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' SUR REPLY IN OPPOSITION
TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

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In their Reply, Defendants raise a handful of new arguments to justify their motion to compel arbitration. Those arguments are unpersuasive and should be rejected.

A. Defendants' New Assertion—that the Narrow Arbitration Provision in Defendants' Rulebooks Trumps the Core Rights in the Charters—Must Fail.

Although in their motion Defendants did not even mention the Core Rights in the Charters that give rise to Plaintiffs' claims, they nonetheless maintain that they can invoke an arbitration clause in the Rulebooks because (1) Rule 578.C is broad enough to encompass the claim, and (2) the arbitration provision is incorporated by reference into the Charters. *See* Reply at 3. Both arguments fail.

Defendants' first argument simply brushes aside the procedural requirement of a member vote to change the Core Rights in the Charters, the absence of any arbitration clause in the Charters, and the fact that Plaintiffs' claims are independent from the Rulebooks and arise from Defendants' separate obligations under the Charters. Thus, Defendants broadly declare that "if the claim falls within the scope of Rule 578.C, it is subject to mandatory arbitration." *See* Reply at 3. In support of that broad proposition, defendants cite and discuss at length *Geldermann, Inc. v. Stathis*, with great fanfare. *See* Reply at 4–6. But *Gelderman* in fact offers no support for Defendants' position. Unlike this case, *Geldermann* did not involve any dispute about whether the claim fell within the CBOE's arbitration clause for member-member disputes over exchange business. 177 Ill. App. 3d 414, 418–19 (1st Dist. 1988). Rather, the parties disputed whether they were bound to follow the CBOE rules. *Id.* Of course, here, Plaintiffs vigorously contest that their claim falls within the scope of the arbitration provision in Defendants' Rulebooks and that they agreed to rules enacted in violation of the Charters.

Defendants also fail to alert this Court to *Gilmore v. Carey*, 2011 IL App (1st) 103840, which recently distinguished *Geldermann* and is more pertinent given that Plaintiffs' claim does not arise under the Rulebooks but under the separate Charters. *Id.* ¶¶ 14, 20–22 (holding that "though the parties are subject to CBOT rules, plaintiff's claims fall outside the mandatory

arbitration provision" where his claims founded on his employment contract did not "directly" fall within the scope of the arbitration provision).[1]

Defendants' second argument is that because provisions in the Charters reference the Rules, the arbitration clause found in the Rules may apply to claims arising under the Charters. But "[m]ere reference to another contract or document is not sufficient to incorporate its terms into a contract. There must be an express intent to incorporate." *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 666 (7th Cir. 2002); *see also Indus. Electronics Corp. of Wisconsin v. iPower Distribution Grp., Inc.*, 215 F.3d 677, 681 (7th Cir. 2000) (refusing to extend arbitration clause "even where the two agreements [were] closely intertwined"). Plaintiffs do not dispute that the Charters reference the Exchange Rules in setting forth who may own or transfer memberships (Reply at 6), but these references do not somehow incorporate the arbitration provision in Rule 578.C, nor bring claims arising from a breach of the Charters within its scope. Further, there is no dispute that when the Charters supposedly incorporated the Rules, those Rules did not contain any agreement to arbitrate—let alone an agreement to arbitrate disputes over Core Rights.[2]

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[1] Defendants do not—and cannot—rebut the fact that this lawsuit in no way "depends" on Defendants' Rulebooks. *Majowski v. Am. Imaging Mgmt. Servc. LLC*, 913 A.2d 572, 583 (Del. Ch. 2006) ("The question then [of whether arbitration clause applies] is whether the purportedly arbitrable lawsuit depends on the existence of the contract containing the arbitration clause."); *see also Israel Disc. Bank of New York v. First State Depository Co., LLC*, 2012 Del. Ch. LEXIS 226, at *22–23 (Del. Ch. Sept. 27, 2012), *aff'd*, 86 A.3d 1118 (Del. 2014) (when plaintiffs seek to vindicate rights arising from one agreement, arbitration cannot be based on a closely related agreement that is not the basis for plaintiffs' claims).

[2] The CMEG Charter provides further evidence that the rulebook has no bearing on Core Rights. In "Division B" setting forth the "rights, preferences and privileges, and qualifications, limitations and restrictions granted to and imposed on the classes of Common Stock," the Charter defines "Core Rights" to mean:

> (1) the divisional product allocation rules applicable to each membership class as set forth in the rules of the Exchange;
> (2) the trading floor access rights and privileges granted to members of the Exchange;
> (3) the number of authorized and issued shares of any class of Class B Common Stock; or
> (4) the eligibility requirements for any Person to exercise any of the trading rights or privileges of members in the Exchange.

CMEG Charter, Div. B, subdiv. 1, § 1 (Ex. B), Appx. at 8. The only two Core Rights at issue in this case are (2) and (4), relating to "trading floor access rights and privileges" and "eligibility requirements," respectively. Significantly, although Core Right (1), above, references the "rules of the Exchange," neither (2) nor (4) makes any mention of the Rules. The conspicuous omission of any reference to the CME rules with respect to Core Rights (2) and (4) further demonstrates that those rules—including Rule 578.C—simply do not apply to this dispute.

B. Defendants' New Argument—that a Procedural Change to Core Rights Does Not Require Member Approval—Is Unavailing.

Defendants concede that any "change, amendment or modification" to Core Rights requires approval of the Class B members. Reply at 8. Yet, they argue that the addition—after demutualization—of an arbitration provision in the rulebooks did not modify Plaintiffs' Core Rights because it was a procedural rather than a substantive change. They are wrong.

An arbitration provision can be added to a preexisting agreement only if it was adopted in compliance with an agreed-upon procedure. *See, e.g., Williams v. Jo-Carroll Energy, Inc.*, 382 Ill. App. 3d 781, 785 (2d Dist. 2008) (provision enforceable where parties agreed to be bound by amendments to bylaws and "when the arbitration provision was added, defendant followed the procedure specified" for doing so). Here member approval was the agreed-upon procedure to change or modify Plaintiffs' Core Rights under the Charters. That never happened.

Defendants' reliance on *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), is misplaced. Reply at 8. There, the Court simply held that parties could choose to arbitrate statutory claims where Congress has not otherwise proscribed arbitration. *Id.* at 626. *Mitsubishi* stands for the unsurprising proposition that statutory rights are not eliminated when the parties properly adopted an arbitration clause requiring arbitration. The case is inapposite, as it did not involve any issue of whether adding an arbitration clause to a pre-existing contract is a change or modification. Neither *Mitsubishi* nor any of Defendants' other cases treats the addition of an arbitration agreement to a contract as something other than an amendment or modification, and Plaintiffs are not aware of any authority for the proposition that adding an arbitration clause to a pre-existing contract does not constitute a change or

modification to the rights under that contract.[3]

Even if adding an arbitration requirement was merely a procedural change in forum (it is not just that), it is still an amendment or modification—which, under the Charters, required a member vote. The Charters do not differentiate between substantive and procedural modifications to the Core Rights in requiring a member vote before a change is made.

C. Defendants New Arguments for Applying Rule 578.C Ignore its Context and Implicitly Concede the Rule Does Not Apply.

Defendants offer no coherent explanation to justify reading subparagraph C of Rule 578 in isolation and entirely out of context as a stand-alone arbitration clause. In ostrich-like fashion, they simply rejoin: it says what it says. Reply at 9. All but conceding the point, Defendants' Reply makes a further fatal admission:

> If, for example, CMEG violated the Core Rights by unilaterally increasing the number of authorized and issued shares of Class B Common Stock, that claim would not be subject to arbitration under 578.C.

Reply at 10. Plaintiffs allege that Defendants have done almost precisely that. The complaint alleges that CMEG has *de facto* issued Class B Common Stock and its associated membership rights by allowing non-members to have access and proximity to Globex and exercise trading rights and privileges that are exclusively reserved for Class B shareholders/members and their lessees, thereby diluting the value of the Class B shares. *See* FAC ¶¶ 4–7, 9–13. The gravamen of Plaintiffs' allegations is that Defendants have breached their obligations by granting membership rights and privileges to non-members without Class B approval and therefore devalued Class B membership/stock by hundreds of millions of dollars. *Id.* ¶¶ 4–7, 9–13, 101–

[3] *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi* for the proposition that "statutory claims may be the subject of an arbitration agreement" without any reference to whether an arbitration provision is an amendment or modification); *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 384 (2004) (noting that *Gilmore* concerned the "interplay between the Arbitration Act and statutory remedies" without any reference to whether an arbitration provision is an amendment or modification).

06. Defendants mischaracterize the complaint as being about the "use of systems" to shoe-horn it into Rule 578.C, when in reality the complaint raises a dispute Defendants now admit is non-arbitrable.[4]

Finally, Defendants argue that "if the Exchange had intended 578.C's arbitration mandate to apply only to the claims outlined in Section 578.A, it would have drafted the provision to refer only to those limited issues." Reply at 9. Defendants have it backwards. If claims of the kind Plaintiffs advance were to be adjudicated by arbitration, the arbitration clause would not lie buried in the third subparagraph of a liability limitation and warranty disclaimer clause. It would be properly written as a stand-alone arbitration clause. *See* Opp. at 15. Defendants clearly could have drafted an arbitration clause that would have applied to this dispute and sought member approval of arbitration of cases such as this one; having failed to do so, they cannot force plaintiffs to arbitrate their claims under an arbitration clause that is not applicable to this dispute.

D. Defendants Concede That This Class Case Is "Not Arbitrable."

Defendants' motion did not address the provision in Rule 578.C allowing claims that are "not arbitrable" to proceed in Court. In their reply, Defendants concede that their arbitration Rules contain no mechanisms for handling class actions. Under the plain language of Rule 578.C, disputes otherwise covered by the arbitration clause but "not arbitrable" must be litigated in this Court. Ex. D, Appx. at 30. Yet Defendants inexplicably maintain that—in the absence of a mechanism for class arbitration—Plaintiffs must abandon their class action and submit to individual arbitrations. Reply at 11. However, the cases on which Defendants rely merely stand for the well-established principle that an arbitration provision may be drafted to preclude class

[4] Defendants also admit that Rule 578.C is a narrow and specific arbitration provision that does not apply to all Member-Exchange disputes or to all Core Rights disputes. *See* Reply at 10. Nonetheless, they revert to relying on a presumption in favor of arbitration that is applicable when the "parties contract includes a broad arbitration clause." *Karl Schmidt Unisia, Inc. v. Int'l Union*, 628 F.3d 909, 913 (7th Cir. 2010) (emphasis added); *see* Opp. at 15–18.

actions and class-wide arbitration, or to require any and all claims, including class claims, to proceed in arbitration. But Rule 578.C does not preclude class actions for claims arising within its scope, and there is no waiver of class rights here. To the contrary, it expressly states that any dispute that is "not arbitrable"—such as the class claims at issue here— should proceed in court. This case is distinguishable from those on which Defendants rely because the Rules explicitly offer a path in the event a dispute cannot be arbitrated.[5]

E. Defendants Offer No Meaningful Response to Plaintiffs' Substantive Unconscionability Argument.

Defendants' half-hearted reply merely points to a handful of provisions that allow Defendants to make still more unilateral decisions and the fig leaf of declaring that they are bound to be ethical. Reply at 15. According to Defendants, the Rules are saved by the fact that any arbitrator must disclose impartiality (Rule 627.D), and that Plaintiffs could request his removal (Rule 614.B.1), while ignoring the fact that Defendants' appointed chairman will decide the request and that his decision is "final and may not be appealed." Rule 614.B.2. That the Defendants' appointed chairman may also unilaterally make up "any" additional procedure (Rule 613) cannot possibly render the arbitration fair and impartial.[6]

If Defendants wanted neutral arbitration under the AAA or otherwise, they could have provided for it; instead they have drawn up Rules that are flatly one-sided and unconscionable. *See McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 (6th Cir. 2004) (finding defendant "Meijer's

[5] Defendants' other citations illustrate the unexceptional proposition that a party may waive its right to bring a class action. *See* Reply at 12. But Plaintiffs certainly did not waive a right to bring a class action under Rule 578.C, which either must provide for class-wide arbitration (which Defendants admit it does not) or requires a judicial forum for cases that are "not arbitrable."

[6] Defendants narrowly interpret Rule 619 to provide no appeal right whatsoever in this case. Reply at 15 n.9. The Rule is at best ambiguous as to whether the "among members" phrase applies only to non-cash awards or also to claims seeking more than $10,000 and should be construed against Defendants as the drafters. *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, 115 Ill. 2d 482, 493 (1987) ("Ambiguous contractual language is generally construed against the drafter of the language."). In any event, the absence of appellate rights does not help make the underlying arbitration fair.

exclusive control over the pool of potential arbitrators particularly problematic because Meijer could easily have adopted a procedure in which an unbiased third-party, such as the AAA or FMCS, selected the pool of potential arbitrators"). Defendants do not—and cannot—point to a single case where such one-sided rules were sanctioned. An arbitration provision that "grants one party to the arbitration unilateral control over the pool of potential arbitrators . . . inherently lacks neutrality." *Id.* at 494.

For each of the foregoing reasons and those more fully explained in Plaintiffs' Opposition, Defendants' motion to compel arbitration should be denied.

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Respectfully submitted,

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