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Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Attn: Nancy M. Morris, Secretary

Re: File Number: SR-CBOE-2007-77

On behalf of CME Group Inc. ("CME") and its wholly-owned subsidiary, Board of Trade of the City of Chicago, Inc. ("CBOT"), we hereby request that the Securities and Exchange Commission ("SEC" or "Commission") promptly abrogate SR-CBOE-2007-77, filed by the Chicago Board Options Exchange, Incorporated ("CBOE"). [1] The filing purports to be an "Interpretation and Policy" (the "Interpretation") of CBOE Rule 3.19. It was filed under Section 19(b)(3)(A)(i) of the Securities Exchange Act of 1934 ("Exchange Act") and was made effective upon filing.[2]

The Interpretation makes a substantive and material change to CBOE's rules that has and will continue to have significant, harmful effects on numerous CBOT Exerciser Members and Exercise Rights Holders. [3] The Interpretation was not properly filed under section 19(b)(3) of the Exchange Act. The Interpretation can be abrogated without adverse impact on CBOE's markets and should be promptly abrogated in order to mitigate the harm unnecessarily caused by CBOE's precipitous action. We address these points below.

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1 CBOT and affected Exerciser Members concurrently are seeking a temporary restraining order in the Delaware Court seeking to restrain CBOE from enforcing the Interpretation. *See* attached Verified Motion for Temporary Restraining Order, filed in the Delaware Action on July 20, 2007, and Verification and Affidavit of C.C. Odom, a CBOT Exerciser Member, in support of CBOT's motion, attached hereto as Exhibit A.

2 The SEC published CBOE's filing for comment on July 5, 2007.

3 Capitalized terms used herein have the same meanings given those terms in the CBOT's February 27, 2007 comment letter in opposition to the Proposed Rule Change that is the subject of SR-CBOE-2006-106 (the "February Letter"). We will not reiterate here CBOT's strenuous opposition to the Proposed Rule Change and the actions of CBOE's Board, nor CBOT's Delaware Action which seeks to require CBOE to honor its contractual commitments to CBOT and the Exerciser Members, all of which has previously been explained in CBOT's February Letter.

A. The Interpretation is Unnecessary

The Interpretation purports to "implement a procedure to determine whether persons who claim to still qualify as [E]xerciser [M]embers should be permitted to retain their membership status, and consequently to trade on CBOE, while a decision on SR-CBOE-2006-106 is still pending." The Interpretation concludes that all Exerciser Members have lost their membership status but arbitrarily permits those persons who were Exerciser Members in good standing as of July 1, 2007, and the close of business on the date (July 11) before the CME – CBOT Holdings merger closing (July 12) to continue to trade pursuant to a temporary membership status until the SEC acts on the Proposed Rule Change, subject to the payment of CBOE member assessments and other member fees, as well as a special monthly "access fee." CBOE's stated justification for the Interpretation is that it avoids "disturbing the trading access" of Exerciser Members by reason of the consummation of the CME merger transaction, and preserves fair and orderly markets at CBOE "by avoiding the sudden loss of more than 200 persons who presently are contributing liquidity to CBOE's markets."

This Interpretation, however, is neither necessary nor is it in any sense an "interpretation" of the cited rule. It is a significant, stand-alone rule change. Rule 3.19 provides:

> **Rule 3.19. Termination from Membership**
>
> The membership status of a member shall automatically terminate at such time that the member does not possess a membership through ownership, lease, or registration of a membership to the member. The membership of a member organization shall also automatically terminate at such time that the member organization has no nominee or person who has registered his or her membership for the member organization. Notwithstanding the foregoing, if the Exchange determines that there are extenuating circumstances, the Exchange may permit a member to retain the member's membership status for such period of time as the Exchange deems reasonably necessary to enable the member to obtain a membership, a substitute nominee, or a substitute person to register his or her membership for the member, as applicable.

Rule 3.19 addresses extenuating circumstances that cause a member to lose his membership and the right of the Exchange to permit that member to retain membership status for a time "reasonably necessary to enable the member to obtain a membership." No "interpretation" is needed to extend membership status in those circumstances, because the language and intent of the rule is plain on its face. Rule 3.19 does not relate to the issue of whether the recent merger between Chicago Mercantile Exchange Holdings Inc. and CBOT Holdings, Inc. (the "Merger") extinguished the membership rights of the existing 221 members of the CBOT who were CBOE members by reason of having asserted their rights under Article Fifth(b) of CBOE's Certificate of Incorporation ("Article Fifth(b)"). Rule 3.19 therefore has nothing to do with the question of whether, after the Merger, the remaining full members of CBOT retain their right to become Exerciser Members of CBOE, and has no bearing at all on the

continued validity of the Exerciser Right that is the subject of the Proposed Rule Change which is pending and relates directly to CBOE's efforts to extinguish the Exercise Right.

Regardless of the purpose and content of Rule 3.19, CBOE has adopted, filed and made effective an interpretation of Rule 3.19 that unequivocally extinguishes the Exercise Right while the Proposed Rule Change is pending and while that issue is under advisement by the Delaware Court. As discussed below, the Interpretation has had, and will continue to have, an immediate, material, adverse impact on CBOT Exerciser Members. The principal impact of the Interpretation is to create the crisis to which it purports to respond. In the guise of protecting persons whose memberships have been terminated, the Interpretation creates and acts on the presumption that the Merger terminated the rights of the Exerciser Members. This is the precise question being litigated before the Delaware Court and which CBOE has attempted to preempt with the Proposed Rule Change submitted to the Commission. The impact of the Merger on the status quo has not been decided.

There was no need to interpret Rule 3.19 to "protect" Exerciser Right members until CBOE unilaterally and improperly determined that the Merger terminated the Exercise Right. But, CBOE has no power to take that action because that issue is now pending before the SEC and the Delaware Court. As is evident from the Proposed Rule Change, CBOE believes it has power to interpret Article Fifth(b) in a manner that will terminate the Exercise Right, but the Proposed Rule Change demonstrates that CBOE is well aware that a rule change of that magnitude, even if it had been lawfully adopted by CBOE's Board, which it was not, may not be implemented without Commission approval. Having thus far failed in its attempt to terminate the Exercise Rights through the standard SRO rulemaking process, CBOE now has used the summary SRO rulemaking process to amend, *without Delaware Court or SEC review*, Article Fifth(b) in violation of Delaware law, the 1992 Agreement and the Exchange Act.

There was no cause for CBOE to take action to "avoid disturbing the trading access" because no such disturbance would have take place absent CBOE's immediate implementation of its meretricious Interpretation. If CBOE had been concerned that continued recognition of the Exercise Rights after the Merger might have prejudiced its legal arguments in the pending Delaware Action, a status quo order or agreement of the parties – to which CBOT would have been readily amenable – expressly preserving the parties' legal positions would have addressed in full CBOE's concerns.[4] Unless and until the SEC and the Delaware Court take action to approve or uphold CBOE's actions that are the subject of the Proposed Rule Change, however, there has been and will be no change in the trading access rights conferred on Exerciser Members. Hence, the status quo of this controversy has not changed in any manner that required action by CBOE at this time. Indeed, the status quo was altered only as a result of CBOE's action.

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[4] CBOT has advised CBOE that it is willing to enter into an appropriate arrangement to preserve the status quo in this fashion, but CBOE to date has been unwilling to accept CBOT's invitation.

B. The Interpretation Is a Substantive and Harmful Unilateral Action that is Based on the False Presumption that the Merger has Extinguished the Exercise Right

There can be no doubt that CBOE determined that the Merger destroyed the Exercise Right, and with it the Exerciser Membership. Moreover, that determination will remain in force to the ongoing harm to CBOT Exerciser Members until such time as an action of the Commission reverses CBOE's unilateral decision. It is important to note that, absent CBOE's voluntary withdrawal of the Interpretation, CBOE's Interpretation provides that only a decision of the Commission taking final action on SR-CBOE-2006-106 will terminate the Interpretation.

The Interpretation is a blatant attempt to foreclose the effective exercise of jurisdiction by the Delaware Court. The Interpretation purports to remain effective even if the Delaware Court decides, as the circumstances suggest it should, that CBOE's interpretation of Article Fifth(b) embodied in the Proposed Rule Change is invalid because it was made in bad faith, breached CBOE's fiduciary obligations and/or violated the 1992 Agreement.

CBOE's efforts to characterize this action as a temporary measure that will have no real impact on the status quo pending the Proposed Rule Change are disingenuous. The Interpretation means that the 147 CBOE members who have leased such seats from a CBOT full member no longer need to lease those seats to continue their trading privileges at CBOE. As of this date, 38 lessees have cancelled their leases, and numerous others have simply declined to make additional payments to their lessors based on CBOE's Interpretation that the Exercise Right being leased no longer exists. Instead, the lease payments previously made to the CBOT lessors are being transferred in equal or greater measure to CBOE and, to the extent that it forces the temporary members to lease from CBOE members, to those CBOE members. As a result, the lease market for CBOT memberships has been thrown into turmoil as these 147 leases are added to the pool, which destroys the equilibrium in that market. Any repayments of escrowed funds will go the party who paid the funds, and not to the pool of injured CBOT lessors. The destruction of the lease value of the CBOE Exercise Right membership will also negatively impact the total value of that membership to a degree that cannot be readily determined. If CBOE's actions are later determined to have been wrong, compensation for these losses will be nearly impossible to determine, thus making the damage irreparable.

In sum, CBOE's Interpretation is a preemptive, "temporary" implementation of its ongoing scheme to extinguish the Exercise Right through an amendment of CBOE Article Fifth(b), which is the subject of the Proposed Rule Change. The impact of the Interpretation on CBOT member-lessors and on prospective Exerciser Members is not temporary or reversible, and will continue until remedial action is taken to cure this misconduct.

C. The Interpretation Violates the Exchange Act and Must be Set Aside

CBOE justified the Interpretation as "constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the [CBOE]" within the meaning of Exchange Act Section 19(b)(3)(A)(i), and made it effective

upon filing. The summary effectiveness provisions of the Exchange Act were intended to be used for SRO housekeeping and administrative matters.[5] Those provisions do not permit material changes to an SRO's membership structure or member ownership rights, and they do not allow rule changes that completely alter the costs of exercising membership privileges -- but this is exactly what the Interpretation does.

Exchange Act Section 19(b)(3)(C) provides in relevant part:

> Any proposed rule change of a self-regulatory organization which has taken effect pursuant to subparagraph (A) or (B) of [Section 19(b)(3)] may be enforced by such organization to *the extent it is not inconsistent with the provisions of this chapter, the rules and regulations thereunder, and applicable Federal and State law*. [Italics added].

The Interpretation does not comply with these standards. The Interpretation is inconsistent with Article Fifth(b), it violates the 1992 Agreement, and it was adopted in violation of Illinois and Delaware law. For these reasons, the Interpretation is expressly unenforceable under Exchange Act Section 19(b)(3).

Exchange Act Section 19(b)(3)(C) also provides:

> At any time within sixty days of the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) of this subsection, the Commission summarily may abrogate the change in the rules of the self-regulatory organization made thereby and require that the proposed rule change be refiled in accordance with the provisions of paragraph (1) of this subsection and reviewed in accordance with the provisions of paragraph (2) of this subsection, 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 this chapter. . . .

CBOE used the summary effectiveness provisions of Exchange Act Section 19(b)(3)(A)(i) to "jump the gun" on its efforts to amend or reinterpret Article Fifth(b) and avoid its obligations under the 1992 Agreement. CBOE also is using the filing of the Interpretation to influence the outcome of the Delaware Action. CBOE has informed the Delaware Court that CBOE must enforce its Interpretation in order to remain in compliance with its obligations under

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[5] "'House-keeping' and other rules which do not substantially affect the public interest or the protection of investors would take effect upon filing with the SEC, subject to the SEC's authority to abrogate them within 60 days of filing." *Summary of Principal Provisions of Securities Acts Amendments of 1975 (S.249)*, Senate Committee on Banking, Housing and Urban Affairs, 94th Cong, 1st Sess. (1975), at 7.

the Exchange Act and that the Delaware Court will be inserting itself into a matter that is within the SEC's exclusive province to decide if it acts in any way to preclude the enforcement of the Interpretation. Therefore, SEC abrogation of the Interpretation is appropriate in the public interest and in furtherance of the purposes of the Exchange Act.

Conclusion

In conclusion, the Interpretation is an unnecessary CBOE action that extinguishes the membership rights of certain Exerciser Members, and materially and adversely affects the value of all Exercise Rights in advance of SEC action on the Proposed Rule Change and the ruling of the Delaware Court, and in derogation of the Commission's decision-making authority under Section 19 of the Exchange Act. The Interpretation also violates Delaware law, and for the same reasons that CBOT has explained in its opposition to the Proposed Rule Change, is not a fit subject of CBOE rulemaking under the Exchange Act, deprives affected Exerciser Members of property rights without due process, and is otherwise inconsistent with Section 6 of the Exchange Act. For these reasons, CBOT respectfully requests that the SEC exercise its authority under Section 19(b)(3)(C) of the Exchange Act to abrogate the Interpretation and require its resubmission as a proposed rule change, as required thereunder.

Thank you for your consideration of the foregoing. If you have any questions, please contact the undersigned at (202) 263-3219, Kathryn McGrath at (202) 263-3374, or Jerrold Salzman at (312) 407-0718.

Very truly yours,

Charles M. Horn

Attachments

cc: The Honorable Christopher Cox, Chairman
The Honorable Paul S. Atkins, Commissioner
The Honorable Roel C. Campos, Commissioner
The Honorable Kathleen L. Casey, Commissioner
The Honorable Annette L. Nazareth, Commissioner

Brian G. Cartwright, Esq., SEC General Counsel
Janice Mitnick, Esq., SEC Assistant General Counsel for Market Regulation
Elizabeth King, SEC
Richard Holley, SEC
Johnna Dumler, SEC
Joanne Moffic-Silver, CBOE

Patrick Sexton, CBOE
Gordon Nash, Counsel for Plaintiff Class in the Delaware Action
Jerrold Salzman, Counsel for CME

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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Dated: July 20, 2007

EXHIBIT 1

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,	)	C.A. No. 2369-N
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, 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.	)	

AFFIDAVIT OF C.C. ODOM, II

C.C. Odom, II, being first duly sworn on oath, deposes and says as follows:

1. I have been a member of the Board of Trade of the City of Chicago Inc. ("CBOT") since 1973. I have served as a member of the Board of Directors of the CBOT and its parent companies, first CBOT Holdings, Inc. and currently CME Group, Inc., since 2001. I am the Chairman of the CBOT Lessors Committee and have been either a member of that committee or its Chairman since its inception in 2001.

2. The Lessors Committee of the CBOT is responsible for developing policies and practices with respect to the leasing of memberships of the CBOT and the distribution of information with respect to such policies and practices. The Member Services Department of the CBOT maintains records with respect to the CBOT memberships that are leased pursuant to the rules of the CBOT applicable to the leasing of memberships. Among other things, those records reflect the number of CBOT B-1 memberships that are from time to time subject to outstanding leases, the identity of the persons who are the lessors and lessees of those memberships and the lease rate negotiated between each lessor and lessee. I am familiar with the records of the Member Services Department of the CBOT and the market for the leasing of memberships at the CBOT.

3. In my capacity as the Chairman of the Lessors Committee and as a member of the Board of Directors of CBOT Holdings, Inc. and CME Group, Inc., I am also familiar with the number Exerciser Members (CBOT B-1 members who have become CBOE members pursuant to the 1992 Agreement) of the Chicago Board Options Exchange, Inc. ("CBOE"). I am also familiar with the number of Exerciser Members who own their CBOT B-1 memberships, and the number of Exerciser Members who lease their CBOT B-1 memberships.

4. As of July 16, 2007, the records of the Member Services Department of the CBOT reflect that there are 381 CBOT B-1 memberships that are leased to individuals who trade at the CBOT. As of that date, there are an additional 147 CBOT B-1 memberships that are leased to individuals who use them to be Exerciser Members. Additionally, as of the same date, there are 74 CBOT B-1 memberships that are owned

by people who use them to be Exerciser Members. Thus, there are a total of 221 Exerciser Members (and Exerciser Memberships) of CBOE.

5. The CBOT Rules provide for a form of lease of a CBOT membership. The form contains a provision permitting the lessee to terminate the lease upon 30 days written notice. A copy of said lease form is attached hereto as Exhibit A.

6. As of July 16, 2007 the current market for leases at the CBOT is such that there are 14 B-1 memberships listed as available for lease that have not been leased. Based on my knowledge and experience, this number is consistent with the market for such leases over approximately the last year and reflects a stable market.

7. Under the CBOE's self-executing rule with respect to "temporary membership status", as of July 1, 2007, the CBOE has unilaterally terminated the exercise membership created by Article Fifth (b) of the CBOE Charter and, beginning September 1, 2007, will charge persons who were Exerciser Members of CBOE as of July 1, 2007 a "monthly access fee based on the then current monthly lease fees being paid to lessors of the interest that CBOT denominates as a full CBOT membership," (SR-CBOE-2007-77at4). The rule abrogates all CBOE Exerciser Memberships including all those that are held currently by CBOT B-1 Members (74) and CBOT B-1 Member Delegates (147). Specifically, the rule provides that, while those who were Exerciser Members on July 1 and July 11, 2007 will be permitted "temporary membership status," no other CBOT members will be permitted to exercise. The rule further provides that those who are granted such "temporary membership status" are no longer required to hold any membership in the CBOT. In this way, CBOE has rendered the exercise right valueless.

8. Unless restrained from taking effect, this rule will result in the termination of all CBOT leases to "Eligible CBOT Full Member Delegates", because there is no longer any requirement that one who qualifies for "temporary membership status" continues to hold his CBOT seat. In fact, as of July 20, 2007, the Member Services Department of the CBOT had received thirty 30-Day Notices of Termination of Delegation Agreement by lessors. The first terminations will become effective in 30 days, i.e. on August 16, 2007. I expect more notices of termination by lessors to be made in the future. Moreover, the persons must now pay "access fees" to CBOE. Thus, CBOE has effectively and unilaterally usurped the value of those Exerciser Memberships and ensured that payments previously made to the lessors of those seats will now be made to CBOE. Additionally, as a consequence of this rule, it is likely that a substantial number of the 221 Exerciser Memberships at the CBOE that are being terminated by this rule will then be placed into the CBOT leasing pool creating a substantial negative effect on the value of CBOT B-1 membership leases and CBOT B-1 memberships. In that event, the pool of CBOT B-1 memberships leased to people trading at the CBOE would be expected to increase from 381 to as many as 602. Moreover, the number of seats presently available for lease would be expected to increase from 14 to as many as 235.

9. If the CBOE's proposed rule is not restrained from taking full effect, it will be nearly impossible to ascertain the financial damages and losses to the CBOT B-1 memberships that result from implementation of the rule. It is certain that the rule will negatively impact the value of CBOT B-1 membership leases and CBOT B-1 memberships because between now and September 1, 2007 as many as 221 additional CBOT B-1 memberships will become available for lease at the CBOT in a market that is

at present reasonably balanced between the number of lessors and lessees. The market imbalance created as a result of the CBOE'S "temporary membership" rule will drive lease rates down and, because of a diminished lease value of a CBOT B-1 membership, reduce the value of the CBOT B-1 membership itself. Because multiple market factors effect both the lease value and total value of CBOT B-1 memberships, the precise financial impact of the CBOT "temporary membership" rule on those values cannot be readily or easily be ascertained. Based on my knowledge and experience, the adverse impact will be substantial and long lasting, but difficult to gauge as to amount or duration.

10. I have read the motion of CBOT, Michael Floodstrand and Thomas J. Ward for a Temporary Restraining Order, and verify that the statements set forth therein are true and correct.

FURTHER, YOUR AFFIANT SAYETH NOT.

C C Odom, II

C.C. Odom, II

Subscribed and Sworn to
before me on July 20, 2007

KEITH FIFE
MY COMMISSION EXPIRES
January 19, 2009

NOTARY PUBLIC, STATE OF TEXAS

EXHIBIT A

30-DAY NOTICE

DATE: _____

RE: TERMINATION OF DELEGATION AGREEMENT

MR. _____

PLEASE BE ADVISED THAT PURSUANT TO PARAGRAPH 1(B) OF OUR LEASE AGREEMENT, I HEREWITH GIVE MY WRITTEN 30-DAY NOTICE TO TERMINATE OUR __ LEASE AGREEMENT ON _____.

THANK YOU.

SINCERELY,

_____

(SIGN AND PRINT LEGIBLY)

_____

_____

(INITIATOR'S CURRENT PRIMARY CLEARING AFFILIATION)

_____

CC: KATHY HOLLOWAY, MEMBER SERVICES RM A-10 OR FAX TO 312-341-7302

PRIMARY CLEARING MEMBER

THERE IS A NON-REFUNDABLE FILING FEE OF $100.00 DUE WHEN TERMINATION IS FILED WITH MEMBER SERVICES, OR TERMINATION WILL NOT BE RECOGNIZED.

NOTE: IT IS THE RESPONSIBILITY OF THE MEMBER/DELEGATE TO NOTIFY THE DELEGATE'S PRIMARY CLEARING FIRM OF ANY EARLY TERMINATION THAT REPLACES THE ORIGINAL TERMINATION DATE. THE DELEGATE HAS A 6 MONTH GRACE PERIOD FROM THE TERMINATION DATE OF PREVIOUS LEASE TO FILE A SHORT FORM APPLICATION WITH THE EXCHANGE TO OBTAIN ANOTHER MEMBERSHIP.