

Two Company Wins for Say-on-Pay Proxy Disclosure Lawsuits (Symantec and Apple)

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In our recent client alert, "[Recent Developments in Executive Compensation](#)," an open question was the fate of *Gordon v. Symantec Corp.* (and similar cases) after the court denied a preliminary injunction to enjoin the company's say-on-pay vote. At the time of our client alert, a demurrer to the plaintiff's class action complaint was pending.

On February 22, 2013, the judge in *Symantec* (the same judge who granted a preliminary injunction in *Knee v. Brocade Communications Systems Inc.* to enjoin a vote on an equity plan proposal) [issued an order](#) sustaining the defendants' demurrer to the plaintiff's complaint. The *Symantec* court noted that once the shareholder vote on Symantec's say-on-pay proposal was held at its annual meeting in October 2012, the direct disclosure claim was no longer available to the plaintiff and the plaintiff's claim then became a derivative claim subject to a pre-suit demand requirement.

The court further stated that the plaintiff, as a substantive matter, failed to plead a sufficient disclosure claim. In other words, the plaintiff failed to demonstrate how the information she claimed should have been disclosed (e.g., fair summary of the competitive market analysis performed by the compensation consultant, other non-compensation consulting and business services that the compensation consultant performed, criteria used to select Symantec's peer group, etc.) could be viewed as significantly altering the total mix of information already made available to Symantec's shareholders.

Even though the plaintiff still has ten days to amend her complaint and this judge's ruling in Santa Clara California State court is not binding on other courts, this result is welcome news for U.S. public companies. It reinforces the notion we posited in our client alert – at least with respect to say-on-pay proposals, these lawsuits are likely to face significant obstacles.

The hope is that this may augur a dismissal of at least one other similar lawsuit in the near future. Specifically, the parties in *Gordon v. Cisco Systems, Inc.* (which is pending before the same judge in Santa Clara California State court) [stipulated](#) that the demurrer in *Cisco* should be deferred until a decision in *Symantec* had been reached, because (i) the issues that were raised in *Cisco* are substantially similar to the issues that were under consideration in *Symantec* at the time and (ii) both actions involve the same plaintiff, the same plaintiff's counsel and the same counsel for defendants. Now that *Symantec* has been decided, it is likely only a matter of time before this result will be replicated in *Cisco*.

It is also worth noting that, while all the reports on the recent lawsuit against Apple's proxy statement in the Southern District of New York focused on the unbundling claim made by Greenlight for the charter amendment proposal, as we previously discussed [here](#), little known is that the judge in that case also dismissed efforts by another plaintiff to enjoin the say-on-pay proposal. That plaintiff had claimed that Apple's use of terms like "experiences," "input" and "peer group data," when describing the compensation committee's judgment in granting long-term equity, failed to provide sufficient information. The judge found, however, that since the plaintiff did not identify any material omission in the proxy and since the compensation discussion and analysis section included in the proxy statement was compliant with the SEC rules, the plaintiff was unlikely to succeed on the merits.

Nonetheless, the *Symantec* and, in the say-on-pay preliminary injunction context, *Apple* successes do not mean that U.S. public companies should relax and assume that the plaintiffs' bar will be deterred. At least one law firm that has been particularly active in filing these types of lawsuits has recently identified several more companies which it is investigating for potential breaches of directors' fiduciary duties in connection with say-on-pay proposals. Given that the proxy season is upon us, we continue to recommend that companies pay extra attention to their executive compensation disclosure.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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