UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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

THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION'S REPLY TO THE EXCHANGES' RESPONSE TO PRIVILEGE LOG

The Securities Industry and Financial Markets Association ("SIFMA") respectfully submits this opposition to the request filed by NYSE Arca, Inc. and the Nasdaq Stock Market LLC (the "Exchanges") for the production of certain communications between SIFMA's members and its outside counsel. *See* Resp. of NYSE Arca, Inc. and the Nasdaq Stock Market LLC to SIFMA's Privilege Log (Apr. 13, 2015) ("Request"). For the reasons discussed below, the Request is entirely without merit and should be denied.

BACKGROUND

The present dispute arises out the Exchanges' continuing effort to evade judicial review of their supracompetitive prices for depth-of-book data. SIFMA has challenged those prices on behalf of its members, who must pay the inflated prices. *See NetCoalition v. SEC*, 715 F.3d 342, 348 (D.C. Cir. 2013). In this proceeding, SIMFA's associational standing was shown through declarations from its members explaining that they "have paid monthly fees in order to continue accessing, using, and distributing depth-of-book data, and . . . the level of the prices charged is so high as to be outside a reasonable range of fees under the Exchange Act." Order on the Issues of Jurisdiction and Scheduling, Admin. Proc. Rulings Release No. 1921, at 9 (Oct. 20, 2014). The declarations were found to be "reasonable and persuasive," *id.*, and to be precisely the sort anticipated by the Commission, *id.* at 10. The Exchanges' various objections to the declarations were rejected because they had "improperly conflate[d] issues of jurisdiction with merits," *id.* at 10.

The Request continues the same strategy. The documents sought are communications between SIFMA's outside counsel and its members regarding the preparation of the declarations regarding ***jurisdiction***. At no point have the Exchanges explained how these communications are relevant to the ***merits*** of this action. Nor have the Exchanges sought reconsideration of the

jurisdictional ruling. In short, they have no possible need for these communications, and they appear to pursue them solely for purposes of delay and harassment.

In any event, every one of the communications sought is both privileged and protected work product. Each document was logged with a unique entry that provides the date, custodian, author, list of recipients, number of pages, description, and assertion of privilege. Each entry identifies the attorney (whether outside or in-house counsel) involved in the communication, and asserts both "Attorney-Client Privilege" and "Work Product" protection. Those entries follow a prior, categorical log that also asserted privilege. Moreover, the extraordinary nature of the logs provided by SIFMA cannot be emphasized enough. As the law firm representing Nasdaq once put it: "It is ***standard practice*** for parties to stop logging privileged documents at the commencement of the lawsuit." Br. in Opp. to Pl.'s Mot. for Sanctions at 3, *Helferich Patent Licensing, L.L.C. v. The New York Times Co.*, No. 10-04387 (N.D. Ill. Jan. 11, 2013), ECF No. 191 (emphasis added) (signed by Brian Buroker and Matthew Chandler, Gibson, Dunn, & Crutcher LLP).[1]

Not content with turning standard practice on its head, the Exchanges also wish to upend the settled law of privilege. Their arguments are meritless. The Exchanges know full well that the privilege log asserts attorney-client privilege based on the (self-evident) common interest that exists between SIFMA and its members, and there is no requirement that SIFMA's counsel represent each SIFMA member for that privilege to exist. For these reasons, and those discussed below, the Request must be denied.

[1] Available at https://ecf.ilnd.uscourts.gov/doc1/067112031236.

ARGUMENT

The major premise of the Exchanges' argument is buried in footnote 2 of their Request, which asserts that the privilege log fails to "assert a common interest privilege" between SIFMA and its members. In reality, every entry on SIFMA's privilege log asserts both "Attorney-Client Privilege" and "Work Product Doctrine." The Exchanges claim that this was insufficient because the entries did not also include the magic words "common interest." In their view, the notion of a common interest is a distinct privilege that must be invoked separately. That is not the law.

The "common interest doctrine" is not a separate privilege—it is a rule that operates as "an extension of the attorney client privilege." *Hanson v. U.S. Agency for Int'l Dev.*, 372 F.3d 286, 292 (4th Cir. 2004) (citations omitted) (internal quotation marks omitted); *accord, e.g.*, *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987). As a legal matter, it is the attorney-client privilege—and not an independent privilege—that protects communications among a common interest group. *See In re Pacific Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) ("Rather than a separate privilege, the 'common interest' or 'joint defense' rule is an exception to ordinary waiver rules . . . ."). In other words, the attorney-client privilege can protect multi-party communications, like the ones here.[2]

The Exchanges contend that no common interest could exist between SIFMA and its members because Sidley Austin LLP ("Sidley") was retained solely by SIFMA. But there is no requirement that parties sharing a common interest be represented by the same counsel. *See*

[2] The Exchanges have long known SIFMA's position is that these communications are covered by the attorney-client privilege as a result of the common interest that exists between SIFMA and its members. Reply Br. of Applicant SIFMA Regarding Satisfaction of Jurisdictional Requirement 13 n.17 (Sept. 2, 2014); *see also* Appl. of SIFMA to Quash, or in the Alternative, to Modify Subpoena *Duces Tecum* 11 n.4 (Jan. 22, 2015).

Evans, 113 F.3d at 1467 (common interest protects "communications passing from one party to the attorney for another party"); *Schwimmer*, 892 F.2d at 243 (same); *Waller*, 828 F.2d at 583 n.7 ("'communications . . . [can] remain privileged when the lawyer subsequently shares them with co-defendants'") (quoting *United States v. McPartlin*, 595 F.2d 1321, 1326 (7th Cir. 1979)). Indeed, ***the very case*** cited by the Exchanges makes this precise point when it explains that the common interest rule requires only that "at least one person who received [the] communication" either have retained or be seeking to retain the attorney. *Robinson v. Tex. Auto. Dealers Ass'n*, 214 F.R.D. 432, 453 (E.D. Tex. 2003), *vacated in part sub nom. In re Tex. Auto. Dealers Assn.*, No. 03-40860, 2003 WL 21911333 (5th Cir. July 25, 2003).[3] Here, each of the communications sought by the Exchanges involved an attorney—either an in-house counsel at SIFMA or an attorney at Sidley—and the provision of legal advice regarding the declarations submitted by SIFMA or SIFMA members. The attorney-client relationship between SIFMA and its counsel is unquestioned, and it is all that is required for purposes of the common-interest doctrine. That Sidley does not also represent the individual SIFMA members is irrelevant.[4]

The Exchanges offer no substantive challenge to the privilege log beyond erroneously insisting on co-representation. They do not, for example, challenge the common interest that exists between SIFMA and the SIFMA members that provided declarations or have assisted in

---

[3] *Robinson* also stated, as explained above, that the 'common interest' or 'joint defense' rule "is not an independent privilege, but merely an exception to the general rule that no privilege attaches to communications that are made in the presence of or disclosed to a third party." 214 F.R.D. at 443.

[4] The Exchanges request only the production of communications between outside counsel and SIFMA members. *See* Request at 3 ("[T]he Exchanges respectfully request that all communications between Sidley and the employees of SIFMA members be produced immediately."). They do not request production of communications on the privilege log between SIFMA's *in-house* counsel and SIFMA members (e.g., PRIV-SIFMA-04, PRIV-SIFMA-05, PRIV-SIFMA-06) or documents maintained by in-house counsel (e.g., PRIV-SIFMA-02). The Exchanges apparently concede that those documents were properly logged and not produced.

this matter. Nor could they, as courts routinely hold that trade associations and their members share a common interest for purposes of litigation. *See, e.g., A & R Body Specialty & Collision Works, Inc. v. Progressive Cas. Ins. Co.*, No. 07-929, 2013 WL 6044333, at *10–11 (D. Conn. Nov. 14, 2013); *United States v. Ill. Power Co.*, No. 99-0833, 2003 WL 25593221, at *4 (S.D. Ill. Apr. 24, 2003). Indeed, the entire point of associational standing is "to create an effective vehicle for vindicating interests that [entities] share with others." *UAW v. Brock*, 477 U.S. 274, 290 (1986). Here, the Commission already has found that SIFMA is attempting to vindicate the interests of its members in this litigation. *See* Order Establishing Procedures And Referring Applications For Review To Administrative Law Judge For Additional Proceedings at 12, Exchange Act Release No. 72182 (May 16, 2014).

Separately, the Exchanges fail to address the fact that these communications took place in the context of preparing declarations to be filed in support of jurisdiction. Communications surrounding the preparation of filings are clearly protected work product.[5] *See, e.g., Innovation Ventures, L.L.C. v. Aspen Fitness Prods.*, No. 11-13537, 2014 WL 2763645, at *3 (E.D. Mich. June 18, 2014) ("'[T]he work product doctrine does protect information relevant to the evolution of an affidavit, including but not limited to communications with the counsel relating to the affidavit, prior drafts of the affidavit, and any notes made by counsel while engaging in the process of drafting the affidavit.'") (quoting *Tuttle v. Tyco Elecs. Installation Servs.*, No. 06-581, 2007 WL 4561530, at *2 (S.D. Ohio Dec. 21, 2007)).[6]

---

[5] Unlike the common interest rule, the work product doctrine is distinct from the attorney-client privilege. *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 508 (1947).

[6] In a footnote, the Exchanges contend that the privilege log does not respond to Subpoena Request No. 9. They are mistaken. PRIV-SIFMA-01 and PRIV-SIFMA-02 were both designated as being responsive to Request No. 9 in the privilege log.

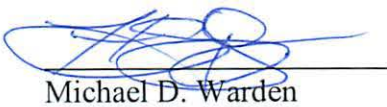
CONCLUSION

For the foregoing reasons, the Exchanges' request for the production of privileged documents should be denied.

Dated: April 16, 2015

Respectfully submitted,

SIDLEY AUSTIN LLP



Michael D. Warden
HL Rogers
Eric D. McArthur
Benjamin Beaton
Jeffrey J. Young
Kathleen Hitchins
Kevin P. Garvey
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
mwarden@sidley.com

Counsel for SIFMA

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2015, I caused a copy of the foregoing Securities Industry and Financial Markets Association's Reply to the Exchanges' Response to Privilege Log to be served on the parties listed below via FedEx:

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

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

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

Stephen D. Susman
Susman Godfrey LLP
1000 Louisiana Street, Suite 5100
Houston, TX 77002

Jacob W. Buchdahl
Susman Godfrey LLP
560 Lexington Avenue, 15th Floor
New York, NY 10022

Dated: April 16, 2015

HL Rogers