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Transaction ID 15661431
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 other similarly situated,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2369-VCN
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, JR., 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.	)	

PLAINTIFFS' VERIFIED MOTION FOR
TEMPORARY RESTRAINING ORDER

Plaintiffs the Board of Trade of the City of Chicago, Inc. ("CBOT"), Michael Floodstrand and Thomas J. Ward hereby move, pursuant to Chancery Court Rule 65 and upon the attached verification and affidavit of C.C. Odom, II (attached as Exhibit 1), for a Temporary Restraining Order ("TRO") enjoining defendants from implementing or enforcing a new rule promulgated by defendant Chicago Board Options Exchange, Inc. ("CBOE") or taking any other unilateral action that interferes with the property rights of certain CBOT members during the pendency of this action. The grounds for this motion are set forth below:

PRELIMINARY STATEMENT – THE NEED TO PRESERVE THE STATUS QUO

1. The principal relief sought by the plaintiffs in this case is a judicial declaration of the contract rights of a class of certain CBOT members ("Eligible CBOT Full Members," also referred to herein as "the Class"). Plaintiffs claim that, by contract, particularly the 1992 Agreement between CBOT and CBOE, Class members are entitled to share equally in any cash or property distribution by defendant CBOE, including any equity interest distributed in respect of CBOE's planned demutualization. Defendants have urged a different interpretation of that agreement, arguing that the rights provided for under the 1992 Agreement (and subsequent agreements) and CBOE's charter are no longer available to the Class because, as a result of the CBOT Holdings' then-anticipated merger with Chicago Mercantile Exchange Holdings ("CME Holdings"), the Class members have lost their status as "CBOT Members."

2. The merger, which was consummated on July 12, 2007, (a) did not eliminate CBOT as a separate Commodities Futures Trading Commission designated exchange and operating company, (b) did not alter the membership rights of CBOT members in any material way under the 1992 Agreement, and (c) did not impair any of the antidilution protections in the recent agreements between CBOT and CBOE. Nonetheless, according to defendants, the "heretofore unfathomable wealth" (Tr. 5/30/07, p. 6) that will result from demutualization will go entirely to CBOE members, including interested members of the CBOE Board that adopted and implemented the self-serving interpretation. The conflicting positions of the parties were presented to the Court at the May 30, 2007 hearing on plaintiffs' motion for partial summary judgment.

3. By way of background, Class members can use their CBOT B-1 memberships in a number of different ways. They can (a) trade at the CBOT; (b) lease their seats at the CBOT; (c) become CBOE regular members pursuant to the 1992 Agreement (commonly referred to as

"Exerciser Members"); and (d) lease their CBOT B-1 memberships to others who in turn can use those memberships as delegates to become CBOE regular members ("lessees"). As of July 16, 2007, approximately 74 CBOT members are Exerciser Members of the CBOE and an additional 147 CBOT members lease their B-1 memberships to allow lessee-delegates to become CBOE regular members. Ex. 1, Odom Aff., ¶ 4. Thus, there are a total of 221 Exerciser Members (and Exerciser Memberships) of CBOE. *Id.* At the same time, there are also approximately 14 CBOT B-1 memberships listed as available for lease, that have not been leased (the "CBOT leasing pool"). *Id.*, ¶ 6.

4. While the plaintiffs' motion for summary judgment was under advisement by the Court, CBOE adopted and implemented a new rule (explained in more detail below), in which CBOE unilaterally declared that:

(a) Exerciser Members will no longer be CBOE regular members and therefore will no longer have the right, according to CBOE, to share in CBOE's planned demutualization and to lease their memberships for consideration;

(b) Exerciser Members (and those who lease Exerciser Memberships) will be permitted to become "temporary members" of the CBOE by the payment of an access fee; and

(c) The newly created category of "temporary members" does not require the holding of a CBOT B-1 membership.

5. The new rule disrupts the *status quo* in a way that irreparably harms the Class members in a number of respects:

(a) Because the "temporary members" do not have to hold a B-1 membership, the lessees do not have an incentive to keep paying lease fees to CBOT members, but do have an

incentive to immediately terminate their leases. In fact, as of July 20, 2007, 30 lessees have given the required 30-day notice to terminate their leases. Ex. 1, Odom Aff., ¶ 8. The first terminations will become effective in 30 days, i.e. on August 16, 2007. *Id.*

(b) The lease terminations at the CBOE will result in a substantial number of the Exerciser Members' CBOT B-1 memberships being placed in the CBOT leasing pool, which had been a stable market of approximately 14 B-1 memberships available for lease. Ex. 1, Odom Aff., ¶ 6. Thus, the lease terminations will create a lessor-side imbalance that will drive down lease rates and have a substantial negative effect on the value of CBOT B-1 membership leases. *Id.*, ¶ 8.

(c) Since the lease value of a CBOT B-1 membership (which is negatively affected by the rule change) is a component of the B-1 membership's total value, the trading value of CBOT B-1 memberships is negatively and immeasurably impacted by the rule change.

6. Thus, there are significant economic consequences from CBOE's decree that leases of memberships from CBOT B-1 members are meaningless. These consequences immediately impact every Class member by driving down the value of the CBOT B-1 memberships that they hold. However, as demonstrated herein, the damages that Class members will suffer as a result of CBOE's actions will not be readily calculable.

7. In light of the immediate, irreparable harm flowing from CBOE's latest ploy to destroy the contract rights of the Class, plaintiffs request that the Court issue a TRO to preserve the *status quo*, enjoining defendants from implementing or enforcing CBOE's new rule, or taking any other unilateral actions to interfere with the exercise rights of the Class. Indeed, CBOE's disruption of the *status quo*, while the Court has the plaintiffs' claims under advisement, was not required by

any circumstance except CBOE's continuing effort to do away with the exercise right. Neither CBOE nor the public will incur any harm if the *status quo* is maintained until this Court has an opportunity to rule on the pending motions. The irreparable harm caused by CBOE's actions warrants a temporary restraining order to preserve the *status quo* until this Court rules on the matters currently pending before it.

STATEMENT OF FACTS

8. The facts giving rise to the parties' dispute are largely set forth in plaintiffs' Second Amended Complaint and summarized in their motion for summary judgment and memorandum in support thereof. *See* S.J. Memo., pp. 4-22. The instant motion, however, was prompted by CBOE's latest efforts to unilaterally strip the Class of their rights, notwithstanding the issues already pending before this Court (and, for that matter, the separate but related issues pending before the SEC). In particular, on July 2, 2007, the CBOE Board adopted and filed with the SEC a self-executing rule change "to address the status of exerciser members in the event that the proposed acquisition of CBOT by CME Holdings is approved and consummated before the SEC takes final action on CBOE rule filing SR-CBOE-2006-106." *See* Ex. 2, CBOE Regulatory Circular RG07-71.[1] The CBOE announced that the new rule is to be "effective immediately." *Id.* at 1. Because the rule is "self-executing," its implementation is not subject to prior approval by the SEC, and CBOE has already begun to implement the new rule.

9. CBOE describes its filing as an "Interpretation and Policy" pursuant to CBOE Rule 3.19. *See* Ex. 3, Rule Change SR-2007-77. However, this "Interpretation and Policy" effects a radical change in the rights of the Class members – and indeed is a radical restatement of the existing

[1] As noted in Mr. Nachbar's July 9, 2007 letter to the Court, CBOE continually and incorrectly refers to the transaction as an "acquisition of CBOT by CME Holdings." In fact, the transaction was a merger between CBOT Holdings and CME Holdings.

Rule 3.19 that can only be described as a change in CBOE Rule 3.19. The new rule effectively terminates the status of Exerciser Members. The new rule provides, among other things:

- Each person who was an Exerciser Member on July 1, 2007 and on July 11, 2007 and satisfies certain conditions will be granted "temporary CBOE membership status." In substance and effect, CBOE has created a temporary permit program that allows the purchasers of the permit certain trading rights at CBOE but otherwise strips the Exerciser Members of their CBOE membership, including their rights under Delaware law and CBOE's charter.
- The CBOT B-1 membership and Exercise Right Privilege, which were previously essential to a "lessee" to become an exercise member of CBOE, will no longer be necessary. A new "temporary" CBOE member will not be required to either hold an Exerciser Membership or lease an exerciser membership from a Class member. Instead, the temporary CBOE member will have to pay directly to CBOE an amount to be determined by CBOE "on a monthly basis, based on published lease fee information."[2] Ex. 3, CBOE Rule Change at 7. The economic consequences to the Class are very substantial but not readily calculable. *See* Ex. 1, Odom Aff., ¶ 9. First, beginning on September 1, 2007, a Class member who has leased his B-1 membership and Exercise Right Privilege to someone trading at CBOE will lose approximately $5,000 in monthly rent.[3] (There are approximately 147 such leases.) *See* Ex. 1, Odom Aff., ¶ 7. Under the CBOE plan, these fees will now go to CBOE coffers instead of lessors. Second, the pool of leases available for rent will increase

[2] CBOE says the fees will be held in escrow. The terms of the escrow and the beneficiaries thereof are not disclosed. The lessors will not be repaid out of the escrow if the lessees were the payors.

[3] Given the 30-day notice provisions in standard membership leases, notices of the termination of these leases seem likely to begin immediately and to conclude by August 1, 2007.

by some estimated 221 memberships, thus decreasing the rent received by all Class members who are lessors. *Id.*, ¶¶ 7&8. And, third, since a significant portion of the value of B-1 memberships is attributable to the potential lease value, the value of all B-1 memberships will decline materially. Because the value of a B-1 membership is affected by other market factors as well, it will be nearly impossible to determine the precise financial loss as a result of CBOE's actions. All Class members own B-1 memberships.

- Commencing July 1, 2007, no additional persons will be granted "temporary CBOE membership" status; unless or until this Court or the SEC otherwise acts. This bar has an immediate financial impact on some CBOT members, and adversely and profoundly affects the value of all B-1 memberships.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THIS MOTION.

10. In our July 9, 2007 letter to the Court, plaintiffs demonstrated that CBOE's arguments, particularly those relating to jurisdiction, are insincere. There, plaintiffs explained that, on May 30, 2007, CBOE argued before this Court that, because of the way it would modify the corporate structure of CBOT, the pending merger between CBOT Holdings and CME Holdings would, as a matter of law, extinguish all CBOE rights of the Class in this case. On that same day, CBOE announced that it had signed an agreement with Intercontinental Exchange, Inc. ("ICE") to support ICE's competing proposal to merge with CBOT Holdings. As part of that alliance, CBOE agreed that if CBOT Holdings and its shareholders would agree to merge with ICE instead of with CME Holdings, *using virtually the same corporate structure* as the then-proposed merger with CME

Holdings, ICE and CBOE would jointly pay the Class over $665 million as compensation for their Exercise Rights and in exchange for dismissing their claims against the defendants in this case.

11. As to jurisdiction, the CBOE/ICE pact provided that its effectiveness was conditioned on final court approval of the settlement by this Court. Thus, while CBOE argued on May 30 that this Court had no jurisdiction because the SEC had exclusive jurisdiction over all aspects of this controversy, the CBOE/ICE agreement acknowledges that this Court *does* have jurisdiction and CBOE agreed *to invoke that jurisdiction* to approve its proposed settlement with the Class.

II. PLAINTIFFS ARE ENTITLED TO ENTRY OF A TEMPORARY RESTRAINING ORDER.

12. To prevail on a motion for a temporary restraining order, the petitioner must demonstrate that: (a) it has a colorable claim on the merits; (b) it will suffer irreparable harm if relief is not granted; and (c) the balance of hardships favors the moving party. *Stirling Investment Holdings, Inc. v. Glenoit Universal, Ltd.*, 1997 Del. Ch. LEXIS 19, at *5 (Del. Ch. Feb. 12, 1997).[4] The Court's primary focus is on the threat of imminent and irreparable injury. *Cottle v. Carr*, 1988 WL 10415, at *2 (Del. Ch. Feb. 9, 1998); *UIS, Inc. v. Walbro Corp.*, 1987 WL 18108, at *1 (Del. Ch. Oct. 6, 1987). *See generally* Donald J. Wolfe, Jr. and Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, § 10-3 [a] at 10-52 (2005). The Court's examination at this stage is not "upon an assessment of the probability of ultimate success, but is primarily upon the injury to plaintiff that is threatened and the possible injury to defendant if the remedy is improvidently granted." *Cottle*, 1988 WL 10415, at *2; *Walbro*, 1987 WL 18108, at *1. "[W]hen this [C]ourt determines whether to grant a TRO, it . . . concentrates on whether the absence of a TRO will permit imminent, irreparable injury to occur to the applicant and

[4] A compendium of unreported cases is filed herewith.

whether that possibility of injury outweighs the injury that the TRO itself might inflict on the defendants." *Ace Ltd. v. Capital Re Corp.*, 747 A.2d 95, 102 (Del. Ch. 1999).

A. Plaintiffs' Claims Have Merit.

13. Petitioners' required showing on the merits is less burdensome at the TRO stage than at the preliminary injunction stage because of the absence of expedited discovery to develop a record and the limited time the Court has to address the issues. *Davis Acquisition, Inc. v. NWA, Inc.*, 1989 WL 40845, at *4 (Del. Ch.); *Cottle*, 1988 WL 10415, at *2. Thus, Petitioners need only demonstrate that their claims are "colorable, litigable, or . . . raise questions that deserve serious attention" sufficient to justify restraining the challenged transaction for the brief period necessary to develop a record and present a preliminary injunction motion. *Cottle*, 1988 WL 10415, at *3 (citing *Hecco Ventures v. Sea-Land Corp.*, 1986 WL 5840, at *3 (Del. Ch.)).

14. The arguments presented in support of plaintiffs' motion for partial summary judgment demonstrate, in detail, the merits of plaintiffs' claims regarding CBOE's attempt to use the merger as an excuse to terminate the exercise rights of the Class. Plaintiffs adopt and will not repeat those arguments here.

B. Plaintiffs Will Suffer Immediate, Irreparable Harm Without Relief.

15. The purpose of a temporary restraining order (or preliminary injunction) is to preserve the *status quo* pending the resolution of a case, where preservation of the *status quo* is necessary to prevent irreparable harm. *Gimbel v. Signal Cos., Inc.*, 316 A.2d 599, 602 (Del. Ch. 1974), *aff'd*, 316 A.2d 619 (Del. 1974); *Marshall v. Holiday Inn, Inc.*, 174 A.2d 27, 28 (Del. Ch. 1961). *Accord, e.g.*, *Mesa Partners v. Phillips Petroleum Co.*, 488 A.2d 107, 112 (Del. Ch. 1984). Here, CBOE seeks to change the *status quo* to the irreparable detriment of the plaintiffs. Instead of allowing this Court to resolve the matters currently pending before it (and which have been briefed

and argued), CBOE unilaterally terminated the most essential property rights of the Class members. Indeed, by declaring that, as of July 1, 2007, the Exercise Rights have been terminated, and that those who had exercised before that time will be granted only "temporary membership status," CBOE has effectively (a) denied Class members the opportunity to collect lease payments from Exerciser Members of CBOE who lease their seats[5]; (b) dramatically and negatively impacted the lease value of all Class members' CBOT B-1 memberships; and (c) dramatically and negatively impacted the market value of the B-1 memberships, because their values depend in part on lease rates of those memberships. These damages are nearly impossible to calculate with any reasonable degree of certainty, and therefore, constitute irreparable harm to the Class for which it has no adequate remedy at law.[6] *See Cantor Fitzgerald, LP v. Cantor*, 724 A.2d 571, 586 (Del. Ch. 1998) ("Preliminary injunctive relief may be appropriate when Plaintiff's damages are difficult or impossible to quantify."); *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1090 (Del. Ch. 2004) ("Injury is irreparable when a later money damage award would involve speculation" or undue "difficulty of shaping monetary relief").

16. CBOE's new rules also effectively extinguish the rights of Exerciser Members to participate in the governance of CBOE by terminating their voting rights. Even those granted "temporary membership status" may have such rights unilaterally stripped, because CBOE's new rule is silent regarding what, if any, corporate governance rights such "temporary members" will have. The denial of such rights also constitutes irreparable harm. *See, e.g., Benchmark Capital Partners IV, L.P. v. Vague*, 2002 WL 1732423, at *14 (Del. Ch. July 15, 2002); *Telcom-SNI*

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[5] That impact has already been felt by at least 30 Class members, whose leases have been terminated. Ex. 1. Odom Aff. at ¶ 8. More termination notices are expected. *Id.*

[6] In their July 17, 2007 letter to the Court, defendants claim that their new rule will "avoid[] disturbing settled interests." As shown above and in the affidavit of C. C. Odom, this is obviously not the case – the new rule will throw the market for CBOT B-1 memberships into turmoil and profoundly affect the lease and sale value of those memberships.

Investors, LLC v. Sorrento Networks, Inc., 2001 WL 1117505, *9 (Del. Ch. Sept. 7, 2001). In short, CBOE's attempt to short-circuit the judicial process through its unilateral, self-executing rule filing will cause irreparable and unascertainable damages to the Class.

C. The Harm Suffered by Plaintiffs in the Absence of Relief is Greater than Any Harm CBOE Would Suffer by Granting Relief.

17. The rights and benefits preserved through the issuance of injunctive relief outweigh any harm that would be caused by the maintenance of the *status quo*. As set forth above, CBOE's conduct drastically alters the *status quo* and immediately impacts all putative Class members. Plaintiffs seek a temporary restraining order to maintain the *status quo* so these threatened acts are not undertaken pending the adjudication of the parties' disputes before this Court, which are fully briefed and awaiting decision.

18. In contrast, CBOE will suffer little, if any, harm if the *status quo* is maintained. CBOE's latest tactic is just one more maneuver in its attempt to eliminate the Exercise Right so that it can appropriate Class members' property in the demutualization. CBOE is not harmed by simply awaiting this Court's decision on the merits of plaintiffs' claims.

19. Accordingly, the balance of equities weighs in favor of granting plaintiffs' request for a temporary restraining order.

CONCLUSION

20. For the reasons stated above, the Court should issue a TRO enjoining defendants from implementing or enforcing CBOE's new rule (3.19) or taking any other action during the pendency of this case to interfere with the exercise rights of the Class.

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