UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Application of: SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION for Review of Actions Taken by Self-Regulatory Organizations	Admin. Proc. File No. 3-15350 The Honorable Brenda P. Murray, Chief Administrative Law Judge

THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION'S OPPOSITION TO NYSE ARCA'S MOTION FOR ADVERSE INFERENCE

REDACTED VERSION FOR PUBLIC FILING

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INDEX OF EXHIBITS v

PRELIMINARY STATEMENT 1

ARGUMENT 3

I. SIFMA'S SUBPOENA RESPONSE WAS PROPER 4

A. If NYSE Arca Desired Discovery From SIFMA's Members, NYSE Arca Was Required To Send Third-Party Subpoenas, But It Chose Not To. 4

B. The Chief ALJ Recognized That NYSE Arca's Subpoena Sought Documents Potentially Outside SIFMA's Control, And SIFMA's Subpoena Response Tracked The Chief ALJ's Instruction. 6

C. Testimony At The Hearing Did Not Provide Any Reason To Second Guess SIFMA's Subpoena Response. 8

II. SIFMA'S EXPERT DISCLOSURES WERE PROPER. 11

III. NYSE ARCA IS NOT ENTITLED TO AN ADVERSE INFERENCE. 14

A. NYSE Arca Does Not, And Cannot, Allege The Requisite Level Of Culpability To Support An Adverse Inference. 14

B. NYSE Arca Did Not Adequately Describe The Adverse Inference That Supposedly Should Be Drawn. 15

C. NYSE Arca Did Not Identify Any Evidence That Is Missing And Would Have Supported Its Case. 16

D. The Supposedly Missing Evidence From SIFMA Members Was Not Peculiarly Within The Power Of SIFMA. 16

E. NYSE Arca Failed To Seek The Supposedly Missing Evidence From The Individual SIFMA Members. 16

F. The Requested Adverse Inference Is Contrary To The Testimony Given By The Fact Witness Called By NYSE Arca. 17

IV. NYSE ARCA SHOULD NOT BE ALLOWED TO EXPAND ITS ORAL MOTION THROUGH ITS REPLY BRIEF. 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Alexander Interactive, Inc. v. Adorama, Inc.,
No. 12-6608, 2014 U.S. Dist. LEXIS 2113 (S.D.N.Y. Jan. 6, 2014) 9

Allstate Ins. Co. v. Electrolux Home Prods., Inc.,
840 F. Supp. 2d 1072 (N.D. Ill. 2012) 13, 14

Bank of Crete, S.A. v. Koskotas,
733 F. Supp. 648 (S.D.N.Y. 1990) 18

Burgess v. United States,
553 U.S. 124 (2008) 17

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991) 14

In re Cheyenne Software, Inc. Securities Litig.,
No. 94-2771, 1997 U.S. Dist. LEXIS 24141 (E.D.N.Y. Aug. 18, 1997) 16

In re Citric Acid Litig.,
191 F.3d 1090 (9th Cir. 1999) 4

City of Arlington v. Tex. Oil & Gas Ass'n,
No. 02-13-00138, 2014 Tex. App. LEXIS 10486 (Tex. Ct. App. Sept. 18, 2014) 5

Czekalski v. LaHood,
589 F.3d 449 (D.C. Cir. 2009) 16, 17

Genentech, Inc. v. Trs. of the Univ. of Pa.,
No. 10-2037, 2011 U.S. Dist. LEXIS 128526 (N.D. Cal. Nov. 7, 2011) 10

Grosdidier v. Chairman, Broad. Bd. of Governors,
774 F. Supp. 2d 76 (D.D.C. 2011), *aff'd in part*, 709 F.3d 19 (D.C. Cir. 2013) 15

Hunt v. Washington State Apple Advertising Comm'n,
432 U.S. 333 (1977) 4

Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am. (UAW) v. NLRB, 459 F.2d 1329 (D.C. Cir. 1972) 18

Jordan v. City of Detroit,
557 F. App'x 450 (6th Cir. 2014) 15

Karn v. Ingersoll-Rand,
168 F.R.D. 633 (N.D. Ind. 1996) 13

McAdams v. United States,
297 F. App'x 183 (3d Cir. 2008) 14

In re NCAA Student-Athlete Name & Likeness Litig.,
No. 09-cv-01967, 2012 U.S. Dist. LEXIS 5087 (N.D. Cal. Jan. 17, 2012) 5, 7, 10

NetCoalition v. SEC,
715 F.3d 342 (D.C. Cir. 2013) 4

New Hampshire Motor Transp. Ass'n. v. Rowe,
324 F. Supp. 2d 231 (D. Maine 2004) 5

Nieman v. Hale,
No. 3:12-cv-2433-L-BN, 2014 U.S. Dist. LEXIS 54831 (N.D. Tex. Apr. 21, 2014) 8

NLRB v. Chester Valley, Inc.,
652 F.2d 263 (2d Cir. 1981) 18

Nosal v. Granite Park LLC,
269 F.R.D. 284 (S.D.N.Y. 2010) 8

Oil Heat Inst. of Oregon v. Nw. Natural Gas,
123 F.R.D. 640 (D. Or. 1988) 5, 7

Priority One Servs. v. W&T Travel Servs., LLC,
502 F. App'x 4 (D.C. Cir. 2013) 14

SEC v. Goble,
682 F.3d 934 (11th Cir. 2012) 15

Shcherbakovskiy v. Da Capo Al Fine, Ltd.,
490 F.3d 130 (2d Cir. 2007) 9

Sherwin-Williams Co. v. Spitzer,
No. 1:04-cv-185, 2005 U.S. Dist. LEXIS 18700 (N.D.N.Y. Aug. 24, 2005) 5, 6

Stanojev v. Ebasco Servs. Inc.,
643 F.2d 914 (2d Cir. 1981) 17

Stepnes v. Ritschel,
663 F.3d 952 (8th Cir. 2011) 14

Synopsys, Inc. v. Ricoh Co.,
Nos. C-03-2289, C-03-4669, 2006 U.S. Dist. LEXIS 47827 (N.D. Cal. July 5, 2006) 10

Talavera v. Shah,
638 F.3d 303 (D.C. Cir. 2011) 15

Thermal Design, Inc. v. Am. Soc'y of Heating, Refrigerating & Air-Conditioning Eng'rs, Inc.,
755 F.3d 832 (7th Cir. 2014) 4, 8

Treppel v. Biovail Corp.,
249 F.R.D. 111 (S.D.N.Y. 2008) 14

U.S. Int'l Trade Comm'n v. ASAT, Inc.,
411 F.3d 245 (D.C. Cir. 2005) 4, 8

United States v. West,
393 F.3d 1302 (D.C. Cir. 2005) 17

United States v. Williams,
113 F.3d 243 (D.C. Cir. 1997) 17

Vanity Fair Paper Mills, Inc. v. F.T.C.,
311 F.2d 480 (2d Cir. 1962) 18

Wells v. Orange Cnty. Sch. Bd.,
No. 05-479, 2006 U.S. Dist. LEXIS 81265 (M.D. Fla. Nov. 7, 2006) 16

Regulation

17 C.F.R. § 200.30-4(a) 9

Rules

SEC R. 222(a) 11

SEC R. 222(b) 11

INDEX OF EXHIBITS

Exhibit A	SIFMA's Response to Subpoena (Feb. 23, 2015)
Exhibit B	Email from Patrick Marecki to Counsel (Feb. 25, 2015 11:12 EST)
Exhibit C	Email from Kathleen Hitchins to Counsel (Mar. 6, 2015 10:27 EST)
Exhibit D	NYSE Arca Subpoena (Jan. 5, 2015)
Exhibit E	Documents Relied Upon by Terrence Hendershott, Ph.D., and Aviv Nevo, Ph.D.
Exhibit F	Professor Evans's List of Materials Relied Upon
Exhibit G	Professor Donefer's List of Materials Relied Upon
Exhibit H	Letter from Douglas W. Henkin to Chief ALJ Brenda P. Murray (Sept. 5, 2014)

The Securities Industry and Financial Markets Association ("SIFMA") respectfully submits this response in opposition to the oral motion made by counsel for NYSE Arca, Inc. ("NYSE Arca") on the final day of the hearing in this matter, which failed to cite any Securities and Exchange Commission ("SEC" or "Commission") authority. *See* Hearing Tr. ("Tr.") 1330:20-1332:11 (Apr. 20-24, 2015). The oral motion requested an adverse inference because of purported "discovery misconduct" about the evidence that non-party SIFMA members "would have said on the subject of subscribers switching and the like" had they been subpoenaed by NYSE Arca for the hearing, which they were not. For the reasons discussed below, the motion is frivolous and must be denied.

PRELIMINARY STATEMENT

Now that the evidentiary hearing mandated by the Commission to determine whether the depth-of-book data fees imposed by NYSE Arca are consistent with the Securities Exchange Act has concluded, it is clear why NYSE Arca has repeatedly tried to avoid a merits assessment of its supracompetitive fees. NYSE Arca bears the burden of proving that its depth-of-book fees are subject to significant competitive restraint. Yet its sole fact witness—a senior director in charge of all proprietary market data for NYSE Arca—was unaware that nine-year-old marketing material remains on the company's active website, could not identify [redacted], and could not identify the names of some of those alleged substitutes. Tr. 122:19-123:2; 125:24-126:9; 137:19-138:6; 64:1-2. In contrast, the actual data showed that when NYSE Arca started charging for its depth-of-book products, it experienced negligible subscriber loss. Tr. 90:13-91:25. And the "studies" commissioned by NYSE Arca and presented by its expert witnesses cannot change the fact that NYSE was able to raise its prices without losing any of its significant customers.

Rather than deal with the merits, NSYE Arca has tried to create sideshow after sideshow. It tried to compel SIFMA to produce protected attorney work product prepared during the course of this litigation. It tried to exclude unrebutted evidence of how depth-of-book data are used to comply with regulatory requirements. And it tried to strike the testimony of Professor Bernard Donefer because his direct testimony included screen shots of depth-of-book data that he obtained with the assistance of a SIFMA member. Each motion failed,[1] but NYSE Arca remains undeterred. NYSE Arca now seeks an adverse inference because Professor David Evans also had "discussions with SIFMA members." Tr. 1331:24. Tellingly, NYSE Arca does so alone—Nasdaq did not join in this sideshow.

The current motion is nothing more than a replay of NYSE Arca's failed motion to strike the testimony of Professor Donefer. Both gambits were premised on the notion that it was improper for SIFMA's experts to meet with SIFMA's members because SIFMA did not produce documents within the custody and control of those members. That premise is fundamentally flawed. SIFMA brings this challenge as a trade association representing the interests of its members, who are not parties.[2] As a trade association, SIFMA shares a common interest with its members, some of whom filed declarations on July 28, 2014, and two of whom met with SIFMA's experts prior to the hearing. But SIFMA's members are all distinct entities that SIFMA does not control for discovery purposes. To the extent NYSE Arca desired to obtain non-privileged information from SIFMA's members, it had the option of sending out non-party subpoenas. Indeed, at the first pre-hearing conference, NYSE Arca stated that it intended to do

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[1] *See* Tr. 7:23-9:11 (denying the motion to compel); Tr. 238:19-241:24 (denying the motion to exclude); Tr. 957:11-961:8 (denying the motion to strike).

[2] Indeed, the Exchanges blocked SIFMA's members from attending confidential portions of the hearing specifically because SIFMA's members are ***not*** parties. Tr. 14:25-15:4.

so, and the Chief Administrative Law Judge ("Chief ALJ") stated that it could. Yet NYSE Arca subsequently ***chose not*** to subpoena any SIFMA members.

Given that choice, NYSE Arca's request for discovery sanctions rings hollow—the only reason that NYSE Arca purportedly lacks information from SIFMA members is that NYSE Arca made a strategic decision not to pursue it. Regardless, the allegation of discovery misconduct is utterly without merit. SIFMA's subpoena response accurately and appropriately stated that it cannot compel its members to produce documents. Likewise, SIFMA's experts accurately and appropriately disclosed all of the materials upon which they relied, and NYSE Arca can point to no SEC rule that was violated.

The motion also fails because NYSE Arca has not established that it is entitled to an adverse inference. NYSE Arca did not, for example, move to enforce its subpoena after SIFMA objected that it cannot compel its members to produce documents. Nor did NYSE Arca establish the requisite culpability for the substantive discovery sanction that it now seeks. NYSE Arca also did not show that the supposedly missing evidence was peculiarly within SIFMA's control or that NYSE Arca had exercised diligence in pursuing it. Finally, NYSE Arca's vaguely-worded request for an adverse inference is contrary to the actual hearing evidence and would impermissibly allow NYSE Arca to escape its burden of proof.

For these reasons, and those discussed below, the motion must be denied.

ARGUMENT

The oral motion alleges that SIFMA failed to respond adequately to the subpoena it received from NYSE Arca on January 5, 2015, because SIFMA did not produce information within the custody and control of its individual members. Tr. 1330:24-1331:21. It also alleges that SIFMA's expert disclosures were inadequate. Tr. 1331:22-1332:1. It seeks an "adverse inference on what the SIFMA members would have said on the subject of subscribers switching

and the like." Tr. 1332:4-6. As discussed below, both allegations are meritless, and the request for an adverse inference is entirely inappropriate.

I. SIFMA'S SUBPOENA RESPONSE WAS PROPER.

A. If NYSE Arca Desired Discovery From SIFMA's Members, NYSE Arca Was Required To Send Third-Party Subpoenas, But It Chose Not To.

The D.C. Circuit held that SIFMA has standing to challenge fees charged by NYSE Arca. *NetCoalition v. SEC*, 715 F.3d 342, 347-48 (D.C. Cir. 2013). The SEC held that SIFMA could bring suit as an association if its members were aggrieved and required SIFMA to establish that they were through declarations or other appropriate evidence. Order Establishing Procedures And Referring Applications For Review To Administrative Law Judge For Additional Proceedings, Exchange Act Release No. 72182, at 12 (May 16, 2014) ("Referral Order"). The Chief ALJ reviewed the declarations and concluded that SIFMA's members were aggrieved for purposes of standing. Order on the Issues of Jurisdiction and Scheduling, Admin. Proc. Rulings Release No. 1921, at 9 (Oct. 20, 2014) ("Jurisdiction Order"). As a result, this matter proceeded—as the SEC contemplated—without "the participation of individual members." *Id.* at 8 (quoting Referral Order at 11) (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

In discovery, a party is responsible only for producing the materials or information within its possession, custody, and control. *See, e.g.*, *Thermal Design, Inc. v. Am. Soc'y of Heating, Refrigerating & Air-Conditioning Eng'rs, Inc.*, 755 F.3d 832, 838-39 (7th Cir. 2014); (agreeing "the test is whether the party has a legal right to obtain the evidence") (quotation marks and brackets omitted); *In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999) ("the legal control test is the proper standard"); *see also U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 254 (D.C. Cir. 2005) (refusing to enforce an ALJ subpoena where there was no "support for

a determination of control as a matter of law"). Associations typically do not have custody or control over their members' documents or information. *See, e.g.*, *In re NCAA Student-Athlete Name & Likeness Litig.*, No. 09-cv-01967, 2012 U.S. Dist. LEXIS 5087, at *12-18 (N.D. Cal. Jan. 17, 2012); *Oil Heat Institute of Oregon v. Northwest Natural Gas*, 123 F.R.D. 640, 642 (D. Or. 1988).

Nevertheless, adverse litigants often desire discovery from the association's members. *See City of Arlington v. Tex. Oil & Gas Ass'n*, No. 02-13-00138, 2014 Tex. App. LEXIS 10486, at *9-10 (Tex. Ct. App. Sept. 18, 2014). The solution is not, as NYSE Arca would have it, to transform the association into a "clearinghouse" for discovery requests targeting "information that would inextricably come from the individual members and not [the association]." *Sherwin-Williams Co. v. Spitzer*, No. 1:04-cv-185, 2005 U.S. Dist. LEXIS 18700, at *20 (N.D.N.Y. Aug. 24, 2005). Rather, the solution is to require litigants that need information from an association's members to use "third-party discovery." *New Hampshire Motor Transp. Ass'n. v. Rowe*, 324 F. Supp. 2d 231, 236-37 & n.5 (D. Maine 2004).

In fact, NYSE Arca recognized that it might be required to subpoena SIFMA members at the very inception of this matter. At the first prehearing conference, counsel for NYSE Arca stated that his client desired to issue subpoenas to obtain information from SIFMA's members regarding both jurisdiction and the merits. *See* Prehearing Conf. Tr. 14:12-20 (June 23, 2014) (statement of Douglas Henkin).[3] The Chief ALJ responded that "if they want subpoenas, I have subpoena authority. Send them to my office." *Id.* at 17:10-13.

[3] The full quote: "We think we need discovery in order to test some of the assertions that [SIFMA members] make, particularly if it's going to be something potentially more than jurisdiction. So what I would suggest is that if you're giving them 30 days to put in whatever their submissions are going to be, then you give the respondents 30 days to respond, including, if necessary, by asking Your Honor to issue subpoenas."

Three hundred and one days elapsed between that conference and the commencement of the hearing on April 20, 2015. At no point did NYSE Arca request a subpoena for SIFMA's members. That inaction contrasts starkly with NYSE Arca's conduct in subpoenaing the Financial Information Services Division of the Software & Information Industry Association ("FISD"). SIFMA first informed NYSE Arca that Professor Donefer would be testifying on March 6, 2015. Within *five days*, NYSE Arca had drafted, the Chief ALJ had approved and NYSE Arca served a subpoena to FISD for documents related to a conference at which Professor Donefer moderated a panel.

The reason NYSE Arca made a strategic decision not to subpoena SIFMA members—either for documents in discovery or for testimony at the hearing—is unknown. But, having made that decision, NYSE Arca must now live with it. This is particularly so in that NYSE Arca can point to no prejudice—no SIFMA member testified and SIFMA did not offer any member documents as exhibits.

B. The Chief ALJ Recognized That NYSE Arca's Subpoena Sought Documents Potentially Outside SIFMA's Control, And SIFMA's Subpoena Response Tracked The Chief ALJ's Instruction.

NYSE Arca's subpoena sought to use SIFMA as a "clearinghouse" for discovery requests targeting SIFMA members. *Sherwin-Williams*, 2005 U.S. Dist. LEXIS 18700, at *20. SIFMA moved to quash because the subpoena "purport[ed] to require SIFMA to produce documents outside its possession, custody, or control." SIFMA Mot. to Quash, 7-9 (Jan. 22, 2015). In opposition, NYSE Arca claimed that SIFMA must produce any materials that it has the "practical ability" to obtain. NYSE Arca Opp. to Mot. to Quash, 3-4 (Jan. 29, 2015).

Although the subpoena was not quashed, the Chief ALJ explicitly stated that if "SIFMA does not have or *cannot compel* production of responsive documents from its members, **it should state so** in its document production." Order on Motion to Quash, Admin. Proc. Rulings Release

No. 2277 (Feb. 3, 2015) (emphasis added). The Chief ALJ thus adopted the settled rule that associations do not have control of member documents, and implicitly rejected NYSE Arca's overbroad interpretation of "control" for discovery purposes.

Consistent with that Order, SIFMA provided its subpoena responses to NYSE Arca on February 23, 2015. The response stated:

> Pursuant to the February 3 Order, SIFMA states that it cannot compel the production of documents responsive to the Subpoena from its members. Nothing in SIFMA's governing documents establish any right of SIFMA to compel its members to produce responsive documents at SIFMA's request.

SIFMA's First Response to Subpoena, 2 (Feb. 23, 2015) (Exhibit A). The response that SIFMA "cannot compel" its members to produce information directly tracks the instruction given by the Chief ALJ and accurately reflects the law—absent a legal right to compel its members to produce responsive materials, SIFMA need not make productions on their behalf. *See, e.g., In re NCAA Student-Athlete Name & Likeness Litig.*, 2012 U.S. Dist. LEXIS 5087, at *13-18; *Oil Heat Institute of Oregon*, 123 F.R.D. at 642.

The core of the oral motion is that this subpoena response by SIFMA was "not accurate." Tr. 1332:2-4. To support this assertion, counsel twice stated that SIFMA had disclaimed any "ability to get information" from its members. Tr. 1331:18-19, 1332:3. That is not what SIFMA said. The subpoena response actually said that SIFMA "cannot compel" information from its members. Exhibit A at 2.

There is no support that this statement was "not accurate." NYSE Arca has no basis to argue, much less evidence demonstrating, that SIFMA can compel its members to produce information. NYSE Arca therefore created a straw man. Even if some members may voluntarily provide information or consent to attend meetings, the "ability to get" information on a voluntary basis has nothing to do with what SIFMA stated in the subpoena response. The ability to seek

voluntary cooperation certainly does not amount to the "legal right" or "legal control" necessary to turn SIFMA into a clearinghouse for discovery requests targeting its members. *See, e.g.*, *Thermal Design, Inc.*, 755 F.3d at 838-39; *see also U.S. Int'l Trade Comm'n*, 411 F.3d at 254 (refusing to enforce an administrative subpoena where there was no "support for a determination of control as a matter of law").[4]

C. Testimony At The Hearing Did Not Provide Any Reason To Second Guess SIFMA's Subpoena Response.

As the party seeking discovery sanctions, NYSE Arca bears a high burden of both proof and persuasion. *See, e.g.*, *Nieman v. Hale*, No. 3:12-cv-2433-L-BN, 2014 U.S. Dist. LEXIS 54831, at *8 (N.D. Tex. Apr. 21, 2014). Here, part of that burden is a showing that NYSE Arca could not have subpoenaed SIFMA's members directly. *See Nosal v. Granite Park LLC*, 269 F.R.D. 284, 290 (S.D.N.Y. 2010) ("[A] party upon whom a discovery demand is served need not seek such documents from third parties if compulsory process against the third parties is available to the party seeking the documents.") (quotation marks and alterations omitted); *see also Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007) (calling this a

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[4] Counsel for NYSE Arca also vaguely referred to SIFMA's policies when moving for an adverse inference. *See* Tr. 1331:19-21 (attributing to SIFMA the statement that "'as a matter of policy, we don't discuss such things with our members'"). SIFMA's actual subpoena response stated only that its members should not have discussions that might give rise to antitrust liability:

> Additionally, SIFMA and its members refrain from sharing or exchanging information relating to the subject matter of many of the Subpoena's requests pursuant to SIFMA's policies, which state in relevant part 'representatives of competing firms should, at all times, avoid discussing actual prices charged or to be charged for products and services,' and 'no discussion about forming a boycott should take place,' and provide guidance on limitations on information exchanges among SIFMA members for matters such as costs and business plans.

Exhibit A at 2 (citing SIFMA Antitrust Booklet, 4 (Nov. 2014), http://bit.ly/1HZS7CG). That SIFMA advises its members to avoid antitrust liability should not be surprising.

"fairly obvious" rule). As discussed above, NYSE Arca initially indicated that it would request such subpoenas, but abandoned the effort.

In addition, NYSE Arca never objected to SIFMA's subpoena responses before jumping to the conclusion that sanctions are needed. After SIFMA responded that it could not compel its members to produce responsive information, SIFMA and NYSE Arca corresponded on that precise point. *See* Email from Patrick Marecki to Counsel (Feb. 25, 2015 11:12 EST) (Exhibit B); Email from Kathleen Hitchins to Counsel (Mar. 6, 2015 10:27 EST) (Exhibit C). NYSE Arca did not further press the point. NYSE Arca certainly institute subpoena enforcement proceedings, which requires an action in federal court. *See* 17 C.F.R. § 200.30-4(a)(10); *see also* Tr. 9:3-7. Because it did not, the underlying dispute—whether SIFMA controls its members—was not litigated. NYSE Arca cannot turn around and seek substantive discovery sanctions based on an issue it was unwilling to air in court.

Most importantly, NYSE Arca also bears the burden of proving that SIFMA has control over its members. *See, e.g., Alexander Interactive, Inc. v. Adorama, Inc.*, No. 12-6608, 2014 U.S. Dist. LEXIS 2113, at *10 (S.D.N.Y. Jan. 6, 2014) (collecting cases). The testimony at the hearing showed that:

- Professor Donefer was approached about serving as an expert by a Wells Fargo employee, Tr. 827:16-828:10;
- Professor Donefer had coffee with the same Wells Fargo employee at the FISD conference mentioned above, Tr. 828:11-15;
- Professor Donefer moderated a panel at the FISD conference that may have included employees of other SIFMA members, Tr. 941:22-949:6;
- Professor Donefer was assisted in obtaining screen shots of a Bloomberg terminal by Bloomberg employees, Tr. 826:15-827:12; 846:2-850:25, 879:16-883:2;
- Professor Donefer discussed depth-of-book market data with a senior Bloomberg employee ***after*** his report was submitted, Tr. 852:16-856:21, 876:9-877:6;

Based on the above testimony, counsel for NYSE Arca moved to strike Professor Donefer's entire testimony. Tr. 957:11-959:6. The motion was denied from the bench, with the Chief ALJ ruling that the testimony failed to show that any SIFMA member had been deeply involved in Professor Donefer's report. Tr. 960:24-961:8. *A fortiori*, Professor Donefer's testimony did not show SIFMA's control over any of its members.

The cross-examinations of Professor Evans similarly yielded no evidence of control. Professor Evans took a trip to New York City in February 2015 to discuss background information concerning the equity trading industry with employees of two SIFMA members. Tr. 1101:2-1104:20, 1189:23-1193:8, 1221:6-1224:7. Professor Evans also testified that he might have been able to obtain some additional information from SIFMA members if he had needed to, but the need never arose. Tr. 1106:17-1107:8.

Such testimony does not come within a country mile of showing that SIFMA can compel its members to produce responsive materials. At most, the testimony shows that Citigroup and Bloomberg employees voluntarily cooperated with SIFMA. A finding of discovery control requires *much more* than a showing of voluntary cooperation. *See, e.g.*, *NCAA Student-Athlete Name & Likeness Litig.*, 2012 U.S. Dist. LEXIS 5087, at *17 (finding no control where there was "no evidence presented that the NCAA and its members have done more than voluntarily cooperate"); *Genentech, Inc. v. Trs. of the Univ. of Pa.*, No. 10-2037, 2011 U.S. Dist. LEXIS 128526, at *9 (N.D. Cal. Nov. 7, 2011) (a non-party's "willing[ness] to provide data" to the party was not proof that the party had control or that the non-party had an "oblig[ation] to hand over materials"); *cf. Synopsys, Inc. v. Ricoh Co.*, Nos. C-03-2289, C-03-4669, 2006 U.S. Dist. LEXIS 47827, at *14 (N.D. Cal. July 5, 2006) (finding control because "the facts here suggest that there is ***more than*** just voluntary cooperation") (emphasis added).

* * *

The request for sanctions based on SIFMA's subpoena response must be denied. That NYSE Arca had the opportunity to take discovery directly from SIFMA's members but decided not do so is sufficient cause to deny the oral motion. That NYSE Arca chose not to challenge SIFMA's subpoena response in court is sufficient cause to reject the oral motion. Most importantly, NYSE Arca did not and cannot meet its burden of showing that SIFMA has control over its members, and it chose not to pursue a motion to compel. All that has been shown is that two members voluntarily cooperated with SIFMA's experts. Under settled law, voluntary cooperation is not enough to create control for discovery purposes, and it certainly is not enough to justify the imposition of sanctions.

II. SIFMA'S EXPERT DISCLOSURES WERE PROPER.

The other allegation of purported discovery misconduct pertains to the expert disclosures made by Professor Donefer and Professor Evans on March 26, 2015. *See* Tr. 1331:22-1332:1. NYSE Arca's complaint is that the disclosures did not state that the experts had met with Bloomberg or Citigroup. That argument is baseless. In reality, SIFMA's experts complied with all relevant requirements—and mirrored NYSE Arca's own disclosures—by disclosing the materials they *relied on* in forming their positions.

NYSE Arca's oral motion did not cite any SEC rule because none supports its position. Pursuant to SEC Rule 222(a)(4), a party must disclose "a brief summary of [the expert's] expected testimony." Under Rule 222(b), a party must disclose "a statement of the expert's qualification, a listing of other proceedings in which the expert has given expert testimony, and a list of publications authored or co-authored by the expert." SIFMA's disclosures provided just such information.

The scheduling orders in this matter did not require any additional expert disclosures beyond those required by Rule 222. The initial scheduling order directed the parties to exchange "a list of their witnesses, copies of exhibits, and any written expert testimony." Jurisdiction Order at 10. The revised scheduling order contained the same direction. Order on Joint Motion to Extend Hearing and Prehearing Schedules, Admin. Proc. Rulings Release No. 2042 (Nov. 21, 2004). SIFMA's disclosures clearly included written expert testimony.

The parties' conduct also demonstrates that the SIFMA's experts made proper disclosures. From the time of the initial discovery dispute regarding the scope of the subpoena that SIFMA could send to the Exchanges, the parties consistently indicated that they would exchange the materials on which their experts relied. Prehearing Conf. Tr. 28:16-30:3 (Dec. 18, 2014); *see also* Prehearing Conf. Tr. 67:21-24 (Dec. 30, 2014). NYSE Arca's January 5, 2015 subpoena to SIFMA reiterated that position. It requested the production of all "documents, facts, and data *relied on* by SIFMA's testifying experts in forming their opinions." NYSE Arca Subpoena, Request 5 (Jan. 5, 2015) (emphasis added) (Exhibit D). A few weeks later (before SIFMA's subpoena responses were due), NYSE Arca provided its own expert disclosures, which also were limited to reliance materials. *See* Exhibit E ("Documents *Relied Upon* by Terrence Hendershott, Ph.D. and Aviv Nevo, Ph.D.") (emphasis added).

Because NYSE Arca's subpoena and its expert disclosures were limited to reliance materials, Professor Donefer and Professor Evans also disclosed only the materials upon which they relied in reaching their opinions. *See* Professor Evans's List of Materials Relied Upon (Exhibit F); Professor Donefer's List of Materials Relied Upon (Exhibit G). Where materials obtained from SIFMA members were relied upon, they were disclosed. Relevant here, Professor

Donefer's list states "I visited the offices of Bloomberg Tradebook for purposes of compiling the screenshots in Appendix A of my report." Exhibit G at 3.

But when materials were not relied upon by the expert, they were not disclosed. For example, an assistant for Professor Evans may have taken notes during his trip to New York in February 2015. Tr. 1226:1-23. But those notes were not disclosed because, as Professor Evans repeatedly explained, his meetings with Citigroup and Bloomberg employees were for general background purposes and did not provide any information that Professor Evans depended on (*i.e.*, relied upon) to reach his opinions. *See, e.g.*, Tr. 1101:6-18, 1102:17-21, 1104:22-25, 1106:3-16, 1190:21-1192:1, 1224:21-1225:25. Professor Donefer also clearly testified that he did not rely on any SIFMA member for any purpose other than generating the screenshots included in his report. Tr. 969:5-970:10; *accord* Tr. 829:3-20; Tr. 855:19-856:21.

NYSE Arca has no good faith basis to impeach that testimony. Nor does it have any legitimate basis to expand the scope of its subpoena beyond reliance materials. Moreover, to the extent that the oral motion implies that "reliance materials" means something broader than its plain meaning, that assertion is wrong as a matter of law and logic. Federal law recognizes a clear and important distinction between the materials that an expert "relies upon" to form her opinions and the materials that an expert "considers" while preparing her report. *See, e.g.*, *Allstate Ins. Co. v. Electrolux Home Prods.*, Inc., 840 F. Supp. 2d 1072, 1080 (N.D. Ill. 2012) (citing, *inter alia*, *Karn v. Ingersoll-Rand*, 168 F.R.D. 633, 635 (N.D. Ind. 1996)). For expert witnesses, the phrase "relies upon" means that the expert actually "depend[ed] on the information" when reaching her opinions. *Karn*, 168 F.R.D. at 635. The word "considered" is much broader, and it includes anything that the witness "take[s] into account." *Id.* Put another

way, materials considered include any "information an expert actively reviews and contemplates, and then chooses not to rely upon." *Allstate Ins.*, 840 F. Supp. 2d at 1080.

Here, for all the reasons discussed above, the parties undertook to exchange (and did exchange) only reliance materials, and not the broader universe of everything that the experts may have considered. SIFMA's expert disclosures therefore were proper.

III. NYSE ARCA IS NOT ENTITLED TO AN ADVERSE INFERENCE.

Discovery sanctions that could affect the outcome of a litigation—including adverse inferences—are among the most severe and extreme sanctions that can be granted. *See Stepnes v. Ritschel*, 663 F.3d 952, 965 (8th Cir. 2011); *McAdams v. United States*, 297 F. App'x 183, 186 (3d Cir. 2008); *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 120 (S.D.N.Y. 2008). NYSE Arca is not entitled to any relief, much less the extraordinary relief requested in the oral motion. As discussed above, there was no discovery misconduct in this matter that can be attributed to SIFMA. But even if that were not the case, the oral motion would still fail for at least *six* independent reasons.

A. NYSE Arca Does Not, And Cannot, Allege The Requisite Level Of Culpability To Support An Adverse Inference.

The oral motion fails because NYSE Arca cannot establish the requisite culpability. NYSE Arca cited no statute, no regulation, no rule of practice, and no legal doctrine when it moved for discovery sanctions. Tr. 1330:20-1332:11. Given that silence, it must have meant to invoke the inherent authority to issue sanctions that is "incidental to all Courts." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991). Sanctions imposed pursuant to inherent authority require a showing of "bad faith," which must be demonstrated by "clear and convincing evidence." *Priority One Servs. v. W&T Travel Servs., LLC*, 502 F. App'x 4, 6 (D.C. Cir. 2013) (collecting cases).

Even when a movant relies on a clear source of law, culpability is required before an adverse inference can be drawn. The Eleventh Circuit recently ruled that no adverse inference could be drawn against the SEC for spoliation of evidence without evidence of bad faith. *See SEC v. Goble*, 682 F.3d 934, 947 (11th Cir. 2012). The D.C. Circuit has allowed an adverse inference to be drawn under circumstances when destruction of evidence was undisputed and the jury could infer intentional misconduct. *See Talavera v. Shah*, 638 F.3d 303, 311-12 (D.C. Cir. 2011); *see also Grosdidier v. Chairman, Broad. Bd. of Governors*, 774 F. Supp. 2d 76, 104 (D.D.C. 2011) (noting that an adverse inference generally "is not warranted" absent bad faith).[5]

The oral motion did not claim that SIFMA acted in bad faith, that intentional misconduct had occurred, or that culpability could be established. *See* Tr. 1330:20-1332:11. Counsel for NYSE Arca claimed that SIFMA's subpoena response was "not accurate." Tr. 1332:2-4. As discussed above, SIFMA's actual response was entirely accurate and NYSE Arca declined to challenge that response in court. But even if the claim of inaccuracy could be taken at face value, "inaccuracy" does not equal "culpability."

B. NYSE Arca Did Not Adequately Describe The Adverse Inference That Supposedly Should Be Drawn.

The oral motion separately fails because NYSE Arca seeks an adverse inference about what *unidentified* SIFMA members would have said about "subscribers switching and ***the like***." Tr. 1332:4-6 (emphasis added). The failure to precisely "describe what adverse inference should be drawn" is alone cause to deny the motion. *Jordan v. City of Detroit*, 557 F. App'x 450, 457

[5] The only prior decision that SIFMA could find by an SEC administrative law judge granting an adverse inference related to missing evidence did so because the Commission had proven that the defendant acted with a "culpable state of mind" in failing to produce a document that it was "required to keep." *In the Matter of Harrison Securities, Inc.*, Admin. File No. 3-11084, at 9 & 59 n.6 (Sept. 21, 2004).

(6th Cir. 2004) (unpublished) (affirming denial of adverse inference in part because the movant failed to adequately specify the inference requested).

C. NYSE Arca Did Not Identify Any Evidence That Is Missing And Would Have Supported Its Case.

The oral motion next fails because NYSE Arca cannot point to any specific document or testimony that was withheld and could reasonably be expected to support its case. *See, e.g.*, *Wells v. Orange Cnty. Sch. Bd.*, No. 05-479, 2006 U.S. Dist. LEXIS 81265, at *7 (M.D. Fla. Nov. 7, 2006) (no adverse inference where the movant did not identify "specific documents which were spoliated"); *In re Cheyenne Software, Inc. Sec. Litig.*, No. 94-2771, 1997 U.S. Dist. LEXIS 24141, at *4 (E.D.N.Y. Aug. 18, 1997) (no adverse inference where the movants "ha[d] not identified with specificity any information that is unavailable"). Here, and consistent with the Commission's directive, SIFMA offered evidence from its members to establish associational standing. That is all that was required. There was no evidence withheld.

D. The Supposedly Missing Evidence From SIFMA Members Was Not Peculiarly Within The Power Of SIFMA.

The oral motion also fails because NYSE Arca was required to show that the supposedly missing evidence was "peculiarly within the power of [SIFMA] to produce." *Czekalski v. LaHood*, 589 F.3d 449, 455 (D.C. Cir. 2009). Evidence regarding "what the SIFMA members would have said on the subject of subscribers switching and the like," Tr. 1332:4-6, is not within SIFMA's power at all, let alone peculiarly so. Rather, such alleged evidence lies within the custody and control of each individual member.

E. NYSE Arca Failed To Seek The Supposedly Missing Evidence From The Individual SIFMA Members.

NYSE Arca also was required to seek the supposedly missing evidence directly from the SIFMA members before seeking an adverse inference. *See Czekalaski*, 589 F.3d at 455 (no

adverse inference where the movant failed to "describe[] any attempt on her part to obtain" the missing evidence). For example, in *United States v. West*, the D.C. Circuit rejected a request for an adverse inference because the defendant had not "sought or subpoenaed a copy" of the relevant document from the third-party custodian. 393 F.3d 1302, 1310 (D.C. Cir. 2005), *abrogated on other grounds by Burgess v. United States*, 553 U.S. 124 (2008). And, in *United States v. Williams*, the D.C. Circuit held that even where the facts otherwise warranted an adverse inference, the request should be denied because the defendant's counsel failed to diligently pursue the missing witness. 113 F.3d 243, 246 (D.C. Cir. 1997). The court explained that the better inference to be drawn from defense counsel's lack of diligence was that "the defense is no more anxious to call the witness than the prosecution." *Id.*

Just so here. Counsel for NYSE Arca made a strategic decision not to subpoena any SIFMA members. In light of that decision, NYSE Arca cannot complain about their absence.

F. The Requested Adverse Inference Is Contrary To The Testimony Given By The Fact Witness Called By NYSE Arca.

An adverse inference cannot to be used to either contradict actual evidence in the record or fill a gap in the record. *See, e.g.*, *In re H.J. Meyers & Co., Inc.*, Admin Proc. No. 3-10140, at 27 (Aug. 9, 2002) ("An adverse inference may be employed to complete a chain of reasoning on a point partially established by direct evidence, but it cannot be used to fill a void where there is otherwise no evidence.") (citing *Stanojev v. Ebasco Servs. Inc.*, 643 F.2d 914, 923-24 n.7 (2d Cir. 1981)). Here, NYSE Arca seeks an adverse inference that SIFMA members were "switching" their subscriptions of depth-of-book data products in response to NYSE Arca's fee increases. Nothing in the record supports that conclusion. Rather, NYSE Arca's own fact witness testified that he could not identify [redacted]. Tr. 137:19-138:6 (testimony of

James Brooks). Likewise, the unrebutted evidence from NYSE Arca was that [redacted]. Tr. 359:19-23. The oral motion impermissibly seeks to use an adverse inference to undo that testimony.

Finally, allowing NYSE Arca to erase hearing testimony would be especially improper because NYSE Arca bears the burden of proof. *See, e.g.*, Referral Order at 15 n.88 ("Exchange Act Section 19(f) places the burden on an SRO to establish, among other things, that its challenged rule is "consistent with the purposes of" the Exchange Act."). Adverse inferences based on the "non-production of evidence" generally are not available to the "party having the burden of persuasion." *Vanity Fair Paper Mills, Inc. v. F.T.C.*, 311 F.2d 480, 486 (2d Cir. 1962). "[N]o unfavorable inference may be drawn" against the unburdened party if it "has good reason to believe that its opponent has failed to meet its burden of proof." *Bank of Crete, S.A. v. Koskotas*, 733 F. Supp. 648, 654 (S.D.N.Y. 1990) (citations omitted); *see also NLRB v. Chester Valley, Inc.*, 652 F.2d 263 (2d Cir. 1981) (citing *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am, (UAW) v. NLRB*, 459 F.2d 1329, 1338 (D.C. Cir. 1972)).

IV. NYSE ARCA SHOULD NOT BE ALLOWED TO EXPAND ITS ORAL MOTION THROUGH ITS REPLY BRIEF.

Given how serious motions for substantive discovery sanctions are, it is surprising that NYSE Arca chose to move for sanctions orally. It is doubly surprising that NYSE Arca did so without identifying the legal basis for its motion, *supra* 11-12, while mischaracterizing SIFMA's subpoena response, *supra* 6-8, failing to identify any missing evidence, *supra* 16, and failing to specify the precise adverse inference it wished to draw, *supra* 15-16.

These shortcomings of the oral motion are fatal, and NYSE Arca should not be allowed to expand, supplement, or amend its motion through a reply brief. As NYSE Arca once put it, a rebuttal filing should not be "more substantive" than an opening motion or "contain[] arguments

not articulated therein." Letter from Douglas W. Henkin to Chief ALJ Brenda P. Murray (Sept. 5, 2014) (Exhibit H).

CONCLUSION

For the foregoing reasons, the oral motion for discovery sanctions should be denied.

Dated: May 4, 2015

Respectfully submitted,

SIDLEY AUSTIN LLP

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HL Rogers
Eric D. McArthur
Benjamin Beaton
Jeffrey J. Young
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Counsel for SIFMA

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Application of: SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION for Review of Actions Taken by Self-Regulatory Organizations	Admin. Proc. File No. 3-15350 The Honorable Brenda P. Murray, Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2015, I caused a redacted, public copy of the foregoing Securities Industry and Financial Markets Association's Opposition to NYSE Arca's Motion for Adverse Inference to be served on the parties listed below via First Class mail:

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

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

Joshua Lipton
Daniel G. Swanson
Amir C. Tayrani
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Jacob W. Buchdahl
Susman Godfrey LLP
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New York, NY 10022

Dated: May 5, 2015

HL Rogers

EXHIBIT A

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Application of: SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION for Review of Actions Taken by Self-Regulatory Organizations	Admin. Proc. File No. 3-15350 The Honorable Brenda P. Murray, Chief Administrative Law Judge

SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION'S FIRST RESPONSE TO THE SUBPOENA *DUCES TECUM* OF NASDAQ STOCK MARKET LLC AND NYSE ARCA, INC.

The Securities Industry and Financial Markets Association ("SIFMA") hereby submits its first response to the subpoena *duces tecum* dated January 5, 2015 (the "Subpoena") issued at the request of Nasdaq Stock Market LLC ("Nasdaq") and NYSE Arca, Inc. ("NYSE Arca") (collectively, the "Exchanges").

GENERAL RESPONSE

On January 23, 2015, SIFMA filed an application to quash the Subpoena because, among other reasons, the Subpoena purported to require SIFMA to produce certain responsive documents that are not within SIFMA's possession, custody, or control, but instead are exclusively in the possession of its members. Chief Administrative Law Judge Brenda P. Murray (the "Chief ALJ") denied SIFMA's application to quash in a February 3, 2015 Order, noting that "[i]f SIFMA does not have or cannot compel production of responsive documents from its members, it should state so in its document production." *In the Matter of SIFMA*, Admin. Proc. Rulings Release No. 2277 (Feb. 3, 2015) ("February 3 Order").

Pursuant to the February 3 Order, SIFMA states that it cannot compel the production of documents responsive to the Subpoena from its members. Nothing in SIFMA's governing documents establish any right of SIFMA to compel its members to produce responsive documents at SIFMA's request. Additionally, SIFMA and its members refrain from sharing or exchanging information relating to the subject matter of many of the Subpoena's requests pursuant to SIFMA's policies, which state in relevant part "representatives of competing firms should, at all times, avoid discussing actual prices charged or to be charged for products and services," and "no discussion about forming a boycott should take place," and provide guidance on limitations on information exchanges among SIFMA and members for matters such as costs and business plans. *See* SIFMA Antitrust Booklet (Nov. 2014), *available at* http://www.sifma.org /Services/Standard-Forms-and-Documentation/Cross-Product/Antitrust-Compliance-Booklet/.

Accordingly, SIFMA's responses to the Subpoena are based upon those documents in its possession, custody, or control.

Document Request No. 1

> *Documents sufficient to identify, for each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, the total number of subscribers for each product and any changes in the number of subscribers on a monthly basis from the time the Rule Changes were adopted to the present.*

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 2

> *Documents sufficient to identify, for each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, the aggregate fees charged to subscribers for*

the products under those Rule Changes on a monthly basis from the time the Rule Changes were adopted to the present.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 3

Documents sufficient to identify, for each Relevant Member who subscribes to the depth-of-book products that SIFMA contends are the subject of the Rule Changes, Nasdaq's and NYSE Arca's shares of the Relevant Member's order flow and any changes in those shares throughout the period from the time the Rule Changes were adopted to the present.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 4

Marketing, promotion, and advertising materials, for each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, used to promote the products (including any packages or suites of data offered by the Relevant Member, whether or not they specifically identify the depth-of-book products that are the subject of the Rule Changes) from the time the Rule Changes were adopted to the present.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 5

The documents, facts, and data relied on by SIFMA's testifying experts in forming their opinions, submitted on or before February 23, 2015 in conjunction with the list of witnesses, copies of exhibits, and any written expert testimony that the scheduling order requires SIFMA to disclose.

On January 12, 2015, subsequent to the issuance of the Subpoena, Nasdaq filed a Consent Motion to Extend Prehearing Schedule, which requested an extension for the parties' pre-trial deadlines for exchanging witness lists, copies of exhibits, and written expert testimony. The

Chief ALJ granted the motion on January 13, 2015, thereby extending SIFMA's deadline to March 2, 2015 for the submission of its witness list, copies of exhibits, and written expert testimony. *In the Matter of SIFMA*, Admin. Proc. Rulings Release No. 2212 (Jan. 13, 2015). In light of this amended pre-trial deadline, SIFMA will be in a position to provide responsive information the week of March 2, 2015.

Document Request No. 6

> *For each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, Documents provided to decision-makers on setting or changing fees charged to subscribers for the depth-of-book products that are the subject of the Rule Changes sufficient to identify Your considerations and reasons for setting or maintaining the fees charged to the Relevant Member's customers for those products, including Documents sufficient to identify Your reasons for setting fees at a particular level, or changing prices.*

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 7

> *For each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, the subscriber fee schedules for those products.*

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 8

> *For each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, Documents sufficient to identify which products You have identified as substitute or alternative products for those depth-of-book products, as well as Your strategy for choosing between those depth-of-book products and the substitute or alternative products.*

SIFMA has identified no documents responsive to this Request in its possession, custody,

or control.

Document Request No. 9

> *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.*

SIFMA has identified no non-privileged documents responsive to this Request in its possession, custody, or control.

Document Request No. 10

> *For each Relevant Member, each communication to any exchange in which the Relevant Member either threatened to reduce order flow or announced that the Relevant Member was reducing order flow based in whole or in part on that exchange's depth-of-book data pricing, pricing policies, or pricing actions or proposals.*

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 11

> *For each Relevant Member, each communication to any exchange in which the Relevant Member offered to increase or agreed to increase its order flow to that exchange in return for a reduction or limitation on depth-of-book data pricing.*

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 12

> *For each Relevant Member, each communication to any exchange in which the Relevant Member either threatened to divert or stated that it would divert any purchases of depth-of-book data products to another source of data.*

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 13

For each Relevant Member, all Documents referring or relating to any decision to route order flow to or from any exchange, or any decision to modify any purchases of depth-of-book data products, based on that exchange's depth-of-book data pricing, pricing policies, or pricing actions or proposals.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 14

For each Relevant Member who submitted a jurisdictional declaration in conjunction with SIFMA's July 29, 2014 filing, all Documents supporting or contradicting the assertion that the level of the prices charged for the specific depth-of-book products that are the subject of the Rule Changes are so high as to be outside a reasonable range of fees under the Exchange Act.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 15

All communications with SIFMA members referring or relating to the submission of jurisdictional declarations by any SIFMA members.

SIFMA has identified no non-privileged documents responsive to this Request in its possession, custody, or control.

Document Request No. 16

Documents sufficient to identify each and all Relevant Members.

As of the date of this Response, Relevant Members, as defined by the Subpoena, are as follows: Bank of America; Bloomberg L.P.; Charles Schwab & Co., Inc.; Citigroup Global

Markets Inc.; Credit Suisse Securities (USA), LLC; Goldman, Sachs & Co.; J.P. Morgan Chase & Co.; Liquidnet, Inc.; and Wells Fargo and Company. SIFMA's response here shall not limit or impede its ability to present at the hearing before the Chief ALJ evidence or testimony from a member that is not listed in this response.

Dated: February 23, 2015

Respectfully submitted,

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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Application of: SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION for Review of Actions Taken by Self-Regulatory Organizations	Admin. Proc. File No. 3-15350 The Honorable Brenda P. Murray, Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2015, I caused a copy of the foregoing Securities Industry And Financial Markets Association's First Response To The Subpoena *Duces Tecum* Of Nasdaq Stock Market LLC And NYSE Arca, Inc. to be served on the parties listed below via First Class Mail:

Douglas W. Henkin
Seth T. Taube
Joseph Perry
Baker Botts LLP
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New York, NY 10112

Joshua Lipton
Daniel G. Swanson
Eugene Scalia
Amir C. Tayrani
Thomas M. Johnson, Jr.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dated: February 23, 2015

Jill Rogers

EXHIBIT B

Hitchins, Kathleen

From: patrick.marecki@bakerbotts.com
Sent: Wednesday, February 25, 2015 11:12 AM
To: Hitchins, Kathleen; douglas.henkin@bakerbotts.com; Seth.Taube@bakerbotts.com; joseph.perry@bakerbotts.com; ssusman@susmangodfrey.com; jbuchdahl@susmangodfrey.com; JLipton@gibsondunn.com; ATayrani@gibsondunn.com; DSwanson@gibsondunn.com; MPhan@gibsondunn.com; JLigtenberg@gibsondunn.com
Cc: Warden, Michael D.; Rogers, HL; McArthur, Eric; Schiller, Lowell; Young, Jeffrey J.
Subject: RE: SIFMA First Subpoena Response, Admin. Proc. File No. 3-15350

Kathleen:

We write to raise several issues of non-compliance regarding SIFMA's responses to the Subpoena dated January 5, 2015. This email is not exhaustive, and we reserve all rights to raise additional issues of non-compliance.

First, the Subpoena requires the production of all responsive documents in the possession of SIFMA. Please confirm whether any of the nine Relevant Members identified in Response to Request No. 16 have at any point provided SIFMA or its counsel with any documents that would be responsive to the Subpoena (leaving aside for the moment the assertions by SIFMA that it does not control its members). If any Relevant Member has provided SIFMA or its counsel with such documents then SIFMA's response to the Subpoena is deficient and must be supplemented immediately.

Second, SIFMA's response states that "it cannot compel the production of documents responsive to the Subpoena from its members" despite its previous ability to convince nine of its members to submit jurisdictional declarations on SIFMA's behalf. Please describe what efforts you undertook to obtain documents from SIFMA members, including by (i) identifying all SIFMA members from whom you sought compliance with the Subpoena and Chief ALJ Murray's Order; (ii) describing those efforts; and (iii) providing the basis for each such SIFMA member's refusal to produce documents.

Third, Relevant Members are defined as "(i) all SIFMA members who provide documents or communications for reliance by SIFMA's fact or expert witness(es), (ii) those SIFMA members from whom SIFMA will present evidence or testimony, and (iii) the nine SIFMA members who submitted jurisdictional declarations." Please confirm that no SIFMA Member, including the nine members listed in response to Request No. 16, have (i) provided documents or communications to SIFMA's fact or expert witnesses or (ii) will present evidence or testimony. If any SIFMA member has met either of these conditions then SIFMA's response to the Subpoena is deficient and must be supplemented immediately.

Finally, SIFMA's responses to Request Nos. 9 and 15 indicate that SIFMA has responsive documents in its possession, custody, or control over which it is asserting a claim of privilege. Please produce a privilege log of all such documents immediately.

We ask that you provide us with responses by 1:00 pm EST on February 27, 2015.

Best,
Patrick

From: Hitchins, Kathleen [mailto:khitchins@sidley.com]
Sent: Monday, February 23, 2015 8:27 PM
To: Henkin, Douglas; Taube, Seth T.; Perry, Joseph C.; Marecki, Patrick; ssusman@susmangodfrey.com; jbuchdahl@susmangodfrey.com; JLipton@gibsondunn.com; ATayrani@gibsondunn.com; DSwanson@gibsondunn.com; MPhan@gibsondunn.com; JLigtenberg@gibsondunn.com
Cc: Warden, Michael D.; Rogers, HL; McArthur, Eric; Schiller, Lowell; Young, Jeffrey J.
Subject: SIFMA First Subpoena Response, Admin. Proc. File No. 3-15350

Dear Counsel:

Attached please find an electronic copy of the Securities Industry and Financial Market Association's First Response to the Subpoena *Duces Tecum* of Nasdaq Stock Market LLC and NYSE Arca, Inc. The response is also being served on the Exchanges via first class mail.

Sincerely,
Katy Hitchins

KATHLEEN HITCHINS
Associate

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EXHIBIT C

Hitchins, Kathleen

From: Hitchins, Kathleen
Sent: Friday, March 06, 2015 10:27 AM
To: 'patrick.marecki@bakerbotts.com'
Cc: 'douglas.henkin@bakerbotts.com'; 'Seth.Taube@bakerbotts.com'; 'joseph.perry@bakerbotts.com'; 'ssusman@susmangodfrey.com'; 'jbuchdahl@susmangodfrey.com'; 'JLipton@gibsondunn.com'; 'ATayrani@gibsondunn.com'; 'DSwanson@gibsondunn.com'; 'MPhan@gibsondunn.com'; 'JLigtenberg@gibsondunn.com'; Warden, Michael D.; Rogers, HL; McArthur, Eric; Schiller, Lowell; Young, Jeffrey J.
Subject: RE: SIFMA First Subpoena Response, Admin. Proc. File No. 3-15350

Dear Patrick:

We are writing to follow up on NYSE Arca's inquiries concerning SIFMA's First Responses to the Exchanges' Subpoena in an email dated, February 25, 2015.

With respect to NYSE Arca's first and third inquiries, SIFMA's Subpoena responses accounted for the Subpoena's multi-part definition of "Relevant Members" and the responsive documents in SIFMA's possession, custody, and control. To the extent any documents relied upon by SIFMA's experts are also responsive to the subpoena, those documents will be produced today.

With respect to NYSE Arca's second inquiry, SIFMA's obligation to respond to the Subpoena does not require it to disclose the efforts undertaken to prepare the responses. To the extent NYSE Arca disagrees, please direct us to the portion of the subpoena or other authority that you believe creates this duty.

Finally, in light of SIFMA's pre-trial deadlines, SIFMA is still looking into the fourth inquiry and will have to get back to NYSE Arca. Until such time, it would assist SIFMA if NYSE Arca could please answer SIFMA's prior inquiry as to whether NYSE Arca was claiming privilege for the document Bates stamped NYSE_ARCA_001750 - NYSE_ARCA_001758. Also, please let us know if NYSE Arca intends to produce a privilege log.

Sincerely,
Katy Hitchins

KATHLEEN HITCHINS
Associate

Sidley Austin LLP
+1.202.736.8420
khitchins@sidley.com

> **From:** Hitchins, Kathleen
> **Sent:** Friday, February 27, 2015 1:02 PM
> **To:** 'patrick.marecki@bakerbotts.com'; douglas.henkin@bakerbotts.com; Seth.Taube@bakerbotts.com; joseph.perry@bakerbotts.com; ssusman@susmangodfrey.com; jbuchdahl@susmangodfrey.com; JLipton@gibsondunn.com; ATayrani@gibsondunn.com; DSwanson@gibsondunn.com; MPhan@gibsondunn.com; JLigtenberg@gibsondunn.com
> **Cc:** Warden, Michael D.; Rogers, HL; McArthur, Eric; Schiller, Lowell; Young, Jeffrey J.
> **Subject:** RE: SIFMA First Subpoena Response, Admin. Proc. File No. 3-15350
>
> Dear Patrick:

We are writing to respond to NYSE Arca's inquiries concerning SIFMA's First Responses to the Exchanges' Subpoena in an email dated, February 25, 2015. In light of SIFMA's upcoming pre-trial obligations, SIFMA is still looking into NYSE Arca's inquiries and will have to get back to you.

Sincerely,
Katy Hitchins

KATHLEEN HITCHINS
Associate

Sidley Austin LLP
+1.202.736.8420
khitchins@sidley.com

From: patrick.marecki@bakerbotts.com [mailto:patrick.marecki@bakerbotts.com]
Sent: Wednesday, February 25, 2015 11:12 AM
To: Hitchins, Kathleen; douglas.henkin@bakerbotts.com; Seth.Taube@bakerbotts.com; joseph.perry@bakerbotts.com; ssusman@susmangodfrey.com; jbuchdahl@susmangodfrey.com; JLipton@gibsondunn.com; ATayrani@gibsondunn.com; DSwanson@gibsondunn.com; MPhan@gibsondunn.com; JLigtenberg@gibsondunn.com
Cc: Warden, Michael D.; Rogers, HL; McArthur, Eric; Schiller, Lowell; Young, Jeffrey J.
Subject: RE: SIFMA First Subpoena Response, Admin. Proc. File No. 3-15350

Kathleen:

We write to raise several issues of non-compliance regarding SIFMA's responses to the Subpoena dated January 5, 2015. This email is not exhaustive, and we reserve all rights to raise additional issues of non-compliance.

First, the Subpoena requires the production of all responsive documents in the possession of SIFMA. Please confirm whether any of the nine Relevant Members identified in Response to Request No. 16 have at any point provided SIFMA or its counsel with any documents that would be responsive to the Subpoena (leaving aside for the moment the assertions by SIFMA that it does not control its members). If any Relevant Member has provided SIFMA or its counsel with such documents then SIFMA's response to the Subpoena is deficient and must be supplemented immediately.

Second, SIFMA's response states that "it cannot compel the production of documents responsive to the Subpoena from its members" despite its previous ability to convince nine of its members to submit jurisdictional declarations on SIFMA's behalf. Please describe what efforts you undertook to obtain documents from SIFMA members, including by (i) identifying all SIFMA members from whom you sought compliance with the Subpoena and Chief ALJ Murray's Order; (ii) describing those efforts; and (iii) providing the basis for each such SIFMA member's refusal to produce documents.

Third, Relevant Members are defined as "(i) all SIFMA members who provide documents or communications for reliance by SIFMA's fact or expert witness(es), (ii) those SIFMA members from whom SIFMA will present evidence or testimony, and (iii) the nine SIFMA members who submitted jurisdictional declarations." Please confirm that no SIFMA Member, including the nine members listed in response to Request No. 16, have (i) provided documents or communications to SIFMA's fact or expert witnesses or (ii) will present evidence or testimony. If any SIFMA member has met either of these conditions then SIFMA's response to the Subpoena is deficient and must be supplemented immediately.

Finally, SIFMA's responses to Request Nos. 9 and 15 indicate that SIFMA has responsive documents in its possession, custody, or control over which it is asserting a claim of privilege. Please produce a privilege log of all such documents immediately.

We ask that you provide us with responses by 1:00 pm EST on February 27, 2015.

Best,
Patrick

From: Hitchins, Kathleen [mailto:khitchins@sidley.com]
Sent: Monday, February 23, 2015 8:27 PM
To: Henkin, Douglas; Taube, Seth T.; Perry, Joseph C.; Marecki, Patrick; ssusman@susmangodfrey.com; jbuchdahl@susmangodfrey.com; JLipton@gibsondunn.com; ATayrani@gibsondunn.com; DSwanson@gibsondunn.com; MPhan@gibsondunn.com; JLigtenberg@gibsondunn.com
Cc: Warden, Michael D.; Rogers, HL; McArthur, Eric; Schiller, Lowell; Young, Jeffrey J.
Subject: SIFMA First Subpoena Response, Admin. Proc. File No. 3-15350

Dear Counsel:

Attached please find an electronic copy of the Securities Industry and Financial Market Association's First Response to the Subpoena *Duces Tecum* of Nasdaq Stock Market LLC and NYSE Arca, Inc. The response is also being served on the Exchanges via first class mail.

Sincerely,
Katy Hitchins

KATHLEEN HITCHINS
Associate

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1501 K Street, N.W.
Washington, DC 20005
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SIDLEY AUSTIN LLP

you have received this message in error, please notify the sender immediately at the email address above and destroy any and all copies of this message.

EXHIBIT D

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Application of: SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION for Review of Actions Taken by Self-Regulatory Organizations	Admin. Proc. File No. 3-15350 The Honorable Brenda P. Murray, Chief Administrative Law Judge

SUBPOENA DUCES TECUM

TO: Custodian of Records
Securities Industry and Financial Markets Association
1101 New York Avenue, N.W., 8th Floor
Washington, D.C. 20005

YOU MUST PRODUCE everything specified in the Attachment to this Subpoena to:

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Baker Botts LLP
30 Rockefeller Plaza
New York, N.Y. 10112

by the date of February 23, 2015.

Dated: ~~December 31, 2014.~~
January 5, 2015

By: Brenda P. Murray
Honorable Brenda P. Murray
Chief Administrative Law Judge

ATTACHMENT TO SUBPOENA
TO SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

DEFINITIONS AND INSTRUCTIONS

1. The term "document" is used in the broadest sense, and includes without limitation the following items, whether printed, recorded, microfilmed, or reproduced by any process, or written or produced by hand, and whether or not claimed to be privileged, confidential, personal, or preliminary: letters, memoranda, reports, agreements, communications, correspondence, summaries of records or personal conversations, diaries, forecasts, statistical statements, graphs, charts, plans, drawings, minutes or records of meetings or conferences, lists of persons attending meetings or conferences, reports of or summaries of interviews, opinions of counsel, circulars, drafts of any documents, books, instruments, appraisals, applications, accounts, tapes and all other material of any tangible medium of expression, computer diskettes, and all other magnetic or electronic media.

2. The term "communication" means all inquiries, discussion, conversations, negotiations, agreements, understandings, meetings, telephone conversations, letters, notes, telegrams, correspondence, memoranda, e-mails, facsimile transmissions, or other form of verbal, written, mechanical, or electronic intercourse.

3. The term "Request" means the request for production of documents in Your possession, custody, or control.

4. The terms "You" and "Your" shall refer to the Securities Industry and Financial Markets Association ("SIFMA"), its subsidiaries, affiliates, the Relevant Members, and all officers, directors, employees, agents, representatives, and all other persons acting in concert with it, on its behalf, or under its control, whether directly or indirectly.

5. The term "Relevant Members" shall mean (i) all SIFMA members who provide documents or communications for reliance by SIFMA's fact or expert witness(es), (ii) those SIFMA members from whom SIFMA will present evidence or testimony, and (iii) the nine SIFMA members who submitted jurisdictional declarations; any SIFMA member falling into category (i), (ii), or (iii) is a Relevant Member for the purposes of this Subpoena.

6. The term "depth-of-book data" means data showing bids to buy at prices below, and offers to sell at prices above, the National Best Bid and Offer.

7. The term "person" means any natural person or any legal entity, including, without limitation, a proprietorship, partnership, trust, firm, corporation, association, government agency or entity, or other organization, or association.

8. The term "order flow" means the volume of purchases, sales, swaps and trades in securities executed on an exchange.

9. The singular includes the plural and vice versa; the words "and" and "or" shall be both conjunctive and disjunctive; the word "all" means "any and all"; the word "any" means "any and all"; the word "including" means "including without limitation."

10. Documents shall be produced as they are kept in the usual course of business or shall be organized and labeled to correspond to the paragraphs of the Request to which they are responsive.

11. Unless otherwise provided, these Requests seek documents from the time the rule changes at issue in this proceeding (*Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Rule 7019*, Release No. 34-62907, File No. SR-NASDAQ-2010-110 (Sept. 14, 2010); *Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca., Inc. Relating to Fees for NYSE Arca Depth-of-Book Data*, Release No. 34-63291,

File No. SR-NYSEArca-2010-97 (Nov. 9, 2010) (the "Rule Changes")) were adopted to the present.

12. Unless otherwise specifically stated, You shall produce Documents authored, compiled, considered, created, drafted, edited, generated, possessed, prepared, read, received, recorded, referred to, reviewed, sent to or by, transmitted to or by, utilized, or written from the time any Rule Changes were adopted to the present.

13. In the event that any document called for by these Requests is to be withheld on the basis of a claim of privilege, identify the document as follows: author, addressee, indicated or blind copies, date, subject manner, number of pages, attachments or appendices, all persons to whom distributed, shown, or explained, present custodian, the nature of the privilege asserted, and the complete factual basis for its assertion. Produce a log containing the above descriptions contemporaneously with the documents responsive to the subpoena.

14. If a portion of an otherwise responsive document contains information subject to a claim of privilege, only those portions of the document subject to the claim of privilege shall be deleted or redacted from the document and the rest of the document shall be produced. If any portions of any otherwise responsive documents are deleted or redacted, those portions are to be included on the log of privileged documents and identified as required by instruction 13.

15. Documents are to be produced in full and complete form, including all drafts and all copies of documents that bear any notes, marks, or notations not existing in the original or other copies.

16. To the extent a Request seeks Documents held by individual custodians, it seeks only those Documents held by the key person or persons within SIFMA or the Relevant Members with primary responsibility over the requested subject matter.

17. Each Request seeks only those books, records, or individually-held Documents as are created or maintained in the ordinary course of business. The Nasdaq Stock Market LLC ("Nasdaq") and NYSE Arca, Inc. ("NYSE Arca") do not envision that the collection of such documents would require an expansive search or the creation of any Documents, nor do Nasdaq and NYSE Arca request direct access to any custodian(s).

DOCUMENT REQUESTS

1. Documents sufficient to identify, for each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, the total number of subscribers for each product and any changes in the number of subscribers on a monthly basis from the time the Rule Changes were adopted to the present.

2. Documents sufficient to identify, for each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, the aggregate fees charged to subscribers for the products under those Rule Changes on a monthly basis from the time the Rule Changes were adopted to the present.

3. Documents sufficient to identify, for each Relevant Member who subscribes to the depth-of-book products that SIFMA contends are the subject of the Rule Changes, Nasdaq's and NYSE Arca's shares of the Relevant Member's order flow and any changes in those shares throughout the period from the time the Rule Changes were adopted to the present.

4. Marketing, promotion, and advertising materials, for each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, used to promote the products (including any packages or suites of data offered by the Relevant Member, whether or not they specifically identify the depth-of-book products that are the subject of the Rule Changes) from the time the Rule Changes were adopted to the present.

5. The documents, facts, and data relied on by SIFMA's testifying experts in forming their opinions, submitted on or before February 23, 2015 in conjunction with the list of witnesses, copies of exhibits, and any written expert testimony that the scheduling order requires SIFMA to disclose.

6. For each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, Documents provided to decision-makers on setting or changing fees charged to subscribers for the depth-of-book products that are the subject of the Rule Changes sufficient to identify Your considerations and reasons for setting or maintaining the fees charged to the Relevant Member's customers for those products, including Documents sufficient to identify Your reasons for setting fees at a particular level, or changing prices.

7. For each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, the subscriber fee schedules for those products.

8. For each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, Documents sufficient to identify which products You have identified as substitute or alternative products for those depth-of-book products, as well as Your strategy for choosing between those depth-of-book products and the substitute or alternative products.

9. 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.

10. For each Relevant Member, each communication to any exchange in which the Relevant Member either threatened to reduce order flow or announced that the Relevant Member was reducing order flow based in whole or in part on that exchange's depth-of-book data pricing, pricing policies, or pricing actions or proposals.

11. For each Relevant Member, each communication to any exchange in which the Relevant Member offered to increase or agreed to increase its order flow to that exchange in return for a reduction or limitation on depth-of-book data pricing.

12. For each Relevant Member, each communication to any exchange in which the Relevant Member either threatened to divert or stated that it would divert any purchases of depth-of-book data products to another source of data.

13. For each Relevant Member, all Documents referring or relating to any decision to route order flow to or from any exchange, or any decision to modify any purchases of depth-of-book data products, based on that exchange's depth-of-book data pricing, pricing policies, or pricing actions or proposals.

14. For each Relevant Member who submitted a jurisdictional declaration in conjunction with SIFMA's July 29, 2014 filing, all Documents supporting or contradicting the assertion that the level of the prices charged for the specific depth-of-book products that are the subject of the Rule Changes are so high as to be outside a reasonable range of fees under the Exchange Act.

15. All communications with SIFMA members referring or relating to the submission of jurisdictional declarations by any SIFMA members.

16. Documents sufficient to identify each and all Relevant Members.

EXHIBIT E

Appendix D

Documents Relied Upon by Terrence Hendershott, Ph.D. and Aviv Nevo Ph.D.

Document Title, Bates Numbers	Document Date
Legal Pleadings	
Court Opinion in re *NetCoalition v. Securities and Exchange Commission*	August 6, 2010
Complaint in re *U.S. v. Deutsche Börse AG and NYSE Euronext*	December 22, 2011
Competitive Impact Statement in re *U.S. v. Deutsche Börse AG and NYSE Euronext*	December 22, 2011
Court Opinion in re *NetCoalition and Securities Industry and Financial Markets Association v. Securities and Exchange Commission*	April 30, 2013
Reports and Submissions	
Statement of Janusz Ordover and Gustavo Banmberger, with Appendices A-B	August 1, 2008
Evans, David "An Economic Assessment of Whether 'Significant Competitive Forces' Constrain an Exchange's Pricing of Its Depth-Of-Book Market Data"	July 10, 2008
An Economic Study of Securities Market Data Pricing by the Exchanges Prepared by Securities Litigation & Consulting Group, Inc.	July 10, 2008
Evans, David, "Response to Ordover and Bamberger's Statement Regarding the SEC's Proposed Order Concerning The Pricing Of Depth of-Book Market Data"	October 10, 2008
Academic Literature and Books	
Tirole, Jean, *The Theory of Industrial Organization*, MIT, 1988	
Glosten, Lawrence R., "Is the Electronic Open Limit Order Book Inevitable?" *The Journal of Finance*, Vol. 49, No. 4, September 1994, pp. 1127-1161	
Domowitz, Ian and Benn Steil, "Automation, Trading Costs, and the Structure of the Securities Trading Industry," In *Brookings-Wharton Papers on Financial Services*, edited by Robert E. Litan and Anthony M. Santomero, 33-81, 1999	
Barclay, Michael J., William G. Christie, Jeffrey H. Harris, et al., "Effects of Market Reform on the Trading Costs and Depths of Nasdaq Stocks," *The Journal of Finance*, Vol. , No. 1, February 1999, pp. 1-34	
Lee, Charles M.C., and Balkrishna Radhakrishna, "Inferring Investor Behavior: Evidence from TORQ Data," *Journal of Financial Markets*, Vol. 3, Issue 2, May 2000, pp. 83-111	
Chew, Margaret, "Reform of Financial Services: The Effect on the Regulator," *Singapore Journal of International and Comparative Law*. Vol. 5, 2001, pp. 569-592	
Pindyck Robert S. and Daniel L. Rubinfeld, *Microeconomics*, Prentice Hall, 5th ed., 2001	
Harris, Larry, *Trading and Exchanges: Market Microstructure for Participants*, Oxford University Press, 2003	
Varian, Hal R, *Intermediate Microeconomics: A Modern Approach*, Norton & Company, 6th ed., 2003	
Ramos, Sofia A., "Competition Between Stock Exchanges: A Survey," FAME Research Paper No. 77, February 2003	
Parlour, Christine A. and Duane J. Seppi, "Liquidity-Based Competition for Order Flow," *The Review of Financial Studies*, Vol. 16, No. 2, Summer 2003, pp. 301-343	
Carlton, Dennis W. and Jeffrey M. Perloff, *Modern Industrial Organization*, 4th ed., Addison-Wesley, 2005,	

Document Title, Bates Numbers	Document Date

Hendershott, Terrence and Charles M. Jones, "Island Goes Dark: Transparency, Fragmentation, and Regulation," *The Review of Financial Studies*, Vol. 18, No. 3, 2005, pp.743-793

Viscusi, Kip W., Joseph E. Harrington, and John M. Vernon, *Economics of Regulation and Antitrust*, 4th ed. MIT, 2005

Kaplow, Louis and Carl Shapiro, "Antitrust," In *Handbook of Law and Economics*, edited by A. Mitchell Polinsky and Steven Shavell, 1073-1225, Elsevier, 2007

"Antitrust Law and the 'New Economy,'" In *Antitrust Modernization Commission Report and Recommendations*, April 2007

Foucault Thierry and Albert J. Menkveld, "Competition for Order Flow and Smart Order Routing Systems," *The Journal of Finance*, Vol. 63, No. 1, February 2008, pp. 119-158

Mizrach, Bruce, "The Next Tick on NASDQ," *Quantitative Finance*, Vol. 8, no. 1, February 2008, pp. 19-40

Barber, Brad M., Terrance Odean, and Ning Zhu, "Do Retail Trades Move Markets?" *The Review of Financial Studies*, Vol. 22, No. 1, 2009, pp. 151-186

Cantillon, Estelle and Pai-Ling Yin, "Competition Between Exchanges: a Research Agenda," *International Journal of Industrial Organization,* Vol. 29, 2011, pp. 329-336

Menkveld, Albert J., "High-Frequency Trading and the New Market Makers," *Journal of Financial Markets,* Vol. 16, 2013, pp. 712-740

Cardella, Laura, Jia Hao, and Ivalina Kalcheva, "Make and Take Fees in the U.S. Equity Market," April 2013

Brogaard, Jonathan , Terrence Hendershott, and Ryan Riordan, "High Frequency Trading and Price Discovery," *Review of Financial Studies*, Vol. 27, No. 8, 2014 , pp. 2267-2306

O'Hara, Maureen. "High Frequency Market Microstructure," 2014

Menkveld. Albert J., "High-Frequency Traders and Market Structure," *The Financial Review*, Vol. 49, 2014, pp. 333-344

Buti,Sabrina, Brabara Rindi, and Ingrid M. Werner, "Dark Pools Trading Strategies, Market Quality and Welfare," January 2014

Menkveld, Albert J., and Marius A. Zoican, "Need for Speed? Exchange Latency and Liquidity," Tinbergen Institute Discussion Paper TI 14-097/IV/DSF78, July 22, 2014

Holden, Craig W., and Stacey Jacobsen, "Liquidity Measurement Problems in Fast, Competitive Markets: Expensive and Cheap Solutions," *Journal of Finance,* Vol. 69, No. 4, August 2014, pp. 1747-1785

Van Kervel, Vincent, "Competition for Order Flow with Fast and Slow Traders," October 2014

Kwan, Amy, Ronald Masulis, and Thomas McInish, "Trading Rules, Competition for Order Flow and Market Fragmentation," *Journal of Financial Economics*, Vol. 115, 2015, pp. 330-348

He, William Peng, Elvis Jarnecic, and Yubo Liu, "The Determinants of Alternative Trading Venue Market Share: Global Evidence from the Introduction of Chi-X," *Journal of Financial Markets*, Vol. 22, January 2015, pp. 27-49

Public Press and Internet Resources

Shapiro, Carl, "Mergers with Differentiated Products, " Address Before the American Bar Association	November 9, 1995
"NASD Rulemaking: Order Approving a Proposed Rule Change to Permanently Expand the NASD's Rule Permitting Market Makers to Display Their Actual Quotation Size," SEC Release 34-40211; File No. SR-NASD-98-21, available at http://www.sec.gov/rules/sro/nd9821o.htm	July 15, 1998
Schmerken, Ivy, "Making Markets Move," WallStreet & Technology	July 26, 2004

Document Title, Bates Numbers	Document Date
"Regulation NMS," Securities Exchange Act Release No. 70 FR 37496, 37498-37499	June 29, 2005
DOJ Press Release, "Investigations Conclude Acquisition of Instinet Group Inc. by NASDAQ and Merger of NYSE and Archipelago Holdings Would Not Reduce Competition"	November 16, 2005
Filing of Proposed Rule Change Relating to Approval of Market Data Fees for NYSE Arca Data, SEC Release No. 34-53952,71 FR33496	June 9, 2006
Securities Exchange Act Release No. 59039	December 2, 2008
Securities Exchange Act Release No. 73 FR 74770	December 9, 2008
Horizontal Merger Guidelines, Department of Justice and Federal Trade Commission	August 19, 2010
Proposed Rule Change by NYSE Arca Pursuant to Rule 19b-4 Under the Securities Exchange Act of 1934 File No. SR-2010-97	November 1, 2010
"Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. Relating to Fees for NYSE Arca Depth-of-Book Data," SEC Release 34-63291, available at http://www.gpo.gov/fdsys/pkg/FR-2010-11-17/pdf/2010-28893.pdf	November 9, 2010
DOJ Press Release, "Nasdaq OMX Group Inc. and Intercontinental Exchange Inc. Abandon Their Proposed Acquisition of NYSE Euronext After Justice Department Threatens Lawsuit,"	May 16, 2011
Mehta, Nina, "Goldman Sachs to Offer Canada Dark Pool as Order Rules Change," Bloomberg, available at http://www.bloomberg.com/news/2011-08-18/goldman-sachs-introduces-sigma-x-canada html	August 18, 2011
Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Establishing Non-Display Usage Fees for NYSE Arca Integrated Feed, NYSE ArcaBook, NYSE Arca Trades, and NYSE Arca BBO, and a Redistribution Fee for NYSE ArcaBook, SEC Release No.34-69315; File No. SR-NYSEArca-2013-37, available at http://www.sec.gov/rules/sro/nysearca/2013/34-69315.pdf	April 5, 2013
De La Merced, Michael J. and Nathaniel Popper, "BATS and Direct Edge to Merge, Taking on Older Rivals," *The New York Times*	August 26, 2013
Securities and Exchange Commission, 17 CFR Parts 202, 240, 242 and 249, Release No. 34-40760, File No. S7-12-98 at § 242.301(b)(3)	
Securities and Exchange Commission, 17 CFR Parts 201, 240, 242 and 249 Release 34-39884; File No. S7-12-98, available at http://www.sec.gov/rules/proposed/34-39884.pdf	
Securities and Exchange Commission, 17 CFR Parts 200, 201, 230, 240, 242, 249, and 270Release No. 34-51808; File No. S7-10-04, available at http://www.sec.gov/rules/final/34-51808.pdf	
White, Mary Jo, "Intermediation in the Modern Securities Markets: Putting Technology and Competition to Work for Investors," SEC, available at http://www.sec.gov/News/Speech/Detail/Speech/1370542122012#.VIi0nTHF98E	June 20, 2014
NYSE Trading Information, available at https://www.nyse.com/markets/nyse/trading-info	
NYSE Arca – Schedule of Fees and Charges, http://www1.nyse.com/pdfs/NYSEArca_Listing_Fees.pdf, available at https://www nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf accessed on 1/25/15	
BATS BYX Exchange Fee Schedule, Effective January 12, 2015, available at http://www.bats.com/us/equities/membership/fee_schedule/bzx/ accessed on 1/25/15	
BATS BYX Exchange Fee Schedule, Effective January 12, 2015, available at http://www.bats.com/us/equities/membership/fee_schedule/byx/ accessed on 1/25/15	
EDGA Exchange, Inc. Fee Schedule, Effective January 16, 2015, available at http://www.bats.com/us/equities/membership/fee_schedule/edga/ accessed on 1/25/15	
EDGX Exchange, Inc. Fee Schedule, Effective January 16, 2015, accessed 1/24/15, available at http://www.bats.com/us/equities/membership/fee_schedule/edgx/ accessed on 1/25/15	

Document Title, Bates Numbers	Document Date

NasdaqTrader.com – Price List - Trading Connectivity, available at http://www nasdaqtrader.com/Trader.aspx?id=PriceListTrading2 accessed on 1/25/15

NasdaqTrader.com – BX Pricing List-Trading & Connectivity, available at http://www nasdaqtrader.com/Trader.aspx?id=bx_pricing accessed on 1/25/15

NasdaqTrader.com – PSX Pricing List, available at http://www nasdaqtrader.com/Trader.aspx?id=PSX_Pricing

"About Us," Tradebot Systems, available at http://www.tradebotsystems.com/about.asp.

BrokerTec, available at http://www.icap.com/what-we-do/electronic/BrokerTec.aspx, accessed 1/24/15

MarketAxess, available at http://www.marketaxess.com/trading/highgrade.php, accessed 1/24/15

EBS, http://www.ebs.com/about-us.aspx, accessed 1/24/15

NYSE Arca – Schedule of Fees and Charges, available at http://www1 nyse.com/pdfs/NYSEArca_Listing_Fees.pdf, accessed 1/24/15

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NYSE Euronext Form 10-Q for the Quarterly Period Ended September 30, 2013	November 5. 2013

Data

TICK Data

NASDAQ Subscriber Data

NYSE Subscriber Data

Document Title, Bates Numbers	Document Date
NYSE Aggregated Trade Data	
CRSP	

Miscellaneous

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Application for An Order Setting Aside Rule Change of NYSE Arca, Inc. Limiting Access to Its Services, Admin. Proc. File No. 3-15350	

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EXHIBIT F

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Aggregated HHI excluding TRF.xlsx
Exhibit 3 and 4.xlsx
FN 79.sas
Monthly fee examples.sas
1. by year leave or join Nasdaq.sas
2. conditional mean by year leave or join Nasdaq.sas
1. Import and Regression Prep_Arca No Z.sas
2. Import and Regression Prep_Nasdaq No Z.sas
3. Import and Regression Prep_Nasdaq.sas
1. Regression_Arca No Z.do
2. Regression_Nasdaq No Z.do
3. Regression_Nasdaq.do

EXHIBIT G

List of Materials Relied On

Case Materials

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NYSE_ARCA_001611-001670

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NYSE_ARCA_001737

NASDAQ000033

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Market Data Screenshots

I visited the offices of Bloomberg Tradebook for purposes of compiling the screenshots in Appendix A of my expert report.

EXHIBIT H

Admin. Proc. File No. 3-15350

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September 5, 2014

VIA HAND DELIVERY

The Honorable Brenda P. Murray
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: *In The Matter Of The Application Of Securities Industry And Financial Markets Association For Review Of Action Taken By Certain Self-Regulatory Organizations*, Admin. Proc. File No. 3-15350

Dear Chief Judge Murray,

We represent NYSE Arca, Inc. ("NYSE Arca") in connection with the above-captioned proceeding. Briefing for the determination on jurisdiction and whether members of the Securities Industry and Financial Markets Association ("SIFMA") come within the meaning of a "person aggrieved" in accordance with Exchange Act Section 19(d)(2), ordered pursuant to Your Honor's Order Following Prehearing Conference, dated June 27, 2014, is now complete.

NYSE Arca respectfully requests that Your Honor hear oral argument on the issues addressed in the parties' briefing. Among other things, SIFMA's Reply Brief is considerably more substantive than its Opening Brief and contains arguments not articulated therein. Oral argument would permit the parties to address those arguments.

NYSE Arca believes that oral argument would assist Your Honor in evaluating the arguments in the parties' briefing and making the determination required in the Commission's May 16, 2014 Order. Accordingly, NYSE Arca respectfully requests that the Your Honor hear argument in this proceeding. We have conferred with counsel for Nasdaq who join in this request.

Respectfully submitted,

D. Henkin / A.A.

Douglas W. Henkin

cc: William W. Miller, Esq., Attorney-Advisor, Office of Administrative Law Judges
All Counsel of Record