

## Schulte Roth's Ele Klein On Exxon And Shareholder Activism

By **Andrew Strickler**

*Law360 (June 2, 2021, 1:31 PM EDT)* -- Last week, a six-month-old activist hedge fund called Engine No. 1 scored a stunning victory against Exxon Mobil Corp. at the company's annual shareholder meeting.

Pushing a clean-energy agenda against the oil giant, shareholders elected two of four director candidates backed by the California-based fund, which holds a minuscule slice of Exxon stock. Exxon said Wednesday that preliminary voting results indicated that a third Engine No. 1 nominee would also join the 12-member board.

Eleazer "Ele" Klein, co-chair of the global shareholder activism group at Schulte Roth & Zabel LLP, represented Engine No. 1 in the proxy battle. He talked with Law360 Pulse about the David-versus-Goliath victory and what it means for shareholder activism and investing focused on environmental, social and governance issues, or ESG.

This interview has been edited and condensed for clarity and brevity.



Eleazer "Ele" Klein

### How did you get started in shareholder activism?

When I came to Schulte about 25 years ago, I was working with Marc Weingarten, who co-heads the shareholder activism group here.

Marc cut his teeth doing hostile takeovers back in the 1980s, which is the sort of the skill set that you have here. He started doing products that ended up being part of the broader [private investments in public equity] market and [special purpose acquisition company] market as it developed over the years.

There were other people, like Jeff Smith, who's now head of Starboard Value LP and one of the biggest activists out there. He and I were also working together when he was doing PIPEs at a prior shop. So it morphed into a practice that I started spending more and more time on as it became more mainstream, and I ended up co-heading the group.

The other piece is the client base that we have here at Schulte. Financial services, investment funds, investments-type entities and banks, that's our bread-and-butter type of client. As a result, we tend to have an outsized presence in anything which includes PIPEs and activism, and we have a unique ability to be able to do all aspects of what they do: the funds documents, the personal investing side, their trusts and estates, and the actual corporate stuff that I concentrate on.

### **What about the shareholder activism side of your practice do you find interesting?**

What attracted me to Schulte originally, going back to the very beginning, is the entrepreneurial spirit of the client base. You look for what the market has a need for, and you make the product fit into that — that's the nature of hedge funds, investment funds, and all the things the market has evolved to over the years. You're able to just make new products. The precedent is less important.

I've been blessed in the last couple of years as the environmental issues, which I think are very important to society, have taken on a new life. We're sitting with the client base that is going to have the spirit and the drive to make those things happen. So you get to do cutting-edge stuff.

Exxon itself, the campaign we're talking about now, had a big environmental component, and I've been working with a bunch of clients, Chris Hohn at [TCI Fund Management Ltd.], and other people who are really trying to make change and make the world better. Shareholder activism is a place where you get to put that stuff into action.

At its most fundamental, activism is looking for underperforming companies that aren't doing what they should be doing, and trying to help improve that performance. I find it fascinating, and really challenging, to be at the forefront of figuring out how to solve things, as opposed to just following the standard practices that exist in the general markets.

### **How did you get involved in the Engine No. 1 campaign? What was your connection?**

As I said, one of Schulte's strategic advantages is that we do everything — biased statement here — better than everyone. It's all under one roof, so there is no need to have another firm. And if you want the best people to figure out how to structure different investment-type products and vehicles, we have 100 lawyers in New York who just do that.

We did do all the formation type stuff for establishing Engine No. 1. As a firm, we have known Chris James, the founder of Engine No. 1, for many years. And Charlie Penner, who heads up the activist part of Engine No. 1, he was actually at Schulte many years ago. Charlie then went to [activist fund] JANA Partners, and we've worked closely and still work closely with them. When Charlie went to Engine No. 1 on a friendly basis, we had the opportunity to continue that relationship.

### **So was Engine No. 1 created, at least initially, for the purpose of getting board members at ExxonMobil?**

No, I don't think that's right. Chris James is a person that wants to make investments to better the world. The environmental issues are very near and dear to him, and for Charlie as well. Charlie was looking at things on the ESG side of the equation even at JANA, so they came together to make change, and the first thing you're seeing from that is this campaign.

### **How was this campaign similar or different from others you've been involved in?**

There have really been only two major campaigns, Procter & Gamble [in 2017] and this one, in terms of size and market capitalization, and we've been fortunate to be involved in both of them. These were iconic companies facing a drive for change, and that does create a unique set of factors.

What Engine No. 1 has done is really amazing in the sense that they had a real thesis. There was a company that had performance issues, it had environmental issues, they addressed them, and they put together a stellar group of people that could improve the company.

And particularly for a company as iconic as Exxon, that's the only way you can get to success, when you hit it on all parts, and you really put something together that doesn't really have flaws in it. They did that, and they deserve a lot of credit for it. It really shows you there is a gold standard for how to do these things, and when you can live up to that, you can really make a difference.

### **So what's your role specifically moving forward?**

That depends. If it's clear in the [inspector of elections] reports where the votes came out and there is nothing to dispute, then that's the end of it.

With Procter & Gamble, the votes were very close, and there was a lengthy debate as to where the votes came out. There was litigation involved, there was the proxy advisers and lawyers getting into what's called the snake pit to go through the votes to try to figure it all out.

It became quite an involved process post-election, and there's always a possibility of that happening here. But the hope is that we'll have none of that.

### **It looks to me like the result here took a lot of people by surprise. What kind of chances did you give this campaign going in?**

In any campaign where the votes are tight and there are so many big blocs, you can never be arrogant about accepting that you're going to win. You never know outcomes until the end because a lot of the big blocs don't vote until the very end.

In this case, I think the facts were pretty compelling and the need for change was pretty compelling. So we were not surprised; we were pleased.

### **What do you expect this victory to mean for the broader ESG movement and shareholder activism?**

This was historic. It definitely gives a vote of confidence and legitimacy to the environmental issues. We've seen the writing on the wall over the last two years and even the last year, and through a lot of things we're working on, that there is a true shift in the market and the will of the big investors to support environmental initiatives.

So I think this is very helpful for giving validation to that thesis. You would have expected these issues to get more attention going forward, but this is sort of an accelerant. And if you're on the fence on whether you'd do something or not because you're not sure about the support, this shows the support is there.

That doesn't mean you don't have to evaluate every situation for the facts that are there, and just

because there's an environmental issue doesn't mean it's a compelling story. But with the right facts, you now have at least validation that there is a path to success.

**Do you expect the Engine No. 1 campaign and the attention it's gotten to have an effect on your work and the profile of the firm?**

We've been doing over the last couple of years a lot more in this ESG area. We move with our clients, and they are going to be at the forefront of a lot of these issues. I do think the environmental slant on shareholder activism is going to increase because of this.

**I have a sense that younger lawyers coming into big law firms have more of an environmental bent than the older generations, and more concerns about the positions clients and firms take. Do you think Schulte's role in this will attract more people with that mindset?**

I hope so. The younger people have grown up with these feelings as opposed to older people who have had to come to these feelings. But I think everyone is coming to it at this point. And there have been certain objections to firms supporting things that are anti-ESG, or anti- what is viewed as societal improvement, and this does put us on the right side of that equation.

**You've worked for, and continue to work for, major hedge funds and others. With this campaign being so focused on the ESG outlook, do you have any concerns about business or public relations conflicts emerging in terms of positions taken by other clients the firm works with?**

Not really. Conflicts can arise in the normal course of any firm's business. And I would think that on this particular issue, most of our clients are on the same side. Nothing is always one-sided, of course, but I think the client base we have is much more going to be on the side of trying to push for these kinds of changes. So I don't think there will be any conflict issues; on the contrary, I think it would be more of everyone rolling in the same direction.

**What advice do you have for a younger lawyer interested in the shareholder activism practice?**

Good lawyers in this area have good fundamental skills. I began my career and still continue to play in [mergers and acquisitions], and a lot of shareholder activism is M&A activism. So you want to build up a fundamental skill set as you develop the skills to specialize, whether its from the M&A side or the litigation side.

This campaign shows you that, in the application of those fundamentals, you can do things in a way that improves society. It's also just really interesting, challenging, cutting-edge. It makes you sharp, and it requires you to have good practical skills. There is nothing cookie-cutter about it.

--Editing by Brian Baresch and Alyssa Miller.