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Case No. 2369-VCN

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. CHICAGO BOARD OPTIONS EXCHANGE, INC., a Delaware non-stock 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.	)	Civil Action No. 2369-VCN

DEFENDANTS' BRIEF IN OPPOSITION TO
PLAINTIFFS' VERIFIED MOTION FOR A TEMPORARY RESTRAINING ORDER

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Dated: July 26, 2007

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NATURE AND STAGE OF THE PROCEEDINGS

In their original complaint, CBOT Holdings, Inc. ("CBOT Holdings") and its wholly owned subsidiary, The Board of Trade of the City of Chicago, Inc. ("Board of Trade" or "CBOT"), and two individuals purporting to represent a class of certain Board of Trade members sued Chicago Board Options Exchange, Incorporated ("CBOE") and its Board of Directors ("CBOE Board") concerning the terms of an anticipated demutualization of CBOE. Plaintiffs claimed that the members of the putative class were entitled to receive, in that demutualization, the same consideration as CBOE members who paid for their membership ("Seat Owners"). Plaintiffs based this claim on Article Fifth(b) of CBOE's Certificate of Incorporation ("Article Fifth(b)"), which grants each "member" of the Board of Trade the non-transferable right to be a member of CBOE, without having to pay for that membership, for so long as that person remains a Board of Trade "member" (the "Exercise Right").

After plaintiffs filed their original complaint, Chicago Mercantile Exchange Holdings, Inc. ("CME Holdings") announced its intent to acquire the Board of Trade by merging CBOT Holdings with and into CME Holdings (the "CME Holdings Acquisition"). After learning of the CME Holdings Acquisition, CBOE needed to assess the effect of that transaction on the eligibility of persons to become and remain "Exerciser Members" under Article Fifth(b). CBOE determined that the proper interpretation of Article Fifth(b) was that, as a result of the CME Holdings Acquisition, no person would qualify as a Board of Trade "member" for purposes of Article Fifth(b) after the transaction was complete and that therefore no person any longer would qualify for the Exercise Right. As required because it is a national securities exchange, CBOE filed its interpretation (the "Proposed Rule Change") with the U.S. Securities and Exchange Commission ("SEC" or "Commission") on December 12, 2006.

Although this Exercise Right eligibility issue already was under SEC consideration at the time, plaintiffs filed their Second Amended Complaint (the "Amended Complaint") on January 4, 2007, to challenge the interpretation of Article Fifth(b) in the Proposed Rule Change (the "Membership Issues"). Only a week later, on January 11, 2007, plaintiffs filed their Motion for Partial Summary Judgment ("Motion for Summary Judgment"), and over a month later filed their Opening Brief in Support of that motion ("Plaintiffs' Brief in Support"), seeking summary judgment that (1) Exercise Right eligibility will survive the consummation of the CME Holdings Acquisition, (2) Exerciser Members are entitled to the exact same consideration that will be provided to Seat Owners in CBOE's planned demutualization, and (3) CBOE's Board members breached their fiduciary duties when they approved CBOE's Proposed Rule Change.

On January 16, 2007, defendants moved to dismiss the Amended Complaint (the "Motion to Dismiss"). In their supporting memoranda ("Defendants' Motion to Dismiss Brief"), defendants argued that plaintiffs' claims about the Membership Issues (*ad damnum* paragraphs a, b, f, g and h) should be dismissed on the ground of federal preemption – given the SEC's exclusive authority over such issues. Defendants also argued that plaintiffs' remaining claims (*ad damnum* paragraphs c, d, e and i) – about the amount of consideration to which the putative class would be entitled in CBOE's planned demutualization if they retain Exercise Right eligibility (the "Valuation Issues") – should be either dismissed or stayed because those claims were not ripe for adjudication. Defendants' Motion to Dismiss and plaintiffs' Motion for Summary Judgment have been fully briefed, and the Court heard oral argument on those motions on May 30, 2007.

Because a vote was scheduled on the CME Holdings Acquisition for July 9, 2007, it was foreseeable that the CME Holdings' Acquisition would be consummated before the SEC was

able to take final action on the Proposed Rule Change. That event would present CBOE with an immediate need to ascertain who was entitled to trade during this interim period – after consummation of the CME Holdings Acquisition and before the SEC's final action on the Proposed Rule Change. In particular, CBOE needed to assure that its markets would not be disrupted by any sudden changes of membership during this period of uncertainty created because the Board of Trade decided to proceed with the CME Holdings Acquisition in the face of the unresolved Membership Issues. To address that situation, CBOE filed with the SEC another rule change (the "Interim Access Rule") on July 2, 2007. (A copy of the Interim Access Rule, SEC file number SR-CBOE-2007-77, is attached to the DuFour Supplemental Affidavit as Exhibit 2). The Interim Access Rule continued the membership rights of Exerciser Members until there was a final decision on the Membership Issues. Pursuant to Section 19(b)(3)(A) of the Exchange Act, the Interim Access Rule became an effective rule of CBOE upon filing, but it is subject to further review and possible abrogation by the SEC.

On July 9, 2007, a week after the Interim Access Rule went into effect, the shareholders of CBOT Holdings and the members of CBOT voted to approve the CME Holdings Acquisition. On July 12, 2007, the CME Holdings Acquisition closed, and CBOT Holdings was merged into CME Holdings.[1]

On July 20, 2007, almost three weeks after the Interim Access Rule went into effect and more than a week after the Board of Trade had closed the CME Holdings Acquisition with full knowledge of the terms of the Interim Access Rule, plaintiffs filed their Verified Motion for Temporary Restraining Order (the "Motion"). In the Motion, plaintiffs request that this Court

[1] Immediately following the CME Holdings Acquisition, "Chicago Mercantile Exchange Holdings Inc." changed its name to "CME Group Inc." For the sake of maintaining consistency with defendants' prior briefs, defendants will continue to refer to the surviving entity as "CME Holdings" in this response.

enter a temporary restraining order "enjoining defendants from implementing or enforcing [the Interim Access Rule] or taking any other action during the pendency of this case to interfere with the exercise rights of the Class," (*See* Mot., ¶ 20) even though Exerciser Members who were granted continued membership under the Interim Access Rule have been taking action in reliance on that rule for almost three weeks.

This is defendants' answering brief in response to plaintiffs' Motion. The Supplemental Affidavit of Richard G. DuFour ("DuFour Supplemental Affidavit") and the Supplemental Affidavit of Paul E. Dengel ("Dengel Supplemental Affidavit") are submitted contemporaneously herewith. The original Affidavit of Richard G. DuFour ("DuFour Affidavit") (Filing ID # 13899687) was previously submitted to the Court in connection with defendants' Motion to Dismiss.

INTRODUCTORY STATEMENT

This supposed emergency is one of the Board of Trade's own making. While the Membership Issues were under consideration by the SEC and by this Court, the Board of Trade elected to proceed with the CME Holdings Acquisition, thereby changing the status quo and requiring an immediate need to determine who, among former Exerciser Members, should be allowed to trade at CBOE the next day and into the future until the Membership Issues were resolved. During this interim period, CBOE chose not to implement its own view of the effect of the CME Holdings Acquisition – namely, that no one any longer is eligible to be an Exerciser Member. Instead, CBOE determined that it would be more appropriate and fair to preserve the rights of Exercise Members who were trading on CBOE before the Board of Trade changed the status quo. To that end, CBOE filed the Interim Access Rule with the SEC. That rule was effective immediately, but it is subject to review and possible abrogation by the SEC under procedures established under the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq*. (the "Exchange Act").

The Interim Access Rule provides that all persons who were Exerciser Members just before the closing of the CME Holdings Acquisition will continue in that membership status until the Membership Issues have been resolved. During that interim period, these persons ("Interim Members") will retain their full rights to trade, their full rights to vote and any rights they may have had as Exerciser Members to participate in corporate transactions that may be concluded during the interim period. These Interim Members will pay an access fee for those rights that is comparable to the fee that would have been paid by lessees of the various Board of Trade interests that an Exerciser Member was required to hold before the CME Holdings Acquisition.

In their Motion, plaintiffs do not complain that anything in the Interim Access Rule imposes additional requirements or burdens on Interim Members, whose membership status is continued by the rule. Instead, plaintiffs complain about one of the requirements and burdens that the Interim Access Rule *eliminates* – namely, the previous requirement that Exerciser Members hold a Board of Trade B-1 membership. Plaintiffs bring their Motion not to vindicate the rights of those who seek to become or remain a CBOE member through the Exercise Right, but rather to assert the interests of those who would lease B-1 memberships to persons who want to continue their membership status as Interim Members under the Interim Access Rule. Plaintiffs fail to identify any legal theory under which they, as lessors, have a basis to complain if CBOE chooses to make membership more liberally available than before, and certainly no such cause of action is contemplated by the claims advanced in the Amended Complaint.

In asking the Court to protect those alleged rights of non-exercising Board of Trade lessors, plaintiffs ask the Court in effect to take on the SEC's statutory duties. The Exchange Act gives the SEC the authority to decide whether the Interim Access Rule should be abrogated. In deciding whether to abrogate the Interim Access Rule, the SEC will focus on key federal interests – including ensuring that the fairness and orderliness of CBOE's markets are not disturbed and that CBOE does not unfairly deny access to its exchange. Plaintiffs essentially would have this Court take on the SEC's duties and decide whether to abrogate the Interim Access Rule. Moreover, the Exchange Act requires that CBOE obey the Interim Access Rule unless and until its rule is abrogated by the SEC, but plaintiffs would have the Court order CBOE to ignore its federal statutory obligation to act in accordance with this effective rule.

Because the SEC's jurisdiction preempts the Court's jurisdiction over those issues, there is no reasonable likelihood that plaintiffs will succeed on the merits. Moreover, the harm that

plaintiffs assert – lost lease fees and the alleged diminution in the lease or sale value of the B-1 memberships that they want to require Exerciser Members to continue to lease – is precisely the type of monetary damage that is susceptible to an adequate legal remedy. Finally, the balance of the equities disfavors a temporary restraining order. The Interim Access Rule is a measured and fair way to avoid market disruption at CBOE while preserving the rights of Exerciser Members who were trading on CBOE before the Board of Trade completed the CME Holdings Acquisition and changed the status quo. Plaintiffs now seek to change the status quo even more by enjoining the Interim Access Rule after it has been in effect for almost three weeks. They seek this extraordinary relief even though, during this three week period, they never voiced any objection – to either the SEC or defendants' counsel – to CBOE's decision not to require Interim Members to lease B-1 memberships during the period until the Membership Issues have been resolved. Interim Members have relied on that silence, and to require them now to try to lease a B-1 membership would create the risk that certain Interim Members would not be able immediately to do so and that CBOE's markets thereby would be disrupted. In light of all of these circumstances, no temporary restraining order should be issued.

STATEMENT OF FACTS

A. Announcement Of The Proposed Acquisition Of The Board Of Trade.

On October 17, 2006, CBOT Holdings and CME Holdings announced their intention to enter into the CME Holdings Acquisition – whereby CBOT Holdings would merge with and into CME Holdings. Am. Comp. ¶ 49. Now that the acquisition has been completed, CME Holdings has become the surviving company, and the Board of Trade has become a subsidiary of CME Holdings. *See* CME Holdings' Post-Effective Amendment to Form S-4 Registration Statement, DuFour Supp. Aff., Ex. 10 at 1.[2]

As discussed in CBOE's briefs in support of its Motion to Dismiss, the CME Holdings Acquisition involved changes that raise serious questions about whether persons will continue to qualify as Board of Trade "members" for purposes of Exercise Right eligibility under Article Fifth(b). *See* Defs' Mot. to Dismiss Br. at 8-9; Defs.' Resp. to Pls.' Mot. for Summary Judgment at 10-11. For instance, no individual has any ownership interest in the Board of Trade after the CME Holdings Acquisition. *Id.*; DuFour Supp. Aff., Ex. 10 at 1, A-13. Instead, the Board of Trade is now owned solely by CME Holdings, which in turn is a publicly traded holding company. *Id.*

B. CBOE Files Its Proposed Rule Change With The SEC.

On December 12, 2006, CBOE filed with the SEC the Proposed Rule Change, which contained CBOE's interpretation of the effect of the CME Holdings Acquisition on Exercise Right eligibility.[3] DuFour Aff., ¶ 4. Under the Proposed Rule Change, no person would qualify as a Board of Trade "member" for purposes of Article Fifth(b) following the completion of the

[2] A complete copy of CME Holdings' July 6, 2007, Post Effective Amendment to Form S-4 Registration Statement, Nos. 333-139538, and 333-143282 can be found at http://www.sec.gov/Archives/edgar/data/1156375/000119312507150693/ds4.htm.

[3] On January 16, 2007, CBOE submitted an amendment to its Proposed Rule Change. DuFour Aff., ¶ 7, Ex. 2.

CME Holdings Acquisition, and therefore no person any longer would qualify to become or remain an Exerciser Member of CBOE.

Pursuant to Section 19(b)(2) of Exchange Act, 15 U.S.C. § 78s(b)(2), the SEC is now in the process of considering whether to approve or disapprove the CBOE Proposed Rule Change. On January 29, 2007, the SEC issued Securities Exchange Act Release Number 34-55190 "to solicit comments on the Proposed Rule Change, as amended, from interested persons" and, on February 6, 2007, that Exchange Act release was published in the Federal Register. DuFour Aff., ¶ 7. The deadline for the submission of comments expired on February 27, 2007 (*id.*); and approximately 140 comment letters were submitted to the SEC, including comment letters submitted by plaintiffs. CBOE submitted its response to those comments on June 15, 2007. DuFour Supp. Aff., ¶ 3, Ex. 1.

In the Proposed Rule Change, CBOE undertook to establish, and propose for SEC review, a plan to deal with certain transitional issues upon the SEC's approval of the Proposed Rule Change. In particular, CBOE committed that this transitional plan would address how to prevent the "loss of exercise members" upon favorable SEC action on the Proposed Rule Change from "adversely affect[ing] liquidity in CBOE's market." DuFour Aff., Ex. 2 at 14-15. On July 3, 2007, the SEC's Division of Market Regulation directed CBOE to submit this transition plan as an amendment to the Proposed Rule Change so that the SEC could assess "the impact of [that] transition plan in the context of the Commission's determination of whether [the Proposed Rule Change] is consistent with the Exchange Act, including the maintenance of fair and orderly markets." DuFour Supp. Aff., ¶10, Ex. 4. CBOE expects to submit this interim plan in the near future.

C. CBOE Files Its Interim Access Rule With The SEC.

Because the Board of Trade had scheduled a vote to approve the CME Holdings Acquisition for July 9, 2007, there was a possibility that the CME Holdings Acquisition would be completed before the SEC decided whether to approve or disapprove of the Proposed Rule Change. DuFour Supp. Aff., ¶4. As a result, CBOE had to determine how it would proceed under that scenario, particularly with regard to the membership status of purported Exerciser Members during the period after the closing of the CME Holdings Acquisition and before the SEC took final action on the Proposed Rule Change. DuFour Supp. Aff., ¶¶ 4-5.

On June 29, 2007, CBOE's Board of Directors approved the filing of the Interim Access Rule. DuFour Supp. Aff., ¶ 5. The Interim Access Rule invokes CBOE Rule 3.19, which authorizes CBOE to permit an existing member who has lost a membership under "extenuating circumstances" to retain "membership status" on a temporary basis.[4] DuFour Supp. Aff., ¶ 7; Ex. 2 at 3, 6. The Interim Access Rule was filed with the SEC pursuant to Section 19(b)(3)(A)(i) of the Exchange Act, and it became an effective rule of CBOE upon filing. *See* 15 U.S.C. § 78s(b)(3)(A)(i); 17 C.F.R. 240.19b-4(f)(1).

In the interest of maintaining a fair and orderly market, the Interim Access Rule allows certain Exerciser Members to maintain their membership status from the time the CME Holdings Acquisition was consummated until the SEC takes final action on the Proposed Rule Change. DuFour Supp. Aff., ¶¶ 8, 14. In particular, the Interim Access Rule grants continued membership status to any person who was an Exerciser Member in good standing as of July 1, 2007 (the day before the Interim Access Rule was filed) and who remained an Exerciser Member in good standing as of the close of business on July 11, 2007 (the trading day before the

[4] By its terms, CBOE Rule 3.19 does not provide a basis to grant membership rights to a person who had not previously become a CBOE member. DuFour Supp. Aff., ¶ 7; Ex. 3 at 8.

consummation of the CME Holdings Acquisition). DuFour Supp. Aff., Ex. 2 at 3-4. During this period, these Interim Members remain CBOE members and retain all rights and privileges that Exerciser Members previously enjoyed. DuFour Supp. Aff., ¶ 9. Because CBOE was extending those membership rights without regard to the disputed issue of whether anyone remained eligible to be an Exerciser Member, CBOE decided that Interim Members would qualify for this continued membership status during that interim period regardless of whether they continued to possess the interests in the Board of Trade that would have been required before the CME Holdings Acquisition changed the nature of Board of Trade membership – namely, a Board of Trade B-1 Membership, an exercise right privilege and the requisite number of shares of stock in CBOT Holdings (collectively, the "CBOT Interests").

The Interim Access Rule provides that the Interim Members who are granted this continued temporary membership status will pay a monthly access fee designed to approximate the fee that lessees of the CBOT Interests would have paid if the CME Holdings Acquisition had not occurred. On July 26, 2007, CBOE filed a rule change that specified the initial access fee through an amendment to CBOE's fees schedule (the "Interim Access Fee Schedule"). (A copy of the Interim Access Fee Schedule, SEC file number SR-CBOE 2007-91, is attached to the DuFour Supplemental Affidavit as Exhibit 7.) The Interim Access Fee Schedule sets the access fee at $4,700 per month – an amount that approximates the average lease rate as of June 28, 2007 charged to lease all of the CBOT Interests during the month of July 2007 (the month in which the CME Holdings Acquisition was completed) – and that fee will be imposed beginning in September 2007. DuFour Supp. Aff., Ex. 7 at 6-9. Both the Interim Access Rule and the Interim Access Fee Schedule also provide that the access fees collected by CBOE will be held in an interest-bearing escrow account pending the SEC's decision on the Proposed Rule Change, and

thereafter those fees either will (1) be retained by CBOE if the SEC approves the Proposed Rule Change or (2) refunded if the SEC disapproves the Proposed Rule Change. DuFour Supp. Aff., Ex. 2 at 4, Ex. 7 at 3.

Rather than determining the Membership Issues in any final manner, the Interim Access Rule provides that it will "cease to be in effect" when the SEC takes final action on the Proposed Rule Change. DuFour Supp. Aff., Ex. 2 at 8. At that point, the rights of those who claim to be entitled to become Exerciser Members will be determined in accordance with the SEC's final action on the Proposed Rule Change. DuFour Supp. Aff., Ex. 2 at 8.

On July 5, 2007, the SEC issued Exchange Act Release Number 34-56016 to solicit comments from interested parties regarding the Interim Access Rule. (A copy of Securities Exchange Act Release No. 34-56016 (July 5, 2007) is attached as Exhibit 5 to the DuFour Supplemental Affidavit.) On July 12, 2007, Exchange Act Release Number 34-56016 was published in the Federal Register, and the SEC established August 2, 2007 as the deadline for submitting comments regarding the Interim Access Rule. (A copy of Exchange Act Release No. 34-56016 as published in the Federal Register is attached as Exhibit 6 to the DuFour Supplemental Affidavit.) In Release Number 34-56106, the SEC specifically noted that it has the authority, under Section 19(b)(3)(C) of the Exchange Act, to "summarily abrogate [the Interim Access Rule] if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act." DuFour Supp. Aff., Ex. 6 at 38108. Under Section 19(b)(3)(C) of the Exchange Act, however, "Commission action [to abrogate a rule that becomes effective on filing] shall not affect the validity or force of the rule change during the period it was in effect." *See* 15 U.S.C. § 78s(b)(3)(C).

On July 9, 2007, a week after the Interim Access Rule had been publicly filed and went into effect, the shareholders of CBOT Holdings, CBOT members and the shareholders of CME Holdings voted to approve the CME Holdings Acquisition. *See* DuFour Supp. Aff., Ex. 8 at 1. On July 12, 2007, the CME Holdings Acquisition closed, and CBOT Holdings merged into CME Holdings. *See* DuFour Supp. Aff., Ex. 9. At the close of the markets on July 12, 2007, the stock of CBOT Holdings was delisted and no longer trades on the NYSE. *See* DuFour Supp. Aff., Ex. 9.

D. Plaintiffs' Motion For A Temporary Restraining Order.

In their letter to the Court dated July 9, 2007, plaintiffs represented that they would confer with defendants to discuss the Interim Access Rule and whether it inappropriately disturbs the status quo. Dengel Supp. Aff., ¶ 3. Counsel for the parties thereafter did discuss the situation, and plaintiffs communicated no objections to the substantive provisions in the Interim Access Rule. Dengel Supp. Aff., ¶ 4. Instead, they proposed only that the material provisions of the Interim Access Rule be incorporated into an agreed order of the Court, a proposal with which CBOE disagreed because CBOE did not consider it appropriate for a court order to specify the particular obligations addressed in a current exchange rule. Dengel Supp. Aff., ¶ 5.

Without any further discussion or explanation, plaintiffs filed their Motion on July 20, 2007. Dengel Supp. Aff., ¶ 6. At that point, the Interim Access Rule had been in effect for eighteen days, and Interim Members had been acting in reliance on that rule – by terminating leases for CBOT Interests that the Interim Access Rule no longer required. *See* Mot., ¶ 5(b). In their Motion, plaintiffs ask the Court to enjoin defendants "from implementing or enforcing [the Interim Access Rule] or taking any other action during the pendency of this case to interfere with the exercise rights of the Class." *See* Mot., ¶ 20.

The only harm that supposedly justifies an injunction is the effect of the Interim Access Rule on owners/lessors of CBOT B-1 memberships. Plaintiffs claim that the Interim Access Rule will (a) result in the termination of leases for Board of Trade B-1 memberships by persons who leased such memberships so that they could become Exerciser Members at CBOE, (b) drive down lease rates because it will increase the number of B-1 memberships that will "be placed in the CBOT leasing pool" and (c) will reduce the overall value of a Board of Trade B-1 membership. *See* Mot., ¶ 5. Although the Amended Complaint exclusively addresses the rights of those who are or may become Exerciser Members, the Motion instead purports to protect the interests of those who would elect to lease rights to such Exerciser Members. No such claim is pled in the Amended Complaint.

As discussed below, because the relief sought in the Motion would directly conflict with the SEC's regulatory authority under the Exchange Act and because plaintiffs do not satisfy the other criteria for obtaining a temporary restraining order, the Motion should be denied.

ARGUMENT

I. THE STANDARDS APPLICABLE TO PLAINTIFFS' REQUEST FOR A TEMPORARY RESTRAINING ORDER.

A temporary restraining order is an extraordinary remedy that is appropriate only when immediate action is required to preserve the status quo.[5] *Emerald Partners v. Berlin*, 712 A.2d 1006, 1009 (Del. Ch. 1997). Courts generally focus on three factors when deciding whether to enter a temporary restraining order: (1) the existence of an irreparable injury, (2) the merits of plaintiffs' claim, and (3) the risks to the defendant and other parties in the event a restraining order is granted and ultimately is determined to have been improvidently issued. *See Newman v. Warren*, 684 A.2d 1239, 1244 (Del. Ch. 1996); *Solash v. Telex Corp.*, 1988 WL 3587, at *1 (Del. Ch. Jan. 19, 1988) (when considering a motion seeking a temporary restraining order, the court must balance the alleged irreparable injury claimed by plaintiff with the "prospect that the defendant or third parties may be wrongfully injured if the relief is improvidently granted").

As an initial matter, plaintiffs are wrong when they assert that they must demonstrate only that they have a "colorable claim on the merits" in order to obtain a temporary restraining order. *See* Mot., ¶¶ 12-13. Instead, where a record exists from which the court may "responsibly make a more informed judgment concerning the merits . . . the elements of the equitable test is something akin to the traditional preliminary injunction formulation." *Instituform Technologies, Inc. v. Insitu, Inc.*, 1999 WL 240347, at *7 (Del. Ch. Apr. 19, 1999) *quoting Newman*, 684 A.2d at 1244.

[5] While plaintiffs' Motion seeks an injunction against the "defendants" collectively, plaintiffs have not brought any claims against the individual CBOE board member defendants with regard to the Interim Access Rule and, as a result, this Court lacks personal jurisdiction over the CBOE board members for purposes of granting an injunction against them. *Cf.* 10 *Del. C.* § 3114 (providing for service of process on a non-resident director of a Delaware corporation only for violations of a duty committed in that person's capacity as a director).

In this case, the extensive briefing and argument on both defendants' Motion to Dismiss and plaintiffs' Motion for Summary Judgment provide the Court with a basis for making an "informed judgment" concerning the merits – particularly with regard to the issue of whether the doctrine of federal preemption requires that this Court refrain from entering a temporary restraining order that would effectively abrogate the Interim Access Rule. Accordingly, the appropriate standard to use in assessing the merits of plaintiffs' Motion is the requirement, applicable to preliminary injunctions, that plaintiffs demonstrate a "reasonable probability of success" on the merits. *Hecco Ventures v. Sea-Land Corp.*, 1986 WL 5840, at *3 (Del. Ch. May 19, 1986).

II. THE RELIEF SOUGHT WOULD GO BEYOND PRESERVING THE STATUS QUO.

A temporary restraining order may be employed "to do no more than preserve the status quo pending the decision of the cause at final hearing." *Ivanhoe Partners v. Newmont Min. Corp.*, 1987 WL 17677, at *3 (Del. Ch. Sept. 28, 1987). In addition, interim injunctive relief is unavailable if it would operate as a grant of the final relief that the applicant seeks after trial. *See Appoquinimink Educ. Ass'n v. Bd. of Educ. of Appoquinimink Sch. Dist.*, 1981 WL 15120, at *1 (Del. Ch. Apr. 7, 1981) (interim injunctive relief is rarely granted where the immediate result would be to allow the applicant all the relief it might hope to gain after a final hearing) *citing Thomas C. Marshall, Inc. v. Holiday Inn, Inc.*, 174 A.2d 27, 28 (Del. Ch. 1961); *Jeffreys v. Exten*, 1988 WL 3636, at *2 (Del. Ch. Jan. 11, 1988) (court is especially reluctant to grant preliminary relief if by doing so it will grant all the relief which the applicant may ultimately be entitled to after trial).

In their Motion, plaintiffs are not seeking merely to preserve the status quo. Indeed, it was the Board of Trade that first changed the status quo when it proceeded with the CME

Holdings Acquisition even though the effect of that transaction on Exercise Right eligibility was under active consideration by both the SEC and this Court. Faced with the Board of Trade's unilateral decision not to await a determination of the Membership Issues, CBOE had to fashion an interim approach that would preserve the integrity of its markets and enable it to continue to discharge its duties as a national securities exchange under the Exchange Act until there was a final determination on the Membership Issues. DuFour Supp. Aff., ¶ 14, Ex. 2 at 8-9. CBOE took that necessary step by enacting the Interim Access Rule, subject to SEC review and possible SEC abrogation. At the time plaintiffs filed their Motion, that rule had been in effect for almost three weeks and Interim Members had been relying on its provisions during that period – in deciding whether to continue or to terminate leases by which they had been procuring the CBOT Interests in order to exercise. Moreover, plaintiffs had more than 10-days' notice of the Interim Access Rule before its provisions were triggered by the CME Holdings Acquisition. Still, plaintiffs failed to voice any concerns for another eight days, until July 20. For all of these reasons, the Interim Access Rule represented the status quo at the time the Motion was filed. Because the Motion seeks to change, not preserve, that status quo, a temporary restraining order would be inappropriate and the Motion should be denied.

Moreover, plaintiffs improperly seek to obtain their final relief, not the preservation of the status quo. They ask for a temporary restraining order to enjoin defendants from "taking any other action during the pendency of this case to interfere with the exercise rights of the class." *See* Mot., ¶ 20. This begs the question of what "exercise rights of the class" remain, if any, after the CME Holdings Acquisition. The Motion makes clear that plaintiffs would have the Court restrict Interim Members from being able to trade unless they lease CBOT B-1 memberships from the owners of such memberships. *See* Mot., ¶ 15. In advancing that position, plaintiffs

necessarily are asking the Court to accept their position on one of the key disputed issues – whether the interpretation of Exercise Right eligibility contained in the 2001 Agreement continues to apply after the CME Holdings Acquisition – because the 2001 Agreement was the only source of any requirement to hold a CBOT B-1 Membership.[6] As defendants demonstrated in their brief in opposition to plaintiffs' Motion for Summary Judgment, the continued applicability of the interpretation embodied in the 2001 Agreement is hotly contested. Defs.' Resp. to Pls.' Mot. for Summary Judgment at 30-31. Defendants' position is that the interpretation no longer applies after the CME Holdings Acquisition.[7] However, plaintiffs' Motion asks the Court to accept plaintiffs' contrary view and to impose that view as the basis for a temporary restraining order. A temporary restraining order cannot be used to shoehorn final relief in such a manner. *See Appoquinimink Educ. Ass'n*, 1981 WL 15120, at *1; *Marshall, Inc.*, 174 A.2d at 27, 28; *Jeffreys*, 1988 WL 3636, at *2.

In contrast, the Interim Access Rule does not ask the Court to prejudge the merits. If defendants were to impose their view of the merits, former Exerciser Members would cease to enjoy any rights of membership because of the CME Holdings Acquisition. They no longer would have any rights to trade, vote or enjoy any of the other rights of membership. However, defendants have not pursued such a path. Instead, the Interim Access Rule preserves the status quo to the extent reasonably practical under the circumstances that the Board of Trade has created by its unilateral decision to consummate the CME Holdings Acquisition. Under that rule, all persons who were Exerciser Members before the CME Holdings Acquisition will

[6] The term "2001 Agreement" was defined on pages 6 and 7 of Defendants' Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment and this brief utilizes that definition.

[7] That interpretation ceases to apply, by its terms, upon any "material changes to the structure or ownership of the CBOT" – a standard that would apply to the CME Holdings Acquisition. *See* Defs.' Resp. to Pls.' Mot. for Summary Judgment at 21-22.

continue to enjoy that same membership status until the SEC acts on the Proposed Rule Change. Their rights as Exerciser Members – the right to trade, to vote and to enjoy any of the other incidents of exercise membership – will be unchanged throughout this interim period. DuFour Supp. Aff., ¶ 9. In this way, the Interim Access Rule seamlessly ensures that those persons who were Exerciser Members before the consummation of the CME Holdings Acquisition will continue to be CBOE members to that same extent after that transaction and until the merits of the Membership Issues have been resolved.[8]

Because plaintiffs' request for a temporary restraining order improperly attempts to alter the status quo, rather than preserve it, and because the Interim Access Rule already serves to preserve the status quo without prejudging the underlying merits of the parties' claims, plaintiffs' Motion should be denied.

III. PLAINTIFFS DO NOT HAVE A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS.

A. The Doctrine Of Federal Preemption Requires The Denial of Plaintiffs' Motion.

In defendants' briefs supporting their Motion to Dismiss, defendants demonstrated that the doctrine of conflict preemption applies whenever a state court action would interfere with the methods by with which the SEC exercises its jurisdiction over exchange membership issues and exchange rules. *See* Defs' Mot. to Dismiss Br. at 18-21; Defs' Reply Br. in Support of Mot. to Dismiss at 1-19. The need for preemption is particularly acute where the SEC is charged with the responsibility to preserve fair and orderly markets and to ensure that trading access is not

[8] The Interim Access Rule does not extend membership to new applicants because the goal of the rule is to preserve the status quo, not to accommodate those who would try to change it. Those who never before had sought exercise membership, but who may want to do so now, appropriately should have their rights determined by the final resolution of the Membership Issues. Moreover, CBOE's rules do not allow new membership rights to be created without a membership vote. *See* CBOE Constitution, § 2.1(a) (requiring a member vote before any grant of new rights to "enter into securities transactions at the Exchange"); DuFour Supp. Aff., Ex. 11.

unfairly denied. *See* 15 U.S.C. § 78b (goals of Exchange Act include "insur[ing] the maintenance of fair and honest markets in [securities] transactions"); 15 U.S.C. § 78s(f) (addressing the SEC's authority to review a denial of access to exchange services). If this Court were to enter an injunction enjoining CBOE from "implementing or enforcing" the Interim Access Rule, that order would be in direct conflict with federal law and those federal interests**.**

Pursuant to Section 19(b)(3)(A)(i) of the Exchange Act, the Interim Access Rule became effective when it was filed, and it now has the force of federal law. *See* 15 U.S.C. § 78s(b)(3)(A)(i). Moreover, pursuant to Section 19(g) of the Exchange Act, CBOE now is *statutorily obligated* to obey and to enforce compliance with the Interim Access Rule. *See* 15 U.S.C. § 78s(g). As a result, if this Court were to grant plaintiffs' request for an injunction, compliance with the Court's order would require that CBOE violate its federal obligations to enforce its rules. The doctrine of conflict preemption requires that the Court decline to enter an order that would place CBOE in the impossible position of needing to comply with both its obligations under federal law and the inconsistent mandates of the Court's order. *See* Defs' Mot. to Dismiss Br. at 18-21; Defs' Reply Br. in Support of Mot. to Dismiss at 13-17.

Moreover, the entry of the injunction requested by plaintiffs would interfere with the federal regulatory "method" established in the Exchange Act for reviewing the rules of self-regulatory organizations and ensuring that those rules fulfill the purposes of the Exchange Act. Plaintiffs essentially are asking the Court to abrogate the Interim Access Rule. However, the Exchange Act grants the SEC the authority and responsibility to determine whether to abrogate an exchange rule that was effective on filing, such as the Interim Access Rule. In particular, Section 19(b)(3)(C) of the Exchange Act grants the SEC the power to determine, within sixty days after the Interim Access Rule was filed, whether that rule should be summarily abrogated.

See 15 U.S.C. § 78s(b)(3)(C). In connection with the SEC's review of the Interim Access Rule, the Exchange Act also provides plaintiffs with the opportunity to submit "written data, views, and arguments" in an attempt to convince the SEC that the rule should be abrogated. 15 U.S.C. § 78s(b)(1). To that end, the SEC has published the Interim Access Rule and has invited interested parties to submit comments regarding the Interim Access Rule on or before August 2, 2007. DuFour Supp. Aff., ¶12, Ex. 6.

In addition to establishing a federal process and federal authority for deciding whether to abrogate the Interim Access Rule, the Exchange Act creates federal standards for the SEC to apply. The SEC is to consider whether such abrogation is "necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title." *See* 15 U.S.C. § 78s(b)(3)(C). In this case, those federal interests are particularly acute. The SEC must determine whether CBOE's Interim Access Rule will maintain fair and orderly markets and avoid the disruption that might result to those markets if particular liquidity providers and other market participants were suddenly no longer permitted to perform key functions. *See* 15 U.S.C. § 78b (goals of Exchange Act include "insur[ing] the maintenance of fair and honest markets in [securities] transactions"). In addition, the SEC's mandate is to ensure that exchange rules do not unfairly deny access to an exchange. *See* 15 U.S.C. § 78s(f).

The Interim Access Rule is designed to accomplish those goals. It seeks to ensure that CBOE's markets will remain fair and orderly after the CME Holdings Acquisition, while not unfairly denying access. But it is up to the SEC to decide whether the Interim Access Rule successfully achieves those goals. By seeking to constrain the ability of the Interim Members to maintain their access rights – by requiring them to hold B-1 memberships that may not be readily available to all Interim Members – plaintiffs threaten these federal goals of the Interim Access

Rule. It is also up to the SEC to weigh these issues when the operations of national securities exchanges are involved. Because the entry of the injunction requested by plaintiffs would interfere with the federal "method" established by the Exchange Act for determining whether the Interim Access Rule should be abrogated, the doctrine of conflict preemption requires denial of plaintiffs' request for a temporary restraining order that effectively would abrogate that rule. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (recognizing that federal preemption is triggered when a court's ruling would interfere with the methods by which the federal statute was designed to reach a federal goal); *Buckley v. Chicago Bd. Options Exch., Inc.*, 440 N.E.2d 914, 919 (Ill. App. Ct. 1982) (preemption occurs when state action "conflict[s] with the Commission's oversight and review of exchange decisions"); *see also* Defs' Mot. to Dismiss Br. at 18-21; Defs' Reply Br. in Support of Mot. to Dismiss at 17-19.

In addition, the entry of the temporary restraining order requested by plaintiffs would create a regulatory void that the Court cannot fill without intruding still more upon the SEC's jurisdiction to consider and protect important federal interests. If the Court were to enjoin the Interim Access Rule, it would need to fashion some other rule or standard to determine who, if anyone, will be permitted to trade at CBOE and thereby avoid a market disruption. However, filling that void would involve the Court in weighing inherently federal interests – namely, what procedures are necessary and appropriate to avoid market disruptions. Under the Exchange Act, this federal inquiry is consigned exclusively to the jurisdiction of the SEC and, as a result, this Court should deny plaintiffs' request for a temporary restraining order.

B. Plaintiffs Do Not Have A Reasonable Probability Of Success On Their Underlying Claims Regarding Exercise Right Eligibility.

As the defendants demonstrated in their May 2, 2007 brief in opposition to plaintiffs' Motion for Summary Judgment, plaintiffs also cannot establish that they have a reasonable

probability of success on the merits of their claims that they remain entitled to become Exerciser Members of CBOE under Article Fifth(b) following the CME Holdings Acquisition. *See* Defs.' Resp. to Pls.' Mot. for Summary Judgment at 21-24. Defendants also demonstrated that neither the 1992 Agreement nor the 2001 Agreement serve to preserve Exercise Right eligibility after the consummation of the CME Holdings Acquisition. *Id.* at 24-32. Because plaintiffs have no reasonable probability of success on their underlying Exercise Right claims, it follows that they have no likelihood of success on the new "lessor" claims raised in the Motion – which are necessarily premised on the assertion that the Exercise Right survived the closing of the CME Holdings Acquisition. As a result, plaintiffs' request for injunctive relief should be denied.

C. Defendants Have Not Waived Their Federal Preemption Arguments.

Plaintiffs assert that defendants' preemption arguments are "insincere" and that this Court has jurisdiction to enter a temporary restraining order because of the terms of a now abandoned agreement where CBOE was prepared to participate in the Intercontinental Exchange, Inc.'s ("ICE") competing bid for the Board of Trade (the "ICE Agreement"). *See* Mot., ¶ 11. Specifically, plaintiffs claim that the fact that the ICE Agreement was conditioned, among other things, on approval by this Court means that CBOE has acknowledged that the Court has jurisdiction over "all aspects of this controversy." *Id.* Plaintiffs' "insincerity" argument is wholly without merit.

As discussed in the defendants' July 17, 2007 letter to the Court, CBOE was prepared to contribute funds to ICE's offer to acquire CBOT, in exchange for both ICE's agreement to structure its acquisition so that exercise right eligibility would be extinguished and the settlement of the exercise right dispute. Rather than conceding that the doctrine of preemption did not apply and that the Court had jurisdiction over the Membership Issues, the requirement for court approval of the settlement component of the ICE Agreement merely reflected the fact that CBOE

is a defendant in this lawsuit initiated by plaintiffs on behalf of a putative class. Chancery Court Rule 23 requires judicial approval of any settlement that would affect the interests of class members. CBOE's recognition of that reality in no way contradicts its view that the SEC has exclusive jurisdiction over the membership and exchange rule issues arising out of the CME Holdings Acquisition. In fact, the ICE Agreement also was subject to SEC approval of CBOE's interpretation that the exercise right eligibility would have been eliminated under ICE's proposed acquisition of CBOT.

IV. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEY WILL SUFFER IRREPARABLE HARM IF A TEMPORARY RESTRAINING ORDER IS NOT GRANTED.

The extraordinary remedy of a temporary restraining order may be granted only where immediate action is required to prevent the threat of imminent, irreparable injury. *Macfadden Holdings, Inc. v. John Blair & Co.*, 1986 WL 7356, at *3 (Del. Ch. July 2, 1986). Plaintiffs have not demonstrated that they will suffer imminent irreparable harm if a temporary restraining order is not entered.

A. The Interim Access Rule Does Not Address The Claims Raised In Plaintiffs' Complaint.

To support their claims of irreparable harm, plaintiffs argue that the Interim Access Rule denies certain plaintiffs the opportunity to collect lease payments from the Interim Members. Mot., ¶¶ 9, 15. Plaintiffs also assert that, as a result, the Interim Access Rule will result in an increase in the pool of available leases and have a corresponding negative effect on the lease value and market value of Board of Trade B-1 memberships. *Id.*

The Motion should be denied because this alleged harm does not relate to the claims pled in the Amended Complaint. The claims in the Amended Complaint relate to the rights of purported Exerciser Members – namely, whether anyone is still eligible to be an Exerciser

Member and, if so, what rights they would have to participate in CBOE's planned demutualization.[9] *See* Mot., ¶ 1. In contrast, the Motion is not brought to vindicate the rights of those who seek to become or remain Exerciser Members, but rather to assert the interests of those who would lease B-1 memberships *to* those persons. In other words, rather than asserting the rights of Exerciser Members, the Motion asserts rights on behalf of those who prefer to lease away any Exercise Right they may have. This fact requires plaintiffs to wear a different hat in this Motion. They seek to weigh down those who would exercise, not to lighten their load. Pending resolution of the Membership Issues, CBOE is prepared to allow Interim Members to continue in their membership status without having to hold the CBOT Interests. In contrast, plaintiffs would require that Interim Members hold those interests – so that the owners of those interests can profit by leasing them. If plaintiffs have their way, those Interim Members who cannot locate, or cannot afford to lease, those interests would lose their Interim Memberships.

The Motion should be denied because it is not related to the claims asserted in the Amended Complaint and because plaintiffs fail to articulate any basis to conclude that CBOE has

[9] While plaintiffs argue that the Interim Access Rule represents a unilateral effort to dictate who will ultimately participate in the demutualization of CBOE (Mot., ¶ 4(a)), that claim is belied by the terms of the Interim Access Rule, which provides that the Interim Access Rule will cease to be in effect when the SEC takes final action on the Proposed Rule Change and that the final rights of purported Exerciser Members will be determined in accordance with the final resolution of the Membership Issues. DuFour Supp. Aff., Ex. 2 at 4, 8. Furthermore, there is no risk that CBOE will demutualize while the Interim Access Rule is in effect because the demutualization plan that CBOE has filed with the SEC is expressly premised on SEC approval of the Proposed Rule Change and this demutualization plan cannot be consummated until and unless the SEC approves that rule change. DuFour Aff., ¶ 8. In sum, plaintiffs' purported rights to participate in CBOE's planned demutualization are not affected in any way by the Interim Access Rule, and a temporary restraining order is not necessary to preserve plaintiffs' demutualization claims.

a legal duty to ensure that Board of Trade lessors continue to receive lease payments.[10] *See, e.g.*, *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994) (recognizing that the party moving for injunctive relief "must necessarily establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint" and affirming the denial of a request for injunctive relief when the motion was based on new allegations of harm that were "entirely different" from the claim raised and the relief required in the complaint); *Stewart v. United States Immigration & Naturalization Serv.*, 762 F.2d 193, 198-99 (2d Cir. 1985) (holding that the district court lacked jurisdiction to issue a preliminary injunction, because the movant had presented issues which were entirely different from those alleged in the original complaint).

B. Plaintiffs Have An Adequate Remedy At Law.

Plaintiffs' Motion also should be denied because plaintiffs' alleged injuries either can be remedied by an award of money damages or are too speculative to warrant interim relief. It is well-settled that where plaintiffs can be fully compensated after a full trial on the merits – either by an award of damages or by any other form of final relief – equitable relief should not be granted. *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 578 (Del. Ch. 1998). Plaintiffs have an adequate remedy at law available to them in the form of money damages for any alleged losses resulting from the termination of lease agreements with CBOE Exerciser Members. All of

[10] While the Court referred to a possible tortious interference claim during the July 23, 2007 conference call regarding the briefing schedule on the Motion, plaintiffs have not pled or even articulated such a claim. Moreover, plaintiffs have no basis to assert any type of tortious interference claim, because their Motion does not allege either that former lessees of CBOT Interests breached their lease agreements, as opposed to lawfully terminating them according to the lease terms (*see* Mot., ¶ 5(a); Odom Aff., ¶ 5 and Ex. A (lessee is permitted to terminate a CBOT lease upon 30 days notice)), or that CBOE did anything other than act to protect its business interests in a fair and lawful manner. *See Luscavage v. Dominion Dental USA, Inc.*, 2007 WL 901641, at *2 (Del. Super. Mar. 20, 2007) (in order to state a claim for tortious interference with a contract, plaintiff must allege and establish a breach of contract, and a *termination* is not a breach); *Elite Cleaning Co. v. Capel*, 2006 WL 1565161, at *10 (Del. Ch. June 2, 2006) (recognizing that parties have a privilege to compete or protect their business interests in a fair and lawful manner).

the harm alleged in the Motion is monetary in nature – *i.e.* lost lease fees and the reduction in lease rates and sales prices. *See* Mot., ¶¶ 5, 9, 15. The lost lease fees are obviously compensable in money damages, because plaintiffs themselves estimate that the lost lease income amounts to approximately $5,000 per month. *See* Mot., ¶ 9.

Similarly, plaintiffs' claims about the alleged decrease in the lease or market value of their B-1 memberships can be remedied by an award of monetary damages. Diminution in value claims present the same types of damage issues that courts regularly address through monetary awards. *Cf. Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 2007 WL 2058733, at *21 (Del. Ch. July 12, 2007) (finding that a "loss of market value between two dates seems to be a classic example of the type of injury that is compensable with monetary damages."). The fact that there are other factors of supply and demand that may affect the market for leasing or selling B-1 Memberships does not mean that the loss is not readily calculable. Expert witnesses regularly testify about the effect of particular factors on the value of an asset – whether it be the value of stock or the value of real estate. *See Improved Parcel of Land, Known as No. 400 Maryland Ave. v. State*, 201 A.2d 453, 456 (Del. 1964) (While "[a]s with all other questions of valuation the method of proving a fair market value occasions some difficulty. It is of course fundamental that fair market value may be established by the opinion testimony of expert witnesses who are qualified to give such opinions.") The fact that the trier of fact must isolate and discount other factors that may affect those values is no barrier to damages actions in those cases, and it is no barrier to a legal remedy for plaintiffs' claims about diminished value. *See e.g. Am. Elecs. Labs., Inc. v. Dopp*, 369 F. Supp. 1245, 1251 (D. Del. 1974) (utilizing expert who arrived at fair market value of shares in dispute after considering factors such as volume of trading, earnings record, financial position, including critical cash flow situation, unstable management situation,

particular characteristics attached to the block of shares in question, book tangible asset values, intangible assets, and a purchase offer.)

Moreover, plaintiffs' claim concerning the alleged diminution in the sale price of Board of Trade B-1 memberships is too speculative to warrant interim relief. "An injunction, being the strong arm of equity, should *never* be granted except in a *clear case of irreparable injury*, and with full conviction on the part of the court of its *urgent necessity*." *Frazer v. Worldwide Energy Corp.*, 1987 WL 8739, at *6 (Del. Ch. Feb. 19, 1987) (emphasis in original), *citing Gimbel v. Signal Cos.*, 316 A.2d 599, 602 (Del. Ch. 1974). Consistent with this formulation, an injunction is inappropriate where the alleged harm is remote or speculative. *Id.* In order to receive *temporary* injunctive relief, plaintiffs must demonstrate that they intend to sell their B-1 memberships in the limited time frame that the temporary restraining order would be in effect. However, plaintiffs fail to offer any proof that any of them intend to offer to sell their B-1 memberships at any particular time, much less during the narrow time frame a temporary restraining order would be in effect. Accordingly, the alleged adverse effect on the market value of the B-1 memberships is too speculative to support a temporary restraining order.

Because plaintiffs have failed to demonstrate that they would suffer irreparable harm in the absence of the requested temporary restraining order, this Court should deny the Motion.[11]

[11] Even in the absence of a temporary restraining order, plaintiffs are not without a remedy. As discussed above, the SEC has the authority to abrogate the Interim Access Rule and plaintiffs now have the opportunity to submit comments asserting that the SEC should exercise that authority. This procedure contained in the Exchange Act provides plaintiffs with a mechanism by which they have the opportunity to seek a remedy equivalent to a permanent injunction if the SEC determines that abrogation of the Interim Access Rule is appropriate. In such a situation, interim injunctive relief is not appropriate. *See Wilmington Fraternal Order of Police Lodge No. 1 v. Bostrom*, 1999 WL 39546, at *4 (Del. Ch. Jan. 22, 1999) (finding no irreparable harm where procedures of administrative board are adequate to address claims); *Riley v. Snyder*, 72 F. Supp. 2d 456, 461 (D. Del. 1999) (no irreparable harm where plaintiff was also seeking to redress substantially the same allegations in an alternate forum). Moreover, the fact

V. A BALANCING OF THE EQUITIES FAVORS DENIAL OF THE TEMPORARY RESTRAINING ORDER.

In determining whether to grant a temporary restraining order, a court must satisfy itself that the potential injury avoided by granting the temporary restraining order outweighs the injury to defendants and third-parties from a temporary restraining order that ultimately may be determined to have been improvidently granted. *Cochran v. Supinski*, 794 A.2d 1239, 1247 (Del. Ch. 2001); *Solash*, 1988 WL 3587, at *1. A balancing of equities in this case requires the denial of plaintiffs' Motion.

As discussed above, the Interim Access Rule represents a measured effort to preserve the status quo, because it allows persons who had become CBOE Exerciser Members before the CME Holdings Acquisition to retain that membership status until the SEC issues its final decision on the Proposed Rule Change. The Interim Access Rule is designed to ensure that CBOE's markets are not disrupted by the sudden loss of hundreds of persons who were performing valuable functions on CBOE's floor immediately before the CME Holdings Acquisition. DuFour Supp. Aff., ¶ 14. One way that the Interim Access Rule accomplishes that goal is by making the continuation of membership easy and seamless during this interim period. As long as a person was an Exerciser Member on the required date, that member would "not be required to hold or maintain any securities, memberships or other interests to maintain that status," but rather continued membership would be automatic. DuFour Supp. Aff., Ex. 2 at 6.

In contrast, the Motion would make the continued membership of the Interim Members more complicated, more contingent, and therefore more uncertain. Plaintiffs would have the Court impose an additional requirement on Interim Members – that they possess a B-1

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that plaintiffs may not be satisfied with the remedy afforded by the federal regulatory framework does not render that remedy inadequate. *See Chateau Apartments Co. v. City of Wilmington*, 391 A.2d 205, 207 (Del. 1978) (that the available remedy is arguably not as attractive is not sufficient to fulfill the threshold requirement of irreparable harm for equity jurisdiction).

membership – in order to prop up the CBOT lease market. Plaintiffs do not say whether their logic would dictate that Interim Members also be required to hold an exercise right privilege and some quantity of the stock of some entity.[12] Any such requirements create the risk that some number of the Interim Members will not be able to find the required interest, will not be able to find that interest at this point without some delay, or will not be able to lease the interest at an affordable price. Any of these scenarios creates the risk that some number of Interim Members will lose their membership status for some amount of time if plaintiffs have their way. That result could lead to chaos, particularly if Interim Members that perform key functions at CBOE are unable to continue as members. By imposing this risk on CBOE, the Motion would undermine CBOE's ability to ensure the fair, orderly and effective operation of its markets. *See* DuFour Supp. Aff. at 15; 15 U.S.C. § 78f(b). Granting plaintiffs' temporary restraining order therefore would undermine the functioning of the regulatory framework established by the Exchange Act and the efforts of CBOE to ensure a fair and orderly market pursuant to the Exchange Act.

Moreover, this result would be unfair to Interim Members and the firms through which they clear their trades ("Clearing Firms"). The Interim Members have open trading positions, but they would risk losing their access to the markets in managing that risk. Instead, they would be forced to attempt to unwind acts that they have taken in reliance on the Interim Access Rule – with no guarantees that they will be successful – so that they can continue to trade. This situation also would pose an unwarranted risk to Clearing Firms, which are ultimately responsible for the Interim Members' positions. The existence of these risks put the movants in

[12] After the consummation of the CME Holdings Acquisition, no stock of CBOT Holdings remains outstanding.

direct conflict with the interests of the Interim Members – who also are members of the putative class.

Any balancing of the equities should consider that the purported emergency upon which plaintiffs base their Motion is one that is entirely of their own making. The Interim Access Rule was filed and became effective on July 2, 2007, and plaintiffs took no action either to request summary abrogation by the SEC or to bring a motion seeking injunctive relief at that time. Instead, with full knowledge of the terms of the Interim Access Rule, plaintiffs chose to proceed with the vote to approve the CME Holdings Acquisition on July 9, 2007. Thereafter, plaintiffs also chose to proceed with the closing of the CME Holdings Acquisition on July 12, 2007. Even after the closing of the CME Holdings Acquisition, plaintiffs inexplicably waited another eight days before filing their Motion, and they have taken no action before the SEC with regard to the Interim Access Rule. Because of plaintiffs' delay, Interim Members have relied to their detriment on the Interim Access Rule and now face the risk that they will not be able to unwind the actions they have taken. If plaintiffs had acted with more dispatch, their contentions could have been addressed without the peril to which their Motion now would expose CBOE and the Interim Members.

Given the potential for serious and irreparable harm to CBOE and the Interim Members if a temporary restraining order is entered, the lack of irreparable harm to plaintiffs if an order is not entered, and plaintiffs' tardiness in raising their current claims, the balance of the equities favors denial of the Motion.

CONCLUSION

For the foregoing reasons, the defendants respectfully request that the Court deny Plaintiffs' Verified Motion for a Temporary Restraining Order.

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