

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

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 2501/April 6, 2015

ADMINISTRATIVE PROCEEDING  
File No. 3-15350

In the Matter of the Application of

SECURITIES INDUSTRY AND FINANCIAL  
MARKETS ASSOCIATION

For Review of Actions Taken by  
Self-Regulatory Organizations

ORDER ON PRIVILEGE LOG

On May 16, 2014, the Securities and Exchange Commission (Commission) issued an Order Establishing Procedures and Referring Applications for Review to Administrative Law Judge for Additional Proceedings. *Sec. Indus. & Fin. Mkts. Ass'n*, Securities Exchange Act of 1934 Release No. 72182, 2014 SEC LEXIS 1686. The hearing will begin on April 20, 2015.

In January 2015, I issued a subpoena in this proceeding from NYSE Arca, Inc., and the NASDAQ Stock Market LLC (collectively, the Exchanges), to the Securities Industry and Financial Markets Association (SIFMA). The production date was February 23, 2015. On March 18, 2015, the Exchanges filed a motion to compel production of documents from SIFMA on the grounds that SIFMA waived the asserted privilege by failing to produce a privilege log at the designated time and eventually producing a privilege log over two weeks late which lacks required information. The motion included five exhibits: SIFMA's response to the subpoena (Ex. A), SIFMA's privilege log (Ex. B), the subpoena and documents reflecting service of the subpoena (Ex. C), and email exchanges between the parties (Exs. D and E).

On March 26, 2015, SIFMA submitted its opposition, arguing that its categorical privilege log was sufficiently detailed because the documents for which it asserted privilege were all created in preparation for litigation. On March 27, 2015, the Exchanges submitted their reply motion (Reply Brief).

The subpoena at issue contained sixteen document requests, and required that if any document was withheld on the basis of privilege, SIFMA would produce a privilege log identifying, among other items, the document's "author, addressee, indicated or blind copies, date, subject matter, number of pages . . . present custodian, the nature of the privilege asserted, and the complete factual basis for its assertion." *See* Ex. C at 4. On February 23, 2015, SIFMA

responded to the subpoena, asserting that it had no documents responsive to thirteen of the sixteen document requests, that it had “identified no *non-privileged* documents responsive to this Request in its possession, custody, or control” for document requests nine and fifteen,<sup>1</sup> and identifying Relevant Members as called for by request number 16. Ex. A at 2-7 (emphasis added).

SIFMA did not produce a privilege log corresponding to the documents withheld for requests nine and fifteen with its response. On March 11, 2015, after repeated demands, SIFMA produced a privilege log to the Exchanges. See Exs. D & E. SIFMA’s privilege log contains two entries, corresponding to document requests nine and fifteen, and each appears to include large groups of documents.<sup>2</sup> See Ex. B. The following information is provided for each entry: date, custodian, description, subpoena item, SIFMA attorneys, and privilege category. The Exchanges contend that this categorical privilege log is improper and that the common interest privilege doctrine does not apply to SIFMA and its members. Reply Brief at 1-4.

SIFMA argues that its privilege log is a permissible “categorical privilege log,” providing descriptions of documents withheld as privileged in terms of document *categories* rather than on a document by document basis. Opposition at 1-2. SIFMA contends that this categorical privilege log is sufficient because all the privileged documents withheld were prepared for the purpose of this litigation, and were thus by their nature privileged. *Id.* at 2-3. In particular, SIFMA states that the withheld documents pertain to two specific times when SIFMA was required to submit evidence relating to the issue of jurisdictional standing, which I have already decided. Opposition at 3-4; see *Sec. Indus. & Fin. Mkts. Ass’n*, Admin. Proc. Rulings Release No. 1921, 2014 SEC LEXIS 3924 (Oct. 20, 2014).

### **Ruling**

It is impossible to determine from what SIFMA has produced as a privilege log whether the material withheld are indeed privileged and appropriately withheld, which defeats the purpose of a privilege log. Moreover, I am dubious that a “categorical privilege log” is appropriate. The cases SIFMA cited are distinguishable.<sup>3</sup> More importantly, the subpoena

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<sup>1</sup> Document request nine calls for: “Documents sufficient to identify, for each Relevant Member, the exchanges (or any other source) from which the Relevant Member purchases or otherwise obtains depth-of-book products, the depth-of-book products the Relevant Member purchases or otherwise obtains from each exchange (or other source), and the fees paid by the Relevant Member for each depth-of-book product.” Document request fifteen calls for: “All communications with SIFMA members referring or relating to the submission of jurisdictional declarations by any SIFMA members.”

<sup>2</sup> One of the entries covers documents dating from May 2014 to October 2014. See Ex. B.

<sup>3</sup> At most, these cases stand for the propositions that some courts do not require documents created after the onset of litigation to be included in a privilege log, and some courts do. See *Teledyne Instruments, Inc. v. Cairns*, No. 12-cv-854, 2013 WL 5781274, at \*15 (M.D. Fla Oct. 25, 2013).

issued to SIFMA had clear instructions on what information needed to be included in a privilege log, and a categorical privilege log ignores these instructions. SIFMA did not raise its preference for “categorical privilege logs” when it filed its motion to quash the subpoena, it failed to produce *any* privilege log when initially responding to the subpoena, and it waited nearly three weeks to produce a log that consists of two categories in a description that fills up one-third of a single page.

Based on the pleading before me, I DENY the request that SIFMA has waived privilege on the withheld documents, and ORDER SIFMA to produce, by Thursday, April 9, 2015, a privilege log in compliance with the instructions of the subpoena. The Exchanges shall have until Monday, April 13, 2015, to file any objections to SIFMA’s assertions of privilege.

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Brenda P. Murray  
Chief Administrative Law Judge