FILED
5/27/2021 4:40 PM
IRIS Y. MARTINEZ
CIRCUIT CLERK
COOK COUNTY, IL
2014ch00829

13493675

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

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

DEFENDANTS' RESPONSE TO PLAINTIFFS'
ALTERNATIVE PROPOSALS FOR CLASS CERTIFICATION

On what is now their fourth attempt, Plaintiffs leave their burden to establish the prerequisites for class treatment far behind, and instead invite the Court to choose from a cafeteria menu of options.[1] The Plaintiffs want some class — any class — quite obviously to advance their objective of pressuring CMEG and achieving their ultimate goal of a buy-out.[2] *See*

[1] Plaintiffs initially filed their Motion for Class Certification on November 2, 2019, seeking a single class of all owners of CME and CBOT Class B Shares other than Corporate Members and owners that are also directors, officers, or employees of the Exchanges. Subsequently, on January 29, 2021, Plaintiffs filed, in a Joint Submission to the Court (the "Joint Submission"), arguments in support of an All-Members Class that included Corporate Members. Following the March 4, 2021 Hearing on Plaintiffs' Motion for Class Certification, and in advance of a follow-up informal conference held on April 21, 2021, the Plaintiffs submitted to the Court for consideration a third Proposal for Class Certification in which Plaintiffs sought to address concerns the Court had raised at the March 4, 2021 Hearing. At the conclusion of the April 21 conference, Defendants understood that Plaintiffs would be filing that same proposal to make it part of the official record. Instead, on May 4, 2021, Plaintiffs filed yet another proposal for Class Certification, titled Plaintiffs' Alternative Proposals for Class Certification ("Pl. Alt. Proposals" or "Alternative Proposals"). Plaintiffs assert that the Alternative Proposals address concerns previously raised by both the Court and Defendants.

[2] Unless otherwise noted, terms are used as defined in Defendants' Position In Opposition To Certification of An Alternative All-Members' Class ("Def. Opp. to All-Members Class").

DA-115 (in which Plaintiff Yermack commented that this is "not about being right or wrong rather an opportunity for [CMEG] to buy us out"). But legally, they have utterly failed.

The starting point of the new menu is two classes: all current owners of CMEG Class B shares, except B Shares held by Corporate Members or officers, directors, and employees of CME (the "Inside Holders"), and a corresponding class for CBOT B shareholders, which also excludes Corporate Members and Inside Holders. From there, Plaintiffs invite the Court to construct a certifiable class by mixing and matching "alternative proposals," which consist of various trial plans and an array of 13 subclasses. The Court should not entertain Plaintiffs' invitation. None of the alternative approaches that Plaintiffs propose cures the defects that prevent certification.

Plaintiffs find themselves in a quandary of their own creation: Plaintiffs bring direct claims for breach of the CMEG and CBOT Certificates of Incorporation, which are claims that inure to the Class B shares themselves. And Plaintiffs propose a primary damages methodology based not on personal monetary harm suffered by the Plaintiffs, but on the alleged diminution in value that Plaintiffs claim all Class B shares have suffered as a result of Defendants' alleged breaches. While at first blush it would appear that this case could be suitable for class treatment, the problem is that the Plaintiffs do not seek to certify and represent a class of all owners of Class B shares, nor can they. Instead, the Plaintiffs, who represent just a vocal minority, intentionally exclude from their class nearly 50% of Class B owners who utilize their shares in Corporate Memberships (and surely a far greater percentage of Class B owners who actually use CMEG's markets). And they do so because they are pursuing theories of breach and requesting relief that materially prejudices the manner in which those market participants trade on the Exchanges.

It is precisely because of the irreparable conflict Plaintiffs have created among the owners of Class B shares that certification is not possible here. It all circles back to where this case started: with made-up rights that do not exist and run counter to the manner in which the Exchanges have operated for the past twenty years. Because of this, the only way to materially advance this case is to deny class certification and require the named Plaintiffs, and whoever else wishes to join their suit, to move forward and adjudicate the merits of the case and prove up their damages without class treatment.

As shown below, each of the four most-recent proposals for class certification fails.

Response to Proposal 1:

Plaintiffs Have Failed To Meet Their Burden To Show That A Damages-Only Class Is Fair Or Appropriate.

Plaintiffs' first proposal — that the Court certify a damages-only class or subclasses, *for now*, and reserve decision on whether to ultimately allow Plaintiffs or any class to pursue injunctive or declaratory relief — is an illusory concession aimed at lulling away the Court's concerns regarding the absence of Corporate Members from Plaintiffs' class. There are three major problems with this proposed approach.

First, under Illinois law, courts are instructed to make certification decisions "as soon as practicable after the commencement of an action." 735 ILCS 5/2-802(a). While a certification decision can be conditional, it cannot be amended after a decision on the merits. *Id.* As the Illinois Supreme Court explained, this legislative mandate "cure[d] a significant defect in prior Illinois law [that allowed the class certification] question [] in some instances [to] not be reached until after a case had been tried on the merits." *Barliant v. Follett Corp.*, 74 Ill. 2d 226, 230-31 (1978); *see also Mashal v. City of Chicago*, 2012 IL 112341, ¶ 32 n.4 (noting that delaying class certification is antithetical to judicial efficacy because it "fosters uncertainty in litigation").

Yet despite the purpose of Section 2-802(a), Plaintiffs ask the Court to do the very thing that it prevents: to make a decision on the merits and then *later* decide whether to certify a declaratory or injunctive relief class.[3] Such a request flies in the face of the statutory language and must be denied. 735 ILCS 5/2-802(a); *see also Mashal*, 2012 IL 112341, ¶ 44 (finding that a "decision on the merits is a complete determination of liability on a claim . . ., and which establishes a right to recover in at least one class member, but which is something short of a final judgment"); *see also id.* ¶ 29 (noting a decision on the merits determines liability issues — not the appropriate remedy).

Notably, Plaintiffs cite no authority to support their claim that Illinois courts can reserve a decision on whether to certify an injunctive relief class until after trial.[4] In the sole case Plaintiffs cite — *Brooks v. Midas-Int'l Corp*., 47 Ill. App. 3d 266, 277 (1st Dist. 1977) — the court certified a damages class and dismissed claims for injunctive relief because equitable relief was not authorized for the statutory claims asserted by the plaintiff class. *See id.* 274-77. The Court did not, as Plaintiffs suggest, certify a damages class while reserving decision on whether to certify equitable relief classes. Plaintiffs cannot temporarily withdraw claims for equitable relief to serve their immediate goal of class certification and reserve the right to seek certification after trial.

Second, allowing a damages-only class to proceed would not change the fact that Plaintiffs ask the Court in the Fourth Amended Complaint to make rulings regarding the rights of all owners of Class B shares and issue relief that would necessarily affect each and every owner

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[3] (*See* Pl. Alt. Proposals at 3 ("Plaintiffs are not *at this time* seeking certification of classes to pursue declaratory or injunctive relief" (emphasis added)); *id.* at 4 n.1 (contemplating "reserve[ing] decision . . . on whether to certify a class for purposes of seeking declaratory or injunctive relief" until after trial).)

[4] (Pl. Alt. Proposals at 4.)

of a Class B share, all while intentionally excluding a significant number of owners of Class B shares with whom Plaintiffs readily admit they have antagonistic interests. Asking the Court to temporarily set aside this concern does nothing to protect the rights of the intentionally excluded owners of Class B shares or to protect Defendants from the risk of continued liability or the threat of inconsistent judgments in the event litigation is later brought by Corporate Members or subsequent owners. In fact, it makes these risks much worse. *See Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980) ("The justifications that led to the development of the class action include: the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, [and] the provision of a convenient and economical means for disposing of similar lawsuits . . . ."); *see also McCabe v. Burgess*, 75 Ill. 2d 457, 468 (1979); *Ballard RN Ctr., Inc. v. Kohll's Pharmacy & Homecare, Inc.*, 2014 IL App (1st) 131543, ¶ 35 *aff'd in part, rev'd in part on other grounds*, 2015 IL 118644. Indeed, as a practical matter, because Plaintiffs' theoretical damages methodology is nothing but a synthetic claim to monetize their proposed injunctive relief, any class claims will necessarily affect the rights of the absent Class B owners. The way the Plaintiffs have staked out this case, any class ruling will undoubtedly impact the most basic functioning of CMEG's markets and all of the Class B shareholders who actually use those markets.

If the Court grants monetary relief and Defendants do not voluntarily adjust Exchange rules and practices, class members, excluded B share owners, or future B share owners could perpetually sue the Defendants for continued diminution in B share value. On the other hand, if Defendants amend their Exchange operations in response to a ruling, Defendants would be subject to suit from excluded Corporate Members who would not be bound by prior class judgment(s) and who may be able to obtain a different result based on the same underlying Core

Rights. That is why, under Delaware law, breach of charter claims, which are "Delaware corporate law claims [that] are tied to the shares themselves," are certified as non-opt-out Delaware Chancery Court Rule 23(b)(1) and 23(b)(2) actions, and not as damages classes under Rule 23(b)(3). *In re Activision Blizzard, Inc. Stockholder Litigation*, 124 A.3d 1025, 1056 & nn. 22-23 (Del. Ch. 2015).

Plaintiffs repeatedly claim that subsequent lawsuits by Corporate Members would not be based on any interpretation of the Core Rights, but on unidentified contracts that CMEG and CBOT allegedly have with individual Corporate Members that provide those Members with additional privileges beyond the Core Rights.[5] But Plaintiffs have not provided any proof to support that these alleged unidentified contracts exist, nor is there any.

Third, Plaintiffs' request for a damages class fails for the additional and independent reason that Plaintiffs have failed to show that there is any valid class-wide damages model that can measure damages caused by the alleged breaches.[6] In their Alternative Proposals submission, Plaintiffs claim that Defendants have damaged class members by:

> (a) depriving members of the substantial monetary payments that they would have demanded in order to vote to approve modifications of their Core Rights[;]
>
> (b) diminishing the value of members' Class B shares, and/or[;]
>
> (c) for those members who have leased out their seats to others during the breaches, causing these members to lose lease income during the class period when demand for memberships was reduced.[7]

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[5] (Joint Submission at 4, 5, 8; *see also* Transcript of Proceedings, Mar. 4, 2021 at 26:4-20 (presuming unidentified contracts have arbitration and force majeure clauses) attached hereto as Exhibit A.)

[6] Plaintiffs' prior contention that Illinois courts should not consider class-wide damages models at certification falls short as it is solely supported by dicta in a footnote from an unpublished appellate opinion which has no precedential value pursuant to Illinois Supreme Court Rule 23(e). (Pl. Reply at 12 (citing *Roberson v. Symphony Post-Acute Care Network*, 2019 IL App (5th) 190144-U, ¶ 20 & n.4.).)

[7] (Pl. Alt. Proposals at 3.)

But Plaintiffs fail to demonstrate how they can prove class-wide damages for any one of these damage theories, let alone all three.

As an initial matter, Plaintiffs have not even attempted to articulate a class-wide damages theory that could calculate damages under (a) or (c), nor could they. As to (a), each of Plaintiffs' proposed classes exist only of *current* owners of Class B shares. But Plaintiffs allege that Defendants' breaches and the alleged modifications to Plaintiffs' Core Rights occurred in 2009. Current owners are thus not necessarily those who would have demanded payments.[8] Further, any determination of lost lease damages under (c) would necessarily require individualized inquiries, including, but not limited to, (i) the time period that an individual member leased out his or her seat, (ii) the type of seat leased, (iii) the lease rate, (iv) available supply and demand at that point in time, and (v) any individual factors that affected the particular lease agreement (e.g., if the seat was leased to a friend or family member).

Moreover, as Defendants demonstrated in their Opposition Brief, the damages methodologies offered in support of establishing damages based on the alleged diminution in the value of Class B shares are unsupported and speculative. Plaintiffs' expert, Dr. Jonathan Arnold, did not undertake any actual analysis, but instead opted to provide the bare opinion that he *thinks* he could create a class-wide damages model *if* asked to do so.[9] He provided no thought, let alone analysis, for what a hypothetical negotiation between the Class B owners and Defendants would look like and admitted that his regression model could yield the same amount of damages regardless of which, if any, theories of liability prevail.[10]

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[8] It bears noting that there is no evidence that *any* Class B owner demanded payment at the time Defendants allegedly modified the Core Rights.

[9] (Def. Br. at 23.)

[10] (*Id.* at 25 (citing DA-446).)

For all of these reasons, Proposal 1 should be rejected.

Response to Proposal 2:

Plaintiffs' Proposed Notice Plan Does Not Adequately Protect The Interests Of Excluded Parties.

Plaintiffs' second proposal — providing class certification notice to excluded Corporate Members — is equally unavailing. In Illinois, "the determination of whether an action may be maintained as a class action and the determination whether notice must be given, and in what manner and to whom, are separate discretionary determinations which the trial court must make." *McCabe v. Burgess*, 75 Ill. 2d 457, 467 (1979). Yet Plaintiffs' proposal to provide class certification notice to all owners of Class B shares in order to satisfy the prerequisites of maintaining a class blurs these separate inquiries. And it does nothing to alleviate the fact that Corporate Members are necessary parties,[11] and under Illinois law, claims cannot continue to a decision on the merits in the absence of necessary parties. *See Howerton v. Prudential Ins. Co of Am.*, 2012 IL App (1st) 110154, ¶ 35. This is true even if the absent party has notice of the suit. *See, e.g., Feen v. Ray*, 109 Ill. 2d 339, 346-49 (1985) (dismissing suit, in part, due to absence of necessary party who had notice of lawsuit); *City of Evanston v. Reg'l Transp. Auth.*, 209 Ill. App. 3d 447, 452-56 (1st Dist. 1991) (affirming dismissal of case due to absence of necessary party even though missing, necessary party had previously been a defendant in the case); *Pelley v. Illinois Mun. Water Co.*, 142 Ill. App. 3d 765, 769-70 (2d Dist. 1986) (same).

Plaintiffs' suggestion that providing notice to the excluded owners of Class B shares somehow excuses the absence of necessary parties lacks merit. Plaintiffs rely on inapposite federal case law interpreting Federal Rule of Civil Procedure 19, which, unlike Illinois law,

[11] (*See* Def. Br. at 18-19.)

permits exclusion of necessary parties who choose not to claim their interests in a suit.[12] There is no similar support under Illinois law for Plaintiffs' assertion that, after receiving notice of the suit, Corporate Members should bear the burden to either intervene or live with the results of the case.

What is more, Plaintiffs' proposed "notice" to Class B owners presents an obscure characterization of Plaintiffs' claims and fails to adequately inform Corporate Members of the true scope of relief that Plaintiffs seek. In fact, the notice appears calculated to dissuade the excluded Corporate Members from intervening by trivializing the suit's impact on them.

The notice describes the issues at stake in this case in the following two paragraphs:

> The lawsuit alleges that Defendants CME and CBOT have breached their obligations to the Sub-Classes by denying the members of the Sub-Classes the best and most proximate access to the Globex electronic trading platform at the Aurora Data Center ("ADC"), by denying the members of the Sub-Classes the right to trade the full range of CME Group products on Globex at member rates, and by requiring the members of the Sub-Classes to pay certain fees for colocation at the ADC.
>
> The Class Representatives further allege that Defendants violated the Sub-Classes' rights by allowing Electronic Corporate Members and, on information and belief, other non-member customers to exercise the trading rights and privileges of exchange members without purchasing or leasing seats on the exchange, and by providing preferential fees to certain non-member customers. Class Representatives seek damages at this time.[13]

Noticeably absent is the fact that Plaintiffs are targeting the primary benefit of Corporate Membership — proprietary trading at discounted rates — as a Core Rights violation. Instead, Plaintiffs cloak their Fee Claims in vague terms and assert that they are challenging the

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[12] (*See* Pl. Alt. Proposals at 5 (citing *Basile v. Valeant Pharmaceutical Int'l, Inc.*, No. SACV 14-2004-DOC (KES), 2017 WL 3641591, at *15 (C.D. Cal. Mar. 15, 2017) (reasoning, under Fed. R. Civ. P. 19, that "where a party is aware of an action and chooses not to claim an interest, the district court does not err by holding that joinder was unnecessary" (citation omitted))).)

[13] (Pl. Alt. Proposals Ex. C. ¶¶ 8, 9.)

Defendants' practice of allowing "non-member customers" to exercise trading rights and privileges without purchasing seats when what they are really doing is attacking the ability of Corporate Members to have an unlimited number of qualified traders executing proprietary trades for the Corporate Member's account at member rates, which is a practice that has existed since before demutualization.[14] Also absent is the fact that Plaintiffs assert that the Aurora Data Center is the "new trading floor," and that, as a result, each employee or independent contractor of a Corporate Member who seeks to execute trades on Globex through the Aurora Data Center must have his or her own B share to do so. This would be a fundamental shift in the operation of CMEG's markets. Consistent with the historical treatment of Corporate Members, an unlimited number of traders trading a Corporate Member's proprietary account can currently route trades through a Corporate Member's server that is located at the Aurora Data Center.

The notice also misconstrues how the suit will impact Corporate Members by stating that the Class "seeks damages at this time." As discussed above, this obfuscates the fact that the operative complaint seeks injunctive relief that would fundamentally overhaul proprietary trading at the Exchanges and require Corporate Members to purchase a B Share for each and every employee or independent contractor trading the firm's proprietary account. Plaintiffs also fail to note that they recently argued Corporate Members should be *included* in the class because they hold the same Core Rights and have allegedly suffered the same harm.

[14] This description starkly contrasts with the clear, concise language Plaintiffs employ when describing their Fees Claims to the Court. (*Compare* Pl. Alt. Proposals Ex. C, ¶ 9 ("allowing . . . non-member customers to exercise the trading rights and privilege of exchange members without purchasing or leasing seats on the exchange and providing preferential fees to certain non-member customers"), *with* Pl. Alt. Proposals at 3 ("allowing unlimited numbers of non-member traders under Corporate Memberships to trade at member rates.").)

The final page of the notice provides the milquetoast warning that "Defendants contend that, in the event that the Sub-classes succeed in whole or in part in their claims, the rights of Corporate Members may be affected."[15] Plaintiffs' contention that this non-descript statement will serve as a call-to-arms for Corporate Member to intervene is transparently flimsy. Non-parties are unlikely to expend the necessary time and energy to independently analyze the Plaintiffs' claims to discover that the notice's description does not tell the full story, monitor the lawsuit to assess how Plaintiffs' claims and requests for relief evolve, and, if necessary, hire an attorney to intervene in a lawsuit seven years after it commenced. The Court should reject Proposal 2.

Response to Proposal 3:

The Court Should Not Adopt The Plaintiffs' Half-Hearted Request To Certify A Liability-Only Class.

Plaintiffs' third proposal — to certify a liability-only class — is, as Plaintiffs acknowledge, an "inferior" approach to class certification that does not address the Court's concerns regarding Plaintiffs' exclusion of Corporate Members. The Court should see this proposal for what it is: an attempt to obtain certification of *any* class in order to impose pressure on Defendants despite Plaintiffs' failure to carry their burden to show class treatment is available. While Plaintiffs contend a liability-only class would delay or obviate the need to resolve "remedies-phase" issues if Defendants prevail on liability, this limited benefit does not justify the inevitable inefficiencies of a liability-only class such as multiple class-wide notices,

[15] (Pl. Alt. Proposals Ex. C, ¶ 24.)

opt-out periods, and trials, nor does it answer the question of what happens if Plaintiffs prevail (which they should not).[16]

Moreover, courts limit certification to liability-only classes in cases where the prerequisites for a class are met as to liability, but there are personal damages calculations that will require individualized inquiries. Here, however, Plaintiffs have failed to establish the prerequisites for a class, contend that their direct claims allow damages to be calculated on a class-wide basis, and assert no individualized damages.[17] While Plaintiffs' theory of class-wide damages is obviously incorrect, it is the only theory that they appear willing to pursue.

Notably, Plaintiffs' reliance on *Bueker v. Madison Cty*., 2016 IL App (5th) 150282 to support a liability-only class is misplaced. The *Bueker* court separated questions of liability and damages because "calculation of actual damages would be too individualized to be handled as part of the class action." *Id.* at ¶ 35. That issue is not present in this case. Certification of a liability-only class is inappropriate here. The Court should reject Proposal 3.

Response to Proposal 4:

The Court Should Not Entertain Plaintiffs' Request To Certify Unrepresented Subclasses.

Plaintiffs' last-ditch effort to certify unrepresented sub-classes speaks volumes about their approach to class certification. Plaintiffs provide the Court with 13 proposed subclasses to address intraclass conflict, but in doing so make no attempt to carry their burden to demonstrate that each subclass meets Illinois' certification requirements. *See Lee v. Buth-Na-Bodhaige, Inc.*, 2019 IL App (5th) 180033, ¶ 53 (party seeking certification bears the burden of establishing

[16] (*Id.* at 6.)

[17] (Pl. Mot. at 19 ("[T]otal damages recoverable by the Class can be proven on a class-wide basis using common proof.").)

certification requirements); *see* 735 ILCS 5/2-802(b) (stating that "each sub-class [be] treated as a class"); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (requiring adequate representation for subclasses). Because the current class representatives are all CME or CBOT B-1 or B-2 members who primarily lease their seats, they cannot adequately represent many of the proposed subclasses. *See, e.g., Byer Clinic & Chiropractic, Ltd. v. Kapraun*, 2016 IL App (1st) 143733, ¶ 9 ("An adequate class representative must . . . be a member of the class . . . ."). Plaintiffs fail to even designate subclass representatives and instead ask the Court for leave to appoint representatives *after* the Court certifies the subclasses.[18] Plaintiffs also fail to provide any evidence that each of the proposed subclasses meets the numerosity requirement. 735 ILCS 5/2-801(1). The Court should not certify subclasses and allow Plaintiffs to backfill them with class representatives after-the-fact. Proposal 4 also fails.

NEXT STEPS

The pending motion for class certification has run its course, and the Court should deny it. The Court has already made clear that Plaintiffs could in the future choose to propose alternative theories of the case and of certification, but denial of the pending motion should foreclose the Plaintiffs' current class theories. Plaintiffs have now had four opportunities to come forward with a class proposal based on their current theories of liability and damages that can satisfy the prerequisites for class certification. Each time, they have failed to meet their burden.

After denial, Plaintiffs may reassess their claims and determine whether they can amend their Complaint to plead a certifiable class claim. Plaintiffs could also seek to appeal, and Defendants reserve all rights in that respect. But a clear denial of the instant motion is

[18] (Pl. Alt. Proposals at 8 (seeking "a brief period to move for leave to appoint additional Class Representatives who are members of each certified subclass" if the court certifies any subclasses.).)

appropriate to provide certainty at this moment. What the Plaintiffs choose to do next, including whether they seek to re-define the class, alter their theories of liability, or add additional plaintiffs, will inform how the parties move this case forward to resolution.

For all these reasons and the reasons set forth in Defendants' prior briefing and on oral argument, Defendants urge the Court to deny the pending motion for class certification.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that on May 27, 2021, I electronically filed a true and correct copy of the foregoing Opposition to Plaintiffs' Alternative Proposals for Class Certification with the Clerk of the Court, and that I also served a true and correct copy of the foregoing Defendants' Response to Plaintiffs' Alternative Proposals by electronic mail on the following counsel:

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

Dated: May 27, 2021

/s/ *Marcella Lape*
Marcella Lape

FILED
5/27/2021 4:58 PM
IRIS Y. MARTINEZ
CIRCUIT CLERK
COOK COUNTY, IL
2014ch00829

13494017

Exhibit A

PROCEEDINGS

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

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

PROCEEDINGS

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.

PROCEEDINGS

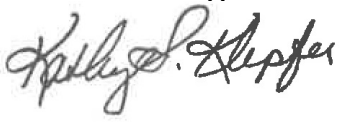
CERTIFICATE

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