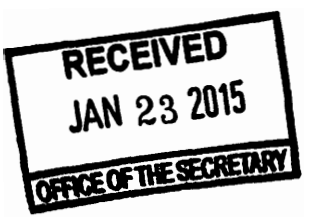
UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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

APPLICATION OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION TO QUASH OR, IN THE ALTERNATIVE, TO MODIFY SUBPOENA *DUCES TECUM*



Pursuant to Rule 232(e) of the Securities and Exchange Commission's ("SEC" or "Commission") Rules of Practice, the Securities Industry and Financial Markets Association ("SIFMA"), by undersigned counsel, hereby applies to quash or, in the alternative, to modify the subpoena *duces tecum* dated January 5, 2015 ("Subpoena") directed to SIFMA.

PRELIMINARY STATEMENT

On January 5, the Chief Administrative Law Judge ("Chief ALJ") issued the Subpoena, as drafted by the Nasdaq Stock Market LLC ("Nasdaq") and NYSE Arca, Inc. ("NYSE Arca") (collectively, the "Exchanges"), which was served on SIFMA on January 8. For at least three independent reasons, the Subpoena should be quashed or, at a minimum, substantially modified.

First, the Subpoena should be quashed because it violates the fundamental principle of discovery that the recipient of a document demand is required to produce only those documents within its "possession, custody or control." Here, although the Subpoena is directed to SIFMA only, it expressly and improperly requires SIFMA to produce documents in the possession of its Members, which are outside SIFMA's possession, custody, or control. Settled law—including the two cases cited by the Exchanges in their Request for Issuance of Subpoena Pursuant to Rule 232 of the Commission's Rules of Practice (Dec. 31, 2014) ("Subpoena Request")—establishes that where, as here, an association is a party to a case, the *only* way to obtain member documents is through discovery directed to those members, not through a document demand to the association itself. *See infra* § I. In that regard, the Subpoena here is unprecedented and no different than if a subpoena were served on the American Bar Association requiring it to collect and produce documents from individual lawyers who are its members. That is not the law. Because the Subpoena is directed to SIFMA and purports to require it to produce Member documents, the Subpoena should be quashed.

Second, even if the Subpoena were not improper in purporting to require SIFMA to produce its Members' documents, the Subpoena independently should be quashed because the information it seeks is irrelevant for multiple reasons. As an initial matter, both the Commission (in ruling that SIFMA has standing to challenge the Exchanges' fees without the required participation of its individual Members) and the Chief ALJ (in her ruling on jurisdiction and in making clear during the December 18 Prehearing Conference that the appropriate focus of the challenge to the Exchanges' fees is on the *Exchanges' conduct*) have made clear that this proceeding is not—and should not be—an inquiry into the conduct of individual SIFMA Members. Indeed, the Subpoena served by the Exchanges seeking more than a dozen categories of documents from SIFMA Members is flatly inconsistent with the Commission's holding that SIFMA could establish associational standing. As the Commission stated, SIFMA's "request that we set those fees aside [does not] require[ ] the participation of individual SIFMA members in the Proceedings," and "evidence regarding individual members . . . bears on standing issues, not the merits of SIFMA's claim itself." *See* Order Establishing Procedures and Referring Applications for Review to Administrative Law Judge for Additional Proceedings at 12, Rel. No. 34-72183, Admin. Proc. File Nos. 3-15350, 3-15351 (May 16, 2014) ("May 16 Order"). The evidence on standing has been heard, and the Chief ALJ has concluded that there is jurisdiction.

Likewise, as the Chief ALJ noted when the Exchanges initially raised the prospect of Member discovery, the Exchanges have not explained "why . . . there [would] be any justification for [the Exchanges] asking for that information from [Members], when it's [the Exchanges'] position that's being challenged" and "[their] conduct or [their] proposals that are being challenged." Pre-Hearing Conference Tr. ("Dec. 18 Tr.") at 14:20–25 (Dec. 18, 2014). The Exchanges still have no answer.

Moreover, to the extent the Subpoena seeks documents from Members who pay the Exchanges a redistribution fee, then package and redistribute the data with other data products in a new interface, it seeks documents that are irrelevant to the issue in this proceeding—the validity of *the Exchanges'* fees. Settled Supreme Court precedent makes clear that when *direct* purchasers (like Members) buy a product at an allegedly supracompetitive price, whether and how they resell that product to *indirect* purchasers is irrelevant. The fundamental rationale underlying this settled Supreme Court doctrine is avoiding the sweeping, time-consuming, and ultimately irrelevant inquiry into the relationships between direct and indirect purchasers. Allowing that inquiry threatens to make "this proceeding . . . resemble Dickens's *Jarndyce v. Jarndyce.*" Order on the Issues of Jurisdiction and Scheduling at 11, Rel. No. 1921, Admin. Proc. File No. 3-15350 (Oct. 20, 2014) ("Jurisdiction Order").

Finally, the Subpoena should be quashed because it is unreasonable and oppressive in multiple other respects. Most significantly, any Member who dares to provide even a single document to SIFMA for inclusion on its exhibit list (such as an invoice for the Exchanges' data products), to submit to a five-minute interview by or to provide *any* information to SIFMA's experts, or to be called as a witness, will be subject to the full force and effect of the Subpoena. It is difficult enough for SIFMA to recruit Members to assist publicly in a case against the Exchanges given their as-of-now unchecked market power to set market data fees, the ongoing business relationship between the Exchanges and Members, and the Exchanges' quasi-governmental powers as self-regulatory organizations to supervise, investigate, and discipline Members under the Exchange Act. The chilling effect of the Subpoena drafted by the Exchanges is patent—any Member that lifts a finger will become subject to retaliatory discovery.

For these and other reasons set forth below, the Subpoena should be quashed or, at the very least, substantially modified.

PROCEDURAL BACKGROUND

SIFMA is "an association representing financial institutions and securities firms." Jurisdiction Order at 1. SIFMA's Members purchase depth-of-book data products from the Exchanges at fees challenged in this proceeding. The Exchanges have insisted repeatedly throughout these proceedings that SIFMA is not an appropriate party to challenge these fees and that the participation of individual Members in this challenge is instead required. The Exchanges' argument has been rejected at every turn and in every forum.

First, the U.S. Court of Appeals for the District of Columbia Circuit held—twice—that SIFMA has associational standing to challenge the fees in federal court on behalf of its Members who are injured by them. *See NetCoalition v. SEC*, 615 F. 3d 525, 532 (D.C. Cir. 2010); *NetCoalition v. SEC*, 715 F.3d 342, 347–48 (D.C. Cir. 2013). *Second*, in its order referring this matter to the Chief ALJ, the Commission held that "neither SIFMA's claim that the fees at issue are inconsistent with the Exchange Act, nor its request that we set those fees aside requires the participation of individual SIFMA members." *See* May 16 Order at 12. As the Commission explained, "SIFMA's arguments do not turn on the identity of the particular member paying the depth-of-book fees," but instead "address the fees with respect to the standards set forth in the Exchange Act and rules thereunder, and SIFMA requests that we set aside those fees for all persons." *Id.* Although the Commission recognized that Members might need to produce evidence showing that they are aggrieved, it made expressly clear that such "evidence bears on standing issues, *not the merits of SIFMA's claim itself*." *Id.* (emphasis added). *Finally*, the Chief ALJ has heard that evidence and concluded that the Commission has jurisdiction.

After this Court held that SIFMA has standing, on December 4, 2014, SIFMA filed a request for issuance of two virtually identical subpoenas—one directed to Nasdaq and a second to NYSE Arca. On December 9, the Chief ALJ issued an order setting a prehearing conference for December 18, 2014, "[t]o eliminate some of the anticipated filings and to provide [her] with a better understanding of what data collection is necessary." Order for Prehearing Conference on Subpoenas, Rel. No. 2110, Admin. Proc. No. 3-15350 (Dec. 9, 2014). After issuance of this order and before the December 18 prehearing conference, SIFMA held two meet-and-confer teleconferences with the Exchanges during which it offered several ways to narrow the scope of the subpoenas to address any potential burden. The Exchanges rejected those offers, variously insisting that discovery was not available at all and that if SIFMA insisted on seeking discovery, they would respond by seeking "reciprocal" discovery from SIFMA's Members. In response, counsel for SIFMA made clear that they represented SIFMA, not its legally distinct individual Members, and therefore could not agree to any production by SIFMA's Members.

During the December 18 prehearing conference, the Exchanges reiterated that they should be allowed "reciprocal discovery from [SIFMA's] members." Dec. 18 Tr. at 14:5. In response, the Chief ALJ correctly noted that "it's [the Exchanges'] position," or "conduct or . . . proposals that are being challenged," and asked the Exchanges "[w]hy . . . that entitle[s] you to go to the person that's questioning you and saying, well, you have to give me this information for you." *Id.* 14:20–25. The Exchanges again requested discovery from SIFMA Members in their December 29 oppositions to SIFMA's amended and narrowed requests for subpoena, asserting that if "SIFMA intends to present evidence from its members, directly or indirectly," the Exchanges are entitled "to discovery from those members that parallels the discovery required from the exchanges." Brief of the Nasdaq Stock Market LLC in Opposition to SIFMA's

Amended Request for Issuance of Subpoenas Pursuant to Rule 232 of the Commission's Rules of Practice at 10 (Dec. 29, 2014).

During the December 30 prehearing conference, the Chief ALJ ruled that SIFMA was entitled to the discovery it requested from the Exchanges but that she would revise the document requests further. On January 2, 2015, the Chief ALJ revised and issued the subpoenas. *See* Notice of Issuance of Modified Subpoenas, Rel. No. 2177, Admin. Proc. No. 3-15350.

On December 31, 2014 (after the Chief ALJ made clear that the subpoenas to the Exchanges would issue), the Exchanges filed their Subpoena Request. In their Request, the Exchanges stated (without citation to any authority) that "[t]he Subpoena would reach documents regarding SIFMA members that are within SIFMA's custody or control because of members' participation in this proceeding by way of affidavit, hearing testimony, or expert support." Subpoena Request at 1 n.1.

The Chief ALJ signed the Subpoena two business days later, and it was served on January 8, 2015. As crafted by the Exchanges, *fifteen* of the sixteen Document Requests in the Subpoena purport to require the production of documents from SIFMA Members, regardless of whether SIFMA itself possesses or has any legal right even to access the documents. *See* Request Nos. 1–4, 6–14.[1] These Document Requests seek documents from what the Subpoena defines as "Relevant Members," meaning "(i) all SIFMA members who provide documents or communications for reliance by SIFMA's fact or expert witness(es), (ii) those SIFMA member from whom SIFMA will present evidence or testimony, and (iii) the nine SIFMA members who submitted jurisdictional declarations." *See* Subpoena Definitions and Instructions at ¶ 5.

[1] The *only* request in the Subpoena that seeks documents from SIFMA, and not its Members, is Request No. 5, which seeks materials that SIFMA will provide with its expert reports.

The topics of the Document Requests are wide-ranging. For example, six Document Requests seek information regarding subscribers, fees, and other matters from any "Relevant Member[s]" who "redistribute[ ] . . . depth-of-book products." *See* Request Nos. 1–2, 4, 6–8. Other Document Requests seek information that pertains exclusively to SIFMA's Member Declarations that supported its claim that SIFMA had standing to maintain this action—an issue that the Chief ALJ already has decided and on which she previously denied substantively identical discovery requests. *See* Request Nos. 14–15.

ARGUMENT

I. THE SUBPOENA SHOULD BE QUASHED BECAUSE IT IMPROPERLY PURPORTS TO REQUIRE SIFMA TO PRODUCE DOCUMENTS FROM MEMBERS THAT ARE OUTSIDE OF SIFMA'S POSSESSION, CUSTODY, OR CONTROL.

The Subpoena is improper because it purports to require SIFMA to produce documents outside its possession, custody, or control. Fifteen of the Document Requests seek documents from Members. But SIFMA has no legal right or ability to compel its Members to produce these documents, and it cannot itself produce materials over which it lacks possession, custody, or control.

SIFMA is a trade association acting in its Members' interest; the Members themselves are not parties to this action. To the contrary, in holding that SIFMA could satisfy the requirements of associational standing, the Commission expressly held that the participation of individual Members was not necessary. May 16 Order at 12. To be sure, a party may seek a subpoena directed to nonparty members of a trade association, just as a party could seek discovery from any other nonparty. But—as both cases cited by the Exchanges recognize, *see* Subpoena Request at 7—such discovery must be directed to the members through nonparty subpoenas, not through discovery directed to the association itself, as does the Subpoena here.

See Sherwin-Williams Co. v. Spitzer, No. 1:04-CV-185, 2005 WL 2128938, at *10 (N.D.N.Y. Aug. 24, 2005) ("If Defendants desire records from the individual members [of plaintiff association], they will have to resort to Rule 45 and issue [nonparty] subpoenas *duces tecum*."); *Builders Ass'n of Greater Chicago v. City of Chicago*, No. 96-C-1122, 2003 WL 291907, at *2 (N.D. Ill. Feb. 10, 2003) (a member's nonparty status "does not prevent the [opposing party] from acquiring the relevant evidence" ordinarily available through the discovery process).

As courts universally hold, a trade association—like any other party—cannot be compelled to produce member documents that it does not have and cannot require to be produced. *See, e.g., U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 254 (D.C. Cir. 2005) (holding that subpoena issued by administrative law judge was unenforceable because it purported to compel the production of documents that the party to whom it was directed lacked "'the legal right, authority or ability to obtain . . . upon demand'"); *U.S. v. Deloitte & Touche USA LLP*, 623 F. Supp. 2d 39, 41 (D.D.C. 2009) (holding that Deloitte USA could not be compelled to produce documents held by a separate corporation that belonged to the same Swiss membership organization because the requesting party failed to establish control under *ASAT* standard), *affirmed in part and vacated and remanded in part on other grounds*, 610 F. 3d 129 (D.C. Cir. 2010); *In re NCAA Student-Athlete Name & Likeness Litig.*, No. 09-cv-01967 CW, 2012 WL 161240, at *1 (N.D. Cal. 2012) (holding that "the NCAA cannot be compelled to produce documents or information that it does not already possess" from its member institutions). To the extent the Exchanges seek information from Members, they must do so from the Members themselves, through the proper channels of nonparty discovery. *See Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007) ("We also think it fairly obvious that a party also need not seek such documents from third parties if compulsory

process against the third parties is available to the party seeking the documents.").

II. THE SUBPOENA SHOULD BE QUASHED BECAUSE THE REQUESTED INFORMATION IS NOT RELEVANT.

Even if the Subpoena were directed to the parties who had possession, custody, and control of the documents requested, it still would be improper because the information sought from Members is not relevant to the validity of the fees charged by the Exchanges. The Exchanges assert that individualized information from SIFMA's Members about how they use the Exchanges' data is relevant to the merits question—"'whether the [Exchanges were] subject to significant competitive forces in setting the terms of [their] proposal[s].'" Subpoena Request at 4 (quoting 73 Fed. Reg. 74,770, 74,781 (Dec. 9, 2008)). They are incorrect.

First, the Commission already considered and rejected that argument, and its ruling forecloses discovery here. In their briefs before the Commission on standing and other matters, the Exchanges argued that SIFMA did not have associational standing because, *inter alia*, SIFMA's claims required the participation of individual Members.[2] *See* NYSE Arca Br. Regarding Preliminary Matters at 6–7, Admin. Proc. File No. 3-15350 (Aug. 30, 2013); Nasdaq Br. Regarding Preliminary Matters at 12 n.4, Admin. Proc. File No. 3-15351 (Aug. 30, 2013). In support of this position, NYSE Arca argued that the participation of SIFMA's Members was necessary because the Exchanges would need to access such supposedly relevant information as "how [SIFMA's Members] used or sought to use the products, how such entities bought or decided not to buy the products, and how the rule filings at issue affected such entities." NYSE Arca Br. Regarding Preliminary Matters at 7 n.14.

[2] The Commission held that "'an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" May 16 Order at 11 (quoting *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

The Commission expressly rejected this argument, holding that "neither SIFMA's claim that the fees at issue are inconsistent with the Exchange Act, nor its request that we set those fees aside requires the participation of individual SIFMA members." *See* May 16 Order at 12. As the Commission explained, "*SIFMA's arguments do not turn on the identity of the particular member paying the depth-of-book fees*," but instead "address the fees with respect to the standards set forth in the Exchange Act and rules thereunder, and *SIFMA requests that we set aside those fees for all persons*." *Id.* (emphases added). Although the Commission recognized that Members might need to produce evidence showing they are aggrieved, it made clear that this "evidence bears on standing issues, *not the merits of SIFMA's claim itself*." *Id.* (emphasis added). And the Chief ALJ has already decided the issue of standing.

The Commission's holding applies with equal force here. After all, it is the validity of the Exchanges' own fees that is at issue, not the actions of SIFMA or its Members. And it is the Exchanges, not SIFMA or its Members, who are subject to the Exchange Act's requirements and who bear the burden of justifying their fees. As the Chief ALJ noted when the Exchanges raised the subject of discovery from SIFMA's Members during a prehearing conference, "it's [the Exchanges'] position that's being challenged" and "[their] conduct or [their] proposals that are being challenged." *See* Dec. 18 Tr. at 14:20–23. *Accord id.* at 14:23–25 ("Why does that entitle you to go to the person that's questioning you and saying, well, you have to give me this information for you?").

In response, the Exchanges simply assert that the requested information is "undoubtedly relevant" to the validity of their fees. Subpoena Request at 4. But, as the Exchanges acknowledge, the applicable legal standard asks "'whether the [Exchanges were] subject to significant competitive forces *in setting the terms of [their] proposal[s]*.'" *Id.* (emphasis added).

To the extent the Exchanges are seeking information to which they did not have access when setting their fees, that information simply is not relevant to assessing whether significant competitive forces *in fact* constrained the Exchanges' *actual conduct*.[3]

Second, the only Members specifically identified in the Subpoena are those Members whose employees submitted declarations in support of SIFMA's associational standing. *See* Subpoena Definitions and Instructions at ¶ 5. But the Exchanges have no valid reason to target Members on this basis. They say they are seeking discovery to "test [these] declarations," Subpoena Request at 5, and the Subpoena even requires production of communications that SIFMA's Members may have had with SIFMA when preparing these declarations.[4] But the issue on which declarations were submitted—SIFMA's standing—has already been decided and the

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[3] The Exchanges also argue that discovery from SIFMA's Members somehow is warranted because SIFMA is "seeking an order from the Commission that the Exchanges must be required to give away their market data *for free*." Subpoena Request at 7. The Exchanges mischaracterize SIFMA's position. As SIFMA explained to the Chief ALJ when responding to this same straw man in the past, its position is that the challenged fees are unreasonable and supracompetitive, as evidenced in part by NYSE Arca's prior practice of giving its data away for free. *See* Reply Brief of SIFMA Regarding Satisfaction of Jurisdictional Requirements at 11 n.15, Admin. Proc. No. 3-15350 (Sept. 2, 2014). But SIFMA never has argued that the data must be given for free, nor has it disputed the Exchanges' ability to charge a commercially reasonable fee. *See id.*

[4] Such communications are, in all events, protected by the attorney-client privilege and beyond the scope of discovery. Communications involving the preparation of declarations or affidavits are quintessential legal communications protected by the attorney-client privilege. *See, e.g.*, *Winans v. Starbucks Corp.*, No. 08-Civ-3734, 2010 WL 5249100, at *2–3 (S.D.N.Y. Dec. 15, 2010); *Ideal Elec. Co. v. Flowserve Corp.*, 230 F.R.D. 603, 608 (D. Nev. 2005); *Randleman v. Fid. Nat'l Title Ins. Co.*, 251 F.R.D. 281, 287 (N.D. Ohio 2008). Courts routinely hold that communications between counsel for an association and the association's members are privileged, particularly where, as here, the association and its members share a common legal interest. *See, e.g.*, *A & R Body Specialty & Collision Works, Inc. v. Progressive Cas. Ins. Co.*, No. 3:07CV929 (WWE), 2013 WL 6044333, at *10–11 (D. Conn. Nov. 14, 2013) (finding common interest doctrine protected communications between trade association counsel and members); *Robinson v. Tex. Auto. Dealers Ass'n*, 214 F.R.D. 432, 453 (E.D. Tex. 2003) (finding members of trade association of auto dealers "clearly shared a common legal interest"), *vacated in part sub nom. In re Tex. Auto. Dealers Assn.*, No. 03-40860, 2003 WL 21911333 (5th Cir. July 25, 2003); *United States v. Ill. Power Co.*, No. 99-CV-0833-MJR, 2003 WL 25593221, at *4 (S.D. Ill. Apr. 24, 2003) (finding communications privileged where association members "were joined in a common interest in current and potential litigation").

proceeding is now at a "new phase." *See* Dec. 18 Tr. at 15:12–13 (Chief ALJ: "[W]e're over that now. I mean, we're at a new phase now."). And, to the extent the Exchanges mean to suggest that these declarations provide a basis to probe individual Members' beliefs as to why they believe the fees violate the Exchange Act, they are mistaken. As the Chief ALJ noted, the Member declarations "explain that they are aggrieved because, *as set forth in SIFMA's applications*, the level of the prices charged is so high as to be outside a reasonable range of fees under the Exchange Act." Jurisdiction Order at 9 (emphasis added). Thus, the basis for the Members' beliefs already is set forth in SIFMA's applications.

This is not the first time the Exchanges have sought this information. They previously sought discovery on precisely these matters when opposing SIFMA's standing, and the Chief ALJ rejected that request. *See* Nasdaq Br. Regarding Jurisdiction at 1, Admin Proc. No. 3-15350 (Aug. 18, 2014); NYSE Arca Br. Regarding Jurisdiction at 9 & n.15, Admin Proc. No. 3-15350 (Aug. 18, 2014); Jurisdiction Order at 7–10. The Exchanges have no need for this information at the merits stage, and it is far past time they stopped relitigating an issue already decided.

Nor can the Exchanges obtain discovery simply because some of SIFMA's Members (as direct purchasers of the Exchanges' market data) pay the Exchanges' redistribution fees and repackage the data with other products and provide it to indirect purchasers. *See* Subpoena Request 4–5; Request Nos. 1–2, 4, 6–8. The Exchanges assert that information about these Members' sales is relevant because *Members'* profits are somehow indicative of whether *the Exchanges'* prices are set at a competitive level. *Id.* The Exchanges are wrong as a matter of law under the settled direct-purchaser principle as articulated by the Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). As the Supreme Court explained in *Hanover Shoe*: "As long as the seller

continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower." *Id.* at 489.

The exact same principle applies here. As long as the Exchanges "continue[] to charge an illegal price" under the Exchange Act, they take from SIFMA's Members "more than the law allows." And, regardless of the price that the Members set for the products they offer, "the price [Members] pay[] [the Exchanges] remains illegally high." And, harkening to the Chief ALJ's reference to *Jarndyce v. Jarndyce* in the Jurisdiction Order, the Supreme Court noted that innumerable inputs and factors go into a direct purchaser's decision to set a price for an indirect purchaser and that allowing proof on these issues would "require a convincing showing of . . . virtually unascertainable figures," "prove nearly insurmountable," and "require additional long and complicated proceedings involving massive evidence and complicated theories." *Id.* at 493.

It is thus not surprising that federal courts evaluating a seller's price-setting decisions, like those of the Exchanges here, routinely reject discovery into the sales and profits of such "downstream" purchasers as "irrelevant and therefore beyond the scope of permissible discovery." *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. MDL 1775, 2010 U.S. Dist. LEXIS 125623, at *66 (E.D.N.Y. Nov. 24, 2010); *see id.* at *66–67 (describing "the tide of cases precluding discovery of 'downstream' information").[5] Many of these courts' decisions stem in part from an "unwillingness to complicate the proof" of sellers' conduct by opening a Pandora's box of ancillary matters about customers' conduct. *Id.* at *66. Allowing the Exchanges to engage

[5] *See also, e.g., Meijer, Inc. v. Abbott Labs.*, 251 F.R.D. 431, 433–34 (N.D. Cal. 2008); *In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732-LDD, 2008 U.S. Dist. LEXIS 109670, 2008 WL 2275528, at*4–6 (E.D. Pa. May 13, 2008); *In re K-Dur Antitrust Litig.*, No. 01-1652, MDL Docket No. 1419, 2007 U.S. Dist. LEXIS 96066, 2007 WL 5302308, at *11–12 (D.N.J. Jan. 2, 2007); *In re Auto. Refinishing Paint Antitrust Litig.*, No. MDL 1426, 2006 U.S. Dist. LEXIS 34129, 2006 WL 1479819, at *8 (E.D. Pa. May 26, 2006).

in this discovery would expand the scope of these proceedings to include matters that virtually every federal court has rejected as irrelevant.[6]

III. THE SUBPOENA SHOULD BE QUASHED BECAUSE IT IS UNREASONABLE, OPPRESSIVE, AND UNDULY BURDENSOME.

The Subpoena should be quashed for the further reason that it is improper under Rule 232 because it is unreasonable, oppressive, and unduly burdensome and would expand the scope of proceedings beyond the scope of the Commission's May 16 Order.

The Exchanges' principal justification for discovery from Members is that "[b]asic fairness" requires the parties to be treated "equally with respect to the benefits and burdens of discovery." Subpoena Request at 6. That, of course, is not the touchstone for discovery, and it is certainly not the touchstone for discovery in this proceeding. In fact, the Commission has squarely rejected the notion that if one party gets a subpoena, then the other must get one too. *See In the Matter of Ernst & Ernst Clarence T. Isensee John F. Maurer*, SEC Release No. 248 (May 31, 1978) (rejecting argument that it was an impermissible "double standard" for ALJ to issue one party's subpoena and to deny the other party's subpoena, holding that "[t]o argue from the fact that opposite rulings were made on two subpoena requests that a double or discriminatory standard was applied is not sound logic").

In fact, the Subpoena is far from fair. It is significant that the Exchanges wear multiple (and conflicting) hats—they are providers of products and services (including the market data

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[6] One Document Request (out of sixteen total) seeks information from "SIFMA's testifying experts" rather than SIFMA's Members. Request No. 5. That request, however, seeks "written expert testimony that the scheduling order requires SIFMA to disclose," *id.*, and there is no need to issue a subpoena to compel SIFMA to produce information it already is required to disclose. Indeed, SIFMA agreed to *withdraw* its request for the Exchanges to produce documents they "intend to use or refer to during the hearing" for precisely that reason. *See* Dec. 18 Tr. at 43:4–8. Likewise, the Exchanges' request for "[t]he documents, facts, and data relied on by SIFMA's testifying experts" is unnecessary because SIFMA already will be producing this information in conjunction with its disclosures required under the scheduling order.

products over which SIFMA claims they have unchecked market power) and self-regulatory organizations with the attendant regulatory and supervisory authorities vested in them by Congress through the Exchange Act. Here, the Exchanges have drafted a Subpoena that triggers production of documents by Members if and only if those Members assist SIFMA in the development and presentation of its case. Whether this is a deliberate strategy by the Exchanges to deter Members from cooperating with SIFMA does not matter, as that is unquestionably the result of the Subpoena and the Exchanges' "springing" definition of "Relevant Members."

The Subpoena is flawed in other respects as well. *First*, it calls for SIFMA Members to produce communications between SIFMA Members and "any exchange," Request Nos.10–12; information regarding Members' purchases from "exchanges (or any other source)," Request No. 9; and information regarding Members' decisions to route order flow to or from "any exchange," Request No. 13. These requests are not limited to the Exchanges that are parties to this proceeding and thus necessarily seek information unrelated to the products and fees at issue and would greatly expand the scope of the proceedings. The Exchanges consistently have argued for narrowing the scope of products and fees that are at issue in this proceeding. *See* Dec. 18 Tr. at 9:8–11 (Mr. Lipton: "And then the other point as far as expanding the proceedings, and this is very important, Your Honor, is that [SIFMA's] requests go well beyond the products and price changes that are at issue in this proceeding."). And while SIFMA takes a different view on those questions, it never has contended that the scope of the proceeding includes nonparty exchanges. *See, e.g.*, *id.* at 12:7–10 (Mr. Warden: "To the extent that there's some way the subpoena [as] drafted could be read to include NASDAQ Philadelphia or NASDAQ Boston, we're not seeking that."). To allow the Exchanges discovery into SIFMA Members' communications with and

documents concerning "any exchange" or "any other source" would drastically expand these proceedings in a manner the Exchanges themselves have argued against.

In addition, to the extent the Exchanges seek communications between SIFMA Members and NASDAQ or NYSE Arca, *e.g.*, Request Nos. 10–12, those documents already are in the Exchanges' possession. Requiring their production would be unduly burdensome. *See In the Matter of Egan-Jones Ratings Co. & Sean Egan*, Admin. Proc. Rel. No. 728, Admin. Proc., File No. 3-14856 (Oct. 10, 2012) ("It is unduly burdensome . . . to produce documents which should already be in Respondents' possession."). Indeed, the request is doubly burdensome insofar as it purports to require SIFMA, which has no possession of or access to these communications, to produce them to the Exchanges, which have the communications already. The request is improper, and the Subpoena should be quashed.

CONCLUSION

Based on the foregoing, SIFMA respectfully requests that the Subpoena be quashed, or at a minimum substantially modified, pursuant to Rule 232(e).

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Respectfully submitted,

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