

Susman Godfrey L.L.P Wins First-of-Its-Kind

Houston, Texas – On March 10, 2010, Susman Godfrey L.L.P. won a declaratory judgment in favor of Apache Corporation and against shareholder activist John Chevedden.

Judge Lee Rosenthal of the United States District Court for the Southern District of Texas granted Apache's motion for declaratory judgment and held that "Apache may exclude Chevedden's proposal from its proxy materials." The case style is Apache Corporation v. John Chevedden, No. 4:10-cv-00076.

Chevedden had submitted a purported shareholder proposal to Apache and asked that it be included in Apache's proxy materials. Apache believed that Chevedden's proposal was deficient because he had not proven that he actually was one of the company's shareholders. In its court papers, Apache described Chevedden as "the single most persistent proponent or proxy of purported shareholder proposals in history" whose proposals "have been the subject of a whopping 953 SEC staff no-action letters."

Apache's lead trial lawyer, Geoffrey L. Harrison, a partner in the Houston office of Susman Godfrey, said he was "thrilled with the court's ruling, and impressed with the court's careful attention to the important securities law issues raised."

Harrison said: "This obviously is a big win for Apache. It also is a big win for responsible corporate governance." Harrison added that the court's decision "should curtail the submission of proposals from those who otherwise might pretend to be shareholders when, in fact, they are not." Harrison said "Apache's aggressive and successful litigation approach here is a game-changer that very well may have a dramatic impact on the way shareholders make proposals, and the way companies respond to them." "By winning this lawsuit, we have helped Apache protect the sanctity of its proxy statement ballot for the benefit of its true shareholders," Harrison added.

Under S.E.C. Rule 14a-8(b), in order to be eligible to submit a shareholder proposal, a person or entity must be a shareholder and must have held a certain amount of stock for certain amount of time.

In its court papers, Apache questioned whether Chevedden was an Apache shareholder and claimed that it had "many compelling reasons to distrust Chevedden's eligibility to submit his proposal." Indeed, Judge Rosenthal found that there are "valid reasons" to believe that Chevedden's offer of proof was "unreliable as evidence."

Chevedden tried to deflect the substantial body of evidence that Apache presented by saying it was "irrelevant" and that "[m]aybe Apache's lawyers can convert this into a spy novel or something."

Judge Rosenthal explained in her decision that "most Rule 14a-8 disputes are resolved cooperatively or through the no-action process." Harrison agreed that's how it's usually done, and noted that, to his knowledge, "this is the very first time that a company has sought to exclude a purported shareholder proposal by taking the proponent directly to court, without first seeking a no-action letter from the SEC staff."

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Two years ago, Harrison won a similar case for Apache and secured a ruling that Apache properly had excluded from its proxy materials a proposal submitted by the New York City Employees' Retirement System. In that prior case, *Apache v. NYCERS*, 621 F.Supp.2d 444 (S.D. Tex. 2008), Apache had secured a favorable no-action letter from the SEC staff before it filed suit in federal court.

In Apache's recent case against Chevedden, Judge Rosenthal held that certain S.E.C. rules were "intended to 'give true vitality to the concept of corporate democracy,' . . . that does not necessitate a complete surrender of a corporation's rights during proxy season." The court held that "Chevedden has failed to meet Rule 14a-8(b)(2)'s requirements" and that "Apache may exclude Chevedden's proposal from its proxy materials."