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,	)	No. 2014 CH 00829
Plaintiffs,	)	Calendar 6
v.	)	
CME GROUP, INC., a Delaware Corporation; THE BOARD OF TRADE OF THE CITY OF CHICAGO, INC., a Delaware Corporation,	)	Hon. Mary L. Mikva, Presiding
Defendants.	)	JURY TRIAL DEMANDED

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO MOTION TO COMPEL ARBITRATION

Suyash Agrawal
Jeannie Y. Evans
Hillary W. Coustan
AGRAWAL EVANS LLP
Cook County Firm No. 56313
308 W. Erie Street · Suite 502
Chicago, Illinois 60654–3924
(312) 448-8800

Stephen D. Susman (admitted, Rule 707)
Stephen E. Morrissey (admitted, Rule 707)
Robert S. Safi (admitted, Rule 707)
Trevor Stutz (admitted, Rule 707)
SUSMAN GODFREY L.L.P.
1000 Louisiana Street · Suite 5100
Houston, Texas 77002–5096
(713) 651-9366

Counsel for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

This class action involves a single claim for breach of contract against CME Group, Inc. ("CMEG") and The Board of Trade of the City of Chicago, Inc. ("CBOT") (together, "Defendants"). The claim arises from Defendants' violations of Plaintiffs' "Core Rights" under Defendants' corporate charters, which are attached to the First Amended Complaint ("FAC") as Exhibit 1 (the "CMEG Charter") and Exhibit 2 (the "CBOT Charter") (together, the "Charters").

The proposed class includes thousands of CMEG Class B shareholders and CBOT Class B members—largely the "old-line" traders who owned the exchanges before they demutualized. To secure the votes needed for demutualization and for CMEG's later acquisition of CBOT, Defendants promised to maintain members' "Core Rights," including the "eligibility requirements" for exercising the members' "trading rights and privileges." Defendants agreed not to make any change to those Core Rights without member approval and guaranteed those Core Rights in the Charters. Defendants, however, have changed the eligibility requirements for exercising trading rights and privileges, in violation of the Core Rights, by:

- Discontinuing the historical practice allowing members the best and most proximate access to the Globex electronic trading platform as part of their membership rights;
- Expanding eligibility to access the Globex electronic trading platform and generating Globex-related fees that were not shared with members;
- Allowing electronic corporate members ("ECMs") and non-member customers to exercise the trading rights and privileges of members without owning or leasing Class B memberships;
- Providing preferential fees and discounts to ECMs, clearing members, and others; and
- Denying members the right to trade the full range of Defendants' products.

FAC ¶¶ 7, 9, 12–13, 101, 114–19. These changes were all effected without member approval. Thus, Plaintiffs bring this action for damages (estimated in the hundreds of millions of dollars) and injunctive relief for Defendants' ongoing breach of contract. *Id.* ¶¶ 101–06, 120.

Defendants' motion to compel arbitration should be denied for three separate and independent reasons. First, Plaintiffs never agreed to arbitrate claims arising under the Charters. Those independent contracts do not contain any arbitration clause, and the parties have not amended those contracts to require arbitration. Second, this dispute is not within the scope of the arbitration clause in Rule 578.C of Defendants' rulebooks, and Rule 578.C specifically provides that disputes that are "not arbitrable," such as Plaintiffs' class action claims, may proceed in this court. Third, even if Rule 578.C. applied to this dispute—and it clearly does not—it would be unenforceable as both procedurally and substantively unconscionable.

Plaintiffs' claim is based on their Core Rights under the Charters, not Defendants' rulebooks. Indeed, when Defendants sought to remove this case to federal court, they correctly admitted that Plaintiffs' action is for breach of the Charters and that it should be resolved in court. Defendants wrote that "[r]esolution of this dispute will require a court to determine whether there has been a breach of contract between CME Group and the CME Inc. members and, separately, whether there has been a breach of contract between CBOT and the CBOT members." Ex. I, Appx. at 82.[1] Back in this Court, Defendants have changed their tune. They now argue Plaintiffs' claim arises under exchange rulebooks and must be resolved by arbitration.

But neither Charter contains an arbitration clause. In fact, the Charters expressly prohibit Defendants from modifying Plaintiffs' Core Rights without a member vote approving any such change. Defendants have expressly stipulated that Plaintiffs were not obligated to arbitrate claims involving their Core Rights when the Charters were adopted and that no vote or approval of arbitration of claims involving Core Rights has ever occurred. Ex. A, Appx. at 1. Moreover, Plaintiffs' claim based on their Core Rights under the Charters is completely

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

independent from any right or obligation under the rulebooks. Consequently, there is no basis for finding an agreement to arbitrate Plaintiffs' claim for breach of their Core Rights.

Defendants nonetheless seek to compel arbitration of Plaintiffs' claims by invoking subparagraph C of Rule 578 in the rulebooks of CBOT and non-party CME, Inc. ("CME", and together with CBOT, the "Exchanges"). *See* Defs.' Mem. in Support of Mot. to Compel Arbitration and Dismiss or Stay ("Motion" or "MTC") at 2 & Exs. 1, 2. However, Rule 578.C cannot be construed to require arbitration here. Rule 578.C is not a stand-alone arbitration clause that broadly purports to require arbitration of claims against the Exchanges; rather, Rule 578.C is only a part of Rule 578, which sets forth the Exchanges' limitations of liability and disclaimer of warranties for claims based on system failures and mistakes involving the use of their systems, services, or facilities. Defendants themselves even acknowledged the limited scope of Rule 578.C in submitting it to the CFTC for review, describing it as a rule requiring arbitration of "disputes involving claims for system failures and negligence." Ex. K, Appx. at 107.

Properly read in context, Rule 578.C's reference to disputes "arising out of the use of systems or services of the Exchange" merely calls for arbitration of claims stemming from matters for which Rule 578 limits the Exchange's liability—such as system glitches and mistakes. Of course, Plaintiffs' claim has nothing to do with any malfunctions or mistakes. Rather, they claim that Defendants violated their Core Rights under the Charters by changing the eligibility requirements without the required member vote. Moreover, Plaintiffs' case is a class action; Defendants' Rules do not allow for the arbitration of class actions, and specifically provide that disputes that are "not arbitrable" under those rules may be litigated in court.

Finally, even if Defendants had the right to unilaterally require arbitration of claims for breach of Core Rights under the Charters (which they do not), and even if Rule 578.C could be

interpreted to require arbitration of this dispute (which it cannot), Defendants' motion would fail for a third reason: The Exchanges' arbitration rules, if applied to this dispute, are unconscionable and therefore unenforceable. They stack the deck in Defendants' favor from beginning to end. The rules give *Defendants*—not an impartial neutral—the right to (1) select judges drawn from an "Arbitration Committee" appointed by the Chairman of CME's Board of Directors, CME's President; (2) decide whether any of the judges they select should be disqualified; (3) decide the applicable law pursuant to opinions rendered by CME's in-house counsel; and (4) determine the outcome of any appeal. Rules 614, 615, 619, 627 (Ex. F, Appx. at 50–55).[2] Under the Federal Arbitration Act, any decision rendered under these inherently-biased procedures would be invalid. Courts have found similarly one-sided arbitration procedures unenforceable.

II. APPLICABLE LAW AND STANDARD OF REVIEW

Defendants assert that the Federal Arbitration Act (the "FAA") applies to their Motion. *See* MTC at 3. Plaintiffs agree. Nevertheless, under the FAA, certain issues are governed by state law, including the formation and scope of any arbitration agreement. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). On those points, Defendants cite Illinois law. Because the Charters from which Plaintiffs' claims arise are governed by Delaware law, Delaware law also applies to issues presented by the Motion. *See* CMEG Charter Art. 3, Ex. B, Appx. at 3; CBOT Charter Art. IX, Ex. C, Appx. at 22. However, it is not necessary for the Court to decide whether to apply Illinois law or Delaware law to state-law issues, because those two states are in basic agreement on the key points of law that bear on the Motion.

[2] Although this Opposition refers to the CME rulebook, each of these provisions is identical under the CME and CBOT rulebooks. *See* MTC at 2 n.3.

First, "parties are bound to submit to arbitration only those issues that they have agreed clearly to resolve through the arbitration mechanism, and a court should not extend an agreement by construction or implication." *Travis v. Am. Mfrs. Mut. Ins. Co.*, 335 Ill. App. 3d 1171, 1176 (5th Dist. 2002); *accord Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 156 (Del. 2002). Second, the scope of an arbitration clause depends on the parties' intent. "[T]he parties to an agreement are bound to arbitrate only those issues they have agreed to arbitrate, as shown by the clear language of the agreement and their intentions expressed in that language." *Salsitz v. Kreiss*, 198 Ill.2d 1, 13 (2001); *accord DMS Properties-First, Inc. v. P.W. Scott Assocs., Inc.*, 748 A.2d 389, 391 (Del. 2000). Third, an arbitration clause is unenforceable if it is unconscionable. *Jackson v. Payday Financial, LLC* 764 F.3d 765, 779 (7th Cir. 2014) (Illinois law); *accord Worldwide Ins. Group v. Klopp*, 603 A.2d 788, 790–92 (Del. 1992).

Procedurally, Illinois law governs the Motion, which is "essentially a motion pursuant to section 2–619(a)(9) to dismiss based on the exclusive remedy of arbitration." *Griffith v. Wilmette Harbor Ass'n, Inc.*, 378 Ill. App. 3d 173, 180 (1st Dist. 2007) (citation omitted). The Court "must interpret all pleadings and supporting documents in the light most favorable to" Plaintiffs, the nonmoving parties. *Melena v. Anheuser-Busch, Inc.*, 219 Ill.2d 135, 141 (2006).

III. ARGUMENT

A. Plaintiffs Never Agreed to Arbitrate Claims Based on Their Core Rights.

1. CME Has Not Obtained the Member Vote Needed to Modify the Charters to Require Arbitration of Core Rights Claims.

Neither Charter contains an arbitration clause. Moreover, when the Charters were adopted, the Exchange rulebooks had no arbitration provision encompassing claims against the

Exchanges such as those at issue here.[3] Indeed, Defendants have stipulated that the Charters did not require members to arbitrate disputes against Defendants when they were adopted. Ex. A, Appx. at 1 (Stipulations of Parties (a)-(d)). Thus, from the face of the Charters, any claim for their breach would be litigated in court—unless validly amended.

The CMEG Charter provides that any "change, amendment or modification" to members' Core Rights requires a majority vote of the members. Ex. B, Appx. at 9–10. The CBOT Charter similarly states that "[a]ny amendment of, or modification or repeal of" various provisions of the CBOT Charter, including Section D of Article IV, requires "the approval of a majority of the votes cast by the Series B-1 Members and Series B-2 Members . . . ." Ex. C, Appx. at 22–23. Section D of Article IV, in turn, protects the "special rights" of CBOT members—including, *inter alia*, "all trading rights and privileges" on "any electronic trading system maintained by CME." *Id*. at 16. Defendants have stipulated that they never "sought or obtained a member vote" agreeing to submit claims involving plaintiffs' Core Rights to arbitration. *See* Ex. A, Appx. at 1 (Stipulations (c), (d)) (admitting that defendants have not "sought a vote by the Members . . . to adopt a rule or other provision requiring Member-Exchange Arbitration").

Subjecting Core Rights claims to arbitration is a change to those Core Rights that required a member vote. Based on the plain language of the Charters, Plaintiffs clearly have the right, under Delaware law, to vindicate their rights under the Charters in court. *See Schultz v.*

[3] In 2001, CME's revised its "liability and damages policies . . . in light of its conversion to a for-profit company and its new pricing structure." Ex. K, Appx. at 106 (June 21, 2001 Letter to CFTC). Accordingly, the rules were revised and a prior arbitration provision in then-Rule 579 was deleted. *Id*. at 112–13. A new Rule 578 included subparagraph C, providing for arbitration of claims for system failures and negligence. *Id*. at 114–15. CBOT did not add such a provision until sometime after its merger with CME. Ex. L, Appx. at 130 (Oct. 25, 2007 Letter to CFTC) (replacing CBOT rulebook entirely and noting that Rule 600.C "Claims Against the Exchange" would be "inserted upon Globex integration" once merger with CME was complete).

Ginsburg, 965 A.2d 661, 664, 666, 671 (Del. 2009) (approving settlement between stockholders of the Philadelphia Stock Exchange and the Exchange based primarily on breach of contract claims for violation of the Exchange's corporate charter); *Winston v. Mandor*, 710 A.2d 835, 840–44 (Del. Ch. 1997) (denying motion to dismiss breach of contract claim where plaintiff stockholder sued for breach of corporate certificate). Injecting an arbitration clause into a contract that did not previously contain one—as Defendants contend they did here by unilaterally amending their rules—and thereby requiring Core Rights to be arbitrated clearly constitutes a change to the contract, particularly where, as here, Defendants' rules set forth patently one-sided arbitration procedures. Because Defendants did not obtain member approval of that change, there is no basis to conclude Plaintiffs agreed to submit their Core Rights claim to arbitration.

2. Defendants Have Consistently Acknowledged that a Member Vote Is Required for Any Modification of Plaintiffs' Core Rights.

Defendants have provided no evidence that they ever previously announced, let alone through any communication to their members, that a claim for breach of members' Core Rights could be subject to arbitration. To the contrary, Defendants previously acknowledged they could not unilaterally change Plaintiffs' Core Rights, and that their inability to do so restricts their decision making. For instance, in its S-1 filing (for its IPO), CME informed investors that "[h]olders of shares of our Class B common stock have the right to approve *changes* to specified 'rights' relating to the trading privileges associated with those shares," including the eligibility requirements for exercising trading rights and privileges. Ex. M, Appx. at 214. In discussing the Core Rights, CME further stated that members

> have the ability to preserve their rights to trade on our exchange by means of special approval rights . . . . In particular, these provisions include a grant to the holders of our Class B common stock of the right to approve <u>any changes</u> to the trading floor rights, access rights and privileges that a member has. . . .

Ex. N, Appx. at 286 (Amend. to CME Form S-4, filed October 1, 2001). Indeed, CME acknowledged the special status of Plaintiffs' Core Rights—and its inability to unilaterally alter them—when it submitted its amended rulebook to the CFTC at the time of demutualization. Ex. J, Appx. at 104 (CME Letter to CFTC, May 16, 2000) ("Except for a change to the 'Core Rights' as defined in the Certificate of Incorporation, which must be submitted to a vote of the holders of the Class B common stock, neither members nor stockholders will have the power to prevent an action lawfully approved by the Board of Directors from going into effect.").

Defendants' promise to preserve Plaintiffs' Core Rights under the Charters also was critical to the approval of CME's 2000 demutualization and, later, the CMEG/CBOT merger. FAC ¶¶ 55–59. As Plaintiffs confirm in their accompanying affidavits, in seeking approval of CME's demutualization and the subsequent CMEG/CBOT merger, Defendants never suggested they could unilaterally alter Plaintiffs' Core Rights by requiring arbitration of claims for breach of the Charters. Had Defendants done so, Plaintiffs never would have approved the transactions. Langer Aff. ¶¶ 3–4, Appx. at 393; Yermack Aff. ¶¶ 3–4, Appx. at 395; Goldberg Aff. ¶¶ 3–4, Appx. at 397.

3. Plaintiffs' Membership Applications Do Not Constitute Agreements to Arbitrate Core Rights Claims.

Defendants' argument that Plaintiffs agreed to arbitrate their Core Rights claims rests entirely on the so-called membership applications included in Exhibit 3 to the Motion. On their face, those documents show only that Plaintiffs Yermack and Langer agreed to abide by the rules of the Exchange and "amendments thereto." MTC Ex. 3. (The documents for Plaintiff Goldberg included an agreement to abide by rules of the "National Futures Association," and says nothing about CBOT rules.) When those documents were signed, CME members had a right to overrule any rule change by referendum, Langer Aff. ¶ 6, Appx. at 393; Yermack Aff. ¶ 6, Appx. at 395.

The documents in Defendants' Exhibit 3 say nothing about the Charters, much less arbitration of claims under the Charters. Plaintiffs' agreement to abide by future rule amendments thus cannot be read to confer upon Defendants the unilateral authority to require Plaintiffs to subject claims involving their Core Rights to arbitration, or to comply with new or amended rules affecting Core Rights that were not adopted in accordance with the procedures set forth in the Charters. Defendants merely try to import an agreement to arbitrate where one clearly does not exist.

4. Defendants' Obligations Under the Charters are Independent from the Rights and Obligations Under the Rulebooks.

Under Delaware and Illinois law, the independence of the Charters from the rulebooks further supports the conclusion that there was no agreement to arbitrate Plaintiffs' claim. As the Delaware Supreme Court explained in *Parfi*, a claim is "independent" from a contract containing an arbitration clause, and thus not subject to arbitration, "if the independent action could be brought had the parties not signed [the] contract [containing the arbitration clause]." 817 A.2d at 156 n.24. In other words, "[t]he question then is whether the purportedly arbitrable lawsuit depends on the existence of the contract containing the arbitration clause." *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 583 (Del. Ch. 2006); *accord Rosenblum v. Travelbyus Ltd*., 299 F.3d 657, 663–64 (7th Cir. 2002) (breach of claim under contract that did not contain clause was not subject to arbitration where "one contract may be fully performed while the other is breached"); *Keeley & Sons, Inc. v. Zurich Am. Ins. Co*., 409 Ill. App. 3d 515 (5th Dist. 2011) (holding that arbitration clause in one contract did not encompass disputes arising under other contracts); *Marks v. Bober*, 399 Ill. App. 3d 385 (1st Dist. 2010) (same).

Here, adjudication of Plaintiffs' claims does not depend in any way upon the existence of the current CME and CBOT rulebooks. Rather, Plaintiffs' breach of contract claim will depend on: (1) what Plaintiffs' Core Rights were under the Charters at the time of CME's

demutualization and, for CBOT members, the subsequent CMEG/CBOT merger, including what trading rights and privileges members enjoyed at the time; and (2) whether Defendants amended, changed or modified those rights and privileges without member approval. The current rulebooks and their arbitration clauses are irrelevant to both issues.[4]

The Delaware Chancery Court's decision in *In re NYMEX Shareholder Litig*., 2009 Del. Ch. LEXIS 176 (Del. Ch. 2009), is instructive. In that case, a proposed class of NYMEX members claimed that the exchange (which had been acquired by CMEG) had breached its obligations under its corporate bylaws by failing to share revenues generated through electronic trading. *Id*. at *60–61. The court noted that the members' right to payments "turn[s] on the contractual rights they have by way of the governing documents of the Exchange," *id*. at *62—just as Plaintiffs' claims here turn on whether CMEG and CBOT have breached their obligations under the Charters. In *NYMEX*, however, the corporate by-laws *themselves* contained an arbitration clause requiring that "[a]ny dispute as to whether the rights of the owners of Class A Memberships concerning a Special Matter . . . will be submitted to mandatory and binding arbitration." *Id*. at *62 n.139. Accordingly, the court rightly concluded that the breach of contract claims were subject to arbitration. *Id.* In contrast, the "governing corporate documents" establishing the basis for Plaintiffs' claims—the Charters—contain no arbitration clauses.

Nothing prevented Defendants from asking the Class B members to approve an arbitration provision like the one in *NYMEX* to govern Core Rights. But they did not. Now, they have no basis for arguing that Plaintiffs' claims are subject to arbitration.

[4] To be sure, the FAC references provisions in the CME rulebook that existed at the time of demutualization. *See, e.g.*, FAC ¶¶ 4, 39, 52–54, 87. But those historical rulebook provisions are relevant to showing what Plaintiffs' historical trading rights and privileges were.

B. Subparagraph C of Rule 578 Does Not Apply to Plaintiffs' Claims for Breach of Their Core Rights.

Defendants' Motion also fails for the independent reason that Plaintiffs' claims do not fall within the scope of subparagraph C of Rule 578—which Defendants improperly portray as an independent arbitration provision. In assessing the scope of an arbitration clause, state contract law governs. *First Options*, 514 U.S. at 944. As with any contract, the scope of an arbitration clause depends on "the intention of the parties." *Id.* at 947; *Salsitz*, 198 Ill.2d at 13.

1. Subsection C of Rule 578, Properly Read in Its Context, Provides Arbitration of Claims Involving System Failures and Negligence.

Defendants' Motion fundamentally mischaracterizes subparagraph C of Rule 578 by treating it as a stand-alone, arbitration clause—untethered from the remainder of Rule 578. *See* MTC at 2, 4, 7. The way Defendants propose to read subparagraph C in isolation not only makes little sense, but it also profoundly disregards the established rule that "[w]ords derive their meaning from the context in which they are used, and the contract must be viewed as a whole 'by viewing each part in light of the others.'" *Bd. of Trade of the City of Chicago v. Dow Jones & Co., Inc.*, 98 Ill.2d 109, 122–23 (1983) (quoting *La Throp v. Bell Fed. Savings & Loan Ass'n*, 68 Ill.2d 375, 381 (1977)). Simply put, Rule 578.C provides for arbitration in the specific context of system failures and mistakes involving trading technology—as when the Globex system fails to execute a member's trade due to an operating system crash.

Subparagraph C does not appear in the rulebooks as an autonomous contractual provision entitled, for instance, "ARBITRATION." Instead, it lies on page 36 of the fifth chapter of CME's rulebooks, as the third subparagraph of a Rule entitled "LIMITATION OF LIABILITY, NO WARRANTIES." *See* Defs.' Exs. 1 & 2. Consistent with its location in the rulebooks, subparagraph C is the dispute-resolution mechanism for Rule 578's liability limitation and warranty disclaimer for technical failures.

Unlike CME's other rules, Rule 578's language itself is prominently distinguished in all capital letters confirming that each of its subparts (including subparagraph C) is an interrelated component of a single integrated rule. A close review of its parts bears this out. To start, the Rule begins in subparagraph A by limiting the liability of the Exchanges "for any losses, damages, costs or expenses … arising from":

- (i) technical glitches (*i.e.*, "failures", "malfunctions", etc.) in connection with the use of the Exchange's systems and services;
- (ii) failures or malfunctions caused by third-parties including independent software vendors and network providers;
- (iii) errors or inaccuracies in information; and
- (iv) unauthorized system access or use.

Rule 578.A, Ex. D, Appx. at 29–30. The subsequent paragraph extends this liability limitation to various kinds of claims (*e.g.*, contract or tort), and subparagraph B further disclaims any corresponding warranties or representations. *See* Rule 578.B, *Id*. at 30.

Within this limitation of liability and warranty disclaimer for glitches and mistakes in Exchange operations, subparagraph C of Rule 578, in turn, requires arbitration for any "dispute arising out of the use of systems or services of the Exchange or services, equipment or facilities." *Id*. Rule 578's remaining subparagraphs likewise address other aspects of the Rule's liability limitations for system failures.[5]

Subparagraph C does not expressly define the expression "use of systems or services," but that language must be read in context. It is black-letter law of contract interpretation that no

[5] 578.E addresses claimsbased on "negligence, failures, malfunctions, faults in delivery, delays, omissions, suspensions, inaccuracies, interruptions, terminations, order statusing errors or any other causes" in the "use or inability to use" exchange systems. Likewise, 578.F and 578.G prescribe distinct liability limitations for "phantom orders," a particular kind of system malfunction. *See* Rule 578.F, G; Ex. D, Appx. at 31.

clause should be viewed in isolation, and each provision should be considered in light of the others. *Gallagher v. Lenart*, 226 Ill.2d 208, 232 (2007); *Bd. of Trade of the City of Chicago*, 98 Ill.2d at 122–23 (quoted *supra*). Contract interpretation "is not a smorgasbord at which you take what you like and leave what does not appeal to your tastes. However much a snippet excised from the broader context of the whole agreement might suit your purposes, the interpretation of the contract cannot turn on that snippet to the exclusion of all else." *Wells Fargo Funding v. Draper & Kramer Mortgage Corp.*, 608 F. Supp. 2d 981, 987 (N.D. Ill. 2009). The "intention of the parties is not to be gathered from detached portion of a contract or from any clause or provision standing by itself." *Martindell v. Lake Shore Nat'l Bank*, 15 Ill.2d 272, 283 (1958).

Reading subparagraph C within the context of Rule 578 clearly establishes that disputes arising out of "use of systems or services" that must be arbitrated are those involving technical failures or mistakes that occurred while using the Exchange's systems, services or facilities; those are the matters for which Rule 578 limits liability and disclaims warranties. Stated another way, arbitration for disputes "arising out of the use of systems or services of the Exchange or services, equipment or facilities used to support such systems or services" is required for losses as a consequence of a technical failure or malfunction (578.A subparts (i) and (ii)), informational error (subpart (iii)), or unauthorized access/use (subpart (iv)).[6]

[6] *See, e.g.*, *Dunhill Asset Servs. III, LLC v. Tinberg*, No. 09 C 5634, 2012 U.S. Dist. LEXIS 102451, *18–20 (N.D. Ill. July 23, 2012) (refusing to consider in isolation the phrase "general equitable principles," an "extremely broad" term, out of context from the agreement's remaining language); *Covinsky v. Hannah Marine Corp.*, 388 Ill. App. 3d 478, 484–87 (1st Dist. 2009) (reading "termination" in agreement's broader context to mean "involuntary termination"); *LaVelle v. Dominick's Finer Foods, Inc.*, 227 Ill. App. 3d 764, 767–68 (1st Dist. 1992) (interpreting "waiver of all claims" within the context of surrounding contractual language as a limited waiver of claims "which arose out of the completed work").

This is illustrated in federal Judge Bucklo's decision in *Plaenum Fund, LP v. Chicago Mercantile Exch., Inc.*, which Defendants submit in support of their Motion. In *Plaenum Fund*, the plaintiff's automated trading system malfunctioned causing the "erroneous execution of numerous trades." *See* Defs.' Ex. 4 at 1. So, that action, unlike this one, indisputably fell within the Rule requiring arbitration of claims "arising from the use of CME systems and services." *Id*.

Any doubt regarding this construction of subparagraph C is removed by what CME itself told the CFTC in 2001 when the Rule was promulgated and adopted. In a letter dated June 21, 2001 to the CFTC, CME described the new Rule within the context of the Exchange's "re-examin[ation]" of its limitation of liability and damages policies "in light of its conversion to a for-profit company and its new pricing structure." Ex. K, Appx. at 106. Subparagraph C was simply part of this comprehensive revision to the Exchange's liability limitation and warranty disclaimer for system failures and negligence, as CME told the CFTC:

> All disputes involving claims for system failures and negligence are directed to arbitration in which the arbitration panel is selected from the NFA list rather than being appointed by the Exchange.[7]

Id., Appx. at 107. CME never suggested that subparagraph C was anything else.

Defendants' proposed construction of subparagraph C as a stand-alone arbitration clause encompassing Plaintiffs' claim simply does not make sense. It defies logic that the arbitration mechanism now claimed to govern disputes concerning Plaintiffs' Core Rights under the CMEG and CBOT Charters would be submerged deep within Rule 578—between the limitation of liability and warranty disclaimers in subparagraphs (A) and (B) and subparagraphs (D) through (G). Moreover, other provisions within subparagraph C also would make no sense under

[7] In this situation, the surrounding circumstances reflected in CME's Letter to the CFTC are appropriately considered. *See, e.g., First Bank & Trust Co. of Ill. v. Vill. of Orland Hills*, 338 Ill. App. 3d 35, 47–48 (1st Dist. 2003).

Defendants' interpretation of the Rules. Rule 578.C provides an express judicial forum (in the alternative), as well as its own choice-of-law clause (electing Illinois law) for claims that fall within the provision but are deemed "not arbitrable":

> If for any reason, a court of competent jurisdiction finds that such dispute is not arbitrable, such dispute may only be litigated in the County of Cook in the State of Illinois and will be governed by the laws of the State of Illinois without regard to any provisions of Illinois law that would apply the substantive law of a different jurisdiction.

Rule 578.C. This runs headlong into Charter provisions governed by Delaware law. *See* CMEG Charter Art. 3, Ex. B, Appx. at 3; CBOT Charter Art. IX, Ex. C, Appx. at 22. Defendants' interpretation of 578.C cannot be squared with the text or the context of the rulebooks.

If these highly sophisticated Defendants had intended to require arbitration of cases like this, Defendants would be able to point to a straightforward and typically broad arbitration clause—not a subpart to a liability limitation and warranty disclaimer. *See Duthie v. Matria Healthcare, Inc.*, 535 F. Supp. 2d, 909, 919 (N.D. Ill. 2008) (noting that "commercially sophisticated parties" had "every incentive and the means to say what they intended"); *Cress v. Rec'l Svcs., Inc.*, 341 Ill. App. 3d 149, 185 (2d Dist. 2003) ("There is a strong presumption against provisions that easily could have been included in the contract but were not.").

2. Neither the "Presumption" Favoring Arbitration Nor the "Arising Out Of" Language Expands Subparagraph C to Cover Plaintiffs' Claim.

To support their untenable construction of Rule 578.C, Defendants advance two legal arguments. First, they raise the FAA's statutory policy favoring arbitration, and second, they argue that subparagraph C's use of the phrase "arising out of" renders it broad enough to include Plaintiffs' claim. Neither argument withstands scrutiny.

First, Defendants invoke what they refer to as a "strong presumption" of arbitrability under the FAA. MTC at 7. But as the Supreme Court has clarified, "this 'policy' is merely an acknowledgment of the FAA's commitment to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'" *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 302 (2010). The Court has "never held that this policy overrides the principle that a court may submit to arbitration 'only those disputes . . . that the parties have agreed to submit.'" *Id*. Despite the FAA's "pro-arbitration tilt, agreements must not be construed so broadly as to force arbitration of claims that the parties never agreed to submit to arbitration." *Welborn Clinic v. MedQuist, Inc*., 301 F.3d 634, 639 (7th Cir. 2002).[8] Defendants cannot use the "strong presumption" to rewrite and improperly expand Rule 578.C's scope.

Second, Defendants argue that the words "arising out of" in Rule 578.C give the clause "expansive reach" to encompass Plaintiffs' claim for breach of their Core Rights in this case. In support, they cite *Gore v. Alltel Commun's*, 666 F.3d 1027 (7th Cir. 2012) and *Fahlstrom v. Jones*, 2011 IL App (1st) 103318. MTC at 7–8. Defendants are wrong. The words "arising out of" are not talismanic incantations that convert any arbitration clause into one that is all-encompassing. Unlike here, both *Gore* and *Fahlstrom* involved arbitration clauses in which the predicate following the "arising out of" phrase was an entire agreement or party relationship—as is commonplace with broad, general arbitration clauses. *See Gore*, 666 F.3d at 1033–34 (providing for arbitration of "any dispute arising out of this Agreement or relating to the Services

[8] It is hardly clear that the presumption has any role whatsoever in this context of a narrow, specific arbitration clause. As the Seventh Circuit has specified, the presumption applies "[i]f the parties' contract includes a broad arbitration clause." *Karl Schmidt Unisia, Inc. v. Int'l Union*, 628 F.3d 909, 913 (7th Cir. 2010).

or Equipment"); *Fahlstrom*, 2011 IL App (1st) 103318, ¶ 6 (requiring arbitration for "[a]ny dispute among the members, and any dispute between the company and any one or more of its members"). Indeed, *Fahlstrom* itself explained that so-called "generic" (*i.e.*, broad) arbitration clauses "include those demanding the arbitration of all claims or disputes 'arising out of' or 'arising out of or related to' or 'regarding' the agreement at issue." *Id.* ¶ 17.[9]

In significant contrast, subparagraph C of Rule 578 contains no such predicate sanctioning broad, general application. It is instead a "specific" arbitration clause under Illinois law because it identifies the precise issues that must be arbitrated. *Roosevelt Univ. v. Mayfair Constr. Co., Inc.*, 28 Ill. App. 3d 1045, 1056 (2d Dist. 1975). That is, it narrowly provides for arbitrations for disputes for a circumscribed subject matter—the Exchange's "systems or services" or supporting "services, equipment or facilities," and, as explained above, properly placing this language within Rule 578's context confirms that it applies to malfunctions and mistakes. Rule 578.C is a narrow clause by its own terms.

Courts applying Illinois law have consistently refused to expand narrow arbitration clauses the way Defendants suggest. *See, e.g., Welborn*, 301 F.3d at 640 (denying arbitration of certain claims and refusing to "do violence" to narrow arbitration clause by interpreting it to include tangentially related issues); *United Cable Television Corp. v. Northwest Ill. Cable Corp.*, 162 Ill. App. 3d 411, 413 (3d Dist. 1987) (denying arbitration of claims that did not "affect the general policy of the Company," as specified by the arbitration agreement). This is especially

[9] Defendants' other cases likewise involved broad, generic arbitration provisions. *See CK Witco Corp. v. Piper Allied Indus.*, 272 F.3d 419, 422 (7th Cir. 2001) (requiring arbitration for violation of the express provision of this Agreement . . ."); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 5 (1983) (providing for arbitration of "[a]ll claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof").

true where, as here, the dispute arises under an agreement (the Charters) that is fundamentally distinct from the one containing an arbitration provision (the rulebooks). *See infra* Sec. III.A.4.

3. Assuming *Arguendo* That Rule 578.C Encompassed Plaintiffs' Claim, This Case is Nonetheless "Not Arbitrable" Under the Rules and Must Proceed to Court

Under the plain language of Rule 578.C, disputes otherwise covered by the arbitration clause but "not arbitrable" may be litigated in this Court. The Rule states, "[i]f for any reason, a court of competent jurisdiction finds that such dispute"—that is, a dispute otherwise covered by Rule 578.C—"is not arbitrable," it may be litigated in Cook County. Rule 578.C. Because this case is a class action and because class actions are not arbitrable under Defendants' rules, this case must proceed in this Court. Defendants' rules are silent about class-wide arbitration. The rules contain no mention of class actions, no bar against pursuing class actions, and no procedures for handling class actions. Rule 627.B requires the arbitrators appointed by Defendants to maintain confidentiality, Ex. F, Appx. at 55, which is fundamentally incompatible with the notice and opt out rights needed to make a class action binding on absent class members. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811–12 (1985). The rules thus provide no basis for concluding that class actions like this one are arbitrable under the Exchange rules.

Nor can Defendants rely on the rules' silence on the subject of class actions to argue that this dispute is arbitrable under those rules. In *Stolt-Nielsen v. AnimalFeeds Int'l Corp*., the Supreme Court squarely held that, under the FAA, an arbitration clause that is silent on the issue of class arbitration cannot be interpreted to imply a right to class arbitration. 559 U.S. 662, 685–87 (2010) ("An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate.").

As Justice Alito explained in *Stolt-Nielsen*, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply

agreeing to submit their disputes to an arbitrator." Id. at 685–86. Class arbitration requires "fundamental changes" to the procedures that apply in standard bilateral arbitrations, including "resolv[ing] claims for hundreds or perhaps thousands of parties," adjudication of the rights of absent parties, and "commercial stakes" that are far greater than most bilateral arbitrations. Id. Consequently, the FAA does not permit the conclusion that class claims are arbitrable absent a specific agreement to arbitrate such claims. *Id*.

The Supreme Court's subsequent decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which upheld an arbitration clause that expressly banned class arbitrations, also supports this conclusion. Writing for the majority, Justice Scalia stressed that "[c]lasswide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes." *Id*. at 1750. The Court noted that "class arbitration *requires* procedural formality"; "[i]f procedures are too informal absent class members would not be bound by the arbitration." *Id*. at 1751. For the judgment in a class action to bind absent class members, "absent class members must be afforded notice, an opportunity to be heard, and a right to opt out of the class." *Id*. (citing *Shutts*, 472 U.S. at 811–12). Because of the "fundamental" differences between class and bilateral arbitration, the Court concluded that class arbitration is "inconsistent with the FAA" absent an express agreement to allow class arbitration. *Id*.

Unlike the AT&T clause at issue in *Concepcion*, Defendants' arbitration clause does not preclude class actions based on claims arising within the scope of Rule 578.C, but instead requires that any dispute that is "not arbitrable" under the rules should proceed in court. Courts have denied motions to compel arbitration, and required class actions to proceed in court, when the arbitration rules at issue did not allow for class arbitration and also did not include any waiver of the right to pursue class claims. *See Velez v. Perrin Holden & Davenport Capital*

Corp., 769 F. Supp. 2d 445 (S.D.N.Y. 2011) (holding that class claims could proceed in court because they were "not arbitrable" under FINRA Rules); *Gomex v. Brill Sec., Inc*., 943 N.Y.S. 2d 400, 404–05 (N.Y. S. Ct. A.D. 2012) (denying motion to compel arbitration because FINRA Rules "preclude[] arbitration when arbitrable claims are brought by class action"). Courts have also denied motions to compel arbitration where arbitration agreements, like the one here, provide exceptions to certain claims within their scope. *See, e.g., James & Jackson LLC v. Willie Gary, LLC*, 906 A.2d 76, 81-82 (Del. 2006) (holding that arbitrability was an issue for court and that despite broad arbitration clause, non-arbitrable claims for injunctive relief were to proceed in court); *see also Kahuku Holdings, LLC v. MNA Kahuku, LLC*, 2014 WL 4699618, at *3=5 (Del. Ch. Sept. 15, 2014) (holding that a Hawaii court had a right to determine arbitrability and litigate the case if it was subject to the "carve out" from the arbitration provision).

Defendants could have sought their members' agreement to an arbitration clause, like that in *Concepcion*, that included a waiver of the right to pursue class action claims. Or, alternatively, the parties could have agreed to class arbitration under the AAA rules governing class arbitrations. *See, e.g., Bess v. DirecTV*, 351 Ill. App. 3d 1148, 1153 (5th Dist. 2004).[10] Defendants instead drafted an arbitration clause under which claims that are found "not arbitrable" by a court are to proceed in court. Under *Stolt-Nielsen* and *Concepcion*, the silence of Defendants' arbitration rules on class actions is tantamount to a prohibition against arbitration of

[10] In *Bess*, the Court noted that the AAA had adopted specific rules governing class actions that mirror the procedures applicable to class actions under Illinois and federal law. 351 Ill. App. 3d at 1152–55. Under the DirecTV arbitration clause, questions of arbitrability were to be resolved by the arbitrator. *Id.* But here, Rule 578.C provides that arbitrability is a question for the Court.

such claims, and requires the conclusion that Plaintiffs' claims are "not arbitrable" and should proceed in this Court.[11]

C. The Arbitration Provisions are Procedurally and Substantively Unconscionable and Therefore Unenforceable.

Under both the FAA and applicable state law, an arbitration agreement is unenforceable if it is unconscionable. *Jackson*, 764 F.3d at 779. As the Seventh Circuit held in *Jackson*, under both the FAA and Illinois law, "courts have refused to honor agreements to arbitrate, where the rules are inherently biased or were not formulated in good faith." *Id*. (citing *Hooters of Am., Inc. v. Philips*, 173 F.3d 933, 940 (4th Cir. 1999); *Penn v. Ryan's Family Steak Houses, Inc*., 269 F.3d 753, 756, 758–61 (7th Cir. 2001)).

To force Plaintiffs' claims into arbitration, Defendants fail to mention the governing procedures that would apply under their rules. Notably, Defendants did not even submit the rules governing CME's arbitration procedures with their Motion. This conspicuous omission is revealing: Defendants hope the Court will ignore the fact that Defendants' arbitration

[11] Defendants' Motion did not address the fact that Rule 578.C requires any "such dispute" that is "not arbitrable" to proceed in this court. Defendants may argue that this language merely requires litigation of cases that are not within the scope of the arbitration clause, equating the concept of arbitrability with scope. But the term "arbitrable" does not solely concern scope; rather, "arbitrable" means "subject to or suitable for arbitration." BLACK'S LAW DICTIONARY 124 (10th ed. 2014). Moreover, such a reading renders the phrase "not arbitrable" superfluous and nonsensical because: (1) disputes that are not within the scope of the arbitration clause would proceed in court even absent that language, making that language superfluous if it means "not within the scope"; and (2) the term "such dispute" clearly means that disputes that otherwise are within the scope of the clause may proceed in court if they are "not arbitrable," making this phrase nonsensical if it means "not within the scope." The Court cannot adopt an interpretation of the language that would render it superfluous. *See Wigod v. Chicago Mercantile Exchange*, 141 Ill. App. 3d 129, 133 (1st Dist. 1986) (holding CME's rules at the time did not require compulsory arbitration; "[i]f arbitration were compulsory, then these provisions concerning execution of arbitration agreements would be superfluous, as would the provision of Rule 608 concerning voluntary recognition of the jurisdiction of the arbitration panel and the Board.").

procedures completely stack the deck in their favor. If these procedures apply to Plaintiffs' claim under the Charters, Defendants will get to sit as judge and jury over themselves.

As the Seventh Circuit explained in *Jackson*, an arbitration clause is a type of forum selection clause and that is subject to "the general principle that unconscionable contractual provisions are invalid." *Id*. at 777, 778 & n.33; *see also Timmerman v. Grain Exch., LLC*, 394 Ill. App. 3d 189, 915 (2009)); *accord Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, ¶ 18 (recognizing that "an arbitration agreement may be invalidated by a state law contract defense of general applicability, such as fraud, duress, or unconscionability"). Under Illinois law, a contract is unenforceable if it is either procedurally or substantively unconscionable. *Jackson*, 764 F.3d at 779 ("a contractual provision may be unconscionable on either procedural or substantive grounds" (citing *Razor v. Hyundai Motor Am*., 222 Ill.2d 75, 99 (2006))).

Here, the application of the Exchange rules to require arbitration of Plaintiffs' claim under the Charters would be both procedurally and substantively unconscionable. As a procedural matter, this case, like *Jackson*, is one involving "unequal bargaining power." *Id*. The arbitration clause Defendants invoke is buried within rulebooks that are hundreds of pages long. Defendants have provided no evidence of any communications to their members explaining that it had adopted the arbitration clauses or explaining their purported application to breach of contract claims involving Plaintiffs' Core Rights under the CMEG and CBOT Charters. In fact, Defendants have submitted no evidence that they ever suggested, prior to this case, that breach of contract claims involving members' Core Rights could be subject to arbitration under their rulebooks. Rather, it is undisputed that Defendants adopted the arbitration clauses unilaterally, without their members' consent. *See* Ex. A, Appx. at 1 (Stipulation of Fact Nos. (c), (d)).

As a substantive matter, Defendants' arbitration rules stack the deck in their favor in every provision:

- The arbitrators are selected from a pool appointed by the Chairman of CME's Board of Directors, Terrence A. Duffy. *See* Rule 627.A, Ex. F, Appx. at 55.
- The five arbitrators are appointed by CME's Market Regulation Department, a division of CME chaired by one of its corporate officers, Tom LaSala. Rule 614.A, Ex. F, Appx. at 50 & Ex. P, Appx. at 391.
- Any objection to any arbitrator would be resolved by Mr. LaSala. Rule 614.B, Ex. F, Appx. at 50.
- Disputed questions of law are referred "to Exchange legal counsel for an opinion." Rule 615.B, Ex. F, Appx. at 50-51.
- There is a right to appeal, but appeals are decided by an "appellate panel of the Board" consisting of three CME directors appointed by the Chairman of CME's Board of Directors, Mr. Duffy. Rule 619, Ex. F, Appx. at 52-53.

Defendants' President and Chairman, Mr. Duffy—who was directly involved in the conduct at issue in the complaint, is mentioned approximately 10 times in the FAC, and will be a key witness in this case—would play a central role throughout the proceedings, with the ultimate right to select an appellate panel consisting of three handpicked CME Directors. *Id.* Rule 619 ("The appeal will be determined by an Appellate Panel consisting of three directors appointed by the Chairman of the Board, one of whom the Chairman of the Board shall designate as chairman of the Panel.").[12] It would be difficult to draft a more one-sided arbitration agreement.

[12] The arbitrators chosen by Defendants are supposed to comply "Code of Ethics for Arbitrators in Commercial Disputes" adopted by the AAA and ABA Rule 627.C. Under that Code, an arbitrator must withdraw if there is a substantial question as to a "direct or indirect personal or financial interest in the outcome of the arbitration," or "any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of the parties." Ex. O, Appx. at 384–85 (ABA-AAA Code Canon II.A(1), (2), G(2)). Any arbitrator on the Exchange's Arbitration Committee would be objectionable under that rule because (a) the arbitrator's annual appointment to serve depends entirely upon CME's chairman, Mr. Duffy; (b) the rules require the arbitrator to take direction on disputed legal questions from CME's in-house legal counsel; and (c) the arbitrator's decision

Courts presented with similarly one-sided arbitration clauses have not hesitated to deny motions to compel arbitration based on substantive unconscionability. *See McMullen v. Meijer, Inc*., 355 F.3d 485, 494 (6th Cir. 2004) (holding that arbitration provision that "grants one party to the arbitration unilateral control over the pool of potential arbitrators . . . inherently lacks neutrality"); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (holding that arbitration rules under which "one party to the proceedings so control the arbitral panel" was a "sham system unworthy of the name of arbitration"); *Raglani v. Ripken Professional Baseball*, 939 F. Supp. 2d 517, 521–22 (D. Md. 2013) (holding that arbitration clause that allowed defendant to choose arbitrator was substantively unconscionable and unenforceable); *Caire v. Conifer Value Based Care, LLC*, 982 F. Supp. 2d 582, 595 (D. Md. 2013) (holding arbitration clause was substantively unconscionable when it provided "no mechanism for selecting a neutral arbitrator and it states no rules by which the arbitration will proceed"). Indeed, the Illinois Supreme Court long ago noted that "[t]he judicial mind is so strongly against the propriety of allowing one of the parties, or its especial representative, to be judge or arbitrator in its own case, that even a strained interpretation will be resorted to if necessary to avoid that result." *Ry. Passenger & Freight Conductors' Mut. Aid & Benefit v. Robinson*, 147 Ill. 138, 159–60 (1893).

These cases are fully consistent with the Supreme Court's decision in *Concepcion*, 563 U.S. 321, which rejected an unconscionability defense to an arbitration clause that included a waiver of the right to pursue claims on a class-wide basis. In *Concepcion*, the Court found that an unconscionability defense was unavailable because the class action waiver "derive[d] [its]

---

is subject to an appeal to a committee consisting of three members of the CME Board of Directors selected by Mr. Duffy. Thus, while the reference to the Code provides a small fig leaf for Defendants' arbitration procedures, the ABA-AAA Code does not provide any mechanism for dealing with a case, like this one, where the bias in the procedures is so systemic that it is impossible to maintain even the appearance, let alone the reality, of impartial decision-making.

meaning from the fact that an agreement to arbitrate was at issue." *Id.* at 327. However, the Court specifically recognized that Section 2 of the FAA, 9 U.S.C. § 2, "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." Here, as in *Jackson* and the other unconscionability cases discussed above, Plaintiffs' unconscionability argument is based on their right to a neutral forum, the procedural defects in Defendants' adoption of their arbitration rules, the absence of any genuine agreement to be bound by those rules, and the one-sided process that Defendants have adopted.

Ultimately, any arbitration under CME's rules would be futile because any award also would be subject to a motion to vacate based on the "evident partiality" of the arbitrators selected by CME, and particularly the appeal panel consisting entirely of CME' Directors under Rule 619. 9 U.S.C. § 10(a)(2). Compelling Plaintiffs to submit to Defendants' arbitration procedures in these circumstances thus would significantly increase cost and impose delay rather than promote the interests in economy and efficiency that arbitration is supposed to advance.

Consequently, the arbitration system adopted by the CME and CBOT rulebooks is both procedurally and substantively unconscionable as applied to this dispute.

IV. CONCLUSION

For each of the foregoing reasons, Defendants' motion to compel arbitration should be denied.

Dated: November 4, 2014

Respectfully submitted,

SHELDON LANGER, RONALD M. YERMACK, and LANCE R. GOLDBERG

By: _____
One of Their Attorneys

Suyash Agrawal
Jeannie Evans
Hillary Weis Coustan
AGRAWAL EVANS LLP
Cook County Firm No. 56313
308 West Erie Street – Suite 502
Chicago, Illinois 60654-3924
(312) 448-8800 main
suyash@agrawalevans.com
jeannie@agrawalevans.com

Stephen D. Susman (admitted under ILL. S. CT. R. 707)
Texas State Bar No. 19521000
Robert S. Safi (admitted under ILL. S. CT. R. 707)
Texas State Bar No. 24051280
SUSMAN GODFREY L.L.P.
1000 Louisiana Street – Suite 5100
Houston, Texas 77002
(713) 651-9366 main
ssusman@susmangodfrey.com*
rsafi@susmangodfrey.com

Stephen E. Morrissey (admitted under ILL. S. CT. R. 707)
Washington State Bar No. 44710
SUSMAN GODFREY L.L.P.
1201 Third Avenue – Suite 3800
Seattle, WA 98101-3000
(206) 516-3880 main
smorrissey@susmangodfrey.com

Trevor Stutz (admitted under ILL. S. CT. R. 707)
New York State Bar No. 5148432
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars – Suite 950
Los Angeles, CA 90067
(310) 789-3100 main
tstutz@susmangodfrey.com
Attorneys for Plaintiffs