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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 CLEANTECH INNOVATIONS, INC.,

4 Plaintiff,

5 v.

11 CV 9358 (KBF)

6 NASDAQ STOCK MARKET, LLC,  
7 et al.,

8 Defendants.

9  
10 December 27, 2011

11 10:10 a.m.

12 Before:

13 HON. RICHARD J. SULLIVAN,

14 District Judge  
15 Sitting in Part I

16 APPEARANCES

17 FENSTERSTOCK & PARTNERS, LLP  
Attorneys for Plaintiff  
18 BY: BLAIR C. FENSTERSTOCK  
EUGENE D. KUBLANOVSKY  
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23 GIBSON DUNN & CRUTCHER, LLP  
Attorneys for Defendants  
24 BY: SCOTT P. MARTIN  
25 JAMES L. HALLOWELL

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1 (Case called)

2 (In open court)

3 THE COURT: Good morning to you. Thanks for all being  
4 here. I hope I haven't ruined anybody's post-holiday plans.

5 We were here last week, obviously discussing the  
6 defendants' motion to vacate the state court TRO. And so I  
7 allowed the plaintiffs an opportunity to respond, which I have  
8 now received and got on Friday. The memorandum of law in  
9 opposition to defendant's motion, which includes basically a  
10 cross motion to continue the temporary restraining order. And  
11 then I've also received a letter, December 23rd letter, which  
12 is in the form of a premotion letter to me, consistent with my  
13 individual practices, that really is, I guess, for the same  
14 relief. It's really about extending the state TRO.

15 I've not heard from the defendants related to that  
16 cross motion or this new motion. Did you intend or want to  
17 respond to this?

18 MR. MARTIN: Yes, your Honor. We would either be  
19 heard today, or we'd prefer to put in a response. Obviously we  
20 oppose the TRO, for the reasons we've discussed previously.

21 THE COURT: Well, I mean, we should all keep in mind  
22 that this is Judge Forrest's case, so I don't want to tread  
23 lightly on her. I'm the Part I judge, so I'm covering for her  
24 this week, and I'll do what I have to do since there is a TRO  
25 that's on the table right now.

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1           But to the extent people want opportunities to brief  
2 things more fully, she's back next week and I guess, then, that  
3 would go to her, depending on the schedule we adopt.

4           All right. Well, I've looked at the papers. It seems  
5 to me -- I'm happy to hear you further, but it seems to me that  
6 really the state court has no business issuing TROs in a matter  
7 like this. I know of no authority in which a state court has,  
8 in fact, exercised jurisdiction in a case involving a delisting  
9 of an exchange. I think the statute is very clear that this is  
10 exclusively for federal courts.

11           And again, I'm puzzled as to how Judge Schweitzer  
12 could have issued the ruling he did. Even if there are some  
13 state constitutional claims, this case is really all about the  
14 delisting of a company on the NASDAQ exchange, and whether or  
15 not NASDAQ complied with its own internal rules and with the  
16 overlay of SEC regulations. So it's really difficult for me to  
17 see why this was brought to state court in the first place, or  
18 why the state court felt that it had jurisdiction.

19           So, Mr. Fensterstock, I'm happy to hear you, but I  
20 didn't see anything in your papers in the form of authority  
21 that would suggest that I'm wrong about that.

22           MR. FENSTERSTOCK: Judge, knowing how thorough you  
23 are, I am not going to suggest that I can come up with any more  
24 authority than what we put in our papers. But obviously, with  
25 a TRO in place until it's vacated or modified by you, we were

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1 trying to be very careful to follow your rules by filing that  
2 letter with requests to --

3 THE COURT: That's fine. That's really a different  
4 issue. That's about asking me or Judge Forrest or a federal  
5 court to do effectively what the state court did.

6 MR. FENSTERSTOCK: And I wanted to follow up and just  
7 bring you up to speed, because there were a couple of other  
8 developments.

9 THE COURT: I thought there might be, so I didn't want  
10 to go there.

11 MR. FENSTERSTOCK: As you know --

12 THE COURT: You appealed to the SEC for a stay, right?

13 MR. FENSTERSTOCK: Right. The NASDAQ on Friday  
14 opposed our motion for a stay. We have not heard anything from  
15 the SEC yet.

16 THE COURT: Are you dealing with a particular person  
17 or persons at the SEC?

18 MR. FENSTERSTOCK: Well, I will defer to Paula  
19 Shaffner, who -- if that's okay, your Honor.

20 THE COURT: That's fine.

21 MR. FENSTERSTOCK: Since Ms. Shaffner's firm is the  
22 one who's handling things before you.

23 THE COURT: I saw the papers related to --

24 MS. SHAFFNER: We filed the appeal with the SEC  
25 through the office that we're required to go through. I have

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1 filed motions for a stay in the past in largely disciplinary  
2 matters that often get granted ex parte same day.

3 THE COURT: Right.

4 MS. SHAFFNER: This is a bit unusual and novel and --

5 THE COURT: Is it that novel? You know better than I  
6 did, and perhaps Senator Specter knows better than any of us,  
7 but I can't imagine it's that novel that a company gets  
8 delisted. It must happen from time to time.

9 MS. SHAFFNER: What is novel is asking the SEC for a  
10 stay of the delisting under those circumstances. The  
11 commentary to the rule, and I'm sure it's been brought up to  
12 your Honor before, suggests that during the -- that process,  
13 the Form 25 process, that the parties have an opportunity to  
14 enforce their federal or state court remedies, which is why  
15 this proceeding happened in the first instance. We've had no  
16 ruling from the SEC. It was filed, and we pointed out to them  
17 that there did not have to be a hearing or anything to that  
18 effect.

19 THE COURT: Right. But in fairness, look, this wasn't  
20 really filed until Friday, right? I mean, I think you may have  
21 gotten the date of the 22nd, but it was after business hours  
22 when you filed it, right?

23 MS. SHAFFNER: It was, your Honor.

24 THE COURT: Because we finished up after 5:00.

25 MR. FENSTERSTOCK: We did it as quickly as we could,

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1 but you're right.

2 THE COURT: So they did not have a ton of time to get  
3 their arms around this. Have you had any communication with a  
4 live person?

5 MS. SHAFFNER: Not yet, your Honor. We'll try to do  
6 that today. The one item of note in NASDAQ's response is that  
7 NASDAQ was in agreement with us that there is no provision for  
8 discovery of any type on the due process issues that we've  
9 raised in court before the SEC. So while we have asked for a  
10 discovery order from the SEC, there is nothing within the rules  
11 of the appellate process at the SEC which would permit us to  
12 get discovery in that proceeding.

13 THE COURT: All right. But, I mean, I guess there's a  
14 couple things. First, we're talking about vacating or --  
15 vacating the state court's order on the grounds that the state  
16 court didn't have jurisdiction. Once that's resolved, then I  
17 guess we get to the next motion, which is that I, on behalf of  
18 Judge Forrest, issue a TRO enjoining the delisting pending  
19 resolution of the appeal before the SEC.

20 And we can talk about what are the criteria that a  
21 court should be considering in deciding whether or not a stay  
22 would be -- you basically would be appealing the SEC's failure  
23 to grant a stay, right, at this point?

24 MR. FENSTERSTOCK: Yes, your Honor. And there's some  
25 serious public policies involved here, and Senator Specter

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1 would like to address that.

2 But let me make one comment. This whole process  
3 started a week ago Monday. We brought our TRO on notice.

4 THE COURT: Right.

5 MR. FENSTERSTOCK: NASDAQ decided not to put in any  
6 papers before Judge Schweitzer. We were here before you last  
7 week. You asked NASDAQ, is there any harm with a TRO? They  
8 never answered that there was any harm. We have now had eight  
9 days since last Monday when we started this process. NASDAQ  
10 has not been able to show you an iota of harm that would follow  
11 an extension of the existing TRO.

12 THE COURT: I guess, but, again, just to be clear, I  
13 mean, it's you that has to establish irreparable harm.

14 MR. FENSTERSTOCK: That's correct.

15 THE COURT: The balance of hardships and public policy  
16 are other factors to be considered, and that's valid. We'll  
17 consider them, if we get there.

18 But one of the questions I asked last week is: What  
19 is the harm in the delisting? Because it seems to me, if  
20 you're suspended now, a delisting doesn't really change that  
21 much. It may a little here and there, I don't know. But it  
22 would seem one of the points you made, and you make again in  
23 your papers, is that to be delisted would make it harder to get  
24 relisted in the event that the SEC or a court were to reverse  
25 NASDAQ's decision. Right?

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1 MR. FENSTERSTOCK: That was one of the points, your  
2 Honor, yes.

3 THE COURT: I still find that hard to understand. It  
4 seems to me that if NASDAQ was wrong, that either the SEC or  
5 the Court of Appeals would order them to relist the company  
6 without making the company go through all the hoops that it  
7 would have to go through if it were initiating the listing  
8 process.

9 MR. FENSTERSTOCK: Let me make two points on that.  
10 First point --

11 THE COURT: We're jumping around a little bit.

12 MR. FENSTERSTOCK: That's okay. In a rational world,  
13 you're absolutely right. NASDAQ or the SEC, as I understand  
14 it -- assuming the court didn't direct SEC or NASDAQ to do  
15 something, which you raised last week -- NASDAQ or the SEC can  
16 apply any requirements they want for a company to be relisted.

17 Number two, Mr. Staloff's affidavit in the TRO  
18 application below portrayed a doom's day scenario which is not  
19 hypothetical. Mr. Staloff suggested that there was a potential  
20 financing which the company was not able to get because of the  
21 potential delisting.

22 THE COURT: But that's true with a suspension as well,  
23 isn't it?

24 MR. FENSTERSTOCK: Well, no. There are levels, your  
25 Honor. There are levels of incredulity with respect to a



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1 company. If you are suspended, that's one level. If you're  
2 delisted, it has the perception of a whole different level.  
3 And I think with regard to the public policies, I think Senator  
4 Specter can address that, if you will, your Honor.

5 THE COURT: All right. Well, right now I want to stay  
6 focused. We're going to do this in pieces.

7 I want to first deal with whether or not the state  
8 court had jurisdiction. That's really the motion that brought  
9 you all here. That's a motion to vacate the state court's  
10 ruling on the grounds that it lacked jurisdiction to issue a  
11 ruling in the first place.

12 So are you still arguing that the state court had  
13 jurisdiction, Mr. Fensterstock?

14 MR. FENSTERSTOCK: I am, your Honor.

15 THE COURT: You are. All right. And so what is the  
16 basis for your argument that the state court has that  
17 jurisdiction, given the plain language of the statute, which  
18 seems to suggest that exchange act -- The Exchange Act is  
19 exclusively the province of federal courts?

20 MR. SPECTER: Your Honor, might I respond?

21 THE COURT: Sure.

22 MR. SPECTER: On that point specifically. There are a  
23 couple of other points that I'd like to make briefly. And I  
24 now read the statute, which provides the district courts of the  
25 United States shall have exclusive jurisdictional violations of

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1 this chapter or the rules and regulations thereunder in all  
2 suits in equity and actions of law brought to enforce any  
3 liability or duty created by this chapter or the rules and  
4 regulations thereunder.

5 THE COURT: Right.

6 MR. SPECTER: Well, this matter does not involve  
7 liability or duty created by this chapter. The action brought  
8 in the state court involves the liability under the  
9 Constitution of the State of New York.

10 THE COURT: But it's really about the failure of the  
11 SRO to abide by its own rules, which are rules that are  
12 promulgated in accordance with the SEC's jurisdiction, right?  
13 SEC regulations that require them to do this. And then  
14 there's --

15 MR. SPECTER: Well, it involves whether there has been  
16 due process of law. And that references the NASDAQ rules. But  
17 the basic authority for challenging NASDAQ and the state courts  
18 has been the New York State Constitution.

19 THE COURT: Well, is there any precedent for this?  
20 Are you aware of state courts that have been -- that have  
21 exercised jurisdiction in a delisting case involving The  
22 Exchange Act?

23 MR. SPECTER: Well, I have not, your Honor. But we  
24 have one right at hand, and that is what this Judge Schweitzer  
25 did.

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1 THE COURT: Well, I understand that. But I guess the  
2 issue is if state courts were granted this kind of authority,  
3 and that was consistent with The Exchange Act, it would seem to  
4 me we'd have other examples of that. But I haven't found any.  
5 It doesn't sound like you have either.

6 MR. FENSTERSTOCK: No, but you know --

7 MR. SPECTER: Wait. On its face, your Honor, I would  
8 submit the argument that the statute talks about actions to  
9 enforce any liability created by this chapter. And that is not  
10 what we're asserting. We're asserting that the state court --  
11 a liability under the Constitution of the State of New York.  
12 We're not asserting a duty or a liability or a provision of the  
13 securities act.

14 THE COURT: Well, you're doing more than that. I  
15 mean, the complaint is not exclusively about a violation of  
16 New York State Constitution, right? The complaint -- we can  
17 look at it, but, I mean, it's really all about The Exchange  
18 Act, isn't it?

19 MR. SPECTER: It is true that there are other causes  
20 of action in the complaint, but that does not change the fact  
21 that there is a cause of action which is bottomed exclusively  
22 on the State of New York.

23 THE COURT: Well, I agree with that. That's obvious,  
24 right? There clearly is -- one of the causes of action is  
25 based on a New York State constitutional provision. The issue

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1 is, I think, was it the intent of the folks who wrote The  
2 Exchange Act to have delisting decisions taken into state  
3 court, have state courts deciding these things, or was it  
4 something that was designed to be kept in federal courts?

5 First, let's be clear. First, through the SEC, and then if the  
6 SEC ultimately decided, then there'd be recourse in federal  
7 courts. Isn't that a logical and coherent system of The  
8 Exchange Act?

9 MR. SPECTER: Permit me to amplify on my argument. In  
10 looking to due process, we are looking to a practice here where  
11 the indicators are prima facie that NASDAQ has engaged in  
12 discriminatory practices. And this goes to the issue of due  
13 process under the New York constitution. Mr. Emmon of NASDAQ  
14 has said that it doesn't matter whether the consultant's  
15 reputation is deserved or not. What matters is that he is  
16 notorious, and that is in the context of discrimination against  
17 a Chinese company.

18 THE COURT: I think that's really in the context of  
19 whether or not plaintiff was being fully forthcoming when asked  
20 for documents, right?

21 MR. SPECTER: Well, that gets into the merits. And if  
22 we take a look there, I would submit to your Honor that it's  
23 conclusive that the plaintiff was forthcoming. But Emmon went  
24 on the to say that over the past year we've developed expansive  
25 procedures to use in reviewing just this type of company that

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1 go well beyond what we do with other applications.

2 What piqued my interest in this case involved these  
3 discriminatory practices. And part of what we hope to get  
4 today, in addition to discovery that they haven't followed  
5 their own rules submitting it to each board member, is an  
6 opportunity to see what they have done.

7 And this case, if I may say, your Honor, involves a  
8 much broader interest, national interest, for the parties  
9 involved here. We have an active foreign trade policy seeking  
10 access to markets in China, great markets there. And here we  
11 have a case where access to US markets have been denied a  
12 Chinese company on what is prima facie already on the record  
13 discriminatory practices. And we think that we will find  
14 within the NASDAQ files more evidence that this is going on.

15 THE COURT: But you're already appealing that to the  
16 SEC, and that's the proper channel for the appeal in the first  
17 instance, right?

18 MR. SPECTER: Well, not really, Judge.

19 THE COURT: Why do you say that?

20 MR. SPECTER: We are looking for an opportunity to  
21 establish for the record that they haven't followed their  
22 procedures.

23 THE COURT: But there is an appeals process that  
24 allows the aggrieved party, any company, to appeal the decision  
25 of the exchange, the individual SRO, to the SEC, correct? And

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1 that has been commenced. You folks commenced that in November.  
2 The SEC is presumably looking at that.

3 MR. SPECTER: We come to a court of equity because of  
4 the irreparable harm, the fact that this company is facing  
5 insolvency. I grant you when you started talking about listing  
6 and relisting, you're in a nebulous area. But the affidavits  
7 which have been submitted here are that this company is on the  
8 brink of insolvency.

9 THE COURT: But, I mean, I understand that. But these  
10 are arguments that can be, and should have been made to the SEC  
11 in the first instance. I mean, I think it's an interesting  
12 issue as to what happens when at the time you appeal the SEC,  
13 the NASDAQ decision, you also ask for a stay of the delisting.  
14 But that didn't happen here. I mean, what the delisting -- the  
15 request to stay the delisting was made the Friday before  
16 Christmas, you know, with basically half a business day left to  
17 get it done before the delisting would go into effect. It's  
18 kind of hard to fault the SEC for that. And really, the scheme  
19 allows the SEC to review what NASDAQ has done and the Court of  
20 Appeals to review what the SEC has done. Why isn't that  
21 sufficient process?

22 MR. SPECTER: Because if those proceedings are allowed  
23 to take their course, this company will no longer be in  
24 business. This company lost an opportunity to build on an  
25 \$8 million contract for the State of New Jersey on towers.

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1 There's a \$100 million contract in the offing, and by the time  
2 the SEC decides this case, there won't be any case left for it  
3 to decide because there won't be any company left.

4 THE COURT: But I don't know if that's the fault of  
5 those who didn't move for a stay until the day before Christmas  
6 or the fault of the SEC for not jumping to it the same day.  
7 But in terms of due process, I mean, there is a process in  
8 place that allows for the SEC to review the SRO decision, and  
9 then the SEC to stay the delisting, if the equities require it,  
10 right? There is a process here. It just wasn't utilized here.  
11 But one could argue this is an end run around the SEC process,  
12 which courts are obviously reluctant to do.

13 And state courts, it's not clear to me what role, if  
14 any, they have in this whole process.

15 MR. SPECTER: Well, where equitable proofs are  
16 submitted of irreparable harm, and there's nothing more  
17 irreparable than going out of business --

18 THE COURT: But is that your -- you really do believe  
19 that that was the intent of this structure, then, is to allow  
20 anybody who can claim irreparable harm to just go running into  
21 whatever court they want to, state or federal, because a court  
22 of equity trumps the scheme that was developed in The Exchange  
23 Act?

24 MR. SPECTER: It would have to do more than make a  
25 claim. You'd have to prove it, which I think we have done.

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1           THE COURT: Well, I think the issue here, right now,  
2 is whether or not the state court had jurisdiction. And I  
3 haven't seen any authority suggested they do. It seems to me  
4 that the remedy is exclusively federal, and it requires the SEC  
5 to make a ruling before federal courts get involved. And so  
6 cite me authority or legislative history or something that  
7 suggests that to be incorrect.

8           MR. FENSTERSTOCK: The legislative history, your  
9 Honor, I think I pointed out to you, maybe not very eloquently  
10 last week, but in the final rule making procedures, I think I  
11 pointed out that -- and these are promulgated by the SEC. It  
12 said, such notice -- that's the ten-day notice at the time --  
13 give investors and the public sufficient time to take any  
14 action permitted under state and federal law. That implies --  
15 that's the legislative history of the ten-day rule. We did  
16 that. The ten-day rule went into effect on the 16th of  
17 December. On the 19th we gave notice. 16th was a Friday. The  
18 19th was Monday. We gave notice when we went into court on  
19 Tuesday, the 20th. That was the earliest we could go in.

20           So, your Honor, I think there are two issues here. I  
21 understand the jurisdictional issue. We're talking about --

22           THE COURT: I want to stay focused on that before we  
23 get to the other one.

24           MR. FENSTERSTOCK: Because we're talking about  
25 substance -- let's talk about just the state jurisdiction. You



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1 asked, this must have happened many times, and then why isn't  
2 there a state court decision?

3 THE COURT: Right. Well, I would expect, given the --

4 MR. FENSTERSTOCK: And I agree --

5 THE COURT: -- the age of The Exchange Act.

6 MR. FENSTERSTOCK: I agree with your question. I  
7 agree with your question. But interestingly enough, I don't  
8 think there are any federal court decisions where an applicant  
9 like Cleantech faced a ten-day delisting, went into court,  
10 asked for a stay and raised a state constitutional issue.  
11 There is no case like that, as far as I know. We have not been  
12 able to find it.

13 So there are no federal cases, and there are no state  
14 cases. And the reason is, I think -- and Ms. Shaffner implied  
15 this -- that normally, when the NASDAQ -- probably any exchange  
16 but maybe more on NASDAQ -- delists a company, the company is  
17 in hurting economic shape. And normally they just go away.  
18 NASDAQ has ruled, and they go away. They don't even appeal to  
19 the SEC.

20 This is an extraordinary situation. Because we've  
21 discovered not only can this company survive if we get a stay,  
22 and we can follow our remedy to the SEC and the Circuit Court  
23 if we have to on the substantive issue of the appeal, but this  
24 is an extraordinary situation where we have discovered in the  
25 record that there's discrimination by the NASDAQ. And what's

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1 important, your Honor, is NASDAQ's position on this is  
2 incredible, because over the weekend -- and I wanted to bring  
3 you up to date. There was a piece that I left out. You know  
4 that I told you that NASDAQ opposed our motion for a stay.  
5 NASDAQ also certified a record to the SEC for the appeal.

6 Ms. Shaffner --

7 THE COURT: Go back.

8 MS. SHAFFNER: More recently.

9 THE COURT: Not Friday?

10 MR. FENSTERSTOCK: No. But Ms. Shaffner's firm sent a  
11 letter to NASDAQ saying, we don't have certain documents that  
12 are in the record. Can we please see them? They wrote back,  
13 no.

14 THE COURT: Who wrote back?

15 MR. FENSTERSTOCK: NASDAQ.

16 THE COURT: NASDAQ?

17 MR. FENSTERSTOCK: Wrote back and said, no, we have no  
18 obligation to give you anything that's in the record. This is  
19 a continuum of discriminatory and abusive action by NASDAQ,  
20 which raises multiple issues on the likelihood of success and  
21 the other issues that don't go to the jurisdiction. And I  
22 understand that, your Honor. And I realize I'm wandering,  
23 because it's a mixed issue here relative to the state court  
24 jurisdiction on New York constitutional grounds and the  
25 irreparable harm and likelihood of success for the continuation

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1 of the TRO.

2 So I realize I'm wandering, but I think there's a  
3 continuum of issues here which portrays a pattern of behavior  
4 by NASDAQ which is bullying, discriminatory, denies Cleantech  
5 due process because of one reason only: Because they're a  
6 China based company, and we have evidence of that.

7 THE COURT: I'm going to stay focused on the  
8 jurisdictional issue. And so nobody's getting any authority  
9 for me, right, one way or the other?

10 MR. FENSTERSTOCK: No further authority, your Honor.

11 THE COURT: Let me hear from the back table.

12 Do you have any more authority, Mr. Martin?

13 MR. MARTIN: Well, your Honor, a few points.

14 The first is there are cases in the federal system  
15 dealing with challenges to delisting. The *Belfort* case out of  
16 this court, the *Dimensional Visions* case, I believe it was, out  
17 of the Eastern District of Pennsylvania, they didn't expressly  
18 deal with this issue but they were federal cases. Now they  
19 didn't permit challenges to the delisting. They said, you  
20 can't do that sort of challenge, but they were federal cases.

21 THE COURT: They're getting to the next step, I think,  
22 about likelihood of success on the merits, because the SEC gets  
23 first bite at this apple. And then appeals are to the Court of  
24 Appeals, right?

25 MR. MARTIN: Yes, your Honor. But it does illustrate

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1 that these cases, to the extent that they had been brought, had  
2 been brought in the federal system. And in more general --

3 THE COURT: But not many. You cited a couple cases in  
4 your papers.

5 MR. MARTIN: That's right, your Honor. There are not  
6 many, and we think the reason for that is -- and again, this  
7 gets to the merits. These types of cases are impermissible.  
8 But just on the jurisdictional point, we think the three most  
9 telling authorities -- and we cite them in our papers -- are  
10 *Sparta Surgical* out of the Ninth Circuit, *Hawkins* out of the  
11 Fifth Circuit, and the *Christian Klein* decision, Judge  
12 Sotomayor in this court. And each of those establish that even  
13 if you plead state law claims, as long as those claims are  
14 based on alleged violations of duties established by The  
15 Exchange Act, it has to go to federal court.

16 THE COURT: Right. Not delisting cases, right?

17 MR. MARTIN: They're not delisting cases.

18 THE COURT: But you're suggesting that's a difference  
19 that doesn't make any -- that's a distinction without a  
20 difference, right?

21 MR. MARTIN: Yes, your Honor. And, you know, in each  
22 case where you attempt to challenge SRO regulatory actions  
23 based on The Exchange Act, it doesn't matter whether you label  
24 it state law or federal law. The statute speaks to suits --  
25 any action based on liabilities created under The Exchange Act

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1 or SEC rules or SRO rules. And so whether it's a challenge to  
2 delisting, the court's denial of membership or any other number  
3 of SRO regulatory activities, it has to go the federal courts,  
4 not the state court system.

5 THE COURT: All right. But you're saying that even a  
6 state district court has no role to play in this, right?

7 MR. MARTIN: Yes, your Honor. Once we get to the  
8 merits, we'd say that even the -- this Court should not grant  
9 the relief because there's a process set up that goes through  
10 the SEC and then to the Court of Appeals. And there's  
11 definitely authority on that both in the Second Circuit and  
12 elsewhere. We cite it in our papers, but the *Fiennes* case in  
13 the circuit and *Desiderio* in the Second Circuit and the  
14 *Series 7* in the DC circuit.

15 THE COURT: We'll come back to that, but I think the  
16 first issue is a jurisdictional one. And I think I'm basically  
17 where I was a week ago, or not quite a week ago.

18 All right. I'm certainly inclined to find that the  
19 state court didn't have jurisdiction to do this. I think that  
20 the scheme is a very clear one. And throwing in a state court  
21 claim doesn't get you out of the exclusive, exclusively federal  
22 jurisdiction that was contemplated by The Exchange Act. So I  
23 think that's the way I'm likely to go on that.

24 I want to hear argument now on the new motion, which  
25 is basically a TRO motion, as though you had brought this case

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1 in federal court from the get-go.

2 Mr. Fensterstock, if you anticipated we'd be going  
3 there -- we talked about that a little last anytime, we talked  
4 about it a little today. The standard's pretty clear. I think  
5 you didn't cite the most recent Supreme Court case on this,  
6 which the Second Circuit has always had its own slightly  
7 different standard for a TRO. But I don't think there's any  
8 real dispute as to what the --

9 MR. FENSTERSTOCK: No. I think we know what the  
10 standard is, your Honor.

11 THE COURT: So I think I've heard you on this. I want  
12 to hear from the back table on this, all right? It is your  
13 argument that this -- I think what you're really saying is the  
14 district court doesn't even have jurisdiction to do this,  
15 right?

16 MR. MARTIN: Yes, your Honor. And we have several  
17 responses. Some of them get to the elements.

18 THE COURT: You haven't briefed this. This is the  
19 first time I'm hearing this. You've sort of gestured toward it  
20 last week, but I haven't seen any real argument on that.

21 MR. MARTIN: That's right, your Honor. There is a  
22 brief section of our motion from last week that cites the  
23 relevant case law for this proposition. It cites *Fiennes*,  
24 *Desiderio*, Series 7.

25 But the basic layout, there are three separate

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1 arguments here. One of them is just the exhaustion argument,  
2 that it has to go through the process that Congress created.

3 The separate argument is the argument that was in  
4 *Fiennes, Desiderio* and *Series 7*, that says once it goes through  
5 that process, there is no further role for federal district  
6 courts. The only role for the federal judiciary is in the  
7 courts of appeals.

8 And then the third argument is they don't satisfy the  
9 test for a TRO.

10 So to start with the first point about exhaustion --

11 THE COURT: That's really a likelihood of success on  
12 the merits point, isn't it?

13 MR. MARTIN: Exhaustion, we believe, your Honor, is a  
14 jurisdictional issue. And it was -- both the --

15 THE COURT: Let me ask you this. Let me cut to the  
16 chase: So imagine Cleantech or any other company finds itself  
17 in a battle with NASDAQ. NASDAQ issues its decision. They  
18 appeal, as they're supposed to, to the SEC. And at the same  
19 time they file that appeal, they also ask for a stay of the  
20 delisting. They do it timely. And they just hear nothing from  
21 the SEC for 30 days.

22 At that point what is their remedy?

23 MR. MARTIN: We believe in that case you would -- that  
24 they would then go to the Court of Appeals --

25 THE COURT: How would they do that? They'd ask the

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1 Court of Appeals for a TRO?

2 MR. MARTIN: Well, no, your Honor. There is a --  
3 Section 78y of The Exchange Act governs review of SEC  
4 decisions. And I think the argument would have to be that  
5 failure to act is tantamount to a decision. And there's an  
6 analogy here to the Administrative Procedure Act, which defines  
7 failure to act as equivalent to agency action.

8 THE COURT: All right. But it doesn't define what  
9 would be a reasonable time, right?

10 MR. MARTIN: Yes, your Honor. But I would think that  
11 in the context of a ten-day provision, ten-day notice period,  
12 that there would be an argument for the other side that that is  
13 the reasonable time.

14 THE COURT: Ten days? That's what you're saying. So  
15 if they waited more than ten days, you could go to the Court of  
16 Appeals; if the SEC waited more than ten days, you could go to  
17 the Court of Appeals for a TRO enjoining the SEC from allowing  
18 the NASDAQ delisting to go forward?

19 MR. MARTIN: Well, the argument, your Honor, would be  
20 that they should -- that the Court of Appeals should deem to be  
21 unlawful or arbitrary the SEC's failure to grant the stay.  
22 And, you know, it might be a shorter period than ten days to  
23 allow enough time for the Court of Appeals. The point is it's  
24 to some extent an artificial inquiry here, because they didn't  
25 allow any of this process to play out.



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1           THE COURT: I understand. So the hypothetical I gave,  
2 your view is that the SEC would have ten days to act; and if  
3 they didn't -- on the stay, ten days to act; and if they did  
4 not, then the folks at the front table could go barreling into  
5 the circuit?

6           MR. MARTIN: I think, actually, it's -- as a matter of  
7 caution, they would probably want to go to the Second Circuit  
8 before that. And the argument would be, in light of all of the  
9 arguments they've been making to this court about irreparable  
10 injury and the likelihood of success, that the Court of Appeals  
11 should act promptly to tell the SEC what to do. And so they  
12 might not want to wait until the very end of the ten-day  
13 period, but wherever in the ten-day period they fall, they  
14 would want to do that to give both the SEC and the Court of  
15 Appeals enough time to act.

16           THE COURT: All right. But at what point in your mind  
17 could they go to the Court of Appeals?

18           MR. MARTIN: Your Honor, I don't know. It's to some  
19 extent an issue between the SEC and Cleantech. And without the  
20 benefit of the SEC being here, we don't know when the SEC's  
21 position would be on this particular issue. NASDAQ wouldn't --  
22 presumably would not be a party to any of this litigation.

23           THE COURT: Look, the way it works is that generally  
24 when I make a ruling, if I really botch it, somebody can go  
25 straight to the Court of Appeals on an emergency basis and get

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1 my order stayed, right? They can do that. But the SEC, you  
2 don't get to do that. You've got to wait 10 or 20 or 30 days,  
3 60 days.

4 MR. MARTIN: As I understood the hypothetical, your  
5 Honor, you imagined a world which the SEC did absolutely  
6 nothing. And it would be a different situation if the SEC  
7 denied it, and then you could go immediately up. If the SEC  
8 just declined to act, maybe they would follow immediately,  
9 maybe they would wait a few days. I think either way, they  
10 would want to go on to the Court of Appeals before the ten-day  
11 period expired. But I think it would be up to them as a  
12 strategic matter how long they waited. But the argument they  
13 would make, though, is that the SEC acted arbitrarily in  
14 failing even to consider the stay issue.

15 THE COURT: Well, all right. But, I mean, there's no  
16 precedent for that either, is there?

17 MR. MARTIN: Not to my knowledge, your Honor.

18 THE COURT: So, I mean, does the SEC routinely grant  
19 stays when they're asked?

20 MR. MARTIN: I don't know about routinely, your Honor.  
21 I know that we're aware of precedents where they have granted  
22 stays. I don't know as an empirical matter how often they're  
23 even asked to grant a stay, so I don't know what percentage of  
24 the cases they are asked and what --

25 THE COURT: And what are the criteria they look to in

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1 deciding whether or not to grant the stay request?

2 MR. MARTIN: My understanding, your Honor, is it's a  
3 similar criteria to what this Court would consider in the *Maxim*  
4 *Integrated Products* case. They considered the same factors  
5 about irreparable harm and likelihood of success on the merits  
6 and the public interest and harm to NASDAQ. Tellingly, the SEC  
7 rather routinely holds that delisting is not itself an  
8 irreparable injury for the simple reason that once a stock is  
9 suspended, it gets traded in the over-the-counter market. And  
10 the final determinations are to be made, to be taken into  
11 account in the stock price.

12 THE COURT: It's kind of hard to raise capital, right?

13 MR. MARTIN: I'm not sure, your Honor, how they would  
14 raise capital through NASDAQ in any event. I mean, once  
15 they've been suspended, they get traded in the over-the-counter  
16 market. And the share price could then take into account the  
17 final determination of the listing even before it becomes  
18 effective.

19 So the SEC has said in the *Maxim Integrated Products*  
20 case, and several other cases cited there, that in the SEC's  
21 view, the effectiveness of delisting is not itself irreparable  
22 harm.

23 THE COURT: Well, so what are they looking to to  
24 determine irreparable harm, then?

25 MR. MARTIN: Your Honor, I'm not sure what showing

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1 they would require to establish irreparable harm.

2 THE COURT: Well, it sounds to me like if they're  
3 applying the same criteria that a court would in a TRO setting,  
4 irreparable harm is an absolute prerequisite. And so if you  
5 can't -- if they can't establish irreparable harm, then I would  
6 think the SEC would be denying these requests routinely.

7 MR. MARTIN: In *Maxim*, in fact, the request was  
8 denied. And *Maxim* is a rather interesting case, because --

9 THE COURT: But if you are right, why would the SEC  
10 ever grant these? If delisting is not irreparable harm, then  
11 there must be either some criteria that the SEC is applying,  
12 because they do grant these on occasion, or there must be some  
13 other way to establish irreparable harm.

14 MR. MARTIN: Well, in *Maxim*, what happened is they  
15 granted a temporary stay just long enough to have briefing on  
16 the stay issue. It might be possible to imagine circumstances  
17 where a party could establish irreparable harm. We don't  
18 believe that's the case here. But it's possible in  
19 extraordinary circumstances that you could conceive of  
20 irreparable harm, but just in the ordinary course, the factors  
21 delisting, once a -- once NASDAQ has already made a final  
22 determination, delisting is not viewed by the SEC as  
23 constituting irreparable harm.

24 THE COURT: Let's stop there.

25 Mr. Fensterstock, with respect to the jurisdictional

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1 argument that exhaustion is required before you get to run into  
2 federal court, your response to that is what?

3 MR. FENSTERSTOCK: Sure. I'm a little bewildered,  
4 your Honor, because --

5 THE COURT: That's the usual case, Mr. Fensterstock.

6 MR. FENSTERSTOCK: You're right, your Honor. And that  
7 is the predicament that I find myself in. However --

8 THE COURT: But you've rallied before, so let's see  
9 what you can do.

10 MR. FENSTERSTOCK: I find it a little peculiar that  
11 Mr. Martin can argue that this Court doesn't have jurisdiction.  
12 After all, they removed the action to this Court.

13 THE COURT: Yeah.

14 MR. FENSTERSTOCK: And said this Court has  
15 jurisdiction.

16 THE COURT: I think what he was saying is that I have  
17 jurisdiction to vacate what Judge Schweitzer is doing. I can  
18 pick on those guys across the street, but there's not much I  
19 can do to the SEC, is I think what he's saying. He's saying I  
20 have jurisdiction for the motion to vacate. I don't have  
21 jurisdiction for the TRO.

22 Is that what you're saying, Mr. Martin?

23 MR. MARTIN: Yes, your Honor.

24 THE COURT: That's what I thought.

25 MR. FENSTERSTOCK: Because I haven't seen that in any

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1 of their papers.

2 THE COURT: Well, we haven't really seen a response to  
3 your requests for a TRO here, right? I mean, we've talked  
4 about it some, but --

5 MR. FENSTERSTOCK: We've talked about it, and they've  
6 had eight days to put in a response before Judge Schweitzer.  
7 They couldn't put in a response before you --

8 THE COURT: I guess they had a better Christmas than  
9 you and I did.

10 MR. FENSTERSTOCK: I think that's probably right, your  
11 Honor. I know they did.

12 But, you know, on the irreparable harm issue, your  
13 Honor, we have showed that. We have shown through  
14 Mr. Staloff's affidavit, through Mr. Uchimoto's affidavit --

15 THE COURT: We're going to get to irreparable harm.  
16 Right now I'm addressing what Mr. Martin characterized as a  
17 jurisdictional issue that the -- there is an exhaustion  
18 requirement. First, you go in to the SEC --

19 You can come in, gentlemen. You're here for attorney  
20 admissions? Have a seat. I've just got another matter.

21 I'm the Part I judge, so I'm admitting new attorneys  
22 today to the district. So that's going to start at 11:00, so  
23 we may have to break at that point.

24 So, anyway, I'm sorry.

25 MR. FENSTERSTOCK: I think the rule on exhaustion,

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1 your Honor, there's no question, I agree with you that NASDAQ  
2 properly follows its own rules. The record goes to the SEC.  
3 We appeal to the SEC.

4 THE COURT: Right.

5 MR. FENSTERSTOCK: Our point here is NASDAQ did not  
6 follow its own rules. NASDAQ will not give us discovery. They  
7 won't even give us a copy of the record. Somebody has to  
8 intrude on a quasi-governmental agency like NASDAQ.

9 THE COURT: But that's SEC. That's the SEC, isn't it?

10 MR. FENSTERSTOCK: No. The SEC has the substantive  
11 right to rule on the appeal.

12 THE COURT: Right or the obligation?

13 MR. FENSTERSTOCK: Pardon me?

14 THE COURT: It's more than a right, right?

15 MR. FENSTERSTOCK: You're right. They have the  
16 obligation. However, we have exhausted the remedy with respect  
17 to a stay because --

18 THE COURT: Well, as of Friday, you mean? Before  
19 Friday you hadn't moved for a stay, or Thursday evening.

20 MR. FENSTERSTOCK: Well, no. Your Honor, wait.  
21 That's not true. Because we got a stay --

22 THE COURT: No. No, I'm talking about with the SEC.

23 MR. FENSTERSTOCK: That's true, but we had received a  
24 stay from a judge. Whether you think it's valid or not, you  
25 know, that's up to you. But we had received a stay. We didn't

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1 have to go to the SEC at that point.

2 THE COURT: Maybe we're talking past each other.

3 My point is: If you follow the rules as Mr. Martin  
4 interprets them, then you should have appealed to the SEC,  
5 moved for a stay before the SEC. And if the SEC then didn't  
6 act within a reasonable period of time, you then go in to the  
7 Court of Appeals and get your stay that way.

8 MR. FENSTERSTOCK: And there is no case that supports  
9 that position.

10 THE COURT: No, but there is certainly the language in  
11 the statute and the writings seem to suggest that. Seems to  
12 me --

13 MR. FENSTERSTOCK: The language in the legislative  
14 history says no. It says you can go before a state or federal  
15 judge.

16 THE COURT: The remedies you would have in federal or  
17 state court, right? I don't know that you ever handed me up  
18 the legislative history. I don't think you did.

19 MR. FENSTERSTOCK: I don't think I did, your Honor,  
20 but we'd be glad to.

21 THE COURT: Do you have it?

22 MR. FENSTERSTOCK: I do. I'm afraid the one I have  
23 is --

24 THE COURT: All marked up, got your secret code?

25 MR. FENSTERSTOCK: Well --



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1 THE COURT: Well, just --

2 MR. FENSTERSTOCK: All it is is it's underlined. It's  
3 not marked up. There are no comments or anything.

4 THE COURT: Show it to Mr. Martin, if he's okay with  
5 it, and Mr. Hallowell.

6 MR. FENSTERSTOCK: And it's the whole hearing but  
7 there's only a couple of pages. I can give you the cite.

8 THE COURT: You said it's the whole hearing?

9 MR. FENSTERSTOCK: No -- well, it's the rule -- the  
10 final rule making. It is 17, CFR, parts 232, 240 and 249. We  
11 can send up a copy as soon as we get out of court, your Honor.

12 THE COURT: Okay. Yeah, I just wanted to make sure  
13 that -- I heard what you quoted. I wanted to just sort of see  
14 it in context.

15 MR. MARTIN: Your Honor, we would, after we've had the  
16 opportunity to review it, want to point out a few other  
17 portions that are not marked in there. But we have no  
18 objection to him submitting a copy.

19 THE COURT: You want to give it to me or wait until  
20 later?

21 MR. FENSTERSTOCK: That's fine, your Honor. I'll hand  
22 it up.

23 So the point, your Honor, is there is no case that  
24 supports their position that we can't come to court.

25 THE COURT: I'm not aware of sort of a whole lot of

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1 case law generally. It seems to me that the language in the  
2 statute talks about the SEC being the place you go to appeal  
3 the SRO's decision. And the SEC then has a reasonable period  
4 of time to rule. And if you don't like the ruling, then you  
5 can go to the Court of Appeals.

6 You agree with that, right? That's a fair  
7 characterization?

8 MR. FENSTERSTOCK: I agree with that appellate  
9 process, correct.

10 THE COURT: Okay. So why isn't that sufficient? Why  
11 isn't that due process good enough for anybody?

12 MR. FENSTERSTOCK: Because if you suffer immediate and  
13 irreparable harm while that process is going on -- and we have  
14 been denied due process below at NASDAQ -- there has got to be  
15 recourse. Our point is there are a paucity of opinions in this  
16 area. Judge Sotomayor in the case often quoted by Mr. Martin  
17 said that. There are a paucity of cases.

18 The point is, your Honor, we have no other recourse at  
19 this point. We have applied to the SEC. They may or may not  
20 respond, as you said in the hearing the other day. We have  
21 done that. If they don't respond, where are we? We have no  
22 recourse whatsoever other than this court. Now, that you  
23 have -- it seems that you are prone to vacate the order by  
24 Judge Schweitzer from Supreme New York, but we had recourse,  
25 presumably either to him or to you.

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1 THE COURT: Or to the SEC. You have some recourse to  
2 the SEC. The SEC can agree. They might agree with you on all  
3 these points, right?

4 MR. FENSTERSTOCK: And if they do, terrific. But how  
5 is anybody harmed by your extending the TRO on which we had a  
6 full and complete hearing?

7 THE COURT: Because I think we're mixing apples and  
8 oranges at this point. We're talking about an exhaustion  
9 requirement. That is the first hurdle before I get to  
10 irreparable harm. And so the exhaustion requirement -- I mean,  
11 there is some overlap, because the -- to evade the exhaustion  
12 requirement, there is a body of case law that says, well, one  
13 of the criteria for not exhausting or for being excused for not  
14 exhausting is that there is an irreparable harm that's not  
15 otherwise going to be provided adequate -- an opportunity for  
16 adequate relief, okay. So I think that's why you keep coming  
17 back to that. It's plausible.

18 But I just want to stay on this as exhaustion. And so  
19 if this was all done timely, this system would work, wouldn't  
20 it? You would have your --

21 MR. FENSTERSTOCK: Not necessarily.

22 THE COURT: You don't get it in the SEC, then you get  
23 to go to the Court of Appeal. That's the framework that  
24 Congress set up, right?

25 MR. FENSTERSTOCK: No, not necessarily.

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1 THE COURT: Why not?

2 MR. FENSTERSTOCK: Because let's assume before I got  
3 involved in the case, which was last week, let's assume a month  
4 ago the company applied for a stay to the SEC.

5 THE COURT: Right.

6 MR. FENSTERSTOCK: On December 16th, NASDAQ files  
7 their Form 25. On December 26th the final delisting occurs.  
8 SEC does nothing. They are delisted. They are done. The SEC  
9 could take no action, at which point they're done. What does  
10 the company do then? They go to the Circuit Court, or they  
11 come back to you and say, we've exhausted our remedies, Judge,  
12 but now we're done. We've delisted. The perception out there  
13 is we're a no-good company. We're down the tubes. The fact of  
14 the matter is the reason we're here is because this ten-day  
15 period will expire. The company will be imminently and  
16 irreparably harmed, and there is no other recourse.

17 So the exhaustion of administrative remedies is fine  
18 and dandy as a principle of administrative law. But you've got  
19 to look at it, as Senator Specter said, from a practical and  
20 realistic point of view. The fact of the matter is, where are  
21 we right now? Right now we have a TRO in place until you rule  
22 that you're going to vacate it.

23 THE COURT: Right.

24 MR. FENSTERSTOCK: Let's assume you vacated it right  
25 now. Presumably the company -- I don't know what happens. Is

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1 the company delisted while the SEC sits there and maybe does  
2 nothing until March and the company is forever doomed, that  
3 it's been delisted? That doesn't seem to me to be the proper  
4 abstract for the Administrative Procedure Act or the entire  
5 parameters of the Securities and Exchange Commission rules.

6 And you pointed that out last week, when you said,  
7 what happens if the SEC doesn't act and we don't have a TRO in  
8 place? Mr. Martin stood there and said, Judge, I don't know.  
9 I guess that's just tough for Cleantech. Well, that's not  
10 justice, your Honor. And they did not follow their rules in  
11 this case. They refused to follow their rules. Even in their  
12 opposition to our stay before NASDAQ, they're very cute when  
13 they say the board did not review the decision. In our view  
14 each member of the board had to have the opportunity to review  
15 the decision. They did not follow the rules.

16 THE COURT: That's the basis of your appeal to the  
17 SEC?

18 MR. FENSTERSTOCK: Correct.

19 THE COURT: What is now before the SEC that is I think  
20 of particular moment is the request for a stay, which they  
21 clearly have the authority to grant, which is the equivalent of  
22 the TRO you're seeking here. And it seems to me that if -- in  
23 the hypothetical you just posed, if you moved timely and  
24 immediately for a stay, and either they denied the stay or they  
25 didn't act at all, then it would seem to me that the recourse

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1 would be in the Court of Appeals to give you the relief that  
2 they either didn't give or erroneously denied. And that  
3 strikes me as a very effective process for dealing with this.  
4 That's certainly the process that was contemplated by Congress  
5 when it passed The Exchange Act.

6 MR. FENSTERSTOCK: Congress never said in passing The  
7 Exchange Act or in the final rule making that you had to  
8 exhaust your procedural remedies for intermediate relief by  
9 going to the SEC rather than coming into court. I don't think  
10 you're going to find that anywhere in the Securities and  
11 Exchange Act. I don't think you're going to find that anywhere  
12 that they said that procedural mechanism -- which is what  
13 courts are for, it seems to me, to grant immediate relief, when  
14 necessary, to toll irreparable harm. That's what we're here  
15 for.

16 THE COURT: Well, I mean, I'm looking at the statute,  
17 78y(c)(1). No objection to an order or rule of the commission  
18 for which review is sought under this section may be considered  
19 by the Court unless it was urged before the commission or there  
20 was a reasonable ground for failure to do so. So is that an  
21 applicable provision or not? It's a rule of the commission,  
22 but its order or rule of the commission is the commission's  
23 issuance of an order denying the request for a stay or failing  
24 to issue an order subject to that provision?

25 MR. FENSTERSTOCK: Your Honor, I don't have that

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1 provision in front of me. I apologize.

2 THE COURT: That's all right. Well, it's Title 15,  
3 United States Code, 78y, and then it is (c)(1), and then (c)(2)  
4 talks about the stay. You know, that's the stay provision.

5 So, well, let me suggest this: I have attorney  
6 admissions that I want to do. In the meantime, it might make  
7 sense to reach out to the SEC to see if they've now had time to  
8 digest what was lobbed over to them on Friday. And maybe  
9 they've issued a stay since we've been here, in which case this  
10 whole thing is moot.

11 So do you want to follow up with that, and we'll come  
12 back here in an hour's time? I hate to have you sort of just  
13 spinning your wheels or cooling your jets, whatever.

14 MR. FENSTERSTOCK: There is no place we'd rather be,  
15 your Honor. We'd be delighted to do that.

16 THE COURT: I'm flattered, Mr. Fensterstock.

17 So let's come back in an hour, and hopefully you can  
18 give me an update on the SEC, and then we'll resume the  
19 argument then.

20 Thanks for your patience. I appreciate it.

21 (Recess)

22 THE COURT: Thanks for your patience. New attorney  
23 admissions are once a week, and they're actually very  
24 inspiring. I do enjoy them. Mr. Fensterstock had the  
25 opportunity to move for the admission -- was it for you,

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1 Eugene -- Mr. Kublanovsky a couple years ago, and they really  
2 are one of the best things of being a judge, I have to say. An  
3 adversarial system, I think, works. I do think that there's  
4 something about having good lawyers like I have here today who  
5 can duke it out and a judge who gets to be the sort of the net,  
6 the unbiased net in the match.

7 But there's something nice once in a while to having a  
8 nonadversarial setting, where you have just an occasion to  
9 celebrate the admission of new, young talent. So I hope you  
10 still remember it, Mr. Kublanovsky.

11 MR. KUBLANOVSKY: I remember it well.

12 THE COURT: I do, too. They are memorable occasions.  
13 The only thing that tops it, honestly, are new citizens, which  
14 I get to do on Friday. That's an inspiring setting, if you  
15 haven't seen it.

16 So all right. Let's get back to this adversarial  
17 proceeding. Any news since we last spoke?

18 MR. FENSTERSTOCK: Yes, your Honor.

19 We endeavored to call the SEC. We spoke -- actually,  
20 one of Ms. Shaffner's associates spoke with Elizabeth Murphy,  
21 Secretary of the SEC, and Joan Loizeaux, L-O-I-Z-E-A-U-X,  
22 associate general counsel for adjudication. Josh Dutill,  
23 Ms. Shaffner's associate, was told that something in the next  
24 day or so on the stay will be issued by the SEC.

25 THE COURT: Okay. Something in the next day or so?



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1 MR. FENSTERSTOCK: In the next day or so.

2 THE COURT: That's pretty quick, considering they got  
3 it Friday and it's a holiday week, and I'm sure everybody is  
4 short staffed. So that's not too bad. But for our purposes, a  
5 little more definite would be nice. All right.

6 MR. FENSTERSTOCK: There are a couple of points I'd  
7 like to make, your Honor, in addition to what we discussed this  
8 morning.

9 One, as we stated in our papers, both before Judge  
10 Schweitzer and before you, we believe this case falls within  
11 the exception of exhaustion of administrative remedies.

12 THE COURT: Well, the Second Circuit has recognized  
13 that there's four or five things that they point to that courts  
14 should look to to decide whether exhaustion has been -- should  
15 be excused.

16 MR. FENSTERSTOCK: Agreed.

17 Two, in this case we're in an enigma, because NASDAQ  
18 has said that we cannot get discovery before the SEC. So even  
19 if the SEC comes back and rules on our stay motion, we cannot  
20 get complete relief from the SEC. So there is no remedy to  
21 exhaust, because we have asked both for a TRO and expedited  
22 discovery.

23 Three --

24 THE COURT: When did you ask for expedited discovery,  
25 just Friday?

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1 MR. FENSTERSTOCK: Yes.

2 THE COURT: First time?

3 MR. FENSTERSTOCK: Yes.

4 THE COURT: Well, when you appealed the November  
5 decision of NASDAQ to the SEC, did you seek any additional  
6 discovery at that time?

7 MS. SHAFFNER: No, your Honor. I don't believe there  
8 is any provision for discovery at the SEC. It was really at  
9 the suggestion of your Honor to approach the SEC for both the  
10 stay and the relief that we had in the state court and were  
11 seeking before this Court that we made the request. NASDAQ in  
12 its response acknowledged that there is no provision for  
13 discovery before the SEC. And those are discovery on the due  
14 process issues that were raised originally.

15 THE COURT: All right. Well, I mean, I guess I'll  
16 hear from Mr. Martin, I presume, on that in a moment.

17 But just so we're clear, I think the Second Circuit  
18 has identified four factors to be considered in deciding  
19 whether or not the requirement of exhaustion of administrative  
20 remedies should be waived: First, that the available remedies  
21 provide no genuine opportunity for adequate relief; second,  
22 that irreparable injury may occur without immediate judicial  
23 relief; three, administrative appeal will be futile; or four,  
24 the plaintiff has raised a substantial constitutional question.

25 So we've been talking a lot about some of these. I

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1 mean, the first relating to no genuine opportunity for adequate  
2 relief. I'm not sure that's even being argued. I think  
3 certainly the SEC could give all the relief that plaintiffs are  
4 asking here.

5 Second factor, irreparable injury that may occur  
6 without immediate judicial relief, is a point that has been  
7 argued at some length. I mean, there is some question in my  
8 mind as to whether or not irreparable harm really would follow.  
9 This is a company that's been suspended for some time, so it's  
10 not clear to me what delisting will actually do that the  
11 suspension or the decision of NASDAQ in November didn't already  
12 do. But we'll talk to that.

13 Administrative appeal will be futile. I don't think  
14 there's been a suggestion that it would be futile at this  
15 point.

16 And that the plaintiff has raised a substantial  
17 constitutional question, I don't think you've articulated a  
18 substantial constitutional question. Have you,  
19 Mr. Fensterstock?

20 MR. FENSTERSTOCK: Well, I tried to. Maybe I didn't  
21 do it right.

22 THE COURT: Just sort of general due process?

23 MR. FENSTERSTOCK: Yes.

24 THE COURT: All right.

25 MR. FENSTERSTOCK: And the due process argument, your

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1 Honor, it seems to me, is amplified by NASDAQ's position that  
2 we can't even get a copy of the record. I don't know how you  
3 have any sort of appeal, any sort of due process without  
4 getting a copy of the record. I mean, to me, that's just  
5 outrageous. I don't see how that can be due process.

6 THE COURT: What is the record you're referring to?

7 MR. FENSTERSTOCK: There is a certified record, as I  
8 understand it -- Ms. Shaffner can speak to this better.  
9 There's a certified record of letters, correspondence, e-mails,  
10 everything that happened before NASDAQ that goes up to the SEC,  
11 just like if we were going from the district court to the  
12 Circuit Court. There are a bunch of things in that record, and  
13 Ms. Shaffner's firm listed, I don't know, 25, 20 of them, that  
14 we don't have a copy of, apparently. NASDAQ took the position  
15 in an e-mail that they have no obligation to give it to us and  
16 they're not going to give it to us.

17 THE COURT: But they have to give it to the SEC if the  
18 SEC required it, correct?

19 MR. FENSTERSTOCK: It's a certified record that is, I  
20 assume, sent up to the SEC. So the SEC must have it.

21 MS. SHAFFNER: Yes.

22 MR. FENSTERSTOCK: Yes.

23 THE COURT: All right. So if you were to request it  
24 to the SEC, then the SEC might have a different answer than  
25 NASDAQ has, correct?

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1 MR. FENSTERSTOCK: Presumably that's correct.

2 THE COURT: Have you made a request to the SEC to get  
3 these materials?

4 MR. FENSTERSTOCK: They just denied it on Friday  
5 night.

6 MS. SHAFFNER: We're making a request, your Honor,  
7 today to the SEC.

8 THE COURT: So NASDAQ denied it on Friday night.  
9 You're making a request to the SEC. I think at this point  
10 probably the SEC is the person you should be addressing, the  
11 entity you should be addressing. All right.

12 MR. FENSTERSTOCK: My third point, your Honor, is I  
13 went back and looked at 15, U.S.C., Section 78y.

14 THE COURT: Let me just find it. Hold on a second.  
15 Okay.

16 MR. FENSTERSTOCK: And I may be reading this wrong,  
17 but to me it says a person aggrieved by a final order of the  
18 commission --

19 THE COURT: Where are you reading?

20 MR. FENSTERSTOCK: 78y(a)(1). A person aggrieved by a  
21 final order of the commission entered pursuant to this chapter  
22 may obtain review.

23 THE COURT: Right.

24 MR. FENSTERSTOCK: And the Court of Appeals --

25 THE COURT: Yeah.

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1 MR. FENSTERSTOCK: As far as I can tell, a motion for  
2 a stay is not a final order. And I don't believe there is a  
3 case that says a stay is a final order appealable to the Second  
4 Circuit or to a Circuit Court. So we do not have any avenue,  
5 assuming the SEC, whatever they do -- deny a stay, don't rule  
6 on a stay, whatever -- we don't believe that's appealable.

7 THE COURT: You don't believe that is appealable?

8 MR. FENSTERSTOCK: It's my understanding that a stay  
9 is not a final order. I cannot find, in the hour that we  
10 looked, any case which says that a stay issued or a refusal to  
11 issue a stay is a final order which can be appealed. So,  
12 therefore, we have no remedy. And that's another reason why  
13 justice requires, and there can be no harm by the extension of  
14 the TRO, which we have in effect pending a hearing on a  
15 preliminary injunction.

16 There are also cases, Judge, besides the exception to  
17 the exhaustion, there are cases which say that you can exhaust  
18 your administrative remedies by giving the administrative  
19 agency a chance to discover and correct its own errors. We  
20 have --

21 THE COURT: That's the SEC you're referring to?

22 MR. FENSTERSTOCK: No. I'm referring to the NASDAQ.

23 THE COURT: NASDAQ.

24 MR. FENSTERSTOCK: We have written to NASDAQ --

25 THE COURT: I'm not sure -- the administrative agency,

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1 or they're the SRO?

2 MR. FENSTERSTOCK: Well, they're the SRO. I believe  
3 they're a --

4 THE COURT: I wouldn't think that they would fall  
5 under the header of administrative agency, but I could be  
6 wrong.

7 MR. FENSTERSTOCK: I may be wrong on that, but that's  
8 my understanding, your Honor.

9 We also believe, your Honor, that from a practical  
10 standpoint, if the TRO is extended, the status quo, assuming  
11 there is a TRO in place, which I think there is until you  
12 vacate it, will be preserved, which will lead to a -- hopefully  
13 lead to a conversation with NASDAQ, which hopefully will lead  
14 NASDAQ to understand that we would like a hearing before the  
15 board of NASDAQ so that we have a full record before we go to  
16 the SEC. And, therefore, the preservation of the status quo  
17 will -- justice will be served by extending the status quo.  
18 We'll be able to resolve the problems. We'll save judicial  
19 time and we'll be able to move on.

20 And lastly, your Honor, on the issue of irreparable  
21 harm, we do have an understanding that should the TRO not be  
22 extended, and should the status quo not be preserved, and  
23 should we be delisted, the equity bridge financing that the  
24 company is working on, has had it going on for some time, there  
25 have been discussions by the equity bridge financiers that if

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1 we are delisted, that financing will go away. If that  
2 financing potentially goes away -- and I can't say one way or  
3 the other how the investment bankers are going to react to  
4 this -- but they have said that if you are delisted, if the TRO  
5 is set aside, it is likely we will walk away from the table.  
6 If the bridge financing goes away, there are going to be  
7 problems in the company. There's no question about it.

8 So all in all, your Honor, we're here for justice.  
9 And we're here to preserve the status quo. Whether or not the  
10 company timely applied to the SEC, that's a question for, it  
11 seems to me, another day. They did get a TRO. Whether it was  
12 valid or not, that's for you to decide, I guess. But barring  
13 anything else occurring, the company will be delisted, unless  
14 there is a stay. And we don't know what's going to happen  
15 before the SEC, so I think a TRO should be granted.

16 There is irreparable harm. We believe we have raised  
17 a constitutional issue of due process. And NASDAQ following  
18 their own rules, I agree that we will -- we're appealing that  
19 before the SEC. But in the interim, if the company is  
20 delisted, and there is no stay, the company is harmed. And I  
21 think we've shown that. And there have been no affidavits in  
22 opposition to our showing.

23 THE COURT: All right. But Judge Koeltl -- I'm not  
24 sure if you're familiar with his decision in *American Benefits*  
25 *Group, Inc. v. National Association of Securities Dealers*.



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1 It's a 1999 case, distinguishable. It's not dealing with the  
2 exact same thing here. But he does state -- and it's not  
3 binding on me. He's just a district court judge like me.

4 But in dealing with exhaustion, he talks about  
5 irreparable harm and states, quote, economic harm suffered by  
6 companies as a result of NASD regulatory actions, including  
7 delisting for failure to file proper forms, does not constitute  
8 irreparable harm for purposes of circumventing the exhaustion  
9 requirement. Then he cites the *Belfort* decision and a couple  
10 of other decisions, including a Third Circuit decision.

11 So, I mean, there is some precedent for saying that  
12 delisting alone is not irreparable harm, even if it will have  
13 economic consequences.

14 MR. FENSTERSTOCK: I'm familiar with Judge Koeltl, and  
15 I'm familiar with the National Association of Securities  
16 Dealers and American Benefits case. That case had to do with  
17 delisting for failure to file a proper form. It did not have  
18 to do with delisting because of a potential constitutional due  
19 process of discriminatory actions.

20 Also in that case Judge Koeltl said notions of  
21 administrative autonomy require that the agency be given a  
22 chance to discover and correct its own errors, a practice that  
23 will protect the integrity, etc. And that's what I was  
24 referencing when you said you thought it was the SEC. Well,  
25 you may be right. I thought --

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1 THE COURT: This is about -- I mean, that case is not  
2 about delisting. That case is about a rule, I believe.

3 MR. FENSTERSTOCK: Correct, and filing the proper  
4 forms, I believe that's correct. And that was to prevent the  
5 implementation of new NASD rules. I think that's what that  
6 case was about.

7 And they also -- it was an argument there about  
8 sovereign immunity, which we're not arguing, because nobody --  
9 in our case we're not calling for liability. We agree there's  
10 sovereign immunity. We're not talking about liability. We're  
11 not talking about immunity. We're talking about an injunction  
12 or a stay.

13 THE COURT: Okay. Mr. Martin, let's hear you with  
14 respect to exhaustion first, and then I guess irreparable harm  
15 is a component of exhaustion analysis and a TRO, if we get  
16 there.

17 MR. MARTIN: Sure. I'd like briefly just to address  
18 the constitutional point, substantial constitutional claim and  
19 then touch on irreparable harm.

20 Just briefly, on the constitutional claim, so there  
21 are about a dozen cases from the Second Circuit saying that  
22 SROs like NASDAQ are not state actors; that, therefore, there  
23 is not only not a substantial constitutional claim, there is  
24 not even a colorable constitutional claim, all these facts. So  
25 we don't think that exception is applicable here.

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1           So turning to the irreparable injury issue, it was an  
2 interesting point, quoting from *American Benefits Group*, that  
3 same reasoning has been picked up in any number of cases,  
4 including *First Jersey Securities*. The point they make in  
5 *First Jersey*, 605 F.2d at 697, is that any company threatened  
6 by an NASD hearing could run in to district court claiming that  
7 the imposition of sanctions would result in irreparable injury.  
8 That's the same thing that's going on here. It's the same  
9 thing that happened in the *Belfort* decision in this court.  
10 It's the same thing that happened in the *Dimensional Visions* in  
11 the Eastern District of Pennsylvania. It's the same thing  
12 happened in the other circuits, including *Swirsky* in the First  
13 Circuit.

14           Whenever an SRO like NASDAQ takes action against a  
15 company, the company could run in to court saying that there  
16 would be irreparable injury unless the action was stopped.  
17 Courts routinely reject those arguments. We're not aware of  
18 any courts ever stepping in to stop a delisting proceeding.  
19 And the reason is that the same sorts of arguments they're  
20 making here could be made anytime there's a delisting. And,  
21 therefore, if this Court were to accept those arguments as  
22 justifying a stay here, it would create, in effect, a blueprint  
23 to derail any NASDAQ delisting process. In our view, the  
24 proper way to proceed in these cases is to go through the  
25 procedures that Congress enacted.

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1 THE COURT: So let's go there. I mean, what  
2 Mr. Fensterstock just suggested is that his reading of 78y is  
3 that it's only a final order of the commission that is entitled  
4 to review by the Circuit Court, and so a denial of a motion --  
5 or a request to stay is not something that would be appealable.  
6 Do you agree with that?

7 MR. MARTIN: I don't believe I do. I think it turns  
8 on what finality means here. I agree with him that I'm not  
9 aware of any case law on the issue, but it seems to me you can  
10 draw by analogy to the Administrative Procedure Act. And on  
11 that, the finality would stem from the fact that it is indeed  
12 the final agency -- the denial of a stay is indeed the final  
13 agency action on the stay request.

14 And so I'm not sure why they would arbitrarily cut off  
15 their ability to go to the Court of Appeals here. I would  
16 think that they would be of the view they should be able to get  
17 Court of Appeals review, particularly since they've taken every  
18 procedural opportunity available to them, and many that are  
19 not, to go to state court. I don't know why they would  
20 simultaneously turn around and argue that they can't get review  
21 by the Court of Appeals.

22 But in any event I do believe that under traditional  
23 finality principles, they would have the argument that the  
24 denial of a stay is a final agency action.

25 We can also look to the APA's definition of agency

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1 action itself. The APA, and I believe this is in Section  
2 706 -- maybe I'm misremembering that -- but it defines agency  
3 action to include failure to act. So Congress enacted the APA,  
4 understood that agency action sometimes comes in the form of  
5 inaction. And that is the sort of thing that can be reviewed  
6 in this case by a Court of Appeals. Therefore, we believe that  
7 they have not yet exhausted.

8 And, you know, one other point. They have been  
9 talking about exhaustion, administrative remedies, and to some  
10 extent in this context that's a misnomer. If you look at the  
11 *Swirsky* decision out of the First Circuit, *Swirsky* says you  
12 have to go through the entire exchange action process,  
13 including SEC review, and then, if applicable, review at the  
14 Court of Appeals.

15 And so you have to exhaust all of the layers of the  
16 process. In our view there are six layers here, four of which  
17 are at NASDAQ. They've gone through those, but there's also  
18 SEC review and Court of Appeals review. And until they've gone  
19 through all those steps, in our view they haven't exhausted.

20 But even if we assume -- and again, we disagree with  
21 this, but if we assume they have exhausted, there are still an  
22 issue about whether they can go to federal district court to  
23 get relief. And that's where the decision in *Series 7* out of  
24 the DC circuit comes in. *Series 7* says when Congress enacted  
25 this comprehensive scheme of regulation, it intended to channel

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1 all review of SRO activity through that comprehensive scheme  
2 and not to allow parties to subvert the scheme by going into  
3 federal district court. And that's relevant here for a fairly  
4 significant reason: They've asserted claims under The Exchange  
5 Act under Section 19g.

6 In the *Fiennes* case out of the Second Circuit, the  
7 Second Circuit said, in light of the comprehensive review  
8 scheme provided by Congress, there is no private right of  
9 action to enforce The Exchange Act against SROs. Now they've  
10 also asserted state law claims. The Second Circuit, applying  
11 *Fiennes* and *Desiderio*, said, and that comprehensive system also  
12 forecloses state law claims.

13 And so when we get to, you know, likelihood of success  
14 on the merits, we believe that the comprehensive review scheme  
15 adopted by Congress precludes them from going to court, either  
16 under exchange act claims or under state law claims, to seek  
17 this review.

18 THE COURT: Wait. Precludes them from going to court?

19 MR. MARTIN: Federal district court; that they still  
20 have review available in the Court of Appeals. So the exchange  
21 act claim is out, because there's no private right of action.  
22 The state law claims are out because they are precluded in  
23 light of the comprehensive review scheme.

24 That leaves the federal constitutional claim. And for  
25 that, the Second Circuit case law was clear. In fact, they

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1 call it -- I have it here. The precedent is clear that NASD --  
2 at the time it was NASD -- is not a state actor.

3 And, therefore, if you turn to the likelihood of  
4 success on the merits claim, prong of the TRO analysis, there  
5 is no claim that they have advanced in which they can establish  
6 any likelihood of success on the merits.

7 So for that reason, even if you get past the  
8 jurisdictional issue of exhaustion, we don't think they can  
9 establish likelihood of success on the merits.

10 THE COURT: But just so I'm clear, I mean, if it were,  
11 in fact, an allegation that NASD was systematically delisting  
12 companies that were owned by women or owned by  
13 African-Americans, there is no way they can -- they don't get  
14 any court assessment of that claim?

15 MR. MARTIN: Well, they get SEC review, followed by  
16 review in Court of Appeals. What they don't get is a federal  
17 constitutional claim that requires action by the government.  
18 The cases are clear. I can cite this Court to about a half  
19 dozen of them saying that SROs like NASDAQ are not state actors  
20 and, therefore, there's no state constitutional claim.

21 One particularly telling example was a case called  
22 *DL Capital*, which involved an investigation conducted jointly  
23 by the SEC and NASD. They divided the claim, the defendants,  
24 between the two against the SEC. There was a Fifth Amendment  
25 claim asserted for privilege from testifying against oneself.

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1 The Second Circuit didn't allow a comparable claim against NASD  
2 because NASD was not a state actor.

3 And there are other cases as well. *Berger v. SEC*,  
4 Second Circuit from 2009, says, we have held that NASD is not a  
5 state actor subject to due process requirements. That picks up  
6 a footnote on *DeLessio*, also from 2009, saying that NASD, which  
7 they had analyzed in New York Stock Exchange in that case, is  
8 not a state actor subject to due process requirements.

9 @Perpetual Circuits Inc. vs. Tang, it is clear and unambiguous  
10 precedent in this circuit holding that NASD is a private actor.  
11 *Desiderio* from 1999 says NASD is not required to act as a state  
12 actor.

13 So if you get to these constitutional claims, there's  
14 no colorable argument that the due process clause would  
15 constrain SRO activity. The way to challenge that is, again,  
16 to go through the process that Congress created to the SEC.

17 THE COURT: And just the standard would simply be  
18 arbitrary and capricious, and presumably, then, a race-based or  
19 gender-based policy on the part of the SRO would be arbitrary  
20 and capricious?

21 MR. MARTIN: I think we can agree that if, in fact, an  
22 SRO were engaged in racial discrimination -- and we do not  
23 believe that to be the case here, of course -- but if that were  
24 true, then we would -- the SEC could properly set aside an SRO  
25 action on that ground. Now, again, we don't believe that's the



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1 case here. We think that issue can be raised and addressed in  
2 the SEC proceedings.

3 But there's no constitutional claim. And under  
4 *Fiennes* and *Desiderio* in the Second Circuit and *Series 7* in the  
5 DC circuit, we also believe they can't proceed with The  
6 Exchange Act claims or state law claims raising some argument.

7 THE COURT: Just to go back to what you started with,  
8 your view is that if the SEC were to issue a ruling today that  
9 says your request for a stay is denied, that plaintiffs then  
10 could go running to the Second Circuit or the DC circuit and  
11 seek to have that denial reviewed?

12 MR. MARTIN: Yes, your Honor, I believe that to be so.

13 THE COURT: What would be the standard of review for  
14 that proceeding?

15 MR. MARTIN: Well, actually, I misspoke on the Second  
16 Circuit. It's not clear to me that they actually could go to  
17 the Second Circuit. I believe they're incorporated in Nevada,  
18 so they might need to go to the Ninth Circuit.

19 THE COURT: I just assumed they had their principal  
20 place of business here, but that's not true?

21 MR. MARTIN: I believe it's a Nevada corporation, with  
22 its principal place of business in China. So it might be that  
23 the place of review would be the Ninth Circuit or the DC  
24 circuit. But whichever Court of Appeals would be the  
25 appropriate venue for the challenge, they would have the

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1 argument that the denial of a stay is the agency's final action  
2 on that request. And their only argument is just to conflate  
3 the state issue with the underlying merits.

4 THE COURT: All right. But so the standard, then,  
5 that the Court of Appeals would be applying is what?

6 MR. MARTIN: I believe it would be substantial  
7 evidence for factual findings. And then, I suspect -- I don't  
8 know it's for certain, but I suspect something equivalent to  
9 the arbitrary and capricious review under the APA.

10 THE COURT: For the denial of the stay?

11 MR. MARTIN: I don't know that there's any case law on  
12 this, your Honor. And I suppose it would be up to them if they  
13 wanted to argue for a different standard. But traditionally  
14 these sorts of agency decisions would be reviewed under the  
15 arbitrary and capricious standard or contrary to law.

16 THE COURT: All right. Well, let's all put our  
17 practical hats on, then. If the SEC is going to issue  
18 something in the next day or so, should we just wait for them  
19 to do it?

20 MR. MARTIN: Your Honor, we don't believe so, for a  
21 few reasons. The first, as we've discussed, we don't believe  
22 there's jurisdiction at all.

23 The second, we don't believe there is a likelihood of  
24 success on the merits that would justify even a TRO.

25 And then the third -- we haven't touched on this

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1 yet -- is that this is a claim involving alleged racial  
2 discrimination in which NASD's entire board is named as  
3 individuals. And so for this Court to issue a TRO in effect  
4 saying that they've satisfied the standards for TRO, which  
5 includes at least some demonstration of likelihood of success  
6 on the merits, in raising claims of racial discrimination  
7 against individual board members, we think, would be quite  
8 harmful both to NASDAQ and to the individual board members.

9 THE COURT: In other words, it would be harmful to  
10 them because it's a scurrilous allegation, is that what you  
11 mean?

12 MR. MARTIN: Well, yes, because it would be this Court  
13 issuing an order that embodies at least some judgment about the  
14 plausibility of their claims that NASDAQ's board members  
15 engaged in racial animus. And we believe for that reason it's  
16 important closely to scrutinize whether they've satisfied each  
17 of the requirements for a TRO before issuing anything. And we  
18 don't believe that they have satisfied those.

19 So even as a practical concern, we think that the  
20 consequences of issuing a TRO would be sufficiently weighty  
21 that it's not just an issue of sitting by for two days. The  
22 Court should go through all of the factors bearing on the TRO.  
23 And we believe that applying those factors, no TRO would be  
24 warranted.

25 THE COURT: Well, I mean, what's going to happen in

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1 the interim with the delisting? Nothing's going forward, right  
2 now, right, until I vacate the state order. There is going to  
3 be no delisting; is that what you're saying?

4 MR. MARTIN: I believe that to be the case, your  
5 Honor. Frankly, I'm not sure that there is anything left for  
6 NASDAQ to do once it has submitted the Form 25.

7 THE COURT: That's my question. So whether or not the  
8 order is vacated, what does that mean as a practical matter?

9 MR. MARTIN: Well, as a practical matter, the issue is  
10 whether you have a TRO outstanding that at least embodies --

11 THE COURT: I mean, what happens with respect to the  
12 delisting? So is there some list where delisted companies go?  
13 Is there some website that says, the following companies have  
14 been delisted, that won't have Cleantech on it unless the order  
15 is vacated?

16 MR. MARTIN: My understanding, your Honor, is that the  
17 only thing out there is a website that lists companies that are  
18 pending for delisting, and that it would -- Cleantech would be  
19 removed from the pending list, but that there would be no  
20 further action taken by NASDAQ.

21 But I think it would be helpful here to separate the  
22 issue of whether to vacate the state court TRO from whether to  
23 grant a new TRO. And the question of whether to grant -- to  
24 vacate the state court TRO, it seems to me, turns just on a  
25 jurisdictional question that this Court can address as a matter

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1 of law now. And then there's the separate issue whether to  
2 exercise this Court's judicial power to issue a new TRO. And  
3 we don't think that they've satisfied the requirements for  
4 that.

5 THE COURT: I understand that. I'm just asking, what  
6 happens as a practical matter if I were to vacate the state  
7 order and deny the request for a TRO here?

8 MR. MARTIN: My understanding, your Honor, is the only  
9 thing that would happen is that NASDAQ would remove Cleantech  
10 from the list of pending delisting. There's just a web page  
11 that they maintain. But beyond that, there would be no  
12 practical effect. It's our understanding that it's now in  
13 front of the SEC.

14 THE COURT: All right. Mr. Fensterstock do you agree  
15 with that or disagree with that?

16 MR. FENSTERSTOCK: Well, it's my understanding -- I  
17 agree and disagree. It's my understanding that Cleantech --  
18 that NASDAQ will, as you suggested, remove Cleantech from the  
19 pending delisting. And it's like going to the university club  
20 and having your membership crossed out --

21 THE COURT: Is this an analogy you think I'm going to  
22 get?

23 MR. FENSTERSTOCK: Yes. I don't know. Maybe.

24 THE COURT: No, I can assure you. Specter knows  
25 because he didn't give me a pay raise. I'm joking, of course.

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1 MR. FENSTERSTOCK: Obviously if you are -- Mr. Martin  
2 argues out of both sides of his mouth. He says NASDAQ is not  
3 going to do anything, then he says, oh, yes. What they're  
4 going to do is they're going to take Cleantech off of the  
5 pending delisting list, or they're going to cross them out and  
6 now they're delisted. If that's not action taken by NASDAQ, I  
7 don't know what it is. It's like being admitted to a school  
8 and then crossing your name out. You're not admitted anymore.  
9 That's not an action? That is an action.

10 THE COURT: I guess it's sort of like being suspended  
11 from a school as opposed to being expelled from a school,  
12 right?

13 MR. FENSTERSTOCK: I have to think about that.

14 THE COURT: Well, I would think that's a pretty good  
15 analogy.

16 MR. FENSTERSTOCK: It's probably pretty good. And  
17 obviously being expelled is a lot worse -- exactly, it's a lot  
18 worse than being suspended. Because you're expelled, you got  
19 to do something to come back in. You're suspended, presumably  
20 it's just for a short period of time. And I think you answered  
21 the question. That is harm. They are doing something.  
22 They're denying they're going to do something, but they're  
23 going to do it.

24 THE COURT: Well, I mean, I guess the issue is, what  
25 is the effect of a delisting? I mean, you have an affidavit

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1 from somebody who says it's going to affect them financially.  
2 I mean, I think there is some authority that says that that's  
3 not enough to establish irreparable harm.

4 And one of the other arguments you make in your papers  
5 is that delisting, followed by a reversal, is still going to  
6 require your client to sort of start all over and to get  
7 listed. And that doesn't strike me as correct, but I don't  
8 have any real knowledge on this. But it would seem to me that  
9 a Court -- if the Court of Appeals or the SEC or whoever, if  
10 the SEC denied the stay and then a week later said, but we are  
11 agreeing with you on the merits and so we're ordering that  
12 Cleantech be listed again, I mean, is it your view that  
13 Cleantech would have to start all over, as though it had never  
14 been listed before?

15 MR. FENSTERSTOCK: My view is the SEC would reverse.  
16 NASDAQ could then say, wait a second, you're a China-based  
17 company. We want to take look at you a little closer. Just  
18 like they did the last time. We're going to put you to  
19 different tests. And because of what they've done in the past,  
20 because of their pattern of discriminatory behavior, I agree  
21 that, yes, they would put them to a different test from any  
22 other company that's not a China based company which was  
23 created by a reverse merger situation.

24 You brought up a very good point last week. You said,  
25 well, if I said -- if I, the judge, said, no, you have to let

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1 them back in the way they were before, that's something. But  
2 NASDAQ can apply their rules.

3 What we have here is it's beyond an SEC rule. It's  
4 beyond a NASDAQ rule. It's NASDAQ's discriminatory application  
5 of the rules. That is actionable. And that is what -- that is  
6 why we need a stay, because it's our position that they have  
7 discriminatorily applied their rules and interpreted their  
8 rules in order to give closer scrutiny to China-based  
9 companies. And we have pretty good evidence of that. That's  
10 our argument.

11 Their argument that there is no irreparable harm, we  
12 believe -- he says there's no irreparable harm. We believe  
13 they haven't shown likelihood of success. They don't have any  
14 affidavits. They have no proof. We do have some --

15 THE COURT: They have some law on their side, right?  
16 They have Judge Koeltl and they have, I guess, Justice  
17 Sotomayor.

18 MR. FENSTERSTOCK: That was not in the context of an  
19 application for a stay of delisting.

20 THE COURT: No, but it's an irreparable harm argument.  
21 It still says that delisting does not equal irreparable harm.

22 MR. FENSTERSTOCK: Generically. In this situation we  
23 have some evidence in the record, we think substantial evidence  
24 in the record, and they have none to refute it.

25 THE COURT: Though, I mean, I think the cases that



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1 they cite are cases in which there are comparable allegations  
2 of harm that would befall the delisted company. And the courts  
3 were unmoved, saying that isn't irreparable harm. I mean, all  
4 of them are slightly distinguishable, but there is certainly  
5 some authority for saying that delisting, even if it carries  
6 with it economic harm, does not constitute irreparable harm, at  
7 least for purposes of exhaustion.

8 I mean, I think it would probably be the same analysis  
9 under a TRO or preliminary injunction standard. I don't think  
10 irreparable harm would be different from one than it is in the  
11 other, but I haven't really focused on that.

12 MR. FENSTERSTOCK: It's hard to know from these cases,  
13 your Honor, what evidence was before the judge. You have two  
14 affidavits that are unrefuted.

15 THE COURT: All right. Mr. Martin, do you want to  
16 refute any of these affidavits?

17 MR. MARTIN: Well, I'd like to begin, your Honor, by  
18 emphasizing that it is, of course, their burden here.

19 On the points made in the affidavit, I think we've  
20 touched largely on what is wrong with them. And the first  
21 issue is they assume that there would be no remedy if the SEC  
22 ultimately were to disagree with the delisting determination  
23 made by NASDAQ. And that's wrong. NASDAQ, in fact, in its  
24 opposition to the stay motion in the SEC acknowledged that it  
25 would be within the SEC's authority to order reinstatement, or

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1 order relisting, rather. And so to the extent that the  
2 affidavits turn on an assertion of irreparable harm based on  
3 needing to go through the entire listing process anew, that's  
4 just inaccurate.

5 As for the remaining allegations of irreparable harm,  
6 there is a vague assertion that some covenants might be tied to  
7 whether it's a listed company or not. But those aren't borne  
8 out by specific factual allegations of any sort. It's just,  
9 you know, any covenants that depend on listing status might be  
10 affected. You know, they don't purport to identify specific  
11 covenants that might be affected, so we don't believe that  
12 would be sufficient.

13 THE COURT: Well, I think you're talking about  
14 Mr. Uchimoto's affidavit at paragraph 8, final delisting will  
15 also have a deleterious effect on any covenants, indenture or  
16 agreements requiring the company to remain in the status of a  
17 listed company. Is there something else?

18 MR. MARTIN: Yes, your Honor. That was the paragraph  
19 that I was talking about. They say that to be so for any  
20 covenants, but then they don't identify any actual covenants  
21 that might be implicated and, of course, that would be economic  
22 harm if it's been deemed insufficient in any other number of  
23 cases.

24 So paragraph seven of that same affidavit, talking  
25 about materially more difficult, if not impossible for the

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1 company once they begin to become listed, again, that depends  
2 on the assumption that the SEC would not be empowered to grant  
3 relief.

4 THE COURT: Or the Court of Appeals.

5 MR. MARTIN: Either the SEC or the Court of Appeals on  
6 review from the SEC. The previous paragraph about significant  
7 adverse effects on the company's common stock, again, this  
8 touches on the point that your Honor was discussing about the  
9 distinction between suspension and delisting. They have been  
10 suspended, which means the stock is now trading in the  
11 over-the-counter market, and any effect of the delisting could  
12 already have been taken into account in the price once NASDAQ  
13 announced publicly that they'd made a final determination of  
14 delisting. That's publicly available information.

15 Elsewhere in their papers they acknowledge that it's  
16 had an effect on the stock price, and so they would have to  
17 posit some additional harm from the effectiveness of delisting  
18 that wouldn't be applicable from the delisting determination  
19 itself. And that's not here.

20 THE COURT: Well, does delisting have any effect on  
21 the over-the-counter market? Is it going to be different?

22 MR. MARTIN: My understanding is that either way, once  
23 it's suspended, it gets traded in the over-the-counter market.

24 THE COURT: And delisting won't change that further?

25 MR. MARTIN: I've spoken with the client, and they

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1 believe that it will continue to be traded in the  
2 over-the-counter market, whether the status is suspended or  
3 delisted.

4 THE COURT: All right. Mr. Fensterstock, is there  
5 anything else in the record you're pointing to? It is sort of  
6 a vague statement in paragraph eight of Mr. Uchimoto's  
7 affidavit.

8 MR. FENSTERSTOCK: Yes, your Honor. I don't know if  
9 you have it before you now, but it's part of the record from  
10 the Supreme Court; the affidavit of Arnold Staloff in support.

11 THE COURT: Yep. What paragraph?

12 MR. FENSTERSTOCK: It starts in paragraph six.

13 THE COURT: Well, this is talking about the things  
14 that Senator Specter referenced before, which is the leads to  
15 the New Jersey Atlantic City project. But that's already  
16 happened, right? That's water under the bridge.

17 MR. FENSTERSTOCK: Yeah, there is a future one for  
18 \$100 million as well. And there is also the -- what I  
19 discussed earlier about this \$20 million bridge financing.

20 THE COURT: Where is that?

21 MR. FENSTERSTOCK: The \$100 million --

22 THE COURT: Where is the bridge financing? I know the  
23 hundred million dollars is paragraph nine.

24 MR. FENSTERSTOCK: The bridge financing, your Honor, I  
25 was told about during the break. It is not in the affidavit.

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1 THE COURT: Okay. Is there anything else in the  
2 record before me that relates to the harm that would flow from  
3 delisting as opposed to the suspension that's currently in  
4 place? I assume a suspension, if I granted you the relief  
5 you're seeking and stayed the delisting, you'd still be  
6 ineligible for the hundred million dollar New Jersey project,  
7 right? You'd still be suspended, you, Cleantech, right?

8 MR. FENSTERSTOCK: I'm sorry. Could you repeat that,  
9 your Honor.

10 THE COURT: Well, paragraph nine says the decision to  
11 delist eliminated Cleantech's opportunity to bid on the  
12 New Jersey Atlantic City project, which involves a construction  
13 of six wind towers, a contract order of 8.4 million and a  
14 follow-up project totaling almost 100 million. As written,  
15 this doesn't suggest that the relief you're seeking, the stay,  
16 would entitle your client to apply for these things. So it's a  
17 little unclear to me as to what exactly is the effect of  
18 delisting.

19 MR. FENSTERSTOCK: I think as written, you are  
20 correct, your Honor. I think, although not written as well as  
21 it could have been, these are examples. And when the NASDAQ  
22 actually takes the pen and crosses out Cleantech, any hope for  
23 any of these projects will be gone.

24 THE COURT: I mean, when we're focusing on what's  
25 going to happen now, if the stay is granted or if the TRO is

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1 not lifted -- excuse me. Let me rephrase that.

2 If the TRO were vacated and the SEC did not grant the  
3 stay request, what would happen? How would the status quo as  
4 it exists now change? And there's not a whole lot in  
5 Mr. Staloff's declaration or affidavit that goes to that. He  
6 says, somewhat generally, the impact of NASDAQ's decision to  
7 delist has been severe. If NASDAQ's decision takes effect  
8 before the SEC issues its decision on Cleantech's appeal, the  
9 impact will be even more profound, potentially resolving in  
10 insolvency. In my experience the delisting of a company often  
11 drives the company rapidly into a state of insolvency and  
12 dissolution. Paragraph 15 and 16.

13 MR. FENSTERSTOCK: Right 15, 16, 17, 18.

14 THE COURT: I mean, that's somewhat conclusory. Do  
15 you agree?

16 MR. FENSTERSTOCK: Well, I agree that 15, 16, 17 and  
17 18 are Mr. Staloff's opinion about what will happen if we do  
18 not get a stay. And it seems to me that he is using the  
19 previous examples as really exemplary of the further  
20 catastrophic impact of the delisting. And it could have been  
21 written better, clearly, but it says what it says.

22 THE COURT: But, I mean, the announcement of a  
23 delisting was made over a month ago, right, that it's going to  
24 happen?

25 MR. FENSTERSTOCK: Correct.

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1 THE COURT: All right. And so -- and the suspension  
2 was in place since March, I think, right?

3 MR. FENSTERSTOCK: Correct.

4 THE COURT: So it's not clear to me what is going to  
5 happen now if this delisting shoe drops that's any different  
6 than what is currently happening.

7 MR. FENSTERSTOCK: To take your analogy, your Honor,  
8 if a high school decides to suspend somebody and says, we're  
9 going to suspend you, or a high school decides to kick somebody  
10 out and they say, we're going to kick you out, obviously there  
11 are different impacts, practical impact.

12 Same here. It is perception of the company. They are  
13 traded over the counter, that's true, and they're going to  
14 continue. And this is why there is no harm on the NASDAQ side  
15 at all -- when you balance the hardships, there is no harm in  
16 extending the TRO. Nobody, absolutely nobody, can be harmed.  
17 And I'll put it to Mr. Martin to tell you what harm can happen  
18 to anybody.

19 On the other hand, the perception that a company has  
20 been suspended or expelled have different perceptual harms in  
21 the marketplace. And in the economic -- especially in this  
22 economy --

23 THE COURT: I'm taking your word for that? It would  
24 seem to me if they've been suspended since March and the  
25 delisting has been announced since November, it would seem to

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1 me the marketplace has already adjusted to this information.  
2 The fact that there's been sort of a stay doesn't mean that  
3 anybody's assessment of the future prospects of the company is  
4 going to be that much different.

5 MR. FENSTERSTOCK: You don't have to take my word for  
6 it. Mr. Staloff, I think, brings his 40 years in the financial  
7 industry to bear on this issue.

8 THE COURT: But just with the statement that in my  
9 experience, delisting has severe implications, that? You're  
10 referring to paragraph --

11 MR. FENSTERSTOCK: I'm referring to the entire  
12 affidavit, your Honor. I realize those paragraphs that you --  
13 15, 16, 17, 18, are specifically directed towards the issue,  
14 but the entire affidavit goes to the impact of the harm that  
15 will enure to the company.

16 THE COURT: All right. I mean, it seems to me fairly  
17 conclusory just to say that in my experience, the delisting of  
18 a company drives the company rapidly into a state of  
19 insolvency. And dissolution isn't too much to hang one's hat  
20 on, particularly since, presumably, the announcement of a  
21 suspension and the forthcoming delisting would probably have  
22 the same effect, and a stay wouldn't -- I mean, I assume a stay  
23 is not going to increase the prospects of getting bridge loans  
24 or other capital into the company.

25 MR. FENSTERSTOCK: I think a stay of execution does



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1 preserve some economic stability. And all we're asking for is  
2 a preservation of the status quo to stay execution of this  
3 company, where no -- when you balance the hardships, there  
4 can't be anything said on the other side.

5 THE COURT: I want to hear from Mr. Martin, then we're  
6 going to wrap this up.

7 Mr. Martin, if we get to the TRO analysis, right, then  
8 I've got a number of considerations, which include irreparable  
9 harm, include likelihood of success on the merits, but also,  
10 you know, balancing the equities among the parties and public  
11 interest. Senator Specter is here to talk about, I think,  
12 really that latter one primarily.

13 I don't want to shortchange you, Senator, but I think  
14 that's principally what you're arguing, that there are real  
15 public policy implications to not granting a stay, right?

16 MR. SPECTER: Well, that certainly is a central point,  
17 but I also raise the issue of the opportunity for a discussion  
18 on the letters which are attached to -- with the affidavit from  
19 Mr. Fensterstock on the background of the sole shareholders  
20 whose affidavit is here with Eric Noll, the key NASDAQ official  
21 on the board, once those conversations could take place. And  
22 Mr. Noll asked for telephone time with me, and then apparently  
23 was told by Mr. Knight not to have the conversation but that I  
24 should reach out to Mr. Knight, which I had done before but did  
25 again. And I think those conversations will be very important,

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1 hinging really on the issue of the discovery.

2 If these board members know that they had the power to  
3 activate a board review, and Mr. Noll and Mr. Staloff got  
4 together, and that was my intervention in the case, could have  
5 been very, very material, we might not be here taking several  
6 hours of this Court's time, had those two then talked. And if  
7 they talked, and this afternoon, we might not be back here on  
8 some other day.

9 THE COURT: Look, that may be true. I'm focused right  
10 now just on the standard for a TRO, which is likelihood of  
11 success on the merits. And I think we've talked about that  
12 some. The likely irreparable harm in the absence of the  
13 injunction, balance of equities in favor of the moving party,  
14 which is Cleantech over NASDAQ or the SEC, and then that the  
15 injunction is in the public interest.

16 MR. SPECTER: Your Honor, there has not been real  
17 discussion on the likelihood on the merits. That has really  
18 not been explored.

19 What you have here is a long process for the listing  
20 of Cleantech, and then shortly before the listing was actually  
21 made, where Cleantech did not know that the listing was  
22 imminent, there was a bridge loan which was participated in by  
23 the consultant.

24 Now, NASDAQ knew the consultant was in this picture  
25 for months and had taken no action. But when the NASDAQ found

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1 out that the bridge loan was being activated and hadn't been  
2 told about it, they used that as the occasion to act against  
3 Cleantech. There has not been a maturation, your Honor, on  
4 likelihood of success on the merits.

5 THE COURT: I don't mean to interrupt you, just  
6 briefly, it seems to me that the failure to exhaust goes to  
7 likelihood of success on the merits.

8 Mr. Martin, that's part of your argument with  
9 likelihood of success on the merits, right?

10 I just want to give him a chance to answer.

11 MR. SPECTER: There has not been a presentation made  
12 of likelihood of success on the merits.

13 THE COURT: Well, but if -- a failure to exhaust would  
14 be a basis to deny the motion on the merits, right?

15 MR. SPECTER: Well, if there is a showing of  
16 likelihood of success on the merits, that would lead the court  
17 not to conclude that there had been a failure to exhaust.  
18 Showing of a likelihood of success on the merits is necessary  
19 in order to avoid failure to exhaust remedies. We have not  
20 really gotten into the likelihood of success on the merits. We  
21 have not gotten into the fact --

22 THE COURT: Who is this? I just had somebody sort of  
23 scurry up to the table here. Can I just have people identify  
24 themselves? I know generally a lot of people come from the --

25 MR. SPECTER: This is Mr. Staloff, your Honor. He's

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1 the independent trustee.

2 THE COURT: I have his affidavit. Just generally, if  
3 we're going to have people up here --

4 MR. FENSTERSTOCK: I apologize, your Honor.

5 THE COURT: Mr. Staloff, you can have a seat. I don't  
6 mind you having a seat at the table. Just I don't have  
7 marshals for civil matters, but I have a criminal matter after  
8 this. So the marshals are looking at me curiously to see why  
9 people are sort of sneaking up to the front table.

10 MR. SPECTER: Your Honor, I was on the point that  
11 there was a hearing panel which ruled, and then it went to a  
12 listing counsel. And the listing counsel felt substantial --  
13 found substantial problems with what the hearing panel had  
14 done. And it remanded the case back to the hearing panel on  
15 the merits on a question of whether there had been a violation  
16 of attorney-client privilege. This case has a lot in it that  
17 your Honor hasn't heard.

18 THE COURT: I only know the tip of the iceberg from  
19 what's in the papers. I understand that.

20 MR. SPECTER: But when you deal with a question of  
21 likelihood of success on the merits, there is a great deal here  
22 on the merits of the case which show that Cleantech would  
23 prevail on the merits.

24 And this business about following the rules of NASDAQ,  
25 where any single board member can activate a board review,

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1 which was not done, well, there are intimations on the papers  
2 that have been filed that the board members never had anything  
3 to do with it. This is a very distinguished board. And if  
4 this board heard about this discrimination against the Chinese  
5 and heard about a practice by NASDAQ in limiting a Chinese  
6 company from having an opportunity in the US markets, when we  
7 were trying to find an opportunity for American companies on  
8 the gigantic Chinese markets, that's something that I have seen  
9 in detail in arguments before the international trade  
10 commission on behalf of the steel industry, the so-called trade  
11 war. Big, big issue in the editorial pages of the New York  
12 Times today. And I think if the board had wind of what's going  
13 on in this courtroom, they would haul the NASDAQ people in and  
14 say, what is going on? Let us listen to this.

15 THE COURT: The board of NASDAQ would haul the --

16 MR. SPECTER: They would call Mr. Knight in. They  
17 would call Mr. Emmons in, who said, we don't care about the  
18 consultant's citizens guild. He's got a bad reputation.

19 Well, you don't convict on reputation. You just don't  
20 do that.

21 Emmon says you have a different standard for Chinese  
22 companies than other companies. My experience tells me that if  
23 we got into the e-mails and into the records of NASDAQ, you'd  
24 find a trail of blatant discrimination. But your Honor raised  
25 the point about, what if you had an African-American or gender?

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1           You have this red herring about no state action. You  
2 could have a violation of due process without having state  
3 action. You could have a violation of constitutional rights or  
4 fairness. We have not gotten a semblance of it. That is what  
5 piqued my interest when I saw what was happening to the  
6 Chinese. That shouldn't happen in America. That shouldn't  
7 happen by NASDAQ, a big powerful outlet like that. And they  
8 acted here to delist for no reason at all, absolutely no  
9 reason. The presence of the consultant was known for a long  
10 time. NASDAQ had had him in for hours. But they used this  
11 bridge loan, which was indispensable to keep the company alive,  
12 and Apollo, a very reputable investment banking company or  
13 house, said to delist on that was something in the interest of  
14 the shareholders.

15           We have cited in our papers the statement of the SEC  
16 commissioner that what should be done here is to encourage  
17 companies to grow. And this Cleantech is a growing company.  
18 It's green energy. That's what green energy is coming from,  
19 China; not coming from the United States. New Jersey wants to  
20 put these towers up. Well, they can't buy them from American  
21 companies. This company was denied an opportunity to bid on  
22 \$8.4 million.

23           THE COURT: But that's, again, water under the bridge  
24 in terms of irreparable harm. The issue is what's going to  
25 happen between now, if I vacate the TRO in the state court and

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1 deny the motion for it, a TRO here? What's going to happen in  
2 the interim between now and when the SEC finally gets around to  
3 ruling on the appeal?

4 MR. SPECTER: Well, you can slice it to irreparable  
5 harm, but it's very relevant on the issue of prevailing on the  
6 merits, of ultimate success if this case is heard. That's a  
7 separate point from the irreparable harm issue. And I heard  
8 your question extensively, Mr. Fensterstock, about  
9 Mr. Staloff's affidavit. Well, you have Bill Uchimoto's  
10 affidavit.

11 THE COURT: I quoted that, but that seems equally  
12 conclusory with respect to what's going to happen next.

13 MR. SPECTER: Well, no, it wasn't, your Honor. You  
14 have questioned a difference of being relisted after you'd been  
15 delisted. You think it doesn't make a whole lot of difference.  
16 There's been an extensive dialogue on that point with your  
17 saying, well, they ought to put him back into the status quo of  
18 Mr. Fensterstock pointing out NASDAQ won't do anything without  
19 being told. They won't even turn over papers of record.

20 THE COURT: No, but this is what Mr. Uchimoto says:  
21 Lifting the TRO and allowing the effectiveness of the final  
22 delisting will cause irreparable harm to the company and its  
23 public shareholders. That's pretty conclusory.

24 Next paragraph: A change from the company's status  
25 from suspended from listing to being delisted could have

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1 significant adverse effects on the company's common stock and  
2 investor and public perception of the continuing viability and  
3 business prospects of the company. Again, pretty conclusory.

4 Next, paragraph seven: A delisting may make it  
5 materially more difficult, if not impossible, for the company  
6 once again to become listed on NASDAQ or another registered  
7 national securities exchange. But, again, that one I didn't  
8 find persuasive at all. If they prevail with the SEC or with  
9 the Court of Appeals, then they're back listed. And I don't  
10 think there's any additional hoops or hurdles that can be put  
11 up that would prevent their delisting.

12 Then paragraph eight, a final delisting will also have  
13 a deleterious effect on any covenants, indentures or agreements  
14 requiring the company to remain in the status of a listed  
15 company. I don't know if there are any such covenants,  
16 indentures or agreements.

17 MR. SPECTER: Well, your Honor, it's inartful but it's  
18 not deficient.

19 THE COURT: It's not?

20 MR. SPECTER: It's unartful but it's not deficient.  
21 Anybody who would say could when they should have said would  
22 ought to go back to drafting school.

23 THE COURT: Well, just more detailed than that is  
24 what's really necessary.

25 MR. SPECTER: Well, where you have a requirement that



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1 if you could be relisted, your stock has to be worth four  
2 dollars a share. If you haven't been delisted, it only has to  
3 be worth one dollar a share. That's in the papers.

4 You take Bill Uchimoto's affidavit and you take Arnold  
5 Staloff's affidavit, you can parse them finely and say there  
6 are holes in them. But the totality of them and common sense  
7 shows that you have a prejudice by delisting. Your Honor  
8 brought the point up in a very concrete term, the difference  
9 between being suspended and expelled. That is a powerful  
10 argument on irreparable harm.

11 THE COURT: Maybe. But, look, if you are the  
12 suspended student and you're suspended indefinitely pending the  
13 Board of Education reviewing the suspension, and, you know,  
14 they decide to call you expelled but the review by the Board of  
15 Education is still taking place, I'm not sure, to me, it makes  
16 that much difference to the student who's not allowed to go to  
17 class or not allowed to participate in school activities. It  
18 seems to be a matter of nomenclature more than practical  
19 reality.

20 Now, that's an analogy that might be an imperfect  
21 analogy, but certain other courts have found delisting not to  
22 be irreparable harm. And I'm not sure it's enough in this  
23 record for me to find there really has been.

24 MR. SPECTER: Your Honor, those conclusory statements  
25 by those courts don't involve this factual situation. Without

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1 repeating it, they are very sketchy. You have Judge Sotomayor  
2 opinion when she was on the district court saying there is a  
3 paucity of authority. I think Mr. Fensterstock really hit a  
4 very valid point. When you said to me, well, do you have any  
5 authority which says that a state court can grant an injunction  
6 under these circumstances, and Mr. Fensterstock came around and  
7 said, do you have any authority that the state court can't  
8 issue an injunction under, or a TRO under these circumstances?  
9 We had an extensive argument on this point and the judge --  
10 very well respected in the commercial section of the New York  
11 State Supreme Court. And here you have an issue which really  
12 goes to the very basis of federalism.

13 THE COURT: Look, I don't think we really want  
14 everybody doing end runs around the SEC and running in to state  
15 court for stays and for TROs when the scheme that Congress  
16 enacted allows for a stay and allows for federal review of the  
17 administrative decision at the Court of Appeals level. You  
18 could cut straight to the Court of Appeals. It strikes me as  
19 what Congress decided to do. They could have decided to do  
20 something different, but they didn't.

21 MR. SPECTER: Congress makes some mistakes, too.  
22 That's why you have courts.

23 THE COURT: You're looking at me when you say that.

24 MR. SPECTER: Congress made a mistake in not raising  
25 your pay.

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1 THE COURT: Well, I don't take it personally.

2 MR. SPECTER: Justice Kennedy and Chief Justice  
3 Roberts came to talk to the Chairman of the Judiciary  
4 Committee. He wanted to raise your pay by \$100,000, from 174  
5 to 274.

6 THE COURT: Wow. Don't tell my wife.

7 MR. SPECTER: Well, that's a fact. I'll give you an  
8 affidavit on it. I was there.

9 THE COURT: I don't think we're going to get that  
10 genie back in the bottle.

11 MR. SPECTER: By the time it moved through, we were in  
12 a recession. Nobody got a pay raise. Federal compensations  
13 are going to be suspended through 2013, if the Tea Party has  
14 its way. But the administrative procedures of the SEC leaves a  
15 lot to be desired.

16 THE COURT: Look, you may get -- it could be the case  
17 that you get all the relief you're seeking this afternoon. So  
18 I'm at least inclined to wait until the end of the day.

19 MR. FENSTERSTOCK: Your Honor, first of all, I want to  
20 thank you for giving us all the time you've given us. I really  
21 appreciate it. I want to make two more quick points.

22 THE COURT: Judge Forrest owes me.

23 MR. FENSTERSTOCK: That's true.

24 THE COURT: This is fascinating. I enjoy it. We need  
25 to cut it short, I think.

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1 MR. FENSTERSTOCK: Two very quick points, 30 seconds.

2 The reason why Mr. Staloff jumped up and was so eager  
3 to come up, he just handed me a note and he said -- and I'm  
4 going to read it, and he will provide an affidavit, if the  
5 Court desires -- the \$20 million bridge loan is contingent on  
6 listing. And if C-tech -- that's Cleantech -- is delisted, the  
7 finance company can take the assets. I've offered to be called  
8 to testify on this.

9 THE COURT: I think an affidavit would be useful, and  
10 you probably ought to send that to the SEC as well.

11 MR. FENSTERSTOCK: We will do that.

12 And also, your Honor, I just want to reference you  
13 to -- on the irreparable harm, just redirect your attention to  
14 my affidavit in state court, Exhibit 12, which includes the  
15 letter to NASDAQ from Apollo Capital Management, which is a  
16 \$68 billion asset under management company, which talked about  
17 irreparable harm as well.

18 Thank you, your Honor.

19 THE COURT: Mr. Martin, I wanted to give you a chance  
20 to be heard. I mean, balance of equities, balance of the  
21 equities between the parties is one factor that I am to  
22 consider. What is the harm to NASDAQ by just staying this  
23 thing? Wouldn't it be cheaper in the long run if you get what  
24 you want, I vacate the state, I decline to grant a TRO here  
25 because I think the SEC process hasn't been exhausted, they

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1 then get something tomorrow or next week that says the stay is  
2 denied, then you are writing up new papers and everybody is  
3 running into the Ninth Circuit or the DC circuit? Why is it  
4 worth all this effort?

5 MR. MARTIN: Frankly, if it goes to the Ninth Circuit,  
6 we think the respondent in that proceeding would be the SEC.  
7 NASDAQ might be able to intervene.

8 THE COURT: I see.

9 MR. MARTIN: But in terms of the irreparable harm to  
10 NASDAQ, the danger here is creating basically a blueprint in  
11 which any party aggrieved by an SRO action, at least in the  
12 delisting context, if not more broadly, could then run in to  
13 court and seek a TRO.

14 THE COURT: Excuse me one second.

15 MR. MARTIN: So at least based on the affidavits we  
16 have before us, who knows what they might come up with later.  
17 But the affidavits here could be raised by anyone.

18 The claim that in my experience the delisting of a  
19 company often drives the company rapidly into a state of  
20 insolvency and dissolution, well, if that were irreparable  
21 harm, then any company facing delisting would then be able to  
22 go to a board and seek a TRO. So what NASDAQ is concerned  
23 about is the long-term effects of a decision that says that  
24 this company, based on the allegations here, gets to blow up  
25 the delisting process without going through the usual review

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1 scheme through the SEC and the Court of Appeals. So that, we  
2 believe, is the most significant harm from this.

3 Now, to be clear, we don't think that there is any  
4 balance at all because we don't think they've established  
5 irreparable injury, but we do believe there is a substantial  
6 concern that they create a blueprint that could be used in any  
7 case based on any conceivable allegations of alleged  
8 wrongdoing.

9 In terms of the public interest, we think there's a  
10 substantial public interest in having the process work as  
11 Congress designed it, and that is to have companies delisted as  
12 provided in NASDAQ's rules. And if the rules are violated,  
13 then to have that addressed by the SEC and then at Court of  
14 Appeals. Right now they're saying, no, we want to stay a  
15 listed company pending review. But the SEC gets to decide  
16 whether they stay a delisted company pending review. And one  
17 of the things it can consider is the potential harm to  
18 investors as shares were traded in the over-the-counter market,  
19 based on the statement that this is still -- this company, even  
20 to NASDAQ, has made a final determination to delist.

21 For those reasons we think even if this Court  
22 concludes they've exhausted, we don't think they have. That's  
23 a jurisdictional defect. And even if it concludes there's a  
24 likelihood of success on the merits, even though the Second  
25 Circuit and the DC circuit have said you don't get to go into

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1 federal district court to try to stop SRO regulatory activity,  
2 and even if they've established irreparable harm, even though  
3 they haven't -- almost conclusory or incorrect assertions in  
4 the affidavits, they haven't met any of the other factors  
5 either.

6 So for those reasons we would submit the Court should  
7 not grant a new TRO, if it chooses to vacate the state court  
8 TRO.

9 THE COURT: All right. I'm going to reserve very  
10 briefly and just see what, if anything, comes in today. And if  
11 plaintiffs want to submit a revised affidavit, I'm happy to  
12 take that. If the defendants want to do the same, they're  
13 welcome to do that as well.

14 But I think I get the issues.

15 I want to thank all the lawyers and others who took  
16 time out of the holiday season to be here. Obviously this  
17 matter is a great deal to both sets of clients, so I understand  
18 the significance of the matter. And I will turn this around  
19 quickly. I want to think about the arguments you've made and  
20 see what else I get and what else I hear from the SEC, okay?

21 Thank you all.

22 (Adjourned)

23

24

25