

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Application of:

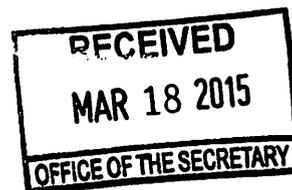
SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION

for Review of Actions Taken by Self-Regulatory
Organizations

Admin. Proc. File No. 3-15350

The Honorable Brenda P. Murray,
Chief Administrative Law Judge

**MOTION OF NYSE ARCA, INC. AND THE NASDAQ STOCK MARKET LLC
FOR ORDER FINDING THAT SIFMA WAIVED PRIVILEGE AND COMPELLING
PRODUCTION OF DOCUMENTS WITHHELD AS PRIVILEGED**



Your Honor issued a subpoena to SIFMA on January 5, 2015, with a return date of February 23, 2015 (the “Subpoena”). That return date has now come and gone, and SIFMA *has not produced a single document* in response to the Subpoena. Instead, SIFMA took the entire response period—a seven-week period that was more than enough time to allow SIFMA to serve complete responses—and provided nothing but a series of cursory non-responses. *See* SIFMA Subpoena Response (Feb. 23, 2015) (attached as Exhibit A). SIFMA’s responses did not, as required by the Subpoena, include a privilege log, despite asserting in conclusory fashion that it had withheld documents under a facially deficient claim of privilege. NYSE Arca, Inc. (“NYSE Arca”) and the Nasdaq Stock Market LLC (“Nasdaq”) (collectively, the “Exchanges”) repeatedly requested that SIFMA produce the required privilege log, and on March 11, 2015— after weeks of stonewalling and 16 days after the production deadline—SIFMA produced what it called a “privilege log.” *See* SIFMA Privilege Log (March 11, 2015) (attached as Exhibit B). What SIFMA produced does not even resemble an actual privilege log, and entirely fails to provide information sufficient to evaluate SIFMA’s claims of privilege. The Exchanges respectfully request that Your Honor enter an order holding that SIFMA has waived privilege and requiring it to produce all documents withheld as privileged immediately.

BACKGROUND

On December 31, 2014, the Exchanges submitted a request for issuance of the Subpoena, which would provide them with discovery from SIFMA sufficient to cross-examine SIFMA’s witnesses, defend against SIFMA’s arguments, and prepare their rebuttal case. The Subpoena narrowly sought documents only from “Relevant Members,” which it defined as “(i) all SIFMA members who provide documents or communications for reliance by SIFMA’s fact or expert witness(es), (ii) those SIFMA members from whom SIFMA will present evidence or testimony,

and (iii) the nine SIFMA members who submitted jurisdictional declarations.” Your Honor granted the Subpoena in full on January 5, 2015, and it was served on SIFMA on January 7, 2015. The Subpoena provided a response time of seven weeks, with a return date of February 23, 2015.

Eighteen days after the Subpoena was granted, on January 23, 2015, SIFMA filed a motion to quash the Subpoena. Your Honor denied the motion to quash on February 3, 2015, 20 days before SIFMA’s production deadline. In ordering SIFMA to produce the requested documents, Your Honor stated that “[t]his dispute has gone on for a considerable period, and it is time to get the facts on the table and reach a resolution.” *Order on Motion to Quash* (Feb. 3, 2015).

SIFMA filed its subpoena response on February 23, 2015. *See* Exhibit A. Remarkably, SIFMA produced *no documents* in response to the Subpoena, claiming that it has no non-privileged responsive documents in its possession, custody, or control. SIFMA asserted privilege in response to two requests, but failed to produce a privilege log, which was required to be produced on February 23, 2015 contemporaneously with the Subpoena response. *See* Subpoena at 4, Instruction 13 (attached as Exhibit C). As discussed below, these claims of privilege were at best suspicious.

On February 25, 2015, the Exchanges contacted SIFMA to request the production of a privilege log as required by the Subpoena (and to raise additional issues of non-compliance).¹

¹ Among other issues, in light of SIFMA’s claim in the response that “it cannot compel the production of documents responsive to the Subpoena from its members” despite its previous ability to convince nine of its members to submit jurisdictional declarations on SIFMA’s behalf, the Exchanges requested that SIFMA describe the efforts it undertook to obtain documents from SIFMA members. SIFMA has been so evasive that it has refused to even state whether it asked its Relevant Members to turn over documents responsive to the Subpoena or whether it advised its members not to comply. *See* Exhibit D.

See Exhibit D. On February 27, 2015—a full 53 days after the Subpoena was granted by Your Honor—SIFMA responded to the Exchanges’ questions merely by stating that “[i]n light of SIFMA’s upcoming pre-trial obligations, SIFMA is still looking into [the Exchanges’] inquiries and will have to get back to you.” *Id.* On March 6, 2015, SIFMA emailed the Exchanges and stated it “is still looking into the [privilege] inquiry and will have to get back to NYSE Arca.” *Id.* NYSE Arca immediately responded, again noting that the Subpoena required the production of a privilege log on February 23, 2015, and repeating its request that SIFMA produce a privilege log immediately. *Id.*

On March 11, 2015, SIFMA produced what it *called* a privilege log, but which is not even close to being a privilege log. Despite weeks of asserting that SIFMA’s “upcoming pre-trial obligations” prevented it from preparing a privilege log, what SIFMA produced contains *two entries* that provide *no* substantive information. See Ex. B. SIFMA’s “privilege log” is not a log at all—it fails to log any individual documents, instead grouping them into two entries, one of which spans more than five months. On March 12, 2015, the Exchanges contacted SIFMA and requested that SIFMA produce a proper privilege log that individually identifies all documents over which SIFMA is asserting privilege. See Exhibit E. SIFMA has not responded to that email or produced a privilege log in accordance with the Subpoena requirement.

ARGUMENT

I. SIFMA Has Failed To Justify Its Claims Of Privilege

The “person asserting a privilege has the burden of establishing its essential elements.” *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.) (citing *United States v. BDO Seidman*, 337 F.3d 802, 811 (7th Cir. 2003)). SIFMA has withheld from production, on the basis of attorney-client privilege

and the attorney work product doctrine, responsive communications (1) related to the Relevant Members' purchases of depth-of-book products and the fees paid for each such depth-of-book product and (2) with SIFMA members relating to the submission of jurisdictional declarations by SIFMA members. *See* Exhibit B, Response to Request Nos. 9, 15. SIFMA's "privilege log" fails to satisfy SIFMA's burden of providing information sufficient to establish the essential elements of the privilege claims asserted. As an initial matter, the log does not even identify individual documents, instead grouping an unknown number of documents into just two entries, one of which spans a period of more than five months. Such blanket assertions of privilege are improper. *See, e.g.,* Exhibit C, Subpoena Instruction 13 (requiring each document to be logged with information sufficient to evaluate the claim of privilege); *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.) (ordering production of "a privilege log that includes for each withheld document the date of the document, the author and recipient, the type of document, and the privilege claimed."); *In the Matter of Keith M. Roberts*, Order on Motions To Quash Subpoenas, File No. 3-11471 (July 14, 2004) (Murray, J.) (ordering production of a privilege log "that identifies each document covered by the subpoena that [the party] has withheld, the legal basis for withholding the material, and a factual description that supports each claim.").

SIFMA waited 49 days to submit a completely empty subpoena response that withholds responsive information on the basis of privilege. As of today, SIFMA has had 70 days to produce responsive information or properly demonstrate that its assertion of privilege was valid. SIFMA's delay is inexcusable given Your Honor's admonition that "some degree of expedition is needed in this proceeding." *Order on Issues of Jurisdiction and Scheduling* at 11 (Oct. 20, 2014). SIFMA's failure to comply with its obligations has prejudiced the Exchanges in their

ability to examine SIFMA's submissions, evaluate the merits of SIFMA's claims of privilege, and obtain on a timely basis any responsive documents wrongfully withheld from production so that they can be incorporated into the Exchanges' prehearing briefs.

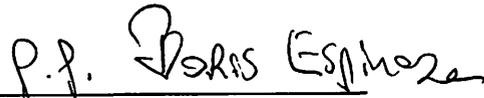
In circumstances like these, the proper result is to deem the privilege waived and compel immediate production of the withheld documents. This is not a case of a good-faith attempt to produce a privilege log that happened to omit some necessary information. What SIFMA did was withhold documents, without even specifying how many, and simply say "privilege." In similar circumstances, courts have deemed privilege waived. *See, e.g., Lohrenz v. Donnelly*, 187 F.R.D. 1, 6-7 (D.D.C. 1999) (request to compel plaintiff to produce documents withheld on privilege grounds granted where plaintiff failed to provide a proper privilege log describing with specificity the nature of the documents withheld); *Burns v. Imagine Films Entertainment, Inc.*, 164 F.R.D. 589, 594 (W.D.N.Y. 1996) (privilege waived where defendants' privilege log did not permit the court or opposing counsel to determine whether the privilege asserted applied to the documents requested). Your Honor should do the same.

Moreover, SIFMA does not assert any privilege in its so-called "privilege log" over any facts and communications with the Relevant Members regarding purchases of depth-of-book products and the fees paid for each such depth-of-book product. Nor could it, as information about the Relevant Members' purchases of depth-of-book products and the fees they paid for each such depth-of-book product is plainly not privileged. *See Loftin v. Bande*, 258 F.R.D. 31, 36 (D.D.C. 2009) (citing *Upjohn v. United States*, 449 U.S. 383, 395-396 (1981)) (attorney-client privilege protects confidential communications between a client and an attorney, not the underlying information itself). Thus, any documents containing such information should be promptly produced.

CONCLUSION

Based on the foregoing, the Exchanges respectfully request that Your Honor enter an order finding that SIFMA has waived the privileges it improperly asserted and compelling the immediate production of all documents withheld as privileged.

Respectfully submitted,

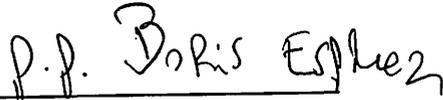


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Dated: March 18, 2015

CERTIFICATE OF SERVICE

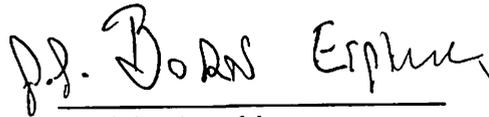
I hereby certify that on March 18, 2015, I caused a copy of the foregoing Motion Of NYSE Arca, Inc. And The NASDAQ Stock Market LLC To Compel Production of Privilege Log to be served on the parties listed below via First Class Mail.

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
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Washington, DC 20549
(via hand delivery)

W. Hardy Callcott
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San Francisco, CA 94104

Michael D. Warden
HL Rogers
Eric D. McArthur
Lowell J. Schiller
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005

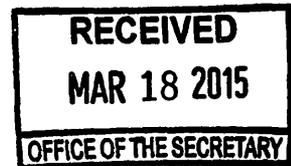
Dated: March 18, 2015



Patrick Marecki
Baker Botts L.L.P.
30 Rockefeller Plaza
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(212) 408-2500
patrick.marecki@bakerbotts.com

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

**SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION'S FIRST
RESPONSE TO THE SUBPOENA *DUCES TECUM* OF
NASDAQ STOCK MARKET LLC AND NYSE ARCA, INC.**

The Securities Industry and Financial Markets Association (“SIFMA”) hereby submits its first response to the subpoena *duces tecum* dated January 5, 2015 (the “Subpoena”) issued at the request of Nasdaq Stock Market LLC (“Nasdaq”) and NYSE Arca, Inc. (“NYSE Arca”) (collectively, the “Exchanges”).

GENERAL RESPONSE

On January 23, 2015, SIFMA filed an application to quash the Subpoena because, among other reasons, the Subpoena purported to require SIFMA to produce certain responsive documents that are not within SIFMA’s possession, custody, or control, but instead are exclusively in the possession of its members. Chief Administrative Law Judge Brenda P. Murray (the “Chief ALJ”) denied SIFMA’s application to quash in a February 3, 2015 Order, noting that “[i]f SIFMA does not have or cannot compel production of responsive documents from its members, it should state so in its document production.” *In the Matter of SIFMA*, Admin. Proc. Rulings Release No. 2277 (Feb. 3, 2015) (“February 3 Order”).

Pursuant to the February 3 Order, SIFMA states that it cannot compel the production of documents responsive to the Subpoena from its members. Nothing in SIFMA's governing documents establish any right of SIFMA to compel its members to produce responsive documents at SIFMA's request. Additionally, SIFMA and its members refrain from sharing or exchanging information relating to the subject matter of many of the Subpoena's requests pursuant to SIFMA's policies, which state in relevant part "representatives of competing firms should, at all times, avoid discussing actual prices charged or to be charged for products and services," and "no discussion about forming a boycott should take place," and provide guidance on limitations on information exchanges among SIFMA and members for matters such as costs and business plans. *See* SIFMA Antitrust Booklet (Nov. 2014), *available at* <http://www.sifma.org/Services/Standard-Forms-and-Documentation/Cross-Product/Antitrust-Compliance-Booklet/>.

Accordingly, SIFMA's responses to the Subpoena are based upon those documents in its possession, custody, or control.

Document Request No. 1

Documents sufficient to identify, for each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, 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 Changes were adopted to the present.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 2

Documents sufficient to identify, for each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, the aggregate fees charged to subscribers for

the products under those Rule Changes on a monthly basis from the time the Rule Changes were adopted to the present.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 3

Documents sufficient to identify, for each Relevant Member who subscribes to the depth-of-book products that SIFMA contends are the subject of the Rule Changes, Nasdaq's and NYSE Arca's shares of the Relevant Member's order flow and any changes in those shares throughout the period from the time the Rule Changes were adopted to the present.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 4

Marketing, promotion, and advertising materials, for each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, used to promote the products (including any packages or suites of data offered by the Relevant Member, whether or not they specifically identify the depth-of-book products that are the subject of the Rule Changes) from the time the Rule Changes were adopted to the present.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 5

The documents, facts, and data relied on by SIFMA's testifying experts in forming their opinions, submitted on or before February 23, 2015 in conjunction with the list of witnesses, copies of exhibits, and any written expert testimony that the scheduling order requires SIFMA to disclose.

On January 12, 2015, subsequent to the issuance of the Subpoena, Nasdaq filed a Consent Motion to Extend Prehearing Schedule, which requested an extension for the parties' pre-trial deadlines for exchanging witness lists, copies of exhibits, and written expert testimony. The

Chief ALJ granted the motion on January 13, 2015, thereby extending SIFMA's deadline to March 2, 2015 for the submission of its witness list, copies of exhibits, and written expert testimony. *In the Matter of SIFMA*, Admin. Proc. Rulings Release No. 2212 (Jan. 13, 2015). In light of this amended pre-trial deadline, SIFMA will be in a position to provide responsive information the week of March 2, 2015.

Document Request No. 6

For each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, Documents provided to decision-makers on setting or changing fees charged to subscribers for the depth-of-book products that are the subject of the Rule Changes sufficient to identify Your considerations and reasons for setting or maintaining the fees charged to the Relevant Member's customers for those products, including Documents sufficient to identify Your reasons for setting fees at a particular level, or changing prices.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 7

For each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, the subscriber fee schedules for those products.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 8

For each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, Documents sufficient to identify which products You have identified as substitute or alternative products for those depth-of-book products, as well as Your strategy for choosing between those depth-of-book products and the substitute or alternative products.

SIFMA has identified no documents responsive to this Request in its possession, custody,

or control.

Document Request No. 9

Documents sufficient to identify, for each Relevant Member, the exchanges (or any other source) from which the Relevant Member purchases or otherwise obtains depth-of-book products, the depth-of-book products the Relevant Member purchases or otherwise obtains from each exchange (or other source), and the fees paid by the Relevant Member for each depth-of-book product.

SIFMA has identified no non-privileged documents responsive to this Request in its possession, custody, or control.

Document Request No. 10

For each Relevant Member, each communication to any exchange in which the Relevant Member either threatened to reduce order flow or announced that the Relevant Member was reducing order flow based in whole or in part on that exchange's depth-of-book data pricing, pricing policies, or pricing actions or proposals.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 11

For each Relevant Member, each communication to any exchange in which the Relevant Member offered to increase or agreed to increase its order flow to that exchange in return for a reduction or limitation on depth-of-book data pricing.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 12

For each Relevant Member, each communication to any exchange in which the Relevant Member either threatened to divert or stated that it would divert any purchases of depth-of-book data products to another source of data.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 13

For each Relevant Member, 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, pricing policies, or pricing actions or proposals.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 14

For each Relevant Member who submitted a jurisdictional declaration in conjunction with SIFMA's July 29, 2014 filing, all Documents supporting or contradicting the assertion that the level of the prices charged for the specific depth-of-book products that are the subject of the Rule Changes are so high as to be outside a reasonable range of fees under the Exchange Act.

SIFMA has identified no documents responsive to this Request in its possession, custody, or control.

Document Request No. 15

All communications with SIFMA members referring or relating to the submission of jurisdictional declarations by any SIFMA members.

SIFMA has identified no non-privileged documents responsive to this Request in its possession, custody, or control.

Document Request No. 16

Documents sufficient to identify each and all Relevant Members.

As of the date of this Response, Relevant Members, as defined by the Subpoena, are as follows: Bank of America; Bloomberg L.P.; Charles Schwab & Co., Inc.; Citigroup Global

Markets Inc.; Credit Suisse Securities (USA), LLC; Goldman, Sachs & Co.; J.P. Morgan Chase & Co.; Liquidnet, Inc.; and Wells Fargo and Company. SIFMA's response here shall not limit or impede its ability to present at the hearing before the Chief ALJ evidence or testimony from a member that is not listed in this response.

Dated: February 23, 2015

Respectfully submitted,

SIDLEY AUSTIN LLP



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Counsel for SIFMA

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Application of:

SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION

for Review of Actions Taken by
Self-Regulatory Organizations

Admin. Proc. File No. 3-15350

The Honorable Brenda P. Murray,
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2015, I caused a copy of the foregoing Securities Industry And Financial Markets Association's First Response To The Subpoena *Duces Tecum* Of Nasdaq Stock Market LLC And NYSE Arca, Inc. to be served on the parties listed below via First Class Mail:

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

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

Dated: February 23, 2015


H.L. Rogers

Exhibit B

Privilege Log of the Securities Industry and Financial Markets Association, March 11, 2015
In the Matter of the Application of Securities Industry and Financial Markets Association
 Admin. Proc. File No. 3-15350

Date	Custodian	Description	Subpoena Item	SIFMA Attorneys (Author, Recipient, Custodian)	Privilege Category
09/19/13	MacGregor, Melissa	Documents concerning the preparation of SIFMA's declaration in support of its application to set aside rule changes in Admin. Proc. File No. 3-15350	9	MacGregor, Melissa (SIFMA attorney); McArthur, Eric (Sidley Austin)	Attorney-Client Communication; Attorney Work Product
05/19/14 – 10/21/14	MacGregor, Melissa	Documents concerning the preparation of Relevant Member jurisdictional declarations and briefing concerning SIFMA's satisfaction of jurisdictional requirements in support of SIFMA's application to set aside rule changes in Admin. Proc. File No. 3-15350, and concerning the Order on the Issues of Jurisdiction and Scheduling, Release No. 1921	15	MacGregor, Melissa (SIFMA attorney); McArthur, Eric (Sidley Austin); Phillips, Carter (Sidley Austin); Rogers, HL (Sidley Austin); Schiller, Lowell (Sidley Austin)	Attorney-Client Communication; Attorney Work Product

Exhibit C

January 7, 2015

VIA UPS OVERNIGHT

Michael D. Warden
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Washington, DC 20005

W. Hardy Callcott
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San Francisco, CA 94104

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

Dear Counsel:

Enclosed please find a subpoena directed to the Securities Industry and Financial Markets Association ("SIFMA"). Pursuant to Rule 150 of the SEC Rules of Practice, I am serving the subpoena on you as counsel of record for SIFMA.

Sincerely,

/s/ Joshua Lipton

Joshua Lipton

Enclosure

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

SUBPOENA DUCES TECUM

TO: Custodian of Records
Securities Industry and Financial Markets Association
1101 New York Avenue, N.W., 8th Floor
Washington, D.C. 20005

YOU MUST PRODUCE everything specified in the Attachment to this Subpoena to:

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

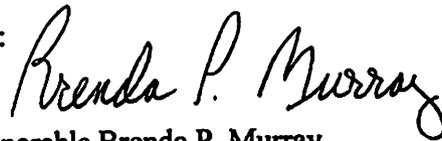
Baker Botts LLP
30 Rockefeller Plaza
New York, N.Y. 10112

by the date of February 23, 2015.

Dated: ~~December 31, 2014:~~

JANUARY 5, 2015

By:



Honorable Brenda P. Murray
Chief Administrative Law Judge

**ATTACHMENT TO SUBPOENA
TO SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION**

DEFINITIONS AND INSTRUCTIONS

1. The term “document” is used in the broadest sense, and includes without limitation the following items, whether printed, recorded, microfilmed, or reproduced by any process, or written or produced by hand, and whether or not claimed to be privileged, confidential, personal, or preliminary: letters, memoranda, reports, agreements, communications, correspondence, summaries of records or personal conversations, diaries, forecasts, statistical statements, graphs, charts, plans, drawings, minutes or records of meetings or conferences, lists of persons attending meetings or conferences, reports of or summaries of interviews, opinions of counsel, circulars, drafts of any documents, books, instruments, appraisals, applications, accounts, tapes and all other material of any tangible medium of expression, computer diskettes, and all other magnetic or electronic media.

2. The term “communication” means all inquiries, discussion, conversations, negotiations, agreements, understandings, meetings, telephone conversations, letters, notes, telegrams, correspondence, memoranda, e-mails, facsimile transmissions, or other form of verbal, written, mechanical, or electronic intercourse.

3. The term “Request” means the request for production of documents in Your possession, custody, or control.

4. The terms “You” and “Your” shall refer to the Securities Industry and Financial Markets Association (“SIFMA”), its subsidiaries, affiliates, the Relevant Members, and all officers, directors, employees, agents, representatives, and all other persons acting in concert with it, on its behalf, or under its control, whether directly or indirectly.

5. The term “Relevant Members” shall mean (i) all SIFMA members who provide documents or communications for reliance by SIFMA’s fact or expert witness(es), (ii) those SIFMA members from whom SIFMA will present evidence or testimony, and (iii) the nine SIFMA members who submitted jurisdictional declarations; any SIFMA member falling into category (i), (ii), or (iii) is a Relevant Member for the purposes of this Subpoena.

6. The term “depth-of-book data” means data showing bids to buy at prices below, and offers to sell at prices above, the National Best Bid and Offer.

7. The term “person” means any natural person or any legal entity, including, without limitation, a proprietorship, partnership, trust, firm, corporation, association, government agency or entity, or other organization, or association.

8. The term “order flow” means the volume of purchases, sales, swaps and trades in securities executed on an exchange.

9. The singular includes the plural and vice versa; the words “and” and “or” shall be both conjunctive and disjunctive; the word “all” means “any and all”; the word “any” means “any and all”; the word “including” means “including without limitation.”

10. Documents shall be produced as they are kept in the usual course of business or shall be organized and labeled to correspond to the paragraphs of the Request to which they are responsive.

11. Unless otherwise provided, these Requests seek documents from the time the rule changes at issue in this proceeding (*Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Rule 7019*, Release No. 34-62907, File No. SR-NASDAQ-2010-110 (Sept. 14, 2010); *Notice of Filing and Immediate Effectiveness of 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) (the “Rule Changes”)) were adopted to the present.

12. Unless otherwise specifically stated, You shall produce Documents authored, compiled, considered, created, drafted, edited, generated, possessed, prepared, read, received, recorded, referred to, reviewed, sent to or by, transmitted to or by, utilized, or written from the time any Rule Changes were adopted to the present.

13. In the event that any document called for by these Requests is to be withheld on the basis of a claim of privilege, identify the document as follows: author, addressee, indicated or blind copies, date, subject matter, number of pages, attachments or appendices, all persons to whom distributed, shown, or explained, present custodian, the nature of the privilege asserted, and the complete factual basis for its assertion. Produce a log containing the above descriptions contemporaneously with the documents responsive to the subpoena.

14. If a portion of an otherwise responsive document contains information subject to a claim of privilege, only those portions of the document subject to the claim of privilege shall be deleted or redacted from the document and the rest of the document shall be produced. If any portions of any otherwise responsive documents are deleted or redacted, those portions are to be included on the log of privileged documents and identified as required by instruction 13.

15. Documents are to be produced in full and complete form, including all drafts and all copies of documents that bear any notes, marks, or notations not existing in the original or other copies.

16. To the extent a Request seeks Documents held by individual custodians, it seeks only those Documents held by the key person or persons within SIFMA or the Relevant Members with primary responsibility over the requested subject matter.

17. Each Request seeks only those books, records, or individually-held Documents as are created or maintained in the ordinary course of business. The Nasdaq Stock Market LLC (“Nasdaq”) and NYSE Arca, Inc. (“NYSE Arca”) do not envision that the collection of such documents would require an expansive search or the creation of any Documents, nor do Nasdaq and NYSE Arca request direct access to any custodian(s).

DOCUMENT REQUESTS

1. Documents sufficient to identify, for each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, 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 Changes were adopted to the present.

2. Documents sufficient to identify, for each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, the aggregate fees charged to subscribers for the products under those Rule Changes on a monthly basis from the time the Rule Changes were adopted to the present.

3. Documents sufficient to identify, for each Relevant Member who subscribes to the depth-of-book products that SIFMA contends are the subject of the Rule Changes, Nasdaq’s and NYSE Arca’s shares of the Relevant Member’s order flow and any changes in those shares throughout the period from the time the Rule Changes were adopted to the present.

4. Marketing, promotion, and advertising materials, for each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, used to promote the products (including any packages or suites of data offered by the Relevant Member, whether or not they specifically identify the depth-of-book products that are the subject of the Rule Changes) from the time the Rule Changes were adopted to the present.

5. The documents, facts, and data relied on by SIFMA's testifying experts in forming their opinions, submitted on or before February 23, 2015 in conjunction with the list of witnesses, copies of exhibits, and any written expert testimony that the scheduling order requires SIFMA to disclose.

6. For each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, Documents provided to decision-makers on setting or changing fees charged to subscribers for the depth-of-book products that are the subject of the Rule Changes sufficient to identify Your considerations and reasons for setting or maintaining the fees charged to the Relevant Member's customers for those products, including Documents sufficient to identify Your reasons for setting fees at a particular level, or changing prices.

7. For each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, the subscriber fee schedules for those products.

8. For each Relevant Member who redistributes the depth-of-book products that SIFMA contends are the subject of the Rule Changes, Documents sufficient to identify which products You have identified as substitute or alternative products for those depth-of-book products, as well as Your strategy for choosing between those depth-of-book products and the substitute or alternative products.

9. Documents sufficient to identify, for each Relevant Member, the exchanges (or any other source) from which the Relevant Member purchases or otherwise obtains depth-of-book products, the depth-of-book products the Relevant Member purchases or otherwise obtains

from each exchange (or other source), and the fees paid by the Relevant Member for each depth-of-book product.

10. For each Relevant Member, each communication to any exchange in which the Relevant Member either threatened to reduce order flow or announced that the Relevant Member was reducing order flow based in whole or in part on that exchange's depth-of-book data pricing, pricing policies, or pricing actions or proposals.

11. For each Relevant Member, each communication to any exchange in which the Relevant Member offered to increase or agreed to increase its order flow to that exchange in return for a reduction or limitation on depth-of-book data pricing.

12. For each Relevant Member, each communication to any exchange in which the Relevant Member either threatened to divert or stated that it would divert any purchases of depth-of-book data products to another source of data.

13. For each Relevant Member, 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, pricing policies, or pricing actions or proposals.

14. For each Relevant Member who submitted a jurisdictional declaration in conjunction with SIFMA's July 29, 2014 filing, all Documents supporting or contradicting the assertion that the level of the prices charged for the specific depth-of-book products that are the subject of the Rule Changes are so high as to be outside a reasonable range of fees under the Exchange Act.

15. All communications with SIFMA members referring or relating to the submission of jurisdictional declarations by any SIFMA members.

16. Documents sufficient to identify each and all Relevant Members.

Exhibit D

Espinoza, Boris

From: Marecki, Patrick
Sent: Friday, March 06, 2015 12:03 PM
To: 'Hitchins, Kathleen'
Cc: Henkin, Douglas; Taube, Seth T.; Perry, Joseph C.; ssusman@susmangodfrey.com; jbuchdahl@susmangodfrey.com; JLipton@gibsondunn.com; ATayrani@gibsondunn.com; DSwanson@gibsondunn.com; MPhan@gibsondunn.com; JLigtenberg@gibsondunn.com; Warden, Michael D.; Rogers, HL; McArthur, Eric; Schiller, Lowell; Young, Jeffrey J.
Subject: RE: SIFMA First Subpoena Response, Admin. Proc. File No. 3-15350

Katy:

With respect to the privilege issue, NYSE Arca answered SIFMA's prior inquiry in my email dated February 20, 2015, which provided a replacement file for NYSE_ARCA_001750. NYSE Arca is not withholding any documents on the basis of privilege. Pursuant to Instruction 13 of the Subpoena, SIFMA was required to produce a privilege log on February 23, 2015, contemporaneously with its response to the Subpoena. We repeat our request that SIFMA produce a privilege log immediately.

We reserve all rights with respect to the issues raised in my February 25, 2015 email.

Best,
Patrick

From: Hitchins, Kathleen [mailto:khitchins@sidley.com]
Sent: Friday, March 06, 2015 10:27 AM
To: Marecki, Patrick
Cc: Henkin, Douglas; Taube, Seth T.; Perry, Joseph C.; ssusman@susmangodfrey.com; jbuchdahl@susmangodfrey.com; JLipton@gibsondunn.com; ATayrani@gibsondunn.com; DSwanson@gibsondunn.com; MPhan@gibsondunn.com; JLigtenberg@gibsondunn.com; Warden, Michael D.; Rogers, HL; McArthur, Eric; Schiller, Lowell; Young, Jeffrey J.
Subject: RE: SIFMA First Subpoena Response, Admin. Proc. File No. 3-15350

Dear Patrick:

We are writing to follow up on NYSE Arca's inquiries concerning SIFMA's First Responses to the Exchanges' Subpoena in an email dated, February 25, 2015.

With respect to NYSE Arca's first and third inquiries, 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. To the extent any documents relied upon by SIFMA's experts are also responsive to the subpoena, those documents will be produced today.

With respect to NYSE Arca's second inquiry, SIFMA's obligation to respond to the Subpoena does not require it to disclose the efforts undertaken to prepare the responses. To the extent NYSE Arca disagrees, please direct us to the portion of the subpoena or other authority that you believe creates this duty.

Finally, in light of SIFMA's pre-trial deadlines, SIFMA is still looking into the fourth inquiry and will have to get back to NYSE Arca. Until such time, it would assist SIFMA if NYSE Arca could please answer SIFMA's prior inquiry as to whether

NYSE Arca was claiming privilege for the document Bates stamped NYSE_ARCA_001750 - NYSE_ARCA_001758. Also, please let us know if NYSE Arca intends to produce a privilege log.

Sincerely,
Katy Hitchins

KATHLEEN HITCHINS
Associate

Sidley Austin LLP
+1.202.736.8420
khitchins@sidley.com

From: Hitchins, Kathleen
Sent: Friday, February 27, 2015 1:02 PM
To: 'patrick.marecki@bakerbotts.com'; douglas.henkin@bakerbotts.com; Seth.Taube@bakerbotts.com; joseph.perry@bakerbotts.com; ssusman@susmangodfrey.com; jbuchdahl@susmangodfrey.com; JLipton@gibsondunn.com; ATayrani@gibsondunn.com; DSwanson@gibsondunn.com; MPhan@gibsondunn.com; JLigtenberg@gibsondunn.com
Cc: Warden, Michael D.; Rogers, HL; McArthur, Eric; Schiller, Lowell; Young, Jeffrey J.
Subject: RE: SIFMA First Subpoena Response, Admin. Proc. File No. 3-15350

Dear Patrick:

We are writing to respond to NYSE Arca's inquiries concerning SIFMA's First Responses to the Exchanges' Subpoena in an email dated, February 25, 2015. In light of SIFMA's upcoming pre-trial obligations, SIFMA is still looking into NYSE Arca's inquiries and will have to get back to you.

Sincerely,
Katy Hitchins

KATHLEEN HITCHINS
Associate

Sidley Austin LLP
+1.202.736.8420
khitchins@sidley.com

From: patrick.marecki@bakerbotts.com [<mailto:patrick.marecki@bakerbotts.com>]
Sent: Wednesday, February 25, 2015 11:12 AM
To: Hitchins, Kathleen; douglas.henkin@bakerbotts.com; Seth.Taube@bakerbotts.com; joseph.perry@bakerbotts.com; ssusman@susmangodfrey.com; jbuchdahl@susmangodfrey.com; JLipton@gibsondunn.com; ATayrani@gibsondunn.com; DSwanson@gibsondunn.com; MPhan@gibsondunn.com; JLigtenberg@gibsondunn.com
Cc: Warden, Michael D.; Rogers, HL; McArthur, Eric; Schiller, Lowell; Young, Jeffrey J.
Subject: RE: SIFMA First Subpoena Response, Admin. Proc. File No. 3-15350

Kathleen:

We write to raise several issues of non-compliance regarding SIFMA's responses to the Subpoena dated January 5, 2015. This email is not exhaustive, and we reserve all rights to raise additional issues of non-compliance.

First, the Subpoena requires the production of all responsive documents in the possession of SIFMA. Please confirm whether any of the nine Relevant Members identified in Response to Request No. 16 have at any point provided SIFMA or its counsel with any documents that would be responsive to the Subpoena (leaving aside for the moment the assertions by SIFMA that it does not control its members). If any Relevant Member has provided SIFMA or its counsel with such documents then SIFMA's response to the Subpoena is deficient and must be supplemented immediately.

Second, SIFMA's response states that "it cannot compel the production of documents responsive to the Subpoena from its members" despite its previous ability to convince nine of its members to submit jurisdictional declarations on SIFMA's behalf. Please describe what efforts you undertook to obtain documents from SIFMA members, including by (i) identifying all SIFMA members from whom you sought compliance with the Subpoena and Chief ALJ Murray's Order; (ii) describing those efforts; and (iii) providing the basis for each such SIFMA member's refusal to produce documents.

Third, Relevant Members are defined as "(i) all SIFMA members who provide documents or communications for reliance by SIFMA's fact or expert witness(es), (ii) those SIFMA members from whom SIFMA will present evidence or testimony, and (iii) the nine SIFMA members who submitted jurisdictional declarations." Please confirm that no SIFMA Member, including the nine members listed in response to Request No. 16, have (i) provided documents or communications to SIFMA's fact or expert witnesses or (ii) will present evidence or testimony. If any SIFMA member has met either of these conditions then SIFMA's response to the Subpoena is deficient and must be supplemented immediately.

Finally, SIFMA's responses to Request Nos. 9 and 15 indicate that SIFMA has responsive documents in its possession, custody, or control over which it is asserting a claim of privilege. Please produce a privilege log of all such documents immediately.

We ask that you provide us with responses by 1:00 pm EST on February 27, 2015.

Best,
Patrick

From: Hitchins, Kathleen [<mailto:khitchins@sidley.com>]

Sent: Monday, February 23, 2015 8:27 PM

To: Henkin, Douglas; Taube, Seth T.; Perry, Joseph C.; Marecki, Patrick; ssusman@susmangodfrey.com; jbuchdahl@susmangodfrey.com; JLipton@gibsondunn.com; ATayrani@gibsondunn.com; DSwanson@gibsondunn.com; MPhan@gibsondunn.com; JLigtenberg@gibsondunn.com

Cc: Warden, Michael D.; Rogers, HL; McArthur, Eric; Schiller, Lowell; Young, Jeffrey J.

Subject: SIFMA First Subpoena Response, Admin. Proc. File No. 3-15350

Dear Counsel:

Attached please find an electronic copy of the Securities Industry and Financial Market Association's First Response to the Subpoena *Duces Tecum* of Nasdaq Stock Market LLC and NYSE Arca, Inc. The response is also being served on the Exchanges via first class mail.

Sincerely,
Katy Hitchins

KATHLEEN HITCHINS
Associate

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Washington, DC 20005
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SIDLEY AUSTIN LLP

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Exhibit E

Espinoza, Boris

From: Marecki, Patrick
Sent: Thursday, March 12, 2015 5:09 PM
To: 'Hitchins, Kathleen'
Cc: Henkin, Douglas; Taube, Seth T.; Perry, Joseph C.; ssusman@susmangodfrey.com; jbuchdahl@susmangodfrey.com; JLipton@gibsondunn.com; ATayrani@gibsondunn.com; DSwanson@gibsondunn.com; MPhan@gibsondunn.com; JLigtenberg@gibsondunn.com; Warden, Michael D.; Rogers, HL; McArthur, Eric; Schiller, Lowell; Young, Jeffrey J.
Subject: RE: SIFMA Privilege Log, Admin. Proc. File No. 3-15350

Katy:

SIFMA's privilege log is wholly inadequate. Among other deficiencies, SIFMA's privilege log fails to log any individual documents, instead grouping them into just two entries, one of which spans almost six months. Such blanket assertions of privilege are improper. *See, e.g.,* Subpoena Instruction 13 (requiring each document to be logged with information sufficient to evaluate the claim of privilege); *In the Matter of Keith M. Roberts*, Order on Motions To Quash Subpoenas, File No. 3-11471 (July 14, 2014) (Murray, J.) (ordering production of a privilege log "that identifies each document covered by the subpoena that [the party] has withheld, the legal basis for withholding the material, and a factual description that supports each claim.")

Please produce a proper log that individually identifies all documents over which SIFMA is asserting privilege by 5:00 pm on March 13, 2015.

NYSE Arca reserves all rights, including with respect to whether SIFMA's claims of privilege have been preserved.

Best,
Patrick

From: Hitchins, Kathleen [<mailto:khitchins@sidley.com>]
Sent: Wednesday, March 11, 2015 9:57 AM
To: Marecki, Patrick
Cc: Henkin, Douglas; Taube, Seth T.; Perry, Joseph C.; ssusman@susmangodfrey.com; jbuchdahl@susmangodfrey.com; JLipton@gibsondunn.com; ATayrani@gibsondunn.com; DSwanson@gibsondunn.com; MPhan@gibsondunn.com; JLigtenberg@gibsondunn.com; Warden, Michael D.; Rogers, HL; McArthur, Eric; Schiller, Lowell; Young, Jeffrey J.
Subject: SIFMA Privilege Log, Admin. Proc. File No. 3-15350

Patrick:

Attached please find SIFMA's privilege log provided in response to NYSE Arca's inquiry concerning such a log.

Best,
Katy

KATHLEEN HITCHINS
Associate