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UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Application of
6D Global Technologies, Inc.
For Review of Action Taken by
The Nasdaq Stock Market LLC

Admin. Proc. File No. 3-17908

NASDAQ'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS 6D GLOBAL TECHNOLOGIES, INC.'S APPLICATION FOR REVIEW AS UNTIMELY

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I. INTRODUCTION

6D concedes that Nasdaq provided all required notices of its final delisting decision by December 9, 2016, and that 6D's application was filed nearly three months after the 30-day appeal period provided by Rule 420 had expired. 6D is forced to claim that "extraordinary circumstances" justify its otherwise untimely appeal.

6D's claim of "extraordinary circumstances" fails for multiple independent reasons.

First, the guiding star for the Commission's interpretation of Rule 420 has been that "extraordinary circumstances" are present only where the reason for the failure timely to file was beyond the applicant's control. All of the arguments 6D makes in its brief were available to it during the time provided by Rule 420. Excusing 6D's untimely application under these circumstances would fatally undermine Rule 420, and encourage litigants to bombard the Commission with similar excuses.

Second, 6D spends the majority of its brief (along with reams of exhibits) attempting to establish that Nasdaq's delisting decision improperly relied on unproven allegations about Mr. Benjamin Wey. This argument is baseless. 6D argued during the delisting process that Nasdaq should not rely on allegations regarding Wey. In response, the Listing Council and the Hearings Panel both expressly disclaimed reliance on any unproven allegations against Wey as a basis for the delisting determination. In prior litigation, 6D has itself disclaimed the argument it now presses the Commission to adopt—insisting that Nasdaq's delisting decision was "*not because of any alleged involvement by Wey.*" *Puddu v. 6D Global Techs., Inc.*, No. 15-cv-8061, Dkt. 113 at 7 n.1 (S.D.N.Y. Aug. 19, 2016) (emphasis added).

6D's attempt to ignore the stated reasoning and determinations in delisting decisions is troubling. If successful, countless individuals and entities would bring similar challenges to

otherwise straightforward rulings by SROs, undermining the finality and predictability of the administrative system. Moreover, the Commission has already held that allegations of an improper administrative process, or even personal animus, do not constitute extraordinary circumstances justifying an untimely application. *See In re Asensio*, Exchange Act Release No. 34-62315, 2010 WL 2468111, at *6, *9 (June 17, 2010).

Third, the district court's dismissal order in the private *Puddu* securities action does nothing to change this analysis. Whether or not the plaintiffs in that case adequately pleaded several securities fraud claims is irrelevant to the bases the Listing Council relied upon in its decision. Even accepting 6D's reading of *Puddu*, arguments that Nasdaq was "simply wrong" are insufficient. The Commission has already rejected claims that the comparative weight of an argument could provide extraordinary circumstances for delay. *In re Pennmont*, Exchange Act Release No. 34-61967, 2010 WL 1638720, at *5 (Apr. 23, 2010).

* * *

Notably, the Listing Council determined that delisting was warranted on many grounds, including 6D's failure to comply with "the filing and annual fee requirements." MTD Ex. A at 12. Although 6D eventually filed a belated Form 10-K for year-end 2015, it remains delinquent on required quarterly or annual filings for 2016 and 2017, and has not provided any meaningful financial information to the public through a press release or an 8-K since that date. *See* Nasdaq Rule 5250(c)(1). There are thus independent grounds justifying delisting that undercut any notion that a waiver of the deadline is appropriate here.

II. ARGUMENT

A. 6D Concedes That Its Application For Review Is Untimely, Barring A Showing Of Extraordinary Circumstances.

6D agrees that its application for review was filed long after the 30-day appeal deadline imposed by Rule 420 expired. There is no dispute that Nasdaq formally notified 6D that the delisting decision became final on November 28, 2016, MTD Ex. C, or that Nasdaq filed the required Form 25 with the Commission on December 9, 2016, providing public notice of Nasdaq's final delisting decision. MTD Ex. D. 6D's time to appeal, therefore, began to run on December 9, 2016, and ended on January 9, 2017 (that is, the next non-Saturday, Sunday, or holiday after January 8, 2017). 17 C.F.R. § 201.420(b); *id.* § 201.160(a). The Commission has repeatedly affirmed the need for "'strict compliance with filing deadlines,'" which "'facilitates finality and encourages parties to act timely in seeking relief.'" *In re Ballard*, Exchange Act Release No. 34-77452, 2016 WL 1169072, at *3 (Mar. 25, 2016) (citation omitted); *In re Manzella*, Exchange Act Release No. 34-77084, 2016 WL 489353, at *4 (Feb. 8, 2016) (same).

Faced with these undisputed facts, 6D relies entirely on the argument that "extraordinary circumstances" justify its untimely April 5, 2017 submission of the application for review. *See* Opp. 1 (arguing that the Commission has "authority to accept an application for review more than thirty days after the notice of determination was filed with the Commission, specifically if extraordinary circumstances are present"); Opp. 13 (arguing that while application for review was not timely, "extraordinary circumstances are present to warrant an extension"); *see also* 17 C.F.R. § 201.420(b). Here, however, no extraordinary circumstances justify 6D's untimely application.

B. No Extraordinary Circumstances Justify 6D's Untimely Filing.

1. All Of 6D's Arguments Regarding Supposed Taint Or Error Were Available At The Time The Delisting Decision Became Final.

The Commission has consistently held that "an extraordinary circumstance under Rule of Practice 420(b) may be shown where the reason for the failure timely to file was beyond the control of the applicant that causes the delay." *In re Pennmont*, Exchange Act Release No. 34-61967, 2010 WL 1638720, at *5 (Apr. 23, 2010); *accord, e.g.*, *In re Ballard*, 2016 WL 1169072, at *3 n.10 (quoting *In re Pennmont*); *In re Lenahan*, Exchange Act Release No. 34-73146, 2014 WL 4656403 at *3 n.13 (Sept. 19, 2014); *In re Orbixa Techs., Inc.*, Exchange Act Release No. 34-70893, 2013 WL 6044106 at *3 n.13 & *4 n.15 (Nov. 15, 2013).

The application fails that basic, prudent standard. All of the arguments 6D now raises could have been brought at the time the delisting decision became final.

The vast majority of 6D's brief concerns Nasdaq's supposed reliance on unproven allegations regarding Wey. *See* Opp. 4-19. 6D never claims, however, that these arguments were unavailable to it within the standard period provided by Rule 420. Indeed, 6D could have made, and did make, those same arguments during the internal Nasdaq appeal process before the final delisting decision. For example, the Listing Council's decision cited 6D's contention that any allegations regarding "Mr. Wey's involvement in the Company" were "unsubstantiated and disproven by Blank Rome's report." MTD Ex. A at 9.

Nor is there an argument that any intervening legal development provides an extraordinary circumstance that would justify 6D's delayed application. 6D's reliance on *Discover Growth Fund v. 6D Global Techs. Inc.*, No. 15-cv-7618, 2015 WL 6619971 (S.D.N.Y. Oct. 30, 2015), confirms the point. 6D argues that the *Discover* decision "reached the same conclusion" as in *Puddu*—the other primary basis cited by 6D for its untimely application.

Opp. 20 n.14. The *Discover* decision, however, was issued *more than a year before* Nasdaq's delisting decision became final. 6D could have made precisely the same arguments that it is making now within the time period set out in Rule 420. In addition, 6D's arguments do not bear any resemblance to the situation in *In re MFS Securities Corp.*, Exchange Act Release No. 34-47626, 2003 WL 1751581, at *3 & n.17 (Apr. 3, 2003), which involved a direct request from the Court of Appeals for the Second Circuit for the Commission's views regarding a relevant statute and regulations, and the application "presented 'novel facts and legal issues.'" Opp. 13.

6D's approach to the extraordinary circumstances exception would swallow the rule, upending the timeliness and finality concerns animating the Commission's 30-day appeal deadline. Presumably, under 6D's theory, if *Puddu* were decided at some point next year (or the year after that), the decision would have similarly provided "extraordinary circumstances" to excuse compliance with the Commission's timing requirements. *See* Opp. 2 (justifying timing of application by arguing that "6D's application was, however, filed within 30 days" of the *Puddu* decision); Opp. 12 (same); Opp. 14 (same); Opp. 19 (same).

Contrary to 6D's speculation, Opp. 2, 21, excusing 6D's untimely application would set a troubling precedent "likely to be repeated in other cases"—eliminating the finality secured by Rule 420, and encouraging those subject to SRO oversight to seek to overcome Rule 420's requirements. It does not take great imagination to foresee the myriad attempts that individuals and entities would make under 6D's approach to Rule 420, to reopen final SRO determinations long after the review period expired any time a new opinion or administrative ruling was issued that touched—however tenuously—on facts or legal circumstances related to a prior SRO ruling.

2. The Delisting Decision And 6D's Own Arguments Foreclose 6D's Attempts To Claim Nasdaq Relied On Allegations Regarding Wey.

6D's argument in support of "extraordinary circumstances" not only could have been raised within the timeline provided by Rule 420, it actually was made by 6D during the delisting process. Specifically, 6D argues that Nasdaq's "fixation on the Wey allegations ... was a direct cause of 6D's delisting." Opp. 14.

Contrary to 6D's argument, the Nasdaq Listing Council's decision expressly declined to reach several "additional grounds for delisting, including Mr. Wey's influence over the Company and potential stock manipulation." MTD Ex. A at 13. The Listing Council relied instead on a number of other reasons, including 6D's failure to file periodic reports with the Commission; the circumstances giving rise to the resignation of 6D's auditor; the treatment of Blank Rome (the Audit Committee's independent counsel) by 6D and its board; and 6D's failure to pay required fees. MTD Ex. A at 12. For this reason, 6D's appeal to authorities holding that allegations in complaints or indictments "cannot be the basis upon which a conclusion is reached," Opp. 15, is irrelevant. Nasdaq's delisting decision expressly refused to draw any conclusions based on the allegations against Wey.

As 6D acknowledges, the Nasdaq Hearings Panel—a reviewing body at an earlier stage in the delisting process—also "declined to consider" various allegations against Wey in support of its decision, which was in turn appealed to the Listing Council. Opp. 11. For instance, the Panel expressly declined to rely on allegations that Wey used a deceptive scheme to obtain 6D's listing on Nasdaq, Opp. Ex. 12 at 9-10, and further declined to "base its decision" on the allegation of "possible stock price manipulation by Mr. Wey." Opp. Ex. 12 at 10. The Panel

also concluded that it "need not reach" the finding that Wey controlled NYGG Asia shares. Opp. Ex. 12 at 9.[1]

It is not just Nasdaq that "contends otherwise" regarding 6D's claim that reliance on the allegations against Wey were "a direct cause of 6D's delisting," Opp. 14; 6D has itself repeatedly rejected the argument it now attempts to make before the Commission. Remarkably, 6D made these arguments in *Puddu v. 6D Global Techs., Inc.*, No. 15-cv-8061 (S.D.N.Y.)—the same case it now claims establishes extraordinary circumstances to excuse the timing requirements of Rule 420. *See* Opp. 19-21. In its memorandum in support of the motion to dismiss the *Puddu* action, 6D argued that "[t]he NASDAQ Hearings Panel denied 6D's delisting appeal *not because of any alleged involvement by Wey*, but simply because it determined that Kang did 'not instill confidence that he has the requisite experience or judgment on matters of corporate governance or public company regulatory issues required of a listed company.'" 15-cv-8061, Dkt. 113 at 7 n.1 (S.D.N.Y. Aug. 19, 2016) (citation omitted and emphasis added); *accord id.* at 7 ("[T]he NASDAQ Hearings Panel expressly did not conclude that Wey controlled NYGG (Asia) ....").

6D also stated that "NASDAQ's delisting of 6D's stock had nothing to do with some supposed control by Wey over 6D or NYGG (Asia)." *Id.* at 20 n.4. 6D's reply brief underlined the point, affirming that it was "undisputed that NASDAQ delisted 6D because it had lost confidence in Kang as CEO, not because of Wey's alleged beneficial ownership of 6D shares or Wey's alleged status as 'secret' CEO." 15-cv-8061, Dkt. 119 at 11 (S.D.N.Y. Oct. 4, 2016).

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[1] Nasdaq's role as a Self-Regulatory Organization in any event would have fully justified consideration of the criminal and civil allegations raised by the Department of Justice and the Commission, because listing on Nasdaq's market carries a message of integrity to the investing public. *See* MTD Ex. A at 11; Nasdaq Rule 5101.

The *Puddu* court agreed—concluding that "[w]hether or not Wey beneficially owned more than five percent of 6D's shares or controlled 6D was not a basis for 6D's delisting." *Puddu v. 6D Global Techs., Inc.*, No. 15-cv-8061, 2017 WL 991866, at *11 (S.D.N.Y. Mar. 6, 2017).

The reasons for the delisting were in no way "based upon unproven and unfounded allegations against Wey." Opp. 18. 6D acknowledges that one of the express grounds for delisting was the resignation of 6D's independent auditor BDO. Opp. 12. The three non-exclusive examples of the inconsistencies by Mr. Kang identified by BDO, moreover, were not related to the unproven allegations. Rather, they involved conflicting statements regarding whether Wey was involved with the Company (including evidence that Wey met regularly at the 6D office and advised the CEO); whether the Board supported an expansion into Ireland (including evidence that 6D later established an Irish subsidiary and Wey had made introductions between Kang and Ireland contacts); and whether 6D paid for Wey's trip to visit Discover Growth Fund (including evidence that these expenses were charged to Kang's credit card and reimbursed by 6D). MTD Ex. A at 5. Additionally, although 6D attempts to invoke Blank Rome's report to whitewash its conduct, Opp. 7-8, it fails to acknowledge that Blank Rome took issue with several statements made by 6D during the course of the delisting proceedings as 6D sought to leverage Blank Rome's report. MTD Ex. A at 9-10. This provided another independent ground supporting delisting, on top of 6D's filing and fee deficiencies. MTD Ex. A at 12.

In addition to being entirely unsupported by the record, 6D's attempt to look behind the express grounds relied upon by Nasdaq is troubling for the Commission and the regulatory system. Permitting 6D to attack the delisting decision on these grounds—despite Nasdaq's express disclaimers and 6D's own prior arguments—would set a pernicious precedent. Every

decision by an SRO subject to SEC review, and every SEC decision on review before the courts, could be attacked on the same ground of "looking behind" what the substantive decision actually said. The finality and predictability of the administrative system would be undermined by this approach.

The Commission's prior decisions make plain that this approach does not provide an extraordinary circumstance to justify relief from the appeal deadline. In *In re Asensio*, the Commission held that allegations regarding an SRO's "'exercise of bias'" during disciplinary proceedings, including charges of a "'bad faith investigation'" and an "'abuse of [the SRO's] regulatory discretion'" did not establish extraordinary circumstances to justify an exception from the 30-day deadline of Rule 420. Exchange Act Release No. 34-62315, 2010 WL 2468111, at *6 (June 17, 2010). Accordingly, the Commission refused to consider the merits of the proceedings, including claims that the SRO acted wrongly "because of its animus towards Asensio." *Id.* at *9. Similarly, in *In re Jakubik*, the Commission determined that allegations regarding "'serious issues of alleged prosecutorial misconduct'" and a "'denial of fair process'" at an SRO proceeding were "misplaced," and did not qualify as "extraordinary circumstances" to justify hearing an untimely appeal. Exchange Act Release No. 34-61541, 2010 WL 589808, at *2, *4 (Feb. 18, 2010). 6D's allegations of "overt hostility," Opp. 2; a "witch hunt," Opp. 18; an "obsession" with Wey, Opp. 14; or a "poison[ed] ... hearing and review process" fare no better. Opp. 14.

3. 6D's Purported Reliance On the *Puddu* Decision Changes Nothing.

The private plaintiffs' pleading deficiencies in the *Puddu* action similarly fail to establish any basis to excuse 6D's untimely filing. *See* Opp. 19-21. Even if the Commission were persuaded by 6D's interpretation of *Puddu*, proof that "Nasdaq was simply wrong" does not justify 6D's untimely appeal. *Contra* Opp. 14. As the Commission has previously concluded,

"the measure of whether an untimely application presents an extraordinary circumstance is not simply the relative weight of the arguments presented on appeal – otherwise, the 'extraordinary circumstances' requirement would be read out of Commission Rule of Practice 420." *In re Pennmont*, 2010 WL 1638720, at *5. The Commission has also previously rejected any related argument that the "complexity" of the case could constitute grounds for extending the deadline. *In re Ballard*, 2016 WL 1169072, at *3.

Nor does the *Puddu* decision undermine Nasdaq's delisting decision in any way. Critically, the Listing Council did not rely on allegations against Wey to justify the delisting decision. *See supra* Section II.B.2. Thus, the *Puddu* court's holdings that the private plaintiffs in that case were unable to establish improper omissions regarding whether "'Wey beneficially owned more than five percent of 6D's shares,'" Opp. 19 (quoting *Puddu*, 2017 WL 991866, at *5), or that the plaintiffs' attempts to "use the unproven allegations against Wey" failed to establish loss causation, Opp. 20, are irrelevant to Nasdaq's delisting decision. Indeed, *Puddu* expressly determined that Wey's purported ownership or control of 6D "was not a basis for 6D's delisting." *Puddu*, 2017 WL 991866, at *11.

Similarly unavailing is 6D's reliance on the *Puddu* court's determination that plaintiffs failed to sufficiently allege scienter by Kang or other officers and directors of 6D to commit fraud. Opp. 20. The Nasdaq Listing Council's decision did not purport to find fraud by Kang—rather, it determined that the 6D Board's refusal to remove Kang was not good governance where a "reputable independent auditor concluded ... that it could no longer accept the representations of the Company's Chairman and CEO." MTD Ex. A at 12.

Finally, the *Puddu* decision also changes nothing about the facts underlying the Listing Council's separate bases for delisting 6D—the filing and fee deficiencies. It remains undisputed

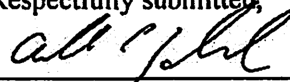
that 6D was delinquent in filing its periodic reports with the Commission and had failed to pay the fees required by Nasdaq's Rules at the time of the Listing Council's decision. Both of those conditions remain today.

III. CONCLUSION

The Commission should dismiss 6D's application for review because it is untimely.

Dated: May 12, 2017

Respectfully submitted,



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I hereby certify that on May 12, 2017, I caused a true and correct copy of the foregoing document to be served on the following by hand delivery:

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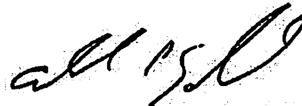

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