UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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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

REPLY OF NYSE ARCA, INC. IN SUPPORT OF MOTION FOR SANCTIONS FOR DISCOVERY MISCONDUCT

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NYSE Arca, Inc. respectfully submits this reply memorandum in support of its April 24, 2015 motion for sanctions against the Securities Industry and Financial Markets Association (the "Motion"). The Motion was initiated orally during the hearing in this matter, and Your Honor ordered a briefing schedule pursuant to Securities and Exchange Commission Rule of Practice 154. Hearing Tr. ("Tr.") 1401:25-1402:15 (April 20-24, 2015).

PRELIMINARY STATEMENT

The sanctionable conduct here is clear and easy to understand: NYSE Arca was surprised to learn, in the last three days of trial, that SIFMA's counsel had arranged several meetings between its experts and senior officials at Bloomberg, LLP ("Bloomberg") and significant witnesses at Citigroup. One of SIFMA's experts, Prof. Donefer, also had a previously undisclosed discussion with the Wells Fargo & Company representative who signed one of the jurisdictional declarations submitted by SIFMA in this proceeding. At least two of these meetings resulted in notes taken at the direction of SIFMA's expert, Dr. Evans, which notes were never produced. These notes clearly relate to the testimony Dr. Evans was going to provide and, among other things, likely included information concerning (i) SIFMA members routing order flow away from an exchange and reducing purchases of depth-of-book data in response to a depth-of-book data price increase, (ii) the way SIFMA members "purchase -- or use multiple depth-of-book data products," and (iii) SIFMA members' redistribution of depth-of-book data. Tr. 1192:7-1195:20; 1202:14-1206:25; 1227:8-1229:2.

Why are these meetings so important? In its attempt to quash the subpoena issued by Your Honor to SIFMA on January 5, 2015 (the "Subpoena"), SIFMA admitted that "any Member who dares" to (i) "provide even a single document to SIFMA for inclusion on its exhibit list" or (ii) ***"submit to a five-minute interview by or to provide any information to SIFMA's***

experts" would ***"be subject to the full force and effect of the Subpoena.***"[1] The cross-examination of SIFMA's experts demonstrated, for the first time, that Citigroup, Bloomberg, and perhaps Wells Fargo were "interview[ed] by or ... provide[ed] ... information to SIFMA's experts" and were thus, in SIFMA's own words, "subject to the full force and effect of the Subpoena," which SIFMA and its experts hid from Your Honor and NYSE Arca. The information (from these members and about the meetings with them) that was withheld is unquestionably responsive to the Subpoena and was wrongfully hidden by SIFMA.

What was disclosed during the cross-examination of SIFMA's experts confirms that SIFMA has played fast and loose in this proceeding from the beginning. SIFMA began by asserting that its members had no necessary role in this proceeding, but then said their participation was critical to SIFMA being able to litigate the proceeding:

What SIFMA Said When Seeking Representative Standing	**What SIFMA Said When It Wanted Its Members to Attend the Hearing**
SIFMA "has associational standing to initiate these proceedings on its members' behalf because ...participation by SIFMA's individual members is unnecessary."[2] "Sidley represents SIFMA and not its individual members in this proceeding."[3]	"[P]reventing any SIFMA members from viewing the documents" would "significantly limit[] SIFMA and its counsel in preparing and presenting its case."[4] "As the Exchanges well know, SIFMA has very few staff, and any expertise regarding the use of their depth-of book products resides at SIFMA's members."[5] "SIFMA cannot be precluded by means of a protective order from accessing the expertise of its members, who

[1] Application of SIFMA to Quash Or, In the Alternative, To Modify Subpoena Deuces Tecum at 3 (Jan. 22, 2015) ("Motion to Quash"), attached as Exhibit A, (emphasis added).

[2] Reply Brief of SIFMA Regarding Procedures To Be Adopted In Proceedings at 5 (Sept. 20, 2013), attached as Exhibit B.

[3] Email from Michael Warden to Joshua Lipton, dated December 29, 2014, attached as Exhibit C.

[4] SIFMA's Opposition to Exchanges' Motion for Protective Order at 2 (Feb. 9, 2015), attached as Exhibit D.

[5] *Id.*

	are the purchasers of the market data ... ."[6]

It could not have been true that both (i) participation of SIFMA members in the proceeding is "unnecessary" *and* (ii) their inability to participate would "significantly limit[] SIFMA and its counsel in preparing and presenting its case."

When faced with having to provide discovery from members, SIFMA asserted that it had no ability to control members and could not obtain information from them. But as became clear during cross-examination of SIFMA's experts, that was false: When it wanted to, SIFMA was able to arrange to get information from SIFMA members on short notice (and in fact obtained such information) and could get SIFMA's experts any information they wanted:

What SIFMA Said When Trying to Avoid Discovery of Its Members	**What SIFMA's Experts Said on Cross-Examination**
"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."[7] "SIFMA ... cannot compel production of documents responsive to the Subpoena from its members."[8] "SIFMA's Subpoena responses accounted for the Subpoena's multi-part definition of 'Relevant Members' and the responsive documents in SIFMA's possession, custody, and control."[9]	Dr. Evans testified that SIFMA's attorneys "were able to arrange interviews with" Young Kang of Citigroup, Greg Babyak of Bloomberg, and others.[10] Dr. Evans further testified that these interviews "were specifically for this case" and that notes were taken at these meetings but not produced.[11] Dr. Evans testified that meeting with [redacted] Dr. Evans testified that SIFMA's counsel arranged a meeting with Bloomberg because "I wanted to see the Depth-of-Book data on Bloomberg. So part of it was to

6 *Id.* at 7-8.

7 Motion to Quash at 7, attached as Exhibit A.

8 SIFMA Subpoena Response at 2, attached as Exhibit A to SIFMA's Opposition to NYSE Arca's Motion ("Opposition" or "Opp.").

9 Email from Kathleen Hitchens to Patrick Marecki, dated March 6, 2015, attached as Exhibit C to SIFMA's Opposition.

10 Tr. 1101:21-1102:12.

What SIFMA Said When Trying to Avoid Discovery of Its Members	What SIFMA's Experts Said on Cross-Examination
	show the Depth-of-Book data that's available to Bloomberg customers, and basically, how it gets displayed and so forth. We had a conversation about the extent to which Bloomberg customers purchase -- or use multiple Depth-of-Book data products, and the answer to that is many of them by and large do purchase or use multiple Depth-of-Book data products. General discussion of the importance of Depth-of-Book data products for traders in this business. How they get used."[13] Dr. Evans also discussed with Mr. Babyak Bloomberg's redistribution of depth-of-book data to its customers and how some customers use multiple depth-of-book products.[14] Dr. Evans testified that had he wanted additional information from SIFMA members he could have obtained it.[15]

NYSE Arca's counsel asked Dr. Evans whether Greg Babyak attended Dr. Evans' meeting with Bloomberg because Mr. Babyak is Bloomberg's chief lobbyist, and has orchestrated many campaigns to serve Bloomberg's interests from behind organizations.[16] Consistent with this, Mr. Babyak attended significant portions of the hearing and his name is all over SIFMA's privilege log, and the context of that fact is now far clearer from the cross-examinations of SIFMA's experts. Indeed, a summer 2014 blog post by Bloomberg Tradebook's

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[11] Tr. 1103:15-19; 1154:10-19; 1226:7-1227:7.

[12] Tr. 1207:21-1208:8.

[13] Tr. 1227:8-21.

[14] Tr. 1227:22-1229:2.

[15] Tr. 1106:17-1107:8.

[16] *See* Aram Roston, *How Bloomberg Does Business*, THE NATION (Feb. 10, 2011), attached as Exhibit E ("What the letter did not say is that Bloomberg LP was the driving force behind the PR campaign, and the Coalition for Competition in Media was conceived, funded and staffed by lobbyists for New York City Mayor Michael Bloomberg's $7 billion-per-year media company.").

Chief Strategy Officer — who Prof. Donefer met but with whom he supposedly discussed nothing of substance (Tr. at 856:7-857:12) — makes this even more curious.[17] Put bluntly, why would someone like Mr. Stone bother to meet with Prof. Donefer for a supposedly non-substantive "chat?"

SIFMA's opposition brief relies principally on the argument that SIFMA does not legally "control" its members, ignoring that SIFMA had already admitted that the interviews that we now know happened subjected SIFMA members to the Subpoena.[18] Given that at least Citigroup and Bloomberg were "subject to the full force and effect of the Subpoena," SIFMA's complaints that NYSE Arca should have done anything other than it did are a dodge.

NYSE Arca respectfully requests that Your Honor do two things to remedy SIFMA's misconduct:

1. Order the immediate production of the notes Dr. Evans' assistant took at Dr. Evans' meetings with Citigroup and Bloomberg and permit NYSE Arca to move their entry into evidence, and

2. After post-trial briefing is complete (including any additions to the record from Dr. Evans' assistant's notes), find that (i) SIFMA members can and do route order flow away from an exchange and reduce purchases of depth-of-book data in response to increases in the price of depth-of-book data; (ii) SIFMA members can and do choose and switch between depth-of-book products; and (iii) SIFMA members redistribute exchanges' depth-of-book data for profit.

STATEMENT OF FACTS

The timeline showing that SIFMA's statements that it did not possess information responsive to the Subpoena were not true is not subject to dispute:

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[17] *Compare id.* with Gary Stone, *Market Data Fee Reform Coming*, available at http://www.bloombergtradebook.com/blog/market-data-fee-reform-coming/ (last visited May 6, 2015), attached as Exhibit F ("NetCoalition, a trade association including Google, Yahoo! and Bloomberg L.P., petitioned the SEC on behalf of their Internet and terminal clients to deny NYSE Arca's plan.").

[18] Motion to Quash at 3, attached as Exhibit A.

- On January 5, 2015, this Court issued the Subpoena, which sought from SIFMA, among other things documents "referring or relating to any decision to route order flow to or from any exchange, or any decision to modify any purchases of depth-of-book data products, based on that exchange's depth-of-book data pricing" (Request No. 13).[19]

- On January 23, 2015, SIFMA moved to quash the Subpoena, acknowledging that if the Subpoena were not quashed, any SIFMA member that "dared" "***to submit to a five-minute interview by or to provide any information to SIFMA's experts... will be subject to the full force and effect of the Subpoena***."[20] Your Honor denied the Motion to Quash.

- On January 26, 2015, SIFMA received the report of Nasdaq expert Professor Janusz Ordover ("Ordover Report"), which disclosed the May 14, 2012 email from Young Kang of Citigroup to Nasdaq, stating:

  [redacted]

- Less than two weeks after SIFMA received the Ordover Report and Mr. Young's email and "specifically for this case," SIFMA's counsel arranged and attended a meeting between Dr. Evans and Mr. Young to discuss, among other things, Mr. Young's email.[22] Approximately *five* other Citigroup employees also attended this meeting.[23] Although Dr. Evans initially stated that he did not take notes and indicated that he relied upon "a good memory," on further cross-examination he admitted that his assistant had in fact attended and taken notes at this meeting.[24] These notes were never produced.

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[19] Subpoena Request No. 13, attached as Exhibit D to SIFMA's Opposition.

[20] Motion to Quash at 3, attached as Exhibit A.

[21] Nasdaq Ex. 505, attached as Exhibit G; Ordover Report ¶ 36. Mr. Young is also the Citigroup representative who signed one of the jurisdictional declarations submitted by SIFMA in this proceeding. *See* NYSE Arca Ex. 4, attached as Exhibit H (excerpt).

[22] Tr. 1100:7-14; 1101:21-1102:12; 1103:15-19.

[23] Tr. 1152:11-23.

[24] Tr. 1103:15-19; 1153:18-1154:19; 1226:7-1227:7.

- Also on February 9 or 10, 2015, and "specifically for this case," SIFMA's attorneys arranged and attended a meeting between Dr. Evans and Mr. Babyak, Bloomberg's chief lobbyist, and two or three other Bloomberg employees.[25] They discussed "the depth-of-book data available to customers," which "customers purchase -- or use -- multiple depth-of-book products," and "the importance of depth-of-book data products for traders."[26] They also discussed Bloomberg's redistribution of depth-of-book data to its customers and how some customers use multiple depth-of-book products.[27] Again, after initially stating that he did not take notes at this meeting, Dr. Evans admitted that his assistant attended and took notes, which were also not produced.[28]

- On February 11, 2015, SIFMA's attorneys arranged and attended a meeting between Prof. Donefer and Dr. Evans to discuss their testimony, and undoubtedly what transpired during the Bloomberg and Citigroup meetings.[29]

- On February 23, 2015, SIFMA submitted its response to the Subpoena, which repeated the statement that it "cannot compel production of documents responsive to the Subpoena from its members."[30]

  In response to Request No. 13, which sought "all Documents referring or relating to any decision to route order flow to or from any exchange, or any decision to modify any purchases of depth-of-book data products, based on that exchange's depth-of -book data pricing," SIFMA stated that it "has identified no documents responsive to this request in its possession, custody, or control." In response to every Request relating to SIFMA members' redistribution of depth-of-book products (Request Nos. 6-8), SIFMA stated that it "has identified no documents responsive to this request in its possession, custody, or control." And yet these issues had been discussed between (i) Dr. Evans and (ii) Citigroup and Bloomberg less than two weeks earlier.

- On February 24, 2015, Prof. Donefer met with Steve Listhaus of Wells Fargo, the Wells Fargo representative who signed one of the jurisdictional declarations submitted by SIFMA in this proceeding.[31] Mr. Listhaus first

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[25] Tr. 1153:10-14; 1221:21-1222:8; 1223:19-1224:7.

[26] Tr. 1227:8-21.

[27] Tr. 1227:22-1229:2.

[28] Tr. 1153:18-1154:19; 1226:7-1227:7.

[29] Tr. 875:9-21.

[30] SIFMA Subpoena Response at 2, attached as Exhibit A to SIFMA's Opposition.

[31] Tr. 828:1-829:16; NYSE Arca Ex. 4, attached as Exhibit I (excerpt).

contacted Prof. Donefer about this proceeding in late January or early February 2015, and they discussed, among other topics, the substitutability of depth-of-book data products.[32]

- On April 10, 2015, Prof. Donefer met with Gary Stone, Bloomberg's Chief Strategy Officer, in a meeting arranged and attended by SIFMA's attorneys, to discuss "all these issues" related to depth-of-book market data, including the importance of depth-of-book data to customers.[33]

The Donefer and Evans reports do not mention the meetings revealed during cross-examination or the notes created as a result of these meetings, supposedly because Prof. Donefer and Dr. Evans "did not rely upon" any of the information they gathered at these meetings.[34] Only during the last three days of trial was information revealed about Prof. Donefer and Dr. Evans' meetings with SIFMA members.

ARGUMENT

I. YOUR HONOR SHOULD ORDER THE IMMEDIATE PRODUCTION OF THE NOTES OF MEETINGS BETWEEN DR. EVANS AND SIFMA MEMBERS

There is no question that since February 10 and 11, 2015, SIFMA has been in the possession, custody, or control of documents responsive to the Subpoena, that SIFMA was required to produce them, and that SIFMA failed to do so. As of February 23, 2015 (the date of SIFMA's subpoena response) SIFMA had possession, custody, or control of notes taken at the direction of Dr. Evans on February 10 and 11, 2015, concerning (i) SIFMA members routing order flow away from an exchange and reducing purchases of depth-of-book data in response to a price increase, (ii) the way SIFMA members "purchase -- or use multiple depth-of-book data products," and (iii) SIFMA members' redistribution of depth-of-book data. Tr. 1192:7-1195:20; 1202:14-1206:25; 1227:8-1229:2. These materials are highly relevant, clearly responsive to the

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[32] Tr. 827:13-829:16.

[33] Tr. 853:6-857:12; 876:9-877:10; 959:1-2.

[34] *See, e.g.*, Tr. 1101:6-1105:15; 969:17-970:4.

Subpoena, and should have been produced. Notably, SIFMA's Opposition does not even attempt to establish that these notes are privileged, and SIFMA's ability to try to make such a claim has long been waived.[35] Indeed, SIFMA previously conceded that the result of any meetings between its members and experts would be that those members would be fully subject to the Subpoena (and would thus have to produce responsive documents), conceding that documents relating to any such meeting (as these notes are) would not be privileged.[36] That alone should end the inquiry.

SIFMA devotes its Opposition to a straw man, focusing on its supposed inability to "control" its members, while failing to say a single word about the central misconduct exposed by its experts on cross-examination—that SIFMA has failed to produce documents SIFMA previously admitted it was required to produce if its experts met with SIFMA members even for "five minutes." That central concession means that the five pages of SIFMA's brief citing authority for the proposition that "a party is responsible only for producing the materials or information within its possession, custody, or control" (Opp. at 4-8) are simply irrelevant.[37]

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[35] *See In the Matter of Thomas R. Delaney II et al.*, Order on Motions, File No. 3-15873, Release No. 1652, at 4 (July 25, 2014) (Murray, J.); *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 637 (N.D. Ind. 1996). That SIFMA has no valid claim of privilege is further evidenced by the fact that no SIFMA privilege log includes any mention of its experts' communications with SIFMA members. After producing two privilege logs and an Opposition brief that does not assert a claim of privilege, SIFMA has waived the right to do so. *See Lohrenz v. Donnelly*, 187 F.R.D. 1, 6-7 (D.D.C. 1999).

[36] Motion to Quash at 3, attached as Exhibit A.

[37] Moreover, 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).). Dr. Evans' testimony (Tr. 1106:17-1107:8) clearly establishes that SIFMA had the "practical ability" to get whatever information it wanted from

SIFMA's previous concession also eviscerates its contentions that its experts' supposed non-reliance on the meetings SIFMA so easily and hastily convened means there was no need for disclosure (Opp. at 11-14). Nonsense. SIFMA's argument in seeking to quash the Subpoena was clear and simple—***any*** meeting with its experts would subject its members to disclosure under the Subpoena.[38] Those meetings happened *after* SIFMA made that concession, and that ends the matter.[39]

In attempting to minimize the fact that its experts had undisclosed meetings with SIFMA members Citigroup and Bloomberg related to their work in this proceeding and that the mere fact of those meetings created production obligations, SIFMA laments that "SIFMA's members are all distinct entities that SIFMA does not control for discovery purposes." Opp. at 2. Beyond the fact that the argument is irrelevant in light of SIFMA's concession, both experts testified that these meetings were arranged by SIFMA, and Dr. Evans testified that he could have

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its members, which makes sense given SIFMA's assertion that it was dependent on its members' expertise to pursue this proceeding.

[38] This also disposes of SIFMA's argument that it did no wrong because it produced the same "reliance materials" NYSE Arca's experts did. What SIFMA stubbornly ignores is that (i) it conceded that the Subpoena would create obligations for SIFMA members to produce responsive documents if SIFMA members gave information to or met with SIFMA's experts, (ii) both of those things happened, and (iii) SIFMA hid the fact that both of those things had happened so that its members would not have to respond to the Subpoena.

[39] SIFMA of course knew this when it made its concession: As even the cases SIFMA cites state, all facts and documents given to experts in preparation for testimony must be disclosed, not just those ultimately relied on in forming the expert's opinion. *See Allstate Ins. Co. v. Electrolux Home Prods. Inc.*, 840 F. Supp. 2d 1072, 1080 (N.D. Ill. 2012) ("An expert must disclose the materials given to him to review in preparation for testifying, '***even if in the end he does not rely on them in formulating his expert opinion, because such materials often contain effective ammunition for cross-examination.***'") (emphasis added); *id.* (noting that information "considered" specifically "applies to that information an expert actively reviews and contemplates, and then chooses not to rely upon"); *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 635, 640 (N.D. Ind. 1996) (stating that courts require experts to disclose materials under the "considered" standard and that "useful cross examination and possible impeachment can only be accomplished by gaining access to all of the information that shaped or potentially influenced the expert witness's opinion").

gotten any other information he wanted.[40] Those facts thus cast significant doubt on the validity of even SIFMA's straw man.[41]

SIFMA's attempt to dismiss Dr. Evans' meetings with Citigroup and Bloomberg as mere attempts to gather "background information" (Opp. at 10) are absurd. SIFMA would have Your Honor believe that, within two weeks of SIFMA learning about Citigroup's 2012 email admitting, in no uncertain terms, the precise constraint addressed in *NetCoalition I*, SIFMA casually set up a meeting for Dr. Evans to get "background" that was attended by the author of that email and *five* other Citigroup employees and at which that email was discussed, but that Dr. Evans knew in advance that he would not need to rely on anything that might be discussed at that meeting. Tr. 1101:6-1105:15. Dr. Evans' assertion that he did not "rely" on the information obtained or notes taken at his meetings with Citigroup and Bloomberg defies belief. Dr. Evans requested meetings with Citigroup and Bloomberg (which SIFMA attorneys then arranged and attended) to discuss issues "specifically for this case." Tr. 1101:19-1102:12; 1103:15-19. The topics Dr. Evans discussed at these meetings go to the very heart of this

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[40] Dr. Evans testified not only that SIFMA arranged the meetings with Citigroup and Bloomberg, but that SIFMA did so "specifically for this case." Tr. 1101:19-1102:12 ("Q: And you understood -- who arranged these interviews? A: The lawyers retained by SIFMA. Sidley."); Tr. 1103:15-19 ("JUDGE MURRAY: Counsel, could I just get straight, those interviews were specifically for this testimony? THE WITNESS: They were specifically for this case."). And Prof. Donefer testified that SIFMA's counsel also arranged for his meeting at Bloomberg. Tr. 846:25-847:2 ("Q: And so it was, in fact, Sidley that arranged the visit with Bloomberg Tradebook? A: Sidley made the appointment, yes."); *see also* Tr. 1106:17-1107:8 (Dr. Evans' testimony that had he wanted additional information from SIFMA members he could have obtained it).

[41] SIFMA's explanation that Prof. Donefer was first approached about serving as an expert by a Wells Fargo employee and that Bloomberg employees directly assisted him in obtaining his screenshots (Opp. at 9) are likewise irrelevant. SIFMA's attorneys organized his meeting with Bloomberg, attended it, and were likely included on emails containing the Bloomberg screenshots that were ultimately used in his report as well as others that were discarded or modified. Tr. 847:22-848:7; 852:1-9; 858:1-8; 876:5-8; 880:17-19.

proceeding, and include Citigroup's smoking gun email, SIFMA members routing order flow away from an exchange and reducing purchases of depth-of-book data in response to a price increase, SIFMA members' use of multiple depth-of-book products, and SIFMA members' redistribution of the Exchanges' data. Tr. 1192:7-1195:20; 1202:14-1206:25; 1227:8-1229:2. Dr. Evans' credibility concerning his reliance on these materials is further undermined by his initial testimony that he relied only on his "good memory" to recall the events of the meeting; it was not until he was pressed on further cross-examination that he backtracked and admitted that his assistant had, in fact, taken notes at his direction. Tr. 1103:15-19; 1154:10-19; 1226:7-1227:7. Finally, SIFMA's criticism that NYSE Arca did not impeach Dr. Evans is almost comical. As demonstrated above, Dr. Evans' testimony is not credible on its face (and there will be still more discussion of this fact in NYSE Arca's post-trial briefing). In any event, a major source of evidence that could have been used to impeach Dr. Evans is the notes his assistant took. But SIFMA never disclosed those meetings (for obvious reasons), Dr. Evans initially claimed no notes were taken, and the notes have not been produced.

The remainder of SIFMA's arguments are similarly nonsensical. SIFMA asserts that "the only reason that NYSE Arca purportedly lacks information from SIFMA members is that NYSE Arca made the strategic decision not to pursue it" with non-party subpoenas to SIFMA members (Opp. at 3). NYSE Arca relied on SIFMA's assertion that if there was any contact between SIFMA's members and its experts, those members would be subject to the Subpoena. No such contact was disclosed by SIFMA or its experts, and NYSE Arca did not learn that such contact had taken place until it cross-examined SIFMA's experts during the last

three days of the hearing.[42] SIFMA's arguments are the antithesis of Your Honor's direction to "get the facts on the table."[43]

Indeed, SIFMA's reference to NYSE Arca's non-party subpoena to the Financial Information Services Division of the Software & Information Industry Association ("FISD") (Opp. at 6) is a perfect example of why SIFMA's arguments are nonsense. NYSE Arca subpoenaed FISD because it knew that Prof. Donefer had moderated a potentially relevant panel discussion at a FISD conference. But SIFMA and its experts hid the fact that the meetings now at issue took place, and SIFMA had previously advised Your Honor that such subpoenas would be unnecessary if what we now know happened did happen. SIFMA cannot have it both ways.

II. NYSE ARCA IS ENTITLED TO AN ADVERSE INFERENCE

When the time comes for Your Honor to issue her preliminary decision, Your Honor will need to address questions regarding (i) the ability of SIFMA members to route order flow away from an exchange and reduce purchases of depth-of-book data in response to an increase in the price of depth-of-book data; (ii) whether SIFMA members can and do substitute depth-of-book data products for each other; and (iii) SIFMA members' redistribution of depth-of-book data for profit. Although NYSE Arca believes that the record contains enough evidence to require findings in NYSE Arca's favor on each of these issues, the misconduct by SIFMA has

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[42] For these same reasons, SIFMA's argument that NYSE Arca had the burden of "showing that NYSE Arca could not have subpoenaed SIFMA's members directly" (Opp. at 8-9) is also nonsense. SIFMA admitted that if the meetings disclosed during cross-examination happened, such subpoenas would have been unnecessary. SIFMA's argument that NYSE Arca is precluded from requesting the relief sought in the Motion because it did not pursue "subpoena enforcement proceedings" in federal court (*id.* at 9) fails for the same reasons.

[43] Order on Motion to Quash, File No. 3-15350, Release No. 2277 (Feb. 3, 2015) ("This dispute has gone on for a considerable period, and it is time to get the facts on the table and reach a resolution. SIFMA's Motion to Quash is DENIED.").

impeded NYSE Arca's ability to contest SIFMA's contentions with respect issues like these. Two examples should suffice:

- SIFMA has repeatedly chastised NYSE Arca, including through submissions by its experts, for supposedly not presenting sufficient evidence that market data users can and do substitute depth-of-book data products, despite the uncontested evidence that market data users are themselves the best sources of information about such conduct.[44]

- SIFMA and its experts have repeatedly contended that SIFMA members need depth-of-book data to decide how to route their customers' orders.[45] The evidence strongly contradicted those assertions (*e.g.*, SIFMA Ex. 369 and Nasdaq Ex. 619), and there is reason to believe that SIFMA members have evidence that would contradict it even more strongly. For example, SIFMA member Charles Schwab & Co., Inc. was recently sued in a class action for breaching its duty of best execution because, that complaint alleges, Schwab has had an agreement in place with SIFMA member UBS Securities LLC since 2004 to route at least 95% of non-directed orders to UBS.[46] Surely Your Honor would have liked to know how many SIFMA broker-dealer members have agreements like that in place in order to evaluate Prof. Donefer's opinions that all broker-dealers "need" all major exchanges' depth-of-book data to "choose" where to send their order flow. The existence of agreements like this, agreements SIFMA's members are the best source of information about, is critical to evaluating the positions SIFMA—not its members—has asserted.

Although SIFMA long asserted that it could not compel its members to provide any information relevant to this proceeding, its experts' cross-examinations demonstrated that to be a ruse—when SIFMA wanted is members to discuss issues like these with its experts, they did so immediately, although those experts claim they had no need to rely on those discussions and have entirely shielded them from disclosure to Your Honor. This is precisely the sort of gamesmanship that calls for an adverse inference.

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[44] *Compare* 1192:2-6; 1204:18-1206:19 *with* 159:23-160:3; 180:14-22; 309:4-18; 443:11-444:22.

[45] Tr. 907:21-912:6; 938:11-939:10; 993:20-994:17.

[46] *See Lim v. Charles Schwab & Co., Inc.*, Case No. 3:15-cv-02074-EDL (N.D. Cal., filed May 8, 2015), Complaint ¶¶ 1, 8-34, attached as Exhibit J.

If a party fails to obey a discovery order, a court may make such orders in regard to the failure as are just, including an order that specific facts shall be taken as established for the purposes of the action in accordance with the claim of the party obtaining the order.[47] Even "in the absence of a discovery order, a court may impose sanctions on a party for misconduct in discovery under its inherent power to manage its own affairs."[48] Where, as here, "the nature of the alleged breach of a discovery obligation is the non-production of evidence," a tribunal "has broad discretion in fashioning an appropriate sanction, including ... to proceed with a trial and give an adverse inference instruction."[49] Where "an adverse inference instruction is sought on the basis that the evidence was not produced in time for use at trial, the party seeking the instruction must show (1) that the party having control over the evidence had an obligation to timely produce it; (2) that the party that failed to timely produce the evidence had 'a culpable state of mind'; and (3) that the missing evidence is 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense."[50]

SIFMA has conceded that once one of its members met with its experts, that member was obligated to respond to the Subpoena. There is thus no dispute that SIFMA had an obligation to produce responsive documents once Dr. Evans and Prof. Donefer met with Citigroup and Bloomberg, whether or not either "relied on" such meetings. SIFMA's "culpable

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[47] *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106 (2d Cir. 2002).

[48] *Id.* at 106-07.

[49] *Id.* at 107; *see also Reilly v. Natwest Markets Group Inc.*, 181 F.3d 253, 267 (2d Cir. 1999).

[50] *Residential Funding Corp.*, 306 F.3d at 107; *see also U.S. v. Philatelic Leasing, Ltd.*, 601 F. Supp. 1554, 1555-56 (S.D.N.Y. 1985) ("where a party withholds (or seeks to suppress) relevant evidence within its control, the court may conclude that such evidence would be harmful to the party's cause.").

state of mind" is clearly demonstrated by the discussion above.[51] And the undisputed evidence establishes that the withheld evidence is relevant. For example, the notion that Dr. Evans would request and SIFMA would enable meetings with, *inter alia*, Citigroup's senior market data personnel and Bloomberg's chief lobbyist for the purposes of this proceeding if the information to be discussed at those meetings was not relevant is, at best, fanciful.

The bases on which SIFMA opposes NYSE Arca's request for an adverse inference lack merit, relating mostly to SIFMA's discredited straw man arguments and inapposite case law relating to the destruction of evidence:

- The legal doctrine underlying NYSE Arca's request is both clear and clearly satisfied here. Contrary to SIFMA's assertion (Opp. § III.A), NYSE Arca is not asking Your Honor to draw an adverse inference because of spoliation—it is asking Your Honor to draw an adverse inference because SIFMA deliberately and intentionally withheld and continues to withhold relevant and responsive evidence. "Bad faith" and "extraordinary circumstances" are not required in this situation.[52]

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[51] *See supra* pp. 8-12; *Residential Funding Corp.*, 306 F.3d at 108 (in determining whether a party acted with a culpable state of mind, a case-by-case approach to the failure to produce relevant evidence is appropriate); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. N. L. R. B.*, 459 F.2d 1329, 1338 (D.C. Cir. 1972) ("while the adverse inference rule in no way depends upon the existence of a subpoena, it is nonetheless true that the willingness of a party to defy a subpoena in order to suppress the evidence strengthens the force of the preexisting inference.").

[52] SIFMA's own citations establish that an adverse inference is appropriate where a party made intentional efforts to withhold evidence at trial. *See SEC v. Goble*, 682 F.3d 934, 947 (7th Cir. 2012); *Stepnes v. Ritschel*, 663 F.3d 952, 965 (8th Cir. 2011). The other cases cited by SIFMA do not support a "bad faith" requirement even in the context of spoliation. *See Priority One Servs. v. W&T Travel Servs., LLC*, 502 F. App'x 4, 6 (D.C. Cir. 2013); *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 120 (S.D.N.Y. 2008); *see generally Talavera v. Shah*, 638 F.3d 303, 311-12 (D.C. Cir. 2011) (permitting an adverse inference for destruction of evidence in the absence of bad faith). SIFMA's reliance on *Grosdidier v. Chairman, Broad. Bd. Governors*, 774 F. Supp. 2d 76, 104 (D.D.C. 2011), is particularly inapposite: In that case, the court denied an adverse inference related to destruction of documents because agency guidelines did not require retention of the documents at issue. But here, SIFMA has already admitted that it was required to produce documents from SIFMA members who met with its experts.

- NYSE Arca is not seeking an unidentified adverse inference (Opp. at § III.B), it is seeking the specific adverse inferences stated above. In any event, SIFMA has only itself to blame for how this issue has arisen—SIFMA, not NYSE Arca, hid the existence of responsive information until its experts were cross-examined.[53]

- As discussed at length above (*supra* pp. 8-12), NYSE Arca has pointed to (i) notes from two different meetings that would support NYSE Arca's position and (ii) SIFMA's concession that the meetings that took place necessitated direct responses to the Subpoena from Citigroup and Bloomberg.[54]

- As discussed above (*supra id.*) there is no question that the missing information is in SIFMA's possession, custody, or control, and thus was within SIFMA's power to produce, as SIFMA conceded in moving to quash the Subpoena and as Dr. Evans admitted under cross-examination.[55]

- Contrary to SIFMA's argument (Opp. § III.F), the requested adverse inference is not to "fill a gap in the record," and is supported by the testimony of NYSE Arca and Nasdaq's witnesses. Indeed, SIFMA points to only two references that allegedly contradict an inference that SIFMA members can switch their product subscriptions in response to an ArcaBook fee increase, but even those citations show that customers *did* move from one depth-of-book product to another and back again. Tr. 359:17-22; 137-19:-138:6. The record is replete with additional testimony from Profs. Hendershott, Nevo, and Ordover and Messrs. Brooks and Albers that customers do, in fact, move back and forth between depth-of-book

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[53] *Jordan v. City of Detroit*, 557 F. App'x 450, 455-57 (6th Cir. 2004), has nothing to do with this proceeding. That decision declined to adopt an adverse inference in a §1983 malicious prosecution action for failure to provide prosecution materials where the inmate never asked for the materials and "was dilatory in his discovery efforts."

[54] SIFMA's citations also do not support its argument, as both relate only to spoliation rather than intentional failure to produce. *Wells v. Orange Cnty. Sch. Bd.*, No. 05-479, 2006 U.S. Dist. LEXIS 81265, at *7 (M.D. Fla. Nov. 7, 2006); *In re Cheyenne Software, Inc. Sec. Litig.*, No. 94-2771, 1997 U.S. Dist. LEXIS 24141, at *4 (E.D.N.Y. Aug. 18, 1997).

[55] The cases cited by SIFMA are irrelevant to how to remedy SIFMA's deliberate failure to produce evidence it previously conceded it was obligated to produce. *See U.S. v. West*, 393 F.3d 1302, 1310 (D.C. Cir. 2005) (upholding denial of missing evidence jury instruction in criminal case where the missing evidence was not in the government's control and the party seeking the instruction had not sought to obtain the evidence from a source who had possession of the evidence); *U.S. v. Williams*, 113 F.3d 243, 245-46 (D.C. Cir. 1997 (upholding denial of a missing witness jury instruction in a criminal case, noting that it was not peculiarly within the government's power to produce the missing witness); *Czekalski v. LaHood*, 589 F.3d 449, 455 (D.C. Cir. 2009) (magistrate judge did not err in declining to provide a missing evidence jury instruction where movant did not identify any evidence that the government failed to produce).

products.[56] SIFMA points to no allegedly "contradictory" testimony regarding SIFMA members routing order flow in response to a price increase or SIFMA members' redistribution of an exchange's depth-of-book data for profit, because *it* elected to submit no such information.

Finally, SIFMA is just wrong that adverse inferences are generally unavailable to parties that bear the burden of proof. Indeed, SIFMA's own citations expressly state that adverse inferences are always available to a movant once it has set forth evidence in support of its burden of proof,[57] precisely what NYSE Arca has done here. Indeed, an adverse inference is particularly appropriate in this proceeding because SIFMA's submissions generally were designed to obfuscate rather than clarify the record,[58] and there can be little question that SIFMA's deliberate withholding of responsive information was intended to further that goal.

III. THIS REPLY BRIEF IS NOT AN INAPPROPRIATE EXPANSION OF THE MOTION

Although SIFMA claims to find it "surprising that NYSE Arca chose to move for sanctions orally" (Opp. at 18), the true surprise was the one exposed during cross-examination of SIFMA's experts. The reason NYSE Arca made an oral motion on the last day of trial was because NYSE Arca had not learned of this information until it had finished its cross-examination of Dr. Evans on the last day of the hearing. Immediately following the close of Dr. Evans' testimony, NYSE Arca made the Motion pursuant to SEC Rule of Practice 154, seeking

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[56] Tr. 159:23-160:3; 180:14-22; 309:4-18; 443:11-444:22.

[57] *Bank of Crete, S.A. v. Koskotas*, 733 F. Supp. 648, 654 (S.D.N.Y. 1990) (a party's failure to provide relevant evidence within its control supports an inference that the evidence would be harmful to the party's cause, provided that there is "good reason to believe" that the movant has put forth evidence to meet its burden of proof); *NLRB v. Chester Valley, Inc.*, 652 F.2d 263, 271 (2d Cir. 1981) (same); *Vanity Fair Paper Mills, Inc. v. F.T.C.*, 311 F.2d 480, 486 (2d Cir. 1962) (same); *Stanojev v. Ebasco Servs. Inc.*, 643 F.2d 914, 923-24 (2d Cir. 1981) (declining to adopt an adverse inference where the party offered "a reasonable explanation for" their nonproduction of documents "unlikely" to contain relevant information).

[58] Tr. 167:21-23; Tr. 172:7-174:6; 187:16-22; 196:4-12; 261:6-10; 278:13-15; 289:25-290:12.

sanctions for the misconduct that its cross-examinations had uncovered. Your Honor then ordered a briefing schedule. Tr. 1401:25-1402:15. The way the arguments relating to SIFMA's misconduct have had to be made arise from SIFMA's longstanding efforts to avoid discovery which, to NYSE Arca's astonishment, continued until the very moment that SIFMA closed its case on the last day of the hearing. What is "surprising" is that SIFMA has the chutzpah to proceed the way it has.

CONCLUSION

NYSE Arca respectfully requests that Your Honor (a) order the immediate production of the notes of meetings between Dr. Evans and SIFMA members and permit NYSE Arca to move their entry into evidence and (b) in connection with Your Honor's preliminary decision find that (i) SIFMA members can and do route order flow away from an exchange and reduce purchases of depth-of-book data in response to increases in the price of depth-of-book data; (ii) SIFMA members can and do choose and switch between depth-of-book products; and (iii) SIFMA members redistribute exchanges' depth-of-book data for profit.

Dated: May 11, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2015, I caused a copy of the foregoing Reply of NYSE Arca, Inc. in Support of Motion for Sanctions for Discovery Misconduct to be served on the parties listed below as follows:

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Exhibit A

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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

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

RECEIVED
JAN 23 2015
OFFICE OF THE SECRETARY

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.

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[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

[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

[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).

Dated: January 22, 2015

Respectfully submitted,

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Exhibit B

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

RECEIVED
SEP 23 2013
OFFICE OF THE SECRETARY

In The Matter of: The Application of SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION For Review of Action Taken by NYSE Arca, Inc.	Admin. Proc. File No. 3-15350

REPLY BRIEF OF APPLICANT SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION REGARDING PROCEDURES TO BE ADOPTED IN PROCEEDINGS

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In its initial brief, Applicant Securities Industry and Financial Markets Association ("SIFMA") explained that the applications in Admin. Proc. File Nos. 3-15350 and 3-15351 can be resolved through straightforward proceedings to determine whether the fees imposed by the rule changes challenged in these actions limit access to the services of various exchanges in a manner inconsistent with the Securities Exchange Act of 1934 (the "Act") and applicable regulations. Although the exchanges that submitted briefs (collectively, the "Exchanges")[1] generally agree with SIFMA on the procedures to be followed, they contend that the Commission should (1) impose threshold barriers to review that have no basis in—and in fact conflict with—the Act, and (2) apply a standard of review created out of whole cloth. These contentions are meritless.

I. There Is No Threshold Barrier To Deciding Whether The Fee Rule Changes Comply With The Act And Applicable Regulations.

As SIFMA explained, the rule changes at issue in these proceedings are subject to challenge under § 19(d) of the Act because they limit access to market data by requiring payment of unreasonable fees as a precondition to access, and §§ 19(d) and (f) require the Commission to set aside those limitations unless it finds that the fees are consistent with all applicable statutory and regulatory requirements, including the requirement that they be "fair and reasonable." SIFMA Br. 5-7; *see* 15 U.S.C. §§ 78k-1(c)(1)(C), 78s(d), (f). The Exchanges attempt to insulate themselves from this review by arguing that (1) their fee rule changes are unreviewable under § 19(d) because they are not "denials of access"; (2) SIFMA lacks standing to challenge the fee rule changes because it is not a "person aggrieved" by these actions; and (3) SIFMA's applications are untimely. NYSE Br. 1-8; Nasdaq Br. 6-14. These arguments are inconsistent with the Act and would require the Commission to contravene commitments it made to the D.C. Circuit.

[1] New York Stock Exchange LLC, NYSE Arca, Inc., and NYSE MKT LLC (collectively, "NYSE") submitted a brief in Nos. 3-15350 and 3-15351 ("NYSE Br."). The Nasdaq Stock Market LLC, NASDAQ OMX PHLX LLC, and EDGX Exchange, Inc. (collectively, "Nasdaq") submitted a brief in No. 3-15351 ("Nasdaq Br.").

A. The Fee Rule Changes Limit Access To Services.

The fee rule changes are squarely within the scope of actions subject to challenge under § 19(d). By its terms, § 19(d) applies to "[a]ny action" by a self-regulatory organization ("SRO") that "prohibits or limits ... access to services offered by" the SRO. 15 U.S.C. § 78s(d)(1), (2). Each of the challenged rule changes fits unambiguously within this definition because it is (1) an "action" by an SRO that (2) "limits ... access" to market data "offered by" the SRO by allowing only those who have paid the requisite, unjustified fees to access the data.

In arguing that the fee rule changes are not subject to challenge under § 19(d), the Exchanges ignore the statute's unambiguous language. Without citing any authority, NYSE contends that it does not limit access to its market data products because it allows access by "any party who wishes to purchase those market data products in exchange for the fees" at issue in these proceedings. NYSE Br. 3. But it is well-established that an SRO that imposes unjustified limitations as a condition to access "limits" access within the meaning of § 19(d), regardless of whether persons choose to comply with the limits rather than forgo access. *See In re Bloomberg*, Exchange Act Rel. No. 34-49076, 2004 WL 67566, at *2 (Jan. 14, 2004) (exchange's refusal to provide access to data unless recipient agreed to limitations on use "effected a denial of access to ... services" once the exchange actually imposed the limitations). Thus, even if the language were ambiguous, the Commission already has construed it to encompass precisely this kind of claim, foreclosing the Exchanges' argument. Here, both NYSE and Nasdaq concede that they have collected the challenged fees from SIFMA's members as a condition of access. NYSE Br. 3; Nasdaq Br. 3. By conditioning access on the payment of a monopolistic fee, and by collecting that fee, the Exchanges have "effected a denial of access." *Bloomberg*, 2004 WL 67566, at *2.[2]

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[2] NYSE attempts to distinguish *Bloomberg* because the action challenged there violated the exchange's own rules. NYSE Br. 3 n.6. But an exchange's action may be set aside if, *inter alia*, it

Nasdaq argues more broadly that a fee rule change can never be challenged under § 19(d) because that section is reserved for challenges to "quasi-adjudicatory" actions in which an SRO has made an individualized determination. Nasdaq Br. 7-10. Thus, in Nasdaq's view, the procedures set forth in §§ 19(b) and (c) provide the *sole* mechanisms by which an immediately effective fee rule change may be reviewed, and a party aggrieved by the fee rule change has no administrative or judicial mechanism by which to challenge it. *See id.* at 9-10.[3]

The Commission, of course, already rejected this position when it explicitly represented to the D.C. Circuit that § 19(d) "provides a means by which it may be determined whether a fee that becomes effective upon filing is consistent with applicable law." Final Brief of Respondent Securities and Exchange Commission at 45, *NetCoalition II* ("SEC Br."). *See also id.* at 46 ("Judicial review of a Commission order in a denial of service proceeding permits a court to consider directly whether a fee is consistent with the Act."). Nasdaq identifies no reasoned basis for the Commission to change its position. To the contrary, Nasdaq's position that the Commission cannot directly review an exchange's imposition and enforcement of a fee rule is flatly inconsistent with § 19(b)(3)(C), which provides that such a rule change "may be enforced" only "to the extent it is not inconsistent with" the Act. 15 U.S.C. § 78s(b)(3)(C). In enacting this provision, Congress necessarily intended the Commission to review fee rule changes directly at the enforcement stage; otherwise, there would be no mechanism to review SRO actions for compliance.

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violates its own rules *or* is inconsistent with the Act. *See* 15 U.S.C. § 78s(f); *see also* SIFMA Br. 5-6. Where, as here, an immediately effective rule change imposes unreasonable fees pursuant to an immediately effective rule change, its action is inconsistent with the Act, 15 U.S.C. § 78k-1(c)(1)(C), and the rule purporting to allow the fees is unenforceable, *id.* § 78s(b)(3)(C) (fee rule enforceable only if "not inconsistent" with Act).

[3] Section 19(b) authorizes the Commission to temporarily suspend and review an immediately effective rule change, but the Commission's decision not to do so has been held not subject to judicial review. *NetCoalition v. SEC* (*NetCoalition II*), 715 F.3d 342, 353 (D.C. Cir. 2013). Section 19(c) authorizes the Commission to alter SRO rules "as [it] deems necessary," but provides no mechanism for a person aggrieved by the rule to initiate proceedings or seek review.

Nasdaq's remaining contentions are meritless. First, its argument that § 19(d) cannot be used to review an immediately effective rule change because the provision requires the SRO to notify the Commission when it limits access and to produce a record, Nasdaq Br. 10, is completely unfounded, given that an SRO proposing an immediately effective rule change must notify the Commission and produce a supporting record. *See* 15 U.S.C. § 78s(b)(1); 17 C.F.R. §§ 240.19b-4(b)(1), 249.819. Second, its suggestion that the Commission lacks authority to rewrite a fee rule or to allow discriminatory access, Nasdaq Br. 10-11, is a red herring because the Commission is being asked to set aside the fee rule changes altogether, not to rewrite them. Finally, its concern that § 19(d) review would undermine Congress's supposed intent to "streamline the procedures governing the introduction of new market data products," *id.* at 11, is purely imaginary: Because fee rule changes take effect immediately and remain effective throughout the pendency of § 19(d) review, there is no risk that such proceedings would affect the speed with which new products—or new fees—might be brought to market. Review under § 19(d) merely ensures that the statute's intent to protect consumers from fee-gouging is fulfilled.

B. SIFMA Is a "Person Aggrieved" By The Challenged Access Limits.

SIFMA plainly has standing to initiate these proceedings. To bring an application under § 19(d), an applicant need only be a "person aggrieved" by the challenged action. 15 U.S.C. § 78s(d)(2). As the Exchanges concede, many of SIFMA's members have been forced to pay the challenged fees in order to access market data products. *See* NYSE Br. 3; Nasdaq Br. 3; *see also* Declaration of Ira Hammerman ("Hammerman Decl.") ¶¶ 4-6 (Ex. A) (identifying individual members who paid fees challenged in Proceeding No. 3-15350).[4] These members have suffered

[4] SIFMA will provide information regarding which of its members pay the fees at issue in Proceeding No. 3-15351, as necessary, at such time as the Commission decides to move forward with that proceeding. *See* Hammerman Decl ¶ 7.

injuries-in-fact traceable to the Exchanges' actions and are therefore "aggrieved." *Chamber of Commerce v. SEC*, 412 F.3d 133, 138 (D.C. Cir. 2005). SIFMA has associational standing to initiate these proceedings on its members' behalf because (1) it has identifiable members with standing to proceed in their own right; (2) the proceeding is germane to SIFMA's purpose of promoting fair and orderly securities markets, *see* Hammerman Decl. ¶¶ 2-3; (3) participation by SIFMA's individual members is unnecessary because the validity of the fee rule changes does not turn on member-specific considerations; and (4) SIFMA's members who purchase the data products or would like to do so are within the zone of interests protected by the Act's requirement that the fees be, *inter alia*, fair and reasonable. *See Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 486-87 (D.C. Cir. 2007).

On this basis, the D.C. Circuit has already held that SIFMA is a "person aggrieved" by a fee rule change. In *NetCoalition v. SEC* (*NetCoalition I*), 615 F.3d 525 (D.C. Cir. 2010), SIFMA petitioned for review of the Commission's approval of a rule change essentially identical to the one at issue in Proceeding No. 3-15350. The D.C. Circuit held that SIFMA had standing because it was a "person aggrieved" within the meaning of the Act's judicial review provision. *Id.* at 532 (applying 15 U.S.C. § 78y(a)); *see* Brief of Petitioners at 18-20, *NetCoalition I* (explaining that SIFMA was "aggrieved" because its members' access was contingent on paying challenged fee). Because § 78s(d) uses the same "person aggrieved" standard, the D.C. Circuit's holding applies equally here. *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) ("'identical words used in different parts of the same act are intended to have the same meaning'").

The Exchanges make no attempt to distinguish *NetCoalition I*. Instead, they argue that SIFMA's members cannot be "aggrieved" unless they were unable to purchase the data products, NYSE Br. 6; were subject to adjudication, Nasdaq Br. 12; or lacked "reasonable market substi-

tutes" for the challenged product, *id.* But none of these supposed (and arbitrary) conditions is a requirement for finding a person to be "aggrieved." *NetCoalition I*, 615 F.3d at 532.

The Exchanges' arguments that SIFMA lacks associational standing are equally baseless. NYSE's unsupported assertion that the phrase "person aggrieved" should be interpreted to exclude associations, NYSE Br. 6-7, ignores the many cases in which associations have brought suit as persons "aggrieved" under § 78y(a). *See, e.g.*, *Fin. Planning Ass'n*, 482 F.3d at 486-87; *NetCoalition I*, 615 F.3d at 532. And the Exchanges' suggestions that these proceedings turn on member-specific considerations, NYSE Br. 6-7; Nasdaq Br. 12 n.4, are simply incorrect. Charging monopolistic fees for market data aggrieves all prospective purchasers, who must either pay an unlawful fee or forgo a desired product. *See Chamber of Commerce*, 412 F.3d at 138. The legality of the fees does not turn on any individual member's circumstances.

C. The Applications Are Timely.

The Exchanges' characterization of SIFMA's applications as untimely, NYSE Br. 7-8; Nasdaq Br. 13-14, is incorrect. Although an application generally must be brought within 30 days of notice to the Commission, 15 U.S.C. § 78s(d)(2), this requirement is far from absolute. An application may be brought "within such longer period as [the Commission] may determine," *id.*, and, as Nasdaq acknowledges (at 13-14), a longer period may be provided through equitable tolling or as otherwise warranted by "extraordinary circumstances." SEC Rule of Practice 420(b); *Young v. United States*, 535 U.S. 43, 49 (2002) ("limitations periods are customarily subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute" (internal citations and quotation marks omitted)). The Exchanges offer no argument as to why SIFMA's applications fall outside these exceptions. In fact, the applications fit well within them.

First, tolling is appropriate for the period during which the Commission's decision whether to temporarily suspend the rule change was still pending. Because the Commission has

60 days in which to suspend an immediately effective rule change and initiate review proceedings, 15 U.S.C. § 78s(b)(3)(C), requiring persons aggrieved by such rule changes to file §19(d) applications within 30 days would force such persons to initiate potentially duplicative proceedings at a time when the Commission is still considering whether to take other action to protect their rights. Equitable tolling is wholly appropriate under such circumstances. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553-54 (1974) (tolling appropriate to avoid the "needless duplication of motions" and to preserve "the efficiency and economy of litigation"); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990) (characterizing such tolling as equitable). Here, suspension proceedings remained open through the pendency of SIFMA's appeals from the Commission's decisions not to suspend. *See NetCoalition II*, 715 F.3d 342. The order in those appeals issued on April 30, 2013, and SIFMA timely initiated these proceedings 30 days later.

Second, regardless of whether suspension proceedings toll the 30-day period as a general matter, tolling is appropriate under the circumstances of these proceedings. Equitable tolling is appropriate "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period." *Irwin*, 498 U.S. at 96. Here, SIFMA diligently pursued its rights by timely filing comments and petitioning the Commission for disapproval,[5] petitioning for review in the D.C. Circuit, and filing these applications upon conclusion of the appeal. In light of the fact that the statute had only just been amended to allow SROs to issue immediately effective fee rule changes, Pub. L. No. 111-203, 124 Stat. 1376 (2010), there was understandably considerable uncertainty regarding the proper mechanism for persons aggrieved by the changes to mount a challenge. Given this uncertainty, it would be inequitable to hold that SIFMA's dili-

[5] *See, e.g.*, SIFMA & NetCoalition, Comment Letter and Petition for Disapproval, File No. SR-NYSEArca-2010-97 (Dec. 8, 2010), *available at* http://www.sec.gov/comments/sr-nysearca-2010-97/nysearca201097-1.pdf (challenging rule change in 3-15351 within 30 days of the date (November 9, 2010) on which NYSE Arca, Inc. provided notice to the Commission).

gent and timely pursuit of administrative and judicial remedies under § 19(b), rather than immediately and precipitously commencing a proceeding under § 19(d), forecloses SIFMA from obtaining meaningful review of the challenged actions. *Cf. Irwin*, 498 U.S. at 96 & n.3 (equitable tolling applies when claimant timely seeks relief in wrong forum). This is particularly so because the Commission succeeded in obtaining dismissal of SIFMA's § 19(b) challenge in part by arguing that § 19(d) provides an effective path to review "[i]n this case." SEC Br. 45. *See NetCoalition II*, 715 F.3d at 347.

II. The Exchanges Bear The Burden Of Proving That Their Fee Rule Changes Are Consistent With The Act And Applicable Regulations.

As SIFMA explained, § 19(f) requires that the Commission "shall set aside" a challenged fee rule change *unless* it finds that, *inter alia*, the fee is consistent with the Act and applicable regulations. *See* SIFMA Br. 5-7; SEC Br. 45 (§ 19(f) "directs the Commission to require the SRO to grant access to the services unless it finds" the § 19(f) standard satisfied). An SRO therefore must affirmatively prove that its action satisfies the applicable statutory and regulatory requirements; if it fails to do so, the Commission "shall set aside" the action. 15 U.S.C. § 78s(f). Ignoring this language, the Exchanges argue that *SIFMA* bears the burden of proving that the fee rule changes *do not* satisfy the § 19(f) standard. NYSE Br. 8; Nasdaq Br. 14-19. This position has no basis in the text of the Act, and the Exchanges do not purport to identify any.

Instead, Nasdaq argues (at 15) that the Commission should construct an elaborate burden-shifting scheme to vindicate Congress's supposed "purpose" of facilitating "the introduction of new market data products," which—in Nasdaq's view—would be undermined if § 19(d) remained a viable means for an aggrieved person to challenge fee rule changes. As an initial matter, a supposed legislative purpose provides no basis for the Commission to ignore the unambiguous allocation of burdens in § 19(f). *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211-12

(1998) (legislative purpose "irrelevant" to "unambiguous statutory text"). In any event, Nasdaq is incorrect that § 19(d) review would burden the introduction of new products or otherwise interfere with § 19(b). Unlike § 19(b), which requires the Commission to decide whether to suspend a rule change pending further review, § 19(d) provides an enforcement-stage remedy for aggrieved persons that does not hamper the ability of an SRO to enforce its rule—or to collect fees—during the pendency of the proceeding. *See supra* p.4.

There is likewise no basis in the statute for the Commission to impose the other requirements that Nasdaq insists SIFMA must satisfy, such as demonstrating that (1) the fee is so "'prohibit[ively] expensive'" that it "actually *prevents* a significant segment of the market from accessing [the] product," and (2) "the product is critical to the ability to conduct business on the exchange." Nasdaq Br. 16, 19 (first alteration in original). Nasdaq cites no authority for the former, ignoring that § 19(d) applies to both prohibitions *and* limitations. With respect to the latter, Nasdaq relies exclusively on several cases in which the Commission has held that an SRO's denial of access to certain grievance procedures or extraordinary remedies were unreviewable under § 19(d) because they did not involve "'fundamentally important service[s].'"[6] But the rules at issue here affect the provision of market data, a service that is fundamental to the national market system. *See NetCoalition I*, 615 F.3d at 528-29. And, in any event, the Commission never suggested to the D.C. Circuit that there is any obstacle to § 19(d) review in this case.[7]

Finally, there is no merit to NYSE's contention (at 8-9) that the Commission's review

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[6] Nasdaq Br. 17; *see In re Application of Sky Capital*, Exchange Act Rel. No. 34-55828, 2007 WL 1559228, at *3-4 (May 30, 2007) (access to SRO Ombudsman not a protected "service"); *In re Application of Morgan Stanley*, Exchange Act Rel. No. 34-39459, 1997 WL 802072, at *3 (Dec. 17, 1997) (same for denial of requested exemption from disciplinary rule).

[7] Nasdaq also addresses (at 18) what it believes to be the appropriate standard for assessing the consistency of a fee with the Exchange Act. That question, of course, will be one of the primary issues on the merits. *See* SIFMA Br. 5-7.

under § 19(d) is somehow limited by its earlier decision not to suspend the rule change under § 19(b)(3)(C). The Commission never set forth its reasons for non-suspension and has taken the position that its suspension authority is permissive, such that it need not suspend a rule change even if the change is inconsistent with the Act. SEC Br. 35-41. Under these circumstances, a given non-suspension decision provides no basis for concluding that the Commission made a determination that would be "law of the case" for purposes of § 19(d).

III. Proceeding No. 3-15351 Should Be Held In Abeyance.

None of the Exchanges disagrees with SIFMA that most of the rule challenges in Proceeding No. 3-15351 should be held in abeyance pending resolution of Proceeding No. 3-15350. NYSE Br. 10, Nasdaq Br. 19. Nasdaq, however, asks (at 19) that the challenge to the rule change extending the pilot program for Nasdaq Last Sale, Rel. No. 34-64856, File No. SR-NASDAQ-2011-092, be allowed to proceed. As SIFMA explained (at 9-10), proceeding in this manner would be inefficient and unnecessary to protect Nasdaq's rights. To the extent the Commission decides to move forward with a challenge in Proceeding No. 3-15351, SIFMA requests that it do so with the challenge to Nasdaq Stock Market LLC Release No. 34-62907, File No. NASDAQ-2010-110, which—unlike the rule change identified by Nasdaq—involves fees for a depth-of-book data product, and thus would reduce the complexity inherent in handling factual variations.

IV. Further Record Development Is Unnecessary.

SIFMA agrees with the Exchanges that there is no need to develop the evidentiary record, and that the record consists of the materials already submitted pursuant to § 19(b)(1). SIFMA Br. 10-12; NYSE Br. 10-11; Nasdaq Br. 19-20.

CONCLUSION

For the foregoing reasons, SIFMA respectfully requests that the preliminary matters on which the Commission requested briefing be resolved in the manner set forth above.

Dated: September 20, 2013

Respectfully submitted,

SIDLEY AUSTIN LLP

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Exhibit A

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of: The Application of SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION For Review of Action Taken by NYSE Arca, Inc.	Admin. Proc. File No. 3-15350

DECLARATION OF IRA HAMMERMAN IN SUPPORT OF THE APPLICATIONS OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION FOR ORDERS SETTING ASIDE RULE CHANGES OF CERTAIN SELF-REGULATORY ORGANIZATIONS

I, Ira Hammerman, do declare as follows:

1. I am the Senior Managing Director and General Counsel for the Securities Industry and Financial Markets Association ("SIFMA"). I make this declaration upon my own personal knowledge.

2. SIFMA is an industry association that brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry.

3. SIFMA has nearly 100 standing committees and four professional Societies. In addition, task forces and subcommittees meet and evolve to address specific topical needs as they arise. Through these functions, thousands of industry participants gather to share their views and ensure their collective voice is heard by governing entities throughout the world.

4. On May 30, 2013, SIFMA filed applications for orders setting aside the rule changes of certain self-regulatory organizations that purport to impose fees for market data products. The Securities and Exchange Commission has assigned these applications administrative file numbers 3-15350 and 3-15351.

5. The rule change at issue in the 3-15350 proceeding is the *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 ("NYSE Arca Rule Change"). This rule change imposes fees for access to depth-of-book data made available by the exchange.

6. In order to obtain access to depth-of-book data made available by NYSE Arca, members of SIFMA have paid fees imposed by the NYSE Arca Rule Change. The members who

have paid these fees include the following: Charles Schwab & Co.; Citigroup Global Markets Inc.; Credit Suisse; and Goldman Sachs.

7. The 3-15351 proceeding involves other fee rule changes by various exchanges or groups of exchanges. SIFMA has requested that the 3-15351 proceeding be held in abeyance pending the resolution of the 3-15350 proceeding involving the NYSE Arca Rule Change. SIFMA will provide information regarding which of its members pay the fees at issue in the 3-15351 proceeding, as necessary, at such time as the Commission decides to move forward with that proceeding.

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

Dated: 9/19/13

Ira Hammerman

Exhibit C

Henkin, Douglas

From: Warden, Michael D. <mwarden@sidley.com>
Sent: Monday, December 29, 2014 11:40 AM
To: Lipton, Joshua; Rogers, HL
Cc: Henkin, Douglas; Perry, Joseph C.; Swanson, Daniel G.; Tayrani, Amir C.; Ligtenberg, Jim; Lowell Schiller; Hitchins, Kathleen
Subject: RE: SIFMA / NYSE / Nasdaq ALJ proceeding

Josh-
Here are the responses to your inquiry.

First, with respect to the first item, the CALJ rejected your request for "reciprocal discovery" (more accurately characterized as retaliatory discovery) during the December 18 Prehearing Conference. Further, as you know from our meet and confer, SIFMA is entitled to call fact witnesses at the hearing, who may include current and former employees of SIFMA members. SIFMA will inform the Exchanges of those fact witnesses on February 23, 2015, consistent with the Order on Joint Motion to Extend Hearing and Prehearing Schedules (Nov 21, 2014). You are correct that Sidley represents SIFMA and not its individual members in this proceeding.

Second, with respect to expert testimony, that Order (as well as the initial Scheduling Order) makes clear that the parties must exchange "written expert testimony" by their respective due dates. That "written expert testimony" serves as direct testimony. We do think it makes sense that the parties agree to ten minutes of live direct examination of experts to "warm the chair" prior to cross examination, and we have had SEC ALJs adopt such joint requests for a brief direct.

Best, Mike

MIKE WARDEN
Partner

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mwarden@sidley.com

From: Lipton, Joshua [mailto:JLipton@gibsondunn.com]
Sent: Friday, December 26, 2014 11:23 AM
To: Warden, Michael D.; Rogers, HL
Cc: Henkin Douglas W.; joseph.perry@bakerbotts.com; Swanson, Daniel G.; Tayrani, Amir C.; Ligtenberg, Jim
Subject: SIFMA / NYSE / Nasdaq ALJ proceeding

Dear Mike,

We wanted to raise two issues with you.

First, in response to our request that SIFMA provide reciprocal discovery from SIFMA and its members during our meet and confer last week, you stated to us that you do not represent SIFMA's members and you have not collected any evidence from them. At the same time, you indicated that SIFMA members would be providing input and information that SIFMA will use in presenting its case. Based on those representations, we understand that SIFMA will not be presenting testimony or other evidence at the hearing directly from SIFMA's members but will be using its experts to present such evidence indirectly. If we have misunderstood your position, please let us know. In any event, if you will be presenting testimony or other evidence from SIFMA members at the hearing, or if your experts will be relying on documents from, or communications with, SIFMA's members in forming their opinions, please let us know if you will agree to discovery that parallels the discovery

that is permitted from NYSE and Nasdaq. In that regard, we would request the following discovery from those SIFMA members who provide documents or communications to SIFMA's expert witnesses, those SIFMA members from whom SIFMA will present evidence or testimony, and the nine SIFMA members who submitted jurisdictional declarations (together, the "Relevant Members"):

- Documents sufficient to identify, for each Relevant Member who redistributes the specific depth-of-book products that are the subject of the rule change at issue, the total number of subscribers for each product and any changes in the number of subscribers on a monthly basis from the time the rule change was adopted to the present.

- Documents sufficient to identify, for each Relevant Member who redistributes the specific depth-of-book products that are the subject of the rule change at issue, the aggregate fees charged to subscribers for the products on a monthly basis from the time the rule change was adopted to the present, including fees that are passed through and those that are added by the member.

- Documents sufficient to identify, for each Relevant Member who subscribes to the specific depth-of-book products that are the subject of the rule change at issue, NYSE's and Nasdaq's share of the Relevant Member's order flow and any changes in that share throughout the period from the time the rule change was adopted to the present.

- Marketing, promotion, and advertising materials, for each Relevant Member who redistributes the specific depth-of-book products that are the subject of the rule change at issue, used to promote the products from the time the rule change was adopted to the present.

We reserve the right to request additional discovery from SIFMA's members in the event that the ALJ grants additional discovery to SIFMA at Tuesday's hearing (or at a later date).

Second, with respect to expert testimony, we think it makes sense to have live expert direct testimony, subject to an agreed-upon time limit (e.g., 90 minutes). Please let us know if you agree with this, and if so we can raise it as a joint request to Chief ALJ Murray. If you disagree, please let us know.

We would appreciate receiving your response by noon EST on Monday.

Best regards.

Josh

This message may contain confidential and privileged information. If it has been sent to you in error, please reply to advise the sender of the error and then immediately delete this message.

****
This e-mail is sent by a law firm and may contain information that is privileged or confidential.
If you are not the intended recipient, please delete the e-mail and any attachments and notify us immediately.

****

Exhibit D

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

FEB 09 2015
194 SECTION

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN OPPOSITION TO NASDAQ STOCK MARKET LLC AND NYSE ARCA MOTION FOR ENTRY OF A PROTECTIVE ORDER

The Securities Industry and Financial Markets Association ("SIFMA") respectfully submits this opposition to the Motion of Nasdaq Stock Market LLC ("Nasdaq") and NYSE Arca, Inc. ("NYSE Arca") (collectively, the "Exchanges") for entry of a protective order, and requests that the Honorable Brenda Murray, Chief Administrative Law Judge ("Chief ALJ"), enter the protective order proposed by SIFMA ("SIFMA's Proposed Order"), attached as Exhibit A.

PRELIMINARY STATEMENT

There is no question that a *limited* protective order in this action is appropriate. The Exchanges compete vigorously with one another in areas such as listings and order flow, although, as this proceeding will show, not in the area of depth-of-book data products. But the protective order sought by the Exchanges ("Exchanges' Proposed Order") goes much further than the requisite step of protecting their confidential information, especially from one another. Instead, through both the Exchanges' excessively broad definition of "Highly Confidential" (which only outside counsel and retained experts may review) and their wholesale designation of

hearing exhibits and discovery material as "Highly Confidential," the Exchanges effectively convert a public hearing into a private one—counter to both the SEC Rules of Practice and public policy—and deny SIFMA and its counsel the ability to prepare SIFMA's case for hearing.

The Exchanges have made clear that they intend to argue that their non-competitive pricing activities are somehow justified by the purported actions of a small set of SIMFA members, while at the same time preventing any SIFMA members from viewing the documents supposedly supporting these arguments. This strategy significantly limits SIFMA and its counsel in preparing and presenting its case. For example, under the Exchanges' Proposed Order, no SIFMA member may review any exhibit or document marked "Confidential" or "Highly Confidential" by the Exchanges. This is so even though many of the exhibits that the Exchanges will use in their case-in-chief specifically refer to or are communications directly with SIFMA members. As the Exchanges well know, SIFMA has very few staff, and any expertise regarding the use of their depth-of-book products resides at SIFMA's Members. The result is that SIFMA's outside counsel cannot disclose the contents, or even the existence, of much of the Exchanges' evidence to the SIFMA members to prepare SIFMA's case.

Moreover, the Exchanges have engaged in wholesale and indiscriminate designations of information as confidential. For example, of its proposed hearing exhibits that are not already public, both Nasdaq and NYSE Arca have designated 100% as highly confidential. And NYSE Arca has attempted to designate even its witness list as confidential.

This action is a matter of significant interest both to investors and the public. SEC hearings and the documents used therein are "presumed to be public." Rule 322. Yet the Exchanges' Proposed Order, combined with "the great mass of documents for which [they seek] confidential treatment," would convert what "should be a public proceeding into one that is

essentially a private hearing." *In the Matter of Narragansett Capital Corp. et al.*, Rel. No. 264, Admin. Proc. No. 3-6539, at *2 (Oct. 4, 1985).

As an alternative to the Exchanges' Proposed Order—which would turn this proceeding into one conducted primarily on an attorneys' eyes only basis—SIFMA has enclosed a proposed protective order that properly balances between the benefits of disclosure and the potential harm. *See* Exhibit A. Under SIFMA's Proposed Order, SIFMA would be permitted to disclose confidential documents only to a limited group of individuals who are members of its Market Data Subcommittee, only in their capacity as members of the Subcommittee, and only to the extent necessary to assist counsel in preparation for the hearing. SIFMA's Proposed Order ¶ 9(e). SIFMA would also be permitted to disclose to particular members any documents or portions of documents that describe the communications or actions of those SIFMA members. *Id.* ¶ 9(h). Second, to prevent the Exchanges from continuing to designate non-confidential material as highly confidential, SIFMA's Proposed Order would narrow the definition of "Highly Confidential," *id.* ¶ 1(b), and prohibit blanket designations of documents or categories of documents, *id.* ¶ 5. In all other respects, the parties' proposed orders are virtually identical.[1]

PROCEDURAL BACKGROUND

On December 9, 2014, the Chief ALJ set SIFMA's request for a subpoena for a prehearing conference on December 18, and ordered SIFMA to "be prepared to explain . . . what protective order they propose if the Exchanges support a position that the information [requested by the subpoenas] is proprietary." Order for Prehearing Conference on Subpoenas, Rel. No. 2110, Admin. Proc. 3-15350 (Dec. 9, 2014). SIFMA circulated a draft protective order to the Exchanges on December 16, 2014. The Exchanges indicated that they would provide revisions to

[1] A red-line document comparing SIFMA's Proposed Order with the Exchanges' Proposed Order is attached as Exhibit B.

SIFMA's proposed draft. More than a month later and three business days before their witness lists, exhibits, and expert reports were due, the Exchanges responded to SIFMA's proposed protective order with a version that made "major changes" to SIFMA's original. E-mail from J. Lipton to M. Warden and H. Rogers (Jan. 21, 2015) [Ex. C]. Nasdaq then stated that if SIFMA did not agree to the terms of the Exchanges' protective order "or at a minimum . . . agree to abide by the terms of [their] protective order pending entry of a protective order by the Chief ALJ," it would not make its production. *See* E-mail from J. Lipton to H. Rogers (Jan. 23, 2015) [Ex. D]. Because the Exchanges' proposal suffered from the same flaws as the Exchanges' Proposed Order, SIFMA replied that it would "work through [the Exchanges' draft] as quickly as possible," and in the interim, would agree to limit disclosure of any documents marked confidential to outside counsel's and experts' eyes only. *See* E-mail from H. Rogers to J. Lipton (Jan. 24, 2015) [Ex. D]. The parties signed the interim agreement on January 26.

When the Exchanges produced their witness lists, exhibits, and expert reports later that day, it became clear just how much SIFMA would be prejudiced by the protective order the Exchanges proposed. Approximately two-thirds of Nasdaq's exhibits and one-quarter of NYSE Arca's exhibits—100% of the Exchanges' non-public exhibits—and both Exchanges' expert reports were marked as "Highly Confidential" in their entirety, without any attempt to limit this designation to those pages or portions of pages that could conceivably contain highly confidential information.[2] Many of those documents marked "Highly Confidential" contain

[2] In apparent recognition that the wholesale designation of their expert reports as "highly confidential" was improper, the Exchanges belatedly agreed to prepare redacted, public versions of the reports. Those were provided only on February 3, 2015. In the interim, counsel for SIFMA could not show the reports either to its client or to any SIFMA members. And SIFMA's counsel still cannot share the redacted sections, even though those sections mention specific members by name and draw spurious conclusions about the reasons for members' conduct. *See, e.g.*, Hendershott & Nevo Report ¶¶ 85-87, Admin. Proc. No. 3-15350 (Jan. 26, 2015) (asserting that certain members purchasing decisions were "possibly in response to price changes").

clearly non-confidential material. For example, entire e-mail chains were designated highly confidential even where all or substantially all of the communications in the chain are with SIFMA members or other outside parties. *See, e.g.*, NYSE Arca Exs. 52, 53, 60; Nasdaq Ex. 505. In the expert reports, only 15% of the total number of paragraphs contain arguably highly confidential material, by the Exchanges' own admission—yet the entire reports were initially marked Highly Confidential.

After additional conferences between the parties, SIFMA revised its draft to incorporate many of the revisions sought by the Exchanges, while adding limited provisions that would allow disclosure to a restricted group of SIFMA members, narrow the definition of "Highly Confidential," and prohibit blanket designations. In contrast, the Exchanges never offered a single provision that would allow members to review information.

ARGUMENT

The Commission has "long underscored the importance of conducting open administrative proceedings . . . 'with attendant public scrutiny.'" *In re Application of Dominic A. Alvarez*, Rel. No. 53231, Admin. Proc. No. 3-12139, at *1 (Feb. 6, 2006) (quoting Disciplinary Proceedings Involving Professionals Appearing or Practicing Before the Commission, 53 Fed. Reg. 26427 (July 13, 1988)). Accordingly, "Commission administrative proceedings, and the documents filed by parties pursuant to those proceedings, generally are accessible to the public unless the circumstances warrant a departure from the norm in accordance with our Rules of Practice." *Id.*

Under Rule 322(b), documents used in a hearing are "presumed to be public." The Rule permits any party to "file a motion requesting a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information," but such

motion will only be granted if "the harm resulting from disclosure would outweigh the benefits of disclosure." Rule 322(a) & (b). The Exchanges have not satisfied their burden to show that the limited disclosure SIFMA seeks would cause them competitive harm, let alone that such harm would outweigh any benefits.

I. The Benefit Of Disclosure Is A Fair And Public Hearing.

A. Restrictions On Disclosure Should Be Minimal To Further The Public Interest.

This proceeding, which affects the fees paid by thousands of market participants for data that is essential to their business, is of significant public concern. This proceeding is also the outcome of multiple public rule filings, a Commission approval decision, and two opinions from the D.C. Circuit Court of Appeals. All of those proceedings were public, and not one of the filings in any of those fora contained even a single redaction. Here, however, the Exchanges have collectively designated nearly half of their exhibits as "Highly Confidential." Under the terms of the protective order, any time one of those exhibits is used during the hearing, it must be redacted, the transcript testimony discussing it must be redacted, and the "the hearing room [must] be cleared of everyone except the Parties, their Counsel, and any others who the Tribunal allows to be present." Ex. B ¶ 3. Not only would the administrative burden of this be enormous, but "convert[ing] the presently-public proceeding into a virtually private one" would undermine both "the actuality of fairness and the appearance of the utilization of fair procedures." *Narragansett Capital Corp. et al.*, Rel. No. 264, Admin. Proc. No. 3-6539, at *7-8.

Moreover, the presumption that administrative hearings and documents should be public is all the more true where, as here, SIFMA is challenging the Exchanges' rule changes under Section 19 of the Securities Exchange Act of 1934, which requires, *inter alia*, that rule changes "protect investors and the public interest." 15 U.S.C. § 78f(b)(5). Relying on *nearly identical*

language in the Investment Company Act of 1940, an SEC administrative law judge refused to enter a protective order on the basis that the proceeding "should be fully ventilated in public both in the 'public interest' and for the 'protection of investors.'" *Narragansett Capital*, Rel. No. 264, Admin. Proc. No. 3-6539, at *7. Here also, the Exchanges have not satisfied "the burden of establishing that such a result is warranted in the face of the Congressional purpose favoring public disclosure that is manifested in . . . the [Exchange] Act" and "the Commission's Rules of Practice." *Id.* at *2.

B. The Exchanges Have Put SIFMA *Members'* Conduct At Issue And Fairness Requires SIFMA Be Permitted To Consult With Members In Order To Respond.

Both the Commission and the Chief ALJ have made clear that the appropriate focus of this proceeding is on *the Exchanges' conduct*—not the conduct of individual SIFMA members.[3] Nevertheless, the Exchanges' exhibits and expert reports make clear that they intend to justify *their own* fee-setting decisions based on their communications with individual SIFMA members. SIFMA cannot respond to this evidence without being able to discuss it with the individual members under attack.

Additionally, the D.C. Circuit, the Commission, and the Chief ALJ have all ruled that SIFMA, acting on behalf of its members, is a proper party in this action, even though SIFMA itself "neither purchases, nor desires to purchase, the market data" products at issue. May 16 Order at 10. But if such associational standing is to have any purpose, SIFMA cannot be precluded by means of a protective order from accessing the expertise of its members, who are

[3] *See* Order Establishing Procedures and Referring Applications for Review to Administrative Law Judge for Additional Proceedings ("May 16 Order") at 12, Rel. No. 34-72183, Admin. Proc. Nos. 3-15350, 3-15351 (May 16, 2014) ("SIFMA's arguments do not turn on the identity of the particular member paying the depth-of-book fees"); Pre-Hearing Conference Tr. ("Dec. 18 Tr.") at 14:20–25 (Dec. 18, 2014) (Chief ALJ Murray: "[I]t's [the Exchanges'] position that's being challenged" and "[their] conduct or [their] proposals that are being challenged[.]").

the purchasers of the market data, regarding evidence *about their purchases*. *See In re Se. Milk Antitrust Litig.*, No. MDL 1899, 2009 WL 3713119, at *2 (E.D. Tenn. Nov. 3, 2009) (modifying protective order to permit class members to access "confidential" and "highly confidential" material because members "have a degree of knowledge and experience in the . . . industry which makes them indispensable to counsel as this case is prepared for trial").

II. The Harm Of Disclosure Is Speculative and Unsubstantiated.

The party seeking a protective order "has a heavy burden" and cannot base its request on "conclusory or speculative statements about the need for a protective order and the harm which will be suffered without one." *United States v. Kellogg Brown & Root Servs., Inc.*, 285 F.R.D. 133, 135 (D.D.C. 2012) (internal quotations omitted). The Exchanges' motion does not carry the burden. Rather, their "arguments are presented in somewhat general fashion by broad categories" and do not "pinpoint the documents whose disclosure would produce these claimed effects or how or why it would do so." *Narragansett Capital*, Rel. No. 264, Admin. Proc. No. 3-6539, at *3, 5 (declining to enter protective order). For this reason alone, the restrictions the Exchanges seek—which would deprive SIFMA of a reasonable opportunity to respond to the Exchanges' case and would turn this public proceeding private—should be rejected.

More importantly, the Exchanges' recent productions belie their representations that they seek to protect only "trade secrets and highly sensitive business information."[4] Nasdaq-NYSE Arca Mot. For Entry Of Protective Order at 1. For example, NYSE Arca has designated the

[4] "Trade secret" is, of course, a concept embodied in various areas of the law, often with varying definitions. The Exchanges do not attempt to define it in their motion, though their proposed order refers to the use of "trade secrets" in Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 522(b)(4), and under Rule 26 of the Federal Rules of Civil Procedure. *See* Ex. B ¶ 1(a). Under FOIA, the D.C. Circuit has narrowly defined a trade secret as "'a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities . . . that can be said to be the end product of either innovation or substantial effort.'" *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 563 n.9 (D.C. Cir. 2010) (quoting *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983)).

entirety of its witness and exhibit lists as "Confidential"—signifying that NYSE Arca considers the names of its witnesses, the generalized topics of their testimony, and the mere existence of exhibits (approximately 75% of which are public) to be trade secret or sensitive business information. *See Bryant v. Mattel, Inc.*, No. C 04-09049 SGL RNBX, 2007 WL 5416684, at *4 (C.D. Cal. Feb. 6, 2007) (where witness list "simply provides the name of each [witness] . . . and a vague and brief description of the subject matter of their anticipated testimony," there can be "no showing that this minimal amount of witness information constitutes confidential business information"). If this is the standard the Exchanges intend to apply, then it is hard to see how there should be *any* restrictions on disclosure, let alone restrictions on disclosure to SIFMA members.

Even taking the most arguably sensitive information the Exchanges have produced thus far—data on the fees paid by subscribers to their products—they have failed to show how limited disclosure to a select group of SIFMA members would cause competitive harm. The subscriber data shows the fees paid by subscribers per product per month. Of course, the fees themselves are listed in publicly-filed rule changes and are uniform for all subscribers. A SIFMA member could not use this data, for example, to negotiate a better rate on ArcaBook's monthly access fee based on what a competitor is paying. In fact, a member could not even link the data to the name of a competitor because the data was produced using anonymized account codes rather than customer names. Finally, hardly any of the data "is current; it reveals directly little, if anything at all, about [the Exchanges'] current operations" and therefore the "value of this data to [the Exchanges'] competitors is speculative." *United States v. Int'l Bus. Machines Corp.*, 67 F.R.D. 40, 49 (S.D.N.Y. 1975) (rejecting confidential treatment for, among other things, a list of customers and products those customers leased).

To be sure, SIFMA agrees that a protective order is appropriate and recognizes the Exchanges' competitive concerns that exist between the Exchanges with regard to order flow and listings. Both parties' proposed orders would preclude Nasdaq from having access to confidential NYSE Arca documents and vice versa. But what is unwarranted is the complete prohibition on SIFMA members having access to a substantial share of the evidence in this action. SIFMA's Proposed Order would resolve this through the two limited disclosure provisions in Paragraph 10(e) and (h).

Finally, to prevent any party from over-designating confidential or highly confidential material, SIFMA's Proposed Order narrows the definition of "Highly Confidential," Ex. A ¶ 1(b), and prohibits blanket confidentiality designations "of either the entirety of a document or categories of documents . . . unless the entirety or substantially all of such document contains Confidential or Highly Confidential Information," *id.* ¶ 5. These modifications to the Exchanges' Proposed Order are narrowly-tailored and reasonable given the course of the Exchanges' productions thus far.

CONCLUSION

Based on the foregoing, SIFMA respectfully requests that the Exchanges' motion for entry of a protective order be denied, and that SIFMA's enclosed protective order be entered, pursuant to Rule 322.

Dated: February 9, 2015

Respectfully submitted,

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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

FEB 10 2015

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2015, I caused a copy of the Brief Of The Securities Industry And Financial Markets Association In Opposition To Nasdaq Stock Market LLC And NYSE Arca Motion For Entry Of A Protective Order to be served on the parties listed below via First Class Mail. Service was accomplished via First Class Mail because of the large service list.

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Exhibit E

Published on *The Nation* (http://www.thenation.com)

How Bloomberg Does Business

Aram Roston | February 10, 2011

Research support for this article was provided by the Investigative Fund at The Nation Institute.

Last July, a group called the Coalition for Competition in Media wrote a letter to two key House subcommittee chairs on Capitol Hill, pleading for help in stopping the then-pending $30 billion megamerger of Comcast and NBC Universal. The group identified itself as "a coalition of public interest organizations, unions, small and minority media companies and independent programmers," and said the merger was "fundamentally threatening to the public interest." That may well have been a sound contention, and any reader might have thought the letter—part of an extensive PR and lobbying campaign—was distributed by a grassroots consumer organization. The letter was signed by the members of the coalition, including the media conglomerate Bloomberg LP. What the letter did not say is that Bloomberg LP was the driving force behind the PR campaign, and the Coalition for Competition in Media was conceived, funded and staffed by lobbyists for New York City Mayor Michael Bloomberg's $7 billion-per-year media company.

At the same time that Bloomberg, the politician, seeks a stage larger than City Hall—helping, for example, to found the political group "No Labels" late last year, and imploring national Democrats and Republicans to put aside party politics—his business empire continues to expand aggressively as well. Though Bloomberg doesn't run the day-to-day affairs of Bloomberg LP, he still owns almost all the shares, handpicks the firm's managers, talks with them as much as he feels he needs to, and therefore imposes his own will on the firm when he likes. (New York's ineffectual Conflicts of Interest Board limited but never fully defined the mayor's role at the company he founded: the board allows him to "maintain the type of involvement that he believes is consistent with his being the majority shareholder.") A spokesman for Mayor Bloomberg declined to comment for this article.

Given Bloomberg's push for a national platform, any intersections between his corporation's interests and the government warrant scrutiny. And Bloomberg LP runs an effective and sophisticated lobbying shop to promote the firm's interests with federal agencies and Congress. It's striking how, in a fully synergistic Bloomberg style, a news organization, a financial information company and a team of lobbyists often seem to be working in smooth concert.

This process was on vivid display as Bloomberg LP faced the prospect of the Comcast-NBC merger. A postmortem of the company's vigorous efforts to protect its interests in response to that challenge reveals the ease with which the Bloomberg empire navigates and manipulates Washington.

From the beginning, Bloomberg executives saw potential problems as well as exceptional opportunities in the Comcast-NBC deal, a massive merger of a huge cable and Internet company with a TV network, which sought Federal Communications Commission approval. To understand the stakes for Bloomberg LP in this deal requires a quick behind-the-scenes glimpse at the company and how it functions.

Almost all of Bloomberg LP's $7 billion yearly revenue still comes from the Bloomberg terminals—the desktop software with floods of financial data that is ubiquitous in Wall Street firms, despite its $20,000-a-year price tag. "Eight-seven percent of the company's revenue is [Bloomberg] terminal revenue," says Douglas Taylor, who follows the company and the financial data industry for Burton Taylor International Consulting.

But increasingly, the company has been extending its journalism enterprises. "There is an aggressive expansion going on in the consumer side of the Bloomberg operation," according to Andrew Schwartzman, senior vice president of the Media Access Project. Consider the breadth of the Bloomberg journalism empire: the company bought *BusinessWeek* in 2009 as the magazine was losing money, and has transformed it into *Bloomberg Businessweek*. That comes in addition to the high-end glossy monthly business magazine *Bloomberg Markets*. At the same time, the company produces Bloomberg Radio on XM, Sirius and WBBR. It also distributes Bloomberg News as a wire service with local and national content on its website. Recently, the company hired ex–*New York Times* editor David Shipley and ex–State Department spokesman Jamie Rubin to oversee a new operation: Bloomberg View, where Michael Bloomberg's political, philosophical and business opinions will be distilled in editorials that can be distributed across all his news platforms.

But the major play for Bloomberg LP, the potential crown jewel of the giant journalism enterprise, is Bloomberg Television, which airs on cable. The company hired Andy Lack, former president of NBC News, in 2008, in an effort to rejuvenate the channel. There was a massive purge, in which Bloomberg laid off 100 workers, but the studios were redesigned, new talent was hired, and it now appears to be on the upswing. Bloomberg executives dream they will one day compete directly with NBC's influential CNBC. Right now the channel is barely watched, analysts say, but Bloomberg has been pouring money into it.

One oddity of the Bloomberg news empire is that without exception, all of its journalistic operations lose money, and they always have, according to sources with knowledge of the company. The news business at Bloomberg is heavily subsidized by the rest of the company—paid for by those terminals on the desks at Wall Street firms.

It almost seems as if, for Michael Bloomberg, the profits don't matter much in that sector. There are various possible explanations for this mindset. "I think Michael Bloomberg did something that was very shrewd and very intelligent," explains Taylor. "I think his approach was, 'I will accept losses in my media business,' because he considers it advertising rather than a profit center." Taylor's theory is that Bloomberg's news operations are a marketing effort rather than a core function of the overall business. "He saw it as a place to generate mind share," Taylor says, "to generate advertising and recognition in the industry." "Mind share" is the current term of art for brand awareness in the marketplace. If he is right, expanding mind share not only advances the company's larger business interests but heightens Michael Bloomberg's national profile.

Although for now the journalism side of the house remains subsidized by other operations, Bloomberg TV could one day churn a profit on its own. At first "it was always regarded as just sort of one of Mike's vanity projects," a company veteran told me, "and so it was sort of left alone." But now some believe it could be a cash cow. "It could produce a quarter-billion dollars a year," the source said, "if they could figure out how to get people to watch it!"

* * *

Which brings us back to the Comcast-NBC deal. Bloomberg was concerned about one thing: once Comcast purchased NBC Universal, would it favor CNBC over Bloomberg's financial news channel? And what could that do to the expansion plans for Bloomberg TV? Bloomberg's solution to the problem was "neighborhooding." The concept involves grouping similar channels together so viewers with an interest

can play with their remotes and find what they are looking for. A parallel is the way diamond shops can be found on Forty-seventh Street in Manhattan, or the way bail bondsmen are located next to one another near courthouses.

But that plan would work only if the FCC forced Comcast and NBC to cooperate. If not, the executives at Bloomberg figured Comcast would try to punish independent channels by making them hard to find. And so Bloomberg's lobbying of the FCC began.

The company's tactical goal was to block the Comcast-NBC deal unless the government required the merged company to put Bloomberg TV on a station next to CNBC. Schwartzman explains that it was an extremely "sophisticated" operation. (Greg Babyak, Bloomberg's in-house lobbyist, referred *The Nation*'s call for information to Bloomberg's new top PR official in Washington, Sarah Feinberg, who left the Obama administration to take the position in March 2010. The company declined to comment.)

One of the first moves Bloomberg LP made as it laid out its game plan against Comcast was to hire Kevin Martin, who retired as head of the FCC in 2009, as its lawyer for the issue. Martin, who works for the lobbying and legal powerhouse Patton Boggs, is not listed as lobbyist for Bloomberg because he performs legal work, but others at Patton Boggs were registered as lobbyists, and Bloomberg LP has paid those lobbyists $340,000 since last spring. Patton Boggs, of course, is one of the largest and most effective firms on K Street.

The other big gun in Bloomberg's lobbying arsenal was Glover Park Group. This is a growing powerhouse in Washington, a Democratic shop on K Street with excellent contacts in the Obama administration and the Democratic establishment. Among its luminaries are Joe Lockhart and Dee Dee Myers. Glover Park was partially owned by Howard Wolfson, the Democratic political operative and former Hillary Clinton spokesman who helped Mayor Bloomberg win his historic 2009 third campaign for mayor in New York City. Wolfson, like other top campaign workers, was paid a $400,000 bonus by the grateful mayor after the vote, and a subsidiary of Wolfson's firm made $490,000 in the campaign.

Then, once he was reinaugurated in January 2010, Bloomberg installed Wolfson as a deputy mayor. (The strategist was seen to be replacing Deputy Mayor Kevin Sheekey, a Bloomberg loyalist who was rotated out of City Hall and back to the private Bloomberg LP by then.) By the time Bloomberg LP hired Glover Park, Wolfson had sold his shares, he tells *The Nation*. "I divested fully when I entered city government," Wolfson says. His financial disclosures reveal that his stake was worth more than half a million dollars.

To sum it up: seven months after Wolfson went to work for Mayor Bloomberg's administration in New York, Wolfson's former company, Glover Park Group, registered as a lobbyist for Bloomberg's company in Washington.

And it was Glover Park Group that set up that Coalition for Competition in Media on Bloomberg's behalf. Operating out of Glover Park Group's office, the "coalition" had a website registered on a Portuguese island. (Glover Park says the domain was registered that way to protect against spammers.) A diverse group of two dozen organizations, linked only by a shared interest in a democratic media, lent their names to the effort. Bloomberg LP was listed as just one of them, but it was the source of all the funds and its lobbyists did all the organizing and wrote the letters and press releases, which it would then run by coalition members for their input. The antifeminist group Concerned Women for America signed on, for example, as did its political nemesis, the National Organization for Women (NOW). The Sports Fans Coalition also joined up, alongside the Writers Guild of America. Some of the groups were obscure, and some were well-known.

Glover Park Group assigned powerful, politically connected talent to the Bloomberg effort. For example, Christina Reynolds had just left Obama's White House, where she had been the director of media affairs for a just over a year. She quickly became one of the contacts for the coalition.

The group's letters, all written by Glover Park Group, were plastered all around Washington. "As a diverse group of 24 public interest groups and private organizations," the group wrote to President Obama, for example, "we urge your administration to ensure this unprecedented combination receives the scrutiny that it deserves."

Coalition building is a normal feature of Washington's influence efforts. Still, Lisa Graves, executive director of the Center for Media and Democracy, says this case stands out. "I would say that it is clever and somewhat deceptive because the assembly of the groups is mainly meant to further Bloomberg's interest." Strictly speaking, she points out, it is not a front group, but it is similar. "It is like a front group because the name of the group and the superficial appearance obscure the primary intent, which is to further this company's corporate interest."

* * *

In the jockeying over the Comcast-NBC merger, Bloomberg corporate synergy also came into play. On October 19, *Bloomberg Businessweek* published a well-researched story exposing how Comcast had boosted its donations to politicians as it pushed for the merger. Reviewing Federal Election Commission records, Bloomberg reporters found that Comcast's political action committee had increased its donations to politicians by more than $400,000, to a staggering $1.1 million.

Comcast's massive lobbying and PR campaign to push for FCC approval stood in direct tension with Bloomberg LP's own lobbying and PR campaign around the merger.

Bloomberg's lobbyists quickly told the coalition members that it intended "to capitalize on the great Business Week/Bloomberg story this morning," according to an e-mail obtained by *The Nation* from a member of the coalition. The lobbyists wrote, "We'd like to flag it for reporters with a quick quote and topper." The coalition's press statement said of the article, "These donations...are part of a calculated attempt to buy approval for a merger that offers too many dangers for consumers and media organizations."

There is no evidence that the Bloomberg reporters wrote the story as part of a companywide strategy or were assigned the story because of corporate influence. A Bloomberg spokeswoman says there is an "impenetrable firewall" between editorial decisions and the other parts of the company. Still, it was a captivating confluence of forces: Glover Park Group, paid by Bloomberg LP, and acting with the coalition it had created on Bloomberg's behalf, was on the warpath to distribute a news story *Bloomberg Businessweek* had written about the issue that was the most important pending matter in Washington for the Bloomberg brand.

Glover Park Group, for its part, readily concedes that it organized the coalition and that Bloomberg was its paying client but insists that the coalition was not technically a lobbying operation. "Any lobbying work that's done is registered and fully disclosed," a spokesman wrote in an e-mail to *The Nation*. "The Coalition never did any lobbying." Here is the way to parse that: Senate lobbying definitions make it clear that lobbying includes "any oral or written communication" with White House or Congressional officials. But material "that is distributed and made available to the public" gets an exemption.

In a subsequent statement to *The Nation* after a request for clarification, a Glover Park spokesman said the coalition letters and other releases "are simply public communications."

In January the FCC finally ruled on the Comcast-NBC merger. The commissioners approved it, with a few conditions. Most of the public interest groups that battled the deal saw it as a loss. Free Press, a nonprofit group that works to reform the media and that also belonged to Glover Park's coalition, called the FCC decision a "devastating loss." NOW tells *The Nation*, "We do feel disappointed."

But Bloomberg's lobbying had paid off. The FCC ruled that Comcast would have to "neighborhood" channels together, in the exact same language Bloomberg and its lobbyists had pushed for. "Whenever Comcast carries news channels near each other, it will have to include all independent news channels in all of these neighborhoods," the FCC announced. "Bloomberg," says the Media Access Project's Schwartzman, a member of Bloomberg's coalition, "got what it wanted." Bloomberg LP's president, Daniel Doctoroff, who had worked as a deputy mayor in Bloomberg's administration until late 2007, put out a press release in celebration: "The FCC has taken strong action to preserve independent news programming, and protect competitors against discrimination." "Bloomberg TV a winner in Comcast-NBC deal" was the headline on *Politico*.

Corie Wright, policy counsel for Free Press, defended Bloomberg and the coalition in an interview with *The Nation*. "To say that Bloomberg got what it wanted at the expense of the interests of the other groups in the coalition, I don't think that's the case." Still, the fact is that Bloomberg LP, the company that funded the "coalition," scored in the end, and the other members didn't.

Michael Bloomberg's company is now getting into federal policy in an even more powerful way: it has launched an information service about political influence that wealthy DC players must pay for. It is called simply Bloomberg Government, and it caters to lobbyists, government officials and federal contractors. "Finding the right path through Washington's maze of regulations, legislation and spending trends can boost your business strategy," according to the website. "Let Bloomberg Government be your guide." It promises the inside dope for Beltway insiders who depend on it: "We give you the headlines, players, financials, spending and more, defining and clarifying the complex intersection of government and business."

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Exhibit F

BLOOMBERG TRADEBOOK

MARKET DATA FEE REFORM COMING

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by Gary Stone

The topic of market data and its relationship to the national market system is defined under the 1975 Amendments to the Securities Acts. Market data is the oxygen of the financial markets—the lynchpin for forming a national market. In the 1975 Amendments, Congress established a process that resulted in the formation of the Securities Information Processor(s) and the consolidated tape. It required brokers to provide immediately and without compensation quotation and transaction information to the exchanges, which were then mandated to consolidate the data and disseminate it to the public. Congress instructed the SEC to ensure that market data fees are fair, reasonable, equitable and non-discriminatory.

How do equity exchanges determine (set) the price for their market data products?

How is the SEC supposed to determine if the price is fair, equitable and non-discriminatory?

Exchanges do not produce market data. They aggregate and disseminate it. The source of market data is actually the customer orders that brokers and exchange members represent at the exchange. Furthermore, each exchange's data is unique. NYSE Arca's depth of book will reflect different stocks and volumes than Nasdaq's depth of book. They cannot be substitutes. So exchanges have a government-granted monopoly over unique data. This has created the opportunity to extract monopoly rents.

And that was precisely the issues set before the court in NetCoalition vs. SEC (NetCoalition I), decided in 2010, and SIFMA/NetCoalition vs. the SEC (NetCoalition II), decided in 2013. Spoiler alert: the courts sided with SIFMA and NetCoalition. The court held that both the top-of-book tape and exchange depth-of-book offerings are monopoly products. To protect investors, exchanges must justify fees by providing cost data or by demonstrating empirically that real competition constrains fees—a demonstration that the exchanges have never been able to make. As a result of this holding, market data reform may be on its way. The exchanges have been raising market data fees to compensate for declining transactional revenue (volumes) for many years. According to the cases, 20% or more of an equity exchange's revenue could be impacted by reform of market data practices.

NYSE Arca's Proposed Fees and the '75 Act

The market data issue erupted in May 2006, after the NYSE purchased Arca. NYSE Arca then filed a proposed rule change with the SEC to start charging for its depth-of-book data. The data had formerly been made available to all at no cost. The NYSE Arca fee schedule proposed to charge:

- a broker-dealer a $750 monthly fee for access to the ArcaBook data feed;
- an additional user fee of up to $30 for a professional subscriber;
- $10 for a non-professional subscriber per device displaying the ArcaBook data.

Organizations such as Google and Yahoo! had provided their users with Arca's last trade and quote information. Under the NYSE Arca fee schedule, for Google and Yahoo! to continue providing the service to their customers, they would have had to pay NYSE Arca hundreds of millions of dollars*, far outstripping the cost of the aggregation and dissemination of the data.

NetCoalition, a trade association including Google, Yahoo! and Bloomberg L.P., petitioned the SEC on behalf of their Internet and terminal clients to deny NYSE Arca's plan.

The SEC approved the NYSE Arca fee schedule asserting that:

1. An investor who didn't want to pay for NYSE Arca's depth-of-book product could, according to the SEC, simply substitute another exchange's depth-of-book product, substitute the top-of-book consolidated tape instead of using an exchange's depth-of-book product; or create a "virtual" depth of book by constantly pinging NYSE Arca and canceling those orders;
2. The Commission asserted that NYSE Arca's need to attract order flow would also constrain market data fees.

NetCoalition—joined by the Securities Industry and Financial Markets Association (SIFMA)—formally sued the SEC, contending that the approval of the NYSE Arca fees was a violation of the securities laws. Specifically:

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• Based on the record before the court, no reasonable person could conclude that any of he "subs itutes" for a given exchange's market data were actually substitutes. Market data is a monopoly product;
• Based on the record before the court, no reasonable person could conclude that compe ition for order flow constrained market data fees.

In 2010, the United States Court of Appeals for the District of Columbia—the highest court in the District of Columbia, one step away from the U.S. Supreme Court—sided with NetCoalition and SIFMA.

SIFMA/NetCoalition II
On April 20, 2013, the Appeals Court again sided with SIFMA/NetCoalition after an appeal from the SEC and the exchanges. In fact, the court believed that since at least 2010 (when the appeal was made), investors had been paying market data fees in violation of the 1975 Amendments to the Securities Act.

Too Many Exchanges
This is a key issue in the current debate on market structure. The order protection rule (Rule 611) lowered he barriers to entry for an exchange because market participants are required to trade with a venue's top-of-file quote. Exchanges can invert pricing (taker > maker) and essen ially "lose" money on every trade because hey are simply rebating some of their market data revenue. In this court case, it was estimated that market data revenues can account for, on average, 20% of an exchange's overall revenues. It is a powerful net revenue driver for U.S. exchanges. Market data has an oversized influence on net profitability because it is a high-margin business. This issue is critical in the current market structure debate because it keeps the marginal (low market share) exchanges in business.

Tradebook's Quan ita ive Research Analysis Group posted a study on The 'Book on November 22, 2013, "Toxicity: It's not just reserved for dark pools" —a study showing that five of the nation's stock exchanges have market share below 1%. Because of their toxicity, these exchanges create a conflict of interest for brokers seeking best execution and they contribute to fragmentation and complexity. In many cases, a broker's best execution order router would avoid hese venues because they have a considerably higher toxicity profile compared with other lit and dark exchanges. Rule 611, the Order Protection Rule, forces brokers to trade with these exchanges even hough interacting with them is not in the best interest of their clients. The Commission introduced Rule 611 to assure competition among orders regardless of what venue they were located in. This appears to still be a goal of the Commission. With the addition of a "trade at" provision, changes in market data charging models could alter the economics of an exchange and competitively resolve some issues.

Where Are We Now?
In a nutshell, the U.S. Court of Appeals for the District of Columbia in April 2013 told the SEC that its approval of NYSE Arca's fee schedule was flawed and that he SEC need to reexamine its ruling in accordance with the 1975 Amendments to he Securities Act. Specifically, the court ruled that:

1. Both dep h of book and top of book are monopoly products; and,
2. To ensure that investors and market participants aren't paying monopoly rents, the SEC needs to either require cost data or some indicia of compe ition.

For example, just as you'd expect to see Pepsi sales substitute for Coca-Cola if Coke increased its prices, the exchanges should be able to demonstrate empirically that when the cost of NYSE Arca's depth of book goes up, traders respond by buying another exchange's depth of book (for example, the Bucharest Exchange's depth of book) because it's a fair substitute for he NYSE Arca's depth of book; .
The court reaffirmed the guiding substantive standard for determining the legality of market data fees (as described above); specified the process by which an aggrieved market participant would challenge the fee (by filing a "denial-of-access" petition at the SEC) and underscored that he court had the jurisdiction and willingness to review the SEC determinations on these denial-of-access proceedings.

As encouraged by the court, SIFMA filed a series of denial-of-access petitions wi h the SEC. Initially, the exchanges argued that there is no process for appealing market data fees because:

1. The denial of access was overturned by Dodd-Frank; or
2. Denial of access doesn't apply to fees; or
3. There is no limitation on access unless a participant literally cannot afford to pay the fees;

4. Market data is not a central func ion of the exchange.

The Commission rejected these arguments but is now asking an administrative law judge (ALJ) to help the Commission settle a few details to guide it in interpre ing the 1975 Amendments. Specifically, he Commission is asking the ALJ to update the record and provide some instructions on how to implement the court's decision. These include:

1. Asking the judge to clarify the factual record. The court case has gone on for so long and has been appealed so often hat the SEC wants clarification on the facts of the case. The SEC also wants he administrative judge to render a preliminary decision to implement the Court of Appeals' rulings;
2. Demonstrate that SIFMA, as an industry group, has standing before the Commission—in other words, can represent the collective par ies;
3. Help clarify with the Commission that no hing has changed over the past hree years—for example, that products are still not subject to competitive forces and that there are no "substitutes" for NYSE Arca depth of book.

After the initial conference, the ALJ should specify a timetable of 120, 240 or 300 days to arrive at a decision.
Changes to market data charging models and heir subsequent effect on revenue could have powerful implications for the debate on market structure. For example, changes could raise the market-share level needed for exchange profitability, thus reducing fragmenta ion. A change could indirectly address speed differences between the SIPs and direct feeds (hough other factors are at work that affect this latency).

** In 2006, more than 50 million unique visitors accessed market data on the web. It struck NetCoalition—and the court—as wrong that investors might have to pay more than $500 million monthly to exchanges for data that the exchanges obtained under a government mandate that was intended to result in broader dissemination to the public of data on "fair and reasonable" terms.*

>> Posted by Bloomberg on June 27, 2014

Gary Stone has been with Bloomberg since 2001. As Chief Strategy Officer, he is responsible for the discovery of innova ive and unique products and forming strategic relationships for Tradebook. He began as a Senior Analyst before being named Director of Trading Research & Strategy in 2004, adding Tradebook development to his responsibilities in 2007.

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Canadian Marketplace Notice
Compliance Notice
Reg NMS
Settlement Instructions
Risk
Settlement Process Description

Exhibit G

EXHIBIT
NQ-505
Admin. Proc. File No. 3-15350

Exhibit H

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 Action Taken by NYSE Arca, Inc. and NASDAQ Stock Market LLC.	Admin. Proc. File No. 3-15350

DECLARATION OF YOUNG KANG OF CITIGROUP GLOBAL MARKETS INC. IN SUPPORT OF STATEMENT OF JURISDICTION OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

I, Young Kang, do declare as follows:

1. I am a Managing Director for Citigroup Global Markets Inc. In my role as Global Head of Electronic Products, I am responsible for equities electronic products globally. My job responsibilities give me first-hand knowledge of the market data products that Citigroup Global Markets Inc. obtains and the importance of those products to the operation of Citigroup Global Markets Inc.'s business. I also have this knowledge because of business records I have reviewed both as a routine part of my job and in preparation for this declaration and because of conversations I have had with colleagues at Citigroup Global Markets Inc. about these market data products.
2. Citigroup Global Markets Inc. is a broker dealer in the financial services business.

3. Citigroup Global Markets Inc. is currently a member of the Securities Industry and Financial Markets Association ("SIFMA"), an industry association that brings together and seeks to advance the shared interests of hundreds of securities firms, banks, and asset managers. Citigroup Global Markets Inc. has been a member of SIFMA since the association was formed on November 1, 2006.

4. Citigroup Global Markets Inc. understands that SIFMA has filed applications for orders setting aside rule changes that various exchanges filed with the Commission, including rule changes by NYSE Arca and NASDAQ that imposed fees for access to and use of their depth-of-book market data products. *See 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) ("NYSE Arca Rule Change"); *Proposed Rule Change to Modify Rule 7019*, Release No. 34-62907; File No. SR-NASDAQ-2010-110 (Sept. 14, 2010) ("NASDAQ Rule Change").

5. Pursuant to the NYSE Arca Rule Change, Citigroup Global Markets Inc. has paid monthly fees since at least September 2010 in order to continue accessing, using, and distributing depth-of-book data made available by NYSE Arca.[1] Citigroup Global Markets Inc. paid these fees as recently as June 30, 2014, and expects to continue paying the fees for NYSE Arca's depth-of-book data in the future.

6. Pursuant to the NASDAQ Rule Change, Citigroup Global Markets Inc. has paid monthly fees since at least September 2010 in order to continue accessing, using, and distributing depth-of-book data made available by NASDAQ. Citigroup Global

[1] NYSE Arca recently increased the amounts of these fees, *see Proposed Rule Change Amending the Fees for NYSE ArcaBook*, Release No. 34-71483, File No. SR-NYSEArca-2014-12 (Feb. 5, 2014), and amended the structure of its non-professional user fees, *see Proposed Rule Change Amending the Fees for NYSE ArcaBook*, Release No. 34-72560; File No. SR-NYSEArca-2014-72 (July 8, 2014).

Markets Inc. paid these fees as recently as July 7, 2014, and expects to continue paying the fees for NASDAQ's depth-of-book data in the future.

7. The fees described above limit Citigroup Global Markets Inc.'s access to NYSE Arca's and NASDAQ's depth-of-book data because, if Citigroup Global Markets Inc. were to cease paying these fees, it would no longer be able to access, use, and distribute the data to its employees.

8. I am familiar with SIFMA's applications challenging the rule changes described above. As set forth in those applications, Citigroup Global Markets Inc. 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. As a result, Citigroup Global Markets Inc. is aggrieved by the challenged fees because they cause Citigroup Global Markets Inc. to expend money for the depth-of-book data that it would not have to expend in the absence of those fees.

9. Further, as set forth in the applications, Citigroup Global Markets Inc. 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 .

10. Citigroup Global Markets Inc. currently suffers these harms and will continue to do so in the future.

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

Dated: 7/21/14

Young Kang

Exhibit I

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 Action Taken by NYSE Arca, Inc. and NASDAQ Stock Market LLC.	Admin. Proc. File No. 3-15350

DECLARATION OF STEVEN LISTHAUS OF WELLS FARGO AND COMPANY IN SUPPORT OF STATEMENT OF JURISDICTION OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

I, Steven Listhaus, do declare as follows:

1. I am the Head of Market Data for Wells Fargo & Company. In my role as Head of Market Data for Wells Fargo & Company, I am responsible for providing market data to the Wells Fargo enterprise. My job responsibilities give me first-hand knowledge of the market data products that Wells Fargo & Company obtains and the importance of those products to the operation of Wells Fargo & Company's business. I also have this knowledge because of business records I have reviewed both as a routine part of my job and in preparation for this declaration and because of conversations I have had with colleagues at Wells Fargo & Company about these market data products.

2. Wells Fargo & Company is a provider of banking, mortgage, investing, credit card, insurance, and consumer and commercial financial services.

3. Wells Fargo & Company is currently a member of the Securities Industry and Financial Markets Association ("SIFMA"), an industry association that brings together and seeks

to advance the shared interests of hundreds of securities firms, banks, and asset managers. A number of Wells Fargo & Company wholly owned subsidiaries including Wells Fargo Securities, LLC, Wells Fargo Institutional Securities, LLC and Wells Fargo Advisors, LLC have been longstanding members of SIFMA and its predecessor organization the Securities Industry Association ("SIA").

4. Wells Fargo & Company understands that SIFMA has filed applications for orders setting aside rule changes that various exchanges filed with the Commission, including rule changes by NYSE Arca and NASDAQ that imposed fees for access to and use of their depth-of-book market data products. *See 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) ("NYSE Arca Rule Change"); *Proposed Rule Change to Modify Rule 7019*, Release No. 34-62907; File No. SR-NASDAQ-2010-110 (Sept. 14, 2010) ("NASDAQ Rule Change").

5. Pursuant to the NYSE Arca Rule Change, Wells Fargo & Company has paid monthly fees since at least September 2010 in order to continue accessing, using, and distributing depth-of-book data made available by NYSE Arca.[1] Wells Fargo & Company paid these fees as recently as July 2014, and expects to continue paying the fees for NYSE Arca's depth-of-book data in the future.

6. Pursuant to the NASDAQ Rule Change, Wells Fargo & Company has paid monthly fees since at least September 2010 in order to continue accessing, using, and distributing depth-of-book data made available by NASDAQ. Wells Fargo & Company paid these fees as

[1] NYSE Arca recently increased the amounts of these fees, *see Proposed Rule Change Amending the Fees for NYSE ArcaBook*, Release No. 34-71483, File No. SR-NYSEArca-2014-12 (Feb. 5, 2014), and amended the structure of its non-professional user fees, *see Proposed Rule Change Amending the Fees for NYSE ArcaBook*, Release No. 34-72560; File No. SR-NYSEArca-2014-72 (July 8, 2014).

recently as July 2014, and expects to continue paying the fees for NASDAQ's depth-of-book data in the future.

7. The fees described above limit Wells Fargo & Company's access to NYSE Arca's and NASDAQ's depth-of-book data because, if Wells Fargo & Company were to cease paying these fees, it would no longer be able to access, use, or distribute the data.

8. I am familiar with SIFMA's applications challenging the rule changes described above. As set forth in those applications, Wells Fargo & Company suffers pecuniary harm by having to pay these fees in order to obtain the depth-of-book data made available by NYSE Arca and NASDAQ. As a result, Wells Fargo & Company is aggrieved by the challenged fees because they cause Wells Fargo & Company to expend money for the depth-of-book data that it would not have to expend in the absence of those fees.

9. Further, as set forth in the applications, Wells Fargo & Company 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 .

10. Wells Fargo & Company currently suffers these harms and will continue to do so in the future.

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

Dated: 7/24/14

Steven Listhaus

Exhibit J

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Attorneys for Plaintiff and the Class

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

LOUIS LIM, Individually And On Behalf Of All Others Similarly Situated, Plaintiff, v. CHARLES SCHWAB & CO., INC., Defendant.	Case No.: **CLASS ACTION COMPLAINT FOR:** **(1) VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200;** **(2) BREACH OF FIDUCIARY DUTY;** **(3) UNJUST ENRICHMENT; and** **(4) DECLARATORY RELIEF** **CLASS ACTION** **DEMAND FOR JURY TRIAL**

Plaintiff Louis Lim ("Plaintiff"), alleges the following based upon the investigation of Plaintiff's counsel, which includes, among other things, a review of United States Securities and Exchange Commission ("SEC") filings by Charles Schwab & Co., Inc. ("Schwab" or "Defendant"), as well as regulatory filings and reports, advisories, press releases and media reports concerning Schwab. Plaintiff believes that substantial additional evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

NATURE OF THE CASE

1. This class action lawsuit seeks redress for Schwab's breach of its duty of "best execution" when routing investment trades for execution on behalf of its customers, known as "non-directed orders."[1] Schwab is a brokerage firm that executes orders for stock and other investment trades on behalf of its clients. As part of providing trade execution services, Schwab routes trades to trading venues that effectuate the purchase or sale of the equity. Schwab selects the trading venue(s) that it wants to execute its customers' non-directed trades. As detailed below, rather than determining which execution venue offers Class members the best price, speed of execution, and likelihood that the trade will be executed, Schwab routes nearly ***all*** of its customers' non-directed orders to UBS Securities LLC ("UBS") as a result of a series of legally binding Equities Order Handling Agreements (the "Order Handling Agreement(s)") between Schwab, The Charles Schwab Corporation ("CSC"), Schwab Capital Markets L.P., and UBS (combined, the "Contract Parties"). This policy and practice violates Schwab's duty of best execution, constituting a breach of Schwab's fiduciary duty to the Class. This action seeks to end this practice by invalidating the provision of any current or renewed Equities Order Handling Agreement that requires Schwab to route at least ***95%*** of its customers' orders to UBS, and to disgorge the money Schwab wrongfully obtained as a result of this improper arrangement.

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[1] Unless the client specifically instructs otherwise (thereby making it a "directed order" versus the normal "non-directed order"), the broker chooses the particular trading venue.

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JURISDICTION AND VENUE

2. This Court has original jurisdiction pursuant to 28 U.S.C. § 1332(d)(2). The matter in controversy, exclusive of interest and costs, exceeds the sum or value of $5,000,000 and is a class action in which there are in excess of 100 Class members and many members of the Class are citizens of states different from Defendant. Further, greater than two-thirds of the Class members reside in states other than the state in which Defendant is a citizen.

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 and 18 U.S.C. § 1965 because many of the acts and transactions giving rise to this action occurred in this District and because Defendant:

(a) is headquartered in this District or does substantial business in this District;

(b) is authorized to conduct business in this District and has intentionally availed itself of the laws and markets within this District; and

(c) is subject to personal jurisdiction in this District.

4. This Court has personal jurisdiction over Defendant because Defendant is an entity with sufficient minimum contacts with this District so as to render the Court's exercise of jurisdiction permissible under traditional notions of fair play and substantial justice.

5. Intradistrict Assignment: Pursuant to Civil Local Rules 3-2(c)-(d), and 3-5(b), Defendant is headquartered in San Francisco County, this action otherwise arises in San Francisco County, and it is therefore appropriate to assign this action to the San Francisco Division.

PARTIES

6. Plaintiff is a retail customer of defendant Schwab. Plaintiff is a citizen of the State of California and a resident of the county of Los Angeles. During the Class Period, Plaintiff submitted equity trades through Schwab that were routed to UBS. Plaintiff and other members of the Class are parties to an Account Agreement with defendant Schwab that contains a "governing law" clause indicating that their relationship "shall be governed by the law (but not the choice of law doctrines) of the state of California."

7. Defendant Schwab is a California corporation, with its principal place of business in San Francisco, California. Schwab is a broker dealer registered with the SEC pursuant to Section 15 of the Securities Exchange Act of 1934. Schwab is party to the Equities Order Handling Agreements. Schwab specializes in "mom and pop" retail investors, and maintains millions of client accounts that collectively hold over $2 trillion in assets. Schwab offers its brokerage services primarily online and over the phone, but also in person in over 300 branches nationwide. Under Schwab's pricing model, customers are charged a flat fee or "commission" per trade. The commission is dependent on the method by which an order is placed: $8.95 for orders placed through Schwab's website, $8.95 + $5.00 service charge for orders placed by phone, and $8.95 + $25.00 service charge for orders placed with the assistance and/or advice of a Schwab broker.

BACKGROUND

8. The Equities Order Handling Agreement issue in this case arose from a sales transaction involving the Contract Parties. In September 2004, CSC sold UBS the proprietary trading technology and market making operations and correspondent business associated with SoundView Capital Markets ("SoundView") for $265 million.

9. As part of the sale of SoundView, the Contract Parties entered into an Equities Order Handling Agreement on October 29, 2004. The original Order Handling Agreement had an eight year term. The Order Handling Agreement was renewed on its eighth anniversary on or around October 29, 2012.

10. The Order Handling Agreement requires Schwab to send at least 95% of its non-directed customer orders to UBS.

11. If Schwab sends less than 95% of its non-directed customer orders to UBS, then Schwab is liable for tens of millions of dollars in liquidated damages to UBS. In particular, during the first three years after entering into the original Order Handling Agreement, Schwab was liable for as much as $58.5 million if it sent less than 95% of its non-directed customer orders to UBS in any 12-month period. During the fourth year of the original arrangement, Schwab was liable for as much as $24.375 million if it sent less than 95% of its non-directed

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customer orders to UBS in the preceding 12-month period. During the fifth year of the original arrangement, Schwab was liable for as much as $19.5 million if it sent less than 95% of its non-directed customer orders to UBS in the preceding 12-month period. During the sixth year of the original arrangement, Schwab was liable for as much as $14.625 million if it sent less than 95% of its non-directed customer orders to UBS in the preceding 12-month period. During the seventh year of the original arrangement, Schwab was liable for as much as $9.75 million if it sent less than 95% of its non-directed customer orders to UBS in the preceding 12-month period. During the eighth year of the original arrangement, Schwab was liable for as much as $4.875 million if it sent less than 95% of its non-directed customer orders to UBS in the preceding 12-month period.

SUBSTANTIVE ALLEGATIONS

Schwab's Best Execution Obligations

12. Schwab has a duty of fair dealing, a duty to use reasonable diligence to ascertain the best market, and a duty of best execution in routing its clients' orders.

13. The duty of best execution predates federal securities laws, and is rooted in common law agency principles of undivided loyalty and reasonable care. In all instances, best execution requires the broker to put the interests of its customers ahead of its own and to use reasonable diligence so that the resultant price to the customer is as favorable as possible.

14. Delivering best execution is fundamental to market integrity and to the delivery of good outcomes for investors who rely on agents to act in their best interests. Pursuant to best execution, brokers are required to use reasonable diligence to ascertain the best trading venue so that the resultant price to the customer is as favorable as possible. Brokers, such as Schwab, are not permitted to allow extraneous inducements to interfere with their duty of best execution.

15. In determining how to route Class member trades, Schwab is required to take into account and examine material differences in execution quality among the various market centers to which the orders may be routed, including execution price, market depth, order size and trading character of the security, efficient and reliable order handling systems and market

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center service levels, speed, efficiency, and accuracy of executions. Schwab is not permitted to allow any other factors to interfere with its duty of best execution.

16. Schwab is required to regularly compare the quality of executions it is obtaining for Class member orders routed to UBS to the executions Schwab could obtain from competing market centers. But Schwab does not choose the "best market" for Plaintiff and Class member trades because Schwab does not give due consideration to the particular security being traded, or other relevant factors. Rather, Schwab has a binding contractual obligation to route nearly all trades to UBS.

Schwab Routes Nearly All of Its Class Member Non-Directed Trades to UBS as Required by Contract

17. Schwab acts in derogation of the fiduciary duties owed to its customers by failing to even consider best execution for their orders. In breach of its duty of best execution and in violation of applicable law, Schwab directs nearly all of its clients' trade orders to UBS, a pre-determined trading venue, pursuant to the Order Handling Agreements.

18. Even though Schwab has eleven registered stock exchanges and more than fifty "alternate trading systems" to which Class member orders can be routed, Schwab sends virtually all Class member orders to a single venue, UBS.

19. The Rule 606 Reports Schwab filed with the SEC further confirm that Schwab routes almost all of its clients' non-directed orders to UBS as required by the Order Handling Agreement. For example, in the fourth quarter of 2014, Schwab routed between 93.8% of its non-directed orders for New York Stock Exchange, Inc. ("NYSE")-listed securities to UBS. Similarly, in the fourth quarter of 2014, Schwab routed 95.8% of its non-directed orders for NYSE Amex or Regional Exchange-listed securities to UBS. In addition, in the fourth quarter of 2014, Schwab routed 93.9% of its non-directed orders for NASDAQ-listed securities to UBS.

20. In the third quarter of 2014, UBS received 93.7% of Schwab's non-directed orders for NYSE-listed securities, 96% of Schwab's non-directed orders for NYSE Amex or

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Regional Exchange-listed securities, and 94.5% of Schwab's non-directed orders for NASDAQ-listed securities.

21. In the second quarter of 2014, UBS received 94.5% of Schwab's non-directed orders for NYSE-listed securities, 95.7% of Schwab's non-directed orders for NYSE Amex or Regional Exchange-listed securities, and 94.4% of Schwab's non-directed orders for NASDAQ-listed securities.

22. In the first quarter of 2014, UBS received 93.5% of Schwab's non-directed orders for NYSE-listed securities, 93.9% of Schwab's non-directed orders for NYSE Amex or Regional Exchange-listed securities, and 94% of Schwab's non-directed orders for NASDAQ-listed securities.

23. In the fourth quarter of 2013, UBS received 93.2% of Schwab's non-directed orders for NYSE-listed securities, 96.5% of Schwab's non-directed orders for NYSE Amex or Regional Exchange-listed securities, and 94.5% of Schwab's non-directed orders for NASDAQ-listed securities.

24. In the third quarter of 2013, UBS received 94.7% of Schwab's non-directed orders for NYSE-listed securities, 92.8% of Schwab's non-directed orders for NYSE Amex or Regional Exchange-listed securities, and 94.6% of Schwab's non-directed orders for NASDAQ-listed securities.

25. In the second quarter of 2013, UBS received 97.8% of Schwab's non-directed orders for NYSE-listed securities, 96.5% of Schwab's non-directed orders for NYSE Amex or Regional Exchange-listed securities, and 97.4% of Schwab's non-directed orders for NASDAQ-listed securities.

26. In the first quarter of 2013, UBS received 99.2% of Schwab's non-directed orders for NYSE-listed securities, 99.7% of Schwab's non-directed orders for NYSE Amex or Regional Exchange-listed securities, and 99.9% of Schwab's non-directed orders for NASDAQ-listed securities.

27. In the fourth quarter of 2012, UBS received 99.1% of Schwab's non-directed orders for NYSE-listed securities, 99.5% of Schwab's non-directed orders for NYSE Amex or

Regional Exchange-listed securities, and 99.9% of Schwab's non-directed orders for NASDAQ-listed securities.

28. In the third quarter of 2012, UBS received 99.4% of Schwab's non-directed orders for NYSE-listed securities, 99.6% of Schwab's non-directed orders for NYSE Amex or Regional Exchange-listed securities, and 99.9% of Schwab's non-directed orders for NASDAQ-listed securities.

29. In the second quarter of 2012, UBS received 98.7% of Schwab's non-directed orders for NYSE-listed securities, 98.7% of Schwab's non-directed orders for NYSE Amex or Regional Exchange-listed securities, and 93.8 % of Schwab's non-directed orders for NASDAQ-listed securities.

30. In the first quarter of 2012, UBS received 99.7% of Schwab's non-directed orders for NYSE-listed securities, 99.9% of Schwab's non-directed orders for NYSE Amex or Regional Exchange-listed securities, and 99.9% of Schwab's non-directed orders for NASDAQ-listed securities.

31. It appears that Schwab sends at least 95% of its non-directed orders to UBS in any 12 month period as required by the Order Handling Agreement.

32. By routing nearly all Class member non-directed orders to UBS pursuant to the Order Handling Agreement, Schwab fails to exercise due care in executing its clients' orders, which deprives Class members of more preferential trading opportunities in the wider marketplace. Schwab is not considering optimal execution price, market depth, order size and trading character of the security, efficient and reliable order handling systems and market center service levels, speed, efficiency, and accuracy of execution as it is required to do. Schwab derogated its duty to use reasonable care in choosing the market center to which individual (or categories of) orders should be routed. Instead, Schwab lets its contractual obligations determine its order routing decisions.

33. Schwab's routing of nearly all Class member non-directed orders to UBS does not allow Class members to receive the most advantageous price for their trades. The Order Handling Agreement explicitly allows UBS to trade against Class member orders for its own

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account, and capture trading opportunities for itself that would be otherwise available to Plaintiff and the Class in the broader marketplace, thus depriving them of the best price available.

34. In addition, UBS regularly and routinely executes Class member trades at prices less favorable than the best price available in the broader marketplace, thus depriving Plaintiff and Class members of the best execution for their orders.

CLASS ACTION ALLEGATIONS

35. Plaintiff brings this case as a class action pursuant to Rules 23(b)(2), (b)(3), and (c)(4) of the Federal Rules of Civil Procedure. The proposed Class consists of all persons who placed non-directed orders with Schwab that were executed until the date notice is disseminated to the Class.

36. The Class excludes Schwab's officers and directors, current or former employees, as well as their immediate family members, other broker dealers, as well as any judge, justice or judicial officer presiding over this matter and members of their immediate families and judicial staff.

37. ***Numerosity.*** The members of the Class are so numerous that their individual joinder is impracticable. Plaintiff is informed and believes, and on that basis alleges, that the proposed Class contains thousands of members. While the precise number of Class members is unknown to Plaintiff, it is known to Defendant.

38. ***Existence and Predominance of Common Questions of Law and Fact.*** Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting only individual Class members. All members of the Class have been subject to the same conduct and their claims arise from the same legal claims. The common legal and factual questions include, but are not limited to, the following:

(a) whether Schwab has a duty of best execution to Plaintiff and members of the Class;

(b) whether Schwab has an obligation to obtain the most favorable terms reasonably available for the non-directed orders placed by Plaintiff and members of the Class;

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(c) whether the Order Handling Agreements impede Schwab's duty of best execution owed to Plaintiff and members of the Class;

(d) whether Schwab engaged in unlawful or unfair business practices;

(e) whether Schwab breached its fiduciary duty to Plaintiff and members of the Class;

(f) whether the Plaintiff and the Class are entitled to injunctive relief;

(g) whether the Plaintiff and the Class are entitled to declaratory relief;

(h) whether Schwab has been unjustly enriched by its improper course of action;

(i) whether any commissions or rebates received by Schwab in connection with the non-directed orders made by Plaintiff and the Class should be disgorged; and

(j) whether Plaintiff and members of the Class are entitled to equitable relief, and the proper measure of that equitable relief.

39. ***Typicality.*** Plaintiff's claims are typical of the claims of the members of the Class in that Plaintiff is a member of the Class that he seeks to represent.

40. ***Adequacy of Representation.*** Plaintiff will fairly and adequately protect the interests of the members of the Class. Plaintiff has retained counsel experienced in the prosecution of this type of class action litigation. Plaintiff has no adverse or antagonistic interests to those of the Class.

41. ***Superiority.*** A class action is superior to all other available means for the fair and efficient adjudication of this controversy. Individualized litigation would create the danger of inconsistent or contradictory judgments arising from the same set of facts. Individualized litigation would also increase the delay and expense to all parties and the court system from the issues raised by this action. The burden and expense that would be entailed by individual litigation makes it impracticable or impossible for Class members to prosecute their claims individually. Further, the adjudication of this action presents no unusual management difficulties.

42. Unless a class is certified, Defendant will retain monies received as a result of its improper conduct. Unless a classwide injunction is issued, Schwab will continue to commit the violations alleged, and will continue to violate its duties of best execution in connection with orders placed by members of the Class. Schwab has acted or refused to act on grounds that are generally applicable to the Class so that injunctive and declaratory relief is appropriate to the Class as a whole.

COUNT I

Against Schwab for Violation of California Business & Professions Code § 17200

43. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

44. Plaintiff, on behalf of himself and the Class, brings this cause of action pursuant to the California Business & Professions Code § 17200.

45. Business & Professions Code § 17200 prohibits any "unlawful . . . business act or practice." Schwab has violated § 17200's prohibition against engaging in unlawful acts and practices by, *inter alia*, failing to ensure that its order routing practices complied with its "best execution" responsibilities.

46. Business & Professions Code § 17200 also prohibits any "unfair . . . business act or practice." Schwab's acts and practices as alleged herein also constitute "unfair" business acts and practices within the meaning of Business & Professions Code § 17200, *et seq*.

47. There were reasonably available alternatives to further Schwab's legitimate business interests, other than the conduct described herein.

48. Plaintiff is a "person" within the meaning of California Business and Professions Code section 17204, has suffered injury, and lost money or property, and therefore has standing to bring this cause of action for injunctive relief, restitution, disgorgement, and other appropriate equitable relief. Plaintiff is concerned about Schwab's practices and is worried that the non-directed orders he places with Schwab have not been, and will not be, executed pursuant to Schwab's "best execution duties."

49. Schwab has thus engaged in unlawful and unfair business acts and practices, entitling Plaintiff to judgment and equitable relief, as set forth in the Prayer for Relief.

50. Additionally, pursuant to Business & Professions Code § 17203, Plaintiff seeks an order and injunction prohibiting Schwab from continuing with its improper market selection and order routing practices that do not conform to its "best execution" duties.

COUNT II

Against Schwab for Breach of Fiduciary Duty

51. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

52. Schwab owed fiduciary duties to Plaintiff and the Class, including duties of best execution.

53. Pursuant to its duty of best execution, Schwab was required to take into account material differences in execution quality among trading venues, including using reasonable diligence to ascertain the best trading venue so that the resultant price to Plaintiff and the Class was as favorable as possible. By utilizing the order routing policies and practices described above, which included routing nearly all of its customers' trades to UBS pursuant to contractual obligations, Schwab breached its fiduciary duty owed to Plaintiff and the Class.

54. Schwab's customers have been damaged thereby, in an amount to be determined at trial.

55. As a result of Schwab's breach of fiduciary duty, Plaintiff and the Class are also entitled to an accounting and injunctive relief.

COUNT III

Against Schwab for Unjust Enrichment

56. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

57. By its wrongful acts and omissions, Schwab was unjustly enriched at the expense of and to the detriment of Plaintiff and the Class. Schwab was unjustly enriched as a

result of the compensation it received while breaching fiduciary duties owed to Plaintiff and the Class.

58. Plaintiff and the Class seek restitution from Schwab, and seek an order of this Court disgorging all profits, benefits, and other compensation obtained by Schwab from its wrongful conduct and fiduciary breaches.

59. Plaintiff and the Class have no adequate remedy at law.

COUNT IV

Against Schwab for Declaratory Relief

60. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

61. A controversy has arisen and now exists between Plaintiff and Class members on the one hand and Schwab on the other. The controversy between the parties concerns Schwab's trade-routing policy and practice and its duty of best execution owed in connection with the trade orders it routes on behalf of Plaintiff and the Class. Plaintiff and Class members contend that by pre-determining where it will automatically route non-directed limit orders in the aggregate based on contractual obligations to UBS, Schwab violates its duty of best execution, including because it fails to use reasonable diligence to ascertain the best trading venue so that the resultant price to the customer is as favorable as possible. Schwab disputes these contentions and contends that it does not violate its duty of best execution when routing its customers' orders.

62. Plaintiff requests a judicial determination of his rights and duties, and the rights and duties of absent Class members and a declaration as to whether Schwab's order routing practice breaches the duty of best execution owed to Plaintiff and Class members.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief in interim orders and by way of entry of final judgment in his favor, in favor of those he seeks to represent, and against Defendant:

A. Certifying this action as a class action and appointing Plaintiff as class representative and his counsel as class counsel;

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B. Invalidating the provision of the current and any renewed Equities Order Handling Agreements that requires Schwab to route at least 95% of its customer's orders to UBS;

C. Awarding declaratory and injunctive relief as permitted by law or equity, including a judicial determination of the parties' rights and duties, enjoining Schwab from continuing the unlawful practices as set forth herein (including the improper order routing practices), imposing a constructive trust on all monies wrongfully obtained by Schwab, and directing Schwab to identify, with Court supervision, victims of its conduct and pay them damages, restitution and/or disgorgement of all monies acquired by Schwab by means of any act or practice declared by this Court to be wrongful;

D. Awarding attorney's fees and costs; and

E. Granting Plaintiff and the Class such other relief as the Court deems just and proper.

JURY TRIAL DEMAND

Plaintiff demands a trial by jury for all of the claims asserted in this Complaint so triable.

Dated: May 8, 2015

BLOOD HURST & O'REARDON, LLP
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THOMAS J. O'REARDON II (247952)
SARAH BOOT (253658)

By: *s/ Timothy G. Blood*
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Attorneys for Plaintiff and the Class

JS 44 (Rev. 12/12) cand rev (1/15/13)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
LOUIS LIM, Individually And On Behalf Of All Others Similarly Situated

DEFENDANTS
CHARLES SCHWAB & CO., INC.

(b) County of Residence of First Listed Plaintiff Los Angeles County, CA
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Timothy G. Blood [See Attachment]
BLOOD HURST & O'REARDON, LLP
701 B Street, Suite 1700, San Diego, CA 92101 Tel: 619/338-1100

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant) (For Diversity Cases Only)*

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☒ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☒ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
28 USC sec. 1332

Brief description of cause:
Violation of B&P Code sec. 17200; Breach of Fiduciary Duty; Unjust Enrichment; Declaratory Relief

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $ 5,000,000.00

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*: JUDGE _____ DOCKET NUMBER _____

DATE 05/08/2015

SIGNATURE OF ATTORNEY OF RECORD s/ Timothy G. Blood

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)

(Place an "X" in One Box Only) ✓ SAN FRANCISCO/OAKLAND ☐ SAN JOSE ☐ EUREKA

Louis Lim v. Charles Schwab & Co., Inc.

United States District Court, Northern District of California
San Francisco Division

ATTACHMENT TO CIVIL COVER SHEET (JS 44)

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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. **Origin.** Place an "X" in one of the six boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.