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UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION

IN THE MATTER OF 6D GLOBAL TECHNOLOGIES, INC.,	:	No.: 3-17908
RESPONDENT.	:	

APPLICATION FOR REVIEW OF FINAL DELISTING ACTION TAKEN BY THE NASDAQ STOCK MARKET, LLC

6D Global Technologies, Inc. ("Respondent") respectfully requests that the United States Securities and Exchange Commission ("Commission") reverse the factual findings, legal conclusions, and determination to delist Respondent rendered by The NASDAQ Stock Market, LLC ("Nasdaq") in Docket No. NQ 6119C-15.[1]

On March 6, 2017, the United States District Court for the Southern District of New York, relying on nearly the same factual record that was before the Council, dismissed an action against Respondent because the Court concluded that the facts could not support the plaintiffs' claims that Respondent had engaged in securities fraud. See Puddu v. 6D Global Tech., Inc., et al., No. 15-Civ.-8061, Opinion (S.D.N.Y. Mar. 6, 2017), a copy of which is attached hereto as Exhibit "B." Indeed the Court found that Respondent's disclosures were sufficient and "would not have misled a reasonable investor," there was no evidence that Benjamin Wey owned or controlled Respondent (other than insufficient conclusory allegations), and Respondent had not concealed its relationship with Wey, and the allegations in a federal indictment and civil complaint against Wey (which could not be considered because they were unproven), did not

[1] On June 16, 2016, the Nasdaq Listing and Hearing Review Council (the "Council") issued a Decision (the "Decision") in this matter. A copy of the Decision is attached hereto and incorporated herein as Exhibit "A." Subsequently, Nasdaq informed Respondent that the Decision was final.

demonstrate that Wey engaged in stock manipulation with respect to Respondent.[2]

Respondent seeks review of the Listing Council's Decision for the following reasons: (1) The Decision is not supported by facts in the record; is inconsistent with facts in the record; is arbitrary, capricious and an abuse of discretion; lacks evidentiary support; and is improper; (2) Nasdaq failed to administer the hearing and the appeal in a manner consistent with the standards of due process; (3) The determination to delist Respondent was unwarranted and excessive given Respondent's good faith efforts to comply with the requirements of the listing process; (4) The determination to delist Respondent was unwarranted and excessive given the lack of any public interest concern related to Respondent as evidenced by the federal court decision in Puddu, Respondent's strong corporate governance, and its remedial actions; (5) Respondent is qualified for listing with Nasdaq as evidenced by Nasdaq's initial determination to grant listing with no qualifications or conditions; and (6) The Nasdaq listing rules do not provide a basis for Nasdaq to delist the Respondent's securities based on its subjective evaluation of the vote of a Board of Director's Audit Committee or the effectiveness of a Board.

WHEREFORE, 6D Global Technologies, Inc. respectfully requests that the Commission review and reverse the Nasdaq Listing and Hearing Review Council's Decision.

Dated: April 5, 2017

Paula D. Shaffner

Paula D. Shaffner
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Attorney for Respondent 6D Global Technologies, Inc.

[2] The Puddu decision is the second federal court decision that has reached these conclusions. See Discover Growth Fund v. 6D Global Technologies Inc., et al., No. 15-cv-7618, Memorandum and Order, at 15 (S.D.N.Y. Oct. 30, 2015). As demonstrated by the recent Puddu decision, NASDAQ improperly disregarded the Discover conclusions.

CERTIFICATE OF SERVICE

I, Paula D. Shaffner, Esquire, hereby certify that on April 5, 2017, I served a true and correct copy of the foregoing Application for Review on the following as follows:

via facsimile and hand delivery

Brent J. Fields, Esq.
Secretary
United States Securities and
Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
Fax: 202.772.9324

via facsimile and Federal Express

Jonathan F. Cayne
Office of Appeals and Review
The NASDAQ Stock Market, LLC
805 King Farm Boulevard
Rockville, MD 20850
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Paula D. Shaffner

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April 5, 2017

3-17908

via facsimile (202-772-9324) and Hand Delivery

Brent J. Fields, Esq.
Secretary
United States Securities and
Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: In the Matter of 6D Global Technologies, Inc.
NASDAQ Stock Market LLC Docket No. NQ 6119C-16

Dear Mr. Fields:

Enclosed please find 6D Global Technologies, Inc.'s Application for Review of Final Delisting Action Taken by the NASDAQ Stock Market, LLC. Also enclosed is the Notice of Appearance of Counsel pursuant to SEC Rule of Practice 102.

I appreciate your prompt attention to this matter.

Respectfully,

Paula D. Shaffner

Paula D. Shaffner

Enclosures

cc: Jonathan F. Cayne , The NASDAQ Stock Market, LLC Office of Appeals and Review (via facsimile (301-978-8472) and Federal Express) (w/encl.)

STRADLEY RONON

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April 10, 2017

via facsimile (703-813-9793) and Hand Delivery
Maggie Baldwin
United States Securities and
Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: In the Matter of 6D Global Technologies, Inc.
NASDAQ Stock Market LLC Docket No. NQ 6119C-16

Dear Ms. Baldwin:

Enclosed please find Exhibits A and B to 6D Global Technologies, Inc.'s Application for Review of Final Delisting Action Taken by the NASDAQ Stock Market, LLC, which was submitted on April 5, 2017.

If you have any questions, please let us know.

Respectfully,

/s/ Kevin C. Aldridge
Kevin C. Aldridge
Litigation Paralegal

Enclosures

cc: Jonathan F. Cayne , The NASDAQ Stock Market, LLC Office of Appeals and Review (via facsimile (301-978-8472) and UPS overnight) (w/encl.)
Paula D. Shaffner, Esq.

Ex. A

BEFORE THE NASDAQ LISTING AND HEARING REVIEW COUNCIL
THE NASDAQ STOCK MARKET LLC

In the Matter of	**DECISION**
6D Global Technologies, Inc. c/o David A. Donohoe, Jr. Donohoe Advisory Associates LLC 9901 Belward Campus Drive, Suite 175 Rockville, MD 20850	Docket No. NQ 6119C-16 Date: June 16, 2016
Concerning the Operations of The Nasdaq Stock Market	

This matter appears before the Nasdaq Listing and Hearing Review Council pursuant to an appeal by 6D Global Technologies, Inc. (the "Company"), of a Nasdaq Listing Qualifications Hearing Panel determination to delist the Company from The Nasdaq Stock Market ("Nasdaq"). After considering the record in this matter, the Listing Council affirms the decision of the Panel.

Background and Proceedings Below

Company Background

The Company describes itself as a digital business solutions company. It has business units providing web experience, analytics, creative, mobile, marketing, and infrastructure staffing services. It was formed in September 2014 in connection with a transaction in which CleanTech Innovations, Inc. ("CleanTech"), merged with Six Dimensions, Inc. ("Six Dimensions"); the merger resulted in the formation of the Company, which has continued the operations of Six Dimensions, and CleanTech's operations were disposed of upon the completion of the merger. Also in connection with the merger, CleanTech converted all of its indebtedness to NYGG (Asia) Ltd., an affiliate of New York Global Group ("NYGG"), in exchange for the issuance of more than 35 million shares of the Company's common stock. The CEO of NYGG is Benjamin Wey. The Company's CEO is Tejune Kang, who was the founder of Six Dimensions.

The Company's common stock began trading on Nasdaq on December 12, 2014.

Nasdaq Trading Halt

On September 10, 2015, the United States Attorney's Office of the Southern District of New York announced a Grand Jury indictment against Mr. Wey and his banker, charging them

with conspiracy, securities fraud, wire fraud, and other crimes.[1] The SEC separately announced charges under several sections of the Securities Exchange Act of 1934 against Mr. Wey, NYGG, Michaela Wey (Mr. Wey's wife), Mr. Wey's banker, and two attorneys who had represented the Company and other companies affiliated with Mr. Wey in connection with their listing on Nasdaq.[2]

The same day, Nasdaq halted trading in the Company's securities based on concerns raised by the grand jury indictment and the SEC charges against Mr. Wey, NYGG, and the Company's former counsel, and their association with the Company. Since then, the Company's common stock has traded on the OTC "Grey Market."

Staff Delisting Determination

Nasdaq Listing Qualifications Department staff ("Staff") subsequently conducted an investigation. On November 20, 2015, Staff notified the Company that it had determined to delist the Company's securities based on public interest concerns under Nasdaq Rule 5101. Staff's determination was based on findings concerning Wey's influence over the Company and his relationship with Mr. Kang, and information that raised questions whether the Company's securities were manipulated to satisfy the initial listing shareholder and price requirements in a manner similar to that alleged by the government with respect to other companies.[3]

Hearing Panel Decision

The Company timely appealed the Staff's determination to a Nasdaq Listing Qualifications Hearing Panel, which held a hearing on January 21, 2016.[4] The Panel delayed its decision pending completion of a review by the Company's Audit Committee and its independent counsel of matters raised by the Staff. The Panel received a report from the Company's Audit Committee on February 26, 2016, and further submissions from the Staff and the Company concerning the Audit Committee's report.[5]

On March 17, 2016, the Company advised the Panel of the following developments:

(i) the Company would not timely file its Form 10-K for the fiscal year ended December 31, 2015;

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1 U.S. v. Wey, et al., Crim. A. No. 15-cr-00611-AJN (S.D.N.Y.).

2 SEC v. Wey, et. al., Civ. A. No. 15-cv-07116-PKC (S.D.N.Y.).

3 Staff Delisting Determination, dated Nov. 20, 2015.

4 *See* Letter from Nasdaq Listing Qualifications Department to Company's Representatives, dated Nov. 30, 2016; Transcript of Hearing Before Nasdaq Listing Qualifications Hearing Panel, Jan. 21, 2016.

5 *See* Decision of Nasdaq Listing Qualifications Hearing Panel, dated March 24, 2016 ("Panel Decision"), at 2.

(ii) the Company's independent auditor, BDO, had concluded that it could not accept the representations of Mr. Kang "because of a number of inconsistencies noted during" BDO's audit, and that BDO had required that Mr. Kang "separate or be separated from" the Company for BDO to continue as its auditor; and

(iii) at a Company Board meeting on March 17, 2017, Mr. Kang determined not to resign, the Board did not terminate Mr. Kang, and the Chair of Company's Audit Committee, Adam Hartung, resigned from the Board.[6]

The Panel issued its decision on March 24, 2016, concluding that it was an appropriate use of Nasdaq's regulatory authority under Nasdaq Rule 5100 to delist the Company's stock based on BDO's letter rejecting Mr. Kang's representations and the response of the Company's Board of Directors.[7] The Panel found those events to constitute a "corporate crisis" that was "highly suggestive of a weak corporate governance structure," and that would delay the filing of the Company's Form 10-K for a substantial period of time.[8] The Panel concluded that continuing the Company's listing would not serve Nasdaq's regulatory goals, and would instead "convey to the market a confidence that the issues will be resolved efficiently and satisfactorily – a confidence that the Panel does not have."[9]

The Panel also reviewed the evidence in the record concerning Staff's assertions about (i) undue and improper influence over the Company by Mr. Wey, (ii) control of NYGG Asia's Company stock, (iii) an allegedly deceptive scheme by Mr. Wey and the Company's former counsel to obtain listing on Nasdaq, and (iv) and alleged manipulation of the Company's stock price. The Panel determined not to base its decision on any of those issues.[10]

Listing and Hearing Review Council Proceedings

The Company timely appealed the Panel decision to the Nasdaq Listing and Hearing Review Council ("Listing Council") on April 8, 2016.[11]

The Company's Brief and Responses to Nasdaq's Information Requests, and BDO's Letters to the Company

On April 25, 2016, the Company submitted its appeal brief, along with responses to Staff's information requests dated March 22 and April 15, 2016.[12] In its brief, the Company

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6 *See* Panel Decision at 2.

7 Panel Decision at 4, 10-11.

8 Panel Decision at 4, 11.

9 Panel Decision at 11.

10 Panel Decision at 4-10.

11 E-mail from Company Representatives to Nasdaq Listing Qualifications Department, dated April 8, 2016.

12 Company Submission in Support of Appeal & Request for Exception, dated April 25, 2016 ("Company Brief"); Company Response to March 22, 2016 Information Request,

explained that its Audit Committee had undertaken a Section 10A independent investigation as to whether there was merit to the concerns expressed in the Staff delisting determination, and whether there had been misrepresentations or other improper behavior by Company management with respect to Mr. Wey and the Staff's concerns.[13] The Audit Committee retained Blank Rome LLP, an independent law firm, to conduct the investigation. Blank Rome found no evidence (i) that the Company's current or former directors were unduly influenced by Mr. Wey, (ii) of inflation of the Company's shareholder count to help the Company obtain its listing on Nasdaq, or (iii) that Mr. Wey or anyone at the Company manipulated the Company's stock price.[14] Blank Rome recommended certain actions to enhance the Company's internal controls, and the Company's Board passed resolutions implementing those recommendations.[15]

In its brief and responses to Staff's information requests, the Company also addressed the events surrounding BDO's resignation as its auditor. It asserted that two days after receiving BDO's March 15, 2016 letter requiring that Mr. Kang be separated from the Company, the Board held a meeting at which Mr. Kang explained that he declined to resign because it was not in the best interests of the Company or its shareholders that he do so, and because he had done nothing wrong.[16] At the same Board meeting, the Audit Committee Chair, Mr. Hartung, made a motion to terminate Mr. Kang, but the motion was not seconded and thus not voted upon by the Company's other two independent directors (the Company had a total of four directors, including Mr. Kang).[17] Mr. Hartung then resigned as a director and as Chair of the Audit Committee on March 17, 2016, effective April 16, 2016, and BDO resigned as the Company's auditor by letter dated March 17, 2016.[18]

In a letter to the Company dated March 21, 2016, BDO outlined a number of material weaknesses and other reportable concerns that it observed prior to its resignation.[19] Among other things, BDO reported that it had learned that Mr. Kang had various uncompensated advisors, including Mr. Wey, and that those relationships and services were not accounted for or

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dated April 25, 2016; Company Response to April 15, 2016 Information Request, dated April 25, 2016.

13 Company Brief at 5.

14 Blank Rome LLP, Audit Committee of 6D Global Technologies, Inc., Presentation to the Nasdaq Listing Qualifications Panel, dated Feb. 26, 2016 ("Blank Rome Report"), Ex. A to Company Brief, at 10-22.

15 Blank Rome Report at 23-26.

16 Company Brief at 6; Company Response to March 22, 2016 Information Request, dated April 25, 2016 at 4.

17 Company Br. at 6; Company Response to March 22, 2016 Information Request, dated April 25, 2016 at 5.

18 Company Br. at 6; Company Response to March 22, 2016 Information Request, dated April 25, 2016 at 5.

19 Letter from BDO to the Company, dated March 21, 2016, Ex. 16.2 to the Company's Form 8-K, filed March 23, 2016 ("BDO Letter").

disclosed in the Company's financial statements.[20] BDO also noted that during the course of the Section 10A investigation, a number of inconsistencies were noted and BDO had concluded that it could no longer rely on the representations provided by Mr. Kang. BDO cited three non-exclusive examples of such inconsistencies:

1. As per conversations with the then Audit Committee Chair ("AC Chair"), Adam Hartung, he inquired with the CEO in July 2015 as to Benjamin Wey's involvement with the Company since Mr. Wey was found guilty of civil charges for sexual misconduct with an intern at NYGG. The Board of Directors was told by the CEO that Mr. Wey was friendly with the CEO but he was not involved with the Company. When the Board inquired again at the September 2015 Board meeting, they learned that Mr. Wey was meeting regularly at the 6D office and was advising the CEO on a regular basis. Additionally, in July 2015, the Company granted non-qualified stock options to [two individuals] who are not employees of the Company [but rather, according to Board minutes, affiliated with NYGG]. It was at the September 25, 2015 meeting that the Board passed a resolution that the Company cease all interactions with Mr. Wey and NYGG.

2. As per conversations with the then AC Chair, he noted that the Board informed management in September 2015 that it did not support an expansion into Ireland and recommended it be dropped. The Company established a subsidiary in Ireland in late 2015. Additionally, per support provided by management as it relates to Mr. Wey's consultations with the CEO, Mr. Wey made introductions between the CEO and Mr. Wey's Ireland contacts in April 2015.

3. As noted in the [Blank Rome Report] . . . , "our investigation revealed that Mr. Kang was unsure who paid for Mr. Wey's trip to visit Discover Growth Fund." As per conversations with the then AC Chair, he was also informed by management that the CEO was unsure who paid for these expenses. As per support provided by Mark Szynkowski, CFO, to us in March 2016 these expenses were charged to the CEO's credit card and reimbursed in 2015.[21]

BDO also identified four material weaknesses in the Company's internal controls over financial reporting, including that the "Company did not appear to have an effective Board of Directors that demonstrates independence from management and exercises oversight responsibility and has the ability to discharge its responsibilities."[22] In that regard, BDO noted that "[t]he Board of Directors (made up of all the members of the Audit Committee plus the CEO) was not familiar with the nature and extent to which Mr. Wey was providing advice to the

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20 BDO Letter at 2.

21 BDO Letter at 2-3.

22 BDO Letter at 3.

CEO or to the extent that the CEO consults with outside advisors. Additionally, the Audit Committee provided management with direction as to not expand into Ireland which management subsequently did anyway."[23]

Finally, BDO cautioned that

> its report on the Company's financial statements for the fiscal year ended December 31, 2014 should no longer be relied upon, and the completed interim reviews related to the previously issued financials for the periods September 30, 2014, March 31, 2015, June 30, 2015 and September 30, 2015 should also not be relied upon, because they did not reflect expenses associated with stock grant agreements the CEO had entered into with various employees and consultants, of which BDO was previously unaware, and because BDO could not rely on representations provided by Mr. Kang.[24]

In its brief, the Company asserts that it has engaged a new auditing firm, SingerLewak LLP – which reviewed BDO's letter and "thoroughly vetted" the Company before accepting the engagement, but which has not yet reached any conclusions or issued audit opinions with respect to the issues identified by BDO – and that the Company would restate its financial statements as appropriate.[25] The Company also asserts that "any purported 'inconsistencies' reported by BDO were not inaccurate or inconsistent with the Company's or Mr. Kang's past or present representation of events."[26] The Company further addresses the issues identified by BDO in its responses to Staff's supplemental information requests. Of particular note is the Company's response to BDO's observation about the Company's expansion into Ireland over the Board's objection:

> Company management informed the Board on several occasions of its intention to establish a subsidiary in Ireland to support one of its largest clients and to penetrate the European market; two such occasions were documented in Board minutes. At the time of the September 2015 Board meeting, rental properties had been secured for the Irish operating company established in 2014 and applications for necessary employee visas has [*sic*] been initiated. No Board minutes reflect any opposition to the plan. The Company monitors the progress of the expansion on a monthly basis and provides updates to the Board.[27]

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23 BDO Letter at 3.

24 BDO Letter at 4.

25 Company Brief at 7, 9.

26 Company Brief at 7.

27 Company Response to April 15, 2016 Information Request, dated April 25, 2016, at 6.

Also of note is the Company's response to Staff's question whether the Company – upon identifying evidence that the Company had paid for Mr. Wey's trip to meet with Discover Growth Fund – had informed Blank Rome of such evidence: "During a subsequent call in follow up to the initial interview with Blank Rome [in which Mr. Kang was unsure who paid for Mr. Wey's trip], Mr. Kang informed Blank Rome that the Company had indeed paid for Mr. Wey's trip to meet with the Discover Growth Fund. . . . Mr. Kang offered to submit the supporting documents to Blank Rome during a follow-up call, however, Blank Rome indicated that it did not require them."[28]

The Company's supplemental submissions also, among other things, describe generally the steps the Company has taken or is contemplating to address BDO's concerns, and the process it followed for identifying its new Audit Committee Chair.[29] They also state that because the Audit Committee's engagement of Blank Rome had concluded, neither the Company nor its Board discussed BDO's concerns with Blank Rome, but that "[i]f so requested by the Staff, the Company is willing to re-engage Blank Rome. Blank Rome has indicated its willingness to be so engaged."[30]

The Company requests that the Listing Council permit it to remain listed on Nasdaq in a suspended state until it files its 2015 Form 10-K and its First Quarter 2016 Form 10-Q, which it anticipates filing by July 15 and 29, respectively.[31] The Company acknowledges that it is not in compliance with Nasdaq's annual listing fee requirement, and "commits to pay the 2016 annual fee upon reinstatement of trading of its securities."[32]

Staff's Brief

Staff argues that the Panel acted well within its discretion under Rule 5101 in light of the concerns with the Company's governance and controls raised by BDO, BDO's demand that Kang be separated from the Company, the response of Kang and the Company's Board, and BDO's resignation.[33] Staff further argues that the Company's submissions regarding these matters provide no comfort that the Company has taken adequate steps to address the issues that gave rise to BDO's resignation and the Panel's decision below.[34] Staff also asserts that the Company's failure to file its 2015 10-K and its failure to pay its 2016 listing fee provide additional bases for delisting.[35] In addition, Staff cites a recently filed putative class action brought by Company investors against the Company and others, which includes allegations from

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28 Company Response to April 15, 2016 Information Request, dated April 25, 2016, at 3.

29 Company Response to March 22, 2016 Information Request, dated April 25, 2016, at 2-4.

30 Company Response to April 15, 2016 Information Request, dated April 25, 2016, at 4-6.

31 Company Brief at 9.

32 Company Brief at 9.

33 Nasdaq Listing Qualifications Department Staff Submission to the Nasdaq Listing and Hearing Review Council, dated May 9, 2016 ("Staff Brief"), at 3-4, 9-10.

34 Staff Brief at 5.

35 Staff Brief t 6-7.

a former Company executive that Wey has been more involved with the Company than the Company and Kang have acknowledged.[36]

The Company's Reply Brief

In its reply brief, the Company argues that the "allegations raised by the Staff have been determined by independent legal counsel . . . to be without merit," and that its more recent issues "have since been resolved: the Company has hired SingerLewak . . . as its new independent audit firm and has appointed a new board member . . . who now serves as the Audit Committee Chair."[37] The Company disagrees that the events leading to BDO's resignation are symptomatic of a weak corporate governance environment; rather, it claims, its steps after BDO's resignation demonstrate strong corporate governance.[38] It asserts that the differing views of the Audit Committee members about Mr. Kang's decision not to resign reflected a legitimate dispute that was not surprising given that Blank Rome "found no corroborating evidence of the Staff's theories" and that the BDO letter "rais[ed] certain issues (many of which were manufactured by Mr. Hartung)."[39] Thus, the Company contends that the "differing opinions of Blank Rome and BDO" have "already been resolved by the proper vote of the Audit Committee," and that finding a basis for delisting in spite of that supposed resolution "is highly problematic."[40] The Company further asserts that "[i]f there are any unresolved issues raised by BDO, they will necessarily be addressed by the new auditors."[41]

The Company also addresses some of the specific issues raised by BDO and asserted by the Staff as bases for delisting. With respect to the Company's payment of Mr. Wey's expenses for his trip to Discover Growth Fund, the Company focuses on the reasonableness of Mr. Kang's failure to remember who paid for the trip during his interview by Blank Rome.[42] With respect to the Company's expansion into Ireland, the Company argues that "contrary to BDO's (and Mr. Hartung's) allegation, there are no board minutes evidencing an objection by the board relating to the Company's plans to expand into Ireland."[43] "It seems logical," the Company contends, "that had Mr. Hartung, who is the source for this claim, taken this position, he would have certainly made it a discussion item in a board meeting and could have put forth a board resolution on the matter."[44] And the Company reiterates that while it and its board "strongly

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36 Staff Brief at 7-8 (citing Second Amended Complaint, Doc. No. 107, in Puddu, et al. v. 6D Global Technologies, Inc., et al., Civ. A. No. 15-cv-08061-RWS).

37 Company Submission in Response to Staff Memorandum, dated May 16, 2016 ("Staff Reply Brief"), at 1.

38 Staff Reply Brief at 2.

39 Staff Reply Brief at 3.

40 Staff Reply Brief at 3.

41 Staff Reply Brief at 3.

42 Staff Reply Brief at 4.

43 Staff Reply Brief at 4.

44 Staff Reply Brief at 4.

believe they have a full factual grasp of the facts and circumstances surrounding the concerns raised by BDO," it is "fully committed re-engaging legal counsel to further investigate BDO's concerns should it become evident during the ongoing audit that such additional inquiry is required."[45]

With respect to the allegations in a new lawsuit concerning Mr. Wey's involvement in the Company, the Company argues that those allegations are unsubstantiated and disproven by Blank Rome's report.[46]

The Company contends that it is inequitable to require it to pay the annual listing fee for 2016 until trading of its stock on Nasdaq resumes, and that it expects to file its delayed SEC filings – and regain compliance with Nasdaq's filing requirements – "in short order."[47]

Finally, the Company requests that the Listing Council schedule an oral hearing. According to the Company, a hearing would be beneficial because this matter presents "unique circumstances" insofar as the Company's "Audit Committee accepted the conclusions of the law firm that it had retained to conduct an internal investigation," and the Staff would have the Audit Committee vote disregarded in favor of the opinion of the Chair only." Moreover, the Company contends, the impact those circumstances "should have on the proposed delisting is a novel issue" and a matter of great importance to the Company and its shareholders and employees.[48]

Letter from Blank Rome to Nasdaq

In a letter addressed to Nasdaq dated May 17, 2016, which the Company submitted to Nasdaq in connection with this proceeding, Blank Rome disputed the Company's representations made in this proceeding that the Company had advised Blank Rome that it paid for Mr. Wey's trip to Discover Growth Fund:

> At no time prior to the issuance of Blank Rome's report to Nasdaq or subsequent to the issuance of the report to Nasdaq did Mr. Kang or anyone at the Company inform Blank Rome or provide information to Blank Rome with regard to who paid for Mr. Wey's trip to Discover Growth Fund. After Mr. Kang's interview and before Blank Rome issued its report, certain supplemental information was provided by Mr. Kang to Blank Rome (unrelated to Mr. Wey's trip expense payment), which Blank Rome accepted.

Separately, the Company dismisses BDO's concern about the Company's previously undisclosed stock grant agreements as a "non-issue," Staff Reply Brief at 4, notwithstanding that the Company might need to restate prior financial statements to account for the agreements.

45 Staff Reply Brief at 4-5.

46 Staff Reply Brief at 6.

47 Staff Reply Brief at 5, 8.

48 Staff Reply Brief at 8.

> Blank Rome did subsequently learn that the Company provided information to BDO demonstrating that the Company paid for Mr. Wey's trip to Discover Growth Fund, and such information was also transmitted to Nasdaq.[49]

Blank Rome also took issue with the Company's suggestion that it was necessarily willing to be re-engaged if requested by Nasdaq Staff: "[S]hould Blank Rome be requested to perform additional services for the Company, it would consider the request at such time."[50]

In its e-mail transmitting the Blank Rome letter to Nasdaq, the Company describes the letter as raising a "factual discrepancy."[51] Staff, however, argues that the Blank Rome letter reveals misrepresentations that are "contrary to the Company's obligation to provide full information to Nasdaq that is not misleading," and that demonstrate a continuing pattern of "conduct that is contrary to the public interest and contrary to maintaining a listing on Nasdaq."[52]

Additional Staff Determinations

On April 12, 2016, Nasdaq issued an Additional Staff Determination arising from the Company's failure timely to file its 2015 Form 10-K as required by Nasdaq Rule 5250(c)(1), and the Company's failure to pay its annual listing fees as required by Nasdaq Rule 5250(f).[53]

On May 17, 2016, Nasdaq issued another Additional Staff Determination. That letter advised the Company that its failure timely to file its Form 10-Q for the first quarter of 2016 is an additional basis for delisting under Rule 5250(c)(1). It further advised the Company that it had fallen out of compliance with Nasdaq's listing rules requiring securities to maintain a minimum bid price of $1 per share and a minimum Market Value of Listed Securities of $35 million, and that the rules provide the Company 180 days to regain compliance with those requirements.[54]

Decision

As set forth in Nasdaq Rule 5101, 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

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49 Letter from Blank Rome LLP to Nasdaq Listing Qualifications Department, dated May 17, 2016, at 2 ("Blank Rome Letter").

50 Blank Rome Letter at 2.

51 E-mail from Company Representatives to Nasdaq Listing Qualifications Department, dated May 17, 2016.

52 E-mail from Staff to Nasdaq Listing Qualifications Department, dated May 18, 2016.

53 Additional Staff Determination: Filing Delinquency, dated April 12, 2016.

54 Additional Staff Determination: Filing Delinquency; Deficiency Notification – Market Value of Listed Securities and Bid Price, dated May 17, 2016.

just and equitable principles of trade, and to protect investors and the public interest."[55] That authority derives directly from the regulatory responsibilities delegated to Nasdaq by Congress through the Exchange Act. Nasdaq is a self-regulatory organization ("SRO") registered as a national securities exchange under Section 6 of the Exchange Act.[56] The Exchange Act establishes a system of cooperative regulation under which private SROs like Nasdaq conduct the day-to-day regulation and administration of the nation's securities markets under the close supervision of the SEC. Before it may permit the registration of an exchange as an SRO, the SEC must determine, among other things, that the exchange has a set of rules that are "consistent with the requirements" of the Exchange Act,[57] and thus that are designed

> to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest . . . .[58]

With respect to the listing of companies on Nasdaq, Rule 5101 explains:

> Nasdaq is entrusted with the authority to preserve and strengthen the quality of and public confidence in its market. Nasdaq stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process. Nasdaq Companies, from new public Companies to Companies of international stature, are publicly recognized as sharing these important objectives.[59]

Thus, Nasdaq may exercise its discretion to delist securities under Rule 5101 "based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on Nasdaq inadvisable or unwarranted in the opinion of Nasdaq, even though the securities meet all enumerated criteria for initial or continued listing on Nasdaq." *Id.*

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55 Nasdaq Rule 5101.

56 *See* 15 U.S.C. §§ 78f & 78c(a)(26); *Findings, Opinion, and Order of the Comm'n*, Exch. Act Rel. No. 53,128 (Jan. 13, 2006), 71 Fed. Reg. 3,550 (Jan. 23, 2006).

57 15 U.S.C. §78s(b)(2).

58 15 U.S.C. § 78f(b)(5).

59 Nasdaq Rule 5101. *See also* Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, 159 F.3d 1209, 1214 (9th Cir. 1998) (listing of a security on Nasdaq "creates the public expectation that the company meets minimum financial criteria, as well as embrac[es] 'integrity and ethical business practices") (quoting 59 Fed. Reg. 29,834, 29,843 (1994)).

The Listing Council finds that the circumstances presented here readily justify delisting pursuant to Rule 5101. The conduct of the Company and its Board with respect to the Company's independent auditor, the Audit Committee's independent counsel, and Nasdaq is inconsistent with the standards of Rule 5101 and the regulatory objectives Nasdaq must consider when determining whether a company should be listed on its market. Likewise, the Listing Council agrees with the Panel that the events giving rise to BDO's resignation as the Company's auditor warrant delisting the Company to protect the investing public and the integrity of the market. The recent revelations that the Company misrepresented facts to Nasdaq in this very proceeding further underscore the problems identified by BDO and the Panel, as well as the public interest in delisting.

The Listing Council is not persuaded by the Company's argument that the Board's decision not to remove Mr. Kang reflects good governance. A reputable independent auditor concluded – based on a number of verifiable factors, not just the word of one director – that it could no longer accept the representations of the Company's Chairman and CEO, and determined that it could not continue as the Company's auditor unless Mr. Kang was separated from the Company.[60] The Company's bald assertions that the inconsistencies BDO cited as the basis for its conclusion were not, in fact, inconsistencies[61] give the Listing Council no basis to disregard BDO's extraordinary conclusion that the Company's Chairman and CEO is untrustworthy.

Nor has the Company provided any basis for the Listing Council to disregard BDO's finding that the Company does not appear to have an effective Board with the ability to discharge its responsibilities. In its attempt to refute BDO's finding that the Company expanded into Ireland over the Board and/or the Audit Committee's prior direction not to do so, the Company proffers no evidence to support its position, and avoids denying that the Board or the Audit Committee opposed the expansion; it asserts only that such opposition is not reflected in the Board meeting minutes. The Listing Council draws no comfort from that narrow assertion. The Listing Council also finds it telling that the Company did not re-engage independent counsel to investigate the very serious concerns that BDO presented to the Company in March 2016.

Equally troubling from the perspective of Nasdaq, which must make the regulatory decision whether to allow the Company to remain listed on its market, is persuasive evidence from the Company's independent counsel, Blank Rome, that the Company made misrepresentations to Nasdaq in its effort to remain listed.[62] Regardless of the nature of the underlying factual issue (the Company's payment for Mr. Wey's visit to Discover Growth Capital), the Company's misrepresentations in its submissions to Nasdaq in the delisting process call into question the ability of Nasdaq and other regulators to rely on information provided by the Company.

The Company's failures to comply with the filing and annual fee requirements of Nasdaq Rules 5250(c)(1) and 5250(f) provide additional grounds for delisting. Particularly in light of the

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60 *See* BDO Letter.

61 Company Brief at 7.

62 Blank Rome Letter at 2.

serious concerns and deficiencies described above, and the uncertainty of the outcome of the work of the Company's new auditors, the Listing Council rejects the Company's request that the Listing Council permit it to remain listed in a suspended state through the July dates by which it anticipates filing its 2015 Form 10-K and First Quarter 2016 Form 10-Q. Moreover, the Company is obligated to comply with Nasdaq's listing requirements as set forth in Nasdaq's rules, regardless of whether the Company contends that the application of any of those requirements is inequitable, as the Company contends with respect to the fee requirement[63]; this is not the appropriate forum for challenging Nasdaq's rules. Should the Company come into compliance with the filing requirements and remedy the other deficiencies now extant, it can reapply for listing at that time.

In light of all the foregoing, the Listing Council need not reach the other issues that formed the basis of Staff's initial delisting decision, or that Staff has asserted as additional grounds for delisting, including Mr. Wey's influence over the Company and potential stock manipulation.

Finally, the extensive written record in this matter provides a sufficient basis for this decision. No unique or other circumstances suggest that an oral hearing would better enable the Listing Council to decide this appeal.

* * *

The Listing Council concludes that the continued listing of the Company on The Nasdaq Stock Market would be inconsistent with Nasdaq Rules 5101, 5250(c)(1), and 5250(f), the maintenance of the quality of and public confidence in The Nasdaq Stock Market, the promotion of just and equitable principles of trade, and the protection of investors and the public interest. The Listing Council therefore affirms the March 24, 2016 Panel Decision to delist the Company from The Nasdaq Stock Market.[64]

On Behalf of the Nasdaq Listing and Hearing Review Council,

Jonathan F. Cayne

Jonathan F. Cayne, Senior Associate General Counsel

63 *See, e.g.*, Nasdaq Rules 5801 *et seq.*; The Nasdaq Stock Market LLC Listing Agreement.

64 The Nasdaq Board of Directors may call the Listing Council Decision for review pursuant to Rule 5825.

Ex. B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSEPH PUDDU; MARK GHITIS; VALERY BURLAK; and ADAM BUTTER,

15 Civ. 8061

Plaintiffs,

OPINION

-against-

6D GLOBAL TECHNOLOGIES, INC., NYGG (ASIA), LTD.; BENJAMIN TIANBING WEI A/K/A/ BENJAMIN WEY; TEJUNE KANG; MARK SZYNKOWSKI; TERRY MCEWEN; and NYG CAPITAL LLC D/B/A/ NEW YORK GLOBAL GROUP,

Defendants.

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Sweet, D.J.

Defendants 6D Global Technologies, Inc. ("6D"), Tejune Kang ("Kang"), Mark Szynkowski ("Szynkowski"), and Terry McEwen ("McEwen" and, collectively, the "6D Defendants" or the "Defendants") have moved pursuant to Rule 12(b)(6), Fed. R. Civ. P., to dismiss the second amended complaint ("SAC") of plaintiffs Joseph Puddu, Mark Ghitis, Valery Burlak, and Adam Butter (collectively, the "Plaintiffs"). Based upon the conclusions set forth below, the motion of the 6D Defendants is granted, and the SAC is dismissed.

I. Prior Proceedings

The Plaintiffs filed their putative class action complaint on October 13, 2015. The SAC was filed on April 4, 2016. It alleges that the Defendants violated Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission ("SEC"), and Section 20(a) of the Exchange Act.

CleanTech, a now-defunct company based in China, manufactured structural towers used in wind turbines and was briefly listed on the NASDAQ. SAC ¶ 7. 6D, which is a successor to CleanTech, is a Delaware company whose operations - software offerings and technology consulting - take place entirely in the United States. SAC ¶¶ 25-26. Kang is its CEO, and Szynkowski is its CFO. SAC ¶¶ 27-28. McEwen has served as a 6D director since September 30, 2013, and between June and September 2014, he served as its sole director and CEO. SAC ¶ 29.

Wey is alleged to be a notorious promoter of fraudulent Chinese companies. SAC ¶ 30. He, through his companies New York Global Group ("NYGG") and NYGG (Asia), assists the Chinese companies in listing their stock on U.S. exchanges and connects them with investment bankers and a compliant auditor in exchange for a large portion of their stock. SAC ¶ 46. Wey then discreetly sells the stock through a network of associates and nominees. *Id.* The companies' stock price collapses soon after Wey's stock sales. *Id.* Wey made more than $70 million from his fraud. SAC ¶ 61.

In early 2011, CleanTech was delisted by the NASDAQ for failing to disclose its connections with Wey in its listing

application. SAC ¶ 76. Wey was the acknowledged principal of NYGG, and CleanTech claimed that it had a relationship with NYGG (Asia) but not with NYGG. Additionally, CleanTech claimed NYGG (Asia) was separately owned and operated by Ming "Roger" Li ("Li"), a false statement Wey himself repeated in a letter to the NASDAQ. SAC ¶¶ 5, 69 a., 80 b., c., 81, 191. Wey at all times was NYGG (Asia)'s controlling shareholder and personally controlled its operations. SAC ¶¶ 126, 127. CleanTech eventually obtained a reversal of the NASDAQ's decision, but the NASDAQ warned that if it ever discovered that Wey was NYGG (Asia)'s controlling shareholder, it would promptly delist CleanTech.

In June 2014, CleanTech announced that it would merge with a private company, Six Dimensions, to become 6D. SAC ¶ 7. In connection with the merger, CleanTech would sell its existing business and convert CleanTech's debt held by NYGG (Asia) into equity in the new company, 6D. *Id.* Following the merger, which closed in September 2014, NYGG (Asia) held approximately 45% of 6D's shares. SAC ¶ 95.

6D's bylaws represented that it was governed much like other public companies. Its day-to-day business was purportedly handled by its named executive officers, nominated by the Board

of Directors, who were identified for the benefit of shareholders in 6D's SEC filings. SAC ¶¶ 137, 138, 149. Defendants implied that NYGG (Asia)'s (and not Wey's) control would be limited to matters requiring stockholder approval, such as the election of directors. SAC ¶¶ 151, 152, 156, 157.

The 6D Defendants were aware that they could not report that Wey was associated with 6D. Prior to the Class Period, Wey's fraudulent business dealings were partially exposed to the press and to investors. Wey's business associates have claimed his business is a "front for illegal activities," SAC ¶ 174, while a Barron's news article reported that the stock price of firms Wey promoted would typically collapse to zero amidst accusations of fraud that his handpicked auditor had missed, SAC ¶ 67. Wey accused public figures of things like having bodies ravaged by "years of consuming hormone-fried chicken and stressing over money" and being "like a dog wagging her tail trying to attract a mating partner" or being an "Uncle Tom" who was "caught messing with another man's wife." SAC ¶¶ 174, 175. Moreover, Wey sexually harassed a NYGG intern, who later won a widely-publicized lawsuit in which the jury awarded her $18 million in damages, $16 million of which were punitive, and the Honorable Paul G. Gardephe held that Wey's misconduct

was "at the extreme end of the [reprehensibility] spectrum." SAC ¶ 177. Matthew Sullivan ("Sullivan"), a named 6D executive officer, referred to Wey as a "very creepy guy," and in March 2015, told Kang he felt "uncomfortable in my position as an officer of the company, [about how] Ben Wey was conducting himself not just on a personal level but on a business level and I was deeply concerned." SAC ¶ 178.

Wey told Kang "you don't want to be seen with me." SAC ¶ 179. Kang instructed other 6D employees not to discuss or mention Wey in any emails, except in an emergency, and then to use a code word to refer to Wey. SAC ¶ 181.

However, Wey was personally involved in 6D's day-to-day management. He had primary responsibility for securing 6D's financing. SAC ¶ 107 a.-b. Wey selected 6D's auditor. SAC ¶ 107 c. Wey interviewed 6D's CFO candidate and signed off on its choice. SAC ¶ 107 e. Wey personally interviewed the candidates for all leadership positions. *Id.* Wey dictated how and when 6D personnel could sell their 6D stock, demanding they sell stock to Wey's friends. SAC ¶ 107 d. In May or June of 2015, Wey instructed Kang to create and implement an aggressive document destruction policy, requiring that all emails be destroyed

within 90 days. SAC ¶ 107 e. Wey reviewed, made changes to, and approved 6D's SEC filings before they were filed. SAC ¶ 107 g. Wey controlled 6D's litigation, selected its counsel, and gave instructions. SAC ¶ 107 i. 6D rescheduled meetings, including marketing discussions, if Wey could not attend. SAC ¶ 107 h. Wey caused 6D to violate Board directives, including by disobeying a direct Board order and violating restrictions imposed by 6D's publicly filed employee stock compensation program to award stock options to NYGG employees. SAC ¶ 109. Wey manipulated public trading in 6D's stock. SAC ¶ 127.

Wey was responsible for 6D's capital markets strategy and activity, which Kang acknowledged. SAC ¶ 107 b. Wey personally controlled 6D's acquisition strategy. SAC ¶ 110. Wey dictated 6D's overall strategy, which was to acquire targets to entice a large investor. SAC ¶¶ 111, 113. Wey selected individual acquisition targets. SAC ¶¶ 115, 117. Wey provided 6D's form acquisition agreement, negotiated individual terms, and reviewed all acquisition agreements. SAC ¶¶ 112, 114, 118.

Wey visited 6D's offices every few weeks, and Kang also regularly visited NYGG's offices in Trump Tower. SAC ¶

107 j. Wey's attorney and co-conspirator Robert Newman ("Newman") also regularly visited 6D's offices. *Id.*

In December 2014, Kang emailed Sullivan, stating that a proposed acquisition "aligns [the] interests of [Benjamin Wey] even more [with] our success and growth because this is more than just [money] to him," and that Wey's interests already were "aligned" with 6D's because of his "investment" in 6D. SAC ¶ 115. Further, Kang stated that the proposed transaction would mean Wey's family "as well" benefits from 6D's growth. *Id.* In a June 2015 call, Kang admitted that Wey "is a shareholder" of 6D and as such "he's got influence" over it. SAC ¶ 13.

Additionally, in discussions with Discover Growth Fund ("Discover"), a large investor, Defendants referred interchangeably to NYGG (Asia) and Wey as the holder of 45% of 6D's stock. SAC ¶ 126. After Discover had signed investment agreements with 6D, Kang summarized his relationship with Wey to Discover as: "[B]asically, I work for him." SAC ¶ 127. When Wey excused himself to use the bathroom during a meeting with Discover, Discover asked Kang pointed questions about Wey, but when Wey returned, Kang immediately stopped speaking and "sheepishly" recounted the questions and answers. SAC ¶ 128. Wey

also stated at the meeting with Discover, in Kang's presence, that he (Wey) controlled 6D. SAC ¶ 127.

On September 10, 2015, the United States Department of Justice ("DOJ") and the SEC announced that they had indicted and sued, respectively, Wey and certain of his associates for securities fraud, including in connection with CleanTech. The SEC complaint and DOJ indictment, and the accompanying press releases, revealed that NYGG (Asia) was a Wey nominee, and that Wey - not Li, as had been claimed - was in truth 6D's controlling shareholder. SAC ¶ 164.

The NASDAQ immediately halted trading in 6D's stock on the ground that Wey actually held NYGG (Asia)'s 6D shares. SAC ¶ 164 d., 166-67. 6D appealed the NASDAQ's delisting.

In the course of its audit of 6D's 2015 financial statements, BDO USA LLP ("BDO") conducted procedures to determine whether Wey's influence over 6D violated its internal controls. BDO determined that Wey and Kang had disobeyed the Board's explicit instructions and issued stock options to NYGG employees in violation of company rules, and that Kang had repeatedly lied to 6D's Board, and to an internal 6D

investigation conducted by the law firm Blank Rome LLP, about Wey. SAC ¶ 15. BDO told 6D it could no longer rely on its CEO's Kang's representations and would have to resign as auditors unless Kang resigned himself. When 6D refused to terminate Kang, BDO resigned, along with 6D's audit committee chair, making its findings public. *Id.*

Shortly thereafter, the NASDAQ delisted 6D's stock. When trading resumed in March 2016, 6D's stock price fell to $1.00 the first day, and continued to fall to $0.21 over the next three trading days. SAC ¶ 172.

III. The Applicable Standards

The Rule 12(b)(6) standard requires that a complaint plead sufficient facts to state a claim upon which relief can be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). On a motion to dismiss under Fed. R. Civ. P 12(b)(6), all factual allegations in the complaint are accepted as true, and all reasonable inferences are drawn in the plaintiff's favor. *Littlejohn v. City of N.Y.*, 795 F.3d 297, 306 (2d Cir. 2015); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir. 1993). However, "a

plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions." *Twombly*, 550 U.S. at 555 (quotation marks omitted). A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 663 (quoting *Twombly*, 550 U.S. at 570).

A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 556). In other words, the factual allegations must "possess enough heft to show that the pleader is entitled to relief." *Twombly*, 550 U.S. at 557 (internal quotation marks omitted).

Additionally, while "a plaintiff may plead facts alleged upon information and belief 'where the belief is based on factual information that makes the inference of culpability plausible,' such allegations must be 'accompanied by a statement of the facts upon which the belief is founded.'" *Munoz-Nagel v. Guess, Inc.*, No. 12-1312, 2013 WL 1809772, at *3 (S.D.N.Y. Apr. 30, 2013) (quoting *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010)) and *Prince v. Madison Square Garden*, 427 F.

Supp. 2d 372, 384 (S.D.N.Y. 2006); *see also Williams v. Calderoni*, No. 11-3020, 2012 WL 691832, *7 (S.D.N.Y. Mar. 1, 2012). The pleadings, however, "must contain something more than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Twombly*, 550 U.S. at 555 (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (3d ed. 2004)).

Plaintiffs must do even more to state a claim for federal securities fraud. *See Emps.' Ret. Sys. v. Blanford*, 794 F.3d 297, 304 (2d Cir. 2015); *S. Cherry St., LLC v. Hennessee Grp., LLC*, 573 F.3d 98, 110 (2d Cir. 2009). These claims are subject to the strict pleadings standards of both Rule 9(b) and the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(2) ("PSLRA"), which was enacted in 1995 "[a]s a check against abusive [securities] litigation by private parties . . . ." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313, 319, 321 (2007).

Plaintiffs must satisfy Rule 9(b)'s requirement that "the circumstances constituting fraud" be "state[d] with particularity." Fed. R. Civ. P. 9(b). Thus, "[t]o satisfy the pleading standard for a misleading statement or omission under

Rule 9(b), a complaint must (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Blanford*, 794 F.3d at 305 (internal quotation marks and citation omitted).

The PSLRA builds on Rule 9's particularity requirement, imposing requirements for both scienter and proximate causation.[1] As to scienter, plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind" with respect to "each act or omission alleged to violate this chapter." 15 U.S.C. § 78u-4(b)(2)(A); *see also Tellabs*, 551 U.S. at 313. This "state of mind" requires a showing "of intent to deceive, manipulate, or defraud," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 188 (1976), or recklessness, *In re Carter-Wallace, Inc., Sec. Litig.*, 220 F.3d 36, 39 (2d Cir. 2000). For the requirement of a "strong inference," a plaintiff must show that the inference of fraudulent intent is "more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of non-fraudulent intent." *Tellabs*, 551 U.S. at 314. Thus, the Court "must consider, not only inferences

[1] Proximate causation is hereinafter referred to as "loss causation."

urged by the plaintiff, . . . but also competing inferences rationally drawn from the facts alleged." *Id.*

As to loss causation, "the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4). The plaintiffs must "prove that the economic harm that it suffered occurred as a result of the alleged misrepresentations and that the damage suffered was a foreseeable consequence of the misrepresentation." *Rothman v. Gregor*, 220 F.3d 81, 95 (2d Cir. 2000) (internal quotation marks and citation omitted). Because the SAC alleges a "corrective disclosure" theory of loss causation, *see* SAC ¶¶ 164-65, Plaintiffs here must allege facts showing that a corrective disclosure revealed the information that Plaintiffs contend was previously omitted. *See Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 n.4 (2d Cir. 2005) (a disclosure that "do[es] not reveal to the market the falsity of [] prior" statements "do[es] not amount to a corrective disclosure"). The SAC must also distinguish the effect of the alleged fraud from the "tangle of [other] factors" that can affect a stock's price. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 343 (2005); *see also Lentell*, 396 F.3d at 177 (complaint

must plead "facts sufficient to support an inference that it was defendant's fraud - rather than other salient factors - that proximately caused plaintiff's loss").

IV. The Misrepresentation or Omission of a Material Fact is Inadequately Pled

In order to state a Section 10(b)/Rule 10b-5 claim, a complaint must plausibly allege "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 232 (2d Cir. 2014); *see also Fila v. Pingtan Marine Enter. Ltd.*, 195 F. Supp. 3d 489, 494 (S.D.N.Y. 2016).

The SAC alleges two misstatements or omissions that purportedly rendered certain statements misleading.

First, according to Plaintiffs, 6D's public disclosures listing its beneficial owners were misleading because they failed to identify Wey, who purportedly

"controlled" and/or "beneficially owned" 6D's largest shareholder, NYGG (Asia). 6D allegedly was supposed to disclose this fact in its 10-K and proxy statements as per Item 403 of Regulation S-K.3 SAC ¶¶ 135-136, 143, 146-148, 153. Plaintiffs do not contend that Wey personally owned more than five percent of 6D's shares, but rather that Wey controlled NYGG (Asia) and thus was a beneficial owner of 6D shares.

Second, according to Plaintiffs, 6D's bylaws, which were attached to some of the company's SEC filings, were misleading because they listed certain officerships but failed to disclose that Wey was the "unofficial" CEO of 6D, as he "control[led] 6D's day-to-day business operations, both through his own personal involvement and through his staff at NYGG." SAC ¶¶ 10, 107, 138, 149, 151.

The first alleged omission is that Wey beneficially owned more than five percent of 6D's shares because he owned or controlled NYGG (Asia). First, Plaintiffs have not shown that there was, indeed, an omission. The September 4, 2014 proxy statement (the "Definitive Proxy"), pertaining to the reverse recapitalization transaction, is cited by Plaintiffs as one of the documents that purportedly omitted material information. *Id.*

¶ 145. However, the Definitive Proxy disclosed that NYGG (Asia) was "represented" by Wey and that Wey was interacting with Six Dimensions (6D's predecessor) in that connection:

> On April 8, 2014, a meeting was held among the Company, represented by Mr. Uchimoto, Six Dimensions, represented by Mr. Kang and others from Six Dimensions and Mr. Peter Campitiello, Esq. of Kane Kessler, P.C. ("Kane Kessler"), counsel for Six Dimensions and NYGG Asia, represented by Mr. James Baxter, Esq., Mr. Benjamin Wey and Mr. Neal Beaton, Esq. from Holland & Knight LLP ("Holland & Knight"), counsel to NYGG Asia, for the purpose of exploring a possible merger of Six Dimensions and the Company [CleanTech]. Prior to this meeting, Six Dimensions had pursued other mergers and funding opportunities with parties unrelated to the Company or NYGG Asia.

The Plaintiffs acknowledge that 6D was explicit in its public filings that NYGG (Asia), as 6D's largest shareholder, had the ability to "substantially influence" and "control" 6D:

> NYGG (Asia), Ltd. holds, in the aggregate, approximately 46.2% of the outstanding shares of our common stock as of November 10, 2014. As a result, NYGG (Asia) has the ability to substantially influence and, in some cases, may effectively control the outcome of corporate actions requiring stockholder approval, including the election of directors. This concentration of ownership may also have the effect of delaying or preventing a change in control of 6D Global, even if such a change in control would benefit other investors.

SAC ¶ 150. These "disclosures and representations, taken together and in context, would [not] have misled a reasonable investor." *Fila*, 195 F. Supp. 3d at 494 (quoting *Rombach v. Chang*, 355 F.3d 164, 172 n. 7 (2d Cir. 2004)); *see also In re ProShares Trust Sec. Litig.*, 728 F.3d 96, 103 (2d Cir. 2013) (affirming dismissal of claim after "read[ing] the prospectus cover-to-cover.").

Even taking Plaintiffs' allegation that there was an omission as true, Plaintiffs fail to "show, beyond mere speculation," that the facts allegedly omitted were actually true. *Turner v. MagicJack VocalTec, Ltd.*, No. 13 CIV. 0448, 2014 WL 406917, at *6 (S.D.N.Y. Feb. 3, 2014); *see also Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998) ("[A] defendant must actually make a false or misleading statement in order to be held liable under Section 10(b).) (internal quotation marks and citation omitted); *SEC v. Cedric Kushner Promotions, Inc.*, 417 F. Supp. 2d 326, 332 (S.D.N.Y. 2006). Specifically, Plaintiffs must plausibly establish Wey's "beneficial ownership" of 6D as defined in Item 403. 17 C.F.R. § 240.13d-3(a). The term "beneficial owner" has independent legal significance; for a person to be a beneficial owner, he or she

must have "voting power" or "investment power" over the shares. *Id.*

Plaintiffs allege that Kang stated, in a surreptitiously recorded phone conversation, that Wey is "'a shareholder' of 6D and, as such, 'he's got influence' over it." SAC ¶ 13. Kang is not alleged to have stated that Wey (i) controlled or owned NYGG (Asia), or (ii) controlled or owned more than five percent of 6D's shares. They contend that Wey "owned" and "controlled" NYGG (Asia), and through that ownership, thereby owned and controlled 6D. SAC ¶¶ 135-136, 143, 146-148, 153. Plaintiffs state in their Opposition that "Defendants' misconduct [predominantly] consists in omitting to disclose that Wey beneficially owned 45% of 6D's stock." Op. at 10. The Plaintiffs' factual support for this allegation, ultimately, is that Wey "owned" NYGG (Asia). Mere "ownership," however, is conclusory, and is not sufficient to satisfy the Rule 9(b) and PSLRA pleading standard. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

The Plaintiffs also rely on statements by third parties to support their theory of beneficial ownership. They point to a declaration filed in another lawsuit that described a meeting in July or August of 2015, in which unnamed "executive officers" of 6D "casually refer[ed]" to NYGG (Asia) and Wey interchangeably. This purported "casual" statement says nothing about whether Wey was a "beneficial owner" of 6D under Item 403, and falls far short of meeting the particularity requirements of Rule 9(b) and the PSLRA. Moreover, the meeting happened after 6D issued the last allegedly misleading SEC disclosure.

Plaintiffs additionally claim that the SEC's assertion, in its September 2015 complaint against Wey, that Wey beneficially owned CleanTech shares at various times means that Wey beneficially owned 6D shares, because certain of those times overlap with 6D's existence. The SEC did not allege that Wey owned 6D shares, as opposed to CleanTech shares. The SEC's CleanTech stock-price manipulation claims appear confined to the time preceding 6D's existence, and Plaintiffs do not allege that Wey manipulated 6D's stock. Moreover, allegations in an SEC complaint cannot serve to allege adequately the instant claim. See *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976) (holding that "neither a complaint nor references to

a complaint which results in a consent judgment may properly be cited in the pleadings" because there had been no "actual adjudication of any of the issues"); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 218 F.R.D. 76, 78 (S.D.N.Y. 2003) (striking allegations in securities fraud complaint that referred to or relied on a separate SEC complaint).

Plaintiffs have not alleged any other facts demonstrating that Wey beneficially owned more than five percent of 6D shares, which is the threshold required to be a "beneficial owner" under Item 403. They admit that a company's owner does not necessarily control the voting and investment power of the stock that the company holds in other entities. Opp. at 10 ("[T]here could be times in which an owner does not share either of these rights."). "An individual shareholder, by virtue of his ownership of shares, does not own the corporation's assets[.]" *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003). Because Plaintiffs did not plead with particularity more than Wey's generic ownership of NYGG (Asia), their claims are insufficient to establish that Wey had "the power to vote" or "the power to dispose" of NYGG (Asia)'s shares, as required to be a beneficial owner under Item 403. 17 C.F.R. § 240.13d-3(a).

The second alleged misstatement in the SAC is that 6D's bylaws, which were attached to a few of 6D's SEC filings, were misleading because they "did not disclose that Wey was 6D's unofficial CEO." SAC ¶ 10; *see also id.* ¶¶ 137, 149. The claim that Wey was 6D's "unofficial CEO" is based upon a series of allegations in the Complaint to the effect that Wey had interactions with certain 6D officers.

6D Defendants had no duty to disclose that Wey was the "unofficial CEO" of 6D. Federal securities law is settled that "[s]ilence, absent a duty to disclose, is not misleading." *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988). In other words, "[f]or an omission to be actionable, the securities laws must impose a duty to disclose the omitted information." *Resnik v. Swartz*, 303 F.3d 147, 154 (2d Cir. 2002); *see also In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993) ("[A] corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact.").

Consistent with Rule 3b-7, "[t]he few cases that have found an employee to be a de facto officer because of their ability to make policy involved alleged 'consultants' who were actually in total control of a company." *SEC v. Prince*, 942 F.

Supp. 2d 108, 134 (S.D.N.Y. 2015) (emphasis added); *see also id.* ("The SEC has never alleged that Prince was 'running the company' and thus none of these cases involve factual situations similar to the present one."). Plaintiffs plead no facts showing that Wey, even if he acted as an "unofficial CEO," somehow managed to usurp the Board's ultimate authority to manage 6D, which is the relevant control issue. There is no allegation that Wey or NYGG (Asia) sat on the 6D Board, that Wey had any influence over the Board, or that Wey held a 6D officer position.

Plaintiffs have not sufficiently alleged how the additional statement in the bylaws - "[t]he business, property and affairs of the Corporation shall be managed by" the 6D Board of Directors - was misleading. Absent allegations that Wey controlled the 6D Board, this alleged omission is insufficient to state a claim. *See In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 993-94 (Del. Ch. 2014) (applying the seminal case of *Kahn v. Lynch Communications Systems, Inc.*, where the Delaware Supreme Court described two scenarios in which a stockholder could be found a controller under Delaware law: where the stockholder (1) owns more than 50% of the voting

power of a corporation or (2) owns less than 50% of the voting power of the corporation but "exercises control over the business affairs of the corporation," and rejecting the theory that an external management company affiliated with the plaintiff controlled a company called KFN, even though it supplied all of the officers of KFN, because the complaint failed to allege that KKR or the manager controlled the KFN Board).

Plaintiffs assert for the first time in their Opposition that the 6D Defendants had an independent obligation to disclose Wey as "an executive officer" pursuant to 17 C.F.R. 229.401(b), based upon the activities he allegedly undertook with respect to the company, such as communications with the CEO, visits to the company, and advice on strategy. Opp. at 16-17. Plaintiffs may not use motion to dismiss briefing to amend their pleadings. *See Veterans in Positive Action, Inc. v. Dep't of Veterans Affairs Veterans Health Admin.*, No. 13 CIV. 3306 PAE, 2013 WL 5597186, at *2 (S.D.N.Y. Sept. 30, 2013) ("[P]laintiffs may not use an opposition brief to amend their complaint."). Therefore, this theory is disregarded.

V. Scienter Has Not Been Adequately Pled

A plaintiff can meet the strict scienter pleading requirements under the PSLRA only by "alleging facts to show either (1) that defendants had the motive and opportunity to commit fraud, or (2) strong circumstantial evidence of conscious misbehavior or recklessness." *ECA v. JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009). The scienter requirement is applicable in cases that allege omissions supposedly rendering statements misleading. *In re Bank of Am. AIG Disclosure Sec. Litig.*, 980 F. Supp. 2d 564, 586 (S.D.N.Y. 2013). This is because "[i]t is entirely possible for a defendant to make an honest but negligent mistake in judging how much detail needs to be included in public statements in order to avoid misleading the market." *In re GeoPharma, Inc. Sec. Litig.*, 411 F. Supp. 2d 434, 437 (S.D.N.Y. 2006).

Plaintiffs have not pled facts showing the 6D Defendants' motive or opportunity to commit fraud. The only "motive" that Plaintiffs attempt to plead is that "Defendants concealed Wey's involvement because they knew they could not reveal to investors that he was associated with 6D," and that

"[i]t is plain that Defendants understood that being associated with Wey was a serious liability." SAC ¶¶ 173, 178.

However, as set forth above, it was disclosed in public SEC filings that Wey was a representative of 6D's largest if not controlling shareholder, NYGG (Asia), and had interactions with 6D in that context. This disclosure counters the Plaintiffs' "motive and opportunity" theory that "Defendants concealed Wey's involvement because they knew they could not reveal to investors that he was associated with 6D." SAC ¶ 173; *see, e.g., In re Bank of Am. AIG Disclosure Sec. Litig.*, 980 F. Supp. 2d at 586 (defendant's "own disclosures . . . support an inference against scienter that is far stronger than the competing inference that the plaintiffs suggest").

As to the alleged omission regarding Wey's purported beneficial ownership, Wey would have been independently required to publicly disclose his beneficial ownership on a Schedule 13D. See 17 C.F.R. § 240.13d-1. In this case, while NYGG (Asia) disclosed its beneficial ownership on Form 13D, Wey did not disclose any ownership of 6D. Plaintiffs allege no facts why the 6D Defendants should not have relied on NYGG (Asia)'s

statutorily required disclosures, and the lack of any corresponding disclosure from Wey.

Plaintiffs do not adequately plead facts showing that Kang, Syznowski, or McEwen were aware at any relevant time of any of Wey's previous bad acts that purportedly made Wey a "serious liability." They have alleged that Kang recounted, during a surreptitiously recorded conversation in June 2015, that he and Wey "recently" deliberately left a restaurant separately because Wey told Kang "you don't want to be seen with me." SAC ¶ 179. This is insufficient to meet the pleading standard here. Further, the alleged conversation occurred after the final SEC disclosure complained of by Plaintiffs (the April 2015 Proxy).

The absence of facts suggesting that Plaintiffs believed Wey was a "liability" during some relevant time period counters the inference that the 6D Defendants had "motive or opportunity" to commit fraud. *See, e.g., Wang v. Bear Stearns Cos.*, 14 F. Supp. 3d 537, 546 (S.D.N.Y. 2014) ("Absent credible allegations that Zhou or Bland had access to nonpublic facts about Bear Stearns's unfolding financial condition, Wang's claim

cannot satisfy the PSLRA and the particularity requirements of Rule 9(b).").

Plaintiffs have also not alleged that Kang, Szynkowski, or McEwen "benefitted in some concrete and personal way from the purported fraud," as is required by the "motive and opportunity" test. *See ECA*, 553 F.3d at 198; see also *Kalnit v. Eichler*, 264 F.3d 131, 139 (2d Cir. 2001) (plaintiffs must allege "concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures"). They provide no facts showing that 6D Defendants received any "concrete benefits," by, for example, selling their shares at an artificially inflated price. Indeed, they do not allege that Kang, Szynkowski or McEwen (or even NYGG (Asia)) sold a single share of 6D stock during the Class Period. *See San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Companies, Inc.*, 75 F.3d 801, 814 (2d Cir. 1996) ("[T]he fact that other defendants did not sell their shares during the relevant class period sufficiently undermines plaintiffs' claim regarding motive."); *In re Glenayre Techs., Inc. Sec. Litig.*, No. 96 CIV. 8252 (HB), 1998 WL 915907, at *4 (S.D.N.Y. Dec. 30, 1998), aff'd sub nom. *Kwalbrun v. Glenayre Techs., Inc.*, 201 F.3d 431 (2d Cir. 1999) (no inference of scienter where the

company's highest ranking officers did not sell stock before the company disclosed the allegedly omitted information); *Turner*, 2014 WL 406917, at *11 ("That three of the four individual Defendants, all high-ranking executives at the Company, did not sell stock during the Class Period . . . rebuts an inference of scienter."). As the Second Circuit has made clear, a lack of insider stock sales cuts against finding scienter. *See San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 814 (2d Cir. 1996) (the failure of some defendants to sell stock during class period undermined the plaintiffs' allegations that any defendant intended to inflate the stock price for personal profit).

Plaintiffs have alleged that the 6D Defendants committed fraud because they were motivated to list on the NASDAQ, an alleged "condition precedent to completing the 6D Acquisition." Opp. at 18. However, obtaining a NASDAQ listing and completing a beneficial corporate transaction are general corporate motives that are insufficient to plead scienter. *See In re Solucorp Indus., Ltd. Sec. Litig.*, No. 98 Civ. 3248(LMM), 2000 WL 1708186, at *5 (S.D.N.Y. Nov. 15, 2000) (allegation that defendants were motivated to be listed on the NASDAQ Small Cap Market was "no different from alleging an abstract desire to

enable the company to enjoy a high stock price and thereby ease the difficulties of raising additional capital") (internal quotation marks and citations omitted); *Kalnit*, 264 F.3d at 141 ("[T]he desire to achieve the most lucrative acquisition proposal can be attributed to virtually every company seeking to be acquired. Such generalized desires do not establish scienter.").

VI. The Allegations of Loss Causation Are Inadequate

To plead loss causation, a plaintiff must plausibly allege "that the *subject* of the fraudulent statement or omission was the cause of the actual loss suffered, *i.e.*, that the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security." *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d at 173 (emphasis in original; internal quotation marks omitted)

Plaintiffs have relied upon the following "corrective disclosures," are referred to collectively as the "September 10 Federal Allegations:"

- The September 10, 2015 unsealing of the Justice Department Indictment filed against Wey two days

earlier in the Southern District of New York and the Press Release issued by the U.S. Attorney's Office that same day (the "Indictment Press Release").

- The September 10, 2015 SEC Complaint filed against Wey (the "SEC Complaint") and the press release issued by the SEC that same day (the "SEC Press Release").

SAC ¶¶ 161-165. As an initial matter, as noted by the Honorable Kevin Castel in the Discover/6D litigation, the September 10 Federal Allegations set forth only unproven Government allegations of a stock manipulation scheme purportedly orchestrated by Wey - not established facts. *See Discover Growth Fund v. 6D Glob. Techs. Inc.*, No. 15 Civ. 7618 PKC, 2015 WL 6619971, at *7 (S.D.N.Y. Oct. 30, 2015) ("The charge in the indictment and the allegation in the SEC complaint are not evidence of the truth of the assertions therein.").

Even if unproven Government allegations could qualify as a corrective disclosure, the September 10 Federal Allegations still did not reveal the alleged fraud. The September 10 Federal Allegations do not state that Wey was the "unofficial CEO" of 6D and "conducted and controlled" the operations of 6D, as the Plaintiffs allege. SAC ¶ 138. The Indictment Press Release focuses on Wey's alleged "scheme" to manipulate the stock prices of U.S.-listed companies, but nowhere even mentions 6D. Nor does

it disclose that Wey would control the operations of these companies. Similarly, the 24-page Indictment against Wey does not once reference 6D, nor state that Wey owned 6D or controlled 6D's operations. And the SEC Press Release focuses on Wey's alleged stock manipulation scheme, without mention of 6D or NYGG (Asia). The SEC Complaint is the only document out of the four that even references 6D, and it states as follows: "In late 2014, CleanTech merged with a small American technology company and became 6D Global Technologies Inc., which is currently traded on the NASDAQ under the ticker symbol, 'SIXD.'" The SEC Complaint does not allege that Wey controlled 6D.

The September 10 Federal Allegations do not disclose the second alleged omission, either. While the documents discuss Wey's purported scheme to use NYGG to engage in stock manipulation with other companies, there are only a handful of brief references to a "Beijing office" of NYGG. Neither the Indictment nor the SEC Complaint alleged that Wey owned or controlled NYGG (Asia) or that Wey had the power to vote or direct the disposition of NYGG (Asia)'s shares, as would be required to be an indirect beneficial owner. *See* 17 C.F.R. § 240.13d-3(a).

Because the September 10 Federal Allegations did not reveal the alleged omissions, the omitted information could not have caused the price drop that followed thereafter, and therefore there is no loss causation. *See Lentell*, 396 F.3d at 175 n.4.

Plaintiffs have also "not adequately pled facts which, if proven, would show that [their] loss was caused by the alleged misstatements as opposed to intervening events." *Lentell*, 396 F.3d at 174. Plaintiffs do not allege that Wey's stock manipulation scheme occurred at 6D, nor have Plaintiffs alleged any facts showing that it was the purported revelation of the "fraud" (that Wey controlled 6D or NYGG (Asia)) in the September 10 Federal Allegations – as opposed to the SEC's and U.S. Attorney's allegations of Wey's stock manipulation scheme – that caused the share price to decline.

Furthermore, the loss in stock price Plaintiffs seek to recover did not take place until six months after the September 10 Federal Allegations. SAC ¶ 172. Plaintiffs allege that the NASDAQ halted trading on 6D's shares immediately after the September 10 Federal Allegations, and that trading did not resume until March 29, 2016, when 6D began trading over the

counter. Plaintiffs allege that the price dropped from the previously frozen $2.90 to $1.00 on March 29, 2016, that it fell to $0.50 on March 30, to $0.30 on March 31, and to $0.21 on April 1. Plaintiffs' loss-causation theory is that omitting from SEC filings Wey's alleged five percent beneficial ownership of 6D shares, and Wey's alleged role as "secret" CEO, caused 6D to be delisted, which in turn "caus[ed] its share value to decline." Opp. at 22.

The NASDAQ stated with respect to the delisting that "we do not know whether CEO Kang acted at Wey's behest or was otherwise influenced by Wey. . . . We cannot conclude on this record that Wey has control over the NYGG Asia shares."). Whether or not Wey beneficially owned more than five percent of 6D's shares or controlled 6D was not a basis for 6D's delisting, which Plaintiffs concede in their Opposition in quoting NASDAQ's findings. Additionally, the September 10 SEC and DOJ allegations focused on Wey's alleged scheme to manipulate CleanTech share prices years before 6D existed, but did not allege that Wey was 6D's "unofficial" CEO. Plaintiffs contend that Wey's alleged "secret CEO" status was revealed in 6D's March 23, 2016 8-K disclosing the resignation of 6D's auditor, BDO. Opp. at 24. Although the 8-K and the attached BDO letter reflect BDO's

concerns that Wey was an uncompensated "advisor," neither the 8-K nor the attached BDO letter characterized Wey as an unofficial CEO of the company or as a controller of the Company.

No facts have been alleged by Plaintiffs to establish that the non-disclosure of Wey's alleged ownership caused the delisting or the loss. Further, a variety of other factors are relevant in the time period between September 10, 2015 and March 29, 2016. The de-listing proceedings before the NASDAQ transpired over the course of those six months; 6D's auditor, BDO, resigned on March 17, 2016; and the NASDAQ denied 6D's appeal to overturn the delisting decision on March 24, 2016. SAC ¶¶ 166-172. Plaintiffs have failed to allege facts showing that the purported disclosure of the "fraud" - as opposed to these or other intervening events - caused the drops in 6D's stock price referenced by Plaintiffs. See *Lentell*, 396 F.3d at 177 (dismissal required in absence of "facts sufficient to support an inference that it was defendant's fraud - rather than other salient factors - that proximately caused plaintiff's loss").

VII. Conclusion

Based upon the conclusions set forth above, the Defendant's motion is granted, and the Second Amended Complaint is dismissed with prejudice.

New York, NY
March 6, 2017

ROBERT W. SWEET
U.S.D.J.