

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

IN THE MATTER OF THE APPLICATION OF

**DNA BRANDS, INC. (DNAX) AND ZA
GROUP, INC. (ZAAG)
SHAREHOLDERS**

FOR REVIEW OF ACTION TAKEN BY

FINRA

ADMINISTRATIVE PROCEEDING

File No.: 3-22572

**SHAREHOLDERS' SUPPLEMENTAL BRIEF IN OPPOSITION
TO FINRA'S MOTION TO DISMISS**

I. INTRODUCTION

On March 12, 2026, FINRA filed its Reply in Support of Motion to Dismiss in *Stephen Hicks and Trillium Partners, L.P. v. Financial Industry Regulatory Authority, Inc.*, No. 1:25-cv-03598-EGS (D.D.C.) (the “Federal Court Reply” attached hereto as Attachment A). That filing postdates the close of briefing on FINRA’s Motion to Dismiss in this proceeding and sheds significant new light on the positions FINRA is simultaneously advancing before this Commission. In its January 8, 2026, Reply in this proceeding, FINRA acknowledged the Federal Court Action and asserted that its positions in both forums are “wholly consistent.” FINRA’s Reply at 3 n.1. Shareholders respectfully submit that this claim does not withstand scrutiny. Taken together, FINRA’s arguments across the two forums operate to foreclose any substantive review of its Rule 6490 deficiency determinations — in any forum — by anyone. That result sits uneasily with the Exchange Act’s framework of SRO accountability and the Commission’s oversight responsibilities and provides an independent ground for the Commission to deny FINRA’s motion or, at minimum, to exercise its general oversight authority under Section 19(h) of the Exchange Act.

This tension takes on particular force in light of FINRA's stated mission. FINRA publicly describes itself as an organization "dedicated to protecting investors," one that "endeavors to protect investors and safeguard the integrity of the U.S. capital markets to ensure that everyone can invest with confidence." FINRA Media Kit, <https://www.finra.org/media-center/media-kit>. That mission is the public justification for FINRA's authority — and for the regulatory immunity from judicial review that FINRA claims in the Federal Court Action. Yet in both proceedings before this Commission and in the federal courts, FINRA argues that investors — the people it is charged with protecting — have no avenue to challenge FINRA's own conduct when it harms

them directly. FINRA used Hicks's investor status as the stated basis for adverse regulatory action affecting DNAX and ZAAG; it now argues that Hicks, and, in fact, any shareholders, have no standing, no private right of action, and no access to Commission review to contest that action. An SRO whose authority rests on a congressional mandate to protect investors cannot credibly claim that those same investors are structurally excluded from any accountability mechanism when the SRO harms them.

II. ARGUMENT

A. FINRA's Positions in the Two Proceedings

1. FINRA's Positions in the Federal Court Action

In the Federal Court Action, the plaintiffs — Stephen Hicks, a convertible noteholder in both ZAAG and DNAX, and Trillium Partners, L.P. — seek relief in their individual capacities as investors. Like Shareholders here, they are not the Issuers; they are persons identified by name in FINRA's deficiency notices. FINRA's Federal Court Reply advances five grounds for dismissal:

First, FINRA argues that the plaintiffs lack Article III standing because any injury they suffered is not distinct from injuries to the Issuers. FINRA contends that the “appropriate challenger of the deficiency notices issued to DNAX and ZAAG, if anyone, is each entity itself, on its own behalf, and only in accordance with the timing and other provisions outlined in FINRA Rule 6490.” Federal Court Reply at 2.

Second, FINRA argues it is absolutely immune from suit for all conduct challenged there, because that conduct was taken “in connection with FINRA's regulatory responsibilities.” Federal Court Reply at 1. That immunity argument rests on FINRA's status as an SRO acting under the Exchange Act's delegated authority, and on what FINRA describes as “the comprehensive structure set up by Congress” that places oversight of FINRA's regulatory

functions with the SEC and, ultimately, the Courts of Appeals. Federal Court Reply at 9 (citing *In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 115 (D.C. Cir. 2008)).

Third, FINRA argues that the Exchange Act provides a designated review pathway for Rule 6490 determinations — issuer appeal to the UPCC, then to the SEC, then to a U.S. Court of Appeals — and that this scheme “displac[es] claims for relief” that attempt to “bypass the Exchange Act and the process Congress envisioned therein.” Federal Court Reply at 11 (quoting *MM&S Financial, Inc. v. NASD*, 364 F.3d 908, 911–12 (8th Cir. 2004)).

Fourth, FINRA argues that its rules do not create private rights of action enforceable in federal court. Federal Court Reply at 12.

Fifth, FINRA argues it is a private entity, not a governmental actor, and that the federal court plaintiffs’ constitutional claims therefore fail for lack of state action. Federal Court Reply at 13–14.

2. FINRA’s Positions in This Proceeding

In this proceeding, FINRA seeks dismissal on three grounds: (1) the Issuers failed to exhaust their administrative remedies by not appealing to the UPCC within seven calendar days; (2) Shareholders are not proper parties because they are neither issuers nor duly authorized representatives of the Issuers; and (3) the Commission lacks authority under Section 19(d) of the Exchange Act to impose structural reforms or entertain constitutional challenges to FINRA’s Rule 6490 process.

FINRA's standing argument also cannot be squared with the statutory text it invokes. Section 19(d)(1) of the Exchange Act authorizes Commission review of SRO actions that "prohibit or limit any person in respect to access to services offered by" the SRO. 15 U.S.C. § 78s(d)(1) (emphasis added). Congress chose the phrase "any person" — not "any issuer," not

"any member," not "any party to the Rule 6490 process." FINRA's argument that Section 19(d) review is categorically unavailable to shareholders because Rule 6490 is an issuer-facing service reads a limitation into the statute that the statutory text does not contain. Whatever the merits of FINRA's procedural arguments, the Commission should be cautious about adopting a categorical rule of exclusion that Congress did not write.

B. The Tensions in FINRA's Cross-Forum Positions

FINRA asserts its positions in both proceedings are “wholly consistent,” characterizing both as maintaining that Commission review is available only when the proper party follows the Rule 6490 process. FINRA’s Reply at 3 n.1. But that framing obscures the practical consequence of FINRA’s arguments operating in combination, and it mischaracterizes the nature of the inconsistency Shareholders identify. The inconsistency is not that FINRA takes incompatible legal positions in isolation; it is that FINRA deploys its relationship with this Commission strategically and asymmetrically — invoking SEC oversight to defeat accountability in one forum while working to minimize that oversight in the other.

1. FINRA Uses the Availability of SEC Review to Defeat Federal Court Jurisdiction While Simultaneously Arguing to Defeat SEC Review

The most fundamental tension is structural. FINRA’s entire basis for absolute regulatory immunity in the Federal Court Action is that Congress chose to place oversight of FINRA’s regulatory conduct with the SEC, not the courts. As FINRA’s Federal Court Reply states, regulatory immunity “flows from ‘[t]he comprehensive structure set up by Congress’ in the Exchange Act, which ‘show[s] Congress’s desire to protect SROs from liability.’” Federal Court Reply at 9 (quoting *Lowe v. Nat’l Ass’n of Sec. Dealers, Inc. (In re Series 7 Broker Qualification Exam Scoring Litig.)*, 548 F.3d 110, 115). Courts have extended immunity to SROs on precisely this rationale — that SEC oversight provides an alternative accountability mechanism that makes

judicial supervision unnecessary. *See, e.g., DL Capital Grp. LLP v. Nasdaq Stock Mkt., Inc.*, 409 F.3d 93, 96 (2d Cir. 2005).

Yet before this Commission, FINRA works just as energetically to foreclose that very oversight. FINRA argues the Shareholders are not proper parties, that the *Issuers* forfeited their appellate rights by missing a seven-day window, and that the Commission lacks authority to address constitutional and structural concerns. FINRA thus wields its relationship with the Commission as a shield against federal court accountability while simultaneously treating Commission review as a procedural obstacle to be won rather than a substantive check to be welcomed.

These two postures are logically incompatible in a meaningful sense: the legitimacy of FINRA's immunity claim rests on the vitality and availability of meaningful SEC oversight. An SRO cannot coherently justify immunity from judicial scrutiny by invoking the Commission as its designated overseer and then argue to that same Commission that it should decline to exercise oversight over the very conduct for which immunity is claimed. If FINRA prevails in both proceedings — defeating federal court jurisdiction on immunity grounds and defeating SEC review on procedural grounds — no forum conducts substantive review of its Rule 6490 conduct as applied to DNAX and ZAAG. That is the “regulatory black hole” Shareholders identified in their initial application; FINRA's own cross-forum positions now demonstrate precisely how that outcome would be achieved.

2. FINRA's “Wholly Consistent” Claim Conceals a Closed Loop That Eliminates All Review

FINRA contends its positions are consistent because, in both forums, it maintains that review is available “only when the proper party follows the Rule 6490 process.” FINRA's Reply

at 3 n.1. Traced through, however, the interaction of those positions forecloses every available avenue of review:

- The Issuers are the only parties with standing to challenge the deficiency notices in federal court, per FINRA. Federal Court Reply at 2.
- But the Issuers did not appeal to the UPCC within seven days, so SEC review of the deficiency determinations is foreclosed for all parties, per FINRA. FINRA’s Reply at 6–9.
- Shareholders cannot seek SEC review because they are not proper parties and cannot avail themselves of the Rule 6490 process. FINRA’s Reply at 9–13.
- And Shareholders cannot sue in federal court because, under FINRA’s theory, only the Issuers have standing, there is no private right of action, and FINRA is immune in any event. Federal Court Reply at 2, 11–12.

This is not procedural consistency; it is a comprehensive foreclosure of review, achieved through the interaction of arguments FINRA advances separately in each forum. The Commission should be attentive to that result, because it is precisely the kind of outcome the Exchange Act’s oversight structure is designed to prevent.

3. FINRA’s Immunity Rests on SEC Oversight That FINRA Simultaneously Seeks to Curtail

When a court extends absolute immunity to an SRO, it does so in reliance on Congress’s judgment that SEC supervision provides an adequate alternative check on SRO conduct. *See In re Series 7*, 548 F.3d at 114–15. If FINRA successfully limits that supervision — by defeating the only available application for Commission review of its Rule 6490 conduct as applied to DNAX and ZAAG — the predicate for immunity is undermined. FINRA cannot have it both ways: it cannot rely on the robustness of Commission oversight to justify immunity in federal court while simultaneously arguing that this Commission’s oversight authority does not reach the conduct at issue.

4. FINRA Targeted Hicks by Name Under Rule 6490 but Forecloses Review by the Very Person Targeted

FINRA's Reply in this proceeding explicitly acknowledges that its deficiency determinations were premised, at least in part, on Rule 6490(d)(3)(3)'s authorization for FINRA to act based on "actual knowledge" that a person "connected to the issuer" — here, Hicks — is "the subject of a pending, adjudicated or settled regulatory action or investigation." FINRA's Reply at 4 n.2. FINRA named Hicks in the deficiency notices sent to DNAX and ZAAG. The Federal Court Reply confirms that Hicks's identity and status was a stated basis for FINRA's conduct. Federal Court Reply at 11.

Yet when Hicks seeks review of conduct FINRA acknowledges was directed at him, FINRA argues he has no standing and no cause of action in federal court. And in this proceeding, FINRA argues that the Shareholders — the very persons FINRA chose to make the basis of its adverse determinations — are not proper parties to seek review. FINRA thus invokes its authority over non-member investors as a predicate for adverse regulatory action while simultaneously ensuring that those investors have no mechanism to challenge it. This is not a neutral application of procedural rules; it is the use of procedural rules to immunize the substantive exercise of FINRA's authority from scrutiny.

The procedural bar FINRA invokes is made more troubling by the sequence in which it operates. FINRA Rule 6490(b)(1) permits not only issuers but also "duly authorized representative[s] of the issuer" to make company-related actions requests and to appeal deficiency notices. Had the Shareholders been designated as authorized representatives before the deficiency notices issued, they would have had access to the very process FINRA now uses to exclude them. But FINRA issued the deficiency notices based on its assessment of Hicks — before Hicks had any opportunity to appear in the Rule 6490 process in any capacity. The bar is

thus self-reinforcing in the most consequential way: FINRA evaluated Hicks, acted adversely on that evaluation, and by the time that action was taken, had already ensured that Hicks had no procedural path to contest the result. The Commission should not lend its imprimatur to a process that operates in this manner.

5. FINRA Misreads *Entrex*, Which the Commission Decided on Mootness, Not Standing

FINRA relies heavily on *Entrex Carbon Market, Inc.*, Exchange Act Release No. 104535 (Jan. 2, 2026), but FINRA itself acknowledges that the Commission in *Entrex* "never addressed the merits of the shareholders' claims." FINRA's Reply at 11 n.7. The Commission dismissed that application because FINRA had processed and announced the Company-Related Actions at issue — the case was moot. *Entrex*, 2026 SEC LEXIS 13, at *2. The Commission did not hold that shareholders categorically lack standing to seek Section 19(d) review, nor that exhaustion requirements applicable to issuers also bar shareholders. Those questions were left open.

Indeed, the Commission's willingness to receive and consider the *Entrex* shareholders' application — proceeding to determine the case was moot rather than immediately dismissing for lack of standing — is itself significant. Had shareholders been categorically excluded from Section 19(d) review, the Commission would have dismissed on that threshold ground without ever reaching mootness. FINRA cannot now cite a case decided on mootness as establishing a categorical standing bar that the Commission never addressed.

FINRA cannot have it both ways. It cites *Entrex* in the same breath that it acknowledges the Commission "never addressed the merits" in that case. *Entrex* is therefore no authority for the proposition that this Commission must dismiss the Shareholders' application.

What *Entrex* does establish — and what FINRA does not contest — is that the Commission's dismissal there "in no way limits the Commission's broad oversight under the

Exchange Act to ensure that FINRA abides by the Exchange Act." *Entrex*, 2026 SEC LEXIS 13, at *3. That statement was made after resolving the case on mootness; it necessarily implies that had the matter not been moot, review would have been available. This proceeding is not moot.

C. What the Commission Should Take from FINRA's Federal Court Positions

Shareholders are not asking the Commission to resolve the Federal Court Action or to take a position on FINRA's immunity defense. They ask only that the Commission consider two consequences of FINRA's cross-forum strategy.

First, FINRA's reliance on SEC oversight as the basis for absolute immunity in federal court is relevant to how the Commission should weigh the balance of interests served by strictly enforcing the exhaustion and standing requirements in this particular case. Whatever force those requirements ordinarily carry, their application here would, in combination with FINRA's federal court arguments, leave no party with any available forum for substantive review of FINRA's Rule 6490 conduct as applied to DNAX and ZAAG. That outcome is not what the Exchange Act's review framework was designed to produce.

Second, FINRA's acknowledgment that its Rule 6490(d)(3)(3) determination was expressly premised on its assessment of Hicks — a non-member, non-issuer investor — means that the practical reach of FINRA's Rule 6490 authority extends to persons who are, by FINRA's own procedural arguments, structurally excluded from any review process. The Commission's oversight obligations under Section 19(h) are most clearly implicated when an SRO acts against identified individuals who have no other avenue for redress.

III. CONCLUSION

The Commission should deny FINRA's Motion to Dismiss. In the alternative, the Commission should exercise its general oversight authority under Section 19(h) of the Exchange Act to examine whether FINRA's Rule 6490 conduct was consistent with the Exchange Act and

the rules promulgated thereunder. FINRA's own arguments in the Federal Court Action demonstrate that the Exchange Act contemplates meaningful Commission oversight of the conduct at issue. Shareholders respectfully ask the Commission to provide it.

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Respectfully submitted,

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