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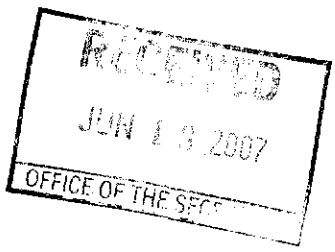

VIA FEDERAL EXPRESS

Ms. Nancy M. Morris
Secretary, Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549-1090

Re: File No. SR-CBOE-2006-106

Dear Ms. Morris:

The Chicago Board Options Exchange ("CBOE" or the "Exchange") is pleased to respond to the comment letters that were submitted to the Commission in response to the above-referenced filing (the "Proposed Rule Change"), which consists of a proposed interpretation of paragraph (b) of Article Fifth of CBOE's Certificate of Incorporation ("Article Fifth(b)"). This proposed interpretation was filed in response to the announced acquisition of the Chicago Board of Trade ("CBOT") by Chicago Mercantile Exchange Holdings Inc. ("CME Holdings"). We have delayed submitting our response to the comments letters because of the heightened uncertainty as to whether this transaction would proceed in light of the competing offer by the IntercontinentalExchange, Inc. ("ICE"). However, because of the impending shareholder vote on the CME Holdings acquisition, we have determined that it is appropriate to provide our comments now, subject of course to necessary revisions to the referenced filing or to our response to comments, or both, in the event that circumstances change.

The interpretation of Article Fifth(b) reflected in the Proposed Rule Change is that, following the CME Holdings acquisition, there will not be "members" of CBOT as that term was understood when Article Fifth(b) first granted to members of CBOT the right (the "exercise right") to become and remain members of CBOE ("Exerciser Members") for so long as they remain members of CBOT. Inasmuch as over 130 comment letters were submitted, it is not practical for CBOE to respond to each of them individually. Instead, CBOE will respond to what it perceives to be the core points among these letters.

Introductory Statement

At the outset, it is important to observe that all of the letters submitted in opposition to the proposed interpretation were submitted by current owners of CBOT memberships or

"exercise right privileges" ("ERPs"), or by CBOT on behalf of such persons. Of course, owners of CBOT memberships and ERPs all stand to gain financially if the proposed interpretation is not approved and if, as a result, their eligibility to utilize the exercise right survives the acquisition of CBOT. Indeed, it is our understanding that several of these commenters have recently acquired large numbers of ERPs as a speculation that the value of ERPs would be likely to increase substantially if CBOE's proposed interpretation were not approved. In contrast to the self-interest of these persons, CBOE's independent directors – who voted unanimously in favor of the proposed interpretation – have no self-interest in the matter whatsoever. Instead, they adopted the proposed interpretation because, in their view, it is the most reasonable interpretation of Article Fifth(b) in light of its language and history, and is fair to all CBOE members.

The objections to the proposed interpretation contained in the comment letters mostly fall into three distinct categories: objections to the exclusive jurisdiction of the Commission over the filing, objections based on claims that CBOE's Board of Directors lacked legal authority or did not follow proper procedures when it adopted the proposed interpretation and directed that it be filed with the Commission, and objections directed at the substance of the proposed interpretation. Although there is some overlap among these categories, we shall attempt to respond to each of them in turn.

I. The Commission Has the Authority and Duty to Act on the Proposed Rule Change.

A. The Commission Has Exclusive Jurisdiction Through its Authority Over Proposed Interpretations of Exchange Rules.

Turning first to the objections to the Commission's jurisdiction over the Proposed Rule Change, the Commission's authority derives from two sources – its overall jurisdiction over an exchange's interpretation of its rules and its particular jurisdiction over rules and policies concerning who is eligible to be a member of the exchange. The Commission's authority over rule interpretations derives from Section 19(b)(1) of the Exchange Act, which requires an exchange to file with the Commission every "proposed rule change" and mandates that "[n]o proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection." Subject to limited exceptions, a "proposed rule change" is defined to include any "stated policy, practice or *interpretation*" of an exchange rule (Commission Rule 19b-4(c), *emphasis added*), and a "stated policy, practice or interpretation" is defined to include any generally available statement of the "meaning, administration, or enforcement of an existing rule" (Commission Rule 19b-4(b)). Section 3(a)(27) of the Exchange Act expressly defines the "rules of an exchange" to include the "constitution, *articles of incorporation*, bylaws, and rules" of the exchange. (Emphasis added.)

Accordingly, the Commission has jurisdiction to approve or disapprove any interpretation of Article Fifth(b) of CBOE's certificate of incorporation, and no such interpretation "shall take effect" unless the Commission approves it. The Proposed Rule Change is just such an interpretation – specifically, an interpretation of the language in Article Fifth(b) that defines who is eligible for the exercise right. In defining eligibility, Article Fifth(b) states only that each "member" of CBOT is entitled to the exercise right "so long as" that person "remains a member of said Board of Trade." This language does not define what it takes to qualify as a "member" of CBOT for purposes of Article Fifth(b), so that concept must be interpreted under particular circumstances.

The concept of CBOT membership was clearly understood when Article Fifth(b) was adopted in 1973, because there was only one group of persons who held any of the rights typically associated with membership. Over the years, however, the concept of CBOT membership has become complicated, as CBOT has diluted and transformed the traditional concept of membership by allowing various groups of persons to enjoy some, but not necessarily all, of the traditional incidents of membership. For instance, CBOT decided to allow memberships to be delegated or leased, thereby splitting ownership from trading rights. CBOT also has issued various special memberships that entitled such "members" to trade some, but not all, of CBOT's products. In addition, CBOT has developed electronic trading, which has allowed a person to trade remotely on CBOT while physically trading on CBOE's floor. CBOT also has become a stock corporation and allowed "members" to sell some or all of their equity stake in the company.

In none of these instances was it self-evident from the language of Article Fifth(b) who, if anyone, still would qualify as a "member" of CBOT, as that term was used when Article Fifth(b) was adopted in 1973. As a result, it fell to CBOE to interpret this language to deal with the new circumstance that had arisen in each of those situations. On each such occasion, CBOE's interpretation of Article Fifth(b) was submitted to the Commission, as required by Section 19(b)(1) of the Exchange Act. Despite objections to the Commission's jurisdiction made in respect of some of those filings that were virtually identical to the objections now made in respect of the pending filing, in each case the Commission acknowledged its jurisdiction and approved the interpretations that had been filed.[1]

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[1] *See* Securities Exchange Act Release No. 34-32430 (June 8, 1993), 58 FR 32969 (June 14, 1993); Securities Exchange Act Release No. 34-46719 (October 25, 2002), 67 FR 66689 (November 1, 2002); Securities Exchange Act Release No. 34-51252 (February 25, 2005), 70 FR 10442 (March 3, 2005); Securities Exchange Act Release No. 34-51733 (May 24, 2005), 70 FR 30981 (May 31, 2005).

As before, CME Holdings' proposed acquisition of CBOT again raises a question of eligibility that cannot be answered without interpreting the text of Article Fifth(b). Among other things, that transaction raises a question as to whether, or under what circumstances, a person still possesses sufficient attributes of CBOT membership if that person's ownership interest is converted into the stock of a holding company that has acquired CBOT and if that person also is stripped of most of the traditional non-trading rights of membership. The text of Article Fifth(b) supplies no express answer to these questions. This omission is not surprising, because it would be decades after the adoption of Article Fifth(b) before anyone would conceive of transforming member-owned exchanges into stock corporations that could be owned or acquired by publicly-traded holding companies. Accordingly, the proposed acquisition of CBOT requires an interpretation of the language of Article Fifth(b), and the Proposed Rule Change fills that need. That interpretation of Article Fifth(b) falls expressly within the Commission's jurisdiction, just as have other interpretations of the same charter provision that have been presented to the Commission for its approval so many times in the past.

B. The Commission Has Exclusive Jurisdiction Because the Proposed Rule Change Involves Eligibility for CBOE Membership.

The Commission also has authority over the Proposed Rule Change because it involves a rule interpretation concerning who is eligible to become and remain a member of a national securities exchange. The Exchange Act expressly mandates a *federal* process for resolving such issues, and it calls for the Commission to exercise the principal regulatory authority in that area. In particular, pursuant to Section 6(b)(7) of the Exchange Act, the rules of an exchange must provide for a fair procedure concerning the "denial of membership" and concerning the "prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange." When issues of membership arise in individual cases, Section 6(d)(2) of the Exchange Act specifies the procedures that an exchange must follow in determining whether a person "shall be denied membership" or "prohibited . . . with respect to access to services offered by the exchange." In the event of such a denial or prohibition, Section 19(d)(1) of the Exchange Act requires that the exchange promptly provide notice of that action to the Commission, and "any person aggrieved" by such a denial or prohibition is entitled to seek Commission review of that decision pursuant to Section 19(d)(2). Commission Rule of Practice 420 sets forth detailed procedures for the review of such denials of membership and prohibitions of access. Under Section 25(a)(1) of the Exchange Act, any "person aggrieved" by a final determination by the Commission upon review of an exchange's denial of membership or denial of access may seek review in the United States Court of Appeals. In short, the Commission has particularly clear authority over questions of whether persons are eligible to become or remain exchange members, and its role in resolving such issues matters is a key part of an entirely federal process governed by the provisions of the Exchange Act.

As with the other interpretations of Article Fifth(b) that the Commission has considered in the past, the Proposed Rule Change raises just such a question of member eligibility. Article Fifth(b) is a membership rule, in that the exercise right contained in Article Fifth(b) is one of the two ways a person may become and remain a CBOE member. Because the proposed acquisition of CBOT raises questions about who is eligible to become a CBOE member pursuant to Article Fifth(b), those matters of interpretation must be answered – so that (1) CBOE can know, for purposes of Section 6 of the Exchange Act, whom to allow to trade or to utilize the other rights of membership pursuant to Article Fifth(b) and (2) the meaning of this membership rule can be established in the event that such a membership decision is appealed to the Commission pursuant to Section 19 or to the Court of Appeals pursuant to Section 25(a)(1).

Beyond the Commission's duty to regulate exchange membership issues, the Proposed Rule Change implicates the Commission's Exchange Act mandate to protect the orderly functioning of the securities markets. The Exchange Act grants the Commission broad powers, and imposes on the Commission correspondingly broad responsibility, to protect investors and to ensure fair and orderly markets.[2] It is uniquely within the Commission's knowledge and expertise to decide questions concerning the maintenance of fair and orderly markets on national securities exchanges. The Proposed Rule Change raises those very issues. It recognizes that the sudden loss of exerciser members could "adversely affect liquidity" and could lead to a "disruption to the market." To avoid such adverse effects and to ensure that fair and orderly markets are maintained on CBOE, the Proposed Rule Change acknowledges that CBOE will need to construct a transitional plan that will mitigate those potentially disruptive effects by allowing certain persons to continue to trade as exerciser members for an interim period after exercise right eligibility is lost. The adequacy of that transition plan in satisfying this critical objective of the Exchange Act is central to the question of whether, and under what conditions, the Proposed Rule Change should be approved by the Commission. Because the Proposed Rule Change implicates this important federal interest, it is essential that it be subject to the Commission's exclusive jurisdiction.

[2] *See* Exchange Act §2 (statutory goal to "remove impediments to and perfect the mechanisms of a national market system for securities" and to "insure the maintenance of fair and honest markets in such transactions"); Exchange Act §19(b)(3)(B) (Commission's power to summarily put into effect exchange rules "necessary for the protection of investors [or] the maintenance of fair and orderly markets").

C. Courts Have Upheld the Commission's Exclusive Jurisdiction Over Interpretations of Article Fifth(b).

Courts that have considered the Commission's authority over membership rules and membership decisions consistently have decided that the Commission not only has jurisdiction over CBOE's interpretations of Article Fifth(b), but that its jurisdiction preempts direct judicial consideration of those issues.[3] For instance, in *Buckley v. Chicago Board Options Exchange, Inc.*,[4] CBOT and a purported Exerciser Member brought suit to challenge CBOE's interpretation of Article Fifth(b) that the lessee of a CBOT membership, rather than the lessor of that membership, was eligible to become a CBOE member pursuant to Article Fifth(b). The *Buckley* court held that the federal regulatory scheme concerning exchange membership issues preempted state judicial review of CBOE's interpretation of Article Fifth(b), and the court accordingly affirmed dismissal of CBOT's lawsuit. In so ruling, the *Buckley* court reviewed the Exchange Act provisions that granted the Commission the authority to oversee exchange membership decisions. The court found that the concept of "membership" is "fundamental to the self-regulatory system established by the [Exchange] Act" *Id.* at 920. The *Buckley* court also recognized that "the breadth of the Commission's statutory authority to review exchange decisions relative to membership suggests a Congressional intent to limit judicial interference in the review procedure." *Id.* at 919-20. The court therefore concluded that the "structure of the Act's membership provisions makes plain that Congress intended an aggrieved person seek relief in the first instance before the Commission," subject thereafter only to a review of the Commission's final order by the United States Court of Appeals. *Id.* As a result of the pervasive nature of the statutory scheme applicable to Commission review of membership decisions, the *Buckley* court held that federal law preempted state law claims related to a purported right to CBOE membership arising under Article Fifth(b).[5]

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[3] As explained above, Section 25(a)(1) of the Exchange Act contemplates limited judicial oversight, but only by the U.S. Court of Appeals on appeal from a Commission decision reviewing membership action by an exchange.

[4] 440 N.E.2d 914 (Ill. App. 1982)

[5] In its comment letter, CBOT misquotes *Buckley* as holding that "preemption does 'not bar [a] plaintiff from pursuing at his option remedies based solely on state law, even though the action may be based on the same factual circumstances.'" Letter from Charles M. Horn, dated February 27, 2007 ("Horn Letter"), at 11, *quoting Buckley*, 440 N.E.2d at 917. *Buckley* makes no such statement about preemption, and CBOT's statement turns the case's holding on its head. As set forth above, the court in fact specifically held that its jurisdiction *was* preempted by the Commission's jurisdiction. The language (continued)

In *Board of Trade of the City of Chicago v. Chicago Board Options Exchange* ("*Board of Trade*"),[6] a different court rejected another CBOT attempt to bypass the Commission's exclusive jurisdiction over interpretations of the membership eligibility criteria in Article Fifth(b). Just as in the present case, CBOE's interpretation in *Board of Trade* was that, following a proposed CBOT transaction, there no longer would be any persons who would qualify to become a CBOE member pursuant to Article Fifth(b). CBOT sought a declaratory judgment that its proposed transaction would not affect the eligibility of such persons. The court rejected CBOT's attempt to end-run the Commission's jurisdiction. Relying on "the comprehensive federal statutory scheme regarding exchange membership regulation" under the Exchange Act, the court determined that CBOT's claims were preempted by federal law and dismissed the action.[7]

Later in 2001, another court affirmed the Commission's exclusive jurisdiction to consider interpretations of Article Fifth(b). By that time, CBOT and CBOE had arrived at an agreed interpretation of Article Fifth(b) under which persons satisfying certain criteria would continue to qualify as members under Article Fifth(b) after the proposed CBOT transaction. This agreed interpretation was reflected in an agreement known as the 2001 Agreement, and the interpretation was filed with, and later approved by, the Commission.[8] Contrary to the arguments it advances in opposition to the Proposed Rule Change, CBOT did not dispute, in connection with the 2001 Agreement, the Commission's power to review interpretations of Article Fifth(b) that arise out of proposed CBOT transactions. In fact, paragraph 11(a) of the 2001 Agreement specifically recites that "CBOT and CBOE *acknowledge* that, as an interpretation of Article Fifth(b), this Agreement must be filed with and approved by the

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that CBOT quotes from *Buckley* actually addressed an entirely different argument – *i.e.*, whether court jurisdiction was barred by Section 27 of the Exchange Act. The *Buckley* court determined that the "exclusive jurisdiction under section 27" did not itself bar a plaintiff "from pursuing at his option remedies based solely on state law, even though the action may be based on the same factual circumstances" – using the language that CBOT misleadingly quoted as applying to preemption. However, the *Buckley* court then proceeded to determine that its jurisdiction to consider such state law claims was *preempted* for the reasons set forth above.

[6] No. 00CH1500 (Circuit Court of Cook County, Illinois, Chancery Division, filed October 17, 2000)

[7] *Board of Trade*, tr. at 58 (Jan. 19, 2001) (attached hereto as Exhibit A).

[8] *See* Securities Exchange Act Release No. 34-51733 (May 24, 2005), 70 FR 30981 (May 31, 2005) (SR-CBOE-2005-19).

[Commission] *in order to become effective*" and that the agreement "shall be null and void, as if never executed, and neither party shall be deemed to be in any way bound by . . . [the 2001 Agreement]" if the Commission refused to approve the interpretation.[9] In other words, CBOT acknowledged that Article Fifth(b) required interpretation in order to determine who would be eligible to exercise after the proposed transaction and accepted as well the Commission's jurisdiction to review and approve such an interpretation.

However, a group of persons who owned transferable CBOE memberships ("Seat Owners") attempted to challenge that interpretation in court. Following a legal discussion of preemption, the court dismissed the case, concluding once again that "the question of whether or not this is a fair interpretation" of the rights under Article Fifth(b) "is exclusively within the province of the Securities and Exchange Commission."[10]

In sum, three courts have addressed the very rule in question – namely, Article Fifth(b) – and on two occasions have considered complaints about CBOE's interpretation of that provision by the same key parties that are complaining now – namely, CBOT and persons who claim to be CBOE members by exercise. In each case, those courts have ruled that the Commission not only has jurisdiction to consider such interpretations, but that any competing judicial jurisdiction is preempted by federal law.

D. Unless the Commission's Jurisdiction Is Exclusive, Exchanges Will Be Unacceptably Subject to Conflicting Regulation by Competing Authorities.

It is critical that the Commission assert and protect its jurisdiction over the interpretation of exchange rules, because exchanges otherwise would be subject to inconsistent standards imposed by competing judicial authorities, a circumstance that would undermine the federal regulatory scheme that the Commission is charged with promoting. This risk would be particularly acute if the Commission were to allow state courts to assert control over membership eligibility standards, such as those contained in Article Fifth(b). One court's interpretation of those standards in one case could conflict with another court's interpretation of those same standards in respect of a prospective member in another case. Both of those interpretations could conflict with the Commission's own interpretation of that same eligibility standard.

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[9] 2001 Agreement (attached hereto as Exhibit B) (emphasis added).

[10] *Bond et al. v. Chicago Board Options Exchange, Inc. and Board of Trade of the City of Chicago*, No. 01CH14427, tr. at 56-57 (Circuit Court of Cook County, Illinois, Chancery Division, Sept. 17, 2001) (attached hereto as Exhibit C).

The court in *Buckley* held that such a potential conflict is unacceptable. When CBOT asked the court to involve itself in construing Article Fifth(b)'s membership eligibility standards, the court determined that its authority to intervene was preempted because judicial action "could conflict with the Commission's oversight and review of exchange decisions relative to membership."[11] As the court observed:

> "This case serves as a perfect example of this potential conflict. If the Board of Trade prevailed Buckley would be reinstated as a member and Hard removed. Hard could then appeal to the Commission through the review procedures set forth in the Act. An obvious conflict would result if the Commission determines that Hard and not Buckley is the proper member for purposes of the Act."[12]

Precisely the same risk of inconsistent determinations would exist in this case if the Commission allowed state courts to define membership eligibility under Article Fifth(b). Exchange membership criteria would be subject to the potentially conflicting interpretations of each court that considered the issue. Not only might those interpretations of the membership eligibility rules differ from the Commission's, but they might differ from each other. Such a situation would put CBOE in the impossible situation of needing to obey potentially inconsistent mandates of competing authorities.

Allowing courts to interpret the membership eligibility criteria in Article Fifth(b) not only would expose exchanges to this unfair dilemma, but also would undermine the goal of a national system of exchange regulation, particularly the regulation of exchange membership.[13] The premise of CBOT's jurisdictional attack is that an exchange's certificate of incorporation constitutes a contract with its members and that state courts therefore have jurisdiction over membership rights arising from that corporate charter. If that argument applies to the exercise right under Article Fifth(b), it applies just as logically to any membership eligibility criteria embedded in any exchange's constitution, charter or rules – all of which are just as logically viewed under state law as contracts with members. If CBOT's argument were accepted,

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[11] *Buckley*, 440 N.E.2d at 919.

[12] *Id.* at 919.

[13] *See* Exchange Act, §§ 6(b)(7) (Commission to ensure that exchanges have a "fair procedure" for the "denial of membership" and for the "prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange") and 19(d)(1)–(2) (establishing procedures for Commission review of such denial of membership or access to services).

therefore, disputes about exchange membership criteria and eligibility would be for state courts to decide. In that event, regulatory policy in this area no longer would reflect the coherent national scheme that is possible with uniform Commission oversight. Instead, regulatory policy would be the chaotic product of a patchwork of potentially conflicting mandates emanating from many courts in multiple jurisdictions. Such disarray would be inconsistent with the Exchange Act's goal of a national system of regulation over national securities exchanges.

Sound regulatory policy underlies the Exchange Act's mandate that the Commission act as a force for consistency in exchange regulation. The central premise of the Exchange Act's concept of self-regulation is that exchanges and the Commission bring important, specialized experience to the issues that confront exchanges. It is instructive, for instance, to consider the "red herring" issues that some of the commentators have raised in opposing the Proposed Rule Change.[14] CBOE is confident that the Commission's experience will prevent it from being misled by these arguments. However, even the most competent judges cannot possess or duplicate the Commission's experience with the subtleties of the Exchange Act or with the complicated interplay of issues that bear on the organization and operation of exchanges. To ensure that the Commission's specialized experience and knowledge is brought to bear on exchange membership issues, the Commission must assert and protect its exclusive jurisdiction over those issues, an exclusive jurisdiction that has been consistently accepted by the courts that have addressed the issue.

E. The Commission's Consideration of the Proposed Rule Change Would Not Exceed Its Authority.

CBOT asserts that the Commission is powerless to consider the Proposed Rule Change because it supposedly "concerns a dispute over the interpretation of CBOE's Delaware Charter," matters of corporate governance, and "contracts between CBOE and CBOT" – specifically, the 1992 Agreement.[15] These assertions are largely incorrect, and in any event in no way deprive the Commission of its statutory jurisdiction.

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[14] For instance, one commenter's misunderstanding of Commission Rule 19b-4 is so complete that the commenter argues that, because an interpretation that is "reasonably and fairly implied" from a rule need not be filed as a "proposed rule change," any interpretation that *is* filed with the Commission necessarily must be unreasonable. *See also* Section III.D.4 (discussing one commenter's argument that the Proposed Rule Change would cause CBOE to violate Section 6(c)(4) of the Exchange Act).

[15] Horn Letter at 6.

1. The Commission has express jurisdiction over interpretations of CBOE's "charter."

It is particularly perplexing that CBOT would argue that the Commission's power is constrained because the Proposed Rule Change involves an interpretation of CBOE's "charter." As demonstrated above, the Exchange Act *expressly* gives the Commission power over interpretations of an exchange's "articles of incorporation" – which is synonymous with its "charter."

2. The Commission would not be interfering with matters of corporate governance.

Contrary to CBOT's claim that consideration of the Proposed Rule Change would cause the Commission to interfere with matters of corporate governance, the Proposed Rule Change in no respect implicates matters of corporate governance. It does not deal for instance with the procedures and formalities for making legally effective corporate decisions. Instead, the Proposed Rule Change involves an interpretation of an exchange membership rule. The only way in which the Proposed Rule Change involves matters of corporate governance is that it was approved by CBOE's Board of Directors in its capacity as CBOE's governing body. That action cannot be cited as a reason why the Commission lacks power to review and act on the Proposed Rule Change, because approval by an exchange's board of directors is necessary for almost every exchange rule change filed for Commission approval under Section 19 of the Exchange Act. Even if actual issues of corporate governance typically are consigned to the jurisdiction of state courts, the Exchange Act, as demonstrated above, expressly gives the Commission the power to oversee exchange membership determinations and to review interpretations of exchange rules that address membership criteria or other issues.

In making its corporate governance argument, CBOT relies on *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990), in which the Court of Appeals invalidated a Commission rule that prevented securities exchanges from listing the stock of corporations that nullified, restricted or disparately reduced the voting power of existing stockholders. The court held, "Because the rule directly controls the substantive allocation of powers among classes of shareholders, we find it in excess of the Commission's authority under §19 of [the Exchange Act]."[16]

[16] *Id.* at 407.

The language of the court's holding in *Business Roundtable* demonstrates its inapplicability to the Proposed Rule Change, as well as the inapplicability of CBOT's entire corporate governance argument. In *Business Roundtable*, the question was whether the Commission had the power, under Section 19, to promulgate a *Commission* rule to deal with a *substantive* matter of corporate law – namely the "substantive allocation of powers" among shareholder classes. The court concluded that the Commission's rule went beyond any of the purposes for which Commission rulemaking was allowed under Section 19. In contrast, the Proposed Rule Change does not involve the promulgation of a Commission rule, but rather the Commission's review of an exchange interpretation of an existing exchange rule. Section 19 of the Exchange Act *expressly* provides for the Commission's power to address such interpretations. Accordingly the Commission's consideration of that interpretation by definition cannot be "in excess of the Commission's authority under § 19."

3. The Commission has the power to evaluate the substance of CBOE's interpretation, not just whether it conflicts with the Exchange Act.

CBOT argues that the Commission has only a limited power to review interpretations of membership rules. Because membership provisions allegedly represent contracts with members, the Commission supposedly must leave to state courts any substantive interpretation of those rules and must limit itself to determining whether the interpretation would conflict with the Exchange Act. CBOT offers no support of this limited view of the issues the Commission may consider in reviewing an exchange's rule interpretation. In any event, that view is inconsistent with the language of the Exchange Act, has therefore previously been rejected by the Commission, and has been rejected by all of the courts to consider the issue.

The language of the Exchange Act makes clear that the Commission has authority to address the merits of the interpretation, not just whether it offends some Exchange Act principle. Section 19(b)(2) requires the Commission to consider whether the interpretation is "consistent with the requirements of [the Act] and the rules and regulations thereunder applicable to such organization." One of the "requirements of [the Act]" is the requirement in Section 19(g)(1) that an exchange "comply with . . . its own rules." Accordingly, the Commission's review of a proposed rule interpretation necessarily includes a review of whether that interpretation is consistent with the language of the exchange rule being interpreted – here, Article Fifth(b).

The Commission itself construed its jurisdiction in this way when it previously was confronted with a substantive dispute about how Article Fifth(b) should be interpreted:

> "Among other things, national securities exchanges are required under section 6(b)(1) of the Exchange Act to comply with their own rules. Thus, if

> CBOE has failed to comply with its own Certificate of Incorporation, which is a rule of the exchange, the Commission believes that this may not only violate state corporation law, but it would also be inconsistent with the Exchange Act and, thus, the Commission could not approve the proposed rule change under section 19."

See Securities Exchange Act Release No. 51252, 70 Fed. Reg. 10442, 10444 (Mar. 3, 2005). In that instance, the Commission concluded that it was a "federal matter under the Exchange Act" whether CBOE "complied with its own Certificate of Incorporation." *Id.* So too, it is a "federal matter under the Exchange Act" whether CBOE has appropriately interpreted what it means to be a CBOT "member" for purposes of Article Fifth(b) in light of the circumstances arising from the proposed CME Holdings acquisition of CBOT.

Moreover, as demonstrated above, the *Buckley* court and the other courts to address the role of the Commission in interpreting Article Fifth(b) have recognized no limit on the power of the Commission to address the merits of a proposed rule interpretation. In those cases, the courts held that the Commission had jurisdiction to review *all* aspects of interpretations of Article Fifth(b) and that the state court's power to engage in any review of such an interpretation was preempted. Those courts recognized that the risk of conflict mandated that the state courts completely defer in such matters to the Commission and to the federal process of judicial review specified in the Exchange Act.

4. The 1992 Agreement did not create CBOE membership rights, but instead constitutes an agreed interpretation of Article Fifth(b).

CBOT's argument that Commission review of the Proposed Rule Change would intrude upon the province of state courts is premised in part on the claim that CBOE's interpretation somehow would "breach" the 1992 Agreement between CBOE and CBOT. These very breach of contract claims were made in *Buckley* and *Board of Trade*. Far from concluding that such claims robbed the Commission of its power to consider interpretations of Article Fifth(b), both cases held that the Commission's jurisdiction was superior and exclusive.

Moreover, the premise of the argument is wrong – that the 1992 Agreement represented some kind of independent bargain to confer a contractual exercise right on certain individuals. Any contractual grant of exercise rights that added to or detracted from the grant in Article Fifth(b) would have represented an amendment of Article Fifth(b). Under the terms of Article Fifth(b), however, no amendment of Article Fifth(b) would have been valid without the affirmative vote of at least 80% of Exerciser Members and Seat Owners, voting as separate

groups. No such vote was obtained in connection with the 1992 Agreement, so the 1992 Agreement could not validly have been a contractual source of new exercise rights.

CBOT correctly observes that the 1992 Agreement provides that Exerciser Members will have the same rights as Seat Owners, subject only to the restriction on transferability. However, that language created no new rights. Instead, it merely echoed the central proposition of Article Fifth(b), which already provides that, "so long as [a person] remains a member of said Board of Trade," that person shall be "vested with all rights and privileges . . . of [CBOE] membership."

The point of the 1992 Agreement was not to confer new contractual rights on Exerciser Members, but to clarify what it takes to *qualify* as such an "Exerciser Member." To that end, the term "Exerciser Member" was defined as "an Eligible CBOT Full Member" (or such a person's delegate) who has "exercised the Exercise Right" to become a CBOE member "pursuant to Article Fifth(b)."[17] In turn, the 1992 Agreement defined what was required to be an "Eligible CBOT Full Member," both in general and in connection with acquisitions or mergers involving CBOT.[18]

In short, the aspects of the 1992 Agreement that are at issue constituted at most an agreement about a shared *interpretation* of Article Fifth(b), not an agreement that created new contractual rights. That agreed interpretation had legal effect not because CBOE and CBOT agreed to it, but because it was approved by the Commission and thereby became a binding interpretation of Article Fifth(b). At most, the contractual obligation between CBOE and CBOT was to jointly advance and advocate that joint interpretation, an obligation that CBOE discharged when it submitted that interpretation to the Commission as a proposed rule change.[19] Any obligation with respect to the terms of that interpretation arose only when and because the Commission approved that interpretation. At that point, the interpretation became part of CBOE's "rules" and, absent any later refinement in light of other circumstances, became something that CBOE was obliged to obey pursuant to Section 19(g)(1) of the Exchange Act.[20]

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[17] 1992 Agreement (attached as Exhibit D) §1(d).

[18] Ex. D, §§1(a), 3(d).

[19] Ex. D, §4(a).

[20] In addition to the obligation to support the interpretation of Article Fifth(b) embodied in the 1992 Agreement in the rule change approval proceedings before the Commission, there were other aspects of that agreement that created contractually enforceable obligations between CBOE and CBOT. (continued)

Indeed, the fact that the shared interpretation embodied in the 1992 Agreement is between CBOE and CBOT demonstrates that no new contractual rights of exercise membership were being created. If CBOE had intended to reach an agreement that would be binding other than as an interpretation of Article Fifth(b), it would have been pointless to reach that agreement with CBOT. It is an elementary principle of corporate law that a corporation has no power to enter into a contract that binds its stakeholders.[21] If CBOE had intended to create contractual rights relating to exercise membership – as well, presumably, to impose contractual limitations on such membership rights – CBOE would have had to reach that contract with those who might claim to be CBOT "members." However, no such persons were parties to the 1992 Agreement. On the other hand, it makes sense that CBOE would reach the 2001 Agreement with CBOT if, as was the case, the purpose of the 2001 Agreement was to support the approval of the interpretation by the Commission.[22] In the context of Commission review, the fact that CBOT institutionally agreed with CBOE's interpretation of Article Fifth(b) made Commission approval of the interpretation more likely – regardless of whether CBOT had the legal right to speak for, and to enter into a contract binding upon potential CBOT "members."

II. CBOE's Board of Directors Followed Procedures that Were Fair, Appropriate, and Fully In Accord with the Requirements of Delaware Law.

We now turn to those comments that attack the procedures that CBOE's Board of Directors followed in considering the impact of the announced acquisition of CBOT by CME

For instance, CBOT agreed to maintain an effective record of every trading right or privilege thereafter granted in respect of a CBOT Full Membership, and CBOT committed to submit a rule change filing consistent with the agreed interpretation of Article Fifth(b). Ex. D, §§ 2(e), 3(f). Unlike these individual commitments, which CBOE and CBOT had the power to make binding on their own, only the Commission has the authority to make interpretations of Article Fifth(b) legally effective.

[21] *See e.g.*, Fletcher Cyclopedia of the Law of Corporations §5710 ("contract between a corporation and a third person is not binding on its shareholders as individuals"); *Majestic Co. v. Orpheum*, 21 F.2d 720, 724 (8th Cir. 1927) ("In legal conception a corporation has an entity separate and distinct from its stockholders; and the act of the corporation is not that of the stockholders."); *First Realvest, Inc. v. Avery Builders, Inc.*, 600 A.2d 601, 603 (Pa. Super. Ct. 1991) ("Shareholders, officers and directors are not held liable for the corporation's breach of a contract," absent piercing of the corporate veil).

[22] In addition, the CBOE interpretations of Article Fifth(b) embodied in the 1992 Agreement and 2001 Agreement were conditioned on certain actions being taken or not taken by CBOT, which also made it necessary for CBOE and CBOT to enter into an agreement concerning these conditions.

Holdings on the eligibility of persons to utilize the exercise right to become and remain members of CBOE.

A. CBOE's Board Interpreted Article Fifth(b) Because New Circumstances Required an Interpretation, Not to Undercut the Delaware Court's Jurisdiction.

Some of the comment letters attack the Proposed Rule Change as an improper attempt to undercut the jurisdiction of the Delaware court to consider the lawsuit brought by CBOT and a purported class of CBOT members. This criticism is both factually incorrect and based on an incorrect legal premise.

The faulty legal premise is that the Delaware court has a proper role in interpreting Article Fifth(b) in light of the new circumstances presented by CME Holding's announced acquisition of CBOT. As demonstrated in Section I above, though, the Commission has the exclusive jurisdiction to consider this issue. There is nothing improper in presenting this issue of interpretation to the authority that has the responsibility to consider it.

Second, as a factual matter, the issue of interpreting Article Fifth(b) was not before the Delaware court when CBOE submitted the Proposed Rule Change to the Commission. The only issue before the Delaware court at that time concerned how to allocate, between Seat Owners and Exerciser Members, the shares of stock or other consideration into which CBOE memberships might be converted in the demutualization of CBOE. That issue did not involve whether anyone continued to *qualify* as an Exerciser Member, but rather sought to *value* the consideration to which an Exerciser Member would be entitled, and this issue therefore was appropriately before the Delaware court prior to the announcement of the proposed acquisition of CBOT.[23] The only impact on the Delaware litigation of CBOE's interpretation of Article Fifth(b) is that the interpretation may moot this valuation issue – because there no longer will be anyone who will qualify as an Exerciser Member.[24] CBOE's Proposed Rule Change therefore does not interfere

[23] However, as expressed in its motion to dismiss filed with that court, any such judicial consideration is premature until CBOE's Special Committee has completed its determination of this issue.

[24] Of course, for the valuation issue to be mooted in this way, the CBOE Board's interpretation first must be approved by the Commission, and the acquisition of CBOT must occur before the demutualization of CBOE. If the acquisition were abandoned or were scheduled to be completed after CBOE's demutualization, the valuation issue once again would be properly before the Delaware court, absent some other change in circumstances.

with a pending lawsuit, but rather represents an effort to bring new and separate issues before the regulatory body charged with resolving those issues. The fact that the resolution of these new issues may moot pending judicial proceedings in no way represents an unwarranted intrusion on the judicial process.

To correct a further factual misconception in several of the comment letters, CBOE's Board did not submit the Proposed Rule Change in an attempt to undercut the jurisdiction of the Delaware court, nor did the Board attempt to "adjudicate" this or any other dispute between CBOE and CBOT or between Seat Owners and Exerciser Members. Instead, the Board considered the impact of the announced acquisition of CBOT on the exercise right simply because the Board had no choice but to do so. It was obvious from the announced terms of the acquisition that it would result in substantial changes to the structure and ownership of CBOT, as well as to the rights represented by CBOT membership. CBOE could not ignore these changed circumstances, but rather had to assess whether these changes affected the eligibility to be an Exerciser Member.

CBOE could not answer this question on the basis of prior interpretations of Article Fifth(b). The demutualization of CBOT in 2005 had itself substantially changed the rights of CBOT members from what they were when "members" of that exchange first were granted the exercise right in 1973. The most notable change was that the 2005 demutualization of CBOT eliminated the ownership rights that previously had been a defining characteristic of CBOT membership. However, CBOE had decided to interpret Article Fifth(b) such that members of CBOT would remain eligible to utilize the exercise right following the demutualization of CBOT under specified conditions, and CBOT agreed to that interpretation in the 2001 Agreement.[25] The interpretation of Article Fifth(b) embodied in the 2001 Agreement expressly applied, though, only "in the absence of any other material changes to the structure or ownership of the CBOT . . . not contemplated in the CBOT Restructuring Transactions [*i.e.*, in the 2005 demutualization]." The currently proposed acquisition of CBOT by CME Holdings obviously would constitute a significant change in the structure and ownership of CBOT. Moreover, in neither its public filings nor its private communications with CBOE concerning the 2005 demutualization did CBOT reveal any plan to be acquired by CME, so the later acquisition transaction addressed by the Proposed Rule Change could not have been, and was not, a change that was "contemplated in the CBOT Restructuring Transactions" that were the subject of the 2001 Agreement, as amended. Thus, the interpretation of Article Fifth(b) embodied in that

[25] The interpretation of Article Fifth(b) embodied in the 2001 Agreement was approved by the Commission in Release No. 34-51733 dated May 24, 2005.

agreement no longer could be relied upon even to resolve the status of the exercise right in light of the restructuring to which that interpretation originally applied, once the acquisition of CBOT by CME Holdings becomes effective.

Beyond this, the acquisition of CBOT will make additional changes to the rights of CBOT members, beyond those made in the 2005 demutualization, by stripping CBOT members of virtually every ownership and governance right they ever held in respect of CBOT.[26] The result will be that, upon the effectiveness of the acquisition, a CBOT membership will become little more than a permit to trade on that exchange – a situation that the 2001 Agreement was never intended to address.

It plainly was essential to address the cumulative effect, if any, of these fundamental changes to the nature of CBOT membership upon the eligibility of persons to become and remain members of CBOE pursuant to the exercise right – questions that were neither contemplated nor addressed in Article Fifth(b) itself or in any prior interpretations of that Article. Contrary to the argument of some commenters, this question could not be resolved merely by determining what CBOT now chooses to call a "member." Because the question involves the meaning of a provision of *CBOE's* certificate of incorporation, the unavoidable question is whether the substance of a person's rights qualifies that person as a CBOT member as that term was contemplated when Article Fifth(b) was adopted. Just as on prior occasions when unanticipated changes to the rights of CBOT members raised similar questions, it fell to CBOE's Board of Directors to answer these questions by interpreting Article Fifth(b) in light of these changes, pursuant to its authority under Delaware law. CBOE's Delaware counsel advised CBOE that its Board of Directors has this authority[27] and, contrary to the statements made in certain comment letters, there is no requirement that the matter of interpreting CBOE's Certificate of Incorporation must be submitted to a membership vote. That power to interpret of course instead is subject only to Commission approval upon consideration of the comments of interested parties.[28]

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[26] *See* Point III.C.2 below.

[27] Letter from Wendell Fenton, Richards, Layton & Finger, to Joanne Moffic-Silver, General Counsel and Corporate Secretary, Chicago Board Options Exchange, Incorporated, dated January 16, 2007, attached as Exhibit 3f to the Proposed Rule Change.

[28] Because this is the process that the Exchange Act established for the review and approval of rule interpretations, there is no basis to argue, as have some commenters, that the fulfillment of that process somehow constitutes a deprivation of "due process."

B. The CBOE Board's Procedures Ensured Its Decision Was Supported by Disinterested Public Directors.

Despite the unfounded statements to the contrary in several comment letters, the CBOE Board of Directors' deliberative procedures ensured that the interpretation of Article Fifth(b) was considered and decided upon by directors who had no personal or financial interest in the issue and who were not subjected to improper influence from those who might have such an interest. Before this issue was presented to CBOE's Board of Directors, it was recognized that there were directors who were Seat Owners and others who were Exerciser Members and that those directors therefore could be considered to have a personal interest in how Article Fifth(b) should be interpreted and could be considered "interested" directors under Delaware corporate law. On the other hand, because CBOE's public directors are forbidden from holding any interest in any type of CBOE membership or in any entity that holds such an interest (or, for that matter, in any CBOT membership or in an ERP), these public directors necessarily must be considered as "disinterested" in the matter.

Accordingly, consistent with principles of Delaware corporate law, the matter was submitted to the Board as one in which some of the directors might be deemed to be interested. As an initial matter, all directors were expressly reminded about their fiduciary obligations to be fair to both classes of CBOE members and to avoid both unjust enrichment and undeserved injury to either group. As permitted under Delaware law, the interested directors then were permitted to participate in an initial discussion of the issue, after their interest had been disclosed to the Board.[29] However, the decision-making process was controlled by the *disinterested* public directors. First, the proposed interpretation was moved and seconded by separate disinterested public directors. After the initial open discussion of the resolution, the seven voting disinterested public directors convened in a separate meeting, outside of the presence of both the interested directors and management. In this separate meeting, the disinterested public directors were given direct access to the Exchange's financial and legal advisors so that they could obtain any pertinent information and counsel from those advisers. The seven disinterested public directors then voted on the proposed interpretation in their private session, and they voted unanimously to adopt the interpretation. Only after the disinterested public directors had completed their vote did the interested directors vote on the matter, and the voting interested directors also unanimously supported the interpretation.

[29] By way of analogy, under 8 Delaware Code § 144, the participation of interested directors in the authorization of a contract or transaction does not invalidate that contract or transaction if the board is aware of the material aspects of the directors' interest and if a majority of the disinterested directors votes to authorize the contract or transaction.

In short, although interested directors were allowed to participate in an initial general discussion of the interpretation at issue, the disinterested public directors' vote was independent of the action of the interested directors and was conducted under procedures that ensured that the disinterested public directors were free of any undue influence from anyone with an interest in the interpretation. These procedures collectively ensured that, contrary to the claims of some of the comment letters, the decision to adopt the interpretation of Article Fifth(b) was independent of Seat Owner influence.

C. CBOE's Special Committee Was Properly Excused from the Deliberations about the Proposed Interpretation and Properly Suspended its Work After that Decision.

In criticizing the decision-making process by which CBOE decided to submit the Proposed Rule Change, a few comment letters criticize CBOE for supposedly excluding from that process the independent directors who served on CBOE's Special Committee. This criticism is based on a fundamental misunderstanding of the purpose of the Special Committee and of the reasons the Special Committee members recused themselves from the decision about the Proposed Rule Change.[30] At the time this issue of interpretation was presented to CBOE's Board of Directors, the Board consisted of eleven public directors, eleven member directors, and the Chairman of the Board. Several months prior to the announcement of the acquisition of CBOT by CME Holdings, four of CBOE's public directors had been designated by the Board as a Special Committee to determine the allocation of consideration between Seat Owners and Exerciser Members in connection with CBOE's own planned demutualization. These four directors were in the midst of their work when CBOT announced the proposed acquisition, thereby requiring the interpretation of Article Fifth(b).

The Special Committee members recused themselves from the decision about the Proposed Rule Change because they could not know definitively at that time whether the acquisition of CBOT would ever be consummated or whether it would be consummated before CBOE's demutualization. They also could not know at that time how the CBOE Board ultimately would interpret Article Fifth(b) in light of the proposed acquisition of CBOT. Thus, there remained (and still remains) a real possibility that CBOE's Special Committee would be called upon to complete its assigned task of allocating the consideration in CBOE's planned

[30] Commenters imply that CBOE removed the Special Committee members from the decision-making process on this issue, but the Special Committee members actually recused themselves from that process.

demutualization.[31] CBOE was aware that the valuation decision of the Special Committee would be accorded substantial deference under Delaware law if the Special Committee's fairness were above suspicion. It was foreseeable that any interpretation of Article Fifth(b) in light of the announced acquisition of CBOT could disappoint either Seat Owners or Exerciser Members, depending on the decision of the Board. Moreover, there was no reason to assume that the four public directors on the Special Committee would lead the Board in a particular direction on that matter of interpretation, and the remaining seven public directors were fully capable to provide thorough and independent consideration of the issues of interpretation raised by the proposed acquisition of CBOT. Accordingly, the four public director members of the Special Committee recused themselves from participation in the interpretation of Article Fifth(b) so that they would be insulated from any claim, however specious, that their participation in that decision evidenced bias or prejudgment that might taint the valuation process that they might later be called upon to complete. In short, far from constituting some illicit maneuver to rig the result, the recusal of the Special Committee members represented a prudent effort to preserve the Special Committee's neutrality from a later attack – from one type of member or the other.

Some commenters also question the decision of the Special Committee to suspend its valuation work after the Board determined to submit the Proposed Rule Change. These commenters assume that the Special Committee was ordered to suspend its work, and they therefore claim that CBOE "took away" matters that had been delegated to the Special Committee and that CBOE "abruptly suspended" that Committee. In fact, the decision to suspend the Special Committee's work was made by the Special Committee itself. When it was informed of the interpretation of Article Fifth(b) adopted by the Board, the Special Committee observed that its valuation work would be moot – because there no longer would be any persons entitled to be treated as Exerciser Members – if the CBOE Board's interpretation were approved by the Commission and if the acquisition of CBOT occurred before the demutualization of CBOE, as CBOE had determined was likely. After consulting with its own independent legal counsel, the Special Committee decided to suspend its activities in light of these developments. The Special Committee itself reported its conclusions in this regard to the Board, which accepted them as reported. However, the Special Committee remains in existence, fully empowered to

[31] Some commentators question why CBOE would purchase ERPs if it believed that the proposed acquisition of CBOT would eliminate exercise right eligibility. The simple answer is that CBOE does not know whether the proposed CME Holdings acquisition ever will be consummated, much less consummated before CBOE's own demutualization. That uncertainty was underscored in recent weeks as ICE made a competing bid for CBOT, and there was a delay in the vote of the shareholders of both CME Holdings and CBOT Holdings on the previously proposed transaction.

make the determinations originally delegated to it, if and when such determinations should be required.

D. The Proposed Rule Change Is Not Subject to the Procedural Requirements for Amendments of Article Fifth(b).

Finally, several commenters incorrectly contend that the action taken by CBOE's Board of Directors constituted an amendment of Article Fifth(b) and therefore was subject to the procedural requirements applicable to amendments of that provision – including, among other things, approval by separate super-majorities of Seat Owners and Exerciser Members. In fact, as demonstrated above, the Proposed Rule Change is an interpretation of Article Fifth(b) in response to unanticipated changed circumstances and is consistent with its language and intent. As such, it is not subject to the procedural requirements applicable to amendments of that provision.

The Commission confronted precisely the same arguments when it considered and approved the interpretation of Article Fifth(b) embodied in the 2001 Agreement and related agreements between CBOE and CBOT. In that circumstance, certain Seat Owners opposed that interpretation and claimed that the 2001 Agreement constituted an amendment of Article Fifth(b) and that it therefore was subject to the approval of the separate super-majorities of the two membership classes. The full Commission rejected that argument, concluding that "it was persuaded by the CBOE's analysis of the difference between 'interpretations' and 'amendments'"[32] – namely, that the purpose of the filing was to interpret the meaning of an existing provision, not to change that provision.

In fact, CBOT's position that the Proposed Rule Change constitutes an amendment directly contradicts the position it consistently took in the *Bond* litigation surrounding the 2001 Agreement (before that litigation was dismissed on preemption grounds). In that case, CBOT's counsel went to great lengths to argue that the 2001 Agreement was an interpretation of Article Fifth(b), just as the 1992 Agreement before it had been:

- "I agree in focusing . . . that what's at stake here is *simply an interpretation by the CBOE*."
- [The 1992 Agreement] "also was *an interpretation as this is*. . . ."

[32] Securities Exchange Act Release No. 34-51733 (May 24, 2005), 70 FR 30981 at 30984 (May 31, 2005) (SR-CBOE-2005-19).

- "This is clearly an interpretation . . . geared toward what the Board of Trade is doing in its restructuring to a share corporation."
- "And that was resolved and then there was a further agreement in '92. *This is yet a new interpretation.*"
- [That case] was "about a dispute that is resolved *in the interpretation that is embodied in the 2001 agreement.*"
- "That's what's at stake here. This is not an amendment. It's an interpretation and that's what this turns on."[33]

There is no way to reconcile CBOT's prior, unambiguous statements with the self-interested position that CBOT now advances. Just as CBOT admitted and the Commission concluded that the 2001 Agreement was an interpretation, not an amendment, of Article Fifth(b), that conclusion unavoidably also applies to the Proposed Rule Change.

III. The Commission Should Approve the Interpretation of Article Fifth(b) Adopted by CBOE's Board of Directors.

We turn now to the comments that address the substance of the Proposed Rule Change.

A. The Proposed Rule Change States an Adequate "Statutory Basis" for Approval.

Some of the comment letters object that the Proposed Rule Change articulates an inadequate "Statutory Basis" under Item 3, because it states only that the proposed interpretation "is consistent with and furthers the objectives of the Act . . . , [and] is a reasonable interpretation of existing rules of the Exchange." This challenge ignores the rest of Item 3, which consists of ten pages of text that immediately precede that one summary sentence. These pages explain in detail the history behind the proposed interpretation, the need for the interpretation, the purpose it serves, and the reasons why it is a fair and reasonable interpretation of Article Fifth(b).

The Proposed Rule Change thereby fully satisfies the requirement of Form 19b-4 that a self-regulatory organization "must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal

[33] Exhibit C at 14-15, 52-55 (emphasis added.)

and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act." Having presented in Item 3 a detailed explanation of why the proposed interpretation is consistent with the requirements of the Act, the Proposed Rule Change then simply states the conclusion that the foregoing presentation provides the required statutory basis to approve the interpretation. This is the format generally used by all self-regulatory organizations in responding to Item 3 of Form 19b-4. Any suggestion that this format is inadequate because the summary statement of the statutory basis at the end of Item 3 does not repeat the detailed description of the purpose and effect of the rule change set forth in the preceding pages of that same Item demonstrates only that persons making such a suggestion lack familiarity with the customary structure of most Form 19b-4 filings.

B. The Proposed Rule Change Does Not Terminate the Exercise Right, but Rather Recognizes that CBOT's Proposed Action Will Eliminate Eligibility for that Right.

Perhaps the most frequently repeated misstatement in the comment letters is that CBOE's proposed interpretation represents an attempt to "terminate" or "extinguish" or "take away" the exercise right from persons who otherwise would be entitled to that right. The first flaw in this argument is its assumption that CBOE somehow has initiated an attack on the exercise right. In fact, CBOE has done nothing but consider the proposed actions of CBOT. It is CBOT that chose to change its structure and ownership in a way that will eliminate the "members" of CBOT as that term is used in Article Fifth(b). Just as CBOE has had to interpret Article Fifth(b) on at least four prior occasions in light of actions taken or proposed to be taken by CBOT, the actions of CBOT in changing and proposing to change fundamental aspects of CBOT membership once again have made it necessary for CBOE to interpret Article Fifth(b). Though CBOE must interpret Article Fifth(b) in response to these actions by CBOT, it is the action of CBOT, and not any action of CBOE, that has put exercise right eligibility at risk.

In any event, the Proposed Rule Change does not terminate or extinguish or take away a vested exercise right, but rather addresses through an interpretation whether anyone will continue to be *eligible* to utilize the exercise right after CME Holdings acquisition of CBOT is complete. Item 2 of the Proposed Rule Change makes this point directly: "This interpretation is that upon the consummation of the acquisition of CBOT by CME Holdings, the right of members of CBOT to become and remain members of CBOE without having to purchase a CBOE membership will be terminated, *in that there no longer will be individuals who qualify as a member of CBOT*

within the meaning of the rule that creates that right."[34] (Emphasis added.) Although here and elsewhere in the Proposed Rule Change, the exercise right is sometimes described as being terminated under the proposed interpretation, those references simply mean that no one will remain eligible to utilize the exercise right after the proposed acquisition of CBOT so fundamentally alters the nature of CBOT membership.

Some commenters purport to be astonished that events could cause persons to lose their eligibility to utilize the exercise right. That expression of astonishment flies in the face of the express terms of Article Fifth(b), which provide that the exercise right is available to a person only for "so long as he remains a member of said Board of Trade." This language demonstrates that the exercise right always has been a fragile right that will be lost the moment a person ceases to be a member of CBOT within the meaning of Article Fifth(b). Accordingly, it should come as no surprise to anyone that the consequence of a merger or acquisition of CBOT might be to eliminate the eligibility of persons to utilize the exercise right. In fact, that possibility was directly contemplated in the prior interpretation of Article Fifth(b) that was embodied in the 1992 Agreement. That provision describes certain conditions that must exist in order for the exercise right to continue to apply following a merger or acquisition of CBOT, and it then states that "Article Fifth(b) shall not apply to any other merger or consolidation of CBOT with, or acquisition of CBOT by, another entity." Thus, even if there can be a debate as to whether the conditions of Section 3(d) of the 1992 Agreement are satisfied in the case of a particular merger or acquisition of CBOT, there can be no debate that a possible outcome of any merger or acquisition of CBOT is that the exercise right eligibility will be lost.

CBOT could have caused CBOE to issue a transferable CBOE membership to every CBOT member at the time CBOT created CBOE and drafted the language of Article Fifth(b), but CBOT chose not to do so. Instead, CBOT tied the exercise right to whether the members of CBOT and their transferees continued to maintain the status of members. It follows from this that, if there ever were a transaction that had the effect of terminating the status of one or more persons as a member of CBOT, such persons would cease to be eligible to utilize the exercise right. On the individual member level, such a transaction could include the sale or other transfer of the person's CBOT membership. On the corporate level, such a transaction could include any merger, acquisition or other corporate reorganization involving CBOT that results in the elimination of CBOT "members" as that term was understood when Article Fifth(b) was

[34] Some commenters argue against the interpretation because of the magnitude of the effect its approval would have on former Exerciser Members. Of course, the fact that the interpretation will have significant consequences in no way detracts from the validity of that interpretation and constitutes no reason why the interpretation should not be approved.

adopted.[35] Both Article Fifth(b) and previously approved interpretations of that provision therefore make clear that exercise right eligibility in fact can be lost in such circumstances.

C. The Proposed Interpretation of Article Fifth(b) is Reasonable.

1. After the Acquisition, CBOT Will Be Owned by CME Holdings, Not by Purported CBOT "Members."

The proposed acquisition of CBOT presents just such a circumstance in which a corporate event will cause exercise right eligibility to be lost. First and most fundamentally, there no longer will be "members" of CBOT after that acquisition, because a fundamental incident of exchange "membership" is an ownership stake in the exchange. After the acquisition, though, CBOT will owned by CME Holdings, not by any of the persons who claim to be CBOT members.

This fundamental problem first arose in connection with CBOT's restructuring in 2005. In that restructuring, CBOT "members" gave up their ownership stake in CBOT, in return for stock in a holding company, CBOT Holdings, Inc., of which CBOT became a wholly-owned subsidiary. As set forth in the Proposed Rule Change, when CBOT first proposed to demutualize in late 2000, CBOE's response was that the loss of the ownership stake in CBOT would eliminate the concept of CBOT "membership" as it existed when Article Fifth(b) was adopted and therefore would eliminate exercise right eligibility.[36] During ensuing negotiations with CBOT, however, CBOE and CBOT agreed on a number of conditions that, if met, provided a basis for CBOE to interpret Article Fifth(b) so that exercise right eligibility would be preserved after the change in CBOT ownership. This interpretation was reflected in the 2001 Agreement, which was filed with, and approved by, the Commission.

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[35] Either in the case of an individual transaction or in the case of a corporate transaction, persons deciding on such transactions presumably would balance the value of what will be received in the transaction with what will be lost in that transaction. The Boards of CBOT and CBOT Holdings presumably made this kind of calculation when they approved the acquisition of CBOT, taking into account the possibility that the transaction might eliminate exercise right eligibility. *See e.g.*, Amendment No. 3 to Form S-4 Registration Statement of Chicago Mercantile Exchange, Inc. (filed Feb. 26, 2007), at 30-32 (warning CBOT members that the exercise right may be lost as a consequence of the CME Holdings' acquisition). A similar calculation will be made by the current members of CBOT in deciding whether to vote in favor of the acquisition.

[36] Securities Exchange Act Release No. 34-43521 (November 3, 2000), 65 FR 69585 (November 17, 2000) (SR-CBOE-2000-44, filed on August 31, 2000).

CBOT's demutualization so stretched the concept of ownership – and the resulting concept of membership – that CBOE made clear that its interpretation would cease to apply if there were any further attenuation of the ownership interest of so-called CBOT "members." Accordingly, section 1(d) of the 2001 Agreement expressly stated that the agreement's provisions concerning exercise right eligibility would apply only "in the absence of any other material changes to the structure or ownership of the CBOT or to the trading rights and privileges appurtenant to a CBOT Full Membership not contemplated in the CBOT Restructuring Transactions," a term that was defined to refer to CBOT's demutualization. The acquisition of CBOT by CME Holdings was first proposed in late 2006 and thus could not have been, and was not, a transaction contemplated in the "CBOT Restructuring Transactions" when the 2001 Agreement was adopted or when CBOT actually restructured in 2005. Accordingly, the interpretation in the 2001 Agreement no longer will apply after the CME Holdings acquisition – either with respect to the original dilution of ownership that resulted from CBOT's 2005 demutualization or the further dilution that will occur as a result of the presently proposed form of acquisition of CBOT by CME Holdings.

Ownership was the essential attribute of CBOT membership in connection with Article Fifth(b), so its absence eliminates exercise right eligibility. Article Fifth(b) itself states that a principal purpose of the exercise right was to recognize "the special contribution made to the organization and development of [CBOE] by the members of the [CBOT]." CBOT acknowledges in its comment letter that this contribution consisted of contributing "seed capital," making "loan guarantees" and sharing "intellectual property."[37] Each of these contributions was made by CBOT members in their capacity as CBOT *owners*. Moreover, CBOT members were granted the exercise right to compensate them for the use of these CBOT assets of which the CBOT members were the indirect owners. It therefore makes sense to interpret Article Fifth(b) such that an ownership interest in CBOT is an essential attribute of CBOT "membership." That ownership interest was deeply attenuated, however, when CBOT demutualized and will become even more remote when CME Holdings becomes the owner of CBOT and the stock of current shareholders of CBOT Holdings is converted into stock of yet another entity, CME Holdings. Under these circumstances, and given the inapplicability of the 2001 Agreement after that acquisition, it is reasonable to interpret exercise right eligibility to be eliminated upon the completion of that transaction.

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[37] Horn Letter at 1-2.

2. Other Key Attributes of Membership Will Be Eliminated in the CME Holdings Acquisition.

Apart from their ownership interest in CBOT, current "members" of CBOT will lose in the CME Holdings acquisition the few remaining membership rights they retained following the 2005 restructuring. In particular, they will be stripped of their present right to elect directors and nominating committee members, the right to nominate candidates for election as directors, the right to call special meetings of members, the right to initiate proposals at meetings of members, the right to vote on extraordinary transactions involving CBOT, and the right to amend or repeal the bylaws of CBOT. In other words, following the CME Holdings acquisition, persons who had formerly been the full members of CBOT will simply be the holders of trading permits and will not possess any of the other rights commonly associated with membership in an exchange. Because, as noted above, the exercise right was originally created to compensate CBOT members in their capacity as the direct or indirect owners of the property used for the development of CBOE, and not simply in their capacity as persons entitled to trade on CBOT, it is reasonable to interpret Article Fifth(b) such that exercise right eligibility will be eliminated after the CME Holdings acquisition is complete and all of the ownership attributes of CBOT members have been eliminated.

3. Section 3(d) of the 1992 Agreement Fails to Support the Objections to CBOE's Interpretation of Article Fifth(b).

Section 3(d) of the 1992 Agreement provides no support for the position of the commenters. Section 3(d) of the 1992 Agreement reflects CBOE's interpretation of Article Fifth(b) that, if specified conditions are met, "the Exercise Right of Article Fifth(b) shall continue to apply" after CBOT "merges or consolidates with or is acquired by or acquires another entity." However, Section 3(d) goes on to provide that "Article Fifth(b) shall not apply to any other merger or consolidation of CBOT with, or acquisition of CBOT by, another entity." In other words, it is *only* by satisfying the conditions of Section 3(d) that exercise right eligibility can survive a merger, consolidation or acquisition of CBOT.

The CME Holdings acquisition does not satisfy these conditions. First, Section 3(d) requires that "the survivor" of the transaction must be an exchange. Section 3(d) does not define what it means to be "the survivor" of an acquisition of CBOT, but the use of the definite article to refer to "the" survivor demonstrates that the condition refers to the single entity that is dominant in the transaction. In the case of an acquisition, that entity is the acquiring entity – in this case, CME Holdings. However, CME Holdings is not an exchange, so the CME Holdings acquisition would not satisfy this condition.

Second, and most importantly, Section 3(d) requires that "the 1,402 holders of CBOT Full Memberships are granted in such merger, consolidation or acquisition membership in the survivor." That condition would not be satisfied even if CBOT somehow were deemed "the survivor" of the CME Holdings acquisition. As demonstrated above, CBOT "members" lost their ownership stake in CBOT when CBOT restructured in 2005, and this event eliminated the concept of CBOT membership in the sense contemplated by Article Fifth(b). The only reason persons continue to qualify today as "members" of CBOT for purposes of Article Fifth(b) is that, under the 2001 Agreement, CBOE interpreted Article Fifth(b) so that persons continue to qualify as "members" of CBOT if they hold all of three specified interests in CBOT and CBOT Holdings following the 2005 demutualization of CBOT. However, that interpretation, by its terms, will cease to apply after the CME Holdings acquisition, because that acquisition will involve a change in the ownership or structure of CBOT not contemplated in the 2005 demutualization of CBOT. Because that interpretation no longer will apply, the fact that no one has an ownership stake in CBOT means that there will be no basis to treat any person as a "member" of CBOT for purposes of Article Fifth(b) after the CME Holdings acquisition. Even if CBOT were considered the "survivor" of the acquisition, the persons who held memberships in CBOT before the acquisition therefore will not be "granted membership in the survivor," and the second condition of Section 3(d) of the 1992 Agreement will not be satisfied.

In fact, the conclusion would be the same even if the 2001 Agreement somehow were deemed to continue to apply after the CME Holdings acquisition – because it will be impossible to satisfy the requirements of the interpretation of Article Fifth(b) embodied in the 2001 Agreement. That interpretation was that persons remain "members" of CBOT only if they continue to hold all of three specified interests in CBOT and CBOT Holdings following the 2005 demutualization of CBOT – namely, one Class B, Series B-1 membership in CBOT, one ERP and 27,338 shares of Class A stock of CBOT Holdings. However, after CBOT is acquired by CME Holdings, there no longer will be any persons who could hold all three of these interests – because CBOT Holdings Class A stock will cease to exist and instead will be converted into either cash or shares of CME Holdings. Some commenters seem to assume that, following the acquisition, ownership of some number of shares of stock in *CME Holdings* should be enough to support exercise right eligibility, in lieu of the shares of stock of CBOT Holdings required in the 2001 Agreement. However, there is no support for this assumption in the 2001 Agreement or anywhere else.

Finally, the CME Holdings acquisition also would not comply with the third condition of Section 3(d) – that the memberships provided in the transaction "have full trading rights and privileges in all products then or thereafter traded on the survivor" (other than products that, at the time of the acquisition, were traded on the acquiring exchange, but not on CBOT). CME Holdings will be the survivor of the CME Holdings acquisition, but it is not an exchange.

Accordingly, no one will be granted trading rights "on the survivor" in the CME Holdings acquisition, and the third condition of Section 3(d) will not be satisfied.

Because the proposed acquisition would fail to satisfy each of the conditions of Section 3(d), that provision not only does not support continued exercise right eligibility, but in fact specifies that the proposed acquisition is one as to which the exercise right eligibility in Article Fifth(b) "shall not apply."

D. Other Objections to the Proposed Rule Change Incorrectly Presume Continued Exercise Right Eligibility and Otherwise Misread Article Fifth(b).

1. Equal Treatment Is Not Mandated.

Finally, various objections to the proposed interpretation of Article Fifth(b) incorrectly assume the very issue at hand – that exercise right eligibility survives the CME Holdings acquisition of CBOT. For instance, several comment letters complain that the proposed interpretation is inconsistent with Article Fifth(b) because that interpretation would not treat Exerciser Members the same as Seat Owners in all respects. However, any argument that Exerciser Members are entitled to equal treatment presumes that a person remains eligible to be an Exerciser Member at the time the relative treatment of the two types of CBOE members is to be determined. However, a person who has lost that status has no claim to be treated the same as a Seat Owner. The Proposed Rule Change deals only with the question of continued exercise right eligibility, and not with how Exerciser Members might have been treated at some future time if they had retained that status at that time. Thus, it is not relevant to the validity of the proposed interpretation that persons who *previously* would have qualified as Exerciser Members will not be treated the same as Seat Owners under that interpretation.

Although the issue is not relevant to the Proposed Rule Change, the commenters are plainly mistaken in arguing that a person who remained an Exerciser Member necessarily would be entitled to equal treatment in all circumstances. To support this incorrect view of absolute equality, CBOT quotes in its comment letter from an excerpt from Section 3(a) of the 1992 Agreement – to the effect that Exerciser Members "have the same rights and privileges of CBOE regular membership as other CBOE Regular Members." However, CBOT ignores the remainder of this sentence, which goes on to state "except that Exerciser Members shall not have the right to transfer (whether by sale, lease, gift, bequest or otherwise) their CBOE regular memberships or any of the trading rights and privileges appurtenant thereto." In light of this express exception to any grant of equal rights, there is an undeniable difference between the rights of Exerciser Members and the rights of Seat Owners, whose memberships are freely transferable and leasable,

subject only to regulatory requirements being met by the transferee or lessee. It would be up to the Special Committee to decide whether and how this difference in the respective rights of the two classes of membership should be reflected in the way that each such class might participate in the demutualization of CBOE. This question would only arise, however, if any persons retain eligibility as an Exerciser Member after the CME Holdings acquisition of CBOT, which they do not under the Proposed Rule Change. Only this latter question is relevant to the validity of the Proposed Rule Change.

To further support a notion of absolute equality, some commenters rely on another aspect of Section 3(a) of the 1992 Agreement, which gives Exerciser Members the same right as Seat Owners to participate in an "offer or distribution of any optional or additional CBOE membership" and in certain kinds of "cash or property distributions." Aside from the fact that such rights belong only to those who remain eligible to be Exerciser Members, the proposed demutualization of CBOE would not involve any "offer" or "distribution" as those terms are understood under Delaware law. That demutualization will be accomplished through a merger of CBOE with a newly created holding company. A merger involves the conversion of ownership interests – here, the conversion of memberships into shares of the holding company stock.[38] A merger is factually and legally distinct from either a distribution, which involves the transfer of money or other property to stakeholders, and from an offer.[39]

2. The Proposed Rule Change Does Not Unfairly Discriminate.

The CBOT comment letter also complains that the proposed interpretation unfairly discriminates between Exerciser Members and Seat Owners. This objection once again assumes away the issue at hand. Any claim that CBOE would be discriminating against Exerciser Members necessarily assumes that there are persons who qualify as Exerciser Members. It

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[38] *Warner Communications Inc. v. Chris-Craft Indust., Inc.*, 583 A.2d 962, 968-69 (Del. Ch. 1989); Black's Law Dictionary 488 (7th ed. 1999) (a distribution is the "transfer of money or other property or incurring of indebtedness to or for the benefit of shareholders).

[39] *See Rothschild Intern. Corp. v. Liggett Group, Inc.*, 474 A.2d 133, 137 (Del. 1984) (cash-out merger is not a liquidating distribution under the doctrine of independent legal significance); *Shield v. Shield*, 491 A.2d 161, 167 (Del. Ch. 1985) ("The statutory conversion of stock in a constituent corporation into stock of the surviving corporation that is effected by a stock for stock merger ought not to be construed to constitute a sale, transfer or exchange of that stock"); *Orzeck v. Englehart*, 192 A.2d 26, 38 (Del. Ch. 1963) (offer and purchase of all of capital stock of corporation did not constitute a *de facto* merger).

cannot constitute unfair discrimination for CBOE to refuse to grant member benefits to a person who has ceased to qualify as an Exerciser Member. The conclusion of the Proposed Rule Change is that no person will continue to be eligible to become or remain an Exerciser Member after the completion of the proposed acquisition of CBOT. It is irrelevant to that issue how CBOE would need to treat persons who indeed did retain that eligibility.

Moreover, if persons somehow did remain eligible as Exerciser Members, it would be the responsibility of the Special Committee to determine the relative participation of the two classes of members in the demutualization of CBOE. It could not be considered unfair discrimination if the Special Committee appropriately treated the two classes differently based on the inherent differences in the rights of those two classes – *e.g.*, differences in the transferability of membership rights. However, that issue is not before the Commission, which instead is asked only to approve an interpretation about whether any persons would remain eligible to be Exerciser Members after the CME Holdings acquisition.

3. Former Exerciser Members Are Not Entitled to Retain the Value of an Exercise Membership After Exercise Right Eligibility is Eliminated.

Many commenters object to the proposed interpretation because, in their view, it would deprive Exerciser Members of the "value" of their CBOE exercise memberships. However, this complaint once again assumes its conclusion – that persons will retain their rights as Exerciser Members after the proposed acquisition of CBOT is completed. However, if that acquisition will end exercise right eligibility, then former Exerciser Members have no claim to any value derived from the exercise right to which they no longer qualify. The "value" of exercise membership would be lost not because of an act by CBOE, but because of by CBOT's decision to be acquired in a way that ended exercise right eligibility. Indeed, in that circumstance, any interpretation that would grant value to former Exerciser Members would constitute an unjust windfall to such persons and would dilute the rights of Seat Owners in a manner inconsistent with the terms of Article Fifth(b). The objection of the commenters therefore misses the point in the same way as so many of the other objections in comment letters. The issue before the Commission is whether any persons will remain eligible to become or remain Exerciser Members after the proposed CME Holdings acquisition is completed. For the reasons set forth in the Proposed Rule Change, the proper interpretation of Article Fifth(b) is that the proposed acquisition will end that eligibility.

4. The Proposed Rule Change Does Not Violate Section 6(c)(4) of the Exchange Act.

One commenter contends that the Proposed Rule Change should be disapproved because it supposedly would violate Section 6(c)(4) of the Exchange Act, which provides that exchanges may not "decrease the number of memberships in such exchange" below the number of memberships "in effect on May 1, 1975." According to this commenter, the number of CBOE members on that date "included all CBOT Members who might subsequently choose to become CBOE members" (emphasis added), so that the supposed "elimination" of Exerciser Members reduces the number of CBOE members below 1975 levels in violation of the Exchange Act.

However, the Proposed Rule Change does not represent an act by CBOE to "eliminate" or "reduce" CBOE memberships. In fact, the Proposed Rule Change merely interprets who is eligible to be an Exerciser Member after the CME Holdings transaction. It is the decision of CBOT and its members to enter into the CME Holdings acquisition, not any act of CBOE, that will cause those persons to lose their status as Exerciser Members after that acquisition is complete. Accordingly, CBOE has taken no action to "eliminate" or "reduce" the number of any of its memberships within the meaning of Section 6(c)(4).

E. The Proposed Interpretation of Article Fifth(b) Would Not Undermine the Quality or Fairness of CBOE's Markets.

Some commenters argue that the Proposed Rule Change should be disapproved because the quality and fairness of CBOE's markets supposedly would be undermined if all persons who presently participate as Exerciser Members were to lose their ability to trade in that capacity. The premise for this argument is unfounded. It is unlikely that the quality of CBOE's markets would be undermined in that circumstance, given the number of persons who provide liquidity as market makers, both in-person and remotely. In any event, if there is a risk of disruption, the answer is to eliminate the disruption, not to disapprove the interpretation. To that end, the Proposed Rule Change already contemplates that temporary, interim trading access may be provided to former Exerciser Members for such period of time as is "necessary to avoid any disruption to the market as a result of the loss of Exerciser Members, which could involve CBOE adopting a plan to provide some form of trading access to such persons in the absence of the exercise right."[40] The exact nature of this interim solution is a function of the circumstances existing if and when the CME Holdings transaction becomes effective, but CBOE is fully

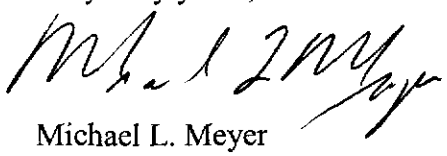
[40] Proposed Rule Change, as amended, at 28 of 69.

prepared to take any interim steps that are necessary to avoid disruption of its markets as a result of the implementation of its interpretation.

CONCLUSON

In light of the foregoing considerations, and the additional points made in the Proposed Rule Filing, CBOE respectfully requests that the Commission approve SR-CBOE-2006-106, as amended.

Very truly yours,

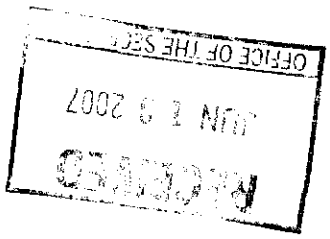


Michael L. Meyer

MLM:mcb

cc: Elizabeth K. King (via Federal Express)
Joanne Moffic-Silver (via Messenger)

EXHIBIT A



#12

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

BOARD OF TRADE, Plaintiff,	)	
vs.	)	NO. 00 CH 1500
CHICAGO BOARD OPTIONS EXCHANGE, Defendants.	)	

REPORT OF PROCEEDINGS had in the above-entitled cause, had before the Honorable THOMAS DURKIN, one of the Judges of said Division, had on the 19th day of January, 2001.

PRESENT:

EDWARD JOYCE

DONNA WELCH

WILLIAM HARTE

ROBERT KOPECKY

WILLIAM R. QUINLAN

MICHAEL ROTHSTEIN

PAUL DANIEL

GREGORY L. ARMSTRONG
Official Court Reporter
69 W. WASHINGTON - 900
Chicago, Illinois 60602

THE COURT: Chicago Board of Trade versus Chicago Board Options Exchange, 00 CH 15000, is called.

Please identify yourselves and state whom you represent.

MR. JOYCE: Ed Joyce for the Chicago Board of Trade.

MS. WELCH: Donna Welch for Chicago Board of Trade.

MR. HARTE: William Harte for Chicago Board of Trade.

MR. KOPECKY: Robert Kopecky for the Chicago Board of Trade.

MR. QUINLAN: William R. Quinlan for Options Exchange.

MR. ROTHSTEIN: Michael Rothstein for Chicago Board Options Exchange.

MR. DANIEL: Paul Daniel Chicago Board Options Exchange.

THE COURT: The matter comes on call this afternoon on a 2-615 motion to dismiss Count 1 and a 2-619 motion to dismiss the entire complaint.

As is the policy of this Court the 615 motion is decided on the briefs, and to the extent that it might be instructive to the litigants this afternoon we'll proceed with that first.

This matter comes before the Court on the defendant's motion to dismiss the plaintiff's complaint for declaratory judgment and injunctive relief. Defendant's motion is brought pursuant to Section 2-619 point one, encompassing both a 2-615 and 2-619 motion to dismiss.

Plaintiff Board of Trade of the City of Chicago, hereinafter referred to as the Board of Trade, is a not for profit corporation which operates a futures and options exchange which facilitates the trading of various financial products.

Defendant, Chicago Board Options Exchange, hereinafter referred to as CBOE is also a not for profit corporation that operates an options exchange which facilitates the trading of securities options. The CBOE is also registered as a national securities exchange with the Securities and Exchange Commission, hereinafter referred to as the SEC.

As such, the CBOE is regulated by the SEC under the Security Exchange Act of 1934, reported at 15 U.S.C. Section 78a et seq. The CBOE's certificate of incorporation provides that full members of the Board of Trade are entitled to become members of the CBOE without having to purchase a CBOE membership. And that will be

referred to as the exercise right.

This exercise right was specifically set forth in Article Fifth (b) of the Certificate of Incorporation and is only available to full members of the Board of Trade, some approximately fourteen hundred individuals. As a full member of the Chicago Board of Trade, a member may trade as a principal and broker all futures and options contracts traded at the Board of Trade. A full member may also sell or lease their membership to another eligible party.

As is relevant here, the other classes of membership have less trading, voting and liquidation rights than do the full members. After several disputes surfaced regarding the appropriate definitions and scope of the exercise right the parties executed an agreement on September 1st, 1992 to further clarify the rights of the parties. And that is referred to as the 1992 agreement.

Under the 1992 agreement the exercise right was specifically limited to the fourteen hundred and two members who had full memberships at the Board of Trade. The 1992 agreement also provided that the exercise right attached to each of the fourteen hundred and two full members as long as a full membership

entitled holders to trade all contracts traded on the Board of Trade and to every trading right or privilege associated with a full membership.

In an apparent anticipation of future growth the 1992 agreement also included provisions governing the merger, consolidation or acquisition of the Board of Trade and the affect of those on the exercise right. Section 3(d) of the 1992 agreement provides that the exercise right shall continue in full force and effect in the event the Board of Trade merges or consolidates or acquires another entity if: One, the surviving entity of the merger, consolidation or acquisition is an exchange which provides a market in financial instruments; two, the fourteen hundred and two full membership holders are granted memberships in the surviving entity; and three, the surviving entity's membership must have full trading rights and privileges in all products then or thereafter traded by the surviving entity.

In light of the sea change within the securities exchange industry, the Board of Trade sought to change its corporate structure. The initial step, which was approved by the Board of Trade's members, resulted in the Board of Trade reincorporating into a

Delaware non-stock not-for-profit corporation. As part of this initial step, the Board of Trade also established a wholly owned subsidiary entitled eCBOT to operate the Board of Trade's electronic trading business.

Troubled by the Board of Trade's restructuring plan the CBOE asserted that if the Board of Trade reincorporated in Delaware the CBOE would view this as a violation of the 1992 agreement. In response, the Board of Trade filed an action for declaratory judgment and injunctive relief.

On August 3rd, 2000 my colleague, Judge Stephen Schiller dismissed the complaint. Judge Schiller's dismissal order was based upon the CBOE's judicial admission that the CBOE would not take action to extinguish the exercise right solely as a result of the Board of Trade reincorporating in Delaware. Thus as a result Judge Schiller found that there was no justiciable controversy.

In order to complete the restructuring plan the Board of Trade would soon become a Delaware for profit stock corporation. In the process the current Board of Trade members would become member shareholders in the for profit corporation. Unsettled with the Board

of Trade's plan the CBOE has again asserted that the present restructuring plan would result in the extinguishment of the exercise right. The CBOE has since filed and amended proposed rule change with the SEC seeking a ruling regarding the effect of the Board of Trade's restructuring plan on the exercise right.

The Board of Trade now brings this two count complaint seeking a determination of rights under the 1992 agreement. Count 1 alleges a claim for breach of the 1992 agreement. In Count 2 the Board of Trade seeks a declaration that its restructuring plan does not violate the 1992 agreement, and also seeks an injunction prohibiting the CBOE from extinguishing the exercise right. Defendants now move to dismiss Count 1 under Section 2-615 and the entire complaint under Section 2-619.

Generally, Courts are directed to rule on the Section 2-615 motion before entertaining a motion brought under Section 2619. Citing to Mueller versus Community Consolidated School District at 287 Illinois Appellate 3d 337. Thus, the Court today will first address the Section 2-615 motion to dismiss, which seeks to dismiss Count 1 only.

Granting a Section 2-615 motion to dismiss

addresses the sound discretion of the trial Court. The only question presented by such a motion is whether the pleader has asserted sufficient facts, which if proven, would entitle him to relief. Citing to Kirchner versus Greene at 294 Illinois Appellate 3d 672. To state a cause of action and avoid dismissal under this section a complaint must set -- must set forth a legally recognized cause of action and then plead facts bringing the claim within the cause of action. Citing to Vincent versus Williams at 279 Illinois Appellate 3d page one at page 15.

Such a motion does not raise affirmative factual defenses, but alleges only defects found on the face of the pleading. Accordingly, as a matter of construction, all well pled facts in the pleading and those in the exhibits attached thereto are to be taken as true, and any reasonable inferences to be drawn there from are to be drawn in favor of the pleader.

However, conclusions of law or factual conclusions unsupported by specific facts are not to be taken as true. With those principles in mind the Court turns to an examination of Count 1. In Count 1 the Board of Trade alleges a claim for breach of the 1992 settlement agreement. To properly plead a breach of

contract action a plaintiff must allege: One, the existence of a contract; two, the performance of all contractual conditions; three, facts of the defendant's breach; and four, the existence of damages as a consequence of that breach. Citing to On Tap Premium Waters versus The Bank of Northern Illinois at 262 Illinois Appellate 3d 254.

The Board of Trade, of course, maintains that it has properly pled an action for breach of contract. They assert that the CBOE has breached its contractual obligation to, quote, "interpret Article Fifth (b) in accordance with the provisions of this agreement". End quote. The CBOE argues in response that the Board of Trade has failed to sufficiently allege that the CBOE has breached the 1992 agreement, and has failed to allege damages as a result of the purported breach.

Specifically, the CBOE maintains that a differing interpretation of a provision within the 1992 agreement is insufficient to establish a breach of the 1992 agreement prior to action on that different interpretation.

After examining plaintiff's complaint the Court finds that the Board of Trade has failed to adequately plead a breach of contract action. The Court

first recognizes that the complaint sufficiently alleges the existence of the 1992 agreement. The complaint, taken as a whole, also sufficiently alleges the performance of all contractual conditions by the parties. However, the Board of Trade has failed to allege any facts establishing that the CBOE breached the 1992 agreement.

The mere intent to breach, or a difference of opinion regarding the scope of a specific provision within a contract is insufficient to establish a breach of contract. Nevertheless, the complaint also fails to allege damages. Indeed, Count 1 does not contain any allegations of damages, or even a prayer for relief. Even the most sympathetic reading of the plaintiff's complaint does not reveal that plaintiff has alleged sufficient facts showing a breach of the 1992 agreement or damages resulting from any breach.

The Court therefore finds that the Board of Trade has failed to state a claim for breach of the 1992 agreement. Accordingly, defendant's motion to dismiss Count 1 pursuant to Section 2-615 is heard and granted without prejudice. Insofar as the 2-619 portion of the motion the movants may argue.

MR. QUINLAN: May we approach?

THE COURT: Of course. Pardon me?

MR. QUINLAN: May we approach.

THE COURT: Are you talking about for the purpose of argument or you want the side here to -- you are talking about, approach for the purpose of argument.

MR. QUINLAN: I assume that's what your Honor just invited.

THE COURT: You can stand anywhere you wish.

MR. QUINLAN: Your Honor --

THE COURT: Before you start, I notice when Mr. Quinlan introduced himself that his voice seemed strained and if it's necessary for you to move in order to hear him --

MR. ROTHSTEIN: If you prefer, your Honor, I'm happy to stand up there.

THE COURT: If you'd like, you are more than welcome.

MR. QUINLAN: Your Honor, our motion addresses four reasons for dismissal. The first one set forth is the preemption. We believe in the Buckley under, the Buckley versus CBOE case is directly on point, that the CBOE's cause of action regarding membership dispute issues, which this is, is preempted.

Furthermore, because of the Buckley decision

we believe that collateral estoppel would also be appropriate here inasmuch as the very issue that is contested here regarding membership issues, and the right of the State Court to consider this under the circumstances is foreclosed by Buckley. As such it would be collaterally estopped inasmuch we have the same parties, we have the same issues, the final judgment -- and under those circumstances it could be collateral estoppel.

The other issue that we raise is primary jurisdiction. In that situation we believe that this issue currently pending before the SEC, we have filed for a rule interpretation on August 30th of this year. We amended that and, in October of this year because of the change in the proposed plan of the CBOT. And that has been set out for comments have been had.

THE COURT: Interrupt you because you make an assertion in your brief that your opponents filed a ninety-two page letter as essentially an aggrieved party with the SEC in responses to the rule change proposal. Is there any dispute as to that, as -- factual assertion?

MR. KOPECKY: As to whether we filed a ninety-two page letter; we did indeed, your Honor.

THE COURT: You may proceed again.

MR. KOPECKY: I think it was ninety-two.

MR. QUINLAN: Ninety-seven I believe, but give or take a few pages, I don't think it makes a lot of difference. And in that submittal they also point out on page seven of the submittal that in fact they reserved through it the right to amend this in that their plan is not at this time finalized and has not been approved.

So that there may well be additional amendments as they point out in the SEC. We think that as -- we'll talk later on that, this other, on that. This is an extremely important issue that gets into the last one, which is we don't think there is any case of controversy. By the CBOT's own admission here the future and contingent facts that may or may not occur preclude any declaratory relief here.

The plan that they have proposed has not been approved. As to the step two, they have not submitted it for a vote. And frankly there is no date that they would submit it for a vote at the present time. They themselves indicate the plan may well be adjusted or changed again.

Under the provisions of, as we put forth and

the cases that we have cited, the declaratory judgment requires some specific firm policy or act taking place. That means that there is an issue here. There is no issue at this time because we are not even sure what their plan is, nor are they in all honesty. So we don't see how this --

THE COURT: I have to interrupt you because I have some knowledge here regarding this; from a scheduling conference I have been informed on, the obverse side of the coin which I also have of this case which is up next week, I have been informed as part of a pretrial conference that there is an expectation of a vote as early as the end of March or as late as the end of July. Only because of the fact -- not bringing that up because I expect it's going to occur at that time, I'm bringing it up because I want you to know that I was made aware of that.

MR. QUINLAN: Well, we have been told in the past that they expect a vote as early as December. We have been told that, expected a vote as early as January and we have not heard the new date that they, quote, expect a vote. But obviously the first two dates that we were told are not any longer on the table, and therefore I don't think that there is any reason to believe that

this new date again would be any more likely to occur than any other.

They do have some new management that has taken place at CBOT and the new management obviously is going to take sometime and has indicated that they will take some time to work on how they go forward and what their process will be, but that really isn't the point.

The real point as I think as your Honor knows, the fact whether it's January, whether it's March, whether it's April or whether it's June, even having such a state indicates to you nothing has taken place yet. So we really don't have anything that is fixed here that would be something that we would be in conflict with. And what we have done, we have a proposed a rule interpretation to the SEC which we must then submit to them for their approval. And they have accepted it and they are looking at this proposed interpretation that we submit as a reasonable or unreasonable interpretation.

And as such that is what pends now. It does pend before the SEC. The Buckley case I think points out clearly, has exclusive jurisdiction generally in these areas where anything that involves an issue regarding membership.

I know that the Chicago Board of Trade makes point of the fact that this is a contract, but there was a contract also in the case involving Buckley and that was the article it incorporated. They also allege it was a contract and what we had here was an ordinary garden variety contract. Well, the Court there on appeal said; no, it isn't. What you really have here is essentially a dispute about membership, who can be a member. Who can be entitled to exercise their right, the so-called exercise right and that determination, who it is, it's a matter for the SEC, because the SEC provides in, SEC rules provide that it's exclusively within their jurisdiction to determine who has membership rights.

And if you do make any interpretation about a membership right or you take any action that in any way affects membership right, immediately the SEC has to be notified. And the SEC has the right then on its own motion to take action regarding that. Surely the other party, whoever is the other party, if he feels that he or she is an aggrieved party may also take action and file.

So we believe here clearly that the Buckley case should be applied. The Buckley case has never been

modified, never been overruled, never been questioned. Really dealing with the same parties, extension of the same transactions. The law of this jurisdiction is binding is the wording. It considered basically the same issues. The only thing we have now is a 1992 agreement, which I think everybody admits was an interpretation of Article Fifth (b). And it provided an exceptional enlargement of the interpretation to include mergers, consolidations, acquisitions, and things of that nature. It resulted in a three point one sixteen rule that was submitted to the SEC along with the agreement which the SEC approved.

Now, there is some suggesting here that in the agreement there is a provision called 6(c) which provides that we can, that the parties can seek relief in the State Courts. Clearly as your Honor knows, if you read, the 6(b) -- 6(c) and then read 6(b) which is, immediately precedes that; 6(b) provides that the State law applies. Under any circumstances where it isn't, federal law doesn't take priority over it, and in a case of, dealing with anything regulating membership or affecting membership. Surely this is the same kind of situation.

This is not a garden variety type of contract

dispute, such as whether we have complied with the terms of the 1992 agreement. That would be a provision, or it would have been some, breach of some vendor's type of contract or something that we were required to comply with, a much different situation. And when it was submitted to the SEC, the SEC while it took the agreement, it never addressed, nor did we address or ask for any kind of interpretation on 6(c), and they did not interpret 6(c).

And what did they do, though; they approved the rule which was thirty-eight point one sixteen and found that to be consistent with the Act. Surely if they were going to take any can action to approve something as dramatic as what's suggested by the Chicago Board of Trade, that somehow all of these agreements, this agreement and all of the issues involved in the agreement now were things that could be handled in the State Court, from any proceeding in the SEC. We think the SEC would have addressed this and it would have been can something they needed to do.

On the other hand, I think as your Honor knows, they don't have the authority to do that in the first place. The only way that jurisdiction can be seeded to the State is by an act of Congress which would

be a new statute or amendment to the statute, and that has not occurred. So even if the SEC somehow wanted to agree that everything should be in the State Court and throw all the -- in your hands, they couldn't do this if they wanted to.

So in that instance there just is no basis for the contention here that somehow 6(c) operates to give jurisdiction now to the State Courts. When --

THE COURT: You don't disagree with your opponents, however, it's not field preemption.

MR. QUINLAN: No. We are not talking about that. It's a preemption, however, because of the particular issue, and because of the broad scheme and plan that they have for that and that -- they insist on the review of that by the SEC and as was pointed out in Buckley, this is a core portion of the statute. And it is not merely the fact that these are self-regulating exchanges. It's the fact that those, self-regulating exchanges are over seen by the SEC, and the enforcement procedure of the SEC that gives the protections under the SEC Act that is intended by Congress.

And that's why the Buckley case and why I believe -- appropriately saw this as a comprehensive plan and scheme that just filled the area on this type

of issue. If it were some other matter, if it were legitimately a contract and just a contract dispute, as Buckley pointed out then surely the State Court could have jurisdiction. They found jurisdiction for purposes of considering the case primarily because it was alleged to be a contract. But the Court determined that the core issue in that case was not determined, was not a contract issue as, we submit it's not in this case either.

We also suggest even if it is not a situation, you know, where we have this complete preemption at the very least it's a primary jurisdiction issue. This is surely a complicated question, complicated issues, factually driven and they need to be considered by an agency that is appropriate to address them and the appropriate agency here would be the SEC. Again, the appropriate action would be a referral to the SEC by a dismissal or at least by, at least a staying of this Court proceedings until the SEC acts. We cited a number of cases in support of that proposition. The Chicago Board of Trade has not responded to any of those cases at all.

Your Honor, we believe for all of these reasons that frankly their case is entitled to

dismissed under any of the theories that we submitted before as enunciated; preemption, collateral estoppel. It's a primary jurisdiction issue. And frankly, bottom line is we don't think there is even a case in controversy here, because we don't seem to have any kind of plan, that is a plan that is, what is CBOT's position that is in conflict with something that we have done or said. Frankly, we have done nothing to in any way infringe upon the exercise right nor have we suggested that we would take any steps against anybody under the exercise right.

The only things we have done is filed, as you are entitled to under the law, a request for an interpretation by the SEC of a proposed interpretation that we have. And the SEC has taken jurisdiction of this and has begun to hear that. For all those reasons we would ask your Honor to grant our motion.

MR. QUINLAN: Miss Welch.

MR. KOPECKY: Thank you.

THE COURT: Two daughters practicing law --

MR. KOPECKY: Your Honor, let me, if I may start just briefly and address Mr. Quinlan's point about the uncertainty of this deal. Mr. Quinlan said that perhaps there was a new chairman, that there was going to be a

re-thinking of whether to go forward with this transaction; he may not be aware that on Tuesday of this week the Board of Directors of the Board of Trade did approve the transaction, did authorize the filing of the S-4 registration statement with the SEC. The terms of -- 1(h) registration statement filed. Next we are on the way toward the final approval process.

THE COURT: Still it requires a vote of the members.

MR. KOPECKY: It does indeed require a vote of the members. It does, and I'll come back to the ripeness issue just a little later if I may, but I want to clarify that factual --

THE COURT: One of the 1(h), 1(h) S-4; one of the things I wanted to check with you on, I highlighted this, now I can't find the highlight. Bear with me for just a moment.

In your argument, page ten, of the 6-219, the second full paragraph, one final difference between this case and Buckley must be mentioned as the Buckley Court recognized is -- Buckley had status as an aggrieved person to seek the SEC reviews of the CBOE's final membership termination decision under the Securities Exchange Act. In this case in contrast the CBOT has no

SEC remedy. The SEC has, though, jurisdiction to hear breach of contract actions, let alone to award damages as the 1992 agreement explicitly provided. If the CBOE's dismissal motion is granted the CBOT will be left without any remedy to enforce its 1992 contract with CBOE, and its planned modernization and restructuring will be stymied despite the specific enforcement provisions agreed to by the parties.

No where in that paragraph is there any mention of the ninety-two or ninety-seven page document filed by your clients with the SEC, or their ability to proceed as an aggrieved party to the Circuit Court of appeals.

Are those avenues available to you?

MR. KOPECKY: I'll give you, my understanding is that we filed our comment letter with the SEC as a public comment, as we were entitled to, as everyone is entitled to do under the statute.

THE COURT: Assuming that they rule in a way that is contrary to your interests, would you regard yourselves, your entity as an aggrieved person?

MR. KOPECKY: And therefore we would be entitled to remedies that aggrieved persons have. I'm not sure, your Honor.

THE COURT: Miss Welch.

MS. WELCH: It's my understanding, your Honor, we were not an aggrieved party for purposes of the SEC.

THE COURT: And that understanding is based upon what?

MS. WELCH: The fact we paid pursuant only to the public comment period along with hundreds of our members.

THE COURT: In some respects Mr. Quinlan is going to point out that this is going to make his argument in support of the primary jurisdiction issue, but what procedure did you -- would you have had to seek to intervene? There is an intervention procedure.

MS. WELCH: There is an intervention procedure at the SEC, your Honor, but we were not, we didn't have status to seek to intervene in this proceeding.

THE COURT: How would one gain -- oh, certainly your position, you would be effected by the approval of the rule change that the SEC is expected to consider on the basis of the CBOE, right? If the CBOE's proposed rule change is accepted by the SEC, certainly your client is affected.

MS. WELCH: No question that the entity and the other full members who wrote petitions under public

comment would be affected.

THE COURT: And there is nothing in the procedure that would allow people in that category or that status to either intervene or to be declared aggrieved parties.

MS. WELCH: Not that I'm aware of, your Honor.

THE COURT: You are not aware?

MR. KOPECKY: I'm not.

THE COURT: Mr. Joyce may be aware of some --

MR. JOYCE: I just make an observation.

THE COURT: Sure.

MR. JOYCE: I think that argument essentially misses the point. We are not contesting that the SEC doesn't have the jurisdiction.

THE COURT: I often miss the point, but this is an argument I want to address.

MR. JOYCE: I'm addressing it, but I'm suggesting that there is a false premise here put forward by CBOE.

THE COURT: The premise -- Mr. Kopecky, I'll blame you for the argument; based upon Mr. Kopecky's assertion that you are left without any means of protecting your interest.

MR. JOYCE: I can address that.

THE COURT: My God, people are flowing from the audience now.

MR. JOYCE: Your Honor, the issue -- if I could just have a moment; we are not contesting that the SEC isn't the appropriate body to pass upon whether or not a rule change by the CBOE is or is not in keeping with the rules of the SEC.

THE COURT: That's not what I am talking about. You may be one hundred percent correct in your assertion. What I am talking about is; assuming that an outside party is aggrieved, using appropriate terminology, by a proposed rule change; what if any vehicle is there for them to enter into the SEC process to state their grievance and, in the event they are unsuccessful at the SEC to seek appropriate redress?

MR. JOYCE: Your Honor, they can appeal the SEC ruling to the appropriate Circuit Court.

THE COURT: Your cohorts said that they cannot.

MR. JOYCE: They cannot appeal the violation of this agreement. The SEC has no jurisdiction to decide if this agreement was breached. In this agreement the CBOE gave up the right to ask the SEC to pursue a rule change without first getting an eighty percent approval vote of its own members or the exercise of members. That issue was not before the SEC.

THE COURT: What you are assuming is that you are

right and good. Your contracts -- for efficacy that you are right and therefore we shouldn't consider any other possibilities. You are saying because I'm right you shouldn't talk about what somebody can do at the SEC under the proposed rule change.

MR. JOYCE: I'm saying the SEC has no jurisdiction to pass on whether or not there was a violation of the 1992 agreement. They have no jurisdiction and don't care whether CBOE didn't get an eighty percent vote as, as it's required by contract to do.

A party can by contract agree to give you something that's, got a perfect right to do. In this contract the CBOE gave up the right to go to the SEC and seek a rule change that would impact on the exercise or right without first getting eighty percent approval. Now, they have done that.

THE COURT: Let's stop right there. Let's assume that you are one hundred percent correct; what procedure is there for somebody to go in and say to the SEC, wait a second you can't hear this because our opponents gave up the right to seek a rule change. Without eighty percent approval there must be a vehicle.

MR. JOYCE: I don't believe there is because the SEC has the jurisdiction to pass upon a rule change once

it's before them. And we comment that rule that -- propose is inappropriate or wrong or doesn't comply with the securities laws. We did appeal that finding to the Seventh Circuit but we did not challenge the propriety of bringing this issue there in the first place. That's an issue which by contract CBOE agreed to give up and we have --

THE COURT: You are telling me that if by contract CBOE gave up the right to go to the SEC and seek a rule change that you as a party who would be aggrieved by this conduct on their part are not permitted to go into the SEC and point that out?

MR. JOYCE: We could point it out, but --

THE COURT: Are you permitted to intervene?

MR. JOYCE: But what can they do?

THE COURT: Refuse the rule change.

MR. JOYCE: This is not a basis, they got jurisdiction over that rule.

THE COURT: They say you are not entitled to rule change because you gave up your right to ask for the rule change.

MR. JOYCE: Well, I know of no authority that the SEC has ever done that. Could they do this? I have no idea.

THE COURT: Do you know of any case where they asked to do it and either did or didn't do it?

MR. JOYCE: I do not. I know we got a contract here that CBOE signed and agreed not to go there without first getting the consent of our exerciser, and they violated that contract and we are not asking you to pass upon whether or not the SEC has jurisdiction to approve that rule. It does.

We are asking you to tell CBOE they shouldn't even have gone there without first getting the vote.

THE COURT: Thank you.

MR. KOPECKY: Let me see if I can just close the loop on this without beating the point to death. The SEC's mandate is to decide whether a proposed rule change is consistent with the statute, with the Securities Exchange Act, whether it's consistent with or inconsistent with that statutory scheme.

It is not their job to regulate private contract rights between parties. It's entirely possible that the SEC could find that this rule change comports with the strictures of the Securities Exchange Act. That says nothing about whether it was wrongful for the CBOE to seek that rule change and whether we are entitled to damages for that, whether we are entitled to

an injunction against them from acting upon that.

There are two separate issues. One is the bailiwick of the SEC, is it consistent with the statutory scheme of the Federal Securities Exchange Act. The other issue is one for the State Courts and that is, is their action a breach of a contract entered into between two private parties. And I think the point we are trying to make in our brief, since I'm now attributed with authorship I'll take it on, is that we can't get relief for the second point, was it wrongful for them as a matter between two private parties, for them to seek the relief they are getting. Wholly apart from whether the SEC decides that under the Securities Exchange Act, what they want to do is consistent with that statutory scheme.

We have no relief for breach, breach of contract and against, in the SEC regardless of what relief, what relief we have or don't have in, from regulatory considerations, that -- clearly, I think that we can't get damages for breach of contract. The SEC has no authority to rule on a private breach of contract dispute, and that's the thrust of the extension between their jurisdiction and this Court's jurisdiction.

Let me see if I can loop back to the start of

my argument and weave through what we have already covered. I wanted to start out by taking on a point that really cuts across all of the arguments and the CBOE's reply brief. And that is the point that, this case is a membership dispute under the rules of the CBOE. It is not, this is a case about, as I just said, a contract between two entities, the CBOE, the Chicago Board of Trade.

Our claim is not based on the rules or a breach of the rules of the CBOE. It's based on a breach of the contract. Your Honor has already recited the key term of the contract we rely on, Section 3(d), in which they said if you merge the members in, the new entity will be entitled to the exercise right, just like the members of the old entity if you meet three conditions. Our merger meets those three conditions.

In Section 6(c) we are granted the right to seek relief for breach of contract in the Courts and to seek damages for that. That's why we are here. The 1992 agreement is not, is not a rule of the CBOE.

THE COURT: Why is it, why was it submitted to the SEC?

MR. KOPECKY: Because pursuant to the agreement, and again, I didn't do the submitting, so I may not be

able to tell you all the reasons, but pursuant to the agreement one of the things done is the parties agree that CBOE was going to request a specific rule change. Rule 3 point 16(c).

And the agreement said you will be, you will submit that to the SEC. We submitted the agreement along with the rule change that accompanied the agreement to the SEC. The SEC reviewed the agreement and it reviewed the rule change, it approved the rule change and the agreement. But the rule change was a rule, the agreement was not. There is nothing --

THE COURT: Why was it necessary to approve the agreement or was it?

MR. KOPECKY: I'm not sure it was, and I don't know why it was. I do know that it was submitted and it was approved. Mr. Quinlan said that, you know, there is no evidence that the SEC specifically focussed on Section 6(c) and specifically said that's okay, or specifically focussed on Section 3(d), but the fact is the SEC reviewed the agreement and approved it.

And to suggest that they simply ignored things that they found repugnant to the statutory scheme of the Securities Exchange Act, and said it was all right sub silentio, I think you can assume that the SEC when it

approves an agreement did so consciously.

MR. JOYCE: If I can answer your question about why this was submitted --

THE COURT: I don't know that yet, but you are going to try I suppose.

MR. JOYCE: Going to endeavor to try. The 1992, 1992 agreement required both the CBOE and the Board of Trade to simultaneously withdraw pending rule changes and submit an agreed rule that we -- effect part of the agreement. The parties did so by transmitting the agreements.

THE COURT: This was also submitted to the CFDC.

MR. JOYCE: Yes, correct. The parties submitted both the agreement and the exhibits, which were the proposed rule changes to their respective governing bodies, regulatory bodies by contractual agreement. Could the contract have been held back? They could have merely transmitted the rule change, but the, but it's significant, we think, that the SEC considered, talked about and discussed the contract and the rule and found nothing repugnant or wrong with what the contract called for.

THE COURT: Continue Mr. Kopecky.

MR. KOPECKY: Thank you, your Honor. Here are the

key points on why the 1992 agreement isn't a rule. Number one, neither the agreement nor the contractual commitment in Section -- that we are suing for has ever been made a rule of the CBOE. You can look at the rules of the CBOE, and Mr. Quinlan I know will correct me if I'm wrong; you will not find that agreement or Section 3(d) published in their rules.

The SEC has never said in any publication that the 1992 agreement is a rule of the CBOE, and nothing, nothing in the Exchange Act gives the SEC plenary authority over breach of private contracts. So it makes sense that it wouldn't be a rule. This, in essence, is why we believe this case is properly before this Court.

I can't take on specifically -- now, the arguments of Mr. Quinlan raised and focussed first on the preemption argument because I believe that really is the main argument of their case, of their motion to dismiss. They say that this lawsuit is preempted by federal law, the Securities Exchange Act. They have acknowledged we don't have field preemption under the Exchange Act. It didn't occupy the field, so they have to rely upon the second prong, prong of preemption, which is conflict preemption, that there is a conflict

between the relief and their contract and statutory schemes of the Securities Exchange.

The issue under conflict preemption is whether the circumstances of the particular case, under the circumstances of the particular case the State's law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. The outcome in each case depends on the effect of the exercise of the State remedy, here breach of contract on the federal statutory scheme regulation.

CBOE relies very heavily on the Buckley case. Let me talk about the Buckley case. The issue in Buckley was a dispute between two individual members, both of whom were claiming the right to the same seat on the exchange. One that leased a CBOT membership from another. In deciding whether a specific issue in that case, that is who gets that membership seat on the exchange the Court performed a painstaking analysis of the statutory scheme in the -- to the qualifications for membership of member discipline, provisions for disciplining members of the exchange, administrative matters relating to the removal of members from the exchange. The determination of who got the seat on the on the exchange was deemed to be within those category

of things because it was governed by an application of the CBOE rules.

And the Court focussed on the provisions of the Exchange Act that say the SEC has the authority in issues involving membership whether discipline or removal, or qualifications to look and see if what the exchange did comports with the rules of the exchange. That's the SEC's job. If it did it blesses it, if it didn't it reverses is it.

Buckley's reference to the broad statutory authority of the SEC has to be read in that context. If you read the statute, what it talks about is interpreting the rules of the exchange. And as we have already discussed at some length, the contract in this case is not a rule of the CBOE, and therefore Buckley does not control the outcome.

Saying Buckley doesn't control the outcome doesn't do away with the issues you spoke -- is there a conflict or isn't there. Because that's the issue for conflict. The 1992 agreement limits, as alleged and argued, and alleged in our complaint, limits the liability of the CBOE to do certain things.

It limits ability to say by merging you lose the exercise right if you have met these conditions. It

limits their ability to seek certain amendments of the rules without our consent. That's something they contractually agreed to. Specifically says that the CBOE will interpret the exercise right consistent with the agreement, including Section 3(d) of the agreement. Nothing, nothing in the Exchange Act or in the Buckley decision prohibits or limits the ability of an Exchange by contract, by private contract to enter into those limitations on what it will and won't do.

As we pointed out, the SEC did review and approve this contract. Even if the SEC -- this returns to the point of our lengthy discussion before, even if the SEC were to determine that under the statutory scheme of the federal statute their proposed rule amendment was permissible, that would not be inconsistent with this Court finding that it was wrong as a matter of contract for them to do what they do. And simply it's no potential conflict between federal statutory scheme and private contract rights of the parties to this case.

On collateral estoppel, just very briefly your Honor, a key element of collateral estoppel is the issue has to be identical, has to be as to the identity of issues in the first case and in the second case. The

issue here is not the same. There was nothing like the 1992 agreement at issue in the Buckley case. The argument was made that the, certain of, or the charter of the CBOE was in fact a contractual right, but the Court clearly said in Buckley the charter is a rule of the Exchange. Here we are talking about an agreement, a contract that is not a rule of Exchange. It's not the same issue. Collateral estoppel doesn't apply.

Ripeness. There is justiciable case of controversy. Essentially, the reply brief of my opponent makes two points. First, that they have not done anything. They haven't done anything that creates a live controversy between their clients and mine. But, the CBOE has done something, your Honor. They have made their position fairly clear. They have made clear that -- well, initially they said if you reincorporate from Illinois to Delaware it extinguishes the exercise right.

They since retrenched from that position. That resulted in the dismissal by Judge Schiller for lack of a justiciable controversy. They have now said step two, if we incorporate as stock corporation in Delaware, for profit corporation, that extinguishes the exercise right. They have said we set up an electronic

trading subsidiary and allowed members who have exercised under trading in the CBOE to also trade electronically, that will terminate the exercise right.

They said if we set up electronic mechanism, which we have set up, and we allow no members to trade electronically over their computer that terminates the exercise right. They have said all these things. Now, why is it significant that they have said these things. The answer is because the Illinois Supreme Court in the Netsch case has said has said that's enough. If I may, your Honor just spend, just a minute on the Netsch case, because I think it's dispositive of this case. In Netsch the plaintiff is a bank. They held mortgages on cemetery properties.

Legislature passed a law imposing new obligations on owners of cemetery property. Said, if you buy a cemetery property at foreclosure sale and there are deficiencies you have to pay them. The Comptroller of the State said we are going to apply that new amendment retroactively to existing mortgage contracts. And the bank filed a lawsuit and they said that impairs our contract rights, it's unconstitutional. And the Comptroller said; well, we haven't done anything. We haven't applied this to any of your

mortgages, you haven't sold any of these properties at foreclosure sales and suffered any harm. And the Illinois Supreme Court said, but -- said you were going to. You said that was the effect of the Statute. You said that was your interpretation of the Statute, and that the Court said creates a live justiciable controversy.

THE COURT: Didn't they also point out that the very act of saying, had an oppressive affect on prices, so it's fait accompli. Of course that's true, once they say it does the prices change at the mortgage foreclosure sale.

MR. KOPECKY: That's not quite what they said. What they said was, I think your Honor, they said if and when the bank goes to sell a particular property at a foreclosure sale; well, by God, that's likely going to reduce their prices and that, that -- future reduction.

Let me tell you, if they can extinguish the exercise right it is going to reduce the price that people are willing to pay for seats on the CBOT.

THE COURT: I'll accept that.

MR. KOPECKY: Okay. And I think that makes this case indistinguishable from the Netsch case.

THE COURT: What happens if the SEC agrees with you

and Miss Welch and Mr. Joyce says, you know what, public policy will not permit the SEC to grant a rule change when in effect it would be a violation of a right to contract that you have entered into and that we approved. So your request for a rule change is heard and denied. Would the time of all these folks sitting in Court have been wasted?

MR. KOPECKY: Would that -- is theoretically possible, yes. It is also very possible that the SEC will sit on this thing for another six or eight or ten months and we are trying to get a vote, an approval of our membership on a restructuring. That is essential to the life of this Exchange or at least important to the life of this Exchange.

THE COURT: Isn't there a statutory period for comment, public comment period?

MR. KOPECKY: The statutory period for public comment --

THE COURT: Mr. Joyce is apparently out of energy, he comments from afar.

MR. JOYCE: They can take as long as they want to rule.

THE COURT: But there is a statutory period for the public comment.

MR. JOYCE: Yes, there is.

MR. KOPECKY: Stop commenting, stop taking comments, but they don't have to rule by any date certain. So --

THE COURT: So how long did it take for the approval in the Buckley case?

MR. KOPECKY: I don't know, your Honor.

MS. WELCH: If I can add, your Honor; the CBOE has already agreed to one extension for the SEC to comment until the end of February. And there is nothing to preclude roll over extensions.

THE COURT: You mean the SEC asked for the extension.

MS. WELCH: Yes.

MR. JOYCE: Your Honor, in the comment we made to the SEC we pointed out that one, the rule changes put forward by the CBOE was not ruled upon for years. So in the meantime our members are buying and selling seats. Our seat prices are impressed because there is an issue of exercise, or right. We are suffering damage every single day.

THE COURT: You may continue.

MR. KOPECKY: I won't belabor with the ripeness point, your Honor, unless you have any further

questions. Let me just conclude by addressing briefly the primary jurisdiction question. In the CBOE's reply brief they cite the United States Supreme Court decision in Far East Conference versus United States.

And in that case the Court explained the, primary jurisdiction applies in cases raising issues of fact not within the conventional experience of judges or requiring the exercise of administrative expression. We submit in this case, your Honor, whether they breached what we believe are the unambiguous terms of the contract the Court read into the record earlier this afternoon, whether they breached that contract is not beyond the conventional experience of this Court. In fact, it's the kind of issue this Court resolves every single day.

Second, as to the administrative discretion; again as we pointed out earlier, the SEC doesn't have discretion to decide whether or not there is a breach of a contract between two private parties. They have the discretion to decide whether a rule comports with the statute. That's not what our case is about. So I believe if you just take the two-part test set forth in their cases and you apply to the circumstances here the primary jurisdiction doctrine is inapplicable, and they

say we don't come to terms with their cases.

Let me do this very briefly; they cite two other Supreme Court cases, the Rekey case and the Deekter case. And in the Rekey case the issue is whether the transfer of an individual membership violated the exchange rules. So again we are back to the issue; was it a violation of the rules. And the Court said that's an issue in the first instance for the SEC. In the Deekter case the issue is whether the exchange itself had properly implemented procedures to control manipulative conduct by its members.

The Court says there is a core issue, that is did the SEC at all -- manipulation of securities exchanges. Again, in the first instance that will be submitted to the SEC.

THE COURT: If they terminate exercise rights, is that a violation of the rules or merely a breach of the contract?

MR. KOPECKY: It is certainly a breach of contract. It is also a violation of the rules.

MR. JOYCE: It won't be if the SEC adopts their new rule.

THE COURT: You want to change your question. That wasn't the question I asked.

MR. KOPECKY: You are saying if would be a violation of the rules as it exists today?

THE COURT: Yes.

MR. KOPECKY: I think it could well be, your Honor, but that's not what we are arguing in this case. That's not what we are asking this Court to settle. And even if were, it wouldn't have, violate -- damages against the CBOE, which I believe we are entitled to under the terms of the contract before this Court --

THE COURT: You haven't answered --

MR. KOPECKY: We invoke the declaratory judgment statute. The Netsch cases says that's the way to avoid getting embroiled in long complicated damage cases. We are hoping to avoid a damage action, your Honor.

THE COURT: Anything further?

MR. KOPECKY: Not unless the Court has any additional questions.

THE COURT: No. Any response from the movants?

MR. QUINLAN: Yes, I do, your Honor. First of all, I'd like to observe here that, you know, counsel, would like you to believe that the world is as he suggests. I'd like to tell you today it's a lovely day. It's eighty-five degrees and if your Honor gets out of here early enough I'm sure he's going to play golf. But that

doesn't just happen to be the fact of the matter.

I think the problem counsel has, he doesn't like the fact that the SEC has jurisdiction over this and he tries to torture this 1992 agreement into a garden variety contract. What it is, it surely is not a garden variety contract. And just because of your Honor's questions, just because of counsel's effort to try to explain this to your Honor as to whether it's just a simple contract that your Honor could handle, don't worry about Fifth B and how it provides for the exercise right under certain circumstances, and that's what this issue is all about.

It's really the exercise right under certain suggested conditions and circumstances. Your Honor, the 1992 agreement clearly describes it, tells rule changes to be included in the 1992 agreement. And the commission entered an order pursuant to Section 19(b)-2 of the Exchange Act that approved the rule change. Approved that, the proposed rule change proposed. CBOT admits that the SEC approved this agreement. The only context in which the SEC would have had to approve this document is that -- constituted a rule or a rule interpretation. And surely as your Honor said, if we just look at what the Statute itself provides here --

you asked for, whether or not they could be an aggrieved person. And the question is, surely under 78-Y of the SEC Act it provides, it's Section 25, Exchange Act itself, Section 78-Y. And it provides that Courts of review, Courts review orders and rules. And it provides in (a)(1) that a person aggrieved by a form order of the Commission entered pursuant to Chapter -- may obtain review of the order in the United States District Court of Appeals in the Circuit in which he resides. And there, covers both orders and rules.

Clearly if counsel's client is injured in any way or he believes he's injured he then may petition the Court as an aggrieved person, not party. Doesn't have to be a party to this, an aggrieved person. And he can do that. And the rules of the Exchange is, as we have tried to point out in our brief clearly include rules of the, association rules of the clearing agency. That means the Constitution, articles of incorporation, bylaws and rules or instruments corresponding to the foregoing.

An exchange association can broker dealers on clearing agencies. Respectfully, such stated policies, practices and interpretations of such exchanges; all of these are included in the definition of what is a rule

of an exchange. The 1992 agreement is a rule. It is a rule that is subject to being interpreted. If we are interpreting it inappropriately -- and as your Honor suggested, if in fact we brought this then to the SEC when we shouldn't have the SEC properly can tell us, tell us just that and say this is inappropriate.

Counsel suggests; well, if you go to the SEC it's a long time. But your Honor said how long did Buckley take? I would submit that Buckley had to take somewhere around two years. So whatever the Court's decision was, believe the appeal process --

THE COURT: Well, my question was actually, I phrased it inartfully; my question was how long did the results of Buckley take? In other words, once the contract and the proposed rule was submitted to the SEC. You are probably being modest, I'm sure Buckley took more than two years.

MR. QUINLAN: In the State Court.

THE COURT: But once the grievant and the contract and the rule were proposed -- I was curious to see how long it took the SEC to act and apparently no one has that answer.

MR. QUINLAN: Well, the 1992 agreement was the ultimate result of that. And that was ten years later.

But that was the parties and I, I don't think this took more than about six months for the 1992. But, I don't know, your Honor. Just a speculation.

THE COURT: All right.

MR. QUINLAN: But clearly the situation here is in a, dramatically different than suggested, somehow that gives the status that this doesn't have. Again, the SEC has to, would disapprove a rule filing that proposed an incorrect interpretation of Article Fifth B of the 1992 agreement. And that is clearly a situation where, if he was correct, if that was what, what he was looking for is, that we made a mistake that's not appropriate. That's exactly what the SEC would do.

By the way, he complains about the SEC could not give him damages. He hasn't even pled damages. You struck his count for damages, so we don't even have a cause of action for damage.

THE COURT: I didn't strike it for, count for damages. His count for damages didn't ask for damages, that's one of the reasons I struck his count for damages.

MR. QUINLAN: Well, that's my point, your Honor. If that's what this case is all about, I'm shocked that I don't see it anywhere. And even in this count, asks

for -- you just don't see that anywhere. An appropriate situation that we need to be concerned -- the other obligation is that we have to comply with our own rules. And the rules here require us to comply with it. If we don't we are still subject to being sanctioned by the SEC.

Let me see if I can just try and pick up a few things he said. He said this case is about, is not about membership dispute, was what -- was what Buckley was about. We heard the argument by counsel and we heard the argument of CBOT here; clearly this case is all about membership and the right of, the exercise right. That's all it's about.

It's not about some -- whether we failed, whether we failed to give notice required by the 1992 agreement under 3(b) 2-1(a), and it was six days instead of ten days or anything of that nature; or we didn't file the notices that we were required to file under. No, this is about whether or not their proposed restructuring conforms to the requirements of Article Fifth B and would entitle them to continue their exercise right for those members who now would succeed in that circumstance without quite the same rights that they had previously.

That's the exact question that is being proposed as an interpretation that we have submitted to the SEC. They have filed a comment to that. They clearly are in the right forum. That is, already been joined there, the SEC has taken jurisdiction on this. If this isn't a complex case involving factual issues, interpretation of rules and interpretation of matters involving national, a national exchange that is best left to the body that is charged with that by the federal, Federal Act, the Securities Exchange Act I don't know what else is.

This clearly, just by the questions that are asked here, indicates this is a significant matter that needs to be addressed by the SEC, needs to be ruled on by them. That is exactly the authority that has been given to them here. This is not a situation where we will have just an appropriate little contract that we are worried about here. This is more than a contract. And I think that's the important things.

Counsel has numerous times suggested that he has to have this resolved quickly so when they get to vote they are going to have these questions answered for them. If that isn't an advisory opinion, your Honor, I don't know what is an advisory opinion. That's exactly

what we all love to ask Courts to do, this -- give us an idea of what this might be if we do this. That does not do it.

I think the law is clear think Buckley applies here. I think clearly this is a situation under the Statute and the Act. Clearly this matter is a membership dispute. It is in front of the SEC. The SEC has jurisdiction and they have had jurisdiction since August 30 of 1999. It is in front of that Court. I have -- nothing counsel has suggested that in any way would change this. The agreement itself is a rule. And this clearly is an interpretation of the rule that has been submitted appropriately to the SEC by the Chicago Board Options Exchange. And for all these reasons, again, your Honor, I would ask that you grant our motion to dismiss.

MR. KOPECKY: Your Honor --

THE COURT: Proponent, respondent, reply. In twenty-two years I've never changed. That isn't going to happen again.

MR. KOPECKY: I hate to ask you to start today.

THE COURT: I'll take a ten minute recess.

(Whereupon a recess was had after which the following

proceedings were had in open Court:)

THE COURT: Having ruled on the 2-615 motion the Court turns to the portion of the motion addressing the 2-619 portion.

The purpose of such a motion is to dispose of issues of law and easily proved issues of fact at the outset of the litigation process. Citing to Malanowski versus Jabamon. 293 Illinois Appellate 3d 720. Generally trial Courts are directed not to grant involuntary dismissals of complaints unless it clearly appears that no set of facts can be proven which would entitle the plaintiff to relief. Citing to Fancher versus Central Illinois Public Service at 279 Illinois Appellate 3d 530 at 534. Under Subsection (a)(9) of 2-619 an action may be dismissed on the ground that the action is barred by other affirmative matter that avoids the legal effect of or defeats the claim.

In support of its motion the CBOE asserts four grounds for dismissal of the complaint. The CBOE initially argues that the Exchange Act preempts the Board of Trade's declaratory judgment action. In support of that position the CBOE cites Buckley versus Chicago Board Options Exchange, Inc. at 109 Illinois Appellate 3d 462, a First District 1982 case, for the

proposition that the requested remedy conflicts with the comprehensive federal statutory scheme for the regulation of exchange memberships.

The Board of Trade responds that its claim is not preempted by federal law. The Board of Trade asserts that the 1992 agreement is a contract and not a rule of the CBOE. As such, the Board of Trade submits that Section 6(c) of the 1992 agreement expressly provides that the parties, quote, "may bring suit to enforce the terms of this agreement and to recover damages for any breach of this agreement". End quote. The Board of Trade further contends that when the SEC approved the provisions of the 1992 agreement the SEC implicitly found that Section 6(c) was not inconsistent with the federal securities laws.

The doctrine of preemption is derived from the supremacy clause of Article 6 of the United States Constitution. Citing to Orman versus Charles Schwab at 179 Illinois 2d 282. The underlying rationale of the preemption doctrine is that the supremacy clause invalidates State laws that interfere with or are contrary to the laws of Congress. Citing to Buckley at page 462.

Under Section 78(f) of the Exchange Act

Congress has enacted a myriad set of rules relating to the terms and conditions governing the organization and structure of a national securities exchange. Indeed, the Exchange Act requires the rules of an Exchange to provides a fair procedure for the, quote, "prohibition or limitation by the Exchange of any person with respect to access of services offered by the Exchange". End quote. Citing to 15 United States Code 78(f) Sub (b) Sub 7.

Moreover, the Court in Buckley discussed at length the comprehensive statutory scheme of exchange membership regulation. After reviewing the breadth of the SEC's statutory authority the Buckley Court specifically noted that the SEC's, quote, "statutory authority to review Exchange decisions relative to membership relative -- decisions, plural, relative to membership suggests a congressional intent to limit judicial interference in the review procedure". End quote. Citing to Buckley at pages 470 and 471.

The Board of trade, however, attempts to distinguish Buckley on its facts. The Board of Trade correctly point is out that the Court in Buckley addressed a claim for specific performance and its relationship to Article Fifth B of the CBOE's

certificate of incorporation. In that case, the Court noted that the certificate of incorporation was expressly recognized as an exchange rule for the purposes of the Exchange Act. While the Court finds the Buckley preemption analysis instructive, the Court agrees with the Board of -- the Court agrees with the Board of Trade that it is not dispositive.

In the present case, the central issue is whether the interpretation of the provisions of the 1992 agreement is sufficiently interrelated to issues of exchange membership regulation and thus preempted by federal law. The Court is persuaded that the provisions of the 1992 agreement are sufficiently interrelated to issues of exchange membership rules and thus preempted by the comprehensive federal statutory scheme.

It is well recognized that an exchange must file with the SEC any proposed rule or any proposed change in addition to or deletion of a rule. Citing to 15 U.S.C Section 78-S (b)(1). The exercise right at issue here is founded in Article Fifth B of the CBOE's certificate of incorporation. As was noted in Buckley the certificate of incorporation is an exchange rule for purposes of the Exchange Act. Citing to 15 U.S.C. 78-C Sub(a) Sub (27) and Buckley at page 466. It is

undisputed that the provisions of the 1992 agreement further clarified and interpreted the language set forth in Article Fifth B of the certificate of incorporation. The 1992 agreement specifically addressed which Board of Trade members possessed the exercise right and how changes to the Board of Trade's corporate structure would effect the exercise right.

It is also undisputed that the provisions of the 1992 agreement were submitted and later approved by the SEC. It is therefore a logical and reasonable extension to conclude that a supplement to the certificate of incorporation, such as the 1992 agreement, which may have a material effect on the certificate of incorporation regarding the regulation of exchange memberships, is preempted by the Exchange Act.

Furthermore, we agree with the CBOE that allowance of the Board of Trade's declaratory judgment action could conflict with the SEC's oversight and review of Exchange decisions relative to membership. Contrary to the Board of Trade's assertions, if this Court and the SEC were to disagree as to whether the Board of Trade's restructuring plan extinguishes the exercise right, the CBOE would find itself in the unenviable position of complying with different rulings

of this Court and the SEC. Such a conflict cannot be permitted.

Finally, the Court finds no merit in the Board of Trade's assertion that the 1992 agreement expressly permits a party to bring a judicial action under the agreement. As the CBOE correctly points out, Section 6 read as a whole allows a party to seek judicial relief only where federal law or an administrative rule does not otherwise preclude judicial action.

In light of the comprehensive federal statutory scheme regarding exchange membership regulation, as well as the possible conflict with that scheme which might arise as a result of this Court's potential declaratory judgment determination, the Court is persuaded that the preemption of the Board of Trade's action for declaratory judgment is required here.

Assuming arguendo that the declaratory judgment action is not preempted by federal law, the Court will turn to the defendant's remaining arguments. The CBOE next asserts that the doctrine of collateral estoppel precludes the Board of Trade's claim for declaratory judgment. Specifically, the CBOE contends that the same parties and the same issues were addressed by the Appellate Court in Buckley. In response, the

Board of Trade asserts that the instant case involves an action to enforce an agreement entered into ten years after Buckley was decided.

The requirements for application of collateral estoppel are; one, identity of issues; two, assertion of estoppel against a party who is a party or in privity with a party to the prior litigation; three, final judgment on the merits in the prior adjudication; and four, actual litigation and determination of the factual issues against which the doctrine is interposed. Citing to Peregrine Financial Group versus Ambuehl at 309 Illinois Appellate 3d 101. The Court finds no merit the CBOE's collateral estoppel argument.

Although the parties to the action are identical to the parties in Buckley, several of the issues in the instant case are markedly distinct from the issues raised in Buckley. In Buckley a Board of Trade member leased his membership to a non-member for a period of one year. During that period the lessor attempted to exercise his exercise right to trade on the CBOE. The CBOE refused to recognize the lessor's exercise right. Instead the CBOE recognized that the lessee was entitled to exercise the right to trade on the CBOE. The lessor and the Board of Trade

subsequently filed suit to compel the CBOE to recognize the lessor's exercise right. After examining the federal securities regulatory scheme, the Appellate Court held that the SEC had exclusive authority in this area.

The Court first notes that in Buckley the Court addressed whether the Board of Trade's claim for specific performance could proceed, as opposed to the Board of Trade's claim for declaratory judgment here. The Court in Buckley also addressed the specific performance claim in relation to Article Fifth B of the certificate of incorporation, while the instant case involves the interpretation of provisions of the 1992 agreement, which was not entered into until ten years after the Buckley case. Because the Court concludes that the issues present in both cases are not sufficiently similar the Court finds that the Board of Trade's claim for declaratory judgment is not barred under the doctrine of collateral estoppel.

The CBOE further asserts that no actual controversy exists to support a declaratory judgment action. More specifically, the CBOE maintains that the Board of Trade is merely seeking an advisory opinion concerning the affect its restructuring plan has on the

exercise right. The CBOE further contends that the Board of Trade's restructuring plan has yet to be approved by its members or the Commodity's Futures Trading Commission or the SEC. The Board of Trade maintains that an actual controversy exists because, one, the CBOE's filings with the SEC have expressed that the Board of Trade's electronic trading business violates the 1992 agreement; and two, the CBOE's informal and formal correspondence has declared that the Board of Trade's restructuring plan has violated the 1992 agreement.

Section 2 dash 701(a) of the Code of Civil Procedure provides that a Court, quote, "may, in cases of actual controversy, make binding declarations of rights, having the force of final judgments". End quote. Citing to the Code at 5 slash 2 dash 701(a). The Declaratory Judgment Act specifically permits declaratory judgment actions for the construction of contracts. An actual controversy exists if there is, quote, "a legitimate dispute admitting of immediate and definite determination of the parties' rights, the resolution of which would help terminate all or part of the dispute." End quote. And I cite, as did Mr. Kopecky, to the Netsch case recorded at 166 Illinois 2d

173.

In declaratory judgment litigation the plaintiff need not have suffered a wrong or incurred an injury. The requirement of an actual controversy is meant only to distinguish justiciable issues from abstract or hypothetical disputes and is not intended to prevent the resolution of concrete disputes from which a definitive and immediate determination of the rights of the parties is possible. Citing to Messenger versus Edgar at 157 Illinois 2d 162.

After reviewing the complaint, the Court finds that the Board of Trade has sufficiently alleged that an actual controversy exists sufficient to support a declaratory judgment action. Accepting the facts alleged in the complaint as true, as the Court must, the Court concludes that a justiciable controversy exists as to whether the actions taken by the Board of Trade violate the 1992 agreement.

The Board of Trade has presented a legitimate dispute admitting of an immediate and definite determination of the parties' rights the resolution of which would help terminate all or part of the dispute. Citing to Netsch at 166 Illinois 2d 173. The Court therefore finds that plaintiff has alleged an actual

controversy sufficient to support a declaratory judgment action.

Finally, the CBOE asserts that the doctrine of primary jurisdiction requires this Court to either dismiss or stay the Board of Trade's claim. The CBOE asserts that the pending comment and review period regarding its proposed rule interpretation with the SEC requires this Court to, at the very least, stay these proceedings.

The CBOE argues that several factors weigh in favor of staying these proceedings, including one, that the Board of Trade's claim is within the SEC's statutory jurisdiction; two, the proposed rule interpretation is within the SEC's expertise; three, the SEC is familiar with the customs and practices within the securities exchange industry; and four, deferring to the SEC will not automatically preclude judicial review.

In response the Board of Trade contends that its claim is based on a contract and not a rule of the CBOE. However, interestingly, I note that I asked the question during oral argument of Mr. Kopecky, whether or not the extinguishment of the rights would constitute not only a breach of contract, but a violation of the rules and he conceded that yes, it probably would also

constitute a violation of the rules. I think that in and of itself pretty well demonstrates the fact that, contrary to the assertion of the Board of Trade, that this is not a garden variety breach of contract action.

The Board of Trade also asserts that the doctrine of primary jurisdiction is not applicable where an administrative agency cannot provide the relief sought. The Court disagrees with that position. Contrary to the Board of Trade's assertions, the SEC's action with regard to the CBOE's amended proposed rule change would in substance amount to a declaratory judgment as to the meaning, rights, and obligations under the proposed rule change. Thus, the SEC may adequately provide the relief requested in Count 2. Considering the implications of a decision by this Court regarding the proper interpretation of the 1992 agreement, the wise and prudent choice for this Court would be to defer such a determination to the SEC.

As the parties are aware, even if they don't admit it explicitly, the SEC brings a special expertise to issues concerning securities laws that has comprehensive effect on the markets and investors. Such consequences must not be taken lightly. The Court would, therefore, under any circumstances stay the

proceedings until a determination is made by the administrative agency with primary jurisdiction.

Based upon the foregoing the defendant's motion to dismiss pursuant to Section 2-615 is heard and granted as to Count 1. Defendant's motion to dismiss as to Section 2-619 is heard and granted as to Count 2.

Please draft your order. As I indicated, the plaintiffs are granted leave to replead. I don't know what you are going to do about Count 2, but if you want to make a stab at it feel free to try. Twenty-eight days to replead.

Court is in recess.

(Which were all the proceedings had in the above-entitled cause.)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CHANCERY DIVISION

I, Gregory L. Armstrong, an Official Court Reporter for the Circuit Court of Cook County, County Department-CHANCERY DIVISION, do hereby certify that I reported in stenotype the proceedings had at the hearing of the aforementioned cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable THOMAS DURKIN, Judge of said Court.

Official Court Reporter
084-001036

DATED THIS__29th___DAY
OF__January___,20001

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CHANCERY DIVISION

I, the Honorable THOMAS DURKIN, Judge of the Circuit Court of Cook County, presiding Judge at the hearing of the aforementioned cause, do hereby certify that the above and foregoing is a true and correct Report of Proceedings had at the said hearing.

AND, FORASMUCH, THEREFORE, as the matters and things hereinbefore set forth do not otherwise fully appear of record, the attorney for the_____tenders this Report of Proceedings and prays that the same may be signed and sealed by the judge of this Court pursuant to the statute in such case made and provided.

WHICH IS ACCORDINGLY DONE this _____day of_____,19_____.

_____

Judge
Circuit Court of Cook County,
ILLINOIS

EXHIBIT B

AGREEMENT

This Agreement is made and entered into this 7th day of August, 2001 ("Effective Date") by and between the Board of Trade of the City of Chicago, Inc., a Delaware non-stock corporation (the "CBOT"), and the Chicago Board Options Exchange Incorporated, a Delaware non-stock corporation (the "CBOE").

WHEREAS, paragraph (b) of Article Fifth of CBOE's Certificate of Incorporation ("Article Fifth(b)") provides, among other things, that every present and future member of the CBOT who applies for membership in the Corporation and who otherwise qualifies shall, so long as he remains a member of the CBOT, be entitled to be a member of the CBOE (this right of members of the CBOT to become members of the CBOE is referred to herein as the "Exercise Right";

WHEREAS, the CBOT and the CBOE entered into an Agreement dated as of September 1, 1992 (the "1992 Agreement") for the purpose of resolving a dispute as to the meaning of certain terms as used in Article Fifth(b) and the nature and scope of the Exercise Right;

WHEREAS, the CBOT intends to pursue a strategic restructuring as specifically contemplated by that certain Registration Statement on Form S-4 (Registration No. 333-54370);

WHEREAS, additional disputes have arisen between the CBOT and the CBOE regarding the Exercise Right in the context of the CBOT's proposed strategic restructuring and the expanded operation of CBOT's electronic trading system proposed to be implemented in connection therewith; and

WHEREAS, the parties, in their own capacity and on behalf of their respective members, wish to resolve these additional disputes to their mutual benefit;

NOW, THEREFORE, in consideration of the foregoing and the mutual promises and agreements contained herein (but subject to Section 11 below), the parties, in their own capacity and on behalf of their respective members, pursuant to the authorization of their respective Boards of Directors, agree as follows:

1. DEFINITIONS.

For purposes of this Agreement, the definitions set forth in this Section 1, including revised definitions of certain terms previously defined in the 1992 Agreement, shall apply. Capitalized terms used but not further defined in this Agreement shall have the respective meanings ascribed to such terms in the 1992 Agreement.

(a) "Registration Statement" means that certain Registration Statement on Form S-4 filed by the CBOT with the Securities and Exchange Commission under the Securities Act of 1933 (Registration No. 333-54370).

(b) "CBOT Restructuring Transactions" means the proposed strategic restructuring of the CBOT and the related expansion of its electronic trading operations described in the Registration Statement, as amended by Amendments No. 1 through 4, and as further amended subject to the provisions of Section 11(b).

(c) "Exercise Right Coupon" means the instrument to be issued to each of the 1,402 CBOT Full Members pursuant to and as part of the CBOT Restructuring Transactions, which shall evidence and represent the Exercise Right and which shall, subject to satisfaction of the other conditions to being an Eligible CBOT Full Member as defined below, entitle the holder thereof to become an Exerciser Member.

(d) "Eligible CBOT Full Member" has the meaning set forth in the definition of that term in the1992 Agreement, provided that upon consummation of the CBOT Restructuring Transactions and in the absence of any other material changes to the structure or ownership of the CBOT or to the trading rights and privileges appurtenant to a CBOT Full Membership not contemplated in the CBOT Restructuring Transactions, an individual shall be deemed to be an Eligible CBOT Full Member if the individual: (i) is the owner of (A) 25,000 shares of Class A Common Stock of the CBOT (such number being subject to anti-dilution adjustment in the event the Class A Common Stock is subject to a stock split, reverse split, stock dividend or other stock distribution made to existing shareholders, or the issuance of shares to existing shareholders at less than fair market value), and (B) one (1) share of Class B Common Stock, Series B-1, of the CBOT, and (C) one (1) Exercise Right Coupon, (ii) has not delegated any of the rights or privileges appurtenant to such ownership, and (iii) meets the applicable membership and eligibility requirements of the CBOT and is deemed to be a "CBOT Full Member" under the CBOT's Rules and Regulations then in effect. CBOT Class A Common Stock, CBOT Class B Common Stock and Exercise Right Coupons may be separately bought and sold, and may be unbundled and rebundled, for purposes of qualifying the owner thereof as an Eligible CBOT Full Member.

(e) "Eligible CBOT full Member Delegate" has the meaning set forth in the definition of that term in the 1992 Agreement, provided that upon consummation of the CBOT Restructuring Transactions and in the absence of any other material changes to the structure or ownership of the CBOT or to the trading rights and privileges appurtenant to a CBOT Full Membership not contemplated in the CBOT Restructuring Transactions, an individual shall be deemed to be an eligible CBOT Full Member delegate if the individual (i) is in possession of (A) 25,000 shares of Class A Common Stock of the CBOT (such number being subject to anti-dilution adjustment in the event the Class A Common Stock is subject to a stock split, reverse split, stock dividend or other stock distribution made to existing shareholders, or the issuance of shares to existing shareholders at less than fair market value), and (B) one (1) share of Class B Common Stock, Series B-1, of the CBOT, and (C) one (1) Exercise Right Coupon, (ii) holds one or more of the items listed in (i) above through

delegation rather than ownership, and (iii) meets the applicable membership and eligibility requirements of the CBOT and is deemed to be a "CBOT Full Member Delegate under the CBOT's Rules and Regulations then in effect. For the purposes of this provision, the words "in possession of" shall be deemed to include possession by ownership, lease, or, in the case of shares, by pledge or assignment agreement relating to such shares whereunder the owner of such shares is precluded from selling or transferring them during the term of such pledge or assignment agreement.

2. **THE CBOT'S AGREEMENTS.**

(a) The CBOT agrees, in its own capacity and on behalf of its members, that only an individual who is an Eligible CBOT Full Member or an Eligible CBOT Full Member Delegate is a member of the CBOT within the meaning of Article Fifth(b) eligible to be an Exerciser Member, subject to the terms and conditions of this Agreement, and to the extent not inconsistent with this Agreement, the 1992 Agreement.

(b) The CBOT agrees that as part of the CBOT Restructuring Transactions it shall issue exactly 1,402 shares of Class B Common Stock, Series B-1, and exactly 1,402 Exercise Right Coupons, and shall distribute one (1) such share of Class B Common Stock and one (1) such Exercise Right Coupon to each of the 1,402 CBOT Full Members, and will not issue any additional shares of Class B Common Stock, Series B-1, or any additional Exercise Right Coupons. The CBOT shall also issue and distribute 25,000 shares of its Class A Common Stock to each of the 1,402 CBOT Full Members. CBOE for its own account and CBOE members will be free to purchase and to hold, lease or sell the Class B shares and the Exercise Coupons without limitation, and may also purchase, hold, lease or sell the Class A shares subject to the same terms as other purchasers of Class A shares.

(c) The CBOT agrees and represents that it has created and will maintain various incentives to promote the continued value of CBOT membership, including meaningful member and delegate fee preferences (applicable to the floor and electronic trading platform) and pit closing provisions as described in the Registration Statement. In addition, CBOT agrees to maintain seat ownership requirements for CBOT clearing firms. A schedule of such current fee preferences and incentives has been provided to CBOE by the CBOT and the CBOE has taken notice of the member and delegate fee preferences reflected in such schedule. These fee preferences and incentives are expected to serve the purpose of preventing mass migration of CBOT exercisers to CBOE. Any questions that may subsequently arise as to the continued meaningfulness of such preferences and incentives for this purpose, as they may be amended from time to time, shall be submitted to binding arbitration in accordance with Section 7 of this Agreement. The arbitration panel will have the authority: 1) to determine whether the member and delegate fee preferences and other incentives maintained by the CBOT remain meaningful for the purposes set forth in this Section 2(c); 2) if that determination is unfavorable to CBOT, to specify a remedy for CBOT's failure to maintain meaningful fee preferences and incentives, including

what CBOT must do to restore meaningful fee preferences and incentives; and 3) to prescribe the consequences of any failure by the CBOT to take any action required under the remedy specified by the arbitrators, including any failure to restore meaningful fee preferences and incentives in the manner specified, within thirty (30) days of the panel's decision.

(d) The CBOT agrees that if a CBOT Full Member delegates his or her membership rights to a CBOT Full Member Delegate who exercises to become an Exerciser Member, the CBOT Full Member/delegator relinquishes all member trading rights at both the CBOT and the CBOE, and may trade only as a customer at customer rates at the CBOT unless the member/delegator owns another CBOT membership which entitles that member to member trading rights and transaction rates.

(e) The CBOT agrees that CBOT Full Member Delegates who are Exerciser Members of the CBOE may trade on the CBOT's electronic trading platform only at customer rates. The CBOT agrees that CBOT Full Members who are Exerciser Members of the CBOE may trade on the CBOT's electronic trading platform as a CBOT member at member rates only if they are not physically present on the CBOE trading floor and are not logged on to the CBOE's electronic trading platform. If a CBOT Full Member is present on the CBOE trading floor or is logged on to the CBOE's electronic trading platform at the time an order is entered or altered on the CBOT's electronic trading platform by or on behalf of such member, then such member will be charged CBOT customer rates for trades resulting from the execution of such orders.

(f) The CBOT agrees to amend its rules, effective no later than the consummation of the CBOT Restructuring Transactions, to the extent necessary to implement the provisions of this Agreement.

(g) Within five (5) days following the Effective Date of this Agreement, the CBOT will file a notice of voluntary dismissal of its amended complaint for declaratory and injunctive relief and damages, Civil Action No. 00CH1500, filed on February 16, 2001, in the Circuit Court of Cook County, Illinois, Chancery Division.

3. **THE CBOE'S AGREEMENTS.**

(a) The CBOE agrees, in its own behalf and on behalf of its members, that an Eligible CBOT Full Member or an Eligible CBOT Full Member Delegate is a member of the CBOT within the meaning of Article Fifth(b), and is eligible to be an Exerciser Member upon satisfaction of the terms and conditions of this Agreement and, to the extent not inconsistent with the terms and conditions of this Agreement, the 1992 Agreement.

(b) The CBOE agrees to submit to binding arbitration in accordance with Section 7 of this Agreement questions concerning the continued meaningfulness of member and

delegate fee preferences or other incentives for the purpose of preventing mass migration of CBOT exercisers to CBOE as described in Section 2(c).

(c) Within five (5) days following the Effective Date of this Agreement, the CBOE will withdraw and terminate its proposed rulemaking request (File No. SR-CBOE-00-44), initially filed with the Commission on August 30, 2000 and further agrees that it shall take no action to amend, modify or otherwise limit, or terminate or cause to expire, whether by interpretation or otherwise, the Exercise Right as a result of the completion of the CBOT's Restructuring Transactions, except as contemplated herein.

4. **ELECTRONIC TRADING.** The CBOT and CBOE are each free to develop, provide, maintain and use electronic trading platforms and to determine their respective trading hours and access policies for all their respective products without such action adversely affecting the Exercise Right except as such action may be inconsistent with the provisions of this Agreement.

5. **INFORMATION SHARING.** The parties agree to provide full information regarding the status of all members including exercisers and delegate exercisers on a current and continuing basis.

6. **FURTHER ASSURANCES.** The CBOT and the CBOE shall take such further steps toward ensuring that their respective memberships understand the implications of this Agreement as they shall reasonably agree, including, without limitation, the development of either a joint or separate "question and answer" publications, in either case subject to the approval of both the CBOT and the CBOE, and other appropriate materials for distribution to the membership of the CBOT and the CBOE. In addition, the CBOE and the CBOT will actively pursue cost-sharing and other mutually beneficial initiatives.

7. **ARBITRATION.** Questions subject to arbitration in accordance with Sections 2(c) and 3(b) of this Agreement shall be submitted to arbitration in Chicago, Illinois under the auspices of the American Arbitration Association ("AAA") and pursuant to the Commercial Arbitration Rules of the AAA in effect at the time arbitration is initiated. The arbitration panel shall consist of three arbitrators: one arbitrator selected by each of the parties within 15 days after receipt of the demand for arbitration, and a neutral arbitrator selected by the two party-appointed arbitrators. If the two party-appointed arbitrators cannot agree upon a person to serve as the neutral arbitrator within 30 days after the parties have notified each other of the identity of the party-appointed arbitrators, the neutral arbitrator shall be selected by the AAA.

8. **GOVERNING LAW.** Except to the extent that this Agreement is governed by any law of the United States or of a rule or regulation adopted by a regulatory agency pursuant to any such law, this Agreement shall in all respects be governed by and construed in accordance with the laws of the State of Illinois, without regard to its conflicts of law doctrine.

9. **ASSIGNMENT.** This Agreement shall be binding upon and inure to the benefit of the successors and permitted assigns of each party hereto, provided that no rights, obligations or

liabilities hereunder shall be assignable by any party without the prior written consent of the other party. It is expressly understood and agreed by the parties that the conversion of the CBOT from a Delaware non-stock, not-for-profit corporation into a Delaware stock, for-profit corporation pursuant to the CBOT Restructuring Transactions shall have no effect whatsoever on the validity or enforceability of this Agreement or the 1992 Agreement.

10. **OTHER AGREEMENTS.** The 1992 Agreement shall remain in full force and effect, and the CBOT and the CBOE hereby reaffirm all of their respective rights and obligations thereunder except that if any provision of the 1992 Agreement conflicts with any provision of this Agreement the provisions of this Agreement shall control. The CBOT and the CBOE agree that this Agreement and, to the extent consistent with this Agreement, the 1992 Agreement, reflect the complete and exclusive understanding and agreement of the parties concerning the Exercise Right, and supersede all prior proposals and communications (oral or written) by or between the parties on the same subject. The CBOT and the CBOE agree to be bound by this Agreement and not to take any action inconsistent with this Agreement.

11 **APPROVALS.**

(a) The CBOT and CBOE mutually agree that it is appropriate, and within the meaning and spirit of Article Fifth(b), for the CBOE to interpret Article Fifth(b) in accordance with the provisions of this Agreement. The CBOT and the CBOE acknowledge that, as an interpretation of Article Fifth(b), this Agreement must be filed with and approved by the Securities and Exchange Commission ("SEC") in order to become effective. The CBOE will submit any rule changes required to implement this Agreement to the SEC for its review and approval. The CBOE also intends to submit this Agreement to the approval of the CBOE membership. The CBOE will use its best efforts to obtain approval from its membership and the SEC in the most expeditious manner possible. The CBOT intends to submit any rule changes required to implement this Agreement to the Commodity Futures Trading Commission ("CFTC") for its review and approval. The CBOT will use its best efforts to obtain approval from the CFTC in the most expeditious manner possible. If the SEC, the CFTC, or both, refuse any of the above approvals unless certain changes are made, the parties agree to consider in good faith the adoption of the necessary changes as expeditiously as possible. If the SEC, the CFTC or the CBOE membership thereafter refuse their approval, despite the parties' good faith efforts, this Agreement shall be null and void, as if never executed, and neither party shall be deemed to be in any way bound by any term or provision, including any agreement or acknowledgement, of this Agreement.

(b) This Agreement shall be attached as an exhibit to the CBOT's Registration Statement and the material provisions of this Agreement shall be summarized in that Registration Statement. This Agreement shall be null and void, as if never executed, and neither party shall be deemed to be in any way bound by any term or provision, including any agreement or acknowledgement, of this Agreement if 1) the SEC does not declare the Registration Statement effective; 2) if the CBOE does not consent to

amendments to the Registration Statement subsequent to Amendments No. 1 through 4 which consent shall not be unreasonably withheld; 3) the CBOT membership does not vote to approve the restructuring transactions described in the Registration Statement; 4) the CBOT does not receive a favorable ruling from the Internal Revenue Service ("IRS"), in form and substance satisfactory to the CBOT's Board of Directors, relating to the restructuring transactions described in the Registration Statement; 5) the CBOT does not receive any required approvals by the CFTC relating to the restructuring transactions described in the Registration Statement; or 6) a court order or other government regulation prohibits or restricts the restructuring transactions described in the Registration Statement. The CBOT will use its best efforts to obtain approval from the SEC, the IRS and the CFTC in the most expeditious manner possible. If the SEC, the IRS or the CFTC refuse their approval unless certain changes are made, the CBOT agrees to consult with the CBOE and to consider in good faith the adoption of the necessary changes as expeditiously as possible.

CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED

By: /s/ William J. Brodsky

TITLE: Chairman & CEO

By: /s/ Mark F. Duffy

TITLE: Vice Chairman

BOARD OF TRADE OF THE CITY OF CHICAGO, INC.

By: /s/ Nickolas Neubauer

TITLE: Chairman

By: /s/ David J. Vitale

TITLE: President and CEO

EXHIBIT C

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

THOMAS A. BOND,)
Plaintiff,)
vs.) No. 01 CH 14427
CHICAGO BOARD OF OPTIONS)
EXCHANGE,)
Defendant.)

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable STEPHEN SCHILLER, Judge of said Court, on Monday the 17th day of September 2001 at the hour of approximately 11:15 o'clock a.m.

PRESENT:
MR. GARY HOLLANDER,
on behalf of the Plaintiffs;
MR. WILLIAM QUINLAN,
on behalf of the Defendants;
MR. PAUL DENGEL,
on behalf of the Defendants;
MR. GARY JOHNSON,
on behalf of the Defendants.

Joyce Ledger, 084-001292
Official Court Reporter
Circuit Court of Cook County
County Department - Chancery Division

THE CLERK: The 11:15 set matter, 01 CH 4427, Bond versus Chicago Board of Options Exchange.

MR. HOLLANDER: Good morning, your Honor.

Gary Hollander for the Plaintiffs.

MR. DENGEL: Paul Dengel, one of the attorneys for CBOE.

MR. QUINLAN: Good morning, your Honor.

William Quinlan on behalf of CBOE.

MR. JOHNSON: Gary Johnson, your Honor, on behalf of the Chicago Board of Trade.

THE COURT: I have got motions to dismiss before me first of all.

If movant's counsel wish to make oral arguments, ten minutes. No more.

You may proceed.

MR. QUINLAN: Thank you, your Honor.

Your Honor, counsel's complaint seeks to join the advisory board, CBOE members on an agreement, 2001 agreement approved by the CBOE board of directors and the board of directors of the Board of Trade of the City of Chicago to interpret the CBOE exercise right held by CBOT full members.

Plaintiffs' complaint seeks a declaration,

seeking for advisory board, violates Article Fifth B of CBOE, certificate of incorporation.

The CBOE exercise right provided in Article Fifth B allows CBOT full members the right to trade at the CBOE without paying for CBOE membership and thus such exercise members with the same rights and privileges as all other CBOE members.

Plaintiffs assert without any support that 2001 agreement, the 2001 agreement amends Article Fifth B and the CBOE members must approve these amendments, pursuant to a voting procedure set forth in Article Fifth B.

The 2001 agreement is not an amendment of Article Fifth B, rather it is an interpretation of Article Fifth B which was necessitated by the CBOT's proposed restructuring which would change the nature of the CBOT membership.

The 2001 agreement interprets what is required to qualify as a CBOT member who is entitled to become a CBOE exercise member pursuant to Article Fifth B.

Plaintiffs seek an injunction to prohibit CBOE from presenting to the members for an advisory

vote inviting the membership to participate in consensus with respect to the agreement before it is filed with the SEC.

Plaintiff is also essentially seeking to enjoin CBOE from proposing an interpretation of its membership rules to the SEC until they have taken an advisory vote in a particular way that they claim is appropriate.

Their motion must fail and the complaint must be dismissed for four reasons.

First, the 2001 agreement is an interpretation, not an amendment as suggested of a member rule of the National Securities Exchange and as such is subject to the regulatory approval by the SEC before it becomes effective.

Second, federal law requires the SEC not the Courts to decide questions of membership in national security exchanges such as presented here by the 2001 agreement and as interpreted by the Buckley case.

Third, the Doctrine of Primary Jurisdiction at the very least requires this Court to stay the Plaintiffs' action, to stay the Plaintiffs' actions until the SEC rules on whether

this is an appropriate agreement under the 2001 agreement.

For all these reasons the complaint should be dismissed on the basis of 2-619.

Fourth, we raise the question that Plaintiff has no standing to allege a scheduled member vote concerning the 2001 membership, 2001 agreement.

That breaches the 1992 agreement. Plaintiffs were not parties to the 1992 agreement and Plaintiffs will raise no facts in support of their assertion that they were the intended beneficiaries of the agreement.

For all these reasons we believe it is appropriate to dismiss under 2-619 and 2-615.

Your Honor, in looking at the agreement itself as to whether it is an amendment or an interpretation, we think clearly it's an interpretation.

Such an argument that it is an amendment is at odds with the expressed terms of the 2001 agreement itself which states that it is an interpretation of Article Fifth B which must filed and approved by the SEC in order to become

effective.

Second, neither the express language nor the intent of the 2001 agreement in anyway changes Article Fifth B.

Instead it merely interprets what it means to be a CBOE member for purposes of the exercise right and such an interpretation is consistent with the CBOE plan and structure.

An interpretation of Article Fifth B does not require an 80 percent affirmative vote of the exercise members in the CBOT.

This issue raised in Plaintiffs' complaint also concerns something which cannot take effect until the SEC approves it.

All the membership rules in the national exchange including interpretation must be approved by the SEC under the particular U.S.E. statute and the Code of Federal Regulations.

Because the 2001 agreement is a proposed interpretation of the exercise right, a CBOT rule affecting membership rights is subject to the SEC and to some extent to CFT approval before it can take effect.

Plaintiffs common-law complaint breach of

contract and declaratory relief should be dismissed.

Congress also intended the SEC to regulate the area of exchange membership to the exclusion of the states in this case.

The Appellate Court in Buckley held that Congress had displaced state regulations, membership issues arising at national security exchanges such as the CBOE.

The Security Exchange Act expressly empowers the SEC to review all membership issues.

THE COURT: Well, Buckley doesn't exclude parties to come to a state court or federal court for that matter, to deal with simple contractual issues, does it?

MR. QUINLAN: That is correct.

THE COURT: Well, putting a face on the complaint that I have here, would it be fair to say that changes in the organizational, in the organization's rules, its method of operation are subject to SEC scrutiny.

They have no primary jurisdiction to deal with that, but generally changes require an initiative to be taken and if there's a contract

between members regarding an approval process before initiatives are taken wouldn't this be just a simple contractual issue that they would be free to come to a state tribunal with litigation?

MR. QUINLAN: If that was such an issue?

THE COURT: They contend, they contend -- let me just --

MR. QUINLAN: Sure.

THE COURT: Hypothetically, they are saying our agreement was that in terms of how we entitle people to exercise membership is defined by 5B and in the event that there may be a desire to make a change before we bother the SEC, we are going to see whether we agree in-house to even, to even ask the SEC, maybe even if we agree there should be a change, the SEC may not agree, but with regard to taking the initiative in the first instance, we are going to impose this 80 percent rule which is I guess at the heart of the bringing of this action, wouldn't that be contractual in nature?

MR. QUINLAN: Only if it was an amendment to the rules, your Honor, and there is no amendment to the rules here.

You have to be changing the substance of

the rule. The rule as your Honor knows specifically provides that a CBOT member who possesses the full benefits of being a CBO member is entitled to be an exerciser of the right to operate also the CBOE.

It leaves it just at that point. In the 1992 case where we had the reorganization of the Chicago Board of Trade which we were in front of you on, your Honor, in some part and also in front of Judge Durkin with the very same thing and Judge Durkin in that case found exactly as what we are arguing here, that really what we were doing was interpreting what that exercise right -- who possesses the exercise right.

At that time certain changes being made by the Board of Trade. Now, there are different changes being made and there are different structures.

What has been created is a totally different structure with a different group of rights being held in a bundle of rights.

There is a what they call a Class A stock, 25,000 shares of that and class B stock and class C coupons.

Now, the question is who, what portion of that or how do you interpret that to be consistent with possessing all the full rights and benefits of a CBOT member to be an exercised, to be entitled to exercise a right and what they have done under the 2001 agreement working with the Chicago Board of Trade is to come up with a proposal to interpret that, but that has no effect whatsoever until they go to the SEC and say, are we correct under our certificate and under our certificate of incorporation is this a correct interpretation?

Is this one that we can make? Is this the one that makes sense? Is this one that the SEC will approve and it has no effect until we do that.

So what they have done here is the same as they did in '92, is exactly the same procedures were followed in '92 and there was a vote also.

THE COURT: Well, why does it require agreement then between the CBOT and the CBOE given that what you are doing is deciding who a CBOT member is for the purpose of exercise?

MR. QUINLAN: Because it's better to work with them and come up with a structure that makes sense for both of you since it operates effectively for

the CBOT, they have an interest in that because they are trying to convey to some members at least the full benefits, the rights under the original 1,402 holders of a CBOT certificate.

That's what trying to be preserved through this because it goes back to the very time in which they entered into the agreement and created the CBOE. They wanted to give them the benefit.

So we need to know what the CBOT would like to include and then we have to interpret whether it can be included.

Where is all these bundle of rights the same as those 1,402 people had before and as we look at it and, we interpret and we say you have got to give them everything, you have got to give them this whole bundle and they agreed.

That helps us obviously in going to the SEC because the SEC will take that into account when they make their determination.

They may say I don't agree with you, CBOT. That doesn't make sense to us. We are going to do it differently and they will do it differently and if they do it differently, that's the interpretation of the rule that's binding.

The rule itself has not changed. There is no amendment to the rule and the provision about the 80 percent vote only applies if you are amending the rule.

Now, you can argue sub silentio, implicitly you are trying to amend it. That is Plaintiffs' argument.

There is no intent here and frankly the 2001 agreement clearly makes that. It's not an intent in any way to amend it.

It is merely an intent to interpret it, to take into account the change and circumstances. That's what's been done here. That's all that's been done here and it really isn't a cat of a different breed.

It's the same breed we have had before. It's the same process we had before except this time the CBOT agrees with us also that this is the right procedure to be followed, not necessarily we got the right result.

Ours is a proposal, both ours and the CBOE and CBOT are making that proposal to the SEC. That's for them to decide and it cannot become a final product, it cannot have any binding effect

until we do that.

Your Honor, of course the same arguments that we have made before, you know, operates in this instance. You can have a conflicting result.

If your Honor decides one and then we go to the SEC and they decide something else, now we have a problem of which, which is the one which is controlling and which is ruling and that's the very thing Buckley pointed out.

They said you can't, because as you know the preeminence would go to the SEC, but we have people relying on different positions and that's why it is not a simple garden variety contract dispute.

In fact it's not even on the contract. We have made no effort to try and change the contract, amend the contract or do anything of that nature.

THE COURT: Just one moment.

(Whereupon, there was a brief pause in the proceedings.)

THE COURT: Okay, go ahead.

MR. JOHNSON: Gary Johnson, your Honor, on behalf of the Board of Trade.

It is -- it relates to of course a little

bit different from what Mr. Quinlan is talking about.

The key focus of our motion to dismiss turns on the fact that this complaint alleges a breach of the 1992 agreement from Paragraphs 23 and 25.

It is clear that's what it alleges as an effort to get into this court.

This is a situation in which the Plaintiffs who are not parties to that '92 agreement, have no standing to sue, not just one of the parties, but both of the parties to the 1992 agreement.

I agree in focusing on the standing point of Mr. Quinlan's point that what's at stake here is simply an interpretation by the CBOE.

It's an interpretation and it's a procedure that is exactly the procedure, that is the 2001 procedure is exactly procedure that the two exchanges followed in 1992 with the 1992 agreement.

That also was an interpretation as this is. That also was put to a majority vote of the CBOE members as the CBOT proposes to do here.

This is an interpretation, a right. It is done so by contract.

What Plaintiffs are seeking to do is sue both parties to a two-party contract claiming that those parties somehow are breaching a contract that those parties agree they are not breaching.

That's completely different from any of the third-party beneficiary cases that Plaintiffs cite and it is also completely different because of the existence in the '92 agreement, the contract that the third parties are seeking to claim breach of, Section 6C.

Section 6C says, "The parties to the agreement, that is the CBOE and the Board of Trade can sue to enforce that agreement on their own behalf or on behalf of their members."

There is no provision that allows the members to sue. So we have a situation in which the contract speaks and what the contract says is that the parties can sue.

It does not say, it does *not* provide a scene to any of the members of either of the exchanges to sue and for that reason we believe that this complaint fails to state a claim

completely and your Honor doesn't need to reach even the Buckley issues.

Thank you.

THE COURT: Mr. Johnson, if I accept your argument that at best the Plaintiffs are incidental beneficiaries of this agreement, doesn't that seem kind of peculiar since 5B would seem to have no purpose other than to protect the individual, the value of an individual trading license at the CBOE?

I mean it acknowledges the CBOT help, the contributions of its membership and then it provides more than 1,402, 1,402 free exercise opportunities to trade on the CBOE for less than or without payment.

Doesn't that appear to be designed specifically to add value to the membership of both the CBOT and CBOE members?

MR. JOHNSON: I don't disagree with that at all, your Honor, as it is but the thrust of my argument, your question has a broader implications than my argument that I just made.

THE COURT: Yes.

MR. JOHNSON: But the thrust of my argument is that the Plaintiffs have not sued here for breach

of Article Fifth B. They have sued for the breach of the 1992 agreement.

THE COURT: Right, because implicitly they are saying, it would impact on the value or nature of licenses of various members of the CBOE for exercise on the CBOE.

MR. JOHNSON: Yes, but they haven't brought that claim.

They haven't, for whatever reason. I believe there would be a deficiency in that claim, that is; an effort directly to enforce Article Fifth B, but what they have done is sue under a contract that does not incorporate the terms of Article Fifth B, but really as a recital that talks about Article Fifth B. So it's the contract, the breach of contract action that we are here for and it's the breach of contract action that is inadequately pled in our view.

The fact that Article Fifth B has as its intent, and one could argue frankly whether its intent was to grant any of the CBOE members as opposed to CBOT members and these are CBOT members not CBOT members.

THE COURT: So the issue you are taking really

is that they allege no damages as beneficiaries of this contract?

MR. JOHNSON: I think it's beyond that.

They are not beneficiaries of Article Fifth B. They have no standing and allege no damages as well.

The parties to that agreement are here and are in agreement on what it means.

THE COURT: Well, if they allege damages, would that rectify the standing issue?

That is if the implication were direct impact on the value of a CBOE membership.

MR. JOHNSON: No, that would not rectify it.

MR. QUINLAN: Your Honor, just a point on that.

THE COURT: You will have a chance to argue.

MR. HOLLANDER: Thank you, your Honor.

Your Honor, I think the Defendants are really trying to walk a fine line here.

The Board of Trade makes no argument that our action is preemptive and in fact from your Honor's knowledge and the exhibits you have been given I believe you are aware that the Board of Trade has strenuously argued that under circumstances where we are dealing with an actual

SEC rule violation or a violation of the federal statute, there is no preemption.

Similarly the Options Exchange makes no argument, doesn't address the issue of whether Article Fifth and the 1992 agreement are one integrated contract both under the terms of the documents and under the doctrine set forth in Tepper versus Deerfield Savings and Loan and I will tell you why and we have -- everyone has touched on this.

Let me give you an example. If the Options Exchange came in and said the 1992 agreement is separate and distinct from Article Fifth, therefore any changes could be made in the 1992 agreement by a simple majority vote.

Okay, if you look at that agreement, that's the agreement that contains the 1,402 Board of Trade member exerciser limitation.

So if that could be changed by a simple majority then if there were 940 Board of Trade exercisers, those people could come in and on their strength, without getting a single Options Exchange vote, they could change that.

They could say we have decided now there

can be 10,000 Board of Trade exercise.

THE COURT: Doesn't that impact on the draftsmanship of the 1992 agreement more than it does on the logic that you are seeking to urge now?

MR. HOLLANDER: No, I --

THE COURT: I mean, what is protected under the 1992 agreement is what it says, Amendment of Article B, 5B.

If there is a way of changing definitions, it's not 5B.

MR. HOLLANDER: Well, that's their argument, correct, but to do that and what I am noting is the Options Exchange doesn't distinguish the Article Fifth language from the 1992 agreement because they know they wouldn't want to do that in the future.

That's not how they actually interpret this contract. We gave you the vice chairman's message to the members where he claims that a change in the language of the 1992 agreement is an amendment to Article Fifth and that is correct.

Under Illinois law even if you don't look at the language in this contract unless there's something in the document itself that says to the contrary these are one integrated contract.

That's the only way it makes sense I would submit to interpret these agreements because otherwise the Board of Trade can come in and take back everything that was given.

THE COURT: But as Mr. Johnson has argued, the agreement is between the exchanges and the members aren't signatories to the agreement and I raised the question and he didn't have a response for it, other than to say, well, I don't think there is any damages there.

If your clients are relying upon their third-party beneficiary status, where's the damage?

MR. HOLLANDER: Well, the damage is and we have set it forth in our complaint that their voting rights are diminished if in fact you have a simple majority when the agreement provides for the dual 80 percent majority.

We also have a request for declaratory judgment here which is --

THE COURT: But this advisory election or referendum as they characterize it, if that characterization holds, one, it doesn't impact 5B.

Second, it doesn't change 5B. So if your clients are relying upon third-party beneficiary

status, if there's no harm, what do they predicate their standing on?

MR. HOLLANDER: Well, that argument, that entire argument is based on a false premise.

Mr. Quinlan has come up here and said to you this is simply an advisory election.

It can't be. That alone violates this agreement. So before you can accept his argument you would have to rule against him.

THE COURT: But if it doesn't change, I think you are missing my point or I am putting it inarticulately, but if it doesn't change 5B which your clients urge they have got a vested right in, and if it doesn't, the election is concluded, at the end of the day, it doesn't result in any injury to your clients, how can they rely upon third-party beneficiary rational for standing?

MR. HOLLANDER: The simple answers are, one, it does amend 5B and, two, it does damage the Plaintiffs in this case.

It amends 5B clearly because as interpreted in the 1992 agreement, 5B says, the right to exercise and become a member on the Options Exchange cannot be separated from the

remaining rights of the Board of Trade members.

It clearly says that. That was a benefit given to the options exchange members.

The proposed new agreement specifically changes that. It has the language bundled, unbundled, lease hold.

It takes this C coupon, the C coupon is the right to become an exercise member on the Options Exchange and it specifically says that can be sold separately from the Board of Trade seat.

That is specifically an amendment. It's an 180 degree difference.

THE COURT: It says that someone other than a full CBOT member who holds just the C coupon can trade?

MR. HOLLANDER: No, what it says, the prior agreement says you cannot separately sell --

THE COURT: No, I am talking about this definition or this refinement or this interpretation.

It says that if you own a C coupon alone you may trade on the CBOE?

MR. HOLLANDER: No, it does not say that.

THE COURT: I didn't read it that way either.

MR. HOLLANDER: No.

THE COURT: You said they could sell the C coupon and thus trade.

As I understand it the refinement or the definition or the interpretation is CBOT members are becoming shareholders.

They hold three things, but they need all three in order to trade on either exchange.

You can't separate them. Now the proposition where you can separate like in a Buckley situation you can lease your CBOT trading rights, but still as the seminal owner of the CBOT seat, trade on the CBOE, that would be a change, but basically as I read the interpretation they are seeking, we have gone to a stock situation and we want it made clear the stock situation doesn't change anything.

It's all got to be on one hand. So it's just applying 5B to a different situation that would prevail after the reorganization of the CBOT, but really doesn't change the fact that there is only 1,402 possible exercise members and they have to own everything.

Now does it says something different than

that?

MR. HOLLANDER: What it says, I mean clearly and if I inferred otherwise I didn't mean to, there's still going to be 1,402 exercise members who can become members of the Options Exchange, but what this gives people the right to do is barter and the right to sell the exercise right to trade on the Options Exchange.

You don't have to have a seat, a full seat now. You can trade-off part of your seat. You can later on come and buy a C coupon from somebody else for instance and in essence reinvest yourself.

THE COURT: Give me an example as to how someone can trade on the CBOE under this interpretation and not own the full package.

MR. HOLLANDER: You have to own the full package to trade.

What you can do is you can sell part of the package. You can sell the C Coupon.

THE COURT: Okay.

MR. HOLLANDER: Down the road some point in time, let's say, the market goes down. The cost of a C coupon will diminish.

THE COURT: Well, can you sell the C coupon and

still trade on the CBOT?

HOLLANDER: Yes, yes, clearly you can.

Right, and then down the road you can repurchase a C coupon from somebody else, a different C coupon and become an exercise member and trade on the Options Exchange.

The agreement as set forth in the complaint by the way also specifically redefines the full member and the full, full eligible CBOT full member and eligible CBOT full member delegate.

Those definitions specifically who can exercise the right --

THE COURT: But it still requires the full package either way, if you are a delagee.

MR. HOLLANDER: Right.

THE COURT: You need the need full package.

MR. HOLLANDER: In that respect --

THE COURT: If you are a CBOT member, you need the full package or you can't exercise.

MR. HOLLANDER: Right, it changes the definition as far as breaking up the membership and who can trade and how you can get back the exercise right and then once again become a potential exercise member.

Specifically by its term it redefines that. Now, your Honor may not think the amendment is significant.

You may not think it is going to make that much of a difference.

Maybe you will think in the long run the seats are going to be remain basically the same value if that's done, but with all due respect I don't think that's an issue we addressed here in this court or that we addressed in the SEC or any other forum other than by the voice of the members here.

THE COURT: Well, breach of contract requires damages, true?

MR. HOLLANDER: Yes.

THE COURT: There is no cause of action without damages.

You are relying on the third-party beneficiary theory for your cause of action here.

The implication would be that the third-party beneficiary would be injured if one party or the other didn't hold the other to the contractual rights that they have.

The third-party would be jurisdiction.

How will the third party be jurisdiction?

MR. HOLLANDER: Their trading rights -- wait, how would they be injured by the amendments you are saying?

THE COURT: By the interpretation, by the amendment, characterize as you will, where is the injury?

MR. HOLLANDER: I think it's two separate issues.

We are injured by the interpretation of this being a simple majority and we have now been told advisory votes because we have a voting right given to us in this and it's directly -- Article Fifth in its entirety, the 1992 agreement in its entirety addresses the rights of members.

There is no question we are intended and direct beneficiaries and we have voting rights and those rights are valuable.

Of course they have a value. You know, can I tell you there's a market today for the voting right?

Of course not, because this has never happened before, but you are right, as a member of this exchange to have not only a different vote,

but a more stringent vote.

Instead of 50 percent of everybody, 80 percent of both groups of members. That is certainly a valuable right.

If the vote is supposed to go a certain way and they ignore that right, clearly we have been damaged.

I don't think there's any issue as to that.

THE COURT: Let me ask you this question.

Your injury would be the loss of a value in the voting rights, since an 80 percent majority is more than a simple majority.

So to some extent the value of the right to vote changes. That's the injury that you are claiming, at least one of the injuries you are claiming.

If this were an interpretation as opposed to a change, 5B speaks only to amendments, not to interpretations of what five -- for the agreement itself says, true?

MR. HOLLANDER: Yes.

THE COURT: Isn't the SEC in a better position than a common-law court to decide whether or not

it's an interpretation or an amendment?

MR. HOLLANDER: No, not at all, not in any way and I think the answer goes to the second part of the prior question you asked where you said how are you damaged by the interpretation of the voting rule and how are you damaged by the amendment and I think the whole point here is we don't have to show we are damaged by the amendment.

Your Honor may think this amendment is something more comparable to the Options Exchange members.

Maybe you think they are being given something even better. That's what the Options Exchange is telling its members.

Vote for this agreement because this is better for you. A strong Board of Trade leads to a strong Options Exchange. That's how they are promoting their side of this in the vote, but it is not for us to decide that.

The SEC, the Court, no one should ever reach that issue. Pursuant to these documents there is one group of individuals that can decide for the Options Exchange members if this amendment is something they want and that's the Options

Exchange member.

THE COURT: Let me ask you this question.

Are they bound to go to the membership for an interpretation?

MR. HOLLANDER: If they are --

THE COURT: No, I am just asking, do you think they are?

MR. HOLLANDER: I was -- if they are, maybe that would be a simple 50 percent majority.

I think that's what was done in 1992 because Article Fifth is completely undefined. It's one sentence.

THE COURT: Well, who would interpret the agreement day-to-day? Who interprets the agreement day-to-day?

MR. HOLLANDER: Interprets it as how the Exchange will be run?

THE COURT: How the Exchange is run.

Let's say the CBOT goes to its intended corporate forum and now you have holders of 25,000 shares, common shares, A shares, one B share, one C coupon.

It just happens, no advice, no selection, no nothing. The holder of those bonds comes to the

CBOE and says, "I want to be an exercise member."

Who makes the decision as to whether or not it's consistent with the agreement?

MR. HOLLANDER: Dealing with the substance of who has a right to become a member in the trade?

THE COURT: Yes.

MR. HOLLANDER: Initially, the options Exchange would make that determination and then as in Buckley, as in the case that Judge Durkin had, there's a rule on that issue and ultimately the SEC makes that determination.

That goes to the substance of the amendment which --

THE COURT: So you said amendment.

I am saying the Board of Trade goes ahead with its intentions, its intended reorganization and a holder of the full package goes to the CBOE and says, "I want to be an exercise member. I am not a historic exercise member, but I want to be an exercise member," who makes the decision as to whether he is entitled, a manager, an officer, who?

MR. HOLLANDER: Well, as I understand the question initially the Options Exchange with the overview from the SEC. The SEC --

THE COURT: Well, I mean the Options Exchange, did they hold a couple of meetings to meet the new applicant? Did they have hazing? I mean what do they do?

MR. HOLLANDER: I am not aware, I am not aware of the process. For instance in the Buckley situation --

THE COURT: But is there an office somewhere, an officer, a manager, a president, a director who makes the decision?

MR. HOLLANDER: I am not sure.

In Buckley they just said the Options Exchange determines that the Plaintiff didn't have --

THE COURT: I am assuming that the members don't elect there in all likelihood, a professional staff or officers in the exchange to make the decision and that it's true.

MR. HOLLANDER: Somebody within the organization, yes.

THE COURT: And if they were to make the same decision that's included in this quote, 2001 agreement, other than maybe opposing a decision before the SEC, the Plaintiffs here would have no

standing to say anything.

MR. HOLLANDER: As to the right to trade.

THE COURT: Right.

MR. HOLLANDER: To be a member.

THE COURT: Right.

MR. HOLLANDER: We have never questioned that. We don't question that at all.

THE COURT: So basically what you are really opposing is a vote on the question as to whether this should be taken to the SEC as quote, an interpretation.

MR. HOLLANDER: No, we are not because the SEC approves, has to approve interpretations and de minimus.

THE COURT: Right.

MR. HOLLANDER: And it doesn't matter which one it was. Here is the rule, given to the SEC and they will determine if this is an appropriate rule, change, we just call it generically a change.

THE COURT: You are saying that regardless of what it is, if it goes to the SEC, if it goes to the SEC other than within the context of an actual controversy, like in Buckley it requires a vote under Article 5?

MR. HOLLANDER: Well, yes.

THE COURT: Okay, so --

MR. HOLLANDER: And --

THE COURT: So you are saying it's not that they are being disingenuous by describing this as an interpretation of the existing agreement? It's the fact that they seek to take this whatever it is to the SEC that invokes 5B?

MR. HOLLANDER: Well, there has to be a membership vote either way.

An interpretation would be a different membership vote from an amendment.

THE COURT: Okay.

MR. HOLLANDER: I mean that's -- and then the SEC --

THE COURT: An interpretation, would that, an interpretation to be presented to the SEC would that be covered under 5B?

MR. HOLLANDER: Well, as far as the voting procedure?

THE COURT: Yes.

MR. HOLLANDER: No, no, the voting procedures under 5B only relates to amendments.

THE COURT: So if this were truly an

interpretation which required SEC, they were going to print up a book, interpretations, it was just being done in the back office, it would have to go to the SEC?

MR. HOLLANDER: Yes.

THE COURT: But it would not require a determination by 80 percent of the membership?

MR. HOLLANDER: Correct.

THE COURT: Okay.

MR. HOLLANDER: We agree with that and that's --

THE COURT: So the real issue before me then as to whether or not 5B applies is whether this is an interpretation or an amendment.

MR. HOLLANDER: I fully agree with that.

We have had the procedural issues that have been raised, standing and the presumption, but the one substantive issue this case presents is, is this an amendment and if it is an amendment, we know the vote has to be a certain way and if it's not an amendment, you don't have to follow that voting procedure.

That's clearly the ultimate issue for you to decide --

THE COURT: And --

MR. HOLLANDER: -- in this case.

THE COURT: And what you are saying is that to the extent this interpretation attempts to define who a full member is for the purpose of 5B, it constitutes an amendment and not an interpretation?

MR. HOLLANDER: By its terms, it is changing them and I think what -- I think what we have to avoid is the question of how are you damaged by the amendment because that's not for anybody else to decide other than the members, the 80 percent voting requirement --

THE COURT: Well, you are not saying the CBOE has a right to veto the CBOT's definitions of its own membership, are you?

MR. HOLLANDER: No, they have a right not to have that definition imposed on the Options Exchange members which why they have this dual 80 percent voting requirement.

This rule change not only has to be good for the Board of Trade member which it clearly is.

You know, I fully expect they would overwhelmingly approve this. It also has to be good for the Options Exchange members in their opinion.

That's undoubtedly what the rules says. It is designed to afford this dual protection. The Board of Trade if they get the upper hand can't shove this rule change down the throat of the Options Exchange members and if it's the other way around, the Options Exchange members can't shove this down their throats.

THE COURT: So what you are saying is that the CBOE has a right through 5B to control how the CBOT defines its full members since it still doesn't change the fact that one must be a full member to possess the full package of the attributes of membership, A stock, B stock, C coupon before they can become an exercise member?

MR. HOLLANDER: The Board of trade I believe is free to define full member in any context they want that affects the Board of Trade.

When they attempt to do that in the context that affects the Options Exchange which clearly it does here, then there is this built-in protection that everybody agreed to and that is that 80 percent of the options members other than the exercise members alone have to approve.

THE COURT: So if they went from their present

form of the shareholders' model, there were no coupons, but now members of the CBOT own 25,000 shares of stock and you had to have at least 25,000 shares of stock in order to be a full member, a member of the CBOE could say then, well, that wasn't the form that membership took at the time the '92 agreement was entered into and therefore any action that would recognize the shareholders as exercise members of the CBOE would require an 80 percent vote, true?

MR. HOLLANDER: That's a hypothetical we are not faced with here.

THE COURT: Right.

MR. HOLLANDER: I have a personal opinion on that.

THE COURT: Okay.

MR. HOLLANDER: And I don't necessarily think that that's true, because again we have to amend the rule.

You know, we had this issue before you, not we, because I wasn't involved, but some of the other parties here, as to whether the change of the state of incorporation would alone extinguish the exercise.

I have a personal opinion about that too, your Honor, and frankly I don't think that's amending Article Fifth or the 1992 agreement, but when you change the definition specifically of who can be an exercise member, you are not changing the formation of, the format of the corporate entity of the Board of Trade, you are changing who can be an exercise member.

That's an amendment, not quantified or qualified in anyway in these things.

Any amendment has to be approved by the members. The reason for that is outsiders aren't going to decide if it's favorable or unfavorable.

The board members are. The members are.

THE COURT: Going back to Buckley, and I promise to let you talk.

Going back to Buckley, the question had to be decided whether in the case of a lessee, the exercise rights stayed with the lessor.

Is this any less than a interpretation given that the form of being a whole member in the CBOT is being changed? Is this anything more than an interpretation?

MR. HOLLANDER: It's much more completely

different. Buckley raised an issue as to his right to trade.

It wasn't so much an interpretation here, it's just saying you are wrong. I retained my right under this amendment --

THE COURT: Sure.

MR. HOLLANDER: -- here to continue to trade.

Buckley, you know, in Buckley if I was before you arguing a person's right to become members or to trade on a national exchange, Buckley would be good authority for the Defendant.

I am here arguing an issue that doesn't have any SEC rule or regulation, no federal statute.

Buckley is authority for my position because it says states are not devises of jurisdiction.

States can interpret the statute as long as there is no potential conflict. Here there is no potential conflict where you have jurisdiction and Buckley establishes that you do.

Preemption is an affirmative defense. It has to be proven by the Defendant. The absence of any local regulation or statute presented to you by

the Defendant speaks volumes.

If there was something from a federal agency or from Congress addressing these voting procedures, they certainly would have brought that to your attention.

There is not and the preemption argument is resolved quite simply by that point because there's no statute, rule or regulation on point.

Therefore there's no potential for conflict and there is no preemption and they have the burden of showing you that this conflict exists and they haven't even began to note that burden.

THE COURT: Mr. Quinlan, do you want to reply briefly?

MR. QUINLAN: Yes, your Honor.

I think that counsel here to some extent wasn't himself.

He suggested to your Honor under the 1992 agreement this surely was an interpretation, must be an interpretation.

As your Honor knows, the article, 1992 agreement was the result of interpretation of 1,402 right.

What is an appropriate exercise? Who is

the ones that qualified, maintain the same ownership rights as it was passed on.

As you read the agreement, the agreement does not define who is an exerciser, but rather it is says any -- it applies to all future purchasers, all future members and present members who applied for membership in the corporation and who otherwise qualify as long as he remained a member of said Board of Trade is entitled to be a member of this corporation, the CBOE, notwithstanding any limitation on the number of members without the necessity of acquiring membership for consideration of value.

The 1992 agreement was necessary to interpret that under the changes that had taken place in the structure of the organization at that time and it was done that way.

They interpreted it, made an interpretation pursuant to the agreement which you have here which was signed.

That agreement then was put out to a vote and it was put out to a vote by a majority vote and that majority vote basically approved it and based on that which is mostly a political type of thing

at the CBOE, this is a test.

Does this make sense, with my memberships agreeing this is a reasonable interpretation?

That then was presented to the SEC and the SEC approved it and they approved that agreement and they approved that interpretation.

The vote was part of it. Now we come down in 2001 and we have a 2001 agreement because there have been different changes and those different changes now as your Honor pointed out involved three different types of stock and -- two, and a coupon if you will, and it has been interpreted that you have got to hold all of those to be an appropriate exerciser under the interpretation of this Article 5 which does not describe who an exerciser is, it doesn't describe the 1,402. It doesn't describe anything.

It just describes anybody who holds the CBOT may do so, but what was intended by that?

They went behind that and tried to interpret what was intended and they went back to the days when the CBOT was organized.

It was organized with 1,402 original members. That's what's been conveyed through here.

THE COURT: Why is this election such a big deal?

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

MR. QUINLAN: Well, they don't.

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

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

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

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

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

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

We can wait until somebody applies and then we can say the basis of the membership and go to the office of the chairman and the chairman would determine, perhaps with the Board, perhaps without the Board, he would determine that you don't make it.

Now that would be immediately be appealed to the SEC because that's an aggrieved party and that's a membership issue.

All I am trying to say is that same thread now goes through this entirely. The 1992 agreement was the same kind of thing.

They didn't wait for somebody from the CBOT to come and apply.

What they said it is much more sensible in a civilized society, that we, CBOT and you, CBOE, agree on what we think it is. So we constructed and we say this will be the interpretation.

So when they go forward with their membership and they say these are the different type of shares that will get you a CBOE member and something less than that will not.

We also note to our members this is what we are going to let in.

THE COURT: But Mr. Hollander is saying the SEC won't discriminate.

They will just say, well, whether it's an interpretation or whether it's an amendment it's all the same.

Do we like it or don't we like it. So if it is truly an amendment whatever additional value this 80 percent majority requirement 5B added to the membership in the CBOE is lost.

MR. QUINLAN: That is not true.

What they would do is they would say you did it wrong and you can't do that and present that until you go back and do it appropriately because you have acted contrary to the certificate of incorporation, but they didn't do the last time and we are suggesting that there's no way they can do it here.

This is an interpretation.

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

MR. QUINLAN: Of an amendment you have to take

the vote first to get the approval to submit the amendment and you have to do that.

So and, but one way to interpret that by the way, no matter whether it is an amendment or whether it is really an interpretation is with the SEC and I think your Honor was absolutely correct on that.

So you take it to them and they will say this is an amendment, SEC, and we will say it's an interpretation and the SEC will say interpretation or amendment.

If they say interpretation, that's the end of it and if they approve it --

THE COURT: But if it's an amendment and they think it's a sensible amendment, they have still lost the value of an 80 percent vote.

MR. QUINLAN: Well, that depends on whether that's the value of the 80 percent vote.

If they interpret this and it doesn't make any difference whether you get an 80 percent vote, I guess what the SEC would be saying then that in all circumstances that the 80 percent was really nothing. It was really advisory.

It didn't mean anything and it has no

impact and it really wasn't a right.

THE COURT: But he is saying, Mr. Hollander is saying, it's a simple contractual right and he has a right to seek the enforcement of it in a state court consistent with Buckley.

MR. QUINLAN: But the problem is that the question comes down to, we say it's an interpretation, the grievant says it's an interpretation, the '92 agreement said it was an interpretation.

There is nothing in here in the Article that's any way changed. There's no amendment to the article.

We don't change anything. We don't disqualify regular members of the CBOT which is the only thing it talks about and we don't throw them out, but we only say you can't have 1,402.

You can only have 723. We don't say anything like that. There's no amendment.

All we say is the same thing we did in '92, the interpretation here is that now with these changes that have taken place outside this agreement now we say the person has to have all these rights and that will be given to 1,402 --

THE COURT: That is today Mr. Hollander is saying well, they can redefine this so the C coupon can be alienated in some way and then suddenly there's the potential for 2,804.

MR. QUINLAN: The C certificate cannot be. It can be transferred and it can be transferred to the others, but under the interpretation of the rule, I am sure as your Honor saw in the 2001 agreement, you have got to get one of those Cs back before you can apply.

So you must have all of those rights and there's only 1,402. So if Paul has one and I need that one, I have got to get it from Paul to get it back.

If somebody else has one, I have got to get it from him. All of it is strictly an interpretation.

Nothing here in any way talks about the invasion of the Article Fifth.

It really is an interpretation. The same thing has happened before.

Counsel here suggests he is harmed, but the issue here is injury, your Honor, not so much damages, injury.

You must be injured to have standing. If you are not injured in some way, then there is no standing to bring this.

He is not injured because first of all this is a tentative objection for CBOT and this is CBOT's right and the CBOT said we can define them any way we want.

That's exactly what we are doing. We are deciding this and the only one that can make an interpretation or criticize us for doing it is the SEC who has the exclusive right to determine membership.

They have a right to an aggrieved party, file objection to our interpretations. They can do as they please.

If this is wrong, we have to go back and do it all over again, but it's really an advisory vote which is really nothing more than to give us a feel and a sense of our membership.

The CBOT doesn't say anything like that and I don't see in any way here that this in any way decreases the value.

He is trying to say whether or not there is a vote that should be taken here on Article

Fifth, that's an interpretation.

If that's an interpretation, that too should be presented to the SEC. If it is not something that he says I am not sure whether the vote applies here or not, how is this different between '92 and now?

What is the difference between those two when it did apply, who took the same vote, the majority vote to the SEC and the SEC approved it?

It is now a rule because the SEC approved it. If they approved this interpretation, that is the same thing.

THE COURT: Mr. Johnson, do you have anything to add?

MR. JOHNSON: It's clearly an interpretation, your Honor, and I would, I would add only that there are plenty of procedural safeguards involved, both in the context of the agreement follow-up, the 1992 form before the SEC and I think it is, it is no basis for a decision this morning for your Honor to accept Mr. Hollander's argument that the SEC would fail to follow its obligation to look at this and see whether it's an amendment or an interpretation.

It clearly is an interpretation. The SEC wouldn't clearly find it to be an interpretation, but that is not the same as the SEC not doing its job and not finding out whether it's an amendment or an interpretation.

Now, if the SEC didn't do its job, then the Plaintiffs here have a right to go after the SEC. That's a different mechanism.

It's not in this court, it's in the Court of Appeals. They have a right to take an appeal in the SEC decision, so there is no absence of procedural safeguards.

THE COURT: Well, regardless whether the SEC was sound in their decision, Mr. Hollander would say the effect of permitting it to go that way would be if it were truly an amendment, no 80 percent majority prior to bringing an initiative to the SEC was required and that's a right under this contract.

MR. JOHNSON: The -- I understand his argument and mine and the reason I focused on the fact that this is clearly an interpretation is that this is clearly from the Board of Trade's perspective, this is clearly an interpretation geared toward what the

Board of Trade is doing in its restructuring to a share corporation.

This is akin to what happened when things changed in the '70s and '80s and there became what there hadn't been in '73 when this was created, there became leasehold, lessee members. That was the Buckley situation.

THE COURT: Right.

MR. JOHNSON: And that was resolved and then there was further agreement in '92. This is yet a new interpretation.

THE COURT: Looking at Paragraph 5B let's assume that Board of Trade undertook to redefine who is the member, the effect of which would be perhaps to increase the number of possible exercisers under 5B, would 5B still affect that decision or could 5B still affect that decision by the Board of Trade?

MR. JOHNSON: That I think, your Honor, was exactly the situation that was the dispute in Buckley and the dispute that was revolved in the 1992 contract.

That is at least one of the subjects of this case.

It is also a dispute that is resolved in the interpretation that is embodied in the 2001 agreement, that is, is the Board of Trade going to through its reorganization increase the number of exerciser members.

Clearly they are not as Mr. Quinlan has pointed out. There is no possibility given the requirement that, that what is now a full member must in the future be someone who holds the full package.

There is no such possibility. It is simply an interpretation that allows the Board of Trade to reorganize as it seeks to do to bring itself into the 21st century and go to the corporate form.

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

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

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

With regard to the specific subject matter of this alleged referendum, to the extent it may be germane, 5B states, "Every present and future member of said Board of Trade who applies for membership in the corporation and who otherwise qualifies shall so long as he remains a member of said Board of Trade be entitled to be a member of the corporation."

Notwithstanding any such limitation on the number of members and without the necessity of requiring such membership for consideration of value from the corporation, meaning the BPOE, it's my conclusion that the subject matter of the quote, "Referendum," does not implicate Paragraph 5B.

Accordingly that necessarily leads to the conclusion that the election may proceed and that the question of whether or not this is a fair interpretation; that is, the subject of the referendum should it pass, if there's a possibility

it will not pass, be viewed as a fair interpretation of the agreement between the parties is exclusively within the province of the Securities and Exchange Commission.

Prepare an order.

MR. QUINLAN: Thank you, your Honor.

MR. HOLLANDER: Thank you.

(WHICH WERE ALL THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE ON THIS DATE.)

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

I, JOYCE LEDGER, Official Court Reporter of the Circuit Court of Cook County, County Department - Chancery Division, do hereby certify that I reported in stenotype the proceedings had on the hearing in the aforementioned cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I certify to be a true and accurate transcript of the Report of Proceedings had before the Honorable STEPHEN SCHILLER, Judge of said Court.

Official Court Reporter
084-001292

Dated this 19th day
of October 2001.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

I, the Honorable STEPHEN SCHILLER, Judge of the Circuit Court of Cook County, presiding judge at the hearing of the aforementioned cause, do hereby certify that the above and foregoing is a true and correct Report of Proceedings had at the said hearing.

AND, FORASMUCH, THEREFORE, as the matters and things hereinbefore set forth do not otherwise appear of record, the attorney for the Plaintiff tenders this Report of Proceedings and prays that the same may be signed and sealed by the judge of this court pursuant to the statute in such case made and provided.

WHICH IS ACCORDINGLY DONE THIS

_____day of_____2001.

_____

HONORABLE_____

Circuit Court of Cook County,

ILLINOIS

EXHIBIT D

AGREEMENT

This Agreement is made and entered into this 1st day of ~~October~~ 1992 ("~~Effective~~ Date"), by and between the BOARD OF TRADE OF THE CITY OF CHICAGO ("CBOT"), an Illinois corporation incorporated by special act of the Illinois General Assembly and located at 141 West Jackson Boulevard, Chicago, Illinois, and the CHICAGO BOARD OPTIONS EXCHANGE, INC. ("CBOE"), a Delaware non-stock corporation located at 400 South LaSalle Street, Chicago, Illinois.

WHEREAS, paragraph (b) of Article Fifth of CBOE's Certificate of Incorporation ("Article Fifth(b)") provides as follows:

> (b) In recognition of the special contribution made to the organization and development of the Corporation by the members of the Board of Trade of the City of Chicago, a corporation organized and existing by Special Legislative Charter of the General Assembly of the State of Illinois, and for the further purpose of promoting the growth and liquidity of the Corporation, developing a broad financial base of dues-paying members, and assuring participation on a continuing basis of persons experienced in the trading and clearing of contracts for future purchase or delivery on a central marketplace, every present and future member of said Board of Trade who applies for membership in the Corporation and who otherwise qualifies shall, so long as he remains a member of said Board of Trade, be entitled to be a member of the Corporation notwithstanding any such limitation on the number of members and without the necessity of acquiring such membership for consideration or value from the Corporation, its members or elsewhere. Members of the Corporation admitted pursuant to this paragraph (b) shall, as a condition of membership in the Corporation, be subject to fees, dues, assessments and other like charges, and shall otherwise be vested with all rights and privileges and subject to all obligations of membership, as provided in the by-laws. No amendment may be made with respect to this paragraph (b) of Article Fifth without the prior approval of not less than 80% of (i) the members of the Corporation admitted pursuant to this paragraph (b) and (ii) the members of the Corporation admitted other than pursuant to this paragraph (b), each such category of members voting as a separate class; provided, however, that any amendment to this paragraph (b) which is required under a final order of any court or regulatory agency having jurisdiction in the matter may be made in accordance with the provisions of Article Twelfth covering amendments to this Certificate of Incorporation generally, without regard to the above provisions concerning such 80% vote by classes.

WHEREAS, the parties, in their own capacity and on behalf of their respective members, dispute the meaning of certain terms as used in Article Fifth(b) and the nature and scope of the entitlement referred to therein of a CBOT member to be a CBOE member (the "Exercise Right"); and

WHEREAS, the parties, in their own capacity and on behalf of their respective members, wish to resolve this dispute to their mutual benefit, including to avoid the costs, delays, and uncertainties of legal proceedings;

NOW, THEREFORE, in consideration of the foregoing and the mutual promises and agreements contained herein (but subject to paragraph 4(a) below), the parties, in their own capacity and on behalf of their respective members, agree as follows:

1. DEFINITIONS.

For the purposes of this Agreement, the following definitions apply:

(a) "Eligible CBOT Full Member" means an individual who at the time is the holder of one of the One Thousand Four Hundred Two (1,402) existing CBOT full memberships ("CBOT Full Memberships") and who is in possession of all trading rights and privileges appurtenant to such CBOT Full Membership. In the event a CBOT Full Membership is registered for a partnership, corporation or other entity, only the individual who is the holder of such CBOT Full Membership and who is in possession of all trading rights and privileges appurtenant to such CBOT Full Membership shall be deemed to be an "Eligible CBOT Full Member."

(b) "Eligible CBOT Full Member Delegate" means the individual to whom a CBOT Full Membership is delegated (leased) and who is in possession of all trading rights and privileges appurtenant to such CBOT Full Membership.

(c) "Trading rights and privileges appurtenant to such CBOT Full Membership" means (1) the rights and privileges of a CBOT Full Membership which entitle a holder or delegate to trade as principal and broker for others in all contracts traded on the CBOT, whether by open outcry, by electronic means, or otherwise, during any segment of a trading day when trading is authorized; and (2) every trading right or privilege granted, assigned or issued by CBOT after the effective date of this Agreement to holders of CBOT Full Memberships, as a class, but excluding any right or privilege which is the subject of an option granted, assigned or issued by CBOT to a CBOT Full Member and which is not exercised by such CBOT Full Member.

(d) "Exerciser Member" means an Eligible CBOT Full Member or Eligible CBOT Full Member Delegate who has exercised the Exercise Right to become and has become a CBOE Regular Member pursuant to Article Fifth(b).

(e) "CBOE Regular Member" or "CBOE Regular Membership" shall mean any CBOE regular member or membership (including an Exerciser Member or membership) entitled to all trading rights and privileges appurtenant to a CBOE membership in accordance with Section 2.1(b) of the CBOE Constitution. There are Nine Hundred Thirty-One (931) CBOE Regular Members, excluding Exerciser Members.

2. THE CBOT'S AGREEMENTS.

(a) The CBOT agrees, in its own capacity and on behalf of its members, that only an individual who is an Eligible CBOT Full Member or an Eligible CBOT Full Member Delegate is a member of the CBOT within the meaning of Article Fifth(b) eligible to have an Exercise Right and to be an Exerciser Member.

(b) The CBOT agrees, in its own capacity and on behalf of its members, that in the event the CBOT splits or otherwise divides CBOT Full Memberships into two or more parts, all such parts, and the trading rights and privileges appurtenant thereto, shall be deemed to be part of the trading rights and privileges appurtenant to such CBOT Full Memberships and must be in the possession of an individual as either an Eligible CBOT Full Member or an Eligible CBOT Full Member Delegate in order for that individual to be eligible to be an Exerciser Member.

(c) The CBOT agrees, in its own capacity and on behalf of its members, that, for the purpose of this Agreement and any rule, regulation or by-law adopted pursuant to or to implement this Agreement, and for the purpose of interpreting the meaning of Article Fifth(b), only the One Thousand Four Hundred Two (1402) existing CBOT Full Memberships shall be deemed to be CBOT Full Memberships entitled to Exercise Rights under Article Fifth(b) and that any additional membership or memberships created by the CBOT, whether categorized by the CBOT as a full membership or as having the same trading rights and privileges as a CBOT Full Membership, shall be specifically excluded from entitlement to Article Fifth(b) Exercise Rights.

(d) Subject to Paragraph 4(a) below, the CBOT agrees to amend its rules and regulations in the form and manner set forth in Exhibit A hereto (the "CBOT Rule Change").

(e) The CBOT agrees that it will maintain an effective record of (i) every trading right and privilege which may hereafter be granted, assigned or issued in respect of each CBOT Full Membership and (ii) every delegation or lease of any CBOT Full Membership (or of any trading right or privilege appurtenant thereto). The CBOT agrees to make such records available to the CBOE promptly upon reasonable request therefor by the CBOE.

3. THE CBOE'S AGREEMENTS.

(a) The CBOE acknowledges and agrees, in its own capacity and on behalf of its members, that all Exerciser Members, including Exerciser Members who are Eligible CBOT Full Member Delegates, have the same rights and privileges of CBOE regular membership as other CBOE Regular Members, including the rights and privileges with respect to the trading of all CBOE products, except that Exerciser Members shall not have the right to transfer (whether by sale, lease, gift, bequest or otherwise) their CBOE regular memberships or any of the trading rights and privileges appurtenant thereto. Notwithstanding the foregoing, all Exerciser Members shall have the right to purchase or to participate in the offer or distribution of any optional or additional CBOE membership or any transferable or nontransferable trading right or privilege offered or distributed by the CBOE after the effective date of this Agreement to other CBOE Regular Members, as a class, on the same terms and conditions as other CBOE Regular Members, and any such additional membership, trading right or privilege so acquired by an Exerciser Member shall be separately transferable by such Exerciser Member on the same basis as the same may be separately transferable by other CBOE Regular Members. In the event the CBOE makes a cash or property distribution, whether in dissolution, redemption or otherwise, to other CBOE Regular Members as a class, which has the effect of diluting the value of a CBOE Membership, including that of a CBOE membership under Article Fifth(b), such distribution shall be made on the same terms and conditions to Exerciser Members.

(b) The CBOE agrees to establish a reasonable record date for any offer, distribution or redemption subject to Paragraph 3(a) above in order to give Eligible CBOT Full Members and Eligible CBOT Full Member Delegates a reasonable opportunity to become Exerciser Members and to participate in such offer, distribution or redemption. The CBOE

agrees to notify the CBOT no less than ninety (90) days prior to every offer, distribution or redemption subject to Paragraph 3(a) above and of the record date established therefor unless impracticable in the circumstances, in which event the CBOE agrees to notify the CBOT no less than (30) days prior to every offer, distribution or redemption subject to Paragraph 3(a) above. In order to permit Eligible CBOT Full Members and Eligible CBOT Full Member Delegates to participate in an offer, distribution or redemption of the kind referred to in the last two sentences of Paragraph 3(a) above, and solely for such purpose, CBOE further agrees to waive all membership dues, fees and other charges and all qualification requirements, other than those that may be imposed by law, that may be applicable to the application for membership on CBOE of each Eligible CBOT Full Member and Eligible CBOT Full Member Delegate who wishes to exercise the Exercise Right during the period commencing on the date CBOE gives notice to CBOT pursuant to this Paragraph 3(b) and ending on the date such individual participates in such offer, distribution or redemption (as the case may be); provided, however, that (i) no Exerciser Member for whom dues, fees and other charges and qualification requirements are waived in accordance with the foregoing shall have any rights as a CBOE member other than to participate in such offer, distribution or redemption, and (ii) the CBOE membership of each such Exerciser Member shall terminate immediately following the time such individual participates in such offer, distribution or redemption.

(c) The CBOE agrees, in its own capacity and on behalf of its members, that any Eligible CBOT Full Member or Eligible CBOT Full Member Delegate is entitled to become an Exerciser Member pursuant to Article Fifth(b), provided such individual qualifies to be a CBOE Regular Member in accordance with the rules of the CBOE applicable generally to CBOE Regular Membership.

(d) The CBOE agrees, in its own capacity and on behalf of its members, that in the event the CBOT merges or consolidates with or is acquired by or acquires another entity ("other entity") and (i) the survivor of such merger, consolidation or acquisition ("survivor") is an exchange which provides or maintains a market in commodity futures contracts or options, securities, or other financial instruments, and (ii) the 1,402 holders of CBOT Full Memberships are granted in such merger, consolidation or acquisition membership in the survivor ("Survivor Membership"), and (iii) such Survivor Membership entitles the holder thereof to have full trading rights and privileges in all products then or thereafter traded on the survivor (except that such trading rights and privileges need not include products that, at the time of such merger,

consolidation or acquisition, are traded or listed, designated or otherwise authorized for trading on the other entity but not on the CBOT), then the Exercise Right of Article Fifth(b) shall continue to apply and this Agreement shall continue in force and effect (with the words "CBOT Full Membership" being interpreted to mean "Survivor Membership"). Article Fifth(b) shall not apply to any other merger or consolidation of CBOT with, or acquisition of CBOT by, another entity.

(e) The CBOE agrees that a significant purpose of the Agreement is to ensure that CBOE will not make any offer, distribution or redemption to CBOE Regular Members as a class which would have the effect of diluting the rights under Article Fifth(b) of Eligible CBOT Full Members and Eligible CBOT Full Member Delegates. It is the intention of the parties that Paragraphs 3(a) and 3(b) above are the agreed and sole means of ensuring that Eligible CBOT Full Members and Eligible CBOT Full Member Delegates will have the ability to participate in every offer, distribution or redemption which would have the effect of diluting the value of CBOE regular memberships, including CBOE memberships under Article Fifth(b).

(f) Subject to Paragraph 4(a) below, the CBOE agrees to amend its Rule 3.16(c) in the form and manner set forth in Exhibit B hereto (the "CBOE Rule Change"), including rescinding and withdrawing its currently proposed Rule 3.16(c) from consideration by the Securities and Exchange Commission.

4. SPECIAL PROVISIONS.

(a) CBOT represents that the CBOT Rule Change requires the approval of both the CBOT membership and the Commodity Futures Trading Commission in order to become effective. CBOE represents that this Agreement and the CBOE Rule Change require the approval of both the CBOE membership and the Securities and Exchange Commission in order to become effective. The parties agree to work in good faith to obtain all such approvals as expeditiously as possible. Should any required approval not be obtained, however, then this Agreement shall be null and void, as if never executed, and neither party shall be deemed to be in any way bound by any term or provision, including any agreement or acknowledgment, of this Agreement.

(b) From and after the Effective Date and so long as this Agreement remains in force and effect, the CBOT Rule Change shall not be amended or modified in any way by the CBOT without the written consent of the CBOE, and the CBOE Rule Change shall not be amended

or modified in any way by the CBOE without the written consent of the CBOT, which consent in either case shall not be unreasonably withheld.

(c) The CBOT agrees to enforce the CBOT Rule Change after the same has been approved and has become effective as set forth in Paragraph 4(a) hereof, and the CBOE agrees to enforce the CBOE Rule Change after the same has been approved and has become effective as set forth in Paragraph 4(a) hereof. In the event that the validity of any provision of this Agreement or any rule, regulation or bylaw adopted pursuant to this Agreement shall be challenged by any person, the parties mutually agree that they will jointly defend the validity of such challenged provision or rule, regulation or bylaw.

(d) The parties mutually agree that it is appropriate, and within the meaning and spirit of Article Fifth(b), for the CBOE to interpret Article Fifth(b) in accordance with the provisions of this Agreement.

5. TERMINATION.

This Agreement shall become effective on the Effective Date, subject to Paragraph 4(a) above, and shall remain in full force and effect thereafter unless and until terminated in accordance with this Paragraph. Either party may terminate this Agreement for cause, and only for cause, by giving the other party fifteen (15) days written notice of the termination and the cause therefore; provided, however, that if the other party remedies the cause for termination to the reasonable satisfaction of the notifying party during such fifteen (15) day period, this Agreement shall not be terminated and shall remain in full force and effect. Cause shall include only (i) a material breach of this Agreement; or (ii) in the event this Agreement, or any part of it, or any rule, regulation or bylaw adopted pursuant to and to implement this Agreement, is set aside by order of a court or regulatory agency of competent jurisdiction.

6. MISCELLANEOUS.

(a) This Agreement constitutes the entire understanding of the parties. No waiver, alteration or modification of any of the provisions hereof shall be binding unless in writing and signed by a duly authorized representative of each party.

(b) Except to the extent that this Agreement or any rule adopted pursuant to this Agreement is governed by any law of the United States or of a rule or regulation adopted by a regulatory agency pursuant to any such

law, this Agreement shall be governed by and construed in accordance with the laws of the State of Illinois.

(c) The parties mutually agree that either party to this Agreement may bring suit (on its own behalf or on behalf of its members, or both) to enforce the terms of this Agreement and to recover damages for any breach of this Agreement.

CHICAGO BOARD OPTIONS EXCHANGE, INC.	BOARD OF TRADE OF THE CITY OF CHICAGO
BY: Alger B. Chapman	BY: Thomas M. Donovan
TITLE: Chairman of the Board	TITLE: President and Chief Executive Offi
BY: William C Howard	BY: William T. O'Brien
TITLE: Vice Chairman of the Board	TITLE: Chairman of the Board

EXHIBIT A

CHICAGO BOARD OF TRADE - RULE AMENDMENTS

210.00 Full Member CBOE "Exercise" Privilege. In accordance with the Agreement entered into on _____, 1992 (the "Agreement") between the Exchange and the Chicago Board Options Exchange ("CBOE"), Eligible CBOT Full Members who maintain all appurtenant trading rights and privileges of a full membership, including any new trading rights or privileges granted, assigned or issued to a CBOT full membership to the extent such right or privilege is deemed under the provisions of such Agreement to be appurtenant to a CBOT Full Membership, are eligible to become regular members of the CBOE pursuant to Article Fifth(b) of CBOE's Certificate of Incorporation. A CBOT Full Member may delegate all of his trading rights and privileges of full membership to an individual who will then be eligible to become a regular CBOE member pursuant to Article Fifth(b) of CBOE's Certificate of Incorporation; provided, however, if a CBOT Full Member delegates some, but not all, of the appurtenant trading rights and privileges of full membership, then neither the member nor the delegate will be eligible to be a CBOE regular member pursuant to Article Fifth(b). No person who is not either an Eligible CBOT Full Member or an Eligible CBOT Full Member Delegate (See Rule 221.00(g)(ii)) shall knowingly apply to become, or knowingly remain, a regular member of CBOE pursuant to Article Fifth(b) of CBOE's Certificate of Incorporation.

For purposes of the Agreement entered into on _____, 1992 between the Exchange and the CBOE, an Eligible CBOT Full Member means an individual who at the time is the holder of one of the One Thousand Four Hundred Two (1,402) CBOT full memberships ("CBOT Full Memberships") existing on the date of the Agreement and who is in possession of all trading rights and privileges appurtenant to such CBOT Full Membership. In the event a CBOT Full Membership is registered for a partnership, corporation or other entity, only the individual who is the holder of such CBOT Full Membership and who is in possession of all trading rights and privileges appurtenant to such CBOT Full Membership shall be deemed to be an "Eligible CBOT Full Member." "Trading rights and privileges appurtenant to such CBOT Full Membership" means (1) the rights and privileges of a CBOT Full Membership which entitle a holder or delegate to trade as principal and broker for others in all contracts traded on the CBOT, whether by open outcry, by electronic means, or otherwise, during any segment of a trading day when trading is authorized; and (2) every trading right or privilege granted, assigned or issued by CBOT after the effective date of this Agreement to holders of CBOT Full Memberships, as a class, but excluding any right or privilege which is the subject of

an option granted, assigned or issued by CBOT to a CBOT Full Member and which is not exercised by such CBOT Full Member.

221.00 Delegation - An individual member may delegate the rights and privileges of Full and/or Associate Memberships to an individual (a "delegate") upon the following terms and conditions:

* * * * *

(g)(i) In accordance with the Agreement entered into on _____, 1992 ("the Agreement") between the Exchange and the Chicago Board Options Exchange ("CBOE"), only an individual who is an "Eligible CBOT Full Member" or an "Eligible CBOT Full Member Delegate", as those terms are defined in the Agreement, is a "member" of the Exchange within the meaning of paragraph (b) of Article Fifth of CBOE's Certificate of Incorporation ("Article Fifth(b)") and only such individuals are eligible to become and to remain regular members of the CBOE pursuant to Article Fifth(b). No person who is not either an Eligible CBOT Full Member or an Eligible CBOT Full Member Delegate shall knowingly apply to become, or knowingly remain, a regular member of CBOE pursuant to Article Fifth(b) of CBOE's Certificate of Incorporation.

(g)(ii) For purposes of the "Agreement" referenced in Rule 221.00(g)(i), an "Eligible CBOT Full Member Delegate" means the individual to whom a CBOT Full Membership is delegated (leased) and who is in possession of all trading rights and privileges appurtenant to such CBOT Full Membership. "Trading rights and privileges appurtenant to such CBOT Full Membership" means (1) the rights and privileges of a CBOT Full Membership which entitle a holder or delegate to trade as principal and broker for others in all contracts traded on the CBOT, whether by open outcry, by electronic means, or otherwise, during any segment of a trading day when trading is authorized; and (2) every trading right or privilege granted, assigned or issued by CBOT after the effective date of this Agreement to holders of CBOT Full Memberships, as a class, but excluding any right or privilege which is the subject of an option granted, assigned or issued by CBOT to a CBOT Full Member and which is not exercised by such CBOT Full Member.

EXHIBIT B

CHICAGO BOARD OPTIONS EXCHANGE, INC. - RULE AMENDMENT

Rule 3.16(c) of the Chicago Board Options Exchange, Inc. shall be amended to be and read as follows:

Deletions [bracketed].

[Rule 3.16(c) Board of Trade Exercisers. For the purpose of continued entitlement to membership on the Exchange in accordance with Section 2.1(b) of the Constitution and Paragraph (b) of Article Fifth of the Certificate of Incorporation of the Exchange, the term "member of the Board of Trade of the City of Chicago" (the "Board") is interpreted to mean a single individual or organization in possession of a full Board membership as described below. Such membership shall consist of all the trading rights and privileges afforded to Board memberships as in existence on February 4, 1972 (the date the Exchange's Certificate of Incorporation was adopted) except for such rights and privileges which the Exchange may exclude. Where the member is an organization, one individual must possess all of a full membership's trading rights and privileges on the Board. If any part not excluded by the Exchange (but less than all) of a full membership's trading rights and privileges on the Board is sold, leased, licensed, delegated or in any other fashion transferred, then neither the transferor or the transferee of such rights and privileges shall be deemed to be a "member of the Board" entitled to Exchange membership. If a full membership's trading rights and privileges, as they existed on February 4, 1972, should be split into two or more sets of rights or privileges or be segmented or separated in any other manner, then, in order for an individual or organization to be deemed to be in possession of all the pertinent and regular trading rights and privileges afforded such full membership, such individual or organization must be in possession of, and have pertinent and regular trading rights and privileges with respect to all of the split, segmented or separated parts of such original membership except for those excluded by the Exchange.]

Rule 3.16(c). Board of Trade Exercisers. For the purpose of entitlement to membership on the Exchange in accordance with Paragraph (b) of Article Fifth of the Certificate of Incorporation of the Exchange ("Article Fifth(b)") the term "member of the Board of Trade of the City of Chicago" (the "CBOT"), as used in Article Fifth(b), is interpreted to mean an individual who is either an "Eligible CBOT Full Member" or an "Eligible CBOT Full Member Delegate," as those terms are defined in the Agreement entered into on _____, 1992, (the "Agreement") between the CBOT and the Exchange, and shall not mean any other person. In order to permit Eligible CBOT Full Members and Eligible CBOT Full Member Delegates to participate in an offer, distribution or redemption of the kind referred to in the last two sentences of Paragraph 3(a) of the Agreement, and solely for such purpose, CBOE agrees to waive

all membership dues, fees and other charges and all qualification requirements, other than those that may be imposed by law, that may be applicable to the application for membership on CBOE of each Eligible CBOT Full Member and Eligible CBOT Full Member Delegate who wishes to exercise the Exercise Right during the period commencing on the date CBOE gives notice to CBOT pursuant to Paragraph 3(b) of the Agreement and ending on the date such individual participates in such offer, distribution or redemption (as the case may be); provided, however, that (i) no Exerciser Member (as defined in the Agreement) for whom dues, fees and other charges and qualification requirements are waived in accordance with the foregoing shall have any rights as a CBOE member other than to participate in such offer, distribution or redemption, and (ii) the CBOE membership of each such Exerciser Member shall terminate immediately following the time such individual participates in such offer, distribution or redemption.