KBR

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Jeffrey B. King
Vice President Public Law

January 13, 2011

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

Re: KBR, Inc. – Omission of Shareholder proposal Submitted by Mr. John Chevedden

Dear Ladies and Gentlemen:

On behalf of KBR, Inc., a Delaware corporation (the "Company" or "KBR"), 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 KBR intends to omit from its proxy statement and form of proxy for its 2011 Annual Meeting of Stockholders (collectively, the "2011 Proxy Materials") a stockholder proposal (the "Proposal") and statements in support thereof received from John Chevedden ("Chevedden").

Pursuant to Rule 14a-8(j), we have filed this notice with the Securities and Exchange Commission (the "Commission") no later than eighty (80) calendar days before the Company intends to file its definitive 2011 Proxy Materials with the Commission; and concurrently sent copies of this correspondence to Chevedden.

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 Chevedden that if he 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).

The Proposal: The Proposal, addressed to the Chairman of the Board of the Company, requests that the Board of Directors "take steps necessary to reorganize the Board of Directors into one class with each director subject to election each year and to complete this transition within one-year." A copy of the Proposal and the Supporting Statement is attached as Exhibit 1.

Basis for Exclusion: We intend to exclude the Proposal pursuant to Rule 14a-8(b) and Rule 14a-8(f)(1) because Chevedden failed to establish the requisite eligibility to submit the Proposal, and failed to provide the requisite proof of stock ownership in response to the Company's proper request for that information.

On November 22, 2010, Chevedden submitted the Proposal for inclusion in KBR's upcoming proxy statement. *See* Exhibit 1. The Proposal was not accompanied by proof of ownership as required by Rule 14a-8(b). Rather, Chevedden attached a letter dated November 22, 2010 from RAM Trust Services ("RTS") that, in its entirety, states: "Ram Trust Services is a Maine chartered non-depository trust company. Through us, Mr. John Chevedden has continuously held no less than 200 shares of KBR, Inc. (KBR) common stock, CUSIP #48242W106, since at least November 7, 2009. We in turn hold those shares through The Northern Trust Company in an account under the name Ram Trust Services." *See* Exhibit 2 (the "RTS Letter"). This November 22, 2010 letter from RTS is the only purported "proof" of ownership Chevedden provided to KBR and, as of today, remains the only purported "proof" that he has provided. But RTS is not registered as a broker with the SEC, is not registered as a broker with the self-regulating industry organization FINRA, and is not registered as a broker with the self-regulating industry organization SIPC. Neither RTS nor Chevedden is listed in the Company's stock records as a record holder of any KBR common stock as is required by Rule 14a-8(b).

The Company sought additional verification of Chevedden's eligibility to submit the Proposal. On December 6, 2010, within 14 calendar days of the Company's receipt of the RTS Letter, the Company sent a letter addressed to Chevedden (the "Deficiency Notice"). *See* Exhibit 3. The Deficiency Notice informed Chevedden that he had failed to comply with the procedural requirements and explained how he could cure the procedural deficiency. In part, the Deficiency Notice states:

> Based on our review of the information provided by you and of the relevant records and regulatory materials, we have been unable to conclude that the proposal meets the requirements for inclusion in the proxy, and unless you can demonstrate you meet these requirements in the proper time frame, we may seek to exclude your proposal from the 2011 proxy statement.
>
> . . .
>
> Pursuant to the SEC's Rule 14a-8(b), since neither you nor Ram Trust Services is a record owner of KBR common stock, nor from their letter does it appear that Ram Trust Services is a custodial institution, you must either:
>
> (1) Submit to KBR a written statement from the record holder of the securities (usually a broker or bank) that is a direct record holder of KBR

> stock verifying that at the time the proposal was submitted you continuously held the requisite securities for at least one year; or
>
> (2) If you have filed a Schedule 13D (17 C.F.R. § 240.13d-101), Schedule 13G (17 C.F.R. § 240.13d-102), Form 3 (17 C.F.R. § 249.103), Form 4 (17 C.F.R. § 249.104) and/or Form 5 (17 C.F.R. § 249.105), or amendments to those documents or updated forms, reflecting ownership of the shares as of or before the date on which the one-year eligibility period begins, you may demonstrate eligibility by submitting to the company: (A) a copy of the schedule and/or form, and any subsequent amendments reporting a change in your ownership level; and (B) your written statement that you continuously held the required number of shares for the one-year period as of the date of the statement.
>
> Please note that to be considered a timely response under the SEC's Rule 14a-8(f), all of the documentation requested in this letter must be sent to my attention at the above address within 14 calendar days of the date you receive this request.

Chevedden responded on December 16, 2010 via electronic mail. *See* Exhibit 4. His response is copied below:

> Mr. King, Thank you for acknowledging the rule 14a-8 proposal. Based on the October 1, 2008 Hain Celestial no-action decision, Ram Trust is my introducing securities intermediary and hence the owner of record for purposes of Rule 14a-8(b). Please let me know if there is a further question.
> Sincerely,
> John Chevedden

A. For the reasons stated below, the RAM Trust Services letter and Chevedden's December 16, 2010 response do not satisfy the requirements of Rule 14a-8(b)(2) and the Proposal is thus excludable pursuant to Rule 14a-8(f).

The Company believes that Chevedden's Proposal properly may be excluded from the Proxy Materials in accordance with Rules 14a-8 and 14a-8(f)(1) because Chevedden has failed to provide the Company, within the time period set forth in Rule 14a-8(f)(1), the requisite verification that Chevedden 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, Chevedden 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 Chevedden, 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: by submitting a written statement from the record holder of the securities, or by submitting 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 Chevedden had to do to cure the deficiency, and explained that Chevedden's response must be postmarked or transmitted electronically no later than 14 days from the date of receipt of the Deficiency Letter.

The RTS Letter indicates that RAM Trust Services is a Maine chartered non-depository trust company and that Chevedden's shares are held by another entity, The Northern Trust Company in an account under the name Ram Trust Services. The RTS Letter itself shows that RTS does not hold custody of Chevedden's shares, either directly, as specified in Rule 14a-8(b)(2), or even through an affiliate. RAM Trust Services is not a record holder of the Company's securities.

Staff Legal Bulletin 14 states that a written statement establishing eligibility under Rule 14a-8(b) must be from the "record" holder and that a written statement from a shareholder's investment advisor is insufficient evidence of ownership unless the investment advisor is also the record holder of the shares. Chevedden should be well aware of the rule's unambiguous requirement that proponents have the burden of proof and must document proof of ownership by submitting the proof from a record holder, because Mr. Chevedden attempted to submit a similarly flawed shareholder proposal to the Apache Corporation just last year. The U.S. District Court ruled that Chevedden's proposal at issue in that case properly could be excluded because Chevedden failed to meet Rule 14a-8(b)(2)'s proof of ownership requirements.

In *Apache Corp. v. Chevedden*, 696 F.Supp.2d 723, 739 (S.D. Tex. 2010), the Honorable Lee H. Rosenthal of the United States District Court for the Southern District of Texas confirmed with respect to Rule 14a-8(b) that "The Rule requires shareholders to 'prove [their] eligibility.'" In the *Apache v. Chevedden* case, proponent Chevedden had submitted a purported shareholder proposal for inclusion in Apache's proxy statement. Apache filed suit in the U.S. District Court asserting that Chevedden failed to submit the requisite proof of ownership of Apache common stock as required by SEC Rule 14a-8(b), and Apache sought a declaratory judgment that Apache properly may exclude Chevedden's proposal from its proxy materials. On March 10, 2010, Judge Rosenthal granted Apache's motion for declaratory judgment, found that "Chevedden has failed to meet the Rule's [14a-8(b)(2)] requirements," and concluded that "Apache may exclude Chevedden's proposal from its proxy materials." 696 F.Supp.2d at 741. In her opinion, Judge Rosenthal explained that:

> Although section 14 of the Securities Exchange Act of 1934 (governing proxies), under which Rule 14a-8 as 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.

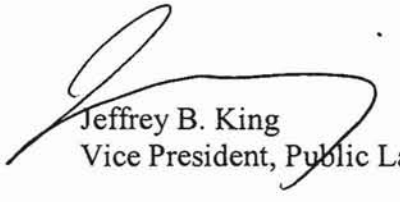
Id. The only timely purported "proof" of ownership Chevedden provided to the Company was a letter from RTS that is nearly identical in all material respects to the RTS letter at issue in *Apache v. Chevedden*. In that case, Judge Rosenthal considered the evidence regarding RTS's purported status as an introducing broker in light of the publicly available information about RTS's status as an investment advisor, and Judge Rosenthal explained that "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)." *Id.* at 740. Judge Rosenthal noted that "here, there are valid reasons to believe the letter is unreliable as evidence of the shareholder's eligibility." *Id.*

Judge Rosenthal's ruling is consistent with previous no action relief the Staff has granted when a proponent attempted to establish proof of ownership 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). Because RAM Trust Services is not a record holder of Chevedden's shares, Chevedden has failed to establish, within the 14 days prescribed by Rule 14a-8(f)(1), his eligibility to submit the Proposal.

Judge Rosenthal considered certain of the Staff's no action letters, including *The Hain Celestial Group, Inc.* (Oct. 1, 2008), in which the Staff declined to allow the exclusion of a shareholder proposal under similar circumstances. The Staff repeatedly has acknowledged in its no-action letters 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." In light of this guidance, and in light of the U.S. District Court's recent ruling in *Apache v. Chevedden* that a near-identical RTS

Letter submitted by Chevedden failed to meet Rule 14a-8(b)(2)'s proof of ownership requirements, the Company intends to exclude the Proposal from its proxy materials in reliance on Rule 14a-8(b) and 14a-8(f) unless a United States District Court rules that the Company is obligated to include the Proposal in its 2011 Proxy Materials. On January 13, 2011, the Company filed suit against Chevedden in the United States District Court for the Southern District of Texas seeking an appropriate declaration and other relief.

Sincerely,



Jeffrey B. King
Vice President, Public Law

Exhibit 1

JOHN CHEVEDDEN

FISMA & OMB Memorandum M-07-16

FISMA & OMB Memorandum M-07-16

to Jeff King

Mr. William P. Utt
Chairman of the Board
KBR, Inc. (KBR)
601 Jefferson St Ste 3400
Houston TX 77002
Phone: 713 753-2000

Dear Mr. Utt,

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 22, 2010
Date

cc: Jeffrey B. King <jeffrey.king@kbr.com>
Corporate Secretary
Fax: 713-753-5353, ~~713-753-3301~~
Rob Kukla, Jr. <investors@kbr.com>
Director of Investor Relations

[KBR: Rule 14a-8 Proposal, November 22, 2010]

3* – Elect Each Director Annually

RESOLVED, shareholders ask that our Company take the steps necessary to reorganize the Board of Directors into one class with each director subject to election each year and to complete this transition within one-year.

Arthur Levitt, former Chairman of the Securities and Exchange Commission said, "In my view it's best for the investor if the entire board is elected once a year. Without annual election of each director shareholders have far less control over who represents them."

In 2010 over 70% of S&P 500 companies had annual election of directors. Shareholder resolutions on this topic won an average of 68%-support in 2009.

If our company took more than one-year to phase in this proposal it could create conflict among our directors. Directors with 3-year terms could be more casual because they would not stand for election immediately while directors with one-years terms would be under more immediate pressure. It could work out to the detriment of our company that our company's most qualified directors would promptly have one year-terms and that our company's least qualified directors would retain 3-year terms the longest.

The merit of this Elect Each Director Annually proposal should also be considered in the context of the need for improvement in our company's 2010 reported corporate governance status:

The Corporate Library www.thecorporatelibrary.com, an independent investment research firm, rated our company "D," with "High Governance Risk," and "Very High Concern" for Executive Pay.

60% of the long-term equity award for our CEO William Utt consisted of cash-based performance awards, which did nothing to tie executive performance with long-term shareholder value. Furthermore, performance awards were based on only three-year performance periods and paid out on sub-median Total Shareholder Return performance relative to company peers – 50% payout for TSR at the 25th percentile.

There was $652,000 of all other pay for our CEO in 2009 – including $543,000 for a Supplemental Executive Retirement Plan (SERP). Also, Mr. Utt was potentially entitled to $15 million cash severance and $25 million total in the event of a change in control. Such practices were not reflective of executive pay that was well-aligned with shareholder interests.

Loren Carroll, chairman of our Executive Pay Committee, was on the boards of four companies rated "D" or lower by The Corporate Library. All four companies were "High Concern" regarding executive pay. The Corporate Library also flagged Mr. Carroll for his tenure on the Fleetwood Enterprises board as it slid into bankruptcy. Furthermore our Lead Director, Frank Blount, was flagged by for his tenure on the Entergy board as it went bankrupt. Messrs. Carroll and Blount were then allowed to hold 4 of the 9 seats on our most important board committees.

Plus one yes-vote from our 150 million shares was all it took to elect each of our directors for 3-year terms.

Please encourage our board to respond positively to this proposal to help turnaround the above type practices: **Elect Each Director Annually – 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(l)(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***

Exhibit 2

RAM TRUST SERVICES

November 22, 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 200 shares of KBR, Inc. (KBR) common stock, CUSIP #48242W106, since at least November 17, 2009. 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 3

KBR

601 Jefferson Street • Houston, Texas 77002-7900
Phone: 713.753.4604 • Fax 713.753.3310

Jeffrey B. King
Vice President, Public Law and Secretary

December 6, 2010

Via Courier and E-mail

John Chevedden

FISMA & OMB Memorandum M-07-16

Re: Director Election Resolution

Dear Mr. Chevedden

On November 24, 2010, we received your letter signed as of November 22, 2010 KBR include your proposed resolution in its proxy solicitation for KBR's 2011 annual meeting. Based on our review of the information provided by you and of the relevant records and regulatory materials, we have been unable to conclude that the proposal meets the requirements for inclusion in the proxy, and unless you can demonstrate you meet these requirements in the proper time frame, we may seek to exclude your proposal from the 2010 proxy statement.

As you know, in order to be eligible to submit a proposal for consideration at KBR's 2011 annual meeting, Rule 14a-8 under Regulation 14A of the United States Securities and Exchange Commission ("SEC") requires that a stockholder must have continuously held at least $ 2,000 in market value, or 1% of KBR'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 by the date the proposal is submitted. The stockholder must continue to hold those securities through the date of the meeting and must so indicate to us. Your letter that "Rule 14a-8 requirements are intended to be met including the continuous ownership of the required stock value," however, the only information provided to us regarding your share ownership is letter from Ram Trust Services indicating that they hold 200 shares of KBR on your behalf and have done so since November 17, 2009. Pursuant to the SEC's Rule 14a-8(b), since neither you nor Ram Trust Services a record owner of KBR common stock, nor from their letter does it appear that Ram Trust Services is a custodial institution, you must either:

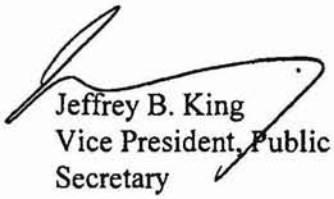
(1) Submit to KBR a written statement from the record holder of the securities (usually a broker or bank) that is a direct record holder of KBR stock verifying that at the time the proposal was submitted you continuously held the requisite securities for at least one year; or

(2) If you have filed a Schedule 13D (17 C.F.R. § 240.13d-101), Schedule 13G (17 C.F.R. § 240.13d-102), Form 3 (17 C.F.R. § 249.103), Form 4 (17 C.F.R. § 249.104) and/or Form 5 (17 C.F.R. § 249.105), or amendments to those documents or updated forms, reflecting ownership of the shares as of or before the date on which the one-year eligibility period begins, you may demonstrate eligibility by submitting to the company: (A) a copy of the schedule and/or form,

and any subsequent amendments reporting a change in your ownership level; and (B) your written statement that you continuously held the required number of shares for the one-year period as of the date of the statement.

Please note that to be considered a timely response under the SEC's Rule 14a-8(f), all of the documentation requested in this letter must be sent to my attention at the above address within 14 calendar days of the date you receive this request. If you have any questions regarding the matters discussed in this letter, please feel free to call or write me at the number and address shown above.

Very truly yours,



Jeffrey B. King
Vice President, Public Law and
Secretary

Exhibit 4

Jeff King

From: ***FISMA & OMB Memorandum M-07-16***
Sent: Thursday, December 16, 2010 11:18 PM
To: Jeff King
Subject: Rule 14a-8 Proposal (KBR) ,

Mr. King, Thank you for acknowledging the rule 14a-8 proposal. Based on the October 1, 2008 Hain Celestial no-action decision, Ram Trust is my introducing securities intermediary and hence the owner of record for purposes of Rule 14a-8(b). Please let me know if there is a further question.
Sincerely,
John Chevedden

From: ***FISMA & OMB Memorandum M-07-16***
Sent: Thursday, March 10, 2011 11:01 PM
To: shareholderproposals
Subject: Defendant's Reply Memorandum of Law for Dismissal for Lack of Statutory Standing and Constitutional Standing and Failure to Join an Indispensable Party in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden
Attachments: CCE00004.pdf

Follow Up Flag: Follow up
Flag Status: Completed

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission

Ladies and Gentlemen:
Attached is the proponent's brief filed just prior to the court's recent ruling in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden. The court's ruling will be sent in the next email in a few minutes.
Sincerely,
John Chevedden

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

KBR, INC.,	§	
	§	
Plaintiff	§	
	§	
v.	§	Civil Action 4:11-cv-00196
	§	
JOHN CHEVEDDEN	§	
	§	
Defendant	§	

DEFENDANT'S REPLY MEMORANDUM OF LAW FOR DISMISSAL FOR LACK OF STATUTORY STANDING, AND CONSTITUTIONAL STANDING PURSUANT TO FED. R. CIV. P. 12(b)(1) AND FAILURE TO JOIN AN INDISPENSIBLE PARTY PURSUANT TO FED. R. CIV. P. 12(b)(7).

There is an old legal aphorism: "If you have the facts on your side, pound the facts. If you have the law on your side, pound the law. If you have neither on your side, pound the table." The plaintiff's reply brief to the defendant's motions for dismissal is essentially an exercise in table pounding. Rather than acknowledge that "the jig is up" and voluntarily dismiss this action it has chosen to act in bad faith by filing a frivolous brief. Even worse, as described below, the plaintiff has resorted to an unethical attempt to deceive this court about the defendant's position. For that and other reasons, the defendant intends to move for sanctions pursuant to Fed. R. Civ. P. 11.

The plaintiff's reply brief fails to grapple with the defendant's assertion that the complaint does not allege an injury in fact. No amount of verbal table pounding can excuse the plaintiff's failure to articulate a concrete injury.[1] That failure is fatal to the plaintiff's attempt to pursue these proceedings. Without a concrete injury, this court cannot render anything but a prohibited advisory opinion.

I. THE PLAINTIFF LACKS CONSTITUTIONAL STANDING.

In its initial brief, the defendant stated that the failure of the plaintiff to establish that any of the three tests set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. at 560 (1992) are met requires dismissal. Astonishingly, the plaintiff's reply brief does not even address this crucial point.[2] Consequently, this court must dismiss this action due to lack of constitutional standing.

II. THE PLAINTIFF LACKS STATUTORY STANDING.

[1] The plaintiff's failure to assert an injury in fact in its reply brief constitutes a violation of Fed. R. Civ. P. 11.

[2] The plaintiff's failure to acknowledge the *Lujan* tests constitutes a violation of Fed. R. Civ. P. 11.

Equally astonishing, the plaintiff's reply brief does not even mention *Alexander v. Sandoval*, 532 U.S. 275 (2001), the case in which the Supreme Court directed all federal courts to refuse to imply a private cause of action to enforce any federal statute unless it is statutorily intended.[3]

Faced with the almost insurmountable task of overcoming the Supreme Court's abandonment of what it referred to as the *ancien regime* under which courts liberally inferred a private right of action to enforce federal statutes, the plaintiff's reply brief relies solely on *J.I. Case Co.* v. *Borak,* 377 U.S. 426 (1964) and several pre-*Sandoval* decisions that in turn relied on *Borak.* In *Borak*, the Court found that a stockholder that alleged a company had issued a false and misleading proxy statement had an implied private right of action because one of "chief purposes" of Section 14(a) is " 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result."

However, in *Sandoval*, the Court, while not expressly overruling *Borak*, rejected its reasoning[4] and indicated that courts should no longer use it as the basis of a finding of the existence of a private right of action to enforce federal statutes. Instead, it said, "Without [finding that the statutory intent is to create both a private right and a private remedy] a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." The Court left no doubt about the inappropriateness of a court applying *Borak* beyond the narrow context of a shareholder claiming an injury resulting from dissemination of a false or misleading proxy statement.

> Respondents would have us revert in this case to the understanding of private causes of action that held sway 40 years ago when Title VI was enacted. That understanding is

[3] The plaintiff's failure to mention and address *Sandoval* constitutes a violation of Fed. R. Civ. P. 11.

[4] In *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 286 F.3d 613 (2d Cir. 2002) the Court of Appeals for the 2nd Circuit noted the "now dubious analysis of *Borak.*"

> captured by the Court's statement in *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 433 (1964), that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute. We abandoned that understanding in *Cort* v. *Ash,* 422 U. S. 66, 78 (1975)--which itself interpreted a statute enacted under the *ancien regime*--and have not returned to it since. Not even when interpreting the same Securities Exchange Act of 1934 that was at issue in *Borak* have we applied *Borak's* method for discerning and defining causes of action. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A., supra,* at 188; *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau,* 508 U. S. 286, 291-293 (1993); *Virginia Bankshares, Inc.* v. *Sandberg, supra,* at 1102-1103; *Touche Ross & Co.* v. *Redington, supra,* at 576-578. Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.

The plaintiff, despite being fully aware of this admonition, acts in bad faith by inviting this court to take another drink from *Borak.* It goes without saying that the court should refuse the invitation.

The plaintiff then improperly compounds its failure to acknowledge *Sandoval* by attempting to use the Declaratory Judgment Act to do an end run around it. Specifically, it cites two pre-*Sandoval* district court decisions to support the proposition that the DCA confers on a plaintiff a right to seek declaratory relief so long as the defendant has a private right to sue the plaintiff under the applicable statute.[5] This argument borders on the frivolous for several reasons.

First, given the Supreme Court's aversion in *Sandoval* to finding an implied private right of action absent clear statutory intent, it is almost inconceivable that the Court would endorse such a loophole today to allow an issuer to obtain a declaratory judgment to eliminate the threat of a stockholder lawsuit alleging dissemination of a false or misleading proxy statement. But even that slim possibility is foreclosed because in this case the plaintiff is not seeking a declaration that its proxy statement is not false or misleading.

More importantly, like every lawsuit brought in federal court, a lawsuit brought pursuant to the DCA requires a "case of actual controversy" which does not exist unless the *Lujan* tests are met. In a case brought under the DCA, the plaintiff must establish the existence of an imminent threat

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[5] The plaintiff also cites two irrelevant cases in the defendant did not raise and the court did not consider the question of statutory standing. They should be given no weight.

from the defendant. Rather than admit that the defendant has never posed any threat whatsoever to the plaintiff, it unconscionably quotes the defendant's words out of context so as to conjure up the existence of a threat:

> Thus, in Chevedden's words, a KBR shareholder would have "statutory standing to bring an action to require [KBR] to include his proposal in its proxy materials," assuming that shareholder timely and properly proved his ownership of KBR shares and otherwise established the eligibility requirements. Since a KBR shareholder would have standing to enforce KBR's obligation to include a shareholder proposal in its proxy materials, KBR also has standing to bring this declaratory judgment action. *See Kansas City Power,* 747 F. Supp. at 762 ("If a declaratory judgment defendant could have brought an action in federal court to enforce its rights, then the federal court has jurisdiction over the declaratory judgment action brought by the plaintiff."). (Emphasis added)

This court should be at least as shocked as the defendant to compare that passage with what the defendant actually said in his initial brief:

> As noted in Section II above, no private party including the defendant has statutory standing to bring an action to require the plaintiff to include his proposal in its proxy materials and, in fact, the defendant has never threatened to, or brought, such an action against any issuer.

This is not mere negligence. It is clear that the plaintiff's intent was to have this court think that that the defendant made a statement in its initial brief whose meaning is exactly opposite to its true meaning. No explanation for this distortion is possible other than that the plaintiff attempted to deceive this court. If that deception does not merit sanctions under Fed. R. Civ. P. 11, nothing does.

III. THE PLAINTIFF HAS FAILED TO JOIN AN INDISPENSIBLE PARTY.

FED. R. CIV. P. 19(a)(1)(A) states: "A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if in that person's absence, the court cannot accord complete relief among existing parties." The plaintiff asserts that it need not sue the Securities and Exchange Commission in order to obtain complete relief. Once again, the plaintiff's argument is fatally flawed at the outset because it has not

asserted that the defendant has threatened any injury. Even if, *arguendo*, the defendant did have a right to sue the plaintiff to compel it to include his proposal in its proxy materials -- and actually threatened to do so -- the SEC has an independent right to sue the plaintiff. Thus, it is frivolous to assert that the Commission is not an indispensable party to this action.

Section 21 of the Securities Exchange Act of 1934 (the "Act") grants the Commission the express authority to enforce Section 14 of the Act and all rules promulgated thereunder including Rule 14a-8. As a result, issuers routinely ask the staff of the Commission for assurance that it will not recommend that the Commission initiate an enforcement action if a particular Rule 14a-8 shareholder proposal is not included in their proxy materials.[6] Over the years, thousands of these "no action" requests have been processed by the staff. On the other hand, only a handful of issuers have eschewed the "no action" process and sought a formal declaratory judgment from a court.

If only the shareholder proponent is named as a defendant in a declaratory action and he defaults or loses for reasons that have nothing to do with merits, that is no reason to preclude the Commission from bringing an enforcement action. Hence, in order to obtain the relief the plaintiff purports to seek, it must name the Commission as a defendant. To hold otherwise would allow an issuer to eliminate the possibility of an SEC enforcement action by suing a small shareholder (like the defendant) for declaratory relief, knowing that he likely does not have the financial resources or economic incentive to mount as good a defense as the Commission would. A plaintiff represented by the same law firm as the plaintiff in this case got away with that ploy in a similar lawsuit against this defendant last year. But, two wrongs do not make a right and this court should tell the plaintiff to "pick on someone its own size," i.e., the Commission, if it

[6] Alternatively, if an issuer requires greater assurance of non-liability, it can petition the Commission itself for a declaratory order pursuant to Section 554(e) of the Administrative Procedure Act of 1946.

wants to eliminate future liability for its decision to exclude the defendant's proposal from its proxy materials .

Since the plaintiff has failed to join an indispensible party, i.e., the Securities and Exchange Commission, the court should dismiss this action pursuant to FED. R. CIV. P. 12(b)(7) and 19(a)(1).

IV. THIS COURT MAY EXERCISE PERSONAL JURISDICTION OVER THE DEFENDANT.

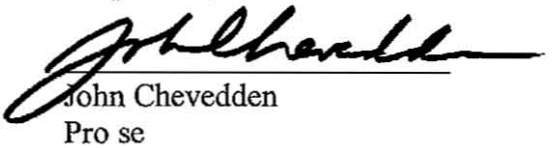
Because the defendant believes the above grounds for dismissal are unassailable, he hereby withdraws his motion to dismiss for lack of personal jurisdiction and consents to the exercise of personal jurisdiction by this court.

V. CONCLUSION

For all of the above reasons, the defendant respectfully requests this court to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(7).

Dated: March 2, 2011

Respectfully submitted



John Chevedden
Pro se

FISMA & OMB Memorandum M-07-16

Certificate of Service

I certify that on March 2, 2011 this motion was sent overnight to the Clerk of the Court. A copy of this motion is also being provided to Geoffrey L. Harrison, plaintiff's attorney.

John Chevedden

From: ***FISMA & OMB Memorandum M-07-16***
Sent: Thursday, March 10, 2011 11:04 PM
To: shareholderproposals
Subject: KBR
Attachments: CCE00003.pdf

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission

Ladies and Gentlemen:
Attached is the court's recent ruling in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden.
Sincerely,
John Chevedden

03/09/2011 17 MEMORANDUM AND ORDER entered DENYING 7 MOTION Contesting Venue, [DENYING 9] MOTION to Dismiss, DENYING AS MOOT 3 MOTION for Hearing, DENYING 12 MOTION to Dismiss 1 Complaint. No later than 3/21/11 the parties may submit additional briefs limited to the effect of the no-action letters issued since this court's opinion in Apache v. Chevedden. (Signed by Judge Lee H Rosenthal) Parties notified.(leddins,) (Entered: 03/09/2011)

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

KBR INC.,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. H-11-0196
	§	
JOHN CHEVEDDEN,	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER

KBR has moved for summary judgment declaring that it may exclude John Chevedden's proposal in the proxy materials for its May 2011 annual shareholders meeting. (Docket Entry No. 8).[1] Chevedden has filed a motion contesting venue, (Docket Entry No. 7); a motion to dismiss for lack of personal and subject-matter jurisdiction, (Docket Entry No. 9); and a motion to dismiss for failure to join the Securities and Exchange Commission (S.E.C.) as an indispensable party, (Docket Entry No. 12). Based on the motions, responses, and replies; the record evidence; and the applicable law, the following orders are entered: Chevedden's motion contesting venue is denied; Chevedden's motion to dismiss for lack of personal and subject-matter jurisdiction is denied; and Chevedden's motion to dismiss for failure to join an indispensable party is denied. No decision is yet rendered on KBR's summary judgment motion. Before ruling, the court would like both parties to address the S.E.C.'s no-action letters issued since *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723 (S.D. Tex. 2010). No later than **March 21, 2011**, the parties may supplement their briefs to address the recent S.E.C. no-action letters.

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[1] KBR also moved for a speedy ruling under Federal Rule of Civil Procedure 57, (Docket Entry No. 3). That motion is denied as moot by this court's opinion.

The reasons for these orders are set out below.

I. Background

A. Factual Background

On November 22, 2010, John Chevedden submitted a shareholder proposal to be included in KBR's proxy statement for its May 2011 annual shareholder meeting in Houston, Texas. (Docket Entry No. 8, Ex. 1). S.E.C. Rule 14a-8(b) limits shareholder 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" who have held that amount of stock continuously for over a year. 17 C.F.R. § 240.14a-8(b)(1). A company may exclude proposals from shareholders who do not prove ownership if the company gives the shareholder notice and an opportunity to correct the deficiency. 17 C.F.R. § 240.14a-8(f)(1).

One way to prove ownership is a written statement from the "record" holder of securities (usually a broker or bank). 17 C.F.R. § 240.14a-8(b)(1). Chevedden attached a letter from RAM Trust Services ("RTS") stating that Chevedden met the Rule 14a-8(b) ownership requirements. RTS identified itself as a "Maine chartered non-depository trust company" that held Chevedden's shares through the "Northern Trust Company in an account under the name Ram Trust Services." (Docket Entry No. 8, Ex. 2). KBR informed Chevedden that it would exclude his proposal unless he provided additional proof of ownership because neither he nor RTS was a record holder of KBR stock. KBR's letter stated:

> As you know, in order to be eligible to submit a proposal for consideration at KBR's 2011 annual meeting, Rule 14a-8 under Regulation 14A of the United States Securities and Exchange Commission ("S.E.C.") requires that a stockholder must have continuously held at least $2,000 in market value, or 1% of KBR'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 by the date the

> proposal is submitted. The stockholder must continue to hold those securities through the date of the meeting and must so indicate to us. Your letter that "Rule 14a-8 requirements are intended to be met including the continuous ownership of the required stock value," however, the only information provided to us regarding your share ownership is a letter from [RTS] indicating that they hold 200 shares of KBR on your behalf and have done so since November 17, 2009. Pursuant to SEC's Rule 14a-8(b), since neither you nor [RTS] [is] a record owner of KBR common stock, nor from their letter does it appear that [RTS] is a custodial institution, you must either:
>
> (1) Submit to KBR a written statement from the record holder of the securities (usually a broker or bank) that is a direct record holder of KBR stock verifying that at the time the proposal was submitted you continuously held the requisite securities for at least one year; or
>
> (2) If you have filed a Schedule 13D [], Schedule 13G [], From 3 [], Form 4 [] and/or Form 5 [], or amendments to those documents or updated forms reflecting ownership of the shares as of or before the date on which the one-year eligibility period beings, you may demonstrate eligibility by submitting to the company: (A) a copy of the schedule and/or form, and any subsequent amendments reporting a change in your ownership level; and (B) your written statement that you continuously held the required number of shares for the one-year period as of the date of the statement.
>
> Please note that to be considered a timely response under the SEC's Rule 14a-8(f), all of the documentation requested in this letter must be sent to my attention at the above address within 14 calendar days of the date you receive this request. If you have any questions regarding the matters discussed in this letter, please feel free to call or write me at the number and address shown above.

(*Id.*, Ex. 3). KBR alleges that on December 16, 2010, Chevedden responded: "Based on the October 1, 2008 *Hain Celestial* no-action decision, [RTS] is my introducing securities intermediary and hence the owner of record for purposes of Rule 14a-8(b)." (Docket Entry No. 8, at 2).[2]

Nothing in the record shows that KBR received a letter from the DTC or Cede & Co. Nor does the record suggest that either Chevedden or RTS appeared on a "Cede breakdown." There is

[2] KBR did not produce this email, but quoted it in its brief.

also nothing in the record suggesting that RTS is a participant in the DTC. Finally, although RTS's letter to KBR states that Northern Trust holds the shares for RTS, Chevedden submitted no letter or other document from Northern Trust.

On January 13, 2010, KBR filed this suit and informed the S.E.C. that it intended to exclude Chevedden's proposal from its proxy materials. (*Id.*, Ex. 5). On January 14, 2011, KBR moved for a speedy decision on the basis that it needed to finalize its proxy statement by April 4, 2011 so that it can be timely filed with the S.E.C. and mailed to shareholders by April 8, 2011. (Docket Entry No. 3). On February 16, 2011, KBR moved for summary judgment. KBR argues that it may properly exclude Chevedden's proposal because the letter he submitted from RTS was not a letter from a "record holder" of KBR securities.

B. The Regulations

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 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION§ 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).

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.*

Among other reasons,[3] 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*

[3] 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).

> *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).[4]

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 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

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[4] 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).

required, "virtually all companies that decide to omit a shareholder proposal seek a no-action letter in support of their decision."[5] 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. 14, Ex. 15). 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 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.

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

> 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.*).

II. The Motion to Dismiss

Chevedden has moved to dismiss under Rule 12(b)(1) and 2(b)(2), (Docket Entry No. 9). In his motion, he argues that this court does not have personal jurisdiction over him because he has a minimal financial interest in the outcome of this lawsuit. He argues that litigating in Houston imposes an unfair burden on him because traveling from his residence in Southern California is expensive.

The motion to dismiss also challenges KBR's standing. Citing the Supreme Court's decisions in *Alexander v. Sandoval*, 532 U.S. 275 (2001) and *Gonzaga University v. Doe*, 536 U.S. 273, 276 (2002), Chevedden argues that the Exchange Act does not provide for private causes of action to enforce Rule 14a-8. He argues further that KBR has failed to show a case or controversy. (Docket Entry No. 13).

A. Personal Jurisdiction

In response to a Rule 12(b)(2) challenge to a court's personal jurisdiction over a nonresident defendant, the plaintiff bears the burden of establishing that the court has jurisdiction. *See Luv n'*

care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465, 469 (5th Cir. 2006) (citing *Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir. 1982)); *Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994) (summary calendar). The court must accept as true the party's uncontroverted allegations and resolve any factual conflicts in favor of the party seeking to invoke the court's jurisdiction. *Cent. Freight Lines Inc. v. APA Transp. Corp.*, 322 F.3d 376, 380 (5th Cir. 2003); *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 869 (5th Cir. 2000); *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000). The law, however, does not require the court to credit conclusory allegations, even if uncontroverted. *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 869 (5th Cir. 2001). When a court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, the party asserting jurisdiction is required only to present facts sufficient to constitute a *prima facie* case of personal jurisdiction. *See Cent. Freight Lines*, 322 F.3d at 380; *Brown v. Slenker*, 220 F.3d 411, 417 (5th Cir. 2000); *Alpine View*, 205 F.3d at 215. The plaintiff need not establish jurisdiction by a preponderance of the evidence. *See Luv n' care*, 438 F.3d at 469.

"When a federal court is attempting to exercise personal jurisdiction over a defendant in a suit based upon a federal statute providing for nationwide service of process, the relevant inquiry is whether the defendant had minimum contacts with the United States." *Luallen v. Higgs*, 277 F. App'x 402, 404 (5th Cir. May 2, 2008) (quoting *Busch v. Buchman, Buchman & O'Brien, Law Firm*, 11 F.3d 1255, 1258 (5th Cir. 1994)). The Securities Exchange Act of 1934 provides for national service of process. It states:

> The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder . . . . Any suit or action to enforce any liability or duty created by this

> chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found . . . .

15 U.S.C. § 78aa; *see also Luallen*, 277 F. App'x at 404 ("The Exchange Act contains a provision providing nationwide service of process."). Because the Exchange Act authorizes nationwide service, the only issue is whether Chevedden has sufficient minimum contacts with the United States.

Chevedden is a California resident. His residence in a state of the United States is for this court to exercise personal jurisdiction over him. *See Busch*, 11 F.3d at 1258 ("Given that the relevant sovereign is the United States, it does not offend traditional notions of fair play and substantial justice to exercise personal jurisdiction over a defendant residing within the United States."); *Luallen*, 277 F. App'x at 404 ("Here, each of the defendants was a resident of the state of Nevada. Therefore, the minimum contacts test was satisfied and the due process concerns of the Fifth Amendment were not offended."); *Trust Co. of Louisiana v. N.N.P. Inc.*, 104 F.3d 1478, 1486–87, 1491 (5th Cir. 1997) (concluding that the district court's exercise of personal jurisdiction over a defendant was proper under § 78aa where the defendant "indisputably had" sufficient contacts with the United States and affirming the judgment against the defendant under federal securities law and Louisiana law). This court has personal jurisdiction over Chevedden.

Chevedden argues that this court does not have personal jurisdiction over him because he has a *de minimis* investment in KBR securities and because litigating in Houston from his California home is burdensome. Chevedden emphasizes that the burden on him of litigating in Houston exceeds any burden on KBR if it had to litigate in California because KBR is a large corporation

with "billions" in assets. Assuming these facts are true, they do not provide a basis to conclude that Chevedden has insufficient minimum contacts with the United States to deprive this court of personal jurisdiction over him.

B. Subject-Matter Jurisdiction

One aspect of subject-matter jurisdiction is standing. Three elements are required: "(1) an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood that a favorable decision will redress the injury." *Croft v. Governor of Tex.*, 562 F.3d 735, 745 (5th Cir. 2009) (citing *Lujan v. Defenders of Wildlife*, 405 U.S. 555, 560 (1992)). As "the party invoking federal jurisdiction," KBR "bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561. KBR must meet this burden "'with the manner and degree of evidence required at the successive stages of the litigation,'" which means that "on a motion to dismiss, [she] must allege facts that give rise to a plausible claim of . . . standing." *Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 133–34 (5th Cir. 2009) (quoting *Lujan*, 504 U.S. at 561). When a complaint seeks multiple kinds of relief, the plaintiff must show standing "for each type of relief sought." *Summers v. Earth Island Inst.*, --- U.S. ----, 129 S. Ct. 1142, 1149, 173 L.Ed.2d 1 (2009) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S. Ct. 1660, 75 L.Ed.2d 675 (1983)).

Chevedden argues that KBR does not have standing because sections 14(a) and 27 of the Exchange Act do not establish a private right of action to enforce S.E.C. Rule 14a-8. Section 14(a) provides:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors,

> to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78l of this title.

15 U.S.C. § 78n. Section 27 of the Exchange Act grants district courts "exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. § 78aa. Chevedden acknowledges that the Supreme Court's decision in *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S. Ct. 1555, 12 L.Ed.2d 423 (1964), recognized a private right of action under section 14(a) of the Exchange Act to enforce certain S.E.C. regulations. Chevedden argues that the Supreme Court's decision in *Alexander v. Sandoval* puts *Borak* in doubt. 532 U.S. 275 (2001).[6] He argues that under *Sandoval*, section 14(a) does not create a private right of action to enforce S.E.C. Rule 14a-8 because it does not use "rights-creating language" and does not refer to a private remedy.

Borak involved a merger allegedly infected by a false and misleading proxy statement. The plaintiff shareholder sought rescission or damages citing (1) section 14(a)'s proscription of proxy solicitation in contravention of Commission rules, and (2) Rule 14a-9's ban on false or misleading statements in proxy solicitations. The Court found it "clear" that section 27 of the Act afforded shareholders the requisite right to sue. Section 27 gives the federal district courts exclusive jurisdiction over violations of the Act and "of all suits in equity and actions at law brought to enforce any liability or duty created by [the Act] or the rules and regulations thereunder." *See Roosevelt v.*

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[6] Chevedden also cites the Supreme Court's decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002). In *Gonzaga*, the issue was whether a student may sue a private university under 42 U.S.C. § 1983 to enforce provisions of the Family Educational Rights and Privacy Act of 1974 ("FERPA), 20 U.S.C. § 1232g. 536 U.S. at 276. 1983 KBR does not argue that the Exchange Act creates rights enforceable under section 1983. *Gonzaga* is inapplicable.

E.I. Dupont de Nemours & Co., 958 F.2d 416, 419–20 (D.C. Cir. 1992) (discussing *Borak*, 377 U.S. 426).

Since *Borak*, the Supreme Court has exercised greater restraint in implying private rights of action and has been critical of aspects of *Borak*'s reasoning. *Id.* at 420. In *Touche Ross & Co. v. Redington*, the Court unsettled one premise of *Borak*'s reasoning. "Section 27," the Court said, is a prescription on federal court jurisdiction, venue, and service of process; it "imposes no liabilities" and "creates no cause of action of its own force and effect." 442 U.S. 560, 577 (1979).

In *Virginia Bankshares, Inc. v. Sandberg*, the Supreme Court refused to extend the *Borak* Section 14(a)/ Rule 14a-9 right of action to minority shareholders who lacked the votes needed to block the merger that gave rise to the claim. 501 U.S. 1083, 1105–08 (1991). The Court's opinion in *Virginia Bankshares* recapitulates the *Touche Ross* main theme: "The ultimate question is one of congressional intent." *Touche Ross*, 442 U.S. at 578, 99 S. Ct. at 2490. "The rule that has emerged in the years since *Borak* . . . is that recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy." *Virginia Bankshares*, 501 U.S. at 1102. "The Court indicated a disinclination, however, to disturb a longstanding 'legal structure of private statutory rights [that] has developed without clear indications of congressional intent.'" *Roosevelt* 958 F.2d at 420 (quoting *Virginia Bankshares*, 501 U.S. at 1104).

An implied private right of action under section 14(a) was not at issue in *Sandoval*. The issue in *Sandoval* was whether regulations promulgated under section 602 of Title VI of the Civil Rights Act of 1964 created private rights of action. 532 U.S. at 279. Section 602 empowered federal agencies to promulgate disparate impact regulations to enforce section 601, which provides that "no person shall, 'on the ground of race, color, or national origin be excluded from participating

in, be denied the benefits of, or be subjected to discrimination under any program or activity' covered by Title VI." *Id.* at 278 (citing 42 U.S.C. § 2000d). The court found that section 602 does not create private rights of actions to enforce regulations promulgated under section 602 to enforce section 601 because section 602 was an agency directive and did not contain "rights-creating language." Section 601 allows private actions because it "decrees '[n]o person . . . shall . . . be subjected to discrimination.'" Section 602, by contrast, states: "[e]ach Federal department and agency . . . is authorized and directed to effectuate the provisions of [section 601]." *Id.* at 288–89. The Court also noted that section 602 provides an agency-based remedial scheme which can "foreclose a private cause of action." *Id.* at 290. In reaching its decision, the Supreme Court rejected the plaintiff's contention that under *Borak*, "'it is the duty of courts to be alert to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute," and noted that "[w]e abandoned that understanding in *Cort v. Ash*, 422 U.S. 66, 78 (1975)." *Id.* at 287.

In a case decided before *Sandoval* but after *Touche Ross* and *Virginia Bankshares*, the D.C. Circuit addressed private rights of action under sections 14(a) and 27 to enforce S.E.C. Rule 14a-8, the rule at issue in this litigation. *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416 (D.C. Cir. 1992). The court recognized that while the right of shareholders to bring causes of action to enforce Rule 14a-8 "has been widely assumed" based on *Borak*, the Supreme Court's restraint in finding private cause of actions in *Touche Ross* and *Virginia Bankshares* gave reason to doubt that assumption. *Id.* at 420–21. Noting that *Touche Ross* and *Virginia Bankshares* both expressed a disinclination to disturb *Borak*'s holding that a private right of action may exist under section 14(a) to enforce S.E.C. rules, the court found a private right of action to enforce Rule 14a-8. The court looked to the text of section 14(a), in which "Congress . . . entrusted to the S.E.C. the prescription

of rules and regulations governing proxy solicitations 'in the public interest or for the protection of investors.'" *Id.* at 42. The court reasoned that this section stemmed from Congress's belief that "fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange," and that Rule 14a-8(c)(7) protected this right. The court stated:

> Access to management proxy solicitations to sound out management views and to communicate with other shareholders on matters of major import is a right informational in character, one properly derived from section 14(a) and appropriately enforced by private right of action.

Id.

The court acknowledged that *Touche Ross* and *Virginia Bankshares* counseled against judicial implication of private rights. The court continued:

> [I]n view of the informational right rooted in section 14(a), we see no instruction in current Supreme Court opinions to "freeze out" private enforcement of Rule 14a-8, a prescription plainly serving the congressional aim of facilitating democracy.

Id. at 422. The court also noted that the S.E.C. took the position that an implied cause of action existed and that the S.E.C. lacked both the authority and ability to remedy Rule 14a-8(c)(7) violations.

As the D.C. Circuit stated in *Roosevelt*, the Supreme Court's decision in *Sandoval* does not establish that there is no private right of action under section 14(a) to enforce S.E.C. Rule 14a-8. Rule 14(a) has "rights-creating" language. Unlike section 602 of Title VI, which provides for agency enforcement, section 27 of the Exchange Act directs courts to enforce the rights and duties created by the Act. The statutory features behind the Supreme Court's decision in *Sandoval* are not present here.

As one court has noted, "[t]he existence of a private right of action by a shareholder under § 14(a) of the Securities Exchange Act and Rule 14a-8 is well settled." *Amalagated Clothing and Textile Workers Union v. Wal-Mart*, 821 F. Supp. 877, 879 n.1 (S.D.N.Y. 1993). Chevedden has cited no authority to support his contention that *Sandoval* gives reason to doubt the "well-settled" proposition that section 14(a) provides a private cause of action to enforce Rule 14a-8.

Chevedden argues that even if an implied right of action exists, KBR has not met its burden of demonstrating: "(1) an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood that a favorable decision will redress the injury." *Croft*, 562 F.3d at 745 (citing *Lujan*, 405 U.S. at 560). Chevedden emphasizes that there is no injury in fact because he has not filed a suit challenging KBR's exclusion of his proposal and asserts that he does not intend to do so in the future.[7]

KBR proceeds under the Declaratory Judgment Act, which states, "In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The phrase "case of actual controversy" "refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127, 127 S. Ct. 764, 166 L.Ed.2d 604 (2007). The "difference between an abstract question and a 'controversy'

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[7] Chevedden also moved for sanctions in his reply brief on the basis that KBR misquoted a sentence from his motion to dismiss. Rule 11(c)(2) requires that a party seeking sanctions must serve the Rule 11 motion on the opposing party and may not file the motion with the district court unless the offending filing is not withdrawn or corrected within 21 days after service. FED. R. CIV. P. 11(c)(2). A motion for sanctions must be made separately from any other motion. *Id.* The record does not show that Chevedden complied with the procedural requirements for seeking sanctions under Rule 11. The motion is denied.

contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy." *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 85 L.Ed. 826 (1941). "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.*

KBR has demonstrated an actual controversy between it and Chevedden over whether it must include his proposal in its proxy statement. The controversy is of sufficient immediacy because KBR must finalize its proxy statement by April of this year. Chevedden has an implied right of action under section 14(a) of the Exchange Act. He may sue KBR for refusing to include his proposal. Issuing a declaratory judgment relieves KBR of the uncertainty over its decision to exclude Chevedden's proposal. *See Concise Oil & Gas Partnership v. La. Intrastate Gas Corp.*, 986 F.2d 1463, 1471 (5th Cir. 1993) ("The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding."). Courts have held that a public company has standing to seek a declaratory judgment that a shareholder's proposal is properly excluded from a proxy statement because the shareholder's ability to sue to challenge the exclusion creates uncertainty warranting judicial resolution. One court explained:

> It is immaterial whether a seller has standing under the '34 Act because the purpose of the Declaratory Judgment Act is to allow a party to a case or controversy to seek a declaration of non-liability in order to determine the issue and be relieved of the burden of

> uncertainty which may be imposed upon one in the event that a potential claimant does not seek redress in the courts in a timely fashion. Thus, all that is necessary is that the declaratory defendant would have standing to bring the claims for which the declaratory relief is sought. Therefore, since defendants would have standing to bring a claim under the '34 Act against plaintiffs, plaintiffs have standing to bring this declaratory judgment action.

May Dep't Stores v. Emps. Ret. Sys. of Ala., No. 93 Civ. 0879, 1993 WL 362389, at *2 (S.D.N.Y. Sept. 14, 1993) (internal citations omitted); *see also City Power & Light Co. v. Kansas Gas & Elec.*, 747 F. Supp. 567, 572 (W.D. Mo. 1990) ("In the instant case, it is clear that this court would have jurisdiction pursuant to section 27 if KG & E filed suit against KCP & L challenging the legality of KCP & L's Schedule 14D-1 because such a suit would be brought to "enforce a liability or duty created by the Exchange Act." 15 U.S.C. § 78aa. Thus, the court finds it has jurisdiction to entertain the declaratory judgment action filed by KCP & L."). KBR has met its burden to show standing. Chevedden's assertion that he has no present intention to sue if KBR excludes his proposal does not undermine the showing. Chevdden's motion to dismiss for lack of subject-matter jurisdiction is denied.

III. The Motion Challenging Venue

Chevedden has filed a separate motion contesting venue. The venue statute governing claims based on federal-question jurisdiction provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b).

Chevedden argues that venue is inappropriate because only a small number of events related to this litigation occurred in Houston. Chevedden is correct that only a few events gave rise to this case. The basis for KBR's claim is two letters Chevedden sent to Houston asking that his proposal be included in KBR's proxy materials for its annual shareholder meeting in Houston. Because these letters form the basis of KBR's claims, venue is appropriate in Houston. *See Fowler v. Broussard*, No. 3-00-CV-1878-D, 2001 WL 184237, at *5 (N.D. Tex. Jan. 22, 2001) (denying motion to dismiss or transfer when the defendant's communications directed to the forum formed the basis of the plaintiff's claims); *Phoenix Mining & Mineral v. Treasury Oil Corp.*, No. 5:06-cv-58, 2007 WL 951866, at *1–2 (S.D. Tex. Mar. 28, 2007) (finding venue proper in Southern District of Texas when "some" of the defendants' allegedly fraudulent communications were directed to there); *Sacody Techs., Inc. v. Avant, Inc.*, 862 F. Supp. 1152, 1157 (S.D.N.Y. 1994) ("The standard set forth in § 1391(a)(2) may be satisfied by a communication transmitted to or from the district in which the cause of action was filed, given a sufficient relationship between the communication and the cause of action."). Chevedden's motion contesting venue is denied.

Alternatively, Chevedden argues that venue would be more appropriate in Southern California. A district court has "broad discretion in deciding whether to order a transfer." *Balawajder v. Scott*, 160 F.3d 1066, 1067 (5th Cir. 1999). The party seeking transfer must show that "the transferee venue is . . . clearly more convenient." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (en banc). Public and private interests factors are relevant. *Id.* "The private interest factors are: '(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing

witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.' The public interest factors are: '(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law.'" *Id.* (quoting *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004)). These factors are "not necessarily exhaustive or exclusive" and "none can be said to be of dispositive weight." *Id.* (quotations and alternations omitted). A primary factor is the convenience of any witnesses, particularly nonparty witnesses. *Spiegelberg v. Collegiate Licensing Co.*, 402 F. Supp. 2d 786, 790 (S.D. Tex. 2005) (citing *LeBouef v. Gulf Operators, Inc.*, 20 F. Supp. 2d 1057, 1060 (S.D. Tex. 1998)).

Chevedden has not demonstrated that the transfer of venue to California is "clearly more convenient." *Volkswagen*, 545 F.3d at 315. This case raises a legal issue that will be resolved on the papers. No court appearance is required, so the parties' relative financial burdens do not provide a basis to transfer the case to California. Chevedden argues that "[i]t is particularly important that the defendant appear in person in this case because the plaintiff, in its filings, has maligned defendant's character . . . . Only an in person appearance can allow the court to fairly assess the defendant's demeanor." Because the critical issue in this case is whether Chevedden's letter to KBR is sufficient proof of stock ownership under Rule 14-8(b), this court's ability to assess Chevedden's demeanor is not relevant to whether this court has personal jurisdiction over him or to whether this court should transfer the case to Southern California. To the extent Chevedden moved this court to transfer this case to Southern California, that motion is denied.

IV. The Motion to Dismiss Under Rule 19

Rule 12(b)(7) allows dismissal for "failure to join a party under Rule 19." "Rule 19 provides for the joinder of all parties whose presence in a lawsuit is required for the fair and complete resolution of the dispute at issue. It further provides for the dismissal of litigation that should not proceed in the absence of parties that cannot be joined." *HS Res., Inc. v. Wingate*, 327 F.3d 432, 438 (5th Cir. 2003) (footnotes omitted). A court must first determine if a person should be joined to the lawsuit under Rule 19(a). If so, joinder should result. But if such joinder would destroy the court's jurisdiction, the court must determine under Rule 19(b) if the party is indispensable. If the party is indispensable, then the court must dismiss the litigation. If the party is not indispensable, the case may continue without joinder. *Id.* Rule 19(b) lists four factors to be considered: (1) the extent to which proceeding without the absent party would prejudice either the absent party or the parties to the lawsuit; (2) whether a judgment can be structured with protective provisions which would lessen the potential prejudice; (3) whether a judgment in the absence of the necessary party will be adequate; and (4) whether the plaintiff has an adequate remedy if the lawsuit is dismissed.

Chevedden cites no authority in support of his proposition that the S.E.C. is a necessary party to a declaratory judgment action over whether a company properly excluded a shareholder proposal. The S.E.C. takes the opposite position. In a document titled, "Division of Corporate Finance — Informal Procedures Regarding Shareholder Proposals," the S.E.C. has explicitly stated that "[o]nly a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials." (Docket Entry No. 13, Ex. 15). Similarly, in a document explaining Rule 14a-8 processes titled "Division of Corporate Finance: Staff Legal Bulleting No. 14," the S.E.C. stated that, "[w]here the arguments raised in the company's no-action request are before a court of law, our policy is not comment on those arguments." (*Id.*, Ex. 7); *see*

also Roosevelt, 958 F.2d at 424 ("The [S.E.C.] has consistently regarded the court, and not the agency, as the formal and binding adjudicator of Rule 14a-8's implementation of section 14(a).").

Applying the Rule 19 factors in light of the S.E.C.'s position shows that it is not an indispensable party. As to the first and second factors — the extent to which proceeding without the absent party would prejudice either the absent party or the parties to the lawsuit and whether a judgment can be structured with protective provisions which would lessen the potential prejudice — Chevedden argues that failure to join the S.E.C. prejudices him because he cannot draw on the S.E.C.'s resources to litigate against KBR. This is not the prejudice at issue in Rule 19. And the S.E.C.'s policy statements do not show that it would provide resources to support Chevedden. The first and second factors do not weigh in favor of finding the S.E.C. is an indispensable party. The third factor — whether a judgment in the absence of the S.E.C. will be adequate — does not weigh in favor of finding the S.E.C. indispensable. The S.E.C. consistently refuses to involve itself in judicial proceedings Rule 14a-8 disputes. The fourth factor — whether the plaintiff will have an adequate remedy if the lawsuit is dismissed — weighs against dismissal. KBR has not failed to join an indispensable party.

V. KBR's Motion for Summary Judgment

A. The Legal Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). "The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–25 (1986)).

If the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden by "'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *See Celotex*, 477 U.S. at 325. While the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case. *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005) (citation omitted). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 326 (5th Cir. 2009) (quotation omitted). "If the moving party fails to meet [its] initial burden, the motion [for summary judgment] must be denied, regardless of the nonmovant's response." *United States v. $92,203.00 in U.S. Currency*, 537 F.3d 504, 507 (5th Cir. 2008) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc)).

When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings. The nonmovant must identify specific evidence in the record and articulate how that evidence supports that party's claim. *Baranowski v. Hart*, 486 F.3d 112, 119 (5th Cir. 2007). "This burden will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence.'" *Boudreaux*, 402 F.3d at 540 (quoting *Little*, 37 F.3d at 1075). In deciding a summary judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party. *Connors v. Graves*, 538 F.3d 373, 376 (5th Cir. 2008).

The moving party bears a heavier burden when seeking summary judgment on a claim or defense on which it would bear the burden of proof at trial. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). "[I]f the movant bears the burden of proof on an issue, either because he is

the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor." *Id.* (emphasis in original); *see also Meecorp Capital Markets LLC v. Tex-Wave Industries LP*, 265 F. App'x 155, 157 (5th Cir. 2008) (per curiam) (unpublished) (quoting *Fontenot*, 780 F.2d at 1194). But "'[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769 (2007) (quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S. Ct. 1348 (1986)).

B. Analysis

In *Apache Corp. v. Chevedden*, this court considered similar issues to those raised by KBR in its motion for summary judgment. 696 F. Supp. 2d 723 (S.D. Tex. 2010). In *Apache*, Apache Corporation sought summary judgment that it could exclude a shareholder proposal from the same defendant as the instant litigation, John Chevedden. "The only issue [was] whether Chevedden [had] met the requirements for showing stock ownership under S.E.C. Rule 14a-8(b)(2)." *Id.* at 724. To prove he met eligibility requirements, Chevedden sent Apache four letters, three from RTS and one from Northern Trust Company (NTC). Only two of the letters, both from RTS, were timely submitted and this court only considered those letters. The RTS letters sent to Apache were almost identical to the RTS letter sent to KBR. The RTS letters stated that it was the "introducing broker" for Chevedden, that Northern Trust was the custodian of the shares, and that Chevedden had held the necessary amount of shares for the necessary duration. *Id.* at 730–31.

After analyzing Rule 14a-8(b), S.E.C. staff legal bulletins and S.E.C. staff no-action letters, this court found that the letters from RTS were insufficient evidence of Chevedden's eligibility. RTS was not a "record holder" of Apache shares under Rule 14a-8(b) because the summary judgment evidence did not show that RTS appeared on either the NOBO list or on any "Cede breakdown." *Id.* at 740. Nor was RTS a DTC participant. *Id.* By contrast, Northern Trust, the company RTS later asserted held Chevedden's shares, was a DTC participant and appeared on the Cede breakdown. RTS's letters that were timely submitted claimed that Northern Trust held the shares but did not provide any additional documents to support its assertion.

In *Apache*, the court explained its narrow ruling that Chevedden's timely submitted letters were inadequate to show ownership, as follows:

> RTS is not a participant in the DTC. It is not registered as a broker with the S.E.C., 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. Chevedden disputes that RTS has not provided investment advice and that its "sole function is as custodian.". . . 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).

696 F. Supp. 2d at 740.

This court declined to accept Apache's position that only a letter from the DTC, the registered owner of the shares, would suffice. But this court also declined to accept Chevedden's position that would require companies to accept any letter purporting to come from an introducing broker that had named a DTC-participating member allegedly having a position in the company.

In stating that DTC participants may be record holders for certification purposes under Rule 14a-8, *Apache* is consistent with *Kurz v. Holbrook*, 989 A.2d 140 (Del. Ct. Chancery 2010), which held that DTC participants are "shareholders of record" for purposes of determining the right to vote under Delaware law. This court declared that Apache could properly exclude Chevedden's proposal. *Id.* at 740–41.

KBR points out that in the present case, Chevedden has submitted the same type of letter from RTS this court found insufficient in *Apache*. As in *Apache*, Chevedden has not timely submitted any document from Northern Trust. Chevedden has neither responded to KBR's motion for summary judgment nor submitted additional evidence showing that he was an eligible shareholder. Under *Apache*, KBR may exclude Chevedden's proposal from its 2011 proxy materials. Before granting KBR's motion for summary judgment, however, this court would like the parties to address an additional area. Since the *Apache* decision, the S.E.C. staff has rejected no-action requests from a number of companies that raised arguments to those raised in *Apache*.[8] The Division of Corporate Finance has not issued additional guidance on the proof of ownership that investors need to provide.

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[8] *See* The McGraw–Hill Companies, Inc., 2011 WL 190603 (S.E.C. No-Action Letter); Devon Energy Corp., 2011 WL 442368 (S.E.C. No-Action Letter); JP Morgan Chase & Co., 2011 WL 686113, (S.E.C. No-Action Letter); Prudential Fin., Inc., 2010 WL 5279924 (S.E.C. No-Action Letter); Amgen, Inc., 2011 WL 400022 (S.E.C. No-Action Letter); The Allstate Corp., 2011 WL 686110 (S.E.C. No-Action Letter); Pfizer Inc., 2011 WL 550008 (S.E.C. No-Action Letter); Am. Express Co., 2010 WL 5179486 (S.E.C. No-Action Letter); Verizon Commc'ns Inc., 2010 WL 5479676 (S.E.C. No-Action Letter); Bristol–Myers Squibb Co., 2010 WL 5497545 (S.E.C. No-Action Letter); Int'l Paper Co., 2011 WL 528413 (S.E.C. No-Action Letter); Yahoo! Inc., 2011 WL 2011 WL 494128 (S.E.C. No-Action Letter); Int'l Paper Co., 2011 WL 190604 (S.E.C. No-Action Letter); King Pharm., Inc., 2011 WL 318084 (S.E.C. No-Action Letter); Bank of Am. Corp., 2011 WL 318085 (S.E.C. No-Action Letter); King Pharm., Inc., 2011 WL 318087 (S.E.C. No-Action Letter); Kinetic Concepts, Inc., 2011 WL 202114 (S.E.C. No-Action Letter); KBR, Inc., 2011 WL 176579 (S.E.C. No-Action Letter); JP Morgan Chase & Co., 2011 WL 341803 (S.E.C. No-Action Letter); The Allstate Corp., 2011 WL 108683 (S.E.C. No-Action Letter); Devon Energy Corp., 2010 WL 1504434 (S.E.C. No-Action Letter); Union Pac. Corp., 2010 WL 1250765 (S.E.C. No-Action Letter).

This court would like the parties to address these no-action letters, which are not binding but are "nonbinding persuasive authority." *Apache Corp. v. New York City Employees' Ret. Sys.*, 621 F. Supp. 2d 444, 449 (S.D. Tex. 2008). No later than **March 21, 2011**, the parties may submit additional briefs limited to the effect of the no-action letters issued since this court's opinion in *Apache v. Chevedden*.

III. Conclusion

Chevedden's motion contesting venue, (Docket Entry No. 7); motion to dismiss for lack of personal and subject-matter jurisdiction, (Docket Entry No. 9); and motion to dismiss for failure to join and indispensable party, (Docket Entry No. 12), are denied. KBR's motion for a speedy hearing, (Docket Entry No. 3), is denied as moot. The motion for summary judgment will be resolved when the additional briefing is received.

SIGNED on March 9, 2011, at Houston, Texas.

Lee H. Rosenthal
United States District Judge

From: ***FISMA & OMB Memorandum M-07-16***
Sent: Tuesday, March 15, 2011 12:43 PM
To: shareholderproposals
Subject: KBR
Attachments: CCE00001.pdf

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission

Ladies and Gentlemen:
Attached is the Defendant's Amended and Clarified Motion and Memorandum of Law for Dismissal in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden

Sincerely,
John Chevedden

------ Forwarded Message
From: ***FISMA & OMB Memorandum M-07-16***
Date: Mon, 14 Mar 2011 09:20:52 -0700
To: Lisa Eddins <lisa_eddins@txs.uscourts.gov>
Cc: "Geoffrey L. Harrison" <gharrison@susmangodfrey.com>
Subject: Defendant's Amended and Clarified Motion and Memorandum of Law for Dismissal in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden

Dear Ms. Eddins,
Attached is the Defendant's Amended and Clarified Motion and Memorandum of Law for Dismissal.
Sincerely,
John Chevedden

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

KBR, INC.,	§	
	§	
Plaintiff	§	
	§	
v.	§	Civil Action 4:11-cv-00196
	§	
JOHN CHEVEDDEN	§	
	§	
Defendant	§	

DEFENDANT'S AMENDED AND CLARIFIED MOTION AND MEMORANDUM OF LAW FOR DISMISSAL FOR LACK OF CONSTITUTIONAL STANDING PURSUANT TO FED. R. CIV. P. 12(b)(1)

On March 9, 2011, this court denied all of the defendant's motions to dismiss. The plaintiff hereby amends and clarifies his motion to dismiss this action for lack of constitutional standing pursuant to Fed. R. Civ. P. 12(b)(1) in order to incorporate the following argument and stipulation.

In his initial brief the defendant asserted that the plaintiff lacked constitutional standing because it failed to establish that any of the three "injury in fact" tests set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. at 560 (1992) were met. Most importantly, the defendant asserted that the plaintiff failed to establish the existence of an injury in fact.

To support his contention that no injury in fact existed, the defendant stated: "[N]o private party including the defendant has statutory standing to bring an action to require the plaintiff to include his proposal in its proxy materials and, in fact, the defendant has never threatened to, or brought, such an action against any issuer." Nevertheless, the court determined that "KBR has demonstrated an actual controversy between it and Chevedden . . . of sufficient immediacy . . . because . . . Chevedden has an implied right of action under Section 14(a) of the Exchange Act [and] he may sue KBR for refusing to include his proposal [in its proxy statement]." The court added: "Chevedden's assertion that he has no present intention to sue" . . . "does not undermine [KBR's standing]." (emphasis added)

In *Lujan*, the Supreme Court stated that an injury in fact sufficient to establish constitutional standing must have occurred or be "imminent, not 'conjectural' or 'hypothetical.'" The court's finding that the defendant "may sue KBR" indicates that the perceived threat here is merely conjectural. (emphasis added)

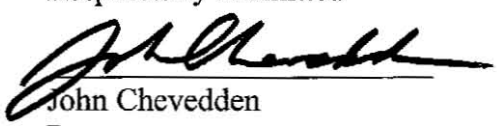
By contrast, in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), the defendant had delivered a letter to the plaintiff expressing its belief that a drug marketed by the plaintiff was covered by a patent held by the defendant and that it expected the plaintiff to pay it royalties.

According to the Court, "[The plaintiff] considered the letter to be a clear threat to . . . sue for patent infringement if [the plaintiff] did not make royalty payments as demanded." The Supreme Court deemed that letter to be an imminent threat to sue the plaintiff that conferred standing on the plaintiff to seek a declaratory judgment. Even if the defendant in this action has an implied right of action to sue the plaintiff (which he disputes), no similar imminent threat exists here. A defendant's mere right to sue is not sufficient to constitute an injury in fact especially where the defendant has disclaimed any intent to do so.

Nonetheless, to erase any doubt about whether the plaintiff faces an imminent injury, the defendant hereby stipulates that he will not sue the plaintiff if it elects to exclude his proposal from its proxy materials and his decision not to sue is irrevocable. Therefore, whatever inferential basis the court had for finding the existence of an injury in fact "of sufficient immediacy" to confer standing upon the plaintiff no longer exists. Consequently, this action should now be dismissed for lack of subject matter jurisdiction.

Dated: March 14, 2011

Respectfully submitted

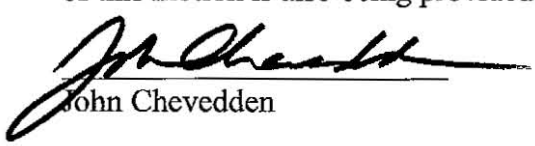


John Chevedden
Pro se

FISMA & OMB Memorandum M-07-16

Certificate of Service

I certify that on March 14, 2011 this motion was sent overnight to the Clerk of the Court. A copy of this motion is also being provided to Geoffrey L. Harrison, plaintiff's attorney.



John Chevedden

From: ***FISMA & OMB Memorandum M-07-16***
Sent: Wednesday, March 30, 2011 12:19 AM
To: shareholderproposals
Subject: KBR
Attachments: CCE00002.pdf

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission

Regarding: S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden

Ladies and Gentlemen:
Attached is an ORDER regarding Defendant's Amended and Clarified Motion and Memorandum of Law for Dismissal for Lack of Constitutional Standing. Show Cause Response due by 3/31/2011.(Signed by Judge Lee H Rosenthal)

Sincerely,
John Chevedden

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

KBR,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. H-11-0196
	§	
JOHN CHEVEDDEN,	§	
	§	
Defendant.	§	

ORDER

In his "Amended and Clarified Motion and Memorandum of Law for Dismissal for Lack of Constitutional Standing Pursuant to Fed. R. Civ. P. 12(b)(1)," the defendant stipulated "that he will not sue the plaintiff if it elects to exclude his proposal from its proxy materials and his decision not to sue is irrevocable." (Docket Entry No. 18, at 3). Because of the defendant's representation, because the period for submitting additional shareholder proposals has expired, and because the plaintiff can apply for a temporary restraining order if the defendant or a related or similarly situated entity or individual later challenges the proposal's exclusion, this court orders the plaintiff to show cause, no later than March 31, 2011, why this court has the ability to issue the declaratory judgment the plaintiff seeks.

SIGNED on March 28, 2011, at Houston, Texas.

Lee H. Rosenthal
United States District Judge

From: ***FISMA & OMB Memorandum M-07-16***
Sent: Thursday, April 07, 2011 11:30 AM
To: shareholderproposals
Subject: KBR
Attachments: CCE00003.pdf

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission

Ladies and Gentlemen:
Attached is a brief in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden

Sincerely,
John Chevedden

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

KBR, INC.,	§	
	§	
Plaintiff	§	
	§	
v.	§	Civil Action 4:11-cv-00196
	§	
JOHN CHEVEDDEN	§	
	§	
Defendant	§	

DEFENDANT'S ADDITIONAL MEMORANDUM OF LAW FOR DISMISSAL FOR LACK OF CONSTITUTIONAL STANDING PURSUANT TO FED. R. CIV. P. 12(b)(1) AND FAILURE TO JOIN AN INDISPENSABLE PARTY PURSUANT TO FED. R. CIV. P. 12(b)(7).

The defendant almost feels sorry for the plaintiff's counsel. After this court issued an order to show cause "why this court has the ability to issue the declaratory judgment the plaintiff seeks," its counsel was faced with the prospect of telling his client that the costs it had incurred in this case had been for naught. In addition, a dismissal would effectively destroy plaintiff's counsel's creative business niche of persuading registered issuers that want to exclude the Rule 14a-8 proposals of small shareholders from their proxy statements to retain plaintiff's counsel to sue the small shareholders (who would very likely not have the resources or economic motivation to mount an effective defense) for a declaratory order as an alternative to tangling with the Securities and Exchange Commission.

I. THE PLAINTIFF HAS NOT ESTABLISHED THE EXISTENCE OF AN IMMINENT INJURY.

Throughout this action, the plaintiff has failed to allege an injury in fact that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. at 560 (1992). In its additional brief on jurisdiction filed on March 31, 2011 (and provided to the defendant on April 1, 2011), the plaintiff makes a desperate attempt to correct this fatal omission. The attempt fails because the plaintiff provides no facts that suggest that any of the alleged injuries it belatedly claims to fear are "actual" or "imminent" rather than "conjectural" or "hypothetical."

The plaintiff correctly sets forth the standard for an imminent injury necessary to confer standing as an injury that is "sufficiently likely to happen to justify judicial intervention." *Chevron USA, Inc. v. Traillour Oil Co.*, 987 F. 2d 1138 (5th Cir. 1993). However, the opinions it cites in which standing was found rely on facts suggesting that a concrete injury to the plaintiff was likely absent a declaratory order. For example, in *Chevron*, the Court of Appeals for the Fifth Circuit

recited facts that supported its conclusion that the plaintiff faced a "substantial possibility" of injury if it did not obtain a declaratory judgment. By contrast, KBR provides no facts to support a finding that there is a "substantial possibility" that the injuries it purports to fear will materialize if it excludes the defendant's proposal from its proxy materials. The overactive imagination of a paranoid plaintiff (or its counsel) is not a substitute for facts. Consequently, this court should dismiss this action due to lack of the plaintiff's constitutional standing.

II. THE PLAINTIFF HAS FAILED TO JOIN AN INDISPENSIBLE PARTY.

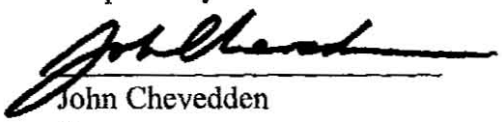
On March 9, 2011, the court denied the defendant's motion to dismiss for failure to join an indispensable party. The defendant asks the court to reconsider this motion in light of the numerous assertions made by the plaintiff in its additional brief on jurisdiction to the effect that it will "[confront] the dilemma of having to include Chevedden's defective proposal in order to avoid a potential SEC enforcement action" if it does not obtain the declaratory judgment it seeks. Those assertions constitute compelling support for finding that the plaintiff must sue the Securities and Exchange Commission in order to obtain the complete relief it seeks, i.e., to eliminate liability for its decision to exclude the defendant's proposal from its proxy materials. Since the plaintiff has failed to join the Commission as an indispensable party the court should reconsider – and grant -- the defendant's motion to dismiss this action pursuant to FED. R. CIV. P. 12(b)(7) and 19(a)(1).

III. CONCLUSION

For the above reasons, the defendant again respectfully requests this court to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(7).

Dated: April 3, 2011

Respectfully submitted

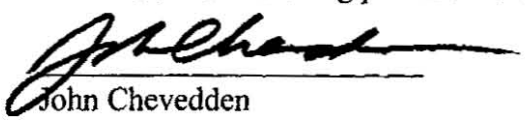


John Chevedden
Pro se

FISMA & OMB Memorandum M-07-16

Certificate of Service

I certify that on April 2, 2011 this motion was sent overnight to the Clerk of the Court. A copy of this motion is also being provided to Geoffrey L. Harrison, plaintiff's attorney.



John Chevedden

From: John Chevedden ***FISMA & OMB Memorandum M-07-16***
Sent: Monday, April 11, 2011 12:41 PM
To: shareholderproposals
Subject: Texas Secession (on corporate governance) Led by Apache, KRB and Kinetic Concepts
Attachments: CCE00000.pdf

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission

Ladies and Gentlemen:
Attached is an article on KBR v. Chevedden

Sincerely,
John Chevedden

http://corpgov.net/?p=5711

Texas Secession Led by Apache, KRB and Kinetic Concepts

April 11th, 2011James McRitchieLeave a commentGo to comments
The American Civil War began on April 12, 1861 or 150 years ago today. Texas companies now appear to believe they are again outside the United States with respect to federal laws regarding proxies, based on the flawed decisions of Judge Lee H. Rosenthal. As reported at theCorporateCounsel.net on April 5th:

KBR filed a lawsuit in the Federal District Court for the Southern District of Texas seeking a declaratory judgment that would allow the company to exclude a shareholder proposal submitted by John Chevedden due to his alleged lack of eligibility. Yesterday, the court ruled in KBR's favor, upholding the Apache decision from last year (which had been filed in the exact same court). We have posted the court's memorandum and order in our "Shareholder Proposals" Practice Area.

Like Apache, KBR filed a lawsuit rather than attempt to exclude the proposal through the normal SEC channels (and thus challenging the Hain Celestial position of the Staff regarding the use of introductory letters from brokers as evidence of ownership under Rule 14a-8(b)).

Ted Allen, reporting for RiskMetrics (ISS), went into more detail, which I abbreviate here (Federal Judge Allows KBR to Omit a Shareholder Proposal, 4/5/2011):

Following the litigation strategy used by oil company Apache in 2010, KBR bypassed the SEC's no-action process that is used by hundreds of companies each proxy season and filed a lawsuit in federal court in Houston, where the engineering company is based.

While the court's ruling is not legally binding outside Texas, this case may inspire other companies to bypass the no-action process and file their own lawsuits. Chevedden has been a magnet for omission requests in recent years, in part because he and his network of retail investors typically file more than a hundred proposals each season on popular governance topics like declassification and the repeal of supermajority voting rules. This year, more than a dozen companies have raised a variety of eligibility challenges against Chevedden network proposals, but few have obained no-action relief from the SEC.

In its lawsuit, KBR argued that Chevedden's ownership letter from Ram Trust Services (RTS), a Maine-chartered non-depositary trust company, failed to satisfy the requirements of SEC Rule 14a-8(b)(2), which requires investors to provide a statement from a "record" holder, which can be an "introducing broker" or a bank, according to the SEC staff. KBR argued that RTS is not a record holder, because it is an investment adviser and is not a participant in the Depository Trust Co. (DTC), a nationwide clearing agency that holds most of the shares that are owned by U.S. retail

investors.

The KBR lawsuit was heard by U.S. District Judge Lee H. Rosenthal, the same judge who ruled for Apache in a relatively narrow decision in March 2010. In *the Apac*he case, Rosenthal said a similar RTS letter was not sufficient to comply with Rule 14a-8(b)(2), but the judge did not address a second ownership letter from Northern Trust because it was submitted too late.

Since *the Ap*ache decision, the staff of SEC's Corporation Finance Division has rejected similar arguments raised by Devon Energy, Prudential Financial, and Union Pacific to omit proposals filed by Chevedden and affiliated investors.

Notwithstanding those staff decisions, Judge Rosenthal concluded that *the Ap*ache decision was still good law, in part because of the eligibility requirements the SEC adopted in August for its proxy access rule, Rule 14a-11. In that rule, the SEC said an investor whose broker is not a DTC participant must "obtain and submit a separate written statement from the clearing agency participant through which the securities of the nominating shareholder . . . are held, that (i) identifies the broker or bank for whom the clearing agency participant holds the securities, and (ii) states that the account of such broker or bank has held, as of the date of the written statement . . ."

I contacted Jay Robert Brown, Professor, University of Denver Sturm College of Law, who blogs at theRacetotheBottom. Here's his quick response. (I hope he takes up the subject further.):

The reigning principles of administrative law is that courts are obligated to defer to agency interprestations of their own rules. In this case, the staff of the SEC has made its position clear and the court should have followed it. Had it been litigated with someone having the necessary resources, the outcome likely would have been different. Some of the analysis also is wrong. The analysis that the SEC simply defers to courts in this area is not supported by the citations in the case. All of this means that its an unfortunate result for John Chevedden but not likely to be followed by other courts.

It may not be followed by other courts but there are a lot of companies in Rosenthal's jurisdiction. Apache, for example, issued its definitive proxy on April 7 without including a proposal from Chevedden. Although they had warned the SEC earlier this year of their intention, the SEC did not issue a no-action letter and Apache did not go to court. They simply waited for the KBR decision as a go-ahead.

Now I learn that Kinetic Concepts, also based in Texas, informed the SEC on April 5 that despite the SEC's March 21 denial of their no-action request, Kinetic will also move forward without a proposal from Chevedden, based on the KBR decision.

However, even a quick glance at page 6 of her decision (2011-04-04 KBR Chevedden Docket 24 – Memorandum and Order) reveals the judge didn't base it on what is required in order to show evidence of ownership for a 14a-8 proposal. Instead, she bases her decision on evidence of ownership requirements adopted in 14a-11, which are provisions for placing shareowner director nominees on the proxy. Aside from being on a completely different subject, these rules are not even in effect, since the SEC put a stay on the rules pending a court decision!

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According to KBR, Chevedden's proposals accounted for over 23.8% of all staff no-action letters in 2010. He files a lot of resolutions on core corporate governance issues and they are frequently supported by a majority of shareowners. It is no wonder that those who oppose more democratic corporate governance are so ready to attack. However, this latest court decision stretches the bounds of credulity. With last week's budget agreement behind us, maybe the SEC will finally wake up to this usurpation of power and will enforce the law.

•

Type text to search here...

Home > News > Texas Secession Led by Apache, KRB and Kinetic Concepts

Texas Secession Led by Apache, KRB and Kinetic Concepts

April 11th, 2011 James McRitchie Leave a comment Go to comments

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Categories: News Tags: Apache, Chevedden, KBR, Kinetic Concepts, proxy, Rosenthal, SEC, shareowners Comments (0) Trackbacks (0) Leave a comment Trackback

From: ***FISMA & OMB Memorandum M-07-16***
Sent: Wednesday, April 13, 2011 11:21 AM
To: shareholderproposals
Subject: Defendant's Motion for Reconsideration Pursuant to Rule 59(E) in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden
Attachments: CCE00002.pdf

Defendant's Motion for Reconsideration Pursuant to Rule 59(E) in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission

Ladies and Gentlemen:
Attached is a new brief in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden

Sincerely,
John Chevedden

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

KBR, INC.,	§	
	§	
Plaintiff	§	
	§	
v.	§	Civil Action 4:11-cv-00196
	§	
JOHN CHEVEDDEN	§	
	§	
Defendant	§	

DEFENDANT'S MOTION FOR RECONSIDERATION PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND SUPPORTING MEMORANDUM

After the defendant stipulated "that he will not sue the plaintiff if it elects to exclude his proposal from its proxy materials and his decision not to sue is irrevocable," this court issued an order on requiring the plaintiff to show cause "why this court has the ability to issue the declaratory judgment the plaintiff seeks."

After briefing, the court issued a memorandum and order on April 4, 2011 in which it determined that "KBR has standing to pursue declaratory judgment" because the defendant's "refusal to withdraw his proposal shows a willingness to continue to litigate the dispute." Citing *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1382–83 (Fed. Cir. 2007), in which the Court of Appeals for the Federal Circuit conducted the "all the circumstances" analysis established in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), this court concluded that "courts have found that a defendant's promise not to sue does not nullify an actual controversy if the defendant has shown a willingness to enforce his rights."

In *Benitec Australia, Ltd. v. Nucleonics, Inc.*, 495 F. 3d 1340, decided shortly after *SanDisk*, the Court of Appeals for the Federal Circuit noted that *MedImmune* did not change its position that if the only relief sought by a plaintiff seeking a declaratory judgment is to remove its apprehension of an imminent lawsuit by the defendant, an unconditional covenant not to sue is "sufficient to divest the court of jurisdiction." It explained that it looked at other circumstances in *SanDisk* because the defendant in that case had not made an unconditional covenant not to sue.

> In *SanDisk,* we did hold that the statement of STMicroelectronics NV's ("ST") vice president of intellectual property and licensing that "ST has absolutely no plan whatsoever to sue SanDisk" did not eliminate the justiciable controversy created by ST's actions. 480 F.3d at 1382. However, ST's statement was made when ST had engaged in a course of conduct that showed a willingness to enforce its patent rights despite its vice-

> president's statement. ST had approached SanDisk having made a studied and considered determination of infringement by SanDisk and having communicated that determination to SanDisk. It then only stated that it did not *intend* to sue SanDisk; it did not say it *would not* sue SanDisk in the future for its alleged infringement. *Id.* at 1382-83. . . . Under these circumstances, there is no controversy between the parties concerning infringement by Nucleonics in its development of human applications of RNAi technology. [The words "*intend*" and "*would not*" are emphasized in the opinion.]

In the instant case, the defendant has stipulated that his decision not to sue the plaintiff if it elects to exclude his proposal from its proxy materials is irrevocable. The defendant asks this court to reconsider whether, in view of *Benitec Australia, Ltd.,* a case or controversy exists after such a stipulation. If not, the defendant respectfully requests this court to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1).

Dated: April 12, 2011

Respectfully submitted

John Chevedden
Pro se

FISMA & OMB Memorandum M-07-16

Certificate of Service

I certify that on April 13, 2011 this motion was sent overnight to the Clerk of the Court. A copy of this motion is also being provided to Geoffrey L. Harrison, plaintiff's attorney.

John Chevedden

From: ***FISMA & OMB Memorandum M-07-16***
Sent: Thursday, April 14, 2011 11:42 PM
To: shareholderproposals
Subject: Defendant's Motion for Reconsideration Pursuant to Rule 59(E) in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden
Attachments: CCE00005.pdf

Defendant's Motion for Reconsideration Pursuant to Rule 59(E) in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission

Ladies and Gentlemen:
Attached is the new date-stamped brief in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden

Sincerely,
John Chevedden

------ Forwarded Message
From: <DCECF_LiveDB@txs.uscourts.gov>
Date: Thu, 14 Apr 2011 14:32:54 -0500
To: <DC_Notices@txs.uscourts.gov>
Subject: Activity in Case 4:11-cv-00196 KBR v. Chevedden Motion for Reconsideration

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U.S. District Court

SOUTHERN DISTRICT OF TEXAS

Notice of Electronic Filing

The following transaction was entered on 4/14/2011 at 2:32 PM CDT and filed on 4/14/2011
Case Name: KBR v. Chevedden

Case Number:4:11-cv-00196 <https://ecf.txsd.uscourts.gov/cgi-bin/DktRpt.pl?859143>
Filer: John Chevedden
Document Number: 28
<https://ecf.txsd.uscourts.gov/doc1/179113554665?caseid=859143&de_seq_num=71&magic_num=83135779>
Docket Text:

MOTION for Reconsideration of [24] Memorandum and Order by John Chevedden, filed. Motion Docket Date 5/5/2011. (kettac,)

4:11-cv-00196 Notice has been electronically mailed to:

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

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

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

4:11-cv-00196 Notice has not been electronically mailed to:

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Document description: Main Document
Original filename:n/a
Electronic document Stamp:
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KBR, INC.,	§	
	§	
Plaintiff	§	
	§	
v.	§	Civil Action 4:11-cv-00196
	§	
JOHN CHEVEDDEN	§	
	§	
Defendant	§	

DEFENDANT'S MOTION FOR RECONSIDERATION PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND SUPPORTING MEMORANDUM

After the defendant stipulated "that he will not sue the plaintiff if it elects to exclude his proposal from its proxy materials and his decision not to sue is irrevocable," this court issued an order on requiring the plaintiff to show cause "why this court has the ability to issue the declaratory judgment the plaintiff seeks."

After briefing, the court issued a memorandum and order on April 4, 2011 in which it determined that "KBR has standing to pursue declaratory judgment" because the defendant's "refusal to withdraw his proposal shows a willingness to continue to litigate the dispute." Citing *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1382–83 (Fed. Cir. 2007), in which the Court of Appeals for the Federal Circuit conducted the "all the circumstances" analysis established in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), this court concluded that "courts have found that a defendant's promise not to sue does not nullify an actual controversy if the defendant has shown a willingness to enforce his rights."

In *Benitec Australia, Ltd. v. Nucleonics, Inc.*, 495 F. 3d 1340, decided shortly after *SanDisk*, the Court of Appeals for the Federal Circuit noted that *MedImmune* did not change its position that if the only relief sought by a plaintiff seeking a declaratory judgment is to remove its apprehension of an imminent lawsuit by the defendant, an unconditional covenant not to sue is "sufficient to divest the court of jurisdiction." It explained that it looked at other circumstances in *SanDisk* because the defendant in that case had not made an unconditional covenant not to sue.

> In *SanDisk*, we did hold that the statement of STMicroelectronics NV's ("ST") vice president of intellectual property and licensing that "ST has absolutely no plan whatsoever to sue SanDisk" did not eliminate the justiciable controversy created by ST's actions. 480 F.3d at 1382. However, ST's statement was made when ST had engaged in a course of conduct that showed a willingness to enforce its patent rights despite its vice-

> president's statement. ST had approached SanDisk having made a studied and considered determination of infringement by SanDisk and having communicated that determination to SanDisk. It then only stated that it did not *intend* to sue SanDisk; it did not say it *would not* sue SanDisk in the future for its alleged infringement. *Id.* at 1382-83. . . . Under these circumstances, there is no controversy between the parties concerning infringement by Nucleonics in its development of human applications of RNAi technology. [The words "*intend*" and "*would not*" are emphasized in the opinion.]

In the instant case, the defendant has stipulated that his decision not to sue the plaintiff if it elects to exclude his proposal from its proxy materials is irrevocable. The defendant asks this court to reconsider whether, in view of *Benitec Australia, Ltd.*, a case or controversy exists after such a stipulation. If not, the defendant respectfully requests this court to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1).

Dated: April 12, 2011

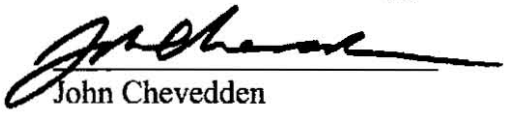
Respectfully submitted

John Chevedden
Pro se

FISMA & OMB Memorandum M-07-16

Certificate of Service

I certify that on April 13, 2011 this motion was sent overnight to the Clerk of the Court. A copy of this motion is also being provided to Geoffrey L. Harrison, plaintiff's attorney.



John Chevedden

From: ***FISMA & OMB Memorandum M-07-16***
Sent: Wednesday, May 04, 2011 6:43 PM
To: shareholderproposals
Subject: Defendant's Motion For Clarification in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden
Attachments: CCE00001.pdf

------ Forwarded Message
From: ***FISMA & OMB Memorandum M-07-16***
Date: Wed, 04 May 2011 09:03:11 -0700
To: Lisa Eddins <lisa_eddins@txs.uscourts.gov>
Cc: "Chanler A. Langham" <clangham@SusmanGodfrey.com>
Subject: Defendant's Motion For Clarification in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden

Dear Ms. Eddins,
Attached is the Defendant's Motion For Clarification.
Sincerely,
John Chevedden

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

KBR, INC.,	§	
	§	
Plaintiff	§	
	§	
v.	§	Civil Action 4:11-cv-00196
	§	
JOHN CHEVEDDEN	§	
	§	
Defendant	§	

DEFENDANT'S MOTION FOR CLARIFICATION AND, IF WARRANTED, RECONSIDERATION PURSUANT TO RULE 59(E) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND SUPPORTING MEMORANDUM

In the Court's Memorandum and Order issued on March 9, 2011, it found that a shareholder has a private right of action under section 14(a) to enforce S.E.C. Rule 14a-8 because "Rule 14(a) has 'rights-creating' language" and thus "[t]he statutory features behind the Supreme Court's decision in *Sandoval* are not present here."

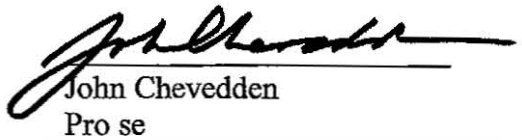
Since there is no "Rule 14(a)," the defendant respectfully requests the Court to clarify whether it meant to say "Rule 14a-8 has 'rights-creating' language." If so, *Sandoval* mandates the Court to give no weight any "rights-creating" language in an agency rule such as Rule 14a-8. It states:

> Both the Government and respondents argue that the *regulations* contain rights-creating language and so must be privately enforceable, see Brief for United States 19-20; Brief for Respondents 31, but that argument skips an analytical step. Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. *Touche Ross & Co. v. Redington*, 442 U. S., at 577, n. 18 ("[T]he language of the statute and not the rules must control"). Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself. (Emphasis in original)

Therefore, if upon further reflection the Court may have initially erred in relying solely on "rights-creating" language contained in Rule 14a-8, the defendant respectfully requests that it reconsider its finding that a private right of action exists to enforce said rule and that it dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1).

Dated: May 3, 2011

Respectfully submitted

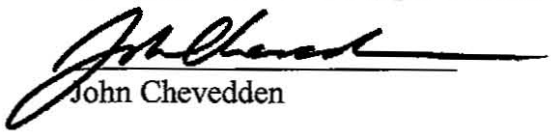


John Chevedden
Pro se

FISMA & OMB Memorandum M-07-16

Certificate of Service

I certify that on May 3, 2011 this motion was sent overnight to the Clerk of the Court. A copy of this motion is also being provided to Geoffrey L. Harrison, plaintiff's attorney.



John Chevedden

From: ***FISMA & OMB Memorandum M-07-16***
Sent: Friday, May 13, 2011 12:45 PM
To: shareholderproposals
Subject: FW: Defendant's Additional Motion for Reconsideration Pursuant to Rule 59(E) of the Federal Rules of Civil Procedure and Supporting Memorandum in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden
Attachments: CCE00004.pdf

------ Forwarded Message
From: ***FISMA & OMB Memorandum M-07-16***
Date: Thu, 12 May 2011 21:41:03 -0700
To: Lisa Eddins <lisa_eddins@txs.uscourts.gov>
Cc: "Geoffrey L. Harrison" <gharrison@susmangodfrey.com>
Subject: Defendant's Additional Motion for Reconsideration Pursuant to Rule 59(E) of the Federal Rules of Civil Procedure and Supporting Memorandum in S.D. Tex., No. 4:11-cv-00196 KBR v. Chevedden

Dear Ms. Eddins,
Attached is the Defendant's Additional Motion for Reconsideration Pursuant to Rule 59(E) of the Federal Rules of Civil Procedure and Supporting Memorandum.
Sincerely,
John Chevedden

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

KBR, INC.,	§	
	§	
Plaintiff	§	
	§	
v.	§	Civil Action 4:11-cv-00196
	§	
JOHN CHEVEDDEN	§	
	§	
Defendant	§	

DEFENDANT'S ADDITIONAL MOTION FOR RECONSIDERATION PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND SUPPORTING MEMORANDUM

In a Memorandum and Order dated March 9, 2011, this court denied the defendant's motion to dismiss for lack of subject matter jurisdiction. In particular, the court rejected the defendant's assertion that the plaintiff does not have standing to enforce Rule 14a-8. The Court accurately represented the defendant's position as follows:

> Chevedden argues that the Supreme Court's decision in *Alexander v. Sandoval* puts *Borak* in doubt. 532 U.S. 275 (2001). He argues that under *Sandoval*, section 14(a) does not create a private right of action to enforce S.E.C. Rule 14a-8 because it does not use "rights-creating language" and does not refer to a private remedy. (Footnote omitted)[1]

The court rejected the defendant's conclusion. It stated: "As the D.C. Circuit stated in [*Roosevelt v. E.I. Du Pont deNemours & Co.*, 958 F.2d 416 (D.C. Cir. 1992)], the Supreme Court's decision in *Sandoval* does not establish that there is no private right of action under section 14(a) to enforce S.E.C. Rule 14a-8." The court also stated: "As one court has noted, '[t]he existence of a private right of action by a shareholder under § 14(a) of the Securities Exchange Act and Rule 14a-8 is well settled.' *Amalagated* [sic]*Clothing and Textile Workers Union v. Wal-Mart*, 821 F. Supp. 877, 879 n.1 (S.D.N.Y. 1993)."

The Supreme Court decided *Sandoval* almost a decade after *Roosevelt* and *Amalgamated Clothing and Textile Workers Union*. Since the latter opinions found an implied right of private action to enforce Rule 14a-8 for reasons other than satisfaction of the "determinative" criteria that the *Sandoval* Court said is required for <u>any</u> federal statute, i.e., whether Congress intended to create (1) a personal right to enforce the statute and (2) a private remedy, they are not reliable authority. Nonetheless, noting that the defendant "has cited no authority to support his contention that *Sandoval* gives reason to doubt the 'well-settled' proposition that section 14(a) provides a private cause of action to enforce Rule 14a-8," this court adopted their reasoning.

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[1] In addition, since (1) Section 21 of the Securities Exchange Act of 1934 (the "SEA") grants the Commission the express authority to enforce Section 14 of the SEA and all rules promulgated thereunder (including Rule 14a-8) and (2) other provisions of the SEA such as Section 16(b) specify a private right of action, it can be inferred that Congress intended the Commission's authority to enforce Section 14 be exclusive.

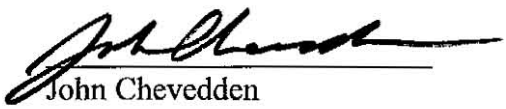
The purpose of this motion and brief is to advise the court that the defendant has found a post-*Sandoval* case that convincingly repudiated the validity of that formerly "well-settled" proposition. In *Wisniewski v. Rodale, Inc.*, 510 F. 3d 294 (2007), the Court of Appeals for the Third Circuit thoroughly analyzed the Supreme Court's jurisprudence regarding the existence of an implied private right of action with respect to any federal statute and stated the following in footnote 9:

> The *Cort* opinion never explicitly acknowledges that it is rejecting the *Borak* approach. In fact, it cites *Borak* several times in a manner suggesting that it is merely distinguishing the statute at issue in *Borak* from the one addressed in *Cort. See Cort,* 422 U.S. at 79-80 & n. 11, 84, 85, 95 S.Ct. 2080. Later cases recognize that *Cort* effectively overruled *Borak. See, e.g., Alexander v. Sandoval,* 532 U.S. 275, 287, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001).

The defendant believes *Wisniewski* is persuasive. Consequently, *Roosevelt* and *Amalgamated Clothing and Textile* must be relegated to the legal dustbin that the Supreme Court in *Sandoval* called "the *ancien regime*." If the court agrees, the defendant respectfully requests that it reconsider whether the defendant's motion to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) should be granted.

Dated: May 12, 2011

Respectfully submitted



John Chevedden
Pro se

FISMA & OMB Memorandum M-07-16

Certificate of Service

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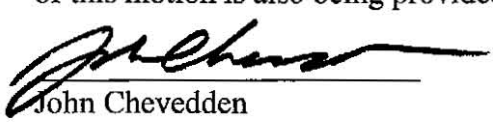

John Chevedden