

1 STATE OF ILLINOIS)  
2 COUNTY OF C O O K)

3  
4 IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
5 COUNTY DEPARTMENT-FIRST DISTRICT  
6

7 SHELDON LANGER )  
 )  
8 PLAINTIFFS, )

9 VS. )  
 )

10 CME GROUP, )  
 )  
11 DEFENDANT, )

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13  
14 REPORT OF PROCEEDINGS held before the  
15 HONORABLE JUDGE GAMWRATH, taken in the above-entitled  
16 cause before GWENDOLYN BEDFORD, a Certified Shorthand  
17 Reporter within and for the County of Cook, State of  
18 Illinois, taken at the RICHARD J. Daley Center, 50 West  
19 Washington Street, Room 2506, Chicago, Illinois held  
20 on the 2nd day of October, 2017 at the hour of  
21 1 o'clock p.m. pursuant to notice.  
22  
23  
24

25 Job No. 131234

1 APPEARANCES:

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4 MS. MARCELLA LAPE

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8 appeared on behalf of the Defendants

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13 MR. STEPHEN MORRISSEY

14 Mr. MARK HATCH-MILLER

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18 appeared on behalf of the Plaintiffs

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## P R O C E E D I N G S

1  
2 THE CLERK: Langer vs. CME.

3 MR. HOGAN: Good afternoon, Judge. Al Hogan  
4 for the Defendants.

5 MS. LAPE: Marcie Lape for the Defendants.

6 MR. MORRISSEY: Steve Morrissey for the  
7 Plaintiffs.

8 MR. HATCH-MILLER: Mark Hatch-Miller for the  
9 Plaintiffs, your Honor.

10 THE COURT: Motion to Dismiss. The Court  
11 appreciates the time you spent on these briefs and  
12 getting me prepared for today, Counsel. I'll let you  
13 speak to the motion.

14 MR. HOGAN: Very good. Judge, I'm not sure  
15 how much time you allocated for discussion.

16 THE COURT: It is best for the Plaintiffs to  
17 be seated at this point.

18 MR. HOGAN: That is what I was going to  
19 suggest. It might take a little bit of time.

20 So, your Honor first of all the  
21 Defendants want to thank you. I'm sure on this point  
22 the parties are actually in agreement. Thank you for  
23 your consideration of the extensive motion papers. The  
24 Defendants are very anxious to get through this hearing  
25 because we believe that this case is capable of

1 disposition on this motion.

2 A Plaintiff cannot simply allege a  
3 contract claim based on the rights that it says exist.  
4 That's contrary to Delaware law. It's contrary to  
5 Illinois law. You can't say what your contract is.  
6 Your contract is what it is. Now, to be sure this case  
7 is, we believe, a fundamental challenge to the way that  
8 the CME Group has conducted its business for the last  
9 15 years. So it's incredibly serious to my client. We  
10 believe it is in very large part a breach of contract  
11 claim built upon which alleged written contracts that  
12 do not exist. It is also a very expensive case to  
13 litigate, Judge, given the discovery, the limited  
14 discovery committed to date. It's expensive. So that  
15 is not a reason obviously to dismiss the case today,  
16 but we think it is important to raise the deficiency of  
17 the Complaint now to avoid further expense.

18 As I mentioned before there is a fee --  
19 at issue. And so it benefits all of the parties to  
20 understand if you're correct and this case is actually  
21 confirmed, we can't move forward any further without  
22 cost and expenses.

23 THE COURT: How is this Motion to Dismiss  
24 different from what Judge Mikva decided?

25 MR. HOGAN: Yes. So Judge, upon the Initial

1 Complaint there was some procedural wrangling in terms  
2 of form, but then the first filing you made with  
3 respect to the initial Complaint, the First Amended  
4 Complaint, was a combined Motion to Dismiss and a  
5 Motion for Summary Judgment. The reason we responded  
6 in that fashion is the First Amended Complaint omitted  
7 entirely the reality of open access of the Globex  
8 systems. As we stared at it, we concluded that that  
9 fact was so important that we had to get it in front of  
10 the Judge and it required us to definitely go to  
11 matters beyond the pleadings. So the Summary Judgment  
12 Motion and the Motion to Dismiss.

13 We asked Judge Mikva to stay discovery  
14 and get to a quick resolution on that because we  
15 believed in large part with that additional fact of  
16 open access, the Complaint could be dealt with right  
17 away. Judge Mikva disagreed as to discovery. She said  
18 you brought a Summary Judgment motion and I'm not going  
19 to rule on that until the end of discovery. When she  
20 ruled on the Motion to Dismiss portion of the  
21 Complaint, contrary to what the Plaintiff suggests, and  
22 I was there, there was no memorandum opinion and no  
23 transcript. She did not dive into the merits of our  
24 arguments. What she said was the Plaintiff's have  
25 alleged one for each count. I'm not going to chop up

1 theories of a breach of contract claim on a Motion to  
2 Dismiss when you have got a Summary Judgment Motion  
3 pending and then go out and do discovery on it. She  
4 was actually -- I can tell you she was actually  
5 sympathetic to some of our theories. So she limited  
6 discovery exclusively to the Summary Judgment motion.  
7 She said with respect to, for instance, their claim  
8 that they were being denied and the trade products,  
9 make them identify that. That claim is now gone by the  
10 Plaintiffs on the fee claim she expressed some  
11 sympathy. Again discovery is not going to go forward.  
12 So, Judge, the prior judge did not rule on the merits  
13 of any aspect of the Motion to Dismiss. The only thing  
14 that we are encouraging this Court to do that  
15 Judge Mikva previously said that she wouldn't do, and  
16 again different procedural posture, is we think the  
17 Complaint should be dismissed entirely. And we go  
18 through, attempt to go through all the different  
19 theories. We strongly believe they did not dismiss in  
20 its entirety. Allegations and theories absolutely  
21 should be struck at this point. We think that is  
22 proper for the Court to do. It would be disappointing  
23 not to see it all go away, but to let this case  
24 continue at large in light of the deficiency that we  
25 outlined. I hope that addressed the question.

1           THE COURT: Because we had anticipated a  
2 refresh Motion For Summary Judgment at one point, my  
3 understanding of once Plaintiffs acknowledged opened  
4 access this changed the landscape.

5           MR. HOGAN: It did, Judge. So to put cards  
6 on the table, I -- again we were surprised open access  
7 wasn't in the initial pleading. And when they amended  
8 their Complaint, open access was added. We looked and  
9 said this looks a lot like the 615 motion we wanted to  
10 bring all along. The refresh Summary Judgment motion,  
11 it was sort of a hybrid that Judge Mikva not forced on  
12 us, but because we did discovery with respect to the  
13 meeting of the core rights. It was a Summary Judgment  
14 motion that was going to be partially through  
15 discovery. If you recall, Judge, there has been no  
16 discovery in terms of course of conduct for instance.  
17 There has been no discovery on the merits of the fee  
18 claims in terms of what's actually charged. There is  
19 huge amounts of discovery that remains to be done. And  
20 the Plaintiffs have always had this view that we only  
21 get one Summary Judgment. So I'm much happier bringing  
22 the motion now as a 615 and 619 motion and hopefully  
23 ends the case. But if not, then we'll proceed in the  
24 more traditional fashion with respect to an ultimate  
25 Summary Judgment motion.



1           THE COURT: Let's get to the 615 basis for  
2 your motion.

3           MR. HOGAN: Very good, Judge. So again  
4 really, really important principle is that breach of  
5 contract claim the Plaintiff's have to identify an  
6 existing contract right. I have a few handouts, slides  
7 as well as handouts. Can I hand those up to the Court  
8 and the Clerk?

9           THE COURT: Have you shown it to Counsel?

10          MR. HOGAN: I'll give them those and their's  
11 in the record except for my slides.

12          THE COURT: Any objections?

13          MR. MORRISSEY: No.

14          MR. HOGAN: I'll tender to your honor three.  
15 And your Honor I tender to the Court a binder of  
16 documents. These are documents that are all cited in  
17 our Motion to Dismiss. I'll explain why it's  
18 completely proper to consider these on the 615 motion,  
19 if I might. Thank you.

20                 So your Honor there is a few fundamental  
21 differences here focusing on the 615 basis for the  
22 claims. There are a few fundamental differences about  
23 how to think about the breach of contract claims in the  
24 context of the 615 motion. The Plaintiffs have a lot  
25 of allegations in their Complaint about what rights

1 they purportedly had, trade rights. The crown jewel is  
2 the so call right to the best and most proximate access  
3 to Globex. But they also say in some degree with  
4 respect to exclusive access, they say with respect to  
5 fees, they assert all sorts of rights. And then  
6 judging their opposition to our Motion to Dismiss they  
7 state the following. They say, "At the pleading stage  
8 these allegations as to the existence of relevant  
9 contract rights must be accepted as true and are  
10 sufficient to allow Plaintiff's claims to proceed  
11 through full discovery." That's at Page 4 of the  
12 opposition. A foundational point. It couldn't be more  
13 false.

14 As I explained, we cited to the Delaware  
15 law cases of -- venture and Alli Capital. You don't  
16 get to make up what your contract rights are. So  
17 that's the first fundamental difference.

18 There is a corollary to that, Judge. And  
19 that is the Plaintiff's apparently believe that they  
20 can allege whatever trading rights and privileges they  
21 would like and those allegations have to be accepted as  
22 true. Again the best and most proximate access is my  
23 favorite example. They seem to say that they could  
24 describe characteristics of their life or what they  
25 could do with respect to trading. Then somehow they

1 can allege that was a right and the Court has to accept  
2 that as true. And once again, Judge, that's  
3 fundamentally flawed. It's against Illinois law and  
4 Delaware law, but it is also very much against the  
5 charters at issues.

6 So my first slide in the front of you is  
7 sort of our first big point. That is that trading  
8 rights and privileges must exist in constituent  
9 documents. The Plaintiffs just don't get to make them  
10 up. And, Judge, I know this might be a little bit  
11 tedious, but you can see it on my slide that it is  
12 really important to see it in the constituent documents  
13 themselves. And so if you have your binder of the  
14 documents that I just handed out, the first tab is what  
15 I am going to call the original charter for CME. What  
16 I mean by that is the charter that went into place that  
17 gave birth to the core rights. So I would like to  
18 direct us.

19 THE COURT: Just to be clear, this is the  
20 2000 original charter?

21 MR. HOGAN: Yes, that's correct. The charter  
22 that is approved and implemented as part of the  
23 mutualization plan and was the first statement of the  
24 core rights. In the binder, Judge, by the way I've got  
25 both the original CME -- charters. I've also got the

1 current ones, which I think are attached to the  
2 Plaintiff's Complaint. In the brief the parties  
3 actually refer to them both. I think everybody is in  
4 agreement there is really no substantive difference as  
5 to the core rights at issue in this case. There  
6 definitely is differences, but I don't think anybody  
7 contends there is differences that matter as to core  
8 rights. So I've got the original. I like looking at  
9 the original because it is when the core rights went  
10 into effect.

11 Looking at Tab A, which is the original  
12 CME charter on Page A-5, and I've got it highlighted  
13 for you in my binder set on Page A-5. Under  
14 Subdivision 3, what's going on here in the chart is  
15 describing about the characteristics of the Class B  
16 common stock, which is the stock the Plaintiff's -- and  
17 under 2, which is highlighted, that says "trading  
18 rights". And I'll just read the first one. I won't do  
19 too much reading along. It says, "Series B1 stock.  
20 The holders of shares of Series B1 stock shall have the  
21 trading rights, including trading for access rights and  
22 privileges set forth in the corporation's by-laws and  
23 rules for its Chicago Mercantile Exchange Division  
24 members."

25 So Delaware law says you have to look to

1 contact. The charter actually tells you where to find  
2 the trading rights that the members have. It is right  
3 there in the charter. And Judge in my binder exhibits  
4 Attach C, let me explain what that is first. That is  
5 the proxy statement. That is used to solicit the votes  
6 for the demutualization. And, Judge, we clearly can  
7 look at that on a Motion to Dismiss because the  
8 Delaware Supreme Court Centaur Partners approved of  
9 looking at proxy statements in the context of a charter  
10 dispute in determining that a contract language was  
11 unambiguous. And it really makes sense when you think  
12 about it. A charter comes into existence. It's voted  
13 on by the members, the proxy statement is given to  
14 them. Centaur Partners looks favorable to the proxy  
15 statements. The by-laws and the rules we just looked  
16 at are specifically referenced in the charter itself.

17 So the entirety of these documents that I  
18 have are by-laws, the rules and the CME proxy  
19 statement, all completely within bounds of the 2-615  
20 motion.

21 THE COURT: 2-615 motion, their equivalent --  
22 wasn't there a Summary Judgment?

23 MR. HOGAN: Centaur Partners, I don't believe  
24 was not a Summary Judgment motion.

25 THE COURT: I thought it was up on a cross

1 motion for Summary Judgment. Plaintiff is shaking his  
2 head yes.

3 MR. HOGAN: Yes.

4 THE COURT: I'll look at that more carefully.

5 MR. HOGAN: For sure Centaur Partners looks  
6 at a charter and says that the language is unambiguous  
7 and allows reference to constituent documents. So  
8 again if you look at the by-laws and the rules, there  
9 is no doubt that the charter provisions specifically  
10 references those. And, Judge, the proxy statement is  
11 what enlightens what the members had in their hands  
12 when they voted on the demutualization.

13 But the proxy statement of 35 also makes  
14 clear that the trading privileges are going to be  
15 encompassed within the rules of the new CME. So the  
16 charter itself as well as the proxy statement makes  
17 clear that to find a trading right you have to look to  
18 a rule.

19 Judge, I've included as well the original  
20 CBOT charter. That is Tab E at G3. So once again this  
21 is the Chicago Board of Trade. If I could, Judge, it  
22 is important to stop here just a moment. The CME and  
23 the CBOT were absolutely distinct enemies. The CME  
24 demutualized in 2000 and CBOT demutualized in 2005.  
25 They were separate exchanges. No common ownership.

1 And the breach of contract claims today for the CBOT  
2 claim to survive, they must be based on the CBOT  
3 Charter.

4 THE COURT: And that's from 2005.

5 MR. HOGAN: That is correct. And with  
6 respect to some of the claims say for instance the best  
7 and most proximate access to Globex, the Plaintiffs  
8 actually served in the opposition brief that you don't  
9 need to look at the CBOT Charter, because all the  
10 rights just became the same with the merger. That is  
11 not true. That is not true at all.

12 So focusing on the CBOT charter on Page  
13 G3, once again we see what were the special rights of  
14 Class B members. And again those are the series  
15 trading rights on Page 1. I will again not read all of  
16 them, but as to Series B1 memberships it says that each  
17 holder, and I'll ellipse some language out, shall be  
18 entitled to the rights and privileges of and shall be  
19 subject to restrictions, conditions and limitations on  
20 a full member as set forth in the Certificate of  
21 Incorporation, the by-laws and the rules.

22 So both charters make very clear  
23 independent. And, Judge, it makes sense, by the way,  
24 that you would have to look to documents to understand  
25 what the rights of members are in these exchanges. I

1 have a demonstrative exhibit. It is not for entry,  
2 Judge, but this is -- I'll tell you this is the 2001  
3 CME Rule Book. It is about two and a half inches thick  
4 it's heavy.

5 My point is, Judge, that if there are  
6 rights and privileges that exist, they need to point to  
7 where they exist in black and white. And significant  
8 parts of this case are based on just their say so.

9 Another corollary to the concept that you  
10 have to see what the contract actually says, the  
11 Plaintiffs appear to contend that the core rights  
12 protect all of their trading rights and privileges.  
13 They say that through some combination of Core Right 2  
14 and 4 or Special Right 3 for CBOT that all of the  
15 trading rights and privileges are protected. That is  
16 also incorrect.

17 So my second slide, "Core rights do not  
18 protect all trading rights and privileges." So we know  
19 that the trading rights and privileges have to exist in  
20 writing and go through the rules and by-laws and core  
21 rights don't protect all of them. How do we know that  
22 the core rights don't protect all of them? I think  
23 that the best thing is just to look at the structure of  
24 the rights that we just examined.

25 So in the CME charter again that is Tab



1 A. If you look at Page A-5 again, that is telling you  
2 that all the rights exist in the by-laws and rules. If  
3 you look at Page A-6, that's where it talks about a  
4 change of modification to have the core rights. And if  
5 you look back on Page A-3, sorry about all the jumping  
6 around. I'll try to make sure you are with me. If you  
7 look back on Page A-3, that is where the core rights  
8 are defined. So, Judge, when you look at A-3 and A-5  
9 it is not reasonable to say that these core rights,  
10 which are defined as something separate from the  
11 trading rights, somehow we are to protect all of the  
12 trading rights that the members ever had. And their  
13 opposition tends to fall into that theory over and  
14 over. If you just look at Core Right 4, it protects  
15 everything that we have. That simply is not a  
16 reasonable construction, and the Court is obviously not  
17 required to accept that construction of the 2-615  
18 motion.

19 So, I think when we -- if you understand  
20 that structure, if one understands that structure, then  
21 you could begin to assess what are the types of claims  
22 that the Plaintiffs are alleging here. And I want to  
23 start with the, as I said, the crown jewel of made up  
24 rights. The best and most proximate access to Globex.

25 The Plaintiffs what they say about the

1 most and proximate access in Paragraph 43, the Second  
2 Amended Complaint, they say "The best and most  
3 proximate access to Globex platform was simply and  
4 consistently treated as a fundamental part of the CME  
5 members trading rights and privileges. The members  
6 were able to access and trade by Globex from the  
7 trading floor and remotely as part of their membership  
8 rights and privileges." That is Paragraph 43.

9 So in assessing that claim, how do you  
10 find such a right? CME Charter Page A-5, the first  
11 thing I have to do is I have to find it as a trading  
12 right in the by-laws of the rules. That is the first  
13 step. They fail at the first step, Judge, because  
14 there is never -- they never point to a rule and they  
15 never point to a bylaw provision that says the CME  
16 members shouting title to the best and most proximate  
17 access to Globex.

18 So that's fatal to their claim once you  
19 understand the waive of the rights are structured.  
20 Even though it is fatal to their claim, we can dig a  
21 little bit deeper on this one.

22 So again the charter at A-5 refers to the  
23 rules or the by-laws. If we take a look at the by-laws  
24 that were put in place along with the Certificate of  
25 Incorporation, that is at Tab B. The by-laws of the

1 Chicago Mercantile Exchange.

2 THE COURT: Are those --

3 MR. HOGAN: Those are for anyone else who may  
4 have wanted them. So, Judge, if we look at the CME  
5 by-laws, and we go to Page 13, Section -- I'm trying  
6 to make sure you are looking at both sets. If you look  
7 at Section 6.3 of the by-laws, lo and behold that's  
8 titled "Trading Rights and Privileges." Just like the  
9 charter says, you look to the by-laws to find out what  
10 the trading rights and privileges are. And I'm going  
11 to do some again ellipsizing, if you look at Letter A,  
12 it says "That the B shareholders will be entitled to  
13 appear on the floor of the Chicago Mercantile Exchange  
14 and act as a floor broker and/or trader for the  
15 contracts assigned to that series."

16 That sounds an awful lot like trading  
17 floor access rights and privileges. It says nothing  
18 about Globex. Globex isn't forgotten, though, because  
19 if we take a look at Subsection B, that says "That the  
20 B shareholder will have the right to trade  
21 electronically through the Globex 2 system." And then  
22 it goes on to restrict the right. "Such right is  
23 restricted when accessing Globex's 2 terminals from the  
24 trading floors to trading only contracts assigned to  
25 that series." Otherwise you can trade any contracts

1 you want.

2 So there is a Globex trading right in  
3 here. But what's absent is any mention in this  
4 by-law or any rule they pointed to that says that the  
5 access rights were somehow better or more proximate  
6 than anyone else.

7 THE COURT: So explain this. When it says,  
8 "Such right is restricted when using Globex on the  
9 trading floor versus some other time". So explain that  
10 to me.

11 MR. HOGAN: Sure. So the really important  
12 piece of the membership structure of the CME and for  
13 that matter the CBOT is that the Class B1 members trade  
14 every product. The subsequent memberships are only  
15 able to trade slices of those products. So if you go  
16 onto the floor and you are a B3 member, you can't go  
17 anywhere in all the pits and trade. It's a fundamental  
18 distinction among the membership categories.

19 So everybody agrees that there were  
20 Globex terminals available to be traded on the pit. I  
21 am sorry, on the floor. And so what they were trying  
22 to do with this is quite obviously, they didn't want to  
23 allow people to use their status as a floor participant  
24 with respect to certain things to allow them to  
25 arbitrage from other pits back to Globex. Does that

1 make sense? And I'll touch on this point right now.

2           The Plaintiffs seems to suggest since  
3 there was an acknowledgment of this arbitrage  
4 opportunity, that that somehow -- the right to best and  
5 most proximate access. It didn't. Arbitrage  
6 acknowledgment is out there, simply says because  
7 members have access to the pits and they could trade on  
8 Globex at the same time, they get an information  
9 advantage by seeing what is going on in the pits and  
10 then trading on the Globex. And their Globex training  
11 is restricted to only the pits that they are allowed to  
12 trade in for that very reason. It is information that  
13 they are taking out of the pits that is valuable. Then  
14 they can arbitrage against that where the market is on  
15 Globex. So that's what that limitation is. But,  
16 Judge, again, boy, that is as close as it come into  
17 saying there is some kind of best and most proximate  
18 access. That is no way to state an affirmative right.  
19 That is a restriction on their ability to trade on  
20 Globex. So they had the ability to trade on Globex.  
21 Nobody disputes that. It was limited. And it's stated  
22 here in Subsection B of Section 6.3, which is separate  
23 and -- Subsection A.

24           So, Judge, we're chasing around do they  
25 have this right to best and proximate access. The

1 answer is still no. They have got to point to  
2 something in writing that says it and they don't.

3 So now, let's just for a second, let's  
4 say we wanted to stretch and say maybe there is some  
5 right here, some trading right to access to proximity  
6 access to Globex. We find that obviously in B of the  
7 chart, I'm sorry, of the by-laws. So there we have to  
8 go back to the charter to see how that fits with the  
9 core rights.

10 So we go back to Tab A and go to Page  
11 A-3. This is where it gets into the core rights don't  
12 cover all trading rights. They don't. So again you  
13 don't have the right to best and most proximate access.  
14 But if they do, where does it live in the core rights?  
15 And the answer is it does not. Why is that? Core  
16 rights, and the only ones that the parties are fighting  
17 about is 2 and 4. Core rights, and I'll go to 2. "The  
18 trading floor access rights and privileges granted each  
19 series, including the commitment to maintain." We'll  
20 talk about that second piece later. Now, remember when  
21 we looked over on Page A-5 and we know the trading  
22 floor access rights and privileges are a subset of  
23 their trading privileges.

24 So again very clearly Core Right 2 says  
25 find me a privilege first, a written one in the rules.

1 But if you look at what the trading access rights and  
2 privileges cover, you would go back to the by-laws in  
3 Section 6.3. This is sort of a punchline. There are  
4 trading floor access rights here. It's in Subsection  
5 A. 6.3(a) says, "They would be entitled to appear on  
6 the floor and act as a floor broker and the trader for  
7 the contracts is assigned to that series." That is  
8 their trading floor access rights and privileges. It  
9 was incredibly valuable to them. That is what Core  
10 right 2 protects.

11 So again, Judge, the best and most  
12 proximate access does not exist as a right. You do not  
13 have to accept that allegation. I think it's a factual  
14 allegation that is highly conclusory. They don't  
15 explain what it means. Even if you assume they had it,  
16 it doesn't exist as a right. It did exist as a right,  
17 it is in 6.3(b) which is not covered by the core  
18 rights. It is the trading floor access rights and  
19 privileges. So the best and most proximate access is a  
20 made up right not covered by the core rights.

21 So I promise all of them won't be this  
22 long. That is the CME piece on the best and most  
23 proximate. But I think it was important to see how the  
24 mechanics worked.

25 With respect to Chicago Board of Trade,

1 it is completely unexplained. I mean completely  
2 unexplained how the Chicago Board of Trade members  
3 obtained the so-called best and most proximate access  
4 right to Globex. The sum total of their allegations as  
5 to how that happened I believe are contained in  
6 Paragraph 70 of the Second Amended Complaint. This is  
7 Paragraph 7 talks about a little history about the  
8 Chicago Board of Trade. In the last sentence of that  
9 paragraph says, "These rights...", talking about all  
10 the trading rights and privileges, "...were  
11 substantially identical to the core rights of CME Class  
12 B shareholders as alleged above and included the best  
13 and most proximate access to CBOT, the electronic  
14 trading systems." That's it.

15           However CBOT got its best and most access  
16 rights, its own trading system we don't know. They are  
17 just alleging it. There is no contract that alleges  
18 it. They certainly don't explain when these two  
19 companies merged in 2007, the CBOT members, somehow  
20 without anybody ever talking about it, obtained best  
21 and most proximate access rights to the Globex system.  
22 Again, Judge, important, separate exchanges, CME  
23 demutualizes in 2000, CBOT in 2005. They don't merge  
24 until 2007.

25           Now the Plaintiffs acknowledge by the



1 time the two exchanges merged in 2007, they say that  
2 the vast majority of trades were executed  
3 electronically. That is the Second Amended Complaint  
4 in Paragraph 8. So you have to ask ourselves, is it  
5 reasonable. They are only entitled to reasonable  
6 inferences here. Unreasonable inferences don't count.  
7 Is it reasonable to say that the CBOT members had some  
8 unstated, undefined right to the best and most  
9 proximate access to their own system? And in 2007  
10 these two separate exchanges merged. And without  
11 anyone ever writing it down, talking about it or even  
12 acknowledging it, even in a world where electronic  
13 trading was now the vast majority of trades, that they  
14 somehow -- their core rights were more -- the access to  
15 Globex, which was still a separate exchange, still had  
16 trading floors in different locations. It makes  
17 absolutely no sense.

18 Judge, the Plaintiffs try to say that  
19 somehow we conceded that all the rights were the same.  
20 No such concession will ever be made. All we pointed  
21 out in our brief is it is not plausible to say these  
22 two exchanges now living in an electronic world merged  
23 in 2007 with no discussion about how the CBOT members  
24 were going to be treated with respect to this right to  
25 Globex. And it doesn't mean that there was disparate

1 treatment. What it tells us is that there was no  
2 secret right for anybody. Not at CBOT. Not at CME.

3 THE COURT: So the 2007 charter took effect  
4 when this merger occurred, correct?

5 MR. HOGAN: Yes, there was an amendment in  
6 2007.

7 THE COURT: There was an amendment in 2007.  
8 Does that cover CBOT or are they still governed by the  
9 2005?

10 MR. HOGAN: They are governed by their own  
11 charter.

12 THE COURT: Notwithstanding the merger.

13 MR. HOGAN: This one is really hard for me to  
14 explain. The Chicago Board of Trade still exist as a  
15 wholly-owned company under the CME Group band of  
16 companies. It has its own Certificate of  
17 incorporation. In fact, that's what is attached to the  
18 Plaintiffs' Complaint. It is the current --

19 THE COURT: That's 2005.

20 MR. HOGAN: -- CBOT charter. But they still  
21 have their own Certificate of Incorporation today. The  
22 Certificate of Incorporation for CME, Inc. exchange it  
23 still exists. But for reasons way beyond what anybody  
24 is fighting about here, the core rights were actually  
25 placed into the CME Group charter, but specifically

1 with respect to the CME Exchange. So I guess the short  
2 circuit, Judge, they are absolutely today two distinct  
3 sets of core rights. One for the CME members. One for  
4 the CBOT members.

5 MS. LAPE: The CBOT Charter was amended in  
6 connection with the merger. So when you said that's  
7 for 2005, the 2005 was a CBOT Charter after  
8 demutualization. After the merger there was a  
9 subsequent amendment. That's what was attached to the  
10 Plaintiffs' Complain. It is also at Tab G in the  
11 binder.

12 MR. HOGAN: Right. The Charters have been  
13 amended. They still sit as one for CBOT and one for  
14 CME.

15 THE COURT: What I have is the last page  
16 mentioned 2007. So I just want to make sure I was  
17 clear on the dates.

18 MR. HOGAN: So, Judge, that's the best and  
19 most proximate access claim for CBOT. It doesn't exist  
20 as a right. They never explained how it exist as a  
21 right. The only thing that the Plaintiffs do now to  
22 try to swoop in this so-called best and most proximate  
23 access is to point to for the CME, they point to Core  
24 Right 2 and Core Right 4. And we already discussed  
25 about how Core Right 2 does not get them there, even if

1 you assume there is a trade right.

2 Core Right 4 in the CME Charter is  
3 something I think is actually fairly straightforward.  
4 And that is at a Tab A-3. So key points, Judge, really  
5 the Plaintiffs case here in large part, because Core  
6 Right 2 and Core Right 4 sit there for CME. You've  
7 only got Special Voting Right 3. They basically try to  
8 make those two core rights the eligibility requirement  
9 core rights. Cover all the ground in this case that  
10 they can't fill through actual contract terms.

11 The problem is Core Right 4 for CME and  
12 Core Right 3 Special Voting Right 3 for CBOT, do a  
13 distinctly, but limited function, with respect to the  
14 eligibility requirements to be a member or exercise  
15 their trade privileges as members. So on my little  
16 slide deck, my next slide talks about how Core Right 4  
17 is designed to prohibit changes to the eligibility  
18 requirements to be a member or exercise the  
19 trading privileges. So just look at the language of  
20 Core Right 4. It starts by saying, "The Core Right  
21 shall mean..." you go down to sub 4, "...the  
22 eligibility requirements when an individual or entity  
23 exercise any of the trading rights or privileges  
24 inherit in any series of Class B common stock.

25 THE COURT: So I see this point and see in

1 the by-laws the eligibility criteria. And I tend to  
2 agree with you. This seems to be defining who is  
3 eligible for exercising this privilege, but what would  
4 that do? What if I accept this notion that this Core 4  
5 only has to do the eligibility, meaning a good moral  
6 character, et cetera? What does that do to this  
7 Complaint?

8 MR. HOGAN: It eliminates most of it. It  
9 eliminates big chunks of it. They call in Core Right 4  
10 to somehow protect all of their trading rights and  
11 privileges. They are going to tell you that best and  
12 most proximate access is protected by Core Right 4.  
13 It's just not.

14 So there is some fee issues with respect  
15 to CBOT that might not be cut out of the claim. That  
16 is a separate -- that is differently a separate  
17 question. I don't know that much of their claim on the  
18 CME side withstands scrutiny once you recognize the  
19 Core 4 is designed to protect the eligibility  
20 requirements. So, your Honor, if you are inclined to  
21 agree with me --

22 THE COURT: No. When I'm saying that, based  
23 on this language, that's what it says. And I read your  
24 argument and I hear it. When you go back to the  
25 by-laws, this is the definition of the eligibility

1 criteria. I was asking if I buy into that and agree  
2 with you, what does that do?

3 MR. HOGAN: It makes the discussion of their  
4 Globex rights very, very difficult. It means that  
5 their argument, which I don't agree with, that they  
6 have the right to have exclusive access to Globex.  
7 That has to go away. As we said, Core Right 2 doesn't  
8 touch Globex. It may make some fee issues left over  
9 maybe for both exchanges, but certainly for CBOT.

10 Judge, so that is -- BMP can't be covered  
11 by the Core Right 2. It is not covered by Core Right  
12 4. With respect to CBOT, again, I'm sort of arguing  
13 the way lawyers argue. There is no way you could get  
14 to the best and most proximate access -- assuming you  
15 are down there and figure out what core right it  
16 covers. There is another glaring problem. That is as  
17 you just point out, there is no Core Right 2 which says  
18 protects this right. So CBOT doesn't have that in its  
19 charter. And the only thing they have is Special  
20 Voting Right 3, which we point out the same thing. It  
21 is absolutely designed to protect changes to the  
22 eligibility requirements for people or leased seats.

23 I do have that on my next slide in my  
24 handouts. CBOT Special Voting Right 3. And there we  
25 can look at the provision of the charter itself and you

1 can look at the rules which incorporated it and which  
2 clearly make clear again what the core right is  
3 intended to protect. No significant increases or  
4 decreases, but certainly increases on the eligibility  
5 requirements. They were trying to protect against the  
6 idea that all of a sudden they couldn't lease their  
7 seats to the same people that they could lease them to  
8 before, or that all of a sudden they would be doing  
9 business in the pits with people who weren't qualified  
10 through the membership qualification process.

11 So that is the plain easy  
12 straightforward reading of what those two cores are  
13 doing. So, Judge, that's best and most proximate  
14 access. I spent the most time on it because it's a  
15 made up right and it is really a fundamental  
16 underpinning of much of their Complaint, but it does  
17 exist as a right. It is not written down anywhere and  
18 it is not protected by the core rights even if it was  
19 construed as a right.

20 I want to talk a little bit about  
21 exclusive access to Globex. This is the part of the  
22 Complaint that I think changed most fundamentally when  
23 we went from the First Amended Complaint to the Second  
24 Amended Complaint.

25 The Plaintiffs now acknowledge that open

1 access happened for Globex in 2000. After the  
2 demutualization vote, but before the demutualization  
3 transaction became effective, CME announced to the  
4 world that it was implementing open access. They made  
5 rule changes submissions to the CFTC in connection with  
6 open access.

7 THE COURT: It is your view that the Board of  
8 Directors could do that on their own without needing  
9 the membership to vote?

10 MR. HOGAN: It's absolutely my view. I don't  
11 think it is Mr. Morrissey's view at all. No, it  
12 absolutely is. The reason why, Judge, and I'll say  
13 sort of this broadly, the CME core rights really didn't  
14 have anything to do with Globex. And when the exchange  
15 was transforming from a mutual member-owned exchange to  
16 a public stock company, the way the old system worked  
17 is that the members have referendum rights. They could  
18 basically overrule or suggest any rule change that they  
19 wanted. So remember how we talked about how the  
20 charter said that your trading rights are found in the  
21 rules and the by-laws. The members had complete  
22 control over that. But when the demutualization  
23 happened, they gave up those referendum rights and  
24 instead obtained the limited protection of the core  
25 rights. Core rights only protect what they protect.



1 And Globex, and who access Globex and how people access  
2 Globex you can stare up and down the core rights, it  
3 has nothing to do with the core rights. The core  
4 rights protect the product allocation, the trading  
5 floor access and privileges, the number of B shares and  
6 the eligibility requirements.

7 Judge, if Globex was supposed to be  
8 covered by the core rights, they already knew Globex  
9 existed. You have to ask the question, why wasn't  
10 there a core right to talk about these Globex rights?  
11 Why isn't there some pointing to a rule that says here  
12 is the rights you have that is now going to be covered  
13 by the core rights?

14 So no, I don't believe at all that it  
15 violated the Core Right Voting Provision when we open  
16 access in 2000. And the Plaintiffs' story, if you want  
17 to believe it, here is what you have to do. The  
18 demutualization vote happens. Two months later the  
19 Board adopts open access, notifies the members,  
20 notifies the public, notifies the CFTC in an act that  
21 basically says, we would like to violate the core  
22 rights. We are going to do it by opening up access to  
23 our system, even though they control it. And in  
24 response, what happened was for 15 years nobody said  
25 anything. If that act violated the core rights, that

1 is what you have to accept happened along the way  
2 before the filing of this Complaint. And again, Judge  
3 they are not entitled to unreasonable inferences about  
4 what happened here.

5 THE COURT: So if that is a reasonable  
6 inference, then the Statute of Limitations are --

7 MR. HOGAN: That's correct, Judge. That's  
8 correct. With respect to simply going to open access,  
9 and of course the way they phrase it now is they are  
10 entitled to all the fees that flow from connectivity.  
11 But if you were to assume, yes, adopting open access  
12 and eliminating Rule 582, which was the mechanism for  
13 some revenue sharing, if you assume that was a dead  
14 bang violation of the core rights, then, yes, you have  
15 a significant Statute of Limitations problem. But I  
16 don't know -- as we sit here today, I don't know if  
17 Plaintiffs really were pleading necessarily open  
18 access, the core rights. It's actually quite clear.  
19 They definitely are now saying they are entitled to the  
20 revenues from open access. Thank you very much for  
21 collecting hundreds of million of revenues. We are  
22 entitled to it. That is their claim today.

23 THE COURT: I'm going to the Plaintiff to  
24 make a note of that and to clarify that on the record.  
25 I'll let you speak for yourself.

1 MR. MORRISSEY: Thank you.

2 MR. HOGAN: So anyway, with respect to  
3 exclusive access to Globex, I won't repeat the exercise  
4 that we just went through with respect to best and most  
5 proximate access to Globex. It all applies entirely  
6 with respect to any claims of exclusive access to  
7 Globex. The only difference, the only difference would  
8 be with respect to best and most proximate access that  
9 right never existed. Whether it ever -- there is such  
10 a thing, it never existed as a right. It is true that  
11 prior to the demutualization and prior to adoption of  
12 open access that the CME was something of a closed  
13 system. It wasn't entirely closed, but it was a  
14 largely closed system. Members, the lessees, the  
15 current holders could trade on Globex and there were  
16 terminal out in the world. There were screens and  
17 Plaintiffs say all this.

18 So again the difference between exclusive  
19 access and BMP -- BMP is completely made up. Exclusive  
20 access has historical rootings, but again it is so  
21 entirely clear that Globex access was not protected by  
22 the core rights. That's why nobody complained about it  
23 for 15 years. And, Judge, it is why particularly with  
24 respect to their -- I say the related claim on revenue  
25 sharing, it is absolutely barred by the Statute of

1 Limitations.

2 THE COURT: What about their notion that this  
3 is a continuing violation?

4 MR. HOGAN: Judge, the Statute of Limitations  
5 is procedural. Illinois law governs. And the courts  
6 have recognized that the so-called Continuing Breach  
7 Doctrine is a defense to the Statute of Limitations or  
8 otherwise informs when the Statute of Limitations  
9 begins to run. So Illinois law applies to that  
10 question. And under Illinois law the cases we cited  
11 does not accept the Continuing Breach Doctrine in  
12 contract cases as a general matter.

13 For torts, it can be. Courts draw a  
14 bright line distinction with respect to contracts. The  
15 only exceptions to that rule relate to installment  
16 contracts or in some cases construction contracts.  
17 Obviously the latter is not what we are talking about.  
18 Even in the case of installment contracts, how can you  
19 construe the revenue sharing as an installment  
20 contract? It is indeterminate. And who knows when  
21 things are to be paid. But Illinois law comes back to  
22 the principle. There is a clear repudiation of the  
23 contract obligation. This then that is a breach. It  
24 is actually at the time that the repudiation occurs.

25 Here we've got a wonderful example of

1 that, in the sense that we have announced open  
2 access -- eliminated 582, which provided the old  
3 mechanism for revenue sharing. So I don't know what  
4 you could do more clearly than say we are going to open  
5 access and we are not sharing revenues any more than to  
6 do what we did in the year 2000. And the Plaintiffs  
7 acknowledge from 2000 onward they say it has been a  
8 continuous breach. But the point is, it was a clear  
9 and unambiguous repudiation. If you accept their view,  
10 they had an existing right in 2000 to prevent the open  
11 access. I don't think the Statute of Limitations  
12 question is valid at all.

13 THE COURT: That is your claim under 619?

14 MR. HOGAN: That is my claim under 619. So  
15 the revenue sharing piece is a little interesting. I  
16 think there is a 615 element to it. That would follow  
17 the reasoning that says there is no contract right  
18 because the revenue sharing structure of CME was not  
19 protected by the core rights. That's a 615 motion.  
20 You have to say core right, point to a trading right  
21 and you have to link those two up. They don't do that.

22 The piece that goes to the 619 element  
23 says all of this was adopted in 2000. The repudiation  
24 was clear and that is a 619 argument. That is correct.  
25 Judge, that is exclusive access and revenue sharing.

1 THE COURT: Let me just ask. Practically  
2 speaking, in 2000 you have the trading floor and you  
3 have the pits. You have Globex right there.

4 MR. HOGAN: That is their allegation.

5 THE COURT: This is going on for many years.  
6 And then -- come into play.

7 MR. HOGAN: That is their allegation.

8 THE COURT: So for all of those years there  
9 was a lot of bodies in the pit and Globex was on campus  
10 sort to speak, there was no revenue sharing going on?

11 MR. HOGAN: Correct.

12 THE COURT: There was no fees being charged  
13 to those Class B holders for Globex?

14 MR. HOGAN: I'm going to have to let them say  
15 what their allegation says, but I don't believe that is  
16 right at all. Their allegations may be that they were  
17 entitled to the fees, everything. I don't know.

18 THE COURT: And this exclusivity you are  
19 saying no one existed once there was open access and  
20 that in fact was being utilized.

21 MR. HOGAN: Oh, absolutely. Once we publicly  
22 announced to the rule changes to the CFTC to allow  
23 direct unlimited access by all participants of Globex,  
24 yes. And for the next -- you know, Plaintiffs, I  
25 think, until this Complaint was filed, electronic

1 systems grew substantially and the use of Globex was  
2 propelled to the largest derivative exchange in the  
3 world.

4 THE COURT: I'll let Plaintiffs answer that  
5 question as to whether there was revenue sharing going  
6 on during that time. And if not, were Plaintiffs  
7 sitting on their hands. Was there open access being  
8 utilized and what was the impetus? The impetus was  
9 moving Globex out to -- that is how I read the  
10 allegation.

11 MR. HOGAN: I agree with you. The one  
12 caveat, I don't know that they allege even before open  
13 access that there was actually in fact revenue sharing  
14 going on.

15 THE COURT: I don't think that allegation is  
16 made. I'm asking whether that was going on, if that is  
17 pled or if it wasn't pled and if there wasn't revenue  
18 sharing going on. Again getting back to this  
19 demarcation back in 2000, why was there no complaint  
20 issued. You said for 15 years everybody went on and  
21 there was no complaints and then comes a rule and that  
22 is when this case comes to a head.

23 MR. HOGAN: The Plaintiffs, their allegation  
24 would lead you to believe that a role was a fundamental  
25 shift. I have to accept that as the way they pled. If

1 we ever get to it, Judge, not even close. But that is  
2 for another day.

3 THE COURT: So currently there is still a  
4 floor albeit much smaller. Is Globex still accessible  
5 from that trading floor?

6 MR. HOGAN: I believe that the members can  
7 still trade Globex from the floor. I'm not entirely  
8 sure.

9 THE COURT: Is that important to know for  
10 purposes of this case?

11 MR. HOGAN: No. I don't believe it is and  
12 here is why. The core rights have nothing to do with  
13 Globex. If the Exchange were to make the determination  
14 that it would not permit any trading on Globex from the  
15 floor, it could do that. It could change the rules  
16 that allow for electronic devices. That would not  
17 implicate any of the core rights. So I don't think it  
18 matters to what extent that Globex trading takes place  
19 from the floor.

20 THE COURT: What if I disagree and think this  
21 Globex is a core right in this sea of trading rights?

22 MR. HOGAN: I hate to answer your question  
23 with a question, but I want to know how do you define  
24 which Globex rights and where you would place it in the  
25 enumerated trading rights and privileges.



1           THE COURT: I suppose if I'm included to  
2 think there is a question, it would be 615 motion.

3           MR. HOGAN: I think, Judge, if you believe  
4 that the core rights protected the exclusive access to  
5 Globex, again it doesn't defeat the 619 piece of the  
6 motion at all. And if there is an unstated right to  
7 the best and most proximate access to Globex, then I  
8 think we have to look again where that right exists and  
9 how do we get up to the core rights. But if you find  
10 that it's trading rights written down somewhere that I  
11 don't know of and covered by the core rights, then I  
12 would have to look at the nature of the Complaint.

13           THE COURT: Plaintiffs don't dispute that  
14 phraseology of exclusive, best, proximate, in this  
15 document. I haven't seen the words in this document,  
16 but their Complaint says this is what went on. This is  
17 what we had and in fact this is what we had by being on  
18 the floor and having Globex on the trading floor and  
19 this is part of our trading floor access rights and  
20 privileges.

21           MR. HOGAN: That is absolutely their  
22 argument.

23           THE COURT: You think it is fatal in terms of  
24 saying best and proximate access does not exist, that  
25 is not a part of this core right which uses that

1 phraseology?

2 MR. HOGAN: I don't think it is part of the  
3 core rights. I don't think it is part of the trading  
4 rights and privileges. Judge, they could have alleged  
5 all sorts of things about alleged advantages or  
6 circumstances about their trading activities. But  
7 again looking at my demonstrative -- these rule books  
8 are immense in terms of what the members' rights and  
9 obligations are. And it is not credible to say that  
10 there is some trading right to the proximity to Globex  
11 when it is never mentioned. And, Judge, it is not just  
12 that people ignored it. We looked at by-law Section  
13 6.3 that said they have a right to trade on Globex. So  
14 Globex was known. There is Globex rules all over the  
15 rule book. The idea that there would be a special  
16 preference for member access, that needed to be  
17 preserved is not credible. We could terminate the  
18 ability to trade on Globex from the floor today and  
19 it's not covered by any core right.

20 It's actually a good segue into what I  
21 wanted to touch on next. And that is, if we accept for  
22 a moment my proposition that the right to invest in the  
23 most proximate access doesn't exist, then one of the  
24 things that the Plaintiffs tried to do to revive that  
25 claim is to suggest that the new Aurora Data Center is

1 a trading floor. What they say about that is that well  
2 the Aurora Data Center is where Globex sits. Its  
3 facility has walls and has a floor and you have  
4 computers that are sitting there next to Globex and  
5 trades, buys and sells are being matched. So it looks  
6 just like the trading floors in existence in 2000 at  
7 the time of demutualization. They omit the important  
8 fact that the Aurora Data Center has no open outcry  
9 trading. It is a data center where computer service  
10 reside.

11 THE COURT: Are there people present?

12 MR. HOGAN: I'm sure.

13 THE COURT: Not tech people or IT people?

14 MR. HOGAN: There is no outcry trading.

15 None. It is a place where data servers are housed.  
16 The rest are here in Chicago. So they say it looks a  
17 lot like a trading floor. We're the only people that  
18 could get on the trading floor. So we are the only  
19 people that should be in the data center. They assert  
20 that again, your Honor, has to accept that  
21 Aurora equals a trading floor, something that you must  
22 accept and I don't agree with that at all. That's as  
23 best a conclusory factual allegation that has to be  
24 tested for reasonableness. I think the first thing to  
25 do is to think about the practical implications of what

1 they are saying.

2           So again, I'm at the point of my argument  
3 where I hope I've convinced you that they don't have a  
4 right to invest in this product, access to Globex.  
5 They never did. They don't have the right to exclusive  
6 access of core rights. But now what they are saying is  
7 that by building the Aurora Data Center, which was  
8 built by a public company. They didn't put any money  
9 into it. The public company built the Data Center. By  
10 moving, again their allegation, by moving Globex to the  
11 Aurora Data Center what we've created was a trading  
12 center. They are the only people who could be in the  
13 Data Center and therefore they now have the best and  
14 most proximate access to Globex.

15           And I think what they say, it is not  
16 entirely clear. If you take the pit analogy, the only  
17 people who can execute trades in the pits are the  
18 members. And so I think what they are saying is they  
19 have the exclusive access to Globex. Globex sits in  
20 the Data Center. We are the only people allowed in the  
21 Data Center. Everybody has to come through us.

22           Judge, again this idea that the Data  
23 Center is a trading floor is nothing but a back door to  
24 trying to get at rights that are not covered by their  
25 existing core rights.

1 THE COURT: The prospectus information and  
2 documents talk about Globex and then they talk about  
3 the trading floor and then they talk about the trading  
4 pits and the trading floors?

5 MR. HOGAN: Yes.

6 THE COURT: Is there a definition provided in  
7 those documents. Because it seems to me that they use  
8 terms like outcry, trading pits and Globex as though  
9 separate. It talks about the open trading that occurs  
10 in the pit on trading floors. It also talks about the  
11 facilities as something different.

12 MR. HOGAN: I think an electronic trading  
13 facility is different than a trading floor. I can  
14 point you to a couple of sections of the proxy in Tab  
15 C. That is Page 7. So under the heading of "Our  
16 Business" talks a little bit about the history. The  
17 second sentence describing the CME and its facilities.  
18 These facilities include physical floor trading  
19 facilities where our members may come together to trade  
20 in a process known as open outcry, and through PMT  
21 Limited Partnerships, an electronic trading facility  
22 known as Globex 2.

23 So right up front -- and they're saying  
24 our physical floor trading facilities is where our  
25 members may come together to trade and process known as

1 open outcry. Very clear language.

2 Further on the proxy statement, this may  
3 be -- it sounds a little more what you were referring  
4 to before, Judge. On Page 62 and 63, at the very  
5 bottom of 62, again this is talking about the exchanges  
6 execution facilities all under one heading. There is  
7 italicized "open outcry trading". And it says "Open  
8 outcry trading occurs in individual pits on our two  
9 trading floors." It goes on to describe what is on  
10 there.

11 On the next page under "Separate",  
12 italicized that, it is describing the Globex 2  
13 electronic trading. That is the Globex 2 system.  
14 Talks about how users can enter orders directly into  
15 the order book.

16 So I think when you look at the proxy, it  
17 is very clear that floor trading equals the place where  
18 open outcry trading is taking place. Judge, there is  
19 also something in the CME Charter that is really worth  
20 looking at with respect to what the parties obviously  
21 understood when they talked about floor trading.

22 And again Tab A is the CME Charter. If  
23 you look at the core rights on Page A-3. Core Number 2  
24 again we've spent some talking about it, says "The  
25 trading floor access rights and privileges granted a

1 series of Class B Common Stock, including the  
2 commitment to maintain floor trading." So Core Right 2  
3 is talking about floor trading as an integral part of  
4 what that Core Right 2 is designed to protect. We just  
5 looked at floor trading is where open outcry trading  
6 is.

7 Let's take a look at that commitment to  
8 maintain floor trading. It is over there on Page A-2.  
9 Just the prior page over. And this is a heading again  
10 that is italicized and it says, "Commitment to maintain  
11 floor trading." It says, "It shall be the  
12 Corporation's obligation as long as an open outcry  
13 market is liquid, to maintain for such open outcry  
14 market a facility for conducting business.

15 And then it goes on to talk about what  
16 they got to do. This is saying the commitment to  
17 maintain floor trading is maintained solely for an open  
18 outcry trading floor. Then there is a liquidity text  
19 down below. That says when you can shut the trading  
20 floors down. And your Honor, may or may not know a  
21 couple of years back quite a few pits were shut down  
22 for quite some time. But it's entirely clear that we  
23 look at the structure of the Charter itself. Forget  
24 the proxy, which is also overwhelming that everybody  
25 understood and when everyone wrote about floor trading

1 in this document, they were talking about the place  
2 where open outcry trading occurred.

3 And again, Judge, I come back to what  
4 the core rights were designed to do. They didn't have  
5 anything to do with Globex. What was going on here was  
6 a demutualization where -- and they say it is in their  
7 Complaint. They allege there is a truth to this story.  
8 That says the demutualization had to be approved by the  
9 floor trading community, the guys in the pits. And the  
10 deal basically was we're going to keep your pits.  
11 We're going to keep your ability to go into the pits  
12 and your access right and act as a floor broker and a  
13 floor trader. We are not going to change around the  
14 product allocation. You can only go in these pits.  
15 We're not going to change the eligibility requirements.  
16 So you can't re-sign your memberships so other people  
17 can go in the pits. Almost entirely about maintaining  
18 the open outcry opportunity that the members had. But  
19 again for the present purposes, the idea of floor  
20 trading could be expanded to include the Aurora Data  
21 Center. That is completely inconsistent.

22 Again, Judge, it is important that  
23 Globex was understood at this time. We were just  
24 looking at the proxy statements. It is not as if the  
25 Globex transaction facility didn't exist. And yet time



1 and again it's referred to as a separate distinct  
2 thing, separate execution facility. The floor is one  
3 thing. Globex is another.

4 THE COURT: So this commitment to maintain  
5 trading contemplates closing the pits if they are not  
6 liquid. Is there any backup provided? In other words,  
7 is there a promise to say if this happens here is what  
8 we will do?

9 MR. HOGAN: When you say "if this", by "this"  
10 do you mean if the pits are closed?

11 THE COURT: Yes.

12 MR. HOGAN: No. No. No. The commitment to  
13 maintain is to keep the pits open as long as they are  
14 liquid. If they are illiquid, they can be shut down by  
15 discretion of management. Then the trading floor  
16 access rights and privileges and the trading pits is  
17 closed. That has happened to certain pits. It may  
18 happen to certain floors.

19 THE COURT: What about Plaintiff's argument  
20 that certain things weren't contemplated or couldn't  
21 have been anticipated, so therefore we had -- we  
22 thought about this, the rights would have been in the  
23 document?

24 MR. HOGAN: I think I just answered that in  
25 large part that Globex was contemplating. Globex was

1 known. The Globex execution facilities were known.  
2 The fact that the pits were there and the electronic  
3 trading was increasing significantly and might one day  
4 render trading in the pits obviously, that was all  
5 known. So Globex wasn't a mystery. The separate  
6 execution facility wasn't a mystery. And the idea that  
7 the parties, if they had just talked about it, would  
8 have provided in essence Globex rights, some of the  
9 pits rights. There is no reason to believe that that's  
10 reasonable. That is not even a reasonable assertion.  
11 And the core rights were carefully constructed to refer  
12 to the trading floor when the trading floor existed  
13 right alongside Globex.

14 THE COURT: So certain Delaware cases that  
15 talk about the Plaintiffs refer to the Dunlap case.  
16 And Delaware cases that deal with breach of implied  
17 covenant of good faith and fair dealing?

18 MR. HOGAN: Uh-huh.

19 THE COURT: Implied covenant attaches to  
20 every contract and we should apply it here to fill in  
21 the gaps.

22 MR. HOGAN: I know they say that.

23 THE COURT: It appears that Delaware law  
24 provides for that?

25 MR. HOGAN: I would say much to the chagrin

1 of Delaware Chancery Court judges who deal with the  
2 breach of contract, yes, it does. There is no such  
3 claim under Illinois law. Judge, the Delaware cases  
4 that I think the Plaintiffs cite certainly are the ones  
5 that we cited made clear that this is an exceedingly  
6 narrow remedy. It is to be used sparingly and is to be  
7 used only in a circumstance where it is clear from the  
8 rights that do exist that the so-called implied rights  
9 absolutely follow along and that no party would ever  
10 think to dispute the implied rights follow along.

11 And obviously the reason Illinois courts  
12 don't recognize the doctrine, it's very difficult. It  
13 is very easy to go down a slippery slope and say we are  
14 not just making up contract rights. So the doctrine  
15 does not exist to create rights that could have been  
16 created, but didn't. It only exists to augment the  
17 existing rights. When it is clear that if the parties  
18 had talked about this, they would have agreed in the  
19 way that the Plaintiffs say they would have. And given  
20 the way that these charters are structured, given the  
21 existence of Globex as a rapidly growing separate  
22 electronic system, there is no way to say that this is  
23 just a gap that people didn't think about. The core  
24 rights were structured specifically to exclude Globex,  
25 because they don't have anything to do with Globex.

1 Not because people didn't think about Globex. It is  
2 not a reasonable inference to say people just forget  
3 about the electronic system when they were constructing  
4 the core rights. And I don't think that the Delaware  
5 cases say that. I think the cases we cite, you can  
6 dispose of that on a Motion to Dismiss when there is no  
7 reasonable reading of the implied rights that they meet  
8 the limited criteria under which they could be implied  
9 under Delaware law.

10 Judge, I want to talk about -- I know I  
11 missed a slide along the way. I'll check and see.  
12 Well, I did. But it said the ADC is not a trading  
13 floor. We just spent some time on that.

14 My next slide I do want to talk about.  
15 That is the fee piece of this case. So I spent the  
16 most time talking about the fee piece of the case.  
17 There is a fee piece of the case. They try to overlap  
18 them. I want to talk about fee preferences for just a  
19 moment distinctly.

20 So the Plaintiffs claim once again for  
21 the CME Plaintiffs, they claim that the core rights  
22 protect a clearing fee preference that existed at the  
23 time of demutualization. The problem for them is that  
24 the core rights absolutely do not provide that  
25 protection. It is just a few page references. I can

1 actually show you again this is no mere omission in the  
2 drafting in the core rights. So my slide, the  
3 important point to bear in mind in the CME case is that  
4 there is no fee preference in the core rights. None.  
5 And we can contrast that with the CBOT Charter which  
6 does at last recognize a requirement that CBOT members  
7 have a right to vote on to the extent there is a change  
8 of rules and by-laws affecting the requirement to  
9 provide transaction fees of a preferential nature to  
10 members.

11 So the CME Charter is silent on fee  
12 preference. And again, Judge, that is not -- that  
13 omission can't be explained away as a scrivener's  
14 error. Judge, if you take a look at the CME -- it will  
15 be nothing to look at in the core rights, because there  
16 is none. If you look at the CME proxy, again that's  
17 Tab C on page -- first I would like to take a look at  
18 Page 25. I'm sorry, 26. It references rule changes.  
19 And again, Judge, this is just to reorient us. As a  
20 result of demutualization, rule changes could be made  
21 by management at their discretion subject to the  
22 protection of core rights. The rule changes exist. It  
23 lists what the block is on the rule changes. Just like  
24 the core rights, you'll see here if you look on the  
25 left side of the column, Class B stock orders will be

1 given the right under the charter to -- changes to --  
2 it goes through a list of things. Fees are not in  
3 there. Preferential clearing fees are not in the list  
4 of things that they have a voting right. These are  
5 core rights. This is another way to phrase core  
6 rights. A fee right is absent.

7 And, Judge, if we could take a look at  
8 Page 35 and 36. I think this is even more visually  
9 instructive. You take actually take the binder and  
10 open it up and holding both pages open, 35 and 36. So  
11 again, if you look on the left side of this page, 35,  
12 that is talking about their trading privileges that are  
13 in the rules. And lo and behold when you look 1, 2, 3,  
14 4 bullets down, there is actually a discussion of a  
15 clearing fee preference. So there is no doubt that  
16 there was a clearing fee preference that is disguised  
17 as a right in the rules. But remember what we said,  
18 the rules could be changed. And the core rights, we'll  
19 check on that. And on that next page when you look at  
20 how the voting on core rights are described, once again  
21 says that the holders would have the right to changes  
22 to specified rights associated with the trading  
23 privileges conferred. And just like the core rights  
24 state, just like the other proxy state, you go down the  
25 list and there is no reference to fees. So it is

1 impossible when you look at Page 35 and 36 to say well,  
2 you know, the clearing fees were a trading right. We  
3 somehow got part of the core right protection. You  
4 didn't. It couldn't be clear in black and white. And  
5 the Plaintiffs efforts to torture the core rights and  
6 say that somehow Core Right 4 in its check on  
7 eligibility requirements protects a clearing fee  
8 preference? It's not credible, Judge. And everybody  
9 knows how to write a protection. It is what you would  
10 say with another core right. I don't want to belabor  
11 the point. It is quite obvious that the CME Plaintiffs  
12 do not have any protection when it comes to fees.  
13 Today CME could eliminate any fee preference it wanted  
14 and discretion like that. No violation. Because they  
15 don't have a core right, there is no breach.

16 Now, as to CBOT, this is where I say in  
17 our brief on this limited point we acknowledge that  
18 there is somewhat of a right here. But the problem is  
19 that they haven't pleaded this case correctly to allege  
20 a breach of their Special Voting Right with respect to  
21 there fee preference. So I think we go straight to --  
22 I'll look at the original CBOT Charter. That is Tab E.  
23 And if you look at Page G-4, which you looked at  
24 before, that is the membership voting rights, core  
25 rights, use those terms interchangeably. And in

1 subsection B-2 -- well let's go up top. I will read  
2 this in because it's important. Section B-2, 2 (b)  
3 says, "In addition to any approval of the Board of  
4 Directors required by the Certificate of Incorporation,  
5 the by-laws or applicable law, the affirmative vote,  
6 holders of the majority of the votes cast, except in  
7 the case of Paragraph 4 below, by the holders of Series  
8 B1 memberships and Series B2 memberships voting  
9 together as a class based on their respective voting  
10 rights and any annual or special meeting of  
11 incorporation...", and here comes the good part,  
12 "...shall be required to adopt any amendments to the  
13 by-laws or rules that in the sole absence of  
14 determination of the Board of Directors adversely  
15 affects. That's a mouthful. That is what you have to  
16 get to.

17                   Number 2, and I'll do some ellipsisizing  
18 here. "The requirement that members will be charged  
19 transaction fees for trades of the corporation's  
20 products for their accounts that are lower than the  
21 transaction fees charged to any other participant."

22                   So that last sentence up there before B,  
23 "Shall be required to adopt any amendment to the  
24 by-laws or the rules that in the sole absence of the  
25 determination the Board of Directors adversely affect



1 this stuff."

2 Now, Judge, we point out that we have  
3 not pleaded any amendment to a by-law or a rule that  
4 adversely affects their fee preference. And they take  
5 us to task for that and say that is just not fair. But  
6 the contract absolutely says what it says and it says  
7 so for a reason. It prevents people from coming in and  
8 just saying our fee preferences were violated. We  
9 would like to conduct millions of dollars of discovery  
10 and see where that gets us. They have to actually  
11 point to something in the rules or the by-laws that  
12 reflects this adverse treatment. And so I don't have  
13 no concern about holding them to the pleading standards  
14 to say they -- a proper breach of the Special Voting  
15 Rights. This complaint simply does not do so. Maybe  
16 they could. I don't know. But they haven't done it in  
17 this pleading. We are entitled to see what is the rule  
18 of the by-law that they are pointing to since they're  
19 invoking special right to B2.

20 And so the CBOT fee claim is subject to  
21 dismissal on 2-615 grounds for that basis. I see what  
22 right they are talking about. But they have not  
23 pleaded it correctly. So therefore they have a breach  
24 of contract.

25 Judge, we talked about the implied

1 counterclaims. I actually think, unless your Honor  
2 have any other questions at this point in time, I think  
3 we have covered the ground that I wanted to cover,  
4 subject to what Mr. Morrissey has to say.

5 THE COURT: You were pointing to the section  
6 of clearing fees. The new CME will continue to -- fees  
7 on clear trades. It says new CME would not charge a  
8 higher clearing fee. The new CME may lower clearing  
9 fees or provide other incentives for other persons.

10 What do you wish the Court to make of  
11 that?

12 MR. HOGAN: That is telling the members what  
13 might happen in the future. It further drives home the  
14 point this idea that there is a fee preference. It is  
15 not clear what it is. What that is acknowledging is  
16 that there was a, and it still is, a business decision  
17 to have a fee preference with respect to members versus  
18 nonmember trades. I think that last piece is simply  
19 saying we can offer -- by the way we might lower, offer  
20 lower fees to nonmembers in circumstances that we think  
21 makes sense. I don't think it says anything more or  
22 anything less than that. But it highlights the fact  
23 that even their clearing fee right that they are  
24 talking about is qualified by management's discretion.  
25 And so its very difficult to see how a clearing fee

1 right with that much discretion could ever be subject  
2 to a core right and maybe that is why it is not.

3 THE COURT: What about the distinction  
4 between the CME and the CBOT dividend portions?

5 MR. HOGAN: Judge, we believe that the CME --  
6 so when you say "the distinction" --

7 THE COURT: There is no dividend rights it  
8 appears?

9 MR. HOGAN: I don't believe there is dividend  
10 rights under either corporations' charters. This goes  
11 most directly to I believe the revenue sharing claim  
12 from the CME members portion of the Complaint. But the  
13 CME certificate is clear that dividends cannot be meted  
14 out to Class B shareholders. They are going to go out  
15 to all shareholders, which is very consistent with the  
16 way Delaware law operates. So what we pointed out in  
17 our brief is that the new allegation in the Second  
18 Amended Complaint the Plaintiffs share in some sort of  
19 a distribution of revenue sharing fees is not  
20 consistent with the way that the common stock structure  
21 is otherwise established.

22 On the CBOT side I believe there is a  
23 similar dividend restriction. I think it is pretty  
24 common. I know it is actually very common to have  
25 those kinds of restrictions in the company stock

1 classes. It obviously prevents exactly what the  
2 Plaintiffs are talking about here, proceeds and profit  
3 sharing public company to classes on a discriminatory  
4 basis, other than what is specified in the charters.

5 With respect to the CBOT Plaintiffs, I  
6 think it must go to the implied claims that there are  
7 certain with respect to revenue sharing or some sort of  
8 revenue sharing. It is not clear how they want CBOT  
9 members to receive money, but we don't believe that  
10 they can.

11 THE COURT: Did the elimination of 582 have  
12 something to do with this --

13 MR. HOGAN: I don't -- 582 was the rule. We  
14 have the old version of it. Under Rule 582, and I'll  
15 explain how 582 works. I'll tell you what they did is  
16 that there were Globex screen rights and they were  
17 limited in number. This is pre open access. This is  
18 historical. There were a limited number of Globex  
19 screen rights. Members could either use their Globex  
20 screen right or they could lease their Globex screen  
21 right or they could do a third thing. They could say  
22 I'm not using it at all. I'm then subject to be in a  
23 pool to receive money from those -- from the lease of  
24 the Globex screen rights. So it wasn't all members.  
25 It was only to members who weren't using or leasing

1 their Globex screen rights. It is much more limited  
2 than what the Plaintiffs say in any event. Again,  
3 there is no allegation that anybody actually ever  
4 received any money from this GSR leasing scheme because  
5 I don't think that would be right. But 587 was  
6 eliminated when we submitted -- when CME submitted a  
7 rule change to the CFTC and now it's open access and  
8 struck 582. It was that -- 582 was going to be out.

9 THE COURT: Just timing wise the members  
10 voted for the demutualization in 2000?

11 MR. HOGAN: Yes.

12 THE COURT: After that occurred, 582 is  
13 eliminated and open access begins and then a month or  
14 two later the demutualization is --

15 MR. HOGAN: Yes, the demutualization vote  
16 occurs. The Board adopts open access and announces  
17 that including submitting rule changes to the CFTC.  
18 When they did that, the demutualization was not yet  
19 effective. At some point then the demutualization was  
20 effective and then open access went into effect.

21 MS. LAPE: That's correct.

22 MR. HOGAN: Again the rules submission  
23 spelled out exactly what was going on. And again there  
24 was an interesting rule book issue. By 2001 582 was  
25 gone. But pursuant to our rule submission to the CFTC

1 it was struck on the rules effective --

2 THE COURT: In your interpretation of the  
3 rules, once the vote happened for demutualization and  
4 then CME notified members of the rule change in this  
5 open access, would those members have had an  
6 opportunity to object, and what would that have -- how  
7 would they have done that?

8 MR. HOGAN: There were referendum rights. I  
9 don't know exactly how you -- the mechanics of  
10 triggering those rights, but members could basically  
11 proposed or change any rule that they wished. And so  
12 rather it was a veto or whether they would institute a  
13 referendum to undue the proposed rule change, yes, I  
14 believe that the members absolutely could have  
15 objected.

16 THE COURT: So they could have pursued the  
17 referendum rights, but once the demutualization was  
18 complete --

19 MR. HOGAN: Then they could not.

20 THE COURT: That was the window?

21 MR. HOGAN: There was a window. I know I'm  
22 harping a little bit, but not only was there no  
23 referendum raised, there was no concern raised and  
24 after the demutualization was effective, there was  
25 nothing until this lawsuit.

1 THE COURT: Thank you.

2 MR. HOGAN: Thank you, Judge.

3 MR. MORRISSEY: I would like to have a number  
4 of slides that I plan to cover, which my colleague  
5 Mr. Hatch-Miller will distribute. I also have, your  
6 Honor, a couple of boards that I'm going to use. It  
7 may be helpful for me to bring that a little closer, if  
8 that is okay with your Honor?

9 THE COURT: Thanks.

10 MR. MORRISSEY: Your Honor, early in  
11 Counsel's argument you touched on a case that I think  
12 is very important to the resolution dispute which is  
13 the Centaur Partners case. Centaur Partners, as the  
14 Court noted, was a Summary Judgment decision. It was  
15 decided on cross motions for Summary Judgment. It was  
16 not a Motion to Dismiss. In that case the parties  
17 agreed that a proxy statement was a piece of extrinsic  
18 evidence that could properly be considered in deciding  
19 the contract. And here there is no dispute that the  
20 proxy statement is among the extrinsic evidence that's  
21 relevant to the interpretation of the contracts. And  
22 we believe that extrinsic evidence, along with the  
23 other extrinsic evidence that we've cited in our  
24 Complaint, certainly supports our allegations which is  
25 all we need at this stage, because after all, we are on

1 a Motion to Dismiss, not closing argument or a Motion  
2 for Summary Judgment.

3 THE COURT: Let me just ask. The third --  
4 the Second Amended Complaint references his sentiments,  
5 they were not attached. They weren't attached to my  
6 copy when we looked at the system. So I want to make  
7 sure that I'm looking at the correct exhibit. I know  
8 that I have them all. They would be in the Charters.  
9 I just want to make sure that I'm clear, did you attach  
10 the 2000 or the 2007 or both?

11 MR. MORRISSEY: The I believe, your Honor --

12 MR. HATCH-MILLER: That was actually an  
13 inadvertent error. The Exhibit 1, Exhibit 2 to the  
14 Second Amended Complaint were intended to be the exact  
15 same Exhibit 1 and Exhibit 2 to the First Amended  
16 Complaint. I don't recall which version it was, but it  
17 is the First Amended Complaint that was not intended to  
18 change the exhibits.

19 THE COURT: Thank you.

20 MR. MORRISSEY: In Centaur Partners, the  
21 Delaware Court cited another case, Wagner vs. Lasker,  
22 which also involves disputed contract language that was  
23 not clear. In that case there had been a dispute of  
24 the contract. The Court ordered discovery on what the  
25 contract meant, depositions of key witnesses and a



1 trial. The determination of what the ambiguous  
2 contract language meant was resolved after trial and  
3 then affirmed on appeal. That's the process that we  
4 believe should happen here. The Plaintiffs have  
5 alleged interpretations of the relevant contracts to  
6 which those contracts are reasonably susceptible. In  
7 their moving papers, one of the first things the  
8 Defendant said is the contract interpretation is an  
9 issue of law for the Court. That's simply not the  
10 case. It is a decision that they backed off of, a  
11 decision of law for the Court that can be resolved on a  
12 Motion to Dismiss. That is not the case. That's not a  
13 position that Defendants maintained in the reply brief.  
14 It is not one that I heard today during their argument.

15 What the law is, both under Delaware law  
16 and Illinois law, and I've cited the few cases in the  
17 first two slides in our presentation is that if the  
18 contract language is reasonably susceptible to multiple  
19 interpretations, the factual dispute must be resolved  
20 by a jury based on a consideration of the extrinsic  
21 evidence. That is the GMG Capital Case from the  
22 Delaware Supreme Court.

23 The Quake Construction case, which we  
24 site on Slide 3 of the presentation is the Illinois  
25 standard which is identical. On a Motion to Dismiss,

1 if the contract language is ambiguous, the Court cannot  
2 resolve it on a Motion to Dismiss. Here CME has  
3 answered the question, the Defendants have answered the  
4 question of whether the contract language is ambiguous  
5 by themselves relying on extrinsic evidence to  
6 interpret it.

7 Today during argument we heard extensive  
8 discussion of the proxy statement as evidence of what  
9 these contracts were designed to accomplish. Those  
10 were the words of Counsel. What the contracts were  
11 designed to accomplish. An assessment of what these  
12 contracts were designed to accomplish depends, yes, on  
13 the proxy statement. But also on the drafting history  
14 of the contracts. And we have taken discovery in this  
15 case for a year and a half. And in that discovery,  
16 we've uncovered drafting history that we believe  
17 supports our position. We didn't plead that evidence  
18 in our Complaint, because Complaints don't plead  
19 evidence. They make allegations.

20 We have taken depositions of key  
21 witnesses who were involved in the demutualization of  
22 the CME. Mr. Oloff and Mr. McNulty. Those depositions  
23 and Mr. Malamic. Those depositions again, they are  
24 evidence. They are not things that you put in a  
25 Complaint. They are the proper subject of Summary

1 Judgment motion or of a trial. We are at the pleading  
2 stage. So we can't rely on that evidence unless the  
3 motion is converted to a Motion for Summary Judgment,  
4 which we believe would be the only way to resolve it in  
5 light of CME's own reliance on extrinsic evidence as  
6 they rely have relied on the proxy statement.

7 THE COURT: Don't you rely on the proxy  
8 statement? You cite in the Complaint these filings.

9 MR. MORRISSEY: We do. We cite the proxy  
10 statement. We cite Mr. Malamic's book or statements of  
11 the principal who orchestrated the demutualization  
12 plan. We cite the demutualization memo authored by the  
13 CFTC, the regulatory body responsible for this industry  
14 in which the CFTC in summarizing CME's representations,  
15 said that CME represented to the agency that  
16 Plaintiffs' rights would remain unchanged after the  
17 demutualization occurred.

18 We cited the fact that the transaction  
19 was treated as a tax free transaction because of  
20 representations that the rights of the Plaintiffs would  
21 remains unchanged after demutualization. So the proxy  
22 statement was amongst the extrinsic evidence of the  
23 Complaint, but it is only one piece of it. But the one  
24 piece of it that would need to be considered along with  
25 the testimony of the witnesses, the testimony of the

1 Plaintiffs, who were the counterparties to this  
2 contract, to assess what a contracting party would have  
3 reasonably understood at the time the contract was  
4 made.

5 THE COURT: Does that make a difference for  
6 my purpose? Ordinarily, I agree with you. I would be  
7 looking at the four corners of the Complaint by virtue  
8 of you bringing in the proxy statement and asking me to  
9 look at them for the purpose of the Complaint, does  
10 that open the door to the Defendants in terms of what  
11 they did here today?

12 MR. MORRISSEY: No. I don't think there is  
13 any authority that allows selective reliance on  
14 extrinsic evidence in dealing with a Motion to Dismiss.  
15 Here the proxy statement is one of a number of pieces  
16 of extrinsic evidence in the Complaint, along with Mr.  
17 Malamic's statements, along with other memoranda that  
18 were drafted as part of the demutualization process.  
19 There is sure a proxy statement the fact that it's in  
20 the file can be the subject of judicial notice. There  
21 is nothing that gives it special privileges in terms of  
22 extrinsic evidence in interpreting the meaning of  
23 disputed contract language. There is certainly nothing  
24 that says you could look at one piece of extrinsic  
25 evidence in isolation from all others to conclude that

1 the Complaint does not allege a breach of contract  
2 claim, which is the proposition that has been advanced  
3 here without citation to any case other than Centaur  
4 Partners which was a Summary Judgment case in which the  
5 parties agreed that the proxy statement there was the  
6 only piece of extrinsic evidence that should be  
7 considered.

8 I think it's helpful to step back to what  
9 this deal was about which we didn't hear a lot of  
10 discussion during Defendants' argument. But this is a  
11 breach of contract case. And a typical -- you start  
12 with what was this deal about? What were the  
13 circumstances surrounding this deal and what happened  
14 that gave rise to this claim? And the Court after, I  
15 believe more than an hour of argument, touched on the  
16 elephant in the room, which was that something did  
17 fundamentally change in the early 2010s, late 2009s and  
18 those were two things.

19 The thrust of our Complaint, one was the  
20 opening of the Aurora Data Center, which Plaintiffs  
21 allege is a trading floor, and we'll get to the  
22 specifics of those allegations in a moment. And  
23 second, that the Defendants' changed the eligibility  
24 requirements for exercising rights of members by  
25 extending trading rights and privileges to people who

1 did not own memberships. In both of those ways, we  
2 believe CME has breached the core rights of both the  
3 CME Plaintiffs and the CBOT Plaintiffs.

4 Now, if we could start with the contract  
5 language which itself -- the language defining core  
6 rights is very broad. Interpreting it requires  
7 consideration of something other than the plain meaning  
8 of the contract. I think that couldn't be more clear.  
9 The parties agree there are two rights at issue here.  
10 The first, the trading floor access rights and  
11 privileges granted to members of the exchange. To know  
12 what that means, you need to look at something beyond  
13 the charter. This language is taken from the charter.  
14 And second, the eligibility requirements for any person  
15 to exercise any of the trading rights or privileges of  
16 the members of the exchange.

17 The Court expressed some scepticism  
18 about the proposed interpretation that Plaintiffs for  
19 Core Right 4 and asked what the eligibility  
20 requirements provisions is about. CME has taken the  
21 position that that position is about imposing a new  
22 requirement that someone speak French to trade at the  
23 Exchange. Imposing a capital requirement that you have  
24 to have a certain amount of capital. That would  
25 violate Core Right 4 to impose some new requirement for

1 trading. But it doesn't say the eligibility  
2 requirements for any person to be a member or to have  
3 whatever rights members have. What it says is the  
4 eligibility requirements for any person to exercise  
5 trading rights or privileges of members. And what we  
6 claim is that by saying you can exercise trading rights  
7 and privileges, even if you don't have a membership,  
8 that is a change of the eligibility requirements.  
9 Before you had to have a membership. Now you do not.  
10 To say that you have trading rights or privileges for a  
11 dozen people or 50 people whereas before you could do  
12 it for one person, that's a change to the eligibility  
13 requirements.

14 By saying that you access the Aurora  
15 Center and trade as a colocated trader at that  
16 facility, you need to pay colocation fees. That's a  
17 change to the eligibility requirements that existed  
18 throughout history at the CME and CBOT floors. And for  
19 years after the demutualization under which members  
20 were allowed to access and trade from those floors  
21 whether electronically or through open outcry. So that  
22 is Core Right 4. Core Right 2 --

23 THE COURT: Let me touch on a point. You  
24 just said Core Right 4 talks about eligibility  
25 requirements to exercise trading rights and privileges.

1 The original 2000 charter used the phrase "eligibility  
2 requirements for individuals or entities to hold shares  
3 or to exercise any trading rights and privileges."

4 MR. MORRISSEY: Or to exercise any trading  
5 rights inherent in a Class B.

6 THE COURT: Inherent.

7 MR. MORRISSEY: Right. So as with the  
8 current version, it had the exercise language and  
9 linked it to the eligibility requirements.

10 THE COURT: Is there at any moment the  
11 phraseology to hold shares?

12 MR. MORRISSEY: No, because it is still -- I  
13 think it's just simplified it. There hasn't been any  
14 claim after that was a change of any significance. I  
15 don't believe it is. It is still in the section of the  
16 charter that describes the characteristics of a Class B  
17 share, the Division B shares.

18 So if I could turn to Core Right --

19 THE COURT: So those classifications of the  
20 Class B shares, where is the best statement of that?

21 MR. MORRISSEY: In the charter for the CBOT  
22 Division B Common Stock Subdivision 3, Class B Common  
23 Stock. It goes through and defines the right  
24 preferences and privileges granted to and imposed on  
25 the shares of Class B Common Stock. Similarly, in the



1     CBOT Charter, which I was going to get to later, but  
2     I'll mention now, the relevant section of the CBOT  
3     Charter starts off by saying that what a Class B share  
4     is, is something that represents the right to trade on  
5     and otherwise use the facilities of the corporation is  
6     the language that is used in the CBOT Charter. There  
7     have been some discussion of whether Aurora as a  
8     trading floor. I don't think there is any dispute that  
9     it is a trading facility. It is a place where people  
10    appear and trade and execute trades. CME, they  
11    described it as a warehouse where trade execution takes  
12    place. They also said in Footnote 24 it would not make  
13    any sense to conclude that one group of the Plaintiffs  
14    was given more rights than the other.

15             And in talking about Core Right 2, CME  
16    refers to the by-laws. And we agree the by-laws are  
17    relevant. They are important. There are pieces of  
18    information that needs to be considered in interpreting  
19    the contract. As do the rules, as we allege in our  
20    Complaint, there were rules at the time of  
21    demutualization that gave members the rights to a  
22    Globex terminal. The right to have Globex terminals on  
23    the floor of the Exchange to trade using those Globex  
24    terminals. So this notion that the rights and  
25    privileges of members at the time of demutualization

1 did not have anything to do with Globex is just  
2 contrary to the fact.

3           What CME is asking is that in a world  
4 where everyone knew Globex was an important part of the  
5 Exchange and that electronic trading would be an  
6 increasingly important part of trading going forward,  
7 that members gave up their rights going forward without  
8 any protections related to Globex electronic trading.  
9 It just defies belief that anyone in the Plaintiffs'  
10 position would have done that. They clearly didn't.  
11 They protected their rights with broadly worded  
12 language that refers to trading floor access rights and  
13 privileges in Core Right 2 and the eligibility  
14 requirements for exercising all of their trading rights  
15 and privileges in Core Right 4.

16           Now, by-law 6.3 lists trading rights and  
17 privileges. We believe that those rights listed under  
18 6.3, the allegation of the Complaint is that those are  
19 included amongst the trading floor access rights and  
20 privileges under Core Right 2. The trading floor  
21 access is one component of Core Right 2, and the  
22 trading privileges is another component of Core Right  
23 2, and that both are protected by that provision and  
24 that the by-law 6.3 spells out the things that are  
25 protected. And by-law 6.3 expressly said to members

1 that they have a right to access Globex terminal from  
2 the trading floor. It is implicit. It says "When  
3 accessing Globex 2 terminals, trading floors, you have  
4 a right to trade whatever products you have. If you  
5 are a full member that means all products. But it  
6 clearly referred to members having amongst their  
7 trading privileges the right to trade via Globex from  
8 the floor, the right to lease their membership rights,  
9 which was an important part of the membership for years  
10 after the demutualization. That's part of what we  
11 would like to get into in discovery here is that there  
12 was a course of dealing where members increasingly  
13 weren't present on the floor, but instead leased out  
14 their trading rights. And the fact that you could  
15 trade from the floor, which was the central locus of  
16 trading activity via Globex, you could lease members'  
17 rights to trade from the historical floor  
18 electronically, is what gave membership value up until  
19 the opening of Aurora. That's when the world changed  
20 and CME decided to take those revenues for itself and  
21 bypass its members.

22 THE COURT: Are you only asking for the fees  
23 dating back to 2012?

24 MR. MORRISSEY: No. On damages there are the  
25 breach related to colocation fees flows from the

1 opening of Aurora in 2012. There is certainly a stand  
2 alone damages claim that seeks to prospectively to give  
3 members the right to access and trade from Aurora and  
4 then lease out the right to do so and the right to  
5 recoup those fees that probably should have been paid  
6 to them as a proponent of their leases.

7 On the preferential trading and clearing  
8 fee claims, those claims date back further. The  
9 relevant changes to the rules that are alleged in the  
10 late '80s, paragraphs of our Complaint, those track  
11 back to 2009 and 2010.

12 Then there is the revenue sharing claim  
13 with respect to 582. I'll get to that later, but the  
14 revenue sharing claim with respect to 582 would date  
15 back to ten years prior to the filing of the Complaint  
16 under Illinois law.

17 So by-law 6.3(d) expressly gave the CME  
18 members a right to lower clearing fees. As we allege  
19 in Paragraph 61 of the Complaint, during these meetings  
20 surrounding the demutualization, Mr. Malamic came in  
21 and promised members that those -- that members would  
22 always have preferential fees vis-a-vis nonmembers.  
23 That was the key feature of membership that it was a  
24 sacrosanct part of membership that would remain in  
25 place. And of course a deal did remain in place up

1 until the late 2000s when CME begin allowing multiple  
2 people to trade under a single membership, allowing  
3 nonmembers to colocate and trade from Aurora when the  
4 world changed. This is not an attack on the CME  
5 business as it developed after demutualization.

6           During nearly a decade after  
7 demutualization, Plaintiffs shared in the benefits in  
8 tandem with CME. What changed is in the relatively  
9 resent pass, CME undermine the promises that it  
10 previously made. Now if I could turn to Slide 5  
11 briefly, this goes to the context surrounding the  
12 agreement and what the world was.

13           THE COURT: You mean Page 5?

14           MR. MORRISSEY: Page 5. This is an image of  
15 the CME floor taken in 2000 around the time of  
16 demutualization. As we allege in the Complaint, this  
17 is by way of demonstrative, but as we allege in the  
18 complaint Globex terminals were integrated in the  
19 floor. Electronic trading took place on the floor and  
20 electronic trading was an integral part of the trading  
21 activities that took place there.

22           We go to the next slide. The deal was  
23 presented as a win win for both members and management.  
24 It was adopted almost unanimously. 98 percent of the  
25 members voted to approve the deal, because they

1 believed they would share in the benefits of the  
2 Exchange going forward. Regardless of whether they  
3 disposed of their A shares immediately. Regardless of  
4 whether they bought -- many members bought B shares at  
5 some point after demutualization. Because of the  
6 commitments associated with those shares and CME's  
7 promises that they would fulfill them going forward as  
8 they did for years with respect to many of them.

9           The next slide, Slide 7, is that  
10 demutualization memo from the CFTC which is cited in  
11 Paragraph 50 of the Complaint which recited that rules  
12 regarding the contract specifications trading on the  
13 floor via an open outcry and trading electronically  
14 through the Globex 2 system would remain unchanged  
15 after demutualization.

16           So that was the background understanding  
17 that members had when the demutualization occurred.  
18 I've covered the language of the rights.

19           Let me step forward to Page 11 which  
20 starts getting into the breaches that are alleged in  
21 the Complaint and a section -- the arguments here are  
22 in large part like two ships passing in the night.  
23 There wasn't -- the claims are set forth in Paragraph  
24 119 and 123 of the Complaint. That is where the breach  
25 of contract allegations are. And in the subparagraphs

1 of those paragraphs of the Complaint, the two causes of  
2 action against -- the cause of action against CBOT and  
3 CME for breach of contract and then the ensuing  
4 paragraphs regarding the breach of the implied covenant  
5 have very specific allegations about how the breaches  
6 occurred. It really breaks into three categories of  
7 plain breaches.

8           There is not a claim that CME breached  
9 merely by allowing open access by allowing people to  
10 remotely access Globex and place orders or make trades.  
11 There is no claim that that's a breach.

12           There is no claim that the right at issue  
13 is one to -- the best proximity and access to Globex is  
14 a feature of being on the floor. That is a  
15 characteristic of floor trading members had after  
16 demutualization and continuing up to the opening of the  
17 ADC. And after the ADC, CME continued to generate  
18 revenues by selling best proximity and access to the  
19 Globex through these new colocation fees rather than  
20 allowing members to receive the benefits of best  
21 proximity and access by leasing their seats, which is  
22 what they had by their ability to trade from the root  
23 of trading activity on the floor.

24           So the first breach that's alleged  
25 relates to the ADC and Globex eligibility and access.

1 And the paragraphs on Slide 13, Page 13 of the  
2 presentation, Paragraph 87 alleges the ADC now  
3 functions as a trading floor. Now that might be a  
4 disputed factual allegation. One thing it clearly is,  
5 is an allegation that's in the Complaint. And if it is  
6 plausible a Motion to Dismiss needs to be denied  
7 because under Core Right 2, as even CME concedes, the  
8 CME Plaintiffs had a right to trading floor access  
9 rights. And as the CBOT Charter makes clear, it  
10 included the right to trade from any facility of  
11 Exchange.

12 Paragraph 89, the ADC became CME's new  
13 trading floor. Paragraphs 119(a) and 123(a) and (b),  
14 the ADC is a trading floor. Now, the question on a  
15 Motion to Dismiss is whether that allegation is  
16 plausible. Is it plausible to conclude that the ADC is  
17 a trading floor? Is the language "trading floor access  
18 rights" or the language in the CBOT charter any  
19 facility of incorporation reasonably susceptible to  
20 interpretation under which the ADC would be --  
21 considered to be a trading floor? We believe it is and  
22 here's why.

23 First the term "trading floor" is not  
24 defined in the Charter. It is not defined in the  
25 Commodity Exchange Act. It's in a glossary that CME



1 cites in its papers as another piece of extrinsic  
2 evidence which shows this isn't an issue that could be  
3 resolved on a Motion to Dismiss.

4 The current glossary from the CME website  
5 with no indication of when that term went up there,  
6 whether that was the understanding that existed at the  
7 time of the demutualization. It has a term of "trading  
8 floor". The definition of "trading floor" is linked to  
9 open outcry.

10 That is not the question. The question  
11 is what would you have understood at the time of  
12 demutualization? When you are a member who has  
13 exclusive rights to any floor, would you have  
14 considered it consistent with your preserving trading  
15 floor access rights? For CME to ten years down the  
16 road open up a new facility, a building where a  
17 substantial portion of trading activity takes place,  
18 where the Globex match engine that was previously  
19 adjacent to the floor is now in that floor. And where  
20 CME makes money by providing people colocated trading  
21 the right to be in that facility and to trade. The  
22 exact thing that people paid for when they bought or  
23 leased a membership.

24 We believe the answer to that is clearly  
25 no. Members would not have -- no one would have

1 believed that they would be consistent with the Core  
2 Rights of members for CME without member approval to  
3 have opened up the facility without giving members  
4 any shares. This isn't asking CME to fundamentally  
5 change its business. All it needs to do is negotiate.  
6 Put this matter up to a vote. Under the CME Charter,  
7 any amendment, change or modification to the core  
8 rights can occur if a member vote is taken.

9 All CME would have needed to do would be  
10 at some point say we have this great new business plan  
11 for a new trading floor, a new electronic trading floor  
12 in Aurora, where we are going to make a ton of money  
13 from selling updated access. It is going to cost us a  
14 bunch of money to invest in that and members, we think  
15 you should approve that because it is in everyone's  
16 interest per the size of the trading or to expand. So  
17 we'll give you some portion of it. They didn't make  
18 that proposal. Instead they just ignored the fact that  
19 members had their rights of any trading floor.

20 THE COURT: So is your position that there  
21 was a breach by opening, moving Globex to Aurora  
22 without member vote and approval?

23 MR. MORRISSEY: Yes.

24 THE COURT: That's a breach.

25 MR. MORRISSEY: Yes. That's breach one. If

1 we go to Slide 15 it is a simple diagram that -- CME's  
2 position that the term "trading floor," here only means  
3 exclusively open outcry trading floors. Our position  
4 is that if CME wanted to sole limit the language, it  
5 could have put in the words "open outcry". Instead it  
6 used the broader term "trading floor", which as we  
7 alleged in the Complaint at the time of  
8 demutualization, there were electronic trading floors.  
9 There was a broader use of the trading floors that was  
10 not limited to open outcry. They understood that their  
11 rights were not sole limited to open outcry.

12 THE COURT: Your position is not that a  
13 breach occurred when they allowed open access?

14 MR. MORRISSEY: We do not allege that  
15 allowing open access as -- and let's be clear on what  
16 that means. That's been part of the confusion. Over  
17 time is that CME adopts a broader interpretation of  
18 open access than we shared. The open access, as it was  
19 approved by the Board in August of 2000 which allowed  
20 people to access Globex remotely, was not a breach.  
21 That is not a breach we're claiming. It's an oddity.  
22 It's certainly something that is peculiar that in  
23 August of 2000 after the demutualization vote, without  
24 any mention in the proxy statement of the fact that  
25 this open access thing was coming down the road, the

1 CME Board approved this without any notice to members.  
2 At the time its significance was not particularly high.  
3 There were then fewer Globex terminals than there were  
4 members. So the open access regime did not become a  
5 significant part of CME's business for some time down  
6 the road.

7           When we get to the revenue sharing claim,  
8 where we diverge on open access whether at the time  
9 members gave up their right to share in the fees  
10 generated by providing nonmembers with access to  
11 Globex, there was no discussion of that when open  
12 access was approved. There was no notice to members  
13 ever that CME would generate fees from giving access  
14 rights to Globex to nonmembers without sharing those to  
15 members. The rule that was in place at the time, Rule  
16 582, which remained in place after the demutualization  
17 closed, so that will remain in the CME rule book for  
18 the next year, it allowed members to share in the  
19 revenues that were generated from providing access to  
20 Globex.

21           THE COURT: So when was Rule 582 deleted?

22           MR. MORRISSEY: I believe it was in the 2001  
23 rule book, but not in subsequent rule books.

24           THE COURT: Wasn't there a notification of  
25 this elimination as early as October of 2000?

1 MR. MORRISSEY: There was a notification of  
2 open axis. There were some documents that referred to,  
3 that listed 582 among the rights that would be  
4 eliminated, but it was not in fact amongst the rules  
5 that were changed prior to demutualization. And we  
6 have not seen as yet and don't believe there was ever  
7 any communication to members telling them that they  
8 would, as part of open access, lose their right to  
9 share in the revenues going forward. If that turned  
10 out to be incorrect in discovery, we would have to  
11 adjust that claim and perhaps not pursue it, but that's  
12 based on a year and a half of discovery, the lay of the  
13 land as we understand it.

14 THE COURT: Didn't CME have to go through the  
15 Commission to get approval of this change?

16 MR. MORRISSEY: Of the --

17 THE COURT: To provide open access?

18 MR. MORRISSEY: To provide open access? They  
19 did have to get approval to allow third parties to  
20 trade. I don't believe they needed to have approval of  
21 the CFTC as to how they would allocate the revenues  
22 generated by trading. Whether they would be able to  
23 pay out all or a portion of the revenues associated  
24 with access fees to Globex to their shareholders. I  
25 see nothing indicating that the revenue sharing

1 component of it requires CFTC approval was amongst the  
2 things that the CFTC considered in approving open  
3 access. Open access was about the access part. The  
4 allowing nonmembers to access -- view the order book,  
5 place trades via Globex.

6 THE COURT: When do you think that this  
7 revenue sharing was eliminated?

8 MR. MORRISSEY: I believe the rule dropped  
9 off the book in 2001. That CME began generating fees  
10 from open access in 2001 or around -- in or around  
11 2001. In the first couple of years the amount of fees  
12 was relatively modest, in the \$12 million range gross  
13 before netting out what the cost of netting out open  
14 access were. And that over time the amount of open  
15 access fees by the late 2000s had grown to in the  
16 \$90 million range. That is what we allege in the  
17 Complaint.

18 THE COURT: So even if that's the case, we're  
19 looking at a ten-year Statute of Limitations?

20 MR. MORRISSEY: Correct.

21 THE COURT: So if I accept your statement  
22 that it was 2001 instead of 2000, even then for ten  
23 years has expired.

24 MR. MORRISSEY: The Statute of Limitations is  
25 what Mr. Hatch-Miller is prepared to discuss in more

1 detail, but we believe, because these are recurring  
2 payments that --

3 THE COURT: This is a continuing violation.

4 MR. MORRISSEY: It's a continuing violation.  
5 Even more than that, it is akin to an installment  
6 contract or a royalty contract where there are ongoing  
7 payment obligations where the general principle is that  
8 if payments would have been due each quarter or each  
9 year during the course of contract performance, you can  
10 get back to the date, however many years, before the  
11 filing of the Complaint is the applicable statute.

12 THE COURT: Where does that installment type  
13 contract exist to say we are going to pay it out  
14 quarterly or annually?

15 MR. MORRISSEY: Before the rule changed, it  
16 would have flowed from Rule 582, the lease revenues.

17 THE COURT: Everybody agrees that 582 ended  
18 whether it was 2000 or 2001. Say it was 2001. At the  
19 latest date it was gone then?

20 MR. MORRISSEY: Yes.

21 THE COURT: When is the next --

22 MR. MORRISSEY: The next -- each quarter CME  
23 reported that Globex access fee revenues, that those  
24 would have been paid to members under the revenue  
25 sharing provision.

1 THE COURT: And that revenue provision comes  
2 from 582?

3 MR. MORRISSEY: Yes, which was eliminated sub  
4 silencio, without any communication to members.

5 THE COURT: So to say the Statute of  
6 Limitations -- really, you have to say that that 582  
7 was a core right and it couldn't be approved?

8 MR. MORRISSEY: Yes, because 582 is in the  
9 section of the rule book. So CME's position is you  
10 can include the rule book provisions, the by-law  
11 provisions that deal with member rights and privileges,  
12 582 is in a section of the rule book entitled "member  
13 trading privileges". So it absolutely was a trading  
14 right privilege to members to share in those revenues  
15 of giving up a piece of what was exclusively their's to  
16 other people. Before allowing other people to trade  
17 via Globex, it's undisputed it was exclusive to  
18 members, and then going under this open access regime,  
19 members would have needed to agree to allow other  
20 people to come in and trade.

21 THE COURT: Wouldn't that breach have been in  
22 582 when that was eliminated?

23 MR. HATCH-MILLER: Your Honor, if I could  
24 just step in real quickly. I think that Mr. Hogan  
25 analogized here to repudiation. I think that the



1 breach is the nonpayment of the revenues on a quarterly  
2 basis. It's ongoing. It's like an installment  
3 contract. And I think CME now, although they took a  
4 slightly different position in their opening brief,  
5 agrees that under Illinois law, which including the  
6 Highlight Products Case which is a 7th Circuit case  
7 that discusses the relevant Illinois cases that the  
8 continuing breach doctrine is recognized in some  
9 circumstances in Illinois. I think Mr. Hogan says it's  
10 only installment contracts and maybe employment cases.  
11 I don't think you are going to find a case that says it  
12 in quite a bright line way like that, but the doctrine  
13 of continued breach is recognized in Illinois.

14 I urge you to take a look at the  
15 Thread & Gage case, which is cited in Highlight  
16 Products. It's a case that's important for exactly the  
17 point you raised, your Honor, which is what happens  
18 when a repudiation occurs, because the removal of this  
19 rule from the above case, in fact a repudiation of a  
20 periodic obligation, and I think the rule that's set  
21 forth in the Thread and Gage case, that case suggested  
22 the date of repudiation is not significant for Statute  
23 of Limitations purposes. Instead in the case of  
24 continuing obligations like this, repudiation has no  
25 affect on the Statute of Limitations. What you look to

1 is core obligations paid or not within the last period  
2 of ten years before the filing of the Complaint.

3 Another case you can take a look at.  
4 This is nonbinding authority by the helpful because it  
5 is a recent case discussing that rule. It's the  
6 Akhert vs. D'avis, which is a little bit of a funny  
7 spelling, D-'-A-V-I-S.

8 THE COURT: Is that the Rule 23 case?

9 MR. HATCH-MILLER: It is an installment  
10 contract Statute of Limitations case.

11 THE COURT: What state?

12 MR. HATCH-MILLER: It's an Illinois case. It  
13 is 2013, Ill. App. 1st 11356-U. It's an unpublished  
14 Sixth District authority from the last few years. It  
15 is a case that discusses that Thread and Gage case and  
16 applies the rule as to what you do with the Statute of  
17 Limitations of the -- repudiation.

18 THE COURT: It is unpublished. Not to be --

19 MR. HATCH-MILLER: Correct, your Honor. It  
20 discussed the Thread & Gage case, the most recent case  
21 that we found that discusses this rule. It is a good  
22 rule that the Court can apply in Illinois.

23 THE COURT: I seem to have diverted your  
24 argument to where you were going. I could come back to  
25 this, but I do find the Statute of Limitations issue

1 critical because I'm trying to point to that date, look  
2 at what the outside date would be and understand very  
3 clearly what your argument is. It seems to be that if  
4 the Continuing Violation rule or exception does not  
5 apply, then you are out of the box for the Statute of  
6 Limitations because the breach would have occurred in  
7 2001 at the latest.

8 MR. MORRISSEY: If either the Continuing  
9 Violation Doctrine or the facts and circumstances that  
10 would give rise to the conclusion this is effectively  
11 an installment contract, if neither of these things is  
12 present, then I agree, the Statute of Limitations  
13 defense would be violated. And that's the key point  
14 that I stress is "defense". It often depends on facts  
15 uncovered in discovery. And here the exact facts and  
16 circumstances about when and how and why it was decided  
17 not to share revenues with members has not yet been the  
18 subject of discovery.

19 When we were before the Court previously,  
20 before Judge Mikva on the Motion to Dismiss, we then  
21 went into this limited discovery related to whether the  
22 contract was so unambiguous that it would be resolved  
23 on this early Summary Judgment motion. We saw during  
24 that base of discovery evidence regarding the course of  
25 performance which is one of the categories of extrinsic

1 evidence of interpreting any contract. Where we landed  
2 was that if the Plaintiffs believed that course of  
3 performance discovery shows something, we could make a  
4 proffer on that part in opposing Summary Judgment. We  
5 have gone back to a Motion to Dismiss. We have to take  
6 up in discovery what course of performance discovery  
7 would be relevant. But I believe it would be relevant  
8 in particular to the potential application of the  
9 Statute of Limitations defense, the revenue sharing  
10 plan.

11 THE COURT: The Court can -- 619 for the  
12 Statute of Limitations.

13 MR. MORRISSEY: It could if it concluded this  
14 was either a continuing breach or an installment  
15 contract that would provide an exception to the Statute  
16 of Limitations. That would be only to the revenue  
17 sharing plan with respect to 582, the CME members.

18 Now, I have covered at some length the  
19 issue of whether we've adequately alleged that the  
20 Aurora Data Center was a floor and the members had  
21 access and proximity rights to the Globex match engine,  
22 both at the time of the demutualization and up until  
23 the opening of Aurora. I have a number of additional  
24 slides that touch on that issue, but I have basically  
25 covered those points unless the Court has other

1 questions on the issue of whether the Aurora Data  
2 Center is a floor. I would be happy to move on to the  
3 second claim which is the preferential fee issue.

4 THE COURT: The by-law, open outcry trading  
5 floors and specifically says we have two trading  
6 floors. And then it has Globex as something separate.

7 MR. MORRISSEY: It is not in the by-laws.  
8 Thank you for bringing me to that. That is in the  
9 proxy statement. And it is interesting -- there are  
10 provisions in the proxy statement which again is  
11 extrinsic evidence.

12 THE COURT: Normally the Court would be --  
13 consider extrinsic evidence. Every argument today has  
14 been about extrinsic evidence and the Complaint refers  
15 to extrinsic evidence. I'm looking at the Complaint.  
16 You don't attach the -- are you citing together these  
17 provisions the proxy statement and the prospectus.  
18 That is voluminous documents. I wouldn't be expecting  
19 you to be citing those in great bulk in your Complaint.  
20 But the fact that you cite reference to them, seems to  
21 open that door.

22 MR. MORRISSEY: It certainly opens the door  
23 to considering them, but only in conjunction with the  
24 other extrinsic evidence, your Honor, which is detailed  
25 in the Complaint would be the subject of discovery.

1           Let's focus on the proxy statement which  
2 is Tab C in the notebook that Counsel handed up. This  
3 is a document that -- let's step back and say what the  
4 proxy statement is. It's a communication from CME to  
5 its members describing what their contract is and why  
6 it believes members should approve it. It's  
7 recommending that members vote to approve this  
8 contract. And CME's position depends on language on  
9 pages 35 to 36 that they cited and discussed at some  
10 length. And their position is that in the section  
11 entitled "Description of Class B Common Stock", the  
12 first section lists trading privileges. And that  
13 language mirrors by-law 6.3 and includes in it floor  
14 access which raises the question of what is a floor.  
15 It doesn't define floor. And there is a question of  
16 whether they were a data center as a floor. It  
17 includes electronic trading rights when accessing  
18 Globex from the floor. That's the second bullet point  
19 on Page 35 of the proxy statement that's describing the  
20 members, why they should approve this deal. The right  
21 to use and lease privileges, trading privileges. And  
22 the fourth bullet, lower clearing fees. That is the  
23 fourth one of these trading privileges that is  
24 described to members here. And as alleged in the  
25 Complaint, this proxy statement was given to members in

1 conjunction with a series of meetings. CME members  
2 management came to members and explained why this deal  
3 would protect their rights. That they would always  
4 have a right to preferential fees, these nonmembers.  
5 There was nothing saying this is only about open  
6 outcry, which is what CME's position is now.

7           Then on the next page -- so you are in  
8 CME's world. You are a member who receives this proxy  
9 statement after you have been at meetings where this  
10 deal was described to you. And then you turn to the  
11 next Page 36. And it says, "Voting on Core Rights."  
12 It says, "Holders of Class B shares will have the right  
13 to approve changes to specified rights associated with  
14 the trading privileges conferred by those shares." The  
15 trading privileges. So if you are a member reading  
16 this, you are saying this Core Right Provision is about  
17 the trading privileges that were just discussed on the  
18 prior page. That's the only natural reading of that as  
19 a layperson receiving this document from management  
20 that they are telling you that you should approve.

21           In those bullets the first core right  
22 which isn't an issue here, the allocation of products.  
23 The second one, "Trading floor access rights and  
24 privileges", is telling the members that if we, CME, at  
25 any point in the future are going to make a change to

1 your trading floor access rights and privileges, you  
2 get a right to vote to approve that change. That seems  
3 fair. In the prior paragraph they just told me that  
4 part of my Class B shares is that I have floor access  
5 rights. That those rights include trading on Globex  
6 from the floor. So that seems perfectly reasonable  
7 particularly when you consider it with the other  
8 extrinsic covenants.

9 In the last bullet point it says, if we  
10 are going to make any change to the eligibility  
11 requirements for exercising any of these trading rights  
12 and privileges. All the things that have been listed  
13 on the prior page, if we are going to make it easier  
14 for other people to do these things or harder for you  
15 to do them, we need to get approval from all of you to  
16 make those changes. So as a member receiving this  
17 description of the core rights, you would absolutely  
18 believe, based on that extrinsic evidence, that the  
19 contract language and the by-laws protected your right  
20 to preferential fees going forward. Protected your  
21 rights in any trading floor, whether it was an  
22 electronic trading floor or open outcry trading floor.

23 Now, the Court did point to the language  
24 later in the document at Page 62, which is where CME  
25 described the facilities that existed at the time of



1 demutualization, the execution facilities. At that  
2 time CME did have two different kinds of facilities.  
3 They had open outcry trading, which was on the floor  
4 and members would be there in person and verbally place  
5 bids and offers. And there was Globex based trading  
6 which likewise was a match engine that was on or  
7 adjacent to the floor, was integrated with the floor,  
8 terminals and handheld devices held by the members.  
9 But also allowed people remote to the floor to place  
10 trades via Globex.

11           What didn't exist at the time was  
12 anything like Aurora. That kind of execution facility,  
13 a new physical building where access to that building  
14 for colocated trading would still be worth a premium  
15 fee. It was something that has market value as it has  
16 in Aurora since Aurora opened up. In a facility, where  
17 trades are placed, and are valuable because of their  
18 proximity to the match engine, the Globex match engine  
19 that was housed at Aurora, just as it had been housed  
20 on the floor. Historically that wasn't something that  
21 existed at the time of demutualization. It did not  
22 exist until Aurora opened. When Aurora opened, the  
23 question arose and this lawsuit was filed sometime  
24 recently, shortly thereafter of whether Aurora was a  
25 trading floor that implicated the rights to trading

1 floor access rights and privileges. And saying to  
2 members, the only way you can come into Aurora and  
3 trade, the only way you are eligible to come in the  
4 door is to pay a colocation fee, even though to be  
5 eligible to come in the door at the historical trading  
6 floors, all you had to do was be a member. So that we  
7 believe is why the proxy statement, which we do cite  
8 extensively in our Complaint, supports our case just as  
9 we site the by-laws in the Complaint. We do believe  
10 those documents are important parts of the story. But  
11 they are only pieces of the extrinsic evidence that are  
12 relevant to the interpretation of the ambiguous  
13 contract language that is at issue in this case.

14 CBOT on the floor. Your Honor, again,  
15 CME's position is that the CME Charter does not have  
16 anything akin to Core Right 2, the trading floor access  
17 rights and privileges provision. But in describing  
18 what member rights are, the CBOT Charter rights, the  
19 contract between CBOT and its members start off by  
20 saying when you get a Class B share, what you get is  
21 the right to trade on, you use the facilities of the  
22 corporation. Historically, that right to show up in a  
23 CBOT facility and exercise the trading rights  
24 associated with your membership was something that came  
25 for free and is part of your membership. You didn't

1 need to pay some colocation fee, which you do now need  
2 to do at Aurora to use those rights.

3           It went on, 41(f) in describing the  
4 trading rights and privileges that the rights, the  
5 trading rights and privileges of members exist on an  
6 open outcry change system of the corporation or any  
7 electronic trading system. And again, Aurora satisfies  
8 that definition of either of the facilities or  
9 electronic trading system.

10           The Special Voting Rights, again  
11 specifically refer to the rights of members in open  
12 outcry and electronic trading systems, and specifically  
13 for CBOT members, provided lower transaction costs.  
14 CBOT's only response on the CBOT rights is that these  
15 rights said that a member vote was required to change a  
16 by-law. And what CBOT essentially is arguing is that  
17 it can change or undermine or eliminate your rights  
18 directly without changing any by-law, by just changing  
19 a business practice and without seeking any vote at  
20 all. But that is not the way that contracts and rights  
21 work.

22           If you have a right under a contract and  
23 your counterparty chooses not to act in conformity with  
24 the right they have given you, you can sue them for  
25 breach of contract and for damages. The fact that CBOT

1 chose not to change the by-laws is on them. They could  
2 have sought to change their by-laws to seek the rights  
3 to go forward, but didn't.

4 THE COURT: The argument, as I understood  
5 Defendants, it wasn't properly pled because you haven't  
6 pointed to this change in a rule or a by-law that  
7 affected this dynamic.

8 MR. MORRISSEY: I think CBOT's argument is  
9 that for there to be a breach of these rights, we would  
10 need to show that CBOT proposed a by-law and/or -- the  
11 by-law didn't pass. It implemented some rule without  
12 giving the members a vote. What we're saying is that  
13 the rights in the contract are broader than that. For  
14 those rights to have any meaning at all, they must be  
15 enforceable if CBOT unilaterally, and without changing  
16 the by-law, changes the relevant business practice.

17 So CBOT's position is, yes, we have an  
18 expressed contractual obligation to give members lower  
19 transactions fees. But we can charge higher  
20 transaction fees to members merely because we haven't  
21 changed any of our by-laws relating to transaction  
22 fees. And if that were right, that would allow the one  
23 party to the contract unilaterally change the meaning  
24 of the contract at anytime and of someone's own  
25 choosing and thereby eliminate the rights which would

1 make the rights illusory. And one of the basic  
2 principles of contract interpretation is that you read  
3 contracts to give them meaning. Here we have express  
4 conference of rights upon CBOT members and those rights  
5 are clearly intended to be meaningful. They were the  
6 basic premise underlying the demutualization of the  
7 CME. The CBOT was the members would retain those  
8 rights. Which brings me to the second category of  
9 breach, which is the preferable fee claim. I touched  
10 on it. The CBOT Charter rights expressly gave members  
11 a right to lower transaction fees. That's perfectly  
12 clear. And the CME Charter, the trading rights and  
13 privileges as we have discussed before. 6.3(d) of the  
14 CME by-laws expressly gave members a right to lower  
15 clearing fees. And what our claim is, both in the  
16 expressed breach of contract claim and in the implied  
17 covenant of good faith and clear dealing claim is that  
18 CBOT and CME have frustrated those rights by A,  
19 allowing nonmembers to trade at member rates, expand  
20 the scope of the membership such that multiple people  
21 can trade under a single membership. B, allowing  
22 nonmembers who don't own or lease a membership, to  
23 trade that are as good or better than the members  
24 obtained. And C, giving discounts to certain  
25 categories of traders to give them fees that are better

1 than the rights that the members generally pay. And D,  
2 by charging colocation and access fees that make a fee  
3 preference meaningless.

4 THE COURT: What does the colocation fee have  
5 to do with the transaction fees or the clearing fees?

6 MR. MORRISSEY: For people who want to trade,  
7 where CME itself has concluded it is much beneficial to  
8 trade which is at the new trading floor where you have  
9 access to the match engine. You are able to trade from  
10 the floor and you are able to process trades more  
11 quickly. That's why people pay these colocation fees.  
12 They say the members, sure you get member transaction  
13 fees, but you can only get those if you pay a  
14 colocation fee first, that that undermines the -- makes  
15 the fee preference meaningless. It is another reason  
16 why that is a violation. We allege that business  
17 practice is a violation of several things. That is one  
18 of them. That it's a violation of fee preference to  
19 charge colocation fees that make the fee preference  
20 meaningless.

21 THE COURT: The documents are the transaction  
22 fees and this colocation fee is real. Its own -- it is  
23 different. Don't the clearing fees happen when there  
24 is a trade and there is buy and sell? This fee that is  
25 going on in Aurora is something different, I would say.

1           MR. MORRISSEY: And that's part of the reason  
2 that that claim is spelled out -- the colocation fee is  
3 a new animal. It is something that has come into place  
4 with the expansion of the electronic trading in Aurora.  
5 It has become a new business line for CME. That if the  
6 parties had contemplated at the time of contracting,  
7 they certainly would have -- members so they wouldn't  
8 have agreed that their right to transaction fees that  
9 were preferential that CME promised would be meaningful  
10 would be rendered meaningless through the addition of  
11 colocation fees.

12           THE COURT: Do your client still have the  
13 ability and the right to go to the trading floors at  
14 the pit and trade if they want to in open outcry? I  
15 assume some do depending on what they're trading.

16           MR. MORRISSEY: The outcry market is still  
17 open.

18           THE COURT: And is Globex still there on the  
19 floor?

20           MR. MORRISSEY: The Globex match engine is  
21 now located at Aurora.

22           THE COURT: So those in open outcry don't  
23 have the ability to access Globex unless it's through  
24 Aurora?

25           MR. MORRISSEY: There are facilities. There

1 is a downtown colocation facility that gives really,  
2 really good access to Globex, but not as good as you  
3 get at Aurora. We touched on this in the Complaint.

4 THE COURT: That is the one that says  
5 Cermack.

6 MR. MORRISSEY: 350 Cermack. That is a  
7 facility that CME built out and is giving nonmembers  
8 rights to show up at that facility and trade without  
9 giving those rights to members. And that undermines  
10 members' rights too.

11 THE COURT: I just want to make sure I'm  
12 clear. Are traders physically going to Aurora or to  
13 Cermack to trade, or is it just their equipment that  
14 they are accessing and they are doing it wherever they  
15 want?

16 MR. MORRISSEY: That is something that we  
17 have been somewhat frustrated in figuring out exactly  
18 how the mechanics of it are. We know that colocation  
19 is something that allows someone to pay a fee to have  
20 space that's their's at Aurora to execute trades. And  
21 that some people will go there to. And we don't know  
22 how often people go there or what exactly they do  
23 there. We do know that it has the key features of a  
24 trading floor which are a place where bids and offers  
25 are matched. Trades are executed and trading activity



1 occurs within a physical facility. That's the  
2 definition of a trading floor that we use, the open  
3 outcry.

4 THE COURT: Someone has to do the matches.  
5 Someone has to be the mastermind behind that is human.

6 MR. MORRISSEY: Some human needs to create a  
7 matching algorithm and they may -- how often any  
8 individual tweaks their algorithm on any given day, you  
9 know, take buy and sell orders physically from space  
10 within Cermack or Aurora, those are facts that we --  
11 they aren't within the Complaint. They would need to  
12 be a subject of a discovery. And the facts obviously  
13 as we get into discovery --

14 THE COURT: Your allegation is Aurora is a  
15 trading floor. I'm going to take that pled fact as  
16 true. You say even though there are computers, Globex  
17 is there.

18 MR. MORRISSEY: That was also true at the  
19 historical trading floor on Wacker. There were open  
20 outcry traders there, but there is also people who  
21 lease memberships, installs computers, traded through  
22 the computer just as they do at Aurora. Because the  
23 match engine was located there --

24 THE COURT: That is what I'm asking you. Are  
25 your clients sitting in Aurora like they were sitting

1 down next to the pit.

2 MR. MORRISSEY: Out clients leased out their  
3 membership to people who could benefit to proximity to  
4 access by installing computers at or near the pit. If  
5 they had colocation rights, they likely would have  
6 leased their memberships to people who would have  
7 collocated to Aurora just as they had collocated at the  
8 historical trading floor.

9 THE COURT: How does it match up with open  
10 access? Because open access wasn't around years ago.  
11 Was that the invitation for the Plaintiffs to see what  
12 was coming? They announced open access? How is this  
13 different?

14 MR. MORRISSEY: This is different in that the  
15 way the market has evolved. It is still important to  
16 have a floor. That may not have been the case. It may  
17 have been that electronic trading would develop in such  
18 a way that it would be entirely cloud based. It  
19 wouldn't be the kinds of latency in prices discovery  
20 and just historically got added trading floors. But  
21 what has happened is that CME concluded that you still  
22 had market benefits by having a floor, a physical  
23 facility with a match engine where people paid for the  
24 right to trade from that facility.

25 THE COURT: What are your best paragraphs in

1 your Complaint that pleads these facts?

2 MR. MORRISSEY: Begins on 83 which describes,  
3 how members benefited from electronic access on the  
4 historical floors. And the main, as I was discussing  
5 that one of the main purposes of an exchange is to  
6 reduce the communication lag or latency period between  
7 an offer and acceptance and that members historically  
8 could get those benefits by leasing it to members. And  
9 then it continues into 84, because members were sharing  
10 in those benefits until the opening of the Aurora,  
11 their lease value and seat values increased  
12 substantially. And then on 85, the Aurora was a change  
13 to this because this new concept of colocation where  
14 rather than treating, rather than doing this on the  
15 floor, on the historical open outcry floor, they build  
16 are a new floor.

17 THE COURT: This lead to your Paragraph 90  
18 where you say, we had best access and closest  
19 proximity, this right and privilege to do so before  
20 demutualization and we don't have that anymore.

21 MR. MORRISSEY: Yes. And 86 and 87 are the  
22 ones that expressly allege that ADC is a floor in some  
23 detail. 89 as well. 128.

24 THE COURT: All the paragraphs you are  
25 referring, I want to specifically point to this

1 argument to that section.

2 MR. MORRISSEY: Understood. I believe I  
3 covered the preferential fee point and how it is  
4 grounded in the contract language. I believe on each  
5 of these claims the contract language is ambiguous. It  
6 is reasonably acceptable to the interpretation we're  
7 offering that whether our interpretation is the more  
8 acceptable one is the one that could be resolved by the  
9 trier of fact, based on all the evidence that develops  
10 in discovery rather than the very much partial and  
11 limited record that is before the Court on the Motion  
12 to Dismiss.

13 Mr. Hatch-Miller was prepared to address  
14 the relief claims that were the subject of the opening  
15 argument. I don't know if the Court is interested in  
16 hearing the argument on that or not.

17 MR. HATCH-MILLER: Your Honor, just briefly.  
18 There were two points raised in Defendants' motion  
19 regarding our alternative request for relief. I think  
20 it is premature for the Court to address either -- you  
21 have heard a lot about the substantive claims of  
22 breach. But obviously we've pled several different  
23 forms of relief. One if ordinary contract damages,  
24 both backward looking and forward looking. We also  
25 have a request in our Complaint for disgorgement and

1 obviously no one at this stage have experts talking  
2 about what the proper measure of damages is. So that  
3 is why I say this is a bit of a premature issue.

4 At the disgorgement, I think Defendants  
5 have hooked on to the fact that we used that  
6 description in our Complaint. We pled it as an  
7 alternative theory of relief. As discussed in our  
8 response to the motion and that there is a slide on  
9 this at the end, you need to rely on this at the end.  
10 You don't have to look at it now, but you can reference  
11 it later. There is authority for allowing disgorgement  
12 as a measurement of contract damages in limited  
13 circumstances. It's a very fact specific issue.  
14 Admittedly, there is no Illinois authority directly on  
15 point either accepting or rejecting this principle. So  
16 the Court would be on somewhat new ground. That is why  
17 I think also specifically something that shouldn't be  
18 addressed this early. That so that is the third  
19 restatement of disgorgement. It's also been adopted by  
20 the Colorado Supreme Court and some others and you  
21 could look at the cases cited in the handout.

22 The cases that Defendants cited on that  
23 point one is an Appellate Court case. The HF Prince  
24 case, which isn't about whether disgorgement is  
25 available as a contract remedy. It is just about

1 whether the Plaintiffs pleaded a claim for unjust  
2 enrichment. We don't have a separate unjust enrichment  
3 claim. So that case is not on point.

4           The authority they cite, the IPCS  
5 Wireless decision. It does support -- the Defendants  
6 correctly cited because it adopts their view that you  
7 need to basically plead an unjust enrichment claim to  
8 get disgorgement damages. We just think that is not  
9 the proper question. We are not asking for an unjust  
10 enrichment claim. It's a legal question about the  
11 availability of disgorgement as a contract remedy. And  
12 that's a trial court level decision. I don't even  
13 think it is a published decision. It is certainly not  
14 binding on the Court.

15           The other issue is the request for  
16 forward looking injunctive relief. Again this is an  
17 alternative pled form of relief. At the pleading stage  
18 all we need to do is plead the facts that show that the  
19 legal remedy of damages may be inadequate and that the  
20 Plaintiffs may suffer irreparable injury. And the  
21 point of this contract, as Mr. Morrissey discussed in  
22 details today, was to ensure members that they would  
23 have rights that would remain in place unless certain  
24 procedural steps were taken. And so that's why we have  
25 a request for relief in this case to restore the status

1 quo with regard to things like the ADC and to take a  
2 member vote.

3 THE COURT: What would that status quo be?

4 MR. HATCH-MILLER: So with regard to the ADC,  
5 it would be to allow members the exclusive right to  
6 occupy that space and lease out the space subject to  
7 the member vote. As Mr. Morrissey said, this is a  
8 matter that could be put to a member vote.

9 THE COURT: Exclusive access. Go back to  
10 open access. Doesn't that term exclusivity on its  
11 head?

12 MR. HATCH-MILLER: I don't think so, because  
13 the distinction that Mr. Morrissey drew that the  
14 Defendants missed is when access was opened, it was  
15 from remote locations. There was never a period when  
16 nonmembers could use those electronic machines which  
17 were located approximate to the matching engine. And  
18 that really is the feature that is discussed in  
19 Paragraph 128 of the Complaint that makes trading from  
20 a location proximate to the floor different. Nobody is  
21 arguing at this point in the case that there should be  
22 an injunction preventing nonmembers from using Globex  
23 through remote connections, but the specific issue here  
24 is can nonmembers use the building that was created  
25 specifically to allow people to obtain the speed and

1 information benefit of being close to the matching  
2 engine which is a different issue than ability to trade  
3 electronically from your laptop in your home or office.  
4 That is what open access is about.

5 On this injunctive relief, your Honor, we  
6 don't have to plead any kind of magic words. We just  
7 have to plead facts. I urge you to look at Section  
8 112, Paragraph 112 of the Complaint where we plead what  
9 Illinois law requires which is not necessarily that  
10 damages are going to be inadequate. I'm sure if we get  
11 to that stage the Defendants will have all kinds of  
12 arguments about why are damages measured in -- but we  
13 plead in the alternative that the value of the  
14 membership could not be fully recovered through damages  
15 alone. As Mr. Morrissey suggested, really the issue  
16 here, especially with regard to the ADC is that we  
17 don't know exactly how membership prices are being  
18 affected by the fact that CME is controlling access to  
19 this space in this facility rather than members leasing  
20 out those rights. Again it is an alternative theory of  
21 remedy that need not be addressed at this stage.

22 THE COURT: Let me see if there is any point  
23 that I want you to cover since CME gets the last word.

24 Plaintiffs have completely left  
25 unexplained how CBOT would have the best and proximate



1 access to Globex. There is no explanation as to how  
2 they even got this access to begin with. Can you  
3 explain that?

4 MR. MORRISSEY: Yes. That is the features of  
5 the CBOT share that what a CBOT class membership -- was  
6 the right to trade on and otherwise use the facilities  
7 of the corporation. That those rights included the  
8 trading rights and privileges. And historically those  
9 rights included going to an open outcry floor. But  
10 here it expressly included any new facility that the  
11 CBOT may open. That Aurora is a new facility. And  
12 like all other facilities that CBOT had opened, CBOT  
13 members should have had the right to access and trade  
14 from that facility as part of their membership rights  
15 and without a new condition which was the payment of a  
16 colocation fee, which diverted value from the members  
17 who otherwise would have realized in the form of lease  
18 fees to CME. That right that the CBOT members had is  
19 grounded in the language of their charter and  
20 historical practice of that being included in the  
21 rights and privileges to trade from any facility of  
22 extension.

23 THE COURT: Do you agree that the CBOT  
24 Charter governs the CBOT?

25 MR. MORRISSEY: Yes.

1 THE COURT: And there was a 2005 charter and  
2 that was amended in 2007?

3 MR. MORRISSEY: Yes.

4 THE COURT: All right. Thank you.

5 MR. MORRISSEY: What is the difference  
6 between open access in Aurora in terms of exclusivity.  
7 I think it is this. That open access itself did not  
8 pose a threat to the members because members still had  
9 exclusive access to the trading facilities, physical  
10 building that provided the best access to the match  
11 engine and the ability to execute trades as quickly as  
12 possible to discover price information from that  
13 facility better than anyone else. And whether you were  
14 doing it electronically through the Globex machines and  
15 match engines located on the floor or through open  
16 outcry, as a member you had an exclusive right to  
17 access that facility. Open access didn't change that.  
18 Open access didn't undermine the value of memberships  
19 for ten years after demutualization. Membership values  
20 continued to increase.

21 What changed is Aurora where CME took all  
22 of the features of the historical trading floor except  
23 open outcry and put them in a new physical facility  
24 where trading takes place, trades are matched and the  
25 match engine occurs and people pay a premium, just as

1 they historically did for memberships and membership  
2 leases.

3 THE COURT: Thank you.

4 MR. HOGAN: We'll try to be brief. As I  
5 predicted an awful lot of what you heard is rights were  
6 not defined. The Plaintiffs did not respond at all to  
7 the argument. But really the elucidation of the  
8 structure of the way the trading rights exist and the  
9 core rights exist. So we heard an hour, but we didn't  
10 hear anything where it was an identification of where  
11 the supposed Globex rights could be found and  
12 understood.

13 When I started the day, when I pointed to  
14 this CME Charter, it talked about how the trading  
15 privileges will be defined in the by-laws and the  
16 rules. That is an important point that can't be  
17 overstated in terms of assessing what it is that the  
18 Plaintiffs are talking about here. So they are  
19 continuing, which I expected, but it was striking to  
20 hear rights being made up without reference to -- here  
21 is where you can understand these rights in the  
22 by-laws. It doesn't exist.

23 The case as Counsel now explained it  
24 seems to turn exclusively on the rights and the best  
25 access to Globex. And the argument that I will touch

1 on in a second about how the Aurora Data Center is a  
2 trading floor. It is really just a proxy to somehow  
3 create the right they have to the best and most  
4 proximate access to Globex.

5           Again, Judge, this isn't an implied  
6 covenant claim. It is something that couldn't be  
7 foreseen. As Plaintiff acknowledged, as we all  
8 acknowledged, the ability to trade on Globex existed.  
9 That was established as one of their rights. And  
10 people understood that Globex was traded on the floor  
11 and traded remotely and that there is never a  
12 discussion, not in their charter or not in any of the  
13 documents that the Plaintiffs point to that their  
14 Globex rights included the right to be best in the most  
15 proximate access.

16           At best, the Court has to listen to their  
17 allegation that they had that. And even Counsel said  
18 as he -- not all characteristics are rights. This  
19 right as they are describing it is striking that it  
20 does not exist. They can't point you to anything that  
21 says here is how we know that they had this. So that  
22 is the first point.

23           The second point that I also foreshadowed  
24 is the discussion, not to be critical, but was  
25 completely confusing in terms of what are the trading

1 rights versus what are protected by the core rights.  
2 One point in time your Honor asked was the elimination  
3 of 587, the violation of the core rights that wasn't  
4 answered. Counsel went off on a discussion about how  
5 certainly the GSR rules and the rules related to Globex  
6 rule Books, they said were part of their rights.

7 So I would urge the Court to bear in mind  
8 the distinction between what might have been rights and  
9 core rights. And this entire transaction was about  
10 protecting specified rights through the core right  
11 protections. Everybody understood because it is clear  
12 in the documents that this was going to involved a  
13 shift from the rule-based approach where the members  
14 controlled all the rules to a new corporation where the  
15 rights were subject to management's discretion, except  
16 in the core rights. And, Judge that comes from frankly  
17 discussion of the 35 and 36. You just have to look at  
18 the structure of the charter itself. It is not  
19 reasonable. It's not plausible to say that all of the  
20 trading rights and privileges are protected by the core  
21 rights. If that was the way it was intended to be  
22 constructed, they would have said very simply the  
23 members get a chance to vote on any change to trading  
24 rights and privileges. That would have been very easy.  
25 And the structure set forth in the charter makes it

1 entirely clear that the core rights cover a subset, a  
2 specified set of the trading rights. As we look at the  
3 by-laws which existed at the time, the trading floor  
4 access rights are distinct from and separate from  
5 Globex rights. That is by-law Section 6.3. It is also  
6 clear that when you look at Page 35 in the proxy.

7 By the way, Judge, I'll divert, it is  
8 totally reasonable to look at the proxy. You are  
9 correct as to the procedural posture. The reason I  
10 overlooked looked is that the ruling -- the Court found  
11 that the charter was unambiguous and it looked to the  
12 charter and the by-laws and the proxy and it tells you  
13 that there is something unique about the documents that  
14 we relied on here, the charter, the rules, the by-laws,  
15 the proximate. There is one more. But that is the --  
16 that is what we're talking about.

17 Plaintiffs, the first part of the  
18 presentation was really just don't decide this today  
19 because we need to go off and conduct a lot more  
20 discovery. It is misplaced. The question for the  
21 Court is, is the contract unambiguous? And if you look  
22 at the construction, I can tell you, these contracts,  
23 unambiguously do not provide for the made up Globex  
24 rights that they are talking about. That is all we  
25 need to answer on this Motion to Dismiss.

1                   Judge, the idea that the Aurora Data  
2 Center is a trading floor, that again now appears to be  
3 where they are staking their entire claim. What I did  
4 not hear was any discussion about how you would read  
5 that in the context of the charter itself. And I would  
6 encourage your Honor again to look in the charter of  
7 how the initial trading or access rights and privileges  
8 included the commitment to maintain the floor trading  
9 and how you see in the charter when you look at it, it  
10 says floor trading. And then it describes how floor  
11 trading is a facility for open outcry trading.

12                   The Aurora Data Center is a trading  
13 floor, the defining characteristic of the trading floor  
14 as it's understood, as it's written in the charter, as  
15 it is written in the proxy, this is a facility where  
16 human beings come together and engage in open outcry  
17 trading. I don't think you can look at that charter  
18 and maintain floor trading and that proxy and business  
19 description up front and have any other conclusion that  
20 everybody is talking about the two trading floors where  
21 open outcry trading existed when they wrote these  
22 protections.

23                   Judge, we did site the CBOT  
24 glossary. I didn't raise it, but Counsel raised it.  
25 If you think that goes outside the pleadings, then we

1 ask to disregard it. I think that the Illinois law is  
2 clear that you could look at the dictionary  
3 definitions. This is a going to be a bit of a loop,  
4 but when you look at the dictionary, a glossary is  
5 defined as a dictionary in a specialized sense. So we  
6 pointed to the glossary that is online published by the  
7 Commodity Futures Trading Commission. That's the  
8 federal regulator that oversees this entire market.

9 THE COURT: I got the impression that it was  
10 something that CME put on their home website and made  
11 it up recently?

12 MR. HOGAN: No, no, no. That's the Commodity  
13 Futures Trading Commission. That's the federal  
14 regulator. That is in their glossary. No, we did not  
15 put that on our website. That is the CFTC's website.  
16 And, Judge, counsel said, well, we don't even know when  
17 that was put up. It might have been put up recently.  
18 Well, I don't know, but if it was just put up recently,  
19 it underscores the point. That means that today  
20 knowing that there is electronic trading, knowing that  
21 there is colocation, the CFTC is telling us a trading  
22 floor is a place where people come together and execute  
23 open outcry trading.

24 So I didn't even look at it and I think  
25 it is really persuasive. With all the advances in



1 technology there are clearing stations between what is  
2 trading floor and what is an electronic trading  
3 facility.

4           So I think -- again, I think you could  
5 look at it. I think, frankly, just at the charter  
6 itself, and the way that electronic rights are  
7 separated from the floor rights and the way the trading  
8 floor rights talk about the commitment to maintain the  
9 floor, which in turn depends on open outcry trading, I  
10 don't see anything that supports conclusionary  
11 obligations that the Aurora Data Center is trading for.

12           I think if you agree with that  
13 assessment, then argument go by the board, because they  
14 have no best and most proximate access. And if the  
15 Aurora Data Center is a data center they don't have any  
16 special right to bring their own people in. Which  
17 would be fairly remarkable if they were. Ten to  
18 hundreds of millions of dollars solely and members are  
19 the only ones to be in there. It is fundamentally  
20 consistent with the way that the trading floor was used  
21 in the charter at the time of the demutualization.

22           Judge, Rule 582 really quickly, I think  
23 first of all, I'm going to stand totally on the breach  
24 doctrine that is not recognized in contract claims in  
25 Illinois. Installment contracts are maybe an

1 exception. Construction contracts wasn't employment.  
2 That is non of these things. What I do have, I thought  
3 I have, is I can tell you for sure CME notified the  
4 CFTC on October 10, 2000. That Rule 582 would be  
5 struck as a part of implementation of the -- related to  
6 the open access. What is interesting, but this is a  
7 rule submission, and Rule 582 is struck in its  
8 entirety.

9 THE COURT: I believe I'm aware of that  
10 because it is part of the file.

11 MS. LAPE: It is part of the court file. It  
12 was made in connection with one of the discovery  
13 motions.

14 MR. HOGAN: So 582(d), the lease provisions  
15 says all these fees collected with respect of GSRs  
16 shall be distributed pro rata to each owner of an  
17 exchange membership who has not made use of the GSR  
18 attributable to that membership period. It is not even  
19 the revenue sharing that they are talking about. It is  
20 a remnant of a by gone era that didn't work. And it is  
21 not installment contract. It was struck in 2000. And  
22 as Mr. Morrissey conceded, it was out of the rule book  
23 within a year. Whenever the printing issues were, this  
24 was struck as part of open access.

25 Mr. Morrissey suggested this was done

1 without any knowledge. The members are absolutely  
2 charged with the responsibility of knowing the rule  
3 book. And at least since 2001, 528 is gone and it says  
4 "reserved" in place of this revenue sharing idea.

5           Again, Judge, the reason no one said  
6 anything about it, the core rights don't have anything  
7 to do with Globex, it didn't protect exclusive access.  
8 It didn't protect best and most proximate access. It  
9 didn't give them any right to share in the revenue with  
10 respect to that Globex access. I'll come back to that  
11 in a second of what they did.

12           With respect to CBOT, Judge,  
13 Mr. Morrissey, I think, misinterpreted what we were  
14 saying with respect to Special Voting Right 3. They  
15 allege a breach of Special Voting Right 3 in the CBOT  
16 charter. That provision has a mechanic. It says that  
17 the members get a vote if there is any change to the  
18 by-laws and rules, the certificate that adversely  
19 affect the specified subject matter. We are not  
20 claiming that it would be impossible to allege a breach  
21 of contract if CBOT didn't make a member of the by-law  
22 change. We are just saying that they haven't alleged  
23 such a change here to invoke Special Voting Right 3 and  
24 they haven't explained any other breach of contract  
25 claim based on the fee rate.

1                   We are entitled to an explanation. So  
2 on the CBOT fee piece, their pleading is deficient.  
3 But we are not saying we gave them a right. They had a  
4 right and somehow can't be voted. We are saying they  
5 have it. And the pleading would be important to see  
6 how it is that they think how we breached it and when  
7 and by whom. This is Special Voting Right 2 concerning  
8 the fee reference.

9                   This is the last thing I want to close  
10 with, Judge. What this deal is about, and maybe your  
11 Honor asked me the question earlier and certainly Mr.  
12 Morrissey talked about it and was trying to figure out  
13 what happened and how is it that the members could have  
14 given away all of their supposed rights to Globex. And  
15 the answer, Judge, Mr. Morrissey slipped. It was just  
16 in passing. The real answer is the A shares. When CME  
17 demutualized and CBOT demutualized for that matter, the  
18 former members retained their membership that held  
19 their trading rights and then they received equity in  
20 the new public stock companies. And, Judge, you know,  
21 a full member of the CME, if that person had received  
22 those shares and done nothing other than just hold on  
23 to them, those shares would be worth many millions of  
24 dollars. I don't have the exact figure. Closer to  
25 \$10 million than \$1 million. It is a substantial

1 increase in value of the A shares. When you think  
2 about it, that sort of -- the Aurora Data Center, I  
3 mentioned it a couple of times, but it was built by the  
4 public company. That was built by the public company  
5 CME to benefit the company and the A shareholders. And  
6 that can sound harsh, but only if you believe the B  
7 shareholders got their B shares, their trading rights  
8 and they kept everything from Globex. And they were to  
9 cash out and sort of you ask yourself, what was left  
10 for the corporation? How was this deal supposed to  
11 work?

12 So the answer really is, like I said in  
13 my opening comments, the core rights were about  
14 protecting the floor, the pits. They even allege it in  
15 their Complaint. The old guard pit traders, they  
16 wanted to make sure that that world would stay active  
17 and that the exchanges wouldn't undercut so long as  
18 those markets were liquid. And the reason why the core  
19 rights don't contain anything with respect to Globex is  
20 because they were not designed to. And Globex has  
21 grown. The A shareholders have benefited. And the B  
22 shareholders who held those all those A share, if they  
23 had the sense to go along for the ride, they would be  
24 sitting on that same value accrued today.

25 So I don't want to be left with the

1 impression that this is somehow a bad deal. This is  
2 them trying to recut the deal. This Complaint doesn't  
3 do it.

4 So, Judge, with that if you have any  
5 other questions, again, we really thank you for your  
6 time and consideration.

7 THE COURT: Thank you all. It was just  
8 excellent presentations today by both sides. Great  
9 briefs and the Court is going to take it under  
10 advisement. Thank you for those who are in the  
11 courtroom. You were all very patient and very quiet.  
12 The Court appreciates that as well.

13 MR. MORRISSEY: One brief point and this is  
14 obviously the first attack on the pleading in this case  
15 that are resolved by the merits. To the extent that  
16 the Court is inclined to grant the motion as to with  
17 respect to the fee allegations, we seek leave to amend.  
18 There is extrinsic evidence that we presented to the  
19 Court as part of their opposition whether to consider  
20 that as part of this motion or not, it's an open  
21 question. We believe obviously it should be  
22 considered. There is other extrinsic evidence that we  
23 covered for discovery, through depositions and  
24 documents that if we were required to put in a pleading  
25 to have it considered to assess whether our

1 interpretation is plausible, we would do so.

2 THE COURT: Thank you.

3 MR. HOGAN: The contract is unambiguous. The  
4 core rights say what they say. They don't say what  
5 they don't say. And all these made up Globex claims  
6 are made up and not covered by the core rights. So on  
7 those -- the vast majority of these claims, they go by  
8 the board including the fee claim.

9 Judge, I would pause only on the CBOT fee  
10 claim, because we talked about how there is a right,  
11 but they haven't alleged a breach of it. Judge, I  
12 think because of the amount of time and the fact that  
13 this is their Second Amended Complaint, I think it  
14 should be dismissed in its entirety with prejudice.

15 THE COURT: Thank you.

16

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18 (WHEREUPON the hearing was

19 adjourned at 4:35 p.m.)

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1 STATE OF ILLINOIS )  
2 )  
3 COUNTY OF C O O K )  
4

5 C E R T I F I C A T E  
6

7 The within and foregoing hearing was taken  
8 before GWENDOLYN BEDFORD, Certified Shorthand Reporter  
9 in the City of Chicago, County of Cook and State of  
10 Illinois, and there were present at the hearing Counsel  
11 as previously set forth.

12 The undersigned is not interested in the  
13 within case, nor of kin or counsel to any of the  
14 parties.

15 IN TESTIMONY WHEREOF, I have hereunto set my  
16 hand this 14th day of October 2017.

17  
18 \_\_\_\_\_  
GWENDOLYN BEDFORD, C.S.R.

19 No. 084-003700  
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