



## E-Notice

**2014-CH-00829**

CALENDAR: 06

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# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

vs.

**2014-CH-00829**

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**ANSWER TO AFFIRMATIVE DEFENSE FILED (PLAINTIFFS' REPLY TO DEFENDANTS' AFFIRMATIVE DEFENSES)**

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**DOROTHY BROWN**  
**CLERK OF THE CIRCUIT COURT**  
COOK COUNTY  
RICHARD J. DALEY CENTER, ROOM 1001  
CHICAGO, IL 60602

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courtclerk@cookcountycourt.com



**ANSWER:** This paragraph does not contain facts but instead sets forth legal conclusions and arguments to which no response is required. To the extent any response is required, Plaintiffs deny the allegations in this paragraph.

**Factual Allegations Common To All Defenses<sup>1</sup>**

2. Defendant CMEG is a Delaware corporation, headquartered in Chicago, Illinois.

CMEG owns and operates derivative exchanges throughout the world.

**ANSWER:** Admitted.

3. Defendant CBOT is a derivatives exchange headquartered in Chicago, Illinois.

CME Holdings Inc. and CBOT merged in 2007. The surviving entity, CME Holdings Inc., then changed its name to CMEG.

**ANSWER:** Plaintiffs admit that CBOT is a derivatives exchange headquartered in Chicago, Illinois and that CME Holdings Inc. and CBOT Holdings, Inc. merged in 2007. Plaintiffs further admit that the surviving entity of this merger, CME Holdings Inc., then changed its name to CMEG. Except as so stated, Plaintiffs deny the allegations of this paragraph.

4. Plaintiffs Sheldon Langer and Ronald Yermack are holders of Class B Common Stock in CMEG, which affords them certain rights and privileges on the Chicago Mercantile Exchange Inc. The rights and privileges of the CMEG Class B Plaintiffs are defined, in writing, in the CMEG Charter, the CMEG Bylaws, and in the Rules of CME. Specifically, the CMEG Charter set forth the Core Rights guaranteed to the Class B shareholders. A Class B shareholder's Core Rights are distinct from other trading rights and privileges defined in the CMEG bylaws

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<sup>1</sup> No response is required to the headings in Defendants' Affirmative Defenses, but to the extent any response is required, Plaintiffs deny all factual assertions in the headings.

and the Rules of CME because the Core Rights cannot be changed or modified absent a majority vote of the Class B shareholders.

**ANSWER:** Plaintiffs admit that Sheldon Langer and Ronald Yermack are holders of Class B Common Stock in CMEG, which affords them, *inter alia*, certain rights and privileges relating to the Chicago Mercantile Exchange Inc., and that certain rights and privileges of members are set forth in the CMEG Group Charter, the CMEG By-laws, and the Rules of the CME. Plaintiffs further admit that the Core Rights set forth in the CMEG Charter cannot be changed or modified absent a majority vote of the Class B shareholders. Except as so stated, Plaintiffs deny the allegations of this paragraph.

5. Plaintiffs Langer and Yermack have leased their trading rights and privileges to other individuals since at least August 2012.

**ANSWER:** Plaintiffs admit that Langer and Yermack have leased their trading rights and privileges to other parties since at least August 2012. Except as so stated, Plaintiffs deny the allegations of this paragraph.

6. Plaintiff Lance Goldberg is a Class B Member in CBOT. As a CBOT Class B Member, Goldberg enjoys certain rights and privileges related to CBOT, which are defined, in writing, in the CBOT Charter, the CBOT Bylaws, and the CBOT Rules.

**ANSWER:** Plaintiffs admit that Lance Goldberg is a Class B Member in CBOT and as a CBOT Class B Member, Goldberg enjoys, *inter alia*, certain rights and privileges related to CBOT, and that certain rights and privileges of CBOT members are set forth in the CBOT Charter, the CBOT Bylaws, and the CBOT Rules. Except as so stated, Plaintiffs deny the allegations of this paragraph.

7. Plaintiff Goldberg has leased his trading rights and privileges since at least August 2012.

ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 3 of 34

**ANSWER:** Admitted.

**A. CME’s Demutualization and the Adoption of the “Core Rights”**

8. Prior to November 2000, CME was an Illinois not-for-profit membership corporation governed by its members. On November 13, 2000, however, CME completed a demutualization in which it converted to a Delaware for-profit corporation.

**ANSWER:** Admitted.

9. In the months leading up to the demutualization, CME prepared numerous public filings that described the process and submitted proposed Rules to implement the demutualization to the Commodity Futures Trading Commission (“CFTC”). The CFTC Division of Trading and Markets subsequently summarized CME’s demutualization plan in a memorandum that it submitted to the Commission, recommending approval of the demutualization (the “CFTC Memo”).

**ANSWER:** Plaintiffs admit that, before demutualization, CME prepared and submitted various demutualization-related filings to the Commodity Futures Trading Commission (“CFTC”). Plaintiffs further admit that the CFTC Division of Trading and Markets prepared a memorandum that it submitted to the Commission and that it recommended approval of the demutualization. Except as so stated, Plaintiffs deny the allegations of this paragraph.

10. The CFTC Memo explained that the transaction would result in the conversion of membership interests in CME into Class A Common Stock, which conferred equity rights, and Class B Common Stock, which conferred the traditional equity rights and trading rights of its associated membership divisions, including floor trading rights and privileges.

ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 4 of 34

**ANSWER:** Plaintiffs admit the CFTC Memo stated, *inter alia*, that “[a]s a result of the two-step merger described above, existing membership interests in Existing CME would be converted into shares of the common stock of New CME. As a result of the recapitalization step, there would be two classes of common stock at New CME – Class A Common Stock, which confers equity rights, and Class B Common Stock, which confers both equity rights and trading rights.” Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

11. The CFTC Memo also explained that the transaction would result in the CME Members giving up their referendum voting rights that allowed them to overturn rule changes that had been approved by Board of Directors. In return, CME agreed that holders of CME Class B shares would have the right to vote on any changes, amendments, or modifications to four “Core Rights.”

**ANSWER:** Plaintiffs admit the CFTC Memo stated, *inter alia*, that “[m]embers would no longer have referendum rights that currently allow members to overturn Board approved rule changes. Instead, holders of Class B shares would have the right to approve changes to certain ‘core rights.’” Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

12. The Core Rights were memorialized in the Amended and Restated Certificate of Incorporation of Chicago Mercantile Exchange Inc., which became effective on November 13, 2000 (the “2000 CME Charter”). (*See* CME November 13, 2000 Form 8-K at A-3 - A-4.) The Core Rights protected by the 2000 CME Charter included:

(1) the divisional product allocation rules applicable to each series of Class B Common Stock as set forth in the rules of the corporation;

(2) the trading floor access rights and privileges granted to each series of Class B Common Stock, including the Commitment to Maintain Floor Trading;

(3) the number of authorized and issued shares of any series of Class B common stock; and

(4) eligibility requirements for an individual or entity to exercise any of the trading rights and privileges inherent in any series of Class B Common Stock.

(*Id.*)

**ANSWER:** Plaintiffs admit that the 2000 CME Charter became effective on November 13, 2000, and it stated, *inter alia*, that “Core Rights” shall mean: “(1) the divisional product allocation rules applicable to each series of Class B Common Stock as set forth in the rules of the corporation; (2) the trading floor access rights and privileges granted to each series of Class B Common Stock, including the Commitment to Maintain Floor Trading; (3) the number of authorized and issued shares of any series of Class B Common Stock; or (4) eligibility requirements for an individual or entity to exercise any of the trading rights or privileges inherent in any series of Class B Common Stock.”

Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

13. The 2000 CME Charter also set forth the “Trading Rights” for each series of Class B Common Stock issued by CME. (*Id.* at A-8.) The Charter explained that the holders of each series of stock would have the “trading rights, including the trading floor access rights and privileges, *set forth in the corporation’s by-laws and rules*” for that series’ corresponding former membership division. (*Id.* (emphasis added).)

**ANSWER:** Plaintiffs admit that paragraph (2) of Division B, Subdivision 3 of the 2000 CME Charter was titled “Trading Rights” and stated, *inter alia*:

“(a) Series B-1 Stock. The holders of shares of the Series B-1 Stock shall have the trading rights, including trading floor access rights and privileges, set forth in the corporation’s by-laws and rules for its Chicago Mercantile Exchange Division Members.

(b) Series B-2 Stock. The holders of shares of the Series B-2 Stock shall have the trading rights, including trading floor access rights and privileges, set forth in the corporation’s by-laws and rules for its International Monetary Market Division Members.

(c) Series B-3 Stock. The holders of shares of the Series B-3 Stock shall have the trading rights, including trading floor access rights and privileges, set forth in the corporation’s by-laws and rules for its Index and Option Market Division Members.

(d) Series B-4 Stock. The holders of shares of the Series B-4 Stock shall have the trading rights, including trading floor access rights and privileges, set forth in the corporation’s by-laws and rules for its Growth and Emerging Markets Division Members.

(e) Series B-5 Stock. The holders of shares of the Series B-5 Stock shall have the trading rights, including trading floor access rights and privileges, set forth in the corporation’s by-laws and rules for holders of fractional interests in its Growth and Emerging Markets Division.”

Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

14. The CME By-Laws in place at the time defined the “trading rights and privileges” of holders of Class B Common Stock to include: (1) the right to appear upon the floor of the Chicago Mercantile Exchange and to act as a floor broker and/or trader; (2) the right to trade electronically through the Globex2 system (the right was restricted to trading only contracts

ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 7 of 34



assigned to the Class B series when accessing Globex terminals from the trading floor); (3) the right to lease out the trading privileges associated with the share of Class B Common Stock; and (4) a guarantee to charge clearing firms a lower clearing fee for trades made for the account of a holder of a series of shares of Class B Common Stock and a guarantee to not charge a higher clearing fee in the open outcry environment than in another trading environment. (*Id.* at A-37 (§ 6.3).) However, a major distinction between the Core Rights contained in the certificate of incorporation and the trading rights and privileges of the holders of Class B Common Stock described in the CME By-Laws was that the “trading rights and privileged” could be changed at any time *without* Class B Shareholder approval.

**ANSWER:** Plaintiffs admit that Section 6.3 of the CME By-Laws submitted with the CME November 13, 2000 Form 8-K was titled “Trading Rights and Privileges.” Plaintiffs further admit that Section 6.3 stated, *inter alia*: “Holders of shares of Class B Common Stock or their permitted transferees, who meet the Corporation’s eligibility criteria for exercise of trading privileges, shall have the following trading privileges:

- (a) Such holder or permitted transferee of a series of shares of Class B Common Stock will be entitled to appear upon the floor of the Chicago Mercantile Exchange and to act as a floor broker and/or trader for the contracts assigned to that series.
- (b) Such holder or permitted transferee of a series of shares of Class B Common Stock shall have the right to trade electronically through the GLOBEX2 system. Such right is restricted, when accessing GLOBEX2 terminals from the trading floors, to trading only contracts assigned to that series. Otherwise, the holder may trade any product listed on the GLOBEX2 system.
- (c) Such holder of a series of shares of Class B Common Stock shall be able to lease out to another person who satisfies the eligibility criteria of the Corporation the trading privileges associated with that share of Class B Common Stock.
- (d) The Corporation shall charge clearing firms a lower clearing fee for trades made for the account of a holder of a series of shares of Class B Common Stock, or a lessee of the

trading privileges associated with such shares, with respect to contracts assigned to such holder's series of shares of Class B Common Stock as of the Effective Date. The Corporation shall not charge a higher clearing fee for any trade for the account of such shareholder or lessee executed in the open outcry environment than the clearing fee for the same trade executed in another trading environment."

Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph. There is no distinction between the Core Rights set forth in the CME certificate and those set forth in the By-Laws; rather, the By-Laws provisions quoted in this paragraph identify certain of the trading privileges that are specifically guaranteed by the Core Rights in the certificate.

**B. CME's Open Access to Globex**

15. During the same time period that CME was completing its demutualization, CME made the determination to allow open access to its "Globex" electronic trading platform.

**ANSWER:** Plaintiffs have insufficient information to admit or deny the allegations in this paragraph, and therefore they are denied. To the extent that defendants allege a decision to allow open access for trading on the Globex platform was properly made before the demutualization vote, or that members were afforded an opportunity to consider and approve any such decision before demutualization, the allegation is denied."

16. Prior to that time, only Clearing Members, Members, and persons who had applied for and obtained Electronic Trading Hours ("ETH") permits had the right to trade directly on Globex. (See former CME Rules 574 and 582.) On August 30, 2000, however, Board of Directors of CME unanimously determined to adopt Rule amendments to allow open access to Globex for all market participants.

**ANSWER:** Plaintiffs have insufficient information to admit or deny the allegations in this paragraph, and therefore they are denied.

17. An August 31, 2000 Dow Jones Newswires article entitled “CME Board to Allow Greater Access to Electronic System” reported that, on August 30, 2000, “CME’s board of directors voted to open up its electronic trading platform, Globex, to all customers.” (Dow Jones Newswires, CME Board to Allow Greater Access to Electronic System, August 30, 2000 at 1 (attached as Exhibit 1.)) The article noted that while CME members currently were the only ones allowed to directly access Globex, after CFTC approval, all “individuals or institutional customers guaranteed by a clearing member of CME will be able to directly access the system,” a move which would “allow investors to have the ability to view bids and offers in the market.”

(*Id.*)

**ANSWER:** Plaintiffs admit that the quoted language in Paragraph 17 appears in the article cited. Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

18. The Dow Jones article similarly reported that “in addition to opening access to Globex, the board also eliminated restrictions on the number of Globex terminals individuals or firms can have,” a move which would enhance “the ability of introducing brokers and non-clearing futures commission merchants to offer their customers direct access to the system.” (*Id.*) This was reported as attempting to grant non-members open access to Globex.

**ANSWER:** Plaintiffs admit that the quoted language in Paragraph 18 appears in the article cited. Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

19. On October 10, 2000, CME submitted the proposed rule changes to the CFTC for review and approval. In its submission, CME explained that:

The purpose of the proposed amendments is to allow **unlimited, direct access to the GLOBEX electronic trading system for all market participants**. Previously, only members, clearing members or those with the Exchange's Electronic Trading Hours (ETH) Permit could have direct access to the system.

**. . . Going forward, any individual or institutional customer guaranteed by a clearing member of the Exchange will be able to obtain direct access to GLOBEX** (see e.g., Rule 574.C.).

(CME Submission No. 00-106, dated October 10, 2000 at 2 (attached as Exhibit 2).)

ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 11 of 34

**ANSWER:** Plaintiffs admit that Exhibit 2 to Defendants' Affirmative Defenses includes a CFTC Submission dated October 10, 2000. Plaintiffs further admit that this submission stated, *inter alia*:

“The purpose of the proposed amendments is to allow unlimited, direct access to the GLOBEX electronic trading system for all market participants. Previously, only members, clearing members or those with the Exchange's Electronic Trading Hours (ETH) Permit could have direct access to the system.

As a result of the amendments, the ETH Permit Program will be phased out, obviating the need for non-members to meet the exchange's qualification requirements and pay ETH application fees. Generally, institutional customers were not permitted to participate in the permit program. Going forward, any individual or institutional customer guaranteed by a clearing member of the Exchange will be able to obtain direct access to GLOBEX (see, e.g., Rule 574.C.)”

Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

20. This change also allowed “all market participants [to] have access to ‘the book’ i.e., the ability to view bids and offers in the market.” (*Id.*)

**ANSWER:** Plaintiffs admit that the CFTC Submission attached as Exhibit 2 to Defendants' Affirmative Defenses stated, *inter alia*: “Additionally, as part of these changes, all market participants will have access to “the book.” i.e., the ability to view bids and offers in the market.” Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

21. CME also explained that the rule changes “eliminated restrictions on the number of GLOBEX workstations individuals or firms c[ould] have,” an action that was “expected to facilitate the development and growth of trading rooms and arcades by enhancing the ability of

introducing brokers and non-clearing futures commission merchants (FCMs) to offer their customers direct access to GLOBEX.” (*Id.*) CME stated that it planned to implement the Rule changes as soon as it received CFTC approval. (*Id.*)

**ANSWER:** Plaintiffs admit that the CFTC Submission attached as Exhibit 2 to Defendants’ Affirmative Defenses stated, *inter alia*: “The Exchange also eliminated restrictions on the number of GLOBEX workstations individuals or firms can have. These actions are expected to facilitate the development and growth of trading rooms and arcades by enhancing the ability of introducing brokers and non-clearing futures commission merchants (FCMs) to offer their customers direct access to GLOBEX.” Plaintiffs further admit that this CFTC Submission also stated that the “Exchange intends to implement these amendments immediately upon receiving Commission approval.”

Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

22. CME issued a Special Executive Report to its Members on October 19, 2000, further notifying them of the rule changes adopted by the Board, including that the former rule regarding Globex access (Rule 582) would be completely repealed as a result of the change to open access. (S-3594, Proposed Amendments to GLOBEX2 Access Rules, at 6.)

**ANSWER:** Plaintiffs have insufficient information to admit or deny the allegations in this paragraph, and therefore they are denied.

23. CME approved the Globex access Rule changes and announced them to the Membership prior to the demutualization and adoption of Core Rights, and at the time that the Members had a referendum right to reject rule changes approved by the Board.

**ANSWER:** Denied.

ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 14 of 34

24. No CME Member sought a referendum on the proposed Rule changes.

**ANSWER:** Plaintiffs have insufficient information to admit or deny the allegations in this paragraph, and therefore they are denied.

25. CME completed its demutualization on November 13, 2000.

**ANSWER:** Admitted.

26. Subsequently, on November 27, 2000, after receiving approval from the CFTC, CME implemented open access on Globex, allowing any market participant who is guaranteed by a clearing member of the exchange to have direct access to trade on Globex.

**ANSWER:** Plaintiffs have insufficient information to admit or deny the allegations in this paragraph, and therefore they are denied.

27. CME's "open access" policy was the subject of further press coverage, and was identified as an important shift in the operation of the exchange. For example, a January 10, 2001 Information Week Wall Street and Technology article comparing the electronic trading platforms of CME and CBOT noted that the "open access rule change [CME] adopted on [November 27, 2000 allowed] any market participant who [was] guaranteed by a clearing member of the exchange [to] get direct access to Globex2." (Information Week Article at 2 (attached as Exhibit 3).) The article also described how CME's "open access" policy was the distinguishing difference between CME and CBOT. *Id.*

**ANSWER:** Plaintiffs admit that the quoted language in Paragraph 27 appears in the article cited. Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

**C. CME Holdings Inc.’s IPO Results in Further Public Disclosure of Its Open Access Policy in Securities and Exchange Commission Filings**

28. Shortly following its demutualization and the enactment of the Core Rights, CME Holdings Inc. began preparing for an initial public offering. It completed this public offering on December 5, 2002. Pursuant to federal reporting requirements, CME Holdings Inc. filed public disclosure statements, including annual Form 10-Ks which described Class B Shareholders membership rights and Globex access rights to the general public. These disclosures reinforced the notion that Globex was an open access system available to any individual customer.

**ANSWER:** Plaintiffs admit that, after demutualization, CME Holdings Inc. completed its initial public offering on December 5, 2002. Plaintiffs further admit that Chicago Mercantile Exchange Holdings Inc. filed public disclosure statements, including annual Form 10-Ks that, *inter alia*, referred to Class B Shareholders’ membership rights and Globex access rights. Except as so stated, Plaintiffs deny the allegations in this paragraph.

29. In the 2001 Form 10-K, CME Holdings Inc. stated that it was “the first U.S. exchange to allow all customers to view the book of prices, where they can see the five best bids and offers in the central limit order book and directly execute transactions in our electronically traded products” and disclosed to the public that it planned to “continue to expand its customer base and trading volume by broadening the access, order routing, trading and clearing solutions we offer to existing and prospective customers.” (2001 CME Form 10-K at 4.)

**ANSWER:** Plaintiffs admit that the Chicago Mercantile Exchange Holdings Inc.’s Form 10-K for the fiscal year ended



December 31, 2001 (the 2001 CME Form 10-K) stated, *inter alia*: “We continue to expand our customer base and trading volume by broadening the access, order routing, trading and clearing solutions we offer to existing and prospective customers. We were the first U.S. exchange to allow all customers to view the book of prices, where they can see the five best bids and offers in the central limit order book and directly execute transactions in our electronically traded products.”

Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

30. The 2001 Form 10-K also described the many ways CME’s customers, both Class B members and non-members, could access Globex, including by using “their own proprietary trading software or third party software connected to CME’s trading environment” and using “front-end trading terminal software solutions for a fee, including a cost-efficient Web-based virtual private network solution, which we call GLOBEX Trader-Internet.” (*Id.*)

**ANSWER:** Plaintiffs admit that the 2001 CME Form 10-K stated, *inter alia*: “We provide our customers with flexibility to access our markets in the most cost-effective manner for them. Our customers can use their own proprietary trading software or third party software connected to our trading environment through a suite of application programming interfaces, or APIs, that we have developed. We also provide front-end trading terminal software solutions for a fee, including a cost-efficient Web-based virtual private network solution, which we call GLOBEX Trader-Internet, for our lower volume customers.”

Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

31. Similarly, in the 2002 Form 10-K, CME Holdings Inc. reasserted that it was the “first U.S. exchange to allow all customers to view the book of prices, where they can see the five best bids and offers in the central limit order book and directly execute transactions in our

electronically traded products.” (2002 Form 10-K at 6.) The Form 10-K reported that while “[p]rior to [CME’s] demutualization, direct access to [its] markets, whether on [CME’s] open outcry trading floors or through the GLOBEX platform, was limited to members and those with an exchange permit who met specified qualifications,” this changed when, “[i]n connection with [its] demutualization, [it] opened access to [CME’s] markets by allowing unlimited, direct access to the GLOBEX platform for all market participants.” (2002 Form 10-K at 4.) CME Holdings Inc. informed the public that the direct result of its open access policy was that “any individual or institutional customer guaranteed by a clearing firm [was] to obtain direct access to the GLOBEX platform.” (*Id.*)

**ANSWER:** Plaintiffs admit that the Chicago Mercantile Exchange Holdings Inc.’s Form 10-K for the fiscal year ended December 31, 2002 (the 2002 CME Form 10-K) stated, *inter alia*: “We were the first U.S. exchange to allow all customers to view the book of prices, where they can see the five best bids and offers in the central limit order book and directly execute transactions in our electronically traded products.” Plaintiffs also admit that the 2002 CME Form 10-K stated: “Prior to our demutualization, direct access to our markets, whether on our open outcry trading floors or through the GLOBEX platform, was limited to members and those with an exchange permit who met specified qualifications. In connection with our demutualization, we opened access to our markets by allowing unlimited, direct access to the GLOBEX platform for all market participants. Today, any individual or institutional customer guaranteed by a clearing firm is able to obtain direct access to the GLOBEX platform.”

Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

32. Further distinguishing the difference between accessing open outcry trading and GLOBEX electronic trading, CME Holdings Inc. stated that “Members who broker trades executed on our open outcry trading floors generally do not play a role in facilitating the

execution of transactions on behalf of customers on GLOBEX.” (*Id.*)

**ANSWER:** Plaintiffs admit that the 2002 CME Form 10-K stated, *inter alia*: “Members who broker trades executed on our open outcry trading floors generally do not play a role in facilitating the execution of transactions on behalf of customers on GLOBEX.”

Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

33. The 2002 Form 10-K also described a member’s membership privileges:

Membership in our exchange entitles members to appear on the floor of the exchange during business days and act as a floor broker and/or floor trader executing trades in the appropriate contracts that correlate with their membership division. Applicants for membership on our exchange are required to be of good moral character, reputation and business integrity. They must also have adequate financial resources and credit to assume the responsibilities and privileges of membership. All members must understand the rules and regulations of our exchange and agree to abide by them. Additionally, they must comply with the provisions of the Commodity Exchange Act and the rules and regulations issued by the CFTC.”

(*Id.* at 27.)

**ANSWER:** Plaintiffs admit that the 2002 CME Form 10-K stated, *inter alia*: “Membership in our exchange entitles members to appear on the floor of the exchange during business days and act as a floor broker and/or floor trader executing trades in the appropriate contracts that correlate with their membership division. Applicants for membership on our exchange are required to be of good moral character, reputation and business integrity. They must also have adequate financial resources and credit to assume the responsibilities and privileges of membership. All members must understand the rules and regulations of our exchange and agree to abide by them. Additionally, they must comply with the provisions of the Commodity Exchange Act and the rules and regulations issued by the CFTC.”

Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

34. In the 2003 Form 10-K, CME Holdings Inc. reiterated that a membership was necessary to trade on the open outcry trading floors:

**Trading on our open outcry trading floors is conducted exclusively by our members.** Our members are individual traders, as well as most of the world’s largest banks, brokerages and investment houses. Prior to the introduction of our electronic trading platform, our members traded only on our open outcry trading floors. Today, our members are able to conduct trading on our open outcry trading floors, electronically through the GLOBEX platform and through privately negotiated transactions that we clear.

(2003 Form 10-K at 5-6.) However, CME Holdings Inc. once again made clear that a membership is not required to execute trades on Globex, stating “[p]rior to our demutualization, direct access to our markets, whether on our open outcry trading floors or through the GLOB EX platform, was limited to members and those with an exchange permit who met specified qualifications .... Today, any individual or institutional customer guaranteed by a clearing firm is able to obtain direct access to the GLOBEX platform.” (*Id.*)

**ANSWER:** Plaintiffs admit that the Chicago Mercantile Exchange Holdings Inc.'s Form 10-K for the fiscal year ended December 31, 2003 (the 2003 CME Form 10-K) stated, *inter alia*:

“Trading on our open outcry trading floors is conducted exclusively by our members. Our members are individual traders, as well as most of the world’s largest banks, brokerages and investment houses. Prior to the introduction of our electronic trading platform, our members traded only on our open outcry trading floors. Today, our members are able to conduct trading on our open outcry trading floors, electronically through the GLOBEX platform and through privately negotiated transactions that we clear. Members who broker trades executed on our open outcry trading floors generally do not play a role in facilitating the execution of transactions on behalf of customers on GLOBEX.

Prior to our demutualization, direct access to our markets, whether on our open outcry trading floors or through the GLOBEX platform, was limited to members and those with an exchange permit who met specified qualifications. In connection with our demutualization, we opened access to our markets by allowing unlimited, direct access to the GLOBEX platform for all market participants. Today, any individual or institutional customer guaranteed by a clearing firm is able to obtain direct access to the GLOBEX platform.”

Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

**D. CBOT Adopts Open Access On Its Own Electronic Trading System and Undergoes a Demutualization Prior to Merging with CME**

35. On September 24, 2001, less than a year after CME adopted open access to Globex, Board of Directors of CBOT determined to amend its Rules to allow open access on its proprietary electronic trading platform, “e-cbot.”

**ANSWER:** Plaintiffs have insufficient information to admit or deny the allegations in this paragraph, and therefore they are denied.

ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 20 of 34

36. In an Interpretive Notice sent to CBOT Members, CBOT explained that the Rule changes “allow[ed] electronic connectivity to the Order Direct™ API and the a/c/e platform for all market participants who are guaranteed by a CBOT® clearing firm member.” (October 22, 2001 CBOT Interpretive Notice (attached as Exhibit 4).)

**ANSWER:** Plaintiffs admit that the Interpretive Notice dated October 22, 2001, attached as Exhibit 4 to Defendants’ Affirmative Defenses, stated, *inter alia*: “On September 24, 2001, the Board of Directors of the Chicago Board of Trade approved policy and regulation changes that are designed to improve delivery of customer order flow to the exchange floor and its electronic trading platform, a/c/e<sup>sm</sup>. These changes will allow electronic connectivity to the OrderDirect™ API and the a/c/e platform for all market participants who are guaranteed by a CBOT® clearing member firm.”

Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs have insufficient information to admit or deny the allegation that this Interpretive Notice was sent to CBOT Members and therefore deny that allegation. Plaintiffs deny the remaining allegations in this paragraph.

37. At the time, CBOT was a member-owned organization, and its Members held referendum rights to overturn Board approved Rule changes. No Member exercised that right, and the Rule changes implementing open access to CBOT’s electronic trading platform became effective December 1, 2001.

**ANSWER:** Plaintiffs admit CBOT was a member-owned organization in 2001. Plaintiffs have insufficient information to admit or deny the remaining allegations in this paragraph, and therefore they are denied.

38. In 2005, CBOT demutualized and converted from a not-for-profit member-owned organization to a for-profit corporation. In connection with the demutualization, CBOT amended

ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 21 of 34

its Certificate of Incorporation to provide its former owners- the Class B members- with a number of contractual protections or Core Rights that could not be adversely affected without the approval of Series B-1 and B-2 Members. (See CBOT Certificate of Incorporation (“2005 CBOT Charter”).)

**ANSWER:** Plaintiffs admit that in 2005, CBOT demutualized and converted from a not-for-profit member-owned organization to a for-profit corporation. Plaintiffs further admit that CBOT amended its Certificate of Incorporation and that the amended Certificate of Incorporation (the 2005 CBOT Charter) confirms that certain membership rights and privileges cannot be adversely affected without the approval of Series B-1 and B-2 Members. Except as so stated, Plaintiffs deny the allegations in this paragraph.

39. Specifically, Series B-1 and B-2 Members received the right to vote on amendments to the Rules, Certificate, or Bylaws if, in the sole and absolute determination of Board of Directors of the Corporation, the amendment adversely affected:

- (1) the allocation of products that a holder of a specific Series of Class B Membership is permitted to trade (including on the electronic trading system);
- (2) the requirement that Members will be charged transaction fees that are lower than any other participant, including on the electronic trading system;
- (3) the membership qualifications or eligibility requirements for holding any Series of Membership or exercising any rights and privileges associated with that Series;
- (4) the commitment to maintain open outcry markets as set forth in the Certificate;
- (5) the requirement that any proposal to offer electronic trading between the hours of 6:00 a.m. and 6:00 p.m. of agricultural contracts or agricultural products traded in the open outcry markets be approved by the holders of Series B-1 and B-2 Memberships.

(*Id.*) Today, the first four Core Rights remain substantively identical in CBOT’s Certificate of

Incorporation.

**ANSWER:** Plaintiffs admit that the 2005 CBOT Charter stated, *inter alia*:

“In addition to any approval of the Board of Directors required by this Certificate of Incorporation, the Bylaws or applicable law, the affirmative vote of the holders of a majority of the votes cast, except in the case of paragraph (4) below, by the holders of Series B-1 Memberships and Series B-2 Memberships, voting together as a class based on their respective voting rights at any annual or special meeting of the Corporation, shall be required to adopt any amendment to the Bylaws or the Rules that, in the sole and absolute determination of the Board of Directors, adversely affects:

- (1) the allocation of products that a holder of a specific Series of Class B Membership is permitted to trade on the exchange facilities of the Corporation (including both the open outcry trading system and the electronic trading system),
- (2) the requirement that, except as provided in that certain Agreement, dated August 7, 2001, between the Corporation and the Chicago Board Options Exchange (the "CBOE"), as modified by that certain Letter Agreement, dated October 7, 2004, between the Corporation, CBOT Holdings, Inc. and the CBOE, in each case, as may be amended from time to time in accordance with their respective terms, holders of Class B Memberships who meet the applicable membership and eligibility requirements will be charged 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, whether trading utilizing the open outcry trading system or the electronic trading system,
- (3) the membership qualifications or eligibility requirements for holding any Series of Class B Membership or exercising any of the membership rights and privileges associated with such Series,
- (4) the commitment to maintain open outcry markets set forth in Section F of Article IV of this Certificate of Incorporation, which must be approved by a majority of the voting power of the outstanding Series B-1 Memberships and Series B-2 Memberships, voting together as a class, or

ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 23 of 34



(5) the requirement that any proposal to offer electronic trading between the hours of 6:00 am, Central Time, and 6:00 pm, Central Time, of agricultural contracts or agricultural products currently traded on the Corporation's open outcry markets be approved by the holders of the Series B-1 Memberships and Series B-2 Memberships."

Plaintiffs further admit that the current CBOT Certificate of Incorporation contains language substantively similar to provisions (1) – (4) above. Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

40. The 2005 CBOT Charter also set forth the specific rights and privileges associated with each Series of membership, explaining for example, that a holder of a Series B-1 Membership was "entitled to the rights and privileges of, and ... subject to the restrictions, conditions and limitations on, a Full Member as set forth in this Certificate of Incorporation, the Bylaws and the Rules." The current CBOT Charter contains the same language today.

**ANSWER:** Plaintiffs admit that the 2005 CBOT Charter stated, *inter alia*: "Each holder of a Series B-1 Membership who satisfies the qualifications for and requirements of Full Membership in the Corporation as set forth in the Rules shall be entitled to the rights and privileges of, and shall be subject to the restrictions, conditions and limitations on, a Full Member as set forth in this Certificate of Incorporation, the Bylaws and the Rules." Plaintiffs further admit that the current CBOT Charter contains the same language today.

Plaintiffs deny any characterizations Defendants make or inferences Defendants draw from the quoted language. Plaintiffs deny the remaining allegations in this paragraph.

**E. Merger of CBOT Holdings and CME Holdings**

41. In 2007, the former parent of CME, Chicago Mercantile Exchange Holdings Inc. merged with Chicago Board of Trade Holdings, Inc. The combined Company was renamed CME Group Inc., and CBOT became a wholly-owned subsidiary of CMEG. At that time, CMEG

amended its Certificate of Incorporation to guarantee that CME and CBOT Members would have “all trading rights and privileges for all new products ... traded on ... any electronic trading system maintained by the Exchange or CBOT.” ( CMEG Charter, § 15.)

**ANSWER:** Plaintiffs admit that in 2007, the Chicago Mercantile Exchange Holdings Inc. merged with Chicago Board of Trade Holdings, Inc., that the combined Company was renamed CME Group Inc., and that CBOT became a wholly-owned subsidiary of CMEG. Plaintiffs further admit that Article 15 of the CMEG Charter confirms and guarantees that CME and CBOT members have “all trading rights and privileges for all new products ... traded on ... any electronic trading system maintained by the Exchange or CBOT,” consistent with the trading rights and privileges that members of CME and CBOT enjoyed at demutualization and thereafter and that were preserved as part of their Core Rights. Except as so stated, Plaintiffs deny the allegations of this paragraph.

42. In January 2008, CBOT migrated all of its electronically-traded products from its e-cbot trading platform onto Globex.

**ANSWER:** Plaintiffs have insufficient information to admit or deny the allegations in this paragraph, and therefore they are denied.

**F. The Investment In Electronic Trading and Co-Location**

43. Over time, demand kept growing for electronic trading. As a result, Defendants spent millions of dollars to constantly work to improve its technological and access capabilities. For example, in August 2010, CME moved the primary matching engine for Globex to a new, massive data center in Aurora, Illinois (the “Aurora Data Center” or “ADC”), and in January 2012, CME began to offer co-location at the ADC. To offset the cost of completing and maintaining the ADC, CME charges members and customers who co-locate at the ADC a monthly or yearly fee. These moves were widely publicized and disclosed in CMEG’s public filings with the Securities and Exchange Commission.

ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 25 of 34

**ANSWER:** Plaintiffs admit that in August 2010, CME moved the primary matching engine for Globex to a new, massive data center in Aurora, Illinois (the “Aurora Data Center” or “ADC”), and that in January 2012, CME began to offer co-location at the ADC. Plaintiffs deny the allegation in Paragraph 43 regarding CME’s reason for charging members who co-locate at the ADC. Plaintiffs have insufficient information to admit or deny the remaining allegations in this paragraph, and therefore they are denied.

### FIRST DEFENSE- STATUTE OF LIMITATIONS

44. Defendants incorporate and reallege the foregoing Paragraphs as if fully set forth herein.

**ANSWER:** Plaintiffs incorporate and repeat their responses to paragraphs 1 to 43 as if fully set forth herein.

45. Under Illinois law, a plaintiff must bring a breach of contract claim based on a written contract within ten years of the date when a party first breaches its contractual duty or obligation. 735 ILCS § 5/13-206.

**ANSWER:** This paragraph does not contain facts but instead sets forth legal conclusions and arguments to which no response is required. To the extent any response is required, Plaintiffs deny the allegations in this paragraph.

46. To the extent that Plaintiffs allege that the Defendants breached their respective Charters by committing any act that predates 10 years from the date the Complaint was filed - including CME’s implementation of open access to Globex on November 27, 2001, and CBOT’s implementation of open access to e-cbot on September 24, 2001, those claims are barred by the applicable statutes of limitations.

**ANSWER:** Denied.

### SECOND DEFENSE - LACHES

ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 26 of 34

47. Defendants incorporate and reallege the foregoing Paragraphs as if fully set forth herein.

**ANSWER:** Plaintiffs incorporate and repeat their responses to paragraphs 1 to 46 as if fully set forth herein.

48. CME implemented open access, allowing any non-member customer to trade on Globex, on November 27, 2001. CBOT implemented open access, allowing any non-member customer to trade on its electronic trading platform, e-cbot, on September 24, 2001. These changes to open access at both CME and CBOT were announced to the memberships, described in filings with the CFTC, and covered by press releases and reports.

**ANSWER:** Plaintiffs have insufficient information to admit or deny the allegations in this paragraph, and therefore they are denied.

49. Open access has become a way of life for the Exchanges for the past 14 years, yet Plaintiffs did not bring this action until January 15, 2014.

**ANSWER:** Plaintiffs admit that this action commenced on January 15, 2014. Except as so stated, Plaintiffs deny the allegations of this paragraph.

50. Moreover, since the implementation of open access, Plaintiffs have been given the same access rights to CBOT's and CME's electronic trading platforms as their non-Member customers and Plaintiffs have never asserted a so-called right to the "best and most proximate" access to Globex.

**ANSWER:** Denied.

ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 27 of 34

51. Finally, Defendants expenditure of millions of dollars to improve upon its electronic trading platform were widely published and disclosed to the public in numerous public filings.

**ANSWER:** Plaintiffs have insufficient information to admit or deny the allegations in this paragraph, and therefore they are denied.

52. As a result, Plaintiffs' breach of contract claims based on the alleged rights to exclusive access to Globex or the best and most proximate access to Globex are barred, in whole or in part, by the doctrine of laches.

**ANSWER:** Denied.

### **THIRD DEFENSE- EQUITABLE ESTOPPEL**

53 Defendants incorporate and reallege the foregoing Paragraphs as if fully set forth herein.

**ANSWER:** Plaintiffs incorporate and repeat their responses to paragraphs 1 to 52 as if fully set forth herein.

54. After determining that it would open access to Globex, CME issued a Special Executive Report to its Members on October 19, 2000 announcing the proposed Rule change. At the time the Special Executive Report was issued, the members had a referendum right to reject rule changes approved by the Board. No CME Member sought a referendum on the proposed Rule changes.

ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 28 of 34

**ANSWER:** Plaintiffs have insufficient information to admit or deny the allegations in this paragraph, and therefore they are denied.

55. Similarly, CBOT members held referendum rights at the time CBOT implemented open access to e-cbot, on September 24, 2001. No CBOT Member sought a referendum on CBOT's change to open access.

**ANSWER:** Plaintiffs have insufficient information to admit or deny the allegations in this paragraph, and therefore they are denied.

56. Because the CME and CBOT Members held referendum rights at the time that CME and CBOT converted to open access, but determined not to exercise those rights, Plaintiffs should be equitably estopped from asserting that CBOT and CMEG breached their respective Charters by adopting open access to their electronic trading platforms.

**ANSWER:** Denied.

#### **FOURTH DEFENSE- STANDING**

57. Defendants incorporate and reallege the foregoing Paragraphs as if fully set forth herein.

**ANSWER:** Plaintiffs incorporate and repeat their responses to paragraphs 1 to 56 as if fully set forth herein.

58. CMEG Class B shareholders Langer and Yermack and CBOT Class B member Goldberg have all leased their Class B memberships since at least August 2012 and, as a result,

have not attempted to trade any products on Globex or been charged any fee for a trade made on Globex.

**ANSWER:** Plaintiffs admit that Langer, Yermack, and Goldberg have leased their Class B memberships since at least August 2012. Except as so stated, Plaintiffs deny the allegations in this paragraph.

59. As a result, Plaintiffs lack standing to assert breach of contract claims against CMEG and CBOT based on the alleged failures to provide preferential fees and to allow Members to trade all new products.

**ANSWER:** Denied.

#### **FIFTH DEFENSE**

60. Defendants incorporate and reallege the foregoing Paragraphs as if fully set forth herein.

**ANSWER:** Plaintiffs incorporate and repeat their responses to paragraphs 1 to 59 as if fully set forth herein.

61. Defendants CMEG and CBOT presently have insufficient knowledge or information upon which to form a belief as to whether there may be, as yet unstated, defenses available to Defendants, and therefore expressly (i) reserve the right to amend or supplement the Answer, defenses and all other pleadings, and (ii) reserve the right to (a) assert any and all additional defenses under any applicable state law in the event that discovery or other investigation indicates such defenses would be appropriate, and (b) assert any cross-claims, counterclaims and third-party claims when and if they become appropriate to this action.

ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 30 of 34

**ANSWER:** This paragraph does not contain facts but instead sets forth legal conclusions and arguments to which no response is required. To the extent any response is required, Plaintiffs deny the allegations in this paragraph.

Respectfully submitted,

SHELDON LANGER  
RONALD M. YERMACK  
LANCE R. GOLDBERG



By: \_\_\_\_\_  
One of Their Attorneys

ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 31 of 34

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ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 32 of 34

STATE OF ILLINOIS        )  
  ) ss.  
COUNTY OF COOK        )

Jeannie Y. Evans on oath deposes and says:

1. That she is one of the attorneys representing the Plaintiffs on whose behalf this reply was prepared.
2. That this reply contains certain statements of insufficient knowledge on which to base a belief as to the truth or falsity of the allegations contained in the affirmative defense.
3. That those allegations of insufficient knowledge are true and correct.

  
\_\_\_\_\_  
Jeannie Evans

SUBSCRIBED AND SWORN to  
before me this 11th day of December, 2015.

  
\_\_\_\_\_  
Suyash Agrawal



ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 33 of 34

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that she served the foregoing PLAINTIFFS' REPLY TO DEFENDANTS' AFFIRMATIVE DEFENSES by transmitting it via e-mail on December 11, 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

ELECTRONICALLY FILED  
12/11/2015 4:26 PM  
2014-CH-00829  
PAGE 34 of 34

# Chancery DIVISION

## Litigant List

Printed on 12/14/2015

Case Number: 2014-CH-00829

Page 1 of 1

### Plaintiffs

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

Total Plaintiffs: 3

### Defendants

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

Total Defendants: 3