

Susman Godfrey L.L.P Wins Fifth Circuit Appeal for KBR, Inc. Against Shareholder Activist

06.11.2012 | 10 | 21NEWS

On June 11, 2012, Susman Godfrey L.L.P. won an appeal in the U.S. Court of Appeals for the Fifth Circuit in favor of KBR, Inc. and against shareholder activist John Chevedden. KBR was represented by Geoffrey L. Harrison and Chanler A. Langham, partners in Susman Godfrey's Houston office, and by Houston associate Ryan Caughey.

The Fifth Circuit (Judges Reavley, Smith, and Prado) affirmed the decision of Judge Lee Rosenthal of the United States District Court for the Southern District of Texas. In April 2011, Judge Rosenthal had ruled in KBR's favor that "KBR may exclude Chevedden's proposal from its proxy statement" and entered judgment against Chevedden.

Chevedden had submitted a purported shareholder proposal to KBR and asked that it be included in KBR's proxy materials. KBR believed that Chevedden's proposal was deficient because Chevedden had failed to prove that he actually was one of the company's shareholders which, of course, is a minimum eligibility requirement for the submission of a shareholder proposal.

Under S.E.C. Rule 14a-8(b), in order to be eligible to submit a shareholder proposal to a company, a person or entity must actually be a shareholder of that company, and must have held a certain amount of stock for a certain amount of time. KBR questioned whether Chevedden qualified, showed that Chevedden had failed to meet his burden of proof, and cast serious doubt on what little information Chevedden did provide.

On appeal, the Fifth Circuit rejected Chevedden's argument that the district court lacked subject-matter jurisdiction, held that "§ 14(a) creates a private right of action to enforce SEC regulations controlling the conditions under which proxies are submitted," and explained that KBR properly filed suit against Chevedden because "The choice between accommodating a potential adverse litigant at substantial expense or taking action that would expose oneself to a suit creates a justiciable dispute" under the Declaratory Judgment Act.

KBR's lead trial lawyer, Geoffrey L. Harrison, said, "The Fifth Circuit got it exactly right in affirming district court Judge Lee Rosenthal's judgment in KBR's favor." Harrison added that "KBR's appropriate and successful approach is a model for other companies that care about protecting the integrity of their proxy materials."

Harrison suggested that "KBR's success in this case, and Apache Corporation's similar success in 2010, should make shareholder imposters and corporate gadflies think more than twice before improperly submitting deficient proposals when they can't prove they are shareholders."

Harrison and Langham also represented Apache Corporation in a similar shareholder proposal case against Chevedden in 2010, *Apache Corporation v. John Chevedden*; 696 F.Supp.2d 723 (S.D. Tex. 2010), and did so again earlier in 2012. Susman Godfrey won both cases for Apache as well.

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According to Langham, the SEC recently reconsidered its previous no action decisions and announced a new interpretation of its rules to reflect that only DTC participants should be viewed as “record” holders of securities for purposes of Rule 14a-8(b)(2)(i) and, in doing so, specifically cited the U.S. district court’s decisions in Apache v. Chevedden and KBR v. Chevedden. Langham noted that “particularly in light of the Fifth Circuit’s ruling yesterday, KBR’s and Apache’s successful litigation is a game-changer that very well may have a dramatic impact on the way actual and pretend shareholders make proposals, and the way companies respond to them. By winning these lawsuits, we have helped companies in the Fifth Circuit and around the country protect the sanctity of their proxy materials for the benefit of all their shareholders.”

Harrison added that “At a minimum, the Fifth Circuit’s ruling makes it perfectly clear that Chevedden and anyone who tries to submit a shareholder proposal to a company had better be ready, willing, and able to prove they actually qualify as a shareholder.”