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

APACHE CORPORATION,	§	
	§	
Plaintiff	§	
v.	§	Civil Action 4:10-cv-00076
	§	
JOHN CHEVEDDEN,	§	
	§	
Defendant.	§	

Apache's Short Reply to Chevedden's "Motion for Summary Judgment"

Chevedden's March 9, 2010 "motion for summary judgment" appears to be a response to Apache's Reply Brief. To the extent Chevedden actually intended to file a motion for summary judgment, the filing is procedurally and substantively improper, is legally and factually wrong for the reasons discussed in Apache's opening and reply briefs, is in conflict with and not permitted by the briefing schedule set by this Court, and should be denied.

Chevedden's March 9 filing does not raise any new points though, curiously, its style and prose is quite different from that of his March 5 response brief. Apache respectfully offers the following comments about Chevedden's new filing.

1. Chevedden repeatedly says that the "burden of proof is on Apache." False. Rule 14a-8(b) unambiguously places the burden of proof on Chevedden to prove his shareholder status and eligibility to submit a proposal. *See* Rule 14a-8(b)(2) ("*you must prove* your eligibility to the company in one of two ways"). He has not come close to meeting his burden.

2. Chevedden still does *not* say that he believes he actually complied with Rule 14a-8, as opposed to just having "made a good faith effort to comply with the rule." And, incredibly, he still does *not* say – much less swear or prove – that he actually is an Apache shareholder.

3. Chevedden does not try to revive his reliance on the staff's rogue informal view in *Hain Celestial*, and does not offer any response to Apache's arguments that *Hain* is wrong, is not entitled to deference, conflicts with Rule 14a-8(b)(2), conflicts

with the staff's prior interpretations, and conflicts with the SEC's confirmation that proof must come from the "record" holder.

4. Chevedden says at page 6 that Apache is "completely silent" on its unwillingness to accept Chevedden's purported proof. Wrong. Apache's briefs loudly explain Apache's many compelling reasons to distrust Chevedden's eligibility to submit his proposal, such as Chevedden's history of abuse, Chevedden/Kessler's withdrawal of their prior proof-deficient (non)shareholder proposal to Apache, Chevedden's own unique circumstances supporting USPX's term "obstructionist crank," and Chevedden's inability to comply with Rule 14a-8(b)(2) here.

5. Chevedden does not deny that he has a history of abusing Rule 14a-8, and does not deny that he routinely flouts Rule 14a-8(h)'s mandatory requirement that the proponent or representative "must attend" the annual stockholder meeting in person "to present the proposal."

6. Chevedden does not deny that USPX took steps – indeed, steps worthy of "a spy novel or something" – to conceal its relationship with Chevedden (and other related groups) just before USPX sought leave to file an *amicus* brief. Chevedden also does not deny the close relationship.

7. Chevedden continues to rely solely on the November 27 and December 3, 2009 letters from Ram Trust as support for his purported "good faith attempt to comply" with Rule 14a-8(b)(2).

8. Recognizing his inability to satisfy even the less strict standard for "record" holders announced in *Kurz v. Holbrook,* 2010 WL 707425 (Del. Ch. Feb. 9, 2010) ("treat the DTC participant banks and brokers who appear on the Cede breakdown as stockholders of record"), Chevedden now tries at page 6 to distance himself from the case. But Chevedden devoted nearly 20% of his response brief and 80-pages of his exhibits to that case. Neither Ram Trust nor its subsidiary Atlantic Financial appear on Apache's March 2009 or 2010 Cede breakdowns.

9. Chevedden's argument at page 7 about what "makes sense" to him is, at best, an argument he more properly can make to the SEC to try to persuade it to change the rule. Chevedden's "sense," or lack of it, does *not* change the *current, actual* language or requirements of Rule 14a-8(b)(2).

10. Chevedden's reliance at page 7 on an excerpt regarding the 1987 amendment is not authoritative because the Rule and language changed again after this date. Apache discussed this at page 15 and n.5 of its opening brief, specifically referenced the relevant May 21, 1998 SEC Release 34-40018, and attached the relevant Staff Legal Bulletin No. 14 as X-12. In any event, Chevedden has not satisfied even the outdated language regarding the 1987 amendment because he did *not* 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." Chevedden only submitted statements from Ram Trust, and Ram Trust is *not* a

"depository" and is *not* a "broker dealer holding the securities in street name." Nor, for that matter, is Ram Trust's subsidiary Atlantic Financial, which did *not* submit any writing in support of Chevedden's eligibility.

11. Chevedden does not offer any explanation for the false statement in Ram Trust's December 10 letter that it is the "*introducing broker* for the account of John Chevedden."

12. Chevedden cites no authority to support his suggestion at pages 7-8 that Ram Trust's letters should be deemed to have come from its subsidiary Atlantic Financial. While some "financial institutions are structured" differently, *in this case*, Chevedden actually submitted a writing from investment advisor Ram Trust, not from Atlantic Financial, and not from any other subsidiary. Even if he had done so, a letter from Atlantic Financial would have been insufficient under Rule 14a-8(b)(2).

13. Chevedden says that the publicly available "Confirmation of Shares" form letter on DTC's website is not for confirming "share ownership by beneficial owners who are not DTC participant firms." That's demonstrably false. The whole point is that a DTC participant firm – which Ram Trust is not, and Atlantic Financial is not – may, on behalf of the *ultimate beneficiary stockholders*, request proof that "DTC's nominee Cede & Co., is a holder of shares of common stock of [company name] . . . credited with [number of] Shares." (X-25). Thus, a DTC participant must send DTC a request letter in which it "certifies to DTC" certain facts for the purpose of "help[ing] to prove the interests of our client to allow it in pursuing legal proceedings not involving DTC as a party." *Id.*

14. Chevedden declines to say whether he (or USPX) called DTC, looked at DTC's website, filled out the form, asked Ram Trust or Northern Trust to do so, or honestly tried to get a written statement from the true record holder, DTC. Instead, Chevedden asks whether Apache has done these things because, he again incorrectly says, the "burden of proof is on Apache, not on the USPX or me."

15. Chevedden does not deny that, if he really was a shareholder, then he, like thousands of others easily could satisfy Rule 14a-8(b)(2) by being a "registered holder of your securities."

As Apache prepares to send its proxy materials to the printer for typesetting, Apache greatly appreciates this Court's willingness to determine this matter on an expedited basis. This Court should declare that Apache properly may exclude Chevedden's proposal from Apache's proxy materials in accordance with Rule 14a-8(b) and (f) promulgated under the Securities Exchange Act of 1934.

Dated: March 10, 2010

Respectfully submitted,

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Certificate of Service

I certify that on March 10, 2010, this pleading electronically was transmitted to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to ECF registrants. A copy of this pleading also is being provided to defendant Chevedden and to *amicus* USPX by email sent to the email addresses they have used to communicate with Apache and with the Court's Case Manager in this case (olmsted7p@earthlink.net and mail@glynholton.com) and by first class mail.

/s/ Geoffrey L. Harrison
Geoffrey L. Harrison

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SOUTHERN DISTRICT OF TEXAS

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