

Two Courts Dismiss Suits Against Chevedden's Shareholder Proposals

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A string of corporate success in court cases seeking the exclusion of shareholder proposals, one of which we recently discussed [here](#), has ended with two wins for the defendants.

In deciding *Omnicom vs. Chevedden*, the U.S. District Court in the Southern District of New York granted Chevedden's motion to dismiss the complaint. The Court was persuaded that since Chevedden had promised the company not to sue if it rejects his shareholder proposal, and the possibility of SEC investigation or action is remote, the threat of injury was not "actual or imminent" as necessary to grant the company's declaratory judgment motion. The company had argued otherwise since it must still decide whether or not to include the proposal in its proxy, including facing all the legal consequences of that decision.

The Court did not address the substance of the proposal, which had sought to prohibit the company from obtaining interim vote tallies during proxy solicitation. The SEC staff recently decided that a number of other companies may exclude the proposal on the grounds of vagueness, because the resolutions allowed preliminary voting results to not be available for solicitations made for "other purposes," but would be available for solicitations made for "other proper purposes." Omnicom had decided to file suit rather than seek a no-action letter.

The Omnicom decision comes on the heels of a similar finding by the U.S. District Court in the District of Massachusetts in a case brought by EMC on a shareholder proposal asking for an independent chair. Unlike Omnicom, EMC had filed suit after the SEC staff decided the company could not exclude the proposal. Like others, EMC also argued that notwithstanding Chevedden (and also Jim McRitchie's) agreement not to sue the company if it decided to exclude the proposal, the company faced the possibility of lawsuits from other shareholders or enforcement action from the SEC. This Court decided that even if there was evidence of a "genuine risk" of such action, declaratory judgment would not bar those suits because those parties would not be collaterally stopped by such a declaration. The Court also noted that dealing with the matter on declaratory judgment, where the company has not presented all of its arguments to the SEC first, would be "reversing the statutory scheme," and depriving the SEC of its role, as the SEC provides shareholders with a "relatively inexpensive opportunity to get claims disputes resolved."

Media [coverage](#) of the suits included reference to Chevedden's memorandum to the courts that the "corporate bar has taken notice of this opportunity to create a mismatch in legal firepower between a large publicly traded company and a small shareholder it would like to crush because he has submitted a proposal that management opposes," with a "let's do an end run around the SEC and sue Chevedden' strategy...suing Chevedden from sea to shining sea and drowning him in a barrage of lawsuits." Chevedden claims that "In January, 2014 alone, in wolf pack fashion, four different public companies sued Chevedden in four different district courts...which may be a record in lawsuits in one month brought by different large corporations against one small individual defendant."

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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