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 and 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

NOTICE OF FILING

Pursuant to the Court's December 29, 2020 Order, Defendants CME Group, Inc. and Board of Trade of the City of Chicago, Inc., with the consent of Plaintiffs Sheldon Langer, Ronald M. Yermack, Lance R. Goldberg, Robert Prosi, and Gerald Petrow, hereby file the Joint Submission of (I) Plaintiffs' Position in Support of Certification of an Alternative All-Members Class, and (II) Defendants' Position in Opposition to Certification of an Alternative All-Members Class, which is attached hereto as Exhibit A.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I certify that on January 29, 2021, I electronically filed a true and correct copy of the foregoing Notice of Filing with the Clerk of the Court, and that I also served a true and correct copy of the foregoing Notice of Filing by electronic mail on the following counsel:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Dated: January 29, 2021

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EXHIBIT A

JOINT SUBMISSION OF (I) PLAINTIFFS' POSITION IN SUPPORT OF CERTIFICATION OF AN ALTERNATIVE ALL-MEMBERS CLASS AND (II) DEFENDANTS' POSITION IN OPPOSITION TO CERTIFICATION OF AN ALTERNATIVE ALL-MEMBERS CLASS

Plaintiffs Sheldon Langer, Ronald M. Yermack, Lance R. Goldberg, Robert Prosi, and Gerald Petrow (collectively, "Plaintiffs"), together with Defendants CME Group, Inc. ("CMEG") and the Board of Trade of the City of Chicago, Inc. ("CBOT") (together, "Defendants"), hereby provide the Court with the following Joint Submission regarding Plaintiffs' proposed alternative All-Members' Class Definition.

I. PLAINTIFFS' POSITION IN SUPPORT OF CERTIFICATION OF AN ALTERNATIVE ALL-MEMBERS CLASS

A. Introduction

The Court should certify a class using Plaintiffs' original proposed class definition, as further specified in Exhibit A to Plaintiffs' Response to the Court's Request for Plaintiffs' Proposed Class Definitions. Plaintiffs carried their burden of showing that class treatment is appropriate for this case. Defendants' opposition arguments—largely suggesting that the original proposed class is *too narrow*—are unpersuasive, and are not supported by Illinois law. But if the Court agrees with Defendants that the original class definition is overly narrow, the Court should instead certify an even broader, modified class. The only difference between Plaintiffs' original proposed class definition and Plaintiffs' alternative, "All Members Class" is that the All Members Class additionally includes CME/CBOT corporate members under Rules 106.F, 106.J, 106.I, 106.S, 106.H, and 106.R. *See* DA. 4-5.

The alternative All Members Class—just like Plaintiffs' original proposed class—satisfies all of the requirements of Illinois Civil Procedure Code § 2-801. The All Members Class satisfies § 2-801's numerosity requirement since it includes even more members than the original

proposed class. Because corporate members have the same contractual Core Rights as any other CME or CBOT B share members, common issues predominate over any individualized issues for the All Members Class, just as they do for Plaintiffs' original proposed class. The proposed class representatives and their counsel can adequately represent the interests of the All Members Class—as they can for Plaintiffs' original proposed class—and a class action is thus the appropriate way to resolve claims for the All Members Class. And any corporate members that do not wish to participate in the case would have an opportunity to opt out of the case.

B. As with Plaintiffs' original proposed class, the All Members Class satisfies the numerosity requirement.

Under Illinois law, a proposed class of as few as 200 members will satisfy the threshold requirement of numerosity under § 2-801. *See Cruz v. Unilock Chicago*, 383 Ill. App. 3d 752, 771 (2d Dist. 2008) (certifying class of approximately 200 individuals). As Defendants showed in their Opposition to Plaintiffs' Motion for Class Certification ("Opp."), there are 1,567 separate individuals or entities that own CME Class B shares and 2,134 separate individuals or entities that own CBOT Class B memberships. *See* DA.16-19. Plaintiffs' alternative All Members Class would include all such individual or entities, except for a handful of owners who are officers, employees, or directors of CME, CBOT, or CMEG. The All Members Class thus satisfies the numerosity requirement, as Defendants concede.

C. Like Plaintiffs' original proposed class, common issues predominate over any individualized issues for the All Members Class.

The Core Rights granted by the CME and CBOT charters apply to each and every Class B share, regardless of that B share owner's membership type. *See* Mot. at 10-14. Accordingly, each member of the All Members Class shares the same Core Rights with all other class members. As a result, questions regarding the interpretation of the CME and CBOT charters, whether those charters grant CME and CBOT members exclusive access to the Aurora trading

floor, and whether those charters grant all CME and CBOT members a fee preference that Defendants have violated are all common issues for the All Members Class. *See* Mot. at 10-14[1]; *see also* Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Class Certification ("Reply") at 5-8. Whether Defendants have breached the All Members Class's Core Rights will turn on common evidence, just as is the case for Plaintiffs' original proposed class. *See* Mot. at 14-18. And class-wide damages can be calculated for the All Members Class in the same way as for Plaintiffs' original proposed class, because CME and CBOT B share values are unaffected by the membership type of their holder. *See* Mot. at 19-23; Reply at 8-18. For these reasons, common issues predominate over individualized issues for Plaintiffs' alternative All Members Class.

Defendants' position that common issues do not predominate for the alternative All Members Class rests on a misunderstanding of Plaintiffs' damages theories—which are in any case not even required certification under Illinois Law, *see, e.g., Roberson v. Symphony Post Acute Care Network*, 2019 IL App (5th) 190144-U, at ¶ 20 & n.4—and Plaintiffs' theory of harm. Defendants violated the Core Rights, which apply to every B share owner, through the conduct alleged in Plaintiffs' Fee and Trading Floor Claims. *See* Mot. at 10-18. Every single B share—whether owned by an individual member or a corporate members—lost value as a result of the breaches. Dr. Arnold has thus proposed two methods for measuring damages for all shareholders on a class wide basis. Mot. at 19-23. The possibility that some corporate members may have benefitted in other ways from Defendants' violative conduct, including as a result of separate business arrangements that they may have had with Defendants, does not change the fact that the values of corporate members' B shares were still adversely affected by Defendants'

[1] "Mot." refers to Plaintiffs' 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.

breaches. And the possibility that some corporate members may have obtained such side benefits has no impact on whether common issues predominate for purposes of class certification.

So there is no "fatal disconnect" between Plaintiffs' liability theory and Plaintiffs' damages theory, and Defendants are simply wrong in characterizing Plaintiffs' liability theory as pitting corporate members as the abusers of individual members. It is Defendants, not corporate members, that violated the Core Rights of every B shareholder, including corporate member shareholders.

D. Plaintiffs and their counsel can adequately represent absent members of the All Members Class.

For the same reasons that the proposed class representatives and their counsel can adequately represent absent members of Plaintiffs' original proposed class, the proposed class representatives and their counsel can likewise adequately represent the absent members of the All Members Class. *See* Mot. at 23-24; Reply at 18-19. The proposed class representatives' rights under the CME and CBOT charters are identical to those of all other current members, so their incentives to protect the rights of the other current CME and CBOT members are the same as any other member.

There are no evident intraclass conflicts between CME and CBOT corporate members and other members with respect to the contractual provisions at issue. All membership holders—regardless of membership type—enjoy the same Core Rights under the CME and CBOT charters, and all membership holders would thus benefit if Plaintiffs are successful in obtaining the relief they seek. Plaintiffs' original proposed class excluded corporate members to avoid the ***appearance*** of ***potential*** intraclass conflicts with certain corporate members who may have benefitted from some of Defendants' challenged conduct, including because some such

members may have had separate contractual relationships with Defendants that provided these members with additional privileges beyond those provided by the Core Rights. Plaintiffs' proposed a narrower class only because of the possibility that some corporate members thus may be opposed to Plaintiffs' positions in this case for self-interested reasons having nothing to do with the meaning or application of the Core Rights.

Defendants' opposition overstates and mischaracterizes Plaintiffs' prior positions. As Plaintiffs stated in their reply in support of their Motion for Class Certification, corporate members were excluded from Plaintiffs' original proposed class definition "out of an abundance of caution, to avoid the appearance of potential intraclass conflicts." Reply at 4. Plaintiffs have never asserted that interclass conflicts are a certainty, nor that all corporate members have interests antagonistic to Plaintiffs' case, as Defendants now suggest. *See* Plaintiffs' Fourth Amended Complaint at ¶ 33 (explaining that Plaintiffs' original proposed class excluded corporate members because "these groups have different and ***potentially*** conflicting interests") (emphasis added); Reply at 4 (noting that "***some*** corporate members were complicit in developing . . . the policies and practices Plaintiffs challenge") (emphasis added); *see also* Langer Dep. Tr. at 223 ("I think a membership is a membership."); Mot. at 9 (mentioning only that "trading firms and CME-affiliated owners of Class B shares" may have interests antagonistic to the class, not all "Corporate Members" as Defendants contend). To the contrary, Plaintiffs have repeatedly argued in this case that the Core Rights apply to "each and every Class B share, regardless of the series or division of membership." Mot. at 1. That means that the Core Rights apply to corporate members just as they apply to individual members like the proposed class representatives. When Defendants violated the proposed class representatives' Core Rights as alleged in this action, Defendants likewise violated corporate members' Core Rights. Plaintiffs'

successful resolution of this action would remedy the violations for all Class B shareholders, including corporate members.

The only supposed conflict of interest that Defendants can muster is corporate members' hypothetical preference for allowing Defendants to continue to violate individual members' fee preference rights. But cases are legion holding that "a judge may not refuse to certify a class simply because some class members may prefer to leave the violation of their rights unremedied." *Srail v. Village of Lisle,* 249 F.R.D. 544, 552 (N.D. Ill. 2008); *see, e.g., J.D. v. Azar*, 925 F.3d 1291, 1317 (D.C. Cir. 2019) (affirming certification of a class despite the possibility that some members preferred the status quo, noting that "in any conceivable case, some of the members of the class will wish to assert their rights while others will not wish to do so.") (quotations omitted); *In re Yahoo Mail Litigation*, 2015 WL 3523908, at * 15 (N.D. Cal. 2015) ("As a general rule, disapproval of the action by some class members should not be sufficient to preclude a class action on the ground of inadequate representation."); *Ruggles v. WellPoint, Inc.*, 272 F.R.D. 320, 338 (N.D.N.Y. 2011) ("Adequacy is not undermined where the opposed class members' position requires continuation of an allegedly unlawful practice."); *see also* 1 *Newberg on Class Actions* § 3:65 (5th ed. 2020) ("As a general rule, disapproval of the action by some class members will not preclude a class action on the ground of inadequate representation."). So even if some, hypothetical corporate members did prefer to leave fee preference breaches unremedied, that would not provide a sufficient basis for denying class certification.

Moreover, Defendants have failed to identify any ***actual*** corporate members that hold interests antagonistic to Plaintiffs' claims, just as Defendants failed to identify absent class members with antagonistic views in their opposition to Plaintiffs' original proposed class.

Although Defendants speculate that some corporate members ***may*** want Defendants to continue the practice of allowing unlimited numbers of traders to make proprietary trades on a member account at preferential rates—a practice that is in direct violation of the Core Rights—Defendants' rank speculation is not sufficient to demonstrate the existence of an ***actual*** intraclass conflict. *See 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.) (2020) ("Conflicts that are merely speculative or hypothetical will not affect the adequacy inquiry."). Defendants have further not even suggested that any corporate members have interests antagonistic to Plaintiffs' Trading Floor Claim. The fact that Defendants have not provided any evidence of an actual conflict provides sufficient ground to reject Defendants' assertion that a conflict exists.

Nevertheless, assuming some corporate members really do have an interest in allowing Defendants to continue breaching the Core Rights, courts have held that the mere existence of some antagonistic class members will not defeat certification so long as those antagonistic class members' interests are adequately represented by another party in the action. *See Horton v. Goose Creek Independent School Dist.*, 690 F.2d 470, 487 (5th Cir. 1982) (certifying class when potentially antagonistic interests of some class members would be "asserted energetically and forcefully by the defendant"); *Dierks v. Thompson*, 414 F.2d 453, at 457 (1st Cir. 1969) (same). If antagonistic corporate members within the class definition truly do wish for Defendants to continue to violate the Core Rights, Defendants and their highly-skilled counsel are more than capable of representing such corporate members' interests in this action.

To the extent that any corporate members do not want to obtain relief for any of the alleged Core Rights breaches, such corporate members are also more than capable of opting out of the class if they so choose. *See Srail v. Village of Lisle*, 249 F.R.D. 544, 553 (N.D. Ill. 2008) (finding adequacy despite the presence of class members with opposing views, because opposing class members "will have the opportunity to opt out of the litigation"). Any separate contractual or business relationships between corporate members and Defendants are not implicated by this action, which is focused on the Core Rights—rights that apply evenly and equally to all CME and CBOT members.[2]

Defendants characterize this opt-out option as a "sidestep", but Defendants are wrong to do so. Courts around the country have repeatedly held that "[t]he availability of this [opt-out] option is an important factor in weighing the effect of a largely hypothetical conflict on a class-certification decision." *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138-39 (1st Cir. 2012) (holding that the existence of a hypothetical antagonistic class member should not defeat class certification when that member can opt-out); *see also Meyer v. U.S. Tennis Ass'n* 297 F.R.D. 75, 86 (S.D.N.Y. 2013) (holding that the antagonistic interests of some class members did not defeat certification when Rule 23 "allows the Court to exclude from the Class any [class member] who requests exclusion."); *Dalton v. Lee Publications*, Inc., 270 F.R.D. 555, 561 (S.D. Cal. 2010) (same); *Braxton v. Farmer's Ins. Grp.*, 209 F.R.D. 654, 660 (N.D. Ala. 2002) (same). Even some of the cases that Defendants cite for support recognize that "the opt-out mechanism might provide an adequate method of alleviating any potential conflicts posed by dissension within a

[2] If the Court certifies Plaintiffs' original proposed class rather than the alternative All Members Class, these same corporate members could bring separate claims for violations of their Core Rights. If Plaintiffs are successful in this action in a way that renders CME incapable of fulfilling its contractual obligations to corporate members without infringing on CME and CBOT members' Core Rights, those corporate members could pursue separate relief for those contractual rights.

class." *Brandriff v. Dataw Island Owners' Assoc., Inc.*, 2010 WL 11534520, at *17 n.12 (D.S.C. Aug. 1, 2010); *see also Gardner v. Equifax Information Services, LLC*, 2007 WL 2261688, at *5 (D. Minn. Aug. 6, 2007) ("[T]he Court acknowledges the existence of the op-out mechanism as a viable method to avoid some conflict within a class . . . .") (emphasis omitted).

Defendants claim Plaintiffs mischaracterized *Srail v. Village of Lisle*, in their Reply in support of their motion for class certification; not so. In *Srail*, the court granted a motion for class certification over defendant's objection that some absent class members "may" disagree with the relief plaintiff sought. 249 F.R.D. 544, 553 (N.D. Ill. 2008). In doing so, the court noted the "speculative nature" of defendant's argument and reasoned that "if [defendant] is right, and absent class members truly do [hold antagonistic beliefs], they will have the opportunity to opt out of the litigation." *Id.* Defendants now cite a later portion of the opinion in *Srail*, in which the Court declined to certify a certain subclass due to "factual distinctions" between the proposed representatives and the subclass, an analysis that does not bear on whether a defendant's speculation about a possible class conflict could defeat certification even in the presence of an opt-out provision. *Id.* at 554 (holding that "the Court concludes that the named plaintiffs have established their adequacy as representatives of the proposed [class]" but also holding that "plaintiffs have not shown that they are adequate representatives of [a sub class]."). The Court in *Srail* at the same time noted that "a judge may not refuse to certify a class simply because some class members may prefer to leave the violation of their rights unremedied," which is exactly the hypothetical conflict Defendants identify here. *Id.* at 249 F.R.D. at 553.

The leading case Defendants cite for the irrelevance of the opt-out provision is similarly off-point. In *Bakinsky v. Corey*, the proposed representatives of a ***defendant*** class action sought to opt-out as representatives ***before a class had even been certified***. 127 Ill. 2d 316, 320–21

(1989). The Supreme Court of Illinois held that the representatives' motion was premature, and noted that if the defendant representatives wished not to represent the defendant class "the course for defendants is, of course, to oppose class certification." *Id.* at 321. The *Bakinsky* Court said nothing about how the opt-out mechanism could cure potential conflicts of interest or affected the adequacy analysis, because the motion before the Court ***was not even a motion for class certification***.

All of the other cases Defendants cite to the contrary are inapposite, because in each of those cases, a court found that there was a ***concrete*** conflict of interest that was fatal to the putative representatives' adequacy. *See, e.g., Brandriff*, 2010 WL 11534520, at *17 n.12 ("[T]he Court does not believe that the opt-out mechanism allows for a finding of adequacy in the presence of ***clear and actual*** conflicts of interest.") (emphasis added); *Gardner*, 2007 WL 2261688, at *5 (finding an actual conflict of interest when class representatives sought to forego for the entire class a category of damages available to other class members); *Clark v. Experian Info. Sols., Inc.*, No. CIV.A.8:00-1217-24, 2001 WL 1946329, at *4 (D.S.C. Mar. 19, 2001) (finding an actual conflict of interest when class representatives limited the sought relief to only one category of available damages, which "jeopardize[d] the remaining class members' rights to seek alternative grounds of relief in a subsequent case"); *Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp.*, No. 05-80183-CIV, 2006 WL 8435096, at *2 (S.D. Fla. Dec. 28, 2006)(finding lack of ***typicality***—not adequacy—when the conflicts were "not merely hypothetical"); *Colindres v. Quitflex Mfg.*, 235 F.R.D. 347, 376 (S.D. Tex. 2006) (same).

Because no conflict of interest exists between Plaintiffs and corporate members—and because if any did it would be hypothetical and capable of resolution through the opt-out

mechanism—Plaintiffs have shown they do not maintain interests antagonistic to members of the alternative All Members Class.

E. A class action is the appropriate way to resolve the All Members Class's claims.

In Illinois, a class action is an appropriate way to resolve a proposed class's claims when the proponent of class certification establishes the first three requirements of Section 2-801. *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."); *see also Hall v. Sprint Spectrum LP*, 376 Ill.App.3d 822, 834 (5th Dist. 2007) (same); *Clark v. TAP Pharmaceutical Prods., Inc.*, 343 Ill.App.3d 538, 552 (5th Dist. 2003) (same). Because Plaintiffs do so here—and because the determination of a few common issues that apply evenly to the class will achieve economies of time, effort, and expense—a class action is the appropriate way to resolve the All Members Class's claims. *See* Mot. at 24.

F. Class certification discovery should not be reopened.

Defendants' filing today includes, as an 11th-Hour insertion, a request to "re-open class discovery" before the Court considers certifying the alternative All Members Class. This conclusory request makes no sense. Defendants make no attempt to identify what additional "relevant document and deposition discovery" they want to seek. They make no attempt to explain how such (unspecified) discovery would play any meaningful role in the Court's certification decision. The Court should not seriously consider further delaying the resolution of this action—which has been pending for ***over seven years***—where there have never been any restrictions on Defendants' ability to seek whatever class certification-related discovery they wished to take ***before the existing class certification motion deadlines***.

G. Conclusion

For these reasons, if the Court does not certify Plaintiffs' original proposed class, Plaintiffs respectfully request, in the alternative, that the Court certify the All Members Class.

II. DEFENDANTS' POSITION IN OPPOSITION TO CERTIFICATION OF AN ALTERNATIVE ALL-MEMBERS CLASS

A. Introduction

On November 2, 2019, Plaintiffs filed a Motion for Class Certification, asking the Court to certify a class consisting of:

> 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, [3] 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.

(Pl. Mot. at 7 (the "Proposed Class").)[4] In doing so, Plaintiffs explained that they excluded the Rule 106 business entities (the "Corporate Members") from the proposed class because they have "interests [that] are antagonistic to those of the Class" and "benefit from the alleged breaches." (*Id.* at 9.)

Following class discovery, Defendants submitted their Opposition to the Motion for Class Certification, setting forth several reasons why Plaintiffs had failed to satisfy their burden to

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3 In their reply brief, Plaintiffs clarified that the Proposed Class also excluded business entities identified as having a membership status under CME and CBOT Rule 106.I. (Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Class Certification at 2 (hereinafter, "Pl. Reply").) Plaintiffs further clarified that they intended to include only current Class B Members in the definition. (*Id.* at 8.)

4 Unless otherwise noted, terms are used as defined Defendants' Opposition to Plaintiffs' Motion For Class Certification, for Appointment of Class Representatives, and for Appointment of Susman Godfrey LLP as Class Counsel (hereinafter, "Def. Br."). Plaintiffs' 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 is referred to as "Pl. Mot."

prove that certification was appropriate. Defendants argued, among other things, that Plaintiffs had (i) failed to recognize that, at a minimum, sub-classes are needed to account for the fact that not all Class B Members have the same rights and privileges, (ii) failed to offer proof that the class representatives can adequately represent the Proposed Class, and (iii) failed to establish that valuation damages are an available damages methodology or can be established on a class-wide basis. Defendants also argued that Class treatment would not result in a fair or efficient adjudication of the controversy because Plaintiffs ask the Court to make wide-sweeping rulings regarding the rights of all Class B Members and to issue injunctive relief, all while intentionally excluding a significant portion of the Membership with whom they have antagonistic interests.

Following the completion of briefing on the Motion for Class Certification, the Parties appeared before the Court for a status hearing on November 18, 2020. At the hearing, the Court expressed its surprise that the Plaintiffs sought one global class and advised that it would be helpful to the Court if the Plaintiffs would submit alternative class proposals in the event the Court was disinclined to certify the broad, requested class. (Transcript of Nov. 18, 2020 Proceedings at 7:13-10:23 (attached as Ex. 1).) Plaintiffs agreed during the hearing that it could "be perfectly appropriate" to "create a subclass of CME and CBOT members or various classes of memberships within the members within the two bodies." (*Id.* at 8:19 – 23.) Yet when Plaintiffs submitted their proposed alternatives to the Court, they petitioned for the Court to either subclassify the originally requested class into two sub-classes of CME and CBOT Class B Members, respectively, or, in the alternative, to certify an even broader All-Members Class that *includes* the Corporate Members. *See* Ex. A to Response To Court's Request For Plaintiffs' Proposed Class Definitions (proposing class of "All current owners of CME Class B shares or CBOT Class B memberships, except for 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.") Plaintiffs suggested that the Court could split this All-Members Class into CME and CBOT sub-classes if it so desired and that "clearing, corporate or trading firm members could elect to opt out of the class." (*Id.*)

Plaintiffs did not, however, make any attempt to show that certification of an All-Members Class is appropriate under Illinois law, and their attempt to do so in this Submission fails for several reasons. First, Plaintiffs cannot show that they can adequately represent the interests of the original Proposed Class, let alone the All Members Class, which includes Corporate Members of CME and CBOT. Over the past seven years, Plaintiffs have repeatedly represented to this Court that their interests are adverse to the Corporate Members of CME and CBOT. Yet now, after being confronted with what they must recognize is a major legal hurdle to class certification, Plaintiffs make yet another shift in their continuously evolving theory of the case and boldly claim that any alleged conflicts are just "rank speculation."

Second, Plaintiffs fail to show that common issues will predominate. Instead, adding Corporate Members to Plaintiffs' already overly broad class will only compound commonality issues. Among other things, Plaintiffs will be required to demonstrate an impossibility: that they can prove common, class-wide damages for both Individual Members, who allegedly were harmed by Defendants' actions, and Corporate Members, who allegedly *benefited* from Defendants' actions.

Third, contrary to Plaintiffs' suggestion, they cannot sidestep their burden to establish the statutory requirements for certification by simply affording Corporate Members an opportunity to opt out. And suggesting that the ability to opt out cures any potential certification issues only highlights why Plaintiffs' pursuit of a class in this case is unworkable in the first instance:

regardless of their choice to opt out, Corporate Members' rights would *still* be affected by Plaintiffs' requested relief. Finally, certification of the alternative All Members Class should be denied because Plaintiffs' last-minute ask would prejudice Defendants, who were denied the opportunity to conduct class discovery on the All-Members Class.

B. Plaintiffs Cannot Fairly and Adequately Represent Corporate Members

Throughout the course of this litigation, Plaintiffs have made repeated statements that emphasize the conflicts between the Individuals Members of CME and CBOT, who they have historically sought to represent, and the Corporate Members of the Exchanges:

> Plaintiffs asserted in their Complaint that Corporate Members are "[e]xcluded from the class . . . because [they] have different and potentially conflicting interests from the Class B Plaintiffs" and engage in practices that are "challenged in [the] [C]omplaint," (Compl. at ¶ 33);
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> Plaintiffs argued in their Motion for Class Certification that the Corporate Members have "interests [that] are antagonistic to those of the Class," (Pl. Mot. at 9);
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> Plaintiffs declared that the Corporate Members "benefit from [Defendants'] alleged breaches" (*id.*) and that "some corporate members were complicit in developing . . . some of the policies and practices Plaintiffs challenge," (Pl. Reply at 4);
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> Plaintiffs proclaimed that the Corporate Members' actions in extending fee preferences to their non-member employees had "eviscerated Plaintiffs' fee preferences in violation of the Core Rights," (*Id.* at 7);
>
> Plaintiff Sheldon Langer called the Corporate Members "the abusers," explaining that "[t]hey [a]re not the victims. They [a]re the people perpetrating the[] abuses to the membership," (Ex. 52 to Pl. Reply Langer Dep. Tr. at 221:9–12); and
>
> Plaintiffs' damages expert based his opinion that damages can be proven on a class-wide basis on an understanding that "the Class excludes trading firms and CME-affiliated owners of CME B shares *whose interests are not aligned with those of the Class*, clearing firm members and corporate member trading firms governed by exchange rules 106.J, 106.H, 106.R, and 106.S," (Ex. 1 to Pl. Mot., Arnold Decl. at 4, n.1) (emphasis added).

Plaintiffs even went so far as serving subpoenas on certain Corporate Members that they now allegedly wish to represent. This is a far cry from excluding Corporate Members "out of an

abundance of caution" and to avoid the "appearance of potential" intraclass conflicts, as Plaintiffs now represent.

Plaintiffs want this Court to believe that since all of the Class B Members have the same Core Rights, all Class B Members' interests are aligned with respect to the alleged enforcement of those Rights. (*See supra* at I.C.) Yet this argument ignores that Plaintiffs are advocating that the Court interpret the Core Rights in a way that is entirely in conflict with the manner in which CME and CBOT have operated since their respective demutualizations, and in a way that would directly and adversely affect the Corporate Members while benefitting the class representatives.[5]

Today (and since demutualization), provided that certain requirements are met, Corporate Members are permitted by CME and CBOT to have an infinite number of persons trade the proprietary account of the Corporate Member and receive preferential rates. Plaintiffs argue that this violates the Core Rights. (*See* Compl. at ¶¶ 117(B)(1), 121(C), 124.) And Plaintiffs ask that the Court issue injunctive relief to require that each person trading the Corporate Member account purchase or lease an additional Class B share in order to receive preferential rates. Accordingly, whereas today, a 106.H Corporate Member[6] may hold a single Class B share and have 50 traders trading its account at 106.H preferential rates, if Plaintiffs are successful in their claim, that same 106.H Corporate Member would have to acquire 49 additional Class B shares to enjoy the same benefits that it enjoys today.

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[5] Plaintiffs make repeated references to alleged "separate contractual or business relationships between corporate members and Defendants" that they assert are "not implicated by this action[.]" (*See supra* Section I.D. at 4, 8.) While Defendants are left to speculate what Plaintiffs refer to, there is no merit to their suggestion that any conflicts between the proposed representatives and Corporate Members have "nothing to do with the meaning or application of the Core Rights." (*Id.* at 5.)

[6] Other types of Rule 106 firms are required to hold additional Class B shares. For example, a CME Rule 106.J Corporate Firm must hold a total of seven Class B shares (two B-1 shares, two B-2 shares, two B-3 shares, and one B-4 share) in order to enjoy the lowest preferential rates on trades for the Corporate Member's propriety account.

Plaintiffs also contend that Defendants have violated the Core Rights by permitting multiple traders associated with a Corporate Member to execute trades on Globex via the Aurora Data Center, which Plaintiffs argue is the new "Trading Floor." Again, Plaintiffs ask that only one trader associated with each Corporate Member's Class B share be permitted to execute trades on Globex via the Aurora Data Center. This again would be a major change from current practice. Whereas today, an infinite number of traders trading a Corporate Member's proprietary account can route trades through a Corporate Member's server that is located at the Aurora Data Center, if Plaintiffs have their way, only one trader associated with each Corporate Member B share will be authorized to do so.

Because Plaintiffs seek to materially and detrimentally change the manner in which each and every Corporate Member of CME and CBOT can operate, the proposed representatives cannot represent the interests of the Corporate Members in this litigation. This is not merely a "hypothetical" or "speculative" conflict, it is a real and fundamental conflict of interest between the class representatives and Corporate Members that precludes certification of the alternative All Members Class.[7] *See, e.g., Hansberry v. Lee*, 311 U.S. 32, 44–46 (1940) (plaintiffs seeking to enforce a covenant could not represent class members who did not want it enforced); *Slimack v. Country Life Ins. Co.*, 227 Ill. App. 3d 287, 299 (5th Dist. 1992) ("There must be no conflict of interest between the representative and the represented class members."); *Client Follow-Up Co v. Hynes*, 105 Ill. App. 3d 619, 625 (1st Dist. 1982) (holding a class representative does not meet the adequacy requirement where it is "seeking relief which is potentially antagonistic to the

[7] Plaintiffs' argument that Defendants failed to present actual evidence of a conflict between Individual Members and Corporate Members is misplaced. Plaintiffs have not previously sought to certify an All-Members Class, and therefore, Defendants did not have notice of the need to conduct class discovery on that topic. *See infra* Section II.E.

members of the class"); *Grimes v. Fairfield Resorts, Inc.*, 331 F. App'x 630, 632–34 (11th Cir. 2007) (affirming denial of class certification based upon a finding of a "fundamental" conflict of interest where certain class members benefitted from the alleged wrongdoing).

The cases that Plaintiffs rely upon do not support a finding of adequacy as none involve the same type of concrete and tangible conflict that presents itself here. *See, e.g., J.D. v. Azar*, 925 F.3d 1291, 1315-20 (D.C. Cir. 2019) (finding that ideological opposition to abortion did not preclude certification of class of all pregnant unaccompanied alien minors who challenged a policy that denied them right to choose and noting that "[t]he ability of minors who . . . oppose abortion to carry their pregnancies to term would not be compromised by the grant of relief securing another class member's ability to make a different choice"); *see also In re Yahoo Mail Litigation*, 308 F.R.D. 577, 596 (N.D. Cal. 2015) (finding that potential of difference of opinions with respect to relief sought—which could affect Yahoo's ability to identify spam emails—did not preclude finding of adequacy in case challenging legality of manner in which Yahoo scanned incoming emails). Moreover, they recognize that "where the representative party *seeks relief* antagonistic to the interests of class members, the representation is not fair and adequate." *Carrao v Health Care Service Corp.*, 118 Ill. App. 3d 417, 428 (1st Dist. 1983) (emphasis in original); *accord Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1993) ("A class is not fairly and adequately represented if class members have antagonistic or competing claims.").

C. Plaintiffs Cannot Prove Commonality

Plaintiffs' alternative All-Members Class also fails because Plaintiffs cannot demonstrate that common issues predominate. By broadening the Proposed Class even further, Plaintiffs have compounded (rather than cured) the commonality issues related to the factual and legal distinctions between the classes of membership within both CME and CBOT. (*See* Def. Br. at 27-30.) What is more, Plaintiffs will no longer be able to rely on Dr. Jonathan Arnold's opinion

that damages can be proven on a class-wide basis because his opinion was premised on his understanding that the Proposed Class would *not* include the Corporate Members. (Arnold Decl. at 4 n.1.) And Plaintiffs will be hard pressed to explain how they will be able to prove damages on a class-wide basis with common proof for a class that consists of both Individual Members, who Plaintiffs allege have been damaged by Defendants' breaches, *and* Corporate Members, who have allegedly benefited from those same breaches. (*See, e.g.*, Pl. Mot. at 3-4 (asserting that Defendants have violated Plaintiffs' Core Rights by "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").)

Further, while Plaintiffs may be correct that Dr. Arnold could still calculate the alleged depreciation in value of all B shares, regardless of who holds them, that fact does not rebut the fatal flaw in their damages theory (the disconnect between their theory of damages and theory of liability), it highlights it. Under Plaintiffs' current liability theory, Individual Members are the victims of multiple trader violations, and the Corporate Members are the abusers. Yet, under their class-wide damages theories, both Individual Members and Corporate Members would be entitled to the exact same damages, i.e., the diminution in value of their B share(s) or their share of a hypothetical negotiation. This contradiction defies logic, as well as the Supreme Court's mandate that a class-wide damages theory must be consistent with, and only measure damages attributable to, Plaintiffs' theories of liability. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013); *see also* Def. Br. at 24–25.

D. The Right to Opt Out Is Not a Cure-All Solution

Plaintiffs cannot sidestep their burden to prove the certification requirements of Illinois Code Section 2-801 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-801, by providing the

Corporate Members the right to opt out of the All-Members Class. In *Baksinsky v. Corey*, the Illinois Supreme Court clarified that the ability to opt out of a class under Section 2-804 of the Code of Civil Procedure, 735 ILCS 5/2-804, is a separate and distinct inquiry from the class certification inquiry and arises only *after* a class is properly certified. 127 Ill. 2d 316, 320-21 (1989). The Court further declared that intraclass conflicts should be analyzed when considering whether a "representative party will be able to fairly and adequately represent the interests of the class"—not through an opt-out mechanism. *Id.* at 321.[8] This guidance comports with the Court's duty to protect absent class members by rigorously enforcing *Plaintiffs'* burden to prove the class action prerequisites before certifying a class. *See* 735 ILCS 5/2-801 (stating an "action may be maintained as a class action . . . only if the court finds" numerosity, predominance, adequacy of representation, and appropriateness); *see also Lee v. Buth-Na-Bodhaige, Inc.*, 2019 IL App (5th) 180033, ¶ 53 (stating that plaintiffs bear burden of establishing the certification requirements and listing evidence courts can consider at certification); *Weiss v. Waterhouse Sec., Inc.*, 208 Ill. 2d 439, 453 (2004) (characterizing the class action prerequisites "as a matter of proof").

Moreover, a number of federal courts have flatly rejected Plaintiffs' opt-out solution where, as here, there are clear and actual conflicts of interest. As the Court in *Colindres v. QuietFlex Manufacturing*, proclaimed: "Providing class members notice and an opt-out opportunity may alert class members that they can pursue individual damage claims, but [they] are not a substitute for the adequate, conflict-free representation required under [Federal] Rule

[8] The fact that *Baksinsky* dealt with a defendant class is of no moment, nor do Plaintiffs offer any rationale as to why that distinction matters. The Supreme Court of Illinois clearly held that (1) courts should analyze adequacy issues at the time of certification, and (2) opt-out options are a distinct analysis that occurs *after* a decision as to certification has been made. Plaintiffs here are trying to combine these two distinct inquiries to force this Court to consider the potential opt-out before a class is certified—which is exactly what the Illinois Supreme Court declined to do. *See Baksinsky*, 127 Ill. 2d at 320-21

[of Civil Procedure] 23(a)(4).” 235 F.R.D. 347, 376 (S.D. Tex. 2006); *see also Brandriff v. Dataw Island Owners' Ass'n, Inc.*, 2010 WL 11534520, at *13 & *17 n.12 (D.S.C. Aug. 5, 2010) (rejecting opt-out as cure to adequacy issues where certain of the absent class members benefited from the alleged wrongdoing); *Gardner v. Equifax Info. Servs., LLC*, No. CIV.06-3102ADM/AJB, 2007 WL 2261688, at *5 (D. Minn. Aug. 6, 2007) (holding that “opt-out is not a sufficient cure for the inadequacy of representation” where a conflict existed between class members who could prove actual damages and those that could not); *Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp.*, No. 05-80183-CIV, 2006 WL 8435096, at *2 (S.D. Fla. Dec. 22, 2006) (rejecting plaintiffs' argument that “the opt-out provision in Rule 23(b) cures any defects in typicality (and class conflicts as well)”); *Clark v. Experian Info. Sols., Inc.*, No. CIV.A.8:00-1217-24, 2001 WL 1946329, at *4 (D.S.C. Mar. 19, 2001) (“The ability to opt out of the class is insufficient to protect the rights of putative class members who would want to seek remedies other than those chosen by the [class] representatives”) (citation omitted).

Rather than help Plaintiffs, their proposed opt-out, cure-all mechanism actually lays bare why Plaintiffs cannot fairly and adequately pursue this case as a class action, *regardless* of their proposed class definition. Defendants explained in their Opposition Brief that allowing Plaintiffs to control litigation that seeks to define the rights of all Class B Members, including those intentionally excluded from the case, and to obtain forward-looking equitable relief that fits their unique interests would not accomplish the “ends of equity and justice that class actions seek to obtain.” *Clark v. TAP Pharm. Prods. Inc.*, 343 Ill. App. 3d 538, 552 (2003). Plaintiffs' opt-out proposal would result in this same problem. If, for example, a Corporate Member determined to opt out of the action because it disagreed with the proposed representatives' construction of the Core Rights or positions the representatives were taking in the litigation, the Corporate

Member's rights would *still* necessarily be affected by any order of this Court. The Court cannot let such a result occur.[9]

The cases Plaintiffs rely upon to support their opt-out solution do not help them. First, the Court in *Srail v. Village of Lisle* did not, as Plaintiffs suggest, "find[] adequacy because opposing class members 'will have the opportunity to opt out of the litigation.'" (Pl. Reply at 21–22 (citing 249 F.R.D. 544, 553 (N.D. Ill. 2008).) Rather, the court made clear that it was not "using the opt-out mechanism of Rule 23(c) to fudge compliance with the requirements of Rule 23(a)" and instead was simply making an observation that absent class members could, under certain circumstances, determine to opt out of the class. *Srail*, 249 F.R.D. at 553. The *Srail* court later went on to hold that the proposed class representatives—residents of an incorporated area of the defendant-municipality—could not adequately represent one of the proposed classes of unincorporated residents because of "a legitimate concern" that they may accept relief at the expense of the absent class members. *Id.* at 554. Here, as in *Srail*, there are legitimate concerns that the named Plaintiffs will continue to pursue constructions of the Core Rights, theories of liability, and avenues of relief that, if accepted by the Court, may materially prejudice the Corporate Members.

Similarly, the other cases cited by Plaintiffs either: (i) found that no real conflict existed, *see Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138-39 (1st Cir. 2012) (finding no "intractable conflict" between class members); (ii) based their opinion on the fact that opting-out would make it so that any potential ruling would not impact absent class members who chose to exit the

[9] As an alternative to their proposed opt out cure-all, Plaintiffs also suggest that an intraclass conflict is not problematic because Corporate Members' interests can be adequately protected by Defendants. But this is just one more attempt to ignore the conflicts of interest that Plaintiffs themselves previously identified. Plaintiffs cannot have it both ways: either their interests are aligned with the Corporate Members or they are not. And Plaintiffs do not satisfy their burden to show adequate representation if they are not.

litigation, *Braxton v. Farmer's Ins. Grp.*, 209 F.R.D. 654, 660 (N.D. Ala. 2002) (by opting out of class, those not adequately represented preserved right to bring claim for damages of their choosing); (iii) dealt with potential violations of federal and state law, not contract interpretation pitting absent class members against the class representatives, *see Meyer v. United States Tennis Ass'n*, 297 F.R.D. 75, 79-81 (S.D.N.Y. 2013) (class sought a determination that employer unlawfully treated them as independent contractors, not employees, in violation of Fair Labor Standards Act and New York Labor Law); *Dalton v. Lee Publications, Inc.*, 270 F.R.D. 555, 558 (S.D. Cal. 2010) (class seeking determination that employer unlawfully treated them as independent contractors, not employees, in violation of California Labor Code); or (iv) offered the language quoted by Plaintiffs as dicta while going on to find lack of adequate representation that could not be cured by opt-out, *Brandriff v. Dataw Island Owners' Assoc., Inc.*, 2010 WL 11534520, at *16 & 17 n.12 (D.S.C. Aug. 1, 2010); *Gardner, LLC*, 2007 WL 2261688, at *5.

E. Certification of the All Members Class Would Unfairly Prejudice Defendants

Finally, the Court should deny certification of the alternative All Members Class because Plaintiffs' last-minute request would unfairly prejudice Defendants, who were denied the opportunity to conduct class discovery on this alternative class. Plaintiffs argue that Defendants have failed to show an actual conflict by offering evidence of Corporate Members who would be harmed by the relief Plaintiffs' seek. But, as the Plaintiffs recognized in their Reply Brief: "Corporate members have been excluded from the class definitions in *every single petition* Plaintiffs have filed in this case . . . over a period spanning *almost seven years*[.]" (Pl. Reply at 2 (emphasis in original).) For that reason, Defendants did not explore during class discovery whether the proposed class representatives could adequately represent the interests of Corporate Members. In the event the Court is inclined to consider certification, Defendants respectfully

request that the Court first re-open class discovery for a limited time period in order to allow Defendants to seek relevant document and deposition discovery.

F. Conclusion

For the reasons herein and in Defendants' Opposition to Plaintiffs' Motion for Class Certification, Plaintiffs have failed to satisfy their burden to prove certification is proper under Illinois law for the Proposed Class or the All Members' Class. The Court should deny Plaintiffs' Motion.

EXHIBIT 1

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION
SHELDON LANGER, et al.,)
Plaintiffs,)
-against-) No. 2014 CH 829
CME GROUP, INC., et al.,)
Defendants.)

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the Honorable CELIA G. GAMRATH, Judge of said Court via Zoom teleconference, on the 18th day of November 2020 at 1:00 o'clock p.m.

LIZABETH A. SILVA, CSR, RPR
License No. 084-002455

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Representing the Defendants;

THE COURT: I am Judge Gamrath. If you are here on my 1:00 o'clock call and you're your an attorney representing the parties, please identify yourself. And if you are not an attorney and do not plan to speak, please as a courtesy, keep yourself on mute.
Counsel for the plaintiff, please identify yourself.
MR. AGRAWAL: Good Afternoon, Your Honor, Suyash Agrawal, Massey & Gail on behalf of the plaintiffs.
MR. MORRISSEY: Good afternoon, Your Honor, Steve Morrissey on behalf of plaintiffs.
MR. FOLSE: Good afternoon, Your Honor, Parker Folse on behalf of the plaintiff.
THE COURT: Are we expecting anyone else on plaintiff's side?
MR. MORRISSEY: No, Your Honor.
THE COURT: Thank you. Counsel for defendants, please identify yourselves.
MR. HOGAN: Good afternoon, Your Honor, this is Al Hogan from Skadden, Arps on behalf of the defendants.
MS. LAPE: Marcella Lape from

Skadden, Arps on behalf of defendants.
MR. FREY: Good afternoon, Your Honor, this is Tim Frey from Skadden, Arps on behalf of defendants.
THE COURT: Are we expecting any other counsel to join us today?
MR. HOGAN: No, Your Honor.
THE COURT: All right. Thank you. Is there an official Court Reporter present? Thank you. I just want to be clear that there shall be no recording, no video, no live streaming, no photographs except as provided by Supreme Court Rules and we'll have one record that will be taken by Ms. Silva. So, if you are found in violation of that rule, you may be subject to contempt of Court. Thank you.
We are here today for setting of a hearing on a Motion for Class Certification. We had talked last time about whether it would be prudent to hold an evidentiary hearing or simply for me to rule based on counsel's argument and the briefs.
I have reviewed the pleadings and the papers and I do not think that an evidentiary

hearing is necessary. Counsel, what's your position on that?
MR. MORRISSEY: This is Steve Morrissey. We do not believe an evidentiary hearing would be necessary either. It would be unusual in class certification. It's typically in evidentiary hearings and here our expert was unrebutted. If the Court has any questions with class representatives, they would be available but otherwise, I don't believe there would be any need for an evidentiary hearing.
MR. HOGAN: Your Honor, Al Hogan for the defendants. We agree that this doesn't appear to be a case that would require an evidentiary hearing. We did not put in an expert, although I don't know that I agree with the characterization but we can find out about the nature of the expert we put and after all of the opinions and factual information are not in controversy, so I think the papers are fine.
THE COURT: Do the parties wish for the Court to entertain arguments? I think it will be helpful. I suspect that I will have some questions after a deep dive into the case

law, as well as the briefs and the voluminous exhibits.
MR. MORRISSEY: We would be in favor of oral argument. I would very much appreciate the Court's time and engagement on prior arguments on such admissions. I think it would be helpful here as well for everyone.
MR. HOGAN: This is Al Hogan. I agree I think the prior sessions have been very helpful for all parties to better understand the issues themselves. I very much appreciate that opportunity.
THE COURT: All right. So, Mr. Morrissey, I must say that I was surprised that you're asking for one global class. Did I read these papers correctly that you were asking for certification of one broad class and that class is all owners of CME B shareholders or CBOT B?
So that or in your phraseology drew a flag for me, as well as this temporal scope which spans ten years. Is there the opportunity for alternative proposed classes such as subclasses in this situation?

MR. MORRISSEY: I think I heard the Court's question that I don't know whether it was my connection or yours, but you froze momentarily in the middle of the question. But if I understood it properly, the question was -- went to the scope of the class definition and why it includes both CME and CBOT, as well as the temporal scope?
THE COURT: Yes.
MR. MORRISSEY: So, as to the why question, we've defined the proposed class to include all individuals who own CME or CBOT memberships now excluding various categories of corporate and clearing members.
The reason that it includes all of both the CME and CBOT members is because the issues are roughly the same and sufficiently similar to cross all of them, but there could be a single class. But to the Court's last question to the extent it's appropriate to create a subclass of CME and CBOT members or various classes of memberships within the members within the two bodies, that would be perfectly appropriate.
It's not uncommon for class definitions

to be modified slightly or for some classes to be created.

THE COURT: Yes. Normally, there's a proposal by plaintiffs as an alternative to have proposed subclasses. I think I was expecting that in your papers and as I read them, there was just one broad sweeping class. If I deny class cert because I think it's overly broad in terms of temporal scope, where do you go from there?

MR. MORRISSEY: Our reply brief does identify a couple of proposed subclasses in the event that the Court has concerns about a couple of those issues; one of which is dividing both the CME and CBOT into both subclasses.

As the temporal scope that we did clarify in our reply brief, there was an ambiguity in our opening brief and I apologize for that, that the class is intended to be defined to be comprised of people who own memberships now.

So, it does not include people who sold previously. That was -- we were to some extent two ships passing in the night on the briefing.

We've clarified that and clarified the class definition in the reply brief. I think it addresses one of the arguments, there are a number of arguments made in the opposition, but that's one of them that hopefully we can put to one side.

THE COURT: It would be helpful to the Court if you could provide the Court with some bullet points about what your overall wish is in terms of class certification. This big broad class of CBOT shareholders or CME shareholders and his date range from 2009 to 2019.

If that's your wish list, number one, put it forward to me, but I also would like to see what your alternative proposals are, serving a one-page document, that doesn't end up muddled in your reply brief.

I don't want briefing on it. I just want it to say, Judge, here's what we're looking for. This is our overall goal, class cert for this. But if you're disinclined to do this, here's option one, two, three, four.

MR. MORRISSEY: Absolutely, Your

Honor. I think that would be helpful for everyone to target the arguments.

THE COURT: All right. Mr. Hogan, do you have any objection to requesting that documents, of course, nobody has seen it. I'm not asking for this to be briefed or to be argued.

You know, my experience shows that you could always come back with a counter and say, this is wrong or that's inconsistent with their briefs, but I would hope to avoid that and I would hope that Mr. Morrissey in drafting this would be consistent with a minimum rely brief which does clarify some issues, but not going beyond that. Because if you do that, it's just going to invite more argument.

MR. HOGAN: So, Your Honor, this is Al Hogan. I understand exactly what you're asking the plaintiffs for. Frankly, I think even among the parties at some other discussions we talked about the possibility of a sur reply, but as we reviewed the reply papers, we sort of looked at it as a similar reaction.

I think what you're asking the

plaintiffs for would certainly be helpful for the Court. I would just follow what you said and that is, to the extent the plaintiffs say things or come up with a construction now that we feel is -- wasn't adequately addressed in the prior briefing, I certainly want to come back and talk to Your Honor about the possibility of us doing additional briefing, but I can tell you that we won't go and do that briefing without talking to you first.

THE COURT: Okay. So, Mr. Morrissey, do you think that you could kind of get your arms around that in the next few weeks?

MR. MORRISSEY: Absolutely, certainly within the next week or so we could get that submitted to the Court.

THE COURT: For purposes of efficiency, it might be prudent to sort of present it to Mr. Hogan before submitting it to the Court. Certainly, it needs to be a file stamped copy, I want it in the Court record. But you might just want to run it by Mr. Hogan, find something that can be tweaked that

plaintiffs can live with, then it's going to be undisputed and avoid Mr. Hogan and his team coming back to me.

I'm not expecting this to be agreed, per se, but it might just streamline things. If Mr. Hogan finds it way off base and feels the need to come through briefing and you can't make a change to it, then that's litigation we'll deal with it, but I think that would be prudent and then, let me know whether you anticipate any objection coming.

MR. MORRISSEY: Yes, we'll certainly do that.

THE COURT: So, why don't we say that that will be done, maybe could you get it done before Thanksgiving?

MR. MORRISSEY: Yes.

THE COURT: Well, is that enough time? Let's see, you know, Thanksgiving sounds so far away, but as I look at my calendar, it's not. So, let's go into December.

MR. MORRISSEY: Okay. Your Honor, you may recall I was supposed to be in trial this week and was anticipating I would not be at

this conference and my trial got kicked to January. So, I certainly have more time on my hands over the next couple of weeks than I was anticipating.

THE COURT: So, why don't we look at some time in mid December.

MR. MORRISSEY: We could do maybe some time the week of the 7th to get it to the Court, maybe the end of that week.

THE COURT: That's fine. Just to give you all time to meet and confer. Why don't you give it to the Court no later than December 11th. With that, of course, copy all parties and indicate whether you anticipate there needing to be some further discussion by the Court.

If so, we'll work in a date for you to come back and discuss it with me towards the end of December or late January, but otherwise in terms of hearing this case, I anticipate finding a date some time towards the end of February.

MR. MORRISSEY: Okay.

THE COURT: Is there anything else that we need to take care of today?

MR. MORRISSEY: No, Your Honor.

THE COURT: All right. So, Mr. Morrissey, if you could please prepare the order? I'm going to turn you over to my Law Clerk, Dominique. She will talk about dates and times with you all.

I would just say thank you to all those on the phone. We have a big crowd with us. Thanks for your patience, courtesy and respect in keeping yourselves muted.

Secondly, once the order gets entered today, Mr. Morrissey, could you please promptly put that on your website, so that we do not get a lot of calls. I would ask those on the phone, please no calls to chambers. The order will be published on the website. So, that would help my Law Clerks a lot, all right?

MR. MORRISSEY: We will do that and we have put the hearing information up on the website, and hopefully that helps streamline everyone getting information about that.

THE COURT: Yes. Thank you, very much. So, with that, I will turn you over to Dominique. She will run through some dates with

you. Send me the order, please, indicating that you'll send me that supplemental list I asked for no later than December 11th.

Mr. Hogan, should you find the need to come in, I would ask you, Mr. Morrissey, and your teams to coordinate with my Law Clerks and we will conduct this via Zoom.

I anticipate the argument being conducted via Zoom as well come February, just so you know, all right? Thank you, all. Stay well.

LAW CLERK DOMINIQUE: Good afternoon, all, this is Dominique. I have some dates in February if you want to check your calendars. How would February 24th at 10:30 look?

MR. MORRISSEY: That works for me, Your Honor.

MR. HOGAN: I have a two-day Arbitration that currently is scheduled for the 25th and the 26th of February. I know those are the last two days of that week and the Arbitration, believe it or not, is not a virtual Arbitration, I'll travel somewhere for it.

So, honestly, I look at that week and very much appreciate if the Court could look to the week of March the 1st towards the back end of that week. I apologize for that, but I just anticipate that week is going to be very hectic for me leading up to my Arbitration.

LAW CLERK DOMINIQUE: Absolutely, counsel. How does -- if we're looking at that first week of March, how does March 4th at 10:30 look? That would be a Thursday.

MR. MORRISSEY: It's fine with plaintiff.

MR. HOGAN: I think it's fine with me. I'll make sure my team has nothing negative to say about that date.

MS. LAPE: Good for me.

MR. HOGAN: Thanks.

LAW CLERK DOMINIQUE: All right. So, if that works for everyone, could you please include that language in the order. We'll have argument March the 4th at 10:30 a.m. That will be conducted via Zoom.

MR. HOGAN: Okay.

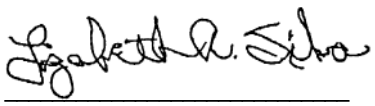
LAW CLERK DOMINIQUE: Thank you, all.

(Which were all the proceedings had in the above cause this date and time.)

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

I, Lizabeth A. Silva, Registered Professional Reporter, a Notary Public in and for the County of DuPage, State of Illinois, hereby certify that the above and foregoing was reduced to writing by means of shorthand and thereafter transcribed into typewritten form; and that it is a true, correct, and complete transcript of my shorthand notes so taken as aforesaid.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed my notarial seal this 11th day of December, A. D., 2020.



Notary Public