SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 52993 / December 21, 2005

Admin. Proc. File No. 3-11934

In the Matter of the Application of

FOG CUTTER CAPITAL GROUP, INC.
c/o Lanny J. Davis, Esq.
Orrick, Herrington & Sutcliffe LLP
Washington Harbour
3050 K St., N.W.
Washington, D.C. 20007-5135

For Review of Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF ASSOCIATION ACTION

Registered securities association delisted issuer's securities after guilty plea by issuer's key executive and largest shareholder, and Board of Directors' response to guilty plea established the need to protect the integrity of market and public interest. Held, review proceedings dismissed.

APPEARANCES:

Lanny J. Davis, of Orrick, Herrington & Sutcliffe LLP, for Fog Cutter Capital Group, Inc.

Edward S. Knight, Michael S. Emen, Arnold P. Golub, and Traynham E. Mitchell, Jr., for The Nasdaq Stock Market, Inc.

Appeal filed: May 23, 2005
Last brief received: October 31, 2005

I.

Fog Cutter Capital Group, Inc. ("Fog Cutter") appeals the decision of NASD delisting Fog Cutter's securities from The Nasdaq National Market ("Nasdaq"). NASD found that the public interest and protection of the integrity of, and public confidence in, Nasdaq required delisting. 1/ NASD based its decision on the guilty plea of Andrew Wiederhorn, who was, at the time of his plea, Fog Cutter's chairman, chief executive officer, and controlling shareholder, to two felonies and on the actions taken by Fog Cutter's Board of Directors ("Board") in anticipation of, and response to, Wiederhorn's guilty plea. 2/ We base our findings on an independent review of the record. 3/

1/ NASD relied on its authority under NASD Marketplace Rules 4300 and 4330. At the time of NASD's decision, Rule 4300 provided that, with respect to continued inclusion of securities, NASD "may deny . . . continued inclusion of particular securities . . . based on any event, condition, or circumstance which exists or occurs that makes . . . continued inclusion of the securities in Nasdaq inadvisable or unwarranted in the opinion of Nasdaq, even though the securities meet all enumerated criteria for . . . continued inclusion in Nasdaq." Rule 4330 provided that NASD may "apply additional or more stringent criteria for the . . . continued inclusion of particular securities" if 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." There has been no substantive change in the rules. NASD's action was based solely on public interest considerations.

2/ Wiederhorn pleaded guilty to payment of an illegal gratuity to an employee-benefit-plan investment advisor in violation of 18 U.S.C. § 1954 and to filing a false tax return in violation of 26 U.S.C. § 7206(1).

3/ Fog Cutter has moved to include its June 3, 2005, Form 10-K/A in the record. NASD, joined by Fog Cutter, asks to include Fog Cutter's Form 8-K reports dated October 12 and October 17, 2005, in the record. Rule of Practice 452, 17 C.F.R. § 201.452, requires that any motion to adduce additional evidence "shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." Here, none of the reports existed when the record closed. The additional evidence is material to this proceeding because the Form 10-K/A evidences the current condition of Fog Cutter's finances and operations, and the Forms 8-K evidence the current status of Wiederhorn. We hereby grant both of the motions and include the June 3, 2005, Form 10-K/A, the October 12, and October 17, 2005, Forms 8-K in the record.

II.

Wiederhorn is the founder of Fog Cutter and with family members controls approximately fifty-three percent of Fog Cutter stock. Fog Cutter is a diverse business controlling or operating a national restaurant chain and a mortgage bank in addition to real estate and investment businesses. Fog Cutter's current business strategy, devised and implemented by Wiederhorn, focuses on continued development of its restaurant operations, expansion of its real estate business, and identification of under-performing businesses that Fog Cutter can acquire and turn around. Fog Cutter represented to the Nasdaq Listing Qualifications Panel ("Panel") that Wiederhorn was responsible for Fog Cutter's transformation and remains "central to the success of [Fog Cutter] and [is] an indispensable CEO." According to the company, Wiederhorn is the "sole officer of Fog Cutter who is familiar with each of Fog Cutter's diverse business lines."

Fog Cutter also asserted that Wiederhorn needed to retain his executive positions so that Fog Cutter could retain its fifty-one percent of George Elkins Mortgage Banking Co., Inc. ("GEMB"). Fog Cutter purchased GEMB from its owners. After the purchase, these sellers retained a forty-nine percent interest in GEMB. However, under the May 2002 Stock Purchase Agreement and the Operating Agreement, the minority owners may repurchase Fog Cutter's interest in GEMB if, among other things, Wiederhorn is neither "serving on [Fog Cutter's] board of directors nor as the Chief Executive Officer." 4/

In March 2001, prosecutors informed Wiederhorn that he was a target of a federal grand jury investigation involving the collapse of Capital Consultants, LLC ("CCI"), an employee-benefit-fund advisor with which other Wiederhorn-controlled company had done business. Wiederhorn kept Fog Cutter's Board informed regarding the existence and progress of the

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4/ GEMB was acquired by a subsidiary of Fog Cutter. Under Section 8.3 of the Stock Purchase Agreement, the minority shareholders can repurchase their interest in GEMB for the "total of (1) such party's share of the Purchase Price [$5,000], (2) the aggregate contributions to the capital of [GEMB] by [the Fog Cutter subsidiary] on or after the Closing Date, and (3) the [Fog Cutter subsidiary's] pro rata share of all accumulated earnings of [GEMB] from and after the Closing Date less the cumulative amount of distributions by [GEMB] to [the Fog Cutter subsidiary]." Fog Cutter represents that, as a result of this provision, the minority shareholders could repurchase GEMB "at a fire sale price, relative to its value," and thereby deprive Fog Cutter of substantial revenue if Wiederhorn ceased to be a director or CEO. Fog Cutter states that the minority shareholders have not exercised the right as a result of Wiederhorn's conviction.

Under the Stock Purchase Agreement, however, Wiederhorn's death or permanent disability would not constitute events that would trigger the repurchase rights of the minority shareholders.

investigation. Fog Cutter represents that, beginning in May 2001, it disclosed the investigation to the Commission and to the public in its public filings.

Between March 2001, when the Board learned of the grand jury investigation, and June 3, 2004, when Wiederhorn pleaded guilty, the Board took two actions with respect to Wiederhorn's situation that are relevant here. In 2003, Wiederhorn asked for an amended employment agreement in advance of the expiration of his then-current employment agreement. On August 11, 2003, the Board approved an amended employment agreement ("Amended Employment Agreement") for Wiederhorn. The Amended Employment Agreement altered the conditions permitting termination of Wiederhorn's employment "for cause." Under the prior employment agreement, the Board, in its discretion, could terminate Wiederhorn's employment for cause upon his conviction of a "felony (other than a felony involving a traffic offense)." Under the Amended Employment Agreement the relevant provision allowed the Board, in its discretion, to terminate Wiederhorn's employment for cause upon conviction of "a felony (other than a felony involving a traffic offense) involving [Fog Cutter]." During negotiation of the Amended Employment Agreement, the Board knew that Wiederhorn was under investigation for felonies that did not involve Fog Cutter. Fog Cutter estimated that the company would have owed Wiederhorn $7 million had it terminated him without cause. 5/

In early 2004, Wiederhorn, by then under indictment and awaiting trial, informed the Board that he wanted to go to trial on the charges against him. 6/ Fog Cutter represents that it

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5/ Under the Amended Employment Agreement, had Wiederhorn been terminated for cause, he would have been entitled to only his base salary through the date of termination and payment of unreimbursed business expenses. If, however, Fog Cutter terminated Wiederhorn without cause, it would owe him within ten days a lump sum payment comprised of the following elements: three times Wiederhorn's annual salary; three times his largest annual bonus from among the most recent three years; unreimbursed business expenses; and accrued but unpaid base salary and bonuses. Other provisions provide for accelerated vesting for benefit and incentive programs and extended coverage for medical and other benefits.

6/ In 2004, Fog Cutter's Board consisted of seven directors, five of whom were independent within the definition of NASD rules. NASD defines "independent director" as "a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship which [in the board of directors' opinion] would interfere with the exercise of independent judgment . . . ." NASD Marketplace Rule 4200(a)(14). Among those explicitly excluded from the definition are employees of the corporation and immediate family members of company executives. NASD Marketplace Rule 4200(a)(14)(A), (C). All of the Fog Cutter directors, however, have family, business, or social ties to Wiederhorn. With minor changes in personnel, the same general

(continued...)

was concerned about a prolonged period of negative publicity and distraction from its business. Wiederhorn offered the Board an alternative: he would plead guilty if he could negotiate a financial package to protect his family's income and benefits during any imprisonment following a guilty plea. On June 2, 2004, the parties concluded a Leave of Absence Agreement ("Leave Agreement"). The Leave Agreement recited the Board's understanding that the crimes to which Wiederhorn intended to plead guilty did not involve acts or omissions by Wiederhorn in his capacity as an officer or director of Fog Cutter and, in one instance, did not involve criminal intent. The Leave Agreement provided that Wiederhorn's absence from his duties because of his anticipated imprisonment would be considered a leave of absence, during which time he would retain his titles (modified to "Co-CEO" and "Co-Chairman") and responsibilities. 7/ Financially, the Leave Agreement provided that Fog Cutter would continue to pay Wiederhorn his $350,000 annual salary, bonuses, and other employee benefits while imprisoned. Fog Cutter also agreed to pay Wiederhorn a $2 million "leave of absence payment" to retain his "good will, cooperation and continuing assistance, and in recognition of Wiederhorn's past service to the Company, to help avoid litigation and for other reasons." 8/

On June 3, 2004, the day after concluding the Leave Agreement, Wiederhorn pleaded guilty to paying an illegal gratuity and filing a false tax return. 9/ The district court sentenced Wiederhorn to eighteen months imprisonment and required him to pay a $25,000 fine and $2 million in restitution to the receiver winding up CCI's affairs.

During the negotiation of the Leave Agreement, Wiederhorn represented that the tentative plea agreement both required him to pay the $2 million restitution at the sentencing hearing and limited his ability to raise the funds by precluding his use of certain means of financing the

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6/ (...continued)
composition of the Board was in effect in 2003, when the Board agreed to negotiate the Amended Employment Agreement with Wiederhorn.

7/ On August 13, 2004, after the Federal Bureau of Prisons informed Fog Cutter that Wiederhorn would not be allowed to conduct business as an inmate, Fog Cutter altered Wiederhorn's titles and responsibilities to reflect his inability to carry out the duties of a Chief Executive Officer under the requirements of the Sarbanes-Oxley Act. Until that time, the plan apparently was for Wiederhorn to act as Co-CEO from his prison cell. From August 13, 2004, until October 12, 2005, he was the Co-Chairman of the Board and Chief Strategy Officer of Fog Cutter.

8/ According to Fog Cutter's June 3, 2005, Form 10-K/A, the company spent $4,750,000 on "leave of absence expense" during a period when the company reported a $3,932,000 net loss.

9/ 18 U.S.C. § 1954 (payment of an illegal gratuity with respect to an employee benefit plan); 26 U.S.C. § 7206(1) (filing a false tax return).

restitution payment. The Board knew, therefore, that Wiederhorn would use the $2 million payment to pay the restitution. 10/ As Fog Cutter's counsel stated to the Panel, Fog Cutter did not "like the idea of helping Wiederhorn pay a criminal penalty" but, nonetheless, did, indirectly, pay the restitution in its entirety. In a Commission filing on June 4, 2004, Fog Cutter disclosed Wiederhorn's guilty plea and the terms of the Agreement. 11/

On July 20, 2004, after concluding an investigation, NASD staff informed Fog Cutter that its securities would be delisted from Nasdaq based on public interest concerns relating to Wiederhorn's guilty plea and Fog Cutter's response to it. NASD staff considered that it was contrary to the public interest for Fog Cutter to remain listed on Nasdaq with a convicted felon exercising substantial influence over the company while incarcerated. NASD staff also concluded that the Board's negotiating Wiederhorn's Amended Employment Agreement, acquiescing to Wiederhorn's demands for financial support during his imprisonment, paying his court-ordered restitution, and retaining him in his executive and director positions during his imprisonment was not in the public interest. Fog Cutter sought review of the staff's decision before the Panel. The Panel determined that delisting was appropriate. Fog Cutter sought review of that decision by the NASDAQ Listing and Hearing Review Council ("Council"), which affirmed the Panel's decision "in order to protect the quality of and public confidence in The Nasdaq Stock Market, and to protect investors and the public interest." When the NASD Board of Governors did not review the Council's decision, Fog Cutter sought Commission review. 12/

III.

Our review of NASD's delisting of Fog Cutter is governed by Exchange Act Section 19(f). Under Section 19(f), we will dismiss Fog Cutter's appeal if we find that "the specific

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10/ The record includes a complaint in a pending shareholder derivative suit in Oregon state courts. McCoon v. Wiederhorn, No. 0407-06900 (Cir. Ct. Multnomah County) (complaint filed July 6, 2004). We have not considered the suit in our resolution of this proceeding.

11/ According to Fog Cutter, even with the June 4, 2004, disclosures, its stock price remained well above Nasdaq minimums until delisting.

12/ Fog Cutter's October 12, 2005, Form 8-K reported that Wiederhorn had been released from prison and had resumed his duties as Fog Cutter's Chairman and CEO. Fog Cutter's October 17, 2005, Form 8-K reported, however, that the Bureau of Prisons objected to Wiederhorn's resumption of his former duties as being incompatible with his participation in a work-release program requiring that he be supervised. To comply with the work-release program, Fog Cutter returned Wiederhorn to the position of Chief Strategy Officer. Fog Cutter reported further that it anticipated Wiederhorn's return to his duties as CEO and Chairman upon completion of the work-release program, on or about November 22, 2005.

grounds on which such denial . . . is based exist in fact, that such denial . . . is in accordance with the rules of [NASD], and that such rules are, and were applied in a manner, consistent with the purposes of [the Exchange Act]." 13/

Under Rules 4300 and 4330, NASD has discretion to apply additional or more stringent rules to issuers listed on Nasdaq when an "event, condition, or circumstance" makes application of stricter standards advisable. 14/ NASD may also apply additional or more stringent standards to issuers to prevent fraud or manipulation, promote just and equitable principles of trade, and to protect investors and the public interest. 15/ Fog Cutter does not dispute that Wiederhorn pleaded guilty to two felonies, payment of an illegal gratuity and filing a false income tax return. Nor does Fog Cutter dispute the facts of the Board's response to Wiederhorn's guilty plea. Fog Cutter does dispute, however, that these events support the conclusion that Fog Cutter's continued listing on Nasdaq sufficiently threatened the public interest or the integrity of Nasdaq to justify delisting Fog Cutter.

NASD found Wiederhorn's two felony convictions and imprisonment serious. Although Fog Cutter describes Wiederhorn's sentence as a "relatively brief period of incarceration," we believe the sentence of eighteen months imprisonment (fourteen of which were served), payment of a $25,000 fine, and payment of $2 million in restitution make clear the seriousness of the offenses. 16/

13/ Exchange Act § 19(f), 15 U.S.C. § 78s(f). Fog Cutter has not alleged, and the record does not suggest, that NASD's delisting "imposes any burden on competition not necessary or appropriate in furtherance of the purposes of" the Exchange Act. See id.

14/ NASD Marketplace Rule 4300.

15/ NASD Marketplace Rule 4330.

16/ Fog Cutter notes that the payment of an illegal gratuity does not involve criminal intent. Fog Cutter does not suggest that filing a false tax return does not require intent. Conviction of the crime of filing a false tax return requires proof that a taxpayer "willfully" signed and filed a tax return he or she knew to be false. 26 U.S.C. § 7206(1). The Supreme Court of the United States has held that, in the context of filing a false tax return, the term "willful" connotes a "voluntary, intentional violation of a known legal duty." United States v. Bishop, 412 U.S. 346, 360 (1973) (summarizing previous holdings that "willful" means "bad faith or evil intent," or "evil motive and want of justification in view of all the financial circumstances of the taxpayer," or knowledge that the taxpayer "should have reported more income than he did").

(continued...)

NASD further expressed concern that Wiederhorn was Fog Cutter's Chairman, CEO, and majority shareholder and intended to continue to exert influence and control over Fog Cutter's affairs even while incarcerated. NASD did not see that there was any attempt by Fog Cutter to limit Wiederhorn's influence over the company despite his felony convictions. Fog Cutter concedes that Wiederhorn is critical to its operations.

In JJFN Services, Inc., we upheld NASD's refusal in 1996 to list JJFN, based on the 1992 felony tax fraud conviction of the company's controlling shareholder, promoter, and paid consultant. 17/ The convicted individual founded the company, created the service it provided to real estate developers, and otherwise played an essential role in the company. We agreed with NASD that the convicted individual's essential role supported NASD's determination not to list JJFN. We noted that NASD's listing authority "is necessarily broad." 18/ We further found that "[b]oth the tax and the securities regulatory schemes depend on the honor, candor, and integrity of regulated persons to report accurately to the regulatory authority the information sought by such authority," 19/ and that the conviction of a controlling person for "tax fraud legitimately may be considered by the NASD to be evidence of a propensity for future conduct violative of securities laws or regulations." 20/

We recognize that, as Fog Cutter argues, the individual in JJFN was convicted for filing a false tax return in connection with another business while Wiederhorn's very recent tax conviction pertained to a personal return, but that distinction does not undermine the applicability of JJFN to Fog Cutter's situation. The wrong committed by an untruthful taxpayer is telling a falsehood to an agency that relies upon truthful reporting of economic activity. The nature of the wrong is not altered by the circumstance that the falsehood was uttered by the taxpayer on his personal return instead of on a business return. As we have noted, the evidence of falsehoods

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16/ (...continued)
Fog Cutter also asserts that Wiederhorn acted with the advice of professionals. As we have suggested in other contexts, we will not permit collateral attack on Wiederhorn's convictions. See Ira William Scott, 53 S.E.C. 862, 866 (1998).

17/ 53 S.E.C. 335 (1997). The person at issue in JJFN pleaded guilty to, among other charges, filing a false tax return in violation of 26 U.S.C. § 7206(1), the same crime to which Wiederhorn pleaded guilty. Id. at 337 n.2. JJFN's promoter admitted filing false tax returns in 1983, 1984, and 1985 in connection with his 1992 guilty plea.

18/ Id. at 340.

19/ Id. at 338-39.

20/ Id. at 338.

told to the government is properly of great interest to securities regulators who operate under similar constraints as the tax authorities. 21/

Fog Cutter suggests that our opinion in JJFN can be distinguished because it made no mention of any action by the JJFN board of directors. Fog Cutter is correct, but the distinction aggravates, rather than lessens, the concerns raised by NASD with respect to Fog Cutter because the actions of Fog Cutter's Board were part of the problem. NASD determined that Wiederhorn so thoroughly influenced the Board that it provided no check upon Wiederhorn's conduct.

Although well aware that the grand jury investigation had targeted Wiederhorn, the Board agreed to the Amended Employment Agreement to prevent his termination for cause in the anticipated event that he might subsequently be convicted of crimes not involving Fog Cutter. 22/ Later, knowing that Wiederhorn was going to plead guilty to the felony charges against him, the Board negotiated the Leave Agreement that continued Wiederhorn's compensation during his incarceration and indirectly paid the restitution imposed on Wiederhorn as part of his sentence. As part of the same Agreement, the Board tried to retain Wiederhorn as co-CEO and co-Chairman during his imprisonment. 23/ Fog Cutter determined not to retain Wiederhorn as co-CEO only when the Bureau of Prisons notified Fog Cutter that Wiederhorn would not be allowed to conduct a business from prison. 24/ Fog Cutter suggests the Leave Agreement allowed the Board to keep Wiederhorn at Fog Cutter and avoid wrongful-termination litigation with Wiederhorn. We note, however, that it was the Board's limitation of its authority to terminate Wiederhorn for cause under the Amended Employment Agreement that made credible Wiederhorn's threat of such litigation.

21/ Id. at 338-39.

22/ Fog Cutter's argument that the amendment strengthened the Board's discretion ignores the fact that termination for cause was discretionary with the Board under the old agreement. The new agreement consequently sharply limited the Board's discretion to address an issue that it should have known was likely to arise.

23/ Fog Cutter has claimed that it needed to retain Wiederhorn as CEO in order to prevent the GEMB minority shareholders from repurchasing Fog Cutter's interest in GEMB. See supra n.4.

24/ See supra n.7 and accompanying text.

Fog Cutter claims that NASD's opinion was conclusory. 25/ We disagree. NASD made clear the bases for its conclusion that the public interest required the delisting of Fog Cutter: Wiederhorn's guilty plea to two felonies; his continuing influence over the company notwithstanding his imprisonment; the negotiation of the Amended Employment Agreement; the agreement to pay $2 million to cover the cost of court-ordered restitution in addition to the other terms of the Leave Agreement; and Fog Cutter's intention to have Wiederhorn act as CEO while incarcerated. These factors led NASD to conclude that Fog Cutter, with Wiederhorn in control under only nominal Board supervision, was an issuer that presented inappropriate non-market risk to public investors and, consequently, should be delisted. 26/

Fog Cutter also seems to complain about the quality of NASD's investigation. NASD represents that it met with company representatives, counsel, and at least one board member. Fog Cutter does not deny that these contacts occurred but complains that the investigation lasted only five weeks and took no on-the-record testimony. We believe NASD acted quickly, appropriately, and in accordance with NASD rules. As NASD notes, there is no requirement for on-the-record testimony in delisting cases. Moreover, Fog Cutter's counsel stated at the beginning of the hearing that Nasdaq staff had gone out of its way to listen to the company. 27/

Fog Cutter also argues that NASD's action is inconsistent with actions taken in response to other high-profile executives who were allowed to return to their companies after serving prison terms for crimes more serious than those committed by Wiederhorn. As we have noted on

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25/ Fog Cutter relies on McCarthy v. SEC, 406 F.3d 179, 188 (2d Cir. 2005). McCarthy involved an appeal of exchange disciplinary action under Exchange Act Section 19(e), 15 U.S.C. § 78s(e), and does not consider the review of actions such as delisting under Exchange Act Section 19(f). In any event, as we have discussed herein, we believe that NASD's opinion sets forth the factual predicate for its decision.

26/ See DHB Capital Group, Inc., 52 S.E.C. 740, 745 (1996).

27/ Fog Cutter's counsel opened his presentation to the Panel with the following statement:

> The [Nasdaq] staff has gone out of its way to give us a hearing[,] to listen to our arguments, to even extend their own period of considerations to talk to members of our Board. We've had our disagreements, but I just wanted to establish this is going to be a very civil exchange, if there is an exchange. Because these three [Nasdaq staff] people have treated us very, very fairly and whatever happens, I wanted to compliment them on their patience as well as their civility.

other occasions, each case is to be decided on its own facts and circumstances, and it is not appropriate to compare them. 28/

Fog Cutter argues that the Board had good business reasons for its actions regarding Wiederhorn. For example, by negotiating the Leave Agreement, Fog Cutter asserts that it retained Wiederhorn's good will and managerial presence and balanced Wiederhorn's desire to provide for his family with Fog Cutter's desire to have Wiederhorn avoid a lengthy criminal trial with its attendant damaging publicity. Fog Cutter concedes that it knew the Board's decisions "could be controversial" and admits it did not request guidance from NASD staff before taking those controversial steps.

The issue here, however, is not the Board's business judgment but, rather, the public interest. Listing a security on a market creates expectations among investors that listed companies meet basic standards of corporate governance and financial soundness. We have stated that "inclusion of a security . . . entail[s] an element of judgment given the expectations of investors and the imprimatur of listing on a particular market." 29/ We have also held that "the risk associated with investing in [Nasdaq] is market risk rather than the risk that the promoter or other person exercising substantial influence over the issuer is acting in an illegal manner." 30/ We also agree with NASD that the Board, in negotiating Wiederhorn's Amended Employment Agreement and acquiescing in his desire for the Leave Agreement, put Wiederhorn's interests above those of the shareholders. 31/ For example, according to Fog Cutter's Form 10-K/A for June 2004, Fog Cutter's "leave of absence expense" totaled $4,750,000, during a period for which Fog Cutter reported a net loss of $3,932,000. We believe that NASD's action in delisting Fog Cutter is consistent with policies of the Exchange Act.

28/ DHB Capital Group, 52 S.E.C. at 745 (rejecting argument that another company continued inclusion in Nasdaq "although associated with a notorious securities law violator."); see Butz v. Glover Livestock Comm'n Corp., 411 U.S. 182, 187 (1973).

29/ DHB Capital Group, 52 S.E.C. at 744.

30/ Id. at 745 (quoting Tassaway, Inc., 45 S.E.C. 706, 709 (1975)).

31/ Fog Cutter's reliance on e-Smart Technologies, Inc., Initial Decision Rel. No. 272 (Feb. 3, 2005), 84 SEC Docket 2979, and other registration revocation cases to suggest that Fog Cutter's shareholders are similarly situated is misplaced, as those cases are inapposite. When the Commission revokes the registration of an issuer's securities pursuant to Exchange Act Section 12(j), that issuer's securities may not be traded publicly, absent an exemption. By contrast, while NASD has delisted Fog Cutter from its market, Fog Cutter's stock continues to be traded publicly. It is listed in the National Quotation Bureau's Pink Sheets. Over the last fifty-two weeks, Fog Cutter stock has traded between $2.50 and $4.00 per share.

IV.

Having found that the grounds for NASD's delisting of Fog Cutter's securities exist in fact, were based on NASD rules, and were applied in a manner consistent with the Exchange Act, we dismiss the review proceeding. 32/

An appropriate order will issue.

By the Commission (Chairman COX and Commissioners GLASSMAN, ATKINS, CAMPOS, and NAZARETH).

Jonathan G. Katz
Secretary

32/ We have considered all of the arguments advanced by the parties. 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
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SECURITIES EXCHANGE ACT OF 1934
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NASD

ORDER DISMISSING REVIEW PROCEEDING

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

ORDERED that the application for review filed by Fog Cutter Capital Group, Inc. be, and it hereby is, dismissed.

By the Commission.

Jonathan G. Katz
Secretary