UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THE DORIS BEHR 2012 IRREVOCABLE TRUST,	:	Civil Action No. 3:19-cv-8828 (MAS) (LHG)
Plaintiff,	:	**Oral Argument Requested**
v.	:	Motion Date: August 5, 2019
JOHNSON & JOHNSON,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT JOHNSON & JOHNSON'S MOTION TO DISMISS

Justin T. Quinn
ROBINSON MILLER LLC
One Newark Center, 19th Floor
Newark, New Jersey 07102
Telephone: (973) 690-5400
Facsimile: (973) 466-2761

Andrew Muscato
Susan L. Saltzstein (*pro hac vice*)
Christopher P. Malloy (*pro hac vice*)
Patrick G. Rideout (*pro hac vice*)
SKADDEN, ARPS, SLATE
MEAGHER & FLOM LLP
(A Delaware Limited Liability Partnership)
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Facsimile: (212) 735-2000

Attorneys for Defendant
Johnson & Johnson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

Defendant Johnson & Johnson ("Defendant" or the "Company") respectfully submits this Memorandum of Law in support of its Motion to Dismiss the Complaint (the "Complaint" or "Compl.") filed by Plaintiff The Doris Behr 2012 Irrevocable Trust ("Plaintiff" or the "Trust") with prejudice.

PRELIMINARY STATEMENT

Plaintiff's trustee has, for years, waged an academic crusade to test the viability of corporate bylaws that would prohibit shareholders from litigating in federal and state courts across the country any and all federal securities law claims against corporations and their officers and directors. These bylaws would require not only mandatory arbitration of all federal securities law claims, but also waivers of class-action rights, rights to appeal and rights to challenge any arbitration award.

In November 2018, Plaintiff's trustee turned his attention to Johnson & Johnson and demanded that the Company include his proposal (the "Proposal") in its annual proxy statement (the "Proxy Materials") to allow its shareholders to vote on adopting such a bylaw. In December 2018, Johnson & Johnson requested that the Staff of the Securities & Exchange Commission ("SEC") issue a "no-action letter" to confirm that the Company could exclude the Proposal from its Proxy Materials. In February 2019, the SEC Staff agreed and issued a "no-action letter" after the Honorable Gurbir S. Grewal, Attorney General of the State of New Jersey (the "Attorney General"), made an unsolicited submission opining that the

Proposal, if implemented, *would violate New Jersey law*. Dissatisfied with the conclusion reached by the Attorney General and the SEC Staff, Plaintiff's trustee took to the press, arguing in an op-ed piece published in *The Wall Street Journal* that everyone else was wrong on the law and the "SEC's decision [was] ill-advised." On February 22, 2019 (the day after the op-ed's publication), the SEC Staff denied Plaintiff's request for full-Commission review of the no-action letter, citing the Attorney General's opinion. Thereafter, the Company filed its Proxy Materials without the Proposal pursuant to SEC Rule 14a-8(i)(2), which allows the Company to exclude any proposal that would "cause the company to violate any state, federal, or foreign law to which it is subject." 17 C.F.R. § 240.14a-8(i)(2).

Undeterred by the unequivocal pronouncement of the State's highest legal officer that the Proposal would violate New Jersey law and the no-action position held by the Staff of the SEC, Plaintiff nonetheless filed the instant action seeking, among other things, (i) a declaration that the Company violated Section 14(a) of the Securities Exchange Act (the "Exchange Act") by declining to include the Proposal in its Proxy Materials for its now-past annual shareholder meeting,[1] and (ii) an injunction preventing the Company from excluding the Proposal (or something "similar") from future Proxy Materials.

[1] Plaintiff's request for a preliminary injunction requiring the Company to include the Proposal in the Proxy Materials for its April 25, 2019 annual meeting was denied (*see* Dkt. Nos. 16 & 17), and now is moot.

Plaintiff's trustee's crusade should end here. As set forth more fully below, the Proposal is contrary to well-settled law—including federal and state statutes, controlling authority and jurisprudence dating back centuries regarding the permissible nature and limits placed on corporate bylaws. Plaintiff's Complaint should be dismissed with prejudice for several separate and independent reasons, including that Plaintiff's Proposal would cause the Company to violate ***both*** the laws of the State of New Jersey and federal law:

First, the Attorney General's opinion is clear, well-reasoned and well-supported and, as the position of New Jersey's chief legal officer, ought to be afforded due deference. The Staff of the SEC recognized the untenable position Johnson & Johnson would be placed in if required to disobey the unambiguous pronouncement of the Attorney General. Indeed, requiring this publicly-traded New Jersey corporation to act in a manner that the Attorney General stated *would* violate New Jersey law potentially could expose the Company to litigation and other collateral consequences. Thus, the Attorney General's opinion provides an insurmountable hurdle to Plaintiff's Proposal.

Further, even if the Court were to accept Plaintiff's invitation to look behind the Attorney General's pronouncement, there is no doubt that his Letter Opinion correctly applies New Jersey law, because the Proposal exceeds the permissible scope of a New Jersey corporation's bylaws. Under settled precedent and the New

Jersey Business Corporation Act ("NJBCA"), bylaws are expressly limited to those matters that relate to a New Jersey corporation's *internal* affairs, or those affairs relating to the rights and duties of the corporation, its officers and directors, and its shareholders *inter se*. This is not a novel concept. Indeed, over 250 years ago, Sir William Blackstone noted in his *Commentaries on the Laws of England* that corporations are authorized "[t]o make by-laws . . . *for the better government of the corporation*." 1 William Blackstone, *Commentaries on the Laws of England*, *463 (William S. Hein & Co., Inc., photo. reprint 1992) (1765) (emphasis added). And New Jersey courts consistently have held that corporate bylaws are "confined to matters touching the administrative policies and affairs of the corporation, the relation of members and officers with the corporation among themselves, and like matters of *internal* concern." *Lambert v. Fisherman's Dock Co-op., Inc.*, 61 N.J. 596, 599-600 (1972). (*See infra* § II.A.1.)

In stark contrast, Plaintiff's proposed bylaw purports to govern causes of action arising under federal law concerning the purchase or sale of the Company's securities—claims that go well beyond the internal affairs of the Company. Such claims concern whether federal law was followed and have long been recognized as *external* claims. (*See infra* §§ II.A.2, II.A.3.) Thus, Johnson & Johnson properly excluded the Proposal because its adoption would contravene the limitations placed on bylaws under New Jersey law.

The Trust's effort to circumvent the Attorney General's authoritative interpretation of New Jersey law by invoking the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA") is makeweight. The FAA cannot preempt relevant New Jersey law because the FAA applies only to *binding* agreements to arbitrate, and then only with respect to disputes "arising out of" such agreements. 9 U.S.C. § 2. Contrary to Plaintiff's argument, shareholders cannot be bound to bylaw provisions that exceed the limits imposed by New Jersey law. Moreover, disputes under the federal securities laws do not "arise out of" a New Jersey corporation's bylaws that, as a matter of law, may concern only internal corporate affairs. In any event, there can be no FAA preemption here because New Jersey law does not discriminate against arbitration; it merely provides that a company's bylaws are not the appropriate place for provisions—like those in Plaintiff's Proposal—that purport to regulate matters *external* to the corporation. (*See infra* § II.A.4.)

Second, the Proposal would violate federal law. Section 29 of the Exchange Act, 15 U.S.C. § 78cc, and Section 14 of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 78n, prohibit agreements waiving the protections of these acts. The Supreme Court recognizes the need to inquire whether an arbitration agreement weakens shareholders' ability to recover on statutory claims and has only permitted arbitration of federal securities claims where (a) the tribunal is subject to SEC oversight and (b) any award is subject to judicial review under the

FAA. Here, the Proposal requires arbitration before a tribunal (the American Arbitration Association ("AAA")) that is not subject to SEC oversight. *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 230-32 (1987). Critically, the Proposal also requires shareholders to waive all rights to appeal or otherwise challenge any arbitration award, eliminating even the limited judicial oversight available under the FAA. Standing alone, this waiver provision is illegal. Further, by stripping shareholders of the right to challenge an award even where it was procured by fraud or where the arbitrators engaged in misconduct, *see* 9 U.S.C. § 10, the Proposal would seriously undermine their ability to recover under the federal securities laws in violation of Section 29 of the Exchange Act. (*See infra* § II.B.)

In short, Johnson & Johnson properly excluded the Trust's Proposal from its Proxy Materials pursuant to SEC Rule 14a-8(i)(2). Thus, Plaintiff's claims fail and should be dismissed with prejudice.

FACTUAL BACKGROUND[2]

A. The Company's Relevant Proxy Requirements

Johnson & Johnson is a publicly traded New Jersey corporation located in New Brunswick. Since 1947, it has held its annual shareholder meeting on the fourth Thursday in April as it did this year, on April 25 (the "Annual Meeting"). In

[2] True and correct copies of all exhibits to this Memorandum of Law (cited herein, "Ex. __") are attached to the accompanying Certification of Andrew Muscato.

advance of such meetings, Johnson & Johnson publishes and circulates a proxy statement to its shareholders pursuant to Section 14 of the Exchange Act, 15 U.S.C. § 78n, and the rules promulgated thereunder. Proxy statements include "information about items or initiatives on which the shareholders are asked to vote" and "can also include shareholder proposals—a device that allows shareholders to ask for a vote on company matters." *Trinity Wall Street v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 328 (3d Cir. 2015) ("*Trinity II*") (citations omitted).

Companies may exclude from their proxy materials shareholder proposals that otherwise meet regulatory requirements on several grounds, including where, if implemented, the proposal would "cause the company to violate any state, federal, or foreign law to which it is subject." 17 C.F.R. § 240.14a-8(i)(2).

B. <u>The Trust Submits Its Proposal</u>

The Trust is a shareholder of Johnson & Johnson, and its Trustee (and co-counsel) is Mr. Hal Scott, an out-of-state law professor (the "Trustee"). On November 9, 2018, Plaintiff submitted to the Company a shareholder proposal "to adopt a mandatory arbitration bylaw" that would require Company stockholders to bring claims arising under the federal securities laws against the Company, its officers or directors, in individual arbitration without the right to appellate review. (Compl. ¶ 15.) Plaintiff requested that the Proposal be included in the Company's Proxy Materials in advance of the Annual Meeting. (*Id.* ¶¶ 15-16.)

C. The Company Requests a No-Action Letter from the Staff of the SEC and the New Jersey Attorney General Joins in the Request

On December 11, 2018, Johnson & Johnson requested that the Staff of the SEC issue a "no-action letter" to confirm that the Company had no obligation to include the Proposal in its Proxy Materials. Specifically, the Company explained that implementation of the Proposal would cause the Company to violate the law, and therefore exclusion of the Proposal was appropriate pursuant to SEC Rule 14a-8(i)(2). (Compl. ¶¶ 19-20; Dkt. No. 1-2.)

Plaintiff submitted an opposition letter on December 24, 2018. (Dkt. No. 1-3.) On January 16, 2019, the Company submitted a supplemental letter presenting the formal opinion of the New Jersey law firm of Lowenstein Sandler LLP, which concluded that the adoption of the Proposal would violate New Jersey law. (Dkt. No. 1-4.) Plaintiff then submitted a supplemental opposition letter on January 23, 2019. (Dkt. No. 1-5.)

On January 29, 2019, the Attorney General submitted an unsolicited letter to the Staff of the SEC in support of the Company's position that it may exclude the Proposal from its Proxy Materials. (*See* Dkt. No. 1-6 (the "Letter Opinion").) The Attorney General stated that "the Proposal would be contrary to the public policy interests underlying the federal securities laws," and "seriously undermine the goals of investor protection and transparency." (*Id.* at 1.) He concluded that "the Proposal is also excludable under Rule 14a-8(i)(2) for the additional reason that

adoption of the proposed bylaw would cause Johnson & Johnson to violate applicable *state* law." (*Id.*) Consequently, the Attorney General requested that the Staff of the SEC take no-action against Johnson & Johnson if the Company chose to exclude the Proposal from its Proxy Materials. (*Id.* at 6.) In response, the Trust contended that the Attorney General misunderstood his own state's laws and grounded his opinion, at least in part, on an "incorrect and incomplete analysis" of decisions of the Delaware Court of Chancery that the Trust also asserted were "wrongly decided." (Dkt. No. 1-7 at 2.)

D. The Staff of the SEC Issues a No-Action Letter

On February 11, 2019, the Staff of the SEC issued a no-action letter, concluding that it would not recommend enforcement if the Company excluded the Proposal. (*See* Dkt. No. 1-8.) The SEC Staff explained that "[t]o conclude otherwise would put the Company in a position of taking actions that the chief legal officer of its state of incorporation has determined to be illegal." (*Id.* at 1.)

On February 18, 2019, Plaintiff sought full SEC review of the no-action decision. (Ex. A.) On February 21, 2019, *The Wall Street Journal* published an op-ed piece penned by the Trustee entitled "The SEC's Misguided Attack on Shareholder Arbitration." (Ex. B.)[3] In it, the Trustee attacked the Attorney

[3] The Court may take judicial notice of this article. *See Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 598 n.2 (3d Cir. 2000).

General's opinion and expressed that the "SEC's decision is ill-advised." (*Id.*)[4]

E. The SEC Staff Rejects Plaintiff's Request for Reconsideration

The day after the op-ed was published, the SEC Staff denied a request from the Trustee for full-Commission review of its no-action letter. (Ex. D.) The SEC Staff stated: "[I]n light of the New Jersey Attorney General's opinion that implementing the Proposal would put the Company in a position of taking an action that would be illegal under state law, we do not believe the matter presents a novel or highly complex issue for the Commission to resolve." (*Id.*)

On March 13, 2019, the Company filed its Proxy Materials—without the Proposal—and distributed them to shareholders. (Compl. ¶ 32.)

The Trust filed this Action on March 21, 2019, challenging the Company's exclusion of its Proposal. (Dkt. No. 1.) Five days later, on March 26, 2019, the Trust filed a motion attempting to manufacture an "emergency" for purposes of obtaining expedited relief. On April 8, 2019, this Court denied Plaintiff's request for preliminary injunctive relief, concluding that "Plaintiff failed to make a

[4] The public discussion regarding the Proposal is not limited to Trustee's self-serving statements. To the contrary, twenty-five law professors have signed on to a working paper authored by Rutgers Law School Professor Jacob Russell, concerning the impermissibility of Plaintiff's Proposal under New Jersey law. *See* Jacob Hale Russell, *Mandatory Securities Arbitration's Impermissibility Under State Corporate Law: An Analysis of the Johnson & Johnson Shareholder Proposal* (Rock Ctr. for Corporate Governance, Working Paper Series No. 237, Jan. 29, 2019), https://ssrn.com/abstract=3332853 (attached as Ex. C).

sufficient showing to justify emergent relief, and further failed to support its argument that it will suffer irreparable harm." (Dkt. No. 16 at 8.) The Court directed this action to proceed in the ordinary course. (*Id.*)[5]

LEGAL STANDARD

Under Rule 8(a)(2), "a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). A complaint will not survive a motion to dismiss where, as here, it is legally insufficient, in that it "fail[s] to state a claim upon which relief can be granted." *Hazan v. Wells Fargo & Co.*, No. 18-10228 (MAS) (TJB), 2019 WL 1923272, at *1 (D.N.J. Apr. 30, 2019) (Shipp, J.) (quoting Fed. R. Civ. P. 12(b)(6)). When deciding a Rule 12(b)(6) motion, the court may consider "the allegations contained in the complaint, the exhibits attached to the complaint and matters of public record," *City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 259 (3d Cir. 1998), as well as documents "integral to or explicitly relied upon in the complaint." *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 493 (3d Cir. 2017) (citation omitted).

[5] Plaintiff filed a Brief in Support of Plaintiff's Motion for Order to Show Cause Why a Preliminary Injunction Should Not Issue ("Pl. Br.") containing legal arguments as to why Plaintiff had a "likelihood of success on the merits." (Dkt. No. 8.) Because the Company expects Plaintiff will advance those same legal arguments in opposition to the Company's motion to dismiss, the Company addresses those arguments where appropriate in this Memorandum of Law.

ARGUMENT

I. PLAINTIFF LACKS STANDING

The Court should dismiss the Complaint because Plaintiff is a Massachusetts irrevocable trust (Compl. ¶ 6), which is not a legal entity with capacity to sue in its own name. *See Morrison v. Lennett*, 616 N.E.2d 92, 94 (Mass. 1993) ("[A] trust is not a legal entity which can be sued directly."); *see also Americold Realty Tr. v. Conagra Foods, Inc.*, 136 S. Ct. 1012, 1016 (2016). Because it is not the real party in interest, the Trust may not be granted any relief. *See Ramirez v. Wells Fargo Bank N.A.*, No. 15-1018-JLS(JEMx), 2015 WL 12659894, at *2 (C.D. Cal. July 9, 2015) (injunctive relief denied where plaintiff was not real party in interest).

II. A SHAREHOLDER PROPOSAL REQUIRING THE COMPANY TO ADOPT AN ILLEGAL, VOID OR ULTRA VIRES BYLAW IS EXCLUDABLE UNDER RULE 14A-8

The entirety of the Complaint is premised on Plaintiff's mistaken view that the Company was required to include the Proposal in its Proxy Materials. (*See* Compl. at *1 (preamble).) There is no dispute that, if one of the bases enumerated by the SEC in Rule 14a-8 applies, the Company was authorized to exclude the Proposal. (*Id.* ¶ 13.) Rather, the gravamen of the Complaint is that the Company purportedly erred by excluding the Proposal under SEC Rule 14a-8(i)(2) because—contrary to the position of the Company and the Attorney General—implementation of the Proposal would not violate state or federal law. Plaintiff is wrong as a matter of law, and the Complaint should be dismissed with prejudice.

A. Implementation of the Proposal Would Cause the Company To Violate New Jersey Law

The State of New Jersey's chief legal officer, the Attorney General, has opined that the Proposal would violate state law, and the SEC Staff's no-action letter recognized that the Company would be placed in an untenable position if it were required to take action that contravened the Attorney General's pronouncement of New Jersey law. (Dkt. No. 1-8 at 2.) Indeed, New Jersey corporations, like Johnson & Johnson, must be able to rely on the Attorney General's statements of New Jersey law.[6] Plaintiff has pointed to no controlling authority to the contrary. Thus, the Attorney General's pronouncement of New Jersey law ought to be respected and followed by this Court, and the instant Complaint should be dismissed.[7]

---

[6] The Attorney General's letter to the SEC expressly noted that "[t]he State of New Jersey and its Attorney General have a substantial interest in New Jersey business corporations' compliance with the NJBCA, and the Attorney General in particular plays an important role in the administration of the NJBCA." (Letter Opinion at 2 n.1.)

[7] New Jersey courts give the Attorney General's legal opinions a "degree of deference, in recognition of the Attorney General's special role as the sole legal adviser to most agencies of State Government." *Quarto v. Adams*, 395 N.J. Super. 502, 513 (N.J. Super. Ct. App. Div. 2007) (considering formal opinion of Attorney General); *accord Peper v. Princeton Univ. Bd. of Trs.*, 77 N.J. 55, 69-70 (1978). This Court also should give "careful consideration" to the SEC Staff's no-action letter. *See Trinity II*, 792 F.3d at 343, n.11 ("[W]e do give the staff's body of no-action letters 'careful consideration as "representing the views of persons who are continuously working with the provisions of the statute [the regulation in our case] involved."'" (citation omitted)); *see also Union of Needletrades, Indus. & Textile*

(cont'd)

As set forth more fully below, the Attorney General correctly applied New Jersey law, which does not authorize a mandatory arbitration bylaw or any other bylaw purporting to regulate matters unrelated to the internal affairs of a corporation. Litigation of federal securities claims undeniably falls outside the scope of the internal affairs of the Company, and a bylaw purporting to govern how such claims are litigated would be invalid and illegal.

1. Under the NJBCA, Corporate Bylaws Must Be Limited To Matters Concerning the Internal Affairs of the Corporation

Plaintiff incorrectly asserts there is no existing "statute or court decision" prohibiting implementation of the Proposal. (Compl. ¶ 38.) To the contrary, New Jersey courts have long recognized that corporate bylaws are "confined to matters touching the administrative policies and affairs of the corporation, the relations of members and officers with the corporation among themselves, and like matters of *internal* concern." *Lambert v. Fisherman's Dock Co-op., Inc.*, 61 N.J. 596, 600 (1972) (emphasis added); *see also* 2 N.J. Trans. Guide § 22.20 ("By-laws are the rules adopted by a corporation for its internal management.").

Such "matters of internal concern," often referred to as "internal affairs," include "matters *peculiar* to corporations, that is, those activities concerning the

---

(cont'd from previous page)
Emps. ("UNITE") v. May Dep't Stores Co., 26 F. Supp. 2d 577, 581 n.3 (S.D.N.Y. 1997) ("While not binding, the SEC opinion letters are entitled to some deference from the Court."), *aff'd*, 171 F.3d 754 (2d Cir. 1999).

relationships inter se of the corporation, its directors, officers and shareholders." *QVT Fund LP v. Eurohypo Capital Funding LLC*, No. 5881-VCP, 2011 WL 2672092, at *7 (Del. Ch. July 8, 2011) (emphasis in original) (citation omitted). As the Supreme Court has explained,

> [O]nly one State should have the authority to regulate a corporation's internal affairs – matters peculiar to the relationship among or between the corporation and its current officers, directors, and shareholders – because otherwise a corporation could be faced with conflicting demands.

Edgar v. MITE Corp., 457 U.S. 624, 645 (1982); *see also Krys v. Aaron*, 106 F. Supp. 3d 472, 484 (D.N.J. 2015) (adopting the *Mite* definition of internal affairs).

The principle that a corporation's constitutive documents govern its internal affairs and not external transactions flows from the nature of state corporate law. A corporate arrangement is a "tripartite arrangement[] between the State, the corporation and the stockholders." *Brundage v. N.J. Zinc Co.*, 48 N.J. 450, 470 (1967). Because the state is the "sovereign that created the entity," it "can use its corporate law to regulate the corporation's internal affairs." *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 WL 6719718, at *11, *17 (Del. Ch. Dec. 19, 2018); *see also Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 950-54 (Del. Ch. 2013) (explaining bylaws cannot regulate external matters).

This distinction between a corporation's "internal affairs," and those external to the corporation, forms a cornerstone of New Jersey law, including the NJBCA,

which, as discussed in greater detail below, only authorizes corporations to enact bylaws regulating matters of internal concern. *See* N.J.S.A. § 14A:3-1(k) (granting corporations power "to make and alter by-laws for the administration and regulation of the affairs of the corporation"); *see also Lambert*, 61 N.J. at 600 (corporate bylaws are "confined to . . . matters of *internal* concern" (emphasis added)). The Attorney General echoed this conclusion in his Opinion Letter: "[l]ongstanding principles of New Jersey law limit the subject matter of corporate bylaws to matters of internal concern to the corporation." (Letter Opinion at 2.)

Indeed, under the internal affairs doctrine, New Jersey's corporate laws would not even apply to a shareholder's claims relating to matters falling outside their rights and duties as shareholders. *See Intarome Fragrance & Flavor Corp. v. Zarkades*, No. 07-873 (DRD), 2009 WL 931036, at *10, *13 (D.N.J. Mar. 30, 2009) (New Jersey law applied to fraud claim while Delaware law applied to fiduciary duty claim against officer of Delaware corporation). It follows that, while shareholders may be deemed to be bound by a corporation's bylaws under the laws of the state of incorporation, their implied agreement to be so bound would not extend to matters unrelated to internal corporate affairs. *See, e.g.*, *Baumohl v. Goldstein*, 95 N.J. Eq. 597, 599 (Super. Ct. Ch. Div. 1924) (while "[t]he by-laws of a corporation may be enforced as a contract between the corporation and the stockholders, and between the latter inter sese," "[t]he right of

a stockholder to sell his stock cannot be defeated by any provision contained in the by-laws of a corporation" (citations omitted)).

That bylaws are limited to regulating matters of internal concern to the corporation is deeply engrained in modern corporate law. Indeed, as Professor Williston observed in analyzing the history of pre-1800 corporate law, the power of making bylaws was "narrowed" and bylaws were "more strictly construed as time went on. . . . [B]y the [time of the] change in the conception of a corporation from an institution for special government to a simple instrumentality for carrying on a large business, *the right to pass by-laws was restricted to regulations for the management of the corporate business*." Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 Harv. L. Rev. 105, 122 (1888) (emphasis added) (citing *Childs v. Hudson's Bay Co.*, 2 P. Wms. 207 (1792)). Sir William Blackstone also reached this conclusion in 1765, noting that corporations were authorized "[t]o make by-laws . . . *for the better government of the corporation.*" *Commentaries on the Laws of England*, *463 (emphasis added). Thus, both Williston and Blackstone long ago recognized the important distinction between internal matters that may be regulated in bylaws, and external matters that may not.

Consistent with this long-established framework, the NJBCA does not permit bylaws to be imposed on the shareholders to the extent that they concern matters unrelated to the internal affairs of the corporation. First, Section 14A:3-1

("Section 3-1(k)") defines the extent of corporate powers generally and provides corporations with the power "to make and alter by-laws *for the administration and regulation of the affairs of the corporation*." N.J.S.A. § 14A:3-1(k) (emphasis added). Under Section 3-1(k), a corporation is without power to adopt a bylaw that does not concern the internal affairs of the corporation.

Second, Section 14A:2-9(4) ("Section 2-9(4)"), provides: "The by-laws may contain any provision, not inconsistent with law or the certificate of incorporation, *relating to the business of the corporation, the conduct of its affairs, and its rights or power or the rights or power of its shareholders, directors, officers or employees*." N.J.S.A. § 14A:2-9(4) (emphasis added). Section 2-9(4) again reflects the uncontroversial position that bylaw provisions are limited to regulating matters concerning the "'internal affairs' of the corporation." *See* 2016 N.J. A.B. 2162, 1st Sess. at 1 (N.J. Comm. Rep. Nov. 30, 2017) (Dkt. No. 1-6 at 9) (the "Committee Report").

Third, under Section 14A:2-9(5) ("Section 2-9(5)"), which was adopted with Section 2-9(4), bylaws may govern forum selection for certain claims:

> Without limiting subsection (4) of this section [N.J.S.A. § 14A:2-9], the by-laws may provide that the federal and State courts in New Jersey shall be the sole and exclusive forum for:
>
> (i) any derivative action or proceeding brought on behalf of the corporation;
>
> (ii) any action by one or more shareholders asserting a claim of a

> breach of fiduciary duty owed by a director or officer, or former director or officer, to the corporation or its shareholders, or a breach of the certificate of incorporation or by-laws;
>
> (iii) any action brought by one or more shareholders asserting a claim against the corporation or its directors or officers, or former directors or officers, arising under the certificate of incorporation or the [NJBCA];
>
> (iv) any other State law claim, including a class action asserting a breach of a duty to disclose, or a similar claim, brought by one or more shareholders against the corporation, its directors or officers, or its former directors or officers; or
>
> (v) any other claim brought by one or more shareholders which is governed by the internal affairs or an analogous doctrine.

N.J.S.A. § 14A:2-9(5). The Committee Report addressed the purpose of Section 2-9(5), noting that "[t]he bill specifically allows the by-laws of a New Jersey corporation to contain exclusive forum clauses to provide that the federal and State courts in New Jersey are the sole and exclusive forum for *disputes related to the 'internal affairs' of the corporation*." Committee Report at 1 (emphasis added).

Federal securities claims are notably omitted from the list of matters that may be the subject of a forum selection bylaw, further confirming that the Proposal, if implemented, would violate both Section 2-9(4) and Section 2-9(5). *See Brodsky v. Grinnell Haulers, Inc.*, 181 N.J. 102, 112 (2004) (New Jersey courts recognize the "canon of statutory construction, *expressio unius est exclusio alterius*—expression of one thing suggests the exclusion of another left unmentioned"); *Germann v. Matriss*, 55 N.J. 193, 220 (1970) ("It is an ancient

maxim of statutory construction that the meaning of words may be indicated and controlled by those with which they are associated."); *accord Gilhooley v. Cty. of Union*, 164 N.J. 533, 542 (2000).[8]

2. Federal Securities Claims Do Not Relate To Internal Corporate Affairs

Without citing any authority, Plaintiff has contended that federal securities claims "most assuredly" relate to the "business of the corporation" and the "rights or powers of its shareholders," and are thus a proper subject of a bylaw under the NJBCA. (Pl. Br. at 35.) As a preeminent global healthcare company, Johnson & Johnson is in the business of providing innovative products and solutions relating to improving human health and well-being. It is not in the business of defending federal securities class actions.

Federal securities claims are rights of action created by federal law that

[8] In briefing its motion for a preliminary injunction, Plaintiff sought to evade the plain meaning of Section 2-9(5) by arguing that the section "authorizes corporations to adopt forum-selection clauses in the circumstances described in subsections (i)-(v)," but leaves open the possibility of other forum selection provisions, to the extent consistent with Section 2-9(4). (Pl. Br. at 36-37.) This argument does not assist Plaintiff because, as set forth above, Section 2-9(4) too limits the permissible scope of bylaws to internal affairs matters.

In passing, Plaintiff also suggested that because Section 2-9(5) only refers to forum selection provisions selecting the federal and State courts of New Jersey, it does not apply to arbitration. (Pl. Br. at 37.) Setting aside that it would make little sense for the Legislature to permit the assignment of a broader class of claims to arbitration than to its own courts, with or without Section 2-9(5), bylaw provisions still are limited by Section 2-9(4) and by Section 3-1(k), which do not afford the flexibility Plaintiff demands.

concern the relationship between purchasers and sellers of a corporation's securities who may or may not be shareholders at the time the claims accrue. *See Sciabacucchi*, 2018 WL 6719718, at *18-22. Such claims concern whether federal law was followed and do not implicate the rights of "stockholders *qua* stockholders," because they do "not arise out of or relate to the ownership of the share, but rather from the purchase of the share." *Id.* at *11, *17.

Indeed, it has long been the rule that transactions in a corporation's securities fall outside the scope of its internal affairs. *See MITE Corp.*, 457 U.S. at 645. The laws of the state of incorporation do not govern such transactions. Rather they are governed by the laws of the state with the most significant nexus to the transaction and, where applicable, the federal securities laws. *See FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842, 853 (Del. Ch. 2016) (Delaware Securities Act "does not apply to a Delaware corporation simply by virtue of incorporating in Delaware"), *aff'd*, 148 A.3d 1171 (Del. 2016); *Intarome Fragrance*, 2009 WL 931036, at *10, *13 (applying most significant relationship test to fraud claim).

Notably, the Supreme Court has rejected attempts to sweep internal corporate affairs within the scope of the federal securities laws: "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the

internal affairs of the corporation." *Sante Fe Indus. v. Green*, 430 U.S. 462, 479 (1977) (citation omitted).[9] Accordingly, the Proposal concerns matters unrelated to the internal affairs of the Company and, thus, implementing the Proposal in the Company's bylaws would violate New Jersey law.

3. New Jersey Courts Would Look to Existing Delaware Law Confirming that the Proposal Would Be Illegal

Although bound by the dictates of New Jersey law, which demarcate the permissible scope of corporate bylaws by distinguishing between internal and external corporate affairs, New Jersey courts also look to Delaware precedent in circumstances applicable here. *See IBS Fin. Corp. v. Seidman & Assocs., L.L.C.*, 136 F.3d 940, 949-50 (3d Cir. 1998) (New Jersey courts look to "Delaware's rich abundance of corporate law for guidance"); *see also Lawson Mardon Wheaton, Inc. v. Smith*, 160 N.J. 383, 398 (1999). Delaware law is well-settled that forum selection bylaws are invalid and illegal if they purport to govern external claims, including claims under the federal securities laws, but valid to the extent that they govern claims regarding the internal affairs of a corporation. *See Sciabacucchi*, 2018 WL 6719718, at *18-22; *Boilermakers*, 73 A.3d at 939.

[9] Congress has gone to lengths to carve internal affairs claims out of grants of exclusive federal jurisdiction, reserving such claims for the law of the place of formation. *See* 15 U.S.C. § 78bb(f)(3)(A) (preserving certain internal affairs claims from grant of exclusive securities-related federal jurisdiction); 28 U.S.C. § 1332(d)(9)(C) (carving out certain internal affairs claims from Class Action Fairness Act of 2005 grant of federal jurisdiction).

Underscoring the importance of Delaware law in this context, NJBCA Section 2-9(4) was imported directly from Section 109(b) of the Delaware General Corporation Law ("DGCL"),[10] and NJBCA Section 2-9(5) was derived from the Delaware Supreme Court's lauded *Boilermakers* decision.[11] The New Jersey Supreme Court has long recognized that "when the Legislature adopts or copies a law from another jurisdiction, we presume that it was aware of the construction given to that law by the courts of the other jurisdiction." *Maeker v. Ross*, 219 N.J. 565, 575 (2014); *see also Francis v. United Jersey Bank*, 87 N.J. 15, 29-31 (1981) (looking to law of New York in interpreting section of corporate law modeled on New York statute); *Todd Shipyards Corp. v. Weehawken*, 45 N.J. 336, 343 (1965) ("[O]ur view of the statute is buttressed by the proposition that our Legislature, in drawing upon the statutory law of another State, probably intended to accept also the interpretive gloss it then had in that jurisdiction." (citation omitted)). Delaware judicial decisions existing at the time these sections were enacted thus are critical to understanding legislative intent, and New Jersey courts would conclude that they are bound by those decisions.

When NJBCA Sections 2-9(4) and 2-9(5) were enacted in 2016, Delaware

---

[10] *Compare* N.J.S.A. § 14A:2-9(4), *with* 8 *Del. C.* § 109(b); *see also* Committee Report at 1 ("This language is based upon a provision of Delaware law.").

[11] *Compare Boilermakers*, 73 A.3d at 943 *with* Committee Report at 1 (repeating near-identical bullet point listing of claims subject to forum selection provisions).

Courts had held that corporate bylaws could govern claims only to the extent that they dealt with internal matters. First, in 2013, in *Boilermakers*, the Delaware Court of Chancery addressed whether forum selection bylaws were valid under 8 *Del. C.* § 109(b), which provides that the bylaws of a corporation "may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."

The bylaws at issue in *Boilermakers* regulated "the forum in which stockholders may bring suit, either directly or on behalf of the corporation in a derivative suit, to obtain redress for breaches of fiduciary duty by the board of directors and officers" as well as "the forum in which stockholders may bring claims arising under the [Delaware corporate code] or other internal affairs claims." *Boilermakers*, 73 A.3d at 939. The court held that these bylaws at issue "easily" met the requirements of Section 109(b) because they were limited to the internal affairs of the corporations. *Id.* In contrast, the court observed:

> [T]he bylaws would be regulating external matters if the board adopted a bylaw that purported to bind a plaintiff, even a stockholder plaintiff, who sought to bring a tort claim against the company based on a personal injury she suffered that occurred on the company's premises or a contract claim based on a commercial contract with the corporation. The reason why those kinds of bylaws would be beyond the statutory language of 8 *Del. C.* § 109(b) is obvious: the bylaws would not deal with the rights and powers of the plaintiff-stockholder *as a stockholder*.

Id. at 952 (emphasis in original).

In 2014, the Delaware Supreme Court decided *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014), answering certified questions from the U.S. District Court for the District of Delaware regarding the validity of a fee-shifting bylaw. The question posed was "whether the board of a Delaware non-stock corporation may lawfully adopt a bylaw that shifts all litigation expenses to a plaintiff in intra-corporate litigation who 'does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought.'" *Id.* at 557 (citation omitted). The Court concluded that a "bylaw that allocates risk among parties in intra-corporate litigation" was theoretically permissible under Section 109(b). *Id.* at 558.

Subsequently, in 2015, the Delaware legislature codified the holding of *Boilermakers* in 8 *Del. C.* § 115, which allows for forum selection provisions in certificates of incorporation and bylaws for "any or all internal corporate claims" and defines such claims as "claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery." Thus, *Boilermakers* and Section 115 demonstrate that Delaware law (the model for New Jersey's statutory scheme and part of the relevant statutory fabric) permits a corporation to enact forum selection

provisions in its charter or bylaws that pertain to claims relating to the internal affairs of a corporation, but *not* those relating to external corporate claims.

The Delaware Court of Chancery's 2018 decision in *Sciabacucchi* logically extended the distinction drawn in *Boilermakers* and *ATP Tour* between intra-corporate claims and external claims to a provision in a certificate of incorporation purporting to govern the forum for federal securities law claims.[12] The Court found the provisions invalid because federal securities claims are "external" claims whose forum cannot be regulated by charter or bylaw. *Sciabacucchi*, 2018 WL 6719718, at *18 ("The Federal Forum Provisions purport to regulate the forum in which parties external to the corporation (purchasers of securities) can sue under a body of law external to the corporate contract (the 1933 Act). They cannot accomplish that feat, rendering the provisions ineffective.").

Plaintiff has argued that *Sciabacucchi*'s holding that federal securities claims were "external" claims is "incompatible" with *ATP Tour*. (*See* Dkt. No. 1-5 at 3-8.) Plaintiff acknowledged that *ATP Tour* limited its approval of fee-shifting bylaws to "intra-corporate claims," but contended (incorrectly) that the court also concluded that shareholder litigation under the federal antitrust laws was amply "intra-corporate" to be subject to the corporation's bylaws and concludes that

[12] The court noted that the "scope" of the Delaware statute governing certificates of incorporation "parallels" the statute governing bylaw provisions. *Sciabacucchi*, 2018 WL 6719718, at *1.

federal securities claims must, therefore, also be intra-corporate. (*See id.* at 6)

Plaintiff grossly misreads *ATP Tour*. The Delaware Supreme Court never decided if the federal antitrust claims at issue were intra-corporate and subject to the fee-shifting bylaw. To the contrary, the court's holding was limited to whether fee shifting provisions were permissible under the DGCL. The court expressly held that, given the limitations of the certified question, *it could not determine* whether the bylaw at issue was "enacted for a proper purpose or properly applied." *ATP Tour*, 91 A.3d at 559. Indeed, after the certified question was answered, the parties continued to litigate whether the claims were "intra-corporate" and apparently settled the matter before the district court decided the question. *See* Ltr. from Robert D. McGill to Hon. Gregory M. Sleet, *Deutscher Tennis Bund v. ATP Tour, Inc.*, No. 07-178 (GMS) (Dkt. No. 277) at *7-8 (D. Del. July 15, 2014) (arguing that antitrust claims are not intra-corporate); Ltr. from Bradley I. Ruskin & Philip Trainer, Jr. to Hon. Gregory M. Sleet, *Deutscher Tennis Bund v. ATP Tour, Inc.*, No. 07-178 (GMS) (Dkt. No. 278) at *4-6 (D. Del. Aug. 22, 2014) (arguing that the subject antitrust claims were intra-corporate).

Aside from this false distinction of *ATP Tour*, Plaintiff does not (and cannot) offer any explanation as to why federal securities claims could be deemed intra-corporate claims or involve the internal affairs of the corporation. Federal securities claims are quintessential "external" claims because the laws of a

sovereign other than the state of incorporation—*i.e.*, the federal government—"provide the necessary authority to regulate" them. *Sciabacucchi*, 2018 WL 6719718, at *2. Only the federal government exercising its sovereign authority can regulate federal securities claims. *See Dura Pharm., Inc. v., Broudo*, 544 U.S. 336, 341 (2005) ("Private federal securities fraud actions are based upon federal securities statutes and their implementing regulations."). "Federal law creates the claim, defines the elements of the claim, and specifies who can be a plaintiff or a defendant." *Sciabacucchi*, 2018 WL 6719718, at *1. Consequently, federal securities claims "exist[] outside of the corporate contract" and are "beyond the power of state corporate law to regulate." *Id.* at *2. Such claims plainly fall outside of the internal affairs of a corporation. (*See supra* § II.A.2.)[13] Thus, Delaware law further supports the ineluctable conclusion that Plaintiff's Proposal would violate New Jersey law if implemented.

4. New Jersey's Corporate Law Is Not Preempted by the FAA

In the face of settled New Jersey law that prohibits implementation of the Proposal, Plaintiff pivots and argues that the FAA preempts any New Jersey law that would forbid its Proposal. (*See* Compl. ¶ 40.) This argument rests on a fundamental misapplication of Supreme Court precedent and the FAA's plain terms

[13] Plaintiff has also argued that the holding in *Sciabacucchi* could not extend to arbitration clauses without violating the FAA. (Pl. Br. at 21, 23-25.) This is wrong for the reasons discussed below. (*See infra* § II.A.4.)

and, thus, should be rejected by this Court.

First, the FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) ("'[T]he first principle that underscores all of our arbitration decisions' is that '[a]rbitration is strictly a matter of consent.'" (citation omitted) (alterations in original)).[14] "It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Scis., Inc. v. Bd. of Trs*, 489 U.S. 468, 478 (1989). As the Supreme Court stated in *Volt*, state law generally determines whether there is, in fact, an agreement to arbitrate. *Id.* at 478-79.

In support of its motion for a preliminary injunction, Plaintiff contended that shareholders are deemed to have notice of and agree to corporate bylaws (Pl. Br. at 28), but any implied assent is a product of state corporate law and could extend legally only to matters within the scope of the corporation's internal affairs. There would be no mutual assent to a bylaw governing matters outside the internal affairs

[14] As explained in *Lamps Plus*, state law cannot be used to convert ambiguous contract provisions into provisions mandating parties to engage in class arbitration, and a state interpretation principle requiring such an outcome will yield to the requirement that "infer consent to participate in class arbitration." *Lamps Plus*, 139 S. Ct. at 1416 ("Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[] the principal advantage of arbitration.'" (alteration in original) (citation omitted).)

of the corporation, including transactions in the corporation's securities, which would be governed by the law of the state with a nexus to the transaction. *See Boilermakers*, 73 A.3d at 949 ("[T]he appropriate question . . . is simply whether the bylaws are valid under the DGCL, and whether they form facially valid contracts between the stockholders, the directors and officers, and the corporation."); *see also Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 236 N.J. 301, 324-25 (2019) (concluding that FAA did not prevent conclusion that arbitration provision was unenforceable because of lack of mutual assent); *James v. Global Tel*Link Corp.*, 852 F.3d 262, 268 (3d Cir. 2017) ("[I]t remains axiomatic that a party cannot be required to arbitrate without its assent.").[15]

Further, Plaintiff has assumed without meaningful analysis that bylaws are a "contract" within the purview of the FAA. (*See* Pl. Br. at 9; *id.* n.6.) But Plaintiff identified no case that has applied the FAA in the context of the corporate arrangement memorialized in bylaws, nor did Plaintiff justify the expansion of existing FAA precedent to such circumstances.

Second, even assuming the bylaws as amended by the Proposal would constitute a binding contract, the FAA only mandates enforcement of arbitration

[15] In addition, the corporate bylaws and charter form a tripartite arrangement among the state, the corporation and its shareholders. Without the state's assent, which is manifested through its corporate laws, there can be no contract that could be subject to the FAA.

with respect to controversies "arising out of such contract or transaction" and federal securities claims do not "arise out of" the bylaws, which govern the rights of the corporation and its shareholders inter se, not transactions unrelated to internal corporate affairs.

Third, the FAA's savings clause leaves "grounds as exist at law or in equity for the revocation of any contract" undisturbed. 9 U.S.C. § 2. In *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017), the Supreme Court explained that the FAA only prohibits invalidating an arbitration provision based on "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id.* at 1426 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). The FAA "preempts any state rule discriminating on its face against arbitration—for example, a 'law prohibit[ing] outright the arbitration of a particular type of claim.'" *Id.* (citation omitted). Intent is crucial, as the Court criticized the "arbitration-specific character" of invalid laws, further noting that to be effective, "the rule must in fact apply generally, rather than single out arbitration." *Id.* at 1428 & n.2. Similarly, in *Concepcion*, the Court invalidated a rule where a contract doctrine—unconscionability—was being applied explicitly to disfavor arbitration. 563 U.S. at 339.

Here, Plaintiff does not and cannot allege that New Jersey corporate law generally prohibits the arbitration of federal securities claims or discriminates

against arbitration. Instead, this case is about what New Jersey corporate law allows to be included in bylaws *regardless of forum and regardless of subject*. New Jersey law limiting corporate bylaws to matters concerning internal corporate affairs is otherwise content neutral. Plaintiff has argued that this creates a "rule that declines to enforce arbitration clauses in only a *subset* of contracts such as corporate bylaws." (Pl. Br. at 25.) But the outcome would be no different if the Proposal sought to require the litigation of all federal securities claims in New Jersey state or federal court, as opposed to in arbitration. This alone demonstrates the inapplicability of FAA preemption. As the court in *Sciabacucchi* explained, "constitutive documents of a Delaware corporation cannot bind a plaintiff *to a particular forum* when the claim does not involve rights or relationships that were established by or under [the State's] corporate laws." *Sciabacucchi*, 2018 WL 6719718, at *3 (emphasis added); *see also* Letter Opinion at 4 ("[F]ederal securities fraud claims are distinguishable from the kinds of state corporate law claims that may properly be addressed in *forum-selection* bylaw provisions." (emphasis added)). These rationales do not disfavor arbitration; indeed, they have nothing to do with arbitration.

Nothing prohibits a New Jersey corporation from contracting with its shareholders in an agreement outside the bylaws to agree to any forum—arbitration or otherwise—regarding federal securities claims. The relevant New Jersey laws

similarly do not discourage, disfavor or even mention voluntary arbitration. Thus, such state laws are not preempted by the FAA, because they "apply generally, rather than single out arbitration." *Kindred Nursing*, 137 S. Ct. at 1428 n.2.

B. The Proposal Would Cause the Company to Violate Federal Law

The Proposal, if implemented, also would violate the "anti-waiver" provision in Section 29(a) of the Exchange Act, which states, "[a]ny condition, stipulation, or provision" that binds "any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void," 15 U.S.C. § 78cc(a), as well as the similar anti-waiver provision of Section 14 of the Securities Act, 15 U.S.C. § 78n. Plaintiff's arguments as to why the Proposal complies with the anti-waiver provisions misconstrues the Supreme Court's decisions and ignores the extent to which the arbitration procedures it proposes would adversely impact shareholders' rights under the federal securities laws. (Pl. Br. at 12-13.)

In *Wilko v. Swan*, 346 U.S. 427 (1953), the Supreme Court first ruled that claims under the Securities Act were not suitable to arbitration. *Id.* at 438. The *Wilko* Court found that the Act's jurisdiction provisions could not be waived under Section 29 because access to a judicial forum was needed to protect the substantive rights created by the Act due to perceived inadequacies with arbitration. *See id.* at 437 ("As the protective provisions of the Securities Act require the exercise of

judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended § 14 . . . to apply to waiver of judicial trial and review.").

The Court revisited *Wilko* in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), which addressed the validity of a brokerage agreement requiring arbitration of federal securities fraud claims under stock exchange rules. The Court explained that Section 29(a) would invalidate an agreement that "*weaken[s] the[] ability to recover"* under the Exchange Act. *Id.* at 230 (emphasis added) (first alteration in original) (citation omitted). The Court then stressed the importance of the SEC's oversight of arbitration procedures under regulated stock exchange rules, explaining that "[n]o proposed rule change may take effect unless the SEC finds that the proposed rule is consistent with the requirements of the Exchange Act." *Id.* at 233. The Court concluded that Congress did not intend to "bar enforcement of *all* predispute arbitration agreements" and that the agreements at issue did not waive compliance with any provisions of the Exchange Act, "where the SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights." *Id.* at 238 (emphasis added).

Thus, under *McMahon*, arbitration provisions will be invalid when the arbitration procedures are insufficient to vindicate rights under the federal securities acts. Indeed, Plaintiff has acknowledged that *McMahon* only approved enforcement of arbitration agreements, where the "arbitration procedures [are]

established by entities within the SEC's regulatory jurisdiction." (Pl. Br. at 12.) Plaintiff nevertheless asserted that those limitations "no longer matter[]" after *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). (Pl. Br. at 12-13.) Plaintiff is incorrect. *Rodriguez* involved the very question in *Wilko* regarding the arbitrability of claims under the Securities Act. The Supreme Court overruled *Wilko*'s broad prohibition on arbitrating such claims, but it did not purport to overrule *McMahon*. To the contrary it embraced it, explaining:

> [I]n *McMahon* we explained at length why we rejected the *Wilko* Court's aversion to arbitration as a forum for resolving disputes over securities transactions, ***especially in light of the relatively recent expansion of the Securities and Exchange Commission's authority to oversee and to regulate those arbitration procedures.*** We need not repeat those arguments here.

Rodriguez, 490 U.S. at 483 (emphasis added) (citation omitted).[16] As in *McMahon*, the arbitration agreement in *Rodriguez* required arbitration before a stock exchange tribunal subject to SEC oversight. *Rodriguez de Quijas v.*

[16] It bears emphasis that twenty-nine of the nation's leading scholars in the field also disagree with Plaintiff's suggestion that Section 29(a) does not apply because the Supreme Court's limitations allegedly "no longer matter[]" after *Rodriguez*. (Pl. Br. at 13.) These scholars submitted a letter to the SEC concluding: "With respect to mandatory arbitration provisions in corporate bylaws the Commission does not have oversight of the type referenced in *McMahon*. The current mandatory arbitration provisions in broker-customer agreements therefore arise from a very different arrangement than that approved by the Supreme Court." James D. Cox, Letter to the SEC re: Arbitration Provisions Threaten Market Integrity And Are Contrary To The Federal Securities Laws, at 4 (Oct. 30, 2013), available at https://law.duke.edu/sites/default/files/centers/gfmc/session_2/4_letter_to_sec_re_arbitration_bylaws-10-30-2013.pdf (attached as Ex. E).

Shearson/Lehman Bros., Inc., 845 F.2d 1296, 1297 n.2 (5th Cir. 1988), *aff'd sub nom. Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

Here, there are multiple problems with the Proposal that would reduce the ability of shareholders to vindicate rights under the federal securities laws, rendering it void and illegal under Section 29 of the Exchange Act and Section 14 of the Securities Act. The Proposal provides for arbitration before the AAA, not a tribunal with rules subject to SEC oversight. And critically, the Proposal includes "a waiver of any right under the laws of any jurisdiction to apply to any court of law or other judicial authority to determine any matter or to appeal or otherwise challenge the award, ruling or decision of the arbitrator(s)." (Compl. ¶ 16.) Thus, the Proposal would not only require arbitration before an unregulated tribunal, it would also eliminate any judicial review including the right to seek vacatur of an arbitration award pursuant to the FAA.

The waiver provisions of the Proposal are reason enough why the Proposal would violate federal law if implemented. While waiver of a review of the merits may be permissible, *see Southco, Inc. v. Reell Precision Mfg. Corp.*, 331 F. App'x 925, 927 (3d Cir. 2009), waiver of the right to seek vacatur under Section 10 of the FAA is not. *See In re Wal-Mart Wage & Hour Emp. Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013). Indeed, in *McMahon*, the Court noted that "although judicial scrutiny of arbitration awards necessary is limited, such review is

sufficient to ensure that arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S. at 232. By removing judicial review altogether, the Proposal would leave no method to ensure compliance with the federal securities statutes.

The Proposal would require waiver of the protection of the FAA procedure for vacating an arbitration award, where for example the award was "procured by corruption, fraud, or undue means," "where there was evident partiality or corruption in the arbitrators" or where the arbitrators exceed their authority. *See* 9 U.S.C. § 10. The Proposal also would require waiver of any right to seek judicial correction of an award under Section 11 of the FAA, for example, "[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award." 9 U.S.C. § 11(a). Thus, the Proposal could require a shareholder (or the Company) to live with an arbitration award that was procured by fraud and is riddled with evident mistakes. Obviously such a procedure "weaken[s] the[] ability to recover" under the federal securities laws. *McMahon*, 482 U.S. at 230 (first alteration in original) (citation omitted).[17]

[17] As a result, Plaintiff's generic references to waivers of rights and implied repeals (Pl. Br. at 10-11, 14-15) are inapposite, as the cases cited did not address the unique contours of the federal securities laws. *See Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004). Here, the *(cont'd)*

Lastly, contrary to Plaintiff's urging, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) does not alter this analysis. (Compl. ¶ 37; Pl. Br. at 13-15.) In *Epic*, the Court addressed a provision in an employment agreement requiring an employee to seek individual relief in arbitration of all claims. The Court found that the arbitration agreement did not conflict with the National Labor Relations Act ("NLRA") because it related to collective bargaining, and contained no right to class actions that would contradict the right to individual arbitration. *Epic* did not concern federal securities claims, and did not purport to overrule *McMahon*. Nor did it involve an arbitration provision purporting to waive even the modest judicial review provided under the FAA. Moreover, the *Epic* Court remarked that the NLRA and FAA did not conflict, but instead "have long enjoyed separate spheres of influence." 138 S. Ct. at 1619.[18] That is not the case of the FAA and federal

(cont'd from previous page)
Supreme Court's cases addressed above explain that the *right* under the federal laws of having the SEC's oversight in arbitration was important; without such a right, the Proposal would act as a waiver under Section 29(a).

[18] Indeed, the federal securities laws are readily distinguishable from the NLRA demonstrating why additional SEC oversight is an appropriate precondition for arbitration in the federal securities law arena. In *Epic*, the Court was careful to note that the NLRA "says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum," and that the NLRA regime contains no "hint about what rules should govern the adjudication of class or collective actions in court or arbitration." *Epic*, 138 S. Ct. at 1619, 1625. In contrast, as noted in both *McMahon* and *Rodriguez*, Congress added provisions to the Exchange Act giving the SEC oversight of arbitration procedures. *McMahon*, 482 U.S. at 233-34; *Rodriguez*, 490 U.S. at 483. Congress
(cont'd)

securities laws, which can overlap and may conflict. *McMahon*, 482 U.S. at 231.

C. Plaintiff Misapprehends SEC Rule 14a-8(i)(2)

Plaintiff asserts that, even if the proposed bylaw would be unenforceable or void under state or federal law, adopting a bylaw that "happens to be unenforceable" in court would not be an illegal act or cause the Company to "violate" state or federal law, as required by SEC Rule 14a-8(i)(2). (Compl. ¶ 39.) But Plaintiff misunderstands the circumstances under which a proposal may be excluded under Rule 14a-8(i)(2), because it ignores that the proposed bylaw would be unenforceable *because it is contrary to New Jersey law*. (*See supra* § II.A.)

A bylaw that is repugnant to New Jersey corporate law is "illegal." *Penn-Texas Corp. v. Niles-Bement-Pond Co.*, 34 N.J. Super. 373, 378 (Ch. Div. 1955); *see also CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 239-40 (Del. 2008) (bylaw "invalid" under Delaware law "violates" the law). Indeed, the Attorney General has opined that implementation of the Proposal "would cause Johnson & Johnson to violate" New Jersey law. (Letter Opinion at 6.)

(cont'd from previous page)
has also twice amended the securities laws to add specific provisions regarding the management of federal securities claims—once in 1995, when it adopted the PSLRA, and again in 1998 when it adopted the Securities Litigation Uniform Standards Act ("SLUSA"). *See* 15 U.S.C. §§ 78bb, 78u-4. These statutes (adopted long after the FAA), provide a comprehensive regime for the oversight of securities litigation including, *inter alia*, a stay of discovery, notice to class members and apportionment of liability.

Plaintiff also argues that, even if a future New Jersey court were to declare Plaintiff's proposed mandatory arbitration bylaw to be illegal, until that occurred the Company would not be subject to any law making the bylaw illegal. (Compl. ¶ 38.) This confused position is obviously wrong. Indeed, it is an attack on the very nature of judicial decision-making. The Proposal is illegal because it violates existing law, including New Jersey statutory and decisional law limiting the permissible scope of corporate bylaws. That a New Jersey court has not yet declared the specific bylaw Plaintiff proposes to be illegal does not mean these laws do not currently exist. As Justice Holmes explained, "A judicial inquiry investigates, declares, and enforces liabilities *as they stand on present or past facts and under laws supposed already to exist*. That is its purpose and end." *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908) (emphasis added).

In any event, even if the Trust's misguided argument were credited, the Proposal is also excludable under Rule 14a-8(i)(6), because the Company "would lack the power or authority to implement the proposal." 17 C.F.R. § 240.14a-8(i)(6). The Company is not authorized to implement bylaws that govern matters external to the corporation. (*See supra* § II.A.1.)

CONCLUSION

For all of the foregoing reasons, Defendant respectfully requests that Plaintiff's Complaint be dismissed in its entirety with prejudice.

Dated: May 31, 2019

Respectfully submitted,

s/ Andrew Muscato
Andrew Muscato
Susan L. Saltzstein (*pro hac vice*)
Christopher P. Malloy (*pro hac vice*)
Patrick G. Rideout (*pro hac vice*)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
(A Delaware Limited Liability Partnership)
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Facsimile: (212) 735-2000
(andrew.muscato@skadden.com)
(susan.saltzstein@skadden.com)
(christopher.malloy@skadden.com)
(patrick.rideout@skadden.com)

Justin T. Quinn
ROBINSON MILLER LLC
One Newark Center, 19th Floor
Newark, New Jersey 07102
Telephone: (973) 690-5400
Facsimile: (973) 466-2761
(jquinn@rwmlegal.com)

Attorneys for Defendant
Johnson & Johnson