SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 69968 / July 11, 2013

Admin. Proc. File No. 3-14640

In the Matter of the Application of

CLEANTECH INNOVATIONS, INC.
c/o Paula D. Shaffner
Joshua R. Dutill
Stradley, Ronon, Stevens & Young, LLP
2600 One Commerce Square
Philadelphia, PA 19103

For Review of Action Taken by
The NASDAQ Stock Market, LLC

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE—DELISTING FROM THE NASDAQ STOCK MARKET, LLC

**Intentionally Withholding Documents Requested by NASDAQ Staff**

National securities exchange delisted issuer's securities based on its finding that issuer intentionally withheld documents requested by staff of exchange while staff was considering issuer's listing application. *Held*, delisting decision *set aside*.

APPEARANCES:

*Paula D. Shaffner* and *Joshua R. Dutill*, Stradley, Ronon, Stevens & Young, LLP, for CleanTech Innovations, Inc.

*Edward S. Knight*, *John M. Yetter*, *Arnold P. Golub*, and *T. Sean Bennett*, for The NASDAQ Stock Market, LLC.

Appeal filed: November 28, 2011
Last brief received: March 1, 2012

## I.

CleanTech Innovations, Inc. seeks review of the decision of The NASDAQ Stock Market, LLC[1] to delist CleanTech's common stock from the NASDAQ Capital Market. NASDAQ based its delisting decision on its finding that CleanTech intentionally withheld documents requested by NASDAQ staff while the staff was considering CleanTech's application to list its shares and thus violated NASDAQ Listing Rules 5205(e) and 5250(a)(1).[2] We base our findings on an independent review of the record.

## II.

This case concerns CleanTech's provision of information about financing transactions involving affiliates of Benjamin Wey, allegedly a promoter of reverse takeovers,[3] that closed on December 13, 2010 (the "December Financing"). NASDAQ staff repeatedly sought information about CleanTech's involvement with Wey while CleanTech's listing application was under review, and CleanTech responded to those information requests. On December 10, 2010, NASDAQ staff informed CleanTech that its listing application had been approved. One business day later, the December Financing closed, and three days after that, CleanTech filed a Form 8-K with the Commission disclosing the December Financing. NASDAQ staff then contacted CleanTech and obtained nearly 200 e-mails related to the December Financing that had not previously been disclosed, the earliest of which was written on November 30, 2010. NASDAQ found that by failing to provide documents about the December Financing before the listing was approved, CleanTech had intentionally withheld documents requested by the staff. The staff characterized this conduct as "an extremely serious violation of the Company's obligations under Nasdaq's rules," and delisted CleanTech's securities.[4]

### A. CleanTech applied for NASDAQ listing.

CleanTech, through wholly owned subsidiaries in China, designs, manufactures, tests, and sells structural towers for on-land and off-shore wind turbines and other specialty metal products. The company was formed in July 2010 by a reverse merger of a Chinese entity and a United States shell company; it traded in the Pink Sheets.[5]

---

1 The name of the market appears in the record as both "Nasdaq" and "NASDAQ." For consistency, we use "NASDAQ," except in quotations.

2 Rules 5205(e) and 5250(a)(1) provide that NASDAQ may deny an issuer initial or continued listing if any communication by the issuer to NASDAQ contains a material misrepresentation or omits material information necessary to make the communication to NASDAQ not misleading.

3 *See infra* note 9 and accompanying text (discussing Wey).

4 *CleanTech Innovations, Inc.*, No. NQ 5872C, at 8 (unnumbered) (NASDAQ July 22, 2011).

5 The Pink Sheets was the name commonly associated with an electronic quotation system that displayed quotes and last sale information for many over-the-counter securities. It is now operated by OTC Markets Group, Inc. with three operating systems: OTCQX, OTCQB, and

(continued…)

On July 14, 2010, shortly after its formation, CleanTech filed a listing application with NASDAQ. The application asked CleanTech to provide, among other things, a list of bridge financings and private placements consummated within the prior six months. The application also required a company officer of CleanTech to sign a certification that he or she would "notify NASDAQ promptly of any material changes to the information provided in the application."[6] Bei Lu, CleanTech's Chief Executive Officer, signed this certification. The law firm of Stevens & Lee, PC ("Listing Counsel") represented CleanTech in seeking NASDAQ listing.

**B. NASDAQ staff reviewed CleanTech's application.**

As the staff reviewed CleanTech's application, it contacted the company from time to time to request additional information. Some of the staff's requests were written, others were made orally in telephone calls or meetings. The record contains very little contemporaneous evidence of the exact terms of the oral inquiries. In many instances, the best evidence about oral requests and responses is provided by an affidavit by William W. Uchimoto, a partner with CleanTech's Listing Counsel, that was submitted in the delisting appeal before NASDAQ.[7]

On August 28, 2010, while NASDAQ staff was considering CleanTech's application, *Barron's* published an article about the growing frequency with which Chinese mid-market companies were reverse-merging with registered United States shell corporations to gain entrance to United States securities markets.[8] The article specifically discussed, and criticized, Benjamin Wey, introducing him as "[o]ne of the most controversial promoters of Chinese reverse takeovers" and identifying CleanTech as "Wey's latest success story."[9]

---

(…continued)
OTC Pink. *See History of the OTC Markets Group,* http://www.otcmarkets.com/about/otc-markets-history (all websites referenced in this opinion were last visited July 10, 2013).

[6] Excerpt from Listing Application, Ex. J to CleanTech's Submission in Support of Appeal to NASDAQ Listing and Hearing Review Council, Docket NQ 5872C-11.

[7] Affidavit of William W. Uchimoto (July 1, 2011) (hereinafter "Uchimoto Aff."). We have considered this affidavit, which is consistent in many respects with other documentary record evidence, for the truth of the factual representations it contains. *See, e.g., Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *22 (Feb. 4, 2008) (including affidavits among the categories of evidence that may be introduced to support a position), *petition denied*, 561 F.3d 548 (6th. Cir. 2009). In contrast, unsworn representations by counsel contained in briefs or memoranda are not evidence of the facts they purport to recount. *See Dennis Todd Lloyd Gordon*, Exchange Act Release No. 57655, 2008 SEC LEXIS 819, at *70 n.98 (Apr. 11, 2008) ("The assertions contained in Applicants' briefs are not evidence.").

[8] Bill Alpert & Leslie P. Norton, *Beware this Chinese Export*, BARRON'S (Aug. 28, 2010), http://online.barrons.com/article/SB50001424052970204304404575449812943183940.html.

[9] *Id*. The article also alluded to Wey's disciplinary history, which had been discussed in an earlier *Barron's* article. The specifics of Wey's disciplinary history are not relevant to our resolution of this matter, because NASDAQ did not base its delisting on the fact of Wey's

(continued…)

On September 1, prompted by the *Barron's* article, NASDAQ staff e-mailed CleanTech to request information about Wey and the services he had provided to the company. CleanTech responded the following day with an e-mail that described Wey as the owner and president of New York Global Group ("NYGG US"), which has a business relationship with New York Global Group China ("NYGG China").[10]

On October 15, CleanTech filed with the Commission a Form 8-K disclosing a financing transaction that closed on October 14 involving Strong Growth Capital Ltd., an entity affiliated with Wey (the "October Financing"). On October 18, NASDAQ staff, by e-mail, requested a conference call with CleanTech's counsel for the stated purpose of "ask[ing] a few questions regarding [CleanTech's] involvement with [Wey]."[11] On October 28, the staff sent CleanTech an e-mail requesting, among other things, "[a]ll documents, including e-mails and attachments, relating to all loans and/or similar arrangements to or from Benjamin Wey, NYGG [US], NYGG China, and/or affiliated persons and/or entities."[12] The request did not include any instruction to update responses on an ongoing basis.

The company gave the staff responsive documents other than e-mails on November 4. CleanTech proposed that Wey "personally appear before [the staff] to answer questions directly in lieu of producing email documents."[13] The staff agreed to meet with Wey, and did so on November 5.[14]

After talking with Wey, the staff still had questions about him and NYGG US. In a conference call on November 16, the staff asked CleanTech to describe the services that NYGG US and NYGG China "[had] performed, [were] currently performing, or [were] anticipated to

---

(…continued)
involvement (or that of his affiliates) with CleanTech, but rather on its finding that CleanTech deliberately failed to provide information about that involvement.

[10] The record contains references to "New York Global Group China," "New York Global Group Asia," and "New York Global Group China / Asia." We understand these references to refer to a single entity. To avoid confusion, we use the term "NYGG China" to refer to this entity.

[11] E-mail from Michael Wolf, NASDAQ OMX, to James M. Connolly (Oct. 18, 2010, 3:28 p.m.). The record does not show whether the conference call took place.

[12] E-mail from Michael Wolf, NASDAQ OMX, to William W. Uchimoto (Oct. 28, 2010, 11:19 a.m.).

[13] Uchimoto Aff. ¶10.

[14] NASDAQ introduced no evidence as to whether it understood that the meeting was to take the place of e-mail production, or whether it expected CleanTech to produce the requested e-mails notwithstanding the meeting.

perform" for CleanTech.[15] CleanTech responded by e-mail dated November 17.[16] There is no indication that CleanTech was asked to update its response on an ongoing basis.

The staff also orally asked CleanTech to provide e-mails on three occasions after the November 5 meeting with Wey. On November 8, the staff requested CleanTech's e-mails; the exact terms of this request are not in the record.[17] CleanTech provided those e-mails it considered non-privileged on November 12.[18] On November 22, the staff asked CleanTech to produce e-mails of the company's corporate counsel, the Newman Law Firm ("Corporate Counsel"). On November 24, after CleanTech's chief executive officer agreed to waive the attorney-client privilege, CleanTech responded, stating that it was providing the documents in response to the staff's November 22 oral request for "all retained e-mail communications of the Company's U.S. legal and disclosure counsel, Robert Newman, Esquire of the Newman Law Firm Pllc that [are] between, cop[y] or mention[] [NYGG China] or [NYGG US], including [NYGG US's] President, Benjamin Wey."[19] The record does not show that the staff told CleanTech that it had an ongoing obligation to update its response.[20]

One week later, on December 1, the staff orally requested e-mails from CleanTech's Listing Counsel.[21] In a conference call on December 2, the staff informed Listing Counsel that "'if every requested [Listing Counsel] email was not produced, [CleanTech's] listing review would not continue and the application would be denied.'"[22] Once again, CleanTech's CEO agreed to waive the attorney-client privilege, and Listing Counsel sent 182 pages comprising 262

---

15 Uchimoto Aff. ¶ 13. CleanTech's e-mail response to the call summarized the request in almost identical language.

16 CleanTech's response listed twelve types of services, including "[i]ntroductions of potential institutional investors and bridge lenders" and "provision of short term loan for working capital through [NYGG China] affiliate." E-mail from William W. Uchimoto, Stevens & Lee, P.C., to Traynham E. Mitchell Jr. (Nov. 17, 2010, 11:03 a.m.).

17 The Uchimoto affidavit states only, "On November 8, 2010, Mr. Sundick called me to request the Company's emails." Uchimoto Aff. ¶ 12.

18 The record is unclear as to whether CleanTech told the staff that it was withholding documents it viewed as privileged when it produced e-mails on November 12.

19 Letter from William W. Uchimoto, Stevens & Lee, to NASDAQ OMX Listing Qualifications, Attn: Traynham E. Mitchell Jr., Chief Counsel, Listing Investigations (Nov. 24, 2010).

20 In his affidavit, Uchimoto stated that he "was not aware of any NASDAQ staff request to me or any other Company representative to provide any updates as to previously submitted responsive documents." Uchimoto Aff. ¶ 21.

21 The exact terms of this request are not in the record.

22 Uchimoto Aff. ¶ 15 (purporting to quote Michael Emen, Senior Vice President, Listing Qualifications, NASDAQ).

e-mails, dated between August 2 and December 3, 2010, to the staff on December 3.[23] The record does not establish that the staff told CleanTech that it had an ongoing obligation to update its response.

By December 6, NASDAQ staff had received the e-mails sent on December 3, and a conference call between Listing Counsel and the staff to review those e-mails was scheduled for December 7. During the December 7 call, there was some additional discussion of Wey, but by the end of the call, the staff had shifted focus and had begun asking questions about CleanTech's contract with Toshiba, one of its suppliers. At the end of the call, Uchimoto had the impression that "the NASDAQ staff appeared comfortable with Mr. Wey and his consulting firm's role with the Company throughout the entire listing process."[24] The record does not show that there were any outstanding requests for information about Wey when the call concluded.[25]

**C. NASDAQ staff approved CleanTech's application, after which CleanTech disclosed new financing arrangements.**

On December 10, 2010, the staff sent CleanTech a letter stating that it had approved its application. The listing approval letter noted that the approval was based on information provided to the staff by the company or filed by the company with the Commission, and it instructed CleanTech to notify the staff promptly of any material change to such information.

Less than a week later, on December 16, CleanTech filed a Form 8-K disclosing the December Financing. The Form 8-K described the December Financing as involving "a closing of US $20,000,000 in a combination of equity and debt offerings through accredited institutional investors."[26] NASDAQ staff thereupon contacted CleanTech and obtained the e-mails at issue.[27]

---

[23] The Uchimoto affidavit states, "All requested emails in existence at that time were produced, whether privileged or not." Uchimoto Aff. ¶ 16.

[24] *Id*. ¶ 18.

[25] In recounting the facts of this matter in the delisting letter, the staff wrote: "Staff discussed [certain e-mails that CleanTech had not initially produced because they were also sent or copied to counsel] at length with the Company's outside counsel on December 7th, and the Company thereafter provided additional documents pursuant to this discussion." Letter from Gary N. Sundick, Vice President, Listing Qualifications, The NASDAQ Stock Market, LLC, to Bei Lu, Chairman & Chief Executive Officer, CleanTech Innovations, Inc., at 2 (Jan. 13, 2011). The record does not show whether these "additional documents" related to Wey. Moreover, we are unaware of any evidence (as opposed to filings by the parties) showing that CleanTech provided documents to the staff between December 3 and 16, 2010, when CleanTech filed its Form 8-K. *See supra* note 7 (distinguishing between affidavits, which may serve as evidence, and assertions made in briefs, which are not evidence).

[26] http://www.sec.gov/Archives/edgar/data/1382219/000114420410066849/v205629_8k.htm (Dec. 16, 2010).

[27] The record does not show the terms of the request that resulted in this production.

**D. NASDAQ delisted CleanTech's stock.**

On January 13, 2011, NASDAQ staff informed CleanTech by letter that, "[b]ased on [its] review of public documents and information provided by the Company," the staff believed that the continued listing of CleanTech's securities on NASDAQ was no longer warranted.[28] The staff found that CleanTech "failed to provide Staff with material information in violation of . . . the applicable Listing Rules."[29] The staff based its conclusion "on Nasdaq's broad discretionary authority contained in Listing Rule 5101 to deny continued inclusion of securities in order to maintain the quality of, and the public's confidence in, Nasdaq and the failure of the Company to comply with Listing Rules 5205(e) and 5250(a)(1),"[30] which provide that a company may be denied initial or continued listing if "any communication to Nasdaq contains a material misrepresentation or omits material information necessary to make the communication to Nasdaq not misleading."[31]

The delisting letter characterized the December Financing as "two material financing transactions," an equity portion and a debt portion, and found that

> neither of these material transactions was disclosed to Nasdaq prior to the filing of the Form 8-K on December 16th, despite the fact [that the] Staff had previously requested any such information with regard to Mr. Wey and Mr. Li or their affiliated entities; the [Company had a] general obligation to update Staff throughout the listing process concerning any material information; and the [listing application contained a specific question] concerning any bridge financings and private placements by the Company. . . . Substantial e-mail traffic was provided to Staff showing that these transactions were developed throughout the very period that Staff was considering whether to approve the Company's application. A number of these emails were copied to Mr. Wey and were required to have been produced to Staff by the clear terms of Staff's requests and discussions with Company counsel.[32]

The staff concluded that CleanTech's failure to inform NASDAQ of the December Financing "displays a blatant disregard for the integrity of the listing process and Nasdaq's Listing Rules," and that CleanTech's actions in "not only proceeding with the [December Financing], but also [hiding it] from Nasdaq . . . raise the risk that the company will continue to

---

28 Sundick letter, *supra* note 25, at 1.

29 *Id*. The delisting letter also alluded to a violation of CleanTech's obligations under its listing application, but as discussed below, NASDAQ did not base its decision on this ground, so we do not consider it.

30 *Id*. (footnote omitted).

31 *Id*. at 1 n.2.

32 *Id*. at 3-4.

act in a manner inconsistent with its obligations under the Nasdaq Listing Rules and the federal securities laws."[33] The staff therefore concluded that CleanTech's actions raised significant public interest concerns and that the delisting of the company's securities from NASDAQ was warranted.

**E. NASDAQ reviewed the delisting decision.**

CleanTech appealed the delisting decision, requesting a hearing before a NASDAQ Listing Qualifications Panel. On February 28, 2011, the hearing panel found that "the Company's failure to provide prior notice to Nasdaq of the [December Financing] displays an unacceptable disregard for the Company's obligations as a listing applicant and for staff's stated concerns regarding the association with Mr. Wey," and it determined to delist CleanTech's shares.[34] The hearing panel made few factual findings, stating that the underlying facts "are largely uncontroverted."[35]

CleanTech immediately asked the NASDAQ Listing and Hearing Review Council to review the hearing panel's decision. An acknowledgement letter, dated March 4, confirmed receipt of CleanTech's request for review, asked the staff to provide the Review Council with an updated qualifications sheet and any additional information that the staff believed would assist the Review Council, and informed CleanTech that it was allowed to submit any additional information that it wanted the Review Council to consider. In response to the acknowledgment letter, the staff submitted an updated qualifications summary sheet and a list of record documents. CleanTech submitted a brief and nineteen exhibits, including copies of record documents as well as newly prepared letters from NYGG US, Listing Counsel, and Corporate Counsel.

On May 19, the Review Council remanded the matter to the hearing panel because it found that the record lacked sufficient fact and detail on two issues critical to the staff's determination to delist CleanTech:

> "1. Did the Company intentionally withhold information from Staff concerning Mr. Wey and his affiliates, and/or the December Financing[?]
>
> 2. At what point did the Company become aware that listing approval was imminent? "[36]

---

[33] *Id*. at 4-6.

[34] Letter from Amy Horton, Chief Counsel, NASDAQ Office of General Counsel, Hearings, to A. David Strandberg III, Donohoe Advisory Associates LLC, at 3 (Feb. 28, 2011) (unnumbered).

[35] *Id*. at 2.

[36] *CleanTech Innovations, Inc.*, No. NQ 5872C (NASDAQ Listing and Hearing Review Council May 19, 2011).

But one week later, on May 26, the Review Council's remand decision was stayed based on a determination that CleanTech made an ex parte communication by not providing the staff with a copy of its submission and in so doing violated NASDAQ Rule 5835(a)(1).[37] The record was reopened to allow the staff to respond to the issues raised by CleanTech, and both CleanTech and the staff were directed to address the factual issues noted in the remand decision so that the Review Council would be able to deliberate on a complete record in its reconsideration of its decision. The parties filed additional briefs and evidence. The staff submitted as evidence selected e-mails and correspondence from the period August to December 2010 and a business card for Ming Li, identified as "Senior Managing Director" and "Chief China Representative" for NYGG US. CleanTech submitted, among other things, the Uchimoto affidavit, in which Uchimoto disavowed any knowledge of an ongoing obligation to update responses to staff information requests.

The Review Council affirmed the decision of the hearing panel on July 22. In so doing, it found that CleanTech's "repeated failure to provide information requested by Staff is likely sufficient by itself to warrant delisting . . ."[38] But rather than basing its decision solely on that ground, the Review Council also considered, and agreed with, the staff's contention that CleanTech's failure to disclose information about the December Financing was intentional. It found that "[b]ecause delisting is warranted on this basis," *i.e.*, CleanTech's intentional failure to disclose, it "need not address whether the Company also violated the duty imposed by the listing application, which requests information on financings and requires the applicant to 'notify NASDAQ promptly of any material changes' to its application."[39]

On November 23, 2011, CleanTech was notified that the Review Council's decision had become the final action of NASDAQ when the NASDAQ Board of Directors declined to call it for review.[40] This appeal followed.

---

[37] *See* NASDAQ Rule 5835(a)(1) (prohibiting ex parte communications relevant to the merits of a proceeding). CleanTech strongly disputed the characterization of its submission as an ex parte communication, and in its brief to the Commission, CleanTech further argues that it is unclear whether the determination that it was an ex parte communication was made in accordance with NASDAQ's rules. Our disposition of this matter makes it unnecessary to address these issues.

[38] *CleanTech Innovations, Inc.*, *supra* note 4, at 5.

[39] *Id*. at 5 n.12.

[40] NASDAQ represented in its brief to the Commission that, on December 9, 2011, CleanTech requested that the Board of Directors reconsider its determination not to review the Review Council's decision, to which NASDAQ responded by letter dated December 12, 2011, informing CleanTech that NASDAQ rules did not provide for the Board of Directors to call a decision for review after it had already declined once to do so.

**III**.

Our review is governed by § 19(f) of the Securities Exchange Act of 1934, which provides that we must dismiss CleanTech's appeal if we determine that the specific grounds on which the delisting is based exist in fact, that the delisting is in accordance with the applicable NASDAQ rules, and that those rules are consistent with, and were applied in a manner consistent with, the purposes of the Exchange Act.[41] NASDAQ has broad discretion in determining whether to permit a security's initial or continued listing on the Exchange,[42] and we are not free to substitute our discretion for NASDAQ's.[43] But in this proceeding, the record does not show that the specific grounds on which NASDAQ based its delisting decision exist in fact, and the considerable discretion afforded to NASDAQ therefore does not permit its delisting decision.[44]

NASDAQ based its delisting determination on its finding that "the record evidence warrants the conclusion that, when the Company failed to produce documents [regarding the December Financing] to Staff, it did so intentionally."[45] The Review Council identified four bases for its conclusion that CleanTech's withholding of information was intentional:

> (1) the Company was aware that Staff was closely examining its relationship and dealings with Mr. Wey and that Staff had requested all documents on the issue; (2) the Company knew that Staff would likely view the December Financing as a subject for further examination, as indeed it did; (3) the Company failed to provide information on the December Financing even as it was producing other

---

41 15 U.S.C. § 78s(f); *cf. Fog Cutter Capital Grp., Inc.*, Exchange Act Release No. 52993, 58 SEC 1049, 2005 SEC LEXIS 3280, at *13-14 (Dec. 21, 2005) (applying § 19(f) standard to NASD delisting decision), *petition denied*, 474 F.3d 822 (D.C. Cir. 2007). CleanTech has not alleged, and the record does not establish, that NASDAQ's action has created "any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act]" such that the Commission is required by § 19(f) to set aside NASDAQ's action.

42 *See* NASDAQ Listing Rule 5101 (providing that NASDAQ "has broad discretionary authority over the initial and continued listing of securities in Nasdaq in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest").

43 *Cf. Tassaway, Inc.*, Exchange Act Release No. 11291, 1975 SEC LEXIS 2057, at *7 (Mar. 13, 1975) (stating that Commission may not substitute its discretion for NASD's in determining whether security should be removed from automated quotation system).

44 NASDAQ's arguments in support of the grounds on which it based its delisting decision are not supported by facts established by the record, but only by assertions made in its briefs. As noted above, *see supra* note 7, unsworn representations by counsel contained in briefs or memoranda are not evidence of the facts they purport to recount, and we have declined to base findings on such representations. *Gordon*, 2008 SEC LEXIS 819, at *70 n.98.

45 *CleanTech Innovations, Inc.*, *supra* note 4, at 6.

documents regarding Mr. Wey; and (4) the Company had previously failed to provide all requested information.[46]

We address these bases in turn.

**A. Although the record evidence establishes that CleanTech knew that the staff was interested in its relationship to and dealings with Wey, it does not support a finding that the staff had requested the documents related to the December Financing that are at issue in this proceeding.**

The record shows that CleanTech was aware that NASDAQ staff was closely examining its relationship and dealings with Wey and that the staff had requested many documents related to that subject. But NASDAQ's statement that the staff had requested "all documents on the issue" of CleanTech's relationship and dealings with Wey—and thus, presumably, the documents related to the December Financing—is overly broad and is not supported by the record. The documents in question are the e-mails dated between November 30 and December 10, 2010 that were not produced until after CleanTech filed the Form 8-K disclosing the December Financing.[47] CleanTech cannot have intentionally withheld those documents while the staff was considering the listing application unless the staff made a request that encompassed them. But because the earliest of the documents at issue did not exist until November 30, CleanTech can be found to have intentionally failed to produce those documents only if the staff requested them on or after November 30 or a request made before November 30 included a requirement to provide updated responses that covered those documents.[48] The record evidence supports neither finding.

**1. There is no evidence that pre-November 30 requests covered the documents related to the December Financing.**

We find in the record no instruction to update that would have required CleanTech to provide the contested e-mails. Although Bei Lu certified, when she filed the application on July 14, 2010, that she would "notify NASDAQ promptly of any material changes to the information provided in the application," [49] NASDAQ did not base its decision on a violation of that duty; it explicitly declined to address "whether [CleanTech] also violated the duty imposed by the listing

---

[46] *Id.*

[47] NASDAQ did not base its decision on a finding that CleanTech's failure to notify NASDAQ of the consummated December Financing between December 13 and December 16 violated the listing rules.

[48] As noted above, NASDAQ explicitly stated that it was not addressing whether CleanTech "violated the duty imposed by the listing application, which requests information on financings and requires the applicant to 'notify NASDAQ promptly of any material changes' to its application." *CleanTech Innovations, Inc.*, *supra* note 4, at 5 n.12.

[49] Excerpt from Listing Application, *supra* note 6.

application, which requests information on financings and requires the applicant to 'notify NASDAQ promptly of any material changes' to its application."[50]

The October 28, 2010 e-mail to CleanTech from the staff contains a comprehensive request for "all documents, including e-mails and attachments, related to Benjamin Wey (a/k/a/ Wei), Ming Li, New York Global Group, NYGG China, and/or any other associated/affiliated persons and/or entities," and "all documents, including e-mails and attachments, relating to all loans and/or similar arrangements to or from Benjamin Wey, NYGG [US], NYGG China, and/or affiliated persons and/or entities."[51] But the e-mail contains no language that imposed an ongoing duty to update information provided in response, and NASDAQ points to nothing else in the record or in the NASDAQ Listing Rules that would impose an ongoing obligation to update responses. Moreover, Uchimoto stated in his affidavit that he "was not aware of any NASDAQ staff request to me or any other Company representative to provide any updates as to previously submitted responsive documents."[52]

If the staff did not ask for updates of information submitted in response to its requests, it was not unreasonable for CleanTech to interpret those requests as terminating once it submitted responsive information.[53] Nor is it, on the record before us, unreasonable for CleanTech to have believed that its answers to repeated staff questions about Wey had assuaged the staff's concerns on that subject.

**2. There is no evidence that post-November 30 requests covered the documents related to the December Financing.**

The record shows that there was only one request for documents made on or after November 30. That was the December 1 oral request for e-mails from CleanTech's Listing Counsel. After CleanTech's CEO waived the attorney-client privilege, Listing Counsel produced responsive documents on December 3. The record does not purport to quote the request

---

50 *CleanTech Innovations, Inc.*, *supra* note 4, at 5 n.12. The only other instance in the record where we have found that NASDAQ instructed CleanTech that it should update its responses was in the December 10 listing approval letter, in which the staff instructed CleanTech to notify the staff promptly of any material change to the information provided to the staff by the company or filed by the company with the Commission. But a failure to produce documents while NASDAQ was considering the listing application cannot be based on a duty imposed only at the time the application was granted.

51 E-mail from Wolf to Uchimoto, *supra* note 12.

52 Uchimoto Aff. ¶ 21.

53 Moreover, because both CleanTech's application and the letter notifying CleanTech of the listing approval imposed an obligation to update information submitted, CleanTech reasonably could have concluded that the staff's decision not to include such language in other contexts was intentional. It was therefore not unreasonable for CleanTech to assume that absent such language, there was no continuing obligation to update its response once it had responded fully to a request.

verbatim, but if we understand "e-mails from CleanTech's Listing Counsel" to mean that the request was for e-mails to or from Listing Counsel, or on which Listing Counsel was copied, then that request would not have encompassed any of the e-mails that NASDAQ found to have been intentionally withheld, because none of those e-mails fit into that category. It was not Listing Counsel, but Corporate Counsel, who was involved in the December Financing. As far as we can tell, Listing Counsel did not send or receive any of the 190 e-mails at issue, nor was it copied on any of those e-mails.[54] Thus, the record does not establish that CleanTech's failure to produce any of the contested e-mails in response to the December 1 request constituted intentional withholding of requested documents.[55]

Thus, given the language of the staff's requests, CleanTech's awareness that the staff had been highly interested in its relationship to and dealings with Wey at some points while its application was under consideration does not establish that CleanTech intentionally withheld information about the December Financing in late November and early December.[56]

---

[54] Not all of the senders or recipients of the e-mails are identified in the record, but NASDAQ does not contend that Listing Counsel was among them.

[55] The Uchimoto affidavit provides the following explanation, the accuracy of which NASDAQ does not contest:

> [Stevens & Lee, PC], as Listing Counsel, was not counsel to nor involved with the then proposed financing transaction that is the subject of this proceeding. In this regard, [James Connolly, an attorney at Stevens & Lee who assisted Uchimoto in the CleanTech listing engagement] and I were not copied on any of the emails regarding this transaction and, therefore, the production of all 182 pages, comprising all of S&L's emails in existence on December 3, 2010, to NASDAQ did not include any mention of this transaction. Because the submission of the Newman Law Firm (corporate counsel) emails requested by the NASDAQ staff had been sent on November 24, 2010, and the financing transaction related emails did not start until November 30, 2010, they did not appear in the November 24 production since none of them existed on November 24.

Uchimoto Aff. ¶ 19.

[56] Nothing in this opinion should be construed to suggest that applicants may engage in a game of semantics with NASDAQ staff, whereby applicants scrutinize every staff request for loopholes so as to avoid providing information that the staff clearly indicated it wanted. On the other hand, the fact that many of the document requests in this matter were made orally limits our ability to discern exactly what those requests encompassed. Our review must be based on the record before us, and we cannot rely on unsworn representations to fill evidentiary gaps.

**B. Awareness on CleanTech's part that the staff would be interested in the December Financing would not, without more, lead to the conclusion that CleanTech intentionally failed to provide the staff with the information in question while its listing application was pending.**

Even if CleanTech knew that the staff would be interested in the December Financing, the record does not show that such knowledge demonstrates that CleanTech intentionally failed to provide NASDAQ with any of the contested e-mails before December 10, when the listing application was granted. The application expressly required CleanTech to provide information only about consummated financings, and CleanTech filed the 8-K after the December Financing was consummated. CleanTech had filed a Form 8-K after the October Financing, with no apparent objection from NASDAQ. In any event, NASDAQ did not base its decision on the violation of the duty to update imposed by the listing application.[57] In the November 16 call, the staff asked for a narrative that would include "anticipated future services" to be provided by NYGG US and NYGG China,[58] but the record does not show that CleanTech anticipated the December Financing on November 17, when it responded to that request. Moreover, Uchimoto stated in his affidavit:

> I did not understand the November 16 Request to be a duty imposed by the NASDAQ staff to continuously update submitted responses, nor could such request reasonably be viewed as such. I understood the meaning of the request for a written statement including "all services anticipated to be provided in the future" to mean ***any expected future services which were then known.***[59]

It appears that CleanTech complied with this understanding of the request, and nothing in the record shows this understanding to have been unreasonable. NASDAQ's second finding thus does not support the conclusion that CleanTech was intentionally withholding information about the December Financing.

**C. Although CleanTech produced certain documents in early December in response to a staff request, there is no evident reason that CleanTech should have considered the documents in question to have been encompassed by that request.**

As discussed above, all of the contested e-mails postdate the staff's request for Corporate Counsel's e-mails and CleanTech's response, and the record does not establish that there was any direction to update. Although CleanTech provided e-mails from Listing Counsel on December 3, after some of the e-mails regarding the December Financing had been written, Listing Counsel

---

57 *See supra* note 48.

58 *See supra* note 15 and accompanying text (discussing wording of November 16 request).

59 Uchimoto Aff. ¶ 21 (emphasis in original).

neither wrote nor received the e-mails about the December Financing, so there is no evident reason that CleanTech should have considered those e-mails encompassed by the request.

**D. The record does not substantiate NASDAQ's assertions regarding CleanTech's alleged pattern of withholding documents.**

The Review Council found that

> After the Company's initial production on November 12, and despite the Company's assurance that it "ha[d] been responsive to all requests made," Staff discovered that the Company had not produced e-mails, including non-privileged e-mails, that were sent or copied to the Company's counsel. After Staff repeatedly pressed the Company on this and subsequent omissions, the Company produced additional documents on three separate occasions—November 24, December 3, and December 7—all while repeatedly assuring Staff that all responsive documents had been produced. Not only was this representation inaccurate because the Company had not produced documents bearing on the December [F]inancing, the Company's repeated pattern of withholding documents itself warrants an inference that the withholding was intentional.[60]

There is insufficient record evidence about the staff's requests and the company's responses to support all of these findings. For example, it is not clear what record evidence the Review Council was relying on in making the finding that the company "repeatedly assur[ed] Staff that all responsive documents had been produced."[61] The November 17 e-mail providing a narrative response about services provided and to be provided by Wey contains the statement, "Based upon the information provided in this correspondence, we believe we have been responsive to the requests made by your Department," which supports the quoted finding to a limited extent.[62] But this is one e-mail, which cannot alone constitute repeated assurances. And the e-mail was sent before any of the e-mails about the December Financing were written. In its brief to the Commission, NASDAQ states that on December 7, the staff "was assured by the company that all responsive e-mails had been produced,"[63] but NASDAQ cites only to a memorandum submitted to the hearing panel by the staff, and assertions in such memoranda are not evidence of the underlying facts.[64] Moreover, because for the reasons set out above there is

---

60 *CleanTech Innovations, Inc.*, *supra* note 4, at 7. As noted above, *see supra* note 25, the record does not show what, if any, documents were produced on December 7.

61 *Id*.

62 E-mail from Uchimoto, to Mitchell, *supra* note 16. This may have been the language to which the Review Council was alluding when it referred to "the Company's assurance that it 'ha[d] been responsive to all requests made.'" *CleanTech Innovations, Inc.*, *supra* note 4, at 7. But in the November 17 e-mail, CleanTech did not use the phrase "all requests," so the company's representation is less sweeping than the Review Council's language would indicate.

63 NASDAQ Br. in Opp'n at 4.

64 *See supra* note 7.

no record evidence of an outstanding request (including a request to update) that would have encompassed the contested e-mails, the record does not show that such a statement made on December 7 would have been inaccurate.

Additionally, although the Review Council states that the staff "repeatedly pressed the Company on this and subsequent omissions,"[65] it is unclear from the record what "subsequent omissions" the Review Council had in mind. Although the staff made a number of requests for information, it is impossible to tell from the record whether that was because CleanTech did not give the staff everything when it first asked, or whether documents provided by CleanTech suggested new avenues of inquiry to the staff, or whether there was a different reason altogether for the inquiries. Some of the "omissions" appear to have been due to CleanTech's assertion of the attorney-client privilege, which does not on its face suggest that CleanTech was being obdurate, and once the staff made clear that the application would be denied unless CleanTech produced the documents it asserted were privileged, CleanTech expeditiously obtained its CEO's consent and produced the requested documents.

## IV.

For the reasons discussed above, we conclude that the record does not show that the grounds on which NASDAQ relied in delisting CleanTech exist in fact. [66] The record may give a distorted

---

[65] *CleanTech Innovations, Inc.*, *supra* note 4, at 7.

[66] Both parties seek to introduce new evidence on appeal. In its brief on appeal, NASDAQ asked us to consider several articles published in January 2012 that, NASDAQ alleges, report that the FBI raided both Wey's home and his office, apparently in early 2012. NASDAQ cited the articles on the theory that it "was entitled at least to consider any relevant information regarding Wey before deciding whether to list CleanTech's securities." NASDAQ Br. in Opp. at 18 (emphasis in original). In a later motion, NASDAQ asked the Commission to allow the submission of a Form 12b-25 filed by CleanTech on May 15, 2012 and to take note that CleanTech did not timely file the underlying Form 10-Q, which, NASDAQ asserts, was due on May 15, 2012. NASDAQ contends that the Form 12b-25 and the Company's failure to file its Form 10-Q demonstrate non-compliance with NASDAQ listing standards and the Commission's filing requirements, further supporting the conclusion that listing of the Company's securities on NASDAQ is unwarranted. NASDAQ asserts that, although CleanTech's failure to timely file its Form 10-Q "was not a basis for NASDAQ's decision to delist [CleanTech], this additional failure is a basis to deny relisting the Company under the Commission's de novo review." NASDAQ's Mot. for Leave to Adduce Add'l Evidence at 3 n.1 (May 24, 2012). CleanTech opposes the motion, but asks that if the Commission allows the Form 12b-25 into evidence, the Commission should also allow CleanTech's Form 10-Q, filed on June 25, 2012, into evidence, "to complete the record." CleanTech's Mot. for Leave to Adduce Add'l Evidence at 1 (July 2, 2012).

Rule of Practice 452 permits the introduction of new evidence on review if the party seeking to adduce the evidence shows that it is material and there were reasonable grounds for failure to adduce such evidence previously. 17 C.F.R. § 201.452. The question in this proceeding is whether the grounds on which NASDAQ based its delisting decision exist in fact. As NASDAQ concedes, CleanTech's failure to file its Form 10-Q in May 2012 was not a basis for the delisting

(continued…)

picture: much of the communication about document production between the staff and the company was oral, and there may not be detailed written records of those conversations. But when the Review Council originally decided that the record was insufficient to enable it to determine whether CleanTech intentionally withheld information and allowed the parties to submit additional evidence, CleanTech submitted the Uchimoto affidavit, providing evidence from someone who was involved in those conversations. The staff did not provide similar evidence. If there were requests that clearly encompassed the contested e-mails, or directions to update that would have required their production, we cannot discern this from the record. We therefore set aside NASDAQ's delisting decision.

An appropriate order will issue.[67]

By the Commission (Chair WHITE and Commissioners WALTER, AGUILAR, PAREDES and GALLAGHER).

Elizabeth M. Murphy
Secretary

(…continued)
decision–indeed, it could not have been, because the alleged untimely filing occurred months after CleanTech was notified in November 2011 that the delisting decision had become final. (The January 2012 "FBI raids" discussed in the articles NASDAQ seeks to admit similarly postdate the delisting decision, as does CleanTech's filing of its Form 10-Q in June 2012.) Thus, none of the proposed evidence is material, and it therefore does not satisfy the requirements of Rule 452. We therefore deny the motions to adduce new evidence.

[67] We have considered all the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein. Because the issues have been thoroughly briefed and can be adequately determined on the basis of the record filed by the parties, Applicants' request for oral argument is denied. Rule of Practice 451, 17 C.F.R. § 201.451.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69968 / July 11, 2013
Admin. Proc. File No. 3-14640

In the Matter of the Application of

CLEANTECH INNOVATIONS, INC.
c/o Paula D. Shaffner
Joshua R. Dutill
Stradley, Ronon, Stevens & Young, LLP
2600 One Commerce Square
Philadelphia, PA 19103

For Review of Action Taken by
The NASDAQ Stock Market, LLC

ORDER SETTING ASIDE DELISTING DECISION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the delisting action taken by The NASDAQ Stock Market, LLC against CleanTech Innovations, Inc. is hereby set aside.

By the Commission.

Elizabeth M. Murphy
Secretary