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 DECERTIFY THE CLASS

I. INTRODUCTION[1]

Despite that the Court granted class status to pursue class damages, Plaintiffs have failed to deliver any method for proving damages on a class-wide basis. Plaintiffs failed to come forward with evidence that Defendants' alleged breaches of the Core Rights damaged the value of the CME and CBOT Class B shares (one of the methods that was sold to the Court at the class certification stage), abandoned their demand for damages on their Fee Claims, and relied only on inadmissible guesswork for their Globex Claims. Without damages, there is no basis for the class claims to continue. Nor have Plaintiffs justified their last-ditch attempt to save their classes by suggesting that the Court modify certification to a liability-only classes in the event it strikes Dr. Arnold's report.

II. ARGUMENT

As explained in the Motion to Exclude the Testimony of Dr. Jonathan Arnold, Plaintiffs' damages expert, Dr. Arnold, should be excluded. With Dr. Arnold's damages opinions properly ruled inadmissible, the Court must decertify the CMEG and CBOT damages classes.[2] While the Court indicated for purposes of preliminary certification that it believed that there was a scenario in which certification was appropriate, that was because "*[f]or now*, the court cannot say Dr. Arnold's methodologies are not viable." (*See* Mem. Op. and Order on Class Cert., Ex. 10 at 6 (emphasis added).) It is now clear they are not. And Plaintiffs do not dispute that they have no

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[1] All capitalized terms retain the same meaning as defined in Defendants' Memorandum of Law in Support of Defendants' Motion to Decertify the Class, referred herein as "Def. Br." Plaintiffs' Memorandum in Opposition to Defendants' Motion to Decertify the Class is referred to as "Pl. Opp."

[2] Additionally, Plaintiffs do not seriously respond to Defendants' argument that Dr. Arnold's theory of damages also exposes a fundamental problem of this case proceeding as a class. (Def. Br. at 8.) Despite that Plaintiffs argue that Defendants violated the Core Rights by failing to provide Class B members (who all have the same rights) with free, exclusive access to the ADC, his damages methodology presumes that Class B members who actually choose to co-locate would pay to do so, but that Class B members who do not would receive those payments. The Plaintiffs have no coherent theory of how the Class B members' rights work, and this underscores why this is not an appropriate class.

other way to prove class-wide damages. That should be the end of Plaintiffs' damages classes. *Bueker v. Madison Cnty.*, 2016 IL App (5th) 150282, ¶ 35 (decertifying damages class where plaintiffs had no methodology to calculate damages on a class-wide basis).

Plaintiffs argue there is no "new information" justifying decertification (Pl. Opp. at 3), but that is not true. The "new information" is that discovery is closed, Plaintiffs have no way of showing class-wide damages, and courts have made clear that decertification is required in such a case. *See, e.g., Johnson v. GEICO Cas. Co.*, 310 F.R.D. 246, 254 (D. Del. 2015) (decertifying class after plaintiffs deserted their plan to prove class-wide damages using "objective standards"), *aff'd*, 672 F. App'x 150 (3d Cir. Nov. 29, 2019); *see also Owner-Operator Indep. Drivers Ass'n, Inc. v. Landstar System, Inc.*, 622 F.3d 1307, 1326–27 (11th Cir. 2010) (affirming decertification of "class for actual damages" when plaintiffs failed "to establish that actual damages can be easily calculated for all class members").

Plaintiffs further contend that decertification is only proper if "new information" results in individualized issues being "injected . . . into the litigation[,]" and they argue that "CMEG has not identified any new individualized damages issues that did not exist when the class was certified." (Pl. Opp. at 4.) But this again misses the mark. While in a typical case, an inability to prove class-wide damages will result in a situation where damages can only be proven on an individualized basis, here, Plaintiffs have no evidence of individual damages either.[3] So the only

[3] There is no evidence to support that a single class member paid to co-locate at the ADC or evidence that a class member would have been able to lease his or her membership for a higher dollar amount had Defendants limited the ADC to Class B members only. That of course would require a tremendous amount of evidence, including as to (i) whether the individual member used his seat during the class period, (ii) the time period that an individual member leased out, or attempted to lease out, his or her seat, (iii) the type of seat leased, (iv) the lease rate, (v) available supply and demand at each applicable point in time, and (vi) any individual factors that affected the particular lease agreement (e.g., if the seat was leased to a friend or family member). Yet the record does not contain any of this evidence (certainly the Plaintiffs have not identified it in opposition to any pending Motion), and the time to develop it has passed.

thing left is for the case to proceed on a claim for class-wide nominal damages (a suggestion they made in their summary judgment opposition as to Fee Claims). But even when nominal damages are recognized as an available form of relief, courts can enter summary judgment rather than proceed to trial because a trial for nominal damages is frequently "a futile exercise for all entities involved." *See Palmer v. Moffat*, No. CIV.A.01C-03-114JEB, 2004 WL 397051, at *5 (Del. Super. Ct. Feb. 27, 2004); *William F. Shea, LLC v. Bonutti Rsch., Inc.*, No. 2:10-CV-615, 2012 WL 5077701, at *18 (S.D. Ohio Oct. 18, 2012); *see also Ivey v. Transunion Rental Screening Sols., Inc.*, 2021 IL App (1st) 200894, ¶ 63, *aff'd*, 2022 IL 127903, *reh'g denied* (Jan. 23, 2023) (affirming summary judgment because "[a]bsent evidence of damages, we will not reverse to permit the recovery of nominal damages"); *Brazil v. Dole Packaged Foods, LLC*, No. 12-CV-01831-LHK, 2014 WL 5794873, at *14 (N.D. Cal. Nov. 6, 2014) (rejecting Brazil's proposed damages model and denying "request to keep the Damages Class certified on the basis that nominal damages might still be available for class members," noting that plaintiff cited "no authority to suggest that a damages class should remain certified solely because nominal damages may be available, even though the class would otherwise be properly decertified").

Finally, the Court should summarily reject Plaintiffs' halfhearted request to modify its certification of damages classes into liability-only classes. (*See* Pl. Opp. at 3 (arguing "class certification is appropriate on liability issues even if damages are not measurable on a class-wide basis").) Plaintiffs cite to *Bueker* to support their request, but in that case, there was no dispute about whether plaintiffs could calculate damages. Instead, statute of limitations issues "would result in individual inquiries to determine whether each class member's claim [wa]s time-barred." 2016 IL App (5th) 150282, ¶ 38. By contrast, here, Plaintiffs cannot show damages at all—on a class basis or individually. And the Court has also already denied Plaintiffs' request to

reserve the ability to pursue class-wide declaratory or injunctive relief. (*See* Mem. Op. and Order on Class Cert., Ex. 10 at 11.) Thus, Plaintiffs' request is essentially a request to proceed on a class basis for nominal damages, which, as discussed above, is improper. Without Dr. Arnold's opinions, Plaintiffs have no basis for *any* type of class certification. The Court should decertify the damages classes.

III. CONCLUSION

For all these reasons, and the reasons set forth in Defendants' Opening Brief, Defendants request that the Court decertify Plaintiffs' damages classes in their entirety.

Dated: May 14, 2024
Chicago, Illinois

Respectfully submitted,

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