UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of:

The Application of BLOOMBERG L.P.

For Review of Amendments of the CTA Limiting Access to its Services

Admin. Proc. File No. 3-18316

BLOOMBERG L.P.'S REPLY IN SUPPORT OF ITS MOTION TO STAY CTA'S FEE AMENDMENT

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PRELIMINARY STATEMENT

CTA's opposition tries to obscure the nature of its 6000% fee increase, but leaves Bloomberg's case largely unrefuted. It never disputes that CTA's fees must be reasonably related to the cost of collecting and disseminating consolidated data. It *concedes* that CTA has not provided any such cost-based justification. Opp. 10. It offers no justification for enlarging the definition of "non-display fee," and does not even address the expanded "access fee." And it offers no evidence that the Amendment actually addressed a competitive imbalance among market-data services.

Rather than defending the Amendment as written, CTA's brief repeatedly misrepresents and contradicts its earlier submissions to downplay the Amendment's harm to SAPI customers and Bloomberg.

First, CTA claims the Amendment "does not adjust or create new fees." Opp. 12. But CTA expressly "designate[d] the amendment as *establishing or changing a fee*." Release No. 34-82071 ("Release" or "Amendment") 3 (emphasis added). And CTA relied on that designation, under Rule 608(b)(3), for the Amendment's immediate effectiveness. Now, despite still asserting immediate effectiveness, CTA has reversed its characterization of the "chang[ed] ... fee" in a transparent attempt to avoid defending a 6000%-plus fee increase.

Second, CTA contends the Amendment "merely clarifies" existing fees. Opp. 5. In fact, it redefines and expands them. CTA offers no response to Bloomberg's showing that the Amendment silently abandons CTA's previous requirement that non-display use involve data "delivered via ... a data feed." Br. 15. Nor does CTA acknowledge, let alone defend, broadening the definition of "non-display use." Previously it applied based on how the data was *used*, but now it applies based on how the data is *delivered*. *Compare* the 2014 definition, 79 FR 60536, 60538 (Oct. 7, 2014) (data used "for a purpose other than *in support of* a data recipient's display") (emphasis added), *with* the 2017 definition, Release 10 (equating "server-based applications" with use "that

does not make the data visibly available"). Despite amending the definition to sweep in SAPI, and without responding to Bloomberg's declarations regarding SAPI's controls, CTA pretends SAPI users should have been paying non-display fees all along.

Third, CTA completely ignores the Amendment's automatic expansion of the access fee for all SAPI customers. Release 9, 13-14. CTA makes only one passing reference to the access fee. Opp. 12 (quoting Br. 14). CTA nevertheless asserts that "neither Bloomberg nor its customers have anything to worry about" if CTA eventually agrees that SAPI "cannot be used for non-display purposes." Opp. 9. This ignores that access fees, totaling thousands of dollars a month, automatically will apply to *all* SAPI customers because CTA incorrectly "deemed" SAPI "tantamount to a data feed." Release 13-14; *contra* Kotovets Decl. ¶¶5-13, Bunnell Decl. ¶¶13-14 (unrebutted testimony that SAPI is a display service, not a data feed). By addressing only non-display fees, CTA misleadingly minimizes the Amendment's impact.

Fourth, CTA's brief claims that CTA "has not concluded whether SAPI allows for non-display use." Opp. 6. The Amendment, however, states categorically that SAPI is a non-display product based on its core function of delivering data to server-based applications. Release 10. Customers needing only display services, CTA asserts, "would not need the Bloomberg SAPI." *Id.* 10-11; *see also id.* 9 (explaining Amendment's aim to avoid case-by-case distinctions). CTA, moreover, took the same categorical position with respect to SAPI in its original March 2017 amendment, asserting in a side letter to Bloomberg that non-display and access fees would apply to SAPI because "SAPI does not make data visibly available to the data recipient." Kotovets Ex. L. Given these definitive statements, CTA's claim that "it has not concluded whether SAPI allows for non-display use," Opp. 6, rings hollow.

Similarly misleading is CTA's claim that the Amendment is merely an effort to enhance its "audit" rights. Opp. 3, 4, 13, 14, 17. "The Amendment," CTA insists, "is essentially an enhanced administrative mechanism" to determine which specific SAPI customers owe "obligations imposed by the 2014 Amendments and CTA's standard vendor and subscriber agreements." Opp. 9. This is a complete distortion: The Amendment mentions "audit" only once, in an unrelated context. Release 19. An individualized focus on detecting potential noncompliance is far different from the Amendment's blanket approach. And, in any event, CTA's contractual audit rights predate the 2017 Amendment; it makes no sense that CTA would (twice) attempt to amend its National Market System ("NMS") plan to accomplish what its existing contracts already allow.

Finally, CTA repeatedly refers to an "ongoing competitive imbalance among vendors." *E.g.*, Opp. 14. Yet CTA fails to identify a single similarly-situated vendor, product, or customer treated inconsistently with Bloomberg and its SAPI customers. The only vendor CTA highlights—Thomson Reuters—concedes that its "Eikon SAPI" product was subject to display fees, like Bloomberg SAPI, under the 2013/14 amendments. CTA's claim that its "primary motivation" was to "level the vendor playing field," Opp. 1-2, 14, 20, has no factual basis.

This series of misrepresentations, omissions, and shifting theories cannot hide a simple truth: CTA is not interested in competitive balance or customer-specific usage. If it were, it could have simply conducted an audit. Instead, CTA abused the NMS process by imposing a unilateral and immediately effective amendment that arbitrarily and discriminatorily increases fees on all SAPI customers. When the actual terms of that Amendment are judged against the Exchange Act and the Commission's longstanding position, CTA's position is indefensible. Staying enforcement of this Amendment will preserve the status quo and prevent CTA's targeted fees from driving SAPI to extinction, without imposing any identifiable harm on CTA or other data vendors.

ARGUMENT

I. Bloomberg Is Likely to Succeed on the Merits Because CTA Provides No Basis for Increasing Core-Data Fees

Bloomberg's opening brief identified three reasons the Amendment is unlawful: it (1) lacks any cost-based justification; (2) arbitrarily redefines the non-display and access fees; and (3) unfairly discriminates against Bloomberg and SAPI customers. CTA's response leaves each reason unrefuted.

A. CTA Concedes the Fees Are Not Related to Costs

1. The Amendment plainly increases fees. CTA's brief does not dispute that for the typical SAPI customer, the Amendment imposes thousands of dollars of additional non-display and access fees—a 6000%-plus increase over previous fees. Br. 9. Yet CTA's brief insists that the Commission's review is unwarranted because the Amendment "d[oes] not set any market data prices" and is "not about fee changes or revenues." Opp. 9-10.

This is nonsense. The Amendment states explicitly that it is "establishing or changing a fee." Release 3 (citing Rule 608(b)(3)). And it plainly expands non-display and access fees to newly reach SAPI—a point CTA concedes by conspicuously making no effort to show that SAPI met the criteria for non-display and access fees under the prior definitions. This increase in fees—from $136 to $9,136 for a typical SAPI customer, *see* Br. 9—constitutes a limitation on access to core data.

CTA also suggests that the Amendment is not a fee increase subject to §11A review because the dollar value of the fees has remained the same, even if the fees apply more broadly. CTA cites no legal authority for this spurious proposition, which is completely at odds with §11A. Congress charged the Commission with ensuring "that an exclusive processor's fees be 'fair and reasonable' and 'not unreasonably discriminatory.'" 64 FR 70613, 70618 n.47 (Dec. 17, 1999). Yet

under CTA's constricted view of the Commission's role, once a fee exists, CTA may expand its applicability without limit and without Commission scrutiny. *See* Opp. 9. That reasoning is untenable. "Calling a dog's tail a leg does not make it a leg." *Alexander v. FedEx*, 765 F.3d 981, 998 (9th Cir. 2014) (Trott, J., concurring). The Amendment expands fees, limits market participants' access to consolidated top-of-book data, and thereby triggers the Commission's review.[1] *See* 73 FR 74770, 74781-82 (Dec. 9, 2008) (fee increases deny access to services).

2. Top-of-book data prices must reasonably relate to costs. CTA's fallback position is that the Exchange Act does not necessarily require it to provide a cost-based justification for every fee increase. Opp. 10-11. This is equally mistaken. The law is clear that "fees charged by a monopolistic provider of a service (*such as the exclusive processors of market information*) need to be tied to some type of cost-based standard in order to preclude excessive profits if fees are too high." 64 FR at 70627 (emphasis added).

CTA cites no contrary authority. Nor does it dispute that consolidated core data is a monopoly product, or identify any competitive constraint on its pricing. Nevertheless, CTA tries to dismiss the notion that it must provide a cost-based justification for core data fee increases as "rest[ing] ... on dicta from *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010) ('*NetCoalition I*')." Opp. 10.[2] *NetCoalition I*, however, recognized the principle that "fair and reasonable" fees generally must be reasonably related to costs, and contemplated a departure from that principle only based on evidence that competition constrains fees, *see* 615 F.3d at 537-38—evidence found lacking by the D.C. Circuit there and undisputedly unavailable for core data here. Bloomberg's

[1] Bloomberg's §11A application is timely because the Amendment extends fees to market participants not previously subject to those fees. *Contra* Opp. 9.

[2] CTA agrees with Bloomberg that *In re SIFMA*, which concerns depth-of-book data, is "separate from" and does not control this challenge. Opp. 9; *see* Br. 3 n.1.

brief explained that this principle is reflected in an unbroken line of Commission precedent, Br. 11-12 & n.7, which CTA does not dispute.

In 1999, the Commission stated unequivocally that "exclusive processors of market information," like CTA, are "monopolistic provider[s] of a service" whose prices must "be tied to some type of cost-based standard in order to preclude excessive profits." 64 FR at 70627. The Commission emphasized that costs are relevant to assessing the reasonableness both of "the total revenues derived from market information fees" and of "individual fees." The exchanges must therefore justify "any disparities in fees" based on "such legitimate factors as differences in relevant costs or degree of use." *Id.* 70629-30.[3]

Subsequent Commission orders have reaffirmed this view. Reg NMS recognized that there is "little opportunity for market forces to determine the overall level of fees" for consolidated data. 70 FR 37496, 37504 (June 29, 2005). And in 2008, the Commission recognized that "the mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees." 73 FR at 74779. "[C]entral processors of core data for the Networks," including CTA, "have monopoly pricing power for such mandated data." *Id.* 74786.

Given that monopoly power, the only constraint on core data fees is Commission oversight under §11A. And the only "objective criterion" that the Commission can use "to resolve fee disputes in an even-handed fashion" is costs. 69 FR 11126, 11178 (Mar. 9, 2004). That is why CTA's fees "should be reasonably related to [its] costs to generate and disseminate the data." *Id.* The Commission (in its *NetCoalition* briefs) and the D.C. Circuit (in its *NetCoalition* opinion) explicitly agreed: "[B]ecause of the mandatory nature of this regime, core data fees should bear some

[3] The Commission also recognized that fees must not be so high that they neither deter users from obtaining core data nor reduce the quality of that information. 64 FR at 70630.

relationship to cost." *NetCoalition I*, 615 F.3d at 529 n.2; SEC Brief at 9, *NetCoalition I*, Nos. 09-1042, -1045 (Oct. 26, 2009). Because CTA *admits* that it has not even attempted to satisfy the Commission's longstanding standard, Release 10, Bloomberg's §11A challenge is highly likely to prevail.

The Commission's decision in *Instinet* illustrates the importance of a cost-based justification, particularly where—as here—concerns exist regarding competition between market-data vendors and exchange affiliates. The National Association of Securities Dealers (NASD) sought to impose fees on Instinet, a would-be competitor of NASD's retail-data subsidiary. *See Institutional Networks Corp.*, Release No. 20874, 1984 WL 472209, at *2-3 & n.17 (Apr. 17, 1984). The Commission held that NASD's competitor status gave it a "theoretical incentive to keep these fees high to preserve its own revenue stream." *Id.* *10-11. Based on that "theoretical incentive," and without determining whether NASD actually was "motivated by any ... anti-competitive pricing policy," the Commission held that NASD's "proposed fees must be cost-based ... to ensure the neutrality and reasonableness of the NASD's charges." *Id.* *4, *10.

Despite CTA's protest that this Amendment "addresses a remarkably different competitive posture," Opp. 12, CTA's administrator and member, NYSE, has the same anti-competitive incentives NASD had in *Instinet*.[4] NYSE's corporate sibling, IDS, competes directly with Bloomberg and would benefit from a fee increase that subjects a terminal-based product like SAPI to the same high fees that apply to IDS's data feed. *See* Bunnell ¶¶10-11, 28, 30. This benefit would redound to IDS and NYSE's corporate parent, ICE. The requirement that exchanges' fees reasonably relate to costs protects investors from such anti-competitive threats. *Instinet*, 1984 WL 742209, at *11;

[4] The risk of abuse is especially acute here. Whereas *Instinet* involved depth-of-book data, a non-profit entity, and pre-implementation review, this case addresses core data disseminated by for-profit exchanges through immediately effective rule changes. *See* 64 FR at 70614, 70629.

see also NetCoalition I, 615 F.3d at 537 (costs are "not ... irrelevant," even in the depth-of-book context, because they "can indicate whether an exchange is taking 'excessive profits' or subsidizing its service"). Indeed, *Instinet* rejected the very value-of-service approach that CTA admits it used here, *see* 79 FR at 60541, dismissing it as a tool monopolists illegitimately use "to maximize profit."[5]

The Commission, CTA notes, has approved core data fees "based on agreement among market participants." Opp. 12. That is true, but irrelevant: CTA never sought to reach any "agreement" with Bloomberg and other market participants before issuing the Amendment. *See* Br. 8; Kotovets ¶¶ 21-26. The absence of any meaningful attempt "to negotiate[e] fees that are acceptable to ... information vendors," 69 FR 71256, 71272 (Dec. 8, 2004), highlights CTA's abuse of its market position and the NMS process. CTA says only that its advisory committee approved the fee increase, omitting that the vendor representative on that committee was Thomson Reuters, whose lucrative data-feed business will benefit directly if the Amendment drives lower-priced options like SAPI from the market. Bunnell ¶11. Indeed, Thomson Reuters' support for this Amendment candidly reflects its interest in preventing its "datafeed clients [from] mov[ing] to SAPI like products at other vendors because of the lower price point."[6] Henkin Ex. I at 1-2. Plainly, this is

[5] CTA attempts to distinguish *Instinet* by noting that NASD's fees targeted a new market-data product. Opp. 12. But the Exchange Act does not impose different standards for new and established products.

[6] Thomson Reuters' November 2017 letter supporting the Amendment cited a need to create "a level playing field for vendors." Henkin Ex. A. This was plainly disingenuous. Its February 2018 letter revealed that the playing field *was* level under the 2014 amendment: Thomson Reuters classified Eikon SAPI exactly as Bloomberg classified SAPI. Henkin Ex. I.

not what the Commission intended from the committee process, and demonstrates why §11A review is essential.

B. CTA Does Not Defend Its Arbitrary "Non-Display" and "Access Fee" Redefinitions

By redefining "non-display use" and "access fee," the Amendment abandons a familiar and rational distinction between data feeds and display devices. *See* Br. 14-17; 79 FR at 60538 (2014 CTA amendment distinguishing "automated and algorithmic trading" from a "human being looking at a terminal"). CTA's principal response is to assert repeatedly—but without elaboration—that the Amendment merely "clarifies" what constitutes "non-display use." Opp. 9, 13, 21. Remarkably, CTA ignores the access-fee expansion altogether. CTA's refusal to defend the Amendment as written confirms that the new definitions are arbitrary and capricious, both on their face and as applied to SAPI.

1. CTA does not defend its departure from the 2013/14 amendments. The Amendment abandons the distinction between human use and automated use on which CTA had relied in 2013 and 2014 as a justification for imposing high fees on data feeds. Br. 14-16. CTA's brief, like the Amendment, offers no justification for this about-face.

With respect to access fees, CTA's brief is totally silent. As Bloomberg demonstrated, the Amendment imposes access fees whenever data can be "manipulated and integrated into [subscribers'] own systems." Release 7. This overbroad redefinition is entirely foreign to the human/automation distinction from the 2013 access-fee amendment. *Any* computerized system, including one used only for display, can "manipulate" or "integrate" data.[7] McManus ¶¶25-26.

[7] This includes Excel, which the Amendment exempts from access fees without any explanation or limiting principle. Br. 16.

CTA's failure to offer any defense of the radically redefined access fee concedes that it is unlawful and must be vacated.

With respect to non-display fees, CTA concedes that in 2014 it relied on "the distinction between human displays and non-display uses" to justify high non-display fees. Opp. 12. But CTA makes no effort to show that the Amendment's new definition is consistent with that distinction. Indeed, it is entirely inconsistent. The Amendment deems "server-based applications" to be non-display use, even if those applications only display data to humans. Release 10. This definition bears no relation to the 2014 justification, and CTA offers no new justification in its place.[8] Br. 14-15.

Thus, the Amendment's new definitions unlawfully depart from "past practices and official policies" without "a reasoned explanation." *Am. Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017).

2. CTA continues to mischaracterize SAPI. CTA also fails to rebut Bloomberg's showing that the specific reclassification of SAPI as a "non-display use" and data feed is arbitrary in light of SAPI's technology, contracts, use, and controls.

Technology. The Amendment deems SAPI to be non-display use because SAPI "allows customers to run server-based applications on market data." Release 10. As Bloomberg explained, and CTA fails to rebut, this is irrational: whether a product delivers data directly to a desktop or indirectly via a server has no bearing on whether it facilitates display or non-display use. Br. 18.

[8] This disconnect is highlighted by applying the new definition to SAPI, which "deliver[s] the same market data for display on the same device" as Bloomberg's basic display service. McManus ¶13. CTA does not dispute this sworn testimony.

CTA also ignores Bloomberg's extensive unrebutted evidence that SAPI is designed for display use only. McManus ¶¶17-22.

Contracts. CTA also fails to reconcile its assertion that SAPI is "tantamount to a data feed," Release 14, with its prior conclusion that SAPI is *not* a data feed or comparable service. *See* Br. 7-8, 15-16. Since SAPI's introduction in 2004, CTA's contracts with Bloomberg have recognized that B-PIPE is the "*only* Bloomberg service" meeting that description. Kasparov Decl. Ex. A §3.0(g) & n.* (emphasis added).

CTA's brief responds that before CTA introduced non-display fees in 2014, "[h]ow SAPI was treated when display use was the only usage category is irrelevant." Opp. 3. Not so. Even before 2014, CTA recognized the distinction between data feeds and display products because that distinction determined whether the *access fee* applied. Br. 7-8. That is why Bloomberg-CTA contracts have consistently categorized SAPI as a display service and B-PIPE as a data feed.[9] Those contracts demonstrate the arbitrary nature of CTA's newfound claim that SAPI is "tantamount to a data feed." Release 14. CTA has offered no explanation why its NMS plan should codify a definition of data feed directly at odds with its 2004, 2005, and 2010 contracts.[10]

Use. The Amendment also asserts that "a customer would not need" SAPI if it "only needs the display features." Release 11. CTA, of course, has no place dictating which products investors do and do not need. Bloomberg demonstrated, in any event, that CTA is wrong; SAPI offers several advantages over basic display services, but those advantages all serve only to enhance display usage by humans. Br. 17. Customers subscribe to SAPI because it is efficient, consistent,

[9] By limiting non-display fees to data feeds in 2014, CTA incorporated that same longstanding distinction—which it now tries to ignore. Br. 14.

[10] Even CTA recognizes that "whether a subscriber is using a 'display device' or a 'data feed'" remains central. Chang ¶2.

and customizable for display use. Bunnell ¶18. CTA offers no defense of the Amendment's mischaracterization of why customers choose SAPI, effectively conceding the error.[11]

Instead, CTA contends that its initial 2004 contract with Bloomberg states that SAPI is used for "pricing engines, portfolio valuations, order management programs, risk compliance engines, and programs trading applications." Opp. 3. Each of those uses, CTA notes, "was included in the list of non-display uses in the 2014 Amendments." *Id.* But this demonstrates a fundamental misunderstanding of how market participants use data: each of the applications CTA describes *could* be automated for non-display use, but *also* could be designed for human display use. *See* McManus Supp. Decl. ¶5. Indeed, CTA previously *acknowledged* that portfolio valuation could occur on a display application. Release 5 n.12. What matters whether an application uses data "in support of a data recipient's display or further internal or external redistribution" (display use) or for any other purpose (non-display use). 79 FR at 60538. SAPI supports only display applications.[12] Yet CTA ignores this operative language and focuses instead on an illustrative list that does not even appear in its NMS plans. *See* http://bit.ly/2oRgVHq. That data *theoretically* (and

[11] CTA cites letters from SAPI customers criticizing the fee increases as evidence that those customers are using SAPI for non-display purposes. *See* Opp. 2, 10. This circular argument takes for granted that CTA properly expanded the definition of "non-display use" to reach SAPI. But that is the very issue Bloomberg and its customers have disputed.

[12] Bloomberg made this clear in 2016 by sending CTA an updated description stating that SAPI "ensures that server-based applications can be used only to enable outputs of such applications *in a display to users*." Kotovets ¶23. CTA emphasizes that it "did not agree" to the updated description, Opp. 3, but that misses the point: The updated description is accurate and unrefuted. Nor did the description "represen[t] to CTA that [Bloomberg] had reconfigured SAPI to remain a display device." *Contra* Chang ¶5 n.2. Bloomberg merely sent "a new definition" in response to *CTA's own request* that Bloomberg review the accuracy of the existing SAPI description. *See* Kotovets Ex. H; McManus Supp. ¶2.

improperly) could be automated is an irrelevant and wildly overbroad basis for defining a data feed; the same could be said of practically any source of electronic data. McManus Supp. ¶4.

Controls. Finally, CTA argues that "[t]here is substantial record evidence that ... [SAPI] subscribers can and do use SAPI for non-display uses." Opp. 13. This is wrong. CTA offers no rebuttal to the sworn declarations of Tony McManus and Keith Bunnell, who described how Bloomberg contractually prohibits non-display use of SAPI data and enforces that prohibition through a strict compliance and oversight regime. McManus attested that:

- SAPI's customer agreement prohibits any automated or black-box data usage;
- SAPI's guidelines and installations adhere to this prohibition;
- customers must annually certify compliance;
- Bloomberg's product-development team screens third-party applications to ensure they are display-only; and
- Bloomberg's product-oversight team enforces the prohibition through compliance and data-monitoring activities.

McManus ¶¶16-22. Bunnell confirmed that Bloomberg does not market or sell SAPI to customers who want to use it for automated, algorithmic, or black box trading. Bunnell ¶¶12-15. Both McManus and Bunnell also stated that Bloomberg has independent interests in guarding against SAPI misuse and in steering customers contemplating non-display uses to the more expensive B-PIPE.[13] McManus ¶24; Bunnell ¶16.

CTA disputes none of Bloomberg's record statements. Instead, it cites second- and third-hand rumors of isolated misuse by unknown users at unknown times. The Chang Declaration relies on triple hearsay regarding (1) what unnamed CTA personnel heard from unnamed vendors

[13] SAPI customers agree that SAPI is not a data feed and is not used for non-display purposes. *See* Comment Letter of Cantor et al., Release No. 34-82071 (Mar. 12, 2018) ("Cantor Letter"); Comment Letter of ACR Alpine Capital Research, LLC, et al., Release No. 34-82071 (Dec. 11, 2017).

about what unnamed customers told them; and (2) what CTA heard from Bernardo Santiago about what unnamed clients told him. *See* Chang ¶¶6, 8; Opp. 13. These statements have no probative or evidentiary value because neither Bloomberg nor the Commission has any means of ascertaining their reliability through the fog of vagueness and hearsay.

Under Rule 201.320(b), hearsay is admissible only if it "bears satisfactory indicia of reliability." But the statements at issue satisfy *none* of the factors the Commission has used to determine reliability. First, they "are contradicted by direct testimony" from McManus and Bunnell. *Gary L. Greenberg*, Release No. 34-28076, 1990 WL 1104065, at *3 (June 1, 1990); *accord* Amendments to the Commission's Rules of Practice, Release No. 34-78319, 2016 WL 3853756, at *26 (July 13, 2016). Second, the "type of hearsay at issue" is extremely suspect. *Greenberg*, 1990 WL 1104065, at *3. The statements are couched in *three* layers of hearsay and fail to identify specific vendors or customers. Furthermore, they rely on the unsworn assertions of a consultant whose qualifications and incentives are unknown, and whom CTA never shows is qualified to opine about the market-data industry. Third, CTA does not deny that Mr. Santiago or the other declarants "w[ere] available to testify." *Id.* Fourth, the hearsay is not "corroborated" in any way, *id.*, notwithstanding CTA's audit rights. Because "mere hearsay lacking sufficient assurance of its truthfulness is not substantial evidence to overcome ... sworn testimony," *id.*, the Chang Declaration is completely inadequate to sustain CTA's reclassification of SAPI.

The Chang Declaration also claims that customers "switch[ed] from a data feed ... to SAPI because they can do the same things with SAPI that they could with the prior data feed product without paying access fees or non-display use fees." ¶7. These assertions, however, do not support SAPI's reclassification. If a customer had been using a data feed for tasks that could be accomplished using displayed data, then switching to SAPI to avoid unnecessary non-display and access

fees would be economically efficient, consistent with SAPI's display functionality, and aligned with the Exchange Act's goal of reducing barriers to market data.

At the very least, these vague and opaque allegations demonstrate the need for a stay pending discovery or a hearing. The present record cannot remotely support SAPI's reclassification under any principle of administrative law. *Cf. NetCoalition I*, 615 F.3d at 540-41 (criticizing the "problematic ... lack of support in the record for the SEC's conclusion").

C. The Amendment Unfairly Discriminates Against SAPI.

Despite singling out SAPI and purporting to correct a "competitive imbalance" among market-data vendors, CTA's Amendment never identified a single vendor, product, or customer harmed by the treatment of SAPI as a display service. Bloomberg identified this gaping hole in CTA's evidence, Br. 18, yet CTA's brief *still* fails to identify any similarly-situated competitor or service that is disadvantaged.

To the contrary, the actions of the only vendor identified in CTA's opposition support Bloomberg's understanding of the 2013 and 2014 amendments. Following the 2014 amendment, Thomson Reuters introduced a competing product—Eikon SAPI—as a *display* service. Then, when CTA's *2017* Amendment threatened to impose new non-display and access fees on Eikon SAPI, Thomson Reuters responded by pulling the product from the market. *See* Henkin Decl. Ex. I. Thomson Reuters' experience with Eikon SAPI corroborates Bloomberg's understanding that the 2013 and 2014 amendments do not apply to SAPI technology. It also demonstrates how CTA unfairly singled out Bloomberg SAPI and its customers in the withdrawn March 2017 amendment, March 2017 side letter, and November 2017 amendment.

Nevertheless, CTA continues to insist that "[t]he ongoing competitive imbalance among vendors was the primary motivation for the Amendment, and *the evidence for it is demonstrated at length* [in CTA's brief] and in CTA's supporting declarations." Opp. 14 (emphasis added). But

there is no evidence, lengthy or otherwise. CTA provides no proof that any two comparable products were ever charged different fees, no proof that any imbalance is "ongoing," no identification of specific vendors or products besides Bloomberg and SAPI, no proof of any competitive impact, and no proof of any effect on CTA's costs under §11A. CTA relies only on unreliable hearsay, *supra* pp.13-14, and on equally vague and conclusory comment letters from competing vendors, Opp. 6 (citing Henkin Exs. A & B). CTA also faults Bloomberg for failing to identify any product besides Eikon SAPI, Opp. 14 n.10, but that is backwards. CTA must justify its fee increase with substantial evidence. It attempted to carry that burden through allegations of competitive imbalance, yet it never identified any similarly situated competitors that were classified differently.[14] CTA's ongoing inability establish a competitive imbalance confirms that the Amendment is unfairly discriminatory.[15]

D. CTA's Newfound Emphasis on Audits Cannot Justify Its Fee Increase

CTA's brief offers an entirely new justification for the Amendment not found in the Amendment's text. CTA claims the Amendment is merely "an enhanced administrative mechanism" to determine the subset of SAPI customers who already owe "obligations imposed by the 2014 Amendments and CTA's standard vendor and subscriber agreements" for non-display fees. Opp. 9. As shown above, however, the Amendment never mentions this explanation, and in fact expressly rejects a case-by-case approach focused on how "some SAPI users" use data. Release

[14] To the extent CTA implies that the competitive landscape between SAPI and *data feeds* is imbalanced, that argument fails. First, Bloomberg has demonstrated that SAPI and data feeds are distinct. *See supra* pp.10-13; Br. 5-6; McManus ¶23. Second, that argument rests entirely on CTA's unreasoned expansion of the data-feed category to include display products like SAPI. *See* Release 13-14. CTA's failure even to acknowledge the expanded definition of access fee, let alone defend it, effectively concedes both of these points.

[15] In any event, there is no reason to presume that a level playing field among vendors ensures reasonable prices for customers—§11A's clear objective.

9; *supra* pp.2-3. CTA's prior statements about the fee change likewise never mention audits. This unsupported, post-hoc rationale cannot justify the fee increase under §11A.

CTA's focus on audits is a red herring in any event. As explained above, CTA defines non-display use to include delivery of data to server-based applications, regardless of whether those applications display the data to humans. Release 10. Based on this (arbitrary) definition, CTA would inevitably deem every SAPI customer to be engaged in non-display use, even under a case-by-case approach, because delivering data to server-based applications for visual display is SAPI's core function.

Even taking CTA at its word regarding audits, moreover, the Amendment is unjustified. CTA repeatedly concedes that before this Amendment, it had authority to audit SAPI customers' data usage under its vendor and customer contracts. *E.g.*, Opp. 3, 7. CTA also does not dispute that it never conducted or attempted to conduct such an audit before promulgating the Amendment. Br. 17. Instead, CTA came to the Commission to unilaterally impose an immediately effective—and across-the-board—fee increase. CTA cannot justify that fee as an "administrative mechanism" to accomplish what it already had authority to do.

II. The Harm Bloomberg Faces Is Underscored By Eikon SAPI's Demise

A 6,000%-plus fee increase on SAPI customers will fundamentally change SAPI's price point and irreparably destroy its customer base. CTA's principal response is that this claim "is not supported by evidence and is at best speculative." Opp. 15. That is demonstrably wrong: Bloomberg's opening brief and declarations described the Amendment's catastrophic effects in detail. Br. 19-20; Bunnell ¶¶29-33. Bloomberg's evidence demonstrates (and common sense confirms) that a fee increase of thousands of dollars per month will drive customers away, and that substantial switching costs will prevent such customers from returning even if the fee is later invalidated. Br. 19.

Remarkably, CTA cites Thomson Reuters' experience as a counterexample—even though it directly illustrates the harm to Bloomberg that warrants a stay. Thomson Reuters withdrew Eikon SAPI from the market in direct response to this Amendment, recognizing that Eikon SAPI was doomed if forced to compete under the fee schedule applicable to data feeds that offer more data and allow non-display use. *See* Henkin Ex. I. Commission precedent makes clear that destruction of a business is irreparable harm, *see Atlantis Internet Grp.*, Release No. 34-70620, 2013 WL 5519826, at *5 n.14 (Oct. 7, 2013), and Eikon SAPI's fate corroborates the extensive evidence of harm that Bloomberg has set forth. Furthermore, CTA's entire competitive-imbalance theory rests on its view that Bloomberg will lose SAPI customers to other products if the new fees take effect. *See* Chang ¶5. CTA cannot have it both ways. The point of a stay is to forestall these irremediable harms until the Commission determines whether those new fees *should* take effect.[16]

CTA notes in passing that "another vendor" supposedly did not experience a catastrophic loss of subscribers when it imposed higher fees on a "SAPI-like product." Opp. 15. But CTA's anecdote is unverifiable and unmeasurable: CTA does not identify the vendor or the product, does not explain what makes it "SAPI-like," and does not explain why this vendor decided its product should be treated as a data feed under the *previous* fee regime. *Id.* CTA concedes that "some of these subscribers" dropped the product, makes no attempt to quantify why their departure was "not ... catastrophic," and ignores switching costs. Opp. 15; Chang ¶6. The record, moreover, contains statements by specific SAPI customers describing the Amendment's errors and the burden it will impose. *See* Cantor Letter. This evidence of customer costs and burdens, together with the evi-

[16] CTA's observation that Bloomberg will pay no additional fees is another red herring. Opp. 5. The harm is the loss of SAPI customers due to *their* higher fees.

dence that the Amendment has already eliminated Thomson Reuters' competing service, distinguish this case from the precedent CTA cites, Opp. 15-16 (citing *Richard L. Sacks*, Release No. 34-57028, 2007 WL 4481516 (Dec. 21, 2007)), and explain why Bloomberg's harm will be irreparable even if the Amendment is ultimately invalidated.

CTA also asserts that even though the "Amendment has been in effect for more than four months, ... Bloomberg has not identified a single customer that has terminated a SAPI subscription." Opp. 15. This is extremely disingenuous. As CTA knows, it took no steps to *enforce* the Amendment until January 2018, when it requested the SAPI customer list. Kotovets ¶34. CTA's suggestion that customers would leave *before* their fees rose makes no sense—particularly when CTA took no steps to notify customers.

CTA's efforts to obtain Bloomberg's confidential customer list only reinforce the threat of irreparable harm. As Bloomberg showed, and CTA has not rebutted, the Commission has repeatedly recognized that disclosure of such information causes competitive harm that cannot be undone. Br. 20. CTA's only response is a non sequitur: Bloomberg's withholding of the list, it claims, breaches the parties' private contract. Opp. 17. CTA does not and cannot explain why an alleged private breach obviates Bloomberg's harm or eliminates its rights under the Exchange Act. In any event, CTA itself is contractually obliged "to make requests" of customer data only "in a reasonable manner," Kasparov Ex. B §19(e), which its year-long effort to impose unlawful fee increases demonstrably is not. As noted above, CTA has never once requested this information for an audit, *supra* p.17, and CTA's belated suggestion that it is acting for reasons other than charging unlawful fees is not remotely credible.

III. CTA's Arguments Regarding Harm to Other Parties All Rest on Mischaracterizations of the Amendment

Bloomberg's brief demonstrated that a stay *will not* harm CTA, which has waited years to propose the changes now at issue. Br. 21. CTA's response does not dispute this point—a significant concession.

Bloomberg also demonstrated that enforcing the Amendment *will* harm SAPI customers by depriving them of the ability to view and analyze market data through the applications that they have determined best serve their and their clients' investment needs. Br. 20-21. To downplay this harm, CTA recycles the same misrepresentations debunked above.

Specifically, CTA insists that customers will face no new fees unless and until CTA finds, after an audit, that they were using SAPI for non-display purposes. Opp. 18. This is baseless. Once again, CTA ignores that the Amendment purports to impose thousands of dollars in monthly access fees on all SAPI customers. *Supra* p.2. CTA persists in acting as if only non-display fees are at issue, and in mischaracterizing its own Amendment as a measured audit effort. *Supra* pp.2-3. These misrepresentations attempt to obscure that the Amendment will more than double SAPI's price, imposing increased monthly fees on the average SAPI customer of $9,136/month. Br. 9. The most common price for customers pay Bloomberg for SAPI, meanwhile, is only $1,910/month. McManus Supp. ¶7. CTA offers nothing but *ipse dixit* in response to Bloomberg's evidence that more than doubling SAPI's total costs (subscription and exchange fees) will force many customers to limit SAPI use, drop SAPI altogether, or upgrade to a more expensive service.[17] Bunnell ¶¶30-31.

[17] CTA's suggestion that customers could avoid fees by switching to delayed data, *see* Chang ¶8, only underscores the harm to investors. In enacting §11A, Congress recognized that giving "each investor ... the opportunity for the best possible execution of his order" depends on the widespread dissemination of real-time, "up-to-the-second" market data, *not* delayed data. S. Rep. No. 94-75, at 7, 9 (1975).

CTA also asserts that a stay will prolong the purported competitive imbalance. Opp. 19-20. But, again, CTA adduces no evidence that such an imbalance even exists. Rather, Thomson Reuters' letter confirms that, before the Amendment, Bloomberg SAPI and Eikon SAPI competed on level ground in terms of exchange fees. Henkin Ex. I. And to the extent CTA is comparing SAPI to data feeds, *see* Opp. 19, it is comparing apples to oranges, *supra* p.16 n.14. CTA has offered no response to Bloomberg's showing that (a) SAPI is controlled in ways that data feeds are not; (b) CTA has long recognized that SAPI is not a data feed; and (c) CTA has never justified reversing that classification. *Supra* pp.10-13. Because CTA fails to establish any competitive imbalance, it also fails to establish any harm to competitors or to rebut the harm that denying a stay will impose on the investing public.

IV. Staying Enforcement of the Amendment Would Preserve the Status Quo and Serve the Public Interest

CTA's public-interest arguments repeatedly mischaracterize the important investor interests at stake. *First*, CTA argues that "staying the Amendment" would change, not preserve, the status quo. Opp. 20. Not so. Because CTA has not enforced the Amendment, lower display fees continue to apply to SAPI. Bloomberg therefore seeks to "stay *enforcement* of the Amendment" pending §11A proceedings. Br. 10 (emphasis added). Such a stay would indisputably preserve the status quo.

Second, CTA argues that Bloomberg's stay application is untimely. Opp. 20-21. This argument rests on the mistaken premise that fees increased months ago, when the Amendment was published. Opp. 20. But Bloomberg sought a stay within weeks of CTA's January 2018 action to enforce the Amendment—an interval CTA cannot credibly criticize as dilatory.

Third, CTA argues that the Commission should not grant a stay because it has already declined to abrogate the Amendment in the face of similar objections. Opp. 8 n.6, 20 (citing *William Timpinaro*, Release Nos. 34-29809, -29927, 1991 WL 288326 (Nov. 12, 1991)). *William Timpinaro*, however, involved a request to stay rule changes *after* the Commission had issued a written decision based on its "examin[ation] [of] the full record and ... findings ... that the proposed rules are consistent with the requirements of the [Exchange] Act." 1991 WL 288326, at *3. This case, by contrast, involves an *immediately effective* fee change, which has not been adjudicated by the Commission. That the Commission has not yet abrogated the Amendment cannot displace the rights Congress expressly granted market participants under §11A to seek a stay during a denial-of-access proceeding. In any event, the Commission in *William Timpinaro* did not preclude stay proceedings based on its prior decision, but "independently and fully reconsidered [the movants'] arguments in light of the stay requests." 1991 WL 288326, at *7. In other words, *William Timpinaro* stands for the exact opposite of CTA's position that its unilateral fee increase is exempt from Commission review.

Finally, CTA disputes that the Amendment denies access to the exchanges' services by making market data more expensive or less accessible. Its brief ignores the public importance of consolidated core data as well as the Commission's requirements that market participants both supply *and* buy the data CTA alone sells. Br. 2-3 (discussing best-execution and trade-through rules). CTA merely argues that the Amendment "does not impose new or different fees" and "merely provides a mechanism to ensure that the 2014 Amendments are applied consistently to all vendors and subscribers." Opp. 21. This argument rests on the same misrepresentations discussed above and directly contradicts the text of the Amendment itself, which admits to "establishing or changing a fee." Release 3. Similarly, the claim that the Amendment merely clarifies the 2014

amendment and facilitates an audit of specific SAPI customers totally ignores the automatic access fees and expanded non-display fees. *Supra* pp.1-2.

Ultimately, when these meritless arguments are swept aside, CTA has no response to Bloomberg's showing that the Amendment abuses CTA's government-sanctioned monopoly over core data, which Congress and the Commission have recognized is critical to the investing public. By seeking monopoly rents, CTA is harming the public interest by reducing reasonably-priced access to core data, reducing incentives to develop innovative products, and ultimately reducing the liquidity and effectiveness of markets. Br. 21-23.

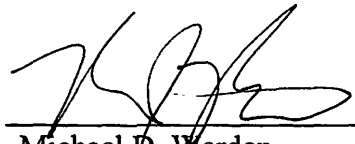
CONCLUSION

The Commission should grant a stay to prevent these abuses and preserve the status quo pending a hearing, argument, or determination on the record evidence Bloomberg has set forth.

Dated: March 12, 2018

Respectfully submitted,

SIDLEY AUSTIN LLP



Michael D. Warden
Benjamin Beaton
Daniel J. Feith
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
mwarden@sidley.com

Counsel for Bloomberg L.P.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of: The Application of Bloomberg L.P. For Review of Amendments of the CTA Limiting Access to its Services	Admin. Proc. File No. 3-18316

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2018, I caused a copy of the foregoing Reply In Support of a Stay of CTA's Fee Amendment to be served on the parties listed below.

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(by hand delivery)

Douglas W. Henkin
Seth T. Taube
Joseph Perry
Baker Botts LLP
30 Rockefeller Plaza
New York, NY 10112
douglas.henkin@bakerbotts.com

Dated: March 12, 2018

Benjamin Beaton

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of: The Application of Bloomberg L.P. For Review of Amendments of the CTA Limiting Access to its Services	Admin. Proc. File No. 3-18316

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 154(d) of the Commission's Rules of Practice, I hereby certify that the foregoing Reply in Support of Bloomberg's Stay Motion contains 6,992 words, according to the word-processing system used to prepare the brief, exclusive of the cover page, table of contents, and table of authorities.

Dated: March 12, 2018

Benjamin Beaton

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of: The Application of BLOOMBERG L.P. For Review of Amendments of the Consolidated Tape Association Limiting Access to its Services	Admin. Proc. File No. 3-18316

SUPPLEMENTAL DECLARATION OF TONY MCMANUS

I, Tony McManus, declare as follows:

1. I submit this declaration in further support of Bloomberg L.P.'s Motion to Stay CTA's Fee Amendment and to respond to certain statements in CTA's opposition brief and supporting declarations.

2. The declaration of Lora Chang, the ICE/NYSE director of market data administration, asserts that Bloomberg "represented" to CTA that it had "reconfigured" SAPI "to remain a display device following [CTA's] 2014 Amendments" establishing non-display fees. Declaration of Lora Chang, Admin. Proc. No. 3-18316 (Feb. 27, 2018), at ¶5 n.2 ("Chang Decl."). This is mistaken. The "representation by Bloomberg" is attached as Exhibit A to the Chang Declaration (and as Exhibit H to the Declaration of Gary Kotovets, Admin. Proc. No. 3-18316 (Feb. 5, 2018) ("Kotovets Decl.")). The Chang Declaration says this exhibit describes changes Bloomberg made to SAPI in response to the 2014 amendment. The "representation," however, describes how SAPI functioned both before and after the 2014 amendment. Bloomberg did not change SAPI's technology, contracts, or controls in response to CTA's 2014 amendment. Both before and after that amendment, Bloomberg required SAPI customers to use the data for display

purposes only. That restriction was given effect through Bloomberg's technological controls, contractual restrictions, and compliance procedures.

3. The Chang Declaration further asserts that "SAPI's functionality also can act as a data feed permitting non-display uses." Chang Decl. ¶4. This is incorrect. As CTA's contracts with Bloomberg have long recognized, one of the defining features of a data feed is that the customer firm, rather than the data vendor, determines how to control access to and use of market data. This is the case with respect to Bloomberg's data feed (known as "B-PIPE"), and with other data feeds with which I am familiar. With SAPI, by contrast, Bloomberg's authorization and entitlement system always controls which individual users may access particular types of data, as I explained in my earlier declaration. *See* Declaration of Tony McManus, Admin. Proc. No. 3-18316 (Feb. 8, 2018), at ¶¶16-22 ("McManus Decl."). Furthermore, unlike data feeds, display services such as SAPI typically cap the amount of data a customer can consume and limit the types of applications a customer may use. *Id.* ¶¶14, 17, 22. No such restrictions apply to B-PIPE or to other data feeds with which I am familiar.

4. CTA's opposition brief and the Amendment itself classify services as data feeds based solely on their potential "functionality." This ignores technological and contractual limits on the use of market-data services like SAPI, as well as the industry's longstanding customary understanding of data feeds. *E.g.*, Opp. 3, 6, 13; Release 13-14. As CTA's contracts with Bloomberg have long recognized, *see* Kotovets Decl. ¶¶5-13, technological and contractual limits on market-data use are critical to distinguishing one category of market-data service (*e.g.*, display services) from another (*e.g.*, data feeds). To be sure, any technology is vulnerable to misuse, and a customer could, in theory, circumvent restrictions on a display service in order to use it like an unrestricted data feed. But it makes no sense to treat this noncompliance as "potential

functionality" when the vendor never intended to sell such a service and works actively to prevent its misuse. The industry, moreover, has never considered the possibility of noncompliance to eliminate the familiar distinction between display products and data feeds.

5. The Chang Declaration also claims that unnamed SAPI customers have told "CTA" (though not necessarily Chang) that they "can do the same things with SAPI that they could with the prior data feed product." Chang Decl. ¶7. On this basis, CTA asserts that "customers do use SAPI for non-display purposes." Opp. 10. This overlooks two important facts. First, data feeds can support display as well as non-display applications. Second, many tasks can be performed with either a display application or a non-display application. For example, as CTA acknowledges, portfolio valuation can be accomplished either manually by a human using a display application or automatically by a non-display application. *See* Release 5 n.12. Position keeping and risk management are two other examples. *Contra* Chang Decl. ¶6. Therefore, for customers that previously used a data feed either (1) for display applications or (2) for tasks that could be performed using display applications, SAPI (and, for that matter, other display services) allow them to accomplish the same things a data feed would. The customer statements CTA cites are thus consistent with the use of SAPI for display only.

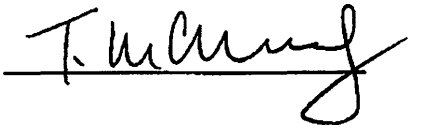
6. The Chang Declaration also claims that CTA has third-hand information indicating customers are using SAPI for algorithmic trading. Chang Decl. ¶6. The comment letter submitted by Bernardo Santiago and cited in CTA's brief (at Opp. 6) likewise states that "using [SAPI] data to perform Non Display activities" is "fairly standard practice" and "the primary purpose for which [he has] seen subscribers purchase Bloomberg SAPI licenses." Exhibit H to the Declaration of Douglas Henkin, Admin. Proc. No. 3-18316 (Feb. 28. 2018), at 2. Bloomberg prohibits any such non-display applications, which would also violate the customer's annual certifications to

annual certifications to Bloomberg that it is in compliance with these restrictions. I am unaware of CTA's ever raising any such concerns with Bloomberg. Bloomberg informs customers that SAPI is for display use only during the sales and implementation process, contractually prohibits customers from using SAPI for algorithmic trading, requires customers to certify annually that they adhere to this restriction, monitor customers' data consumption, and employs product-oversight personnel who address non-compliance concerns with customers. Had CTA conveyed reports of misuse, Bloomberg would have investigated them and, as necessary, corrected any violations or misuse, including by terminating the customer's subscription if necessary.

7. Mr. Santiago's comment letter also states that a standard SAPI license from Bloomberg costs $5,485 per month. Henkin Decl. Ex. H at 2. In fact, the largest group of SAPI customers subscribe at a price of $1,910 per month.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: 3/12/2018



Tony McManus