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

CBOT HOLDINGS, INC., a Delaware corporation; THE BOARD OF TRADE OF THE CITY OF CHICAGO, INC., a Delaware corporation; and MICHAEL FLOODSTRAND and THOMAS J. WARD, and all others similarly situated,	:	
Plaintiffs,	:	
v	:	Civil Action No. 2369-VCN
CHICAGO BOARD OPTIONS EXCHANGE, INC., a Delaware nonstock corporation; WILLIAM J. BRODSKY; JOHN E. SMOLLEN; ROBERT J. BIRNBAUM; JAMES R. BORIS; MARK F. DUFFY; JONATHAN G. FLATOW; JANET P. FROETSCHER; BRADLEY G. GRIFFITH; STUART K. KIPNES; DUANE R. KULLBERG; JAMES P. MacGILVRAY; R. EDEN MARTIN; RODERICK PALMORE; THOMAS H. PATRICK, JR.; THOMAS A. PETRONE; SUSAN M. PHILLIPS; WILLIAM R. POWER; SAMUEL K. SKINNER; CAROLE E. STONE; HOWARD L. STONE; and EUGENE S. SUNSHINE,	:	
Defendants.	:	

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Chancery Courtroom No. 12B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Wednesday, May 30, 2007
10:03 a.m.

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ORAL ARGUMENT ON DEFENDANTS' MOTION TO DISMISS OR STAY, PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, MARSHALL SPIEGEL'S MOTION TO INTERVENE, and PARTIAL RULING OF THE COURT

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801-3759
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- - -

BEFORE: HON. JOHN W. NOBLE, Vice Chancellor.

- - -

APPEARANCES:

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-and-
PETER B. CAREY, ESQ.
of the Illinois Bar
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-and-
KEVIN M. FORDE, ESQ.
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ANDRE G. BOUCHARD, ESQ.
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-and-
GORDON B. NASH, JR., ESQ.
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Drinker Biddle Gardner Carton
for Plaintiffs Michael Floodstrand, Thomas J. Ward, and all others similarly situated

SAMUEL A. NOLEN, ESQ.
DANIEL A. DREISBACH, ESQ.
RUDOLF KOCH, ESQ.
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-and-
PAUL E. DENGEL, ESQ.
of the Illinois Bar
Schiff Hardin LLP
for Defendants

MARSHALL SPIEGEL (via speakerphone)
Pro Se Intervenor

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THE COURT: Good morning, everyone.

ALL COUNSEL: Good morning.

THE COURT: Good morning, Mr. Nachbar.

MR. NACHBAR: Good morning. We may begin with some introductions. I'm here on behalf of CBOT Holdings and the Chicago Board of Trade. And I'd like to introduce my co-counsel who will be arguing, Kevin Forde from Kevin M. Forde, Limited.

MR. K. FORDE: Good morning, Your Honor.

MR. NACHBAR: And Peter B. Carey from the Law Offices of Peter B. Carey.

MR. CAREY: Good morning, Your Honor.

THE COURT: Good morning.

MR. NACHBAR: Thank you.

MR. BOUCHARD: One more, Sam? Thanks.

THE COURT: Good morning, Mr. Bouchard.

MR. BOUCHARD: Good morning, Your Honor. Andy Bouchard for the plaintiff class. My co-counsel will be making the argument for the plaintiff class this morning, which is Mr. Gordon Nash from Drinker Biddle.

MR. NASH: Good morning, Your Honor.

THE COURT: Good morning.

MR. NOLEN: Good morning, Your Honor.

THE COURT: Good morning, Mr. Nolen.

MR. NOLEN: Before I make introductions, I'm happy to report two things to Your Honor. The first is that Mr. Spiegel has advised me, the proposed intervenor, Mr. Spiegel, that he has no objection to the schedule that I submitted to Your Honor last week.

Secondly, the parties have conferred with respect to the order of this morning's argument. Subject to Your Honor's pleasure, the parties have agreed that the two motions will be heard together, argued together; that the defendants will go first to be then followed by the plaintiffs. Defendants will reply, and plaintiffs will then have an opportunity to reply as well.

THE COURT: That's fine. It seemed to me that it made most sense for the defendants to go first, because I guess logically the first question is whether there's anything for me to do here. And I also concluded that it was impossible to keep the issues separate and discrete and argue them as two discrete motions. So that's fine.

MR. NOLEN: All right. Thank you, Your Honor.

With -- with those two bits of housekeeping, I would also like to introduce to Your Honor Paul Dengel of Schiff Hardin in Chicago. With the Court's permission, Mr. Dengel and I will split the argument on the defendants' side. Mr. Dengel will address the issues relating to the interpretation of the exercise right in light of the pending acquisition proposal concerning the Board of Trade, including federal preemption, the merits of CBOE's interpretation of the exercise right and fiduciary duty allegations plaintiffs have made about that.

I will address two additional issues, the lack of ripeness of plaintiffs' claims, both as to post-acquisition eligibility and to valuation in a demutualization and, although clearly not ripe, the absence of any right to precise equality of treatment in some future demutualization.

With the Court's permission, Mr. Dengel will go first.

THE COURT: Good morning and welcome.

MR. DENGEL: Good morning, Your Honor.

Plaintiffs would have this Court

interfere with the SEC's authority over issues that go to the heart of the SEC's regulatory mandate.

THE COURT: Let's -- let's start philosophically. We've spent a lot of time arguing about what membership is. But is this case really about membership? Isn't it really just about cutting up the pie of heretofore unfathomable wealth that's going to be created through the demutualization of CBOE, and what does the SEC have to do with dividing the pie?

MR. DENGEL: If we get to the valuation issue, if there are members that qualify as exercise members, we do not dispute the Court's power to hear that issue.

THE COURT: But isn't --

MR. DENGEL: But the question --

THE COURT: Excuse me. Isn't the whole purpose of the CBOE's presenting rule to the SEC to deny exerciser rights their expectation in the fruits of the CBO -- CBOE demutualization?

MR. DENGEL: The purpose of the interpretation is to do what CBOE has had to do in the past. When new events have occurred that changed the circumstances, CBOE has had to interpret Article

Fifth(b), which is the source of the so-called exercise right. That defines whether someone is an exerciser member. It is not self-evident from the words used in the charter provision what it means. And CBOE has to interpret that and, under the Securities Exchange Act, has to submit that interpretation to the SEC for its approval.

So yes, in answer to your question, it is very much a membership issue. What gives the plaintiff class any rights to participate as an exerciser member is if they are an exerciser member. And the question of whether or not they are eligible to be exerciser members is a matter first for interpretation of the charter provision; and under the Exchange Act, that provision then must be approved -- that interpretation must be approved by the SEC.

There is a long history of doing precisely that on at least four previous occasions in two sets of litigation where the SEC has accepted that jurisdiction, has accepted that role, and where courts in Illinois have recognized that it is the SEC's primary jurisdiction to decide those issues. Because, Your Honor, it's not just about cutting up the pie. Upon the moment that that merger transaction is

completed, if ever it is completed, CBOE must decide who gets to trade that day; who gets to walk onto the floor that day and trade, who gets to vote, should there be a vote; and then, of course, should there later be a demutualization, who's entitled to participate in that. But the participation in the demutualization is only one aspect of membership. What is important here is who are our members. And who is a member of a securities exchange is fundamentally a question that the -- that goes to the heart of the SEC's regulatory mandate.

THE COURT: There are presumably 1402 people out there who -- that's the maximum number, at least. What difference does it make whether they're members or not? In other words, whether -- whether the Board of Trade is held by CBOT Holdings or CME Holdings, why does it matter?

MR. DENGEL: Well, it -- it matters --

THE COURT: I'm trying -- I'm trying to figure out why practically -- in other words, what I'm searching for is, give me a reason why this is being done other than this -- I don't -- I don't know quite how to frame this. But this to me just looks like a gambit cut-out, the CBOT side of the equation

from the demutualization. And that perhaps may be framed harshly, but that seems to be what the intent is, that's what the purpose is. And when you come from an equity background, you kind of chafe at that. And maybe you can do that. I'm not saying you can't, and maybe you have every right to do it. But I'd like to understand why other than that reason which I've identified would motivate this approach, because if it was okay to have CBOT Holdings, why isn't it okay to have CME Holdings? I can't figure out why on the ground it makes any difference.

MR. DENGEL: Well, it makes a difference in the sense that a decision has to be made one way or the other. If -- if we were to say "Sure. All of you people that previously thought of yourself as Board of Trade members and thought of yourself as exercise members, come on over, be members," well, then, we have other people who also have an interest in the institution, people who are seat owners will say "You can't do that, because that itself is an interpretation. And we think you're wrong, and you have to go to the SEC on that issue."

We have two -- our 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.

It -- there's not a design to disenfranchise anybody, but there is a need to answer the question about eligibility for exercise membership. We can't abstain. We can't say it's too tough a decision. We have to under our rules make a decision, but we don't get to make the decision by ourself. The -- the federal system says we do our interpretation and then we give it to the SEC to approve. And that's the mechanism that exists.

And no, Your Honor, it's not that they're -- it matters, because the issue must be decided. We -- we don't have the option to simply say it's too tough an issue. We have to interpret in response to these, just like we did in '92, just like we did in 2001, just like we did in 2005. The choice is unavoidable. We must choose.

So really what we're here to talk about is what is the mechanism for determining that

choice. And the mechanism is clear and the precedent that exists is clear on that.

And you mentioned the Court's equitable power. That's also -- or the Court's equitable interest. That's also very much the SEC's interest. Their interest is in making sure that things are done fairly. So fairness is -- is nowhere going to be off the table. Really, the question simply, who decides.

And I would submit to you that the risk here, if -- if the Court proceeds, is that CBOE is put in an impossible situation, because the SEC process is under way, because we're required to do it that way. And this Court's process is under way. So we have two decisional bodies simultaneously answering the very same question. And if they were to decide it differently, then CBOE is in a very bad situation. It has to choose between contempt of court in this Court or submitting itself to a -- an action for violating its rules by the SEC. We should not be in that situation. Someone has to have the primary jurisdiction here. And the answer is under the supremacy clause in this situation, where there is a dedicated, detailed federal system that's been

constructed, the mechanism is for the SEC to make that decision.

And I do want to make it clear, we are not saying that everything having to do with CBOE is off the Delaware table. By no means.

As I started, the valuation issue, should we ever get to that, is very much a Delaware issue. We've always accepted that. We've just said it wasn't ripe. It's a very limited issue that we're saying is not subject to state court jurisdiction in this case. And that is, the determination of who is a member; that is, what is the eligibility to be a member of CBOE, and the interpretation of CBOE's rules. There can't be two answers to those questions. We can't have it either may or may not be a member or either is or isn't this interpretation. CBOE needs a uniform answer that requires a uniform decider. And under the system we have here and the Exchange Act, that decision is the SEC's.

THE COURT: When we talk about who has responsibility, you're -- you're giving me the colloquial, the rock-and-hard-place argument. Unlike most of the cases, such as I sell electricity and I've got the Federal Energy Regulatory Commission and the

local Public Utilities Commission telling me what to do, here, you may have a rock on one side; but the hard place you constructed yourself, you being your client -- I apologize for that -- CBOE constructed for itself by making the call that it did. So there's a little bit of self-creation of the plight that you're in, isn't there? I mean, isn't that what distinguishes this from other preemption cases that -- I don't know that I've ever seen a situation in the cases that I've read at least where the party complaining about having the risk of inconsistent results created that risk itself.

MR. DENGEL: Well, Your Honor, we -- we -- the -- the risk that we created was simply our good-faith interpretation done by disinterested directors here. That -- that created the interpretation, because we had to make one. But no. The -- if we had made the opposite decision, if we had said "No. Our view is that exercise rights survives," you can bet that there would have been seated owners who would have said "You're giving away the store. You can't do that. That's wrong."

Now, if they had done it properly, they would have gone to the SEC and they would have

made their case there and we would have fought it out at the SEC. But what if they come to this Court and said "There's that's a violation of your fiduciary duty"? We'd be in the same situation.

And the point I'm making, Your Honor, this isn't -- the decision here isn't a function of the interpretation that CBOE has decided in good faith should be made. The question is more systematic -- systemic. The question is, there's always going to be potential for the Court and SEC, if they're simultaneously considering the same issue, to reach a different decision regardless of the interpretation we went in with.

We went in with this interpretation. If we had gone in with the opposite one, the same potential risk exists. It just highlights the fact that this issue, the system, the process has to be the same regardless of the decision CBOE reaches. And that decision, therefore, requires one decider and it requires it be the SEC.

And I point out, Your Honor, and I'm sure you're aware, this is not -- that this is an unusual case in many ways, but one way in which it's unusual, we have precedent in this case that isn't

just similar, it's not just on point, it's the same parties, it's the same provision, it's the same effort; namely, to bring a -- a breach of contract action when there is an interpretation of this exercise right. Two previous courts have addressed this very issue and have said that in this situation, the conflict risk that I mentioned exists, it's serious and it mandates deferral to the federal system.

Your Honor, if I can respond also to one comment -- one -- one thread I heard in your comment, because perhaps it's troubling you --

THE COURT: I don't make threats. I --

MR. DENGEL: No threat.

THE COURT: -- if you interpreted --

MR. DENGEL: No, no, no.

THE COURT: -- it as such, I apologize.

MR. DENGEL: Thread. I meant -- I said "thread," Your Honor.

THE COURT: I'm sorry.

MR. DENGEL: A notion that I heard in your comment that I want to address, and that is,

certainly the plaintiffs have made the argument that this is really just a contract action, that all they're really asking for is contract rights and that they keep pointing to the '92 agreement as the source of contract rights.

A very key point I think that -- that we need to emphasize, Your Honor, is that the source of the membership rights here is and can only be Article Fifth(b), because Article Fifth(b) specifically states that it cannot be changed without a supermajority vote by the exerciser members and seat owners voting separately. What that means is, certainly CBOE cannot reduce the rights of exerciser members. It also cannot increase them. It cannot allow more people to be exerciser members than otherwise would be entitled to. Otherwise that provision would be invalid under the voting requirement.

So what has happened in this case, as has happened in all the previous instances, is, we're not talking about changing the rights. We're talking and must talk about interpreting those rights. So if there's any suggestion before the Court that the '92 agreement gave additional rights than -- than -- than

Article Fifth(b) did, that can't be. That cannot be valid, given the restrictions under Article Fifth(b).

And I would refer the Court to the fact -- and we quoted it extensively in our brief -- the Board of Trade counsel in previous litigation went to great lengths to point out that the '92 agreement and the 2001 agreement were just that. They were interpretations, nothing more. They were not contracts that created new rights.

So that's where we are, Your Honor. We're talking about interpretations of an Exchange rule, a membership rule. And it needs to be decided by the SEC in that regard.

THE COURT: When you talk about interpretations, am I supposed to ignore them? Am I supposed to say, "Well, both sides came to a consensus. Sounds like a meeting of the minds"? I get to the meeting of the minds, it's not hard for me to go from meeting of mind to, in essence, an amendment to whatever the underlying agreement is. Do I -- what weight -- how -- how do I assess an interpretation? I'm not exactly sure what it means as a -- as a -- as -- in terms of a binding or authoritative source.

MR. DENGEL: The prior interpretations have legal effect. They have legal effect not because they created contract rights. They have legal effect because they were a shared interpretation which the SEC then approved. It is upon the approval by the SEC that it became a rule, and it became binding on the parties. So I'm not suggesting that the prior interpretations don't matter. The point I'm making is, those prior interpretations in those agreements are valuable touchstones; but ultimately it's the language of Article Fifth(b), to the extent it helps us, that we will go to. And it's really, again, who does the deciding.

The -- but the prior interpretations are certainly useful in that regard, but I'm suggesting, of course, that the decision that ultimately gets -- who does the deciding would be the SEC when it considers those issues and those prior interpretations.

The argument -- one of the arguments that has been made is that this really isn't before the SEC's jurisdiction because Article Fifth(b) just deals with disciplinary issues or, rather, that the SEC's jurisdiction only deals with membership issues

that rise to the level of disciplinary matters. And I think we can dispense with that argument fairly easily, because when you look at the Exchange Act provision, Section 6 and Section 19, they're giving the SEC plenary authority over membership decisions by exchanges. Nothing whatsoever, not -- not in any way limited to disciplinary matters. Certainly there's jurisdiction over disciplinary matters, but it even gives the SEC jurisdiction when an exchange merely limits some of the rights of membership. And in that situation the SEC has jurisdiction over this as a membership dispute. Nothing suggests to the contrary in the Exchange Act that the SEC's jurisdiction is somehow limited to disciplinary matters.

I would like to emphasize one other point. There has been a suggestion that the SEC would not do what this Court would do, and that is grapple with the underlying interpretation, the merits of the interpretation. And that's just not so. Just like the SEC is going to consider fairness issues just as this Court would, the SEC is going to have to grapple with the merits of CBOE's interpretation just as this Court would, because it's a matter of the statute. The statute says that the SEC has to approve or

disapprove the interpretation based on whether it's consistent with the provisions of the Exchange Act. One of the provisions of the Exchange Act is that an exchange must obey its own rules. And the SEC has said that in its view, that means that in approving an interpretation, it has to ask whether the interpretation is faithful to the underlying rule. It has to look at the underlying rule and make sure that that interpretation is consistent with the actual language of the rule.

So the SEC is going to be asked to do the same thing that plaintiffs are asking this Court to do, and that is, look at the merits of the interpretation, consider its fairness to all the parties, and make a decision about whether it does or doesn't agree with CBOE's view.

THE COURT: Where is the SEC in a progression sense?

MR. DENGEL: The rule was published for comment I believe at the end of January, which means that any interested party was offered the opportunity to comment, submit written comments. 135 comments were received. They were received, among others, by the representatives of the plaintiff class

here and by the Board of Trade itself. They submitted a lengthy comment letter that laid out all of the arguments that are before this Court. They laid them out to the SEC as well. So 135 comments were received by the end of February. And that matter is now under advisement with the SEC.

The -- I guess the last point I would address on preemption, unless Your Honor has further questions, which I'd be happy to address, would be the -- the reference to the so-called savings clause in Section 28(a) of the Exchange Act. That provision allows state regulation of the same rights and remedies given by the Exchange Act.

What that means, certainly it preserves the state -- state court's authority over blue sky issues and the state's ability to regulate blue sky issues, namely, to regulate securities issues. It says nothing about securities exchanges. And although the regulation of securities by states is -- is well-established, it isn't well-established that states get involved in the regulation of the securities exchanges. And one can imagine why that is. Because if every state and every court in every state had authority to regulate the -- the rules and

the membership of security exchanges, then CBOE would be and other exchanges would be subject to competing regulation among the 50 states. That's not the system that has been set up. What has been set up is a system designed to achieve a uniform result, because we're talking about national institutions here that are infused with national purpose, a self-regulatory organization. They have duties under the Exchange Act not just to run their own business, but to act as regulators and to make sure that their markets operate in the furtherance of the national interest. And the 1975 amendments of the Exchange Act were designed to put teeth into the SEC's oversight of that self-regulatory process.

Nothing that undercuts that kind of uniform system is a good idea, and it would be antithetical to the principles established in the Exchange Act.

Your Honor, on --

THE COURT: How -- how is the SEC's interest in the orderly operation of the markets implicated by whether these 1402 or fewer individuals are -- are members of the -- have the chance to be members of CBOE? In other words, they can be members

now, I presume we all agree. Let's assume that the -- the CME transaction occurs. On the other side, what -- why does the SEC care -- why would the SEC care? In other words, what's the federal interest that's at stake here other than the most abstract one, when you compare the -- the -- if we go back to my perception of reality, which is this is all about divvying up a pie. That's the tension that I'm struggling with, because I agree with you. If -- if there's a regulatory interest that goes to the efficient operation of the market, that clearly is for the SEC; but I don't understand how saying 1402 people today can do it and 14 -- those same 1402 people tomorrow can't do it, how that implicates the SEC other than perhaps in transitioning the exiting of the 1402 people.

MR. DENGEL: My point is not that the SEC has an interest in which person gets to be a member. Their interests are much more general than that. Their interest is in process. Their interest is in making sure that there's a fair and an orderly process for determining who is a member and who's not a member. The people that are -- that -- that seek to be a member have a fair opportunity to do so, and the

people that are restricted from being a member have a fair opportunity to be so; and, secondly, their interest is that the result or the answer is a uniform answer.

Now, yes, if we were to designate -- if Congress were to have designated a particular court to decide these issues, that would have been fine, but it didn't go that way. It said those -- since we need a uniform answer on membership, we'll choose the SEC, but we'll also have a process beyond that; namely, the Court of Appeals, federal Court of Appeals can address that issue.

So no, it's not that the SEC in this case cares whether or not exerciser members do or don't get to continue to be eligible for the exercise right, assuming that -- I mean, there could conceivably be some point where there would be an effect on the market. But no, I think the federal interest here is more in avoiding chaos and avoiding a nonuniform answer and ensuring that there is a fair process. Now, to be sure, this Court could have a fair process, but we can't have multiple fair processes. We have to have a single process, a uniform process that is fair. And the Exchange Act

says well, the way to do that is to have it go through the SEC and have it go through the federal Court of Appeals.

Do you have any further questions on the preemption issues? because --

THE COURT: I -- I may drift back in that direction at some point, but not right now.

MR. DENGEL: Okay. Well, let me address, then, the merits of CBOE's interpretation and, first, to deal with a red herring issue.

CBOE is not seeking to extinguish any rights here. It's not extinguishing the exercise right in any way. That right continues on the books. But the question -- and I acknowledge that it -- it is a fine distinction, but it's an important one. The question is who is eligible for it. And that is the issue that is to be decided here.

This case is about eligibility. And we have to decide -- again, that's the key issue. It's not as if CBOE reached out to say "We're going to squelch the exercise right." Rather, the Board of Trade has announced that it intends to take an action. No one made them take this action. They've announced they want to take an action. They want to merge in a

particular way. That requires CBOE then to react, and that --

THE COURT: Suppose CB -- CBOT Holdings were taken over through a hostile action. Would that change the analysis?

MR. DENGEL: It wouldn't, Your Honor. Still, CBOE would have to react to that circumstance. But the point is, neither of those events is CBOE reaching out to cause a change. CBOE is reacting to a change, either under the current circumstances because it's a voluntary choice by the Board of Trade or under your scenario because someone else did something. In either event, the point is, CBOE doesn't have the option of saying "I don't want to deal with that." We have to deal with it because we need to know, we need to have an established process that we know who gets to be a member.

And although Your -- Your Honor understandably is focusing on dividing up the pie, I do want to remind the Court that there are other aspects of becoming a member that CBOE needs to decide. It needs to decide who it will allow on that trading floor the next day, who's going to get to vote. There are many other rights of membership

that -- that follow from these external events. And CBOE has to get answers to those questions.

And this -- this fact that the exercise right is fragile in the sense that it can be destroyed by changes in the structure of the Board of Trade should not be surprising to the Board of Trade or to the plaintiff class. There have been two lawsuits and four interpretations of -- of exercise right rules, all of which were premised on the question being a fair and important question as to whether events had occurred that did in fact extinguish exercise right eligibility.

The -- as to the merits of the interpretation, I would focus on ownership, which is the key reason behind the decision that CBOE made when it reached its interpretation of the exercise right.

THE COURT: Let's go back to the charter.

MR. DENGEL: Yes.

THE COURT: No reference to ownership there, is there?

MR. DENGEL: It -- not explicitly. It refers to members.

THE COURT: So then we progress to

where ownership is one of -- where it eventually is one of the three factors. We've -- haven't you given -- or hasn't CBOE given up on the ownership of the Board of Trade issue when it says CBOT Holdings is -- is a good enough placeholder?

MR. DENGEL: No, Your Honor. And I can answer that in two parts. First answer is --

THE COURT: You can answer it in three parts. That's fine, too.

MR. DENGEL: Answer first your starting premise. Article Fifth(b) does not refer to owners specifically. It refers to members. But in 1973 what that meant was crystal-clear. A member owned -- the members owned the exchange. No one else ever did. In 1973 the idea of demutualizing exchanges and turning them into stock corporations was not in anybody's contemplation. Members owned the exchange. Members voted and members traded. Those were the three key aspects of what it took to be a member, ownership, trading rights, and voting rights, and also some liquidation rights.

So in this case the key thing is ownership. Now, you point out -- you ask whether or not CBOE has given up on that issue.

When the Board of Trade demutualized, CBOE's initial reaction was, that did it, because by transferring ownership from the individuals to a holding company, they had stripped away ownership that killed exercise right eligibility. CBOE filed an interpretation to that effect. The Board of Trade went to court. The Court said "No. This is an SEC issue." It dismissed the case on preemption.

After that the Board of Trade and CBOE talked. And we accommodated both, the Board of Trade by saying that we could get comfortable with this situation because it was the creation of a -- their own holding company, and then we set forth certain rules. If they owned a certain number of shares of the Board of Trade holdings, they have to own those shares, and they have trading shares and the other elements of the -- that the right was divided into.

But -- this is the direct answer to your question -- the 2001 agreement, which was key to their divesting that aspect of ownership, was expressly stated to be good for this day only. It so stretched the concept of ownership and membership, that the agreement specifically said that it would only apply so long as there were no other material

changes in ownership or structure. This is such an additional material change in ownership and structure. The 2001 agreement was as far as CBOE could in good conscience go, and it said so.

Now the Board of Trade seeks to go farther. And it can't do so under the 2001 agreement. That agreement cannot now be extended pursuing some broader principle for further material changes in ownership and structure, because the agreement said that's exactly how it would not work, that it would not be transferable to later iterations and later changes of structure.

THE COURT: No. 1, the Board of Trade as a subsidiary remains unchanged; is that correct --

MR. DENGEL: Right.

THE COURT: -- as anticipated? What we have simply -- so, in other words, if there were a merger and CBOT Holdings were the surviving entity, you wouldn't have any problems with that.

MR. DENGEL: That would eliminate that issue. I'd have to know the whole structure.

THE COURT: I understand.

MR. DENGEL: Yeah.

THE COURT: There's so many

contingencies, that that's probably an unfair question. And I -- I know what I'm asking and you may know what I'm asking, but, unfortunately, it may not be clear in the transcript.

But what's a material change? How -- how do I ask -- how do I -- how would someone put material -- just a different identity, does that make it material? Is it something that would change the way the Board of Trade would operate? Is -- I mean, how -- how do I assess the word "material" in that context? In other words, why does -- whether it's CBOT Holdings or CME Holdings as survivor of the merger, why is that material to anyone?

MR. DENGEL: The question was has there been a change in ownership that is material. Now, a change in ownership that takes ownership from one entity, the Board of Trade holders, and puts it in another entity, CME Holdings, a stranger to the original transaction entirely, is material because it's complete. One person used to own it -- one entity used to own the Board of Trade and now an entirely separate entity owns the Board of Trade. It's material because it is total.

THE COURT: So -- and, again, there's

so many combinations of this question, that it's probably unfair. If the -- the acquisition had been structured that CME Holdings ended up owning CBOT Holdings which continued to hold the Board of Trade, this issue wouldn't have arisen.

MR. DENGEL: That issue might not have arisen. I'd have to think that through, but I -- if -- if the ownership stayed the same; that is, the ownership of the Board of Trade stayed the same, it was still CBOT Holdings, at least that issue would no longer exist. There are other ways in which important things can happen. In this case voting rights, governance rights have been stripped; but at least that issue wouldn't exist under that circumstance.

As to why another proof that ownership should be key to the analysis is going back to Article Fifth(b). Article Fifth(b) says why was this right given. This right was given in recognition of the special contribution of the Board of Trade and, by extension, its members to the development of CBOE.

Well, what was that special contribution? The Board of Trade and the plaintiff in their papers admit what it was. It was capital. It was intellectual property that was contributed. In

short, it was the stuff of owners. So it makes perfect sense that exerciser members were compensated, if you will, in the -- in the original structure of CBOE in their capacity as owners, not in their capacity as traders on the Board of Trade, but because they had given something of -- in their capacity as owners.

So when that ownership stake no longer exists, then, something very fundamental is happening, and it's consistent, then, with Article Fifth(b) that you would focus on that lack of the ownership interest.

Now, to be sure, the 2001 agreement addressed that issue; but, as I say, it said this far and no farther, and -- and they were on fair warning. This far and no farther. It said it would only apply so long as there were no material changes.

It was one thing to have the Board of Trade set up its own holding company that it merged into. It's another thing when they sell off the Board of Trade to another entity that was a stranger to the original transaction.

The Section 3(d) of the '92 agreement is also material to this issue and material to the

merits of CBOE's interpretation.

Now, as I said, the 1992 agreement, as the Board of Trade previously admitted, is just an interpretation. It doesn't create new rights. It just interprets the existing rights. Section 3(d) dealt with what you do if there's an acquisition of the Board of Trade.

THE COURT: Let -- let's stop right there. And this is -- I'm sure you've lived with this a long time and have a much -- certainly hope you have a better understanding of it than I do.

But isn't the purpose, at least my limited function -- I realize you don't think I have any function. Let's assume for purposes for argument I have a function -- that my limited function is really to use the '92 agreement to gain an understanding as to what the word "member" or the term "membership" means in the charter? Is that what I'm looking at the '92 agreement for? And that the reason why 3(d) matters is because that gives us at least an understanding as to what the folks 15 years ago thought "member" meant?

MR. DENGEL: Correct, Your Honor. As a shared interpretation of the institutions, it gained

legal effect because and when it was approved by the SEC. But yes, that is significant.

And what it tells us on the subject is the parties tried -- they jointly agreed how they would interpret Article Fifth(b) in the event of an acquisition of the Board of Trade, and we have an acquisition here because membership -- I'm sorry; ownership is changing. And what they said was that there are several requirements that must be met. We've dealt in the brief with -- with all of them, but I'd like to focus here on the second one, which I think is the most important one, and that's ownership, again.

The requirement there is that the 1402 members of the Board of Trade have to be granted in that acquisition membership in the survivor. Now let's just assume that the Board of Trade is the survivor. In the brief we show really why they're not. Let's assume they're the survivor. They're not -- the so-called members of the Board of Trade will not be granted membership in the Board of Trade by this transaction because they will lack that ownership stake. And I realize, again, if the 2001 agreement could be extended, that might answer that

question, but it can't be. That amendment does -- that -- that agreement, that interpretation does not exist to save the day.

So we are in a situation where the people that trade on the Board of Trade after this transaction will not own any aspect of the Board of Trade. They will own stock in the holding company. They will not own anything about the Board of Trade. And that's just antithetical to the notion of membership. We went as far as we could in the 2001 context to help the Board of Trade demutualize, but we cannot go any further and should not, in fairness and in recognition of what it means to be a member, go any further.

THE COURT: Won't these individuals be members of the Board of Trade as such on the other side of the merger?

MR. DENGEL: They would -- the question --

THE COURT: Their rights may not be the same, but they will be members of some sort of the Board of Trade on the other side of the merger.

MR. DENGEL: What adds to the confusion in an already confusing thing is, sometimes

people speak of membership in different contexts. If you mean members from a regulatory point of view, like for the CFTC to regulate them as members, probably yes. But are they members -- and in that sense, all they are required to be is someone that -- that trades.

Now, I -- I'm speaking on the assumption that it's that way on the futures side. I know it's that way on the securities exchange side. But are they members in the true sense of the word that the Article Fifth(b) meant in 1973.

There, membership meant more. It meant the ownership interest as well as the trading interest. It meant the voting interest. It meant the whole package of rights traditionally associated with being a member on an exchange. And although now, in 2007, we speak loosely of members just as long as they have the right to trade, that wasn't the sense in which 197 -- the Article Fifth(b) was enacted or adopted. There they meant much more. And the parties throughout their -- their dealings, as they've tried to jointly interpret this agreement, have recognized that it meant more, that it meant an ownership right. That's why you see the requirement in the 2001

agreement of that ownership interest. You have to have 27,338 shares of the Board of Trade stock.

And that just -- even if the 2000 [sic] agreement were to continue in application, which it can't for the reason I was suggesting; but even if it were to apply, after this transaction there would be no Board of Trade stock any longer and, obviously, therefore, no one could hold 27,338 shares much -- they couldn't hold any shares. The Board of Trade dismisses that. "Well, we'll just" -- "we'll reform that agreement and it'll mean the number of shares of CME Holding stock."

That's not in this agreement. They cannot just extend this agreement. This agreement was an agreed interpretation that only went so far and expressly no further. They can't extend it.

Lastly, and very briefly.

THE COURT: Why isn't --

MR. DENGEL: Yeah.

THE COURT: -- and the exchange rate has changed. So if I've got my numbers -- I'll probably get them wrong, regardless of which exchange rate. But if -- if -- whether I have 27,000 shares of CBOT Holdings or 9,000, or whatever the numbers are,

of CME Holdings -- pardon my language -- but that's skin in the name. Isn't that enough? Isn't that the idea, that you have equity interest in adventure and you care about the future of the entity, which is why we expect -- for example, there are those who say directors of corporations are more likely to be concerned about the corporation if they own stock in the corporation -- that type of incentive to -- to align their interests? If I've got that much same dollar amount presumably, why should I -- why shouldn't that be sufficient interest to -- to keep the parallel interests aligned so that we can go forward on that basis?

MR. DENGEL: If someone were coming up with a new interpretation, that argument could certainly be made. It could be made that it's an extension of the 2001 agreement. But the point I hope I've made clear is, the 2001 agreement by its terms wasn't an agreement that was going to be extendible, and it wasn't an agreement -- an agreed understanding that was going to be transferable to broader and different contexts.

THE COURT: What I'm hearing -- if I characterize this unfairly, fix it, if you will --

perhaps CBOE could have made the interpretation that I was suggesting, that CBOT Holdings, CME Holdings, same amount of dollars would work; but it didn't, and it's CBOE that has the right to make that call in the first place under the regulatory scheme in which we find ourselves, and it exercised that power and, therefore, it's not for anybody to second-guess, assuming the SEC says it's consistent with the rules. Is that -- that's really what your argument is, I think.

MR. DENGEL: Almost, Your Honor, except the last part, that it's up to nobody to second-guess. It's up to everybody to second-guess. Anybody that disagrees is free to submit a comment letter to the SEC, and they have done so. They have made exactly that argument to the SEC. That -- that 9,000 shares of CME Holdings stock, that should be sufficient to the SEC. That's how you should interpret Article Fifth(b). They can make all those arguments. They're free to second-guess us. The SEC is free to second-guess us by disapproving the rule if it thinks it's unfair. If it decides "This isn't enough of a change that we think it should matter," they're free to disapprove the rule.

There, we're talking about process and

method. There, which was our original discussion, it's that the SEC should make that decision. But no, we don't claim to be above review by anyone. We have to make an initial call, and now we're talking process, who oversees that call. It should be the SEC, and it should be the federal Court of Appeals.

I was going to turn to the last issue, which is going to be very brief, on the fiduciary duty point, unless Your Honor has further questions that I --

THE COURT: Not right now.

MR. DENGEL: Okay. Very briefly --

THE COURT: But that's -- that's not an affirmative promise.

MR. DENGEL: I understand. That will be Mr. Nolen's problem, then.

On the fiduciary duty point, Your Honor, the fiduciary duty claim at this point, as I read the reply brief, has been reduced down to this: And that is that there were seven independent directors that voted for this proposition and seven directors that had an interest -- that -- that held a seat that voted for this, and that the fact that there were not more of the former presents a fiduciary duty

issue.

I, quite honestly, don't quite fathom this, because the simple fact is this: Disinterested directors met separately to consider this issue. They were unanimous in supporting. So this decision obtained the unanimous support of disinterested directors, "disinterested" meaning they don't own a seat. They don't own exercise membership. They have no right to do either, and they are not affiliated with any organization.

So the suggestion that there was somehow something amiss in the process by which CBOE reached this interpretation is just flat wrong. It was supported by the unanimous vote of all of the independent directors that voted. It was supported by the unanimous vote of all the so-called interested directors that voted. And, therefore, the process was made as -- we took every step we could to make sure that this process was free of any of the interest that a seat owner or a exerciser member might bring to the table. And that is why we looked to the seven independent, disinterested directors who met separately and reached a decision. And they reached a unanimous decision.

THE COURT: I do have one other question. I apologize.

The rule is considered by the SEC. The SEC considers whether it is legally consistent with the charter, the prior interpretations, whatever other guidance documents it deems appropriate to consider. Would the SEC's approval of the rule also eliminate any claim that the plaintiff class would have as to a breach of the covenant of good faith and fair dealing?

MR. DENGEL: If the nature of that claim was that the interpretation was wrong and not only wrong but wrong to the extent it represented a breach of fiduciary duty, yes, it would, because the question of the interpretation at that point, assuming SEC approval would have been decided and, therefore, any fiduciary duty claim would be based on the assumption that that interpretation was wrong, would not -- would not hold.

Now, Mr. Nolen will be getting into this; but there's, of course, a prematurity issue here, because we haven't done anything yet. We have filed an interpretation to give fair notice to people about what we expect to be the interpretation if this

transaction closes. So I don't know what the fiduciary duty claim would be, since at this point we are seeking the advice of the -- and the approval of the SEC on an issue but have not yet kicked anybody off of the floor or taken any action against anybody's rights.

THE COURT: Thank you.

MR. DENGEL: With that, Your Honor, I will turn things over to Mr. Nolen, who will address that and other issues.

THE COURT: Thank you.

MR. DENGEL: Thank you, Your Honor.

MR. NOLEN: Thank you, Your Honor. And let me dispense with some preliminaries and simply turn directly to the question of the lack of ripeness of the issue of whether anyone will retain the eligibility to be or become an exerciser member if the CME acquisition closes. And Your Honor, I think, knows what I mean by "the CME acquisition."

It's important to keep in mind just at the outset and to reiterate here why this issue of post-acquisition eligibility comes up at all. It comes up because the Board of Trade decided to enter into a transaction. It's the Board of Trade deciding

to enter into a transaction to be acquired by CME. And if that transaction closes, the interests of the Board of Trade's members or shareholders will be changed, and it will be -- and it is the effect, Your Honor, of that change or that potential change that bears on continued eligibility. So it's immediately obvious that unless and until a transaction actually occurs that changes the status quo, there's nothing to adjudicate. This isn't --

THE COURT: Isn't -- isn't the CBOE saying that if the merger occurs on Day 5, come Day 6, those who trade on the CBOE as CBOT members will no longer be able to trade, subject to whatever transitional rules are adopted?

MR. NOLEN: Yes, except the issue for ripeness purposes, Your Honor, is that you have -- you have put the rabbit in the hat, because you have assumed there -- I don't mean you.

THE COURT: Judges do that a lot.

MR. NOLEN: I don't mean you. I mean -- hypothetical question.

THE COURT: Judges -- judges put rabbits in lots of hats.

MR. NOLEN: -- has -- has presumed

that the CME transaction gets to closing. But not anyone, not you and not I and not the plaintiffs can say today that that transaction will be accomplished.

Looking at the transaction itself, Your Honor, it's subject to a number of risks of noncompletion. It lacks necessary regulatory approvals, the -- the 900-pound gorilla being antitrust problems faced, and, of course, approvals of foreign authorities. It's subject to closing conditions, including conditions on the CME side that the Board of Trade cannot control. It's subject to shareholder approval, which in and of itself is a factor that our courts have held precludes a finding of ripeness.

Looking slightly more broadly, the CME transaction is under attack in this Court and before Your Honor by Board of Trade shareholders themselves. So any eventual closing is subject to legal and injunction risk.

And looking more broadly than that, it's the fact that the Board of Trade has been and is the subject of competing bids; and it may well be that the bid upon which plaintiffs' claims are now predicated, which itself is a different bid than the

one on which the complaint was originally filed, will not ever get to closing at the end of the day. If there's one thing we know in Delaware and in this Court with your heavy diet of controlled contests and acquisition battles, it's that it ain't over until it's over. That's why we have fiduciary outs.

So any claim that's predicated on an assumption of eventual completion of a bid that remains subject to competition, to shareholder approval, to regulatory approval, and to conditions to closing is inherently premature. And issues that will arise, to answer Your Honor's question directly, only by reason of closing of such a deal are inherently unripe for present adjudication.

Ripeness is a precondition to subject matter jurisdiction. And ripeness requires that the material facts are static, as the Supreme Court put it in Stroud against Milliken, and that the rights of the parties are presently defined rather than future or contingent. What we have here is precisely the opposite - a fluid and dynamic and inherently uncertain set of developing facts arising out of -- of differing bids where the deal on top today might be gone tomorrow or might be changed or modified.

Your Honor suggested some hypothetical modifications that -- that might affect the -- the continued eligibility under the exercise right. These parties that are here before Your Honor were parties that are not here before Your Honor may very well change or modify the form of their bids. And whatever deal in whatever eventual structure it may have -- exists may not present the same issues or raise the same concerns as the one on the table at the moment.

You're being asked, Your Honor, for an advisory opinion on a bed of changeable facts. And if you decide to adjudicate the hypothetical rights of the parties here, there's nothing to prevent ICE or any other bidder who chooses to step in to come here to this courtroom and to ask you to address their transaction and structure, too. That is exactly what this Court has said it won't do in cases like FMC against Scherer and General DataComm. It doesn't allow its processes to be viewed or used for pre-adjudication of issues to help bidders or targets or anyone else get a sneak peek at how the Court might ultimately rule when, if ever, the issue does become ripe. It's exactly what those courts decided. And it's all at peace with the general and fundamental

requirement, which is expressed and, again, as a matter of subject matter jurisdiction, of ripeness of issues of settled factual matrices rather than hypothetical ones as a precondition to adjudication by this Court. It reflects prudential concerns that Your Honor is well familiar with.

THE COURT: Why don't the steps taken by the CBOE to present the rule change and interpretation, rather, to the SEC constitute that kind of concrete step that triggers the availability of judicial review? I'm putting aside obviously the question of whether preemption applies.

MR. NOLEN: Sure. And -- and it's -- and it's a good and it's a fair question. And the answer to the question I think is very simple and it's very straightforward. Agencies of the executive branch do not have the same doctrines regarding ripeness that courts of law do. Agencies do not work in a common law system, for example. Our courts have -- have decided that our courts have limited jurisdiction and that the jurisdiction is limited -- in the United States constitution it's limited to cases or controversies. We don't have a parallel phrase in our state constitution, but the concept is

parallel and has been widely articulated by this Court and by the Supreme Court.

Agencies don't have the same thing. Agencies are expected to have an ongoing dialogue with those that they regulate. Agencies -- the -- the Internal Revenue Service, for example, an example being private letter rulings -- the Securities and Exchange Commission, exactly this kind of rule interpretation. In this Court there's no jurisdiction to adjudicate matters, decide matters until they have reached a concrete form.

In an agency it's different. Agency has to be forward-looking. And the agency here, the Securities and Exchange Commission, is faced with -- with needing to have a -- a determination, make a determination of who's going to be able, as Mr. Dengel put it, to walk out on that exchange floor on the day after the closing of the transaction. In the case of this court, we don't know that that transaction will ever close. There are competing bids for this -- for this entity at the moment. And there are Revlon claims pending before Your Honor in another case relating to this transaction.

So there is a distinct absence of the

kind of fact that a court needs, and that absence of fact is not necessarily fatal to agency proceedings.

Your Honor, plaintiffs have no answer, no answer for the fact that the CME acquisition remains contingent and uncertain, may never close and that, therefore, an adjudication of the effect that transaction structure on the exercise right may never have to be decided.

So what is their argument? First they say there's a compelling jurisdiction for adjudication now so that the Board of Trade members will know what their ultimate rights will be before they vote on the CME acquisition if, indeed, they are ever asked to vote on the CME acquisition, which is itself entirely uncertain. That one's easy, Your Honor. Such a justification has been tried and rejected before in the Diceon case. Then-Vice Chancellor Jacobs rejected it, saying "Shareholders do not need an adjudication in order to cast an informed vote. The requisite information can be provided by the parties themselves in their proxy materials."

Vice Chancellor Strine said the same thing in the General DataComm case, "The shareholders can cast an informed vote if the proxy materials

disclose that there are differing views."

The key to this particular problem is wholly within the Board of Trade's control and needs no reversal of the ripeness doctrine and no change of the Court's inclination to provide advisory opinions.

Second argument that the plaintiffs advance is that the declaratory judgment action effectively renders ripe any dispute under a contract. Here, too, our courts have already rejected that mistaken claim. In Stroud, the Supreme Court expressly stated the ripeness concerns "are not rendered irrelevant by the declaratory judgment statute."

And in this Court, Vice Chancellor Parsons' decision in Energy Partners is equally clear, noting a requirement of present harm -- and I would note that no present harm is alleged by the plaintiffs -- and stating that "If the action requires the occurrence of some future event before the acquisition's factual predicate is complete, the controversy is not ripe, declaratory judgment act or no."

So the issue of what will happen to exerciser membership eligibility if the CME deal

closes, which is obviously contingent on that deal closing, an event as to which there are multiple uncertainties internal to the deal, external to the deal and, indeed, external to the parties to the deal, is hypothetical.

These same considerations apply in spades to the valuation issue of exerciser member interest in the demutualization. That issue, as Your Honor will recall, involves the question of what exerciser members will be entitled to if a demutualization occurs at a time when there are exerciser members and seat owners.

The reason I say the ripeness issue applies in spades to this question is that there is no currently-proposed demutualization that contemplates a conversion of any exerciser member interest. I'll repeat that, because the plaintiffs seem to have -- have missed it. There is no currently-proposed demutualization that contemplates a conversion of any exerciser member interest. So it is patent that the issue of what exerciser members should receive, were their interests to be converted in a demutualization merger, is not ripe, nor yet even extant.

Now, it's true that CBOE contemplates

a demutualization and that it has filed a draft S-4 registration statement regarding it. But as is clear from the S-4 and expressed in the explanatory note at the very front of the document, that demutualization presumes that before it occurs, the CME acquisition or some other deal will have occurred and will have resulted in no persons any longer being eligible to be or become an exerciser member. You know, obviously, if those presumed facts didn't occur, then we'd have to go back to the drawing board. The valuation issue that the plaintiffs wish to litigate here, however, is simply not on the table today.

In fact, that issue could only come to the fore if no transaction occurs that makes it impossible for anyone to have or maintain the necessary status to -- to be eligible to be an exerciser member and CBOE decides to demutualize in a way other than is currently proposed but at a time when there are both seat owners and exercise members. Of course, in that latter event, the special committee would have to have resumed its work and made a decision, and plaintiffs would have to disagree with that decision, and the plan decided upon would have to be approved by the CBOE board and thereafter also by

CBOE's members, none of which has occurred and all of which would have to occur before plaintiffs could even arguably suffer any harm and come before Your Honor. It's obviously pure speculation at this time whether any of that, much less all of it, will ever occur. So this valuation issue is wholly premature and unripe and can't be adjudicated.

THE COURT: Where are we with respect to the 90-day notice requirement?

MR. NOLEN: Well, there is nothing, I think, at the moment that requires such notice to be given. So we're in unripeness ground on that. I don't believe that a notice obligation is in dispute. Certainly there is nothing that CBOE has ever said that it isn't going to give such a notice. So it's an entirely hypothetical dispute. And the way these demutualizations go, they take quite a lot of time. And I'm sure that there will be plenty of notice when and if such a thing comes about.

Let me address, though, Your Honor, if I may, the lack of merit to the plaintiffs' valuation argument. It's, in my view, obviously, unripe. Your Honor shouldn't reach it. Were Your Honor to reach it, I think you -- Your Honor would want to start with

a basic legal premise. It's a premise the plaintiffs don't like, but it's one that's clear in our law. And that premise is that stockholders and, by implication, members, even ones within the same class or a series, are not necessarily entitled to be treated identically. They're entitled to be treated fairly in a transaction that affects their interests but not necessarily equally. That's the teaching of Nixon against Blackwell, of the Golaine case, of Jackson against Turnbull, and of Times Mirror. In fact, fair but unequal treatment is not only permissible, but as the Bridgeport Oil case shows, may sometimes be required.

And with that basic legal premise, let's also keep the basic factual premise in mind. Exerciser members don't own the same thing as seat owners. Exerciser members have a nontransferable and temporary membership that goes away once they're not Board of Trade members any longer under Article Fifth(b). That's not disputed. In fact, the Board of Trade set this company up, set CBOE up back in 1973. And when they did that, they could have given their own members memberships outright and there wouldn't be a dispute today. They didn't do that. They could

have given their members an option to buy for some nominal amount, a penny, for example, a membership. They didn't do that. They set it up with a contractual provision that requires continued membership on the Board of Trade of the City of Chicago as a precondition to the eligibility to become a member of the -- of the Chicago Board Options Exchange, CBOE.

Not only is it not disputed that their interest is a fragile one, a temporary one that is subject to divestment, but CBO -- it's also not disputed that CBOE seat owners -- sometimes we call them regular members, sometimes seat owners; whichever Your Honor prefers -- owned fully-transferable memberships that are not subject to that divestment.

And, you know, I couldn't help but note that some of the materials that the Board of Trade put in front of you in -- I think it's Mr. Perce's affidavit, in fact, suggests the exercise right privileges that the Board of Trade members have trade at only about 8 to 12 percent of the value of regular seat owner memberships. So the market recognizes the difference, and clearly the economics don't suggest the quality of value.

Given that -- that the legal principle where quality is not mandated is clear and the, frankly, difficult factor for the plaintiffs that they're not similarly situated to the regular seat owners, plaintiffs really do struggle to find some basis on which to argue that they're entitled to equal treatment as opposed to fair value.

THE COURT: Well, let's just assume that the exerciser members still have status, because I think the valuation question presupposes that. And 3(a) of the '92 agreement says they'll have the same rights and privileges. Why doesn't "same rights and privileges" mean I get whatever the seat owners get?

MR. NOLEN: Let me -- let me answer that directly, Your Honor. It says -- 3(a) says they have the same rights and privileges except. They have the same rights and privileges except.

THE COURT: The transferability.

MR. NOLEN: Except for transferability. If I have something that is not transferable, I have something that lacks a fundamental attribute of value, because I don't get to trade that -- I don't get any of -- any of the gain in that. I get only the current use for -- of it. So it

puts, again, the rabbit in the hat to say that they're equal when they're not.

It also has a -- I think, a very broad and --

THE COURT: But the last sentence in 3(a) is where I want to go next, and that talks about if CBOE makes a property distribution -- depending upon how a demutualization happens, I guess that could qualify as a property distribution -- then it will be done on the same terms.

MR. NOLEN: The -- the premise, the guess part that you just put in there is -- is what I can't let Your Honor accept without challenging it.

THE COURT: I thought it would draw a response.

MR. NOLEN: A demutualization doesn't involve an offer or a distribution, much less one of optional or additional memberships. The sentence Your Honor was reading from is -- provides a right to participate in the offer or distribution of any optional or additional CBOE membership. And that's not involved in the demutualization merger. Indeed, an offer or distribution isn't -- of any kind is not involved in such a thing.

And looking at the next sentence which you will -- will perhaps take me to next, it doesn't involve a cash or property distribution, much less one that is dilutive of membership value as to which, in all events, plaintiffs have offered no evidence.

A demutualization involves the conversion by merger of membership interests of the demutualizing entity into shares of stock of the survivor. The conversion of shares in a merger is legally and conceptually distinct from the concepts expressed in paragraph 3(a) of offer or distribution. And our courts and our practitioners are careful and vigilant not to erode such distinctions, lest our law become imprecise and lose its tremendous utility.

But don't take my word for it, Your Honor. We've laid out in the briefing cases that expressly distinguish these terms. Orzeck says that offer and purchase of shares is not the same as merger. Hariton says that a purchase and distribution of shares is not the same as a merger. Rothschild holds that a cash-out merger is not the same as a distribution. Dart holds that a merger is not a redemption.

And the Levco case, Your Honor, it

seems to me, is perhaps the most instructive of all. There there was a claim of right to equal treatment between two classes of stock, Class A and Class B stock. Plaintiffs pointed to a provision that the two classes of stock -- and I'll quote from the underlying charter document -- "shall participate, share and share alike in all distributions of assets in liquidation or otherwise."

Your Honor, the Chancellor made short work of that claim for equality, remarking in words applicable here that "the company isn't not distributing assets when it reclassifies stock." Flat out, "the company isn't distributing assets when it reclassifies stock."

So it's not making an offer or distribution of cash or property or of optional or additional CBOE memberships. Simply not doing that.

And then, again, as applicable here, the Chancellor went on, and he said "The plaintiffs' argument makes no sense, because it assumes the shares of the two classes are worth the same amount," whereas, as the Chancellor observed, "the Class A stock has historically traded at a premium to the Class B stock."

And that takes me back to what I mentioned just a moment ago about the very evidence that the plaintiffs put in the record before Your Honor that the exercise right privileges of the exerciser members trade at 8 to 12 percent historically of the -- of the trading value of an -- of a regular seat owner's membership. "Such an unusual result," the Chancellor remarked, "would certainly need to be made" -- and these are his words -- "would certainly need to be made clear, explicit, and express, for example, through a statement that holders of the two classes would receive equal amounts of consideration in the event of a reorganization, consolidation, or merger." That's a quote from the Levco case, Your Honor. That is exactly what's missing here.

Certainly when the Board of Trade set up the Chicago Board Options Exchange, it could have put such terms in the certificate of incorporation. It didn't do so. It didn't do so in the 1992 agreement, either, although the parties to that agreement clearly knew how to discuss merger when they intended something to occur with respect to a merger, because on the very next page of the agreement from

what Your Honor was referring to, in paragraph (d) there's a discussion about what happens in the event of a merger, a merger of CBOT, of course. But the parties were focused on merger. They knew how to address it if they wanted to. They didn't. And that in and of itself, I think, is dispositive of the -- of the plaintiffs' claim and certainly evidence that the plaintiffs would have to overcome that disentitles them to any summary judgment here.

Now, Your Honor asked a moment ago about well, okay. Let's put aside the fact that the two -- the two kinds of membership are not the same because one's not transferable and one is. Let's just put that aside and say, you know, what about this rights and privileges language. You know, Your Honor, if -- if you own the Manor House and I own a tenant house and both of them stand in the way of a highway project and they're going to be taken for the highway project, you and I as citizens have the same rights and privileges. That right and privilege is to receive fair value. It's not to receive equal value. I don't get for my tenant house exactly that which you get for your Manor House unless that's how a valuation happens to work out. And the valuation is an

inherently factual exercise that's to be undertaken initially by directors and by their advisors, and they are to come up with in their business judgment an appropriate allocation of value.

And that, at the end of the day, is what will be tested, if ever we get to that point, which, obviously, my argument on prematurity suggests we may never get to.

And that I think has some bearing on the question with which Your Honor opened the argument today. You said, isn't this just about dividing the pie? I mean, aren't you just trying to get rid of these people so you don't have to pay them anything? Only members have a right in a demutualization to get anything, okay, because it's their interests that are being converted.

If a CBOT member has done something that eliminates him as a member or her as a member or it as a member, that's not our doing. If -- if a current member of the Board of Trade, who has all three of the -- of the pieces that are necessary to have eligibility under the 1992 agreement, sells one share of stock and falls below the minimum, that's -- that's his, her, or its choice. That's not CBOE's

choice. And it would be contrary to the fiduciary duties that are owed to the remaining constituency of the Board of Options Exchange to say "Well, okay. Even though he doesn't have the three pieces, we'll let him participate."

And I would analogize it, Your Honor, to a situation, a stock corporation. Let's suppose we have a stock corporation and there's a transfer restriction under Section 202 of the GCL that requires that in X event, the stockholder is required to -- to sell for a nominal value his stock interest back to the company. Would we -- would we ever say that -- that it was improper for the company in that event to enforce that because otherwise the stockholder would be entitled to get some greater benefit by continuing to be a stockholder? I don't think so. And I think the Shields against Shields case tells us that that's not how it works.

The question is a matter here of contract. It's not necessarily a matter of equity. It's a matter of contract and how do the contract rights that the parties negotiated, indeed CBOT unilaterally imposed at the outset, relate. If it's about divvying up a pie, it's about divvying up a pie

in accordance with the contractual rights and expectations of the parties, the contract by which that pie was baked. And that's how I think Your Honor needs to look at it.

Now, with that, let me -- let me wrap up and say what I -- what I think is where we would like the Court to come out. As to the valuation issue, plaintiffs' motion for summary judgment ought to be denied. Indeed, plaintiffs' claim ought to be dismissed or, if Your Honor prefers, stayed. I know some of the ripeness cases have -- have preferred to stay the suit in light of its obvious prematurity and unripeness of that issue.

As to the issue concerning future eligibility to become or remain exerciser members, as Mr. Dengel has argued to you, the SEC has preempted jurisdiction to decide that question. And even if it did not, the issue is both too premature and too unripe to permit judicial as opposed to SEC agency action at this time. So plaintiffs' complaint should be dismissed to that extent as well.

MR. NOLEN: Thank you.

THE COURT: Thank you.

I think we'll take a 10-minute recess

before I hear from plaintiffs.

(A short recess was taken from 11:25 a.m. until 11:37 a.m.)

THE COURT: Good morning still.

MR. CAREY: Good morning, Your Honor. My name is Peter Carey, and I'm one of the attorneys who represent CBOT Holdings and the Chicago Board of Trade. Counsel.

I'd like to start, if I may, with a little bit of conceptual framework about the contractual issues as we see them. And we see them as contractual issues.

The defendants would suggest to the Court that the 1992 agreement and the 2001 agreement are nothing more than interpretations, which apparently contain no enforceable rights and obligations. Simply interpretations to be passed upon to some other agency for its approval.

To be sure, the agreements, specifically the '92 agreement, require that there be -- that each participating party to the agreement execute and approve a rule and submit it for approval to the CFTC in the case of CBOT and to the SEC in the case of CBOE. But those were conditions precedent to

the effectiveness of the agreement, and they were approved and the members of both institutions voted on that agreement and approved the agreement. And the parties provided in the agreement specifically that either of them, either on their own behalf or on behalf of their members, could bring suit to enforce the terms of the agreement and to recover damages for any breach.

Now, Mr. Forde is going to deal more directly with the jurisdictional issues; but it seems to me that if you read those provisions of the 1992 agreement together, that what you have is an enforceable agreement between the parties that can be enforced by either party in a lawsuit seeking either specific enforcement or some declaration of rights or damages.

Indeed, there are definitions and terms and agreements that are reflected in the 1992 agreement that are not found in the charter. For example, the term "eligible CBOT member" -- "full member" and the definition for it, not contained in the charter.

The provisions limiting the number of full members who would -- who could qualify as

eligible CBOT full members to 1402, not found in the charter.

The requirement that in order to be an eligible CBOT full member, you have to hold all of the parts of that membership at the same time, so long as those parts were distributed to you as a class, not found in the charter, either.

So there were concessions made in the context of disputes that had arisen, concessions made by the Board of Trade on behalf of its members in favor of the -- of -- of -- of the CBOE. And the CBOE made certain agreements as well that we believe are enforceable and that bring us to this Court.

We don't know -- and, again, Mr. Forde will -- will address the SEC issues, the preemption issues and the ripeness issues; but it would be difficult to fathom how the SEC is going to specifically enforce the terms of this agreement or provide damages for their breach.

Turning to paragraph 3(a) and 3(b), we respectfully differ with our able opponents on the construction of that language. We think that the "same rights and privileges" mean exactly that. The transfer restriction is not implicated in either the

merger or in the demutualization of CBOE, the merger of CBOT Holdings and CME Holdings. So I'm not sure exactly what the point is with respect to that.

But in any event, the very next line says, "Notwithstanding the foregoing." In other words, notwithstanding the transfer limitations, and then a series of provisions that says that the -- that a CBOE regular member and a CBOE exerciser member are to be treated the same for purposes of any offers or additional memberships, any additional transferable or not transferable trading right or privilege; and that in the event that they make -- that CBOE makes a cash or property distribution, whether in dissolution, redemption, or otherwise, to other -- to its CBOE regular members as a class, then they have to do so on the same terms to the exerciser members if the -- if the distribution would have the effect of diluting the value of CBOE membership, including an exerciser's membership.

Now, in a -- in a -- in a restructuring where equity is to be distributed for the first time and you distribute less equity to one class of members than another, by definition you have diluted the value of the other class' membership

because they don't receive the same amount of equity.

THE COURT: I chafe at the notion that a right which is transferable -- and you're right. Let's assume the same in all respects except that it's not transferable -- are equal.

MR. CAREY: Judge, I can understand why you might chafe at that. But the fact of the matter is, the parties, recognizing that difference, still provided for same or identical treatment in the event of these transactions that are described in 3(a) and then in 3(b). They provide a mechanism for those who have -- who are eligible but who have not yet exercised to go ahead and exercise for the limited purpose of taking advantage of those offers.

The purpose of this equal treatment really, if you go back to the -- to the -- to the charter, there's no limitation in the charter on transferability. You -- you retain the exercise membership or that membership so long as you are a Board of Trade member. But that doesn't mean that what -- as long as you're a Board of Trade member, you couldn't transfer during that time frame. That was an agreement that was reached as a part of the '92 agreement. You may say, well, it's kind of a limited

right to transfer and it's not the same as a full member's. To be sure, it's not.

But, again, I keep coming back to the provisions of the '92 agreement that say notwithstanding this difference, which really isn't implicated in a -- in a restructuring, that you will distribute the same amount to each class, where distributing less than that would have a dilutive effect on one or the other.

THE COURT: Explain to me how a demutualization fits within the scope of all the various things that could happen in 3(a).

MR. CAREY: All the things -- things --

THE COURT: That could happen in 3(a). In other words --

MR. CAREY: Well, I think it's a --

THE COURT: -- is it a property distribution?

MR. CAREY: I think it is a property distribution. In our brief, we -- we -- we -- we pointed out as well, Your Honor, that the 1992 agreement provides that Illinois law, not Delaware law, would apply. And under Illinois law, a

distribution is broadly interpreted. It is given its plain meaning. And if it is given its plain meaning, it clearly includes a -- a distribution of shares in connection with a -- a -- a demutualization.

The cases that the defendant rely upon, also even the Delaware cases, don't specifically define distribution as such. They deal with dissolutions under your statute with redemptions under Delaware corporate statutes, but they don't define the term "dissolution," none of them. So that -- plus the fact that Illinois law applies here by the parties' own agreement suggests that you're in a -- you're in a circumstance where a distribution of shares would satisfy the description of it in 3(a) of the agreement. And in 3(b), of course, there is no dispute. No notice has been given at this juncture, although it is conceded, apparently, that there is a requirement at some point to provide such notice.

The conceptual framework with respect to the merger, it is suggested by the defendants, doesn't apply here. That is, the '92 agreement doesn't apply here and the 2001 agreement doesn't apply here, because the 2001 agreement said, "We're only going this far." It didn't really say that, but

it said, "Absent some other material change to the structure or ownership of CBOT, then the following will be considered eligible."

But it did something as well. It didn't just stop there. It said in paragraph 10 that the 1992 agreement would remain in full force and effect and that the CBOE hereby reaffirm all of their respective rights and obligations thereunder except if there's a conflict. In fact, we would suggest there is no conflict. This is entirely consistent. That is, if -- the -- the merger transaction here is entirely consistent with what happened in the restructuring transaction regarding the CBOT.

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 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 the 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 of that article that require" -- "there is nothing in Article Fifth(b) or 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 a restructuring of" -- "of CBOT. That same amount of equity must continue to be held by an

individual, together with all other interest distributed to the CBOT full members."

And then they -- in a footnote they point out that the reason for this is that -- that -- that the 1992 agreement -- this is simply an application of the 1992 agreement's provision and requirement, that to be an eligible CBOT full member, you have to hold all of the parts and all of the trading rights and privileges -- all of the parts of the membership and all of the trading rights and privileges appurtenant thereto.

Those circumstances will continue to apply in -- after -- upon consummation of the CBOT Holdings-CME Holdings merger. The CBOT will simply become a subsidiary of the CBO -- CME Holdings instead of the CBOT Holdings. It will have the same broad spectrum of public shareholders that C -- CME Holdings -- or CBOT Holdings has. That is to say, they're both publicly-traded companies. Their shares are freely traded on the open marketplace, and their owners -- and the owners of those shares frequently change. Indeed, the owners of the CBOT membership frequently change and have frequently changed since the -- since the 2001 agreement.

So, I mean, if that were considered to be a "material change," one would have expected to hear about the extinguishment of the exercise right before now, because it says in the absence of any material change in the structure or ownership of the CBOT. Well, the CBOT itself is owned by both the public company and the members. And those members frequently sell or trade those memberships. And they have since 2001. And that ownership is constantly changing. If that was considered material, I think we would have heard about it from the CBOE before now.

So I submit to the Court that -- that the proper framework for deciding the issues before you are the contract rights that are -- are -- are articulated in the 1992 agreement. And as -- and -- and -- and the 2001 agreement represents an -- an analogous application of the 1992 agreement in the context of the CBOT restructuring. What we're suggesting is that same analysis, if applied in the context of the CME Holdings-CBOT Holdings merger, produces the same result.

THE COURT: Well, let me ask a question. You seem to be suggesting that -- going back to the 2001 agreement, for want of a better

place, when you talk about material changes in ownership, that because there's public trading of the new holding company, that the ownership is always changing. But don't you agree that the proposed CME transaction would be different in that there really is a change in control in the sense that a new entity will be controlling what was the CBOT business?

MR. CAREY: Well, this is true. But I don't think that -- that is a material change under the terms of the 2001 agreement, nor do I think that applying the '92 agreement in this same context, Judge, under the same rights, that the result is any different, whether -- the identity of that owner wasn't the important consideration. What was important -- and they're outlined in the documents -- is -- it's supremely important -- is that you hold all the parts of a full membership. Whether all those parts are CBOT Holdings' shares or CME Holdings' shares I submit to you is a distinction without a difference, a material difference for purposes of the agreement. You will continue to hold your trading right and you will continue to hold your exercise right privilege.

THE COURT: Well, what would be a --

an example of a material change in the ownership of the CBOT?

MR. CAREY: Well, I think if they cease to be a -- a -- an exchange, that -- and -- or curtailed significantly the trading rights of the members of those exchange. If you look at the '9 --

THE COURT: Excuse me. Would that fit under the definition of a material change in structure? I mean, I'm talking about a material change in the ownership. I'm not sure you can have a more material change in ownership than somewhere it's taken over as a result of a merger.

MR. CAREY: But even if you accept that as the case, all that says is that you have to look elsewhere besides the 2001 agreement to get the answer to the question.

THE COURT: That takes us back to '92.

MR. CAREY: That takes us back to '92. And the 2001 agreement made that express reservation and reaffirmed all of the CBOE's obligations under that '92 agreement. Even if you conclude that the -- that there has been a material change in ownership, all that says is you have to look elsewhere for the answer to the question. It's not in the 2001

agreement. Then you look to -- to the 1992 agreement and see if the answer is there. We submit that it is.

In fact, we submit that the 2001, by admission of the general counsel of the CBOE, is nothing more than an application of the '92 agreement. We say that the same application and the same principles that were employed in that application, if applied here, lead to the same result or conclusion.

I'm going to try to conclude, Judge, and allow Mr. Nash to speak to the -- to the -- more to the demutualization issue. My -- my comments were directed more to the overall conceptual framework and to the -- and to the merger issues, merger-related issues.

THE COURT: Thank you.

MR. CAREY: Thank you, Your Honor.

MR. NASH: Thank you, Your Honor.

I think maybe Mr. Carey actually stole some of my thunder, because he talked about some of the issues relating to the demutualization already.

My clients are members of the Board of Trade. As -- as our briefs indicate, their money and experiential resources created the CBOE. But for my clients, there would be no CBOE. And Mr. Carey has

already explained what the contract rights are, the '92 agreement, 2001 agreement, and what the charter is. And I'm not going to repeat all of that.

I think this is about cutting up the pie, and my clients want to know "I want my share. It's supposed to be equal to the share received by the CBOE members." They have a contract that says that, and that's what we're here to enforce. We can't go to the SEC to enforce that right.

They put a lot of emphasis on the difference in --

THE COURT: Well, I think the -- the defendants would concede that if there is a right, this is where you would enforce the right. The question is whether the CME merger goes through will there be any right. And that ultimately is -- is a question that goes to whether it's for this Court or for the SEC to address. I don't think the dispute is if there is a right, it would be enforced here. The question is whether the proposed rule will wipe out, for want of a better term, any claims that your clients might have.

MR. NASH: The contract defines what it means to be an eligible CB -- CBOT full member.

They're going to be a full member of the Board of Trade if the merger with the Merc goes through just as they are today.

THE COURT: Well, are you suggesting that the SEC doesn't matter?

MR. NASH: I'm suggesting that we have a right to enforce a contract, and we have that right regardless of what the SEC does, yes.

THE COURT: So if the proposed rule is confirmed, approved, adopted, whatever the proper verb is, by the SEC, it doesn't matter.

MR. NASH: I think we're going to be in court trying to enforce our contract rights. And my clients want their share. They say the contract is clear. I agree with that. And that's why we're here.

This isn't about their trading privileges, as Mr. Dengel suggested. And I think that's clear in the -- in the terms of the -- the agreement, particularly the terms about the notice requirement that have already been highlighted for Your Honor.

The -- the -- I want to speak briefly about the argument that they make that their proposed demutualization in the form of a merger would

terminate our contract rights. We don't read the law that way. We think the law is pretty clear that our contract rights would survive any kind of merger that they go through. And whoever they merge with or the merged entity would be obligated to honor the contract rights.

And we pointed to Illinois cases because the 1992 contract is being interpreted by reason of the Illinois law, and I think that law is pretty clear and I don't think they've done anything to refute that argument at all.

We actually want their demutualization to go through. We're not challenging it. We're not saying it's unlawful. We simply want our fair share. And it is about cutting up that pie.

Although the exercise members, Mr. Floodstrand, the plaintiff in this case, may have gotten his membership in the CBOE in a different way than -- than other CBOE members, they are entitled to be treated equally; and that's the point of the 1992 agreement very clearly. And that's a contract right which we think survives the merger. It's a contract right that we're here to ask this Court to enforce, because that's where you go to enforce contracts. You

go to a court just like this one.

And finally, I want to point out that we're -- we're relying on a common understanding of what a distribution is under Illinois law. And I think Mr. Carey already touched on that, and I don't intend to repeat it. We -- we think it's Illinois contract law that's the important element to be enforced here.

I don't have anything more to say.

THE COURT: Thank you.

MR. K. FORDE: Good morning, Your Honor. My name is Kevin Forde. And I also represent the Chicago Board of Trade. I'd like to make a few brief observations about the jurisdictional issue in particular.

We know we have a significant contract question here. The term "eligible full member," "eligible CBOT full member" does not appear in the securities act. It does not even appear in the charter. The only place that important term appears is in the 1992 agreement. And it's Your Honor's responsibility and jurisdiction to decide that issue.

The SEC has no expertise in determining what an eligible CBOT member means in that

contract. That's just interpreting a contract term. You determine what the intent of the parties are under that agreement, not the SEC. The SEC has no expertise in this field. The expert -- the SEC does not even regulate CBOT members. CBOT -- CBOT members are regulated by the CFTC.

The -- the people -- Your Honor asked some very pertinent questions about the -- why would the -- why would the SEC care who shares in the pie. And that's a -- that's a very good question and that gets right to the heart of it, because this is about money. And I can tell you why they wouldn't care who owned the equity.

The people that are in this class, most of them have never and will never trade at the CBOE, which is regulated by the SEC. Some of them in the class will never even trade at the CBOT. They are just -- they just own those seats for investment purposes, and they've owned them, and part of their investment is their equity interest in the CBOE.

Very significant on this point, probably the most important aspect of the 1992 agreement that we're asking you to enforce -- and I -- and let me segue. We know the SEC can read Delaware

law and Illinois law. You can enforce it. The SEC cannot give us a judgment, cannot make a declaration of our rights, cannot award damages.

But --

THE COURT: But can't the SEC determine who are the members?

MR. K. FORDE: I don't think so. They can determine who can trade, who's a member for trading purposes at the CBOE, not the CBOT. They cannot interpret -- they have no more -- and I would suggest much less -- expertise in determining reading that contract than you do. I would suggest much less, Your Honor.

There's an important aspect that demonstrates my point, Your Honor, in the '92 agreement. The '92 agreement provides that if there is a cash or property distribution, which we think is this case -- but it's for you to decide whether it's this case. If there is a cash or property distribution, then eligible CBOT members may elect to participate, and they become CBOE members solely for the purpose of participating in this distribution. They are specifically exempt from any tests to determine their -- their -- their competence, if you

will. They don't have to pay any dues. They don't have to do anything that a trader would have to do to participate. It shows that the SEC would have no interest. This is strictly a divide-the-pie mechanism, and -- and it -- it demonstrates clearly why this is a contract dispute that belongs here and why it isn't an SEC dispute.

THE COURT: Why shouldn't I simply sit back and see what the SEC does? The SEC may make -- reach that conclusion on its own and say this is a matter properly resolved by the state courts.

MR. K. FORDE: Because -- I hate -- I hate to say this this way. Because it's -- it's our right to have it declared. We think this is a court of prompt -- competent jurisdiction. And the thing I was reluctant to say, it's your job to do it. That -- that's why.

THE COURT: Well, what happens -- Mr. Nolen has chastised me for perhaps looking too far into the future but won't be quite as unhappy with this question about the future. What happens if the SEC approves the rule and does what the CBOE apparently wants done, which would end up with your clients or perhaps Mr. Nash's clients not being able

to exercise their rights and I come up with a different answer? What happens?

MR. K. FORDE: I don't think there's any question what would happen. What would happen in that instance is that CBOE would have to present a new rule that conformed with this Court's order. This has happened before. You know, in 2001 they proposed a rule. There was a lawsuit. That lawsuit was settled. So they submitted a different rule in conformity with the settlement, and the SEC approved it. They would just -- in this case they would do the same thing. They would -- obviously they would have to comply with your order. They would go back to the SEC, and the SEC would approve that rule. If the SEC didn't approve the rule, then maybe we would have some kind of a conflict, but that can never happen.

Let me tell you something that is -- that is rather remarkable that didn't come up that really demonstrates the point of what a farce that argument is about the possible conflict.

As you pointed out, they created the conflict by -- by submitting that rule. Under the 1992 agreement, they are not allowed to submit a rule to the SEC without our consent. They never asked our

consent when they submitted that rule. And the provision of that rule is that -- the purpose of that contractual obligation was so that we can discuss these things and work them out before they submitted it. But they preempted the agreement, and they're already in breach of the agreement for doing so simply because they wanted to get in there so they could make this jurisdictional argument.

The -- it's -- it's 12(b), Your Honor.

THE COURT: Yes. I've read it.

MR. K. FORDE: But I'll tell you the most telling argument, I think, and the circumstance that demonstrates the point that -- that the SEC is not the problem in terms of -- of what you're confronted with.

When I awoke this morning, I was told -- I received a phone call that the CBOE had announced today that they were offering -- they were making an offer to the exerciser right holders to settle. They, in conjunction with another corporation, ICE, who was interested in buying CBOT, were going to -- were making an offer to the exercise right holders. My first reaction was, that's not possible, because there's a class action pending, and

certainly they couldn't make an offer to the class to -- to compromise their rights without getting the permission of the Court.

By the time I got to court here, I was told there is a press release, and I was shown a press release, which I'm surprised they didn't tell you about; but that -- I don't have any -- I'm not -- I'm not raising that objection to -- to their -- to the process. I'm using that to demonstrate this: If -- according to this press release, they're going to -- they're going to pay over $600 million to buy all the exercise rights. Now, if they can do that, how do they square that offer with owing -- with -- with "We can't" -- "we can't" -- "under the securities act, we can't pay money here"? If they can pay $600 million without offending this SEC, certainly they can pay the full rights that are required by the contract.

The -- the --

THE COURT: I'll just leave it that. When people are trying to work deals or so in matters, I find it's better that I not get involved or pay too much attention to it.

MR. K. FORDE: I -- I'm -- I brought -- I'm pointing it out, Judge, because you're

going to be reading about it, and I'm surprised it wasn't pointed out earlier. But you're going to be reading about it, and it just shows -- it just shows you that -- that this isn't a critical SEC issue and the fact that -- that in prior instances the differences were resolved.

THE COURT: Well, let me -- if we're going to talk about the prior differences, it seems to me that your client's position has changed from the position it took in the Illinois litigation, because it seemed to me, as I read the -- both the -- the -- the appellate court's opinion and the -- and the opinion out of Cook County, that -- that the -- your client took the position that, "Well, the individual traders really don't have anything to do with this in court. The Court shouldn't be involved. It ought to be involved before the SEC." Did I misread those?

MR. K. FORDE: No, no. Our client was -- the -- our -- CBOT's position was that this was a -- a -- a -- an issue that should be resolved by the Court.

Oh, I -- I apologize, Your Honor. You're talking about the Buckley case or the CBOT case?

THE COURT: Buckley.

MR. K. FORDE: Buckley was before the '92 agreement. And -- and the Court -- I'm sorry. The Court observed that contract cases belong in the courts. But the Buckley case was before the '92 agreement. After the '92 agreement there was litigation; that is, the CBOT versus CBOE case that was referred to. And -- and there the position of the CBOT under the '92 agreement was that these are issues for the Court. That case was settled. They -- they -- you should be aware that that decision was not even a final trial court decision. That -- Judge Durkin in that case allowed the parties to amend their complaints, and then the case was settled, but it never even went to a final judgment.

On the ripeness issue, Your Honor, the -- I -- I find it ironic that you were told a little earlier that they -- it is critical that they have a ruling from the SEC by -- so that the day after the CME merger is accomplished, they can bar traders from the floor. It's equally urgent that the traders would know what the outcome of this case is before that date if they are -- they intend to bar them from the floor on that date.

So these issues that -- that we have here are -- involve a present breach. They have breached by not getting out consent before they filed the rule. They breached when they filed the rule. They breached when they filed -- when they filed their S-4 without providing -- without providing equal participation on behalf of the class. And all of these issues are ready for decision now. And they should be decided by this Court and not by an agency that doesn't have the power this Court has.

Thank you, Your Honor.

THE COURT: Thank you.

MR. DENGEL: Your Honor, just a few comments about what you've heard.

THE COURT: Take your time. You've never been in front of me. I'm more than willing to give you all the time you want.

MR. DENGEL: Thank you, Your Honor.

Mr. Nash said something very important in response to your question. If the Court -- if the SEC were to approve the rule filing, you asked what would he do. And he said we would be in court. So, in other words, the conflict I was talking about is going to be here. And it illustrates the problem that

I was mentioning. We can't have two decisional bodies going down the same path. You even posed the proper point, what if the Court were to agree with CBOE but the SEC were not? We'd have the same problem there. We could end up with these kinds of conflicts. We need to avoid that.

Mr. Nash -- I'm sorry. It was Mr. Carey was asked by the Court what happens if we lose the 2001 agreement because there has been a material change. The answer was we'll go back to the 1992 agreement. But then we do not have anything to deal with or to protect or to preserve exercise right eligibility in light of what happened in 2005 when the Board of Trade demutualized. That change of ownership where so-called members lost their ownership interest in the Board of Trade would no longer have any interpretation to save it. So go back to the '92 agreement. We are nowhere helpful to the Board of Trade, because at that point we're in a situation where we have so-called members that have no ownership interest at all. There was a limited exception that was agreed to in the 2001 agreement, and I explained how limited that was. But if there is not that to protect it -- and clearly, the 2005 demutualization

eliminated ownership, as would the proposed transaction on the table now -- it would further undercut that ownership.

There was a lot of discussion about how this is a contractual issue. Again, nothing that the parties could agree to could change the exercise right without a supermajority vote. Article Fifth(b) cannot be amended. And -- without that vote.

And in the Bond litigation, I heard the Board of Trade's lawyers were clear in telling the Court that's not what the purpose of the '92 agreement or the 2001 agreement were. They were not changes. They were not amendments. And I'll quote the Board of Trade's counsel: "I agree ... that what's at stake here is simply an interpretation by the CBOE."

The '92 agreement was "also an interpretation as this is ..."

Then referring to the '92 agreement, "This is yet a new interpretation."

Another quote, "That's what is at stake here. This is not an amendment. It's an interpretation and that's what this turns on."

That's what the Board of Trade said in litigation when it served their interest to say that

this was not subject to a supermajority vote. They cannot now say that the 2001 or the '92 agreements create contractual rights. That is not to say that they are not meaningful. What they are and the reason they have meaning is what they led to. What they led to was an SEC-approved interpretation. And to be sure, having the agreement of the Board of Trade and CBOE about the right interpretation helped convince the SEC that it was an appropriate interpretation, but the agreement itself was for that purpose only.

Now, of course, there is -- there are provisions in these agreements that go beyond interpretations that impose other obligations on the parties. And it is to that that the rights to lawsuits referred to in these agreements apply, but not to the interpretation issues.

The -- there was an attempt to suggest that CBOE's general counsel in addressing the 2001 agreement had somehow said that any future change of ownership that will involve a holding company would now be subject to preserving exercise right eligibility. What he was reading from was an answer to a question about the 2001 agreement and why that particular interpretation was appropriate. There was

nothing in her statements that was trying to suggest that the Board of Trade could do whatever it wanted with future holding companies and exercise right eligibility would be preserved. In fact, the 2001 agreement says that the parties, when they actually put down in paper what the future applicability of the 2001 agreement were very clear, it was for this transaction only. It would not apply to material future changes in ownership or structure.

There was a suggestion that the SEC is ill-positioned to answer the question in this case because it relates to what it takes to be a Board of Trade member. Well, first, it comes somewhat with ill-grace to say that, since CBOE and the Board of Trade have had shared interpretations over the years -- four of them to be precise -- where exactly that was done where we were interpreting and going to the SEC saying what it took to be a Board of Trade member.

But also, the more important question is, the SEC is not interpreting something about the Board of Trade. They're not interpreting a Board of Trade's charter. They're interpreting CBOE's charter, and that they did have jurisdiction over, and that is the jurisdiction that they have exercised repeatedly

over the years.

The -- the Court quite understandably is not interested in hearing too much about today's announcement. I will just say this, Your Honor: That is a merger bid by the Intercontinental Exchange. They have upped their ante, and CBOE has contributed to that. It just demonstrates why this process, to get to Mr. Nolen's point, is so much in flux. It is a sweetened competing bid for the Board of Trade.

THE COURT: Well, I haven't said anything about this, and I don't really think I need to; but I want to be very clear. I don't want anybody reading anything in my questions or comments today that had any impact whatsoever with respect to the other matter pending before me. And that's one of the reasons I'm especially not getting into any discussions to what may or may not have happened and what the consequences, if any -- I think I've put enough legal limitations on that -- may be.

MR. DENGEL: Actually, Your Honor, I understand your point.

Lastly, there was a suggestion that the '92 agreement somehow forbids for all time CBOE submitting rules to the SEC on the exercise right. I

didn't hear that in 2001. I didn't hear that in 2005. Those were submitted in 2001 in an adversarial context.

But in any event, Your Honor, when you read that, what it's referring to is the defined term "CBOE rule change." This agreement required that there be the "CBOE rule change" to implement the '92 interpretation. And that was done. That provision is simply saying "You can't change what we've agreed to here, in the '92 agreement," and we are not purporting to do so. We're dealing with new circumstances that have arisen. And that provision in no way meant to handcuff CBOE, nor could it, from interpreting its rules as it's required to as a self-regulatory organization subject to SEC oversight as new circumstances developed over these.

And I think Mr. Nolen has a few comments to address as well, Your Honor.

MR. NOLEN: I do. I do, Your Honor, but I will try to be as brief as I can be. I -- I know Your Honor's very generous with time, and I hope not to tread unduly on that generosity.

In Mr. Carey's argument, he commented that the same -- or the phrase "the same rights and

privileges" is there to have absolute equality. I had hoped to hear an explanation of why, if, in paragraph 3(a), the first sentence specifies the same rights and privileges and if that means general equality as my esteemed opponent suggests, the scriveners of the contract felt that it was necessary to then add two sentences specifying two particularized things as to which there would be inequality. Seems to me that certain elements of common statutory construction law might apply to that. But I heard no such explanation.

Now, also with respect to -- to paragraph 3(a), I didn't hear any explanation, really, about the -- this issue of dilution of the value of a membership. I think the argument was that, "Well, if you" -- "if you give us less than the other guys got, then" -- "then the value of the membership is diluted." But no, that's not true. Dilution has to be determined with reference to value, are you getting less than the value. And that gets you right back to the same place that a valuation, not a concept of equality, is necessary and is contemplated by the contract.

Now, with respect to the statement that was made that -- with respect to the meaning of

the word "distribution," that Illinois law, not Delaware law applies, I have to apologize profusely to my colleague, Mr. Koch, over here, who I set out yesterday on a research errand to find the many cases under Illinois law, as he -- as he did find, where the courts in Illinois have said Illinois looks to Delaware corporate law. It's expressed in the cases. It's clear. There are many cases out there. And I'm apologizing to Mr. Koch, because I forgot to bring them with me and I can't provide them to Your Honor. I will be happy to do so if that would save Your Honor's own clerk some work. If you want them, I will -- I will do that.

But apart from that, they --

THE COURT: You're suggesting I don't do my own research?

MR. NOLEN: Well, Your Honor, I -- I know that you and I are about the same age, and I'm just suspecting.

(Laughter)

MR. NOLEN: But --

THE COURT: I didn't say you were wrong. I'm just asking a question.

(Laughter)

MR. NOLEN: The -- the fact is that the term "distribution" means the same thing in Illinois, which looks to Delaware law, as it means in Delaware law and as it means in Black's Law Dictionary, which members of the Delaware bar look to, just as members of the Illinois bar look to, which is a transfer of money or other property. Distribution is the corporation taking its own assets and distributing them to someone else. So they no longer are in the corporation. The merger involves a conversion of interests. None of the corporation's assets are -- are alienated in such a transaction. It's a change in the form of ownership of the owners. The owners have a membership before. They have shares of stock after. That's not a distribution of shares of stock to them. It's a conversion of the nature of their interests.

So whether it's Illinois law, Delaware law, Black's Law Dictionary or -- or anything else, the concepts are different, and our law recognizes that they're different and our cases recognize that they're different.

Mr. -- in Mr. Nash's argument, he -- he noted -- he argued that -- that his clients have

contract rights and those rights would necessarily survive a merger and we would have to honor them. Well, of course, it assumes that those rights do survive a merger, which is the first hurdle if you ever were to get there that you have to get over.

But, secondly, I think it's been established since -- when was Federal United against Avatar decided? In the '20s, '30s? Certainly by the 1940s, where it was established -- and it is established today and it's a fundamental matter of corporation law -- that -- that stock interest may be eliminated by merger where merger of a corporation is permitted, a shareholder's preferential rights are subject to be feasance. Stockholders are charged with knowledge of this possibility at the time they acquire their shares. The same applies to members and member interests. So I think that's really a nonstarter of an argument.

Now, I won't respond to anything Mr. Forde said, but I -- I would like to respond to one thing Your Honor said during Mr. Forde's argument, which is I chastised Your Honor for looking to the future. I'm in no position to chastise Your Honor in that or any other respect. In fact, where -- where

clairvoyance is concerned, I'm perhaps notably a dim bulb. I can't see the future. I can't predict the future. But I think that that is also why we have doctrines such as the ripeness doctrine that prevent the risk that I might ever become a judge.

Thank you, Your Honor.

THE COURT: Thank you.

Do you have anything further?

MR. CAREY: Very briefly, Your Honor.

With regard to whether we are suggesting some construction that amounts to an amendment of the charter and that we haven't recognized that the '92 and 2001 agreements are indeed interpretations, you know, we have acknowledged that. The difference, I think, is that we believe those interpretations create enforceable contract rights and that we have, as the agreements themselves provide, the right to sue to enforce those interpretations that were agreed upon between the parties to resolve disputes between those same parties.

We're still back to the same proposition that we're talking about, an enforceable contract right the parties expressly so provided. And they didn't limit it to just some of the terms of the

'92 agreement, as Mr. Dengel would have you believe. It says you can -- either party by suit can enforce the terms of the agreement. Doesn't restrict it to some of the terms that Mr. Dengel would like us to have the right to enforce and some that he wouldn't.

With regard to 3(a), there are -- Mr. Nolen claims he didn't hear me, but I think I pointed out that the -- and our argument is that the -- the distribution of shares that will be made in conjunction with the demutualization is, indeed, a distribution under Illinois law within the meaning of one of those two sections of -- or sentences of 3(a) that he references.

I'm glad there's at least a concession now that Illinois law applies. Mr. Nolen may be correct about Illinois having -- Illinois law and courts having respect for the courts of Delaware, which they clearly do, but they do not delegate to the courts of Delaware the responsibility for interpreting Illinois law contracts. That is a responsibility for the Illinois courts. They have done so, and they say that when you're in a contract, you give the words their plain meaning. And distribution, giving it its plain meaning, results in the -- the -- the

demutualization, which involves a distribution of shares to the members as a distribution within 3(a).

Thank you.

MR. K. FORDE: Nothing further, Your Honor.

MR. NASH: Nothing further.

MR. K. FORDE: Thank you very much.

THE COURT: If no one has anything further, thank you all very much for the arguments. I will reserve decision.

Mr. Nolen when he opened indicated that he and Mr. Spiegel had come to closure on an order governing the memoranda with respect to Mr. Spiegel's motion to intervene. I will approve that order and will have telephonic oral argument sometime in the last week in June. I can't give you the date right now. I apologize for that.

With that, thank you very much for the arguments. They were very helpful. And those of you who have to travel, I wish you a safe trip back to Chicago and elsewhere.

And with that, recess Court, please.

MR. K. FORDE: Thank you.

MR. NOLEN: Thank you, Your Honor.

(Court adjourned at 12:31 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 107 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 1st day of June 2007.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
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