UNITED STATES OF AMERICA
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of Minim, Inc. For Review of Disciplinary Action Taken by The Nasdaq Stock Market LLC.	Admin. Proc. File No. 3-22276 **MINIM'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR AN EMERGENCY STAY PURSUANT TO SEC RULE OF PRACTICE 401**

***** EXPEDITED CONSIDERATION REQUESTED UNDER RULE 401(d)(3) *****

Dated: October 31, 2024

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PRELIMINARY STATEMENT

This appeal is about whether Nasdaq should employ the "nuclear weapon" of delisting Minim, and thereby forfeiting Minim's planned merger with e2Companies, simply because Minim provided a written submission to Nasdaq after Nasdaq's arbitrarily-selected deadline, but still well in advance of the hearing by the Nasdaq Hearings Panel, and prior to the deadline for supplemental written submissions.[1] Nasdaq's argues that Minim should be delisted only by mischaracterizing the relief Minim seeks in this appeal.

Nasdaq claims that Minim seeks in this appeal to be relisted on Nasdaq, but that is not the case. All Minim is asking for in this appeal is the opportunity for it to present to the Nasdaq Hearing Panel its plan for regaining compliance with the Minimum Equity Rule. Nasdaq's bizarre insistence that Minim be denied this basic due-process right is unsupported by the Nasdaq Rules, and contrary to long-standing SEC policy favoring determinations on the merits, rather than on default.

Similarly unavailing is Nasdaq's claim that Minim will not suffer irreparable harm. The publicly-filed merger agreement with e2Companies expressly conditions the merger on Minim's continued listing on Nasdaq. Minim will lose out on this and other business opportunities if it is delisted. Nasdaq's speculation that Minim can renegotiate this condition is insufficient to defeat Minim's claim of irreparable harm.

Finally, staying the delisting serves the public interest. There is a strong public policy disfavoring adjudication by default, but that is precisely what Nasdaq argues for here.

[1] Capitalized terms not defined in this brief shall have the meaning ascribed to them in Minim's moving brief.

For these reasons, and as discussed below, Minim respectfully requests that the Commission enter a stay of Minim's delisting pending an adjudication of Minim's Application for Review.

ARGUMENT

I. MINIM WILL LIKELY SUCCEED ON THE MERITS OF ITS APPLICATION FOR REVIEW

A. Nasdaq Acted Outside of the SEC Approved Rules

The Second Circuit has held that the Nasdaq Rules are contractual in nature. *See Barbara v. N.Y. Stock Exch.*, 99 F.3d 49, 54-55 (2d Cir. 1996) ("[T]he rules of a securities exchange are contractual in nature, and are thus interpreted pursuant to ordinary principles of contract law . . ."). Like any contract, ambiguities in the contract are construed against the drafter, in this case, Nasdaq. *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 59, 67 (2d Cir. 2000).

Here, the Nasdaq Rules are silent or ambiguous on a number of key issues relating to this appeal, and those ambiguities must be construed against Nasdaq.

First, while Nasdaq Rule 5815 permits Nasdaq to require a written submission, and to set deadlines for written submissions in advance of the hearing before the Nasdaq Hearing Panel, Opp. at 7-8, the Nasdaq Rules nowhere state that the failure to provide a written submission by the deadline will result in the hearing being deemed abandoned. Indeed, the entire concept of a hearing being deemed "abandoned" appears **nowhere** in Nasdaq Rule 5815. The only place this admonition appears is in the letter Nasdaq attached to its one-line e-mail – but not in the SEC-approved Rules. Ex. 6. This silence in the Nasdaq Rules is construed against Nasdaq, and means that Nasdaq was operating outside of its authority when it held that Minim abandoned the hearing because it filed its written submission ten days late, but still nine days in advance of the hearing.

Second, Minim *did* make a written submission nine days in advance of the August 1, 2024 hearing, and a week before the deadline for written updates. *See* Ex. 2. That written submission, consistent with Nasdaq Rule 5815(a)(5), did not include any legal argument, but only included facts demonstrating Minim's plan for regaining compliance with the Minimum Equity Rule.

Nasdaq argues that an issuer is only permitted to submit a written update if it had timely made an initial written submission, Opp. at 8, but that additional limitation appears nowhere in the Rules, and was invented whole cloth by Nasdaq. Rule 5815(a)(5) states that the "the Company may supplement the Written Submission by providing a written update to the Hearings Department ("Written Update") no later than two business days in advance of the hearing." *Id.* Black's Law Dictionary defines "supplemental" as "supplying something additional; adding what is lacking." Black's Law Dictionary 1577 (9th ed. 2009). Minim "supplied something additional" by providing Nasdaq with additional facts demonstrating its plan for regaining compliance with the Minimum Equity Rule. And, even if Nasdaq Rule 5815 was ambiguous, such ambiguity is to be construed against Nasdaq, not Minim.

Third, Nasdaq acted contrary to the Rules by denying Minim the right to appeal Nasdaq's decision deeming Minim's appeal abandoned to the Listing Council. Nasdaq initially told Minim it could appeal the decision, but then reversed course on August 1, 2024, and told Minim it could not appeal the decision. Nasdaq claimed that the Listing Council could only hear the appeals of Hearing Panel Decisions, but "in this matter, there was no Hearing and there is no Panel Decision to appeal." *See* Ex. 7.

Nasdaq's decision is contrary to the express text of Nasdaq Rule 5820(d)(2) which provides that "the Listing Council may consider any failure to meet any quantitative standard or qualitative consideration for initial or continued listing, *including failures previously not considered by the*

Hearings Panel." (emphasis supplied). The emphasized language makes clear that Listing Panel may consider issues that "were not considered by the Hearing Panel," meaning that Nasdaq ignored its own Rule when denying Minim the right to appeal this decision. Minim's construction of the Rule is supported by Nasdaq's Notice to Amend Rule 5820, which states that "Listing Rule 5820(d) gives the Listing Council broad discretion to consider . . . failures previously not considered by the Hearings Panel . . . This language suggests that the Listing Council's mandate is broader and that it may render decisions based upon facts and circumstances that were not before the Hearings Panels. . . ." [2]

Nasdaq argues that Rule 5820(d)(2)'s provision allowing the Listing Council to consider "failures previously not considered by the Hearings Panel" only allows the Listing Counsel to consider failures once the Panel renders a decision, Opp. at 10, but this adds words not found in the text of the Rule. Nowhere does Rule 5820(d)(2) limit the scope of the Listing Council's appellate review to Panel decisions. The scope of the Listing Council's appellate review is broad, and includes "any failure to meet any quantitative standard or qualitative consideration," whether it was recorded in a Hearing Panel decision or not.

In sum, Nasdaq has acted outside of the scope of the SEC-approved Rules, which Rules must be construed in Minim's favor. As such, Minim is likely to succeed on the merits of its appeal.

B. Nasdaq's Abandonment Decision Was Excessive and Contrary to Public Policy

Nasdaq argues that its refusal to allow Minim to attend the Hearing Panel hearing was not an excessive sanction because the SEC stated in approving Rule 5815 that allowing a company to

[2] Available at https://www.federalregister.gov/documents/2024/07/23/2024-16105/self-regulatory-organizations-the-nasdaq-stock-market-llc-notice-of-filing-of-proposed-rule-change

"delay providing material information and legal arguments and thereby extend the delisting review process . . . would raise issues under the Exchange Act." Opp. at 12. However, Minim submitted its plan to regain compliance with the Minimum Equity Rule **nine days** before the Hearing Panel hearing, which provided the Hearing Panel ample time to consider Minim's plan. The hearing could have taken place without delay, but for Nasdaq's arbitrary and excessive decision to cancel the hearing and deem it abandoned.

Moreover, Nasdaq does not address, let alone distinguish the line of Second Circuit cases holding that "strong public policy favors resolving disputes on the merits," *Am. All. Ins. Co. v. Eagle Ins. Co.*, 92 F.3d 57, 61 (2d Cir. 1996), and that deciding cases on default is a "harsh and drastic remedy." *Carlton v. Pollack* (*In re Carlton*), 72 B.R. 543, 547 (Bankr. E.D.N.Y. 1987). In *Rapoport v. SEC*, the D.C. Circuit Court of Appeals vacated the Commission's order denying respondent's s motion to set aside the default entered against him. 682 F.3d 98, 99 (D.C. Cir. 2012).

Indeed, the Commission regularly vacates default judgments that arise after a respondent misses a SEC deadline, particularly where the respondent cures the default quickly and where the default was not intentional. *See e.g., In re: David Mura,* Exchange Act Release No. 72080, 2014 WL 1744129, at *4-6 (May 2, 2014) (vacating default); *In re: RKO RESOURCES, INC*., Exchange Act Release No. 75765, 2015 SEC LEXIS 3540, *9 (S.E.C. Aug. 26, 2015) (vacating default where, *inter alia,* respondent made an "inadvertent mistake about how long it had to answer" and where the "claim of inadvertence [] is supported by the speed with which [Respondent] filed its motion to vacate after default.").[3]

[3] Thus, contrary to Nasdaq's assertion in its brief that "intent plays no role in the analysis," Opp. at 9, intent is one of the three factors the SEC expressly considers when deciding whether to vacate a default. *See RKO RESOURCES, INC.,* 2015 SEC LEXIS 3540, *9 (considering whether "the respondent did not intentionally default" as part of analysis on whether to vacate the default.)

Here, Minim cured the alleged default by providing a written submission nine-days in advance of the Hearing, and the McMurdo Affirmation, Ex. 1, explains in detail how Minim inadvertently overlooked the initial email containing the deadlines. Minim's written submission provides a detailed explanation for Minim's plan to regain compliance with the Minimum Equity Rule. There is no justification for Nasdaq to adopt the draconian policy of refusing Minim an opportunity to appear at a hearing and demonstrate its plan to regain compliance with the Minimum Equity Rule.

II. MINIM AND ITS SHAREHOLDERS WILL SUFFER IRREPARABLE HARM

Minim's moving brief established that Minim will suffer irreparable harm because its merger with e2Companies will fall through if it is delisted, and it will lose other business opportunities. *See* Ex. 1, McMurdo Aff. ¶ 20; *Mony Grp., Inc. v. Highfields Capital Mgmt., L.P.*, 368 F.3d 138, 148 (2d Cir. 2004) (irreparable harm found where "defeat of this transaction could spell the loss of a business opportunity that (by its nature) can only exist at one point in time and cannot be recovered or repaired with money damages."). Nasdaq does not contest that the loss of the merger would irreparably harm Minim, but speculates that Minim can renegotiate the terms of its merger to eliminate the requirement that Minim stay listed on Nasdaq as a precondition to the merger. This is rank speculation on Nasdaq's part, and is wholly insufficient to defeat Minim's showing of irreparable harm.

CONCLUSION

For all the foregoing reasons, Minim respectfully requests that the SEC stay Minim's delisting pending Minin's application for review of Nasdaq's actions.

OS Received 10/31/2024

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In the Matter of the Application of Minim, Inc. For Review of Disciplinary Action Taken by The Nasdaq Stock Market LLC.	Admin. Proc. File No. 3-22276 **CERTIFICATE OF SERVICE**

Samuel Kadosh, being of full age, hereby certifies:

1. I am an attorney at Gulko Schwed LLP.

2. On October 31, 2024, in accordance with SEC Rule of Practice 100(c) and Commission Release No. 88415, I caused electronic copies of Minim's Reply Memorandum Of Law In Further Support Of Its Motion For An Emergency Stay to be sent via email to Nasdaq, and by facsimile on the SEC:

The Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, NE Room 10915
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administrativeproceedingsfax@sec.gov
Fax: 703-813-9793

and

The Nasdaq Stock Market LLC
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3. Gibson Dunn has consented to accept service via email on behalf of Nasdaq.

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

Dated: October 31, 2024
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