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

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY OF DR. JONATHAN ARNOLD

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I. INTRODUCTION

Through their motion to exclude the testimony of Plaintiffs' damages expert Jonathan I. Arnold, Defendants ("CMEG") effectively seek to preclude Plaintiffs from offering *any* evidence of damages at trial. Indeed, as set forth in its accompanying motion to decertify, CMEG seeks to preclude Plaintiffs from pursuing their claims on a class-wide basis at all. But there is no basis for excluding Dr. Arnold's testimony.

CMEG does not challenge Dr. Arnold's qualifications, nor could it. Dr. Arnold is the former Chief Economist for the New York Attorney General. He holds a Ph.D. in economics from the University of Chicago and is on the faculty of the University of Chicago School of Business. He has served as a damages expert in numerous cases. **PA Ex. 1, at 4, 35-39**.

Nor does CMEG question the calculations underlying Dr. Arnold's opinions on damages. CMEG concedes Dr. Arnold's math is correct. CMEG offers its own damages expert, Dr. Jeffrey Prince, to question Dr. Arnold's methodologies. But CMEG did not even ask Dr. Prince to attempt damages calculations of his own—even though Dr. Prince admitted that he has been able to estimate damages based on exclusivity rights in a broad range of complicated industries. **PA Ex. 2, at 87-98** (11:1-22:11).

CMEG also does not question—or even mention—the relevant legal standards for estimating damages in a breach of contract case governed by Delaware law. Under Delaware law, upon establishing a breach of contract, the plaintiff "is entitled to compensation in an amount that will place it in the same position it would have been in if the contract had been properly performed. The measure of damages is the loss actually sustained as a result of the breach of contract." Del. Pattern Jury Instruct. Civ. Prac. No. 22.24 (2000 ed. Rev. 2016). Under Delaware law, Plaintiffs are entitled to the benefit of their bargain, *i.e.,* the benefit they

reasonably expected to receive from their contractual rights. And Delaware law does not permit a defendant to exploit uncertainty as to the precise amount of harm caused by its breach to avoid paying damages at all. Rather, upon establishing breach, a plaintiff need only provide a reasonable estimate of losses sustained a result of defendant's breach. *See, e.g.*, *Del. Express Shuttle Inc. v. Older*, Civ.A. 19596, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002).

Dr. Arnold's calculations reasonably assess what Plaintiffs would have been paid, had CMEG honored the parties' bargain. CMEG's motion (which barely mentions Delaware cases) fails to identify any Delaware authority precluding Dr. Arnold's methodology. By estimating the value of Plaintiffs' exclusive floor trading rights throughout the duration of CMEG's twelve years and counting breach, Dr. Arnold has reasonably estimated what Plaintiffs are owed.

In their liability case, Plaintiffs will show that, for decades, members of CME and CBOT used their core trading floor exclusivity rights either to access and trade from the historical trading floors for free, or, to lease out their memberships to others seeking to trade from the historical trading floors. Since opening its new electronic trading floor at the ADC in 2012, however, CMEG has breached members' trading floor exclusivity rights by charging and collecting the "co-location fees" paid to access and trade from that new trading floor for itself. And while the ability to access and trade from the historical trading floors was exclusively limited to a fixed number of members (or their lessees), CMEG now allows an unlimited number of non-members, including those affiliated with corporate member trading firms, to trade from the ADC. Thus, whereas members previously received all the benefit of the exclusive trading floor right they contracted for by freely using that right themselves or leasing out their memberships to others seeking to use them, CMEG now forces members to pay for their

previously free trading floor access rights and collects all the fees associated with allowing an unlimited number of non-members to trade from the new floor.

Dr. Arnold identified two categories of revenue streams class members reasonably would have expected to receive from the new ADC trading floor if CMEG had honored Plaintiffs' exclusive floor trading rights since opening the new trading floor in 2012. First, Dr. Arnold estimates what he refers to as "foregone Co-Location Trading Fees"—a share of the additional trading fee revenues CMEG generated by allowing an unlimited number of traders to access and trade from its new trading floor. Based on a comparable transactions analysis, Dr. Arnold estimates a 10% revenue share. **PA Ex. 1 (Arnold Report) at ¶¶ 17, 19-20, 23-39**. Second, Dr. Arnold calculates the "Co-Location Access Fees" that would have flowed to Plaintiffs based on their exclusivity rights. ***Id.*** **at ¶¶ 17, 19-20, 40-47**. Because members received all the benefit of trading floor exclusivity at CMEG's historical trading floors in the form of either lease payments or free access to the floor, Plaintiffs claim that all the new "Co-Location Access Fees" charged at the ADC likewise should have flowed to the Class B shareholders. Based on the assumption that Plaintiffs will establish their liability claim, Dr. Arnold's calculation of lost Co-Location Access Fees damages reflects an arithmetical calculation of those fees and an apportionment of those fees among the various categories of class and non-class members. Both categories of damages are based on the premise that Plaintiffs will show CMEG fundamentally undermined Plaintiffs' exclusive floor trading rights by allowing non-members to co-locate at and trade from the ADC trading floor and by collecting all the fees associated with accessing that new trading floor for itself.

CMEG nonetheless argues that Dr. Arnold's opinions should be excluded. CMEG first points to the factually incorrect and legally irrelevant red herring that Dr. Arnold has modified

his methodologies from those proposed in the report he submitted at class certification. The "comparable transaction" analysis set forth in Dr. Arnold's merits stage report is entirely consistent with the hypothetical negotiation approach previewed in his earlier report. Dr. Arnold repeatedly described his merits-stage analysis as "modeling a hypothetical negotiation over the value of the exclusivity rights class members have been unable to exercise during the damages period." **PA Ex. 3 (Arnold Rebuttal Report) at ¶ 1**. To the extent there is some variance between Dr. Arnold's class certification and merits-stage opinions, such variance is commonplace in class cases. Dr. Arnold expressly reserved the right to refine his approach based on the full evidentiary record developed in fact discovery, **PA Ex. 4 (Arnold Class Certification-Stage Declaration) at ¶ 30**, and CMEG identifies no case law prohibiting such refinement.

CMEG's other challenges to Dr. Arnold's methodologies equally lack merit. As to both categories of damages, CMEG misleadingly suggests that Dr. Arnold's damages methodologies are somehow precluded by the Court's prior ruling that Plaintiffs could not seek a right to share in the *Globex access fees* CMEG charges traders to access the Globex platform from anywhere. CMEG misleadingly conflates two different types of fees charged by the exchange—the newly created "co-location fees" charged to access and trade from the ADC (which CMEG initiated upon opening the ADC), and long-established "Globex access fees" (which CMEG has charged Globex users since shortly after its 2000 demutualization). The Court's prior decision that Plaintiffs cannot claim a share of Globex access fees has no bearing whatsoever on their remaining trading floor claim, nor on any of Plaintiffs' expert's damages measures. Dr. Arnold does not opine, anywhere, that Plaintiffs are entitled to share any of the Globex access fees that were the subject of the Court's prior ruling.

As to Dr. Arnold's trading fee damages calculations, CMEG challenges Dr. Arnold's reliance on a 10% electronic trading fee revenue sharing provision in the NYMEX by-laws as a comparable transaction for estimating the share of ADC-associated revenues that members should have received in exchange for relinquishing their exclusive floor trading rights.[1] But CMEG's challenges to the details of whether NYMEX is an appropriate comparable transaction go only to weight, not admissibility. CMEG is free to offer evidence or argue to the jury that members should have received a lower percentage (or no percentage at all) of the additional revenues generated at the ADC, but it has no basis for claiming that Plaintiffs should be prevented from presenting their damages claim.

With respect to Dr. Arnold's Co-Location Access Fees damages calculations, CMEG does not challenge the accuracy of his calculations or question the fact that members historically were paid all the money associated with their exclusive trading floor access rights. Instead, CMEG faults Dr. Arnold for assuming Plaintiffs will establish their liability case. But this is no basis for challenging a damages expert—damages experts routinely and necessarily offer calculations that are predicated on the assumption that plaintiffs will establish liability, and that become moot if they do not.

Finally, CMEG argues that Dr. Arnold's reliance on damages methodologies that would provide class members with additional money in exchange for their Core Rights would somehow violate the CME Group Charter and the CBOT Certificate. This is a legal argument, not a challenge to Dr. Arnold's damages methodologies. And this argument is in any event

[1] CMEG falsely suggests that the NYMEX transaction is the only evidence Dr. Arnold relies upon to support this part of his opinion. In fact, Dr. Arnold identifies at least two other examples of evidence showing that CMEG recognizes revenue sharing arrangements as an appropriate mechanism to compensate members for modifications of their rights. **PA Ex. 1 at ¶ 30 n.41.**

unsupported by the actual language of the governing corporate documents and contradicted by the evidence that CMEG itself has considered providing revenue sharing in exchange for modifications to members' rights.

Through CMEG's unilateral vitiation of Plaintiffs' free, exclusive trading floor access rights, CMEG has enabled itself to realize a massive increase in trading volume, many billions of dollars in additional clearing fees, and a ***$60 billion*** increase in its market capitalization while this litigation has been pending. All the while, the value of the Class B shares underlying Plaintiffs' memberships has stagnated while Plaintiffs have not been allowed to share in the value of CMEG's enormously successful new trading floor because of CMEG's breaches. Hence why Plaintiffs filed this lawsuit.

CMEG nevertheless asks the Court to reject Dr. Arnold's damages estimate as too big—or, in its words, "gigantic." Memo. of Law in Support of Def. Motion to Exclude the Testimony of Dr. Arnold ("Mtn. to Exclude") at 3. But Dr. Arnold's $1.5 billion past damages number is only as large as it is because of the enormous benefits CMEG has realized at Plaintiffs' expense. The claimed damages are only 1/40th of the increased market capitalization CMEG has realized and a similarly small fraction of the revenues CMEG has collected during the twelve-year breach.

In sum, under both the governing Delaware substantive law and the Illinois *Frye* standard for admissibility of expert testimony, there is no legitimate basis for excluding any part Dr. Arnold's testimony. CMEG's challenges go to weight, not admissibility. CMEG will have a full opportunity to urge its positions to the trier of fact through cross-examination and the testimony of its own damages expert. In any event, under established law, any decision regarding the

admissibility of Dr. Arnold's testimony should be made by the trial court in the context of the full evidence at trial. CMEG's motion should be denied.

II. BACKGROUND

A. The Legal Framework Governing Delaware Contract Damages

All claims in this case are governed by Delaware law. Yet there is virtually no discussion of the applicable Delaware law of contract damages in CMEG's motion.

In Delaware, "the standard remedy for breach of contract is based upon the reasonable expectations of the parties *ex ante*." *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001). More specifically, "damages for breach of contract are based on *the non-breaching party's* . . . expectation interest." *Leaf Invenergy Co. v. Invenergy Renewables LLC*, 210 A.3d 688, 695 (Del. 2019) (emphasis added). Here, Plaintiffs are the non-breaching parties. Damages are therefore appropriately measured here based on Plaintiffs' expectation interests.

The "principle of expectation damages is measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract." *Duncan*, 775 A.2d at 1022. Expectation damages thus can consist of "the value that the performance would have had to the injured party, or the loss in value caused by the deficient performance compared to what had been expected." *Leaf Invenergy Co.*, 210 A.3d at 695 (citation omitted).

"[W]hen a contract is breached, expectation damages can be established as long as the plaintiff can prove the fact of damages with reasonable certainty," whereas "[t]he amount of damages can be an estimate." *Siga Technologies, Inc. v. Pharmathene, Inc.*, 132 A.3d 1108, 1111 (Del. 2015). "Responsible estimates that lack mathematical certainty are permissible . . . ." *Del. Express Shuttle Inc. v. Older*, Civ.A. 19596, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002). And "[p]ublic policy has led Delaware courts to show a general willingness to make a wrongdoer 'bear the risk of uncertainty of a damages calculation where the calculation cannot be

mathematically proven.'" *eCommerce Indus., Inc. v. MWA Intel., Inc.*, No. CV 7471-VCP, 2013 WL 5621678, at *42 (Del. Ch. Sept. 30, 2013) (citation omitted). Thus, "[a]ll that a plaintiff must prove is the fact of harm," and "[a] party's inability to prove precise harm is not fatal." *In re Cellular Telephone P'Ship Litig.*, Coordinated C.A. No. 6885-VCL, 2021 WL 4438046, at *71 (Del. Ch. Sept. 28, 2021).

B. Dr. Arnold's Class Certification-Stage Declaration

Dr. Arnold previously submitted a declaration at the class certification stage which addressed a single issue: "[W]hether damages sustained by Plaintiffs arising from the misconduct of the Defendants, as alleged, *can be* measured on a class-wide basis." **PA Ex. 4 at ¶ 5** (emphasis added); ***see also id.* ¶ 6** ("For purposes of class certification, I understand that the relevant issue is whether there is likely to be at least one reliable, class-wide methodology for measuring damages in this case."). Dr. Arnold's prior declaration made clear that—as often occurs in class action litigation—his merits stage opinions could diverge to some degree from those outlined in preliminary fashion for the purposes of supporting Plaintiffs' class certification motion. Dr. Arnold wrote: "[M]y opinions on the appropriate methodologies for assessing damages on a class-wide basis *are likely to be revised, refined and supplemented* as discovery proceeds and as I have the opportunity to consider additional information." ***Id.* ¶ 6.**

Dr. Arnold wrote at the class certification stage that in this case there are, consistent with Delaware law, multiple possible ways to measure "the difference between the value that would have existed in the absence of alleged breach and the value that exists in the presence of the alleged breach." ***Id.* ¶ 30.** Dr. Arnold outlined two such possible approaches—a hypothetical negotiation approach and a statistical approach. ***Id.***[2] However, he clearly stated "[t]hese two

[2] Dr. Arnold did not to pursue a statistical regression-based approach in his merits-stage report for two reasons. First, the data produced by CMEG subsequent to his class certification report

approaches are not necessarily the only approaches to measure damages in this case," and "[d]epending on the claims that Plaintiffs are able to prove, facts obtained through discovery, and data availability, it is possible that other approaches may be used." ***Id.***

Related to the hypothetical negotiation approach, Dr. Arnold explained that although "[t]here was not an actual, historical negotiation over the value of a consent to a change in Plaintiffs' Core Rights . . . one can identify the factors that reasonable parties to such a negotiation would likely have considered and estimate[] a likely price range over which the parties would have negotiated." ***Id.* ¶ 33.** He further opined: "[t]he purpose of the analysis is to provide a reasonable estimate of the amount of money that CMEG would have paid, and that class members would have received, if a negotiation had taken place." ***Id.*** Dr. Arnold concluded: "At a minimum, assuming Plaintiffs can establish that CMEG breached the Core Rights, Plaintiffs would not have agreed to give up their Core Rights unless they are compensated *by an amount equal to at least the value of the rights they would be giving up*"; and "at a maximum, the CMEG would be willing to pay an amount *up to the profits it expected* from its planned business initiatives that could not be completed without breaching Plaintiffs' Core Rights." ***Id.* ¶ 34.**

Dr. Arnold did not, in his class certification stage report, conduct a merits-stage damages analysis. However, he previewed certain factors that might be considered at the merits stage. Dr. Arnold specifically identified CMEG's acquisition of the NYMEX exchange as a potentially comparable transaction that he might consider in his assessment of Plaintiffs' damages. ***Id.* ¶ 38.**

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did not allow him to estimate damages with an acceptable level of precision. See **PA Ex. 5 at 172-73** (Arnold Dep. 9:9-9:13). Second, whereas a statistical regression-based approach may have shown that membership values were depressed as a result of CMEG's breach, it is also possible that membership values will increase following a liability determination. By estimating past damages only, Dr. Arnold avoids any need to assess the possibility of future changes in membership values.

C. Dr. Arnold's Merits-Stage Opinions

Defendants claim that Dr. Arnold's challenged merits-stage opinions consist of "nothing more than rank speculation and conjecture" and are "untethered to the facts of the case." Mtn. to Exclude at 1. Nothing could be further from the truth. Dr. Arnold reasonably estimates what Plaintiffs would have received had CMEG complied with contractual obligations in connection with the ADC trading floor since 2012. That is all that Delaware damages law requires, as explained above. And nowhere does CMEG argue that Dr. Arnold's calculations are inconsistent with Delaware law.

Dr. Arnold submitted a detailed, 30-page opening report along with nine exhibits setting forth various supporting calculations. In addition to his opening report, Dr. Arnold submitted a 14-page report rebutting opinions of CMEG's damages expert, Dr. Prince. CMEG's motion largely ignores those reports. CMEG also ignores the deposition testimony of its expert, Dr. Prince, in which Dr. Prince admitted he has previously been able to successfully estimate damages arising from lost exclusivity rights in various industries and conceded that CMEG did not even ask him to estimate damages in this case. **PA Ex. 2, at 87-98** (11:1-22:11). Instead, CMEG relies almost exclusively on selective quotes from Dr. Arnold's deposition, which are largely taken out of context, to present a distorted picture of Dr. Arnold's opinions and analysis.

As detailed in his opening report, Dr. Arnold's opinions (as is commonplace in testimony from damages experts) rest on the assumption that Plaintiffs will establish certain liability facts at trial—if Plaintiffs do not do so, their claims will fail on the merits and Dr. Arnold's opinions will become moot. Dr. Arnold assumed that the trial evidence will show (1) that CMEG has never obtained member approval, from either CME or CBOT members, to waive or modify members' rights in relation to the ADC; (2) that the ADC is a trading floor to which CME and CBOT members have a right to free, exclusive access; (3) that members would have demanded

compensation of some kind from CMEG in exchange for waiving or modifying their ADC-related rights; (4) that CMEG has generated additional fees, including co-location fees and additional trading fees, for itself as a result of the breach of members' ADC-related rights—fees which have not been shared with members; and (5) that absent the breach, members (who control access to the trading floors via leasing) would have collected the co-location fees for themselves. **PA Ex. 1 at ¶ 10.** As detailed further herein, CMEG's motion appears to largely take issue with these *assumptions* underlying Dr. Arnold's opinions, rather than with Dr. Arnold's own opinions and calculations. But as set forth in Plaintiffs' separately filed opposition to CMEG's motion for summary judgment, there are genuine factual disputes on these issues that must be resolved by the trier of fact.

Dr. Arnold estimates the value of the trading floor exclusivity rights that CME and CBOT members reasonably expected to receive but lost as a result of the alleged breach. **PA Ex. 1 at ¶¶ 15, 17.** The breach complained of here consisted of CMEG's taking and monetizing a right retained by members—their exclusive right of access to any trading floor. Had CMEG honored members' core right of exclusive trading floor access, members would have enjoyed the ability to access and trade from the ADC for free rather than each paying CMEG $120,000 per year[3] in new co-location fees, and members alone would have controlled the right to allow non-members to access to ADC, via leasing out memberships or collecting any additional fees associated with expanding trading floor access beyond individual members. That, of course, is not what happened. Instead, since the ADC's opening, CMEG profited at its members' expense by collecting fees for ADC access.

[3] In comparison to the $120,000 annual cost of ADC access, the most expensive class of permanent CME membership, per CMEG's website, is trading for around $500,000. ***See*** **PA Ex. 6**.

Given the "essence of the breach" at issue, an appropriate measure of expectancy damages includes an amount equal to members' "pro rata share of the value that [CME] generated by using . . . [and] selling" something that belonged to members. *In re Cellular*, 2021 WL 4438046, at *79-80; *see also Energy Capital Corp. v. United States*, 302 F.3d 1314, 1330 (Fed. Cir. 2002) (when "expectancy damages . . . absent the breach, would have accrued on an ongoing basis over the course of the contract . . . [such] damages are measured throughout the course of the contract"); *Anchor Sav. Bank, FSB v. United States*, 597 F.3d 1356, 1361 (Fed. Cir. 2010) (same). Dr. Arnold assumed that Plaintiffs will prove at trial that ADC trading floor access belongs to members alone, and that the profits CMEG generated from selling such access belong to the members, pro rata. For the lost co-location access fee component of his damages estimate, Dr. Arnold then summed up the access fees that CMEG has generated and apportioned those fees out across the various classes of CME and CBOT memberships. **PA Ex. 1 at ¶¶ 40-51.**

For the second component of Plaintiffs' damages measure, Dr. Arnold addressed an additional "measure of Plaintiffs' economic loss [that] *can be viewed as the product of a hypothetical negotiation.*" **PA Ex. 1 at ¶ 15** (emphasis added). Co-location fees charged for accessing the ADC trading floor are not the only way that CMEG has profited from opening up the ADC to non-members. By opening a new, electronic trading floor to non-members at the ADC, CMEG also vastly increased trading volumes on the exchange—this is a fact that even CMEG does not seriously dispute.[4] CMEG has generated enormous additional trading fees as a result of its increased ADC-related volume. Based on Dr. Arnold's consideration of an analogous

[4] CME speculates that it could have achieved the same volume and clearing fee levels as it did at the ADC in some manner that did not *breach its obligations* as alleged by Plaintiffs. Mtn. to Exclude at 12-13. If true, then CMEG will be free to manage its operations in a manner that comports with its obligations going forward after trial. Dr. Arnold has estimated past damages only, and his opinions thus do not require any speculation as to what may transpire in the future.

transaction involving NYMEX—the same transaction Dr. Arnold disclosed he might rely upon in his class certification-stage report—Dr. Arnold concluded CMEG could have secured an agreement for members to approve CMEG's plans to open and operate the ADC by sharing with members 10 percent of future CME and CBOT trading fees associated with trading at the ADC. ***Id.*** **at ¶¶ 23-39.**

Dr. Arnold's total damages calculation—comprising the sum of the first and second damages components described above—is entirely consistent with the hypothetical negotiation approach set forth in his class certification-stage report. As Dr. Arnold further confirmed in his rebuttal report, the measure "may alternatively be viewed as modelling a hypothetical negotiation over the value of the exclusivity rights class members have been unable to exercise during the damages period." **PA Ex. 3 at ¶ 1**. And the total damages amount per this calculation falls squarely between the "minimum" hypothetical negotiation damages of an "amount equal to at least the value of the rights they would be giving up," and the "maximum" of the total "profits [CMEG] expected from its planned business initiatives that could not be completed without breaching Plaintiffs' Core Rights." **PA Ex. 5 at ¶ 34**. If anything, Dr. Arnold's calculation is extremely conservative, given that it assumes the members would have allowed CMEG to keep 90% of the ADC trading fees for itself.

III. ARGUMENT

A. The *Frye* Standard Does Not Preclude Dr. Arnold's Opinions

CMEG argues that Dr. Arnold's opinions fail to satisfy the *Frye* test for admissibility. CMEG is wrong. The *Frye* standard poses no barrier to any part of Dr. Arnold's testimony. None of the Illinois *Frye* decisions cited by CMEG comes remotely close to supporting its positions.

Commonly called the "general acceptance" test, the *Frye* standard dictates that scientific evidence is admissible at trial if the methodology or scientific principle upon which the opinion

is based is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). In this context, "general acceptance" does not mean universal acceptance, nor does it require that the methodology be accepted by unanimity, consensus, or even a majority of experts. *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 199 Ill. 2d 63, 78 (2002), *abrogated on other grounds by In re Commitment of Simons*, 213 Ill. 2d 523, 529-30 (2004). Instead, it is sufficient that the underlying method used to generate an expert's opinion is reasonably relied upon by experts in the relevant field. *Id*. at 77; *Simons*, 213 Ill. 2d at 530.

Importantly, however, "*Frye* does not make the trial judge a 'gatekeeper' of all expert opinion testimony." *Donaldson*, 199 Ill. 2d at 78. This makes the *Frye* standard distinct from the federal *Daubert* standard—and the bulk of the cases CMEG relies upon here are federal *Daubert* cases. *See Apple Inc. v. Wi-LAN Inc.*, 25 F.4th 960, 971 (Fed. Cir. 2022) (recognizing that under *Daubert*, a federal "trial judge plays a 'gatekeeping role,'" including in connection with assessing the comparability of transactions relied upon by a damages expert). Rather, under *Frye*, and in Illinois state court, "the trial judge's role is more limited." *Donaldson*, 199 Ill. 2d at 78. "[A]n expert's conclusion is subject to challenge by traditional efforts such as cross-examination," and thus, "[t]he general acceptance test should not replace the role of the advocate, who may expose shaky but admissible evidence by vigorous cross-examination or the presentation of contrary evidence." *Id.* at 88.

For these reasons, the *Frye* test applies *only* in the relatively rare circumstance where an expert relies upon *"new" or "novel"* scientific methodologies. *Donaldson*, 199 Ill. 2d at 78-79; *Simons*, 213 Ill. 2d at 530. And a scientific methodology is only considered "new" or "novel"

under *Frye* if it is "original or striking" or "does not resembl[e] something formerly known or used." *Donaldson*, 199 Ill. 2d at 79 (quotation marks omitted); *Simons*, 213 Ill. 2d at 529-30.

Dr. Arnold's opinions regarding damages calculation do not rely upon any new or novel methodologies. Dr. Arnold does not purport to do so. And CMEG's motion nowhere identifies what method utilized by Dr. Arnold is supposedly new or novel. *See Molitor v. BNSF Railway Co.*, 2022 IL App (1st) 211486, at ¶ 70 ("Initially, we have difficulty determining exactly what the defendant contends is new or novel with respect to Dr. Chiodo's testimony that implicates *Frye*."). Indeed, CMEG admits at various points in its motion that Dr. Arnold's "comparable transaction" methodology is one that experts in Dr. Arnold's field have reasonably relied upon in other cases before this one. *See* Mtn. to Exclude at 6-7 (discussing comparable uncontrolled transaction analysis cases).

Instead of identifying a new or novel method that is subject to *Frye* assessment, CMEG—relying on the rebuttal opinions of its own expert—appears to argue that Dr. Arnold *incorrectly applied* the damages measurement methods that he purported to apply. "[T]hese kinds of criticisms do not make [Dr. Arnold's] methodology new or novel." *Molitor*, 2022 IL App (1st) 211486, at ¶ 70. And the few Illinois court *Frye* cases cited in CMEG's motion are all easily distinguishable.

None of CMEG's cases struck a damages calculation opinion as unreliable, and none involved even remotely analogous circumstances. In *Kane v. Motorola, Inc.*, 335 Ill. App. 3d 214, 222 (1st Dist. 2002), the court found it was not an abuse of discretion to exclude, as unreliable, expert testimony that purported to draw a causal link between radio frequency exposure and brain cancer, without any basis in medical data. Similar, *Durbin v. Illinois Workers' Compensation Com'n*, 2016 IL App (4th) 150088WC, at ¶ 39, concerned the

admissibility of medical causation conclusions that found no support at all in any peer-reviewed scientific literature. And in *Simons*, 213 Ill. 2d 533, the Illinois Supreme Court *rejected* a *Frye* challenge to the admissibility of "actuarial risk assessment[s]" used to "predict whether a sexual offender is likely to reoffend." *Id.* at 535.

Indeed, states around the country applying the *Frye* standard have rejected attempts to wholesale strike damages expert opinions before trial, instead allowing the factfinder to weigh the acceptability of the opinions. *See, e.g*., *MBIA Ins. Corp. v. Countrywide Home Loans, Inc*., 958 N.Y.S.2d 647, at *1 (N.Y. Sup. 2010) (rejecting pretrial challenge to damages expert's use of statistical sampling and noting that defendant's challenges were "premature to decide here" because they went to "the weight, rather than the acceptability, of the evidence."); *Hewlett-Packard Co. v. Oracle Corp.*, 65 Cal. App. 5th 506, 571 (2021) (affirming trial court's refusal to strike damages expert's opinion before trial, and holding that attacks on the experts' opinions were "factors the jury could properly consider, but they [did] not mandate exclusion of the evidence altogether."); *Busy Bee, Inc. v. Corestates Bank, N.A*., 72 Pa. D. & C. 4th 533, 553 (Com. Pl. 2004) (rejecting pretrial attack on damages expert and noting that "[a]ny criticisms that the Bank may have with respect to those methodologies may be legitimate fodder for cross-examination, but do not warrant exclusion of the evidence in its entirety.").

B. CMEG's Pre-Trial "Foundation" Challenge Is Baseless and Premature

The remaining Illinois authorities cited in CMEG's motion largely concern the requirement that a party must, *at trial*, lay a foundation to establish the reliability of expert testimony. Just as none of the cited *Frye* cases supports CMEG's position, none of the "foundation" cases cited by CMEG supports its pre-trial motion to exclude Dr. Arnold either.

Johnson v. Johnson, 386 Ill. App. 3d 522 (1st Dist. 2008), did not concern a pre-trial motion to exclude an expert. There, the court ***rejected*** an argument that expert trial testimony

"about the nature and instinctive responses of horses, including their kick response," should have been excluded as unduly speculative. *Id.* at 547. In so ruling, the appellate court emphasized that trial courts have broad discretion to admit expert opinions that may be helpful to a jury. *Id.* at 544-45. In *People v. Simmons*, 2016 IL App (1st) 131300, the appellate court also ***rejected*** an argument (raised during trial not via a pre-trial motion) that a firearms expert's opinion testimony lacked foundation and should have been stricken. The appellate court reasoned that the foundation challenge went to the weight to be given to, rather than to the admissibility of, the expert's testimony—and, "Defense counsel certainly probed Maryland's opinion during cross-examination and argued that the jury should disregard it because it lacked any reasoned basis." *Id.* at ¶ 122. The same is true here—the various arguments CMEG makes about supposed flaws in Dr. Arnold's analysis, are proper fodder for cross-examination and argument.

The only Illinois case CMEG cites in which an expert was actually disqualified based on lack of "foundation" is *Freeman v. Crays*, 2018 IL App (2d) 170169, at ¶ 36. But in *Freeman*, the reason the challenged expert's opinion lacked "foundation" was a problem with his training and experience. The expert in *Freeman* planned to offer an opinion that cardiology treatment could have prolonged a person's life. *Id.* But the expert was not a cardiologist—and he had "referred 100% of his patients with cardiovascular issues to a cardiologist." *Id.* at ¶ 33. Here, CMEG does not challenge Dr. Arnold's qualification to testify regarding economic damages.

C. Dr. Arnold's Opinions Regarding the Comparability of the NYMEX Transaction and Foregone Trading Fees Are Admissible.

Dr. Arnold's opinion that class members reasonably would have expected a 10% share of the additional trading fees generated at the new ADC trading floor in exchange for relinquishing their exclusive trading floor rights is based, in part, on a "comparable transaction" approach. CMEG does not contest that this is an accepted approach in Dr. Arnold's field, as recognized in

cases in Delaware and elsewhere, including *Medtronic, Inc. & Consol. Subsidiaries v. Comm'r of Internal Revenue*, 900 F.3d 610, 613-14 (8th Cir. 2018), and *In re United States Cellular Operating Co.*, No. CIV. A 18696-NC, 2005 WL 43994, at *17 (Del. Ch. Jan. 6, 2005). Instead, CMEG argues (citing its own rebuttal expert) that Dr. Arnold performed the comparability analysis *incorrectly*. These criticisms do not provide a basis for excluding him under the governing *Frye* standard. *See Donaldson*, 199 Ill.2d at 88 ("Traditional methods, such as cross-examination and rebuttal witnesses, offer[] . . . the opportunity to challenge the experts' conclusions in the proper forum, during trial in front of the jury.")

Dr. Arnold's expert opinion that members would have demanded and received 10% of the additional trading fees generated at the ADC in exchange for relinquishing their exclusive floor trading rights is reasonably based on his assessment of (a) the 10% electronic trading fee revenue sharing right in the NYMEX by-laws, under which members negotiated a right to a 10% share of future electronic trading revenues if the exchange discontinued open outcry trading for any product; (b) CMEG's decision to "buy out" the NYMEX revenue sharing right for $750,000 per member when it acquired NYMEX in 2008; and (c) CMEG's own consideration of offering members revenue sharing in exchange for relinquishing or modifying their rights at various times, both before and after demutualization. **PA Ex. 1 at ¶¶ 27-30**, **30 n.41**; **PA Ex. 3** at **¶¶ 12-13**.[5]

CMEG nonetheless claims that Dr. Arnold failed to follow "require[d]" steps of a comparable uncontrolled transaction ("CUT") analysis. The argument is dubious. CMEG cites

[5] CMEG asserts, without citing any supporting evidence, that the 10% NYMEX rate may have reflected a view that electronic trading on that exchange was not very valuable. Mtn. to Exclude at 15. This ignores the fact that those rights were bought out by CME itself for $750,000 per member, a much more than minimal value, when CME acquired NYMEX less than two years after the NYMEX revenue sharing by-law was adopted. **PA Ex. 1 at ¶ 28 n. 39; *see also* PA Ex. 7 at 197**.

just *one* non-binding federal court opinion from the *Medtronic* case regarding the factors that, according to CMEG, an expert must assess in the course of performing any CUT analysis. Mtn. to Exclude at 6. But the opinion that CMEG relies on is not even the majority opinion from the case—it is merely a concurrence. And CMEG glosses over the fact that the *Medtronic* concurrence is focused entirely on the interpretation of federal Treasury Regulations governing tax valuations by a tax court, which has no applicability whatsoever to this case. CMEG fails to identify any authorities applying the Treasury Regulation factors outside the tax context. There is no list of such factors in CMEG's cited Delaware case, *United States Cellular*.

Relatedly, CMEG faults Dr. Arnold for failing to walk through what CMEG claims are "essential elements of a hypothetical negotiation" analysis. Mtn. to Exclude at 5. CMEG—repeating arguments that appear in its own expert reports, and previewing its trial arguments—argues that Dr. Arnold's analysis of the NYMEX transaction is insufficiently detailed, that he misunderstood aspects of the NYMEX transaction, and that he should have considered different or additional transactions.[6] In support of these arguments, CMEG relies entirely upon *Daubert* standards set forth in federal court patent cases which have no bearing on this non-patent case pending in a state court under the *Frye* standard—not *Daubert*. *See, e.g.*, *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51 (Fed. Cir. 2012); *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860 (Fed. Cir. 2010); *Riles v. Shell Expl. & Prod.*, 298 F.3d 1302 (Fed. Cir. 2002); *Unisplay,*

[6] CMEG argues that the conclusion Dr. Arnold reaches based on his analysis of the NYMEX transaction is "implausible" because "the CME and CBOT Charters *preclude* distribution payments like the one that Dr. Arnold proposes." Mtn. to Exclude at 13 (emphasis in original). This is a proper subject for cross examination, not a reason to exclude Dr. Arnold's opinion. Moreover, CMEG's argument ignores other relevant charter provisions that support a different conclusion. Among other things, CME's charter states that common stockholders' dividend rights are "[s]ubject to the rights of the holders of Preferred Stock," *i.e.*, members. **PA Ex. 8 at 207** (Division B Common Stock, Section 3. Dividends). And CBOT's charter limit on CBOT paying dividends does not prevent a post-merger payment *from CMEG* for modifying CBOT members' rights. **PA Ex. 9 at 215** (Article IV, Section 2(c)).

S.A. v. Am. Elec. Sign Co., 69 F.3d 512 (Fed. Cir. 1995); *Pelican Int'l, Inc. v. Hobie Cat Co.*, 655 F. Supp. 3d 1002 (S.D. Cal. 2023); *Ravo v. Covidien LP*, 55 F. Supp. 3d 766 (W.D. Pa. 2014); *DataQuill Ltd. v. High Tech Comput. Corp.*, 887 F. Supp. 2d 999 (S.D. Cal. 2011); *IOENGINE, LLC v. PayPal Holdings, Inc.*, No. 18-cv-452, 2022 WL 2800911 (D. Del. June 27, 2022). As CMEG's motion indicates, CMEG already examined Dr. Arnold regarding supposed methodological errors during his deposition. CMEG can continue that questioning at the trial.

Moreover, even the federal courts that CMEG cites are outliers. Federal cases applying the *Daubert* standard in patent cases recognize that, ordinarily, "[t]he degree of comparability" of a particular transaction, "as well as any failure on the part of [the] expert to control for certain variables," are both "factual issues best addressed by cross examination and not by exclusion." *ActiveVideo Networks, Inc. v. Verizon Comm's, Inc.*, 694 F.3d 1312, 1333 (Fed. Cir. 2012); *see, e.g.*, *Puma Biotech., Inc. v. AstraZeneca Pharma. LP*, Case No. 21-CV-01338, 2024 WL 1157120, at *21 (D. Del. Mar. 18, 2024) (declining request to exclude expert testimony on comparable transactions); *Electrolysis Prevention Sols. LLC v. Daimler Truck N. Am. LLC*, Case No. 3:21-CV-00171, 2024 WL 688167, at *7 (W.D.N.C. Feb. 20, 2024) (challenges to "reasonable royalty analysis are more appropriately addressed through cross examination rather than by exclusion"); *Centripetal Networks, LLC v. Palo Alto Networks, Inc.*, Case No. 2:21-CV-137, 2024 WL 380972, at *4 (E.D. Va. Jan 30, 2024) (concluding that parties dispute over comparability of a particular transaction, raised via a *Daubert* challenge pre-trial, was "a dispute of fact that must be left to the jury"). But again, *Daubert*'s standard simply does not apply here.

Since it is always possible for a defendant, in comparing a transaction relied upon by a plaintiff's damages expert, to identify specific differences, the real question is whether those differences matter, in what direction, and by how much. As Dr. Arnold explained in his rebuttal

report, the differences CMEG identified here are either neutral, or, cut in favor of any even higher share of value going to members. **PA Ex. 3 at ¶¶ 12-13**. For example, CMEG points to the fact that NYMEX members retained certain trading floor rights (including an agreement to maintain open outcry for at least five years and exclusive access to any trading floor), and that the 10% share only applied to products that went electronic. Mtn. to Exclude at 9–11. That difference supports a *higher* sharing rate here, as CMEG members were forced to relinquish *all* their exclusive floor rights in connection with the ADC, and thus may have demanded a higher portion of CME's enormous benefits from the floor in exchange for their consent to the transaction. ***Id.* ¶ 13**. But Arnold still conservatively assumed a 10% rate, and CME offers no alternative rate.

Aside from relying on a host of inapplicable and distinguishable federal cases, CMEG also quotes a Delaware case, *Fletcher Int'l, Ltd. v. Ion Geophysical Corp.*, No. CV 5109-CS, 2013 WL 6327997, at *19 (Del. Ch. Dec. 4, 2013), in which a court stated that hypothetical negotiations are "fraught with uncertainty." Nevertheless, the *Fletcher* court ***approved*** the use of hypothetical negotiation damages in Delaware contract cases. *Id.* at *19. To the extent that there is uncertainty here about what would have happened hypothetically, this uncertainty exists only because the real-world negotiation never happened *due to defendants' own breaches of the parties' contract*.

And there is nothing at all in the *Fletcher* opinion or other Delaware case law that suggests the courts in that state would adopt the federal patent case standards that CMEG tries to import and rely upon here. To the contrary, in *Leaf*, the Delaware Supreme Court subsequently confirmed that the plaintiff in a breach of contract case is entitled to damages based on his full "expectation interest." 210 A.3d at 695. *Leaf*, like this case, involved claims that the defendant

had breached a "consent right." In *Leaf*, consent to any sale of the company was required. *Id.* at 690. Here, consent for any change or modification to Plaintiffs' exclusive floor trading rights is required. The Delaware Supreme Court in *Leaf* reversed the trial court's determination that there were no damages and instead awarded $126 million in damages based on plaintiffs' expectation that they would share in the benefits of the transaction. *Id.* at 704. Dr. Arnold likewise provides a reasonable estimate of the benefits of the contracts Plaintiffs expected to flow to them as a result of any additional revenues generated from the ability to access and trade from CMEG's new trading floor.

D. CMEG's Criticisms of Dr. Arnold's Co-Location Fee Opinion Are Baseless

Finally, CMEG challenges Dr. Arnold's opinions regarding the component of damages comprised of foregone co-location fees on several grounds, none of which justifies exclusion.

CMEG faults Dr. Arnold for not making a "legal determination" that co-location access fees should be included in his damages. But Dr. Arnold's opinions correctly rest upon a factual foundation, not any legal determination. As previously discussed, it is appropriate for co-location access fees to be included in the damages assessment here based on the "essence of the breach," where CMEG directly profited from selling access that belonged to members and deprived members of their right to access and trade from the trading floor for free. *See In re Cellular*, 2021 WL 4438046, at *79–80. It is up to Plaintiffs' counsel, not Dr. Arnold, to prove to the jury that this breach occurred and that absent this breach members would have received the value of exclusive access to the ADC trading floor. And if they do, Dr. Arnold should be permitted to present his calculations of the amount of co-location access fees that would have flowed to the classes absent that breach.

CMEG next argues that the Court made a prior ruling precluding the inclusion of co-location access fees in the damages model. The premise of this argument is false—indeed,

CMEG's counsel is intentionally trying to mislead the Court. The prior ruling CMEG references dismissed the claim that CMEG breached an agreement to share *Globex access fees* with members. *See* **PA Ex. 10 at 234-35**. Dr. Arnold's opinions regarding the newly created *co-location access fees* associated with the ADC (essentially, rents for ADC floor space) has nothing to do with the long-existing Globex access fees. ADC co-location fees are a different fee, as CMEG counsel knows.

CMEG also argues that Dr. Arnold's co-location access fee damages are not attributable to the specific breach alleged. The exact opposite is true: co-location access fee damages are *directly* tied to the specific trading floor rights breach that the jury will consider at trial. This part of CMEG's motion cites the United States Supreme Court's decision in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). *Comcast* concerns the federal requirement that an antitrust damages model must "measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised." *Id.* at 36. This is not an antitrust case and Dr. Arnold does not rely on any antitrust model or antitrust industry. *Comcast* has no bearing on this case at all. CMEG also cites *Bueker v. Madison County*, 2016 IL App (5th) 150282, at ¶ 35—a class certification case which has nothing to do with the admissibility of expert opinion testimony.

CMEG falsely contends that Plaintiffs' damages model effectively calls for some members to pay other members for their access rights. But the member and non-member firms who are now able to host an unlimited number of traders and their trading firms at the ADC pay co-location fees in exchange for the *expanded* trading floor access CMEG now provides in contravention to Plaintiffs' rights—not for the exclusive, free access members previously enjoyed at CMEG's historical trading floors. There is nothing "absurd" about providing each

member the pro rata share of the full value of exclusive trading floor access they had enjoyed throughout the exchanges' history, until the opening of the ADC. And CMEG's argument about this supposed "absurdity" is a matter for jury argument, not a reason to exclude Dr. Arnold.

CMEG's reliance on *Philips v. Ford Motor Co.*, Case No. 14-CV-02989, 2016 WL 7428810 (N.D. Cal. Dec. 22, 2016), is also misplaced. *Philips* was a car defect case in which Dr. Arnold offered opinions, at the class certification stage, regarding the potential damages associated with power steering system problems. The court in *Philips* criticized Dr. Arnold for assuming that because of the defect, the system had *zero* value—questioning whether even a defective system might have some residual value. As this description of *Philips* makes clear, about the only similarity between this case and *Philips*, is that both involve Dr. Arnold. The *Philips* court's exclusion of Dr. Arnold's unrelated opinion about the value of defective power steering systems—under the inapplicable *Daubert* standard—has zero relevance to this case.

CMEG also claims that Dr. Arnold's measure seeks disgorgement, which is not available as a measure of damages under Illinois law. The substantive law applicable here is Delaware law, not Illinois law. And Dr. Arnold's measure is not a disgorgement measure in any event, but rather, a direct measure of expectation damages consistent with governing Delaware law.

CMEG next argues that Dr. Arnold's co-location access fee damages should be excluded "because it is internally inconsistent and is contradicted by the facts." Mtn. to Exclude at 20. CMEG cites no cases in support of this baseless argument for exclusion. Supposed inconsistencies and factual contradictions can be explored via cross-examination, or, if available, testimony from CMEG's own experts.

E. CMEG's Argument For Exclusion of *Any* Damages Measure Is Absurd

Finally, CMEG contends that Plaintiffs cannot be entitled to *any* damages because, according to CMEG, no members contemporaneously complained about the ADC when it

opened. This argument—apparently, that damages are somehow unavailable unless a contemporaneous objection was immediately raised at the time of the breach—is frankly absurd given that this case was filed within a year after CMEG began operating the co-location facility at the ADC and collecting all the associated revenues for itself. The argument is utterly inconsistent with the applicable statutes of limitation and laches doctrines.

Neither of the two cases CMEG cites lends any support to its far-fetched argument that *no* damages are available as a matter of law. CMEG describes *Glidepath Ltd. v. Beumer Corp.*, C.A. No. 12220, 2019 WL 855660 (Del. Ch. Feb. 21, 2019), as a case "finding that sellers could not show they would have extracted management concessions in return for their consent when sellers knew about misconduct but did not try to stop it." Mtn. to Exclude at 23. Omitted from CMEG's description is that *Glidepath* is a *post-trial ruling* following a bench trial. There, the *factfinder* concluded, based on the evidence presented in that trial, that the plaintiff suffered no "actual harm from the breach." 2019 WL 855660, at *22. Nothing in *Glidepath* even remotely suggests that CMEG has a basis for seeking to preclude presentation of Plaintiffs' damages evidence in this case. CMEG also relies upon a statement from *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292 (Fed. Cir. 2011), that "beginning from a fundamentally flawed premise and adjusting it based on legitimate considerations specific to the facts of the case nevertheless results in a fundamentally flawed conclusion." That statement concerned the admissibility of testimony based on a completely arbitrary, made-up "25 percent rule of thumb" for assessing royalties in patent cases. Dr. Arnold did not rely on the 25 percent rule, or any other rule of thumb, anywhere in his expert report.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to exclude Dr. Arnold's testimony respectfully should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 15, 2024, I electronically filed the foregoing, and that on April 12, 2024, Morgan McCollum, one of the attorneys for Plaintiffs, served a true and correct copy of the same 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: April 15, 2024

/s/ Suyash Agrawal
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