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

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

John Chevedden's Motion for Summary Judgment

Inauspiciously, Apache's lawyers open their response brief with innuendo that I have a relationship with a third party organization that happens to have a relationship with the USPX. Furthermore, they contended the third-party organization recently changed its website. Maybe Apache's lawyers can convert this into a spy novel or something, but it is entirely irrelevant to this case.

To avoid wasting the court's time, I move that the court provide summary judgment; that it confirm that SEC Rule 14a-8(b)(2) does not require that a shareowner proposal proponent provide a letter from a party that appears on the stock ledger; that it confirm that a holding company with both investment management and brokerage subsidiaries can be a "record holder" for purposes of Rule 14a-8(b)(2); and that it require Apache to include my proposal in their 2010 proxy materials.

In their complaint and two lengthy briefs, Apache's lawyers managed to identify two possible grounds for declaring that Apache may exclude my proposal from their proxy materials:

1. Perhaps Rule 14a-8(b)(2) requires a letter from a party listed on the stock ledger, and
2. Perhaps Rule 14a-8(b)(2), despite the fact that the SEC has confirmed numerous times that an investment manager that is also a broker can provide a letter, that the rule does not consider an investment manager with a wholly owned subsidiary broker is an "investment manger that is also a broker."

There are no material facts in dispute. No one disputes that I provided a letter from RAM Trust in a timely manner before (and therefore within 14 days of) Apache's notice of deficiency. No one disputes that RAM Trust has a wholly owned subsidiary that is a broker. Since there are no material facts in dispute, the entire suit is about questions of law, which warrants a summary judgment.

The burden of proof is on Apache Corp., and Apache Corp. has failed to prove either of the above positions. I describe their failure below.

1. Apache Corp has failed to prove that Rule 14a-8(b)(2) requires a letter from a party listed on the stock ledger.

In their original *Brief on the Merits*, Apache's lawyers sought to "prove" their claim by merely repeating, time and again, that Rule 14a-8(b)(2) must be interpreted literally according to the pre-1975 meaning of the word "record holder".

In their *amicus curiae* brief, the USPX pointed out that Rule14a-8(b)(2) uses quotation marks and a parenthetical statement that suggests the rule is not to be read literally. Nowhere have Apache's lawyers responded to this issue.

The USPX made the point that it is logically impossible for DTC to write a letter confirming that a beneficial owner, that is not itself a DTC participating firm, beneficially owns shares. The conclusion is inevitable because DTC does not possess information on beneficial ownership. Apache's lawyers never responded to this logical hole at the core of their case.

They did direct the court to a form on DTC's website through which a DTC participant firm might request a "Confirmation of Shares" letter. That form includes a blank of the letter DTC would send (bottom of Apache's Exhibit 25), and it clearly is only for confirming share ownership by DTC participating firms—not share ownership by beneficial owners who are not DTC participant firms. This is hardly surprising, since DTC has no knowledge of beneficial owners who are not DTC participant firms.

Not only do Apache's lawyers portray that web form as something it is not, they flamboyantly demand of myself and/or the USPX (p. 10 of Apache's reply brief):

> Have they called DTC? Have they written? Have they looked at DTC's website? Have they filled out the form on DTC's website? Have they asked Ram Trust or Northern Trust

> to do so? Have they ever honestly tried to get a written statement from the true record holder, DTC.

I would like to turn this question around and ask, perhaps less flamboyantly, "how many of these tasks has Apache's lawyers attempted, and what was the outcome?" The burden of proof is on Apache, not on the USPX or me. I am under no obligation to try to prove Apache's case for them. If their "proof" that DTC can (or will) provide certain letters is merely a flamboyant argument and that I haven't strived to their satisfaction to obtain such a letter, then Apache has not proven their claim.

When Apache's lawyers cite documents they represent as supporting their claims, one has to read those documents carefully. In their original brief, Apache's lawyers cited some 30 SEC no-action letters they represented as supported their claims. When the USPX read all those letters, they found that, not only did none of the letters support Apache's claims, but several explicitly contradicted those claims. Now Apache's lawyers are claiming that their Exhibits 21 through 24 are examples of letters in which DTC confirmed ownership of shares by a beneficial owner that was not a DTC participant firm. A careful reading of those letters reveals that they *do nothing of the sort*. Consider the letter in Apache's Exhibit 21. In that letter, DTC does not confirm a beneficial owner's share holdings. Rather, it nominates directors and provides notice of intent to propose a bylaws amendment. In the letter, DTC makes it clear that it is acting as principal, as legal owner of shares, at the instruction of one of its participant firms, "Merrill-Lynch. Pierce Fenner & Smith Incorporated ('Participant')." As for confirming a beneficial shareowner's holdings, here is what the letter says

> DTC is informed by its Participant, Merrill- Lynch. Pierce Fenner & Smith Incorporated ("Participant") that on the date hereof 85 of such shares (the "Shares") credited to Participant's DTC account are beneficially owned by The Circle K Corporation, a customer of the Participant (the "Customer")

This is not confirmation that Circle K Corporation beneficially owns the shares. It is merely DTC offering hearsay. That hearsay is immaterial to the purpose of the letter—nominating directors and giving notice of a proposed bylaws amendment—because DTC is the legal owner of the shares and can take such actions independently.

If I were somehow to get DTC to write a letter about my beneficial ownership of Apache shares, here is the form that hearsay would have to take

> We have received a letter from our participant firm Northern Trust saying they received a letter from non-participant firm RAM Trust saying that a client of theirs, John Chevedden, holds shares of Apache Corp ...

That would not be documentation of beneficial ownership. It would be "whisper-around-the-room" hearsay. As the USPX brief explained, DTC cannot directly confirm beneficial ownership because it has no information about beneficial owners that are not participant firms. Any such hearsay evidence would ultimately depends on a letter from RAM Trust. RAM Trust is the only party that can confirm my share ownership with anything more than hearsay.

Apache's Exhibits 22 –24 are similar to Exhibit 21, although details differ. None of the letters evidence ownership so that a beneficial owner can submit a proposal. Instead, each of the examples simply demonstrate that DTC will honor a request made by one of DTC's participants to demand a shareowners list, nominate directors, call a special meeting or take other actions as principal.

The USPX showed with fourteen affidavits that I followed standard practice, accepted by shareowners and corporations alike, for documenting beneficial share ownership. Apache's lawyers did nothing to reply to this, except complain that the fourteen affidavits are "are noteworthy for how very few USPX was able to solicit." Again, the burden of proof is on Apache. Complaining that my or the USPX's evidence is not voluminous enough for their liking

proves nothing. Apache responded to those 14 affidavits with zero affidavits documenting contrary practices by shareowners or corporations.

The USPX's affidavits describe four instances in which Apache has accepted introducing broker letters as evidence of beneficial share ownership for purposes of Rule 14a-8(b)(2). This is a substantial number, as Apache claims they have only ever received 13 shareowner proposals. On p. 9 of their amicus curiae brief, the USPX comments

> It appears that, up until now, Apache has accepted letters documenting share ownership from parties not on their stock ledger. This raises the question of why John Chevedden is being sued in court for a practice Apache has willingly accepted of others in the past.

In their response brief, *Apache's lawyers are completely silent on this issue.*

Apache's lawyers distort the USPX brief:

> USPX's assertion at page 7 that "Under Delaware law, not only DTC, but all firms listed on a corporation's CEDE breakdown are considered owners of record" is a red herring' Ram Trust is not listed on Apache's Cede breakdown. Thus, even under Kurz's generous interpretation, Ram Trust is not a "record" holder under Rule 14a-8(bx2)' and Chevedden's proposal is still deficient.

The USPX brief makes it clear that it cites Delaware law merely to illustrate that other laws/rules do not insist that shareowner must appear on the company's stock ledger for it to meet their definition for "record holder", so there is no reason to believe Rule 14a-8 must do so. Different laws/rules can define "record holder" differently, and that is what the USPX brief says (emphasis added):

> In the post 1975 world, any financial institution in the daisy chain linking a beneficial owner to share certificates in DTC's vaults can be and often is—formally or informally—considered a record holder, *depending on the task at hand.* This is true under Delaware law and it is true under federal law.

In the post-1975 world, the definition of "record holder", in practice, depends on the task at hand. One possible task for a "record holder" is granting a proxy, and for that purpose, it makes sense to define "record holder" as DTC or a party on the DTC breakdown. That is what

Delaware law and SEC Rule 14a-1(b)(i) do. For Rule 14a-8, the task of a "record holder" is to confirm beneficial share ownership. For that purpose it makes sense (and this is the only definition that makes sense) to define "record holder' as the party through which the beneficial shareowner directly owns shares in street name—generically sometimes referred to as the "introducing broker" although this could be a bank or custodian as well.

With the 1987 amendment to Rule 14a-8, the SEC clarified the meaning of "record holder" in the notes accompanying the amendment. This is authoritative, and here is what the note says

> The Commission also is amending Rule 14a-8(a)(1) to codify its interpretive position that 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, of the proponent's holding of the registrant's securities for the relevant one year time period is appropriate documentation for a proponent's beneficial ownership claim.

This is clear and explicit. In their response brief, *Apache's lawyers don't even try to respond to this*. The court need look no further than this one authoritative paragraph. Based on it, the court must rule against Apache on this issue.

2. Subsidiary brokers do count for determining if an investment manager can be a "record holder" for Rule 14a-8.

Apache's attorneys provided an extended discussion of investment advisors and letterhead. It would appear that Ram Trust Services is the corporate parent and there are several other subsidiary companies, including Atlantic Financial Services and a company known as "Ram Trust Services: Registered Investment Advisors." As previously stated, I only deal with Ram Trust Services, I do not deal with their Registered Investment Advisors. I submit buy and sell

orders to Ram Trust Services and they execute those orders. I have never paid for or sought their investment advice.

The letters evidencing my ownership of Apache came from Ram Trust Services, NOT from "Ram Trust Services: Registered Investment Advisors."

There is no dispute that the SEC has determined that an investment manager that is also a broker can be a "record holder" for Rule 14a-8(b)(2). However, Apache's lawyers are interpreting this as meaning that a single entity must be both an investment manager and a broker—a subsidiary broker, they claim, doesn't count. I defer to the USPX's brief excellent discussion of the practical ramifications of all this. However, I should add that the Apache lawyers seem unaware of how financial institutions are structured. Investment managers are regulated under the 1940 Act. Brokers are regulated under the 1934 Act. When financial institutions combine multiple functions—such as a commercial bank and an insurer or an investment manager and a broker—they typically do so with a holding company and subsidiary arrangement. When the SEC refers to an "investment manager that is also a broker", that is pretty much what they are referring to: an investment manager and a broker that are both subsidiaries of the same holding company. *How else would you structure it?*

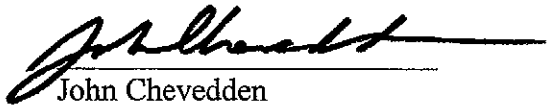
The burden of proof is on Apache. If they cannot prove that the SEC explicitly does not consider a holding company with both investment management and brokerage subsidiaries to count as an "investment manager that is also a broker", then the court must decide against Apache on this issue.

Conclusion

There are only two substantive issues in this case. Both are matters of law. There are no disputed facts. The burden of proof is on Apache, and they have miserably failed to prove their case on either issue. I ask that the court make summary judgment in my favor on both issues.

Dated: March 9, 2010

Respectfully submitted



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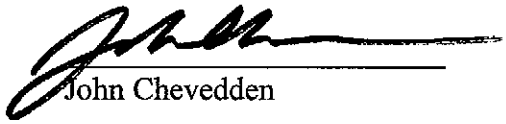
Certificate of Service

I certify that on March 9, 2010 this pleading was sent overnight to the Clerk of the Court. A copy of this pleading is also being provided to Geoffrey L. Harrison, plaintiff's attorney.



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