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UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
AUGUST 26, 2019

SECURITIES EXCHANGE ACT OF 1934
Release No. 86040/June 5, 2019

Admin. Proc. File No. 3-17906r

In the Matter of the Application of	)
ABN AMRO Clearing Chicago, LLC,	)
For Review of Disciplinary Action Taken by	)
CBOE	)

REPLY MEMORANDUM IN SUPPORT OF APPLICATION FOR REVIEW FILED BY ABN AMRO CLEARING CHICAGO, LLC

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I. INTRODUCTION

In its Opposition Brief ("Opposition" or "Opp.")[1], it is abundantly clear that Regulation's entire case on appeal is based upon an unreasonable and overreaching application of the Rule. Further, Regulation ignores or distorts both the procedural history of this proceeding and the undisputed fact findings that require reversal of the Board. In this Reply, AACC will address Regulation's misguided interpretive arguments and highlight Regulation's abuse of procedure and its distortion of the record.

II. REGULATION'S ARGUMENTS IGNORE OR DISTORT THE BCC PROCEDURAL HISTORY AND THE BCC FACT FINDINGS

From the very outset of the SEC appeal process, Regulation has attempted to justify the Board's Decision by a) disregarding the fact allegations set forth in the Charges that formed the basis of the original prosecution, b) ignoring or disputing the uncontested fact findings of the BCC and c) applying the Rule in an overreaching manner that misapplies SEC guidance and ignores the testimony of its own witnesses. In this respect, Regulation is merely replicating the Board's errors.

On appeal, Regulation advances three broad arguments. First, Regulation argues that the Rule requires the implementation of pre-order entry controls that "ensure" orders comply with "all regulatory requirements" without any possible caveat, limitation or exception – even where a pre-order entry control is indisputably impossible.[2] Although risk controls must be tailored to a customer's strategy, Regulation insists that risk controls must cover every potential violation scenario, however unrelated to that strategy. Second, faced with overwhelming evidence that the

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[1] With respect to all other filings and record citations, AACC will continue to use the same defined terms that were used in its Brief In Support of Application for Review ("Brief"). AACC will not repeat in this Reply every argument already set forth in the Brief; rather, AACC will only address those specific arguments or new issues raised in the Opposition. AACC does not waive or concede any arguments set forth in the Brief but not included in this Reply.

[2] Opp. 2.

disputed risk controls (i.e., monitoring market maker appointments and a COA "block") are impossible, Regulation argues that "impossibility is legally irrelevant" – in other words, AACC was required to implement the disputed risk controls regardless of their impossibility.[3] In the event that risk controls are, in fact, impossible – as is the case here - Regulation argues that the Rule requires that market access be denied or radically truncated. Finally, Regulation now argues – for the first time - that AACC violated the Rule based on two specific fact allegations: specifically, that AACC's certification of the FIN risk management system[4] and its onboarding of Simplex was careless and incomplete.[5] However, neither these fact allegations nor any supporting evidence were set forth in the Charges or in Regulation's case-in-chief at the Hearing.

All of Regulation's arguments depend on ignoring the procedural history of this proceeding and ignoring the indisputable facts established at the BCC hearing, and raising new facts and arguments on for the first time on appeal. As a result, Regulation's appellate arguments are not merely unfair, they undermine the integrity of this disciplinary process. For this reason, AACC will address these issues first before addressing Regulation's misguided interpretation of the Rule.

A. Regulation Improperly Ignores The Charges And Makes Fact Allegations Which Were Never Included In The Charges Or Presented In Regulation's Case-In-Chief

At the BCC hearing, AACC defended and debunked the very specific fact allegations that were explicitly set forth in the Charges. On appeal, Regulation has improperly substituted and advanced *new* fact allegations as the basis for the Rule violation even though they are nowhere mentioned in the Charges.[6] In its Opposition, Regulation ignores the disparity between the fact allegations in the Charges and the fact allegations it is arguing on appeal, and apparently hopes

[3] Opp. 16.
[4] The FIN risk management system is the highly regarded system used by AACC to provide market access to Simplex.
[5] Opp. 6-7, 13.
[6] Brief, 45-47.

that the Commission will as well. Instead, Regulation attempts to distract the Commission with a red herring argument to the effect that its "theory of liability" has always been the same.[7] Regulation's conflation of "facts" with "theory" is obfuscating and misleading.

At the risk of stating the obvious, every disciplinary proceeding, including this one, involves both legal assertions (i.e., allegations of a rule violation) and fact allegations (i.e., allegations of specific acts or omissions whereby the rule was violated). Here, the Charges explicitly alleged that AACC had violated the Rule (a legal assertion) by virtue of the following acts or omissions: (a) failing to properly monitor Simplex's market maker appointments and (b) failing to implement a pre-order entry COA "block" (specific fact allegations).

> 9. *** ABN AMRO failed to maintain market access controls for . . . Simplex that were reasonably designed to assure compliance with all regulatory requirements which must be met on a pre-order basis, specifically the requirement that responders to COAs hold a Market-Maker appointment in the relevant option classes prior to responding to COAs.
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> * * *
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> 13. The acts, practices and conduct described in Paragraph 9 constitute violations of . . . Rule 15c3-5 under the Act by ABN AMRO.[8]

The Charges contain absolutely no other acts by which AACC is alleged to have violated the Rule.

After the BCC approved them, the Charges were the cornerstone document of this proceeding and performed a critical function: putting AACC on notice, in specific terms, of the fact allegations it was required to defend at the evidentiary hearing. Fundamental principles of

[7] Opp. 25-26.

[8] The Cboe and C2 Charges are identical in this respect. FINRA 183-85 and 195-97.

equity and fair play demand no less, and so do the Securities Exchange Act of 1934[9] and Cboe Rule 17.4(b).

The Exchange Act requires "specific charges" setting forth "any act" by which AACC violated the Rule. Similarly, Cboe Rule 17.4(b) requires that the Charges "specify the acts" by which AACC violated the Rule. Since the BCC hearing was AACC's sole opportunity to present evidence in its defense, Regulation cannot be allowed to switch the factual basis of the prosecution on appeal now that the factual allegations in the Charges have proven to be baseless.

But that is exactly what has occurred here. The Charges alleged only two specific acts by which ACC violated the Rule: that AACC (a) failed to assure that Simplex held the necessary market maker appointments and (b) failed to implement a pre-order entry COA "block." In its Opposition, Regulation does not attempt to rationalize these two specific acts, doubtless because they were utterly discredited as impossible at the Hearing.[10] Instead, Regulation now argues that AACC's failure lies in its purportedly negligent certification of the FIN system[11] and its defective on-boarding of Simplex.[12] However, these fact allegations are nowhere to be found in the Charges nor was any supporting evidence presented in Regulation's case-in-chief presentation at Hearing.

This is not a matter of mere pleading technicalities. The Exchange Act and Cboe Rule 17.4(b) *require* the inclusion of "any specific acts" in the Charges in order to provide fair notice to the respondent and prevent expedient maneuvering by Regulation.[13] Substituting the specific

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[9] *See* 15 U.S.C. 78f(d)(1)

[10] Those specific acts, though essential to the Charges, were perfunctorily dismissed as "irrelevant" in the Opposition.

[11] Regulation alleges that the FIN certification and Simplex on-boarding were defective because AACC failed to ascertain that the FIN system theoretically might allow Simplex to access COAs.

[12] Opp. 6-7.

[13] AACC was never informed that the FIN certification and on-boarding of Simplex were the fact allegations that it was required to defend, and therefore called virtually none of the numerous AACC personnel and committee members who were deeply involved in these processes. FINRA 1458, 1465.

factual basis of the Charges on appeal violates both Cboe Rule 17.4(b) and Section 78f(d)(1) of the Exchange Act.

B. On Appeal, Regulation Disputes BCC Fact Findings And Undisputed Facts That Were Uncontested At The Hearing And Were Never Included In This Appeal

Worse yet, in arguing that AACC's certification of the FIN system and onboarding of Simplex was negligent, Regulation improperly ignores and/or disputes the BCC's undisputed fact findings to the contrary. The BCC specifically found that AACC conducted a "thorough" certification of the FIN system as well as a "thorough and detail-oriented" onboarding of Simplex:

> The AACC on-boarding process that was applied to Simplex prior to Simplex becoming a Sponsored User of AACC appeared thorough and detail-oriented. . . . As part of the onboarding process, AACC appeared to have engaged in a thorough certification process of the FIN system.[14]

It is improper and unfair to allow Regulation to contest these undisputed facts on appeal when Regulation never disputed these facts at the Hearing.

Regulation apparently recognizes that the BCC's fact findings as to the "thoroughness" of the FIN certification and Simplex on-boarding are fatal to its appeal, because it now attempts to argue that these are not fact findings at all:

> AACC contends that the Board ignored numerous BCC findings of fact and conclusions of law when it rendered its decision . . . A careful review of **these so-called "findings"** and "legal rulings," however, indicated that they **represent little more than a laundry list of the factual and legal arguments that AACC has put forth** repeatedly in defending against the Exchange's action.[15]

We are dumbfounded. Undoubtedly, Regulation would like nothing more than to extricate itself from the dispositive effect of these findings. However, this is no excuse for Regulation to blatantly

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[14] BCC Decision at 17; FINRA 1913.
[15] Opp. 10, n.9 (emphasis added).

misrepresent the BCC Decision. The BCC Decision left no room for doubt that its recitation of the facts are facts findings or were facts undisputed by Regulation at the Hearing:

> The facts contained herein are either undisputed or are findings based upon the documentary evidence and the credibility or believability of each witness.[16]

The BCC's fact findings as to the thoroughness of the certification of the FIN system and the onboarding of Simplex were based upon ample evidence and were never contested at the Hearing. They are not "so-called findings," they are actual fact findings, and they were undisputed at the Hearing.[17] Regulation's mischaracterization of these fact findings a meaningless "laundry list"[18] is typical of Regulation's "win at all costs" approach on this appeal, and is a disservice to the Commission.

If it is possible, Regulation is committing an even worse transgression than misleading the Commission regarding the nature of the BCC's fact findings. Regulation is now attempting to contest whether AACC's FIN certification and on-boarding of Simplex was, in fact, thorough,[19] even though Regulation never appealed from these undisputed fact findings in the first place. In its Petition, Regulation very clearly stated that it was not appealing from *any* fact findings or raising *any* factual questions on the appeal:

> Here, the issues presented on appeal are not factual questions . . . but rather, involve purely questions of law. (Petition at 6)

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[16] BCC Decision at 6, n. 26; FINRA 1902

[17] Even if the thoroughness of AACC's FIN certification and on-boarding of Simplex were not fact findings (which they were), they were nevertheless undisputed facts at the Hearing, as the BCC states in the BCC Decision. Despite ample opportunity, Regulation never presented witnesses on these issues. On appeal, Regulation cannot attempt to "dispute" these facts through its counsel's arguments when AACC no longer has the opportunity to present additional evidence on its behalf.

[18] The Commission requires the BCC to make fact findings, not pointless "laundry lists." *See* 17 C.F.R. 240.19-1(d)(4).

[19] See, e.g., Opp. 22, n.19, where Regulation argues that "the undisputed facts attest" that AACC did not "perform appropriate due diligence" with respect to the FIN system certification. This disingenuous assertion directly contradicts the BCC's undisputed fact finding to the contrary. *See* Decision at 17; FINRA 1913.

Cboe Rule 17.10(a)(1) states, "Any objections to a decision not specified by written exception shall be considered to have been abandoned." Cboe Rule 7.10(b) further provides that appellate review of a BCC decision "shall be based solely on the record and the written exceptions filed by the parties." In its Petition, Regulation deliberately declined to appeal on the basis of any factual issues or findings, including the BCC findings that AACC's FIN certification was "thorough" and AACC's on-boarding of Simplex was "thorough and detail-oriented." According to the express terms of Cboe Rule 17.10(a)(1), Regulation abandoned any such challenge.

A final comment. AACC has not enumerated Regulation's abusive tactics to score debating points, but rather to direct the Commission's attention to the fundamental unfairness of the appeal process to date and fatal procedural errors in the Board's Decisions. Cboe Rules 17.4 and 17.10 are designed to ensure the integrity of the disciplinary process. Regulation threatens to undermine the integrity of this process in its "knows-no-bounds" efforts to overturn the BCC Decision. Among other things, Regulation has (a) substituted new specific acts as the basis for alleged Rule violation on this appeal, though they were never mentioned in the Charges, (b) is now "contesting" on appeal facts that were undisputed[20] at the Hearing, (c) has blatantly misrepresented BCC fact findings as nothing more than a meaningless "laundry list," and (d) is contesting facts or findings that were explicitly excluded from its appeal. In contriving and carrying out these abusive tactics, Regulation has violated the Exchange Act, multiple Cboe rules as well as fundamental principles of fair play.[21] If successful, Regulation's tactics will convey to the public that the Cboe disciplinary process has two sets of rules: one for respondents and one for the Exchange.

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[20] AACC feels compelled to note that, at the time the Charges were issued and throughout its case-in-chief, Regulation's counsel and witnesses (incorrectly) believed that it was perfectly feasible for AACC to monitor market maker appointments and implement a COA block. This may explain why Regulation never bothered to allege or prove, in the Charges or in its case-in-chief, that AACC's FIN certification or on-boarding of Simplex were allegedly defective.

[21] It is particularly hypocritical for Regulation to show disregard for the Exchange Act's mandatory requirement that the Charges set forth "*any act*" which forms the basis of the Charges. 15 U.S.C. 78f(d)(1).

III. AACC'S RISK CONTROLS FOR SIMPLEX WERE REASONABLY DESIGNED

A. AACC's Risk Management Was Repeatedly Examined And Found Compliant

At all relevant times, AACC had implemented a system of risk controls reasonably designed to prevent Rule violations. The BCC explicitly found that AACC's risk management system was reasonable and compliant with the Rule:

> During the Hearing, AACC's risk management controls and compliance procedures were examined. Overall, the Hearing Panel found AACC to take its compliance obligations very seriously, both in general and with specific respect to the Market Access Rule. . . . The AACC Compliance Manual also shows that AACC had a risk management controls and supervisory procedures regime in place to ensure compliance with Rule 15c3-5.[22]

The BCC Decision was not the first time that AACC's risk management controls had been examined. AACC's Rule procedures had been examined numerous times by the Cboe since the time the Rule was enacted (including during the relevant time period from the end of 2012 through early 2013). AACC was never advised by the Cboe nor made aware of any material deficiencies in its procedures.[23] AACC takes this to mean that its Rule controls and procedures, after careful review by Exchange examiners, were, in fact, reasonably designed to meet the requirements of the Rule.

B. AACC Properly Tailored Its Risk Controls For Simplex

The Rule requires that a broker-dealer's risk management system be "reasonably designed," and SEC guidance has stressed the importance of "reasonableness." Consistent with this principle, the Commission confirmed that risk controls *must* be customized for each customer.

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[22] BCC Decision at 16-17; FINRA 1913-1914.
[23] FINRA 1481-1504.

The Adopting Release specifically states that "risk controls must be tailored to the particular nature of the market access, the arrangements between the market participants and the market venue and the client's trading strategy."[24]

Significantly, Regulation agrees that risk controls should be tailored in accordance with a customer's trading strategy:

> The Exchange agrees with the BCC's statement that AACC's risk management controls "should take into consideration Simplex's trading strategy.[25]

Thus, Regulation does not take issue with the fact that AACC tailored its risk controls for Simplex; rather, Regulation argues that AACC and the BCC have supposedly taken this principle to an "extreme."[26] More specifically, Regulation argues that the Rule does not permit a market access provider such as AACC to tailor risk controls "only to strategies pre-disclosed to it by their customers.[27] However, in tailoring risk controls for Simplex, AACC did much more than simply rely upon Simplex's pre-disclosed strategies. AACC's on-boarding review of Simplex actually followed the Commission's guidance in every respect.

1. AACC Followed SEC Guidance In Tailoring Risk Controls For Simplex

The Adopting Release expressly states that, when tailoring its risk controls, a market access provider should consider, not only the customer's intended trading strategy, but also the nature of the customer's market access and the arrangements between the market participant and the market venue.[28] In this case, the record makes clear that AACC did just that. As the BCC found, AACC conducted a "thorough and detail-oriented" on-boarding of Simplex. In the course of on-boarding

[24] Adopting Release at 24, n.48. FINRA 306.
[25] Petition at 23; FINRA 1962.
[26] Id.
[27] Id.
[28] FINRA 306.

Simplex, AACC subjected Simplex and its business to the review and questioning of multiple committees and personnel over a number of months.[29] Without question, AACC carefully considered Simplex's anticipated trading strategy, including the scope and nature of its strategy and the products Simplex intended to trade.[30] But AACC did not stop there.

AACC also considered Simplex's liquidity and net worth, its business model, its prior trading patterns and its trading history generally.[31] Finally, AACC considered the nature of Simplex's market access as a high-frequency trading firm[32] and its arrangements with Cboe, the market venue.[33] This is precisely the type of tailored and reasonable design that the Commission expressly endorsed in its Adopting Release. Both the Board and Regulation have ignored all these facts.

2. AACC Did Not Need Risk Controls For Every Conceivable Scenario

Since Simplex had never been a Cboe market maker or engaged in market maker activity and had no intention of doing so, AACC did not even offer market maker services to Simplex.[34] For the same reason, AACC did not implement risk controls designed exclusively to address market maker activity - such as the use of COAs to trade complex orders for Proprietary Products, among other things.[35]

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[29] FINRA 1458, 1465.
[30] FINRA 1459.
[31] FINRA 1459-61.
[32] FINRA 1459-61, 1492, 1580-83. Simplex entered more than 300 million orders per month and traded at 140-250 mics. This is one of the major reasons why the AMG system could not be used for Simplex, and why the FIN system was required. FINRA 1492, 1580. AMG lacked the speed and capacity for the large professional trading groups and high frequency trading firms. FINRA 1580-83.
[33] FINRA 1456-1462, 1464-1465.
[34] FINRA 114, 1473-74, 1473-74, 1548-49, 1584, 1582-90.
[35] Regulation notes that AACC was unaware of the impossibility of a COA block or the fact that the FIN system could have potentially allowed Simplex to use COAs for Proprietary Products – assuming that Simplex possessed the necessary COA log-in credentials. However, if AACC was not actually required to implement a COA block for Simplex and in light of the fact that the COA block is, in fact, impossible, Regulation's comments in this regard are beside the point. The law does not require AACC to engage in idle gestures or exercises in futility. *Telemark Dev. Grp. V. Mengelt*, 313 F.3d 972 (7th Cir.2002).

Despite AACC's "thorough and detail-oriented" on-boarding of Simplex, Regulation attacks AACC's actions as negligent on the basis of a highly literalistic and overreaching interpretation of the phrase "all regulatory requirements." Regulation argues that AACC was required to ensure compliance with "all regulatory requirements," without any "caveat, exception or exemption," in its own words.[36] The BCC correctly characterized Regulation's position as requiring "every possible risk management control in place for every possible circumstance."[37] The Adopting Release, however, does not support this view. Nor does common sense.

Indeed, Regulation's all-embracing application of the phrase "all regulatory requirements" effectively cancels out the Commission's "tailoring" guidance and is unreasonable and impractical in application. The Adopting Release states that risk controls "must be tailored to [Simplex's] arrangements with [the Cboe] and [Simplex's] trading strategy."[38] Simplex's "arrangement" with the Cboe was a common one: it was a non-market maker which was permitted to trade complex orders for approximately 1500 Cboe/C2 symbols.[39] Simplex's trading strategy, though, did not contemplate, and had never carried out, any COA trading or any market maker activity – particularly using COAs for Proprietary Products.

Therefore, in tailoring reasonably designed risk controls for Simplex, AACC adapted its risk controls to address risks inherent in the trading activity that Simplex had been, and would be, continuously engaging in, and that included complex orders. AACC was *not* required to implement risk controls addressing trading activity that Simplex was not allowed to engage in, had never engaged in, and had no intention of engaging in. As an example, AACC was not required to

[36] Petition at 24; FINRA 1963.
[37] Decision at 21; FINRA 1917.
[38] Adopting Release at 24, n.48. FINRA 306.
[39] FINRA 1559.

implement controls addressing foreign stocks, domestic bonds or ETFs – none of which Simplex had ever traded or planned to trade.

In advancing the contrary argument, Regulation cannot avoid circular reasoning and perverse outcomes. On the one hand, Regulation agrees that risk controls may be tailored to Simplex's trading strategy. On the other hand, Regulation insists that, in order to ensure compliance with "all regulatory requirements," however unrelated to Simplex's trading strategy, every possible, hypothetical rule violation must be accounted for. According to Regulation, that includes a COA block to prevent potential illicit trades that were outside the scope of Simplex's strategy.[40]

Here is the problem: it is indisputable that a COA block is technologically impossible for any firm to implement. To solve this problem, Regulation now argues that AACC was required to prevent the entry of any complex orders at all.[41] This leads to a perverse regulatory result: Regulation simultaneously agrees that AACC should tailor its risk controls to Simplex's trading strategy (which includes placing complex orders in 1500 Cboe/C2 symbols) but demands that these risk controls be "tailored" in a manner that actually eviscerates Simplex's entire strategy (by precluding the entry of *any* complex orders for *any* products). This is patently unreasonable. It is especially unfair when one considers the role played by the Exchange in bringing about Simplex's impermissible COA usage. (See Section IV, p. 20-22, *infra*)

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[40] Regulation argues that "controls that do not exist are not reasonably designed." Opp. 3. AACC feels compelled to point out that the Rule refers requires a reasonably designed *system* of risk management controls and supervisory procedures." 17 C.F.R. 15c3-5(b) (emphasis added). It does not follow that a system of risk management controls can only be reasonable if it includes every possible control for every possible scenario regardless of the customer's trading strategy, etc.

[41] AACC reminds the Commission that, until AACC presented its defense case-in-chief, Regulation had no idea that a COA block is impossible. Regulation first started making its fall-back argument that AACC was required to prevent any and all complex orders on appeal after losing before the BCC. It is apparent thaRegulation's current argument – that AACC should have prevented the entry of any and all complex orders – is an ad hoc and convenient litigating position.

C. Regulation Has Admitted that Absolutely No Relevant Facts Alleging A Violation Of The Rule By AACC Are Set Forth In The Statement Of Charges

The Charges specifically alleged that AACC improperly (a) failed to "assure" that Simplex held the market maker appointments necessary to use COASs for Proprietary Products and (b) failed to implement a pre-order entry COA block. These were the *only two* fact allegations set forth in the Charges by which AACC allegedly violated the Rule. At the Hearing, AACC completely debunked both allegations as impossible due to the inability of any market access provider to access the Exchange's market maker portal or monitor, surveil or block COA messages.

Having lost on this issue, Regulation now contends that the fact "that it is not possible to monitor market maker appointments is . . . irrelevant."[42] Regulation similarly asserts that "AACC's claim of irrelevancy is legally irrelevant."[43] Thus, Regulation now argues that both of the fact allegations in the Charges are "irrelevant," and should be ignored by the Commission. If that is true, then the Charges must be dismissed as a matter of law because they contain *no* relevant fact allegations whatsoever supporting the charge of a Rule violation by AACC.[44]

D. The Impossibility Of Monitoring Market Maker Appointments Is Dispositive

Regulation supports its "irrelevant" argument by noting that AACC was a sponsored user, not a market maker and, since "there were no market maker appointments for AACC to monitor, the impossibility of monitoring is irrelevant." This is disingenuous. Simplex could have become a market maker in the Proprietary Products at any time, and could have dropped and added that appointment over time on a daily basis and without notice – all unbeknownst to AACC.[45]

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[42] Opp. 4.

[43] Opp. 16. Based on these remarkable statements, one might conclude that Regulation is in the habit of making "irrelevant" allegations in its Charges. Or perhaps Regulation routinely conceals "relevant" allegations from its Charges with the intention of raising them for the first time at the hearing.

[44] This violates Cboe Rule 17.4(b) and the Exchange Act. 15 U.S.C. 78f(d)(1).

[45] Brief at 24.

From the outset of this proceeding, Regulation has asserted that the burden of assuring necessary market maker appointments is upon the market access provider, and the Charges contain that very allegation. It is a critical fact that neither AACC nor any other market access provider can monitor or "assure" that a customer holds the necessary market maker appointments for the Proprietary Products. That being the case, a market access provider such as AACC can never know when or whether risk controls relating to Proprietary Products (e.g., a COA block) are required. This strongly supports the argument that AACC and similar market access providers are not and should not be required to implement COA blocks for their customers – even if such a block was possible, which it is not.

E. The Impossibility Of Implementing A COA Block Is Dispositive

In its Brief, AACC recounted the overwhelming evidence that it is impossible to observe, monitor, block or surveil COA messages, as well as ample judicial precedent and testimony by Exchange witnesses to the effect that the Rule cannot be interpreted so as to require the impossible.[46] AACC also detailed the undisputed testimony that it is impossible to block any *portion* of Exchange messaging (including COA messaging) without blocking *all* Exchange data feeds.[47] Accordingly, AACC will not repeat these points. Rather, AACC wishes to address Regulation's intellectually dishonest treatment of this issue.

In its Opposition, Regulation bluntly argues that "whether Exchange protocols made it impossible to implement a risk management control is irrelevant to the legal issue of whether the control is required in the first place."[48] Regulation insists that "AACC failed to design or

[46] Brief at 26-7, 28-31, 47-8.
[47] Brief at 29-30.
[48] Opp. 19, n.17.

implement any controls . . . to ensure that Simplex complied with the Exchange's rules governing COAs."[49]

It is truly remarkable – indeed, unprecedented – that an Exchange continues to insist upon the implementation of a risk control which it knows is indisputably impossible. Regulation makes several arguments in support of this unique argument, all of which are misleading and unfounded.

First, Regulation avers that the Exchange "is not responsible for providing the tools necessary for AACC to establish any pre-trade risk management controls . . ."[50] This is a red herring. AACC has never asked the Exchange for any tools or assistance and, in any event, has demonstrated that it would be impossible for the Exchange to do so. There is no system available anywhere that would allow a market access provider to observe or monitor COA messaging.[51]

Second, Regulation argues that AACC's proof of the impossibility of the COA block is a post facto rationalization for its failure to implement controls to prevent Simplex's COA usage. However, Regulation studiously avoids addressing judicial precedents to the effect that a regulation cannot be construed so as to require the impossible.[52] Not surprisingly, Regulation cannot find a single case standing for the contrary proposition. Most notably, Regulation never addresses the admissions of its own witnesses to the effect that, if a risk control is impossible, then AACC could not be liable for failing to implement it.[53] Rather, Regulation continues to advance an argument that all its witnesses have disavowed. This is unprecedented.

Third, Regulation argues that the impossibility of the risk controls is "irrelevant" because AACC had "options available . . . to avoid violating [the Rule]."[54] These so-called "options" are

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[49] Opp. 2.
[50] Opp. 17.
[51] BCC Decision at 12-13; FINRA 1908-10.
[52] Brief at 27.
[53] Brief at 47-48.
[54] Opp. 19.

the same draconian actions, raised for the first time on appeal, that would have required the termination of market access. Regulation argues that AACC could have disabled auction access,[55] but ignores the undisputed testimony that an attempted block of a *portion* of the Exchange data feed blocks the *entire* Exchange data feed – and thereby terminates market access entirely.[56] This is not a "risk control," and there is no regulatory notification that complete termination of market access is required if a theoretical risk control is impossible. Regulation also argues that AACC could have provided access to Simplex via its AMG system, which did not support complex order activity. But the AMG system could not support the activity of any of AACC's large or high-frequency customers such as Simplex, who trade at high speeds and in huge volume.[57] Further, Regulation's proposed "option" would have the effect of eviscerating Simplex's trading strategy by precluding legitimate complex orders in 1500 Cboe/C2 symbols. This is unreasonable.[58]

F. The Rule Does Not Expand AACC's Underlying Regulatory Obligations

Exchange rules never required AACC to prevent Simplex from improperly using COAs. AACC has argued that, since no Exchange rule ever imposed upon AACC a duty to block Simplex's COA usage, the Rule did not create one. AACC relied upon repeated SEC guidance to the effect that "the Rule would not impose new substantive regulatory requirements" on AACC or other broker dealers.[59]

Regulation argues that AACC "misses the point and purpose of [the Rule] entirely."[60]In support, Regulation cites and quotes a number of Rule commentaries, but none of them address

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[55] Opp. 19.
[56] BCC Decision at 15; FINRA 1910.
[57] FINRA 1492, 1580-83
[58] We remind the Commission that Regulation's "options," which require prevention of any and all complex orders or termination market access, would apply to all other non-market maker trading firms. This is because the disputed risk control, i.e., the COA block, is equally impossible for every other market access provider to implement.
[59] Adopting Release, p. 43)(See also Adopting Release, pp. 14, 42)
[60] Opp. 20.

this issue. They are, to use Regulation's favorite word, irrelevant. What is surprising – though perhaps not so surprising – is that Regulation never even mentions the two SEC pronouncements to the effect that the Rule "would not impose new substantive regulatory requirements" or "expand . . . the underlying substantive regulatory requirements otherwise applicable to broker-dealers."[61] These SEC pronouncements are prominently quoted in AACC's Brief, are directly on point, and support AACC's argument. Yet Regulation has nothing to say about them. Regulation's silence is deafening.

IV. THE EXCHANGE IMPROPERLY IGNORES ITS SOLICITATION OF SIMPLEX TO USE COAS

There are many glaring omissions in the Opposition, but none so glaring as Regulation's meticulous avoidance of the Exchange's own role in encouraging Simplex to use COAs. Regulation correctly notes that "AACC was not aware of Simplex's impermissible trading when it occurred," but notably fails to explain why.[62]

AACC presented unrebutted evidence that Cboe representatives solicited and encouraged Simplex to trade COAs for Proprietary Products. AACC's Chief Compliance Officer, Monika Tyrichtrova, testified that Cboe representatives, unbeknownst to AACC, solicited and encouraged Simplex to do so:

> **Q** And did you reach out to Simplex to find out how it was that . . . Simplex had begun responding to index proprietary COAs?
>
> **A** Yes.
>
> **Q.** What did they tell you about their communications with Cboe marketing personnel?

[61] Brief at 14.

[62] Opp. 7. The Commission may well ask why Simplex suddenly started using COAs for Proprietary Products when this was never part of its long-standing trading strategy. This question cries out for an answer, and it speaks volumes that Regulation avoids acknowledging the Exchange's undeniable role in encouraging Simplex to use COAs for Proprietary Products.

> A [Simplex told us that] . . .[Simplex was] approached by Cboe people with this new business opportunity that now the COA responses will not be limited to the market makers and this could be new business for both Simplex and obviously the Exchange.[63]

AACC introduced into evidence a number of emails[64] between Exchange technical personnel and Simplex demonstrating that the Exchange made proactive efforts to encourage COA usage, even providing COA log-in capability to Simplex. No one informed AACC that the Exchange had encouraged and enabled Simplex to utilize COAs.[65]

Simplex had been trading as AACC's sponsored user prior to this incident. Simplex's impermissible COA use began immediately after receiving this COA log-in capability from Exchange staff on January 10, 2013.[66] In thanking the Exchange staff, Simplex affirmed that "I hope to be interacting with Cboe COA on a very regular basis going forward."[67] And so they did - immediately. Of course, AACC was unable to observe or surveil Simplex's COA use because, according to the undisputed fact findings of the BCC, it is impossible to observe, identify or surveil COA messages.[68]

Significantly, Regulation never called any witnesses to rebut Ms. Tyrichtrova's testimony, or to explain why Exchange staff provided Simplex with unrestricted COA log-in capability. Quite to the contrary. When AACC requested that the Exchange personnel in question be required to appear at the hearing as adverse witnesses to be questioned about their COA-related solicitation of Simplex, Regulation objected and persuaded the BCC to deny AACC's request. As a result, AACC was deprived of the opportunity to add even more damaging evidence that it was the Exchange, not AACC, who was to blame for the fact that Simplex began the impermissible use of

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[63] FINRA 1570.
[64] FINRA 669-676.
[65] FINRA 1570-71.
[66] *See* Statement of Charges, ¶¶ 6-9, 13.
[67] AACC Ex. 39. FINRA 675-76.
[68] Brief at 28-31.

COAs. This makes the Board's rejection of AACC's undisputed evidence on this issue all the more unfair.

Put simply, after many months of COA-free trading, Simplex was only prompted to depart from its original trading strategy and use COAs for Proprietary Products because of the Exchange's misguided marketing and its undisclosed furnishing of COA log-in capability, not because AACC's on-boarding process and risk control system failed to reasonably anticipate Simplex's plans. It would be profoundly unfair to conclude that AACC should have foreseen the Exchange's undisclosed communications with Simplex and thereby anticipated Simplex's entirely unpredictable use of COAs.

V. REGULATION'S REPLY IGNORES AND CONCEDES CRITICAL FACTS AND ARGUMENTS

The most remarkable aspect of the Opposition is the array of critical facts and arguments that Regulation does not even attempt to rebut. Undoubtedly, Regulation has no persuasive rebuttal to the following facts and arguments:

> (1) The Charges allege only two "wrongful" acts/omissions, *i.e.,* failure to monitor market maker appointments and failure to impose a COA block, but both are impossible;
>
> (2) The Exchange Act and Cboe Rule 17.4 *require* charges that specify "any acts" that support the alleged rule violation;
>
> (4) Regulation never appealed on the basis of any facts or fact findings;
>
> (5) Regulation was unaware it is impossible to monitor, block or surveil COA messaging;
>
> (6) It is impossible to block a portion of the Exchange data and messaging feed without blocking the entire feed, and Regulation did not know this;
>
> (7) BCC found that AACC's FIN certification and Simplex on-boarding was thorough;

(9) AACC tailored the Simplex risk controls based on numerous SEC-approved considerations, not just its trading strategy;

(10) The Exchange encouraged, solicited and enabled Simplex to trade COAs;

(11) All Exchange witnesses admitted that a firm cannot violate the Rule by failing to implement an impossible risk control;

(12) Judicial precedent uniformly holds that a rule cannot be interpreted to require the impossible;

(12) The AMG system (which did not support complex orders) could not be used for a high frequency trading like Simplex due to speed and capacity limitations;

(13) To date, Regulation has never issued a regulatory interpretation explain the duties of a market access provider in the event that a risk control proves to be impossible to implement;

(14) Regulation has never prosecuted any other firm for violating the Rule on this basis

Again, AACC does not highlight Regulation's deliberate omissions to score debating points. The consequences of Regulation's silence are severe. The Seventh Circuit has repeatedly ruled that a party has abandoned a claim or conceded an argument after failing to respond to his opponents' argument. *See Bombard* v. *Fort Wayne Newspapers, Inc.,* 92 F.3d 560, 562 n.2 (7th Cir. 1996)(claim abandoned); *Johnson* v. *Saville,* 2008 US. Dist. LEXIS 82935 *20 (N.D. Ill. 2009)(argument abandoned); *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver"). *See also Myatt* v. *Chicago,* 1991 US.Dist. LEXIS 7056, *26 (N.D. **Ill.** 1991) (party conceded argument by not addressing it) *Combined Counties Police Ass'n* v. *Evanston,* 1991 US.Dist. LEXIS 7996, *4 (N.D. **Ill.** 1991) (same). Per established precedent, Plaintiffs have conceded the issues and arguments that they have failed to address or respond to. Because the abandoned arguments involve essential elements of the Regulation's appeal, reversal is warranted.

VI. CONCLUSION

Since Regulation's appeal never raised any fact issues, the Commission must accept the BCC's undisputed finding that ACC's certification of the FIN system and its on-boarding of Simplex was "thorough and detail-oriented" – in a word, reasonable. On the other hand, it is unreasonable to expect AACC to implement risk controls that were impossible. Given the impossibility of the disputed risk controls, it is equally unreasonable to expect that AACC should have terminated or truncated Simplex's market access, since judicial precedent and the Exchange's own witnesses have confirmed that a firm cannot violate the Rule by failing to implement impossible risk controls. This is especially true in the absence of any regulatory guidance and in the face of regulatory uncertainty, as exemplified by the contradictory and muddled statements of the Exchange counsel and witnesses.

The Exchange has never prosecuted anyone else for such a Rule violation and should not be allowed violate the Exchange Act and numerous procedural rules in its "no holds barred" effort to overturn the BCC Decision. Regulation's appeal is permeated with arguments about undisputed facts that were never included in the Charges, its case-in-chief or its appeal. This misconduct should not be rewarded.

The unrebutted evidence makes clear that Simplex began the impermissible use of COAs immediately after being solicited to use COAs by Exchange marketing personnel, who had given Simplex COA log-in credentials. In these circumstances, AACC could not control Simplex's access to COAs, and it could not detect, block or surveil Simplex's COA messaging. It is unreasonable to place responsibility upon AACC for activities outside its control which were technologically impossible to prevent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, J. Michael Bresnahan, an attorney, do hereby certify that on August 26, 2019, I caused a copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF APPLICATION FOR REVIEW FILED BY BY ABN AMRO CLEARING CHICAGO, LLC**, to be served on the following persons through facsimile transmission and FedEx delivery:

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/s/ J. Michael Bresnahan

CERTIFICATE OF COMPLIANCE PURSUANT 17 C.F.R. § 201.450(d)

Pursuant to 17 C.F.R. § 201.450(d), the undersigned certifies that this Reply Memorandum in Support of Application for Review Filed by ABN AMRO Clearing Chicago, LLC does not exceed the 7,000 word limit set forth in 17 C.F.R. § 201.450(c). The word count application of the word processing program used to prepare this Reply Memorandum in Support of Application for Review Filed by ABN AMRO Clearing Chicago, LLC indicates that the reply brief contains 7,000 words, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits. Accordingly, this [Reply Brief] as-filed complies with the word limit imposed by 17 C.F.R. § 201.450(c).

Respectfully submitted,

ABN AMRO Clearing Chicago, LLC

Dated: August 26, 2019

By: /s/ Stephen P. Bedell
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Via Fax & FedEx
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Re: ABN AMRO Clearing Chicago, LLC's Reply Memorandum in Support of Application for Review; Admin. Proc. File No. 3-17906r

Dear Mr. Fields:

Enclosed please find a copy of ABN AMRO Clearing Chicago, LLC's Reply Memorandum in Support of Application for Review.

Please contact the undersigned if you have any questions.

Sincerely,

Joseph M. Bresnahan