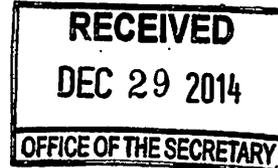


# GIBSON DUNN

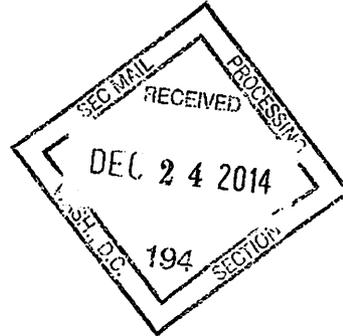


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CONFIDENTIAL

December 24, 2014

VIA HAND DELIVERY  
VIA UPS OVERNIGHT



The Honorable Brenda P. Murray  
Chief Administrative Law Judge  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

Re: *Application of SIFMA for Review of Actions Taken by Self-Regulatory Organizations,*  
*Admin. Proc. File No. 3-15350*

Dear Chief ALJ Murray:

We write on behalf of the Nasdaq Stock Market LLC ("Nasdaq") and NYSE Arca, Inc. ("NYSE Arca") regarding Your Honor's December 19, 2014 Order Following Prehearing Conference and Order for Another Prehearing Conference on Subpoenas ("Order"). As set out below, we respectfully submit that the Order does not fully capture Your Honor's oral rulings from the prehearing conference on December 18, 2014. Accordingly, consistent with the Order's instruction that we should alert Your Honor if the modifications to the discovery requests do not reflect the substance of Your Honor's rulings, *see* Order at 1 n.1, we ask that the first and second document requests of the Securities Industry and Financial Markets Association ("SIFMA") be further modified to comport with those oral rulings. We have sought SIFMA's position on our requests, but SIFMA has not yet provided a position.

### *Document Request Number One*

First, the Order modifies Document Request Number One to provide that Nasdaq and NYSE Arca shall produce "Documents sufficient to identify the total number of subscribers to each and all of Your depth-of-book products and any changes in the number of subscribers on a monthly basis from August 1, 2006 to the present." Order at 2. During the hearing, however, Your Honor unambiguously ruled that Request Number One should not encompass all depth-of-book products, but rather should be limited to those depth-of-book products at issue in this proceeding. Your Honor explicitly agreed with the exchanges' position that this request should be limited in this respect, stating that "I would go with the New York Stock Exchange and NASDAQ's position," and that "[t]his thing is limited to the products that we

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have at issue in this specific proceeding.” Tr. at 11 (Ex. A); *see also id.* at 13 (“[Y]ou’ve limited the products in Number 1.”). SIFMA’s counsel acquiesced in that decision, affirming that “to the extent that our subpoena could be read to cover products that are not subject -- the subject of this instant proceeding, we have clarified that we are not seeking that.” *Id.* at 11.

Consistent with these statements, Nasdaq requests that the first document request be modified to read as follows: “Documents sufficient to identify the total number of subscribers to *the Level 2* depth-of-book product *at issue in this proceeding* and any changes in the number of subscribers on a monthly basis from August 1, 2006 to the present.” Similarly, NYSE Arca requests that the first document request be modified to read as follows: “Documents sufficient to identify the total number of subscribers to *the ArcaBook* depth-of-book product *at issue in this proceeding* and any changes in the number of subscribers on a monthly basis from August 1, 2006 to the present.” By limiting the request to the two products actually at issue here—Nasdaq’s Level 2<sup>1</sup> and NYSE Arca’s ArcaBook<sup>2</sup>—this language would avoid the unwarranted and unduly burdensome expansion of the proceeding, which Your Honor indicated will not be allowed. *See* Tr. at 11.

## Document Request Number Two

The Order also modifies Document Request Number Two to provide that Nasdaq and NYSE Arca must produce “All Documents sufficient to identify the fees paid by subscribers for each and all of Your depth-of-book data products that are at issue in this proceeding on a monthly basis from August 1, 2006 to the present.” During the conference, however, Your Honor made clear that Request Number Two would be limited to the fees paid under the specific rule changes challenged in this proceeding, as opposed to *all* fees paid by subscribers for the products at issue:

Mr. Henkin: If we’re talking about the fees that were imposed by the November 2010 ArcaBook filing, we agree, we’ll produce those. But if we’re talking about fees that were imposed by later filings that are not part of this proceeding, then that’s where we have the objection.

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<sup>1</sup> The Nasdaq rule change at issue modifies Nasdaq Rule 7019 by requiring distributors receiving the data feed containing the Level 2 entitlement to pay distributor and direct access fees for Nasdaq-listed securities. *See* Release No. 34-62907, File No. SR-NASDAQ-2010-110 (Sept. 14, 2010).

<sup>2</sup> The relevant NYSE Arca rule change authorizes market data fees for the receipt and use of its ArcaBook product. *See* Release No. 34-63291, File No. SR-NYSEArca-2010-97 (Nov. 9, 2010).

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Judge Murray: No, I'll limit it to what was imposed by the November 10th filing. I believe that's what's at issue here.

Mr. Henkin: Yeah. And with that modification, then we're going to produce that information, as well.

Judge Murray: Fine. Then okay, we've got Number 1 and Number 2 solved.

Tr. at 20. While counsel for SIFMA then challenged that ruling as to Nasdaq specifically, asking for an expansion of Request Number Two to encompass other fees, Your Honor rejected his arguments and made clear that SIFMA had "lost." Tr. at 26 ("I think you lost, Mr. Warden."); *see also id.* at 25 ("I'm not willing to assist your argument that you need all this other information because it's just too much."); *id.* at 25-26 ("I am bound and determined to limit this as much as I can to what -- exactly what they sent down for a decision on. So on that basis I am limiting that request in Number 2 for fees."); *id.* at 27 ("So okay, so you've lost that one.").

To accurately reflect Your Honor's oral rulings, and to avoid the unnecessary expansion of this proceeding, Nasdaq requests that the second document request be modified to read as follows: "All Documents sufficient to identify the fees paid by subscribers *under the rule change at issue in this proceeding for the Level 2* depth-of-book data product at issue on a monthly basis from August 1, 2006 to the present." Similarly, NYSE Arca requests that the second document request be modified to read as follows: "All Documents sufficient to identify the fees paid by subscribers *under the rule change at issue in this proceeding for the ArcaBook* depth-of-book product at issue on a monthly basis from August 1, 2006 to the present."<sup>3</sup>

*SIFMA's Notice of Request of Modification of December 19, 2014 Order to Conform with Prehearing Conference Record*

SIFMA's filing with the Office of the Secretary on December 23, 2014 seeks a modification of Your Honor's Order as it pertains to Document Request Number Three. The Order presently provides that "the third request was denied because the Exchanges agreed to produce documents responsive to that request on January 20, 2015." Order at 1. SIFMA has asked for the Order to be modified to reflect the fact that Your Honor "granted" SIFMA's third document request "with a modified response date." *See* Notice of Request for

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<sup>3</sup> Although Document Requests One and Two seek information from August 1, 2006 to the present, both of the rule changes at issue were filed in 2010. Accordingly, in the event that Your Honor accepts the above language with respect to these requests, the exchanges will provide information dating back to 2010, when the relevant rule changes were filed.

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Modification of December 19, 2014 Order To Conform with Prehearing Conference Record (Dec. 23, 2014) at 1. We do not share this view.

As the colloquy among the parties and Your Honor reveals, the exchanges expressly agreed to furnish the documents responsive to this request. Tr. 27:6-33:16. Accordingly, we submit that a more accurate modification of the Order would be simply to strike the language, “the third request was denied.” This modification is consistent with Your Honor’s Order concerning Document Request Number Five (“the Exchanges agreed to provide the materials called for in the fifth request to SIFMA by February 19, 2015”). Order at 1.

\* \* \*

For the foregoing reasons, the exchanges respectfully request that Document Requests One, Two, and Three be modified as indicated above.

Sincerely,

/s/ Joshua Lipton  
Joshua Lipton

/s/ Douglas W. Henkin  
Douglas W. Henkin

cc: Michael D. Warden  
HL Rogers  
Eric D. McArthur  
Lowell J. Schiller  
W. Hardy Callcott  
Eugene Scalia  
Daniel G. Swanson  
Amir C. Tayrani  
Thomas M. Johnson, Jr.

# Exhibit A

THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of: )  
 ) File No. 3-16263  
THE APPLICATION OF SECURITIES )  
INDUSTRY AND FINANCIAL MARKETS )  
ASSOCIATION )

ADMINISTRATIVE PROCEEDING PRE-HEARING CONFERENCE

PAGES: 1 through 58  
PLACE: 100 F. Street, N.E.  
Washington, D.C. 20549  
DATE: Thursday, December 18, 2014

The above-entitled matter came on for pre-hearing,  
pursuant to notice, at 10:00 a.m.

BEFORE (Via Telephone):

BRENDA P. MURRAY, CHIEF ADMINISTRATIVE LAW JUDGE

Diversified Reporting Services, Inc.

(202) 467 9200

1 APPEARANCES:

2

3 On behalf of NASDAQ:

4 JOSHUA LIPTON, ESQ.

5 AMIT TAYRANI, ESQ.

6 Gibson Dunn and Crutcher

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10

11 DANIEL SWANSON, ESQ.

12 333 South Grand Avenue

13 Los Angeles, California 90071-3197

14 (213) 229-7000

15

16 On behalf of NYSE Arca:

17 DOUGLAS HENKIN, ESQ.

18 JOSEPH PERRY, ESQ.

19 Baker Botts, LLC

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22 (212) 408-2520

23

24

25

1 APPEARANCES (CONT.):

2

3 On behalf of SIFMA:

4 MICHAEL WARDEN, ESQ.

5 H.L. ROGERS, ESQ.

6 ERIC McARTHUR, ESQ.

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P R O C E E D I N G S

JUDGE MURRAY: Okay, on the record.

This is the second pre-hearing conference, "In the Matter of The Application of Securities Industry and Financial Markets Association." It's Administrative Proceeding File Number 3-15350, and this is our second pre-hearing conference.

We'll start now with appearances by the parties. And why don't we start with SIFMA, since we're all here because of you.

MR. WARDEN: Thank you, Your Honor.

This is Mike Warden, and with me is Eric McArthur and H.L. Rogers, all from Sidley Austin, LLP on behalf of SIFMA.

JUDGE MURRAY: Thank you.

MR. HENKIN: Your Honor, good morning. This is Douglas Henkin and Joseph Perry from Baker Botts, LLP for NYSE Arca, Inc.

MR. LIPTON: And Your Honor, this is Joh Lipton with Gibson Dunn and Crutcher, representing NASDAQ. I also have on the line with my colleagues at Gibson Dunn, Daniel Swanson and Amir Tayrani.

JUDGE MURRAY: Okay. Thank you all very much.

And the court reporter would like each of you to identify yourself when you talk so that we'll have a

1 good record.

2 Let me just run through a couple of things  
3 before we start formally.

4 This proceeding started on the 16th of May. We  
5 had our first pre-hearing conference on June 27th. I  
6 issued a protective order on August 20th. I issued an  
7 order on jurisdiction and scheduling on October 20th.  
8 And I put out an order for this pre-hearing on the 9th of  
9 December.

10 The issue today is the submission to me of  
11 subpoenas by SIFMA. And that request came in on the 5th  
12 of December.

13 And last night, I guess, the New York Stock  
14 Exchange and NASDAQ filed a letter concerning the  
15 subpoenas.

16 Let me say initially, that you all know a lot  
17 more about this case, a very lot more about this case  
18 than I do at this time. So it's, kind of, difficult for  
19 me, as it is for any judge, to make decisions on these  
20 matters because I really haven't dug into what's going  
21 on. One of these days, when I get -- when I move this  
22 thing along, I will know a lot about it. But this is the  
23 initial stage, so it's very hard for me to make a  
24 reasoned judgment.

25 But let me just -- my thought is to go first of

1 all with the letter that came in last night or this  
2 morning. A couple of things. The first thing is there  
3 seems to be a thought by the people writing the letter  
4 that this is somehow -- the request for subpoenas is an  
5 expansion of the scope of the proceeding. And let me  
6 tell you that's -- no, it's not. When I put out a  
7 procedural order, there are basics in the order. Every  
8 Commission proceeding, administrative proceeding, always  
9 has subpoena requests in it.

10 (Whereupon, a brief recess was taken.)

11 JUDGE MURRAY: Okay, we're going to try again.

12 Yeah, okay, we're all set.

13 So the authors of the letter are Mr. Lipton and  
14 Mr. Henkin. But just so we're clear on that, I do not  
15 consider the request for a subpoena an attempt to broaden  
16 the scope of the proceeding.

17 And then the other thing I noted in there, that  
18 they -- you say this is -- that the change in the  
19 procedure of schedule is a modest -- a modest extension.  
20 Well, we moved the hearing date back, I think, from  
21 February to April; I don't consider that a modest  
22 extension. It was like a two-month extension in the  
23 hearing date, so I don't consider that modest.

24 But all right, let's take them one by one.  
25 This is the only way I know how to go about these. If

1 you look at the subpoena request and you start on Page 3,  
2 because both requests to NASDAQ and the New York Stock  
3 Exchange, I believe, are identical. But if you just take  
4 them one by one, and you keep in mind the standard. The  
5 standard for issuing a Commission subpoena is that the  
6 request should not be unreasonable, oppressive, excessive  
7 in scope, or unduly burdensome. And that's in Rule  
8 232(a) -- or 232(b), I'm sorry.

9           So if you look at Number 1, "Documents  
10 sufficient to identify the total number of subscribers to  
11 each and all of your depth-of-book data products or fees  
12 and any changes in the number of subscribers on a monthly  
13 basis from August 1, 2006 to the present."

14           I don't know, do you keep that data? Is this  
15 going to require a special study? Or I assume you keep  
16 this kind of data?

17           MR. LIPTON: Your Honor --

18           MR. HENKIN: Your Honor -- I'm sorry, go ahead.

19           MR. LIPTON: Your Honor, this Josh Lipton with  
20 Gibson Dunn on behalf of NASDAQ.

21           I wanted to, with respect to the burden and  
22 what we're talking about here, I wanted to perhaps start  
23 at the top and I want to make sure we're communicating  
24 clearly.

25           You know, we may not have in the letter, but I

1 think there's an overarching point here, which is the --  
2 we're in the final stages of our preparation of our  
3 submissions on the merits under a case schedule that Your  
4 Honor is moving this case along, and we're trying to move  
5 along with it. Our submissions on the merits, including  
6 our exhibits for the hearing, our expert testimony, and  
7 our list of witnesses are due in just over a month. And  
8 we're in the final stages of preparing those.

9           It was just a few weeks ago that SIFMA  
10 approached us to ask for a -- an extension of the  
11 schedule, which they claimed was because of the press of  
12 the holidays and they asked for an extension of a few  
13 weeks and various deadlines. We agreed. And we agreed  
14 in that extension that we would take the holidays in our  
15 timing.

16           When we had those discussions, there was no  
17 hint or suggestion that they would be launching discovery  
18 requests to us. It's not something that's, you know,  
19 frankly that's built into the schedule. And in fact,  
20 they represented to us and to Your Honor that the  
21 extension would not be used to expand the proceedings.  
22 And yet, here we are in the final stages of our  
23 preparation and we have significant discovery requests.

24           So even things that would be, you know,  
25 arguably modest, require modest effort in a vacuum, will

1 divert our resources when we're trying to move very  
2 quickly to comply with the schedule. And will also, you  
3 know, if there is any material that would not be in the  
4 materials that we would already be providing, you know,  
5 it will be adding things to the record at a time when our  
6 experts are, frankly right now, you know, writing up  
7 their testimony. So that's one significant point.

8           And then the other point as far as expanding  
9 the proceedings, and this is very important, Your Honor,  
10 is that these requests go well beyond the products and  
11 price changes that are at issue in this proceeding.

12           And as written, and we've conferred with SIFMA  
13 and they have reaffirmed this, they are seeking discovery  
14 materials not only with regard to the price changes at  
15 issue in this proceeding, but also with regard to  
16 additional products and all price changes that NYSE and  
17 NASDAQ have made for these products during this entire  
18 time period.

19           So I think that's an important thing that I  
20 wanted to make sure is clear and that we're all clear on  
21 at the outset before we march through these individually.

22           JUDGE MURRAY: Okay. No, no, I appreciate  
23 that, Mr. Lipton. I don't think -- I don't think you've  
24 ever appeared before me in administrative proceeding.  
25 But I can assure you that requests for subpoenas in

1 administrative proceedings are like par for the course.

2 I mean, the fact that there's a procedural  
3 order outstanding and it doesn't say -- specify requests  
4 for subpoenas, the two are not incompatible. But you  
5 know, maybe my experience is different than your  
6 experience is.

7 But anyway, let's go from that one. The  
8 points --

9 MR. HENKIN: And Your Honor -- Your Honor, this  
10 is Douglas Henkin. Can I just add two very brief things  
11 to what Mr. Lipton said?

12 JUDGE MURRAY: Sure.

13 MR. HENKIN: The first thing is, I wanted to  
14 just pick up on something that Josh had finished with,  
15 which was the fact that these -- you know, these requests  
16 specifically don't limit themselves to -- and I'm going  
17 to speak for NYSE Arca in this instance -- the one fee  
18 filing that's at issue in the 50 proceeding, which is the  
19 November 2010 filing.

20 They've specifically asked for information  
21 about fee filings that are -- that post-date that filing,  
22 and that are the subject of the consolidation motion,  
23 which hasn't yet been ruled on by the Commission.

24 So in that sense, you know, that's one of the  
25 things that we were talking about with respect to -- when

1 we said in the letter "expanding the proceedings,"  
2 because they're -- SIFMA is asking about directly, in the  
3 context of a subpoena in this proceeding, fee filings  
4 that they've asked to have consolidated with this  
5 proceeding, but has not happened yet.

6 JUDGE MURRAY: No. Well, I -- that -- no, I go  
7 with -- I go with your position. You have to excuse me,  
8 but you -- we usually talk about Respondents and the  
9 Division, so I'm going to have to be careful of this.  
10 But I would go with the New York Stock Exchange and  
11 NASDAQ's position on that.

12 We're not expanding this thing. This thing is  
13 limited to the products that we have at issue in this  
14 specific proceeding. I'm not -- I don't want -- no. I  
15 don't want this any broader than its -- has been  
16 designated when the Commission sent it down to an  
17 Administrative Law Judge for decision.

18 Is SIFMA -- does SIFMA know where I'm coming  
19 from on that?

20 MR. WARDEN: Your Honor, this is Mike Warden.

21 I believe so. And to the extent that our  
22 subpoena could be read to cover products that are not  
23 subject -- the subject of this instant proceeding, we  
24 have clarified that we are not seeking that.

25 JUDGE MURRAY: Okay.

1           MR. WARDEN: For example, there's a way to read  
2 our definition of NYSE Arca, that -- or you, that would  
3 include not only NYSE Arca and the ArcaBook product, but  
4 also the depth-of-book product of NYSE, itself. We're  
5 not seeking that information regarding that other  
6 product.

7           Same thing with respect to NASDAQ. To the  
8 extent that there's some way the subpoena's drafted could  
9 be read to include NASDAQ Philadelphia or NASDAQ Boston,  
10 we're not seeking that. And we've made that clear. And  
11 we're happy to clarify that. We can -- in any way  
12 possible.

13           Now, the issue with respect to the fees is a  
14 little bit different, because there are a host of fees  
15 that SIFMA member pay -- members pay for these products.

16           NYSE Arca or NASDAQ could file a fee application  
17 tomorrow changing one of those host of fees for the  
18 product. And if you look at NASDAQ's rules, it's 7019,  
19 there's any number of fees that our members pay for the  
20 particular products at issue here; total view and open  
21 view. And the fees that are specifically at issue are a  
22 monthly direct access fee, a monthly internal distributor  
23 fee, and an external distributor fee.

24           If our members paid those fees and only those  
25 fees, they couldn't use the product. They couldn't look

1 at it. They couldn't -- they couldn't distribute it.  
2 They couldn't have their employees use it. So we are  
3 absolutely limiting our request to these products.

4 JUDGE MURRAY: Okay. I've got you on the  
5 products thing. But what about the fees now? The  
6 products is Number 1 in your -- the documents that  
7 request -- and the fees are in Number 2.

8 Let's see -- you've limited the products in  
9 Number 1, but you're saying that you can't limit  
10 it -- you can't limit the fees; is that it?

11 MR. WARDEN: That's it. That's it, because for  
12 NYSE Arca it is almost all the fees, except for a  
13 redistribution fee.

14 JUDGE MURRAY: Well, let's take it step-by-  
15 step.

16 MR. WARDEN: It's the fee -- it's just a fee  
17 increase for --

18 JUDGE MURRAY: Have we got -- have we resolved  
19 Number 1?

20 Is -- are NASDAQ and the New York Stock  
21 Exchange, given the on-the-record comments by SIFMA's  
22 counsel to the limitations that he is willing to put on  
23 the document request in Number 1, are you folks still  
24 oppose to that?

25 MR. LIPTON: Your Honor, this is Josh Lipton.

1 I think one of the things we asked -- the short  
2 answer is yes, as currently structured.

3 One of the things we asked SIFMA in the course  
4 of our meet and confer discussions, is would they agree  
5 to reciprocal discovery from their members on their  
6 request, such as Number 1, and they said no.

7 This is something that we -- this information,  
8 I think is something we planned to provide as part of our  
9 disclosure, so we're willing to provide it. We would  
10 like reciprocity from SIFMA's members if this  
11 information's going to be coming in by --

12 MR. WARDEN: Your Honor, may I be heard? This  
13 is Mike Warden.

14 JUDGE MURRAY: Well, wait a second. I have to  
15 just, sort of, think that thing -- I have to think that  
16 through.

17 But Mr. Lipton, I'm not quite -- I'm not  
18 quite -- Mr. Lipton or Mr. Warden, I forget. Which --  
19 I'm not quite sure on that reciprocity thing. I mean,  
20 I -- why would there be any justification for you asking  
21 for that information from them, when it's your position  
22 that's being challenged or your conduct or your proposals  
23 that are being challenged? Why does that entitle you to  
24 go to the person that's questioning you and saying, well,  
25 you have to give me this information for you? What's the

1 logic there?

2 MR. LIPTON: Your Honor, I think it gets -- it  
3 gets a little bit into the weight. But I think there is  
4 the -- SIFMA members have put in declarations asserting  
5 that they were aggrieved and bringing those issues into  
6 play.

7 JUDGE MURRAY: Right.

8 MR. LIPTON: Asserting that these fees are  
9 unreasonably high to them. And this is discovery that  
10 from them is relevant to assess those claims.

11 JUDGE MURRAY: No. No. Okay, okay, I'll buy  
12 that. But, you know, kind of, we're over that now. I  
13 mean, we're at a new phase now. We're at a -- we're  
14 getting to a hearing.

15 If a witness takes the stand and he or she says  
16 this is unreasonable and all the things that they said in  
17 their affidavits, then you have the right to say, well,  
18 what's your support for that? And if they don't have any  
19 support for it, then it's not worth very much.

20 But I don't know whether that -- that by itself  
21 justifies you to make this reciprocal request, if I --

22 MR. LIPTON: Your Honor --

23 JUDGE MURRAY: But listen.

24 MR. LIPTON: Your Honor, actually I agree with  
25 you 100 percent.

1 JUDGE MURRAY: Now, who are you now?

2 MR. LIPTON: This is Josh Lipton representing  
3 NASDAQ, I'm sorry.

4 JUDGE MURRAY: Okay.

5 MR. LIPTON: I agree with you 100 percent. And  
6 you know, our view we should be going -- we should be --  
7 each side should be putting in their evidence to -- as  
8 previously ordered. We should be going forward for the  
9 hearing.

10 The position for some reciprocity in the  
11 discovery is if we're going to be now doing discovery and  
12 diverting our resources and adding stuff to the record  
13 the other side might ask for, that other side might  
14 actually have an opportunity to ask that.

15 And so if we're going down this path, you know,  
16 what we have -- what we've tried to do is meet, confer,  
17 and reach a mutual agreement if there's going to be  
18 discovery. If the path is, you know, putting in a  
19 subpoena request and having an adversarial proceeding,  
20 then we'll have to go there. I think we were trying to  
21 cut through some steps in response to Your Honor's order.

22 But if that's not the -- if that's not the way Your  
23 Honor would like to go, then you know, we'll go in the  
24 other direction.

25 JUDGE MURRAY: Hey, what do you mean it's not

1 the way I would like to go? I put in that order. If you  
2 people can settle this, we wouldn't be having this pre-  
3 hearing conference. I'm only having this pre-hearing  
4 conference because you people can't -- you can't resolve  
5 this. I mean, you --

6 MR. HENKIN: Your Honor --

7 JUDGE MURRAY: You're all big -- you're all --  
8 you know, this is not -- I'm not dealing with pro se  
9 litigants. I'm dealing with high-powered counsel. And  
10 if you people can't get your act together and straighten  
11 this out, then I'm going to have to make the best  
12 judgments I can. That's where we're at.

13 If you can work it out, fine with me, you can  
14 work it out. But you can't. That's why I'm sitting here  
15 doing this. Okay.

16 MR. HENKIN: Your Honor, this is Douglas  
17 Henkin. Can I expand a little bit on what Mr. Lipton was  
18 saying? Because I think if we put it in context a bit it  
19 will make you -- it will give you a better idea of how  
20 we're approaching this.

21 JUDGE MURRAY: No. I don't want context.

22 MR. HENKIN: Okay.

23 JUDGE MURRAY: I've got a subpoena request in  
24 front of me. I have to decide it. I want to either sign  
25 them or not -- or refuse them.

1           You can give me context when it comes time for  
2           briefs. Right now I'm trying to move this proceeding to  
3           a hearing. That's all I'm interested in. And if you  
4           people can't do it, then I'm going to have make  
5           judgments.

6           Right now, I think I've got, at least in my  
7           mind, with the modifications for the first data request,  
8           it seems reasonable to me. I mean, I don't think it's  
9           unreasonable, so I'm -- as far as the first paragraph of  
10          the data request, requesting the total number of  
11          subscribers for the products that he refined it for -- I  
12          mean, "he" is Mr. Warden, then it sounds okay to me.

13                   Now, I'm --

14                   MR. HENKIN: Your Honor?

15                   JUDGE MURRAY: -- at fees.

16                   MR. HENKIN: Your Honor, and -- Your Honor,  
17          this is Douglas Henkin.

18                   And if that -- if it's limited to in NYSE  
19          Arca's case, just ArcaBook on a month-to-month basis, we  
20          are going to produce that data and we will provide it to  
21          them.

22                   The problem is, as its written, it says,  
23          "Products or fees," and there are in Arca -- in the case  
24          of ArcaBook, there are fees that were not imposed and  
25          structural changes that were not imposed by the fee

1 filing that's at issue in this proceeding that were  
2 imposed by subsequent filings that are not part of this  
3 proceeding.

4 If all we're talking about is ArcaBook and just  
5 how many subscribers did ArcaBook have in month one,  
6 month two, month three, et cetera, we'll give them that.

7 But as written it's directed to product or fees, and  
8 that's the confusion.

9 JUDGE MURRAY: Okay. Then we're striking  
10 "fees" from the first request. We're taking your  
11 modification for the Request Number 1.

12 Okay, we're moving on now to Request Number 2,  
13 and you all, "you all" being the New York Stock Exchange  
14 and NASDAQ, have made some good points about the  
15 aggregate fees paid; that it would be very difficult for  
16 you to get all of those.

17 So let me ask SIFMA, can you modify that  
18 somehow?

19 MR. WARDEN: Yes. We will modify it as,  
20 documents sufficient to identify the fees paid by  
21 subscriber for the Arca -- the two products -- the  
22 products at issue in this proceeding.

23 JUDGE MURRAY: Okay. Has the New York Stock  
24 Exchange and NASDAQ got an objection to it as it stands  
25 modified?

1 MR. HENKIN: Yes, Your Honor. This is Douglas  
2 Henkin for NYSE Arca.

3 It's essentially the same one as for Number 1.  
4 If we're talking about the fees that were imposed by the  
5 November 2010 ArcaBook filing, we agree, we'll produce  
6 those. But if we're talking about fees that were imposed  
7 by later filings that are not part of this proceeding,  
8 then that's where we have the objection.

9 JUDGE MURRAY: No, I'll limit it to what was  
10 imposed by the November 10th filing. I believe that's  
11 what's at issue here.

12 MR. HENKIN: Yeah. And with that modification,  
13 then we're going to produce that information, as well.

14 JUDGE MURRAY: Fine. Then okay, we've got  
15 Number 1 and Number 2 solved.

16 We're down now to Number 3, which is --

17 MR. WARDEN: Your Honor, if I may? This is  
18 Mike Warden.

19 We're fine with that with respect to NYSE  
20 ArcaBook. But with respect to NASDAQ, we do want it  
21 limited just to the product because there are any number  
22 of fees that our members pay and that -- and that NASDAQ  
23 collects for the products at issue here. And as part of  
24 our experts assessing fees and assessing costs, we need  
25 it to relate

1 to -- we need the information to relate to the particular  
2 product.

3           And what -- as we understand it, and I believe  
4 that counsel for one of the Exchanges said earlier this  
5 morning, and as they told us yesterday, they have already  
6 culled some of the data for 1, 2, 3 and 4. They already  
7 have that and have provided it to their experts. So  
8 there's really no reason they can't do 1, 2, 3 and 4  
9 relating to the specific products at issue here.  
10 ArcaBook products and fees are really interchangeable  
11 because the 2010 request is just a fee increase.

12           JUDGE MURRAY: Let me just see if I can get it  
13 straight now. You're saying that the modification for  
14 fees by the New York Stock Exchange was okay, but it's  
15 not okay for the NASDAQ product?

16           MR. WARDEN: Yes, because the specific fees at  
17 issue --

18           JUDGE MURRAY: Okay. I don't have to --

19           MR. WARDEN: -- regarding NASDAQ --

20           JUDGE MURRAY: I don't have to know why. I  
21 just have to know what your position is.

22           Okay. Can NASDAQ think of a way to modify that  
23 to give him what --

24           MR. LIPTON: Your Honor --

25           JUDGE MURRAY: -- what he says he needs? A

1 complete picture on the fees?

2 MR. LIPTON: Your Honor, this is Josh Lipton.

3 Our position is that they've challenged the  
4 particular fee filing at issue and we're willing to  
5 provide the data on that fee. If they want to expand  
6 this to include all of the other fees for these products,  
7 that's an expansion of the proceeding, and it would  
8 impose undue burden.

9 MR. WARDEN: Your Honor, this is Mike Warden.

10 I'm sure as you noticed, counsel for NASDAQ did  
11 not offer something that would provide a complete picture  
12 on the fees, as Your Honor asked. So the only way to get  
13 the complete picture on the fees, is to provide all the  
14 fee information with respect to the NASDAQ products at  
15 issue.

16 It doesn't expand the nature of what is being  
17 challenged. It --

18 JUDGE MURRAY: Mr. Lipton, let me ask you.

19 I -- I'm sympathetic to your position, but I'm also  
20 trying to figure out Mr. Warden's position. His position  
21 is that to argue what is at issue here your limitation  
22 would not give him that information. No?

23 MR. LIPTON: Your Honor, I was trying to be  
24 brief. I'll be happy to expand.

25 SIFMA has put in a petition to the Commission

1 saying that the fee -- the fee change that they've  
2 challenged is unreasonable. They've put in nine  
3 declarations saying that this fee petition is an  
4 unreasonable fee and they're aggrieved by paying it. And  
5 it was SIFMA who actually asked the Commission to have  
6 this fee, this fee change at issue here, pulled off and  
7 put in this proceeding. And we're moving forward and  
8 planning to present evidence with respect to this fee  
9 petition.

10 SIFMA also has a pending motion to consolidate  
11 all of the other fees that they've challenged into this  
12 proceeding. That petition is pending. And now we're  
13 hearing as by way of a discovery request, they're seeking  
14 discovery and to introduce into this proceeding, and to,  
15 you know, apparently to adjudicate as a lump, all  
16 together, all of NASDAQ's fees. You know, fundamentally  
17 that's changing what we're doing here.

18 JUDGE MURRAY: No, I don't want a fundamental  
19 change. I don't want to go to this motion to  
20 consolidate. I'm not -- I'm not considering that. You  
21 know, if -- with the help of God I won't have to face  
22 that. I just want to face what I've got before me in  
23 this proceeding.

24 But what I'm up against is Warden's position  
25 that somehow the -- he needs more than what you're going

1 to give him to defend himself or to take his position in  
2 this proceeding. That's what -- I don't want to go  
3 beyond what I've got -- that was sent down for decision.

4 But I -- that's what I'm --

5 MR. WARDEN: Your Honor?

6 MR. LIPTON: Thank you, Your Honor.

7 MR. WARDEN: Your Honor, this is Mike Warden,  
8 if I may?

9 I think that a simple hypothetical reinforces  
10 our issue here. Let's say that NASDAQ has a particular  
11 depth-of-book product for which it has two fees, a  
12 monthly fee of a penny a month and an annual fee of \$10  
13 million. Their view is that because by the circumstances  
14 of its particular fee filing, we could only challenge the  
15 penny a month and we can't even get discovery on the \$10  
16 million annual fee.

17 Now, ultimately in my hypothetical, Your Honor  
18 would be assessing and the Commission would be assessing  
19 the reasonableness of that penny a month fee. But that  
20 can't be determined without knowing about the \$10 million  
21 annual fee. It's pretty simple and it's not a complete  
22 picture without all the fee information.

23 JUDGE MURRAY: But are you saying you don't  
24 have any information about the fees beyond what we've got  
25 here, the one penny a month?

1           MR. WARDEN: No, we -- that -- the one penny a  
2 month is the monthly fee. It's not -- actually not a  
3 penny a month but --

4           JUDGE MURRAY: Yeah, but whatever it is.

5           MR. WARDEN: The monthly fee is the only thing  
6 that's technically being reviewed. But there are a whole  
7 host of fees that our members pay because they're  
8 invoiced those each month.

9           JUDGE MURRAY: Yeah, but I understand your  
10 argument. But I've only got one little part of this now,  
11 okay. And if what I'm facing is your position by the  
12 issuance of these or the request for these subpoenas is  
13 that you need this information to support the issues that  
14 we have in this proceeding, now, I'm willing to give you  
15 that.

16           But I'm not willing to assist your argument  
17 that you need all this other information because it's  
18 just too much. You can argue, if you can establish that  
19 this smaller fee is unreasonable, that in addition to  
20 this you're also paying this other thing. I mean, I  
21 don't know how you're going to get that evidence in. I  
22 assume your members pay it, so they must be knowledgeable  
23 about it. But you can make that argument.

24           But I am bound and determined to limit this as  
25 much as I can to what -- exactly what they sent down for

1 a decision on. So on that basis I am limiting that  
2 request in Number 2 for fees.

3 Now, Mr. -- I think it's Mr. Lipton, do you  
4 know from what I've said how to interpret what I'm giving  
5 him, if I grant that subpoena for Number -- that includes  
6 Number 2?

7 MR. LIPTON: Yes, Your Honor.

8 JUDGE MURRAY: Okay, that's good. All right.

9 MR. WARDEN: Your Honor, if I may? I know --  
10 I'm sorry, this is Mike Warden.

11 JUDGE MURRAY: I think you lost, Mr. Warden. I  
12 think --

13 MR. WARDEN: No, I understand that. I'm trying  
14 to get the equivalent of a mulligan, a do-over. Because  
15 it's really going to be extremely difficult for us to  
16 challenge the NASDAQ fees if we only get --

17 JUDGE MURRAY: But Mr. Warden, what you're  
18 forgetting is they've got the burden of proof. They have  
19 to prove the things are reasonable. You've got -- you  
20 know, you -- you're not in the catbird seat, but they've  
21 got the burden of proof. They've got to come in with  
22 evidence and you're going to see what they come in with.

23 I mean, we've got a schedule that they have to  
24 give you the exhibits and they have to give you the list  
25 of witnesses, which I've limited -- number. So I just

1 don't go along with what you say. I mean, you know, you  
2 might be right, but I'm trying to -- I say if you could  
3 work this out, I wouldn't have to do this. But I've got  
4 to make these decisions and move this thing along. So  
5 okay, so you've lost that one.

6 We're on to Number 3 now, "All documents  
7 sufficient to identify your market share of order flow  
8 and any changes in your market share throughout the  
9 period from August 1, 2006 to the present, including  
10 without limitation, all documents sufficient to prepare  
11 charts and graphs for NASDAQ equivalent to those  
12 contained at JA213-217 of the Joint Appendix to Net  
13 Coalition v SEC (Net Coalition II), No. 10-1421 (D.C.  
14 Circuit, March 7, 2012)."

15 Okay, what -- what's NASDAQ and the New York  
16 Stock Exchange objections to that?

17 MR. HENKIN: Your Honor, this is Douglas Henkin  
18 for NYSE Arca.

19 I think that really there's an objection and a  
20 question. If what we're talking about is just, for  
21 example, Arca's, you know, Arca's share of order flow for  
22 that period of time, it's publically available  
23 information. I mean, you know, this available, for  
24 example, from the SEC. The SEC tracks it. I'm sure  
25 SIFMA members track it. And so we, kind of, don't

1 understand why there was even a need to include it in the  
2 subpoena.

3 That being said, we plan on providing this  
4 information to them as part of what we're going to  
5 produce on January 20th in our case. And so we don't  
6 really have an objection. We don't see why they needed  
7 to subpoena it, but you know, it is what it is.

8 JUDGE MURRAY: Well, they probably aren't sure  
9 what you're going to produce when you produce your  
10 material in January. But okay. Let me --

11 MR. HENKIN: But we're going to give it to  
12 them.

13 JUDGE MURRAY: Okay. Well, this would just  
14 make you give it to them early.

15 What -- Mr. --

16 MR. HENKIN: And Your Honor, I mean, that's the  
17 issue here, is if we have to -- if we have to -- you  
18 know, we're going to give them what our experts are going  
19 to rely on what is going to be part of our case, and what  
20 we're going to use to address, you know, the ArcaBook  
21 direct order and as affirmed by Net Coalition I, if --  
22 and that's kind of -- that's really our objection; its  
23 timing and why they're not looking for this in the public  
24 domain and you know, from their own members.

25 You know, it's more work for us to have to

1 produce it to them in advance, then if we simply give to  
2 them with what Your Honor has already directed us to  
3 provide on January 20th. It's a separate -- you know,  
4 it's something separate.

5 We have no objection to giving it to them with  
6 our expert reports. And in fact, giving them the  
7 reliance data, so the underlying data that, you know, the  
8 experts are going to use to prepare charts and whatever  
9 it is that they end up producing. It's the giving it to  
10 them in advance off the schedule that's the issue.

11 JUDGE MURRAY: Well, I can see where they're  
12 asking for it because they have no assurance they're  
13 going to get it.

14 But Mr. Warden, let me ask you, if we accept  
15 their assurance that they are going to produce this  
16 material to you as part of their January 20th  
17 presentation of exhibit lists and all that material, are  
18 you satisfied with that?

19 MR. WARDEN: With respect to Item Number 3?

20 JUDGE MURRAY: Yes.

21 MR. WARDEN: Yes, Your Honor.

22 JUDGE MURRAY: Oh, that's wonderful.

23 MR. WARDEN: Well, but the thing is that what I  
24 don't want this to become, and what the counsel for the  
25 Exchanges were suggesting yesterday, is they get to

1 cherry pick among the data; provide some of that to their  
2 experts and then provide to us what their experts rely  
3 upon. We want what's responsive to Number 3.

4 JUDGE MURRAY: Okay. Okay.

5 MR. HENKIN: Your Honor, I'm -- I mean, I'm not  
6 really sure how to interpret that because this isn't a  
7 plenary proceeding, it's a denial of access proceeding in  
8 which they've -- you know, SIFMA and nine of its members  
9 have asserted that these are super competitive and  
10 there's an absence of competition. And we're going to  
11 provide -- and Your Honor, as in the first instance,  
12 going to review the record that we submit to determine  
13 whether the record that we submit is sufficient to  
14 satisfy the Commission's ArcaBook direct order and the  
15 issues that were raised about that by the D.C. Circuit in  
16 Net Coalition I. This isn't a plenary proceeding.

17 You know, that all being said, we're going to  
18 provide -- I'm not really what Mr. Warden's worry is  
19 about cherry picking, but that can't be an excuse for a  
20 fishing expedition in something like this, which is not a  
21 plenary proceeding.

22 JUDGE MURRAY: Let me ask you, what's a  
23 "plenary proceeding"?

24 MR. HENKIN: Well, Your -- it kind of goes back  
25 to something that Your Honor said when we started the --

1 when we started the conference, where normally this is  
2 somebody from the Enforcement Division versus a  
3 Respondent or a situation like that, as opposed to SIFMA  
4 coming in and challenging on a denial of access basis  
5 market data fee filings.

6 And the structure and what's -- you know, what  
7 Your Honor and the Commission ultimately have to decide,  
8 is different from a situation where there's, for example,  
9 an accusation by the Division of Enforcement that  
10 somebody did something wrong. It's a very different  
11 issue.

12 So the question here is, do these fee filings  
13 comply with the statutory requirements for market data --  
14 for proprietary market data fees as the Commission set  
15 forth in the ArcaBook direct order from 2006, and as the  
16 D.C. Circuit talked about in Net Coalition I. So it's  
17 not an "X" suing "Y" situation. And the rules of  
18 discovery that might apply in a situation like that don't  
19 apply here.

20 You know, as Your Honor said, we do have the  
21 burden of proof, and we're going to -- you know, we're  
22 going to submit documents and evidence that we believe  
23 satisfies that burden of proof. And then it will be for  
24 Your Honor to -- it will be for the parties to argue  
25 about that and for Your Honor to make an initial

1 determination about that.

2 But turning this into an "X" suing "Y"  
3 situation is what we think isn't appropriate and what we  
4 think would be an expansion of the proceedings.

5 So with all -- you know, with all that being  
6 said though, I'm not really sure what is that Mr. Warden  
7 thinks we're going to cherry pick, and that's why I  
8 mentioned that, you know, market share information is a  
9 matter of public record. I don't really understand what  
10 he thinks we're going to do that would be problematic for  
11 him.

12 JUDGE MURRAY: Well, initially I -- that  
13 distinction between my role in this case and my role in  
14 the kinds of cases that we normally get in this office,  
15 it's -- I don't see a whole lot of difference the way you  
16 describe it. I mean, I just -- I go by what the OIP or  
17 in this case, this order setting it down says is my  
18 charge, and -- and I just it run it that way and that's -  
19 - that's what I -- that's what I do for a living. So I  
20 don't -- the line you draw is, kind of, lost on me. But  
21 say -- okay.

22 All right, let's get back to this. Could you  
23 be a little bit more specific, Mr. Warden, on what --  
24 what you're afraid of? I think you think that somehow  
25 the expert is going to cherry pick, as you say, the

1 information and only use those parts that support the New  
2 York Stock Exchange and NASDAQ's position. But you think  
3 that some of that data might be -- might support you  
4 rather than them and that you won't get it unless you  
5 have this subpoena?

6 MR. WARDEN: Well, Yes, Your Honor. And that  
7 goes to primarily other elements.

8 As I understand the Exchanges' positions on  
9 Item Number 3, is that they will produce responsive  
10 information in -- on or around January 20th, which I  
11 believe is their due date for their expert report.

12 JUDGE MURRAY: Right.

13 MR. WARDEN: And I'm fine with that as to  
14 Number 3, Your Honor.

15 JUDGE MURRAY: Oh, you are? Oh, well that's  
16 wonderful. Okay, so we're by Number 3.

17 Okay, we're at Number 4 now, "All documents  
18 concerning the setting of prices or fees for your depth-  
19 of-book data products, including without limitation,  
20 documents concerning: your reasons for setting prices at  
21 a particular level; the extent to which those prices  
22 enable you to recover the costs of providing your depth-  
23 of-book data products; and/or the relationship between  
24 your depth-of-book data prices and your order flow,  
25 including without limitation, any documents regarding the

1 effects of price changes on your market share of order  
2 flow."

3 Mr. Warden, right off the top, this seems to me  
4 to be a very burdensome kind of thing. I mean, I don't  
5 understand --

6 Well, I suppose I should ask them; do you have  
7 this kind of data available? Or is it something you  
8 would have to generate?

9 MR. HENKIN: Your Honor, is that the directed  
10 to the Exchanges? This is Douglas Henkin.

11 JUDGE MURRAY: Yes, I'm sorry, Mr. Henkin.

12 MR. HENKIN: Okay. All right, so this is  
13 Douglas Henkin again.

14 The answer to that question is as I think you  
15 suspected from, kind of, the way it meanders around, some  
16 yes, some no. And so, you know, for example, just to  
17 sort of go through the individual things that are  
18 separated by semi colons. There will be some information  
19 about -- about anticipated effects of price changes on  
20 market share of order flow that will be part of our fact  
21 witnesses' testimony. Some of it may be part of expert  
22 testimony, in which case obviously that will be produced  
23 on the normal schedule that we've all been discussing.

24 Reasons for setting prices at a particular  
25 level are actually in the fee filings themselves.

1           With respect to the extent to which prices  
2   enable us to recover costs of providing in depth-of-book  
3   data products, that isn't something that NYSE Arca  
4   tracks. So in that case, that's not something that we  
5   have, and that is something that we would have to try to  
6   create in some way. And so that's something that --  
7   that, you know, would be a very, very significant burden  
8   for us to do because we would have to create data. We  
9   would have to produce data in a way that NYSE Arca  
10  doesn't use it or keep track of it. So that would be a  
11  very, very significant burden. And that's not the way we  
12  intend to present the case, for example.

13           JUDGE MURRAY: How -- are you -- are you --

14           MR. WARDEN: Your Honor, this is Mike Warden.

15           If I could address that I may be able to --  
16  because we did discuss on Tuesday a way to narrow that.  
17  But this document request, in contrast to 1, 2 and 3, for  
18  example, doesn't seek the data, in effect; it seeks  
19  existing documents.

20           So for example, if there is a decision memo, a  
21  board package, that kind of document that sets forth the  
22  reasons for setting prices at a particular level, the  
23  anticipated effects of the market share, those things  
24  that Mr. Henkin just acknowledged that NYSE Arca has,  
25  those are the documents we're seeking.

1           We're not seeking an exhaustive and time-  
2 consuming electronic e-mail search. We made that clear  
3 on Tuesday. And frankly, as Your Honor knows, those are  
4 the cases cited by the Exchanges in their letter. But  
5 really, the, kind of, final versions of memos,  
6 presentations summarizing or analyzing these issues, akin  
7 to a decision memo or board package. It's not -- it's  
8 not individualized every single e-mail thing because we  
9 recognize that we could turn this into a two-year  
10 endeavor, which no one wants. SIFMA certainly doesn't  
11 want, Your Honor.

12           JUDGE MURRAY: Well, let me -- I hear what  
13 you're saying.

14           In that letter that I received last night from  
15 Lipton and Henkin, they talked about this -- that you all  
16 had been discussing a somewhat more limited discovery  
17 plan in which they would identify relevant employees.

18           Do you have or does the New York Stock Exchange  
19 and NASDAQ have a marketing vice president or somebody  
20 like that, that we could use that suggestion for? In  
21 other words, could somehow Mr. Warden gain access to the  
22 person that's responsible for making these pricing  
23 decisions and get that kind of information from that  
24 person, rather than having a whole exchange, data search  
25 for memos that have to do with pricing? I mean --

1           MR. HENKIN: Your Honor, this is Douglas  
2 Henkin.

3           There's two issues with respect to that. One  
4 is, we don't track costs, and I'm speaking for NYSE Arca.  
5 We don't track costs and don't make the determinations  
6 on that basis. So the answer to that is no.

7           But there's a separate issue here, specifically  
8 with respect to what Your Honor just suggested. The  
9 people who are involved, and who are -- and who we are  
10 working with to prepare our submissions for January 20th,  
11 would be diverted from helping us prepare those  
12 submissions by somehow giving Mr. Warden access to that  
13 person for, I don't know what it would be, an interview,  
14 a deposition, I'm not really sure. You know, and that's  
15 one of the reasons that we were unhappy with the proposal  
16 that this be done on a discovery basis.

17           Obviously, if there's something that we are  
18 going to rely on as part of our case in chief or  
19 procedure in chief, we are going to produce that under  
20 Your Honor's schedule. You know, if it's a document that  
21 one of our -- that our fact witness, for example, is  
22 going to testify about, then we're going to produce that.

23           It's the going beyond that that's the problem, and it's  
24 diverting somebody from helping us prepare our  
25 submissions that's the problem.

1 JUDGE MURRAY: Yeah.

2 MR. WARDEN: Your Honor, if I -- I'm sorry,  
3 Your Honor.

4 JUDGE MURRAY: That's okay. Is that you, Mr.  
5 Warden?

6 MR. WARDEN: It is. I mean, I -- you know, we  
7 did offer up on Tuesday, with respect to any number of  
8 the subsequent requests, specifications in the subpoena,  
9 that if the Exchanges could identify a key person or two  
10 and collect documents from them, I don't need direct  
11 access to the vice president of marketing. I would  
12 certainly be willing to rely on Gibson Dunn and Baker  
13 Botts to do the appropriate document collection  
14 interview. And obviously, you know, we have very good  
15 lawyers and very good law firms representing the  
16 Exchanges.

17 So -- but that's all we wanted on Tuesday, and  
18 frankly, we got no answer to that yesterday. But that's  
19 -- that's what we would request and we can narrow Number  
20 4 in that regard so it doesn't entail searching all  
21 records of the Exchanges.

22 JUDGE MURRAY: But I --

23 MR. HENKIN: Your Honor --

24 JUDGE MURRAY: Hold on just a second.

25 I think they have a valid point, Mr. Warden.

1 That they are preparing a positive presentation, and the  
2 people involved in making decisions of what they should  
3 submit to the Commission as part of that presentation are  
4 the same people who are going to be answering this kind  
5 of a request.

6 This request seems awfully nebulous. You know,  
7 around the Commission they send around and they'll tell  
8 all of us, if we've ever had anything to do with any  
9 specific case, we have to go through our files and --  
10 it's just -- it's just an awful lot of responsibility to  
11 take on. And these kinds of questions are open-ended:

12 "Your reasons for setting prices at a particular level."

13 "The extent to which those prices enable you to recover  
14 the costs of providing your depth-of-book data products."

15 I mean, those are -- that's a heavy --

16 MR. WARDEN: Your Honor --

17 JUDGE MURRAY: -- that's a heavy subject. You -  
18 - somebody's going to have to spend some time on it.

19 But I should think this particular inquiry,  
20 Number 4, would be what they are going to present. I  
21 mean -- well, let me ask them.

22 Are you going to have some kind of a witness on  
23 why you set prices the way you set them?

24 MR. HENKIN: This is Douglas Henkin, Your  
25 Honor.

1 Yes.

2 MR. LIPTON: Josh Lipton.

3 Yes, as well.

4 JUDGE MURRAY: Yeah.

5 MR. WARDEN: And Your Honor, this is Mike  
6 Warden.

7 Then how do cross-examine them? This gets to  
8 the cherry picking issue.

9 JUDGE MURRAY: Well, wait a second.

10 MR. WARDEN: I understand --

11 JUDGE MURRAY: No, wait a minute. Wait a  
12 minute, I'm going to answer that first part. You're  
13 going to answer it because you're going to get the  
14 person's name and you're going to get the exhibits that  
15 the person's going to use to support his position on  
16 January 20th. So if, you know -- I mean --

17 MR. WARDEN: And --

18 JUDGE MURRAY: -- you're going to go --

19 MR. WARDEN: And Your Honor --

20 JUDGE MURRAY: -- from those exhibits.

21 MR. WARDEN: Your Honor? Your Honor, then in  
22 effect, they can pick documents that support their  
23 position and I don't get access that -- to documents that  
24 may contradict their position. That's why subpoenas are  
25 allowed.

1           We are willing to limit this to the key --  
2 documents of the key employees responsible for setting  
3 and reviewing prices and producing the documents that  
4 those employees ordinarily generate and review when  
5 setting and reviewing prices. Like final versions of  
6 memos or presentations summarizing, analyzing, or  
7 justifying the reasons for a decision to set prices at a  
8 certain level, or final versions of those presentations.  
9       Just final versions of those memos.

10           Your Honor, if it's a sequencing and a  
11 bandwidth issue with respect to the individuals involved,  
12 we're sympathetic to that. We don't need to divert those  
13 people from that. But we still would like this  
14 information; maybe we just get it January 27th, instead  
15 of -- after the submissions are made.

16           JUDGE MURRAY: I'm sorry, Mr. Warden, but this  
17 is the -- I think it's the 18th of December, and they're  
18 going to give you a lot of material on January 20th, and  
19 you want them to give you additional material. And I  
20 just -- it -- to me it's not something that they can just  
21 do a computer run and give it to you. This is going to  
22 be a -- the way these questions are framed, they would  
23 have to really hold interviews with a lot of people and  
24 put together a lot of material because you know, they --  
25 you say pick and choose; of course they're going to pick

1 and choose. That's their job.

2 MR. WARDEN: Well, Your Honor --

3 JUDGE MURRAY: They're going to make the best  
4 case they can for their client, and you're going to make  
5 the make the best case for your client. So hey, you're  
6 not -- they're not going -- you know, unless it's -- this  
7 isn't a criminal case. But unless it's something that's  
8 -- there's no impetus on them to give you any kind of  
9 Brady material or Jencks material. So you know, you got  
10 a hard row to hoe, but that's it. That's the name of the  
11 game.

12 MR. WARDEN: Your Honor, respectfully, this is  
13 my one opportunity to get it. And we're willing to  
14 address timing. As we said, we'll limit it to a key  
15 individual, and existing documents, no creation of  
16 documents.

17 My suggestion is to Number 4 and others, I can  
18 -- I can file tomorrow revised narrowed requests that  
19 make this abundantly clear and have Your Honor rule on  
20 those. We -- we get what Your Honor said in her order on  
21 this pre-hearing conference. We get what Your Honor said  
22 just now. But the other -- about narrowing this.

23 But the other component, Your Honor, is that  
24 the Exchanges have the evidence. We don't. And so this  
25 is our one shot to get it. And so my request, Your

1 Honor, is as to these -- Item Number 4 and through the  
2 balance, what we will do is file by the close of business  
3 tomorrow or by noon tomorrow, narrowed specific requests  
4 as to each of 4 through 9. We will withdraw Number 10.  
5 And Your Honor can rule upon those.

6 JUDGE MURRAY: I was going to deny Number 10.  
7 You just took -- that was the one I was sure of; 10 was  
8 out of there.

9 Okay. All right, so let me just say, you know,  
10 I think I've -- I've probably reaffirmed my initial  
11 comments that you all know a lot more about this case  
12 than I do, and I'm just trying to do the best I can.

13 I think Mr. Warden's got a good point. If you  
14 can -- if he can whittle this down -- his --

15 We've finished with 1, 2 and 3. The court  
16 reporter is here. The comments, the restrictions that  
17 are placed on those requests are valid and are recorded  
18 in the transcript, so we don't need anything in writing  
19 on them. But if we can resolve somehow 4 through 9, it  
20 would be good.

21 If you two can -- or you three can talk it over  
22 and reach a resolution, I would appreciate it. If not,  
23 Mr. Warden sends me a modified request on 4 through 9, I  
24 will consider it. Okay.

25 MR. HENKIN: Your Honor, this is Douglas

1 Henkin.

2 Can I raise an issue? And it really goes to --  
3 there's two parts of it; one is timing and one is  
4 substance.

5 So what Mr. Warden is suggesting is, as he  
6 correctly and honestly phrased it, a mulligan, and there  
7 is a timing issue. So he's going to send it either today  
8 or tomorrow. The question is how we're going to address  
9 that, because there are certain aspects of 4 through 9  
10 that we object to on a substantive merits basis.

11 So for example, all of the requests seeking  
12 cost data are requests that I don't know that there's any  
13 way that Mr. Warden can narrow those in a way that we  
14 will -- that the Exchanges would find acceptable because  
15 that's --

16 JUDGE MURRAY: Hold on. Just -- just slow down  
17 a little bit. On Number --

18 MR. HENKIN: Oh, sorry.

19 JUDGE MURRAY: Number 6 mention costs. 4  
20 doesn't mention costs, unless you say "setting of prices  
21 of fees," that's not costs.

22 MR. HENKIN: Well, 4 mentions costs in -- let  
23 me find it where -- "recover the costs," it's in the  
24 third line, at the end.

25 JUDGE MURRAY: Third line at the end.

1 MR. HENKIN: In Number 4, "The extent to which  
2 those prices enable you to recover the cost."

3 JUDGE MURRAY: Oh, okay. Okay.

4 MR. HENKIN: So it's in there, but it's buried  
5 in the middle.

6 JUDGE MURRAY: Okay, I got it.

7 MR. HENKIN: And 6 talks about costs. 7 talks  
8 about profitability, which is another way of looking at  
9 costs. And 8 is about -- talks about "The extent to  
10 which fees you charge enable you to recover costs of  
11 building, maintaining, hosting, and operating the  
12 platform."

13 So to the extent that what they're after is  
14 cost data, that is something to which the Exchanges, and  
15 NYSE Arca in particular, object to because we don't think  
16 Net Coalition provides for that. We don't think it  
17 requires the Commission, or in the first instance Your  
18 Honor, to consider that. And it's not going to be part  
19 of our affirmative case.

20 The record that we're going to make on our  
21 affirmative case is going to address the existence of  
22 competitive constraints at -- without regard to  
23 underlying cost base data, in accord with the ArcaBook  
24 direct order, as the methodology was affirmed by the D.C.  
25 Circuit in Net Coalition I.

1           So asking us to go out and collect any kind of  
2 data on cost goes beyond what we're going to do and will  
3 divert people, you know, from what they're doing to  
4 prepare our affirmative case. And in NYSE Arca's case,  
5 it's not even data that we, you know, that we keep. So  
6 that -- you know, we don't keep -- track marginal cost on  
7 a product by product basis, or even on a market data  
8 business unit basis.

9           MR. WARDEN: Your Honor, this is Mike Warden.

10           With respect to the legal issue of whether cost  
11 is relevant, we think that that's clear that it's  
12 absolutely relevant. The D.C. Circuit said so. And  
13 basic economics say that competitive -- in a competitive  
14 market, the prices approach marginal costs.

15           Mr. Henkin is fond of referring to Net  
16 Coalition I, and that's in 615 F.3d, the jump site is at  
17 537. In there the D.C. Circuit said, "Super competitive  
18 pricing may be evidence of monopoly or market power."  
19 And then it went on in other quote, "In a competitive  
20 market, the price of a product is supposed to approach  
21 its marginal cost, i.e., the seller's cost of producing  
22 one additional unit." And so although the Exchanges may  
23 not offer that in their case in chief, it is absolutely  
24 relevant.

25           Now, with that said, we can -- we can look at

1 those specific requests and try to narrow those requests  
2 as well. But we think that the cost issue and the legal  
3 argument, it is frankly, Your Honor, you know, wrong; the  
4 information is relevant.

5 JUDGE MURRAY: Okay.

6 MR. WARDEN: To be sure, it may not be part of  
7 the Exchanges' case in chief, but it's relevant.

8 JUDGE MURRAY: Okay. But listen, it's very  
9 interesting to hear their position. And if they decide  
10 that what he's described as the route that they're going  
11 to take to show that these costs are -- that these  
12 charges are -- or changes in the charges are reasonable,  
13 that's their -- that's their choice.

14 If I decide that they've left a very strong  
15 element out of their proof, you know, that's something  
16 else to be considered.

17 If you make the position that they should have  
18 produced costs and they failed to do so, and that's a  
19 major deficiency, and I buy it, well, then that's fine.

20 But I can't tell them how to present their  
21 case, and I'm not going to do that. That's their choice.

22 So if they're not going to cover costs, fine, they're  
23 not going to cover costs.

24 So okay, we've got -- we've -- we are where we  
25 are.

1           As far as Number 5, that seemed like a rather  
2 simple one to me, that from --

3           MR. WARDEN: Your Honor -- I'm sorry, Your  
4 Honor, this is Mike Warden.

5           I thought that I was charged with narrowing and  
6 writing 5 through -- 4 through 9, 10 being withdrawn, and  
7 then --

8           JUDGE MURRAY: You are.

9           MR. WARDEN: -- sharing that with --

10          JUDGE MURRAY: You are. But I'm trying to get  
11 rid of 5. Is there any objection to 5? The advertising  
12 materials?

13          MR. HENKIN: One moment, Your Honor.

14          MR. WARDEN: And Your Honor, if I -- I'm sorry,  
15 I'll wait.

16          JUDGE MURRAY: Yeah.

17          MR. HENKIN: Your Honor, from NYSE Arca's  
18 perspective, we don't really understand the relevance.  
19 But you know, I guess my position to try to be helpful  
20 and move this along is, it's not really going to be --  
21 it's not going to be part of our affirmative case. And  
22 as long as it doesn't divert us from our affirmative  
23 case, we'll give it to them, even though we think it's  
24 irrelevant. As long as it's after our merit submission  
25 is done, so I would say if we can give them to them in

1 the middle of February, that's fine, we'll give it to  
2 them.

3 JUDGE MURRAY: Any problem, Mr. Warden?

4 MR. WARDEN: I am looking for the revised  
5 schedule and our due date.

6 JUDGE MURRAY: Oh, your due date is February  
7 23rd.

8 MR. WARDEN: Maybe if we could get it two weeks  
9 in advance of that? My bad math says that's February  
10 9th.

11 JUDGE MURRAY: Yeah, I think you're right.

12 Could they get it, Mr. Lipton, by February 9th?

13 MR. HENKIN: This is Douglas Henkin for Arca --

14 JUDGE MURRAY: Oh, I'm sorry.

15 MR. HENKIN: -- for NYSE Arca.

16 That's fine.

17 JUDGE MURRAY: That's fine.

18 MR. LIPTON: For NASDAQ, that's fine, as well.

19 This is Josh Lipton.

20 JUDGE MURRAY: So we've got 5 out of the way.

21 Okay, we're going to -- Mr. Warden's going to  
22 do a revision of 4, 6, 7 and 8 and 9. And I will  
23 consider it.

24 We have granted 1, 2, and 3 with modification.

25 Okay, is there anything -- now, wait a second.

1           You all -- Mr. Lipton and Mr. Henkin, you're  
2 concerned about how this procedure's going to work. He's  
3 going to come in with a modified request as soon as he  
4 can, and if I give you -- this is a terrible time of  
5 year. If I give you --

6           MR. HENKIN: Exactly, Your Honor. That was the  
7 point.

8           JUDGE MURRAY: Yeah, I know. If I gave you,  
9 like, five business days to object to his modified  
10 request, is that okay?

11          MR. HENKIN: I guess. What is that? I'm try -  
12 - I'm looking at the calendar and trying to figure out  
13 when that gets -- is that -- does that get us to what,  
14 December 29th, I think, because of the Christmas  
15 holidays?

16          JUDGE MURRAY: I'm just saying five business  
17 days. I mean --

18          MR. HENKIN: Your Honor, tomorrow -- because  
19 the end of next week is out, so I think that gets us to  
20 the 29th or 30th, am I right?

21          JUDGE MURRAY: Is it easier for you all to have  
22 this kind of a pre-hearing conference and not write  
23 something and just state your position after you've seen  
24 his -- what he comes up, a modified request, if you all  
25 can't -- if you can't compromise on his modified request?

1 So the modified request would be a joint request saying  
2 you've agreed on 4, 6, 7, 8, and 9. If you can't agree,  
3 would it be better for me to get what he's come up with  
4 in writing and then have another one of these pre-hearing  
5 conferences? Is that --

6 MR. HENKIN: Your Honor --

7 MR. WARDEN: Your Honor, this is Mike Warden.

8 That would be satisfactory to us. And I can  
9 certainly try to -- we will get something to the  
10 Exchanges tomorrow, recognizing that obviously that's  
11 Friday before certain holidays begin next week. So I  
12 don't want to -- I'm not trying to push my colleagues.

13 JUDGE MURRAY: And we would have a --

14 MR. WARDEN: But we can --

15 JUDGE MURRAY: We would have a pre-hearing  
16 conference on Tuesday morning?

17 MR. HENKIN: Which would be -- wait, the 23rd?

18 JUDGE MURRAY: I think so.

19 MR. HENKIN: I mean, what I -- I mean, what I  
20 would suggest is, I think it would be helpful, given the  
21 issues that are raised by this -- by the ones that we're  
22 now talking about, for us to submit something short, you  
23 know, maybe shorter hopefully even than the letter that  
24 we sent last night in advance so that Your Honor can see  
25 our positions, because Your Honor will see SIFMA's

1 positions in writing.

2           And I would, you know -- what I would request  
3 is if we're going to get this tomorrow, you know, I -- I  
4 don't want to speak for NASDAQ's counsel, but I will say  
5 that, you know, doing -- doing everything that we need to  
6 do and having that addressed next -- by next Tuesday, and  
7 having another one of these conferences is going to be --  
8 is going to be tough. And it's to Your Honor's point  
9 about the time of year.

10           JUDGE MURRAY: Well, what would -- do you have  
11 a suggestion?

12           MR. HENKIN: I mean, what I would suggest is  
13 perhaps, you know, have another conference and again, I'm  
14 speaking only for myself, not for Mr. Lipton, on the  
15 30th, with us to submit a short response to whatever it  
16 is that Mr. Warden gives us, let's say the morning of the  
17 29th.

18           MR. LIPTON: Your Honor, this is Josh Lipton.  
19           I -- that's reasonable. I think that comports  
20 with your initial five business day suggestion, which I  
21 thought was helpful timing given the holidays, and you  
22 know, my entire team scatters to the wind for various  
23 parts of the next week or so. And they're already being  
24 pushed very hard on the substance, so we would appreciate  
25 that five business days.

1 JUDGE MURRAY: Okay. Let me just see if I've  
2 got it right now. Okay, Mr. Warden is giving us  
3 something in writing by tomorrow. And then you all would  
4 like to have a short brief pre-hearing conference on, is  
5 it December 30th?

6 MR. HENKIN: Yeah, that's what I said, Your  
7 Honor. This is Douglas Henkin.

8 JUDGE MURRAY: Okay. Is that alright with you  
9 now, Mr. Lipton?

10 MR. LIPTON: Yes. Thank you, Your Honor.

11 JUDGE MURRAY: Is that okay with you, Mr.  
12 Warden?

13 MR. WARDEN: Yes, Your Honor.

14 JUDGE MURRAY: Okay.

15 MR. WARDEN: And just to be clear, what I'm  
16 doing tomorrow, am I filing that? Or just providing it  
17 to the Exchanges?

18 JUDGE MURRAY: I'm afraid I'm going to have to  
19 see it.

20 MR. WARDEN: Okay. No, okay.

21 And then what I would request, Your Honor, is  
22 if we don't agree to it, that we would likewise file a  
23 very short brief on the morning of the 29th.

24 JUDGE MURRAY: Well -- and you better make these  
25 filings. You better make them as filings, because I

1 mean, if we have a transcript of the court reporter and  
2 these pre-hearing conferences, it's part of the record.  
3 But we should have the whole record so that somebody can  
4 go back and review this.

5 Okay. I think that's it. Is there anything  
6 else before I recess this pre-hearing conference?

7 MR. WARDEN: No, Your Honor. Thank you.

8 JUDGE MURRAY: Thank --

9 MR. HENKIN: And Your Honor, so we're both  
10 going to be -- just to be clear, Your Honor, this is  
11 Douglas Henkin.

12 So we're both going to be making filings on  
13 December 29th?

14 JUDGE MURRAY: He's going to --

15 MR. HENKIN: So in other words --

16 JUDGE MURRAY: Mr. Warden's going to file  
17 something tomorrow.

18 MR. HENKIN: Right.

19 JUDGE MURRAY: And then you all -- I don't  
20 know, do you want to just have the pre-hearing conference  
21 on the 30th? Or do you want to make a filing on the  
22 29th?

23 MR. HENKIN: We think it would be helpful to  
24 have -- for us to make a filing setting forth our  
25 position on the 29th, so that Your Honor can have the

1 benefit of seeing it before the conference on the 30th.

2 JUDGE MURRAY: Okay.

3 MR. HENKIN: And then -- and I understood, and  
4 maybe I misunderstood and if I did I apologize, Mr.  
5 Warden also wanted to make some kind of filing on the  
6 29th, although, I'm not quite sure what it would be.

7 MR. WARDEN: Mr. -- Your Honor, this is Mike  
8 Warden.

9 Mr. Henkin understood correctly. I understand  
10 what I'm filing tomorrow would just be the bare bones  
11 replacement subpoena as to the specifications --

12 JUDGE MURRAY: Right.

13 MR. WARDEN: -- that are still open. And  
14 hopefully, although time is limited between then and the  
15 29th, some of these issues we may be able to agree upon  
16 with the Exchanges. And then if there are open issues  
17 going into the 30th, we too, would like to file, you  
18 know, a short substantive brief on the 29th. We aren't  
19 going to make any substantive filing other than the  
20 specifications on Friday of this week.

21 JUDGE MURRAY: I don't think I can handle all  
22 of that. If I handle what you're going to file tomorrow,  
23 and then I'm going to handle their responses to it on the  
24 -- written responses on the 29th, and then I'm going to  
25 hold a pre-hearing on the 30th at 10:00, that's enough,

1 okay. I don't need any more pleadings.

2 All right, is there anything else now? And  
3 thank you, I don't know, I think it was Mr. Henkin or Mr.  
4 Lipton for straightening that out. I'm sorry I left it  
5 up in the air and I should have nailed it down.

6 Okay, if there's nothing else, then the pre-  
7 hearing conference is adjourned. Thank you gentlemen  
8 very much.

9 MR. HENKIN: Thank you, Your Honor.

10 MR. WARDEN: Thank you, Your Honor.

11 (Whereupon, at 11:12 a.m. the pre-hearing  
12 conference was concluded.)

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PROOFREADER'S CERTIFICATE

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In The Matter of: THE APPLICATION OF SECURITIES  
INDUSTRY AND FINANCIAL MARKETS  
ADMINISTRATIVE PROCEEDING - PRE-HEARING CONFERENCE  
File Number: 3-16263  
Date: December 18, 2014  
Location: Washington, D.C.

This is to certify that I, Nicholas Wagner,  
(the undersigned), do hereby swear and affirm that the  
attached proceedings before the U.S. Securities and  
Exchange Commission were held according to the record and  
that this is the original, complete, true and accurate  
transcript that has been compared to the reporting or  
recording accomplished at the hearing.

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