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

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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR ALTERNATIVE PROPOSALS FOR CLASS CERTIFICATION

As the Court itself suggested at the prior hearings on Plaintiffs' motion for class certification, this is a case in which a class should be certified. From the outset of the case, the class representatives have advanced the interests of thousands of CME and CBOT members who saw the values of their memberships destroyed by CMEG's breaches of their Core Rights. Damages are the appropriate remedy for the harms these members have sustained. Plaintiffs have easily met their burden of establishing the requirements for certification of a class. Hence why the Court is now properly focused on narrower questions regarding the specific class definition(s), notice form(s), and other procedures to be used for managing this case as a class action. Plaintiffs appreciate this opportunity to further clarify their positions regarding the most manageble scope of the class, the specific metes and bounds of the classwide relief to be sought, and the best means available for ensuring that members who are may not be included in the class definition will still have an opportunity to participate in the proceedings should they choose to do so.

Despite this Court's clear directive that Plaintiffs and CMEG should think creatively about "potential ideas that might solidify things and put us in a posture where we can move forward" and to offer "palatable solutions" for the Court to choose, CMEG's most recent filing flippantly disregards Plaintiffs' alternative proposals for refining the class definitions and managing the case as a class action through trial as a "cafeteria menu of options." March 4, 2021 Hearing Tr. at 111, 115. In fact, each of the various proposals Plaintiffs have recently put on the table—all of which CMEG has been unwilling to consider in good faith—is a sound possible alternative to Plaintiffs' previous class proposals, and each would allow for an expeditious and orderly resolution of the parties' disputes.

I. Plaintiffs Are Not Seeking Certification of an Injunctive Relief Class

CMEG's opposition apparently misunderstands Plaintiffs' proposal regarding injunctive and declaratory relief. For the avoidance of doubt, Plaintiffs are no longer seeking certification of an injunctive or declaratory relief class. There is no "decision" for the Court to "reserve" as to the propriety of an injunctive or declaratory relief class. CMEG's cited case law about when class certification questions should be decided is thus inapposite. If—after a determination on the merits for the currently proposed damages class(es)—Plaintiffs were to subsequently ask for certification of an injunctive or declaratory relief class, CMEG would be more than able to argue that such motion is untimely or not allowed under Illinois law, and the parties will brief the issue then, if that motion ever comes to pass.

II. Plaintiffs' Notice Proposal is Sound and Addresses the Court's Concerns About Excluding Corporate Members from Plaintiffs' Proposed Damages-Only Class

CMEG is similarly mistaken in asserting that Plaintiffs' proposed damages-only class is inappropriate under Illinois law. CMEG claims that Plaintiffs' proposed damages-only class would still require the Court to "make rulings regarding the rights of all owners of Class B shares

and issue relief that would necessarily affect each and every owner 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." CMEG's Response to Plaintiffs' Alternative Proposals for Class Certification ("CMEG Resp.") at 4-5.

As Plaintiffs have already explained, there is no Illinois law requirement that "necessary parties"—let alone all parties with any theoretical interests in the litigation—be included in a proposed class. None of the cases CMEG cites stands for that proposition, and other cases discussed in Plaintiffs' prior briefing have held the opposite. Reply at 2-3. In *Feen v. Ray*, cited by CMEG, plaintiff brought a derivative class action on behalf of taxpayers alleging that defendants fraudulently deprived the taxpayers' school district of interest on district funds. 109 Ill.2d 339, 341 (1985). The Court held that the school district—which was not party to the litigation—was a necessary party in that derivative action, because in Illinois "[c]orporations or governmental entities are necessary parties in derivative actions . . . because the recovery runs in favor of them." *Id.* at 345. This case is not a derivative action; the *Feen* rule does not apply. *Pelley v. Illinois Municipal Water Company*, cited by CMEG, was likewise a derivative action in which "the interests of the [excluded party**]** provided the whole bases" for the claims. 142 Ill.App.3d 765, 769 (2d Dist. 1986). CMEG's other cases held that necessary *defendants* were missing, not that any proposed class was underinclusive. *See Howerton v. Prudential Ins. Co of Am.*, 2012 IL App (1st) 100154, ¶ 35; *City of Evanston v. Reg'l Transp. Auth.*, 209 Ill. App. 3d 447 (1st Dist. 1991).

To the extent the Court still concludes it is important for the interests of other CME/CBOT to members to be represented in the litigation, Plaintiffs' notice proposal addresses this concern adequately by providing any interested, but excluded, Corporate members the ability to intervene

and be heard. If any excluded Corporate members believe that CMEG or Plaintiffs cannot represent their interests—and CMEG to this day has not identified a single Corporate member that holds that view—those members may intervene upon receiving Plaintiffs' proposed notice.

CMEG's latest filing attacks Plaintiffs' proposed notice plan, but tellingly provides the Court no alternative to address the concerns CMEG raises. The truth is that CMEG simply wants to avoid certification of any class and is merely using arguments about (theoretical) interested Corporate Members as the means to achieve the goal of stymying Plaintiffs. CMEG has no interest in complying with the Court's request to help find a manageable solution. Although Plaintiffs disagree that there is anything is deficient about their proposed notice plan, Plaintiffs are of course willing to continue to confer with CMEG counsel about the best language to use in a notice to inform excluded Corporate Members of their options.

Most important, CMEG identifies no authority that would prohibit the Court from using a notice as proposed by Plaintiffs to give excluded Corporate Members the opportunity to intervene and be heard, as other courts have done. *See Basile v. Valeant Pharmaceutical Int'l, Inc.*, SACV 14-2004-DOC (KES), 2017 WL 3641591, *15 (C.D. Cal., Mar. 15, 2017). The only case CMEG cites on the topic is inapposite. *McCabe v. Burgess* was about, among other things, a plaintiff who "misunderstood the common-question requirement" and confusingly argued that "the common question [wa]s whether the class members may receive actual notice of their potential legal remedies." 75 Ill.2d 457,467–68 (1979). It did not address, in any way, whether a court may provide notice to persons excluded from a class definition in order to give them the opportunity to intervene. *Id.*

CMEG further wrings its hands that certifying Plaintiffs' classes would open it up to "the risk of continued liability or the threat of inconsistent judgments in the event litigation is later

brought" by other Class B members of CME/CBOT. CMEG Resp. at 5. But CMEG ignores the alternative. As the Court has noted, "[t]his is not a case where defendants are walking away without the potentiality of future litigation." March 4, 2021 Hearing Tr. at 111. If Plaintiffs' proposed classes are not certified, CMEG will likely face a parade of litigations brought by like-minded Class B members seeking relief for CMEG's violation of their Core Rights. The alternative world of *no class certification* would lead to a far greater threat of continued litigation and inconsistent judgments. Certifying one or more of Plaintiffs' proposed classes would better ensure consistent interpretation of CMEG's obligations and would dispose of numerous similar claims that might otherwise be brought by individual members of the proposed classes. These are exactly the reasons why class actions exist. *See U.S. Parole 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 interest of absentees, [and] the provision of a convenient and economical means for disposing of similar lawsuits . . . .").

Finally, CMEG is wrong to suggest that Delaware law prohibits pursuit of a damages class action to enforce a corporate charter. In doing so, CMEG yet again misstates the holding of *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1056 (Del Ch. 2015). That case did not hold that breach of charter claims under Delaware law cannot be pursued via a damages class action. The court there merely noted, in the context of overruling an objection to a proposed class settlement, that the claims for breach of a corporate charter *in that particular case* were not of a "personal" nature, did not "have any value," and thus could be settled fairly without any cash payment. Nothing about *In re Activision* precludes certification of a damages class in a breach of charter case. Accordingly, other Delaware cases have awarded damages as a remedy for breach

of a corporate charter. *See Fletcher Int'l, Ltd. v. Ion Geophysical Corp.*, C.A. No. 5109-CS, 2013 WL 6327997, at *1 (Del Ch. Dec. 4, 2013).

In sum, Plaintiffs' proposed notice is a practical way to ensure that any interested parties are heard before this Court; nothing in Illinois law prevent the Court from adopting this proposal.

III. Plaintiffs Have Shown that Damages Can Be Measured on a Class-Wide Basis

For the reasons stated in Plaintiffs' opening and reply briefs in support of class certification, Plaintiffs have demonstrated that damages can be measured on a class-wide basis. *See* Opening Br. at 19-23; Reply at 8-18. CMEG's opposition largely rehashes its old arguments, briefed repeatedly, and Plaintiffs have previously explained why CMEG's arguments fall short.

CMEG raises one new point—it asks this Court to ignore the holding of *Roberson v. Symphony Post-Acute Care Network* that a damages class may be certified even when a plaintiff never "articulated her theory of damages" at all. 2019 IL App (5th) 190144-U, ¶ 20 & n.4. First, CMEG incorrectly identifies this holding as "dicta". *See Dictum*, Black's Law Dictionary (11th ed. 2019) ("Obiter dictum: A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential."). The *Roberson* Court could not have certified a damages class at all, but for its recognition that it was unnecessary for the plaintiff to articulate a specific damages theory. Second, CMEG ignores that proof of class-wide damages is not required for class certification under Illinois law. *See Bueker v. Madison Cnty.*, 2016 IL.App (5th) 150282 at ¶¶ 30-32. Third, in this case, Plaintiffs have gone beyond what Illinois courts require by submitting an expert report that identifies multiple class-wide damages methodologies. Plaintiffs have proposed a hypothetical negotiation model and a diminution in value model, either of which can measure the harms caused by CMEG's breaches of the Core Rights on a classwide basis, accounting for the losses each member has sustained. *See* Opening

Br. at 19-23; Reply at 8-18. Plaintiffs' class-wide damages models, which were described in detail in Dr. Arnold's report, are not a "synthetic claim to monetize [Plaintiffs'] proposed injunctive relief," whatever that means. And CMEG has not provided any expert opinions attacking the propriety of Plaintiffs' proposed damages methodologies.

IV. If the Court Believes Division or Lessor Subclasses are Necessary, Plaintiffs Seek Leave to Appoint Additional Class Representatives

If the Court concludes that subclasses for leaseholders or separate divisions are necessary, Plaintiffs would seek leave to appoint additional Class Representatives who are members of each certified subclass. Plaintiffs would do so to meet the Court's concerns about potential discrepancies between the classes, and raised this point solely because the Court asked them to "think creatively" about solutions to moving this case forward expeditiously and efficiently. Plaintiffs do not believe that such subclasses are necessary, since there are no conflicts among the potential subclasses, and as of yet have not moved to appoint any such extra class representatives.

Like most of its response to Plaintiffs' proposals, CMEG's opposition misses the point. CMEG's invocation of the numerosity requirement for these subclasses illustrates that CMEG is not seriously interested in working with Plaintiffs to resolve these issues, as the Court has requested. CMEG's own opposition to Plaintiffs' class certification motion acknowledges that Plaintiffs easily meet the numerosity requirement for each CME and CBOT division subclass, because according to CMEG the outstanding memberships in the various divisions number between 74 and 1,402:

CME Classes of Membership[1]

- 625 Class B-1 memberships
- 813 Class B-2 memberships

[1] DA-6.

- 1,287 Class B-3 memberships
- 413 Class B-4 memberships

CBOT Classes of Membership[2]

- 1,402 Class B-1 memberships
- 830 Class B-2 memberships
- 74 Class B-3 memberships
- 641 Class B-4 memberships
- 643 Class B-5 memberships

Subclasses of these approximate sizes would each easily satisfy the numerosity requirement, even if some Corporate Members and insiders were to be excluded, as CMEG well knows. *See Kulins v. Maclo, a Microdot Co., Inc.*, 121 Ill.App.3d 520, 530 (1st Dist. 1984) (affirming trial court's finding that 19-member class satisfied the numerosity requirement); *see also Cruz v. Unilock Chicago*, 383 Ill. App. 3d 752, 771 (2d Dist. 2008) (finding class with approximately 200 members to be sufficiently numerous to make joinder impracticable).

V. Plaintiffs' Proposed Liability-Only Class is a Sound Alternative to No Class

Plaintiffs agree with CMEG that certifying a liability-only class would be a less efficient alternative—that is why Plaintiffs favor full certification of a damages class. But CMEG is wrong to suggest that the Court is somehow *unable* to certify a liability-only class while leaving for later the question whether to certify a damages class or classes. It is hornbook law that a Court may do so. *See* Newberg on Class Actions § 11:8 (5th ed.) ("The efficiencies of the class suit can be accomplished by trying the defendant's liability once in the aggregate proceeding while working out the subsequent damages, if necessary, either through similar classwide proof or though some

[2] DA-12.

kind of more individualized procedure."); *see Bueker v. Madison Cnty.*, 2016 IL App (5th) 150282. Although CMEG claims that "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," CMEG cites *no cases* for that proposition, from Illinois or elsewhere. And nothing in *Bueker v. Madison County* suggests that such a rule exists in Illinois, despite CMEG's attempt to imply otherwise. 2016 IL App (5th) 150282.

VI. Conclusion

For these reasons, and all of the reasons stated in Plaintiffs' previous briefing in support of their motion for class certification, Plaintiffs request that the Court grant their motion for class certification.

Dated: June 9, 2021

Respectfully submitted,

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PROOF OF SERVICE

Pursuant to Illinois Supreme Court Rules 11 and 131, the undersigned, an attorney, certifies that he served the foregoing instrument by transmitting it via e-mail on June 9, 2021 from Chicago, Illinois to the following designated e-mail addresses of record for Defendants' counsel, who have consented to e-mail service:

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