

McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Houston London Los Angeles Miami Milan
Munich New York Orange County Rome San Diego Silicon Valley Washington, D.C.

Strategic alliance with MWE China Law Offices (Shanghai)

November 30, 2010

VIA E-MAIL rule-comments@sec.gov

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090 -

Re: File No. SR-NASDAQ-2010-137
Proposed Rule Change to Amend IM-5101-2 to Provide Acquisition Companies the
Option to Hold a Tender Offer in Lieu of a Shareholder Vote on a Proposed Acquisition -

Dear Ms. Murphy: -

We are writing to provide comments on the proposal by Nasdaq (the "Proposal") reflected in the Commission's "Notice of Filing of Proposed Rule Change to Amend IM-5101-2 to Provide Acquisition Companies the Option to Hold a Tender Offer in Lieu of a Shareholder Vote on a - Proposed Acquisition" (Release No. 34-63239; File No. SR-NASDAQ-2010-137). Capitalized-terms used but not defined in this letter have the respective meanings given to them in the Proposal.

Our firm has represented issuers and underwriters in a number of initial public offerings ("IPOs") of SPACs, as well as SPACs and acquisition targets in a number of business combination transactions.

Earlier this year, as counsel to the underwriters in the IPO of a SPAC,¹ we participated in a - meeting with Meredith Cross, Director of Corporation Finance, and other senior staff of the Commission (the "Staff") at the Commission's headquarters in Washington, D.C., in which we initially proposed the option for a SPAC to conduct a tender offer in lieu of a shareholder vote on its proposed acquisition. Since that IPO was completed in May 2010, we have represented either - the issuer or underwriters in two other completed SPAC IPOs which have include the tender offer option. These SPACs have not been able to list on Nasdaq because of the existing shareholder vote requirement.

We support Nasdaq's proposal to provide SPACs with an option to conduct a tender offer in lieu of a shareholder vote on a proposed acquisition. As we discussed with the Staff earlier this year,

¹ 57th Street General Acquisition Corp. (SEC File No. 333-163134).

the hallmark feature of a SPAC is that any shareholder who does not wish to continue to hold its shares following the completion of the SPAC's business combination transaction may redeem its shares for cash at the time of the business combination transaction. Nasdaq described this feature in its Proposal as the ability of shareholders to "vote with their feet." Shareholders derive no benefit from an additional requirement that the SPAC hold a shareholder vote and, as stated in the Proposal and further described below, holding a shareholder vote carries with it certain detriments.

We note, however, that the Proposal does not include any exemption from the shareholder voting requirements of Nasdaq Listing Rule 5635, which requires shareholder approval of certain issuances of shares by a listed company in excess of specified thresholds or where it results in a change of control. Most SPAC business combination transactions involve the issuance by the SPAC of a significant number of shares, which typically triggers one or more shareholder approval requirements of Rule 5635. As a result, we believe that the Proposal also should include a one-time exemption from the shareholder approval requirements of Rule 5635 for any share issuances by a SPAC in connection with its initial business combination transaction where shareholders are given the right to redeem their shares for cash pursuant to a tender offer conducted by the SPAC.

Nasdaq has stated that the shareholder approval requirements in Nasdaq Listing Rule 5635 were designed to provide shareholders with a greater level of participation in corporate affairs and with protection from the potential effects on them of certain significant corporate transactions.² In the case of a SPAC, its sole purpose is to engage in a significant corporate transaction. Every investor in a SPAC understands that the SPAC intends to engage in an initial business combination transaction that, by definition, is transformational. The protection that SPAC investors desire, and the participation which they are afforded, is the ability to "vote with their feet" and redeem their shares. This protection is embedded in the terms of the SPAC shares, and, as Nasdaq acknowledges in the Proposal, is afforded in the tender offer structure even absent a shareholder vote.³

Moreover, without a one-time exemption from the shareholder approval requirements of Rule 5635, a dichotomy would exist between a transformational transaction effected with cash consideration, in which shareholder approval would not be required, and a transformational transaction effected with stock consideration, in which shareholder approval would be required, despite the fact that the SPAC's business has been transformed to the same extent.⁴

² See Commission Release No. 34-26433 (January 13, 1989). -

³ "Nasdaq believes that the protections provided by the existing rule would continue to be available." Id. -

⁴ While a transaction effected with stock consideration would cause dilution, as opposed to a transaction effected with cash consideration, in the context of a SPAC, where under the Nasdaq rule the SPAC must complete its business combination with a target having a fair market value of at least 80% of the value of the trust account, we do not believe that this is meaningful difference. -

The requirement for the SPAC to hold a shareholder vote adds no protection beyond the ability of shareholders to “vote with their feet.” As we understand it, the shareholder vote requirement was originally included in the SPAC structure for two reasons.

The first was to provide a mechanism for disseminating information to investors about the SPAC’s proposed business combination transaction, *i.e.* the proxy statement. As described in the Proposal, the tender offer alternative accomplishes the very same purpose.

The second was to seek to ensure that only well-received transactions (*i.e.*, transactions receiving approval of the holders of a majority of the shares voted on the transaction) are consummated by the SPAC. While this may have been well-intentioned, “greenmail” tactics by opportunistic and activist investors, as well as the ability of the SPAC itself to use “forward contracts,”⁵ has allowed transactions to be consummated that were not, in reality, supported by holders of a majority of the shares voted on the transaction.

As noted in the Proposal, the shareholder vote requirement has resulted in certain negative consequences from what Nasdaq calls “greenmail” by certain opportunistic and activist investors. In addition to the negative consequences specified in the Proposal, the potential for “greenmail” and other delays and costs engendered by the shareholder vote could have the effect of narrowing the pool of quality acquisition targets for the SPAC, which is contrary to the interests of shareholders who want the broadest array of quality acquisition targets to be available for the SPAC’s business combination transaction.

In the tender offer context, on the other hand, Rule 14e-5 under the Securities Exchange Act of 1934, as amended, prevents the issuer and certain other covered persons from purchasing or entering into arrangements to purchase any subject shares outside the tender offer. As a result, we expect that the potential for any “greenmail” will be substantially reduced.

* * *

⁵ In a forward contract, the SPAC agrees to redeem the shares of common stock held by one or more shareholders immediately following the closing of the business combination transaction for a cash payment in excess of the amount they would have received had they chosen to redeem their shares at the time of the business combination transaction. The shareholder that is party to the forward contract typically votes in favor of the transaction, with the result that the transaction is approved by holders of a majority of shares voted, even though some of those holders do not wish to continue to hold their shares following the transaction.

Ms. Elizabeth M. Murphy

November 30, 2010

Page 4

We appreciate the opportunity to comment on the Proposal. While we support the Proposal, we believe that it must also include a one-time exemption from the shareholder approval requirements of Rule 5635 for any share issuances by a SPAC in connection with its initial business combination transaction. Otherwise, we do not believe that the Proposal would result in SPAC issuers listing on Nasdaq if they wish to include the tender offer option.

We would be pleased to discuss any questions the Commission or its Staff may have about this letter. Any questions may be directed to either of the undersigned at 212.547.5400.

Sincerely,

/s/

Joel L. Rubinstein

/s/

Jonathan Rochwarger