

May 23, 2010

Elizabeth M. Murphy
Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: File No. SR-Phlx-2010-048: Response to Comment Letter of Richard
S. Rudolph

Dear Ms. Murphy:

I would like to make a few brief comments on Mr. Rudolph's response to the Lempert and Sullivan letters. First let me say that as a Market – Maker I am extremely pleased that Mr. Rudolph has clarified for the record that the Phlx has no policy to prohibit Market-Makers from interacting electronically with the limit order book and as such, Market- Makers do have the full ability to interact electronically with the book¹. The rest of Mr. Rudolph's response is certainly disingenuous as he misstates the facts and intents of the Lempert and Sullivan letters. Further he fails to address the major questions and issues raised by both the Lempert and Sullivan letters. As such I would say that the credibility of anything presented by Mr. Rudolph should certainly be treated as suspect to both fact and intent.

Mr. Rudolph clearly admits that TOPO Plus contains “core- data” and then brushes off the issue of charging for that data by saying that Phlx sends that data to OPRA². While interesting, Mr. Rudolph fails to mention that subscribers to TOPO Plus get to look at the “core- data” first and even interact (trade) with it before it is seen at OPRA. Contrary to what Mr. Rudolph later states, TOPO Plus subscribers to get to see the core data as it enters the pipe and are thereby “flashed” the data before it goes to OPRA. I would ask the Commission to ask Mr. Rudolph to reply to the one simple example in Lempert's comment letter: “For example, if the PHLX market is 1.00 bid and 1.20 offered and a single order is entered into the PHLX order book system to buy 10 contracts for 1.18, our vendors inform us that only TOPO Plus subscribers will be given this “flash” order information. Only TOPO Plus subscribers will be able to trade with the 1.18 order book prior to the time it would go out to OPRA. If any TOPO Plus subscriber trades this order before it hits the PHLX book then the only data that is disseminated to OPRA is the fact that there was a bid and that it traded immediately.”³ The failure to address this major issue can only be seen as an avoidance of the truth of Lempert's position. I would ask the Commission to request Mr. Rudolph to state simply whether this example is correct or not.

Mr. Rudolph states that the Phlx proposal is not discriminatory because Market – Makers would only be charged the \$20 professional subscriber fee plus whatever their

¹ Rudolph p.4

² Rudolph p.2

³ Lempert p.5

vendors wish to pass on of the \$4000.00 fee⁴. The position laid out by Mr. Rudolph was only done after the Lempert and Sullivan letters were filed and a series of contentious meetings were held. Furthermore, Mr. Rudolph's position is at best specious as it starts from the premise that charging for "core-data" is acceptable. Contrary to what Mr. Rudolph states Lempert and Sullivan have no objection to the Phlx charging for "non-core" data their only objection is the charge for "core-data" hidden as "non-core".

Regarding Complex Order Live Auction (COLA) Mr. Rudolph clearly admits that the orders are "core – data" and again brushes off the issue of charging for access to that data by saying that OPRA doesn't recognize complex order strategies⁵. While interesting, Mr. Rudolph again fails to mention that only paid subscribers to TOPO Plus will have access to these "core-data" orders and that at no time will these orders ever be displayed to anyone other than a paid TOPO Plus subscriber. Mr. Rudolph then says that only TOPO Plus paying subscribers will be able to see pre-market data⁶. In addition Mr. Rudolph states that COLA has a 5 second delay to allow for matching of interest⁷ but again fails to mention that only paying TOPO Plus subscribers have a way to participate. Clearly Lempert was correct when he stated in regards to COLA that the only firms able to see complex orders at any time would have to be paid TOPO Plus subscribers⁸.

It is readily apparent after reading Mr. Rudolph's response letter that he is uninformed, misinformed or clearly misleading. I will let the Commission be the judge.

Therefore for the reasons stated above as well as those in Lempert's and Sullivan's letters I request that the Commission require the Phlx to provide the "core-data" contained in TOPO Plus to all market participants on a fee free basis and that the Phlx be able the charge as it wishes for the "non-core data". If this is not an available action then I request the commission to deny the Phlx proposal.

Sincerely,

Michael Waber
Fairview Trading Inc.

⁴ Rudolph p.3&4

⁵ Rudolph p.2

⁶ Rudolph p.5

⁷ Rudolph p.5

⁸ Lempert p.5