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' SUR-SUR REPLY IN FURTHER 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

Plaintiffs' Sur Reply attempts to make the question of arbitrability harder than it is by mischaracterizing Defendants' arguments and making flawed statements of the applicable law. Defendants submit this Sur-Sur Reply to bring clarity to the relevant issues.

- Rule 578.C Does Not Modify or Change Plaintiffs' Core Rights.

Defendants do not argue that Rule 578.C trumps the Plaintiffs' Core Rights, nor do they "brush aside" the procedural requirement of a Member vote before the Core Rights can be changed or modified, or, in the case of CBOT, adversely affected. (Sur Reply at 1.) Rather, as Defendants explained in their Reply, the adoption of Rule 578.C had zero effect on the substance of Plaintiffs' Core Rights. (Reply at 7-8.) Plaintiffs received the *exact same* core privileges both before and after the adoption of Rule 578.C. The only thing that changed was the forum in which CBOT and CME Members must bring certain disputes. (*Id.* at 8.)

Plaintiffs acknowledge that the substance of the Core Rights remains constant, but argue that the arbitration clause is a "procedural change" to the Core Rights, which requires a Member Vote. (Sur Reply at 3-4.) Plaintiffs fail to cite to any case law to support their argument, and Defendants do not believe that any such authority exists.[1] Instead, arguing in retreat, Plaintiffs assert that Defendants' reliance on *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) is misplaced because it stands only for the proposition that statutory rights are not "eliminated" by the adoption of an arbitration clause. But the *Mitsubishi* Court goes further than that: the Court recognizes that a party who agrees to arbitrate does not forgo any substantive rights, it only submits to their resolution in an arbitral forum. The Court states: "we must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention w[ould] be deducible from text or legislative history." *Id.* at 628. Here too, if the parties intended that the Core Rights include the right to vindicate all disputes in court, that intention would have been included in the Charters.[2]

- Defendants Do Not Ignore that the Charters Themselves Do Not Contain Arbitration Provisions or that Plaintiffs' Claims Arise from Obligations under the Charters.

Defendants explained at length in both the Opening Memorandum and the Reply that the fact that the Charters themselves do not contain arbitration provisions is inconsequential. Plaintiffs want this Court to ignore that as Members of the Exchanges, Plaintiffs agreed to be

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[1] *Williams v. Jo-Carroll Energy, Inc.*, 382 Ill. App. 3d 781, 785 (2d Dist. 2008) does not support Plaintiffs' argument that adoption of an arbitration provision is a "procedural change" to the contract's underlying rights. It merely provides that an arbitration provision added to a pre-existing contract will be held enforceable if adopted in accordance with set procedures.

[2] Plaintiffs argue that none of the cases cited to by Defendants treat the addition of an arbitration clause as something other than an amendment or modification. (Sur Reply at 3.) There is a difference, however, between an amendment or modification of the contract as a whole, and the amendment or modification of a specific right granted within a contract. Plaintiffs' attempts to conflate these distinct issues must be rejected.

bound by the Exchange Rules and all amendments thereto, including the adoption of any arbitration provisions. *See, e.g., Geldermann, Inc. v. CFTC*, 836 F.2d 310 (7th Cir. 1987) (determining that a member of CBOT consented to arbitration where he had agreed to be bound by the exchange's rules, and the exchange subsequently adopted a rule mandating arbitration).[3] They also want to treat the Exchange Rules as a finite contract, rather than a set of continuous obligations that governs the entire relationship between the Members and Exchanges. (Reply at 3-7 (explaining that arbitration is required for the independent reasons that Rule 578.C encompasses the dispute and because the Charters incorporate the Exchange Rules by reference).) The appellate court's decision in *Geldermann v. Stathis*, discussed at length in Defendants' Reply, emphasizes the importance of Plaintiffs' agreement to abide by the Exchange Rules. (Reply at 4-6 (discussing *Geldermann, Inc. v. Stathis*, 177 Ill. App. 3d 414 (1st Dist. 1988).)

Plaintiffs attempt to distinguish *Stathis* by characterizing it as a dispute regarding whether CBOE members were bound to follow the CBOE rules, not whether the claim fell within the CBOE's arbitration clause. (Sur Reply at 1). Plaintiffs misread the case, and quite badly. The *Stathis* court determined that as members of the CBOE, the parties were subject to the CBOE's rules, including the arbitration provision within the rules. *Stathis*, 177 Ill. App. at 418-20. The court then held that the trial court did not err in refusing to stay the arbitration, the underpinning of which ruling was that the parties' dispute fell within the scope of the arbitration provision. *Id.*

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[3] Plaintiffs take issue with the fact that at the time the Charters incorporated the Rules, the Rules did not contain an agreement to arbitrate. This argument misses the mark for two reasons. First, Plaintiffs agreed, as a condition of Membership, to abide by all Exchange Rules and all amendments thereto. (Mem. at 5-6.) Second, the CMEG Charter has been amended and restated since the adoption of Rule 578.C. *See* August 28, 2008 Form 8-K, *available at* http://www.sec.gov/Archives/edgar/data/1156375/000119312508186823/0001193125-08-186823-index.htm.

Plaintiffs also raise issue with the fact that Defendants did not alert this Court to *Gilmore v. Carey*, 2011 IL App (1st) 103840, a recent case in which the court denied the defendants' motion to compel arbitration after determining that the parties' dispute did not fall within the scope of CBOT's member-to-member arbitration provision. Plaintiffs allege that *Gilmore* supports their argument that the CBOT Rules do not require arbitration in this case. But a close examination of *Gilmore* reveals that it actually supports Defendants' argument by confirming that the Exchange Rules, including their arbitration provisions, apply to the entire scope of a Member's relationship with the Exchange and can require arbitration of disputes that arise out of separate contracts.

The *Gilmore* court went through a two-part process in determining whether the dispute at issue was subject to arbitration. The court first recognized that as a member of CBOT, Gilmore was subject to the CBOT Rules, including Rule 600, governing member-to-member arbitration. *Id.* at ¶ 14. The court then proceeded to examine the substance of the parties' dispute to determine whether or not the claims fell within the scope of Rule 600. *Id.* at ¶¶ 23-25. Although the court ultimately determined that the parties' employment-related dispute was not subject to arbitration, it was not, as Plaintiffs' suggest, because the dispute arose out of a separate employment contract: it was because the arbitration provision at issue did not encompass the parties' dispute. *Id.* Here, in contrast to *Gilmore*, for the reasons set forth in both the Opening Memorandum and Reply, Plaintiffs' claims fall directly within Rule 578.C's arbitration mandate. (Mem. at 7-9; Reply at 8-10.)

- Defendants Do Not "Implicitly" Concede that Rule 578.C Does Not Apply.

Plaintiffs argue that Defendants make a "fatal admission" by acknowledging that a unilateral increase in the number of authorized and issued shares of Class B Common Stock would not fall under the scope of 578.C. But Plaintiffs' sudden assertion that the "complaint

alleges that CMEG has *de facto* issued Class B Common Stock" to non-Members without Member approval must be viewed as what it is: a contrived and transparent attempt to avoid arbitration. (Sur Reply at 4.)

There is no issuance of stock, actual, "de facto," or otherwise, mentioned anywhere in the Complaint. And even if the Complaint contained such an allegation, a claim for a "de facto" issuance of stock would be nonsense. There is no such thing. What is more, Plaintiffs cannot use their Sur Reply to manipulate or redraft their allegations in order to avoid arbitration. As the Seventh Circuit has recognized, the manner in which a plaintiff characterizes his claim does not govern its arbitrability: "'Were the rule otherwise, a party could frustrate any agreement to arbitrate simply by the manner in which it framed its claims.'" *Gore v. Alltel Commc'ns, LLC*, 666 F.3d 1027, 1036 (7th Cir. 2012) (quoting *In re Oil Spill by the "Amoco Cadiz" off the Coast of France March 16, 1978*, 659 F.2d 789, 794 (7th Cir. 1981)). Instead, Plaintiffs state no fewer than nineteen times that this dispute involves the "best and most proximate access" to Globex.

- Defendants Do Not Concede that the Absence of a Class Action Renders Plaintiffs' Dispute "Not Arbitrable."

Plaintiffs also assert that Defendants somehow concede that this case is "not arbitrable" because they agree that the Exchange Rules do not allow classwide arbitration. (Sur Reply at 5.) The absence of a class mechanism does not, however, render a dispute "not arbitrable." Instead, as Defendants explained in their Reply, it requires the Plaintiffs to abandon their class claims and bring individual arbitration actions. (Reply at 10-12.)

Plaintiffs argue that Defendants failed to cite any authority to support their argument that individual arbitration actions are required, but cite only to cases that stand for the "well-established principle that an arbitration provision may be drafted to preclude class actions

and class-wide arbitration, or to require any and all claims, including class claims, to proceed in arbitration." (Sur Reply at 6.) This is simply not true.

Reed Elsevier, Inc. v. Crockett, cited in Defendants' Reply at page 11, is directly on point. 734 F.3d 594, 600 (6th Cir. 2013). In *Crockett*, the arbitration provision in the parties' contract was completely silent as to whether class procedures were available. When Crockett attempted to bring a classwide arbitration, LexisNexis sued Crockett in federal court seeking, in part, a declaration that the agreement did not authorize arbitration of class claims. *Id.* at 596. After analyzing the parties' contract, the district court granted summary judgment for LexisNexis, thereby enjoining Crockett from bringing a classwide arbitration. The Sixth Circuit affirmed, holding that an arbitration clause must expressly include the possibility of classwide arbitration before the court will force it on the parties. *Id.* at 600. The Court further rejected Crockett's attempt to avoid arbitration by claiming that an agreement that failed to provide for classwide arbitration was unconscionable. Crockett was thus left to arbitrate his claim on an individual basis. *Id.*

Here, as in *Crockett*, the absence of a classwide arbitration mechanism does not result in Plaintiffs having the ability to bring class claims in a judicial forum. Instead, Plaintiffs must arbitrate their claims on an individual basis.

- Defendants Did Not Fail to Offer a Meaningful Response to Plaintiffs' Unconscionability Argument.

Plaintiffs assert that Defendants failed to rebut Plaintiffs' claims of unconscionability. But Defendants pointed out in the Reply that Plaintiffs' entire argument is based on case law involving employment and consumer disputes where the arbitration procedures overwhelmingly favor the employer or commercial entity. This dispute, on the other hand, involves voluntary Membership Exchanges and highly sophisticated business parties who

receive substantial privileges in exchange for agreeing to comply with the Exchange Rules. Plaintiffs cannot reap the benefits of Membership without also submitting to its obligations. Plaintiffs' cases are therefore inapposite.

I. CONCLUSION

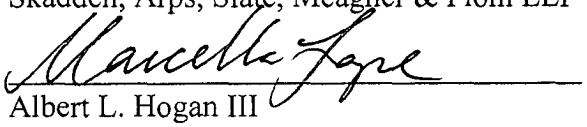
For the foregoing reasons, and for the reasons set forth in Defendants' Opening Memorandum and Reply, Defendants respectfully request that this Court enter an order compelling arbitration and staying the proceedings in this case or dismissing the case outright.

Dated: December 18, 2014

Chicago, Illinois

Respectfully submitted,

Skadden, Arps, Slate, Meagher & Flom LLP



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CERTIFICATE OF SERVICE

Marcella Lape, an attorney, hereby certifies that on December 18, 2014, she caused a true and correct copy of the foregoing *Defendants' Sur-Sur Reply in Further Support of Their Motion To Compel Arbitration And Dismiss Or Stay This Action* to be served by U.S. Mail and electronic mail on the following counsel:

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Dated: December 18, 2014

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