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

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APPEARANCES:

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MARSHALL SPIEGEL (via speakerphone)
Pro Se Intervenor

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THE COURT: Good morning, everyone.

ALL COUNSEL: Good morning.

THE COURT: Good morning, Mr. Nachbar.

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

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

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

MR. CAREY: Good morning, Your Honor.

THE COURT: Good morning.

MR. NACHBAR: Thank you.

MR. BOUCHARD: One more, Sam? Thanks.

THE COURT: Good morning, Mr. Bouchard.

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

MR. NASH: Good morning, Your Honor.

THE COURT: Good morning.

MR. NOLEN: Good morning, Your Honor.

THE COURT: Good morning, Mr. Nolen.

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

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

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

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

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

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

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

THE COURT: Good morning and welcome.

MR. DENGEL: Good morning, Your Honor.

Plaintiffs would have this Court

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

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

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

THE COURT: But isn't --

MR. DENGEL: But the question --

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

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

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

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

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

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

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

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

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

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

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

We have two -- our fiduciary duties are not just to the seat owner. They also go to

people who are Board of Trade members now or who are exerciser members who -- who claim that right. We have to make a decision as between two competing sets of interest, two diametrically-opposed views about what the effect of the merger transaction would be on membership.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DENGEL: No threat.

THE COURT: -- if you interpreted --

MR. DENGEL: No, no, no.

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

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

THE COURT: I'm sorry.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Your Honor, on --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DENGEL: Yes.

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

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

THE COURT: So then we progress to

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

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

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

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

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

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

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

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

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

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

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

MR. DENGEL: Right.

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

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

THE COURT: I understand.

MR. DENGEL: Yeah.

THE COURT: There's so many

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

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

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

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

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

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

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

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

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

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

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

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

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

merits of CBOE's interpretation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lastly, and very briefly.

THE COURT: Why isn't --

MR. DENGEL: Yeah.

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

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

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

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

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

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

There, we're talking about process and

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

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

THE COURT: Not right now.

MR. DENGEL: Okay. Very briefly --

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

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

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