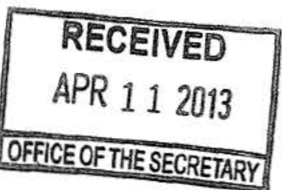

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

mPhase Technologies, Inc.

For Review of Denial of Company-Related Action by

FINRA

File No. 3-15130

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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BEFORE THE
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In the Matter of the Application of

mPhase Technologies, Inc.

For Review of Denial of Company-Related Action by

FINRA

File No. 3-15130

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

I. INTRODUCTION

mPhase Technologies, Inc., an issuer quoted on the Over-the-Counter Bulletin Board®, appeals from a FINRA decision that denied the company's request to process documentation related to a reverse stock split. FINRA's denial was fully authorized under FINRA's rule regarding company-related actions. This rule, FINRA Rule 6490, authorizes FINRA's Department of Operations to deny an issuer's request to conduct a reverse stock split if the issuer's officers or directors have, among other events, previously settled a Commission action involving securities laws violations.

FINRA denied mPhase Technologies' request to process the reverse stock split because FINRA knew that mPhase Technologies' Chief Executive Officer, and the company's Chief Operating Officer, who also was on the Board of Directors, settled a Commission cease-and-desist proceeding involving securities laws violations. In the settlement, the Commission found that the CEO and COO purchased and sold unregistered securities and failed to disclose their beneficial interest in, and acquisition of, large amounts of an issuer's stock. mPhase

Technologies' CEO, COO, and the corporate entities that they controlled agreed to cease and desist from future violations of the federal securities laws and pay disgorgement of $950,000.

FINRA was correct to deny mPhase Technologies' request to process the reverse stock split. FINRA considered the CEO's and COO's current management and ownership of mPhase Technologies and the seriousness of the securities laws violations that resulted in the settlement and concluded that the CEO's and COO's continued involvement with mPhase Technologies raised reasonable concerns about harm to the investing public.

Because FINRA's denial of mPhase Technologies' request was in accordance with FINRA Rule 6490, the Commission should dismiss mPhase Technologies' application for review.

II. BACKGROUND

A. FINRA's Processing of Company-Related Actions

FINRA performs critical functions in the over-the-counter market. *See Order Approving Proposed FINRA Rule 6490 (Processing of Company-Related Actions)* ("*Approval Order*"), Exchange Act Release No. 62434, 2010 SEC LEXIS 2186, at *2-3 (July 1, 2010). FINRA operates the Over-the-Counter Bulletin Board® ("OTCBB"), which provides a mechanism for FINRA members to quote certain registered over-the-counter securities.[1] *See id.* at *3.

FINRA also reviews and processes requests to announce or publish certain actions taken by issuers of over-the-counter securities. *See id.* Specifically, FINRA reviews and processes

[1] The OTCBB is an electronic quotation facility that displays current quotes, last-sales prices, and volume information for eligible equity securities that are not listed on a national securities exchange. *See NASD Notice to Members 99-15*, 1999 NASD LEXIS 90, at *1-2 (Feb. 1999); *see also* FINRA Rule 6520. Unlike national securities markets, where securities issuers apply for listing and must meet listing standards, FINRA members initiate quotations for specific securities on the OTCBB. *See NASD Notice to Members 99-15*, 1999 NASD LEXIS 90, at *2.

documents relating to announcements for two categories of issuer actions, actions made pursuant to Rule 10b-17 under the Securities Exchange Act of 1934 ("Exchange Act") and other company-related actions (collectively, "Company-Related Actions"). *See id.*; *see also* Exchange Act Rule 10b-17, 17 C.F.R. 240.10b-17 (2013) (Untimely Announcements of Record Dates); FINRA Rule 6490(a)(1), (2) (Processing of Company-Related Actions).

These Company-Related Actions include: (1) dividend payments or other distributions in cash or kind, (2) stock splits, (3) reverse stock splits, (4) rights or other subscription offerings, (5) any issuance or change to an issuer's symbol or name, (6) mergers, (7) acquisitions, (8) dissolutions, (9) bankruptcy, (10) liquidations, or (11) any other company control transaction. *See Approval Order*, 2010 SEC LEXIS 2186, at *3-4; *see also* Exchange Act Rule 10b-17, 17 C.F.R. 240.10b-17; FINRA Rule 6490(a)(2).

In considering an issuer's request to process a Company-Related Action, FINRA's Department of Operations ("Department") may request additional information in order to complete its review of the request. *See* FINRA Rule 6490(b)(4); *Approval Order*, 2010 SEC LEXIS 2186, at *4. If FINRA processes the documentation, FINRA also provides notice of the Company-Related Action to the over-the-counter market and adjust the issuer's name, symbol, or stock price, as requested in the Company-Related Action.[2] *See id.*

B. <u>FINRA's Review of Company-Related Actions</u>

FINRA Rule 6490 sets forth five different grounds under which the Department may deny a request. *See* FINRA Rule 6490(d)(3). Two of these grounds focus on the completeness

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[2] FINRA publishes Company-Related Actions pursuant to requests from issuers and their agents on its website in a document known as the "Daily List." *See Approval Order*, 2010 SEC LEXIS 2186, at *5 n.7. Publication of Company-Related Actions in the Daily List announces the Company-Related Action to the over-the-counter market. *See id.*

or timeliness of an issuer's request or its reporting obligations. *See* FINRA Rule 6490(d)(3)(1), (2). Subsection one allows the Department to deny an issuer's request if "the forms and all supporting documentation . . . may not be complete, accurate or with proper authority." FINRA Rule 6490(d)(3)(1). Subsection two requires the issuer to be current in its applicable reporting obligations to the Commission or another regulatory authority. *See* FINRA Rule 6490(d)(3)(2).

Subsections three and four require the Department to use its judgment as to the significance of certain events. *See* FINRA Rule 6490(d)(3)(3), (4). Subsection three allows the Department to deny an issuer's request if "FINRA has actual knowledge that the issuer, associated persons, officers, directors, transfer agent, legal adviser, promoters or other persons connected to the issuer" or the Company-Related Action "are the subject of a pending, adjudicated or settled regulatory action or investigation by a federal, state or foreign regulatory agency, or a self-regulatory organization; or a civil or criminal action related to fraud or securities laws violations." FINRA Rule 6490(d)(3)(3). Subsection four allows the Department to deny the issuer's request if FINRA knows or a government authority or regulator has given FINRA information indicating that persons connected with the issuer "may be potentially involved in fraudulent activities related to the securities market and/or pose a threat to public investors." FINRA Rule 6490(d)(3)(4).

The fifth ground – that there "is significant uncertainty in the settlement and clearance process for the security" – requires the Department to evaluate information provided by entities that clear or settle securities transactions. FINRA Rule 6490(d)(3)(5).

Following a Department determination that a request to process a Company-Related Action is deficient, the Department provides written notice of the deficiency to the issuer, identifying the specific factors that caused the request to be deemed deficient. *See Approval Order*, 2010 SEC LEXIS 2186, at *11; FINRA Rule 6490(d)(4).

FINRA Rule 6490 provides an issuer with a right to appeal from a Department deficiency determination. *See* FINRA Rule 6490(e). A three-person subcommittee comprised of current or former industry members of FINRA's Uniform Practice Code Committee ("UPC Subcommittee") thoroughly reviews and decides all appeals.[3] *See id.* The appeal process is swift for the issuer. The UPC Subcommittee meets each month and must issue a written decision within three business days of its consideration of the appeal. *See id.*

III. FACTS

A. mPhase Technologies

mPhase Technologies is a public New Jersey corporation that maintains its principal place of business in Norwalk, Connecticut.[4] The company was quoted on the OTCBB under the symbol XDSL and develops high performance batteries.[5] RP 4.[6]

B. Durando and Dotoli Settle the Federal Regulatory Action

In October 2007, Ronald Durando, mPhase Technologies' CEO, and Gustave Dotoli, the company's COO and a Director on the Board of Directors, settled a civil administrative action with the Commission through the concurrent institution and settlement of cease-and-desist

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3 The Uniform Practice Code Committee provides the framework of rules governing broker-dealers for the settlement of non-exchange listed securities quoted or traded in the over-the-counter market. *See Approval Order*, 2010 SEC LEXIS 2186, at *6 n.8.

4 *See* Connecticut Secretary of State Commercial Record for mPhase Technologies, available at http://www.concord-sots.ct.gov/CONCORD/online?sn=PublicInquiry&eid=9740 (last visited, Apr. 10, 2013). The Connecticut Commercial Record for mPhase Technologies is attached as Appendix A.

5 On March 26, 2013, mPhase Technologies was removed from quotation on the OTCBB because of a lack of quotations.

6 "RP" refers to the record page in the certified record.

proceedings.[7] *See PacketPort.com, Inc.*, Exchange Act Release No. 56672, 2007 SEC LEXIS 2472, at *1 (Oct. 18, 2007). In the settlement, the Commission made findings of fact and conclusions of law regarding Durando and Dotoli.[8] *See id.* at *1, 6-12.

The Commission found that Durando, Dotoli, and the corporate entities that they controlled, PacketPort.com, Inc. ("PacketPort")[9] and Microphase, Inc. ("Microphase"),[10] made unregistered offers and sales of PacketPort's common stock, in violation of Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"). *See id.* at *11. The Commission also determined that Durando and Dotoli were officers, directors, or beneficial owners of more than 10 percent of PacketPort's common stock, and that they violated Section 16(a) of the Exchange Act, and Exchange Act Rule 16a-3, by failing to disclose timely their holdings and positions in

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[7] The settlement resulted in the dismissal of a civil action that the Commission initiated in the United States District Court for the District of Connecticut in November 2005. *See PacketPort.com, Inc.*, Litigation Release No. 20339, 2007 SEC LEXIS 2461, at *1-2 (Oct. 18, 2007).

[8] Three additional individuals and two corporate entities also were parties to the settled cease-and-desist proceeding with the Commission. *See PacketPort*, 2007 SEC LEXIS 2472, at *1.

[9] PacketPort is a public Nevada corporation that maintains its principal place of business in Norwalk, Connecticut. *See id.* at *2. The company, which is quoted on the OTCBB under the symbol PKPT, develops and distributes internet telephony products. *See id.* PacketPort's principal place of business is the same Norwalk, Connecticut business address as mPhase Technologies. *See* Connecticut Secretary of State Commercial Record for PacketPort, available at http://www.concord-sots.ct.gov/CONCORD/ online?sn=PublicInquiry&eid=9740 (last visited, Apr. 10, 2013). The Connecticut Commercial Record for PacketPort is attached as Appendix B.

[10] Microphase designs and manufactures electronic components for commercial and defense applications. *See PacketPort*, 2007 SEC LEXIS 2472, at *3. It is a private Connecticut corporation that maintains its principal place of business in Norwalk, Connecticut, at the same business address as mPhase Technologies and PacketPort. *See* Connecticut Secretary of State Commercial Record for Microphase, available at http://www.concord-sots.ct.gov/CONCORD/ online?sn=PublicInquiry&eid=9740 (last visited, Apr. 10, 2013). The Connecticut Commercial Record for Microphase is attached as Appendix C. Microphase owns 1.6 percent of mPhase Technologies. RP 358.

PacketPort. *See id.* The Commission found further that Durando violated Section 13(d) of the Exchange Act, and Exchange Act Rule 13d-1, because he failed to disclose timely his acquisition of more than five percent of PacketPort's stock. *See id.* at *11-12.

The settlement ordered that Durando, Dotoli, PacketPort, and Microphase cease and desist from future violations of the federal securities laws that they were found to have violated in the case, and required Durando, Dotoli, and Microphase to pay disgorgement of $150,000, $100,000, and $700,000, respectively. *See id.* at *12-13.

C. The 1-200 Reverse Stock Split

On July 6, 2012, mPhase Technologies submitted a request to the Department to process a 1-200 reverse stock split.[11] RP 49-54. The Department asked mPhase Technologies to answer questions and provide documentation to facilitate the Department's review. RP 65-68. After reviewing the information, the Department determined that mPhase Technologies' request was deficient and denied the request. RP 323-326.

The Department denied mPhase Technologies' request pursuant to FINRA Rule 6490(d)(3)(3). RP 323. The Department explained that it had actual knowledge that Durando,[12] mPhase Technologies' CEO and beneficial owner, and Dotoli,[13] the company's COO, Director

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[11] mPhase Technologies initially requested that FINRA process documentation related to a 1-100 reverse stock split. RP 53. In subsequent communications with FINRA, the company requested the revised 1-200 split. RP 249-252.

[12] When mPhase Technologies filed the application with the Department, Durando maintained a 21.71 percent beneficial ownership interest in the company. RP 358. This marked a 10.89 percentage point increase from his ownership interest in 2007. RP 382. In September 2007, Durando reported that he owned 10.82 percent of mPhase Technologies. RP 382.

[13] Dotoli's beneficial ownership interest in mPhase Technologies was 15.31 percent when the company filed its application with the Department. RP 364. In September 2008, Dotoli disclosed that he owned 11.36 percent of mPhase Technologies. RP 376.

on the company's Board of Directors, and beneficial owner, were the subject of a settled federal regulatory action related to fraud or securities laws violations. RP 323.

The Department noted that mPhase Technologies' application triggered one of the grounds delineated in FINRA Rule 6490(d)(3), and consequently, declined to process the reverse stock split. RP 323-324. The Department provided mPhase Technologies with a written deficiency determination on October 2, 2012. RP 323.

D. The Appellate Proceedings Before the UPC Subcommittee

On October 8, 2012, mPhase Technologies requested that the UPC Subcommittee review the Department's decision under FINRA Rule 6490(e).[14] RP 327-333. Consistent with the rule, the UPC Subcommittee provided mPhase Technologies with the opportunity to respond to the Department's deficiency determination and supplement the record with additional supporting documentation. RP 335. mPhase Technologies supplemented the record on November 1, 2012. RP 341-399.

After a de novo review of the record, the UPC Subcommittee affirmed the Department's denial of mPhase Technologies' requested reverse stock split. RP 401-404. The UPC Subcommittee's decision cited three reasons in support of the denial. RP 403. First, the UPC Subcommittee determined that the settled cease-and-desist proceedings involved several serious violations of the federal securities laws. RP 403. Second, the UPC Subcommittee considered that Durando and Dotoli maintained significant roles within mPhase Technologies. RP 403. And finally, the UPC Subcommittee examined the connections among mPhase Technologies, PacketPort, and Microphase, and determined that all three companies maintained common high-

[14] mPhase Technologies' filing of an appeal stayed the processing of the reverse stock split. Company-Related Actions are not processed during an appeal. *See* FINRA Rule 6490(e); *Approval Order*, 2010 SEC LEXIS 2186, at *11.

ranking executives in Durando and Dotoli and operated from the same premises in Norwalk, Connecticut.[15] RP 403.

The UPC Subcommittee analyzed each of the arguments that mPhase Technologies offered in support of the appeal – that five years had transpired since the parties entered into the settlement agreement with the Commission, the purported personal nature of Durando's and Dotoli's misconduct, and their alleged lack of profit. RP 402-404. The UPC Subcommittee concluded, however, that these factors did not favor approval of the reverse stock split. RP 403.

To the contrary, the UPC Subcommittee noted that Durando's and Dotoli's corporate positions within mPhase Technologies provided them with substantial management authority, placed them in roles with minimal supervisory oversight, and presented opportunities for abuse. RP 403. The UPC Subcommittee found that these facts provided ample grounds to deny mPhase Technologies' request for the reverse stock split.[16] RP 403-404.

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15 Durando is PacketPort's Chairman, President, and CEO and Microphase's COO and majority shareholder. RP 358. *See PacketPort*, 2007 SEC LEXIS 2472, at *3. Dotoli is PacketPort's Secretary and a Director on the company's Board of Directors. *See id.* at *3-4.

16 In addition to state corporate law requirements, an issuer with a class of publicly traded securities must comply with Exchange Act Rule 10b-17. *See Approval Order*, 2010 SEC LEXIS 2186, at *3, 4 n.6. An issuer must provide FINRA with notice of proposed Company-Related Actions when their securities are not listed on a national securities exchange or the Commission has not issued an exemption. *See* Exchange Act Rule 10b-17(b)(2), (3), 17 C.F.R. 240.10b-17(b)(2), (3). Once FINRA receives this notice, FINRA Rule 6490 authorizes FINRA to use its judgment and process or decline to process the Company-Related Action. *See Approval Order*, 2010 SEC LEXIS 2186, at *7. If FINRA declines to process the Company-Related Action, the OTCBB does not receive notice of the proposed Company-Related Action. *See id.* at *4. Although the record does not contain evidence of further actions by mPhase Technologies, it appears that the company did not set another record date for a reverse stock split or attempt to complete the reverse stock split. When an issuer fails to give The Depository Trust Company ("DTC") advance notice of a stock split, including a record date, DTC may decide not to process a stock split. *See* DTC Rule 6, available at http://www.dtcc.com/ legal/ rules_proc/dtc_rules.pdf (last visited, Apr. 10, 2013).

The UPC Subcommittee provided mPhase Technologies with its decision on November 20, 2012. mPhase Technologies timely appealed to the Commission on December 12, 2012. RP 401, 413.

IV. SUMMARY OF ARGUMENT

FINRA appropriately concluded that processing mPhase Technologies' reverse stock split presented a reasonable concern that the securities markets or the investing public would be harmed. The UPC Subcommittee's decision complied with the three-pronged standard of review for this action – FINRA followed its rules, relied on grounds that are factually accurate, and applied its rules in a manner consistent with the Exchange Act.

FINRA properly applied FINRA Rule 6490 in this case. FINRA Rule 6490(d)(3)(3) permitted the UPC Subcommittee to examine any pending, adjudicated, or settled regulatory action related to fraud or securities laws violations, in which the issuer, or its associated persons, officers, directors, or other persons connected to the issuer are a party. In this instance, Durando and Dotoli, officers and directors of mPhase Technologies, settled a cease-and-desist proceeding with the Commission that was related to securities laws violations. The settlement invoked FINRA Rule 6490(d)(3)(3), and the UPC Subcommittee properly exercised its judgment to deny mPhase Technologies' request for a reverse stock split.

On appeal before the Commission, mPhase Technologies demonstrates a fundamental misunderstanding of FINRA Rule 6490. mPhase Technologies mischaracterizes FINRA 6490 as a ministerial rule that limits FINRA's authority to decline to process Company-Related Actions to circumstances in which the issuer fails to disclose information related to the Company-Related Action. Reading FINRA Rule 6490 in this manner, however, ignores the rule's text, imposes a meaning that has no support, and would render the rule ineffective.

mPhase Technologies argues that FINRA impermissibly considered the allegations of the Commission's 2005 civil administrative action and the substantive findings of the settlement to deny processing of the reverse stock split. mPhase Technologies misreads the UPC Subcommittee's decision in this case and misconstrues FINRA's role in the processing of Company-Related Actions. As an initial matter, the UPC Subcommittee's decision, the decision that is under review in this appeal, did not rely on the 2005 complaint in reaching its decision. The UPC Subcommittee supported its decision by discussing solely the findings of fact and conclusions of law detailed in the settled cease-and-desist proceedings.

FINRA properly relied on the settlement's substantive findings to deny the Company-Related Action. FINRA Rule 6490 authorizes FINRA to consider settled federal regulatory matters, like the one at issue here, to determine whether to process a reverse stock split. To make this determination, FINRA necessarily must examine and consider the seriousness of the settlement's substantive findings. To do otherwise renders the rule largely inapplicable. In fact, the Commission has acknowledged this point in a related context and has endorsed FINRA's reliance on settled cases, where there has been no admission of wrongdoing, as a basis to deny an individual's or entity's membership in FINRA or access to FINRA's services.

Finally, FINRA's decision maintains the status quo and denies mPhase Technologies' ability to conduct a reverse stock split at this time. The decision does not prohibit Durando or Dotoli from serving as officers or directors of any company, imposes no sanction or penalty on mPhase Technologies, Durando, Dotoli, or any other individual associated with the company, and is not subject to the five-year statute of limitations for federal securities laws violations. FINRA's denial was precisely addressed to mPhase Technologies' request. The UPC Subcommittee denied mPhase Technologies' requested reverse stock split based on concerns

over investor protection and market integrity in the OTCBB. The Commission therefore should dismiss this appeal.

V. **<u>ARGUMENT</u>**

Section 19(f) of the Exchange Act governs the Commission's review of this case.[17] *See* 15 U.S.C. § 78s(f). The Commission should affirm FINRA's denial of mPhase Technologies' proposed reverse stock split because: (1) FINRA's action was taken in accordance with its rules; (2) the specific grounds upon which FINRA based its action "exist in fact"; (3) FINRA applied its rules in a manner that is consistent with the purposes of the Exchange Act; and (4) FINRA's action imposes no undue burden upon competition.[18] *See id.*; *see also Tassaway, Inc.*, 45 S.E.C. 706, 709 (1975) ("Our function when asked to review the [FINRA's] action . . . is very narrow. It is solely that of seeing 'whether the specific grounds on which such action [are] based exist in fact and are in accord with the applicable rules of the association.' Should the [FINRA's] action meet that test, we must dismiss the review proceedings.").

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[17] Section 19(d) of the Exchange Act, 15 U.S.C. § 78s(d), grants the Commission jurisdiction to review any denial of access to services by a self-regulatory organization. *See JD Am. Workwear, Inc.*, Exchange Act Release No. 43283, 2000 SEC LEXIS 1906, at * 7 (Sept. 12, 2000) (explaining Commission's basis for jurisdiction and denying request to stay issuer's removal from OTCBB). The UPC Subcommittee's denial of the reverse stock split prevents mPhase Technologies' access to FINRA's services, is FINRA's final action in this case, and is subject to Commission review. *See id.*; *Approval Order*, 2010 SEC LEXIS 2186, at *21.

[18] mPhase Technologies does not assert, and the record does not demonstrate, that FINRA's denial of the Company-Related Action imposes an unnecessary or inappropriate burden on competition. *See generally Revcon, Inc.*, 53 S.E.C. 315, 328 (1997) (holding that denial of access to services was "aimed reasonably" at an important regulatory purpose and did not burden competition unnecessarily).

A. <u>FINRA Rule 6490 Allows the UPC Subcommittee to Deny a Request Based on a Settled Commission Action</u>

FINRA Rule 6490(d)(3) enumerates five grounds upon which the Department may decide to classify a Company-Related Action as deficient. The rule states that the Department will make a decision, a "determination," about whether to approve or "deem deficient" the requested Company-Related Action. FINRA Rule 6490(d)(3). Specifically, FINRA Rule 6490(d)(3) explains that, "In circumstances where . . . the Department *may* determine that it is necessary for the protection of investors, the public interest and to maintain fair and orderly markets, that documentation related to [the] . . . Company-Related Action will not be processed." FINRA Rule 6490(d)(3) (emphasis added).

The Department's decision-making authority is signified by use of the word "may." In interpreting contracts, agency rules, or statutes, courts have long found that may is a permissive word. *See Black's Law Dictionary* 993 (7th ed. 1999) ("This is the primary legal sense [of 'may'] . . . termed the 'permissive' or 'discretionary' sense."). FINRA Rule 6490 does, however, limit the grounds upon which the Department may deny a Company-Related Action by using "shall" to introduce the list of five grounds. FINRA Rule 6490(d)(3). The rule states, "The Department shall make such deficiency determinations solely on the basis of one or more of the following factors . . . ." FINRA Rule 6490(d)(3); *see also Black's Law Dictionary* 1379 (shall means, "[h]as a duty to; more broadly, is required to . . . .").

Read completely, subsection (d)(3) of FINRA Rule 6490 is precise. The Department may use its judgment and determine whether a request is deficient. If the Department exercises such judgment, however, the Department must deem the issuer's request deficient based only on one or more of the five grounds. *See* FINRA Rule 6490(d)(3). In short, if one of the five grounds exists, then the Department decides whether it will deny the request.

The UPC Subcommittee identified subsection (3) of FINRA Rule 6490(d)(3) as the basis for its denial of mPhase Technologies' reverse stock split. That subsection permits the UPC Subcommittee to deny a Company-Related Action based on a settled Commission action related to securities laws violations:

> (3) FINRA has actual knowledge that the issuer, associated persons, officers, directors, . . . or other persons connected to the issuer . . . are the subject of a pending, adjudicated or settled regulatory action . . . by a federal . . . regulatory agency . . . related to fraud or securities laws violations.[19]

FINRA Rule 6490(d)(3)(3). The UPC Subcommittee's denial is fully authorized by the rule.

B. mPhase Technologies' Interpretations of FINRA Rule 6490 Have No Merit

mPhase Technologies argues that the UPC Subcommittee exceeded the authority granted to it under FINRA Rule 6490. mPhase Technologies contends that the UPC Subcommittee has only ministerial powers when denying a Company-Related Action. mPhase Technologies also contends that FINRA Rule 6490 authorizes the UPC Subcommittee to deny a request only for an issuer's failure to disclose information. Each of these arguments about the meaning of FINRA Rule 6490 conflicts with the plain language of the rule and would rewrite the rule in a nonsensical way.

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[19] The settled cease-and-desist proceeding, to which Durando and Dotoli are parties, constitutes a settled regulatory action by a federal regulatory agency, i.e., the Commission.

1. FINRA Rule 6490 Is Not a Ministerial Rule

mPhase Technologies argues that FINRA Rule 6490 demonstrates that "FINRA's sole function in the application process is ministerial." Applicant's Br. at 11.[20] This conclusion is deeply flawed and has no support in the text of the rule or the Commission's order approving FINRA Rule 6490. *See generally Approval Order*, 2010 SEC LEXIS 2186, at *1. Before the Commission approved FINRA Rule 6490, FINRA had limited authority in processing Company-Related Actions for issuers. *See id.* at *5 ("Historically, FINRA has viewed its role in performing issuer-related functions as primarily ministerial.").

The adoption of FINRA Rule 6490, however, changed FINRA's role from ministerial to one that permits the use of judgment to approve or deny Company-Related Actions. *See id.* One example illustrates this point. The Approval Order discusses the issue of whether the Department "automatically" would deem an issuer deficient, if that issuer is delinquent in its reporting obligations. *See id.* at *18-19. In response, the Approval Order explains that,

> [W]hen the Department reasonably believes that an issuer . . . has triggered one of the explicitly enumerated factors, the Department would generally conduct an in-depth review . . . . FINRA noted that it would *have the discretion* not to process any such actions that are incomplete or when it determines that not processing such an action is necessary for the protection of investors.

Id. at *19 (footnotes omitted, emphasis added). The Approval Order reinforces the Department's use of judgment when the Commission finds that "the proposed factors [in FINRA Rule 6490(d)(3)] are reasonably designed *to allow* FINRA to deny a request." *Id.* at *20 (emphasis added).

[20] "Applicant's Br." refers to mPhase Technologies opening brief.

In sum, mPhase Technologies misreads FINRA Rule 6490 when it asserts that the Department has only ministerial powers under the rule. To the contrary, the text of FINRA Rule 6490, as well as the Commission's Approval Order, establishes that the UPC Subcommittee may affirm a denial of a Company-Related Action that is based on the Department's judgment that certain events raise reasonable concerns about the effect of a proposed Company-Related Action on the investing public and the securities markets.

2. mPhase Technologies Misunderstands the Meaning of "Actual Knowledge," as Used in FINRA Rule 6490(d)(3)(3)

mPhase Technologies argues that the words "actual knowledge" mean that the UPC Subcommittee may deny a request only if an issuer does not disclose material information relating to its requested Company-Related Action.[21] Applicant's Br. at 12-13. In addition to creating limits in the rule where none exist, this argument would result in a vastly ineffective rule.

When subsections three and four of FINRA Rule 6490(d)(3) are read in context, the phrase "FINRA has actual knowledge" in FINRA Rule 6490(d)(3)(3) means that FINRA knows of the regulatory, civil, or criminal action. *See Black's Law Dictionary* 876 ("knowledge" is an "awareness or understanding of a fact or circumstance."). This contrasts with subsection four of

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[21] In conjunction with this argument, mPhase Technologies asserts that FINRA's reading of FINRA Rule 6490(d)(3)(3) violates due process and permits FINRA to "prejudge" an individual's "guilt or liability by virtue of the *mere existence* of an investigation." Applicant's Br. at 13 n.7. In addition to presenting hypothetical facts that are not present in this case, the company's argument misses the point as to how FINRA Rule 6490(d)(3)(3) applies in this case. The UPC Subcommittee did not impose liability on Durando, Dotoli, or their corporate entities. Instead, the UPC Subcommittee considered the pre-existing facts, which were detailed in the settled cease-and-desist proceedings, to deny mPhase Technologies' request for the reverse stock split. mPhase Technologies' due process argument is without merit.

the rule, which states that a state or federal authority "has provided information to FINRA." FINRA Rule 6490(d)(3)(4).

The meaning of FINRA Rule 6490 should be determined by looking to the particular language of the rule, in addition to the design of the rule as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Here, actual knowledge means that FINRA has knowledge of the regulatory, civil, or criminal action, as opposed to receiving that knowledge through information provided to FINRA.

mPhase Technologies' argument is further undercut by the fact that FINRA Rule 6490(d)(3)(3) does not have a disclosure requirement. The requirement under FINRA Rule 6490(d)(3)(3) is simply that the Department knows of a regulatory, civil, or criminal action. The fact that a different subsection of the rule, FINRA Rule 6490(d)(3)(1), requires an issuer to be accurate and complete in filling out the forms to support a Company-Related Action does not mean that subsection (3) has this limit grafted into it. mPhase Technologies' efforts to change the meaning of FINRA Rule 6490 are ineffective, and the Commission should find that the UPC Subcommittee acted within the scope of the rule.

3. <u>FINRA Complied with FINRA Rule 6490</u>

FINRA Rule 6490 permits the Department and the UPC Subcommittee to use its judgment and deem a request for a Company-Related Action "deficient," if doing so "is necessary for the protection of investors and the public interest and to maintain fair and orderly markets . . . ." *See* FINRA Rule 6490(d)(3); *see also Approval Order*, 2010 SEC LEXIS 2186, at *9. FINRA properly applied the rule and denied mPhase Technologies' reverse stock split in this case.

After mPhase Technologies filed the application for the reverse stock split, FINRA followed each of the procedural steps set forth in FINRA Rule 6490. RP 65-305, 323-325. The

Department provided the company with written notice of the deficiency determination. RP 323-325. *See* FINRA Rule 6490(d)(4). And the Department explained that its deficiency determination was based on FINRA Rule 6490(d)(3)(3) and Durando's and Dotoli's management and ownership of mPhase Technologies, PacketPort, and Microphase. RP 323-325. *See* FINRA Rule 6490(d)(4).

Thereafter, mPhase Technologies availed itself of the opportunity to appeal the Department's denial and submitted a brief to the UPC Subcommittee. *See* FINRA Rule 6490(e). RP 327-333. The UPC Subcommittee considered the written record developed during the proceedings before the Department, permitted mPhase Technologies to supplement the record with additional supporting documentation, and conducted a de novo review of the Department's denial. RP 335-336, 341-399. *See* FINRA Rule 6490(e). After an independent review of the record, the UPC Subcommittee concluded that the Department's decision was correct and provided mPhase Technologies with written notice of its decision. RP 401-402. *See* FINRA Rule 6490(e). The UPC Subcommittee's decision to deny mPhase Technologies' proposed reverse stock split was in accordance with FINRA Rule 6490.

C. <u>FINRA Relied on Grounds That Are Factually Accurate</u>

The UPC Subcommittee's decision relied on grounds that are factually accurate. mPhase Technologies' request for the reverse stock split fell within one of the five grounds detailed in FINRA Rule 6490(d)(3) because FINRA had actual knowledge that Durando and Dotoli, mPhase Technologies' executives and beneficial owners of significant numbers of shares, had settled a federal regulatory action with the Commission. RP 402. *See* FINRA Rule 6490(d)(3)(3).

The UPC Subcommittee considered that Durando and Dotoli maintained significant management roles within mPhase Technologies, and highlighted the connections among mPhase Technologies, PacketPort, Microphase, Durando, and Dotoli. RP 403. The UPC Subcommittee

also carefully examined the settled cease-and-desist proceeding and determined that the Commission's findings against Durando and Dotoli involved serious violations of the federal securities laws. This conclusion is supported by the Commission and the courts. *See SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 78 (D.C. Cir. 1980) ("Whether due to ignorance, neglect, or conscious decision, noncompliance with [S]ection 16(a) [of the Exchange Act] does evince a disregard of the securities laws that may manifest itself in noncompliance elsewhere."); *Cosmetic Ctr., Inc.*, Initial Decision Release No. 329, 2007 SEC LEXIS 871, at *32 (Apr. 30, 2007) (finding that public company's and its officers violation of reporting requirements under Sections 13(d) and 16(a) of the Exchange Act were serious); *Lorsin, Inc.*, Initial Decision Release No. 250, 2004 SEC LEXIS 961, at *35 (May 11, 2004) (explaining that the unregistered distribution of securities, in violation of Section 5 of the Securities Act, presented a serious violation of the securities laws).

The grounds underlying the UPC Subcommittee's determination exist in fact:

- Durando is mPhase Technologies' Chief Executive Officer and a beneficial owner, owning 21.71 percent of the company's stock. RP 323, 358.
- Dotoli is mPhase Technologies' Chief Operating Officer, Director on the company's Board of Directors, and beneficial owner of 15.31 percent of the company. RP 323, 364.
- In October 2007, Durando and Dotoli settled cease-and-desist proceedings with the Commission. *See PacketPort*, 2007 SEC LEXIS 2472, at *1. The settlement involved Durando's and Dotoli's control, management, and ownership of PacketPort, an over-the-counter issuer. *See id.*
- As part of the settlement, the Commission found that Microphase, PacketPort, Durando (PacketPort's Chairman, President, and Chief Executive Officer and Microphase's Chief Operating Officer and majority shareholder), and Dotoli (PacketPort's Secretary and a Director on the Board of Directors) made unregistered offers and sales of PacketPort's shares. *See id.* at *3-4, 11.

- The Commission determined that Durando and Dotoli were officers, directors, or beneficial owners of more than 10 percent of PacketPort and violated the Exchange Act by failing to disclose timely their holdings and positions in the company. *See id.* at *11.

- The Commission concluded that Durando violated the Exchange Act because he failed to disclose timely his acquisition of more than five percent of PacketPort's stock. *See id.* at *11-12.

- The Commission ordered Durando, Dotoli, PacketPort, and Microphase to cease and desist from future violations of the federal securities laws that they were found to have violated in the case, and required Durando, Dotoli, and Microphase to pay disgorgement of $150,000, $100,000, and $700,000, respectively. *See id.* at *12-13.

FINRA had actual knowledge of these facts, as detailed in the settled cease-and-desist proceeding, and the UPC Subcommittee determined that the settlement raised reasonable concerns about Durando's and Dotoli's continued involvement in mPhase Technologies and the company's proposed reverse stock split. Indeed, the ongoing relationship that mPhase Technologies maintains with PacketPort and Microphase, through their shared executives (Durando and Dotoli) and office space, reinforces FINRA's decision. FINRA's denial of mPhase Technologies' Company-Related Action in this matter is well-founded and firmly rooted in the facts.

1. <u>FINRA Properly Relied on the Substantive Findings of the Commission's Cease-and-Desist Proceeding</u>

On appeal, mPhase Technologies asserts that FINRA impermissibly considered the Commission's substantive findings in the settled cease-and-desist proceedings to deny processing of the reverse stock split. Applicant's Br. at 15-16.[22] mPhase Technologies argues

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[22] At no time during the proceedings before the Department or the UPC Subcommittee did mPhase Technologies argue that FINRA improperly considered the Commission's substantive findings in the settled cease-and-desist proceedings, that FINRA impermissibly relied on the Commission's dismissed civil administrative complaint from 2005, that FINRA is collaterally estopped from considering the underlying cease-and-desist proceeding that resulted in the

[Footnote Continued on Next Page]

that the UPC Subcommittee's decision binds mPhase Technologies to a settlement to which only Durando, Dotoli, PacketPort, and Microphase are parties, and further, suggests that the UPC Subcommittee may not use the Commission's findings to deny the Company-Related Action because the parties to the settlement did not admit or deny the findings. Applicant's Br. at 15-16. These arguments lack legal support and demonstrate a misunderstanding of FINRA's denial of mPhase Technologies' requested Company-Related Action.[23]

FINRA Rule 6490(d)(3)(3) permits the UPC Subcommittee to examine any pending, adjudicated, or settled regulatory action related to fraud or securities laws violations in which the issuer, or its associated persons, officers, directors, or other persons connected to the issuer are a party. Nothing in FINRA Rule 6490 requires that the issuer is a party to the regulatory action.

[cont'd]

settlement, or that FINRA's ability to deny processing of the reverse stock split was limited by a statute of limitations. mPhase Technologies did, however, have ample opportunity to raise these issues below. The Department's denial letter highlighted the Commission's cease-and-desist proceedings as the basis for the initial denial. RP 323-24. Yet, mPhase Technologies' arguments on appeal to the UPC Subcommittee were limited to urging that the cease-and-desist order be given little weight because Durando's and Dotoli's securities laws violations were merely "technical" and were at least five years old. RP 328-332, 341-342. Because mPhase Technologies did not advance these arguments previously, it failed to preserve its ability to raise them during this appeal. *See Mayer A. Amsel*, 52 S.E.C. 761, 767 (1996) (holding that arguments are waived where raised for the first time on appeal); *see also In re Nortel Networks Corp. Secs. Lit.*, 539 F.3d 129, 132 (2d Cir. 2008) ("It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.") (quotation omitted).

[23] mPhase Technologies' argument to the Commission that the UPC Subcommittee erred in relying on the cease-and-desist order is in direct contradiction of its statement made during its appeal of the Department's denial that "The Company believes that [the] purpose of FINRA Rule 6490, in pertinent part, is to enable FINRA to review the activities of parties related to the Company-Related Action that are subject to a prior consent decree." RP 332. The Commission should disallow mPhase Technologies' conflicting arguments. "[A] respondent cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action." *Amsel*, 52 S.E.C. at 767 (quotation omitted).

mPhase Technology fails to explain why the Commission should invalidate the express language of FINRA Rule 6490.

Moreover, the UPC Subcommittee properly considered the Commission's cease-and-desist order on the basis that the Commission made findings that Durando and Dotoli violated the Securities Act and the Exchange Act and, based on those violations, imposed sanctions. The UPC Subcommittee did not treat the cease-and-desist order as an admission by Durando and Dotoli. Rather, the UPC Subcommittee's consideration of a cease-and-desist order is fully consistent with a self-regulatory organization's consideration of settlements and consent orders that deny an applicant's request for FINRA membership or membership continuance when seeking to associate with a statutorily disqualified person.

For example, in *Timothy H. Emerson Jr.*, the Commission upheld FINRA's denial of an application for a statutorily disqualified person to associate with a firm when FINRA had concluded that customer complaints, which had been settled by the firm, and terminations from prior FINRA firms demonstrated poor judgment and lack of trustworthiness. *See Timothy H. Emerson Jr.*, Exchange Act Release No. 60328, 2009 SEC LEXIS 2417, at *17-18 (July 17, 2009). Similarly, in *Asensio & Co., Inc.*, the Commission affirmed FINRA's denial of a membership application when the denial was based on disciplinary history, which included settlements. *See Asensio & Co., Inc.*, Exchange Act Release No. 68505, 2012 SEC LEXIS 3954, at *20 n.25 (Dec. 20, 2012), *appeal docketed*, No. 13-1037 (D.C. Cir. Feb. 20, 2013); *DHB Capital Group, Inc.*, 52 S.E.C. 740, 744-45 (1996) (affirming denial of issuer's request for quotation on NASD's automatic quotation system, where the controlling shareholder, officer, and director had settled a civil administrative complaint with the Commission alleging that he had aided and abetted in violations of Sections 15(b) and 15(f) of the Exchange Act of 1934 and Exchange Act Rule 15b3-1). Just as FINRA considers settlements when evaluating statutory

disqualification applications to determine if allowing a person to return to the securities industry "would be in the public interest," so too must FINRA be allowed to consider settlements regarding violations of the securities laws when evaluating whether a requested reverse stock split creates a threat to the protection of investors. *Eric J. Weiss*, Exchange Act Release No. 69177, 2013 SEC LEXIS 837, at *24 (Mar. 19, 2013).

Durando and Dotoli cannot make their cease-and-desist settlement vanish from existence merely because they did not admit or deny the allegations in the complaint. The Commission made findings and conclusions that the UPC Subcommittee was entitled to review when evaluating mPhase Technologies' request.

2. FINRA Did Not Consider the Civil Administrative Complaint from 2005

Citing evidence contained in the record for this case, mPhase Technologies also argues that the Department and the UPC Subcommittee improperly considered the complaint from the dismissed civil action from 2005. Applicant's Br. at 14-15. RP 7-12. *See supra* note 6. The company, however, is mistaken. As an initial matter, neither the Department's nor the UPC Subcommittee's decision discusses, or even cites to, the Commission's civil complaint. RP 323-326, 401-404.

Moreover, even if the Department had considered the complaint in rendering its decision, it is the decision of the UPC Subcommittee, not the Department, that constitutes FINRA's final action in this matter. The UPC Subcommittee did not consider the civil administrative action in rendering its decision. RP 401-404. *See* FINRA Rule 6490(e) (providing that UPC Subcommittee's decision constitutes the final action that is subject to the Commission's review). The UPC Subcommittee based its decision solely on the Commission's findings in the settled cease-and-desist proceeding. RP 401-404.

D. FINRA Applied FINRA Rule 6490 in a Manner Consistent with the Exchange Act

FINRA's process for denial of mPhase Technologies' request for the reverse stock split was entirely consistent with the Exchange Act. *See Approval Order*, 2010 SEC LEXIS 2186, at *15-16 ("[T]he proposal is consistent with the [Exchange Act] and . . . Section 15A(b)(6) of the [Exchange Act]," and "is necessary for the protection of investors and the public interest and to maintain fair and orderly markets.").[24]

In fact, a central purpose of the Exchange Act is to promote market integrity and enhance investor protection. *See, e.g., United States v. O'Hagan*, 521 U.S. 642, 658 (1997) (stating that in passing the Exchange Act, one of Congress's animating objectives was "to ensure honest markets, thereby promoting investor confidence . . . ."). In this case, FINRA properly found that Durando's and Dotoli's settlement of the cease-and-desist proceedings raised reasonable concerns about investor protection and market integrity, and it denied mPhase Technologies' request for the reverse stock split. In denying the request, FINRA appropriately considered that the settled cease-and-desist proceedings involved serious securities-related misconduct, and noted that Durando and Dotoli, and the corporate entities that they controlled, made unregistered offers and sales of securities, that Durando and Dotoli failed to disclose timely their holdings and positions in the company, and that Durando did not disclose timely his acquisition of more than

[24] On appeal, mPhase Technologies asserts that Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-17 thereunder, limit the scope of FINRA Rule 6490. mPhase Technologies is incorrect. The applicable section of the Exchange Act for FINRA, a national securities association, is Section 15A, and upon approving the rule, the Commission found that FINRA Rule 6490 was "consistent with Section 15A(b)(6) of the [Exchange] Act." *Approval Order*, 2010 SEC LEXIS 2186, at *21. The Commission did not rely on Section 10(b) of the Exchange Act for its authority to approve FINRA's rule, and FINRA Rule 6490 should not be interpreted as deriving its authority from that section.

five percent of company's stock. RP 403. *See PacketPort*, 2007 SEC LEXIS 2472, at *3-4, 11-12.

The UPC Subcommittee properly exercised its judgment, relied on grounds that are factually accurate, and denied mPhase Technologies' request for the reverse stock split, in accordance with FINRA Rule 6490 and the Exchange Act. The Commission should dismiss mPhase Technologies' application for review.

E. mPhase Technologies' Attacks on FINRA's Decision Have No Merit

mPhase Technologies raises several procedural arguments on appeal. These arguments are without merit.

1. The Commission Is Not Prohibited from Affirming FINRA's Action as a "De Facto" Officer and Director Bar

mPhase Technologies contends that the Commission is collaterally estopped from affirming FINRA's denial of the reverse stock split because it operates as a "de facto" bar that prohibits Durando and Dotoli from serving as officers and directors of any company. Applicant's Br. at 18, 22. This argument, however, misses its intended mark.

FINRA's decision imposes no sanction or penalty upon mPhase Technologies, or any individual associated mPhase Technologies, for Durando's and Dotoli's previous securities law violations. *See infra* Part V.E.2. Although FINRA's action denies mPhase Technologies' request to conduct a reverse stock split at this time, it does not prohibit Durando or Dotoli from serving as an officer or director of *any* company. *Cf. Weiss*, 2013 SEC LEXIS 837, at *45 (stating that FINRA's decision imposes no penalty because "Weiss remains free to restart the association process with a different firm at any time."). FINRA's decision also does not prohibit or prevent mPhase Technologies, or any other company for which Durando and Dotoli might

serve as officers or directors, from undertaking any Company-Related Action permitted by and consistent with the federal securities and FINRA rules. mPhase Technologies' suggestion to the contrary, Applicant's Br. at 18, is unfounded. *Cf. Eagle Supply Group, Inc.*, 53 S.E.C. 480, 485 n. 12 (1998) ("Eagle argues that the NASD has effectively established a rule . . . that prevents an entity's securities from being listed if an officer or director engaged in prior criminal or civil violations of the federal securities laws. We disagree.").

FINRA's consideration of Durando's and Dotoli's prior securities law violations, as a basis for the denial of mPhase Technologies' request for a reverse stock split, is consistent with both the express terms of FINRA Rule 6490(d)(3), and the exercise of judgment granted to FINRA therein. *Cf. DHB Capital Group*, 52 S.E.C. at 744-45 ("The NASD's decision to deny inclusion – based in part on the fact that, upon finding that Brooks committed serious securities law violations, we barred him (with his consent) from the industry – is a collateral consequence of Brooks' misconduct . . . . It also is a proper exercise of the NASD's authority under its Qualification Requirements By-Law."); *see also Approval Order*, 2010 SEC LEXIS 2186, at *7 ("[FINRA] Rule 6490 would codify the authority of [FINRA] to conduct in-depth reviews of requests to process Company-Related Actions and to provide FINRA staff the discretion not to process . . . requests for which there are certain indicators of potential fraud."). In this respect, the settled cease-and-desist proceedings support that FINRA's action, consistent with the requirements of Section 19(f) of the Exchange Act, is based and grounded in fact. *Cf. DHB Capital Group*, 52 S.E.C. at 745 ("We find that a sufficient factual basis exists to deny DHB's application . . . and that the NASD acted with respect to DHB both fairly and in accordance with its rules which it applied in a manner consistent with the purposes of the securities laws.").

FINRA has not, by denying mPhase Technologies' application, relitigated any issue (or claim) previously adjudicated by the Commission that would preclude the Commission's

affirmance of FINRA's action.[25] *See Frederick W. Wall*, Exchange Act Release No. 52467, 2005 SEC LEXIS 2380, at *11 (Sept. 19, 2005) (rejecting a claim that the Commission's action under Section 15(b) of the Exchange Act was prohibited "because the underlying misconduct already has been the basis of criminal and civil proceedings").

2. FINRA's Action Is Not Time-Barred

mPhase Technologies also contends that FINRA's denial of the company's requested reverse stock split is barred by the five-year statute of limitations contained in 28 U.S.C. §

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[25] Collateral estoppel refers to the preclusive effect of a judgment that bars a party from litigating a second time an issue of fact or law that has been decided against the party or party in privity in a prior proceeding. *See Parklane Hosiery Co., Inc., v. Shore*, 439 U.S. 322, 326 (1979). mPhase Technologies' collateral estoppel argument fails in this case. While the Commission and FINRA both seek to protect investors and preserve the integrity of the market, their respective roles, although sometimes overlapping and coordinated, represent distinct legal interests. *See Jones v. SEC*, 115 F.3d 1173, 1180-81 (4th Cir. 1997). They are not the same parties, and they are not parties in privity.

Moreover, the issues that arise from FINRA's action in this matter and those that resulted in the settled cease-and-desist proceedings are not identical. The UPC Subcommittee sought to determine whether Durando's and Dotoli's ownership and control of mPhase Technologies and their involvement in the settled cease-and-desist proceeding raised reasonable concerns about investor protection and market integrity. *See* FINRA Rule 6490(a); *see also Approval Order*, 2010 SEC LEXIS 2186, at *4 ("FINRA notes that the issuer-related services it performs are aimed not only at facilitating trading and settlement, but also at promoting investor protection and market integrity."). The issue before the Commission in the cease-and-desist proceeding, in contrast, was whether Durando, Dotoli, and the corporate entities that they controlled violated the federal securities laws and, if so, what level of sanctions, penalties, and disgorgement to impose. Collateral estoppel therefore provides no basis to preclude the Commission's affirmance of FINRA's decision to deny mPhase Technologies' request to conduct a reverse stock split in this case. *See* Section 8A of the Securities Act ("If the Commission finds . . . that any person is violating, has violated, or is about to violate any provision of this title, . . . the Commission may publish its findings and enter an order requiring such person . . . to cease and desist from committing or causing such violation and any future violation of the same provision, rule or regulation."); Section 21C of the Exchange Act (same).

2462.[26] Applicant's Br. at 22. This argument, however, is an ill-conceived novelty. The period of limitations established in 28 U.S.C. § 2462 does not apply to FINRA's denial of mPhase Technologies' request.

First, the Commission has long held that *no* statute of limitations applies to the actions of FINRA and other self-regulatory organizations. FINRA is a private organization, and its actions are not limited by the requirements applicable to a governmental agency, including 28 U.S.C. § 2462.[27] *See, e.g., William D. Hirsh*, 54 S.E.C. 1068, 1077 & n.11 (2000) ("We have consistently held that no statute of limitations applies to the disciplinary actions of the Exchange or other self-regulatory organizations."); *Shamrock Partners, Ltd.*, 53 S.E.C. 1008, 1015 n.15 (1998) ("The five-year statute of limitations . . . does not apply to NASD proceedings.").

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[26] 28 U.S.C. § 2462 provides a default five-year statute of limitations:

> Except as otherwise provided by an Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service be made thereon.

[27] Contrary to the applicant's argument on appeal, Applicant's Br. at 24, the fact that FINRA derives rulemaking and disciplinary authority from the Exchange Act, is obligated to enforce provisions of the federal securities laws, must adopt rules that prevent fraudulent and manipulative acts and practices, and is subject to the Commission's oversight and review powers, does not diminish or undermine this well-settled proposition. *See Herbert Garrett Frey*, 53 S.E.C. 146, 153 (1997) ("The NASD is a private organization that operates subject to a scheme of government regulation by self-regulatory organizations. Many courts and this Commission have determined that such self-regulatory organizations are not subject to many of the requirements applicable to a government agency."); *see also Mission Secs. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *39 (Dec. 7, 2010) ("Although Section 15A authorizes the SEC to exercise a 'significant oversight function' over registered associations, self-regulatory organizations, such as FINRA, are not 'Government-created, Government-appointed entit[ies].'").

Second, FINRA's denial of mPhase Technologies' request to conduct a reverse stock split does not constitute "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture," and consequently, 28 U.S.C. § 2462 does not apply. As an initial matter, FINRA simply does not possess the authority to seek judicial enforcement of any remedy to which 28 U.S.C. § 2462's limitations period attaches. *See Fiero v. Fin. Indus. Regulatory Auth., Inc.*, 660 F.3d 569, 577 (2011) ("[W]e conclude that the heavy weight of evidence suggests that Congress did not intend to empower FINRA to bring court proceedings to enforce its fines.").

Moreover, in denying mPhase Technologies' request, FINRA did not employ its disciplinary procedures, adjudicate claims that mPhase Technologies, Durando, or Dotoli violated the federal securities laws or FINRA rules, or impose any final disciplinary sanction that is subject to Commission review under Section 19(e) of the Exchange Act. *See Larry A. Saylor*, Exchange Act Release No. 51949, 2005 SEC LEXIS 1536, at *8 (June 30, 2005) ("NASD did not employ its disciplinary procedures, did not make a determination that Saylor had violated a statute or rule, and did not impose a final disciplinary sanction."); *Pac. Stock Exch.'s Options Floor Post X-17*, 51 S.E.C. 261, 266 (1992) ("We . . . have interpreted the term 'disciplinary' to refer to action responding to an alleged violation of an Exchange rule or Commission statute or rule, or action 'in which a punishment or sanction is sought or intended.'"). mPhase Technologies therefore may not fairly rebrand FINRA's action in denying mPhase Technologies' request to conduct a reverse stock split as a sanction or "penalty" for purposes of this appeal. *See Morgan Stanley & Co., Inc.*, 53 S.E.C. 379, 383 (1997) ("The fact that Morgan was adversely affected by the NASD's exemption denial does not make the NASD's action disciplinary in nature."); *see also Allen Douglas Secs.*, Inc., Exchange Act Release No. 50513, 2004 SEC LEXIS 2329, at *12 (Oct. 12, 2004) (rejecting an assertion that NASD's action involved, "'either directly or indirectly, the employment of disciplinary procedures'").

In this respect, mPhase Technologies misconstrues the nature of FINRA's decision. *See* Applicant's Br. at 22. Although FINRA considered Durando's and Dotoli's history of securities law violations in reaching a decision to deny mPhase Technologies' request to conduct a reverse stock split, FINRA neither punished nor penalized mPhase Technologies for "the past conduct of its officers and directors."[28] Applicant's Br. at 22.

Rather, FINRA's decision in this matter serves simply to maintain the status quo ante for the remedial purpose of protecting the investing public and promoting market integrity.[29] *See* RP 402-403; *see also Approval Order*, 2010 SEC LEXIS 2186, at *4 (noting that FINRA's issuer-related OTCBB services "are aimed not only at facilitating trading and settlement, but also promoting investor protection and market integrity"). The period of limitations provided in 28

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[28] "[T]he test for whether a sanction is sufficiently punitive to constitute a 'penalty' within the meaning of § 2462 is an objective one, not measured from the subjective perspective of the accused (which would render virtually every sanction imposed a penalty)." *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996). In membership continuance appeals where FINRA maintained the status quo and denied an application for a disqualified person to associate with a firm, the Commission has held that denial of the application was not a penalty. *See, e.g., Weiss*, 2013 SEC LEXIS 837, at *46 n.90 (explaining that FINRA did not impose a penalty or remedial sanction… "FINRA merely denied [the applicant's] 'relief from a previously existing disqualification.'") (citation omitted); *Dennis Milewitz*, 53 S.E.C. 701, 707 (1998) ("We have held that engaging in such a judgment, the NASD's consideration of the applicant's disciplinary history prior to the statutory disqualification, including misconduct for which sanctions were imposed previously, does not amount to a further penalty for that prior misconduct."); *Halpert and Co., Inc.*, 50 S.E.C. 420, 422 (1990) ("Contrary to applicants' contention, the NASD has not expelled Tuchman from the securities industry. Nor is it imposing a penalty on applicants in this matter or even a remedial sanction.").

[29] mPhase Technologies' citation to the Fifth Circuit's unpublished decision in *SEC v. Bartek*, which has no precedential effect, does not detract from this inevitable conclusion. *See Bartek*, 484 Fed. Appx. 949 (5th Cir. Aug. 7, 2012); *see also* 5th Cir. R. 47.5.4. The denial of mPhase Technologies' request to conduct a reverse stock split does not impose a sanction or penalty upon the issuer, or any person associated with the issuer, that could objectively be viewed as having a "stigmatizing effect and long-standing repercussions." *Bartek*, 484 Fed. Appx. at 957.

U.S.C. § 2462 is entirely inapplicable.[30] *See Riordan v. SEC*, 627 F.3d 1230, 1234-35 (D.C. Cir. 2010) (finding that a Commission cease-and-desist order did not pose a statute of limitations problem because it was "purely remedial and preventative" and not a "penalty" or "forfeiture"); *SEC v. Brown*, 740 F. Supp.2d 148, 156-57 (D.D.C. 2010) ("Equitable relief which is granted upon a showing that it is necessary to prevent future harm to the public is remedial, not punitive."); *Vladislav Steven Zubkis*, Exchange Act Release No. 52876, 2005 SEC LEXIS 3125, at *16-18 (Dec. 2, 2005) (finding that Commission action under Section 15(b) of the Exchange Act was neither punitive nor penal, focused only upon the individual's risk to the public, and thus was not subject to 28 U.S.C. § 2462's time limitations).

VI. CONCLUSION

The UPC Subcommittee properly exercised its judgment, relied on grounds that are factually accurate, and denied mPhase Technologies' request for the reverse stock split in accordance with FINRA Rule 6490 and the Exchange Act. The UPC Subcommittee considered the seriousness of the violations at issue, the importance of conducting registered distributions of securities, and the significance of disclosing the acquisition of significant blocks of stock. The UPC Subcommittee also considered Durando's and Dotoli's current management and ownership

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[30] The United States Supreme Court's recent decision in *Gabelli v. SEC*, 2013 U.S. LEXIS 1861 (Feb. 27, 2013), which addressed the question of when the statute of limitations in 28 U.S.C. § 2462 begins to accrue for Commission enforcement actions requesting civil penalties under the Investment Advisors Act, has no bearing upon the issues before the Commission in this matter. Neither FINRA nor the Commission has brought an enforcement action. Assuming, *arguendo*, that 28 U.S.C. § 2462 has any bearing upon this case, which it does not, its application would be in the future. FINRA's decision is subject to Commission review under Section 19(f) of the Exchange Act, and a Commission "action, suit or proceeding" for purposes of the five-year limitations period could not accrue unless and until the Commission issues an order of affirmance dismissing mPhase Technologies' appeal. *See SEC v. Mohn*, 465 F.3d 647, 654 & n. 4 (6th Cir. 2006) ("The SEC simply had no order to enforce until it issued the . . . order affirming the NASD sanctions.").

of mPhase Technologies and concluded that their continued involvement with the company raised significant concerns about the proposed Company-Related Action.

The UPC Subcommittee's decision imposed no undue burden upon competition. To the contrary, the UPC Subcommittee's decision maintained the status quo. Because FINRA's denial comports fully with Section 19(f) of the Exchange Act, the Commission should dismiss mPhase Technologies' application for review.

Respectfully Submitted,

Alan Lawhead
Gary Dernelle
Jante Turner

By: ______________________
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FINRA – Office of General Counsel
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Washington, DC 20006
202-728-8264 – Facsimile
202-728-8317 – Telephone

April 10, 2013

APPENDIX A

Business Inquiry

HOME HELP

Business Inquiry Details

Business Name:	**M PHASE TECHNOLOGIES, INC.**	Business Id:	**0620380**
Business Address:	**587 CONNECTICUT AVE., NORWALK, CT, 06856**	Mailing Address:	**587 CONNECTICUT AVE., NORWALK, CT, 06854**
Citizenship/State Inc:	**Foreign/NJ**	Last Report Year:	**2011**
Business Type:	**Stock**	Business Status:	**Active**
Date Inc/Register:	**May 06, 1999**	Name in State of INC:	M PHASE TECHNOLOGIES, INC.
Commence Business Date:	**Jun 02, 1997**		

Principals

Name/Title:	Business Address:	Residence Address:
RONALD A DURANDO PRESIDENT	587 CONNECTICUT AVE., NORWALK, CT, 06856	NUTLEY, NJ,
GUSTAVE T. DOTOLI SECRETARY	587 CONNECTICUT AVE, NORWALK, CT, 06856	NUTLEY, NJ,
MARTIN SMILEY DIRECTOR	587 CONNECTICUT AVE, NORWALK, CT, 06856	WESTPORT, CT,

Business Summary

Agent Name:	**SECRETARY OF THE STATE**
Agent Business Address:	**30 TRINITY STREET, HARTFORD, CT, 06106-0470**
Agent Residence Address:	**NONE**

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APPENDIX B

Business Inquiry

HOME HELP

Business Inquiry Details

Business Name:	**PACKETPORT.COM, INC.**	Business Id:	**0300976**
Business Address:	**587 CONNECTICUT AVENUE, NORWALK, CT, 06854**	Mailing Address:	**587 CONNECTICUT AVENUE, NORWALK, CT, 06854**
Citizenship/State Inc:	**Foreign/NV**	Last Report Year:	**2007**
Business Type:	**Stock**	Business Status:	**Active**
Date Inc/Register:	**Aug 11, 1994**	Name in State of INC:	PACKETPORT.COM, INC.

Principals

Name/Title:	Business Address:	Residence Address:
RONALD A. DURANDO PRESIDENT	587 CONNECTICUT AVENUE, NORWALK, CT, 06854	NUTLEY, NJ
GUSTAVE T. DOTOLI VICE PRESIDENT	587 CONNECTICUT AVENUE, NORWALK, CT, 06854	NUTLEY, NJ,
EDWARD J. SUOZZO DIRECTOR	587 CONNECTICUT AVENUE, NORWALK, CT, 06854	SOMERSET, NJ,

Business Summary

Agent Name:	**PRENTICE HALL CORPORATION SYSTEM**
Agent Business Address:	**50 WESTON STREET, HARTFORD, CT, 06120-1537**
Agent Residence Address:	**NONE**

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APPENDIX C

Business Inquiry

HOME HELP

Business Inquiry Details

Business Name:	**MICROPHASE CORPORATION**	Business Id:	**0031147**
Business Address:	**587 CONNECTICUT AVE., NORWALK, CT, 06854**	Mailing Address:	**587 CONNECTICUT AVE, NORWALK, CT, 06854**
Citizenship/State Inc:	**Domestic/CT**	Last Report Year:	**2011**
Business Type:	**Stock**	Business Status:	**Active**
Date Inc/Register:	**Apr 20, 1959**		

Principals

Name/Title:	Business Address:	Residence Address:
NECDET ERGUL PRES	MICROPHASE CORPORATION, 587 CONNECTICUT AVE., NORWALK, CT, 06856	, GREENWICH, CT,
RONALD A. DURANDO C.O.O.	MICROPHASE CORPORATION, 587 CONNECTICUT AVE., NORWALK, CT, 06856	NUTLEY, NJ,
JEFFREY R. F. PETERSON SECRETARY AND TREASURER	MICROPHASE CORPORATION 587 CONNECTICUT AVE, NORWALK, CT, 06856	GREENWICH, CT,

Business Summary

Agent Name:	**JEFFREY PETERSON**
Agent Business Address:	**MICROPHASE CORPORATION, 587 CONNECTICUT AVE, NORWALK, CT, 06856**
Agent Residence Address:	**150 CLAPBOARD ROAD, GREENWICH, CT, 06831**

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CERTIFICATE OF COMPLIANCE

I, Jante Turner, certify that this brief complies with the length limitation set forth in Commission Rule of Practice 154(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 9,987 words, exclusive of the pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits.

Respectfully Submitted,

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