UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of: The Application of SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, For Review of Action Taken by CAT LLC and Certain Self-Regulatory Organizations	Admin. Proc. File No. 3-19766

CONSOLIDATED AUDIT TRAIL, LLC'S AND PARTICIPANTS' MEMORANDUM OF LAW IN OPPOSITION TO SIFMA'S MOTION TO STAY

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Consolidated Audit Trail, LLC ("CAT LLC") and the participants of the CAT NMS Plan (the "Participants")[1] respectfully submit this memorandum of law in opposition to the Securities Industry and Financial Markets Association's ("SIFMA") motion for a stay (the "Stay Motion") pending the resolution of SIFMA's application (the "Application") for review pursuant to Sections 19(d) and 19(f) of the Securities Exchange Act of 1934 (the "Exchange Act"). The Stay Motion should be denied in its entirety.

PRELIMINARY STATEMENT

The Securities and Exchange Commission (the "Commission") should deny SIFMA's extraordinary and unprecedented request for a stay of CAT LLC and SRO actions that are entirely consistent with the Exchange Act and the CAT NMS Plan particularly because SIFMA's challenge is unlikely to prevail and it has not articulated any harm (let alone irreparable harm). A stay would also harm CAT LLC and the Participants and impede the orderly implementation of the consolidated audit trail (the "CAT").

The Commission adopted Rule 613 of Regulation NMS and tasked the SROs with creating the CAT to "oversee our securities markets on a consolidated basis – and in so doing, better protect these markets and investors."[2] In advance of live CAT reporting, CAT LLC prepared a standard reporter agreement (the "CRA") for all CAT reporters (including the SROs and industry members ("Industry Members")) to execute. The CRA is authorized by the CAT NMS Plan as well as the SROs' implementing CAT compliance rules, and contains customary limitation of liability and indemnification provisions of the sort to which Industry Members routinely agree and impose on

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[1] SIFMA's filings are ambiguous as to whether CAT LLC has been named as a respondent to these proceedings. In light of that ambiguity, CAT LLC is listed as a signatory to this brief. Because CAT LLC is not an SRO, however, it is not a proper party under Section 19(d). Counsel for CAT LLC is authorized to represent that this memorandum of law is submitted on behalf of CAT LLC and the individual Participants named in SIFMA's application.

[2] Nov. 14, 2017 Statement on the Status of the Consolidated Audit Trail, Chairman Clayton, available at https://www.sec.gov/news/public-statement/statement-status-consolidated-audit-trail-chairman-jay-clayton.

their own customers. Nonetheless, SIFMA baldly and incorrectly asserts that the CRA's terms are "unfair, inappropriate, and bad policy."[3]

A denial of access proceeding is not the proper vehicle for SIFMA to raise these concerns because the Commission lacks jurisdiction to hear this Application. Neither CAT LLC nor the SROs have denied Industry Members (or SIFMA) access to any "service offered" by an SRO within the meaning of Exchange Act Section 19(d). A "service" refers to core functions of an SRO offered to firms to enable them to operate (*e.g.*, access to trading data) – not an SEC-mandated regulatory program.[4] And SIFMA lacks standing to bring this petition because it is not an aggrieved party.

Jurisdictional hurdles aside, SIFMA has fallen far short of satisfying its burden to obtain the extraordinary relief of a stay. SIFMA will not prevail on the merits. *First*, the CAT NMS Plan contains multiple provisions – including provisions granting CAT LLC broad authority to do anything that may be necessary, proper or advisable to create, implement, and maintain the CAT; set access terms; and maintain the CAT's solvency – that allow, if not mandate, that CAT LLC require Industry Members to execute the CRA. *Second*, the CAT NMS Plan mandates that the individual Participants will not be liable for CAT LLC's losses, which necessitates limitation of liability and indemnification provisions that extend to the Participants. *Third*, the CAT NMS Plan also mandates that each Participant enact Compliance Rules that direct Industry Members to submit data to the CAT System in accordance with the decisions of the CAT Operating Committee.

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[3] April 22, 2020 Memorandum of Law in Support of SIFMA's Stay Motion ("SIFMA Br.") at 2.

[4] CAT LLC and the Participants intend to seek leave to file a motion for Summary Disposition on the jurisdictional grounds discussed in this memorandum and other jurisdictional defects in SIFMA's Application including: (1) CAT LLC, an NMS facility, is not a permissible party under Section 19(d) and (2) the Participants are not denying "access" to anyone by virtue of *CAT LLC's* CRA.

Thus, the CRA and its customary limitation of liability and indemnification provisions are authorized by the Commission-approved CAT NMS Plan and consistent with the Exchange Act.

SIFMA's Application, unsupported by a declaration from any fact witness, fails to make *any* showing of irreparable harm. The prospect of defending against a hypothetical disciplinary action (which SIFMA fears the Industry Members who choose not to sign the CRA will face) is not irreparable harm. Moreover, Industry Members can avoid any such harm by signing the CRA during the pendency of this proceeding. And while SIFMA speculates that doing so would expose Industry Members to "competitive harm" in the event of a future, hypothetical data breach (April 22, 2020 Declaration of Lorin L. Reisner in Support of SIFMA's Application ("Reisner Decl.") ¶ 17), it is black letter law that financial harm is not irreparable. *See infra* at 18-20. SIFMA's failure to articulate – let alone prove through admissible evidence – any irreparable harm eliminates the need even to consider the remaining stay factors.

But those factors also strongly weigh in favor of denying SIFMA's Application. First, the harm to non-moving parties weighs against a stay because if the Stay Motion is granted, the CAT would be forced to accept data from approximately 1,200 Industry Members without any reporting agreement, exposing CAT LLC and the Participants to uncertain obligations and inappropriate risk that was never considered by the Commission when it adopted Rule 613 or approved the CAT NMS Plan. Second, it would be a disservice to the public interest for the Commission either to stay execution of the CRA and thereby compromise protections aimed at ensuring the viability of CAT LLC, or to stay the reporting deadlines and prevent CAT LLC and the Participants from implementing the important market regulation tool that the SEC envisioned when it enacted Rule 613.

For all these reasons, SIFMA's Stay Motion should be denied.

BACKGROUND

A. The Consolidated Audit Trail

On July 11, 2012, the Commission adopted Rule 613 of Regulation NMS to enhance regulatory oversight of the U.S. securities markets. The rule directs the Participants to create a "Consolidated Audit Trail" that would strengthen the ability of regulators – including the Commission and the SROs – to surveil the securities markets. *See* 17 C.F.R. § 242.613 (2012).

Rule 613 establishes only a broad framework and required the Participants to collectively submit a plan to create, implement, and maintain the CAT (the "CAT NMS Plan"). *See* Consol. Audit Trail, Exchange Act Release No. 67457, 2012 WL 2927797 (July 18, 2012), 77 Fed. Reg. 45722, 45743 (Aug. 1, 2012). To implement the requirements of Rule 613 – including the development of the CAT NMS Plan – the SROs formed CAT NMS LLC and, subsequently, CAT LLC. (*See* May 6, 2020 Declaration of Michael Simon ("Simon Decl.") ¶ 13).

B. The Participants and the Industry Collaborate to Develop and Implement the CAT NMS Plan

The Participants solicited extensive feedback on all aspects of the CAT NMS Plan from SIFMA, Industry Members, and other interested stakeholders including by creating a comprehensive website, making multiple requests for comment, and hosting a series of public events. (Ex. A, at 3-4;[5] *see also* Simon Decl. ¶¶ 14-22 for additional details regarding Industry Members' collaboration with the Participants).

Based on extensive feedback from Industry Members and other constituencies, the Participants submitted a proposed CAT NMS Plan along with subsequent amendments, many of

[5] All exhibits are attached to the May 6, 2020 Declaration of David Oliwenstein.

which have already been approved by the SEC.[6] Among other relevant provisions, the current SEC-approved CAT NMS Plan:

- Mandates that the Participants shall not have any liability for any debts, liabilities, commitments, or any other obligations of CAT LLC or for any losses of CAT LLC (§ 3.8.(b));

- Requires the CAT Operating Committee to build financial stability to support CAT LLC as a going concern (§ 11.2.(f));

- Provides CAT LLC broad authority to: (i) create, implement and maintain the CAT system and (ii) do anything else that may be necessary, incidental, proper, advisable or convenient to accomplish the foregoing purpose that is not prohibited by the Exchange Act or other applicable law (§ 2.6.);

- Requires Industry Members to utilize the methods provided by the Plan Processor and approved by the Operating Committee to transmit data to the CAT's central repository (§ 6.4.(e));

- Requires that each Participant enact Compliance Rules that direct its members to submit data to the CAT System in accordance with the decisions of the CAT Operating Committee and the Participants (§§6.4.(a)-(d));[7]

- Requires the Operating Committee to annually approve CAT LLC's budget, which covers projected costs, revenues and the funding of any reserve that the Operating Committee deems reasonably appropriate for prudent operation of CAT LLC (§ 11.1.(a)); and

- Grants the Operating Committee discretion to establish funding for CAT LLC, including the fees that the Participants and Industry Members shall pay (§ 11.1.(b)).

(Ex. B).

C. CAT LLC Prepares an Industry Standard Reporter Agreement

Following the Commission's approval of the CAT NMS Plan, the Participants continued to solicit feedback from SIFMA and Industry Members regarding the CAT. For example, the Participants created an advisory committee of Industry Members (the "Advisory Committee") to

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[6] The Commission approved the proposed CAT NMS Plan on November 15, 2016.

[7] *See, e.g.*, IEX Rule 11.630(a)(1); BOX Exchange LLC, Rule 16030(a)(1); Cboe Exchange, Inc., Rule 7.22(a)(1); FINRA, Rule 6830(a)(1); Long-Term Stock Exchange, Rule 11.630(a)(1); Miami International Securities Exchange, LLC, Rule 1703(a)(1); The Nasdaq Stock Market LLC, General Rule 7, Section 3(a)(1); NYSE, Rule 6830(a)(1).

advise CAT LLC on the implementation, operation, and administration of the CAT. (*See* Ex. B, § 4.13.). The Advisory Committee comprises a variety of broker-dealers (among other constituencies) that are representative of the industry. (Simon Decl. ¶ 19).

On or around August 29, 2019, the Participants shared with the Advisory Committee and the Commission staff a draft CRA. (Simon Decl. ¶ 22; Ex. C).[8] The CRA, among other things, grants CAT Reporters access to the CAT System (§ 2.1.), sets forth the requirements for the submission of Data (§ 3.2.), defines how the data in the CAT system may and may not be used and provides other terms of use (e.g., § 2.4.), and sets forth the CAT Reporter's payment obligations (§ 4.) and the term of the CRA (§ 6.1.).

The CRA's limitation of liability provision (the "Limitation of Liability Provision") provides:

> TO THE EXTENT PERMITTED BY LAW, UNDER NO CIRCUMSTANCES SHALL THE TOTAL LIABILITY OF CATLLC OR ANY OF ITS REPRESENTATIVES TO CAT REPORTER UNDER THIS AGREEMENT FOR ANY CALENDAR YEAR EXCEED THE LESSER OF THE TOTAL OF THE FEES ACTUALLY PAID BY CAT REPORTER TO CATLLC FOR THE CALENDAR YEAR IN WHICH THE CLAIM AROSE OR FIVE HUNDRED DOLLARS ($500.00).

(Ex. E, § 5.5.).

The scope and substance of the Limitation of Liability Provision is squarely in line with industry standards. For instance, it is similar in scope to the liability provision in an agreement – the FINRA Entitlement Program Terms of Use (i.e., the "OATS Agreement") – that virtually all Industry Members have agreed to in connection with an existing regulatory reporting system that has been existence for over 20 years: the Order Audit Trail System ("OATS") (Ex. F, § 6). Additionally, trade reporting facilities, SRO regulatory reporting systems, and NMS plans

[8] One month earlier, a version of the FINRA CAT Onboarding Guide that notes that CAT reporters will be required to sign a CAT Reporter Agreement was shared with a working group that includes Advisory Committee members. (Ex. D).

routinely require that Industry Members execute reporter agreements with broad limitation of liability provisions. *See* Appendix A. Further, the Limitation of Liability Provision is similar in substance and scope to provisions that Industry Members routinely use when they are in possession of customer data (including order and trade data). *See id.* Finally, each exchange has rules, approved by the Commission, that broadly provide that the Participants shall not be liable to Industry Members.[9]

The CRA also contains an indemnification provision (the "Indemnification Provision") that requires Industry Members to indemnify CAT LLC and the Participants, in limited circumstances, from third party claims arising from **Industry Member acts and omissions**:

1) A breach of the warranty **by the Industry Member** that it "has the full legal right to submit to the CAT System the CAT Data" (§ 5.2.(a));

2) A failure **by the Industry Member or any of its agents** "to protect and secure CAT Data under its control, including any PII that is part of the CAT Data" (§5.2.(b));

3) A failure **by the Industry Member or any of its agents** "to protect its own systems from misuse … or unauthorized access to the CAT System by or through [the Industry Member's] systems" (§5.2.(c)); or

4) A failure **by the Industry Member or any of its agents** "to comply with its obligations under this [CRA]" (§5.2.(d)) (emphasis added).

As with the Limitation of Liability Provision, the CRA's Indemnification Provision complies with industry norms routinely reflected in agreements for other NMS plans and regulatory reporting facilities (including OATS), as well as customer agreements utilized by Industry Members. *See* Appendix B.

The Operating Committee approved the CRA by unanimous written consent on August 29, 2019. (Simon Decl. ¶ 22).

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[9] *See* NYSE, LLC Rule 17, BOX Exchange LLC, Rule 7230; Cboe Exchange, Inc., Rule 1.10; Investors Exchange LLC, Rule 11.260; Long-Term Stock Exchange, Rule 11.260; Miami International Securities Exchange, LLC, Rule 527; Nasdaq, Rule 4626.

D. CAT LLC and the Participants Proposed in Good Faith to Revise the CRA to Address SIFMA's Concerns Regarding Liability Issues

Even though the CRA's Limitation of Liability Provision is consistent with longstanding industry practice, SIFMA has voiced its objections. In response, the Participants advanced several proposals to resolve SIFMA's concerns regarding allocation of liability, including joint funding models and other formulations. (Ex. G at 2); *see also* March 27, 2020 alternative "term sheets" (Ex. H) (each containing a compromise proposal); (Simon Decl. ¶¶ 23-26). Throughout these discussions, the Participants made clear they were willing to consider in good faith any reasonable proposals offered by SIFMA. SIFMA repeatedly declined that offer, insisting upon the wholesale deletion of the Limitation of Liability Provision. (Id. at ¶ 26).

Notwithstanding SIFMA's objections, between September 2019 and the date of this Opposition, over 1,300 Industry Members executed the CRA with the Limitation of Liability and Indemnification Provisions. (Id. at ¶ 32).

E. The CAT's Extensive Cybersecurity

In approving the CAT NMS Plan, the Commission approved CAT LLC's extensive cybersecurity policies, procedures, systems and controls. (*See* Ex. B, § 6.12., Appendix D10-D15). The CAT NMS Plan requires that the CAT's plan processor (the "Plan Processor") develop a comprehensive information security program that addresses the security and confidentiality of all information accessible from the CAT and the operational risks associated with accessing the CAT. Prior to the filing of this Application, the Participants offered – at the Commission's suggestion – to facilitate a meeting with security officials from the SROs and the Industry Members to discuss CAT's security. (Ex. I at 1-2).

F. Industry Members Withdraw Previously Executed Testing Agreements

To enable the minority of Industry Members who had refused to execute the CRA to begin testing their connectivity to the CAT, in December 2019, CAT LLC created a Limited Testing Acknowledgment Form, which enabled Industry Members to test with obfuscated data. (Simon Decl. ¶ 32; Ex. J).

On or around March 31, 2020, one Industry Member rescinded its execution of the Limited Testing Acknowledgment Form and indicated that it intended to submit production data to the CAT without executing the CRA. (Simon Decl. ¶ 33). Shortly thereafter, nine additional Industry Members rescinded their Limited Testing Agreements. (Id. ¶ 33). In total, approximately 1,200 Industry Members are required to report equity data to the CAT on June 22, 2020. (Id. at ¶ 35).

ARGUMENT

A stay is an extraordinary remedy for which SIFMA, as the moving party, bears the burden of proof. *In re Alpine Sec. Corp.*, Exchange Act Release No. 87599, 2019 WL 6251313, at *5 (Nov. 22, 2019). SIFMA has not met this burden, and its Stay Motion must be denied.

In determining whether to grant a stay the Commission considers four factors: (i) the likelihood that the moving party will succeed on the merits; (ii) the likelihood that the moving party will suffer irreparable harm without a stay; (iii) the likelihood that another party will suffer substantial harm as a result of a stay; and (iv) the impact of a stay on the public interest. *Id.*

All four factors weigh against a stay here. Yet, to conclude that a stay is not warranted, the Commission need not proceed further than the first two factors, which are the most critical, and often dispositive, especially where, as here, the applicant has failed to demonstrate any likelihood of success or irreparable harm. *See In re Windsor St. Capital, L.P.*, Exchange Act Release No. 83340, 2018 WL 2426502, at *3 (May 29, 2018).

A. SIFMA Is Unlikely to Succeed on the Merits

As a threshold matter, the Commission lacks jurisdiction to hear this Application because neither CAT LLC nor the SROs have denied Industry Members access to any "service offered" by an SRO within the meaning of Section 19(d). In the event the Commission nonetheless considers the Application on the merits, it should determine that the CAT NMS Plan and the SROs' implementing CAT Compliance Rules authorize CAT LLC to require Industry Members to execute the CRA. Any limit imposed on Industry Members' access to the CAT as a result of their failure to sign the CRA is therefore "in accordance with the rules of the [SROs]" and "consistent with the purposes of the Exchange Act." 15 U.S.C. § 78s(d)(1).

1. SIFMA Cannot Show a Likelihood of Success on the Merits Because the Commission Lacks Jurisdiction to Review SIFMA's Application

Section 19(d) provides four **exclusive** bases for the Commission to exercise jurisdiction over an applicant's challenge to SRO action. If, as here, none of these bases applies, the Commission "must dismiss the proceeding." *In re Sky Capital*, LLC, Exchange Act Release No. 55828, 2007 WL 1559228, at *3 (May 30, 2007).

SIFMA brings this Application under the third basis of Section 19(d)(1), which applies when an SRO "prohibits or limits any person in respect to **access to services** offered by such organization or member thereof." 15 U.S.C. § 78s(d)(1) (emphasis added). SIFMA must therefore show that the Commission should exercise jurisdiction because an SRO has "denied or limited [an applicant's] ability to utilize one of the fundamentally important services offered by the SRO." *Sky Capital*, 2007 WL 1559228, at *4 (dismissing petition for lack of jurisdiction). SIFMA's Application simply assumes, without analysis, that "[t]he CAT System is clearly a service offered by the SROs." *See* SIFMA Br. at 11.

The Commission's precedents, however, teach otherwise. They consistently construe "services" to refer to core functions of an SRO offered to firms to enable them to operate.[10] For instance, in *In re Bloomberg L.P.*, Exchange Act Release No. 49076, 2004 WL 67566, at *2-3 (Jan. 14, 2004), the primary decision on which SIFMA relies, the Commission exercised jurisdiction where the SRO placed restrictions on the display and use of liquidity data that it provided. *See also In re Higgins*, Exchange Act Release No. 24429, 1987 WL 757509, at *5 (May

[10] SIFMA incorrectly asserts that the CAT NMS Plan allows the Participants to use CAT data for commercial purposes. (*See* Ex. B, § 6.5.(g)).

6, 1987) (exercising jurisdiction because operation of a trading floor is the principal service offered by a national securities exchange to its members, and by its members to investors).[11]

By contrast, the Commission has declined jurisdiction where, as here, the SRO action involved activities by exchanges relating to regulatory oversight and rule enforcement. *See In re Morgan Stanley & Co., Inc.*, Exchange Act Release No. 39459, 1997 WL 802072, at *3 (Dec. 17, 1997) (holding that an application was not reviewable where NASD refused to grant an exemption from a prohibition on engaging in municipal securities business because disciplinary sanction was not a "service"). CAT LLC and the Participants are implementing the CAT in their regulatory capacities to comply with Rule 613. Indeed, the reason the Commission evaluates whether denial of access to "services" causes an unfair burden on competition is because "services" invariably involve offerings needed by Industry Members to compete in the marketplace (not offerings needed to comply with an SRO's regulatory obligations).[12] *See Higgins*, 1987 WL 757509, at *6 (noting review under Section 19(f) involves assessment of "**burden on competition**") (emphasis added).

2. SIFMA Lacks Standing to Bring this Application

SIFMA lacks statutory standing. Section 19(d) of the Exchange Act provides a remedy to "any person aggrieved" by SRO action. Because SIFMA has not alleged that it has attempted to report, or even has any data to report, to the CAT – as opposed to one of SIFMA's members –

[11] *See also In re Scattered Corp.*, Exchange Act Release. No. 37249, 1996 WL 284622 (May 29, 1996) (Commission had jurisdiction to review the refusal to process a request to register as a market maker because such action limited access to exchange's offerings).

[12] *See, e.g.*, *Sky Capital*, 2007 WL 1559228, at *4 (forum provided by NASD to address unfair practices or disparate treatment not a "fundamentally important service"); *In re Simpson*, Exchange Act Release No. 40690, 1998 WL 801399, at *3 (Nov. 19 1998) ("We do not view permitting any person to file a complaint against an NASD member or associated person and conducting any resulting proceeding as offering a 'service' for purposes of Section 19(d).").

SIFMA has not been denied access to any service, and it therefore is not an aggrieved person. *See* S. Rep. 94-75, 1975 WL 12347, at *25 (Apr. 14, 1975), 1975 U.S.C.C.A.N. at 203-04 (Section 19(d) provides a remedy for those "directly affected by" SRO action).

Furthermore, SIFMA cannot meet the three part "associational standing" test in which it would have to show that: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *In re Sec. Indus. & Fin. Mkts. Ass'n*, Exchange Act Release No. 72182, 2014 WL 1998525, at *7 (May 16, 2014). At a minimum, SIFMA cannot meet the first two requirements because the overwhelming majority of SIFMA members have signed the CRA (Simon Decl. ¶¶ 32-35) and have access to the CAT. SIFMA claims that Industry Members informed SIFMA that they signed the CRA because "they had no other practical choice" (Reisner Decl. ¶ 21) but offers no admissible evidence – for example, a declaration from each of SIFMA's members – to support that assertion.

Given that the vast majority of SIFMA's members have access to the CAT and thus suffered no injury, and that SIFMA is advocating for a position that most of its members have not taken, this is not a case where associational standing can be established.

3. The CRA Including the Limitation of Liability and Indemnification Provisions Is Fully Consistent with the CAT NMS Plan and Industry Standards

SIFMA's Application fares no better on the merits. Under Section 19(f) of the Exchange Act, the Commission shall set aside an action of an SRO and "require it to … grant … access to services offered by the [SRO]" if it finds that: (1) the specific grounds on which such denial, bar, or prohibition or limitation is based do not exist in fact, (2) that such denial, bar, or prohibition or limitation is not in accordance with the rules of the self-regulatory organization, or (3) that such

rules are, and were applied in a manner, inconsistent with the purposes of the Exchange Act. 15 U.S.C. § 78s(f). No such findings can be made here.

CAT LLC's authority to require Industry Members to sign a reporter agreement is clear under the CAT NMS Plan. Section 2.6 provides CAT LLC with the authority to do anything that "may be necessary, incidental, proper, advisable or convenient to [create, implement, and maintain CAT] and that is not prohibited by … the Exchange Act." (Ex. B, § 2.6.). The CAT NMS Plan further provides that "each Industry Member may utilize such methods as may be provided by the Plan Processor and approved by the Operating Committee to transmit Industry Member Data to the Central Repository." (Ex. B, § 6.4.(e)). It would be unreasonable to expect CAT LLC to accept data from over 1,300 Industry Members without creating standardized, uniform terms governing how those Industry Members will report. At a minimum, it was certainly "necessary…proper, advisable or convenient" for CAT LLC to create those terms and memorialize them in an agreement. (Ex. B, § 2.6.).

The CAT NMS Plan, moreover, expressly contemplates that each Participant will enact Compliance Rules that direct its members to submit data to the CAT System in accordance with the decisions of CAT LLC's Operating Committee. (Ex. B, §§ 6.4.(a)-(d)). For example, IEX Rule 11.630(a)(1) provides that "each Industry Member shall record and electronically report to the Central Repository…in the manner prescribed by the Operating Committee pursuant to the CAT NMS Plan." The other Participants have substantively identical requirements in their SEC-approved rules.[13] Because the Operating Committee approved the CRA (which prescribes the

[13] *See, e.g.*, BOX Exchange LLC, Rule 16030(a)(1); Cboe Exchange, Inc., Rule 7.22(a)(1); FINRA, Rule 6830(a)(1); Long-Term Stock Exchange, Rule 11.630(a)(1); Miami International Securities Exchange, LLC, Rule 1703(a)(1); The Nasdaq Stock Market LLC, General Rule 7, Section 3(a)(1); NYSE, Rule 6830(a)(1).

manner through with Industry Members will report data), the Participants' Compliance Rules require Industry Members to sign it.

The CAT NMS Plan also authorizes the Limitation of Liability and Indemnification Provisions to which SIFMA objects. It provides that the Participants shall not have "**any personal liability**…for any debts, liabilities, commitments, or any other obligations of [CAT LLC] or for **any losses** of [CAT LLC]." (Ex. B, § 3.8.(b)) (emphasis added). This provision, approved by the Commission when it adopted the CAT NMS Plan, is not optional. Other provisions in the CAT NMS Plan likewise authorize – indeed, arguably require – CAT LLC and the Participants to limit their liability and require indemnification from Industry Members. For instance, the section regarding "Funding Principles" provides that the Operating Committee "**shall** seek … to build financial stability to support [CAT LLC] as a going concern." (Ex. B, § 11.2.(f)). If SIFMA's hypothetical disaster data breach scenario occurred (*see* SIFMA Br. at 5-6), it is difficult to imagine how CAT LLC would ensure its solvency without limitation of liability and indemnification provisions. In any event, it is certainly "advisable or convenient" for CAT LLC to ensure its solvency, in accordance with the requirements of the CAT NMS Plan, through the Limitation of Liability and Indemnification Provisions in the CRA. (Ex. B, § 2.6.).

As another example, the CAT NMS Plan grants the Operating Committee discretionary authority to charge fees to Industry Members (subject to Commission approval), establish funding mechanisms for the CAT, and approve CAT LLC's budget. (Ex. B, §§ 11.1(a), 11.1(b)). Implicit in this broad authority is the recognition that the Operating Committee has the authority to reasonably allocate liability between Industry Members and the Participants.[14]

[14] Because of the provisions in the CAT NMS Plan requiring the Limitation of Liability and Indemnification Provisions in the CRA, granting SIFMA's Application and shifting liability from Industry Members to CAT LLC and the Participants without notice and comment would amount to a procedurally improper amendment of the CAT NMS Plan and Rule 613.

In light of these provisions, the crux of SIFMA's argument appears to be that the CAT NMS Plan does not contain the precise words "reporter agreement" or "limitation of liability." But this is not nearly sufficient to support SIFMA's request for extraordinary relief. At bottom, CAT LLC's decision to implement CAT reporting through a CRA that includes the Limitation of Liability and Indemnification Provisions is well within the plain meaning of the CAT NMS Plan and the discretion afforded to CAT LLC thereunder. (Ex. B, § 2.6.).

Bloomberg is readily distinguishable. In *Bloomberg*, the Commission concluded that certain provisions in vendor agreements relating to an SRO's Liquidity Quote Service were not in accordance with a Commission order that had conditioned approval of a proposed rule change on specific revisions to the vendor agreements. *See Bloomberg L.P.*, 2004 WL 67566, at *4. *Bloomberg* was thus decided on a bespoke factual record that has limited application here. By contrast, as discussed above (*see supra* at 13-15), the CRA is authorized by the CAT NMS Plan and SRO rules – all of which were approved by the Commission following notice and comment – and, unlike the vendor agreements in *Bloomberg*, the CRA's provisions do not run afoul of any Commission order.

SIFMA repeatedly asserts that the CRA's Limitation of Liability and Indemnity Provisions are "unfair, inappropriate, and bad policy." SIFMA Br. at 2; April 22, 2020 Letter from Lorin L. Reisner to Vanessa Countryman; *In re Application of SIFMA,* Application for Review of SRO Action, Admin Proc File No. 3-19766, at 2; (Reisner Decl. ¶ 17). But SIFMA's views about good policy are irrelevant and ring hollow when considering the CRA within the context of well-settled industry standards. Trade and other regulatory reporting agreements – including those for other NMS facilities – generally contain broad limitation of liability and indemnification provisions. *See respectively* Appendix A at 1-4; Appendix B at 1-4. Likewise, Industry Members themselves

regularly require their own customers to agree to similar limitations of liability and indemnification provisions. *See respectively* Appendix A at 5-7; Appendix B at 5-6. Finally, each Exchange has rules, approved by the Commission, that broadly provide that the Participants shall not be liable to Industry Members. *See Supra* at 7. These liability rules expressly extend to "facilities,"[15] and both the Commission and SIFMA have recognized that the CAT system is a facility of the SROs. *See* Consol. Audit Trail, Release No. 67457 (July 18, 2012); SIFMA Br. at 11. Thus, SIFMA cannot plausibly claim to be aggrieved by risk allocations widely adopted throughout the industry – and repeatedly approved by the Commission. *See id*.

SIFMA's self-professed "guiding principle" is "they who hold the data bear the liability." April 22, 2020 Letter from Lorin L. Reisner to Vanessa Countryman at 2. It is, however, apparent that SIFMA does not mean what it says. *Compare id. with* Appendix A 5-7. Despite being "in possession of the data," many of SIFMA's Industry Members routinely disclaim liability to their own customers. Appendix A 5-7. Conversely, by its wholesale objection to the CRA's Indemnification Provision, SIFMA takes the position that Industry Members in possession of data should ***not*** have to take responsibility for their ***own*** breaches and failures – including an Industry Member's failure "to protect and secure CAT Data ***under its control***" (§5.2.(b)) and an Industry Member's failure "to protect ***its own systems*** from misuse" (§5.2.(c) (emphasis added)). SIFMA Br. at 2. SIFMA offers a convenient principle, not a guiding one.

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[15] *See, e.g.*, Cboe Exchange, Inc., Rule 1.10(a) ("claims that arise out of the use or enjoyment of the facilities afforded by the Exchange"); Investors Exchange LLC, Rule 11.260(a)(1) ("growing out of the use or enjoyment of any facility of the Exchange"); Long-Term Stock Exchange, Rule 11.260(a)(1) ("growing out of the use or enjoyment of any facility of the Exchange"); Miami International Securities Exchange, LLC, Rule 527(a) ("claims that arise out of the use or enjoyment of the facilities or services afforded by the Exchange"); BOX Exchange LLC, Rule 7230(b) ("claims arising out of the use of the facilities, systems or equipment afforded by BOX"); Nasdaq GEMX, Section 27(a) ("claims arising out of the use of the facilities, systems or equipment afforded by the Exchange"); New York Stock Exchange LLC, Rule 17(a) ("growing out of the use or enjoyment by such member, allied member or member organization of the facilities afforded by the Exchange"). FINRA does not operate its own securities exchange and therefore does not have a comparable rule. (Ex. K).

For all these reasons, SIFMA has not demonstrated a likelihood of succeeding on the merits.

B. SIFMA Has Not Articulated Any Irreparable Harm that Industry Members Would Suffer Absent a Stay

SIFMA has not alleged – let alone proven – that Industry Members will suffer irreparable harm absent a stay. This failure, standing alone, compels denial of SIFMA's Stay Motion. *In re Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 571255, at *5 (Nov. 27, 2017) (failure to demonstrate irreparable harm "eliminates the need to balance the other factors"); *In re Am. Petroleum Inst.*, Exchange Act Release No. 68197, 2012 WL 5462858, at *3 (Nov. 8, 2012) (failure to demonstrate imminent, irreparable harm, by itself, is a sufficient basis to deny a stay).[16]

SIFMA alleges Industry Members may suffer two types of harms absent a stay: 1) enforcement or disciplinary actions against Industry Members who opt not to execute a CRA (SIFMA Br. at 13-14) and 2) unspecified financial damages resulting from a hypothetical future data breach. (Reisner Decl. ¶ 17). As an initial matter, SIFMA's *only* evidentiary support for its purported irreparable harm is a declaration from its outside counsel. It offers no declarations from any of its members describing what harm will irreparably befall them if they execute the CRA or explaining why, in the face of purported irreparable harm, the vast majority of SIFMA members nonetheless chose to execute the CRA. *In re Kabani & Co., Inc.*, Exchange Act Release No. 80403, 2017 WL 1295034 (Apr. 7, 2017) ("[M]ovants provide no evidentiary support for [their] prediction" that complained-of harm will cause their business to cease operations.) (citing SEC

[16] SIFMA rests much of its irreparable harm argument on *In re Bloomberg* (SIFMA Br. at 14), but SIFMA omits that the stay in that case was issued on a "brief, interim" basis and was lifted only 17 days later, when the Commission concluded the alleged future harm to Bloomberg's business did not warrant a stay. *In re Bloomberg L.P.*, Exchange Act Release No. 47999, 2003 WL 2157776, at *2 (June 6, 2003). In granting its interim stay, the Commission noted that the exchange's opposition papers were not even due to be filed until after the launch of the challenged service. *In re Bloomberg L.P.*, Exchange Act Release No. 47891, 2003 WL 21184560, at *2 (May 20, 2003). After undertaking its more comprehensive evaluation, the Commission declined to extend the stay because Bloomberg had not demonstrated irreparable harm. *In re Bloomberg L.P.*, 2003 WL 2157776, at *2 (June 6, 2003).

Rule of Practice 401(a), 17 C.F.R. § 201.401(a) ("[I]f the facts are subject to dispute, [a stay] motion shall be supported by affidavits or other sworn statements or copies thereof.")).

More fundamentally, neither proffered harm satisfies Rule 401(a). The Commission has held that having to defend against an enforcement action is not an irreparable injury. *See In re Edward M. Daspin*, Exchange Act Release No. 86230, 2019 WL 2717085, at *3 (June 28, 2019) ("The Supreme Court has [] recognized that the expense and disruption of defending against an adjudicatory proceeding does not constitute irreparable harm, even when a party takes issue with the institution or lawfulness of the proceedings."). *Daspin* comports with the bedrock equitable principle of preliminary relief that only harm that is truly irreparable may justify a stay. *See, e.g.*, *In re Am. Petroleum Inst.*, 2012 WL 5462858, at *3 (Nov. 8, 2012). As the Commission recognized in *Daspin*, the harm from any enforcement or disciplinary action that results from an Industry Member's choice not to execute the CRA can be remedied by the Commission (or by the SROs) if the CRA ultimately is found to be improper. *See Daspin* 2019 WL 2717085, at *3; *In re Meyers Assocs., L.P.*, Exchange Act Release No. 77994, 2016 WL 3124674, at *4 (June 3, 2016) ("[t]he Commission and courts have consistently held…that mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough to constitute irreparable harm.").[17] Industry Members can avoid any short-term "harm" from defending against an SRO disciplinary action by signing the CRA while the Application is

[17] SIFMA asserts that a denial of access to SRO services in the absence of alternatives can constitute irreparable harm. *See* SIFMA Br. at 13-14. However, the irreparable harm in both cases upon which SIFMA relies depended on a threat to market competition, which is not present here. *In re Bunker Ramo*, Exchange Act Release No. 14606, 1978 WL 197047, at *4 (Mar. 24, 1978) ("petitioners could be forced out of this line of business during the pendency of contractual negotiations"); *Bloomberg L.P.*, 2003 WL 21184560, at *2 (finding that conditions at issue would "severely disadvantage and indeed cripple the ability of small to middle-market investment firms to compete").

pending. If the Commission subsequently invalidates the CRA, Industry Members will be freed from its Limitation of Liability and Indemnity Provisions without any irremediable harm.

SIFMA also alleges that Industry Members may face unspecified harm due to a hypothetical CAT data breach, but this purported harm rests on pure speculation and is not irreparable. (*See* Reisner Decl. ¶ 17). The theoretical possibility of a data breach is insufficient to warrant a stay, especially considering CAT LLC's extensive cybersecurity protocols, which were approved by the Commission following notice and comment. (*See* Ex. B, § 6.12., Appendix D10-D15; Simon Decl. ¶¶ 27-31).

Nor has SIFMA demonstrated that Industry Members will suffer any cognizable damages in the event of a hypothetical data breach. *See Alpine Sec. Corp.*, 2019 WL 6251313, at *10 ("A stay will not be granted against something merely feared as liable to occur at some indefinite time; rather, the party seeking a stay must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm."). Moreover, harm that is solely financial in nature – i.e., the type of harm SIFMA speculates Industry Members might suffer (Reisner Decl. ¶ 17) – is insufficient as a matter of law. *In re Robert J. Prager*, Exchange Act Release No. 50634, 2004 WL 2480717, at *1 (Nov. 4, 2004); *see also Meyers Assocs.*, 2016 WL 3124674, at *4 ("The Commission has generally refused to grant stays based on applicants' claims that [a] decision will negatively affect, or even close, a business.").

During the pendency of SIFMA's Application, Industry Members may choose to either sign the CRA or potentially subject themselves to disciplinary actions. Neither of these paths constitutes irreparable harm and, as such, a stay is unwarranted.[18]

[18] So long as at least one of the two options that Industry Members have does not constitute irreparable harm, they are obligated to exercise it. *See In re Gregory Evan Goldstein*, Exchange Act Release No. 68904, 2013 WL 503416, at *5 (Feb. 11, 2013) (no irreparable harm where applicant could remedy the situation causing its suspension).

C. It Is More Likely for CAT LLC to Be Substantially Harmed By a Stay Than for SIFMA Members to Be Irreparably Harmed in the Absence of a Stay

A stay is more likely to harm CAT LLC and the Participants than the absence of a stay would harm Industry Members. *See Meyers Assocs.*, 2016 WL 3124674, at *5. A stay of the requirement to sign the CRA would force CAT LLC to accept data from a multitude of Industry Members without any terms or conditions. Without a CRA, each of the approximately 1,200 Industry Members with reporting obligations beginning on June 22 presumably could unilaterally determine the terms under which it reported data. This chaotic scenario would create an untenable situation for operating the CAT and fly in the face of the CAT NMS Plan. (Ex. B, 6.4(e)).

Moreover, even in SIFMA's hypothetical data breach scenario, CAT LLC is the entity most likely to suffer harm. Individual Industry Members would only be harmed by a breach that affected their individual data; CAT LLC, by contrast, would be harmed in any breach scenario.

D. A Stay Is Not in the Public Interest

SIFMA argues that the public interest would be served by a stay of the CAT deadlines or the CRA requirement to enable Industry Members to obtain Commission review. SIFMA Br. at 15. But SIFMA's conclusory assertion that a stay is necessary to enable the Commission to fairly adjudicate the issues can be made whenever any party seeks preliminary relief. Moreover, the cases upon which SIFMA relies all involved stays designed to "preserve the status quo." *See In re PalmWorks, Inc.*, Exchange Act Release No. 43294, 2000 WL 1335343, at *2 (Sept. 15 ,2000); *In re Intelispan, Inc.*, Exchange Act Release No. 42738, 2000 WL 511471, at *1 (May 1, 2000). In light of the fact over 1,300 Industry Members have signed the CRA and with CAT reporting scheduled to commence on June 22, a stay would disrupt rather than preserve the status quo. *See Alpine Sec. Corp.*, 2019 WL 6251313 (public interest weighed against a stay that would alter the status quo).

The public interest is best served by permitting the CAT to proceed. As Rule 613 contemplates, the CAT will play a vital role in enabling the Commission, the SROs, and other enforcement authorities to surveil the securities markets and protect investors. *See* Consol. Audit Trail, 2012 WL 2927797, at *8 (the Commission determined that the CAT was necessary for the prompt and accurate recording of material information about all orders in NMS securities). Abruptly staying CAT deadlines is plainly contrary to the public interest in reaching these goals.

CONCLUSION

For the foregoing reasons, CAT LLC and the Participants respectfully request that the Commission deny SIFMA's Stay Motion in its entirety.

Dated: New York, New York
May 6, 2020

Respectfully submitted,

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of: The Application of SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, For Review of Action Taken by CAT LLC and Certain Self-Regulatory Organizations	Admin. Proc. File No. 3-19766

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rule 154(c) of the Commission's Rules of Practice, I hereby certify that this memorandum of law contains 6,973 words, according to the word-processing system used to prepare the brief, exclusive of the cover page, table of contents, table of authorities, and appendices.

Dated: New York, New York
May 6, 2020

Ari Berman

Ari M. Berman

APPENDIX A

Limitation of Liability Provisions

I. NMS Plans

NMS Plan	Agreement	Limitation of Liability Provision in Agreement
Consolidated Audit Trail (CAT)	Consolidated Audit Trail Reporter Agreement (*available at* https://www.catnmsplan.com/sites/default/files/2020-02/Consolidated-Audit-Trail-Reporter-Agreement%2808-29-19%20FINAL%29.pdf)	**5.5. Limitation of Liability:** Provides that liability of Consolidated Audit Trail ("CATLLC") and its Representatives to CAT Reporter under the Agreement shall not "for any calendar year exceed the lesser of the total of the fees actually paid by CAT Reporter to CATLLC for the calendar year in which the claim arose or five hundred dollars." **5.6. Damage Exclusion:** Provides that CATLLC and its Representatives shall not "be liable to CAT Reporter or any other person for lost revenues, lost profits, loss of business, or any incidental, consequential, special, exemplary, punitive or other direct or indirect damages of any kind or nature." **5.7. Data Exclusion:** Provides that CATLLC and its Representatives shall not "be liable for any inconvenience caused by the loss of any data, for the loss or corruption of any CAT Reporter data or for any delays or interruptions in the operation of the CAT System from any cause."
Consolidated Tape Association Plan/ Consolidated Quotation Plan (CTA/CQ Plan)	Form of Subscriber Contract (Agreement for Receipt of Consolidated Network A Data and NYSE Market Data) (*available as Exhibit D*: https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/CQ_Plan_Composite_as_of_December_6_2019.pdf)	**6. Data Not Guaranteed.** No disseminating party (i.e., NYSE, any other Authorizing SRO and the Processor) "shall be liable in any way to Subscriber or to any other person for (a) any inaccuracy, error or delay in, or omission of, (i) any such data, information or message, or (ii) the transmission or delivery of any such data, information or message, or (b) any loss or damage arising from or occasioned by (i) any such inaccuracy, error, delay or omission, (ii) non-performance, or (iii) interruption in any such data, information or message, due either to any negligent act or omission by any disseminating party or to any "Force Majeure" (i.e.….equipment or software malfunction) or any other cause beyond the reasonable control of any disseminating party."

Unlisted Trading Privileges Plan	UTP Plan Subscriber Agreement (*available at* http://www.utpplan.com/DOC/subagreement.pdf)	**6. Limitation of Liability:** • "Nasdaq shall not be liable to Subscriber, its Vendor or any other Person for indirect, special, punitive, consequential or incidental loss or damage (including, but not limited to, trading losses, loss of anticipated profits, kiss by reasons of shutdown in operation or increased expenses of operation, costs of cover or other indirect loss or damage) of any nature arising from any cause whatsoever." • The "liability of Nasdaq within a single year of the Agreement…is limited to an amount of Subscriber's damages that are actually incurred by Subscriber in reasonable reliance (combined with the total of all claims or losses of Subscriber's Vendor and any other Person claiming through, on behalf of or as harmed by Subscriber) and which amount does not exceed the lesser of:" (i) a prorated month's credit of any monies due directly to Nasdaq from Subscriber or, if applicable, from any other Person, for the Information at issue during the period at issue, or if Subscriber or any other Person no longer receives either the Information or any other data and/or information offered by Nasdaq, a refund of any monies due directly to Nasdaq from Subscriber or, if applicable, from any other Person, for the Information at issue during the period at issue; or (ii) $500.
Options Price Authority Facility (OPRA)	Vendor Agreement (*available at* https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5c6f058889c3684b7571a552_OPRA%20Vendor%20Agreement%20100118.pdf)	**12. No Warranty as to OPRA Data:** Provides that "neither OPRA, the Processor nor any Participant shall be liable in any way to Vendor or to any Subscriber for any loss, damages, cost or expense which may arise out of any failure of performance by OPRA, the Processor or any Participant, or from any delays inaccuracies, errors in, or omissions of, any OPRA Data or in the transmission or delivery thereof, whether or not due to any negligent act or omission on the part of OPRA, the Processor or any Participant. In no event shall OPRA, the Processor or any Participant be liable for any incidental, special, indirect or consequential damages, including but not limited to lost profits, trading losses, or damages resulting from inconvenience, or loss or use of any OPRA Data."

II. Trade Reporting Facilities and Regulatory Reporting Systems

Trade Reporting Facility	Agreement	Limitation of Liability Provision in Agreement
FINRA Market Transparency Facilities: **1. Trade Reporting and Compliance Engine (TRACE)** **2. OTC Reporting Facility (ORF)** **3. Alternative Display Facility (ADF)**	FINRA Transparency Services Participation Agreement (*available at* https://www.finra.org/sites/default/files/FINRA_Transparency_Services_Participation_Agreements-Version-1.4.pdf)	**Section 18. Limitation of Liability:** Provides that: • FINRA shall not be liable to Participant "for indirect, special, punitive, consequential, or incidental loss or damage (including trading losses, loss of opportunity, loss of anticipated revenues, loss of anticipated profits, loss by reason of shutdown in operation or increased expenses of operation, or other loss or damage) of any nature arising from any cause whatsoever." • FINRA shall not be liable to Participant "for any unavailability, interruption, delay, incompleteness, or inaccuracy of the Service or the Information and Data unless such unavailability, interruption, delay, incompleteness, or inaccuracy of the Service or Information and Data lasts for an entire Business Day and continues at the commencement of the immediately succeeding Business Day." • "If FINRA is for any reason held liable, …the aggregate liability of FINRA within a single year is limited to the lower of: (1) if Participant continues to receive the Service or any other data and/or information offered by FINRA, a prorated month's credit of any monies due to FINRA from Participant for the period at issue or, if Participant no longer receives either the Service or any other data and/or information offered by FINRA, a refund of any monies due to FINRA from Participant for the period at issue; or (2) $5,000.00." • "FINRA shall not be responsible for or liable…for any unavailability, interruption, delay, incompleteness, or inaccuracy of the Service of the Information and Data that is not caused by FINRA."
FINRA/Nasdaq TRFs **1. FINRA /Nasdaq TRF Carteret** **2. FINRA /Nasdaq TRF Chicago**	Nasdaq U.S. Services Agreement (*available at* http://www.nasdaqtrader.com/content/marketregulation/membership/NasdaqServicesAgreement.pdf)	**Section 13. Limitation of Liability:** Provides that: • Nasdaq "shall not be liable to Subscriber…for trading losses, loss of anticipated profits, loss by reason of shutdown in operation or for increased expenses of operation, or for indirect, special, punitive, consequential, or incidental loss or damage of any nature arising from any cause whatsoever." • "Nasdaq shall not be liable to Subscriber…for the unavailability, interruption, delay, incompleteness or inaccuracy of information from Nasdaq's third party information and software providers."

Order Audit Trail System (OATS)	FINRA Entitlement Program Terms of Use[1] (*available at* https://www.finra.org/sites/default/files/Entitlement_Program_Privacy_Statement.pdf)	**6. Disclaimer of Warranty; Limitation of Liability:** Provides that: • "This disclaimer of liability applies to any damages or injury caused by any failure of performance, error, omission, interruption, deletion, defect, delay in operation or transmission, computer virus, communication line failure, theft or destruction or unauthorized access to, alteration of, or use of record, whether for breach of contract, tortious behavior, negligence, or under any other cause of action." • "In no event will FINRA, its affiliates or licensors, or any person or entity involved in creating, producing or distributing the Web Site, the application, materials or services accessible through the Web Site or software underlying the foregoing, for or on behalf of FINRA, be liable for any damages, including, without limitation, direct, indirect, incidental, special, consequential or punitive damages arising out of the use or inability to use the Web Site or the applications, materials or services accessible through the Web Site." • "Neither FINRA, nor its affiliates, licensors, information providers or content partners shall be liable regardless of the cause or duration, for any errors, inaccuracies, omissions, or other defects in, or untimeliness or unauthenticity of, the information contained within the Web Site or the applications, materials or services accessible through the Web Site, or for any delay or interruption in the transmission thereof to the Subscriber, or for any claims or losses arising therefrom or occasioned thereby or for any disciplinary or regulatory action taken thereupon." "Neither, FINRA, nor its affiliates, licensors, information providers or content partners shall be liable for any third-party claims or losses of any nature, including, but not limited to, lost profits, punitive or consequential damages."

[1] All applicants for FINRA Membership are required to execute this agreement under FINRA Rule 1013(a)(R).

III. Industry Member Agreements

Industry Member	Agreement	Limitation of Liability Provision in Agreement
Vanguard	Electronic Services Agreement (effective September 5, 2017) (*available at* https://personal.vanguard.com/pdf/v718.pdf)	**Section 14. Limitations of Liability:** • "In no event will [Vanguard Brokerage Services "(VBS)"] and its affiliates, agents, licensors, or service providers, the Information Providers, or the Information Transmitters be liable to you or anyone else for any consequential, incidental, special, exemplary, punitive, or indirect damages (including, but not limited to, lost profits, trading losses, and damages) that result from inconvenience, delay, the use of, or loss of the use of the Electronic Services, even if VBS or its affiliates, agents, licensors, or service providers, the Information Providers, or the Information Transmitters have been advised of the possibility of such damages or losses." • "Neither VBS and its affiliates, agents, licensors, or service providers, the Information Providers, nor the Information Transmitters shall be liable for any loss resulting from a cause over which such entity does not have direct control, including, but not limited to, failure of electronic or mechanical equipment or communication lines, telephone, or other interconnect problems, bugs, errors, configuration problems, or incompatibility of computer hardware or software, failure or unavailability of wireless access, internet access, internet service providers, or other equipment or services relating to your computer, intermediate computer or communications networks or facilities, data transmission facilities or your telephone or telephone service, or unauthorized access, theft, operator errors, severe weather, earthquakes, other natural disasters, or labor disputes."
E*TRADE	E*TRADE Customer Agreement (effective April 15, 2019) (*available at* https://us.etrade.com/e/t/estation/contexthelp?id=1209031000)	**Section 14. Limitation of Liability:** • Provides that "no E*TRADE Indemnified Parties shall be liable for any action taken or omitted to be taken by any of them hereunder or in connection herewith except for their breach of this Customer Agreement, gross negligence, or willful misconduct." • "In no event shall any E*TRADE Indemnified Parties be held liable for (i) indirect, consequential, exemplary, or punitive damages or (ii) any loss of any kind caused, directly or indirectly, by any Force Majeure Event, and the Account Holder unconditionally waives any right it may have to claim or recover such damages (even if the Account Holder has informed an E*TRADE Indemnified Party of the possibility or likelihood of such damages)."

		○ ""Force Majeure Event" shall mean any act beyond E*TRADE's control, including any…communications, system or power failures, cybersecurity incident, and equipment or software malfunction." • "…[T]he Account Holder expressly agrees that under no circumstances will the total, aggregate liability of E*TRADE Indemnified Parties to the Account Holder or any party claiming by or through the Account Holder, for any cause whatsoever, exceed $1,000, regardless of the form of action and whether in contract, statute, tort, or otherwise."
Charles Schwab	Electronic Services Agreement (effective January 2020) (*available at* https://www.schwab.com/legal/schwab-brokerage-account-agreement)	**5. Limitations of Liability:** • Schwab "will not be liable under any circumstances for any consequential, incidental, special or indirect damages…This includes, but is not limited to, claims for lost profits, trading losses and damages that may result from the use, inconvenience, delay or loss of use of the Information or for omissions or inaccuracies in the Information." • "[T]he liability of Schwab… arising out of any legal claim… in any way connected with Schwab's Electronic Services or Information will not exceed the amount you originally paid for the Electronic Services related to your claim." • "Schwab… will not be liable for any loss that results from a cause over which that entity does not have direct control. Such causes include, but are not limited to: (1) the failure of electronic or mechanical equipment or communication lines; (2) telephone or other interconnect problems; (3) bugs, errors, configuration problems or the incompatibility of computer hardware or software; (4) the failure or unavailability of Internet access; (5) problems with Internet service providers or other equipment or services relating to your computer or network; (6) problems with intermediate computer or communications networks or facilities; (7) problems with data transmission facilities or your telephone, cable or wireless service; or (8) unauthorized access, theft, operator errors, severe weather, earthquakes, other natural disasters or labor disputes. Schwab is also not responsible for any damage to your computer, software, modem, telephone, wireless device or other property resulting in any way from your use of Schwab's Electronic Services."

Bank of America	Electronic Trading Terms and Conditions (November 2019) (*available at* https://www.bofaml.com/content/dam/boamlimages/documents/PDFs/baml_electronic_trading_platform_terms_final_12_03_2015.pdf)	**10. Indemnity, Disclaimer of Warranties and Limitation of Liability** • 10.3: "In no event shall BofA…be liable for: (a) any losses suffered or incurred by customer or any third party which arise out of or in connection with these Terms or any breach or non-performance of these terms no matter how fundamental (including by reason of BofA's negligence) including, for the avoidance of doubt, any losses that occur as a result of an action or inaction of BofA, including BofA's indicative prices, any relevant market or any other party that directly or indirectly results in a customer offer and/or customer order being executed, failing to be executed, or being executed on a delayed basis, (b) any losses, damages, claims, costs or expenses which arise out of or relate to (i) any service interruption or failure or incorrect operation for any reason of BofA electronic trading services or associated communications systems or equipment, or (ii) any incomplete or incorrect executed transactions resulting from incomplete, incorrect, failed, intercepted or misdirected communications; or (c) any indirect, incidental, special or consequential loss, damage, claim, cost or expense (including, without limitation, any economic loss or damage, loss of profits, revenue, goodwill or anticipated savings, loss of or corruption to data, loss of operation time or loss of contracts) of any nature…" • 10.6: "BofA shall not be considered in breach of these Terms in the event of any failure or delay for reasons not within BofA's reasonable control, including, without limitation, war, disaster, acts of nature, power failure, failure of communications services or networks, labor stoppage, sabotage, computer virus, hacking, unrest or disputes, or acts or omissions of Customer…"
TD Ameritrade	Client Agreement (2019) (*available at* https://www.tdameritrade.com/retail-en_us/resources/pdf/AMTD182.pdf)	**7(c). Limitation of Liability:** "Subject to Applicable Rules, in no event will [TD Ameritrade, its] affiliates, the Third-Party Providers or their respective licensors, employees, distributors, or agents be liable to [the account owner] or any third party for any direct, indirect, incidental, special, punitive, or consequential losses or damages of any kind with respect to the Services." **14(g). Force Majeure:** "[TD Ameritrade] will not be liable for loss caused directly or indirectly by conditions beyond [its] reasonable control, including but not limited to Force Majeure events. "Force Majeure" means events that are beyond the reasonable control of a party, including but not limited to the following: disasters, extraordinary weather conditions, earthquakes or other acts of God,…terrorists acts, government restrictions, exchange or market rulings, suspension of trading, computer or communication line failure, or failure of market centers or transmission facilities."

APPENDIX B

Indemnification Provisions

I. NMS Plans

NMS Plan	Agreement	Indemnification Provision in Agreement
Consolidated Audit Trail (CAT)	Consolidated Audit Trail Reporter Agreement (*available at* https://www.catnmsplan.com/sites/default/files/2020-02/Consolidated-Audit-Trail-Reporter-Agreement%2808-29-19%20FINAL%29.pdf)	**Section 5.2:** Requires CAT Reporters to indemnify CAT LLC, the Participants, the Plan Processor from third party claims in four limited circumstances: 1) A breach of the warranty by the CAT Reporter that it "has the full legal right to submit to the CAT system the CAT Data" that it submitted (§ 5.2(a)); 2) A failure by the CAT Reporter or any of its agents "to protect and secure CAT Data under its control, including any PII that is part of the CAT data" (§5.2(b)); 3) A failure by the CAT Reporter or any of its agents "to protect its own systems from misuse … or unauthorized access to the CAT System by or through CAT Reporter's systems" (§5.2(c)); or 4) A failure by the CAT Reporter or any of its agents "to comply with its obligations under this Agreement" (§5.2(d)).
Consolidated Tape Association Plan/ Consolidated Quotation Plan (CTA/CQ Plan)	Form of Subscriber Contract (Agreement for Receipt of Consolidated Network A Data and NYSE Market Data) (*available as Exhibit D*: https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/CQ_Plan_Composite_as_of_December_6_2019.pdf)	**Section 15(e): "**Indemnification - Subscriber shall indemnify and hold harmless each Authorizing SRO from and against any liability, loss or damages caused by (i) any inaccuracy in or omission from, (ii) Subscriber's failure to furnish or to keep, or (iii) Subscriber's delay in furnishing or keeping, any report or record that this Paragraph 15 requires. Subscriber shall do so even if Subscriber depends on information from a third party and the third party caused the inaccuracy, omission, failure or delay. Without limiting the generality of the foregoing, if NYSE determines that, as a consequence of any such inaccuracy, omission, failure or delay, applicable Subscriber charges were not billed when incurred, Subscriber may be billed for those charges and Subscriber shall promptly pay those charges plus any applicable tax.")

Unlisted Trading Privileges Plan	UTP Plan Subscriber Agreement (*available at* http://www.utpplan.com/DOC/subagreement.pdf)	**Section 9. Claims and Losses:** "Subscriber will indemnify Nasdaq and hold Nasdaq and its employees, officers, directors and other agents harmless from any and all Claims or Losses imposed on, incurred by or asserted as a result of or relating to: (a) any noncompliance by Subscriber with the terms and conditions hereof; (b) any third-party actions related to Subscriber's receipt and use of the Information, whether authorized or unauthorized under the Agreement."
Options Price Authority Facility (OPRA)	Vendor Agreement (*available at* https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5c6f058889c3684b7571a552_OPRA%20Vendor%20Agreement%20100118.pdf)	6(d): "Vendor agrees to indemnify, hold harmless and defend OPRA, each Participant, the Processor and each Affiliate of the foregoing from and against any and all claims, suits, proceedings at law or in equity, and any and all liability, loss, damages, costs or expenses (other than fees and expenses of attorneys separately retained by any of the indemnified parties) arising out of or in connection with any allegation that an Electronic Subscriber Agreement is unenforceable or invalid, if any of the reasons for the alleged unenforceability or invalidity of the contract is based upon or related to the fact that the contract was entered into or administered electronically; provided, however, that Vendor shall be notified promptly in writing of any such claims and Vendor shall have sole control of the defense of any such claim, suit or proceeding and all negotiations for settlement or compromise thereof, but only insofar as such settlement or compromise does not impose any liability on OPRA, any Participant, any Affiliate thereof, or the Processor." 17: "Vendor hereby agrees to indemnify, hold harmless and defend OPRA, each Participant and each Affiliate of a Participant from and against any and all suits, proceedings at law or in equity, and any and all liability, loss, damages and expenses (other than fees and expenses of attorneys separately retained by any of the indemnified parties), arising out of, or in connection with any claim by any person that the use of Vendor's Service infringes any United States patent or violates any property right…"

II. Trade Reporting Facilities and Regulatory Reporting Systems

Trade Reporting Facility	Agreement	Indemnification Provision in Agreement
FINRA Market Transparency Facilities: **1. Trade Reporting and Compliance Engine (TRACE)** **2. OTC Reporting Facility (ORF)** **3. Alternative Display Facility (ADF)**	FINRA Transparency Services Participation Agreement (*available at* https://www.finra.org/sites/default/files/FINRA_Transparency_Services_Participation_Agreements-Version-1.4.pdf)	**Section 20. Indemnification:** "Participant shall be liable to, indemnify, defend and hold harmless FINRA its, employees, directors, and other agents against, any and all Claims or Losses imposed on, incurred by or asserted against FINRA, its employees, directors, and other agents arising out of or in connection with this Agreement and access, receipt or use of the Service, including all Testing Services, provided pursuant hereto to the extent that the Claims and Losses result from (i) acts or omissions of the Participant or its Users, (ii) breach of this Agreement by Participant or its Users, (iii) Participant's or its Users' access, receipt or use of the Service (including representations about the Service), (iv) as a result of a claim by a third party to intellectual property rights related to Participant's hardware, software, or services used with the Services or use of the Services in combination with the Participant's hardware, software, or services, including any claim alleging contributory infringement, or (v) any defense of or participation by FINRA its, employees, directors, and other agents in any action, suit, arbitration, mediation, judicial or administrative proceeding, or any other proceeding involving any Claims or Losses described in this Agreement caused by or related to any act or omission by Participant or any party obtaining access to the Service or Testing Services intentionally, knowingly or negligently from or through Participant."
FINRA/Nasdaq TRFs **1. FINRA /Nasdaq TRF Carteret** **2. FINRA /Nasdaq TRF Chicago**	Nasdaq U.S. Services Agreement (*available at* http://www.nasdaqtrader.com/content/marketregulation/membership/NasdaqServicesAgreement.pdf)	**Section 14. Indemnification: "**Subscriber shall be liable to, indemnify against, and hold the Nasdaq Affiliates harmless from, any and all Claims or Losses (as those terms are defined in subsection (F) herein) imposed on, incurred by or asserted against any Nasdaq Affiliate by an unaffiliated third party to the extent that the Claims and Losses result from the breach or alleged breach of this Agreement by the Subscriber, its employees, directors, agents or associated persons, or from the receipt or use of the Services (including representations about the Services) by Subscriber, its affiliates, its customers, or its employees, directors, agents or associated persons."

Order Audit Trail System (OATS)	FINRA Entitlement Program Terms of Use[1] (*available at* https://www.finra.org/sites/default/files/Entitlement_Program_Privacy_Statement.pdf)	**Section 9. Indemnification:** "Subscriber agrees to defend, indemnify and hold harmless FINRA, its affiliates, licensors, information providers or content partners and their respective directors, officers, employees and agents from and against all claims and expenses, including attorneys' fees, arising out of the use of the Web Site or the applications, materials or services accessible through the Web Site by Subscriber or Subscriber's Account(s)."

[1] All applicants for FINRA Membership are required to execute this agreement under FINRA Rule 1013(a)(R).

III. Industry Member Agreements

Industry Member	Agreement	Indemnification Provision in Agreement
Vanguard	Electronic Services Agreement (effective September 5, 2017) (*available at* https://personal.vanguard.com/pdf/v718.pdf)	**15. Indemnification:** "You agree to defend, indemnify, and hold harmless VBS and its agents, licensors, and service providers, the Information Providers, and the Information Transmitters, and each of its and their affiliates, officers, directors, employees, agents, and contractors, from and against any and all claims, losses, liabilities, costs, and expenses (including, but not limited to, attorneys' fees) arising from (i) Your improper use of or access to the Electronic Services; (ii) Your furnishing of any of the Information to any third party; or (iii) Your violation of this Electronic Services Agreement, state or federal securities laws or regulations, or any third party's rights, including, but not limited to, infringement of any intellectual property right, violation of any proprietary right, and invasion of any privacy rights. This obligation will survive any termination of this Electronic Services Agreement."
E*TRADE	E*TRADE Customer Agreement (effective April 15, 2019) (*available at* https://us.etrade.com/e/t/estation/contexthelp?id=1209031000)	**15. Indemnification:** "The Account Holder agrees fully to indemnify, hold harmless, and reimburse the E*TRADE Indemnified Parties, on a current basis, from and against any and all Losses arising out of or relating to: (i) any transaction effected for or in the Account in accordance with any communication, notice, instruction, or order received from the Account Holder, the Account Holder's agent, or an individual any E*TRADE Indemnified Party believes to be authorized to act on behalf of the Account Holder; (ii) any erroneous, mismatched, or incomplete identifying information on any electronic funds transfer instruction; (iii) failure of the Account Holder to perform their obligations hereunder, including without limitation failure to satisfy any Obligations due to E*TRADE or timely deliver in Good Deliverable Form any Collateral sold for the Account; (iv) breach of any representation, warranty, or covenant made by the Account Holder hereunder or any subsequent false or misleading statement or representation made by the Account Holder or its agents; (v) any act or omission by the Account Holder with respect to any of their accounts; (vi) the Account Holder's failure to comply with any provision of Applicable Law; (vii) any action taken by any E*TRADE Entity to enforce its rights under this Customer Agreement; (viii) any Event of Default by the Account Holder; and (ix) any violation or infringement by the Account Holder or its agents of any copyright or other intellectual property right."
Charles Schwab	Electronic Services Agreement (effective January 2020) (*available at* https://www.schwab.com/legal/schwab-brokerage-account-agreement)	**17. Indemnification:** "You agree to defend, indemnify and hold Schwab, the Information Providers and the Information Transmitters harmless from and against any and all claims, losses, liability costs and expenses (including, but not limited to, attorneys' fees) arising from your violation of this Agreement, state or federal securities laws or regulations, or any third party's rights, including, but not limited to, infringement of any copyright, violation of any proprietary right and invasion of any privacy rights."

Bank of America	Electronic Trading Terms and Conditions (November 2019) (*available at* https://www.bofaml.com/content/dam/boamlimages/documents/PDFs/baml_electronic_trading_platform_terms_final_12_03_2015.pdf)	**10. Indemnity, Disclaimer of Warranties and Limitation of Liability** • 10.1: "Customer…agrees to indemnify, defend and hold harmless BofA and its directors, officers, employees, contractors and agents from and against any and all direct and indirect losses, claims, liability, damages, expenses (including reasonable legal fees and advertising costs reasonably incurred by BofA in connection with mitigating any damage caused to BofA's reputation and goodwill) (Losses) in connection with (i) any claim arising out of any breach of these Terms by Customer, any Authorized Person or any other employee, officer, contractor or agent (whether authorized or not) of Customer and (ii) any regulatory or other investigation or proceeding arising out of Customer's use of the services provided by BofA pursuant to these Terms and any Executed Transactions resulting therefrom (including any resulting fines, loss of business caused by any suspension or ban from any relevant market, expenses or other costs arising from an actual or alleged breach by Customer of any Applicable Law and any reasonable legal costs incurred in liaising with any regulator or relevant market)."
TD Ameritrade	Client Agreement (2019) (*available at* https://www.tdameritrade.com/retail-en_us/resources/pdf/AMTD182.pdf)	**14(h). Indemnification:** "I agree to indemnify and hold harmless [TD Ameritrade]…from any and all liabilities, losses, costs, judgments, penalties, claims, actions, damages, expenses, or attorney's fees (collectively "Losses") resulting or arising directly or indirectly from use of the Services or transactions in my Account, except to the extent that such Losses are the direct result of [TD Ameritrade's] gross negligence or willful misconduct."

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of: The Application of SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, For Review of Action Taken by CAT LLC and Certain Self-Regulatory Organizations	Admin. Proc. File No. 3-19766

CERTIFICATE OF SERVICE

Pursuant to Rule 150 of the Commission's Rules of Practice, I, David Oliwenstein, hereby certify that on May 6, 2020, I caused a true and correct copy of Consolidated Audit Trail, LLC's Memorandum of Law in Opposition to SIFMA's Motion to Stay as well as the accompanying declarations and exhibits, to be delivered to the recipients listed below in the manner indicated.

Via Email

The Honorable Vanessa Countryman
Secretary
U.S. Securities and Exchange
100 F Street, N.E.
Washington, DC 20549

Lorin L. Reisner, Esq.
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1285 Avenue of the Americas
New York, New York 10019
Counsel for Petitioner Securities Industry and Financial Markets Association

Dated: New York, New York
May 6, 2020

David Oliwenstein
David Oliwenstein