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

SHELDON LANGER, RONALD M. YERMACK, LANCE R. GOLDBERG, ROBERT PROSI and GERALD PETROW, individually and on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	No. 2014 CH 00829
v.	)	Calendar 6
CME GROUP, INC., a Delaware Corporation; THE BOARD OF TRADE OF THE CITY OF CHICAGO, INC., a Delaware Corporation,	)	Hon. Celia G. Gamrath, Presiding
Defendants.	)	

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

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I. INTRODUCTION[1]

Rather than addressing the countless problems with Dr. Arnold's opinions, Plaintiffs devote most of their Opposition attempting to convince the Court that it has no role to play in determining the admissibility of expert testimony. According to Plaintiffs, if an expert has a Ph.D. and can slap a label on his analysis that is not new or novel, the Court must allow the jury to weigh his opinions. But that is not the law in Illinois. Illinois courts must ensure both that expert opinions use sound and accepted methodologies and that they are based on facts, not falsehoods or speculation, before they can go to a jury. Dr. Arnold's damages estimate fails to satisfy these basic requirements and must be excluded.

Dr. Arnold opines that Plaintiffs' economic loss from the alleged deprivation of their exclusivity rights to the ADC can be calculated by adding together (1) a 10% revenue share from co-location trading fees and (2) all the co-location access fees Defendants have ever collected—a loss that he pegs at nearly $1.5 billion and counting. But Dr. Arnold has no generally accepted method that provides any support for combining those components to produce single number. Dr. Arnold pays lip service to a variety of methods, but none of them support his overall approach and in any event, he never even applied them. Instead, as his Expert Report shows, Dr. Arnold created a new approach that is *internally conflicting* as it purports to calculate damages based on an alleged "comparable" transaction but also adds an additional category of damages on top. Dr. Arnold cannot make up his own method and satisfy *Frye* by invoking methods he did not use.

[1] All capitalized terms retain the same meaning as defined in Defendants' Memorandum of Law in Support of Defendants' Motion to Exclude the Testimony of Dr. Jonathan Arnold ("Opening Brief"), referred to herein as "Def. Br." Plaintiffs' Memorandum in Opposition to Defendants' Motion to Exclude the Testimony of Dr. Jonathan Arnold ("Opposition") is referred to as "Pl. Opp." References to Exhibits are to the Exhibits attached to the Affidavit of Marcella L. Lape in Support of Defendants' Motion to Exclude the Testimony of Dr. Jonathan Arnold.

Dr. Arnold's opinions also lack any evidentiary foundation because they are speculative and rely on false assumptions. As to the trading fees portion of his estimate, Dr. Arnold relies solely on the NYMEX Transaction, which he fundamentally misunderstands and misapplies to this case. Plaintiffs *do not even try* to argue that Dr. Arnold did anything to meaningfully assess the NYMEX Transaction or its similarities and differences (he did not), nor do they argue that the NYMEX Transaction meets the "baseline" level of comparability courts require for admissibility (it does not). And adding co-location access fees to his estimate rests on a false assumption that Class B members could have collected fees from *other* Class B members who Plaintiffs argue likewise should have received free access to the "ADC trading floor." It also improperly seeks to revive Plaintiffs' dismissed claim for disgorgement of Globex access fees.

Finally, Plaintiffs do not contest that the entire premise of Dr. Arnold's approach—that members "would have demanded compensation" to allow Defendants to operate the ADC without providing them exclusivity rights—is false because members did not object to the ADC's public announcement or opening. As explained in detail in Defendants' Opening Brief and below, Dr. Arnold's opinions should be excluded in full.[2]

II. ARGUMENT

A. Dr. Arnold's Opinions Are Inadmissible Under Illinois Law

Dr. Arnold's opinions are Plaintiffs' *only* evidence of damages in this case. So unsurprisingly, Plaintiffs contend that the Court should not examine Dr. Arnold's wide-ranging failures. Plaintiffs argue the bar is so low in Illinois that none of the fundamental problems Defendants have identified can stop Dr. Arnold's unsupported claim that Defendants owe billions

[2] Without Dr. Arnold's inadmissible opinions Plaintiffs have no evidence of damages at all. That entitles Defendants to both summary judgment as a matter of law and decertification of Plaintiffs' damages class.

of dollars from getting to a jury. Plaintiffs are wrong. Defendants' arguments for exclusion fall squarely within the established framework for evaluating the admissibility of expert testimony in Illinois. The Court should not ignore Dr. Arnold's complete failure to connect his conclusions to (1) any generally accepted method, or (2) the facts of the case.[3]

1. Plaintiffs Cannot Show that Dr. Arnold Used a Generally Accepted Method

Despite that Dr. Arnold does not identify a comprehensive, accepted methodology he used to derive his damages estimate, Plaintiffs contend that the Court is powerless to exclude his opinions. As Plaintiffs would have it, all Dr. Arnold needs to do to get before a jury is label his analysis with a method that has previously been accepted, regardless of whether his analysis follows that method. But that is not the proper standard. *Frye* does not permit Dr. Arnold to evade exclusion just by naming methods; he must actually *use* a generally accepted methodology. As the Illinois Supreme Court stated in *Donaldson v. Central Illinois Public Service Co.*:

> [T]he proper focus of the general acceptance test is on the underlying methodology *used to generate* the conclusion. If the underlying method *used to generate* an expert's opinion are reasonably relied upon by the experts in the field, the fact finder may consider the opinion—despite the novelty of the conclusion rendered by the expert.

199 Ill. 2d 63, 77 (2002) (emphasis added). Further, that a methodology is approved as applied in one case, "does not mandate" approval of that methodology in every case. *Agnew v. Shaw*, 355

[3] Rather than defend Dr. Arnold's damages assessment, Plaintiffs set forth the substantive remedies and associated legal standards in a breach of contract case under Delaware law. To be clear, Defendants agree that expectation damages are an appropriate measure of damages in a breach of contract action (assuming there is a breach). But Dr. Arnold has failed to provide an admissible estimate of those damages—a procedural issue governed by Illinois law. *See Burlington N. & Santa Fe Ry. Co. v. ABC-NACO*, 389 Ill. App. 3d 691, 702 (1st Dist. 2009). In any event, Delaware law likewise requires that Plaintiffs provide a proper foundation for any proffered damages estimate: "Speculation is an insufficient basis" for a "responsible estimate" of damages. *Del. Exp. Shuttle, Inc. v. Older*, No. 19596, 2002 WL 31458243, at *15 (Del. Ch. Oct. 23, 2002); *see also eCommerce Indus. v. MWA Intel., Inc.*, No. 7471-VCP, 2013 WL 5621678, at *42 (Del. Ch. Oct. 4, 2013) (court "may not set damages based on mere 'speculation or conjecture'").

Ill. App. 3d 981, 990 (1st Dist. 2005).

Here, Dr. Arnold does not contend anyone other than him has ever employed the "method" he used to arrive at his total damages estimate. Instead, he has invented a novel and results-driven approach with no economic basis or precedent: splicing together the result of a single alleged "comparable transaction" *and* the sum of a group of fees he opines relate to the breach. Plaintiffs cite no academic literature or cases providing any support for this hybrid damages estimate. That is because it is not an established method—let alone one that is generally accepted in Illinois. For this reason alone, the Court should exclude Dr. Arnold's opinions.

What is more, the two prongs of Dr. Arnold's estimate are *internally inconsistent with each other*. He opines that Plaintiffs should receive a new right to a 10% trading fee revenue share because members received that right in the NYMEX Transaction. But then he adds to that all fees that any person paid to co-locate at the ADC (co-location fees), connect to Globex (G-Link fees), and receive technical support service (remote hands). If Dr. Arnold is right that he can estimate damages by pulling from the NYMEX bylaws, however, then the trading fees must be the *only* measure of damages—it was the entirety of the compensation in NYMEX. Rather than engage with this basic problem, Plaintiffs suggest that Defendants can simply explore it on cross-examination. (Pl. Opp. at 24.) But it is Plaintiffs' burden under *Frye* to show that Dr. Arnold's opinions are based on an accepted method, and they fail to do so.

Finally, Dr. Arnold cannot save his opinions by labeling the *components* of his estimate as a comparable uncontrolled transaction ("CUT") analysis or a hypothetical negotiation analysis. Even if adding together the results of two unrelated methods with no accepted basis for doing so could satisfy *Frye* (it does not), as explained below Dr. Arnold did not use either approach at all. Thus, both together and standing alone, neither prong of Dr. Arnold's estimate is based on an

accepted method.

(a) Dr. Arnold Did Not Employ a Generally Accepted CUT or Comparable Analysis Method

Dr. Arnold labels his trading fee component as a CUT analysis, but Plaintiffs *do not even argue* that Dr. Arnold used that methodology. Nor do they contest that Dr. Arnold failed to follow the requirements set forth in the *only* academic source Dr. Arnold cites or in the *Medtronic* case, which Plaintiffs rely on to support that CUT is an accepted methodology (Pl. Opp. at 17-18). Instead, Plaintiffs inexplicably turn around and argue (incorrectly) that the CUT requirements set forth in *Medtronic* are inapplicable outside of the tax context. (*Id.* at 18-19.) *See Medtronic, Inc. & Consol. Subsidiaries v. Comm'r of Internal Revenue*, 900 F.3d 610 (8th Cir. 2018) (Shepherd, J., concurring) ("Courts assessing damages in patent cases find these factors decisive as well."). Plaintiffs try to dodge the fact that Dr. Arnold did not conduct a CUT by vaguely describing what Dr. Arnold did as a "comparable transactions" analysis instead, but they never explain what this means, how that approach differs from CUT, or defend it as generally accepted for proving expectation damages in a breach of contract case. Instead, to show that a "comparable transactions" analysis has been accepted, Plaintiffs cite the appraisal analysis in *In re United States Cellular Operating Co.*, No. CIV. A 18696-NC, 2005 WL 43994 (Del. Ch. Jan. 6, 2005) (Pl. Opp. at 17-18)—which was not an estimation of damages at all.

(b) Dr. Arnold Did Not Employ a Generally Accepted Hypothetical Negotiation

Plaintiffs cannot salvage Dr. Arnold's opinions by suggesting they are "consistent" with a "hypothetical negotiation." Dr. Arnold himself admitted he *never* performed a hypothetical negotiation analysis. (Ex. 3 at 45:8-11.) That should end the *Frye* inquiry. Rather, he decided that the NYMEX Transaction—a transaction that he failed to research or understand—could just "stand[] in for a hypothetical negotiation." (*Id.* at 46:12-13.)

Plaintiffs' reliance on *Fletcher International, Ltd. v. Ion Geophysical Corp.*, No. CV 5109-CS, 2013 WL 6327997 (Del. Ch. Dec. 4, 2013) (Pl. Opp. at 21) is misplaced. As the *Fletcher* court instructed: "[T]he court *must* consider the relative bargaining power of each of the parties that would be involved in the hypothetical negotiation"—something Dr. Arnold *admitted* he did not do. 2013 WL 6327797 at *19 (emphasis added); *see also* (Ex. 3 at 51:14-52:14). And while Plaintiffs assert (without support) that Dr. Arnold's result "falls squarely between" the minimum Class B members would have demanded, and the maximum CME would have been willing to pay (Pl. Opp. at 13), Dr. Arnold never even analyzed the minimum and maximum. His analysis has "no hypothetical, no negotiation, no bargaining range, and no consideration of bargaining power"—all essential elements of a hypothetical negotiation. (Ex. 5 at ¶¶ 13, 25; Ex. 3 at 51:14-52:14, 52:22-53:8, 54:5-9.)

Dr. Arnold did not simply *incorrectly apply* a generally accepted methodology. He did not apply one at all. Instead, he cobbled together pieces of two inconsistent and unrelated analyses, neither of which is accepted even standing alone—a novel approach for which neither Dr. Arnold nor Plaintiffs cite any precedent or support. His opinions must be excluded under *Frye*.

2. Plaintiffs Cannot Prove that Dr. Arnold's Opinions Have a Reliable Foundation

Even if this Court determines Dr. Arnold's opinions satisfy the *Frye* standard, the Court should still exclude them because Plaintiffs fail to show they are based on any reliable foundation. To show foundation, the party offering the expert must also show that "the information on which the expert bases her opinion is reliable." *People v. Simmons*, 2016 IL App (1st) 131300, ¶ 115 (quoting *Fronabarger v. Burns*, 385 Ill. App. 3d 560, 565 (5th Dist. 2008)). Courts must exclude expert testimony, where, as here, there is "simply too great an analytical gap between the [underlying factual bases] and the opinion proffered." *Kane v. Motorola, Inc.*, 335

Ill. App. 3d 214, 222 (1st Dist. 2002) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

Citing to out-of-state case law, Plaintiffs argue that questions of reliability and foundation are not for the Court to decide now, but instead for the factfinder to weigh at trial. (Pl. Opp. at 16.) They do this because they know they cannot defend how Dr. Arnold calculated damages, and so they do not even try. But their attempt to avoid judicial scrutiny fails under Illinois law. The court in *Northern Trust Co. v. Burandt & Armbust, LLP*, 403 Ill. App. 3d 260 (2d Dist. 2010), explicitly rejected the Plaintiffs' argument that once a trial court determines that a methodology meets the *Frye* test, "the court [i]s *required* to admit the [expert] evidence and to let the jury weigh the evidence." *Id.* at 277 (emphasis added). Instead, "[b]efore expert testimony will be admitted at trial . . . the proponent of the evidence must persuade the trial court . . . that the testimony sought is *supported by adequate facts, data, or opinions*." *Id.* (emphasis added) (citing *Ruffin v. Boler*, 384 Ill. App. 3d 7, 18 (1st Dist. 2008)). The court explained:

> If we were to accept defendants' proposal that all evidence passing the *Frye* test is admissible, no expert opinion involving well-settled principles could be excluded, regardless of the paucity of evidence to support the opinion. The supreme court did not intend such an absurd result. We agree with plaintiffs that a *Frye* determination is a threshold matter and that opinion evidence surviving a *Frye* challenge may nevertheless be excluded if it lacks an evidentiary foundation.

Id. at 277-78; *see also* 1 Illinois Evidence Courtroom Manual § 702.5 (noting that even where *Frye* is satisfied, "experts do not have carte blanche to render opinions merely on their assertion that their testimony is based on an adequate foundation. The trial court is obligated in every case to look behind the expert's conclusion and analyze the adequacy of the foundation").

Indeed, courts frequently strike expert witnesses at the summary judgment stage, and often for lack of a reliable foundation. In *Kane*, for example, the court struck Plaintiffs' causation experts and subsequently granted summary judgment for lack of competent causation evidence

after determining that the extrapolation methodologies as applied by the experts were unsound and there was no scientific data to support their opinions. 335 Ill. App. 3d at 222. In doing so, the court noted that it was "not required to accept any conclusion an expert may reach merely because the expert claimed the conclusion was extrapolated from generally accepted scientific data." *Id.* Instead, "[a]n expert must be able to show the methodologies he employed to extrapolate his conclusion were sound." *Id.*; *see also, e.g.*, *Freeman v. Crays*, 2018 IL App (2d) 170169, ¶ 36 (excluding expert testimony that lacked adequate foundation at summary judgment); *La Salle Nat'l Bank v. Malik*, 302 Ill. App. 3d 236, 241 (2d Dist. 1999) (stating that at summary judgment, courts must "critically evaluate the reasoning process by which an expert witness connects data to his conclusion").[4] Here, Plaintiffs have wholly failed to show that Dr. Arnold used sound methodologies based on facts.

(a) Dr. Arnold's "Foregone Trading Fees" Must Be Excluded

As in *Kane*, Plaintiffs cannot show that Dr. Arnold applied a sound methodology to conclude that Plaintiffs should receive a 10% trading fee revenue share. Plaintiffs concede that the *only* piece of information Dr. Arnold reviewed to assess the comparability of the NYMEX Transaction was the NYMEX bylaws—documents that codified a subset of the *results* of the Transaction but provided no information about its substance or negotiation. (Pl. Opp. at 18.) And Dr. Arnold's deposition testimony confirmed that he knew absolutely *nothing* about NYMEX when he formed his opinions. (Def. Br. at 7-10.) In response, Plaintiffs argue that Defendants

[4] Whereas here, a defendant relies *solely* on expert testimony to support an essential element of his or her cause of action, and that testimony is challenged, it is especially important that the Court rule on the challenge in connection with a summary judgment motion. That is because parties may rely solely on admissible evidence to defeat summary judgment. *Muhammad v. Citizens Bank*, 2022 IL App (1st) 210571-U, ¶ 51. Here, as Defendants argue in their summary judgment papers, because Dr. Arnold's opinions lack any reliable foundation, they cannot support Plaintiffs' claim for damages, and therefore summary judgment is proper on that basis alone.

excerpt lines of questioning "out of context" and present a "distorted" picture of Dr. Arnold's testimony. (Pl. Opp. at 10.) Remarkably, however, Plaintiffs fail to provide (1) any additional "context," (2) a single example of any "distortion," or (3) any basis for concluding that Dr. Arnold did in fact study or understand the NYMEX deal. Nor can they.

As explained in Defendants' Opening Brief, courts consistently exclude similarly baseless "comparability" analyses before trial. (Def. Br. at 6-7, 10-12.) Plaintiffs criticize Defendants for citing patent cases that apply the *Daubert* standard to find expert opinions inadmissible and argue that the jury and not the Court should assess comparability. (Pl. Opp. at 19-20.) But just like federal courts, Illinois courts have an obligation to ensure that there is a proper foundation before an expert opinion is deemed admissible. *N. Trust*, 403 Ill. App. 3d at 277–88.[5] And Dr. Arnold himself contends his analysis is "similar to what is typically used in . . . patent and intellectual property cases." (Ex. 6 ¶ 3.) Moreover, while questions of degree sometimes may be appropriate for a jury, even the cases Plaintiffs cite recognize that expert testimony based on comparable transactions is admissible only where "*the expert has made 'a showing of baseline comparability*.'" *Puma Biotechnology, Inc. v. AstraZeneca Pharms. LP*, No. 21 C 1338, 2024 WL 1157120, at *21 (D. Del. Mar. 18, 2024) (emphasis added) (quoting *Bio-Rad Labs., Inc. v. 10X Genomics Inc.*, 967 F.3d 1353, 1373 (Fed. Cir. 2020)). Plaintiffs fail to show Dr. Arnold did so. (Pl. Opp. at 19-20.) Indeed, they cite no authority—and there is none—suggesting that an analysis consisting of one transaction that (1) an expert did not research or understand, and (2) is

[5] While Plaintiffs try to derogate cases Defendants cite applying the federal *Daubert* standard, Illinois courts are free to "find federal cases persuasive unless they run contrary to previously decided state cases." *Daniels v. ArvinMeritor, Inc.*, 2019 IL App (1st) 190170, ¶ 40; *see also People v. Luna*, 2013 IL App (1st) 072253, ¶ 68; *In re Commitment of Sandry*, 367 Ill. App. 3d 949, 970 (2d Dist. 2006). Plaintiffs do not point to a single Illinois case contrary to these well-reasoned decisions, all of which require exclusion of Dr. Arnold's testimony.

different from the transaction at hand in every material way, satisfies "baseline comparability."[6]

Plaintiffs try to defend the reasonableness of Dr. Arnold's analysis by arguing that he did not just base it on the NYMEX Transaction but considered two other data points—each of which is just a sentence in a footnote to Dr. Arnold's report: (1) CMEG's decision to buy out the NYMEX revenue share when it acquired NYMEX; and (2) CMEG's own supposed consideration of offering a revenue share "both before and after demutualization." (Pl. Opp. at 18.) Neither of these footnotes do anything to show there is a reliable factual basis for Dr. Arnold's opinions. The 2008 buyout—in which CMEG made the elimination of the revenue sharing agreement a condition of the merger—shows the *opposite* of Dr. Arnold's opinion: CMEG was *unwilling* to enter revenue-sharing arrangements. And neither the so-called "Globex Access Rights" proposal nor the "Bandwidth Allocation" proposal called for CMEG to pay the Class B members a revenue share.

Plaintiffs also try to distract the Court by framing the issue as if Defendants' only quibble with Dr. Arnold's analysis is that there is some minor "uncertainty" about whether 10% is the right number. (Pl. Opp. at 2.) But Dr. Arnold is inventing a *new absolute right* to a revenue share of a specific revenue stream, based on a supposition that the parties could have negotiated that arrangement. And his only support for this right is NYMEX—a transaction where the parties reached a *different* arrangement (a contingent right to revenues on a product-by-product basis), under markedly different circumstances, and in the context of an unrelated business deal. Thus, while Plaintiffs assert the only question is which "direction" differences between NYMEX and

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[6] Plaintiffs' reliance on *Leaf Invenergy Co. v. Invenergy Renewables LLC*, 210 A.3d 688 (Del. 2019), to support their claim that Dr. Arnold provides a reasonable estimate of the parties' "expectation interest" (Pl. Opp. at 21-22) gets them nowhere. In that case, the court relied on a contract provision specifically setting forth the calculation that would apply in the event of a breach. *Leaf*, 210 A.3d at 702. By contrast, Dr. Arnold's damages estimate here lacks any basis in the parties' agreement.

this case point (*id.* at 20) and suggest it is somehow Defendants' burden to offer an "alternative rate" (*id.* at 21), the problem runs far deeper than the choice of 10%. Dr. Arnold has offered no admissible basis for concluding that Defendants should receive *any* revenue share. In fact, as this Court has already recognized, the CME and CBOT Charters *preclude* the revenue sharing arrangement Dr. Arnold proposes. (*See* Ex. 15 at 10 (noting that "revenue sharing in the form of a dividend or distribution is prohibited by Article IV.B.2.(c) of the CBOT Charter").)[7]

As a final matter, even if Dr. Arnold could show his method of reaching the 10% figure was sound—which he cannot—the assumptions underlying his calculation would nonetheless doom his opinion. Dr. Arnold incorrectly assumes that all trading fees associated with the ADC are "additional" fees, even though the undisputed evidence shows that most ADC users simply migrated from LNet. (Def. Br. at 16-17.) Plaintiffs' assertion (without citing any evidence) that the ADC "increased trading volumes" misses the point. (Pl. Opp. at 12.) Even if the ADC did increase trading volumes, Dr. Arnold made no attempt to parse which portion of that alleged increase, if any, was attributable to the ADC. For this reason too, Dr. Arnold's trading fee component is unsupported by the data on which Dr. Arnold relies and therefore lacks foundation.

To allow Dr. Arnold to present his opinion that the parties would have agreed to a 10% revenue share to a jury regardless of its serious shortcomings would run contrary to Illinois law. There is "simply too great an analytical gap between the data" (the NYMEX bylaws) "and the opinion proffered" (that the parties would have negotiated a 10% trading fee revenue share in

[7] In a footnote, Plaintiffs halfheartedly contest this prohibition but their arguments fail. Plaintiffs are wrong when they say members are holders of CMEG Preferred Stock. The members are holders of Class B Common Stock, as Plaintiffs well know. Nor do they support their assertion that CBOT can legitimize a payment of dividends to its members by labeling it a "post-merger payment . . . for modifying [] Member Rights." (Pl. Opp. at 19 n.6.)

exchange for members waiving their alleged rights). Dr. Arnold's opinions should be excluded. *Kane*, 335 Ill. App. 3d at 222.

(b) Dr. Arnold's "Foregone Access Fees" Are Inadmissible as Well

Plaintiffs' attempts to salvage Dr. Arnold's second damages component—what Dr. Arnold describes as the co-location access fees collected by CMEG—fare no better. As Plaintiffs concede, Dr. Arnold's "method" is nothing more than an "arithmetical calculation of [] fees" that Plaintiffs' counsel told Dr. Arnold to add up and then portion out to the class members. (Pl. Opp. at 3; *see also* Ex. 3 at 129:21-130:13, 130:22-131:6 (testifying that Plaintiffs' counsel told him to "compute the aggregate co-lo revenue and then portion it out").)

Plaintiffs contend that this calculation is admissible because it is "a direct measure" of damages based on the "essence" of the alleged breach and represents the "value of the [alleged] trading floor exclusivity rights" that members would have collected for themselves, absent the breach. (Pl. Opp. at 11, 22.) The problem with Plaintiffs' argument is that nothing in the record could support that Plaintiffs ever would have been able to collect the sum of all co-location access fees for themselves. Plaintiffs assert that this is an attack on Dr. Arnold's assumptions rather than his opinions (*id.* at 22), but expert testimony is admissible only if there is "an adequate foundation establishing that the information upon which [the expert] based his opinion [is] reliable." *Friedman v. Safe Sec. Servs., Inc.*, 328 Ill. App. 3d 37, 44 (1st Dist. 2002); *see also Campbell v. Autenrieb*, 2018 IL App (5th) 170148, ¶ 44 (experts are "not permitted to speculate or to state a judgment based on conjecture, i.e., a conclusion based on assumptions not in evidence or contradicted by the evidence") (quoting *Royal Elm Nursing & Convalescent Ctr., Inc. v. N. Ill. Gas Co.*, 172 Ill. App. 3d 74, 79 (1st Dist. 1988)).

Among other problems, nearly all the co-location fees paid to CME to date have been

paid by Class B members themselves (ones who are excluded from the class)—who under Plaintiffs' theory of breach have a right to *free* co-location, but who, under Dr. Arnold's damages model, would have to pay access fees to *other* members (those who are in the Plaintiff classes in this case). Plaintiffs argue it is appropriate for these members to pay other members for "expanded" ADC access, yet they do not dispute that Dr. Arnold failed to perform *any* analysis to investigate how even a single corporate member trades from the ADC. (*See* Pl. Opp. at 24.)

What is more, Plaintiffs cannot show that the "Foregone Access Fees" that Defendants have collected represent the value of Plaintiffs' alleged exclusivity rights. The fees may represent what one is willing to pay for *co-location*, *Globex access*, and related *technology services* (given that Dr. Arnold strangely adds up all these fees), but they do not represent the value of the *exclusivity* right that Plaintiffs allege belongs to Class B members. And it is undisputed that Dr. Arnold did not assess what the value of that right may be in an alternate world with finite, exclusive co-location rights. (Pl. Opp. at 22.)

On top of these many already-fatal foundational defects, the Court has been clear that "[d]isgorgement for Globex-related fees is not recoverable" in this action. (Ex. 15 at 10.) Plaintiffs argue that the Court's prior ruling is irrelevant because Dr. Arnold's opinions relate to "the newly created *co-location access fees* associated with the ADC (essentially, rents for ADC space)" and not "the long-standing Globex access fees." (Pl. Opp. at 23.) Yet co-location access fees *are* a type of Globex access fee—customers pay for *co-location* to access *Globex connectivity.* And even if the co-location portion of the access fees were a "new" category of fees, Dr. Arnold aggregates in his damages component *all* fees paid by any person who co-locates at the ADC, including fees paid to rent space at the ADC, to connect to Globex, and even to obtain technical services. Thus, contrary to Plaintiffs' argument, his damages figure includes

the "long-standing Globex access fees."

B. Plaintiffs Cannot Avoid that Members Never Objected or Demanded Compensation for the ADC

Finally, Plaintiffs do not and cannot contest that Dr. Arnold's fundamental assumption that members "would have demanded compensation" for their purported rights is demonstrably false. There is no evidence that any member objected when CME announced its intent to open co-location at the ADC nor that members "demanded" compensation for their alleged rights. Again, Dr. Arnold may not opine based on assumptions that are "contradicted by the evidence." *Campbell*, 2018 IL App (5th) 170148, ¶ 44. Yet this false assumption underlies all of Dr. Arnold's opinions. As a result, his damages estimate lacks foundation and should not be admitted. Plaintiffs attempt to distinguish *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292 (Fed. Cir. 2011), which makes clear that methodologies based on false assumptions are inadmissible, because, in that case, the expert relied on something that was "made-up." But the same is true here. Dr. Arnold relied on a "made-up" assumption that lacks any evidentiary basis in the record and is contradicted by the fact of members' telling silence at the relevant time.

Plaintiffs also misconstrue Defendants' observation that Dr. Arnold's assumption is false as an argument that Plaintiffs should be barred from presenting any evidence of damages. While Plaintiffs' claims *are* barred by laches for the reasons explained in Defendants' motion for summary judgment, Defendants' point in this motion is more limited. Plaintiffs have chosen to rely solely on Dr. Arnold's estimate to show damages, and Dr. Arnold has chosen to derive his estimate by constructing an alternate reality that is inconsistent with the facts. That is precisely what happened in *Glidepath Ltd. v. Beumer Corp.*, No. CV 12220-VCL, 2019 WL 855660 (Del. Ch. Feb. 21, 2019). There, "[t]o recover damages, Sellers had to prove at trial that they suffered actual harm from the breach. The Sellers did not try to meet this burden. Instead, they argued that

they could have extracted management concessions in return for their consent." *Id.* at *22. Because the evidence showed that was wrong—they knew about the alleged breach, and "did not attempt to extract concessions"—they failed to establish damages. *Id.* at *23. While *Glidepath* did not address a motion to exclude expert testimony, the same principle applies with equal force here because Dr. Arnold's false premise destroys the foundation for his opinions.

Ultimately, that the exclusion of Dr. Arnold's opinions leaves Plaintiffs with no way to prove damages is a combination of the merits of their claims and their over-reaching strategy on damages. That result should not dissuade the Court from striking Dr. Arnold's inadmissible testimony. *See In re Illinois Bell Telephone Link-Up II*, 2013 IL App (1st) 113349, ¶¶ 28-29 (finding that "[t]he trial court was correct in rejecting class counsel's all-or-nothing position on the remedy for this breach of contract" where "[c]lass counsel had the duty to establish damages and to present evidence of a reasonable basis for computing those damages" but failed to do so).

III. CONCLUSION

For all these reasons, and the reasons set forth in Defendants' Opening Brief, Defendants request that the Court exclude Dr. Arnold's reports, opinions, and testimony in their entirety.

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Chicago, Illinois

Respectfully submitted,

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