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

DIVISION OF
CORPORATION FINANCE

July 19, 2024

Thomas J. Ivey
Skadden, Arps, Slate, Meagher & Flom LLP

Re: NetApp, Inc. (the "Company")
Incoming letter dated May 3, 2024

Dear Thomas J. Ivey:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by John Chevedden for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal requests that the Company amend its bylaws to include specified requirements for fixing the compensation of directors.

There appears to be some basis for your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal seeks to micromanage the Company. Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on Rule 14a-8(i)(7). In reaching this position, we have not found it necessary to address the alternative bases for omission upon which the Company relies.

Copies of all of the correspondence on which this response is based will be made available on our website at https://www.sec.gov/corpfin/2023-2024-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: John Chevedden

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VIA STAFF ONLINE FORM

May 3, 2024

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

RE: NetApp, Inc. – 2024 Annual Meeting
Omission of Shareholder Proposal of
John Chevedden

Ladies and Gentlemen:

Pursuant to Rule 14a-8(j) promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), we are writing on behalf of our client, NetApp, Inc., a Delaware corporation (the "Company"), to request that the Staff of the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission (the "Commission") concur with the Company's view that, for the reasons stated below, it may exclude the shareholder proposal and supporting statement (the "Proposal") submitted by John Chevedden (the "Proponent") from the proxy materials to be distributed by the Company in connection with its 2024 annual meeting of stockholders (the "2024 proxy materials").

In accordance with relevant Staff guidance, we are submitting this letter and its attachments to the Staff through the Staff's online Shareholder Proposal Form. In accordance with Rule 14a-8(j), we are simultaneously sending a copy of this letter and its attachments to the Proponents as notice of the Company's intent to omit the Proposal from the 2024 proxy materials.

Rule 14a-8(k) and Section E of Staff Legal Bulletin No. 14D (Nov. 7, 2008) provide that shareholder proponents are required to send companies a copy of any correspondence that the shareholder proponents elect to submit to the Commission or the Staff. Accordingly, we are taking this opportunity to remind the Proponent that if the Proponent submits correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should concurrently be furnished to the Company.

I. The Proposal

The text of the resolution contained in the Proposal is set forth below:

The Bylaws of NetApp, Inc. are amended as follows:

Article III, Section 3.14 is deleted and replaced in its entirety as follows:

Compensation. Unless otherwise restricted by the Certificate of Incorporation or these Bylaws, the Board of Directors shall have the authority to fix the compensation of directors. The compensation of directors the corporation pays shall be fixed at $1 in a fiscal year; provided, however, the corporation may pay, grant, or award compensation greater than $1 in a fiscal year if such compensation has been (1) disclosed to stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation; (2) submitted to an approval vote of stockholders at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such disclosed compensation; and (3) approved by a majority of stockholder votes present in person or represented by proxies and entitled to vote cast in favor of the disclosed annual compensation at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation. No such payment shall preclude any director from serving the corporation in any other capacity and receiving compensation therefor. In the fiscal year in which this Section 3.14 takes effect, the Board shall continue to pay, grant, or award any such compensation that the Board has previously approved for such fiscal year. The directors may be paid their expenses, if any, of attendance at each meeting of the Board of Directors.

II. Bases for Exclusion

We hereby respectfully request that the Staff concur in the Company's view that it may exclude the Proposal from the proxy materials for the 2024 Annual Meeting pursuant to:

- Rule 14a-8(i)(2) because implementation of the Proposal would violate Delaware law;

- Rule 14a-8(i)(6) because the Company lacks the power or authority to implement the Proposal; and

- Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company's ordinary business operations.

III. Background

The Company received the Proposal via email on March 29, 2024. After confirming that the Proponent was not a shareholder of record, in accordance with Rule 14a-8(f)(1), on April 4, 2024, the Company sent a letter to the Proponent (the "Deficiency Letter"), via email, requesting a written statement from the record owner of the Proponent's shares verifying that it had beneficially owned the requisite number of shares of Company common stock continuously for at least one year as of the date of submission of the Proposal. On April 11, 2024, the Company received a letter from Fidelity Investments (the "Broker Letter"), dated April 11, 2024, verifying the Proponent's stock ownership. Copies of the Proposal and related correspondence are attached hereto as Exhibit A.[1]

IV. The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(2) Because Implementation of the Proposal Would Violate State Law.

The Company is incorporated in Delaware. The Proposal, if adopted, is binding and would immediately amend the Company's Bylaws and prohibit the Company's Board of Directors (the "Board") from providing any compensation to directors of more than $1 per year unless, among other requirements, the compensation is "approved by a majority of stockholder votes present in person or represented by proxies and entitled to vote cast in favor of the disclosed annual compensation at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation." Rule 14a-8(i)(2) permits a company to exclude a shareholder proposal if implementation of the proposal would cause the company to violate any state, federal or foreign law to which it is subject. As discussed below and based upon the legal opinion of Morris James LLP regarding Delaware law, attached hereto as Exhibit B (the "Delaware Opinion"), implementation of the Proposal would cause the Company to violate Delaware law. Accordingly, the Proposal is excludable under Rule 14a-8(i)(2) as a violation of state law.

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[1] Exhibit A omits correspondence between the Company and the Proponent that is irrelevant to this request, such as the aforementioned deficiency letter and subsequent response. *See* the Staff's "Announcement Regarding Personally Identifiable and Other Sensitive Information in Rule 14a-8 Submissions and Related Materials" (Dec. 17, 2021), available at https://www.sec.gov/corpfin/announcement/announcement-14a-8-submissions-pii-20211217.

The Staff consistently has permitted exclusion under Rule 14a-8(i)(2) of shareholder proposals regarding bylaw amendments that, if implemented, would cause the company to violate state law. *See, e.g.*, *eBay Inc.* (Apr. 16, 2024) (permitting exclusion under Rule 14a-8(i)(2) of a proposal requesting that the company amend its bylaws to include specified requirements for fixing the compensation of directors, noting that "in the opinion of Delaware counsel, implementation of the [p]roposal would cause the [c]ompany to violate state law"); *Verizon Communications Inc.* (Mar. 15, 2024, *recon. denied* Apr. 15, 2024) (permitting exclusion under Rule 14a-8(i)(2) of a proposal to adopt specific revisions to the director election resignation provisions in the company's bylaws, noting that "in the opinion of Delaware counsel, implementation of the [p]roposal would cause the [c]ompany to violate state law"); *The Goldman Sachs Group, Inc.* (Feb. 1, 2016) (permitting exclusion of a proposal under Rule 14a-8(i)(2) where the proposal, if implemented, would cause the company to violate Delaware law relating to the appointment of non-directors to board committees); *Vail Resorts, Inc.* (Sep. 16, 2011) (permitting exclusion under Rule 14a-8(i)(2) of a proposal requesting to amend the bylaws to "make distributions to shareholders a higher priority than debt repayment or asset acquisition" because the proposal would cause the company to violate state law); *Citigroup, Inc.* (Feb. 18, 2009) (permitting exclusion under Rule 14a-8(i)(2) of a proposal requesting to amend the bylaws to establish a board committee on U.S. economic security because the proposal would cause the company to violate state law); *Monsanto Co.* (Nov. 7, 2008, *recon. denied* Dec. 18, 2008) (permitting exclusion under Rule 14a-8(i)(2) of a proposal requesting to amend the bylaws to require directors to take an oath of allegiance to the U.S. Constitution because the proposal would cause the company to violate state law).

In this instance, the Proposal seeks an amendment to the Company's Bylaws that would fix director compensation at $1 in a fiscal year and subject any director compensation greater than $1 to disclosure and stockholder approval requirements. As more fully described in the Delaware Opinion, this would impermissibly interfere with the Board's ability to fix director compensation under Section 141(h) of the General Corporation Law of the State of Delaware (the "DGCL") in contravention of Section 109(b) of the DGCL. Specifically, Section 141(h) provides that "[u]nless otherwise restricted by the certificate of incorporation or bylaws, the board of directors shall have the authority to fix the compensation of directors." Such authority may be restricted by a corporation's organizational documents, but it may not be eliminated. The Proposal would mandate the adoption of a bylaw that does not merely restrict the Board's authority to fix director compensation but rather eliminates it entirely and subjugates it to stockholder authority, contrary to Delaware law. Accordingly, the Proposal is excludable under Rule 14a-8(i)(2) as a violation of state law.

V. The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(6) Because the Company Lacks the Power or Authority to Implement the Proposal.

Under Rule 14a-8(i)(6), a company may exclude a shareholder proposal if the company would lack the power or authority to implement the proposal. The Staff has consistently permitted exclusion of proposals under circumstances where implementation of the proposal would cause the company to violate law and, therefore, the company would have neither the power nor the authority to implement the proposal. *See, e.g., Arlington Asset Investment Corp.* (April 23, 2021)* (permitting exclusion under Rules 14a-8(i)(2) and 14a-8(i)(6) of a proposal that requested the company's officers liquidate the company's entire investment portfolio and distribute the net proceeds to shareholders and the company argued that the proposal would cause the company to violate Virginia law); *eBay Inc.* (April 1, 2020)* (permitting exclusion under Rules 14a-8(i)(2) and 14a-8(i)(6) of a proposal requesting that the company reform its board structure to allow employees to elect 20% of board members and the company argued that the proposal would cause the company to violate Delaware law); *Trans World Entertainment Corporation* (May 2, 2019) (permitting exclusion under Rules 14a-8(i)(2) and 14a-8(i)(6) of a proposal requesting that the company's bylaws be amended to provide for an elevated quorum requirement and the company argued that the proposal would cause the company to violate New York law).

The Staff also has consistently taken the position that "[p]roposals that would result in the company breaching existing contractual obligations may be excludable under rule 14a-8(i)(2), rule 14a-8(i)(6), or both, because implementing the proposal would require the company to violate applicable law or would not be within the power or authority of the company to implement." Staff Legal Bulletin No. 14B (Sept. 15, 2004). *See also, e.g., Cigna Corp.* (Jan. 24, 2017) and *Comcast Corp.* (Mar. 17, 2010). As discussed above and in the Delaware Opinion, the Proposal's implementation would cause the Company to violate Delaware law because the mandatory amendment to the Company's Bylaws contained in the Proposal would eliminate the Board's authority to fix the compensation of directors pursuant to Section 141(h) of the DGCL and adopt a bylaw provision contrary to statute in violation of Section 109(b) of the DGCL. In addition, neither the Company nor its Board has the authority to implement the Proposal as written because it would result in a breach of the Company's existing compensation arrangements for directors. As described in the Company's proxy statement for the 2023 annual meeting of stockholders (the "2023 Proxy Statement"), beginning in fiscal 2023, directors receive automatic annual equity grants in the form of restricted stock units ("RSUs"), which may be revised from time to time as the Board or the Talent and Compensation Committee deems appropriate, along with cash. Implementing the Proposal would effectively require the Company to repudiate obligations to pay both cash compensation and grants of RSUs that have been previously approved. Thus, the

* Citations marked with an asterisk indicate Staff decisions issued without a letter.

Proposal may be excluded under Rule 14a-8(i)(6) as beyond the Company's power to implement.

VI. The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(7) Because the Proposal Deals with Matters Relating to the Company's Ordinary Business Operations.

Under Rule 14a-8(i)(7), a shareholder proposal may be excluded from a company's proxy materials if the proposal "deals with matters relating to the company's ordinary business operations." In Exchange Act Release No. 34-40018 (May 21, 1998) (the "1998 Release"), the Commission stated that the policy underlying the ordinary business exclusion rests on two central considerations. The first recognizes that certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. The second consideration relates to the degree to which the proposal seeks to "micro-manage" the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment. As demonstrated below, the Proposal implicates this second consideration.

The Staff has consistently agreed that shareholder proposals attempting to micromanage a company by probing too deeply into matters of a complex nature upon which shareholders, as a group, are not in a position to make an informed judgment are excludable under Rule 14a-8(i)(7). *See* 1998 Release; *see also, e.g., JPMorgan Chase & Co.* (Mar. 22, 2019); *Royal Caribbean Cruises Ltd.* (Mar. 14, 2019); *Walgreens Boots Alliance, Inc.* (Nov. 20, 2018). As the Commission has explained, a proposal may probe too deeply into matters of a complex nature if it "involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies." 1998 Release. In Staff Legal Bulletin No. 14L (Nov. 3, 2021), the Staff explained that a proposal can be excluded on the basis of micromanagement based "on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management."

The Staff also has permitted exclusion on the basis of micromanagement of shareholder proposals urging the adoption of policies that impose specific methods for implementing complex policies. For example, in *Amazon.com, Inc.* (Apr. 7, 2023, *recon. denied* Apr. 20, 2023), the Staff permitted exclusion on the basis of micromanagement of a proposal that would have required the company to adopt a particular methodology for scope 3 greenhouse gas emissions measuring and reporting that was inconsistent with the company's existing approach. In its response, the Staff noted that "the [p]roposal seeks to micromanage the [c]ompany by imposing a specific method for implementing a complex policy disclosure without affording discretion to management." *See also The Coca-Cola Co.* (Feb. 16, 2022) (permitting exclusion on the basis of micromanagement of a proposal requesting that the company submit any proposed political statement to shareholders at the next shareholder meeting for

approval prior to issuing the subject statement publicly); *JPMorgan Chase & Co.* (Mar. 30, 2018) (permitting exclusion on the basis of micromanagement of a proposal that requested a report on the reputational, financial and climate risks associated with project and corporate lending, underwriting, advising and investing for tar sands production and transportation, noting that the proposal sought to "impose specific methods for implementing complex policies").

In this instance, the Proposal seeks to micromanage the Company by prescribing specific methods for implementing complex policies. It does so because it is a binding proposal that, if adopted, would immediately require that director compensation be fixed at $1 for any fiscal year, unless it is (i) disclosed to stockholders in advance of the year in which compensation will be paid, (ii) submitted for stockholder vote in advance of the year in which compensation will be paid and (iii) approved by a majority of stockholder votes in advance of the year in which compensation will be paid. Thus, the Proposal would eliminate the Board's ability to fix director compensation and inappropriately limit the Board's ability to exercise its business judgment in setting appropriate level of director compensation.

In addition, if approved, the Proposal would require the Company to quickly hold a special meeting of stockholders in order to vote on board compensation to either modify or ratify the Company's existing director compensation arrangements. This additional meeting would result in increased costs for the Company, to the detriment of stockholders. Because the Proposal requires approval of any modifications to director compensation "in advance of the year in which compensation will be paid," the Proposal would preclude the Company from modifying directors' compensation during the course of a year, even if stockholders support the change.

The Proposal also would interfere with the Company's ability to attract and retain highly-qualified directors. The principal objective of the Company's director compensation policy is to provide for competitive levels of non-employee director compensation in order to attract and retain highly-qualified directors to oversee the Company. The Proposal, however, would drastically reduce the compensation available for directors and director candidates and create significant uncertainty each year as to what, if any, compensation they might receive for their significant commitment of time and effort to serve on the Board. As a result, the Proposal, if implemented, would hinder the Company's ability to maintain a high-performing Board compared to competitors that can offer a predictable, competitive compensation package before candidates commit to board service. This would impermissibly interfere with the ability of the Company to manage a critical Board function and also place the Company at a significant competitive disadvantage.

Decisions concerning director compensation in particular forms, and at particular levels, entail complex business judgments by the Board. In this respect, as described in the 2023 Proxy Statement, the Board — through the Talent and

Compensation Committee (the "Committee") — exercises its business judgment and discretion to further the business objectives of attracting and retaining qualified directors to remain competitive. The 2023 Proxy Statement elaborates on the Committee's processes for determining the appropriate form and level of director compensation, noting that the Committee reviews, among other things, the annual cash retainer, the annual equity grant, fees for committee services, fees for chairs, grants on initial appointment and stock ownership guidelines for the Company's non-employee directors. The Proposal, however, would categorically prohibit the Committee from fixing director compensation based on its business judgment.

The Proposal's supporting statement makes clear that the goal of the Proposal is to replace the Board's judgment with stockholders' on the critical issue of "how and how much NetApp compensates directors." Specifically, the Proposal states that "[c]urrently, directors design and approve compensation with no approval from stockholders" such that "[d]irectors receive whatever compensation they desire," and that the Proposal's proposed Bylaws amendment "corrects this problem." Thus, the Proposal attempts to prescribe specific limitations on the ability of the Board to make business judgments, without any flexibility or discretion. As a result, the Proposal prescribes a specific method for implementing complex policies and, therefore, probes too deeply into matters of a complex nature upon which stockholders, as a group, are not in a position to make an informed judgment. Therefore, the Proposal attempts to micromanage NetApp and is precisely the type of effort that Rule 14a-8(i)(7) is intended to prevent.

Accordingly, the Proposal may be excluded from the Company's 2024 proxy materials pursuant to Rule 14a-8(i)(7) as seeking to micromanage the Company.

VII. Conclusion

Based upon the foregoing analysis, the Company respectfully requests that the Staff concur that it will take no action if the Company excludes the Proposal from its 2024 proxy materials. Should the Staff disagree with the conclusions set forth in this letter, or should any additional information be desired in support of the Company's position, we would appreciate the opportunity to confer with the Staff concerning these matters prior to the issuance of the Staff's response. Please do not hesitate to contact the undersigned at (650) 470-4522.

Very truly yours,

Thomas J. Ivey

Enclosures

cc: Elizabeth O'Callahan
Executive Vice President and Chief Legal Officer
NetApp, Inc.

John Chevedden

EXHIBIT A

(see attached)

JOHN CHEVEDDEN

[redacted]

[redacted]

Mr. Elizabeth OCallahan
Corporate Secretary
NetApp, Inc. (NTAP)
3060 Olsen Drive
San Jose, CA 95128
PH: 408-822-6000

Dear Ms. OCallahan,

This Rule 14a-8 proposal is respectfully submitted in support of the long-term performance of our company.

This Rule 14a-8 proposal is intended as a low-cost method to improve company performance – especially compared to the substantial capitalization of our company.

This proposal is for the next annual shareholder meeting.

I intend to continue to hold the required amount of Company shares through the date of the Company's next Annual Meeting of Stockholders and beyond as is or will be documented in my ownership proof.

This submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication.

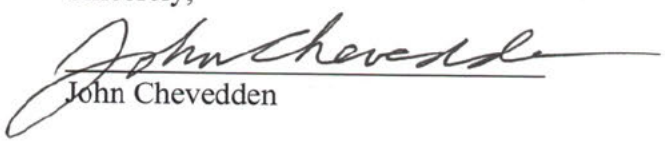
Please assign the proper sequential proposal number in each appropriate place.

Please use the title of the proposal in bold in all references to the proposal in the proxy including the table of contents, like Board of Directors proposals, and on the ballot. If there is objection to the title please negotiate or seek no action relief as a last resort.

I expect to forward a broker letter soon so if you acknowledge this proposal in an email message to [redacted]
it may very well save you from formally requesting a broker letter from me.

Please confirm that this proposal was sent to the correct email address for rule 14a-8 proposals. Per SEC SLB 14L, Section F, the Securities and Exchange Commission Staff "encourages both companies and shareholder proponents to acknowledge receipt of emails when requested."
I so request.

Sincerely,



John Chevedden

March 29, 2024
Date

cc: "Meese, Amy" <[redacted]>
"Tham, Bryan" <[redacted]>
Michele Quinnette <[redacted]>

[NTAP: Rule 14a-8 Proposal, March 29, 2024]
[This line and any line above it – *Not* for publication.]

Proposal 4 – Bylaw Amendment: Stockholder Approval of Director Compensation

The Bylaws of NetApp, Inc. are amended as follows:

Article III, Section 3.14 is deleted and replaced in its entirety as follows:

Compensation. Unless otherwise restricted by the Certificate of Incorporation or these Bylaws, the Board of Directors shall have the authority to fix the compensation of directors. The compensation of directors the corporation pays shall be fixed at $1 in a fiscal year; provided, however, the corporation may pay, grant, or award compensation greater than $1 in a fiscal year if such compensation has been (1) disclosed to stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation; (2) submitted to an approval vote of stockholders at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such disclosed compensation; and (3) approved by a majority of stockholder votes present in person or represented by proxies and entitled to vote cast in favor of the disclosed annual compensation at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation. No such payment shall preclude any director from serving the corporation in any other capacity and receiving compensation therefor. In the fiscal year in which this Section 3.14 takes effect, the Board shall continue to pay, grant, or award any such compensation that the Board has previously approved for such fiscal year. The directors may be paid their expenses, if any, of attendance at each meeting of the Board of Directors.

Supporting statement

NetApp stockholders seek an independent board, one that has as its sole objective representing stockholders without conflict of interest. One interest pertains to compensation and how NetApp compensates directors for board service. Stockholders seek the authority to approve compensation that directors receive from NetApp.

Stockholders want and need authority over how and how much NetApp compensates directors. If stockholders approve compensation, then directors have the greatest incentive to work in the sole interest of stockholders. Currently, directors design and approve compensation with no approval from stockholders. Directors receive whatever compensation they desire. This bylaw amendment corrects this problem.

The bylaw amendment provides for a stockholder vote on director compensation. Directors can continue to design and propose compensation structure and amount, including the mix and amount of cash and equity. Stockholders will have final approval over whether directors receive what directors propose. Stockholders will vote on director compensation as disclosed in the proxy statement for a stockholder meeting before the fiscal year in which directors receive that compensation.

We urge stockholders to approve this bylaw amendment and assume proper authority over the compensation of directors who represent us.

Notes:

Please use the title of the proposal in bold in all references to the proposal in the proxy and on the ballot. If there is objection to the title please negotiate or seek no action relief as a last resort.

"Proposal 4" stands in for the final proposal number that management will assign.

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 will be held until after the annual meeting and the proposal will be presented at the annual meeting. **I intend to continue holding the same required amount of Company shares through the date of the Company's next Annual Meeting of Stockholders as is or will be documented in my ownership proof.**

Please acknowledge this proposal promptly by email [redacted PII].

It is not intend that dashes (–) in the proposal be replaced by hyphens (-).
Please alert the proxy editor.

The color version of the below graphic is to be published immediately after the bold title line of the proposal at the **beginning** of the proposal and be **center justified**.

Please use the title of the proposal in bold in all references to the proposal in the proxy and on the ballot.
If there is objection to the title please negotiate or seek no action relief as a last resort.
Please do not insert any management words between the top line of the proposal and the concluding line of the proposal.

EXHIBIT B

(see attached)

Morris James LLP

May 3, 2024

NetApp, Inc.
3060 Olsen Drive
San Jose, California 95128

Re: Stockholder Proposal Submitted by John Chevedden

Ladies and Gentlemen:

We have acted as special Delaware counsel to NetApp, Inc., a Delaware corporation (the "Corporation"), in connection with the stockholder proposal (the "Proposal") submitted by John Chevedden (the "Proponent"), dated March 29, 2024, for inclusion in the Corporation's proxy materials for its 2024 annual meeting of stockholders. We have been advised that the Corporation is considering excluding the Proposal from its proxy statement for the 2024 annual meeting of stockholders under, *inter alia*, Rule 14a-8(i)(2) of the Securities Exchange Act of 1934, as amended. Rule 14a-8(i)(2) states that a proposal may be excluded "if the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." This letter is in response to the Corporation's request for our opinion whether the Proposal, if implemented, would violate the laws of the State of Delaware.

In rendering the opinion set forth below, we have examined and relied the following documents, in each case as are publicly available and filed with the Securities and Exchange Commission or as provided to us by the Company: (a) the Amended and Restated Certificate of Incorporation of the Corporation, dated September 10, 2021, (b) the Amended and Restated Bylaws of the Corporation, dated as of November 15, 2023 (the "Bylaws"), and (c) the Proposal (collectively, the "Documents"). In our examination of the Documents, we have assumed the genuineness of all signatures, the legal capacity and competency of all natural persons, the authenticity of all documents submitted to us as originals, the conformity to original documents of all documents submitted to us as electronic, certified or photocopied copies, and the authenticity of the originals of such copies. In connection with this letter, we have only reviewed the Documents and we assume that (i) the Documents have not been and will not be altered or amended in any respect material to our opinion as expressed herein and (ii) there exists no provision of any such other document that bears upon or is inconsistent with our opinion as expressed herein. As to all matters of fact relevant to the opinions expressed herein, we have relied on the factual representations and warranties made in the Documents. We have not independently established the facts made in the Documents and have conducted no independent factual investigation of our own.

If adopted, the Proposal would result in an amendment to the Bylaws. The Proposal states:

The Bylaws of NetApp, Inc. are amended as follows:

Article III, Section 3.14 is deleted and replaced in its entirety as follows:

> Compensation. Unless otherwise restricted by the Certificate of Incorporation or these Bylaws, the Board of Directors shall have the authority to fix the compensation of directors. The compensation of directors the corporation pays shall be fixed at $1 in a fiscal year; provided, however, the corporation may pay, grant, or award compensation greater than $1 in a fiscal year if such compensation has been (1) disclosed to stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation; (2) submitted to an approval vote of stockholders at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such disclosed compensation; and (3) approved by a majority of stockholder votes present in person or represented by proxies and entitled to vote cast in favor of the disclosed annual compensation at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation. No such payment shall preclude any director from serving the corporation in any other capacity and receiving compensation therefor. In the fiscal year in which this Section 3.14 takes effect, the Board shall continue to pay, grant, or award any such compensation that the Board has previously approved for such fiscal year. The directors may be paid their expenses, if any, of attendance at each meeting of the Board of Directors.

Based upon and subject to the foregoing, and subject to the assumptions, qualifications, limitations and exceptions set forth herein, we are of the opinion that the Proposal, if implemented, would violate Delaware law because it (i) eliminates the Board of Directors' (the "Board") authority to fix the compensation of directors pursuant to Section 141(h) of the General Corporation Law of the State of Delaware (the "DGCL") and (ii) adopts a bylaw provision contrary to statute in violation of Section 109(b) of the DGCL.

Section 141(h) of the DGCL states: "[u]nless otherwise *restricted* by the certificate of incorporation or bylaws, the board of directors shall have the authority to fix the compensation of directors."[1] 8 *Del. C.* § 141(h) (emphasis added). The Proposal seeks to fix compensation of

[1] "Section 141(h) was enacted in 1969 in response to early Delaware cases that called into question the ability of directors to receive compensation for their services . . . § 141(h) only

directors at "$1 in a fiscal year" absent stockholder approval. Fixing the compensation of the directors at $1 in a fiscal year is not a lawful restriction under Delaware law as it removes any discretion of the Board unilaterally and without the Board's consent and eliminates the Board's authority pursuant to Section 141(h) of the DGCL.[2]

Delaware law differentiates the concepts of "eliminate" and "restrict." Unlike other notable provisions of the Delaware Code where elimination is contemplated, Section 141(h) does not expressly provide for the elimination of the Board's authority to fix the compensation of the directors. *See* 8 *Del. C.* § 102(b)(7) (permitting a corporation to adopt a provision in its certificate of incorporation *eliminating* or limiting the personal liability of a director or officer to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director or officer in certain circumstances) (emphasis added); 6 *Del. C.* § 17-1101(d) ("the partner's or other person's duties may be expanded or restricted or *eliminated* by provisions in the partnership agreement") (emphasis added); 6 *Del. C.* § 18-1101(e) (a limited liability company agreement may not limit or *eliminate* liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing) (emphasis added). Further, Delaware courts have distinguished between restrict and eliminate. *See Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 167-68 (Del. 2002) ("'the partner's or other person's duties and liabilities may be *expanded or restricted* by provisions in the partnership agreement.' There is no mention in § 17–1101(d)(2), or elsewhere in DRULPA at 6 *Del. C.*, ch. 17, that a limited partnership agreement may *eliminate* the fiduciary duties or liabilities of a general partner.") (quoting 6 *Del. C.* § 17-1101(d));[3] *see also New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 545 (Del. Ch. 2023) ("By statute, a trust instrument governed by Delaware law may restrict, eliminate, or otherwise vary [a] fiduciary's powers . . . .") (quoting Gregory Klass, *What if Fiduciary Obligations are like Contractual Ones?*, in Contract and Fiduciary Law 93) (internal quotation marks omitted).

Section 109(b) of the DGCL states: "[t]he bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees." 8 *Del. C.* § 109(b). "[A] bylaw provision that conflicts with the DGCL is void." *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 398 (Del. 2010); *accord Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 497 (Del. 1985); *Datapoint Corp. v.*

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speaks to the authority of directors to set their own compensation." *Cambridge Retirement System v. Bosnjak*, 2014 WL 2930869, at *6 (Del. Ch. June 26, 2014).

[2] The supporting statement to the Proposal states "[w]e urge stockholders to approve this bylaw amendment and assume proper authority over the compensation of directors who represent us."

[3] Subsequent to *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 6 *Del. C.* § 17-1101(d) was amended to provide for the elimination of fiduciary duties.

Plaza Sec. Co., 496 A.2d 1031, 1036 (Del. 1985); *Kerbs v. California E. Airways*, 90 A.2d 652, 659 (Del. 1952).

The amendment to the Bylaws under the Proposal, if implemented, would eliminate the Board's authority to fix director compensation, thus violating Section 141(h) of the DGCL. Further, if implemented, the amendment to the Bylaws under the Proposal would violate Section 109(b) of the DGCL because the bylaw provision is inconsistent with the DGCL. Accordingly, the Proposal violates Delaware law and the amendment to the Bylaws proposed thereunder is invalid.

The foregoing opinions are subject to the following assumptions, exceptions, qualifications and limitations, in addition to those above:

A. The opinions in this letter are limited to the laws of the State of Delaware, including the DGCL. We have not considered and express no opinion on the laws of any other jurisdiction, including, without limitation, federal laws and rules and regulations relating thereto, including federal securities laws.

B. Except to the extent expressly stated in the opinion contained herein, we do not express any opinion with respect to the effect on the opinions stated herein of (i) the compliance or non-compliance of any party to any of the Documents with any laws, rules or regulations applicable to such party or (ii) the legal status or legal capacity of any party to any of the Documents.

C. The opinions rendered herein speak only as of the date of this letter and we undertake no duty to advise you as to any change in law or change in fact occurring after the delivery of this letter that could affect any of the opinions rendered herein.

This opinion is being furnished only to you and is solely for your benefit in connection with the matters addressed herein. Without our prior written consent, this opinion may not be used, circulated, quoted or otherwise referred to for any other purpose or relied upon by, or assigned to, any other person or entity for any purpose; provided, however, that a copy of this opinion may be furnished to the Securities and Exchange Commission and the Proponent.

Very truly yours,

Morris James LLP

VJC III/KTO

May 14, 2024

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

 # 1 Rule 14a-8 Proposal
NetApp, Inc. (NTAP)
Stockholder Approval of Director Compensation
John Chevedden
566626

Ladies and Gentlemen,

I write in response to the notice from NetApp that it intends to omit from its proxy statement and form of proxy for its 2024 Annual Meeting of Stockholders my stockholder proposal and supporting statement. We have sent a copy of this correspondence to NetApp.

NetApp asserts three bases for excluding the proposal:

1. Implementation of the proposal will cause NetApp to violate Delaware law (Rule 14a-8(i)(2))
2. NetApp lacks the power and authority to implement the proposal (Rule 14a-8(i)(6)
3. The proposal deals with matters related to NetApp ordinary business operations (Rule 14a-8(i)(7)).

This letter rebuts those bases and urges the SEC to seek an enforcement action if NetApp so omits the proposal.

The first two bases constitute a single basis, namely the proposal will cause NetApp to violate Delaware law. In the second listed basis, NetApp asserts it lacks the power and authority to implement the proposal because doing so will violate Delaware law. Below, we rebut both bases together in demonstrating that the proposal does not violate Delaware law.

We also address the third stated basis, ordinary business operations.

1. Violation of Delaware Law

Fix director compensation
Delaware law allows the proposed bylaw term that restricts the Board in setting director compensation.

NetApp asserts the proposal "eliminates … entirely" the "power [of directors] to determine director compensation". This allegedly violates Delaware law in that it "does not merely restrict the Board's authority to fix director compensation but rather eliminates it entirely and subjugates it to stockholder authority, contrary to Delaware law".

The letter from Delaware counsel distinguishes between "restrict" and "eliminate". It admits Delaware law allows NetApp bylaws to "restrict" directors in establishing their own compensation, but to not "eliminate" directors' rights to do so. The letter cites several examples that cite "eliminate" and "restrict" without arriving at a clear definition, based in Delaware law, of either. Without such a clear definition, their argument that Delaware law allows bylaws to "restrict" directors but not "eliminate" their rights has no meaning.

Based on common understanding of these terms, the proposal does not "eliminate" Board authority to set director compensation, only "restricts" it. In fact, the proposal allows the Board to design and recommend, in whatever structure and amount it wishes, in whatever detail the Board desires, the proposed director compensation for a fiscal year. It must then disclose whatever it designs, submit that design to a vote, and win a majority of shares voting. The bylaw term does not prescribe any element or detail of director compensation, nor does it provide in any way for shareholders to so prescribe. It merely provides for shareholders to vote on and approve whatever compensation the Board discloses. This does "restrict" the Board, but hardly "eliminates" its role in determining compensation.

Contractual obligations

NetApp asserts the bylaw term would "result in a breach of the Company's existing compensation arrangements for directors." We disagree the bylaw term will do this, as the director compensation programs that NetApp describes do not represent a binding contractual obligation.

NetApp refers to its compensation arrangements as "automatic annual equity grants in the form of restricted stock units … which may be revised from time to time as the Board … deems appropriate, along with cash." NetApp then asserts the proposal will require it to "repudiate obligations to pay both cash compensation and grants of RSUs that have been previously approved." NetApp does not explain how these plans represent a binding contract in which directors serve on the Board in consideration of the compensation to which NetApp refers. Directors agree to serve on the Board before they know the nature and extent of the compensation they will receive. At the time they accept their appointment, when elected at each annual shareholder meeting, they have yet to even discuss their precise future compensation. We presume those just-elected directors consider past compensation paid to directors, NetApp's history of reliably paying compensation, and possibly representations from NetApp that it intends to pay compensation in the future for Board service. However, we find no specific agreement between NetApp and a given director related to the specific compensation that directors receive. Thus, the arrangement between directors and NetApp fails to meet the definition of a contract. The proposal will not cause NetApp to abrogate a contract, and thus does not violate Delaware law.

We also note the proposal specifically excludes from shareholder approval any director compensation for the fiscal year in which the shareholders approve the proposal. Thus, NetApp can continue to pay directors their compensation that has already been approved by the Board.

2. Ordinary Business

NetApp asserts the bylaw term will "micromanage the company" and "prescribes specific methods for implementing complex policies." It thus allegedly represents ordinary business,

subject to exclusion under Rule 14a-8(i)(7). Either NetApp did not read the proposal closely, or misstates and misunderstands, inadvertently or willfully, the contents of the proposal. NetApp fails to show how the specific bylaw term, providing for a shareholder vote on director compensation, represents ordinary business.

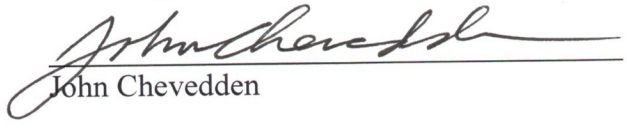
After an exhaustive recitation of the precedent about the ordinary business exception (p. 6-7), NetApp says the bylaw term "eliminates the Board's ability to fix director compensation". If we take "fix" to mean "approve", then this is true: approving director compensation will lie exclusively with shareholders, who will have final, restrictive authority over that compensation. However, this does not constitute micromanagement in the way that the regulation intends.

NetApp worries it cannot "modify or ratify" existing director compensation without a special stockholder meeting. It does not show how this constitutes micromanagement, either. NetApp complains that the proposal will "interfere with the … ability to attract and retain high-quality directors." Without agreeing whether this is in fact true, we point out NetApp again fails to show how it constitutes micromanagement.

NetApp also thinks the proposal will "prohibit [directors] from fixing director compensation based on its business judgment". As shown above, this is just not true, as directors can design and recommend, in whatever structure and amount it wishes, in whatever detail the Board desires, the proposed director compensation for a fiscal year. It also fails to show how this constitutes micromanagement.

Finally, NetApp asserts the proposal "prescribes a specific method for implementing complex policies and, therefore, probes too deeply into matters of a complex nature upon which stockholders, as a group, are not in a position to make an informed judgment." As shown above, directors can design and recommend compensation to shareholders. Furthermore, NetApp fails to show in any way how director compensation is too complex a subject for shareholders to vote on. We note shareholders now vote annual on executive compensation, a subject of at least as much and probably deeper complexity.

Sincerely,



John Chevedden

cc: Bryan Tham

[NTAP: Rule 14a-8 Proposal, March 29, 2024]
[This line and any line above it – *Not* for publication.]

Proposal 4 – Bylaw Amendment: Stockholder Approval of Director Compensation

The Bylaws of NetApp, Inc. are amended as follows:

Article III, Section 3.14 is deleted and replaced in its entirety as follows:

Compensation. Unless otherwise restricted by the Certificate of Incorporation or these Bylaws, the Board of Directors shall have the authority to fix the compensation of directors. The compensation of directors the corporation pays shall be fixed at $1 in a fiscal year; provided, however, the corporation may pay, grant, or award compensation greater than $1 in a fiscal year if such compensation has been (1) disclosed to stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation; (2) submitted to an approval vote of stockholders at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such disclosed compensation; and (3) approved by a majority of stockholder votes present in person or represented by proxies and entitled to vote cast in favor of the disclosed annual compensation at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation. No such payment shall preclude any director from serving the corporation in any other capacity and receiving compensation therefor. In the fiscal year in which this Section 3.14 takes effect, the Board shall continue to pay, grant, or award any such compensation that the Board has previously approved for such fiscal year. The directors may be paid their expenses, if any, of attendance at each meeting of the Board of Directors.

Supporting statement

NetApp stockholders seek an independent board, one that has as its sole objective representing stockholders without conflict of interest. One interest pertains to compensation and how NetApp compensates directors for board service. Stockholders seek the authority to approve compensation that directors receive from NetApp.

Stockholders want and need authority over how and how much NetApp compensates directors. If stockholders approve compensation, then directors have the greatest incentive to work in the sole interest of stockholders. Currently, directors design and approve compensation with no approval from stockholders. Directors receive whatever compensation they desire. This bylaw amendment corrects this problem.

The bylaw amendment provides for a stockholder vote on director compensation. Directors can continue to design and propose compensation structure and amount, including the mix and amount of cash and equity. Stockholders will have final approval over whether directors receive what directors propose. Stockholders will vote on director compensation as disclosed in the proxy statement for a stockholder meeting before the fiscal year in which directors receive that compensation.

We urge stockholders to approve this bylaw amendment and assume proper authority over the compensation of directors who represent us.