IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CBOT HOLDINGS, INC., et. al.,	)	
	)	
Plaintiff,	)	
v.	)	C.A. No. 2369-N
	)	
CHICAGO BOARD OPTIONS EXCHANGE, et. al.,)		
	)	
Defendant.	)	

MARSHALL SPIEGEL'S COMBINED REPLY TO CBOT AND CBOE'S BRIEF IN OPPOSITION TO HIS MOTION FOR LEAVE TO INTERVENE

Pro Se Proposed Intervenor, Marshall Spiegel, submits this reply to CBOT Holdings ("CBOT") letter of June 4, 2007 to this Court and the Chicago Board Options Exchange ("CBOE's") Brief In Opposition to his Motion For Leave To Intervene and responds:

1. Spiegel's interests intersect with the underlying issues and questions being presented for this Court's consideration.. Though damages may be different, many of the points before this Court mirror those that Spiegel is asking it to consider, e.g., does this court have jurisdiction to determine how a Board of Directors can amend its Articles of Incorporation without having to submit to an Article Fifth vote by bypassing a State Court Chancellor and asking the SEC to ratify their *ultra vires* actions.[1]

2. As this Court correctly noted at the May 30, 2007 hearing (as reflected at page 12 of the transcript of proceedings), "When we talk about who has responsibility, you're -- you're giving me the colloquial, the rock-and-hard-place argument." One way this Court may avoid being placed in such a position is recommending that a super-majority vote of 80% of each respective class of member, CBOE treasury seat holders and CBOT exercisers, be required before there is a change to any membership status at CBOE,

[1] See the September 1, 2007 admission by then CBOE Vice Chairman Mark Duffy attached as Exhibit 4 to Plaintiff's Second Amended Complaint. This is an example of the issues that mirror Spiegel's claims.

similar to the relief that Spiegel is suggesting in his proposed Intervenor Complaint. Understandably, neither party to this case would want to suggest this *nuclear solution* to their issues. This may help explain one primary reason why this could be one of the few issues the parties agree on in wanting to prevent Spiegel from intervening in this case.[2]

3. However, faced with such a prospect the parties would most likely move very quickly to settle this dispute. This is an example of the unique perspective Spiegel can bring in helping this Court to better understand the flavor and texture of the many permutations this case can take, as he proposed in ¶ 7 of his Motion To Intervene.[3]

4. Further, the parties placed themselves between the proverbial *rock and hard place.* CBOT did it to itself standing by idly, while CBOE's Board, acting as the sole arbitrator as to what is an "interpretation" versus an "amendment", began stripping its membership of their voting rights, as alleged in Spiegel's proposed Intervenor Complaint. Allowing that unchecked discretion to the CBOE Board, relying on legal advisory letters written in 2004 and 2005 from their defense counsel in this case, which was contradicted by the June 3, 2005 letter (exhibit #1 of the Intervenor Complaint) by Bond's Delaware Legal

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[2] The only three issues the parties agree on is not to ask for an Article Fifth vote as Spiegel previously proposed with fellow members (see footnote 5 of Motion To Intervene), keep him out of this case because of the potential effect of a determination by this Court that the 2004 and 2005 agreements, the subject of this litigation, were entered into *ultra vires*, and agree to continue litigating on an *everything or nothing* scenario. CBOE members seem to believe that the market has factored into their value that some 1,331 Full CBOT members will be participating in a shareholder distribution that is currently valued at $2.5 million per member. As a result from their point of view they have absolutely *nothing to lose* and *everything to gain* by attempting to belatedly extinguishing the exercise right. If they succeed they can only see their seats appreciate. Conversely, CBOT members believe that they only have $225,000 to lose, the current value of a CBOE exercise right privilege. If they succeed, they stand to gain over ten times that value in a CBOE stock distribution. Spiegel respectfully suggests that if this case comes down to the Court having to make a valuation decision, an alternative approach may be to securitize the value of rights to trade at the CBOE which according to their S-4 it proposes to annex along with equity (the profit mechanism for crossing trades) as the New York Stock Exchange had done. This can be approximated by multiplying the current value of a CBOE seat market rental, which annualized averages $60,000, with approximately 1,200 CBOE members that includes CBOT exercisers. If that $72,000,000 in annual revenue is calculated with a 2.5% dividend return (40 times Price over Earnings), those trading right have a value of over $2,880,000,000. If that is divided by approximate 2,200 combined membership of both exchanges each member would receive stock worth over $1,000,000 for that right to trade at CBOE.

[3] See footnote 1 *supra.*

Counsel, Gordon, Fournis, & Mamerella, CBOT empowered CBOE to "*interpret*" away CBOT's claim to the exercise rights. Conversely, CBOE entered into agreements *ultra vires* with CBOT, which amend the definitions under CBOE's Articles of Incorporation of what a CBOT member turned shareholder is in a demutualized corporate organization.

5. CBOE's claim that a change from *CBOT Holdings Inc.,* to *CME Holdings Inc.,* should extinguish the exercise right places *form over substance.* This was contemplated by the 1992 agreement between CBOE and CBOT, which acknowledged that if CBOT merges or is acquired by a futures exchange, the exercise right survives.

6. But now, (in December 2006 by SEC rule filing SR-CBOE-2006-16 referred to in ¶5 of Spiegel's Motion To Intervene), CBOE belatedly adopts Spiegel's position from two years ago on a virtually indistinguishable legal basis.

7. Both CBOT and CBOE, following these counter-productive courses of action which are anti-corporate democracy, were acted on to avoid an Article Fifth vote by disenfranchising the respective memberships of both exchanges, CBOT exercisers (like former CBOE Vice-Chairman and Director, Tom Bond) and CBOE equity members (treasury seat owners like Spiegel).[4] This is what Spiegel's Intervenor Complaint is about.

8. Ironically, CBOT appears to recognize its parallel interests to those of Spiegel because it states that, "Plaintiffs do not endorse certain characterizations set forth in the CBOE's opposition to the Motion," in CBOT's letter of June 4, 2007 to this Court.

9. This admission was made by CBOT's counsel who at 74-75 in the May 30, 2007

[4] Paradoxically, Spiegel and Bond had potentially conflicting economic interests. Spiegel, while a CBOE member through July 19, 2005, considered CBOT's demutualization tantamount to extinguishing exercise rights. This was done for the same reasons CBOE now claims CBOT exercise rights are extinguished, pursuant to CBOE's Articles of Incorporation and the 1992 agreements between the Chicago Exchanges. Bond, in theory, wanted to make sure his CBOT exerciser interests were sustained without future threat of CBOE's board *interpreting* them away, absent an Article Fifth vote, as occurred in this instant case. Both Spiegel and Bond, among other CBOE members, sought a political solution that CBOE materially thwarted by having the SEC validate the *ultra vires* actions of CBOE's Board.

hearing, stated:

> "In fact, it's interesting. The -- no less than the general counsel of the CBOE would seem to agree. **In 2005, May of 2005, in response to a -- an objection**[5] **by a series of CBOE members to the -- to the same effect that you've heard here today,*** 'Oh, these are serious changes in ownership,' 'The CBOT is not going to be the same CBOT,' 'They're not going to have members,' these same arguments were made by a former chairman by the name of Bond in what was called the Bond letter to SEC.
>
> And the CBOE responded negatively to that. They said, first of all, that the CBOT will continue to exist as a Delaware membership corporation, following the restructuring . Same thing is going to happen here.
>
> And with respect to the stock ownership and the change in ownership criteria, they said -- the heading of the paragraph is -- and this is the general counsel of the CBOE -- 'CBOT Full Members are not Required to Own 100% of the Equity of the CBOT in order to be Entitled to Exercise' And she goes on to say, 'Nothing in Article Fifth (b) or in the prior interpretations that require CBOT full members to own 100 percent of the equity of CBOT in order to qualify for the exercise right. Instead, it is clear that, under the interpretations embodied in the 1992 agreement and in the 2001 agreement, that whatever amount of equity in CBOT (or in a holding company that owns CBOT)' -- no specific identification of a particular holding company, but a holding company which owns the CBOT -- 'is issued to each CBOT full member in restructuring of' -- of CBOT. That same amount of equity must continue to he held by an Individual, together with all other interest distributed to the CBOT full members.'"

(emphasis added)

10. In *Bond et al v. CBOE and CBOT, Case No. 01CH 14427* (Circuit Court of Cook County, Illinois, Chancery Division, filed August 30, 2001), the September 17, 2001 Report of Proceedings relied on by Defendants and filed in this case as the Dengel Affidavit, Exhibit B attached to their May 3, 2007 Brief In Opposition To Plaintiff's Motion For Summary Judgment referred to at 8, the Court did find at 55-56:

> "All right, first of all in ruling on this case on the standing issue, you state that should an issue arise regarding a member of either exchange's right to vote pursuant to 5B of the 1992 agreement, I think it's clear that that right would be sufficient to afford the exchange member standing.

[5] See ¶2 and Footnote 5 of Spiegel's Motion To Intervene *and the endnote on the last page of this Reply.

It's a protectible right I believe. That being said, looking at 5B itself, it reads, 'No amendment may be made with respect to this paragraph B of Article Fifth Without prior approval of the 80 percent majority. Requirement follows.'"

This declaration recognizes Spiegel has standing to bring action against both parties here.

11. With regard to the erroneous assertions that Spiegel's "claims were the subject of prior proceedings", it seems that these premature questions should more appropriately be raised as part of a Motion To Dismiss, if Spiegel were allowed to Intervene.

12. As to the disingenuous nature of such positions, the parties to this case concede, that the *Bond* litigation was brought to defeat an *advisory vote*, which was revealed to the plaintiffs at the oral argument at 3-4 and 45-48 of the September 17, 2001 transcript:

"MR. QUINLAN (counsel for CBOE): Plaintiffs seek an injunction to prohibit CBOE from presenting to the members for an advisory vote inviting the membership to participate in consensus with respect to the agreement before it is filed with the SEC.

Plaintiff is also essentially seeking to enjoin CBOE from proposing an interpretation of its membership rules to the SEC until they have taken an advisory vote in a particular way that they claim is appropriate. (Page 45-46 to follow):
THE COURT: Why is this election such a big deal?

If the directors of the CBOT and CBOE agree that this is a reasonable interpretation, why do they need to go to membership at all?

MR. QUINLAN: Well, they don't.

What they do as they did the last time and that was approved by the SEC and they do because of the political issues involved in the sense is this something that there is a general consensus with the membership this is okay.

THE COURT: What if the membership says, no? What if 52 percent say, no?

MR. QUINLAN: I don't know what would happen, but you are right.

They don't even have to do this and frankly the only difference here between us and Buckley at the moment is we could say, okay, CBOT here is our interpretation, but we are not going to do that, but that's generally what we are thinking.

THE COURT: Write it down. In order to go to the SEC for an interpretation do you need a majority vote?

MR. QUINLAN: We don't have to do that. Your honor is absolutely correct.

(Bottom of page 47 to follow):

THE COURT: Well, is there a distinction between the process for SEC approval of an interpretation and SEC approval of an amendment?

MR. QUINLAN: Of an amendment you have to take the vote first to get the amendment and you have to do that."

13. The parties to this case know, that even if their assertions were correct, the SEC is not a venue in which Spiegel can recover damages as sought in his Intervenor Complaint.

14. As the above statement by CBOE's counsel Quinlan suggests, the nature of the *Bond* litigation dealt with a non-binding "advisory vote" on an "interpretation" that was to be filed at the SEC, SR-CBOE-2002-01, over an agreement which was subsequently withdrawn and repeatedly amended as described below by CBOE over Spiegel's objections as stated in SEC Release No. 34-51252 at 15-16 and fn. 48, which stated:

"In particular, Petitioner objects to the CBOE's withdrawal of its proposed rule change SR-CBOE-2002-01. Petitioner claims that the interpretation of Article Fifth(b) in the August 7, 2001 agreement between the CBOE and CBOT is integrally related to the proposed rule change. Subsequently, Petitioner similarly argued that the Commission should require the CBOE to file this August 7, 2001 agreement, as well as other subsequent related agreement because the CBOE and CBOT should not effectuate the terms of these agreements until such agreements are filed and approved by the Commission. …. The Commission is not required to consider proposed rule changes that may be filed by an SRO at a future date.

The Commission also notes that agreements between SROs and third parties are not, per se, proposed rule changes that must be filed with the Commission. In fact, as noted above, the Commission is not approving the 2003 Agreement, but is approving only the interpretation of Article Fifth(b), which references certain terms as used in the 2003 Agreement."(70 FR 10442) (2005 WL 483109)

15. The issues that were litigated concerning the SR-CBOE-2002-01 rule filing by CBOE's own admission, at 7 of their Defendants' Brief In Opposition To Plaintiffs'

Motion For Plaintiff's Motion For Partial Summary Judgment, were different than the issues that Spiegel is attempting to litigate in his Intervenor Complaint. As CBOE stated:

> "That shared interpretation [between the parties to this case] was embodied in an Agreement dated August 7, 2001, which was **amended**[6] by subsequent[7] letter agreements dated October 7, 2004 and February 14, 2005 (collectively, the '2001 agreement')[8]….. This interpretation once again was filed with the SEC, and became effective when the SEC approved it."[9]

16. Spiegel's complaint requests monetary damages that were never part of the *Bond* litigation, which was only asking for injunctive relief on an anticipated rule filing SR-CBOE-2002-01 that was subsequently withdrawn on April 7, 2004.[10]

17. CBOE and CBOT also know that in SEC Release No. 34-51568 (70 FR 20953) the SEC never ruled on the merits of the arguments Spiegel raised in his Motion For Reconsideration, that is attached as Exhibit #3 to his Intervenor Complaint, which they suggest were the subject of prior proceedings that may have some *res judicata* effect, here. At pages 4-5 of their April 18, 2005 findings, attached as Exhibit A, the SEC ruled:

> "The Petitioner did not, however, make an argument - as he does now - that the interpretation by the CBOE Board diminishes the rights of CBOE equity holders and, therefore, is an amendment under Delaware law. Because Petitioner cannot raise an argument for the first time on a Motion For Reconsideration, the Commission is not addressing the merits of this new argument.
>
> Petitioner contends, in another new argument first raised in his motion to reconsider, that the Commission 'does not even deign to address - and appears oblivious to - the material conflicts of interests of the Board of Directors of [CBOE] in attempting to 'interpret' the Certificate of Incorporation….' Petitioner elaborates on his position by arguing that 'the CBOE Board, which owes fiduciary duties of honesty, loyalty

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[6] CBOE appears comfortable admitting to amending interpretations but not to interpreting amendments.

[7] Another agreement was entered into on December 17, 2003, ratified by the SEC as Release Nos. 34-51252 (70 FR 10442) (2005 WL 483109) and 34-51568 (70 FR 20953), which is the partial focus of Spiegel's Proposed Intervenor Complaint at ¶ 2 and referred to in ¶ 2 and footnote 1of his Motion For Leave To Intervene.

[8] SEC Release No. 34-51733 (70 FR 30981) (2005 WL 483109)

[9] All of these so called amendments to the "shared interpretations" were filed after the *Bond* litigation was dismissed on September 17, 2001. It amended the 2001 agreement as CBOE admits in the quote at ¶ 14 *supra.*

[10] See SEC Release No. 34-49620 at page 4, footnote 4, attached as Exhibit B

> and good faith to all equity holders, is conflicted with respect to the interpretation it has made….' Petitioner is not permitted to raise an argument for the first time on a Motion To Reconsider and, for this reason, the Commission is not addressing the merits of this new argument."

18. In ¶C at 5-6 of Release #34-51568, the SEC denies making findings as to Delaware Law, which Spiegel is requesting this Court do in both counts of his Complaint:

> "The Petitioner argues that the Commission's order 'manifestly errs in concluding that the CBOE Board has independent, unilateral, and final authority to determine the answer …' to the question of what it means to be a 'member of the [CBOT]' under Article Fifth(b). Petitioner asserts that Delaware law does not permit the CBOE Board to make such an interpretation, and that the fiduciary obligations on the CBOE Board under Delaware and federal law preclude the Board from doing so.
>
> First, Petitioner mischaracterizes our conclusion. Nowhere in our Order did we conclude that the CBOE Board has independent, unilateral, and final authority to determine what it means to be a 'member of the [CBOT]' under Article Fifth(b)."

19. There never was a final determination made on the SEC rule filings. CBOE was not a party when the D.C. Circuit found that Spiegel's appeal was moot because of the sale of his seat. Mootness itself demonstrates that there are no findings on the merits of the case..

20. Spiegel's arguments on appeal were a different than those asserted here because the appeal was brought under the Securities and Exchange Act of 1934 and the Administrative Procedure Act.[11] CBOE was not a party, and no remedies for diminution of value, breach of contract and fiduciary duty were available, as they are here. Spiegel's legal arguments were directed at the SEC, not the CBOE.

21. Inasmuch as CBOE has chosen to use Spiegel's attempts to obtain review of the SEC "rule interpretations" as a sword to prevent him from pursuing his claims in this forum, Spiegel respectfully requests that this Court look at the attached Group Exhibit C,

[11] See Brief Of CBOE In Opposition To Motion of Marshall For Leave To Intervene Exhibit E page 1and 3

statements by CBOE in moving to intervene in his appeals before the U.S. Court of Appeals for the D.C. Circuit. Ironically, CBOE embraces language similar to Spiegel's in his Motion For Leave To Intervene, which suggests that our interests are parallel. CBOE admits at 3 in their Reply In Support Of Its Motion For Leave To Intervene:

> "However, the fact that Spiegel sees fit to raise issues about CBOE's conduct only underscores that CBOE needs to be part of this appeal and that CBOE has a valuable perspective to offer on the arguments on which Petitioner intends to rely."

22. *Torturing* CBOE's position in this matter, if CBOE believes that Spiegel should be precluded from intervening in this case because the D.C. Circuit found his appeal to be moot and never decided CBOE's Motion For Leave to Intervene, then using their arguments as a shield, CBOE should be *barred* from raising their opposition here.

23. Spiegel concedes that he has no standing to intervene as a matter of right. He never made such a claim, and conveyed that point through disclosure of his position and interests.

24. Spiegel does not dispute CBOT's notion that he could "pursue such claim(s) in a separate action." He does disagree with their contention that it would be "the appropriate course" since there is a Court immediately available who is familiar with all the issues who would not need to be *brought up to speed* .

25. Spiegel has demonstrated by the legal admissions of CBOE and CBOT, and through the intersecting and parallel issues in the instant case to those of his claim, that he

does have standing to request permissive intervention. This is exemplified in ¶ 9 above, and ¶¶ 5 and 8 in Spiegel's Intervenor Complaint.

26. Both CBOT and Spiegel are making claims of breach of fiduciary duty by the CBOE Board because of their divided loyalties in this matter. Conversely, CBOE is

making claims as to why the exercise right should be extinguished, which mirror Spiegel's position two years ago. CBOE's actions validate Spiegel's claims that the CBOE Board entered into agreements with CBOT *ultra vires* that resulted in a diminished value in the sale of his seat.

27. As a result, Spiegel has demonstrated that he has met his burden under Delaware Chancery Court Rule 24(b), because a movant "may be permitted to intervene in an action: (2) when an applicant's claim or defense and the main action have a question of law or fact in common."

28. With respect to the contention that granting Spiegel intervention in this case, would cause "distractions", this is not accurate. The extent of the parties' involvement with Spiegel in this case would be responding to a Motion For Summary Judgment against CBOE. Of course, Spiegel has no control if CBOE wishes to engage in convoluted motion practice against him, as they have done here, consistent with the Court inquiry at the May 30 hearing about CBOE getting into situations of their own making.

29. For reasons of judicial economy, since the same documents, the same question of who gets to decide if an SEC rule filing is an interpretation or amendment, and similar issues of when a corporate board gets to make those determinations, are before this Court, Spiegel asks this Court to grant his Motion To Intervene, assuming this Court decides to continue hearing the underlying claims between CBOT and CBOE since the Department of Justice has approved the Chicago Mercantile Exchange ("CME") and CBOT merger.[12]

[12] Spiegel withdraws his contingent statement in the introduction to his Motion For Leave To Intervene that indicated if the Intercontinental Exchange ("ICE") "fail[ed] in its March tender offer to acquire CBOT.", this case should continue. Even if ICE succeeded, and have since revised their tender offer that would include a settlement of this controversy, CBOT Chairman Charley Carey pointed out in a letter to CBOT members that the class members would have to separately decide that issue. CME has just revised their acquisition offer which in value brings it very close to ICE's tender as CBOT's Board has found the ICE bid "not superior" according to news reports by CNBC. If CME acquires CBOT, this footnote is obsolete.Information on this is attached as a supplemental exhibit to this foot note.

30. This Court also has an interest in hearing Spiegel's Intervenor Complaint to prevent the possibility of inconsistent rulings which may effect the parties in the current case, if Spiegel's claims were decided in another venue.[13]

CONCLUSION

For the foregoing reasons Spiegel requests that his motion for permissive intervention be granted.

Dated: June 18, 2007 Respectfully submitted,

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[13] To the extent that this Court may wish to look further into the history of the exercise right dispute of all the parties which is implicated by CBOE attaching Spiegel's Petition For Certiorari as an Exhibit referred to in footnote 11 above, Spiegel incorporates by reference, group exhibit D, this contains the *Amici Brief* of current CBOE members Donald Cleven and CBOT exerciser and former Vice-Chairman and Board Member Tom Bond, along with Spiegel's Supplement To The Petition For Certiorari which was triggered when this lawsuit was filed last August found on the SEC website at http://sec.gov/comments/sr-cboe-2006-106/mspiegel6883.pdf and http://sec.gov/comments/sr-cboe-2006-106/mspiegel1946.pdf respectively.*At 9 and 94 of this hearing CBOE's counsel identifies the same issues that Spiegel raises in this case at ¶ 5 exhibit #3 of his Intervenor Complaint which he states, "We have two -- fiduciary duties are not just to the seat owner. They also go to people who are Board of Trade members now or who are exerciser members who -- who claim that right. We have to make a decision as between two competing sets of interest, two diametrically-opposed views about what the effect of the merger transaction would be on membership…But then we do not have anything to deal with or to protect or preserve the exercise right eligibility in light of what happened in 2005 when the Board of Trade would no longer have any interpretation to save it."