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CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
CHANCERY DIVISION
CLERK DOROTHY BROWN

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
Plaintiffs,	)	Calendar 6
v.	)	
CME GROUP, INC., a Delaware Corporation; THE BOARD OF TRADE OF THE CITY OF CHICAGO, INC., a Delaware Corporation,	)	Hon. Celia G. Gamrath, Presiding
Defendants.	)	JURY TRIAL DEMANDED

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR STRIKE CERTAIN ALLEGATIONS IN PLAINTIFFS' SECOND AMENDED COMPLAINT

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Plaintiffs Sheldon Langer, Ronald M. Yermack, and Lance Goldberg ("Plaintiffs"), through their undersigned counsel, respectfully submit this Opposition to the Motion to Dismiss or Strike Certain Allegations in Plaintiffs' Second Amended Complaint ("Second Mot." or "Second Motion to Dismiss") filed by Defendants CME Group, Inc. ("CME"[1]) and the Board of Trade of the City of Chicago ("CBOT") ("Defendants" or the "Exchanges").

I. INTRODUCTION

Plaintiffs' original Complaint in this action was filed more than three years ago. Defendants' Motion reflects their ***fourth*** attempt to dispose of this case without full discovery and adjudication on the merits. Defendants previously removed the case to federal court, tried to compel arbitration, and even brought a prior motion to dismiss (in conjunction with a withdrawn summary judgment motion) that included some of the same arguments renewed here. Those three prior motions, including the prior motion to dismiss, were soundly rejected—and rightly so.

Since the denial of Defendants' prior motion to dismiss, the parties have engaged in more than 18 months of discovery that has only added to the strength and detail of Plaintiffs' claims, thereby enabling them to sharpen their allegations in a Second Amended Complaint. During the course of the discovery period following the denial of Defendants' prior motion to dismiss, Defendants repeatedly represented that they intended to seek summary judgment after completing that discovery. Yet, rather than seeking summary judgment (which would of course would require consideration of whether the evidence shows the existence of genuinely disputed issues of material fact, as it clearly would), Defendants' Motion instead now asks the Court to

[1] Defendants sometimes refer to CME as "CMEG," using the new initials following CME's 2007 merger with CBOT and formation of a new entity called "CME Group." Plaintiffs here use the abbreviation "CME" to distinguish that specific exchange from the post-merger CMEG entity, which includes both of the two Exchanges as its subsidiaries.

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reconsider Judge Mikva's denial of their prior motion to dismiss certain claims, and to deny plaintiffs' remaining claims as a matter of law without consideration of any of the evidence that has been developed through 18 months of discovery.

CME asks the Court to disregard § 2-615's governing standard, which requires that the pleadings be construed in the light most favorable to the nonmoving party and all well-pled facts and reasonable inferences therefrom be taken as true. Defendants' sprawling 54 page memorandum—***which relies heavily on Defendants' selective recitation of extrinsic evidence that Defendants (inaccurately) view as supportive of their claims***[2]—confirms that Defendants cannot sustain their burden under § 2-615 of proving that the disputed contract terms are unambiguous. CME is misusing the § 2-619 procedure, which does not allow a party to seek dismissal by proffering evidence that merely refutes a plaintiff's allegations. Just as with their prior motions, Defendants' latest effort to avoid a full adjudication of the case should be rejected.

A more detailed review of the allegations results in the same conclusion. This is a breach of contract case in which the putative class of CME and CBOT Class B shareholders and members alleges numerous breaches of members' fundamental contractual rights under the CME and CBOT Charters. When CME and CBOT secured member approval of the demutualization transactions that enabled those Exchanges to convert from member-owned and member-controlled mutual companies and ultimately combine into a publicly traded corporation that is today worth tens of billions of dollars, CME and CBOT agreed to preserve those fundamental

[2] If the Court agrees to entertain the extrinsic evidence submitted by Defendants, it will in effect be converting this motion to dismiss into a summary judgment motion. As explained herein, the discovery so far supports Plaintiffs' reading of the Charters. But the Court should decline to address issues related to extrinsic evidence now, and instead, should wait until discovery ends.

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rights. And they agreed to make any changes to the business practices guaranteed by those fundamental rights contingent on obtaining further member votes approving such changes.

As detailed in the Second Amended Complaint, Defendants' demutualizations—the corporate restructurings that gave them the platform they needed to grow into a publicly traded conglomerate—were possible only because CME and CBOT members voted to approve the transactions and accept the contractual terms proposed by Defendants' management. Before demutualization, ***all*** of the rights in Defendants' Exchanges were vested in their members, and members had the right to share in the growth and success of the Exchanges—whether in the open outcry pits, on Defendants' electronic trading platforms, or on any trading floor that Defendants might operate in the future. Because memberships would remain valuable after demutualization, because members wanted to continue to share in the growth and success of Defendants' Exchanges, and because Defendants' management recognized that providing members with the right to do so was essential to securing the votes needed to proceed with their demutualizations, both CME and CBOT agreed to guarantee that certain fundamental rights of members would be preserved and protected after demutualization in binding contracts. These contractually guaranteed trading rights and privileges of members—referred to as "Core Rights" in the CME Charter and "Trading Rights" or "Special Rights" in the CME Charter—included: (1) the exclusive right to access and trade from any "trading floor" operated by the Exchanges, as well the right to the best and most proximate access to CME's electronic trading platforms, for free and as part of their memberships; (2) the right to preferential fees vis-à-vis non-members; and (3) for CME members, the exclusive right to share in any revenues generated from leasing access to the Globex electronic trading platform to non-members.

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These contractual rights are not, as Defendants now desperately contend, "made up." Contrary to the hyperbolic protestations in Defendants' Motion, these fundamental rights of members are well-supported by the contractual language at issue. The broadly worded contractual language—"trading rights and privileges," "trading floor access rights and privileges," etc.—necessarily requires the consideration of extrinsic evidence to give it any limiting meaning. As alleged in the Second Amended Complaint, the language, structure, and history of the relevant contractual provisions shows that ***Defendants themselves*** recognized these rights and privileges existed at the time of demutualization, and further that Plaintiffs reasonably understood the contracts to encompass the claimed trading rights and privileges. At the pleading stage, these allegations as to the existence of the relevant contractual rights must be accepted as true and are sufficient to allow Plaintiffs' claims to proceed through full discovery.

As further alleged in the Second Amended Complaint, Defendants have fallen far short of fulfilling their promises to preserve the trading rights and privilege of members, as they had promised they would in the CME and CBOT Charters. Instead, Defendants have made a series of dramatic changes to the operation of their business that have deprived Plaintiffs and the proposed class of CME and CBOT members of the benefits of their memberships. As a result, Plaintiffs' memberships are today worth a fraction of what they were a decade ago, even as the value of CME and its publicly traded Class A shares has soared.

In 2012, CME and CBOT opened a new, state-of-the-art, electronic trading facility known as the Aurora Data Center ("ADC"). The ADC is a new electronic trading floor where a substantial portion of Defendants' trading activity is now executed. But rather than allowing Plaintiffs and the Class B members the exclusive right to access and trade from the ADC for free and as part of their memberships that they enjoyed at demutualization—or even seeking member

approval of a revenue sharing proposal that would have allowed them to share in the benefits of the ADC—Defendants instead have allowed anyone willing to pay co-location fees to access and trade from this new trading floor. Defendants have thus deprived plaintiffs of their exclusive right to trading floor access, as well as their right to have the best and most proximate access to Defendants' trading facilities for free and as part of their memberships.

Likewise, despite the long-recognized rights of both CME and CBOT members to preferential fees, Defendants entered into a variety of arrangements that allow an unlimited number of non-members to use a single membership and obtain preferential rates, and that also allow certain members to trade at rates that are significantly better than those available to members generally. These fee preference claims were one of the subjects of Defendants' prior, denied motion to dismiss. Defendants' attempted second bite at the apple—which asks the Court to ignore the extensive thus far developed through discovery, and would deprive Plaintiffs of the ability to develop their claims further through additional discovery—should be rejected.[3] The Court has discretion to prevent Defendants from seeking dismissal of claims that they already moved on once. *See Inland Real Estate Corp. v. Lyons Savings & Loan*, 153 Ill. App. 3d 848, 853 (2d Dist. 1987) (decision whether to allow multiple motions to dismiss is in the trial court's

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[3] Notably, Defendants decision to recast their dispositive motion as a motion to dismiss rather than the "refreshed" motion for summary judgment they had previously indicated they would file has denied Plaintiffs the opportunity to complete even the discovery the Court permitted in denying Defendants' prior motion. Plaintiffs had previously scheduled depositions of Craig Donohue, CME's former CEO, and William Shepard, the former Chairman of CME's Globex Oversight Committee, both of whom were among the architects of CME's demutualization plans. After delaying the noticed depositions for many months, Defendants declined to make the witnesses available at all after moving to dismiss rather than moving for summary judgment. In addition, document discovery from CBOT is still in the early stages, and Plaintiffs have not yet had an opportunity to depose ***any*** CBOT-specific witnesses.

discretion).[4] This is a particularly appropriate case for the Court to exercise that discretion in light of the Court's denial of Defendants' prior motion to dismiss, the highly detailed allegations of Plaintiffs' Second Amended Complaint, and Defendants' participation in discovery for more than a year and a half before asking the Court to resolve the case on the pleadings rather than consider the merits of Plaintiffs' claims based on the evidence developed through discovery.

Finally, CME has deprived its members of the right to share in the revenues generated from leasing access to the Globex electronic trading platform—a revenue-sharing right that clearly existed, and was even expressly provided in CME's Rulebook as a privilege belonging to CME members, when members voted to approve the demutualization transaction. That privilege remained in CME's Rulebook after the demutualization was completed, and was in no way inconsistent with CME's decision shortly after the demutualization vote to adopt a regime under which non-members were granted "open access" to the Globex electronic trading platform.

It is indisputable that, when members voted demutualize, they enjoyed ***exclusive*** access to Globex. The CME board voted to adopt the new "open access" regime months ***after*** the demutualization vote. Nothing in the prospectus for the demutualization vote suggested that members would be foregoing their rights to exclusive access to Globex without compensation if they voted to approve the transaction. Nor has CME pointed to any document relating to the adoption of its "open access" rules in August 2000 (months after the demutualization vote) that suggested that the benefits of providing "open access" to Globex would not be shared with CME's Class B members. Given that members enjoyed exclusive access to Globex prior to

[4] Courts in more recent cases have exercised that discretion and declined to consider repeat motions to dismiss. *See, e.g., Int'l Profit Assocs., Inc. v. Chamberlain*, 2011 IL App (2d) 110299-U, ¶¶ 15-16 (citing *Inland Real Estate* and finding no abuse of discretion where trial court refused to hear a second motion to dismiss).

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demutualization, and had a clear right in CME's rules to share in any revenues derived from leasing Globex access to non-members, it is inconceivable that members would have forfeited that privilege without compensation. Yet, that is precisely what CME contends its members did in asserting that the claim for revenue sharing of Globex access fees is "made up" and somehow inconsistent with the implementation of the "open access" regime.

Defendants' other arguments, old and new, should also be rejected. First and foremost, the Charters use broad language to describe CME and CBOT members' preserved rights. The relevant Charter language is ***ambiguous and susceptible of multiple reasonable interpretations***; the application of that language to Plaintiffs' claims cannot be adjudicated without consideration of extrinsic evidence. That is why this Court authorized (ongoing) extrinsic evidence discovery over the last two years. Defendants now wish to throw those efforts out the window.

That tactic is telling. First, Delaware law follows the doctrine of *contra proferentem* under which ambiguous terms in a contract must be construed against the drafter. *SI Mgmt't, L.P. v. Wininger*, 707 A.2d 37, 42 (Del. 1998).[5] The CME and CBOT Charters were drafted by management and sent to members for votes without any chance to negotiate. *See* Second Amend. Compl. ¶¶ 46, 51, 76. With respect to the drafting processes, the CME and CBOT lawyers (who previously represented the member-owned entities) advised the new, not-yet-formed entities. In that process, no lawyers represented the members' interests with respect to the terms of the Charters, including the Core Rights and Special Rights; Defendants concede that they can identify no such lawyers. *See* Defendants' Responses and Objections to Plaintiffs' Third Set of

[5] Also potentially applicable here because the Charters are ambiguous, "the forthright negotiator principle provides that, in cases where the extrinsic evidence does not lead to a single, commonly held understanding of a contract's meaning, a court may consider the subjective understanding of one party that has been objectively manifested and is known or should be known by the other party." *See United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 836 (Del. Ch. 2007).

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Interrogatories (attached as Exhibit A to Hatch-Miller Aff.). Second, the discovery taken so far supports Plaintiffs' claims and undermines Defendants' attempts to narrow the Charters' terms. This all explains Defendants' unusual strategic decision to file a second motion to dismiss more than three years into the case.

While Defendants style their Motion as a motion to dismiss, and purport to offer plain meaning arguments, their brief repeatedly asks the Court to consider the extrinsic evidence that Defendants consider helpful, while disregarding the evidence that Plaintiffs have developed through discovery—***and thus demonstrate in their own moving papers that these claims cannot be adjudicated on the pleadings***. Defendants support their arguments by selectively relying on certain pre- and post-contract execution documents as well on trade usage evidence. By relying on this extrinsic evidence, Defendants in effect concede the Charters are ambiguous and that Plaintiffs' claims are not susceptible to resolution on a motion to dismiss. A motion to dismiss contract claims cannot be granted if the contract is ambiguous. In that circumstance, contract meaning is a question of fact that cannot be adjudicated on the merits until after full discovery. *See Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281, 288-89 (1990).

Defendants' request to dismiss Plaintiffs' claims under the implied covenant of good faith and fair dealing should also be denied. The good faith and fair dealing doctrine is well-established in Delaware. It permits a Court to imply terms in an agreement to "analyze unanticipated developments or . . . fill gaps in the contract's provisions." *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 441 (Del. 2005). This is an appropriate case for employing that doctrine, particular in light of Defendants' insistence that the claims in question implicate unforeseen technological developments that were not contemplated by the parties.

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II. FACTUAL BACKGROUND

This brief factual background is drawn from the allegations in the Second Amended Complaint and the documents incorporated into it. *See Storm & Assocs., Ltd. v. Cuculich*, 298 Ill. App. 3d 1040, 1047 (1st Dist. 1998) ("In ruling on a motion to dismiss under either section 2-615 or section 2-619 of the Code, the court must accept all well-pled facts in the complaint as true and draw all reasonable inferences from those facts in favor of the plaintiff.").

The Chicago Mercantile Exchange, or CME, is a futures and options exchange company. Second Amend. Compl. ¶ 2. Until 2000, CME was a non-profit membership organization owned by its members. *Id.* ¶ 3. In 2000, CME underwent a "demutualization" and became a for-profit entity. *Id.* In exchange for their votes approving the demutualization, CME's members received "Class B" shares representing both equity interests in the for-profit entity and contractual promises to preserve certain existing trading rights and privileges. *Id.*

CME's promises to the former member-owners are contained in the "Core Rights" provisions in the corporate Charter. *Id.* ¶ 14. The relevant portions of Division B, Subdivision 1, Section 1 of the original Charter defines the Core Rights to include:

> (2) the trading floor access rights and privileges granted to each series of Class B Common Stock, including the Commitment to Maintain Floor Trading; [and]
>
> . . .
>
> (4) eligibility requirements for an individual or entity to hold shares of any series of Class B Common Stock or to exercise any of the trading rights or privileges inherent in any series of Class B Common Stock.

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Amendment No. 5 to CME Form S-4 Registration Statement, filed April 25, 2000, at A-3 ("April 2000 S-4"); *see* Second Amend. Compl. ¶ 51.[6] Division B, Subdivision 3, Section 4(b) of the Charter requires a vote of the Class B shareholders to authorize "[a]ny change, amendment or modification of the Core Rights." April 2000 S-4, at A-6.

The proxy statement used to solicit member votes included a detailed section titled "Trading Privileges." The document explained that members' privileges would include "Floor Access," "Electronic Trading Rights," "Use and Leasing of Trading Privileges," and "Clearing Fees." *Id.* at 35. On the last of these four privileges, the proxy statement explained:

> New CME will continue to differentiate fees on cleared trades based on the trader for whom the trades are being cleared. In recognition of the importance of the liquidity provided by holders of Class B shares, New 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. New CME will not charge a higher clearing fee for any trade executed in the open outcry environment than charged for the execution of the same trade in another trading environment. New CME's management may lower clearing fees or provide other incentives with respect to trades of other persons, including persons considered to be especially important as providers of market liquidity.

Id.

The agreement to preserve CME members' Core Rights provided substantial benefits to CME and its Class A shareholders. Doing so enabled the company to complete the demutualization on a tax-free basis. As alleged in the Second Amended Complaint, in seeking confirmation that the demutualization transaction would not result in any adverse tax

[6] The April 2000 S-4 is available online at https://www.sec.gov/Archives/edgar/data/1103945/000095013100002795/0000950131-00-002795.txt. As Defendants' brief points out, the language used to describe the Core Rights in the CME Charter has changed somewhat over time, but the rights remain "substantively identical." Second Mot. at 6-7 & n.6. Plaintiffs' Second Amended Complaint uses the language of the current version of the Charter.

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consequences, CME represented that there would be ***no change*** to members' trading rights and privileges as they existed prior to demutualization. *See* Second Amend. Compl. ¶ 46.

The Chicago Board of Trade, or CBOT, is also an exchange that was once owned by its members. *Id.* ¶ 70. CBOT similarly underwent a demutualization in 2005. *Id.* In the CBOT demutualization transaction, members similarly obtained contractual promises that the new for-profit entity would maintain their existing trading rights and privileges. *Id.*

CBOT's promises to its former member-owners are contained in the "Special Rights" provisions of that exchange's separate corporate Charter. Article IV, Section D of the CBOT Charter includes several categories of "Special Rights" attaching to Class B member shares, including both "Trading Rights" and "Voting Rights." *Id.* ¶ 72. Article IV, Sections D(1)(a)-(e) guarantee members' trading rights specifically enumerated in the Charter, Bylaws, and Rules. But Article IV, Section D(1)(f) makes clear that members' guaranteed and "Special" Trading Rights were not limited to those enumerated in the Charter, Bylaws, and Rules of the exchange and, moreover, specifically included electronic trading-related rights:

> In addition to the rights and privileges set forth above, except as otherwise provided in the Certificate of Incorporation, the Bylaws or the Rules, each holder of a Class B Membership of any Series shall 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 maintained by the Corporation or any of its affiliates or any of their respective successors or successors-in-interest.

Id. ¶ 73.

The Voting Rights provisions that follow further require a member vote to approve any amendment to the Charter, Bylaws, or Rules that "in the sole determination of the Board of Directors of the corporation, adversely affects" various matters, including:

> (2) the requirement that, except as provided in that certain Agreement, dated August 7, 2001, between the Corporation and the Chicago Board Options Exchange

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(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 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 Memberships for the same products, whether trading using the open outcry trading system or the electronic trading system; [and]

(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 . . . .

Id. ¶ 75. No Charter provision provides that voting is a remedy for breach of Trading Rights.

Plaintiffs' Second Amended Complaint identifies several categories of breaches of CME and CBOT members' rights under the Charters, which are detailed in paragraphs 119 and 123. Those categories of breaches include:

(1) Depriving Plaintiffs and the proposed class of their exclusive membership right to trade from Defendants' trading floors, and to have the best and most proximate access to Defendants' electronic trading platforms, by allowing non-members to trade from a new electronic trading floor at the ADC; conditioning the best and most proximate access to the Globex electronic trading platform on payment of "co-location" and other access-related fees; and collecting co-location and other access-related fees from market participants without paying them to or sharing them with members. *Id.* ¶ 119(A), 123(A), 123(E).

(2) Depriving Plaintiffs and the proposed class of the right to preferential fees, in violation of CME members' Core Rights 2 and 4 and CBOT members' Trading Rights and Special Voting Rights 2 and 3, by:

(a) Allowing non-members, and individuals associated with certain members, to trade at member rates.

(b) Providing certain customers with special discounts and rebates that enable them to trade on terms that are substantially preferential to the rates available to members generally.

(c) Charging co-location and other access-related fees to obtain the best and most proximate access to Globex, thereby vitiating the right to preferential fees. *Id.* ¶ 119(B), 123(B), (C), (D), (E).

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(3) Depriving CME members of their right to share on a *pro rata* basis in the access fees generated by leasing Globex access to market participants. *Id.* ¶ 119(C).

Plaintiffs allege that each of these alleged breaches involves conduct that was not permitted before the demutualization of CME and CBOT, is among Defendants' current business practices, was implemented by CME and CBOT without the required member vote, and has resulted in substantial damage to the value of their memberships. *Id.* ¶ 120, 124-25. Plaintiffs further allege that Defendants' conduct breached the implied covenants of good faith and fair dealing in the Charters. *Id.* ¶ 126-42.

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These breaches are significant because the value of CME or CBOT membership is derived from the fact that it provides the person who owns or leases it with certain rights *vis-à-vis* other market participants. *See* Definition of *Privilege*, Merriam-Webster's Collegiate Dictionary (11th ed. 2009) ("a right or immunity granted as a peculiar benefit, ***advantage***, or favor"). At demutualization, those rights and privileges included exclusive access to any trading floor, and the immediate access to market information that flowed from the ability to trade from the floor, from being able to access the electronic trading platform from the floor, and from having exclusive access to the electronic trading platform. *See* Second Amend. Compl. ¶¶ 15, 43, 50, 70. Since demutualization, CME and CBOT have deprived members of their well-established trading rights and privileges by creating new methods for obtaining superior access to market information that are not available to members generally, but are instead sold to individual trading firms that are granted preferential trading rights. *Id.* ¶ 87, 101. These efforts to undermine the rights and privileges of members began shortly after the CME demutualization vote with the CME Board of Directors' approval of the "open access" regime while subsequently (***and without member approval***) discontinuing members' rights under the CME rulebook to share in any

revenues derived from granting Globex access to non-members. The efforts continued with undermining members' rights to preferential fees by allowing unlimited numbers of non-members to trade under a single membership and by providing special fee terms to certain members and non-members. They culminated in the opening of the ADC, a new trading floor that members are not entitled to access and trade from at all unless they pay substantial "cover charges" in the form of co-location fees. *Id.* ¶ 86. Thus, CME has completely subverted the level playing field that existed for members at the time of DM, and has thereby deprived members of the core value of their memberships—*i.e.*, the best and most proximate access to the Exchanges' markets and market information.

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III. PROCEDURAL BACKGROUND

Plaintiffs filed their Complaint in this case on January 15, 2014. Defendants removed the case to federal court on February 19, 2014. Plaintiffs moved for remand on March 21, 2014, and the federal court granted the remand on August 7, 2014. Following the remand, Plaintiffs filed their First Amended Complaint on September 12, 2014. On October 3, 2014, Defendants moved to compel arbitration. Judge Mikva denied the motion to compel arbitration on April 28, 2015.

On July 2, 2015, Defendants filed their Combined Motion to Dismiss and for Summary Judgment ("First Motion" or "First Mot."). Defendants then filed a motion to stay discovery on July 8, 2015. The motion to dismiss portion of Defendants' filing attacked, among other things, Plaintiffs' claims related to preferential fees. Defendants argued that "[t]he Core Rights granted to CME Class B Members are specifically enumerated in the CMEG Charter and do not contain and right to preferential fees." First Mot. at 28. Defendants argued that Plaintiffs did not properly plead a breach of CBOT's Charter, while admitting it protects a member fee preference. *Id.* at 29.

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Judge Mikva held a hearing on the stay motion just a few days after it was filed. At the hearing, the Court observed: "You've already chased this around from three different forums. You know, I mean they're entitled to discovery." July 13, 2015 Hr'g Tr. at 29:3-5. The Court went on to state: "I'm not sure it's possible to explore [the meaning of the contract] without some broader discovery because ***it wasn't, you know, a simple contract, it was a complicated contract that incorporated history and rules*** . . . ." *Id.* at 29:19-22 (emphasis added). On July 22, 2015, the Court denied the stay motion in a written order, stating that "the contract terms at issue in the case before this Court are not standard terms . . . rather, they are terms unique to the unusual situation in which they were negotiated. While the terms of the Charter may, ultimately, be unambiguous, ***they must be read in context***." July 22, 2015 Order at ¶ 4 (emphasis added). On September 1, 2015, the Court denied the motion to dismiss portions of Defendants' filing.

After conducting document discovery and taking depositions of several CME witnesses who were involved in the demutualization to respond to Defendants' anticipated motion for summary judgment, Plaintiffs filed their Second Amended Class Action Complaint on March 2, 2017. The Second Amended Complaint included new factual allegations based on information learned in discovery, and also added claims for breach of the implied covenant of good faith and fair dealing. Defendants conceivably could have responded to these changes by renewing any portions of their prior motion for summary judgment they believed were still relevant in light of the discovery that had been completed and, perhaps, moving to dismiss the new good faith and fair dealing claims. Instead, Defendants have now moved to ***dismiss the entire case*** on the new pleadings—including the same fee preference claims that Defendants unsuccessfully sought to have dismissed nearly two years ago, albeit using slightly different arguments this time around.

IV. APPLICABLE LEGAL STANDARDS

A. MOTION TO DISMISS STANDARDS

"A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint and presents the question of whether the complaint states a cause of action upon which relief can be granted." *Gassman v. Clerk of the Circuit Court of Cook Cnty.*, 2017 IL App (1st) 151738, ¶ 12 (reversing grant of section 2-615 motion). "When ruling on a section 2-615 motion, the pleadings are construed in the light most favorable to the nonmoving party, and all well-pled facts and reasonable inferences drawn from the complaint are taken as true." *Id.*

"A section 2-619 motion admits the legal sufficiency of the complaint but argues that some defense or affirmative matter defeats the claim." *Boswell v. City of Chicago*, No. 1-15-0871, 2016 IL App (1st) 150871, ¶ 15 (reversing grant of section 2-619 motion). "The affirmative matter relied upon must be more than just evidence that refutes a well-pled fact of the complaint." *Village of Willow Springs v. Village of Lemont*, No. 1-15-2670, 2016 IL App (1st) 152670, ¶ 23 (quotation marks omitted). "It must be in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Id.* (quotation marks omitted).

B. CONTRACT INTERPRETATION STANDARDS

Both parties agree that Delaware contract law applies. *See* Second Mot. at 15 n.13. "Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language." *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012) (quotation marks omitted) (finding contract ambiguous and reversing order granting summary judgment). "A contract is not rendered ambiguous simply

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because the parties do not agree upon its proper construction." *Id.* (quotation marks omitted). "Rather, an ambiguity exists when the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings." *Id.* (quotation marks and alterations omitted). "Where a contract is ambiguous, the interpreting court must look beyond the language of the contract to ascertain the parties' intentions." *Id.* (quotation marks omitted).

Plaintiffs' Second Amended Complaint relies in part on the implied covenant of good faith and fair dealing. "The covenant is best understood as a way of implying terms in the agreement, whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions." *Dunlap*, 878 A.2d at 441 (quotation marks omitted) (reversing order dismissing good faith and fair dealing claim). A party may invoke the implied covenant "when it is clear from the writing that the contracting parties would have agreed to proscribe the act later complained of had they thought to negotiate with respect to that matter." *Id.* at 442; *see Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 422 (Del. 2013), *overruled on other grounds by Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013); *see also Renco Group, Inc. v. MacAndrews AMG Holdings LLC*, No. 7668-VCN, 2015 WL 394011, at *6 (Del. Ch. Jan. 29, 2015) (citing *Gerber* and declining to dismiss implied covenant claim because "recent authority teaches that a claim for violation of the implied covenant of good faith and fair dealing can survive if, notwithstanding contractual language on point, the defendant failed to uphold the plaintiff's reasonable expectations under that provision").

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C. STATUTE OF LIMITATIONS AND RELATED STANDARDS

The parties agree that Illinois law supplies the statute of limitations. *See* Second Mot. at 33; *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 351 (2002) ("Statutes of limitations are procedural, merely fixing the time in which the remedy for a wrong

may be sought, and do not alter substantive rights."). The statute of limitations breach of contract in Illinois is ten years. *See* 735 ILCS 5/13-206.

However, not all issues with limitations implications are procedural. *See, e.g., Freeman v. Williamson*, 383 Ill. App. 3d 933, 939 (1st Dist. 2008) (concluding that statute of repose was substantive and therefore applying Delaware law). Delaware law recognizes that some contracts are continuous, and some contract breaches are continuing. *Smith v. Mattia*, No. 4498-VCN, 2010 WL 412030, at *4 (Del. Ch. Feb. 1, 2010) (citing cases). In the case of a continuous contract or continuing breach, under Delaware law, no breach triggering the limitations period to run is deemed to occur until full damages can be ascertained and recovered. *Id.* Whether or not a contract or breach is continuous is not a procedural issue but a substantive contract interpretation issue. *See id.* (this question under Delaware law "turns on the parties' intent").

Defendants urge that Illinois law on applies on this issue, without engaging in traditional choice of law analysis. *See, e.g., Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 155 (2007). Illinois also recognizes a variant of the continuous breach doctrine. "Contracts requiring continuous performance are capable of being partially breached on numerous occasions." *Hi-Lite Prods. Co. v. Am. Home Prods. Corp.*, 11 F.3d 1402, 1408 (7th Cir. 1993) (citing Illinois cases). "Each partial breach is actionable and is subject to its own accrual date and own limitation period." *Id.* at 1408-09. "Accordingly, because each breach of a continuous duty has its own accrual date, a plaintiff may sue on any breach which occurred within the limitations period, even if earlier breaches occurred outside the limitation period." *Id.*; *see CB Realty & Trading Corp. v. Chicago & N.W. Ry. Co.*, 289 Ill. App. 3d 892 (1st Dist. 1997) (permitting recovery of damages incurred over ten year period before lawsuit where plaintiff "could not know what

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damages it would suffer in future years" at time of defendant's initial breach). To the extent there is any meaningful difference between these doctrines, Delaware law should apply.

V. ARGUMENT

A. The Relevant Contract Provisions Support Plaintiffs' Claims

Defendants' effort to dispose of this entire case on a motion to dismiss is premised on a fundamental misapplication of Delaware contract law. Delaware courts recognize that contract "ambiguity exists when the provisions in controversy are ***fairly susceptible of different interpretations or may have two or more different meanings.***" *GMG Capital Invs.*, 36 A.3d at 780 (quotation marks omitted). As explained in detail below, the provisions of the CME and CBOT Charters on which Plaintiffs' claims rely are broad and, at minimum, susceptible of multiple interpretations. Hence this case cannot be resolved based solely on the contract text. *Id.*

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1. CME Core Right 2 Is Far Broader Than Defendants Argue

Core Right 2 prohibits modifications to the "trading floor access rights and privileges granted to each series of Class B Common Stock, including the Commitment to Maintain Floor Trading." The Charter does not define what "trading floor access rights and privileges" means. In the absence of any definition giving content to these rights and privileges, it is inherently necessary to resort to extrinsic evidence. *Grotto Pizza, Inc. v. Ocean Bay Mart, Inc.*, No. Civ. A. 16424, 1998 WL 388402, at *7–8 (Del. Ch. June 30, 1998) (finding contract that described "rights," "privileges," and "appurtenances" without defining their contents to be ambiguous).

a. *"Trading Floor" Is A Broad And Undefined Term*

Defendants urge a narrow construction of the term "trading floor" in this part of the CME Charter. But "trading floor" is not defined in Core Right 2, or anywhere else in the Charter for that matter. The Charter likewise does not purport to define what specific "rights and privileges"

related to the "trading floor" are protected. In these circumstances, extrinsic evidence is required to determine what "rights" and "privileges" are protected. *See id.*

Defendants offer little support from the contract itself for their reading of "trading floor" as excluding the possibility that CME members may have rights and privileges in an electronic trading floor like the ADC, in electronic trading generally, or in their proximity to the location where electronic trades were actually consummated—the match engine which was located on the trading floor at the time of demutualization. There is certainly no provision of the Charter (or the proxy, to the extent the Court considers it) expressly defining "trading floor" as limited to the open outcry environment, as Defendants repeatedly assert.

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Defendants instead rely heavily on the definition of "trading floor" in an online CFTC Glossary, which they state in conclusory fashion is an "authoritative" source. Second Mot. at 29-30. Defendants' invocation of the CFTC Glossary proves Plaintiffs' point that the Charter is ambiguous. Delaware law only permits parties to rely on evidence of ***trade-specific usage***—like an industry glossary—to interpret ***ambiguous*** contract language. *See Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 (Del. 1997). This is extrinsic evidence and can only be considered in the context of all the other available extrinsic evidence bearing on the meaning of the contract.[7]

[7] Although Delaware law permits reliance on contemporary dictionary definitions to interpret unambiguous contract terms, *See Lorillard Tobacco Co. v. American Legacy Foundation*, 903 A.2d 728, 738 (Del. 2006) ("Dictionaries are the customary reference source that a reasonable person in the position of a party to a contract would use to ascertain the ordinary meaning of words not defined in the contract."), this Glossary is not a dictionary. It lacks the characteristic features that make the use of dictionaries at the motion to dismiss stage acceptable. *See id.* (observing that dictionaries "note when a particular definition of a term has become obsolete"). Indeed, it is not even clear when the CFTC Glossary's definition of "trading floor" was written.

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If the Court permits Defendants to rely on the cited extrinsic evidence, it will in effect be converting the motion to dismiss into a summary judgment motion. *See Malanowski v. Jabamoni*, 293 Ill App. 3d 720, 724 (1st Dist. 1997). In that event, the Court should not—and cannot—limit its review to the materials hand-selected by Defendants to support their reading. At a minimum, the Court should consider the fact that terms like "electronic trading floor" and "virtual trading floor" were in use in the period when the Charter was enacted. *See, e.g., Domestic Securities, Inc. v. SEC*, 333 F.3d 239, 243 (2003) (describing Nasdaq as a "virtual trading floor"); SEC News Digest 2000-183-2, 2000 WL 1366466, at *1 (Sept. 22, 2000) (discussing Cincinnati Stock Exchange's operation of an "electronic trading floor"). Indeed CME's own trademark lawyers appear to have used the phrase "virtual trading floor" to describe the Globex electronic trading platform in 2004 regulatory filings. *See Chicago Mercantile Exchange v. Globix Corp.*, Trademark L. Guide ¶ 60298 (C.C.H.), 2004 WL 7213590 (Apr. 8, 2004) (Trademark Trial and Appeal Board decision granting trademark over CME's objection).

The Court should also take into account the fact that, although discovery is ongoing, contemporaneous documents already produced in discovery undermine Defendants' reading of the contract. For example, a CME slide presentation on the demutualization plan delivered to members on November 2, 1999 stated that management's "commercial decisions and rulebook changes concerning electronic trading" would be "subject to regulatory ***and core rights restrictions*** . . . ." CME-LANGER-0069542, at 0069585 (attached as Exhibit B to Hatch-Miller Aff.). This contemporary document is utterly inconsistent with Defendants' new litigation position that the CME Core Rights are limited to the "trading floor" which excludes electronic trading. Further, an undated CME-produced document that appears to be part of the

demutualization planning indicates that a "trading floor" is not necessarily a "physical facility." A virtual "pit" "migrate[d] . . . to [an] electronic platform" may also meet that definition:

> Trading Floor
> What should/can we do to make floor operations more efficient and better place to do business?
>
> Characteristics:
> High fixed costs: marginal cost of a market reporter is low. We don't start to see significant savings until a whole floor is closed.
> Physical facility - consolidate pits or migrate pits to electronic platform
> Need the right electronic platform

CME-LANGER-0175612, at 0175612 (attached as Exhibit C to Hatch-Miller Aff.).

The snippets from these documents alone establish that construing the disputed contractual language is hardly the open-and-shut exercise Defendants' Motion suggests. Plaintiffs' interpretation of the disputed contractual provisions underlying their claims is at least sufficiently plausible to defeat a motion to dismiss—and, indeed, is sufficiently compelling that Plaintiffs may prevail as a matter of law on this issue unless CME can point to evidence that the term "trading floor" somehow cannot encompass an electronic trading facility like the ADC. Plaintiffs should have the opportunity to complete document discovery, and to explore this and other documents in depositions, before the Court resolves the meaning of Core Right 2. Thus as an alternative to denying the Motion outright, the Court could instead carry it and permit both parties to supplement the papers after discovery.[8]

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[8] Through the limited discovery that has been allowed, Plaintiffs have adduced much more evidence supporting their position. On this motion to dismiss, Plaintiffs provide the Court with a preview solely to illustrate the futility of Defendants' attempt to skirt the obvious factual disputes that vitiate their attempt to seek dismissal. If the Court treats this motion as a summary judgment motion, Plaintiffs respectfully request an opportunity to supplement and present a full record.

b. *"Trading" Modifies Both "Floor Access Rights" And "Privileges"*

Next, according to Defendants, "trading floor access rights and privileges" includes just one limited right, "to access and trade on the physical trading floor where CME operates open outcry trading." Second Mot. at 19. But Defendants' proposed interpretation depends on factual disputes that cannot be resolved based on the plain language of the contract. First, the argument assumes that the words "trading floor access" in the contract modify the nouns "rights and privileges"—*i.e.*, the contract protects only "trading floor access rights" and "trading floor access privileges." However, it is at least equally plausible as a matter of linguistics that the word "trading" ***separately*** modifies ***both*** "floor access rights" ***and*** "privileges," in which case Core Right 2 protects both members "trading floor access rights" and their "trading privileges."

Nothing in the Charter itself requires one reading over the other. Defendants point out that the phrase "trading floor access rights and privileges" also appears at Division B, Subdivision 3, Sections 2(b)-(e) of the Charter. *Id.* at 18. Those provisions merely state that the holders of Series B-2, B-3, B-4, and B-5 shares "shall have the trading rights, including trading floor access rights and privileges, set forth in the corporation's by-laws and rules for" the various subdivisions of CME. But that language actually supports Plaintiffs' proposed construction. The term "including" typically means "including but not limited to," and this language thus suggests that there are broader trading rights and privileges in addition to "trading floor access rights." At a minimum, both readings of the phrase "trading floor access rights and privileges" can be consistent with these other Charter provisions.

Because the Charter does not provide any clear answer as to how this language should be interpreted, Defendants must rely on sources beyond the contract's text to support their argument. Defendants cite at least two outside documents—*i.e.*, extrinsic evidence—to support

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their narrow reading of "trading floor access rights and privileges." First, Defendants rely on the proxy statement submitted to members in April 2000 to secure their support for demutualization. *Id.* Second, Defendants rely on the CME bylaws enacted in November 2000. *Id.* at 18-19. By relying on these extrinsic sources, Defendants again ***tacitly concede*** that Core Right 2 is ambiguous, and that evidence beyond the pleadings and the plain language of the contract must be considered to determine its meaning and scope. That alone requires this Court to deny the pending Motion and permit the parties to finish discovery. *See Quake Construction*, 141 Ill. 2d at 288-89. Defendants' arguments regarding the proxy and the bylaws are, in any case, unconvincing—and certainly not so definitively convincing as to justify resolving them as a matter of law on a motion to dismiss.

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There is limited authority in Delaware for reviewing a proxy statement as if it was, in effect, part of a charter. *See Centaur Partners, IV v. National Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990) (reasoning that "the intent of the stockholders in enacting particular charter or by-law amendments is instructive in determining whether any ambiguity exists").[9] But nothing in the proxy statement here supports Defendants' narrow reading of Core Right 2, let alone doing so in any way that could support dismissing Plaintiffs' claims as a matter of law. The proxy statement actually suggested that "trading privileges" are broader than just "floor access":

> ***Trading Privileges***. Each series of Class B shares will have the trading privileges currently encompassed in the existing membership interest associated with that series. New CME's rules will provide as follows:

[9] At least one Delaware trial court has expressed disagreement with *Centaur Partners*' reasoning. *See Lions Gate Entertainment Corp. v. Image Entertainment Inc.*, No. Civ.A.2011-N, 2006 WL 1668051, at *6 (Del. Ch. June 5, 2006) ("[A]fter *Centaur Partners* was decided, the Delaware Supreme Court sharply limited the extent to which courts may consider extrinsic evidence in determining the plain meaning of a contract."). However, the Delaware Supreme Court has never directly revisited or overruled this 1990 decision.

- ***Floor Access***. A holder of a series of Class B shares who meets New CME's membership and eligibility criteria will be entitled to appear upon the floor of New CME and to act as a floor broker and/or trader for the contracts assigned to that series. The current product allocation rules applicable to a particular membership division will be associated with the corresponding series of Class B shares.

- Electronic Trading Rights. A holder of a series of Class B shares who meets New CME's membership and eligibility criteria will have the right to trade electronically through the GLOBEX2 system. This 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.

- Use and Leasing of Trading Privileges. A holder of Class B shares may use the trading privileges associated with those shares or may transfer those privileges to another person who satisfies the membership and eligibility requirements imposed by New CME. These requirements are expected to be substantially the same as the requirements set forth in our current rules.

- Clearing Fees. New CME will continue to differentiate fees on cleared trades based on the trader for whom the trades are being cleared. In recognition of the importance of the liquidity provided by holders of Class B shares, New 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. New CME will not charge a higher clearing fee for any trade executed in the open outcry environment than charged for the execution of the same trade in another trading environment. New CME's management may lower clearing fees or provide other incentives with respect to trades of other persons, including persons considered to be especially important as providers of market liquidity.

- Clearing Memberships. The right to be a clearing member will require an ownership interest in New CME equivalent to the requirements under our current rules.

April 2000 S-4, at 36 (emphasis added). If anything, this language in the proxy supports Plaintiffs' reading of the CME Charter. At worst, though, it provides no clear answer.

There is ***no authority whatsoever*** that could allow Defendants to rely on the cited CME bylaws at the motion to dismiss stage. But even if the Court could consider the November 2000 bylaws as evidence of the Charter's meaning, Defendants' argument makes little sense. The cited

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bylaw, Section 6.3, describes members' "Trading Rights and Privileges." While Subsection 6.3(a) relates to the right to "appear upon the floor of the Chicago Mercantile Exchange," it does not use the words "trading floor access". This single bylaw does not purport to define "trading floor access rights and privileges." There is certainly no reason to think this bylaw was intended or understood to comprise the entire universe of "trading floor access rights and privileges."

2. CME Core Right 4 Prevents Giving "Inherent" Member Rights to Non-Members

CME Core Right 4 prohibits changes to the "eligibility requirements for an individual or entity ***to hold shares of any series of Class B Common Stock*** or ***to exercise any of the trading rights or privileges*** inherent in any series of Class B Common Stock" without member authorization. According to Defendants, this provision prohibits changes to considerations like moral character, financial resource, and credit rating requirements to hold a membership. Second Mot. at 19-20. Those are certainly part of what Core Right 4 protects, but the plain language cannot support the proposition that is all it covers. The highlighted language indicates that the "eligibility requirements" for an individual "to hold shares" do not completely encompass the eligibility requirements "to exercise any of the trading rights or privileges" of membership. The words "inherent in . . . Class B Common Stock" in the latter part of the provision suggest that ***owning a membership*** is itself an "eligibility requirements" for exercising the "inherent" "trading rights or privileges." *See* James E. Oliff Dep. at 114:8-14 ("Q. Before demutualization, in order to be eligible to exercise the trading rights of a member, you had to own or lease a membership; is that right? A. Yes. Q. And the same was true after demutualization; is that right? A. Yes.") (excerpts attached as Exhibit D to Hatch-Miller Aff.).

There is at least reasonable ground for disagreement over Defendants' reading. *See, e.g.*, *UtiliSave, LLC v. Miele*, No. 10729–VCP, 2015 WL 5458960, at *7 (Del. Ch. Sept. 17, 2005)

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(denying motion to dismiss where "the plain language of the provisions at issue [wa]s reasonably susceptible of two interpretations, each favoring a different party"). The obvious purpose of the Core Rights as a whole was to enshrine certain key rights as features of membership. *See American Legacy Foundation v. Lorillard Tobacco Co.*, 831 A.2d 335, 344 n.37 (Del. Ch. 2003) ("[W]ell established canons of contract interpretation require courts to read a contract as a whole, and consistent with its purposes.") (citing *Northwestern Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996)). It would defeat this purpose if management could, without formally changing any eligibility rule, nonetheless dilute the value of a membership (or, effectively, expand the size of the membership) by extending the inherent trading rights and privileges ***of members*** to non-members.

In opposing this alternative reading of Core Right 4, Defendants contend that it impermissibly "swallow[s] up" and renders "superfluous" Core Right 2. Second Mot. at 21. That is not so—under Plaintiffs' reading, the two provisions address separate concepts, with Core Right 2 preventing the formal elimination of membership rights, and Core Right 4 preventing the extension of membership rights to non-members (which would inevitably devalue the membership). *See* Oliff Dep. at 114:19-115:3 ("Q. Would allowing nonmembers to exercise the trading rights and privileges of members dilute or diminish the value of existing memberships? . . . A. Purely in a hypothetical sense, the answer would be yes. . . . ") (excerpts attached as Exhibit D to Hatch-Miller Aff.). Defendants' superfluity argument is also disingenuous. Defendants offer an exceedingly narrow reading of Core Right 2 to cover ***only*** a narrow set of open outcry, "trading floor"-related rights and privileges. If the Court accepts that reading of Core Right 2, it is all the more reason to adopt a broader reading of Core Right 4 "inherent" rights and privileges language. In any event, Delaware courts recognize that partial overlap or

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partial redundancy is not the equivalent of superfluity. *See, e.g.*, *iBio, Inc. v. Fraunhofer USA, Inc.*, No. 10256-VCMR, 2016 WL 4059257, at *11 (Del. Ch. July 29, 2016).

Finally, should the Court agree to entertain extrinsic evidence and convert the Motion to into a summary judgment motion, the discovery taken so far supports Plaintiffs' reading. For example, numerous documents from the planning process describe the right that eventually became Core Right 4 as covering "Issuance of additional B shares / Increased eligibility restrictions." *See, e.g.*, CME-LANGER-0081395, at 0081403 (attached as Exhibit E to Hatch-Miller Aff.). Clearly, management understood, just as Plaintiffs and other members understood, that protecting against the creation of more stringent eligibility requirements (effectively taking away memberships from existing members) ***and*** protecting against dilution of the membership pool would be equally important to preserving B share value. A rule prohibiting again relaxation of membership requirements would have no effect without complementary assurance that only a limited number of members would be permitted to exercise "inherent" member rights.

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3. CBOT's "Trading Rights" Provision Is Not Limited To Enumerated Rights

The CBOT "Special Rights" include protections for "Trading Rights." Defendants seek dismissal arguing that the "Trading Rights" provision "does not . . . preserve in place all of the trading rights and privileges that CBOT Members had at the time of demutualization." Second Mot. at 36 Defendants say ***only*** specifically enumerated trading rights stated elsewhere in the CBOT Charter, Bylaws, or Rules count as specially protected "Trading Rights." *Id.* 39.[10]

[10] Elsewhere in their motion, Defendants appear to concede that CBOT members' rights and CME members' rights are identical, at least with respect to electronic trading rights. *See* Second Mot. at 41 n.24 ("It is not credible to claim that these two corporations merged with one group maintaining special rights to the Globex system, and the other receiving second-class status."). The concession is consistent with a letter that CME sent to CBOT members in connection with these entities' 2007 merger. *See* Second Amend. Compl. ¶ 80 (quoting June 22, 2007 letter to CBOT members implying that "our," *i.e.* CME's, Core Rights protections would extend to cover

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CBOT Trading Rights are not so limited. It is true that the Trading Rights provision initially states that members will retain rights and privileges set forth in the CBOT Charter, the Bylaws and the Rules. Second Mot. at 11. But Defendants omit the following language: "***In addition to the rights and privileges set forth above***, except as otherwise provided in the Certificate of Incorporation, the Bylaws or the Rules, each holder of a Class B Membership of any Series shall 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 maintained by the Corporation or any of its affiliates or any of their respective successors or successors-in-interest." Second Amend. Comp. ¶ 73.

The prefatory "in addition" clause here indicates that the "trading rights and privileges" that were among the core rights of CBOT members were ***not limited*** to the rights and privileges in the Charter, Bylaws, and Rules. When trading the specific "products that [a member] is ***entitled*** to trade" either in open outcry or electronically, the member is entitled to "all trading rights and privileges," not just those specific trading rights and privileges that are enumerated in the Charter, Bylaw, and Rules. Defendants' reading renders the words "in addition to" and "all trading rights and privileges" here entirely superfluous. *See NAMA Holdings, LLC v. World Market Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007). At minimum, Plaintiffs' alternative construction is reasonable and the Charter is ambiguous in this regard.

4. CBOT Special Voting Right 3 Prevents Giving Member Rights to Non-Members

CBOT Special Voting Right 3 prohibits changes to "the membership qualifications or eligibility requirements for holding any Series of Class B Membership or exercising any of the

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CBOT members post-merger). Based on this written concession, the Court does not need to separately construe CBOT's charter language in connection with certain of Plaintiffs' claims.

membership rights and privileges associated with such Series." Defendants' arguments about this provision and CME Core Right 4 are virtually identical—they claim CBOT Special Voting Right 3 "serves the limited purpose of assuring that CBOT does not unilaterally alter the membership qualifications and eligibility requirements necessary to exercise the trading rights and privileges of an Exchange Member." Second Mot. at 41; *see supra* at 26-28 (rebutting Defendants' similar arguments for a narrow reading of CME Core Right 4). Defendants' arguments regarding the meaning of CBOT Special Voting Right 3 and CME Core Right 4 requires an unreasonably narrow interpretation of the meaning of these Core Rights that is contradicted by the evidence. Both were intended to prevent the Exchanges from extending rights and privileges characteristic of membership to non-members—which is exactly what CME and CBOT have done. Members used to have the exclusive right to trade at member rates; now that these lower rates are available to many non-members, the memberships have lost much of their value.

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5. CBOT Special Voting Right 2 Ensures A Broad "Transaction Fee" Preference

Finally, Defendants concede (as they must) that CBOT Special Voting Right 2 protects members' right to preferential "transaction fees." Second Mot. at 3. Defendants have raised questions about whether certain types of fees qualify as "transaction fees." But the Charter does not define "transaction fees." Defendants offer no textual analysis, and do not provide dictionary definitions to help the Court understand what is and isn't a "trading fee." Their assertion that the language means only "the fees associated with executing a trade" is pure *ipse dixit*. *Id*. at 43. There can be no serious question that answering questions about what sorts of fees qualify as "transaction fees" under CBOT's Charter requires consideration of extrinsic evidence.

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B. Plaintiffs Properly Stated Claims for Breaches Related to ADC Access

Defendants' Motion first seeks dismissal of Plaintiffs' CME and CBOT claims related to the ADC. *See id*. at 28-31, 38-42; Second Amend. Compl. ¶¶ 9-13, 15, 17-18, 85-91, 108-112, 119, 123, 127-130. Defendants hyperbolically attack these claims as "made up out of whole cloth," Second Mot. at 22; or "out of thin air," *id.* at 40. But Defendants' argument erroneously conflates two different concepts: open access and the ADC. This is a classic red herring.

As described in the Second Amended Complaint, Defendants deprived Plaintiffs and the proposed class of their exclusive membership right to trade from Defendants' trading floors and to have the best and most proximate access to Defendants' electronic match engine. Second Amend. Compl. ¶¶ 119(A), 123(A). Defendants did this by prohibiting members from trading at the ADC unless they pay a fee for the privilege. *Id.* Without the ability to trade at the ADC, Members are essentially deprived of their trading right to consummate their trades. Given the ambiguities in the relevant contracts, the Court cannot dismiss these claims on a bare motion to dismiss. *See Quake Construction*, 141 Ill. 2d at 288-89.

1. Access To The ADC Is A "Trading Floor Access" Right

As to the claims brought on behalf of CME members, Core Right 2 undisputedly protects members' exclusive "trading floor access rights and privileges" Defendants do not—and cannot—dispute that members had, as part of that set of Charter-ensured rights, the ability to access and trade from any "trading floor" for free, including the electronic components of the trading floor. But the ADC is, as Plaintiffs allege, ***a new trading floor*** to which they are supposed to have exclusive, and free, access. Second Amend. Compl. ¶ 9. That allegation by itself is sufficient to permit this particular claim to proceed. *See, e.g.*, *Hnilica v. Rizza Chevrolet, Inc.*, 384 Ill. App. 3d 94, 99-100 (1st Dist. 2008) (reversing in part trial court's order granting

motion to dismiss because the trial court failed to "accept the plaintiffs' factual allegations as true, as well as all reasonable inferences that can be drawn from those factual allegations").[11]

Defendants state in conclusory fashion that Plaintiffs "failed to plead any facts" sufficient to show that the ADC is a trading floor or that Plaintiffs' right to trade at the ADC was a trading right. Second Mot. at 29. Defendants once more seek to impose pleading burdens that do not exist. A complaint needs to contain ultimate facts. It is well-established that a plaintiff's complaint is not required to lay out all of the plaintiff's evidence. *See People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308 (1981) ("[I]t is a rule of pleading long established, that a pleader is not required to set out his evidence. To the contrary, only the ultimate facts to be proven should be alleged and not the evidentiary facts tending to prove such ultimate facts.").

The Second Amended Complaint even goes beyond ultimate facts. It amply describes in detail how the ADC functions as a trading floor. "At and before demutualization, CME members had the exclusive right to access CME's trading floor and trade via Globex from the trading floor." Second Amend. Compl. ¶ 7. "The ability to do so provided members with the best and most proximate access to Globex . . . ." *Id.* "In January 2012, CME opened the [ADC], a massive new data center in Aurora . . . that now houses the Globex electronic trading platform . . . ." *Id.* ¶ 9. "Upon opening the ADC, CME stopped providing [members] with the best and most proximate access to the Globex trading platform . . . and instead told the [members] that they could continue to have the best access and closest proximity to Globex from the ADC only if they each paid CME $8,000 to $12,000 in monthly rental fees to do so." *Id.* ¶ 15; *see also id.*

[11] The alleged breaches—charging members for access to the ADC, and allowing non-members to access it—will likely be undisputed so long the ADC is found to be a "trading floor."

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¶ 128 (explaining why "the ADC . . . ha[s] a trading floor's quintessential characteristics"). The Court must take these allegations as true. *See Hnilica*, 384 Ill. App. 3d at 99-100.

Defendants' counterargument about how the ADC works, *see* Second Mot. at 29 ("a (sophisticated) warehouse where trades are executed through computers"), is just that—a competing explanation unsuitable for a merits-decision on a motion to dismiss. *See Evergreen Oak Elec. Supply & Sales Co. v. First Chicago Bank of Ravenswood*, 276 Ill. App. 3d 317, 319 (1st Dist. 1995) ("What surfaces from a reading of the complaint and the motion to dismiss side by side is a disputed issue of fact . . . ."). Worse, this argument runs headlong into the actual ***evidence*** obtained so far that supports Plaintiffs' allegations about how ADC works. According to James E. Oliff, a CME board member since 1994 who participated in drafting the Charter, a trading floor is defined as a "physical location," "[w]here market information is exchanged between market participants," and "[w]here trades are executed." Oliff Dep. at 195:17-196:2 (excerpts attached as Exhibit D to Hatch-Miller Aff.). The ADC, according to Mr. Oliff, shares all of those defining "trading floor" characteristics. *See id.* at 259:18-260:21. The fact that trades at the ADC are only executed electronically is irrelevant, since "[a]t the time [of demutualization] there was electronic trading going on on the trading floor." *Id.* at 196:22-25; *see also id.* at 142:12-15 (agreeing that "[a]t the time of demutualization, members' trading floor rights were not limited to open outcry trading"); Second Amend. Compl. ¶ 51 (quoting CME SEC filing describing "proximity to trading activity" as a privilege of membership).

Finally, Defendants assert that Plaintiffs have not alleged "a single instance in which CME . . . referred to the ADC as CME's "new" trading floor or even a "virtual trading floor." Second Mot. at 29. Why is such an allegation required to avoid dismissal? Defendants and their lawyers generally may have avoided referring to the ADC as a "trading floor," but the reality is

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that, as alleged in the Second Amended Complaint, the ADC is a massive building, with a physical floor, at which market participants lease space in order to obtain the best and most proximate access to the Globex match engine. The argument is misleading in any event; Defendants ignore Plaintiffs' allegation in the Second Amended Complaint, ¶ 9, that CME has used the equivalent term "electronic pit." As discussed above at 21-22, the extrinsic evidence obtained so far indicates CME was already contemplating the possibility of virtual "pits" at the time of the demutualization.

2. CME Core Rights 2 And 4 Also Protect Proximate Access To Electronic Trading

Even if the Court were inclined to think that the ADC does not qualify as a "trading floor," dismissal of CME members' claims would still not be warranted. CME Core Rights 2 and 4 are both broad enough to protect members' rights to the best and more proximate access to electronic trading. The fact that more precise words like "proximity" and "co-location" do not appear in the CME Charter is not dispositive given the Charter's broad language about members' rights, and the critical fact that "proximity to trading activity" is plainly stated as a characteristic feature of membership in CME's filings with the SEC. Second Amend. Compl. ¶ 51.

As to Core Right 2, as discussed above at 22-26, it can be reasonably construed to protect members' "trading privileges" and not just "trading floor access rights." The Second Amended Complaint alleges in detail that proximity to electronic trading (and the advantages associated with that proximity) was a privilege members enjoyed at demutualization. *See id.* ¶¶ 7, 9, 15, 128 (describing the proximity to the electronic trading system that members enjoyed at the time of demutualization). The evidence adduced so far supports those allegations. *See* Melamed Dep. at 44:20-24 ("Q. . . . [A]m I correct that at the time of demutualization one of the benefits of being about to access the trading floor was the ability to use these Globex terminals [located on the

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floor]? A. Yeah.") (excerpt attached as Exhibit F to Hatch-Miller Aff.); Oliff Dep. at 141:25-142:15 (describing members' electronic trading rights on the floor and agreeing that "[a]t the time of demutualization, members' trading floor rights were not limited to open outcry trading") (excerpts attached as Exhibit D to Hatch-Miller Aff.). It is entirely fair to read Core Right 2's "trading privileges" to include protecting that proximity. Plaintiffs are entitled to discovery on the extent to which proximity was a privilege at the time of the demutualization.

As discussed above at 26-27, Core Right 4 can reasonably be read to prohibit CME from extending certain "inherent" "trading rights or privileges" to non-members. The Second Amended Complaint explicitly alleges, at ¶ 119, that the ability to benefit from proximity to the electronic trading system was an inherent feature of membership (because only members could obtain such proximity from the trading floor) and that the most proximate access cannot be sold off to non-members. At the pleading stage, the Court is required to accept those allegations as true, and Plaintiffs are entitled to take discovery on these issues. Beyond urging a narrow reading of Core Right 4, Defendants' Motion does not address this aspect of the CME members' claim. *See* Second Mot. at to 28-31 (discussing Core Right 2 but not mentioning Core Right 4).[12]

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3. The CBOT Charter Also Ensures Members' Access To The ADC Access

For different reasons, the CBOT Charter also ensures members exclusive rights to access the ADC trading floor for free, as well as to have the best and most proximate access to Globex.

As a preliminary matter, as discussed above at 28 n.10, Defendants concede "[i]t is not credible to claim that these two corporations merged with one group maintaining special rights to the Globex system, and the other receiving second-class status." Second Mot. at 41 n.24. In other

[12] Defendants' motion also does not challenge in any way CME plaintiffs' alternative allegations that they are entitled to preferential ADC fees, and/or that revenues collected from non-members for accessing the ADC must be shared with members. *See* Second Amend. Compl. ¶ 119(A)(3).

words, CME and CBOT members' rights related to electronic trading are coextensive. Based on this concession, the Court need not separately consider whether the language of CBOT's charter ensures trading floor access and/or proximity to CBOT's markets and market information.

a. *The CBOT "Trading Rights" Provision Applies To The ADC*

In any event, the text of CBOT's Charter also ensures the same substantive rights protecting trading floor access and associated proximity to electronic trading and market information—that is, pricing and trade execution data. Defendants are correct that Plaintiffs' ADC claim under the CBOT Charter relies in part on the "Trading Rights" provision. *See* Second Mot. at 36. Defendants do not dispute that the protected CBOT "Trading Rights" include "the right to trade . . . on the CBOT trading floor." *Id.* As previously discussed above at 31-34, the Second Amended Complaint sufficiently alleges that the ADC is a trading floor. Again, at the pleading stage, the Court must accept those allegations as true, and that should end the matter.

Even if the ADC is not itself a "trading floor," the "Trading Rights" provision is broad enough to ensure a right to proximity. Defendants fault Plaintiffs for failing to "identify a single provision of the CBOT Charter, Bylaws, or Rules that identifies, defines, or described" a specific right to proximity, Second Mot. at 39, but the "Trading Rights" protected in the CBOT Charter are not limited to such enumerated rights. *See supra* at 28-29. CBOT members enjoyed expressly enumerated rights to access the electronic trading system, *see* Second. Mot. at 39-40, and the Second Amended Complaint further alleges that CBOT members enjoyed a traditional benefit of proximity to the electronic trading system just like CME members did. Second Amend. Compl. ¶ 70. Those allegations defeat Defendants' motion to dismiss this claim.

Defendants separately argue that the CBOT plaintiffs' ADC claim fails because of a failure to "allege[] a factual predicate necessary to establish breach." Second Mot. at 45-46.

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Specifically, Defendants contend that no breach of the CBOT Charter's "Special Rights" provisions can occur unless a Charter, Bylaw, or Rule is altered without member approval. The argument is based entirely on language in the ***Special Voting Rights*** provisions which appear later in the CBOT Charter. There is absolutely nothing in the ***Special Trading Rights*** provision to indicate such a predicate showing is required. This argument has absolutely no merit.

Moreover, under Delaware law, "courts will not construe a contract as taking away a common-law remedy unless that result is imperatively required." *Gotham Partners, L.P. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 176 (Del. 2002) (quotation marks omitted). "[E]ven if a contract specifies a remedy for breach . . . a contractual remedy cannot be read as exclusive of all other remedies if it lacks the requisite expression of exclusivity." *Id.* (quotation marks and alterations omitted). There is no reason to infer that the parties contemplated calling a vote would be the sole remedy available for a breach of members' Trading Rights. *See GMG Capital Invs.*, 36 A.3d at 781-82 (discussing interpretation of remedial provisions).[13]

b. *CBOT Special Voting Rights 3 Also Ensures ADC Access*

Alternatively, CBOT Special Voting Right 3 also protects members' rights to access a trading floor and to have the best and most proximate access to the electronic trading platform. Defendants' arguments about this provision and CME Core Right 4 are virtually identical—they claim CBOT Special Voting Right 3 "serves the limited purpose of assuring that CBOT does not unilaterally alter the membership qualifications and eligibility requirements necessary to exercise the trading rights and privileges of an Exchange Member." Second Mot. at 41; *see supra* at 26-27 (rebutting Defendants' similar arguments for a narrow reading of CME Core Right 4).

[13] At various points in their brief, Defendants contend that "Trading Rights" are "basic" and not "Core Rights." *See* Second Mot. at 39. But the "Trading Rights" provision is part of the "Special Rights" section of the Charter—the CBOT Charter does not use the term "Core Rights."

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Defendants' arguments regarding CBOT Special Voting Right 3 and CME Core Right 4 are unpersuasive (or at least, not conclusively so) for the same reason—both were intended to prevent the Exchanges from extending the rights and privileges of membership to non-members. As previously discussed, Plaintiffs sufficiently alleged that free access to a trading floor, and proximity to electronic trading, were features of CBOT membership at demutualization.

Defendants further contend that Plaintiffs have not stated a claim for breach of Special Voting Right 3 (or Special Voting Right 2, discussed below) because they have not identified a change to the CBOT Charter, Bylaw, or Rules that required a member vote. Second Mot. at 45-46. They argue in essence that CME's managers wrote in a loophole giving themselves ***free reign to alter members' substantive rights***, so long as they could concoct a way to do so ***without formally altering*** a Charter, Bylaw, or Rule. While there is admittedly some textual support for Defendants' position, this one-sided and hyper-technical reading is inconsistent with Delaware law, which considers contract purpose and the expectations that "a ***reasonable person*** in the position of either party would have" upon reading a contract. *GMG Capital Invs.*, 36 A.3d at 78. The Charter's voting rights provisions would be entirely ineffective if management could avoid any challenge by structuring their actions to avoid formal Charter, Bylaw, and Rule changes.

Even if the Court adopts Defendants' construction of the language of Special Voting Rights 3, Plaintiffs should be permitted to proceed on their fee preference claim under the implied covenant. Notwithstanding the contract's language, Defendants' extreme position on the limited reach of the Special Voting Rights is contrary to what ordinary members reasonably expected. That is a sufficient basis to invoke the implied covenant under Delaware law. *See Renco Group*, 2015 WL 394011, at *6 (citing *Gerber*, 67 A.3d at 422).

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c. *CBOT Special Voting Rights 2 Requires Preferential ADC Fees*

At a minimum, CBOT Special Voting Right 2 protects members' right to be charged preferential rates for accessing the electronic trading system from the ADC. This provision, discussed above at 30, requires that members receive preferential rates for "transaction fees." The Second Amended Complaint alleges that all fees charged to CBOT members related to the ADC qualify as transaction fees, and the Court is required to accept that factual allegation for now. *See* Second Amend. Compl. ¶ 123(E) (alleging that "co-location" fees "increase the overall cost of transactions on Globex that are executed from the ADC"). As discussed above, the Court should reject Defendants' additional argument that the Special Voting Rights have no application so long as management acts without formally changing the Charter, Bylaw, or Rules.

4. Alternatively, Plaintiffs Properly Stated Claims Under The Implied Covenant

Finally, Defendants argue that that Plaintiffs' ADC claims must be dismissed because ADC co-location "did not exist until 12 years after the Core Rights came into existence." Second Mot. at 30. This is a non-sequitur. The language of the Charters was written broadly so that it could encompass dynamic, changing circumstances and technology. Defendants do not dispute either that CME and CBOT Charters remain in place as binding contract, or that the preserved fundamental rights in the CME and CBOT Charters remain in place. And the mere fact that a breach occurred after an existing contract was executed is irrelevant and obviously does not provide any basis for dismissing a breach of contract claim at the pleading stage.

But if Defendants are correct that co-location technology and related fees were not anticipated in their current form by the parties, then Plaintiffs' claims under the implied covenant of good faith and fair dealing should proceed to discovery. Under Delaware law, the covenant of good faith and fair dealing may be employed to "imply[] terms in the agreement . . . to analyze

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unanticipated developments or to fill gaps in the contract's provisions." *Dunlap*, 878 A.2d at 441. The entire purpose of the implied covenant is to deal with the unforeseen. The question is: What would the parties have agreed to had they negotiated about the establishment of the ADC as an alternative to the open outcry "pit"?

The Second Amended Complaint explains in detail what would have happened if the parties had foreseen such a development. Second Amend. Compl. ¶¶ 127-136. At the time of demutualization members enjoyed the benefit of a "time and place advantage relative to other market participants" when trading electronically from the floor. *Id.* ¶ 128; *see id.* ¶ 7. Co-location at the ADC now offers the same "quintessential characteristics" to non-members for a fee. *Id.* ¶ 128. Just as "co-location" facilities such as the ADC were not contemplated when members voted to demutualize, related co-location, access, and communication fees were not, and could not have been, contemplated by the parties. *Id.* ¶¶ 132, 138.[14] For those specific reasons, had the parties contemplated the existence of a co-location facility like the ADC, they would have agreed to provide members access to the ADC for free or at a preferred rate. *Id.* ¶¶ 133-134, 139-40.

These allegations more than sufficiently state a claim for breach of the implied covenant under Delaware law, particularly given Defendants' apparent admission that the ADC was an unforeseen development. *See, e.g., The Chemours Co. TT, LLC v. ATI Titanium LLC*, No. N15C-03-083 WCC CCLD, 2016 WL 4054936, at *10 (Del. Super. July 27, 2016) (denying motion for judgment on the pleadings because issue was "entirely unanticipated and unexpected by the parties"). The Court should not resolve this issue without a complete factual record. *See Simon-Mills II, LLC v. Kan Am USA XVI Limited P'ship*, No. 8520-VCG, 2014 WL 4840443, at *14

[14] With respect to CBOT, at demutualization, transaction-based fees were "the only fees that Class B members had ever been charged for the ability to trade electronically." Second Amend. Compl. ¶ 132.

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(Del. Ch. Sept. 30, 2014) (finding unanticipated issue and denying summary judgment because record on good faith and fair dealing claim was "not fully developed" and "required further factual development"). The necessary record here likely includes expert testimony on the development of co-location services and related technologies.

C. Plaintiffs Properly Stated Claims For Breaches Related To Preferential Fees

Defendants next seek dismissal of the CME and CBOT fee preference claims asserted in the Second Amended Complaint. *See* Second Mot. at 31-32, 45-46; Second Amend. Compl. ¶¶ 6, 11, 13, 14, 16, 34, 70, 76, 98, 100, 102, 106, 111, 113, 118, 119, 121, 122, 123, 131, 137. Defendants previous moved to dismiss the fee preference claims asserted in the First Amended Complaint. First Mot. at 27-30. The Court denied that portion of Defendants' prior motion in its September 1, 2015 order. Plaintiffs' allegations regarding clearing fee preferences did not change from the First to the Second Amended Complaint. The Court has and should exercise its discretion to deny Defendants' effort to move to dismiss the same claims a second time after their first attempt failed. *See Inland Real Estate*, 153 Ill. App. 3d at 853.

If the Court nevertheless elects to reach the merits of this part of Defendants' Motion, Defendants' main argument regarding CME clearing fees is that "the CME[] Charter lacks a specific Core Right that speaks to fees." Second Mot. at 31-32. (The Defendants raised the identical argument the first time around. First Mot. at 28-29.) The mere absence of such specific language cannot be dispositive. Ultimately, the Court will have to decide whether the general provisions of the contract are broad enough to arguably encompass fee preferences.

Defendants also make much of the fact that CBOT's Charter expressly references member fee preferences. Second Mot. at 3, 31. But just because the CBOT Charter, enacted by a different exchange and approved by that exchange's different members five years after the CME

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demutualization, includes more specific language on fee preferences has absolutely no bearing on the proper interpretation of CME's Charter. Incredibly, after claiming that only the CBOT Charter protects members' rights to preferential fees, Defendants construe the CBOT Charter in a manner that renders this protection virtually illusory. All these arguments should be rejected.

1. The CME Charter Protects Members' Rights To Preferential Clearing Fees

The CME Charter provisions relevant to the fee preference claim are Core Right 2 and 4. Both provisions are broad enough to protect members' clearing fee preference.

As discussed above at 22-26, the Court should reject Defendants' narrow reading of Core Right 2. The provision can reasonably be construed to protect "trading floor access rights" as well as "trading privileges." Plaintiffs allege that a clearing fee preference is among the "trading privileges" protected by Core Right 2. Second Amend. Compl. ¶ 118. The Court is required to accept that allegation as true for now and that should end this argument.

Although the Court need not reach the issue specific language in the proxy supports Plaintiffs' factual allegations about the clearing fee preference. *See Centaur Partners*, 582 A.2d at 928. "Clearing Fees" were specifically listed as one of members' protected "trading privileges" in the proxy. *See* April 2000 S-4, at 35. Defendants' argument that the proxy "demonstrate[s] that no such right exists," Second Mot. at 32, misreads the document. The proxy statement indicated that management "may lower clearing fees or provide other incentives with respect to trades of" non-members. But neither the proxy, nor any another communication with members, suggested there could be circumstances in which non-members would pay ***less*** than members. In fact CME's other communications to members suggested exactly the opposite. *See* McNulty Dep. at 196:8-197:7 (testifying regarding the proxy statement: "What was explained to

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the members before we demutualized was they would have ***a right*** to lower fees . . . than non-members.") (emphasis added) (excerpt attached as Exhibit G to Hatch-Miller Aff.).

Defendants attempt to brush aside the proxy statement language by characterizing the clearing fee preference described therein as a mere "longstanding policy," and not a "Core Right." Second Mot. at 3. (This "policy" versus "right" distinction is at odds with the previously quoted deposition testimony.) In fact there is no such distinction in the proxy, which describes the clearing fee preference as a "Trading Privilege[]" that will be preserved after demutualization, and nowhere uses the term "policy." April 2000 S-4, at 35. Defendants are asking the Court to assume that the members who voted on the demutualization plan against the background of this admitted longstanding practice would have ***inferred*** this highly technical "policy" versus "right" distinction. An objective reader of the proxy would not have agreed with Defendants' tortured reading of the Charter. *Cf. Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (describing Delaware's "'objective' theory of contracts").

Alternatively, CME members' rights to preferential clearing fees are also protected by Core Right 4. As previously discussed, the purpose of Core Right 4 is to ensure that members' "inherent" rights are not extended to non-members. The extension of preferential member rates to non-members is also a violation of Core Right 4 because it changes the eligibility requirements to trade at member rates, and thereby dilutes the value of any membership, by allowing market participants to do so without owning or leasing a membership.

In sum, based on the Charter terms as disclosed in the proxy statement, CME members reasonably understood that they would have an ongoing, protected right to the lowest clearing fees when trading for their own accounts. The Court should deny the Motion and permit the parties to finish discovery on fee preference-related breach and damages issues.

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2. The CBOT Charter Protects Members' Rights To Preferential Transaction Fees

Defendants concede (as they must) that CBOT's Charter expressly protects members' right to preferential "transaction fees." Second Mot. at 3. On this point, the CBOT Charter states: "holders of Class B Memberships who meet the applicable membership and eligibility requirements will be charged transaction fees . . . that are lower than the transaction fees charged to any participant who is not a holder of Class B Memberships." Yet after ***repeatedly citing this language as the example of what's missing*** from the CME Charter, Defendants urge an absurdly narrow reading of the mechanism for enforcing this right by CME members.

Defendants' argument rests on the fact that the above-quoted language about fees appears in Special Voting Right 2. Special Voting Right 2 begins with a description of the need to hold a member vote in the event of a Charter, bylaw, or rule change that "in the sole and absolute determination of the Board of Directors of the Corporation, adversely affects" members' fee preference rights. Defendants contend the fee preference described in the Charter is ***solely*** a voting right, and that members have no recourse so long as management can undermine fee preferences without formally changing the Charter, bylaws, or rules. This narrow construction is inconsistent with the language and purpose of the Charter— and is certainly not the only possible reasonable reading. *See, e.g.*, *UtiliSave*, 2015 WL 5458960 (motion to dismiss should be denied if contract is susceptible of multiple reasonable interpretations). And at a minimum, members' reasonable expectations regarding the reach of the Voting Rights on fee preferences are protected under the implied covenant. *See supra* at 38.

Moreover, Defendants ignore the fact that fee preferences are also preserved under the Trading Rights provision. *See* Second Amend. Compl. ¶ 123(C)-(D) (alleging that CBOT's acts in derogation of members' fee preferences constitute a breach of the Trading Rights). The

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Trading Rights provision says nothing about voting. The Second Amended Complaint alleges that CBOT members enjoyed a transaction fee preference long before the demutualization vote occurred. *Id.* ¶ 73. Defendants appear not to dispute that the same transaction fee preference mentioned in Special Voting Right 2 was already among members' trading rights before demutualization. And in any event, the Court is required to accept that factual allegation as true for purposes of resolving a motion to dismiss.

D. Plaintiffs Stated Claims For Breaches Related To Globex Revenue Sharing

CME also moves to dismiss Plaintiffs' CME revenue sharing claim. Defendants raise four arguments for dismissing this claim. These arguments are meritless, and cannot be resolved on this motion to dismiss record.

First, while it is undisputed that under CME's pre-demutualization rules, members shared in certain electronic trading revenues at the time of the demutualization vote, Defendants contend that privilege was not intended to be preserved by any Core Right. *See* Second Mot. at 25-26. This argument relies on the overly narrow reading of CME Core Rights 2 and 4, discussed above at 22-28. Members' trading rights and privileges broadly encompass the rights relating to electronic trading, floor access, and Globex that existed at the time of demutualization. It is at least ambiguous whether members' entitlement to share in these revenues qualifies as a "trading privilege" preserved under Core Right 2, or an "inherent" trading right or privilege preserved under Core Right 4. Defendants' additional argument, raised in a footnote, *see id.* at 26-27 n.16, that only "select Class B Members" were entitled to share in revenues under pre-demutualization rules is at the very least an admission, and unquestionably raises a factual issue.

Second, Defendants argue that Plaintiffs cannot complain about the elimination of members' revenue sharing rights because these rights were modified "before CME's actual

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demutualization and when Plaintiffs maintained their referendum voting rights." *Id.* at 26. In other words, Defendants apparently contend that Plaintiffs ratified this change to their rights by allowing the transaction to close despite the CME Board's adoption of its new "open access" policy, which took place ***after*** the member vote that formed the contract establishing their Core Rights but ***before*** the regulatory approval that was a condition of closing. Ratification is, of course, an affirmative defense, and is not a basis for rejecting a breach of contract claim on a motion to dismiss.

Moreover, while Defendants contend Plaintiffs somehow conceded that they ratified the elimination of their Globex revenue sharing rights without compensation in the Second Amended Complaint, the opposite is true. *See* Second Amend. Compl. ¶ 96 ("CME Rule 582 . . . remained in place after the demutualization was completed"). Defendants submit no other evidence in support of their apparent contention that the breach occurred before the Charter's Core Rights protections took effect, and accordingly this issue cannot be resolved on a motion to dismiss. At most, Defendants' position that members should have raised objections earlier confirms that a disputed fact question exists over when the Charter was formed and took effect.

Third, Defendants point to another Charter provision that they claim ***prohibits*** CME from sharing electronic trading revenues with Class B members. Second Mot. at 27, 44. Defendants' precise argument about the significance of that provision is not entirely clear. If Defendants are arguing that the Core Rights should be interpreted to avoid a conflict with this other provision, the argument fails. The limitation on dividends and distributions appears in the Third Amended Certificate of Incorporation attached to Plaintiffs' Complaint, but it was not in the original version of the Charter on which CME members voted. *See generally* April 2000 S-4. It has no bearing on how the Core Rights provisions should be interpreted.

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Defendants also misread the dividend and distribution provision in the amended Charter. By using the specific phrase "***such*** dividends and other distributions" as may be "declared by . . . the board of directors from time to time out of assets or funds of the corporation," it indicates that only "such" declared dividends and distributions must be "share[d] equally on a per share basis." *See Patterson-Woods & Assocs., LLC v. Realty Enterprises, LLC*, No. 05C-01-224-JOH, 2008 WL 3854076, at *2 (Del. Super. July 29, 2008) (explaining significance of the limiting term "such" in a contract). This language would not prohibit CME from complying with its pre-existing revenue sharing obligations to members, and other shareholders certainly could not complain about such payments. *See Quadrant Structured Prods. Co v. Vertin*, 102 A.3d 155, 202 (Del. Ch. 2014) (observing that the "declaration of a dividend is a specific corporate act"); *Horbal v. Three Rivers Holdings, Inc.*, No. Civ. A. 1273-N, 2006 WL 668542 (Del. Ch. Mar. 10, 2006) (refusing to characterize payments under a "management compensation agreement" as dividends requiring equal distribution, and noting "it is axiomatic that the declaration of dividends is necessary to trigger any such obligation").

Fourth, Defendants contend that Plaintiffs' revenue sharing claim is barred by Illinois' ten-year breach of contract statute of limitations. Second Mot. at 33-35. As discussed above at 18, Plaintiffs maintain that CME breached a continuing, periodic obligation to share revenues; Defendants disagree and frame the rule change as one single breach.

Whether Plaintiffs' or Defendants' characterization is correct raises a substantive contract issue that cannot be resolved on this record. Under Delaware law, "[w]hether the obligations under a contract are continuous or severable turns on the parties' intent, which may be ascertained through the contract's terms and subject matter, taken together with the pertinent facts and circumstances surrounding its formation." *Smith*, 2010 WL 412030, at *4 (quotation

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marks omitted). "Whether a duty under a contract and whether a breach of a contract are continuous or severable are questions fact, and cannot fairly be resolved . . . upon [a] motion to dismiss." *Id*.

Should the Court disagree and apply Illinois law on this issue, Defendants' argument that Illinois "does not apply [the continuing violation doctrine] to claims for breach of contract" is incorrect. Defendants later admit in a footnote, *see* Second Mot. at 35 n.21, that "Illinois courts make an exception for" contract cases involving a continuous obligation. *See Hi-Lite Prods.*, 11 F.3d at 1408 (citing Illinois cases holding that "[c]ontracts requiring continuous performance are capable of being partially breached on numerous occasions" and "[e]ach partial breach is actionable and is subject to its own accrual date and own limitation period"). That is the doctrine itself, not an exception.

There are few Illinois cases on point regarding whether, under Illinois law, this issue can be resolved on a motion to dismiss. In this circumstance, it is appropriate for the Court to follow persuasive authority from other state courts, *see Turner v. Nama*, 294 Ill. App. 3d 19, 31 (1st Dist. 1997) (adopting reasoning of persuasive Delaware authority on continuous negligence and related limitations issues), including but not limited to the Delaware authority cited above. *See also Jensen v. Janesville Sand & Gravel Co.*, 415 N.W.2d 559, 529 (Wisc. App. 1987); *Segall v. Hurwitz*, 339 N.W.2d 333, 343 (Wisc. App. 1983). This court should follow that persuasive authority and decline to resolve this fact-intensive contract issues on motion to dismiss.

E. Plaintiffs Adequately Pled The Need For Injunctive Relief And Disgorgement

Finally, Defendants' request to strike Plaintiffs' claims for injunctive relief and disgorgement should be denied. *See* Second Mot. at 52-54. As to injunctive relief, the cases cited by Defendants merely establish that a plaintiff must allege ***facts*** showing the inadequacy of legal

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remedy and the irreparable injury. *See Sadat v. American Motors Corp.*, 104 Ill. 2d 105, 116 (1984). No magic words are required. The Second Amended Complaint adequately pleads facts supporting an injunction. *See, e.g.*, Second Amend. Compl. ¶ 18 (stating that money damages are sought "for losses already suffered"); *id.* ¶¶ 119, 125 (describing continuous, ongoing breaches); *id.* ¶ 112 ("The Class B Plaintiffs will continue to suffer lost rental income, and the value of their shares will not recover, if they are not allowed to co-locate at the ADC without having to pay an access fee.").

As to disgorgement, Defendants contend that even if Plaintiffs' pleadings are sufficient, disgorgement is unavailable as a matter of law as a breach of contract remedy. Although Defendants claim this principle is "well established," Section 39 of the Third Restatement of Restitution and Unjust Enrichment permits disgorgement in contract cases where there is no adequate remedy at law and Defendants' breach was opportunistic. Defendants cite no Illinois authority to the contrary. In the single Illinois case cited by Defendants, *iPCS Wireless, Inc. v. Sprint Nextel Corp.*, No. 08 CH 17214, 2009 WL 1489850, at *7 (Ill. Cir., Ch. Div., Cook Cnty. Apr. 30, 2009), the court appears to have simply found that the plaintiff failed to "plead unjust enrichment in the alternative." There is no such pleading defect in the Second Amended Complaint, which specifically alleges unjust enrichment. See Second Amend. Compl. ¶ 125.

VI. CONCLUSION

For all of the above reasons, Plaintiffs respectfully request that the Court deny all parts of Defendants' Second Motion to Dismiss and allow the parties to complete discovery.

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Dated: May 31, 2017

Respectfully submitted,

SHELDON LANGER
RONALD M. YERMACK
LANCE R. GOLDBERG

By: 
One of their Attorneys

Suyash Agrawal
Matt Reedy
MASSEY & GAIL LLP
Cook County Firm No. 56232
50 E. Washington Street – Suite 400
Chicago, Illinois 60602
(312) 283-1590 main
sagrawal@masseygail.com
mreedy@masseygail.com

Stephen D. Susman
IL ARDC# 6314819 (Rule 707)
Robert S. Safi
IL ARDC# 6314817 (Rule 707)
SUSMAN GODFREY L.L.P.
1000 Louisiana Street – Suite 5100
Houston, Texas 77002
(713) 651-9366 main
ssusman@susmangodfrey.com
rsafi@susmangodfrey.com

Stephen E. Morrissey
IL ARDC# 6314877 (Rule 707)
SUSMAN GODFREY L.L.P.
1201 Third Avenue – Suite 3800
Seattle, WA 98101-3000
(206) 516-3880 main
smorrissey@susmangodfrey.com

Mark Hatch-Miller
IL ARDC# 6323352 (Rule 707)
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas, 32nd Fl.
New York, NY 10019-6023
(212) 336-8332 direct

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Mhatch-miller@susmangodfrey.com

Attorneys for Plaintiffs

PROOF OF SERVICE

Pursuant to Illinois Supreme Court Rules 11 and 131, the undersigned, an attorney, certifies that he served the foregoing instrument by transmitting it via e-mail on May 31, 2017 from Chicago, Illinois to the following designated e-mail addresses of record for Defendants' counsel, who have consented to e-mail service:

Albert L. Hogan III, Esq.
al.hogan@skadden.com

Marcella L. Lape, Esq.
marcella.lape@skadden.com

Suyash Agrawal

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