UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

March 27, 2014

Michael J. O'Brien
Omnicom Group Inc.
michael.o'brien@omnicomgroup.com

Re: Omnicom Group Inc.
Incoming letter dated March 12, 2014

Dear Mr. O'Brien:

This is in response to your letters dated March 12, 2014 and March 18, 2014 concerning the shareholder proposal submitted to Omnicom by John Chevedden. We also have received letters from the proponent dated March 12, 2014, March 13, 2014, March 18, 2014, March 19, 2014, March 23, 2014 and March 24, 2014. Copies of all of the correspondence on which this response is based will be made available on our website at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml. For your reference, a brief discussion of the Division's informal procedures regarding shareholder proposals is also available at the same website address.

Sincerely,

Matt S. McNair
Special Counsel

Enclosure

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

March 27, 2014

**Response of the Office of Chief Counsel**
**Division of Corporation Finance**

Re: Omnicom Group Inc.
Incoming letter dated March 12, 2014

The proposal requests that the board take the steps necessary to adopt a bylaw that prior to the annual meeting, the outcome of votes cast by proxy on uncontested matters, including a running tally of votes for and against, shall not be available to management or the board and shall not be used to solicit votes. The proposal also describes when the bylaw would, and would not, apply.

There appears to be some basis for your view that Omnicom may exclude the proposal under rule 14a-8(i)(3), as vague and indefinite. We note in particular your view that the proposal does not sufficiently explain when the requested bylaw would apply. In this regard, we note that the proposal provides that preliminary voting results would not be available for solicitations made for "other purposes," but that they would be available for solicitations made for "other proper purposes." Accordingly, we will not recommend enforcement action to the Commission if Omnicom omits the proposal from its proxy materials in reliance on rule 14a-8(i)(3).

Sincerely,

Norman von Holtzendorff
Attorney-Advisor

## DIVISION OF CORPORATION FINANCE
## INFORMAL PROCEDURES REGARDING SHAREHOLDER PROPOSALS

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. 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.

**JOHN CHEVEDDEN**

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

March 24, 2014

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 205491

**# 6 Rule 14a-8 Proposal**
**Omnicom Group Inc. (OMC)**
**Confidential Voting**
**John Chevedden**

Ladies and Gentlemen:

This is the 6th in a series of letters in regard to the company March 12, 2014 request-for-waiver no action request which reversed the company January 20, 2014 letter announcing its avoidance of the no action process.

The company March 18, 2014 letter failed to produce any evidence whatsoever that, in the cases it cites starting with *Exxon Mobil Corp.* (March 23, 2007), that any proponent signed a letter that he would not present the respective proposal if the respective company did not publish that proposal.

The proponent will submit additional rebuttal letters to the Staff.

This is to request that the Securities and Exchange Commission allow this resolution to stand and be voted upon in the 2014 proxy.

Sincerely,

John Chevedden

cc: Michael J. O'Brien <michael.obrien@OmnicomGroup.com>

**JOHN CHEVEDDEN**

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

March 23, 2014

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 205491

**# 5 Rule 14a-8 Proposal.**
**Omnicom Group Inc. (OMC)**
**Confidential Voting**
**John Chevedden**

Ladies and Gentlemen:

This is the 5th in a series of letters in regard to the company March 12, 2014 request-for-waiver no action request which reversed the company January 20, 2014 letter announcing its avoidance of the no action process.

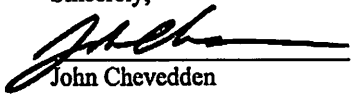
Attached is the Court Order in:
Civil Action No. 1:14-cv-00018-WJM-KMT
Chipotle Mexican Grill, Inc. v. John Chevedden, James McRitchie and Myra K. Young

On page 7 the Court Order is opposed to reversing the statutory scheme. Although the court did not specifically address a company appealing to the Staff after a failed lawsuit, there is no question that appealing to the Staff after a failed lawsuit (possibly an unprecedented act in regard to a rule 14a-8 proposal), there can be no doubt that this is a reversal of the statutory scheme.

The proponent will submit additional rebuttal letters to the Staff.

This is to request that the Securities and Exchange Commission allow this resolution to stand and be voted upon in the 2014 proxy.

Sincerely,



John Chevedden

cc: Michael J. O'Brien <michael.obrien@OmnicomGroup.com>

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**Judge William J. Martínez**

Civil Action No. 14-cv-0018-WJM-KMT

CHIPOTLE MEXICAN GRILL, INC.,

Plaintiff,

v.

JOHN CHEVEDDEN,
JAMES MCRITCHIE,
MYRA K. YOUNG,

Defendants.

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**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

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Plaintiff Chipotle Mexican Grill, Inc. ("Plaintiff") has filed this action for a declaratory judgment against Defendants John Chevedden, James McRitchie, and Myra K. Young (collectively "Defendants"), arising out of an alleged violation of the regulations under the Securities Exchange Act of 1934, 17 C.F.R. § 240.14a-8. (ECF No. 1.) This matter is before the Court on Defendants' Motion to Dismiss for Lack of Jurisdiction ("Motion") (ECF No. 10) and Plaintiff's Motion for Summary Judgment (ECF No. 19). The Court agreed to rule on these motions on an expedited basis. (ECF No. 17.) For the reasons set forth below, Defendants' Motion is granted and the case is dismissed for lack of jurisdiction.

## I. LEGAL STANDARD[1]

Rule 12(b)(1) empowers a court to dismiss a complaint for "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case. Rather, it calls for a determination that the court lacks authority to adjudicate the matter, attacking the existence of jurisdiction rather than the allegations of the complaint. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so).

A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere conclusory allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). When considering a Rule 12(b)(1) motion, however, the court may consider matters outside the pleadings without transforming the motion into one for summary judgment. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Where a party challenges the facts upon which subject matter jurisdiction depends, a district court may not presume the truthfulness of the complaint's "factual allegations . . . [and] has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id.*

The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in

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[1] Although the pending Motions include arguments pursuant to both Rules 12(b)(1) and 56, the Court addresses herein only Rule 12(b)(1) because it is dispositive of the case.

which it becomes apparent that jurisdiction is lacking." *See id.*

## II. DISCUSSION

This action is the most recent in a line of cases brought by corporate plaintiffs challenging shareholder proposals submitted by Defendant Chevedden. (*See* ECF No. 13 at 2-8 (citing, *e.g.*, *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723 (S.D. Tex. 2010); *KBR Inc. v. Chevedden*, 776 F. Supp. 2d 415 (S.D. Tex. 2011); *Waste Connections, Inc. v. Chevedden*, 2014 WL 554566 (5th Cir. Feb. 13, 2014)); *see also Express Scripts Holding Co. v. Chevedden*, 2014 WL 631538 (E.D. Mo. Feb. 18, 2014); *EMC Corp. v. Chevedden*, No. 14-cv-10233-MLW (Mass. March 7, 2014); *Omnicom Group, Inc. v. Chevedden*, No. 14 Civ. 0386 (S.D.N.Y. March 11, 2014).[2] Plaintiff seeks a declaration that the shareholder proposal at issue here, which Defendants submitted for inclusion in Plaintiff's proxy statement for its upcoming stockholder meeting, violates the Securities Exchange Act and can therefore be excluded from Plaintiff's proxy statement. (Compl. (ECF No. 1).) In their Motion to Dismiss, Defendants argue that Plaintiff lacks standing to sue because it can show no injury in fact, and that the case should therefore be dismissed for lack of jurisdiction. (ECF No. 10.)

A declaratory judgment may be granted only in "a case of actual controversy within its jurisdiction". 28 U.S.C. § 2201(a). This refers directly to the "case or

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[2] Defendants brought the recently decided *EMC* and *Omnicom* cases to the Court's attention by filing letters and transcripts from those cases, but failed to file a Motion for Leave to File Supplemental Authority. (ECF Nos. 24 & 25.) As Defendants are *pro se*, the Court is required to liberally construe their pleadings. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). Thus, given these cases' persuasive value and pertinence to the instant case, the Court construes Defendants' filings as a Motion for Leave to File Supplemental Authority, grants the construed motion, and accepts the supplemental authority as filed.

controversy" requirement of Article III of the United States Constitution. U.S. Const. Art. III § 2; *see Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 848 (2014) (holding that "the Declaratory Judgment Act does not extend the jurisdiction of the federal courts." (internal quotation marks omitted)). The limitation of jurisdiction to an actual controversy is a "bedrock requirement" that protects the system of separated powers, and from which the concept of standing arises. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982); *see also Raines v. Byrd*, 521 U.S. 811, 818 (1997) ("'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976))).

Of the justiciability doctrines created to enforce the case or controversy limitation, the requirement that a litigant "have 'standing' to invoke the power of a federal court is perhaps the most important". *Allen v. Wright*, 468 U.S. 737, 750 (1984). "[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

A plaintiff must show three elements to establish standing to assert a claim:

> [1] The plaintiff must have suffered an injury in fact . . . , [2] there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and . . . [3] it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted). Allegations of future injury cannot satisfy the injury in fact requirement if the injury is merely possible, but "must be 'certainly impending'" to establish standing. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

The Tenth Circuit "has repeatedly characterized standing as an element of subject matter jurisdiction." *Hill v. Vanderbilt Capital Advisors, LLC*, 702 F.3d 1220, 1224 (10th Cir. 2012). Because Plaintiff is the party invoking this Court's jurisdiction, it bears the burden of establishing that it has standing to pursue its claim. *See Basso*, 495 F.2d at 909.

Plaintiff's briefing here proposes three future injuries that it argues establish standing: (1) the threat of suit by Defendants if Plaintiff wrongfully excludes their proposal; (2) the threat of suit by other shareholders; and (3) the threat of an enforcement action by the Securities and Exchange Commission ("SEC"). (*See* ECF No. 13 at 7-8.) Defendants contend that because they have made an "irrevocable promise" not to sue Plaintiff if it excludes their shareholder proposal, the first alleged injury will not occur. (ECF No. 21 at 2-4.) With regard to the second and third alleged injuries, Defendants contend that they are too speculative to pass constitutional muster. (*Id.*; ECF No. 22 at 2.)

The Court agrees with Defendants that Plaintiff's proposed future injuries fail to meet the "certainly impending" standard necessary to establish standing. *See Whitmore*, 495 U.S. at 158. The prospect of Defendants breaking their "irrevocable

promise" not to bring legal action against Chipotle if it excludes their shareholder proposal, though possible, is undisputedly not "certainly impending." Nor is the prospect of a lawsuit by another shareholder or an SEC enforcement action anything more than pure speculation. Thus, none of these injuries satisfies the injury in fact requirement. Furthermore, even if the uncertainty about another shareholder or SEC action sufficiently established an injury in fact, Plaintiff cannot show that its requested relief—a declaration from this Court with respect to Defendants—would redress its injury as against a third party over whom this Court has no jurisdiction. *See Lujan*, 504 U.S. at 569 (holding that an injury was not redressable where the district court's decision would not have been binding on non-party government agencies).

Plaintiff's citations to the Fifth Circuit Court of Appeals' decisions in *KBR* and *Waste Connections* are unavailing. In *KBR*, the Fifth Circuit found that Chevedden's stipulation not to sue did not vitiate any possibility of legal action stemming from a decision to exclude his proposal, because that decision "would implicate KBR's duties to all of its shareholders . . . [and] could expose KBR to an SEC enforcement action." *KBR Inc. v. Chevedden*, 478 F. App'x 213, 215 (10th Cir. 2012). However, the Fifth Circuit did not apply the "certainly impending" standard established by the Supreme Court for evaluating future injuries for standing purposes. *See Whitmore*, 495 U.S. at 158. Additionally, in citing the risk of shareholder or SEC actions, the Fifth Circuit considered only whether KBR might expose itself to suit, not whether the district court's ruling would redress that exposure. The *Waste Connections* decision was substantively identical to *KBR* and did not address either of these well-established standing requirements. 2014

WL 554566 at *2.

Instead, the Court finds more persuasive the reasoning of the District Courts of the Southern District of New York and the District of Massachusetts, both of which rejected the same proposed injuries Plaintiff cites here as too speculative to be "certainly impending". *See Omnicom*, 1:14-cv-0386, at *2-*3 (holding that "Omnicom does not face suit from Mr. Chevedden if it excludes his proposal, and the possibility of SEC investigation or action is remote."); *EMC*, 1:14-cv-10233, Doc. 38 at 46-52 (same). As in *EMC*, given Defendants' promise not to sue and Plaintiff's failure to show either any threat of suit by a third party or the redressability of such injury, "a declaratory judgment by this court would be an [unconstitutional] advisory opinion without relieving [the plaintiff] of any uncertainty or insecurity about being sued by the defendants if [the plaintiff] excludes their proposal." *EMC*, 1:14-cv-10233, Doc. 38 at 53. Furthermore, where Plaintiff has not presented its case to the SEC, this Court's issuance of a declaratory judgment on an expedited basis "would be essentially reversing the statutory scheme and not be in the interests of the administration of justice." *Id.* at 54.

Accordingly, the Court finds that Plaintiff lacks standing to bring this action, and thus the Court lacks jurisdiction to hear the matter.

## III. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Defendants' Motion to Dismiss for Lack of Jurisdiction (ECF No. 10) is GRANTED and this matter is DISMISSED WITHOUT PREJUDICE; and
2. Judgment shall be entered in favor of Defendants. Defendants shall have their costs.

Dated this 14th day of March, 2014.

BY THE COURT:

William J. Martínez
United States District Judge

**JOHN CHEVEDDEN**

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

March 19, 2014

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 205491

**# 4 Rule 14a-8 Proposal**
**Omnicom Group Inc. (OMC)**
**Confidential Voting**
**John Chevedden**

Ladies and Gentlemen:

This is the 4th in a series of letters in regard to the company March 12, 2014 request-for-waiver no action request which reversed the company January 20, 2014 letter announcing its avoidance of the no action process.

Attached is the Court Order which seems to be in contradiction with key conclusions in the company March 18, 2014 letter.

The proponent will submit additional rebuttal letters to the Staff.

This is to request that the Securities and Exchange Commission allow this resolution to stand and be voted upon in the 2014 proxy.

Sincerely,

John Chevedden

cc: Michael J. O'Brien <michael.obrien@OmnicomGroup.com>

UNITED STATES DISTRICT COURT
SOUTHERN DISTICT OF NEW YORK
----------X

OMNICOM GROUP, INC.,

Plaintiff,

-against-

JOHN CHEVEDDEN,

Defendant.

----------X

14 Civ. 0386 (LLS)

MEMORANDUM AND ORDER

This case raises the question whether a corporation that has sufficient doubt whether it is entitled to exclude a shareholder's proposal from its proxy materials should consult its attorneys and follow their advice, with the common risk that a court may later hold to the contrary if the proposal is rejected, or take advantage of the Declaratory Judgment Act, 28 U.S.C. § 2201, to seek a court's declaratory judgment that exclusion is permissible or that the proposal's inclusion is mandatory.

There are thousands of public companies in the United States; they have annual meetings, and their shareholders are free to suggest items for inclusion in their proxy materials.

In this case, Omnicom Group, Inc. ("Omnicom") seeks declaratory judgment that it may exclude Mr. Chevedden's shareholder proposal under SEC's rule 14a-8, and moves for

summary judgment. Mr. Chevedden, who has promised Omnicom not to sue if it rejects his proposal, moves to dismiss the action on the ground, among others, that the threat of injury from corporate misjudgment is too remote and speculative to present a justiciable controversy under Article III of the United States Constitution.

A court may use its discretion to grant declaratory judgment only "In a case of actual controversy within its jurisdiction," 28 U.S.C. § 2201(a), that is, those "Cases" and "Controversies" that are justiciable under Article III. The Supreme Court has explained that:

> To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling. Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending. Thus, we have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient.

Clapper v. Amnesty Intern. USA, 133 S. Ct. 1138, 1147 (2013)(internal quotations and citations omitted; italics in original).

Omnicom argues that its injury is imminent because, even though Mr. Chevedden has promised not to sue, "the proposal

remains pending, still requiring Omnicom to decide whether or not it is required to include the proposal in its proxy statement (and face all the legal consequences of that decision).," Pl.'s Reply Mot. Summ. J. 4.

Nonetheless, any speculative future "legal consequences" are not certainly "actual or imminent." Omnicom does not face suit from Mr. Chevedden if it excludes his proposal, and the possibility of SEC investigation or action is remote.

As stated by the Second Circuit in U.S. v. Broadcast Music, Inc. (Application of Muzak LLC and AEI Music Network, Inc.), 275 F.3d 168, 178-79 (2d Cir. 2001):

> An issue is ripe for judicial resolution only if it presents a real, substantial controversy, not a mere hypothetical question. Pursuant to ripeness doctrine, we must avoid entangling ourselves in abstract disagreements and engaging in premature adjudication. The ripeness doctrine cautions courts against adjudicating contingent future events that may not occur as anticipated, or indeed may not occur at all. Two additional factors, the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration, also inform any analysis of ripeness.
>
> . . .
>
> Applicants argue that the district court's decision not to decide the issue places them in an untenable position, because they now must go through the rate determination proceeding while facing the possibility that the copyright holder might then attempt, and

> be permitted, to veto the outcome of that proceeding. The fact remains, however, that at this juncture Applicants have suffered no injury, and the threat of an injury is speculative—a contingent future event that may not occur at all. A federal court lacks the power to render advisory opinions. We therefore affirm the district court's decision not to decide the issue.

(internal quotations and citations omitted).

Mr. Chevedden's motion to dismiss (Dkt. No. 12) is granted. Omnicom's motion for summary judgment (Dkt. No. 13) is denied. The clerk is requested to enter judgment dismissing the complaint, with costs and disbursements in favor of Mr. Chevedden according to law.

So ordered.

Dated: New York, New York
March 11, 2014

Louis L. Stanton
LOUIS L. STANTON
U. S. D. J.

**JOHN CHEVEDDEN**

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

March 18, 2014

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 205491

**# 3 Rule 14a-8 Proposal**
**Omnicom Group Inc. (OMC)**
**Confidential Voting**
**John Chevedden**

Ladies and Gentlemen:

This is the 3rd in a series of letters in regard to the company March 12, 2014 request-for-waiver no action request which reversed its January 20, 2014 letter announcing its avoidance of the no action process.

The company initially bypassed the no action process and sought the advice of the Federal Court. Now the company does not want to follow the advice of the Federal Court.

The attached pages of the transcript of this case show that the Court views it important that the Staff first review any merits of a company request to not publish a rule 14a-8 proposal before it is brought to the attention of the Court.

If the Staff grants no action relief it will be in contradiction with the Court on the proper order in which to consider a company request to not publish a rule 14a-8 proposal.

The proponent will submit additional rebuttal letters to the Staff.

This is to request that the Securities and Exchange Commission allow this resolution to stand and be voted upon in the 2014 proxy.

Sincerely,

John Chevedden

cc: Michael J. O'Brien <michael.obrien@OmnicomGroup.com>

statements you reference are material -- materially false or misleading. Accordingly, we do not believe that EMC may omit the proposal or portions of the supporting statement from its proxy materials in reliance on Rule 14a-8(i)(3)." That's Exhibit D to the complaint, at Page 3.

As I said earlier, two weeks later, on January 30, 2014, EMC filed the instant suit in this court requesting a declaratory judgment that it may exclude the proposal or, in the alternative, a preliminary and permanent injunction to prevent the defendants from continuing to seek the inclusion of the proposal in the proxy materials.

I conclude that issuing a declaratory judgment on an expedited basis, without the advice of the SEC, without more time, and to compensate for the fact that the adversary process is not working well here because the defendants are not represented; and, as Mr. McRitchie said, it would be too expensive to be represented, would run the risk of a decision that's not well-informed and properly considered.

In addition, it would abet what I regard as an inappropriate practice of depriving the SEC of the opportunity to perform its proper role of considering all the grounds that in this case have been argued to me and giving informed advice.

I also have in mind Mr. McRitchie's last argument, that permitting -- or where there's a legitimate discretion or abetting an end run around the SEC deprives shareholder of a

relatively inexpensive opportunity to get claims disputes resolved in their favor and by forcing them into court keeps them from really, as a practical matter, having an appropriate opportunity to have their positions evaluated on an informed basis as the SEC's in a better position to do quickly and relatively inexpensively.

Finally, in the interests of completeness, I'd say that the standing analysis also bears on the alternative relief. Plaintiff requests a preliminary and permanent injunction. As the Supreme Court has explained, "a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: 1) that it has suffered an irreparable injury; 2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; 3) that considering the balance of hardships between plaintiff and defendant are remedied in equity is warranted; and 4) that the public interest would not be disserved by a permanent injunction." I'd say, as I understand it -- well, that's a permanent injunction.

The Supreme Court has indicated that the injury in fact -- well, and I was just quoting from eBay, Inc., 547 U.S. 388, at 391.

The Supreme Court has indicated that the injury in fact prong of the standing requirement is related to the

# Omnicom Group Inc.

Michael J O'Brien
Sr. Vice President,
General Counsel and Secretary
March 18, 2014

**VIA ELECTRONIC MAIL**

Office of the Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: **Omnicom Group Inc. Shareholder Proposal from John Chevedden**

Ladies and Gentlemen:

Omnicom Group Inc., a New York corporation (the "***Company***"), hereby submits this letter to the Division of Corporation Finance (the "***Staff***") regarding its request (the "***No-Action Request***") for confirmation that the Staff will not recommend enforcement action to the Securities and Exchange Commission (the "***Commission***") if the Company excludes a shareholder proposal (the "***Proposal***") and related supporting statement submitted by Mr. John Chevedden ("***Chevedden***") from the Company's proxy statement (the "***Proxy Materials***") for the Company's 2014 annual meeting of shareholders (the "***Annual Meeting***") pursuant to Rule 14a-8(i)(3), as the Proposal violates the proxy rules, including Rule 14a-9, because it is impermissibly vague and indefinite.

Due to Chevedden's recent correspondence, the Company further requests that the Staff concur that the Proposal may be properly excluded because Chevedden has indicated his intention to act contrary to Rule 14a-8(h)(1), providing new and independent grounds for exclusion under Rule 14-a(8).

## I. The District Court Ruling Allows the Company to Exclude the Proposal.

As discussed in the No-Action Request, on March 11, 2014, the United States District Court for the Southern District of New York (the "***Court***") dismissed the Company's lawsuit against Chevedden, writing that a declaratory judgment is inappropriate because "Omnicom does not face suit from Mr. Chevedden if it excludes his proposal, and the possibility of SEC investigation or action is remote."

Nothing in the Court's ruling prevents Omnicom from properly excluding Chevedden's proposal. Quite to the contrary, the Court wrote that the Company *may* exclude the Proposal, without risk of a lawsuit by Chevedden or an enforcement action by the Commission. In an overabundance of caution, and because Chevedden refuses to withdraw the Proposal, the Company submitted the No-Action Request on March 12, and further submits this letter, to



NY\6195636.3 437 Madison Avenue, New York, NY 10022 (212) 415-3640 Fax (212) 415-3574

request confirmation that the Staff will not recommend enforcement action to the Commission if the Proposal is excluded from the Company's Proxy Materials pursuant to Rule 14a-8(i)(3) because it is impermissibly vague and indefinite. In the No-Action Request, the Company was not presenting any new arguments; it was instead seeking confirmation from the Staff that it agrees with the Court and that the Proposal may be properly excluded from the Proxy Materials.

The Company notes that throughout the lawsuit, Chevedden argued to the Court that Omnicom should have sought no-action relief from the Staff, not through litigation. Now that Omnicom has sought such relief from the Staff, Chevedden has bombarded the Staff and the Company with correspondence arguing that the Staff should not consider Omnicom's request for relief. He cannot have it both ways.

## II. The Staff has Overwhelmingly Established that the Proposal may be Properly Excluded Because it is Impermissibly Vague and Indefinite.

The Staff has overwhelmingly established that the Proposal may be properly excluded under Rule 14a-8(i)(3) because it is impermissibly vague and indefinite. Since the submission of the No-Action Request, the Staff has granted no-action relief to ***nine more companies*** that received proposals virtually identical to the Proposal, bringing the total number to ***twelve***.

The Staff granted no-action relief to these nine companies, concluding that "the proposal does not sufficiently explain when the requested [bylaw/policy] would apply." *Amazon.com, Inc.* (avail. Mar. 6, 2014); *Comcast Corporation* (avail. Mar. 6, 2014); *Equinix, Inc.* (avail. Mar. 6, 2014); *The Home Depot, Inc.* (avail. Mar. 6, 2014); *Leidos Holdings, Inc.* (avail. Mar. 6, 2014); *Reliance Steel & Aluminum Co.* (avail. Mar. 6, 2014); *The Southern Company* (avail. Mar. 6, 2014); *SunEdison, Inc.* (avail. Mar. 6, 2014); *UnitedContinental Holdings, Inc.* (avail. Mar. 6, 2014). Those grants of no-action relief are in addition to the three letters cited in the No-Action Request. *Intel Corporation* (avail. Mar. 4, 2014); *Verizon Communications Inc.* (avail. Mar. 4, 2014); *Newell Rubbermaid Inc.* (avail. Mar. 4, 2014).

Accordingly, because the Proposal is nearly identical to the proposals in the letters cited above, Company respectfully requests confirmation that the Staff will not recommend enforcement action to the Commission if the Proposal is excluded from the Company's Proxy Materials pursuant to Rule 14a-8(i)(3) because it is impermissibly vague and indefinite.

## III. Chevedden's Irrevocable Promise not to Present the Proposal is in Violation of the Proxy Rules and Provides an Independent Grounds for Exclusion under Rule 14a-8(i)(3).

Chevedden has not contested or disagreed that the Proposal is impermissibly vague and indefinite. He has also "irrevocably" promised not to sue the Company if the Proposal is excluded from the Company's Proxy Materials and *not to present the Proposal at the Company's Annual Meeting*. However, as evidenced by his recent barrage of letters to the Staff, Chevedden nevertheless continues to pursue the Proposal. Accordingly, the Company is compelled to submit to the Staff the following additional, independent reason why the Proposal may be excluded from the Company's Proxy Materials.

The Company may exclude the Proposal under rule 14a-8(i)(3) as contrary to proxy rule 14a-8(h)(1) because Chevedden has irrevocably promised not to present the Proposal at the Annual Meeting.

Rule 14a-8(h)(1) states that "Either you, or your representative who is qualified under state law to present the proposal on your behalf, must attend the meeting to present the proposal." On February 26, 2014, Chevedden delivered a letter (attached hereto as Exhibit A, the "***Irrevocable Promise***") to the Company's counsel in which he "irrevocably" promised not to present the Proposal at the Annual Meeting if the Company excludes the Proposal from its Proxy Materials. For the reasons stated above and in the Company's letters to the Staff of January 20, 2014 and March 12, 2014, the Company does not intend to include the Proposal in its Proxy Materials. For the reasons stated below, the Company believes that the Irrevocable Promise has created new and independent grounds for exclusion of the Proposal under Rule 14a-8(i)(3).

The Staff has written, if "a shareholder voluntarily provides a written statement evidencing his or her intent to act contrary to rule 14a-8(h)(1), rule 14a-8(i)(3) may serve as a basis for the company to exclude the proposal." Staff Legal Bulletin No. 14 (July 13, 2001), Item C.4.b. The Staff has also previously concurred that when a proponent has indicated that neither the proponent nor his or her qualified representative will attend a shareholders' meeting to present a proposal, the proposal may be properly excluded under Rule 14a-8(i)(3). *See Exxon Mobil Corp.* (avail. Mar. 23, 2007); *Exxon Mobil Corp.* (avail Mar. 7, 2001); *Johnson & Johnson* (avail. Jan. 9, 2001). In each of the Exxon Mobil letters and the Johnson & Johnson letter, after submitting a proposal, the proponents subsequently indicated to the companies that neither they nor their representatives would attend the companies' annual meetings to present their proposals. And in each of these instances, the Staff concurred that the proposals could therefore be properly excluded under Rule 14a-8(i)(3) as contrary to proxy Rule 14a-8(h)(1).

Here, as in each of the Exxon Mobil cases and the Johnson & Johnson case, Chevedden has delivered the Irrevocable Promise, an unsolicited, written statement that he will not present the Proposal at the Annual Meeting. Rule 14a-8(h)(1) requires that either a proponent or a qualified representative of a proponent attend the shareholders' meeting to present the proposal. Because Chevedden has irrevocably promised not to present the Proposal, he has evidenced his intent to act contrary to Rule 14a-8(h)(1). Therefore, the Proposal may be properly excluded under Rule 14a-8(i)(3).

The Company notes that because Chevedden's promise not to present the Proposal is irrevocable, the deficiencies presented by the Irrevocable Promise are not deficiencies that may be cured. Rule 14a-8(f) provides that a "company need not provide [a proponent] such notice of a deficiency if the deficiency cannot be remedied . . . ." Thus, because the Irrevocable Promise is irrevocable and contrary to the proxy rules as stated above, the Company is not required to provide Chevedden with notice of the above-mentioned deficiencies, nor is Chevedden allowed an opportunity to cure the deficiencies under Rule 14a-8.

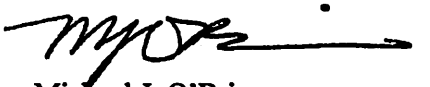
## IV. Conclusion.

Based upon the foregoing analysis, the Company respectfully requests confirmation that the Staff will not recommend enforcement action to the Commission if the Proposal is excluded from the Company's Proxy Materials pursuant to Rule 14a-8(i)(3) because it is impermissibly vague and indefinite and because Chevedden has irrevocably promised not to present the Proposal at the Annual Meeting.

* * *

If the Staff does not concur with the Company's position, we would appreciate an opportunity to confer with the Staff concerning this matter prior to the determination of the Staff's final position. In addition, the Company requests that Chevedden copy the undersigned on any response he may choose to make to the Staff, pursuant to Rule 14a-8(k).

Sincerely,



Michael J. O'Brien
Senior Vice President, General Counsel and
Secretary

Enclosure

cc: Jeff Hammel, Latham & Watkins LLP
Joel H. Trotter, Latham & Watkins LLP
John Chevedden

**Exhibit A**

**JOHN CHEVEDDEN**

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

February 26, 2014

Mr. Jeff Hammel
Latham & Watkins
885 Third Avenue
New York, NY 10022-4834

Dear Mr. Hammel,

I irrevocably promise not to attempt to present my rule 14a-8 proposal at the 2014 annual meeting if Omnicom Group Inc. (OMC) excludes it from the 2014 annual meeting proxy materials.

Sincerely,

John Chevedden

**JOHN CHEVEDDEN**

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

March 13, 2014

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 205491

**# 2 Rule 14a-8 Proposal**
**Omnicom Group Inc. (OMC)**
**Confidential Voting**
**John Chevedden**

Ladies and Gentlemen:

This is the second in a series of letters in regard to the company March 12, 2014 request-for-waiver no action request which reversed its January 20, 2014 letter to avoid no action relief.

After the company in effect said that it did not trust the Staff to make a proper determination in its January 20, 2014 letter – now the company asks the Staff to come to its rescue. Due to the unique nature of the burdensome and demeaning company request, the company should not have the opportunity to submit any further letter in regard to its March 12, 2014 request.

As an alternative, and if the staff is in any way inclined to consider the company request, this is to ask for the opportunity to cure any issue with the resolved text of this well-established topic. If the company is granted a waiver the shareholder should be granted some latitude in return. The company has not expressed any objection to this.

This is to request that the Securities and Exchange Commission allow this resolution to stand and be voted upon in the 2014 proxy.

Sincerely,

John Chevedden

cc: Michael J. O'Brien <michael.obrien@OmnicomGroup.com>

**JOHN CHEVEDDEN**

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

March 12, 2014

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 205491

**# 1 Rule 14a-8 Proposal**
**Omnicom Group Inc. (OMC)**
**Confidential Voting**
**John Chevedden**

Ladies and Gentlemen:

This is in regard to the company March 12, 2014 no action request reversing its January 20, 2014 letter to not request no action relief. The company does not address whether its March 12, 2014 no action request is an unprecedented type of request. The company does not address whether such an unprecedented or unusual request would demand a higher burden than its belated 5-page no action request. The company does not address whether such an unprecedented or unusual request would demand more than the usual amount of Staff time and consultation for proper consideration.

Since the company expressed its preference to have a federal court rule on its attempt to exclude a rule 14a-8 proposal, attached is the transcript of a 2-hour hearing in the related EMC Corporation lawsuit to give perspective on the view of a Federal Court on the proper process to attempt to exclude a rule 14a-8 proposal.

This is the first in a series of replies to this belated and unprecedented or unusual no action request.

This is to request that the Securities and Exchange Commission allow this resolution to stand and be voted upon in the 2014 proxy.

Sincerely,

John Chevedden

cc: Michael J. O'Brien <michael.obrien@OmnicomGroup.com>

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EMC CORPORATION, Plaintiff,
vs.
JOHN CHEVEDDEN and JAMES McRITCHIE, Defendants.

CA No. 14-10233-MLW

BEFORE: THE HONORABLE MARK L. WOLF

HEARING ON MOTIONS

John Joseph Moakley United States Courthouse
Courtroom No. 10
One Courthouse Way
Boston, MA 02210
Friday, March 7, 2014
2:00 p.m.

Cheryl Dahlstrom, RMR, CRR
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 3209
Boston, MA 02210
Mechanical Steno - Transcript by Computer

APPEARANCES:

NUTTER, McCLENNEN & FISH LP
By: Ian Roffman, Esq.
155 Seaport Boulevard
Boston, Massachusetts 02210-2604
- and -
GIBSON, DUNN & CRUTCHER LLP
By: Adam H. Offenhartz, Esq., and
Aric H. Wu, Esq.
200 Park Avenue
New York, New York 10166-0193
On behalf of the Plaintiff.

Appearing on behalf of EMC:
Leigh Slayne, Esq.

Appearing by telephone:
John Chevedden
James McRitchie

P R O C E E D I N G S

THE CLERK: EMC Corporation vs. John Chevedden and James McRitchie, Civil Action No. 14-10233. Court is in session. You may be seated.

THE COURT: Good afternoon. Would those present to participate in the courtroom please identify themselves for the Court and for the record.

MR. ROFFMAN: Good afternoon, your Honor. Ian Roffman from Nutter, McClellan & Fish, on behalf of EMC Corporation. With me on my left are --

02:01

MR. CHEVEDDEN: I can't hear very well. This is John Chevedden.

THE COURT: Speak into that microphone.

MR. ROFFMAN: Sure. Ian Roffman from Nutter, McClellan & Fish, on behalf of EMC Corporation. With me on my left are Adam Offenhartz and Aric Wu of Gibson, Dunn & Crutcher. On my right is Leigh Slayne of EMC Corporation.

THE COURT: All right. Who's on the telephone, please?

02:01

MR. CHEVEDDEN: John Chevedden.

MR. McRITCHIE: And James McRitchie.

THE COURT: Is anybody else in the room with either of you?

MR. CHEVEDDEN: No.

MR. McRITCHIE: No.

THE COURT: And those of you on the telephone are going to have to say your name before you speak, okay?

MR. McRITCHIE: Yes.

THE COURT: Because we have a court stenographer, and we need an accurate transcript.

MR. ROFFMAN: Your Honor, if I may, Mr. Offenhartz and Mr. Wu have motions for admission pro hac vice pending.

THE COURT: They are allowed.

MR. ROFFMAN: Thank you. And Mr. Offenhartz will do today's argument. Thank you.

02:02

THE COURT: Okay. This case was filed on January 30, 2014. It relates to a scheduled April 30, 2014, meeting, annual meeting, of shareholders of plaintiff, EMC. EMC represented that it must complete its proxy materials by March 14, 2014, for that meeting. It, in this case, seeks a declaratory judgment and a permanent injunction which would permit EMC to exclude the defendants' proposal which would require an independent chairman of the board from the proxy materials to be sent to shareholders. EMC requested an expedited decision. Therefore, I scheduled a hearing for today. I ordered further briefing.

02:03

The defendants have provided written promises not to present the proposal at the annual meeting if it is not included in the proxy materials and also not to sue if the plaintiff excludes its proposal from the proxy materials. The

defendants have filed a motion to dismiss for lack of standing essentially meaning that there is not a true case or controversy as required by Article III of the Constitution. The plaintiff seeks summary judgment in what's characterized as a preliminary injunction. I think it would actually be a permanent injunction.

It is my present tentative view, having studied the matter, that there isn't a cognizable case in controversy under Article III. EMC lacks standing on the facts of this case. In any event, I would exercise the discretion that I have under the Declaratory Judgment Act not to issue a declaratory judgment in the circumstances of this case and that an injunction, permanent or preliminary, would not be appropriate because there's no threat of irreparable harm.

EMC can decide what to do, and if it excludes the defendants' proposal, it will not be at risk from the defendants and, as far as I can discern from the record, anybody else, certainly anybody else who would be bound by a decision of mine.

But while that results -- or that view results from my study of what's been submitted, it isn't a final view. So I am interested -- since I'm inclined to grant the motion to dismiss on the standing ground, I'll hear first from EMC.

MR. OFFENHARTZ: Thank you, your Honor. Adam Offenhartz with Gibson, Dunn, on behalf of EMC. Your Honor, we

thank you for sharing your tentative rulings, and I thank you for the opportunity to be heard on those tentative rulings.

Your Honor, before I dive into the standing issue, I just want to stress that this issue is of great importance to EMC because it goes to enforcing the securities laws and the rules that afford individuals the opportunity to properly place proposals on -- in a proxy. What we're dealing with here is a proxy that is deficient for a number of reasons and does not --

THE COURT: Did you present all of those reasons to the SEC before it declined to give you a no-action letter?

MR. OFFENHARTZ: Your Honor, we did not present all of those issues to the SEC, but, your Honor, it is very, very clear that the SEC is not the final arbiter of such issues.

THE COURT: No. I know that very well. I wrote about it Gillette vs. RB Partners --

MR. CHEVEDDEN: This is John Chevedden.

THE COURT: -- in 1987. I think we have a statutory scheme in our country where the anticipated order of things is that you would make your arguments to the SEC to get an -- in an effort to get a no-action letter. Usually, it has to go quite fast. And then if there's a genuine case or controversy, as there was in my Gillette case, you know, a court will scrutinize it after the fact.

Why didn't you -- you confirmed my understanding. Not all the arguments were presented to the SEC.

MR. OFFENHARTZ: Yes. Your Honor, EMC --

THE COURT: Go ahead.

MR. OFFENHARTZ: May I proceed? Thank you, your Honor.

EMC does not proceed to litigation lightly. It made an effort to address this issue at the SEC; and when the SEC disagreed with it in a nonbinding, non-adjudicative letter, it exercised its right to come to this court to seek a declaratory judgment, to seek summary judgment, to seek preliminary injunction, protecting its rights and protecting the shareholders at the April 30th shareholder meeting from voting for directors on tainted information.

MR. CHEVEDDEN: Your Honor, John Chevedden. Do I have an opportunity to talk at this time?

THE COURT: No, not a bit. I'll tell you when it's your turn. First, EMC will go and then --

MR. CHEVEDDEN: Okay.

THE COURT: -- I'll offer you an opportunity to speak.

MR. CHEVEDDEN: Okay. Thank you.

THE COURT: But I've got the impression from your submissions, Mr. Chevedden, although you're representing yourself, it's not your first time in litigation. So I thought you knew how this worked. You'll get a chance, but it will be when I tell you it's your turn, okay?

MR. CHEVEDDEN: Thank you.

MR. OFFENHARTZ: Your Honor, the rule that is being posited, that one must include every ground one may have before going to the district court or that one must even go to the SEC first is simply not the authority or the regime.

THE COURT: No, I don't think it's -- I'm not saying that you're required to exhaust administrative remedies, but -- that really only comes up -- first of all, there has to be an actual case or controversy. If there's an actual case or controversy, I have to decide whether to exercise my discretion to provide a declaratory judgment. And going to the SEC, in my view, relates to that second question, which, in my current conception, I wouldn't reach. So go ahead.

MR. OFFENHARTZ: Okay.

THE COURT: Address the standing issue, and I'm going to listen to you more than I've listened to you so far.

MR. OFFENHARTZ: Thank you, your Honor. Regarding the standing issue -- and I will circle back to other courts that have recently reached this very issue with Mr. Chevedden and have found that standing does exist. But let me start --

THE COURT: Are there more than the two Fifth Circuit decisions?

MR. OFFENHARTZ: There's also Express Scripts, which is a District -- Eastern District of Missouri decision, your Honor.

THE COURT: Did you cite that?

MR. OFFENHARTZ: We did cite that in our papers, your Honor.

THE COURT: I'll get it.

MR. OFFENHARTZ: Your Honor, I'm going to hearken back to two Supreme Court cases which I think really, really give great guidance and explain why EMC has standing in this matter. And that's the Genentech case and the Medtronic case. What those cases show us --

THE COURT: Hold on a second. I'll get them.

02:10 MR. OFFENHARTZ: Thank you. Your Honor, what those cases make clear --

THE COURT: Just wait one second.

MR. OFFENHARTZ: Oh, certainly.

THE COURT: Sorry. What is the case other than Medtronic?

MR. OFFENHARTZ: MedImmune vs. Genentech, your Honor.

THE COURT: What's the first name?

MR. OFFENHARTZ: MedImmune, M-e-d --

THE COURT: MedImmune.

02:11 MR. OFFENHARTZ: MedImmune vs. Genentech, 549 U.S. 118. That's a 2007 decision.

THE COURT: I have it right here.

MR. OFFENHARTZ: And the other decision is Medtronic vs. Mirowski Family Ventures.

THE COURT: I have that, too.

MR. OFFENHARTZ: That's the January 22, 2014, case.

Your Honor, what those cases provide is that the test for standing is not a likelihood of an adverse suit absent a ruling. It is not a reasonable apprehension of suit. It's a prospect of an adverse suit.

THE COURT: Adverse suit by whom?

MR. OFFENHARTZ: Well, in this case, your Honor, that could be the SEC bringing an enforcement action. That could be any number of shareholders.

02:12 THE COURT: Where does MedImmune -- this is not a rhetorical question -- suggest that the concern is an adverse suit by anybody, not an adverse suit by the defendant in a declaratory judgment action? That sounds --

MR. OFFENHARTZ: Your Honor, at Page 130 on the MedImmune case, the opinion states, Supreme Court --

THE COURT: Hold on a second. Let me get it. Let me get to the page. Go ahead.

MR. OFFENHARTZ: Your Honor, I think the best place to look is at the end of Page 128 and the beginning of 129. The

02:13 Supreme Court notes, "Our analysis must begin with the recognition that, where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for that threat. For example" -- and it goes on.

Your Honor, that's -- that is a situation where the

Supreme Court makes clear that a threatened action can be by the government.

THE COURT: And what evidence do I have of a threatened action here?

MR. OFFENHARTZ: Well, your Honor, the government was not a party to this lawsuit, but it was -- you know, the reality is that the Commission, the SEC, has indicated -- and this is -- has indicated that "no response or other action by the Commission or its staff is required in regard to such communications. Although the notification requirement of Paragraph D may alert the Commission that enforcement action may be appropriate in the event that management follows through on its announced intention to omit the proposal at issue in that action."

THE COURT: I'm sorry. What are you reading from?

MR. OFFENHARTZ: Your Honor, this is the -- this is the statement of informal procedures for the rendering of staff advice with respect to shareholder proposals, at 41 Federal Register, at 29 --

THE COURT: That's a -- I'm sorry. You're talking -- I have something that says, "Division of Corporation Finance, Informal Procedures Regarding Shareholder Proposals." Is that what I should be reading?

MR. OFFENHARTZ: Well, your Honor, I suspect I may be getting there shortly, but that's a separate document.

THE COURT: Is the document you're quoting something you cited?

MR. OFFENHARTZ: Yes, it is, your Honor.

THE COURT: Then I should have it.

MR. OFFENHARTZ: But, your Honor, the other reason or evidence -- besides the fact the Supreme Court notes in its opinion in MedImmune that the threat of an action by a nonparty is sufficient. And, again, not the reasonable or the, you know, very likely threat, the threat. It's important to keep in mind that we already have -- the no action -- the letter from the SEC has told EMC, "Accordingly, we do not believe that EMC may omit the proposal or portions of the supporting statement from its proxy materials in reliance on Rule 14a-8(i)(3)."

So we have a government actor, the SEC, telling EMC, You need to put this in your papers. You need to -- you may not omit this.

THE COURT: But you only -- you made several arguments to me as to why they could be excluded. I think you only made one to the SEC, is that right?

MR. OFFENHARTZ: That is correct, your Honor.

THE COURT: So the -- you know, if this is meritorious -- if your contentions to me are meritorious, maybe if you put them all to the SEC, they would have given you your no-action letter.

MR. OFFENHARTZ: Well, your Honor, that may or may not have been the case, but the SEC and, indeed, the D.C. Circuit Court of Appeals in the Roosevelt case made clear that it's the district court's place to be the final arbiter of these issues.

THE COURT: And the question -- but not necessarily in a declaratory judgment action. There has to be a case in controversy.

MR. OFFENHARTZ: Well, certainly --

THE COURT: If -- you know, if the defendants here had only told you, you know, We're thinking about asking you to make -- to include this proposal. Will you do it? We're thinking about it. Do you think you would have had standing to seek declaratory judgment, or would that have been an impermissible advisory opinion?

MR. OFFENHARTZ: If they had not actually provided us a proposal?

THE COURT: Right, if they said they were thinking about this.

MR. OFFENHARTZ: I think, if they said they were thinking of making a proposal and they never provided it to us, I don't think we would be standing here today having this conversation.

But, your Honor, the reality is they did provide a proposal. The proposal is deficient on numerous grounds. The proposal, if left unchecked, will, in our view, cause

irreparable harm. It will taint the shareholder vote that is going to occur on April 30th. And, your Honor --

THE COURT: It doesn't have to. Is there something that requires that it be April 30th? Let's say, at the end of this, you raise enough questions. I mean, I have really juggled my schedule to accommodate yours.

MR. OFFENHARTZ: And we're grateful.

THE COURT: But is there any legal obligation to hold the meeting on April 30th rather than, say, June 30th?

02:19 MR. OFFENHARTZ: Well, your Honor, shareholder meetings do need to be held within a certain period of time. The April 30th date has -- is set, has been set. To change it would be very, very cumbersome to shareholders.

THE COURT: Why is that? The first matter I ever participated in -- you won't find my name on it because I wasn't a member of the bar, and I didn't go to court. Look at the Schnell vs. Chris-Craft. I was part of a team representing some dissidents who wanted to take control of Chris-Craft Industries in 1971. As soon as Chris-Craft heard about it,

02:19 they moved the date of the annual meeting back so there would be less time to solicit proxies. My colleagues went to court in Delaware, and the meeting -- the early meeting was enjoined. It was pushed back. And our clients got clobbered in the proxy contest.

But I still don't think I've heard an answer to my

question. Is there some legal obligation to have the meeting on, say, April 30th, not June 30th, in case I decide there's a case or controversy and wanted to study the merits more?

MR. OFFENHARTZ: Your Honor, if you wanted to study the merits more --

THE COURT: You're asking -- you're asking -- you raise a lot of issues you haven't presented to the SEC, and I'm trying to find out whether the schedule you've asked me to accommodate is artificial or legally required. You've got counsel from EMC here, don't you? Isn't that --

MR. OFFENHARTZ: Your Honor, may we take --

THE COURT: Isn't Miss Slayne from EMC?

MS. SLAYNE: I am. Can I --

MR. OFFENHARTZ: Your Honor, may we take 30 seconds to make sure we get a correct answer?

THE COURT: Yeah. You want to give me a reliable response. I would have thought you knew this.

MR. OFFENHARTZ: Your Honor, I want to make sure we get it completely right.

THE COURT: Okay.

(Discussion held off the record.)

MR. OFFENHARTZ: Your Honor.

THE COURT: Go ahead.

MR. OFFENHARTZ: May I proceed, your Honor?

THE COURT: Yes.

MR. OFFENHARTZ: Your Honor, the short answer is that there are a number of advance notice bylaw provisions that require a shareholder meeting to take place at a time specific. There are a number of steps and various items that occur and that need to take place in a certain order so that you can have a shareholder meeting. And there are certainly limits to how far off a shareholder meeting can be pushed.

And the way we look at it is -- and that it would be very, very difficult for a company as large as EMC, which has its process in the works, the shareholder meeting in the works, for a significant amount of time, the advanced bylaws need to be dealt with, to have all these in the works for an April 30th meeting, makes it -- to the extent it is possible to reach a decision before that, that would be infinitely better all around.

Your Honor, turning again to the standing issue, as the Supreme Court instructs us, "It does not need to be the party" -- as the MedImmune vs. Genentech case says, "It does not need to be the party to bring the lawsuit."

02:24 THE COURT: Actually, wasn't the dispute in -- the language you had cited me in MedImmune was sort of general survey of the law. But --

MR. OFFENHARTZ: Yes.

THE COURT: -- in MedImmune, one party had a patent and said it was entitled to royalties, I think, if it was going

to be used, and the other party wouldn't pay them.

MR. OFFENHARTZ: Right.

THE COURT: But here, they promise not to sue you. They're putting the ball in your court.

MR. OFFENHARTZ: But the important thing about the two Supreme Court cases is that they make clear that the test is not a high likelihood of lawsuit. It's the prospect of a lawsuit.

THE COURT: The defendants didn't do this in an affidavit. But what is this? Rule 14a-8 that's implicated here? Shareholder proposal?

MR. OFFENHARTZ: Yes.

THE COURT: And the defendant argues that, I think, there's only one time the SEC has ever brought a 14a-8 proceeding. Now, that's not -- the fact that they put it in their memo is not evidence. But did you give me any evidence that the SEC brings 14a-8 enforcement actions?

MR. OFFENHARTZ: Your Honor, we provided a footnote that details a number of more general enforcement actions that the SEC brings.

THE COURT: First of all, a footnote is not evidence. Second of all, were any of those 14a-8 matters?

MR. OFFENHARTZ: They were not SEC enforcement actions, 14a-8 actions. They were 14a actions, your Honor.

THE COURT: Okay.

MR. OFFENHARTZ: The other thing, your Honor, is the SEC has a new enforcement director. The SEC has a new head. The SEC recently has changed its approach to settlements. Now parties are being forced to admit that they have committed wrongdoing. For many, many years before --

THE COURT: Do I have -- this isn't rhetorical. Have you told me this in any affidavit, or are you just telling me this?

MR. OFFENHARTZ: Your Honor.

02:26 THE COURT: You have a burden of proof here, and the proof has to be based on the kind of evidence that's cognizable and evidence that the defendants had notice of before today. Is any of this in any of your affidavits?

MR. OFFENHARTZ: Your Honor, the fact that there is --

THE COURT: About the new enforcement?

MR. OFFENHARTZ: Your Honor, the fact that there is a new SEC enforcement head, the fact that there's a new head of the SEC, the fact that the SEC now requires parties to admit to wrongdoing, where for 20 years it had allowed them to say, We

02:27 neither admit nor deny anything, that is not in an affidavit. However, your Honor, I would be grateful to be afforded the opportunity --

THE COURT: You're not going to be afforded an opportunity. You persuaded me you need a decision today. That's why I've rearranged my schedule to give it to you.

MR. OFFENHARTZ: Your Honor.

THE COURT: I'm going to decide this matter orally within the hour. I have another matter at 3:30.

MR. OFFENHARTZ: Your Honor, let me refer you again to the SEC's own language. This is again from -- this is from the Statement of Informal Procedures For the Rendering of Staff Advice With Respect to Shareholder Proposals. Nothing --

THE COURT: I'm sorry. Hold on a second. Just read it, please.

02:27 MR. OFFENHARTZ: "Nothing the Commission or its staff does or admits to do in connection with such proposals affects the right of a proponent, or any shareholder for that matter, to institute a private action with respect to the management's intention to omit that proposal from its proxy materials." That is the SEC recognizing that other shareholders may bring that action.

THE COURT: Has anybody threatened to?

MR. OFFENHARTZ: Your Honor, as the two Supreme Court cases we've been discussing make clear, you don't need a

02:28 threat. They had rejected the ruling --

THE COURT: Right in the language in MedImmune that you read me earlier, begins on 128, goes to 129, it says, "Our analysis must begin with the recognition that where threatened action by the government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit

to challenge the basis for the threat." Then it goes down. "For example, in Terrace, the State threatened the plaintiff with forfeiture of his farm." And in Steffel, there was the threat of criminal prosecution for distributing handbills. Anyway, go ahead.

MR. OFFENHARTZ: Your Honor.

THE COURT: I said I'd listen to you. I haven't been quiet enough. Give me your whole argument.

MR. OFFENHARTZ: Thank you, your Honor.

02:29 Your Honor, I just want to turn back briefly to the MedImmune vs. Genentech case because, respectfully, I think this case is very supportive of the standing position of EMC. For instance, in that case, as I've noted, the Supreme Court specifically rejected a reasonable-apprehension-of-suit test for establishing Article III standing in a declaratory judgment action and held that Article III case or controversy requirement was satisfied where the declaratory judgment plaintiff faced the prospect of an adverse suit, the "prospect" of an adverse suit.

02:30 THE COURT: Which is -- where are you reading from?

MR. OFFENHARTZ: That's at 128 and also 132, Note 11.

So the Supreme Court is telling us, your Honor, that it is the prospect of a suit that gives rise to a case or controversy. And we have the SEC telling us that any shareholder can bring a lawsuit if we do not -- if we fail to

include this deficient proposal. And the SEC itself can bring an enforcement action. So we have --

THE COURT: I'm looking at Footnote 11. I'm sorry. Go ahead.

MR. OFFENHARTZ: So, your Honor, we have the Supreme Court in the MedImmune vs. Genentech case saying -- specifically rejecting a reasonable apprehension of suit. That's not the test.

THE COURT: Go ahead.

02:31 MR. OFFENHARTZ: The test -- the test is -- the test -- "the Article III case or controversy requirement was satisfied where the declaratory judgment plaintiff faced the prospect of an adverse suit."

THE COURT: Where do you -- where is that?

MR. OFFENHARTZ: I believe that's at, again, 132 and Note 11. And, your Honor, in the Medtronic case, again, the Supreme Court -- this is the Supreme Court in January.

THE COURT: Wait, wait.

MR. OFFENHARTZ: Certainly, your Honor.

02:31 THE COURT: I don't see that in Note 11, the discussion about prospect. Anyway, why don't you go ahead.

MR. OFFENHARTZ: Your Honor, in the Medtronic case --

THE COURT: What page?

MR. OFFENHARTZ: 848. The Court says, and I'm quoting now, "Amicus says that an infringement suit would be unlikely."

The Supreme Court says, "But that is not the relevant question. The relevant question concerns the nature of the threatened action in the absence of the declaratory judgment suit." So the fact that the threatened action is unlikely is not the relevant question. That's the Supreme Court.

The Supreme Court has made clear in both of these cases that, for there to be standing, there needs to be -- for -- case or controversy requirement is satisfied when there's a prospect of an adverse suit. It is not -- the test is not that 02:33 the suit would be unlikely. The test is not whether or not EMC has a reasonable apprehension of suit. That's simply not the test.

THE COURT: It says here, "The relevant question concerns the nature of the threatened action in the absence of declaratory judgment suit." I guess at the moment I'm having trouble perceiving any threatened action.

MR. OFFENHARTZ: Well, your Honor, right now we have -- if EMC does not have a district court ruling that it may exclude this provision, it is open to action by the SEC, which 02:34 has already, as a state actor, sent a letter saying, We disagree with you.

THE COURT: They didn't say they disagree with everything you're asking me to decide. You only gave them one of the four grounds. But go ahead. We've been over this. Go ahead.

MR. OFFENHARTZ: Your Honor, the other thing about standing that I want to stress is that the cases that my adversary cites are really inapposite. The Clapper case deals with a five-step chain of events that respondents forecast may or may not happen.

And in the Already case, the Already, LLC vs. Nike case, the Court noted, "It's absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur." It was two parties who locked themselves up in a resolution.

02:35 Here, EMC, a large, publicly traded company, that is well-known in the markets, well-known in the business community, comes to this district court as the final arbiter, as the party with the resources, the means, to address these very real questions that relate to the shareholder meeting that is scheduled for April 30th. And the Supreme Court has taught us that this higher expectation, this likelihood-of-a-lawsuit test, that has been rejected. That is not the test.

And the Fifth Circuit and the Express Scripts case also have looked at this issue, and they --

02:36 THE COURT: The Fifth Circuit decisions are both unpublished, so they're not precedent even in the Fifth Circuit, right?

MR. OFFENHARTZ: They are both unpublished, but I do think that it shows that a court has looked at this issue and has come to a decision.

Your Honor, looking again at the MedImmune case, I think -- I just keep coming back to the fact that the Supreme Court has rejected the standard that this court is perhaps suggesting exists. And it is important to keep in mind that under this Supreme Court authority, EMC is left in a position -- it is left with the proverbial Hobson's choice. It is left between the proverbial rock and hard place.

When you think of all of the reasons for a declaratory judgment when you have -- by the way, the plaintiffs have affirmatively raised this issue. This is not something EMC sought out by itself.

THE COURT: You mean the defendants?

MR. OFFENHARTZ: I'm sorry. You're right. The defendants affirmatively sought out this issue. They put forward a proposal. They are the ones that created this problem. They are the ones that brought EMC into this issue. And EMC is now here -- and we're grateful to be here -- to ask the Court to address the issues. And I think it is significant that the defendants in this action have not put in any affidavits challenging the facts. They have not put in any arguments challenging our summary judgment arguments.

THE COURT: Well, you have -- you have to get over another hurdle before I would get to the merits of the case. So if there was a case or controversy, then I would have to decide whether to exercise my discretion to issue a declaratory

judgment. It's different than a case for damages, for example. There has to be an actual controversy. There's some overlap. But that's not the end of the inquiry. I consider the totality of the circumstances and, you know, wonder why, when you didn't present all your arguments to the SEC -- I might want to hear from the SEC on this. They have expertise. You haven't presented it to them. I haven't asked if they want to intervene.

As I said, my understanding going back decades, is that, generally speaking, companies present their arguments to the SEC and ask for a no-action letter and decide what to do. That's why you get paid the big bucks. After you make your decision, if, after the meeting perhaps, the defendants or somebody -- well, the defendants or someone else was disgruntled, there could be a lawsuit, and there would be sort of a deliberate process to educate the judge on the securities law and time for an appeal. But here, the defendants have said they're not going to sue you. They're going to defer to your judgment.

02:39 MR. OFFENHARTZ: Well, your Honor, EMC really does find itself in the proverbial between a rock and a hard place because without a ruling from your Court, it -- it is in a very untenable position.

THE COURT: Actually, I don't even see why that's true. Why don't you go present -- let's say I find there's no

case or controversy other than timing because you want to have your meeting on April 30th, although you have a discretion to have it later. Why couldn't you present all the arguments you presented to me to the SEC? You think they're meritorious. And this expert body, which would quickly know what you're talking about, would give you a no-action letter.

MR. OFFENHARTZ: Your Honor, first of all, there's no obligation that we go to the SEC first.

THE COURT: No, but there's no obligation for me to ignore that in deciding how to exercise my discretion if there's an actual case or controversy.

MR. OFFENHARTZ: Your Honor, certainly -- and I would be happy to address the discretionary factors.

THE COURT: You should do it right now.

MR. OFFENHARTZ: Thank you, your Honor. Your Honor, as the Court knows, and as you raised in your first order, a district court does have a degree of discretion in determining a declaratory -- whether or not to entertain a request for a declaratory judgment action. Your Honor, in this case, we think we meet all of the factors. And, indeed, your Honor, first of all, the sought-after declaration would be of practical assistance in settling the underlying controversy and putting it to rest. And that's citing the Verizon vs. New England case that your Honor pointed out in your order. With a ruling from your Honor that this proposal should be excluded,

the issue would be put to rest. We would have clarity.

Secondly, your Honor, one of the themes that runs through all of the cases on discretion is alternative forum, parallel state proceedings. In the Wilton case, which your Honor had us look at, there was a state court parallel proceeding and, indeed, the Wilton case made clear that when you have that, there is more discretion.

There is no state court parallel proceeding here, nor can there be. The securities laws call for exclusive

02:42 jurisdiction over the -- the securities laws provide for the district court to have exclusive jurisdiction over matters such as this. And I'll note, parenthetically, the SEC does not adjudicate, by its own words, these matters. It renders what it describes as informal views. That is not a parallel proceeding. That is advisory. That is not what a court does. That is not what the cases on discretion have reached.

The third factor, the cases that your Honor raised, the El Dia case in particular, pointed out a number of things and was very instructive. Among the things that case points

02:43 out is: Are there state law issues in the heart of it? In El Dia, I believe it was certain issues about open access in Puerto Rico relating to acts of Parliament or executive orders.

We simply don't have that there. This is the securities laws, and it's for a district court. It's for this court to decide and exercise its discretion to reach these very

important issues to protect the integrity of the shareholder vote on April 30th.

Your Honor, also turning to the El Dia case, there are no constitutional issues at play here. A number of courts have determined and advised and ruled that it is the better practice for a district court to avoid reaching constitutional questions if it does not need to, particularly in the context of a declaratory judgment. That is not at issue here.

Your Honor, the next standard for whether or not a court should exercise declaratory judgment is whether it will be effective in accomplishing its remedial purpose. Your Honor, I don't believe anyone is disputing that were this court -- were this court to rule and exclude this, that EMC's box would be opened.

THE COURT: What do you mean "box would be opened"? The decision by me wouldn't protect you against what you're characterizing as a threat of litigation by the SEC or by another shareholder because they're not represented in this action, so they wouldn't be collaterally stopped from relitigating the issue.

MR. OFFENHARTZ: Your Honor, the SEC has indicated that it will -- it views its own rulings and decisions as informal advice. In fact, the SEC has said -- and, again, I'm referring to that July 7, 1976 -- thing -- report, SEC report. "As a result, we do not adjudicate the merits of a management's

posture concerning such a proposal."

THE COURT: No.

MR. OFFENHARTZ: "As a result, the informal advice and suggestions emanating from the staff in this area are not binding."

THE COURT: Okay.

MR. OFFENHARTZ: But, your Honor --

THE COURT: Nor would any decision I rendered today be binding on the SEC or any other shareholder.

02:46 MR. OFFENHARTZ: The SEC has indicated that it will not challenge a district court decision on this matter because --

THE COURT: That's -- I don't interpret what you just read to say that. But, anyway, it doesn't matter. Keep going.

MR. OFFENHARTZ: Thank you, your Honor.

THE COURT: You should be coming to the end of this. If I get -- if I want to hear more on the merits, I'll let you know.

MR. OFFENHARTZ: Your Honor, the cases -- well, just

02:46 -- if I may, an additional point on the SEC. The SEC Division of Corporate Finance, Informal Procedures Regarding Shareholder Proposals, which we do cite, says, and I quote, "Only a court, such as a U.S. District Court, can decide whether a company is obligated to include shareholder proposals and proxy materials." If you rule in our favor, the SEC is not

challenging that based on what I just read.

And in terms of other shareholders, your Honor, if another -- if -- after your Honor were to rule in EMC's favor, if another shareholder were to challenge EMC, it would be in an infinitely better position than it is now because it would not have included the tainted, deficient proposal that has the risk of really tainting the vote that is to take place about the directors at the shareholder meeting. And wherever they went, EMC would obviously -- EMC, a Massachusetts -- a company
02:47 headquartered in Massachusetts, would want to get that case brought to this court, if not this judge.

THE COURT: If the case were brought within two years, and EMC was a party, under our local rules, it would be related, and it would come to me.

MR. OFFENHARTZ: Then, your Honor, I think that that is a very helpful point in that, if your Honor rules, how does it help EMC and get it out of the box? The SEC has indicated that it is not going to challenge a district court. And if any shareholder were to rule -- were to bring an action against EMC
02:48 after your Honor rules that this proposal should be excluded, there is no doubt that EMC would take every method at its disposal to get the case moved to this court.

THE COURT: Yeah. But you -- it could be a problem. If I ruled in your favor today based on this sort of expedited procedure, I might change my mind once I studied it more.

Anyway, go ahead.

MR. OFFENHARTZ: Your Honor, the other issue that I do -- that I do want to raise is, we've also brought a motion for a preliminary injunction. Your Honor indicated tentatively that there is not -- you do not think that we have made that necessary showing. But that does require a showing on the likelihood of success on the merits.

THE COURT: But it requires a showing of at least four things. And if you satisfy the four things, it still has to be
02:49 equitable to issue the injunction. One of the four things you have to show is an imminent threat of irreparable harm. But the defendants say they're not going to sue you.

MR. OFFENHARTZ: Well, your Honor, on our preliminary injunction and in our papers, we stress -- I believe it's the Bender vs. Jordan case and the Tractenberg case both highlight this, that if you have a vote, if you have a shareholder vote, and that vote takes place and is tainted by misleading -- false, misleading information, then that constitutes irreparable harm.

02:50 THE COURT: Are those cases brought by shareholders who want proposals included?

MR. OFFENHARTZ: Your Honor, those were not 14a-8 cases, but those were 14a cases, your Honor. We are still dealing with the securities laws. 14a-8 is a subset --

THE COURT: What are the two cases you just --

MR. OFFENHARTZ: The Bender vs. Jordan case and the Tractenberg case, your Honor.

THE COURT: We'll look at those.

MR. OFFENHARTZ: Your Honor, it's also -- well-settled might be a bit strong, but there's a strong public policy in favor of enforcing the securities laws. And I think that factors into the factors on declaratory judgment. I think that factors into the equitable aspect of granting the preliminary injunction. And I think that at some level, at a very core level, if one takes a step back and looks at this from the mantel of the SEC is just an advisory board, the district court is the place where the securities rules of this country are enforced. And we are here today to enforce the securities laws. And we believe we have standing because the Supreme Court has made clear --

THE COURT: I understand your standing argument.

MR. OFFENHARTZ: Your Honor, but it's also important to keep in mind that the 14a-8 rules, that is a subset of Section 14a.

THE COURT: I understand that, too.

Here, you've had 50 minutes. Let me ask the defendants if there's anything important they would like to say before I take a break. I do want to look at some of these cases more closely, and I may have some questions for the defendants after I do that, or I may be ready to rule if my

tentative views remain my views.

Is there something the defendants would like to say at this point?

MR. McRITCHIE: Yes. This is James McRitchie. EMC's counsel has discussed the fact that the SEC will not challenge the district court's decision, but it might be instructive to look at a no-action relief denied to Apple on appeal to the SEC Commission dealing with the same issue of proxy by proxy, one of the issues that EMC raises here. And in that case -- or in
02:52 that no-action denial on appeal, Apple brought up Waste Connections and its appeal decision in that case, in a Texas court. And there, the SEC denied no-action relief. While they didn't challenge the district court, they certainly disagreed with the district court in that denial. So that's one factor.

Another thing is, as found in the 1987 U.S. case of Hewlett vs. Helms, redress is sought through the court but from the defendants. This is no less true of a declaratory judgment suit than of any other actions. The real value of the judicial pronouncement, what makes it a proper judicial resolution of a
02:53 case in controversy rather than an advisory opinion, is in the settling of some dispute which affects the behavior of the defendants or the plaintiff and these -- emphasis -- `which affect the behavior the defendants --

(James McRitchie has left the conference.)

THE COURT: Well, this is a problem.

MR. CHEVEDDEN: This is John Chevedden.

THE COURT: He probably got cut off and we'll come back. Is there anything you would like to say, Mr. Chevedden?

MR. CHEVEDDEN: I just wanted -- one point about the tainted vote is that that's hard to conceive because the company has an unlimited opportunity in the proxy to rebut, you know, line for line and word for word, you know, the Rule 14a-8 proposal.

THE COURT: All right. Well, I'm sorry we lost Mr. McRitchie. I allowed the two of you to appear by telephone because you're representing yourselves and, as I understand it, you're in California.

02:54

MR. CHEVEDDEN: Yes.

THE COURT: This has to go on an expedited basis. By the time I got the request, it probably would have been too late for you to get here anyway. I'm going to take a recess.

(James McRitchie has joined the conference.)

MR. OFFENHARTZ: Your Honor, may I add --

THE COURT: No, you can't, not now.

02:55

Mr. McRitchie, you're back. Is there anything important you'd like to add?

MR. McRITCHIE: Well, those are two -- well, another thing is this footnote that keeps being referred to by EMC in their reply memorandum in the most recent document from them. Those 14a-8 -- no, 14a cases, none of them, other than

TransAmerica, which they've already stated, involve 14a-8. The other ones involve merger and acquisition cases where the company -- the exhibits are -- I don't know. They're fraudulent. I don't know what the legal term was for it, but they basically failed to disclose properly in those documents.

THE COURT: I understand that point. I'm going to take a break and may or may not have a decision for you.

Something very quick you'd like to say?

MR. OFFENHARTZ: Less than 30 seconds, your Honor.

02:56 In the MedImmune case, I just wanted to highlight that MedImmune, at 133, the Court makes a distinction about a case, the Willing case, pre- and post-declaratory judgment action. And in the case, the Willing case, which was pre-declaratory judgment action, there was no case or controversy -- this court, the Supreme Court, had held there was no case or controversy because no defendant had wronged the plaintiff or had threatened to do so. The court, in MedImmune vs. Genentech, then went on to say, "Had Willing been decided after the enactment in our upholding of the Declaratory Judgment Act 02:57 and had the legal disagreement between the parties been as this one, we are confident a different result would have obtained."

MR. McRITCHIE: This is James McRitchie. Could I add one more thing?

THE COURT: Yes.

MR. McRITCHIE: In reading the cases you referred us

to, I was struck by the broad discretion the Court has in granting or declining to grant declaratory action based on public issue. Here, the public interest is in not granting EMC's motion. EMC's motion would have a chilling effect on shareholders considering whether or not to submit a proposal. At least two law firms have already come out touting the courts as an alternative to the SEC's no-action process. And before three years ago, everyone went to the SEC. No one went to the courts.

02:57 My wife, basically, you know, is frightened to death about the prospect of EMC getting the court to have us pay for their attorneys. You know, that kind of prospect sends a real chilling message. I'm a small shareholder. I've got $5,000 in EMC. It's not worth it for me to hire a legal team to fight this. That's why I basically gave that irrevocable promise that I'm not going to show up to the meeting. I won't sue them. So --

THE COURT: All right. Thank you. I'm going to take a break and let you know when I come back if I'm prepared to

02:58 decide the pending motions.

MR. CHEVEDDEN: Do we call back, your Honor?

THE COURT: No. I'd suggest you stay on the phone. Okay?

MR. CHEVEDDEN: Yeah, that's fine.

THE COURT: Okay. Court is in recess.

(Recess taken at 2:58 p.m.)

(The Court entered the courtroom at 3:11 p.m.)

THE COURT: Do we still have the defendants on the telephone?

MR. CHEVEDDEN: John Chevedden is here.

MR. McRITCHIE: Jim McRitchie is here.

THE COURT: Okay. The argument today has been very helpful in testing the tentative views I reached reading the parties' submissions, which most recently addressed the questions I had initially. However, the arguments haven't altered my tentative views. Therefore, for the reasons I'll describe in some detail, I find that plaintiff, EMC Corporation, lacks standing to bring this case. There is not an actual case or controversy within the meaning of Article III of the Constitution. Although that, as a legal matter, could end the inquiry, as I'll explain, I would, even if there was Article III standing, exercise my discretion not to decide this matter on a motion or a request for declaratory judgment. I would also deny the request for a permanent injunction, which, as a practical matter, any injunction issued today would be because of the timing of this matter.

As I said earlier -- well, the transcript will have to be the record of the decision for present purposes at least. I'm sure EMC will order the transcript. If you order the transcript, I will review it to see if any corrections are

necessary and correct any misunderstandings the stenographer may have had in, and the transcript will be filed. If this matter is appealed, and, in any event, if I find the time, I may convert it into a more formal memorandum and order, but you will just get a very summary order dismissing the case.

As I said, this case was filed on January 30, 2014. And plaintiff, EMC Corporation, or EMC, sued Defendants John Chevedden and James McRitchie, who have offered a shareholder proposal for inclusion with EMC's proxy materials to be distributed in connection with EMC's annual shareholder meeting on April 30, 2014. EMC claims it is entitled to exclude the shareholder proposal, which, if adopted, would require that EMC have an independent chairman.

Before this court, EMC argues that Mr. Chevedden does not satisfy the stock ownership requirements that would permit him to file any shareholder proposal. EMC also contends the proposal contains misleading information in violation of the Securities and Exchange Commission, SEC, proxy rules. EMC requests a declaratory judgment that it may exclude the proposal or, in the alternative, request an injunction against Chevedden and McRitchie to prevent them from asking that the shareholder proposal be included in the proxy materials. On February 14, 2014, in anticipation of the approaching March 14, 2014, deadline or date that EMC says is the deadline to complete its proxy materials for the shareholder meeting, I

allowed EMC's motion to expedite this matter.

There are now two pending substantive motions, both of which I've heard to some extent argument on today. EMC has filed a motion for summary judgment or, in the alternative, a preliminary injunction. EMC argues that it has a right to exclude the shareholder proposal because of its multiple deficiencies.

The defendants have filed a motion for lack of subject matter jurisdiction and for failure to join an indispensable party. Defendants argue that EMC lacks standing to bring this declaratory judgment action if there is no private cause of action under SEC Rule 14a-8 which pertains to shareholder proposals and that the action should be dismissed because EMC has failed to include the SEC, an allegedly indispensable party. The determination of jurisdiction is the essential issue. If this court lacks subject matter jurisdiction, that is the end of the inquiry. So I will, in some detail, address that matter next.

03:18

03:19

Important to the analysis of the question of whether there's an actual case or controversy are the undisputed facts that the defendants have each entered into an irrevocable covenant not to sue the plaintiff if their proposal is excluded from the proxy materials and, indeed, have irrevocably promised not to present their proposal at the shareholder meeting.

I am allowing the defendants' motion to dismiss

because the plaintiff has not borne its burden of demonstrating the existence of a "case or controversy," as required by Article III, to permit a judicial decision on a question such as the question presented here. This is an issue of subject matter jurisdiction. "It is the plaintiff's burden to prove the existence of subject matter jurisdiction," as the First Circuit said in Aversa, 99 F.3d 1200, at 1209.

Where a court decides a 12(b)(1) motion on the pleadings, it must "construe the Complaint liberally and treat all well-pleaded facts as true, according to -- according the plaintiff the benefit of all reasonable inferences," as the First Circuit said in Murphy, 45 F.3d at 522. However, the court is not bound to accept as true a legal conclusion couched as factual, a factual allegation, as the Supreme Court said in Bell Atlantic, 550 U.S. 544, 555.

Importantly, for the instant case, "When a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) involves factual questions . . . the court must determine whether the relevant facts, which would determine the court's jurisdiction, also implicate elements of the plaintiff's cause of action," as the First Circuit wrote in Torres-Negrón, 504 F.3d 151, at 162-163. "[I]f the facts relevant to the jurisdictional inquiry are not intertwined with the merits of the plaintiff's claim . . . the trial court is free to weigh the evidence and satisfy itself as

to the existence of its power to hear the case,'" as the First Circuit also said in Torres-Negrón. Here, because the facts relevant to the jurisdictional inquiry are distinct from those relevant to the merits of the plaintiff's claim, the court may and is considering evidence in addition to the allegations.

The requirement that a plaintiff have standing emanates from Article III of the Constitution, which grants courts jurisdiction over "cases" and "controversies." As the Supreme Court has explained in Warth, 422 U.S. 490, at 498, "In its constitutional dimensions, standing imports justiciability whether the plaintiff has made out a case or controversy between himself and the defendant within the meaning of Article III." This is the threshold question in every federal case, determining the power of the court to entertain the suit.

This fundamental standing requirement has been applied by the Supreme Court both to actions for declaratory judgment, such as MedImmune, 549 U.S. 118, at 126, Note 8, and actions for injunctive relief, such as City of Los Angeles, 461 U.S. 95, at 110.

Furthermore, when a plaintiff requests more than one remedy, it bears the burden to show standing "for each type of relief sought," as the Supreme Court said in Summers, 555, U.S. 488, at 493. Although the application of the standing doctrine to injunctive relief is relatively straightforward, its application to actions for declaratory judgment requires or

deserves some discussion in light of recent Supreme Court rulings.

When courts assess whether a "case or controversy" exists in a declaratory judgment action, they do not always discuss standing. As Professors Wright and Miller explain, however, "Because 28 USC Section 2201 explicitly requires a case of actual controversy, declaratory judgment cases are frequently written in terms that look directly for a case or controversy without pausing to employ more specific categories of justiciability." That's 13 Federal Practice and Procedure, Section 3529, Note 30.

03:24

Here, the defendants have framed their argument in terms of standing. I find that is the proper framework for analysis. The Declaratory Judgment Act provides that: "In a case of actual controversy within its jurisdiction . . . any court of the United States, upon filing an appropriate pleading, may declare the rights and other legal relationships of any interested party seeking such a declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

03:25

The Supreme Court has explained that the phrase "case of actual controversy" in the Act refers to the type of case and controversy -- cases and controversies that are justiciable under Article II of the Constitution. That's MedImmune, 549

U.S. at 126.

Defining the boundaries of the Declaratory Judgment Act jurisdiction, however, has proven challenging. In its most recent in-depth treatment of justiciability of cases brought under the Declaratory Judgment Act, the Supreme Court wrote in MedImmune, at 127, "[Our cases] do not draw the brightest of lines between those declaratory-judgment actions that satisfy the case-or-controversy requirement and those that do not. Our decisions have required that the dispute be definite and concrete, touching the legal relations of the parties having adverse legal interests; and that it be real and substantial and admit of specific relief through a decree of a conclusive character, as distinguished from an opinion as to advising what the law would be upon a hypothetical state of facts."

In Maryland Casualty, 312 U.S. 270, at 273, the Supreme Court wrote in MedImmune, "We summarize as follows: Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

The court in MedImmune explained that traditional justiciability doctrines, excluding standing and ripeness, can still operate in the case or controversy analysis in the realm of declaratory judgments. That's addressed in MedImmune at

126, Note 8. While MedImmune clarified that a declaratory judgment might be possible when the party seeking declaratory relief is himself preventing the complained of injury from occurring, such relief is permissible only when, in the absence of the plaintiff's prophylactic actions, there would be a real risk of enforcement by the defendant. That's what was said in MedImmune, at 134. Although I recognize a real risk of enforcement by somebody other than the defendant might, in certain circumstances, also be sufficient to justify a court deciding a declaratory action, that is, might create an actual case or controversy, as discussed in MedImmune.

Essentially, MedImmune instructs courts to decide whether there would be an imminent redressable injury in fact if the declaratory judgment plaintiff refused to accede to the defendant's demand. I was just earlier quoting from MedImmune, at 126, Note 8, and also 134.

With regard to the constitutional requirements for standing, the plaintiff must demonstrate: 1), injury in fact; 2), causation; and 3), redressability, as the Supreme Court explained in Lujan, 504 U.S. 555, at 560-561. In this case, the first and third requirements are the most important. An injury in fact is the invasion of a legally protected interest, which is (a) concrete and particularized and, (b), actual or imminent, not conjectural or hypothetical. The Supreme Court -- as Lujan said, 504 U.S., at 560.

The Supreme Court has repeatedly reiterated that the threatened injury must be certainly impending to constitute injury in fact and that allegations of possible future injury are not sufficient. The Supreme Court said that in Clapper, 133 Supreme Court 1138, at 1147, just last year, in 2013.

The redressability requirement is met only where there is a "likelihood that the requested relief will redress the alleged injury," as the Supreme Court said in Steel, 523 U.S. 83, at 103. When redress of a plaintiff's claims "'depends on the unfettered choices made by independent actors not before the courts, and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict' . . . it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury." The Supreme Court explained that in Lujan 504 U.S., at 562.

Because the plaintiff, EMC here, is the party seeking to invoke federal jurisdiction, it bears the burden of establishing the elements of standing. EMC must support each of the elements of standing in a way -- in the same way -- well, let me take a step back. It's Lujan that tells us that the burden of proof -- of proving standing is on the plaintiff. That's at 561. EMC must support each of the elements of standing "in the same way as any other matter on which

plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation," again, Lujan, at 561.

"At the pleading stage, general factual allegations of injury resulting from the defendants' conduct may suffice. For a motion to dismiss, we presume the general allegations embrace those specific facts that are necessary to support the claim." However, as I explained earlier, "If the facts relevant to the jurisdictional inquiry are not intertwined with the merits of the plaintiff's claim, the trial court is free to weigh the evidence and satisfy itself, as to the existence of its power to hear the [claim]." That's Torres-Negrón again, 504 F.3d, at 163. Here, as I said, the existence of a controversy -- facts relating to whether a controversy exists are distinct from the underlying merits of the controversy or the claim. Therefore, the court has considered the evidence submitted by the parties.

In this case, the defendants argue that EMC lacks standing because it has not satisfied the Lujan requirements. I find that this contention is correct. EMC has not demonstrated that there will be an "imminent injury in fact" in the absence of a declaratory judgment or injunction or that a declaratory judgment would actually redress any injury in fact that might occur. Therefore, EMC lacks standing to pursue this matter, and the motion to dismiss is meritorious.

First, EMC has not carried its burden of demonstrating

that, if it decided to exclude the defendants' proposal from its proxy materials, it would face an imminent injury in fact attributable to defendants. If the defendants, as I said earlier, have provided a "irrevocable promise" that they will not file suit against EMC if their proposal is excluded from the proxy statement, indeed, they have promised that they would not raise the proposal at EMC's annual meeting.

As the Supreme Court has recently recognized, a comprehensive covenant not to sue can moot a request for declaratory relief, as was the case in Already, LLC, 133 Supreme Court 721, at 733, a decision issued last year. That conclusion is similar to the conclusion I reached in In Re: Columbia University Patent Litigation, 343 F. Supp. 2d 35. There, at Page 43, I determined that a patentee's covenant not to sue eliminated the Article III controversy between the litigants.

Although one court applying MedImmune concluded that the defendants' direct and unequivocal statement that it had absolutely no plan whatsoever to sue did not moot the actual controversy between the litigants, that decision, SanDisk, 480 F.3d 1372, at 1382, found that conclusion because the defendant had nevertheless "engaged in a course of conduct that showed a preparedness and willingness to enforce its rights." In essence, the Federal Circuit found that the declaratory judgment defendant was using extrajudicial means to scare

parties like the plaintiff into paying it to avoid litigation.

Moreover, in that case, the defendant merely said that it had "no plan" to sue, but it did not expressly renounce its right to sue as the defendants have done here. The Federal Circuit in Benitec, 495 F.3d 1340, at 1347-48, noted the critical distinction between the defendant's statement that it did not intend to sue and a statement, such as that here, that it would not sue. Here, where the defendants have "irrevocably promised" not to sue, no justiciable case or controversy exists between the litigants.

03:37

EMC argues that even if there is little or no risk of a suit from the defendants, there is still a substantial risk that the SEC or other shareholders would bring an action if the proposal is excluded. In support of this argument, EMC cites the Fifth Circuit, which adopted this argument in its unpublished opinions in two successful declaratory judgments against Mr. Chevedden, one of the defendants here. Those are Waste Connections vs. Chevedden, a February 13, 2014, unpublished decision; KRB vs. Chevedden, 478 Fed. Appx. 213, a 2012 Fifth Circuit decision. Although the Fifth Circuit credited the defendants' promise not to sue, it, nevertheless, concluded that a "case or controversy" existed because the plaintiffs had explained to the district court that the exclusion of the defendants' proposal could lead directly to an SEC enforcement action or liability from other shareholders.

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That is found in Waste Connections, 2014 WL 554566, at 2. However, I find the Fifth Circuit's reasoning to be unpersuasive at least on the record of this case. The Fifth Circuit cases, among other things, do not recognize that a declaratory judgment stating that shareholder proposal could be excluded would not, as a matter of law, actually redress the plaintiff's alleged harm or risk.

The plaintiff, EMC, has submitted no evidence to support the contention that there is a substantial risk of an enforcement action by the SEC or any other shareholder. Indeed, I'd go further. They haven't provided evidence that there's any real risk at all. In the absence of such evidence, this court has no basis to conclude that EMC has established an "imminent injury in fact" that would result from its exclusion of the defendants' proposal.

The defendants argue that enforcement by the SEC or any other shareholders is quite unlikely. The defendants assert in their memorandum that the SEC has brought a suit under the pertinent rule, Rule 14a-8, only once in the 72-year history of 14a-8 and its predecessor rule and claim that, to their knowledge, there have been no enforcement suits brought by third-party shareholders under Rule 14a-8. This information is not in an affidavit and, therefore, is not evidence on which the Court now relies. However, these statements have not been rebutted by any evidence offered by EMC, which bears the burden

of proof.

EMC has provided as evidence the complaints filed -- well, actually, has provided not as evidence but as argument in its reply brief, that the SEC, in three enforcement actions -- EMC has, in its reply memorandum, Page 6, Note 3, argued that the SEC has brought three enforcement actions for alleged violations of Section 14a and related rules, although not Rule 14a-8. And, indeed, there actually, I think, is evidence of that in the Roffman declaration, Exhibits 7, 8, and 9. However, none of those cases involved alleged violations of Rule 14a-8, as I said. Rather, in those cases, the SEC brought suit because of the defendant corporation's own allegedly misleading statements in their proxy materials in violation of Rule 14a-9, not because the corporation excluded shareholder proposals in alleged violation of Rule 14a-8.

Even if there were evidence that indicated a risk, a genuine risk, of an enforcement action by the SEC or other shareholders, declaratory judgment issued by this court would not bar such suits because those parties would not be collaterally estopped by such a declaration. Due process requires that for collateral estoppel to operate the party against whom the prior judgment is asserted must have had a "full and fair opportunity" to litigate its claim in the earlier action, as the Supreme Court wrote in Parklane, 439 U.S. 322, at 328. Here, however, neither the SEC or the other

shareholders have had an opportunity to participate in this case, directly or indirectly; and, therefore, they would not be bound by any decision of this court.

This fact relates to the other major standing requirement implicated in this case: redressability. Even a favorable decision for the plaintiffs in this case would not redress any alleged imminent injury of a potential enforcement suit by the SEC or another shareholder since the potential parties capable of bringing such a suit would not be bound by this court's decision. As the Supreme Court noted in Lujan, no redressability existed in that case because "resolution by the district court would not have remedied [the plaintiff's] alleged injury anyway because it would not have been binding upon the [relevant government] agencies. They were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced," the court said at 504 U.S., at 569.

EMC argues that the SEC would, nevertheless, feel bound by a declaratory judgment issued by this court and would not bring an independent enforcement action. EMC contends that the SEC has stated in one of its publications that "only a court, such as a U.S. District Court, can decide whether a company is obligated to include shareholder proposal in its proxy materials." And the SEC "does not and cannot adjudicate the merits of a company's position with respect to the

proposal." That's an SEC Division of Corporate Finance, Informal Procedures Regarding Shareholder Proposals publication of November 2, 2011.

This statement, however, is made in the context of the SEC's explanation that individual shareholders may file suit to have their proposals included notwithstanding a no-action letter from the SEC. The SEC was addressing a situation that was analogous to that which I addressed in 1988, in Gillette vs. RB Partners, 693 F. Supp. 1266, at 1287-88. That's a case where the SEC issued no-action letters after the proxy contest litigation was begun, and there were proceedings to, in a more deliberate and adversarial fashion, decide whether the proxy rules had, indeed, been violated.

03:46

So, essentially, for those reasons, I find there's no case or controversy, no standing and no case or controversy. I note, however, that if there were a case or controversy, I would exercise my discretion under the Declaratory Judgment Act not to issue a declaratory judgment at this case, at this time.

In Wilton 515 U.S. 277, at 287, the Supreme Court

03:47

wrote, "By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver. It created an opportunity rather than a duty to grant a new form of relief to qualifying litigants. Consistent with the non-obligatory nature of the remedy, the district court is authorized, in the sound exercise of its discretion, to stay or

to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close. In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration."

In this case, a declaratory judgment by this court would be an advisory opinion without relieving EMC of any uncertainty or insecurity about being sued by the defendants if EMC excludes their proposal. As I noted earlier, the defendants have given an irrevocable promise in writing not to present their proposal at the annual meeting if EMC excludes it from the proxy materials or to sue if it's excluded.

In addition, EMC has not demonstrated the existence of any threat that the SEC or anyone else will sue if the proposal is excluded.

In addition, I've considered that I have not received any briefing or assistance from the -- well, any direct assistance from the expert SEC which has declined to grant a no-action letter. Ideally, I would want to offer the SEC an opportunity to be heard before deciding the -- before deciding whether to issue the declaratory judgment EMC requests. Given what EMC asserts is the short time frame is not time to provide or solicit the participation of the SEC, and the SEC has not attempted to intervene in this action.

In my view, dealing with this matter on declaratory judgment on an expedited basis, when, as here, EMC has not presented all of its arguments to the SEC first, would be essentially reversing the statutory scheme and not be in the interests of the administration of justice. As I've understood them, at least since I decided the Gillette case in 1998, Congress, in the present, have established a scheme by which companies like EMC can present their proxy materials to the SEC. The SEC, necessarily somewhat quickly and informally, will provide advice and in appropriate cases issue no-action letters. And if it turns out that a shareholder is sufficiently disappointed with the SEC's advice, no-action letter, it can bring a suit in federal court either to enjoin a meeting or, as happened in Gillette, the parties, after the contest, after the annual meeting, can litigate, and the court can make a properly informed decision. Issuing a declaratory judgment would reverse this process without good cause.

As I noted, as was confirmed by counsel for EMC today, EMC did not provide all the arguments for excluding the proposals that it's presented to me to the SEC. More specifically, on December 20, 2013, EMC's senior corporate counsel, Rachel Lee, sent a letter to the SEC's Division of Corporate Finance, to inform the Division of EMC's intent to omit the proposal from its proxy materials. Reiterating the company's contention that Mr. Chevedden and Mr. McRitchie had

violated proxy rules by failing to provide a copy of the GMI ratings report referenced in the proposal, EMC stated, "We believe that the proposal may properly be excluded from the 2014 proxy materials pursuant to Rule 14a-8(i)(3) because the supporting statement contained unsubstantiated and misleading references to nonpublic materials that the proponent has not made available to the company for evaluation." That's Exhibit C, at Page 4, to the complaint.

The letter did not mention any other potential ground for exclusion of the proposal, though EMC did attach its prior correspondence with Mr. Chevedden and Mr. McRitchie which included stated concerns about their satisfaction of the ownership requirements, essentially the issue that Mr. Chevedden does not evidently own any EMC stock.

On January 16, 2014, the SEC Division of Corporate Finance declined EMC's request for a no-action letter. In its letter to EMC, the SEC stated that "the proposal request that the board adopt a policy and amend other governing documents is necessary to reflect that policy to require that the chair of the board of directors be an independent member of the board. We are unable to concur, in your view, that EMC may exclude the proposal or portions of the supporting statement under 14a-8(i)(3).

"We are unable to conclude that you have demonstrated objectively that the proposal or portions of the supporting

statements you reference are material -- materially false or misleading. Accordingly, we do not believe that EMC may omit the proposal or portions of the supporting statement from its proxy materials in reliance on Rule 14a-8(i)(3)." That's Exhibit D to the complaint, at Page 3.

As I said earlier, two weeks later, on January 30, 2014, EMC filed the instant suit in this court requesting a declaratory judgment that it may exclude the proposal or, in the alternative, a preliminary and permanent injunction to prevent the defendants from continuing to seek the inclusion of the proposal in the proxy materials.

I conclude that issuing a declaratory judgment on an expedited basis, without the advice of the SEC, without more time, and to compensate for the fact that the adversary process is not working well here because the defendants are not represented; and, as Mr. McRitchie said, it would be too expensive to be represented, would run the risk of a decision that's not well-informed and properly considered.

In addition, it would abet what I regard as an inappropriate practice of depriving the SEC of the opportunity to perform its proper role of considering all the grounds that in this case have been argued to me and giving informed advice.

I also have in mind Mr. McRitchie's last argument, that permitting -- or where there's a legitimate discretion or abetting an end run around the SEC deprives shareholder of a

relatively inexpensive opportunity to get claims disputes resolved in their favor and by forcing them into court keeps them from really, as a practical matter, having an appropriate opportunity to have their positions evaluated on an informed basis as the SEC's in a better position to do quickly and relatively inexpensively.

Finally, in the interests of completeness, I'd say that the standing analysis also bears on the alternative relief. Plaintiff requests a preliminary and permanent injunction. As the Supreme Court has explained, "a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: 1) that it has suffered an irreparable injury; 2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; 3) that considering the balance of hardships between plaintiff and defendant are remedied in equity is warranted; and 4) that the public interest would not be disserved by a permanent injunction." I'd say, as I understand it -- well, that's a permanent injunction.

The Supreme Court has indicated that the injury in fact -- well, and I was just quoting from eBay, Inc., 547 U.S. 388, at 391.

The Supreme Court has indicated that the injury in fact prong of the standing requirement is related to the

irreparable injury requirement for an injunction. It did that in Lyons, 461 U.S., at 111. There, the Supreme Court said, "The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there's no showing of any real or immediate threat that the plaintiff will be wronged again, the likelihood of substantial and immediate irreparable injury." As the D.C. Circuit has explained, "To show irreparable harm, a plaintiff must do more than merely allege harm sufficient to establish standing." That's In Re: Navy Chaplaincy, 534 F.3d, 756, at 766. Accordingly, the absence of an "injury in fact" for standing purposes necessarily means that one of the essential prongs of the test for permanent injunction has not been satisfied.

The particular and somewhat unusual posture of this case indicates that the plaintiff would suffer no "irreparable injury" if defendants are not enjoined from continuing to offer their proposal. Even if the defendants do not withdraw the proposal, the plaintiff, EMC, is free to exclude it. If, as the plaintiff contends, it has a valid reason to do so, then any "injury" suffered as a result of that exclusion would be temporary or nonexistent. And, significantly, again, the defendants have pledged not to pursue any action against the plaintiff for excluding their proposal. It is the plaintiff's position that any enforcement action against it by the SEC or a third party would be unmeritorious.

Injunctive relief and, in particular, the concept of irreparable harm is more likely in the context of the mirror image of this suit in which a shareholder seeks to enjoin the corporation from excluding the proposal, as was the case in New York City Employers Retirement System, 795 F. Supp. 95, and Amalgamated Clothing, 821 F. Supp. 877. In such situations, courts have acknowledged that a shareholder's inability to present its proposal to other shareholders for another year might constitute irreparable harm. However, here, EMC would suffer no irreparable harm as a result of the defendants' actions.

So, in conclusion, the plaintiff has not demonstrated that it would suffer an imminent injury in fact if it excluded the defendants' proposal; and, more broadly, the plaintiff has not demonstrated there is any case or controversy between the litigants that would allow this court to exercise its power under Article III of the Constitution.

So, once again, in conclusion, I find that EMC lacks standing because it hasn't shown there's an actual case or controversy within the meaning of Article III of the Constitution.

In addition, although it's not necessary to go further, in the interests of completeness, I've explained that EMC has also not shown that it would be appropriate for me to exercise my discretion and issue a declaratory judgment if it

did have standing.

And, finally, even if there was an actual case or controversy, there wouldn't be a proper basis for issuing a permanent injunction, which any injunction issued today would, as a practical matter, be.

As I said, the transcript will be the record of the decision. I may convert it into a more formal memorandum and order. But what I will issue today is a very short order allowing the motion to dismiss and dismissing the case. The Court will be in recess.

MR. OFFENHARTZ: Your Honor, may I make one request, please? Your Honor, we -- EMC seeks a preliminary injunction pending an expedited appeal based --

THE COURT: You can file whatever you want, but I'll tell you the following: In order to get such relief, I think you're going -- you'll have to file that under the proper standards. And when it's filed, and I get a response, I'll deal with it. But you have to make certain showings to get a stay pending appeal or to get an injunction pending appeal, and you're going to have to make written submissions that address those standards.

MR. OFFENHARTZ: Your Honor, my understanding is that, in order to take this up to the First Circuit, it is appropriate to ask your Honor at this juncture --

THE COURT: You have to ask it, but -- but I'm

ordering you to ask it in a written motion, supported by a memorandum that addresses the requirements for, in effect, a stay pending appeal. But I'm not going to -- unless you tell me that you're going -- I think you would probably -- you're going to have to make that submission. But you're seeking -- I don't even understand at the moment what my order would be. So you're going to have to put it in writing, support it with a memorandum. The defendants will respond to it and I'll decide. But if what you're asking me for is to order pending appeal that you don't have to include the proposal in your materials, that would be granting you the preliminary injunction that I just denied you.

MR. OFFENHARTZ: Your Honor, I fully understand that this is a necessary, if -- a necessary but perhaps repetitive or seemingly futile request. I recognize I am asking you to grant the very relief you just said no to. I'm simply asking you, and if your Honor denies that request, we will go on our way.

THE COURT: I'm denying it now. I don't have it properly in front of me. I just admitted you pro hac vice. Local Rule 7.1 requires motions be made in writing, be supported by affidavits and memoranda addressing matters of -- issues of law, citing cases. There are standards for getting a stay pending appeal, but it's not immediately obvious to me how they apply here. When you file your motion and your

memorandum, I'll consider what you submit. But such stays are not automatic. Here, in effect, you're seeking a mandatory injunction that I just denied.

So, you know, you've got four lawyers sitting here. Maybe the folks back there are with you, too. You know, you filed this case two months ago. I've given it very high priority despite all the competing matters that I have. But I don't have a motion in front of me. I don't have a memorandum in front of me. I'm not granting or denying your oral motion. I'm telling you that, if this remains an urgent matter, some of you will have to begin working on it today. And when you file something and I get a response or have opportunity to deal with it, I'll deal with it.

04:07

And your answers to my questions earlier suggest to me that some of this urgency may be artificial in the sense that, if it's very important to EMC, you know, to litigate this to an informed conclusion, you might want to move your annual meeting. I don't know that there's any legal impediment to that.

04:08

But all I'm saying now -- we've been here more than two hours, and I've given you a thoughtful decision, which is the best I can do given the limited time. The briefing in this case was not complete until about three days ago -- that there are distinct standards for getting a stay pending appeal. And you're looking for an injunction pending appeal. Brief it.

Use the law in the First Circuit. That's where you are now. And when I get it, consistent with my other obligations and consistent with getting the transcript, which I'm sure you'll order, I'll decide it.

Court is in recess.

(Whereupon, at 4:09 p.m. the hearing concluded.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/Cheryl Dahlstrom — 03/11/2014

Cheryl Dahlstrom, RMR, CRR — Dated

Official Court Reporter

# Omnicom Group Inc.

Michael J O'Brien
Sr. Vice President,
General Counsel and Secretary

March 12, 2014

**VIA ELECTRONIC MAIL**

Office of the Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: **Omnicom Group Inc. Shareholder Proposal from John Chevedden**

Ladies and Gentlemen:

Omnicom Group Inc., a New York corporation (the "***Company***"), hereby amends and supersedes its letter of January 20, 2014 (the "***Original Letter***") to the Division of Corporation Finance (the "***Staff***") in which the Company stated its reasons for excluding from its proxy statement for the Company's 2014 Annual Meeting of Shareholders (the "***Proxy Materials***") a shareholder proposal (attached hereto as Exhibit A, the "***Proposal***") and related supporting statement submitted by Mr. John Chevedden ("***Chevedden***").

The Company respectfully requests confirmation that the Staff will not recommend enforcement action to the Securities and Exchange Commission (the "***Commission***") if the Company excludes the Proposal pursuant to Rule 14a-8(i)(3), as the Proposal violates the proxy rules, including Rule 14a-9, because it is impermissibly vague and indefinite. As discussed below, the Company notes that on March 4, 2014, the Staff recently determined that nearly identical proposals submitted to Intel Corporation, Verizon Communications Inc. and Newell Rubbermaid Inc., two of which were from Chevedden, could be excluded pursuant to Rule 14a-8(i)(3) because those proposals were vague and indefinite, noting that those proposals did not sufficiently explain when the requested bylaw or policy would apply. *Intel Corporation* (avail. Mar. 4, 2014); *Verizon Communications Inc.* (avail. Mar. 4, 2014); *Newell Rubbermaid Inc.* (avail. Mar. 4, 2014) (together, the "***No-Action Letters***").

In accordance with Rule 14a-8(j)(2) and Staff Legal Bulletin No. 14D (November 7, 2008), we are submitting by electronic mail (i) this letter, which sets forth our reasons for excluding the Proposal; and (ii) Chevedden's letter submitting the Proposal. By copy of this letter, we are advising Chevedden of the Company's amended reasons for excluding the Proposal.



NY\6190681.5 437 Madison Avenue, New York, NY 10022 (212) 415-3640 Fax (212) 415-3574

The Company intends to file its definitive proxy statement with the Commission on or about April 10, 2014. The Company believes that it has complied with the requirements of Rule 14a-8(j) by submitting the Original Letter on January 20, 2014, which was not less than 80 days before the Company intends to file its definitive Proxy Statement with the Commission. However, in the alternative, if the Staff believes that the Company has not complied with the requirements of Rule 14a-8(j) because this letter is being sent to the Staff fewer than 80 calendar days before such date, as described below, the Company requests that the Staff waive the 80-day requirement with respect to this letter.

The Company notes that on January 21, 2014, it filed a lawsuit against Chevedden in the United States District Court for the Southern District of New York seeking a declaratory judgment that it could exclude the Proposal from the Proxy Materials on the grounds cited in the Original Letter. On February 20, 2014, Chevedden delivered a letter (attached hereto as Exhibit B, the "***Chevedden Letter***") to the Company's counsel in which he "irrevocably" promised "not to sue" the Company if it excluded the Proposal from the Proxy Materials. On March 11, 2014, citing the Chevedden Letter, the court dismissed the lawsuit on the grounds that there was no case or controversy, writing that the Company "does not face suit from Mr. Chevedden if it excludes his proposal, and the possibility of SEC investigation or action is remote." Nevertheless, because Chevedden has refused to withdraw the Proposal, the Company is hereby submitting this request.

**I. The Proposal.**

On December 5, 2013, Chevedden sent an email to the Company. Attached to that email was a letter dated December 5, 2013, addressed to the chairman of the Company's Board of Directors (the "***Board***"), and enclosing the Proposal, entitled "[OMC: Rule 14a-8 Proposal, December 5, 2013], 4* - Confidential Voting". The Proposal and its supporting statement provide in part as follows:

> Shareholders request our Board of Directors to take the steps necessary to adopt a bylaw that prior to the Annual Meeting, the outcome of votes cast by proxy on uncontested matters, including a running tally of votes for and against, shall not be available to management or the Board and shall not be used to solicit votes. This enhanced confidential voting requirement should apply to 1) management-sponsored or Board-sponsored resolutions seeking approval of executive pay or for other purposes, including votes mandated under applicable stock exchange rules; 2) proposals required by law, or the Company's Bylaws, to be put before shareholders for a vote (e.g., say-on-pay votes); and 3) Rule 14a-8 shareholder resolutions included in the proxy.
>
> This enhanced confidential voting requirement shall not apply to elections of directors, or to contested proxy solicitations, except at the Board's discretion. Nor shall this proposal impede our Company's ability to monitor the number of votes cast to achieve a quorum, or to conduct solicitations for other proper purposes.

The December 5, 2013 letter, attaching the Proposal and supporting statement, is included in Exhibit A.

**II. Basis for Exclusion.**

The Company respectfully requests that the Staff concur with its view that the Proposal may be excluded from the Proxy Materials pursuant to Rule 14a-8(i)(3) because the Proposal and its supporting statement are impermissibly vague and indefinite.

Rule 14a-8(i)(3) provides that a shareholder proposal may be omitted from a proxy statement "[i]f the proposal or supporting statement is contrary to any of the Commission's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy materials." Rule 14a-9 specifically provides:

> No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

The Staff has explained that a shareholder proposal is excludable under Rule 14a-8(i)(3) if the proposal is "so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires." Staff Legal Bulletin No. 14B (Sept. 15, 2004), Item B.4.

Here, the Proposal is impermissibly vague and indefinite so as to be inherently misleading because, among other things, the Proposal is internally inconsistent and does not sufficiently explain when the requested policy would apply. As the Staff noted in the No-Action Letters, the Proposal provides that preliminary voting results would not be available for solicitations made for "other purposes," but that they would be available for solicitations made for "other proper purposes."

In particular, the first paragraph of the Proposal indicates that the "enhanced confidential voting requirement should apply to . . . management-sponsored or Board-sponsored resolutions seeking approval of executive pay *or for other purposes*" (emphasis added), using the phrase "for other purposes" as a catch-all to attempt to describe all the situations in which the Proposal *will* apply. Meanwhile, the second paragraph of the Proposal states, "[n]or shall this proposal impede our Company's ability to monitor the number of votes cast to achieve a quorum, or to conduct solicitations *for other proper purposes*" (emphasis added), using the substantially similar language, "for other proper purposes," as a catch-all to attempt to describe all the situations in which the Proposal will *not* apply.

In neither case does the Proposal clarify the meaning of "other purposes," or give any guidance as to what "other purposes" the particular paragraph refers. Because of this, these two paragraphs, which are functionally opposite and ought to be mutually exclusive, conflict. The first paragraph brings within the ambit of the Proposal those solicitations for the listed purposes, plus all other purposes, while the second paragraph removes from the ambit of the Proposal those solicitations for the listed purposes, plus all other purposes. This creates an internal inconsistency that is not resolved elsewhere in the Proposal, making it impossible to determine which matters are intended to be covered by the Proposal and which matters are intended *not* to be covered by the Proposal.

As noted above, the Staff has recently concurred in the exclusion of shareholder proposals that are, with respect to all relevant language, identical to the Proposal, concluding that "the proposal does not sufficiently explain when the requested [bylaw/policy] would apply." *Intel Corporation* (avail. Mar. 4, 2014); *Verizon Communications Inc.* (avail. Mar. 4, 2014); *Newell Rubbermaid Inc.* (avail. Mar. 4, 2014). The Staff specifically "note[s] that the proposal provides that preliminary voting results would not be available for solicitations made for 'other purposes,' but that they would be available for solicitations made for 'other proper purposes.'" *Id.* The Company believes, for this reason, that it may properly exclude the Proposal from the Proxy Materials as impermissibly vague and indefinite pursuant to Rule 14a-8(i)(3).

**III. Request for Waiver under Rule 14a-8(j)(1).**

The Company believes it has complied with the requirements of Rule 14a-8(j)(1) by delivering the Original Letter on January 14, 2014, which was not less than 80 days before the Company intends to file its definitive Proxy Statement with the Commission. If the Staff does not agree, in the alternative, the Company hereby requests that the Staff waive the 80-day filing requirement set forth in Rule 14a-8(j) for good cause.

Rule 14a-8(j)(1) requires that, if a company "intends to exclude a proposal from its proxy materials, it must file its reasons with the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission." However, Rule 14a-8(j)(1) allows the Staff, in its discretion, to permit a company to make its submission later than 80 days before the filing of its definitive proxy statement if the company demonstrates good cause for missing the deadline.

As noted above, the Staff has very recently concurred in the exclusion of shareholder proposals substantially identical to the Proposal on the same grounds as are set forth herein. The No-Action Letters were posted to the Commission's website on March 7, 2014, which is less than 80 days before the Company intends to file its definitive proxy statement. The No-Action Letters clarify that the Staff concurs with the Company's view that the Proposal is vague and indefinite because it does not sufficiently explain when the requested bylaw/policy would, and when it would not, apply. *Intel Corporation* (avail. Mar. 4, 2014); *Verizon Communications Inc.* (avail. Mar. 4, 2014); *Newell Rubbermaid Inc.* (avail. Mar. 4, 2014).

Based on the timing of the posting of the No-Action Letters, the Company believes that it has good cause for its inability to meet the 80-day requirement. The Company acted in good faith and in a timely manner following the posting of the No-Action Letters, to minimize any

delay. Accordingly, the Company respectfully requests that the Staff waive the 80-day requirement with respect to this letter.

## IV. Conclusion.

Based upon the foregoing analysis, the Company respectfully requests confirmation that the Staff will not recommend enforcement action to the Commission if the Proposal is excluded from the Company's Proxy Materials pursuant to Rule 14a-8(i)(3) because it is impermissibly vague and indefinite.

* * *

If the Staff does not concur with the Company's position, we would appreciate an opportunity to confer with the Staff concerning this matter prior to the determination of the Staff's final position. In addition, the Company requests that Chevedden copy the undersigned on any response he may choose to make to the Staff, pursuant to Rule 14a-8(k).

Sincerely,

Michael J. O'Brien
Senior Vice President, General Counsel and
Secretary

Enclosure

cc: Jeff Hammel, Latham & Watkins LLP
Joel H. Trotter, Latham & Watkins LLP
John Chevedden

# Exhibit A

**JOHN CHEVEDDEN**

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

Mr. Bruce Crawford
Chairman of the Board
Omnicom Group Inc. (OMC)
437 Madison Ave.
New York, NY 10022

Rule 14a-8 Proposal

Dear Mr. Crawford,

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

December 5, 2013
Date

cc: Michael J. O'Brien <michael.obrien@OmnicomGroup.com>
Michael J. O'Brien <IR@OmnicomGroup.com>
Corporate Secretary
PH: 212 415-3600
FX: 212 415-3530
Eric Cleary <eric.cleary@omnicomgroup.com>

[OMC: Rule 14a-8 Proposal, December 5, 2013]

**4* – Confidential Voting**

Shareholders request our Board of Directors to take the steps necessary to adopt a bylaw that prior to the Annual Meeting, the outcome of votes cast by proxy on uncontested matters, including a running tally of votes for and against, shall not be available to management or the Board and shall not be used to solicit votes. This enhanced confidential voting requirement should apply to 1) management-sponsored or Board-sponsored resolutions seeking approval of executive pay or for other purposes, including votes mandated under applicable stock exchange rules; 2) proposals required by law, or the Company's Bylaws, to be put before shareholders for a vote (e.g., say-on-pay votes); and 3) Rule 14a-8 shareholder resolutions included in the proxy.

This enhanced confidential voting requirement shall not apply to elections of directors, or to contested proxy solicitations, except at the Board's discretion. Nor shall this proposal impede our Company's ability to monitor the number of votes cast to achieve a quorum, or to conduct solicitations for other proper purposes.

Management is able to monitor voting results and take steps to influence the outcome on matters where they have a direct personal stake such as such as ratification of stock options. As a result, a Yale Law School study concluded: "Management-sponsored proposals (the vast majority of which concern stock options or other bonus plans) are overwhelmingly more likely to win a vote by a very small amount than lose by a very small amount to a degree that cannot occur by chance."

This proposal should also be more favorably evaluated due to our Company's clearly improvable corporate governance performance as reported in 2013:

GMI Ratings, an independent investment research firm, was concerned with our board of directors which it rated F. Seven of our directors had 16 to 27-years long-tenure. Long tenure has a reverse relationship with director independence. Long-tenured directors included: Gary Roubos (age 76), John Murphy (age 79), John Purcell (age 81) and our Chairman Bruce Crawford (age 84). Alan Batkin was negatively flagged by GMI due to his director duties at Overseas Shipholding Group when it filed for bankruptcy. Plus Leonard Coleman was potentially over-burdened with director duties at 4 companies. Our board had not formally taken responsibility in overseeing our company's social impacts.

In regard to executive pay there was $35 million for John Wren. Plus Omnicom could give long-term incentive pay to Mr. Wren for below-median performance.

Returning to the core topic of this proposal from the context of our clearly improvable corporate performance, please vote to protect shareholder value:

**Confidential Voting – Proposal 4***

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.
If the company thinks that any part of the above proposal, other than the first line in brackets, can be omitted from proxy publication based on its own discretion, please obtain a written agreement from the proponent.

*Number to be assigned by the company.
**Asterisk to be removed for publication.**

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).
The stock supporting this proposal is intended to 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 B**

**JOHN CHEVEDDEN**

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

February 20, 2014

Mr. Jeff Hammel
Latham & Watkins
885 Third Avenue
New York, NY 10022-4834

Dear Mr. Hammel,

I irrevocably promise not to sue Omnicom Group Inc. (OMC) if OMC does not include my 2014 rule 14a-8 proposal (Confidential Voting) in its 2014 annual meeting proxy statement.

Sincerely,

John Chevedden

# Omnicom Group Inc.

Michael J O'Brien
Sr. Vice President,
General Counsel and Secretary
January 20, 2014

**VIA ELECTRONIC MAIL**

Office of the Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: **Omnicom Group Inc. Shareholder Proposal from John Chevedden**

Ladies and Gentlemen:

Omnicom Group Inc. (the "***Company***") hereby files with the Securities and Exchange Commission (the "***SEC***") the Company's reasons for excluding from its proxy statement for the Company's 2014 Annual Meeting of Shareholders (the "***Proxy Materials***") a shareholder proposal (attached hereto as Exhibit A, the "***Proposal***") and related supporting statement submitted by Mr. John Chevedden ("***Chevedden***").

The Company plans to file its definitive proxy statement with the SEC on or about April 10, 2014. Accordingly, we are submitting this letter not less than 80 days before the Company intends to file its definitive proxy statement. A copy of this letter and its attachments is being e-mailed on this date to Mr. Chevedden.

This is not a request for a no-action letter. The Company is contemporaneously initiating a lawsuit in the U.S. District Court for the Southern District of New York seeking a judicial declaration that the Company does not have to include the Proposal in its Proxy Materials.

We have concluded that the Proposal may be properly omitted from the Proxy Materials on the following grounds:

- Rule 14a-8(i)(2) permits the exclusion of proposals that would, if implemented, cause the Company to violate any state, federal or foreign law to which it is subject;

- Rule 14a-8(i)(3) permits the exclusion of proposals that violate the proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials; and

- Rule 14a-8(i)(7) permits the exclusion of proposals that deal with a matter relating to the Company's ordinary business operations.



NY\6151607.4 437 Madison Avenue, New York, NY 10022 (212) 415-3640 Fax (212) 415-3574

**BACKGROUND**

On December 5, 2013, Chevedden sent an email to the Company. Attached to that email was a letter dated December 5, 2013, addressed to the chairman of the Company's Board of Directors (the "***Board***"), and enclosing the Proposal, entitled "[OMC: Rule 14a-8 Proposal, December 5, 2013], 4* Confidential Voting".

The Proposal and its supporting statement provide as follows:

> Shareholders [sic] request our Board of Directors to take the steps necessary to adopt a bylaw that prior to the Annual Meeting, the outcome of votes cast by proxy on uncontested matters, including a running tally of votes for and against, shall not be available to management or the Board and shall not be used to solicit votes. This enhanced confidential voting requirement should apply to 1) management-sponsored or Board-sponsored resolutions seeking approval of executive pay or for other purposes, including votes mandated under applicable stock exchange rules; 2) proposals required by law, or the Company's Bylaws, to be put before shareholders for a vote (e.g. say-on-pay votes); and 3) Rule 14a-8 shareholder resolutions included in the proxy [sic].
>
> This enhanced confidential voting requirement shall not apply to elections of directors or to contested proxy solicitations, except at the Board's discretion. Nor shall this proposal impede our Company's ability to monitor the number of votes cast to achieve a quorum, or to conduct solicitations for other proper purposes.
>
> Management is able to monitor voting results and take steps to influence the outcome on matters where they have a direct personal stake such as such as [sic] ratification of stock options. As a result, a Yale Law School study concluded: "Management-sponsored proposals (the vast majority of which concern stock options or other bonus plans) are overwhelmingly more likely to win a vote by a very small amount than lose by a very small amount to a degree that cannot occur by chance."
>
> This proposal should also be more favorably evaluated due to our Company's clearly improvable corporate governance performance as reported in 2013:
>
> GMI Ratings, an independent investment research firm, was concerned with our board of directors which it rated F. Seven of our directors had 15 to 27-years [sic] long-tenure. Long tenure has a reverse relationship with director independence. Long-tenured directors included: Gary (Roubos (age 76), John Murphy (age 79), John Purcell (age 81) and our Chairman Bruce Crawford (age 84). Alan Batkin was negatively flagged by GMI due to his director duties at Overseas Shipholding Group when it filed for bankruptcy. Plus Leonard Coleman was potentially over-burdened with director duties at 4 companies. Our board had not formally taken responsibility in overseeing our company's social impacts.

In regard to executive pay there was $35 million for John Wren [sic]. Plus Omnicom could give long-term incentive pay to Mr. Wren for below-median performance [sic].

Returning to the core topic of this proposal from the context of our clearly improvable corporate performance, please vote to protect shareholder value:

Confidential Voting – Proposal 4*

The December 5, 2013 letter, attaching the Proposal and supporting statement are included in Exhibit A.

**ANALYSIS**

**I. The Proposal may be excluded under Rule 14a-8(i)(2) because the Proposal would, if implemented, cause violations of New York Law.**

Rule 14a-8(i)(2) permits a company to exclude a shareholder proposal from its proxy materials where "the proposal would, if implemented, cause the company to violate any state, federal or foreign law to which it is subject." Chevedden's proposal, if implemented, would do just that.

Under New York law, a board of directors has ultimate responsibility for the management of a company. *See* N.Y. BUS. CORP. LAW § 701 (Consol. 2013). New York law also imposes on directors fiduciary duties in discharging those responsibilities, and entitles directors to consider certain types of information in order to do so:

> A director shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances. *In performing his duties, a director shall be entitled to rely on information, opinions, reports or statements including financial statements and other financial data, in each case prepared or presented by . . .*
>
> (2) counsel, public accountants or *other persons as to matters which the director believes to be within such person's professional or expert competence . . .*

N.Y. BUS. CORP. LAW § 717(a) (Consol. 2013) (emphases added).

The Proposal, however, would categorically deprive directors of information, including information on which they are entitled to rely under New York law. During shareholder proxy voting, proxy solicitation and investor communications firms, as well as others, routinely provide companies and their directors certain information about shareholder voting. This information can include data regarding how many votes have been cast, which shareholders have cast votes

and the status of the preliminary vote total. This information can inform companies and their directors regarding whether, and how, to communicate with shareholders and distribute additional proxy materials to shareholders in response to this preliminary voting information. Thus, rather than an anonymous, one-time decision on the part of the voter (as is common in elections for government offices), corporate proxy voting is more akin to an ongoing conversation between the company and its shareholders. Indeed, the SEC itself has recognized the importance of such communications between companies and their shareholders, stating "[t]he [] communication between a Board and the company's shareholders may lead to enhanced transparency into the board's decision-making process, more effective monitoring of this process by shareholders, and, ultimately, a better decision-making process by the board." SEC Facilitating Shareholder Director Nominations, 17 C.F.R. §§ 200, 232, 240, 249 (2010), (available at www.sec.gov/rules/final/2010/33-9136.pdf) at 345.

The Proposal would deprive the Company's directors, in advance and without any exceptions, from having access to certain information, including information on which directors are entitled to rely under New York law, and which can facilitate communications with the Company's shareholders. This restriction would apply even in instances—many of which cannot be foreseen—where the directors' fiduciary duties would require them to monitor such information in order to decide whether, and how, to communicate with shareholders on matters of critical importance to the company and its shareholders.

Blindfolding directors in this way, in disregard of their duties, is plainly inconsistent with New York law. For the foregoing reasons, the Company believes that it may properly exclude the Proposal from the Proxy Materials under Rule 14a-8(i)(2) because the Proposal would, if implemented, cause violations of New York Law.

**II. The Proposal may be excluded under Rule 14a-8(i)(3) because the Proposal and its supporting statement are impermissibly vague and indefinite, and materially false and misleading.**

Rule 14a-8(i)(3) permits a company to exclude a shareholder proposal "[i]f the proposal or supporting statement is contrary to any of the Commission's proxy rules, including 17 C.F.R. § 240.14a-9 [("Rule 14a-9")], which prohibits materially false or misleading statements in proxy materials." Rule 14a-9 specifically provides:

> No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

There are multiple reasons why Chevedden's Proposal should therefore be excluded

under Rule 14a-8(i)(3) and Rule 14a-9.

**A.** The Proposal is impermissibly vague and indefinite under Rule 14a-8(i)(3) because key terms are undefined or ambiguous.

The staff of the Division of Corporation Finance (the "***Staff***") of the SEC has explained that a shareholder proposal is excludable under Rule 14a-8(i)(3) if the proposal is "so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires." Staff Legal Bulletin No. 14B (Sept. 15, 2004), Item B.4.

Here, the Proposal is impermissibly vague and indefinite because, among other things, it fails to define key terms that are subject to multiple interpretations, and thus precludes shareholders and the Company from understanding precisely what it would require.

1. The undefined term "uncontested matters" is impermissibly vague and indefinite.

The Proposal purports to apply only to "votes cast by proxy on uncontested matters." This is impermissibly vague and indefinite on several levels.

The term "uncontested" is undefined yet, generally speaking, any matter that is subject to a vote is, by definition, contested. Resolving disputes is what voting is for. It is therefore anything but clear what matters, put up for a vote, are to be considered "uncontested" for purposes of the Proposal.

This ambiguity is underscored by the Proposal itself. The Proposal lists three categories of so-called "uncontested matters":

> 1) management-sponsored or Board-sponsored resolutions seeking approval of executive pay or for other purposes, including votes mandated under applicable stock exchange rules; 2) proposals required by law, or the Company's Bylaws, to be put before shareholders for a vote (e.g. say-on-pay votes); and 3) Rule 14a-8 shareholder resolutions included in the proxy.

However, all three of these supposedly uncontested matters can be (and often are) contested. Indeed, the third category ("Rule 14a-8 shareholder resolutions included in the proxy") is, as a practical matter, *always* contested. This is because if a company agrees with a shareholder's proposal, it simply implements the proposal without the need for a shareholder vote. Similarly, the first category of matter in the Proposal ("resolutions seeking approval of executive pay") appears, at a minimum, to substantially overlap the second circumstance ("say-on-pay" executive compensation voting).

As a result, it is far from clear which matters fall into which category of the Proposal, and would thus be subject to the Proposal. Neither the shareholders who would be asked to vote on it, nor the company who would be required to implement it if approved, can reliably understand

what matters it applies to or how to comply with it. For the foregoing reason, the Company believes that it may properly exclude the Proposal from the Proxy Materials pursuant to Rule 14a-8(i)(3).

2. The undefined term "running tally" is impermissibly vague and indefinite.

The Proposal would also require that management and the Board be denied access to a "running tally" of shareholder votes. However, the Proposal fails to define what that term means.

During proxy voting, in the time leading up to an annual meeting, companies often receive from investors, financial institutions, investor communications and proxy solicitation firms a variety of information about the shareholder voting at different points in time. The Proposal offers no explanation regarding which, if any, of this information is intended to be deemed a "running tally," whether it applies to both oral and written information, and which of these different types of voting information management and directors would therefore be prohibited from accessing. The Company and its directors clearly cannot control what information third parties choose to share with them. Indeed, there are instances in which such reports are legally *required* to be delivered to a company. For example, banks and brokers are obligated by Rule 14b-2 to provide to companies voting instructions of their beneficial owner-clients, and often do so through investor communication firms. *See* 17 C.F.R. § 240.14b-2(b)(2), (3). There is no way of knowing whether such information could be considered a "running tally" under the Proposal, which would impose the odd requirement that a management and a board ignore information legally required to be provided to the company.

Here again, there is no way for shareholders or the Company to understand what the Proposal would do, or how it would be implemented and complied with if approved. This is another independent basis on which the Company believes that it may properly exclude the Proposal from the Proxy Materials under Rule 14a-8(i)(3).

3. The undefined term "other proper purposes" is impermissibly vague and indefinite.

The Proposal states: "Nor shall this proposal impede our Company's ability to monitor the number of votes cast to achieve a quorum, or to conduct solicitations for other proper purposes." There is simply no telling what this means.

The sentence appears intended to create an exception to the Proposal, permitting access to voting information as long as it is for a "proper purpose." The term "proper purpose," however, is undefined. Its meaning is highly subjective and subject to multiple interpretations in various contexts. Accordingly, just as it is unknown which voting matters are intended to be covered by the Proposal (for reasons explained above), it is also unknown which voting matters are intended *not* to be covered by the Proposal under this "proper purpose" exception.

Here again, the Proposal itself highlights this ambiguity. On the one hand, it seeks to prevent access to voting information on certain "proposals required by law," but on the other hand it would permit access to voting information "to conduct solicitations for other proper

purposes"—as though a solicitation for "proposals required by law" is somehow not a proper purpose.

This portion of the Proposal simply makes no sense. There is certainly no way a shareholder can understand it or the Company to implement or abide by it in a coherent way. The Company believes, for this additional reason, that it may properly exclude the Proposal from the Proxy Materials as impermissibly vague and indefinite pursuant to Rule 14a-8(i)(3).

**B.** References to outside sources and other statements in the Proposal's supporting statement are materially misleading under Rule 14a-8(i)(3).

The Proposal is impermissibly vague and indefinite for still other reasons.

First, the supporting statement for the Proposal contains various assertions attributed to information reported by something called "GMI Ratings," an external source that is not publicly available. Based on a review of the GMI Ratings website, it is impossible to determine what data source or type of report the Proposal purports to be citing. Moreover, the structure of the supporting statement implies that GMI Ratings is the source of all the information contained therein, the accuracy of which the Company has no way of confirming. The Company is unable to verify the relevant GMI Ratings source (or sources) to which any or all of the statements in the supporting statement to the Proposal are attributable, whether those statements are accurately cited in the supporting statement or are taken out of context, or whether the GMI Ratings statements have been updated or are out of date. Chevedden's failure to provide the Company with this non-public source is an established basis for exclusion. *See* Staff Legal Bulletin No. 14G (Oct. 16, 2012), Item D.2 (reference to an external source that is not publicly available may be able to avoid exclusion "if the proponent, at the time the proposal is submitted, provides the company with the materials that are intended for publication on the website").

Second, portions of the supporting statement are demonstrably false. For example, it includes the following misleading and unintelligible partial sentence: "In regard to executive pay there was $35 million for John Wren." This is simply false (and in any event has nothing to do with the Proposal). Total compensation in 2012 for Mr. Wren, the Chief Executive Officer of the Company, as reported in the Company's 2013 Proxy Statement, was $14,846,067, not "$35 million."

The materially misleading statements in the Proposal form yet another independent basis on which the Company believes that it may properly exclude the Proposal from the Proxy Materials under Rule 14a-8(i)(3).

**C.** Substantial portions of the supporting statement are irrelevant to the subject matter of the proposal so as to be materially misleading under Rule 14a-8(i)(3).

There are still more independent grounds that warrant the exclusion of the Proposal under Rule 14a-8(i)(3). Rule 14a-8(i)(3) permits the exclusion of a proposal when "substantial portions of the supporting statement are irrelevant to a consideration of the subject matter of the proposal, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which she is being asked to vote." Staff Legal Bulletin 14B, Item B.4; *see also Boise Cascade Corp.* (Jan. 23, 2001) (permitting exclusion of supporting statements regarding the

director election process, environmental, and social issues and other topics unrelated to a proposal calling for separation of the CEO and chairman).

Here, substantial portions of the Proposal are irrelevant to a consideration of the subject matter of the Proposal. For instance, the supporting statement observes that seven of the Company's directors have tenures of more than sixteen years. Chevedden appears to be asserting through this fact that these long tenures threaten the directors' independence. Even if that were true, which it is not, director independence has no bearing on voting procedures outlined in the Proposal.

Similarly, the supporting statement asserts the Board "had not formally taken responsibility in overseeing our company's social impacts." This vague allusion to unspecified "social impacts" has nothing to do with confidential shareholder voting.

On this additional basis, the Company may exclude the Proposal from the Proxy Materials pursuant to Rule 14a-8(i)(3) because substantial portions of the supporting statement are irrelevant to the subject of the Proposal so as to be materially misleading.

## III. The Proposal may be excluded under Rule 14a-8(i)(7) because the Proposal impermissibly relates to ordinary business matters.

Under Rule 14a-8(i)(7), a company may exclude from its proxy materials a shareholder proposal that "deals with a matter relating to the company's ordinary business operations."

The SEC has stated that the policy underlying the ordinary business exclusion is based on two considerations: first, whether a proposal relates to "tasks so fundamental to management's ability to run a company on a day-to-day basis they could not be subject to shareholder oversight;" and second, whether a "proposal seeks to 'micromanage' a company by probing too deeply into matters upon which shareholders would not be in a position to make an informed judgment." Exchange Act Release No. 40,018, 17 C.F.R § 240 (May 21, 1998). Here, the Proposal would violate both of these principles.

First, the Proposal, if implemented, would inhibit the Company's ability to engage in routine dialogue with its shareholders. This is an ordinary business matter, not something appropriate for a shareholder vote.

Second, the Proposal asks shareholders to vote on issues on which they cannot reasonably be expected to make informed judgments. The Proposal asks shareholders to decide whether to prohibit the Company's management and directors from examining a "running tally" for three categories of "uncontested matters"—the definitions of which are, as explained above, far from clear—but to permit management and the Board to examine such information for all other matters.

Shareholders generally are not equipped to make such fine distinctions regarding how a company should conduct itself. Indeed, this is exactly the kind of micromanagement of company decisions that Rule 14a-8(i)(7) precludes. *See, e.g., Amazon.com, Inc.* (Mar. 20 2013) (finding the shareholder proposal requesting the board of directors hold a competition for giving public advice on the voting items in the proxy filing sought to micromanage the company to an

impermissible degree).

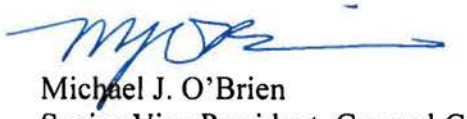
For the foregoing reasons, the Company believes that it may properly exclude the Proposal from the Proxy Materials under Rule 14a-8(i)(7) because the Proposal impermissibly relates to ordinary business matters.

* * *

To the extent that the reasons for exclusion of the Proposal from the Proxy Materials stated herein are based on matters of law, such reasons constitute the opinions of the undersigned, an attorney licensed and admitted to practice law in the State of New York. Such opinions are limited to the law of the State of New York and the federal law of the United States.

For the foregoing reasons, the Company believes that it may exclude the Proposal from its Proxy Materials.

Sincerely,



Michael J. O'Brien
Senior Vice President, General Counsel and Secretary

Enclosure

cc: Jeff Hammel, Latham & Watkins LLP
Joel H. Trotter, Latham & Watkins LLP
John Chevedden

# Exhibit A

**JOHN CHEVEDDEN**

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

Mr. Bruce Crawford
Chairman of the Board
Omnicom Group Inc. (OMC)
437 Madison Ave.
New York, NY 10022

Rule 14a-8 Proposal

Dear Mr. Crawford,

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

December 5, 2013
Date

cc: Michael J. O'Brien <michael.obrien@OmnicomGroup.com>
Michael J. O'Brien <IR@OmnicomGroup.com>
Corporate Secretary
PH: 212 415-3600
FX: 212 415-3530
Eric Cleary <eric.cleary@omnicomgroup.com>

[OMC: Rule 14a-8 Proposal, December 5, 2013]

**4* – Confidential Voting**

Shareholders request our Board of Directors to take the steps necessary to adopt a bylaw that prior to the Annual Meeting, the outcome of votes cast by proxy on uncontested matters, including a running tally of votes for and against, shall not be available to management or the Board and shall not be used to solicit votes. This enhanced confidential voting requirement should apply to 1) management-sponsored or Board-sponsored resolutions seeking approval of executive pay or for other purposes, including votes mandated under applicable stock exchange rules; 2) proposals required by law, or the Company's Bylaws, to be put before shareholders for a vote (e.g., say-on-pay votes); and 3) Rule 14a-8 shareholder resolutions included in the proxy.

This enhanced confidential voting requirement shall not apply to elections of directors, or to contested proxy solicitations, except at the Board's discretion. Nor shall this proposal impede our Company's ability to monitor the number of votes cast to achieve a quorum, or to conduct solicitations for other proper purposes.

Management is able to monitor voting results and take steps to influence the outcome on matters where they have a direct personal stake such as such as ratification of stock options. As a result, a Yale Law School study concluded: "Management-sponsored proposals (the vast majority of which concern stock options or other bonus plans) are overwhelmingly more likely to win a vote by a very small amount than lose by a very small amount to a degree that cannot occur by chance."

This proposal should also be more favorably evaluated due to our Company's clearly improvable corporate governance performance as reported in 2013:

GMI Ratings, an independent investment research firm, was concerned with our board of directors which it rated F. Seven of our directors had 16 to 27-years long-tenure. Long tenure has a reverse relationship with director independence. Long-tenured directors included: Gary Roubos (age 76), John Murphy (age 79), John Purcell (age 81) and our Chairman Bruce Crawford (age 84). Alan Batkin was negatively flagged by GMI due to his director duties at Overseas Shipholding Group when it filed for bankruptcy. Plus Leonard Coleman was potentially over-burdened with director duties at 4 companies. Our board had not formally taken responsibility in overseeing our company's social impacts.

In regard to executive pay there was $35 million for John Wren. Plus Omnicom could give long-term incentive pay to Mr. Wren for below-median performance.

Returning to the core topic of this proposal from the context of our clearly improvable corporate performance, please vote to protect shareholder value:

**Confidential Voting – Proposal 4***

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.
If the company thinks that any part of the above proposal, other than the first line in brackets, can be omitted from proxy publication based on its own discretion, please obtain a written agreement from the proponent.

*Number to be assigned by the company.
**Asterisk to be removed for publication.**

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(I)(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).
The stock supporting this proposal is intended to 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 ***