other practices. The companies claimed that the proposals addressed the ordinary business matters of legal compliance and/or management of IP. The proponents urged that the proposals dealt with the significant social policy issue of "the strategic, reputational, and public policy risks created by anticompetitive practices."[16]

Similar outcomes have been reached on other kinds of proposals involving companies' products where proponents persuaded the Staff that a significant policy issue was implicated. For example:

- The Staff did not agree with JNJ's[17] claim that a proposal asking the company to establish and implement standards of response to the HIV/AIDS pandemic in developing countries could be excluded in reliance on the ordinary business exclusion because it addressed product development, research and testing; the proponent had urged that the proposal addressed the significant policy issue of the HIV/AIDS pandemic.
- Gilead's[18] argument that a proposal seeking a report on risks related to rising pressures to contain specialty drug prices was excludable on ordinary business grounds was not persuasive, even though Gilead had pointed to the focus on its products and pricing decisions.
- In Denny's,[19] the Staff did not concur with the company's claim that a proposal asking it to sell at least 10% cage-free eggs by volume was excludable because it implicated the sale of particular products, siding with the proponent's characterization of the proposal's subject as the significant policy issue of "[r]educing cruel confinement conditions for egg-laying hens" (i.e., animal cruelty).

The role of IP protections in keeping drug prices high and limiting patient access is a subject of consistent and widespread public debate, the standard applied in determining whether a proposal's subject transcends ordinary business operations.[20]

Media have given substantial attention to the issue in the past few years, despite its technical nature. Some examples include:

- Editorial Board, "Save America's Patent System," The New York Times, Apr. 17, 2022[21] ("Twelve of the drugs that Medicare spends the most on are protected by more than 600

16 AbbVie, Inc. (Mar. 11, 2022); Pfizer, Inc. (Mar. 8, 2022).
17 Johnson & Johnson (Feb. 7, 2003)
18 Gilead Sciences Inc. (Feb. 23, 2015); see also Celgene Corporation (Mar. 19, 2015); Vertex Pharmaceuticals Inc. (Feb. 25, 2015). The Staff has long declined to allow exclusion on ordinary business grounds of proposals addressing drug pricing, which quite directly implicate companies' products. See Eli Lilly and Company (Feb. 25, 1993); Bristol-Myers Squibb Company (Feb. 21, 2000) (same); Warner Lambert Company (Feb. 21, 2000) (same).
19 Denny's Inc. (Mar. 17, 2009)
20 See, e.g., www.sec.gov/interps/legal/cfslb14a.htm.
21 https://www.nytimes.com/2022/04/16/opinion/patents-reform-drug-prices.html

patents in total, according to the committee. Many of those patents contain little that's truly new. But the thickets they create have the potential to extend product monopolies for decades. In so doing, they promise to add billions to the nation's soaring health care costs -- and to pharmaceutical coffers.")

- Editorial Board, "How Big Pharma plays games with drug patents and how to combat it," USA Today, Jan. 18, 2019[22] ("The pharmaceutical industry has shown contempt for this attempt at balance through a range of abusive tactics. Two common, and sometimes related, maneuvers are called 'evergreening' and 'thicketing.'")
- Robin Feldman, "Our patent system is broken. And it could be stifling innovation," The Washington Post, Aug. 8, 2021[23]
- Berkeley Lovelace Jr., "'Gaming' of U.S. patent system is keeping drug prices sky high, report says," NBCNews.com, Sept. 15, 2022[24]
- "Biden Drug Price Pressure on Patent Office Draws Skeptics," Bloomberg, Sept. 21, 2021[25] ("Patents—viewed by some as an obstacle to greater competition in pharmaceuticals—have seized the spotlight in a wide-ranging government effort to get at high drug costs.")
- Cynthia Koons, "This Shield of Patents Protects the World's Best-selling Drug," Bloomberg Businessweek, Sept. 7, 2017[26] (focuses on patent thickets and specifically mentions JNJ's Remicade)
- Matthew Lane, "The Key to Lowering Drug Prices is Improving Patent Quality," Techdirt, July 21, 2021[27] ("One of the key drivers of these rising costs are the habit of drug makers of blocking competition on older drugs that have proven themselves to be blockbusters. And the best modern strategy for doing that is creating a patent thicket.")
- Alexander Sammon, "It's Time for Public Pharma," The American Prospect, July 25, 2022[28] ("Much of the research and development for new discoveries is publicly funded, and yet drugmakers charge whatever they want, with exclusive monopoly patent grants. Not content to just enjoy that bounty, those companies work to extend that monopoly period, through slight changes to the treatment (known as 'patent evergreening') or even bribing generic companies to not compete ('pay for delay').")
- Joe Cahill, "Humira Patent Strategy Makes the Case for Reform," Crain's Chicago Business, May 20, 2019[29]
- Gunjan Sinha, "How Patent Extensions Keep Some Drug Costs High," Undark, June 16, 2021[30]
- Sarah Gantz, "Costs for lifesaving drugs have skyrocketed. Some experts say there are intentional moves to prevent generic competition," Philadelphia Inquirer, May 12, 2019

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22 https://www.usatoday.com/story/opinion/2019/07/18/big-pharma-plays-games-drug-patents-you-pay-editorials-debates/1769746001/
23 https://www.washingtonpost.com/outlook/2021/08/08/our-patent-system-is-broken-it-could-be-stifling-innovation/
24 https://www.nbcnews.com/health/health-news/gaming-us-patent-system-keeping-drug-prices-sky-high-report-says-rcna47507
25 https://news.bloomberglaw.com/health-law-and-business/biden-drug-price-pressure-on-patent-office-draws-skeptics
26 https://www.bloomberg.com/news/articles/2017-09-07/this-shield-of-patents-protects-the-world-s-best-selling-drug
27 https://www.techdirt.com/2021/07/21/key-to-lowering-drug-prices-is-improving-patent-quality/
28 https://prospect.org/health/its-time-for-public-pharma/
29 https://www.chicagobusiness.com/joe-cahill-business/humira-patent-strategy-makes-case-reform
30 https://undark.org/2021/06/16/how-patent-extensions-keep-some-drug-costs-high/

- Sarah Karlin-Smith and Brent D. Griffiths, "FDA to examine anticompetitive practices by drug industry," Politico, July 17, 2017[31]
- Ryan Chatelain, "House committee report blasts drug pricing strategies as 'troubling,'" NY1, Dec. 10, 2021[32]
- David Chanen, "Price caps on drugs part of AG's plan," Star Tribune (Minneapolis, MN), Feb. 20, 2020 (discussing Minnesota AG's report that highlighted abuse of patent system)
- Joe Nocera, "Here's how drug companies game the patent system," Chicago Tribune, Oct. 23, 2017[33]
- Matthew Lane, "To rein in Big Pharma over high drug prices, start with patent reform," Roll Call, Jan. 17, 2020[34] ("A significant reason for the skyrocketing price of prescription drugs is that major pharmaceutical companies have enjoyed an effective open season on raising drug prices. Armed with government-sponsored monopolies obtained through shameless abuse of the patent system, Big Pharma has been free to raise prices at their leisure.")
- Garrett Johnson and Wayne T. Brough, "Big pharma is abusing patents, and it's hurting America," CNN, Sept. 13, 2019[35] ("Large pharmaceutical companies have continually engaged in the strategic accumulation of patents to restrict patient access to more affordable drugs by delaying the entry of generic options into the market.")
- David Blumenthal, "The U.S. Can Lower Drug Prices Without Sacrificing Innovation," Harvard Business Review, Oct. 1, 2021[36] ("One strategy they use is creating so-called 'patent thickets' around existing products. . . . [Challenging those patents] can take years to adjudicate and cost huge sums in legal fees. Meanwhile, Big Pharma maintains its monopolies and pricing power for decades longer than the 17 years contemplated under current law.")
- Tahir Amin, "The problem with high drug prices isn't 'foreign freeloading,' it's the patent system," CNBC, June 25, 2018[37]
- "Congress takes aim again at pharmaceutical giant over patent-stacking for brand-name drugs," The Examiner (Washington, DC), May 20, 2021
- Robert Pearl, "Why Patent Protection in the Drug Industry is Out of Control," Forbes, Jan. 19, 2017[38]
- Ahmed Aboulenein, "Consumer group says drugmakers abuse U.S. patent system to keep prices high," Reuters, Sept. 16, 2022[39]
- Sarah Jane Tribble, "Drugmakers Play the Patent Game to Ward Off Competitors," NBCNews.com, Oct. 2, 2018[40]

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31 https://www.politico.com/tipsheets/prescription-pulse/2017/07/17/fda-to-examine-anticompetitive-practices-by-drug-industry-221368
32 https://www.ny1.com/nyc/all-boroughs/politics/2021/12/10/house-committee-report-blasts-drug-pricing-strategies-as--troubling-
33 https://www.chicagotribune.com/opinion/commentary/ct-perspec-drugs-health-care-pharm-1024-20171023-story.html
34 https://www.rollcall.com/2020/01/17/to-rein-in-big-pharma-over-high-drug-prices-start-with-patent-reform/
35 https://www.cnn.com/2019/09/12/perspectives/drug-patents-abuse/index.html
36 https://hbr.org/2021/10/the-u-s-can-lower-drug-prices-without-sacrificing-innovation
37 https://www.cnbc.com/2018/06/25/high-drug-prices-caused-by-us-patent-system.html
38 https://www.forbes.com/sites/robertpearl/2017/01/19/why-patent-protection-in-the-drug-industry-is-out-of-control/?sh=73fa684178ca
39 https://www.reuters.com/business/healthcare-pharmaceuticals/consumer-group-says-drugmakers-abuse-us-patent-system-keep-prices-high-2022-09-16/
40 https://www.nbcnews.com/health/health-news/drugmakers-play-patent-game-ward-competitors-n915911

Legislators and regulators have also focused on the impact of IP protections—and secondary and tertiary patents in particular—on access.

Bipartisan legislation addressing patent thickets has been introduced in Congress. The REMEDY Act introduced in 2019 provided that a generic manufacturer could enter the market after primary patent expiration without having to litigate the validity of secondary patents.[41] The TERM Act, also introduced in 2019, would have shifted the burden of supporting secondary patents from the putative generic or biosimilar manufacturer to the branded drug maker and required the U.S. Patent and Trademark Office ("PTO") to review its practices related to secondary patents.[42] The Second Look at Drug Patents Act would have required publication of patents filed after approval of a new drug or abbreviated new drug application by the FDA in order to facilitate validity challenges.[43] The Affordable Prescriptions for Patients Through Improvements to Patent Litigation Act of 2019[44] would have limited the number of patents that the manufacturer of a biologic medicine can assert in a lawsuit against a company seeking to sell a biosimilar version.

In 2021, the Affordable Prescriptions for Patients Through Promoting Competition Act, which prohibited product-hopping, was introduced.[45] Product hopping occurs when branded drug makers persuade prescribers to switch patients to products that have the same active ingredient as the branded medicine, but with a small difference like a more convenient dosing schedule, tweaked manufacturing process or different method of administration that forms the basis for a secondary or tertiary patent. These efforts generally occur shortly before the primary patent expires; the new product's later-expiring patent preserves exclusivity, minimizing revenue loss when generic versions of the original product become available.

In June 2022, a bipartisan group of Senators wrote to the director of the PTO about patent thickets. The letter stated: "In the drug industry, with the most minor, even cosmetic, tweaks to delivery mechanisms, dosages, and formulations, companies are able to obtain dozens or hundreds of patents for a single drug. This practice impedes generic drugs' production, hurts competition, and can even extend exclusivity beyond the congressionally mandated patent term." It closed by asking the PTO to "consider changes to your regulations and practices to address [overpatenting] problems where they start, during examination. . . We therefore ask that your office issue a notice of proposed rulemaking or a public request for comments" on several questions related to secondary patents.[46]

Congressional committees have held many hearings addressing secondary and tertiary patents and access to medicines. In July 2021, the Senate Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights held a hearing on "A Prescription for Change: Cracking Down on Anticompetitive Conduct in Prescription Drug Markets." At that hearing, the vice president for Biosimilars Patents and Legal for Fresenius Kabi, a company that specializes in injectable medicines, biosimilars and medical technologies, testified that the "root cause" of unaffordable U.S. drug prices is patent thickets. She explained that numerous low-quality secondary

41 https://www.durbin.senate.gov/newsroom/press-releases/durbin-cassidy-introduce-remedy-act-to-lower-drug-prices-by-curbing-patent-manipulation-promoting-generic-competition#:~:text=The%20REMEDY%20Act%20amends%20FDA,that%20delay%20generic%20market%20entry.
42 https://www.congress.gov/bill/116th-congress/house-bill/3199/text
43 https://www.congress.gov/bill/116th-congress/senate-bill/1617
44 https://www.congress.gov/bill/116th-congress/house-bill/3991
45 https://www.congress.gov/bill/117th-congress/house-bill/2873
46 www.leahy.senate.gov/imo/media/doc/20220608%20Letter%20to%20PTO%20on%20repetitive%20patents.pdf

patents extend exclusivity and are prohibitively expensive for a potential generic or biosimilar maker to challenge.[47]

The House Judiciary Antitrust Subcommittee held a hearing in April 2021 on "Treating the Problem: Addressing Anticompetitive Conduct and Consolidation in Health Care Markets." [48] Experts on drug companies' anticompetitive practices testified, including Professor Robin Feldman, who discussed the relationship between secondary patents and product-hopping.[49]

The House Committee on Energy and Commerce's Subcommittee on Health held a hearing on "Lowering the Cost of Prescription Drugs: Reducing Barriers to Market Competition" in March 2019.[50] Witnesses testified regarding the impact of anticompetitive practices, including patent thickets. A government relations officer from Kaiser Permanente stated:

> Drug companies have virtually unfettered discretion to raise prices, which imposes considerable—and often devastating—financial hardship on patients and families. We are very concerned by over-patenting, exclusivity gaming and pernicious lifecycle management trends. Too often, the primary goal of these tactics is to leverage the law to stifle competition, rather than to protect meaningful clinical advancements.[51]

The House Oversight Committee initiated a sweeping investigation in 2019 into "pricing and business practices in the pharmaceutical industry."[52] After reviewing more than 1.5 million pages of internal company documents and holding five hearings, the Committee issued a report in December 2021, concluding that "companies have manipulated the patent system and marketing exclusivities granted by the Food and Drug Administration to extend their monopolies far longer than lawmakers envisioned when they created these systems."[53] The Committee found that the companies it investigated "have obtained over 600 patents on the 12 drugs examined, which could potentially extend their monopoly periods to a combined total of nearly 300 years."[54] Secondary patents were a focus of the Committee's investigation; its report opined that "in many cases, pharmaceutical

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47 https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20July%2013%202021_Rachel_Moodie.pdf

48 https://oversight.house.gov/news/press-releases/house-judiciary-antitrust-subcommittee-to-hold-hearing-on-anticompetitive

49 https://docs.house.gov/meetings/JU/JU05/20210429/112518/HHRG-117-JU05-Wstate-FeldmanR-20210429.pdf, at 3-4

50 https://energycommerce.house.gov/committee-activity/hearings/hearing-on-lowering-the-cost-of-prescription-drugs-reducing-barriers-to

51 https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-Barrueta-Drug%20Pricing%20Hearing-031319.pdf; see also https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-Davis-Drug%20Pricing%20Hearing-031319.pdf (head of Association for Accessible Medicines stating that "Increasingly, brand-name drug companies are building patent 'estates' around their drugs, not just for the original innovative research, but for much smaller changes that may not be deserving of decades-long monopolies. . . . Addressing abuse of the patent system must be front-and-center if Congress is effectively going to reduce drug prices for patients.").

52 oversight.house.gov/sites/democrats.oversight.house.gov/files/DRUG%20PRICING%20REPORT%20WITH%20APPENDIX%20v3.pdf, at i.

53 oversight.house.gov/sites/democrats.oversight.house.gov/files/DRUG%20PRICING%20REPORT%20WITH%20APPENDIX%20v3.pdf, at i.

54 oversight.house.gov/sites/democrats.oversight.house.gov/files/DRUG%20PRICING%20REPORT%20WITH%20APPENDIX%20v3.pdf, at ix.

companies have obtained secondary patents covering topics that are not particularly innovative."[55] The resulting extended exclusivity periods allow "drug companies to raise prices without threat to their market share, and lead to higher prices for American patients and increased spending by government programs."[56]

The House Ways and Means Committee's Subcommittee on Health held a hearing in March 2019 on the cost of drugs to the Medicare program. In his opening statement, Subcommittee Chairman Doggett noted that "[o]ver the last decade, 74 percent of all pharmaceutical patent applications were not for new innovative cures, but were for modifying existing drugs, which often took the form of what's referred to as evergreening, simply to protect monopoly pricing, not to provide new drugs."[57] One witness commented that "instead of innovation, we are seeing secondary patents piled on to old drugs over and over again. When a company makes a secondary change to a drug, such as adjusting the drug's dosage, the R&D investment is often far less than is required for the drug's initial development. And in addition, the change may not mean much from a therapeutic standpoint. So, we may be lavishing rewards without getting the innovation that we desperately need."[58] Another witness identified patent thickets as key to high drug prices.[59]

The Senate Finance Committee held a hearing on "Drug Pricing in America: A Prescription for Change, Part I"[60] in January 2019, at which the Committee heard testimony on drug makers' anticompetitive practices. The Executive Vice President of the John and Laura Arnold Foundation linked patenting practices and drug prices, testifying at the hearing:

> Instead of encouraging research into the next generation of cures, firms with drugs approved by the Food and Drug Administration (FDA) are incentivized to hold on to their monopolies as long as possible and deploy as many anticompetitive tactics as possible to ensure generics or biosimilars are not available. . . . Between 2005 and 2015, over 75 percent of drugs associated with new patents were for drugs already on the market. Of the roughly 100 bestselling drugs, nearly 80 percent obtained an additional patent to extend their monopoly period at least once; nearly 50 percent extended it more than once. For the 12 top selling drugs in the United States, manufacturers filed, on average, 125 patent applications and were granted 71. For these same drugs, invoice prices have increased by 68 percent.[61]

A 2017 hearing held by the House Judiciary Committee addressed "Antitrust Concerns and the FDA Approval Process." Although some witnesses focused on other anticompetitive practices, the testimony from Harvard's Aaron Kesselheim, an expert on drug pricing, described the use of

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55 oversight.house.gov/sites/democrats.oversight.house.gov/files/DRUG%20PRICING%20REPORT%20WITH%20APPENDIX%20v3.pdf, at 81.

56 oversight.house.gov/sites/democrats.oversight.house.gov/files/DRUG%20PRICING%20REPORT%20WITH%20APPENDIX%20v3.pdf, at 77.

57 https://www.youtube.com/watch?v=aA3cDgRp37s (at 3:15).

58 https://www.youtube.com/watch?v=aA3cDgRp37s (at 10:09).

59 https://www.youtube.com/watch?v=aA3cDgRp37s (at 20:22).

60 https://www.finance.senate.gov/hearings/drug-pricing-in-america-a-prescription-for-change-part-i

61 https://www.finance.senate.gov/imo/media/doc/29JAN2019MILLERSTMNT.pdf

secondary patents to delay generic entry.[62] In addition to the general problem posed by patent thickets, Kesselheim explained how secondary patents facilitate product hopping.[63]

Anticompetitive conduct in the pharmaceutical industry, including abuse of the patent system, is a priority for federal agencies. In 2021, President Biden issued Executive Order 14036 entitled "Executive Order on Promoting Competition in the American economy" (the "E.O."). It provided, among other things, that "[t]he Secretary of Health and Human Services shall . . . [work to] lower the prices of and improve access to prescription drugs and biologics [and] continue to promote generic drug and biosimilar competition" by "help[ing] ensure that the patent system, while incentivizing innovation, does not also unjustifiably delay generic drug and biosimilar competition beyond that reasonably contemplated by applicable law."[64] The E.O. also directed the Secretary of Health and Human Services to take various steps to "promote generic drug and biosimilar competition." Pursuant to the E.O., the FDA and PTO are collaborating to implement strategies to lower drug prices.[65]

The previous administration also focused on how patenting practices can delay generic entry. In 2017, the FDA sought comment on the "appropriate balance between encouraging innovation in drug development and accelerating the availability to the public of lower cost alternatives to innovator drugs."[66] The Federal Register notice of the related meeting explained that, "In some cases . . . the legal framework surrounding [patents and first-generic exclusivities] may have been applied to delay generic competition to an extent that may not have been intended by the Hatch-Waxman Amendments, and in ways that may not serve the public health. Relatedly, certain elements of the approval process for both innovator and generic drugs have been used in ways that may (depending on the circumstances) inappropriately hinder generic competition."[67] The FDA specifically sought stakeholder input on patents, the citizen petition process, and obstacles faced by potential generic competitors in obtaining branded drug samples for testing.[68] The Acting Director of the FTC's Bureau of Competition testified in 2017 that "[a]lthough the widespread introduction of generic drugs has saved Americans hundreds of billions of dollars in drug costs, some companies have exploited the ability to delay generic entry through abuse of government processes."[69]

In 2020, Minnesota State Attorney General Keith Ellison released recommendations for addressing prescription drug costs, including the creation of a commission that could investigate industry practices and cap the prices of some drugs. His report cited the abuse of the patent system—and patent thickets specifically--as a key factor contributing to high drug prices. It stated, "First, the misuse and abuse of federal patent and exclusivity laws by drug manufacturers has led to high-cost branded drugs being insulated from generic competition for years— if not decades— beyond the initial patent and exclusivity periods. For example, AbbVie created a 'patent thicket' for

62 https://docs.house.gov/meetings/JU/JU05/20170727/106333/HHRG-115-JU05-Wstate-KesselheimA-20170727.pdf
63 https://docs.house.gov/meetings/JU/JU05/20170727/106333/HHRG-115-JU05-Wstate-KesselheimA-20170727.pdf, at 6-7.
64 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/, at section 5(p)(vi).
65 https://www.uspto.gov/sites/default/files/documents/PTO-FDA-nextsteps-7-6-2022.pdf
66 https://s3.amazonaws.com/public-inspection.federalregister.gov/2017-12641.pdf
67 https://s3.amazonaws.com/public-inspection.federalregister.gov/2017-12641.pdf
68 https://s3.amazonaws.com/public-inspection.federalregister.gov/2017-12641.pdf
69 https://docs.house.gov/meetings/JU/JU05/20170727/106333/HHRG-115-JU05-Wstate-MeierM-20170727.pdf

Humira, which is used to treat arthritis and is the top-selling drug in the world, by securing 132 patents for the drug, which resulted in 39 years of patent protection."[70]

Health care payors have also called for patent reform to moderate drug price increases. A senior vice president for government relations at Kaiser Permanente opined recently that patent thickets deter development of biosimilars for costly biologic medicines and drive up health care costs. He urged Congress to revisit patent laws to "address[] how drugmakers manipulate the patent system to maximize profit on long-existing products."[71] In December 2021, America's Health Insurance Plans, the trade association for health insurers, released a study regarding drug prices and exclusivity protections. It found that "many drugs with long periods of patent protection are the result of Big Pharma shenanigans and anti-competitive tactics like patent thicketing, patent evergreening, and pay-for-delay settlements."[72]

In 2022, Priti Krishtel, co-founder and co-executive director of patent watchdog group the Initiative for Medicines, Access and Knowledge (I-MAK) was selected to receive a MacArthur Fellowship (sometimes referred to as the "genius grant"). When announcing her selection, the program described I-MAK's work on patent reform and the impact of secondary patents on access: "Patents are intended to incentivize innovation by ensuring that only the patent holder can sell and profit from the product for a fixed time. However, many pharmaceutical companies seek to extend their monopolies by filing multiple patents on small changes (such as changes in dosage) to existing drugs over several years. This stifles competition, delays generic production, and keeps medicines out of the hands of people who need them the most."[73]

The existence of a significant social policy issue, then, distinguishes the Proposal from those analyzed in the determinations JNJ cites on pages 3-6 of the No-Action Request.

JNJ cites numerous determinations in which the Staff allowed exclusion on ordinary business grounds of proposals that dealt with companies' products and services, but none of those proposals involved a significant policy issue. In Wells Fargo[74] and JPMorgan Chase,[75] proposals focused on specific products that the proponents argued were forms of predatory lending, which had previously been found to transcend ordinary business. The Staff granted relief, characterizing the proposals as relating to the ordinary business matter of products and services offered by the companies.

In the three other determinations on which JNJ relies, the proponents unsuccessfully argued that the use of the company's products for lethal injection, the controversy over releasing the film "Song of the South" on Blu-ray, and the company's stewardship program for specific products were significant social policy issues. The proponent did not even respond to the company's no-action

70 https://www.ag.state.mn.us/Office/Initiatives/PharmaceuticalDrugPrices/Taskforce.asp
71 https://about.kaiserpermanente.org/news/want-to-lower-drug-prices-reform-the-us-patent-system
72 https://www.ahip.org/news/press-releases/new-research-big-pharma-companies-earn-big-revenues-through-patent-gaming
73 https://www.macfound.org/fellows/class-of-2022/priti-krishtel#searchresults
74 Wells Fargo & Co. (Jan. 28, 2013, *recon. denied* Mar. 4, 2013)
75 JPMorgan Chase & Co. (Mar. 16, 2010)

request in IBM,[76] where the proposal asked the company to assume a greater role in promoting open source software. Thus, IBM's characterization of the proposal's subject as the marketing, delivery and support of its software products went unchallenged.

The Proposal does not focus on ordinary business matters despite touching upon a significant policy issue, as JNJ claims.[77] Instead, access to JNJ's products and its policies regarding IP protection are integral elements of the significant policy issue on which the Proposal focuses. Several of the determinations JNJ cites involved proposals that raised a significant policy issue, but also grafted on elements that implicated day-to-day management. In contrast, the *sole* focus of the Proposal is a significant policy issue. This is distinct from the determinations on which JNJ relies:

- In PetSmart,[78] the proposal asked the company to require its suppliers to attest that they had not violated certain laws related to animal cruelty. PetSmart urged that the laws in question governed not only animal cruelty, a significant policy issue, but also mundane matters such as record keeping. The Staff concurred and granted relief, citing the breadth of the laws referenced in the proposal. Importantly, however, the Staff did not concur with PetSmart's more sweeping argument, which is similar to the one JNJ makes here: that even if animal cruelty is a significant social policy issue, the selection of suppliers is an ordinary business matter, essentially negating significant social policy issue status.
- The proposal in CIGNA[79] asked the company to report on how it was "responding to regulatory, legislative and public pressures to ensure affordable health care coverage" as well as "the measures our company is taking to contain the price increases of health insurance premiums." CIGNA argued that the second part of the resolved clause focused on the ordinary business matter of expense management, rather than health care reform, as shown by the supporting statement's discussion of the relationship between administrative costs and premiums. The Staff concurred with CIGNA's view that the proposal was excludable because it addressed "the manner in which the company manages its expenses."
- Capital One[80] successfully argued that a proposal went beyond addressing the arguably significant policy issue of outsourcing to include several ordinary business matters such as "estimated or anticipated cost savings associated with job elimination actions taken by the company over the past five years."

In the 2021 proxy season, JNJ[81] unsuccessfully advanced an argument similar to the one it makes here in an effort to exclude a proposal seeking disclosure regarding the role of public funding in the company's decisions affecting access to its COVID-19 products. JNJ claimed that the proposal addressed the ordinary business matter of its pricing decisions in addition to an unidentified "potential significant policy issue" (presumably the COVID-19 pandemic or access to vaccines and therapeutics). The proponent contended that access to COVID-19 vaccines and therapeutics, including the role of public funding in decisions regarding such access, was a significant policy issue despite the connection to pricing of JNJ's products. The Staff declined to grant relief.

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76 International Business Machines Corp. (Jan. 22, 2009).
77 No-Action Request, at 5.
78 PetSmart, Inc. (Mar. 24, 2011).
79 CIGNA Corporation (Feb. 23, 2015).
80 Capital One Financial Corp. (Feb. 3, 2005).
81 Johnson & Johnson (Feb. 12, 2021).

Finally, the Proposal would not micromanage JNJ. Staff Legal Bulletin ("SLB") 14L recently clarified the Staff's approach to micromanagement claims. It states that the Staff will analyze "the level of granularity sought in the proposal and to what extent it inappropriately limits the discretion of the board or management."[82] SLB 14L indicated that climate change proposals that "suggest targets or timelines so long as the proposals afford discretion to management as to how to achieve such goals" will not be deemed excludable on micromanagement grounds. Thus, a proposal can ask a company to change its behavior, even to set a specific objective like an emissions reduction target, as long as it doesn't instruct management or the board on exactly how to implement the change.

JNJ argues that the Proposal "seeks to micromanage Johnson & Johnson by dictating the establishment of a particular intellectual property analysis that inappropriately limits discretion of the board and management." But the Proposal does not specify any details around the Proposal's implementation. It does not prescribe the weight to be accorded to access considerations, dictate how they should be balanced against other factors, or control how the impact on access should be measured. The Proposal, then, suggests a factor to be included in the deliberative process but "afford[s] discretion to management as to how to achieve" that outcome, in the words of SLB 14L.

Last season, despite similar arguments, JNJ failed to convince the Staff that it should be permitted to exclude a proposal advocating for a change in the company's approach to executive incentive compensation.[83] The proposal asked JNJ's board to adopt a policy that legal and compliance costs should not be excluded when calculating metrics for senior executives' executive compensation awards. JNJ urged that the proposal micromanaged because it sought to inappropriately limit the discretion of the JNJ board's compensation committee by dictating how financial performance metrics could be adjusted. The Staff did not concur with JNJ.

The Proposal is less prescriptive than last year's JNJ executive pay proposal. Both concern inputs into a formula or deliberative process. The Proposal inserts an input but leaves room for discretion in how to determine the impact on access and incorporate it into other factors JNJ already takes into account. The 2022 proposal, by contrast, prohibited an input—legal and compliance costs—from being removed from a formula. These costs are established through the financial accounting process and management does not have discretion over their amounts or the fact that expenses are subtracted from revenues to produce net income. By its nature, then, the change requested in last year's proposal affords less opportunity for management to exercise discretion over the proposal's implementation.

In sum, JNJ is not entitled to exclude the Proposal on ordinary business grounds because the role IP protections play in access to medicines—the Proposal's sole subject--is a significant social policy issue transcending ordinary business, as evidenced by the consistent and widespread public debate in the media and among policy makers. The Proposal gives JNJ's management significant discretion over how to incorporate the impact on patient access into the decision making process regarding secondary and tertiary patents, ensuring that the Proposal would not micromanage JNJ.

* * *

[82] Staff Legal Bulletin 14L (Nov. 3, 2021).

[83] Johnson & Johnson (Mar. 2, 2022).

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

The Proponents appreciate the opportunity to be of assistance in this matter. If you have any questions or need additional information, please contact me at (317) 910-8581.

Sincerely,

Lydia Kuykendal
Director of Shareholder Advocacy
Mercy Investment Services, Inc

cc: Marc Gerber, marc.gerber@skadden.com

Co-filers

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BY EMAIL (shareholderproposals@sec.gov)

January 9, 2023

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

RE: Johnson & Johnson – 2023 Annual Meeting
Supplement to Letter dated December 12, 2022
Relating to Shareholder Proposal of Mercy
Investments Services, Inc. and co-filers

Ladies and Gentlemen:

We refer to our letter dated December 12, 2022 (the “No-Action Request”), submitted on behalf of our client, Johnson & Johnson, a New Jersey corporation, pursuant to which we requested that the Staff of the Division of Corporation Finance (the “Staff”) of the U.S. Securities and Exchange Commission (the “Commission”) concur with Johnson & Johnson’s view that the shareholder proposal and supporting statement (the “Proposal”) submitted by Mercy Investment Services, Inc. (“Mercy”) and co-filers (collectively with Mercy, the “Proponents”) may be excluded from the proxy materials to be distributed by Johnson & Johnson in connection with its 2023 annual meeting of shareholders (the “2023 proxy materials”).

This letter is in response to the letter to the Staff, dated January 3, 2023, submitted by Mercy (the “Proponents’ Letter”), and supplements the No-Action Request. In accordance with Rule 14a-8(j), a copy of this letter also is being sent to the Proponents.

The Proponents' Letter presents an uncompelling attempt to rebut the No-Action Request. In particular, it argues that the Proposal should not be excluded as relating to Johnson & Johnson's ordinary business because it focuses on a significant policy issue. As explained below, this argument is not persuasive.

Notably, the Proponents' Letter concedes that a company's product offerings and choices about intellectual property protections are ordinary business matters and does not dispute that these are the Proposal's focus. Given that, to our knowledge, the Staff has never recognized a significant policy issue relating to the general role of intellectual property protections in access to medicines in ordinary circumstances, this should be the end of the analysis.

Nevertheless, the Proponents' Letter asserts that the Staff should recognize a new significant policy issue for various reasons. In doing so, the Proponents' Letter attempts to draw support from a number of unrelated prior decisions where the Staff did not permit exclusion of proposals under Rule 14a-8(i)(7). Specifically, the Proponents' Letter tries to draw support from *Johnson & Johnson* (Feb. 8, 2022), *Pfizer, Inc.* (Feb. 23, 2022) and *Moderna, Inc.* (Feb. 8, 2022). These instances are inapposite, however, as they were related to proposals focused on the narrow question of intellectual property decisions relating to COVID-19 vaccines in the midst of a global pandemic. These letters simply established the Staff's view that the subject of intellectual property decisions involving COVID-19 vaccines during the height of the pandemic transcended the companies' ordinary business matters, rather than standing for the Proponents' sweeping characterization that intellectual property decisions concerning pharmaceutical products allegedly impacting patient access to those products always transcends a pharmaceutical company's ordinary business.

The Proponent's Letter also attempts to draw support from *Pfizer, Inc.* (Mar. 8, 2022) and *AbbVie, Inc.* (Mar. 11, 2022), but these instances similarly cannot be generalized to support the Proponents' broad assertions. As the Proponents' Letter describes, the proposals in these instances focused on "the strategic, reputational, and public policy risks created by anticompetitive practices," rather than the specific matter of the alleged impact of intellectual property protections on patient access at issue here. Accordingly, the Staff's prior no-action decisions relied on by the Proponents' Letter fail to demonstrate that the Proposal implicates a significant policy issue previously recognized by the Staff.

Perhaps recognizing this shortcoming, the Proponents' Letter also attempts to demonstrate that there is broad societal interest in the matter raised by the Proposal through lengthy discussions of past media publications, proposed legislation, Congressional hearings, federal agency and other executive branch actions and certain statements from the private sector on patent practices. These citations, however, fail to establish a broad societal focus on the issue of the impact of intellectual property protections on patient access to pharmaceutical products generally. Given that the pharmaceutical industry and patent protections are highly regulated areas, it is not surprising that pharmaceutical companies' patent practices have drawn attention of certain groups of interested parties and become the topic of Congressional hearings and proposed legislation from time to time. That fact alone does not support the Proponents' assertion that the Proposal's topic transcends the company's ordinary business matters. The test for whether a significant policy issue exists is not whether select groups find the issue significant; instead, the test is whether the issue holds broad societal significance. The Proponents' Letter only demonstrates interest from a small group with a vested interest in the matter.

In addition, even assuming the Proponent's Letter demonstrates some level of societal concern, it fails to establish a sustained level of concern over time. The discussions cited in the Proponents' Letter indicate that interest in the Proposal's topic has waned over the years and, therefore, the Staff has even less reason to recognize the Proposal's topic as a new significant policy issue today. For example, among the 23 media publications that the Proponents' Letter cites, only four were issued in 2022 and no media outlet published on the issue more than once other than Bloomberg and NBCNews. Similarly, a vast majority of the proposed legislation and Congressional hearings the Proponents' Letter cites occurred in 2019 or earlier. Therefore, the Proponents have not demonstrated, and we see no reason why, this issue should now be recognized as one with broad societal impact.

Accordingly, the Proposal should be excluded from Johnson & Johnson's 2023 proxy materials pursuant to Rule 14a-8(i)(7) as relating to its ordinary business operations.

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

Very truly yours,

Marc S. Gerber

cc: Marc Larkins
Worldwide Vice President, Corporate Governance & Corporate Secretary
Johnson & Johnson

Lydia Kuykendal
Director of Shareholder Advocacy
Mercy Investment Services, Inc.

Lydia Kuykendal, on behalf of Bon Secours Mercy Health, Inc., Daughters of Charity, Province of St. Louise, Providence St. Joseph Health and The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America

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Sr. Marcelline Koch, OP
Dominican Sisters of Springfield Illinois

Tom McCaney
Director, Corporate Social Responsibility
The Sisters of St. Francis of Philadelphia

January 11, 2023

Via e-mail at shareholderproposals@sec.gov

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

Re: Request by Johnson & Johnson to omit proposal submitted by Mercy Investment Services Inc. and co-filers

Ladies and Gentlemen,

This letter responds to one of the arguments made in Johnson & Johnson's ("JNJ's" or the "Company's") letter dated January 9, 2023 supplementing its request (the "No-Action Request") to exclude the shareholder proposal (the "Proposal") filed by Mercy Investment Services and co-filers (the "Proponents"), which asks JNJ to consider the impact on patient access when deciding whether to apply for secondary and tertiary patents.

JNJ urges that the determinations issued last year to JNJ,[1] Pfizer[2] and Moderna,[3] declining to allow those companies to exclude proposals asking them to issue certain reports related to the intellectual property ("IP") associated with their COVID-19 vaccines and therapeutics, are inapposite because the Proposal does not involve the COVID-19 pandemic. But the Division has repeatedly found that drug pricing and access to medicines are significant social policy issues, even

1 Johnson & Johnson (Feb. 8, 2022)
2 Pfizer, Inc. (Feb. 23, 2022).
3 Moderna Inc. (Feb. 8, 2022).

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absent a pandemic. For instance, in Gilead,[4] Celgene,[5] and Vertex,[6] the Staff declined to allow exclusion of proposals seeking a report on risks associated with high drug prices, over the companies' objection that the proposals dealt with their products. Thus, last year's JNJ, Pfizer, and Moderna determinations could be read as standing for the proposition that patient access continues to be a significant social policy issue even where a proposal's specific request focuses on IP sharing.

Here, the Proposal's whole raison d'etre is patient access; there is no aspect of the Proposal that addresses IP outside the context of access. The Proponents could agree with JNJ's analysis if the Proposal asked the Company, for example, to consider the impact on JNJ's profitability when it applies for secondary or tertiary patents. In that case, IP would be the primary focus and there would be no significant policy issue to avoid application of the ordinary business exclusion. Given the centrality of access to the Proposal, however, the fact that it does not invoke the COVID-19 pandemic does not compel exclusion.

The Proponents appreciate the opportunity to be of assistance in this matter. If you have any questions or need additional information, please contact me at (317) 910-8581.

Sincerely,

Lydia Kuykendal
Director of Shareholder Advocacy
Mercy Investment Services, Inc

cc: Marc Gerber, marc.gerber@skadden.com

Co-filers

4 Gilead Sciences Inc. (Feb. 23, 2015)
5 Celgene Corporation (Mar. 19, 2015)
6 Vertex Pharmaceuticals Inc. (Feb. 25, 2015)

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BY EMAIL (shareholderproposals@sec.gov)

January 19, 2023

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

RE: Johnson & Johnson – 2023 Annual Meeting
Supplement to Letter dated December 12, 2022
Relating to Shareholder Proposal of Mercy
Investment Services, Inc. and co-filers

Ladies and Gentlemen:

We refer to our letter dated December 12, 2022 (the "No-Action Request") and our letter dated January 9, 2023 supplementing the No-Action Request, submitted on behalf of our client, Johnson & Johnson, a New Jersey corporation, pursuant to which we requested that the Staff of the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission (the "Commission") concur with Johnson & Johnson's view that the shareholder proposal and supporting statement (the "Proposal") submitted by Mercy Investment Services, Inc. ("Mercy") and co-filers (collectively with Mercy, the "Proponents") may be excluded from the proxy materials to be distributed by Johnson & Johnson in connection with its 2023 annual meeting of shareholders (the "2023 proxy materials").

This letter is in response to the letter to the Staff, dated January 11, 2023, submitted by Mercy (the "Proponents' Letter"), and further supplements the

No-Action Request. In accordance with Rule 14a-8(j), a copy of this letter also is being sent to the Proponents.

The Proponents' Letter again concedes that a company's product offerings and choices about intellectual property protections are ordinary business matters and again asserts that the Proposal should not be excluded as relating to Johnson & Johnson's ordinary business because, in the Proponents' view, it focuses on a significant policy issue. As previously described, the Staff has never recognized a significant policy issue relating to the general role of intellectual property protections in access to medicines.

The Proponents' Letter attempts to extrapolate from the Staff's prior decisions in *Gilead Sciences, Inc.* (Feb. 23, 2015), *Vertex Pharmaceuticals Inc.* (Feb. 25, 2015) and *Celgene Corp.* (Mar. 19, 2015). In doing so, the Proponents read the Staff's decisions as the Proponents wish they had been decided rather than how they were actually decided. As the Staff described, those proposals focused on each company's "fundamental business strategy with respect to its pricing policies for pharmaceutical products" and established the Staff's view that the subject of drug pricing in certain instances could transcend the companies' ordinary business matters. These decisions do not support the Proponents' proposition that simply referencing patient access when submitting a proposal to a pharmaceutical company always converts an otherwise ordinary business matter into a matter that transcends a pharmaceutical company's ordinary business.

In particular, decisions with respect to how Johnson & Johnson safeguards and protects the intellectual property rights associated with the products it develops and sells are distinct from questions of "fundamental business strategy with respect to [Johnson & Johnson's] pricing policies for pharmaceutical products." As described in the No-Action Request, decisions with respect to intellectual protections involve a variety of technical, scientific, regulatory and other determinations with respect to obtaining a patent on a specific invention. While intellectual property protection plays an important role in fostering innovation, these decisions do not rise to the same level of the pricing policies that were the subject of the proposals in *Gilead*, *Vertex* and *Celgene*. Stated another way, there are numerous ordinary business decisions that may be taken into consideration when a pharmaceutical company develops pricing for its products, and the ultimate business strategy with respect to pricing policies may, in some cases, transcend a company's ordinary business. But that does not mean that each of those numerous ordinary business decisions themselves transcends a company's ordinary business. How a company goes about protecting its intellectual property is one such ordinary business matter that does not rise to the level of transcending a company's ordinary business.

Accordingly, the Proposal should be excluded from Johnson & Johnson's 2023 proxy materials pursuant to Rule 14a-8(i)(7) as relating to its ordinary business operations.

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

Very truly yours,

Marc S. Gerber

cc: Marc Larkins
Worldwide Vice President, Corporate Governance & Corporate Secretary
Johnson & Johnson

Lydia Kuykendal
Director of Shareholder Advocacy
Mercy Investment Services, Inc.

Lydia Kuykendal, on behalf of Bon Secours Mercy Health, Inc., Daughters of Charity, Province of St. Louise, Providence St. Joseph Health and The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America

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