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 11108129 Calendar 6 Hon. Celia G. Gamrath, Presiding

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

This is a straightforward case for class certification under Illinois law. The case was brought on behalf of thousands of proposed class members—CME and CBOT's Class B shareholders. All members of the proposed class have virtually identical substantive rights under the CME and CBOT charters. Plaintiffs assert common claims for breaches of common charter provisions, which will be proven through common evidence regarding the charters' application to Defendants' common conduct. The central liability issues of (1) whether the Aurora Data Center ("ADC") is a "trading floor" to which class members have exclusive access rights, and (2) whether Defendants' breached class members' right to preferential fees, will turn on common evidence. Plaintiffs' expert Dr. Jonathan Arnold—whose opinions and testimony stand unrebutted by any defense expert—has identified the existence of class-wide methodologies for calculating damages.

Rather than meaningfully challenging these clear grounds for class certification, Defendants seek to narrow, split apart, or perhaps expand the class; to limit the class to injunctive relief only; or to disqualify the class representatives based on specious attacks. But Defendants' arguments lack foundation in Illinois class certification law, and provide no basis for limiting or modifying the class—let alone for denying certification altogether.

I. The Proposed Class

A. The proposed class does not include former members.

As a preliminary matter, Defendants interpret the class definition to include former CME and CBOT members, and argue that these former members lack standing. Opp. at 14-15 ("Opp." citations refer to Defendants' class certification response brief). Only the named plaintiffs must establish their standing at the certification stage. *I.C.S. Illinois, Inc. v. Waste Mgmt. of Illinois, Inc.*, 403 Ill. App. 3d 211, 221 (1st Dist. 2010); *cf. Glazewski v. Coronet Ins. Co.*, 108 Ill. 2d 243, 254 (1985) (cited by Defendants, but considering only a challenge to the named plaintiffs'

standing). Defendants do not challenge the named Plaintiffs' standing. Regardless, the proposed class definition was intended to encompass only current CME and CBOT members. Plaintiffs do not object to the Court clarifying that limitation on the class definition in its certification order.

B. The proposed class properly excludes certain corporate members.

Plaintiffs' proposed class definition excludes some corporate members of CME and CBOT. (Plaintiffs intended to exclude Rule 106.I members from the class, as Defendants note; Plaintiffs have no objection to the Court clarifying that additional limitation in its certification order.) Defendants argue that the exclusion of these corporate members is somehow problematic. Opp. at 16-19. Not so.

First, "the rule requiring joinder of indispensable parties is not applied when a party, though not before the court in person, is so represented by others that his interest receives actual and efficient protection." *Yorulmazoglu v. Lake Forest Hosp.*, 359 Ill.App.3d 554, 561 n.4 (5th Dist. 2005). Defendants imply that corporate members would not agree that any breaches of the CME or CBOT charters occurred, or that corporate members would oppose the relief Plaintiffs seek. Assuming either is true, then the interests of those corporate members will be actually and efficiently represented by Defendants. Corporate members have been excluded from the class definitions in *every single petition* Plaintiffs have filed in this case (all of which are readily available on cmelawsuit.com) over a period spanning *almost seven years* during which this case become well known to the CME and CBOT communities. Not once has there even been a whisper of any corporate members seeking to intervene or otherwise expressing a concern that their interests are not adequately represented in this action.

The "necessary party" cases Defendants cite—none of which contradicts the above-discussed rule—are inapposite. None of these cases denied certification due to the alleged absence of necessary class members. Two of the cases were not class actions. *See Society of Mount Carmel*

v. National Ben Franklin Ins. Co. of Ill., 268 Ill.App.3d 655, 655 (5th Dist. 1994); *City of Evanston v. Reg'l Transp. Auth.*, 209 Ill.App.3d 447, 456 (1st Dist. 1991). The other cases held that necessary defendants were missing, rather than that the proposed classes were underinclusive. *Midwest Television, Inc. v. Champaign-Urbana Commc'n, Inc.*, 37 Ill.App.3d 926, 932 (4th Dist. 1976); *Howerton v. Prudential Ins. Co. of Am.*, 2012 IL App (1st) 110154, ¶ 39 (1st Dist. 2012).

No Illinois case suggests that when a class seeks prospective relief, all persons potentially impacted by or opposed to the prospective relief become necessary parties. Although not yet addressed in Illinois, federal courts have declined to adopt rules similar to what Defendants favor. In *Bertulli v. Independent Ass'n of Continental Pilots*, 242 F.3d 290 (5th Cir. 2001), the plaintiffs sought to certify a class of airline pilots who alleged that the defendant union deprived them of their rights to vote on a seniority issue. *Id.* at 294. The class sought both damages and prospective relief. *Id.* The proposed class included pilots who were harmed by the failure to hold a vote, but excluded some pilots who arguably benefitted from the same decision. The defendant union argued that the class was underinclusive, and could not be certified, because the excluded pilots also held voting rights. *Id.* at 296. The trial court certified the class over this argument, noting that a class of all pilots would include pilots "with interests antagonistic to each other"; and the appellate court affirmed, observing that the trial court had correctly "ensured that the class maintained a degree of cohesion, a commonality of interest, that a broader class may have lacked." *Id.*

Defendants' argument regarding the voting power *currently* held by excluded corporate members, *see* Opp. at 16-17, is a red herring, and irrelevant to certification. Whether individual members held sufficient voting power *at the time of the alleged breaches* to control the outcome of votes on Core Rights matters, and whether those members had sufficient power to insist on a monetary payment to allow the breaches, may be merits issues at the end of the day. The Court

need not and should not resolve those issues at this stage. *See Cruz v. Unilock Chicago,* 383 Ill.App.3d 752, 764 (2d Dist. 2008). For now, all that matters is that they are common issues that will be the subject of common proof.

Second, Defendants identify no authority supporting their argument that the exclusion of corporate members, who have at least potentially different interests from the individual members in the defined class, renders the use of a class proceeding here "inappropriate." Defendants misunderstand the appropriateness requirement. As Defendants acknowledge, *see* Opp. at 18 n.31, controlling authority provides that when a proponent of class certification establishes the first three requirements of 735 ILCS 5/2-801, that suffices to show that a class action is the appropriate method for the fair and efficient adjudication of the controversy. *Gordon v. Boden*, 224 Ill. App. 3d 195, 204 (1st Dist. 1991) ("Initially, our holding that the first three prerequisites of section 2-801 are established makes it evident that the fourth requirement is fulfilled.").

Plaintiffs excluded corporate members from the proposed class definition out of an abundance of caution, to avoid the appearance of potential intraclass conflicts with respect to the claimed relief. Some corporate members were complicit in developing, and have benefitted from, some of the policies and practices Plaintiffs challenge by, for instance, allowing hundreds or thousands of traders to trade electronically at the ADC under a single membership, or extending fee preferences to multiple traders under a single membership. But other corporate members have been harmed by the challenged conduct, and there is no question that many corporate members are fully aligned with Plaintiffs' claims and would welcome the opportunity to participate in the class. If the Court agrees with Defendants that corporate members must be included in the class, the Court can simply certify a broader class that includes all Class B members, and afford any members who wish to opt out the opportunity to do so.

II. Common issues predominate.

A legion of common issues of fact and law, provable through common evidence and arguments, will dictate the outcome of this case. *See* Mot. at 10-19 ("Mot." citations refer to Plaintiffs' opening class certification brief). For example, on the common question of whether the ADC is a "trading floor" to which CME and CBOT members must be given exclusive access, Plaintiffs will rely on testimony from Defendants' own witnesses, and admissions made in Defendants' own contemporaneous documents, that the ADC is a high-speed, electronic "trading floor." Defendants themselves used these terms internally up until the filing of this lawsuit, when they suddenly stopped using those words. *Id.* at 15. Plaintiffs will also rely on common evidence of fee preference breaches. *Id.* at 12-18. That is enough to show predominance under Illinois law. *See Walczak v. Onyx Acceptance Corp.*, 365 Ill. App. 3d 664, 674 (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 . . . .").

Defendants insist that just two issues defeat predominance, or alternatively, require subclasses. As detailed below, the supposedly individualized issues are not pervasive and do not defeat the overwhelming predominance of the central common issues. If any subclasses are required, Plaintiffs and their counsel can ably represent all potential subclasses.

A. The fact that CME and CBOT have separate charters does not defeat predominance.

Defendants fail to identify *any* differences between the CME and CBOT charters that are *material* to the outcome, unlike in *Avery v. State Farm Mut. Auto Ins. Co.*. 216 Ill.2d 100, 134-35 (2005). *See* Opp. at 28. In fact, the Chief Executive of CME Group admitted that the Core Rights in the CBOT charter "were exactly verbatim written down as [CME's] were," with the exception of additional language regarding fee preferences. **PA.89-90**. And regarding fee preferences,

although the language of the CBOT charter is somewhat more explicit in protecting this privilege, pre-demutualization CME Rule 121 and Bylaw 6.3(d) established preferential fee rights for members. **PA.440**. Multiple CME executives have admitted that CME members had a right to preferential fees at demutualization. Mot. at 12-13.

Even so, if the Court finds that the CME and CBOT charters may have materially different terms, the Court may certify CME and CBOT subclasses, which could be represented by the same current proposed CME/CBOT class representations and their same chosen counsel. *See* Mot. at 10 n.3; *Purcell and Wardrope Chartered v. Hertz Corp.*, 175 Ill.App.3d 1069, 1075 (1st Dist. 1988) (noting that "if certain individual questions exist which may require individual determinations . . . *the court* may simply choose to divide the class into subclasses") (emphasis added). Defendants are wrong to argue that the Court cannot create subclasses unless Plaintiffs affirmatively move for them. Defendants do not even attempt to rebut the cases cited in Plaintiffs' opening brief expressly allowing the Court to create subclasses in lieu of denying certification. Mot. at 10 n.3. And in *Schlenz v. Castle*, 132 Ill. App. 3d 993 (2d Dist. 1985), cited by Defendants, the appellate court held only that it was permissible for the trial court to dismiss an action without ruling on a pending motion to certify a subclass when plaintiffs waited eight months to propose a subclass, despite being ordered to do so. *Id.* at 1002. The *Schlenz* court did not hold, as Defendants suggest, that subclasses are permissible only if plaintiffs ask for them.

B. The fact that CME and CBOT have different divisions of Class B memberships does not defeat predominance.

The Core Rights that underlie Plaintiffs' Trading Floor and Fee Claims apply equally to each different membership division of both CME and CBOT. **PA.7-11**. Hence all CME and CBOT members are identically situated on the question of breach.

Defendants emphasize that some CBOT divisions lacked voting rights. Opp. at 28. At most, this might impact the extent to which members in those categories would have benefitted from a negotiated payment in lieu of a vote. In other words, the argument only raises a potential question about the damages available to members in those categories, and only under one of the potential damage models (the hypothetical negotiation model). It is well-established that the presence of some individualized damages questions does not defeat predominance. *See Neale v. Volvo Cars of North America, LLC*, 794 F.3d 353, 374 (3rd Cir. 2015) ("[R]ecognition that individual damages calculations do not preclude class certification . . . is well-nigh universal.").

For similar reasons, Defendants' argument that specific incentive programs and fee policy changes impacted membership divisions differently does not defeat predominance. Plaintiffs assert that Defendants made a series of fundamental changes to their pricing practices at the expense of members, including developing over 150 long-term incentive programs that provided preferential fees to non-members. Mot. 16-17. That some of these fee changes and incentive programs might have applied somewhat differently to certain divisions of membership is beside the point. These programs—like the Asset Manager Incentive program detailed in Plaintiffs' opening brief—allowed non-members to trade at preferential rates, which reduced the value of all memberships regardless of the division. Other programs and changes allowed certain corporate member firms to extend the fee preference to non-member traders without buying or leasing seats and granted the right to the best fees not based on membership rights but on trading volume. Mot. 16-18. These changes and programs, taken together, eviscerated Plaintiffs' fee preferences in violation of the Core Rights, and these changes affected all divisions of membership by reducing the values of all memberships. The extent to which particular changes affected specific divisions of membership

may be relevant to damages, but that does not defeat predominance. *See Hall v. Sprint Spectrum L.P.*, 376 Ill.App.3d 822, 832 (5th Dist. 2007).

Defendants also insist, without support, that certain class members may have interests in conflict with the named Plaintiffs' interests due to differences across membership divisions. But the only "example" Defendants muster is Plaintiffs' testimony, according to Defendants, "that, if the Aurora Data Center is a trading floor, then the CME Class B Members would only be entitled to trade products assigned to his or her division of membership from within the Data Center." Opp. at 29. This legal opinion testimony was given in response to leading questions from Defendants' counsel designed to suggest this is an inevitable consequence of Plaintiffs' positions in the case. Whether or not the conclusion Defendants themselves suggested actually follows from the logic of Plaintiffs' positions, membership-division-limited ADC access has never been part of the relief that Plaintiffs seek in this case, and the argument is therefore irrelevant. In any event, conflicts between class members bear on adequacy, not predominance. *See Cruz*, 383 Ill.App.3d at 778. For the reasons detailed *supra* at 22, there are no real conflicts that preclude the named Plaintiffs from adequately representing the class.

III. The Court should certify a damages class.

Plaintiffs advance two potential methodologies for assessing class-wide damages supported by opinions from a well-qualified damages expert, Dr. Arnold. Defendants did not move to exclude Dr. Arnold's opinions and submitted no competing expert opinions of their own. Their criticisms of Dr. Arnold's proposed methodologies are insufficient to defeat certification.

A. Damages are an appropriate remedy in this case.

Defendants contend that Plaintiffs' claims for breaches of the CME and CBOT charters are not "personal," and suggest that this supposed distinction means that damages are unavailable as a matter of law here. Opp. at 19–20. But *In re Sunstates Corp. S'holder Litig., C.A.*, No. C.A.

13284, 2001 WL 432447 (Del. Ch. Apr. 18, 2001), cited by Defendants, says nothing of the sort. *See* Opp. at 19. Instead, *In re Sunstates* merely noted that in "a suit for violation of . . . a protective charter provision . . . the remedy is *more apt* to take the form of a declaration of rights and an order restoring the *status quo ante* than an award of money damages." *Id.* at *3 (emphasis added). Defendants ignore that *In re Sunstates* certified the class as requested without prejudging "the appropriate remedy to award" after trial. *Id.* at *4.

Defendants' opposition also misleadingly cites a passage from *In re Activision Blizzard Shareholder Litig.*, 124 A.3d 1025, 1056 (Del. Ch. 2015), discussing the "personal nature of federal securities claims." Opp. at 20. *In re Activision* merely observed, in the context of overruling an objection to a proposed class settlement, that the claims for breach of a corporate charter at issue *in that particular case* were not of a "personal" nature, and moreover did not "have any value," such that they could be settled fairly without any cash payment. *Id.* at 1056-57. *In re Activision* did not hold that damages are never an appropriate remedy for breach of corporate charter breach claims.

In fact, applicable Delaware law expressly permits a court to award damages as a remedy for breach of a corporate charter. That is exactly what occurred in *Fletcher Int'l, Ltd. v. Ion Geophysical Corp.*, C.A. No. 5109-CS, 2013 WL 6327997, at *1 (Del. Ch. Dec. 4, 2013). There, the court not only awarded damages for breaches of a corporate charter, but also relied on a hypothetical negotiation damages model similar to the one Plaintiffs propose here.

B. An injunction would not provide complete relief. Defendants do not get to elect Plaintiffs' remedy.

Defendants argue that a damages class should not be certified because injunctive relief would return Class members to the status quo ante. Opp. at 20. But Defendants submit no expert declaration supporting that economic assumption, and Defendants do not identify a single class

certification decision that refused to certify a damages class based on the speculative possibility that injunctive relief *might* provide full recompense. In fact, injunctive or declaratory relief will not necessarily alleviate all of Plaintiffs' injuries. An injunction could theoretically compensate the class for damages running from the date the injunction is imposed—but the class would still have suffered economic losses from the time of the first breach up to the date of injunctive relief. For example, class members may have suffered economic losses from reduced lease income or lost opportunities to sell seats between the date of the alleged misconduct and an injunction at a future date (during which seat prices were depressed due to the breaches, as alleged). Injunctive relief could not redress this past economic loss. Thus, it does not necessarily follow that any injunctive relief would restore seat values to the exact (or even substantially the same) prices that would have obtained in the absence of the two alleged breaches.

Moreover, injunctive relief is available only when damages are found to be an inadequate remedy. *Am. Food Mgmt., Inc. v. Henson*, 105 Ill.App.3d 141, 147 (5th Dist. 1982). Whether that is the case will depend on various factors that will be the subject of discovery and further proceedings. Now is not the time for the Court to decide the form the ultimate remedy will take.

Defendants blithely accuse Plaintiffs of seeking a "double recovery," when Plaintiffs seek only to preserve their right to elect between possible remedies—as Defendants concede Plaintiffs may do. *See Kel-Keef Enterprises, Inc. v. Quality Components Corp.*, 316 Ill.App.3d 998, 1008-11 (1st Dist. 2000) (discussing Illinois' election of remedies doctrine, which permits a plaintiff to seek both damages and equitable relief alternatively); *see also, e.g.*, *Preston Hollow Capital LLC v. Nuveen LLC*, C.A. No. 2019-0169-SG, 2020 WL 1814756, at *22 (Del. Ch. Apr. 9, 2020) (denying injunction based on the equities and noting plaintiff's failure to preserve damages claim).

It is Defendants, not Plaintiffs, that seek to have it both ways. At the motion to dismiss stage, Defendants argued that injunctive relief should be unavailable as a matter of law, and ultimately persuaded the Court to strike Plaintiffs' request for injunctive relief, albeit without prejudice. **PA.441-42**. Plaintiffs later repleaded their injunctive relief claim in the alternative. And although Defendants did not move to dismiss the repleaded injunctive relief claim, they will undoubtedly continue to argue that injunctive relief should be denied—including because, as discussed *infra* at 4, some favored corporate members arguably benefit from the ongoing breaches and those members may oppose injunctive relief.

Third, Defendants argue—without citing any legal authority—that a damages remedy "would not work here where the harm is to all Class B shares and not just those held by the Class." Opp. at 21; *see also id.* at 3. Illinois law governs class certification here. And while Illinois requires certain factual or legal commonalities to exist among class members to obtain certification, but there is no converse requirement that *all* persons commonly interested in a defendant's alleged wrongdoing *must* be included in the class, at the risk of losing the right to seek damages. Illinois courts regularly certify damages classes that, for various reasons, exclude some persons potentially harmed by the alleged wrongdoing. *See, e.g.*, *Roberson v. Symphony Post Acute Care Network*, 2019 IL App (5th) 190144-U, at ¶19 (approved class definition excluded defendant's employees, officers, directors, subsidiaries, and affiliates).

Defendants contend that Dr. Arnold's models somehow "would not work" because some persons (such as corporate members) who may have been harmed by Defendants' alleged misconduct are excluded from the class definition. Opp. at 21. The two damages models Dr. Arnold proposes could, in principle, be used to determine damages for all Class B shareholders. All B shares have diminished value due to one or both alleged breaches and, for example, under

the hypothetical negotiation model, all B shareholders could have demanded payment to permit the breach conduct. But these calculations can and will be adjusted to limit actual recovery to members of the proposed class—which is a subset of all Class B owners.

Defendants also suggest that a damages class should not be certified because they may be subject to other litigation following an award to the class. *Id.* at 21-22. Defendants provide no explanation for their worry that class members could somehow sue again following a damages ward—unless class members opt out, they clearly could not do so, based on res judicata principles. And the fact that Defendants may be sued later on related claims by non-class members has no bearing on any of the class certification factors under Illinois law. That is always a risk in class litigation, and no authority holds that the prospect of related litigation by non-class members or opt outs provides a basis for denying class certification.

C. Plaintiffs have made a sufficient showing that damages can be proven on a class-wide basis.

Defendants next claim that Plaintiffs have failed to sufficiently show that damages can be measured class-wide using common methodologies. *Id.* at 22-23. Illinois law does not require a proof-positive showing that damages can be calculated on a class-wide basis to certify a damages class. For example, in *Roberson v. Symphony Post Acute Care Network*, 2019 IL App (5th) 190144-U, at ¶ 20 & n.4, the appellate court approved certification of a damages class, even though the plaintiff never "articulated her theory of damages" at all.

The only supposedly contrary Illinois authority on which Defendants rely, *Bueker v. Madison Cnty.* 2016 IL App (5th) 150282, is easily distinguishable. *Bueker* was a proposed class action against a county tax assessor over allegedly illegal tax sales. *Id.* at ¶ 1. The appellate court declined to permit the certified class to seek damages because "resolution . . . would require an individualized evaluation of each parcel sold at the tax sale." *Id.* at ¶ 9. In other words, the *Bueker*

court concluded that it is improper to seek entirely "individualized review" of each class member's damages. *Id.* at ¶ 35. Although the *Bueker* court quoted from federal cases imposing a requirement to prove the availability of a common, classwide damages method, *see id.*, even subsequent class certification decisions by the very same appellate court have not imposed that requirement. *See Roberson*, 2019 IL App (5th) 190144-U, at ¶ 17 (citing *Bueker*).

Defendants criticize Dr. Arnold because he has not yet performed a full-blown damages calculation. Opp. at 22-23. But Defendants identify no Illinois authority requiring a complete damages calculation at this early stage. Indeed, while Defendants largely rely on federal court authorities, even most federal courts do not require a full-scale damages analysis at the certification stage. *See, e.g.*, *Monroe Cnty. Employees' Retirement System v. Southern Company*, 332 F.R.D. 370, 399 (N.D. Ga. 2019) (rejecting argument that damages expert's class certification-stage explanation of his potential damages model was "too vague"); *Thorpe v. Walter Management, Corp.*, No. 1:14-cv-20880-UU, 2016 WL 4006661, at *16 (S.D. Fla. March 16, 2016) (certifying class even though plaintiff's expert admitted "I have not conducted an analysis of loss causation or calculated class-wide damages in this matter"); *In re Scotts EZ Seed Litigation*, 304 F.R.D. 397, 414 (S.D.N.Y. 2015) (stating that "nothing in *Comcast* requires an expert to *perform* his analyses at the class certification stage") (emphasis original).

Defendants' cited federal cases, which do not bind this Court, are also all inapposite. Most of them have been narrowly construed by, and distinguished by, other federal courts. *See Ward v. Apple, Inc.*, 784 F. App'x 539 (9th Cir. 2019) (unpublished), *distinguished and not followed by Smith v. Keurig Green Mountain, Inc.*, No. 18-cv-06690-HSG, 2020 WL 5630051, at *10 (N.D. Cal. Sept. 21, 2020) ("Unlike *Ward*, the proposed model is not purely theoretical, but can be applied concretely . . . once the appropriate data is obtained."); *Bell Atlantic Corp. v. AT&T Corp.*,

339 F.3d 294 (5th Cir. 2003), *distinguished and not follow by Kamakahi v. Am. Soc. For Reproductive Med.*, 305 F.R.D. 164, 188 (N.D. Cal. 2015); *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 100 F. App'x 296 (5th Cir. 2004) (unpublished), *distinguished and not followed by In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2013 WL 5429718, at *21 & n. 23 (N.D. Cal. June 20, 2013); *see also Opperman v. Kong Techs., Inc.*, No. 13-cv-00456-JST, 2017 WL 3149295 (N.D. Cal. July 25, 2017), *distinguished and not followed by In re Arris Cable Modem Consumer Litig.*, 327 F.R.D. 334, 369-70 (N.D. Cal. 2018). The cited decision in *Wiesfeld v. Sun Chem. Corp.*, 84 F. App'x 257, 262-64 (3d Cir. 2004) (unpublished), is not about flaws in a damages model but about the plaintiff's failure to commonly show *antitrust injury* across the class. Defendants also rely on an entirely out-of-context quotation from *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 188 (3d Cir. 2015), which held only that the trial court erred in failing to consider the reliability of an expert's methods at the class certification stage *at all*.

Dr. Arnold has done far more that provide a "promise of a model to come." Opp. at 23. Dr. Arnold's declaration explained in some detail how each of the damages models will work and described the evidence that would be relevant to each model. See Arnold Decl. ¶¶ 17-48. The declaration also explained that discovery is not yet complete, and that more discovery may yield additional information that affects the ultimate quantification of damages. *Id.* ¶¶ 6, 30. Thus, Dr. Arnold's declaration satisfies even the federal requirement (never adopted in Illinois) of offering a class-wide damages methodology that "can be applied concretely . . . once the appropriate data is obtained." *Smith*, 2020 WL 5630051, at *10.

D. Dr. Arnold's proposed damage models are viable.

As a preliminary matter, Defendants generally criticize Dr. Arnold's two proposed damages models because they do not directly measure out-of-pocket losses from fee overpayments

or losses from depressed membership sale or lease transactions. Opp. at 19-20.[1] These criticisms miss the point. Neither of Dr. Arnold's models depends on these factors; there is no reason for him to take them into account. It is possible to conceive of alternative models that might rely on these factors as inputs. Defendants may do so later, though such a model would be unlikely to compensate the full economic injury experienced by Class B shareholders, whose shares have lost significant value. But that has no bearing on whether a damages class should be certified as requested by Plaintiffs.

1. The hypothetical negotiation model is viable.

Reliance on a hypothetical negotiation damages model is particularly appropriate in this case because of the extensive record evidence that Defendants have in fact considered membership buy-out or consent payment proposals in analogous scenarios in order to permit them to take actions otherwise forbidden by their charters. *See* **PA.20**; **PA.531-542**. Defendants' opposition brief glosses over this key factual evidence supporting use of a hypothetical negotiation model.

Defendants complain instead that Dr. Arnold has not yet prepared a hypothetical negotiation damages model. Opp. at 26. However, Dr. Arnold undisputedly has extensive experience conducting hypothetical negotiation damages analysis in other contexts, and Defendants supply nothing to suggest a hypothetical negotiation inquiry would apply differently in this case compared to in an intellectual property case. Hypothetical negotiation models borrowed from the intellectual property context have been used to measure damages for Delaware corporate charter breaches before. *Fletcher*, 2013 WL 6327997, at *1. *Fletcher* is no anomaly;

[1] Defendants asserts that, on the one hand, only current shareholders have standing to sue under Delaware law, *see* Opp. at 14-15, but on the other hand, current shareholders have no compensable economic loss, *id.* at 19-20. Defendants identify no Delaware law support for the latter proposition. If Defendants were right about that proposition—they are not—then no damages could possibly have been awarded in *Fletcher*, 2013 WL 6327997, at *1.

other Delaware courts have approvingly cited *Fletcher*'s hypothetical negotiations approach. *See, e.g.*, *Lehman Brothers Holdings Inc. v. Spanish Broadcasting Sys., Inc.*, C.A. No. 8321-VCG, 2014 WL 718430, at *8 (Del. Ch. Feb. 25, 2014) ("As *Fletcher* demonstrates, at least one measure of damages supported by the Plaintiffs—a hypothetical consent fee—is a proper measure of contract, rather than equitable, damages."); *Cedarview Opportunities Master Fund, L.P. v. Spanish Broadcasting Sys., Inc.*, C.A. No. 2017-0785-AGB, 2018 WL 4057012, at *12 (Del. Ch. Aug. 27, 2018) (relying on potential hypothetical negotiation damages framework from *Fletcher* as an "illustration . . . to demonstrate another way that compensable damages are reasonably conceivable").[2]

Defendants also claim that Dr. Arnold's hypothetical negotiation methodology fails to take certain "relevant aspects" of a real-world negotiation into account. But hypothetical negotiation damages need not take all conceivable real-world negotiation factors into account to be valid. A hypothetical negotiation damages model is intended to measure the likely outcome of a negotiation between plaintiffs and defendants on the eve of the breaches, as alleged. This is, by necessity, a counterfactual exercise—if such a negotiation had occurred, then no litigation would have ensued. This is the case with all hypothetical negotiation analyses, and Defendants provide no reason to anticipate that the same hypothetical negotiation standards used to measure damages in, for example, intellectual property cases, could not fairly be applied here.

Defendants tellingly cite no authority supporting their assertion that the specific aspects or factors they identify in their brief are required to be considered to generate a valid hypothetical

[2] Illinois case law in this context is irrelevant, as "[t]he matter of the measure of compensatory damages is substantive, not procedural" and controlled by Delaware law here. *Laugelle v. Bell Helicopter Textron, Inc.*, C.A. No. 10C–12–054 PRW, 2013 WL 5460164, at *1 (Del. Super. Ct. Oct. 1, 2013).

negotiation damages opinion. The primary focus of a hypothetical negotiation analysis is to determine the likely outcome of a voluntary, good faith, negotiation assuming that both parties possess all relevant commercial information, act honestly and in their own interest, and are not under time pressure to reach an agreement. This means that the details of how a negotiation process occurs is not typically the focus of the inquiry. That said, Dr. Arnold could consider some of the seven "aspects" identified by Defendants in applying the model to the extent he ultimately deems them relevant to the negotiation process. For example, external constraints, such as regulatory issues, could be relevant if they constrained the range of possible negotiation outcomes. And external options (i.e., the "walk away" value) also can play a role in a hypothetical negotiation analysis. In any event, Dr. Arnold has not yet performed a merits-stage analysis, and he could consider any of the aspects listed by Defendants if he finds them relevant. *Id.*

2. The statistical model is viable.

Defendants contend that Dr. Arnold's proposed statistical model fails to comport with certain federal requirements for class certification. Opp. at 23-24. But Defendants cite no Illinois court decision requiring class plaintiffs to submit a detailed regression analysis, disclosing all of the variables to be considered in the analysis in order to obtain certification of a damages class. Even in federal courts, the demand by some judges to supply a fully-modeled regression analysis at the certification stage is not uniformly imposed. *See, e.g.*, *In re CRT Antitrust Litig.*, 2013 WL 5429718, at *22 ("[Plaintiffs] need not demonstrate that their multiple regression analysis captures all the proper variables and thus reaches the 'right' answer [for class certification], as the defendants would require them to[.]") (internal quotation marks omitted)). Other federal courts have correctly criticized the approach followed in the federal cases Defendants cite, because as even Defendants admit, "[t]he basic regression model is simple." *Id.* at 24. In the event this Court imposes a new barrier to class certification in Illinois for the very first time in this case, Plaintiffs

requests leave to finish damages-related discovery and then file a detailed supplemental declaration from Dr. Arnold prior to a certification decision.

Defendants also claim that Dr. Arnold's proposed statistical model (but not his proposed hypothetical negotiation model) "fails to comport with Plaintiffs' theories of liability." Opp. at 24-25. The only identified basis for this argument is a misleading quotation from Dr. Arnold's deposition testimony, in which he indicated that the damages on the two claims might overlap to some extent (which is not surprising). *Id.* at 25. Dr. Arnold's damages methodologies could be applied, perhaps with different results, in the event that liability is found only on one claim, on both claims, and against one or both Defendants. For example, suppose that the trading floor claim, standing alone, imparts $X in harm to the class. Suppose, further, that the preferential fee claim, standing alone, imparts $Y in harm to the class. Because committing a second bad act cannot reduce the total harm, the harm has to be at least the greater of $X and $Y. At the same time, because it is possible that the economic losses arising from the two allegedly wrongful acts are overlapping, the total injury may be less than the sum ($X plus $Y). Just how much it adds up to will depend on the interaction between the two claims. Naturally, the ultimate quantification of damages will depend on the claim or claims on which Defendants are each found liable.

IV. Plaintiffs will adequately and fairly represent absent class members.

A. Plaintiffs understand the issues.

Defendants claim that Plaintiffs lack a basic understanding of the facts and claims of the case. That is not true, but even if it were, "it is well established that a named plaintiff's lack of knowledge and understanding of the case is insufficient to deny class certification, unless his ignorance unduly impacts his ability to vigorously prosecute the action." *Murray v. New Cingular Wireless Servs., Inc.*, 232 F.R.D. 295, 300 (N.D. Ill. 2005). Defendants have not even tried to

explain how Plaintiffs are unable to vigorously prosecute this action. Opp. at 31-32. That alone is sufficient to defeat its argument that Plaintiffs cannot adequately represent the class. Opp. at 32.

And Plaintiffs *do* have a firm understanding of the facts and issues in this case. They have devoted thousands of hours to the case, including attending depositions, **PA.475-77; PA.461; PA.491-92; PA.508-9**, reviewing case filings, **PA.524-25; PA.467-68; PA.480; PA.498; PA.504-5**, and working with interim class counsel to bring their decades of experience as members of CME and CBOT to bear on the litigation of this action. **PA.519-20; PA.464; PA.483-485; PA.495; PA.512**. Each provided hours of deposition testimony regarding the facts and theories of the case, and all have expressed their willingness to continue to prosecute the action to its resolution. **PA.447-48**.[3]

Defendants' only case is inapposite. In *Schlenz v. Castle*, the proposed representatives "knew essentially nothing about the suit and had simply told the attorney to do whatever he thought necessary." 80 Ill. App.3d 1131, 1132 (2d Dist. 1980). That is a far cry from the situation in this case. Defendants point to minutia that they believe the class representatives were unable to recall at their depositions, but "understanding the minutia of a case is not a prerequisite to being a class representative." *Murray*, 232 F.R.D. at 300; *see also Randle v. GC Servs., L.P.*, 181 F.R.D. 602, 604 (N.D. Ill. 1998).

B. Plaintiffs do not seek relief antagonistic to the class.

Defendants invent four purported intra-class conflicts to argue that Plaintiffs do not account for the diverse interests of absent class members. But Defendants offer no evidence or declarations to show that even ***a single*** absent class member holds such views. Speculation as to potential class

[3] If the Court desires, Plaintiffs can make available the entirety of their deposition transcripts, which demonstrate Plaintiffs' understanding of the facts and issues in this action.

conflicts without evidentiary support is not enough to defeat class certification. *See, e.g.*, *Carrao v. Health Care Service Corp.*, 118 Ill.App.3d 417, 428 (5th Dist. 1983) (rejecting defendant's inadequacy argument when purported conflicts were shown only "through speculation in its brief"); *Rosario v. Livaditis*, 963 F.2d 1013, 1019 (7th Cir. 1992) (same); *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003) (same); *see also* 1 Newberg on Class Actions § 3:58 (5th ed.).

Defendants' invented intra-class conflicts are also not true conflicts at all. Defendants first claim that Plaintiffs cannot adequately represent the class because Plaintiffs do not engage in any "significant level of trading". Opp. at 33. This ignores that Plaintiff Prosi *does* trade on his membership, including for himself during the relevant time period. **PA.518**. Defendants try to dodge this fact by insisting that the level of trading must be "significant," without explaining what "significant" means or why *that* volume of trading—rather than the amount Plaintiff Prosi trades—is necessary to adequately represent the interests of trading class members.

Even assuming a "significant" level of trading were required, Defendants' only support for why this matters is their belief that Plaintiffs "would ***likely*** elect monetary damages whereas trading members ***may*** be more interested in injunctive relief." Opp. at 33 (emphasis added). Defendants cite no case holding that this is sufficient to defeat adequacy. To the contrary, courts routinely hold that potential disagreements over the proper form of relief is not sufficient to defeat certification. *See, e.g.*, *Californians for Disability Rights, Inc. v. California Dep't of Transp.*, 249 F.R.D. 334, 348 (N.D. Cal. 2008) ("A difference of opinion about the propriety of the specific relief sought in a class action among potential class members is not sufficient to defeat certification."); *Hanrahan v. Britt*, 174 F.R.D. 356, 364 (E.D. Pa. 1997).

Next, Defendants claim that Plaintiffs cannot adequately represent class members who hold a significant number of Class A shares, on the theory that if Plaintiffs are successful in this action,

Class A share values will suffer. Defendants offer no evidence—let alone expert testimony—that the Class A shares would be so affected and cite no case holding that this is a conflict sufficient to defeat class certification. That is no surprise, because courts around the country have rejected this exact argument. In *In re Tyco Intern., Ltd.*, the defendant company argued that the proposed non-equity holding representatives were antagonistic to equity-holding class members, because the equity holders' positions in the company would be adversely affected if defendant had to pay out damages to the class. 236 F.R.D. 62, 68 (D.N.H. 2006). The court found that this was insufficient to defeat adequacy, ***even when*** the defendant company offered expert testimony supporting its theory. *Id; see also Connecticut Retirement Plans and Trust Funds v. Amgen, Inc.*, No. CV 07-2536 PSG, 2009 WL 2633743, at *6 (C.D. Cal. Aug. 12, 2009); *Ziemack v. Centel Corp.*, 164 F.R.D. 477, 481 (N.D. Ill. 1995); 1 Newburg on Class Actions § 3:62 (5th ed.).

Defendants' third claim is that there could be unidentified class members whose interests are aligned with corporate members that are not part of the class, creating a conflict between Plaintiffs and these members. Defendants again do not identify a single class member who holds such views, introduce a single declaration from such a member, or cite a single case saying that the presence of such members would be sufficient to defeat class certification. Defendants also do not claim that any of these hypothetical class members would have divergent interests over Plaintiffs' Trading Floor Claim. Even if such members existed—and even if their views were aligned with the excluded Corporate Members—that is not sufficient to defeat adequacy, because "[a]s a general rule, the fact that some members of a putative class object to the lawsuit is not sufficient to preclude certification." *Lockwood Motors, Inc. v. General Motors Corp.*, 162 F.R.D. 569, 578 (D. Minn. 1995). And such members, if they actually exist, could always opt out of the class, eliminating any such conflict. *See* 735 ILCS 5/2-804; *see also Srail v. Village of Lisle,* 249

F.R.D. 544, 553 (N.D. Ill. 2008) (finding adequacy because opposing class members "will have the opportunity to opt out of the litigation.").

As a last-ditch effort, Defendants claim that Plaintiffs are in conflict with class members who own lower series of shares. Defendants anchor this claim in Plaintiffs' testimony at their depositions that members should only be entitled to trade products assigned to their division of membership at the ADC, something members owning lower series of shares might disagree with. Opp. at 29. First, this purported conflict is not the kind of substantial issue necessary to defeat class certification. *See Matamoros v. Starbucks Corp*., 699 F.3d 129, 138 (1st Cir. 2012) ("Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the [] adequacy requirement."). Second, that some class members benefit from an alleged wrongdoing is insufficient to defeat adequacy. *See Ruggles v. WellPoint, Inc.*, 272 F.R.D. 320, 338 (N.D.N.Y. 2011) ("Adequacy is not undermined where the opposed class members' positions requires continuation of an allegedly unlawful practice."). Consistent with its other inadequacy arguments, Defendants fail to identify any case to the contrary or to identify any absent class members holding those views.

Dated: November 6, 2020

Respectfully submitted,

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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 November 6, 2020 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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