FINAL REPLY BRIEF

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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Case No. 06-1071

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FOG CUTTER CAPITAL GROUP INC.,
Petitioner

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,
Respondent

ON A PETITION FOR REVIEW OF AN OPINION AND ORDER
OF THE U.S. SECURITIES AND EXCHANGE COMMISSION

REPLY BRIEF OF PETITIONER FOG CUTTER CAPITAL GROUP INC.

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

GLOSSARY iv

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE STANDARD OF REVIEW IS NOT IN DEBATE 4

II. THE COMMISSION'S INTERPRETATION AND APPLICATION OF SECTION 19(f) OF THE EXCHANGE ACT IN THIS ACTION IS INCORRECT AND INCONSISTENT WITH ITS INTERPRETATION OF THAT PROVISION IN PRIOR CASES 5

III. THE SEC'S BRIEF, LIKE THE COMMISSION'S ORDER, IGNORES CRITICAL, UNDISPUTED FACTS THAT RENDER THE COMMISSION'S FINDINGS OF FACT UNSUPPORTED BY SUBSTANTIAL EVIDENCE 8

IV. THE COMMISSION ABUSED ITS DISCRETION BY FAILING TO PROPERLY ADDRESS WHETHER NASDAQ'S ACTIONS WERE CONSISTENT WITH THE EXCHANGE ACT'S REMEDIAL PURPOSES 20

V. THE COMMISSION ABUSED ITS DISCRETION BY FAILING TO EXPLAIN WHY DELISTING WAS WARRANTED HERE IN THE FACE OF DISPARATE TREATMENT OF SIMILARLY SITUATED ISSUERS 24

CONCLUSION 27

ADDENDUM 1: UNPUBLISHED OPINIONS

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

CASES

Blinder, Robinson & Co. v. SEC, 837 F.2d 1099 (D.C. Cir. 1988) 24

Buchman v. SEC, 553 F.2d 816 (2d. Cir. 1977) 3, 19

Butz v. Glover Livestock Comm'n Co., 411 U.S. 182 (1973) 24, 25

Kivitz v. SEC, 475 F.2d 956, (D.C. Cir. 1973) 3, 19

McCarthy v. SEC, 406 F.3d 179 (2d Cir. 2005) 19, 20

Morall v. Drug Enforcement Agency, 412 F.3d 165 (D.C. Cir. 2005) 25

* *Rockies Fund, Inc. v. SEC*, 428 F.3d 1088 (D.C. Cir. 2005) 19, 20

SEC RELEASES

In re Eagle Supply Group, Inc., Exch. Act. Rel. No. 34-39800, 1998 WL 133847 (Mar. 25, 1998) 5, 17, 18

In re JJFN Servs. Inc., Exch. Act Rel. No. 34-93943, 1997 WL 722029 (Nov. 21, 1997) 20, 21

* *In re Richardson*, Exch. Act Rel. No. 34-51236, 2005 WL 424920, (Feb. 22, 2005) 6, 7, 22

* *In re Van Dusen*, Exch. Act Rel. No. 34-18284, 1981 WL 315505 (Nov. 24, 1981) 5, 6, 22

* Authorities on which we chiefly rely are marked with asterisks.

STATUTES

5 U.S.C. § 706(2)... 4, 5

15 U.S.C. § 78s(f).. 1

MISCELLANEOUS

SEC Litig. Rel. No. 19794 (Aug. 7, 2006).. 26

GLOSSARY

Board	Fog Cutter's Board of Directors
Fog Cutter or the Company	Fog Cutter Capital Group Inc.
MSLO	Martha Stewart Living Omnimedia Inc.
SRO	Self-Regulatory Organization
Steve Madden	Steve Madden Ltd.

SUMMARY OF ARGUMENT

As it did in its Opinion and Order below ("Op.") and as Nasdaq did in delisting petitioner Fog Cutter Capital Group Inc. ("Fog Cutter" or the "Company") from the Nasdaq National Market, respondent Securities and Exchange Commission ("SEC" or "Commission") ignores the key facts that compel the conclusion that delisting is neither in the public interest nor consistent with the purposes of the Securities Exchange Act of 1934 ("Exchange Act"): Fog Cutter promptly disclosed to shareholders and prospective investors all the facts on which the SEC and Nasdaq relied to justify delisting, and shareholders and investors essentially stuck with the Company despite these disclosures. *See, e.g.*, Fog Cutter's Opening Brief ("Opening Br.") at 27. More generally, while the Commission chooses to focus on certain facts that it says constitute substantial evidence supporting its Opinion and Order, it ignores other facts that are contrary to or inconsistent with the facts on which it chooses to rely or that at least put them into proper perspective. Based on the *entire* record, it was neither in the public interest nor consistent with the Exchange Act's purposes to delist Fog Cutter. Accordingly, the Commission's Opinion and Order was an abuse of discretion.

Throughout its brief, the SEC cites and relies on Section 19(f) of the Exchange Act, 15 U.S.C. § 78s(f), to suggest that its review of Nasdaq's delisting decision is somehow abbreviated in scope. It focuses heavily on the first two

prongs of the Section 19(f) inquiry, namely, whether the "specific grounds" for Nasdaq's decision "exist in fact" and whether there is some applicable Nasdaq rule. However, the Commission pays only scant lip-service to the critical third part of its required Section 19(f) inquiry – whether Nasdaq's decision is consistent with the remedial purposes of the Exchange Act – and its discussion of that element in its brief is irrelevant to that inquiry and fails to support its decision.

At all events, the Commission agrees with Fog Cutter that the central issues on *this* appeal are whether the Commission's Opinion and Order is supported by substantial evidence and was not arbitrary, capricious, or an abuse of discretion. *Compare* Opening Br. at 25 *with* SEC's initial brief ("SEC Br.") at 2. As demonstrated in Fog Cutter's Opening Brief and herein, the Commission's Opinion and Order was not supported by substantial evidence and was arbitrary and capricious or an abuse of discretion.

In both its Opinion and Order and its brief to this Court, the Commission improperly ignores directly relevant record evidence regarding the decisions made by Fog Cutter's Board of Directors (the "Board"). Though disclaiming that its or Nasdaq's review included an evaluation of the Board's business judgment (*see* SEC Br. at 23, 33), the Commission nevertheless undertook such a review on the ground that the public interest inquiry included evaluating whether the Company met "basic standards of corporate governance" (*id.*). Having undertaken that

impermissible review, however, the Commission then improperly considered only some, but not all, of the facts relevant to such a review. The Commission's failure to consider all the relevant facts was an abuse of its discretion. *See Kivitz v. SEC*, 475 F.2d 956, 961 (D.C. Cir. 1973) (reversing Commission Order where substantial evidence was lacking, and noting that evidence must be viewed "in the light that the record in its entirety furnishes, including the body of evidence opposed to the agency's view") (internal quotation omitted); *Buchman v. SEC*, 553 F.2d 816, 820 (2d. Cir 1977) (vacating SEC order finding that petitioners violated NASD rules, and noting that a Court of Appeals "must consider the record as a whole, which includes the body of evidence opposed to the Commission's review") (internal citations omitted).

As stated, while devoting considerable attention to the first two prongs of the Section 19(f) inquiry, the Commission devoted no attention to the third critical part of that inquiry – whether Nasdaq's delisting decision was consistent with the Exchange Act's purposes, which are remedial, not punitive, and are designed to protect investors from future harm. Instead, the Commission addressed a different question – whether Nasdaq treated Fog Cutter differently than it treated similarly situated issuers. SEC Br. at 41-45. In discussing this issue, the Commission failed to explain how delisting Fog Cutter would serve any *remedial* purpose and thus be consistent with the Exchange Act's purposes.

Whether the Commission treated Fog Cutter consistently with the way it has treated similarly situated issuers such as Martha Stewart Living Omnimedia ("MSLO") and Steve Madden, Ltd. ("Steve Madden") is relevant to a separate inquiry in this appeal, namely, that both Nasdaq and the Commission itself acted in an unfair or discriminatory way. That fact constitutes an independent reason for vacating the Commission's Order and Opinion. As demonstrated in Fog Cutter's Opening Brief (at pp. 45-45), in glibly observing that each case is decided on its own facts and then failing to consider the disparate treatment of Fog Cutter vis-à-vis such entities as Steve Madden and MSLO, the Commission abused *its* discretion in failing to ensure that it treats entities subject to the self-regulatory organizations ("SROs") that it oversees in a fair, non-discriminatory way.

In short, the Commission's Opinion and Order was not supported by substantial evidence, and its decision was arbitrary, capricious and an abuse of discretion.

ARGUMENT

I. THE STANDARD OF REVIEW IS NOT IN DEBATE

There is no dispute as to the standard governing this Court's review: review of the Commission's Order is governed by the Administrative Procedure Act. 5 U.S.C. § 706(2)(A); *see* SEC Brief at 25. The questions are whether the Commission's findings of fact are supported by substantial evidence based on the

record as a whole and whether the Commission's conclusions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Id.*

II. THE COMMISSION'S INTERPRETATION AND APPLICATION OF SECTION 19(f) OF THE EXCHANGE ACT IN THIS ACTION IS INCORRECT AND INCONSISTENT WITH ITS INTERPRETATION OF THAT PROVISION IN PRIOR CASES

The Commission observes that "under Section 19(f), which governs the Commission's review here, the Commission may either dismiss the proceeding—thus letting NASD's listing decision stand—or set aside the decision and order NASD to allow the issuer's securities to be listed on Nasdaq." SEC Br. at 29-30.[1] From this premise, the SEC seems to argue that its review can and should be more perfunctory than the robust review that Section 19(f) in fact requires, which level of review was lacking here. Such a characterization of the Commission's scope of review of an SRO action is incorrect.

As the Commission itself has recognized in the past, the Section 19(f) determination whether an SRO applied its rules in a manner consistent with the purposes of the Exchange Act necessarily encompasses a determination whether the SRO applied its rules in an "unfair" way. *See In re Van Dusen*, Exch. Act Rel.

[1] The Commission also notes that it may remand cases to Nasdaq where the record does not support Nasdaq's decision, and cites *In re Eagle Supply Group, Inc.*, Exch. Act. Rel. No. 34-39800, 1998 WL 133847 (Mar. 25, 1998) (attached at Addendum 1 hereto). SEC Br. at 30 n.6. *Eagle Supply* is particularly instructive here, as discussed *infra* at 18.

No. 34-18284, 1981 WL 315505, at *3 (Nov. 24, 1981) (attached in Addendum 1 hereto). This inquiry is considerably broader than the scope of review that the Commission urges and in fact took here.

The Commission itself has recently applied *Van Dusen* to reject the NASD's view that Section 19(f) is intended to ensure that only "basic procedural guarantees" are afforded to a member, ruling instead that there is a "substantive fairness requirement" that it must consider pursuant to Section 19(f) in reviewing SRO actions. *See In re Richardson*, Exch. Act Rel. No. 34-51236, 2005 WL 424920, at *5 (Feb. 22, 2005) (attached to Opening Br. at Addendum 3); SEC Br. at 30-31. In *Richardson*, the Commission, pursuant to Section 19(f), reviewed denial of an application to associate with an individual. 2005 WL 424920, at *2. In remanding the NASD's denial, the Commission made explicit that "Congress clearly intended that the substantive fairness of NASD deliberations be subject to the Commission's review .... The Commission has an obligation to ensure that [self-regulatory power] is used effectively to fulfill the responsibilities assigned to the self-regulatory agencies, and that it is not used in a manner inimical to the public interest or unfair to private interests." *Id.* (internal quotations omitted). The Commission added that "among [its] responsibilities in reviewing SRO actions under Section 19(f) is to determine whether the rules of the SRO have been applied

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in a discriminatory or unfair manner, i.e., whether the action is substantively fair." *Id.* (internal quotations omitted).

Fog Cutter's Petition and Opening Brief address how the Commission failed to satisfy its obligations under Section 19(f), demonstrating that the Commission's Order should be vacated and that the Commission should have ordered NASD to allow the Company's securities to be listed on Nasdaq. At all events, the Commission's argument on this point is nothing more than a game of semantic wordplay. In discussing one of the standards relevant to this Court's scope of review – whether substantial evidence supported the Commission's findings of fact – Fog Cutter addressed the matters relevant to first prong of the Section 19(f) inquiry, namely, whether the specific grounds for Nasdaq's decision existed in fact. And, in addressing the other standard relevant to this Court's review – whether the Commission acted arbitrarily and capriciously or abused its discretion – Fog Cutter addressed the matters relevant to the second and third prongs of the Section 19(f) inquiry, namely, whether Nasdaq acted in accordance with the only rules it relied on in delisting Fog cutter (i.e., the rules allowing delisting in the public interest) and whether its decision was consistent with the purposes of the Exchange Act. As explained in detail in its Opening Brief and below, as a result of the Commission and Nasdaq ignoring critical, undisputed facts, the Commission's findings of fact were not supported by substantial evidence and Nasdaq's specific

grounds for decision did not exist in fact. Further, by failing even to address whether, much less conclude that, any *remedial* as opposed to punitive purpose would be served by delisting, the Commission acted arbitrarily and capriciously and abused its discretion, and Nasdaq did not act in accordance with its own rules or consistently with the Exchange Act's purposes. As a result, this Court should grant Fog Cutter's petition and vacate the Commission's Order.

III. THE SEC'S BRIEF, LIKE THE COMMISSION'S ORDER, IGNORES CRITICAL, UNDISPUTED FACTS THAT RENDER THE COMMISSION'S FINDINGS OF FACT UNSUPPORTED BY SUBSTANTIAL EVIDENCE

The SEC's recitation of the facts in its brief mirrors the narrow, incomplete view taken by the Commission in deciding to dismiss the review proceedings and therefore uphold the delisting sanction. *See* SEC Brief at 10-17; Op. at 4-6. The SEC again sidesteps the reality that Nasdaq and the Commission second-guessed the Board's business judgment, decided that (in their view) the actions taken by the Board were not in the best interests of Fog Cutter's shareholders, and determined that such actions posed such a threat to the public interest that delisting was warranted. As discussed in greater detail below, neither Nasdaq nor the Commission is tasked with evaluating whether a member company's Board made good business decisions.

In any event, having adopted this impermissible approach to its review responsibilities, the Commission then failed to consider *all* of the facts relevant to

Board's decisions. Most glaringly, the Commission utterly failed to address the undisputed fact that Fog Cutter promptly disclosed to shareholders and investors *all* of the facts on which it and Nasdaq relied and, judging by the minimal impact of such disclosures on the Company's stock, shareholders and prospective investors were unconcerned. The Commission attempts weakly and elliptically to address these facts by observing that the mere fact that a company trades above minimum listing requirements does not guarantee continued listing. SEC Br. at 41. The SEC misses – and fails to address – the point of Fog Cutter's argument: that in light of the minimal if not non-existent impact on the market of Fog Cutter's prompt disclosure of every single fact on which the SEC and Nasdaq relied to conclude that delisting was necessary in the investing public's interest, there was in reality no public interest or remedial purpose to be served by delisting the Company, and therefore (i) Nasdaq's decision was neither in accordance with its rules nor consistent with the Exchange Act's purposes and (ii) the SEC's Opinion and Order was arbitrary, capricious, and an abuse of discretion.

As Fog Cutter pointed out in its opening brief – and as the SEC has never addressed or disputed, either in its Opinion and Order or in its brief to this Court – Fog Cutter consistently, promptly, and thoroughly informed both the investing public and market regulators about Mr. Wiederhorn's situation, and about the

decisions made by the Board and the reasons behind them. Specifically, Fog Cutter disclosed:

- the progress of government and criminal investigations, specifically identifying Mr. Wiederhorn as a target of a grand jury investigation;
- the risks to its business that stemmed from the government's investigation of Mr. Wiederhorn, including the challenges that the Company would face if the government chose to charge him;
- its plans to continue executing its business strategy in Mr. Wiederhorn's absence, should he be charged;
- Mr. Wiederhorn's plea and the Leave of Absence Agreement it entered into with Mr. Wiederhorn, and the reasoning of the Board in making that business decision; and
- a fulsome explanation of the facts and circumstances leading up to the plea and the Board's actions *before* Nasdaq delisted its shares.[2]

Moreover, with respect to each of the Company's decisions criticized by the Commission and on the basis of which it concluded that delisting is in the public interest, there are several accompanying facts that the Commission ignored or

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[2] *See generally* Opening Br. at 42-44; *see also* R. 124-125, JA 49-50 (2003 Form 10-K); Form 10-K filed March 3, 2003 at 14 (same); Form 10-K/A filed Aug. 1, 2003, at 14 (same); Form 10-K filed March 22, 2002, at 10 (same); R. 102-115, JA 27-40; R. 197-202, JA 122-127.

summarily dismissed, that vitiate its conclusions, and that thus demonstrate the insufficiency of its review:

- SEC's fact: The Board amended Mr. Wiederhorn's employment agreement while he was being investigated. SEC Br. at 11-12.
  - All of the facts: The Board viewed Mr. Wiederhorn's substantial experience and leadership of the Company as one of the Company's greatest assets. Under Mr. Wiederhorn's leadership, the Company paid out $4.5 million in dividends to its minority shareholders in 2002 and 2003. R. 229; JA 133.

    In addition, the Board determined that in order to realize the value of its investment in George Elkins, Mr. Wiederhorn's continued leadership of the Company was critical. The terms of the agreement under which Fog Cutter acquired a majority interest in George Elkins enables George Elkins's minority owners to buy Fog Cutter's majority interest at a price substantially below its market value if Mr. Wiederhorn is no longer serving as CEO or as a director. R 236-38, JA 140-42; R. 1091-92, JA 435-36. Prior to its amendment, the terms of Mr. Wiederhorn's employment agreement would have allowed the Board to fire Mr. Wiederhorn for cause if he were convicted of a felony – whether or not that felony had anything to do with Fog

Cutter. The Board would thus have had very limited discretion to act in a manner that would have preserved the value of the George Elkins asset, and Mr. Wiederhorn's leadership, which the Board recognized was an integral part of the Company's success.

Based on the fact that the investigation and potential charges against Mr. Wiederhorn did not involve Fog Cutter, and did not involve any allegations of fraud or intentional corporate wrongdoing, the Board agreed to exclude from the definition of a "for cause" termination any termination based on Mr. Wiederhorn's conviction of a felony unrelated to Fog Cutter.

The language change in the employment agreement upon which the SEC focused is a red herring. *See* Op. at 9 n.22.[3] The Board has always retained the "authority" to terminate Mr. Wiederhorn, subject to whatever liability may be imposed on the Company as a result of that decision. The Board chose not to exercise this option because it believed Mr. Wiederhorn's experience and leadership were an

[3] The Commission's description of the Board's decision to amend the employment agreement is particularly telling. The Commission found that the amended employment agreement limited the Board's discretion "to address an issue that it *should have known* was likely to arise." Op. at n.22 (emphasis added). This passage aptly demonstrates the actual analysis the Commission conducted: an

important part of the Company's past success and future prospects, and to protect its investment in George Elkins. Far from disputing that Mr. Wiederhorn's experience and leadership were necessary for the Company, the Commission essentially admits these facts.

- SEC's fact: The Board chose to retain Mr. Wiederhorn in certain positions at the Company, including an initial period during which Mr. Wiederhorn remained Co-CEO, and then named Mr. Wiederhorn to a non-certifying position in the Company in which he received salary and benefits during the period of his incarceration. SEC Br. at 3.
  - ➢ All of the facts: The Commission attempts to nefariously cloak this decision by referring to "ties" between Mr. Wiederhorn and the members of the Board and Mr. Wiederhorn's influence resulting from those ties, rather than focusing on the stated, publicly disclosed reasons for the Board's decisions. As it disclosed to its investors, in evaluating the effect that Mr. Wiederhorn's separation would have on the Company, the Board determined that in order to avoid triggering the buy-out clause in the George Elkins agreement, and thus lose the income stream that George Elkins had brought and likely would bring

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evaluation of the merits of the Board's business judgment, and not (as required by Section 19(f)) an evaluation as to whether Nasdaq applied its rules fairly.

to the Company in the future, Mr. Wiederhorn needed to remain as a Co-CEO or a director. R. at 107-113; JA 32-38 (recitals to the Leave of Absence Agreement).

Further, the Commission apparently misses the point of the leave of absence agreement. As its title suggests, the negotiated agreement provided that Mr. Wiederhorn would *not* continue to exert the type of day-to-day influence associated with a CEO, but rather would be on *leave* from that position during the period of his incarceration. Nevertheless, for reasons relating to the requirements of Sarbanes-Oxley, the Board removed him from that position. By focusing only on the fact that Mr. Wiederhorn remained as co-CEO for a short period of time *after* his plea and *before* his incarceration, the Commission ignores a salient Board decision that undercuts the Commission's decision: the Board acted to comply with Sarbanes-Oxley by removing Mr. Wiederhorn from the position of co-CEO before he began his sentence, and kept him from being in that position for the duration of his incarceration. The Board, apparently, gets no credit from the Commission for complying with the law.

- SEC's fact: The Board chose to pay Mr. Wiederhorn salary and bonuses during the period of his sentence, and agreed to pay a him a $2 million

lump sum as part of a Leave of Absence Agreement, knowing he would use that money to pay the restitution required by his plea agreement. SEC Br. at 3.

- All of the facts: The Board and the Compensation Committee, which was composed entirely of independent directors, made the unremarkable decision to recognize Mr. Wiederhorn's contributions to the Company by continuing his association with the Company during his incarceration and by paying him a lump sum in connection with his Leave of Absence. As demonstrated by the minutes of the Board and Compensation Committee during the period, which the Commission ignored, the Board weighed the distraction to the Company and the potential costs of protracted litigation (including potential litigation with Mr. Wiederhorn over his understanding of his rights under his employment agreement) against the costs and benefits of a settlement with Mr. Wiederhorn that would allow the Company to look forward. The Board's business judgments were sound, and were motivated by the interests of *all* of the Company's shareholders. Once again, rather than disputing that Mr. Wiederhorn's experience and leadership

were necessary for the Company, the Commission basically admits these facts.

- SEC's fact: Mr. Wiederhorn pled guilty to two felony charges and was incarcerated. SEC Br. at 3.
  - All of the facts: The Commission glosses over the important fact that neither of these charges involved Fog Cutter, nor did they demonstrate a lapse of corporate governance. Even the prosecutors admitted that Mr. Wiederhorn took the actions underlying the charges only after seeking and receiving advice from attorneys and accountants, and after being assured that the actions were permissible. Far from being a "collateral attack" on Mr. Wiederhorn's conviction (SEC Br. at 37-38; Op. at 7 n.16), the fact that Mr. Wiederhorn relied on the advice of counsel and other professionals demonstrates that (i) he is not the type of person who ignores the law – indeed, it demonstrates the opposite; and (ii) the Company's corporate governance is not such as to require delisting.
- SEC's fact: Fog Cutter is a company controlled by Wiederhorn, with only nominal Board supervision.

➢ <u>All of the facts</u>: This statement is both misleading and unremarkable.[4] The fact that a majority of a company's stock is held by an individual and his family can hardly be a basis on which to delist the Company for, if it were, we suspect that hundreds if not thousands of public companies would have to be delisted.

As Fog Cutter informed the Listing Panel, the Company had more than 1,000 minority shareholders who continued to trade in the Company's securities throughout the period. R. 937; JA 374. Furthermore, the Board's decisions challenged here were sound business judgments made in the face of extraordinary facts, and consistently prioritized the value of the Company's critical assets, including its investment in George Elkins and Mr. Wiederhorn's continued involvement in and leadership of the Company's business plan.

As the Commission itself has noted, failure to consider or even review key facts supporting a *company's* arguments is unacceptable. *In re Eagle Supply Group, Inc.*, Exch. Act. Rel. No. 34-39800, 1998 WL 133847, at *4 (Mar. 25, 1998). *Eagle Supply*, which the SEC cites in its brief, is contrary to its position in

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[4] The SEC's brief fails to point out that Mr. Wiederhorn himself owned substantially less than 50% of the Company's outstanding shares at the time of

this case. There, the Commission remanded Nasdaq's decision to exclude a company's securities on the Nasdaq SmallCap Market on the same "public interest" grounds on which Nasdaq delisted against Fog Cutter here, namely, Nasdaq Marketplace Rules 4300 and 4330. Nasdaq had denied inclusion based on the purported "threat" posed by the continuing involvement with the issuer of two control persons who were found, in civil and criminal actions, to have violated the securities laws. 1998 WL 133847, at *3. The Commission found that Nasdaq "did not explain how, or even whether, it factored into its decision" certain key facts advanced by the company relating to the control persons' securities law convictions and their otherwise unblemished record. *Id.* As here, Nasdaq simply noted that the violations "were serious, and that [the control persons] currently [held] the same positions with the Company that they held at the time of the violations," but failed to address the fact that such violations were committed in the distant past. *Id.* Because of Nasdaq's failure to even address such facts supporting *the company's* arguments, the Commission remanded. *Id.* at *4.

Nasdaq committed the same error here that it did in *Eagle Supply*. Accordingly, in upholding Nasdaq's determination to delist Fog Cutter, the Commission impermissibly failed to apply its own precedent.

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these events. R. 1014; JA 387.

The Commission's determination in its own Opinion to ignore critical facts that are contrary to or inconsistent with, or that illuminate, the isolated facts on which it chose to rely was also arbitrary, capricious and abuse of discretion. *Kivitz*, 475 F.2d at 961; *Buchman*, 553 F.2d at 820. The Commission must support a sanction it imposes or upholds with a "***meaningful*** statement of findings and conclusions . . . on ***all*** the material issues of fact, law, or discretion presented on the record." *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005) (vacating decision upholding SRO sanction where SRO failed to demonstrate how the sanction "protect[ed] the trading public from further harm" and where the SEC "made no findings regarding the protective interests to be served by" the sanction ordered by the SRO) (internal quotations and citation omitted) (emphasis added).[5] In this case, the Commission either ignored or glossed over these critical facts.

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[5] The Commission seeks to distinguish *McCarthy* on the ground that it involved review under Section 19(e) rather than 19(f) of the Exchange Act, and that the remedies available to the Commission under those two provisions are different in that Section 19(e) permits the SEC to reduce a sanction imposed by an SRO while Section 19(f) does not permit the Commission to reduce a sanction, only to set aside a delisting order. SEC Br. at 29. This is a meaningless distinction. The substantive inquiry under Sections 19(e) and 19(f) is the same: whether the SRO's rules and their application in the particular instance were consistent with the purposes of the Exchange Act, such as to warrant a sanction. Under both Sections 19(e) and 19(f), therefore, the Commission is required to find on the basis of substantial evidence that the sanction ordered by the SRO is consistent with the remedial purposes of the Exchange Act and to provide a reasoned explanation for its conclusion (*see also Rockies Fund, Inc. v. SEC*, 428 F.3d 1088, 1099 (D.C. Cir.

Here, the Commission failed to give any, much less a meaningful, statement of its findings and conclusions on *all material* factual issues. Accordingly, its Opinion and Order must be vacated.

IV. THE COMMISSION ABUSED ITS DISCRETION BY FAILING TO PROPERLY ADDRESS WHETHER NASDAQ'S ACTIONS WERE CONSISTENT WITH THE EXCHANGE ACT'S REMEDIAL PURPOSES

The Commission failed to articulate how the delisting sanction imposed served a remedial purpose necessary to protect future investors, rather than simply punishing Fog Cutter's shareholders for actions taken by the Board with which the Commission disagreed. This failure was an abuse of discretion and provides sufficient basis for this Court to vacate the Order. *See McCarthy*, 406 F.3d at 188 (vacating decision upholding SRO sanction where SRO failed to demonstrate how the sanction "protect[ed] the trading public from further harm"). As in *McCarthy*, *id.*, the Commission "merely recites, in general terms," why it believed a sanction was necessary, saying without more that "Fog Cutter was an issuer that presented inappropriate non-market risk to public investors, and consequently, should be delisted." Op. at 10. This cursory explanation is insufficient.[6]

2005)). Just as in *McCarthy* and *Rockies Fund*, the Commission failed to satisfy that obligation here.

[6] As it did below, the SEC here relies almost exclusively on its own decision in *In re JJFN Servs. Inc.*, Exch. Act Rel. No. 34-93943, 1997 WL 722029 (Nov. 21, 1997) (attached in Addendum 1 to Opening Br.). As Fog Cutter pointed out in its

In reality, the facts on which the Commission based its conclusion boil down to the following: the Board made a series of business decisions that, in the Commission's view, placed Mr. Wiederhorn's interests ahead of its shareholders. As described above, the Commission's analysis was improper under Section 19(f) and unsupported by substantial evidence. At all events, in setting forth its analysis, the Commission impermissibly failed to explain how delisting would serve any remedial purpose or would be necessary to protect the investing public.

As discussed above, during the period in which Fog Cutter was contemporaneously disclosing these facts to the investing public, Fog Cutter's stock price remained stable on consistent trading volumes. *See supra* at 9-10. Perhaps the most critical fact that speaks to the investing public's confidence in Fog Cutter and its Board is that in December 2004, after all of these events, 97% of

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Opening Brief, the Commission's reliance on that dated, unappealed decision is unjustified, given the marked differences between Fog Cutter's and JJFN's respective records of public disclosures. *See* Opening Br. at 36-38. The SEC attempts to liken this case to *JJFN* by pointing out the seriousness of Mr. Wiederhorn's violation of the tax laws. As it did below, the SEC here dismisses the importance of the fact that Mr. Wiederhorn took the actions underlying the tax violation only after consulting with and relying on the advice of tax professionals, and took the actions underlying his ERISA violation only after consulting with and relying on the advice of counsel. Such evidence is directly relevant to assessing the "threat" to the investing public, and thus whether the sanction imposed was consistent with the purposes of the Exchange Act. Further, the Commission pointed out (though said it did not rely on) the fact that the individual at issue in *JJFN* had twice been the subject of SEC Enforcement Division actions.

Fog Cutter's shareholders voted to re-elect the directors who made the decisions challenged by the Commission. R. 1297; JA 520. The SEC's brief, like the Commission's Opinion, simply ignores the importance of these facts, which irrefutably demonstrate that a fully informed investing public – the very public that the Commission believes is so threatened by Fog Cutter's continued listing – maintained a consistent, more than sufficient, level of confidence in Fog Cutter and the decisions made by its Board.

The Commission has long recognized its need to be "cognizant of the importance of exercising the discretionary power reposed in [it] in this area in a manner that will afford investors protection without visiting upon the wrongdoers adverse consequences not required in achieving statutory objectives." *Van Dusen*, 1981 WL 315505, at *3 (internal quotations omitted). The Commission has long held, and strongly reaffirmed recently, that all disciplinary actions that are subject to review under Section 19(f) are intended to be remedial, not punitive. *Id.* (stating that "the purpose of all such [sanctions] is remedial, not penal. They are not designed to punish, but to protect the public interest against further risk of harm."); *see also In re Richardson*, 2005 WL 424920, at *4 (Feb. 22, 2005) (relying on *Van Dusen*). The Commission ignored those precepts here.

Id. at *5 n.6. Mr. Wiederhorn has never been accused of any securities laws violations.

As the SEC's Brief points out, in determining whether to delist a company's securities, "primary emphasis must be placed on the interests of prospective future investors." SEC Br. at 41, citing *In re Tassaway*, Exch. Act Rel. No. 34-11291, 1975 WL 160383, at *2 (Mar. 13, 1975). But, the Commission never identified any threat to future investors from Fog Cutter's continued listing, and the record permits no inference of such a threat, particularly where (1) there have *never* been accusations that Fog Cutter or Mr. Wiederhorn violated the securities laws or misled the investing public; and (2) Fog Cutter disclosed all relevant facts to prospective investors and, as evidenced by their continued trading in the stock on consistent volumes, prospective investors were unmoved by the facts that the Commission and Nasdaq believe require delisting in those investors' interest.

The SEC's Brief, like the Commission's opinion, sidesteps these facts and miscasts Fog Cutter's argument. Fog Cutter is not arguing that it should remain listed because it was not accused of violating the securities laws and thus impairing the functioning of the public market for its shares. Rather, the facts that there were no such accusations, and that the public continued to trade in Fog Cutter's shares on consistent volumes at prices well above Nasdaq minimums following thorough and timely disclosure of these events, demonstrate that the market was in fact working, and that delisting serves no remedial or pro-investor purpose.

V. THE COMMISSION ABUSED ITS DISCRETION BY FAILING TO EXPLAIN WHY DELISTING WAS WARRANTED HERE IN THE FACE OF DISPARATE TREATMENT OF SIMILARLY SITUATED ISSUERS

The Commission failed to explain how the sanction imposed here was warranted in the face of dramatically different treatment of other issuers. Here, too, the SEC miscasts Fog Cutter's argument: Fog Cutter is *not* claiming that it was the "victim of selective prosecution," and therefore it need not demonstrate that it is a member of a suspect class or that its constitutional rights were violated.[7] Rather, Fog Cutter urges that the Commission must do more than recite the maxim that "each case must be decided on its own facts" in the way it exercises its oversight of SROs, who have accorded very different treatment to remarkably similarly situated issuers. The Commission's failure, and inability, to do so demonstrate that the Order was an abuse of discretion and should therefore be vacated.

The SEC relies heavily on *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973), for the proposition that "employment of a sanction within the authority

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[7] The SEC's Brief also miscasts Fog Cutter's reliance on *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099 (D.C. Cir. 1988). There, as the Commission points out, petitioners argued that they were singled out for disproportionately harsh treatment as part of the Commission's systemic pattern of treating smaller, newer firms more harshly than older, more established firms. *Id.* at 1112-1113. The Court's point in *Blinder*, however – and Fog Cutter's point here – is that disparate treatment must

of an administrative agency is ... not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." SEC Br. at 42 (citation omitted). This proposition is both unremarkable and ineffectual in propping up the Commission's Opinion. As this Court has recently affirmed, although "mere 'unevenness in the application of [a] sanction does not render its application in a particular case 'unwarranted in law' [citing *Butz*]," an agency's decision to impose sanctions upon a regulated person or entity that are an "unprecedented and unexplained departure" from its treatment of other persons whose record is "comparable or significantly more troubling" is an abuse of discretion. *See Morall v. Drug Enforcement Agency*, 412 F.3d 165, 183 (D.C. Cir. 2005) (internal citations omitted).

As Fog Cutter pointed out in its Opening Brief, both Nasdaq and other national exchanges have permitted other companies to continue trading, despite those companies' similar decisions to remain associated with high ranking executives convicted of felonies (and, in the cases cited, of violations of or related to the federal securities laws). *See* Opening Br. at 45-49. These facts are directly relevant to the question whether Nasdaq properly applied its rules and acted

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be *explained* by reference to the facts supporting it. Such explanations are wholly missing from the Commission's Opinion here.

consistently with the purposes of the Exchange Act in this case by requiring delisting of Fog Cutter.

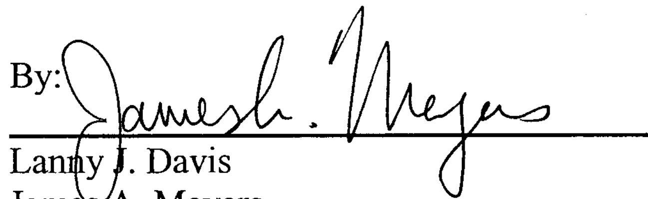
The SROs (including Nasdaq) did not consider delisting necessary in the cases of Steve Madden, whose founder CEO was convicted of violating the federal securities laws and who remained equally if not more involved in his company than did Mr. Wiederhorn here, or MSLO, whose founder and CEO was convicted of conduct relating to the federal securities laws, has more recently agreed to a consent order regarding insider trading, and throughout this time remained equally if not more involved in her company than did Mr. Wiederhorn here. *See* SEC Litig. Rel. No. 19794, Aug. 7, 2006 (http://www.sec.gov/litigation/litreleases/2006/lr19794.htm) (announcing the consent order under which Ms. Stewart agreed to pay a civil penalty of three times the amount of losses avoided, the stiffest sanction available). If the SROs did not consider delisting necessary in those circumstances, then it was certainly unnecessary here, where Mr. Wiederhorn's guilty plea did not involve conduct relating to the securities laws, and where the Board's conduct and his ongoing involvement in the Company are not substantively different from what occurred in those cases. At minimum, it was error for the Commission to even refuse to address the question.

CONCLUSION

For the reasons stated herein, Fog Cutter respectfully requests that this Court grant its petition and vacate the Commission's Order.

Dated: September 20, 2006 Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: 

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ADDENDUM 1

C

Securities and Exchange Commission (S.E.C.)
*1 Securities Exchange Act of 1934

IN THE MATTER OF THE APPLICATION OF **EAGLE SUPPLY GROUP**, INC.
122 EAST 42ND STREET
SUITE 1116
NEW YORK, NEW YORK 10168
FOR REVIEW OF ACTION TAKEN BY THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.
Admin. Proc. File No. 3-9313
March 25, 1998

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- DENIAL OF NASDAQ SMALLCAP MARKET LISTING
Control Persons' Prior Civil and Criminal Actions

Registered securities association, in denying an issuer's request that its securities be included in the association's automatic quotation system, failed to explain why twenty-five- and twenty-seven-year-old securities law violations by two control persons indicate a risk of future misconduct. Held, remanded for a more definitive and complete statement of the reasoning for its decision.

APPEARANCES:

Richard H. Rowe, of Proskauer Rose LLP, for **Eagle Supply Group**, Inc.

Robert E. Aber, Sara Nelson Bloom, and Arnold P. Golub, for the Nasdaq Stock Market, Inc.

Appeal filed: May 22, 1997

Last brief filed: August 28, 1997

I.

Eagle Supply Group, Inc. ("Eagle" or the "Company") has applied for review of a decision of the National Association of Securities Dealers, Inc. ("NASD") denying its application to include the Company's securities on the Nasdaq SmallCap Market. The NASD identified as the basis for denial the fact that two of Eagle's control persons were found, in criminal and civil actions, to have violated the securities laws twenty-five and twenty-seven years ago. The NASD found that these prior violations created a risk of future misconduct and that denial of listing was, therefore, merited. [FN1] We base our findings on an independent review of the record.

II.

The two Eagle control persons referred to above are Douglas P. Fields, chairman of the board of directors and chief executive officer of the Company and Frederick M. Friedman, the executive vice president, treasurer, secretary, and a director of

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the Company. Since the early 1970s, Fields and Friedman have held the same positions with TDA Industries, Inc. ("TDA") that they hold with the Company.

Fields and Friedman's securities law violations occurred in the early 1970s. In 1971, Fields and Friedman engaged in "illicit schemes and misrepresentations designed to artificially inflate the price of TDA stock prior to a public offering of that company's stock." [FN2] In addition, in 1971 and 1973, Fields and Friedman were involved in the payment of sham finder's fees disguised as legitimate business transactions in connection with company acquisitions by TDA and one of its subsidiaries. A prospectus relating to a public offering of TDA stock in November 1971 and proxy materials distributed in December 1971 were false and misleading because they failed to disclose the 1971 transactions.

In a 1976 action brought by this Commission based on the conduct described above, Fields, Friedman, and TDA were enjoined from violating certain of the registration, reporting, proxy, and anti-fraud provisions of the federal securities laws. [FN3] In a 1979 criminal action based on the same conduct, Fields and Friedman were convicted of conspiracy, securities fraud, making a false statement concerning finder's fees paid in connection with company acquisitions by TDA and a subsidiary of TDA, and the preparation and filing of an offering document and proxy statements that failed to disclose these transactions. [FN4] In 1980, Friedman was convicted on two counts of mail fraud and one count of wire fraud in connection with the 1973 finder's fee. [FN5]

***2** Following their convictions and the expiration of the two-year prohibition on their acting as directors of TDA, Fields and Friedman resumed their positions with TDA and currently continue to hold these positions. TDA is a holding company which operates four business enterprises, including a roofing supply distributor and three real estate investment companies. Fields and Friedman currently advise the roofing supply distributor as to potential roofing company acquisitions and are compensated through finder's fees.

Eagle was incorporated on May 1, 1996, primarily to raise capital and to acquire and operate privately-held companies engaged in the wholesale distribution of roofing supplies. On August 12, 1996 the Company filed a Form S-1 Registration Statement ("Registration Statement") with this Commission in connection with an initial public offering of its common stock and warrants. [FN6] According to the Registration Statement, upon the conclusion of the initial public offering, TDA will own approximately 54% of the issued and outstanding common stock of the Company. Fields and Friedman are principal stockholders of TDA and therefore will own, through TDA, a controlling interest in the Company. [FN7] Fields and Friedman will identify potential acquisitions for the Company and receive finder's fees in return for their services.

In November 1996, the Company applied to the NASD for inclusion of its securities in the Nasdaq SmallCap Market. The NASD staff denied the Company's application based on the disciplinary histories of Fields and Friedman and on other issues. [FN8] The Company appealed the decision to the Nasdaq Listing Qualifications Panel ("Qualifications Panel"). During the pendency of the Company's application, all of the issues that were the basis of the NASD's initial denial other than the disciplinary history of Fields and Friedman were resolved. The Qualifications Panel, however, also denied the Company's request for listing on the Nasdaq SmallCap Market.

The Qualifications Panel was particularly concerned by its belief that Fields and Friedman had received a kick-back twenty-five years ago and concurred with the NASD

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staff's concern that there were "similarities between the activities from which the civil and criminal penalties resulted and the activities that Messrs. Fields and Friedman . . . will be engaged in on behalf of the Company." At the hearing before the Qualifications Panel, Company counsel testified that in the more than twenty-five years since the misconduct occurred "there has not been any suggestion of any wrongdoing on a civil or criminal level against" Fields and Friedman. The Qualifications Panel noted that "the passage of time" may be considered a mitigating factor. The Qualifications Panel concluded, however, that the serious nature of the violations and Fields' and Friedman's "direct ties" to the Company merited denial of listing.

The Company requested that the Nasdaq Listing and Hearing Review Committee ("Review Committee") review the Qualifications Panel's decision. During the review process the Company notified the Review Committee that the Qualifications Panel had incorrectly stated that the Commission had alleged that both Fields and Friedman received a kick-back in connection with TDA's acquisition of another company. The Company noted that the Commission alleged that only Friedman received such a kick-back.

***3** The Review Committee affirmed the Qualifications Panel's decision to deny listing based on the "serious disciplinary histories" of Fields and Friedman. Thus, the basis for the NASD's refusal to accept the Company for listing on the Nasdaq SmallCap Market is the disciplinary histories of Fields and Friedman. The Review Committee concurred with the Qualifications Panel's conclusion that since the "SEC complaint focused on the receipt of a kick-back by Messrs. Fields and Friedman," there existed "this same potential with respect to activities that they will be engaged in on behalf of the Company going forward." The Review Committee did not explain how, or even whether, it factored into its decision to concur with the Panel the Company's assertion that only Friedman received a kick-back in connection with TDA's acquisition of another company and what significance, if any, this information might have. The Review Committee also did not explain why it believed that securities law violations that occurred twenty-five and twenty-seven years ago would create the potential for similar misconduct in the future given the Company's assertion that Fields and Friedman have had an unblemished record since that time.

III.

In order to sustain NASD action of this nature, we must find that such action is in accordance with applicable NASD rules and that these rules are and were applied in a manner consistent with the purposes of the securities laws. In addition, the specific grounds for the denial of inclusion must exist in fact. [FN9] The applicable NASD rule here is Rule 4300. [FN10]

In reviewing applications for listing, the NASD "will form a reasonable belief as to whether certain persons connected with an issuer may be predisposed to engage in further violative conduct" since "the NASD believes that the history of prior violative conduct raises concerns regarding the continuing potential for conduct in connection with the operation of the company or the market for its securities that would be considered fraudulent and manipulative, contrary to just and equitable principles of trade, or otherwise raise investor protection concerns." [FN11] Thus, the NASD may consider past securities law violations in assessing whether the association of certain persons with a company raises concerns about its listing. Nevertheless, the NASD must articulate a basis for concluding that individuals who have engaged in past misconduct may be predisposed to engage in future violations of the securities laws or otherwise present a risk to the integrity of the Nasdaq Stock Market. [FN12] The NASD's decision and the record here do not reveal the

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basis for its conclusion.

At the hearing before the Qualifications Panel, Company counsel stated that, in the lengthy period following the securities law violations by Fields and Friedman, "there has not been any suggestion of any wrongdoing on a civil or criminal level against [Fields and Friedman]." The NASD does not respond to this contention, and the record does not reflect any facts to the contrary. The NASD simply notes that the securities law violations committed by Fields and Friedman were serious, and that Fields and Friedman currently hold the same positions with the Company that they held at the time of the violations. However, Fields and Friedman have held these positions for over twenty years, [FN13] during which time the Company asserts that there has been no suggestion of any further misconduct. The NASD does not describe in detail its concerns about the misconduct of Fields and Friedman and we are unable to ascertain the extent to which the criminal record of Fields and Friedman was reviewed or considered by the NASD. Absent further explanation of the NASD's conclusion that these historic violations are indicative of the potential for future misconduct, we cannot evaluate the NASD's decision. Given the circumstances, we think it is appropriate to remand this review proceeding for further consideration.

***4** The decision as to whether or not to list a particular security in Nasdaq "should not depend solely on meeting quantitative criteria, but should also entail an element of judgment given the expectation of investors and the imprimatur of listing on a particular market." [FN14] We have said that "[t]o the extent that discretion enters into the matter . . . the discretion in question is the NASD's, not ours." [FN15] We do not intend to substitute our judgment for that of the NASD. Rather, we are directing the NASD on remand to provide a sufficient basis for its decision to enable us to make the requisite determination as to whether the NASD's action was in accordance with applicable NASD rules and that such rules were applied in a manner consistent with the purposes of the securities laws. [FN16]

IV.

We find that the Review Committee has set forth insufficient reasoning for its denial of Eagle's application for inclusion of its securities in the Nasdaq SmallCap Market. Accordingly, this review proceeding is remanded to the NASD for further consideration and for an explanation of the basis for its finding that there exists a potential for future misconduct by Fields and Friedman. Its explanation should be supported by a description of the factors which led it to conclude that the securities law violations of Fields and Friedman have a likelihood of repetition. [FN17] In making the decision to remand, we express no view concerning the outcome.

An appropriate order will issue. [FN18]

By the Commission (Chairman LEVITT and Commissioners JOHNSON, HUNT AND UNGER); Commissioner CAREY not participating.

Jonathan G. Katz

Secretary

FN1. The NASD invoked its authority under NASD Marketplace Rules 4300 and 4330. Rule 4300 provides that the NASD exercises "broad discretionary authority" over initial inclusion in the Nasdaq SmallCap Market. Rule 4330 provides that the NASD may "deny inclusion or apply additional or more stringent criteria for the initial

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. . . inclusion of particular securities" if the NASD "deems it necessary to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, or to protect investors and the public interest."

FN2. United States v. Fields, No. 76 Crim. 1022, 1977 LEXIS 15588 (S.D.N.Y. Jun. 3, 1977).

FN3. See SEC v. TDA Industries, Inc., No. 75 Civil 4519, 1976 SEC LEXIS 1835 (S.D.N.Y. Apr. 23, 1976) (In addition, Fields and Friedman were removed as directors of TDA and were prohibited from voting any securities of TDA for a two-year period).

FN4. See United States v. Friedman, No. 76 Crim. 1022, 1979 SEC LEXIS 326 (S.D.N.Y. Nov. 14, 1979) (Fields was sentenced to six months imprisonment on each of five counts, to run concurrently, and a $50,000 fine, and Friedman was sentenced to three months imprisonment on each of two counts, to run concurrently, and a $25,000 fine).

FN5. See United States v. Friedman, No. 76 Crim. 1022, 1980 SEC LEXIS 2117 (S.D.N.Y. Feb. 7, 1980) (Friedman was sentenced to one month imprisonment on each of three counts, to run concurrently, and a $3,000 fine).

FN6. An amendment to the Registration Statement was filed on October 15, 1996 and this Commission sent comments concerning the amendment to the Company on October 29, 1996. The Company has not responded to those comments and the Registration Statement has not yet been declared effective, withdrawn, or abandoned.

FN7. Fields is the chairman of the board of directors, president, and the chief executive officer of TDA, and Friedman is the executive vice president, chief financial officer, treasurer, and a director of TDA.

FN8. The NASD staff gave the following reasons for denying the application:
(1) the regulatory history of Douglas P. Fields, Frederick M. Friedman and TDA Industries, Inc. coupled with their significant control and influence over the operations of the Company presents a public interest concern to future Nasdaq Investors, (2) certain June and July 1996 Private Placements appear to be inconsistent with just and equitable principles of trade, and (3) the legal entity applying to be listed on Nasdaq does not meet the income [and net tangible asset] requirements . . . .

FN9. Section 19(f) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78s(f).

FN10. This provision was adopted in 1994 as an amendment to Part II, Section 3(a) of Schedule D to the NASD's By-Laws and subsequently became a part of Rule 4300.

FN11. See Exchange Act Rel. No. 34151 (June 3, 1994), 56 SEC Docket 2654, 2655.

FN12. Eagle argues that the NASD has effectively established a rule, without formal promulgation in accordance with the requirements of Section 19(b) of the Exchange Act, that prevents an entity's securities from being listed if an officer or director engaged in prior criminal or civil violations of the federal securities laws. We disagree. As noted, the NASD has broad discretion in these matters. This discretion necessarily involves a fact-specific inquiry in determining whether to list particular securities.

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FN13. Twenty years have elapsed since the expiration of the two-year prohibition on Fields and Friedman acting as directors of TDA.

FN14. See Exchange Act Rel. No. 34151 (June 3, 1994), 56 SEC Docket 2654, 2656.

FN15. Tassaway, Inc., 45 S.E.C. 706, 710 (1975).

FN16. We also note that in order to affirm NASD action of this nature, we must find that the specific grounds for the denial of inclusion exist in fact. Exchange Act Section 19(f), 15 U.S.C. § 78s(f). The Review Committee appears to have relied on an inaccurate version of certain facts. The Review Committee stated in its decision that it concurred "with the Panel's concerns regarding the potential for similar misconduct going forward." In reaching this conclusion, the Qualifications Panel specifically relied on its belief that both Fields and Friedman had received a kick-back. The Review Committee in its decision notes that the Company alerted the Review Committee to this inaccuracy by stating that in the Commission complaint only Friedman was the focus of allegations involving kick-backs in connection with TDA's acquisition of another company. However, the Review Committee does not respond to this, or address the impact, if any, of this information on the Review Committee's reasoning. The NASD may address this point on reconsideration.

FN17. The NASD explanation may also be supported by any additional fact-finding that it deems necessary.

FN18. All of the arguments advanced by the parties have been considered. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C.

***5** SECURITIES EXCHANGE ACT OF 1934

Rel. No. 39800 / March 25, 1998

Admin. Proc. File No. 3-9313

In the Matter of the Application of **EAGLE SUPPLY GROUP**, INC.

122 East 42nd Street

Suite 1116

New York, New York 10168

For Review of Action Taken by the NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

ORDER DISMISSING REVIEW PROCEEDING

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

ORDERED that this proceeding be, and it hereby is, remanded to the National Association of Securities Dealers, Inc., for further action in accordance with such opinion.

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By the Commission.

Jonathan G. Katz

Secretary

Release No. 39800, Release No. 34-39800, 66 S.E.C. Docket 1920, 1998 WL 133847
(S.E.C. Release No.)

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Dated: September 20, 2006

Meredith Moss

Attorney for Petitioner Fog Cutter Capital Group Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of September, 2006, I have caused two true copies of Petitioner Fog Cutter Capital Group Inc.'s Final Reply Brief to be sent by hand and by electronic mail to:

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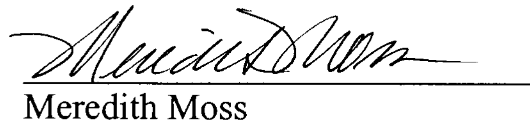
I further certify that, on this 20th day of September, 2006 I have caused fourteen copies of Petitioner Fog Cutter Capital Group Inc.'s Final Reply Brief to be delivered by hand to the Clerk of the Court.



Meredith Moss