IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

SHELDON LANGER, RONALD M. YERMACK, LANCE R. GOLDBERG, individually on behalf of themselves and all others similarly situated,	:	
Plaintiffs,	:	Case No. 2014CH00829
v.	:	Hon. Mary L. Mikva
CME GROUP, INC., a Delaware Corporation; THE BOARD OF TRADE OF THE CITY OF CHICAGO, INC., a Delaware Corporation,	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY THIS ACTION UNDER 735 ILCS 5/2-619 AND 9 U.S.C. § 3

Defendants CME Group, Inc., ("CMEG") and The Board of Trade of the City of Chicago, Inc. ("CBOT") (collectively, "CME" or "Defendants") submit this memorandum of law in support of their Motion to Compel Arbitration and Dismiss and/or Stay Proceedings.

I. INTRODUCTION

Plaintiffs Sheldon Langer, Ronald Yermack, and Lance Goldberg ("Plaintiffs") bring this putative class action alleging that CMEG and CBOT breached their respective contractual obligations to Class B members by refusing them free access to the Aurora Data Center ("ADC"), which houses the primary matching engine for Globex—the electronic trading system used by members and other customers of CBOT and the Chicago Mercantile Exchange,

Inc. ("CME Inc.").[1] (Comp. ¶ 4.) Plaintiffs Langer and Yermack are members of CME Inc. and Goldberg is a member of CBOT.[2] (*Id.* at ¶¶ 19-21.)

The trading rights and privileges of CME and CBOT members are governed by each Exchange's corporate governance documents and the Rules of the Exchanges. Those Rules require mandatory arbitration of claims against the Exchanges and their affiliates where, as here, the dispute arises out of "the use of systems or services of the Exchange[s] or services, equipment or facilities used to support such systems or services." *See* Rule 578.C.[3] Rule 600.C further reinforces that "Claims against the Exchange pursuant to the provisions of Rule 578.C . . . shall be subject to mandatory arbitration in accordance with the rules of this Chapter."

Plaintiffs ignored these mandatory arbitration rules, to which they had agreed, and instead filed this putative class action asserting breach of contract claims based on the denial of free access to the fastest path to Globex. Plaintiffs' claims are based on their alleged membership rights to access CME's electronic trading system, but they have refused to abide by their obligations to arbitrate disputes involving the "systems or services of the Exchange[s]." *See* Rule

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1 CME Inc. is a wholly owned subsidiary of CMEG. CME Inc. and CBOT are jointly referred to as the "Exchanges."

2 There are several types of individual CME and CBOT memberships (*e.g.*, Class B-1, B-2). Each membership type grants certain rights to trade products on each Exchange and certain rights under the Certificate of Incorporation. For example, a Class B-1 CME member can trade any CME-listed contract, but a Class B-3 CME member can only trade Equity Index futures contracts, random length lumber contracts, all options contracts, and all GEM products. Regardless of the type of Class B membership held, all members of the exchange are subject to the Rules of the Exchanges.

3 The CME and CBOT Rules cited herein are identical, and as a result, each Exchange's Rules are referred to generically. The cited CME Rules are attached as Exhibit 1, and the CBOT Rules are attached as Exhibit 2. The full sets of CME and CBOT Rules are available at http://www.cmegroup.com/rulebook/CME/ and http://www.cmegroup.com/rulebook/CBOT/.

578.C. Accordingly, because this dispute is governed by the Exchange Rules compelling arbitration, the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, requires this Court to stay or dismiss all proceedings in this action and compel Plaintiffs to submit their claims to arbitration.

II. ARGUMENT

The arbitration provisions in the Exchanges' Rules are governed by the FAA because they cover transactions involving commerce; specifically, the Plaintiffs' electronic futures trading on the Globex platform. *See* 9 U.S.C. § 2.[4] The FAA reflects a "liberal federal policy favoring arbitration agreements," and provides for orders compelling arbitration when one party fails to comply with an arbitration agreement. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); 9 U.S.C. § 3.

Defendants move to compel arbitration and to dismiss or stay the proceedings under Section 3 of the FAA. The Illinois Supreme Court has instructed that when a trial court is "presented with a motion to stay litigation pending arbitration under section 3 of the FAA, the

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[4] In *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359, 1364 n.4 (N.D. Ill. 1990), the court analyzed whether the FAA or the Illinois Uniform Arbitration Act applied to the parties' dispute governed by the CBOT's arbitration provisions. The parties agreed that the FAA applied, but the court recognized that in *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 530 N.E. 2d 439 (1988), the Illinois Supreme Court had assumed "albeit with no analysis" that the Illinois Uniform Arbitration Act applied to a member dispute under CBOT's arbitration rules. *Zechman*, 742 F. Supp. at 1363 n.4. The *Zechman* court looked to *Geldermann, Inc. v. Stathis,* 177 Ill. App. 3d 414, 532 N.E. 2d 366 (1st Dist. 1988), where over the appellant's objection, the court determined that the FAA applied to the arbitration agreement in CBOE's rules, which were nearly identical to CBOT's Rules. The *Zechman* court further recognized that other courts had concluded that the FAA applied to the arbitration agreements contained in the New York Stock Exchange and NASDAQ rules. "[Seeing] no basis on which to distinguish these analogous lines of authority," the court applied the FAA to the arbitration agreement in CBOT's Rules. *Id.* at 1363 n.4, "[seeing] no basis. . .not found on p. 1370.

court's inquiry is limited to whether an agreement to arbitrate exists and whether it encompasses the issue in dispute." *Jensen v. Quik Int'l*, 213 Ill. 2d. 119, 123-24, 820 N.E. 2d 462, 465 (2004) (emphasis omitted). If the answer to both of these questions is "yes," a stay is mandatory. *Id.*; *see also e.g., Merit Ins. Co. v. Leatherby Ins. Co.*, 581 F.2d 137, 142 (7th Cir. 1978) ("If the agreement to arbitrate is valid the court has no further power or discretion to address the issues raised in the complaint."); *Volkswagen of Am., Inc. v. Sud's of Peoria, Inc.*, 474 F.3d 966, 971 (7th Cir. 2007) (same).

Here, this court is required to stay or dismiss this action until arbitration is complete. *See* 9 U.S.C. § 3. The Plaintiffs, as Members of the Exchanges, agreed to the arbitration provisions contained in the Exchanges' Rules, and the dispute at issue is covered by those provisions.

A. Plaintiffs Agreed to the Arbitration Provisions in the CME and CBOT Rules.

CME and CBOT are membership organizations and the Plaintiffs here are members of either CME or CBOT. Members of CBOT and CME agree as part of their membership application to be bound by all rules of the Exchange. Notably, these rules in their current form contain an agreement that the members will arbitrate certain disputes rather than proceed in court. Rule 578.C states that:

> ANY DISPUTE ARISING OUT OF THE USE OF SYSTEMS OR SERVICES OF THE EXCHANGE OR SERVICES, EQUIPMENT OR FACILITIES USED TO SUPPORT SUCH SYSTEMS OR SERVICES IN WHICH THE EXCHANGE (INCLUDING ITS SUBSIDIARIES AND AFFILIATES), OR ANY OF ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, CONSULTANTS OR LICENSORS IS A PARTY SHALL BE ARBITRATED PURSUANT TO EXCHANGE RULES.

Rule 600.C further provides that "Claims against the Exchange pursuant to the provisions of Rule 578.C . . . shall be subject to mandatory arbitration in accordance with the rules of this Chapter[.]"

It is well-established that "Rules of a stock exchange constitute a contract between all members of the exchange" and that "the arbitration provisions embodied in the rules have contractual validity." *Geldermann, Inc. v. Stathis,* 177 Ill. App. 3d 414, 418-19 (1998). Indeed, Courts uniformly find that members of an exchange who agree to be bound by the exchange's rules are subject to the arbitration provisions within those rules. *See, e.g.*, *Pacaud v. Waite*, 218 Ill. 138 (1905) (finding that members agreed to be bound by the rules of CBOT compelling alternative dispute resolution of certain claims); *Stathis*, 177 Ill. App. 3d at 419 (enforcing CBOE arbitration rules in dispute between CBOE members); *John Olagues Trading Co. v. First Options of Chicago, Inc.*, 88 F. Supp. 1194, 1999 (N.D. Ill. 1984) (holding that arbitration was required because, inter alia, the parties had "agreed to be bound by the rules of the Exchange"); *Pleanum Fund, LP v. Chi. Mercantile Exch., Inc.*, Case No. 08 C 6091 (N.D. Ill. Jan. 23, 2009 & Apr. 24, 2009) (Bucklo, J.) (granting CME's motion to compel arbitration, and denying motion for reconsideration of that ruling) (Exhibits 4-5.)

What is more, courts have held that members are subject to arbitration provisions even if the arbitration provisions are adopted after the commencement of membership. *See, e.g., Gelderman v. CFTC*, 836 F.2d 310 (7th Cir. 1987) (determining that a member of CBOT consented to arbitration where, as a precondition to membership, he had agreed to be bound by the exchange's rules, and the exchange subsequently promulgated a rule mandating arbitration); *Patten Securities Corp., Inc. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987) (requiring a member of NASD to arbitrate because the member had agreed to abide by all rules and regulations of NASD "as they are or may be adopted").

Here, Plaintiffs agreed to and are bound by the arbitration provisions set for in the Exchange Rules. In their applications to become Members of the CME or CBOT, each Plaintiff

executed a written acknowledgement agreeing "to abide by all the rules and bylaws of the Exchange and all amendments that may be made thereto." (*See* Exhibit 3.) The CBOT Certificate of Incorporation explains that "the terms and conditions of membership in the Corporation shall be as provided in or pursuant to this Certificate of Incorporation, the Bylaws of the Corporation . . . and the Rules and Regulations of the Corporation as in effect from time to time." *See* CBOT Certificate at Art. IV.A (attached to Complaint as Exhibit B). The CME Certificate of Incorporation similarly declares that no person may own a Class B Membership unless that person "is recognized on the books and records of the Exchange as the owner [of the Membership] in the Exchange as governed by the rules of the Exchange." *See* Third Amended and Restated Certificate of Incorporation of CME Group Inc., § B.2.2(a)(i)-(iv) (attached to Complaint as Exhibit A).

The Rules themselves further emphasize this point. Rule 101 provides that a member "shall be subject to all Exchange Rules" and "agrees to have any disputes . . . which relate to or arise out of any transaction upon the Exchange or membership in the Exchange, resolved in accordance with Exchange Rules." In addition, under Rule 400, the Exchanges notify Members that they are "deemed to know, consent to and be bound by all Exchange rules" and that the Exchanges "from time to time adopt[] amendments and supplements to [their] Rules[.]" Members who commence legal action against the Exchanges without first exhausting administrative remedies through arbitration are "deemed to have committed an act detrimental to the interest or welfare of the Exchange. *See* Rule 440.

Here, Plaintiffs agreed to, and are bound by the arbitration provisions in the Exchange Rules. Plaintiffs each executed a written acknowledgement agreeing "to abide by all the rules and bylaws of the Exchange and all amendments that may be made thereto." (Exhibit 3.)

The Rules currently contain an arbitration provision in Rule 578.C, and thus a valid arbitration agreement exists between the parties.

B. The Arbitration Agreements Cover This Dispute

"When a contract contains an arbitration clause, a strong presumption in favor of arbitration exists and courts have no choice but to order arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *CK Witco Corp. v. Piper Allied Indus.*, 272 F.3d 419, 421-22 (7th Cir. 2001) (internal citations and quotations omitted). The U.S. Supreme Court has held that under the FAA, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

Here, Plaintiffs' claims fall directly within the scope of Rule 578.C. Under Rule 578.C, any person involved in a dispute with CME, CBOT, or their affiliates,[5] which "arises out of" the use of Exchange systems or services, or the services, equipment, or facilities used to support the Exchange's systems or services, must submit his dispute to arbitration.

Federal courts characterize the phrase "arising out of" as "extremely broad and capable of an expansive reach[,] . . . necessarily creat[ing] a presumption of arbitrability." *Gore v. Alltel Commc'ns.*, LLC, 666 F.3d 1027, 1033-34 (7th Cir. 2012) (citing *Kiefer Specialty*

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[5] The CME Rulebook does not define the term "affiliate" but several state and federal statutes define an "affiliate" as including a parent company. *See, e.g.*, Illinois Retail Installment Sales Act, 815 ILCS 405/17(a) (defining "affiliate" to include "a parent or subsidiary corporation"); *see also* 12 C.F.R. 223.2(a)(1) (defining an affiliate for purposes of the Federal Reserve Act, 12 U.S.C. 371c, 371c–1, as, *inter alia*, "Parent companies" or "[a]ny company that controls the member bank"). SEC Rules 405 and 12b–2 similarly define an "affiliate" as "a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified." In addition, Black's Law Dictionary defines an "affiliate" as "A corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation."

Flooring, Inc. v. Tarkett, Inc., 174 F.3d 907, 909-10 (7th Cir. 1999) (internal citations omitted). Illinois courts similarly interpret the phrase "arising out of" as obligating the parties to "arbitrate *any* dispute that arguably arises" under the subject matter of the agreement. *See, e.g., Fahlstrom v. Jones*, 2011 IL App (1st) 103318, ¶ 17, 952 N.E. 2d 1227, 1230.

Here, Plaintiffs' complaints stem from CME's opening of the ADC, a data center in Aurora, Illinois that now houses the primary Globex electronic trading platform and match engine[6] for CME, Inc., CBOT, and other exchanges operated by CMEG.[7] (Compl. ¶ 7.) Plaintiffs claim that upon opening the Aurora Data Center, CME discontinued its alleged practice of providing the Class B members with the best and most proximate access to Globex for free and instead told Plaintiffs that they would need to pay substantial monthly rental fees to access Globex at the Aurora Data Center. (Compl. ¶¶ 7, 11, 81-83.) Plaintiffs further allege that CME provided non-member customers with Globex access rights, a preferential fee structure, and permission to trade new CME products that, in some instances, Plaintiffs are not authorized to trade. (*Id.* at ¶¶ 12, 89.) According to Plaintiffs, these actions violated CME's and CBOT's commitments to Class B members under their respective Certificates of Incorporation. (*Id.* at ¶¶ 114-119.)

Plaintiffs are suing over their use of CME Globex, access to Globex at the ADC, the cost of that access, and the range of products that they are able to trade. Plaintiffs state no fewer than nineteen times that this dispute involves the "best and most proximate access" to

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6 A match engine is a software component that matches up bids and offers to complete trades.

7 The facts set forth herein are as alleged by Plaintiffs and for purposes of the Motion to Compel. Defendants deny Plaintiffs' allegations and reserve their rights to challenge the sufficiency of Plaintiffs' complaint in whatever forum ultimately hears Plaintiffs' claims.

Globex. Thus, their claims thus arise both from the "use of CME's and CBOT's systems or services," that is, futures trading on Globex; and from the "services, equipment, or facilities used to support such systems or services:" the Globex trading system that is located at the ADC. *See* Rule 578.C. Indeed, the Plaintiffs' contention that they are entitled to preferential access to the physical systems of the Exchange is at the heart of their complaint. That claim falls squarely under the arbitration provision of Rule 578.C.

As members of the Exchanges, Plaintiffs must live up to all the responsibilities of membership—they cannot enjoy member benefits without also satisfying their obligations. And they cannot pick and choose which Rules to comply with while ignoring others. Accordingly, because Plaintiffs' claims are covered by Rules 578.C and 600.C, this Court must stay or dismiss the litigation pending arbitration.

CONCLUSION

Wherefore, for the foregoing reasons, CME Group and CBOT respectfully request that this Court enter an order compelling arbitration and dismissing or staying this action.

Dated: October 3, 2014
Chicago, Illinois

Respectfully submitted,

Skadden, Arps, Slate, Meagher & Flom, LLP

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CERTIFICATE OF SERVICE

Emily Reitmeier, an attorney, hereby certifies that on October 3, 2014, she caused a true and correct copy of the foregoing *Defendants' Memorandum Of Law In Support Of Their Motion To Compel Arbitration And Dismiss or Stay This Action Under 735 ILCS 5/2-619 And 9 U.S.C. § 3* to be served by U.S. Mail and electronic mail on the following counsel:

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Dated: October 3, 2014

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