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March 27, 2019

BY ECF
Honorable Michael A. Shipp
United States District Judge
District of New Jersey
Clarkson S. Fisher Building &
U.S. Courthouse
402 East State Street
Trenton, New Jersey 08608

RE: *The Doris Behr 2012 Irrevocable Trust v. Johnson & Johnson*, No. 3:19-cv-8828-MAS-LHG

Dear Judge Shipp:

We are counsel to Johnson & Johnson ("Defendant" or the "Company") in the above-referenced action (the "Action"). We write concerning Plaintiff's Motion For Order to Show Cause Why a Preliminary Injunction Should Not Issue (Dkt. No. 7, the "Application"), filed by Plaintiff The Doris Behr 2012 Irrevocable Trust ("Plaintiff") yesterday evening following the filing of an unverified Complaint on March 21, 2019. As set forth more fully below, given Plaintiff's extensive delay in bringing its Application and the absence of any emergency here, we respectfully submit that the Court should decline to enter the proposed Order to Show Cause, and instead allow this Action to proceed in the normal course.

This Action concerns a shareholder proposal (the "Proposal") that Plaintiff proffered in November 2018 for inclusion in the Company's proxy materials in connection with the upcoming April 25, 2019 annual shareholder meeting. In short, the Proposal seeks an amendment to the Company's bylaws that would require any federal securities claims asserted by any of the Company's shareholders against the Company or its directors or officers to be pursued *exclusively* in individual arbitrations. (Compl. ¶ 15.) The Proposal further contains an express prohibition on

class actions, as well as any joinder or consolidation. (*Id.*) In December 2018, the Company indicated that it intended to omit the Proposal from its proxy materials on the basis that "the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." 17 C.F.R. § 240.14a-8(i)(2). After extensive submissions to the Staff of the Securities and Exchange Commission ("SEC") made between December 2018 and February 2019—including a robust unsolicited submission by New Jersey Attorney General Gurbir S. Grewal opining that "the Proposal, if adopted, would cause Johnson & Johnson to violate New Jersey state law" (Dkt. No. 1-6)—the SEC Staff granted "no action" relief stating that the Staff would "not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on rule 14a-8(i)(2). To conclude otherwise would put the Company in a position of taking actions that the chief legal officer of its state of incorporation has determined to be illegal." (Dkt. No. 1-8.)

Against this backdrop, the Application seeks a mandatory injunction compelling the Company to issue supplemental proxy materials not only including the Proposal, but also affirmatively stating (directly contrary to the New Jersey Attorney General's opinion) that the Proposal is "legal under the law of New Jersey and under the law of the United States." (Dkt. No. 7.) Plaintiff demands this extraordinary relief overruling the New Jersey Attorney General and the SEC Staff on an unreasonable expedited basis only weeks before the Company's annual shareholder meeting scheduled for April 25, 2019.

But conspicuously absent from the Application is any attempt to demonstrate emergency circumstances that constitute "good and sufficient reasons why a procedure other than by notice of motion [under L. Civ. R. 7.1(d)(1)] is necessary." L. Civ. R. 65.1(a). And even if Plaintiff had attempted to submit such proof (which it did not), any purported "emergency" would be entirely of its own making. Plaintiff has known the Company's intention to exclude the Proposal from its proxy materials since December 11, 2018—approximately four and a half months ago—when the Company "announced its intent to exclude the Trust's proposal from its proxy solicitation materials" and requested that the SEC Staff issue a "no action" letter declaring that the SEC Staff would not recommend enforcement action against the Company if it excluded Plaintiff's proposal from its proxy materials. (Compl. ¶ 19.) And Plaintiff has known the Attorney General's position that the Proposal would violate New Jersey law since January 29, 2019. Further, it has known the SEC Staff's position since February 11, 2019, when the SEC Staff issued a "no action letter . . . announcing that it would *not* recommend enforcement action if Johnson & Johnson proceeded with its plan to exclude the Trust's proposal from its 2019 proxy materials." (Comp. ¶ 28 (emphasis in original); *see* Dkt. No. 1-8.)

After February 11, Plaintiff's trustee (who also serves as Plaintiff's co-counsel) had ample time to be interviewed about this matter by Reuters on February 12, 2019, and to pen a February 21, 2019 op-ed in the *Wall Street Journal*, entitled "The SEC's Misguided Attack on Shareholder Arbitration," that criticized the Company, the New Jersey Attorney General and the SEC for taking the view that the Proposal would violate New Jersey law if enacted.[1] And, on March 13, 2019, just one day shy of two weeks ago, the Company distributed its proxy materials.

Yet, Plaintiff did not file suit *until March 21*—more than *four and a half months* after it knew Johnson & Johnson intended to exclude the Proposal, almost *six weeks* after the SEC issued its no-action letter and *eight days* after the Company filed (and mailed and/or made available electronically) its proxy materials. Still in no hurry, Plaintiff waited another five days after filing the Action before filing the instant Application after hours on March 26. Plaintiff has not yet made service of the summons and Complaint. There can hardly be better evidence of the absence of a need for immediate relief or irreparable harm than Plaintiff's own dilatory conduct. *See, e.g. MNI Mgmt., Inc. v. Wine King, LLC*, 542 F. Supp. 2d 389, 403 (D.N.J. 2008) ("inexcusable delay in seeking a preliminary injunction" defeats "assertion of irreparable harm"); *Chaves v. Int'l Boxing Fed'n*, Civ. No. 16-1374 (JLL), 2016 WL 1118246, at *2 (D.N.J. Mar. 22, 2016) (no irreparable harm when "Plaintiffs waited until the last minute to file" for preliminary relief despite being on notice of claim "nearly four months ago"); *Shack v. Reinhard*, No. 08cv1950-WQH-JMA, 2008 WL 11337335, at *1–3 (S.D. Cal. Oct. 29, 2008) (two-month delay in seeking preliminary relief related to proxy proposal).

Indeed, Plaintiff's "delay wasted nearly [or more than] half of the time potentially available to prepare, hear and decide this case." *Oliver Press Partners, LLC v. Decker*, No. 1817-N, 2005 WL 3441364, at *1 (Del. Ch. Dec. 6, 2005); *see also In re Allis-Chalmers Energy, Inc. S'holders Litig.*, C.A. No. 5726-VCN, at 15-16 (Del. Ch. Feb. 3, 2011) (transcript of decision attached) (denying motion to expedite where, among other things, plaintiff waited to move until twelve days after definitive proxy was filed, leaving only three weeks before meeting). And it cannot be overstated that "delay in seeking injunctive relief undercuts the urgency that forms the cornerstone of preliminary injunctive relief–and indeed, indicates a lack of immediacy." *Smart Vent Products, Inc. v. Crawl Space Door Sys., Inc.*, No. 13-5691 (JBS/KMW), 2016 WL 4408818, at *12 (D.N.J. Aug. 16, 2016); *see also Kahn v. MSB Bancorp, Inc.*, No. CIV.A. 14712, 1995 WL 1791092, at *1 (Del. Ch. Dec 6,

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[1] *Available at* https://www.wsj.com/articles/the-secs-misguided-attack-on-shareholder-arbitration-11550794645 (last visited 3/26/2019).

1995) ("A party seeking preliminary relief must move as promptly as possible to prevent the passage of time from increasing the risk of injury to the opposing party and from depriving the court of an opportunity to make a more informed judgment."); *see generally Pharmacia Corp. v. Alcon Labs., Inc.*, 201 F. Supp. 2d 335, 383 (D.N.J. 2002) (inexcusable delay "knocks the bottom out of any claim of immediate and irreparable harm"); *Blakeley v. Scanlon*, 604 A.2d 416 (Table), 1991 WL 247801, at *1 (Del. Nov. 14, 1991) ("Equity only aids the vigilant, not those who slumber on their rights.").

Further, Plaintiff's contention that "there is time for Johnson & Johnson to issue supplementary proxy materials" (Pl. Br. at 8), ignores the prejudice that accelerated adjudication of these issues could cause to interested parties. Because of the Trust's unreasonable and strategic delay, the Company will be prejudiced by a schedule that seemingly is designed to preclude briefing and adjudication on a timeline that promotes full and fair mounting of defenses by parties (and non-parties) alike. *See Oliver Press Partners*, 2005 WL 3441364, at *1 ("This extensive delay is unquestionably prejudicial to the defendants' ability to present their defense."). It bears emphasis that the New Jersey Attorney General expressed views and positions about Plaintiff's Proposal prior to Plaintiff's initiation of this lawsuit. And the New Jersey Attorney General may view his participation in this lawsuit as necessary and appropriate. In addition, in the event the Court grants Plaintiff's Application for expedition (which we respectfully submit it should not do), it is critical that shareholders have a reasonable amount of time with any supplemental proxy materials so that they may give Plaintiff's Proposal adequate consideration and vote on an informed basis. *See, e.g.*, *Bolger v. First State Fin. Servs.*, 759 F. Supp. 182, 187 (D.N.J. 1991) (finding supplemental proxy material sent thirteen days in advance of meeting sufficient "especially in light of its relatively straightforward, uncomplex nature" (citations omitted)).

Although the Company will address all aspects of Plaintiff's Application in far greater detail in its full opposition thereto, if necessary, it bears emphasis that Plaintiff cannot satisfy a single prong of the test for a preliminary injunction. First, there plainly is no irreparable harm here, where Plaintiff only dedicates one paragraph of its 40-page brief to this requirement and concedes that it "intends to submit its proposal again for the 2020 shareholder meeting, and it will continue submitting this proposal each year until the proposal is adopted by the shareholders." (Compl. ¶ 34.) *See Oliver Press Partners, LLC*, 2005 WL 3441364, at *1 (no irreparable harm when plaintiff delayed in seeking injunctive relief and director slate could stand for re-election the following year). Second, there is no likelihood of success on the merits. While Plaintiff boldly proclaims that it "is not only likely but certain to succeed on its claim" (Pl. Br. at 8), closer scrutiny reveals that the entirety

of Plaintiff's theory is built upon the notion that everyone else got it wrong. Plaintiff claims, *inter alia*, that the New Jersey Attorney General's opinion concerning the proper interpretation of New Jersey law is "meritless" (*id.* at 33), and that the Delaware Court of Chancery wrongly interpreted Delaware law in *Sciabacucchi v. Salzberg*, Civ. No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018) (Pl. Br. at 25-27). In actuality, Plaintiff has no likelihood of success, as evidenced by the numerous authorities it dismisses as wrong (including the State of New Jersey's chief legal officer). Further, the proposed mandatory injunction would impose substantial expense and inconvenience on the Company, which has already prepared and distributed its proxy materials. Finally, the public interest simply cannot be served by requiring Johnson & Johnson to take action that the chief legal officer of its state of incorporation has declared *would violate the laws of that state*.

Accordingly, for all the foregoing reasons, we respectfully submit that the Court should decline to enter the proposed Order to Show Cause and allow the matter to proceed in the ordinary course with fulsome briefing on these legal issues.

We thank the Court for its consideration of this submission. Although our client has yet to be served, we welcome the opportunity to address the foregoing at an in-person or telephonic conference with the Court.

Respectfully submitted,

s/ Andrew Muscato

Andrew Muscato

Encl.

cc: All Counsel (via ECF)