

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 81604 / September 13, 2017

Admin. Proc. File No. 3-17908

In the Matter of the Application of
6D GLOBAL TECHNOLOGIES, INC.
For Review of Action Taken by
THE NASDAQ STOCK MARKET LLC

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE – DELISTING FROM THE NASDAQ STOCK
MARKET LLC

Applicant appealed from decision of national securities exchange delisting its stock nearly three months after deadline had passed. *Held*, appeal is dismissed as untimely.

APPEARANCES:

Paula D. Shaffner and *Amy E. Sparrow* of Stradley, Ronon, Stevens & Young, LLP for 6D Global Technologies, Inc.

Edward S. Knight, John M. Yetter, and Arnold Golub for The Nasdaq Stock Market LLC.

Appeal filed: April 5, 2017
Last brief received: May 12, 2017

The Nasdaq Stock Market LLC requests that we dismiss as untimely an application filed by 6D Global Technologies, Inc. seeking review of Nasdaq's decision to delist it. 6D failed to comply with the filing deadline established by Section 19(d) of the Securities Exchange Act of 1934 and our Rule of Practice 420(b) because it filed its application more than thirty days after receiving notice of Nasdaq's final decision and the decision's filing with the Commission. Because 6D has failed to show the "extraordinary circumstances" that would, under our rules, support an extension of the deadline, we grant Nasdaq's motion and dismiss the application for review.

I. Background

6D, which describes itself as a "full-service digital experience firm," was formed in September 2014 through a merger of CleanTech Innovations, Inc. and Six Dimensions, Inc. In connection with the merger, CleanTech's indebtedness to an affiliate of New York Global Group ("NYGG") was cancelled in exchange for the issuance of approximately 35 million shares of 6D common stock. 6D common stock began trading on Nasdaq on December 12, 2014.

About a year after the merger, NYGG's Chief Executive Officer, Benjamin Wey, was indicted on charges of conspiracy, securities fraud, money laundering, and other crimes.¹ The indictment did not mention 6D but did accuse Wey and other defendants of manipulating the stock of one of 6D's predecessors (CleanTech) and of using the stock as part of a money laundering scheme. Two days later, the Commission announced civil charges against Wey and a number of other individuals involved with CleanTech's Nasdaq listing.² Criminal charges against Wey were dismissed on August 8, 2017; civil charges were dismissed September 1, 2017.³

The same day that the civil action was announced, Nasdaq halted trading in 6D's securities. Following an investigation and hearing, the Nasdaq Listing Qualifications Staff issued a delisting determination letter. The staff's determination that 6D should be delisted was based principally on evidence that Wey and his affiliates "exerted significant influence over [6D] and . . . orchestrated a scheme to enable [6D] to list its securities on Nasdaq by artificially inflating [6D's] shareholder count and stock price."

6D timely appealed the determination to a Nasdaq Listing Qualifications Hearing Panel, which also concluded in a March 24, 2016 decision that it was appropriate to delist 6D. The Hearing Panel considered the reasons given in the staff delisting determination, but was also concerned by more recent events and conduct. BDO USA, LLP, 6D's independent auditor, had

¹ See *United States v. Wey*, No. 1:15-cr-0611 (S.D.N.Y. Sept. 8, 2015), ECF No. 2.

² See *SEC v. Wey*, No. 1:15-cv-7116 (S.D.N.Y. Sept. 10, 2015), ECF No. 1.

³ See *United States v. Wey*, No. 1:15-cr-0611 (S.D.N.Y. Aug. 8, 2017), ECF No. 129; *SEC v. Wey*, No. 1:15-cv-7116 (S.D.N.Y. Sept. 1, 2017), ECF No. 166.

concluded that it could not accept the representations of Tejune Kang, 6D's CEO, because of a number of inconsistencies it had noted during an audit concerning Kang's and 6D's relationship with Wey. It notified 6D by letter that it would not continue as its auditor unless Kang separated from the company. After Kang declined to resign and 6D's board of directors declined to terminate him, BDO and the chair of 6D's Audit Committee resigned. The Hearing Panel found that BDO's letter and the Board's response "reflect[ed] conflicts that will not be easily resolved, and are highly suggestive of a weak corporate governance structure." As a result, the Hearing Panel concluded that "this corporate crisis is one best resolved while [6D] is not listed," and "warrants the exercise of Nasdaq's broad authority to [delist to] protect the investing public and integrity of the marketplace." In explaining its conclusion, the Hearing Panel also clarified that it did not "base its delist[ing] determination on the Wey allegations or Wey's affiliation with [6D]."

6D timely appealed the Hearing Panel's decision to the Nasdaq Listing and Hearing Review Council, which affirmed the decision on June 16, 2016. The Council explained that it based its determination that 6D should be delisted on three main factors. First, like the Hearing Panel, the Council expressed concern over the conduct of 6D and its board of directors in connection with the resignation of BDO, and found that the conduct of 6D and its board called the board's ability to discharge its responsibilities into question, making delisting necessary "to protect the investing public and the integrity of the market."

Second, the Council found "persuasive evidence . . . that [6D] made misrepresentations to Nasdaq in its effort to remain listed." 6D's Audit Committee had retained independent counsel to conduct an investigation into whether there was merit to the concerns expressed in Nasdaq staff's initial delisting determination and whether there had been other misrepresentations or improper behavior by 6D with respect to Wey. 6D represented to Nasdaq that it had advised the independent counsel that 6D had paid for a business trip of Wey's to the Caribbean. However, in a letter addressed to Nasdaq the independent counsel stated that 6D's disclosure of the Caribbean trip to the independent counsel did not occur until after issuance of counsel's report. The independent counsel also disputed 6D's assertion to Nasdaq that counsel was willing to be re-engaged on Nasdaq's request.

Third, the Council stated that 6D's "failures to comply" with certain filing and fee requirements "provide[d] additional grounds for delisting." The Council added that if 6D "come[s] into compliance with the filing requirements and remed[ies] the other deficiencies now extant, it [could] reapply for listing at that time."

Notice of the Council's decision was sent to 6D's counsel on June 20, 2016. The Council noted that Nasdaq's board of directors could call the decision for review. But the board chose not to review the Council's decision. Nasdaq informed 6D on November 28, 2016 that this meant that the Council's decision "represents Nasdaq's final action in this matter," and that 6D could appeal the decision to the Commission "as provided by Rule 420 of the SEC Rules of Practice." On December 9, 2016, Nasdaq filed a Form 25 notification of its decision to delist 6D with the Commission. 6D filed its application for review on April 5, 2017.

II. Analysis

Exchange Act Section 19(d)(2) provides that appeals from final actions of self-regulatory organizations (“SROs”) like Nasdaq must be filed by the aggrieved person “within thirty days after the date such notice was filed with [the Commission] and received by [the] aggrieved person, or within such longer period as [the Commission] may determine.”⁴ Rule of Practice 420(b), which is “the exclusive remedy for seeing an extension of the 30-day [filing] period,” provides that the Commission “will not extend this 30-day period, absent a showing of extraordinary circumstances.”⁵ We find that 6D’s application for review is untimely and that there are no extraordinary circumstances warranting an extension.

Nasdaq informed 6D of the finality of the delisting decision and its option to appeal to the Commission on November 28, 2016, and filed notice with the Commission on December 9, 2016. 6D’s time to appeal thus ended on January 9, 2017. Yet 6D did not file its application for review until nearly three months later, on April 5, 2017. 6D never sought an extension of the filing deadline and provides no explanation for the untimely filing, apart from noting in passing (and without elaboration) that the recent dismissal of a class action that had been brought against the company now “allows 6D to press forward with an application for review in this matter financially.”⁶

As we have observed repeatedly, “strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief.’ Unmet deadlines may cut off substantive rights to review, but this is their function.”⁷ Although our rules give us the discretion to extend the filing deadline in extraordinary circumstances, that exception is “narrowly construed and applied only in limited circumstances.”⁸ And, in applying the exception, we consider whether “the failure timely to file was beyond the control of the applicant,” such as

⁴ 15 U.S.C. § 78s(d)(2).

⁵ 17 C.F.R. § 201.420(b).

⁶ Cf. *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 WL 772515, at *4 (Mar. 1, 2013) (dismissing appeal where applicant “did not seek permission to extend the thirty-day deadline under Rule 420(b) and offer[ed] no explanation for the delinquent appeal”); *Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 WL 2117161, at *4 (May 20, 2008) (dismissing appeal where applicant made “tactical decision” not to “undergo the time and expense of a timely-filed petition for review”) (internal quotation marks removed).

⁷ *Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 WL 489353, at *4 (Feb. 8, 2016) (quoting *Walter V. Gerasimowicz*, Exchange Act Release No. 72133, 2014 WL 1826641, at *2 (May 8, 2014)); see also *PennMont Sec.*, Exchange Act Release No. 61967, 2010 WL 1638720, at *3 (Apr. 23, 2010) (dismissing application for review of stock exchange decision as untimely), *petition dismissed*, 414 F. App’x 465 (3d Cir. 2011).

⁸ *PennMont*, 2010 WL 1638720, at *4.

through “attorney misconduct or mental incapacity [which] prevented the party from making a timely filing,” and whether the applicant “promptly arranged for the filing of the appeal as soon as reasonable practicable thereafter.”⁹ But 6D does not argue, and the pleadings do not suggest, that its failure to file a timely appeal was the result of circumstances beyond its control.

Instead, 6D argues that the requisite extraordinary circumstances are established by what it asserts are flaws in the Nasdaq decision. 6D claims that the delisting decision was “based upon unproven and unfounded allegations against Wey” from the civil and criminal actions filed against him. Specifically, 6D argues that Nasdaq has a “troubling” and “incessant fixation” on the allegations against Wey, which had “a cascading effect” that ultimately led to 6D’s delisting, and that “it is crucial this flawed chain of reasoning be addressed by the Commission.”

We have held that “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 [Rule] 420.”¹⁰ We also have held that accusations of bias or personal animus by an SRO—what 6D suggests with respect to Nasdaq’s concerns about Wey and Kang—do not constitute extraordinary circumstances justifying an extension.¹¹ 6D has provided no reason why its arguments could not have been raised in a timely application to the Commission.

Furthermore, the Council’s decision to delist 6D was premised on the conduct of 6D, its CEO, and its board of directors, in addition to 6D’s failure to comply with certain filing and fee requirements. Some of the conduct the Council cited related to Wey, but the Council’s concerns were focused on how 6D, its CEO, and directors reacted when their relationship to Wey was questioned. According to the Council, 6D’s CEO and board misrepresented facts to numerous entities, including to Nasdaq within the delisting proceeding itself, and offered “bald assertions” to dismiss and disregard its auditor’s stated concerns rather than acknowledge and investigate them. It was that behavior, not Wey’s or any allegations against him, that called into question the board’s effectiveness in “discharg[ing] its responsibilities” and “the ability of Nasdaq and other regulators to rely on information provided by [6D].” The Council explicitly did not consider “Mr. Wey’s influence over [6D] and potential stock manipulation” in arriving at its decision.

For similar reasons, the recent developments in Wey’s criminal case that 6D highlights—two evidentiary rulings and the dismissal of charges against Wey—have no bearing on this case. At most, they pertain only to Nasdaq’s original halt of trading in 6D’s stock, not its ultimate delisting decision. And 6D has offered no reason why its main arguments regarding the criminal

⁹ *Id.*

¹⁰ *Id.* at *5.

¹¹ *See, e.g., Manuel P. Asensio*, Exchange Act Release No. 62315, 2010 WL 2468111, at *6, *9 (June 17, 2010), *aff’d*, 447 F. App’x 984 (11th Cir. 2011).

and civil cases against Wey—that Nasdaq made improper use of unproven allegations from those cases in arriving at its delisting decision—could not have been raised in a timely manner.

6D also mentions the dismissal of claims against an attorney in the civil case as constituting extraordinary circumstances. We fail to see how the dismissal constitutes an extraordinary circumstance that prevented 6D from filing a timely appeal in this case. Nor could the ultimate dismissal of civil claims against Wey nearly five months after 6D filed its application for review have had any effect on 6D’s untimely filing.

6D argues further that its successful defense in a class action lawsuit “confirms the fact that Nasdaq was simply wrong” and “demonstrates that Nasdaq’s decision to delist 6D was unjustified and is an extraordinary circumstance warranting review.”¹² But that lawsuit focused on allegations that Wey owned or controlled 6D and that this information was concealed from investors. That lawsuit did not consider any of the conduct on which the Council based its delisting decision; in fact, the district court stated that Wey’s purported ownership or control of 6D “was not a basis for 6D’s delisting.”¹³ The district court dismissed the lawsuit because it found that plaintiffs had failed to identify a misrepresentation or omission and had not adequately pleaded scienter and loss causation. 6D has not shown how the district court’s conclusions are relevant to this proceeding. Even if it had, those conclusions would relate to “the relative weight of the arguments presented on appeal,” which, as explained above, do not constitute extraordinary circumstances justifying an extension.¹⁴

6D also cites *MFS Securities Corp.*,¹⁵ but that case is readily distinguishable. There, we found extraordinary circumstances because in related litigation the Court of Appeals for the Second Circuit had “asked for the Commission’s views as to whether the [SRO’s] actions comported with the Exchange Act and the [SRO’s] rules.”¹⁶ We found that this request, combined with the fact that MFS’s application presented “novel facts and legal issues,” created a “set of unusual circumstances” that constituted extraordinary circumstances.¹⁷ In so doing, we

¹² See *Puddu v. 6D Global Techs., Inc.*, No. 1:15-cv-8061, 2017 WL 991866 (S.D.N.Y. Mar. 6, 2017).

¹³ See *id.* at *11.

¹⁴ *PennMont*, 2010 WL 1638720, at *5.

¹⁵ See *MFS Sec. Corp.*, Exchange Act Release No. 47626, 2003 WL 1751581, at *3 (Apr. 3, 2003).

¹⁶ *Id.*

¹⁷ *Id.*

stated explicitly that absent these factors we would generally “reject such an application as untimely.”¹⁸ The factors at issue in *MFS* are not present here.

Nor do we believe that 6D’s citation to *PennMont Securities*¹⁹ supports its contention that it has established the requisite extraordinary circumstances. In that case, we found that the untimely application for review did not “present the type of critical legal issue that could potentially rise to the level of an extraordinary circumstance.”²⁰ And we cited our statement in *MFS* that it was the combination of “novel facts and legal issues” and a request by a court of appeals for the Commission’s views on those issues that justified accepting the application for review and that our action “should not be viewed as indicating that we will accept other applications under similar circumstances.”²¹ Accordingly, we dismissed the untimely application in large part because it was “undisputed that no circumstance beyond Applicants’ control led to their failure to timely file an application for review.”²² The same result is warranted here.

An appropriate order will issue.²³

By the Commission (Chairman CLAYTON and Commissioners STEIN and PIWOWAR).

Brent J. Fields
Secretary

¹⁸ *Id.*

¹⁹ *PennMont*, 2010 WL 1638720.

²⁰ *Id.* at *6.

²¹ *Id.* at *5 & n.28 (quoting *MFS*, 2003 WL 1751581, at *3 & n.17).

²² *See id.* at *5-6; *cf. John Vincent Ballard*, Exchange Act Release No. 77452, 2016 WL 1169072, at *3 (Mar. 25, 2016) (dismissing untimely appeal because applicant’s pro se status and case’s potential complexity did not constitute extraordinary circumstances); *Caryl Trewyn Lenahan*, Exchange Act Release No. 73146, 2014 WL 4656403, at *3 (Sept. 19, 2014) (dismissing untimely appeal because applicant’s professed ignorance of sanction’s consequences and alleged reliance on SRO employee advice did not constitute extraordinary circumstances); *Edward J. Jakubik, Jr.*, Exchange Act Release No. 61541, 2010 WL 589808, at *4 (Feb. 18, 2010) (dismissing untimely appeal because allegations of prosecutorial misconduct and denial of fair process did not constitute extraordinary circumstances).

²³ We have considered all of the parties’ contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
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THE NASDAQ STOCK MARKET LLC

ORDER DISMISSING APPLICATION FOR REVIEW OF ACTION TAKEN BY
REGISTERED SECURITIES ASSOCIATION

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

ORDERED that the appeal filed by 6D Global Technologies, Inc. be, and it hereby is,
dismissed.

By the Commission.

Brent J. Fields
Secretary