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

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO REMAND

AGRAWAL EVANS LLP

Suyash Agrawal (IL Bar No. 6308343)
Jeannie Y. Evans (IL Bar No. 6296339)
308 West Erie St., Suite 502
Chicago, IL 60654

SUSMAN GODFREY L.L.P.

Stephen E. Morrissey (WA Bar No. 44710)
1201 3rd Avenue, Suite 3800
Seattle, WA 98101

Stephen D. Susman (TX Bar No. 19521000)
Robert Safi (TX Bar No. 24051280)
1000 Louisiana Street, Suite 5100
Houston, TX 77002

Trevor Stutz (NY Bar No. 5148432)
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067

Counsel for the Class B Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Under well-established law, this case properly belongs in state court, where plaintiffs filed their class action complaint. As set forth in plaintiffs' motion to remand, this case should be remanded to state court on three independent and equally sufficient grounds: (1) the complaint relates to the corporate governance of CME Group and CBOT, and is thus subject to the "internal affairs" exception to CAFA jurisdiction provided by 28 U.S.C. § 1332(d)(9)(B); (2) plaintiffs' sole claim claim relates to a "security," and the complaint is thus subject to the "securities" exception to CAFA jurisdiction provided by 28 U.S.C. § 1332(d)(9)(C); and (3) plaintiffs' complaint is subject to the "home state" exception to CAFA jurisdiction under 28 U.S.C. § 1332(d)(4)(B) because the available evidence shows that more than two-thirds of the proposed class is likely comprised of Illinois citizens. Additionally, because it is clear (and defendants tacitly concede) that well more than one-third of the proposed class consists of Illinois citizens, and because of the strong local interest in resolving this controversy involving Illinois-based companies and the Illinois-based members of their Illinois-based exchanges, the Court should exercise its discretion to remand the case to state court under 28 U.S.C. § 1332(d)(3). In arguing otherwise, defendants mischaracterize the allegations of plaintiffs' complaint, ignore or misconstrue the relevant case law, and urge the court to adopt new and insurmountable standards for showing that a class action complaint is subject to remand. None of defendants' arguments comport with the case law or with Congress's clear intent to preserve state jurisdiction over cases like this one. Accordingly, plaintiffs' motion should be granted.

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

1. Disputes over the terms of a corporate charter are internal affairs.

The dispute in this case concerns the terms of the corporate charters of CME Group and CBOT. Plaintiffs claim that the "core rights" granted by defendants' corporate charters, which cannot be modified without a vote of the Class B Plaintiffs, include the right to the best and most

proximate access to defendants' exchange facilities, including the Globex platform. Doc. 1-2 at ¶¶ 9-12. In asserting that "no such right can be remotely found in either document," Opp. at 1, defendants' opposition confirms the existence of a dispute regarding this corporate governance issue. As plaintiffs explained in their opening brief, disputes relating to the terms of a corporate charter fall squarely within the province of the internal affairs doctrine, and are thus among the categories of class actions over which state courts retain jurisdiction under CAFA. *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). Defendants cite *no* instance in which the internal affairs doctrine was held not to apply to a dispute over the terms of a corporate charter.

Instead, defendants argue that this is not an internal affairs case because plaintiffs have styled their claim as one for "breach of contract." But the corporate charters at issue are not ordinary commercial contracts; they are "a contract between the corporation and its shareholders." *Korzen v. Local Union 705, Int'l Bhd. of Teamsters*, 75 F.3d 285, 288 (7th Cir. 1996) (citing Delaware law); *see also In re Nat'l Mills*, 133 F.2d 604, 609 (7th Cir. 1943) (quoting Illinois Supreme Court for the proposition that "[i]t is established law that a corporate charter is a contract"). Because corporate charters define the relationships, rights, and responsibilities of the various corporate constituents of defendants, disputes over their terms necessarily fall within the internal affairs doctrine. [1]

[1] Defendants attempt to distinguish *Ormond* based on the fact that the breach in that case arose before or during the demutualization, Opp. at 10–12, but that distinction misses the mark. The *Ormond* plaintiffs alleged that their contractual right that was breached derived from several sources, including "the contractual relationship . . . as set forth in corporate articles, bylaws, certain merger agreements and other relevant documents." 4th Am. Compl. ¶ 295, 2009 WL 3782372; cited by *Ormond v. Anthem, Inc.*, 2009 WL 3163117, at *11 (S.D. Ind., Sept. 29, 2009). It was this breach of contract claim that the court held fell within the internal affairs doctrine. *Id.* at *9. Thus, for purposes of this case, *Ormond* demonstrates that when a breach of contract claim involves rights derived from a corporate charter, the claim concerns the "internal affairs" of the corporation.

Nano-Proprietary, which Defendants wrench out of context, only proves this point. *See Nano-Proprietary, Inc. v. Canon, Inc.*, 2006 WL 6058423 (W.D. Tex. Nov. 14, 2006). The court rejected Canon's argument that the suit involved its subsidiary's "internal affairs" because the suit did not require the court to analyze the rights set forth in its corporate charter. *Id.* at *3-5. Rather, the suit concerned only the licensing agreement "between two companies dealing at arms' length." *Id.* Implicit in the court's decision is the distinction between a suit that concerns a corporate charter (which relates to "internal affairs") and one that concerns only a contract with a third party (which does not relate to "internal affairs"). *See id.* at *5. Here, plaintiffs' claim plainly involves interpreting defendants' corporate charters, which form the basis for plaintiffs' breach of contract claim.

Like *Nano-Proprietary*, *LaPlant v. Northwestern Mut. Life Ins. Co.*, 701 F.3d 1137 (7th Cir. 2012), did not involve the interpretation of a corporate charter. The Seventh Circuit analogized the annuitants in that case to debt-holders with thousands of individual contracts who, unlike shareholders, were not "entitled . . . to a role in [the defendant-insurer]'s corporate governance." *Id.* at 1140. Here, by contrast, plaintiffs are explicitly entitled to a role in defendants' governance in the same capacity that they proceed here: as Class B shareholders of CME Group and Class B members of CBOT.

Defendants incorrectly contend that *LaPlant* stands for the proposition that a case does not implicate internal affairs unless it requires the application of corporate law. Opp. at 7. *LaPlant* made clear that the inquiry for remand under the internal affairs exception "asks whether the dispute 'relates to' internal affairs and not what law the state court will apply." *LaPlant*, 701 F.3d at 1139. To be sure, the court commented that the lower court discussed "several states' laws about marketing but scarcely mentioned Wisconsin's corporate law. That pretty much

shows that this dispute does not concern the internal affairs of a Wisconsin corporation." *Id.* That statement, like *LaPlant*'s other references to corporate and contract law, reflects that the annuitants' suit concerned thousands of distinct annuity contracts governed by multiple states' insurance laws, and not any corporate governance issue. Here, because plaintiffs' claim arises from defendants' corporate charters, and will turn on whether defendants fulfilled the obligations established by those charters, this action "relates to" defendants' internal affairs regardless of the extent to which it turns on the application of more general principles of corporate law.

In any event, disputes over the terms of the charters *are* governed by, and may require resort to, Delaware corporate law. "[I]t is a basic concept that the General Corporation Law is a part of the certificate of incorporation of every Delaware company. *See* 8 *Del.C.* § 394." *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991) (reciting "principles of established law" and noting secondly that "a corporate charter is both a contract between the State and the corporation, and the corporation and its shareholders"); *see also* DEL. CODE ANN. TIT. 8, § 102 (defining provisions of certificates of incorporation). Indeed, although the general rules of contract construction generally apply to corporate charters, Delaware law has created special presumptions around interpreting charter provisions. *See, e.g.*, *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990) (noting that in order to change certain voting presumptions charter provisions must be "clear and unambiguous").[2]

[2] In a similarly misguided point, defendants erroneously assert that plaintiffs seek to compel defendants "only to pay damages," Opp. at 10—as if that makes this any less an internal affairs case. Defendants cite no case that even hints that the applicability of CAFA's internal affairs exception turns on the relief sought. In any event, as defendants acknowledge in the last two pages of their opposition, plaintiffs also seek injunctive relief to require defendants to act in accordance with their corporate charters.

2. The CME plaintiffs' claim implicates CME Group's internal affairs.

Defendants distinguish between the CME plaintiffs' rights as CME Group Class B shareholders and their rights as members of CME, Inc. But that distinction does not matter for purposes of the internal affairs exception for two reasons.

First, it is the corporate charter of CME Group—not its wholly-owned subsidiary CME, Inc.—that institutionalized the core rights at issue. *See* Ex. A (CME, Inc. Certificate of Incorporation) (no mention of core rights). Even if defendants were correct that this case is only about the CME plaintiffs' rights as members of CME, Inc.—it is not for the reasons discussed immediately hereafter—plaintiffs' claim is nonetheless properly asserted against CME Group and implicates the internal affairs of both CME Group and CME, Inc., of which CME Group is the sole stockholder.

Second, defendants' argument completely ignores the fact that the CME plaintiffs' claim arises from CME Group's failure to honor the voting rights granted to plaintiffs in their capacity as CME Group Class B shareholders, not as CME, Inc. members. Doc. 1-2 at PageID 57-58 ("Any change . . . of the Core Rights . . . shall be submitted to a vote of the holders of the Class B Common Stock. . . ."). Plaintiffs allege a single claim: defendants' violated their respective certificates of incorporation by modifying certain "core rights" without the required vote of CME Group Class B shareholders or certain CBOT Class B members. "[D]isputes concerning a shareholder's right to vote fall squarely within the purview of the internal affairs doctrine." *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1115 (Del. 2005); *see also 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.").

Although defendants accuse plaintiffs of changing their theory, the Court need look no further than paragraph 1 of the Complaint to see that plaintiffs' voting rights have been central to this case since day 1. *See* Doc. 1-2 at ¶1 (alleging that "CME's decision to fundamentally change the trading rights and privileges afforded to the Class B Plaintiffs" violated "contractual obligations under which any such change by CME required the Class B Plaintiffs' approval, which CME never obtained"); *see also, e.g.*, *id.* at ¶ 104 (alleging the "changes to the Class B Plaintiffs' trading rights and privileges required a vote, but no vote was taken and Defendants therefore violated the Charter provisions"); *see also id.* at ¶¶ 4, 6, 9, 29(b)–(c), 43, 48, 66–67, 84, 97, 101–03. It is defendants who attempt to re-write the complaint by contending that "Plaintiffs' 'voting rights,' whatever they may be, are irrelevant to resolving their breach of contract claim or awarding the relief that they seek." Opp. at 10. That simply is not true. The court will be required, as in recent litigation, to inquire into the very meaning of the voting rights provisions in defendants' charters and to determine if defendants violated those provisions.[3]

3. The CBOT plaintiffs' claim implicates CBOT's internal affairs.

Defendants argue that the CBOT plaintiffs' claims do not fall within the internal affairs doctrine because, nominally, they are "members" rather than "shareholders." This purely formal distinction is meaningless for purposes of CAFA's internal affairs exception because "members" of a Delaware nonstock corporation (like CBOT) are the functional and legal equivalent of "shareholders" in a Delaware stock corporation (like CME Group). CBOT is a "nonstock corporation." DEL. CODE ANN. Tit. 8, § 114(d)(4) ("A 'nonstock corporation' is any corporation

[3] In *McKerr v. Bd. of Trade of the City of Chicago, Inc.*, 2012 WL 5932787 (Ill. Cir. Ct. Nov. 26, 2012), certain CBOT Class B members alleged that CBOT and CME Group breached CBOT's corporate charter when they altered certain exchange rules without a vote of the CBOT B members. *Id.* at *1–2, 4. The court denied defendants' motion to dismiss the breach of contract claim because the parties "disagree as to how and when the requirement" triggering members' voting rights applied. *Id.* at *4. A similar inquiry is required here. *See* Doc. 1-2 at ¶ 67 (invoking the voting rights of certain CBOT Class B members under the same disputed CBOT charter provision at issue in *McKerr*).

organized under this chapter that is not authorized to issue capital stock."); Doc. 1-2 at PageID 64 ("[CBOT] shall have no authority to issue capital stock."). Under Delaware law, CBOT Class B members enjoy the same rights as shareholders in a stock corporation. DEL. CODE ANN. Tit. 8, § 114(a)(1) (providing that for nonstock corporations "[a]ll references [in the Delaware General Corporation Law] to stockholders of the corporation shall be deemed to refer to members of the corporation"). Although the term "shareholder" is a convenient label that appears in the internal affairs case law, it is not meant to exclude other corporate constituents, such as members of a nonstock corporation who have a right of control. *See, e.g.*, *Ellis v. Mut. 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") (emphasis added), *cited in* S. REP. 109-14 at 45 n.129. The fact that the CBOT Class B members technically are not "shareholders" does not matter.[4]

Nor does it matter that CBOT Class B members are not "equity holders." *LaPlant* rejected the idea that plaintiffs' "ownership" interest in the defendant company was the *sine quo non* of "internal affairs"; instead the court looked to whether plaintiffs were "entitled . . . to a role in [the insurer]'s corporate governance." 701 F.3d at 1140. Here, CBOT Class B members have

[4] Even if the Court were to accept defendants' misguided argument that plaintiffs' claim does not implicate CBOT's internal affairs because the CBOT plaintiffs are members rather than shareholders, the internal affairs exception would nevertheless apply. Plaintiffs' only claim implicates CME Group's internal affairs and therefore "solely involves . . . a claim that relates to the internal affairs or governance of a corporation" for purposes of § 1332(d)(9)(B). Defendants suggest that the Court should dissect the claim and analyze it as two separate claims, but there is no authority for that approach, and it is contrary to the cases cited by plaintiffs. *See Greenwich Fin. Servs. Distressed Mortgage Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23, 31 (2d Cir. 2010) (rejecting defendants' argument that the phrase "solely involves" should be read to limit the exceptions in § 1332(d)(9)); *Becher v. Nw. Mut. Life Ins. Co.*, 2010 WL 5138910, at *5 (C.D. Cal. Dec. 9, 2010) (holding that the "internal affairs" exception applied where "[t]here are no additional claims unrelated to the internal affairs of the corporation that would deviate from the exclusivity ('solely') requirement").

a say in CBOT's governance. The CBOT charter grants them the right to vote on modifications to core rights that is very similar to CME Group Class B shareholders' voting rights under the CME Group charter. Like the claim against CME Group, the claim against CBOT arises from its breach of these voting rights, and will turn on the interpretation of CBOT's charter.

4. The fact that there are two defendants does not render the "internal affairs" exception inapplicable.

Defendants erroneously argue that because "Plaintiffs' complaint is not solely about one corporation . . . the internal affairs exception cannot apply" because § 1332(d)(9)(B) refers to "*a* corporation." Opp. at 12. Plainly, Congress's use of the *indefinite* article "a" was not intended to limit the number of possible named defendants. If Congress had so intended, it would have chosen words of numerical limitation, such as "a single corporation." Instead, the statute says "a corporation," which is naturally read as inclusive rather than limiting, *i.e.*, "any corporation."

Defendants' proposed interpretation would impose an arbitrary limitation on the application of § 1332(d)(9)(B) that is not consistent with the purpose of the internal affairs exception, not supported by CAFA's legislative history, and not recognized by any authority cited by defendants. Here, plaintiffs have shown that the only claim they assert relates to the internal affairs of both defendants, who are both part of the same overarching corporate enterprise with the same board of directors.[5] Nothing more is required.

Defendants cite *Tuttle v. Sky Bell Asset Mgmt., LLC*, 2011 WL 208060 (N.D. Cal. Jan. 21, 2011), but *Tuttle* does not support their position. Defendants quote the *Tuttle* defendants' brief, not a statement by the court. Without adopting the defendants' reasoning, the court merely noted their arguments and concluded: "Plaintiffs do not set forth an argument to the contrary.

[5] CBOT is wholly owned by CME Group with an identical board of directors. Even if the Court were to agree with defendants' interpretation, in a very real sense this case does involve a single corporation.

Thus, the [internal affairs] exception does not apply." *Id.* at *5. Moreover, *Tuttle* is not like this case. There, defendants argued that the exception did not apply because (i) plaintiffs asserted negligence claims against an outside auditor, and (ii) the 25 defendants were incorporated in several states and thus several states' laws applied. Unlike *Tuttle*, plaintiffs here assert a claim against two intimately related corporations governed by one state's law.

This case is much more like *In re Textainer Partnership Securities Litigation*, 2005 WL 1791559 (N.D. Cal. July 27, 2005), which *Tuttle* discussed with approval but ultimately distinguished, *see* 2011 WL 208060, at *6. In *Textainer*, a putative class of limited partners asserted a single cause of action for breach of fiduciary duty against several related corporate entities. 2005 WL 1791559, at *1. After removal, the court granted plaintiffs' motion to remand, holding that the internal affairs exception applied. *Id.* at *1, 5–6 (repeatedly referring to the multiple defendants). Plaintiffs respectfully submit that the Court should follow *Textainer* and remand this action under § 1332(d)(9)(B) because plaintiffs asserts a single claim against two defendants that relates to their internal affairs or corporate governance.

B. The "securities" exception in § 1332(d)(9)(C) applies.

Defendants do not dispute that CME Group's Class B shares are securities. Instead, defendants repeat their argument that the CME Group Class B shareholders' claim relates only to their rights "as CME Inc. members, not CME Group Class B shareholders." Opp. at 13–14. As explained in Section A(2) above, that is not the case. The CME plaintiffs' claim relates to their voting rights as Class B shareholders under the CME Group charter. *See* Doc. 1-2 at PageID 57–58. Therefore, plaintiffs' single claim "relates to the rights, duties [], and obligations relating to or created by or pursuant to any security." 28 U.S.C. § 1332(d)(9)(C).

The Court need not decide whether the CBOT Class B memberships also are securities. Defendants read § 1332(d)(9)(C) as applying only where "a claim solely involves a security."

That is not what the statute says. Section 1332(d)(9)(C) states that the exception applies to "any class action that *solely involves a claim* . . . that relates to the rights . . . relating to . . . any security." This action "solely involves" a single claim, and that claim clearly relates to the rights relating to CME Group Class B stock. *See Rubin v. Mercer Ins. Grp., Inc.*, 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)); *Greenwich*, 603 F.3d at 31 (stating that 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" and "[i]f 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"); *Lincoln Nat. Life Ins. Co. v. Bezich*, 610 F.3d 448, 451 (7th Cir. 2010).

C. Section 1332(d)(4)(B)'s "home state" exception applies.

Plaintiffs have met their burden of proving that it is more likely than not that two-thirds of the putative class members are citizens of Illinois. Defendants' critiques misstate the law and do not undermine this straight-forward conclusion. In *Sprint*, the Seventh Circuit noted that it "would have been a much simpler case" had plaintiffs—instead of merely relying on their class definition—submitted some actual evidence of class members' citizenship. *In re Sprint Nextel Corp.*, 593 F.3d 669, 675 (7th Cir. 2010). Here, plaintiffs have done just that.

1. Plaintiffs have proven the residency of the individual class members and of the trustees of the trust class members.

Defendants attempt to rebut Dr. Comolli's statistical conclusions with the report of Dr. Spencer. As detailed in Dr. Comolli's attached report, Dr. Spencer makes only one attempt to quantify his critique, and it relies on an extreme and biased assumption in defendants' favor. *See*

Comolli Reply Decl. ¶ 9(b); Ex. 1 (report) § VII.C. In contrast, Dr. Comolli's analysis relies on an unbiased assumption. *Id.*; Ex. 1 §§ VII.A & B. The remainder of Dr. Spencer's report simply points out miniscule errors that, even assuming their truth, do not impact the conclusion that more than two-thirds of the class are citizens of Illinois with a 95% confidence level. *Id.* ¶ 10; *see also* Ex. 1 §§ VI, VII.D, VIII, IX. Any confidence level "greater than 50 percent would [] allow[] the district court to conclude that the plaintiffs ha[ve] established the citizenship requirement by a preponderance of the evidence." *In re Sprint Nextel Corp.*, 593 F.3d at 676.[6]

2. Proving residency raises a presumption of domicile and citizenship, which defendants have not rebutted.

In arguing that plaintiffs' proof of class members' residency is insufficient to establish domicile of individuals and trustees, defendants ignore well-established Supreme Court precedent and misread the other case law. The Supreme Court has never deviated from the long-established rule that "[t]he place where a man lives is properly taken to be his domicile until facts adduced establish the contrary." *District of Columbia v. Murphy*, 314 U.S. 441, 455 (1941); *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."); *Toombs v. WalMart*, 2011 WL 4435688, at *2 (S.D. Ill. Sept. 23, 2011) (relying on *Murphy*); *Nat'l Inspection & Repairs, Inc. v. George S. May Int'l Co.*, 202 F. Supp. 2d 1238, 1242 (D. Kan. 2002) (relying on *Murphy* and stating that "[t]he place where a person lives is assumed to be his domicile unless the evidence establishes the contrary"). Moreover, in enacting the "home state" exception, Congress specifically directed that "these jurisdictional determinations should be made largely on the basis of readily available information." S. REP. No. 109-14, at *44; *accord Hollinger v. Home State*

[6] Putting aside the debate over statistical analysis, defendants do not challenge plaintiffs' method for determining the residency of individuals or trusts; nor do they dispute that plaintiffs used the appropriate criteria for determining the citizenship of the business entities.

Mut. Ins. Co., 654 F.3d 564, 573 (5th Cir. 2011) ("where a proposed class is discrete in nature, a common sense presumption should be utilized in determining whether citizenship requirements have been met").

Defendants' interpretation of *Sprint* and *Phillips* is contrary to Supreme Court precedent. First, defendants misread *Phillips*' discussion of burdens. *See* Opp. at 20 n.16. The court did not reject the Supreme Court's reasoning in *Murphy*. Rather, *Phillips* reasoned that the plaintiffs were not entitled to the presumption that residency establishes domicile because, by relying on eight-year-old mailing addresses, they failed even to establish residency. *Phillips v. Wellpoint, Inc.*, 2010 WL 4877718, at *4 (S.D. Ill. Nov. 23, 2010). Here, plaintiffs' data is up to date, robust, and easily establishes residency, as defendants implicitly concede.[7] Second, defendants overread *Sprint*'s admonition that "a court may not draw conclusions about the citizenship of class members based on things like their phone numbers and mailing addresses." 593 F.3d at 674. *Sprint*, like *Phillips*, must be read in the context of that case—and all those on which it relied—where no evidence was submitted and plaintiffs sought only to rely on class definitions.[8]

This case is unlike *Sprint* or *Phillips*, which involved large amorphous classes and no evidence of citizenship. Here, the putative class is a "discrete" group of Class B shareholders and members, *Hollinger*, 654 F.3d at 573, and plaintiffs have produced a comprehensive sample based on a complete class member list. In *Sprint*, "plaintiffs presented no evidence" whatsoever,

[7] Defendants also confuse plaintiffs' burden of establishing citizenship through evidentiary submissions, with the presumption that a person's residence is his domicile. *See* Opp. at 20 n.16. Although plaintiffs bear the ultimate burden of proving that the "home state" exception applies, this does not alter the underlying reality that once plaintiffs have established an individual's or trustee's residency, their burden of proving domicile is satisfied unless defendants rebut the *Murphy* presumption.

[8] *See Gerstenecker v. Terminix Int'l, Inc.*, 2007 WL 2746847, at *3 (S.D. Ill. Sept. 19, 2007) (finding that plaintiffs failed to meet their evidentiary burden where they offered no evidence of citizenship and merely relied on defining the class as owners of real property in Illinois); *Anthony v. Small Tube Mfg. Corp.*, 535 F. Supp. 2d 506, 517 (E.D. Pa. 2007) (rejecting plaintiffs' remand motion where "[p]aintiff relied entirely on the averments in the pleadings to support its motion" and "submitted no other factual evidence").

but merely relied on the class definition—defined to encompass only those with Kansas mailing addresses and phone numbers—to infer Kansas citizenship. 593 F.3d at 671. The *Sprint* court rejected the notion that it could rely on "guesswork" to estimate the number of out-of-state businesses, out-of-state college students, military personnel, and the like, in calculating the number of Kansas citizen class members across the entire state. *Id.* at 674. The same was true in *Phillips*, where "[a]s primary support for their proposition that two-thirds of the proposed class are citizens of Illinois, Plaintiffs point to the definition of the proposed class." 2010 WL 4877718, at *3. The *Phillips* plaintiffs also failed to consider altogether that "half of the proposed class" were corporations for which the class definition bore no relation to citizenship. *Id.* In contrast, plaintiffs here have submitted ample factual evidence (appropriate to each type of class member) to meet their burden of proving residency, which raises a presumption of domicile under *Murphy*. Defendants do not even attempt to rebut that presumption.

3. In any event, plaintiffs have established the domicile of individual class members and of the trustees of trust class members.

In this context, domicile is residence plus intent to remain in the state. *See In re Sprint Nextel Corp.*, 593 F.3d at 675–76 (stating that "the district court could have relied on evidence going to the citizenship of a representative sample" of the putative class including evidence of whether they "intend to remain"); *Heinen v. Northrop Grumman Corp.*, 671 F.3d 669, 670 (7th Cir. 2012) (cited by defendants) (stating that citizenship "depends on domicile—that is to say, the state in which a person intends to live over the long run"); *Midwest Transit, Inc. v. Hicks*, 79 F. App'x 205, 208 (7th Cir. 2003) ("Domicile has two elements: (1) physical presence or residence in a state and (2) an intent to remain in the state."). Defendants apparently believe that plaintiffs must track down the location of each class member's "accountant and dentist" in order to prove domicile. Opp. at 20. But that is not the law of the Seventh Circuit.

Although proof of intent to remain is unnecessary to meet plaintiffs' burden here, plaintiffs have offered such additional evidence. *See* Comolli Reply Decl. ¶ 11 (showing that the vast majority of individual class members and trustees of trust class members have remained in Illinois for more than four years); Doc. 29-2 at PageID 484–85 (showing that the vast majority of individuals and trusts that held CBOT memberships in 2010 and 2014 maintained addresses in Illinois over those four years).[9] Evidence of long-standing residence in Illinois is proof of intent to remain. *See Toombs*, 2011 WL 4435688, at *2 (concluding that a letter stating the plaintiff lived in Illinois for several years was sufficient to show her Illinois citizenship).[10]

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

If the Court does not find that the home state exception applies, then it should remand the case in the "interests of justice" because all six § 1332(d)(3) factors favor remand. Defendants (1) implicitly concede that at least one-third of putative class members are citizens of Illinois; (2) make a single "national interest" argument of exactly the kind rejected by Congress and existing case law; (3) implicitly concede that the fourth factor—"distinct nexus"— favors remand; and (4) make no argument regarding the remaining four factors aside from asserting that they are in essence "neutral." *See* Opp. at 24–25. Defendants' "national interest" argument is unavailing, and for the reasons stated in plaintiffs' opening brief, each of the six factors favors remand here.

---

[9] Defendants miss the point when they argue that "evidence of where putative class members lived four years ago is irrelevant to determining their citizenship now." Opp. at 23. Plaintiffs proffer this evidence to indicate that a substantial majority of class members have intended to remain in Illinois over several years and more likely than not continue to intend to remain.

[10] To the extent the Court finds that plaintiffs have not met their burden of proving that it is more likely than not that two-thirds of the putative class are Illinois citizens (and the Court otherwise denies remand), Plaintiffs request leave to renew their motion to remand after conducting a survey of the putative class to further demonstrate their Illinois citizenship. *See Mondragon v. Capital One Auto Fin.*, 736 F.3d 880, 885 & n.4 (9th Cir. 2013) (describing how on remand from the Seventh Circuit the district court in *Sprint* permitted jurisdictional discovery and ultimately remanded the case to the state court again) (citing *In re Text Messaging Antitrust Litig.*, 2011 WL 305385, at *3 (N.D. Ill. Jan. 21, 2011)).

This is not a case of "national interest" that warrants denying remand. Defendants contend that the case is one of "national interest" because (i) the class would contain out-of-state plaintiffs and (ii) "CME Group is a substantial institution in the global financial system." Opp. at 24. The first point—the composition of the class—is directly addressed in the statute and favors remand. Remand is favored when between one-third and two-thirds of the class members are citizens of Illinois and the class contains substantially more Illinois citizens than citizens of any other single state. *See* 28 U.S.C. § 1332(d)(3)(E). Defendants do not dispute that is true here; they simply disagree with Congress's considered policy choice.

The second point—that federal jurisdiction is warranted merely because CME Group is a "substantial institution"—has no foundation in law or logic. Under defendants' logic, federal courts should hear any state-law class action against large corporations regardless of the nature of the issues or the composition of the class. That ignores the remaining five factors Congress included in the statute and the existing case law. And, even if the "nation [took] interest" in this case, that "does not mean that the legal claims at issue in this class action lawsuit qualify as national or interstate interest." *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 804, 822 (5th Cir. 2007). Rather, "[u]nder 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." *Id.* Here, most plaintiffs are Illinois citizens and the state court must only apply a single state's law.[11]

E. Conclusion

Plaintiffs respectfully submit that their Motion to Remand should be granted.

[11] Defendants cite the Senate report for the proposition that "cases with 'nationwide ramifications of the dispute and the probable interface with federal [] laws . . .' should be heard in federal court." Opp. at 24 (quoting S. REP. NO. 109-14 at *36). Yet defendants do not even argue that federal law is applicable—because it is not. To the contrary, defendants assert throughout their brief that this is just a contracts case.

Dated: May 19, 2014

Respectfully submitted,

By: */s/ Stephen E. Morrissey*

Suyash Agrawal (IL Bar no. 6308343)
Jeannie Y. Evans (IL Bar No. 6296339)
AGRAWAL EVANS LLP
308 West Erie St., Suite 502
Chicago, IL 60654
Phone: (312) 448-8800
Suyash@agrawalevans.com
Jeannie@agrawalevans.com

Stephen E. Morrissey (WA Bar no. 44710)
SUSMAN GODFREY L.L.P.
1201 3rd Avenue, Suite 3800
Seattle, WA 98101
Phone: (206) 516-3880
smorrissey@susmangodfrey.com

Stephen D. Susman (TX Bar no. 19521000)
Robert Safi (TX Bar no. 24051280)
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, TX 77002
Phone: (713) 651-9366
ssusman@susmangodfrey.com
rsafi@susmangodfrey.com

Trevor Stutz (NY Bar no. 5148432)
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067
Phone: (310) 789-3192
tstutz@susmangodfrey.com

CERTIFICATE OF SERVICE

Stephen E. Morrissey, an attorney, hereby certifies that on May 19, 2014, he caused a true and correct copy of the foregoing *Plaintiffs' Reply Memorandum in Support of Motion to Remand* to be served by electronic filing on counsel at the addresses listed below in accordance with the NDIL Procedures for Electronic Filing.

Albert L. Hogan III Jerrold E. Salzman Marcella L. Lape Brian S. Wallach **SKADDEN ARPS SLATE MEAGHER & FLOM LLP** 155 North Wacker Dr. Chicago, IL 60606 Email: albert.hogan@skadden.com Email: jerrold.salzman@skadden.com Email: marcella.lape@skadden.com Email: brian.wallach@skadden.com	Matthew M.K. Stein **SKADDEN ARPS SLATE MEAGHER & FLOM LLP** One Beacon St. Boston, MA 02108 Email: matthew.stein@skadden.com

Dated: May 19, 2014

/s/ *Stephen E. Morrissey*
Stephen E. Morrissey