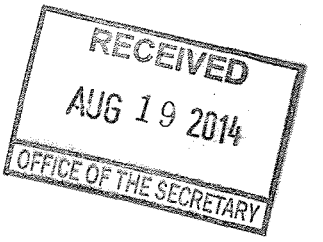

UNITED STATES OF AMERICA

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

BRIEF OF NYSE ARCA, INC. IN OPPOSITION TO APPLICANT SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION'S BRIEF REGARDING SATISFACTION OF JURISDICTIONAL REQUIREMENT

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2006 NYSE Arca Rule Change	SR-NYSEArca-2006-21, Release No. 34-54597, "Proposal to establish Market Data Fees," *available at* http://www1.nyse.com/nysenotices/nysearca/rule-filings/pdf.action?file_no=SR-NYSEArca-2006-21&seqnum=1 (last visited August 18, 2014).
2010 NYSE Arca Rule Change	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), *available at* http://www.sec.gov/rules/sro/nysearca/2010/34-63291.pdf (last visited August 18, 2014).
2013 Applications	*In The Matter of: The Application of Securities Industry And Financial Markets Association For Review of Action Taken by NYSE Arca, Inc.*, Application For An Order Setting Aside Rule Change Of NYSE Arca, Inc. Limiting Access To Its Services (May 30, 2013); and *In The Matter of: The Application of Securities Industry And Financial Markets Association For Review of Action Taken by Certain Self-Regulatory Organizations Listed in Exhibit A Annexed Hereto*, Application For An Order Setting Aside Rule Changes Of Certain Self-Regulatory Organizations Limiting Access To Their Services (May 30, 2013).
ALJ	Administrative Law Judge
Commission	United States Securities and Exchange Commission
December 2008 Order	Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data, 73 Fed. Reg. 74770 (Dec. 9, 2008) *available at* http://www.gpo.gov/fdsys/pkg/FR-2008-12-09/pdf/E8-28908.pdf (last visited August 18, 2014).
Dodd-Frank Act	Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o)
Exchange Act	Securities Exchange Act of 1934, as amended
Exchanges	NYSE Arca, Inc. and NASDAQ Stock Market LLC
NASDAQ	NASDAQ Stock Market LLC
NYSE Arca	NYSE Arca, Inc.

October 2006 Order	Order Approving Proposed Rule Change Relating to NYSE Arca Data , Release No 34-54597 (filed Oct. 12, 2006), *available at* http://www1.nyse.com/nysenotices/nysearca/rule-filings/approval.action?file_no=SR-NYSEArca-2006-21 (last visited August 18, 2014)
Order	Securities and Exchange Commission Order dated May 19, 2014
SIFMA	Securities Industry and Financial Markets Association
SIFMA Brief	Brief of Applicant Securities Industry and Financial Markets Association Regarding Satisfaction of Jurisdiction Requirements, dated July 28, 2014
SIFMA Member Declarants	Bank of America, Bloomberg L.P., Citigroup Global Markets Inc., Credit Suisse Securities (USA) LLC, Goldman, Sachs & Co., JP Morgan Chase & Co., Liquidnet, Inc., Charles Schwab & Co., Inc., and Wells Fargo & Company

NYSE Arca respectfully submits this memorandum of law in opposition to the SIFMA Brief. For the reasons set forth below, SIFMA has not satisfied the requirements set forth in the Order. Accordingly, the Commission lacks jurisdiction to consider SIFMA's challenges to rules promulgated by the Exchanges pursuant to the Exchange Act that set fees for access to their depth-of-book market data. Specifically, SIFMA has failed to provide evidence sufficient to show that the SIFMA members who submitted form declarations[1] are "person[s] aggrieved" under Exchange Act Section 19(d)(2) and that individual participation by SIFMA members is unnecessary.

PRELIMINARY STATEMENT

SIFMA was directed by the Commission to submit *evidence* that some of its members are aggrieved by the pricing of ArcaBook data. Instead, SIFMA submitted nearly identical form declarations from nine SIFMA members that do no more than state that those members pay for ArcaBook data, profess to agree with SIFMA's assertions that the pricing does not conform to the Exchange Act, and assert that they are injured because ArcaBook data is not free. But SIFMA has already fought that battle and lost: the D.C. Circuit and the Commission have held that NYSE Arca is entitled to sell ArcaBook data and not give it away for free. Because the declarations do no more than assert (without any support) that ArcaBook data should be free, they do not satisfy the requirements of the Order.

Beyond the fact that SIFMA did not do what the Commission directed it to do, the declarations that it submitted raise more questions than they answer. They say nothing about

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[1] Along with its brief, SIFMA submitted form declarations from (i) Bank of America, (ii) Bloomberg L.P., (iii) Citigroup Global Markets Inc., (iv) Credit Suisse Securities (USA) LLC, (v) Goldman, Sachs & Co., (vi) JP Morgan Chase & Co., (vii) Liquidnet, Inc., (viii) Charles Schwab & Co., Inc., and (ix) Wells Fargo & Company. *See* SIFMA Br. Exs. 1-9.

whether the declarants themselves actually pay for ArcaBook data: At least one declarant (Bloomberg) in fact passes on that data to its external professional customers, who pay directly for the data, and pay a separate charge to Bloomberg itself. Nor do the declarations say anything about what the declarants who do actually use the data themselves do with it — for example, do they use it in profit-generating activities or otherwise pass the cost on to their customers? Without this information — which is totally absent from the declarations — the Commission can draw no conclusions about whether the declarants are actually aggrieved. Particularly when considered with the data NYSE Arca has submitted, the only proper conclusion is that the declarants are not aggrieved, and thus SIFMA's applications should be dismissed.

PROCEDURAL HISTORY

On May 23, 2006, NYSE Arca filed with the Commission the 2006 NYSE Arca Rule Change, which proposed a fee for access to ArcaBook, a proprietary depth-of-book product. ArcaBook provides, among other information, lists of all of the bids and offers placed on the NYSE Arca exchange, including those outside the prevailing market price, on a real-time data feed. This information is useful, for example, to traders who want to gauge the depth and liquidity of a particular security traded on NYSE Arca's market. On October 12, 2006, the Commission, pursuant to delegated authority, issued an order approving the proposed rule change. In approving the rule change, the Commission determined that it was consistent with the Exchange Act, particularly the requirements of Section 6(b)(4) and (5), and determined the proposed fees were "reasonable when compared to the fees charged by other markets for similar products."[2]

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2 *See* October 2006 Order.

SIFMA and NetCoalition (a technology lobby group) petitioned the full Commission to review that order. The Commission did so, and approved the fees a second time.[3] Evaluating the proposed fees under a "market-based" approach, the Commission determined that NYSE Arca is subject to significant competitive forces, including NYSE Arca's "compelling need to attract order flow from market participants" and "the availability to market participants of alternatives to purchasing the ArcaBook data," and found there was no countervailing basis under the Exchange Act to disapprove of the proposal.[4] NetCoalition and SIFMA filed a petition for review of this order in the United States Court of Appeals for the District of Columbia Circuit.

On review, the D.C. Circuit set aside the December 2008 Order, not because it determined that the fees charged were unreasonable, but because there was not adequate evidence in the record before the Commission for the Commission to make the determination it had made. Accordingly, the D.C. Circuit was "unable to perform [its] A[dministrative] P[rocedure] A[ct] review on the record before [it]."[5] The D.C. Circuit similarly did not determine that the fees charged failed to comply with the Exchange Act, but found that the SEC "failed to 'disclose a reasoned basis' ... for concluding that NYSE Arca is subject to significant competitive forces in pricing ArcaBook."[6] Despite setting aside the Commission's approval order, however, the D.C. Circuit held that the market-based approach the Commission used was fully consistent with the Exchange Act and that the Commission was *not* required to assess the

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3 *See* December 2008 Order.

4 *NetCoaliation v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) ("*NetCoalition I*").

5 *Id.* at 544 (citation omitted).

6 *Id.* The holding that the Commission "failed to disclose a reasoned basis" became moot after the enactment of the Dodd-Frank amendments discussed *infra*. Those amendments removed the requirement that the Commission approve market data fee rule filings in advance.

proposed fees using a cost-based approach.[7] Although the D.C. Circuit indicated that costs *could* be considered by the Commission — which SIFMA repeatedly mis-cites in support of its efforts to cause the Commission to engage in rate-making proceedings for all market data fees — the D.C. Circuit did *not* mandate the use of a cost-based analysis.[8]

Just before the D.C. Circuit issued *NetCoalition I*, Congress enacted the Dodd-Frank Act, which changed the approval process for rules setting market data fees. Under the Dodd-Frank Act, such rule changes now "take effect upon filing with the Commission." 15 U.S.C. § 78s(b)(3)(A). The Commission has authority to suspend a rule change "if it appears to the Commission that such action is necessary or appropriate to the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act.]" 15 U.S.C. § 78s(b)(3)(C).

Accordingly, in November 2010, NYSE Arca filed a rule change setting fees for the ArcaBook product, and this rule became effective immediately.[9] SIFMA incorrectly asserts that the 2010 NYSE Arca Rule Change "authorized fees that essentially were the same ones that had been vacated in *NetCoalition I*" and "invoke[s] the same purported economic justifications that the D.C. Circuit explicitly rejected in *NetCoalition I*...." (SIFMA Br. at 3.) But the D.C. Circuit did not reject the Commission's market-based approach in *NetCoalition I*. The D.C. Circuit also did not evaluate the merits of either the 2006 NYSE Arca Rule Change filing or the

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7 *Id.* at 531. Indeed, the D.C. Circuit noted that "the SEC responded to the congressional desire that it rely 'on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'" *Id.* at 535 (citing 73 Fed. Reg. at 74,781).

8 *Id.* at 536-37. The D.C. Circuit noted that "Congress knew how to tie a fee's reasonableness to its underlying cost *but declined to do so for non-core data fees.*" *Id.* at 534 n.11 (emphasis added).

9 *See* 2010 NYSE Arca Rule Change.

fees charged for the market data products pursuant to it. The D.C. Circuit merely found that it was "unable to perform its APA review" on the record *that was then* before it. That conclusion is no longer relevant because (i) the 2010 NYSE Arca Rule Change is based on a different record than the record the D.C. Circuit had before it in *NetCoalition I* (indeed, the new record directly responds to issues raised by the D.C. Circuit in *NetCoalition I*), and (ii) the Commission has expressly stated that it will (if necessary after determining whether SIFMA has standing to pursue this proceeding) take additional information into the record for consideration (*see* Order at 14).[10]

After the Commission declined to suspend the 2010 NYSE Arca Rule Change, SIFMA and NetCoalition again sought review in the D.C. Circuit.[11] The D.C. Circuit held that the Commission's decision was not reviewable under Section 19(b)(3)(C) and dismissed the petitions for review.

After the D.C. Circuit decided *NetCoalition II*, SIFMA filed a series of applications for review of market data fees established by NYSE Arca and NASDAQ, among other markets, including the ArcaBook fees at issue in this case, claiming that the fees constituted a denial of access pursuant to Section 19(d) of the Exchange Act. On July 3, 2013, the Commission requested briefing from NYSE Arca, NASDAQ, and SIFMA regarding the primary issues to be decided in considering the 2013 Applications, including the standard of review, whether consolidation would be appropriate, the extent to which further development of

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10 SIFMA also conflates the ***fees charged*** for ArcaBook pursuant to the current and prior rule filing with the ***rule filings themselves***. Although the fees for ArcaBook are the same in both filings, the records relating to the 2006 NYSE Arca Rule Change and the 2010 NYSE Arca Rule Change are significantly different. The 2010 NYSE Arca Rule Change filing that is the subject of the current application, among other things, contains a substantially enlarged record and directly addresses the concerns expressed by the D.C. Circuit in *NetCoalition I*.

11 *NetCoaliation v. SEC*, 715 F.3d 342 (D.C. Cir. 2013) ("*NetCoalition II*").

the record was necessary, and any other relevant matters.[12] NYSE Arca argued, *inter alia*, that SIFMA lacked standing to pursue the 2013 Applications, as it had not adequately alleged that any of its members was aggrieved.

On May 16, 2014, the Commission issued an order that, *inter alia*, referred the case to an ALJ to make an initial determination as to jurisdiction. (Order at 20.) If the ALJ determines that the Commission has jurisdiction over the applications, the Order directs the ALJ to "hold a hearing addressing whether the challenged rules should be vacated under the statutory standard set forth in Exchange Act Section 19(f) ... and after such a hearing [] issue an initial decision in this matter." (*Id.*)

ARGUMENT

I. STANDARD OF REVIEW

In the Order, the Commission held that the Exchange Act permits associational standing to seek review of market data fee rules. (Order at 10.) For SIFMA to have associational standing to bring such applications on its members' behalf, it must show that "its members would otherwise have standing to sue in their own right." (*Id.* at 11.) A party has standing to challenge market data fees if it is a "person aggrieved" under Section 19(d)(2) of the Exchange Act, and a party is aggrieved if an SRO has "prohibit[ed] or limit[ed]" the party "in respect to access to services."[13]

Critically, the Commission explained that "not every fee charged by an SRO will constitute a reviewable limitation on access." (*Id.* at 13-14.) The Commission set forth "three

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12 *See* Order Regarding Procedures to be Adopted in Proceedings, Admin. Proc. File Nos. 3-15350, 3-15351 (July 3, 2013).

13 15 U.S.C. §§ 78s(d)(1), (d)(2).

important considerations" regarding "what fees might constitute reviewable limitations under Section 19(d)." (Order at 14.)

> *First*, SIFMA must establish that its members are actually subject to a limitation of access to ArcaBook. In particular, a mere declaration stating that certain SIFMA members purchased ArcaBook would, "standing alone," be insufficient to support a denial of access petition. (*Id.*)
>
> *Second*, SIFMA's members must "assert a basis that, if established, would lead the Commission to conclude that the fee violates Exchange Act Section 19(f)." (*Id.*) In particular, a member may not object to a fee "simply because it believes that it is too high." (*Id.*)
>
> *Third*, a party must show that the limitation of access limits the party's " 'ability to utilize one of the fundamentally important services offered by the SRO.'" (*Id.* at 15) (quoting Exchange Act Release No. 39459, 53 SEC 379, 1997 WL 802072, at *3 (Dec. 17, 1997).)

The Chief ALJ established a schedule for the submission of evidence by SIFMA to try to meet these requirements and for the Exchanges to respond to SIFMA's submission. As described more fully below, SIFMA has failed to meet the requirements set by the Commission with respect to ArcaBook, and so the Chief ALJ should find that the Commission lacks jurisdiction to consider SIFMA's denial of access petition with respect to ArcaBook.[14]

II. SIFMA HAS FAILED TO PROVIDE EVIDENCE OF ANY ACTUAL LIMITATION OF ACCESS TO ARCABOOK

To demonstrate that SIFMA has associational standing, SIFMA "must establish that its members are subject to an actual limitation of access." (Order at 14.) To do so, the Commission directed that:

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[14] Holding the declarants to the standing test set forth in the Order does not shift the burden regarding the rule filing's validity. (*See* Order at 15 n.88.) Although an SRO has the burden to show that its challenged rule is consistent with the purposes of the Exchange Act under Section 19(f), that burden only arises after it is determined that review is appropriate under Section 19(d). (*Id.*) Such review is appropriate only if SIFMA's members establish that they are aggrieved under Section 15(d) and SIFMA establishes that it satisfies associational standing, neither of which has been done. (*See id.* at 14.)

> SIFMA should present, ***at a minimum***, member declarations, or other comparable evidence, ***establishing*** that particular SIFMA members purchase the depth-of-book products and ***explaining*** that those members are aggrieved because the level of the prices charged for those products is so high as to be outside a reasonable range of fees under the Exchange Act [or . . . .] showing that they were unable to purchase depth-of-book products due to alleged supracompetitive pricing violating the Exchange Act.

(*Id.* at 14, 14 n.76 (emphasis added).) Importantly, this direction followed and took into account the Commission's finding that the Declaration of SIFMA General Counsel Ira Hammerman made in support of SIFMA's 2013 Applications was "standing alone ... insufficient for [the Commission] to conclude that there has been a limitation of access." (*Id.* at 14.) Mr. Hammerman's 1½ page declaration simply stated that certain SIFMA members "have paid fees imposed by the NYSE Arca Rule Change" including "Charles Schwab & Co., Citigroup Global Markets Inc., Credit Suisse, and Goldman Sachs." Hammerman Decl. at 1-2 (Sept. 9, 2013). Thus, the Commission held that a declaration reciting the mere fact that fees were paid and that someone believed (without support or explanation) that the fees were unfair or unreasonable was not sufficient to establish "aggrieved person" status. The Commission expressly required more from SIFMA's current filing: an explanation of why the ArcaBook fees are allegedly unreasonably high and how that confers "aggrieved person" status. (Order at 14.) Moreover, the Commission required individual SIFMA members to establish (through declarations or other evidence) that they had purchased depth-of-book data or had been prevented from purchasing it because of allegedly supracompetitive costs. The Order demonstrates that the Commission required SIFMA to submit more than just form declarations from SIFMA members parroting what Mr. Hammerman previously said.

Despite the Commission's direction and the Chief ALJ's clear statements to SIFMA that establishing the Commission's jurisdiction was not to be a formalistic, "box

checking" exercise, SIFMA filed nine form declarations as the entirety of its evidence. Contrary to SIFMA's assertion that "[t]hese declarations provide the evidence that the Commission called for in its May 16 Order" (SIFMA Br. at 10), the declarations fail to meet the requirements set by the Commission and fail to establish that the declarants' firms are aggrieved. The near-identical content of these declarations also raises questions about how they were created and submitted, questions the Chief ALJ should consider addressing through targeted discovery aimed at shedding light on how SIFMA approached what the Order directed it to do.[15]

A. The SIFMA Members' Declarations Fail To Show That Any Member Is Aggrieved Because ArcaBook Fees Are Unreasonably High

The Order specified that the individual member declarations must "***explain***" that each member is "aggrieved because the level of the prices charged for those products is so high as to be outside a reasonable range of fees under the Exchange Act." (Order at 14 (emphasis added).) To explain is "to give the reason for or cause of." *Explain*, MERRIAM-WEBSTER'S DICTIONARY (2014) *available at* http://www.merriam-webster.com/dictionary/explain (last

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[15] Examination of the declarations suggests that a form of declaration was sent to SIFMA members for execution and that those who returned it did so without adding specific details about their firms or their firms' uses of ArcaBook (an issue discussed more fully below). But it also raises related questions, such as whether any SIFMA members refused to submit such declarations and whether SIFMA pressured any members to submit such declarations. All of these issues should be addressed in full before the Chief ALJ determines whether SIFMA has demonstrated that jurisdiction exists here. Such limited discovery would be easy to accomplish: SIFMA could simply be directed to produce to the parties and the Chief ALJ copies of all communications between SIFMA and any SIFMA member regarding the submission by any SIFMA member in its individual capacity of any declarations or affidavits in support of challenges by SIFMA to market data fee filings, whether such documents are maintained in paper or electronically stored form, for January 1, 2014 through the present. Such communications would not be protected by the attorney-client privilege, as they would be between (i) SIFMA and/or its counsel and (ii) SIFMA member firms acting in their individual capacities. Although SIFMA's counsel may act for SIFMA and its committees, such representation does not establish an attorney-client relationship with SIFMA's members. *See In re Warren*, 129 F. Supp. 2d 327, 337 (S.D.N.Y. 2001); *In re Circle K Corp.*, 199 B.R. 92, 99 (Bankr. S.D.N.Y. 1996).

visited August 18, 2014). Declarations that fail to provide explanations the declarants were ordered to provide may be rejected.[16]

Each of the SIFMA Member Declarants should therefore have provided the Chief ALJ with an explanation of why and how "the level of prices charged" for ArcaBook results in that specific declarant being aggrieved. (Order at 14.) Instead, all of the declarants give the same, identical reason why each is purportedly aggrieved. All nine declare that:

> [Member] is aggrieved by the challenged fees because they cause [Member] to expend money for the depth-of-book data that it would not have to expend in the absence of those fees.

(SIFMA Br. Exs. 1-5, 7-9 ¶ 8.)[17] Thus, each member asserted that it is aggrieved simply because it has to pay *something* for ArcaBook. They do not state what they pay, what they use the data for, whether they pass those costs on to someone else, or why the data is not worth what they pay for it. All they say is that they are aggrieved because they have to pay for it at all. In light of SIFMA's counsel's admission to the D.C. Circuit that SIFMA's goal is to force market data to be free,[18] this is perhaps not surprising (although SIFMA has fought and lost that argument already).

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16 *See generally SEC v. Seghers*, 404 F. App'x 863, 864 (5th Cir. 2010) (declaration was insufficient where "the declaration is conclusory and fails to explain adequately the source of funds in the ... account"); *James v. City of New York*, No. 97 Civ. 9159 (JSM), 1998 U.S. Dist. LEXIS 15168, at *2-3 (S.D.N.Y. Sept. 29, 1998) (sanctioning defendants for submitting two nearly identical form declarations and finding that "[f]ar from being responsive, the affidavits demonstrated an utter disregard and apparent disdain for the Court's order . . . . [and] made no attempt to comply with the Court's direction to explain . . . .").

17 JP Morgan Chase added the adjective "excessive" before the word "fees" to this statement in its declaration. (*See* SIFMA Br. Ex. 6 ¶ 8 ("JP Morgan Chase & Co. is aggrieved by the challenged excessive fees because they cause JP Morgan Chase & Co. to expend money for the depth-of-book data that it would not have to expend in the absence of those excessive fees.").)

18 Counsel for SIFMA stated at oral argument before the D.C. Circuit in *NetCoalition I* that "it very well may be that the Exchanges would recognize that their costs for this are virtually non-existent, and that they will then adopt the view that previously existed,

SIFMA's submission is thus in direct conflict with *NetCoalition I* and the Order. As made clear by both, the mere existence of a fee is not itself a limitation on access. In *NetCoalition I*, the D.C. Circuit made clear that NYSE Arca is permitted to sell ArcaBook — that is, to charge a non-zero price for it. *See NetCoalition I*, 615 F.3d at 530 & n.6. The Commission then recognized that more was necessary to support jurisdiction over a denial of access proceeding than simply asserting that a petitioner would be happier if market data were free. (*See* Order at 13-14 ("[N]ot every fee charged by an SRO will constitute a reviewable limitation on access.").) Indeed, if the standard were low enough that SIFMA's submissions met it, then any applicant unwilling to pay for any product or service could claim that it was aggrieved and thus have standing to challenge any fee charged by any SRO, contrary to the specific holding in the Order. But none of the SIFMA Member Declarations speaks to this issue. All they say is that they do not want to pay the fee, but that is not enough. Indeed, the declarations SIFMA submitted are so generic and non-substantive that they could be submitted to challenge any proprietary market data fee simply by changing the name of the product mentioned in the declaration and nothing else. That is clearly not what the Commission envisioned in the Order.

The Commission also directed SIFMA to have its members explain why the price levels are "so high as to be outside a reasonable range of fees under the Exchange Act." (Order at 14.) Eight of the nine declarants state that the fees are unreasonable only because each of them *believes* them to be unreasonable:

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which was to offer [market] data for free . . . . I think that's just as legitimate and likely an outcome of this as the alternative, which was that we're going to have to slog through all the rate making." (Transcript of Oral Argument at 19:21-20:4, *NetCoalition I*, 615 F.3d 525 (Feb. 16, 2010), attached hereto as Exhibit 1.)

> [A]s set forth in the applications, [Member] is aggrieved because ***it believes that*** the level of the prices charged for the depth-of-book data products at issue is so high as to be outside a reasonable range of fees under the Securities Exchange Act of 1934.

(SIFMA Br. Exs. 1-5, 7-9 ¶ 9 (emphasis added).) The ninth declarant (JP Morgan Chase) declined to make even this hollow claim.[19]

Beyond the fact that this statement simply parrots what the Order said SIFMA was required to *show* (as opposed to allege), it fails to satisfy SIFMA's evidentiary burden for two additional reasons. *First*, the statement relies entirely on SIFMA's applications, which do not state any reasons why the fees are allegedly unreasonable. Indeed, the applications have already been rejected by the Commission as insufficient to establish that any individual SIFMA member is aggrieved.[20] Thus, having some SIFMA members state only that they agree with the applications does nothing to address the evidence the Commission directed SIFMA to provide.[21]

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19 Although JP Morgan Chase omitted this statement from its declaration, it appears that JP Morgan Chase inserted part of the statement — "so high as to be outside a reasonable range of fees under the Securities Exchange Act of 1934" (which simply copies the Order) — in an earlier sentence at paragraph 8 of its declaration. (*Compare* SIFMA Br. Exs. 1-5, 7-9 ¶ 8 ("As set forth in those applications, [Member] suffers pecuniary harm by having to pay these fees in order to access, use, and distribute the depth-of-book data made available by NYSE Arca and NASDAQ) *with* SIFMA Br. Ex. 6 ¶ 8 ("[A]s set forth in those applications, JP Morgan Chase & Co. suffers pecuniary harm by having to pay these excessive fees so high as to be outside a reasonable range of fees under the Securities Exchange Act of 1934, in order to access, use and distribute the depth-of-book data made available by NYSE Arca and NASDAQ.").)

20 And of course the applications are, on their face, inconsistent with *NetCoalition I*: for example, the ArcaBook application asserts that NYSE Arca "has provided no evidence of the cost of collecting and distributing the data at issue, despite the D.C. Circuit's finding that such costs are undeniably relevant to whether the Exchange is charging supracompetitive fees" (ArcaBook Application ¶ 6), even though the D.C. Circuit held no such thing (*see supra* at 5-6).

21 Indeed, the Commission must have assumed that at least some SIFMA members agreed with the applications, for otherwise SIFMA could never "represent" anyone with respect to these issues, and so the Commission must have expected more than for some members to say, in effect, "we agree with what was already submitted."

Second, the Commission made clear that "an applicant cannot object to an SRO fee simply because it believes that it is too high." (Order at 14.) Yet this subjective "belief" is the only "evidence" offered by SIFMA to establish that its members are aggrieved because the fees are too high. Relying only on the "reasons" supposedly given in the applications — of which there are none — the declarants' subjective beliefs are supported by nothing.[22] Essentially, all SIFMA did was submit nine declarations that say that the declarants object to paying any fee for depth-of-book data because of the "reasons" stated in the applications (of which there are none). As such, SIFMA has failed to provide the Chief ALJ with any evidence establishing that any members are aggrieved.

B. The SIFMA Members' Declarations Do Not Satisfy The Commission's Order Because They Do Not Establish That Each Purchases The Depth-of-Book Products At Issue.

The Order specified that individual member declarations must "***establish***" that each member "purchase[s] the depth-of-book products" or "show[] that they were unable to purchase depth-of-book products due to alleged supracompetitive pricing." (Order at 14.) Here, the nine form declarations SIFMA submitted are from individual members who each purport to pay fees for the Exchanges' depth-of-book market data products and expect to continue to pay these fees in the future. (*See* SIFMA Br. at 9.) The declarations state that

> Pursuant to the NYSE Arca Rule Change, [Member] has paid monthly fees since at least [DATE] in order to continue accessing, using, and distributing depth-of-book data made available by NYSE Arca.

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22 In any event, subjective beliefs not supported by facts are not evidence. *See generally NetCoalition I*, 615 F.3d at 541 (noting that "self-serving views" provide "little support" for proposed conclusion and rejecting statement deemed to be "a conclusion, not evidence").

(SIFMA Br. Exs. 1-9 ¶ 5.)[23]

As an initial matter, SIFMA has abandoned the notion that the prices for depth-of-book data are so high that some entities are completely unable to purchase the data, as no declarant makes such an assertion.[24] Thus, the only thing left for SIFMA to challenge is whether the prices for ArcaBook are so high as to be unreasonable. But as noted above, SIFMA's submissions establish no more than that the members who submitted them would prefer ArcaBook to be free.

On their face, the declarations SIFMA submitted offer little more than Mr. Hammerman's Declaration. Indeed, the most important issues regarding whether any declarant is in fact aggrieved are entirely missing from the declarations:

- No declarations provide any detail disclosing which depth-of-book products are actually purchased by each member or how much each member has actually spent or continues to spend on those products, including how many individual devices, both professional and nonprofessional, it pays to use. They do not even include aggregate numbers for what the declarants spend on ArcaBook.
- No declarations disclose what kinds of fees each member pays, such as access fees, redistribution fees, and/or subscriber fees. None of the declarations

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[23] Interestingly, Bloomberg Finance L.P. removed the word "using" from this sentence in its declaration. (*See* SIFMA Br. Ex. 2 ¶ 5 ("Pursuant to the NYSE Arca Rule Change, Bloomberg Finance L.P. has paid monthly fees since at least September 2010 in order to continue accessing and distributing depth-of-book data made available by NYSE Arca.").) Notably, Bloomberg provides no evidence regarding the fees it receives from distributing depth-of-book data to its customers. Charles Schwab & Co also removed both the words "using" and "distributing" from this sentence in its declaration, but states that it "use[s]" and "distribute[s]" ArcaBook data in paragraphs 7 and 8 of its declaration. (*See* SIFMA Br. Ex. 8 ¶ 5 ("Pursuant to the NYSE Arca Rule Change, Schwab has paid monthly fees since at least September 2010 in order to continue receiving access to depth-of-book data made available by NYSE Arca.").) It is unclear why Schwab's declaration is internally inconsistent.

[24] Charles Schwab & Co states that the fees are "so high" that they limit its "ability to distribute the data to ***more*** of its employees and clients." (*See* SIFMA Br. Ex. 8 ¶ 7 (emphasis added).) But that statement fails to establish that Schwab has actually been unable to purchase ArcaBook or how much more access it would otherwise desire to have; to the contrary, it is an admission that Schwab *has* purchased ArcaBook data.

discloses any profit that is made by redistributing ArcaBook data to the SIFMA members' clients. Similarly, no declaration indicates whether the declarant passes along, or otherwise offsets, the cost of the data.

- No declarations disclose whether any subsidiary or affiliate of any declarant accesses ArcaBook, or whether any such subsidiary or affiliate pays access fees, redistribution fees, and/or subscriber fees. None of the declarations discloses whether any subsidiary or affiliate of any declarant makes a profit by redistributing ArcaBook data to its respective clients, or whether any of the fees it pays are passed along, or otherwise offset.

- No declaration indicates what profit the declarant generates from using the data in its business, whether from proprietary trading or operating an internal trading venue (such as an ATS or dark pool).

- No declarations disclose whether a declarant has benefited from any caps on these fees.

- No declarations disclose whether a declarant purchases access to ArcaBook through third parties, in addition to directly from NYSE Arca (in which case it is paying both NYSE Arca and a vendor, and it cannot assign blame for its vendors' fees to NYSE Arca).

Beyond the vague statements that each declarant "has paid monthly fees," the declarations are also vague regarding what each individual identified SIFMA member does with the ArcaBook data once it has paid the fees it pays, other than to say that they access, use,[25] and distribute the data. This is critically important, because this glaring omission is key to understanding whether any particular declarant might be aggrieved at all and why the quest for market data to be free is really about increasing the profit margins of those who use and distribute it.

SIFMA seeks to pursue the applications on the basis of associational standing. Associational standing can only be utilized when neither the claim SIFMA asserts nor the relief it requests requires the participation of individual members in the proceeding. (*See* Order at 11.) The declarations that SIFMA's members submitted make it clear that such individual participation would be necessary here for a number of related reasons, not least is that SIFMA

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[25] *See supra* note 23.

has not even demonstrated that the entities that submitted the declarations it relies on are similarly situated. To understand why that is so requires examining how SIFMA's members use depth-of-book data and focusing on what SIFMA's member's declarations omitted.

Some Uses of Depth-of-Book Data Generate Profits for the Users. Broadly speaking, there are two different ways to use depth-of-book data: to display the data to users, whether internal or external (a "display use") or to use the data for trading purposes, such as using the data as an input into high frequency trading or other algorithmic models, (a "non-display use"). (*See* Declaration of Colin Clark, executed on August 18, 2014 ("Clark Decl.") ¶ 3.) Non-display use of ArcaBook is charged at a flat monthly fee and can generate large profits for those who use it (for example, one ArcaBook feed can provide the data for thousands or tens of thousands of trades per day at a microscopic cost per trade). (*Id.*) If an ArcaBook subscriber realizes profits from the use of ArcaBook data that more than cover the cost of that data, then that data product is worthwhile for the subscriber to purchase. For example, suppose that an ArcaBook subscriber paid $4000 per month for non-display access to ArcaBook data but realized net profits of $40,000 per month on those non-display uses.[26] Would it be reasonable to call that user "aggrieved" by the cost of ArcaBook data? No, just as a securities purchaser who made a profit on trades in a certain security cannot represent a class of plaintiffs suing for fraud in connection with that security. Such a plaintiff cannot prove damages,[27] and likewise such a market data customer should not be able to claim it is "aggrieved."

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26 In this example, "net profits" refers to profits net of the cost of all data used by the non-display use.

27 *See In re Organogenesis Sec. Litig.*, 241 F.R.D. 397, 403 (D. Mass. 2007) (finding proposed lead plaintiff atypical in a proposed class action when he might have made a profit on the securities transactions at issue).

None of the declarants addresses this issue. NYSE Arca's records show that in June 2014 all declarants except Goldman Sachs and Schwab paid at least $4000 per month for "non-display" access to ArcaBook. (*See id.* ¶ 4.) These seven SIFMA members therefore use the data to generate profits (or else, as rational actors, these declarants would not pay for the data for non-display uses[28]). Because the declarants have entirely failed to address this key issue, their declarations are not just insufficient to show that they are aggrieved, but demonstrate that their individual participation would be required to determine whether they are in fact aggrieved.[29]

Many Declarants Distribute ArcaBook To Clients: Bloomberg Finance L.P., Goldman Sachs, JP Morgan Chase, and Schwab each state that they distribute ArcaBook data not only to their employees, but also to their clients.[30] (*See* SIFMA Br. Exs. 2, 5, 6 & 8 ¶ 7.) What these declarants fail to disclose, however, is that their professional clients who receive ArcaBook are often billed directly — in which case the declarants do not pay NYSE Arca for the cost of providing ArcaBook data to their clients. (*See* Clark Decl. ¶ 5.) Bloomberg is an apt example: In June 2014, Bloomberg had 4,586 professional clients who received ArcaBook data feeds

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28 *Cf. Atlantic Gypsum Co. v. Lloyds Int'l Corp.*, 753 F. Supp. 505, 514 (S.D.N.Y. 1990) (courts assume that entities act in their informed economic self-interest and reject inferences that defy economic reason).

29 SIFMA argues that this proceeding need not address whether its request to set aside ArcaBook fees requires the participation of individual SIFMA members, because the Commission purportedly held that SIFMA already satisfied this issue. (SIFMA Br. at 7-8.) What the Order actually says is that whether the participation of individual SIFMA members is necessary is still relevant to the jurisdictional question currently before the Chief ALJ. (*See* Order at 12 ("And to the extent that evidence regarding individual members is necessary to consideration of the first element of associational standing analysis, that evidence bears on standing issues, not the merits of SIFMA's claim itself.").) SIFMA's own submissions revived this issue.

30 None of the declarations discloses whether any subsidiary or affiliate of any declarant distributes ArcaBook data to its respective clients. For example, JP Morgan subsidiary Neovest Inc. distributes ArcaBook externally and pays a redistribution fee, and NYSE directly bills Neovest's professional customers. (*See* Clark Decl. ¶ 5.)

through their Bloomberg terminals. (*See id.*) For all of those clients, Bloomberg itself paid NYSE Arca nothing —Bloomberg's clients were directly billed for the ArcaBook data they received. (*See id.*) Each of those clients also paid Bloomberg an additional $1 per month to access ArcaBook through a Bloomberg terminal (in addition to both the amount the client direct-paid NYSE Arca and the monthly amount the client paid Bloomberg for use of the terminal itself). (*See id.*) Bloomberg's declaration is strikingly silent about both the direct payment arrangement and the additional fee it receives, which is directly relevant to whether Bloomberg could be deemed "aggrieved." The absence of any information regarding what arrangements each declarant has regarding any pass-throughs or similar arrangements it has with its own clients is another reason individual participation is required.[31]

Most Declarants Pay Fees To Vendors Other Than NYSE Arca For ArcaBook Data: Another glaring omission from the declarations is that all of the declarants except for Bloomberg also pay to access ArcaBook through third-party vendors. (*See id.* ¶ 6.) For example, *all* of the declarants pay Bloomberg to access ArcaBook through Bloomberg terminal subscriptions. (*See id.*) But four of the declarants take ArcaBook data through Bloomberg and two other vendors and one (Citigroup) takes it through Bloomberg and three other vendors.[32] (*See id.*) None of the declarations addresses this issue, which further shows why individual participation of the SIFMA members is necessary.

These are reasons why the declarations SIFMA submitted raise more questions than they answer and thus demonstrate why the individual participation of SIFMA members

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31 Should the Chief ALJ be inclined to place any weight on the declarations given this failing, she should compel the declarants to provide full explanations regarding whether their customers in fact pay to access ArcaBook and to what extent they each do so.

32 Ironically, BofA and Goldman Sachs both take ArcaBook data directly from NYSE Arca and through Bloomberg, and BofA also takes ArcaBook data through Goldman Sachs. (*See* Clark Decl. ¶ 6.)

would be necessary (which defeats SIFMA's attempt to rely on associational standing). Focusing, as an example, on Bloomberg's ArcaBook fees for the month of June 2014 makes it even clearer why individual participation is necessary:

- The total amount Bloomberg paid relating to ArcaBook data in June 2014 was $9,510.
- Of that amount, $4,000 was for non-display uses declared by Bloomberg — that is, for uses that were likely profit-making activities of Bloomberg.
- In June 2014, Bloomberg re-vended ArcaBook data to 4,586 of Bloomberg's customers through their Bloomberg terminals. Bloomberg itself paid NYSE Arca nothing for those users — the customers were billed directly. However, Bloomberg itself charged each of those users $1 for accessing ArcaBook through their Bloomberg terminals, receiving a total of $4,586.
- Thus, excluding the non-display fees that Bloomberg paid — which presumably generated a profit of undisclosed amount for Bloomberg — the net amount Bloomberg paid relating to ArcaBook data in June 2014 was $924 ($9,510-$4,000-$4,586). That of course does not take into account any other ways Bloomberg might have passed on the costs of ArcaBook data to its customers or whether that cost was outweighed by profits Bloomberg made from using the data or distributing it in other ways. Without taking all such information into account, there is no way to determine whether Bloomberg could be deemed aggrieved by the ArcaBook fees at issue. By way of example of how much Bloomberg could have profited in a single month just by redistributing ArcaBook data, the total monthly cost to Bloomberg of receiving ArcaBook data for the purpose of redistributing it to its customers was $3,500 — the $2,000 access fee plus the $1,500 redistribution fee. And yet Bloomberg charged those customers $4,586 to receive the data, meaning that Bloomberg earned $1,086 more in June 2014 from sending ArcaBook data to its customers than it paid for access and redistribution right.[33] Neither Bloomberg nor SIFMA have offered any explanation for why the fees Bloomberg paid to access and redistribute ArcaBook data should be deemed excessive given that Bloomberg was able to generate more revenue from the fees paid by its customers than the fees it paid for ArcaBook access and redistribution rights.

(*See id.* ¶¶ 5-6.)

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[33] This comparison likely understates Bloomberg's profit, because the access fee also covers Bloomberg's internal uses of ArcaBook, which one must presume Bloomberg deems profitable as well, and Bloomberg charges separately for the use of its terminals.

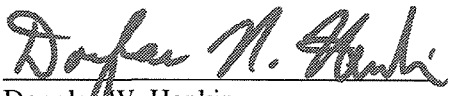
Because the Commission would have to address similar questions for each declarant and the underlying facts and circumstances will be different for each, SIFMA cannot rely on associational standing here.

CONCLUSION

For the reasons set forth above, NYSE Arca respectfully requests the Chief ALJ find that the members SIFMA has identified are not "persons aggrieved" under Section 19(d)(2) of the Exchange Act, that SIFMA lacks associational standing, and that following such a finding SIFMA's applications be dismissed.

Dated: August 18, 2014

MILBANK, TWEED, HADLEY & McCLOY LLP

By: 

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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 August 18, 2014, I caused a copy of the foregoing Brief of NYSE Arca, Inc. in Opposition to Applicant Securities Industry and Financial Markets Association's Brief Regarding Satisfaction of Jurisdictional Requirement to be served by hand on the parties listed below:

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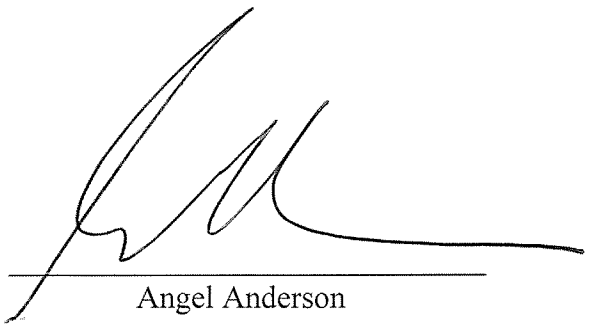

Angel Anderson

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NETCOALITION,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Nos. 09-1042 et al.

Tuesday, February 16, 2010
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES KAREN LeCRAFT HENDERSON AND MERRICK B. GARLAND AND SENIOR CIRCUIT JUDGE HARRY T. EDWARDS

APPEARANCES:

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CARTER G. PHILLIPS, ESQUIRE

ON BEHALF OF THE RESPONDENT:

MARK PENNINGTON, ESQUIRE

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PROCEEDINGS

THE CLERK: Case number 09-1042. et al., NetCoalition, Petitioner v. Securities and Exchange Commission. Mr. Phillips for the Petitioners; Mr. Pennington for the Respondent; and Mr. Henkin for the Intervenor.

JUDGE HENDERSON: Mr. Phillips, good morning. I think --

ORAL ARGUMENT OF CARTER G. PHILLIPS. ESQ.

ON BEHALF OF THE PETITIONERS

MR. PHILLIPS: Good morning, Your Honors. May it please the Court, my name is Carter Phillips, and I'd like to reserve three minutes for rebuttal, please.

JUDGE HENDERSON: All right.

MR. PHILLIPS: I'd like to start, I think, where we have common ground among the parties. First of all, it is accepted by all sides that the New York Stock Exchange Arca is an exclusive processor of information, and therefore subject to regulation by the Securities Exchange Act under Section 3A; and second, that the depth of book data fees that are at the issue in this are in fact reviewable under a fair and reasonable standard, so that there is some form of rate making that has to be applied. All of the parties agree to that extent.

The point at which we come to disagreement, obviously, is the extent to which a fair and reasonable

assessment can be made without any regard to costs whatsoever, particularly in a market that is a brand new market, where we've never had any efforts to sell this particular type of data before, and we're trying to evaluate whether or not the fees are fair and reasonable.

And it seems to me that the sort of fundamental question you would ask yourself in that situation is if you had a reasonable allocation of the fees and you said, you know, that this basically represents a 10 percent profit and 90 percent of the costs then you would say okay, that's a pretty reasonable way to proceed. But if you on the other hand thought that this was 10 percent of the cost and 90 percent of the profit then the only conclusion you would draw from that is obviously that this is a not fair and reasonable fee under those circumstances, or at least you would have to take a harder look at the basis on which those fees are being determined.

And that's particularly true, it seems to me, in this case where New York Stock Exchange Arca specifically said in its application that part of the reason why we're asking to put in fees, because we didn't charge anything for this historically, the reason we're doing this is because of increased costs that we've incurred. Now, that seems under those circumstances perfectly sensible in the absence of a completely deregulated environment to say fine, if there are

additional costs that justify these particular data being charged then put forward those costs, let us see what they look like, and then we can make an assessment of whether or not it's a fair and reasonable evaluation.

It seems to me that is the fairest and most reasonable understanding of what a rate making rule requires. Just and fair and reasonable rates typically start with the notion of cost, as courts established that on a number of occasions. Historically that's what Congress would have understood in 1975 when it imposed this kind of a requirement. We're talking about exclusive processors.

The legislative history is quite clear that they should be treated like any other kind of regulated industry where it's, you know, you have essential information that's not accessible by any other source, and under those circumstances the right solution is to regulate it. It may turn out in time after you've regulated for awhile that you can comfortably conclude that there's a place to deregulate, and you've certainly seen that in the electric and natural gas oil pipeline situations where because there were clear substitutes available that ultimately the agencies that regulated those particular activities could conclude that they could rely on the market.

But here we don't have any direct market substitutes for this exclusive data that NYSE Arca has put forward in the

circumstances of this case. And in the absence of something that we can turn to that says yes, we are confident that these prices will be constrained then it seems to me a complete at least abuse of discretion, if not contrary to the statute itself for the SEC not to insist on having some cost information made available to it so that it can evaluate that, and then be in a position to make a judgment, at least in the first instance that these are just and reasonable rates.

JUDGE EDWARDS: Mr. Phillips, part of what --

JUDGE HENDERSON: Is that the same case --

JUDGE EDWARDS: I'm sorry.

JUDGE HENDERSON: Is that the same case with NASDAQ's total view that the SEC approve that in 2002?

MR. PHILLIPS: Those are the, yes, the same basic problem is embedded in that.

JUDGE HENDERSON: So, I thought you began by saying this is a brand new field. Am I incorrect that back in 2002 SEC, the SEC approved exactly this type of market based approach with respect to the NASDAQ depth --

MR. PHILLIPS: Depth of book.

JUDGE HENDERSON: -- of non-core date?

MR. PHILLIPS: Right. In 2002 the portion of the SEC acting on delegated authority --

JUDGE HENDERSON: Right.

MR. PHILLIPS: -- approved this, and it wasn't

subsequently reviewed under those circumstances, so it was allowed to go into effect. If the Court were to conclude in this case that some form of cost analysis is appropriate for any kind of rate setting for fees for depth of book it would be available to the parties to go back and ask the SEC to take another look at it, and frankly, it would be in the authority of the SEC to take another look at it, and candidly I assume that they would.

I mean, it's interesting that the rationale that was put forward by NYSE Arca in this case in the first instance was, you know, our fees are reasonable because they're less than the fees that were charged by other monopolists under these circumstances. Now, the Commission didn't embrace that particular perspective, and I think that makes a lot of sense. But, you know, the reality is, is that we're talking about three major players in this field who have significant ability to influence or control the costs that they're going to impose on users of this information, and the Commission's answer is ultimately to say well, I just don't know how much everybody needs this information.

Well, that's all well and good, but we know that at least 19,000 subscribers are out there, and significantly want the information. I can represent quite confidently because of my clients that there are lots more who would do so if the prices were more reasonable than they are today. And if you

look back and you think about sort of the regulatory history, I mean, my guess is that whenever the railroad started up there were probably not 19,000 people using the railroads, there were probably just a few hundred, and everybody else used wagons to get things across, and over time it became more and more popular.

So, it is in the nature of this kind of undertaking when you start a new market, and you create a new opportunity people have to learn about it, they have to develop the expertise in order to be able to use this particular tool as they go forward in their investment decision making.

And so, you know, to sit here and say well, we'll just leave it in the hands of the market rather than take some evaluation of the actual costs it seems to me to simply sort of cast all of those people aside and to constrain a market that would otherwise be in a position hopefully to develop in a proper way so that you can make an assessment down the road whether or not --

JUDGE EDWARDS: Let me see if I understand some of this. Part of what I think the Agency says is if this price is too large or too high they'll go to one of the other processes for the same, similar data.

MR. PHILLIPS: Right. But while they will say -- I mean, they don't actually say that --

JUDGE EDWARDS: Right.

MR. PHILLIPS: -- because you can't do that, because their data is their data. I mean, the New York Stock Exchange knows what's on their market, and NYSE Arca knows what's on its. They don't, you know, buying one isn't a substitute for the other, so they just say it has some sort of generic ability to constrain, so you can at least get some --

JUDGE EDWARDS: All right. So, you're --

MR. PHILLIPS: -- information.

JUDGE EDWARDS: -- rejecting that suggestion that you can move from process A to process B --

MR. PHILLIPS: Right. Clearly, that's not --

JUDGE EDWARDS: -- because they're not offering the same thing.

MR. PHILLIPS: Right. It's not the same data, it's fundamentally different data.

JUDGE EDWARDS: And then I think you're also saying to the, I want to make sure I understand this, to the extent that they are offering some things that are similar, they all have rocket power, for want of a better term, the price is set too high then there are groups of people who will be excluded from using all three, they just can't.

MR. PHILLIPS: Right. Absolutely. And some of them can't even use one, much less all three. But the reality is, you know, if you want to be in a position to make use of this tool you really do need from all three, and so therefore you

really are at the mercy of whatever race they said. And the notion that the three of them now are basically in this situation where they're pegging against each other and saying well, as long as my rates are slightly less than the next rates it will just continue to escalate up and the rates will continue on, particularly given the ruling now from the Commission that's under review in this specific case, in contrast to the ruling that came out in the previous decision by the Division. Because now they have said we have concluded that because there is competition for orders all of the exchanges are subject to some kind of a constraint on the costs they're going to be able to impose, and therefore presumptively whatever number they come up with is basically a number they get to make the call on, and then we'll see whether or not there are any supervening considerations that would justify a different undertaking in this context.

But the Court, I mean, the Commission, you know, doesn't come to a, you know, to the, you know, leaves that issue, you know, basically now to the market.

JUDGE EDWARDS: Well, your order flow argument you're saying I think the Commission will hear from them, they're relying very heavily on that, and you're saying that doesn't really constrain the fee setting at all.

MR. PHILLIPS: No, because the decision as to where you're going to place an order is securities and transaction

specific. If I want to buy Goggle, I want to buy Google. You know, somebody, you know, I'm a broker/dealer, my customer says I want to buy Google, so what am I going to do? I'm going to go look and see where I can execute the best opportunity for Google.

The question of whether or not I'm going to get depth of book data for a particular exchange is something I will have made months ago because I have to subscribe on a monthly basis. And so, I have to have that information available to me. Will I use --

JUDGE GARLAND: Okay, isn't their argument that if you want to buy Google and you want the best deal, and you think depth of book is required that you'll go to the exchange that offers depth of book, and you'll ignore NYSE because they're not making their exchange attractive? That's their argument, right?

MR. PHILLIPS: I guess that, I mean, I don't know that they make that precisely that way, because the problem is, is that that doesn't make any sense because without -- if you go to the place that gives you the depth of book it may be the smallest exchange, and its depth of book could be 10 shares. They may not have any more than 10 shares available. Whereas, for Google, which I think is a NASDAQ, on the NASDAQ, let's assume that for purposes of argument, you know, that's where all the liquidity is, and if you really want to buy

thousands of shares of it, the only place you can find that out is by going to the NASDAQ --

JUDGE GARLAND: So, their --

MR. PHILLIPS: -- depth of book.

JUDGE GARLAND: Assuming I'm understanding their argument, their argument that this is an element by which exchanges differentiate themselves and make themselves more attractive doesn't really work, that is that depth of book is not the relevant factor with respect to where you're going to trade?

MR. PHILLIPS: Right. I think at the margins it can be a relevant factor for the unusually small exchanges and operations. But once you get to a certain level of strength, and the NYSE Arca, NASDAQ, New York Stock Exchange clearly are in that category where nobody can make, or you don't have the option of saying I'm not going to trade on those exchanges, that's just not something any realistic person can do. And so, you're going to have to buy the depth of book, and since it is an exclusive processor for each one of them, and since just a reasonable rate, or fair and reasonable rate making is the statutory requirement then it seems to me it's incumbent on the Commission to say look, we'll look at the cost data, we'll make an assessment, and then we'll decide whether or not these are fair and reasonable rates. We're not going to simply leave it --

JUDGE GARLAND: Well, can I ask you on --

MR. PHILLIPS: -- unregulated.

JUDGE GARLAND: -- on that point, are you withdrawing, or am I misconstruing your argument from numeral one, as compared to your argument in roman numeral three? That is --

MR. PHILLIPS: Yes.

JUDGE GARLAND: You're nodding to suggest at least you understand what I'm asking which is --

MR. PHILLIPS: Right.

JUDGE GARLAND: -- the way you're putting the argument now is that yes, perhaps competition could be a way of guaranteeing just and reasonable rates, there isn't enough evidence here that there is competition, therefore arbitrary and capricious, that's roman number three.

MR. PHILLIPS: Right.

JUDGE GARLAND: Roman numeral one, at least as I read it was --

MR. PHILLIPS: Is a statutory interpretation argument.

JUDGE GARLAND: -- statutory has to be, can't be dependent on competition.

MR. PHILLIPS: Right. What the Court said in Goldstein v. SEC is pretty much the way I come out in this particular case, because in that case the Court said even if

the Act doesn't foreclose the Commission's interpretation, the interpretation, you know, is outside the bounds of reasonableness, and so it doesn't matter whether you sort of look at it as the statute --

JUDGE GARLAND: Well, it --

MR. PHILLIPS: -- you're looking at --

JUDGE GARLAND: Of course it does matter, but it matters in a sense if we held the way --

MR. PHILLIPS: But it matters for the long haul, it doesn't matter --

JUDGE GARLAND: Yes.

MR. PHILLIPS: -- for the specifics of this case. Right.

JUDGE GARLAND: Which unfortunately matters to us because we're writing an opinion.

MR. PHILLIPS: Well, it would matter to me, too, and my client --

JUDGE GARLAND: Yes.

MR. PHILLIPS: -- in the long run. So --

JUDGE GARLAND: But --

JUDGE EDWARDS: What Goldstein was saying no matter how you look at it, it fails, which is also to say fails under Chevron I/II. I mean, I remember it quite well.

MR. PHILLIPS: Right.

JUDGE EDWARDS: What Judge Garland is asking you,

are you pretty much moving away from the Chevron I/II argument, and resting primarily on arbitrary and capricious and lack of --

MR. PHILLIPS: Yes. I'm not abandoning the Chevron I argument, it just seems to me for purposes of what Judge Edwards you asked about earlier, how do you write this opinion? If it were me I would write this opinion to say we don't need to decide whether or not the statute precludes that, that's an argument for another day, but we do need to decide that cost is a fundamental element of any kind of fair and reasonable rate making, that's statutorily mandated. And until we are fully convinced, and the Commission can make a showing based on a mature market that cost isn't a consideration, or it doesn't need to be a consideration, the statute demonstrably pushes us in favor of regulation.

JUDGE GARLAND: All right. But that's still a different question. So, under what I regard as roman numeral one, cost is relevant because in regulated industries we look at costs and we give some return above cost, that's how it's done. If I look at your roman numeral three argument, the argument is cost is relevant because super competitive profits indicate lack of competition. Those are two very different ways to --

MR. PHILLIPS: Well, I agree with that.

JUDGE GARLAND: -- look at cost.

MR. PHILLIPS: I agree with that, Judge Garland. And, you know, my basic, you know, my first argument is still I think that Congress intended that there would be in fact cost regulation. But I recognize that even in other situations where fair and reasonable rate making is part of the practice, at some point it is possible that the Commission might be in a position where it could deviate from a pure cost based analysis to something else, because there's a lot of precedent that suggest that. I don't think that's the way this statute was teed up, but if the Court were not prepared to accept my statutory argument then at a minimum it has to recognize that the statute provides more than indifference as to whether or not there ought to be a regulatory scheme in place that protects consumers and ensures that the rates are fair and reasonable under those circumstances.

JUDGE GARLAND: Can I ask you one more question? As I understand it depth of book information, the SEC has not required it to be published, is that right?

MR. PHILLIPS: That is correct.

JUDGE GARLAND: So, if you were to win, and they were to decide okay, we're just not going to produce this stuff, could they do that?

MR. PHILLIPS: Yes, they could do that. Obviously, we would have to go back to the Commission and make a pitch that we think that's a terrible mistake, and that the

Commission --

JUDGE GARLAND: So, what if they were --

MR. PHILLIPS: -- ought to add it --

JUDGE GARLAND: Right.

MR. PHILLIPS: -- to the depth of, ought to add it to the consolidated data.

JUDGE GARLAND: But at least they could do it during the period of the rate making, or whatever it is we are going to call this proceeding. So, you could -- and given our experience with rate making in other cases this could be multiple years before you come out with a rate that you regard as having been, and forget about whether you regard it, but the Agency regards it as --

MR. PHILLIPS: Right.

JUDGE GARLAND: -- being just and reasonable, other than purely competitive, is that right? I mean, we could be three or four years from now before any depth of book data is published.

MR. PHILLIPS: Yes. Although I don't know that that's necessarily the assumption I would make. Because again, remember, when they filed the application, NYSE Arca specifically said that we were doing this to recover specific costs that we have in mind. I don't know why it would be particularly different if they had that information back when they filed the application why they couldn't simply release

those data now --

JUDGE GARLAND: Well, you would undoubtedly disagree with the data, I mean, your argument is about marginal cost.

MR. PHILLIPS: Right.

JUDGE GARLAND: And say almost all economists agree that in the real world it's very difficult to evaluate what marginal cost is, right?

MR. PHILLIPS: Well, I think it's harder, actually, to allocate fixed costs to --

JUDGE GARLAND: Okay.

MR. PHILLIPS: -- rather than it is to --

JUDGE GARLAND: Well, we'll add that to it.

MR. PHILLIPS: -- determine marginal costs. But --

JUDGE GARLAND: But that doesn't suggest that the rate making proceeding is going to be very easy, or quick. I mean, they may have a view about what their costs are, you are very unlikely to agree with it. So, there --

MR. PHILLIPS: Right.

JUDGE GARLAND: -- has to be a proceeding, right?

MR. PHILLIPS: Right. But I don't know that that necessarily requires that it be a three to four year proceeding, because --

JUDGE GARLAND: What's the typical --

MR. PHILLIPS: -- we're not asking for pure rate, you know, a pure regulated rate making process to be

undertaken. Our basic position here is that you cannot make a determination of whether something is fair and reasonable without at least some assessment of what the thing costs to begin with. And, you know, it --

JUDGE GARLAND: I guess what I'm trying to get at is --

MR. PHILLIPS: You know, I realize that once you open the box --

JUDGE GARLAND: Yes.

MR. PHILLIPS: -- you've got the pandora problem.

JUDGE GARLAND: Exactly.

MR. PHILLIPS: I understand that.

JUDGE GARLAND: And what I'm asking about is, you know, we want data to be out there.

MR. PHILLIPS: Yes.

JUDGE GARLAND: We want -- and there's going to be all different kinds of data over the next few years that may be good to be out there, might not. And if in each situation there has to be the kind of proceeding that you're talking about aren't we slowing down the release of the data?

MR. PHILLIPS: Well, I think the alternative way to think about it is that it very well may be that the Exchanges would recognize that their costs for this are virtually non-existent, and that they will then adopt the view that previously existed, which was to offer those data for free in

order to better serve transparency and protect the consumers' interests. I think that's just as legitimate and likely outcome of this as the alternative, which was that we're going to have to slog through all the rate making.

JUDGE GARLAND: So, you think that the Exchanges have this sort of elimuncinary (phonetic sp.), or whatever the pronunciation of the word is, attitude about things that they're going to release it for free just because they like transparency? That's not the approach you're taking in your brief in terms --

MR. PHILLIPS: No, no.

JUDGE GARLAND: -- of their motives.

MR. PHILLIPS: No. To be sure. I understand that. But I think what they'll recognize is this goes back to the same point the Commission made about the relationship between the people who use the exchanges, and the exchanges themselves, there's obviously an interaction there. Now, these are for profit enterprises, so those interactions have changed to some extent, but we're still basically their customers, and if we really want that information, if there's a significant call for it my guess is they will realize that it's in their best interests not necessarily in a profit loss basis, but just simply in the best interests of protecting their customer base to go forward and provide the information for free.

JUDGE GARLAND: Okay. One more question, this is a fact question I'm not sure I understand. With respect to the core data --

MR. PHILLIPS: Yes.

JUDGE GARLAND: -- the brief suggested that the fees for that are negotiated, not determined on the basis of costs.

MR. PHILLIPS: So far they have been, yes.

JUDGE GARLAND: And is that because the Agency's been unable to figure out what the cost is, or --

MR. PHILLIPS: No, that's because the Agency I think has placed a fair amount of pressure on the parties to come to some kind of an agreement as to the cost, and they've done that so far successfully. But obviously if at some point the negotiations were to break, or those understandings were to break down then I think the Commission would have to undertake a pure cost based analysis in the same way it does with the tape, you know, with the consolidated tape where the exchangers provide the information, and they get it back they have to pay the fees for that. I mean, the fair and reasonable approach in that situation according to the exchanges absolutely requires an analysis of the costs in order to come up with something that's fair and reasonable. All we're asking is whatever's good for the exchanges when they have to pay a fee ought to be good for their customers when we have to pay a fee.

JUDGE GARLAND: Are there proceedings to determine that? And how --

MR. PHILLIPS: Yes, there are proceedings.

JUDGE GARLAND: -- long do they take?

MR. PHILLIPS: The Commission's order asking for an analysis of 10 or 12 questions was a year or so ago, as I recall.

JUDGE GARLAND: Thanks.

MR. PHILLIPS: Thank you, Your Honor.

JUDGE HENDERSON: All right. Thank you. Mr. Pennington.

ORAL ARGUMENT OF MARK PENNINGTON, ESQ.

ON BEHALF OF THE RESPONDENT

MR. PENNINGTON: Good morning. Mark Pennington for the Securities and Exchange Commission. It was thrilling to hear the words elimuncinary and the securities market in the same sentence.

In 1972 when the Commission first recognized that market data technology had reached the point where it would make sense to tie all the markets together and to create a national market system it recognized at that time that there was always going to be this tension between unification and diversity, and their downsides of monopolization and fragmentation. And as it's gone through the last 30 or 40 years of implementing the national market system that's the

issue that comes up constantly, and it comes up here. You have market data that is useful to investors, you could require it all to be disclosed; you could leave the exchanges, the markets to just decide what to disclose; or you can come up with some balance. And the Commission has come up with the concept of core data, which is basically "last transactions," requires that to be distributed, and then leaves the non-core data, including depth of book data, like we have here, up to the individual markets, or up to the individual markets to decide whether they want to distribute it or not, and whether they want to charge for it or not.

And it's subject to the Commission's oversight, it has to be among other things the fees have to be fair and reasonable. And the Commission has not deregulated the area, it has set up a two step test that starts by asking is there a competitive market, are there competitive pressures on the exchanges that will keep them from overcharging, from charging monopolistic fees for this data. And if so, and if there's no countervailing arguments then we rely on the market.

Let me talk for a just a minute about the statutory issue, which would be roman numeral one I think in both briefs. The language of the statute is, is it requires the fees to be fair and reasonable; and it doesn't say there has to be a cost based analysis; and the statute in fact, Section 6(E)(1)(b) of the Exchange Act which was added in 1975 at the

same time expressly does say consider costs when you're deciding whether to allow the exchanges to set commissions, so Congress had that in mind, sometimes cost based rate making is essential, sometimes it's not. And this Court has held in a number of cases, particularly in the natural gas and electricity area that when there's a competitive market the regulator can rely upon market based prices in lieu of cost of service regulations to assure a just and reasonable rate of return. So, we think the statute permits us to do this, and we think -- so I'd like to turn then to the second issue, which is sort of the APA issues.

And I'd like to point out first of all that the Commission, there are no sort of administrative law issues in terms of the Commission here noticed this matter three times, first, when it was submitted; second, when it decided to take the matter from delegated authority; and then third, took the extremely unusual, perhaps unique or nearly unique step of putting out its proposed order and says this is what we're thinking about adopting, give us any further thoughts if you have, and each time obtained additional information. So, the Commission has really looked hard at this. What's more, it's been looking at this very issue, how much to charge for market data, really since the National Market System Act was passed in 1975. So, we come to it with a lot of experience, and a lot of hard thought.

And the Petitioners say well, what you're really required to do either as an absolute matter of statutory interpretation, or at least until you get some more experience with this type of data is first of all, just figure out the costs, after all, what could be more reasonable than that, than you have a yardstick you can measure it against, you can hold it against --

JUDGE GARLAND: Can you focus on the roman numeral three --

MR. PENNINGTON: Yes.

JUDGE GARLAND: -- argument, which has basically been retreated to? So, that is why costs don't have to be evaluated for purposes --

MR. PENNINGTON: Right.

JUDGE GARLAND: -- of determining whether there really is competition here, and not whether --

MR. PENNINGTON: Right.

JUDGE GARLAND: -- costs have to be evaluated for purposes of setting up regulatory rate.

MR. PENNINGTON: Well, I think the first, the threshold problem with the Petitioner position is their assumption is it would be easy to figure costs, just figure that out. But what the Commission has found is that it's virtually impossible to figure costs, you may be able to figure out depending on how the market is set up the sort of

you think of as a market as generating market data, and then the market decides to start selling its data, so they say well, we'll come up with some kind of a connector to connect our market to the world. You might be able, depending on how that's done, to figure out that sort of direct cost. But that's not how rate making is done. If you're going to figure out costs you have to allocate a reasonable amount of other relevant costs of operating the market, which generates the data to the market data. And that was what the Commission talked about in the 1999 release, it said we haven't ever done this, the parties have always agreed on the prices, would it be helpful if we came up with a, if we laid out some standards for figuring out costs? And the industry said no, it's a meaningless exercise. And the Commission pointed --

JUDGE GARLAND: Well, what is to prevent under that theory cross subsidization?

MR. PENNINGTON: Well, the theory is, or the belief is if there's a competitive market that acts as a check on the price, that's --

JUDGE GARLAND: But the competitive market is not for depth of book data, it's overall -- your argument about it is it's one exchange against another.

MR. PENNINGTON: Well, our argument is, though, that they won't -- our argument is that the order flow, and the depth of book are, as one of the commentators said, two sides

of the same coin, that the exchanges use -- you can't really even separate them out. The markets operate and they generate this data which has value. But if you don't distribute the data you don't get the order flow, and consequently you don't have a business, which is -- and that's by far their largest profits come from the order flow, from the order flow itself.

JUDGE GARLAND: Right. But your own, you know, part of your argument for why you should let this go is it's not that important, not that many people want depth of book data, only five percent of the NASDAQ customers buy it.

MR. PENNINGTON: Right.

JUDGE GARLAND: What else did you -- a similar line said 99 percent of the shares traded at the NBBO --

MR. PENNINGTON: Right.

JUDGE GARLAND: -- that suggests that depth of book is, to coin a phrase, the tail wagging the dog here. It's not --

MR. PENNINGTON: Well --

JUDGE GARLAND: -- very important for order flow.

MR. PENNINGTON: Well, if it's -- well, but if it's not very important, or if it's not very important, I mean, if it's not important for, if it's not important to investors then you can't exercise monopoly pricing over it. The point would be --

JUDGE GARLAND: Well, you can for the investors who

it's important to you can. I mean, just because things are unimportant doesn't mean that you can't get a monopoly price for it.

MR. PENNINGTON: Right. And if to the extent that it is important there's a competitive market among the markets the sort of combined product of order flow and depth of book data, which are inter-related, to the extent that it's not important there's no ability to exercise --

JUDGE GARLAND: No, but --

MR. PENNINGTON: -- monopoly power.

JUDGE GARLAND: -- I guess it depends on --

JUDGE EDWARDS: That just isn't, it isn't following.

JUDGE GARLAND: I guess it depends on how many people it's important to. If it's only --

JUDGE EDWARDS: Right.

JUDGE GARLAND: -- important to a small number of people then it may not matter for order flow, but you still may be able to make a profit off of those people.

JUDGE EDWARDS: Right.

MR. PENNINGTON: Well, let's look at what the evidence ahead -- first of all, let's look at what the evidence was that the Commission relied on, because I don't know that it got into quantifying that amount, but that -- what you have to bear on the other hand is that the cost is not going to be a perfect substitution, it's not going to be a

solution to the problem. In other words, you say perhaps there are some people out there who can't get this data that would like it, so why don't we just figure out the cost? But we don't think we can meaningfully come up with the cost. So, you're going to distort the market by coming up with what looks like a cost number, but it's artificial. I mean, you're in an area where you don't know, you can't tell exactly what you're going to do to the market. But the Commission had a substantial basis for believing that the competition for order flow, and given how many people are going to want it, is going to be a useful check on the price.

JUDGE GARLAND: Where's the evidence --

JUDGE EDWARDS: Where's the evidence of that?

JUDGE GARLAND: -- on how many --

MR. PENNINGTON: All right.

JUDGE GARLAND: -- people are going to want it?

MR. PENNINGTON: Well, the evidence we have is that not very many people buy it.

JUDGE GARLAND: Well, there you go. That hurts, doesn't help.

MR. PENNINGTON: No. The evidence that the competition for order flow will be a sufficient check on the price for the data.

JUDGE EDWARDS: Why?

MR. PENNINGTON: This is the record evidence that

the Commission relies on, which is testimony, or the -- starting with back in 2001 they had the special advisory committee, and they brought up themselves that the motivation to enhance shareholder value by the profits, the concern was that the exchanges are now for profit, so they're going to start charging a lot for this data, because they're not just selling it to their members. The motivation to enhance shareholder value by increasing market data fees will be checked by the need to make data available to generate order flow and attract listings.

JUDGE GARLAND: Well, that's just a conclusive, but what's the evidence of that, other than this advisory committee statement what's --

MR. PENNINGTON: Well --

JUDGE GARLAND: -- the evidence?

JUDGE EDWARDS: It's a self-serving statement, too, isn't it?

MR. PENNINGTON: I mean, Your Honor, this brings us back to --

JUDGE EDWARDS: You wouldn't have expected them to say otherwise.

MR. PENNINGTON: Well, no, this was an advisory committee that was put together across the range, and there was a division within the committee, but it wasn't just the markets, maybe it was just the markets who thought it would be

adequate, but everybody here has an interest. The Commission has --

JUDGE EDWARDS: I mean, the reason we're asking this is that when we read the briefs on work flow I'm not getting the argument. I mean, one point of the argument makes sense, when you flip it it doesn't. I just don't see the connection, so that's why I think Judge Garland asked you where's the evidence, what are you pointing to? And now you're saying well, an advisory committee speculated.

MR. PENNINGTON: No, it was the judgment of people who were experts in the industry that this -- I mean, there are no numbers, so it's a judgment about how much --

JUDGE EDWARDS: Right.

MR. PENNINGTON: -- influence does it have. Second, when NYSE Arca, again, this is certainly self-interested, but when they filed, or in connection with their application they said this is a factor we've considered when we decided what price to set. And other --

JUDGE GARLAND: Well, I mean, that really, with respect, that's not worth anything, that's the other side saying, you know, leave us alone from regulation because don't worry, we're competitive. I mean, I'm not saying they're, that doesn't mean they're right or wrong, but it's not evidence. I mean, your opponent cites a lot of quotations from the exchanges saying how, you know, how important the

depth of book data is going to be, and all that stuff, and you blow that off as not important because that's just marketing information. So, I mean, to what extent are we going to take views of the exchanges on this?

MR. PENNINGTON: Well, they have a reasoned position, and the Commission was persuaded by it, and then in response to the final notice there was an economic study submitted that came to the same conclusion that this would be an effective competitive market, to the extent that it matters, the price will be checked. I mean, we don't have numbers, but the alternative solution, we don't have cost numbers either. As I say there's going to be --

JUDGE EDWARDS: Was there any determination made in this study as to the number of folks who might want it, who would be foreclosed?

MR. PENNINGTON: No.

JUDGE EDWARDS: And that --

MR. PENNINGTON: And the market price will foreclose some people. Everybody, if you charge something you're going to foreclose somebody. The evidence is you're not foreclosing a lot of people because not a lot of people want to stay there, and if they want to get it somewhere else there are available substitutes for it. So, our judgment is it's not essential data, and we are satisfied based on the evidence that was available to us that there was competition for order

flow will be sufficient to check the possibility of monopoly pricing.

JUDGE GARLAND: What was your answer to their -- they cite, let's see, on page 46 of their brief, the NYSE Arca's marketing document saying now more than ever in order to see and estimate true market liquidity you need to look beyond just the top of book price. I mean --

MR. PENNINGTON: Well, the evidence is if you look, the --

JUDGE GARLAND: So, then it is necessary, it is --

MR. PENNINGTON: No.

JUDGE GARLAND: -- now essential.

MR. PENNINGTON: No, I mean, if you look at NASDAQ which offers this, and this is the company that has five percent of the people buy the security that was giving the stuff away. I'm sorry, ISE was giving the data away and got 15 percent. I mean, it's a relevant factor, some people use it, mostly professionals who are in the business, this is not something that's, it's essential to ordinary investors, or most ordinary investors. There may be somebody somewhere who would like to get this who can't afford the fee and won't have it available. But the alternative is to either say you can't charge for it, in which case you run the risk that it's not going to be distributed, or you're distorting the market by using a cost based mechanism that is not going to come up with

a number that you can say well, that's useful. I mean, even if we come up with the cost, I guess, you still have this question of you can't quantify it exactly, the Agency has to make a judgment based on what's the record before it, and what's its experience with this type of data.

JUDGE EDWARDS: See, it really sounds like your argument, you're going back and forth, and I'm not sure, it sounds like your argument it's essential, it's not essential, and we can't figure it out anyway, so let them do what they want to do. That's what I keep hearing. It's not essential, it's like who cares, and we can't figure it out.

MR. PENNINGTON: Well, I think --

JUDGE EDWARDS: Now, obviously --

MR. PENNINGTON: -- I think that's right --

JUDGE EDWARDS: -- obviously the folks who want to increase the fee have figured out something because they said we want to charge fees because our costs have gone up. So, they figured out something.

MR. PENNINGTON: But they haven't done any kind of an allocation that would be a rate making --

JUDGE EDWARDS: Well, then how do they know their costs went up?

MR. PENNINGTON: I -- they --

JUDGE EDWARDS: You should have accepted, you shouldn't have accepted --

MR. PENNINGTON: We didn't base it --

JUDGE EDWARDS: -- their proposal.

MR. PENNINGTON: We didn't base it on their cost representations, we based it on the judgment that we would let the cost be set by a competitive market.

JUDGE EDWARDS: No, but what I'm saying is they made the proposal on a significant, significantly because they said they were incurring increased costs, so obviously --

MR. PENNINGTON: Yes.

JUDGE EDWARDS: -- someone figured it out in house, and I bet you they can figure it out in house.

MR. PENNINGTON: Well, they can --

JUDGE EDWARDS: I'd be stunned if they couldn't.

MR. PENNINGTON: No, they can figure it out. I'm sure that whatever their increase discrete cost is they know that.

JUDGE EDWARDS: Right.

MR. PENNINGTON: But the Commission has said since 1999 that the harder problem, the impossible problem so far is to allocate the common costs, the cost of operating the market, some part of that would have to be paid for. So, the Commission --

JUDGE GARLAND: Can you tell me where is that, I was just looking for that. Is that in the final order?

MR. PENNINGTON: Which?

JUDGE GARLAND: The SEC's conclusion that it would be impossible, or very difficult to figure out costs?

MR. PENNINGTON: Yes, it's --

JUDGE GARLAND: Can you just help me with that? I'm not saying -- I'm sure it is in here, I'm just trying to focus on that now that you're emphasizing it. It starts at J.A. 688 of the order.

MR. PENNINGTON: Well, I've --

JUDGE GARLAND: Maybe I'll give the Intervenor a chance --

MR. PENNINGTON: There's a quotation from the special study, and it's where the Commission, it talked about the -- there's a discussion in the opinion, I can't lay my finger on it, but --

JUDGE GARLAND: Okay.

MR. PENNINGTON: -- it is in there about how in 1999 we proposed it, nobody had a solution, the industry was against it, the advisory committee was against it, it's not, has not -- there's nobody has come up with a practical way to do it. So, if you have to make a choice between letting some theoretical people be deprived of data that's professional data, and it's not essential data, alternatively to undertake this cost allocation process that nobody knows how to do our choice is that we believe it's a competitive market, and we believe there are available alternatives, and that all in all

the best result here is to allow competition to solve the problem.

JUDGE GARLAND: Okay. After you sit down if you could just take a quick look and -- or maybe the next speaker will know where to point us to. Thank you.

JUDGE HENDERSON: All right. Mr. Henkin.

ORAL ARGUMENT OF DOUGLAS W. HENKIN, ESQ.

ON BEHALF OF THE INTERVENOR

MR. HENKIN: Good morning, may it please the Court, Douglas Henkin representing the Intervenors. I wanted to jump to Judge Garland, your question. I believe the place that you were looking for, although it was just based on a quick look, starts on page 61 of the order. But to jump into some of the --

JUDGE GARLAND: Thank you.

MR. HENKIN: -- issues that were being addressed, under anti-trust law, and this is something that has not yet been really dealt with by any of the speakers, one of the important options that has to be considered in assessing competition is market participants' abilities to just say no to a product. And that's really where the action has been on this, Judge Garland, I agree with your point about the tail wagging the dog, because this is, depth of book fees are a very, very, very small aspect of the market, they're not the core fees, they don't represent core data. The SEC explained

back in Reg. NMS in 2005 that it was going to allow proprietary data to be sold by the exchanges under exactly the rule and the regime that it set forth here.

So, just saying no is an option, and when you look at the evidence that exists in the record that goes to in the ISE case that when it was free, when ISE was giving the data away only 15 percent of the professional, of the participants took the data, NASDAQ only five percent buy the data. When Island went dark, and the Petitioners say when it went dark completely, that's actually not true, it was a more controlled experiment than that, when Island stopped displaying market data for three ETF funds their market share for order flow with respect to those three funds declined by 50 percent. And the SEC also looked at --

JUDGE GARLAND: So, how do those two things fit together?

JUDGE EDWARDS: Right.

JUDGE GARLAND: That there's only a few people want it, but when you go dark all together you increase by 50 percent.

MR. HENKIN: Decrease.

JUDGE HENDERSON: Decrease.

JUDGE EDWARDS: Decrease.

JUDGE GARLAND: I mean decrease by 50. Yes, you decrease by 50 percent. How do those two fit together? If

only a few people want it why does going dark lead to a decrease of 50 percent?

MR. HENKIN: Well, with respect to Island, I can't speak to precisely why, the point is that it demonstrates the connection between order flow and market data.

JUDGE GARLAND: The Island one does, but --

MR. HENKIN: Correct.

JUDGE GARLAND: -- how does that make up, how does that -- what do I do with the five percent figure? That seems like it's not particularly relevant to order flow, otherwise more people would buy it.

MR. HENKIN: It is, because it's indicative that the SEC was correct about the importance of depth of book data, and more importantly, who it's important to. It's important to people who are trading very large market sizes. This is not about the retail investors, you need to look at the actual market here, and all of the evidence is, including one piece that I'm going to get to in a moment, all of the evidence confirms that the SEC's views of the way this part of the market works were right.

JUDGE GARLAND: Okay. So, just so -- this is actually is an explanation --

MR. HENKIN: Uh-huh.

JUDGE GARLAND: -- and that explanation is that for the big investors it matters, and where they go matters, that

is it matters to which exchange they would go to. So, let me ask two questions about that.

JUDGE EDWARDS: Do you agree with that?

JUDGE GARLAND: Is that what you're saying?

MR. HENKIN: It depends by the word matters. When you say it matters for in terms of competition for order flow, yes.

JUDGE GARLAND: Yes, that's what I mean.

MR. HENKIN: Whether the depth of book data is actually important for their trading decisions I'm not sure I would agree with, at least --

JUDGE GARLAND: Well, then why --

MR. HENKIN: -- on a universal basis.

JUDGE GARLAND: -- is order flow affected by that if --

JUDGE EDWARDS: Right.

JUDGE GARLAND: -- it doesn't affect?

MR. HENKIN: Well, order flow is affected by it because when a, depending upon what data, what market data a participant gets that will determine or help determine where it sends its orders. And if the quality of the data that it's not getting, if the quality of the data that it gets from one market center is better than the quality of the data that it gets from another center, all else being equal, that will tend to nudge the orders to the market center where the better data

is coming from. So --

JUDGE GARLAND: So --

MR. HENKIN: -- they're competing in that sense.

JUDGE GARLAND: All right. So, you're saying that depth of book is important in the sense that it nudges you, could nudge you from one exchange to another?

MR. HENKIN: My only question is with the word important. It is something that is competitively of value. The data itself isn't important. Where I'm struggling is whether it's important for the trade execution decisions because the Petitioners' argument focused on evaluating their best execution obligations, and what the SEC concluded is that it's --

JUDGE GARLAND: Well, then leave --

MR. HENKIN: Yes.

JUDGE GARLAND: I understand. Leave that part aside. But for purposes of evaluating why else are you going to be pushed from one exchange to another based on whether it has depth of book if not because it's important to your trading decisions?

MR. HENKIN: Well, it could be because it's important to where you steer the business, that is --

JUDGE GARLAND: Yes.

MR. HENKIN: -- one possibility. And then all of the other aspects that go into markets, or participants

deciding where to route their orders. And the SEC went through a long list, and actually NYSE's submission in the record went through a long list of how market participants direct their data, first they try -- their orders, first they try to internalize it, then they try to send it to non-exchange markets like ECNs and alternative trading systems. Only after they've gone through all of those do they then try to send it to exchanges. That's the way the analysis goes when they're trying to determine where to send the orders. And in there, within there the availability of market data and the quality of that market data can be a factor, and that's why the competitive position that the --

JUDGE GARLAND: All right. So, this raises two questions in my mind. The first question is it sounds like you're saying that with respect to retail there isn't really any, there is no competitive effect here.

MR. HENKIN: There is no competitive effect for retail investors because they very, very rarely, and the record clearly shows this, have any need for depth of book data. On an access basis, though, the proposal doesn't treat them differently if they feel that it's necessary for them.

JUDGE GARLAND: I thought the fee is different, isn't it?

MR. HENKIN: The fee is different for professional versus non-professional, but it's --

JUDGE GARLAND: Right.

MR. HENKIN: -- available to both if they want it.

JUDGE GARLAND: Right. But the fee for non-professional you're saying there's no competitive pressure on it.

MR. HENKIN: Well, there is competitive pressure because if nobody buys it then the exchanges won't sell it.

JUDGE GARLAND: That's different. In other words, the order flow pressure doesn't exist.

MR. HENKIN: It is less in the individual investor prospective, but that is primarily. And the record also shows why this is true. The individual investors generally don't determine where their orders go, their broker/dealers usually determine where brokers go.

And so, if you look for example in the record one of the things that the SEC relied on was the Schwab data, and we also mentioned this in the Intervenor's brief. The Schwab data that showed that I think it was 94 percent of orders were directed by Schwab not to an exchange at all, and that therefore there was no effect on, that depth of book data could have asserted on those orders. So, it really is a broker/dealer issue, not a retail investor issue.

JUDGE GARLAND: Mr. Phillip's other argument was, that this raised in my mind is some things like his example, at least hypothetical example was Google was traded with

enough liquidity only in one exchange, so that there really, this could not be, the order flow couldn't be a competitive factor with respect to that, is that right or wrong?

MR. HENKIN: With respect to that we just disagree, and we think the record disproves it. There has been declining market share, and basically the theory goes, the theory that the Petitioners are relying on is this notion that listed markets have a monopoly, and listing markets have a monopoly in trades of the shares that are listed in the first instance on those markets. The SEC looked at that, and looked at it exhaustively in terms of statistics and concluded that in fact those market shares had been declining, and that no market, no listing market has a majority, or a monopoly share of trading in its listed shares.

And in fact, from NYSE's perspective that share had dropped from about just under 80 percent to around 30 percent in just a few years. And you contrast that with something like the BATTS (phonetic sp.) exchange, which is also discussed in the record, which went from zero to just under 10 percent in about three years in part by offering some of its market data for free.

So, there is an extraordinary amount of fluidity in the order flow as between exchanges, and the main reason for this is that the SEC has as part of shepherding the national market system allowed for unlisted trading privileges, and

that's one of the things that has caused all the fluidity between the markets in terms of where the order flow goes versus where a security might be listed in the first instance. We just think that the Petitioners have got the data wrong in that regard, and the record clearly reflects that the SEC was right. Thank you.

JUDGE HENDERSON: All right. Does Mr. Phillips have any time left?

THE CLERK: Mr. Phillips does not have any time left.

JUDGE HENDERSON: You have --

MR. PENNINGTON: Do you want the pages now?

JUDGE HENDERSON: You have the answer to the question? All right. Why don't you go ahead and tell Judge Garland that.

MR. PENNINGTON: In the opinion on page number 74 around notes 254, and page number 100, note 313.

JUDGE GARLAND: Yes, I got the 100. Thank you.

JUDGE HENDERSON: All right. Mr. Phillips, why don't you take a couple of minutes.

ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ.

ON BEHALF OF THE PETITIONERS

MR. PHILLIPS: Thank you, Your Honor. I appreciate it. I will try to be brief. Your Honor, first of all, Judge Garland, you asked the question about the tail wagging the dog

in this particular context, and I think ultimately that's the core problem with the Commission's approach in this case, because what it's basically saying is that this is too small an enterprise for us to spend any time worrying about it. Candidly, that sounds an awful lot like what the Federal Energy Regulatory Commission said about in the Texaco case, which is that the small producers are just too small, and it's too important for us to let them go out and handle their operations, so what we're going to do is we're just going to deregulate it. And what the Supreme Court said there was that's fine, go tell Congress that you have the authority to deregulate it, and then you can proceed along that path. But what you can't do is set up a scheme in which you're supposed to make a determination of the fair and reasonableness of the rates, and then decide unilaterally that you're not going to do that because either they're too small, or too unimportant under these circumstances.

The reality is there is a market there, there are people, they are captive, they have to go and look at depth of book data as their own marketing materials say, and it may not be true for everyone, but for those for whom it is true they are subject to the monopoly pricing. You specifically asked the question how do we know that there is no cross-subsidization going on here? The answer is we can't know because we have no idea what the costs are, and under those

circumstances the assumption ought to be that there is the possibility of cross-subsidization, something specifically that Congress precludes in this particular scheme.

I see my time is up. I'd urge the Court to set aside the Commission's order.

JUDGE HENDERSON: All right.

JUDGE GARLAND: Thank you.

MR. PHILLIPS: Thank you.

JUDGE HENDERSON: Thank you.

(Recess.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Paula Underwood

Paula Underwood February 28, 2010

DEPOSITION SERVICES, INC.

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

DECLARATION OF COLIN CLARK IN SUPPORT OF NYSE ARCA, INC.'S OPPOSITION BRIEF

COLIN CLARK, declares, pursuant to 28 U.S.C. § 1746:

1. I am a Senior Vice President of NYSE Group, Inc., the parent company of NYSE Arca, Inc. ("NYSE Arca").

2. I have knowledge of the books and records relating to the ArcaBook depth-of-book product which is sold by NYSE Arca, and I reviewed those books and records in connection with executing this declaration.

3. There is a flat monthly fee of $2000 for receipt of ArcaBook data feeds. Additional fees may be charged based on the manner in which a subscriber chooses to use ArcaBook. For example, subscribers who wish to redistribute ArcaBook data externally to others pay a flat monthly redistribution fee of $1500. Subscribers also may utilize ArcaBook for "display use" and "non-display use." Subscribers who wish to use ArcaBook data for non-display purposes (such as feeding ArcaBook data directly into computerized trading programs such that it is never viewed by a human but is used in making trading decisions) may pay a flat fee for such non-display access. Non-display access is generally used by subscribers for

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4. In June 2014, Bank of America, Bloomberg L.P., Citigroup Global Markets Inc., Credit Suisse Securities (USA) LLC, JP Morgan Chase & Co., Liquidnet, Inc., and Wells Fargo & Company each paid at least $4000 or more per month for "non-display" access to ArcaBook.

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Bloomberg; Bank of America, JP Morgan, and Wells Fargo each pay two other vendors; and Citigroup pays three other vendors. Among its vendors, Bank of America actually pays declarant Goldman for access to ArcaBook.

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

Executed on August 18, 2014
In New York, New York

COLIN CLARK