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

SHELDON LANGER, RONALD M. YERMACK, LANCE R. GOLDBERG, ROBERT PROSI and GERALD PETROW, individually on behalf of themselves and all others similarly situated, Plaintiffs, v. CME GROUP, INC., a Delaware Corporation; THE BOARD OF TRADE OF THE CITY OF CHICAGO, INC., a Delaware Corporation, Defendants.	No. 2014-CH-00829 Calendar 6 Hon. Celia G. Gamrath, Presiding

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION, FOR APPOINTMENT OF CLASS REPRESENTATIVES, AND FOR APPOINTMENT OF SUSMAN GODFREY LLP AS CLASS COUNSEL

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I. Introduction

For the past five years, Plaintiffs Sheldon Langer, Ronald M. Yermack, and Lance R. Goldberg have pursued this breach of contract case against Defendants CME Group Inc. ("CME") and the Board of Trade of the City of Chicago ("CBOT") on behalf of a proposed Class of themselves and other members and Class B members of CME and CBOT (the "Class"). The proposed Class numbers in the thousands of Class B members, and the proposed Class's claims all turn on common issues as to the meaning and scope of Defendants' contractual obligations, whether Defendants have breached those obligations, whether and in what amount Defendants should be required to pay damages, and whether any declaratory or equitable relief should be awarded against Defendants and in what form. It is difficult to imagine a case more clearly suitable and appropriate for litigating as a class action. By this motion, Plaintiffs seek certification of the Class pursuant to Ill. Civ. Proc. Code § 2-801, *et seq.* In addition to certification of the Class, the motion seeks appointment of the named Plaintiffs as class representatives, and requests that the Court appoint Susman Godfrey LLP, which has been vigorously prosecuting this case from the start, as Class Counsel.

Plaintiffs' claims are based on breaches of contractual obligations set forth in the corporate charters of CME and CBOT. Under those charters, Defendants promised to protect the "Core Rights" of CME's Class B shareholders and CBOT's Class B members,[1] and to make any amendment, change, or modification to the Core Rights only after obtaining affirmative consent from the Class B shareholders through a member vote. These Core Rights apply to each and every

[1] Subject to the exclusions discussed below, membership in the Class is based on owning a share of CME Class B common stock or a CBOT Class B membership. For simplicity, we refer to all such owners as "Class B shareholders" or "Class B members," interchangeably, and the units as "Class B shares" and "Class B memberships," interchangeably.

Class B share, regardless of the series or division of membership. The Core Rights were adopted as part of the demutualizations of the two exchanges. As a result of the demutualization, the members who previously were member/owners of the exchanges received both Class B shares, which entitled them to the Core Rights, and Class A shares, which are publicly traded. Defendants honored the Core Rights for years after the demutualization transactions, and their Class B shares substantially appreciated in value in tandem with the publicly traded Class A shares, even as the exchanges transitioned from the historical "open outcry" trading model to the modern era of electronic trading.[2] By the end of 2007, even with approximately 80% of exchange trading taking place electronically on CME's Globex trading platform, the CME B-1 shares that CME's former Chairman Leo Melamed once referred to as the "bellwether" for the success of the exchange were valued at more than $1.5 million.

In recent years, however, the Class B shares have languished—and, for most membership divisions, substantially declined in value—even as CME's Class A shares and the company's overall market value have skyrocketed. Plaintiffs contend that this dramatic deviation between the value of the Class A and Class B shares in the same company happened because CME breached Plaintiffs' Core Rights, and the implied covenant of good faith and fair dealing with respect to those Core Rights, in two ways: the Trading Floor Claims and the Fee Breach Claims.

For each and every member of the proposed Class, the Trading Floor Claims are based on evidence that, in late 2009, CME's executive team authorized plans to open a new trading floor at a massive new trading facility in Aurora, Illinois called the Aurora Data Center ("Aurora"). This new trading floor—which CME's own executives dubbed a "*high speed trading floor*" and a

[2] The open outcry trading model is one in which transactions are executed through verbal communications and hand signals delivered from one trader to another. Compl. at ¶ 37. In electronic trading, those trades are executed through computers. *Id.*

"*strategic, electronic trading floor*"—ultimately opened in January 2012, and now accounts for the vast majority of trading activity on the CME and CBOT exchanges. Under the CME and CBOT charters, the right to access and trade from *any* trading floor is exclusively limited to the Class B members and their lessees as part of their Core Rights as Class B members. Defendants recognized in their internal documents—produced only through discovery—that the operation of this new trading floor would deliver enormous value to CME. Yet Defendants neither honored their Class B members' rights in the new Aurora trading floor (by giving them exclusive access) nor sought member consent to the operation of a new trading floor that would not be exclusively available to them. Instead, throughout this litigation CME has pretended that the Aurora trading floor was a "mere data center" that did not implicate Plaintiffs' Core Rights in any way. As a result, the Class B shareholders have been deprived of their valuable right to exclusive access to Defendants' trading floors and have not been compensated for being stripped of these valuable rights.

The Fee Claims are similarly based on common, class-wide evidence. As part of Class B members' Core Rights, members are entitled to a meaningful fee preference, that is, the lowest fees relative to other traders on the exchange. Historically, this fee preference served as a significant incentive to purchase or lease memberships. Defendants long recognized that the fee preference was a key component of membership value. But through a series of changes that culminated in 2009 and continued thereafter, Defendants adopted significant changes to their fee rules that effectively eliminated the member fee preference by (1) allowing clearing member firms, corporate trading member firms, and electronic corporate members (which are all specifically excluded from the class) to extend the members' fee preferences to non-member traders without buying or leasing additional memberships for those traders; (2) adopting a volume discount regime under which the right to the best fees depended on trading volume rather than membership rights;

and (3) implementing a slew of incentive programs under which the rights to preferential fees were not linked to owning or leasing memberships. Through these changes, Defendants substantially eliminated the advantages of the fee preference for Class B members and their lessees. And again, they did so without seeking member consent to any of these changes.

As explained below, the case for certifying a class to pursue these claimed breaches, determine the amount of damages sustained thereby, and determine the scope of any appropriate declaratory and equitable relief, is simple and straightforward:

First, the size of the Class—which includes thousands of current Class B members, excluding clearing and corporate trading member firms and any membership-holding officers, directors, and employees of Defendants—far exceeds the threshold for class certification. *See, e.g.*, *Cruz v. Unilock Chicago*, 383 Ill. App. 3d 752, 771 (2d Dist. 2008) (certifying class of approximately 200 individuals).

Second, all of the key disputed liability issues—the history and meaning of the disputed CME and CBOT charter provisions, the scope and applicability of the implied covenant of good faith and fair dealing, whether and when CME and the exchanges breached the charters and/or the implied covenant—are common to the Class and predominate over any individualized issues. Even Defendants' pleaded affirmative defenses raise issues that are common either to the entire class, or at least large subsets of the class. Plaintiffs also have identified methodologies that may be used to show damages on a class-wide basis, as detailed in the accompanying expert declaration of Dr. Jonathan Arnold. The appropriateness of declaratory and equitable relief is also a common issue.

Third, the five proposed representatives, both on their own and together as a group, will fairly and adequately protect the interests of the Class. The group of proposed class representatives is broadly representative of the class, including multiple CME Class B shareholders (Langer,

Yermack, and Prosi), multiple CBOT Class B members (Goldberg, Petrow), members who primarily hold their seats as investments and/or lease them out for income (Langer, Yermack, and Goldberg), and members who have used their memberships to trade on the exchanges during the class period (Prosi, Petrow). The representatives' counsel Susman Godfrey is widely recognized as one of the nation's leading commercial litigation firms and has extensive experience in class actions. Susman Godfrey, in association with Chicago-based attorneys from Massey & Gail LLP and Dedendum Group, LLC, has been leading the prosecution of this case since filing the initial complaint more than five years ago, and has defeated each of Defendants' numerous attempts to transfer the case elsewhere or win early dismissal.

Fourth and finally, a class action is the appropriate method for fairly and efficiently adjudicating this dispute between the two exchanges and their numerous members over issues that broadly impact the exchanges, their members, and others. Allowing the case to proceed as a class action will save both the Court and all parties, including Defendants, the additional time, effort, and expense that would be necessitated by litigating these claims individually on behalf of the named plaintiffs and other members who choose to participate, and ensure a uniform result.

II. Class Certification Standard

"In Illinois, there are four criteria for assembling a class action lawsuit: (1) the class is so numerous that joinder of all members is impracticable; (2) questions of fact or law common to the class predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interests of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy." *Byer Clinic & Chiropractic Ltd. v. Kaprun*, 2016 IL App (1st) 143733, ¶ 8 (citing 735 ILCS 5/2-801 (West 2012)).

On the first requirement, numerosity, a plaintiff need not provide an exact number of class members at the certification stage. *See, e.g., Cruz,* 383 Ill. App. 3d at 771. It is sufficient to proffer a good-faith, non-speculative estimate. *Id.*

On the second requirement, known as commonality and predominance, a plaintiff must show that "successful adjudication of the purported class representatives' individual claims will establish a right of recovery in other class members." *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 128 (2005). "A common question may be shown when . . . the [class] members are aggrieved by the same or similar conduct." *Clark v. TAP Pharm. Prods. Inc.*, 343 Ill. App. 3d 538, 548 (5th Dist. 2003). "[W]here a defendant is alleged to have acted wrongfully in the same manner toward the entire class, the trial court may properly find common questions of law or fact that predominate over questions affecting only individual members." *S37 Management, Inc. Advance Refrigeration Co.*, 2011 IL App. (1st) 102496, ¶ 32 (2011); *see also Walczak v. Onyx Acceptance Corp.*, 365 Ill. App. 3d 664 (2d Dist. 2006) ("A class action may be properly pursued where the defendant allegedly acted wrongfully in the same basic manner as to an entire class, and, in such circumstances, the common class questions predominate the case and the class action is not defeated."). Factual variations among class members' grievances do not defeat a class action, nor do individual questions of injury or damages. *Clark,* 343 Ill. App. 3d at 548–49.

Adequacy, the third requirement, assesses whether "the interests of those who are parties are the same as those who are not joined and whether the litigating parties fairly represent those not joined." *CE Design Ltd. v. C & T Pizza, Inc.*, 2015 IL App (1st) 131465, ¶ 16. A named class representative is not disqualified simply because his *claim* is not "*exactly* the same" as those of all other class members. *Bueker v. Madison Cty.*, 2016 IL App (5th) 150282, ¶ 41 (emphasis added). "It is only necessary that the representative not seek relief *antagonistic* to the interests of other

potential class members." *Id.* (emphasis added). Additionally, the representatives' attorneys must be "qualified experienced and generally able to conduct the proposed litigation." *CE Design Ltd.*, 2015 IL App (1st) 131465, ¶ 16.

The fourth and final requirement, known as appropriateness, is satisfied when a class action "(1) can best secure the economies of time, effort and expense and promise uniformity; or (2) [can] accomplish the other ends of equity and justice that class actions seek to obtain." *Gordon v. Boden*, 224 Ill. App. 3d 195, 203 (1st Dist. 1991). When the first three prerequisites for certification are met, that "is evidence that the [appropriateness] requirement has been fulfilled as well." *Bueker*, 2016 IL.App (5th) 150282, ¶ 47.

In sum, where a plaintiff shows that successful adjudication of his or her individual claims will establish liability or resolve a central issue on behalf of other class members, and that the plaintiff's interests are not potentially antagonistic to the non-represented members of the class, certification is appropriate. *See Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 811 (3rd Dist. 2007); *P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.*, 345 Ill. App. 3d 992, 1003 (2d Dist. 2004); *Weiss v. Waterhouse Securities*, 208 Ill. 2d 439, 452 (2004).

III. Argument

Plaintiffs' proposed Class is defined as follows:

> "All owners of CME Class B shares or CBOT Class B memberships from June 1, 2009 to November 22, 2019, except for (1) business entities that are identified by CMEG as having membership status under any of the following rules: Rule 106.F, Rule 106.J, Rule 106.H, Rule 106.R, and Rule 106.S as of June 30, 2019, and (2) any current Class B shareholders who are, or are owned by, officers, employees, and directors (other than those directors elected only by the Class B shareholders) of CME, CBOT, or CMEG as of November 22, 2019."

Plaintiffs thus seek relief on behalf of a proposed Class consisting of the individual Class B members of CME and CBOT whose memberships have been harmed by Defendants' ongoing conduct. As explained below, the proposed Class satisfies each class certification requirement.

A. The proposed Class easily satisfies the numerosity requirement.

Under Illinois law, a proposed class of as few as 200 members will satisfy the threshold requirement of numerosity. *See, e.g.*, *Cruz*, 383 Ill. App. 3d at 771 (finding class with approximately 200 members to be sufficiently numerous to make joinder impracticable). Here, the proposed Class totals in the thousands and thus easily satisfies the numerosity requirement.

Combined, CME and CBOT have a total of 6,819 Class B members. The Class B memberships at each exchange include various "divisions" of membership, with the B-1 division of each exchange having rights in the full range of products offered by that exchange, and the other divisions having rights in a more limited range of products. As set forth in the corporate charters, the total number of Class B members in each relevant membership division is as follows:

Class B Membership Types	Members (CBOT)	Members (CME)
B-1	1,402	625
B-2	867	813
B-3	128	1,287
B-4	641	413
B-5	643	
Total Per Exchange:	3,681	3,138
Grand Total:		6,819

Affidavit of N. Carullo, Plaintiffs' Appendix ("PA").192; PA.206.

CME and CBOT track the ownership and lease value of each of these subclasses on a monthly basis, and the values of each membership moves in tandem with the other memberships in the class. **PA.217–22.**

The proposed Class excludes trading firms and CME-affiliated owners of Class B shares whose interests are antagonistic to those of the Class. The proposed Class also excludes all business entities governed by exchange Rules 106.F, 106.J, 106.H., 106.R, and 106.S. To qualify for these categories of membership, trading firms must own limited numbers of Class B shares. These trading firms benefit from the alleged breaches because Defendants allow them to extend preferential fees to any traders—including non-members— associated with their firms, and to allow any of their traders to engage in trading activity from the new trading floor at Aurora, without owning or leasing additional memberships. The proposed Class also excludes any Class B memberships owned by current officers, employees, or directors of CME (except the six directors elected by the Class B shareholders of CME).

Based on documents produced by Defendants, Plaintiffs estimate that approximately 1,285 Class B memberships are owned by the clearing members and corporate members that are excluded from the proposed Class, and that no more than a handful of additional Class B memberships are owned by the CME officers and directors excluded from the Class. *See* **PA.224** (listing the corporate and clearing holders of CME and CBOT memberships). In total, the Class will include approximately 5,534 Class B memberships. Because some individuals own multiple memberships, the exact size of the Class will be somewhat smaller than that figure. To the extent necessary, the precise size of the Class can be determined through membership records maintained by Defendants. *See, e.g.*, **PA.226**; **PA.228**; **PA.230**; *see also* **PA.47–50**. (describing CME's ability to pull membership records including Rule types); *see also* **PA.52–53** (describing CME's ability to

identify employees that hold memberships). But for purposes of class certification, it is clear that the proposed Class numbers in the thousands and thus satisfies the numerosity requirement.

B. Common issues predominate over any individualized issues.

1. All questions regarding the proper interpretation of the charters and the scope and applicability of the implied covenant of good faith are common to the Class.

There are significant disputed factual questions in this case regarding the meanings of the CME and CBOT charters, as well as the applicability of Defendants' implied covenant of good faith and fair dealing to the Plaintiffs. All of these questions are common to the CME and CBOT class members, or CME-specific and CBOT-specific sub-classes,[3] and susceptible of common proof as detailed below. These pervasive common questions of interpretation, undisputedly governed by Delaware law for both exchanges, makes this case appropriate for class certification. *See, e.g., Lee v. Allstate Life Ins. Co.*, 361 Ill. App. 3d 970, 976 (2d Dist. 2005) (affirming certification based on common issues regarding interpretation of form contract); *Van Vactor v. Blue Cross Ass'n*, 50 Ill. App. 3d 709, 720 (1st Dist. 1977) (same). That is true for both charters, and for both the Trading Floor Claim and the Fee Claim.

2. The Trading Floor Claim involves class-wide charter interpretation issues that turn on common evidence.

The Trading Floor Claim will turn on common evidence to answer common questions: Are Class members' trading floor access rights limited only to "pits" where a specific form of trading, known as "open outcry", occurred before CME closed those pits? Or do those rights attach to other

[3] CME Executive Chairman Terry Duffy testified that the Core Rights of CME and CBOT Class B members are identical except with respect to "pricing" (that is, fees). **PA.89–90**. Even if there were any differences between the CME and CBOT core rights at issue, that can be dealt with through sub-classing. *See Hall v. Sprint Spectrum L.P.*, 376 Ill.App.3d 822, 832 (5th Dist. 2007) ("If individual damages determinations are required, the court can utilize various procedures to determine damages, including creating subclass"), *citing Clark*, 343 Ill.App.3d at 549.

CME and CBOT floors where most trading in CME and CBOT products occurs and market information is generated? Plaintiffs will prove that the answers are "no" and "yes", respectively, with evidence that will be the same for all class members.

For all CME class members, the claimed rights are grounded in Core Right 2, which guarantees members' "trading floor access rights and privileges," and requires a member vote to approve any amendment, change, or modification to members' rights. **PA.198–99**. Similarly, for all CBOT class members, the Trading Floor Claim will require a determination whether CBOT Class B members' express "right to trade on and otherwise utilize the facilities of the Corporation," **PA.206**, and their enjoyment of "all trading rights and privileges" on either "the open outcry exchange system of [CBOT] or any electronic trading system," **PA.207**, includes the exclusive right to access and trade from any trading floor for free and as part of a membership. While the two charters' specific language varies somewhat on this point, the inquiry is the same.

Plaintiffs are confident the express "trading floor" rights preserved in the CME charter, and the equivalent rights protected by the CBOT charter, include the exclusive right to access Aurora for free. However, Plaintiffs also pleaded alternative theories of liability under the covenant of good faith and fair dealing implied in the exchanges' charters. The Court sustained those alternatives legal theories over Defendants' motion to dismiss. *See* **PA.442–44.** As the Court's order stated, "[u]nder Delaware law, the implied covenant . . . is best understood as a way of implying terms in the agreement, whether employed to analyze unanticipated developments or to fill gaps in the contracts' provisions," **PA.442** (quotation marks omitted); thus, "[t]he appropriate legal test is . . . is it clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith – had they thought to negotiate with respect to that matter,"

PA.443 (quotation marks omitted). Because the exchange charters apply to all members of each exchange, and are not individually negotiated contracts, all questions related to the scope and applicability of the covenant of good faith and fair dealing are common, not individualized. *Cf. In re Checking Account Overdraft Litigation*, 307 F.R.D. 630, 646 & n.7 (S.D. Fla. 2015) (applying analogous federal class certification requirements, concluding that good faith and fair dealing claim presented common questions under Delaware's "objective" standard).

3. The Fee Claims will similarly involve class-wide charter interpretation issues that turn on common evidence.

Defendants admit the CBOT charter grants a fee preference right to CBOT class members, but deny such a right exists under the CME charter. In denying Defendants' motion to dismiss, the Court found that "it is plausible [CME members'] rights protect against extending . . . preferential fees to non-members." **PA.441**.

Plaintiffs will prove CME members have fee preference rights under the CME charter through common proof. As the Court recognized in its motion to dismiss ruling, "CME Rule 121 and Bylaw 6.3(d) recognize preferential fees for members as a trading right and privilege – a privilege once limited only to members and individuals who leased a membership." **PA.440**. In addition to the By-Laws and Rules demonstrating the CME member fee preference, Plaintiffs will also rely on common evidence in the form of testimony from CME executives regarding the fee preference for CME members.

Jim Oliff was CME's Second Vice Chairman at the time of demutualization and, as Chairman of the Strategic Planning Committee, was responsible for presenting and communicating CME's demutualization plan to members. **PA.59; PA.61**. Mr. Oliff testified that in advance of the demutualization vote, he told CME members that "in the long run, the benefit [of owning a CME

Class B share] was going to be a fee differential, whatever that may be, between a member and a nonmember, and that would drive the economic value of the membership." **PA.63**.

Jim McNulty was CME's President and CEO during the period before the CME demutualization vote through its initial public offering a few years later. **PA.72**; **PA.74–75.** Mr. McNulty testified similarly to Mr. Oliff: "What was explained to the members before we demutualized was they would have *a right* to lower fees . . . than non-members." **PA.79–80.** (emphasis added). He also confirmed that "fee preferences [were] part of the traditional rights of CME members" both "before and after demutualization." **PA.77.**

Terry Duffy was CME's Vice Chairman at the time of demutualization and is currently CME's Chairman and CEO. **PA.86–87**. Mr. Duffy admitted that "everybody believed they had [preferential rates] in their core rights" and that "members trading for a discount is something that people thought they had inherently." **PA.96–97; PA.92–94**.

Phupinder Gill was on CME's strategic planning committee at the time of demutualization and was CME's CEO from 2012 to 2016. Mr. Gill agreed that preferential rates were part of CME members' trading floor rights and privileges "[b]y virtue of the fact that members had the lowest rate and there was always an articulate rate as to what the members would actually pay." **PA.110–11**; *see also* **PA.103–04; PA.106.**

William Shepard, another CME director and member of the Strategic Planning Committee, further confirmed in his deposition that "[t]he fee preferences that CME members had before demutualization were a valuable part of the membership," and that "[t]he value of the fee preference was one of the things reflected in the market price for buying a membership." **PA.145–46**; **PA.148**; **PA.143**; *see also* **PA.124–25** (agreeing before demutualization that members could obtain preferential fees).

Against this historical background, Plaintiffs will prove that the CME charter must be reasonably read to have protected at least against "permanent fixture" non-member discounts that "gut[]" the value of CME membership. **PA.440–41.** All of this evidence will be common proof that can and should be adjudicated in a single proceeding involving the proposed Class.

4. All questions of breach are common to the Class.

Illinois courts routinely certify classes where, as here, there are common questions regarding a defendant's alleged breaches susceptible of class-wide proof. *See, e.g.*, *Walczak,* 365 Ill. App. 3d at 674. One overarching, common breach issue is whether Aurora is a "trading floor." The Court denied Defendants' motion to dismiss on this point, stating that "it [wa]s premature to conclude, as a matter of law, [that] the Aurora Data Center (ADC) is not a trading floor." **PA.431**; *see also* **PA.439** ("[P]laintiffs have alleged sufficiently that the ADC is a trading floor, attempting to explain how it functions . . . ."). Whether or not Aurora qualifies as a trading floor, such that allowing non-members to trade from that facility and charging members for access breach the CME and/or CBOT charters, is a common question.

At trial, Plaintiffs will show through common proof that members have exclusive rights to access and trade from any trading floor, that the co-location facility at Aurora is a trading floor, and that CME and CBOT have thus breached their charters. Craig Donohue, CME's former CEO, flat-out admitted that the right to access and trade from a trading floor is exclusively held by CME and CBOT members and is part of their Core Rights. **PA.117–18**. Donohue further admitted that, as part of the demutualization transaction, CME made certain representations to the IRS to ensure the transaction could be completed on a tax-free basis, and that those representations included assuring the IRS that members' exclusive trading rights—including the rights to "trade Globex from the floor" and to access CME facilities to engage in electronic trading—would remain intact. **PA.129–32; PA.134–37.** *See also* **PA.232–39; PA.241–55** (November 2, 2000 communication

from the IRS approving the tax-free treatment of the demutualization transaction based on the representation that there would be "no material change" to members' rights associated with their Class B shares, including the rights to access and trade from CME's "premises" and the right to "special rates").

With respect to the issue of whether the co-location facility at Aurora is a trading floor, Mr. Oliff, who participated in drafting the CME charter, confirmed that Aurora has all the characteristics of a trading floor: it is a "physical location," "[w]here market information is exchanged between market participants," and "[w]here trades are executed." **PA.65–66**. Donohue further confirmed that the entire purpose of Aurora was "to set up this building where customers would come in and set up their servers and then engage in trading," and that the "actual matching of bids and offers" took place at Aurora. **PA.181**. CME's Director of Strategy, Kevin Wenta, described the plans to develop Aurora as "building a high-speed trading floor," **PA.259**, and CME's Head of Strategic Planning since 2008 Jason Weller agreed that this was "a helpful analogy." **PA.154.** CME's Managing Director of Co-Location Services (the name given to the special, proximate trading access offered by CME at Aurora since January 2012) Craig Mohan thought the same before he was aware of this lawsuit. Mr. Mohan said in a 2013 presentation to CME's Management team that the goal of the Co-Location team was to "build an electronic *trading floor* by launching the exchange co-location service." **PA.263** (emphasis added); *see also* **PA.275** ("[W]e wanted to create a strategic, electronic *trading floor*.") (emphasis added). In a January 2016 segment for the online radio program Futures Radio Show Mr. Mohan described Aurora as "market access along with infrastructure and services that firms use to access the market place." **PA.283**. Incredibly, Mr. Mohan claimed at his deposition that he had never heard someone use the term "electronic trading floor" before, **PA.160**, and CME has throughout this

litigation maintained that Aurora is "just a data center" that cannot plausibly be considered a "trading floor" within the meaning of the Core Rights. *See* **PA.189.** But the truth is that CME only ceased to describe Aurora as what it obviously is—a trading floor under any common-sense definition—in response to the filing of this lawsuit.

All anticipated questions regarding whether or not Plaintiffs can establish the Fee Claims are also common. At trial, Plaintiffs will offer common proof to show that, following the 2008 completion of the merger between CME and CBOT, CMEG made a series of fundamental changes to its pricing practices that were intended to benefit CME and its large trading firm customers at the expense of individual members. Those changes, which CMEG adopted unilaterally and without any member vote, included, (1) replacing CME's historical individual-based fee structure with volume-based incentives that depended on trading volume rather than membership status; (2) eliminating individual clearing fee caps that previously had provided strong incentives to buy and lease individual memberships; (3) allowing an "infinite" number of affiliates, traders, and independent contractors associated with a trading firm to trade at a firm's member rates; and (4) developing a raft of long-term incentive programs that benefited individual customers and categories of customers. **PA.285–315**; **PA.317–48**; **PA.179** (noting that there is no limit to the number of traders that can trade on the account of proprietary trading firm and receive member rates).

As just one example of a discount program that Plaintiffs will challenge at trial, in August 2011 CME and CBOT approved a so-called "Asset Manager Incentive Program," which allowed certain non-member firms to trade at rates below those of some CME and CBOT members. **PA.350** and **PA.352–54**; *see also* **PA.166–71**. The express goal of the program was to achieve fees for one specific, large trading entity "similar to trading member fees." **PA.350**; **PA.168** (Q. When

you talk about the market constituency that's targeted by the asset manager incentive program, in fact, there was one specific large customer that asked for this program to be created; isn't that true? A. That is correct."). The program was specifically created in response to complaints from this firm that CME and CBOT's "membership structure doesn't work for them." **PA.352**; **PA.173**. In response, CME designed, and its board approved (without holding a member vote), a program to reduce fees for some 4,000 traders associated with the firm—as well as other traders from firms meeting the minimum assets under management threshold for participation in the program. ***Id.*** It is hard to imagine a more flagrant breach of members' rights and expectations. There were 152 such incentive programs at their peak in 2013. **PA.365**. *See also* **PA.108** ("Q: And was the effect of those incentives to give the best rates to those who had the highest volume? A: The best marginal rates for those that traded the most, correct.").

Plaintiffs have uncovered similar evidence of breaches related to the exchanges' allowance of unlimited numbers of human or automated traders to place trades at member rates. In 2009, Managing Director John Curran completed a Q&A Draft for an upcoming member meeting. **PA.388**. Curran's draft the of Q&A contained a potential question asking whether an "infinite" number of traders could trade on a hedge fund or proprietary clearing fund's memberships. **PA.411**. Curran's response? "Generally speaking a member firm or fund can have as many traders they like trading their accounts . . . ." ***Id***. Like the incentive programs, CME's willingness to allow an "infinite" number of traders to trade on a single membership eviscerated the value of the B shares. *See also* **PA.145**. ("Q. So for corporate memberships, can multiple traders operate a single ATS? A. . . . . [T]here is no limit on how many people can be on that team ATS."). While the Class's claim for damages based on CME's breach of their right to preferential fees is focused on substantial breaches that began in 2009, there is also evidence that CME breached the obligation

early. For instance, as of 2003, a CME document indicates it had a special deal with JP Morgan under which it was "comfy" with JP Morgan allowing an unlimited number of affiliated non-member traders to trade at its member rates. **PA.423**.

5. The pleaded affirmative defenses all raise common questions.

Defendants' Answer raises three affirmative defenses, related to the statute of limitations, laches, and to the standing of members who only lease their seats to others for trading. Defendants' Answer and Affirmative Defenses to Plaintiffs' Third Amended Complaint ("Answer") ¶¶64-80. All of these defenses raise issues that are either common to the entire class, or that apply broadly to large and identifiable groups of class members.

On the statute of limitations, Defendants argue that claims based on breaches occurring more than ten years before the original complaint was filed on January 15, 2014 are barred. *Id.* ¶¶ 65-66. The defense is meritless, as the breaches giving rise to the Trading Floor Claim and the Fee Claim all occurred less than ten years before the original complaint was filed. And for CBOT members, any statute of limitations defense makes no sense since the demutualization itself occurred less than 10 years before the complaint was filed. But regardless of the merits, any question regarding whether any of the claims at issue are barred by the 10-year statute of limitations is, on its face, common, not individualized.

With regard to laches, Defendants' Answer asserts this defense on both claims, but the defense appears to focus primarily on the Trading Floor Claim. *See* Answer ¶¶ 67-76. All anticipated issues related to laches are common, not individualized. Among other things, no such defense is available as a matter of law on Plaintiffs' money damages claim so long as it was brought within the 10-year limitations period. "[G]enerally, statutes of limitation apply to actions at law; laches is the doctrine of limitation applied to actions in equity." *Sundance Homes, Inc. v. County of DuPage*, 195 Ill. 2d 257, 263 (2001). "No court has applied laches to a breach of contract action

between private parties where the relief sought was limited to money damages." *Gen. Auto Serv. Station, LLC v. Garrett*, 2016 IL App (1st) 151924, ¶ 17. The First District has repeatedly refused to apply laches and other equitable defenses to claims for monetary relief. *See id.*; *Primus Fin. Servs. v. Walters*, 2015 IL App (1st) 151054, ¶ 15 ("In this case, Jaguar only sought the payment of money in its complaint; therefore, this is an action at law and laches is inapplicable."); *Guarantee Trust Life Ins. Co. v. Kribbs*, 2016 IL App (1st) 160672, ¶ 46 (Mikva, J.) (refusing to apply equitable estoppel where the plaintiff sought "a money judgment, which is legal in nature, not equitable").

As to standing, Defendants contend in their Answer that members who have not paid for access to the Aurora trading floor and/or who have not paid trading fees during the class period—because they lease out their seats to others—lack standing to sue on the alleged breaches. These arguments apply to broad groups of Class members—including some, but not all, of the proposed Class representatives—if not to all Class members equally. But even for those groups, there is no real standing issue under Illinois law, which requires only that the Plaintiffs demonstrate "*some injury* to a legally cognizable interest." *Law Offices of Colleen M. McLaughlin v. First Star Fin. Corp.*, 2011 IL App. (1st) 101849, ¶ 15 (emphasis added). Plaintiffs allege that members, including those who lease out their seats, have been injured because the alleged breaches reduced the value of their memberships. *See, e.g.*, Compl. ¶11. That is enough to have standing.

6. Total Class-wide damages and the need for declaratory or injunctive relief present common issues.

Although not required for certification under Illinois law, *see Bueker*, 2016 IL.App (5th) 150282 at ¶¶30-32, the total damages recoverable by the Class can be proven on a class-wide basis using common proof. *Cf. Kramer v. American Bank and Trust Company, N.A.*, 2017 WL 1196965 (N.D. Ill. 2017) (certifying a class proposing a class-wide method of calculating damages

attributable to violations of federal and state minimum wage and overtime laws, even with the presence of individual damage issues). To that end, Plaintiffs have retained as their damages expert Dr. Jonathan Arnold of Compass Lexecon. **PA.4–5**. Dr. Arnold holds a B.A. in Economics, an M.B.A. in Finance and Accounting, and a Ph.D. in Business Economics, all from the University of Chicago. *Id.* He has extensive experience in damages calculation matters. *Id.* As explained in further detail in Dr. Arnold's accompanying report, total class damages can be proven in at least three different ways, none of which are predominated by any individualized factors.

First, damages can be established using a hypothetical negotiation model—in other words, by considering what Class B members would have demanded as concessions from the exchanges to approve the breaching conduct had a Class B member vote been held. A hypothetical negotiation model has been adopted in Delaware for a breach of contract claim based on the breach of a consent right. *See, e.g.*, *Fletcher Intern. Ltd. v. ION Geophysical*, No. 5109-CS, 2013 WL 6327997 (Del. Ch. 2013); *see also Siga Tech. v. Pharmathene*, 132 A.3d 1108, 1130 (Del. 2015) (noting that breach of contract cases "require the breaching promissor to compensate the promisee for the promisee's reasonable expectation of the value of the breached contract, and hence, what the promisee lost"). And former CME CEO Craig Donahue recognized that the CME board and management "certainly" would have the "latitude to propose" compensation to members in exchange for a waiver of their Core Rights, as it did when it sought to reduce the size of the board in 2011. **PA.120–22**. Dr. Arnold is prepared to determine the present value of the amount CME would have paid to obtain the Class B members' vote using financial and statistical/econometric techniques. **PA.18–25.**

This hypothetical negotiation model can be measured in two ways. First, Defendants could have avoided seeking Plaintiffs' consent by buying out Plaintiffs' Class B shares in full. The price

that these shares would have been bought out at would likely have been the then-current trading price of the shares, plus an appropriate buy-out premium, and the Class's damages would be the difference between the then-current trading price and the present trading price of the shares (including a buy-out premium). It is well established that a reasonable measure of damages for an income generating asset—like the Class B shares in CME and CBOT—is to compare the present value of the asset to the market value of the asset at the time of the breach. *See Schonfeld v. Hillard*, 218 F.3d 164, 176 (2d Cir. 2000); *First Federal Lincoln Bank v. United States*, 518 F.3d 1308, 1317 (Fed. Cir. 2008); *Fluorine on Call, Ltd. v. Fluorogas Ltd.*, 380 F.3d 849, 850 (5th Cir. 2004). That is because the current market value of an income-producing asset includes the discounted present value of its estimated future earnings. The value of the asset at the time of the breach can be established by evidence of the market value of the asset. *See Schonfeld*, 218 F.3d at 176 ("When the defendant's conduct results in the loss of an income-generating asset with an ascertainable market value, the most accurate immediate measure of damages is the market value at the time of the breach."); *see also First Federal Lincoln Bank*, 518 F.3d at 1317 ("It has been established that the damages for lost income-producing property is properly determined as of the time the property is lost . . . because the market value of the lost property reflects the then-prevailing market expectation as to the future income potential of the property."); *Fluorine*, 380 F.3d at 850; *KMS Restaurant Corp. v. Wendy's Intern. Inc.*, 194 Fed. Appx. 591, 602 (11th Cir. 2006). Dr. Arnold is prepared to use standard valuation methods such as discounted cash flow and price-based approaches to determine this amount.

The hypothetical negotiation model can also be measured as the price for Defendants to partially buy-out members' rights, under which members would have agreed to forego their right to exclusive access to the new co-location trading floor but retained other membership rights such

as the right to trade at member rates. Historically, CME has offered members compensation in exchange for members' agreements to forego portions of their rights. For instance, since 2011, CME has considered and pursued proposals to reduce the number of directors elected by its B shareholders. CME offered lump sum payments to its members in exchange for agreeing to reduce the size of the board. Both proposals were voted down. CME also conducted its own internal analysis of what it would need to pay to acquire the Class B shares. Dr. Arnold is prepared to rely on these and other factors to assess the compensation members likely would have required for CME to buy out their rights.

Alternatively, Dr. Arnold has opined that Class-wide damages for Defendants' ongoing breaches may be measured based on the diminution in Class B share value—which fluctuates for each category of Class B shares on a uniform basis, just like the shares of any publicly traded stock—caused by the alleged breaches. Dr. Arnold is prepared to compare the pre- and post-breach share prices—along with one or more factor—to estimate the price of the shares in a world where no breach occurred. **PA.25.** This method involves an economic regression model that would include CME's Class A share price, revenues, earnings, and the exchanges' trading volume. **PA.26**. This data, and the data for the Class B share price, is readily available, and is in fact published and updated monthly on CME's web-site.[4] The damages under this model would be the difference between the value of Plaintiffs' Class B seats in the absence of the breaches and the actual, current value of Plaintiffs' Class B seats.

[4] All of these hypothetical negotiation models, to be clear, would not extinguish, sell, or transfer Plaintiffs' shares or their Core Rights, but instead estimate what CMEG would have needed to pay to obtain consent for the claimed breaches.

The appropriateness and appropriate scope of declaratory and equitable relief, just like class-wide damages, is also an issue common to the entire Class. *See, e.g.*, *Nebel v. City of Chicago*, 53 Ill. App. 3d 890, 903 (1st Dist. 1977).

C. The proposed representatives and their counsel will adequately represent the interests of the Class.

The named Class representatives, and their counsel at Susman Godfrey and the other supporting firms, readily satisfy Section 2-801(3)'s adequacy requirement. Three of the Class representatives (Mr. Langer, Mr. Yermack, and Mr. Prosi) have been Class B members of CME since the demutualization; two (Mr. Goldberg and Mr. Petrow) have been Class B members of CBOT since that exchange's separate demutualization. **PA.447–48.** These five exchange members' rights under the CME and CBOT charters are exactly the same as those of all other current members. All five fall within the metes and bounds of the class definition. Their incentives to protect the rights of the other current CME and CBOT members are the same as other members.

Indeed, three of the named plaintiffs have already expended significant effort to pursue this case over the last several years. Mr. Langer, Mr. Yermack, and Mr. Goldberg have spent many hours working with Class Counsel, collecting and producing documents, reviewing plaintiffs' pleadings and other court submissions, examining Defendants' filings, attending hearings, participating in a mediation, and otherwise assisting Class Counsel's prosecution of this action. ***Id.*** Mr. Prosi and Mr. Petrow have likewise attested to their genuine desire to participate to a similar extent in the future proceedings in the case. ***Id.***

Finally, Susman Godfrey LLP—which has been pursuing the case on behalf of Mr. Langer, Mr. Yermack, and Mr. Goldberg individually since the outset of the case, assisted by local attorneys including Suyash Agrawal, now of Massey & Gail LLP, and Neal Weinfield, now of Dedendum Group LLC—is qualified, experienced, and able to conduct the proposed litigation.

Susman Godfrey's and the associated attorneys' performance in this case over the many years since it was filed—from defeating a motion to compel arbitration, to beating back an effort to remove the case to federal court, to defeating a motion to dismiss, to obtaining extensive document discovery and starting the deposition phase of the case during the last year—itself establishes these attorneys' suitability to handle a matter of this size and scope. The Court should authorize the continued involvement of Mr. Agrawal's and Mr. Weinfield's respective firms on behalf of the class as well. All three firms have submitted declarations further detailing their respective qualifications to serve, and adequately represent the interests of, the class. **PA.447–57.**

D. A class action is the appropriate way to resolve the Class claims.

Finally, the appropriateness requirement for certification is also satisfied. The fact that the other three requirements are satisfied, for the reasons set forth above, is evidence of this. *Gordon*, 224 Ill. App. 3d at 203. Further, because the determination of a few common issues will apply evenly to the entire Class, certification achieves the economies of time, effort, and expense, and promise uniformity. Requiring each Class member to litigate these common issues separately—and perhaps relitigate some of the same contentious fights over venue raised by Defendants as to the named Plaintiffs—would not make sense for either the members of the proposed Class, or the Defendants. The costs of that alternative would be truly enormous.

IV. Conclusion

The proposed class satisfies the requirements of Section 2-801. Accordingly, Plaintiffs request that the Court: (1) grant Plaintiffs' Motion for Class Certification, (2) appoint Plaintiffs as the Class representatives, and (3) appoint Plaintiffs' attorneys as Class Counsel.

Date: November 21, 2019

/s/ *Stephen E. Morrissey*

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PROOF OF SERVICE

Pursuant to Illinois Supreme Court Rules 11 and 131, the undersigned, an attorney, certifies that he served the foregoing instrument by transmitting it via e-mail on December 4, 2019 from Chicago, Illinois to the following designated e-mail addresses of record for Defendants' counsel, who have consented to e-mail service:

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