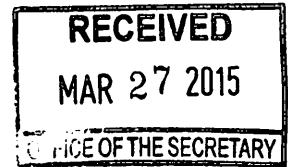


UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



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

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

SIFMA's response to NYSE Arca, Inc. and the Nasdaq Stock Market LLC's Motion for Order Finding that SIFMA Waived Privilege and Compelling Production of Documents Withheld as Privileged (the "Motion") fails to overcome its much-delayed failure to produce *any* documents that were called for by the Subpoena:¹

- SIFMA acknowledges that the privilege log it produced fails to meet the Subpoena requirement that it log every document withheld as privileged. *See* SIFMA's Opposition to the Exchanges' Motion for an Order Finding Waiver of Privilege and Compelling Production (March 26, 2015) ("Opposition") at 1-2.
- SIFMA's assertion of privilege is facially deficient. It did not assert privilege (let alone common interest) in its "privilege log" for many documents it has withheld, and it does not acknowledge an entire category of such documents in the Opposition.

SIFMA should be compelled to produce all documents it wrongfully has withheld as privileged.

ARGUMENT

I. SIFMA's Categorical Privilege Log is Improper and Does Not Assert Privilege Over Communications With SIFMA Members

SIFMA's assertion that it satisfied its obligations under the Subpoena with a two-entry "categorical" privilege log (belatedly produced 9 weeks after the Subpoena was served) lacks merit. By SIFMA's own admission, a valid "categorical privilege log provides descriptions of documents withheld as privileged in terms of document categories rather than on a document-by-document basis." *See* Opposition at 1 n. 1.

First, as explained in the Motion, SIFMA's "privilege log" ignores completely that SIFMA asserted privilege over documents having nothing to do with the jurisdictional declarations. *See* Motion Exh. A at 5 (response to Request No. 9) ("SIFMA has identified no non-privileged documents responsive to this Request in its possession, custody, or control."). Not surprisingly, the "privilege log" does not contain any description of documents that

¹ Capitalized terms not defined herein have the meanings set forth in the Motion.

identifies, for each Relevant Member, the exchanges from which the Relevant Member purchases or obtains depth-of-book products, the depth-of-book products purchased, and the fees paid by the Relevant Members for those products. *See* Subpoena Request No. 9. Indeed, the Opposition concedes this by focusing entirely on the preparation of jurisdictional declarations, to which Request No. 9 does not relate. SIFMA's failure to identify (let alone categorize) *any* purportedly privileged documents responsive to Request No. 9 waives any privilege. *See Lohrenz v. Donnelly*, 187 F.R.D. 1, 6-7 (D.D.C. 1999).

Second, the "privilege log" does not assert privilege over communications with SIFMA members. On its face, it only identifies communications among SIFMA counsel. *See* Motion Exh. B (column marked "SIFMA Attorneys (Author, Recipient, Custodian)"). No SIFMA members are identified as "Author, Recipient, [or] Custodian" of any documents asserted to be privileged. Thus it cannot withhold such communications.

II. The Common Interest Privilege Doctrine Does Not Apply to SIFMA's Privilege Assertions

SIFMA's claim that it shares a "common interest" with all members with which it may have communicated is belied by its conduct in this proceeding.

- SIFMA's counsel has stated that it does not represent SIFMA's members in this proceeding and cannot compel its members to produce documents. *See* Application of SIFMA To Quash Or, In The Alternative, To Subpoena Duces Tecum at 7 (Jan. 23, 2015) ("SIFMA has no legal right or ability to compel its Members to produce these documents").
- SIFMA has repeatedly represented that it does not control its members. *See, e.g.*, SIFMA Subpoena Response at 2 (Feb. 23, 2015) ("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 ...").

These admissions are inconsistent with an assertion of common interest privilege.

The common interest privilege “is an extension of the attorney-client privilege that protects from forced disclosure communications between two or more parties and/or their respective counsel if they are participating in a joint defense agreement.” *Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F. Supp. 2d 11, 15-16 (D.D.C 2007). The party asserting such a privilege must establish it, not merely intone the words “common interest.” In order to establish the existence of a joint defense privilege, the party asserting it must show that “(1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived.” *Id.*

Applying this standard, SIFMA has failed to meet its burden to demonstrate that it and its members entered into a common interest agreement. The mere fact that courts, in certain circumstances, have found that trade associations and its members share a common interest, does not mean that such a common interest exists in all such cases. *First*, SIFMA has produced no proof that a written or oral agreement was entered into between it and its members.² This is not surprising, given SIFMA’s longstanding efforts to distance itself from its members as a means to thwart discovery by the Exchanges. *Second*, SIFMA’s prior admissions that it “does not control” or “exchange information (with)” its members undermines claims of a “joint” effort (as does the fact that SIFMA claims that its proffered experts submitted their reports without relying on any documents from SIFMA members). *Third*, as noted above, SIFMA waived any such privilege since it did not identify communications with any of its members on its “privilege log.”

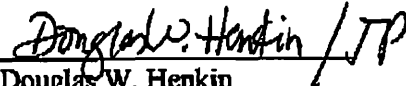
² The cases relied upon by SIFMA do not support its position. For example, in *A&R Body Specialty & Collision Works, Inc. v. Progressive Cas. Ins. Co.*, No. 3:07CV929 (WWE), 2013 WL 6044333, at *10-11 (D. Conn. Nov. 14, 2013), the court examined documents submitted *in camera* and determined that a common interest privilege existed among trade association counsel and members. No such documents or evidence of a “common interest” were produced here.


SIFMA cannot have it both ways. It cannot (i) fail to produce *any* documents on the grounds that it is not in “possession, custody, or control” of its members’ documents while (ii) asserting that it is not required to produce documents it apparently does possess on common interest grounds. SIFMA’s about-face on this issue is an attempt to deprive the Exchanges of discovery that they are entitled to under the Subpoena. SIFMA should therefore be directed to produce all the documents withheld on the basis of privilege immediately.

CONCLUSION³

For all the foregoing reasons and those set forth in the Motion, the Exchanges respectfully request that Your Honor enter an order finding that SIFMA has waived the privileges it asserted and compelling the immediate production of all documents withheld as privileged.

Respectfully submitted,


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Eugene Scalia

³ Although it is not necessary to grant the Motion, the Exchanges note that the Motion was served on SIFMA’s counsel by hand on March 18, 2015, as well as with courtesy copies by email (as shown on the email transmittal of the Motion to Your Honor). An employee of Sidley Austin’s Washington, DC office, Terry McCarthy, acknowledged hand delivery of the Motion and signed for it at approximately 12:44 PM on March 18. See Exhibit A. Under the Commission’s Rules of Practice, SIFMA was thus required to respond to the Motion by March 25, 2015. See 17 C.F.R. §§ 201.154(b); 201.160. That the certificate of service attached to the Motion erroneously omitted that service had also been completed by hand does not change the fact that it was.

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Dated: March 27, 2015

CERTIFICATE OF SERVICE


I hereby certify that on March 27, 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 as follows:

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549
(via facsimile to 202-772-9324)

W. Hardy Callcott
Sidley Austin LLP
555 California Street, Suite 2000
San Francisco, CA 94104
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Michael D. Warden
HL Rogers
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Washington, DC 20005
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Dated: March 27, 2015



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EXHIBIT A

COPY

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**

Sign: T. M. Clancy

Date +
Time:

3/15/15

Perry, Joseph C.

Subject: FW: Shipment 2065310 Notification

From: wex@e-courier.com [mailto:wex@e-courier.com]

Sent: Thursday, March 26, 2015 3:55 PM

To: Lewis, Ralph

Subject: Shipment 2065310 Notification

Washington Express LLC || Order #2065310 Notification

Account Name: Baker Botts

Account #: 10225

Order Placed by: Ralph Lewis

Order Number: 2065310

Vehicle Type: Any

Service Type: B30

Pieces: 1

Weight: 1

Ready: 3/18/2015 10:52:00 AM

Authorization Code: 070388.1342

2nd Authorization Code: 06264

Pickup Address:

Baker Botts

1299 Pennsylvania Ave NW

Suite LL

Ralph Lewis

(202) 639-7997

Washington, DC 20004

Delivery Address:

Sidley & Austin

1501 K St NW

Suite Nrn

Michael D Warden

(202) 736-8000

Washington, DC 20005

Signed By: Mccarthy

Delivered On: 3/18/2015 12:44:00 PM

Price: \$20.94

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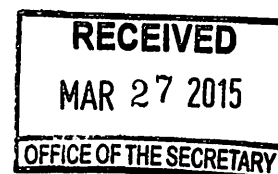
FROM **Joseph Perry**
DATE **March 27, 2015**
PAGES **11**

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FAX NO. **2122592587**
RETURN TO **Joseph Perry**

TO **Brent J. Fields**
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