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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, vs. CME GROUP INC., a Delaware corporation; THE BOARD OF TRADE OF THE CITY OF CHICAGO, INC., a Delaware corporation, Defendants.	Case No. 2014 CH 00829

REMOTE HEARING

BEFORE:

The Hon. Celia Gamrath,

Chancery Division

Daley Center

Chicago, Illinois

Thursday, March 4, 2021

Reported by:
KATHY S. KLEPFER, CSR, RMR, RPR, CRR, CLR
JOB NO. 190850

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(Time Noted: 9:29 a.m.)

THE COURT: Mr. Morrissey, good morning. This is Judge Gamrath.

MR. MORRISSEY: Good morning, your Honor. Good to see you.

THE COURT: Good to see too.

Let's see. I see your colleague here.

Do I see defendants' counsel on the line? We have a lot of guests, so let's see, is Ms. Lape present?

Is Mr. Hogan present?

I think he's coming in now. Let's see. So Mr. Hogan? I think I see Mr. Hogan. Is Ms. Lape present?

MS. LAPE: Yes. Good morning, your Honor.

THE COURT: Good morning. Is your colleague coming today, Mr. Hogan? I thought we saw him on the line.

MR. HOGAN: Actually, Judge, I'm sorry. Ms. Lape and I are actually social-distanced in the same room.

THE COURT: All right.

MR. HOGAN: Actually, my partner,

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Marcie Lape, is going to handle the argument today.

Mr. Frey, our colleague, recently left the firm to pursue another opportunity so he won't be here with us today. We're happy for him, great for him, but he won't be with us.

THE COURT: All right. Thank you.

Mr. Morrissey, who else are we expecting from plaintiffs' side?

MR. MORRISSEY: I expect a number of folks to be on the line, but the only other person I anticipate speaking is Mr. Carullo.

MR. CARULLO: Good morning, your Honor.

THE COURT: Good morning.

So we have several people on the line, roughly 70 people, and it seems the more people getting added the more tech-strain I seem to be experiencing on this end with respect to sound quality.

So let me just make this announcement: Could everybody who is not an attorney of record please mute yourselves and please

turn your cameras off. I would appreciate it.

Also, we do have a court reporter present. She has identified herself as Kathy Klepfer. Ms. Klepfer will be the official court reporter for today's proceedings.

There shall be no videotaping or photography, no recording of any kind by anyone on this call. Failure to comply with the Supreme Court mandate will result in contempt of court.

The transcript will likely be ordered, correct, Mr. Morrissey? And I suspect that you will share that with your clients.

MR. MORRISSEY: Absolutely, your Honor.

THE COURT: All right. So, Mr. Morrissey, could we get started?

MR. MORRISSEY: Yes. Good morning, your Honor.

As you know, this case --

THE COURT: Let's just start so that the court reporter has the caption, if she

doesn't already have it, along with those counsel of record who are going to be speaking today.

MR. MORRISSEY: Terrific.

THE COURT: If you could identify yourselves for plaintiffs.

MR. MORRISSEY: Yes. Steve Morrissey of Susman Godfrey for the plaintiffs.

MR. CARULLO: Nick Carullo of Susman Godfrey for the plaintiffs.

MR. AGRAWAL: Suyash Agrawal, Massey & Gail, for the plaintiffs. I will not be speaking and will therefore go off audio and will go mute.

MS. LAPE: Hi. Marcie Lape on behalf of the defendants.

MR. HOGAN: And this is Al Hogan, also on behalf of defendants.

THE COURT: We are here today on plaintiffs' motion for a class certification. I know that we have several interested parties in today's proceeding. As always, I appreciate your courtesy with respect to keeping yourselves on mute and

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following court protocols.

Just not to keep you in suspense, I will not be ruling today on class certification. I will do so at a later point in time by a written order.

But we will have argument today and, with that, Mr. Morrissey, it's your burden, I will allow you to present your argument.

MR. MORRISSEY: Absolutely, your Honor. Thank you.

As you know, this case has now been going on for more than seven years, and the questions raised by plaintiffs' motion are whether it should proceed to trial as a class action.

As the Court knows, this case is a matter of enormous importance both for the individual class representatives and for the membership of CME and CBOT, generally.

The Court has seen the large number of people who regularly attend hearings in this case. The case has been closely followed throughout its existence, and I can assure you that there are many, many CME and CBOT

members who closely follow everything that happens in this case.

There are a lot of cases, a lot of class actions where the Court's decision as to whether the case will proceed as a class action determines whether the case will proceed to trial at all. This isn't one of them.

This is a case where there is enough at stake for every CME and CBOT member that if class certification is denied, what we'll end up with is a trial -- or many, many trials -- on behalf of dozens or hundreds or perhaps thousands of individual members who end up deciding to pursue their claims over the next who knows over however many years.

So, given that reality, I'm not even sure why CME is opposing class certification here, because I think it is abundantly clear that a class action is the most fair and appropriate way for all parties and for the Court for this matter to proceed to trial.

So the issue raised by this motion --

And if I may, I have a PowerPoint

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presentation, your Honor, and I'd like to share my screen, but apparently that functionality has been disabled. If there's a way to re-enable it, I would love it.

THE COURT: All right. Sean Sullivan, could you do that for Mr. Morrissey?

MR. SULLIVAN: I'm sorry, Judge, could you repeat that? I was on the phone with a litigant.

THE COURT: Yes. Could you give Mr. Morrissey the ability to share his screen?

MR. SULLIVAN: Yes, your Honor.

THE COURT: All right. Mr. Morrissey, let me just find you on this list.

MR. MORRISSEY: A year in, and we're still figuring things out, your Honor.

THE COURT: I've got 90 names to scroll through.

MR. MORRISSEY: Understood.

THE COURT: Mr. Morrissey, in the meantime, do you have the ability to e-mail that PowerPoint to us?

MR. MORRISSEY: I should. What I'll do is I'm going to forward it to Mr. Agrawal

right now, the last version I'll be using, and he should be able to forward it so that I can limit the number of attachments to it.

THE COURT: Ms. Lape, should you or Mr. Hogan have any exhibits or PowerPoints that you wish to share, if you would like to e-mail those to us as well. It will be easier for me to go off my second screen.

MS. LAPE: Thank you. We are not sharing any PowerPoints today.

THE COURT: All right. Thank you.

Mr. Morrissey, you are a co-host, so you should have that ability.

Thank you.

MR. MORRISSEY: Thank you, your Honor. I now have that ability, so I will proceed.

So, as I was mentioning, the issue here is really largely a practical one, and under the framework set up by Rule 280.1, the appropriateness standard, the key question is really set forth I think very well in the Gordon v. Boden case that we cite in our papers.

The question is whether a class action

will best secure the economies of time, effort, and expense and promote uniformity of decision; and, two, whether a class action will accomplish the other ends of equity and justice that class actions seek to obtain.

So here, after considering both subsection 4 of 801 and the other relevant factors, we submit that the only possible answer is that a class action is the most fair manner for the case to proceed to trial, both for the parties and for the Court.

But let me back up for a moment to what it is we're seeking here, what's the class that we propose in our motion and in the follow-on briefing that we submitted in coordination with the Court and opposing counsel on the class definition.

Our opening brief, as the Court noted back in November, was somewhat unclear on the point of whether the proposed class was intended to include former members, and the Court raised the question of whether it was

too broad insofar as it did.

We have now clarified it does not. The proposed class is limited to current members of CME and CBOT, and the proposed definition that's set forth at the top of this slide here is one that includes all non-corporate members.

It excludes various categories of trading firms and clearing firms and it also excludes shares that are owned by officers, employees or directors of one of the defendants, apart from those directors who were elected by the B shareholders themselves.

We believe this non-corporate member class is the most appropriate way to proceed, and that isn't because other corporate members don't have the same core rights as the individual members. They do. They have exactly the same rights.

It isn't because those categories of members are necessarily all opposed to or antagonistic towards the class. Many, and perhaps even most, likely are not. A number

of the corporate members that are listed encouraged us to be included in the class at various times, and many, many corporate members are very much like the individual members, smaller, mom-and-pop-type trading firms with an handful of traders with the same number of traders as there are memberships.

But the corporate membership group also includes large, large entities like Goldman Sachs and Citadel, who work closely with CME on a broad range of matters, and for that reason, we suggested excluding the corporate members generally and allowing them to take care of themselves.

If a corporate member under this approach wants to bring a separate action, they can do so. If a corporate member wants to sit back and see what happens, as corporate members have through the seven years of litigation, they also can do so. And if they want to, even in some cases, come forward and testify for CME, as none to date have, they could also do that under

this approach.

This approach allows the corporate members to take care of themselves such that the Citadel's and Jump Trading's and Goldman Sachs' of the world who have their relationships that extend far beyond the core rights could choose what to do or not to do at all with respect to this case.

Some of these members, the Goldman Sachs' and the Jump Trading's and the Citadel's have hundreds or thousands of traders now trading each and every day from Aurora, from the trading floor there -- what we allege is a trading floor.

They have broad-ranging agreements with CME. They have a fee structure that they have to work out with CME that they may find beneficial, and they may not want to challenge what we are challenging. That is fine.

The fact that these firms have made arrangements separate and apart from their corporate charters, separate and apart from the core rights, and essentially made

themselves a new class of membership is not what the case is about. It's not the rights we're complaining about. Whatever rights they have as a result of their contracts with CME are not the members' core rights.

But if the Court did conclude that, as CME suggests, that the proposed class is somehow too narrow insofar as it excludes the corporate members, it would be perfectly appropriate to certify an all-member class and allow these corporate members to opt out.

That would be a valid approach. It's one that is not a preferred approach, but it's one that we think would be perfectly appropriate, and under that approach, which is the alternative listed on this page, the only members who would be excluded are the officers and directors of CME.

THE COURT: Let me interrupt you. If a person holds a single membership as a single-member LLC, for example --

MR. MORRISSEY: Yes.

THE COURT: -- that individual would

not be a part of this class if they are corporate members.

MR. MORRISSEY: If they are a corporate member under one of those specific rules, the 106.F, J, H, R series of rules, they would not be a class member.

A number of individuals do own their memberships in LLCs or partnerships or family trusts. Those individual memberships certainly would be included in this proposed class.

THE COURT: Okay. So just so that everybody is clear, then, those that are specified by those rules, and I recognize that we are talking about, for example, those with, you know, trading firms and clearing firms, but what else?

When you talk about how this is going to exclude the mom and pop's of the world and those small individual traders that are corporate memberships, who are those people and do they know it, that they would not potentially reap the benefits of any damages?

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MR. MORRISSEY: So the categories of 106 members can be broken down as between clearing members. That's a fairly small and well-defined pool of large financial services entities who are, and have been even since demutualization, different from the individual members in important ways. They clear trades for others.

The 106.J category, which includes corporate members, that's where it gets somewhat trickier, because the 106.J member includes and a couple of the other categories include proprietary trading firms and hedge funds. A number of those are very large entities, but some are small shops.

There are a number of 106.J's. Some of them are legacy 106.J's that obtained that category of membership in the 2000s when the criteria for obtaining one was somewhat different.

But a number of those 106.J memberships have only one or two folks. They are, frankly, more like the individual members. It's just that, in the interest of

having a bright line rule, we suggested excluding all categories of corporate members.

If one of those or more than one of those folks wanted to join onto the case as an individual plaintiff, we would be happy to do that. We would be happy to have them a notice of class certification go out to all members so that every member is informed of their opportunity to participate in the case. We're certainly not trying to prejudice any particular member or category of members from participating, if that answers the Court's question.

THE COURT: Okay. So this relief, if it turns out to be injunctive relief, it is going to affect every class holder of a B share, including corporate members. You can't avoid it.

MR. MORRISSEY: I plan to get to the injunctive relief point in a bit. I believe that the questions defendants have raised about injunctive relief are largely putting the cart before the horse.

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Injunctive relief is, of course, available only when damages prove to be an inadequate remedy, and here, it's entirely possible that we'll proceed to trial and pursue a damages claim on a per-member, per-share basis that would fully compensate the members and that --

THE COURT: But it --

MR. MORRISSEY: -- we wouldn't be speaking of injunction at all.

Yes, your Honor.

THE COURT: Yes, so it's going to fully compensate these members who are not excluded by Rule 106 and its subparts because they're not what you consider corporate members.

It is really designed for this subset of Class B's who somehow think that they were damaged by the action of defendants but to the exclusion of their brethren who, again, have these vary same core rights.

So, again, it is a difficult sell right now to say that we should have this class that excludes all of these B members.

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And it's also a difficult sell to say we should include all of the B members, including these large corporate members from who you are seeking to take away their benefits.

Let me ask you, you made the point that said the Goldman Sachs' of the world or the Citadel's, they can still make these arrangements with defendants because of their contractual relationships.

If that's the case, don't we just go full circle? If they could make those arrangements post-litigation, why can they not make them now, which they have done so?

You're seeking to stop them from making those contractual relationships.

MR. MORRISSEY: Well, I'm seeking to enforce the contract that applies to everyone and prevent CME from avoiding its obligations to all of the beneficiaries of that contract by providing benefits to a handful of them.

Under this theory, a defendant in a class action could cut special deals with a

subset of its contracting parties and preclude a class action from happening anytime. That's just not the law. It's not the way it works, generally.

The Bertulli case that we cite in our brief, Bertulli v. Independent Pilots, goes directly to this point. It's a union contract case involving Continental pilots, where some of the pilots would benefit from being in a contract because they're more senior. The Court defined the class to include those pilots who were harmed.

And that's similar here. The fact that CME has set up a new series of rules and contracts outside the core rights, without going through the process that its charter requires of seeking a full member vote to approve any change to the members' rights, is precisely the problem and precisely why, minimally, that group of plaintiffs, which numbers in the thousands -- it's undisputed that the number is in the thousands. It's upwards of 3,500, by defendants' own submission. We think

it's higher than that. It's a numerous class, it's a class that we hold in interest, and it's the kind of class that proceeds all day, every day in courts around the country in class actions where there are some subset of people, like in the Bertulli case where the more senior airline pilots were excluded, like in securities class actions when institutional investors who benefited from the fraud or who didn't buy or sell during the particular period at issue are excluded from the case even though they, too, like the plaintiffs, are shareholders, as in antitrust cases when large customers are oftentimes excluded.

This is standard stuff, your Honor. This is a manufactured argument, that the fact that a subset of parties is not fully aligned with the class we propose is somehow a basis for defeating class action.

In Illinois, there's just no law -- in Illinois or elsewhere -- that would support denying class certification on that basis.

THE COURT: So let's say that I

certify a class that excludes these corporate members. You will certainly go to trial. You get a ruling on the interpretation of these core rights. That interpretation binds the plaintiffs who are part of the class and the defendants, but now we've got these other B shareholders who don't like that result.

Can they potentially sue for a different result and a different interpretation? Because they're not bound by this judgment, arguably.

MR. MORRISSEY: So, your Honor, there are, I think, several scenarios that could play out with respect to those corporate members in the setting where the certified class is the one we propose.

The first is, let's say the class loses on liability. In that scenario, it's obviously a total non-issue. The second is the class wins on liability and some subset of corporate members decides, hey, we would like that result too.

CME can't complain about that. These

folks are beneficiaries of the same contract. They could come forward and take the same relief that other members have had. They too would be entitled to whatever additional compensation or right or recognition of their rights that the class secures and would benefit from collateral estoppel, presumably, in doing so.

And then, finally, there's this hypothetical scenario where the class wins and some subset of corporate members comes forward and says, hey, that's not what we think the contract means.

Now, first, having notice of the action and having seen the case proceed through trial for all these years, if we got all the way through trial, there's a judgment that the contract means what we say it means, and these third-party corporate members have never come forward and said it means something else, and then they suddenly, more than seven years into the matter, come forward and say they think it does, there would be a strong argument that

they're barred by collateral estoppel from doing so.

If their argument was instead, hey, we have contracts with CME that give us special additional rights and CME now can't abide by that contract, that's a matter of the contract. It's not a matter of the core rights.

And if CME can no longer fulfill its obligation under whatever contract it has with DRW or Citadel, that's a matter between them that they could presumably resolve through whatever arbitration clause their contract has and whatever force majeure clause that contract might have, but it's a purely hypothetical concern at this point. There hasn't been a single one of these corporate members who has come forward and expressed this concern.

There's no indication that this is anything that could possibly happen, and there's no indication that any subset of these members, if they were given what we say members should have -- a right to access

and trade from Aurora as a trading floor, full stop -- if members had a right to have memberships limited to one membership/one trader such that they could have a membership would obviously be much more valuable -- and CME would have to come up with a regime for compensating members for any expansion of trading rights -- that corporate members would be upset with that; that they too would be able to negotiate some share of the benefits that flow from the overall enterprise that should be going to members and not entirely to CME under the contract.

So, at this point, I think unless the Court has further questions on this point, let me move on to the factors.

THE COURT: So the Court is well-versed with the briefs. I have read the cases that you cited, I've read your briefs. Your first point out of the box was to say: Judge, certifying class is fair and it's appropriate. It is the best way to proceed.

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I don't necessarily disagree with you, but I do to the extent that I feel like there are still these hanging elements out there of all these other Class B members who might come back for more against defendants or who might come back to challenge the result that this subset of Class B members have achieved.

And so, do we have all necessary parties? Quite frankly, we have never talked about including corporate members for the years that this case has been pending. Now plaintiffs say, oh, we could bring them in and let them opt out if they want to, but I don't think that you have satisfied the elements with respect to the corporate members in terms of adequacy or appropriate representation.

We certainly don't have a named plaintiff who would qualify to represent the Goldman Sachs's of the world. They might be, you know, quite frankly, defendants in one way in this case, or some other sort of third party and not necessarily plaintiffs,

because while you say they have never stepped forward, we know based on reality that Citadel and Goldman Sachs would not want your interpretation of these core rights to prevail.

Because your interpretation says we, this subset of Class B members, get this, you know, most proximate, best, free access to Globex, and everybody else has to have one membership interest assigned per trader. You cannot allow hundreds or thousands to trade on one corporate membership.

That's what you're seeking. So we know that that would not be the result that these other corporate members would want.

MR. MORRISSEY: Let me --

THE COURT: And so is it just a race to the courthouse? Your subset of plaintiffs got here first, so therefore this proceeds?

I mean, I'm asking you this in a concerted way to see, if I do certify a class, what the best class is possible. I will tell you, as I have indicated in prior

discussions, this one-size-fits-all will not work.

At a minimum, you will need two subsets. These contracts or charters are different in material respects. I will not certify one broad-based class of all current owners of B Shares of CME and CBOT. That is just a non-starter.

So let's get back, and let me ask Ms. Lape to kind of interject and participate in this discussion about who, if any, is the appropriate class or subclass in this scenario.

MS. LAPE: Thank you, your Honor.

As our opposition brief makes clear and our supplemental briefing, we don't believe that, as plaintiffs have presented this case, there is a class that can be certified. Their initial proposed class that excludes corporate members, that excludes necessary parties.

As you recognized, if there is a decision on the merits that awards equitable relief that declares the rights of the Class

B members, that decision will necessarily affect not only the individuals that are before the Court and who have a voice in this litigation, but will also affect the corporate members who have been excluded from the class.

And not only are they necessary parties whose rights will be affected, but if they're excluded, then it will very well be the case that CME and CBOT will be left open to inconsistent judgments if the corporate members should then bring a case against them. And so the initial proposed class, as they defined it, just would not be appropriate for the fair and efficient adjudication of this matter.

And also, as you recognized, there is a big problem with the alternative class here because there is no adequate representation of the corporate members. Not only have the plaintiffs themselves repeatedly emphasized that the corporate members have interests that are antagonistic to the class, but, again, as you recognized

already, what they're trying to do here is to fundamentally change the manner in which the exchanges have operated over the last 20 years since there's been an open access policy on Globex.

And so this isn't just, you know, a potential conflict of interest with the corporate members. It's not a situation where, if a corporate member desires to just opt out of the class, it can and that will solve things. Because this is a fundamental problem, it's a fundamental conflict that just destroys the entire class as a whole in the way that the plaintiffs have presented their case.

And so we don't believe that there's any class that works in this situation, your Honor, and it's because of the way the plaintiffs have brought their claims. It's because the plaintiffs here, they are actually a very small subset of the Class B members as a whole.

And so they have fashioned their claims in ways that are divorced from

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reality. And if we think about where this case started with, at the very beginning, now, the plaintiffs brought, you know, two buckets of claims. They have got their Globex access claims and they have got their B claims, and the Globex access claims started out as this unfettered right that they claimed they had to the best and most proximate access to Globex for free. And they claimed that they had that right, because, before demutualization, Globex was a closed system that only members could access, and the Globex match engine which matched its trades and passed on trade confirmations was located at the same building where the trading floor was.

And so they allege that when the Globex match engine was moved to the Aurora Data Center in 2012, that destroyed their best and most proximate access to Globex that they had for free for all time, but the facts as they came out in discovery revealed that this is just completely divorced from reality.

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First, open access to Globex, that was enacted before the demutualization. In August of 2000, CME voted to open access to Globex for all market participants, and that meant that both members and non-members could access and directly trade on Globex.

And since that time, CME has provided equal access to Globex for all market participants on an equal basis, including at Aurora. And not only that, but the facts showed that CME actually moved the match engine in 2002 to Lombard, Illinois, ten years before moving it to the Aurora Data Center.

And so plaintiffs' idea that they have always had this best and most proximate access to Globex for free, it just got obliterated. And so the plaintiffs had to change their strategy at that point in time, and so instead of claiming that they have this best and most proximate access to Globex for free, they now allege that, well, the Aurora Data Center is not really a data center. It's a trading floor, and so, as

members, we have the exclusive right to access that trading floor.

And plaintiffs make this claim despite the fact that there is nothing about the Aurora Data Center that could possibly make anyone believe that it's a trading floor, and that they have exclusive rights to that trading floor as the certificate of incorporation contemplated.

In 2000, when CME demutuallized the trading floor at 30 South Wacker, that was a place where human beings went, where human beings stood in a round circular pit, orally communicated with each other, executed trades by hand signals and orally. None of that exists at the Aurora Data Center. The Aurora Data Center --

THE COURT: I'm sorry to interrupt.

I asked for your opinion based on prior motions and argument, so we have briefed the difference.

One of the things that's not appearing to the Court, or I don't even think the parties were quite aware, was that, before

the matching engine moved to Aurora, there was a stopover somewhere else. You had mentioned, I think, Lombard.

Was there a charge at that point? And Mr. Morrissey, you can answer this as well. Were members being charged to go to Lombard? Were they able to go to Lombard and execute trades like they do at Aurora?

MR. MORRISSEY: Lombard was not, your Honor, a trading floor. It was a building that hosted the match engine, and while the match engine was at Lombard, no one had better access to trading activity than the people on the floor.

People on the floor traded electronically before demutualization, and they continued trading electronically from the floor for many years thereafter. Aurora was the first time, and only time, CME set up a new trading floor that, if I may, your Honor, one more time --

THE COURT: All right. So, just to be clear, and I don't really want to get off-topic, but this Globex was housed at the

original trading floor downtown Chicago. Members in the pit were there on campus, on premises, and could access it right there.

It was moved to Lombard. Presumably, then trading got a little bit slower; is that correct?

MR. MORRISSEY: I don't believe that trading got slower because computers generally were getting much and much faster, and data --

THE COURT: But they were further away from this matching engine.

MR. MORRISSEY: Yes.

THE COURT: Okay. So --

MR. MORRISSEY: Electronic trading increased as a percentage of all trading --

THE COURT: Right.

MR. MORRISSEY: -- for a long period of time, and by 2008, eight years after CME's demutualization, after CBOT's demutualization, membership values were at their peek, all-time high. They had gone up, and that was when CME for the first time decided that, in this new electronic world,

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we need -- and this is a key piece of evidence that's come out in this case -- is this is the person, Craig Mohan, who was responsible for managing the Aurora Data Center. He called the place an electronic trading floor right up until this case was filed.

The idea that it's somehow manufactured by plaintiffs the notion that Aurora is a trading floor or that this place in no way resembles a trading floor, which is language in CME's brief, is divorced from reality. This is the CME trading floor now, and CME, rather than making it a place for members to go and trade, has made it a place where they sell access to anyone who will buy it.

THE COURT: So let me ask this. Because these matching engines are not just exclusive to the Aurora Data Center. I think once it was talked about having these all over the world.

Am I right?

MR. MORRISSEY: No, there is a single

match engine now. It may well have backups for disaster recovery that are offsite, but the match engine that serves as the central nexus for trading activity on the exchange is housed at Aurora. There are data connections to others who trade from remote locations through that are setups at Aurora.

THE COURT: And so let me ask you: Is that lesser access, or is that still as good as being physically in Aurora?

MR. MORRISSEY: Most of the people are also physically in Aurora and pay for the right to be there, because Aurora --

THE COURT: Right.

MR. MORRISSEY: -- is valuable.

So, no, being remote is not better access, but the point, it's not a right to have just proximate access; it's a right to trading floors. It's a trading floor right. And that's how we have alleged it in our complaint, that's how we have alleged it throughout the case, that's how the court's order on the motion to dismiss reads.

The claim is that members have a

trading floor access right under Core Right 2; that a CBOT membership represents a right to access and trade from the corporation's facilities.

That's a right that's exclusive to members under both charters, and CME decided to open a new trading floor and not make it exclusive to members. That's the problem. They did it in 2009, they did it when they called it a trading floor, and that's a fact question that's common to everyone in the class.

I would like to, I know we sort of have gone back and forth between --

THE COURT: Excuse me. One more question: You mentioned Surmac. Is there still some engine at Surmac?

MR. MORRISSEY: The match engine is not at Surmac. Surmac is still a building. It's still a building where people engage in trading and, through various kinds of high-speed data connections, people can --

THE COURT: So, wait. Is that a trading floor?

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MR. MORRISSEY: No, it's not. It's not a single building owned by a single exchange that's used by that exchange for trading. It's a building that's, you know, subleased out to anyone who wants to buy a space and run their operations from there.

But the notion of exchange-based electronic trading floors is not unique to CME. Aurora is CME's electronic trading floor. The New York Stock Exchange has one in New Jersey. The European exchanges have one in London. CBOE has one in downtown Chicago. CBOE refers to its trading floor as a hybrid trading floor that includes both electronic and open outcry trading.

It in no way manufactured the concept of that.

THE COURT: So let's go back to class certification, because under your argument, ABC is a trading floor. That means if you have a membership, it's one person that gets to trade per membership; is that it, in simple terms?

MR. MORRISSEY: That sort of conflates

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the two issues. One is if it's a trading floor, only the members can access and trade from that floor absent --

THE COURT: Okay.

MR. MORRISSEY: -- absent a vote that allows others to come in there.

THE COURT: Right.

MR. MORRISSEY: Which would only require CME to do what every other exchange in the world has done, including NYMEX that CME itself owns.

Every other exchange in the world has made a deal with its members to allow them to share in the value of electronic trading because every exchange in the world had a status quo beforehand where members had the exclusive right to the floor.

CME, and CME alone, along with CBOT, are the only ones who have left their old line members stranded and allowed their values to get destroyed. They are the only ones who have done this, and that's what we will show at trial.

THE COURT: So let me just interrupt

you.

The old line traders that you refer to who are Class B members, they also held or hold Class A shares.

MR. MORRISSEY: Some do. If someone was a member beforehand, they would have owned the Class A shares, which they could have sold because they --

THE COURT: Sure.

MR. MORRISSEY: But there are hundreds, if not thousands of people who, between 2000 and 2008, when they fully expected CME would continue to honor its rights, when they thought they could make a return in this electronic market and they could trade or just lease out their seat and benefit from the growth of electronic trading, bought into the membership as an investment in the B Shares. And those people had every reason to believe that CME would honor its contracts, as did CBOT members. They don't have any shares.

The B share is a completely separate right with a separate contract that everyone

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who owns one has one, and --

THE COURT: Yes, I understand that, but, again, to be clear, it seems like you are trying to elevate Class B shares to the equivalent of equity Class A shares. Because Class A shares are sharing in the profits of B trading by virtue of their value.

MR. MORRISSEY: I wouldn't elevate the B shares to the Class A shares. It would not have any relationship at all to A shares. A shares would share in, if CME buys an exchange in Brazil, as they have, if they buy --

THE COURT: But A shares are also sharing in the value of these profits free trading.

MR. MORRISSEY: Just as B shares are sharing in the value of having trading floor access rights and privileges.

THE COURT: Okay.

MR. MORRISSEY: The fact that a B share carries with it the exclusive right to trading floor access rights and privileges

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is why B shares appreciated in value from a few hundred thousand dollars to a million dollars.

THE COURT: So tell me again, because again, your subset of B shareholders wants to exclude B shareholders who are able to allow hundreds of people to trade on their membership. You want to stop that.

MR. MORRISSEY: What we've proposed is defining the class to exclude the categories of corporate members that CME itself has defined as different. These are rule provisions that CME has that says these are corporate members, they have somewhat different rights, and it has somewhat different requirements for them to be one is.

THE COURT: Yes.

MR. MORRISSEY: Those are different provisions than the contract.

THE COURT: Okay. But, again, don't they share the same core rights?

MR. MORRISSEY: They also have those same core rights, which is why, you know,

some of them may well choose to participate.

But that's not a problem that's different from any class action. In any class action, a group of people can opt out. Everyone has a right to notice and a right to opt out, and opt-outs can, and often do, bring subsequent claims. They can bring inconsistent claims.

That happens all the time. That's not a problem that's unique to this case. These people are no different from the senior airline pilots in the Continental Airlines case we cited.

THE COURT: All right. So that I would say is your best case.

I'm going to turn to defendants and ask them to tell me why that case doesn't apply.

Just going back, you have changed your kind of ten-year frame where you say, you know, members who owned up until, you know, whatever year it was, to saying now it's current Class B members.

So, under your new proposed class,

does it matter if a Class B member was a shareholder at the time of demutualization, or could a class member just have acquired a Class B share last week?

MR. MORRISSEY: It's the latter, and this follows from an argument that CME made in its opposition, which we thought was reasonably well-taken.

The law is not entirely clear on this point, but there is a strand of Delaware law that says that the contractual rights associated with a preferred share travel with the share such that the current owner of the share is the person who has those rights.

There are settings in which a former owner can bring a claim. Those are typically fraud-type claims. If you were defrauded into selling your share at some earlier time, you have the right to defraud, but those are not rights that flow from the share.

THE COURT: Okay. I just want to be clear.

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So, even up until the moment of trial, technically, somebody could be added as a class member. Once you give notice, it will be to all current shareholders, defined class.

MR. MORRISSEY: What we provide is current shareholders at the time of the order, and it's safe to say the successors, the successors. It's a finite number of shares, obviously.

THE COURT: Right. And what is that number of shares? I mean, here's another problem that I'm having. So that current share is owned by Sally Smith, for example, individually.

MR. MORRISSEY: Uh-huh.

THE COURT: In this litigation, it gets transferred to ABC Corporation. ABC Corporation then no longer is a class member even though Sally might have been under your scenario.

MR. MORRISSEY: I think that scenario, it depends on the nature of ABC Corporation. Let me give a related and similar example

that actually came up in a phone call I had a few weeks ago.

Let's say it's Sally Smith and Doug Smith, and Sally Smith owns a share. She dies. This share passes to her son Doug. I think the person in that scenario, the person who owns the share would be the person who owns it as of the date of class certification and their successor.

Let's say Doug is ABC Corporation, and Sally just sold the share to Doug. That would effectively be an assignment from Sally of her claims associated with the share, and ABC Corporation would step into her shoes as the class member.

THE COURT: Now you're excluding class members, potentially. If you exclude class members then how could the successor be a part of the class?

MR. MORRISSEY: Who are we then excluding?

THE COURT: Well, ABC Corporation, who has acquired Sally's individual share.

MR. MORRISSEY: No, they're included.

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I may have --

THE COURT: I know, but I'm asking you, how could that be? How could that be?

I don't think that could be. And again, just for clarification, your first proposal is, Judge, certify all current owners of these shares except for corporate members.

If an individual member transfers to a corporation, they would have to be decertified as part of the class, I would think.

MR. MORRISSEY: Ah. That's the point of part of your question that I did not follow, your Honor.

So the assumption is that ABC Corporation is not just a corporation; it's also a corporate member of CME.

THE COURT: Right. Yes.

MR. MORRISSEY: Okay. Okay. That's an additional factor.

THE COURT: Because, again, Mr. Morrissey, it's not just 106.J that includes proprietary trading firms and some small

shops that only have one and two people; it's other subsets of 106 that would include some of these members who might consider themselves individuals, but they're not as the definition of 106 goes.

MR. MORRISSEY: Understood.

THE COURT: And so --

MR. MORRISSEY: Not all corporations are corporate members. They could be --

THE COURT: I understand that, but plenty of them are, plenty of them who have the characteristics of individual members.

It seems to me that this class is going to be fluid up until the end, which to me is untenable. That's not a correct scenario. And also, for years I have seen dozens of people coming to my courtroom, dozens of people Zooming into these calls, and I ask myself: Do they know if they are in fact a class member under your definition?

MR. MORRISSEY: Well, I believe everyone --

THE COURT: Are there people --

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MR. MORRISSEY: Everyone knows. Members know they're members, your Honor. This is their main asset in life.

THE COURT: Okay. But the 106.F, the 106.J, the 106.H, those, even you, when I asked you to define those, had difficulty defining those and said, "Here's where it gets a little tricky."

It does get tricky, and that's my concern of an over-inclusive class and an under-inclusive class, that we may be leaving out people who rightfully have these same claims, and that it's dangerous to include people who would be patently antagonistic to the relief you are seeking.

And so I am really in earnest trying to work to see, if this case gets certified as a class, what is the appropriate class? It can't be a swath of all these members.

I asked you pointedly to give me some options. I asked you specifically to give me some subclasses. I expected more subsets within what you gave. I didn't expect that you were going to broaden it to corporate

members.

I did expect you to at least break it down, as you did, into CME Class B shares or CBOT Class B shares, but I think that more refinement needs to be done in terms of these subclasses because they are different claims and there are different forms of relief.

And, for example, the voting rights. Voting rights let's talk about for CBOT members. Those don't apply to all current Class B memberships. Am I correct that it's only B1 and B2 CBOT class members who get to vote?

So some people being deprived of that right to vote wouldn't affect what you have defined.

MR. MORRISSEY: Well, they would all benefit from having the B1s and B2s vote and, thus, would obtain the same relief as the --

THE COURT: Do they have standing for that particular element of your case?

MR. MORRISSEY: I believe so, your

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Honor.

So a B3 from CBOT has a contractual right to appear on and trade from any CBOT trading floor and has a contractual right to preferential fees. The contract says that any amendment, modification, or appeal of that provision requires a majority vote of the B1s and B2s. If there's been a change, there wasn't any vote, I would think a B3 has an equal basis to claim that there's a breach.

But if I could back up a moment to one of your Honor's comments that triggered an idea -- it's really a two-part idea. One is this. One is the subclass point, which is, because of this subset of 106 corporate members, particularly 106.J's who are more like the individual members, the 3500-plus who are just like the class reps and have the same types of claims that we believe are substantially similar under the two contracts that Mr. Duffy admit in the testimony we cite, for those other folks, there could be an opt-in subclass. Notice

could go to everyone, and the 106 members who choose to opt in could opt in and become a subclass, and we could identify an additional representative for those folks. That would be one approach.

A second approach is to recognize the stepwise nature of litigation. One of the cases that CME relies on heavily in their brief is the Bucher case. That's one of the few Illinois cases where a court found that the remedy phase issues were a reason for limiting a class at all, and there the court certified the class for liability, allowed it to proceed on liability, and it went from there, reversed the decision certifying the damages class, and had that issue deferred to later. The Sunstates case in Delaware that defendants cite had the same approach.

And so a liability class would allow, for instance, a trial on the issue of whether Aurora is a trading floor, and then we proceed from there on whether the remedy phase is done on a class-wide basis, on a member-by-member basis, or something else.

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THE COURT: Well, that's news to me.

As to your first approach with respect to the opt-in, I don't think that that is the preferred methodology. Courts have been criticized for using opt-in and opt-out, and case law makes it clear that that is not the preferred method.

It may be necessary or appropriate in certain cases. I'm not sure it's appropriate here, and it doesn't address the concern that they still may be leaving themselves open to inconsistent judgments or interpretations of these charters.

Mr. Hogan or Ms. Lape, in terms of this Bucher idea of certifying the class for liability, any thoughts on that?

MS. LAPE: Well, I think, your Honor, we obviously don't think that a liability class is certifiable here in the manner in which plaintiffs have proposed it. Even a liability class does not satisfy the prerequisites under Illinois law.

Certainly, though, if your Honor were inclined to certify a liability class, we

don't think that a damages class is certifiable here at all for several reasons, including that the plaintiffs haven't come forward with any class-wide methodology for how they could establish damages at all or that damages are even available here.

I mean, this is a breach of charter action, and it inures to the B share itself, and the plaintiffs allege that they're damaged with respect to the value of the B share because defendants haven't been honoring their core rights.

So the more apt remedy in this type of case would be injunctive relief and a return to the status quo, and then that would have the effect of bringing that B share value up to where it allegedly should be if defendants are honoring the core rights.

In such a case, there wouldn't be any monetary loss. The class members are holding their B shares today, so they have not suffered a loss in that value of a B share.

I think in the briefing, plaintiffs

said, oh, well, maybe injunctive relief would give us a remedy going forward, but that doesn't account for all our lost lease value and lost opportunities to sell our B shares, but the plaintiffs haven't defined a class here of leaseholders and they haven't defined a class of people who have attempted to sell their B shares and haven't been able to.

So I guess, at a minimum, we would say that the damages class absolutely should not be certified here, but we don't think that the plaintiffs have met their burden to show that a liability class is acceptable either.

THE COURT: All right. Mr. Morrissey, tell me why you have satisfied your burden to certify, at a minimum, a liability class and who that class would be.

In particular, so it's no secret, I am interested in two of the elements: Predominance of common issues of fact or law and adequacy.

MR. MORRISSEY: Yes, your Honor.

First, on the issue of predominance,

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Illinois law doesn't give damages or remedies any particular preference in assessing whether common issues will predominate at trial.

The issue is whether, taking all the issues together, common issues will predominate over individualized issues, and here we've satisfied that requirement by putting forth a liability claim that will turn, as the court found in the motion to dismiss ruling, on a question of fact as to whether Aurora is a trading floor and questions of fact as to whether CME honored the fee preference.

Those issues, the contracts, as between if they're subclasses of CME and CBOT members, the contract is exactly the same for all CME members, it's exactly the same for all CBOT members.

The contracts could be tried together because CME admits that they are materiality the same. This is in a presentation from CBOT to its members, jointly with CME management, in conjunction with CBOT

management as part of the CME/CBOT merger, where members were told the membership rights were the same.

At pages 89 to 90 of our appendix, Chairman Duffy, chairman and CEO of the exchange, testified that the rights are identical.

The history of the exchanges, how members were treated for years, the fact that members had exclusive access to any trading floor and the right to trade from there and that electronic trading had been on the trading floors will be common to all members.

The decision-making within CME is made jointly for CME and CBOT members. There's not some separate team of executives who makes decisions as to how Aurora operates. The decisions are made by the team that was, at the relevant time, led by Mr. Mohan, who called Aurora an electronic trading floor.

That's all common evidence. There's common evidence on the fee issue, where CME in 2009 made this decision to allow an

infinite number of traders to trade on a single account. That evidence is common to all members.

And then there's the issue of damages. What we have put forward is a damages methodology, two alternative methodologies that satisfy the burden that, under Illinois law, is fairly minimal, as it is in most courts throughout the country, to show that there are methodologies whereby damages can be calculated on a class-wide basis.

Dr. Arnold, our expert, identified two potential methodologies, one of which is the hypothetical negotiation approach, an approach recognized by the Fletcher and Cedar View and Lehman Brothers cases cited in our brief, as appropriate. And that methodology is used in contractual royalty-type intellectual property cases and intellectual property cases, generally, and they can be applied in shareholder cases, as the Delaware cases we cite mention.

Dr. Arnold testified that he's used this methodology in numerous kinds of

engagements, that it can be adjusted to account for the various factors in this case, and that he can use it to calculate damages on a per-share basis.

He also offered a statistical methodology that will look at the performance of the B shares over time and what they would have been worth absent the breaches.

Now, CME suggests -- first, how did they respond to Dr. Arnold? They didn't. They didn't have an expert of their own. They didn't put forward any explanation of why they think anything Dr. Around said is wrong.

Their response is, essentially, nothing, and suggests that, well, you should really be seeking an injunction, which, again, injunctions in contract matters are rare. They're so rare that CME itself initially moved to strike our claim for injunctive relief, which was stricken without prejudice, so then is now in there, but an injunction can be awarded only if

damages are not adequate to compensate the plaintiff for their loss.

And it's premature to make that assessment now. We need to see what the trial looks like, what remedy is conferred, and whether there is in fact a practicable way to reset things.

It's been now going on nine years since Aurora opened. If it were determined that members have the exclusive right to a trading floor, what would it look like? Can there be an injunction that would allow members to take the place over and trade from there exclusively, or is the only possible remedy a damages award that treats them like they should have been treated in the first place, or declaratory relief on the issue of it being a trading floor that then requires the parties to negotiate a resolution of that.

All of those issues are remedy-phase issues that, as in the Sunstates case that CME cites, are typically dealt with well after class certification, not on the issue

of whether a class could be certified.

Classes are denied on damages grounds when, as in Bucher, the issue of damages is individualized, requires a member-by-member or plaintiff-by-plaintiff assessment of what their particular harm was.

The issue in Bucher was, to calculate damages, the court would need to go to every tax parcel in Madison County and figure out whether the plaintiff was injured, and it turned out, the evidence there was, that many, many of the potential class members weren't injured because they were already paying the maximum tax rate. So you would need to go through each and every parcel and see whether they were paying the maximum tax rate beforehand. That was what led the court there to limit the class to liability issues.

And on this point of necessary parties, the only cases in Illinois in which any court has found there is a necessary party issue in a class action were the Midwest Television and Howerton cases cited

in CME's brief. Those were both cases in which the plaintiff was faulted for not having joined necessary defendants.

There are no cases in which all members of a group of shareholders or group of consumers or group of employees is considered necessary for a case to proceed to trial. That's typically the case, both in our Continental Airlines case, where the senior pilots were excluded; it happens all the time in shareholder cases when institutional investors either choose to exclude themselves or are excluded because of their buying and selling activity outside the class period. It happens all the time in antitrust cases with large customers, and it happens every time a class member chooses to opt out.

In any class action, any class member has a right to notice and a right to opt out and can pursue their claims at trial, and whether it results in an inconsistent verdict typically is a function of whatever collateral estoppel results from the

original trial on behalf of the class.

So the issues of necessary parties or inconsistent verdicts are either wrong or entirely hypothetical, and in neither case provide a basis for denying class certification altogether.

THE COURT: Except we do have this sort of anomaly whether a potential class plaintiff would be antagonistic, and while you describe it as just a few of these Citadel's of the world and so forth, you would anticipate the relief sought to be antagonistic to their interests.

MR. MORRISSEY: And that's not anomalous at all, your Honor. That's true in any shareholder fraud case where --

THE COURT: We're not talking about fraud. You know, fraud --

MR. MORRISSEY: Not at all, but that kind of antagonism is rampant in the law and rampant in class actions and is a reason for defining the class relatively narrowly so that it encompasses those people who are most closely aligned, and allows others,

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particularly those kinds of institutions capable of taking care of themselves, to make their own decisions.

But here when you have thousands of people, many of whom may not have the wherewithal to pursue a case on their own absent a class action, many of whom are, given the, you know, age of the demographics of the CME memberships, are quite elderly and are members of this class to protect an asset that's really the biggest asset they have and what they were depending on to protect their retirement, the question is what's the most fair and appropriate way to allow their claims to proceed?

Is it to say, hey, you can join on as an additional individual plaintiff and we can be having individual trials on this issue till the cows come home? Or is it to allow a class of these several thousand individuals who are closely aligned and have entirely common liability issues that would be tried on entirely common evidence with a common methodology for assessing what their

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damages are on a per-share basis?

THE COURT: So before we move on to --

MR. MORRISSEY: And you did mention adequacy.

THE COURT: Yes, before we move on to adequacy, Ms. Lape or Mr. Hogan, do you want to respond to this component, the predominance?

MS. LAPE: Yes, your Honor. Thank you.

In order to satisfy the commonality and predominance prong, plaintiffs have to show that if a class representative succeeds on a claim, all other class members will also be entitled to recovery. And their one-size-fits-all approach to their class doesn't meet this, and for several reasons.

It's not just unacceptable because you have two different charters: The CME charter and the CBOT charter that certainly have different core rights. And if somehow plaintiffs are able to prove a violation of the CME charter, that doesn't necessarily mean that there's a violation of the CBOT

charter.

So certainly, at a minimum, those would need to be subclassed, but it goes much deeper than just the CME and CBOT. As you recognized, there are unique differences within each series of Class B shares, and those differences matter. Not all of the series have the same entitlements.

And so, for instance, in addition to the fact that, you know, only CBOT B1s and B2s even have a right to vote if there are changes to the core rights, or if core rights are adversely affected, there are theories of breach that the plaintiffs have brought forward that would not affect each and every series of Class B membership.

There may, for instance, be an incentive program that perhaps plaintiffs could point to -- and we don't think there are, to make it clear -- where a non-member may have been able to trade on a product that is only assigned to B1s at a rate that is lower than what the members could trade at.

While, theoretically, that may violate a CBOT B1s right to obtain the lowest fee, because that product would not have been in the membership category of a B2 or a B3 or a B4 of CBOT or any of the CME members, that breach as to the B1s would not be able to be extended to the entire class, even the entire class of CBOT members. And so those issues affect the commonality and destroy a class even of the CBOT and CME members separately.

In addition, there are strategic choices that the plaintiffs are going to have to make in this case as it moves forward, and one of the most glaring strategic choices is with respect to their concept that the Aurora Data Center is a trading floor.

Because if the Aurora Data Center is a trading floor, historically, trading in the open outcry pits on the trading floor, a Class B member was only entitled to trade those particular products that were in his or her division of membership.

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Now, when it came to electronic trading, at the time of demutualization, members could only trade electronically from the trading floor those products within their division of membership, but after CME and CBOT merged in 2007 and combined their trading floors, at that point in time, the exchanges determined that any member could trade any product electronically from the trading floor on CBOT or CME.

So a CBOT member could trade, as a non-member of CME, could trade any CME product from the trading floor -- not from the open outcry pits, but from the trading floor. And so if Aurora is a trading floor, the plaintiffs are going to have to determine: Is our strategy going to be that only a B1 can trade all products, that only a CME B1 can trade all CME products electronically from Aurora, or can a B4 trade all products electronically from the Aurora Data Center?

And that matters because if a non-member wants to lease a membership in

order to have access to the Aurora Data Center and trade products, that non-member is going to have to decide, am I going to lease a B1 membership or am I going to lease a B4 membership? And that's going to affect each series of membership differently.

And so there are these issues that plaintiffs have created in this case that destroy commonality and make this so that, at a very minimum, subclasses of every single series of Class B memberships, both on CME and CBOT, would have to be put in place, and then they would have to be able to adequately represent them, which is something we don't think they can do.

THE COURT: And why don't you touch on the affirmative defenses. Mr. Morrissey's brief talks about how your affirmative defenses will be answered with common evidence.

MS. LAPE: The affirmative defenses, laches and statute of limitations, those --

THE COURT: Laches and statute of limitations.

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MS. LAPE: Yes. For the most part, those likely would be on common evidence. I do think that is true, your Honor.

It's not exactly on commonality, but Mr. Morrissey keeps referencing the Bertully case and how, you know, this sort of class happens all the time. And I think Mr. Morrissey is just wrong, and the reason he's wrong is because, yes, there are multiple times, dozens of times, hundreds of times where classes are certified and they exclude certain people, like in Bertulli, because there, there are personal damage claims.

And even in Bertulli, when the class said I'm going to certify a class of the flight attendants who were harmed by my seniority decision, he did so because that was the class who was harmed. They had personal damage claims. They were harmed.

This case is unique because this case does not involve personal claims to the share owners. This case involves direct claims, direct Delaware corporate claims that inure to the share itself. And so to

the extent that there are damages here, those damages are to the share, not to the individuals.

And that's why the Delaware Court of Chancery has repeatedly said that, in a case such as this where there's a breach of the charter, direct claim, those cases are typically certified under Delaware Chancery Court Rule 23(b)(1) or 23(b)(2) as shareholder classes.

And the Delaware Rule 23(b)(1) and (b)(2) certification methods are exactly the same as the federal rule certification under 23(b)(1) and (b)(2). Those are non-opt-out classes because the court's decision will necessarily affect all of the shares.

And all of the cases that plaintiffs have pointed to where they say, oh, no, the court can do this, the court need not concern itself with the fact that not all of these shareholders are being represented here, not all shareholders are part of this, every single case that they have pointed to involves a personal claim, a personal damage

claim, not a direct claim that inures to the share itself, not a claim where the damages are to the share itself.

And defendants, we have not been able to locate a single case where the court has said it's okay to certify a class of some shareholders but not all shareholders when they have suffered the same alleged harm and have the same alleged damages.

THE COURT: I thank you for making that point.

Mr. Morrissey, do you think that these plaintiffs have a personal claim, or do you agree that it is a direct claim to the share itself?

MR. MORRISSEY: I think it is clearly a personal claim, and the --

THE COURT: In what way?

MR. MORRISSEY: The cases that illustrate that are the Fletcher, Cedar View and Lehman Brothers cases types, all of which I believe, and certainly Fletcher, involves a preferred shareholder of a corporation suing on its rights under the

agreement governing the preferred shares and seeking damages based on the loss of value of those shares which were calculated based on a hypothetical negotiation methodology.

Here, what we're claiming is that, before these breaches occurred, the plaintiffs had tremendously valuable assets, the value of which was substantially destroyed as a result of the breaches, leaving them with assets that are now worth very, very little.

That's a claim that's not a harm to the corporation as a whole, which is the issue that comes up in the Activision case that's cited by defendants, where the officers of the corporation allegedly engaged in some shenanigans that diverted value from the corporation as a whole and caused a harm to the shares that was common to all classes of shares across the corporation because it was a harm to the corporation and, thus, not a personal harm. Any additional value that flowed into the corporation would flow through to each class

of shares in accordance with its rights to the shareholders.

Here, we're not claiming a harm to the corporation as a whole. We're not claiming that A shareholders were harmed by this conduct, for instance. We aren't claiming that CME itself was harmed by this conduct where it diverted value from its members to itself.

It's a claim that's limited to the Class B shareholders who suffered personal harm and personal damages as a result of the breach, and they're entitled to both a declaration of their rights in the contract and damages based on that breach that will turn on evidence that's common to each and every one of them.

THE COURT: To each and every one of them, which you have excluded a whole bunch of them in your proposed class.

MR. MORRISSEY: Yes, indeed, your Honor, as noted, we have excluded from the proposed class the classes of corporate members that CME has defined as separate

under its rules and would allow them to choose whether to pursue their own claims in parallel with us, to sit on their hands and pursue claims later, to come in and testify for CME, whatever they want to do.

The alternative would be, again, to include some subset of them in the proposed class, whether it's ones whose memberships are limited to one member, one trader, you give notice to them and they have a right to either opt out or stay in.

THE COURT: Well, before you do, you would have to find a new plaintiff who could represent them, right?

MR. MORRISSEY: We would. Whether Mr. Prosi could do that, as he's had, over time, although not at the moment, worked with corporate members, but I could certainly find additional class representative who would be willing to serve for that group. I know of some who are interested in doing that.

THE COURT: Let me ask you this about a personal claim versus a direct claim as to

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the value of the share.

The personal claims and your methodology of damages, can you really calculate that on a class-wide basis?

Because, for example, if Sally Smith is an individual who says maybe I would have leased my seat, maybe I could have gotten ten times the amount that I did, and then, you know, Tim Thoms says, well, I always lease my seat, and here's what I got on it.

How do you reconcile that -- by selling a lease, sometimes lease your seat, tentative, all the time -- isn't that engaging in a level of damages that's going to have to be calculated individually, if that's your claim?

MR. MORRISSEY: No, your Honor.

THE COURT: So everybody --

MR. MORRISSEY: Here's why. Here's why.

THE COURT: Okay.

MR. MORRISSEY: Under the hypothetical negotiation model and contract law, generally, damages are typically measured as

of the time of the breach, and here the breach occurred in 2009. So the question is what additional value would flow to these shares as a result of CME's having not done what it should have done in 2009 and provided additional compensation to these shareholders, what additional amount would that be.

And that's not something that depends on anecdotal evidence as to what any particular member did or wouldn't have done. It depends on evidence of what exchanges like CME itself -- this is how CME dealt with its NYMEX members, how CME dealt with the CBOE rights in CBOT, how every other exchange has dealt with their members -- the members have gotten together and hired an investment banker, the exchange hires an investment banker, and they negotiate what the electronic trading rights are worth and whether there's a lump-sum payment or some sharing of the revenues.

CME is an outlier in not having ever done this and, instead, keeping all the

money for itself.

THE COURT: So let me just say, to see what the rights are worth, to see what the value is worth, we have already established that to be able to be a member you have to be a current owner.

You have not shown that yet, so let's say hypothetically you have proved that there was a breach. The value way back when was, you know, call it $10. It has dropped down to $1. But if there wasn't a breach, it would be worth $20 today.

Isn't that the direct claim against the share and not the personal claim? In other words, isn't that the damages where, if there is a value, that would be realized upon sale?

MR. MORRISSEY: No; because that distinction between a direct claim based on the share and a personal claim is one that is only made when it's a claim against all the shares and the corporation and it's a harm to the corporation itself. That's the distinction that Activision and Sunstates

drew.

Sunstates didn't actually reach the issue. It said this will be an issue that will need to be resolved down the road. It certified the class, said this is an issue that we'll need to deal with; but it certified the class and identified the issue.

Here, there's not a harm against the corporation as a whole. There's a harm to this class of shareholders that can be measured on a division-by-division basis in a formulaic fashion based on common evidence, common data, and common methodologies that our expert, who stands unrebutted, has testified he can use.

MS. LAPE: If I may, your Honor. I think that the issues are being confused a little because Mr. Morrissey keeps talking about damages that are to the corporation, and damages that are to the corporation, that's not a direct claim. That's a derivative claim, and derivative lawsuits are, you know, brought on behalf of the

nominal defendant corporation by shareholders frequently.

But that's not what's going on in this case. This is not a derivative claim. This is a direct claim that inures to the share, and there can be both direct damages to the share in such a case, and there can also be personal damages. Now, the damages that the plaintiffs have alleged here are not personal damages. They are direct damages to the share.

Now, there could be personal damages in this type of case. For instance, let's say that the plaintiffs had actually paid to co-locate at the Aurora Data Center. The plaintiffs would then have a personal damage claim because they would have alleged that they wrongfully paid to access the trading floor that they should have received for free. That would be a personal damage claim to those shareholders.

Alternatively, a CBOT class member could have a claim that, hey, I trade product A, and these non-members traded

product A at a lower rate than me, and so I have a personal damage claim because I paid a higher rate to trade this product than a non-member.

That would be a personal damages claim. There would still be able to be a direct claim as the breach of a charter, but it would be personal damages that they could potentially recover.

But what they have asked for here are direct damages that inure to every single one of the shares, and not just the shares that are being held by the plaintiffs and the people that they represent.

Personal claims are different. They are like the 10b-5 claim, a securities claim, where it's the fraud in connection with the case and not the underlying security that matters and that creates the damages.

And that's why, with those cases that are personal claim cases, entirely personal claims, like the 10b-5, that's why you can have a class of some but not all

shareholders.

THE COURT: At this point, it is alleged that some of the members were trading at the same or preferential rates. I don't think that plaintiff has identified anyone who has said on CBOT's side that I traded A at a higher rate than a non-member.

MS. LAPE: No, your Honor, there's not.

THE COURT: Mr. Morrissey, in getting back to these B claims, I recognize that the court allowed these B claims to stand and did not dismiss them with respect to CME, but I think it was very clear that the CBOT charter is very different in terms of the province for lower fees than the CME charter.

While you say that it's a right or a privilege because of preferential fees, the CBOT charter expressly promises lower fees. We have talked about this too.

What does that mean? It doesn't say substantially lower. It doesn't say significantly lower. I think it says lower.

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That can be ten cents. And that, again, would have to be a personal damages claim that could not be calculated on a class-wide basis.

MR. MORRISSEY: We are not pursuing a claim product-by-product based on price differentials. The fee claim is based on extending the fee preference to non-member traders by allowing an unlimited number of traders to trade at member rates under a single membership and by giving special deals, in particular, to one large asset management fund that got a special deal for thousands of traders who were not members.

THE COURT: So Rule 12 of the bylaws of the CME say that preferential fees is a privilege, and the court again, you know, recognizes that a core right includes trading floor access rights and privileges. But defendants carved out for themselves management's ability to give incentive pricing.

MR. MORRISSEY: Yes, so that is something that's been developed through

common evidence through extensive discovery. Let me summarize it.

Both Bylaw Provision 6.1 and Rule 121 from the time of demutualization and the demutualization prospectus said that members would get member rates; that they would be lower than those made to people generally.

There is a description of the right to provide incentive programs. The evidence that we've developed and that we will present at trial is that, at the time of demutualization, those were understood to be short-term incentive programs of limited duration, not perpetual programs, and certainly nothing that would allow non-members to trade at member rates.

The CME promised to the IRS that members' fee preferences and all their rights, including their trading floor rights, would remain unchanged and that that was what made the transaction a tax-free transaction.

We have testimony from a number of CME executives that the member fee preference

existed and was viewed as a part of members' rights. And we have testimony from the CEO of the company that the core rights of the two groups of members were the same.

So that's the evidence we would present at trial. I anticipate that CME would attempt to dispute it, but it would be disputed based on common class-wide evidence.

THE COURT: If you go to trial and the court disagrees with you that the ADC is a trading floor, is that it? Is that game over?

MR. MORRISSEY: If the jury disagrees with us, your Honor, yes.

THE COURT: All right. Could we please turn to the element of adequacy?

MR. MORRISSEY: Yes. Absolutely.

My colleague, Mr. Carullo, is prepared to address the issue of adequacy, generally, and particularly any questions the court has on that point.

THE COURT: Thank you.

MR. CARULLO: Yes, your Honor. This

is Nick Carullo.

So the foundation of the adequacy inquiry is whether the interests of the representatives are the same as absent class members.

As Mr. Morrissey has talked about repeatedly today, they are at the core the same between the representatives and the absent proposed class members.

Now, CME identifies four what they call conflicts between the representatives and the absent class members, none of which are availing. And the important thing that I think overarches everything that we discussed earlier as to the representatives and absent class members is it's entirely speculative.

Our proposed class has been public for at the time that we filed the litigation about seven years ago. No one's come forward and said that any of the four, which I will go to in the second, are conflicts that they think exist or are things that they think are a problem.

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So the first they point to is significant level of trading. They say, well, the class representatives cannot represent other class members that may trade more than the representatives do.

The only reason that defendants say this is a conflict is they say, well, those members that trade a little bit more than the representatives, they may want a different damage remedy, but the case law is clear that a dispute over relief is not sufficient to defeat class certification.

The second thing they point to are A shares. They say, well, there may be some class members that have A shares. Those A shares may be damaged if plaintiffs are successful. So maybe, possibly, those class members may not want the suit to go forward.

Well, that's wrong on two counts. It's wrong on the first count because there's plenty of case law, and that we cite in our brief, that says if an equity holder doesn't have a conflict with a non-equity holder that's trying to represent class,

it's the outcome of the litigation that will affect the share price. That's one.

Number two is what those A shareholders are really saying is our rights are being violated, but we're okay that our rights are being violated because we want our A shares to be higher.

Now, it's hornbook law that the fact that some class members may not want the violation of their rights to be remedied is not sufficient to defeat class certification.

And there's a third point on this issue I should have mentioned as well, which is we don't even know if this is true. The CME hasn't put forth any evidence, let alone expert testimony, saying that the A shares are going to go down if plaintiffs are successful in the litigation.

So the third potential conflict that they mention is that there may be, possibly, individual members that have interests aligned with corporate members. Again, we don't know who they are because they haven't

come forward, and we don't know if they exist because they haven't come forward.

And this is an analogue to what I was saying about the A shares, which is what these class members who have interests, supposedly, aligned with corporate members are saying is, please keep violating my right because I like the status quo. And that's not sufficient to defeat class certification.

Then the last point is that there may be conflicts among divisions of membership. Again, there may be some divisions of membership saying I like the status quo, I don't want you to change it, please keep violating my rights. That's not sufficient to defeat class certification.

MS. LAPE: May I respond, your Honor?

THE COURT: Yes.

MS. LAPE: And so I think we're talking about just adequacy of representation with respect to plaintiffs' initial proposed class, and I haven't heard anything about attempts to adequately

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represent all corporate members as well during Mr. Carullo's argument.

MR. CARULLO: I can speak to that, if your Honor would like as well.

THE COURT: Well, yes, I definitely do, because, again, I am concerned whether you could adequately represent an all-member class, coupled with the fact that I am very concerned about a declaration interpreting these charters that would only affect or involve certain members who are bound by this charter.

So, yes, can you please talk about this potential interclass conflict with respect to the corporate members that you haven't mutually excluded?

MR. CARULLO: Sure, your Honor. And it's largely the same song with slightly different lyrics.

The core rights that the corporate members have are, again, the same that the individual members have, and that means that CME has violated its core rights.

There may be other agreements not

related to the core rights or other reasons that corporate members, some of them, do like that their rights are being violated because they like the status quo.

But, again, as you mentioned before, your Honor, and it's in the briefing, there are plenty of cases, it's treatises saying that if some class members like that their rights are being violated, they like the status quo, that's not sufficient to defeat class certification.

It's also true, and this is also to the point, that we haven't identified who those corporate members are. It could be one. It could be two. It actually could be none. We said earlier that it's possible, oh, that we can point to the Jump Trading's of the world or the Citadel's. Clearly, they're going to not want this to be successful litigation.

We actually don't know that yet because it's all speculative. They haven't entered into the litigation. CME hasn't put forward any declarations from them saying

that there's a conflict. We don't know that yet.

The last point is that the CME sidesteps a little bit and pooh-poohs a bit the opt-out option and the ability for corporate members who are part of the class to opt out.

There's case law that we cite in our brief that says that when you have speculative conflicts like this, the opt-out option is highly relevant.

And one of the things that hasn't been touched on in this necessary membership point, your Honor, the CME hasn't cited any cases that say you have to have in a plaintiffs' class anyone that could possibly be interested.

They point to just necessary party cases in Illinois. What those necessary party cases in Illinois also say is that that necessary party rule only applies if the interests of those absent parties aren't being represented.

If the interests of those absent

parties are being represented, according to CME, they are represented by CME. If there's a corporate member that says, I love the status quo, I love what CME has done, and they are excluded from the class, that corporate member's interests are being represented by CME.

If there's a corporate member that's included in the class and they think, actually, I like that my rights are being violated, keep doing it, their interests are being represented by CME.

So the worry that a corporate member will not have their rights represented, whether they're in the class or out of the class, isn't really present here because they have the CME to represent their interests.

THE COURT: Let me ask you. Are we spinning our wheels even talking about it? Because the complaint as pled does not even name as a named plaintiff one of these 106 corporate members.

So, at this point, your alternative

proposal for this all-member class, including the 106 corporate members, I don't even think is viable just on the face of the caption of the complaint.

MR. MORRISSEY: Your Honor, if I could speak to that.

I think, as we proposed, our preferred class is the class limited to the non-corporate members. If the court's ruling were to deny class certification on the ground that that class is too narrow insofar as it includes some subset of or all of the corporate members, then I think it should be denied without prejudice for finding an appropriate class representative for any additional corporate representatives.

I don't think that's the appropriate approach. I think the appropriate approach is to certify the class we've proposed. This isn't an adequacy issue is what I'm really speaking of. But the class we propose is a class of people with common interests.

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The issue the court is struggling with, which I understand, is, you know, a real one, about whether a declaration of these plaintiffs' rights could, you know, lead to there being some subsequent claim or some subsequent result that could arguably be inconsistent. That does not go away with the certification of the class or with denying certification of the class.

With certifying a class, people could opt out and bring different or inconsistent claims. If the court denies class certification, we head over to the Law Division with hundreds or thousands of individual class members to proceed to trial, either one at a time or all at a time, on a mass claim basis and there's a determination of their rights.

So the question then goes back to the rule and how Illinois courts have treated class certification over and over and over, and perhaps being the most charitable towards class certification of any set of courts in the country. And rightly so,

because it's worked well for the state to allow a class to be certified so long as it's the most fair and appropriate means of adjudicating the controversy.

And here, for this group of people for whom we propose proceeding to trial, it is more fair and appropriate than making each and every one of them go to the burden of joining on as an additional plaintiff and having some judge decide how to handle intervention and trial, the structure of the trial, whether there are multiple trials or one trial, all issues that go away if a class is certified.

THE COURT: Thank you.

Ms. Lape, you may now address those points regarding adequacy.

MS. LAPE: Thank you, your Honor.

From the beginning of this litigation, the plaintiffs have repeatedly shown that they have no understanding of the way that the exchanges have operated over the past 20 years, and that's with respect to the way that electronic trading has developed, how

non-members and members have accessed Globex, and how the fee policies have been implemented over time.

These positions that they have taken, that are so divorced from reality, not only create conflicts with the corporate members who they want to exclude from the class, but they create conflicts with the people who they purport to represent as well.

I mean, one of the plaintiffs even vocalized: It's not about being right here; it's about an opportunity to be bought out. Well, that right there, that comment, that emphasizes how plaintiffs are just such a small subset of the class that they wish to represent.

Because they are this tiny subset of class members, Class B members, who do not trade. They lease out their memberships. And so they don't benefit from the fee preferences that the Class B members who trade benefit from on a daily basis.

And while these plaintiffs may just want to force a buyout, regardless of

whether they're right or wrong about what their core rights say, I can guarantee that the Class B members who are trading and benefiting from those fee preferences, they don't feel the same way.

And so these plaintiffs are not adequate representatives of this class of all owners of Class B series other than the corporate members. They're just not.

And aside from the fact that they don't trade, you know, they also don't own as many A shares anymore. And Mr. Morrissey earlier said, you know, CMEs left their old line traders out in the dark, they threw them out, they're not doing anything for them. That is just dead wrong. That is just dead wrong.

At the time of demutualization, the members received Class A shares and Class B shares. They had the choice to do what they wanted with those. Those class A shares that a full member got back in 2000, I think they're worth more than $15 million today. That's not leaving old line traders out in

the dark at all.

But now that these plaintiffs have largely sold their Class A shares and have already reaped the benefits of having received these Class A shares and demutualization, they don't care that they're pitting their interests against the other Class B shareholders who still maintain their Class A shares.

And additionally, the plaintiffs can't represent owners who are affiliated with corporate members but don't themselves utilize their membership as a corporate member. You know, there are owners of a 106.J firm, for example, and those owners also have their own membership, but their interests aren't aligned with these individual traders. Their interests are aligned with the corporate members -- the people that they want to exclude.

And the plaintiffs also can't represent people who are a lower series of memberships than they are. And it's not, like Mr. Carullo suggested, that the lower

series of memberships are saying, oh, no, please, CME, keep violating my rights. That's not at all what's going on here.

The situation is that they are taking strategic choices in this litigation that could harm those lower levels of series, and that's what is important and that's why they cannot adequately represent all of the Class B owners who they wish to do.

And the idea that they can also somehow adequately represent the corporate members in the proposed all-members class, it's honestly just outrageous. I mean, for over seven years, the plaintiffs have taken positions in this litigation that demonstrate just why their interests are so antagonistic to the corporate members.

I mean, I think in the reply brief plaintiff said: In every single submission that we have ever put before the court we have noted that the corporate members have been excluded from this class. Plaintiff Langer called them the abusers, said that they are the ones that are benefiting from

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all the breaches. The plaintiffs said that actually the corporate members were complicit in developing all these policies and procedures that are breaching the individual members' core rights.

They made these statements over and over again, but now, all of a sudden, they can represent them? It just does not add up. They can't.

And when you think about what plaintiffs are trying to do here, it becomes crystal clear. A 106.H firm. This is one of the types of corporate firms that plaintiffs originally wanted to exclude, now they want to represent. The 106.H requires one membership, and with that one membership that corporate member can qualify for 106.H rates.

Now, the 106.H rates aren't as low the as the individual rates, but they're a preferred rate over non-members, and with that one membership, the 106.H firm can have an unlimited number of traders trading the proprietary account of that firm and receive

16.H rates. And that's trading on Globex, and it's regardless of where they connect.

And so if that 106.H member has a presence in the Aurora Data Center, it can have 50 traders trading through that connection at the Aurora Data Center and getting corporate 106.H member rates. And that's been the case, by the way, since before demutualization; that you can have multiple traders trading on a single membership and getting corporate rates.

That's what plaintiffs are trying to stop. They want that same 106.H firm to have to buy 50 memberships in order for each of those traders to get 106.H rates and connect through the Aurora Data Center.

That is a fundamental change to the way that the exchanges have operated for the past 20-plus years, and that is exactly why not only can plaintiffs not adequately represent a class that includes the corporate members, but this court should not certify a class that excludes the corporate members and allows the plaintiffs to seek

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injunctive and equitable relief that would affect their rights without them having any voice.

THE COURT: So, I hear you and I hear what you're saying, but there has to be some scenario where plaintiffs can have a class certified. I have one group that's too narrow. I have one group that is overbroad.

I have heard you from the beginning say, the way they have pled their case, they cannot certify a class based on the claims that they have alleged and how they have morphed into a variety of claims.

I can't imagine that's the correct result either. Because of the elements of fairness and some commonality and numerosity and appropriateness, I understand that it is plaintiffs' burden to show all four prerequisites for class certification.

Those observing today's call may feel as though Mr. Morrissey was sort of on the hot seat here, and it was not any combativeness by the court. It is truly because plaintiffs bear the burden to show

that class certification is appropriate, and I am critically testing these theories and to poignantly say to Mr. Morrissey: What other options do I have?

I gave you a long leash a few months ago when I said, Go back and give me some alternatives. You said, Judge, if you want to do subclasses, go ahead, figure it out. And I said, Well, this is not a dumping grounds for the court to manufacture subclasses where I have no facts or evidence upon which to do it.

I put that ball in your court, appropriately, and what I got back was not just the obvious, which I told you to do, which was split them up according to charters, but then there was no deeper digging by plaintiffs.

There was this broad swath of new members who, for seven years, I was told corporate members are antagonistic because they are the ones that are creating this devaluation of our shares.

This is perplexing for the court, and

it puts me in quite a quandary, because I can't believe that no class certification is possible. But, plaintiffs, you haven't given me the class that is possible to certify and to quell my concerns, which I expressed previously over the years and which I am expressing here today in open court.

MR. MORRISSEY: Understood, your Honor, on the class definition. And I do appreciate the exchange on all the issues and that it is our burden, and this argument has been very helpful. And you're, as always, very gracious with your time for argument.

We will put our thinking caps on in terms of the class definitions. I know the court suggested at the outset that you intended to take the motion under submission.

In light of today's discussion, if there's any way we could further refine subclasses based on discussion. Minimally, you have made it clear that if there's a

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class, the CME and CBOT classes should be separate subclasses.

THE COURT: Yes.

MR. MORRISSEY: That's clear.

In terms of other subclasses, you know, it's always a balance. You want to have a class that's as clear and clearly defined and as understandable as possible for everyone.

A case that our firm settled last year, it involved all auto parts. So it was every single component of a car was part of a price-fix, a multinational price-fixing conspiracy involving dozens of defendants.

The class was basically everyone who bought each and every one of these models of cars, if your car contained one of these thousands of parts, you were in the class. The class definition was as short as ours, and it included everyone who bought a car.

That's kind of what you're trying to do when you're defining a class, is to make it as clear and broad and appropriate as possible.

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I'm similarly working on the Flint case, where our class is basically everyone in Flint because everyone got water. And, you know, some people in Flint didn't necessarily drink the water, some people who got water or businesses who didn't drink it.

So those issues are issues that get worked out and refined in the class after it's certified. We think they can be worked out here. We think the class we have proposed is the best one, but to the extent we can put our collective heads together and come up with some way of refining it, I'm happy to continue doing that while the court has the motion under submission.

THE COURT: The court is going to take the matter under advisement. I am not denying the motion for class certification today, and even if I do, I would do it without prejudice to give you that opportunity.

So before the court rules, I will take your suggestion and give you a little bit of time, and then let me throw this out to

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defendants:

As Mr. Morrissey has stated, this case is not going away. Maybe it will. Maybe the thousands of people and dozens who appear at each court appearance will say I don't want to throw money towards this or my time, but given the level of interest, I suspect that there will be lawsuits filed, either in another class or individuals or whatnot. This is not a case where defendants are walking away without the potentiality of future litigation.

And so, in some ways, it behooves defendants, who have already exhausted an incredible amount of time, money and energy over the last seven years with this case, to -- I'm not saying to acquiesce to the class. I know you want this case out, but also to come up with a palatable solution so that, from your perspective as well, perhaps, defendants can kind of put a lid on this and not be subjected to those additional claims that I'm so concerned about too and whose potentialities have

conflicting judgments or interpretations.

This case is in front of me in Chancery for class action proceedings, for class certification. I have ruled on certain dispositive motions.

If indeed I do certify class in this case, it is a breach of contract claim. There is a jury demand. This will indeed go to Law for trial. I will not be your trial judge in this case.

We have talked about whether the court will hold it for some additional motions, possibly dispositive motions, trying to navigate through the remainder of discovery and so forth, but that's something that we'll probably make a decision collectively with the lawyers to figure out the best solution and the best efficiencies moving forward.

But I say that to you because, as I have said for many years, this case has a solution that could be workable and winnable for all interests -- I am confident of that -- without impacting value of the A

shares, without bleeding defendants dry and giving their profits for 20 years over to this small subset of B shareholders, but also without much impact on defendants and those who are not included by creating some remedial measures on a moving-forward bases.

I know plaintiffs want damages. I have looked through Dr. Arnold's report. I am trying to figure out where that methodology would go, how it would be figured out.

I've talked a little bit today about how the value, if any, seems to be in the value of the share versus these particular claims, because there are fact-specific claims that I can't imagine could be viewed on a class-wide basis because of the nuances: Who leases? Who doesn't? Who trades? Who trades actively? Who doesn't trade at all? Who might have the same interests as an individual but holds it under 106.J or some other fashion and so forth?

It seems to me that a solution could

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be reached where not only B shares increase, but A shares maintain the same, or potentially increase, and the overall profits and value of defendants remains steady. Or, again, if everything goes up, they go up too.

I know I sound overly optimistic, but this isn't my first time around the block with corporate litigation or complex financials and so forth, and just stepping back as an objective observer, I would, again, strongly encourage you to seek out the right mediator for this case before this court transfers you on to Law Division, where it is only the beginning to start all over again, seven years in.

So I say that as much for your benefit as well as for those on the line so that they could hear it from a person who has some experience and absolutely no skin in the game here other than to, hopefully, be helpful in creating a fair, just solution for all parties who have come before me, and that includes plaintiffs and defendants.

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Mr. Morrissey, I am going to give you a few weeks, and then I am going to ask the attorneys to reconvene with the court and, sort of on a softer level, just talk about some potential ideas that might solidify some things and put us in a posture where we can move forward.

Today was a big step. We're not quite past the finish line, though.

MR. MORRISSEY: That sounds very good, your Honor. And to your broader comments, fortunately, one thing about this case for seven years is that Ms. Lape and Mr. Hogan and I have had a very good working relationship, and although we haven't yet been successful on that front, we're always trying to come up with creative solutions that could be a win-win for everyone, including the court.

THE COURT: All right. Well, I will say it is always a pleasure to hear lawyers who are as articulate and experienced and prepared as all of you have been throughout for the many years. So thank you for your

patience today with the court. That is also why I called you in early, anticipating my many questions.

Ms. Lape and Mr. Hogan, I am confident that you had a well-prepared speech when it was your turn to go. I'm much like you might get in appellate court. I'm what is considered sort of an active questioner in terms of the bench, so I'm sorry if I cut you short or interrupted that.

If there is anything that you want to say at this point that you feel like we haven't addressed, please feel free to do so. But, again, I did point my questions mostly at Mr. Morrissey, recognizing that it is plaintiffs' burden for this purpose.

MS. LAPE: Thank you, your Honor. We appreciate your invitation to say more, but I think we're fine at this point, and we really do appreciate all the time that you have put into preparing and reading the papers, as always.

THE COURT: Thank you.

So why don't we come back sometime in

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April. Does that sound fine? I'm looking --

MR. MORRISSEY: It does, your Honor.

THE COURT: Okay.

MR. MORRISSEY: Are you thinking of something in chambers or...

THE COURT: Well, it would be conducted via Zoom, and to the extent it was along the line of an informal conference with the court that would be conducted more narrowly in chambers, if you want it in that sort of setting, the court would accommodate you if that's acceptable to all parties. Otherwise, if you want to do it as a formal court hearing, we could coordinate that as well.

But either way, why don't you do this: Look at your calendars, propose some dates where you could give me a block of your time and when you think that you'll have some scenarios for me, and then coordinate with my law clerk Sean to squeeze you in sometime in April. If you give like two to three dates to work with, we should be able to do

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that.

MR. MORRISSEY: Sometime the week of the 5th or the 12th, and we can confer with --

THE COURT: That will be fine. I've out both of those Fridays and Monday the 5th. So not the 5th, 9th or 16th. Any other date should be fine on time.

MR. MORRISSEY: Understood.

THE COURT: Okay. All right.

So if that's it, we're going to have Mr. Morrissey prepare an order that just says argument was conducted. We have a court reporter.

Let me apologize to the court reporter. I completely got engrossed and forgot to give you a break in this. My apologies profusely. I know you're working very, very hard.

But, Mr. Morrissey, if you could just prepare the order saying the matter was taken under advisement, and then we'll coordinate from there.

MR. MORRISSEY: Will do, your Honor.

PROCEEDINGS

THE COURT: Okay. Thank you, all.

MS. LAPE: Thank you, your Honor.

MR. MORRISSEY: Thank you very much, your Honor.

MR. HOGAN: Thank you, your Honor.

(Whereupon, the proceedings adjourned at 11:50 a.m.)

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PROCEEDINGS

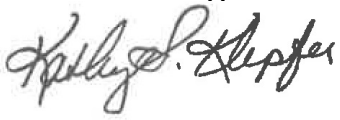
CERTIFICATE

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

I, Kathy S. Klepfer, a Registered Merit Reporter and Notary Public within and for the State of New York, do hereby certify that the within is a true and accurate transcript of the proceedings taken on March 4, 2021.

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

IN WITNESS WHEREOF, I have hereunto set my hand this 15th day of March 2021.



KATHY S. KLEPFER, RPR, RMR, CRR