

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3951/June 28, 2016

ADMINISTRATIVE PROCEEDING
FILE NO. 3-15350

In the Matter of the Application of

SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION

For Review of Actions Taken by
Self-Regulatory Organizations

ORDER ON MOTIONS FOR
REDACTIONS AND MANIFEST
ERRORS OF FACT

On June 1, 2016, I issued a sealed initial decision in this proceeding. *Sec. Indus. Fin. Mkts. Ass'n* (SIFMA), Initial Decision Release No. 1015. The public version of this initial decision is issued today, as modified by the two motions I address below.

Motion for Redactions

In a companion order issued the same day as the sealed initial decision, I ordered the parties to file a joint motion under seal by June 17, 2016, specifying what portions of the initial decision should remain under seal, and to specify the grounds under which the redaction was sought. *SIFMA*, Admin. Proc. Rulings Release. No. 3886, 2016 SEC LEXIS 1935 (ALJ June 1, 2016).

The parties timely filed such a motion. SIFMA represents that it proposes redactions that identify seven SIFMA members and one employee of a SIFMA member in connection with their negotiations regarding depth-of-book data fees. *Jt. Mot.* at 1. SIFMA argues that disclosure would cause harm by revealing sensitive business information, and there is no reason why disclosure of the names of particular firms is necessary or useful. *Id.* at 2.

NYSE Arca, Inc. (NYSE Arca), and Nasdaq Stock Market LLC (Nasdaq) (collectively the Exchanges) argue that the entire initial decision should be unsealed. *Id.* at 3-6. The Exchanges contend that the names SIFMA seeks to redact do not constitute trade secrets or commercially sensitive information that should remain under seal. *Id.* at 3.

I adopt SIFMA's proposed redactions. The parties treated specifics about companies and negotiations as highly confidential throughout the proceeding, and the redactions SIFMA

proposes amount to approximately fifty words in a forty-four page initial decision. I give the benefit of the doubt to SIFMA and accept its claim that identifying SIFMA members and their employees that engaged in negotiations over depth-of-book data fees may cause harm by revealing sensitive business information related to the price they pay for such data or their negotiation tactics. The benefit of disclosing these identities is minimal and does not impact the findings and conclusions in the initial decision. In summary, the harm resulting from disclosure would outweigh any purported benefits of disclosure. *See* 17 C.F.R. § 201.322(b). Accordingly, I have made the redactions that SIFMA requests to the public version of the initial decision.

Motion to Correct Manifest Errors

On June 13, 2016, SIFMA filed a motion pursuant to Commission Rule of Practice 111(h) to correct six alleged manifest errors of fact, and to correct the spelling of one name in the appearances section below the caption.¹ The Exchanges filed an opposition on June 20.

A motion to correct a manifest error of fact is appropriate to correct a patent misstatement of fact in the initial decision. 17 C.F.R. § 201.111(h). A manifest error is “an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record.” *Robert Cord Beatty*, Admin. Proc. Rulings Release No. 618, 2005 WL 354587, at *3 (ALJ Feb. 10, 2005) (quoting Black’s Law Dictionary (7th ed. 1999) (alteration omitted)), *finality notice*, Securities Act of 1933 Release No. 8554, 2005 WL 608131 (Mar. 16, 2005). An error of fact is “manifest” if it could reasonably affect the outcome of the decision. *Raymond James Fin. Servs., Inc.*, Admin Proc. Ruling Release No. 622, 2005 WL 3778678, at *1 (ALJ Oct. 14, 2005), *finality notice*, Securities Act Release No. 8636, 2005 WL 3108488 (Nov. 21, 2005). I address SIFMA’s contentions below.

Change the word “all” to “many,” Bernard S. Donefer’s testimony

SIFMA challenges the following statement: “Donefer testified that **all** broker-dealers need depth-of-book data from all the major exchanges, or otherwise they run the risk of not meeting their duty of best execution.” *SIFMA*, Initial Decision Release No. 1015, at p. 23 (emphasis added). SIFMA argues that this statement erroneously characterizes Donefer’s testimony. To correct this supposed manifest error, SIFMA suggests replacing the bolded text with “many.” In opposition, the Exchanges contend that the original statement correctly reflects Donefer’s testimony. I agree with the Exchanges. The cited basis for the statement in the initial decision is the following:

Q. So is it your opinion that **all** broker-dealers need to have access to all Depth-of-Book data from the major exchanges?

A. **They should.** All of them that are dealing with, you know, trades where they have best execution responsibilities, they should have that kind of data.

¹ As requested, references to SIFMA’s attorney will be changed from “Eric D. MacArthur” to “Eric D. McArthur.”

Tr. 919.² (emphasis added).

I therefore DENY SIFMA’s motion because the challenged statement is reasonable based on the testimony. The statement is not a plain and indisputable error or in complete disregard of the credible evidence in the record. In addition, the proposed change would not affect the outcome of the decision.

Change the word “jurisdiction” to “standing”

SIFMA challenges the following statement: “After briefing from the parties, I determined that SIFMA had **jurisdiction** to pursue its challenges under Exchange Act Section 19(d).” *SIFMA*, Initial Decision Release No. 1015, at p. 7 (emphasis added). It argues that the word “jurisdiction” should be replaced with the word “standing,” to accurately describe my finding. The Exchanges contend that this is not a manifest error but merely an “inconsequential correction[],” but agree that SIFMA’s proposed change would be more accurate.

SIFMA is correct. The order discussed in the challenged statement states that “SIFMA has provided a reasonable and persuasive response to what the Commission required it to show to establish associational **standing** in order to challenge the rules on behalf of its members.” *SIFMA*, Admin. Pro. Rulings Release. No. 1921, 2014 SEC LEXIS 3906, at *24 (ALJ Oct. 20, 2014) (emphasis added). The sealed and unsealed initial decision will be corrected and the term standing will replace the term jurisdiction, as requested. However, I DENY SIFMA’s manifest error motion because this error is inconsequential—not a manifest one.

References to ArcaBook and BlueFin

SIFMA challenges three statements, all relating to whether a NYSE Arca customer, BlueFin Trading, dropped ArcaBook, rather than the Arca integrated feed. The first statement is: “For example, BlueFin Trading, a former subscriber, dropped **ArcaBook** because of a price increase.” *SIFMA*, Initial Decision Release No. 1015, at p. 10 (emphasis added). SIFMA argues that the bolded text should be replaced with “Arca Integrated Feed.” The second statement is: “However, the only customer Brooks could identify that actually dropped **ArcaBook** in response to a price increase is BlueFin” *Id.* (emphasis added). SIFMA argues the bolded text should be replaced with “a NYSE Arca product containing depth information.” Lastly, SIFMA challenges the statement “Brooks also provided an example of a company, BlueFin, which dropped **ArcaBook** in direct response to a price increase.” *Id.* at p. 33 (emphasis added). SIFMA argues that the bolded text should be replaced with “the Arca Integrated Feed.”

SIFMA argues that all three statements are incorrect because James Gilbert Brooks, III, testified that BlueFin dropped the Arca integrated feed and that NYSE Arca’s counsel stated that the Arca integrated feed is not the same as ArcaBook. *See* Tr. 72, 146. The Exchanges object, arguing that ArcaBook is a component of the Arca integrated feed, and that BlueFin’s actions in dropping the Arca integrated feed but continuing to take NYSE Arca’s best bid and offer data are

² The transcript cites are to the public hearing.

functionally equivalent to simply dropping ArcaBook depth-of-book data. *See* Tr. 71-73, 111-112, 155.

I DENY SIFMA's motion because the challenged statements are reasonable interpretations of the record testimony. It is unclear to me whether there is an appreciable difference between BlueFin dropping ArcaBook directly or BlueFin dropping the Arca integrated feed, which contained ArcaBook data, and replacing it with only NYSE Arca's best bid and offer data. Regardless, the challenged statements do not amount to a complete disregard of the credible evidence in the record.

Strike the word “regression”

SIFMA challenges the statement, “Hendershott and Nevo’s **regression** analysis showed that NYSE Arca lost only 5% of its accounts and 2% of its subscribers in 2009 after it began charging certain subscribers up to \$750 a month for depth-of-book data.” *SIFMA*, Initial Decision Release No. 1015, at p. 25 (emphasis added). SIFMA states that the reference to the regression analysis is incorrect here, because Hendershott and Nevo’s regression analysis related to order flow, not a decline in NYSE Arca subscriptions following the price increase. SIFMA requests that the term regression be stricken. The Exchanges do not contest this change.

I DENY the motion because there is no manifest factual error, but this statement in the sealed and unsealed initial decision will be corrected as SIFMA requests.

Brenda P. Murray
Chief Administrative Law Judge