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

SHELDON LANGER, RONALD M. YERMACK, and LANCE R. GOLDBERG, individually on behalf of themselves and all others similarly situated, *Plaintiffs*, v. CME GROUP, INC. a Delaware Corporation; THE BOARD OF TRADE OF THE CITY OF CHICAGO, INC., a Delaware Corporation, *Defendants*.	No. 14 CH 829 Judge Mary L. Mikva Calendar 6

ORDER AND OPINION

This case comes before the Court on Defendants CME Group, Inc. ("CMEG") and The Board of Trade of the City of Chicago, Inc.'s ("CBOT") (collectively "CME" or "Defendants") Motion to Compel Arbitration and Dismiss and/or Stay Proceedings pursuant to Section 2-619 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619, and the Federal Arbitration Act, 9 U.S.C.S. § 1 *et seq*. For the following reasons, the Court DENIES Defendants' Motion.

Background

Plaintiffs Sheldon Langer, Ronald M. Yermack, and Lance R. Goldberg (collectively "Plaintiffs") have filed this putative class action on behalf of themselves and similarly situated CMEG and CBOT Class B shareholders. Plaintiffs became Class B shareholders following the demutualization of CMEG in 2000 and CBOT in 2005.

CMEG and CBOT's Corporate Charters ("Charters") establish Class B shares and define Class B shareholders' rights and privileges, including "Core Rights." The Charters require that: "Any change, amendment or modification of the Core Rights" must be submitted to and approved by a majority of the Class B shareholders.

The Core Rights include the following:

(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;

(4) the eligibility requirements for any Person to exercise any of the trading rights or privileges of members in the Exchange.

In their class action Complaint, Plaintiffs allege that Defendants altered Plaintiffs' Core Rights when CME opened a new data center in Aurora, Illinois and relocated its trading platform, Globex, to Aurora in January 2012. According to the Complaint, following the move, Defendants discontinued Plaintiffs' preferred and free access to Globex and instead sought to charge Plaintiffs a monthly access fee. Plaintiffs also complain that, prior to January 2012, Defendants began allowing electronic corporate members and non-members to use Globex and trade CME products, a right previously reserved to Exchange members, like Plaintiffs. Defendants also allegedly began marketing Globex directly to non-members, which harmed Plaintiffs because they had previously earned fees leasing their Class B shareholder trading rights and privileges to non-members. Plaintiffs also allege that Defendants developed new products to trade on Globex that Class B members were either unable to trade or were unable to trade at the best rates, proximity, or access. Plaintiffs allege that these changes implicate their Core Rights of trading floor access because Globex serves as a virtual trading floor. Plaintiffs' contention is that the changes altered their Core Rights, as enshrined in the Charters, and because Plaintiffs never consented to the changes, CMEG and CBOT violated their contractual obligations to Plaintiffs.

Defendants' Motion to Compel Arbitration rests on the Rules of the Chicago Mercantile Exchange, Inc. ("Exchange") (the "Rules"). Both Defendants are governed by those Rules and no Class B shareholder can hold stock or be an Exchange "Member" without being subject to the Rules.

In response to the Complaint, Defendants removed the case to federal court on February 19, 2014, but Judge James F. Holderman of the United States District Court for the Northern District of Illinois remanded the case back to this Court on July 24, 2014. Defendants now seek to compel arbitration pursuant to Rule 578.C. of the Exchange Rules. Plaintiffs oppose arbitration on the basis that this Complaint falls outside of the arbitration provision and also on the basis that to compel arbitration would violate their Core Rights under the Charters. Plaintiffs

also argue that, if Rule 578.C. is applicable to this dispute, it would be unenforceable as procedurally and substantively unconscionable.

Discussion

The parties agree that the Federal Arbitration Act ("FAA") applies to Defendants' Motion. "The FAA governs the enforceability of arbitration agreements in contracts involving interstate commerce." *Bovay v. Sears, Roebuck & Co.*, 2013 IL App (1st) 120789, ¶28. The FAA makes "a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . valid, irrevocable, and enforceable . . . ." 9 U.S.C.S. § 2. The FAA further provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C.S. § 3.

A trial court's inquiry is limited when presented with a motion to compel arbitration and stay or dismiss litigation pursuant to Section 3 of the FAA. *Jensen v. Quik Int'l*, 213 Ill. 2d 119, 123 (2004). The inquiry is a two-step process: first, does a valid agreement to arbitrate exist and, second, does the agreement encompass the issue in dispute. *Bovay*, 2013 IL App (1st) 120789, ¶ 28. If the court answers both questions affirmatively, then "a stay under section 3 of the FAA is mandatory." *Jensen*, 213 Ill. 2d at 124.

For the purposes of this Motion, the Court accepts two of Defendants' assumptions in order to reach the critical issue of whether Plaintiffs' claims are subject to arbitration. First, the Court assumes that Defendants could condition Exchange membership on an agreement to arbitrate all disputes. *See Williams v. Jo-Carroll Energy, Inc.*, 382 Ill. App. 3d 781, 784–85 (2d Dist. 2008) (holding that where plaintiff's member agreement explicitly stated it was subject to the bylaws existing and thereafter amended, and where the arbitration provision was properly added, the arbitration provision was valid). Second, the Court assumes that even claims arising under the Charter could be arbitrable, since requiring arbitration of disputes is a choice of forum, not substantive law, and thus would not necessarily entail a change in Plaintiffs' Core Rights without their consent. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002); *Melena v.*

Anheuser-Busch, Inc., 219 Ill. 2d 135, 143–44 (2006). "According to the [Supreme] Court, 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights . . . ; it only submits their resolution in an arbitral, rather than a judicial, forum.'" *Melena*, 219 Ill. 2d at 144 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Thus, the Court assumes that the parties have a valid agreement to arbitrate certain disputes.

The Court, however, disagrees with Defendants that Rule 578.C. encompasses this Complaint. The Exchange Rules' various arbitration provisions, like any contract provision, must be read in context. *Dowling v. Chi. Options Assocs.*, 226 Ill. 2d 277, 296 (2007) ("A contract should be given a fair and reasonable construction based upon all of its provisions, read as a whole"); *see also Gilmore v. Carey*, 2011 IL App (1st) 103840, ¶ 23 (finding that claims of an Exchange member fell outside the mandatory arbitration provisions of the Rules).

If Rule 578.C. is read in the context of the Exchange Rules as a whole and of Rule 578 in particular, it is clear that Rule 578.C. has no application to this dispute. Moreover, if the language that the Defendants rely on in Rule 578.C. meant what Defendants contend it means, Rule 578 would significantly alter Plaintiffs' substantive Core Rights, which, according to the Charters, is impossible without the Class B shareholders' consent.

The arbitration provisions of the Exchange Rules are specific and limited. Exchange Rule 600 lists the disputes that are subject to arbitration. Rule 600.C. lists which claims by Members against the Exchange are covered: "Claims against the Exchange pursuant to the provisions of Rule 578.C., Rule 578.D., Rule 578.F., and/or Rule 579.C. shall be subject to mandatory arbitration in accordance with the rules of this Chapter [6], provided the claimant has complied with all pre-filing requirements under the applicable rules." Arbitration is also compelled in certain disputes between members of the Exchange under Rule 600.A., and between members and certain non-members if the claim relates to "non-compete clauses to the extent that they relate to the Exchange; and . . . terms of employment on the trading floor" under Rule 600.B. Rule 600.D. provides for permissive arbitrations in certain situations. Chapter 6 of the Rules outlines arbitration panel requirements, hearing procedures, filing deadlines and related issues for all of the arbitrations mandated by the Exchange Rules.

The only arbitration provision that Defendants rely on here is in Rule 578.C. Rule 578, as a whole, is entitled "LIMITATION OF LIABILITY, NO WARRANTIES." The entire Rule, unlike any of the other Exchange Rules that the Court is aware of, is in capital letters. This

includes the arbitration provision in 578.C., underscoring the need to read 578.C. in the context of Rule 578, as a whole.

Rule 578.A., as the title of the Rule suggests, is a broad limitation on any liability of the Exchange, the Board of Trade, the Mercantile Exchange and their subsidiaries, officers and other affiliates. Subsection A.(i). broadly limits Defendants' liability for:

> LOSSES, DAMAGES, COSTS OR EXPENSES . . . ARISING FROM:
>
> ANY FAILURE, MALFUNCTION, FAULT IN DELIVERY, DELAY OMISSION, SUSPENSION, INACCURACY INTERRUPTION, TERMINATION, OR ANY OTHER CAUSE, IN CONNECTION WITH THE FURNISHING, PERFORMANCE, OPERATION, MAINTENANCE, USE OF OR INABILITY TO USE ALL OR PART OF ANY OF THE SYSTEMS AND SERVICES OF THE EXCHANGE, CME OR NYMEX, OR SERVICES, EQUIPMENT OR FACILITIES USED TO SUPPORT SUCH SYSTEMS AND SERVICES . . . .

Subsection (ii) of 578.A. makes clear that this limitation applies equally "WHETHER A CLAIM ARISES IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY, CONTRIBUTION OR OTHERWISE AND WHETHER THE CLAIM IS BROUGHT DIRECTLY OR AS A THIRD PARTY CLAIM."

Rule 578.C., which is the arbitration provision that Defendants rely on here, goes on to say 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 . . . IS A PARTY SHALL BE ARBITRATED PURSUANT TO EXCHANGE RULES. ANY ARBITRATION SHALL BE BROUGHT WITHIN THE PERIOD PRESCRIBED BY EXCHANGE RULES. ANY OTHER ACTIONS, SUITS OR PROCEEDINGS AGAINST ANY OF THE ABOVE MUST BE BROUGHT WITHIN TWO YEARS FROM THE TIME THAT A CAUSE OF ACTION HAS ACCRUED. . . . 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 . . . .

Rule 578.D. permits CMEG and CBOT to assume responsibility for "OUT-OF-POCKET LOSSES DIRECTLY CAUSED BY THE NEGLIGENCE OF GLOBAL COMMAND CENTER OR OTHER EXCHANGE STAFF AND/OR ORDER STATUS ERRORS PROVIDED BY THE GLOBAL COMMAND CENTER AND/OR THE CLEARING CUSTOMER SERVICE DESK" and limits liability to "$200,000 FOR ALL LOSSES

SUFFERED FROM ALL CAUSES IN A SINGLE CALENDAR MONTH, EXCEPT FOR LOSSES CAUSED BY PHANTOM ORDERS."

Rule 578.F. permits CMEG and CBOT to assume responsibility for phantom orders, which are orders:

> NOT AUTHORIZED BY A PERSON BUT [were] CAUSED BY A FAILURE, MALFUNCTION OR NEGLIGENT OPERATION OF GLOBEX OR ANY OTHER EXCHANGE SYSTEM, SERVICE OR FACILITY, OR 2) WHOSE TERMS . . . WERE CHANGED WITHOUT AUTHORIZATION OF THE PERSON PLACING THE ORDER SOLELY AS A RESULT OF A FAILURE, MALFUNCTION, OR NEGLIGENT OPERATION OF GLOBEX OR ANY OTHER EXCHANGE SYSTEM, SERVICE OR FACILITY.

CMEG and CBOT's liability for phantom trades is limited to "$5,000,000 FOR ALL SUCH LOSSES SUFFERED IN A SINGLE CALENDAR MONTH."

Defendants argue that Rule 578.C. compels arbitration of Plaintiffs' claims because Plaintiffs' Complaint is a "DISPUTE ARISING OUT OF [Plaintiffs'] USE OF SYSTEMS OR SERVICES OF THE EXCHANGE . . . OR FACILITIES," in that Plaintiffs are alleging that Defendants have restricted Plaintiffs' use of Globex at the Aurora data center. Defendants argue that "arising out of" is broad language and, if any part of Plaintiffs' claims "arise" from the use of the Aurora data center or Globex, then the Court must compel arbitration. *See, e.g.*, *Gore v. Alltel Comm., LLC*, 666 F.3d 1027, 1033–34 (7th Cir. 2012); *Fahlstrom v. Jones*, 2011 IL App (1st) 103318, ¶ 17.

Rule 578, as a whole, provides limited liability for "furnishing, performance, operation, maintenance, use of or inability to use all or part of any of the systems and services of the exchange." Rule 578.A. As part of that limitation, 578.C. directs such claims to arbitration. These 578 claims specifically include negligence and phantom orders and also include other similar claims growing out of the use of systems and services. While the phrase "arising out of" may be broad, it is not limitless and "a party cannot be forced to arbitrate a dispute which the party has not agreed to submit to arbitration." *Roubik v. Merrill Lynch, Pierce, Fenner & Smith*, 181 Ill. 2d 373, 382 (1998) (citation omitted). Plaintiffs' claims are not about the "use of systems and services," as those terms are used in Rule 578. Instead, Plaintiffs complain that their right to free and preferred access to the Exchange, conferred on them by their Class B shareholder status, has been curtailed. Plaintiffs' "use" of Globex and the Aurora data center does not give rise to

their Complaint, rather their claim is based on their membership rights and what they allege is a serious diminution of those rights.

Indeed the Mercantile Exchange recognized the limited reach of the Rule 578 arbitration provision when it sought approval of Rule 578 from the Commodity Future Trading Commission. In a letter dated June 21, 2001, Stephanie Szarmack, then Director and Associate General Counsel of the Chicago Mercantile Exchange, advised that Rule 578 provided that: "All disputes involving claims for system failures and negligence are directed to arbitration . . . ." Now, Defendants are trying to shoehorn into the limited scope of Rule 578 claims that have nothing to do with system failures or with negligence.

The text of the Rules, rather than supporting Defendants' argument, compels the Court to find that Plaintiffs' claims are not arbitrable. An arbitration agreement is a document, which "should be read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 63 (1995) (citation omitted).

The language of Rules 578.A. and 578.C. track closely. Rule 578.A.(i). eliminates all Defendant liability for:

> LOSSES, DAMAGES, COSTS, OR EXPENSES (INCLUDING . . . LOSS OF USE . . .), ARISING FROM . . . USE OF OR INABILITY TO USE ALL OR ANY PART OF ANY OF THE SYSTEMS AND SERVICES OF THE EXCHANGE OR SERVICES, EQUIPMENT OR FACILITIES USED TO SUPPORT SUCH SYSTEMS . . . .

If the Court interprets the phrase "ARISING OUT OF THE USE OF SYSTEMS OR SERVICES OF THE EXCHANGE" in Rule 578.C. broadly enough to encompass Plaintiffs' claims, then "ARISING FROM . . . USE OR INABILITY TO USE ALL OR ANY PART OF THE SYSTEMS OR SERVIES OF THE EXCHANGE" in Rule 578.A. would also apply to Plaintiffs' claims. This would mean that Rule 578 eliminates any liability for any diminution in Plaintiffs' rights or their use of Exchange systems or services. Such an elimination of liability can't possibly be squared with the Charters' protection of Plaintiffs' Core Rights. Indeed Defendants appear to acknowledge that 578.A.'s limitation on liability does not apply to this Complaint. However, the only consistent interpretation of 578.C. is that it is part of the Rule 578 limitation on liability. Rule 578.C., like 578.A., is about disputes arising from system malfunctions and not about minority shareholder rights.

Additionally, analyzing Rule 578.C. in the context of 578.D. and F. and 579.C., it is clear to the Court that, like all of the Member claims against the Exchange listed in Rule 600.C., the

arbitration provision in 578.C. is for claims of system failures and negligence that could lead to litigation, not minority shareholder disputes. Rule 578.C. compels arbitration for "[A]NY DISPUTE ARISING OUT THE USE OF SYSTEMS OR SERVICES OF THE EXCHANGE"; Rule 578.D. compels arbitration and limits liability for "OUT-OF-POCKET LOSSES DIRECTLY CAUSED BY NEGLIGENCE" of Defendants' employees; 578.F. compels arbitration and limits liability for losses resulting from "PHANTOM TRADES"; and Rule 579.C. compels arbitration and limits liability for incorrect order statuses. All of these Rules reference similar claims, none of which are akin to Plaintiffs' claims in this case.

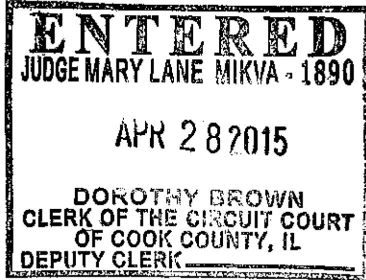
Rule 578.C. must also be understood in the context of the Rules' procedural requirements for arbitration. Rule 609 provides different periods for filing arbitration claims under the Rules. Arbitration of disputes between members of the Exchange under Rule 600.A., and between members and non-members under Rule 600.B, and permissive arbitrations under Rule 600.D. all allow two years for filing an arbitration claim. However, all claims by members against the Exchange, that is all claims governed by 578.C., "must be submitted within 10 days of receiving notice that the Exchange has refused to compensate the claimant for the claimed loss." Rule 609.

This ten day limitation for filing claims underscores the inapplicability of Rule 578.C. to Plaintiffs' claim here. A ten day limitation may be reasonable when disputes arise from problems with the use of the Exchange's service or system, or if a phantom trade or incorrect order status causes a loss. These events are easily recorded and reportable. For these claims claimants will likely notify the Exchange of their easily calculated loss and be able to take action and file an arbitration complaint within ten days. In contrast, any suggestion that Plaintiffs' claims here, resting on a complex and difficult to calculate claim for breach of their core rights under the Charters should begin with a notification to the Exchange of their loss followed within ten days by the filing of an arbitration complaint is absurd. These claims are simply not the kind of claims contemplated by the ten day period of eligibility for arbitration in Rule 609.

In summary, Rule 578.C., read in the context of the Rules as a whole, clearly does not apply to Plaintiffs' Complaint. Because the Court finds that Plaintiffs' claims are not arbitrable, the Court does not reach the merits of Plaintiffs' arguments that the Rules' arbitration provisions are procedurally and substantively unconscionable as applied here or that imposing arbitration would be a violation of Plaintiffs' Core Rights under the Charters.

Conclusion

Defendants Motion to Compel Arbitration and Dismiss and/or Stay Proceedings is DENIED. This case remains set for status on May 1, 2015 at 9:45 a.m.



ENTERED:

Judge Mary L. Mikva, #1890
Circuit Court of Cook County, Illinois
County Department, Chancery Division