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

SHELDON LANGER, RONALD M. YERMACK, LANCE R. GOLDBERG, individually and 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

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' CLAIMS FOR BREACH OF CONTRACT UNDER 735 ILCS 2/615

Defendants CME Group Inc. ("CMEG") and The Board of Trade of the City of Chicago, Inc. ("CBOT") (collectively, "Defendants") respectfully submit this reply[1] brief in support of their Motion to Dismiss Plaintiffs' claims that CMEG and CBOT breached their Certificates of Incorporation (the "Charters") by (i) failing to allow Plaintiffs to trade all products and (ii) failing to provide Plaintiffs with preferential fees (the "Product and Fee Claims").

INTRODUCTION

Plaintiffs try to save their Product and Fee Claims from dismissal by asking the Court to evaluate their Complaint as if they asserted just a single claim for breach of contract. (Pl. Opp. at 6.) But Plaintiffs' Complaint does not – nor could it – assert just one breach of contract claim against both CMEG and CBOT. Instead, Plaintiffs assert that CMEG and CBOT committed four separate and distinct breaches of their respective Charters by: (i) allowing open access to Globex; (ii) failing to provide Plaintiffs the best and most proximate access to Globex; (iii) failing to allow Plaintiffs to trade all products; and (iv) failing to provide Plaintiffs with preferential fees. Plaintiffs' burden is to set forth well-pled factual allegations that, if true, could establish each element for a breach of contract claim as to each of these eight alleged breaches. Plaintiffs do not meet this burden.

Plaintiffs also ask the Court to ignore the actual Core Rights granted in the Charters and to instead read into the Charters an amorphous "promise to respect the trading rights and privileges" that the Class B Members supposedly had "[b]efore they accepted CME's [or CBOT's] demutualization proposal[s]." (Pl. Opp. at 1-2, 7.) The Court should not accept

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[1] All capitalized terms retain the same meaning as defined in Defendants' Memorandum of Law in Support of Defendants' Combined Motion to Dismiss and Motion for Summary Judgment, referred to herein as "Def. Br." Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss is referred to as "Pl. Opp."

Plaintiffs' invitation to rewrite the Charters. Instead, for the reasons set forth herein and in the Opening Memorandum, this Court should dismiss Plaintiffs' Product and Fee Claims.

ARGUMENT

I. PLAINTIFFS MUST SUPPORT EACH ALLEGED BREACH WITH SUFFICIENT FACTUAL ALLEGATIONS

Plaintiffs argue that the Court should allow each of their theories for breach of contract to proceed – along with the burdensome discovery associated with them – even if they have only asserted factual allegations sufficient to support just one of those eight alleged theories. (Pl. Opp. at 6-7.) This is at odds with Illinois law. Illinois courts require a plaintiff to plead independent and specific facts to support each theory for a breach of contract claim. *Wilkonson v. Yovetich*, 249 Ill. App. 3d 439, 449 (1st Dist. 1993) (treating allegations of two distinct breaches of the same contract plead in the same count as two distinct claims). In fact, Section 2-603(b) of the Illinois Code of Civil Procedure mandates that a plaintiff set forth "[e]ach separate cause of action upon which a separate recovery might be had [] in a separate count or counterclaim." 735 ILCS 5/2-603 (b).

Here, Plaintiffs argue that "Defendants committed multiple violations of the requirements in the CME and CBOT Charters." (Pl. Opp. at 1.) Yet Plaintiffs chose not to comply with their Illinois pleading obligations and, instead, set forth a single count for breach of contract even though their claim relates to four distinct theories of breach against two separate defendants based on two different contracts. What is more, Plaintiffs Langer and Yermack are CME Members (not CBOT Members) and thus have no rights under the CBOT Charter. And Plaintiff Goldberg is a CBOT Member (not a CME Member) and thus does not enjoy any rights granted to CME Members in the CMEG Charter. This standing issue further demonstrates that Plaintiffs' multiple allegations of breach cannot be jumbled into a single claim.

The Court should not allow Plaintiffs to use their pleading deficiencies to their advantage. Instead, the Court should independently examine each of Plaintiffs' theories of breach to determine whether Plaintiffs have met their burden to plead non-conclusory factual allegations.[2] *Wilkonson*, 249 Ill. App. 3d at 449. As shown below, Plaintiffs fail to meet this burden on the Product and Fee Claims.

II. PLAINTIFFS' PRODUCT AND FEE CLAIMS ARE NOT ADEQUATELY PLED

When viewed as separate claims for breach of contract, it is readily apparent that Plaintiffs have failed to meet their burdens to set forth well-pled facts supporting their Products and Fee Claims. First, there is no contractual right that could serve as a basis for breach of contract against CMEG related to the alleged failure to provide "preferential fees" to CME Class B Members. Moreover, Plaintiffs have done nothing more than assert speculative and unsupported conclusory allegations of fact to support their claims. That is not enough to survive a motion to dismiss. *Skolnick v. Nudelman*, 71 Ill. App. 2d 424, 431 (1st Dist. 1966) (affirming denial of motion to amend where allegations were merely conclusory and speculative).

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[2] *Wait v. First Midwest Bank/ Danville*, 142 Ill. App. 3d 703 (4th Dist. 1986), and *Linker v. Allstate Insurance Co.*, 342 Ill. App. 3d 764 (1st Dist. 2003), the main cases on which Plaintiffs rely, (Pl. Opp. at 6-7), do not instruct otherwise. *Wait* is entirely inapposite as the plaintiff in that case alleged just one theory of breach of contract. *See Wait*, 142 Ill. App. 3d at 706 ("[C]ount I alleges breach of an oral commitment or agreement to loan.") And in *Linker*, the Appellate Court, in an unpublished section of the opinion and likely for the purpose of making distinct rulings as to particular breach theories to provide the law of the case for the trial court on remand, actually analyzed and determined the merits of each allegation of breach. 2003 Ill. App. LEXIS 937, *37-*42 (1st Dist. 2003). For example, the Court found that Plaintiffs' second allegation of breach was "insufficient to withstand a motion to dismiss" *id.* at *37-38, that Plaintiffs had "waived" their third allegation of breach by failing to cite any relevant authority *id.* at *39-40, and that the allegations related to the fourth theory of breach were sufficient to withstand a motion to dismiss *id.* at *41. The manner in which the appellate court segregated each theory of breach and determined whether the allegations were sufficient to support each theory is exactly what Defendants ask the Court to do here.

A. CMEG Class B Plaintiffs Have No Core Right to Preferential Fees

As Defendants set forth in their Opening Memorandum, the Core Rights granted to CME Class B Members are specifically enumerated in the CMEG Charter, and unlike in the case of CBOT, they do not contain any right to preferential fees. (CME Charter, Div. B.1.1; *Cf.* CBOT Charter, Art. IV.D.2.(b)(2).) Rather than address this fact, Plaintiffs argue that "the standard of review on a motion to dismiss" saves their claim because they have alleged a trading right to preferential fees, which must be taken as true. (Pl. Opp. at 8.) This argument fails.

As an initial matter, Plaintiffs improperly try to conflate the Core Rights granted to CME Class B Members with general "trading rights and privileges." Plaintiffs claim that CMEG breached the Core Rights granted to CME Members by failing to provide them with preferential fees. To state their claim, Plaintiffs must therefore point to a specific Core Right that provides CME Members with the right to preferential fees. Plaintiffs cannot do this. There is no Core Right that grants CME Class B Members preferential fees.[3] And the only Core Right that even speaks to the "trading rights and privileges" of CME Class B Members is Core Right 4. That Core Right guarantees only that CMEG will not change the *eligibility requirements* to exercise trading rights and privileges, not that CMEG will not change the trading rights and privileges themselves.

Because there is no contractual right to preferential fees granted in the CMEG Charter, Plaintiffs' allegations and arguments related to the CME fee schedule and Rule 121 are

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[3] The CMEG Charter guarantees that CMEG will not make any changes to the following Core Rights without Member approval: "(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; [and] (4) the eligibility requirements for any Person to exercise any of the trading rights or privileges of members in the Exchange." (CME Charter, Div. B.1.1.)

nothing more than a side show. Even assuming that Rule 121 somehow provides Plaintiffs with a trading right to preferential fees—which it does not—Rule 121 is an Exchange Rule that can be amended or repealed at any time without a Member vote. [4]

Finally, contrary to Plaintiffs' argument, they cannot survive a motion to dismiss by claiming that a right exists. It is well established that allegations in a complaint that are clearly contradicted by a complaint's exhibits and judicially noticed documents are insufficient to state a claim. *See, e.g., Johnson v. Johnson*, 244 Ill. App. 3d 518, 523 (1st Dist. 1993) (stating that an "exhibit controls over the complaint where allegations in the complaint conflict with the facts contained in the exhibit."); *Int'l Ins. Co. v. Sargent & Lundy*, 242 Ill. App. 3d 614, 622 (1st Dist. 1993) (same).

B. Plaintiffs Fail to Adequately Plead a Breach of the CBOT Charter Based on the Failure to Provide Preferential Fees

In contrast to the CMEG Charter, the CBOT Charter provides the CBOT Class B Members with the right to preferential fees. CBOT Charter, Art. IV.D.2.(b)(2). Nonetheless, Plaintiff Goldberg still fails to adequately plead that CBOT breached his right. Plaintiff Goldberg does not set forth a single factual allegation that relates to any of the fees charged by CBOT, nor does he allege a single trade for a single CBOT product that he incurred a transaction rate that exceeded the rate incurred by any non-Member. In fact, the Complaint is practically devoid of any allegations related to CBOT or Plaintiff Goldberg.

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[4] On July 30, 2015, CME amended Rule 121 to provide that CME members have the right to "receive member or lessee fee rates in accordance with Exchange requirements." *See* Rule 121, *available at* http://www.cmegroup.com/rulebook/CME/I/1/1.pdf. Prior to that time, the Rule provided that CME members had the right to "receive member or lessee *clearing* fee rates in accordance with Exchange requirements." The amendment to Rule 121 does not alter Defendants' argument on this Motion to Dismiss. The CMEG Charter does not provide CME Class B Members with the right to preferential fees, plain and simple.

Plaintiffs try to justify their absence of allegations related to CBOT by claiming that because "CME and CBOT are collectively referred to as 'CME' or 'Defendants'" in the Complaint, the same allegations that allegedly support claims for breach of contract against CMEG also support the claims against CBOT. (Pl. Opp. at 12.) But this argument fails to recognize that CMEG and CBOT are distinct entities, with distinct memberships, and distinct fee schedules. *Cf.* CME Group Inc., Clearing & Trading Fees, http://www.cmegroup.com/company /clearing-fees/ (providing separate links to the CME Fee Schedule and the CBOT Fee Schedule). The fee schedule allegations as to CMEG cannot apply equally to CBOT.

Plaintiffs argue in their Opposition Brief that their claims are not just supported by the published CME fee schedule, but also by their belief that CME and CBOT may also be giving non-members lower fees by "rebates or kickbacks based on trading volume." (Pl. Opp. at 10.) As an initial matter, any such claim related to Electronic Corporate Members ("ECMs") must fail because owning or leasing a Class B membership is a prerequisite to becoming an ECM. *See* CME Rule 106.R. Even ignoring this dispositive detail, Plaintiffs fail to support these conclusory allegations with a single specific factual allegation of an instance where a high volume trader received rates or kickbacks. Because Illinois is a fact pleading state, these speculative, conclusory allegations are insufficient support a claim for breach of contract. *See, e.g., Colangelo v. Novartis Pharm. Corp.*, No. 95 L 5635, 2000 WL 33342379, at *2 (Ill. Cir. Ct. Aug. 1, 2000) ("The trial court is not required to reach . . . unwarranted conclusions or to draw . . . unwarranted inferences in order to sustain the sufficiency of the complaint. Legal conclusions, speculation and conjecture must be ignored by the court.") (internal citations omitted); *Skolnick*, 71 Ill. App. 2d at 431 (affirming trial court's denial of motion to amend complaint where the only new allegation in proposed amended complaint was merely

"conclusion and speculation, unsupported by any factual allegation."). Accordingly, this claim must be dismissed. *Wilkonson*, 249 Ill. App. 3d at 449.

C. Plaintiffs Have Not Pled Facts Sufficient to Establish Any Breach Based on the Alleged Inability to Trade New Products

Despite asserting that their Complaint "sufficiently details the factual assertions relating to CME's (and CBOT's) failure to provide members with access to all new products" (Pl. Opp. at 13), Plaintiffs have yet to identify a single product that any Plaintiff has been denied the opportunity to trade. Instead, Plaintiffs repeat speculative and conclusory allegations that Class B Members generally are not allowed to trade all products on Globex. (*Id.* (citing Compl. ¶¶ 7, 9, 13, 89, 106).) Such conclusory and speculative allegations are insufficient to support a claim for breach of contract. *Costa v. Stephens-Adamson, Inc.*, 142 Ill. App. 3d 798, 802 (2d Dist. 1986); *Skolnick*, 71 Ill. App. 2d at 431; *Colangelo*, 2000 WL 33342379, at *2.

The cases cited by Plaintiffs do not hold differently. In each of the cases Plaintiffs rely upon, the parties bringing claims asserted factual allegations to support their claims of breach. For example, in *Hirsch v. Feuer*, 299 Ill. App. 3d 1076 (1st Dist. 1998), which the court recognized was a "close" "question," plaintiffs asserted that defendants "knew that the heating, central cooling, ventilating and plumbing fixtures and systems were not in working order at the time of closing" in violation of a representation made in the contract. *Id.* at 1082. The plaintiffs identified the representation that resulted in a breach, whereas here, Plaintiffs fail to identify any instance in which a Plaintiff was denied the right to trade a product. *Id.*

Plaintiffs attempt to justify their pleading failure by asserting that they cannot name a single product because they have "yet to obtain[] discovery" on the matter. (Pl. Opp. at 13.) A plaintiff cannot, however, state a claim by asserting speculative and conclusory allegations with the hope that discovery will reveal something more. Illinois is a "fact pleading

jurisdiction" and "a plaintiff must allege facts, not mere conclusions" to state a claim for relief. *Napleton v. Vill. of Hinsdale*, 229 Ill. 2d 296, 305 (2008); *see also Cooney v. Magnabosco*, 407 Ill. App. 3d 264, 270 (1st Dist. 2011). (affirming dismissal pursuant to section 2-615 and refusing discovery where plaintiff admitted she did not know whether defendant engaged in conduct in violation of the statutory provision under which plaintiff brought suit). Further, if any Plaintiff was actually denied the right to trade a specific product on Globex, he would be in just as good a position as Defendants to identify that product.[5] Tellingly, Plaintiffs have not identified such a product for any Plaintiff and, as such, their claims should be dismissed.

III. PLAINTIFFS SHOULD NOT BE AFFORDED DISCOVERY IN ORDER TO STATE A CLAIM

As a final matter, Plaintiffs argue that they should be granted discovery on their Fee and Product Claims if the Court finds that they have failed to meet their pleading burden. (Pl. Opp. at 15.) However, it is improper for a plaintiff to file a claim without any factual basis and to attempt to use discovery "as a fishing expedition to build [its] speculative claims." *Cooney*, 407 Ill. App. 3d at 270. Moreover, because Plaintiffs have failed to state a claim upon which relief could be granted, the discovery they seek is similar to the pre-complaint discovery described in Illinois Supreme Court Rule 224. That type of discovery has been limited by Illinois Courts to "situations where a plaintiff has suffered injury but does not know the identity of one from whom recovery may be sought." *Gaynor v. Burlington N. & Santa Fe Ry.*, 322 Ill. App. 3d 288, 294 (5th Dist. 2001) (denying pre-complaint discovery where Plaintiff simultaneously sought discovery and filed suit against defendant).

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[5] Notably, each Exchange website lists all products that can be traded. *See* CME Group Products, *available at* http://www.cmegroup.com/trading/products/.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant Defendants' Motion to Dismiss pursuant to 735 ILCS 5/2-615.

Dated: August 17, 2015
Chicago, Illinois

Respectfully submitted,

Skadden, Arps, Slate, Meagher & Flom LLP

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CERTIFICATE OF SERVICE

Marcella L. Lape, an attorney, hereby certifies that on August 17, 2015, I caused a true and correct copy of Defendants' Reply in Support of Their Motion to Dismiss to be served by Federal Express and electronic mail on the following counsel:

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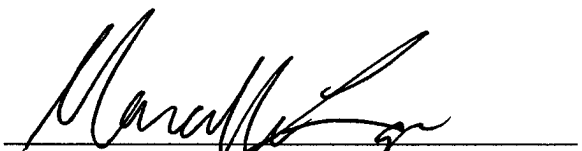

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