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

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

DEFENDANTS' REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION[1]

Plaintiffs' Opposition confirms what Defendants have told this Court all along: The Plaintiffs' Globex Claims are based on ever-shifting, made-up rights that run flatly contrary to the history and purpose of CME's and CBOT's demutualizations and the operations of the Exchanges for two decades since. Their Fee Claims are based on a profound misunderstanding of Defendants' longstanding fee policies and ignore entirely the substantial member fee preference that both Exchanges have maintained since demutualization. And, as to both sets of Claims, Plaintiffs have no coherent or credible theory of damages. On the Globex Claims they have an over-reaching, under-done expert opinion that the Court should exclude. And on the Fee Claims they have nothing—literally nothing. The Plaintiffs are indeed empty-handed.

What they retain is their penchant to confuse, conflate, and distort. Their Opposition is a *tour de force* in distraction and sleight of hand. The job of this Reply is to re-focus on what matters and what is real, because so much of what Plaintiffs say does not matter and is simply fiction.

As to the Globex Claims: The members of both CME and CBOT, facing the same competitive landscape, adopted demutualization plans to allow their Exchanges to grow and operate electronic trading as for-profit entities, while preserving and protecting open outcry opportunities for members through the Core Rights. The plans gave the members benefits of both sides of this deal—they could make money on the trading floor as long as the open outcry

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[1] All capitalized terms retain the same meaning as defined in Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment, referred herein as "Def. Br." Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Plaintiffs' Opposition") is referred to as "Pl. Opp." References to exhibits in Plaintiffs' Appendix are referred to as ("PA Ex."). References to Exhibits 1-100 are to the Exhibits attached to the Affidavit of Khadija Waugh. References to Exhibits 101-170 are to the Exhibits attached to the Affidavit of Marcella L. Lape. References to Exhibits 171-184 are to the Exhibits attached to the Supplemental Affidavit of Khadija Waugh. References to Exhibits 185-188 are to the Exhibits attached to the Supplemental Affidavit of Marcella L. Lape.

markets were liquid under specific volume tests, and they could make money through equity ownership of a for-profit company running an electronic venue in the emerging open-access, level-playing-field world of modern exchanges. The Exchanges' operations following their respective demutualizations show conclusively that this was in fact the deal.

But through this litigation, Plaintiffs have tried to re-negotiate the deal. They came to Court alleging that they had important substantive rights to advantaged electronic trading on Globex. Like in the open outcry venue, where their exclusive access to the floor and their concomitant status as intermediaries in all trading gave them the best and fastest insight to market information and activity occurring on the floor, so too they claimed was their place on the electronic venue. The formulation they landed on (after an initial embarrassing claim to *exclusive* access to Globex) was that they enjoyed the "best and most proximate access" (BMPA) to Globex. BMPA would give them the first look at bids and offers submitted to Globex (the "book"), as well as the market information generated by Globex as it reported matched trades: an electronic "edge" relative to traders who did not have the fastest access. Plaintiffs insisted that they had BMPA to Globex from the trading floor; that it was a right under their core "trading floor access rights and privileges" (and various more distant formulations under the CBOT Charter, which does not include the word "trading floor"); and that they in fact had BMPA all the way up until CME and CBOT opened a co-location facility at the Aurora Data Center (ADC) in 2012. This was the story on which this case was framed.

Now, as Plaintiffs face the moment of truth, they abandon the very theory that allowed them to survive a motion to dismiss. According to Plaintiffs, their case today has virtually nothing to do with BMPA. They do this because the evidence has crushed their story. It shows conclusively that the CME and CBOT members *never had a right to the best and most proximate*

access to Globex, and that instead the Exchanges have provided equal, open access for all market participants since their demutualizations, straight through until today.[2] All along, BMPA was a made-up right, just as Defendants said.

Without a right to access Globex better, faster, and "more proximate" than anyone else, Plaintiffs retreat to a supposedly independent, last-stand position that the ADC is a new "trading floor" to which Class B members have exclusive access. Plaintiffs say that anything that can be called, or even analogized to a "trading floor" is something that belongs to them, exclusively. Their new bottom line is that because the ADC is a facility that provides a "time and information" advantage on the electronic venue, like what they had on the open outcry venue, it is a trading floor to which they have exclusive access. (Pl. Opp. at 70; *see also* Pl. Opp. at 33 (alternatively calling this a "speed and information" advantage).) And Plaintiffs argue that the one and only issue the Court must decide is whether there is a material dispute of fact as to whether the ADC operates as a trading floor—i.e., as Plaintiffs frame it, whether it provides for the best access to trading activity.

But the reason that the co-location facility at the ADC provides a "time and information" advantage to trading activity is because *the co-location facility is the place that provides the BMPA to Globex*. Nothing else. So, while Plaintiffs in desperation run away from the idea that their claim depends on a substantive right to BMPA to Globex, they say at the same time that the ADC is a trading floor because it provides the BMPA to Globex, which is a right they no longer contend they enjoy. If not for the millions and millions of dollars that CME and CBOT have

[2] Plaintiffs in their Opposition feign incredulity that one could have misunderstood their Claims as relying on a substantive right to BMPA to Globex. The dozen or so references to this supposed right in their operative Complaint, including describing it as "an ironclad guarantee" is a good start to solving the mystery. (Ex. 115, ¶¶ 4, 5, 14, 16, 45, 61, 64, 69, 71, 116, 117, 120, 121.)

spent to show that Plaintiffs' Globex Claims (or Trading Floor Claims, or "time and information" Claims, or whatever label they may wish to place on their claim to a supposed right to the fastest access to Globex) are nonsense, the absurd circularity of this position might be almost comedic. But it is not, and enough is enough.

Plaintiffs' "trading floor" theory is legally flawed because it completely divorces the term "trading floor" from the Class B members' contractual rights found in the CME and CBOT Charters. The question is not whether the ADC can be called or analogized to a "trading floor"; it is whether there is a material dispute of fact that the ADC is a "trading floor" as that term is used or contemplated in the Core Rights. The evidence shows there is not because members have contractual rights only to open outcry trading floors. But in this regard, it is important to keep in mind that Plaintiffs' legal failure is a product of their substantive farce. *Plaintiffs do not have the right to faster or more proximate access to Globex*. It is not in the Charters, and it has conclusively not been the case for two decades. And this is not happenstance! Rather, the members voted to demutualize precisely so that the Exchanges could compete in the world of electronic trading with venues that did not provide anyone with a market advantage.[3] Thus, Plaintiffs' last hope is to empanel a jury and spin about whether the ADC with a low-latency connectivity option to Globex can be considered a "trading floor," irrespective of the fact that members have no right to the fastest access to Globex. This Court should preclude that gambit.

As to the Fee Claims: Based on the Opposition, the question is why Plaintiffs have not simply abandoned the Fee Claims altogether. Plaintiffs do not contest the evidence showing that members have enjoyed a substantial and consistent fee preference relative to non-members both

[3] Their wisdom in pursuing this course is obvious. The members gave themselves the opportunity to make a fortune through their *ownership* of the for-profit exchanges, which turned out to be the smart side of the deal.

before, and ever since both Exchanges demutualized. Plaintiffs pretend to not understand that, since before demutualizing, both Exchanges allowed member firms to have unlimited employees trading for member firm accounts at member firm rates. But pretending does not create a factual dispute. And as to damages, Plaintiffs have given up the ghost. Their own expert believes the entire cause of a supposed undervaluation of their B shares is on account of the Globex Claims. Plaintiffs' answer—a class trial seeking nominal damages—is bewildering. More than likely, Plaintiffs stubbornly cling to the Fee Claims as something of a sacrificial lamb, hoping this Court will not be inclined to eliminate all of their Claims. But the Fee Claims are easily dispatched, and the Globex Claims, while more convoluted, should meet the same fate on this Motion.

II. PLAINTIFFS CANNOT CREATE A DISPUTED ISSUE OF MATERIAL FACT WITH BARE ARGUMENT AND MISCHARACTERIZED EVIDENCE

In the Opening Brief, Defendants set forth uncontroverted evidence regarding the facts and circumstances of the CME and CBOT demutualizations: That in response to competitive pressures following the emergence of electronic trading, CME and CBOT demutualized in a way that preserved their members' open outcry trading opportunities, while vesting the development and control over electronic trading entirely in new for-profit exchanges. CME and CBOT carefully developed their plans for demutualization and unveiled them to their members in detail, articulating that while members' referendum rights would largely be eliminated, the members would receive blocking rights designed to protect their open outcry trading privileges.

Following their demutualizations, CME and CBOT embraced the world of electronic trading, including by providing access to their electronic trading platforms to all market participants on equal terms, including at the lowest latency connections. And members benefited tremendously from the growth of electronic trading through their equity ownership—ownership the Exchanges told members would serve as a hedge in the event electronic trading overtook

open outcry. Defendants also explained how, since the time of their respective demutualizations, they have consistently applied their fee policies in the new electronic world, maintaining per-trade fee preferences in favor of members versus non-members and allowing business entities to participate as members and trade through their agents at member rates provided that the trading activity is truly for the benefit of the member firm and not any individual traders.

Plaintiffs largely fail to engage with this evidence. Instead, they write a fictional counter-story in an attempt to contrive a disputed issue of material fact. According to Plaintiffs, CME and CBOT guaranteed members not only that they would preserve their exclusive open outcry opportunities but that the Exchanges would protect the value of their memberships, including by preserving all of their trading rights and privileges (however Plaintiffs can describe them) into perpetuity and ensuring that members would always have a privileged status in the marketplace, whether in open outcry or as to the electronic trading platform. Plaintiffs contend that this means that Class B members now have the right to exclusive access to what they call the new ADC "trading floor," and that CME's own witnesses admit this. Plaintiffs also contend that the Exchanges somehow promised (how and when is not clear) they would enforce a "one seat, one trader" limitation for fees, even in the electronic world, and that Defendants breached this promise when in 2008, they allowed Corporate Members to "now" receive member rates for trades initiated by an unlimited number of non-member agents.

The problem with Plaintiffs' story is that it finds no support in the actual evidence. Instead, Plaintiffs resort to mischaracterizing documents and testimony and making arguments without any supporting citations. Plaintiffs apparently hope that the Court will not take the time to read the underlying record and will instead accept Plaintiffs' argument that there is conflicting evidence that could support their version of events and create a genuine dispute of material fact.

But when the Court reviews the *actual* evidence produced in this case and analyzes the context of the select quotes that Plaintiffs pull from documents and depositions, it will see that Plaintiffs' so-called "evidence" is nothing but a ruse. "Plaintiffs' sloppy and disingenuous description of the record cannot create a genuine issue of material fact where none exists." *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 367 (Del. Ch. 2008), as revised (June 24, 2008).

- Plaintiffs argue that the Exchanges adopted Core Rights to serve as "'ironclad guarantees' to protect the value of [] memberships," and imply that this means that the Exchanges must now sustain those values by providing members with a privileged place in an all-electronic market. (Pl. Opp. at 1, 3.) But just as with their now-abandoned theory that the "ironclad guarantee . . . included the right to maintain the best and most proximate access to the Globex electronic trading platform" (Ex. 115 ¶ 64), there is no free-standing "ironclad guarantee" related to the value of the Class B memberships, and especially as it relates to electronic trading. Instead, CME told its members that it would take "*no action that would diminish the open outcry trading right currently granted to our membership*[,]*"* but that going forward, "management [would] make decisions and take actions designed to maximize profits and stockholder value" including "decisions or changes which . . . [may] negatively impact the value of Class B shares . . . ." (Def. Br. 16 (citing Ex. 37 at 1:28:46-1:30:06; Ex. 105 at A-3141 (62:19-63:14)), 18-19 (citing Ex. 3 at A-59).) Members were also told that the grant of equity ownership in the for-profit exchanges would be the "prudent defensive measure" (i.e., the hedge) against value erosion in an all-electronic world. (Ex. 37 at 1:08:55-1:09:21; Ex. 105 at A-3128 (49:13-20).)

- Plaintiffs repeatedly and intentionally conflate the limited set of CME and CBOT Core Rights that cannot be changed or adversely affected without member approval and instead

insist that the demutualization plans cemented in place all of the circumstances and advantages they claim to have enjoyed as "trading rights and privileges," regardless of whether they were even documented in writing. In their discussion of the CME Demutualization Plan presented to members following the November 2, 1999 meeting, for example, Plaintiffs grab quotes from various portions of the Plan and commingle them to try to paint a picture of obscurity in which Plaintiffs were left guessing about what their Core Rights protected. But the Plan itself was clear in explaining that the Board had designed special provisions to "preserve members' core open outcry rights," listing each of those rights in a section titled "Special Rights of Shareholders":

> **Special Rights of Class B Shareholders**
> In order to assure members that their current floor trading rights will be protected, the Board has designed provisions to preserve members' core open outcry trading rights. These core rights include: (1) current divisional product allocation rules applicable to each series of Class B shares; (2) current floor access rights and privileges, including the commitments to the membership described below; (3) decisions regarding the issuance of additional Class B shares; and (4) eligibility requirements for exercising and transferring the trading privileges component of Class B shares.

(Ex. 41 at A-1793.) Plaintiffs do the same as to CBOT, trying to create the impression that the CBOT Core Rights include every incidental circumstance of trading and not just the five express, enumerated categories of rights that cannot be changed absent member approval. (Ex. 142 at A-4034-35.)

- Plaintiffs imply that when CME and CBOT told the IRS that the demutualization transactions would result in "no gain or loss" by members, it was a promise that members would always enjoy the same trading rights and privileges into perpetuity, whether in open outcry or electronically, and whether express or happenstance. (Pl. Opp. at 17, 44, 51.) But a review of the

letters shows that CME and CBOT only explained that, because the members' trading rights would remain intact, the transactions would not result in any *financial* gain or loss that would create a tax consequence for members. (PA Ex. 56 at 1319, 1323 (explaining that none of the minor changes in the non-equity component of the CME membership should be "regarded as a realization event"); PA Ex. 63 at 1465; Ex. 171 at A-4362-63.) Indeed, reading the letters as Plaintiffs propose would have prevented CME from ever adopting open access to Globex, as that would have modified the members' then-exclusive rights to Globex. Plaintiffs also excerpt a quote from a *draft* letter ruling request sent by CME's tax counsel to argue that both "floor access" and "electronic trading rights" are Core Rights that cannot be altered without consent. (Pl. Opp. at 17 (citing PA Ex. 54 at 1295-96).) But Plaintiffs conveniently ignore that CME's tax counsel corrected the description of the Core Rights when it sent the IRS its *actual* letter ruling requests and that every communication that members received, including the Demutualization Plan and Prospectus, accurately listed the Core Rights, which do not contain "electronic trading rights." (Ex. 171 at A-4386; PA Ex. 55 at 1310; Ex. 41 at A-1793; Ex. 3 at A-84.)

- Plaintiffs allege that Jim Oliff used a PowerPoint presentation during his demutualization speech to members that guaranteed that "'commercial decisions and rulebook chang[es] *concerning electronic trading*' would be 'subject to regulatory and core rights restrictions." (Pl. Opp. at 15-16.) But the video of his speech, which reveals no accompanying PowerPoint, proves conclusively that Oliff told the members that while commercial decisions regarding open outcry trading would be subject to Core Rights restrictions, management would have discretion to make decisions concerning electronic trading. (Ex. 105 at A-3149 (70:24-71:6); Ex. 38 at 9:16-9:43.) This same message was repeated in the Demutualization Plan, which members received following the meeting. (Ex. 41 at A-1798.) Moreover, when asked if the

specific slide with the excerpted verbiage was accurate, Oliff said the slide appeared to be a typo, which is the only reasonable view of it. (Ex. 186 at A-4537 (290:6-290:11).)

- Plaintiffs cite to several deposition excerpts in which CME witnesses testified that members' exclusive right to access and trade from a trading floor is not confined to a "specific physical space" to argue that the witnesses *admit* the CME and CBOT Core Rights guarantee exclusive access to any type of trading floor, including a virtual or electronic trading floor. (Pl. Opp. at 2-3.) But the context of each quote shows that the testimony related only to the right of members to physically appear in person on a trading floor and trade in open outcry pits, and that the right would exist whether the open outcry trading floor existed at 10 S. Wacker Dr. or 151 W. Jackson Blvd. No CME witness testified that the right extended to virtual or electronic trading floors, and Plaintiffs point to no contemporaneous evidence to suggest it would.

- Plaintiffs repeatedly claim that Jack Sandner "explicitly promised" the members at the 1999 CME Annual Meeting that their "trading floor rights would continue even after open outcry trading ended." (Pl. Opp. at 16 (citing to PA Ex. 8 at 181-83); *see also id.* at 3, 19, 43-44.) But Jack Sandner never even spoke at the 1999 Annual Meeting. Mr. Sandner gave remarks at the 1998 Annual Meeting in the context of a member vote on side-by-side trading of Eurodollars, and at a time when members had exclusive access to all trading on Globex and when there was no proposal pending to unlock the value of memberships through the grant of A shares. His remarks had nothing to do with demutualization or the Core Rights that members would receive. Sandner spoke *more than a year before the Board approved the Demutualization Plan and Jim*

Oliff presented it to the members and *eight months before the concept of Core Rights even existed*.[4]

- Plaintiffs point to a handful of documents in which various CME employees analogize the co-location facility at the ADC to an "electronic trading floor" or a "high-speed trading floor" or CME customers refer to the co-location space as a "trading floor." These scattered references have no legal significance at all (*see infra* at 27), and there is no treasure trove of similar documents as Plaintiffs insinuate. (Pl. Opp. at 53.) The documents that Plaintiffs cite are not a sample. These are what Plaintiffs could come up with out of more than 272,000 documents that CME produced from more than 50 custodians over nearly a 25-year period. Rather than proving that the ADC is a trading floor protected by the Core Rights, this dearth of evidence shows the opposite. If Plaintiffs were correct that their "trading floor" rights extended to the ADC, there surely would have been a constant drumbeat of questions regarding how CME planned to open the ADC without violating members' rights or why CME required members to pay to co-locate at the ADC.

- Plaintiffs suggest that CME and its former outside counsel Jerry Salzman are dismissive of member rights because of references to a well-known Saturday Night Live skit that Salzman added to a draft Q&A in advance of a September 3, 2003 member meeting responding to potential member questions. (Pl. Opp. at 5-6.) But far from showing a dismissive attitude, the

[4] Similarly, Plaintiffs rely on a thought piece written by Craig Donohue, who was then a member of CME's strategic planning group, to argue that CME had a secret "ultimate goal" of demutualization to move to an exchange where no seats exist and "memberships would be worth *nothing*." (Pl. Opp. at 18-19.) But there is nothing nefarious about Donohue's memo. It does not reflect a secret CME plan to destroy the value of memberships but rather reflects one person's idea on how to "improve membership values" with a Globex access rights leasing plan that could serve as an *alternative* to a demutualization transaction. (PA Ex 1 at 2 (describing the memo as Donohue's "preliminary thoughts"); Ex. 188 at A-4555-56 (126:25-127:25).) The memo sheds no light on the actual demutualization plan adopted by the SPC, which is why Plaintiffs use it only as a baseless character assassination.

substance of the Q&A (putting aside the obvious, if not off-color jokes) provides thoughtful and near-contemporaneous evidence that the demutualization did not provide members the rights Plaintiffs now claim. For example, in response to a question regarding why the exchange is not doing anything about declining seat and lease prices, Salzman and CME explained that, "We demutualized and went public to protect our members from the consequences of a migration of trading from the floor to an electronic system. It was our belief that *the value of the equity interest distributed to our members would more than make up for any loss in value of the trading right*." (PA Ex. 18 at 337 (emphasis added).) CME further advised that "[t]rading rights will remain valuable *to the extent that our customers value trading in the pits*." (*Id*. (emphasis added).) And in response to a question asking why CME was allowing proprietary trading firms to use non-member employees to trade at member rates, CME explained that this "is not a violation of our policy" and that "under our rules there is a category of inactive clearing firms that are allowed to trade for their firm's account with member rates." (*Id*. at 338.)

- Plaintiffs point to a Fee Policy Bulletin published in December 2008 to argue that, for the first time, CME and CBOT determined to allow member firms to "receive member rates for any trade executed on the member firm's behalf, regardless of the executing firm employee's lack of membership status." (Pl. Opp. at 67.) But the Bulletin itself makes clear that this was not a new policy but instead a clarification of CME Group's *existing* policy for member firm trading. (PA Ex. 124 at 2726.) In fact, the Bulletin refers to the prior Fee Policy Bulletin published in February 2007 (FPB 07-01), which likewise explained the requirements under which member firms could obtain member rates for trades executed by their agents. (Kokal Aff., Ex. 5.) And that Fee Policy Bulletin referred to Audit Information Bulletin #06-03, issued in September 2006, which likewise explained that non-member employees and independent contractors could

trade on behalf of member firm accounts at member rates. (Kokal Aff., Ex. 4). None of this was new. It was the same principle that existed since demutualization. (Def. Br. at 33-34.)

- Plaintiffs argue that CMEG expanded the categories of corporate member firms in September 2010, allowing those firms to further "extend members' fee preferences to non-member traders without buying or leasing additional memberships for those traders." (Pl. Opp. at 66.) But the very evidence Plaintiffs rely on shows that CMEG did not "expand" the categories of member firms, but instead converted *existing* CME Corporate Equity Members into CME Rule 106.J Equity Member Firms in order to "harmonize[] requirements of CME's equity non-clearing members with the CBOT . . . equity non-clearing/corporate member firms." (PA Ex. 128 at 2827.) And in doing so, CME did not alter the existing membership requirements or fee privileges of those member firms. (*Id*. at 2828.)

Each of the above examples are not matters of interpretation. They are mischaracterizations and exaggerations of evidence made in an attempt to convince the Court that there is a material dispute of fact as to the meaning and purpose of the Core Rights or the existence of a breach of the Core Rights. Plaintiffs cannot, however, avoid summary judgment by mischaracterizing evidence or relying on their own conclusory allegations and argument. As the Delaware Chancery Court cautioned:

> All corporate [transactions] leave in their wake certain artifacts—documents, e-mails, conversations, and notes. If one digs through enough of the rubble of a consummated [transaction], one will almost invariably find something questionable. A clever corporate archeologist can extrapolate from these suspicious artifacts and concoct a theory of malfeasance, disloyalty, and bad faith. Yet, theories alone cannot lead to liability. To survive a motion for summary judgment, such excavating plaintiffs must provide the Court with solid evidence of a genuine issue of material fact; they cannot rely on their allegations.

In re Transkaryotic Therapies, 954 A.2d at 349; *see also In re Cnty. Treasurer*, 394 Ill. App. 3d 111, 120-21 (2d Dist. 2009) (nonmoving party cannot create a genuine issue of material fact by

"mischaracteriz[ing] the record"); *Pekin Ins. Co. v. Adams*, 343 Ill. App. 3d 272, 275 (4th Dist. 2003) ("'Genuine' means there is evidence to support the position of the nonmoving party."). As shown below, Plaintiffs have failed to meet this burden as to any of their theories of breach.

III. ARGUMENT

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

As a threshold matter, Plaintiffs' assertion that Defendants mischaracterize their claim as dependent on a substantive right of special access to Globex is false. Plaintiffs' complaint specifically alleges that "[t]he rights and privileges that each CME Class B shareholder has are not limited to a trading floor, but include . . . the right to the best and most proximate access to Globex." (Ex. 115 ¶ 116.) Plaintiffs refer to this right no less than 13 times in their Complaint (*Id*. ¶¶ 4, 5, 14, 16, 45, 61, 64, 69, 71, 116, 117, 120, 121) and claim this right in the Notice of Class Action sent to putative members of the Classes in June 2022 (Ex. 120 at A-3803). The Court also allowed this case to advance past the pleading stage because Plaintiffs had "pled sufficient facts to state a claim for breach of their right to the most proximate, free access to Globex housed at the ADC." (Ex. 111 at A-3369.) As to CBOT, the Court stated that "there exists a viable claim based on their Special Trading Rights designed to protect the right to the electronic trading system, which Plaintiffs allege encompasses free, proximate access to Globex." (*Id.*) Thus, it has not been clear "for years" that Plaintiffs do not claim a substantive right to BMPA and rely solely on a supposedly independent claim that the ADC is a "trading floor" to which they have exclusive access. In any event, though, Plaintiffs' BMPA theory is demonstrably false. (Def. Br. at 48-56.)

Plaintiffs' current theory—that the co-location facility at the ADC is a "trading floor"—remains a word game. Instead of claiming a right to BMPA, Plaintiffs now argue that the ADC *is*

a trading floor *because* it provides the BMPA to Globex and trading activity. (Pl. Opp. at 37.) But Defendants are entitled to summary judgment on this theory as well because the uncontroverted evidence shows that the Core Rights are limited to *open outcry* trading floors only, and it is undisputed that the ADC is not an open outcry trading floor. Thus, while Plaintiffs devote the bulk of their brief to the argument that the ADC "operates like" a trading floor or could qualify as a type of "virtual" or "electronic" trading floor in some ways but not others (Plaintiffs never allege, for example that there are people at the ADC or open outcry trading there), all that analysis is irrelevant. The Court need not address any of it to grant summary judgment. The fundamental issue is not whether the ADC is a trading floor or can be called or likened to a trading floor. It is whether the CME and CBOT Charters provide Plaintiffs with contractual rights to the ADC because it allows for the fastest access to Globex. Because Plaintiffs lack any evidence linking their "trading floor" theory to their Charter rights, their Claims fail as a matter of law.

1. The ADC Is Not an Open Outcry Trading Floor Protected by the CMEG and CBOT Core Rights

That Plaintiffs' exclusive access rights to a trading floor relate solely to an *open outcry* trading floor is clear from the text of the Charters themselves and confirmed by all the relevant extrinsic evidence in the record.[5] And because Plaintiffs do not and cannot argue that the ADC is an *open outcry* trading floor, that is the end of their Claims as a matter of law.

[5] The CBOT Charter does not specifically define the "Core Rights" in the same manner as the CMEG Charter. Nonetheless, the CBOT Prospectus confirms that the "core rights" are the enumerated five rights in Art. IV(D)(2) of the Charter that the board of directors cannot adversely affect without approval of the Series B-1 and B-2 members. (Ex. 4 at A-176; Ex. 142 at A-4034-35 (CBOT Charter at Art. IV(D)(2)).)

(a) CMEG Core Right 2 Is Unambiguously Limited to Open Outcry

As to CME, Plaintiffs' Globex Claims fail because they cannot prove that the co-location facility at the ADC is a "trading floor" as the term is used in CMEG Core Right 2. Plaintiffs argue that this Court has already "implicitly held" that the Charter is "ambiguous and that members' trading floor rights could extend to the ADC if there were factual evidence supporting that the ADC is a trading floor." (Pl. Opp. at 38.) Not so. When the Court ruled on Defendants' Motion to Dismiss, it addressed Plaintiffs' theory that the BMPA to Globex was one of the "trading floor access rights and privileges" granted to Plaintiffs. (*See* Ex. 111 at A-3369 (Plaintiffs allege "[t]he most proximate, free access to Globex was a right and privilege Plaintiffs enjoyed before it moved to the ADC. Non-members did not enjoy this same right or privilege and would lease a membership in order to have floor access and proximity to Globex.").) But the Court did not consider whether the term "trading floor" itself was ambiguous or address this threshold issue in the context of Plaintiffs' newfangled "trading floor" theory.

Plaintiffs contend that the term "trading floor" is ambiguous because it is not explicitly defined in the Charter, and they urge the Court not to "insert words into a contract that are not there." (Pl. Opp. at 40.) But the Court does not need to "insert" words to conclude that the meaning of "trading floor" is clear from the Charter as a whole and when considered in the appropriate context. The absence of language specifically ruling out Plaintiffs' play on words does not give Plaintiffs license to upend the structure of rights otherwise clearly established by the Charter. As Defendants have explained, the Court "must" interpret this provision "in light of the entire contract" and the "basic business relationship between [the] parties." (Def. Br. at 56-58 (citing *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 913-14,

930 (Del. 2017)).) And it is impossible to square Plaintiffs' expansive reading with the Charter as a whole and when "situated in the commercial context" of the demutualization. *Id.*

Plaintiffs have no serious response to Defendants' evidence that within the four corners of the Charter, "trading floor" clearly refers to a place where open outcry takes place. "The Commitment to Maintain Floor Trading" provision guarantees that CME will maintain "a facility for conducting business . . . as long as an open outcry market is liquid." (Ex. 115 at A-3704.) Rather than engage with the plain meaning of this provision (and its broader context), Plaintiffs try to turn it on its head. They bizarrely assert that nothing about the provision limits the definition of floor to a place where there is open outcry trading. Instead, they contend that this commitment to maintain a "facility" for "*open outcry*" trading so long as an "*open outcry*" market is liquid signifies that a "floor" is any facility where "business is conducted, price information is disseminated, and trades are cleared and delivered[,]" regardless of the presence of open outcry trading. (Pl. Opp. at 42.) This reading of plain English is not credible. It is facially obvious that the reference to "floor" in the Commitment to Maintain refers to an open outcry trading floor.[6]

Nor is there merit to Plaintiffs' argument that reading "trading floor" to refer to open outcry trading somehow makes a separate Charter provision's reference to "the open outcry exchange system" "superfluous" because "trading floor" would mean the same thing as "open outcry exchange system." (Pl. Opp. at 40-41.) Defendants do not argue that "trading floor" is

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6 Although Defendants cited to the CME Charter adopted at the time of demutualization in their Opening Brief, the Commitment to Maintain is identical both in that Charter and in the Third Amended and Restated Certificate of Incorporation, which Plaintiffs assert is the operative version. Moreover, Plaintiffs themselves concede that "the sparse differences" between the two are "immaterial," and Plaintiffs have presented no evidence that their rights and privileges have expanded since the original version. (Pl. Opp. at 39.)

synonymous with "open outcry exchange system." Instead, the trading floor is the "facility" where the open outcry exchange system operates, and which CMEG is required to "maintain."[7]

The commercial context of the demutualization only reinforces that Core Right 2 unambiguously refers to an open outcry trading floor. As Defendants set forth in detail in their opening brief, the scope of Core Right 2 is the direct result of the goal of the transaction—preserving members' open outcry rights while allowing the exchange to run the electronic trading system as a competitive for-profit business. (Def. Br. at 58-59.) Plaintiffs do not offer any reasonable alternative interpretation of the demutualization goals.

(b) All the Extrinsic Evidence Confirms the Unambiguous Meaning of CMEG Core Right 2

A reasonable factfinder could only draw one conclusion from the relevant and admissible extrinsic evidence: That the "trading floor" referenced in Core Right 2 refers to an open outcry trading floor—the only trading floor that existed at CME at the time of demutualization. (Ex. 3 at A-110-11.) *See also Gomez v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 130568, ¶¶ 27-28 (affirming grant of summary judgment when the undisputed extrinsic evidence, including "evidence regarding the parties' previous dealings [and] course of performance," resolved any ambiguity).[8] The evidence consistently demonstrates that CME told the members that the Core

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[7] Plaintiffs suggest that the plain meaning of trading floor is not the facility where open outcry trading exists, but instead "a physical location where bids are matched and trades are executed." (Pl. Opp. at 41.) Unsurprisingly, Plaintiffs cite no evidence to support their definition, which is contrary to the definition provided by CME's federal regulator. (*See, e.g.* Ex. 185 at A-4526 (Futures Glossary of the U.S. Commodity Futures Trading Commission, *available at https://www.cftc.gov/LearnAndProtect/Advisories AndArticles/CFTCGlossary/index.htm#T* (defining "Trading Floor" as "A physical trading facility where traders make bid and offers *via open outcry or the specialist system*")) (emphasis added).)

[8] *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776 (Del. 2012), which Plaintiffs cite, is not to the contrary. There, the court held only that summary judgment is inappropriate "if the language is ambiguous ***and*** the moving party has failed to offer uncontested evidence as to the proper interpretation." *Id.* at 784 (emphasis added). Unlike in *Athenian Venture Partners*, here, the admissible—and unrebutted—extrinsic evidence confirms that CMEG Core Right 2 covers open outcry trading only.

Rights pertained to open outcry trading alone. Among other things, SPC-Chair Jim Oliff explained that (1) the Board had "designed provisions to *preserve member's core open outcry trading rights*," (2) management's ability to make commercial decisions concerning electronic trading would not be limited by those rights, and (3) if "electronic trading overtakes open outcry," CME would "pay dividends and provide equity appreciation to our owners." (*See* Def. Br. At 58.) The Demutualization Plan delivered to members following Oliff's presentation confirmed this, and the Prospectus that the members voted on contained the *same* set of Core Rights. (Ex. 3 at A-84; Ex. 41 at A-1793-94.)

CME's Demutualization Prospectus also made clear that the physical "trading floor" is the venue for "open outcry trading," while "an electronic, centralized order book" is the venue for Globex. (Ex. 3 at A-110-11.) Plaintiffs try to avoid this straightforward distinction by incorrectly claiming that the Prospectus disclosed that electronic trading took place in tiered booths surrounding the pits. (Pl. Opp. at 44.) In fact, the Prospectus says nothing about electronic trading from booths. But even ignoring the embellishment, this argument is incoherent. It is undisputed that members could engage in electronic trading from the trading floor, but that does not change the unambiguous meaning of "trading floor" in Core Right 2. No one would suggest that just because a halftime show took place on a football field, it would be reasonable to define "football field" from that point forward as "anywhere a concert takes place."

Plaintiffs further insist that because the text of CMEG Core Right 2 does not literally read "*open outcry* trading floor access rights and privileges," that must mean that "trading floor" could encompass non-open outcry facilities. To support this claim, Plaintiffs cite to deposition testimony acknowledging that if CME moved its physical trading floor from one location to another, members' rights would extend to the new floor. (Pl. Opp. at 42.) But that testimony has

nothing to do with extending rights to so-called electronic trading floors. Plaintiffs also erroneously cite the testimony of former CEO Phupinder Gill to argue that he acknowledged CME should have used the words "open outcry" if it intended to limit the meaning of "trading floor." (*See id.* at 46.) But Gill's testimony is directly *contrary* to Plaintiffs' argument: he testified that, while adding the words would have prevented Plaintiffs' nonsense here, there was no need to use the phrase "open outcry trading floor," because "at the time, it was [] understood by every member on the floor . . . trading floor access rights meant open outcry access rights." (PA Ex. 6, 129-30 (77:20-78:10).)

Finally, Plaintiffs assert that the Court should read a new and expanded definition of "trading floor" into the Charter because at the time CME demutualized two other exchanges had already used the term "electronic trading floor." (Pl. Opp. at 46-47.) But setting aside that Plaintiffs have no evidence to suggest that anyone at CME even knew of these remote references (and that the documents cannot serve as extrinsic evidence (*see infra* at 26)), both cut against Plaintiffs' argument. The documents refer to those exchanges' *electronic trading systems* as "electronic trading floor[s]"—the equivalent of calling Globex an electronic trading floor. (PA Ex. 103; PA Ex. 140.) But even Plaintiffs acknowledge—as they must—that Core Right 2 does not give Class B members exclusive access to Globex.

Plaintiffs further challenge the relevance of Defendants' direct evidence of mutual intent, arguing that Board materials and a Q&A document developed for use in a members' meeting are not probative extrinsic evidence because the documents were not sent to the broader membership. (Pl. Opp. at 45.) But Plaintiffs do not contest that the Q&A document supplied Board members and policy advisors with responses *to provide to members* at a meeting. And fundamentally, Plaintiffs' attempt to draw a line between the Board and CME members falls flat.

Prior to demutualization, CME was a non-profit member-owned organization. *The Board and the SPC were comprised of members and represented the members*. Thus, documents received by the Board directly speak to the reasonable expectations of the members. Plaintiffs have no basis to exclude the Board in identifying relevant extrinsic evidence.[9]

The Exchanges' actions since demutualization—none of which Plaintiffs' challenge—including adopting open access to Globex, moving the match engine away from the CME building, and adopting equal connectivity for all market participants, including through LNet proximity hosting, make it even more clear that the members never intended to preserve for themselves preferred rights related to electronic trading. In response to CME's longstanding course of performance of providing non-members and members alike with the same connectivity options, including the lowest latency options, Plaintiffs hang their hat on members' ability to trade electronically from the open outcry trading floor. According to Plaintiffs, that ability was a perpetual right, and so they must also have a perpetual right to any fully virtual or electronic trading floor. But every aspect of this story falls apart upon even minimal scrutiny.

To be clear, Defendants do not dispute that only members could trade on Globex from the trading floor, that members derived a benefit from the arbitrage opportunity associated with

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[9] Plaintiffs try to malign CME's Strategic Planning Committee process by criticizing the code of silence that the SPC acted under as it developed and finalized the demutualization plan first presented to the Board for approval and then to the members. (Pl. Opp. at 12-13.) Of course, a board deliberating confidentially before unveiling a final plan to members or shareholders is a routine occurrence. Moreover, as Leo Melamed explained in his book, the code of silence was not designed to hide anything from the members, nor did it result in a lack of transparency. It was done to prevent the sausage-making from destroying the final product:

> I knew that if demutualization had any chance at all, it would be *only* if the idea were presented at one time, after its full formation, after every conceivable error had been addressed, when every query, no matter how wild, had a prepared and credible response, and only when its unveiling was made under precisely prepared and orchestrated conditions. Even a breath or hint of what was being formulated could become a flash point of gossip and distortion so that by the time the plan was fully divulged, the built-up fears, misrepresentation, and misconceptions could not be overcome.

(PA Ex. 34 at 502.)

trading on Globex simultaneous with open outcry trading, and that open access did not modify this opportunity. But Plaintiffs ignore that the ability to engage in arbitrage and resulting benefit was not an absolute right—it was contingent on members' exclusive access to the *open outcry* trading floor and dependent on the presence of an *open outcry* market. And in turn, CME's obligation to maintain the open outcry floor was tied to the volume of open outcry trading on that floor. If volume dropped below the threshold, CME could (and did) close the floor and end the open outcry markets altogether. (Ex. 98 at A-2877.) In other words, there is no perpetual right to arbitrage, let alone a right explicitly protected by Core Right 2.

On top of that, Plaintiffs never explain how or why their ability to trade electronically on Globex from the open outcry trading floor translates into an exclusive right to access and trade on Globex from a fully "virtual" or "electronic" trading floor that CME has no obligation to create or maintain in the first place. Plaintiffs assert that they are no longer pursuing their argument that they have an independent right to the best and most proximate access to Globex (Pl. Opp. at 37-38), so their only explanation appears to be that the ADC now offers traders the same time and information advantage to Globex as the time and information advantage that members had on the open outcry trading floor. (*Id*. at 33.)

But there are multiple problems with this theory too. First, just as with their BMPA theory, Plaintiffs do not and cannot point to any rule, bylaw, or other commitment where CME promised a "time and information" advantage to its members as it pertains to electronic trading. (Def. Br. at 49-50.) Instead, at the time of demutualization, CME told its members that management would have the right to make all decisions concerning electronic trading, including as to "access." (Ex. 41 at A-1798; Ex. 38 at 9:16-9:43; Ex. 105 at A-3149 (70:24-71:6).) To avoid having to identify a documented right, Plaintiffs assert that the bylaws and rules cannot

inform the scope of members' trading rights because the Board's ability to modify the bylaws would negate the Charter's protections of the Core Rights. (Pl. Opp. at 41.) Nonsense. The Board would violate the Charter if it attempted to change the trading floor access rights and privileges by changing the bylaws without obtaining a member vote.

Nor can Plaintiffs overcome the uncontroverted evidence that the same "time and information" advantage that Plaintiffs now assert is at the ADC existed from late 2006 to early 2012 at the Cermak data center through the CME-sponsored LNet connectivity option. (Def. Br. at 26.) Plaintiffs insist that the proximity hosting offered through LNet is completely different from the co-location offering at the ADC, such that only the ADC is a trading floor. But their attempts to draw a crucial line between these connectivity options only highlights the absurdity of their "trading floor" theory. Just like the co-location and GLink offering at the ADC, proximity hosting and LNet at Cermak offered the lowest latency connection to Globex on equal terms for members and non-members—the very feature of the ADC that provides the "time and information" advantage Plaintiffs contend violates their Core Rights. (*Id*. at 26-27.) And CME profits from Globex access fees through LNet as well as through GLink. (*Id.* at 26.) Ignoring the substance, Plaintiffs highlight a hodgepodge of "differences" that have no significance to the scope of members' trading rights. (*See* Pl. Opp. at 27 (noting, for example, that the ADC, but not Cermak, is owned and operated by CME, so CME can dictate "security policies" and "control the cabling").) In other words, they interpret the Core Rights to protect a particular connectivity governance structure, not a substantive trading advantage. According to Plaintiffs, if a third party owns and operates the place that provides a "time and information" advantage, no harm, no foul. It only becomes a trading floor subject to Plaintiffs' exclusive rights if it is owned and operated by CME. This defies logic.

(c) CBOT's Charter Does Not Contain Non-Open Outcry Trading Floor Rights Either

As for CBOT, Plaintiffs' "trading floor" theory is even more remote because the words with which they play are not even in the CBOT Charter. Plaintiffs attempt to avoid that problem by asserting that CME and CBOT members have the same rights, relying on generalized testimony regarding the nature of CBOT members' trading privileges. But the Court has already rejected Plaintiffs' side-stepping suggestion that it "need not consider CMEG's arguments regarding the CBOT Certificate's language." (Pl. Opp. at 48.)[10] As the Court has ruled, these are two different Charters with two different sets of Core Rights. (*See* Ex. 111 at A-3374.) CBOT Plaintiffs cannot rely on language in the CME Charter to state a claim for breach of contract.

Plaintiffs' arguments based on the text of the CBOT Charter are equally unpersuasive. Like the CMEG Charter, the CBOT Charter specifically enumerates the five "Core Rights" that the CBOT Board of Directors is barred from "adversely affect[ing]" absent approval of the Series B-1 and B-2 members. (Ex. 142 at A-4034-35- (Art. IV.D(2)(b)(1)-(5); *see also* Ex. 4 at A-176 (defining the "core rights").) Because there is no mention of "trading floor" in the Core Rights, Plaintiffs point to other provisions in the Charter that reference members' ability to trade on "any electronic trading system" and to "utilize the facilities of the Corporation" to support their claim to exclusive access to what they call the new ADC "trading floor." (Pl. Opp. at 20-21 (citing PA Ex. 43 at 998).) But nothing in those provisions establishes a right that cannot be changed absent a vote of the members, as Plaintiffs' theory requires. And while Plaintiffs point

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[10] Plaintiffs argue that during merger discussions, CME promised the CBOT members that if they voted in favor of the merger with CME, the CBOT member rights would be "*better* protected" and imply that "CME's core right protections would serve to protect CBOT members post-merger." (Pl. Opp. at 24.) But Plaintiffs cite no legal support, nor can they, to support that CBOT members—who do not hold CMEG B shares—have any contractual rights under CMEG Charter.

to CBOT Core Right 1 to argue that members' rights are not limited to open outcry, Plaintiffs do not allege that CBOT violated Core Right 1. Moreover, that Core Right, which protects the allocation of products that a specific Series of Class B member is permitted to trade on the exchange facilities—defined to include the "open outcry trading system" and the "electronic trading system"—cannot be read to extend members' exclusivity rights to any electronic venue. (PA Ex. 43 at 1000.) While only members could trade on the open outcry trading system, by the time CBOT demutualized, its electronic trading system had been an *open access system* for nearly four years and CBOT offered members and non-members alike equal access on the same terms, including from the lowest latency connection or the place with the best "time and information" advantage. (Def. Br. at 23-27.)[11] There is simply no provision in the CBOT Charter that gives rise to a right of exclusive access to an "electronic trading floor," and summary judgment is appropriate on that basis alone.

The extrinsic evidence also confirms that any exclusive right to a trading floor—and not just the "open outcry trading system"—would nonetheless be limited to open outcry and would not extend to any "electronic trading floor." CBOT's stated purpose for demutualizing and subsequent course of performance allowing equal and open access to electronic trading was the same as for CME. (Def. Br. at 21-23.) CBOT Plaintiffs do not address any of this evidence. They instead focus on the fact that members had the exclusive ability to trade electronically from the open outcry trading floor. But as with CME, that has no bearing on whether members' have a

[11] Plaintiffs try to dodge this argument by alleging (incorrectly) that, at demutualization, CBOT's floor terminals "were connected straight to the [match] engine." (Pl. Opp. at 10 (citing PA Ex. 31 at 482).) Plaintiffs cannot dispute that, at the time of demutualization, CBOT's match engine was located in London, England. (Def. Br. at 25 (citing Ex. 129 at A-3927).)

Core Right that provides "exclusive access to . . . an all-electronic trading floor," as Plaintiffs insist. (Pl. Opp. at 52.) That right is made up.

2. Plaintiffs Address the Wrong Question and Lack Relevant or Admissible Evidence of the Meaning of the Charters

Instead of coming forward with evidence contradicting that members have special rights to an open outcry trading floor only, Plaintiffs address the wrong question: whether the ADC could qualify as an "electronic trading floor" or "virtual trading floor." But again, the Court need not even address that issue. It is not the proper question in this case, and thus the parties are not "locked in a quintessential battle of the experts" as Plaintiffs claim. (Pl. Opp. at 55.)

It does not matter whether the ADC shares common characteristics to an open outcry trading floor. Nor does it matter that Plaintiffs can point to a handful of documents (out of more than 272,000 documents produced over a 25-year period) in which CME employees analogized the ADC co-location facility to a high-speed electronic trading floor a decade after demutualization or to stray characterizations made by other exchanges or individuals uninvolved in demutualization. (Pl. Opp. at 54.) None of these documents qualifies as proper extrinsic evidence and none creates a material dispute of fact as to the meaning and purpose of "trading floor" in CMEG Core Right 2 or as to any provision of the CBOT Charter. Indeed, it is well established that under Delaware law, the Court may only consider extrinsic evidence that "shed[s] light on the expectations of the parties *at the time they entered into the [a]greement*.'" *Texas Pac. Land Corp. v. Horizon Kinetics LLC*, 2023 WL 8297050, at *12 (Del. Ch. Dec. 1, 2023) (emphasis added) (quoting *Eagle Indus. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 (Del. 1997)). "In this respect, backward-looking evidence gathered after the time of contracting is not usually helpful." *RoundPoint Mortg. Servicing Corp. v. Freedom Mortg. Corp.*, 2020 WL 4199957, at *5 (Del. Ch. July 22, 2020); *see also Thermo Fisher Sci. PSG*

Corp. v. Arranta Bio MA, LLC, 2023 WL 2771509, at *26 (Del. Ch. Apr. 4, 2023) ("[E]xtrinsic evidence unrelated to the time of contract is generally not relevant in determining the parties' intended meaning of an ambiguous term."). Moreover, only evidence "relating to the negotiations" of the agreement itself can be considered as evidence of the agreement's meaning. *See Merck & Co. v. SmithKline Beecham Pharms. Co.*, 1999 WL 669354, at *47 (Del. Ch. Aug. 5, 1999). Thus, documents related to the ADC, which was launched in 2012, have no bearing on the meaning of Core Rights established over a decade earlier, nor do documents concerning other exchanges.[12]

Ultimately, Plaintiffs' Claims depend on plucking a term (for CME) or concept (for CBOT) out of the Charters and linking it with unrelated analogies and descriptions that occurred years later. It is a word game. Plaintiffs' documents and testimony have no probative value, and they certainly cannot "counter the substantial weight of extrinsic evidence speaking to the contrary collective understanding held by industry participants and deal parties." *Kabakoff v. Zeneca, Inc.*, 2020 WL 6781240, at *23 (Del. Ch. Nov. 18, 2020) (rejecting reliance on email between employees referring to an annual report as a study report to determine meaning of the latter term in the contract), *aff'd*, 264 A.3d 214 (Del. 2021). Because Plaintiffs fail to come forward with any evidence to support their interpretation of the Core Rights, summary judgment is proper, even if the Court determines that the Charter language is ambiguous.

3. Plaintiffs' Globex Claims Are Barred by Laches

As shown above, Plaintiffs have no contractual right to a non-open outcry trading floor. But even if they did, their breach of contract Claims would nonetheless be barred by laches

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[12] For the same reason, Plaintiffs cannot rely on Sandner's speech from the 1998 CME Member Meeting as extrinsic evidence as it is entirely unrelated to the negotiations of the demutualization transaction itself. (*See supra* at 10.)

because they knew that, since open access, the Exchanges had consistently provided equal access to their electronic trading platforms for members and non-members alike, including at the lowest latency connection points, without complaint. So relying on this longstanding course of performance—all of which Plaintiffs try to ignore and which is powerful evidence confirming that members' "trading floor" rights concern open outcry only—Defendants spent hundreds of millions of dollars building the ADC.

Plaintiffs argue that their delay in bringing suit was not unreasonably long. But their prejudicial delay began no later than 2006, when CME launched LNet as the low latency Globex connection. (Def. Br. at 26.) While Plaintiffs now disavow a claim to the "best and most proximate access to Globex," they cannot dispute that LNet similarly provided market participants with the same "time and information" advantage that Plaintiffs claim makes the ADC a trading floor. (*See* Ex. 67 at A-2501; Ex. 167 at A-4344 (69:2-12); Ex. 164 at A-4321 (258:19-24); Ex 153 at A-4274 (68:15-25).) Moreover, even accepting Plaintiffs' absurd claim that the ADC alone implicated their rights because it is owned and operated by CME, Plaintiffs still did not object to the ADC after Defendants publicly announced it in March 2010 (Ex. 81 at A-2675), and despite that, as Plaintiffs concede, CME could have easily altered its plans to open a co-location facility so that it would *not* create a "trading floor."

Plaintiffs now argue that there is insufficient evidence that class members knew about plans for the ADC in 2010, but they fail to grapple with the fundamental fact that both CME and CBOT Class B members served on the CMEG Board of Directors at the time the plans were approved. (Pl. Opp. at 74; Def. Br. at 27.) Nor does anything in the record suggest it was possible for Plaintiffs or class members to be unaware of the public, years long, $372 million construction of the ADC. And in any event, an *additional two years* passed between the ADC's opening,

which Plaintiffs do not contest they were aware of, and their lawsuit. Every stage of Plaintiffs' delay is sufficient to trigger laches. *See Osler Inst., Inc. v. Miller*, 2015 IL App (1st) 133899, ¶ 25 (delay of two years between plaintiff's attaining knowledge of its cause of action and filing suit was sufficient delay to invoke laches).

Plaintiffs also contend that laches should not apply to a breach of contract action brought within the statute of limitations. (Pl. Opp. at 74.) But if that were the case, why would the doctrine even exist? In Illinois, "the doctrine of *laches* may apply 'although the time fixed by the statute of limitations has not expired.'" *Tolbert v. Godinez*, 2020 IL App (4th) 180587, ¶ 24 (quoting *Sundance Homes, Inc. v. Cnty. Of Du Page*, 195 Ill. 2d 257, 270 (2001)). In the context of this case—a years-long construction of a multi-hundred-million-dollar facility, completed in reliance on several years of no objections—laches should bar Plaintiffs' Claims. *See PNC Bank, Nat'l Ass'n v. Kusmierz*, 2022 IL 126606, ¶ 33 (applying laches where counterparty incurred significant expenses); *Mo v. Hergan*, 2012 IL App (1st) 113179, ¶ 39 (applying laches where plaintiff "allowed the remaining owners to continue to participate in the ventures and create value on her behalf, while she withheld her decision").

Finally, Plaintiffs argue that laches should not apply at all because their Claims are "currently limited" to money damages. (Pl. Opp. at 74.) But as Plaintiffs know well, they seek equitable relief too. (*See* Ex. 115 at A-3692-93 (requesting both a "declaratory judgment regarding the scope of members' rights and CME's breaches of those rights" and numerous distinct categories of "forward-looking equitable relief").) It does not matter that only a damages class is certified to seek class-wide relief. As Plaintiffs have made clear, they continue to seek all forms of relief on an individual basis. (Pl. Opp. at 72.) Plaintiffs cite cases declining to apply laches where the plaintiff sought *only* money damages but fail to mention that the Illinois

Supreme Court has held that laches is a proper defense to "a purely legal matter, particularly where [plaintiffs] are seeking both legal and equitable relief." *PNC Bank*, 2022 IL 126606, ¶ 30 (affirming dismissal of petition seeking damages in its entirety based on laches); *see also Valdovinos v. Tomita*, 394 Ill. App. 3d 14, 18, 914 N.E.2d 221, 226 (2009) (explaining that "[t]raditionally, the defense of *laches* was limited to actions arising in equity," but "[o]ver time, Illinois courts have expanded the application of the defense" such that "*laches* is now routinely applied in lawsuits simultaneously seeking both legal and equitable remedies"); *Fed. Nat'l Mortg. Ass'n v. Altamirano*, 2020 IL App (2d) 190198, ¶ 22 (same).

4. Plaintiffs Have No Evidence of Damages

Finally, Plaintiffs' Opposition confirms that they cannot prove damages. Plaintiffs concede they have no way to prove individual damages. Instead, their only argument is that Dr. Arnold's report—the only "evidence" of damages they have offered—should not be excluded. As explained in Defendants' concurrent motion, Dr. Arnold's report must be excluded for a host of reasons. Without it, Plaintiffs have no way to establish damages. The Court can and should grant summary judgment for this reason alone. *See Burkhart v. Davies*, 602 A.2d 56, 60 (Del. 1991) (summary judgment proper when plaintiff fails to prove an essential element of its claim); *Westlake Fin. Grp., Inc. v. CDH-Delnor Health Sys.*, 2015 IL App (2d) 140589, ¶ 30 ("Damages are an essential element of a breach-of-contract claim, so a plaintiff's failure to prove damages entitles the defendant to judgment as a matter of law.").

B. The Court Should Grant Summary Judgment on Plaintiffs' Fee Claims.

Plaintiffs are wrong to assert that the Court cannot consider and dispose specifically of their Fee Claims on summary judgment. (*See* Pl. Opp. at 62-63.) Plaintiffs hide behind their choice to plead a single cause of action for breach of contract and a single cause of action for

breach of the implied covenant of good faith and fair dealing to argue that there are no independent Fee Claims on which the Court can grant summary judgment. Plaintiffs go so far as to argue that, if the Court finds a genuine dispute of material fact as to the Globex Claims, it should just allow all theories of breach to proceed to trial and deal with any evidentiary disputes along the way. (*Id*. at 63.)

Plaintiffs' argument about where their Fee Claims begin and where their Globex Claims end is incomprehensible by design. (*Id.* at 62.) Yet in any case, summary judgment is specifically designed to allow a court to rule on "one or more of the major issues in the case . . . that appear without substantial controversy" in order to either dispose of the case entirely or to "facilitate litigation and expedite trial procedure." *Smith v. State Farm Ins.*, 369 Ill. App. 3d 478, 482 (1st Dist. 2006); 735 ILCS 5/2-1005(d). Moreover, this Court has already demonstrated that Plaintiffs' theories of breach—regardless of being enveloped in only a single cause of action—can and should be evaluated and ruled on independently. (*See, e.g.*, Ex. 111 at A-3359 (dismissing Plaintiffs' theory of breach based on exclusive access to Globex and revenue sharing but allowing Plaintiffs' theory of breach based on BMPA to Globex to proceed).) And for the reasons set forth in Defendants' Opening Brief, and further explained below, Defendants are entitled to summary judgment on all of Plaintiffs' Fee Claims.

1. Plaintiffs Have Not Raised a Genuine Issue of Material Fact that Precludes Summary Judgment on CMEG or CBOT Fee Claims

Plaintiffs devote several pages of their Opposition to arguing that there is a material dispute as to whether the CMEG Charter includes a right to preferential fees and claim that, because there is competing evidence to support that members have such a right, summary judgment should be denied. (Pl. Opp. at 63-66.) This misses the mark. It does not matter if there is an issue of material fact regarding the existence of a CMEG right to preferential fees.

Defendants would still be entitled to summary judgment "because the undisputed record confirms that any such right is narrow and qualified and does not prevent the CME policies and practices Plaintiffs find objectionable." (Def. Br. at 67.)

Indeed, Plaintiffs do not point to any record evidence to contradict that, even if a CMEG right existed, it would require only that members receive lower clearing fees than non-members, subject to CMEG's right to lower fees or provide incentives to others, including important liquidity providers. (*Id*. at 67-68.) Nor do Plaintiffs point to any evidence to support that the CBOT Core Right is any broader than its plain text shows: a guarantee that CBOT members will receive lower transaction fees than non-members. (*Id*. at 72.) Plaintiffs also fail to come forward with any evidence that could demonstrate a violation of these rights—that is—that any non-member was ever charged a lower fee than a member.

Multiple Trader Claims. Plaintiffs' Multiple Trader Claims challenge CME's and CBOT's longstanding policies regarding proprietary member firm (Corporate Member) trading. But these policies do not implicate the Plaintiffs' fee preferences because a guarantee that members will pay lower fees than *non-members* cannot support an action for breach of contract based on fees that CME and CBOT charge to other *members*. (Def. Br. at 68, 72.) Plaintiffs do not dispute this point, nor can they. Instead, Plaintiffs once again resort to distorting and mischaracterizing evidence, arguing that CME and CBOT did not allow non-member employees to trade for Corporate Member accounts at member rates until at least 2008, and that CMEG "expanded" corporate membership with the "introduction" of CME Rule 106.J members in 2010. (Pl. Opp. at 68.) Plaintiffs' arguments are pure fiction.

The uncontroverted evidence shows that CME and CBOT have allowed an unlimited number of non-member employees to trade electronically for Corporate Member accounts at

member rates at least since they demutualized in 2000 and 2005, respectively. (Def. Br. at 34-37.) None of Plaintiffs' evidence, including their feigned ignorance of the policies, creates a material dispute of fact as to this timeline. The 2008 and 2009 CMEG fee policy bulletins Plaintiffs rely on say *nothing* that could be construed as an announcement that, *for the first time*, Corporate Members could receive member rates for non-member employees' trades. (*See* PA Ex. 124 at 2726; PA Ex. 126 at 2741.) In fact, the bulletins show the opposite: they reflect the latest pronouncements reiterating the Exchanges' commitments to reserving member rates for only legitimate Corporate Member trading, which was an area of focus *precisely because* non-member agents could execute these trades. (*See, e.g.*, Ex. 94 at A-2788; Ex. 172 at A-4414; Ex. 173 at A-4417; Ex. 174 at A-4419.)[13] Nor did CBOT's decision in 2009 to modify its fee schedule to eliminate the CBOT executor discount for trading member firms (a specific category of member firm) result in a sudden change allowing non-members to execute trades on behalf of those firms. (PA Ex. 125 at 2738.) Plaintiffs do not dispute that both before and after the modification, trading member firms received member rates whenever an employee or independent contractor executed a trade for the firm's account. (*Id.*) Elimination of the executor discount did not change this. Instead, it merely simplified the fee schedule.

Plaintiffs are also wrong when they argue that CME's "Globex Exchange Fees" presentation supports their position and shows that CME has not historically allowed non-

[13] The "Best Practices" section of the policy does not, as Plaintiffs allude, allow for non-member trading that was previously prohibited. Instead, the bulletin explains that where a member is non-compliant with a "Best Practice," in order to receive member rates for its trades, the member must "clearly demonstrate to CME Group [that] their application of [] non-compliant practices is not inconsistent with CME Group's goal of providing member fees for trading activity for the account and sole benefit of the member firm." (PA Ex. 124 at 2726-27.) The fee policy bulletins, like the Q&A that Plaintiffs focus on (Pl. Opp. at 71 n.12), show that the Exchanges are committed to ensuring that a corporate member receives member rates only where the trading is conducted on "behalf of the member firm itself and not the trading activity of individual customers/traders conducted. . . under the guise of member firm trading." (PA Ex. 124 at 2726; PA Ex. 138 at 2963).

member employees to trade corporate member accounts at member rates. (Pl. Opp. at 71 (citing Ex. 89).) The presentation draws a critical distinction between individual member trading and Corporate Member trading, which Plaintiffs try to ignore. In it, CME recommended that it alter its policy assessing Globex orders based solely on the ownership of the account for *individual traders only*—not Corporate Members. Going forward, Globex trades for individual members would be assessed based on the combined membership of both the operator and account owner, while Corporate Member trades would continue to be assessed based solely on account owner (PA Ex. 137 at 2941 (showing no change between "today's fees" and "recommended fees" for clearing firm accounts, 106.I members, and 106.H/J/N members); Ex. 90 at A-2769 (explaining that clearing, 106.I, 106.H, 106.J, and 106.N members would receive the applicable member rates "for Globex2 transactions for products authorized within the member's division" and noting no exceptions).)

Finally, Plaintiffs further misrepresent evidence to claim that CMEG "expanded the categories" of Corporate Membership with the "introduction" of CME Rule 106.J Members in 2010, further facilitating non-member trading on behalf of member firms. (Pl. Opp. at 68.) There was no expansion: the evidence shows that CME (and only CME) merely changed how it referred to Corporate Members that owned equity but did not clear trades—a membership category that had existed at CME under different names since 2001.[14] (*See* PA Ex. 128 at 2827-28; Kokal Aff. ¶ 11.) And as Plaintiffs' own exhibits explain, while "Corporate Equity Member Firms" became "Rule 106.J Equity Member Firms," the number of memberships these firms

[14] CME has had inactive clearing members since at least 2001. (*See* Ex. 183 at A-4474 (describing, in August 2001, board actions "streamlin[ing] the requirements for in-active clearing members" while keeping in place "[c]ore requirements establishing clearing membership, such as assigned shares").) In 2008, CME renamed inactive clearing members "Corporate Equity Members," but made "no changes . . . to the requirements and benefits of the firm membership categor[y], only to [its] name[]." (*See* Ex. 184 at A-4477).)

needed to own and the fee benefits they received *"[did] not change and [] remain[ed] identical."* (PA Ex. 128 at 2828; *see also* PA Ex. 127 at 2754.)

Plaintiffs cannot overcome the uncontroverted evidence showing that CME's and CBOT's longstanding fee policies have consistently allowed an unlimited number of Corporate Member employees to conduct firm trading activities at corporate member rates, regardless of the employee's membership status. Nor can they dispute that members, including class representative Sheldon Langer, have known about and objected to these policies since at least 2003. (Def. Br. at 35-36, 70.) Defendants are entitled to summary judgment both because Plaintiffs cannot establish a breach of members' preferential fee rights and because, as to CME, their Claims are time-barred in any event.

Volume Discount Claims. Like their Multiple Trader Claims, Plaintiffs' Volume Discount Claims fail because they too challenge Defendants' fee policies as they pertain to *Corporate Members.* Plaintiffs' fee preferences, however, speak only to member fees vis-à-vis non-member fees. Plaintiffs' response is to assert that the "volume discount regime" that Defendants "adopted" in 2008 "effectively eliminated the fee preference for individual members." But Plaintiffs do not explain how or why this is the case. Nor can Plaintiffs point to any prohibition that restricts the Exchanges from lowering member fees for individuals or member firms as they trade additional contracts. What is more, Plaintiffs cite to no instance in which a volume discount results in a situation in which a *non-member* pays less to trade for his own account than an *individual member*. Without that evidence, there can be no violation of member rights.

As a final matter, Plaintiffs' attempt to escape the statute of limitations as to the Volume Discount Claim against CMEG rings hollow. Plaintiffs' assertion that the Exchanges only

"occasionally" used "targeted" volume-based incentives before 2008 (Pl. Opp. at 66-67, 72) is contradicted by the record evidence. CME has employed volume discounts—often applying to entire product divisions—without interruption since at least 2001. (*See, e.g.*, Ex. 175 at A-4427; Ex. 176; Ex. 177; Ex. 178; Ex. 179; Ex. 180; Ex. 181; Ex. 182; Curran Aff. ¶ 15.)

Incentive Programs. Plaintiffs' Opposition further confirms that summary judgment is warranted on Plaintiffs' claim that CMEG and CBOT violated member fee preferences by employing incentive programs that allow non-members to pay lower exchange fees than members. (Def. Br. at 70-71, 74.) Despite Plaintiffs' obligation to come forward with evidence, Plaintiffs did not identify a single offending incentive program in place at either CME or CBOT. While Plaintiffs complain about the Asset Manager Incentive Program in their Opposition, Plaintiffs acknowledge, as they must, that, even at the highest possible volume and liquidity thresholds, participants can only achieve rates lower than those applied to *lessees*. (Pl. Opp. at 68-69.) But lessees are not members, and the rates non-members pay compared to lessees is irrelevant to Plaintiffs' Fee Claims. Moreover, the evidence shows that no participant ever reached the threshold that would allow them to achieve a lower rate than lessees (Ex. 187 at 4543-44 (128:21-129:9).)

2. Plaintiffs' Pursuit of Nominal Damages and Declaratory Judgment Does Not Save Their Fee Claims.

Plaintiffs concede that they have no evidence of any independent damages with respect to their Fee Claims. (*See* Pl. Opp. at 72.)[15] They nonetheless argue that the Court should allow their

[15] Plaintiffs suggest that there are genuine disputes related to the value of their Class B shares that somehow prevents summary judgment. (*See*, *e.g.*, Pl. Opp. at 62-63.) But the issues they raise could only possibly be relevant to damages, which Plaintiffs concede they do not have. Recognizing that Dr. Sen's testimony placed Plaintiffs in a no-win situation, Plaintiffs also try to walk back his opinion that the announcement and opening of the ADC were the *only plausible cause* of the decline in the value of CME and CBOT memberships. (*Id.* at 69-70 n.11.) But this is a tall order, and one that Dr. Sen's report and testimony cannot allow. Dr. Sen stated his view in plain English. (*See, e.g.*, Ex. 149 at A-4202 ¶ 6 ("[T]he ADC trading floor and the ability for non-

(cont'd)

Fee Claims to proceed in any event so they can seek nominal damages or declaratory judgment. (*See id.*) But because Plaintiffs cannot show that they are entitled to either form of relief, they cannot prevent summary judgment on this basis.

Citing to a case about meeting pleading standards (not surviving summary judgment), Plaintiffs argue that "specific monetary harm is not a requirement" of a breach of contract claim under Delaware law. (Pl. Opp. at 72.) But Delaware courts (and courts all over the country) nonetheless grant summary judgment when a plaintiff is unable to prove damages, including in circumstances where a plaintiff expressly seeks nominal damages. That is because a trial for nominal damages is often "a futile exercise for all entities involved." *See Palmer v. Moffat*, 2004 WL 397051, at *4-5 (Del. Super. Ct. Feb. 27, 2004); *William F. Shea, LLC v. Bonutti Rsch., Inc.*, 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 grant of summary judgment because "[a]bsent evidence of damages, we will not reverse to permit the recovery of nominal damages"). That is the case here, and Plaintiffs' lack of damages should end their Fee Claims now.

As to Plaintiffs' request for declaratory judgment, Plaintiffs are wrong when they assert, without supporting citation, that Delaware law applies. (Pl. Opp. at 73.) Because "[a] declaratory judgment action . . . merely affords a new, additional, and cumulative *procedural* method for the judicial determination of the parties' rights[,]" Illinois law applies. *Hampton v. Chi. Transit Auth.*, 2018 IL App (1st) 172074, ¶ 53 (emphasis added); *see also Nationwide Affinity Ins. Co. of*

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members to access the ADC trading floor – directly or through a third-party service provider – without purchasing a membership *was the only plausible cause of the underperformance* [of the value of B shares]."; *id.* at A-4222 ¶ 67 ("I do not see any evidence of any event at the CME that could plausibly have caused this decoupling [of B share value versus A share value] *other than CMEG opening the ADC trading floor* and denying members exclusive, free access to that new trading floor.").)

Am. v. Shelley, 2014 WL 1334224, at *1 (M.D. Pa. Apr. 2, 2014) ("[F]ederal courts have concluded that declaratory judgment actions are procedural rather than substantive.") And as Defendants have explained, courts in Illinois, and in the First District, have held that a breach of contract claim is not a proper subject for declaratory judgment. (Def. Br. at 81.) *See also Karimi v. 401 N. Wabash Venture, LLC*, 2011 IL App (1st) 102670 ¶ 10 ("A claim for declaratory judgment, however, is not the proper vehicle for presenting what are, in essence, plaintiffs' breach of contract allegations."); *Brewer v. Allstate Life Ins. Co.*, 2022 IL App (1st) 210932-U, ¶ 18 (same). The out-of-district cases that Plaintiffs cite are inapplicable because neither case involves a party pursuing *both* a breach of contract claim and declaratory judgment. *Roland Mach. Co. v. Reed*, 339 Ill. App. 3d 1093, 1103 (4th Dist. 2003); *Ill. State Toll Highway Auth. v. Amoco Oil Co.*, 336 Ill. App. 3d 300, 305 (2d Dist. 2003).

Finally, Plaintiffs misconstrue Defendants' position and ignore reality when they argue that summary judgment on their requests for declaratory relief is "premature." (Pl. Opp. at 73.) Defendants do not request "to preclude the Classes from seeking any form of declaratory relief relating to fees." The Court's class certification order already does that. (Ex. 118 at A-3790.) Defendants' motion addresses Plaintiffs' individual Claims for declaratory judgment—the only declaratory relief request that is live in this case.

C. Plaintiffs' Good Faith and Fair Dealing Claims Fail

Just as the evidence proves Defendants did not breach any express right in the CME or CBOT Charters by opening the ADC, they did not breach any "implied" right under the covenant of good faith and fair dealing either. As a threshold matter, Plaintiffs do not even try to defend their fee-based GFFD Claims. That is because the uncontroverted evidence proves there is no gap in either Charter with respect to access and co-location fees, but that instead, the members

demanded and received only per-trade preferential clearing fees (CME) and per-trade preferential transaction fees (CBOT). (Def. Br. at 78-80.)

There is likewise no "gap" in the Charters as to co-location. There is no doubt that the members knew at the time of CME's and CBOT's demutualizations that futures trading may eventually occur exclusively on electronic trading platforms. Yet preferential access to an electronic trading system was intentionally *excluded* from the Core Rights, including as to any future connectivity options such as co-location. (Def. Br. at 75-76.) To escape this reality, Plaintiffs cling to their theory that the ADC is not just an advancement in access but is something different that creates identical "time and information" advantages that members received on the trading floor and to which they have a perpetual right. (Pl. Opp. at 59.) But there is no evidence to support that the Exchanges would have agreed that they could control access to Globex and provide equal access to non-members and members alike, including at the lowest latency connection, all the way up until they built the ADC and then, and only then, would members' rights re-emerge. Plaintiffs' lawyer-driven theory results in an incoherent view of their substantive rights. The fact is that the members were keenly focused on allowing the new for-profit exchanges to run their electronic venues in an equal and open way to meet competition.

There is also no evidence that CMEG or CBOT would have granted members exclusive or preferential access to a co-location facility had they considered it. To the contrary, the ability of management to run the electronic trading venues as for-profit companies was a critical element of the transactions. And it is undisputed that as early as 2000 when CME demutualized, CME believed it was competitively necessary to create a system that was open and fair to all market participants. (*see generally* Ex. 22 at A-1357.) Plaintiffs' post hoc disagreement with that assessment—supported only by the fact that CME members "were described as 'embrac[ing]

technology'"—does not create a material dispute of fact that Plaintiffs are entitled to this "limited, extraordinary remedy." (Pl. Opp. at 60; Ex. 111 at A-3374.)

Plaintiffs also argue that if "CME and CBOT wanted unfettered discretion to 'grow and operate electronic trading as for-profit entities,' they would not have provided *any* Core Rights protections in their Charters." (Pl. Opp. at 60 (emphasis in original).) That too misfires because again, the Core Rights protected members' *open outcry* trading opportunities. And the open outcry pits stayed operational for years after demutualization, allowing members to make money as traders or brokers all along the way. By contrast, members benefited from the success of the electronic trading business through equity, which operated as a "financial hedge." (Ex. 36 at A-1436.) It was a win-win for members.[16] Allowing Plaintiffs to re-negotiate the demutualizations through their GFFD Claims would be contrary to the very essence of the deal struck at demutualization.

IV. CONCLUSION

As explained above and in Defendants' Memorandum of Law, Defendants are entitled to summary judgment in full.

[16] Plaintiffs again argue that because the "financial hedge" explanation occurred at a Board meeting, it is irrelevant. But the Board of CME, a member-owned non-profit, was comprised of members and represented members. Thus, it makes no sense to say the Board's understanding of demutualization is different from the intent of the parties (the members). Moreover, Jim Oliff told members at the November 2, 1999 meeting, that unlocking CME's equity value and providing members with A shares "can be viewed as a prudent defensive measure to ensure that if electronic trading overtakes open outcry, we're in a position to run the electronic company like a business and to pay dividends and provide equity appreciation to our owners." (Ex. 37 at 1:08:55-1:09:21; Ex. 105 at A-3128 (49:13-20).)

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Respectfully submitted,

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