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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

vs.
2014-CH-00829

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MEMORANDUM FILED (PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY)

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

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY

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Plaintiffs, through undersigned counsel, respectfully submit this Opposition to Defendants' Motion to Stay Discovery Pending Resolution of Defendants' Combined Motion to Dismiss and Motion for Summary Judgment ("Mot." or "Motion to Stay"):

I. BACKGROUND

After a year and a half of costly—and ultimately unsuccessful—jurisdictional challenges, CME[1] now proposes to skip discovery entirely and have this Court precipitously adjudicate all of Plaintiffs' claims on the merits because, it says, discovery would be "expensive." Mot. ¶ 17. CME's Motion to Stay is yet another classic defense tactic in a long line of such motions to prolong this action and prevent Plaintiffs from having their day in Court. Plaintiffs cannot realistically respond to CME's claim that there is "insufficient evidence" to support a breach, or that there is "uncontroverted evidence" of no breach, *see* Defendants' Motion for Summary Judgment at 12–13, when CME has refused to produce *any evidence* whatsoever in this case.

Plaintiffs filed their Complaint in this Court on January 15, 2014, more than eighteen months ago. Not once, but twice, Defendants tried unsuccessfully to prevent this Court from hearing this dispute. First, CME unsuccessfully sought removal to federal court on February 19, 2014. Five months later, on July 24, 2014, the federal court remanded this action on *four independent* grounds. After Plaintiffs file their Amended Complaint on September 9, 2014 (the "Complaint"), CME again tried to have this case go away by filing a Motion to Compel Arbitration. After substantial briefing and oral argument, the Court denied CME's motion on April 28, 2015, observing that the decision was not a "close call".

At the May 1, 2015 hearing, the Court allowed discovery to commence. One week later, on May 8, 2015, Plaintiffs served their first set of document requests. On June 15, 2015, CME

[1] In this memorandum, Defendants CME Group, Inc., and The Board of Trade of the City of Chicago, Inc. are referred to, in the singular, as "CME".

served its responses and objections, in which CME stated that it would produce documents on 17 of the 54 requests. CME also completely refused to produce any documents in response to 31 requests, including patently relevant requests, such as a request for "documents concerning the decision to move the Globex platform and/or Globex terminals to the ADC [Aurora Data Center]." *See* Hogan Decl., Ex. A at 5 (RFP 1). Plaintiffs promptly initiated a meet-and-confer on CME's objections, and the parties' counsel conferred by phone on June 24. Near the conclusion of this call, CME's lawyers announced for the very first time their possible intention to seek a stay of *all discovery* pending resolution of CME's forthcoming dispositive motion.[2]

On July 2, 2015, CME filed a ***30-page*** motion for summary judgment, with a less-than-five page motion to dismiss tacked on at the end ("Motion for Summary Judgment" or "MSJ"). Despite submitting the Motion for Summary Judgment with a combined ***5 inches of supporting exhibits***, including copies of CME and CBOT Rulebooks that are not publicly available, CME maintains that it has presented the Court with an absolutely clear-cut dispositive motion on the merits. CME is wrong. CME does not seem to recognize the irony in presenting a Motion for Summary Judgment that makes frequent reference to the "indisputable evidence" in the case, *see, e.g.*, MSJ at 13, *when CME has refused to produce any evidence yet in this case*.

On July 8, 2015, CME filed the present Motion to Stay, which is scheduled for hearing on July 13, 2015.

II. ARGUMENT

"Discovery is intended, first and foremost, for the 'ascertainment of truth, for the purpose of promoting either a fair settlement or a fair trial.'" *Jiotis v. Burr Ridge Park Dist.*,

[2] CME cited to General Objection Number 16 during this teleconference, which CME cited in its briefing to the Court, *see* Mot. ¶ 5, but as Plaintiffs pointed out on the call, this general objection in no way informed Plaintiffs that CME was indeed seeking a stay of all discovery as opposed to reserving the right to do so via a boilerplate objection.

2014 IL App (2d) 121293, ¶ 28 (2014) (holding motion for summary judgment was premature and entitling plaintiffs to discovery before having to comply with Rule 191's affidavit requirement). Staying discovery in this case will promote neither goal.

A. Courts Routinely Permit Discovery Before Motions for Summary Judgment Are Decided

Contrary to CME's assertions, courts do not "routinely grant stays of discovery pending dispositive motions," Mot. at 5, and they certainly do not routinely stay all discovery pending a *motion for summary judgment* where the moving party has refused entirely to produce any documents or witnesses. In fact, the opposite is true: "Where a motion for summary judgment is made by the party who does not have the burden of proof on an issue asserting that the nonmovant cannot prove a prima facie case, it is critical that the respondent be given a reasonable opportunity to conduct discovery before summary judgment is rendered against him or her in a case of this nature." 4 ILL. PRAC., CIVIL PROCEDURE BEFORE TRIAL § 38:4 (2d ed.); *see, e.g.*, *Williams v. Covenant Med. Ctr.*, 316 Ill. App. 3d 682, 691 (4th Dist. 2000) ("[A] plaintiff should be given adequate time to gather evidence when a defendant makes a *Celotex*-type motion."); *Jiotis*, 2014 IL App (2d) 121293, ¶ 47 ("It very well may be that plaintiff cannot provide facts that would raise an issue of material fact . . . . However, plaintiff should first be given an opportunity to discover those facts, if indeed there are facts to be discovered.").

CME has sought summary judgment on the basis that "the nonmovant lacks sufficient evidence to prove an essential element of the cause of action." MSJ at 12 (internal quotation marks omitted). This *Celotex*-type motion is routinely deemed premature absent the opportunity for Plaintiffs to conduct discovery. *See, e.g., Williams*, 316 Ill. App. 3d at 691 (holding that Rule 191, which permits motions for summary judgment "at any time," did not preclude Plaintiffs from seeking discovery when such a motion was filed prematurely). As the court aptly pointed

out in *Williams*, "a plaintiff may not know what the witnesses will testify to before discovery is taken and accordingly be unable to comply with Rule 191(b)." *Id.* at 692. Discovery is thus necessary and appropriate before such a motion can be entertained.

B. Plaintiffs Cannot Reasonably Respond to CME's Motion for Summary Judgment Without Discovery

Even if CME's Motion could be classified as a "traditional" summary judgment motion, despite CME's own description in its "Legal Standard" section that it is applying the sufficiency-of-the-evidence (or *Celotex*) standard, MSJ at 12, Plaintiffs are entitled to discovery before having to respond to CME's arguments.

As a simple example, CME argues that the terms of the contract are "unambiguous," yet in making this argument, CME cites five inches of exhibits, much of which is classic extrinsic evidence, which CME itself refers to as "evidence." *See, e.g.*, MSJ at 12 ("the indisputable evidence demonstrates that the Plaintiffs' contractual rights do not include . . . .); *id.* at 15 ("[t]he indisputable evidence tells a different story" citing rule changes and CFTC submissions from fall 2000). CME seeks to treat the contract as not just the four corners of the Charters, but the Charters, plus the Bylaws, *plus the Rulebook* at the time of demutualization, MSJ at 3-4, yet CME has selectively attached only excerpts of this Rulebook to its motion. *See* Declaration of Margaret Wright, Exhibits 5 & 6 (CME Rules from 1999 and 2000).

Even if CME is right that the Rules comprise part of the contract—and Plaintiffs should not be forced to take a position on that prematurely without the benefit of discovery—the exhibits CME attaches *contradict CME's argument*. CME states that Rule 582, which required CME to pay fees to Class B members for Globex Screen Rights ("GSRs"), was "completely repealed" in November 2000 as a result of CME's supposed implementation of a new "open access" policy, the scope of which CME does not define. MSJ at 8. Because of this supposed

open access, CME claims, Plaintiffs cannot claim that their right encompassed exclusive access. But the very exhibit CME cites to support this "fact" shows that Rule 582 was in fact alive and well in December 2000, *after demutualization of CME*. *See* Wright Ex. 5 (December 2000 Rules) at A258 (providing text of Rule 582). CME should be required to produce *all* of the relevant documents relating to Rule 582 and its supposed amendment in 2000, not merely the ones selectively attached to the affidavit of someone who does not even attest to have been an employee of CME from that time period, before Plaintiffs should be required to respond to this assertion of fact and the accompanying legal arguments made by CME.

There are dozens of other areas where Plaintiffs anticipate discovery will reveal disputes of fact relating to CME's claims that the "indisputable evidence" shows no breach of contract. These areas include, but are not limited to, the following topics plainly covered by CME's initial requests for production:

- The meaning of the core rights at the time of demutualization (RFP 14);
- The amendments to Rule 582 and the timing of the amendment in relation to the member vote (RFP 25);
- Communications to members, if any, describing the anticipated significance of changes to Rule 582 the development of non-member trading through Globex (RFP 12, 22, 23, 25 and 5(b));
- Members' rights to access and trade through Globex at the time of demutualization and up through the opening of the ADC, such as where they could co-locate and for how much, who else was allowed to co-locate there and for how much (if anyone), etc. (RFP 2);
- Any preferential fees or discounts provided to non-members (RFP 6(b));
- Any limitations on members' ability to trade the full range of CME products (RFP 7);

The fact that some of this discovery may ultimately comprise "extrinsic evidence" to the contract does not mean that such discovery is irrelevant to deciding CME's Motion for Summary

Judgment or the initial question of ambiguity, and Plaintiffs should be able to see this evidence before having to respond to CME's Motion for Summary Judgment. *See, e.g., Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923 (Del. 1990) ("In the interpretation of charter and by-law provisions, '[c]ourts and must give effect to the intent of the parties as revealed by the language of the certificate and *the circumstances surrounding its creation and adoption*.'" (emphasis added) (quoting *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990)); *William Blair & Co., LLC v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 339-40 (1st Dist. 2005) (holding contract ambiguous and declining summary judgment); ("[C]ourts may refer to extrinsic evidence to determine that words, seemingly unambiguous within the four corners of a contract, are, nevertheless, blatantly ambiguous within the broader context of the parties' dealings.").

Plaintiffs have not even had the opportunity to consult with experts on the resulting discovery—because there has been no discovery. Plaintiffs should be permitted to review the relevant evidence surrounding the key contracts before responding to CME's assertion that the contracts—and they myriad Rules that CME claims are incorporated by reference into that contract—are unambiguous. *See also Oakley v. Remy Int'l, Inc.*, No. 1:10-CV-166-JMS-TAB, 2010 WL 4670613, at *1-2 (S.D. Ind. Nov. 8, 2010) (granting extension of time to respond to early MSJ and allowing plaintiff to conduct discovery before ruling whether contract was unambiguous or not).

As another example of the factual issues raised by CME's Motion for Summary Judgment, CME also states, without citation to any document, affidavit, or evidence whatsoever (let alone undisputed evidence), that "on November 27, 2000 . . . CME implemented open access on Globex." MSJ at 8. What CME means when it says "open access," and whether that is the same as Plaintiffs' allegation that CME failed to provide Plaintiffs with exclusive access, is

unknown because Plaintiffs have been given no discovery whatsoever of these issues. It is wholly unclear from CME's exhibits whether the "access" CME claims it provided non-members under the 2000 amendments allowed direct trading by non-members, or whether members and lessees instead retained the exclusive right to trade through Globex (remotely or at the co-location facilities) for some time thereafter. Plaintiffs have no way of evaluating whether the supposed "open access" implemented in November 2000, which CME does not dispute was conspicuously missing from the rule changes submitted prior to the vote and was only publicly announced *after the vote to demutualize*, allowed Electronic Corporate Members the same right to co-locate Globex that had previously been exclusively given to Class B members. Nor does CME state when it ceased to pay licensing fees for Globex Screen Rights supposedly given to non-members, even though the Rulebook CME provides from December 2000 still provides this right to Class B members. *See* Wright Ex. 5 (December 2000 Rules) at A258 (providing text of Rule 582).

Plaintiffs are barely in a position to identify what affiants it will require to oppose CME's Motion for Summary Judgment under Rule 191 because no documents have been produced to date. As of today, Plaintiffs intend to depose a number of individual identified by public documents—Leo Melamed, Bill Shepard, and Terrence Duffy, to name a few. But Plaintiffs are not required to limit their list of deponents to those identified in public disclosures alone—the documents may reveal other critical parties involved in the drafting of the Charters, the Bylaws, and the Rules, or those who were responsible for communications to the Class B Members at the time of CME and CBOT's respective demutualizations and merger, or those individuals who made the decisions that ultimately comprised the breach of contract. As courts have recognized, "to demand strict compliance with Rule 191(b) before adequate discovery—before a party even

knows the identity of witnesses who can provide material facts—turns Rule 191(b) from a procedural safeguard for the nonmovant into a tactical weapon for the movant." *Jiotis*, 2014 IL App (2d) 121293, ¶ 29.

Plaintiffs are actively seeking to obtain this information from CME and have submitted fifty-four requests for production, the first thirty-two of which directly relate to merits questions implicated by CME's Motion and its accompanying exhibits. CME suggests that Plaintiffs discovery requests are overly "broad" and span back to 1999, but CME does not dispute that the key contractual language for the CME Charter was first implemented in 2000. Therefore, discovery will necessarily require going back to 1999, or whenever CME first began drafting the demutualization documents. Plaintiffs cannot reasonably respond to CME's Motion absent such discovery.

C. CME Offers No Reasonable Basis Upon Which to Stay Discovery

CME's support for its bold proposition that its Motion for Summary Judgment can be resolved without giving Plaintiffs the benefit of *any discovery* consists almost entirely of cases where a stay was deemed not an abuse of discretion pending resolution *of motions to dismiss* and a plea that discovery is "expensive." *See DOD Technologies v. Mesirow Ins. Servs., Inc.*, 381 Ill. App. 3d 1042, 1055 (2008) (holding stay of discovery was not an abuse of discretion pending motion to dismiss where plaintiff failed to explain how discovery "would help him overcome the pleading deficiencies in its complaint"); *Redelmann v. Claire Sprayway, Inc.*, 375 Ill. App. 3d 912, 927 (2007) (holding stay of discovery was not an abuse where plaintiff "failed to explain how discovery will help him overcome the pleading deficiencies in the sixth amended complaint"). None of these cases held that when a plaintiff has sought substantial discovery on key disputes of material fact relevant to deciding a dispositive motion, as Plaintiffs have done in this case, that such discovery should be withheld. And CME's claim of "expense" falls on deaf

ears considering the many motions CME has unsuccessfully filed in an effort to avoid keeping this case in Cook County.

The only case CME cites where a stay was upheld did not state that such a stay was required or even advisable, but merely held that the imposition of a stay in the face of an unambiguous insurance policy "was not arbitrary or unreasonable." *Mutlu v. State Farm Fire & Cas. Co.*, 337 Ill. App. 3d 420, 434 (1st Dist. 2003). That is not a basis to deny discovery under the facts of this case, where CME has only selectively attached excerpts from the documents CME claims comprises the entire contract. *See* MSJ at 3-4 (arguing contract comprises the Charter, Bylaws, *and Rulebooks*, but attaching only selective excerpts).

And, even the cases cited by CME caution that "a court should not refuse a discovery request and grant a motion to dismiss where it reasonably appears discovery might assist the nonmoving party." *Evitts v. DaimlerChrysler Motors Corp.*, 359 Ill. App. 3d 504, 513-14 (1st Dist. 2005). CME's Motion to Dismiss is buried in the last four pages of its thirty-five page brief, which is otherwise entirely devoted to disputed issues of fact upon which CME has so far produced any documents. The existence of a partial Motion to Dismiss, which is patently unmeritorious, is an insufficient basis upon which to support a stay *of all discovery* in this case, particularly where, as discussed below, Plaintiffs would be substantially aided in responding by completing discovery.

"Summary judgment is a drastic means of resolving litigation and should only be allowed when the right of the moving party is clear and free from doubt." *Country Mut. Ins. Co. v. Olsak*, 391 Ill. App. 3d 295, 301 (2009). Here, Plaintiffs are entitled to obtain discovery before this Court rules on CME's Motion for Summary Judgment.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion to Stay Discovery.

Dated: July 10, 2015

Respectfully submitted,

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PROOF OF SERVICE

Pursuant to Illinois Supreme Court Rules 11 and 131, the undersigned, an attorney, certifies that he served the foregoing instrument by transmitting it via e-mail on July 10, 2015 from Chicago, Illinois to the following designated e-mail addresses of record for Defendants' counsel, who have consented to e-mail service:

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