

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

SHELDON LANGER, RONALD M.)
YERMACK, LANCE R. GOLDBERG,)
ROBERT PROSI and GERALD PETROW,)
individually and on behalf of themselves and all)
others similarly situated,)

Plaintiffs,)

v.)

CME GROUP, INC., a Delaware Corporation;)
THE BOARD OF TRADE OF THE CITY OF)
CHICAGO, INC., a Delaware Corporation,)

Defendants.)

No. 2014 CH 00829

Calendar 6

Hon. Celia G. Gamrath, Presiding

**DEFENDANTS' RESPONSE TO QUESTIONS
REGARDING THE PROPOSED CLASS NOTICE**

Defendants CME Group Inc. ("CMEG") and The Board of Trade of the City of Chicago, Inc. ("CBOT") (collectively, "Defendants"), respectfully provide the Court with notice of Defendants' responses to the questions posed by the Court at the May 5, 2022 status hearing related to the Class Notice Plan.

1. On May 5, 2022, the parties appeared at a status conference on Plaintiffs' Unopposed Motion for Approval of Notice Plan. During the conference, the Court raised a number of concerns regarding the opt-out period for subsequent purchasers of Class B Memberships and the apparent ability of owners of Class B Memberships to opt in and out of the Classes during the pendency of the lawsuit by purchasing, selling, or trading Class B Memberships.

2. Following the conference, the parties met and conferred to discuss these issues. Plaintiffs expressed their view that an opt out period for future purchasers was not necessary and

FILED DATE: 5/16/2022 8:57 AM 2014CH00829

proposed to eliminate that right from the notice plan. Plaintiffs further explained that they did not believe any action needed to be taken to address concerns related to the trading or exchanging of rights. Defendants have a different view on these points and therefore submit these observations in the hope of a more productive discussion with the Court.

3. First, Defendants believe that 735 ILCS 5/2-804(b) requires that subsequent acquirors of Class B Memberships must have an opportunity to opt out of the Class. The statute states:

Exclusion. Any class member seeking to be excluded from a class action may request such exclusion and any judgment entered in the action shall not apply to persons who properly request to be excluded.

(735 ILCS 5/2-804(b).)

4. This case, unlike many class actions, presents the somewhat unique feature that the claims being advanced are “direct” claims that are inherent in the Class B Membership itself, as opposed to the “personal” claims that might accrue to a particular shareholder over time. (*See* Defs.’ Opposition to Class Certification at 14-15, 20-21.) After Defendants identified that Plaintiffs appeared to be pursuing direct claims, Plaintiffs agreed and advocated for classes consisting only of then-current owners of Class B Memberships. (*See* Plfs.’ Reply in Support of Motion for Class Certification at 2.)¹ Accordingly, under Delaware law, the claims Plaintiffs

¹ As the Defendants have explained, Plaintiffs’ framing of the particular direct claims in this case and their attempt to cast them as giving rise to monetary “damages” is, in Defendants’ view, a distortion. In contrast to the way Plaintiffs appear to be proceeding, an owner of a Class B Membership could assert claims of a personal nature, for example, by claiming damages from co-location fees they paid that they allege the Defendants improperly charged, or trading fees they paid that they contend were too high by virtue of their alleged fee preferences. During the May 5 hearing, the Court noted that its class certification order is interlocutory: Whether the Plaintiffs’ formulation of the direct claims in this case and the damages model they ultimately put forward to support those claims are proper or should proceed as a class action are matters that Defendants have reserved the right to contest in further proceedings.

advance in this case do not represent a divisible property right that can be severed from the Class B Membership.

5. Defendants have been unable to locate case law that discusses the application of 735 ILCS 5/2-804(b) to persons who are not class members at the time of certification of a class, but who become class members subsequently through purchase or otherwise. Especially in the context of a case involving “direct” claims, when the rights being advanced are not severable from the security (and thus cannot be conditioned by the prior owner following a transfer), this lack of case law leaves the Court to wrestle with the statutory language. Defendants believe that the better reading is that in this circumstance the new owner, who steps into all of the rights of the Class B Membership, needs to have an opt out opportunity.

6. As to the Court’s questions regarding the potential for individuals to engage in transactions designed to leave, enter, or split their participation in the Classes over time, Defendants believe that such behavior should and can be conditioned, as described further below.

7. Defendants believe that, theoretically, there are two ways to address the potential problems that both the opt-out right and trading concerns may create. The first is an “Opt-Out Option” where all persons who later become class members through a subsequent purchase or transfer of a Class B Membership would receive notice of the Action and a limited period of time in which they can opt out of the Class. To guard against current owners engaging in later-in-time transactions that would modify their opt out decisions, Defendants believe that an owner of one or more Class B Memberships as of the opt-out deadline should be required to make a uniform decision with respect to all Class B Memberships owned as of that date and in the future. An owner would make an election and be bound to it regardless of future sales or purchases.

8. While this would preserve the Classes as currently defined, Defendants believe it would be nearly impossible to administer given that not all owners of Class B Memberships are included in the Classes and therefore not all sales or transfers will result in new class members.

9. Defendants thus believe that the more practical solution is the second option or the “Date Certain Option.” In the Date Certain Option, the class definition would be modified slightly so that the definition of “current owners” no longer includes those owners’ “transferees, assignees, heirs and successors, who are otherwise eligible for inclusion in the Classes, and who own the Class B Membership at the time of judgment.” Instead, the Classes would consist only of current owners of Class B Memberships in CME and CBOT, in all membership divisions, with current owners defined as the owners as of thirty days after issuance of the notice.

10. All potential members of the Classes would have one opt out opportunity, which election would be binding on an individual. The right to any recovery would continue to require that the class members own the Class B Membership at the time of judgment. As to a subsequent owner, this case would not affect their rights at all, and they would be free to pursue their claims in the future.

11. The Date Certain Option would provide for certainty as to the makeup of the Classes (subject to persons voluntarily leaving the Classes by selling their Class B Memberships), eliminate any concerns regarding compliance with 735 ILCS 5\2-804(b), and prevent the insider baseball concerns that the Court highlighted at the May 5, 2022 status conference.

* * * *

Defendants look forward to further discussing these issues at the May 16, 2022 status conference.

Dated: May 16, 2022
Chicago, Illinois

Respectfully submitted,

Skadden, Arps, Slate, Meagher & Flom LLP

/s/ Marcella L. Lape

Albert L. Hogan III

Marcella L. Lape

155 North Wacker Drive

Chicago, Illinois 60606

albert.hogan@skadden.com

marcella.lape@skadden.com

Firm ID No.: 91729

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that on May 16, 2022, I electronically filed a true and correct copy of the foregoing with the Clerk of the Court, and that I also served a true and correct copy of the foregoing Motion by electronic mail and Odyssey eFile IL on the following counsel:

Stephen E. Morrissey
Parker C. Folse
Susman Godfrey LLP
1201 3rd Ave., Suite 3800
Seattle, WA 98101
(206) 446-1199
smorrissey@susmangodfrey.com
pfolse@susmangodfrey.com

Robert S. Safi
Susman Godfrey LLP
1000 Louisiana, Suite 5100
Houston, TX 77002
(713) 651-9366
rsafi@susmangodfrey.com

Mark Hatch-Miller
Nick Carullo
Susman Godfrey LLP
560 Lexington Avenue, 15th Floor
New York, NY 10022-6828
(212) 336-8332
Mhatch-miller@susmangodfrey.com

Suyash Agrawal
Massey & Gail LLP
50 E. Washington Street, Suite 400
Chicago, IL 60602
(312) 283-1590
sagrawal@masseygail.com

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

Dated: May 16, 2022

/s/ Marcella L. Lape
Marcella L. Lape