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.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY OF DR. JONATHAN ARNOLD

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Defendants CME Group, Inc. ("CMEG") and Board of Trade of the City of Chicago, Inc. ("CBOT") (together, "Defendants") respectfully move this court for an order striking the reports, opinions, and testimony of Plaintiffs' damages expert, Dr. Jonathan I. Arnold, and ruling as inadmissible Dr. Arnold's opinions. As set forth below, Dr. Arnold's reports, opinions, and testimony amount to nothing more than rank speculation and conjecture, are untethered to the facts of the case, inconsistent with this Court's prior orders, and contrary to the methodologies that he previously endorsed for the purpose of seeking and obtaining class certification.

I. INTRODUCTION

Plaintiffs seek to offer the testimony of Dr. Arnold to support a damages assessment on their Globex Claims[1] of nearly $1.5 billion and counting. As this Court will recall, Dr. Arnold first appeared in this case when he submitted a declaration in support of class certification, opining that—if asked to perform an analysis—he believed with a reasonable degree of certainty that he could assess damages on a class-wide basis for both the Globex Claims and Fee Claims using one of two "common and reliable methodologies[:]" (1) a regression analysis that would measure the direct loss in value of the Class B shares caused by Defendants' breaches, or (2) a hypothetical negotiation that would measure the amount the Class B members would have demanded that Defendants pay to modify members' Core Rights. (Nov. 21, 2019 Expert Declaration of Jonathan I. Arnold, Ph. D ("Ex. 1") ¶¶ 6, 29-30).

But when the time came for actual analysis, he backtracked. In Dr. Arnold's July 14, 2023 Expert Report, the regression analysis or hypothetical negotiation that Dr. Arnold promised were nowhere to be found. (*See* Jul. 14, 2023 Expert Report of Dr. Jonathan I. Arnold, Ph. D

[1] Plaintiffs allege that Defendants have made a series of decisions regarding access to the Globex electronic trading platform (the "Globex Claims") and changes to their fee policies (the "Fee Claims") that violated the CMEG and CBOT Core Rights and caused damage to the value of their B shares.

(“Ex. 2”).) Nor did Dr. Arnold assess damages at all based on the Plaintiffs’ Fee Claims. Instead, he now purports to determine “Plaintiffs’ economic loss from the deprivation of their exclusivity rights in the ADC trading floor” with a two-part approach in which he (1) identifies one allegedly comparable transaction (the “NYMEX Transaction”) by doing nothing more than reviewing a set of bylaws, and then (2) goes beyond the NYMEX Transaction and conducts a separate math exercise following an instruction from counsel. (*Id*. ¶¶ 15, 17.)

Applying this approach, he concludes that ***had*** CMEG “negotiate[d] an agreement with Class B members to proceed with its plans to develop and operate the ADC[,]” it “***could have*** been achieved” through providing the Class B members with (1) a revenue share of 10 percent of total CME and CBOT trading fees associated with trading activity at the ADC (the “Foregone Trading Fees”), and (2) 100 percent of all CME and CBOT co-location access fees (i.e., disgorgement of the Globex access fees that CME and CBOT have collected) (the “Foregone Access Fees”) (collectively, the “Foregone Fee Damages”). (*Id*.) As to both payment streams, Dr. Arnold also opines that this form of “damages” is not fixed, but continues to accrue, day by day, and will do so up until the resolution of this case. And even thereafter, according to Dr. Arnold, the Class B members would still have the right to exclusive access to the ADC, which the parties could “negotiate a[] buyout [of] in the future.” (Arnold Dep. Tr. (Sept. 13, 2023) (“Ex. 3”) at 158:15-159:8.)

The problem with Dr. Arnold’s opinion is that it has zero methodological rigor and no grounding in the facts. As to the Foregone Trading Fees, Dr. Arnold claims to have performed a comparable uncontrolled transaction (“CUT”) analysis to determine that Class B members would have received a 10% revenue share. (Ex. 2 ¶ 26.) Not only is what Dr. Arnold did a far cry from an accepted CUT analysis, but the single comparable he applies—the NYMEX Transaction—

bears no resemblance to the circumstances of the supposed negotiation Dr. Arnold envisions.

Dr. Arnold's inclusion of Foregone Access Fees in his damages calculation is equally flawed. Dr. Arnold does not support this portion of his damages figure with a comparable transaction, admitting that he instead summed up all of the fees that both non-members and members paid to co-locate and connect to Globex from the ADC because Plaintiffs' counsel told him to do so. (Ex. 3 at 130:11-13; 130:22-131:6.) He then apportioned that amount out to all Class B members even though the Court had already dismissed Plaintiffs' claim for revenue sharing and equitable disgorgement of Globex access fees and even though it produced the absurd result of Class B members (excluded from this case), who under Plaintiffs' theory should, like Plaintiffs, have free access to the co-location facility, paying access fees to other Class B members (Plaintiffs in this case) who did not pay to co-locate.

As Dr. Arnold's Expert Report and deposition testimony reveal, his opinions fail to follow any generally accepted methodology and are untethered to the fact of this case. Instead, it appears that Dr. Arnold simply designed his approach to meet Plaintiffs' desired outcome: to put a gigantic damages number in front of a jury.[2] But because he gets to that number with nothing more than instruction from counsel, rank speculation, and conjecture, Dr. Arnold's reports, opinions, and testimony must be excluded in full.

[2] Dr. Arnold foreshadowed his inability to support his massive damages figure with true economic analysis in his deposition prior to class certification. There, Dr. Arnold testified that the total damages number could be the same regardless of whether Plaintiffs could prevail on the Globex Claims, the Fee Claims, or both. *See* Arnold Dep. Tr. (Aug. 19, 2020) ("Ex. 4") at 64:18-65:25 (opining that, "if the Plaintiffs prevail on the trading floor claim . . . 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 anyway").

II. LEGAL STANDARDS

The admissibility of expert evidence in Illinois is governed by Rule of Evidence 702, which provides the following standard, known as the *Frye* test, *see Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923):

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs.

Ill. R. Evid. 702.

Before such evidence is admissible, the proponent of expert testimony must demonstrate general acceptance of the methodology they used to formulate their opinion. *See Kane v. Motorola, Inc.*, 335 Ill. App. 3d 214, 220 (1st Dist. 2002), *as modified on denial of reh'g* (Nov. 27, 2002) (citing *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 199 Ill. 2d 63, 76-77 (2002)). Accordingly, an opinion should be excluded if it is "speculative" or "lack[s] support in the relevant scientific literature." *Durbin v. Ill. Workers' Comp. Comm'n*, 2016 IL App (4th) 150088WC, ¶ 39. And an expert's reliance on a particular methodology must be reasonable. *In re Commitment of Simons*, 213 Ill. 2d 523, 530 (2004).

The proponent of expert testimony must lay a proper foundation for the testimony. *Johnson v. Johnson*, 386 Ill. App. 3d 522, 545 (Ill. App. Ct. 2008). To lay an adequate foundation, it must be shown that the information on which the expert bases his opinion is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject." *People v. Simmons*, 2016 IL App (1st) 131300, ¶ 115 (quoting Ill. R. Evid. 703). Testimony based on "guess, speculation, or conjecture" lacks foundation and is therefore

inadmissible. *Johnson*, 386 Ill. App. 3d at 545; *see also Freeman v. Crays*, 2018 IL App (2d) 170169, ¶ 18 (if an expert's opinion is "based on varying or uncertain factors to the extent that the expert is required to guess or surmise, the opinion should be barred as speculative and unreliable").

The Court should exclude Dr. Arnold's opinions because they fail under these standards.

III. ARGUMENT

Dr. Arnold does not attempt a regression or any other method that could directly measure actual damages. (Ex. 3 at 9:9-10:15.) Nor does he perform a hypothetical negotiation. (*Id.* at 45:8-11.) As Dr. Arnold acknowledged in 2020, the "starting point" of a hypothetical analysis is a computation of "the maximum willingness to pay and the minimum charge that the Class Bs would demand." (Ex. 4 at 107:22-108:7.) Dr. Arnold's analysis here, however, contains "no hypothetical, no negotiation, no bargaining range, and no consideration of bargaining power"—all of which are essential elements of a hypothetical negotiation. (Oct. 24, 2023 Expert Report of Dr. Jeffrey T. Prince ("Ex. 5") ¶¶ 13, 25; Ex. 3 at 51:14-52:14, 52:22-53:8, 54:5-9.)

Instead, Dr. Arnold purports to value the "exclusivity right to trade at the ADC" using two steps. First, Dr. Arnold simply lifts a 10% revenue share from an unrelated transaction—which he claims "stand[s] in for a hypothetical negotiation"—and then uses CME revenues to value and apportion it to the class. (Ex. 3 at 46:12-13.) Second, on top of the revenue share, he inflates the total damages estimate by adding up all the fees that market participants paid to co-locate and access Globex from the ADC, and again apportions them out to the class. For this "analysis" to be admissible, Dr. Arnold must show it is grounded in a valid and reliable economic methodology and comports with the facts of the case. Remarkably, and as explained in detail below, Dr. Arnold does not even try to meet either of these standards.

A. Dr. Arnold's Calculations Are Not Supported by Any Generally Accepted or Reliable Methodology

1. Dr. Arnold Fails to Ground His Assessment of Foregone Trading Fees in a Generally Accepted Methodology

Dr. Arnold purports to calculate the first half of his damages analysis—Foregone Trading Fees—through the use of a "comparable uncontrolled transaction" analysis or CUT analysis. (Ex. 2 ¶ 26). A CUT analysis is generally used to "evaluate[] whether the amount charged for a controlled transfer of intangible property was arm's length by reference to the amount charged in a comparable uncontrolled transaction." *Medtronic, Inc. & Consol. Subsidiaries v. Comm'r of Internal Revenue*, 900 F.3d 610, 613–14 (8th Cir. 2018) (citing 26 C.F.R. § 1.482-4(c)). Elsewhere, Dr. Arnold describes his methodology as a "comparable transaction approach," but he ultimately clarifies that he undertakes an analysis to value the exclusivity right to the ADC in a manner "similar to what is typically used in . . . patent and intellectual property cases." (Dec. 7, 2023 Rebuttal Report of Jonathan I. Arnold ("Ex. 6") ¶ 3.)[3]

To be acceptable, an evaluation of comparability in the IP or patent context must include an analysis of "relevant functions, contract terms, risks, economic conditions, and property or services." *Id.* (citing 26 C.F.R. § 1.482-1(d)(1)). Courts have stressed that a proper CUT "***requires analysis*** of all of the factors that affect comparability." *Medtronic*, 900 F.3d at 616 (Shepherd, J., concurring) (quoting 26 C.F.R. § 1.482-1(d)(1)) (emphasis in original); *see also id.* (noting that "[c]ourts assessing damages in patent cases find these factors decisive as well"). "[A]lleging a loose or vague comparability between different technologies or licenses does not suffice." *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 79 (Fed. Cir. 2012). Where

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[3] A "comparable transactions analysis" is also a method of estimating damages in appraisal disputes. *See In re United States Cellular Operating Co.*, No. CIV. A 18696-NC, 2005 WL 43994, at *17 (Del. Ch. Jan. 6, 2005) ("A comparable transactions analysis requires finding similar transactions, quantifying those transactions through financial metrics, and applying those metrics to the company at issue in order to arrive at a value.").

an expert fails to satisfy his "burden to demonstrate a 'minimum threshold' of comparability with respect to technology, economic terms, and time period[,]" expert testimony relying on comparable transactions must be excluded. *Ravo v. Covidien LP*, 55 F. Supp. 3d 766, 779 (W.D. Pa. 2014) (quoting *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1315 (Fed. Cir. 2014), *overruled on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015)). As emphasized in the ***only*** academic source Dr. Arnold cites, the use of non-identical comparable transactions is appropriate only if "there are only minor differences that have a definite and reasonably ascertainable effect on price and for which appropriate adjustments are made." (R. F. Reilly, & R. P. Schweihs, *The Handbook of Business Valuation and Intellectual Property Analysis* (McGraw Hill 2004) ("Ex. 7") at 510.)

This type of methodology requires such rigor because estimating what parties would have agreed to in an alternate history "is an exercise in counterfactual historical imagination that is, by its very nature, fraught with uncertainty." *Fletcher Int'l, Ltd. v. Ion Geophysical Corp.*, No. CV 5109-CS, 2013 WL 6327997, at *19 (Del. Ch. Dec. 4, 2013). "Determining a fair and reasonable royalty is . . . a difficult judicial chore, seeming often to involve more the talents of a conjurer than those of a judge." *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010) (quoting *Fromson v. Western Litho Plate & Supply Co.,* 853 F.2d 1568, 1574 (Fed. Cir. 1988)). Courts only permit such inherently uncertain estimates in limited circumstances when they are supported by a proper analysis. *See Fletcher*, 2013 WL 6327997, at *19.

(a) Dr. Arnold Does Not Apply a Proper "CUT" or "Comparable Transaction" Analysis

Dr. Arnold's Expert Report and deposition testimony show that what Dr. Arnold did here does not come close to what is required. He asserts that, through research, he found one "comparable transaction"—a provision in the NYMEX Bylaws from the time period before

CME acquired NYMEX—that he can use to assess damages. (Ex. 2 ¶ 29.) He writes:

> Before [CME acquired NYMEX], NYMEX [] members were entitled to revenue sharing rights when products were shifted from the open outcry to electronic trading. The NYMEX Bylaws stated that NYMEX [] members were entitled to receive 10 percent of relevant revenues. I understand that CME Class B shareholders possess rights similar to the NYMEX Class A shareholders. In my opinion, it is therefore appropriate to treat the two transactions as comparable and, consequently, that it is reasonable to attribute to the Class B shareholders 10 percent of CME's and CBOT's trading fees arising from the ADC trades at issue.

(*Id.* (footnotes omitted).) ***That is the extent of his explanation of his analysis***. That is because he did no analysis. Dr. Arnold did ***nothing*** to understand whether the transactions are comparable. Crucially, he did not even read the Proxy Statement—the document that explains the elements of the NYMEX Transaction and should have been the starting point for any legitimate analysis of comparability. Instead, ***the only thing Dr. Arnold did was read the NYMEX Bylaws themselves***. (Ex. 3 at 83:6-83:10 ("Q: So the only NYMEX document that you recall considering in connection with your analysis is the NYMEX bylaws, correct? A: I believe that is the document that I use, yes."); *see also id.* at 91:15-92:9 (same).)[4] But the Bylaws only codified a subset of the ***results*** of the NYMEX Transaction. They do nothing to explain the substance of the transaction or the relevant underlying negotiations.

And when asked critical questions about the NYMEX Transaction at his deposition, including what NYMEX members gave up in exchange for receiving the right to a 10% revenue share, Dr. Arnold either did not know the answer, or got it wrong ***every single time***. Dr. Arnold's lack of any basic understanding of the NYMEX deal is disqualifying:

> Q: What were the circumstances in which the NYMEX [] members negotiated with NYMEX's management for the ten percent revenue share?
>
> A: My recollection is that the [] NYMEX class A members had the ability to prevent the migration of products from open outcry to electronic trading.

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[4] This is confirmed by the fact that it is the only NYMEX document listed in Dr. Arnold's "Materials Relied Upon." (Ex. 2 at App'x B.)

> And that that was the – the obstacle that was overcome by negotiating a ten percent fee on cross exchange revenues attributable to electronic trading.

(Ex. 3 at 83:3-84:5.) **WRONG.** Had Dr. Arnold taken the time to examine the NYMEX Transaction, he would have learned that NYMEX members negotiated the 10% revenue share in connection with a minority investment in NYMEX made by a private equity firm in advance of NYMEX's initial public offering. (*See* NYMEX, Schedule 14A Definitive Proxy Statement, filed with the SEC February 10, 2006 ("Ex. 8") at 4, 17; *see also* Ex. 5 ¶ 33.)

> Q: In the NYMEX situation, what was the right that the NYMEX members were giving up?
>
> A: My recollection is that the NYMEX [members] were able to prevent NYMEX from implementing electronic trading of various NYMEX division products.

(Ex. 3 at 85:2-7.) **WRONG.** The private equity investment resulted in the NYMEX members giving up 10% of the equity in the exchange and ceding the ability to elect two directors to the private equity firm. In return, the members negotiated for a number of rights, including the right to receive a 10% revenue share of trading fees, on a product-by-product basis, only if NYMEX "terminate[d] permanently all open outcry floor trading for a particular listed product on the NYMEX Division for trading only via electronic trading, or at least 90% of contract volume of such applicable NYMEX Division product is from electronic trading." (Bylaws of New York Mercantile Exchange, filed as Exhibit 3.4 to Form 8-K, filed with the SEC Mar. 17, 2006 ("Ex. 9"), at 18; *see also* Ex. 8 at 3 (Feb. 10, 2006 letter from Chairman M. Steinhause to NYMEX Members explaining terms of private equity investment).) At the same time, members also received blocking rights that prevented NYMEX from suspending or terminating ***open outcry*** trading. For the first five years following the investment, without 75% approval from members, NYMEX could not eliminate, suspend, or restrict open outcry trading under any circumstances.

After five years, NYMEX could only suspend or eliminate open outcry if a product was no longer "liquid." (Ex. 8 at 20.)

While Dr. Arnold at least tried to answer the above questions, for others he just admitted ignorance:

Q: What was the structure of NYMEX at the time of the NYMEX agreement?

A: **I don't have an understanding one way or the other.**

(*Id.* at 88:8-19.)

Q: Do you understand whether the [the commercial context in which the NYMEX negotiation occurred] was in connection with a merger, in connection with a going-public transaction, in connection with a different type of corporate transaction[;] do you have any understanding in what commercial context this negotiation between the NYMEX members and NYMEX management took place?

A. **I don't recall what the macro environment was like at the time as I sit here.**

(*Id.* at 84:11-19.) And the list goes on: Dr. Arnold also admitted that he failed to investigate the relevant economic circumstances of electronic trading at the time of the NYMEX Transaction (*id.* at 89:18-21) or whether NYMEX ever paid its members revenue sharing for products that shifted from open outcry to electronic trading (*id.* at 89:12-17).

The actual answers to these questions—as opposed to the ones Dr. Arnold made up or did not know—reveal that the NYMEX Transaction is not remotely comparable and cannot be properly used in this type of analysis. *See DataQuill Ltd. v. High Tech Comput. Corp.*, 887 F. Supp. 2d 999, 1022 (S.D. Cal. 2011) (expert testimony that "relies on non-comparable licenses in reaching [a] royalty rate should be excluded"). First, whereas the NYMEX Transaction valued the amount that its members would be willing to accept in exchange for giving up 10% of the equity in the exchange shortly before its IPO, Dr. Arnold seeks to value the "exclusivity right to the ADC." Even in the context of a straightforward licensing case (which this case is not), courts

routinely exclude expert testimony where the underlying intangibles are insufficiently comparable. *See, e.g.*, *id.*; *Pelican Int'l, Inc. v. Hobie Cat Co.*, 655 F. Supp. 3d 1002, 1049 (S.D. Cal. 2023) (excluding expert opinion because plaintiff failed to "demonstrate a sufficient 'baseline comparability'" allowing the use of a branding license to estimate reasonable royalty for license to use watercraft technology); *IOENGINE, LLC v. PayPal Holdings, Inc.*, No. 18-cv-452, 2022 WL 2800911, at *6 (D. Del. June 27, 2022) (license related to "*de*cryption services" inadmissible to estimate royalty for "*en*cryption services").

Second, there are key economic differences between the two transactions that Dr. Arnold gave no consideration. For example, the NYMEX revenue share agreement came into existence in 2006—many years before the launch of the ADC in 2012—and at a time when only 5% of NYMEX's total volume traded electronically. (*See* NYMEX Form 10-K, filed with the SEC March 7, 2006, available at https://www.sec.gov/Archives/edgar/data/1105018/ 000119312506047592 /d10k.htm.) This meant that the revenue share was only a ***contingent*** right that would apply on a product-by-product basis and only if NYMEX determined to close an open outcry pit (which it could not do without member approval for at least five years) or if 90% of the total volume of a contract migrated to the electronic trading platform. But Dr. Arnold did not bother to educate himself at all with respect to any of these factors. (Ex. 3 at 89:18-90:7.) Instead, he took what was a ***contingent*** right reflected in the NYMEX Bylaws and converted it to an ***immediate*** and ***absolute*** right for all products at CME and CBOT without any analysis, explanation, or adjustment. Dr. Arnold's failure to even explore whether any "economic differences" existed, let alone perform an analysis with respect to any identified differences, is a further basis for exclusion. *DataQuill*, 887 F. Supp. 2d at 1024 (excluding analysis based on

licenses with different economic structures even where, unlike here, underlying intangibles were comparable).

Third, the group of Class B members with voting rights that would have done the negotiating here—the Class B shareholders of CMEG and the Class B-1 and B-2 members of CBOT[5]—had a host of opposing interests and incentives such that any negotiation in this case would have had an entirely different bargaining dynamic than the NYMEX Transaction. Unlike the homogenous and straightforward incentives that NYMEX members would have had in giving up equity in the exchange, CME and CBOT member incentives would have varied based on many factors, including membership type and whether or not the members actively traded.

Notably, ***corporate members***—which Plaintiffs allege "undeniably benefited from" the way Defendants have operated the ADC (Mem. Op. and Order on Class Cert. ("Ex. 10") at 7)—would have had an important seat at the table for any vote at the time of the opening of the ADC. And on Plaintiffs' own theory of how the ADC is a "trading floor," members should not be allowed to trade using the ADC outside of their membership division (*e.g.*, a B-3 member could not trade a B-1 product), such that different divisions would stand to gain or lose from succeeding on this claim. (*See* Class Notice ("Ex. 11") at 4-5 (asserting that Defendants breached the Core Rights by "allowing Class B Members and lessees to trade outside of their exchange and division of membership from the Aurora Data Center").) This is another key difference between the transactions that Dr. Arnold failed to consider, let alone adjust for.

Dr. Arnold also failed to evaluate whether Defendants could have structured their

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[5] At CBOT, only B-1 and B-2 members had voting rights. (Restated Certificate of Incorporation of Board of Trade of the City of Chicago, Inc., dated July 12, 2007 ("Ex. 12") at 2, Article IV.C.) Classes of CMEG members had widely varying voting rights. B-1 members had 6 votes per share, B-2 members had 2 votes per share, B-3 members had 1 vote per share, and B-4 members had only 1/6 a vote. (Third Amended and Restated Certificate of Incorporation of CME Group Inc., dated August 22, 2008 ("Ex. 13") at 11, Division B, Subdivision 2 Section 1.)

business in a way that did not implicate even the Plaintiffs' conception of their Core Rights. Importantly, prior to the opening of the ADC, market participants could place co-located trading servers at exchange-approved facilities in a data center located in Chicago and connect to Globex through LNet, the lowest latency connection to Globex at the time. (Mohan Dep. Tr. (Jul. 30, 2019) ("Ex. 14") at 258:15-24.) Plaintiffs do not contend LNet violated their Core Rights. Dr. Arnold does not mention LNet in his Expert Report at all, let alone analyze whether Defendants would have continued to offer a low latency connection through LNet rather than pay Class B members billions of dollars to open the ADC.

At his deposition, Dr. Arnold claimed that none of these issues matter because "[t]reating the NYMEX negotiated outcome as a proxy for what would have happened here embodies and captures all of those forces at work." (Ex. 3 at 66:13-67:9; *see also id.* at 46:12-13 ("you can think of NYMEX as standing in for a hypothetical negotiation").) But this logic is fatally circular. One cannot simply anoint a transaction "comparable." Dr. Arnold needed to examine the NYMEX Transaction, the underlying intangibles (i.e., the rights being given up), the economic conditions, and the various negotiating interests to determine whether it in fact could be reliably used as a comparable—all things he failed to do here. (*See, e.g.*, Ex. 7 at 510 (explaining that the use of non-identical comparable transactions is appropriate only if "there are only minor differences that have a definite and reasonably ascertainable effect on price and for which appropriate adjustments are made").

Finally, Dr. Arnold also ignores that the very thing that he proposes—a revenue sharing arrangement—is implausible under the facts of the case. The CME and CBOT Charters ***preclude*** distribution payments like the one that Dr. Arnold proposes should be applied here. The CME Charter prohibits distributions to Class B shareholders that are not also paid to Class A

shareholders. (Ex. 13 at 10, Division B, Subdivision 1 Section 3.) And the CBOT Charter likewise bars CBOT from providing any distributions to the CBOT members. (Ex. 12 at 2, Article IV.B.2.(c); March 16, 2018 Order on Motion to Dismiss ("Ex. 15") at 10 (noting that "revenue sharing in the form of a dividend or distribution is prohibited by Article IV.B.2.(c) of the CBOT Charter").) Dr. Arnold does not conduct any analysis to adjust for the fact that the Charters prohibit the very result that he advocates for. This further illustrates the fatal flaws of his methodology.

Remarkably, even after Defendants exposed the defects in Dr. Arnold's methodology, he doubled down in his December 7, 2023 Rebuttal Report. When given the opportunity to clarify his methods, he declined, providing no further details about his analysis of the NYMEX Transaction. Nor did he attempt to explain how his use of the NYMEX Transaction is appropriate despite the numerous material differences, or even bother to go back and review the underlying documentation or context of the NYMEX Transaction to evaluate whether his assumptions were correct. Instead, he argued that Defendants' expert Dr. Prince does not have "an objective test" for whether a difference is material and does not "quantify" the effects of the material differences. (Ex. 6 ¶ 12.) That gets it completely backwards—it is Dr. Arnold's burden to demonstrate that he has a reliable method of proving damages. *See DataQuill*, 887 F. Supp. 2d at 1024 (excluding analysis where expert did not present "sufficient evidence to allow the jury to weigh the economic differences between the licenses").

Ultimately, the arguments in Dr. Arnold's Rebuttal Report further demonstrate that comparing this case to the NYMEX Transaction is a fool's errand. For example, Dr. Arnold argues that because electronic trading was 5 percent of trading volume at the time of the NYMEX Transaction, whereas it was 84 percent for CMEG at the time of the ADC launch, that

means “there was more value that Class B members were giving up.” (Ex. 6 ¶ 13.) Even if true (which it is not), that would be beside the point. Because the NYMEX Transaction is fundamentally different from this case, the outcome of the NYMEX Transaction is not a reliable measure of damages—regardless of whether certain differences point up or down. And it completely misses the mark because the NYMEX members gave up equity, not access rights. It also omits the critical fact that the NYMEX revenue-share payment was contingent on a 90 percent electronic trading volume trigger. That electronic trading represented only 5 percent of total trading volume supported NYMEX’s reasonable belief that the 10 percent revenue-share payment would never be triggered at all. (*See* Ex. 6 at 17 (stating that private equity investment was “an endorsement and validation of” the NYMEX “open outcry trading model”).)

These are not “minor differences that have a definite and reasonably ascertainable effect on price.” (Ex. 7 at 510.) The NYMEX Transaction concerned compensation for an entirely different asset under circumstances far removed from this case, yet Dr. Arnold made no attempt to even learn of the differences, much less account for them in his analysis. Instead, he opines that because there was a “10 percent” in that case, there should be a “10 percent” in this case. His careless attempt to appropriate a revenue sharing agreement that bears no resemblance to access rights to the ADC must be excluded.

(b) Dr. Arnold Ignores Relevant Transactions by CME and CBOT

In addition to his deficient analysis of the NYMEX Transaction, Dr. Arnold has not explained how he determined there were no other comparable transactions even though at ***both CME and CBOT themselves*** there is a history of members ceding electronic trading exclusivity rights. Courts consistently emphasize the importance of considering a party’s own history in conducting a comparable analysis. *See Riles v. Shell Expl. & Prod.*, 298 F.3d 1302, 1313 (Fed.

Cir. 2002) (district court abused discretion in admitting expert testimony on reasonable royalty rate that ignored party's own "established licensing practice"); *Unisplay, S.A. v. Am. Elec. Sign Co.*, 69 F.3d 512, 519, 36 USPQ2d 1540, 1545 (Fed. Cir. 1995) (patentee's prior license agreements "should carry considerable weight in calculating a reasonable royalty rate").

While Dr. Arnold asserts that the NYMEX Transaction "is far and away the closest and most comparable transaction" (Ex. 3 at 87:12-15), had he analyzed the history of the very entities at issue, he would have discovered key transactions to consider. Notably, at both CME and CBOT, members initially had exclusive access to their electronic trading platforms, but both Exchanges adopted open access to those platforms, eliminating members' exclusivity rights, without providing members any compensation. (*See* Ex. 15, Order on Motion to Dismiss at 8.) These events are directly relevant (and certainly far more comparable than NYMEX), yet Dr. Arnold does not address them at all.

(c) **Dr. Arnold's Determination of Which "Trading Fees" to Include Is Unreliable**

Finally, Dr. Arnold's own determination of the "trading fees" he includes in his calculation is internally inconsistent. While Dr. Arnold asserts that the trading fees represent "a share of the ***additional*** trading fees CMEG was able to generate" through operation of the ADC (Ex. 6 ¶ 1), he makes no attempt to show that the ADC generated ***any*** "additional" trading fees beyond the fees CMEG would have otherwise collected. Prior to opening the ADC, CME offered LNet, which was the lowest latency connection to Globex in a data center environment. (Ex. 13 at 258:15-24.) But instead of estimating the extent to which the ADC increased the fees CMEG could collect relative to LNet, Dr. Arnold appears to assume that all trading fees associated with the ADC are "additional" fees. This assumption is wrong. (*Id.* at 261:16-263:12 (the "vast majority" of LNet customers migrated to the ADC).) Class B Members could not have negotiated

the right to receive fees that CMEG could have collected with or without the Class B Members' consent.

All told, although Dr. Arnold purports to apply a "CUT" or "comparable transaction," analysis, in actuality he does no such thing. As demonstrated above, there is no methodology at all underlying his opinion on trading fees, let alone an analysis that follows a generally accepted or reliable economic method. Instead, it is a conclusory and results-driven analysis that ignores the required elements to make it fit a pre-determined conclusion.

2. Dr. Arnold's Inclusion of Foregone Access Fees Is Untethered to the Facts

The second component of Dr. Arnold's damages opinion is even more improper than the first. To justify including 100 percent of Forgone Access Fees, Dr. Arnold simply assumes that "if CMEG had honored their exclusive trading floor rights during the damages period," Plaintiffs would have been able to collect all of the co-location access fees for themselves. (Ex. 6 ¶ 2; Ex. 2 ¶ 10(iv).) Dr. Arnold fails to explain how or why this is the case or provide any supporting analysis. Instead, he appears to have computed damages in this manner because ***Plaintiffs' counsel told him to do it that way***:

> Q: On what basis do you believe that [] member co-lo revenue is properly the right of the class Bs?
>
> A: . . . Well, I -- I guess, I'm not making the legal determination that that's right. . . . I was -- I was asked to compute the aggregate co-lo revenue and then portion it out using the systematic procedure that I lay out here.
>
> Q: You were asked to calculate damages in this matter; is that what you said []?
>
> A: Well, I was asked to quantify the [] remedy for the value of co-lo access, as well as trading fees. And with respect to co-lo, I was asked to treat the member [] co-location payments as a group and aggregate them along with the non-members and then apportion them out to CME and CBOT members[.]

(Ex. 3 at 129:21-130:13, 130:22-131:6.) Unfortunately, Plaintiffs' counsel led Dr. Arnold astray.

Class B members have no right or ability to share in the revenue from, or obtain for themselves, the co-location access fees, and the Court has already rejected this damages theory.

(a) The Court Already Dismissed Plaintiffs' Theory That They Can Recover Access Fees

In their Second Amended Complaint ("Ex. 16"), Plaintiffs sought to collect "co-location and other access-related fees from market participants that trade from the ADC." (*Id.* ¶ 119(A).) This Court dismissed that claim, ruling that Plaintiffs have no right to Globex-related fees and therefore, "[d]isgorgement for Globex-related fees is not recoverable." (Ex. 15, Order on Motion to Dismiss at 10.) Dr. Arnold's inclusion of co-location access fees is the same improper request the Court has already considered and rejected.

Moreover, the Court has also reinforced its ruling in response to this exact attempt to backdoor these dismissed claims back into the case. At a 2018 hearing on a motion to compel, Plaintiffs' counsel argued that ADC co-location access revenues could be used to estimate damages for their Globex Claims—which they have now directed Dr. Arnold to do. In response, the Court asked: "because you are not entitled to share in revenue . . . how does it still match up to what's still alive?" (Sept. 6, 2018 Hearing on Motion to Compel ("Ex. 17"), at 68:10-23.) "[T]he Court has made clear that there is no claim for revenue sharing[.]" (*Id.* at 81:19-20.) Plaintiffs argued—as Dr. Arnold does now—that they could measure a diminution in value associated with the ADC by asking "what's somebody else charging for that?" (*Id.* at 85:15-16.) The Court did not buy that argument. As the Court put it: "this just screams to me you still want a piece of the action with the revenue sharing, and ignoring that there is, in fact, this open access, for which you have no remedy." (*Id.* at 88:14-18.) As a result, the Court could not "see how you're not back-dooring what I told you you can't do when you open it through the front." (*Id.* at 106:25-107:5.) Ultimately, Plaintiffs' counsel demurred: "whether that's . . . something our

expert can rely on or whether we can introduce it at trial as evidence, that's a fight for another day." (*Id.* at 96:21-25.)

The time for that fight has come. As the Court correctly observed, Plaintiffs' (and now Dr. Arnold's) damages theory violates the Court's order dismissing it from the case. And the mismatch between Plaintiffs' remaining Globex Claim—to exclusive, free access to the co-location facility—and Dr. Arnold's opinion providing for a 100% revenue share (i.e., disgorgement) renders it unreliable. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) (class damages model must measure only those damages attributable to plaintiff's theory); *see also Bueker v. Madison Cnty.*, 2016 IL App (5th) 150282, ¶ 35. In fact, another court has excluded a damages report submitted by Dr. Arnold himself that did "not offer a theory of damages consistent with Plaintiffs' theory of liability." *Philips v. Ford Motor Co.*, No. 14-cv-02989, 2016 WL 7428810, at *26 (N.D. Cal. Dec. 22, 2016), *aff'd*, 726 F. App'x 608 (9th Cir. 2018). The same result obtains here. Dr. Arnold fails to measure damages connected to Plaintiffs' live claims, so his opinion must be excluded.

Dr. Arnold's assertion that disgorgement of access fees could amount to a reasonable royalty rate also fails because, as this Court has recognized, generally "disgorgement is not a remedy for breach of contract." (Ex. 15, Order on Motion to Dismiss at 10.) *See In re Ill. Bell Tel. Link-Up II*, 2013 IL App (1st) 113349, ¶ 29 ("demand for disgorgement" not a basis for calculating breach of contract damages); *iPCS Wireless, Inc. v. Sprint Nextel Corp.,* No. 08 CH 17214, 2009 WL 1489850, at *7 (Ill. Cir. Ct. Apr. 30, 2009) (dismissing disgorgement claim because "Illinois does not provide for these remedies in breach of contract claims"). And courts have consistently rejected attempts to measure the value of rights at the time of breach using hindsight-based valuations, because "[a] reasonable royalty determination . . . must relate to the

time infringement occurred, and not be an after-the-fact assessment." *Riles*, 298 F.3d at 1313 (district court should have excluded models that assessed worth "at the time of trial" rather than estimating what a "hypothetical negotiation . . . would have yielded at the time the infringement began"). Dr. Arnold cannot measure the value of plaintiffs' alleged exclusivity rights at the time the ADC opened by relying solely on the value of fees CMEG has collected in subsequent years.

(b) Dr. Arnold's Inclusion of Access Fees is Incoherent

Even if Dr. Arnold's Foregone Access Fee theory was legally permissible and not foreclosed by this Court's prior rulings, it must also be excluded because it is internally inconsistent and is contradicted by the facts. Unlike with the trading fees, Dr. Arnold disavows the use of the NYMEX Transaction or any other purportedly comparable transaction as a basis for this component. But there is no methodologically consistent basis for relying on the NYMEX Transaction for half of the damages estimate and ignoring it for the other—either NYMEX is a comparable transaction, or it is not. And if it is comparable, then there is no basis on which to add the Foregone Access Fees to the results of what the parties ***could*** have agreed upon. To the contrary, the NYMEX Transaction as adopted by Dr. Arnold in the first part of his opinion precludes the access fees he adds in the second part of his opinion.[6]

Further, Dr. Arnold's speculation that the summation of co-location access fees is a proper damages methodology because Class B members "would have collected the co-location fees" pursuant to their ability to lease out their memberships is easily debunked. (Ex. 6 ¶ 2.) Nearly all the co-location fees were paid by Class B members themselves. (*See* Affidavit of

[6] This contradiction gets even worse considering Dr. Arnold's baseless claim that his damages estimate "can be viewed as the product of a hypothetical negotiation." (Ex. 2 ¶ 15.) Dr. Arnold provides no basis for the idea that—as in the NYMEX Transaction—CMEG and CBOT would have agreed to give its members a 10% revenue share for trading fees, but ***also*** would have agreed to give them access fees, let alone 100% of those fees, rather than the 10% figure negotiated as to the revenue share.

David Gresky ("Ex. 18") ¶¶ 8-9 (citing CME-LANGER-1985556).) Thus, Dr. Arnold's calculation of access fees as damages requires the "facially implausible" assumption that Class B Members would have agreed to an arrangement whereby certain members (those excluded from the classes in this case) would pay access fees to other members (those who are in the Plaintiff classes in this case). (Ex. 5 ¶ 62.) But this theory cannot be reconciled with the Plaintiffs' view that ***all*** Class B Members are entitled to access the ADC, ***for free***. Dr. Arnold begrudgingly admitted this at his deposition:

> If – if what you're getting at is that one could go through an exercise of specific identification and just return money to – if member number 1 paid a thousand dollars, you give him a thousand; and if member number 2 paid $1,500 per month, you give him $1,500 as opposed to pooling it and then allocating in, ***that might be right.*** [But] that's not what I did. I was – ***I was asked to compute the aggregate co-lo revenue and then portion it out***[.]

(Ex. 3 at 130:2-13.)

In his Rebuttal Report, Dr. Arnold hypothesizes that if corporate members were limited to one trader per membership, those corporate members might have been willing to pay co-location fees regardless of their purportedly free access right. (Ex. 6 ¶ 18.) But this is pure conjecture. While Dr. Arnold imagines that the supposed breach "could have allowed one corporate member plus 999 other traders to trade from the ADC using a single corporate membership and a single co-location fee," he has done nothing to investigate how even a single corporate member trades from the ADC, let alone whether a change in policy would result in any increased demand. (*Id.*)[7]

Dr. Arnold attempts to shift the blame for this failure onto Defendants because CMEG does "not have data to determine how many traders trade from the ADC using a single corporate

[7] This entire construct is sophistry in any event. As Defendants show in their concurrently filed Motion for Summary Judgment, both CME and CBOT have allowed unlimited ATS trading on behalf of corporate members since the time of their respective demutualizations.

membership." (*Id.*) But courts have made clear that where defendants have not happened to "maintain records . . . that would be helpful to Plaintiffs in prosecuting their case," plaintiffs are not "justif[ied]" in cutting corners. *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 407 F. Supp. 3d 422, 434 (S.D.N.Y. 2019); *see also LaserDynamics*, 694 F.3d at 69–70 (rejecting argument that plaintiff could estimate a royalty using "the price of an entire laptop computer" without apportioning damages attributable to the infringing component part where defendant did not "track the prices, revenues, or profits associated with individual components"). It is Plaintiffs' burden to produce a reliable method of calculating damages. Dr. Arnold's unsubstantiated guesses do not meet that burden.[8]

What is more, without any explanation, Dr. Arnold assumes that Plaintiffs' measure of damages should include all fees that relate in any manner to the co-location facility, including fees incurred to license rack space in the co-location facility where firms can place their servers, Globex access fees for Glink connections, and related technology services fees (i.e., remote hands, power, etc…). (*See* Ex. 2 at Ex. F thereto.) Dr. Arnold provides no explanation for how any of these categories of fees estimate the value of Plaintiffs' supposed exclusivity right. When Plaintiffs historically leased their access rights to the trading floor, that did not include the right to private booth space, a Globex connection, or to any other services that CME or CBOT may have provided on the floor. Those had to be paid for by the lessees or members to the exchanges. (*See* CME-LANGER-0810584 ("Ex. 19").)

[8] Plaintiffs chose not to pursue any third-party discovery to explore the number of traders any firm employed for trading via the ADC. Their failure to pursue available avenues to develop the facts makes their reliance on Dr. Arnold's speculation even more inappropriate.

B. The Record Contradicts the Premise of Dr. Arnold's Opinions

All of Dr. Arnold's opinions rest on the assumption that the Class B members would have demanded compensation for their purported rights. But that assumption is false. When CME announced its intent to open co-location at the ADC to all market participants, ***not a single person objected***. Nor did anyone claim that Class B members possess the access rights Plaintiffs now allege. In this case, the lack of any attempt by the Class B members to raise their rights or demand a "negotiation" is even more striking given their unique role in CMEG's corporate governance. At the time CMEG planned, approved, and announced its intent to build the ADC and the co-location facility (and, indeed, until this day), CMEG Class B Members had the power to ***elect six of the directors who served on CMEG's board***, and on July 12, 2007, CBOT ***appointed ten directors to the CMEG board*** following the CME/CBOT merger. (Ex. 13 at 11, Division B, Subdivision 2, Section 1.(a); CME Group Inc. Form 8-K (filed July 12, 2007), available at https://www.sec.gov/Archives/edgar/data/1156375/000129993307004214/htm_21468.htm.) And yet there is no evidence that any of those directors raised any issue, or that any Class B member at either exchange asked them to do so, regarding the ADC.

The absence of any objection or attempt to negotiate means that Dr. Arnold may not now "hypothesize" to the contrary. Courts reject attempts to construct an alternate reality where a party knew of an alleged violation of his rights but chose not to assert them. *See, e.g.*, *Glidepath Ltd. v. Beumer Corp.*, No. CV 12220-VCL, 2019 WL 855660, *22 & n.167 (Del. Ch. Feb. 21, 2019) (finding that sellers could not show they would have extracted management concessions in return for their consent when sellers knew about misconduct but did not try to stop it). Any assumption that the parties ***could have*** negotiated to buy out the Plaintiffs' alleged exclusivity rights before opening the ADC is directly contradicted by the fact that Plaintiffs chose not to

demand a negotiation at that point in time. Because this assumption is the basis for all of Dr. Arnold's opinions, his opinions must be excluded in full. *See Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1317 (Fed. Cir. 2011) ("Beginning from a fundamentally flawed premise and adjusting it based on legitimate considerations specific to the facts of the case nevertheless results in a fundamentally flawed conclusion.").

IV. CONCLUSION

For all these reasons, Defendants request that the Court exclude Dr. Arnold's speculative and unreliable reports, opinions, and testimony in their entirety.

Dated: February 16, 2024
Chicago, Illinois

Respectfully submitted,

Skadden, Arps, Slate, Meagher & Flom LLP

Marcella L. Lape
Albert L. Hogan III
Marcella L. Lape
155 North Wacker Drive
Chicago, Illinois 60606
(312) 407-0700
albert.hogan@skadden.com
marcella.lape@skadden.com
Firm ID No.: 91729

Counsel for Defendants
CME Group, Inc. and The Board of Trade of the City of Chicago, Inc.

CERTIFICATE OF SERVICE

I certify that on February 16, 2024, I electronically filed a true and correct copy of the foregoing Memorandum of Law in Support of Defendants' Motion to Exclude the Testimony of Dr. Jonathan Arnold in with the Clerk of the Court, and that I also served a true and correct copy of the foregoing Memorandum of Law by electronic mail on the following counsel:

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

Robert S. Safi
Susman Godfrey LLP
1000 Louisiana, Suite 5100
Houston, TX 77002
rsafi@susmangodfrey.com

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

Suyash Agrawal
Massey & Gail LLP
50 E. Washington Street, Suite 400
Chicago, IL 60602
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: February 16, 2024

/s/ Marcella L. Lape

Marcella Lape