

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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

Admin. Proc. File No. 3-22512

In the Matter of the Application of

VIRPAX PHARMACEUTICALS, INC.

For Review of Disciplinary Action Taken by

THE NASDAQ STOCK MARKET LLC

**VIRPAX PHARMACEUTICAL INC.'S
REPLY BRIEF IN SUPPORT OF
APPLICATION FOR REVIEW**

Dated: January 30, 2026

Samuel Kadosh
Asher Gulko
GULKO SCHWED LLP
525 Chestnut Street, Suite 212
Cedarhurst, New York 11516
P: 212.500.1312 / F: 212.678.0405
skadosh@gulkoschwed.com
asher@gulkoschwed.com

Attorneys for Virpax Pharmaceuticals, Inc.

TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
ARGUMENT	2
I. VIRPAX WAS NOT REQUIRED TO APPEAL TO LISTING COUNCIL BEFORE SEEKING COMMISSION REVIEW.....	2
A. Virpax Is Permitted to Respond to Arguments Raised in Nasdaq’s Opposition Brief.....	2
B. The Exhaustion Doctrine Does Not Bar Virpax’s Appeal.	3
II. Nasdaq Rule 5840(e)(3) Clearly Authorized The Two-Day Extension Virpax Requested.....	9
A. Issue Exhaustion Does Not Bar Virpax’s Argument.	9
B. Granting an Extension Under Rule 5840(e)(3) is a “Procedural Action.”.	10
C. The Predicate Requirement of Rule 5840(e)(3) Was Satisfied.	12
D. Virpax Demonstrated “Extenuating Circumstances.”	13
III. Nasdaq’s Retraction of the Extension Was Arbitrary, Capricious, and Unfair.	14
IV. Virpax’s Private Nondelegation Claim is Timely and Meritorious.....	15
CONCLUSION	20

PRELIMINARY STATEMENT

Nasdaq's¹ Opposition Brief ("Opp.") does not provide any legitimate basis for affirming the Hearing Panel's decision to delist Virpax after it granted, then retroactively retracted, a brief extension that it granted for Virpax to gain compliance with the minimum equity requirement. Instead, Nasdaq raises meritless procedural arguments that are often belied by Nasdaq's own supporting authority.

Nasdaq seeks to avoid responding to the substance of Virpax's claims by arguing that the Commission should not even hear this appeal because Virpax did not engage in the discretionary appeal to the Nasdaq Listing and Hearing Review Council ("Listing Council") before seeking Commission review. This argument fails for three reasons. First, the appeal to the Listing Council is discretionary, not mandatory, and there is no requirement to exhaust discretionary appeals before appealing to the Commission. Second, even if the exhaustion doctrine applied, there are several exceptions that apply here. Finally, the imposition of the exhaustion doctrine is discretionary, and the Commission should exercise its discretion to hear this appeal, given the procedural irregularities that infected the Hearing Panel's decision.

As for Nasdaq's substantive argument that Nasdaq Rule 5840(e)(3) does not permit the two-day extension that Nasdaq itself initially granted, case law makes clear that extensions of time, such as the one requested, is considered a "procedural action" under Rule 5840(e)(3). Moreover, the record demonstrates that Virpax demonstrated the "extenuating circumstances" that justified the extension.

¹ All capitalized terms in this reply brief have the same definition attributed to them in Virpax's Opening Brief, unless otherwise defined herein.

Finally, under Supreme Court precedent cited by Nasdaq itself, the constitutional private nondelegation doctrine prohibits a private actor like Nasdaq from exercising delegated regulatory power without the Commission serving as the “final authority” on the exercise of that power. Nasdaq simply fails to explain how its practice of filing a Form 25 that effectuates a delisting by operation of time rather than Commission approval satisfies this constitutional requirement.

In light of the foregoing, Virpax requests that the Commission set aside Nasdaq’s erroneous decision to delist Virpax.

ARGUMENT

I. VIRPAX WAS NOT REQUIRED TO APPEAL TO LISTING COUNCIL BEFORE SEEKING COMMISSION REVIEW.

Nasdaq argues that the Commission should not even consider the merits of Virpax’s appeal because Virpax only appealed the delisting decision to the Nasdaq Hearing Panel, but not the Nasdaq Listing Council, and thereby failed to exhaust its administrative remedies. Opp. 14-15. Nasdaq further contends that Virpax may not even respond to this argument in this Reply because doing so would be to raise a new argument on reply *See* Opp. p. 15. Nasdaq is wrong on both points.

A. Virpax Is Permitted to Respond to Arguments Raised in Nasdaq’s Opposition Brief

Virpax is plainly permitted to respond to Nasdaq’s exhaustion argument in this Reply. 17 C.F.R. § 201.450(b), which Nasdaq purports to rely on, expressly provides that “[r]eply briefs shall be confined to matters in opposition briefs of other parties,” and that is exactly what Virpax does here. As courts routinely recognize, “an appellant generally may respond to arguments raised for the first time in the appellee’s brief.” *Loja v. Main St. Acquisition Corp.*, 906 F.3d 680, 684 (7th Cir. 2018) (“Main Street raised the issue of amendment in its response brief and Loja replied. Accordingly, the issue is not waived.”). *See also United States v. Powers*, 885 F.3d 728, 732 (D.C.

Cir. 2018) (“But an appellant generally may, in a reply brief, ‘respond to arguments raised for the first time in the appellee’s brief.’”). Indeed, “a reply necessarily raises facts and issues, for the first time, that are germane to the opposition. If the evidence and argument included with a motion were required to anticipate the arguments a respondent might raise in opposition to the motion, the court would not permit the movant to file a reply to any opposition.” *In re Large Scale Biology Corp.*, 2007 Bankr. LEXIS 3395, at *3 (Bankr. E.D. Cal. Sept. 25, 2007).

B. The Exhaustion Doctrine Does Not Bar Virpax’s Appeal.

1. Appeals To the Listing Council Are Discretionary, Not Mandatory

Virpax’s appeal is not barred by the exhaustion doctrine because appeals to the Listing Council are discretionary, not mandatory, and the exhaustion doctrine does not apply to discretionary appeals.

Specifically, Nasdaq Rule 5820 provides that “a Company *may* appeal a Panel Decision to the Listing Council.” (emphasis supplied). The term “may” in contexts similar to this one means that the referenced appeal is discretionary, but not required, and the exhaustion requirement does not apply to such discretionary appeals. *See MCR Oil Tools, L.L.C. v. United States Dep’t of Transportation*, 110 F.4th 677, 690 (5th Cir. 2024) (construing a regulation stating that an applicant “may request” reconsideration as “permitting but not requiring applicants to seek further agency review” before filing suit, and holding that the scheme therefore did not impose an exhaustion requirement) (internal citations omitted); *Young v. Reno*, 114 F.3d 879, 882–83 (9th Cir. 1997) (holding that appellant was not required to exhaust administrative remedy of seeking appeal to BIA before seeking judicial review because the governing regulations provides that ‘[t]he petitioner *may* appeal the decision within fifteen days after the service of notice’ –indicating “the appeal itself is optional – and “do not explicitly require a petitioner to appeal to the BIA prior to

seeking judicial review...”); *Montoya v. Reliance Standard Life Ins. Co.*, No. 14-CV-02740-WHO, 2015 U.S. Dist. LEXIS 26044, at *13-15 (N.D. Cal. Mar. 2, 2015) (“[D]enial letters only permit, but do not require, an administrative appeal: ‘[Claimant] may request a review of this determination....’... This permissive language does not inform an ordinary plan participant that he must exhaust the available administrative remedies prior to filing suit.”); *True Care Physical Therapy, PLLC v. Auto Club Grp. Ins. Co.*, 347 Mich. App. 168, 180–81, 14 N.W.3d 456, 463 (2023) (statutory language stating that “provider ‘may appeal the determination’ to the DIFS . . . provide an alternative and discretionary way to appeal a utilization-review determination to the DIFS, not an exclusive or mandatory method for challenging denial of benefits.”). Accordingly, Virpax’s appeal to the Commission without seeking Listing Council review is not grounds for dismissing this appeal.

2. Even If Mandatory Exhaustion Applied, There Are Several Exceptions Applicable Here

Even if Virpax was required to appeal to the Listing Council, the Commission should still consider this appeal as “there are a number of exceptions to the exhaustion requirement” that are fully applicable here. *Trinity Indus., Inc. v. Reich*, 901 F. Supp. 282, 286 (E.D. Ark. 1993). First, “exhaustion is not required when the issue presented to the court is ‘one of purely statutory interpretation,’ *Touche Ross & Co. v. S.E.C.*, 609 F.2d 570, 577 (2nd Cir.1979), or involves purely legal issues, *Bethlehem Steel Corp. v. E.P.A.*, 669 F.2d 903, 907 (3rd Cir.1982).” *Id.*

Here, the core dispute is a pure matter of law and statutory interpretation, namely, whether Nasdaq Rule 5840(e)(3) permits Nasdaq to grant an extension beyond the 180-day period referenced in Rule 5815(c)(1)(A). *See generally* Virpax’s Opening Brief (“Virpax Brief”), Opp. As such, the exhaustion doctrine does not bar this appeal.

Moreover, “exhaustion is not required where administrative proceedings involve questions of significant national interest or where the agency has clearly violated rights secured by the Constitution, statutes, or administrative regulations.” *Trinity Indus., Inc.*, 901 F. Supp. at 286 (citing cases). Here, as established in the Opening Brief, Nasdaq has clearly violated the constitutional non-delegation doctrine, as well as Virpax’s statutory right under the Exchange Act to a “fair procedure,” (which itself is akin to the constitutional requirement of procedural due process, *see Feins v. Am. Stock Exch., Inc.*, 81 F.3d 1215, 1218 (2d Cir. 1996)). Accordingly, the exhaustion doctrine does not bar this appeal.

Exhaustion is also excused where the appellant challenges the very administrative procedure that the SRO and agency insist must be exhausted. *Finnerty v. Cowen*, 508 F.2d 979, 982-83 (2d Cir. 1974) (“[W]e agree with other recent opinions dispensing with the exhaustion requirement in situations where the very administrative procedure under attack is the one which the agency says must be exhausted. . . Accordingly, we hold that it was error to dismiss the complaint in this case on the ground that plaintiff failed to exhaust her administrative remedy.”); *Touche Ross & Co.*, 609 F.2d at 577 (“To require appellants to exhaust their administrative remedies would be to require them to submit to the very procedures which they are attacking.”). Here, Virpax’s private non-delegation challenge targets Nasdaq’s delisting process, which includes its entire internal review structure of delisting decision, which enables and facilitates the delisting companies without SEC approval, in violation of the private non-delegation doctrine. Virpax therefore is excused from seeking review from the Listing Council in this matter.²

² Nasdaq’s supporting authority of *In re Fox*, Release No. 34-54840, (Nov. 30, 2006), *In re Hsu*, Release No. 34-78899 (Sept. 21, 2016) and *In re Cassuto*, Release No. 34-48087 (June 25, 2003), are all distinguishable from the instant matter not only because none of these well-established exceptions to the exhaustion doctrine was raised, but also because those matters were not delisting proceedings. Moreover, *In re Hsu*, and *In re Cassuto* are distinguishable on the additional ground that the application completely ignored the SRO’s administrative process altogether, as opposed to here, where Virpax participated in the appeals process save for seeking Listing Council review.

3. The Commission Has Discretion to Review This Appeal In any Event and Based on its Own Precedent Should Decide to Do So.

Regardless of any applicable exceptions to the exhaustion doctrine, the Commission retains the discretion to review this appeal because any applicable exhaustion doctrine is discretionary, not mandatory. As the Second Circuit explained in *MFS Sec. Corp. v. SEC*, 380 F.3d 611 (2d Cir. 2004), a case on which Nasdaq heavily relies, because the SRO appellate scheme is not mandated by statute, the exhaustion requirement is considered judicially created and discretionary, not jurisdictional or mandatory. *Id.* at 623 (“We . . . see no reason to doubt that administrative exhaustion requirements not created by statute are discretionary. . . . It does not follow from such requirements that the agency is, absent exhaustion, without jurisdiction. **The exhaustion requirement applicable to review of proceedings before SROs is akin to a judicially created exhaustion requirement. It is therefore not mandatory.**”) (emphasis supplied).

Crucially, *MFS* cites to *JD American Workwear*, Exchange Act Release No. 43283, 73 S.E.C. Docket 559, 2000 SEC LEXIS 1906 (Sept. 12, 2000), a matter analogous to the instant matter, to illustrate that the exhaustion requirement in the SRO context is discretionary. There, after a hearing, a Nasdaq hearing panel issued a decision that the company “JDAW was not in compliance with the [NASD’s] Eligibility Rules,” and directed that JDAW be delisted from Nasdaq effective Monday September 11, 2000. *Id.* at *4. JDAW, like Virpax, did not seek review from the Nasdaq Listing Council under Rule 5820, but instead, like Virpax, appealed directly to the SEC. *Id.* NASD argued, like Nasdaq does here, that the matter should be dismissed because JDAW was required to exhaust its administrative remedies by first appealing to the Listing Council. *Id.* at *7, fn 11. The Commission rejected that argument, reasoning that where delisting would take effect immediately and internal review would not stay the decision, the Hearing Panel action constitutes a denial of access ripe for Commission review under 15 U.S.C. § 78s(d):

Rule 9760 provides that institution of review, whether upon application or on initiative of the Review Council, “shall not operate as a stay of the decision.” Exchange Act Section 19(d), 15 U.S.C. § 78s(d) grants the Commission jurisdiction to review any denial of access to services by a self-regulatory organization. We normally require an applicant to exhaust the NASD’s appellate procedure before considering the application for review. Here, however, the hearing panel’s decision was to become effective on the opening of business on September 11, 2000 and, under the NASD’s rules, will continue in effect pending completion of the NASD’s appeal process. Under these circumstances, the hearing panel’s action constitutes a denial of JDAW’s access to the OTCBB’s services.

Id. (emphasis supplied).

Likewise, here, by letter dated April 2, 2025, the Hearings Panel issued a delisting decision to Virpax which included a decision to suspend the trading of its stock on Nasdaq as of April 4, 2025. Nasdaq_Virpax_000135. And while Virpax could have appealed to the Listing Council, Nasdaq itself candidly recognized that “an appeal (to the Listing Council) does not stay the suspension action.” Nasdaq_Virpax_000050.³ Under these circumstances, as in *JD American Workwear*, the Panel Decision constituted a denial of access to Nasdaq’s services that was immediately effective and therefore ripe for Commission review under 15 U.S.C. § 78s(d). Accordingly, this appeal should not be dismissed for any purported failure seek Listing Council review.

In sum, Listing Council review is discretionary, multiple exceptions to the exhaustion doctrine apply to this matter, and in any event, the Commission can and should exercise discretion to review this appeal as it did in *JD American Workwear*. As such, Nasdaq’s exhaustion argument provides no basis to dismiss this appeal.

³ See also

https://listingcenter.nasdaq.com/Material_Search.aspx?cid=107&criteria=1&materials=&mcd=LQ&sub_cid=32&years=0&utm (FAQ May a company appeal a Hearing Panel’s decision?)

II. Nasdaq Rule 5840(e)(3) Clearly Authorized The Two-Day Extension Virpax Requested.

Virpax's Opening Brief explained that Nasdaq Rule 5840(e)(3) authorized the Panel to grant Virpax the requested two-day extension beyond the 180-day limit contained in Rule 5815(c)(1)(A). In its Opposition Brief, Nasdaq raises a number of challenges – some procedural and some substantive - to this straightforward argument, but as discussed below, each one is without merit.

A. Issue Exhaustion Does Not Bar Virpax's Argument.

Nasdaq first argues that Virpax is barred from invoking Nasdaq Rule 5840(e)(3) in this appeal because Virpax did not cite that Rule to Nasdaq when requesting the two-day extension on April 1, 2025. Opp. p. 17. That contention is meritless. Nothing in the Nasdaq rules or governing law requires an issuer to identify the precise rule citation supporting a request in order to preserve the issue for review. To the contrary, case law indicates that appellants “need not cite the relevant statute or regulation to exhaust a legal issue.” *Oregon Nat. Desert Ass’n v. McDaniel*, 751 F. Supp. 2d 1151, 1161 (D. Or. 2011). *See also Cook Inletkeeper v. Raimondo*, 533 F. Supp. 3d 739, 750 (D. Alaska 2021) (“The Ninth Circuit has ‘held that the exhaustion requirement should be interpreted broadly,’ explaining that ‘[p]laintiffs fulfill the requirement if [they] ‘provided sufficient notice to the [agency] to afford it the opportunity to rectify the violations that the plaintiffs alleged.’” As such, “[p]laintiffs need not state their claims in precise legal terms, and need only raise an issue ‘with sufficient clarity to allow the decision maker to understand and rule on the issue raised, but there is no bright-line standard as to when this requirement has been met.’”) (internal citations omitted).

Nasdaq's sole authority purportedly supporting its argument, *In re Williams*, Release No. 89238, 2020 SEC LEXIS 3614 (July 7, 2020) is no support at all. There, FINRA had initiated an investigation into Williams for possible securities laws violations and in conjunction therewith had

issued him multiple notices of its request for documents and information. Williams failed to respond to any of these notices, and ultimately, FINRA barred him from association with any FINRA member, effective November 5, 2018. Williams made no attempt to challenge the FINRA decision by way of FINRA proceedings, and instead, more than nine months later, sent a letter to the SEC appealing the bar. *Id.* at *3. The SEC found that Williams failed to exhaust his administrative remedies by not challenging the FINRA decision using FINRA’s administrative process when “Williams had actual notice of FINRA’s requests for information and of the proceeding against him [to bar him from participation in FINRA].” *Id.* at *4. Williams is glaringly inapplicable to this case. Preliminarily, that case was not based on *issue* exhaustion but the failure to exhaust administrative *remedies*, which, as discussed *supra*, is not applicable to this case for a myriad of reasons. *See Carr v. Saul*, 593 U.S. 83, 88 n.2 (2021) (“Issue exhaustion should not be confused with exhaustion of administrative remedies.”). Moreover, Williams made no challenge whatsoever to FINRA during the FINRA proceedings, and instead, first raised a challenge to the FINRA action before the SEC. Needless to say, that lends no support to Nasdaq’s argument here that Virpax, which undisputedly *did* participate in proceedings before the Hearing Panel, was required to cite the specific Rule supporting the two-day extension when making the extension request.

In sum, Virpax’s argument based on Nasdaq Rule 5840(e)(3) was timely raised and does not run afoul of any exhaustion doctrine.

B. Granting an Extension Under Rule 5840(e)(3) is a “Procedural Action.”

Nasdaq next argues that because the Equity Rule is substantive, an extension relating to equity compliance cannot be a “procedural action” under Rule 5840(e)(3). This argument is a non-sequitur, as it conflates Rule 5550(b)(1), which provides the substantive equity standard, with Rule

5840(e)(3), which merely governs the Panel’s procedural authority to extend deadlines to meet certain requirements, including the Equity Rule. Indeed, “Rules that ‘prescribe [] a timetable for asserting substantive rights’” – such as Nasdaq Rule 5840(e)(3) – “are procedural.” *Nat’l Whistleblower Ctr. v. Nuclear Regul. Comm’n*, 208 F.3d 256, 262 (D.C. Cir. 2000) (citing *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 328 (D.C.Cir.1983)). And the fact that the procedural rule will have an effect on a party’s substantive rights “does not convert a procedural rule into a substantive one.” *Id.* at 263. In fact, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407, (2010), cited by Nasdaq, makes clear that the test of whether a rule is procedural or substantive “is not whether the rule affects a litigant’s substantive rights; most procedural rules do. . . . What matters is what the rule itself regulates: If it governs only ‘the manner and the means’ by which the litigants’ rights are ‘enforced,’ it is valid; if it alters ‘the rules of decision by which [the] court will adjudicate [those] rights,’ it is not.” Accordingly, Nasdaq providing two additional days for evidencing compliance with the Equity Rule is a “procedural action” that it fits squarely into Rule 5840(e)(3)’s language.

To the extent there is any ambiguity concerning the Nasdaq Rules, such ambiguity must be construed in Virpax’s favor because the Nasdaq Rules are contractual in nature, and like any other contract, ambiguities in the contract are construed against the drafter, in this case, Nasdaq. *See Barbara v. N.Y. Stock Exch.*, 99 F.3d 49, 54-55 (2d Cir. 1996) (“[T]he rules of a securities exchange are contractual in nature, and are thus interpreted pursuant to ordinary principles of contract law . . .”); *Revson v. Cinque & 13 Cinque, P.C.*, 221 F.3d 59, 67 (2d Cir. 2000) (ambiguous contract provisions are “generally to be construed against the drafter.”).

C. The Predicate Requirement of Rule 5840(e)(3) Was Satisfied.

Nasdaq next argues that its April 2, 2025, extension grant did 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." In essence, Nasdaq is asking the Commission to believe that it acted *ultra vires* by issuing an extension against its own Rule requiring a predicate determination, and that Virpax should suffer the consequences of that purported *ultra vires* action. Aside from the glaring inequity in the argument, the argument is legally flawed for a number of reasons.

First, the only support Nasdaq references to support its contention that the predicate determination was never made is that the "Nasdaq Hearing Administrator sent Virpax's request to the Panel not to the Office of General Counsel." But this allegation is belied by the record itself. The record instead shows that Virpax's extension request *was* sent to the Office of General Counsel, and specifically, Aravind ("Andy") Menon. *See* Nasdaq_Virpax_000095 ("MR. MENON: Good morning. My name is Andy Menon. I'm an attorney with Nasdaq's Office of General Counsel."). In fact, Mr. Menon served as the Hearings Attorney and Hearings Advisor in this matter. *See* Nasdaq_Virpax_000013; Nasdaq_Virpax_000124. And not only did Mr. Menon receive Virpax's April 1, 2025 request for extension, Nasdaq_Virpax_000127, he also received the Nasdaq Hearings Administrator's promise to send the inquiry to the Panel, *id.*, and the Panel's decision granting the extension on April 2, 2025. Nasdaq_Virpax_000129. Clearly, the Office of General Counsel was fully on notice of the request and the decision, rendering baseless Nasdaq's assumption that the predicate determination was not satisfied.⁴ *Talmadge v. Clewiston Iron Co.*,

⁴ The alleged fact that Mr. Menon was purportedly out of the office that week, Nasdaq_Virpax_000129, does not mean he was *incommunicado* and failed to review his emails or converse with the Panel.

252 Ill. App. 508, 521 (“The burden of proof was on defendant to establish the defense of ultra vires.”).

Moreover, even if it were true that only the Panel received the request, that itself does not carry Nasdaq’s burden of showing that it never secured the predicate determination by the Office of General Counsel. To the contrary, the April 2, 2025 email from Mr. Golub, deputy counsel with Nasdaq’s Office of General Counsel, which retracted the extension grant did not say the grant was ineffective because the predicate determination never made, but instead, merely stated that the grant was “in error because the Panel does not have the authority under Nasdaq’s Rules to grant the requested extension.”

D. Virpax Demonstrated “Extenuating Circumstances.”

Nasdaq finally argues that no “extenuating circumstances” existed because Virpax allegedly sought an extension solely because “investors are concerned about bid price compliance.” Opp. p. 10. This argument mischaracterizes the record, as Nasdaq omits the core facts supporting Virpax’s request. Specifically, by email dated March 27, 2025, Virpax informed Nasdaq that it only recently effectuated a reverse stock split (on March 21, 2025), and that the delay in accomplishing the same was due to the Depository Trust Company’s protracted “eligibility process for the new post-split CUSIP number.” Nasdaq_Virpax_000125. The email further explained that this “slight delay” will have the result of bringing the company within compliance with the Bid Price Rule by April 3, 2025, and therefore, it requested a one-day extension for bid price compliance. *Id.* Virpax “followed up” on this email in its April 1, 2025 request for an extension on the Equity Rule deadline, further explaining that a brief extension on equity compliance was needed because the investors in the public offering that would cause Virpax to regain compliance with the Equity Rule were concerned about Virpax’s bid price compliance – which was delayed due to the DTC’s delay

in issuing a new post-split CUSIP – and the bid price compliance letter would be needed to consummate the public offering that would restore Virpax’s compliance with the Equity Rule. Nasdaq_Virpax_000126. And because Virpax would not be in compliance with the Bid Price Rule until April 2, 2025 (because of the DTC’s failure to issue a post-split CUSIP), it would need until April 3, 2025 to demonstrate compliance with the Equity Rule. *Id.* It is these circumstances, unforeseeable and beyond Virpax’s control (and entirely omitted by Nasdaq) which are the qualifying “extenuating circumstances” that justified the brief two-day extension request. Notably, Nasdaq does not produce any case law that challenges the well-supported argument in Virpax’s brief that unforeseeable circumstances beyond Virpax’s control such as those described here indeed constitute “extenuating circumstances.” Accordingly, the circumstances warranted the requested two-day extension under Rule 5840(e)(3), and Nasdaq’s retraction of that extension warrants reversal.

III. Nasdaq’s Retraction of the Extension Was Arbitrary, Capricious, and Unfair.

In the Opening Brief, Virpax argued that Nasdaq’s reversal of its decision to grant the extension was arbitrary and capricious, and generally a failure to satisfy the requirement to provide a “fair procedure.” Opening Brief, pp. 12-13. In response, Nasdaq merely argues that its sudden retraction of its April 2, 2025 decision to grant the requested extension was because the extension grant was a “mistake” as Nasdaq “had no choice but to delist” because the 180 days represented the full extent of the Panel’s discretion. *Id.* at 20. But this response simply ignores the entire Opening Brief, as well as Nasdaq’s own Rule 5840(e)(3). As discussed in the Opening Brief (and above), given the extenuating circumstances described to Nasdaq, Nasdaq did not have “no choice but to delist” Virpax, and instead, was authorized under the plain language of Rule 5840(e)(3) to grant the two-day extension to April 3, 2025, and in fact Nasdaq presumably proceeded under that

Rule to grant the extension in the first instance. Thus, if there was a “mistake” here, it was Nasdaq’s decision *to retract* the extension that was properly granted. And, as noted in the opening brief, the lack of any internal email, memorandum, or analysis explaining why Nasdaq initially determined the DTC’s delay constituted extenuating circumstances or why Nasdaq adopted a contrary interpretation to justify retraction, only confirms the impropriety of the retraction.

In short, Nasdaq’s failure to offer the Commission (or even itself) any viable explanation for why it retracted the granted extension underscores the arbitrary, capricious and unfair nature of the retraction.⁵

IV. Virpax’s Private Nondelegation Claim is Timely and Meritorious.

Virpax’s opening brief raised a constitutional challenge to Nasdaq’s delisting procedures under the private nondelegation doctrine. Virpax. Br. 15-18. Virpax argued that Nasdaq’s practice of filing a Form 25 that effectuates delisting ten days later, regardless of whether the Commission has reviewed or approved the underlying delisting decision as a practical matter, violates the private nondelegation doctrine.

Nasdaq responds to Virpax’s argument by claiming, in reliance on *In re Kielczewski*, Release No. 34-104352, 2025 SEC LEXIS 3108 (Dec. 9, 2025), that Virpax has forfeited this argument because Virpax failed to raise it before Nasdaq. As to the substance of Virpax’s argument, all Nasdaq can offer the Commission is the generic contention that it is “broadly subordinate” to the federal government, which, it believes, is sufficient to satisfy the nondelegation doctrine. Nasdaq is wrong on both counts.

⁵ On a number of occasions in the Opposition Brief, Nasdaq states that Virpax could not have relied on the extension grant because it was first communicated on April 2, 2025 and the retraction came later that very day. See Opp., pp. 2, 19. Preliminarily, this does not disprove that Virpax relied on the extension once requested on April 1, 2025, as that is that expected result of the proper application of Rule 5840(e)(3). Regardless, none of the arguments advanced by Virpax require a showing of reliance.

First, Virpax’s private non-delegation claim, like the rest of Virpax’s claims has not been forfeited under the issue exhaustion doctrine raised in *In re Kielczewski* (or on any other ground). It is well settled that issue exhaustion does not apply where, as here, the appellant had no opportunity to raise the issue before the SRO. *LTV Steel Co. v. United States*, 985 F. Supp. 95, 120 (Ct. Int’l Trade 1997) (“In *Philipp Bros., Inc. v. United States*, 10 CIT 76, 86, 630 F.Supp. 1317, 1324 (1986), this Court held that because Commerce did not address the issue challenged before the Court until its final decision, plaintiff had no opportunity to raise the issue at the administrative level and the exhaustion doctrine did not preclude judicial review. The Court similarly finds in this case . . . Krupp did not have the opportunity to challenge Commerce’s methodology until Commerce articulated that methodology and applied it to the program at issue. . . . As a result, this Court will address the merits of Commerce’s determination to countervail the Aid for Closure program.”) (emphasis supplied); *Carr*, 593 U.S. at 89 n.3 (“Where claimants are not expected to develop certain issues in ALJ proceedings, it is generally inappropriate to treat those issues as forfeited.) Here, Virpax’s constitutional private non-delegation doctrine only materialized after Nasdaq filed its Form 25 with the SEC on July 21, 2025, which form announced that the delisting would automatically go into effect “at the opening of the trading session on July 31, 2025,” and, in fact, it went into effect on or about said date, with no record of any SEC input or oversight. Nasdaq_Virpax_000137. Thus, at no point during Virpax’s appeal of the delisting decision to the Hearings Panel did Virpax have the opportunity to assert a fully accrued private non-delegation claim. Importantly, this chain of events distinguishes this case from *In re Kielczewski*, where Kielczewski’s constitutional claims fully accrued as of no later than when the Hearing Panel issued an adverse disciplinary sanction against him, and yet, he failed to assert those claims to either the

Hearing Panel or FINRA during FINRA's review of the Panel Hearing's decision. 2025 SEC LEXIS 3108 at *30.

Nasdaq's substantive response to Virpax's argument is also flawed. Nasdaq argues that this case differs from *Alpine* because Commission regulations "allow the opportunity for Commission review before a delisting takes effect" by having the delisting take effect 10 days after the Form 25 is filed. But that misses the point. It is not enough to simply *allow* the opportunity for Commission review as a theoretical matter; Nasdaq must ensure that the Commission *takes* the opportunity to review, so that it, and not Nasdaq, is the "final authority" on the delisting decision "as a practical matter." This affirmative requirement was made clear by the Supreme Court in *Fed. Commc'ns Comm'n v. Consumers' Rsch.*, 606 U.S. 656 (2025), a case prominently cited in Nasdaq's Opposition Brief:

Although the Administrator plays an advisory role, the Commission alone has decision-making authority. Recall that each quarter's contribution factor is a function of the carriers' projected revenues and the Fund's projected expenses. See *supra*, at 2494 – 2495. The Administrator makes the initial projections. On the revenue side, that means just doing arithmetic: The carriers submit their projections on FCC forms and the Administrator adds them up. See §§ 54.709(a)(2)–(3), 54.711(a). On the expense side, the Administrator's estimates involve considerably greater effort—but still no policy-making. The FCC's rules implementing the Act dictate the programs' scope: For example, they set eligibility criteria for beneficiaries, provide formulas for calculating subsidies, and impose some funding caps. See, e.g., §§ 54.410, 54.507, 54.604–54.606.10 Working within those rules, the Administrator estimates the programs' cost. It then publicly reports those projections, along with supporting documents, to the Commission—on the revenue side, at least 30 days before a quarter starts, on the expense side, at least 60. See § 54.709(a)(3). That gives the Commission a chance to review—and, if needed, to revise—the projections before approving final figures. See *ibid.* **When the review process is complete, the Commission sets the contribution factor and posts it in a public notice.** See *ibid.* The Commission then has 14 days to make additional changes before the factor is "deemed approved." *Ibid.* **So the Commission is, throughout, the final authority—just as the agency was in *Sunshine Anthracite*. The Administrator, following the FCC's rules, makes recommendations. But the Commission decides whether or how to use them in setting the contribution factor.**

Id. at 693-694 (emphasis supplied) (continuing on to indicate that even situations where Commission review is demonstrated but it provides “rubber stamp” approval is constitutionally problematic). In other words, the delegation to the USAC Administrator did not run afoul of the private non-delegation doctrine because its recommendations were not final until the Commission *affirmatively* reviewed and approved the final figures computed by the USAC Administrator. This is materially different from Nasdaq’s delisting process, where the delisting takes effect regardless of Commission review or approval. *See also In the Matter of the Application of SILVER LEAF PARTNERS, LLC*, 2025 SEC LEXIS 649 at *25 (“Through the Exchange Act, Congress gave the Commission ‘pervasive supervisory authority’ over the rulemaking and enforcement activities of FINRA and other self-regulatory organizations in order to protect ‘the public interest.’ For example, FINRA’s proposed rules for its members generally only take effect if the Commission approves the rules after public notice and comment.”) (emphasis supplied). Accordingly, under *Consumers’ Research*, Nasdaq’s procedure of automatically delisting issuers regardless of Commission review or approval violates the private nondelegation doctrine by stripping the Commission of the final decision-making authority Congress entrusted to it. Indeed, not only does Nasdaq’s filing of a Form 25 effectuate the delisting automatically after 10 days without any obligation or realistic expectation of SEC review during those 10 days, but once the delisting takes effect, subsequent Commission review does not restore the status quo while the review is pending.

The other authorities Nasdaq cites (at best) address the Exchange Act’s supervisory structure in general and do not confront the specific constitutional problem presented here: delisting becoming effective automatically through Form 25 without Commission review and approval as a practical matter. *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89 (2d Cir. 2007) (does not even discuss the Commission’s oversight of SROs within the context of the private non-delegation

doctrine); *Sorrell v. SEC*, 679 F.2d 1323, 1325-26 (9th Cir. 1982) (Rejecting plaintiff's general contention that "the statute authorizing self-regulatory groups such as the NASD" is "an unconstitutional delegation of legislative power to a private organization" because of the "Commission's power...to approve or disapprove of the association's Rules, and (b) the Commission's review of any disciplinary action."); *First Jersey Sec. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979) (Rejecting plaintiff's general contention that "the Maloney Act is an unconstitutional delegation of legislative power to the NASD" because the SEC "must make an independent decision on the violation and penalty."); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012-13 (3d Cir. 1977) (Finding that the "Association's rules and its disciplinary actions were subject to full review by the S.E.C., a wholly public body, which must base its decision on its own findings."); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952) (Holding the Exchange Act does not unconstitutionally delegate power to the NASD only because of the SEC's power "to approve or disapprove of the association's Rules, and (b) the Commission's review of any disciplinary action."); *In re Jones*, Release No. 34-104273, 2025 WL 3419593, at *15-16 (Nov. 28, 2025) (Discussing the constitutionality of the "Exchange Act's statutory scheme" and holding that "FINRA's structure does not violate the Constitution" based on the SEC's "supervisory authority over FINRA's disciplinary decisions, including plenary review over its final disciplinary actions."); *In re Minim, Inc.*, Release No. 34-101502, 2024 WL 4650996, at *1 (case where SEC actually did review the delisting decision and granted stay, but not discussing nondelegation doctrine).

Finally, Nasdaq's other distinction of *Alpine* on the ground that a delisting from Nasdaq can be less severe than expulsion from FINRA, is a distinction without a difference. Preliminarily, delisting does have the potential to be as existentially devastating as expulsion from FINRA, and

in any event, “it stands to reason that all companies on the brink of being delisted face economic harm in the event the delisting takes place.” *Cleantech Innovations, Inc. v. NASDAQ Stock Market, LLC*, No. 11 Civ. 9358 (KBF), 2011 U.S. Dist. LEXIS 153142, at *17 (S.D.N.Y. Dec. 30, 2011). But whatever the magnitude of harm in a particular case, delisting remains as much an exercise of regulatory power over access to a national securities exchange as expulsion from FINRA. As such, the delegation of such power to Nasdaq requires the SEC to affirmatively act as “final authority” over Nasdaq’s delisting decisions, and it currently does not.

CONCLUSION

For all the foregoing reasons, and those set forth in Virpax’s Opening Brief, Virpax respectfully requests that the SEC set aside and invalidate Nasdaq’s decision to delist it.

Dated: January 30, 2026

Respectfully Submitted,

Samuel Kadosh
Asher Gulko
GULKO SCHWED LLP
525 Chestnut Street, Suite 212
Cedarhurst, New York 11516
P: 212.500.1312 / F: 212.678.0405
skadosh@gulkoschwed.com
asher@gulkoschwed.com

Attorneys for Virpax Pharmaceuticals, Inc.

WORD COUNT CERTIFICATION

Pursuant to 17 C.F.R. § 201.450(d), counsel certifies that, as calculated by the word processing system used to prepare this brief, the number of words in the brief, exclusive of the caption, table of contents, table of authorities, signature block, and this certification, is 5,953.

/s/ Samuel Kadosh

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 104032 /January 30, 2026

Admin. Proc. File No. 3-22512

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

Samuel Kadosh, being of full age, hereby certifies:

1. I am an attorney at Gulko Schwed LLP.
2. On January 30, 2026 in accordance with SEC Rule of Practice 100(C) and Commission Release No. 88415, I caused electronic copies of Virpax's Reply Brief In Support of Application for Review to be filed via the SEC's Electronic Filings in Administrative Proceedings (eFAP) and emailed to:

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

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

Dated: January 30, 2026
Cedarhurst, NY

Gulko Schwed LLP

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