UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SHELDON LANGER, RONALD M. YERMACK, LANCE R. GOLDBERG, individually on behalf of themselves and all others similarly situated, Plaintiffs, vs. CME GROUP, INC., a Delaware Corporation; THE BOARD OF TRADE OF THE CITY OF CHICAGO, INC., a Delaware Corporation, Defendants.	Case No. 1:14-cv-01240 Hon. James F. Holderman, Presiding

(CORRECTED) MEMORANDUM IN SUPPORT OF MOTION TO REMAND

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Plaintiffs Sheldon Langer, Ronald M. Yermack, and Lance R. Goldberg, individually and as representatives of a proposed class of Class B shareholders of Defendant CME Group ("CME") and Class B members of Defendant The Board of Trade of the City of Chicago ("CBOT," together with CME, "Defendants"), respectfully submit this memorandum in support of their Motion to Remand this action to the Circuit Court of Cook County Illinois, Chancery Division.

I. INTRODUCTION

The Complaint asserts a single state-law claim on behalf of a single class of CME Class B shareholders and CBOT Class B members (the "Class B Plaintiffs"), who are largely comprised of the traders who owned the two exchanges before they demutualized. The Class B Plaintiffs allege that Defendants violated the "core rights" that were enshrined in Defendants' respective certificates of incorporation (or "charters" for short) in connection with their respective corporate restructurings by (1) modifying the Class B Plaintiffs' trading rights and privileges, including their right to the best and most proximate access to the Globex electronic trading platform, without putting those changes to a vote of the Class B Plaintiffs as required by the charters, Compl. ¶¶ 6, 43, 66–67, 97, 101, 104; and (2) modifying the eligibility requirements for membership in CME and CBOT without putting those changes to a vote of the Class B Plaintiffs as required by the charters, *id.* ¶¶ 11–12, 75–77, 82, 84–88, 97, 102–04.

The Class B Plaintiffs originally filed this action in the Circuit Court of Cook County Illinois, Chancery Division. Defendants removed the case to this Court, invoking the Class Action Fairness Act ("CAFA"), 28 U.S.C. §§ 1332(d) and 1453, which creates federal diversity jurisdiction over certain class actions—with certain specified exceptions that preserve state-court jurisdiction over cases like this one. Defendants' Notice of Removal does not assert any other basis for federal jurisdiction, *see* Doc. 1, and none exists. Because Plaintiffs' claims are subject

to well-recognized exceptions to CAFA jurisdiction, Plaintiffs respectfully submit that this case should be remanded to state court.

First, this action falls squarely within the "internal affairs" exception to CAFA jurisdiction under § 1332(d)(9)(B). It arises from Defendants' violations of their respective certificates of incorporation, which define the relationship between Defendants and their shareholders and members. Because the Class B Plaintiffs' sole claim relates to Defendants' internal affairs and governance, the Court lacks jurisdiction under CAFA.

Second, this action falls within § 1332(d)(9)(C)'s exception for actions that relate to the rights, duties, and obligations relating to securities. There can be no debate that CME Class B shares are securities: CME registered them as securities, and they bear the traditional hallmarks of stock. Because the only claim asserted in the Complaint relates to the rights, duties, and obligations relating to CME Class B shares, § 1332(d)(9)(C) is satisfied and remand is required. CBOT Class B memberships also qualify as securities, but the Court does not need to reach that issue because the Class B Plaintiffs' single claim relates to CME Class B securities. Nothing more is required.

Third, this action falls within § 1332(d)(4)'s "home state" exception because Defendants are citizens of Illinois and the available evidence confirms that at least two-thirds of the putative Class members likely also are citizens of Illinois.

Fourth, if the Court determines that less than two-thirds of the putative Class members likely are citizens of Illinois, then it is likely that between one-third and two-thirds of putative Class members are citizens of Illinois. Because the factors enumerated in § 1332(d)(3) each favor remand, the Court should remand in the "interests of justice."

II. STANDARD OF REVIEW

The Class B Plaintiffs bear the burden of demonstrating that an exception to CAFA jurisdiction applies. *See Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 619 (7th Cir. 2012). For purposes of the "home state" exception, Plaintiffs satisfy their burden if they show that it is "more likely than not" that two-thirds of the putative Class members are citizens of Illinois. *In re Sprint Nextel Corp.*, 593 F.3d 669, 676 (7th Cir. 2010).

If the Court finds that either the internal affairs or securities exceptions apply, then CAFA jurisdiction "shall not apply," and the Court must remand. 28 U.S.C. § 1332(d)(9)(B)–(C). Similarly, the Court "shall decline to exercise jurisdiction" under CAFA if this case falls within the home-state exception. *Id.* § 1332(d)(4). The Court "may" decline to exercise jurisdiction if this case falls within the interests of justice exception. *Id.* § 1332(d)(3).

The Seventh Circuit reads "the exceptions in § 1332(d) and § 1453(d) ***without a presumption*** for either remanding or retaining jurisdiction. We try to give the statutory language a natural meaning in light of its context, without a thumb on the scale." *LaPlant v. Nw. Mut. Life Ins. Co.*, 701 F.3d 1137, 1139 (7th Cir. 2012).[1]

III. ARGUMENT

A. This action falls within the "internal affairs" exception to CAFA jurisdiction.

In 28 U.S.C. §§ 1332(d)(9)(B) and 1453(d)(2),[2] Congress expressly excluded from CAFA jurisdiction a category of cases traditionally left to state regulation: those related to "the internal affairs or governance" of corporations. Section 1332(d)(9)(B) excludes from CAFA

[1] Unless otherwise indicated, all emphases in this brief have been added.

[2] Sections 1332(d)(9)(B) and 1453(d)(2) are materially identical. Section 1332(d)(9)(B) governs original jurisdiction, and § 1453(d)(2) governs appellate jurisdiction. *See BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assur. Corp.*, 673 F.3d 169, 176 (2d Cir. 2012). Nonetheless, Plaintiffs move under both statutory provisions to the extent that some courts have relied on § 1453(d)(2) to determine when remand is appropriate.

jurisdiction, "any class action that solely involves a claim . . . that relates to the internal affairs or governance of a corporation . . . and that arises under or by virtue of the laws of the State in which such corporation . . . is incorporated." *Id.* Plaintiffs assert a single claim arising under and by virtue of Delaware law, and the source of Plaintiffs' rights are Defendants' Delaware certificates of incorporation—the documents at the heart of Defendants' internal affairs and corporate governance. Accordingly, this action falls squarely within the internal affairs exception and therefore must be remanded.

1. This action "solely involves" a claim that relates to Defendants' "internal affairs or governance."

In enacting § 1332(d)(9)(B), "Congress did not define 'internal affairs', but neither did it signal a departure from that term's ordinary meaning, which the Supreme Court restated in *Edgar*: 'matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders.'" *LaPlant*, 701 F.3d at 1139–40 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982)); *see also* S. REP. 109-14 at 45 & n.129 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3 (citing *Edgar*, 457 U.S. at 645).[3]

The Class B Plaintiffs were affected solely in their capacity as Class B shareholders/members. *See Ellis v. Mutual Life Ins. Co.*, 187 So. 434, 443 (Ala. 1939) (concluding that "where the act complained of affects the complainant solely in his capacity as a member of the corporation . . . and is the act of the corporation . . . then such action is the management of the internal affairs of the corporation"), *cited in* S. REP. 109-14 at 45 n.129. That is precisely why Class B shareholder/member status is required for membership in the proposed class. *See* Compl. ¶¶ 23–26 (class definition). Because this case involves "matters peculiar to the relationships among or between the corporation and its current officers, directors, and

[3] The Seventh Circuit has looked to the Senate Report in construing CAFA. *See, e.g., Appert*, 673 F.3d at 618, 620, 622.

shareholders," it is subject to the internal affairs doctrine, *Edgar*, 457 U.S. at 645, and, by extension, the internal affairs exception to CAFA jurisdiction.

In addition, the Class B Plaintiffs' claim arises from and turns on the interpretation of Defendants' respective certificates of incorporation, which define the relationships, rights, and duties between Defendants and the Class B Plaintiffs. The Class B Plaintiffs allege that Defendants violated the "core rights" that were enshrined in Defendants' corporate charters in connection with their respective corporate restructurings by (1) modifying the Class B Plaintiffs' trading rights and privileges, including the best and most proximate access to the Globex electronic trading platform, without putting those changes to a vote of the Class B Plaintiffs as required by the charters, Compl. ¶¶ 6, 43, 66–67, 97, 101, 104; and (2) modifying the eligibility requirements for membership in CME and CBOT without putting those changes to a vote of the Class B Plaintiffs as required by the charters, *id.* ¶¶ 11–12, 75–77, 82, 84–8, 97, 102–04. Disputes relating to the terms of a certificate of incorporation fall squarely within the province of the internal affairs doctrine. *See Wolfe v. Weiss*, 2013 WL 591977, at *2 (N.D. Ohio Feb. 14, 2013); *Aboushanab v. Janay*, 2007 WL 2789511, at *4 (S.D.N.Y. Sept. 26, 2007).

Furthermore, this case implicates the Class B Plaintiffs' right to vote and approve certain matters that affect their core rights as Class B shareholders/members. Shareholder voting and approval rights are internal affairs. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders."); *Robertshaw v. Pudles*, 2013 WL 3976284, at *18 (E.D. Pa. Aug. 5, 2013) (recognizing that voting rights associated with shares is an internal affairs matter); *Nano-*

Proprietary, Inc. v. Canon Inc., 2006 WL 6058423, at *5 (W.D. Tex. Nov. 14, 2006) ("Shareholder voting rights would ordinarily fall squarely within the internal affairs doctrine.").

The Class B Plaintiffs' claim implicates several other issues relating to the internal affairs and governance of Defendants. The Restatement of Conflict of Laws, which the Seventh Circuit and Illinois state courts follow,[4] identifies several non-exclusive examples of internal affairs that are subject to the doctrine:

> Matters . . . which involve primarily a corporation's relationship to its shareholders include ***steps taken in the course of the original incorporation***, the election or appointment of directors and officers, the adoption of by-laws, ***the issuance of corporate shares***, preemptive rights, the holding of directors' and shareholders' meetings, methods of voting including requirement of cumulative voting, shareholders' rights to examine corporate records, ***charter*** and by-law ***amendments***, ***mergers***, consolidations and ***reorganizations*** and the reclassification of shares.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. a (1971). Although these matters are illustrative and not definitive, the Class B Plaintiffs' claim implicates several of them. The background for the Class B Plaintiffs' claim is CME's and CBOT's respective demutualizations and "reorganizations," including "steps taken in the course of the original incorporation" of CME, *see* Compl. ¶¶ 40–57, amendments to CBOT's charter, *see id.* ¶ 65, and "the issuance of corporate shares" and memberships in both entities, *see id.* ¶¶ 59, 64. The 2007 merger of CME and CBOT and the associated amendment of their respective charters also figures prominently in the Class B Plaintiffs' claim. *See id.* ¶¶ 68–74.

[4] *See CDX Liquidating Trust v. Venrock Associates*, 640 F.3d 209, 212 (7th Cir. 2011); *Nagy v. Riblet Products Corp.*, 79 F.3d 572, 576 (7th Cir. 1996); *Resolution Trust Corp. v. Chapman*, 29 F.3d 1120, 1122–23 (7th Cir. 1994); *Jano Justice Sys., Inc. v. Burton*, 2010 WL 2012941 (C.D. Ill. May 20, 2010) ("Illinois has adopted the Restatement (Second) of Conflict of Laws."); *Ormond v. Anthem, Inc.*, 2009 WL 3163117, at *10 (S.D. Ind. Sept. 29, 2009).

Former Chief Judge Hamilton's decision in *Ormond v. Anthem, Inc.*, the only case in this circuit addressing the "internal affairs" doctrine in the context of demutualization, is highly instructive. *See* 2009 WL 3163117 (S.D. Ind. Sept. 29, 2009). There, the "[p]laintiffs were policyholders in a mutual insurance company who then received compensation as the mutual company went through the legal alchemy of demutualization and was transformed into a publicly traded stock corporation." *Id*. at *9. The plaintiffs sued the insurance company, Anthem, asserting breach of contract and negligence claims based on Anthem's demutualization. *Id*. at *1. Judge Hamilton found that these claims were "closely analogous to claims by shareholders against a corporation." *Id*. at *9. He ruled that "[t]he reasoning behind the internal affairs doctrine extends to plaintiffs' claims here for negligence and breach of contract where both types of claims arise from the plaintiffs' relationship with Anthem in the demutualization process." *Id*. at *10.

The Class B Plaintiffs' claim arises in the same context as in *Ormond*. Plaintiffs were member–owners of CME and CBOT before their demutualizations and received Class B shares/memberships, which are governed by Defendants' certificates of incorporation (along with their respective bylaws and rules). As in *Ormond*, the Class B Plaintiffs' claim, which "arises from their relationship" with Defendants "in the demutualization process," is covered by the internal affairs doctrine. *Id*.

Because the Class B Plaintiffs' sole claim relates to Defendants' internal affairs or governance, the "solely involves" requirement of 28 U.S.C. § 1332(d)(9) is satisfied. *See Becher v. Nw. Mut. Life Ins. Co.*, 2010 WL 5138910, at *5 (C.D. Cal. Dec. 9, 2010) ("The only claims in this case are the breach of contract and breach of fiduciary duties claims [which both] relate to the 'internal affairs' of the corporation. . . . There are no additional claims unrelated to the

internal affairs of the corporation that would deviate from the exclusivity ('solely') requirement in the applicable CAFA provision.").

2. Plaintiffs' claim "arise[s] under" and "by virtue of" Delaware law.

If the Court determines that the Class B Plaintiffs' claim relates to Defendants' internal affairs, then it necessarily follows that the claim is governed by the law of Delaware, Defendants' state of incorporation. *See* Doc. 1 ¶ 8(b) (Notice of Removal) (stating that Defendants are organized under Delaware law). The internal affairs doctrine is, after all, "a choice-of-law principle calling for resort to the law of the firm's place of incorporation." *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1019 (7th Cir. 1995); *see also Nagy*, 79 F.3d at 576 ("[T]he corporate charter is a species of contract, and selecting a state of incorporation then is no different from putting a choice-of-law clause in a complex commercial contract.").

The Illinois state court will apply Delaware law to this action because Illinois adheres to the internal affairs doctrine. 805 ILCS 5/13.05 ("[N]othing in this Act shall be construed to authorize this State to regulate the organization or the internal affairs of such corporation [chartered in another jurisdiction]"); *see also Resolution Trust Corp.*, 29 F.3d at 1122–23 (7th Cir. 1994) ("Illinois adheres to this [internal affairs] principle."). Thus, Delaware law would apply to the Class B Plaintiffs' claim in Illinois state court. *See, e.g.*, *Newell Co. v. Petersen*, 325 Ill. App. 3d 661, 687 (2001) (applying Delaware law to claims concerning internal affairs of Delaware corporation).

Accordingly, the Class B Plaintiffs' claim "arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized." 28 U.S.C. § 1332(d)(9)(B). This action therefore falls within the internal affairs exception, which defeats

jurisdiction under CAFA. *See, e.g.*, *Wolfe*, 2013 WL 591977, at *2 (holding that CAFA's "internal affairs" exception applied and dismissing case for lack of jurisdiction where defendant corporation was organized under Ohio law and plaintiff's claim was governed by Ohio law). The Court should remand this action for this reason alone.

B. This action falls within one of the "securities" exceptions to CAFA jurisdiction.

Under 28 U.S.C. § 1332(d)(9)(C), CAFA jurisdiction "shall not apply to any class action that solely involves a claim . . . that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. § 77b(a)(1)) and the regulations issued thereunder." *See also* 28 U.S.C. § 1453(d)(3). This is precisely such an action.

1. The shares of CME Class B common stock are securities.

Section 1332(d)(9)(C) incorporates the definition of "security" under the Securities Act of 1933 ("1933 Act"), as codified at 15 U.S.C. § 77b(a)(1). That definition is extremely broad:

> The term "security" means any note, ***stock***, treasury stock, ***security future***, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, ***transferable share***, ***investment contract***, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, ***any put, call, straddle, option, or privilege on any security***, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or ***right to subscribe to or purchase, any of the foregoing***.

15 U.S.C. § 77b(a)(1).

CME's Class B common stock qualifies as a security in at least two ways. First, it is "stock" and has all the traditional features of stock. Class B shareholders are entitled to receive dividends and other distributions to the same extent as Class A shareholders and enjoy the same liquidation rights. *See* Ex. A §§ 3, 5 (CME Certificate of Incorporation).[5] Second, CME Class B Common Stock takes the form of "transferable share[s]." Ex. B at 26 (CME 10-K for FY2013) ("Class B shares and the associated trading rights are bought and sold or leased through our shareholder relations and membership services department.").[6]

According to CME's SEC filings, all series of CME Class B Common Stock are registered as securities. *See* Ex. B at 1. CME's acknowledgement to the SEC that shares of its Class B common stock are securities forecloses any argument here that they are not.

2. This action relates to the rights, duties, and obligations relating to CME Class B shares.

The securities exception applies to suits that enforce "the terms of the instruments that create or define securities or on the duties imposed on persons who administer securities." *Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23, 28 (2d Cir. 2010), *followed by Appert*, 673 F.3d at 621. Certificates of incorporation are such instruments. *Id.* (citing *Estate of Pew v. Carderelli*, 527 F.3d 25, 31 (2d Cir. 2008); S. REP. 109-14, at 45 (confirming that the securities exception is "intended to cover disputes over the meaning of the terms of a security, which is generally spelled out in some formative document of

[5] *See also* Ex. A § 2 ("Except as otherwise set forth in this Division B, the relative powers, preferences and participating, optional or other special rights, and the qualifications, limitations or restrictions of each class of Common Stock shall be identical in all respects."); Ex. B at 26 (CME 10-K) (stating that the "Class B shares have the same equitable interest in [CME's] earning and the same dividend payments as our Class A shares"); Ex. C (press release announcing special dividend payment to Class B shareholders).

[6] In the event Defendants dispute that CME Class B shares are securities, the Class B Plaintiffs reserve the right to demonstrate that CME Class B shares qualify as securities for the same reasons explained below in connection with CBOT Class B memberships: they are "investment contracts," and they give their holders the right to purchase securities. *See* Section III(B)(4) below.

the business enterprise, ***such as a certificate of incorporation*** or a certificate of designations.") As explained in Section III(A)(1) above, this action seeks to enforce the terms of CME's certificate of incorporation and the rights of CME Class B shareholders in their capacity "as holders." *Cardarelli*, 527 F.3d at 32. Accordingly, this action relates to the rights, duties, and obligations relating to or created by or pursuant to CME Class B shares.

3. This action "solely involves a claim" that relates to the rights, duties, and obligations relating to the CME Class B shares.

For the reasons explained above, the Class B Plaintiffs' claim relates to the rights, duties, and obligations relating to a security (namely, CME Class B shares). That is the only claim asserted in the Complaint, and that single claim is asserted on behalf of a single class. Accordingly, for purposes of § 1332(d)(9)'s prefatory phrase, this action "solely involves a claim" that relates to the rights, duties, and obligations relating to a security. *See Rubin v. Mercer Ins. Grp., Inc.*, No. 10–6816 (MLC), 2011 WL 677466, at *3 (D.N.J. Feb. 15, 2011) (holding that a case "solely involves" claims concerning a security under Section 1332(d)(9)(A) where the plaintiff alleged "no claims *not* relating to" the security) (emphasis in original)).

As the Second Circuit explained:

> Needless to say, the phrase "solely involves" cannot be stretched so far as to limit the exception in §§ 1332(d)(9) and 1453(d) to class actions that raise no collateral issues and for which there are no affirmative defenses. [An] interpretation of the prefatory phrase "solely involves" as strictly limiting CAFA's jurisdictional exceptions is especially unpersuasive in the light of the expansive language of the exceptions themselves. Sections 1332(d)(9)(A) and 1453(d)(1) exempt from CAFA jurisdiction any claim "*concerning* a covered security," (emphasis added), while § 1332(d)(9)(B) and (C), as well as § 1453(d)(2) and (3), use the equally broad phrase "relates to." If Congress had intended these provisions to apply only to class actions that involve no legal issues extraneous to the primary claim, they would have used

> language that was more clearly limiting. Furthermore, we must reject an interpretation of the statutory text that would render the jurisdictional exception of §§ 1332(d)(9)(C) and 1453(d)(3) nugatory.

Greenwich, 603 F.3d at 31.

The Seventh Circuit construed this provision similarly in rejecting a defendant's argument that a plaintiff's claim did not "solely" involve a security. *See Lincoln Nat. Life Ins. Co. v. Bezich*, 610 F.3d 448, 451 (7th Cir. 2010) (holding that if the life insurance policies at issue in the case met the definition of a "security" under CAFA, then there could be no argument that a claim for breaching the terms of those policies did not "solely" involve a "security").

All the requirements of § 1332(d)(9)(C) are satisfied: This action (1) solely involves a claim that (2) relates to rights, duties, and obligations relating to (3) a security. This by itself defeats CAFA jurisdiction and mandates remand.

4. The CBOT Class B memberships also are securities.

Because the single claim in this action involves a claim that relates to rights, duties, and obligations of CME Class B shares, which are securities for the reasons explained above, the Class B Plaintiffs respectfully submit that the Court does not need to decide whether CBOT Class B memberships also are securities. In the event the Court reaches that inquiry, it should find that CBOT Class B memberships are securities.

The statutory definition of "security," quoted in full in Section III(B)(1) above, "is broad, encompassing 'virtually any instrument that might be sold as an investment.'" *Appert*, 673 F.3d at 620 (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990)). "[I]n searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepin v. Knight*, 389 U.S. 332, 336 (1967).

CBOT Class memberships fall within the broad, flexible definition of securities in at least two ways: They are "investment contracts," and they give their holders "the right to purchase" securities or "option[s] . . . on any security." 15 U.S.C. § 77b(a)(1).

a. CBOT Class B memberships are "investment contracts."

In *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), the Supreme Court held that "an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . . ." *Id.* at 298–99. "The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852 (1975). "Profits" means both income and "return," including "increased value of the investment." *SEC v. Edwards*, 540 U.S. 389, 394 (2004).

CBOT Class B memberships satisfy the *Howey* test. The "common enterprise" dates back to CBOT's founding in 1848. From that time until its demutualization in 2005, CBOT was owned and managed by and for its members. Compl. ¶ 63; Ex. D at 113, 127. Class B memberships are bought and sold just like any other security. In fact, Defendants' own website provides information about bids, offers, and last sale prices for CBOT Class B memberships. Ex. E.[7] The price to buy or lease memberships fluctuates over time. *See, e.g.*, Ex. D at 128–29 (CBOT membership prices for 1998–2004). Members profit from any appreciation of their investment when they sell or lease their memberships.

Defendants may argue that CBOT Class B memberships are not investment contracts because Class B members can profit through their own trading activity, which is not the "efforts

[7] *Available at* http://www.cmegroup.com/company/membership-pricing-cbot.html (last visited Mar. 21, 2014).

of others." That argument ignores economic reality. No doubt CBOT Class B members can profit through trading activity. Such profits, however, do not derive from the "investment in a common venture" (*i.e.*, the purchase of a Class B membership), but rather from the purchase or sale of futures, options, or other exchange-traded products in separate and singular transactions. Although trading profits are produced by the trader's efforts, appreciation in the value of his membership is not. The price that a membership may fetch through sale or lease depends upon the "efforts of others"—specifically, the management of CME and CBOT. As alleged in the Complaint, the value of the Class B Plaintiffs' exchange seats diminished as a result of Defendants' actions:

- "The languishing value of the Class B Plaintiffs' seats since the beginning of 2012 stems from the fact that the previously liquid and lucrative market for leasing the trading rights and privileges associated with Class B memberships has been substantially destroyed." Compl. ¶ 8.

- Specifically, "[s]ince the opening of the ADC in January 2012, the value of the Class B Plaintiffs' shares has decreased substantially, even as the market capitalization of CME and the value of its Class A shares has increased dramatically." *Id.* ¶ 89. "[T]he Class B Plaintiffs have suffered hundreds of millions of dollars in damages as a result of the diminished value of their memberships and the loss of lease revenues that they otherwise would have earned and would continue to earn if they had been allowed to co-locate at the ADC without paying an access fee." *Id.* ¶ 105. "[T]he value of their shares will not recover, if they are not allowed to co-locate at the ADC without having to pay an access fee. *Id.* ¶ 92.

- "The Class B Plaintiffs have also suffered a further diminished share value and diminution in lease income and as a result of CME's failure to compel ECM-Ws and other non-member customers to purchase or lease Class B memberships, and as a

> result of CME's granting of preferential fees to ECMs and other non-member customers." *Id.* ¶ 11; *see also id.* ¶¶ 11, 88, 105.[8]

Any doubt that CBOT Class B memberships are investments is removed by the New York Supreme Court's decision regarding seats on the New York Stock Exchange:

> A seat on the NYSE is the ultimate security; it clearly meets [the *Howey*] test. The New York Stock Exchange traces its origins to 1792, when 24 New York City stockbrokers and merchants signed the Buttonwood Agreement. This agreement set in motion the NYSE's unwavering commitment to investors and issuers by creating a market for the fair and orderly exchange of securities. Thus, the creation of the NYSE itself satisfies the "common enterprise premised on the reasonable expectation of profits requirement. Further, the value of the seat is derived from the "efforts" of brokers and traders driving the stock market, by trading a volume of securities,[9] adding new companies to the exchange, and making a profit from each trade.
>
> However, the most telling evidence that the seat is a security is Ms. Wey's own testimony. Mrs. Wey purchased her seat from her father on May 18, 2000 for $1.1 million. The seat was sold by her father and purchased by Mrs. Wey as an "investment opportunity" in the New York Stock Exchange. The scope of the securities laws are meant to encompass such an investment.

Wey v. The New York Stock Exchange, Inc., 2007 WL 4101655 (N.Y. Sup. Ct. Nov. 7, 2007) (internal citations omitted).[10]

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[8] *See also* Compl. ¶74 (alleging that Defendants' demutualizations unlocked value for exchange seats).

[9] *Accord* Compl. ¶79 ("In prior conversations with Yermack and other Class B Plaintiffs between 2010 and 2013, [CME Executive Chairman Terrence A.] Duffy had repeatedly claimed that the value of Class B memberships and the lease revenues that could be generated from Class B memberships was linked to the overall trading volume at the exchange, and that the value of Class B memberships would appreciate as volume increased.").

[10] The Class B Plaintiffs have found only one case (unpublished, out-of-circuit, and twenty-five years old) with any suggestion that seats on an exchange may not be "securities," and the case is easily distinguished. *See Ferreri v. Goldberg Sec., Inc.*, 1989 WL 11073 (E.D. Pa. Feb. 7, 1989). The plaintiff in *Ferreri* owned two seats on the Philadelphia Stock Exchange and sued a defendant clearing firm when the firm allegedly interfered with the sale of his seats to a third party. *Id*. at *1–3. The court did not

So, too, this Court should conclude that the CBOT Class B memberships are securities and remand this action to state court pursuant to 28 U.S.C. § 1332(d)(9)(C).

b. CBOT Class B memberships qualify as a right to purchase security futures and options on security futures.

The definition of "security" includes "security futures." 15 U.S.C. § 77b(a)(1). "Security future" means "a contract of sale for future delivery of a single security or of a narrow-based security index . . . ." 15 U.S.C. § 78c(a)(55)(A) (1934 Act); *id.* § 77b(a)(16) (incorporating this definition into the 1933 Act).

CBOT Class B memberships are securities because they give members the right to purchase security futures and options on security futures. *See id.* § 77b(a)(1) (security includes "right to purchase . . . any of the foregoing"). For example, CBOT Series B-1 and B-2 members have the right to trade all of CBOT's financial futures products, including futures contracts on single stocks. *See* Ex. F;[11] Ex. G, CBOT Rule 34100 *et seq.* (Single Stock Futures).[12] In addition, CBOT Series B-1, B-2, and B-4 members may trade index futures, including narrow-based stock indexes. *See* Ex. G, CBOT Rule 120 (Series B-1, B-2, and B-3 members may trade products assigned to the Government Instruments Market); *id.*, CBOT Rule 35100 *et seq.* (Narrow Based Stock Index Futures). CBOT Series B-1, B-2, and B-3 members may trade futures on U.S. treasury bonds, which constitute security futures. *See id.*, CBOT Rule 120 (Series B-1, B-2, and B-4 members may trade products assigned to the Index Debt and Energy

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evaluate the nature of the exchange seats or whether they should be consistently characterized as securities. Rather, the court looked to plaintiff's proposed seat sale in the context of that transaction and found that plaintiff and the defendant clearing firm were not co-venturers under *Howey*. *Id.* at *2–3. The court's analysis suggests nothing about the nature of exchange seats generally, and the analysis is wholly inapplicable to the relationship between Class B members and CBOT, which have been engaged in a "common enterprise" for 165 years.

[11] *Available at* http://www.cmegroup.com/company/membership/types-of-membership-cbot.html (last visited Mar. 21, 2014).

[12] *Available at* http://www.cmegroup.com/rulebook/CBOT (last visited Mar. 21, 2014).

Market); *id.*, CBOT Rule 18100 *et seq.* (U.S. Treasury Bond Futures). They also may trade options on such bond futures. *See, e.g.*, *id.*, CBOT Rule 40A00 (Standard Options on Long-Term U.S. Treasury Bond Futures).

The fact that CBOT Class B memberships give members the right to purchase security futures and options on security futures is yet another reason to remand this action under 28 U.S.C. § 1332(d)(9)(C) because it solely involves a claim that relates to rights, duties, and obligations relating to a security.

C. This action should be remanded pursuant to the mandatory "home-state" exception in § 1332(d)(4)(B).

"The requirements of the home-state exception are simple: if 'two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed,' the district court should decline jurisdiction." *Sprint*, 593 F.3d at 671 (quoting 28 U.S.C. § 1332(d)(4)(B)). The statutory language is mandatory: "A district court *shall* decline to exercise jurisdiction" under CAFA where the two citizenship criteria are met. 28 U.S.C. § 1332(d)(4). The only defendants in this action, CBOT and CME, are citizens of Illinois, the state in which Plaintiffs filed their Complaint. *See* Doc. 1 ¶ 8(b) (Notice of Removal). As discussed below, the available evidence demonstrates that it is more likely than not that two-thirds of the putative Class members are citizens of Illinois. *See Sprint*, 593 F.3d at 676. Section 1332(d)(4)(B) therefore requires remand.

In *Sprint*—a case which involved the precise concerns that gave rise to CAFA, *i.e.*, a case that apparently was gerrymandered in an effort to defeat federal jurisdiction and involving an alleged nationwide practice impacting Sprint Nextel customers, 593 F.3d at 671—the plaintiffs did not submit any evidence to support their argument for remand based on the home state

exception, *id.* at 673. Here, by contrast, Plaintiffs have attached to this motion evidence that 74.9% of putative Class members are citizens of Illinois. *See* Comolli Decl. ¶ 7; *see also id*. ¶ 9 (concluding with 95% level of confidence that the proportion of Illinois citizens is between 71.48% and 78.31%).

Defendants provided the Class B Plaintiffs a list of current CME Class B shareholders and CBOT Class B members. That list indicates that Class members fall into three categories: (1) individuals, (2) trusts, and (3) business entities. The Class B Plaintiffs and their expert analyzed Class citizenship along those lines.

The evidence shows that 79.2% of individuals—who make up the large majority of the Class—are citizens of Illinois, *id*. ¶¶ 4, 7, and that 73.5% of trusts are citizens of Illinois, *id*. ¶¶ 5, 7.[13] The Class B Plaintiffs have provided direct evidence of residency and provided ample evidence from which to draw the logical inference that those residents intend to remain in Illinois and are therefore citizens of Illinois. *See id*., Exs. 1 & 2 (indicating the length of time that each individual Class member and trustee of a trust Class member have resided at their current Illinois home address and often their previous home address in Illinois); *id*., Ex. 4 at 14-15 (comparing the current addresses of Class members to their addresses in 2010 and concluding that, where address information was available, 82% of individuals and 84% of trusts had maintained Illinois addresses over the past four years).

[13] Trusts are citizens of the states of which their trustees are citizens. *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006). Therefore, the Class B Plaintiffs applied a similar methodology for determining the citizenship of the listed trusts as it did for the listed individuals. Because the information provided by Defendants did not list the names of trustees—and such information is unavailable without discovery—Plaintiffs logically rely on the name of each trust (*e.g.*, John Doe for "John Doe Revocable Trust"). *See, e.g., Marvin H. Maurras Revocable Trust v. Bronfman*, 2013 WL 5348357, at *14 (N.D. Ill. Sept. 24, 2013); *Inland Mortgage Capital Corp. v. Chivas Retail Partners*, LLC, 884 F. Supp. 2d 702, 704 n.3 (N.D. Ill. 2012); *McCallum v. Bank One*, 2007 WL 2962653, at *1 (N.D. Ill. Oct. 4, 2007). This assumption is also likely to render a lower than true number of Illinois citizens because for trusts with multiple trustees, only one needs to be an Illinois citizen. Here, the Class B Plaintiffs had access to the name of only a single trustee.

Moreover, "courts have acknowledged that where a proposed class is discrete in nature, a common sense presumption should be utilized in determining whether citizenship requirements have been met." *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 573 (5th Cir. 2011). In fact, Congress specifically cautioned that "these jurisdictional determinations should be made largely on the basis of readily available information." S. REP. No. 109-14, at 44; *accord Hollinger*, 654 F.3d at 570–71.

> For example, in assessing the citizenship of the various members of a proposed class, it would in most cases be improper for the named plaintiffs to request that the defendant produce a list of all class members (or detailed information that would allow the construction of such a list), in many instances a massive, burdensome undertaking that will not be necessary unless a proposed class is certified. Less burdensome means (e.g., factual stipulations) should be used in creating a record upon which the jurisdictional determinations can be made.

S. REP. No. 109-14, at 44. The Class B Plaintiffs (with Defendants' cooperation) have gone well beyond what Congress contemplated in order to meet their minimal burden of proving putative Class members' citizenship.

Once Class Plaintiffs have put forth evidence to prove individuals' and trustees' Illinois residency, the burden shifts to Defendants to disprove those persons' intent to remain in Illinois. *See Phillips v. Wellpoint, Inc.*, 2010 WL 4877718, at *4 (S.D. Ill. Nov. 23, 2010) (noting that "evidence of residency may create a rebuttable presumption of domicile and, by implication, citizenship") (citing *District of Columbia v. Murphy*, 314 U.S. 441, 455 (1941) ("The place where a man lives is properly taken to be his domicile until facts adduced establish the contrary.")); *see also Ennis v. Smith*, 55 U.S. 400, 423 (1853) ("Where a person lives, is taken *primá facie* to be his domcil [sic], until other facts establish the contrary."); *Shelton v. Tiffin*, 47 U.S. 163, 185 (1848). The Class B Plaintiffs respectfully submit that the Court should follow the

Supreme Court's long-standing common-sense presumption and find that 79.2% of individual plaintiffs and 73.5% of trust plaintiffs are presumptively citizens until proven otherwise.

As to the remaining business entities, the evidence shows that of the 290 business entities for which information could be found, 149 (or 51.4%) are citizens of Illinois. *See* Comolli Decl. ¶ 6. Pursuant to §§ 1332(c)(1) & (d)(10), the Class B Plaintiffs determined the citizenship of each corporate entity and unincorporated association on the basis of their state of incorporation and principal place of business. *See Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 705 (4th Cir. 2010) (holding that § 1332(d)(10) "refers to all non-corporate business entities"). This percentage of business entities, when weighted along with the overwhelming number of individual Class members and trust Class members of Illinois citizenship, indicates that 74.9% of all Class members are Illinois citizens. *See* Comolli Decl. ¶ 7.

Because both Defendants are citizens of Illinois and it is more likely than not that at least two-thirds of putative Class members are Illinois citizens, the court should remand this action pursuant to 28 U.S.C. § 1332(d)(4)(B).

D. Even if the "home-state" exception does not apply, the Court should nevertheless remand this action in the "interests of justice" under § 1332(d)(3).

Even if the Court were to conclude that the Class B Plaintiffs have failed to carry their burden of showing that two-thirds of putative Class members are Illinois citizens (it should not), the Court nevertheless should remand pursuant to 28 U.S.C. § 1332(d)(3). The "interests of justice" exception picks up where the "home-state" exception ends. The Court "may, in the interests of justice and looking at the totality of the circumstances," remand this action if it finds

that "greater than one-third but less than two-thirds" of putative Class members are Illinois citizens[14] and the balance of the following enumerated factors tips in Plaintiffs' favor:

> (A) whether the claims asserted involve matters of national or interstate interest;
>
> (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
>
> (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
>
> (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
>
> (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
>
> (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

28 U.S.C. § 1332(d)(3). Each factor independently favors remand here.[15]

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[14] As with the home-state exception, Defendants' Illinois citizenship is not in dispute. Plaintiffs' argument that two-thirds of Class members are Illinois citizens applies with even greater force here. In other words, if this court finds that it is more likely than not that some portion of the 74.9% Illinois residents are not Illinois citizens, such that the proportion of Illinois citizens falls below the two-thirds threshold, it is certainly more likely than not that at least a majority of the 74.9% are Illinois citizens. Thus, if Plaintiffs fail to meet their burden of showing two-thirds of Class members are Illinois citizens, then surely they have at least shown one-third are. *See Hirschbach v. NVE Bank*, 496 F. Supp. 2d 451, 460-62 (D.N.J. 2007) (remanding under § 1332(d)(3) where 70% of putative plaintiffs mailing addresses were in-state). There, the court concluded that "it need not base its decision to remand this action on such a precise determination regarding the composition of the putative class. It logically follows . . . that no fewer than one-third of the putative class are domiciled in [the state of filing]" and therefore the court could make a "conservative estimate that between one-third and two-thirds" of class members were citizens of that state. *Id*. at 461. The identical proposition holds true here.

[15] The few courts that have applied § 1332(d)(3) have limited their analysis to the enumerated factors and given no independent weight to the "interests of justice" or "totality of the circumstances" phrases in the statute. *Kessler v. Am. Resorts Int'l's Holiday Network, Ltd.*, 2008 WL 687287 (N.D. Ill. Mar. 12, 2008); *see also Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 804, 822-24 (5th Cir. 2007); *Hirschbach*, 496 F.Supp.2d at 461–62. Given the scant body of jurisprudence, the plain text of the statute along with the legislative record provides definitive guidance here.

First, the Delaware breach of contract claim at issue here is not one of national or interstate interest. "Under CAFA, the terms local and national connote whether the interests of justice would be violated by a state court exercising jurisdiction over a large number of out-of-state citizens and applying the laws of other states." *Preston*, 485 F.3d at 822. Here, both defendants and the majority of Class members are Illinois citizens, and the state court has only a single state's law to apply to a single claim.

Second, although the claim will be governed by Delaware law rather than Illinois law, the second factor still weighs in favor of remand. The second factor is meant to address Congress' concern that a state court would apply its own law while "ignoring the distinct, varying state laws that should apply to various claims included in the class depending on where they arose." S. REP. No. 109-14, at 37. "Under this factor, if the federal court determines that multiple state laws will apply to aspects of the class action, that determination would favor having the matter heard in the federal court system." *Id.* That is not the case here, where the state court will apply only Delaware law—as it has in many cases involving Delaware corporations. *See* Section III(A)(2) above.

Third, Plaintiffs have not pleaded their action to avoid federal jurisdiction.

> The purpose of this inquiry is to determine whether the plaintiffs have proposed a "natural" class—a class that encompasses all of the people and claims that one would expect to include in a class action, as opposed to proposing a class that appears to be gerrymandered solely to avoid federal jurisdiction by leaving out certain potential class members or claims. . . . [I]f the class definition and claims appear to follow a "natural" pattern, that consideration would favor allowing the matter to be handled by a state court.

S. REP. No. 109-14, at 37. Here, the Class B Plaintiffs have included all Class B shareholders and members of CME and CBOT with certain exceptions that have nothing to do with federal

jurisdiction. *See* Compl. ¶ 26 (excluding "Clearing Members" and "Corporate Members" from the class because they are not "in the business of leasing Class B memberships to third parties, and the current fee for co-located access to the Globex at the ADC is not material to their viability").

Fourth, Illinois clearly has a "distinct nexus with the class members, the alleged harm, [and] the defendants." Section 1332(d)(3) (stating the disjunctive "or"; requiring a nexus to only one of the three listed elements). Congress' "major concern that led to this legislation [was] the filing of lawsuits in out-of-the-way 'magnet' state courts that have no real relationship to the controversy at hand." S. REP. No. 109-14, at 37. As already recited, both defendants and most Class members are in Illinois, and the harm—lack of certain access to the Aurora, IL Data Center and modified membership and exchange eligibility rights—all arose in Illinois.

Fifth, the majority of the putative Class members are citizens of Illinois. *See* Section III(C). The remaining non-Illinois citizens are widely dispersed. *See* Comolli Decl. Exs. 1-3.

Sixth, and finally, to the Class B Plaintiffs' knowledge, no other class action asserting the same or similar claims has been filed at all. Thus, there are no efficiencies to be gained by a federal forum and no risk of unfairness to "other overlapping or parallel class actions." *Id*. at *38.

Because these enumerated factors weigh in favor of remand, the Class B Plaintiffs respectfully submit that the Court should decline to exercise jurisdiction over this action. *See Kessler v. Am. Resorts Int'l's Holiday Network, Ltd.*, 05 C 5944, 2007 WL 4105204, at *11–12 (N.D. Ill. Nov. 14, 2007) (remanding case), *adhered to on reconsideration*, 2008 WL 687287 (N.D. Ill. Mar. 12, 2008); *Hirschbach*, 496 F.Supp. 2d at 461–62 (same); *Preston*, 485 F.3d at 822–24 (affirming remand).

IV. CONCLUSION

The Class B Plaintiffs respectfully submit that their Motion to Remand should be granted, and that the Court should remand this action to the Circuit Court of Cook County Illinois, Chancery Division.

Dated: March 27, 2014

Respectfully submitted,

By: */s/ Stephen E. Morrissey*

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CERTIFICATE OF SERVICE

Stephen E. Morrissey, an attorney, hereby certifies that on March 27, 2014, he caused a true and correct copy of the foregoing *Attorney Appearance Form* to be served by electronic filing on counsel at the addresses listed below in accordance with the NDIL Procedures for Electronic Filing.

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