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 THE NASDAQ STOCK MARKET LLC AND NYSE ARCA, INC. IN OPPOSITION TO SIFMA'S APPLICATION TO QUASH OR, IN THE ALTERNATIVE, TO MODIFY SUBPOENA *DUCES TECUM*

Pursuant to Rule 232(e)(1) of the SEC's Rules of Practice, the Nasdaq Stock Market LLC ("Nasdaq") and NYSE Arca, Inc. ("NYSE Arca") (collectively, the "Exchanges") respectfully request that SIFMA's Application To Quash Or, In The Alternative, To Modify Subpoena *Duces Tecum* (the "Motion") be denied because:

- The Exchanges' Subpoena appropriately seeks evidence in the possession, custody, or control of SIFMA. SIFMA provides no basis—nor could it—for its argument that the Subpoena should be quashed with respect to documents and information already in SIFMA's possession, including information regarding the nine member declarations submitted in support of the Commission's jurisdiction. Moreover, the documents held by the Relevant Members are within SIFMA's custody or control and should be produced in light of those members' active participation in this proceeding.[1]

- The Motion fails to establish that the information sought by the Subpoena is irrelevant. Ignoring authorities SIFMA previously cited reflecting a strong presumption in favor of discovery, SIFMA asks Your Honor to apply a different standard to it than to the Exchanges. But the Exchanges should receive the same types of evidence that SIFMA will be receiving, including information regarding the competitive forces confronting the Exchanges in setting their prices for the rule changes at issue. Such information is clearly relevant to this proceeding under the ArcaBook Order[2] and *NetCoalition I*.[3] Moreover, other evidence sought by the Subpoena is relevant to testing the claims of SIFMA and the Relevant Members. Like SIFMA, the Exchanges should be allowed to challenge SIFMA's assertions and arguments with relevant documents. The case law cited in SIFMA's Motion is not to the contrary and only reinforces that SIFMA's intention in bringing this proceeding is to increase the profits of its members (multi-billion-dollar companies) at the expense of the Exchanges.

- SIFMA has failed to demonstrate that the Subpoena is unreasonable, oppressive, or unduly burdensome. The Subpoena imposes very little burden on SIFMA, which is already in the possession of relevant documents and information, and it imposes a minimal burden on a small subset of SIFMA

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[1] The Subpoena defines "Relevant Members" as "(i) all SIFMA members who provide documents or communications for reliance by SIFMA's fact or expert witness(es), (ii) those SIFMA members from whom SIFMA will present evidence or testimony, and (iii) the nine SIFMA members who submitted jurisdictional declarations."

[2] *Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data*, 73 Fed. Reg. 74,770 (Dec. 9, 2008).

[3] *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010).

members who are actively assisting SIFMA with its case. SIFMA's claim of hardship is nothing more than an unsupported allegation that discovery would create a "chilling effect" on its members' participation in this case. This argument is contrary to law and is contradicted by the significant financial incentive of its members to support SIFMA in this proceeding. In addition, granting the Motion would require the Exchanges to subpoena each Relevant Member individually, which would needlessly impose delay and multiply the burdens on the Exchanges and this Tribunal.

ARGUMENT

SIFMA bears the burden of establishing that compliance with the Subpoena would be "unreasonable, oppressive or unduly burdensome." SEC Rule 232(e)(2); *see also In re vFinance Investments, Inc.*, Admin. Proc. File No. 3-12918, 2008 WL 2743876, at *1 (July 15, 2008). SIFMA's Motion makes no such showing. Because the Subpoena seeks a narrow set of relevant evidence that is within SIFMA's possession, custody, or control and that would not be unduly burdensome to provide, the Motion should be denied.

I. The Subpoena Appropriately Seeks Evidence In The Possession, Custody, Or Control Of SIFMA

A. SIFMA Should Be Compelled To Produce Documents In Its Possession

The Motion seeks to quash the entire Subpoena on the basis that it requires SIFMA to produce documents from the Relevant Members that are supposedly outside of SIFMA's possession, custody, or control. Motion at 1, 7-9. However, the Subpoena seeks documents not only from the Relevant Members, but also that are currently in SIFMA's possession. Subpoena Instruction 4. SIFMA does not (because it cannot) offer any reason why the Subpoena should be quashed with respect to responsive documents already possessed by SIFMA. SIFMA prepared and produced nine declarations from Relevant Members in support of its jurisdictional brief. And SIFMA has confirmed in meet and confer discussions that its members are providing it and its expert witnesses with documents and other information that it intends to rely on as evidence.

That these materials originated from Relevant Members does not change the fact that SIFMA now possesses them and can and should be compelled to produce them. *See* SEC Rule 232.

B. The Relevant Members' Documents Are Within SIFMA's Custody Or Control And Should Be Produced

In determining whether another person's documents are in the "control" of a subpoenaed party, "courts have interpreted 'control' broadly." *See Hitachi, Ltd. v. AmTRAN Tech. Co.*, No. C 05-2301 CRB(JL), 2006 WL 2038248, at *1 (N.D. Cal. July 18, 2006). "Actual physical possession is not relevant, the question is whether the party has the 'right, authority *or practical ability* to obtain the documents from a non-party to the action.'" *Id.* (emphasis added, citations omitted). "Practical ability" to obtain documents is established where, as here, the non-party has "actively participated" in the litigation. *Id.* at *2 (a subpoenaed party had practical ability to obtain documents from a third-party where the third-party had a financial interest in the litigation, was present at a mediation session, and acted as an agent in related matters).[4]

Here, the Subpoena seeks documents ***only*** from SIFMA members who are providing documents and assistance to SIFMA in connection with this proceeding. When SIFMA has wanted documents or other evidentiary materials from these members, it has gotten them. If there are other members who are not under SIFMA's control, such that SIFMA itself cannot get materials or cooperation when it wants them, such members are excluded by the definition of

[4] *See also Synopsys, Inc. v. Ricoh Co.*, No. C-03-2289 MJJ (EMC), 2006 WL 1867529, at *2 (N.D. Cal. July 5, 2006) (a subpoenaed party had the practical ability to obtain documents from a third-party where there had been "voluntary cooperation between a [subpoenaed] party and a third-party" and the subpoenaed party had been able to obtain a declaration from the third-party); *Bank of New York v. Meridien Biao Bank Tanzania*, 171 F.R.D. 135, 149 (S.D.N.Y. 1997) (there was a practical ability by defendant to obtain documents from third-party because "[the defendant] ha[d] been able to obtain documents from [the third-party] when it ha[d] requested them," and the third-party readily cooperated with the defendant's requests by searching for and turning over relevant documents from its files).

"Relevant Member" in the Subpoena. The crux of the issue here is that SIFMA has access to and control over the materials that it asks for and wants to use, but it asks Your Honor to conclude that it has no access to the materials that it wants to foreclose the Exchanges from using.

SIFMA's control over the Relevant Members has already been established by the Relevant Members' active participation in this proceeding. At SIFMA's request, nine SIFMA members submitted to the jurisdiction of the Commission when they filed declarations in support of SIFMA's efforts to obtain associational standing. The Relevant Members are also within SIFMA's control by virtue of their participation in this proceeding by way of providing documents upon request, hearing testimony, and assistance in support of SIFMA's pursuit of this case for their benefit, and by possessing a financial interest in the litigation. *See Hitachi*, 2006 WL 2038248, at *2; *Synopsys*, 2006 WL 1867529, at *2; *Bank of New York*, 171 F.R.D. at 149. SIFMA should not be permitted to shield its members from discovery at the same time it uses their active participation in this proceeding to obtain standing and advance its case.

Moreover, at the same time that SIFMA is asking Your Honor to quash the Subpoena because it supposedly has no control over the Relevant Members, it is asking the Exchanges (in meet and confer discussions) to agree that the protective order needed to protect confidential information disclosed by the Exchanges be expanded to permit SIFMA members to have access to the Exchanges' confidential information. As a justification for this request, SIFMA has maintained that its members' participation in the litigation is critical, and it apparently takes the position that those members—through SIFMA's participation in this action—are sufficiently before this Tribunal that the protective order could be enforced against them. Those positions are entirely inconsistent with the arguments in SIFMA's Motion.

SIFMA does not offer *any* authority to establish that an association cannot be compelled to produce documents from its members *who are actively participating in the association's case*. In a misrepresentation of the case law it cites, SIFMA asserts that "[a]s 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." Motion at 8. But three of the four cases cited by SIFMA relate to whether a corporate subsidiary "controls" a parent or affiliate and involve questions of foreign law.[5]

And in the only case cited by SIFMA that actually involves a trade association, the court declined to compel production from the association's individual members because, unlike here, the "individual institutions have not 'actively participated' in this litigation" and because the association had agreed to "produce documents and information in its possession, even if such documents or information came from members." *In re NCAA Student-Athlete Name & Likeness Litig.*, No. 09-cv-01967 CW, 2012 WL 161240, at *1-2 (N.D. Cal. 2012).[6] As the case law

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[5] *See U.S. v. Deloitte & Touche USA LLP*, 623 F. Supp. 2d 39, 41 (D.D.C. 2006) (Deloitte & Touche USA could not be compelled to produce documents from its corporate affiliate Deloitte Switzerland because the record did not establish that "Deloitte USA has the legal right, authority, or ability to obtain documents" from Deloitte Switzerland); *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 256 (D.C. Cir. 2005) (record lacked sufficient evidence to determine that third-party subpoenaed parent corporations controlled the defendant-subsidiary); *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138-39 (2d. Cir. 2007) (noting generally that compulsory process is available to compel third-party production where Russian law prohibited an individual corporate board member from producing documents absent the board's approval).

[6] Contrary to SIFMA's assertion, the cases cited in the Exchanges' Subpoena Request do not stand for the proposition that an association's members cannot be compelled to produce documents in a litigation in which they are participating. *See 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) (none of the association's members were actively involved in the lawsuit); *Sherwin-Williams Co. v. Spitzer*, No. 1:04-CV-185, 2005 WL 2128938, at *9-10 (N.D.N.Y. Aug. 24, 2005) (association's members were not actively participating in the proceeding).

establishes, SIFMA cannot have it both ways. The Subpoena is not, as SIFMA argues, "no different" than one requiring the American Bar Association to produce documents from all its individual lawyers who are members, *see* Motion at 1; it is properly directed to a small subset of this association's members who have apparently chosen to actively participate in the association's litigation. Because SIFMA itself does not purchase depth-of-book data, the Relevant Members are the only ones with an actual financial stake here, as the Motion and their participation concede. That justifies the discovery the Exchanges seek. Accordingly, the Relevant Members' documents should be produced.

II. The Subpoena Seeks Evidence Relevant To This Proceeding

A. SIFMA Ignores Its Previously Cited Authorities Reflecting A Strong Presumption In Favor Of Discovery

In requesting that the Exchanges' Subpoena be quashed, SIFMA neglects to mention the authorities SIFMA previously cited in its own subpoena requests indicating that there is a "strong presumption in favor of discovery" in proceedings before SEC ALJs. *SIFMA Request for Issuance of Subpoenas*, Admin. Proc. File No. 3-15350 (Dec. 4, 2014), at 4. SIFMA previously represented that (1) the concept of "relevance," as a general matter, is "*much broader* than that concept under the Federal Rules of Evidence"; (2) "the standard of relevance is *even broader* when it comes to document subpoenas"; and (3) subpoenas should be issued when "there is *any possibility* that the information may be relevant to the subject matter of the action." *Id.* at 5 (citations omitted). Having advocated for this broad standard to apply to its own subpoena requests, SIFMA cannot now request a more stringent standard be applied to the requests of the Exchanges. Under the standard SIFMA asserted applied to its requests, the Exchanges' requests should be upheld so long as there is "'any possibility' that the information sought may be relevant." *Id.*

B. The Subpoena Seeks Information Relevant To This Proceeding

Regardless of which standard of relevance is applied to the Exchanges' requests, the documents sought in those requests are undoubtedly relevant to the issues here.

First, as noted in the Exchanges' submission requesting issuance of the Subpoena—which described the relevance of each request (and which we will not repeat here)—the Subpoena seeks documents concerning the competitive forces the Exchanges face in setting their prices for the rule changes at issue, which are clearly relevant to this proceeding under the ArcaBook Order and *NetCoalition I.* The first prong of the ArcaBook test, which the Commission directed Your Honor to address in this proceeding, asks "whether the exchange was subject to significant competitive forces in setting the terms of its proposal." 73 Fed. Reg. at 74,781. In approving this test, the D.C. Circuit made clear that evidence regarding "order flow competition," "trader behavior," and the availability of substitute products is relevant to the inquiry. *NetCoalition I,* 615 F.3d at 539-44. That is exactly the evidence sought by the Subpoena, including documents concerning the Exchanges' shares of Relevant Members' order flow (and changes therein in response to market data prices), the substitute or alternative products Relevant Members have identified for the products at issue, the instances in which Relevant Members have—in what unquestionably constitutes "trader behavior"—threatened to reduce or offered to increase order flow in response to data pricing, and other documents reflecting competitive pressures placed by SIFMA members on the Exchanges. *See* Exchanges' Requests 3, 8-13.

SIFMA cannot credibly claim that such documents are irrelevant to this proceeding, as that position is completely at odds with its own subpoena requests. In fact, SIFMA asked for (and will receive) evidence that closely mirrors that requested by the Exchanges. For instance,

SIFMA fails to explain why discovery into the Exchanges' "market share of order flow and any changes in [their] market share" (which SIFMA will receive), *see Notice on Issuance of Modified Subpoenas*, Admin. Proc. File No. 3-15350 (Jan. 2, 2015), at 2, is highly relevant to this proceeding, but somehow discovery into the Exchanges' "shares of the Relevant Member's order flow and any changes in those shares," *see* Exchanges' Request 3, is completely irrelevant. Likewise, there is no basis for concluding that "products [the Exchanges] have identified as competitive or substitute products" (which, again, SIFMA will receive), *see Notice on Issuance of Modified Subpoenas*, Admin. Proc. File No. 3-15350 (Jan. 2, 2015), at 3, are any more relevant to the existence of competitive forces than the "products [SIFMA and its members] have identified as substitute or alternative products," as the Exchanges request, *see* Exchanges' Request 8. As these examples make plain, SIFMA is asking Your Honor to apply a double-standard with respect to relevance.

Despite the fact that there is no question the evidence the Exchanges seek exists, SIFMA argues that the evidence this Tribunal receives should be limited to the information already known to the Exchanges, and that similar information in traders' possession is entirely irrelevant even for purposes of discovery. Motion at 9, 16. But the potential relevance of information in traders' possession—in a proceeding in which "trader behavior" is at issue—is obvious. To take one illustrative example, SIFMA will likely attempt to downplay the connection between competition for order flow and pricing of depth-of-book data—an important issue in assessing the competitive constraints on data pricing. Where SIFMA members have actually used the threat of diverting order flow to or from an exchange in order to try to influence the exchange's depth-of-book data pricing—and where SIFMA members address that competitive constraint in their internal documents—that evidence is highly relevant to the issues here. This is true

whether the incident involved NYSE, Nasdaq, or another exchange. And this is no fishing expedition: One of the same people who executed a jurisdictional declaration SIFMA submitted in fact sent exactly such an email threat to Nasdaq, and the Exchanges should be permitted to obtain discovery regarding similar documents that other Relevant Members may have.

In addition to documents regarding competitive forces, the Exchanges' Subpoena seeks information relevant to testing the claims of SIFMA and its members, including the claim that members are "aggrieved because [they] believe[] that the level of the prices charged [for the relevant data products] is so high as to be outside a reasonable range of fees" under the Exchange Act. *See* Exchanges' Requests 1, 2, 4, 6-7, 14-15. SIFMA justified its own requests on the basis that "the information SIFMA seeks through the Subpoenas is relevant to testing other arguments that the Exchanges made in their rule filings and may continue to assert in this proceeding." *SIFMA Request for Issuance of Subpoenas*, Admin. Proc. File No. 3-15350 (Dec. 4, 2014), at 7-8. Yet SIFMA would deny the Exchanges the ability to test SIFMA's evidence in the same way.

SIFMA is attempting to engage in exactly the sort of "cherry picking" that it complained about in the conferences with Your Honor regarding its own subpoena requests. Counsel for SIFMA argued that the Exchanges should not be allowed "to cherry pick among the data; provide some of that to their experts and then provide to us what their experts rely upon." Tr. at 29-30 (Dec. 18, 2014); *see also id.* at 40-41. Counsel then repeated this argument during the second prehearing conference on subpoenas, stating: "So their position, Your Honor, is that they get to put on whatever witness they want, they elicit whatever direct examination they want, but we can't get as part of discovery other evidence that might support, detract from or otherwise be relevant to their arguments." Tr. at 82 (Dec. 30, 2014). Your Honor ultimately concluded that the Exchanges, "as part of [their] case, are going to present positive information and data that

supports it and [SIFMA] wants to know whether there is anything else there they could raise to question that, and they have a right to do that." *Id.* at 89. The Exchanges have the same right. Yet under SIFMA's approach, SIFMA alone would be allowed to examine the evidence received from Relevant Members and pick and choose only the documents and data supporting its own position. Your Honor should reject SIFMA's request for special treatment allowing it to "cherry pick" evidence in exactly the manner it previously decried.

Indeed, just like SIFMA, the Exchanges should be allowed to seek "evidence to test [SIFMA's] explanations" and "arguments." *SIFMA Request for Issuance of Subpoenas*, Admin. Proc. File No. 3-15350 (Dec. 4, 2014), at 7-8. Documents concerning the fees that SIFMA members charge to their own customers in redistributing the relevant depth-of-book products and the decision-making process used by members in determining the resale fees will allow the Exchanges to test SIFMA and its members' claims regarding the alleged unreasonableness of the Exchanges' fees. For example, as noted in the Exchanges' subpoena request, if SIFMA members resell the very same products at issue in this proceeding for an even greater price, that casts doubt on their assertions that the prices charged by the Exchanges are unreasonably high.

In an attempt to obfuscate this point, SIFMA cites a series of antitrust cases regarding "the direct-purchaser principle," which purportedly demonstrates that information regarding SIFMA members' prices and profits is irrelevant. However, these cases have no bearing on this proceeding. In SIFMA's primary case, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Supreme Court—*after* affirming that the defendant had engaged in illegal price fixing—rejected defendant's argument that plaintiff did not suffer an injury because plaintiff passed along the overcharge to its customers. *Id.* at 488-89. The Court reasoned that the plaintiff's profitability did not preclude injury and damages because its profits would have

been even greater in the absence of the illegal price fixing. *Id.* at 489.[7] In contrast, here, the Exchanges are not seeking information for the purpose of examining SIFMA members' potential injuries (or lack thereof), but rather are attempting to show that no legal violation occurred at all. Documents concerning the fees that SIFMA members charge to their own customers in redistributing the relevant depth-of-book products are clearly relevant to the question of whether the Exchanges' prices for the very same products are unreasonably high. Accordingly, SIFMA's price-fixing cases are inapplicable.

Moreover, as SIFMA notes, the antitrust cases it cites are largely animated by "an unwillingness to complicate treble-damages actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge." *Illinois Brick Co.*, 431 U.S. at 725; *see* Motion at 13-14. There is no such issue here. Instead, the Exchanges are simply seeking easily accessible information regarding fee levels and the reasoning behind them. Producing this information will not, as SIFMA claims, "'require a convincing showing of . . . virtually unascertainable figures,' 'prove nearly insurmountable,' [or] 'require additional long and complicated proceedings involving massive evidence and complicated theories.'" Motion at 13 (citing *Hanover Shoe*, 392 U.S. at 493).

Although it in no way supports the Motion, SIFMA's citation to these cases makes plain its true intentions in bringing this case: to increase the profits of its multi-billion-dollar-company

[7] SIFMA's other cases merely affirm and apply this principle. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *Meijer, Inc. v. Abbott Labs*, 251 F.R.D. 431, 433-34 (N.D. Cal. 2008); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. MDL 1775, 2010 WL 4916723, at *2 (E.D.N.Y. Nov. 24, 2010); *In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732-LDD, 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 WL 5302308, at *11-12 (D.N.J. Jan. 2, 2007); *In re Auto. Refinishing Paint Antitrust Litig.*, No. MDL 1426, 2006 WL 1479819, at *8 (E.D. Pa. May 26, 2006).

members at the Exchanges' expense. SIFMA's own Motion represents the price-fixing cases as standing for the proposition that "At whatever price the buyer sells, . . . his profits would be greater were his costs lower." Motion at 13 (citing *Hanover Shoe*, 392 U.S. at 489). Under SIFMA's logic, wherein resale price is utterly irrelevant, the Exchanges' prices could be found unreasonably high even if SIFMA members resold the exact same products for one hundred times the price and therefore could not possibly have suffered any injury. The Exchanges need the documents requested in the Subpoena in order to test this twisted logic.[8]

C. The Commission Has Not Foreclosed The Exchanges From Seeking Discovery.

Finally, SIFMA is wrong in suggesting that the Commission has already prohibited discovery regarding its members. *See* Motion at 9-10. The Commission merely found that SIFMA had satisfied one prong of the three-part test for associational standing employed by federal courts because "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." *Order Establishing Procedures and Referring Applications For Review To Administrative Law Judge For Additional Proceedings*, Admin. Proc. File No. 3-15350 (May 16, 2014), at 12.[9] A preliminary finding that an association meets standing requirements cannot possibly operate to exclude any and all discovery from members; if it did, then discovery from members would never be allowed in any associational standing case, no matter how relevant the

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[8] With respect to Request No. 5, if SIFMA "already will be producing this information in conjunction with its disclosures required under the scheduling order," Motion at 14 n.6, then there is no reason for the request to be quashed or modified.

[9] Although the Exchanges believe that the Commission erred in concluding that this prong of the associational standing test was satisfied, they recognize that this Tribunal is bound by the determinations in the Order, and therefore reserve that issue for any appeal. Nevertheless, this Tribunal should not permit the record to be closed to information that would assist the Exchanges in demonstrating that that preliminary holding was incorrect.

materials sought. That is not the law. *See supra* Part I.B. As Your Honor has already recognized, nothing in the Commission's order forecloses discovery from individual SIFMA members. *See Order On The Issues Of Jurisdiction And Scheduling*, Admin. Proc. File No. 3-15350 (Oct. 20, 2014), at 10 (information showing "how much individual members pay for depth-of-book data, how much they charge their customers for that data, how each SIFMA member uses that data, and whether those prices have increased with the onset of the new fees" "may indeed have relevance in the ultimate disposition of this matter").

Moreover, even accepting that the participation of individual SIFMA members was not *required* in this proceeding, that in no way precludes the Exchanges from obtaining discovery from those members who *elect* to participate. SIFMA, not the Exchanges, has injected individual members into this proceeding. SIFMA has indicated that individual members will be heavily involved in preparing SIFMA's case, including by providing input and information to expert witnesses, exhibits for the hearing, and witnesses for testimony—and the Exchanges have narrowly limited their subpoena requests to those Relevant Members. SIFMA should not be allowed to closely involve those members in preparing for this proceeding while simultaneously claiming that the fact that member participation was not "required" excludes those very members from discovery requests. Again, SIFMA cannot have it both ways. Because the Exchanges' subpoena requests are relevant to this proceeding, they should be upheld and enforced. Further, to the extent that SIFMA cannot or will not produce the requested documents from a Relevant Member, Your Honor should preclude that member from participating in the proceeding in any way (including by assisting SIFMA) and strike any declaration submitted by that member or exhibit referencing that member.

III. The Exchanges' Document Requests Are Narrowly Tailored, Reasonable, And Impose A Minimal Burden On SIFMA And The Relevant Members

The Subpoena is narrowly tailored and seeks solely the information needed by the Exchanges to defend against the arguments raised by SIFMA, cross-examine SIFMA's witnesses, and prepare the Exchanges' rebuttal case. As described above, the information sought by the Exchanges is clearly relevant to this proceeding and is not, as SIFMA claims, an improper attempt to obtain tit-for-tat discovery. *See* Motion at 3, 14. The Subpoena imposes very little burden on SIFMA, which is already in the possession of relevant documents and information. And it imposes a minimal burden on SIFMA members by (i) requesting documents only from a narrow universe of Relevant Members, (ii) foregoing an expansive search for documents by seeking "only those Documents held by the key person or persons within SIFMA or the Relevant Members," and (iii) expressly limiting the Exchanges' Requests to those documents maintained by the Relevant Members in the ordinary course of business. Subpoena Instruction ¶¶ 5, 16, 17.

SIFMA's primary complaint is that the production of documents by Relevant Members would be oppressive because it allegedly would deter SIFMA members from cooperating in this matter. But SIFMA's outrage that discovery could be taken from "any member who dares to provide" documents and information that are key to the success of SIFMA's rule challenges, *see* Motion at 3, is not just contrary to a fair hearing, it is contrary to law. *See, e.g.*, *Hitachi*, 2006 WL 2038248, at *2; *Synopsys*, 2006 WL 1867529, at *2; *Bank of New York*, 171 F.R.D. at 149; *Sherwin-Williams*, 2005 WL 2128938, at *5 (mere "speculat[ion] that the document demands may cause a withdrawal of membership" or lack of cooperation in litigation do not constitute a showing "of a chill or threat to [an association] or its members."). The Exchanges are not seeking to deter members from cooperating with SIFMA, they are seeking narrow discovery of

those members who *choose* to participate in the development and presentation of SIFMA's case. That imposes no improper burdens on SIFMA's membership and is not a "chill."

Instead of producing responsive documents from the Relevant Members within SIFMA's possession, custody, and control, SIFMA would require Your Honor to issue separate subpoenas to each Relevant Member participating in this proceeding. *See* Motion at 7, 8. This would foist a tremendous discovery burden on the Exchanges and this Tribunal for no reason other than to needlessly delay the production of indisputably relevant information.[10]

Furthermore, the Exchanges will not even know the identities of the Relevant Members (other than those that submitted declarations) until SIFMA's March 2, 2015 submission deadline. At that point it would be extremely difficult for subpoenas to be issued to individual Relevant Members, and for those members to produce responsive documents, in time for the Exchanges to analyze those documents prior to the March 23 briefing deadline and the April 20 hearing.

CONCLUSION

Based on the foregoing, the Exchanges respectfully request that SIFMA's motion to quash or modify the subpoena be denied.

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[10] Acknowledging this very issue, the court in *Sherwin-Williams* shifted some costs associated with the issuance of third-party subpoenas to the association claiming that third-party subpoenas were necessary because it was not in "control" of its members. 2005 WL 2128938, at *10. To the extent Your Honor agrees with SIFMA that "discovery must be directed to the members through nonparty subpoenas," Motion at 7, the Exchanges respectfully request that Your Honor order SIFMA to bear all costs related to securing the requested documents from the Relevant Members.

Respectfully submitted,

/s/ Joshua Lipton

Daniel G. Swanson
Eugene Scalia
Joshua Lipton
Amir C. Tayrani
Thomas M. Johnson, Jr.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
jlipton@gibsondunn.com

Stephen D. Susman
Jacob W. Buchdahl
Susman Godfrey LLP
1000 Louisiana, Suite 5100
Houston, TX 77002
(212) 336-8331
ssusman@susmangodfrey.com

/s/ Douglas Henkin

Douglas W. Henkin
Seth T. Taube
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 408-2500
douglas.henkin@bakerbotts.com

Jeffrey S. Davis
NASDAQ OMX
805 King Farm Boulevard
Rockville, MD 20850

John Yetter
NASDAQ OMX
805 King Farm Boulevard
Rockville, MD 20850

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