



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CME GROUP, INC., a Delaware Corporation, as successor by merger to CBOT HOLDINGS, INC., a Delaware Corporation; THE BOARD OF TRADE OF THE CITY OF CHICAGO INC., a Delaware Corporation; and MICHAEL FLOODSTRAND and THOMAS J. WARD and All Others Similarly Situated,

Plaintiffs,

v.

C.A. No. 2369-VCN

CHICAGO BOARD OPTIONS EXCHANGE, INC., a Delaware non-stock corporation, WILLIAM J. BRODSKY, JOHN E. SMOLLEN, ROBERT J. BIRNBAUM, JAMES R. BORIS, MARK F. DUFFY, JONATHAN G. FLATOW, JANET P. FROETSCHER, BRADLEY G. GRIFFITH, PAUL J. JIGANTI, STUART K. KIPNES, DUANE R. KULLBERG, JAMES P. MacGILVRAY, JR., ANTHONY D. McCORMICK, EDEN MARTIN, RODERICK PALMORE, THOMAS H. PATRICK, JR., SUSAN M. PHILLIPS, WILLIAM R. POWER, SAMUEL K. SKINNER, CAROLE E STONE, HOWARD L. STONE, and EUGENE S. SUNSHINE,

Defendants.

PLAINTIFFS' MOTION TO LIFT STAY TO ALLOW FOR THE FILING OF A THIRD AMENDED COMPLAINT AND THE COMMENCEMENT OF DISCOVERY

Plaintiffs CME Group, Inc., the Board of Trade of the City of Chicago, Inc., Michael Floodstrand and Thomas J. Ward hereby move this Court to lift the stay in this case for the limited purposes of (1) allowing Plaintiffs to file a Third Amended Complaint, and (2) allowing the parties to commence discovery. The grounds for this motion are as follows:

1. This Court has previously stayed all action in this case pending United States Securities and Exchange Commission ("SEC") action on Defendants' December 12, 2006

proposed rulemaking (“the December Rule”). As the Court explained at that time, avoiding a potential conflict between the SEC action and this Court’s ruling militated in favor of staying this case. Over the past nine months, the SEC has not addressed the merits of the December Rule. CBOE’s July 2, 2007 interim rule (“the July Rule”) was made effective on filing by CBOE and SEC did not act within the requisite 60 days to abrogate that rule. Regardless of when or how the SEC acts in the pending CBOE request, further proceedings in this Court, on the economic issues, are inevitable. Lifting the stay to allow the filing of a third amended complaint will permit pleadings to be updated to reflect current circumstances.¹ Discovery on the economic issues, particularly the breach of fiduciary duties claims and the damage issues will be required at some point. Completing some of the discovery sooner – rather than later – is in the interests of the parties and will further judicial economy and efficiency. Lifting the stay now for limited purposes will advance the ultimate resolution of this case, without requiring further action by the Court. A lifting of the stay for these purposes will not be inconsistent with the objectives of the Court in ordering the stay. On the contrary, it is entirely consistent with the rationale for the stay as described in the Court’s Order.

Procedural History of This Case

2. Plaintiffs filed their original Complaint in this case on August 23, 2006. On October 2, 2006, Defendants filed a motion to dismiss that complaint, and then a supporting brief on November 2, 2006. Plaintiffs filed an Amended Complaint on November 20, 2006.² On December 22, 2006, Plaintiffs moved for leave to file a Second Amended Complaint. The Court

¹ Clean and blacklined copies of the proposed Third Amended Complaint are attached hereto as Exhibits 1 and 2, respectively.

² This Amended Complaint was substantially identical to the original Complaint except that it contained an updated list of defendants to reflect changes in the CBOE Board.

granted this motion and Plaintiffs filed their Second Amended Complaint on January 4, 2007. On January 11, 2007, Plaintiffs filed a Motion for Partial Summary Judgment on all counts.

3. Meanwhile, certain proceedings have occurred before the SEC. CBOE filed the first of the relevant rule filings, SR-CBOE-2006-106 with the SEC on December 12, 2006. It submitted an amended filing on January 16, 2007. The comment period for this rule filing closed on February 27, 2007. A total of at least 153 comments were filed, including comments submitted by the Plaintiffs. Then on July 2, 2007, CBOE filed the July Rule, a self-executing “Interpretation” (SR-CBOE-2007-77) in which it announced its intention to terminate the Exercise Right upon consummation of the merger between CBOT Holdings, Inc. and Chicago Mercantile Exchange Holdings, Inc., which occurred on July 12, 2007. As stated above, the SEC has not taken any action with respect to the December Rule.

This Court’s August 3 Orders

4. On August 3, this Court ruled on several of the pending motions in this case. Most significantly, the Court held that it does have jurisdiction over Plaintiffs’ pending claims. Specifically, the Court held “that it has jurisdiction to consider the ‘economic rights’ issues raised by the Complaint because those claims emerge from and are governed by state contract or fiduciary duty law.” August 3, 2007 Mem. Op. at 29-30.

5. At the same time, the Court stayed the case “subject to further order of the Court, *sua sponte* or on application by any party for cause, pending final action by the United States Securities and Exchange Commission on the Proposed Rule Change, as defined in the Memorandum Opinions and styled as SEC File No. SR-CBOE-2006-106.” August 3, 2007 Order at 2. The Court explained that “the interests of judicial efficiency militate in favor of

staying this action pending the SEC's response to the CBOE's proposed rule change filing."

August 3, 2007 Memo. Op. at 7. The Court later explained:

The Court is satisfied that resolution of the Plaintiffs' 'economic rights' claims is best stayed pending completion of the SEC's review of the CBOE's filing. A stay would serve a multitude of interests, including the economy of judicial effort and the prevention (or minimization) of potential conflict, or perceived conflict, between the administrative powers and the judicial process. Significantly, a stay would enable the Court to assess more accurately how, and if, the SEC's decision on the proposed rule change affects the Court's calculus on the economic rights claims.

Id. at 29 (footnotes omitted).

The Stay Should Be Lifted for Certain Limited Purposes

6. More than nine months have passed since CBOE filed the December Rule. Over six months have passed since the comment period on that rule closed. The SEC has taken no action on the December Rule. Moreover, there is no indication that the SEC will take any action on the proposed rule change in the near future. The SEC has taken a year or even much longer to act on such proposals.³

³ Release No. 34-53103; File No. SR-ISE-2006-01. Notice of Filing of Proposed Rule Change to Amend Exchange Rule Governing Directed Orders Release Date: January 11, 2006, <http://sec.gov/rules/sro/ise/2006/34-53103.pdf>. The proposal was filed January 5, 2006; the last set of comments was received February 27, 2006. To date, this proposed rule change is still pending action by the Commission. Release No. 34-52049; File No. SR-NASD-2005-087. Notice of Filing of Proposed Rule Change to Reflect Nasdaq's Separation from NASD Upon Nasdaq's Anticipated Approval as a National Securities Exchange Release Date: July 15, 2005, <http://sec.gov/rules/sro/nasd/34-52049.pdf>. The proposal was filed July 11, 2005 and approved June 30, 2006. However, the proposed rule change was conditioned upon Nasdaq's approval as a national securities exchange; while such approval was granted on January 13, 2006, certain conditions set forth in the Nasdaq Exchange Order were modified on June 30, 2006, prompting the NASD to file an amendment to the above-captioned proposed rule change. The order granting approval of the proposed rule change also approves the amendment, on an accelerated basis. This rule change proposal was intended to replace and update SR-NASD-2001-90, filed December 7, 2001, which, as of July 11, 2005, the Commission had not yet approved. Release No. 34-51062; File No. SR-Amex-00-27. Notice of Filing of Proposed Rule Change and Amendments No. 1, 2, 3, 4, 5, and 6 Thereto to Require the Immediate Display of Customer Option Limit Orders. Release Date: August 12, 2004, <http://www.sec.gov/rules/sro/amex/34-50188.pdf>. The proposal was filed May 10, 2000, and approved, as amended, January 21, 2005. Amex filed amendments to the proposed rule change on March 13, 2002, April 3, 2003, July 15, 2003, August 19, 2003, October 22, 2003, and August 12, 2004. Release No. 34-45630; File No. SR-CBOE-2002-03. Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Incorporated Relating to Customer Portfolio and Cross-Margining Requirements. Release Date: March 22, 2002, <http://www.sec.gov/rules/sro/34-45630.htm>. The proposed was filed January 15, 2002, and approved, as amended,

7. Prior to the stay, the parties had not taken any discovery. Discovery is justified at this time to obtain and preserve documents and testimony related specifically to Plaintiffs' breach of fiduciary duty claims against the CBOE and its directors, as well as the damages related to those claims. As the attached Third Amended Complaint demonstrates, Plaintiffs' claim for breach of fiduciary duties (Count IV) contains substantial new allegations relating to the conduct by the Director Defendants since the Second Amended Complaint was filed in January 2007. Plaintiffs seek this discovery to supplement their pending Motion for Partial Summary Judgment on Count IV. Relevant documents are lost and memories fade as time passes, especially in high stakes litigation such as this case. *See Siegman v. Columbia Pictures Entertainment, Inc.*, 1993 WL 133068, at * 3 (Apr. 14, 1993) (denying defendant's motion to stay damages discovery because "[i]t has been three and a half years since the events that gave rise to this action took place [and] [t]here is the risk that if damages discovery is further delayed that memories would fade and documentary evidence would be difficult to obtain."). The necessity of prompt discovery is heightened where much of the key evidence remains solely in the control of defendants whose conduct has been challenged.⁴

8. Another reason for seeking to commence discovery is to allow the parties to gather evidence in the possession of defendants and unavailable elsewhere so Plaintiffs will have

July 14, 2005. The CBOE filed amendments to the proposed rule change on April 2, 2004 (amendment published December 27, 2004) and April 15, 2005.

⁴ Defendants can hardly object to Plaintiffs' attempt to initiate discovery when the Defendants have previously criticized Plaintiffs for *not* taking discovery. *See* Def. Br. in Opp. to Mot. for Part. Summ. Judg. at 41 ("The Plaintiff Representatives did not bother to seek discovery before bringing their motion, so not surprisingly they offer no material factual support for their baseless accusations. The facts actually establish that the CBOE Board in fact went to great lengths to ensure that its decisions were careful, fair and free of self-interest"); *see also id.* at 42 ("Because the Plaintiff Representatives did not bother to check their assumptions through discovery, their knowing ignorance of the facts led them to completely and irresponsibly misrepresent the CBOE Board's actual decision-making process").

a full opportunity to review this material before reaching any opinions as to whether defendants satisfied their fiduciary obligations to the Plaintiffs.

9. Defendants should have no objection to this Motion since their recent actions and subsequent events are the primary reasons that the Complaint must be amended.

10. Lifting the stay for these limited purposes will serve the interests of judicial efficiency by allowing the parties to start discovery so this case will move forward most expeditiously once the Court lifts the stay for all other purposes. Given that the Court has held that it has jurisdiction over the Plaintiffs' "economic rights" claims, such discovery is inevitable. If the SEC rejects the December Rule and the Interim Rule terminates, the question of the damages caused by CBOE's misconduct remains.

11. In addition, lifting the stay now will not conflict with any of the Court's reasons for imposing the stay in August. Those reasons focused on the wisdom then of allowing the SEC to act before the Court made any decision in the case. However, allowing Plaintiffs to amend their complaint and the parties to begin discovery will not require the Court to make any substantive decision in this case until it decides to proceed with this action.

WHEREFORE, Plaintiffs respectfully request that this Court to lift the stay in this case for the limited purposes of (1) allowing Plaintiffs to file their Motion for Leave to File a Third Amended Complaint, and (2) allowing the parties to commence discovery.

MORRIS, NICHOLS, ARSHT & TUNNELL
LLP

/s/ Kenneth J. Nachbar

Kenneth J. Nachbar (# 2067)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200
*Attorneys for CME Group, Inc., and The
Board of Trade of the City of Chicago, Inc.*

BOUCHARD, MARGULES &
FRIEDLANDER, P.A.

/s/ Andre G. Bouchard

Andre G. Bouchard (#2504)
222 Delaware Avenue, Suite 1400
Wilmington, DE 19801
(302) 573-3500
*Attorneys for Michael Floodstrand,
Thomas J. Ward and All Others Similarly
Situated*

OF COUNSEL:

Hugh R. McCombs
Michele L. Odorizzi
Michael K. Forde
MAYER BROWN LLP
71 South Wacker
Chicago, IL 60606-4637
(312) 782-0600

Peter B. Carey
LAW OFFICES OF PETER B. CAREY
11 South LaSalle Street, Suite 1600
Chicago, IL 60603
(312) 541-0360

Kevin M. Forde, Esq.
KEVIN M. FORDE, LTD.
111 West Washington Street, Ste. 1100
Chicago, IL 60602
(312) 641-1441

Jerrold E. Salzman
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP
333 W. Wacker Drive
Chicago, Illinois 60606
(312) 407 0718

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OF COUNSEL:

Gordon B. Nash, Jr.
Scott C. Lascari
DRINKER BIDDLE GARDNER CARTON
191 North Wacker Drive
Suite 3700
Chicago, IL 60606