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 MOTION FOR LEAVE TO FILE A SURREPLY TO NYSE ARCA'S MOTION FOR ADVERSE INFERENCE

REDACTED VERSION FOR PUBLIC FILING

The Securities Industry and Financial Markets Association ("SIFMA") respectfully seeks leave to file a surreply, attached as Exhibit A, to address new matters raised for the first time in NYSE Arca, Inc.'s ("NYSE Arca") reply in support of its motion for adverse inference.

NYSE Arca's reply significantly expands its original motion by (1) arguing for the first time that SIFMA's obligations under the subpoena were expanded by "concessions" SIFMA supposedly made in its application to quash the subpoena; (2) requesting for the first time that SIFMA be ordered to produce the notes taken by Dr. David S. Evans's assistant during the February 2015 meetings with Citigroup and Bloomberg; and (3) requesting additional adverse inferences that were not identified in its original motion. SIFMA should be afforded the opportunity to respond to these newly raised matters. *See, e.g., In the Matter of Steven Erik Johnston*, Admin. Proc. File No. 3-7528, 1992 WL 160082, *1 (June 23, 1992) (permitting a surreply where the movant "emphasized different issues than it did in its Initial Brief to which Respondents replied"); *In the Matter of the Application of Robert Bruce Orkin*, Release No. 34-32035, 1993 WL 89023, at *6 n.36 (Mar. 23, 1993) (finding "no prejudice to [movant] in permitting consideration of the [nonmovant]'s surreply").

For these reasons, SIFMA respectfully requests leave to file the short proposed surreply, attached hereto, to address the new arguments and expanded requests for relief raised for the first time in NYSE Arca's reply.

Dated: May 14, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2015, I caused a redacted, public copy of the foregoing Securities Industry and Financial Markets Association's Motion for Leave to File a Surreply to NYSE Arca's Motion for Adverse Inference to be served on the parties listed below via First Class Mail:

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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

THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION'S [PROPOSED] SURREPLY TO NYSE ARCA'S MOTION FOR ADVERSE INFERENCE

REDACTED VERSION FOR PUBLIC FILING

The Securities Industry and Financial Markets Association ("SIFMA") respectfully submits this surreply to address the new arguments and expanded requests for relief raised for the first time in NYSE Arca, Inc.'s ("NYSE Arca") reply in support of its motion for an adverse inference. At the hearing, NYSE Arca requested leave for a "very short rebuttal," Hearing Tr. ("Tr.") 1333:14–15 (Apr. 20–24, 2015), but now it has filed a 19-page brief, chock full of single-space paragraphs, that significantly expands its oral motion by including, *inter alia*, a demand for production of notes taken by Dr. David S. Evans's assistant and a request for additional adverse inferences. These requests are outside the scope of NYSE Arca's motion and should be rejected for that reason alone. To the extent the Chief Administrative Law Judge ("Chief ALJ") considers NYSE Arca's belated arguments and requested relief, they are baseless for the reasons explained below.

ARGUMENT

I. Dr. Evans's Meetings With Citigroup and Bloomberg Did Not Create Any Production Obligations.

Throughout its reply, NYSE Arca asserts that Dr. Evans's meetings with Citigroup and Bloomberg somehow "created production obligations" under the subpoena. Reply of NYSE Arca In Support of Mot. for Sanctions ("Reply") at 10. That is wrong because, as SIFMA has already explained, (1) SIFMA cannot compel production of documents from its members and thus had no obligation to produce such documents, SIFMA Opp. to Mot. ("Opp.") at 4–11; and (2) with regard to experts, SIFMA was required to produce only reliance materials, and Dr. Evans did not rely on any information from the meetings, *id.* at 11–14.[1]

[1] NYSE Arca asserts that it "defies belief" that Dr. Evans did not rely on information from the meetings. Reply at 11. But NYSE Arca does not cite a single sentence from Dr. Evans's report for which he needed to rely on any information from Citigroup or Bloomberg. NYSE Arca tries to bolster its argument by claiming that Dr. Evans specifically "requested meetings with Citigroup and Bloomberg," *id.*, but NYSE Arca mischaracterizes the record. Dr. Evans testified

Unable to cite any rule of law or any language in the subpoena that created a production obligation, NYSE Arca now belatedly claims—for the first time on reply—that the production obligation arose from *a statement SIFMA made in its application to quash the subpoena.* Specifically, NYSE Arca cites SIFMA's statement that a member would become subject to the subpoena if it "'dare[d] ... to submit to a five-minute interview by or to provide any information to SIFMA's experts.'" Reply at 1–2 (quoting SIFMA App. to Quash at 3) (emphasis omitted). Based on this statement, NYSE Arca argues that SIFMA has "conceded" that production obligations were triggered if a member provided *any* information to SIFMA's experts, regardless of whether the experts relied on that information in forming their opinions. Reply at 9.

NYSE Arca's argument is absurd, and only underscores how far it must reach in an effort to manufacture a basis for the production obligation it accuses SIFMA of violating. SIFMA's production obligations are governed by the terms of the subpoena, which NYSE Arca drafted, and which required SIFMA to produce only the "documents, facts, and data *relied on* by SIFMA's testifying experts in forming their opinions." NYSE Arca Subpoena Request No. 5 (emphasis added); *see also* NYSE Arca Subpoena Definition No. 5 (defining "Relevant Members" to include "all SIFMA members who provide documents or communications *for reliance* by SIFMA's fact or expert witness(es)") (emphasis added). SIFMA's statement in its application to quash is irrelevant.[2] Even if that statement had suggested that the subpoena created

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that "[redacted]," Tr. 1207: 25–1208:1, and that "SIFMA counsel" proposed the meeting with Bloomberg, Tr. 1221:21–24.

[2] The statement at issue, which appeared in the Preliminary Statement of SIFMA's application to quash, simply made the general point that the subpoena chilled members from providing information to SIFMA because doing so could make them "Relevant Members" (if they were not already "Relevant Members" because they had signed jurisdictional declarations). SIFMA App. to Quash at 3.

broader obligations than it actually did—and it did not—it would not matter. The terms of the subpoena are clear, and they control.

In any event, NYSE Arca's argument that the "fact of th[e] meetings created production obligations," Reply at 10, is both wrong and irrelevant for a separate reason: both Citigroup and Bloomberg were already "Relevant Members" under the subpoena well before the time the meetings occurred because they had previously submitted declarations at the jurisdictional stage. *See* NYSE Arca Subpoena Definition No. 5 (defining "Relevant Members" to include "the nine SIFMA members who submitted jurisdictional declarations"). As a result, Dr. Evans's meetings with Bloomberg and Citigroup could not have created any additional obligations under the subpoena. Because Citigroup and Bloomberg were already "Relevant Members" as a result of their jurisdictional declarations, SIFMA produced all the responsive, nonprivileged documents from Citigroup and Bloomberg that were in SIFMA's possession, custody, and control—namely, none.

Thus, even if the subpoena had defined "Relevant Members" to include members who provided *any* information to SIFMA's experts, the meetings with Citigroup and Bloomberg would not have created any new production obligations and would not have made any difference to SIFMA's subpoena response. For this reason as well, NYSE Arca's claim that the meetings "subjected SIFMA members to the Subpoena," Reply at 5, is simply wrong. If NYSE Arca wanted documents in the possession, custody, and control of Citigroup, Bloomberg, or any other SIFMA member, it could and should have subpoenaed those members directly.

II. SIFMA Had No Obligation under the Subpoena to Produce Notes of the Meetings.

Because it cannot show that SIFMA failed to produce any member documents that it was required to produce, NYSE Arca pivots and argues—again for the first time—that the notes taken by Dr. Evans's assistant during the meetings were responsive to the subpoena. Reply at 8.

This argument fares no better. Even assuming the notes were in SIFMA's possession, custody, or control, they are not subject to the subpoena and SIFMA had no duty to produce them.

In arguing to the contrary, NYSE Arca cites only subpoena Request No. 13, which required SIFMA to produce, "[f]or 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." But even if the notes referred or related to these subjects, they are not covered by Request No. 13 or any other provision of the subpoena. The subpoena's general instructions specify that the requests for documents held by individual custodians "see[k] only those Documents held by the key person or persons within SIFMA or the Relevant Members with primary responsibility over the requested subject matter," and that each request "seeks only" documents that were "created or maintained in the ordinary course of business." NYSE Arca Subpoena Definition Nos. 16–17. The notes meet neither of these criteria—they were held by Dr. Evans's assistant, not a key person "within SIFMA or [a] Relevant Membe[r]" with responsibility over the requested subject matter, and they were created and maintained for this litigation, not in the ordinary course of business.

In any event, even if there were any ambiguity as to whether the subpoena's general terms covered the notes, Request No. 5 makes clear that SIFMA had no obligation to produce them. Request No. 5 specifically addressed the subject of expert materials, and it required production only of materials "relied on" by the expert.[3] In light of that express limitation in the provision that specifically addresses expert materials, general terms elsewhere in the subpoena

[3] NYSE Arca does not contend, and there is no support in the record, that Dr. Evans ever even saw, let alone relied upon, the notes in forming his opinions. Nor is there any evidence to support NYSE Arca's claim that Dr. Evans "directed" his assistant to take notes. Reply at 1, 8, 12.

cannot be read to expand the category of expert materials that SIFMA was required to produce. *See, e.g., Radlax Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (explaining the "general/specific canon" of interpretation); *Great Am. Ins. Co. v. Norwin Sch. Dist.*, 544 F.3d 229, 247 (3d Cir. 2008) ("specific provisions ordinarily control more general provisions").

NYSE Arca thus can point to no subpoena request that obligated SIFMA to produce the notes.[4] Nor can it point to any SEC Rule of Practice or other authority that required SIFMA to produce the notes. That is because SIFMA had no obligation to produce the notes, or to disclose the meetings. SIFMA fully complied with its production obligations, and NYSE Arca's accusations of discovery misconduct, and its accusations that SIFMA "hid" and "concealed" information, are entirely baseless and are merely another effort to distract from NYSE Arca's failure to carry its burden of proof that its fees are significantly constrained by competition.

III. NYSE Arca's Requests for Additional Adverse Inferences Are Improper.

Finally, the Chief ALJ should reject NYSE Arca's request for additional adverse inferences that were not identified in its motion. In its motion, NYSE Arca sought only an adverse inference on "what the SIFMA members would have said on the subject of subscribers switching and the like." Tr. 1332:4–6. NYSE Arca now seeks to expand that request to include

[4] Independently, SIFMA has no obligation to produce the notes because they are work product. Dr. Evans's work for this matter, including any notes taken by his assistant, was done at the direction of SIFMA's counsel and constitutes attorney work product. NYSE Arca claims SIFMA has waived any privilege over the notes, Reply at 9, but that is false. SIFMA had no reason to assert the work product privilege before this time because it had no notice, either from NYSE Arca's motion or from the subpoena, that the notes were the subject of a request for production. Although NYSE Arca argues for this production obligation, not surprisingly, it did not produce any of the notes taken by the myriad Cornerstone employees who assisted its two experts. Tr. 213:5–7, 13–20.

inferences regarding SIFMA members' (1) order-routing decisions, (2) responses to increases in depth-of-book data prices, and (3) redistribution of depth-of-book data for a profit. Reply at 5.

In addition to the reasons already explained in SIFMA's opposition, Opp. at 14–18, these requests are improper because they were not included in NYSE Arca's motion and because there is no basis to make sweeping inferences about all SIFMA members based on two meetings with Bloomberg and Citigroup—meetings that Dr. Evans described at the hearing, and as to which NYSE Arca had a full and fair opportunity to cross-examine Dr. Evans. The sweeping inferences NYSE Arca seeks would simply allow NYSE Arca to evade its burden of proof, which NYSE Arca is obviously, and for good reason, anxious to do given the state of the evidence it offered at the hearing, but which would be unjustified and improper for the reasons SIFMA already has explained. No adverse inference can be drawn.

CONCLUSION

For these reasons, and those stated in SIFMA's opposition, NYSE Arca's motion for discovery sanctions is meritless and should be denied.

Dated: May 14, 2015

Respectfully submitted,

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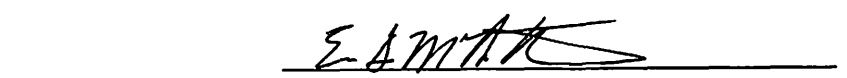

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