

UNITED STATES OF AMERICA
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

VIRPAX PHARMACEUTICALS, INC.

For Review of Action Taken by

THE NASDAQ STOCK MARKET LLC

Administrative Proceeding
File No. 3-22512

OPPOSITION BRIEF OF THE NASDAQ STOCK MARKET LLC

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Pursuant to the September 24, 2025, Order Scheduling Briefs in this matter, The Nasdaq Stock Market LLC (“Nasdaq”) respectfully submits this brief in opposition to the opening brief of Virpax Pharmaceuticals, Inc. (“Virpax”) supporting its application for review of the delisting of its securities from Nasdaq.¹

INTRODUCTION

Virpax does not dispute that it was out of compliance with Nasdaq’s Equity Rule when Nasdaq staff issued a delisting determination. *See* Nasdaq Rule 5550(b)(1). Nor does Virpax dispute that Nasdaq’s Hearings Panel exercised its discretion to grant Virpax the full 180-day extended compliance period that Virpax requested or that this was the maximum extension permitted under Nasdaq Rule 5815 for regaining compliance with continued listing requirements. *See* Nasdaq Rule 5815(c)(1)(A). And Virpax does not dispute that it failed to regain compliance with the Equity Rule by the end of that extended compliance period on April 1, 2025.

Without a basis to challenge any of these facts, Virpax nevertheless insists that a Nasdaq email on April 2—the day *after* Virpax’s extended compliance period had already expired—that mistakenly purported to grant Virpax a further two-day extension, before Nasdaq quickly corrected that mistake the same day, somehow bound Nasdaq to provide an extension beyond the maximum 180-day period authorized by Nasdaq Rule 5815. Virpax’s application is procedurally barred and substantively meritless.

¹ The Commission’s Order Scheduling Briefs initially set November 24, 2025, as the due date for Nasdaq’s opposition brief. The Commission’s October 1 blanket stay in pending administrative proceedings provided that, for any Commission-ordered deadline in a pending proceeding, “the total number of days that the Commission is subject to a lapse in appropriations shall be added to each such date.” SEC Release No. 34-104162, 2025 WL 2803300 (Oct. 1, 2025). On November 13, the Commission further ordered that all deadlines extended by the 43-day shutdown be further extended for an additional 10 days. *See* SEC Release No. 34-104177, 2025 WL 3191887 (Nov. 13, 2025). Accordingly, the deadline for Nasdaq’s brief in opposition was extended to and including January 16, 2026.

At the outset, Virpax's application for review must be dismissed because Virpax deliberately chose not to exhaust its available administrative remedies before Nasdaq. The Hearings Panel's delisting decision specifically informed Virpax of the opportunity under Nasdaq's rules to appeal that decision to Nasdaq's Listing Council. Virpax elected to forgo its appellate rights, which Virpax's public securities filings make clear was a conscious choice. And Virpax has presented no argument in its brief to excuse its failure to exhaust those concededly available remedies. These deliberate choices have consequences: Virpax has failed to exhaust its remedies and waived any argument for excusing its failure to do so. The Commission need go no further to dismiss the application for review.

Virpax fares no better on the merits. The delisting decision is consistent with Nasdaq's rules because the plain language of Nasdaq Rule 5815 provides a 180-day limit on the discretionary extended compliance period a Nasdaq Hearings Panel can grant. Virpax requested, and received, the full extension provided by the rule. Both Nasdaq and Virpax repeatedly expressed their understanding that Nasdaq's rules did not provide the opportunity for a further extension beyond that limit. The unavailability of additional extensions is not affected by Nasdaq's April 2 email mistakenly stating that Virpax would be granted a further two-day extension. That email could not override the Commission-approved limit of a 180-day extended compliance period in Nasdaq Rule 5815. In addition, Nasdaq sent the erroneous email *after* the extended compliance period granted by the Hearings Panel had already expired—so it could not have induced detrimental reliance by Virpax—and Nasdaq promptly corrected the mistake the same day by telephone and in writing.

Virpax's reliance on Nasdaq Rule 5840(e)(3) to support its supposed entitlement to an additional extension is misplaced. Virpax did not cite that rule when requesting a further extension

of the compliance period, and Nasdaq did not cite the rule when mistakenly purporting to grant the two-day extension via email. That makes sense because Rule 5840(e)(3) is categorically inapplicable to the compliance period for Nasdaq's continued listing requirements. The rule affords a Hearings Panel the discretion to grant an extension for companies to take "procedural actions" when the Office of General Counsel finds that there are "extenuating circumstances." Nasdaq Rule 5840(e)(3). It is inapplicable here because compliance with the Equity Rule is not a "procedural action[]," Nasdaq's Office of General Counsel never made the predicate finding, and no "extenuating circumstances" were present. There is nothing arbitrary, unfair, or otherwise improper about Nasdaq's faithful application of the time limits in its Commission-approved rules to delist Virpax.

Finally, Virpax's private nondelegation challenge to Nasdaq's enforcement of its listing standards also fails. As the Commission has recently held in analogous proceedings, that argument is waived because Virpax failed to raise it before Nasdaq, and it fails on the merits because the Commission and courts have repeatedly rejected private nondelegation challenges to self-regulatory organizations, like Nasdaq, that operate subject to the Commission's pervasive oversight.

The application for review should be dismissed.

BACKGROUND

I. Nasdaq's Listing Rules And Delisting Procedures

Nasdaq is a national securities exchange registered as a self-regulatory organization under the Securities Exchange Act ("Exchange Act"). *See* 15 U.S.C. §§ 78f, 78s; *see also* SEC Release No. 34-39326, 62 Fed. Reg. 62,385 (Nov. 21, 1997). Nasdaq has promulgated a comprehensive set of rules governing the listing and delisting of companies' securities on Nasdaq's exchange. *See*

Nasdaq Rule 5000 *et seq.*² The Commission has reviewed and approved those rules under the procedures prescribed in the Exchange Act, *see, e.g.*, SEC Release No. 34-53128, 71 Fed. Reg. 3,550 (Jan. 23, 2006), which authorizes Nasdaq and other securities exchanges to maintain standards for companies that seek to list their securities for public sale on their exchange, *see DL Cap. Grp., LLC v. Nasdaq Stock Mkt.*, 409 F.3d 93, 95 (2d Cir. 2005); 15 U.S.C. § 78l(d).

Companies that have obtained a listing on Nasdaq “must continue to meet” various listing requirements, including the Equity Rule, which requires a minimum stockholder’s equity of \$2.5 million. Nasdaq Rule 5550(b)(1). In the alternative, companies can show that they have a market value of listed securities of at least \$35 million or “[n]et income from continuing operations of \$500,000 in the most recently completed fiscal year or in two of the three most recently completed fiscal years.” Nasdaq Rule 5550(b)(2)–(3).

Nasdaq’s rules provide that for “quantitative deficiencies from standards that do not provide a compliance period,” including the Equity Rule, “the Listing Qualifications Department may accept and review a plan to regain compliance when a Company is deficient.” Nasdaq Rule 5810(c)(2)(A), (A)(i); *see also* Nasdaq Rule IM-5810-2. Those plans “must be provided generally within 45 calendar days.” Nasdaq Rule 5810(c)(2)(A). “If the Company does not regain compliance within the time period provided by all applicable Staff extensions, Staff will immediately issue a Staff Delisting Determination indicating the date on which the Company’s securities will be suspended unless it requests review by a Hearings Panel.” Nasdaq Rule 5810(c)(2)(E).

² Nasdaq’s Listing Rules are publicly available on Nasdaq’s website. *See* <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>.

In addition, Nasdaq's Bid Price Rule requires companies listed on its exchange to maintain a minimum bid price of \$1. Nasdaq Rule 5550(a)(2). Nasdaq's rules provide that "[a] failure to meet the continued listing requirement for minimum bid price shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days" and generally provide companies with a 180-day cure period to regain compliance with the Bid Price Rule. Nasdaq Rule 5810(c)(3)(A). To demonstrate compliance after a deficiency, the company's stock must trade at or above \$1 for 10 consecutive business days. *Id.*

Nasdaq's rules provide a multi-step review and appeal process for delisting companies that no longer meet Nasdaq's listing requirements. *See* Nasdaq Rule 5801 (summarizing process). Nasdaq staff are responsible for identifying and notifying companies of deficiencies that could warrant delisting, such as a company's failure to meet Nasdaq's Equity Rule. *See* Nasdaq Rules 5550, 5810. If the company disagrees with the staff's determination that delisting is appropriate, it may request review by a Hearings Panel of outside, independent experts. Nasdaq Rules 5805, 5815. The experts are not employed by Nasdaq, but are assisted at the hearing by a Nasdaq Hearings Attorney who acts as a neutral advisor regarding Nasdaq's rules. Nasdaq_Virpax_000049. If the company does not prevail before the Hearings Panel, it may further appeal to the Nasdaq Listing Council within 15 days of the Panel decision. *See* Nasdaq Rule 5820. Alternatively, within 45 days of the Panel decision, the Listing Council may independently call the decision for review. *Id.* If the Listing Council upholds the delisting decision, Nasdaq's Board of Directors may call that decision for review. *See* Nasdaq Rule 5825.

Throughout this process of review and appeal within Nasdaq, listed companies are entitled to notice and the opportunity to provide written submissions (and sometimes oral presentations) to the reviewing bodies. *E.g.*, Nasdaq Rule 5820 (explaining notice, written submissions, and oral

hearings before the Listing Council). “If the Office of General Counsel determines that notice required to be provided under this Section was not properly given or that other 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 or an Adjudicator, as applicable, to allow the Company or the Adjudicator the time contemplated by these rules.” Nasdaq Rule 5840(e)(3). But in all cases, the Hearings Panel can only “grant an exception to [a] continued listing standard[] for a period not to exceed 180 days from the date of the Staff Delisting Determination.” Nasdaq Rule 5815(c)(1)(A).

Nasdaq’s decision to delist a company becomes final when, “after a Delisting Determination has been issued, all available review and appeal procedures and periods available under th[e] Rules have expired.” Nasdaq Rule 5830. When that occurs, Nasdaq is required to provide notice to the Commission using Form 25. *See* 17 C.F.R. § 240.19d-1(j)-(k). Under the Commission’s rules, “[a]n 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.” *Id.* § 240.12d2-2(d)(1). The “10-day public notice requirement” that follows the filing of Form 25 is designed to “provide an opportunity for the Commission to impose such terms for the protection of investors” as it deems appropriate or to postpone the delisting to facilitate further review by the Commission. SEC Release No. 34-52029, 70 Fed. Reg. 42,456, 42,459 (July 22, 2005); *see also* 17 C.F.R. § 240.12d2-2(d)(3). These same procedures apply “[i]f the company does not appeal a Decision to delist and the Listing Council does not call the matter for review.” Nasdaq Rule 5815(d)(2).

Once a delisting determination becomes final under Nasdaq’s rules, the delisted company can ask the Commission to review the exchange’s decision, 15 U.S.C. § 78s(d); 17 C.F.R.

§ 201.420, and it can further request that the Commission grant a stay of the delisting during the 10-day period between the filing of Form 25 and the effective date of the delisting; 17 C.F.R. § 201.401; *see, e.g., In re Minim, Inc.*, Release No. 34-101502, 2024 WL 4650996 (Nov. 1, 2024) (granting administrative stay of delisting determination during 10-day period preceding delisting). If the Commission upholds the delisting decision, the delisted company can petition for review in a federal court of appeals. 15 U.S.C. § 78y(a)(1).

Following delisting, companies can reapply for listing on Nasdaq. Or, in lieu of listing on Nasdaq's exchange, companies are free to list with a competitor exchange (such as the New York Stock Exchange), publicly trade over the counter without listing, or go private.

II. Virpax's Listing And Delisting

Virpax was initially listed on Nasdaq's exchange in 2021. *See* Virpax Pharmaceuticals, Inc., Form 10-K (2023), https://www.sec.gov/Archives/edgar/data/1708331/000121390024025781/ea0201565-10k_virpax.htm. Nasdaq delisted Virpax on July 31, 2025, based on its failure to comply with Nasdaq's Equity Rule, even after it received the longest extension available under Nasdaq's rules. Prior to its delisting, Virpax also had a series of noncompliance events that did not result in delisting, including failures to comply with Nasdaq's \$1 minimum bid-price requirement in December 2022, April 2023, June 2024, and October 2024; with Nasdaq's periodic filing requirement in December 2023; and with the independent director and audit committee requirements in November 2024. Nasdaq_Virpax_000032.

Nasdaq staff first notified Virpax of the company's noncompliance with the Equity Rule's \$2.5 million stockholders' equity requirement on April 2, 2024. Nasdaq_Virpax_000002; Nasdaq_Virpax_000037; Nasdaq Rule 5550(b). Based on materials submitted by Virpax in May, Nasdaq staff granted Virpax's request for an extension until September 30 to comply with the rule. Nasdaq_Virpax_000002; Nasdaq_Virpax_000062.

Virpax “did not meet the terms of the extension” and failed to “demonstrate compliance” by the extended deadline. Nasdaq_Virpax_000002. Accordingly, on October 3, 2024, Nasdaq staff informed Virpax that it would be delisted based on its violation of the Equity Rule. Nasdaq_Virpax_000001–05. The decision notified Virpax of its opportunity to appeal to the Nasdaq Hearings Panel and that doing so would automatically stay the suspension of trading in Virpax’s securities and the filing of Form 25 with the Commission. Nasdaq_Virpax_000002–03. On October 4, Nasdaq sent Virpax a separate bid-price deficiency notice, which provided a 180-day grace period for compliance until April 2, 2025. Nasdaq_Virpax_000020 n.1; Nasdaq_Virpax_000032 n.5.

Virpax requested and received a hearing before the Hearings Panel, which occurred on December 3, 2024. *See* Nasdaq_Virpax_000012. Both Virpax and Nasdaq staff provided the Hearings Panel with written submissions ahead of the hearing. *Id.*; Nasdaq_Virpax_000019–28 (Virpax submission); Nasdaq_Virpax_000029–46 (Nasdaq staff submission). The staff submission noted that “[p]er Listing Rule 5815(c)(1)(A), the Panel has the discretion to grant the Company an exception to the continued listing standards for a period not to exceed 180 days from the date of the Staff Delisting Determination, or in this case, until April 1, 2025.” Nasdaq_Virpax_000031 n.2.

Virpax presented to the Hearings Panel its compliance plans for both its stockholders’ equity and minimum bid-price deficiencies. Nasdaq_Virpax_000086–92. Virpax’s compliance plan for increasing stockholders’ equity involved a series of planned fundraising events and reduced expenses. Nasdaq_Virpax_000086–87. To regain compliance with the minimum bid-price requirement, Virpax planned to execute a reverse stock split by January 29, 2025. Nasdaq_Virpax_000090. In its slides accompanying its Hearings Panel presentation, Virpax

explicitly stated that it “underst[ood] that the Panel’s discretion with respect to Stockholders’ Equity compliance extends through April 1, 2025 (i.e., 180 days from the date of the Staff’s delist determination).” Nasdaq_Virpax_000092. Virpax requested an exception through April 1 to regain compliance with the Equity Rule. *Id.* Virpax did not seek a further exception to the 180-day compliance period for the minimum bid-price requirement, which was set to expire on April 2.

As in its slides, Virpax repeatedly acknowledged in its oral presentation to the Hearings Panel that April 1 was the longest compliance extension that the Panel could grant for the stockholders’ equity requirement. *See* Nasdaq_Virpax_000098 (Tr. 6:16–21) (Donohoe: “So, in short, we are here today to request an exception through April 1 to complete both offerings, thereby demonstrating our ability to sustain long-term equity compliance and we will have addressed the bid price issue before the end of the grace period.”); Nasdaq_Virpax_000111 (Tr. 19:3–16) (Donohoe: “So, based on the foregoing, Virpax Pharmaceuticals, Inc. respectfully requests an exception through April 1, 2025 to evidence compliance with the stockholders’ equity and bid price requirements. Again, we’re planning to complete the bid price return to compliance within the grace period that we’re currently under. So, I guess we technically don’t need an exception for bid price, but we’ll demonstrate at that time, by April 1, our compliance with all other applicable requirements for continued listing on the Nasdaq Capital Market.”); Nasdaq_Virpax_000115 (Tr. 23:10–11) (Donohoe: “Our request is going to be out and through April 1.”).

The Hearings Panel issued its decision on January 6, 2025, granting continued listing, subject to demonstrating compliance with the Equity Rule on the timetable Virpax had requested— “[o]n or before April 1, 2025.” Nasdaq_Virpax_000123.

On March 27, Virpax emailed the Hearings Panel asking for a “1-day extension for bid price compliance.” Nasdaq_Virpax_000125. The email stated that Virpax completed a reverse stock split on March 21 and would have the requisite 10 days of trading above \$1 by April 3, “one day past the [April 2] expiration of their current grace period” for compliance with the Bid Price Rule. *Id.* The email further explained that the delay was caused by the “required DTC eligibility process for the new post-split CUSIP number.” *Id.* “Regarding equity compliance, the Company [wa]s seeking to close an offering by April 1, 2025, to demonstrate compliance with the Equity Rule as required by the Panel’s decision.” *Id.*

At 2:25 p.m. on April 1—the final day for Virpax to demonstrate compliance with the Equity Rule under the 180-day discretionary extension authorized by Nasdaq Rule 5815(c)(1)(A), and the day before the expiration of the 180-day grace period to demonstrate compliance with the Bid Price Rule under Nasdaq Rule 5810(c)(3)(A)—Virpax again emailed the Hearings Panel. Virpax reiterated its request for an extension of the April 2 compliance deadline for the Bid Price Rule, and, for the first time, also requested an extension of the April 1 deadline to demonstrate compliance with the Equity Rule. Virpax explained that it “plan[ned] to price a public offering to demonstrate Equity compliance, but investors are concerned about bid price compliance.” Nasdaq_Virpax_000126. Virpax repeated that it would demonstrate compliance with the Bid Price Rule (10 days of trading above \$1) on April 3, and “[u]nderstanding the Panel limit is 180-days, or through April 1, 2025, for Equity compliance,” Virpax nevertheless asked for “an extension through April 3, 2025, to obtain a bid price compliance letter and to price the offering.” *Id.* (emphasis added). Virpax did not identify Nasdaq Rule 5840(e)(3)—or any other Nasdaq rule—as the basis for this extension request.

A Nasdaq Hearings Administrator responded to Virpax on April 1 at 2:55 p.m., stating that she would send the inquiry to the Panel, Nasdaq_Virpax_000127, but Nasdaq did not provide a substantive response prior to the expiration of the 180-day extension granted by the Hearings Panel under Nasdaq Rule 5815(c)(1)(A) for Virpax to regain compliance with the Equity Rule.

Following the expiration of the 180-day extension period on April 1, the Hearings Administrator emailed Virpax on the morning of April 2, erroneously stating that an “[e]xtension until 4/3 has been granted by the Panel.” Nasdaq_Virpax_000129. Nasdaq promptly corrected that misstatement later that day by telephone and in writing. Less than nine hours later, at 5:52 p.m., the Hearings Panel issued its delisting decision based on Virpax’s failure to demonstrate compliance with the Equity Rule by April 1. Nasdaq_Virpax_000131–33. The decision explained that “earlier today the Company was incorrectly informed that the requested extension would be granted” and recounted that “[i]n a subsequent telephone conversation, the advisor to the Company was informed that this communication was in error because the Panel does not have the authority under Nasdaq’s rules to grant the requested extension.” Nasdaq_Virpax_000132 n.1. The Hearings Panel further reasoned that “April 1st represented the full extent of the Panel’s discretion to grant continued listing while the Company was non-compliant with Nasdaq’s continued listing requirements, and the Panel therefore has no choice but to delist the Company’s securities.” Nasdaq_Virpax_000132. The decision detailed Virpax’s opportunity to “request that the Nasdaq Listing and Hearing Review Council review this decision” within 15 days of the decision, as well as the possibility that the Listing Council would call the decision for review within 45 days of the decision. Nasdaq_Virpax_000132–33.

Virpax’s April 3 8-K disclosed the Hearings Panel’s April 2 decision to delist Virpax “as a result of the Company’s failure to regain compliance with the minimum stockholder’s equity

requirement under Nasdaq Listing Rule 5550(b)(1).” Virpax Pharmaceuticals, Inc., Amended Form 8-K (Apr. 3, 2025), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001708331/000173112225000524/e6490_8-ka.htm. Virpax further acknowledged the availability of Nasdaq’s internal appeal process, but stated that “[t]he Company does not intend to request a review of the Panel’s decision by the Nasdaq Listing and Hearing Review Council. As a result, the delisting is expected to become effective following the filing of the Form 25 with the SEC.” *Id.* Consistent with this representation, Virpax did not appeal the Hearings Panel’s decision to the Listing Council, and the Listing Council did not independently call the matter for review.

Three months later, Nasdaq notified Virpax that a press release announcing the delisting decision was forthcoming. Nasdaq_Virpax_000134–35. And on July 21, Nasdaq filed a Form 25 with the Commission noticing Virpax’s removal from listing on Nasdaq’s exchange. Nasdaq_Virpax_000136. Following Nasdaq’s filing of Form 25 on July 21, the delisting went into effect on July 31, without intervention by the Commission or any request for a stay by Virpax. Nasdaq_Virpax_000137. Thereafter, on August 20, Virpax filed this action before the Commission seeking review of its delisting.

LEGAL STANDARD

A person “aggrieved” by a self-regulatory organization’s final decision “prohibit[ing] or limit[ing] any person in respect to access to services offered by such organization,” including a delisting decision, can seek review by the Commission within thirty days of the date that the self-regulatory organization files the required notice with the Commission. 15 U.S.C. § 78s(d)(1)–(2); 17 C.F.R. § 201.420. The Commission’s review of the self-regulatory organization’s decision is *de novo*. *Otto v. SEC*, 253 F.3d 960, 964 (7th Cir. 2001).

ARGUMENT

The Commission should dismiss Virpax's application for review.

I. Virpax's Deliberate Choice To Forgo Its Administrative Remedies Compels Dismissal.

A straightforward application of the Commission's exhaustion requirements compels dismissal of Virpax's application for review because Virpax publicly acknowledged Nasdaq's Commission-approved appeal procedures, deliberately chose to forgo them, and has presented no argument for excusing its failure to exhaust those concededly available remedies.

Dismissing an "application for review for failure to exhaust the remedies made available by" the relevant self-regulatory organization is consistent with "both [the Commission's] practice in reviewing SROs and general principles of administrative law." *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621 (2d Cir. 2004); *see also In re MFS Sec. Corp.*, Release No. 34-47626, 2003 WL 1751581, at *6 (Apr. 3, 2003) (dismissing application for "failure to exhaust the procedures offered by the [New York Stock] Exchange").

Nasdaq "is a self-regulatory organization to which Congress has delegated authority to police" its members and listed companies "for violation of [Nasdaq]'s Commission-approved rules." *MFS Sec.*, 380 F.3d at 621. The Commission's requirement that persons seeking review of self-regulatory organizations' actions "fully exhaust the remedies made available by those organizations before seeking Commission review is a sensible way of preventing circumvention of this congressional scheme." *Id.* The Commission's exhaustion requirement "promotes the development of a record in a forum particularly suited to create it, upon which the Commission and, subsequently, the courts can more effectively conduct their review"; "provides SROs with the opportunity to correct their own errors prior to review by the Commission"; and "is in harmony with Congress's delegation of authority to SROs to settle, in the first instance, disputes relating to

their operations.” *Id.* at 621–22. The Commission therefore routinely “applie[s] an exhaustion requirement in its review of disciplinary actions by SROs.” *Id.* at 621 (collecting cases).

For example, the Commission applied an exhaustion requirement to dismiss an action by a registered representative aggrieved by a New York Stock Exchange Hearings Panel decision because he failed to timely apply for review to the exchange’s Board of Directors. *In re Fox*, Release No. 34-54840, 2006 WL 3455114 (Nov. 30, 2006). The Commission concluded that the applicant’s “failure to exhaust his remedies at the NYSE precludes our consideration of his application for review” because “[t]he precedent on this issue is well settled: ‘It is clearly proper to require that a statutory right to review be exercised in an orderly fashion, and to specify procedural steps which must be observed as a condition to securing review.’” *Id.* at *2. Because the applicant “did not follow the clear steps provided by NYSE,” the Commission dismissed his appeal. *Id.* The Commission has consistently applied this exhaustion requirement where applicants had notice of the administrative procedures available to them but failed to avail themselves of those procedures. *E.g., In re Hsu*, Release No. 34-78899, 2016 WL 5219504 (Sept. 21, 2016); *In re Cassuto*, Release No. 34-48087, 2003 WL 21474389 (June 25, 2003).

This exhaustion requirement squarely applies to Nasdaq’s review procedures for delisting determinations and requires dismissal of Virpax’s application. Nasdaq’s Commission-approved rules provide for two levels of review after a Hearings Panel decision: appeal as of right to the Listing Council and discretionary review by the Board of Directors. Nasdaq Rules 5820, 5825. The Hearings Panel decision informed Virpax of its opportunity to appeal. Nasdaq_Virpax_000132–33. Virpax expressly acknowledged those appeal procedures in its securities filings and publicly announced that it “d[id] not intend to request a review of the Panel’s decision by the Nasdaq Listing and Hearing Review Council.” Virpax Pharmaceuticals, Inc.,

Amended Form 8-K, *supra*. Because Virpax has “fail[ed] to exhaust the remedies made available by” Nasdaq for review of delisting decisions, the Commission should dismiss the application. *MFS Sec.*, 380 F.3d at 621.

Virpax makes no argument in its opening brief to excuse its failure to exhaust these known remedies and has thus waived any attempt to argue for an exception to the Commission’s exhaustion requirements. Any such argument in Virpax’s reply brief would be untimely. *See* Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (“[E]xcept as otherwise determined by the Commission in its discretion, any argument raised for the first time in a reply brief shall be deemed to have been waived.”); *In re Jones*, Release No. 34-91045, 2021 WL 396767, at *3 n.17 (Feb. 2, 2021) (arguments raised for the first time in a reply brief are waived); *In re Potomac Cap. Markets, LLC*, Release No. 34-91172, 2021 WL 666510, at *4 n.30 (Feb. 19, 2021) (same).

The Commission should dismiss Virpax’s application because it failed to exhaust its administrative remedies.

II. All Of Virpax’s Substantive Arguments Fail.

If the Commission reaches the merits, it should dismiss Virpax’s application for several additional reasons.

A. Nasdaq’s Delisting Of Virpax’s Securities Was Consistent With Nasdaq’s Commission-Approved Rules.

Virpax’s primary contention is that a single email from Nasdaq mistakenly purporting to grant Virpax’s request for an additional two-day extension—which Nasdaq sent *after* the expiration of the April 1, 2025, compliance deadline and corrected that *same day*—somehow bound Nasdaq to provide an extension beyond the 180-day period authorized by its Commission-approved rules. *See* Virpax Br. 11-14. That argument fails because Nasdaq Rule 5815(c)(1)(A) prevented the Hearings Panel from granting Virpax an extension beyond April 1 to come into

compliance with the Equity Rule. Nothing in Rule 5840(e)(3)—on which Virpax relies here but did not invoke when requesting an extension from Nasdaq—alters that conclusion.

The plain language of Rule 5815(c)(1)(A) limits the “scope of the hearings panel’s discretion” and provides that when a Hearings Panel is reviewing “a deficiency related to continued listing standards, the Hearings Panel may, where it deems appropriate . . . grant an exception to the continued listing standards for a period *not to exceed 180 days* from the date of the Staff Delisting Determination with respect to the deficiency for which the exception is granted.” Nasdaq Rule 5815(c)(1)(A) (capitalization altered; bolding removed; emphasis added). Here, the Staff Delisting Determination regarding Virpax’s noncompliance with the Equity Rule—one of Nasdaq’s continued listing standards, Nasdaq Rule 5550(b)(1)—was issued on October 3, 2024, which means that the Hearings Panel had discretion to grant an exception for Virpax’s noncompliance with the Equity Rule until April 1, 2025—but no longer. Nasdaq_Virpax_000001–05. As the Hearings Panel explained, “April 1st represented the full extent of the Panel’s discretion to grant continued listing while the Company was non-compliant with Nasdaq’s continued listing requirements.” Nasdaq_Virpax_000132.

The Hearings Panel’s straightforward application of Rule 5815(c)(1)(A) as limiting its discretion to granting an extension of no more than 180 days is consistent with Nasdaq’s statements to Virpax during the administrative process and Virpax’s own contemporaneous statements in its written and oral presentations at the hearing. Nasdaq staff provided Virpax notice of Rule 5815(c)(1)(A), as well as Nasdaq’s interpretation of the rule and its application to Virpax’s particular circumstances, in its pre-hearing submission. See Nasdaq_Virpax_000031 n.2 (“Per Listing Rule 5815(c)(1)(A), the Panel has the discretion to grant the Company an exception to the continued listing standards for a period not to exceed 180 days from the date of the Staff Delisting

Determination, or in this case, until April 1, 2025.”). Consistent with staff’s interpretation of Rule 5815(c)(1)(A), the Hearings Panel’s decision of January 6, 2025, granted the maximum 180-day extension, requiring compliance with the Equity Rule “[o]n or before April 1, 2025.” Nasdaq_Virpax_000123.

Virpax repeatedly acknowledged the April 1 deadline and Nasdaq’s lack of discretion under the rules to provide a further extension. Virpax’s compliance-plan presentation slides for the Hearings Panel explicitly stated that it “underst[ood] that the Panel’s discretion with respect to Stockholders’ Equity compliance extends through April 1, 2025 (i.e., 180 days from the date of the Staff’s delist determination).” Nasdaq_Virpax_000092. In accordance with those slides, Virpax only asked for an extension through April 1 at the hearing, *id.*, and acknowledged that limitation in its oral presentation, *see* Nasdaq_Virpax_000098 (Tr. 6:16–21); Nasdaq_Virpax_000111 (Tr. 19:3–16); Nasdaq_Virpax_000115 (Tr. 23:10–11). It then did so again in its last-minute request for a further extension beyond April 1. *See* Nasdaq_Virpax_000130 (“Understanding the Panel limit is 180-days, or through April 1, 2025, for Equity compliance, we are seeking an extension through April 3, 2025, to . . . regain[n] compliance with both the bid price and equity issues.”).

Virpax is mistaken in invoking Nasdaq Rule 5840(e)(3) as a supposed escape hatch from the 180-day limit established in Rule 5815(c)(1)(A). As an initial matter, Virpax did not cite Nasdaq Rule 5840(e) when requesting a two-day extension of time from Nasdaq on April 1, 2025. *See* Nasdaq_Virpax_000126. It is therefore barred from invoking that rule here. *See, e.g., In re Williams*, Release No. 34-89238, 2020 WL 3820989, at *5 (July 7, 2020) (refusing to consider arguments where applicant “did not timely raise these issues in the first instance to FINRA through its administrative process”).

Virpax’s arguments under Rule 5840(e)(3) also fail on the merits. That rule provides that “[i]f the Office of General Counsel determines that notice required to be provided under this Section was not properly given or that other 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 or an Adjudicator, as applicable, to allow the Company or the Adjudicator the time contemplated by these rules.” Nasdaq Rule 5840(e)(3). For multiple reasons, Rule 5840(e)(3) did not authorize the additional two-day extension of time, to April 3, 2025, that a Nasdaq Hearings Administrator fleetingly and mistakenly purported to grant via email.

First, compliance with the Equity Rule is not a “procedural action[]” by Virpax within the meaning of Rule 5840(e)(3)—it is a substantive standard required for “continued listing” on Nasdaq’s exchange. Nasdaq Rule 5550(b)(1) (capitalization altered). Unlike “written submissions” and the “scheduling of hearings,” Nasdaq Rule 5840(e)(3), the Equity Rule is not a rule of ““process for enforcing rights and duties”” or for ““administering remedy and redress.”” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality op.) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) (distinguishing procedural rules from substantive standards)). Rule 5840(e)(3) thus does not provide Nasdaq the authority to afford listed companies a period of more than 180 days after a Staff Delisting Decision to cure noncompliance with the Equity Rule. *See* Nasdaq Rule 5815(c)(1)(A).

Second, the April 2 email does not satisfy Rule 5840(e)(3)’s predicate requirement that “the Office of General Counsel determine[] that notice required to be provided under this Section was not properly given or that other extenuating circumstances exist.” As the record makes clear, the Nasdaq Hearings Administrator sent Virpax’s request for an additional two-day extension to

the Hearings Panel, Nasdaq_Virpax_000127, not the Office of General Counsel. Without the Office of General Counsel's predicate finding, the Hearings Panel had no authority to grant an extension under Rule 5840(e)(3). Indeed, as Virpax explains, it was the Office of General Counsel's position that Virpax was *not* entitled to an additional two-day extension. *See* Virpax Br. 7–8 (“Arnold Golub, Nasdaq’s deputy general counsel, . . . 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.’”).

Third, no “extenuating circumstances” were present as required by Rule 5840(e)(3). As detailed above, the compliance deadline of April 1 was well known to and repeatedly acknowledged by Virpax in advance of April 1. Virpax’s only justification for seeking an additional extension was that “investors are concerned about bid price compliance.” Nasdaq_Virpax_000126. In other words, Virpax was seeking to bootstrap its noncompliance with Nasdaq’s Bid Price Rule into an extension of time for complying with its Equity Rule. That hardly constitutes an “extenuating circumstance.” Nor can Virpax demonstrate any reliance on the email incorrectly stating that Virpax had been granted a further two-day extension of time because its 180-day extended compliance period had already expired when it received the email on April 2, which means that the erroneous April 2 email could not possibly have affected Virpax’s efforts to comply with the Equity Rule in the operative 180-day compliance period that expired on April 1.

The delisting decision was therefore fully consistent with Nasdaq’s rules.

B. Nasdaq’s Decision To Delist Virpax’s Securities Was Neither Arbitrary And Capricious Nor The Product Of Unfair Procedures.

Virpax further argues that Nasdaq’s retraction of the erroneous April 2 email was arbitrary and capricious for lack of explanation, Virpax Br. 13, but that contention is belied by the reasoning provided in the Hearings Panel’s decision. As the Hearings Panel explained, the statement in the

April 2 email purporting to grant an additional two-day extension was a mistake and was inconsistent with the Hearings Panel's authority under Nasdaq's rules. *See* Nasdaq_Virpax_000132 n.1 (“In a subsequent telephone conversation, the advisor to the Company was informed that this communication was in error because the Panel does not have the authority under Nasdaq's rules to grant the requested extension.”). Because “April 1st represented the full extent of the Panel's discretion to grant continued listing,” the Panel “ha[d] no choice but to delist” Virpax's securities. Nasdaq_Virpax_000132. Nasdaq's quick rectification of its harmless email error and faithful application of the plain language of its Commission-approved rules are neither unexplained nor arbitrary.

For many of the same reasons, Virpax was not subjected to unfair procedures. *See* Virpax Br. 14. There is nothing “unfair” about Nasdaq's adherence to the limits imposed by its Commission-approved rules. Like Nasdaq's other delisting rules, the Commission found in approving Rule 5815(c)(1)(A) that the rule—including its prohibition on extensions of more than 180 days for companies to regain compliance with continued listing standards—was designed to “promote just and equitable principles of trade” and “protect investors and the public interest.” 15 U.S.C. § 78f(b)(5); *see also* SEC Release No. 34-61446, 75 Fed. Reg. 6,072, 6,076 (Jan. 29, 2010) (approving maximum 180-day extension in Rule 5815(c)(1), while emphasizing that “[w]e also continue to expect Nasdaq, as they have represented, to monitor companies that are out of compliance and delist them promptly should there be public interest or other concerns that make continued trading unwarranted”). The 180-day limit reflects the public interest in the prompt enforcement of Nasdaq's listing standards, which the Commission has emphasized is “important given investor expectations regarding the nature of securities that have achieved an exchange listing, and the role of an exchange in overseeing its market and assuring compliance.” SEC

Release No. 34-65708, 76 Fed. Reg. 70,799, 70,802 (Nov. 15, 2011). As the Commission explained in approving another Nasdaq listing rule, “[a]llowing a company that will not be able to demonstrate compliance with the Exchange’s listing standards to . . . extend the delisting review process . . . would raise issues under the Exchange Act, including investor protection concerns.” SEC Release No. 34-90201, 85 Fed. Reg. 67,024, 67,029 (Oct. 21, 2020).

In accordance with those important policies and the plain language of Rule 5815(c)(1)(A), the Hearings Panel determined that it could not grant Virpax an extension longer than 180 days to attain compliance with Nasdaq’s Equity Rule. Nasdaq’s decision to enforce the 180-day time limit—which it was required to do under the Exchange Act, *see* 15 U.S.C. § 78s(g)(1)—was not remotely unfair, especially where Virpax repeatedly displayed awareness of the limit and has not demonstrated any reliance on the erroneous email stating that it had been granted a further two-day extension that Nasdaq quickly retracted later the same day.

C. Nasdaq’s Application Of Its Commission-Approved Delisting Rules Complies With The Private Nondelegation Doctrine.

Finally, Virpax raises a constitutional challenge to Nasdaq’s delisting procedures under the private nondelegation doctrine. Virpax Br. 15-18. To begin with, like all of Virpax’s other arguments, Virpax’s private nondelegation challenge fails because Virpax forfeited this argument by failing to raise it before Nasdaq. As the Commission recently confirmed, “[c]hallenges premised on constitutional claims are not exempt from ‘ordinary principles of waiver and forfeiture.’” *In re Kielczewski*, Release No. 34-104352, 2025 WL 3537495 at *13 (Dec. 9, 2025) (citation omitted) (holding that “[a]s a threshold matter, Kielczewski forfeited these [private nondelegation] arguments by failing to raise them before FINRA”).

Virpax’s private nondelegation challenge also fails because the SEC’s pervasive control over Nasdaq’s listing rules and their enforcement means that Nasdaq operates in a constitutionally

permissible subordinate role to the Commission. The Supreme Court recently reaffirmed in *FCC v. Consumers' Research*, 606 U.S. 656 (2025), that Congress may afford a private entity a role in executing a regulatory program, provided that the entity “function[s] subordinately to,” and is under the “authority and surveillance” of, a governmental body. *Id.* at 692 (reaffirming *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)). There, the Court rejected a private nondelegation challenge to the Universal Service Administrative Company (“USAC”)—a private company that assists the FCC in administering the Universal Service Fund—because USAC is “broadly subordinate” to the FCC, which, upon request of “anyone aggrieved by an action” of USAC, reviews that action “*de novo.*” *Id.* at 692–93.

Under the Supreme Court’s standards, Virpax’s private nondelegation challenge fails because Nasdaq, like USAC, is “broadly subordinate” to the federal government. As courts have recognized, the Commission “retains formidable oversight power to supervise, investigate, and discipline” stock exchanges like Nasdaq “for any possible wrongdoing or regulatory missteps.” *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 101-02 (2d Cir. 2007) (Sotomayor, J.). Among other regulatory powers, the Commission must approve Nasdaq’s rules and “may abrogate, add to, and delete from” those rules as it deems necessary. 15 U.S.C. § 78s(b)(1), (c). Indeed, the Commission specifically approved the Equity Rule at issue here, as well as the rules governing Nasdaq’s review process and the compliance period in Rule 5815. SEC Release No. 34-61446, 75 Fed. Reg. at 6,076 (approving Nasdaq’s proposal “increasing from 105 to 180 the maximum number of calendar days for which staff can grant an extension of time [to regain compliance] from its initial notification of non-compliance”); SEC Release No. 34-44499, 66 Fed. Reg. 35,819, 35,820–21 (July 9, 2001) (approving Nasdaq’s “proposal to move from a net tangible assets standard to a stockholders’ equity standard as part of its listing requirements,” including a continued listing

requirement of “\$2.5 million in stockholders’ equity”). If Nasdaq fails to comply with its own rules, the Commission is authorized to impose sanctions that include the suspension and termination of its registration as a self-regulatory organization. *See* 15 U.S.C. § 78s(h)(1).

The Commission’s extensive oversight cabins Nasdaq’s self-regulatory authority to a constitutionally permissible subordinate role. For this reason, courts have repeatedly rejected private nondelegation challenges to self-regulatory organizations. *E.g.*, *Sorrell v. SEC*, 679 F.2d 1323, 1325 (9th Cir. 1982); *First Jersey Sec. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012–13 (3d Cir. 1977); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952). The Commission has repeatedly come to the same conclusion in rejecting private nondelegation challenges to FINRA. *See, e.g.*, *In re Kielczewski*, Release No. 34-104352, 2025 WL 3537495, at *13 (“Courts have repeatedly recognized that the relationship between FINRA and the Commission satisfied these private non-delegation principles.”); *In re Jones*, Release No. 34-104273, 2025 WL 3419593, at *16 (Nov. 28, 2025) (same).

Virpax offers no basis to depart from those authorities. In support of its private nondelegation doctrine argument, Virpax points primarily to the D.C. Circuit’s decision in *Alpine Securities Corp. v. FINRA*, 121 F.4th 1314 (D.C. Cir. 2024), a “narrow and limited” opinion that confirmed that the exercise of regulatory authority by a self-regulatory organization does not violate the private nondelegation doctrine where an “accountable government agency . . . retains the ultimate authority to approve, disapprove, or modify the private entity’s actions and decisions on delegated matters.” *Id.* at 1325, 1330 (alterations and internal quotation marks omitted). Because FINRA’s rules at the time did not provide an opportunity for Commission review before FINRA could expel a member through an expedited disciplinary proceeding—and because expulsion of a member from FINRA could lead the broker-dealer “to shut down their securities-

trading business[]”—the D.C. Circuit preliminarily enjoined FINRA from immediately expelling Alpine before it could seek Commission review of an expulsion order but otherwise permitted the disciplinary proceeding to move forward. *Id.* at 1326–27, 1331; *id.* at 1327 (“Because expulsion from FINRA carries with it a moratorium on all securities trading, even a few days or weeks may be too long for an expelled FINRA member to stay afloat.”).

Unlike the expedited disciplinary procedures at issue in *Alpine*, the Commission’s regulations always allow the opportunity for Commission review before a delisting takes effect by providing that “[a]n 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.” 17 C.F.R. § 240.12d2-2(d)(1). The Commission specifically designed that 10-day period to ensure that it can review delisting decisions before they take effect. As the Commission explained, the “10-day public notice requirement” was adopted to “provide an opportunity for the Commission to . . . delay the delisting” and undertake closer review of the decision, where appropriate. SEC Release No. 34-52029, 70 Fed. Reg. at 42,459; *see In re Minim, Inc.*, Release No. 34-101502, 2024 WL 4650996, at *1 (granting administrative stay of delisting decision during 10-day period preceding delisting); *In re Minim, Inc.*, Release No. 34-102482, 2025 WL 606061, at *5 (Feb. 25, 2025) (granting stay and setting briefing schedule). The Commission therefore “retains the ultimate authority to approve, disapprove, or modify” Nasdaq’s delisting decisions. *Alpine*, 121 F.4th at 1325 (alterations and internal quotation marks omitted); *see also In re Kielczewski*, Release No. 34-104352, 2025 WL 3537495, at *13 (distinguishing *Alpine* from review processes where “plenary Commission review” is available); *In re Jones*, Release No. 34-104273, 2025 WL 3419593, at *16 (same).

In addition, the D.C. Circuit in *Alpine* premised its preliminary injunction in part on the fact that FINRA was the “only registered securities association in the United States.” 121 F.4th at 1321. But Nasdaq is not the only exchange on which securities may be listed, and it has competitors—including the New York Stock Exchange—on which companies delisted from Nasdaq can seek to relist. Alternatively, delisted companies can publicly trade over the counter without listing or go private. In light of these alternatives, a company that is delisted from Nasdaq and that fails to obtain a stay of that delisting from the Commission would be able to continue in business while seeking Commission review of the delisting decision.

For all of these reasons, Nasdaq “function[s] subordinately to,” and under the “authority and surveillance” of, the Commission when carrying out its listing-related responsibilities. *Consumers’ Research*, 606 U.S. at 692.

CONCLUSION

The application for review should be dismissed.

Dated: January 16, 2026

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Amir C. Tayrani

Amir C. Tayrani
Alex Gesch
1700 M Street, N.W.
Washington, D.C. 20036
Tel.: (202) 887-3692
Fax: (202) 467-0539
atayrani@gibsondunn.com

David Salant
200 Park Avenue
New York, New York 10166
Tel.: (212) 351-4000
Fax: (212) 351-4035
dsalant@gibsondunn.com

Attorneys for The Nasdaq Stock Market LLC

CERTIFICATE OF COMPLIANCE

Pursuant to the SEC Rules of Practice, I hereby certify that this opposition complies with the applicable length limitations in Rule 450(c) because it contains 7,422 words.

Dated: January 16, 2026

/s/ Amir C. Tayrani
Amir C. Tayrani

CERTIFICATE OF SERVICE

Pursuant to SEC Rule of Practice 151(d), I hereby certify that, on January 16, 2026, I caused a copy of the foregoing document to be served on Virpax Pharmaceuticals, Inc. via email to:

Samuel Kadosh, Esq.
Asher Gulko, Esq.
GULKO SCHWED LLP
525 Chestnut Street, Suite 207
Cedarhurst, New York 11516
Tel: 212-500-1312
skadosh@gulkoschwed.com
asher@gulkoschwed.com

Attorneys of record for Virpax Pharmaceuticals, Inc.

Dated: January 16, 2026

/s/ Amir C. Tayrani
Amir C. Tayrani