## E-Notice

**2014-CH-00829**

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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 (Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss)**

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

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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Plaintiffs, through undersigned counsel, respectfully submit this Memorandum in Opposition to Defendants' Motion to Dismiss ("Mot." or "Motion to Dismiss").

## I. INTRODUCTION

Plaintiffs have sufficiently alleged that Defendants[1] committed multiple violations of the requirements in the CME and CBOT Charters, thereby breaching those contracts. Plaintiffs' First Amended Complaint, filed on September 9, 2014 ("Compl." or "Complaint"), details Defendants' breach by fundamentally changing the trading rights and privileges afforded to the Class B Plaintiffs and by modifying the eligibility requirements for exercising trading rights and privileges without the member vote required by the Charters. Before they accepted CME's demutualization proposal, Plaintiffs (a) had the best and most proximate access to Globex; (b) paid no additional fee for that access; (c) were able to trade the full range of Defendants' products at member rates; and, as a result; (d) enjoyed preferential trading and clearing fees vis-à-vis other customers; and (e) were able to generate substantial revenues through leasing. Compl. ¶ 5. As a result of CME's actions, the Plaintiffs' trading rights and privileges have fundamentally changed—without a member vote—at great loss to Plaintiffs. *Id.* at ¶¶ 119-20.

CME does not dispute that Plaintiffs have satisfied the pleading requirements for their breach of contract claim; instead, CME challenges the sufficiency of the allegations for two of the many underlying acts that changed Plaintiffs' trading rights and privileges in breach of the Charters: CME's failure to provide (a) preferential fees to members and (b) access to all new products for members. CME is wrong. Plaintiffs' Complaint more than satisfies the pleading requirements to state a claim for breach of contract, both as a whole and with respect to these two underlying acts. Therefore, Defendants' Motion should respectfully be denied.

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

## II. BACKGROUND

The Plaintiffs are all Class B members of CME and CBOT who largely comprise the traders who owned the two exchanges prior to their demutualization. Compl. ¶ 3. CME operates through various futures exchanges and trading platforms, including CBOT, which CME acquired in 2007 for $11.3 billion. *Id.* at ¶ 2. CME is now the world's largest futures and options exchange company, with annual revenues of more than $2.9 billion and a market capitalization in excess of $25 billion. *Id.* When CME and CBOT demutualized, in 2000 and 2005 respectively, Class B members were conferred both equity interests in CME and CBOT and contractual rights that were designed to preserve the value of their membership by protecting their trading rights and privileges into the future. *Id.* at ¶ 3.



At issue in this lawsuit are those contractual rights first conveyed at demutualization and now set forth in the CME Group Charter and the CBOT Charter. Compl. Exs. 1 & 2. In the CME Group Charter, Defendants agreed to preserve certain "Core Rights" of the Class B shareholders, including Core Right Numbers 2 and 4, under which CME agreed not to change without a vote the Class B shareholders' "trading floor access rights and privileges granted to members of the Exchange" or "the eligibility requirements for any Person to exercise any of the trading rights or privileges of members of the Exchange." Compl. ¶ 10, 43-44 (citing Ex. 1, Article 4, Div. B, Subdiv.1, §1 & Subdiv. 2, § 1(b)). Similarly, CBOT's Charter also guarantees that Class B members will "be entitled to all trading rights and privileges with respect to those products that such holder is entitled to trade on the open outcry exchange system of the Corporation ***or any electronic trading system***" and that such rights cannot be modified without member approval. *Id.* at ¶ 10, 65-69 (emphasis added) (citing Ex. 2, Article IV.D.1(f) & IV.D.2(b)). Article 15, which was added in connection with CME/CBOT merger in 2007, further confirms that members shall have "***all trading rights and privileges for all new products*** first made available after the

effective time of the merger of CBOT Holdings, Inc. with and into the corporation . . . and traded on the open outcry exchange system of the Exchange or CBOT ***or any electronic trading system maintained by the Exchange or CBOT*** . . . ." Compl. ¶ 73-77 (citing Ex. 1, Article 15).

Notwithstanding its promise to respect the trading rights and privileges of Class B members, including trading on any electronic trading system, CME has waged a campaign to undermine the value of the Class B shares by removing or otherwise hindering these trading rights and modifying the eligibility requirements for trading CME products. In January 2012, CME opened the Aurora Data Center ("ADC"), a massive new data center in Aurora, Illinois that now houses the Globex electronic trading platform, a virtual trading floor or "electronic pit." Compl. ¶ 7. Upon opening the ADC, CME discontinued its longstanding practice of providing the Class B Plaintiffs with the best access to the Globex for free and told the Class B Plaintiffs that they would need to pay substantial monthly rental fees to access the Globex at the ADC. *Id.* at ¶ 7, 11. CME also started to market the right to access Globex in the ADC directly to non-members and now allows "non-member customers" and additional traders within clearing and corporate members to access Globex and trade CME products at the ADC. *Id.* at ¶ 7.

Additionally, CME has developed or introduced new products traded on Globex that Class B members are not allowed to trade by virtue of their memberships, and CME has adjusted the rates of other products so that Class B members are no longer given the best rates, further depriving Class B members of the trading rights and privileges promised to them under the Charters and undermining the value of their memberships. *Id.* at ¶ 7. Upon information and belief, around the same timeframe as the opening of the ADC, CME began providing trading rights and preferential fees to certain customers, such as Electronic Corporate Members ("ECMs"), who met minimum trading volume thresholds. *Id.* at ¶ 12. These ECMs, along with

clearing members and other non-member customers, were also provided access rights not made available to Class B members. *Id.*; *see also id. at* ¶ 9. As a direct result of CME's numerous adverse changes to the trading rights and privileges of Class B members, the value of Plaintiffs' Class B memberships has declined substantially. *Id.* at ¶¶ 8, 9.

## III. ARGUMENT

### A. Legal Standard

A motion to dismiss pursuant to 735 ILCS § 2-615 "challenges the legal sufficiency of a plaintiff's complaint." *Linker v. Allstate Ins. Co.*, 342 Ill. App. 3d 764, 773 (1st Dist. 2003) (reversing dismissal of breach of contract claim). In determining whether a complaint is adequate, the pleadings are to be liberally construed. *Scott v. College Hills Corp.*, 91 Ill.2d 138, 145 (1982). A plaintiff is not required to set forth the entire universe of facts underlying his or her claim; rather, the complaint need only "contain sufficient direct or inferential allegations of all material elements to sustain a recovery under some viable legal theory," not "exhaustive[] detail." *Zinser v. Rose*, 245 Ill. App. 3d 881, 883 (3d Dist. 1993) (affirming dismissal of RICO claim for lack of heightened specificity but reversing dismissal of claims under Consumer Fraud and Unfair Trade Practices Acts). "The aim is to see substantial justice done between the parties. To see if a cause of action has been stated the whole complaint must be considered, rather than taking a myopic view of a disconnected part." *Scott*, 91 Ill.2d at 145 (citations omitted).

In deciding a motion under Section 2-615, "all well-pleaded facts in the complaint are taken as true and a reviewing court must determine whether the allegations of the complaint, when interpreted in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted." *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill.2d 482, 490 (1996). The defendant has the burden to show that the allegations are insufficient. 735 ILCS 2-615(a), (b). The claim should not be dismissed "unless it is clear that the plaintiffs could prove

no set of facts that would entitle them to relief." *Linker*, 342 Ill. App. 3d at 773.

### B. Plaintiffs' Allegations Satisfy the Pleading Requirements

Plaintiffs have properly pleaded the elements necessary to state and prove a cause of action for breach of contract. CME challenges the sufficiency of the pleadings with respect to two of the specific acts taken by CME identified in the Complaint: CME's failure to provide (a) preferential rates to members and (b) access to all new products as a member. With respect to preferential rates (but not for the allegations of exclusion from new products), CME also disputes whether the right to preferential rates fall within the ambit of the "trading rights and privileges" promised in the CME Charter (but not the CBOT Charter). Mot. at 29. CME's Motion fails because Plaintiffs are not required to allege each specific instance of misconduct taken by CME to state a claim for breach of contract. Unlike claims for fraud, there is no heightened pleading requirement for breach of contract claims. And, Plaintiffs' detailed allegations satisfy the fact-pleading standard applied by Illinois courts. CME's Motion should therefore be denied.



#### 1. Plaintiffs Properly State a Claim for Breach of Contract

To establish breach of contract under Delaware law,[2] Plaintiffs must prove: "first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff." *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003). Plaintiffs here have done so. Plaintiffs alleged the existence of an express contract, which Plaintiffs attached to the Complaint. *See* Compl. ¶¶ 3, 108-09 & Exs. 1 & 2. Plaintiffs identified the specific provisions within those

[2] Defendants are Delaware corporations, so the substantive law of Delaware will govern. *Newell Co. v. Peterson*, 325 Ill. App. 3d 661, 687 (2d Dist. 2001) (applying Delaware law to claims concerning internal affairs of Delaware corporation); *cf. Airgas, Inc. v. Air Products & Chems.*, Inc., 8 A.3d 1182, 1188 (Del. 2010) (citing *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990)) ("Corporate charters and bylaws are contracts among a corporation's shareholders; therefore, our rules of contract interpretation apply.")

contracts that were breached. *Id.* at ¶¶ 43-44, 66-69, 74-75, 110-112. Plaintiffs identified the specific conduct comprising the breach, *see id.* at ¶¶ 5, 7, 113-19, and also provided extensive supporting details and factual allegations for CME's breaches throughout their forty-page complaint, *see, e.g., id.* at ¶¶ 78-84 (describing opening of ADC and other changes by CME that changed the trading rights and privileges of members); *id.* at ¶¶ 85-100 (describing changes to fee structures and preference given to non-members). Finally, Plaintiffs detailed the resulting harms caused by CME's conduct. *See id.* at ¶¶ 8, 9, 101-06, 120 (describing effect of CME's breaches on value of Class B memberships).



At the outset, Defendants err in suggesting that Plaintiffs' claim for breach of contract should be subdivided into four separate and distinct breaches, and that Plaintiffs must plead each with heightened specificity. Not so. Plaintiffs have sufficiently alleged all of the necessary elements of a breach of contract claim—the contracts, CME's breach by changing or otherwise modifying Class B members' trading rights and privileges, and the resulting harm to the value of the Class B members' seats. That is all the law requires of a well-pleaded complaint. In *Linker*, for example, the plaintiffs alleged four potential bases for breach of contract. *Linker*, 342 Ill. App. 3d at 773. After determining that the contract was not at-will, the court reversed the granting of defendants' motion to dismiss because the plaintiffs had "set forth sufficient facts to state a cause of action for breach of contract, under at least one theory." *Id.* at 779. The court did not suggest that each theory needed to be detailed with heightened specificity; it was enough that plaintiffs "clearly alleged that defendant engaged in conduct that could be found, by a trier of fact, to be a breach of the termination with cause provision." *Id.*

Similarly, in *Wait v. First Midwest Bank/Danville*, the court reversed the dismissal of a breach of contract claim under Section 2-615, holding that plaintiff had sufficiently alleged each

element of the claim. 142 Ill. App. 3d 703, 707 (1986). The court noted that there is a "fine line" between legal conclusions and factual assertions; therefore, simply saying a party "'breached its contract'" would not be enough. However, "[t]o determine whether the complaint states facts or conclusions, the entire complaint must be considered as a whole, and not just its disconnected parts." *Id.* at 707. With respect to the element of breach, it was enough that the plaintiff had alleged that "defendant breached its contract when it refused to make the loan without stating any reason for such refusal." *Id.* at 706. There was no discussion of requiring the plaintiff to further allege when the refusal had been made, how many times it had been made, or any other details or circumstances surrounding the breach.



Here, Plaintiffs' Complaint identifies numerous factual assertions comprising a breach of contract because of their adverse impact on the trading rights and privileges of Class B Members. Compl. ¶¶ 5, 7, 78-84 (describing opening of ADC and other changes by CME that impacted trading rights and privileges of members); *id.* at ¶¶ 85-100 (describing changes to fee structures and preference given to non-members); *see also id.* at ¶¶ 113-19 (further identifying facts underlying breach). That is enough. Plaintiffs are not required to "exhaustively detail" every instance where CME has negatively impacted their trading rights and privileges protected under the contract. *Zinser*, 245 Ill. App. 3d at 883. Breach of contract claims are not subject to the heightened pleading requirements for other causes of action, such as for pleading fraud. *See, e.g.*, *Hirsch v. Feuer*, 299 Ill. App. 3d 1076, 1088 (1st Dist. 1998) ("There is a high standard of specificity required for pleading claims of fraud."). Plaintiffs have alleged the factual assertions necessary to sustain the elements of their breach of contract claim; no more is required.

However, even if Plaintiffs were required to plead CME's specific misconduct with respect to preferential rates and Class B members' ability to access all new products using their

membership, Plaintiffs' detailed factual assertions more than satisfy the pleading requirements.

**2. Plaintiffs Sufficiently Allege CME's Failure to Provide Preferential Fees**

CME argues that (1) preferential rates are not among the trading rights and privileges granted to CME Class B members under the CME Group Charter (but does not make that same argument as to CBOT Class B members), and (2) even if they are, according to CME, Plaintiffs have not sufficiently alleged that preferential fees were not provided. Mot. at 29.

CME's first argument—that CME Class B Members have no right to preferential fees (even though CBOT Class B Members do)—fails because it does not account for the standard of review on a motion to dismiss: Plaintiffs' allegations must be accepted as true and liberally construed in a light most favorable to Plaintiffs. *Connick*, 174 Ill.2d at 490. Plaintiffs have alleged that the trading rights and privileges of CME Members include the right to preferential rates. *See, e.g.*, Compl. ¶ 10 ("[T]he 'trading rights and privileges' of the Class B Plaintiffs included the right and privilege . . . to trade the full range of CME products traded on Globex at member rates, without any surcharge or additional fee."); *see also id.* at ¶¶ 12, 89. Respectfully, the Court should accept these allegations as true.[3]

CME's second argument that Plaintiffs' factual allegations are insufficient relating to preferential fees for both CME members and CBOT members also fails. With respect to legacy

[3] Through their Motion to Dismiss, Defendants apparently seek to obtain the same relief they seek with respect to their Motion for Summary Judgment—namely, that the contractual provisions in the Charters be given an insupportably narrow interpretation as a matter of law without the benefit of any discovery. *See, e.g.*, Mot. at 28 (repeating the argument advanced in Defendants' Motion for Summary Judgment that CME Rule 121 defines the trading rights and privileges of CME Class B members). Plaintiffs object to the resolution of this issue on a motion to dismiss. Defendants in their Motion for Summary Judgment generally disputed that the trading rights and privileges promised in the Charters include anything more than the ability to access Globex—regardless of how expensive or cumbersome such access has become or how free and preferential Plaintiffs' access was previously. However, as the Court has already ruled, Plaintiffs are entitled to discovery before having to respond to CME's narrow interpretation of the contracts. *See* Order and Opinion, 7/22/15, ¶¶ 1-3.

CME Members, CME does not dispute that Plaintiffs have alleged that "certain classes of customers . . . receive clearing and trading fees that are lower than those paid by Class B shareholders and their lessees." Mot. at 28 (quoting Compl. ¶ 92). CME is wrong to suggest, however, that this is the "sole supporting allegation" in the Complaint. *Id.* Plaintiffs' Complaint details over the course of sixteen paragraphs how CME has failed to honor Plaintiffs' rights on the virtual trading floor. Compl. ¶¶ 85-100. Specifically, Plaintiffs have alleged:

- CME "provid[ed] trading rights and preferential fees to certain customers, including Electronic Corporate Members ("ECMs"), that met minimum trading volume thresholds, providing additional Globex access rights and preferential fees to ECMs, clearing members and non-member customers that were not made available to Class B members generally." *Id.* at ¶ 12.

- The proxy materials substantiate that "[n]ew CME will continue to charge a lower clearing fee on Exchange products for trades made for their own accounts by a holder of a Class B share or by a lessee of the trading privileges of a Class B share" and that "[t]he trades of members and lessees of memberships for their own accounts qualify for lower fees in recognition of the market liquidity their trading." *Id.* at ¶ 48.

- In connection with demutualization, members were told "the clearing fees available to Class B shareholders would always be sufficiently lower than the fees available to any other customers to provide significant value to the Class B shareholders." *Id.* ¶ 56.

- "CME . . . grant[ed] ECMs and, on information and belief, other categories of customers, access to the ADC without requiring that they purchase or lease a Class B membership and without Class B Plaintiffs' approval, ***by providing ECMs and other customers preferential trading and clearing fee terms*** while failing to honor their obligation to ensure that the ***Class B Plaintiffs would receive preferential fees***." *Id.* at ¶ 89 (emphasis added).

- "CME now markets access to Globex directly to corporate members, clearing members and non-members ***at rates that are equal to or better than the rates available to the Class B Plaintiffs***," and that "CME has not honored its commitment to share Globex-related fees with the Class B plaintiffs." *Id.* at ¶ 101.

Plaintiffs also provided specific examples of new programs that CME has put in place to undermine the Class B members preexisting rights to preferential fees. For example, CME has

instituted a "volume incentive program" through which CME created an entirely new class of ECM known as "ECM-W" for which the requirement that an ECM own or lease a membership is waived so long as the firm meets certain trading volume thresholds. Compl. ¶ 91. "In other words, ECM-Ws can gain trading rights and privileges without any requirement that they own or lease any other type of CME membership." *Id.*

CME is wrong to argue that the published rates on CME's website somehow contradict these allegations. First, Plaintiffs never alleged that CME's published rates were the *only* determining factor regarding the rates paid by non-members. As Plaintiffs alleged, rates may be determined based on such factors as "minimum trading volume thresholds" for ECMs. Compl. ¶ 12. There are many ways CME could be giving non-members lower fees, including rebates or kickbacks based on trading volume, the impact of which would not be publicly available.[4] Discovery is necessary to know the full scope of the rates given to non-members, and Illinois courts have long held that a plaintiff "need not plead facts with precision when the information needed to plead those acts is within the knowledge and control of the defendant rather than the plaintiff." *Holton v. Resurrection Hospital*, 88 Ill. App. 3d 655, 658 (1st Dist. 1980).

Second, Plaintiffs' allegations should be accepted as true for purposes of the Motion to Dismiss, and these allegations are sufficiently detailed to survive Defendants' Motion to Dismiss. Plaintiffs alleged by way of example that CME's current fee schedule "makes clear that it is providing preferential fees to customers who are not Class B members," and that under the fee schedule in place in August 2014, "certain classes of customers, including ECMs, 'International Incentive Program' and 'International Volume Incentive Program' participants,

[4] For example, the Commodity Futures Trading Commission has initiated a probe into these opaque and complicated high-volume discounts. *See* Scott Patterson & Jenny Strasburg, *High-Speed Trading Firms Face New U.S. Scrutiny*, WALL STREET JOURNAL, March 18, 2014, available at http://www.wsj.com/articles/SB10001424052702303287804579447610625554506

receive clearing and trading fees that are lower than those paid by Class B shareholders and their lessees." *Id.* at ¶ 92.

Third, contrary to CME's representations, the published rates *do* support Plaintiffs' contention.[5] Plaintiffs revisited the website on July 31, 2015,[6] and confirmed that the alleged incentive program participants do in fact receive lower rates, precisely as alleged. *See, e.g.*, Col. C, "Agricultural Futures" (Row 32: $.36 for members; Row 36: $.32 for incentive program participants); Col. F, "Foreign Exchange Products" (Row 32: $.25 for members; Row 36: $.10 for incentive program participants); Col. I, "Equity Products" (Row 32: $.50 for members; Row 36: $.20 for incentive program participants). CME argues that these are not "clearing fees," and are instead a "transaction fee," but such a distinction is incorrect, unsupported, and irrelevant. Plaintiffs' allegations clearly refer to *any* preferential rates or fees, not just the fees that CME has selectively entitled "clearing fees." *See, e.g.*, Compl. ¶ 101.[7]

Furthermore, in the very section that CME argues relates to "clearing fees," there are indeed examples of incentive program participants receiving lower rates than members, contrary



[5] This Court would have to take judicial notice of the website to consider it on a motion to dismiss. CME's citation to cases where exhibits were considered and deemed controlling over allegations is inapposite because, as CME does not dispute, the rate schedule was not attached as an exhibit to the Complaint. Nor can this Court take judicial notice of CME's rates because CME, as a party to this lawsuit, cannot be considered a source "whose accuracy cannot reasonably be questioned," *see* Ill. R. Evid. 201(b).

[6] *See* http://www.cmegroup.com/company/clearing-fees/ and link to excel schedule titled "CME Fee Schedule," *available at* http://www.cmegroup.com/company/files/cme-fee-schedule.xls.

[7] Defendants' purported distinction between "clearing fees" and "transaction fees" is a reiteration of the argument advanced in their motion for summary judgment that CME Rule 121 defines the trading rights and privileges of CME Class B members. *See* Mot. at 28. Plaintiffs respectfully submit that Defendants' argument is not properly resolved on a motion to dismiss without the benefit of any discovery. For purposes of Defendants' Motion to Dismiss, it suffices that Plaintiffs' allegations regarding preferential rates or fees plainly encompass what Defendants refer to as "clearing fees" as well as other transaction fees.

to CME's assertion that "the top box . . . specifies that CME Members are to receive the lowest clearing fees." Mot. at 29. For example, for the E-mini CNX Nifty Futures product, members are required to pay $.09, whereas certain incentive program participants, e.g., the "Latin American Commercial Incentive Program" and the "CTA/Hedge Fund Incentive Program" are each given a lower rate of $.04. Col. N, Rows 11, 18, 19. Thus, even though Plaintiffs' allegations with respect to preferential fees were plainly not limited to the published rates, let alone the published rates called "clearing fees," even accepting CME's narrow premise that these are the only rates that matter, CME's argument fails.



With respect to CBOT Members, Defendants do not dispute that they should be given "transaction fees for trades of the Corporation's products for their accounts that are lower than the transaction fees charged to any participant who is not a holder of Class B Membership for the same products." Mot. at 29.[8] Defendants argue, however, that Plaintiffs have failed to offer any allegations that CBOT failed to provide preferential fees to its members. Defendants ignore that in the Complaint, "CME and CBOT are collectively referred to as 'CME' or 'Defendants.'" Compl., Intro. Para. Plaintiffs have already detailed the numerous paragraphs of the Complaint that allege the factual assertions in support of Plaintiffs' claim that "CME" (and therefore also CBOT) failed to provide preferential rates to members. Compl. ¶¶ 12, 48, 56, 86, 88, 89.

Plaintiffs' pleadings with respect to CME's (and CBOT's, to be clear) failure to provide

[8] If CME is suggesting that Mr. Goldberg lacks standing to bring a breach of contract claim because he has leased his seat, such an argument is improper on a Section 2-615 motion and must be raised via a Section 2-619 motion, which CME has not done. Nor is there any support for such an argument—whether Mr. Goldberg leases his seat or not, CME's conduct has caused Mr. Goldberg injury by fundamentally changing his trading rights and privileges to his great detriment and in direct breach of the Charter. Plaintiffs allege that Defendants' breaches have caused a decline in the lease value of their memberships. *See* Compl. ¶ 8-9, 12, 101-06. That injury is more than sufficient to confer standing on Mr. Goldberg. *Greer v. Illinois Hous. Dev. Auth.*, 122 Ill.2d 462, 493 (1988) ("Economic injuries have long been recognized as sufficient to lay the basis for standing with or without a specific statutory provision for judicial review.").

preferential rates to members are sufficiently detailed to survive a motion to dismiss.

### 3. Plaintiffs Sufficiently Allege a Breach from CME's Failure to Provide Access to New Products as Members

The Complaint also sufficiently details the factual assertions relating to CME's (and CBOT's) failure to provide members with access to all new products:

- CME "develop[ed] new products traded on Globex that Class B members were not authorized to trade at all or were unable to trade at the best rates." Compl. ¶ 7; *see also id.* at ¶ 9.

- CME "directly market[ed] to non-member customers the right to 'co-located' access to Globex at the ADC and allow[ed] additional traders to trade directly on Globex so long as they paid Globex fees to CME and their trades are guaranteed by a clearing member, while excluding Class B members from new products traded on Globex," *id.* at ¶ 13

- CME "allow[ed] ECMs and other customers to trade products through Globex at preferential rates even though the Class B members have not been granted access to such rates and, in some instances, are not authorized to trade those products at all." *Id.* at ¶ 89.

- "The Class B Plaintiffs have also suffered a further diminished share value and diminution in lease value as a result of CME's launch of new products for trading on Globex, without permitting the Class B Plaintiffs to trade those products or to trade them at member rates." *Id.* at ¶ 106.

Thus, the Complaint squarely alleges that, at demutualization, Class B members had the right to trade the full range of defendants' products by virtue of their memberships, that defendants recently have developed new products and new markets with new and different eligibility requirements without the required member vote, and that defendants breached Plaintiffs' Core Rights by doing so. CME's argument is essentially that these myriad allegations are insufficient to state a claim for breach of contract and that Plaintiffs should instead be required to name each product for which they have been denied access. But Plaintiffs have not yet obtained the discovery needed to identify all of the products and markets CME has developed without member approval, or any explanation CME may have for developing new products and

markets without member approval or for changing the "eligibility requirements" that are applicable to those markets. Plaintiffs have alleged that this is one of the ways in which CME has changed or modified Plaintiffs' Core Rights and diluted the value of Plaintiffs' Class B shares, and Plaintiffs should be permitted to proceed with discovery on this claim. Defendants have not provided any basis for resolving this issue on a piecemeal basis in their Motion to Dismiss.

CME, in essence, is arguing for the heightened pleading standard required for fraud claims, where plaintiffs must identify the who, what, where, and when of the fraudulent conduct to make out a sufficient claim. None of CME's cited case law supports this contention.[9] And, Illinois courts have generally held the opposite. In *Hirsch v. Feuer*, for example, the court reversed a dismissal of the plaintiffs' breach of contract claim under Section 2-615, holding that while the allegations were "not as clear as they could (and should) have been . . . , we cannot agree that the complaint does not at least set forth the basic facts for a cause of action for breach of contract." 299 Ill. App. 3d at 1082. The lower court held that the complaint did not state sufficiently a breach of contract claim. The appellate court disagreed. The two simple allegations that defendants had knowledge of the defects before entering into the contract and that they knew certain systems were not in working order were sufficient in combination to satisfy Section 2-615, despite containing "mixed conclusions with their factual assertions." *Id.*; *Linker*, 342 Ill. App. 3d at 773 (holding brief factual assertions relating to breach sufficient to survive motion to dismiss); *see also Shubert v. Federal Express Corp.*, 306 Ill. App. 3d 1056, 1059 (1st Dist. 1999) (reversing dismissal of breach of contract claim where plaintiff simply alleged defendants had

[9] Here, Plaintiffs' Complaint does not remotely resemble the barebones allegations for tortious interference of contract claims found lacking in *Grund v. Donegan* —where there was no allegation of breach *at all*—or *Herman v. Prudence*, where the only allegation was the conclusory sentence of inducement "to breach or terminate their respective contracts" with no supporting facts. *See Grund v. Donegan*, 298 Ill. App. 3d 1034, 1038 (1st Dist. 1998); *Herman v. Prudence Mut. Cas. Co.*, 41 Ill. 2d 468, 475 (1969).

"(1) fail[ed] to amend the Service Guide . . . , (2) institute[ed] the fuel surcharge although the 'condition precedent,' rising fuel prices, had not been met, and (3) fail[ed] to impose the surcharge equitably."); *see Scott,* 91 Ill.2d at 145 ("To see if a cause of action has been stated the whole complaint must be considered, rather than taking a myopic view of a disconnected part."). Here, Plaintiffs' extensive allegations more than satisfy this standard.

### C. Alternatively, Plaintiffs Request Limited Discovery and Leave to Amend

If the Court determines that the allegations are insufficient, Plaintiffs respectfully request limited discovery and leave to amend. "The granting or refusal of a motion for leave to amend rests in the discretion of the court. This discretion should be liberally exercised in favor of allowing such new pleadings as are essential to the presentation of a party's action or defense." *Merrill v. Drazek,* 58 Ill. App. 3d 455, 458 (1st Dist. 1978) (citations omitted). Many of the specific details regarding the preferential fee structures granted by CME to non-members will require discovery. Upon information and belief, Defendants offer incentives to favored traders that substantially reduce the final rate paid to trade certain products below the published rate. Plaintiffs are not expected to "plead facts with precision when the information needed to plead those acts is within the knowledge and control of the defendant rather than the plaintiff." *Holton,* 88 Ill. App. 3d at 658; *see also Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 66 (1994) (same). Therefore, to the extent the Court determines that Plaintiffs' allegations are insufficient, Plaintiffs would therefore request leave to amend following a deposition of the person most-knowledgeable at CME and a narrow production of documents with respect to (1) the rates it charges to trade its products and (2) the eligibility requirements to trade certain products.

## IV. CONCLUSION

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

Respectfully submitted,

SHELDON LANGER
RONALD M. YERMACK
LANCE R. GOLDBERG

By: Jeannie Evans
One of Their Attorneys

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*Attorneys for Plaintiffs*

## CERTIFICATE OF SERVICE

Pursuant to Illinois Supreme Court Rules 11 and 131, the undersigned, an attorney, certifies that she served the foregoing PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS by transmitting it via e-mail on August 3, 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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Jeannie Evans

Jeannie Evans

# Chancery DIVISION

Litigant List

Printed on 08/04/2015

Case Number: 2014-CH-00829



## Plaintiffs

| Plaintiffs Name | Plaintiffs Address | State | Zip | Unit # |
|---|---|---|---|---|
| LANGER SHELDON | | | 0000 | |
| YERMACK RONALD | | | 0000 | |
| GOLDBERG LANCE | | | 0000 | |

Total Plaintiffs: **3**

## Defendants

| Defendant Name | Defendant Address | State | Unit # | Service By |
|---|---|---|---|---|
| CME GROUP | | 0000 | | |
| BOARD TRADE CITY CHICAGO | | 0000 | | |
| DELAWARE CORPORATION | | 0000 | | |

Total Defendants: **3**