



# **Company Takes Aim at Shareholder, Refusing to Include Proposal in its Proxy Materials**



MICHAEL J. BARRY

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**O**n March 10, 2010, the Hon. Lee H. Rosenthal, of the United States District Court for the Southern District of Texas issued her decision in a closely watched case relating to the procedural requirements imposed on shareholders who seek to introduce proposals under SEC Rule 14a-8. 17 C.F.R. § 240.14a-8. In *Apache Corp. v. Chevedden*, No. H-10-0076, 2010 WL 918443 (S.D. Tex., Mar. 10, 2010), Judge Rosenthal granted summary judgment in favor of Apache Corporation ("Apache" or the "Company"), which had sought a declaratory judgment that it was not required to include in its 2010 proxy materials a shareholder proposal submitted by well-known activist John Chevedden. Although technically a victory for Apache, the decision is more appropriately viewed as a "split decision," because it emphatically rejected the primary argument advanced by Apache that in order to establish eligibility to submit proposals shareholders should be required to submit a letter from the "registered" owner of the stock attesting to the beneficial owner's interest.

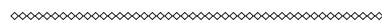
**T**he litigation arose from an unusually heavy-handed attack in which Apache sued Mr. Chevedden seeking to prevent him from presenting a proposal at the Company's 2010 annual meeting under SEC Rule 14a-8 because Mr. Chevedden allegedly had not adequately established his requisite ownership of Apache stock. In order to introduce a shareholder proposal, SEC Rule 14a-8 requires the proponent to have held at least \$2,000 in market value or 1% of a Company's outstanding stock continuously for at least one year as of the time of submitting the proposal. SEC Rule 14a-8(b)(1). If a proponent is not the "registered owner" of the stock (meaning the shareholder's name does not appear in the company's records as a shareholder), the proponent may prove eligibility by submitting to the company a "written statement from the 'record' holder" of his stock. See SEC Rule 14a-8(b)(2). SEC Rule 14a-8 does not expressly define the term "record holder," but states that a record holder is generally a "broker" or a "bank." *Id.*

**M**r. Chevedden's proposal requested that Apache's Board take the necessary steps to amend the Company's bylaws and charter to provide that all actions by shareholders can be taken with a simple majority vote. Like most retail investors, Mr. Chevedden is not a "registered" owner of Apache stock. Accordingly, to satisfy Rule 14a-8(b), Mr. Chevedden submitted a letter from his "introducing broker" (which essentially functions as an intermediary between the customer and a broker-dealer) attesting to his beneficial ownership. In the lawsuit, Apache sought a judicial ruling that the letter Mr. Chevedden provided from his "introducing broker" was not sufficient for purposes of establishing ownership under Rule 14a-8(b)(2). Instead, Apache argued, in order to satisfy the eligibility requirements set forth in SEC Rule 14a-8, Mr. Chevedden was required to submit a letter from the "registered owner" of this stock – meaning the name of the entity listed in the Company's stockholder list as the official owner of the shares.

Judge Rosenthal rejected Apache's argument in this regard. To facilitate the clearance and settlement of transactions in securities, Judge Rosenthal observed, publicly traded stock typically is held by the Depository Trust Company ("DTC"), which serves as a clearinghouse for trades and registers the stock it holds with the company's under DTC's "nominee name" of Cede & Company. Because neither DTC nor Cede & Co. is a "broker or bank," Judge Rosenthal reasoned, Rule 14a-8(b)(2) necessarily contemplates that shareholders can demonstrate their ownership interests by providing a letter from an entity other than the true "registered owner" of the company's stock. 2010 WL 918443 at \*10 ("If the Rule meant that a shareholder needed a letter from the 'street name' holder (usually Cede & Co.) listed in the company records, the Rule would have asked for a letter from the 'registered holder,' not the 'record' holder." The Rule text does not support Apache's proposed narrow reading.").

**H**owever, with respect to Mr. Chevedden's proposal in particular, Judge Rosenthal held that the letter Mr. Chevedden submitted from his "introducing broker" – RAM Trust Services ("RTS") – was not sufficient. RTS is neither a broker nor a bank, and is not a participant in the DTC. Further, Judge Rosenthal held, the letter provided by RTS that the Court found to be controlling did not identify any DTC participant as the "broker" that could attest to Mr. Chevedden's holdings, and Apache submitted publicly available information that raised questions regarding the accuracy of certain statements in RTS's letter. Although Mr. Chevedden thereafter produced a second letter from RTS identifying Northern Trust Bank as the broker, and a letter from Northern Trust Bank itself attesting to Mr. Chevedden's stockholdings, Judge Rosenthal held that these two supplemental letters were not provided to the Company within the requisite 14 day period after Apache notified Mr. Chevedden of the deficiency, and as a result could not be considered.

Judge Rosenthal's holding in *Apache Corp. v. Chevedden* is very narrow, and although technically a defeat for Mr. Chevedden, can be seen as a victory for shareholders generally. Apache's argument that Rule 14a-8 required shareholders to establish their eligibility to introduce shareholder proposals by submitting letters from the "registered" owners of corporate stock, if accepted, threatened to make the process of introducing shareholder proposals much more difficult and cumbersome for all investors. By rejecting Apache's primary argument here, even aside from the merits of Mr. Chevedden's particular submission, Judge Rosenthal's decision preserved the primary goal of Rule 14a-8, which is to facilitate shareholder communications.



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