UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re VALEANT PHARMACEUTICALS INTERNATIONAL, INC. SECURITIES LITIGATION	Master File No. 3:15-cv-7658-MAS-LHG **NOTICE OF MOTION FOR LEAVE TO APPEAR AND FILE A BRIEF AS *AMICUS CURIAE*** Motion Date: January 17, 2017

PLEASE TAKE NOTICE that on January 17, 2017, or as soon as the Court may allow, the undersigned, counsel for non-party the Securities Industry and Financial Markets Association ("SIFMA"), shall move before the Honorable Michael A. Shipp, United States District Judge, for entry of an Order granting it leave to appear and file a brief as *amicus curiae* in support of Defendants' motion to dismiss; and

PLEASE TAKE FURTHER NOTICE that SIFMA will rely upon the attached Memorandum of Law in Support of Motion for Leave to Appear and File a Brief as *Amicus Curiae*, the proposed *amicus* brief, and the proposed Order, which are electronically filed and submitted herewith; and

PLEASE TAKE FURTHER NOTICE that pursuant to L. Civ. R. 78.1(b)(1), oral argument is requested if any opposition is submitted.

Dated: New York, New York
December 14, 2016

Respectfully submitted,
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re VALEANT PHARMACEUTICALS INTERNATIONAL, INC. SECURITIES LITIGATION	Master File No. 3:15-cv-7658-MAS-LHG Motion Date: January 17, 2017

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AND FILE A BRIEF AS *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") respectfully moves the Court for leave to appear and file a brief as *amicus curiae* in support of Defendants' motion to dismiss Counts III through VI of the Consolidated Complaint.[1]

District courts have the inherent power to permit third parties to participate in an action as *amicus curiae*. *United States v. Alkaabi*, 223 F. Supp. 2d 583, 592 (D.N.J. 2002) ("The extent, if any, to which an *amicus curiae* should be permitted to participate in a pending action is solely within the broad discretion of the district court."). There is no rule governing the appearance of *amici* in district court, but courts in the District of New Jersey are guided by the Third Circuit's interpretation of Federal Rule of Appellate Procedure 29 governing such appearance in circuit court. Rule 29 permits a private *amicus* brief upon motion where the movant has an interest in the matter, the movant's participation would be desirable, and the movant's brief will address matters "relevant to the disposition of the case." Fed. R. App. P. 29(a)(2)-(3). The Third Circuit has explained that a motion for leave to file an *amicus* brief should be granted "unless it is obvious that the proposed brie[f] do[es] not meet Rule 29's criteria as broadly interpreted." *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.). Under this broad reading, it is "preferable to err on the

[1] "Defendants" refers to the Bank Offering Defendants, *see* Dkt. No. 164-1, and the Valeant Defendants, *see* Dkt. No. 167-1.

side of granting leave." *Id.* Numerous courts in this District have granted *amici* leave to file briefs on this basis. *See, e.g.*, Order, *Islamic Soc'y of Basking Ridge v. Twp. of Bernards*, No. 16-1369 MAS (D.N.J. Dec. 12, 2016), ECF No. 74; *Acra Turf Club, LLC v. Zanzuccki*, No. CIV.A. 12-2775 MAS, 2014 WL 5465870, at *5 (D.N.J. Oct. 28, 2014); *Foley v. Horizon Blue Cross Blue Shield of NJ, Inc.*, No. CIV. 06-6219 FSH, 2007 WL 2694069, at *1 (D.N.J. Sept. 11, 2007); *Alkaabi*, 223 F. Supp. 2d at 592.

SIFMA satisfies the Rule 29 criteria here. As SIFMA's proposed *amicus* brief demonstrates, SIFMA has a strong interest in the subject matter of this action, which involves offerings made pursuant to Securities and Exchange Commission ("SEC") Rule 144A. SIFMA is a securities industry trade association representing the interests of hundreds of broker-dealers, banks, and assets managers. Its mission is to promote a strong financial industry, investor opportunity, capital formation, economic growth, and job creation, and to build trust and confidence in the financial and capital markets. In light of its mission and membership, one of SIFMA's chief concerns is the accurate and predictable enforcement of the federal securities laws. Moreover, many of SIFMA's members engage in transactions pursuant to Rule 144A, and therefore have a significant interest in ensuring the efficient functioning of that market.

SIFMA's participation in this matter is desirable and is likely to aid the Court. SIFMA brings a unique perspective as an industry group concerned with the broader application of the securities laws generally, and thus it can contribute to the Court's analysis of the matter in question. *See Avellino v. Herron*, 991 F. Supp. 730, 732 (E.D. Pa. 1998) (granting leave to participate as *amicus curiae* where it "will aid the Court in its understanding of the issues before it"); *Waste Mgmt. of Pa., Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995) (granting leave where "the information offered is timely and useful"). SIFMA's *amicus* brief, which is timely,

elaborates on the potential impact of the Court's ruling on the relevant market participants. *See Neonatology Assocs.*, 293 F. 3d at 132 (explaining that an *amicus* brief may be helpful if it can explain "the impact a potential holding might have on an industry or other group"); *Harris v. Pernsley*, 820 F.2d 592, 603 (3d Cir. 1987) ("[P]ermitting persons to appear in court . . . as friends of the court . . . may be advisable where third parties can contribute to the court's understanding of the consequences" of the matter.). It thus provides the Court with relevant information and an analysis of the broader context and circumstances that may not otherwise be addressed by the parties to the litigation.

For these reasons, SIFMA respectfully requests that the Court grant it leave to appear and participate in this action as *amicus curiae*.

Dated: New York, New York
December 14, 2016

Respectfully submitted,
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re VALEANT PHARMACEUTICALS INTERNATIONAL, INC. SECURITIES LITIGATION	Master File No. 3:15-cv-7658-MAS-LHG **PROPOSED ORDER GRANTING LEAVE TO APPEAR AND FILE A BRIEF AS *AMICUS CURIAE***

Having considered the motion of the Securities Industry and Financial Markets Association ("SIFMA"), by and through its attorneys, Cleary Gottlieb Steen & Hamilton LLP, for leave to appear and file a brief as *amicus curiae*; and all parties, by and through their counsel, having received due notice of the motion and having the opportunity to be heard; and for good cause shown,

IT IS on this ____ day of _____, 20__, **ORDERED:**

1. SIFMA's Motion for Leave to Appear and File a Brief as *Amicus Curiae* is hereby **GRANTED**;

2. SIFMA's proposed *amicus* brief is hereby deemed **FILED**.

_____
Hon. Michael A. Shipp, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re VALEANT PHARMACEUTICALS INTERNATIONAL, INC. SECURITIES LITIGATION	Master File No. 3:15-cv-7658-MAS-LHG

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS, URGING DISMISSAL

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is an association comprised of hundreds of member securities firms, banks, and asset managers that are frequent targets of securities litigation. As an organization, SIFMA has an interest in the accurate and predictable enforcement of the federal securities laws. SIFMA therefore supports Defendants in their argument that Section 12(a)(2) of the Securities Act of 1933 (the "Securities Act" or "Act") does not apply to private offerings under Rule 144A. SIFMA submits this brief to elaborate on the practical reasons why it is critical that the decision by the Securities and Exchange Commission (the "SEC") that Rule 144A offerings are private transactions be honored.

The SEC has clearly stated that transactions covered by Rule 144A's "safe harbor" are "private transactions," Resale of Restricted Securities, Securities Act Release No. 33-6862, 55 Fed. Reg. 17,933, 17,934 (Apr. 30, 1990) ("Adopting Release"), and the Rule itself provides that such offerings "shall be deemed not to have been offered to the public." 17 C.F.R. § 230.144A(c) (2015). This determination is based on fundamental precepts and is entitled to "controlling weight." *United States v. O'Hagan*, 521 U.S. 642, 673 (1997). It should preclude Plaintiffs' Section 12(a)(2) claims here. Indeed, the vast majority of courts and commentators have recognized that, "[b]ecause the [Rule 144A] offering is private . . . , Sections 11 and 12(a)(2) of the Securities Act . . . simply do not apply." William K. Sjostrom, Jr., *The Birth of Rule 144A Equity Offerings*, 56 UCLA L. Rev. 409, 438 (2008).[1]

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[1] *See also, e.g.*, Steven Mark Levy, *Regulation of Securities: SEC Answer Book* (5th ed. 2016) ("[A] Rule 144A offering memorandum is not a prospectus and there can be no Section 12(a)(2) liability."); Peter V. Darrow et al., *U.S. Equity Markets for Foreign Issuers: Public Offerings and Rule 144A Placements of American Depository Receipts* 33 (2008) ("Section 12(a)(2) . . . applies only to prospectuses . . . used in a registered public offering of securities."); *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 624-26 (S.D.N.Y. 2007) (Lynch, J.)

The Securities Act imposes duties on sellers of securities, and imposes costs on them, in order to protect "members of the investing 'public'" who are unsophisticated and "need . . . the protections afforded by registration." *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126–27 & n.5 (1953) (noting the Securities Act "does not affect transactions beyond the need of public protection"). It would be fundamentally inconsistent with that regime, and with the process of capital raising and formation in this country, for the provisions of Section 12(a)(2) to be applied to Rule 144A private placements, which are, by rule, made only to qualified institutional buyers ("QIBs")—sophisticated institutional investors that the SEC has decided need not rely on the protections of those securities laws. *See* Resale of Restricted Securities, Securities Act Release No. 33-6806, 53 Fed. Reg. 44,016, 44,018 (Nov. 1, 1988) (the "Proposing Release").

ARGUMENT

Plaintiffs' position that a properly executed private offering under Rule 144A may nevertheless be "functionally public" based on "a fact specific determination," Pls.' Opp'n at 151–52—and that the assumption of Securities Act responsibilities and potential Section 12(a)(2) liability should rest on a post hoc, factual determination by a court—would flatly undermine the objectives that Rule 144A was intended to achieve, raise the cost of capital for companies and U.S. investors, and undermine the critical certainty and predictability that the federal securities laws are intended to provide, with little or no commensurate benefit to investors.

Over the past 26 years, Rule 144A has provided an essential mechanism for scores of companies, both foreign and domestic, to access the U.S. capital markets and reach significant numbers of institutional investors. *See, e.g.*, Keith F. Higgins, Dir., SEC Div. of Corp. Fin., Keynote Address at PLI: International Developments – Past, Present and Future (Jan. 21, 2016)

("[O]fferings under Rule 144A are by definition non-public, and offering memoranda distributed in connection with such offerings cannot give rise to Section 12(a)(2) liability.").

(Rule 144A "has become a clearly-blazed trail for unregistered offerings in the United States, both by U.S. and foreign issuers.").[2] Consistent with the SEC's statement in the Rule 144A proposing release that "Rule 144A could have a significant impact" on the domestic market for unregistered securities, Proposing Release at 44,022, the number of Rule 144A offerings and the value of the securities offered has significantly increased since the Rule's adoption. For example, in 1991—the year following Rule 144A's adoption—there were 319 Rule 144A issues worth $16.4 billion. Bo James Howell, *SEC Rule 144A and the Global Market*, 7 Asper Rev. Int'l Bus. & Trade L. 199, 215 (2007). "By 2002, the [Rule 144A] market had exploded into 2,585 issues worth $253.7 billion," *id.*, and, in 2006, "over $1 trillion of debt and equity capital was raised . . . through Rule 144A offerings, reflecting a 300 percent increase since 2002." Sjostrom, *supra*, at 411.[3] As indicated below, in each of the past five years, there have been over 1,000 Rule 144A offerings, peaking in 2014 with a value of more than $1.02 trillion.

Year[4]	Value of 144A Offerings – Total (US$m)	Value of 144A Offerings – U.S. Offerors (US$m)	Value of 144A Offerings – Non-U.S. Offerors (US$m)	Total Number of 144A Offerings
2011	639,688.4	268,998.2	370,690.2	1,028
2012	896,151.8	420,792.9	475,358.9	1,431
2013	950,302.4	425,833.9	524,468.5	1,607
2014	1,023,444.3	516,697.5	506,746.8	1,605
2015	909,915.0	540,971.3	368,943.7	1,315

[2] *See also* Darrow, *supra*, at 2 ("Rule 144A has significantly expanded and deepened the liquidity of the U.S. private placement market, making it much easier, less expensive and less burdensome for foreign issuers to raise capital from U.S. institutional investors.").

[3] *See also* Sjostrom, *supra*, at 412 ("Notably, in 2006 more money was raised in Rule 144A equity offerings ($162 billion) than the combined total raised that year in IPOs listed on the New York Stock Exchange (NYSE), NASDAQ Stock Market, and the American Stock Exchange (AMEX) ($154 billion).").

[4] Sources: Thomson Reuters, Full Years 2011–15 U.S. Private Placement Reviews.

As this information demonstrates, Rule 144A offerings are not outliers, but rather essential components of the U.S. securities markets for foreign and domestic companies alike.

Plaintiffs' position would eviscerate this frequently used and highly beneficial regime. Under their approach, Rule 144A issuers would be subject to the risk that their private transactions will be deemed "public" *after the fact*, thus triggering strict liability under Section 12(a)(1) of the Securities Act, as well as the attendant costs and burdens of litigating about that issue. As a consequence, Rule 144A issuers would be forced to assume that all private offerings could be considered public within the meaning of the Securities Act, and to consider complying prophylactically with the requirements of that Act—lest a court, after the fact (and after costly and burdensome discovery), later provide investors with the option to rescind through no fault of the issuer. This, of course, would entirely change the Rule 144A calculus for prospective issuers: they would either have to restructure their transactions to price in the "costs and liability exposure associated with registered public offerings," or, if such costs undermined the viability of the transaction, "foreg[o] raising capital in the United States" altogether, to the detriment of U.S. investors and the competitiveness of the U.S. marketplace. Proposing Release at 44,022.[5]

Moreover, such a sea-change in the use of Rule 144A offerings is not necessary: the SEC's releases and Rule 144A itself demonstrate that the protections of the Securities Act are not intended for and are not designed to apply to sophisticated Rule 144A investors, such as Plaintiffs here. Rule 144A's QIB requirement ensures that only certain large and sophisticated

[5] The added cost to foreign issuers of essentially eliminating Rule 144A capital-raising would lead to increased costs to other U.S. market participants as well. Decreased participation of foreign issuers in the U.S. capital markets would increase "the costs borne by U.S. institutional investors that wish to invest in foreign securities and [that would be] compelled . . . to go overseas to obtain such securities." Proposing Release at 44,022. In addition, U.S. intermediaries, which play a key role as underwriters for Rule 144A offerings, "may . . . los[e] business to foreign competitors simply because [unregistered] securities may be available only offshore." *Id.*

institutions "that in the aggregate ow[n] and inves[t] on a discretionary basis at least $100 million in securities" may purchase Rule 144A securities. 17 C.F.R. § 230.144A(a)(1)(i). The SEC determined, based in part on guidance from the Supreme Court's *Ralston Purina* decision, that "these large institutional investors are fully able to fend for themselves" without the protections normally afforded by the Securities Act. Proposing Release at 44,027.[6] A subsequent study of capital-raising Rule 144A transactions by foreign issuers demonstrates that this determination was valid: institutional buyers in Rule 144A transactions have consistently demonstrated the ability and willingness to negotiate for specific protections, including mandatory disclosures and other representations (often called "10b-5 representations," since they can give rise to Rule 10b-5 liability). *See* Howell E. Jackson & Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe - Part II*, 3 Va. L. & Bus. Rev. 207, 220–21, 251–54 (2008). Yet, Plaintiffs' argument would permit sophisticated investors to participate willingly in a Rule 144A transaction under the private-placement framework, and later claim in a lawsuit that the public-transaction framework, with all its attendant costs and requirements for issuers, should apply. There is no basis in the text or structure of Rule 144A for permitting this reversal, which would undermine the foundations of

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[6] *See also* Proposing Release at 44,022 ("The Congress and the Commission historically have recognized the ability of professional institutional investors to make investment decisions without the protections mandated by the registration requirement of the Securities Act."); R. Brandon Asbill, *Securities Regulation—Great Expectations and the Reality of Rule 144A and Regulation S; The S.E.C.'s Approach to the Internationalization of the Financial Marketplace*, 21 Ga. J. Int'l & Comp. L. 145, 147 (1991) ("Such institutions are thought to be powerful and sophisticated enough to be able to insist upon appropriate disclosure as a condition to committing their funds, therefore not in need of the protection of the 1933 Act's registration and disclosure provisions."); Sara Hanks, *Rule 144A: Another Cabbage in the Chop Suey*, 24 Geo. Wash. J. Int'l L. & Econ. 305, 325 (1991) ("[T]here appears to be a consensus that institutions are able to fend for themselves and, therefore, offerings to them are not public offerings. This conclusion is based on the theory that institutions have access to information and the ability to analyze that information.").

the Rule 144A private-placement market. Indeed, such sophisticated institutions can (and do) bring individual claims under Section 10(b) of the Securities Exchange Act of 1934 (and Rule 10b-5 promulgated thereunder) as well as state law for any deficiencies in a Rule 144A offering, and thus need not rely on the mechanism provided in the Securities Act for unsophisticated investors.

Finally, Plaintiffs' fact-specific, post-transaction approach also would introduce uncertainty and unpredictability in "an area that demands certainty and predictability." *Pinter v. Dahl*, 486 U.S. 622, 652 (1988).[7] There is no one-size-fits-all Rule 144A private placement. Some offerings are small in size and made to a few investors. Others are larger. For example, in the past few months alone, Bombardier raised $1.4 billion and Deutsche Bank $3 billion through Rule 144A offerings. *See Bombardier Announces Closing of its New Issuance of Senior Notes due 2021*, GlobeNewswire (Nov. 21, 2016), https://globenewswire.com/news-release/2016/11/21/891817/0/en/Bombardier-Announces-Closing-of-its-New-Issuance-of-Senior-Notes-due-2021.html; Natalie Harrison, *Deutsche Bank sells $3 billion bond as investors seek spread*, Reuters (Oct. 8, 2016), http://www.reuters.com/article/us-deutsche-bank-bond-bonds-idUSKCN1280MN. And still others are in the vast middle. The main common denominator is that they are made to QIBs. In this context, Plaintiffs' suggestion that courts should assess whether a Rule 144A transaction is private or public after the fact based on a "flexible" balancing approach would not provide any guidance to sellers as to which transactions are public and which are not—contrary to Rule 144A's dictates and the Supreme Court's

[7] Plaintiffs' assertion that Rule 144A offerings can be private in some respects but public in others, Pls.' Opp'n at 151, is flatly inconsistent with the Supreme Court's recognition that "the [Securities] Act is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995).

admonition that unclear rules are "not a satisfactory basis for a rule of liability imposed on the conduct of business transactions." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994). Plaintiffs' position would also require extensive factual discovery and the application of a nebulous test nowhere found in Rule 144A's text, which would undoubtedly lead to drawn-out (and costly) disputes before the courts. The Supreme Court, however, has viewed with skepticism rules that would create "excessive litigation" in the securities area, *Central Bank*, 511 U.S. at 189, and has stated that it would "would reject any theory" that raised the prospect of "protracted" litigation under the securities laws. *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1106 (1991).

CONCLUSION

For the foregoing reasons, SIFMA respectfully submits that the Court should dismiss Counts III through VI of the Complaint.

Dated: New York, New York
December 14, 2016

Respectfully submitted,
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re VALEANT PHARMACEUTICALS INTERNATIONAL, INC. SECURITIES LITIGATION	Master File No. 3:15-cv-7658-MAS-LHG **CERTIFICATE OF SERVICE**

I, Jeffrey A. Rosenthal, an attorney admitted to practice in the State of New Jersey, hereby certify that on December 14, 2016, I caused a true and correct copy of the (1) Notice of Motion to Appear and File a Brief as *Amicus Curiae*; (2) Memorandum of Law in Support of the Motion to Appear and File a Brief as *Amicus Curiae*; (3) proposed Brief of *Amicus Curiae*; and (4) proposed Order, to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

Dated: December 14, 2016

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