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

SHELDON LANGER, RONALD M. YERMACK, LANCE R. GOLDBERG, individually on behalf of themselves and all others similarly situated,	:	
Plaintiffs,	:	Case No. 2014CH00829
v.	:	
	:	Hon. Celia Gamrath
CME GROUP, INC., a Delaware Corporation; THE BOARD OF TRADE OF THE CITY OF CHICAGO, INC., a Delaware Corporation,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Pursuant to section 2-1005 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-1005, Defendants Board of Trade of the City of Chicago, Inc. ("CBOT") and CME Group Inc. ("CMEG") (collectively, "Defendants"), by their undersigned attorneys, respectfully submit this Memorandum of Law in support of their Motion for Summary Judgment.

I. PRELIMINARY STATEMENT

The time for allegations has passed. Plaintiffs' say-so is no longer entitled to any weight. Now, ***truth*** is the standard, established by fact.

Defendants will demonstrate in this Motion that the indisputable truth is, as they have maintained all along, Plaintiffs' claim to special or preferential access to Globex, whether framed as a substantive right or a "trading floor" word game, is ***simply made up***. Plaintiffs' claim that Defendants have violated their rights to a fee preference relative to non-members and that they have somehow been harmed as a result is similarly ***baseless***. Defendants will establish these two points with facts that are not susceptible to reasonable dispute. Accordingly, this meritless suit should end now.

At this point in a traditional preliminary statement what might follow would be a summation of why summary judgment should be granted. But a summation does not remotely do this story justice. This in turn provides the answer to a question regarding this Motion that may arise on first impression: If Defendants' position is so simple and so strong, why is this Motion for Summary Judgment so long?

The answer is that the more of the story that is told, the more Plaintiffs' claims are exposed as fantasy. When one understands the disruptive circumstances CME and CBOT faced with the transformative emergence of electronic trading; how both demutualized in a way that preserved their members' open outcry trading opportunity, but vested the development and control over electronic trading entirely in new for-profit exchanges; how these new for-profit

exchanges embraced the world of open-access electronic trading, including by making low-latency connectivity options available to all market participants on equal terms; and how the grant of equity in the for-profit exchanges, as the "hedge" in case electronic trading displaced the open outcry system, turned out to be the pathway to fortune for the members—when one truly understands these facts, Plaintiffs' claim to special access rights to Globex is rendered a fiction.

The facts of the story are no less devastating to Plaintiffs' fee right claims. When one understands the longstanding CME and CBOT fee policies, including how business entities can participate as exchange members and trade through their agents at reduced rates; how CME and CBOT have consistently maintained a fee preference in favor of ***individual members*** versus ***non-members***; and how there is no evidence that any Plaintiff paid one penny more for a trade than she should have, or that her B share is worth one penny less than it would have been but for the alleged violation of the fee preference—when one truly understands this story, Plaintiffs' claim that their fee rights have been disrespected is rendered an empty vessel.

Defendants are grateful for the opportunity to tell the full story in this Motion, and respectfully submit that upon its telling, based on facts that cannot reasonably be disputed, summary judgment for Defendants is plainly warranted.

II. FACTUAL BACKGROUND

A. Parties

Defendant CME Group, Inc. ("CMEG"), a Delaware corporation headquartered in Chicago, Illinois, owns and operates a number of derivative exchanges. CMEG affords market participants the opportunity to "manage risk within and across multiple asset classes, by trading

futures, options, cash, and over-the-counter (OTC) products." (Ex. 135 at A-3952.)[1] CMEG's futures markets today are sophisticated and technologically-advanced. Trading occurs predominantly on CMEG's electronic trading platforms around the globe, nearly 24 hours a day throughout the trading week. (*Id.* at 5.) The Chicago Mercantile Exchange Inc. ("CME") is a subsidiary of CMEG and is a derivatives exchange headquartered in Chicago. (*Id.* at 93.) Defendant Board of Trade of the City of Chicago, Inc. ("CBOT") is also a subsidiary of CMEG and a derivatives exchange headquartered in Chicago.[2] (*Id.* at 5.)

Plaintiffs Sheldon Langer, Ronald Yermack, Robert Prosi, and Craig Rheingruber are holders of Class B Common Stock in CMEG and class representatives of a certified class of select Class B Members of the CMEG (the "CMEG Plaintiffs"). (Ex. 119 at A-3792; Ex. 115 ¶¶ 23-24, 26; Ex. 118 at A-3780.) As owners of CMEG Class B shares, the CMEG Plaintiffs receive certain rights and privileges under the CMEG Certificate of Incorporation (the "CMEG Charter") and are required to be recognized on the books and records of the CME as the owner of a divisional membership in CME. (Ex. 141 A-4025 (Art. IV, Div. B, Sub.Div. 2).) As holders of CME Memberships, Plaintiffs Langer, Yermack, Prosi, and Rheingruber enjoy membership privileges on CME and are subject to member obligations as contained in the CME Rulebook. (*See, e.g.*, Ex. 1 A-4 at Rule 101.)

Plaintiffs Lance Goldberg, Gerald Petrow, Stanton Miller, Ray Larsen, Daniel Ryan, and Carol Jorissen are holders of Class B Memberships in CBOT and serve as class representatives of a certified class of select owners of CBOT Class B Memberships (the "CBOT Plaintiffs"). (Ex. 115 ¶¶ 25, 27; Ex. 119 at A-3793.) As owners of CBOT Class B Memberships, the CBOT

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[1] References to Exhibits 1-100 are to the Exhibits attached to the Affidavit of Khadija Waugh. References to Exhibits 101 -170 are to the Exhibits attached to the Affidavit of Marcella L. Lape.

[2] CME and CBOT are jointly referred to as the "Exchanges."

Plaintiffs enjoy certain rights and privileges related to CBOT and are subject to certain obligations, which are defined, in writing, in the CBOT Amended and Restated Certificate of Incorporation (the "CBOT Charter"), the CBOT Bylaws, and the CBOT Rules. (Ex. 142 at A-4032 (Art. IV.A); Ex. 2 at Rule 101.)

B. Operation of CME and CBOT

Futures markets in the United States, including CME and CBOT, developed in the mid- to late-1800s as a tool to help farmers and consumers avoid or hedge the risks they faced due to supply issues and price fluctuations. (Ex. 3 at A-56; Ex. 4 at A-172; Ex. 101 at A-2915.) CME and CBOT initially began as marketplaces for the exchange of agriculture futures contracts and later offered financial futures and options contracts. (Ex. 3 at A-56; Ex. 4 at A-172.)

The business of an exchange is to create a marketplace. Exchanges do not buy or sell the futures contracts that are traded in their marketplace. Instead, the exchanges create contracts for the purchase and sale of commodities, with standardized terms regarding quantity, quality, and delivery in the hope that there will be sufficient interest from the natural buyers and sellers of the commodity to come to its marketplace and trade (buy and sell) those contracts. (Ex. 101 at A-2915.) Members of the exchange can represent the persons managing risk (the hedgers), or they can participate simply by buying and selling contracts purely for profit (the speculators), thus providing liquidity to the marketplace. (Ex. 102 at A-2919.) Exchanges compete with *one another* to establish a marketplace for a particular commodities contract. (*See* Ex. 103 at A-2923.)

Historically, both CME and CBOT operated as not-for-profit organizations owned by and operated for the benefit of their members. (*See, e.g.,* Ex. 3 at A-44 – A-45; Ex. 128 at A-3921.) Members benefited from their ability to engage in trading activity in the exchange's contract markets, not from dividend distributions. (*See, e.g.,* Ex. 3 at A-126.) The members largely

controlled the exchange operations. Members elected member-representatives to serve on the exchanges' boards of directors and oversee the management of the business.[3] (Ex. 3 at A-57, A-67 – A-68, A-74; Ex. 4 at A-181.) The exchanges also formed committees of members to consider important matters and make recommendations to the boards of directors. (Ex. 5 at A-503; Ex. 3 at A-57 - A-58.) In addition, at both CME and CBOT, members had referendum rights to challenge policies adopted by their boards or to create new or modified policies through a member voting process. As a result, members enjoyed affirmative control and veto rights over any exchange initiative. (Ex. 3 at A-74; Ex. 4 at A-349.) The exchanges also maintained rulebooks that set forth the rights, privileges, obligations, and expected standards of conduct for their members. (*See, e.g.,* Ex. 6; Ex. 7)

1. Open Outcry Trading

From their beginnings through the late 1990s, CME and CBOT were centralized places where traders primarily bought and sold derivative contracts on trading floors, in individual pits by a system called "open outcry." (Ex. 3 at A-109; Ex. 4 at A-292.) A typical open outcry pit was round or oval and organized with members standing shoulder to shoulder on steps descending from the top. Traders executed trades in the pits by communicating face-to-face, shouting out bids or offers to buy or sell contracts for the future purchase or sale of a specific commodity at a specific price. (*See, e.g.,* Ex. 8 at A-620 (Rule 521); Ex. 9 at A-700 – A-701 (Rule 332); Ex. 3 at A-110; Ex. 4 at A-292.) Only members and their lessees could access and trade in the pits. They could act as floor brokers, executing trades for non-member customers for a fee, or they could trade for their own or another member's account. (*See, e.g.*, Ex. 8 at A-610

[3] At the time of CBOT's demutualization, the CBOT board had eighteen directors, four of whom were non-members.

(Rule 500); Ex. 6 at A-532 – A-533 (Rule 121); Ex. 9 at A-687 (Rule 301); Ex. 7 at A-563 – A-564 (Rule 210 and 211).)

2. Development of Electronic Trading

CME. In 1992, CME launched a proprietary electronic trading system—Globex—to allow market participants to trade futures and options contracts electronically. (Ex. 3 at A-111.) Unlike open outcry trading, where humans verbalized their bids and offers as they saw fit and physically interacted with other traders doing the same, electronic trading consisted of a computer that accepted and maintained orders anonymously (both bids and offers) in a "central limit order book" (the "book") and then automatically matched those orders to create a trade when the best available bid matched the best available offer. (Ex. 3 at A-110; Ex. 167 at A-4342 (19:14-19:17).) CME initially developed Globex to provide trading coverage after the open outcry markets on the trading floor closed for the day, during what the Exchange referred to as "Electronic Trading Hours" or "ETH." (Ex. 3 at A-111.)

At its inception, only members of CME were eligible for "Globex terminals" that provided access to Globex with a view of the order book. (*See, e.g.*, Ex. 10 at A-760 – A-761; Ex. 11 at A-880 – A-885.) During the first few years of Globex trading, if a Class B owner leased out his membership, the lease included both "his floor trading privileges" and "eligib[ility] for a GLOBEX terminal for order entry." (Ex. 6 at A-532 – A-533 (Rule 121(e)); *see also* Ex. 11 at A-880 – A-881.) To spur growth, however, in 1995, CME amended its rules to allow non-member permit holders ("ETH Permit holders") to use Globex terminals. (Ex. 11 at A-880 – A-881.) CME also modified its membership privileges so that a lessor would continue to be eligible for a Globex order entry terminal even if he leased out his floor trading privileges. (*Id.*) CME subsequently adopted international alliances with other exchanges including Paris Bourse SA, The Singapore Exchange Derivatives Trading Limited, the Bolsa de Mercadorias y

Futuros, and the Montreal Exchange to offer their mutual products electronically "to customers on a global basis." (Ex. 3 at A-116.)

Although initial trading volume on Globex was modest, interest was high and volume grew steadily. (*Id.* at A-111.) In September 1997, CME launched the E-Mini S&P 500 futures contract (the "E-Mini"), which represented one-fifth the size of the standard S&P 500 contract that traded in the open outcry pit. The E-Mini was the first product to trade exclusively on Globex and the first to trade during open outcry trading hours. (Ex. 12 at A-891.) At launch, CME installed forty-two Globex terminals on the trading floor at the periphery of the S&P 500 pit. (Ex. 13 at A-917.) This gave members the unique ability to observe open outcry activity in the standard-sized contract and engage in arbitrage when price deviations between the E-minis trading on Globex and the standard-sized contracts occurred. (Ex. 14 at A-996.)

Throughout the late 1990s, CME continued to invest in and improve the Globex platform in hopes of expanding its customer reach. (*See, e.g.*, Ex. 15 at A-1022.) In 1998, CME launched its upgraded platform—calling it Globex$_2$ (hereinafter referred to as "Globex"). (Ex. 16 at A-1225 – A-1229.) At inception, CME provided dedicated Globex terminals that ran only one type of "front-end" trading software developed for CME by a company called GL Trade. (Ex. 17 at A-1231, A-1234.) In late July 1999, however, CME introduced connectivity to Globex through an application programing interface or the "API." (Ex. 18 at A-1254.) The API allowed technology vendors and traders themselves the ability to create their own trading software that best suited their needs and use personal computers for order entry rather than Globex terminals. (*See id.*; Ex. 153 at 15:15-15:21.) CME's management explained to members that the API was a step in CME's "process of 'opening' up the [Globex] system." (Ex. 18 at A-1254.) Shortly thereafter, CME's Board of Directors adopted its first policy for "automated order routing

systems" or systems that permitted orders to be sent to Globex without human intervention. (Ex. 10 at A-760 – A-761; Ex. 19 at A-1262.) These AORSs are also known as Automated Trading Systems ("ATSs").

CBOT.

CBOT similarly first made its contracts available for electronic trading in 1992, and like at CME, only members could trade directly on CBOT's electronic trading platform from dedicated terminals. (Ex. 4 at A-293; Ex. 20 at A-1266.) Unlike CME, however, CBOT used a number of different trading systems over time, including technology from other exchanges through various licenses and partnerships. For example, in 1999, CBOT determined to abandon its own proprietary electronic trading system—Project A—in favor of a system called a/c/e that was developed and managed by the European exchange Deutche Börse (Eurex). (Ex. 21 at A-1280, A-1284 – A-1285.) The a/c/e system featured an API and open architecture that allowed traders to use their own front-end trading software. It also enabled the use of automated systems that evaluated market prices and could automatically generate orders. (Ex. 21 at A-1311 (1.10), A-1313 (2.4).)

3. Rise in All-Electronic Exchanges

In the late 1990s, advances in electronic trading technology led to turmoil within the futures industry, highlighted by consolidation and the rise of competitive all-electronic exchanges. (Ex. 22 at A-1367; Ex. 104 at A-2952 (11:17 - 13:14); Ex. 23 at 7:23:48 - 7:24:54; Ex. 103 at A-2925; Ex. 50.) In 1998, two European exchanges partnered to form Eurex—the first all-electronic major exchange. (Ex. 103 at A-2928.) Eurex's model of competition was different. Eurex immediately challenged another exchange's established contract market by launching a copycat version of the London International Financial Futures and Options Exchange's ("LIFFE") "Bund" interest rate futures contract on its electronic trading platform. Soon, nearly

all trading in the Bund contract shifted to Eurex's electronic venue and away from LIFFE's open outcry venue. (Ex. 103 at A-2929; Ex. 22 at A-1367.) The CFTC reported on the significance of this "capture," remarking that:

> The emergence of EUREX has been notable for its "capture" of a significant volume of trading in Bund futures from LIFFE. Generally, once an exchange has established a significant level of trading in a contract, it is very rare for another exchange to establish significant trading levels on like contracts. Within a very short time period, however, EUREX has become the dominant market for Bund futures.

(Ex. 103 at A-2930.) Shortly after the loss of this important contract market, LIFFE responded by shuttering its trading floor operations and moving to an all-electronic model. (Ex. 22 at A-1367.) The Paris Exchange, MATIF, similarly closed its trading floor after listing its contracts electronically in order to compete with Eurex and LIFFE. (*Id.*)

C. CME Strategic Planning Leads to Demutualization

The competition facing CME created fear that the exchange could be driven out of existence absent change. (Ex. 152 at A-4259 – A-4260 (102:24–103:11).) So in February 1998, the CME Board formed a Strategic Planning Oversight Committee ("SPC"), made up of CME members, to perform a self-assessment and develop a comprehensive strategic plan for the future. (Ex. 22 at A-1360; Ex. 104 at A-2957 (16:5 - 17:2); Ex. 23 at 7:29:30 - 7:30:37; *see also* Ex. 166 at A-4338 – A-4339 (14:21-15:3).) Among other things, the Board charged the SPC, which would be chaired by Board member Jim Oliff, with "consider[ing] whether [a] for-profit corporate structure would be better aligned with [CME's] goals." (Ex. 138 at A-4003.)

Over several months, the SPC developed a strategic plan, which it presented to the members at the November 17, 1998 Annual Members' Meeting. (Ex. 137 at A-3966; Ex. 104 at A-2993 (52:15 - 53:19); Ex. 25 at 54:58 - 56:39.) In Chairman Gordon's opening remarks at this meeting, he summarized the economic environment and challenges facing CME. Gordon told the

members that CME's "goal must be to anticipate what the world will look like several years from now, embrace change and take steps now to ensure [] continued success into the future . . . ." Gordon cautioned that "[w]e cannot afford to sit idle[;] . . . we must be willing to modify many of our current methods of doing business in order to survive . . . It is only by being proactive that we will withstand the test of time." (Ex. 22 at A-1357 – A-1358; Ex. 104 at A-2951 (10:6 - 10); Ex. 23 at 7:22:12 - 7:22:26.) Gordon warned members that, following Eurex's capture of the Bund contract, "[t]echnology, in the form of electronic trading, has called into question the very core of our open outcry markets[.]" (Ex. 22 at A-1357 – A-1358; Ex. 104 at A-2952 (11:21 - 23); Ex. 23 at 7:24:04 - 7:24:11.) Gordon noted that CME faced "electronic competitors, whose goal is to gain market share, at any cost, and shift business to their platform." (Ex. 22 at A-1357 – A-1358; Ex. 104 at A-2953 (12:23 - 13:4); Ex. 23 at 7:25:20 - 1:25:38.) CME in particular feared for its Eurodollar contract market—CME's crown jewel. As SPC chair Jim Oliff warned, "because of its success, others are coming after it. And they're coming hard." (Ex. 137 at A-3975; Ex. 104 at A-2995 (54:12 - 15; Ex. 25 at 57:35 - 57:46.)

Chairman Gordon observed that, given these circumstances, CME's form of governance, with management control effectively held by the full membership, could now threaten its existence. (Ex. 22 at A-1365 – 1366; Ex. 23 at 54:27 – 55:26; Ex. 104 at A-2972 (31:13 – 32:3).) CME's competing constituencies made it a challenge to accomplish change, leaving it at a disadvantage to competitors that could move quickly. (*Id.*; *see also* Ex. 159 at A-4301 (125:4-125:8).) It also made it difficult to access capital markets in a way that would allow CME to build an exchange that could compete in the electronic trading world. (Ex. 137 at A-3990; Ex. 104 at Ex. 104 at A-3013 (72:23 - 73:2); Ex. 26 at 52:59 - 53:10.)

Accordingly, when Oliff then presented the SPC's five-point strategic plan, he reported that the SPC had concluded that CME must convert from a membership organization to a for-profit, streamlined enterprise, which would expand choices available to CME, enhance structural flexibility, and unlock the value of membership. (Ex. 137 at A-3973 – A-3974; Ex. 104 at A-3012 (71:17 - 72:11); Ex. 26 at 51:21 - 52:22.)

After the 1998 Annual Meeting, the SPC continued its work on behalf of the members. In a May 18, 1999 letter to CME Members, Gordon reminded them that CME would "continue to face new and previously unimagined competitive challenges, and [] must not lose sight of [the] need to embrace change." He also emphasized that CME was strategically positioned to face the challenges, including by "building a world-class electronic trading platform that can support increasing customer demand and a shift from open outcry should the need arise." (Ex. 136 at A-3963.)

By the end of July 1999, the SPC had determined that the leading plan for demutualization involved the conversion of each existing membership to a number of class A shares, representing the equity in the Exchange, plus one share of an additional class of stock, corresponding to an existing membership division. (Ex. 29 at A-1381 – A-1382.) The challenge for CME was to "determine the specific additional rights to be included in each of the additional shares of stock" that would strike "the right balance to effect meaningful change in a way that [wa]s acceptable to membership as a whole." (*Id.* at A-1381.)

With its advisors, the SPC subsequently worked to determine which of these potential "rights" should be included in the additional shares of stock. Their assessment included key distinctions between open outcry and electronic trading: members' open outcry trading rights would continue, but members' "reserved rights would be eliminated" with respect to electronic

trading decisions. Instead, "decisions regarding electronic trading of products [would] be vested in the Board of Directors and their decision making [would] be guided by the principle of enhancing shareholder value." (Ex. 30 at A-1385.) Among other things, "the Board of the newly constituted exchange would decide whether to continue the existing policy of restricting access to the [Globex] book to members or eliminating such restrictions, providing full access to all parties and/or charging for same[.]" And "[m]embers' rights to limit the distribution of GLOBEX terminals to non-members [] would be eliminated" so that "[t]he Board of the newly constituted exchange [c]ould determine whether broader distribution and access rights would enhance shareholder value[.]" (*Id.* at A-1388.)

The concept of granting members "Core Rights" first appeared in an August 17, 1999 presentation, titled "Discussion of Class B Shares." (Ex. 139 at A-4012 – A-4017.) There, the SPC's consultant Solomon Smith Barney ("SSB") wrote: "[H]olders of Class B Shares will have the right to approve, through [super]majority vote, certain changes to the rights their Class B Shares contain at issuance." Yet SSB cautioned that the "success of the demutualization transaction will depend in part, upon providing the management of CME with maximum flexibility to pursue new strategic initiatives and/or respond to competitive pressures." (*Id.* at 0000773.) SSB thus advised that the "balancing of these factors is best accomplished by requiring Class B shareholder votes only for material changes to [certain] key rights[.]" SSB advised that "[w]hile the CME may choose to provide additional rights to holders of Class B Shares at the time of a demutualization transaction, their change need not be subject to the same governance/minority shareholder provisions." (*Id.*)

Following this presentation, on August 27, 1999, SSB and CME Staff working for the SPC circulated a draft demutualization memo that, after several revisions, ultimately became the

plan of demutualization. (Ex. 31 at A-1396.) The memo began by listing the overarching "Working Tenets" guiding the process. In addition to the need to "provid[e] CME management with maximum flexibility," the SPC aimed "[t]o develop a demutualization plan that unlock[ed] member equity value in the CME, that produce[d] a lean and nimble governance structure for the changing market, and that provide[d] a currency and a signal for working with strategic partners." (*Id.* at A-1392.)

The memo explained that CME would convert to a for-profit company with two classes of stock: Class A (equity only) and Class B (trading rights and equity). The memo noted that, while the intent was to encourage equity ownership, [] the "political reality . . . is that to obtain membership approval, both affirmative and blocking rights will have to be given to the Class B holders. The intent is to strike a balance to achieve maximum shareholder value." (*Id.* at A-1392.)

The memo advised that, following demutualization:

> Holders of Class B shares will have the right to approve certain changes to the rights that their Class B Shares contain at issuance. *[The demutualization transition is not designed either to promote or to impede open outcry or electronic trading. The New CME can only undertake initiatives that* ***significantly alter the floor trading rights of B-shares with respect to current division distinctions and product allocation, with respect to floor access, and with respect to issuing of additional B-shares*** *subject to a petitioned override vote by B-share holders on a 6-2-1 basis.]* Examples include the following.
>
> - A core right is the determination of whether to move a market from open outcry or side-by-side to exclusively all electronic.
>
> - A core right may be the decision to close the trading floor altogether, although this still remains the subject of debate . . .
>
> - A core right is floor access. The New CME cannot issue new B-shares with floor access without the approval of B-share holders.

(*Id.* at A-1393 – A-1394 (brackets in original) (emphasis added)). At the same time, the memo explained that, as to Globex, "The management of the new CME will have the right to make

commercial decisions on electronic trading rights (including products, side by side, fee differentials between electronic and open outcry platforms, etc . . .)." (*Id.* at A-1393.)

The SPC continued to craft a plan that would be acceptable to membership throughout the fall of 1999, guiding several revisions to the demutualization memo. (*See, e.g.*, Ex. 31; Ex. 32; Ex. 33; Ex. 34; Ex. 35.) The SPC finalized the plan and presented it to CME's Board of Directors—all of whom were themselves members, and elected by the membership (Ex. 3 A-57, A-67 – A-68, A-74)—on October 27, 1999, one section at a time, allowing for discussion and approval on a topic-by-topic basis. (Ex. 36 at A-1701-A, A-1725) In the section titled "**Open Outcry Commitments**," the SPC explained the blocking rights that members would receive at demutualization, stating that:

> B-share-holders must ratify on a 6-2-1 basis CME initiatives that significantly alter the ***core open outcry trading rights*** of B-shares. The ***core open outcry trading rights*** include
>
> - product allocation,
> - floor access
> - the issuance of additional B-shares, and
> - eligibility restrictions on trading privileges

(*Id.* at A-1718 – A-1719.) The SPC also advised that CME would make a financial commitment to open outcry markets provided that they remained liquid (i.e., that market participants continued to trade a significant volume of products in the open outcry pits). If a market became illiquid, CME management would make a commercial decision whether to keep the market open pursuant to the best interests of shareholders. (*Id.*) The Board unanimously approved these "Open Outcry Commitments," with a clarification regarding when a market would be considered illiquid. (*Id.* at A-1719 – A-1720.)The Board minutes do not reflect any discussion regarding special access rights to Globex in this section on "Open Outcry Commitments."

In a separate section titled "**Fees**," the SPC presented three points: (i) "the CME will maintain preferential clearing fees on current CME products to the holders of the CME trading rights embedded in B-shares . . ."; (ii) "The Board will have discretion to provide preferential fees or incentives with respect to trades of other persons considered to be especially important as liquidity providers[;]" and (iii) "The clearing fee for open outcry will never be greater than the clearing fee for the electronic market." (*Id.* at 1720.) The Board unanimously approved these clearing fee provisions, and later, unanimously approved the SPC presenting the demutualization plan, as approved and modified during the meeting, at CME's upcoming Annual Members' Meeting. (*Id.* at A-1720.)

Six days later, on November 2, 1999, the CME Board unveiled the demutualization plan to the full membership. SPC Chair Jim Oliff explained to his fellow members that, "[f]irst and foremost, we must transition to a governance and management structure that is nimble and swift in its ability to respond to competition. Whether that means listing contracts electronically, whether it means changing clearing and transaction fees, or whether it means expanding our traditional business lines." (Ex. 37 at 1:03:22-1:03:45; Ex. 105 at A-3124 (45:20 - 46:1).) He cautioned that "[w]e are in the midst of a transition from one business model to another. One that will surely involve electronic trading of many if not all of our products whether it be side by side, or whether it be exclusively on Globex," and which requires an improved financial decision making model. (Ex. 37 at 1:07:27-1:07:45; Ex. 105 at A-3127 (48:13 -17).)

Oliff told members that "demutualization will allow us to unlock our equity value"—something that "can be viewed as a prudent defensive measure to ensure that if electronic trading overtakes open outcry, we're in a position to run the electronic company like a business and to pay dividends and provide equity appreciation to our owners." (Ex. 37 at 1:08:55-1:09:21;

Ex. 105 at A-3128 (49: 13 -20); *see also* Ex. 36 at A-1436.) Oliff emphasized that this unlocked equity value would enable members to choose to sell only a portion of their interest in the exchange, whereas previously there was no ability to separate any ownership rights from trading rights. (Ex. 37 at 1:11:03-1:11:17; Ex. 105 at A-3129 (50:15 - 24).)

As to the members' trading rights, Oliff remarked:

> The Board recognizes that in a commercially driven world, Class B Shareholders will be concerned that the new corporation may take action to diminish the value of the Class B trading privilege. As a protection, the Board felt that it was necessary to enter into a commitment to its members of part of its Charter to assure the membership that ***no action that would diminish the open outcry trading right currently granted to our membership could be taken without the membership's specific ratification.*** Accordingly, the Board in its commitment to the membership has designed provisions to ***preserve members' core open outcry trading rights.*** These core rights include the current divisional product allocation rules, applicable to each Class B Series. Second, current floor access rights and privileges, including the commitment [to maintain open outcry]. Third, decisions regarding the issuance of additional Class B Shares. And, fourth, eligibility requirements for exercising and transferring the trading privileges component of Class B Shares.
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> ***
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> As to clearing fees, in recognition of the importance to the CME of the liquidity that's provided by the holders of Class B shares, ***CME [] will continue to grant preferential clearing fees on current CME products for trades made by such holders***. For example, the trades of the Class B Shareholder who uses the trading privilege component of his Class B share would be entitled to equity rates when trading in division. The trades of a lessee of such trading privileges, would be entitled to lessee trading rates when trading in division. ***The Board will also have discretion to provide preferential clearing fees or other incentives with respect to trades of other persons*** considered by the Board to be especially important to CME [] as providers of market liquidity. Under the plan, the clearing fees for open outcry trading will never be greater than the electronic market clearing fees.

(Ex. 37 at 1:28:46-1:30:06; Ex. 38 at 2:51-4:00; Ex. 105 at A-3141 (62:19 – 63:15), A-3145 (66:19 – 67-12).)

Finally, Oliff described how the responsibilities of management would differ between decisions related to open outcry and electronic trading, explaining that any decisions related to open outcry would be subject to the Core Rights, whereas electronic trading decisions would not:

> The management of CME [] will make commercial decisions concerning open outcry trading ***subject to limitations prescribed by our core open outcry trading rights***. The management of CME [] will make commercial decisions, including decisions concerning electronic trading, products, access, distribution, side-by-side trading, and electronic execution fees.

(Ex. 38 at 9:16-9:43; Ex. 105 at A-3149 (70:24 - 71:6).)

At the end of the meeting, the Board distributed a written demutualization plan to members (the November 2, 1999 Demutualization Plan (the "Demutualization Plan")). (Ex. 38 17:22-17:46; Ex. 105 at A-3155 (76:2 – 9); *see generally* Ex. 41.) The Demutualization Plan reiterated that the Core Rights were designed to protect Members' ***open outcry*** trading rights and described in detail the "Commitments to the Membership [for] Open Outcry and Trading Floor Facilities." (Ex. 41 at A-1794.) The Demutualization Plan stated that while management decisions regarding open outcry trading would be constrained by the adoption of the Core Rights, decisions regarding electronic trading, and access to such trading, would not. (Ex. 41 at A-1793, 1798.) The Plan also emphasized that Class B shareholders would have blocking rights only as to changes to these open outcry rights. (*Id.* at A-1795.) Finally, it disclosed the commitments CME would make with respect to clearing fees: that CME would continue to grant preferential *clearing fees* for trades made by holders of Class B shares, but that the Exchange would have the discretion to provide preferential clearing fees or other incentives to non-member market participants. (*Id.* at 00004543.)

On May 4, 2000, the Board mailed the full membership the April 25, 2000 proxy statement and prospectus, announcing the special members' meeting to vote on the demutualization (the "CME Prospectus"). (Ex. 3 at A-44 – A-45.) The CME Prospectus explained in detail the transactions proposed, including the rights that would attach to the Class B shares. The CME Prospectus advised that, with respect to trading privileges, "each series Class B shares will have the trading privileges currently encompassed in the existing membership

associated with that series," and that these privileges, each of which was described in full, would be reflected in "New CME's rules." (*Id.* at 3352.) The listed "trading privileges" consisted of (i) floor access rights, (ii) electronic trading rights, (iii) use and lease of trading privileges, (iv) clearing fee privileges, and (v) clearing membership rights. (*Id.*)

The Prospectus further explained that holders of Class B shares would receive "the right to approve changes to specified 'rights' associated with the trading privileges conferred by those shares." (*Id.* at 3353.) The Prospectus then listed the same "Core Rights" as those included in the Demutualization Plan and presented at the Annual Members' Meeting:

- the allocation of products which a holder of a series of Class B shares is permitted to trade on New CME's exchange facilities;
- the trading floor access rights and privileges which a holder of a series of Class B shares has, including the circumstances under which New CME can determine that an existing open outcry-traded product will no longer be traded by means of open outcry;
- the number of authorized and issued shares of any series of Class B shares (other than the issuance of series B-4 shares upon the conversion of series B-5 shares); and
- the eligibility requirements to exercise the trading rights or privileges associated with each series of Class B shares.

(*Id.*)

The CME Prospectus also cautioned that the conversion to a for-profit company would result in management making decisions to maximize profits and stockholder value, including decisions that may adversely affect the B shares, and it made no promises as to the value of those shares. Instead, the CME Prospectus stated that:

- "The value of Class B shares is likely to be driven primarily by the perceived value, and the demand for, the related trading privileges."
- "Decisions made by management or the board of New CME, or changes in the business or operations of New CME, may negatively impact Class B stockholders or affect Class A and B stockholders differently."
- "The conversion to a stockholder-owned for-profit corporation will require management to make decisions and take actions designed to maximize profits and stockholder value."

- "It is possible that decisions or changes which benefit the value of Class A shares will negatively impact the value of Class B shares . . . ." (*Id.* at 3328-3329.)

Finally, the CME Prospectus disclosed that, following the demutualization, Class B shareholders would have the right to elect 6 directors to the board of the New CME. (*Id.* at 3343.)

The Board subsequently held meetings with their fellow members on May 16 and May 17, 2000, regarding the demutualization. In advance, CME Staff developed detailed Qs&As to prepare the Board officers and policy advisors who would be charged with answering questions at the meetings. (Ex. 42, A-1806.) Those Qs&As again confirmed that CME designed the Core Rights to address member concerns regarding their control over decisions affecting open outcry trading privileges:

105. Why does the demutualization proposal include "core rights"?

The Board recognized that the transition to a management driven for-profit structure could create concerns on the part of the membership with respect to control over decisions affecting floor trading privileges. The Board also recognized the need to strike an appropriate balance between maximizing management decision making on the one hand, while protecting these existing membership privileges. Therefore the demutualization proposal includes specified core rights that can be modified only with the approval of Class B stockholders.

116. Are electronic trading rules and access covered by core rights?

No, these are not core rights. Note, however, that Class B trading privileges would be required even to trade GLOBEX from the floor.

(*Id.* at A-1835, 1837.) They also confirmed that any preferential fee guarantee pertained to clearing fees only and was not among the Core Rights:

115. Are fees a core right?

No.

117. Is there a specific commitment to maintain preferential fees for owners and lessees of Class B shares?

Yes, as described in the Proxy Statement, clearing fees will be lower for owners and lessees who exercise Class B trading privileges and serve as liquidity providers. Additionally, clearing fees for trades executed on the floor will never be greater than clearing fees for trades executed off the floor or on GLOBEX. The Exchange may also provide lower rates for other liquidity providers.

120. Will GLOBEX fees change?

The Board of Directors will have the ultimate decision for setting GLOBEX fees, just as it does today. The Board does not have any immediate plans to raise GLOBEX fees, but continues to have the option to alter fees to meet the financial objectives of the Exchange.

121. Will other fees change?

The Board does not have any immediate plans to raise any fees, but continues to have the option to alter fees to meet the financial objectives of the Exchange.

(*Id.* at A-1837, A-1839.) On June 6, 2000, the Members voted overwhelmingly in favor of demutualization with 98.3% voting in favor of the proposal. (Ex. 43; Ex. 152 at A-4261 (214:6-214:9).) CME, Inc. completed its demutualization on November 13, 2000, converting to a Delaware for-profit corporation. (Ex. 123 at A-3853.)

D. CME's Open Access to Globex

During the same time period that CME was completing its demutualization, on August 30, 2000, the CME Board determined to allow open, direct access to Globex to all market participants regardless of membership status. (Ex. 44 at A-1887-1888.) CME distributed a letter and press release announcing open access to the CME membership the following day. In its release to members, CME explained that:

- The CME Board voted to allow unlimited, direct access to its $GLOBEX_2$ electronic trading system for all market participants;

- Going forward, any individual or institutional customer guaranteed by a clearing member of the exchange will be able to obtain direct access to $GLOBEX_2$.

- As part of these changes, all market participants will have access to "the book," i.e., the ability to view bids and offers in the market.

(Ex. 45 at A-2079-2080.) CME further explained that this move would allow it to "reap the rewards [of its] investments in technology" and "rapidly expand the growth curve in [its] markets." (*See id.* at A-2078; Ex. 47 at A-2171.) There is no evidence that any member asked whether, with the adoption of open access, he or she would have a right to *preferred* Globex access, nor is there evidence that CME informed members that they would have any favored or best or most proximate access to Globex or "the book" following open access.

E. CBOT Strategic Planning Leads to Demutualization

Facing the same market changes and competitive threats as CME, CBOT likewise began to explore restructuring alternatives in the late 1990s. (Ex. 124 at A-3992 – A-3993; *see also* Ex. 150 at A-4246 (26:9-26:21).) In July 1999, the CBOT board of directors established a task force of directors and non-director members to develop a "restructuring strategy designed to modernize [CBOT's] organizational and corporate governance structure" and "to position [CBOT] to compete more effectively in the evolving marketplace." (Ex. 4 at A-207 – A-208) In a letter to its members on July 21, 1999, then-Chairman David Brennan wrote:

> Frankly speaking, our current governance structure does not allow us to enact decisions and mobilize financial resources with the speed required in today's electronic marketplace. It worked well for 150 years, but it is not the structure a company would use if starting a successful new exchange today.

(Ex. 48 at 0210821.) Following board approval of a general strategy to restructure CBOT, the CBOT Board, on May 16, 2000, presented the membership with its initial "Restructuring Report," contemplating that CBOT would restructure into two separate, competing corporations trading the same contracts: eCBOT, a for-profit, publicly traded, all-electronic market and CBOT, a closely held open outcry market, both of which would be owned by the CBOT members. (Ex. 49 at A-2185.) On August 31, 2000, the Board adopted a revised restructuring

strategy—and the one that it ultimately followed—that called for the conversion of CBOT into a Delaware stock, for-profit corporation, with eCBOT being operated as a wholly-owned for-profit subsidiary. (Ex. 50; Ex. 4 at A-209 – A-211.)

In announcing the revised strategy to the CBOT members, Chairman Brennan explained:

> Technology is bringing about violent structural changes in the way we do our business, at a pace that puts stress on every individual and every firm involved. Knowing the CBOT's membership structure is a limiting factor in dealing efficiently in this environment, our restructuring plan was developed in order to have a governance model and business strategy fluid enough to adapt to the competitive challenges we will inevitably face.

(Ex. 50.) Like CME's demutualization, the CBOT restructuring called for the issuance of both Class A shares and Class B shares to its members, reflecting equity in the new for-profit exchange and the members' trading rights and privileges, respectively. It also called for CBOT to "adopt[] a revised corporate governance structure, . . . substantially eliminating the membership petition process, streamlining the board of directors and making certain other changes to implement a more efficient decision-making process for the company." (Ex. 4 at A-210.) In place of the petition process, holders of Series B-1 and B-2 Memberships would receive the right to "vote on any amendment to the certificate of incorporation, bylaws or rules and regulations of the CBOT [] that would adversely affect" a set of defined Core Rights. (Ex. 124 at A-3902 – A-3903.)

Despite CBOT's sense of urgency, member litigation related to the allocation of A shares and issues related to certain CBOT members' rights regarding another exchange (the Chicago Board of Options Exchange) delayed the completion of CBOT's demutualization for several years. (Ex. 4 at A-218.) After resolving the litigation, CBOT finalized its demutualization proxy statement and prospectus on February 14, 2005. (*Id*.) The 2005 Charter provided that Class B-1 and B-2 members would have voting rights over the following five Core Rights: (i) allocation of

products that a Class B member can trade; (ii) the requirement that a holder of a Class B membership receive a lower transaction fee than a non-member for trades of CBOT products for his own account; (iii) membership qualifications and eligibility requirements; (iv) the commitment to maintain open outcry markets; and (v) trading of agricultural products on e-cbot during daytime hours. (Ex. 143 at A-4047.) On April 14, 2005, the Class B-1 and B-2 members of the CBOT voted overwhelmingly in favor of the restructuring proposal with 99% of the members voting yes. (Ex. 51.)

F. CBOT Adopts Open Access

Four years *before* CBOT completed its demutualization, in reaction to the same market forces that CME was facing, CBOT adopted open access to its electronic trading platform, allowing all market participants to access and trade on the electronic trading platform without going through an intermediary. (Ex. 52 at A-2249.) In an October 22, 2001 Interpretive Notice sent to CBOT Members, CBOT explained that the Rule changes "allow[ed] electronic connectivity to the OrderDirect™ API and the a/c/e platform for all market participants who are guaranteed by a CBOT® clearing firm member." (Ex. 53.) There is no evidence that any member asked whether, with the adoption of open access, he or she would have a right to *preferred* electronic trading access, nor is there evidence that CBOT informed members that they would have any favored or best or most proximate access to the a/c/e system or "the book" following open access.

G. CME and CBOT Continue to Advance Electronic Trading in the Open Access World

Following their respective adoptions of open access, CME and CBOT offered their market participants—both non-members and members alike—a variety of ways to connect to their electronic trading platforms. They did not distinguish between members and non-members,

rather, customers paid connectivity fees based on the bandwidth size of their connection. For example, on December 14, 2000, the CME board announced a new fee schedule for access to the Globex platform. (Ex. 54 at A-2265; Ex. 55.) The fee schedule included, *inter alia*, (1) monthly network connectivity costs for all users connecting to Globex, dependent upon the bandwidth selected by the user and (2) monthly fees for GL WIN software and/or GL WIN software/hardware to be used on Globex terminals. (Ex. 55 at A-2278.) Similarly, effective June 26, 2002, CBOT began charging its members, non-members and service providers monthly a/c/e network line charges based on the level of access they desired: premium, access through the Internet ("iAccess") or a combined option. (Ex. 56 at A-2287.)

Throughout the 2000s, both CME and CBOT continued to evolve their connectivity options based on demand and technology enhancements. In 2002, for example, CME began to offer a "European Hub" option in which it managed a telecommunication connection from London, England to Globex. (Ex. 57; Ex. 125 at A-3910.) CME later added additional hubs in Amsterdam, Dublin, Frankfurt, Gibraltar, Milan, Paris, Singapore, Hong Kong, Seoul, and Tokyo. (*See, e.g.*, Ex. 127 at A-3918; Ex. 58.) In 2003, CME introduced two new global connectivity options for gaining direct access to Globex: (i) Client DirectLink, which allowed participants to use existing connections to telecommunications vendors to access CME, and supported bandwidths greater than a T1 line, and (ii) Client InternetLink, which allowed customers to use high-bandwidth internet connections to access Globex. (Ex. 57.) Again, CME offered these new options to both members and non-members with identical functionality at the same price points, and there is no evidence that any member ever objected. (*Id.*)

In January 2004, CBOT replaced the a/c/e system with a new electronic trading solution called e-cbot, which was licensed from LIFFE. (*Id.*; *see also* Ex. 59 at A-2304.) At launch,

CBOT offered members and non-members the same connectivity options, allowing market participants to choose between a standard connection or a resilient high availability connection for an annual fee of $15,000 or $26,400, respectively. (Ex. 60 at A-2340, A-2343; Ex. 4 at A-199.) There is no evidence that any member objected, let alone on the basis that members had a preferred access right.

As demand for electronic trading increased, CME needed to expand its data center capabilities. (Ex. 61 at A-2351.) At the time of demutualization, the Globex proprietary matching engine was located in a "computer room" at CME's building at 10 S. Wacker Drive, Chicago, Illinois. (*See* Ex. 153 at 39:14-18, 60:3-4; Gisch Aff. ¶¶ 4-5.) In late September 2002, however, CME moved the Globex match engine to a new, off-site facility, which was located in Lombard, Illinois. (*See* Ex. 62; Gisch Aff. ¶ 5.) In a Member Update sent to all members, CME announced:

> Chicago Mercantile Exchange Inc. (CME) this week launched its new state-of the art Remote Data Center (RDC) with the successful deployment of major exchange technology upgrades at the off-site facility. Designed to ensure business continuity for the CME markets and outfitted with a comprehensive new technology and communications infrastructure, the new RDC is now the primary site for operation of CME's Globex electronic trading platform.

(Ex. 63 at A-2448; *see also* Ex. 62.)

The location of the match engine for the CBOT electronic trading platform likewise changed over time. At the time of CBOT's demutualization, the match engine for e-cbot, licensed from LIFFE, was located in London, England. (Ex. 129 at A-3927.)

H. CME Adopts Low Latency Connectivity

As automated electronic trading grew (i.e., ATS or algorithmic trading), customers became latency sensitive and demanded faster, more reliable connections. (Ex. 153 at 26:15–27:7; Ex. 64 at A-2465.) Across the globe, competitor exchanges had begun to offer co-location, setting an expected precedent. (Ex. 64 at A-2476-77; Ex. 65 at A-2481-82.) In response, on

October 3, 2006, CME, Inc. issued a press release announcing that it would offer a new connectivity option called LNet (CME Local Network) that would allow market participants to place their trading servers in exchange-approved facilities in a data center on Cermak Street in Chicago (the "Cermak Data Center") and connect them directly to the CME over high-speed fiber optic connections. (Ex. 66 at A-2498.) CME marketed LNet as "colocated trading" even though the Globex match engine was not located in the same facility. (*Id.*)

CME announced that, at launch, it expected the LNet server connections "to decrease network latency times for order entry to CME Globex to less than one millisecond." (*Id.*) LNet was the lowest latency connection to Globex. (*Id.*; Ex. 67 at A-2501; Ex. 167 at A-4344 (69:2-12); Ex. 164 at A-4321 (258:19-24); Ex. 153 at 68:15-25.) CME initially charged $6,000 per month for each LNet connection, regardless of membership status, and customers also paid the third-party hosting providers for data center services (space, power, and cooling) in the CME-approved facilities. (Ex. 67 at A-2501.) There is no evidence that any member objected to LNet or claimed that it violated members' preferred access rights.

Nor is there evidence that any member objected when, in December 2006, CME released a CME Globex Reference Guide in which it marketed electronic trading on Globex as "[o]pen access and direct participation" and "an entirely level playing field for all participants" with fairness, transparency and anonymity. (Ex. 68 at A-2507.)

I. Merger of CBOT Holdings and CME Holdings

On July 12, 2007, the former parent of CME, Chicago Mercantile Exchange Holdings Inc. merged with Chicago Board of Trade Holdings, Inc., to form CMEG. CBOT and CME became wholly-owned subsidiaries of CMEG. During the merger negotiations, CME emphasized that CBOT members would keep their core rights following the merger. (*See, e.g.*, Ex. 70 at A-2543; Ex. 71 at A-2553; *see also* Ex. 72 at A-2557.) Despite repeated public filings related to the

merger, there is no evidence that CME or CBOT members or management ever inquired about or discussed a CBOT member right to preferred e-cbot access, a CME member right to preferred Globex access, or how any such rights would be reconciled and managed after the merger.

As a result of the merger, the CMEG board of directors expanded to include 10 CBOT-designated directors (the "CBOT 10") until the 2012 annual shareholders meeting. (Ex. 131 at A-3938.) CBOT also amended its Charter to provide that, during the period of time between the merger and the annual CMEG meeting of shareholders to be held in 2012, CBOT could not adopt any changes to its rules without first providing the CBOT 10 advance notice and an opportunity to object. (Ex. 144.) The CMEG Class B shareholders continued to have the right to elect six directors to the CMEG Board. (Ex. 132 at 3942.)

Following the merger, CMEG moved the CME trading floor to the CBOT building and formed a combined trading floor. (Ex. 133 at A-3946.) In January 2008, CBOT migrated all of its electronically-traded products from its e-cbot trading platform onto Globex. (Ex. 73 at A-2562.) While CME and CBOT members continued to have trading floor access only to those open outcry pits that fell within their division of membership, any CME or CBOT member could trade any product electronically from the trading floor, regardless of the exchange the product traded on. (Ex. 74 at A-2570-71.)

LNet continued to be the lowest latency connection to Globex. (Ex. 164 at A-4321 (258:15-258:24); Ex. 155 at A-4286 (34:11-34:14).) In October 2008, CME announced Jackson Direct, a connectivity option available only to customers with offices located at the Chicago Board of Trade building in downtown Chicago. Members could not connect to Jackson Direct from the trading floor. (Gisch Aff. ¶ 18.) Jackson Direct had "speed/latency comparable to L-NET connectivity[]" and cost customers $6,000 per month. Like other connectivity offerings,

there was no membership requirement to connect to Globex via Jackson Direct. (Ex. 75 at A-2573; *see also* Gisch Aff. ¶ 18.)

J. CME and CBOT Plan to Open the Aurora Data Center

In 2007, CMEG purchased space in Aurora, Illinois to build a new data center, which CMEG internally refers to as DC3 and Plaintiffs refer to as the ADC or the Aurora Data Center.[4] (Gisch Aff. ¶ 7) The primary reason for building the ADC was that Defendants believed that their existing data facilities would soon lack capacity to accommodate growth in Globex infrastructure. (Ex. 61.) But CME also determined to build out a co-location offering at the ADC in order to address customer demand and physical constraints at the Cermak Data Center and to align with competitor offerings. (Ex. 153 at 24:13-25:5; Ex. 169 at A-4353 (18:4-18:12); Ex. 165 at A-4333 (85:2-9); Ex. 76 at A-2584.) Indeed, in developing its co-location plans, CME sought the feedback of many of its existing LNet customers to gauge interest and determine what the customers would need in terms of space, power, and ancillary services to successfully manage their infrastructures in the facility. (Ex. 165 at A-4330 (65:7-13); A-4330 – A-4332 (65:22-67:4); A-4334 – A-4335 (121:13-122:07).)

Co-location at the ADC would provide the same low-latency advantage as LNet connectivity at the Cermak Data Center, but the data center would now be managed by CME instead of a third party. With LNet, customers placed their trading equipment in spaces managed by one of two service providers and paid those service providers a "hosting fee" for the managed space and related data center services. (Ex. 153 at 24:13-25:5; Ex. 77 at A-2619.) CME then charged the customers for LNet connectivity over "the high speed fiber to [CME's] data center

[4] In internal documents, CME refers to the Aurora Data Center as "DC3" for Data Center 3. References to the "ADC" in internal documents almost always refers to its data center in Chicago, known as the "Annex Data Center."

where the match engine resided." (Ex. 153 at 25:23-26:14; Ex. 77 at A-2619.) With co-location at the ADC, customers would now pay CME the hosting fee, as CME would now manage the space, power, and related data center services. (Ex. 78 at A-2628.) Customers would continue to pay for connectivity to the Globex match engine. (*Id.* at A-2629.) Because the new co-location offering would replace LNet as the lowest latency connection to Globex (what Plaintiffs call the "best and most proximate access" to Globex (the "BMPA" to Globex)), Defendants believed that "80% of the existing LNet customers" would transition from LNet to the ADC. (Ex. 79 at A-2640; *see also* Ex. 153 at 95:24.)

In March 2010, CME announced its plans to launch co-location at the ADC beginning in 2012. (Ex. 80 at A-2672; Ex. 81 at A-2675.) The co-location facility would provide three main services: hosting, connectivity, and support services. (Ex. 82 at A-2678; *see also* Ex. 83 at A-2682.) The services would provide "equidistant access for all customers" and "the lowest possible latency connection to the CME Globex platform." (Ex. 80 at A-2672; *see also* Ex. 84 at A-2697.) CME was clear that the offering would be made available to all customers on equal terms. CME structured this approach to be consistent not only with its longstanding Globex access policies but also in line with recommendations and guidelines in the futures industry. (Ex. 65 at A-2484.)

CMEG completed the ADC in August of 2010, and fully transitioned the Globex matching engine to the ADC in November 2010. (Ex. 85 at A-2703; Gisch Aff. ¶ 8.) Defendants began offering co-location at the ADC on January 29, 2012. (Ex. 84 at A-2697.) By this time, Defendants had spent over $372 million to build and maintain the ADC, of which $168 million

was related to co-location.[5] (Romeo Aff. ¶ 7; Romeo Ex. 2.) As Defendants expected, the "vast majority" of LNet customers transitioned from the Cermak Data Center to co-location at the ADC. (Ex. 164 at A-4324 (261:16-263:12).) In fact, "close to 50%" of LNet customers migrated to the ADC before its very first day in operation. (*Id.*) At the close of market the Friday before the ADC co-location facility opened, many LNet customers took their servers out of the Cermak Data Center, put them in trucks, and shipped them to Aurora for installation at the ADC to begin use the following Monday. (*Id.*)

From 2012 to the present, the overwhelming majority of market participants licensing space in the co-location facility at the ADC have been members of one or more of the CMEG exchanges. (Gresky Aff. ¶ 9). In addition to market participants, a number of telecommunication and other service providers co-locate at the ADC and provide services to other persons. (Ex. 158 at A-4297 – A-4298 (64:17-65:5); Ex. 155 at A-4283 – A-4284 (19:10-20:19).) When a service provider sublicenses space at the ADC or provides other services, it is the service provider, not CME, that collects the fees. (*See* Ex. 164 at A-4319 (74:8-74:12), *id.* at A-4320 – A-4321 (90:9-91:2).).

K. Fee Types and Preferences

At the time of its demutualization, CME charged market participants per trade clearing and transaction fees, which included Globex fees and other volume-related fees. (Ex. 3 at A-124 – A-125.) CME charged a *clearing fee* for trades executed on its marketplace, including via both open outcry and Globex, which varied based on the product traded and membership status of the account owner. As a general policy, CME charged its members a lower clearing fee than non-

[5] As of 2022, that number had risen to over $683 million, of which over $327 million related to the co-location facility. (Romeo Aff. ¶ 6; Romeo Ex. 2.)

members.[6] (*See, e.g.*, Curran Aff. ¶ 6; Kokal Aff. ¶ 5.) CME also charged market participants *Globex fees* for electronic trades. (Curran Aff. ¶ 6.) In addition to these per trade fees, CME charged certain *access fees* (also called *communication fees*) for the use of its communications networks and services, including fees to access the Globex platform. (*See, e.g.*, Curran Aff. ¶ 10; Ex. 3 at A-126.) As a non-profit entity, the fees charged by CME reflected the fact that it could not distribute earnings to its member-owners. (Ex. 3 at A-126).

In connection with CME's demutualization, CME committed to its members that, subject to its discretion to lower fees for others, it would continue to charge lower clearing fees for trades made by holders of Class B shares. CME did not, however, make any additional commitments as to Globex fees, or access or communication fees, including fees charged to connect to Globex. (*See infra* at II.C; Ex. 184 at 17; Ex. 3 at A-83.) Instead, CME reserved its right to alter its fee policies to reflect its new status as a for-profit entity. And immediately following demutualization, CME announced to its members on December 14, 2000, "a new pricing framework that advances our strategic plans as a for-profit growth company and enables us to invest in additional technology and service improvements." That pricing framework included "new or changed fees [to] cover nearly all CME products and services, including $GLOBEX_2$ connectivity, GL WIN software and hardware; . . . floor brokerage activities; market data; . . . floor access; and booth space." (Ex. 55 at 0584)

At the time of its demutualization in April 2005, CBOT also charged per trade fees to its market participants, including an *exchange transaction fee* and *clearing fee*. (Curran Aff. ¶ 8) The exchange transaction fee varied based on the trading venue (e.g., open outcry or e-cbot),

[6] CME has long provided clearing services through its own clearinghouse. (*See, e.g.*, Ex. 3 at A-83). To clear trades, a clearinghouse serves as a buyer to every seller and a seller to every buyer. (*Id.*) This process eliminates counterparty risk by ensuring that the party on the other side of a trade will hold up her end of the bargain. (*Id.*)

product traded, and membership status of the account owner. (Curran Aff. ¶ 8) As a general policy, CBOT charged its members a lower exchange transaction fee than non-members. (Curran Aff. ¶ 8) CBOT market participants also paid a *clearing fee* for every trade, which was the same amount for all market participants.[7] (Curran Aff. ¶ 8; Ex. 131 at S-19, S33). Like CME, CBOT charged its market participants for access and communication services, including to connect to its electronic trading platform, usually on a monthly basis. (Curran Aff. ¶ 10; Ex. 4 at A-257 – A-258).

In connection with its demutualization, CBOT included in its Charter a Core Right that "holders of Class B Memberships . . . will be charged transaction fees for trades . . . for their accounts that are lower than the transaction fees charged to [non-members] for the same products." (Ex. 143 at A-4047 (Art. IV.D.2.(b)(2).) CBOT did not make any other commitments as to fees, including as to access or communication fees, and instead reserved the ability of the for-profit board of CBOT to set those fees going forward. (*See generally* Ex. 4).

Following their respective demutualizations, CME continued to charge a separate clearing fee and Globex fee, and CBOT continued to charge a separate exchange transaction fee and clearing fee, until the exchanges streamlined their fee structures in April 2016. The exchanges now charge one all-in *exchange fee* (a combination of the clearing and Globex fees at CME, and a combination of the exchange transaction and clearing fees at CBOT). (Curran Aff. ¶¶ 7, 9.) Both CME and CBOT set their exchange fees based on the trading venue (i.e., Globex, over-the-counter, or trading floor), product traded, and membership status. (*See, e.g.*, Ex. 151 at A-4250 – A-4251 (148:14-149:18).) As a general policy, CME and CBOT charge their members lower exchange fees relative to non-members.

[7] Unlike CME, prior to the merger, CBOT did not operate its own clearinghouse.

The extent of the fee preference that CME and CBOT members receive depends on their membership type. CME and CBOT both have various categories of membership for individuals and business entities, each with unique requirements and benefits. (Kokal Aff. ¶ 3; *see also, e.g.*, Ex. 86 at A-2706.) Traders can hold memberships as "individual members" to qualify to pay the lowest rates available to trade, or hold memberships as "lessees" (CME) or "delegates" (CBOT) to qualify for reduced rates, though not the lowest. (Kokal Aff. ¶¶ 8, 14). Business entities can hold memberships as "clearing members," "equity member firms," or "trading member firms," among other membership types (collectively, "Corporate Members"). (Kokal Aff. ¶¶ 10, 11, 16) Clearing members and equity member firms can pay the lowest rates available for their trades (equal to individual members). Trading member firms pay reduced, but not the lowest, rates. (Kokal Aff. ¶¶ 12, 16)

L. Corporate Member Fee Policies

CME and CBOT have adopted detailed fee policies that govern the application of trading fees to their Corporate Members. The goals of the policies are the same at both exchanges: to ensure that Corporate Members receive preferential fees and to prevent non-members from improperly receiving preferential fees. (*See, e.g.*, Kokal Aff. ¶ 17; Ex. 151 at A-4256 (158:11-158:14).) For a Corporate Member to receive preferential fees, a trade must be "conducted for the sole benefit of the member firm itself and not the trading activity of individual customers/traders conducted in the name of the firm." (*See, e.g.*, Ex. 87 at A-2716; Ex. 88 at A-2737.) Only the Corporate Member itself can have "the financial benefit and risk of the trading activity." (*See, e.g.*, Ex. 87 at A-2717; Ex. 88 at A-2737.) The exchanges have reasserted this policy again and again. (Kokal Aff. ¶ 19.)

Corporate Member Floor Trading. At both CME and CBOT, employees of a Corporate Member, both on and off the floor, directed open outcry trades for the account of the

Corporate Member. (Kokal Aff. ¶ 20.) A Corporate Member would put its memberships in the names of certain employees (thereby, "badging" them) and only those employees could access the trading floors and execute trades in the pits for the Corporate Member. (Kokal Aff. ¶ 20.) Despite this floor access limitation, there were no limitations on the number of employees who could make trading decisions for a Corporate Member. These decision-making employees could be located anywhere in the world, communicating orders to colleagues and brokers at trading desks on the floor via phone, fax, email, etc. (Kokal Aff. ¶¶ 19-22; Ex. 168 at A-4347 – A-4351 (62:24-66:10); Ex. 152 at A-4262 (301:15-19).) Regardless of the membership status of the employee initiating the trade, trades executed this way for a Corporate Member's account and sole benefit received member rates. (Kokal Aff. ¶ 21; Ex. 151 at A-4254 – A-4255 (156:23–157:3).)

Corporate Member Electronic Trading at CME. At the time of its demutualization, CME assessed fees for Globex trades based on the membership status of the account owner and did not consider the membership status of the person entering the trade. (Ex. 89 at A-2752). With respect to Corporate Members, CME placed no limit on the number of employees who could trade electronically for a Corporate Member account and receive member rates. (Kokal Aff. ¶ 24; Ex. 151 at A-4252 – A-4253 (152:25–153:5).) No "badge" requirement existed as it did on the trading floor.

After moving to open access, CME initially continued to assess fees for electronic trades for all market participants at the account-owner level. (Ex. 89 at A-2752.) However, because open access created new opportunities for certain violations of *individual* member fee policies, in February 2001, CME tightened its rules governing who could trade electronically for *individual* members at member rates and began to consider both account ownership and the membership

status of the person entering the trade. (Ex. 90 at A-2769.) At the same time, CME reaffirmed that for *Corporate* Members, member rates would apply regardless of the membership status of the person entering the trade—meaning that any employee (i.e., an unlimited number of employees) could execute trades for these accounts and receive member rates. (Ex. 90 at A-2769; Ex. 91 at A-2774.)

Critically, there are no limits on the number of employees who can trade electronically for a Corporate Member's account and receive member rates regardless of how a Corporate Member chooses to access Globex: whether from the Internet, through LNet from the approved hosting facilities in the Cermak Data Center, or through the GLink connection at the ADC. (Kokal Aff. ¶ 27) Equally important, CME's approach to automated trading systems (ATSs) reflects the same policy: CME has never restricted the number of ATSs that can enter trade orders for a Corporate Member's account and receive member rates. (Kokal Aff. ¶ 28; Ex. 157 at A-4292 – A-4294 (74:25-76:21); Ex. 160 at A-4304 – A-4305 (158:15-160:24).)

Over the years, members have complained about CME's Corporate Member fee policies, arguing that CME should require each employee of a Corporate Member to own or lease a membership in order to receive member rates for trades conducted for the Corporate Member's account. On July 26, 2003, for example, a member sent Plaintiff Sheldon Langer a letter that he gave to Chairman (and now CEO) Terrence Duffy related to Corporate Member proprietary trading. (Ex. 140 at A-4019 – A-4021.) The member complained that entities are purchasing "the required number of memberships to become a member firm and then [] allow[ing] as many traders to trade as the new firms want[] as long as the traders [are] PROPRIETARY TRADERS." And he lamented that CME needs to "[r]equire that ALL ATS computers have a single membership per computer." (Ex. 140 at A-4020) In response to such complaints, the CME

board of directors established an ad hoc committee that investigated the Class B Members' concerns and concluded that "some shareholder concerns arose from a lack of understanding as to how the Exchange's proprietary trading rules operate." (Ex. 92 at A-2776.) The committee also requested that the Audit Department undertake a vigorous enforcement effort to detect violations—none were found at the time—and to continue to focus on compliance with fee policies. (*Id.*)

Corporate Member Electronic Trading at CBOT. Long before its demutualization, by at least 1999, CBOT's rulebook expressly provided that non-member employees could trade electronically on behalf of a Corporate Member. (Ex. 93 at A-2783 (9B.11).) The rules did not impose any limits on the number of employees who could initiate or enter trades on behalf of a Corporate Member. (*Id.*) In 2001, in part to ensure that "market participants that receive member transaction fees under proprietary trading arrangements are legitimately structured as proprietary accounts," CBOT codified its definition of "proprietary trading." (Ex. 94 at A-2788.) Consistent with its purpose, the definition set forth a detailed list of restrictions to ensure that trades conducted by a Corporate Member's employees and independent contractors that received member rates were in fact trades conducted for the firm's proprietary account. (Ex. 94 at A-2788-90.) The definition did not include any limits on the number of employees who could trade for a Corporate Member account at member rates.

Like at CME, at CBOT an unlimited number of employees can trade electronically for a Corporate Member account no matter how the Corporate Member accesses Globex. (Kokal Aff. ¶ 27.) CBOT's ATS rules, again like CME's, fit this framework. CBOT has allowed a Corporate Member to register ATSs (which CBOT referred to as Automatic Price Injection Models) to trade for its proprietary account since at least 2004, (Ex. 95 at A-2823-24.) and CBOT does not

limit the number of ATSs a Corporate Member can have trading for its account or the number of ATSs that can receive member rates. (Kokal Aff. ¶ 28)

M. Special Fee Programs

In addition to their general fee structures and schedules, CME and CBOT use special fee programs to attract new customers, build liquidity and trading volume, and reward loyal traders. (Curran Aff. ¶ 11) In particular, both exchanges have employed volume-based pricing, fee caps, and market maker and other incentive programs to help achieve these objectives. Although non-members have participated in these initiatives to varying degrees, in the aggregate, CME and CBOT have consistently provided members a fee preference relative to non-members even accounting for these programs.[8] (Richmond Aff. ¶¶ 40, 43.)

CME has included volume-based discounts as part of its fee framework since at least 2001, and CBOT since at least 2002. (Curran Aff. ¶ 15) Under the exchanges' volume-based pricing structures, traders pay reduced transaction fees for meeting certain volume thresholds, usually on a tiered basis. At CME, the discounts can apply to members and non-members; at CBOT, the discounts once applied to members and non-members but now apply to members only. (Curran Aff. ¶¶ 18-19) For firms, as a general policy and with some exceptions, trading volume is aggregated to determine the rates the firm pays under any applicable volume

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[8] For electronic trades, between January 2005 and April 2023, CME Members paid an average exchange fee (or, before April 2016, an average combined clearing and Globex fee) of about $0.16 per contract, while non-members and incentive program participants paid an average of $1 per contract. CME Members' average monthly rate during this period ranged from about $0.12 per contract to about $0.19 per contract, while monthly average rates for non-members and incentive program participants ranged from about $0.78 per contract to about $1.19 per contract.

Between July 2007 and April 2023, for electronic trades, CBOT Members paid an average exchange fee (or, before April 2016, an average combined exchange [transaction] and clearing fee) of about $0.17 per contract, while non-members and incentive program participants paid an average of $0.93 per contract. CBOT Members' average monthly rate during this period ranged from about $0.15 per contract to about $0.20 per contract, while monthly average rates for non-members and incentive program participants ranged from about $0.64 per contract to $1.28 per contract.

discounts. CME has taken this approach since before demutualization, and CBOT since at least its demutualization. (Curran Aff. ¶ 20) Both CME and CBOT have consistently outlined their volume-based fee frameworks on their fee schedules, including explanations of how the discounts are applied to firms. (Curran Aff. ¶ 16) At CME, the lowest rates non-members can achieve under these fee structures are higher than the standard rates charged to individual members. (Curran Aff. ¶ 18) When CBOT had volume-based discounts for non-members, it was CBOT's general policy to set the lowest rates non-members could achieve at amounts higher than the standard rates for individual members. (Curran Aff. ¶ 19.)

CME and CBOT also have used fee caps since before their respective demutualizations. (Curran Aff. ¶ 14) Fee caps limit the fees charged to a market participant. (Curran Aff. ¶ 14) One example of a fee cap is CME's E-Mini fee cap, which the exchange developed to grow liquidity in E-Mini products. The exact parameters varied over time, but the fee cap generally limited the amount CME members paid in Globex fees per day to trade E-Mini futures and options. (Curran Aff. ¶ 14.) CME eliminated the fee cap in 2010, replacing the cap with a volume discount that rewarded liquidity across market participants more uniformly.[9] (Ex. 96 at A-2857.)

CME and CBOT also historically have implemented market-maker and other incentive programs to build liquidity, increase volume, and attract new traders. The details of the programs vary widely, but participants in market-making programs generally receive special rates in exchange for meeting certain quoting obligations (i.e., continuously providing both bids and offers for a given product). (Curran Aff. ¶ 13.) Other incentive programs offer participants special rates for their trades based on criteria ranging from product-specific trading volume,

[9] Because the E-mini fee cap was trader-based, "trading firms with identical volumes could pay different fees solely based on the structure of their traders or trader IDs." (Ex. 96 at A-2857.)

location, and entity type. (Curran Aff. ¶ 12.) CME and CBOT have used both market maker programs and other incentive programs to encourage trading since before their respective demutualizations. (Curran Aff. ¶ 12.) The exchanges have informed their members of these initiatives in member newsletters, on their fee schedules, and through public filings with the Commodity Futures Trading Commission describing the programs. (Curran Aff. ¶ 12, 14-16.)

N. Trading Floor Closures

In 2015, long after most of the open outcry pits had failed CME's and CBOT's liquidity tests, CMEG closed the majority of the CME and CBOT open outcry pits, leaving open only the S&P 500 futures pit and a number of options trading pits. (Ex. 97 at A-2874.) After closing all pits in March 2020 due to the COVID-19 pandemic, on May 4, 2021, CME Group announced that it would permanently close all CME and CBOT open outcry pits other than CME's Eurodollar options pit, which at that time traded both Eurodollars and SOFR options. (Ex. 98 at A-2878.) Following the conversion of all Eurodollar options to SOFR options in April 2023 (Ex. 99 at A-2883), the SOFR option pit remains the only open pit on the CME trading floor today.

O. Value of Class A Shares Received at CME's and CBOT's Demutualizations

The Class A shares granted to all CME members at the time of CME's demutualization have appreciated significantly. As shown in the table below, for example, the Class A shares granted to all CME Class B-1 shareholders (*i.e.*, a member of the historical CME division) at the time of demutualization, appreciated over $15.9 million in value between CME's IPO and

June 20, 2023. Those Class A shares also entitled the holder to receive over $6.2 million in dividend payments.[10] (Richmond Aff. ¶ 20.)

CME Members' Class A Share Value as of June 30, 2023

Historical CME Membership Division	Class A Share Allocation per Membership	Value of Class A Shares as of June 30, 2023	Aggregate Dividends Accrued through June 30, 2023
CME	17,999	$16,675,173	$6,203,895
IMM	11,999	$11,116,473	$4,135,815
IOM	5,999	$5,557,773	$2,067,735
GEM	99	$91,719	$34,123

Had the member reinvested the cash dividends back into CME/CMEG Class A shares, the member would have net gains of approximately $30 million: (*Id.*)

CME Members' Class A Share Value as of June 30, 2023 (Reinvested Dividends)

Historical CME Membership Division	Class A Share Allocation per Membership	Value of Class A Share Allocations as of June 30, 2023 Assuming Dividend Reinvestment
CME	17,999	$30,728,864
IMM	11,999	$20,485,341
IOM	5,999	$10,241,817
GEM	99	$169,018

The CBOT Class A shares granted to members at the time of CBOT's demutualization have similarly appreciated significantly. As shown in the table below, for example, the Class A shares granted to all CBOT Class B-1 members (*i.e.,* a member of the historical Full division) at the time of demutualization, realized an appreciation of over $7.3 million as of June 30, 2023. Those Class A shares also entitled the holder to receive over $3.7 million in dividend payments.[11] (Richmond Aff. ¶ 28.)

[10] The chart similarly shows the appreciation of the Class A shares granted to Class B-2 shareholders (the IMM members), Class B-3 shareholders (the IOM members) and Class B-4 shareholders (the GEM members).

[11] The chart similarly shows the appreciation of the Class A shares granted to CBOT Class B-2 members (the Associate members), Class B-3 members (the GIM members), Class B-4 members (the IDEM members), and Class B-5 members (the GEM members).

CBOT Members' Class A Share Value as of June 30, 2023

Historical CBOT Membership Division	Class A Share Allocation per Membership	Value of Class A Shares as of June 30, 2023	Aggregate Dividends Accrued through June 30, 2023
Full	27,338	$9,497,733	$3,703,991
Associate	10,000	$3,474,187	$1,354,888
GIM	5,000	$1,737,094	$677,444
IDEM	1,100	$382,161	$149,038
COM	2,500	$868,547	$338,722

Had the Member reinvested the cash dividends back into CBOT/CMEG Class A shares, that same CBOT Class B-1 Member would have net gains of over $15 million, as reflected in the table below: (Richmond Aff. at ¶ 21.)

CBOT Members' Class A Share Value as of June 30, 2023 (Reinvested Dividends)

Historical CBOT Membership Division	Class A Share Allocation per Membership	Value of Class A Share Allocations as of June 30, 2023 Assuming Dividend Reinvestment
Full	27,338	$17,617,624
Associate	10,000	$6,444,372
GIM	5,000	$3,222,186
IDEM	1,100	$708,881
COM	2,500	$1,611,093

III. CASE BACKGROUND AND SUMMARY OF CLAIMS

Plaintiffs filed their initial complaint on January 15, 2014, and first amended complaint on September 12, 2014, asserting that Defendants breached their Certificates of Incorporation when they opened the co-location facility at the ADC and allowed both members and non-members the ability to place their servers in the facility and access Globex through the lowest latency connection (the "Globex Claims"). Plaintiffs' focused their Globex Claims on the assertion that the Core Rights granted Class B Members *exclusive* direct access to the Globex platform and the right to the "best and most proximate access" to Globex for free. (Ex. 107 ¶¶ 4-5, 110, 113-115). Plaintiffs did not allege in either Complaint that the ADC itself is a trading floor. Instead, Plaintiffs repeatedly asserted in those early complaints that *Globex* was a "virtual

pit" or "virtual trading floor," that the "ADC, *in conjunction with Globex*, now serves as a virtual trading floor," and that Defendants violated the Core Rights by failing to honor Plaintiffs' "[p]referred access to the *Globex* virtual/electronic trading floor." (*Id.* ¶¶ 7, 40, 85, 110 (emphasis added); Ex. 170 at A-4358 (12:24-12:25); Ex. 156 at A-4289 (138:16-138:17).)[12] In addition, Plaintiffs initially alleged that Defendants further breached the Core Rights "by providing preferential fees to non-member customers" (the "Fee Claims"). (Ex. 107 ¶ 117.)

On July 2, 2015, Defendants filed a combined motion to dismiss the Fee Claims and motion for summary judgment on the Globex Claims, the latter based on the indisputable reality of open access to Globex and the CBOT electronic trading platform. Plaintiffs amended their complaint rather than respond to Defendants' motion for summary judgment. In their Second Amended Complaint that followed on February 23, 2017, Plaintiffs were forced to acknowledge that CME had adopted direct, open access to Globex for all market participants in August 2000, before the effective date of CME's demutualization, and that CBOT had also opened access to its electronic trading platform in 2001, four years before it demutualized. (Ex. 108 at A-3284.) Realizing that this rendered their claim to exclusive Globex access a dead letter, Plaintiffs pivoted.

It was then, more than three years after their initial complaint, that Plaintiffs shifted their focus. Whereas before, Plaintiffs alleged CME failed to honor their rights to the *Globex* virtual trading floor, they now claimed that the *ADC* itself is a trading floor.[13] (Ex. 110 ¶ 119(A); *see also* ¶¶ 13, 85, 123(A) (emphasis added).) Yet Plaintiffs' theory was still based on the allegation

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[12] Many of the Plaintiffs deposed in this case likewise contend that Globex itself is a "trading floor." (*See* Ex. 170 at A-4358 (12:24-12:25) ("[W]herever Globex went, that is the trading floor."); Ex. 156 at A-4289 (138:16-138:17); Ex. 161 at 39:24-40:10 (explaining that although Globex was not initially a trading floor, it became one over time, "probably when they built the Aurora Data Center.")).

[13] Notably, Plaintiffs continued to allege that Globex too is a "virtual trading floor." (Ex. 110 ¶ 92.)

of a substantive right regarding special Globex access—the claim that the Core Rights granted Class B Members the BMPA to Globex—a right that Plaintiffs asserted they had from their respective demutualizations up until the point in time that Defendants opened the co-location facility at the ADC. (*See generally* Ex. 110.) Their allegation that the ADC is a trading floor was just a spin on their BMPA theory: Plaintiffs alleged that "Once the Globex electronic trading platform was moved to the ADC, access to Globex at the ADC became the best and most proximate available trading access, akin to access to the pit under open outcry trading. The ADC became CME's new trading floor." (Ex. 110 ¶ 89.) In other words, the very thing that Plaintiffs alleged makes the ADC a trading floor is the BMPA to Globex.

Defendants moved to dismiss the complaint in full on April 10, 2017. On March 16, 2018, the Court granted in part and denied in part the motion. (Ex. 111 at A-3359.) The Court dismissed Plaintiffs' claims based on exclusive access and the right to share in Globex access revenue as time-barred, but determined that "it [was] premature to conclude, as a matter of law, the Aurora Data Center (ADC) is not a trading floor within the context of Core Right 2 and there is no Core Right protecting Plaintiffs' access to Globex[.]" (Ex. 111 at A-3361.) The Court also denied Defendants' motion to dismiss Plaintiffs' Fee Claims. (Ex. 111 at A-3371.)

Shortly thereafter, Plaintiffs filed their Third Amended Complaint. Plaintiffs continued to focus their Globex Claims on the alleged core right to BMPA to Globex and asserted that the ADC is a trading floor because "access to Globex at the ADC [is] the best and most proximate available trading access[.]" (Ex. 112 ¶ 88.) On May 21, 2018, Defendants filed their Answer and Affirmative Defenses, presenting facts that show that CBOT Class B Members have *never* enjoyed the BMPA to any electronic trading system (the CBOT match engine was in London at the time of demutualization) and that CME had moved its match engine from the CME building

to Lombard, Illinois in September 2002, thereby ending any incidental BMPA to Globex that may have theoretically existed from the trading floor at the time of demutualization.[14] (Ex. 113 at A-3504–A-3506.) And after ten years, there is no evidence that anyone at either Exchange ever discussed, let alone granted, this alleged right. Plaintiffs' claim to the BMPA to Globex is just as much a dead letter as their claim to exclusive access to Globex.

In an attempt to overcome this problem, Plaintiffs now resort to abstractions of their made-up rights. They emphasize that the ADC is a trading floor to which they have exclusive access because it allegedly offers the "best access to price discovery" and the "same time and place advantages" that were once held by members trading on the open outcry trading floors.[15] But the only reason the ADC has any of these purported advantages is *because it provides the BMPA to Globex*.

On November 22, 2019, Plaintiffs filed their Motion for Class Certification. (Ex. 116 at A-3721.) After several rounds of briefing and oral argument, the Court certified two *damages-only* classes: a class of all current owners of CMEG Class B shares, except B Shares held by Corporate Members or officers, directors, and employees of CME, and a corresponding class for CBOT B shareholders. (Ex. 118 at A-3788.) The Court also certified division subclasses. (*Id*. at 9-11.) The Court specifically "denie[d] Plaintiffs' request to reserve certification of a class to pursue declaratory or injunctive relief until after trial and only if Plaintiffs prevail on liability." (*Id.* at 11.)

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[14] Plaintiffs filed a substantially identical Fourth Amended Complaint on November 18, 2019, in order to name additional class representations, to which Defendants filed their Answers and Affirmative Defenses on December 16, 2019.

[15] These are the phrases Plaintiffs and their experts now employ.

Plaintiffs provided potential class members with the court-approved notice of class certification order ("Class Notice") on June 17, 2022. The Class Notice advised that:

> Th[is] Lawsuit alleges that Defendants breached the Core Rights of Class B Members by taking a number of actions without first seeking Class B Member approval as provided for in CMEG's and CBOT's Certificates of Incorporation. Specifically, Plaintiffs allege multiple breaches related to Defendants' operation of the co-location facility at the Aurora Data Center and the manner in which Defendants permit access to the Globex electronic trading platform as well as Defendants' policies and practices related to transaction fees. (Ex. 120 at A-3803.)

As to the Globex Claims, the Notice informed potential class members that Plaintiffs contend:

> Defendants breached [Plaintiffs'] Core Rights by:
>
> (1) allowing non-members to trade from the [ADC] without owning or leasing memberships;
>
> (2) requiring Class B Members to pay co-location fees to access and trade from the Aurora Data Center;
>
> (3) not allowing Class B Members to collect the rents for leasing space to access and trade from the [ADC];
>
> (4) allowing multiple traders and/or algorithmic trading strategies associated with a corporate and or clearing member to execute trades from the colocation facility, without requiring the corporate or clearing member to own, lease, or otherwise be assigned a unique Class B Membership for each of their associated traders and/or algorithmic trading strategies; and
>
> (5) allowing Class B Members and lessees to trade outside of their exchange and division of membership from the Aurora Data Center.

(Ex. 120 at A-3803–A-3804.)

The Notice also advised that Plaintiffs allege Defendants have deprived Class B Members of their right to preferential fees and thereby breached the Core Rights by:

> (1) "Allowing multiple non-member employees and independent contractors of Corporate Members to trade for the Corporate Member's account at the Corporate Member rate instead of requiring that each employee or independent contractor of a Corporate Member lease, own, or otherwise have assigned to him or her a Class B Membership;"

(2) "Implementing volume-based fee structures under which the ability to obtain the best transaction fees depends on the trading volume generated by all traders within a trading firm, and not solely on the lease or ownership of a Class B Membership;"

(3) "Eliminating the daily cap on individual Class B Members' Globex fees; and"

(4) "Implementing incentive programs under which non-members are allegedly provided fees that are as good or better than those provided to individual Class B Members."

(Ex. 120 at A-3804.)

In the event the Court determines the Core Rights do not provide the rights Plaintiffs assert, Plaintiffs bring claims, in the alternative, for breach of the covenant of good faith and fair dealing. Plaintiffs assert that had the parties considered it, they would have agreed that the members' rights and privileges should include the exclusive and free right to access Globex from the ADC or any other co-location facility. (Ex. 112 ¶¶ 130-31.)

On July 19, 2023, Plaintiffs informed Defendants that they are no longer seeking class-wide damages for Plaintiffs' Fee Claims. Plaintiffs refused, however, to dismiss the Fee Claims, and appear to be continuing to prosecute them notwithstanding the failure of any proof as to damages. Defendants thus address the Fee Claims in this motion for summary judgment.

IV. ARGUMENT

A. Legal standard

Summary judgment "shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS § 5/2-1005(c). An issue precluding summary judgment exists only where the material facts are disputed, or where a reasonable person might draw different inferences from those facts. *State Farm Mut. Auto. Ins. Co. v. Murphy*, 2019 IL App (2d) 180154, ¶ 21.

The moving party bears the initial burden of production and can satisfy that burden by either (1) affirmatively disproving the plaintiffs' case with evidence that entitles the movant to judgment as a matter of law, or (2) establishing that the nonmoving party lacks sufficient evidence to prove an element of their claim. *Williams v. Covenant Med. Ctr.*, 316 Ill. App. 3d 682, 688 (4th Dist. 2000). Once the movant has satisfied their burden, the burden shifts to the nonmoving party. *Id*. at 689. "[M]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Chicago White Sox, Ltd. v. State Auto. Mut. Ins. Co.*, 2023 IL App (1st) 230101, ¶ 19. "While a nonmoving party need not prove his or her claim at the summary judgment stage, it is the 'put up or shut up' moment in a suit, and the nonmoving party must present some factual basis to support his or her claim." *Wells Fargo Bank, N.A. v. Coghlan*, 2021 IL App (3d) 190701, ¶ 23. As shown below, because Plaintiffs cannot present any factual basis to support their claims, Defendants are entitled to summary judgment as a matter of law.

B. Defendants Did Not Breach the Plaintiffs' Core Rights When They Opened the Co-Location Facility at the ADC

Plaintiffs' Globex Claims fail because Plaintiffs cannot produce any evidence to support that they have the rights they claim. Instead, the indisputable evidence shows that Plaintiffs do *not* have Core Rights that provide members with the BMPA to Globex, nor do they have Core Rights that extend to any virtual, electronic, or other *non*-open-outcry trading floor. Without a contractual obligation, there can be no breach. Defendants are thus entitled to summary judgment as a matter of law. *See, e.g., Underwood v. City of Chicago*, 2023 IL App (1st) 211317, ¶ 38 (affirming grant of summary judgment in a breach of contract claim where plaintiffs had "no right to receive" the funds that were the subject of alleged breach); *Jacobs v. Mundelein Coll., Inc.*, 256 Ill. App. 3d 476, 477, 483-84 (1st Dist. 1993) (affirming grant of summary judgment

because the plaintiff could not establish that he had the contractual rights that he believed were breached).

1. Plaintiffs Cannot Prove that the CMEG or CBOT Core Rights Include BMPA to Globex

Plaintiffs first allege that the CMEG and CBOT Core Rights grant them BMPA to Globex for free. But neither the CMEG nor the CBOT Core Rights say anything about Globex or any other electronic trading platform, let alone anything about preferential access, or preferential access for free. This alone should end the inquiry. *See In re Viking Pump, Inc*., 148 A.3d 633, 648 (Del. 2016) (noting Delaware courts "give priority to the parties' intentions as reflected in the four corners of the agreement") (internal citations omitted). Plaintiffs assert nevertheless that the absence of an express Core Right covering "Globex access rights and privileges" is inconsequential because at the time of their respective demutualizations up until the opening of the ADC, the CME and CBOT Class B Members had the BMPA to Globex (or e-cbot) from the trading floor, and this purported circumstance is therefore protected by the Core Rights.

While the Court determined at the motion to dismiss stage that Plaintiffs' allegations of BMPA were sufficient to ward off dismissal, Plaintiffs can no longer rely on allegations. Instead, they must come forward with evidence to show that they have the rights they allege. It is time for Plaintiffs to "put up or shut up." *Wells Fargo Bank, N.A. v. Coghlan*, 2021 IL App (3d) 190701, ¶ 23. And as shown below, there are no facts to support that the CMEG or CBOT Core Rights include a right to BMPA to Globex.

(a) CMEG Core Right 2 Does Not Grant BMPA to Globex

Under Delaware law,[16] contractual interpretation is a question of law. Delaware courts seek to discern "the parties' shared expectations at the time they contracted." *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1267 (Del. 2017) (quoting *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 n.11 (Del. 1997)). In addition, because Delaware adheres to an objective theory of contracts, the "contract's construction should be that which would be understood by an objective, reasonable third party." *Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014) (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)).

Because the CMEG and CBOT Charters contain different Core Rights, Plaintiffs' theories of how they have the right to BMPA to Globex differs. The CMEG Plaintiffs assert that BMPA to Globex is one of the "trading floor access rights and privileges" that CMEG Core Right 2 provides. But Plaintiffs cannot make up rights out of thin air and claim they are protected by Core Right 2. CMEG Core Right 2 protects only a limited, defined set of rights that relate to physical access and the ability to trade on CME's open outcry trading floor.

This result is irrefutable when looking at the plain language of the CMEG Charter adopted at demutualization. The Charter provides that "holders of Class B Stock shall have the trading privileges, including the trading floor access rights and privileges, *set forth in [CME's] bylaws and rules*." (Ex. 123 at A-3864 (Art. B.3(2) (emphasis added).) This language directs an

[16] As this Court has recognized, "this case is governed by Delaware substantive law." (Ex. 111 at A-3366.) Under the internal affairs doctrine, Illinois courts apply the substantive law of the state of incorporation to issues related to the internal affairs of a corporation. Because both CMEG and CBOT are incorporated in Delaware and because Plaintiffs' claims relate to the interpretation of the CMEG and CBOT Charters, Delaware substantive law applies to Plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing. *Libco Corp. v. Roland*, 99 Ill. App. 3d 1140, 1144 (4th Dist. 1981); *Newell Co. v. Petersen*, 325 Ill. App. 3d 661, 685–86 (2d Dist. 2001) (applying Delaware law to shareholder voting agreement interpretation).

objective, reasonable third party to look to the bylaws and rules of CME to determine the extent of a member's "trading floor access rights and privileges." And doing so confirms that those rights consist of the ability to "appear on the floor of the [CME] and to act as a floor broker and/or trader for the contracts assigned to that series."[17] (Ex. 123 at A-3888 (Section 6.3); Ex. 100 at A-2900 (Rule 121); Ex. 1 at A-16; Ex. 3 at A-83.) Those enumerated "trading floor access rights and privileges" are what Core Right 2 protects. *See Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 913–14 (Del. 2017) ("In giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract."). Indeed, Plaintiffs are unable to point to a bylaw, rule, or any other document where CME ever guaranteed, defined, described, or even mentioned the alleged right to BMPA to Globex from the trading floor or any place else. As Defendants have repeatedly told the Court, BMPA to Globex is a made up right.

Although this should end the inquiry, even if the Court determines that the phrase "trading floor access rights and privileges" is ambiguous, the uncontroverted extrinsic evidence, including the parties' long-standing course of performance, confirms that Plaintiffs cannot transform what they claim were the circumstances of trading on Globex from the trading floor at the time of demutualization (the BMPA to Globex) into a non-enumerated "Core Right." In construing an ambiguity, the Court may consider extrinsic evidence including: "overt statements and acts of the parties, the business context, prior dealings between the parties, [and] business

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[17] Following the conversion of CME, Inc. to CME Holdings, Inc., the trading privileges were removed from the bylaws. CME Rule 121 today continues to provide that the membership privileges include the right "[t]o access the trading floor if properly qualified by a clearing member" and "[t]o act as a Floor Broker and/or Floor Trader in accordance with Exchange rules[.]" (Ex. 1 at A-16.) The CME Demutualization Prospectus also specifically defines the "*Floor Access*" trading privilege as the right to "appear upon the floor of New CME and to act as a floor broker and/or trader for the contracts assigned to that series[.]" (Ex. 3 at A-83); *see Centaur Partners, IV v. National Intergroup, Inc*., 582 A.2d 923, 927 (Del. 1990) (considering proxy materials in determining that certificate of incorporation and bylaws were unambiguous).

custom and usage in the industry." *Salamone*, 106 A.3d at 374 (quotation marks omitted) (quoting *In re Mobilactive Media, LLC*, C.A. No. 5725–VCP, 2013 WL 297950 at *15 (Del. Ch. Jan. 25, 2013)). The Court may also consider "the history of negotiations, earlier drafts of the contract, trade custom, or course of performance." *LSVC Holdings, LLC v. Vestcom Parent Holdings, Inc.*, C.A. No. 8424-VCMR, 2017 WL 6629209, at *6 (Del. Ch. Dec. 29, 2017) (quoting *In re Westech Cap. Corp.*, Consol. C.A. No. 8845-VCN, 2014 WL 2211612, at *9 (Del. Ch. May 29, 2014)).

All of this evidence uniformly refutes Plaintiffs' claims. What is more, because the extrinsic evidence is not in dispute, this Court can properly construe the meaning of "trading floor access rights and privileges" as a question of law. *See William Blair & Co. v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 342 (1st Dist. 2005) (when "the extrinsic evidence available to construe ambiguous language is not in dispute, a court may [] properly decide the issue as a question of law, as no question of fact is raised"); *Gomez v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 130568 ¶¶ 27-28 (affirming summary judgment where "the undisputed extrinsic evidence," including "evidence regarding the parties' previous dealings [and] course of performance," resolved the contractual ambiguity); *Richard W. McCarthy Tr. Dated Sept. 2, 2004 v. Illinois Cas. Co.*, 408 Ill. App. 3d 526, 536 (3d Dist. 2011) (affirming summary judgment where a contract modification was ambiguous, but the extrinsic evidence supported "only [one] conclusion").

Here, leading up to demutualization, CME repeatedly told its members that "the Board ha[d] designed provisions to preserve members' core open outcry trading rights," and that, following demutualization, commercial decisions concerning *open outcry* trading would be subject to limitations prescribed by those Core Rights. By clear and stark contrast, management

would be free to make decisions related to *electronic* trading, including as to "access, distribution . . . and electronic execution fees." (Ex. 41 at A-1793, 1798; Ex. 38 at 9:28 – 43; Ex. 105 at A-3150 (71:3 – 6); Ex. 3 at A-67 – A-68.) Following the demutualization vote, CME did just that. It repeatedly made decisions about access to Globex without ever obtaining a member vote. And it did so *with the approval of the six Class B director representatives who served on the Board at all times*. (*See, e.g.*, Ex. 122 at A-3848.)

On August 30, 2000, the CME Board adopted open access to Globex, allowing "unlimited, direct access to [the] GLOBEX[] electronic trading system for all market participants." (Ex. 45 at A-2080; Ex. 44 at A-1887-1888.) CME notified its members of the action multiple times (Ex. 45 at A-2080; Ex. 47 at A-2171), yet there is no evidence that a single member objected or inquired whether the Class B members would nonetheless retain any BMPA to Globex.

In January 2001, CME then began to offer all market participants—members and non-members alike—a variety of connection options to Globex, including choices of line speeds at the same price points. (Ex. 55 at A-2278.) CME continued this equal treatment of market participants as it offered additional connectivity options to Globex over time, both in terms of latency and cost. (*See, e.g.*, Ex. 57; Ex. 67 at A-2501.) And CME marketed electronic trading on Globex as "an entirely level playing field for all participants" with "fairness, transparency and anonymity." (*See, e.g.*, Ex. 68 at A-2507.) There is no evidence that any member ever objected to this equal access or asserted a right that it violated members' rights to BMPA to Globex.

What is more, even if CME Class B members incidentally had the BMPA to Globex from the trading floor at the time of demutualization—a fact that is far from certain—that did not continue for long. As noted above, in late September 2002, CME moved the Globex match

engine from the computer room at CME's headquarters in Chicago, Illinois to a data center in Lombard, Illinois. (Ex. 62.) CME announced the move to members, including that the "new RDC is now the primary site for operation of CME's Globex electronic trading platform." (Ex. 63 at A-2448; Ex. 62.) And once again, Plaintiffs cannot show that a single member objected or asked if the move of the Globex match engine from the CME building to the RDC altered the alleged right to BMPA.

Nor is there evidence that members raised their alleged right to BMPA to Globex in October 2006 after CME announced the LNet connectivity option to all customers, marketing it as "collocated electronic trading" that would "decrease network latency times for order entry to CME Globex to less than one millisecond." (Ex. 66 at A-2498; Ex. 67 at A-2501.) That no member objected is another nail in the coffin of Plaintiffs' claim that they have a Core Right to BMPA to Globex.

Given that all of these commercial decisions relating to electronic trading and Globex access did not mention, let alone make provisions for, an alleged member right to BMPA to Globex, the outcome is clear. As the Delaware courts recognize, "[w]hen the terms of an agreement are ambiguous, 'any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.'" *See Sun-Times Media Gp., Inc. v. Black*, 954 A.2d 380, 398 (Del. Ch. 2008) (quoting Restatement (Second) of Contracts § 202 (Am. L. Inst. 1981)). And here, since open access, CME has consistently and publicly offered members and non-members the equal ability to pay to connect to Globex, including via the LNet low latency, data center connection. Yet until this 2014 lawsuit, no member ever objected or demanded a vote under the Core Rights—not because they did not know about the connectivity options—but because the members' Core Right to trading floor

access rights and privileges did not encompass preferential access to Globex. (Ex. 37 at 1:28:46-1:30:06; Ex. 38 at 2:51-4:00; Ex. 105 at A-3141 (62:19 – 63:15), A-3145 (66:19 – 67-12).)

(b) CBOT Members Likewise Do Not Have a Core Right to BMPA to Globex

Defendants are also entitled to summary judgment on Plaintiffs' claim that CBOT breached its members' alleged Core Right to BMPA to Globex when it opened the ADC. The CBOT Charter does not contain a counterpart to CMEG Core Right 2. Instead, Plaintiffs argue that Section IV(D)(1)(f) of the CBOT Charter somehow encompasses a right to BMPA to Globex that cannot be changed without a vote of the CBOT B-1 and B-2 Members. As in the case of CME, the plain and unambiguous language of the CBOT Charter forecloses this claim.

Section IV(D) of the CBOT Charter sets forth the "Special Rights of Class B Memberships." (Ex. 143 at A-4046 (Art. IV.D).) Subsections IV(D)(1)(a)-(e) assign each of the B Series of Memberships (B-1 through B-5) to their respective existing membership interest in the CBOT.[18] (*Id.* (Art. IV(D)(1)(a)-(e)).) Subsection IV(D)(1)(f) then states that CBOT Class B Members are entitled "to all trading rights and privileges with respect to those products that such holder is entitled to trade on the open outcry exchange system of the Corporation or any electronic system maintained by the Corporation." (*Id.* (Art. IV(D)(1)(f)).) While this subsection confirms that CBOT Class B Members will have the right to trade as members both in open outcry and on any electronic trading system, this says nothing about a right to BMPA to an electronic trading platform. And Plaintiffs cannot show any other place in the Charter, CBOT bylaws, or rules where such a right exists.

[18] These provisions explain, for example, that "[e]ach holder of a Series B-1 Membership . . . shall be entitled to the rights and privileges of, and shall be subject to the restrictions, conditions and limitations on, a Full Member a*s set forth in this Certificate of Incorporation, the Bylaws and the Rules*[,]" whereas each holder of a Series B-4 Membership has the articulated rights of an IDEM Membership Interest. (Ex. 143 at Art. IV(D)(1)(a)-(e).)

Moreover, the section of the Charter Plaintiffs rely on is not even the Core Rights provision. It is a different subsection of the CBOT Charter altogether that grants holders of Series B-1 and B-2 Memberships the limited right to vote before CBOT is permitted to make changes that "adversely affect" the CBOT Class B Members' Core Rights. (*Id.* at A-4046 (Art. IV(D)(2)); A-4045 (Art. IV(C)).) Plaintiffs do not allege that any of those Core Rights encompass the alleged right to BMPA to Globex, nor could they.[19] (*Id.* at A-4046 (Art. IV(D)(2)).) The CBOT Core Rights say nothing about electronic trading, and as with CME, there is no evidence that anyone at CBOT ever discussed the existence of BMPA to an electronic trading platform from the CBOT trading floor, let alone contemplated it as some sort of protected right.

Even if the theory, like for CME, is that the Plaintiffs' characterization of the mere circumstances of their floor trading environment can be converted into unwritten protected "rights," the evidence is conclusive that CBOT members never had even circumstantial BMPA to an electronic trading floor. When CBOT demutualized in 2005 (well into its open access era), the match engine was located in London. (Ex. 130 at A-3930.)

Because a "right" to BMPA to electronic trading had never been documented or even hinted at for either exchange, it is unsurprising that, when CME and CBOT engaged in merger discussions, there is no evidence that the parties ever discussed whether CBOT members would have the BMPA to Globex following the merger, or how to manage the purported preferred access rights across two exchanges that would now operate on Globex. Nor is there a single reference to BMPA to Globex in any public filing made in connection with the CME merger

[19] The CBOT Core Rights include: (i) product allocation; (ii) preferential fees; (iii) membership qualifications; (iv) the commitment to maintain open outcry markets; and (v) the ability of a Class B Member to engage in dual-trading. (Ex. 143 at Section IV(D)(2), IV(C).)

despite the filings repeatedly detailing how the merger would affect the rights and privileges of Class B Members. Moreover, following the merger and migration of CBOT products to Globex, CME continued to offer LNet as the lowest latency connection to Globex for CME and now CBOT as well. (Ex. 67 at A-2501.) Yet no one at CBOT, including the CBOT 10 Directors, objected to LNet or complained that it would deprive the members of their supposed BMPA right to CBOT's electronic trading platform. (Ex. 144 at A-4058 (Art. D(2)(e).)

Plaintiffs cannot survive summary judgment based on a made-up right. And, as the record establishes beyond any possible doubt, Plaintiffs' cornerstone claim to the "best and most proximate access to Globex" is made up. *Mundelein Coll., Inc.*, 256 Ill. App. 3d at 477, 483-84 (affirming summary judgment because plaintiff could not establish he had the contractual rights he believed were breached).

2. Plaintiffs Cannot Prove that the CMEG or CBOT Core Rights Extend to a Trading Floor Without Open Outcry

Plaintiffs cannot save their Globex Claims by arguing that the co-location facility at the ADC or the ADC itself is now a "trading floor" to which Class B Members have exclusive access. Indeed, the entire argument offered by Plaintiffs is nothing more than a rehash of their BMPA arguments repackaged as a word game around the term "trading floor," and thus fails for the same reason articulated above. In any event, Plaintiffs cannot come forward with any evidence to support that their Core Rights extend to a "virtual trading floor," an "electronic trading floor," or any other trading floor or facility that is not in the business of providing a market for open outcry trading. Defendants are entitled to summary judgment on this theory too.

(a) CMEG Core Right 2 Grants Members Access Rights and Privileges Only to the Open Outcry Trading Floor

The CMEG Charter, viewed as an integrated whole, is clear that Core Right 2 unambiguously grants members rights to an open outcry trading floor, nothing more. *Chicago*

Bridge & Iron Co. N.V., 166 A.3d at 913–14 (instructing that "courts must read the specific provisions of the contract in light of the entire contract"). The Charter adopted by CME at the time of demutualization defines Core Right 2 as the "trading floor access rights and privileges granted to each Series of Class B stock, including the Commitment to Maintain Floor Trading." (Ex. 123 at A-3860.) The Commitment to Maintain Floor Trading, in turn, guarantees that CME will maintain a "a facility for conducting business," "as long as an open outcry market is liquid." (*Id.*) The Charter thus explicitly situates "trading floor" rights within the context of "open outcry" trading.

The disclosures made in CME's Demutualization Prospectus further confirm that the term "trading floor" as used in the Charter unambiguously relates to the facility maintained by CME where people congregate to participate in open outcry trading. *See Centaur Partners*, 582 A.2d 923 at 927 (considering proxy materials in determining that certificate of incorporation and bylaws were unambiguous). In describing CME's two trade execution facilities, the Prospectus linked open outcry trading to the trading floor:

> Open outcry trading occurs in individual pits on our two trading floors . . . The trading floors, covering 70,000 square feet, have tiered booths surrounding the pits from which clearing member firm personnel can communicate with customers regarding current market activity and prices and receive orders either electronically or by telephone. In addition, our trading floors display current market information and news on wallboards hung above the pits. (Ex. 3 at A-110 – A-111.)

In contrast, CME disclosed that its second trade facility, Globex, consisted of "an electronic, centralized order book and trade execution algorithm for futures and futures option contracts and allows users to directly enter orders into the order book." (*Id.*)

The entire purpose and business context for the demutualization also requires the understanding that Core Right 2 protects open outcry trading only. As the Delaware Supreme Court has explained, "[t]he basic business relationship between parties must be understood to

give sensible life to any contract." *Chicago Bridge*, 166 A.3d 926-27, 930 (concluding that contract was unambiguous when "situated in the commercial context between the parties," including the specific "complicated commercial relationship" and the "underlying economics of the parties' bargain"). Here, the scope of Core Right 2 relates directly to the overarching goal of the transaction: to preserve members' open outcry rights while allowing the exchange to run the electronic trading system as a for-profit business that could compete in a rapidly evolving world and generate profits for members as equity holders. *See generally* Section II.C

When SPC-Chair Jim Oliff unveiled the demutualization plan, he told the members that, CME "must transition to a governance and management structure that is nimble and swift in its ability to respond to competition." (Ex. 37 at 1:03:22-1:03:33; Ex. 105 at A-3124 (45: 20 – 23).) But he advised that the plan called for a "commitment to its members as part of its Charter to assure the membership that no action ***that would diminish the open outcry trading right currently granted to our membership*** could be taken without the membership's specific ratification." (Ex. 37 at 1:28:46-1:29:24; Ex. 105 at A-3141 (62:23 - 63:3).) He explained that the Board "designed provisions to ***preserve member's core open outcry trading rights***," (Ex. 37 at 1:29:24-1:29:34; Ex. 105 at A-3142 (63:4 – 11).) and that going forward, management's ability to make commercial decisions concerning open outcry trading would be limited by those core open outcry rights, whereas commercial decisions related to electronic trading would not. (Ex. 38 at 9:16 - 9:43; Ex. 105 at A-3149 (70:24 - 71:6).)

Oliff further stressed that, in the event "electronic trading overtakes open outcry," by demutualizing and unlocking the equity value of the exchange, CME would be "in a position to run the electronic company like a business and to pay dividends and provide equity appreciation to our owners." (Ex. 37 at 1:09-1:09:21; Ex. 105 at A-3128 (49:13 – 20).) In essence, although

management would have full control over electronic trading decisions, the members would still benefit—not from any special electronic trading rights or privileges, but from equity ownership. This context confirms that CMEG Core Right 2 only protects access to the *open outcry* trading floor. Expanding it to provide members additional blocking rights as to electronic trading would run counter to the entire point of demutualization.

Even if the Court determines that the term "trading floor" in the Charter is ambiguous (which it should not), Defendants would still be entitled to summary judgment. That is because all of the relevant and admissible extrinsic evidence verifies that the only objectively reasonable interpretation is that, consistent with the articulated business need to compete effectively in the burgeoning market for electronic trading, Core Right 2 protects the members' access rights to an open outcry trading floor, and nothing more. *Gomez*, 2013 IL App (1st) 130568, ¶¶ 27-28 (affirming grant of summary judgment when the undisputed extrinsic evidence, including "evidence regarding the parties' previous dealings [and] course of performance," resolved any ambiguity); *see also Salamone*, 106 A.3d at 374 (extrinsic evidence includes "statements and acts of the parties, the business context, prior dealings between the parties, [and] business custom and usage in the industry") (internal quotations and citation omitted).

The minutes reflecting the Board's approval of the demutualization plan reveal that the Board discussed and approved the Core Rights in a section of the plan titled "Open Outcry Commitments." (Ex. 36 at A-1718 – A-1719) And the plan presented to members both in writing and orally confirmed that while management decisions concerning open outcry trading would be limited by members' core rights, decisions related to electronic trading would not. (Ex. 41 at A-1798; Ex. 37 at 01:43; Ex. 105 at __.) 4541; Ex. 38 at 9:16 - 9:43; Ex. 105 at A-3149 (70:24 - 71:6).) This evidence speaks directly to the reasonable shared expectations of members at the

time they voted in favor of the demutualization. *See Shiftan v. Morgan Joseph Holdings, Inc.*, 57 A.3d 928, 940 (Del. Ch. 2012) (material used as "advertising to the buyers" of stock was "very powerful parol evidence" because it "speaks to the reasonable expectations" of investors). And it confirms that a reasonable participant could have come to only one conclusion: that Core Right 2 protects members' open outcry trading floor rights and those rights only.

The parties' long-standing course of performance further confirms that the Class B members understood the scope of the Core Rights. Since immediately following the demutualization vote, CME has made changes to its Globex access policies and the manners in which market participants can connect to Globex without ever obtaining a vote of the members. This includes direct access for non-members and LNet connectivity for all market participants—a 2006 service that CME marketed as "collocated electronic trading" that decreased latency to Globex. (Ex. 66 at A-2498.) And there is no evidence that any member objected to any of these practices at the time. This consistent and unbroken pattern of conduct is extremely probative. *See Sun-Times Media Grp., Inc.*, 954 A.2d at 398 ("course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement").

In the face of the overwhelming weight of this evidence, Plaintiffs do not have a single piece of evidence to show that members had a reasonable basis at the time of demutualization to believe that Core Right 2 extended beyond an open outcry trading floor. Nor do they have any evidence to square their Globex access claims with members' longstanding silence in connection with management decisions related to Globex access. This silence is consistent with the only plausible interpretation of the Charter and demutualization plan: CMEG Core Right 2 relates only to the open outcry trading floor. Because the evidence allows "only [one] conclusion," no

material factual dispute exists and summary judgment is warranted. *Richard W. McCarthy Tr.*, 408 Ill. App. 3d at 536.

(b) CBOT's Core Rights Likewise Do Not Extend Beyond an Open Outcry Trading Floor

Plaintiffs similarly cannot come forward with any evidence to show that, at the time of demutualization, members had exclusivity rights to anything other than the open outcry trading floor. There is no provision in the CBOT Charter that even mentions the phrase "trading floor." Nor can Plaintiffs tie their argument to any of the CBOT Core Rights. (Ex. 144 at A-4057 (Art. IV(D)(2)(b).) Instead, in a separate section, the Charter refers only to Class B members having rights to the "open outcry system" and "electronic trading system"—a system that had gone open access four years earlier. (*Id.* at A-4056 (Art. IV(D)(1)(f)); Ex. 53.)

Even if one were to superimpose "trading floor access rights and privileges" into the CBOT Charter's Core Rights, given that CBOT faced the exact same competitive threats as CME and sought to demutualize for the exact same reasons, the only plausible interpretation of this implied provision would be that it relates only to an open outcry trading floor. CBOT's course of performance confirms this. CBOT, like CME, made changes to the manner in which its market participants could access and connect to its electronic trading platform without ever obtaining a vote of its members. Shortly following its demutualization, CBOT merged with CME to form CMEG and migrated its products from e-cbot to Globex. CBOT then offered connectivity to all market participants through CME's existing options on the same equal and open terms as CME. (Ex. 66 at A-2498.) CBOT also offered Jackson Direct from offices at the Board of Trade Building to all market participants on equal terms. There is no evidence that any member claimed that these access decisions violated the CBOT Core Rights. *See Sun-Times*

Media Gp., Inc., 954 A.2d at 398 (holding that a "course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement").

(c) The ADC Is Not an Open Outcry Trading Floor or System

Because, as established above, any exclusivity rights of the CME and CBOT Class B Members apply to an open outcry trading floor or system only, Plaintiffs' (false) factual claim that the ADC "operates like" a trading floor is a red herring. Instead, Plaintiffs' claim that the ADC is a trading floor turns on whether it is an ***open outcry*** trading floor. Because the ADC is not an open outcry trading floor and Plaintiffs' core rights do not extend beyond open outcry trading, their claim that Defendants somehow breached the Core Rights by allowing non-member customers to co-locate at the ADC without purchasing or leasing a Class B Membership thus fails as a matter of law. *See City of Chicago*, 2023 IL App (1st) 211317, ¶ 38; *Mundelein Coll., Inc.*, 256 Ill. App. 3d at 477, 483-84.

3. Plaintiffs' Globex Claims Are Barred by Laches

Even if Plaintiffs' Core Rights could somehow be construed to include a right to BMPA to Globex or to a trading floor without open outcry, Plaintiffs' claim for breach of contract based on that right would be barred by the equitable defense of laches. The laches doctrine prevents a plaintiff from bringing a claim with undue delay. *See PNC Bank, Nat'l Ass'n v. Kusmierz*, 2022 IL 126606, ¶ 25; *Pyle v. Ferrell*, 12 Ill. 2d 547, 552 (1958). A party asserting the affirmative defense of laches must establish two elements: "(1) [a] lack of due diligence by the party asserting the claim; and (2) prejudice to the party asserting *laches*." *Ashley v. Pierson*, 339 Ill. App. 3d 733, 739 (4th Dist. 2003); *LaSalle Nat'l. Bank v. Dubin Residential Communities Corp.*, 337 Ill. App. 3d 345, 351 (1st Dist. 2003). The evidence easily establishes both elements.

First, since no later than 2006, Plaintiffs have known that CME has allowed both non-members and members to co-locate their servers at exchange-approved facilities and connect to

the Globex match engine through LNet, which provided what Plaintiffs call the "best and most proximate available trading access" at the time, just as the ADC does today. (Ex. 164 at A-4321 (258:19-258:24); Ex. 167 at A-4344 (69:2-69:5); Ex. 155 at A-4285 (33:18-33:22).) CME has also publicly advertised Globex as providing "an entirely level playing field for all participants" with "fairness, transparency and anonymity" since at least 2006. (Ex. 68 at A-2507.).

For CBOT, the uncontroverted facts show that members did not enjoy the lowest latency connection to e-cbot at the time of demutualization: the match engine was located in London. (Ex. 129 at A-3927.) And after the merger between CME and CBOT and migration of CBOT products to Globex, there was no question that LNet then provided the lowest latency connection to Globex. (Ex. 66 at A-2498; Ex. 67 at A-2501; Ex. 167 at A-4344 (69:2-12); Ex. 164 at A-4321 (258:19-24); Ex. 153 at 68:15-25.) Yet no member complained that this migration cost them their BMPA to an electronic trading system.

Even after Defendants announced their intent to open co-location at the ADC in May 2010, Plaintiffs did not assert that the ADC's co-location offering would violate their Core Rights. And this so even though both CME and CBOT Class B members had designated directors who served on the CMEG Board of Directors. (Ex. 134 at A-3949.) Instead, they sat back and watched CME expend significant resources to build out the facility, hire employees, and prepare to launch co-location. Indeed, by the time the ADC opened in 2012, Defendants had spent over $372 million to build, maintain, and operate it, including $168 million on the co-location facility. (Romeo Aff. ¶ 7.) Even after the ADC opened in January 2012, Plaintiffs still did not object, and Defendants continued to manage access to Globex on the same terms as they had since adopting open access more than a decade earlier: on equal terms for members and non-members alike. It was not until January 15, 2014, that Plaintiffs finally filed their original

complaint, asserting that Defendants had breached their alleged right to BMPA to Globex. *See, e.g., Osler Inst., Inc. v. Miller*, 2015 IL App (1st) 133899, ¶ 25 (delay of two years between plaintiff's attaining knowledge of its cause of action and filing suit was sufficient delay to invoke laches); *Renth v. Krausz*, 219 Ill. App. 3d 120, 121-23 (5th Dist. 1991) (reversing trial court's grant of rescission; holding that summary judgment should have been granted on the basis of laches after buyers delayed six years before seeking rescission of their contract).

Second, Plaintiffs' undue delay prejudiced Defendants. "A party suffers prejudice in the context of laches where he or she 'incurs risk, enters into obligations, or makes expenditures for improvements or taxes' while the other party remains passive." *PNC Bank, Nat'l Ass'n*, 2022 IL 126606, ¶ 33 (citation omitted). Here, it is unduly prejudicial for Plaintiffs to have sat on their hands and waited until *after* the completion of the several-hundred-million-dollar ADC facility to assert that Defendants' long-time policy of providing all market participants equal, fair access to Globex violated their Core Rights. *See, e.g.*, *PNC Bank, Nat'l Ass'n,* 2022 IL 126606, ¶ 33 (applying laches where counterparty incurred significant expenses); *Mo v. Hergan*, 2012 IL App (1st) 113179, ¶ 39 (applying laches where plaintiff "allowed the remaining owners to continue to participate in the ventures and create value on her behalf, while she withheld her decision"). Plaintiffs' Globex Claims are thus further barred by laches.

4. Plaintiffs Cannot Provide Evidence of Damages

Summary judgment is independently warranted on the Globex Claims because Plaintiffs will be unable to provide any evidence of damages on a class-wide or individual basis at trial. *Burkhart v. Davies*, 602 A.2d 56, 60 (Del. 1991) (holding summary judgment should be entered for defendant when plaintiff fails to prove an essential element of its claim); *Westlake Fin. Grp., Inc. v. CDH-Delnor Health Sys.*, 2015 IL App (2d) 140589, ¶ 30 ("Damages are an essential element of a breach-of-contract claim, so a plaintiff's failure to prove damages entitles the

defendant to judgment as a matter of law."). Plaintiffs' only evidence to support class-wide damages is the inadmissible opinion of Dr. Jonathan Arnold, who calculates damages using a novel and unreliable methodology that results in a speculative and unsupported damages figure.[20]

Nor can any of the named Plaintiffs prove damages on an individual basis. There is no evidence, for example, that any named Plaintiff paid to co-locate at the ADC (*See, e.g.*, Ex. 161 at A-4308 (255:10-255:19); Ex. 170 at A-4359 (228:2-228:7)), and in fact, most Plaintiff-class-representatives testified that they did not trade at all during the Class Period. (*See, e.g.*, Ex. 163 at A-4315 (35:14-35:16); Ex. 154 at A-4279 – A-4280 (45:2-46:15); Ex. 162 at A-4311 – A-4312 (100:22-101:1).) Nor is there evidence to support that any Plaintiff could have leased out his or her membership for more money had Defendants limited access to the ADC. The evidence instead shows that nearly every market participant licensing space from Defendants at the ADC was itself a member of one of the CMEG exchanges. (Gresky Aff. ¶ 9.) Because Plaintiffs lack any admissible evidence of damages, summary judgment is required.

C. Plaintiffs Cannot Prove that Defendants' Fee Practices and Policies Breached the CMEG or CBOT Plaintiffs' Core Rights

Defendants are likewise entitled to summary judgment on Plaintiffs' Fee Claims. Not only is there no evidence to support that Plaintiffs' Core Rights extend to bar the fee practices and policies that Plaintiffs complain of, but Plaintiffs have offered no evidence of any damages (class-wide or otherwise) with respect to their Fee Claims. Several of Plaintiffs' claims are also barred by the statute of limitations and/or doctrine of laches as they attack practices that Defendants have employed ever since (and even prior to) their demutualizations.

[20] Defendants have concurrently filed a motion to exclude Plaintiffs' damages expert.

1. Plaintiffs Cannot Establish Damages on Any of Their Fee Theories

As a threshold matter, Plaintiffs' Fee Claims fail because Plaintiffs have no evidence of damages for any theory of breach, whether on a class-wide or individual basis. *Burkhart*, 602 A.2d at 60 (holding summary judgment should be entered for defendant when plaintiff fails to prove an essential element of its claim); *see also In re Illinois, Bell Tel. Link-Up II*, 2013 IL App (1st) 113349, ¶19. In support of class certification, Plaintiffs submitted an expert report of Dr. Jonathan Arnold in which he opined that damages could be assessed on a class-wide basis for the Globex Claims and/or the Fee Claims, using either a regression analysis that measured the loss in value to the Class B shares caused by Defendants' breaches or a hypothetical negotiation analysis that measured a full or partial buyout of members' Core Rights. (Ex. 147, A-4071 ¶¶ 29-30, 37, 42, 47, 49.) Dr. Arnold did not, however, assess damages at that time. (*Id.* ¶ 29)

When he ultimately served his July 14, 2023 Expert Report, Dr. Arnold did not offer any opinion on damages caused by Defendants' alleged breaches of Plaintiffs' fee rights, but instead measured damages only as to the alleged loss of "exclusivity rights in the ADC trading floor." (Ex. 148, A-4115 ¶ 15.) That same day, Plaintiffs served the expert report of Dr. Arun Sen, opining that the opening of the ADC (*i.e.*, the Globex Claims) caused the entire alleged devaluation of the B Shares. (Ex. 149 at A-4199 – A-4200 (¶¶ 1-2, 4-5).) In fact, Dr. Sen opines that the Globex Claims are ***the only plausible cause*** of the devaluation, meaning that ***none*** of it is attributable to the Fee Claims. (*Id.*) Following Defendants' inquiry, Plaintiffs confirmed that they "are not seeking separate class-wide damages for any breach of plaintiffs' rights to preferential clearing fees." (Ex. 106 at A-3204.)

Without evidence of class-wide damages, and having admitted that the alleged Fee Claims did not cause a devaluation in their B shares, even assuming Plaintiffs can prove a violation of their rights to preferential fees, Plaintiffs are left with proving individual transaction-

level damages, showing that a specific Plaintiff executed a trade and was charged a fee that was higher than it should have been. Plaintiffs have no evidence that this ever occurred. Summary judgment is thus required.

2. Plaintiffs Cannot Prove that CME Breached Any Right to Preferential Fees

Summary judgment on the Fee Claims is required for multiple other reasons too. First, as this Court has already observed, unlike the CBOT Charter, which expressly gives CBOT members a protected right to lower transaction fees, the CMEG Charter is silent on fees. Plaintiffs nonetheless allege that the "right to preferential clearing fees was among the trading rights and privileges held by members when CME demutualized, and [is] thus guaranteed by Core Right 2." (Ex. 115 ¶ 117) As shown above in Section IV.B.1(a), however, the plain language of the Charter, read as a whole, confirms that CMEG Core Right 2 is unambiguous and protects only a limited, defined set of rights that relate to physical access and the ability to trade on the open outcry trading floor. This alone should be dispositive. *See ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 69 (Del. 2011) (warning that "creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented").

Even if this Court determines that there is an issue of material fact regarding the existence of a Core Right to preferential fees, Defendants would still be entitled to summary judgment. This is because the undisputed record confirms that any such right is narrow and qualified and does not prevent the CME policies and practices Plaintiffs find objectionable. As to "Clearing Fees," the Prospectus states that "New CME's rules will provide as follows:"

> In recognition of the importance of the liquidity provided by holders of Class B shares, New CME will continue to charge a lower clearing fee on Exchange products for trades made for their own accounts by a holder of a Class B share or by a lessee of the trading privileges of a Class B share. New CME will not charge

> a higher clearing fee for any trade executed in the open outcry environment than charged for the same trade in any other environment. New CME's management may lower clearing fees or provide other incentives with respect to trades of other persons, including persons considered to be especially important as providers of market liquidity.[21] (Ex. 3 at A-83.)

The Demutualization Plan contains very similar language. (Ex. 41 at A-1795.) At most, members thus have a limited right to pay lower clearing fees than non-members, and even that is subject to exceptions for liquidity providers at CME's discretion.

Plaintiffs' specific theories as to how CME has breached their "fee rights" are based on made-up versions of that right, or are unsupported by any evidence of a breach, or both. As shown below, none can survive summary judgment.

Multiple Traders. Plaintiffs first argue that CMEG has breached their Core Rights "by allowing multiple non-member employees and independent contractors of Corporate Members to trade for the Corporate Member's account at the Corporate Member rate" (the "Multiple Traders Claim"). This framing of their "fee right" contravenes longstanding exchange policy and practice regarding proprietary Corporate Member trading. CME's Corporate *Member* fee policies are just that—member fee policies. (*See generally* Kokal Aff.) They do not enable non-members to trade at rates lower than members because they have no application to non-member trading. Plaintiffs try to confuse the issue by implying that when employees and other firm agents make trades for a Corporate Member without personally holding memberships, it constitutes non-member trading. (Ex. 115 ¶¶10, 97.) But as Plaintiffs acknowledge, these employees are not trading for their own accounts—they are *executing* trades for the Corporate Member's proprietary account, (Ex. 120 at A-3804) and the Corporate Member is being charged the applicable member rate for those trades.

[21] Additionally, the Demutualization Prospectus explains that "New CME will not charge a higher clearing fee for any trade executed in the open outcry environment than charged for the same trade in any other environment." (Ex. 3 at A-83.) Plaintiffs do not claim, and there is no evidence, that CME violated this obligation.

Corporate Member fee policies simply do not violate a member's right to receive better rates than non-members.[22]

Moreover, since at least its demutualization, CME has allowed an unlimited number of employees to direct trades for a Corporate Member's proprietary account and obtain the Corporate Member rate without requiring that those employees themselves hold memberships. (*See* Section II.L; Kokal Aff. ¶¶ 20-24.) For open outcry trades, non-member employees of a Corporate Member could instruct badged employees or others to execute trades for a Corporate Member's account. (Kokal Aff. ¶ 20.) And as to electronic trading, non-member employees themselves could enter trades for the firm's account on Globex. (Kokal Aff. ¶ 23-24; Ex. 151 at A-4252 – A-4253 (152:25–153:5); Ex. 168 at A-4347 – A-4351 (62:24-66:10); Ex. 152 at A-4262 (301:15-19).)

In fact, at the time of demutualization, the fees charged for all Globex transactions were based only on the ownership of the account, not the identity of the executor. (Ex. 89 at A-2752.) In April 2001, in order to "ensure proper application of the Exchange fee schedule for member and non-member transactions on Globex," CME updated its policy to assess fees for *individual* members based on the "combined membership of both the operator and the account owner." (Ex. 89 at A-2759-60; Ex. 90 at A-2769.) Yet CME still continued to assess fees for the accounts of its member *firms* based on the Corporate Member type only. CME disclosed this policy to its members in a letter and on the face of its fee schedule. (Kokal Aff. ¶ 26.) In short, CME's longstanding fee policies have consistently allowed multiple—indeed "unlimited"—Corporate Member employees to conduct *firm* trading activities at applicable Corporate Member rates.

[22] As this Court previously recognized, "the [alleged] breach comes by virtue of the fact that defendants have allegedly not honored their agreement to give preferential fees to Class B members as compared to non-Class B members, nonmembers. . . . [T]hat's the comparative." (Ex. 114 at A-3572–A-3573 (58:18-23; 59:12-13).)

Plaintiffs' grievance in this case is not a new one. Indeed, by at least 2003, individual members were complaining to CME about its Corporate Member fee policies for Globex trading, including how they applied to ATS trades. (Ex. 140 at A-4019 – A-4021.) That some individual members have long wished to impose their self-interested restrictions on CME's Corporate Member fee policies does not translate those wishes into a Core Right. It shows the opposite—that CME's Corporate Member fee policies are outside the scope of Plaintiffs' rights. The consequence of this history also means that Plaintiffs' Multiple Traders Claim is time-barred in any event. Under Illinois law, a plaintiff cannot sue for breach of contract more than ten years after her claim accrues. 735 ILCS 5/13-206 (West 2003).

Volume Discounts and Incentive Programs. Plaintiffs' complaint about volume-discount programs is just another variation of their Multiple Traders Claim. Here, Plaintiffs assert that CMEG breached the Core Rights by "implementing volume-based fee structures under which the ability to obtain the best transaction fees depends on the trading volume generated by all traders within a trading firm, and not solely on the lease or ownership of a Class B Membership" (the "Volume Discount Claim"). This challenges CME's ability to create a fee structure that rewards Corporate Members for providing liquidity by aggregating all trades executed by a firm's agents for the firm's account and applying a volume discount. As shown above, however, any fee preference that CME members have is a fee preference vis-à-vis non-members and does not restrict CME from rewarding its ***Corporate Members*** for providing liquidity. Moreover, CME has used volume-based fee structures and disclosed them on the face of its fee schedule since at least 2001. (*See, e.g.,* Curran Aff. ¶¶15-16.) Plaintiffs' claim is therefore false and time-barred. 735 ILCS 5/13-206.

Plaintiffs' claim based on CME's use of incentive programs fares no better. Here, Plaintiffs assert that CMEG violated the Core Rights by "adopting incentive programs in which non-members are allegedly provided fees that are as good or better than those provided to individual Class B Members" (the "Incentive Program Claim"). (Ex. 120 at A-3804.) But Plaintiffs cannot provide evidence showing that (i) an incentive program allows a non-member to achieve a lower rate than an individual member, (ii) it falls outside the discretion CME reserved to lower fees or provide incentives to others, or (iii) Plaintiffs have suffered harm as a result thereof. (*See infra* at IV.C.1.)

What is more, the evidence shows that even after accounting for all of CME's volume discounts and incentive programs, in the aggregate and on average, CME members have over time paid significantly less to trade than non-members. An analysis of per contract exchange fees charged for electronic trades between January 2005 and April 2023 demonstrates that non-members paid an average of six times more than members to trade.[23] (Richmond Aff. at ¶ 40.) It is thus not surprising that Plaintiffs and their experts failed to offer any theory of damages from Defendants' alleged fee violations.

Globex Fee Cap Claim. Lastly, Plaintiffs cannot prove that CME's elimination of the E-Mini fee cap breached any alleged right of CMEG Members to preferential fees. This grievance simply does not relate—at all—to a commitment to a clearing fee preference for members versus non-members. (Ex. 3 at 35; Ex. 41 at A-1795.) The E-Mini fee cap served to limit members' *Globex fees* for trades of E-Mini products. *See* Section II.L. The distinction between clearing

[23] For consistency, for the period before April 2016, this analysis takes into account traders' combined clearing and Globex fees; beginning in April 2016, the analysis incorporates exchange fees. In particular, between January 2005 and April 2023, members paid an average exchange fee of about $0.16 per contract, while non-members and incentive program participants paid an average of $1 per contract.

fees and Globex fees is clear. Moreover, Plaintiffs do not even allege (nor could they prove) that the elimination of the E-Mini fee cap resulted in members paying more to trade than non-members.

Plaintiffs cannot come forward with evidence to support any one of their theories of breach. CME is entitled to summary judgment on Plaintiffs' Fee Claims.

3. Plaintiffs Cannot Prove CBOT Breached Its Members' Core Right to Preferential Transaction Fees

In contrast to the CMEG Charter, the CBOT Charter does provide a Core Right to preferential fees. But the Core Right is limited in scope and protects only the right of "holders of Class B Memberships . . . [to] be charged transaction fees for trades of [CBOT's] products for their accounts that are lower than the transaction fees charged" to a non-member for the same products. (Ex. 143 at A-4047 (Art. IV.D.2.(b)(2).) Thus, CBOT Core Right 2 simply governs the relationship between member transaction fees and non-member transaction fees on a per trade basis, giving members the right to pay lower rates—nothing more. By its plain terms, CBOT Core Right 2 does not give members any fee rights *relative to other members*, and therefore has no bearing on CBOT's Corporate Member fee policies or its incentive programs offered to members. Nor does it prevent CBOT from offering non-members discounts or incentives that do not violate its directive. As such, and as shown below, Plaintiffs cannot survive summary judgment on any of their Fee Claims against CBOT either.

Multiple Traders. Plaintiffs' Multiple Traders Claim against CBOT fails for the same reason as their claim against CME: it challenges CBOT's Corporate Member fee policies, which govern the rates that *members* receive on trades for their proprietary accounts. (Ex. 120 at A-3804.) These policies have no relation to CBOT Core Right 2, which only speaks to member versus non-member fees. Like CME, CBOT has allowed an unlimited number of employees who

do not hold memberships to direct trades for Corporate Members' proprietary accounts at Corporate Member rates since at least its demutualization. (Ex. 93 at A-2783 (9B.11).) Non-member Corporate Member employees could direct trades for execution in open outcry for the firm's account and those trades would receive member rates. With respect to electronic trading, CBOT adopted rules providing that non-member employees could enter trades electronically directly on behalf of a Corporate Member and those trades would receive member rates. (*See, e.g.*, *Id.*; Kokal Aff. ¶¶ 23-24, 27.) Plaintiffs cannot put forward any evidence to prove that CBOT's Corporate Member fee policies somehow violate Core Right 2.[24]

Volume Discounts and Incentive Programs. Plaintiffs' claims based on CBOT's implementation of volume-based discounts and incentive programs are equally meritless. With respect to volume-based discounts, Plaintiffs allege that "starting in or about June 2009," CBOT violated CBOT Members' Core Rights by "implementing a volume-based fee structure under which the ability to obtain the best transaction fees depended on the trading volume generated by all traders within a trading firm, and not the lease or ownership of an individual membership." (Ex. 121 at A-3838.) This claim is just another attack on how CBOT applies its Corporate Member fee policies, which as shown above has no relation to CBOT Core Right 2. Moreover, CBOT's volume-based pricing models currently are not even available to non-member market participants. (Curran Aff. ¶ 19.)

The Plaintiffs' Incentive Program Claim also fails because they cannot show the existence of any incentive program that provided non-members with fees that are as good or

[24] Plaintiffs' CBOT Multiple Trader claim–to the extent it had any merit–would nonetheless be barred by the doctrine of laches. The doctrine of laches "bars an action where, because of delay in bringing suit, a party has been misled or prejudiced or has taken a course of action different from what the party otherwise would have taken." *Senese v. Climatemp, Inc.*, 289 Ill. App. 3d 570, 578 (1997) (affirming dismissal of action on the basis of laches where plaintiff "offer[ed] no reasonable excuse for not pursuing his claim earlier").

better than those provided to individual Class B Members, and even if they could, they cannot show that they suffered resulting damages. (*See* Section IV.C.1.) Finally, contrary to Plaintiffs' claims, the evidence actually shows that, in the aggregate and on average, CBOT Members have paid ***significantly less*** to trade than non-members, even after accounting for volume discounts and incentive programs. Between July 2007 and April 2023, for electronic trades, CBOT non-members and incentive program participants paid an average per contract exchange fee over five times greater than CBOT Members' average per contract exchange fee.[25] (Richmond Aff. ¶ 43)

Because the CBOT Plaintiffs cannot come forward with a single issue of triable fact on any one of their Fee Claim theories, summary judgment for Defendants is warranted.

D. Plaintiffs' Good Faith and Fair Dealing Claims Fail

Recognizing that their breach of contract claims assert rights that do not exist, Plaintiffs claim, in the alternative, that Defendants' operation of the ADC breaches the implied covenant of good faith and fair dealing (the "GFFD Claims"). But Plaintiffs' GFFD Claims find no support in the facts, and instead, are at complete odds with the key goals and contemporaneous understanding of the demutualizations: to grow and operate electronic trading as for-profit entities, preserve open outcry opportunities for members for so long as the open outcry markets remained liquid, and unlock the equity value of ownership. *See* Section II.C, E.

As this Court previously acknowledged, "the implied duty of good faith and fair dealing is a limited, extraordinary remedy," that is "rarely utilized." (Order on Motion to Dismiss at 16.) Delaware courts only recognize an "occasional necessity" to invoke the covenant and only to

[25] To conduct a consistent comparison across the entire period, this analysis takes into account traders' combined clearing and transaction (or exchange) fees for the period of time before April 2016; beginning in April 2016, the analysis incorporates exchange fees (which is the combined fee). Members' average rate per contract during the period analyzed was about $0.17, while the average rate per contract for non-members and incentive program participants was about $0.93. (Richmond Aff. ¶ 43.)

"honor the parties' reasonable expectations." *Cincinnati SMSA Ltd. v. Cincinnati Bell Cellular Systems Co*, 708 A.2d 989, 992 (Del. 1998); *see also Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010) (dismissing good faith and fair dealing claims where plaintiffs "got the benefit of their actual bargain"). Importantly, the covenant cannot "give the plaintiffs contractual protections that they failed to secure for themselves at the bargaining table." *Winshall v. Viacom Intern., Inc.*, 76 A.3d 808, 816 (Del. 2013) (internal citations omitted); *see also Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1035 (Del. Ch. 2006) (holding courts should not imply a contract right "when the contract could easily have been drafted to expressly provide for it"). As set forth below, Plaintiffs' extraordinary claim that they possess implied contractual rights to exclusive co-location and free or preferential co-location fees fails under these standards and lacks any support in the extensive factual record.[26]

Globex GFFD Claim. Plaintiffs first allege that if the co-location facility at the ADC is not a trading floor protected by the Core Rights, then "there is a gap . . . in both the CME and CBOT Charters . . . with respect to the ADC and other 'co-location' facilities, the development of which was not, and could not have been, anticipated by the parties at the time of Defendants' demutualization." (Ex. 115 ¶ 131.) They speculate that if the parties had specifically considered co-location facilities such as the ADC, they would have agreed to give members the exclusive right to access Globex from the ADC and other co-location facilities for free. (*Id.* ¶ 132.) This theory is wrong at every step.

To begin with, Plaintiffs cannot prove that there is a gap in either the CME or CBOT Core Rights regarding co-location. Rather, the parties intentionally excluded from the Core

[26] The Court may consider extrinsic evidence when evaluating Plaintiffs' good faith and fair dealing claims. *Horizon Pers. Commc'ns, Inc. v. Sprint Corp.*, No. CIV.A. 1518-N, 2006 WL 2337592, at *14 n.129 (Del. Ch. Aug. 4, 2006).

Rights any preferential access to any electronic trading system—and that is exactly what co-location provides. (*See* Section II.C.) As to CME, co-location at the ADC is just the latest in a long line of Globex access upgrades that CME has made over the last quarter-century, including open access in 2000, international hubs in 2002, Client InternetLink in 2003, LNet low latency connectivity in 2006, and Jackson Direct in 2008. (Ex. 44 at A-1887-1888; Ex. 125 at A-3910; Ex. 57; Ex. 66 at A-2498; Ex. 75 at A-2573.) Each of these access upgrades allowed all market participants to connect to and trade on Globex using advances in technology, including at the lowest-latency connection. And each of these access upgrades also required members to pay for their Globex access.[27] (Ex. 153 at 24:13-25:5; Gisch Aff. ¶¶ 13-19.) The same is true as to CBOT, as explained above. (*Infra* at II.G, II.I.) As Plaintiffs themselves admit, co-location is just "placing multiple high-speed servers in very close proximity to electronic trading platforms," and the placement of the Globex match engine at the ADC is "just another upgrade of the same electronic trading platform that CME has maintained and upgraded since the early 1990s." (Ex. 115 ¶¶ 87, 92).

Nor can Plaintiffs support that the Exchanges and their members could not have contemplated the development of a low latency connectivity point at the time of their respective demutualizations. While the parties may not have known about the exact concept of co-location, they certainly contemplated that advances in technology would result in changes to how market participants would access and trade on Globex, and they contracted for management to have sole discretion to make decisions as to those electronic trading access upgrades. (Ex. 41 at 1798;

[27] Even from the trading floor, members paid to connect their own equipment to Globex; it was not free. (Ex. 55 at A-2278 – A-2280.)

Ex. 37 at 9:16; Ex. 4 at A-210; Ex. 104 at A-3150.) Again, this was the entire purpose of the demutualizations.

The last step of Plaintiffs' fanciful theory—that CME and CBOT would have agreed to give members free and exclusive co-location access and connectivity—is demonstrably false. CME had plans to expand access to Globex at the time of its demutualization and understood that to compete in the new electronic world against all-electronic, non-member exchanges, it would need to create a system that was open and fair to all market participants. (Ex. 15 at A-1023; Ex. 126 at A-3915; *see generally* Ex. 22 at A-1357.) CBOT had already moved to an open access electronic system prior to its demutualization. (Ex. 52 at A-2249; Ex. 53.) It is implausible to suggest that either would have agreed to restrict co-location to members at the very moment they were taking intentional and transformative steps to expand and equalize market participant access to electronic trading. Indeed, that would have gone entirely against the deals struck at demutualization: members obtained blocking rights to protect open outcry trading and management received the ability to run the electronic trading business as a for-profit company. (*See, e.g.*, Ex. 38 at 9:28-9:43; Ex. 105.)

But this does not mean the members were left out of the upside of electronic trading. Members also received Class A shares, which "provid[ed] a financial hedge against electronic trading" in the event it overtook open outcry. (Ex. 36 at A-1436.) There would have been no need to provide members a hedge against electronic trading if, as Plaintiffs would have it, members would have received free, exclusive access to connect to CME's electronic trading platform from the lowest-latency connection point and thereby have an electronic trading advantage over all non-members.

Plaintiffs cannot use the implied covenant to re-trade the deal they struck. *Winshall*, 76 A.3d at 816 (internal citations omitted). Plaintiffs' attempts to do so and secure "judicially compelled charity" would be "a fundamentally unfair judicial rewriting of a contract." *Winshall v. Viacom Intern., Inc.* 55 A.3d 629, 641 (Del. Ch. 2011), *aff'd*, 76 A.3d 808 (Del. 2013). And given the massive appreciation in the value of Class A shares that the CME and CBOT Class B members received at their respective demutualizations—based on the deals that they struck—any charity here is entirely unwarranted.

Fees GFFD Claim. Plaintiffs further allege that, if the Court agrees with Defendants that CME's and CBOT's obligations to provide their respective Class B Members with preferential fees do not "carr[y] with [them] a duty not to impose other fees, such as co-location, access, and communication fees, that eliminate the benefits of preferential [] fees," then "there is a gap or interstitial space in the express terms of both [] Charters." (Ex. 115 at ¶¶ 135, 141) They claim that at demutualization the parties did not consider and could not have contemplated "co-location, access, and communication fees," but if they had they would have agreed that members either (1) "would have the right to access the ADC and other 'co-location' facilities free of charge" or (2) "were entitled to co-location, access, and communication fee preferences that were sufficient to promote the value of Class B shares . . . ." (*Id.* ¶¶ 136-38, 141.) Again, Plaintiffs cannot come forward with any facts to support this farfetched claim.

As a threshold matter, Plaintiffs have abandoned any attempt to prove class-wide damages based on their fee claims, and there is no evidence that any of the named Plaintiffs paid co-location fees or otherwise suffered individual damages. (Ex. 149 at A-4199 – A-4200 (¶¶ 1-2, 4-5); Ex. 106 at __.) Because damages are an element of a claim for breach of the implied

covenant of good faith and fair dealing, *Baldwin v. New Wood Res. LLC*, 283 A.3d 1099, 1117-18 (Del. 2022), the Court should grant summary judgment for that reason alone.

Plaintiffs' GFFD fee claim fails for other reasons as well. Once again, the entire premise is wrong. The parties ***did*** contemplate that CME and CBOT would charge market participants additional types of fees related to electronic trading, including access and communication fees. Even before demutualization, CME and CBOT members paid these types of fees. (Curran Aff. ¶ 10; Ex. 60 at A-2340, A-2343; Ex. 4 at A-257 – A-258.) Yet the exchanges committed to provide members only with per-trade preferential clearing fees (CME) and transaction fees (CBOT). (Ex. 3 at A-83; Ex. 143 at A-4047 (Art. IV.D.2.(b)(2)); Ex. 41 at A-1795.)

This limitation was ***intentional***. Indeed, immediately following demutualization, CME announced to its members on December 14, 2000, "a new pricing framework that advances our strategic plans as a for-profit growth company and enables us to invest in additional technology and service improvements." That pricing framework included fees for "nearly all CME products and services," including for Globex connectivity at the same cost for both members and non-members. (Ex. 55.) CME has continued to offer all market participants the same Globex access and communication services at the same cost through today. (*See* Section II. G, H, I; Gisch Aff. ¶¶12-19.) At the time of CBOT's demutualization, CBOT similarly already gave market participants the same options to connect to e-cbot at the same price points. (Ex. 60 at A-2340, A-2343.) This continued after CBOT's merger with CME, when members and non-members alike could access Globex by co-locating at the Cermak Data Center and connecting through LNet and subsequently through Jackson Direct for $6,000 a month. (Ex. 67 at A-2501; Ex. 75 at A-2573.)

There is no basis to distinguish any of the access and communication fees that members paid before the ADC opened, and which Plaintiffs do not challenge, from the co-location fees

that Plaintiffs now assert violate an implied right. Plaintiffs cannot rely on the implied covenant to obtain "a contractual protection when the contract could easily have been drafted to expressly provide for it." *Allied Capital*, 910 A.2d at 1035. The Court should reject Plaintiffs' attempt to upend the balance the parties struck.

Finally, Plaintiffs' allegation that Defendants would have agreed to maintain "co-location, access, and communication fee preferences that were sufficient to promote the value of Class B shares" is contradicted by the record. Defendants have consistently and specifically disclaimed any duty to protect the value of B shares. CME's demutualization prospectus warned that "management will [] acquire substantial decision-making responsibility compared to Existing CME" and "it is possible that decisions or changes which benefit the value of Class A shares will negatively impact the value of Class B shares." (Ex. 3 at A-59.) Likewise, CBOT cautioned that management "may make decisions that may have the effect of benefitting one class of membership over the other." (Ex. 4 at A-205.) And because members received equity ownership in the Exchanges through their Class A shares, here again, this bargain made complete sense.

E. Plaintiffs Cannot Prove They Are Entitled to Declaratory or Injunctive Relief

At class certification, Plaintiffs informed the Court that they no longer sought to certify a class for declaratory or injunctive relief. (Ex. 117 at A-3753.) To the extent the named Plaintiffs still seek such relief on an individual basis, not only would this be an improper run-around the class certification process, but Defendants are also entitled to judgment as a matter of law.

Plaintiffs first ask the court to issue a "declaration delineating the scope of their contract rights and CME's breach of that right." (Ex. 115 ¶ 124.) But "a breach of contract claim is an action at law and is not a proper subject for a declaratory judgment." *Eyman v. McDonough Dist.*

Hosp, 245 Ill. App. 3d 394, 397 (3d Dist. 1993); *see also Karimi v. 401 N. Wabash Venture, LLC*, 2011 IL App (1st) 102670 ¶ 10 ("A claim for declaratory judgment, however, is not the proper vehicle for presenting what are, in essence, plaintiffs' breach of contract allegations."). Nor is it proper to seek a declaratory judgment on a claim for breach of the implied covenant and fair dealing, which is simply a type of "breach of contract theory." *Barwin v. Vill. of Oak Park*, No. 14-CV-06046, 2018 WL 4052156, at *3 (N.D. Ill. Aug. 24, 2018).

The purpose of a declaratory judgment is "to allow the court to address [a] controversy one step sooner than normal, after a dispute has risen but before steps have been taken that give rise to a claim for damages." *Cf. Excelsior Garage Parking, Inc. v. 1250 N. Dearborn Condo. Ass'n*, 2015 IL App (1st) 133781, ¶ 34. Where a breach has already occurred—as Plaintiffs assert here—the proper claim is one for breach of contract, as declaratory judgment would only serve to facilitate additional or piecemeal litigation. *Marlow v. Am. Suzuki Motor Corp.*, 222 Ill. App. 3d 722, 730-31 (1st Dist. 1991); *see also Adkins Energy, LLC v. Delta-T Corp.*, 347 Ill. App. 3d 373, 379 (2d Dist. 2004) (holding a declaratory judgment is inappropriate where the "potentially breaching act" has already occurred).

Nor can Plaintiffs provide evidence to support injunctive relief on an individual basis. Here, Plaintiffs request that the Court issue "forward-looking equitable relief requiring CME to honor the Class B Plaintiffs' express and implied contract rights going forward." (Ex. 115 ¶ 124.) As this Court has recognized, "an injunction is an extraordinary remedy which may be granted when the plaintiff establishes that his remedy at law is inadequate and he will suffer irreparable harm without the injunctive relief." *Sadat v. Am. Motors Corp.*, 104 Ill. 2d 105, 115 (1984).

Plaintiffs' request for injunctive relief fails because, as shown above, Plaintiffs cannot present evidence to establish the elements of any one of their theories of breach, and therefore, no remedy is proper at all. *Kopnick v. JL Woode Mgmt. Co.*, 2017 IL App (1st) 152054, ¶ 34 ("A party seeking a permanent injunction must not only allege a recognized cause of action but must also succeed on the merits of the cause of action in order to be entitled to permanent injunctive relief.").

V. CONCLUSION

For the reasons stated above, Defendants are entitled to summary judgment in full. *Williams*, 316 Ill. App. 3d at 688-89.

Dated: February 16, 2024
Chicago, Illinois

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 16, 2024, I electronically filed a true and correct copy of the foregoing Memorandum in Support for Summary Judgment with the Clerk of the Court, and that I also served a true and correct copy of the foregoing Motion for Summary Judgment 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: February 16, 2024

/s/ *Marcella L. Lape*
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