2000 POST OAK BOULEVARD / SUITE 100 / HOUSTON, TEXAS 77056-4400

(713) 296 6000
WWW.APACHECORP.COM

December 29, 2010

Office of Chief Counsel
Division of Corporate Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: Apache Corporation - Omission of Stockholder Proposal
Submitted by Mr. John Chevedden

Ladies and Gentlemen:

On behalf of Apache Corporation, a Delaware corporation (the "Company" or "Apache"), pursuant to Rule 14a-8(j) under the Securities and Exchange Act of 1934, as amended (the "Exchange Act"), I am writing to inform you that Apache intends to omit from the proxy statement for its 2011 Annual Meeting of Stockholders (the "2011 Proxy Materials") a stockholder proposal (the "Proposal") received from John Chevedden (the "Proponent").

Pursuant to Rule 14a-8(j), we have filed this notice with the Securities and Exchange Commission (the "Commission") no later than eighty calendar days before the Company intends to file its definitive 2011 Proxy Materials with the Commission and concurrently sent copies of this correspondence to the Proponent.

Rule 14a-8(k) provides that stockholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the staff of the Division of Corporation Finance (the "Staff"). Accordingly, we are taking this opportunity to inform the Proponent that if the Proponent elects to submit additional correspondence to the Commission or the Staff with respect to this Proposal, a copy of that correspondence should concurrently be furnished to the undersigned on behalf of the Company pursuant to Rule 14a-8(k).

I. The Proposal

The Proposal requests that the Board of Directors "take the steps necessary so that each shareholder voting requirement impacting our company, that calls for a greater than simple majority vote, be changed to a majority of the votes cast for and against the proposal in compliance with applicable laws." A copy of the Proposal and the Supporting Statement is attached as Exhibit A.

II. Basis for Exclusion

We hereby inform the Staff that we intend to exclude the Proposal pursuant to Rule 14a-8(b) and Rule 14a-8(f)(1) because the Proponent failed to provide the required proof of stock ownership in response to the Company's proper request for that information.

III. Analysis

The Proposal May Be Excluded Under Rule 14a-8(b) And Rule 14a-8(f)(1) Because The Proponent Failed To Establish The Requisite Eligibility To Submit The Proposal

A. *Background*

The Proposal, dated November 24, 2010, was received by the Company on November 29, 2010. *See* Exhibit A. On the same date, Apache received from the Proponent via electronic mail a letter from Mr. Michael P. Wood, Senior Portfolio Manager of RAM Trust Services ("RTS"), detailing the Proponent's purported proof of ownership (the "RTS Letter"). *See* Exhibit B. The RTS Letter stated that RTS was confirming that the Proponent has held no less than 50 shares of Apache stock in an account at RTS since November 7, 2008, and that RTS, in turn, holds those shares through the Northern Trust Company in an account under the name Ram Trust Services. Notably, the RTS Letter does not indicate that it is an introducing broker. Similarly, the RTS Letter goes to great lengths to make it clear that it does not have custody of the shares of Apache common stock purportedly owned by the Proponent. Neither the Proponent nor RTS are listed in the Company's stock records as record holders of any Apache common stock as is required by Rule 14a-8(b).

Accordingly, the Company sought additional verification of the Proponent's eligibility to submit the Proposal. On December 7, 2010, within 14 calendar days of the Company's receipt of the RTS Letter, the Company sent a letter addressed to the Proponent (the "Deficiency Notice"). *See* Exhibit C. The Deficiency Notice informed the Proponent that he had failed to comply with the procedural requirements of Rule 14a-8 and explained how he could cure the procedural deficiency. In part, the Deficiency Notice stated:

> Apache has reviewed the list of record owners of the company's common stock, and neither you, nor RAM Trust Services, nor Northern Trust is listed as an owner of Apache common stock. Pursuant to the SEC Rule 14a-8(b), since neither you nor RAM Trust Services, nor Northern Trust appear to be record holders of Apache common stock, you must provide a written statement from the record holder of the shares you claim to beneficially own verifying that you continually have held the required amount of Apache common stock for at least one year as of the date of your submission of the proposal. As required by Rule 14a-8(f), you must provide us with this statement within 14 days of your receipt of this letter.

The Proponent responded on December 20, 2010 via electronic mail. *See* Exhibit D. His response is copied below:

Dear Ms. Peper,

Thank you for acknowledging the rule 14a-8 proposal. Based on the October 1, 2008 Hain Celestial no-action decision, Ram Trust Services is my introducing securities intermediary and hence the owner of record for purposes of Rule 14a-8(b). I intend to hold the shares of Apache common stock that I own through the date of the meeting. Please let me know if there is another question.

Sincerely,
John Chevedden

For the reasons stated below, the RTS letter and the Proponent's electronic mail response to the Company's Deficiency Notice do not satisfy the requirements of Rule 14a-8(b)(2) and the Proposal is thus excludable pursuant to Rule 14a-8(f).

B. *Discussion*

The Proposal may be properly excluded from the Proxy Materials in accordance with Rule 14a-8 for three reasons. First, RTS is not a "record" holder of the Company's securities. Second, RTS does not qualify as an introducing broker under the SEC's prior no-action positions. And, finally, the exclusion of the Proposal is dictated by a final decision of a federal district court that is binding upon the Company and Proponent.

1. The Proposal May Be Excluded Pursuant To Rule 14a-8(B) And Rule 14a-8(F)(1) Because RTS Is Not A "Record" Holder Under The SEC's Definition Of That Term

Proponent has failed to provide the Company, within the time period set forth in Rule 14a-8(f)(l), the requisite verification that the Proponent satisfies the eligibility requirements of Rule 14a-8(b). Rule 14a-8(b)(1) provides that in order to be eligible to submit the proposal, the Proponent must have continuously held at least $2,000 in market value, or 1% of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date on which the Proposal is submitted.

Rule 14a-8(b)(2) provides that the Proponent, who is not a registered holder of the Company's securities, must prove his eligibility at the time of his submission in one of two ways: he may submit a written statement from the record holder of the securities or he may submit copies of Schedules 13D or 13G or a Form 3, 4 or 5.

In response to the RTS Letter, the Company's Deficiency Letter described the ownership requirements of Rule 14a-8, identified the deficiency in the RTS Letter, provided adequate detail about what the Proponent had to do to cure the deficiency and explained that the Proponent's response must be postmarked or transmitted electronically no later than 14 days from the date of receipt of the Deficiency Letter.

The electronic mail from Proponent submitted in response to the Deficiency Notice claims that RTS serves as the Proponent's "introducing securities intermediary" and hence the owner of record for purposes of Rule 14a-8(b). However, RTS does not hold custody of securities and therefore is not a record holder of the Company's securities. Rule l4a-l(b)(i) defines "record holder" for the purposes of Rules l4a-13,14b-1 and 14b-2 as follows:

> For purposes of Rules l4a-13, l4b-1 and l4b-2, the term "record holder" means any broker, dealer, voting trustee, bank, association or other entity that exercises fiduciary powers which holds securities of record in nominee name or otherwise or as a participant in a clearing agency registered pursuant to section 174 of the Act. 17 C.F.R. §240.14a-(1)(b)(i).

Even though this definition does not apply to Rule 14a-8, it is instructive in determining whether RTS is a record holder in this case. Even if this broad definition were applied to Rule 14a-8, RTS is not a "record" holder because (1) it is not a "broker, dealer, voting trustee, bank, association or other entity that exercises fiduciary powers" and (2) it does not hold or have custody of securities and is not a participant in a §17A clearing agency.

a) RTS Is An Investment Adviser And Is Not A Broker, Dealer, Voting Trustee, Bank, Association Or Other Entity That Exercises Fiduciary Powers

On March 15, 2005, RTS and certain of its investment advisers signed a Consent Agreement with the State of Maine Office of Securities, agreeing that RTS is "an investment adviser company, and identifying several RTS employees, including Michael P. Wood as "investment advisor representatives." In the Consent Agreement, RTS agreed that its employees would comply with all licensing and other legal requirements governing investment advisors in the State of Maine. The Consent Agreement makes clear that RTS is "an investment adviser company."[1]

Further, on its website, RTS says that it "provides superior, highly personalized and fully integrated financial services primarily to high net worth families, individuals and private foundations," that "Unlike many investment managers, Ram Trust Services is never content to rely solely on outside sources of information in assessing our investments," and refers to itself as "investment advisors who invest in tandem with our clients." *See* www.ramtrust.com/strategy.htm. While Ram Trust calls itself "investment managers" and "investment advisors" on its website, it does not anywhere call itself a "broker" or an "introducing broker."

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[1] *Apache Corporation v. John Chevedden*, No. 4:10-cv-00076 (S.D. Tex. March 10, 2010).

b) RTS Does Not Purport To Be, And Could Not Legally Be, The Custodian Or Holder Of Apache Stock

Notably, nowhere in RTS's purported proof of ownership does it indicate in any way that it is the custodian or a holder of Apache stock. That is because RTS could not legally be the custodian or holder of Apache stock. The Investment Advisers Act of 1940, 17 C.F.R. §275.206(4)- 2(a), makes it "a fraudulent, deceptive, or manipulative act" for an investment adviser "to have custody of client funds or securities" unless it's a "Qualified Custodian." Ram Trust is not a "Qualified Custodian" because it is not a bank, a "broker-dealer registered under section 15(b)(1) of the Securities Exchange Act of 1943." *See* 17 C.F.R. §275.206(4)-2(c)(3). In the absence of such custody, RTS is not and could not be a "record holder" under Rule 14a-1(b) because it does not have a sufficient nexus with the securities reliably to verify that the stockholder status and eligibility requirements of Rule 14a-8 have been met.

Staff Legal Bulletin 14 states that a written statement from a stockholder's investment advisor is insufficient evidence of ownership *unless* the investment advisor is also the record holder of the shares. Because RTS is not a record holder of the Proponent's shares, the exception for investment advisors that also are record holders does not apply. Accordingly, RTS could not, as a matter of law and in accordance with past staff interpretations, provide proof of ownership in accordance with Rule 14a-8.

Since the Proponent failed to provide proof of ownership from the record holder of his shares, the Proponent has failed to establish, within the 14 days prescribed by Rule 14a-8(f)(1), his eligibility to submit the Proposal. The Staff has granted no action relief previously where the Proponent attempted to establish by providing documentary evidence of ownership by a person other than the "record" holder. *See e.g. JP Morgan Chase & Co.* (Feb. 15, 2008); *Verizon Communications, Inc.* (Jan. 25, 2008); *The McGraw Hill Companies, Inc.* (Mar. 12, 2007); *MeadWestvaco Corporation* (Mar. 12, 2007). Thus, because RTS is not a record holder of Apache securities, its letter is insufficient to demonstrate that the Proponent satisfies the minimum ownership requirements of Rule 14a-8.

2. The Proposal May Be Excluded Because RTS is Not an Introducing Broker Under the 2008 *The Hain Celestial Group, Inc.* No-Action Letter

Proponent claims that RTS serves as Proponent's introducing securities intermediary, and, as such, qualifies as an introducing broker under the no-action letter in *The Hain Celestial Group, Inc.* (Oct. 1, 2008). This however is incorrect based on the statements of RTS itself and on the Staff's position as expressed in *The Hain Celestial Group* (Oct. 1, 2008). In that letter, the stockholder at issue had provided a letter from its introducing broker in order to substantiate its satisfaction of Rule 14a-8's minimum ownership requirements. Despite well supported arguments by the company requesting no-action relief, as well as a number of previously issued no-action letters that reached contrary conclusions, the Staff broke from its historical approach and ultimately ruled that the letter from the introducing broker satisfied the rule.

The Staff stated that a written statement from an introducing broker-dealer constitutes a statement from a "record" holder of securities for purposes of satisfying Rule 14a-8(b)(2)(i). The Staff went on to define an introducing broker-dealer as: "a broker-dealer that is not itself a participant of a registered clearing agency but clears its customers' trades through and establishes accounts on behalf of its customers at a broker-dealer that is a participant of a registered clearing agency and that carries such accounts on a fully disclosed basis."

Under the definition of "record holder" expressed in *The Hain Celestial Group*, RTS does not qualify as an introducing broker, as it is not a broker-dealer at all. Instead, and as discussed above, RTS is "a registered investment adviser" and it is not, and cannot be, Chevedden's introducing broker under the SEC's no-action letter. Indeed, RTS's own form of "Investment Management Agreement" confirms that it is not an introducing broker. ("RAM will execute all requested purchases and sales of securities through Atlantic Financial Services of Maine, Inc. ("AFS"), or another registered broker-dealer of RAM's selection."). As the SEC has made clear on numerous occasions, a written statement from an investment advisor is insufficient to verify continuous ownership under Rule 14a-8 unless that investment advisor is also the record holder of the shares. *See* Section C.1.c. Staff Legal Bulletin No. 14 (July 13, 2001); *see also, e.g., Clear Channel Communications* (Feb. 9, 2006) (concurring in exclusion where the proponent submitted ownership verification from an investment adviser that was not a record holder). Based on the information available to the company, RTS is an investment adviser, is not an introducing broker, and is not the record holder of Chevedden's purported stock. The Proponent's electric mail statement that RTS is a "non-depository trust company" does not change this conclusion.

3. Recent SEC Rulemakings Suggest that Additional Proof of Ownership Would be Required Even if RTS Was an Introducing Broker

The SEC recently adopted Rule 14a-11, which will require that a public company include in its proxy materials candidates to the board who have been nominated by stockholders who meet certain conditions. *See* SEC Rel. No. 33-9136 (Aug. 25, 2010) (the "Adopting Release"). Among other aspects of Rule 14a-11, a stockholder who owns 3% of the voting power of a company's securities is entitled to require that the company disclose that stockholder's nominees to the board in the company's proxy materials if the stockholder complies with the procedural and substantive requirements of the rule. *See generally* Rule 14a-11. Where the nominating stockholder under Rule 14a-11 is not the registered holder of the securities, the nominating stockholder would be required to demonstrate ownership by attaching to its notice of nomination on Schedule 14N a written statement from the "record" holder of the nominating stockholder's shares (usually a broker or bank) verifying that, at the time of submitting the stockholder notice to the company on Schedule 14N, the nominating stockholder continuously held the securities being used to satisfy the applicable ownership threshold for a period of at least one year.

Notably, Schedule 14N provides that a nominating stockholder who owns shares through a broker that is not a participant in a clearing agency acting as a securities depository must both (1) submit a written statement or statements (the "initial broker statement") from the broker with

which the nominating stockholder maintains an account that provides the information about securities ownership set forth above and (2) submit a separate written statement from the clearing agency participant through which the securities of the nominating stockholder are held, that (a) identifies the broker for whom the clearing agency participant holds the securities, and (b) states that the account of such broker has held, as of the date of the separate written statement, at least the number of securities specified in the initial broker statement, and (c) states that this account has held at least that amount of securities continuously for at least three years.

Applying this approach here, the Proponent should be required to obtain a letter from his "introducing broker" (if he has one) as well as from the DTC participant through which the introducing broker holds shares. We urge the Staff to follow the same protocols with respect to introducing brokers or even an investment adviser like RTS. In both cases the person requiring proof of ownership is not otherwise in a position to verify that the purported stockholder satisfies the minimum ownership requirements of the rule. We believe that this verification is critical - regardless of whether the stockholder is submitting a proposal under Rule 14a-8 or making a nomination pursuant to Rule 14a-11.

4. The Proposal May Be Excluded Because The District Court's Decision in *Apache Corporation v. John Chevedden* Dictates its Exclusion.

a) The District Court in the *Apache* Decision Ruled that These Same Facts Provide a Basis for Exclusion Under Rule 14a-8

On March 10, 2010, the United States District Court for the Southern District of Texas ruled that Apache was not obligated to include the Proponent's proposal in its 2010 proxy materials.[2] Specifically, the court determined that Proponent had failed to satisfy the requirements of Rule 14a-8(b)(2) where, as here, the only documentation submitted within the 14-day time period purporting to substantiate his stock ownership was a letter from RTS. In that case, ruling in Apache's favor and concluding that Chevedden's letter from RTS did not satisfy Rule 14a-8(b)(2), the court stated:

> The only issue before this court is whether the earlier letters from RTS – an unregistered entity that is not a [Depositary Trust Company ("DTC")] participant – were sufficient to prove eligibility under Rule 14a-8(b)(2), particularly when the company has identified grounds for believing that the proof of eligibility is unreliable. This court concludes that the December 2009 RTS letters are not sufficient.
>
> ...
>
> Although section 14 of the Securities Exchange Act of 1934 (governing proxies), under which Rule 14a-8 was promulgated, was intended to "give true vitality to the concept of corporate democracy," Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 676 (D.C. Cir. 1970), cert. granted sub nom SEC v. Medical Comm. for Human Rights, 401

[2] *See Apache Corporation v. John Chevedden*, No. 4:10-cv-00076 (S.D. Tex. March 10, 2010).

> U.S.973, 91 S. Ct. 1191 (1971), vacated as moot, 404 U.S. 403, 92 S. Ct. 577 (1972), that does not necessitate a complete surrender of a corporation's rights during proxy season. Rule 14a-8 requires a shareholder seeking to participate to register as a shareholder or prove that he owns a sufficient amount of stock for a sufficient period to be eligible. *Id* at 29.

The court reached this decision because RTS was not a registered broker dealer or a DTC participant. In response to the Company's deficiency notice prior to the *Apache* case, RTS had submitted a letter stating that RTS was the "introducing broker for the account of John Chevedden" and that Northern Trust was the custodian of his Apache stock. The district court found this insufficient to satisfy the requirements of Rule 14a-8(b)(2) because RTS could not be considered a record holder or an introducing broker for purposes of the rule. The court reached this decision because of "the inconsistency between the publicly available information about RTS and the statement in [RTS's] letter that RTS is a 'broker.'" Specifically, RTS was not registered with FINRA, SIPC, or the SEC as a broker, but was rather registered as an investment advisor under Maine law, and its website advertised itself as such. Chevedden argued that the statement in Rule 14a-8(b)(2) that the "record holder is usually a bank or broker" meant that the letters from RTS describing itself as an introducing broker were sufficient proof of ownership. The court explicitly rejected this interpretation of the rule on the basis that it "would require companies to accept *any* letter purporting to come from an introducing broker, that names a DTC participating member with a position in the company, regardless of whether the broker was registered or the letter raised questions" as to proof of ownership. The court found that such an interpretation would reduce the requirement to simply provide a letter from "a self-described 'introducing broker.'" Thus, the court rejected the RTS letter as sufficient proof of ownership. The same issues about RTS's status as a self-proclaimed broker versus an investment advisor exist here. In both instances all the evidence indicates that RTS is not an introducing broker.

Indeed, in the *Apache* case, Proponent had put forth *more* evidence purporting to substantiate his stock ownership than he has put forth here. In that case, in addition to the RTS letter, the Northern Trust Company submitted a letter (albeit after the 14-day deadline) stating that it held the shares of the Apache stock as custodian for RTS. Here no such substantiation on the part of Northern Trust was submitted. In the *Apache* case, because the Northern Trust letter was submitted after the 14-day time limit, the court did not consider it in determining whether Proponent had met Rule 14a-8(b)(2)'s requirements; however, the court did indicate that Northern Trust may have qualified as a record holder under the rule. The court noted that Northern Trust is a DTC participant, and that "a separate certification from a DTC Participant allows a public company at least to verify that the participant does in fact hold the company's stock by obtaining the Cede breakdown from the DTC..." However, no such letter from Northern Trust was ever submitted here. Thus, Proponent is making the same argument (that a letter from RTS alone is sufficient to substantiate stock ownership) as was explicitly rejected by the district court in its March 10, 2010 opinion.

b) The *Apache* Decision is Binding on the Proponent and Apache and the Staff Should Defer to That Decision

The Staff has repeatedly acknowledged that, "a determination reached in such letters cannot adjudicate the merits of a company's position with respect to the proposal. Only a court such as a U.S. District Court can decide whether a company is obligated to include a shareholder proposal in its proxy materials." Thus, even if the SEC staff has spoken, "a court must independently analyze the merits of a dispute." *Apache Corp. v. New York City Employees Ret. Sys.*, 621 F. Supp. 2d 444, 449 (S.D. Tex. 2008) (citing *New York City Employees' Ret. Sys. v. Brunswick Corp.*, 789 F. Supp. 144, 146 (S.D.N.Y. 1992)). "Because the staff's advice on contested proposals is informal and nonjudicial in nature, it does not have precedential value with respect to identical or similar proposals submitted to other issuers in the future."[3] Because that case adjudicated the same issue between the same parties on effectively the same facts as are present here, Apache and Proponent are bound by that 2010 order. As in the doctrines of *res judicata*[4] and collateral estoppel, the parties may not relitigate the same issue that was previously settled by a final judgment between the same parties based upon a common nucleus of operative facts.

The SEC has made clear that no-action letters do not create binding precedent in the way of a federal court decision on the merits.[5] Ultimately, because it is well-established that the Staff's responses to contested proposals are "informal and nonjudicial in nature, [and] do[] not have precedential value with respect to identical or similar proposals submitted to other issuers in the future," the *Apache* case should dictate the outcome. A final decision on the merits in a federal district court on the same issues, between the same parties, and upon the same nucleus of operative facts precludes one of the parties from relitigating the same issue subsequently. Thus, even if the SEC is not bound by the *Apache* case's outcome, the Company and the Proponent (both parties to that suit) are so bound under the generally accepted principles of *res judicata* and collateral estoppel. *See Agilectric Power Partners, Ltd. v. General Electric, Co.*, 20 F.3d 663, 664 (5th Cir. 1994); *States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir. 1994); *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, 1045 (5th Cir. 1989).

In this regard, we note that the Staff has historically deferred to decisions in federal court

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[3] Statement of Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals, S.E.C. Release No. 34-12599, 1976 WL 160411 (July 7, 1976).

[4] A doctrine applicable in Texas federal courts. *See, e.g. States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir. 1994) (stating that res judicata (or issue preclusion) is appropriate if: 1) the parties to both actions are identical (or at least in privity); 2) the judgment in the first action is rendered by a court of competent jurisdiction; 3) the first action concluded with a final judgment on the merits; and 4) the same claim or cause of action is involved in both suits).

[5] *See* Statement of Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals, Exchange Act Release No. 12,599, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶80,635, at 86,606 (July 7, 1976) ("[T]he staff's views are advisory only," and management's decision to accept or reject that advice "is subject to review by a district court in the event appropriate enforcement action is instituted by... the proponent.").

where a stockholder proposal raises issues with respect to a particular company that have been addressed by a court with jurisdiction over such company. For example, in 2007, the Staff declined to take a position with respect to a stockholder proposal that Hewlett-Packard sought to exclude from its proxy materials in reliance on Rule 14a-8(i)(8) where the application of Rule 14a-8(i)(8) to such proposal had been addressed by the Court of Appeals for the Ninth Circuit. In its response, the Staff stated:

> One of the United States Courts of Appeals has recently addressed the scope of rule 14a-8(i)(8). See American Federation of State, County and Municipal Employees, Employees Pension Plan v. American International Group, Inc. (2d Cir., Sep. 5, 2006). This decision disagreed with certain prior staff interpretations upon which you have relied as precedent. Your letter, however, assumes that the Ninth Circuit is the applicable jurisdiction for purposes of this request. Since we are unable to dispute or concur in this assumption, we express no view concerning whether HP may exclude the proposal under rule 14a-8(i)(8) as relating to an election for membership on its board of directors.

See Hewlett-Packard Company (Jan. 22, 2007). Here, Apache is unambiguously subject to the jurisdiction of the court in the *Apache* case. In that case, the court made clear that the proof of ownership offered by John Chevedden does not satisfy the requirements of Rule 14a-8. Accordingly, the Staff should defer to the ruling in the *Apache* case.[6]

IV. Conclusion

Rule 14a-8 requires that a stockholder who intends to rely on the rule substantiate its satisfaction of the rule's minimum ownership requirements. John Chevedden has failed to satisfy this requirement because (i) he has submitted proof of ownership from an entity that is not a "record" holder of the Company's securities, (ii) the entity providing proof of ownership is not an introducing broker under the SEC's prior rulings, and (iii) Apache and John Chevedden are subject to a final decision of a federal district court that found that the proof of ownership that has been provided is insufficient as a matter of law.

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[6] We are aware that since the *Apache* case, there have been several instances where the SEC Staff has declined to apply the *Apache* decision in subsequent no-action letters. For example, Devon Energy and Union Pacific both cited the *Apache v. Chevedden* decision in their no-action requests against proposals filed by Chevedden. In their no-action requests, Devon and Union Pacific argued that Chevedden's ownership statements (supporting letters from RTS) were insufficient. The staff rejected both requests without analyzing or addressing the companies' reliance on the *Apache* case. However, those cases are distinguishable from the one at hand. In both the Devon and Union Pacific cases, the companies were requesting a waiver of the 80-day filing requirement in Rule 14a-8(j)(i). Further, in the Devon case, Devon failed to send a letter of deficiency to Chevedden within the 14-day period for timely notification of deficiency under Rule 14a-8(f), and in the Union Pacific case, Chevedden argued the notice was insufficiently detailed. Here, the Company is not requesting a waiver of the 80-day requirement, nor is Chevedden claiming that the deficiency notice was untimely or insufficient. While the Staff did not indicate the basis for its rejection of the Devon and Union Pacific petitions, we believe that these issues may have been relevant or contributing factors to the Staff's decisions.

Based on the foregoing, we are notifying the Staff and the Proponent as required by Rule 14a-8(j) that the Company intends to exclude the Proposal in reliance on Rule 14a-8(f).

Sincerely,

Cheri L. Peper
Corporate Secretary

Exhibit A

JOHN CHEVEDDEN

FISMA & OMB Memorandum M-07-16

Ms. Cheri L. Peper
Corporate Secretary
Apache Corporation
2000 Post Oak Blvd Ste 100
Houston TX 77056
Phone: 713 296-6000
FX: 713 296-6496
Fax: 713-296-6480
F: 713-296-6805

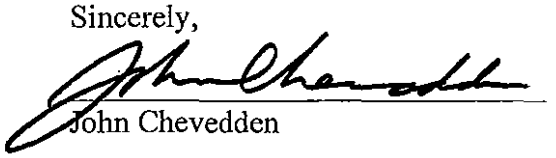
Dear Mr. Peper,

This Rule 14a-8 proposal is respectfully submitted in support of the long-term performance of our company. This proposal is submitted for the next annual shareholder meeting. Rule 14a-8 requirements are intended to be met including the continuous ownership of the required stock value until after the date of the respective shareholder meeting and presentation of the proposal at the annual meeting. This submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication.

In the interest of company cost savings and improving the efficiency of the rule 14a-8 process please communicate via email to ***FISMA & OMB Memorandum M-07-16***

Your consideration and the consideration of the Board of Directors is appreciated in support of the long-term performance of our company. Please acknowledge receipt of this proposal promptly by email to ***FISMA & OMB Memorandum M-07-16***

Sincerely,



John Chevedden

November 29, 2010

Date

cc: Sarah B. Teslik
Senior Vice President – Policy and Governance

[APA: Rule 14a-8 Proposal, November 24, 2010]

3* – Adopt Simple Majority Vote

RESOLVED, Shareholders request that our board take the steps necessary so that each shareholder voting requirement impacting our company, that calls for a greater than simple majority vote, be changed to a majority of the votes cast for and against the proposal in compliance with applicable laws.

Corporate governance procedures and practices, and the level of accountability they impose, are closely related to financial performance. Shareowners are willing to pay a premium for shares of corporations that have excellent corporate governance. Supermajority voting requirements have been found to be one of six entrenching mechanisms that are negatively related with company performance. See "What Matters in Corporate Governance?" Lucien Bebchuk, Alma Cohen & Allen Ferrell, Harvard Law School, Discussion Paper No. 491 (09/2004, revised 03/2005).

This proposal topic won from 74% to 88% support at the following companies: Weyerhaeuser, Alcoa, Waste Management, Goldman Sachs, FirstEnergy, McGraw-Hill and Macy's. The proponents of these proposals included William Steiner, James McRitchie and Ray T. Chevedden.

If our Company were to remove required supermajority, it would be a strong statement that our Company is committed to good corporate governance and its long-term financial performance.

The merit of this Simple Majority Vote proposal should also be considered in the context of the need for additional improvement in our company's 2010 reported corporate governance status:

The Corporate Library www.thecorporatelibrary.com, an independent investment research firm said, "We are affirming Apache's D rating. The company's recent federal lawsuit against a shareholder resolution filer, challenging commonly-used procedures for demonstration of stock ownership, was an unusually aggressive move and an indicator of poor shareholder relations."

The Corporate Library also rated our company "High Governance Risk," "Very High Concern" in Board Composition and "High Concern" in Executive Pay – $25 million for Raymond Plank, retired Chairman.

CEO Steven Farris's base salary was above the 75th percentile of the peer group. The 2010 performance program pays out 50% if the company's Total Shareholder Return rank is in the lower quartile or underperforming a majority of our peers. Raymond Plank was due a $13 million lump sum.

There were also concerns regarding board entrenchment and succession planning: all but one director had from 10 to 33-years long-tenure (as tenure increases independence declines). Six directors were age 72 to 81. Our board was the only significant directorship for 9 of our 11 directors. This could indicate a significant lack of current transferable director experience.

Two directors were inside related. Directors Frederick Bohen, George Lawrence and Patricia Graham attracted our highest negative votes.

Our board had 3-year terms for directors and we had neither an independent Chairman nor a Lead Director. We had no proxy access, no cumulative voting and no shareholder right to act by written consent or to call a special meeting. We had a poison pill locked in until 2016.

Please encourage our board to respond positively to this proposal to initiate improved governance: **Adopt Simple Majority Vote – Yes on 3.***

Notes:
John Chevedden, ***FISMA & OMB Memorandum M-07-16*** sponsored this proposal.

Please note that the title of the proposal is part of the proposal.

* Number to be assigned by the company

This proposal is believed to conform with Staff Legal Bulletin No. 14B (CF), September 15, 2004 including (emphasis added):

> Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on rule 14a-8(I)(3) in the following circumstances:
>
> • the company objects to factual assertions because they are not supported;
>
> • the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
>
> • the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or
>
> • the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.
>
> ***We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.***

See also: Sun Microsystems, Inc. (July 21, 2005).
Stock will be held until after the annual meeting and the proposal will be presented at the annual meeting. Please acknowledge this proposal promptly by email***FISMA & OMB Memorandum M-07-16***

FLR:
RM#: 1056A
Peper Cheri

CYHRM0341940?

TO: Peper Cheri
PH: (713) 296-6507
BDG:
RM: 1056A
PCS: 1

CARR: United States Postal Service
TRK#: 70092820000162153248
RCVD: 11/29/2010 0928

FISMA & OMB Memorandum M-07-16

U.S. POSTAGE PAID NORTH REDONDO B.C 90278 NOV 24, '10 AMOUNT $3.24 00046645-10

1000 77056

FIRST CLASS

Ms. Cheri L. Peper
Corporate Secretary
Apache Corporation
2000 Post Oak Blvd Ste 100
Houston TX 77056

7009 2820 0001 6215 3248

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS. FOLD AT DOTTED LINE
CERTIFIED MAIL™

7009 2820 0001 6215 3248

FISMA & OMB Memorandum M-07-16

Exhibit B

Peper, Cheri

From: ***FISMA & OMB Memorandum M-07-16***
Sent: Monday, November 29, 2010 8:01 PM
To: Peper, Cheri
Cc: Teslik, Sarah
Subject: Rule 14a-8 Proposal (APA)
Attachments: CCE00008.pdf

Dear Ms. Peper,
Please see the attached Rule 14a-8 Proposal.
Sincerely,
John Chevedden

JOHN CHEVEDDEN

FISMA & OMB Memorandum M-07-16

Ms. Cheri L. Peper
Corporate Secretary
Apache Corporation
2000 Post Oak Blvd Ste 100
Houston TX 77056
Phone: 713 296-6000
FX: 713 296-6496
Fax: 713-296-6480
F: 713-296-6805

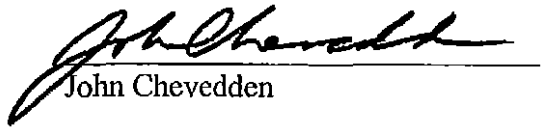
Dear Ms. Peper,

This Rule 14a-8 proposal is respectfully submitted in support of the long-term performance of our company. This proposal is submitted for the next annual shareholder meeting. Rule 14a-8 requirements are intended to be met including the continuous ownership of the required stock value until after the date of the respective shareholder meeting and presentation of the proposal at the annual meeting. This submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication.

In the interest of company cost savings and improving the efficiency of the rule 14a-8 process please communicate via email to ***FISMA & OMB Memorandum M-07-16***

Your consideration and the consideration of the Board of Directors is appreciated in support of the long-term performance of our company. Please acknowledge receipt of this proposal promptly by email to ***FISMA & OMB Memorandum M-07-16***

Sincerely,



John Chevedden

November 29, 2010

Date

cc: Sarah B. Teslik
Senior Vice President – Policy and Governance

[APA: Rule 14a-8 Proposal, November 24, 2010]

3* – Adopt Simple Majority Vote

RESOLVED, Shareholders request that our board take the steps necessary so that each shareholder voting requirement impacting our company, that calls for a greater than simple majority vote, be changed to a majority of the votes cast for and against the proposal in compliance with applicable laws.

Corporate governance procedures and practices, and the level of accountability they impose, are closely related to financial performance. Shareowners are willing to pay a premium for shares of corporations that have excellent corporate governance. Supermajority voting requirements have been found to be one of six entrenching mechanisms that are negatively related with company performance. See "What Matters in Corporate Governance?" Lucien Bebchuk, Alma Cohen & Allen Ferrell, Harvard Law School, Discussion Paper No. 491 (09/2004, revised 03/2005).

This proposal topic won from 74% to 88% support at the following companies: Weyerhaeuser, Alcoa, Waste Management, Goldman Sachs, FirstEnergy, McGraw-Hill and Macy's. The proponents of these proposals included William Steiner, James McRitchie and Ray T. Chevedden.

If our Company were to remove required supermajority, it would be a strong statement that our Company is committed to good corporate governance and its long-term financial performance.

The merit of this Simple Majority Vote proposal should also be considered in the context of the need for additional improvement in our company's 2010 reported corporate governance status:

The Corporate Library www.thecorporatelibrary.com, an independent investment research firm said, "We are affirming Apache's D rating. The company's recent federal lawsuit against a shareholder resolution filer, challenging commonly-used procedures for demonstration of stock ownership, was an unusually aggressive move and an indicator of poor shareholder relations."

The Corporate Library also rated our company "High Governance Risk," "Very High Concern" in Board Composition and "High Concern" in Executive Pay – $25 million for Raymond Plank, retired Chairman.

CEO Steven Farris's base salary was above the 75th percentile of the peer group. The 2010 performance program pays out 50% if the company's Total Shareholder Return rank is in the lower quartile or underperforming a majority of our peers. Raymond Plank was due a $13 million lump sum.

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Our board had 3-year terms for directors and we had neither an independent Chairman nor a Lead Director. We had no proxy access, no cumulative voting and no shareholder right to act by written consent or to call a special meeting. We had a poison pill locked in until 2016.

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Notes:
John Chevedden, ***FISMA & OMB Memorandum M-07-16*** sponsored this proposal.

Please note that the title of the proposal is part of the proposal.

* Number to be assigned by the company

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> - the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.
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> ***We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.***

See also: Sun Microsystems, Inc. (July 21, 2005).
Stock will be held until after the annual meeting and the proposal will be presented at the annual meeting. Please acknowledge this proposal promptly by email ***FISMA & OMB Memorandum M-07-16***

RAM TRUST SERVICES

November 29, 2010

John Chevedden

FISMA & OMB Memorandum M-07-16

To Whom It May Concern,

Ram Trust Services is a Maine chartered non-depository trust company. Through us, Mr. John Chevedden has continuously held no less than 50 shares of Apache (APA) common stock, CUSIP #037411105, since at least November 7, 2008. We in turn hold those shares through The Northern Trust Company in an account under the name Ram Trust Services.

Sincerely,

Michael P. Wood
Sr. Portfolio Manager

45 Exchange Street Portland Maine 04101 Telephone 207 775 2354 Facsimile 207 775 4289

Exhibit C

* * * COMMUNICATION RESULT REPORT (DEC. 7. 2010 12:14PM) * * *

FAX HEADER: APACHE CORP SECY

TRANSMITTED/STORED : DEC. 7. 2010 12:07PM FILE MODE	OPTION	ADDRESS	RESULT	PAGE
845 MEMORY TX		***FISMA & OMB Memorandum M-07-16***	OK	5/5

REASON FOR ERROR
E-1) HANG UP OR LINE FAIL
E-2) BUSY
E-3) NO ANSWER
E-4) NO FACSIMILE CONNECTION

2000 POST OAK BOULEVARD / SUITE 100 / HOUSTON, TEXAS 77056-4400

(713) 296 6000
WWW.APACHECORP.COM

December 7, 2010

Mr. John Chevedden

FISMA & OMB Memorandum M-07-16

Re: Rule 14a-8 Proposal

Dear Mr. Chevedden:

On November 29, 2010, we received your letter dated November 24, 2010, requesting that Apache include your proposed resolution in its proxy materials for Apache's 2011 annual meeting. Also, on November 29, 2010, we received a copy of a letter dated November 29, 2010, from you along with a letter from RAM Trust Services that appears intended to demonstrate that you satisfy the minimum ownership requirements of Rule 14a-8. Based on our review of the information provided by you, our records and regulatory materials, we have been unable to conclude that the proposal meets the requirements for inclusion in Apache's proxy materials, and unless you can demonstrate that you meet the requirements in the proper time frame, we will be entitled to exclude your proposal from the proxy materials for Apache's 2011 annual meeting.

As you know, in order to be eligible to include a proposal in the proxy materials for Apache's 2011 annual meeting, Rule 14a-8 under the Securities Exchange Act of 1934 requires that a stockholder must have continuously held at least $2,000 in market value or 1% of Apache's common stock (the class of securities that will be entitled to be voted on the proposal at the meeting) for at least one year as of the date that the proposal is submitted. The stockholder must continue to hold those securities through the date of the meeting. You state in your letter that "Rule 14a-8 requirements are intended to be met including continuous ownership of the required stock value," however, we have been unable to confirm your current ownership of Apache stock, or the length of time that you have held the shares.

Although you have provided us with a letter from RAM Trust Services, which states that you have held no less than 50 shares of Apache common stock through RAM Trust Services, who in turn holds those shares through The Northern Trust Company, the letter does not identify the record holder of the shares or include the necessary verification. Apache has reviewed the list of record owners of the company's common stock, and neither you, nor RAM Trust Services, nor Northern Trust is listed as an owner of Apache common stock. Pursuant to SEC Rule 14a-8(b), since neither you, nor RAM Trust Services, nor Northern Trust appear to be record holders of Apache common stock, you must provide a written statement from the record holder of the shares you claim to beneficially own verifying that you continually have held the required amount of Apache common stock for at least one year as of the date of your submission of the

2000 POST OAK BOULEVARD / SUITE 100 / HOUSTON, TEXAS 77056-4400

(713) 296 6000
WWW.APACHECORP.COM

December 7, 2010

Mr. John Chevedden

FISMA & OMB Memorandum M-07-16

Re: Rule 14a-8 Proposal

Dear Mr. Chevedden:

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proposal. As required by Rule 14a-8(f), you must provide us with this statement within 14 days of your receipt of this letter.
In addition, Rule 14a-8(b) requires that you state that you intend to hold the shares of Apache common stock that you beneficially own through the date of the meeting. Your submission, however, only states that "Rule 14a-8 requirements are intended to be met including the continuous ownership of the required stock value until after the date of the respective shareholder meeting and presentation of the proposal at the annual meeting." As required by Rule 14a-8(f), you must provide us with the statement required by Rule 14a-8(b) within 14 days of your receipt of this letter.

We have attached to this notice of defect a copy of Rule 14a-8 for your convenience.

If you adequately correct these problems within the required time frame, Apache will then address the substance of your proposal. Even if you adequately remedy these deficiencies, Apache reserves the right to raise any substantive objections it has to your proposal at a later date.

Sincerely,

Cheri L. Peper
RS Corporate Secretary

Attachment

Exhibit D

Peper, Cheri

From: ***FISMA & OMB Memorandum M-07-16***
Sent: Monday, December 20, 2010 8:56 PM
To: Peper, Cheri
Subject: Rule 14a-8 Proposal (APA)

Dear Ms. Peper, Thank you for acknowledging the rule 14a-8 proposal. Based on the October 1, 2008 Hain Celestial no-action decision, Ram Trust Services is my introducing securities intermediary and hence the owner of record for purposes of Rule 14a-8(b). I intend to hold the shares of Apache common stock that I own through the date of the meeting. Please let me know if there is another question.
Sincerely,
John Chevedden

JOHN CHEVEDDEN

*** FISMA & OMB Memorandum M-07-16 ***

January 19, 2011

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

 # 1 Rule 14a-8 Proposal
Apache Corporation (APA)
Simple Majority Vote
John Chevedden

Ladies and Gentlemen:

This responds to the December 29, 2010 request to avoid this rule 14a-8 proposal.

In 2010, Commission staff had planned to release a Staff Legal Bulletin clarifying requirements for verification letters under Rule 14a-8(b)(2). This did not happen. As a stopgap, the United States Proxy Exchange (USPX) released recommended standards for banks and brokers to use in preparing verification letters. Those standards were based on staff no-action decisions. They explicitly addressed the court's ruling in Apache vs. Chevedden. They also reflected informal discussions with the SEC and the extensive experience of the USPX membership. The USPX made it clear those standards were not intended to anticipate future guidance from the Commission, but rather to provide standards that were "conservative in the sense that they call for more documentation than is necessary." The goal was to avoid frivolous no-action requests from issuers, or, in the event such frivolous requests were filed anyway, to ensure they would be rejected.

The USPX standards can be downloaded at
http://proxyexchange.org/Resources/Documents/standards_1.pdf, and a copy is attached. They provide further clarification of issues raised in Apache's no-action request. Ram Trust prepared their verification letter according to the USPX standards.

The company letter presents the same empty argument about the word "record holder" that was rejected in the *The Hain Celestial Group, Inc.* (October 1, 2008) no action decision, in the Apache vs. Chevedden lawsuit, and in subsequent no-action decisions, especially especially *News Corporation* (July 27, 2010).

In Hain Celestial, the Staff determined that a verification letter can come from an "introducing broker". In the United States, investors can hold stocks thorough banks as well as brokers, and there is no reason to believe staff intended to exclude banks. Accordingly, "introducing broker" should be understood to include introducing banks.

The company letter repeatedly claims that Ram Trust is not a bank. That is false. As a state chartered non-depository trust, Ram Trust is a bank. Non-depository trust companies can be members of the Federal Reserve, although many chose not to be.

Ram Trust is, in this case, the introducing securities intermediary and not a mere investment advisor. The Ram Trust verification letter made this clear.

The company letter page 5 asserts "... nowhere in RTS's purported proof of ownership does it indicate in any way that it is the custodian or a holder of Apache stock." Not only is this claim false. It is bizarre. In their verification letter, Ram Trust explicitly CONFIRMED they hold Apache stock on my behalf:

"Ram Trust Services Is a Maine chartered non-depository trust company. Through us, Mr. John Chevedden has continuously held no less than 50 shares of Apache (APA) common stock, CUSIP #037411105, since at least November 7, 2008. We in turn hold those shares through The Northern Trust Company in an account under the name Ram Trust Services."

The company goes on to cite Investment Advisers Act of 1940, 17 C.F.R. §275.206(4)-2(a). This is irrelevant because Ram Trust does not serve as the proponent's investment advisor. The purpose of 17 C.F.R. §275.206(4)-2(a) is to provide a safeguard against an investment advisor that has trading authority over a client's account from representing that the account holds securities that it does not. Think Bernie Madoff here. By requiring that some entity other than the investment advisor holds custody of securities, the rule ensures there is independent, third party confirmation of the holdings the investment advisor claims to be in the account. The rule does not apply in this case because Ram Trust does not have trading authority over the proponent's account and does not serve as the proponent's investment advisor.

If the company thinks 17 C.F.R. §275.206(4)-2(a) prohibits non-depository trust companies from holding stock on a client's behalf, then the company really doesn't understand what a trust company does.

The company's mention of proof-of-ownership requirements under Rule 14a-11 is irrelevant. In its August 17, 2009 comment letter on the proposed Rule 14a-11, the USPX explicitly asked the Commission to harmonize the ownership requirements for Rules 14a-8 and 14a-11. The Commission chose not to do so. Ownership requirements, and hence proof-of-ownership requirements, under the two rules are very different. Furthermore, Rule 14a-11 is suspended.

The company's discussion of Apache vs. Chevedden is another, albeit extravagant, effort to re-characterize the court's emphatic rejection of Apache' Corp's attempted reinterpretation of Rule 14a-8(b)(2). Commission staff has repeatedly rejected such attempts. For an accurate description of what happened in Apache vs. Chevedden, please see my response for the *Union Pacific Corporation* (March 26, 2010) no-action decision, or the court's March 10, 2010 Memorandum and Order (attached). See also my response to, and Staff's decision in, the *News Corporation* (July 27, 2010) no-action decision. The Ram Trust verification letter was written according to the USPX guidelines, which were prepared to explicitly addressed concerns raised by the Apache vs. Chevedden court.

Furthermore, the court indicated that its decision was narrow and applied only to the specific facts in that case. That was another way of saying that issuers should not cite this decision in no-action requests to the SEC.

This is to request that the Securities and Exchange Commission allow this resolution to stand and not defer to the ruling in the Apache case where the facts presented and the rebuttal were materially different.

Sincerely,

John Chevedden

cc:
Cheri L. Peper <cheri.peper@apachecorp.com>

[APA: Rule 14a-8 Proposal, November 24, 2010]

3* – Adopt Simple Majority Vote

RESOLVED, Shareholders request that our board take the steps necessary so that each shareholder voting requirement impacting our company, that calls for a greater than simple majority vote, be changed to a majority of the votes cast for and against the proposal in compliance with applicable laws.

Corporate governance procedures and practices, and the level of accountability they impose, are closely related to financial performance. Shareowners are willing to pay a premium for shares of corporations that have excellent corporate governance. Supermajority voting requirements have been found to be one of six entrenching mechanisms that are negatively related with company performance. See "What Matters in Corporate Governance?" Lucien Bebchuk, Alma Cohen & Allen Ferrell, Harvard Law School, Discussion Paper No. 491 (09/2004, revised 03/2005).

This proposal topic won from 74% to 88% support at the following companies: Weyerhaeuser, Alcoa, Waste Management, Goldman Sachs, FirstEnergy, McGraw-Hill and Macy's. The proponents of these proposals included William Steiner, James McRitchie and Ray T. Chevedden.

If our Company were to remove required supermajority, it would be a strong statement that our Company is committed to good corporate governance and its long-term financial performance.

The merit of this Simple Majority Vote proposal should also be considered in the context of the need for additional improvement in our company's 2010 reported corporate governance status:

The Corporate Library www.thecorporatelibrary.com, an independent investment research firm said, "We are affirming Apache's D rating. The company's recent federal lawsuit against a shareholder resolution filer, challenging commonly-used procedures for demonstration of stock ownership, was an unusually aggressive move and an indicator of poor shareholder relations."

The Corporate Library also rated our company "High Governance Risk," "Very High Concern" in Board Composition and "High Concern" in Executive Pay – $25 million for Raymond Plank, retired Chairman.

CEO Steven Farris's base salary was above the 75th percentile of the peer group. The 2010 performance program pays out 50% if the company's Total Shareholder Return rank is in the lower quartile or underperforming a majority of our peers. Raymond Plank was due a $13 million lump sum.

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Please encourage our board to respond positively to this proposal to initiate improved governance: **Adopt Simple Majority Vote – Yes on 3.***

Notes:
John Chevedden, *** FISMA & OMB Memorandum M-07-16 *** sponsored this proposal.

RAM TRUST SERVICES

November 29, 2010

John Chevedden

*** FISMA & OMB Memorandum M-07-16 ***

To Whom It May Concern,

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Sincerely,

Michael P. Wood
Sr. Portfolio Manager

45 EXCHANGE STREET PORTLAND MAINE 04101 TELEPHONE 207 775 2354 FACSIMILE 207 775 4289

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

APACHE CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. H-10-0076
	§	
JOHN CHEVEDDEN,	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER

This court is asked to decide whether the proof of stock ownership that John Chevedden submitted to Apache Corporation satisfies the requirements of S.E.C. Rule 14a-8(b)(2). This rule requires a shareholder submitting a proposal for the company to include in its proxy materials to prove that he is eligible. A company may exclude a shareholder proposal from its proxy materials if the shareholder fails to present timely and adequate proof of eligibility. Apache seeks a declaratory judgment that it may exclude a proposal submitted by Chevedden from the proxy materials it will distribute to shareholders before Apache's annual shareholder meeting on May 6, 2010. The only issue is whether Chevedden has met the requirements for showing stock ownership under S.E.C. Rule 14a-8(b)(2), 17 C.F.R. § 240.14a-8(b)(2).

Chevedden is not listed as a shareholder in Apache's records. Chevedden sent Apache four letters, three from Ram Trust Services ("RTS"), which Chevedden asserts is his "introducing broker," certifying that Chevedden was the beneficial owner of Apache stock, and another from Northern Trust Company, certifying that it held Apache stock as "master custodian" for RTS. Northern Trust is a participating member of the Depository Trust Company ("DTC"). In its "nominee name," Cede & Co., the DTC is listed as the owner of Apache's shares in the company's

records. Apache's records do not identify the beneficial owners of the shares held in the name of Cede & Co. Chevedden argues that Rule 14a-8(b)(2) was satisfied by a letter from RTS, his "introducing broker." *Id.* Apache argues that Rule 14a-8(b)(2) required Chevedden to prove his stock ownership by obtaining a confirming letter from the DTC or by becoming a registered owner of the shares. Apache has moved for a declaratory judgment that it may exclude Chevedden's shareholder proposal from the proxy materials because he failed to do either. (Docket Entry No. 11). Chevedden has responded and asked for a declaratory judgment that his proposal met the Rule 14a-8(b)(2) requirements. (Docket Entry No. 17).[1] Apache has replied. (Docket Entry No. 18).

Based on the motion, response, and reply; the record; and the applicable law, this court grants Apache's motion for declaratory judgment and denies Chevedden's motion. The ruling is narrow. This court does not rule on what Chevedden had to submit to comply with Rule 14a-8(b)(2). The only ruling is that what Chevedden did submit within the deadline set under that rule did not meet its requirements.

The reasons for this ruling are explained below.

I. Background

A. Proof of Securities Ownership

It has been decades since publicly traded companies printed separate certificates for each share, sold them separately to the individual investors, kept track of subsequent sales of the shares, and maintained comprehensive lists identifying the shareholders, the number of the shares they held, and the duration of their ownership. Nor are securities certificates any longer traded directly by brokers on exchanges, with the shares recorded in the brokers' "street name" in a company's

[1]At a hearing held on February 11, Chevedden objected to this court exercising personal jurisdiction over him. (Docket Entry No. 10). Apache filed a brief on that issue. (Docket Entry No. 12). In his brief on the merits, however, Chevedden stated that he is no longer challenging personal jurisdiction. (Docket Entry No. 17).

records. The volume, speed, and frequency of trading required a different system. In 1975, Congress, amended the Securities Exchange Act of 1934. The amendments were based on four explicit findings:

> (A) The prompt and accurate clearance and settlement of securities transactions, including the transfer of record ownership and the safeguarding of securities and funds related thereto, are necessary for the protection of investors and persons facilitating transactions by and acting on behalf of investors.
>
> (B) Inefficient procedures for clearance and settlement impose unnecessary costs on investors and persons facilitating transactions by and acting on behalf of investors.
>
> (C) New data processing and communications techniques create the opportunity for more efficient, effective, and safe procedures for clearance and settlement.
>
> (D) The linking of all clearance and settlement facilities and the development of uniform standards and procedures for clearance and settlement will reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors.

15 U.S.C. § 78q-1(a)(1). Congress directed the S.E.C. to create a "national system for prompt and accurate clearance and settlement in securities." 15 U.S.C. § 78q-1(a)(2)(A)(i). Clearing agencies became subject to S.E.C. regulation and uniform procedures. After the amendments were passed, the two national securities exchanges—the New York Stock Exchange and the American Stock Exchange—as well as, the National Association of Securities Dealers, which operated the over-the-counter trading market, merged their subsidiary clearing agencies into one larger entity, called the National Securities Clearing Corporation ("NSCC"). The S.E.C. permitted the NSCC to register as a clearing agency, provided that it established links with the regional clearing agencies. The S.E.C. found that this was "an essential step toward the establishment, at an early date, of a comprehensive

network of linked clearance and settlement systems and branch facilities with the national scope, efficiencies and safeguards envisioned by Congress in enacting the 1975 Amendments."[2]

A parallel development to centralizing clearing operations was the establishment of the Depository Trust Company ("DTC") in 1973. The DTC is the nation's only securities depository.[3] A securities depository is "a large institution that holds only the accounts of 'participant' brokers and banks and serves as a clearinghouse for its participants' securities transactions." *Delaware v. New York*, 507 U.S. 490, 495, 113 S. Ct. 1550 (1993). Although the DTC is also an S.E.C.-registered clearing corporation, 3 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 14.2[2], at 99 n. 48, its primary purpose is to improve trading efficiency by "immobilizing" securities, or retaining possession of securities certificates even as they are traded. According to its website, the DTC holds nearly $34 trillion worth of securities in participants' accounts. When a securities transaction occurs, the DTC changes, in its own records, which participant broker or bank "owns" the securities. The company's records, however, reflect that these securities are owned in street name, under the DTC's "nominee name" of Cede & Company. *Delaware*, 507 U.S. at 495, 113 S. Ct. 1550; *In re Color Tile Inc.*, 475 F.3d 508, 511 (3d Cir. 2007). Neither the company nor the DTC records the identity of the beneficial owner of the shares unless that owner is registered as such.

One result—and major advantage—of this process is "netting." Participating brokers that have engaged in multiple transactions in the same securities in a trading day will report only the net

[2]In the Matter of the Application of the National Securities Clearing Corporation for Registration as a Clearing Agency, Release No. 13163, File No. 6000-15, 1977 WL 173551 (Jan. 13, 1977).

[3]Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 92 GEO. L.J. 1227, 1238 n. 50 (2008).

change in their ownership to the DTC.[4] The DTC and the NSCC are now subsidiaries of the same holding company, the Depository Trust & Clearing Corporation ("DTCC"). The functions of each entity are integrated as well. "The changes in beneficial ownership of securities resulting from transactions that are cleared and settled at NSCC are implemented by book-entry transfers among brokers' accounts at DTC." *Whistler Investments, Inc. v. Depository Trust & Clearing Corp.*, 539 F.3d 1159, 1163 (9th Cir. 2008). Cede & Co. is the shareholder of record for a substantial majority of the outstanding shares of all publicly traded companies. *See In re FleetBoston Financial Corp. Securities Litigation*, 253 F.R.D. 315, 345 n. 32 (D.N.J. 2008) (quotations omitted).

There is at least one intermediary between the DTC and a retail investor such as Chevedden. A participating broker or bank sells securities to the DTC; a participating broker or bank on the other side buys from the DTC. A retail investor could be a direct client of the participating broker or bank, in which case the DTC and the participating broker or bank are the only intermediaries between the investor and the company. Frequently, however, there is a third financial institution, an "introducing" broker, which serves as an intermediary between the retail investor and the participating broker or bank.

One important part of this system is the Non-Objecting Beneficial Shareholders ("NOBO") list. When a company's shares are held in street name, S.E.C. rules require the DTC to provide the company, upon request, with a list of participants that hold its stock. Once the company has this DTC participant list, called a "Cede breakdown," it asks the participating banks and brokers on it to submit the names of beneficial owners to the company. This second list is the NOBO list. This is typically done through a centralized intermediary, Broadridge Financial Solutions, Inc., which

[4]Gene N. Lebrun & Fred H. Miller, *The Law of Letters of Credit and Investment Securities Under the UCC–Modernization and Process*, 43 S.D. L. REV. 14, 28 (1998).

compiles the NOBO list. Beneficial owners may exclude themselves from this list by objecting, which is why the list includes only "Non-Objecting" shareholders. The NOBO list includes the name, address, and ownership position of each nonobjecting beneficial owner. The NOBO list is used to communicated with shareholders, primarily to distribute proxy materials . *See* 17 C.F.R. § 240.14b-1; *Sadler v. NCR Corp.*, 928 F.2d 48, 50 (2d Cir. 1991).[5] Approximately 75% of beneficial owners object to disclosing their information to the company.[6] But while the majority of institutional shareholders object to the disclosure, according to one report, an estimated 75% of individual shareholders do not object to inclusion on the list.[7] Nonetheless, the company will never discover the identity of many of its beneficial owners. The company must communicate with those shareholders through Broadridge and the intermediary financial institutions.

B. Shareholder Proposals

Before a public company holds its annual shareholders' meeting, it must distribute a proxy statement to each shareholder. A proxy statement includes information about items or initiatives on which the shareholders are asked to vote, such as proposed bylaw amendments, compensation or pension plans, or the issuance of new securities. 2 HAZEN, *supra*, § 10.2, at 83-90. The proxy card, on which the shareholder may submit his proxy, and the proxy statement together are the "proxy materials." *See* 17 C.F.R. § 240.14a-8(j).

Within this framework, the rules governing proxy solicitation for director voting are different than those governing proxy solicitation for voting on other proposals. *See* 17 C.F.R. §

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[5]*See also* Alan L. Beller & Janet L. Fisher, *The OBO/NOBO Distinction in Beneficial Ownership, Council of Institutional Investors* (Feb. 2010), *available at* http://www.cii.org.

[6]Kahan & Block, *supra* note 3, at 75.

[7] Katten Munchin Rosenman LLP, *Frequently Asked Questions Regarding the SEC's NOBO-OBO Rules and Companies' Ability to Communicate with Retail Shareholders, available at* http://www.kattenlaw.com.

240.14a-8(i)(6). This case involves a proposed shareholder resolution. A shareholder wishing to submit a proposed shareholder resolution may solicit proxies in two ways. First, he may pay to issue a separate proxy statement, which must satisfy all the disclosure requirements applicable to management's proxy statement. *See* HAZEN, *supra*, § 10.2, at 85-89. Second, a shareholder may force management to include his proposal in management's proxy statement, along with a statement supporting the proposal, at the company's expense. *See id.* § 10.8[1][A] at 136-37. Regulations promulgated under the Securities Exchange Act of 1934 apply to this second method. *See* 17 C.F.R. § 240.14a-8 ("This section addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders.").

Rule 14a-8 is written in a question-and-answer format. It informs shareholders that "in order to have your proposal included on a company's proxy card, and included along with any supporting statement in its proxy statement, you must be eligible and follow certain procedures. Under a few specific circumstances, the company is permitted to exclude your proposal, but only after submitting its reasons to the [S.E.C.]." *Id.*

Many of these reasons for exclusion are substantive. Among other reasons, a proposal may be excluded if it would cause the company to violate the law, if it relates only to a personal grievance against the company, if it is beyond the company's authority, or if it relates to the company's "ordinary business operations." 17 C.F.R. § 240.14a-8(i). The company may also exclude proposals that violate the procedural requirements set out in the S.E.C. rules. These procedural requirements include a 500-word limit, a filing deadline, and a limit to one proposal per shareholder per meeting. 17 C.F.R. § 240.14a-8(c)-(e). Finally, the company may exclude a proposal if the submitter does not satisfy the eligibility requirements. The requirements limit those

submitting proposals to holders of "at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting." 17 C.F.R. § 240.14a-8(b)(1). The shareholder must have owned at least that amount of securities continuously for one year as of the date he submits the proposal to the company and must continue to do so through the date of the shareholder meeting. *Id.*

Rule 14a-8(b)(2) sets out two ways for a shareholder who is not a registered owner to establish eligibility. Only the first of those ways is relevant here. The rule states:

> If you are the registered holder of your securities, which means that your name appears in the company's records as a shareholder, the company can verify your eligibility on its own, although you will still have to provide the company with a written statement that you intend to continue to hold the securities through the date of the meeting of shareholders. However, *if like many shareholders you are not a registered holder, the company likely does not know that you are a shareholder, or how many shares you own*. In this case, at the time you submit your proposal, *you must prove your eligibility* to the company in one of two ways [only the first of which is relevant]:
>
> > (i) The first way is to submit to the company a *written statement from the "record" holder of your securities (usually a broker or bank)* verifying that, at the time you submitted your proposal, you continuously held the securities for at least one year. You must also include your own written statement that you intend to continue to hold the securities through the date of the meeting of shareholders. . . .

17 C.F.R. § 240.14a-8(b)(2) (emphasis added).[8]

If a shareholder's proposal is procedurally deficient or the shareholder has not submitted proper proof of ownership, the company may exclude it only after giving the shareholder notice and

[8]The Rule was amended in 1998, to recast it in question-and-answer format. This amendment added the "usually a bank or broker" language. The prior amendment, in 1987, was accompanied by a note stating that a shareholder should submit " a written statement by a record owner or an independent third party, such as a depository or broker-dealer holding the securities in street name." S.E.C. Release No. 34-25217, 52 FR 489 48977-01, 1987 WL 153779 (Dec. 29, 1987). The notes to the 1998 amendment did not state that a substantive change to Rule 14a-8(b)(2) was intended. S.E.C. Release No. 34-40018, 63 FR 29106-01, 1998 WL 266441 (May 28, 1998).

an opportunity to correct the deficiency. 17 C.F.R. § 240.14a-8(f)(1). The company must notify the shareholder of the problem in writing within 14 days of receiving the proposal and inform the shareholder that he has 14 days to respond. *Id.* If after the response date the company decides to exclude a proposal, it must notify the S.E.C. of its reasons for doing so no later than 80 days before the company files its proxy materials with the S.E.C. 17 C.F.R. § 240.14a-8(j). The shareholder is entitled to file with the S.E.C. his arguments for including the proposal. 17 C.F.R. § 240.14a-8(k). The burden is on the company to demonstrate to the S.E.C. that the proposal is properly excluded. 17 C.F.R. § 240.14a-8(g).

A company may ask the S.E.C. Department of Corporate Finance staff for a no-action letter to support the exclusion of a proposal from proxy materials. Although no-action letters are not required, "virtually all companies that decide to omit a shareholder proposal seek a no-action letter in support of their decision."[9] The S.E.C. receives hundreds of requests for no-action letters each year. HAZEN, *supra*, § 10.8[1][A], at 138. The company submits the proposal and its reasons for exclusion to the S.E.C. staff, seeking a letter stating that the staff will not recommend enforcement action to the S.E.C. if the company chooses to exclude the proposal. The shareholder often responds with his own submission. The staff will issue a brief letter stating either that it will not recommend enforcement action ("no action") or that it is "unable to concur" with the company. This advice comes with a lengthy disclaimer, entitled "Division of Corporate Finance Informal Procedures Regarding Shareholder Proposals." (Docket Entry No. 11, Ex. 11). It states:

> The Division of Corporation Finance believes that its responsibility with respect to matters arising under Rule 14a-8 [17 CFR 240.14a-8], as with other matters under the proxy rules, is to aid those who must

[9] Donna M. Nagy, *Judicial Reliance on Regulatory Interpretation in S.E.C. No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 989 (1998).

> comply with the rule by offering informal advice and suggestions and to determine, initially, whether or not it may be appropriate in a particular matter to recommend enforcement action to the Commission. In connection with a shareholder proposal under Rule 14a-8, the Division's staff considers the information furnished to it by the Company in support of its intention to exclude the proposals from the Company's proxy materials, as well as any information furnished by the proponent or the proponent's representative.
>
> Although Rule 14a-8(k) does not require any communications from shareholders to the Commission's staff, the staff will always consider information concerning alleged violations of the statutes administered by the Commission, including argument as to whether or not activities proposed to be taken would be violative of the statute or rule involved. The receipt by the staff of such information, however, should not be construed as changing the staff's informal procedures and proxy review into a formal or adversary procedure.
>
> It is important to note that the staff's and Commission's no-action responses to Rule 14a-8(j) submissions reflect only informal views. The determinations reached in these no-action letters do not and cannot adjudicate the merits of a company's position with respect to the proposal. Only a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials. Accordingly a discretionary determination not to recommend or take Commission enforcement action, does not preclude a proponent, or any shareholder of a company, from pursuing any rights he or she may have against the company in court, should the management omit the proposal from the company's proxy material.

(*Id.*).

C. Chevedden's Proposal

The events giving rise to this dispute began on November 8, 2009, when Chevedden, a retired Hughes Aircraft employee living in Redondo, Beach, California, sent an e-mail to Cheri Peper, the Corporate Secretary of Apache Corporation. (Docket Entry No. 11, Ex. 1). Apache is an oil and gas company based in Houston and incorporated in Delaware. The November 8 e-mail

attached a "Rule 14a-8 Proposal" and a cover letter. The cover letter was addressed to Raymond Plank, Apache's Chairman, and stated:

> This Rule 14a-8 proposal is respectfully submitted in support of the long-term performance of our company. This proposal is submitted for the next annual shareholder meeting.[10] Rule 14a-8 requirements are intended to be met including the continuous ownership of the required stock value until after the date of the respective shareholder meeting and presentation of the proposal at the annual meeting. This submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication.
>
> In the interest of company cost savings and improving the efficiency of the rule 14a-8 process please communicated via email to *** FISMA & OMB Memorandum M-07-16 ***
>
> *** FISMA & OMB Memorandum M-07-16 ***
>
> Your consideration and the consideration of the Board of Directors is appreciated in support of the long-term performance of our company. Please acknowledge receipt of this proposal promptly by email to
>
> *** FISMA & OMB Memorandum M-07-16 ***

(*Id.* at 2). The proposal was a shareholder resolution that "our board take the steps necessary so that each shareholder voting requirement in our charter and bylaws, that calls for a greater than simple majority vote, be changed to a majority of the votes cast for and against the proposal in compliance with applicable laws." (*Id.* at 3). The resolution called for changing the 80% supermajority requirements for amending particular provisions of the charter and bylaws. (*Id.*). The record does not show an Apache response to this e-mail.

Chevedden sent another Apache another e-mail on Friday, November 27, 2009, this time copying the Office of the Chief Counsel in the S.E.C.'s Division of Corporate Finance. (*Id.*, Ex. 2 at 1). Chevedden wrote: "Please see the attached broker letter. Please advise on Monday whether there are now any rule 14a-8 open items." (*Id.*). The attached broker letter, on the letterhead of Ram

[10]Apache's 2010 annual shareholders' meeting is scheduled for May 6, 2010 in Houston.

Trust Services ("RTS"), was dated November 23, 2009 and signed by Meghan M. Page, Assistant Portfolio Manager. It stated:

> To Whom it May Concern,
>
> I am responding to Mr. Chevedden's requiest to confirm his position in several securities held in his account at Ram Trust Services. Please accept this letter as confirmation that John R. Chevedden has continuously held no less than 50 shares of the following security since November 7, 2008:
>
> • Apache Corp (APA)

(*Id.* at 2).

On December 3, 2009, Peper sent Chevedden a letter, presumably by fax or e-mail. (*Id.*, Ex. 3). The letter informed Chevedden that Apache had received his November 8 letter and the RTS letter. The letter stated:

> Based on our review of the information provided by you, our records and regulatory materials, we have been unable to conclude that the proposal meets the requirements for inclusion in Apache's proxy materials, and unless you can demonstrate that you meet the requirements in the proper time frame, we will be entitled to exclude your proposal from the proxy materials for Apache's 2010 annual meeting.
> . . .
>
> [W]e have been unable to confirm your current ownership of Apache stock, or the length of time that you have held the shares.
>
> Although you have provided us with a letter from RAM Trust Services, the letter does not identify the record holder of the shares or include the necessary verification. Apache has reviewed the list of record owners of the company's common stock, and neither you, nor RAM Trust Services are listed as an owner of Apache common stock. Pursuant to the SEC Rule 14a-8(b), since neither you nor RAM Trust Services is a record holder of the shares you beneficially own verifying that you continually have held the required amount of Apache common stock for at least one year as of the date of your submission of the proposal. As required by Rule 14a-8(f), you must provide us with this statement within 14 days of your receipt of this

> letter. We have attached to this notice of defect a copy of Rule 14a-8 for your convenience.

(*Id.* at 1-2). It is undisputed that neither Chevedden nor RTS appears on Apache's list of registered holders of common stock.

Chevedden responded to the letter by e-mail the same day, again copying the Division of Corporate Finance. The e-mail cited Rule 14a-8, which Chevedden "believed to state that a company must notify the proponent of any defect with 14-days of the receipt of a rule 14a-8 proposal – which was already acknowledged by the company to be almost a month ago." (*Id.*, Ex. 4). Peper responded on December 8, 2009, disagreeing with Chevedden's characterization of the 14-day rule. Peper referred to the language in Rule 14a-8(b)(2) stating that a shareholder must establish his eligibility at the time he submits his proposal, meaning that the 14-day period did not begin until Chevedden completed his submission by sending the November 23 RTS letter on November 27. Apache's December 3 response was within 14 days of that date. Peper then reminded Chevedden that, within 14 days of the December 3 defect letter, he had to submit "a written statement from the record holder of the shares you beneficially own verifying that you continually have held the required amount of Apache common stock for at least one year as of the date of your submission of the proposal." (*Id.*, Ex. 5).

On December 10, 2009, Chevedden sent Peper another e-mail, without copying the S.E.C. staff. This e-mail directed Peper to "see the attached broker letter" and to "advise tomorrow whether there are now any rule 14a-8 open items." (*Id.*, Ex. 6 at 1). The attached letter was dated December 10 and again signed by Meghan Page of RTS. It stated:

> To Whom it May Concern,
>
> As introducing broker for the account of John Chevedden, held with Northern Trust as custodian, Ram Trust Services confirms that John

> Chevedden has continuously held no less than 50 shares of the following security since November 7, 2008:
>
> • Apache Corp (APA)

(*Id.* at 2). It is undisputed that Northern Trust is not a registered shareholder listed in Apache's records.

On January 8, 2010, Apache sent notice to the S.E.C. staff (and to Chevdedden) that it intended to exclude Chevedden's proposal from its proxy materials for the 2010 annual meeting. Apache informed the staff that "[b]ecause an introducing broker is not a record holder of the shares of a company, the Company intends to exclude this proposal unless a U.S. District Court rules that the Company is obligated to include it in its 2010 Proxy Materials." (*Id.*, Ex. 7). Rather than seek a no-action letter from the staff, Apache filed this lawsuit the same day. The S.E.C. staff will not provide no-action letters when litigation is pending.[11] (Docket Entry No. 1).

On January 11, Chevedden sent the S.E.C. staff a response to Apache's letter. He attached the December 10 RTS letter and stated that it "appears to be consistent with the attached precedent of [the no-action letter issued in] *The Hain Celestial Group, Inc.* (October 1, 2008)." (*Id.*, Ex. 8). As discussed more fully below, in *Hain Celestial*, the S.E.C. staff stated that "we are now of the view that a written statement from an introducing broker-dealer constitutes a written statement from the 'record' holder of securities, as that term is used in rule 14a-8(b)(2)(i)." Apache had attached the December 10 letter as an exhibit to its submission to the S.E.C. staff and, in its submission, had attempted to distinguish the *Hain Celestial* no-action letter. (*Id.*, Ex. 7).

[11] Securities and Exchange Commission, Division of Corporate Finance Staff Legal Bulletin No. 14 (July 13, 2001), *available at* http://www.sec.gov/interps/legal/cfslb14.htm.

On January 22, 2010, Carolyn Haynes, an RTS Executive Assistant, e-mailed Peper two letters. The first was from Meghan Page of RTS, addressed to Peper and dated January 22. Page wrote:

> John R. Chevedden owns no fewer than 50 shares of Apache Corporation (APA) and has held them continuously since November 7, 2008.
>
> Mr. Chevedden is a client of Ram Trust Services ("RTS"). RTS acts as his custodian for these shares. Northern Trust Company, a direct participant in the Depository Trust Company, in turn acts as master custodian for RTS. Northern Trust is a member of the Depository Trust Company whose nominee name is Cede & Co.
>
> Mr. Chevedden individually meets the requirements set forth in rule 14a-8(b)(1). To repeat, these shares are held by Northern Trust as master custodian for RTS. All of the shares have been held continuously since at least November 7, 2008, and Mr. Chevedden intends to continue to hold such shares through the date of the Apache Corporation 2010 annual meeting.
>
> I enclose a copy of Northern Trust's letter dated January 22, 2010 as proof of ownership in our account for the requisite time period. Please accept this telefax copy as the original was sent directly to you from Northern Trust.

(*Id.*, Ex. 9 at 2). The Northern Trust letter, signed by Rhonda Epler-Staggs, was also dated January 22 and addressed to Peper. It stated:

> The Northern Trust Company is the custodian for Ram Trust Services. As of November 7, 2009, Ram Trust Services held 183 shares of Apache Corporation CUSIP# 037411105.
>
> The above account has continuously held at least 50 shares of Apache common stock for the period of November 7, 2008 through January 21, 2010.
>
> Northern Trust is a member of the Depository Trust Company whose nominee name is Cede & Co.

(*Id.* at 3). The parties agree that Apache has not received any letter from the DTC or Cede & Co., the registered owner of any Apache stock Chevedden owns. There is nothing in the record to suggest that Apache attempted to obtain a NOBO list to determine whether Chevedden was included. Apache has submitted into the record two lists it obtained from the DTC. These are "Cede breakdowns," one from March 18, 2009 and the other from March 5, 2010, of DTC participating brokers or banks that hold Apache stock on behalf of beneficial owners or on behalf of brokers and their beneficial owners. (Docket Entry No. 18, Exs. 26, 27). Northern Trust appears on both lists. RTS is not a participant in the DTC and as a result is not included on the list. Beneficial owners are also not included.

Because of the impending annual meeting, this case has proceeded on an expedited basis. After filing its complaint on January 8, 2010, Apache filed a motion for a speedy hearing on January 14, informing this court that the proxy materials had to be finalized by March 10, 2010. (Docket Entry No. 3). At the hearing, this court overruled Chevedden's objection to the method of service and set a briefing schedule. (Docket Entry Nos. 10, 14). The parties complied.

Apache filed briefs on February 15, 2010. (Docket Entry Nos. 11, 12). Chevedden responded on March 4, 2010. (Docket Entry No. 17), stating that he was no longer contesting personal jurisdiction. In the response, Chevedden did not argue that Apache's deficiency notice was untimely. With this court's permission, the United States Proxy Exchange filed an *amicus curiae* brief on March 5, 2010. (Docket Entry No. 19). Apache filed a reply. (Docket Entry No. 20). On March 10, 2010, Chevedden submitted a brief styled as a "Motion for Summary Judgment" to this court's case manager by e-mail, with a copy to Apache. Apache filed a response the same day. (Docket Entry No. 20). The only issue before this court is whether, under Rule 14a-8, Chevedden

has provided Apache with proper proof of his eligibility to submit proposals. If he has, Apache must include the proposal in its proxy materials.

II. Analysis

Because most Rule 14a-8 disputes are resolved cooperatively or through the no-action process, there is little case law. *See* 2 HAZEN, *supra*, § 10.8[1][A], at 138. Indeed, the parties have not identified, and research has not revealed, judicial opinions deciding what proof of stock ownership is required for eligibility under Rule 14a-8(b)(2). In this case, unlike others, *see Apache Corp. v. New York City Employees Ret. Sys.*, 621 F. Supp. 2d 444 (S.D. Tex. 2008), the S.E.C. has not been asked to issue a no-action letter. In presenting their arguments, the parties rely on four sources of authority: the Rule; S.E.C. staff legal bulletins; S.E.C. staff no-action letters; and the policy reasons for the Rule.

The text of Rule 14a-8(b)(2), in its question-and-answer format, instructs a shareholder who is not "the registered holder" that "you must prove your eligibility to the company." 17 C.F.R. 240.14a-8(b)(2). The parties agree that Chevedden is not the registered holder of his shares. The rule instructs him to "submit to the company a written statement from the 'record' holder of [his] securities (usually a broker or bank) verifying that" he satisfies the eligibility requirements. *Id.* Apache argues that the unambiguous meaning of this language is that shareholders must submit a letter from the entity actually registered on the company's books. Under this interpretation, Chevedden would have to obtain a letter from the DTC or Cede & Co.

Chevedden points to the language explaining that a "record" holder is "usually a broker or bank." Neither the DTC nor Cede & Co., which "usually" is the registered owner named on a company's shareholder list, is a broker or bank. This suggests that Apache's reading of the word

"record" is too narrow. The parenthetical statement that the "'record' holder" is usually a broker or bank is inconsistent with reading the rule to require a letter from the DTC or Cede & Co.[12] It also weighs against Apache's interpretation that the Rule uses the word "registered" to describe shareholders who do not need take any additional steps to prove eligibility. A "registered" holder's "name appears in the company's records as a shareholder." 17 C.F.R. § 2 40.14a-8(b)(2). 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.[13]

The next cited source of authority is guidance issued by the S.E.C. staff. Staff Legal Bulletin No. 14, issued on July 14, 2001, is set out in a question-and-answer format. Section C.1.c(1) states:

> Q: Does a written statement from the shareholder's investment adviser verifying that the shareholder held the securities continuously for at least one year before submitting the proposal demonstrate sufficiently continuous ownership of the securities?
>
> A: The written statement must be from the *record holder of the shareholder's securities, which is usually a broker or bank*. Therefore, unless the investment adviser is also the record holder, the statement would be insufficient under the rule.

Securities and Exchange Commission, Division of Corporate Finance Staff Legal Bulletin No. 14 (July 13, 2001) (emphasis added), *available at* http://www.sec.gov/interps/legal/cfslb14.htm. An

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[12]The S.E.C.'s notes to the 1987 Rule amendments provides further support for this conclusion. It stated that, under the prior text of the Rule, proof could be supplied by a "record owner or an independent third party, such as a depository or broker-dealer holding the securities in street name." S.E.C. Release No. 34-25217, 52 FR 489 48977-01, 1987 WL 153779 (Dec. 29, 1987). There is no evidence that the 1998 amendments were intended to make substantive changes to this interpretation.

[13]As Apache states in its reply brief, the S.E.C. rules elsewhere provide a definition of "record holder," but limit the applicability of the definition to Rules 14a-13, 14b-1, and 14b-2. The definition does not apply to Rule 14a-8. 17 C.F.R. § 2 40.14a-1(b)(1).

update, Bulletin No. 14B, issued on September 15, 2004, repeats the Rule language, advising companies to include the language in their notices of defect. S.E.C., Division of Corporate Finance Staff Legal Bulletin No. 14B (Sept. 15, 2004), *available at* http://www.sec.gov/interps/legal/cfslb14b.htm. These bulletins do not add significant clarity. The information that an investment adviser's statement is insufficient unless the adviser is also the record holder—which, again, is "usually a broker or bank"—does not address who is a "'record' holder."

The next source of cited authority is no-action letters issued by the S.E.C. staff. "[N]o-action letters are nonbinding, persuasive authority." *Apache*, 621 F. Supp. 2d at 449 (noting that the proper weight to accord no-action letters was an issue of first impression in the Fifth Circuit and adopting Second Circuit precedent).[14] Even if the S.E.C. staff has spoken, "a court must independently analyze the merits of a dispute." *Apache*, 621 F. Supp. 2d at 449 (citing *New York City Employees' Ret. Sys. v. Brunswick Corp.*, 789 F. Supp. 144, 146 (S.D.N.Y. 1992)). "Because the staff's advice on contested proposals is informal and nonjudicial in nature, it does not have precedential value with respect to identical or similar proposals submitted to other issuers in the future."[15] "[R]egulatory interpretations in no-action letters may nonetheless enlighten a court struggling with ambiguous provisions in federal securities statutes or S.E.C. rules." Nagy, *supra* note 9, at 996. Although this court is not bound by S.E.C. staff determinations made in no-action letters, the letters are "persuasive" authority.

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[14] *See also Amalgamated Clothing & Textile Workers Union v. S.E.C.*, 15 F.3d 254, 257 (2d Cir. 1994); Nagy, *supra* note 9, at 989 (Because "deference principles assume that the responsible administrative agency has authoritatively interpreted a regulatory provision, . . .neither *Chevron* nor *Seminole Rock* mandate judicial deference to regulatory interpretations in staff no-action letters that the Commission has neither reviewed nor affirmed." (quotations and alterations omitted)).

[15] Statement of Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals, S.E.C. Release No. 34-12599, 1976 WL 160411 (July 7, 1976).

Apache argues that the S.E.C. staff has consistently found that a letter from a broker stating that an individual or institution owned a certain amount of a specific stock on certain dates is insufficient to satisfy Rule 14a-8(b)(2). Apache argues that when companies have asserted their intent to exclude a proposal submitted by a shareholder who has a letter from a broker not listed on the company's shareholder list, the S.E.C. staff will recommend no enforcement action. Apache cites a number of letters that have reached this conclusion. For example, in *JP Morgan Chase & Co*, 2008 WL 486532 (Feb. 15, 2008), Chevedden presented a proposal on behalf of Kenneth Steiner. In response to a deficiency notice based on Rule 14a-8(b), Chevedden submitted a letter from DJF Discount Brokers stating that it was the "introducing broker for the account of Kenneth Steiner . . . held with National Financial Servcies Corp. as custodian" and certifying that Steiner met the ownership requirements. *Id.* at *3. The S.E.C. staff attorney found this broker letter insufficient proof of ownership under the Rule. He wrote:

> While it appears that the proponent provided some indication that he owned shares, it appears that he has not provided a statement from the record holder evidencing documentary support of continuous beneficial ownership of $2,000, or 1% in market value of voting securities, for at least one year prior to submission of the proposal. We note, however, that JPMorgan Chase failed to inform the proponent of what would constitute appropriate documentation under rule 14a-8(b) in JPMorgan Chase's request for additional information from the proponent. Accordingly, unless the proponent provides JPMorgan Chase with appropriate documentary support of ownership, within seven calendar days after receiving this letter, we will not recommend enforcement action to the Commission if JPMorgan Chase omits the proposal from its proxy materials in reliance on rules 14a-8(b) and 14a-8(f).

Id. at *1. Other no-action letters from 2008 and earlier, many issued in response to requests involving Chevedden, have also concluded that letters from introducing brokers are insufficient. *See, e.g., Verizon Communications, Inc.*, 2008 WL 257310 (Jan 25. 2008); *MeadWestvaco Corp,*

2007 WL 817472 (Mar. 12, 2007); *Clear Channel Communications*, 2006 WL 401184 (Feb. 9, 2006); *AMR Corp.*, 2004 WL 892255 (Mar. 15, 2004).

According to Apache, the S.E.C. staff's single deviation from this consistent approach was what Apache calls the "rogue" no-action letter issued in *Hain Celestial Group*, 2008 WL 4717434, (Oct. 1, 2008). In *Hain Celestial*, Chevedden once again wrote on behalf of Kenneth Steiner, who submitted a shareholder proposal. The company sent a deficiency notice based on Rule 14a-8(b). Chevedden then submitted a letter from DJF signed by its president, Mark Filberto. The letter stated that DJF was the introducing broker for Steiner and that his shares were held by National Financial Services as custodian. *Id.* at *5-6. In submitting a no-action request, Hain Celestial made arguments similar to those advanced here by Apache. Hain Celestial cited the *JP Morgan*, *Verizon*, and *MeadWestvaco* no-action letters to argue that a letter from DJF as "introducing broker" was insufficient to satisfy the "record" holder requirement. *Id.* at *6. The S.E.C. staff attorney issued an unusually detailed letter. He wrote:

> We are unable to concur in your view that The Hain Celestial Group may exclude the proposal under rules 14a-8(b) and 14a-8(f). After further consideration and consultation, *we are now of the view that a written statement from an introducing broker-dealer constitutes a written statement from the "record" holder of securities, as that term is used in rule 14a-8(b)(2)(i).* For purposes of the preceding sentence, an introducing broker-dealer is a broker-dealer that is not itself a participant of a registered clearing agency but clears its customers' trades through and establishes accounts on behalf of its customers at a broker-dealer that is a participant of a registered clearing agency and that carries such accounts on a fully disclosed basis. *Because of its relationship with the clearing and carrying broker-dealer through which it effects transactions and establishes accounts for its customers, the introducing broker-dealer is able to verify its customers' beneficial ownership.* Accordingly, we do not believe that The Hain Celestial Group may omit the proposal from its proxy materials in reliance on rules 14a-8(b) and 14a-8(f).

Id.(emphasis added).

Apache argues that this letter is "wrong and should not be followed," that it conflicts with the "unambiguous" requirement in Rule 14a-8(b)(2), and that it is "inconsistent with the staff's long and otherwise unblemished line of no-action letters," issued before and after *Hain Celestial*.

The argument that Rule 14a-8(b)(2) is unambiguous is not persuasive. And a closer examination of S.E.C. staff letters shows that *Hain Celestial* was not a "rogue" position. The *Hain Celestial* no-action letter was neither the first or last letter in which the S.E.C. staff declined to agree that a letter from the registered owner was required under Rule 14a-8(b)(2).

In *AIG*, 2009 WL 772853 (Mar. 13, 2009), for example, the S.E.C. staff wrote that it was "unable to concur" with AIG's position that a proposal advanced by Kenneth Steiner, with Chevedden as his representative, should be excluded under Rule 14a-8(b). Chevedden had submitted a letter from DJF Discount Brokers stating that it was the "introducing broker" for Steiner, that Steiner was the beneficial owner of an appropriate amount of AIG stock for an appropriate length of time, and that National Financial Services Corp. was the "custodian" of Steiner's securities. *Id.* at *4-5. Although the S.E.C. staff did not cite *Hain Celestial*—the no-action letters rarely cite precedent—the refusal to issue a no-action letter was consistent with *Hain Celestial*. Indeed, the facts were similar.

In another *post-Hain Celestial* case in which Chevedden represented Kenneth Steiner and submitted a similar letter from DJF Discount Brokers, the S.E.C. staff also declined to issue a no-action letter. *Schering-Plough Corp.*, 2009 WL 926913 (Apr. 3, 2009). The S.E.C. staff reached the same result in two other cases in which Chevedden was a representative of shareholder proponent William Steiner and had submitted broker letters from DJF Discount Brokers. *Schering-*

Plough Corp., 2009 WL 975142 (Apr. 3, 2009); *Intel Corp.*, 2009 WL 772872 (Mar. 13, 2009). In these three cases, the company's Rule 14a-8(b) objection was that Chevedden, who owned no shares, was the actual proponent of the shareholder proposal, not Steiner. In concluding that there was no basis for exclusion under Rule 14a-8(b), the S.E.C. staff presumably would have had to find that Steiner was the proponent and that the broker letter was sufficient to establish his stock ownership under Rule 14a-8(b)(2).

In an interesting post-*Hain Celestial* case not involving Chevedden, *Comerica Inc.*, 2009 WL 800002 (Mar. 9, 2009), the company sought to exclude a shareholder proposal by the Laborers National Pension Fund because, among other reasons, the Fund had not provided adequate proof of stock ownership. The Fund provided a letter from U.S. Bank confirming that it held an adequate amount of Comerica stock on behalf of the Fund as beneficial owner. In a letter to the S.E.C., the Fund stated:

> Comerica argues that U.S. Bank was not the record holder of any Company stock because the securities were held through CEDE & Co. This argument has consistently been rejected by the Staff and should be rejected here. *See Equity Office Properties Trust* (March 28, 2003); *Dillard Dept. Stores, Inc.* (March 4, 1999).

Comerica Inc., 2009 WL 800002, at *3 (Mar. 9, 2009). The S.E.C. staff found no basis for excluding the proposal under Rule 14a-8(b). The Fund's citations to earlier letters are accurate and helpful. In *Equity Office Properties Trust*, 2003 WL 1738866 (Mar. 28, 2003), the S.E.C. staff found no basis for excluding a shareholder proposal from the Service Employees International Union, which had submitted a letter from Fidelity Investments confirming that the Union was the beneficial owner of shares "held of record by Fidelity Investments through its agent National Financial Services." *Id.* at *15. The Union's letter to the S.E.C. staff observed: "Despite the nearly

universal practice by institutional shareholders of employing an agent such as the Depository Trust Company ("DTC") or NFS, the Rule indicates that the record owner from whom a statement must be obtained is usually a broker or bank. It is unlikely that the Commission was unaware of the ubiquity of agents when it drafted the Rule." The company's letter, which failed to persuade the S.E.C. staff, argued that the Fidelity letter was insufficient because Fidelity was not the registered owner and that it was inappropriate to require the company to determine whether National Financial Services was in fact Fidelity's agent. *Id.* at *14.

Several years earlier, in *Dillard Department Stores, Inc.*, 1999 WL 129804 (Mar. 4, 1999), the S.E.C. staff also stated that it did not believe there was a basis for exclusion under Rule 14a-8(b). The shareholder proponent in that case, an investment fund, submitted a statement from the Amalgamated Bank of New York that the fund's "shares are held of record by the Amalgamated Bank of New York through its agent, CEDE, Inc." *Id.* at *4. Because no letter was submitted from Cede & Co., Dillard's argued to the S.E.C. staff that there was insufficient proof of ownership. In its letter to the S.E.C., the fund argued that it was inconsistent with the text of Rule 14a-8(b)(2) to require a letter from Cede & Co. The argument was that because the Rule placed the term "record" in quotations and stated that the "'record' holder" would usually be a broker or bank, it would be anomalous to require a letter from Cede & Co., which is not a bank or broker and is the registered holder of most securities. "Beneficial owners generally have a relationship with their broker or bank; requiring investors to obtain a letter from an agent of their broker or bank would needlessly complicate the process and encourage the sort of petty games-playing in which Dillard's is engaging here." *Id.* at *3. The S.E.C. staff sided with the fund.

The letters Apache cites to show that the S.EC. staff retreated from its *Hain Celestial* position do not provide support for that proposition. *See EQT Corp.*, 2010 WL 147295 (Jan. 11, 2010); *Microchip Tech., Inc.*, 2009 WL 1526972 (May 26, 2009); *Schering-Plough Corp.*,2009 WL 890012 (Mar. 27, 2009); *Omnicom Group*, 2009 WL 772864 (Mar. 16, 2009). In these cases, the shareholder seeking to have a proposal included in the company's proxy materials received a deficiency notice but either failed to submit documents intended to prove ownership or failed to do so within the 14-day period provided by the rules. Other recent S.E.C. letters finding a basis for exclusion under Rule 14a-8(b)(2) when a broker letter was submitted are consistent in that there were defects in the broker letter that warranted exclusion. *See, e.g., Continental Airlines, Inc.*, 2010 WL 387513 (Feb. 22, 2010) (shares listed in broker letter amounted to less than $2,000 in value); *Pfizer, Inc.*, 2010 WL 738739 (Feb. 22, 2010) (broker letter was never received by company and was dated three days before submission of the proposal, making it incapable of establishing ownership for a year as of the actual submission date); *Intel Corp.*, 2009 WL 5576306 (Feb. 3, 2010) (broker letter was dated 18 days after deficiency notice, received by the proponent 26 days late, and received by the company 31 days late). These no-action letters all involved broker letters that were deficient for reasons other than the nature of the broker submitting them. These no-action letters do not provide a basis for believing that the S.E.C. staff's reading of Rule 14a-8(b)(2) has changed since *Hain Celestial*. *See Pioneer Natural Resources Co.*, 2010 WL 128070 (Feb. 12, 2010) (finding no basis for exclusion when the proponent, a union pension fund, had submitted a broker letter from AmalgaTrust, which was not a registered shareholder, stating that it served as "corporate co-trustee and custodian for the [pension fund] and is the record holder for 1,180 shares of [company] common stock held fore the benefit of the Fund.").

The S.E.C. staff's position in *Hain Celestial* and the similar letters is more consistent with the text of Rule 14a-8(b)(2) than the position Apache advances, that the Rule requires confirming letters from the DTC or Cede & Co. Apache argues that the DTC does offer letters certifying a shareholder's beneficial stock ownership and attaches examples to its reply brief. But these examples show that the DTC will only process letter requests forwarded to it by participants, not by beneficial owners. The record does not show how long it takes shareholders to obtain such letters, especially when they are not direct clients of a DTC participant. The documents Apache attached to its reply brief show that the DTC bases its response to such requests on information supplied by the participant. The responses state that the DTC is a "holder of record" of the company's common stock and that the "DTC is informed by its Participant" that a certain amount of shares "credited to the Participant's DTC account are beneficially owned by [John Doe], "a customer of Participant." (*See* Docket Entry No. 18, Exs. 21-24). The responses provide no indication that the DTC presents information about beneficial owners other than what is submitted by the participant for the purpose of preparing the letter. Nor is there information on how the participant obtains information about beneficial owners when the participant's customer is not the beneficial owner but the broker for the owners. And as a practical matter, because of the "netting" system, in which DTC members report only the net change in their ownership at the end of the day rather than the details of each transaction between members, the DTC could not accurately certify that a participating broker—let alone that broker's client—had held a sufficient number of shares continuously for a year to comply with the Rule. If a participating broker sold all its Apache shares one morning, its continuous ownership would end, but if it bought all the shares back after lunch, the DTC might never know. Finally, as noted, the text of Rule 14a-8(b)(2), which was amended in 1998 (well after ascendency of the

depository system), shows that the Rule does not envision companies receiving letters from the DTC (at least not *solely* from the DTC). It is not a "broker or bank." Rule 14a-8(b)(2) permits but does not require Chevedden to obtain a letter from the DTC.

This court need not decide whether the letter from Northern Trust, the DTC participant, in combination with the letter from RTS, met the Rule's requirements. The January 22 letters from RTS and Northern Trust were untimely. Any letters had to be submitted within 14 days of the December 3, 2009 deficiency notice. The only letters submitted within that period were the November 23 and December 10, 2009 RTS letters. The first letter stated that Chevedden had held no less than 50 shares of Apache stock in his account at RTS since November 7, 2008. The second letter stated that RTS was the "introducing broker for the account of John Chevedden" and that Northern Trust was the custodian of his Apache stock. (*Id.*, Ex. 6 at 2). The second is the type of letter the S.E.C. staff found adequate in *Hain Celestial*.[16] The present record does not permit the same result in this case.

[16]Apache argues that this case is distinguishable from the facts in *Hain Celestial* because RTS was not a broker. Apache is correct that RTS does not appear on the SEC's list of registered broker-dealers, on the FINRA membership list, or on the SIPC membership list. But neither does DJF Discount Brokers, which submitted the broker letter in *Hain Celestial*. RTS's website and customer application indicate that an RTS subsidiary, Atlantic Financial Services of Maine, Inc ("AFS")., acts as the broker for RTS customers' securities transactions. AFS, which shares an address with RTS, is on the SEC, FINRA, and SIPC membership lists. Similarly, DJF's website states that it is a division of R&R Planning Group LTD. R&R appears on the SEC, FINRA, and SIPC membership lists.

The Rule requires shareholders to "prove [their] eligibility."[17] The parties agree that all Chevedden gave Apache as timely, relevant proof of ownership was the December 10 RTS letter. Apache has described its concerns about the reliability of the statements made in the RTS letter. It is not Apache's burden to investigate to confirm the statements or to engage in such steps as obtaining a NOBO list to provide independent verification of Chevedden's status as an Apache shareholder. Because of the limited nature of the NOBO list, Chevedden's absence from the list would not have been definitive. And even if Chevedden were on the list and the list indicated that he owned a sufficient number of shares, that would not have established that he had owned those shares continuously for a year.

RTS is not a participant in the DTC. It is not registered as a broker with the SEC, or the self-regulating industry organizations FINRA and SIPC. Apache argues that RTS is not a broker but an investment adviser, citing its registration as such under Maine law, representations on RAM's website, and federal regulations barring an investment adviser from serving as a broker or custodian except in limited circumstances. (Docket Entry No. 18 at 14-19). Chevedden disputes that RTS has not provided investment advice and that its "sole function is as a custodian." (Docket Entry No. 17 at 3). The record suggests that Atlantic Financial Services of Maine, Inc., a subsidiary of RTS that is also not a DTC participant, may be the relevant broker rather than RTS. Atlantic Financial

[17]Apache points out that it was not until the January 22 letters that Chevedden gave any indication that his shares were held in Cede & Co.'s name. This argument is disingenuous. Without even looking at the shareholder list, the default assumption for a publicly traded company should be that Cede & Co. holds a beneficial owner's shares. DTCC publishes a list of DTC member banks and brokers on its website. The list is a seven-page document, with all the members listed in alphabetical order. Once the December 10 letter identified Northern Trust as custodian, it would have been easy for Apache to look at the list and see that Northern Trust was included. *See* Depository Trust & Clearing Corp., DTC Participant Accounts in Alphabetical Sequence, at 6, *available at* http://www.dtcc.com/downloads/membership/directories/dtc/alpha.pdf. Apache also had the May 2009 "Cede breakdown" listing the DTC participants that owned Apache shares. This list indicated that Northern Trust has a substantial position in Apache. It also appears from the March 2010 Cede breakdown that Apache had access to the DTC website to obtain less formal versions of the Cede breakdown owning participants owning Apache shares at any time.

Services did not submit a letter confirming Chevedden's stock ownership. RTS did not even mention Atlantic Financial Services in any of its letters to Apache. The nature of RTS's corporate structure, including whether RTS is or is not an "investment adviser" is not determinative of eligibility. But the inconsistency between the publicly available information about RTS and the statement in the letter that RTS is a "broker" underscores the inadequacy of the RTS letter, standing alone, to show Chevedden's eligibility under Rule 14a-8(b)(2).

Chevedden's interpretation of the Rule would require companies to accept *any* letter purporting to come from an introducing broker, that names a DTC participating member with a position in the company, regardless of whether the broker was registered or the letter raised questions. Chevedden's interpretation of Rule 14a-8(b)(2) would not require the shareholder to show anything. It would only require him to obtain a letter from a self-described "introducing broker," even if, as here, there are valid reasons to believe the letter is unreliable as evidence of the shareholder's eligibility. By contrast, a separate certification from a DTC participant allows a public company at least to verify that the participant does in fact hold the company's stock by obtaining the Cede breakdown from the DTC, as Apache did in May 2009 and March 2010.

Chevedden did, ultimately, submit a letter from the participant, Northern Trust, along with a letter from RTS. The January 22 Northern Trust letter refers to RTS's account and RTS's stock ownership; the RTS letter submitted that same day linked RTS's account with Northern Trust to Chevedden. Because these letters were submitted well after the deadline, this court does not decide whether they would have been sufficient. The only issue before this court is whether the earlier letters from RTS – an unregistered entity that is not a DTC participant – were sufficient to prove eligibility under Rule 14a-8(b)(2), particularly when the company has identified grounds for

believing that the proof of eligibility is unreliable. This court concludes that the December 2009 RTS letters are not sufficient.

Although section 14 of the Securities Exchange Act of 1934 (governing proxies), under which Rule 14a-8 was promulgated, was intended to "give true vitality to the concept of corporate democracy," *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 676 (D.C. Cir. 1970), *cert. granted sub nom SEC v. Medical Comm. for Human Rights*, 401 U.S.973, 91 S. Ct. 1191 (1971), *vacated as moot*, 404 U.S. 403, 92 S. Ct. 577 (1972), that does not necessitate a complete surrender of a corporation's rights during proxy season. Rule 14a-8 requires a shareholder seeking to participate to register as a shareholder or prove that he owns a sufficient amount of stock for a sufficient period to be eligible. Although this court concludes that Rule 14a-8(b)(2) is not as restrictive as Apache contends, on the present record, Chevedden has failed to meet the Rule's requirements.

III. Conclusion

Apache's motion for declaratory judgment is granted and Chevedden's motion is denied. Apache may exclude Chevedden's proposal from its proxy materials.

SIGNED on March 10, 2010, at Houston, Texas.

Lee H. Rosenthal
United States District Judge

Joyce Ingram

From: DCECF_LiveDB@txs.uscourts.gov
Sent: Wednesday, March 10, 2010 3:12 PM
To: DC_Notices@txs.uscourts.gov
Subject: Activity in Case 4:10-cv-00076 Apache Corporation v. Chevedden Memorandum and Order

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SOUTHERN DISTRICT OF TEXAS

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Case Name: Apache Corporation v. Chevedden
Case Number: 4:10-cv-00076
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Docket Text:
MEMORANDUM AND ORDER entered. Apaches motion for declaratory judgment is granted and Cheveddens motion is denied. Apache may exclude Cheveddens proposal from its proxy materials. (Signed by Judge Lee H Rosenthal) Parties notified.(leddins,)

4:10-cv-00076 Notice has been electronically mailed to:

Chanler Ashton Langham clangham@susmangodfrey.com, jingram@susmangodfrey.com

Geoffrey L Harrison gharrison@susmangodfrey.com, jingram@susmangodfrey.com

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John Chevedden

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(713) 296 6000
WWW.APACHECORP.COM

January 31, 2011

Office of Chief Counsel
Division of Corporate Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: Apache Corporation - Omission of Stockholder Proposal Submitted by Mr. John Chevedden

Ladies and Gentlemen:

On behalf of Apache Corporation, a Delaware corporation (the "Company"), pursuant to Rule 14a-8(j) under the Securities and Exchange Act of 1934, as amended (the "Exchange Act"), we are writing in response to a January 19, 2011 letter (the "Response") from the Proponent (as defined below) to the Company's Rule 14a-8(j) notice submitted on December 29, 2010 (the "Rule 14a-8(j) Notice"). In the Rule 14a-8(j) Notice, the Company informed the staff of the Division of Corporation Finance of the Company's plans to omit from the proxy statement for its 2011 Annual Meeting of Stockholders (the "2011 Proxy Materials") a stockholder proposal (the "Proposal") submitted by John Chevedden (the "Proponent").

Notwithstanding Proponent's arguments in the Response, the Company may exclude the Proposal pursuant to Rule 14a-8(b) and Rule 14a-8(f)(1) because the Proponent has failed to provide the required proof of stock ownership in response to the Company's proper request for that information. The Proponent's purported proof of stock ownership is insufficient because the Proponent failed to obtain proof of ownership from a "record" holder of Company stock. Instead, the Proponent submitted the same insufficient proof of ownership that entitled the Company to exclude the Proponent's stockholder proposal from the Company's 2010 proxy materials as a result of the decision in *Apache Corporation v. John Chevedden*, No. 4:10-cv-00076 (S.D. Tex. March 10, 2010) ("The only issue before this court is whether the earlier letters from RTS – an unregistered entity that is not a [Depositary Trust Company ("DTC")] participant – were sufficient to prove eligibility under Rule 14a-8(b)(2), particularly when the company has identified grounds for believing that the proof of eligibility is unreliable. This court concludes that the December 2009 RTS letters are not sufficient").

There are three key points raised by the Rule 14a-8(j) Notice, none of which are refuted by the Response:

- the Proponent is not a record holder of Company common stock,
- the Proponent has not provided the Company with a letter from an entity that is a "record holder" of Company common stock on his behalf, and
- the proof of ownership submitted on behalf of the Proponent fails to satisfy even the more lenient standard included in the *Hain Celestial* no-action letter.[1]

The Proponent does not claim to be a record holder of shares of the Company's common stock. In addition, as discussed in the Rule 14a-8(j) Notice, the Proponent has not provided any information that indicates that RAM Trust Services ("RTS") is a record holder of the Company's common stock. Finally, the Response only makes clearer that the position reflected in the *Hain Celestial* no-action letter does not apply to the Company's Rule 14a-8(j) notice because the Proponent has now acknowledged that RTS is not a broker or even an introducing broker.

Even though the Response does not refute any of the arguments made in the Rule 14a-8(j) Notice, the Response is important for another reason. It marks the Proponent's third attempt to recharacterize RTS in the last two years. Last year the Proponent claimed that RTS was an introducing broker. After the Company demonstrated in litigation last year that RTS was in fact an investment adviser, this year RTS has attempted to recharacterize itself as a "non-chartered non-depository trust company." The Proponent's December 20, 2010 response to the Company's deficiency notice of December 7, 2010 (the "Deficiency Notice"), states that "Ram Trust Services is [the Proponent's] introducing securities intermediary." The Response now asserts that RTS is a bank.

These attempts to recharacterize RTS are concerning and underscore the principal reasons that the SEC adopted the proof of ownership requirements of Rule 14a-8 in the first place; to give companies some degree of certainty that the person who has submitted the proposal in fact owns company shares.

Setting aside the Proponent and RTS' machinations, the Proponent has missed the core issue. Rule 14a-8 requires that a stockholder who owns shares beneficially and who does not file beneficial ownership reports under Section 16 or Regulation 13D substantiate its satisfaction of the rule's minimum ownership requirements by providing an issuer with proof of ownership from the record holder of the shares. Typically the record holder is a broker or bank, but in all cases, regardless of whether the entity providing proof of ownership is a broker or a bank, whomever attempts to provide proof of ownership must be a record holder of the shares.

Here, the Proponent has not provided any information that indicates that RTS is a record holder of Company shares. The closest thing we have to that is a statement from RTS that it

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[1] In *The Hain Celestial Group* (October 1, 2008), the Staff broke from its historical approach and ruled that a letter from an introducing broker can be used to demonstrate a shareholder's satisfaction of the minimum ownership requirements of Rule 14a-8(b).

owns shares through the Northern Trust Company. The letter from RTS conspicuously fails to state that it is the record holder of the shares, while, as was the case last year in the Company's litigation with the Proponent, the Proponent has not provided a letter from Northern Trust verifying that RTS or the Proponent own Company shares within the time frame prescribed by Rule 14a-8. In fact, the Proponent has failed to provide a letter from Northern Trust at all, which only further raises the Company's suspicions regarding the Proponent's claim that he satisfies the minimum ownership requirements imposed by Rule 14a-8. As was made clear in the *Apache* litigation last year, a record holder must either hold shares of record in nominee name or be a Depository Trust Company depositary system ("DTC") participant. RTS is neither. Because RTS does not hold custody of any of the Company's securities, and is not a DTC participant, it is not a record holder of Company common stock. [2]

While we understand that the Staff discourages companies from making "overly technical" arguments under Rule 14a-8, we also understand that the Staff has conceded the point made in the Apache litigation; that providing proof of ownership from a DTC participant can avoid questions about whether the entity providing proof of ownership is a record holder, particularly where there is suspicion regarding this issue.

Here, as has been recounted by numerous no-action letters, there is good reason for suspicion with respect to the Proponent. This season alone, several companies have submitted no-action requests under Rule 14a-8(b) based on facts that suggest that the Proponent may have forged the proof of ownership submitted to those companies. *See e.g.*, International Paper Company, No-Action Request dated January 14, 2011(citing a report from a recognized certified forensic handwriting and document examiner concluding that a portion of the letter attempting to demonstrate John Chevedden's satisfaction of Rule 14a-8's minimum ownership requirements was completed by Mr. Chevedden himself and not the broker submitting the proof of ownership letter); *see also* American Express Company, No-Action Request dated December 17, 2010; Bristol-Myers Squibb Company, No-Action Request dated December 30, 2010. It would be different if this was the Proponent's first transgression, but it is not. The Proponent is well known for his violations of the letter and spirit of Rule 14a-8 over the past 20 years. See *Intel Corporation* (March 13, 2009) ("Mr. Chevedden and his tactics are well known in the

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[2] A recent discussion of the issue by the Delaware Chancery Court in *Kurz v. Holbrook* also supports the proposition that RTS is not a record holder under Delaware law, which applies to Apache as a Delaware corporation. *Kurz v. Holbrook*, C.A. No. 5019-VCL (Del. Ch. Feb. 9, 2010). The court in *Kurz* stated that banks and brokers that hold shares in street name through the DTC are the stockholders of record under Delaware law. Under this broadened interpretation of record holders, RTS would still not be considered a record holder of Company securities because RTS does not appear to be a DTC participant. Northern Trust Bank, however, a DTC participant and potentially the entity that does actually have custody of the securities, *would* be considered a record holder under this definition; however the Proponent did not to provide a verification letter from Northern Trust and we have no information from Northern Trust which confirms that Northern Trust hold shares on behalf of RTS. We note that in its April 21, 2010 decision in *Crown EMAK Partners, LLC v. Kurz*, the Delaware Supreme Court stated that the Delaware Chancery Court's determination in *Kurz v. Holbrook* that this position should be regarded as *obiter dictum* and without precedential effect. *Crown EMAK Partners, LLC v. Kurz*, Consol. Nos. 64, 2010 and 85, 2010 (Del. Supr. April 21, 2010).

stockholder proposal community. Although he apparently personally owns stock in a few corporations, through a group of nominal proponents Mr. Chevedden submitted more than 125 stockholder proposals to more than 85 corporations in 2008 alone. ... Mr. Chevedden and certain stockholders under whose names he frequently submits proposals (the Proponent, the Rossi Family, the Steiner family and the Gilbert family) accounted for at least 533 out of the 3,476 stockholder proposals submitted between 1997 and 2006"); *see also TRW Inc.* (January 24, 2001) (agreeing with TRW that it could exclude from its proxy materials a stockholder proposal submitted by a nominal proponent on behalf of Mr. Chevedden where Mr. Chevedden did not own any of the company's stock); *PG&E Corp.* (Mar. 1, 2002) (agreeing with PG&E that it could exclude a stockholder proposal submitted by Mr. Chevedden and co-sponsored by several nominal proponents where the nominal proponents indicated that they did not know each other, one proponent indicated that Mr. Chevedden submitted the proposal without contacting him and the other said that Mr. Chevedden was "handling the matter").

In light of this track record, the Company believes, consistent with the binding case law in its jurisdiction, that the proof of ownership provided by the Proponent does not satisfy the requirements of Rule 14a-8. Here, the only entity that has offered proof of ownership on behalf of the Proponent is not the record holder of the shares. In the absence of a communication from the record holder of the shares, the Proponent cannot satisfy the requirements of Rule 14a-8(b).

* * * * * * *

Based on the foregoing, we are notifying the Staff and the Proponent as required by Rule 14a-8(j) that the Company intends to exclude the Proposal in reliance on Rule 14a-8(f) unless a U.S. District Court rules that the Company is obligated to include the Proposal in its 2011 Proxy Materials. Please be advised that the Company reserves the right to submit additional arguments for exclusion. In this regard, although the Company is not requesting no-action relief, we respectfully request that the Staff notify the Company in advance of any response to this notification so that the Company may supplement its arguments for exclusion or take appropriate legal action if need be.

Sincerely,

Cheri L. Peper
Corporate Secretary

JOHN CHEVEDDEN

*** FISMA & OMB Memorandum M-07-16 ***

February 7, 2011

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

 # 2 Rule 14a-8 Proposal
Apache Corporation (APA)
Simple Majority Vote
John Chevedden

Ladies and Gentlemen:

This responds to the December 29, 2010 request (supplemented) to avoid this established rule 14a-8 proposal.

As there is no reason to believe that the *Hain Celestial* decision was intended to exclude verification letters from banks, the term "introducing broker" has been understood, at least by some parties, as including introducing banks. Any prior references to RTS as an "introducing broker" should be understood in this light. Since executives of certain corporations have chosen to make this an issue, others and the proponent have since gravitated towards the term "introducing securities intermediary."

Under *Hain Celestial*, RTS is the record holder of the proponent's shares. Apache's claim that RTS is an "investment advisor" is misleading. RTS provides investment advisory services to some clients. The proponent is a client, but that is not a service RTS provides to the proponent.

The company's claim that RTS is a "non-chartered non-depository trust company" is false. RTS is a Maine-chartered non-depository trust company. As such, RTS is legally a bank. Non-depository trust companies can be members of the Federal Reserve System.

The company's discussions of what they tried to make clear in the 2010 Apache litigation should be understood in light of the fact that the court resoundingly rejected almost all the company's claims. The company's quotes from the judge's ruling are incomplete and taken out of context.

The company cites a Northern Trust letter that was not even considered according to the 30-page Memorandum and Order in the Apache lawsuit.

The company is at least bold enough to claim that a failed no action request supports its scenario, such as *Intel Corporation* (March 13, 2009). The company also cites unique no action decisions nearly a decade old. The company fails to provide any specifics on its scenario of there being supposedly few stocks that the proponent owns. In spite of the company claim, the company provided no evidence that the proponent submitted shareholder proposals in 1991.

This is to request that the Securities and Exchange Commission allow this established resolution to stand and not defer to the ruling in the Apache case where the facts presented and the rebuttal were materially different.

Sincerely,

John Chevedden

cc:
Cheri L. Peper <cheri.peper@apachecorp.com>

JOHN CHEVEDDEN

*** FISMA & OMB Memorandum M-07-16 ***

March 27, 2011

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

 # 3 Rule 14a-8 Proposal
Apache Corporation (APA)
Simple Majority Vote
John Chevedden

Ladies and Gentlemen:

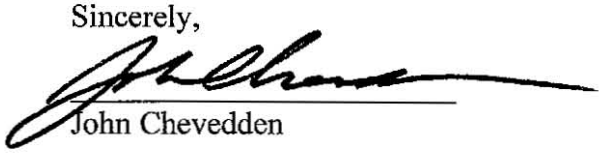
This further responds to the company request of three-months ago on December 29, 2010 (supplemented) to avoid this established rule 14a-8 proposal.

The company issued its preliminary proxy on March 2, 2011 (for a May 5, 2011 annual meeting) and the company already completely omitted the rule 14a-8 proposal for Simple Majority Vote.

In 2010 the company issued its definitive proxy on March 31, 2010 for a May 6, 2010 annual meeting. Thus it appears that the company will issue its definitive proxy this week.

This is to request that the Securities and Exchange Commission allow this established resolution to stand and not defer to the ruling in the 2010 Apache case where there was a material difference in the facts presented and the rebuttal.

Sincerely,



John Chevedden

cc:
Cheri L. Peper <cheri.peper@apachecorp.com>