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,	No. 2014 CH 00829
v.	Calendar 6
CME GROUP, INC., a Delaware Corporation; THE BOARD OF TRADE OF THE CITY OF CHICAGO, INC., a Delaware Corporation,	Hon. Celia G. Gamrath, Presiding
Defendants.	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION, FOR APPOINTMENT OF CLASS REPRESENTATIVES, AND FOR APPOINTMENT OF SUSMAN GODFREY LLP AS CLASS COUNSEL

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I. INTRODUCTION

Plaintiffs are current Class B shareowners of CME Group ("CMEG") and Class B members of the Board of Trade of the City of Chicago, Inc. ("CBOT," and together with CMEG, "Defendants"), who purport to bring an action for damages and equitable relief to force compliance with certain rights granted to the Class B Members[1] in the CMEG and CBOT Certificates of Incorporation (the "Charters"). In reality, however, Plaintiffs at most represent a fringe minority of Class B Members who do not trade, have little knowledge of the way that the Chicago Mercantile Exchange, Inc. ("CME")[2] and the CBOT have operated over the past 20 years, and are upset that their trading rights and privileges — which are encompassed in their Class B Shares — are not worth what they would like. They now hope that this lawsuit will force Defendants to buy back and expire the Class B Shares at an amount that far exceeds the current demand-based trading value. As one class representative commented, "so its [sic] not about being right or wrong rather an opportunity for them to buy us out[.]" *See* Affidavit of T. Frey, Defendants' Appendix ("DA") at DA-115.[3]

At the appropriate time, Defendants will show this Court that the rights Plaintiffs claim Defendants have breached are either made up or grossly exaggerated and that Defendants have honored their Charters and provided all Class B Members with the benefit of the bargain struck at demutualization. That, of course, is for another day. For purposes of the Motion for Class

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[1] For ease of reference and without waiving any argument as to the distinctions between CMEG and CBOT as entities or as to the differences in the rights and privileges appurtenant to each security, Defendants will refer to CMEG Class B shares and CBOT Class B memberships collectively as "Class B Shares" and to CMEG Class B shareholders and CBOT Class B members as "Class B Members."

[2] The CMEG Class B shares provide owners the ability to become members of the CME and exercise trading rights and privileges on that Exchange.

[3] Citations refer to exhibits attached to the Affidavit of Timothy Frey. The exhibits are individually tabbed and collectively paginated as DA-1 through DA-560.

Certification though, it is critical that the Court realize that, as Plaintiffs admit, "the Core Rights apply to each and every Class B share, regardless of the series or division of membership." (Pl. Mem. at 2.)[4] That is why courts have recognized that claims that assert a charter violation are more properly addressed through injunctive relief, and not through an action for monetary damages. *See, e.g., In re Sunstates Corp. S'holder Litig., C.A.*, No. C.A. 13284, 2001 WL 432447, at *3 (Del. Ch. Apr. 18, 2001). But although Plaintiffs ask this Court, in part, to make sweeping rulings regarding the rights of all Class B Members in the Exchanges and to issue injunctive relief that would necessarily affect each and every owner of a B share in CMEG or CBOT, that is *not* the class who Plaintiffs seek to represent. Plaintiffs readily admit that they have excluded Class B Members who are trading firms or corporate members of CMEG and CBOT because those Class B Members have interests that are "antagonistic to those of the Class." (Pl. Mem. at 9.) In other words, Plaintiffs ask the Court to define the rights of all Class B Members based on their views, while simultaneously ignoring the views of roughly 50%[5] of the Members who do not agree with them. It would be neither fair nor appropriate to certify a class that seeks to define the rights of people intentionally excluded.

The type of class Plaintiffs seek to certify — which consists of some, but not all shareholders — may be acceptable in a case where the shareholders assert personal claims that are measurable on a class-wide basis, but this is not one of those cases. Not a single proposed class representative has paid fees to co-locate or trade from the Aurora Data Center (what Plaintiffs now refer to as the "new trading floor") and not a single class representative asserts

[4] Plaintiffs' Memorandum of Law In Support of Plaintiffs' Motion For Class Certification, For Appointment Of Class Representatives, And For Appointment Of Susman Godfrey LLP As Class Counsel is referred to herein as "Pl. Mem."

[5] Plaintiffs estimate that they exclude from their proposed class approximately 19% of the Class B Members. As explained below in Section III.B.2, this is a gross underestimate.

that that he has been charged a fee to trade that is greater than the fee charged to a non-member. Instead, Plaintiffs bring direct Delaware corporate law claims and assert that Defendants took certain actions that breached the Charters and damaged the values of the Class B Shares themselves. In such a case, there can be no differentiation among the B Shares. It would be improper for the Court to award damages on a direct claim to only certain of the Class B Members if all of the B Shares have likewise been affected by the breach. Moreover, even it were acceptable, Plaintiffs have failed to establish that there is any non-speculative class-wide damages model that can be tied to the theories of breach.

What is more, class discovery revealed that the proposed representatives cannot adequately represent the Class B Members that they *want* to include in their class. While Plaintiffs purport to prosecute their rights under the Charters based on the alleged "history, tradition, and practices" of the Exchanges, they have no basic factual knowledge of the manner in which electronic trading has evolved in an open access world or how the Exchanges have enacted and enforced their fee policies. In reality, what the Plaintiffs want is to roll back the clock, recover the rights that Class B Members gave up when the Exchanges demutualized, and institute Members as exclusive trading intermediaries in the electronic world, ignoring entirely the open access model that has driven the growth of CME and CBOT for the past two decades. Because of this, Plaintiffs take positions in this litigation that are divorced from reality and that lead to conflicts not only with those Class B Members that they intentionally exclude but also with others who they allegedly seek to represent.

For all of these reasons and those that follow, the Court should deny class certification.

II. BACKGROUND

A brief background of the history and membership structure of the CME and CBOT is critical to understanding the group of Class B Members that Plaintiffs seek to represent and who they exclude.

A. The Evolution of CME and CBOT

The CME and CBOT were founded in 1898 and 1848, respectively as marketplaces for the exchange of agricultural futures contracts.[6] After broadening their product offerings to include financial futures and options contracts, they made Chicago the capital of the American futures marketplace and a risk management center for the larger global financial system.[7] From their foundings through the late 1990s, CME and CBOT were places where derivatives contracts were primarily bought and sold on trading floors, in iconic "pits," by the "open outcry" method of trading. Open outcry trading is a face-to-face trading model in which transactions are executed through verbal communications and hand signals delivered from one human trader to another. (Fourth Amended Class Action Complaint, ¶ 37 ("Compl.").)[8] The trading floor was (and remains today) exclusively the domain of members of the Exchanges. Only members could access the trading floor and trade in the open outcry pits.[9]

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6 CME Group Inc., Form S-4 at 20 (July 6, 2007) ("Merger Prosp."), *available at* https://www.sec.gov/Archives/edgar/data/1156375/000119312507150693/ds4.htm.

7 *See generally* Ex. 3 ("CME Demut. Prosp.") at DA-144–50; Ex. 4, ("CBOT Demut. Prosp.") at DA-185–92.

8 *See* CME Demut. Prosp. at DA-150 (open outcry trading represented 92% of total volume in 1999); CBOT Holdings Inc., Form S-4 at 93 (Oct. 24, 2001) (open outcry trading represented 83% of total volume in the first half of 2001) *available at* https://www.sec.gov/Archives/edgar/data/1161448/000095013101503846/ds4.txt.

9 CME Group Inc., Form 10-K at 6 (Feb. 28, 2020) *available at* https://www.sec.gov/ix?doc=/Archives/edgar/data/1156375/000115637520000013/cme-2019123110k.htm.

1. Development of Electronic Trading

In the early 1990s CME developed an electronic trading platform known as "Globex" that allowed members to execute trades electronically. Like the trading floors, CME initially operated Globex as a closed system. Only Members and certain permit holders had the ability to directly connect and trade on the platform. On August 30, 2000, in response to competitive pressures and the rise of all-electronic exchanges, CME determined to adopt an open access policy for Globex. DA-212–13. This decision transformed CME's business, converting electronic trading to an open system that allowed all market participants — including non-members — to directly access Globex and view the Globex order book. (*Id.*) From this point forward, non-members could execute trades on Globex from anywhere in the world without going through a Member intermediary.

After adopting open access, CME invested substantially to improve the speed, capacity, and functionality of Globex, including the manners in which customers could access and trade on Globex. CME initially housed the Globex "match engine," which matches the electronic bids and offers and sends trade confirmations, in the same building as the trading floor at 30 S. Wacker Dr. in Chicago, Illinois. In October 2002, however, CME relocated the match engine to a Remote Data Center in Lombard, Illinois.[10] (Answer, Ex. C.). As CME's technological infrastructure continued to increase in size, CME determined that it would need additional space for its

[10] Defendants CME Group Inc.'s And Board Of Trade Of The City Of Chicago, Inc.'s Answer And Affirmative Defenses To Plaintiffs' Fourth Amended Complaint filed on December 17, 2019, is referred to herein as "Answer."

systems. In late 2007, CME purchased land in Aurora, Illinois to build a new data center, with the intent to move Globex operations to that location.[11]

CBOT (which then operated as an independent exchange) similarly began to adapt to the development of electronic trading in the 1990s. After initial attempts to develop its own technology, in 2000 CBOT licensed an electronic trading system known as a/c/e from Eurex, a German all-electronic exchange.[12] Initially only available to Members, CBOT made the key decision to move a/c/e to an open access model a year after CME, in October 2001. DA-255. From that time forward, like at CME, all of CBOT's market participants could execute electronic trades directly, rather than going through Member intermediaries. *Id.* In January 2004, CBOT transitioned from Eurex to another third-party platform provided by LIFFE Connect, which was based in London, England.[13] It was not until after the demutualization, on February 9, 2006, that CBOT announced that it had moved its trading host from London to a location in Chicago.[14]

In July 2007, CME and CBOT merged to form CMEG,[15] and subsequently, the Exchanges combined their trading floors in the CBOT building. In January 2008, CBOT migrated its electronic trading system to the Globex platform.[16] There is no evidence that before,

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[11] CME Group Inc., Form 10-K at 63 (Mar. 2, 2009) *available at* https://www.sec.gov/Archives/edgar/data/1156375/000119312509042361/d10k.htm (we also purchased a remote data center facility. . .").

[12] CBOT Demut. Prosp. at DA-194–95.

[13] CBOT Demut. Prosp. at DA-194–95.

[14] CBOT Holdings, Inc., Form 8-K, Ex. 99.1 (Feb. 9, 2006) *available at* https://www.sec.gov/Archives/edgar/data/d8k.htm/000119312506024478/0001193125-06-024478-index.html ("CBOT successfully moved trading host to Chicago").

[15] CME Group Inc., Form 10-K at 6 (Feb. 28, 2008) *available at* https://www.sec.gov/Archives/edgar/data/1156375/000119312508040449/d10k.htm; *see generally* Merger Prosp.

[16] CME Group Inc., Form 10-K at 11 (Mar. 2, 2009) *available at* https://www.sec.gov/Archives/edgar/data/1156375/000119312509042361/d10k.htm.

during, or after the merger discussions anyone ever suggested that either CMEG or CBOT Class B Members had any sort of right to the lowest latency access to their respective open access electronic trading systems, from the Exchanges' trading floors or otherwise. What is more, at the time of the merger, CME offered on an equal basis to both Members and non-members a co-located connectivity option to the Globex platform called LNET that CME marketed as the lowest latency connection option to the Globex trading system. Answer, Ex. D.

Subsequently, in August 2010, CME transitioned the Globex electronic trading platform to the Aurora Data Center. DA-218. In January 2012, CME and CBOT began to offer co-location and a G Link connection to Globex to all market participants from the Aurora Data Center.[17] Importantly, from open access to the present, CME and CBOT offered access to their electronic platforms, including access marketed as the lowest latency connection to Globex, to both Members and non-members on equal terms. DA-224; *see also* Answer, Ex. D; Da-374.

2. The Demutualizations

CME demutualized from a member-owned, non-profit organization on November 2, 2000, and CBOT followed suit on April 22, 2005.[18] The demutualizations allowed CME and CBOT to unlock the Members' equity in the Exchanges. Prior to that time, the Exchanges operated as non-profit entities for the benefit of Members, and Members got value solely from their trading opportunities on the trading floors or electronic trading platforms. But as part of the demutualizations, the Members in CME and CBOT received Class A shares, representing the

[17] CME Group, Inc., Form 10-K at 7 (Mar. 1, 2013) *available at* https://www.sec.gov/Archives/edgar/data/0001156375/000115637513000007/cme-2012123110k.htm.

[18] Merger Prosp. at 165–66; *see generally* CME Demut. Prosp. DA-118–55; CBOT Demut. Prosp. at DA-157–209.

equity in the Exchanges. They also received Class B shares or memberships, which primarily embodied the historic trading rights and privileges that the members had on CME or CBOT.[19]

The demutualizations of CME and CBOT fundamentally altered the governance structures of the Exchanges. While the members previously had the ability to control the Exchanges' actions through referendum rights that allowed them to overturn management decisions, they gave those rights up and in return received a narrow set of special "core" rights that could not be changed or adversely affected absent a weighted vote of the Class B members.[20] Ceding this control was the very purpose of the demutualizations. The Exchanges needed to be able to make swift commercial decisions that would allow them to compete in the quickly changing global marketplace.[21] Following the demutualizations, CME and CBOT became for-profit entities charged with maximizing shareholder value.[22]

B. Membership Structure

Since well before the time of either CME's or CBOT's demutualizations, the Exchange members included a diverse mix of market participants including both individual Members (floor brokers and traders) and Corporate Members (agricultural interests, large financial institutions, trading companies, and commodities brokers). When CME demutualized in 2000, it offered five different types of Corporate Membership.[23] Krewer Decl. at DA-5, ¶ 9; DA-21–25; *see also* DA-261–62. Likewise, when CBOT demutualized in 2005, it offered eight different types of

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[19] CME Demut. Prosp. at DA-124–29, 135–36; CBOT Demut. Prosp. at DA-158–64, 197.

[20] CME Demut. Prosp. at DA-138–40; CBOT Demut. Prosp. at DA-198–209.

[21] CME Demut. Prosp. at DA-128–129, 132; CBOT Demut. Prosp. at DA-158–59, 166–70.

[22] CME Demut. Prosp. at DA-124; CBOT Demut. Prosp. at DA-158, 170.

[23] The Declaration of Robert Krewer In Support of Defendants' Opposition To Plaintiffs' Motion For Class Certification, For Appointment of Class Representatives, And For Appointment of Susman Godfrey LLP as Class Counsel is referred to herein as "Krewer Decl."

Corporate Membership. Krewer Decl. at DA-11, ¶ 23; DA-79–80. To qualify as a Corporate Member, an entity had to own one or more seats (depending on the form of membership sought) and meet other qualifications set forth in the Exchanges' Rulebooks. Trades properly executed for the account of a Corporate Member qualified to receive Corporate Member rates, whether executed in open outcry or on the electronic trading platform. While only a member or lessee could execute trades on behalf of a Corporate Member in the open outcry pits on the trading floor, even before the CME and CBOT demutualizations, non-member employees of a Corporate Member could execute trades for the proprietary account of the Corporate Member on Globex and e-cbot and receive preferential fees. DA-258-60, 263–68.

Following the CME-CBOT merger in 2007, the Exchanges harmonized their Rules and adopted the Corporate Membership structure in place today. The attached Declaration of Robert Krewer includes two tables that set forth the current Corporate Membership types, their corresponding rule references, the number of each type of Corporate Member at CME and CBOT, and the total amount of B shares owned by and assigned to those Corporate Members on the date Plaintiffs filed their motion for Class Certification. Krewer Decl. at DA-7–8, ¶ 17; DA-13–14, ¶ 31. The Declaration also provides a full description of the requirements for each form of Corporate Membership. *Id.* at DA-4–5, ¶ 8; DA-9–11, ¶ 22. Each and every one of the Class B Members structured as a Corporate Member is excluded from Plaintiffs' proposed class.

C. Plaintiffs' Allegations

Plaintiffs brought this case as a putative class action, seeking to represent a class of certain Class B Members in CMEG and CBOT. (Compl., ¶ 30.) Plaintiffs allege that, although Defendants honored the Core Rights for several years following CME's and CBOT's demutualizations, since 2009, Defendants have made a series of decisions regarding access to the Globex electronic trading platform and changes to their fee policies that have violated the Core

Rights and caused damage to the value of their B Shares. (*See generally id.*) In the alternative, Plaintiffs argue that if the Court determines that the acts complained of do not violate the Plaintiffs' Core Rights, the Court should nonetheless find that they violate the covenant of good faith and fair dealing with respect to those Core Rights. (*Id.*, ¶¶ 130–146.)

Plaintiffs' claims fall into two buckets: the Globex Access Claims and the Fee Breach Claims. At the beginning of this case, Plaintiffs based their Globex Access Claims on the assertion that the Core Rights included a right to the "best and most proximate access" to Globex for free ("BMPA") — a right that is imaginary at best. (*See id.*, ¶¶ 4–5, 8, 10, 16, 71–77, 86–92.) Plaintiffs define BMPA as the lowest latency connection to the match engine. DA-274 (Goldberg: BMPA means "best latency or speed to execute the trade"); *see also* DA-297. Plaintiffs alleged that when Defendants opened the Aurora Data Center and allowed both Members and customers to pay to co-locate their servers and connect to Globex, Defendants breached this alleged "longstanding" right. (Compl., ¶¶ 8, 86.)

Plaintiffs realized throughout discovery that their theory of the case was divorced from reality: CBOT Members *never* had the BMPA to an electronic trading platform from the trading floor, and to the extent the CME Members at one time may have theoretically had the BMPA by happenstance, that changed as early as October 2002, when CME announced that it had moved its Globex match engine from Chicago to Lombard. (Answer, Ex. C.)[24] Neither Exchange ever discussed, let alone promised, that Members had a right to the lowest-latency connection to an electronic trading system or any other preferred latency advantage over non-members. What is more, Plaintiffs apparently were ignorant of even the most basic facts about non-member access

[24] *See also* CBOT Holdings, Inc., Form 8-K, Ex. 99.1 (Feb. 9, 2006) *available at* https://www.sec.gov/Archives/edgar/data/d8k.htm/000119312506024478/0001193125-06-024478-index.html (CBOT trading host moved to Chicago in late 2005).

to the Exchanges' electronic trading platforms. They did not even know about the key concept of open access when they filed this lawsuit. DA-313–315. Since then, they have had to grapple with the reality that open access occurred before either Exchange demutualized and materially changed the way that non-members could access and trade on their electronic platforms. Whereas, similar to the trading floors, the electronic platforms were once the domain of Members, that has not been the case for nearly twenty years.

Confronted with the reality of how unfounded their claims to BMPA were as a factual matter, Plaintiffs have now repackaged their Globex Access Claims.[25] Instead of claiming a breach based on their alleged right to BMPA, Plaintiffs claim that the Aurora Data Center is not *really* a data center, but is *actually* a "new trading floor" to which Class B Members and their lessees have exclusive access. (*Compare* Compl., ¶¶ 4, 5, 6, 14 *with* Pl. Mem. at 2-3.) But the Aurora Data Center bears no resemblance to a trading floor: there are no human traders or open outcry pits there. DA-361–62 (Langer: "There are no human traders, from what I understand. They're only electronic servers."); DA-374–76. Instead, it is a large building that houses the match engine, and in a separate room offers co-location racks, the lowest latency connection to Globex, and supporting services. DA-374; DA-379. In other words, the Aurora Data Center provides BMPA to Globex: precisely what Plaintiffs falsely claimed was their uninterrupted right since demutualization. Plaintiffs' "trading floor" theory is nothing more than a play on words.

Plaintiffs' Fee Claims are based on the allegation that, as part of the Class B Plaintiffs' Core Rights, Members are entitled to a meaningful fee preference that is the lowest relative to other traders on the Exchange. (Compl., ¶¶ 13, 15, 96–101, 116–117.) The CBOT Plaintiffs rely

[25] For example, while Plaintiffs refer to BMPA 15 times in their Complaint, that concept appears zero times in the Motion for Class Certification.

on express language in their Charter to support this right, while the CME Plaintiffs seek to imply the fee preference in CMEG Core Right 2, which protects "trading floor access rights and privileges." Plaintiffs contend that beginning in 2009, Defendants adopted a number of changes to their fee policies that effectively eliminated the fee preference, including by enacting volume incentive programs, eliminating the e-mini Globex fee cap, and allowing multiple people to trade on a Corporate Member's proprietary account and receive a member rate. (*Id.*) Nonetheless, no Plaintiff alleges that he paid a fee higher than a non-member or that he knows of another Member that paid a higher fee than a non-member. Moreover, even before the demutualizations, the Exchanges had volume incentive programs and allowed multiple non-member employees to trade a Corporate Member's proprietary account and receive member rates.

III. ARGUMENT

A. Legal Standard

Section 2-801 sets forth prerequisites to maintaining a class action. 735 ILCS 5/2-801. The Supreme Court of Illinois has summarized a proponent's burden to certify a class as follows:

> [A] class may be certified *only if the proponent establishes the four prerequisites* set forth in the statute: (1) numerosity ("[t]he class is so numerous that joinder of all members is impracticable"); (2) commonality ("[t]here are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members"); (3) adequacy of representation ("[t]he representative parties will fairly and adequately protect the interest of the class"); and (4) appropriateness ("[t]he class action is an appropriate method for the fair and efficient adjudication of the controversy").

Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill. 2d 100, 125 (Ill. 2005) (quoting 735 ILCS 5/2-801) (emphasis added). Unlike a motion to dismiss, a proponent must present proof establishing each certification requirement. *See Weiss v. Waterhouse Sec., Inc.*, 208 Ill. 2d 439, 453 (2004) (contrasting certification motions with motions to dismiss and stating certification motions are "a

matter of proof"). The proponent must also establish that his complaint meets all cause-of-action and standing requirements. *Glazewski v. Coronet Ins. Co.*, 108 Ill. 2d 243, 254 (1985).

B. Plaintiffs Fail to Establish that a Class of Select B Share Owners Can Be Properly Certified

Plaintiffs seek to represent a class of "[a]ll owners of CME Class B shares or CBOT Class B memberships from June 1, 2009, to November 22, 2019" except Corporate Members[26] and CMEG insiders who hold B shares or memberships (the "Class"). (Pl. Mem. at 7.) Plaintiffs estimate that this Class will encompass roughly 5,534 Class B memberships. (*Id.* at 9.) While the proposed definition leaves Defendants to speculate whether Plaintiffs intended to limit the Class to current holders of Class B shares, or to include other persons who purchased or sold throughout the June 1, 2009 to November 22, 2019, time period, a number of the proposed class representatives testified that it includes both current and former B share owners — essentially anyone who held, bought or sold a CME or CBOT Class B share between June 1, 2009, to November 22, 2019. *See, e.g.*, DA-398–99; DA-301–02; *but see* DA-368–69 (Langer: class members had to own seats in June 2009).

There are several problems with Plaintiffs' Class. *First*, it is both over-inclusive and under-inclusive. It is over-inclusive because under Delaware law, only current Class B Members have standing to sue for breach of the Charters. Yet Plaintiffs' class is also under-inclusive because Plaintiffs ask the Court to make wide-sweeping rulings regarding the rights of Class B Members and to issue injunctive relief, all while intentionally excluding a significant number of

[26] Plaintiffs have excluded from their class "business entities that are identified by CMEG as having membership status under any of the following rules: Rule 106.F, Rule 106.J, Rule 106.H, Rule 106.R, and Rule 106.S" because they allegedly benefitted from Defendants' breaches. (Pl. Mem. at 9.) Although not excluded in Plaintiffs' proposed class definition, entities having membership status under Rule 106.I share all material characteristics as the excluded entities. Accordingly, Defendants presume Rule 106.I entities are excluded as well. For ease of reference Defendants will refer to the excluded entities as "Corporate Members."

Class B Members with whom Plaintiffs readily admit they have antagonistic interests. Because of this, Plaintiffs' intended class action is not an appropriate method for the fair and efficient adjudication of the controversy. *Second*, Plaintiffs do not allege any personal claims or damages and have failed to establish that valuation damages are appropriate or that they can be proven on a class-wide basis. *Third*, Plaintiffs fail to recognize that, at a bare minimum, sub-classes are required to account for the fact that not all of the Class B Members have the same rights and privileges. And *fourth*, the proposed class representatives have not offered proof that they can adequately represent the Class's interests. For these reasons, and as explained in full below, Plaintiffs have failed to meet their burden to show that any class should be certified.

1. Former B-Share Owners Lack Standing

As an initial matter, Plaintiffs cannot represent any former Class B Members. Instead, any class must be composed solely of those persons who are current Class B Members at the time of a decision on the merits. Under Section 8-302(a) of the Delaware General Corporate Law Code, "a purchaser of a . . . security acquires all rights in the security that the transferor had or had power to transfer." 6 Del. Code § 8-302(a).[27] Those rights include any "direct" claims that are inherent in the security. *See Urdan v. WR Capital Partners, LLC*, 2019 WL 3891720, C.A. No 2018-0343-JTL, at *11 (Del. Ch. Aug. 19, 2019) ("[W]hen the shares are sold, the rights to assert and benefit from direct claims pass with the shares to the new owner"); *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1050 (Del. Ch. 2015), as revised (May 21, 2015), *judgment entered* 2015 WL 2415559 (Del. Ch. May 20, 2015) ("[w]hen a share of stock is

[27] The Parties have agreed and the Court has ruled that "this case is governed by Delaware substantive law." (*See* March 16, 2018 Order Granting In Part Defendants' Motion to Dismiss at 8.)

sold, the property rights associated with the shares, including any claim for breach of those rights and the ability to benefit from any recovery . . . travel[s] with the shares").

In *In re Activision Blizzard, Inc. Stockholder Litig.*, the court explained the contours of a direct claim:

> Shares of stock carry with them particular rights that a holder of the shares can exercise by virtue of being the owner. A stockholder can invoke these rights directly, rather than derivatively. . . . Direct claims [] include causes of action to enforce contract rights that stockholders possess under the corporation's certificate of incorporation and bylaws . . . . Classic examples included the right to vote, the right to compel payment of a contractually specified dividend, and the right to own and alienate shares. Stockholders similarly can sue directly to enforce contractual constraints on a board's authority under the charter, bylaws, and provisions of the DGCL. The availability of a direct cause of action in these situations comports with the Delaware Supreme Court's longstanding recognition that the DGCL, the certification of incorporation, and the bylaws together constitute a multi-party contract among the directors, officers, and stockholders of the corporation. As parties to the contract, stockholders can enforce it.

124 A.3d at 1049–50.

Here, there is no question that Plaintiffs assert direct claims. Plaintiffs allege that Defendants breached both the Core Rights and associated voting rights that are granted to the Class B Members in their respective Charters. *See Schultz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009) ("As a matter of law, a Charter Violation claim transfers to a later purchase because the injury is to the stock and not the holder"); *FDIC v. Citibank N.A.*, No. 1:15-CV-6560, 2016 WL 8737356, at *5 (S.D.N.Y. Sept. 30, 2016) ("One example of a 'corporate right' that passes with the transfer of a security . . . is the right to enforce corporate bylaws or charters. . . . Under Delaware law, these claims are asserted under breach of contract."). Accordingly, by selling their shares, any former holders relinquished the right to bring claims against CMEG and CBOT, and thus, lack standing to sue. *See id.* (plaintiff lacked standing to sue for breach of securities agreement because it sold securities after the alleged breach and before filing suit). As a result, any Class must be limited to only current Class B Members. *See Glazewski*, 108 Ill. 2d at 254.

2. A Class Action Would Be Neither Fair Nor Appropriate.

At the same time that Plaintiffs' proposed Class is over-inclusive, it is also underinclusive in a manner that renders the proposed class action neither fair nor appropriate. That is because although Plaintiffs seek a declaratory judgment regarding the scope of CMEG and CBOT Member rights and ask for forward-looking equitable relief compelling Defendants to take certain actions, Plaintiffs seek to exclude from their class a significant number of Class B Members whom they readily admit have "interests [] antagonistic to those of the Class." (Pl. Mem. at 9.) In doing so, the Plaintiffs essentially ask the Court to only entertain their view of the Core Rights, which is uniquely shaped to further the interests of non-trading lessors who have sold the majority of their CMEG Class A shares. Yet the Corporate Members, like all putative class members, are Class B Members. They are parties to the same CMEG and CBOT Charters. They are protected by the same Core Rights, and they too enjoy the right to vote before CMEG or CBOT can make commercial decisions that would change or adversely affect those Core Rights. What is more, the Plaintiffs ask the Court to make findings regarding the Core Rights that will directly and negatively impact the excluded Corporate Members' operations. (Pl. Mem. at 9) (asserting that the Corporate Members benefit from Defendants' alleged breaches).

Plaintiffs assert that excluding the Corporate Members decreases the class size by roughly 19%. (Pl. Mem. at 8–9.) But this is a gross underestimation. By excluding Corporate Members from their class, Plaintiffs actually exclude 46% of the CMEG Class B shares (including 59% of the B-1 shares) and 33% of the CBOT Class B memberships (including 48% of the B-1 memberships).[28] Those are just the headcounts alone. Because the respective Charters

[28] The full divisional breakdown of the excluded CME Class B shares is as follows: 59% of B-1s, 55% of B-2s, 34% of B-3s, and 44% of B-4s. Krewer Decl. at DA-6–7, ¶ 13. The full divisional breakdown of the excluded CBOT Class B memberships is as follows: 48% of B-1s, 41% of B-2s, 5% of B-3s, 16% of B-4s, and 12% of B-

allocate weighted voting rights among the series of Class B shares,[29] this translates to the exclusion of 53% of the voting power on CMEG Core Rights issues, and 47% of the voting power on CBOT Core Rights issues. If B shares that are assigned to Corporate Members are also excluded (as they likely should be since many individual owners of Corporate Members own B shares in their own names, but assign them to their affiliated Corporate Members), Plaintiffs exclude 50% of CMEG Class B Shares (68% of B-1s), and 34% of CBOT Class B Memberships (51% of B-1s).[30]

As the Court presaged during discovery, Plaintiffs most assuredly do not represent a class of all Class B Members; they represent a vocal subset "who feel they got slighted." DA-403–04 (The Court: "Who is your class going to be? Are we now picking and choosing Class B members? . . . The ones that feel like they got slighted versus the ones who are getting a good deal? . . . How is this going to be a class?"). Allowing such a Class to control litigation that seeks to define both the Class Members' rights and the rights of parties intentionally excluded from the

5s. *Id*. at DA-12, ¶ 27. Notably, these CME and CBOT figures only reflect those B shares owned by Corporate Members actively utilizing the seats to satisfy membership requirements as of November 22, 2019.

[29] When voting on Core Rights issues, owners of CME B-1 shares are entitled to six votes per share; owners of CME B-2 shares are entitled to two votes per share; owners of CME B-3 shares are entitled to one vote per share; and owners of CME B-4 shares are entitled to one-sixth of a vote per each share. (Compl., Ex. 1) (CMEG Charter at 4.B.2.1.b). In votes affecting CBOT B members special voting rights owners of B-1 memberships are entitled to six votes per share; owners of B-2 memberships are entitled to one vote per share; and owners of B-3, B-4, and B-5 memberships are not entitled to vote. (*Id.*, Ex. 2) (CBOT Charter at IV.C.D.2.B.).

[30] Accounting for assignments, Plaintiffs exclude 60% of the voting power on CME Core Rights issues, and 50% of the voting power on CBOT Core Rights issues. Krewer Decl., DA-8, *id.* at DA-14. There are other Class B shares associated with Corporate Members that also should be excluded from the Class. For example, a number of former Corporate Members who no longer have membership status still own B shares but either lease them out to individuals or other Corporate Members, or do not use them at all. There are other B shares owned by active Corporate Members that are in excess of the number needed to meet Exchange requirements and those are leased to other individuals or entities. *Id.* at DA-8, ¶ 18; *id.* at DA-15, ¶ 32. In addition, a number of B shares were owned by business entities as of November 22, 2019 that have since become Corporate Members. These numbers also do not reflect the B shares owned by officers, employees, or directors of CME, CBOT, or CMEG.

case and to obtain forward-looking equitable relief that fits their unique interests would not accomplish the "ends of equity and justice that class actions seek to obtain." *Clark v. TAP Pharm. Prods., Inc.*, 343 Ill. App. 3d 538, 552 (2003) (explaining the factors that a court focuses on when determining if a class action meets the "appropriateness" prong).[31]

In fact, Plaintiffs' claims for broad prospective relief exposes a fatal flaw to Plaintiffs' Motion for Class Certification: Plaintiffs seek to exclude necessary parties. Under Illinois law, a court cannot proceed to a decision on the merits in the absence of all necessary parties. *Howerton v. Prudential Ins. Co. of Am.*, 2012 IL App (1st) 110154, ¶ 35. Individuals are necessary parties when they have a protectable interest that would be materially affected by a judgment or when their presence in a suit would "enable the court to make a complete determination of the controversy." *Soc'y of Mount Carmel v. Nat'l Ben Franklin Ins. Co. of Ill.*, 268 Ill. App. 3d 655, 661 (1st Dist. 1994) (quoting *Brumley v. Touche, Ross & Co.*, 123 Ill. App. 3d 636, 644 (Ill. App. 1984)). In declaratory judgment suits or contract-based claims, courts have recognized the importance of assuring all necessary parties are present. *Id.*; *see, e.g. City of Evanston v. Reg'l Transp. Auth.*, 209 Ill. App. 3d 447, 456 (1st Dist. 1991) (holding property owner is necessary party in suit for declaratory judgment that transfer of title was void and prohibiting certain uses of the property); *Midwest Television, Inc. v. Champaign-Urbana Commc'n, Inc.*, 37 Ill. App. 3d 926, 932 (4th Dist. 1976) ("The parties to the contract which is sought to be declared null and

[31] Defendants recognize that there is case law in Illinois that implies that where a proponent is able to establish the first three requirements for a class action under 735 ILCS 5/2-801, the fourth prong requiring appropriateness will also be satisfied. *See, e.g., Gordon v. Boden*, 224 Ill. App. 3d 195 (1st Dist. 1991). But that cannot be the case — as the Supreme Court has found, the legislature would not adopt a meaningless requirement. *People v. Lloyd*, 2013 IL 113510, ¶ 25 ("This court has repeatedly held that statutes should be read as a whole and construed so that no part is rendered meaningless or superfluous."). If there ever were a case where a class action is not the appropriate method for the fair and efficient adjudication of a controversy, this is it.

void would be indispensable parties because such a determination would obviously affect the rights of all contracting persons.").

Here, the excluded Class B Members are necessary parties because the Plaintiffs seek declaratory and injunctive relief that Plaintiffs assert may harm the excluded Members' interests. Moreover, the Court cannot completely determine the relevant rights of all Class B Members by reference to the distorted perception of a vocal, dissatisfied minority. Without these excluded Class B Members, the Class should not prosecute these claim**s.**

3. Plaintiffs Have Failed to Show that a Damages Class Is Proper

Plaintiffs have similarly failed to show that a damages class is certifiable. As an initial matter, Plaintiffs do not allege personal claims upon which they can recover individual damages. *See, e.g., In re Sunstates Corp. Shareholder Litig.*, 2001 WL 432447, at *3 (explaining that a claim involving a security can be either personal, for example, breach of the right to receive payment of a lawfully declared dividend, or direct, where a wrong is not to the stockholders individually but to a provision of the corporate charter designed to protect preferences of the share). Here, not a single Plaintiff asserts that he has paid more than a non-member to execute an in-division trade, and not a single Plaintiff asserts that he has paid to co-locate and connect to Globex from what Plaintiffs refer to as the "new" trading floor. DA-279–80, 284 **(**Goldberg: has never attempted to co-locate at ADC or paid fees that violate his core rights); *see also* DA-370; DA-425–26, 429; DA-304. Instead, Plaintiffs assert that Defendants' actions have harmed the value of the B share, and Plaintiffs seek to be compensated for that harm. (*See Declaration of Jonathan Arnold*, Ex. 1 to Pl. Mem. ("Arnold Decl.").)

Plaintiffs' theory of damages fails to acknowledge that current Class B Members — who are the only persons with standing to bring breach of Charter claims — have not suffered a financial loss based on a depressed B share value because they have not sold their shares at an

improperly low price. An award of injunctive relief requiring compliance with the Core Rights or the opportunity to exercise voting rights would return these Class members to the status quo ante, and therefore, correct any de-valuation of the B shares caused by the alleged breaches, thus making it the only proper form of relief. Indeed, the Delaware Chancery Court has recognized that breach of charter claims are best remedied through injunctive relief, reasoning:

> [I]t is not readily apparent that a claim by a class of shareholders stockholders about the corporation's [actions] in other shares allegedly in violation of the corporation's charter gives rise to a separate right to damages belonging to the individual members of that class. The wrong is not to the stockholders individually but to a provision of the corporate charter designed to protect the contractual dividend preference of the shares. Thus, a suit for violation of such a protective charter provision is one to enforce obedience to the charter in order to protect the contractual preference, and the remedy is more apt to take the form of a declaration of rights and an order restoring the status quo ante than an award of money damages.

In re Sunstates Corp. S'holder Litig., 2001 WL 432447, at *3.

Unfortunately, the Plaintiffs here do not seem to be truly interested in ensuring that CMEG and CBOT are in compliance with their Charters and are honoring all Class B Members' rights. Instead, they want their particular sub-group of Class B Members to receive valuation damages, similar to how a class of select shareholders in an opt-out FRCP 23(b)(3) class for securities fraud can recover *personal* damages based on their *personal* claims under Rule 10b-5 of the federal securities laws. *See, e.g.*, *Activision Blizzard*, 124 A.3d at 1056 (explaining that, unlike a direct Delaware corporate claim, a Rule 10b-5 claim is a personal claim that is akin to a tort claim in fraud: it is not a property right associated with the shares and does not travel with the shares). But because Plaintiffs have not alleged any personal claims or personal damages in this action, they cannot proceed as a damages class. They have only alleged direct, Delaware corporate law claims. And those claims affect each and every outstanding Class B share. For that very reason, whereas the "personal nature of federal securities claims manifests itself in the fact

that class certification generally must be obtained as a damages class under Rule 23(b)(3) . . . . Delaware corporate law claims that are tied to the shares themselves, they are certified under Rule 23(b)(1) and 23(b)(2)." *Id.*

Consideration of what would happen if the Court granted valuation damages to this group of Plaintiffs demonstrates why it is not a proper damages methodology. First, if the Court granted both valuation damages and injunctive relief, the Plaintiffs would receive a double recovery. Not only would they receive monetary damages from the Exchanges for the alleged diminution in the value of their B shares, but the Exchanges would also be required to modify their actions to return the Class B Members to the status quo before breach, which in turn would return the value of the Class B shares to the but-for breach level. To solve for this, Plaintiffs may argue that they should be entitled to elect the remedy they receive in the event the Court finds liability. But as a practical matter, that simply would not work here where the harm is to all Class B shares and not just those held by the Class.

If the Court granted only valuation damages to the Class as defined, then the Exchanges would be exposed to a bevy of future litigation regardless of whether they voluntarily chose to amend their practices consistent with the Court's determination as to the meaning of the Core Rights. If B share values continue to decline, the Exchanges could be subject to various suits including claims brought by (1) these very same class B shareholders to recover any further alleged diminution in value of their B shares and (2) future B share owners or excluded class members to recover any alleged diminution in the value of their B shares. They may also be subject to suit from the excluded Class B Members who may argue that the Exchanges' policies violate their Core Rights. In all of these scenarios, the Exchanges would be subject to the possibility of future conflicting court rulings regarding the proper interpretation of the Core

Rights. This is the very reason why class actions that assert Delaware corporate law claims are generally certified as mandatory class actions applicable to all shareholders. *Activision Blizzard*, 124 A.3d at 1056.

Even if it were legally permissible for Plaintiffs to pursue valuation-based direct damages for just a subgroup of Class B shareholders, Plaintiffs have failed to show that there is a valid class-wide damages model that can actually measure damages caused by the alleged breaches. Plaintiffs claim that this is not actually necessary under Illinois law, but the very case Plaintiffs rely upon for the proposition that a common methodology is not required, *Bueker v. Madison County*, found that it was an abuse of discretion for the circuit court to certify a class as to damages when the plaintiffs failed to demonstrate that "individual damages are calculable on a class-wide basis." 2016 IL App (5th) 150282, ¶ 35. Federal courts have similarly refused to certify classes when plaintiffs did not offer a common damages methodology. *See, e.g., Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003) ("Class treatment, however, may not be suitable where the calculation of damages is not susceptible to a mathematical or formulaic calculation, or where the formula by which the parties propose to calculate individual damages is clearly inadequate."); *Opperman v. Kong Techs., Inc.*, No. 13-CV-00453-JST, 2017 WL 3149295, at *10 (N.D. Cal. July 25, 2017) ("At the class certification stage, Plaintiffs must show that damages can feasibly and efficiently be calculated once the common liability questions are adjudicated." (internal citations and quotations omitted)).

Plaintiffs argue here that damages can be proven on a class-wide basis by relying on an economist, Dr. Jonathan Arnold, who opines that, *if asked to do so*, he believes he could calculate class-wide damages showing the diminution in value of B Shares under either a "hypothetical negotiation" model or a statistical regression model. (Pl. Mem. at 20); (Arnold Decl., ¶¶ 29–49.)

But Arnold's "expert report" does nothing more than describe two damages methodologies, one of which is not an econometric method at all but just an exercise in guesswork, DA-455, and the other based on the idea of a regression analysis.

Dr. Arnold admitted at his deposition that his opinion is not based on any analysis or calculations. *See, e.g.*, DA-451–52 (Arnold: "maybe the lawyers can stipulate with one another that this is not a damages report and I have not undertaken a damages analysis or any of the calculations relating to it."); DA-434. It is based solely on the fact that Arnold has employed the methodologies to assess damages in other cases in the past. *See, e.g.*, DA-434–37 (Arnold: "I don't think I would say that I'm certain of [being able to use a statistical approach to estimate class-wide damages in a way that will be valid and reliable] until I were actually asked to undertake the analysis and reach a conclusion, but I believe that that is an appropriate approach and in the past, I've used such approaches."); 440–41, 448–50, 456. This is not sufficient. *See e.g., Ward v. Apple Inc.*, 784 F. App'x 539, 540–41 (9th Cir. 2019) (mem. op.) (holding expert's testimony that he did not expect "insurmountable difficulty in applying" regression analysis and "a promise of a model to come" were insufficient to certify a damages class); *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) ("[A] party's assurance to the court that it intends or plans to meet [Rule 23's] requirements is insufficient.") (quotation marks and citations omitted); *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 100 F. App'x 296, 299–300 (5th Cir. 2004); *Wiesfeld v. Sun Chem. Corp*., 84 F. App'x 257, 264 (3d Cir. 2004).

(a) The proposed regression analysis is unsupported and speculative

Various federal courts — typically in the securities fraud and employment discrimination context — have examined proposed regression analyses and explained the required steps to perform a valid model. In *Reed Construction Data Inc. v. McGraw-Hill Companies, Inc.*, for example, the Court explained:

> The basic regression method is simple: isolate the effect of one variable (the "independent variable") on another variable (the "dependent variable") by holding all other potentially relevant variables (the "control variables") constant. By controlling for other factors that might influence the dependent variable, one "regresses" the influence of the independent variable on the dependent variable. The number associated with that influence is called a "coefficient."

49 F. Supp. 3d 385, 396 (S.D.N.Y 2014), *aff'd*, 638 F. App'x 43 (3d Cit. 2016). According to Dr. Arnold, if he determines the coefficient, he will then be able to apply it to the "post-breach" period to determine the but-for B-share value in the absence of breach. (Arnold Decl., ¶¶ 43–47.)

While Arnold is clear that the dependent variable in any regression analysis he performs would be the B Share prices or returns, he has made no other determinations to support his claim that he could — if asked — conduct a valid regression model. He has yet to: (1) select an independent variable (stating, instead that "explanatory variables *potentially include* Class A common stock or returns, trading volume, revenues, and earnings") (Arnold Decl., ¶ 44), (2) fully consider or identify factors he may need to control for, and (3) even determine if he would perform separate analyses for each series of Class B Share or just lump the B Shares all together. *See* DA-437–39, 443–44, 447–52. More is required to support a motion for class certification. *See, e.g., Opperman*, 2017 WL 3149295, at *11 (citing related cases); *Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, 2014 WL 2702726, at *20 (N.D. Cal. June 13, 2014) (rejecting regression model because expert "does not provide a clearly defined list of variables, he has not determined whether the data related to any or all of his proposed control variables exists, and he has not determined, or shown how he would determine, which competing and complementary products he would use").

Equally as fatal to Arnold's regression analysis model is that it fails to comport with Plaintiffs' theories of liability. In *Comcast Corp. v. Behrend*, the United States Supreme Court held that a damages model purporting to serve as evidence of damages in a class action must

measure only those damages attributable to plaintiff's theory and "[i]f the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class . . . ." 569 U.S. 27, 35 (2013). Here, Arnold readily admits that his regression analysis could be "applied regardless of whether Plaintiffs can establish liability related to the Trading Floor Claim only, Preferential Fee Claim only, or both claims." (Arnold Decl., ¶ 35.) In other words, the regression analysis would likely determine essentially the same amount of damages *regardless of the underlying theory of liability* or whether there is any liability proven at all. *See* DA-446 (Arnold: "if the Plaintiffs prevail on the trading floor claim, then the — then loading on the misconduct with respect to preferential fees may only add a little bit, if anything, to damages over and above the trading floor claim. But if you didn't have the trading floor claim at all and just — and the Plaintiffs just prevailed on the preferential fee claim they may get something close to that total amount any way."). Such a result — which fails to determine whether a result is just and reasonable or speculative — cannot be accepted.[32] As the U.S. Supreme Court cautioned in *Comcast*, "[u]nder that logic, at the class-certification stage *any* method of measurement is acceptable so long as it can be applied class-wide, no matter how arbitrary the measurements may be." *See Comcast*, 569 U.S. at 35–36. For this reason alone, Arnold's regression analysis model is insufficient to support certification.

(b) The hypothetical negotiation is unsupported and speculative

Dr. Arnold's hypothetical negotiation model fares no better. Instead, as with his regression model, Dr. Arnold opines that he could utilize this model before considering any

[32] At least one federal court has rejected a class certification damages opinion offered by Dr. Arnold for this very reason. In *Phillips v. Ford Motor Company*, the court denied class certification where plaintiffs only evidence of class-wide damages was a report from Dr. Arnold, and that report did not include a damages model consistent with plaintiffs' theory of liability. 14-CV-02989-LHK, 2016 WL 7428810, at *20-22 (N.D. Cal. Dec. 22, 2016) ("after stating what a proper damages model would look like, Dr. Arnold then offers an entirely different model that does not attempt to measure [the relevant variables]," but merely assumes them.).

relevant aspects as to what an actual negotiation between CMEG or CBOT and the Class B Members would look like. DA-456–63. Dr. Arnold has not considered: how the Class B Members would have negotiated with either Defendant, what role the various conflicts of interest among Class B Members would have played (including which facet of membership controlled the weighted vote), whether Defendants could have chosen to negotiate only with the Class B Members with voting rights, whether there would have been one or multiple negotiations, what role CME and CBOT's regulator would have played, what role CMEG's Class A shareholders and members of other Exchanges operated by CMEG[33] would have played, or what other potential alternatives would have been available to Defendants. *Id.*

Arnold also admits that he has never before utilized this damages methodology outside the context of intellectual property litigation and has no recollection of ever applying this type of model in a breach of contract action, a breach of charter action, or a class action of any type. DA-453–55. This is not surprising. Defendants have found only one Delaware court case (and no Illinois cases) that adopted a hypothetical negotiation damages model outside of the intellectual property context: *Fletcher Int'l, Ltd. v. Ion Geophysical Corp.*, C.A. No. 5109-CS, 2013 WL 6327997 (Del. Ch. Dec. 4, 2013) (C. Strine) ("*Fletcher III*").[34] And in that case, the Court adopted it begrudgingly and only after acknowledging that hypothetical negotiations are

[33] Today, CMEG owns and operates four Exchanges: CME, CBOT, NYMEX and COMEX. CMEG acquired NYMEX and COMEX in August 2008. Products from all four Exchanges are traded via Globex. DA-469.

[34] *Fletcher III* was a post-trial damages opinion issued by Chancellor Strine after a prior court had found that a publicly traded corporation breached the consent rights of a preferred stockholder in completing a company-saving transaction, *Fletcher Int'l, Ltd. v. ION Geophysical Corp.*, C.A. No. 5109-CS, 2010 WL 2173-83-8, at *1 (Del. Ch. May 28, 2010) (C. Parsons) (*Fletcher II*"), but refused to grant injunctive relief which would have voided the deal, *Fletcher Int'l, Ltd. v. ION Geophysical Corp.*, C.A. No. 5109-CS, 2010 WL 1223782, at *1, 5 (Del. Ch. March 24, 2010) (C. Parsons) ("*Fletcher I*"). After *Fletcher III*, Delaware courts have acknowledged a hypothetical negotiation as a potential damages model but have hesitated to endorse it.

"admittedly imperfect" and "an exercise in counterfactual historical imagination that is, by its very nature, fraught with uncertainty." *Id.* at *1, 19.

Accordingly, because Arnold has provided no analysis that this theory of damages would result in a non-speculative model, it is equally flawed and cannot serve as a common damages model sufficient to support certification.

4. Common Issues Do Not Predominate

The proposed Class further fails because Plaintiffs cannot demonstrate that common issues predominate with respect to the Class. The crux of the predominance requirement is that if the class representative succeeds on his claim, all other class members will be entitled to recovery. *See Smith v. Ill. Cent. R.R. Co.*, 223 Ill. 2d 441, 449 (2006) ("Satisfaction of section 2-108's predominance requirement necessitates a showing that successful adjudication of the purported class representatives' individual claims will establish a right of recovery in other class members." (internal quotations and citations omitted)). The predominance requirement is "far more demanding" than the commonality requirement of Federal Rule 23(a)(2) and calls for the Court to "look beyond the pleadings" to the "claims, defenses, relevant facts, and applicable substantive law." *Id*. at 448–49. A cursory review of the facts and substantive law reveals that Plaintiffs cannot establish a right to recovery for all members of their proposed Class.

Here, Plaintiffs propose to define one Class of all Class B Members who are not excluded by virtue of being a Corporate Member or an officer, director, or employee of the Exchange. This one-size-fits-all approach does not work. It ignores that (1) the rights guaranteed to CME and CBOT members are governed by different Charters with materially different provisions and (2) there are significant factual and legal distinctions between the classes of membership within both CME and CBOT. *See Avery v. State Farm Mut. Auto Ins. Co.*, 216 Ill.2d 100, 134-35 (2005)

("Where a putative class includes members who are insured under policies that are materially different, the commonality and predominance requirement of section 2-801 cannot be met.").

(a) CMEG and CBOT are governed by different Charters

At a minimum, Plaintiffs' request to certify a single class of both CME and CBOT Class B Members must be rejected. The CMEG and CBOT Class B Members do not all enjoy the same Core Rights at both Exchanges. Rather, the CMEG Class B Members are parties to the CMEG Charter, and the CBOT Class B Members are parties to the CBOT Charter. Those Charters, respectively, grant separate Core Rights to the CMEG and CBOT Class B Members and establishing a breach of one will not necessarily establish a breach of the other. Accordingly, Plaintiffs cannot proceed as a single class. *See Avery*, 216 Ill. 2d at 134-35. Plaintiffs recognize this problem and note that CME-specific and CBOT-specific subclasses may be required. (*See* Pl. Mem. at 10.) But "it [is] the plaintiffs' burden, not the court's to propose subclasses to be certified," and Plaintiffs have failed to seek certification of subclasses. *Schlenz v. Castle*, 132 Ill. App. 3d 993, 1002 (2d Dist. 1985), *aff'd*, 115 Ill. 2d 135 (1986).

(b) Significant distinctions exist between classes of Membership

Plaintiffs have also ignored that there are a number of factual and legal differences that require the Court, at a minimum, to require sub-classes of the various series of Class B Shares. This is because not all series of Class B Shares enjoy the same rights and privileges. For example, although the CBOT Plaintiffs complain that they were deprived of their right to vote on changes to the Core Rights, the CBOT Charter clarifies that only Series B-1 and Series B-2 CBOT members have the right to vote. (*See* Compl., Ex. 2) (CBOT Charter at IV.D.2. b). Thus, of the 3,681 total CBOT memberships, there are 1,412 Series B-3, B-4, and B-5 members who have no right to vote whatsoever. Under Plaintiffs' hypothetical negotiation model, these absent class members would have had zero negotiating power. *See* DA-457.

Further, because each membership class is only entitled to member fees on products that fall within their division of membership, the various incentive programs and fee policy changes that Plaintiffs complain of would not impact all divisions of membership equally. *See* DA-487; *see* DA-510. For instance, Plaintiffs have alleged that Defendants breached their Core Rights to preferential fees by eliminating the e-mini Globex fee cap in 2009. DA-536; (Arnold Decl., ¶ 28.) Even assuming for the sake of argument that Plaintiffs had a Core Right to preferential Globex fees, and that the elimination of the Globex fee cap somehow violated this purported right, neither the CBOT Class B Members, nor the CME Class B-4 Members had the right to trade the e-mini contract at member rates, meaning the fee cap did not apply to their trades. As such, the alleged breach would have had no effect on them. This is not unique to the fee cap: to determine whether any program or change affected the rights of Class B Members, the finder of fact will first need to examine the products affected by each program or policy and then determine which Class B Members had rights to those products.

What is more, Plaintiffs have failed to consider whether the positions that they are taking in this litigation could create conflicts among the different series of Class B memberships. As an example, each of the proposed CME class representatives testified that, if the Aurora Data Center is a trading floor, then the CME Class B Members would only be entitled to trade products assigned to his or her division of membership from within the Data Center. DA-392–93; DA-282–83; DA-363–64; DA-295–96. This is consistent with how the Exchanges operated at the time of their demutualizations: the Class B Members' ability to trade products electronically on Globex and e-cbot from the trading floors was limited to in-division products.[35] Over time, however, this restriction was lifted. In 2008, after the CME/CBOT merger, CME and CBOT

[35] CME Demut. Prosp. at DA-141; DA-548.

determined to allow Members from either Exchange to trade the full slate of products at both Exchanges on Globex from the trading floor, irrespective of whether it was within that Member's division or even at that Member's Exchange. *See* DA-554. Reversing this now would operate to the detriment of the lower divisions of membership. The only way to account for these types of conflicts is to require sub-classes and representatives that can represent both sets of interests.[36]

5. The Class Representatives Do Not Fairly And Adequately Represent Absent Class Members

Plaintiffs' Motion for Class Certification fails for the additional reason that the proposed class representatives do not fairly and adequately represent the absent members of the Class. 735 ILCS 5/2-801(3). "The test to determine the adequacy of representation is whether the interests of those who are parties are the same as those who are not joined." *P.J.'s Concrete Pumping Serv., Inc. v. Nextel W. Corp.*, 345 Ill. App. 3d 992, 1004 (2d Dist. 2004). This requirement prevents intraclass conflicts of interest and ensures that absent class members receive proper, efficient, and appropriate protection throughout the presentation of the claim. *Bueker v. Madison Cty.*, 2016 IL App (5th) 150282, ¶ 40; *see also Slimack v. Country Life Ins. Co.*, 227 Ill. App. 3d 287, 299 (5th Dist. 1992) ("There must be no conflict of interest between the representative and the represented class members.").

When analyzing the adequacy requirement, courts commonly refer to two over-arching touchstones. First, representatives who lack a basic understanding of the facts underlying their claim cannot satisfy the adequacy requirement. *See, e.g.*, *Schlenz v. Castle*, 80 Ill. App. 3d 1131, 1133 (2d Dist. 1980), *aff'd in part, rev'd in part*, 84 Ill. 2d 196 (1981) (holding named plaintiff

[36] This further reflects a problem with the merits of the case: if, as Plaintiffs assert Defendants could take no actions that affected the Class B Members' electronic trading rights without first obtaining a Member vote, CME and CBOT could not have taken the steps to allow Class B Members to trade all products on Globex from the trading floors.

did not provide adequate representation because he was not familiar with the suit). Second, representatives who seek relief antagonistic to the interests of other potential class members likewise cannot satisfy this requirement. *Bueker*, 2016 IL App (5th) 150282, ¶ 40. The class representatives suffer from each of these flaws, and thus, cannot provide adequate representation.

(a) Plaintiffs lack a basic understanding of the facts

The proposed class representatives have, at best, exhibited a tenuous and inconsistent understanding of the manner in which the Exchanges have operated over the past twenty years and the facts underlying their allegations. As asserted in the operative Complaint, the heart of Plaintiffs' Globex Access Claim is that Class B Members are entitled to exclusive access to co-locate and trade at the Aurora Data Center because it is the "new" trading floor of CME and CBOT. This is not because any human or open outcry trading takes place there, but because it provides the BMPA to the match engine where bids and offers are matched. (*See, e.g.*, Compl. ¶¶ 4, 5, 6, 14.) Plaintiffs also assert, that for at least two decades prior to the opening of the Aurora Data Center, the Class B Plaintiffs enjoyed the BMPA to Globex for free. (*Id.* at ¶ 92.)

Despite these allegations, when asked at their depositions, not one of the putative CME class representatives had any personal knowledge regarding where the BMPA to the CME match engine was at the time of CME's demutualization. DA-390–91; DA-348–56 (Langer: admitting he had no personal knowledge of whether CME trading floor had BMPA); *see also* DA-390–91; DA-296–99. Further, the CBOT class representatives testified that, contrary to the allegations in the Complaint, the CBOT members did not have the BMPA to the CBOT match engine from the CBOT trading floor before or at the time of the Demutualization. DA-415–417, 421–22, 427–28 (Petrow: "doubted" that CBOT members on the floor had BMPA at demutualization); DA-281 (Goldberg: did not know whether CBOT members ever had BMPA as a factual matter).

Plaintiffs from each Exchange also lacked factual knowledge — despite Defendants' repeated disclosures both before and during this litigation — regarding the Exchanges' adoption of open access or how access to Globex (or e-cbot) and the location of the match engine changed over time. DA-275, 281 (Goldberg: did not know trading host's location at demutualization and whether CBOT members ever had BMPA) DA-276 (Goldberg: testified falsely that only members could directly access CBOT's electronic trading platform at the time of demutualization); DA-346–47 (Langer: "I'm just getting this thirdhand of how this Globex seems to function"); DA-357–60 (Langer: did not know about LNet, CME's original co-location offering); DA-289 (Yermack: "I don't know when CME moved their match engine."). Because of this, the purported class representatives have different understandings as to when CME and CBOT first breached B share owners' purported Globex Access Core Rights, some of which differ from what Plaintiffs alleged in their Fourth Amended Complaint. *Compare* DA-419–21 (Petrow: allowing non-members direct access to CBOT's electronic trading system before demutualization violated members' "fundamental right") and DA-386–87, 394–95 (Prosi, as board member, approved non-member access to Globex in 2000 even though he now believes it violated the members' core rights), *with* (Compl., ¶ 117.)

Similarly, the purported class representatives do not have any personal, factual knowledge that supports their Fee Claims. The class representatives know of no instances in which a non-member has paid a lower transaction (CBOT) or clearing (CME) fee to trade. DA-398; DA-366; DA-425–26; DA-301. Nor do they agree on when Defendants first breached the Class B Members' alleged fee preferences. *See, e.g.*, DA-396–97 (Prosi: fees breaches began "in the early 2000s to . . . 2008."); DA-418, 423–24, 430–31 (Petrow: multiple trader violations

began in 1990s and continued after demutualization); DA-277–78 (Goldberg: members must approve all changes to fee schedule).

Accordingly, because the proposed class representatives have no personal knowledge or understanding of their claims, or how those claims relate to the manner in which the Exchange has operated since demutualization and open access, they cannot adequately represent the class.

(b) The class representatives do not account for the diverse interests of absent class members

While Plaintiffs portray the similarities shared by the named class representatives as a strength, (Pl. Mem. at 23), their unique and closely aligned interests actually demonstrate their inability to represent the diverse interests of absent class members. At least four categories of absent class members would not be adequately represented by the proposed class representatives: (1) individual Members who actively trade, (2) individual Members who hold a significant number of A shares, (3) B-Share owners not identified as having membership status under a Corporate Membership rule who are nonetheless affiliated with Corporate Members; and (4) individuals who hold a lower series of CME or CBOT Class B Membership.

First, the purported class representatives do not adequately represent Class B Members who engage in any significant level of trading. DA-382–83 (Prosi: he trades on behalf of two customers and hasn't traded on his own behalf in more than a year); DA-331–42 (Langer: "stopped trading period" in the early 1990s); *see also* DA-407–10; DA-291. The trading Class B Members have economic interests that differ materially with those who simply lease out their seats for additional monthly cash payments. As an example, assuming the Plaintiffs could establish a breach of the fee preference and were forced to elect a remedy, the class representatives would likely elect monetary damages whereas trading members may be more interested in injunctive relief that defines the scope of their fee rights into the future.

Second, the purported class representatives do not adequately represent individual Class B Members who hold a significant number of A shares. The Plaintiffs allege that Defendants breached the Core Rights of the Class B Members in order to improperly benefit the Exchanges and the CMEG Class A shareholders, thus pitting the interests of the Class B Members against the equity owners of the Exchanges. Because the proposed class representatives have already enjoyed the profits of selling off the majority of their CMEG Class A shares, they seek relief that is antagonistic to the traditional equity that many absent Class B Members retain. *See, e.g.*, DA-273 (Goldberg: estimating $5 million from A share sales); DA-384–85 (Prosi: has sold 5,991 of 6,000 A shares received at demutualization); DA-292–94 (Yermack: sold 17,900 of his original Class A shares); *see also* DA-343–45, 411–14. In the words of one putative class representative, this lawsuit is designed to "kill the A shares valuation." DA-557; *see also* DA-285–86.

Third, the purported class representatives do not adequately represent B-Share owners not identified as having membership status under a Corporate Membership rule who are who are affiliated with Corporate Members, or are themselves Corporate Members. Plaintiffs excluded all Corporate Members from the proposed Class because the Corporate Members supposedly benefit from Defendants' alleged wrongdoing, and thus, their interests "are not aligned with those of the Class." (Arnold Decl., ¶ 4 n.1); (*see also* Pl. Mem. at 9.) But Plaintiffs fail to recognize that there are other Class B Members, including those who assign their memberships to Corporate Members or who have an ownership interest in a Corporate Member, who share the same adverse interests. Plaintiffs also fail to take into account that there are former, current, and prospective Corporate Members who own B-Shares, but do not utilize them in order to fulfill a Corporate Membership requirement. For instance, there are some B shares that are owned by former Corporate Members who no longer have membership status but either lease them out to

individuals or other Corporate Members, or do not use them at all. There are also B shares owned by active Corporate Members who lease B shares in excess of their membership requirements to other individuals or entities. Finally, there are B shares that were held by business entities that became Corporate Members after November 22, 2019.

Finally, as explained above, because Plaintiffs have taken positions in this litigation that create intra-Class conflicts (namely, with respect to who can trade what products from the alleged "new trading floor"), the proposed class representatives, all of whom own CME or CBOT Class B-1 or B-2 shares, cannot adequately represent Class B Members owning lower series of shares as they have interests that conflict. *See* 735 ILCS 5/2-802(b) (stating that "each sub-class [be] treated as a class"); *see also Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (requiring adequate representation for subclasses).

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs' Motion for Class Certification, for Appointment of Class Representatives, and for Appointment of Susman Godfrey LLP as Class Counsel.

Dated: September 14, 2020
Chicago, Illinois

Respectfully submitted,

Skadden, Arps, Slate, Meagher & Flom LLP

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CERTIFICATE OF SERVICE

I certify that on September 14, 2020, I electronically filed a true and correct copy of the foregoing Opposition to Plaintiffs' Motion for Class Certification, for Appointment of Class Representatives, and for Appointment of Susman Godfrey LLP as Class Counsel with the Clerk of the Court, and that I also served a true and correct copy of the foregoing Opposition 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: September 14, 2020

/s/ Marcella Lape
Marcella Lape