UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 104032 /October 24, 2025

Admin. Proc. File No. 3-22512

| | |
|---|---|
| In the Matter of the Application of<br><br>VIRPAX PHARMACEUTICALS, INC.<br><br>For Review of Disciplinary Action Taken by<br><br>THE NASDAQ STOCK MARKET LLC | **VIRPAX PHARMACEUTICAL INC.'S OPENING BRIEF IN SUPPORT OF APPLICATION FOR REVIEW** |

Dated: October 24, 2025

Samuel Kadosh
Asher Gulko
Gulko Schwed LLP
525 Chestnut Street, Suite 209
Cedarhurst, N.Y. 11516
P: 212.500.1312
F: 212.678.0405
skadosh@gulkoschwed.com
asher@gulkoschwed.com

*Attorneys for Virpax Pharmaceuticals*

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases**

**Statutes**

## PRELIMINARY STATEMENT

This appeal arises from The Nasdaq Stock Market LLC's ("Nasdaq's") decision to delist Virpax Pharmaceuticals, Inc. ("Virpax") from its stock exchange in direct contradiction to its own written assurances and in violation of its rules, the Exchange Act and the United States Constitution.

More specifically, on the morning of April 2, 2025, Nasdaq confirmed in writing that its Nasdaq's Listing Qualifications Panel (the "Panel") granted Virpax a two-day extension until April 3, 2025, to demonstrate compliance with the $2.5 million minimum stockholders' equity requirement under Nasdaq's Listing Rule 5550(b)(1). That brief extension was permitted under Nasdaq Rule 5840(e)(3), which allows for extensions under "extenuating circumstances." Yet, Nasdaq subsequently changed its interpretation of Rule 5840(e)(3), and held that the extension was not allowed, and then delisted Virpax prior to the expiration of the extended deadline it had granted. Nasdaq subsequently filed a Form 25-NSE ("Form 25") with the Securities and Exchange Commission ("SEC"), falsely stating that the April 1, 2025 extension request was not granted and that the Nasdaq Rules do not permit such an extension. The Form 25 also made the delisting effective within 10 days of its filing - regardless of whether the SEC approved the delisting decision first.

Nasdaq's abrupt reversal of the extension it granted was both procedurally improper and substantively indefensible. Nasdaq's own Rule 5840(e)(3) expressly authorizes granting extensions - such as the one it initially granted - under "extenuating circumstances," and such circumstances existed here as Virpax had completed a reverse stock split on March 21, 2025, and was awaiting a new post-split CUSIP number from the Depository Trust Company ("DTC")—an administrative delay outside of Virpax's control. Moreover, Nasdaq's refusal to honor its own

written extension, and instead, delist Nasdaq prematurely, deprived Virpax of the "fair procedure" Nasdaq has an obligation to provide – which obligation was expressly acknowledged by Nasdaq during these very proceedings.

To make matters worse, Nasdaq provided no justification for its abrupt reinterpretation of its own Rules to disallow the extension. Nor is any explanation of this decision provided in the administrative record provided by Nasdaq. There is not a single email or memo explaining why Nasdaq initially construed the Rule to allow this extension, and then changed its interpretation of the Rule. It is black letter law that an agency's unexplained departure from prior agency determinations is inherently arbitrary and capricious. That is the case here.

Finally, Nasdaq's conduct in this case constitutes a violation of the private non-delegation doctrine. As a private, profit-driven entity to which the SEC delegated regulatory authority, Nasdaq is prohibited from exercising such authority without real-time SEC oversight and approval, as doing so contravenes the constitutional limits on private delegation. By effectuating Virpax's delistiment before it was approved by the SEC, Nasdaq clearly acted in contravention of those constitutional limits.

In light of the foregoing, Virpax respectfully requests that the Commission set aside Nasdaq's delisting determination and restore Virpax's access to exchange services pursuant to 15 U.S.C. § 78s(f) of the Exchange Act.

## STATEMENT OF FACTS

### A. THE PARTIES

Virpax is a preclinical-stage pharmaceutical company focused on developing novel and proprietary drug delivery systems across various pain indications. Nasdaq_Virpax_000021. Virpax's drug-delivery systems and drug-releasing technologies are focused on advancing non-opioid and non-addictive pain management treatments and treatments for central nervous system disorders to enhance patients' quality of life. *Id.* Nasdaq is a for-profit stock exchange owned by Nasdaq, Inc., a publicly traded corporation. *See All. for Fair Bd. Recruitment v. SEC*, 85 F.4th 226, 239-240 (5th Cir. 2023). Nasdaq is a self-regulated private entity and not a state actor. *Id.*

### B. NASDAQ SENDS VIRPAX A DELISTING NOTIFICATION AND VIRPAX PROCURES EXTENSION BY SUBMITTING A VIABLE COMPLIANCE PLAN.

On April 2, 2024, The Nasdaq Listing Qualifications Staff (the "Staff") notified Virpax that it did not comply with the minimum $2,500,000 stockholders' equity requirement for continued listing, or the alternatives, as set forth in Nasdaq Listing Rule 5550(b)(1) (the "Equity Rule"). Nasdaq_Virpax_000058. The notice further advised that "[u]nder our Rules the Company has 45 calendar days to submit a plan to regain compliance" — or, no later than May 17, 2024 — with the Equity Rule, and "[i]f your plan is accepted, we can grant an extension of up to 180 calendar days from the date of this letter to evidence compliance." *Id.*

On May 17, 2024, Virpax submitted a detailed compliance plan and requested an extension until September 30, 2024, to regain compliance with the Rule. Nasdaq_Virpax_000062. By letter dated July 29, 2024, the Staff granted Virpax's request for an extension through September 30, 2024, to demonstrate compliance with the Equity Rule, based on Virpax's representations in its May 17, 2024, plan. Nasdaq_Virpax_000041.

## C. NASDAQ ISSUES DELISTING DETERMINATION TO VIRPAX WHICH VIRPAX APPEALS.

Despite its best efforts, Virpax was unable to achieve compliance with the Equity Rule by September 30, 2024. Consequently, by letter dated October 3, 2024, the Staff indicated to Virpax that Virpax "did not meet the terms of the extension" it granted, and therefore, "trading of the Company's common stock will be suspended at the opening of business on October 14, 2024, and a Form 25-NSE ("Form 25") will be filed with the Securities and Exchange Commission (the "SEC"), which will remove the Company's securities from listing and registration on The Nasdaq Stock Market" ("Staff Delisting Determination"). Nasdaq_Virpax_000043.

On or about October 4, 2024, the Staff notified Virpax that it also did not comply with the $1.00 minimum bid price requirement set forth under Listing Rule 5550(a)(2) ("Bid Price Rule"). Nasdaq_Virpax_000032. Virpax subsequently entered a 180-day grace period to regain compliance with the Bid Price Rule that would expire on April 2, 2025. Nasdaq_Virpax_000090.

On October 10, 2024, Virpax exercised its right to appeal the Staff Delisting Determination to the Listing Qualifications Hearings Panel ("Hearings Panel") pursuant to Listing Rule 5815. Nasdaq_Virpax_000006-000010; Nasdaq_Virpax_000137. By letter dated October 11, 2024, Aravind Menon, an attorney with Nasdaq's Office of General Counsel and a hearing advisor for Nasdaq, acknowledged receipt of Virpax's request to appeal the Staff Delisting Determination and that the delisting action has been stayed pending a final written decision by the Hearings Panel. Nasdaq_Virpax_000012. The letter further notified Virpax that its appeal would be considered at an oral hearing on December 3, 2024, and instructed Virpax to submit a written submission in support of its appeal by November 13, 2024. Nasdaq_Virpax_000012.

Virpax submitted a pre-hearing written submission on November 13, 2024, which, amongst other things, described certain opportunities and new initiatives that it expected to bring Virpax

within compliance with the Equity Rule, including that it was able to "successfully file and complete an S-1 public offering, raising $5 million in gross proceeds, with Spartan Capital Securities, LLC as the underwriter." Nasdaq_Virpax_000023.

By email dated November 26, 2024, the Staff submitted an Opening Statement and a Hearing Memorandum in connection with the upcoming hearing. Nasdaq_Virpax_000047 - Nasdaq_Virpax_000057. The Opening Statement assured Virpax that "The Panel's objectives are to assure that the Company has had an opportunity to fully present its case, establish a clear and complete record, *and render a fair and impartial decision*." Nasdaq_Virpax_000049 (emphasis added). It further represented that the Panel will be advised by a Hearings Attorney whose "role . . . is to ensure that the Company receives *a fair and impartial process* and to advise the Panel on the application of Nasdaq rules." *Id.* (emphasis added). The Staff's Hearing Memorandum argued that the Panel should affirm the Staff Delisting Determination and immediately suspend the company's securities from the Nasdaq Stock Market because the "Staff cannot assess whether its Initiatives will materialize and contribute to regaining compliance with the Equity Rule." Nasdaq_Virpax_000053.

On November, 29, 2024, Virpax submitted to Nasdaq a copy of its hearing presentation, which included a detailed overview of Virpax and a description of its updated compliance plan (the "Compliance Plan"). *See* Nasdaq_Virpax_000069 - 000092. The Compliance Plan advised of certain financing milestones, including that "on November 18, 2024, the Company completed a $5 million public offering led by Spartan Capital Securities, LLC," and that "the Company will complete an additional financing for $6 million gross proceeds ($5.7 million net) in December 2024, with the assistance of Spartan Capital," and further still, that an additional equity raise for

approximately $5 million gross proceeds ($4.7 million net) is expected to be completed on or before March 31, 2025. Nasdaq_Virpax_000086.

The Compliance Plan also indicated that Virpax expected to demonstrate compliance with the Bid Price Rule by February 11, 2025, through the effectuation of a reverse stock split expected to occur by January 29, 2025. The November 29, 2024 hearing presentation also contained a request for an extension until April 1, 2025 to demonstrate compliance with the Equity Rule, in light of the Compliance Plan. Nasdaq_Virpax_000092.

At the December 3, 2024 hearing, Virpax presented its plan to demonstrate compliance with the Bid Price Rule by February 11, 2025, Nasdaq_Virpax_000109, and its plan to demonstrate compliance with the Equity Rule by March 31, 2025. Nasdaq_Virpax_000097-98. Echoing the extension request in the written presentation it submitted on November 29, 2024, Virpax orally requested an extension at the hearing until April 1, 2025 to evidence compliance with the Equity Rule. Nasdaq_Virpax_000111.

Through a letter authored by Mr. Menon dated January 6, 2025, the Panel "determined to grant the Company an exception until April 1, 2025, to complete its compliance plan and demonstrate compliance with the Equity Rule." Nasdaq_Virpax_000121.

### D. THE PANEL GRANTS VIRPAX BRIEF EXTENSION ON COMPLIANCE DEADLINES IN LIGHT OF EXTENUATING CIRCUMSTANCES AND THEN MR. GOLUB SUDDENLY ANNOUNCES THAT THE PANEL DECIDED TO DELIST VIRPAX BEFORE THE NEW DEADLINE ARRIVES.

By email dated March 27, 2025, Virpax informed Nasdaq that it effectuated a reverse stock split on March 21, 2025, and that the delay in accomplishing the same was due to the Depository Trust Company's protracted "eligibility process for the new post-split CUSIP number." Nasdaq_Virpax_000125. The email further explained that this "slight delay" will have the result

of bringing the company within compliance with the Bid Price Rule by April 3, 2025, and therefore, it requested a one-day extension for bid price compliance. *Id.*

On April 1, 2025, Virpax sent a "follow-up" email to multiple Nasdaq representatives, including Jennifer Schlacht, a Nasdaq Hearings Administrator, and Mr. Menon, requesting a two-day extension, or until April 3, 2025, to demonstrate compliance with the Equity Rule. Nasdaq_Virpax_000126. Virpax's email explained that the brief extension was needed because the investors in the public offering that would cause Virpax to regain compliance with the Equity Rule were concerned about Virpax's bid price compliance – which was delayed due to DTC' delay in issuing a new post-split CUSIP – and the bid price compliance letter would be needed to consummate the public offering that would restore Virpax's compliance with the Equity Rule. Nasdaq_Virpax_000126. Because Virpax would not be in compliance with the Bid Price Rule until April 2, 2025 (because of DTC's failure to issue a post-split CUSIP), it would need until April 3, 2025 to demonstrate compliance with the Equity Rule. *Id.* By reply-all email still on April 1, 2025, Nasdaq, through Ms. Schlacht, indicated that it will "send the inquiry to the Panel" and let Virpax "know the answer as soon as possible." Nasdaq_Virpax_000127. At 9:10 a.m. on April 2, 2025, Nasdaq replied, and notified Virpax that the "Extension until 4/3 has been granted by the Panel." Nasdaq_Virpax_000129.

After being granted the extension until April 3, 2025, and in reliance thereupon, Virpax continued on its course of seeking a bid compliance letter and closing the referenced offering by that date. The administrative record following Nasdaq's grant of the two-day extension is completely silent until an email sent by Nasdaq to Virpax after business hours on April 2, 2025. The email attached a letter from Arnold Golub, Nasdaq's deputy general counsel, who shockingly announced that "the Panel has determined to delist Virpax from Nasdaq." Nasdaq_Virpax_000131.

According to Golub, the Panel purportedly had "no choice but to delist" Virpax because "April 1, 2025, represented the full extent of the Panel's discretion to grant continued listing while [Virpax] was non-compliant with Nasdaq's continued listing requirements." Nasdaq_Virpax_000132. In a footnote, Mr. Golub conceded that the Panel had earlier that day granted an extension until April 3, 2025, but he insisted that the extension was granted "in error because the Panel does not have the authority under Nasdaq's Rules to grant the requested extension." *Id.* As mentioned, there is not a single document, email or internal communication in the administrative record produced by Nasdaq that purports to explain Nasdaq's sudden reversal.

### E. NASDAQ PUBLICIZES ITS DECISION TO DELIST VIRPAX.

Over three months after it decided to delist Nasdaq, on July 11, 2025, Nasdaq issued a press release informing the public of its determination to delist Virpax, promising to file a Form 25 with the SEC to complete the delisting and advising that the delisting becomes effective ten days after the Form 25 is filed. Nasdaq_Virpax_000134-35. On or about July 21, 2025, the Form 25 was filed, indicating that the determination to delist Virpax would go into effect "at the opening of the trading session on July 31, 2025." Nasdaq_Virpax_000137. This appeal followed.

## STANDARD OF REVIEW

The Exchange Act "sets forth a specific and comprehensive scheme for reviewing disciplinary actions taken by self-regulatory organizations ("SRO") like Nasdaq, including review by the SEC ... of SRO disciplinary actions, such as delistings." *CleanTech Innovations, Inc. v. NASDAQ Stock Mkt., LLC*, 2012 U.S. Dist. LEXIS 13707, *3 (S.D.N.Y. Jan. 31, 2012). Specifically, under 15 U.S.C. § 78s(d), an issuer may seek SEC review of an SRO's decision to delist it, *CleanTech Innovations, Inc. v. NASDAQ Stock Mkt., LLC*, 2011 U.S. Dist. LEXIS 153142, *5-6 (S.D.N.Y. Dec. 30, 2011), and that review is "subject to a full and independent review by the

SEC as to the facts as well as the law." *Gold v. SEC,* 48 F.3d 987, 990 (7th Cir. 1995). *See also Otto v. SEC*, 253 F.3d 960, 964 (7th Cir. 2001) ("the SEC conducts *de novo* review of the NASD's sanctions"). *See also Feins v. American Stock Exch*., 1995 U.S. Dist. LEXIS 2067, *7 ("any SRO's action that imposes a final disciplinary sanction on a member, denies membership or participation in the SRO to any person, or prohibits or limits any person with respect to his access to the SRO's services is reviewable by the Commission, which is authorized to take certain remedial measures to correct the improper SRO action.").

15 U.S.C. § 78s(d) and 15 U.S.C. § 78s(f) set out the SEC's standard of review for delisting decisions. *Feins v. Am. Stock Exch., Inc.*, 81 F.3d 1215, 1220 (2d Cir. 1996); Under 15 U.S.C. § 78s(f), the SEC must independently determine whether "the specific grounds on which such denial, bar, or prohibition or limitation is based exist in fact, that such denial, bar, or prohibition or limitation is in accordance with the rules of the self-regulatory organization, and that such rules are, and were applied in a manner, consistent with the purposes of this title [15 USCS §§ 78a et seq.] (i.e. the Exchange Act)." *See also Sum-Slaughter v. Fin. Indus. Regul. Auth., Inc.*, 320 A.3d 313, 316 (D.C. 2024) ("The Exchange Act requires SROs themselves to comply with the Act, the SEC's Rules, and their own rules."). The "purposes of the Exchange Act" include implementing a philosophy of full disclosure in the securities industry, *see, e.g., Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972), and maintaining fair and orderly markets. *See NASDAQ OMX Grp., Inc. v. UBS Sec., LLC*, 770 F.3d 1010, 1021 (2d Cir. 2014). "So the SEC must analyze burdens on competition, and then decide whether those burdens are 'necessary or appropriate' to further the purposes of the Exchange Act." *All. for Fair Bd. Recruitment*, 85 F.4th at 263. *See also NetCoalition & Secs. Indus. & Fin. Mkts. Ass'n v. SEC*, 715 F.3d 342, 352 (D.C. Cir. 2013)

(requiring the SEC to ensure that SRO conduct does not "impose[]any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.").

Importantly, the Exchange Act requires that the exercise of self-regulatory powers by SROs like Nasdaq "conform to the standards of due process." *Feins*, 81 F.3d at 1218. "Therefore, a securities exchange must comply with certain procedural requirements in connection with a denial of membership." *Id.* At a bare minimum, these "procedural requirements" include "providing a fair procedure generally." *See Id; accord* 15 U.S.C. § 78f(b)(7) ("The rules of the exchange provide a fair procedure for . . . the denial of membership to any person seeking membership therein . . . and the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange or a member thereof.").

If the Commission finds that the SRO's delisting decision was improper, "the Commission *must* 'by order, set aside the action of the self-regulatory organization and . . . grant such person access to services offered by the self-regulatory organization or member thereof.' 15 U.S.C. § 78s(f) (2006)." *NetCoalition & Secs. Indus. & Fin. Mkts. Ass'n*, 715 F.3d at 352 (emphasis supplied). *See also Nasdaq Stock Mkt., LLC v. SEC,* 961 F.3d 421, 430 (D.C. Cir. 2020)("Under Section 19(f), if the Commission concludes that an SRO's Section 19(d) limitation violates the Exchange Act, the Commission must provide a two-part remedy. First, it must 'set aside the action' of the SRO. 15 U.S.C. § 78s(f). Second, it must 'grant [the aggrieved] person access to [the SRO's] services.'").

## ARGUMENT

### I. NASDAQ GRANTED THE APRIL 3, 2025 EXTENSION IN ACCORDANCE WITH ITS OWN RULES AND IS BOUND TO ABIDE BY IT.

The two-day extension Nasdaq granted to Virpax to evidence compliance with the Equity Rule by April 3, 2025 was authorized by Nasdaq Rule 5840(e)(3) and Nasdaq is bound to its own interpretation of its Rules.

Nasdaq Rule 5840(e)(3) provides that "If the Office of General Counsel determines that . . . extenuating circumstances exist, the Hearings Department may adjust the periods of time provided by the rules for the filing of written submissions, the scheduling of hearings, or the performance of other procedural actions by the Company . . .".

After Virpax submitted its request for an extension, Nasdaq interpreted Rule 5840(e)(3) to determine that the facts presented by Virpax constituted extenuating circumstances that justify the two-day extension. Specifically, Virpax's compliance with the Equity Rule turned on its ability to evidence compliance with the Bid Price Rule, and it could not demonstrate compliance due to DTC's delay in issuing a new CUSIP number following Virpax's reverse stock split. These circumstances were plainly unforeseen and beyond Virpax's control, and readily qualified as extenuating circumstances. Accordingly, Nasdaq granted the extension through a routine application of Rule 5840(e)(3).

Nasdaq's inexplicable reversal of its prior interpretation of Rule 5840(e)(3) is of no moment, as Nasdaq is bound by its own construction of its Rules. *See, e.g., In the Matter of the Application of MINIM, INC.*, 2025 SEC LEXIS 532, *6 ("Nasdaq is required to provide a process consistent with its own rules."); *See also The NASDAQ Stock Mkt., LLC & NASDAQ Execution Servs., LLC*, Rel. No. 69,655, 2013 SEC LEXIS 1563 (May 29, 2013) (imposing $10 million fine on Nasdaq for, amongst other things, failing to abide by its own rules); *Gen. Elec. Co. v. United*

*States EPA*, 53 F.3d 1324, 1333-34 (1995)("Where, as here, the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished.").

Nasdaq's after-the-fact reversal of its prior construction of Rule 5840(e)(3) is unsupported by any case law or authority. *See* Nasdaq_Virpax_000132 (citing no authority for the claim that the "Panel does not have the authority under Nasdaq's rules to grant the requested extension"). To the contrary, both the plain language of the Rule, which allows for extensions under "extenuating circumstances" and its stated purpose – to ensure issuers receive a fair process before being delisted – demonstrate that the extension was properly granted. *See* Rule 5840(e)(3); SEC, *Order Approving Proposed Rule Change and Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 2 Regarding Procedures for Denying Listing on Nasdaq*, Exchange Act Release No. 34-52342, 2005 SEC LEXIS 2234, *21-22 (Aug. 26, 2005)2005 SEC LEXIS 2234, *21-22 ("The Commission believes that Nasdaq's proposed amendments to NASD Rule 4885 would facilitate fairness in the listing and delisting procedures.").

Moreover, to the extent there is any ambiguity about whether Rule 5840(e)(3) allows for an extension in these circumstances, such ambiguity must be construed against Nasdaq. This is because the Nasdaq Rules are contractual in nature, and like any other contract, ambiguities in the contract are construed against the drafter, in this case, Nasdaq. *See Barbara v. N.Y. Stock Exch.*, 99 F.3d 49, 54-55 (2d Cir. 1996) ("[T]he rules of a securities exchange are contractual in nature, and are thus interpreted pursuant to ordinary principles of contract law . . ."); *Revson v. Cinque &*

*Cinque, P.C.*, 221 F.3d 59, 67 (2d Cir. 2000) (ambiguous contract provisions are " generally to be construed against the drafter.").

## II. NASDAQ'S REVERSAL OF ITS PRIOR DETERMINATION GRANTING THE EXTENSION IS ARBITRARY AND CAPRICIOUS

It is well-established that an agency's "unexplained departure from prior agency determinations is inherently arbitrary and capricious." *Nat'l Treasury Emples. Union v. FLRA*, 404 F.3d 454, 457 (D.C. Cir. 2005). The Supreme Court has expressly stated that "[u]nexplained inconsistency is … a reason for holding an interpretation to be an arbitrary and capricious change . . ." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). An agency "cannot simply adopt inconsistent positions without presenting some reasoned analysis." *Huntington Hosp. v. Thompson*, 319 F.3d 74, 79 (2d Cir. 2002)

Here, the administrative record provided by Nasdaq for this appeal contains *no internal communications whatsoever* discussing, explaining or justifying Nasdaq's reversal of its prior construction of Rule 5840(e)(3). There is not a single email or memo that explains why Nasdaq initially thought that DTC's delay constituted extenuating circumstances, and why it subsequently adopted a different construction of the rule. Under longstanding Supreme Court and Circuit Court precedent, the lack of any principled reason or reasoned analysis for Nasdaq's flip-flop constitutes an abuse of discretion, which mandates reversal of Nasdaq's decision.[1] *Nat'l Treasury,*, 404 F.3d at 457 (D.C. Cir. 2005) (agency acted arbitrarily in failing to follow its own precedent in determining whether the proposal was an appropriate arrangement).

[1] Nasdaq's flip-flop was not the result of a new (and incorrect) interpretation of Rule 5840(e)(3), but in keeping with Nasdaq's recent punitive trend toward aggressively delisting companies based on procedural, rather than substantive deficiencies. *See In the Matter of the Application of MINIM, INC.*, 2025 SEC LEXIS 532, *6 (finding that the company showed a sufficient likelihood of success in favor of a stay as to its claim that Nasdaq erred in denying company its right to appeal to the Listing Council a Nasdaq decision that required the company to be delisted). This trend may be movitated by Nasdaq's efforts to improve its bottom line, by requiring delisted companies to go through the lucrative (for Nasdaq) relisting process.

## III. NASDAQ'S PREMATURE DELISTMENT OF VIRPAX VIOLATED THE EXCHANGE ACT'S REQUIREMENT AND NASDAQ'S PROMISE TO PROVIDE A "FAIR PROCEDURE."

Aside from acting against its own rules, Nasdaq's premature delisting decision was patently unfair. Nasdaq assured Virpax in writing that it would receive an extension until April 3, 2025, to evidence compliance with the Bid Price and Equity Rules. Nasdaq's sudden about-face decision to delist Virpax before that time for failing to comply with the Equity Rule constitutes a violation of Nasdaq's obligation under the Exchange Act to provide a "fair procedure," and undermines the stated "purposes of the Exchange Act" of "maintaining fair and orderly markets" as well as Nasdaq's own promise at the December 3, 2024 hearing to provide a "fair and impartial process." Additionally, it was neither "necessary" nor "appropriate" to impose the harm and burden of delistment on Virpax in this case, given that Nasdaq literally needed to wait one more day to see whether Virpax would evidence compliance.

Moreover, Virpax reasonably relied on Nasdaq's written assurances that it would have until April 3, 2025 to demonstrate compliance with the Equity Rule, and it continued to expend resources to procure financing consistent with that time frame. Virpax should not suffer the severe financial and reputational harm that attends delistment because it followed the misleading guidance provided Nasdaq. Accordingly, the delistment decision should be set aside. [2]

[2] Nasdaq has not, and can not, argue that the statements of Ms. Schlacht, a Nasdaq Hearings Administrator, are not binding on Nasdaq. In fact, the SEC has rejected such attempts by Nasdaq to distance itself from representations made by its own personnel. *See, e.g., In the Matter of the Application of MINIM, INC*., 2025 SEC LEXIS 532, *6 ("To the extent Nasdaq is arguing that a Hearing Panel did not issue the Abandonment Determination, but rather that a staff member within the Hearings Department had done so, Nasdaq does not reconcile this assertion with the transmittal email's express characterization of the determination as that of the Hearing Panel. Nor has Nasdaq provided any authority for how, even if true, an individual staff member could make such an abandonment determination.").

## IV. NASDAQ'S DELISITNG OF VIRPAX WAS INVALID BECAUSE IT VIOLATED THE PRIVATE NON-DELEGATION DOCTRINE.

Nasdaq's delisting of Virpax also violates the private nondelegation doctrine. Under this doctrine, which is rooted in the United States constitution, "[f]ederal lawmakers cannot delegate regulatory authority to a private entity." *Ass'n of Am. R.R. v. United States DOT*, 721 F.3d 666, 670 (D.C. Cir. 2013). *See also Planned Parenthood Southeast, Inc. v. Strange*, 9 F. Supp. 3d 1272, 1278 (M.D. Ala. 2014) ("The private non-delegation doctrine prohibits States from granting to private individuals or entities final decision-making authority with regard to others' rights."); *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 61 (2015) (Alito, concurring) ("Congress cannot delegate regulatory authority to a private entity."). This is because "any delegation of regulatory authority to private persons whose interests may be and often are adverse to the interests of others in the same business is disfavored." *Pittston Co. v. United States*, 368 F.3d 385, 394-395 (4th Cir. 2004) (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311, (1936)). So prevalent are the "difficulties sparked by such allocations" that "even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority." *Ass'n of Am. R.R.*, 721 F.3d at 670-71.

Instead, "for a delegation of governmental authority to a private entity to be constitutional, the private entity must act only 'as an aid' to an accountable government agency that retains the ultimate authority to 'approve[], disapprove[], or modif[y]' the private entity's actions and decisions on delegated matters." *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth*., 121 F.4th 1314, 1325 (D.C. Cir. 2024). *See also Consumers' Rsch. v. FCC*, 88 F.4th 917, 925 (11th Cir. 2023) (joining sister courts holding "that there is no violation of the private nondelegation doctrine where the private entity functions subordinate to an agency, and the agency has authority and surveillance over the entity."); *Pittston Co.*, 368 F.3d at 395 (agreeing to the Third Circuit's articulation "that

Congress may employ private entities for ministerial or advisory roles, but it may not give these entities governmental power over others.")

In *Alpine Securities Corporation v. Financial Industry Regulatory Authority*, for instance, the D.C. Circuit held that FINRA likely violated the private nondelegation doctrine when it initiated expedited disciplinary proceedings against Alpine Securities Corporation ("Alpine") that could result in the expulsion of Alpine from FINRA without prior SEC review. 121 F.4th at 1325. The DC Circuit explained that "Alpine has shown, on the record before us, that the SEC does not exercise ultimate control over FINRA's decisions to expel its members in expedited proceedings because those orders take effect immediately, before the SEC can review them, and the severe consequences associated with expulsion can make any later review by the SEC a largely academic exercise." *Id.* at 1326. With respect to this latter element, the Court explained further that "delayed SEC review of expulsion orders will almost always be too little too late. . . . [E]xpulsion from FINRA effectively amounts to expulsion from the securities industry as a whole. Expelled FINRA members may not trade securities on behalf of themselves or their clients. Barred from pursuing their trade, many expelled FINRA members could be forced out of business before they can obtain SEC review of the merits of FINRA's decision." *Id.*

Like FINRA's expulsion procedures described in *Alpine*, Nasdaq's delisting procedures in this case (and more than likely, in most if not all cases) lack the requisite SEC oversight and control so as to avoid running afoul of the private non-delegation doctrine. Specifically, upon the Listing Council's decision to delist Virpax, Nasdaq submitted a Form 25 to the SEC under which the delisting decision *automatically* took effect within ten days of that submission – regardless of whether the SEC will review the decision by that time. *See* 17 CFR 240.12d2-2 ("An application on Form 25 to strike a class of securities from listing on a national securities exchange will be

effective 10 days after Form 25 is filed with the Commission."); Nasdaq_Virpax_000137 (July 21, 2025 Form 25 filing providing that "The Nasdaq Stock Market LLC (the Exchange) has determined to remove from listing the common stock of Virpax Pharmaceuticals, Inc. effective at the opening of the trading session on July 31, 2025."). Indeed, the filing of a Form 25 does not stay the effectuation of the delisting decision until after SEC review, nor is there any obligation or realistic expectation that the SEC will review the delisting decision within those 10 days.

And like expulsion from FINRA, delistment from Nasdaq is "the securities industry equivalent of capital punishment." *PAZ Sec., Inc. v. S.E.C.*, 494 F.3d 1059, 1065 (D.C. Cir. 2007). *See* Shearman & Sterling LLP, January 7, 2005  , SEC Comments on Rulemaking ("the delisting process often lags the 'facts on the ground,' and properly so, as Exchanges are reluctant to impose a premature death sentence on listed companies. Thus, we submit that a company that receives a delisting notice would likely be in severe financial distress. We note that this financial distress could be exacerbated by the receipt of the delisting notice, which typically would constitute a breach of the company's listed financial covenants in material contracts, and is almost always an indication of impending bankruptcy or insolvency. This prospective 'domino effect' would effectively prevent an injection of much needed financing until it is too late to prevent irredeemable financial harm. It is also our experience that, by the time a company receives a delisting notice, it is likely already financially troubled, and would unlikely be eligible to list on another Exchange."). Consequently, whatever review and oversight that the SEC provides after the delistment takes effect is "too little, too late."

Because Nasdaq's delisting actions in this case were taken without SEC approval or authorization (and likely even, knowledge) and caused Virpax to incur severe financial and reputational harm destructive to its business, they must be invalidated as unconstitutional under

the private non-delegation doctrine. *See, e.g.*, *Carter*, 298 U.S. at 311-12 (invalidating federal law that gave regulatory power to private persons).

## CONCLUSION

For all the foregoing reasons, Virpax respectfully requests that the SEC set aside and invalidate Nasdaq's decision to delist it.

Dated: October 24, 2025

Samuel Kadosh
Asher Gulko
Gulko Schwed LLP
525 Chestnut Street, Suite 209
Cedarhurst, N.Y. 11516
P: 212.500.1312
F: 212.678.0405
skadosh@gulkoschwed.com
asher@gulkoschwed.com

*Attorneys for Virpax Pharmaceuticals*

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 104032 /October 24, 2025

Admin. Proc. File No. 3-22512

| |
|---|
| In the Matter of the Application of<br><br>VIRPAX PHARMACEUTICALS, INC.<br><br>For Review of Disciplinary Action Taken by<br><br>THE NASDAQ STOCK MARKET LLC |

Samuel Kadosh, being of full age, hereby certifies:

1. I am an attorney at Gulko Schwed LLP.

2. On October 24, 2025 in accordance with SEC Rule of Practice 100(C) and Commission Release No. 88415, I caused electronic copies of Virpax's Brief In Support of Application for Review to be filed via the SEC's Electronic Filings in Administrative Proceedings (eFAP) to:

The Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, NE Room 10915
Washington, D.C. 20549

And

The Nasdaq Stock Market LLC
c/o Amir C. Tayrani
Gibson, Dunn & Crutcher LLP
1700 M Street, N.W.
Washington, D.C. 20036-4504

3. I certify under penalty of perjury that the foregoing is true and correct.

Dated: October 24, 2025
Cedarhurst, NY

**Gulko Schwed LLP**

By: /s/ Samuel Kadosh
Samuel Kadosh
Asher Gulko
525 Chestnut Street, Suite 209
Cedarhurst, New York 11516
212-634-7927
skadosh@gulkoschwed.com
asher@gulkoschwed.com