

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - FIRST DISTRICT

-----)
SHELDON LANGER, et al.,)
))
Plaintiffs,)
))
vs.) No. 2014 CH 00829
))
CME GROUP, Inc.)
))
Defendant.)
-----)

REPORT OF PROCEEDINGS
Chicago, Illinois
Thursday, September 6th, 2018

Reported by:
Amy M. Spee, CSR, RPR, CRR
Job No. 147564

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

September 6, 2018

12:48 p.m.

REPORT OF PROCEEDINGS held before
the HONORABLE JUDGE CELIA G. GAMRATH, taken
in the above-entitled cause before Amy M.
Spee, CSR, RPR, CRR, at the RICHARD J.
DALEY CENTER, 50 West Washington Street,
Room 2408, Chicago, Illinois, at the hour
of 12:48 p.m.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S :

SUSMAN GODFREY

Attorneys for Plaintiffs

1301 Avenue of the Americas

New York, New York 10019

BY: MARK HATCH-MILLER, ESQ.

MASSEY & GAIL

Attorneys for Plaintiffs

50 East Washington

Chicago, Illinois 60602

BY: SUYASH AGRAWAL, ESQ.

DEDENDUM GROUP

Attorneys for Plaintiffs

1956 Cloverdale Avenue

Highland Park, Illinois 60035

BY: NEAL WEINFELD, ESQ.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S (CONT'D):

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

Attorneys for Defendant

155 North Wacker Drive

Chicago, Illinois 60606

BY: ALBERT HOGAN, ESQ.

MARCELLA LAPE, ESQ.

TIMOTHY FREY, ESQ.

NOVACK & MACEY

Attorneys for Nonparty Virtu Financial

100 North Riverside Plaza

Chicago, Illinois 60606

BY: BRIAN COHEN, ESQ.

KATTEN MUCHIN ROSENMAN

Attorneys for Nonparties Allston Trading,

LLC, Hudson River Trading LLC, and Jump

Trading, LLC

525 West Monroe Street

Chicago, Illinois 60661

BY: PATRICK SMITH, ESQ.

PROCEEDINGS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Is everyone here?

MR. WEINFELD: Your Honor, my co-counsel should be here any minute.

THE COURT: That's fine. Thanks.
(Brief pause.)

MR. WEINFELD: My co-counsel is present.

THE COURT: Good afternoon. You may approach.

Please identify yourselves.

MR. AGRAWAL: Thank you, Your Honor. Suyash Agrawal, Massey & Gail, on behalf of plaintiffs.

Apologies for the delay.

MR. HATCH-MILLER: Mark Hatch-Miller, Susman Godfrey, for the plaintiffs.

MR. HOGAN: Good afternoon, Judge.

Al Hogan from Skadden Arps for the defendants.

MS. LAPE: Marcy Lape from Skadden Arps for defendants.

MR. FREY: Tim Frey of Skadden Arps for defendants.

PROCEEDINGS

1
2 MR. COHEN: Brian Cohen on behalf
3 of -- from Novack and Macey on behalf of
4 nonparty Virtu Financial.

5 MR. SMITH: And Patrick Smith on
6 behalf of nonparties.

7 THE COURT: All right. We are here
8 today on plaintiffs' motion to compel as
9 well as the nonparties' motion to quash.

10 I was inclined to do those first,
11 but it might depend in part on some
12 questions that I have for defendants. But
13 I still think that that's wise to take care
14 of you first and you could be on your way.

15 MR. COHEN: Oh, whatever the Court
16 prefers is fine.

17 THE COURT: All right.

18 MR. COHEN: I can wait.

19 THE COURT: All right. Let me just
20 ask this general question: Plaintiff, you
21 are asking the nonparties to produce
22 certain documentation, and you are claiming
23 that defendants either don't have it or
24 have withheld it. The nonparties are
25 saying, "Go to defendants first."

PROCEEDINGS

1
2 So since all of the pleadings have
3 been filed, have you had a chance to meet
4 and confer and determine if indeed
5 defendants don't have it before we go that
6 step, or is it that defendants don't want
7 to produce it at this point?

8 MR. HATCH-MILLER: So, Your Honor, I
9 think on that point, we have not had a
10 further meet-and-confer. But I think after
11 all the briefs are in, I think it -- and
12 unless -- unless Mr. Hogan tells me
13 otherwise, I think we are clear now that
14 the materials we are still requesting -- we
15 gave up some previously and agreed not to
16 seek them, but the materials that we are
17 requesting from the third parties related
18 to their own internal communications on two
19 subjects and lease transactions, sublease
20 transactions, are not in possession of
21 defendants.

22 MR. HOGAN: Those two categories, I
23 would agree, are not in our possession.

24 THE COURT: All right. Is there
25 anything else that you have asked from the

PROCEEDINGS

1
2 third parties that defendants would have
3 but are otherwise objecting to?

4 MR. HATCH-MILLER: The defendants
5 would have, but -- no, Your Honor. No. I
6 don't believe so.

7 THE COURT: Okay. So let me turn to
8 the nonparties and ask them a question.

9 Is there something in here that is
10 left that you are still saying "Go to
11 defendants first"?

12 MR. COHEN: I think that -- I agree
13 with the notion that the documents still
14 being sought are -- or it sounds like
15 things not within defendant's possession.

16 I would just tag to that -- the
17 point that to the extent any such types of
18 documents could be relevant, they are in
19 defendant's possession. And it could be
20 that just our arguments related to these
21 documents are not relevant, but we can -- I
22 tend to agree with the representations of
23 the defendant's and plaintiffs' counsel.

24 MR. SMITH: Your Honor, for example,
25 communications related to fee arrangements

PROCEEDINGS

1
2 with the defendants, obviously, to the
3 extent that those are relevant, the
4 defendants would have our communications
5 with them about the fee arrangements that
6 we've agreed to or other agreements related
7 to colocations, for example.

8 MR. HATCH-MILLER: And on that note,
9 Your Honor, I will -- I guess -- I may have
10 misunderstood your question slightly
11 before, but there are -- there are
12 documents that we seek from defendants on
13 the subject of these fee -- fee
14 arrangements with firms like those
15 represented by counsel here today.

16 We have a dispute raised in the
17 motion about that topic, and the defendants
18 don't want to produce documents on the
19 subject of those underlying arrangements.

20 THE COURT: All right.

21 MR. HATCH-MILLER: So -- but --
22 but --

23 THE COURT: To the extent I order
24 those disclosed, they would come from
25 defendants and not the nonparties.

PROCEEDINGS

1
2 MR. HATCH-MILLER: Correct. As to
3 the agreements themselves, yes.

4 THE COURT: Okay. So I understand
5 that the attorneys in front of me represent
6 two separate entities who are both
7 nonparties, the discovery documents ask for
8 essentially the same information, and your
9 motions are, in essence, the same, so I am
10 going to address you as one.

11 MR. SMITH: Okay.

12 THE COURT: I am not going to treat,
13 unless plaintiffs tell me that I must
14 treat, these two entities different.

15 But for my purposes, the same rule
16 will apply to both the nonparties because
17 they have the same objections.

18 MR. HATCH-MILLER: I think that's
19 correct, Your Honor. They have the same
20 relevance arguments, they make similar
21 burden arguments, and we disagree with them
22 for the same reasons.

23 THE COURT: Okay.

24 MR. HATCH-MILLER: And I -- I am --
25 I have a presentation I was prepared to

PROCEEDINGS

1
2 give you on some background information
3 related to the third-party requests. If
4 you'd like, I'm happy to provide that now
5 or wait until after you've asked questions.

6 THE COURT: Well, it's the
7 nonparties' motions to quash, so I will
8 give them the first opportunity to speak.

9 MR. SMITH: Do you want to start or
10 do you want me to start?

11 MR. COHEN: Sure. I'd be happy to
12 start.

13 MR. SMITH: Okay.

14 MR. COHEN: First of all,
15 Your Honor, you're absolutely correct that
16 our arguments are largely the same. We
17 have some fact-specific burden arguments,
18 though they largely overlap in terms of the
19 basis for them.

20 Obviously, we're -- you know, none
21 of us are parties to the dispute. We're
22 simply here because, you know, sometime
23 over the last over ten years, we have some
24 relationships with defendants, you know,
25 purportedly, and are now recipients of

PROCEEDINGS

1
2 extremely broad and, in many instances,
3 vague and open-ended subpoenas, which are
4 asking us to do, you know, tens, if not
5 hundreds of thousands of dollars of work,
6 to try and find documents that may or may
7 not even exist.

8 And then if they do, it would be of
9 little to no relevance to the dispute,
10 primarily because, as counsel has already
11 indicated, they seek internal
12 communications about perhaps a subject
13 matter that in a broader sense is relevant
14 to the litigation here, but the internal
15 communications of our, you know, nonparties
16 here, it strikes us -- I suspect counsel
17 will agree with me -- as not being relevant
18 at all.

19 And the Court, you know, should
20 exercise and has the authority to exercise
21 its discretion to quash those subpoenas
22 for, as you've articulated, the two main
23 reasons that the documents are not relevant
24 and the burden would be great.

25 So during our meet-and-confer with

PROCEEDINGS

1
2 plaintiffs' counsel, plaintiffs' counsel
3 had a very difficult time articulating what
4 the potential relevance of these documents
5 would be.

6 And the response, frankly, doesn't
7 do a much better job. It purports to say
8 that these documents might be relevant to
9 the scope of the defendant's alleged
10 breach, to whether that breach occurred,
11 and to plaintiffs' alleged damages. None
12 of those hold water.

13 First of all, the notion that
14 internal communications of a third-party
15 would have anything to do with the scope of
16 or whether a defendant breached its
17 agreement with plaintiffs is, frankly,
18 ridiculous on its face.

19 The agreement says what it says, the
20 defendant's conduct was what it was, and
21 what anyone at some other place across the
22 country had to say about it between
23 employees is just not material or relevant
24 to that in any such way.

25 The documents, to the extent that

PROCEEDINGS

1
2 plaintiff is looking for things that
3 indicate what these nonparties were willing
4 to pay for the services, are the contracts
5 with defendants and perhaps records
6 defendants have about those payments.

7 But whether they were internally
8 saying, "Hey, this is great" or "We'd love
9 to pay more" or "We'd love to" -- I mean,
10 there's just no potential relevance.

11 THE COURT: I tend to agree.

12 So what's your response, then?

13 MR. HATCH-MILLER: So the primary
14 relevance, Your Honor, relates to damages.
15 And if I could give you some general
16 background of the theory -- you know, the
17 two different claims that are left in the
18 case after the motion to dismiss.

19 One relates to the -- this
20 colocation, which is firms pay for access
21 to a physical location where they can keep
22 their computers to engage in high-speed,
23 high-frequency trading -- trading.

24 And one of the topics in the
25 subpoena relates to subleasing. So at this

PROCEEDINGS

1
2 building, the Aurora Data Center, where the
3 colocation services are offered, the
4 defendants offer, for published prices,
5 access to the building, but there's also
6 subleasing.

7 And the defendants have told us that
8 they don't track the market for subleasing
9 in this case.

10 One of our core theories of
11 liability in the case, one of the two
12 left --

13 THE COURT: Okay. Let's go back to
14 these internal communications as to what
15 they're talking about in terms of price.

16 So I'm going to assume that these
17 nonparties are paying to defendants a fee,
18 whether it's a monthly, a transaction.
19 Whatever the fee is, they're paying it, and
20 it's presumably pursuant to a contract.

21 If the nonparties say between
22 themselves, you know, "They're" -- "They
23 want to charge us a thousand dollars per
24 X," and they're having communications
25 saying, "Too high, we think it should be

PROCEEDINGS

1
2 800; or, if push comes to shove, we're
3 willing to go to 14," who cares? The
4 contract is what it is.

5 So if it goes to damages, it is
6 actually a bird in the hand in terms of
7 what they are, in fact, paying; not whether
8 they think it's a good deal or not whether
9 they're willing to pay more, because that
10 has not happened.

11 MR. HATCH-MILLER: So as to the ADC,
12 Your Honor, the colocation -- the
13 colocation subleasing market is not a
14 matter between the defendants and these
15 third parties.

16 These are transactions that are
17 entered with -- with other people who lease
18 the space from the defendants, and the
19 defendants have told us they do not track
20 the market.

21 And our theory of -- one of the two
22 theories of liability in the case relates
23 to that one of the things that's supposed
24 to travel as a right with membership is
25 the -- is the ability to have this

PROCEEDINGS

1
2 proximate access.

3 THE COURT: So, again, let me go
4 back --

5 MR. HATCH-MILLER: Sure.

6 THE COURT: -- to these internal
7 communications.

8 It's one thing to say, "We want the
9 contracts, we want the records or the
10 payments that you are collecting in terms
11 of a sublease," but what relevance at all
12 could it be if they are negotiating between
13 themselves or strategizing as to how to
14 maximize their own profit for these
15 subleases?

16 If the sub- -- if the person
17 subleasing, again, is going to pay them a
18 thousand dollars and they want more, they
19 would be willing to take less, what moment
20 is that for purposes of discovery and
21 relevance here?

22 MR. HATCH-MILLER: Sure. So just to
23 be clear, Your Honor, the three -- the
24 three different topics at issue with the
25 third parties, number one is the

PROCEEDINGS

1
2 transaction information about -- about the
3 subleasing.

4 So that's -- that's one separate
5 issue and somewhat different from what your
6 concern is. I understand your concern, and
7 maybe -- hopefully I can address it in
8 connection with this -- this second topic.

9 The second topic relates to
10 the commun- -- these are the internal
11 communications related not to the
12 valuation, but to the benefits of -- of
13 colocation.

14 And Your Honor is well aware that
15 there's a dispute in this case about
16 whether colocation -- the ability to
17 colocate provides benefits that are
18 equiv- -- the kind of electronic equivalent
19 of being on a physical trading floor.

20 And so that's the primary reason
21 we're seeking those -- those internal
22 communications, is we think they're -- it's
23 not on damages, but on liability, to
24 specifically show that the reason people
25 like these high-frequency trading firms are

PROCEEDINGS

1
2 purchasing these services from defendants
3 is because they provide the exact -- the
4 benefit that used to belong exclusively to
5 members.

6 And so we think that that's --

7 THE COURT: So their subjective view
8 as to what the benefit is to them is
9 somehow relevant to what?

10 MR. HATCH-MILLER: Relevant to the
11 dispute the parties have about whether the
12 eight -- whether the Aurora Data Center and
13 the colocation services provide the -- the
14 analogous benefit that used to belong to
15 members on the floor.

16 And the reason that's significant in
17 terms of damages is because --

18 THE COURT: Wouldn't a simple
19 deposition do? Couldn't they just identify
20 somebody, if that's really your -- your
21 theory and your point, to pinpoint somebody
22 and say, "Here's what I personally think
23 the benefit is"? Again, completely
24 subjective. It's not an expert. Maybe
25 your expert will take it for information,

PROCEEDINGS

1
2 maybe he won't.

3 But you could go around surveying
4 anybody you want who thinks that there is a
5 benefit to this. Clearly, plaintiffs do.
6 And those willing to pay for it must think
7 that there is.

8 But a benefit to me may be different
9 from a benefit to you and a benefit to the
10 man across the street. You put them all in
11 a package and you do with it what you want.

12 But their internal communications to
13 nonparties who have no skin in this game
14 for purposes of litigation, I just think
15 that that would be unduly harassing, overly
16 broad, and just, quite frankly, I can't
17 find the relevance in it. It seems to me
18 like there would be a much easier way to
19 give you some of that information, far less
20 onerous and far less invasive.

21 I do need to balance the privacy
22 concerns. And while I've read your brief
23 to say the same rules apply to parties and
24 nonparties, the fact is, there are privacy
25 concerns and limitations in terms of

PROCEEDINGS

1
2 harassment and so forth.

3 The case you cite for that
4 proposition talks about 201(c), and the
5 protections in place apply equally to
6 parties and nonparties alike, but when it
7 comes to nonparties, Courts are not so
8 liberal and broad to say, "Turn it all
9 over."

10 Because, again, just because they
11 are doing business with defendants, you
12 don't get such open access to them, and
13 certainly not to their internal
14 communications.

15 MR. HATCH-MILLER: So, Your Honor,
16 two quick points on that.

17 One -- one is in terms of the point
18 that the -- these entities do not have skin
19 in the game, I -- I respectfully disagree
20 with that.

21 The -- the -- if I could present you
22 the -- the background that I hope to show,
23 their -- this is a slide presentation that
24 addresses some -- some background of the
25 status of the case and other matters, but

PROCEEDINGS

1
2 I'll -- I'll hand out copies here.

3 The -- these firms are
4 high-frequency trading firms. There's four
5 appearing today.

6 Here's a copy, Your Honor. Copies
7 for others.

8 And --

9 THE COURT: Counsel, just for
10 clarification, when we anticipate
11 presenting documents or things outside the
12 pleading, can you as a courtesy -- and
13 that's for everybody -- send them in
14 advance to the Court, send them in advance
15 to the parties. It's really difficult to
16 just be thumbing through and listening to
17 you at the same time.

18 MR. HATCH-MILLER: Your Honor, I --
19 I understand. I do have a copy if you'd
20 like.

21 Okay. So these -- the -- the basic
22 background, Your Honor, is that these firms
23 and others like them are -- are what our
24 clients view as the primary beneficiaries
25 of the misconduct in this case.

PROCEEDINGS

1
2 The practices of this industry
3 changed. The --

4 THE COURT: They are not parties to
5 this case.

6 MR. HATCH-MILLER: Your Honor, they
7 are not parties to the case, but the --
8 the -- there has been reporting, if you --
9 there's a slide regarding a report in
10 The Wall Street Journal.

11 There was previously a regulatory
12 probe about these very communications.
13 These -- these special fee deals, which we
14 allege are a breach of the contract, was
15 previously the subject of a CFTC
16 investigation.

17 The defendants have declined to
18 provide documents regarding these, even
19 though it's --

20 THE COURT: Counsel, if -- this is
21 just way off topic from the pleadings that
22 I have before me. I --

23 MR. HATCH-MILLER: Your Honor -- and
24 I understand. I'm just trying to answer
25 the que- -- the background question about

PROCEEDINGS

1
2 whether these -- these firms -- these
3 entities have skin in the game. I --
4 they're --

5 THE COURT: So these entities are
6 paying the price dictated by defendants in
7 terms of their access. That's what they're
8 doing. They're doing business with the
9 defendants. Correct me if I'm wrong, but
10 they're doing business with defendants.
11 They are paying the price to have this
12 access.

13 And --

14 MR. HATCH-MILLER: Right.

15 THE COURT: So do they want to
16 continue to do business with the
17 defendants? Maybe, maybe not. But that is
18 not really a stake in this litigation. The
19 stake in the litigation is between
20 plaintiffs and defendants.

21 MR. HATCH-MILLER: I -- I understand
22 your point, Your Honor, but I was just
23 trying to answer the background of why
24 these specific -- why these specific
25 entities were subpoenaed and to provide an

PROCEEDINGS

1
2 explanation about -- our theory of the case
3 is that the market for sales and leases of
4 these memberships has been distorted
5 because the defendants have -- rather than
6 providing these rights exclusively to
7 plaintiff individual members, they have
8 been extended to others, who now obtain the
9 same special benefits for -- for a price,
10 and that the benefits that the defendants
11 are receiving from their dealings with
12 these entities -- in the absence of a
13 breach, the market for sales and leases of
14 the memberships would -- would be -- would
15 be reflecting the prices of these same kind
16 of services that these entities are now
17 obtaining from the defendants.

18 So that's -- that's the explanation
19 of why their internal communications are
20 about how they value these -- these rights
21 are important to the case, is that in the
22 absence of a breach, the market for sales
23 and leases would -- would reflect these --

24 THE COURT: But --

25 MR. HATCH-MILLER: -- values.

1 PROCEEDINGS

2 THE COURT: -- isn't that the
3 critical point?

4 So the market would affect the
5 value. That comes with the numbers. That
6 comes with the revenue. That doesn't come
7 with their internal strategy in terms of
8 what they subjectively believe the value
9 is. Your damages would be predicated on
10 figures.

11 MR. HATCH-MILLER: You're --
12 you're --

13 THE COURT: And that's going to be,
14 you know, the books and records, not --
15 that's going to be the contracts between --
16 in connection with this subleasing market,
17 but not, "Hey, Joe, I think that this is
18 another added value to this."

19 Who really cares what, you know, Joe
20 and Susan think, who are sitting in their
21 offices at Virtu? I don't think that you
22 get to probe into that.

23 MR. HATCH-MILLER: Sure.

24 And, Your Honor, just as further
25 context here -- and we can discuss it in

PROCEEDINGS

1
2 the context of the defendant's opposition
3 to our discovery -- they've taken the
4 position that we don't get access to their
5 books and records from how they benefit
6 financially from these transactions either
7 because Your Honor dismissed a claim for --
8 you know, to get -- to measure -- to
9 have -- to directly receive proceeds or
10 share of those -- of those. And so they
11 say, as a result, we can't get discovery
12 into that topic.

13 So what we're trying to figure out
14 is some source of information here, whether
15 from defendants or otherwise, about how we
16 measure the damages here.

17 THE COURT: Okay. So the damages in
18 connection with what component, what claim?
19 Because to that point, the Court did
20 clearly dismiss with prejudice any
21 potential claim for revenue sharing and
22 right of exclusive access.

23 MR. HATCH-MILLER: Correct.

24 THE COURT: Those are out.

25 MR. HATCH-MILLER: Yes.

PROCEEDINGS

1
2 THE COURT: So no discovery is going
3 to be done on that.

4 So if this isn't relevant to revenue
5 sharing, what is it relevant to that still
6 survives?

7 MR. HATCH-MILLER: So there's two
8 different claims left. One is -- relates
9 to the Aurora Data Center. There are fees
10 charged -- this is not a revenue-sharing
11 claim; it's a breach of contract claim, and
12 that's a question of how do we measure the
13 damages in terms of the diminution in value
14 of memberships as a result of the alleged
15 breach, which is that people other than
16 members are being allowed to trade from
17 this extra-beneficial location.

18 We've asked these third parties for
19 their internal communications that might
20 reflect ways to value what that benefit is,
21 and the value of which should belong --
22 should be reflected in membership prices.

23 We've asked the defendants for their
24 information about how they benefit
25 financially. That's not to say that we

PROCEEDINGS

1
2 have a claim that's for, you know, share --
3 share of those revenues, but it's certainly
4 relevant to the measure of damages in the
5 case to obtain that basic financial
6 information, which is a sort that you'd
7 normally get from -- in any contract case
8 where there's a claim for damages.

9 MR. SMITH: Your Honor, I think you
10 hit the nail on the head as it relates to
11 relevance and burden.

12 We submitted an affidavit just to
13 demonstrate the burden here. It's very
14 real. It's very significant. It would be
15 very, very expensive to comply, and the
16 internal communications just aren't
17 relevant.

18 I think this slideshow, if anything,
19 demonstrates that really what this is is a
20 fishing expedition, looking for some sort
21 of other misconduct or some other deal
22 completely unrelated to this case. And for
23 those reasons, it should not be allowed.

24 Anything that's relevant would be in
25 the defendant's possession. The amount of

PROCEEDINGS

1
2 money we paid the defendants would be in
3 the defendant's possession.

4 THE COURT: Mr. Hogan, is it in your
5 possession?

6 MR. HOGAN: It is, Judge. With
7 respect to the colocation fees and the
8 connectivity fees that parties paid
9 directly to the exchange, we have that
10 information.

11 We've offered to produce to the
12 plaintiffs certain -- obviously subject to
13 certain confidentiality provisions, the
14 contracts pursuant to which parties lease
15 space in connectivity at the GLOBEX -- at
16 the Aurora Data Center.

17 So we -- we have the data about how
18 much we charge for people to lease space
19 and make connectivity to GLOBEX at the ADC.

20 What we don't have is the -- the
21 subleasing data. We can talk about that
22 later. But as to these folks, who I
23 believe the allegations are they directly
24 lease space, we have those contracts. We
25 have that information.

PROCEEDINGS

1
2 MR. HATCH-MILLER: And, Your Honor,
3 I think the core -- the core of our request
4 from the third parties is to get that
5 subleasing information.

6 If you think it's a more appropriate
7 way to get the other information through a
8 deposition rather than through document
9 search, I think we could live with that.

10 THE COURT: The Court thinks that it
11 is appropriate for defendants to be the
12 ones to turn over the contracts concerning
13 the colocation fees and the connectivity
14 fees. They have that in their possession.

15 I think that that is appropriate for
16 them to turn it over, to the extent it
17 could lead to something relevant related to
18 the damages on the remaining claims in
19 terms of this diminution of value.

20 With respect to the nonparties
21 providing the same type of information, the
22 subleasing information in terms of
23 contracts to the extent you are subleasing
24 your access to that, that does not seem to
25 me as though it would be unduly burdensome,

PROCEEDINGS

1
2 and it would contain hard data and real
3 facts. It would not cover your internal
4 communications.

5 Obviously, that would be subject to
6 a protective order.

7 MR. HATCH-MILLER: And we've
8 discussed previously looking at whether
9 there's a need to amend the protective
10 order to expressly cover, and we're happy
11 to have -- have those negotiations and
12 submit an amendment, if necessary, to the
13 Court.

14 THE COURT: And to be clear, I'm
15 not, you know, inviting you to take any
16 kind of unnecessary deposition, but to the
17 extent plaintiff is in good faith truly
18 seeking more information about benefits of
19 colocation and what some subjective party
20 might think, then you -- your experts could
21 talk to who they want to talk to. But I
22 think that that is significantly different
23 from going into their files and their
24 e-mail communications and their own
25 internal correspondence.

PROCEEDINGS

1
2 I would say with respect to that,
3 this is not a fishing expedition either to
4 start taking a dozen depositions for these
5 nonparties. You might all put your heads
6 together to say, "We're going to name one
7 particular party who seems to know the most
8 about this, and he or she could give you
9 their view on why we are willing to pay
10 what we paid."

11 MR. SMITH: Your Honor, I think it
12 is the matter of public record the
13 defendant is a colocation. I'm certain
14 that an expert could, on his own, come up
15 with an opinion describing the benefits of
16 colocation.

17 If they wanted to engage one of my
18 clients and pay them an hourly rate to have
19 them, you know, serve as an expert, that is
20 something we may consider.

21 But a third party's deposition to
22 ask my client about the benefits of
23 colocation seems pretty extreme. I mean,
24 we could maybe submit an affidavit
25 describing a few of the benefits.

PROCEEDINGS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: I -- again --

MR. SMITH: I can Google it.

THE COURT: Again, that's -- I mean, that's sort of my point in saying I might think that there's five benefits. You might think that there's six benefits. She might that think that there's eight.

Maybe there's overlap, maybe there's not, but it's just information. And your experts, who I am sure are going to be prominent in this field and know how to do their job, are going to have that information readily without having to subpoena and take -- you know, take depositions of these individuals.

That would be my sense, but we're not there yet. We don't have something.

But I am -- I am looking to tailor these subpoenas in the best way possible, and so that was why I was suggesting a simple conversation might do versus going through your internal files.

Is there anything else that needs to --

PROCEEDINGS

1
2 MR. SMITH: Your Honor, just to be
3 clear, it looks like, then, based off your
4 ruling, that 6 and 7 are quashed.

5 And then 5, which relates to the
6 subleasing, we will be ordered to, to the
7 extent it exists, produce documents
8 reflecting the amounts paid or received for
9 subleasing. And with --

10 MR. COHEN: Well, I guess I'd like a
11 little clarity on that.

12 THE COURT: Okay.

13 MR. COHEN: And I don't know if
14 Your Honor --

15 THE COURT: Yes.

16 MR. COHEN: -- has the subpoena --

17 THE COURT: I do.

18 MR. COHEN: -- in frame. I know
19 it's Exhibit A to our motion. I'm sure
20 it's in other places, too.

21 But I think what counsel just said,
22 6 and -- it's the last page of the
23 subpoena. 6 and 7, it sounds like
24 Your Honor is quashing in their entirety.

25 Like I said, I just want to be

PROCEEDINGS

1
2 clear.

3 MR. HATCH-MILLER: Although our
4 understand is that you're not foreclosing
5 the possibility of seeking depositions,
6 subject to meeting and conferring.

7 THE COURT: Okay. So to be clear,
8 my suggestion was a deposition of somebody
9 who knows what the benefits are, and so
10 forth, if this is something that would be
11 relevant for your expert.

12 Your expert is going to have his or
13 her own contacts in the field, in the
14 industry, and resources, and as you
15 mentioned and somebody put in the papers,
16 it's out there. There is a whole list of
17 benefits of stuff that's published. It's
18 on the website. It's in documents.

19 But I would not foreclose you from
20 taking a particular deposition.

21 MR. HATCH-MILLER: Understood,
22 Your Honor.

23 MR. HOGAN: Your Honor --

24 THE COURT: Yes.

25 MR. HOGAN: -- look, I'm obviously

PROCEEDINGS

1
2 here for CME. These are CME's clients.

3 I would say also the plaintiffs are
4 going to take a representative deposition
5 of CME in the near future to explore the
6 subject of colocation and what I think the
7 advantages or perceived advantages are.

8 I think your point is exactly
9 correct. From I know, the Exchange's view
10 is that there's a lot of different people
11 who have a lot of different kind of trading
12 strategies, and whether that's colocation
13 via receipt or using the hub to connect
14 remotely, or coming through the Cermak
15 center or going through the Internet, a lot
16 of people view a lot of different things
17 about the trading strategies and so on.

18 THE COURT: All right. Frankly --

19 MR. HOGAN: So you could allow a
20 deposition, but --

21 THE COURT: Yeah.

22 Quite frankly, I don't expect it to
23 be so particularly revealing to what an
24 expert would be evaluating, because I
25 suspect that the answers will be very

PROCEEDINGS

1
2 broad-brushed.

3 One person might value it for this
4 purpose. Another may value it for this
5 purpose. One may just not want to get
6 boxed out and is willing to pay a premium
7 for it and never use. There are a whole
8 bunch of merits of things why people think
9 that this is a benefit.

10 And so I'm expecting that you will
11 get some of those broad-brushed answers,
12 but if you feel that they were absolutely
13 necessary, I would not necessarily at this
14 stage foreclose you from getting the
15 information in that fashion in a limited
16 way.

17 I think that it would be far less
18 intrusive and invasive for these
19 nonparties.

20 With respect to 6 and 7, again, any
21 communications that would be between the
22 nonparties and the defendants would be in
23 the possession of the defendants, and
24 that's from where those things should arise
25 and come.

PROCEEDINGS

1
2 Any internal communications or
3 communications that are not the contracts
4 between you and the -- those that are
5 subleasing, those are not discoverable
6 either, but the contracts themselves would
7 be.

8 MR. COHEN: So the -- these
9 contracts being a sublease.

10 THE COURT: Yes.

11 MR. COHEN: And to the extent there
12 are subleases --

13 THE COURT: Yes.

14 MR. COHEN: -- those are to be
15 produced.

16 So I guess my only -- which --
17 which, as I'm reading that, I think that
18 applies to No. 5, "sufficient to show the
19 extent to which you've subleased."

20 I guess I -- I don't know that we've
21 discussed the second part of No. 5,
22 "Documents sufficient to show the amounts
23 you have paid or received for such sublease
24 access."

25 It would seem to me that the sub- --

PROCEEDINGS

1
2 to the extent there's some market theory
3 here, the subleases will reflect the
4 amounts agreed to -- and let me --

5 THE COURT: Yes.

6 MR. COHEN: -- let me preface this
7 by saying, today Virtu's -- for the reasons
8 explained in our motion, but unable to even
9 identify whether we've done this or not,
10 but let's assume for a moment we have.

11 It would seem that a sublease might
12 contain some information that I suppose
13 could be -- may be relevant to some market.

14 I guess I don't want my client to
15 have go down the road of figuring out who
16 paid and who missed payments and -- and I
17 don't know for what kind of time period.

18 THE COURT: I think that the
19 contract would satisfy, because if there's
20 missed payments, then it's probably to the
21 benefit of plaintiff because they are going
22 to just assume that it was collected.

23 MR. COHEN: Sure.

24 THE COURT: If --

25 MR. COHEN: That's right.

1 PROCEEDINGS

2 THE COURT: -- one of the contracts
3 terminated, you'll have that in
4 documentation, and you can turn that over
5 as well.

6 But this is -- I view those
7 contracts sufficient to show the amounts
8 that you have received or contracted for in
9 terms of the sublease market.

10 To the extent -- the amounts you
11 have paid, you would have paid those things
12 to the defendants, correct?

13 MR. COHEN: I'm not aware of a paid
14 part of that.

15 THE COURT: Unless you are --

16 MR. COHEN: A sublessor as well.

17 THE COURT: -- someone who is
18 subleasing. But --

19 MR. COHEN: Right.

20 MR. SMITH: In that case, we would
21 produce an agreement, Your Honor.

22 THE COURT: All right.

23 MR. SMITH: All right. I think
24 that's it.

25 MR. COHEN: I think we have

PROCEEDINGS

1
2 agreement.

3 THE COURT: Anything else?

4 MR. HATCH-MILLER: No. I understand
5 the Court's ruling on that. As to the
6 third parties, obviously we have the
7 defendant's discovery issues.

8 THE COURT: All right. Thank you.

9 MR. SMITH: Thank you, Your Honor.

10 MR. COHEN: Thank you.

11 THE COURT: Turning to plaintiffs'
12 motion to compel discovery from the
13 defendants themselves, I will allow you to
14 speak to the motion.

15 MR. HATCH-MILLER: Thank you,
16 Your Honor.

17 So there's -- I think there's four
18 categories here; at least, I view them as
19 four categories.

20 The first is fairly straightforward,
21 in my view. It's the -- we've asked for
22 the negotiated fee deals that we just
23 discussed with the third parties from --
24 from the defendants.

25 THE COURT: All right. So those are

PROCEEDINGS

1
2 the contracts.

3 MR. HATCH-MILLER: So these are the
4 con- -- there are -- there are -- we
5 understand that -- and this is the subject
6 of that Wall Street Journal report
7 before that the -- there are published fee
8 schedules.

9 And one of the claims in the case
10 relates to the -- the fee preference
11 that -- and it's disputed in the meaning of
12 the contract, but that there's a fee
13 preference; members are supposed to get the
14 best fees. The most pref- -- the -- have a
15 fee preference.

16 And one of our pleaded breach
17 theories is that there are special deals
18 under which these large firms get certain
19 kinds of rebates, refunds, or rates that
20 are below the member rate, the published
21 member rates.

22 THE COURT: Okay.

23 MR. HATCH-MILLER: We don't know --

24 THE COURT: So wouldn't those be
25 pursuant to a contract?

PROCEEDINGS

1
2 MR. HATCH-MILLER: Should be, yes.

3 THE COURT: Okay.

4 MR. HATCH-MILLER: And the
5 defendant's position is that we didn't
6 plead that, but as we point out -- it's
7 part of our complaint -- I understand they
8 disagree with our position on the merits,
9 but it's a pleaded theory. They didn't
10 move to dismiss it. And the only argument
11 for not producing it is that the claim
12 lacks merit.

13 MR. HOGAN: So, Judge, first, I
14 think to -- just to make sure we're precise
15 about what we're talking about here, with
16 my colleagues that were here from the third
17 parties before, the kinds of fees and
18 transactions that I think were being
19 discussed that -- that we were talking
20 about at the end with respect to contracts
21 with us regarding colocation fees, those
22 are one kind of fees. Those are access and
23 connectivity fees.

24 The fees that Mr. Hatch-Miller was
25 just discussing, I think, relate to

PROCEEDINGS

1
2 transaction-related fees and back to -- if
3 we remember the CBOT core rights, there is
4 a stated fee preference with respect to
5 clearing fees --

6 MS. LAPE: Transaction.

7 MR. HOGAN: -- transaction fees.

8 Those are fees that apply to
9 everybody trading anywhere in the world on
10 a per-trade basis; nothing to do with the
11 colocation or the connectivity fees that we
12 were discussing in terms of leasing and
13 subleasing.

14 So I just wanted to set the table on
15 that because I think it's easy to get those
16 confused.

17 With respect to the transaction
18 fees, Judge, you know, what -- our -- our
19 view of this is that we -- we did move to
20 dismiss -- we moved to dismiss the entirety
21 of the complaint, the whole thing.

22 And we moved to dismiss the CME
23 claim on the ground that the right didn't
24 exist, and we moved to dismiss the CBOT
25 claim on the ground that it wasn't properly

PROCEEDINGS

1
2 pleaded, and Your Honor ruled against us.

3 But the characterization that the
4 plaintiffs have portrayed in the reply
5 brief is not correct.

6 I'm guilty as charged, as well as my
7 colleague, with respect to bringing slides
8 today.

9 There's -- there's a lot of
10 interesting issues today. I don't know how
11 much time Your Honor has for us, but I
12 would like to hand this out and I'd like to
13 try and talk to you but use this slide so
14 you can see where I'm going, if that's
15 acceptable. If it's not, I can -- I can
16 keep trying it this way.

17 THE COURT: Well, I will certainly
18 take it.

19 And the reason why I point this out
20 is because I read what you give me. I read
21 it --

22 MR. HOGAN: Yes, we know.

23 THE COURT: -- from the stand.

24 So I like to be familiar with it so
25 that it's more meaningful when you are

PROCEEDINGS

1
2 speaking.

3 MR. HOGAN: And some of this,
4 Your Honor, will -- will track very closely
5 to our reply brief -- I'm sorry -- to our
6 opposition brief.

7 So if you cut -- cut to the chase on
8 Slide 3, I think it's important to focus on
9 what the plaintiffs are characterizing the
10 Court ruled. And the quoted indent there
11 is what the plaintiffs say in their reply
12 brief.

13 But, Judge, the actual ruling that
14 the Court issued in response to our motion
15 to dismiss the entirety of the claims was
16 focused on a fee preference that exists
17 with respect to CBOT.

18 And Your Honor said "plausibly may
19 exist" with respect to CME, so there's no
20 question. The text of your order makes
21 clear the contours of the claim that you
22 perceived and allowed to go forward.

23 It is true, as plaintiffs have
24 pointed out in meet-and-confer discussions,
25 that somewhere in the complaints, there are

PROCEEDINGS

1
2 stray allegations about their theories of
3 breach.

4 But the fact of the matter is,
5 Judge, in a breach of contract claim -- and
6 that's what this is -- they first have to
7 satisfy the Court that there is a contract
8 right; that they plead a contract right.

9 And so what Your Honor did in the
10 ruling on our motion to dismiss was take
11 all of their allegations as true. But
12 obviously you're not bound by legal
13 conclusions, you're not bound by pleadings
14 that were contradicted by the contract.

15 And so if you turn the page to
16 Page 4, just to recall where this claim
17 comes from, this is the CBOT fee right.
18 This is in the core rights.

19 And it actually -- as we conceded,
20 there is a fee preference right in the core
21 rights as to the CBOT charge. It is
22 entirely clear that it is a fee preference
23 of members versus nonmembers. It's for
24 holders of a membership relative to the
25 holders that are -- who are not a holder of

PROCEEDINGS

1
2 the class memberships.

3 THE COURT: All right. So I see
4 that point in these briefs. And plaintiffs
5 say, "Well, Judge, look at our complaint.
6 Paragraph X, Y, and Z talk about members
7 and nonmembers to trade at superior rates,"
8 and -- and so forth. So you're identifying
9 that.

10 But I think what we are talking
11 about in terms of the comparative group is
12 the Class B members versus non-Class B
13 members.

14 So from these documents, are
15 there -- there are other members who are
16 not Class B members.

17 MR. HOGAN: The -- the folks that
18 they're talking about here are other
19 Class B members. The folks who are
20 standing before you --

21 THE COURT: They talk about, like,
22 ECMS, and they're saying those are members.

23 MR. HOGAN: There are things that
24 are called members. Not everything that's
25 called a member is a Class B member.

PROCEEDINGS

1
2 And so those folks are getting
3 whatever fee rates they're getting, but
4 they're not getting member rates.

5 So we -- we perceive this request to
6 be asking us to turn over fee agreements or
7 fee incentive agreements that we may have
8 that are open, for instance, to all
9 members, Class B members.

10 And if certain Class B members show
11 up and produce trades or make -- make
12 markets in particular specifications, they
13 get an incentive fee agreement. Those
14 agreements do exist.

15 But the point is, where we're
16 ultimately going to have a real interesting
17 dispute is vis-à-vis members, Class B
18 members versus nonmembers. That's their
19 core right, and I think their claim would
20 be as to those folks, we violated that fee
21 preference, and our view is we haven't.

22 And we're going to -- obviously,
23 that's going to be a subject of much
24 discovery. But we don't believe as a
25 discovery point, we should have to go and

PROCEEDINGS

1
2 identify -- there are member-only fee
3 programs only available to Class B members.

4 We don't think that we should have
5 to even go hunt for those, because if the
6 only people that are eligible for fee deals
7 or fee preferences are Class B members, it
8 is irrelevant to the claim that we breached
9 our contract when that contract right is
10 limited to a fee preference of members,
11 Class B members versus non-Class B members.
12 That's the essence of our point.

13 And it's the same exact point with
14 respect to CME, even though we -- we still
15 have a dispute about whether or not that
16 claim exists. The same idea.

17 THE COURT: So -- so in your
18 response, you say the special voting right
19 says nothing about member-to-member fee
20 parity.

21 What members are you talking about?
22 Are you talking --

23 MR. HOGAN: Class B members.

24 THE COURT: So Class B to Class B.

25 So, Plaintiff, what are you looking

PROCEEDINGS

1
2 for in terms of discovery? Isn't the
3 comparative here the Class B members as
4 compared to non-Class B members?

5 MR. HATCH-MILLER: There are certain
6 types of membership holding entities. And
7 this is one of the kind of disputes that we
8 have, that certain entities can own a
9 membership; and if they own a membership,
10 all of the people that trade for that
11 business obtain member rates or, under
12 certain specifically negotiated fee
13 agreements, pay rates that are below those
14 open to members.

15 And I understand that they have a --
16 they want to raise a substantive dispute
17 about the scope of the contract right here,
18 but what they're pointing out to you is --
19 I think they're trying to indicate that you
20 ruled in silence, basically, on an issue
21 that was not the -- not substantively
22 covered.

23 And I think Mr. Hogan will admit
24 this was not one of the arguments that they
25 raised in the motion to dismiss papers.

PROCEEDINGS

1
2 So they're trying to draw a
3 distinction based on language in your
4 ruling when there was not a substantive
5 dispute on the motion to dismiss on this
6 issue, and they're -- so they're --

7 THE COURT: But the entire motion to
8 dismiss was premised on plaintiffs'
9 complaint construed in the light most
10 favorable to plaintiff that said, "There is
11 a breach of contract here because we have a
12 special right, we have a core right, we
13 have a right to preferential fees as
14 compared to non-Class B members. We
15 plaintiffs are all Class B members. We
16 have a right that's superior to the rest."

17 And so those are the comparators.
18 So I -- so if you're looking for that
19 comparative analysis and the fee preference
20 information relative to non-Class B
21 members, I -- I would think that that is
22 discoverable.

23 MR. HOGAN: We've already agreed
24 that's discoverable.

25 THE COURT: So what is it that

PROCEEDINGS

1
2 defendant, then, is not providing you with?

3 MR. HATCH-MILLER: What defendants
4 have not agreed to provide is that there
5 are agreements and programs under which
6 certain businesses, like these
7 high-frequency trading firms that own a
8 membership or a group of memberships, are
9 able to obtain rates that our --

10 THE COURT: Are they Class B
11 members?

12 MR. HATCH-MILLER: They own a
13 membership. They may own --

14 THE COURT: Is there --

15 MR. HATCH-MILLER: -- one -- one or
16 more --

17 THE COURT: If they're --

18 MR. HATCH-MILLER: -- memberships.

19 THE COURT: If they're plaintiffs
20 and they're Class B members, then --

21 MR. HOGAN: The answer is yes, they
22 do. They're Class B members.

23 THE COURT: Then what are we looking
24 for?

25 Presumably your clients would have

PROCEEDINGS

1
2 the information if they're a part of this
3 purported class.

4 MR. HATCH-MILLER: Well, that's
5 the -- but that's the problem, Your Honor,
6 is that these are some special rights that
7 are being extended to some members and not
8 others.

9 And they -- these types of
10 memberships were excluded from our class
11 definition. This is --

12 THE COURT: Some members and not
13 others.

14 MR. HATCH-MILLER: There are certain
15 types of corporate membership holders.
16 They are --

17 THE COURT: Sure.

18 MR. HATCH-MILLER: -- that have a
19 special status.

20 THE COURT: Sure. And if they're
21 not Class B members, you get the discovery.
22 But if they are Class B members, you don't,
23 because we are comparing now Class B
24 members and the rest of the world.

25 MR. HATCH-MILLER: Right. But I

PROCEEDINGS

1
2 think our point, Your Honor, is that --

3 THE COURT: That's your -- that's
4 your complaint right there, is -- wasn't
5 that the entire premise for the breach, is
6 "We as this group have this right as
7 compared to the rest"?

8 MR. HATCH-MILLER: Right. But,
9 Your Honor, I think that -- our point is
10 that there's -- the meet -- the preference
11 that members were supposed to have is no
12 longer meaningful if the rate, which is
13 supposed to be the lowest rate for members,
14 is actually subject to certain exceptions
15 where some people --

16 THE COURT: Are you saying --

17 MR. HATCH-MILLER: -- may pay
18 nothing.

19 THE COURT: -- if the two of you
20 standing in front of me are both Class B
21 members for all perpetuity, you have to
22 have the same exact deal, even if you trade
23 at a volume that's a billion and he trades
24 at a volume of a hundred thousand?

25 MR. HATCH-MILLER: No. No,

PROCEEDINGS

1
2 Your Honor, we're not saying that in all
3 circumstances.

4 But the characteristics of these
5 programs -- and this is specifically
6 alleged in our complaint and was part of
7 the motion to dismiss briefing -- is
8 that -- that the -- the types of -- the
9 types of special deals that were -- that
10 are now being extended are different in
11 terms of the duration, the amounts, than
12 anything that previously existed.

13 MR. WEINFELD: Your Honor, if I
14 may.

15 Bill Weinfield, counsel for the
16 plaintiffs.

17 In our complaint, we exclude from
18 the class specifically electronic corporate
19 members, and we are alleging that these
20 ECMs are getting better deals than the
21 individual Class B members that are members
22 of the class. Those special deals provide
23 fees that are lower than what we get.

24 And we have alleged that
25 specifically, and we've alleged that they

PROCEEDINGS

1
2 should not -- these ECMS should not get
3 lower fees than the other Class B members
4 that are parts of the complaint.

5 MR. HOGAN: Judge, we've agreed to
6 give ECMS. They're not Class B members,
7 just like the distinction you've drawn.
8 That's already what we've agreed to
9 provide.

10 THE COURT: That seems to provide
11 plaintiffs with the information that they
12 would need as pled in this complaint,
13 because, again, I see throughout your
14 complaint that you do identify those ECMS
15 as something separate, and that they're
16 being given preferential treatment, in
17 plaintiffs' view. You make that point.

18 But the breach comes by virtue of
19 the fact that defendants have allegedly not
20 honored their agreement to give
21 preferential fees to Class B members as
22 compared to non-Class B members,
23 nonmembers.

24 And when you say "other members,"
25 that would be read to be members who are

PROCEEDINGS

1
2 not Class B members.

3 So if you call them "customers,"
4 which you do at some points, if you call
5 them "members" or you call them "ECMs" or
6 you call them "nonmembers," the way this
7 complaint is pled, those all stand in this
8 balloon here (indicating), and the Class B
9 members plaintiffs are here (indicating).

10 They, in your mind, have a right to
11 have preferred fees as compared to this
12 balloon on my left. And that's the
13 comparative.

14 So it sounds like defendants agree
15 to give you that information and those
16 documents, and so I'm not sure what else
17 you're looking for.

18 I'm going to require defendants to
19 give that information, and if this issue
20 comes to a head somewhere later down the
21 road, you can raise it with me. But right
22 now I don't see how this could possibly be
23 relevant based on the complaint pled.

24 MR. WEINFELD: I -- I have a
25 question, Your Honor --

PROCEEDINGS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Yes.

MR. WEINFELD: -- for clarification.

So when you have firms like Virtu, they are receiving special fees that are much lower than the Class B members in the complaint.

Are you asking CME to provide those agreements to plaintiffs?

MR. HOGAN: Judge, Virtu is a Class B -- they own a Class B membership. That's what we just said.

Those two guys that were here before, their clients are -- own Class B memberships.

MR. WEINFELD: They're treated so differently, Your Honor. I mean, they're actually making trades for zero, subzero, or close to zero, whereas the members of the class are paying 12 cents a trade, 18 cents a trade.

MR. HOGAN: It's not a core right, Judge. The comparative isn't a core right.

MR. HATCH-MILLER: And that's --

PROCEEDINGS

1
2 that's the basic issue here, Your Honor, is
3 now this is -- it's kind of sneaking into a
4 discovery motion, like an attempt to get a
5 totally new substantive ruling on.

6 And if you want us to brief that
7 issue, I mean, we can do -- we could -- we
8 could do so.

9 But, Your Honor, I just -- we don't
10 understand how you could be asked to narrow
11 the complaint to something narrower than
12 what's pleaded in connection with a
13 discovery motion on a point that -- you
14 know, they're pointing out the absence of a
15 word in your ruling, but --

16 THE COURT: So I'm just
17 fast-forwarding. I'm thinking ahead to
18 probably November when we're going to start
19 talking about -- and it might be next
20 November -- when we start talking about
21 class certification and so forth.

22 Who is your class going to be? Are
23 we now picking and choosing Class B
24 members?

25 MR. HATCH-MILLER: No.

PROCEEDINGS

1
2 THE COURT: The ones that feel like
3 they got slighted versus the ones who are
4 getting a good deal?

5 MR. HATCH-MILLER: No, there are --

6 THE COURT: How is this going to be
7 a class?

8 MR. HATCH-MILLER: There are
9 separate classifications of memberships
10 within CME and CBOT's own hierarchy.

11 And one of the issues in the case
12 that we've hinted at at least, or I've
13 talked about a little bit earlier, is there
14 have been changes in the rules regarding,
15 as Mr. Hogan points out, a firm like Virtu
16 might own one membership, yet an unlimited
17 number of computers running automatic
18 software or traders associated with that
19 firm can now claim the rights of
20 membership.

21 That's one of our pleaded breach
22 theories that the plaintiffs disagree --
23 the defendants disagree with, but it's
24 not -- it wasn't part of the motion to
25 dismiss.

1 PROCEEDINGS

2 And, in effect, they're trying to
3 get you to rule that part of the case out
4 on a discovery motion.

5 THE COURT: I am going to deny the
6 motion to compel without prejudice as to
7 that particular point.

8 We're going to have defendants give
9 you the information vis-à-vis these other
10 non-Class B members, and let's see where it
11 goes from there.

12 We've got a lot of discovery still
13 left to do, and I don't think that that
14 will put you too far behind any 8-ball
15 should I reconsider.

16 But as of today, I'm going to deny
17 that point without prejudice.

18 MR. HATCH-MILLER: We understand the
19 ruling, Your Honor. Thank you.

20 So if I could turn to the next --
21 the next topic --

22 THE COURT: Yes.

23 MR. HATCH-MILLER: -- which is --
24 and to be clear, that was Request for
25 Production 74, was the one related to these

PROCEEDINGS

1
2 deals.

3 The next part relates to Requests
4 for Production 75 and 79, and these are
5 requests for the financial information
6 related to these transaction fees.

7 So the defendant's argument here, we
8 talked about briefly before with regard to
9 the third parties, is that because
10 Your Honor said there's no longer a -- a
11 claim under a revenue-sharing rule, that we
12 are no longer entitled to any discovery
13 related to the defendant's revenues.

14 This is completely within the normal
15 bounds of what you'd expect in commercial
16 litigation: financial information,
17 financial benefits, financial results
18 related to the specific operations at issue
19 in the case. There's no significant burden
20 associated with providing it, and it should
21 be produced.

22 If there's a dispute later on about
23 its admissibility or, you know, whether
24 it's relevant to our damages theory,
25 whatever it might be -- obviously we're not

PROCEEDINGS

1
2 at the stage where we have -- where we have
3 expert reports or anything like that, but
4 this is part of the information that we
5 need to develop our case.

6 THE COURT: What part of your case?

7 MR. HATCH-MILLER: It's related to
8 damages, Your Honor, to understand --

9 THE COURT: Under what claim or
10 theory?

11 MR. HATCH-MILLER: The fee
12 preference claim.

13 THE COURT: So the fee preference
14 claim, in just the most simplistic terms,
15 is you as a Class B member are supposed to
16 get preferred fees.

17 MR. HATCH-MILLER: Correct.

18 THE COURT: A nonmember is getting a
19 better fee deal than you.

20 MR. HATCH-MILLER: Correct.

21 THE COURT: That's a breach.

22 How is the revenues and profits for
23 clearing, transactions, or other
24 trading-associated fees relevant to that
25 particular claim?

PROCEEDINGS

1
2 Because wouldn't it just be
3 calculated based on the -- some sort of
4 differential -- like, does it matter how
5 much revenue they get from that as compared
6 to what you are paying?

7 I mean, is that -- I'm not seeing
8 how their overall revenues and profits
9 would give you the information that you
10 need. It seems like you only need a much
11 more limited scope that would be relevant
12 to if the Court finds, yes, there is a
13 breach, you should have been paying \$5 if
14 he was paying 6, right? That's your fee
15 preference. You shouldn't have been paying
16 the 6 while he was paying 5, right?

17 Does it matter how much gross
18 revenue and profits they received in
19 totality from this?

20 MR. HATCH-MILLER: So in terms of --
21 I guess what you're saying is, what -- what
22 we -- what would be a more direct measure
23 might be the transaction-specific
24 information about each individual
25 transactions and the fees charged.

PROCEEDINGS

1
2 That was also something that's -- I
3 think that's a subject of -- of dispute,
4 and what we're trying to do is to narrow --
5 to -- to ask for something that's more
6 readily available at this stage, without --

7 THE COURT: Well, I guess I'm just
8 looking -- so it says "any projections or
9 estimates," which, you know, that's
10 futuristic and speculative.

11 Again, it's not going to damages
12 because if you win, then presumably this is
13 going to change, right? What's -- what's
14 part of the relief? You in the future
15 would get your preferred fees.

16 So -- theoretically, right?

17 MR. HATCH-MILLER: So, Your Honor --

18 THE COURT: I mean, so the
19 projections and the estimates, I'm not sure
20 that that is something that would be
21 relevant.

22 But we're going through "projections
23 or estimates regarding future revenues and
24 profits from clearing, transactions,
25 trading-associated fees, including

PROCEEDINGS

1
2 colocation services, fees charged for
3 colocation services."

4 And then we go on to say, "the
5 trading volume, the transaction fee revenue
6 and profits, access fee revenue and
7 profit."

8 All of this dating back to the year
9 2000, which, again, is very, very broad.

10 And because you are not entitled to
11 share in revenue, I'm trying to figure out
12 how these requests can be appropriately
13 narrowed in scope to get plaintiff
14 information that it feels it is entitled to
15 and may need for its case, but also not
16 opening the box here to require defendants
17 to give you each and every document that
18 you are requesting in these incredibly
19 broad requests that I can't find a way that
20 they possibly could be relevant.

21 So I'm just talking this through
22 with you to say, what is it -- how does it
23 still match up to what's still alive?

24 MR. HATCH-MILLER: So as to the --
25 as to the colocation fees, the -- the -- as

PROCEEDINGS

1
2 I explained before, both of these requests
3 include the clearing fees, transactions,
4 other related fees.

5 And I understand your point that 75
6 is related to future -- future projections
7 and estimates, and it's really 79 that's
8 kind of the past -- past financial results.

9 But as -- as to the colocation part
10 of the case -- claim, the revenues --
11 whether -- whether or not we can directly
12 claim a share of access, which is a
13 different -- a different issue because the
14 access fees that were the subject of the
15 previous claim were -- that was from a time
16 period where we -- that related to the open
17 access claim, which is no longer in the
18 case, and general access to electronic
19 trading.

20 We're now talking specifically about
21 revenues earned through the colocation
22 services. And that -- that -- because our
23 allegation is that that's a right that
24 belongs exclusively to members, the ability
25 to trade from that proximate location

PROCEEDINGS

1
2 should be -- should be a right that travels
3 with a membership.

4 And so our theory of the case on
5 terms of damages there is that the
6 membersh- -- the value of the memberships,
7 which are -- there is -- they're traded in
8 the market, they're leased and sold on the
9 market, and the value of that right has
10 been diminished.

11 And it -- there may not be a direct
12 way to measure the diminution of that value
13 without looking at the revenues that the
14 defendants are earning from it.

15 And that's not to say that our --
16 our claim is for revenue sharing, but it's
17 one of the possible ways that we can
18 measure the diminution of value of the --
19 of the memberships, is the results of
20 the -- the financial results of the
21 colocation program, which should be readily
22 ascertainable and available without --
23 not -- not talking about future projection,
24 but the past revenue, since the thing has
25 been opened in 2012, which is a fairly

PROCEEDINGS

1
2 limited period of time, and we're talking
3 quarterly or annual financial results.

4 THE COURT: Mr. Hogan, response?

5 MR. HOGAN: So, Judge, let me --
6 again, I prefaced this before, but keeping
7 straight, I think, the distinction between
8 transaction fees, which are clearing and
9 transaction fees charged everywhere, and
10 colocation fees are very important.

11 Coming to the colocation fees first.
12 There is zero doubt that in Your Honor's
13 ruling, you ruled that the contract claims
14 with respect to revenue sharing, GLOBEX
15 access revenue, or right to share leasing
16 fees generated from the ADC are out of the
17 case. That is from your ruling at Page 9
18 and 10.

19 And I -- I think I hear the
20 plaintiffs conceding that they're not
21 trying to build a damages model based on
22 sharing colocation revenues.

23 But then they turn around on the
24 other hand and say, "but it could be
25 reflective of the value of our

PROCEEDINGS

1
2 memberships."

3 And, Judge, that's where I hear that
4 as a sentence stated, but I have no way to
5 link that in any economic way. If you
6 can't recover directly the revenues that
7 the exchange earns from providing
8 colocation and connectivity at the Aurora
9 Data Center, then you can't take that
10 information and say, "Well, it somehow
11 should have been reflected in the value of
12 our memberships."

13 And the big picture, Judge, with
14 respect to either colocation fees or
15 clearing and transaction fees, the members
16 have never revenue shared with those kinds
17 of fees. That's the way the exchange, when
18 it was a mutual exchange, where it made its
19 money.

20 When a Class B member would walk in,
21 they'd go on the floor and they'd trade.
22 They'd make a profit and loss on their
23 trade where they'd lose their membership,
24 but there was no direct correlation to the
25 transaction fees that the exchange did.

PROCEEDINGS

1
2 With respect to the transaction
3 fees, the clearing fees and the transaction
4 fees, Judge, the first point that we want
5 to make sure we reiterate is that to the
6 extent those are something that the
7 plaintiffs feel that they're entitled to,
8 those transaction fees, again, inure to the
9 benefit of the exchange, the public
10 corporation now.

11 And at the time of demutualization,
12 these plaintiffs received their Class B
13 shares and they received Class A equity
14 interest in the public corporation. So you
15 would expect a direct correlation in the
16 value of A shares over time with respect to
17 the financial results of the exchange.

18 But for the plaintiffs to come in
19 and say, "We want to model our damages
20 based on what the Class A shares, in
21 essence, that we had, and who knows what we
22 did with; maybe we sold them. Now I'm
23 happy we sold them."

24 But this -- this transaction -- the
25 contract they received gave them all that

PROCEEDINGS

1
2 bundle of rights. And it's entirely clear
3 that the financial result in operation of
4 the exchange were distinct from the
5 financial benefits of having a B share
6 membership.

7 At times they moved in concert, at
8 times they moved differently. There are
9 different drivers that determine those
10 things with respect to the exchange fees
11 and the clearing fees that are charged.

12 But you have to come back to the
13 colocation fees, Judge, and if you -- one
14 thing I want to be very clear on.

15 If you turn to Slide 9 in my
16 presentation, I just have to -- and I'm
17 sure it's a -- I'm sure it's a mistake in
18 the plaintiffs' briefing, but I just want
19 to point it out because it is a mistake.

20 In the reply brief, what the
21 plaintiffs try to say is that the prior
22 claim that Your Honor dismissed was with
23 respect to clearing and transaction fees
24 associated with open access. That's --
25 that's in their reply brief.

PROCEEDINGS

1
2 And if you flip back, Judge,
3 obviously, to Page 8, the page right
4 before, that is the text of Your Honor's
5 ruling, which, again, is very clear that
6 what we were talking about were revenue
7 sharing, GLOBEX access fees, and leasing
8 fees generated from the ADC.

9 And Your Honor didn't just make that
10 up. If you turn to Page 10 of my
11 presentation, there are the cites from
12 their complaint where they're talking about
13 what their contract rates are here, they
14 believed that the collection of colocation
15 and other access-related fees -- that by us
16 collecting them and not sharing them
17 breached the core rights.

18 So I want to be very clear.
19 Your Honor's prior ruling was all over
20 this, and it was all about their claim that
21 they got GLOBEX access fees.

22 Do you remember, Judge, that was the
23 582 rule and there was the leasing pool
24 that was set up, and then that was changed
25 at the time of open access in the year

PROCEEDINGS

1
2 2000, more than ten years prior to the
3 filing of this complaint. And Your Honor
4 ruled as to the CBOT plaintiffs, they
5 didn't have such a right, in any event.

6 And so considering all of these
7 access to claims, which is what -- colo is
8 a data center that manages access to GLOBEX
9 in the open-access world, so there's all
10 sorts of fees. There's colo fees, but
11 there's fees charged for GLOBEX
12 connectivity in all sorts of different
13 ways.

14 All of those connectivity fees is
15 what Your Honor was talking about and that
16 the plaintiffs are raising in the motion to
17 dismiss.

18 And so the profit loss and the
19 amount of revenues that are earned from
20 colocation, the idea that then we can bring
21 that back into the case just by sort of --
22 I'm going to just say hand waving and say
23 it's relevant to damages, I don't think is
24 right. I think it's out of the case and
25 it's, therefore, irrelevant for discovery

PROCEEDINGS

1
2 purposes.

3 MR. HATCH-MILLER: So, Your Honor,
4 the basic point here is that there are
5 certain rights that, under the core rights,
6 were supposed to travel with the B share.

7 And Mr. Hogan's argument about the
8 value of A shares and the market value
9 going up and down really puts the cart
10 before the horse because if certain rights
11 were supposed to travel with the B share,
12 as we allege, and one of them is proximity,
13 that -- the value of that right is supposed
14 to be reflected in the membership.

15 And we're -- as part of our damages
16 case, are going to have to prove the
17 diminution of value of the -- of the
18 share -- of the market for membership sale
19 and leases.

20 And there's always been a
21 transaction -- a market for such
22 transactions, even before the core rights
23 memberships were held as an asset and
24 traded or leased for profits, and the value
25 goes up and down, of course.

PROCEEDINGS

1
2 But in this case, our allegation is
3 that one of the core rights -- two of the
4 core rights, but related to colocation,
5 that that core right has been breached, and
6 that has negatively impacted the value of
7 the memberships.

8 And the documents we're talking
9 about are part of the way that we're going
10 to be able to value that in the -- that
11 what -- what, in another -- in an
12 alternative world where the breach didn't
13 exist, what the membership values would
14 look like if that right was traveling with
15 the membership instead of being sold
16 directly by CME.

17 THE COURT: At most, though,
18 wouldn't any revenue or profit information
19 that could possibly be relevant only relate
20 to what defendants are receiving from these
21 others from whom you say they don't have a
22 right to get this?

23 But let's not forget, open access is
24 allowed. We have open access, and you as
25 plaintiffs don't have a right to claim that

PROCEEDINGS

1
2 there wasn't open access. That time period
3 has passed. It is gone.

4 So now we have open access, right?

5 MR. HATCH-MILLER: Correct. But as
6 Mr. Hogan points out, there are --

7 THE COURT: So now, to try to find
8 this inherent value in what you describe as
9 the "best most proximate," you think that
10 the information regarding revenue and
11 profits is somehow going to tie that up --

12 MR. HATCH-MILLER: Sure.

13 THE COURT: -- to best and most
14 proximate?

15 MR. HATCH-MILLER: Yes, Your Honor,
16 because I -- I mean, I -- we don't have the
17 information yet, but I'd be very surprised
18 if they don't have financial records that
19 talk about the financial results of this
20 specific facility that they built at
21 significant cost.

22 And they -- there's -- there are
23 specific --

24 THE COURT: I don't -- I don't doubt
25 that either, but I'm, again, trying to

PROCEEDINGS

1
2 understand from plaintiff how this is
3 relevant, how it could possibly lead to
4 something that would come into being at
5 trial.

6 MR. HATCH-MILLER: In terms of
7 the -- the way -- the -- what we're looking
8 for these doc- --

9 THE COURT: Here's what I'm going to
10 do --

11 MR. HATCH-MILLER: Yeah.

12 THE COURT: -- with respect to this,
13 because I do think that this is going to be
14 extremely -- the way that 79 -- oops -- 75
15 is purely a hypothetical. I'm not allowing
16 75.

17 Projections? What's that? I mean,
18 what's that going to tell you? What they
19 hypothetically think that this is worth?
20 That's not what your damages are going to
21 be based on, correct?

22 MR. HATCH-MILLER: Well, our damages
23 would be -- I mean, it depends on when we
24 go to trial, right? I mean, there -- in
25 certain -- right now they have --

PROCEEDINGS

1
2 THE COURT: Has your expert told you
3 that you need any of this information for
4 purposes of value or damages?

5 We're not there yet. You don't even
6 have an expert, I trust.

7 MR. HATCH-MILLER: I don't -- I
8 don't think I can tell you that,
9 Your Honor, one way or another. I'm not
10 sure.

11 THE COURT: And so what I'm going to
12 tell you is, again, I don't think that
13 we're there yet for you to start uncovering
14 this, because this case is going to take a
15 little bit of time for you all to sit with
16 your experts and figure out exactly how
17 they plan to value any purported damages
18 before you're just getting this
19 information, where the Court has made clear
20 that there is no claim for revenue sharing,
21 there is no claim for -- as opposed to this
22 breach that you claim for open access.

23 Open access has been allowed, and
24 now what do you do with this information
25 going forward?

1 PROCEEDINGS

2 I look at this case in terms of the
3 view that you say that you have
4 preferential fees. They were charging
5 lower fees to some non-Class B members, and
6 that's part of your gripe.

7 And to the extent that is a breach,
8 there are going to be damages associated
9 with that; not just in the past, but what
10 do you do going forward?

11 I suspect that the best solution
12 possible would be to make sure that if
13 there is a breach, it gets cured and
14 remedied on a going-forward basis.

15 They're not going to pay damages
16 forever; they're going to change the system
17 so that if you do, in fact, have a right to
18 preferential fees, you get that going
19 forward.

20 We talked about that before. What
21 does that mean? Does that mean a nickel
22 less? What is a preferential fee? What is
23 a preferential fee that was never discussed
24 in here? So maybe it's a huge number,
25 maybe it's not. What is their obligation

PROCEEDINGS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

here?

But the projections, I don't think, would be relevant because that would be a change going forward.

You claim that the value of the shares have diminished. That would mean, presumably, if you get your rights back that you think that you have lost, your shares would theoretically rise right at that moment, correct?

MR. HATCH-MILLER: I mean, I'm not sure whether we -- whether you -- I'm not sure whether you could say that one way or another. There -- there has been damages incurred already. There's -- like I said, there's -- there are transactions --

THE COURT: Is that because of those who may have been trading their fee shares?

MR. HATCH-MILLER: And there's a lease market for these --

THE COURT: Mm-hmm.

MR. HATCH-MILLER: -- for these seats --

THE COURT: But the lease part --

PROCEEDINGS

1
2 MR. HATCH-MILLER: -- at all times.

3 THE COURT: Right. But this lease
4 market, we're going to get that through
5 these contracts, right?

6 So if you had a right such that they
7 weren't allowed or permitted to lease or
8 sublease -- let's just assume that.

9 We know what those contracts are.
10 We know what they collected. Why do you
11 need all of this information in addition?

12 MR. HATCH-MILLER: So the lease --
13 we're talking about the sublease
14 transactions first, so that the -- the --

15 THE COURT: Well, I don't think
16 they're getting a piece of that.

17 MR. HOGAN: No.

18 MR. HATCH-MILLER: So the sublease
19 transactions is one.

20 But the member -- the market for
21 lease -- leases is -- you know, it's set on
22 a -- on a -- people are trading with each
23 other, just like people lease their
24 apartment.

25 And when there is a -- one of the

PROCEEDINGS

1
2 rights that travels with the memberships
3 that's not being honored, the -- the
4 trading market for those leases is
5 negatively impacted, and has been since
6 these services started being offered in
7 2012.

8 And so there -- there certainly are
9 past damages that could not be cured
10 through injunctive relief alone, if that's
11 what you're suggesting.

12 And I -- and I -- certainly one of
13 the ways that you would measure the
14 negative impact on the market for
15 membership sales and leases is, well,
16 what's somebody else charging for that?

17 THE COURT: Okay. And so part of
18 this motion to dismiss and a lot of what
19 we've discussed were, is there a right to
20 revenue sharing? No, we know that there is
21 not. What about this open access? No, you
22 don't have a claim based on that.

23 I said that plaintiffs were not
24 foreclosed from claiming a breach of their
25 core right, which you say -- said is "most

PROCEEDINGS

1 proximate and free access to the ADC."

2 That's your words, right?

3 Mr. Hogan is moving in his skin, I
4 can see, because --

5 MR. HOGAN: Yeah. I memorized your
6 ruling, so I know where you're reading
7 from.

8 THE COURT: Because he believes
9 firmly that you don't have such right.

10 But, nonetheless, I left it alone
11 and said maybe you do. Maybe you do have a
12 right to preferred fees. What does that
13 mean? That means you pay less than
14 non-Class B members.

15 What else does that mean? If you
16 have such a right, that means you get to
17 sit right next door to GLOBEX. You get
18 your terminal right there where it's housed
19 at the ADC, and you get it for free if the
20 Court buys into your complaint as framed,
21 right? Those were the words that you used.

22 MR. HATCH-MILLER: I understand,
23 Your Honor.

24 THE COURT: "Most proximate free
25

PROCEEDINGS

1
2 access."

3 So what about everybody else?

4 In other words, is that ultimately
5 going to stop defendants from doing what
6 they're doing? No. There's open access.
7 We know that there's open access.

8 What is "most proximate"? "Most
9 proximate" means immediate. "I'm right
10 here; my terminal is there, where it always
11 was when it was back on the trading floor."

12 Let's not forget, part of this
13 motion to dismiss and part of the way that
14 this was pled originally was on the
15 assumption that GLOBEX was sitting on the
16 floor, sitting on the floor for all these
17 years, and then moved fairly recently to
18 the ADC.

19 Last month or two months ago for the
20 first time after this ruling came, we find
21 out, oh, by the way, it has moved somewhere
22 else.

23 How that factors in here, I'm not
24 quite sure. But what I do know is when
25 this ruling was made, I looked at

PROCEEDINGS

1
2 plaintiffs' complaint in the light most
3 favorable to plaintiff, in so ruling that
4 your claims can survive for a few things:
5 preferential fees, most proximate, not
6 exclusive -- you're not the only ones; we
7 have open access -- and free, meaning stop
8 charging us those colo fees.

9 That's where we're at.

10 And so if you could point me to how
11 this really broad No. 79 is going to help
12 you sustain those claims, we'll see about
13 getting you those documents.

14 But right now this just screams to
15 me you still want a piece of the action
16 with the revenue sharing, and ignoring that
17 there is, in fact, this open access, for
18 which you have no remedy.

19 MR. HATCH-MILLER: So, Your Honor,
20 on -- as to open access, the only point
21 that I want to make on that is that we're
22 talking about a period of time when only
23 members got access to that electronic
24 trading, and there was a rule that
25 others -- any- -- anyone else, if they paid

PROCEEDINGS

1
2 a fee, there was a piece of that revenue
3 that went to members.

4 But colocation and the existence of
5 this trading floor facility where people
6 can pay to participate, that didn't exist
7 at the time. So the rule -- that -- the
8 rule that we're talking about on open
9 access is just -- it's not about ADC and
10 colocation; it was about open access.

11 And our understanding of your ruling
12 is that the open access part of the claim
13 is out, but as to the fact that there is
14 now a trading floor that now is -- is not
15 accessible to members unless they pay a fee
16 and accessible to others for a fee,
17 that that breach negatively impacts the
18 value of -- of membership sale and lease
19 transactions, has for a number of years.

20 There are -- there are past damages
21 as a result of that that won't be
22 recompensed through forward-looking relief,
23 and we need a way to measure that.

24 And one -- one way to measure that
25 is through the revenues that CME and CBOT

PROCEEDINGS

1
2 have generated for charging access to
3 others that otherwise those amounts would
4 have been reflected indirec- -- directly or
5 indirectly in the -- in the market for --
6 for memberships.

7 THE COURT: All right. So this is
8 going back from January 1 of 20- -- 2000.

9 Is that even the time period that
10 we're talking about?

11 MR. HATCH-MILLER: So as to the ADC
12 claim, the relevant portion is since the
13 opening of the ADC, which is, I believe,
14 2011 or 2012.

15 MS. LAPE: 2012.

16 MR. HOGAN: 2012.

17 THE COURT: So what's -- what's
18 happening for these 12 years in between?
19 Why in the world would I even contemplate
20 giving this kind of information for those
21 12 years? You're asking to go back month
22 by month from January 1 of 2000.

23 MR. HATCH-MILLER: Yeah, Your Honor,
24 because of the other transaction fees.

25 But for the -- for the colocation

PROCEEDINGS

1
2 part of the claim, I think that what we
3 really -- what we really need to measure
4 the damages for that are the financial
5 results of the colocation, of the
6 colocation operations from 2011 through the
7 present. And that's -- that's essentially
8 what we need.

9 MR. HOGAN: Your Honor, I'd urge you
10 to go back to where you were --

11 THE COURT REPORTER: I'm sorry?

12 MR. HOGAN: Or excuse me -- to go
13 back to where you were a moment ago.

14 There is no doubt that Your --
15 Your Honor has perceived entirely correctly
16 the import of open access.

17 And so you asked what's being going
18 on since 2001? In 2000, the exchange went
19 to open access.

20 In 2001, the matching engine was
21 moved, actually, to Cermak.

22 And then in 2002, it was moved to a
23 remote data center in Lombard.

24 In 2006, CME began offering
25 colocation services out of Cermak, charged

PROCEEDINGS

1
2 \$6,000 a month for those.

3 So we're going to get to in a second
4 this story of most proximate access. But
5 you can tell I'm getting excited, Judge,
6 because I said from day one these GLOBEX
7 rights are made up, and they are.

8 Coming back to what Your Honor
9 ruled, there is no -- I haven't heard any
10 articulation -- Your Honor was very clear,
11 GLOBEX access fees, ADC leasing fees are
12 out of this case, because all things having
13 to do with connectivity to GLOBEX, which is
14 what the Aurora Data Center facilitates,
15 are barred by the statute of limitations.

16 We're about to find out pretty
17 quickly that the claim of proximate access
18 to GLOBEX is also barred by the statute of
19 limitations. That's what we're trying --
20 trying to avoid here, I think.

21 But based on Your Honor's prior
22 ruling, sharing in the financial results of
23 the colocation center, which manages
24 connections to GLOBEX, and leasing space at
25 the ADC is exactly what Your Honor ruled

PROCEEDINGS

1
2 out.

3 And so for us, they didn't have to
4 turn around and figure out how to sort out
5 the financial information, because it
6 should be directly or indirectly reflected
7 in the, quote, "value of their
8 memberships." It's plain and simple in the
9 end runaround that we're in.

10 THE COURT: Okay.

11 MR. HOGAN: So I urge you to stay
12 where you are.

13 THE COURT: So let me ask you,
14 Mr. Hogan, looking at 79, they ask for
15 "Documents or data sufficient to show the
16 trading volume."

17 MR. HOGAN: Yeah.

18 THE COURT: That's out there.
19 That's published, right?

20 MR. HOGAN: Well, let -- let me make
21 sure I understand it.

22 "The trading volume" --

23 THE COURT: Comma.

24 MR. HOGAN: -- "clearing,
25 transaction fee revenues, access, and" --

1 PROCEEDINGS

2 THE COURT: So --

3 MR. HOGAN: The same thing as
4 trading volume.

5 THE COURT: -- trading volume,
6 that's out there, right?

7 MS. LAPE: Some of it is rolled up
8 into CME Group as a whole. So CME Group
9 has five or six different exchanges under
10 it, and so sometimes in the -- in the
11 financial documents that are filed with the
12 SEC, it's filed with respect to all five
13 exchanges together.

14 THE COURT: Okay. And those
15 documents would be discoverable, right? I
16 mean, they're on the public website.

17 MR. HOGAN: They're publicly
18 available on a consolidated basis for sure.
19 I don't know about on a per-exchange basis
20 over time. I don't know if those are
21 publicly available. And I don't know how
22 easy -- you know, I don't know --

23 THE COURT: All right.

24 MR. HOGAN: -- is the answer --

25 THE COURT: Is it --

PROCEEDINGS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. HOGAN: -- to the question.

THE COURT: -- something that is available? If it's something that is available -- because then you use the conglomeration of all five to give this SEC report. I'm going to assume that it is.

MR. HOGAN: Yeah.

THE COURT: And I think that plaintiffs are entitled to the trading volume.

MR. HOGAN: For sure the exchanges report on a daily basis what the number of contracts traded on the exchange is.

THE COURT: I'm asking you to provide those documents --

MR. HOGAN: Right.

THE COURT: -- and you need to provide those documents.

The second set: "Clearing and transaction fee revenue and profits, access fee revenue and profits, and colocation fee revenue and profits."

This is where my concern is, not to mention that it's going back now 18 years,

PROCEEDINGS

1
2 which we know that that is not the
3 appropriate time frame. So that alone --
4 that date is not appropriate.

5 But, Plaintiff, one more time to
6 explain to me which of these categories
7 could possibly be relevant to the remaining
8 claims.

9 MR. HATCH-MILLER: Your Honor, the
10 colocation fee revenue and profits for --
11 now they -- Mr. Hogan says they've been
12 charging them since 2006.

13 So the co- -- whatever the
14 colocation fee revenues and profits are
15 from 2006 through the present is directly
16 relevant to the -- the diminished value of
17 the trading that -- the sale and lease
18 markets for these memberships that would
19 otherwise have reflected that value. And
20 that's fair game for discovery.

21 If there's a fight later on about
22 whether that's, you know, something our
23 expert can rely on or whether we can
24 introduce it at trial as evidence, that's a
25 fight for another day.

PROCEEDINGS

1
2 But this should be readily available
3 and is not going to impose any significant
4 burden to produce the financial results of
5 colocation fees.

6 And again here, this is distinct
7 from general fees for access to GLOBEX.
8 We're talking --

9 THE COURT: Right.

10 MR. HATCH-MILLER: -- specifically
11 about --

12 THE COURT: So you'd agree --

13 MR. HATCH-MILLER: -- colocation.

14 THE COURT: -- that the access fee
15 revenue and profits, in light of my ruling,
16 is not relevant?

17 MR. HATCH-MILLER: Your Honor, we
18 will not seek that. We'll -- you know,
19 we -- we are willing to live with the
20 colocation-specific financial results.

21 MR. HOGAN: Judge, they're one and
22 the same in -- in a large extent. That's
23 why I believe that your prior ruling with
24 respect to GLOBEX access is -- is virtually
25 impossible to tease out from colocation

PROCEEDINGS

1
2 fees.

3 Yes, the data center sits there,
4 people rent Rackspace, but they also pay
5 \$12,000 a month for GLOBEX connectivity.

6 THE COURT: The revenue and
7 profits -- so you're going to get the
8 contracts in terms of who is paying a
9 colocation fee, right?

10 MR. HATCH-MILLER: Right.

11 MR. HOGAN: That's correct. Yeah,
12 for sure.

13 THE COURT: Okay.

14 MR. HOGAN: I was -- I was actually
15 going to add something. You're right.

16 So -- and, Judge, the -- the only
17 way that this financial data is -- is
18 correct is what you said about they don't
19 get exclusive access. If that's true, then
20 we have a different discussion. But you've
21 said that that's not true.

22 They are going to get what it costs
23 to colocate. If these plaintiffs want to
24 go colocate this afternoon, they'll know
25 how much it costs; how much it costs to

PROCEEDINGS

1
2 connect, how much the Rackspace is.
3 They'll know it. That's their colocation
4 damages as Your Honor has explained it, in
5 light of the prior ruling.

6 The only thing the financial results
7 does is it comes back into -- they get a
8 piece of the access that is generally
9 received from CME as a result of
10 connectivity. It happens to be in the ADC,
11 but it's connectivity to GLOBEX. And,
12 again, in the open-access world, that claim
13 is simply gone.

14 THE COURT: Okay. The clearing and
15 transaction fee.

16 MR. HATCH-MILLER: So, Your Honor,
17 the clearing and transaction fees, I mean,
18 those relate to the -- the fee preference
19 claim.

20 I think that, you know, in light of
21 your -- in light of your explanation today,
22 I don't think we're -- we necessarily need
23 those at this point. I mean, I -- I --

24 MR. AGRAWAL: Yeah, look, the real
25 challenge -- this is Suyash Agrawal for the

PROCEEDINGS

1
2 plaintiffs, Your Honor.

3 The real challenge here is that --
4 is the one that you identify, which is that
5 this is data that an economist is going to
6 use to -- or a number of economists are
7 going to use to try to isolate and identify
8 what the measure of our damages is.

9 And so, you know, Mr. Hogan says,
10 well, you know, lock, stock, and barrel,
11 everything with respect to X, since you've
12 determined that a particular claim is out,
13 you know, there's no probative value of
14 that economic evidence.

15 It's entirely premature to be
16 drawing conclusions about how that
17 damage -- how that's going to play out.

18 Economists use proxies. You know,
19 the fact that there was open access does
20 not necessarily mean that all of a sudden
21 the value of colocation essentially has
22 become meaningless.

23 But this is -- this is why we're in
24 the stage of discovery, because we're
25 trying to gather the data. We're going to

PROCEEDINGS

1
2 work with experts. They're going to work
3 with their experts.

4 But -- but the idea that -- the idea
5 that, for example, because we -- because
6 you -- you ruled that we don't have a right
7 to open access and, therefore, it means
8 that data that may relate to fees that --
9 various types of fees that are collected
10 can possibly -- essentially, as a matter of
11 law, have no bearing on a damages model or
12 a variety of damages models that we might
13 ultimately proffer at that stage of the
14 proceedings.

15 I think that -- I think that, you
16 know, you're saying that some of this may
17 be premature. Maybe it is premature. But
18 to issue rulings that effectively enshrine
19 a -- as a -- that the data itself, because
20 of certain claims being out of the case,
21 can never be of any value to an expert or
22 an economist down the line, I think that's
23 a bridge too far.

24 THE COURT: That's why I'm asking
25 you.

1 PROCEEDINGS

2 MR. AGRAWAL: Right.

3 THE COURT: Do you know -- have you
4 talked to them yet? Do we know why this
5 would even be relevant? Is this something
6 that they would be looking at?

7 The colocation fee revenue --

8 MR. WEINFELD: Absolutely.

9 THE COURT: -- is relevant, in your
10 mind, because you think that your value of
11 your shares have diminished and it's
12 relevant to this leasing market. That's
13 the import of this colocation fee revenues.

14 MR. HATCH-MILLER: Correct. What
15 we're trying to find is ways that we're
16 going to be able to identify and isolate
17 the various impacts of these breaches and
18 to disaggregate those from other things
19 that have happened, like opening
20 colocation.

21 THE COURT: All right. So this --

22 MR. HATCH-MILLER: And we have
23 talked --

24 THE COURT: -- colocation, we know
25 that you're going to get information from

PROCEEDINGS

1
2 defendant about the colocation fees, right?

3 So they are going to turn over to
4 you what you're paying, what she's paying,
5 what he's paying, and who's paying them,
6 correct?

7 MR. HOGAN: Correct.

8 THE COURT: All of that is going to
9 be in the documents that we already talked
10 about.

11 MR. HOGAN: Correct.

12 THE COURT: When you say you want
13 the revenue and profits -- I guess I'm even
14 looking to say, is that even isolated or
15 parsed out somewhere? Where -- where would
16 that exist?

17 I mean, do they -- are you
18 envisioning some kind of P&L balance sheet
19 based on how much is coming in? You know,
20 I mean, how -- in what form or fashion
21 would this exist?

22 MR. HATCH-MILLER: Possibly it might
23 be on P&Ls. It might be on -- you know,
24 this is a rela- -- or at least as of the
25 time we filed this case, this was a

PROCEEDINGS

1
2 relatively new business.

3 We know we've seen documents already
4 about, you know, planning for it, how much
5 it's going to cost, how much money is going
6 to come in. And --

7 THE COURT: So you're going to get
8 all the incoming income flow.

9 MR. HATCH-MILLER: Well --

10 THE COURT: You're going to know --

11 MR. HATCH-MILLER: -- if they find
12 it. That's -- but that's the question,
13 Your Honor, is they say they're going to
14 tell us, you know, the contracts that
15 people have signed, and we'll get possibly
16 thousands of -- of pieces of paper that
17 someone is then going to have to go add up
18 and figure out, you know, when --

19 THE COURT: So you're --

20 MR. HATCH-MILLER: -- did the --

21 THE COURT: -- looking for --

22 MR. HATCH-MILLER: -- leases end.

23 THE COURT: -- for expenses in terms
24 of the ADC, like to upgrade this ADC? Is
25 that what you're looking for?

PROCEEDINGS

1
2 MR. HATCH-MILLER: That's part of
3 it. The request for profits is -- relates
4 to that because there may be things that
5 are, you know, offered at the ADC that
6 don't have to do with the -- with -- with
7 the -- this -- this right of membership.

8 THE COURT: And --

9 MR. HATCH-MILLER: That would be
10 something that an economist would have to
11 consider, and -- and you would want to know
12 not just, you know, each contract, but
13 what's the total amount of money coming in
14 on a periodic basis?

15 THE COURT: All --

16 MR. HATCH-MILLER: How many
17 people --

18 THE COURT: -- of the --

19 MR. HATCH-MILLER: -- are connected?

20 THE COURT: -- in- -- so all of the
21 income and the profits and that is going to
22 the corporation of which there are
23 shareholders.

24 MR. HATCH-MILLER: Correct.

25 THE COURT: And do I have this

PROCEEDINGS

1
2 right, the As are the equity?

3 MR. HOGAN: That's right. That's
4 right.

5 THE COURT: And so whatever the
6 profits are, the As are getting to the
7 exclusion of B, other than some mechanism
8 as set forth in the -- in the governing
9 documents?

10 MR. HATCH-MILLER: Correct, but
11 the -- but the point is, there are certain
12 rights that were supposed to travel with
13 the B shares.

14 THE COURT: But --

15 MR. HATCH-MILLER: And the core
16 rights that travel with the B shares, you
17 can't move those rights and say, "Well, no,
18 the A shares get the profit of that" -- "of
19 that" -- "what was supposed to be a right
20 of the B membership" and --

21 THE COURT: That's a really --

22 MR. HATCH-MILLER: -- disregard
23 that.

24 THE COURT: At this stage, that's
25 really, really difficult for -- for me to

PROCEEDINGS

1
2 get my arms around, because I don't see how
3 you're not back-dooring what I told you you
4 can't do when you open it through the
5 front.

6 In other words, I ruled no revenue
7 sharing because it was -- because it was
8 time-barred.

9 And --

10 MR. HATCH-MILLER: But the -- to
11 be -- to be clear, Your Honor, though,
12 you -- you ruled that that was -- that was
13 out as time-barred. That wasn't -- we
14 weren't talking about colocation fees at
15 that point. That was talking about general
16 access fees to GLOBEX.

17 There is no -- there were no --
18 there's no statute of limitations ruling or
19 problem with regard to the fees charged at
20 the ADC because they're not -- it's not a
21 charge just for access to GLOBEX. It's a
22 specific type of --

23 THE COURT: Let me -- let me --

24 MR. HOGAN: Your Honor, can I direct
25 you to my slide deck 12 -- or Page 10,

PROCEEDINGS

1
2 first of all?

3 THE COURT: Yes.

4 MR. HOGAN: There's no doubt that in
5 the Second Amended Complaint, the
6 plaintiffs are talking about collecting
7 "colocation and other access-related fees
8 from market participants to trade from the
9 ADC."

10 And then let's look back at your
11 ruling on Page 8, but it's Page -- Page 8
12 of my slides, Page 9 and 10 of your ruling.
13 You dismiss with prejudice claims -- I've
14 bolded it -- revenue sharing, GLOBEX access
15 revenue stream, or right to share leasing
16 fees generated from the ADC.

17 THE COURT: Yes. Yes. So that's
18 Pages 9 and 10 of my ruling.

19 Trading volume information is
20 allowed.

21 The colocation fees is allowed to
22 the extent it's going to come by virtue of
23 those contracts.

24 With respect to asking about the
25 revenues and profits relating to the

PROCEEDINGS

1
2 clearing and transaction fees, the access
3 fees, and the colocation fees, I am not
4 going to compel production of that today.

5 Let me give this some more thought
6 as to what the interplay of this is going
7 to be.

8 Number one, I am going to tell you
9 that from the year 2000 is way overly
10 broad.

11 Number two, I think we all agree
12 that the access fees and the clearing and
13 transaction fees are not going to be
14 relevant in terms of where -- where you'd
15 be going to show any sort of damage, but
16 maybe I missed -- misheard your -- you
17 point on that. I thought that you agreed
18 that they wouldn't be discoverable at this
19 point in time.

20 MR. HATCH-MILLER: No, I think I
21 understood that there was already your
22 ruling, but, you know, as to whether -- I
23 mean, I -- look, your question was, have we
24 talked --

25 THE COURT: Trading volume, yes.

PROCEEDINGS

1
2 Time frame, absolutely not.

3 These revenue and profit sheets, I
4 think that we're going to -- I'm going to
5 ask defendant to go back to his client, see
6 what is even there; in other words, is this
7 information even compartmentalized or
8 identifiable?

9 Because what plaintiffs are asking
10 for is something to show specifically
11 itemization of access fee revenue and
12 profits.

13 Maybe they've been collecting the
14 data for that particular notion or for the
15 clearing and transaction fee, or maybe it's
16 all going into a particular pot and
17 whatnot.

18 Find out the information, and then
19 we're going to talk about it some more.

20 Today I am not giving volume
21 production; but, again, I am not barring it
22 at this time.

23 MR. WEINFELD: Your Honor, just to
24 assist the Court --

25 THE COURT: Yeah.

PROCEEDINGS

1
2 MR. WEINFELD: -- and defendant, I
3 believe it was in 2014 Mr. Duffy, the
4 president of CME, said that such fees was
5 \$40 million. That was just two years after
6 the colocator opened up. That means that
7 he had that sort of information.

8 THE COURT: Well, there's no doubt
9 that they have the fees. Then they know
10 how much they're collecting.

11 The question is -- you're asking for
12 the revenue and profits, which is now
13 identifying -- unless I'm reading that
14 incorrectly, but I'm assuming that you want
15 what's underneath. How much does it cost
16 to build this? How much does it cost to
17 maintain this? What are the expenses
18 involved in this?

19 MR. WEINFELD: Well --

20 THE COURT: If that's what you're
21 looking for, I'm going to ask Mr. Hogan to
22 ask their client if they even have it in
23 that form or fashion.

24 MR. HATCH-MILLER: And to be clear,
25 on some of those issues you just mentioned,

PROCEEDINGS

1
2 we have -- we're currently negotiating and
3 working well with the defendants on e-mail
4 search requests, and some of -- I mean, I
5 think some of the documents we already have
6 contain some of this information;
7 presentations and --

8 THE COURT: I have no doubt -- I
9 have no doubt that it does. I have no
10 doubt that through the discovery, you are
11 absolutely going to get information
12 pertaining to the clearing and transaction
13 fees, the colocation fees, and the access
14 fees. I know that it is covered within the
15 parameters of all of this.

16 What I am honing in on are these
17 revenue and profits. And I -- I am taking
18 that to mean, because you have it
19 capitalized, "Revenue and Profits," that
20 you're making it more meaningful to tell me
21 in/out expenses, everything that goes along
22 with this.

23 And that's why -- what I'm concerned
24 about, and maybe it's a moot point. Maybe
25 they don't even have it in that form or

PROCEEDINGS

1
2 fashion.

3 MR. HATCH-MILLER: It could be,
4 Your Honor, but I -- I expect that, you
5 know, if -- if -- if we didn't ask for
6 information like this later on and we
7 presented an expert report that didn't
8 isolate issues --

9 THE COURT: Yeah.

10 MR. HATCH-MILLER: -- like that,
11 their costs, we'd be hearing a lot of
12 complaints from the defendants about our
13 failure to make those --

14 THE COURT: Well, it certainly -- it
15 certainly behooves them, I would think, to
16 reduce the figures on that in terms of
17 considering those expenses and the upkeep
18 and so forth so that it's not just a big
19 gross number that plaintiffs are going to
20 seize on and say, "Here is our share. This
21 is what we could have could have had."
22 There are going to be some expenses
23 associated with that.

24 MR. HOGAN: We might even ask the
25 plaintiffs to kick in for the cost of

PROCEEDINGS

1
2 building the GLOBEX facility.

3 THE COURT: So --

4 MR. HOGAN: That's an idea.

5 THE COURT: So I --

6 MR. AGRAWAL: Your Honor, I think
7 that makes perfect sense. Why don't -- you
8 know, we'll start with this. You know,
9 deny it without prejudice. Let us work
10 with this information. Let us talk to our
11 experts.

12 And, you know, if we -- if we
13 continue to press upon it, we will -- we
14 will revisit the issue with -- with a more
15 clearly defined explanation --

16 THE COURT: As to why you need --

17 MR. AGRAWAL: -- as to the
18 relationship between the --

19 THE COURT: Yes.

20 MR. AGRAWAL: -- specific data and
21 the damages model.

22 In my experience, economists want as
23 much as they can get, and then they work
24 with that data to sort of figure things
25 out.

PROCEEDINGS

1
2 But I think your comments today have
3 given us a lot of guidance about kind of
4 where you're going with this, what your
5 thoughts are and what your questions are.

6 And rather than us, you know, sort
7 of shoot -- you know -- you know, shoot
8 from the hip, let us be more articulate
9 with you, because clearly we're -- we're
10 not -- we're not on the same page yet.

11 And so I think -- I think -- I think
12 the approach that Your Honor has
13 articulated makes perfect sense for today.

14 THE COURT: All right. The comments
15 I am making I hope are useful when you go
16 to a mediation session in two weeks or a
17 week or whenever that is scheduled on
18 board.

19 So I am hopeful for that.

20 I also just want to state that I do
21 appreciate the diligence and the
22 cooperation of the attorneys working
23 together to get this case to a head.
24 Obviously, it is expensive. It is
25 time-consuming. All the lawyers involved

PROCEEDINGS

1
2 have just been nothing but excellent,
3 prepared and professional, civil and
4 cooperative, advocating for your clients
5 but doing that which is right.

6 We don't manufacture facts, we don't
7 change the facts, we don't hide the facts.
8 We deal with the truth and we apply the
9 law. That is what we do in this
10 courthouse. That is what I have seen from
11 these lawyers, and I really appreciate that
12 on behalf of your clients.

13 I'm going to move to the
14 interrogatories, and I am not compelling
15 the answer of these interrogatories. I
16 think that these are absolutely premature.
17 They are based on hypotheticals.

18 Counsel for plaintiffs, put out your
19 theories, put out your motion for class
20 certification, let them respond, and then
21 we can take discovery with respect to that.

22 But I am certainly not going to
23 compel a defendant to start giving you
24 information as to a hypothetical, "will
25 you," "what if," "what if we do this,"

PROCEEDINGS

1
2 "what if the Court rules X, how are you
3 going to" -- "how are you going to plead?"
4 I mean, that's just not right.

5 So those specific objections are --
6 are sustained.

7 And it's not to say that defendants
8 won't have defense with these later, but
9 it's certainly not going to come now
10 beforehand, as I have the appropriate
11 pleadings before me.

12 MR. HATCH-MILLER: Thank you,
13 Your Honor. We understand the ruling.

14 THE COURT: Anything else that needs
15 to be done today? A status date?

16 MR. HATCH-MILLER: No, I think just
17 the --

18 MR. AGRAWAL: Let us -- let us
19 confer with our -- our colleagues. The two
20 counsel for the third parties wanted to see
21 a copy of the -- of the order forthcoming
22 for today.

23 And, again, if you'll give us a
24 couple of days to put it together, circle
25 with defense counsel and with third-party

1 PROCEEDINGS

2 counsel, you know, so we can all get on the
3 same page about what the -- what the order
4 reflects, we'll submit it.

5 THE COURT: That's fine with the
6 Court.

7 You have mediation scheduled; is
8 that correct?

9 MR. AGRAWAL: October 20th.

10 MR. HOGAN: 22nd.

11 MR. AGRAWAL: 22nd.

12 THE COURT: We do not have another
13 status date.

14 MR. AGRAWAL: Right. With that
15 order, we will include a status that we
16 will confer with our colleagues on their
17 availability.

18 THE COURT: I would say why don't
19 you come back after mediation.

20 MR. AGRAWAL: Okay.

21 THE COURT: So probably sometime in
22 November. Does that --

23 MR. AGRAWAL: Yeah. I mean, I think
24 that if the original plan of maintaining --
25 of trying to get through -- of getting

PROCEEDINGS

1
2 through written discovery by the end of the
3 year, it would seem like early -- early
4 November, and certainly well before we get
5 into the holidays, would make the most
6 sense.

7 But again, as to a specific date, if
8 you want to give us a few days in early
9 November that works for the Court, then we
10 can circle back with our colleagues, figure
11 out which works for everyone, and put it in
12 the order.

13 THE COURT: I will do that.

14 So are you asking for me not to
15 enter the order today?

16 MR. AGRAWAL: Yeah. We need to
17 draft up an order that reflects all of
18 these various loose pieces, get sign-off
19 from our third-party counsel --

20 THE COURT: All right. Can I --
21 it's Thursday today. Could I anticipate
22 receiving it by Monday?

23 MR. AGRAWAL: We will get it to
24 defense counsel by tomorrow.

25 The reason there was a hang-up last

PROCEEDINGS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

time was because --

THE COURT: Yeah, I just don't want to lose track of it.

MR. AGRAWAL: Yeah. No, no. We won't -- we won't lose track of it, we assure you.

Can we have until Tuesday? I'll try to get it in by Monday, but because our hands are tied by, you know, the responsiveness of these nonparty counsel, who have been, but --

MS. LAPE: We could also do separate orders as to the motion to compel.

THE COURT: I think that you should do separate orders.

MR. AGRAWAL: That's fine.

MS. LAPE: We can get ours in for sure by Monday.

THE COURT: All right.

MR. AGRAWAL: Yeah, that's fine.

THE COURT: Do one with respect to both nonparties --

MR. AGRAWAL: Sure.

THE COURT: -- but then do a

PROCEEDINGS

1
2 separate order with respect to this and put
3 the status date in this.

4 I'll give you some dates. Thank
5 you.

6 MR. AGRAWAL: Thank you.

7 MR. HATCH-MILLER: Thank you,
8 Your Honor.

9 MR. HOGAN: Thank you, Judge.

10 MR. WEINFELD: Thank you,
11 Your Honor.

12 (Time Noted: 2:47 p.m.)
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

STATE OF ILLINOIS)
COUNTY OF COOK)

I, AMY M. SPEE, CSR, RPR, CRR, do
hereby certify:

That the proceedings as hereinbefore
set forth is a true record of the
proceedings.

I further certify that I am not
related to any of the parties to this
action by blood or marriage; and that I am
in no way interested in the outcome of this
matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 17th day of September,
2018.

AMY M. SPEE, CSR, RPR, CRR