SCHIFFHARDIN LLP

6600 SEARS TOWER
CHICAGO, ILLINOIS 60606
t 312.258.5500
f 312.258.5600
www.schiffhardin.com

Paul E. Dengel
312-258-5614
pdengel@schiffhardin.com

August 30, 2007

VIA ELECTRONIC FILING

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

Re: File No. SR-CBOE-2007-77

Dear Ms. Morris:

The Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange) hereby responds to the so-called "Emergency Petition for Securities and Exchange Commission Review of Rulemaking Action of the Chicago Board Options Exchange, Incorporated" (the "Comment Letter"), in which CME Group, Inc. ("CME"), the Board of Trade of the City of Chicago, Inc. ("Board of Trade") and Michael Floodstrand and Thomas J. Ward (collectively, the "commenters") ask the Commission to abrogate SR-CBOE-2007-77 (the "Continued Membership Interpretation").

PRELIMINARY STATEMENT

The commenters' so-called "Petition" is nothing more than a failed attempt to elevate a comment letter beyond its rightful place in the rule-making process. Having squandered the vast majority of the comment period, the commenters cannot now claim an "emergency" has arisen. Public policy should not be formulated under this pretext. Moreover, in support of their position, the commenters distort and misstate the facts and the law and make unfounded factual assertions. The Comment Letter is nothing more than a desperate attempt by the commenters to lure the Commission into taking action when none is appropriate.

The commenters make two primary claims, each of which has no merit. First, the commenters claim that CBOE's Continued Membership Interpretation was not validly filed under Section 19(b)(3)(A). Second, the commenters assert that CBOE's Continued Membership Interpretation is not valid because it supposedly is in contravention of CBOE's Constitution, and because the Board allegedly did not properly authorize it. In making these claims, the commenters misstate the requirements under Section 19(b)(3)(A) and CBOE's Constitution.

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f 312.258.5600
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As more fully described below, CBOE's Continued Membership Interpretation clearly fits within the requirements of the Exchange Act. CBOE's Continued Membership Interpretation is consistent with CBOE's Constitution and rules, because no new memberships or trading permits are being created. Instead, former memberships are only being extended under an existing CBOE rule. Finally, CBOE's Board employed a process that guaranteed procedural fairness when it adopted the Continued Membership Interpretation. A majority of the Board that considered and approved the Continued Membership Interpretation rule filing was comprised of disinterested, independent directors. In support of their bald assertion that CBOE's directors breached their fiduciary duties, the commenters rely on a Delaware counsel opinion letter that addresses the Board's decision to approve a completely different rule – namely, SR-CBOE-2006-106. As such, this opinion letter is irrelevant for purposes of determining whether the Continued Membership Interpretation was validly adopted. Even with respect to the adoption of SR-CBOE-2006-106, the opinion letter should be given no weight, because it is based on assumptions that are factually wrong.

BACKGROUND

The Continued Membership Interpretation is an interpretation of an existing rule, CBOE Rule 3.19, that is designed to preserve the status quo and to avoid disruption in CBOE's markets until the Commission can act on a separate rule filing, SR-CBOE-2006-106 (the "Exercise Right Interpretation"). Because the Continued Membership Interpretation is a stated interpretation of the meaning of an existing rule, CBOE submitted it pursuant to Section 19(b)(3)(A) of the Exchange Act, under which it was immediately effective subject to possible abrogation by the Commission. The commenters ask the Commission to abrogate the Continued Membership Interpretation, in which case CBOE would face the immediate loss of more than 200 persons who are currently supplying liquidity by trading on CBOE's floor.

Adoption of Exercise Right Interpretation

The underlying Exercise Right Interpretation construes Article Fifth(b) of CBOE's Certificate of Incorporation ("Article Fifth(b)"), which grants each "member" of the Board of Trade the right (the "Exercise Right") to obtain, by exercise and without having to make any payment, a non-transferable membership in CBOE (an "Exerciser Membership"). Article Fifth(b) does not define what is required to qualify as a "member" of the Board of Trade. Accordingly, on the several occasions when changes in the structure or business model of the Board of Trade affected the nature and character of Board of Trade membership in ways not contemplated when Article Fifth(b) was enacted, CBOE has had to interpret what it means to be a Board of Trade "member" for purposes of Article Fifth(b) under those new circumstances. On

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t 312.258.5500
f 312.258.5600
www.schiffhardin.com

each such occasion, CBOE's interpretation of Article Fifth(b) was submitted for Commission approval pursuant to Section 19(b)(1) of the Exchange Act.[1]

Another such occasion requiring interpretation of Article Fifth(b) arose on October 17, 2006, when the then-parent of the Board of Trade and CME's predecessor (CME Holdings, Inc.) announced their intention to enter into a transaction in which CME would acquire the Board of Trade by means of a merger of the Board of Trade's parent with and into CME. This proposed transaction involved changes that raised questions about whether persons would continue to qualify as Board of Trade "members" for purposes of Exercise Right eligibility under Article Fifth(b). For instance, no individual would have any ownership interest in the Board of Trade after the transaction. Instead, the Board of Trade would be owned solely by CME, which in turn would be a publicly traded holding company. In addition, the persons called "full" members of the Board of Trade prior to the transaction would be stripped of most of the rights commonly associated with exchange membership – including the 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 the Board of Trade, and the right to amend or repeal the bylaws of the Board of Trade.

In light of the issues raised by these changes in the nature of Board of Trade "membership," CBOE's Board met on December 12, 2006 to consider how to interpret Article Fifth(b) in light of that proposed transaction. The seven voting public directors of CBOE met to consider this issue separately from any industry director who arguably might have an interest in the issue. None of those public directors had any membership interest in CBOE, possessed any right to acquire such a membership interest or had any affiliation with an entity that owned any CBOE membership. In their separate meeting, the voting public directors unanimously approved the Exercise Right Interpretation, which interpreted Article Fifth(b) to mean that, upon the consummation of the CME acquisition of the Board of Trade, no persons any longer would qualify as "members" of the Board of Trade within the meaning of Article Fifth(b) and, therefore, no persons thereafter would qualify to be Exerciser Members of CBOE.

After the vote of the public directors, the full Board reconvened to consider and vote on the Exercise Right Interpretation. In that portion of the meeting, a majority of the voting

[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).

directors had no interest in the Exercise Right Interpretation. In particular, only five of the voting directors owned or were affiliated with a firm that owned a non-Exerciser Membership. In that meeting of the whole Board, the Exercise Right Interpretation was again approved unanimously, and even the director who was trading as an Exerciser Member voted in favor of the interpretation. This Exercise Right Interpretation thereafter was filed as SR-CBOE-2006-106.

The commenters (or their predecessors in interest) thereafter challenged the Exercise Right Interpretation in Delaware state court. CBOE moved to dismiss that portion of the complaint on the ground that the Commission had exclusive jurisdiction to consider interpretations of the rules of national securities exchanges, particularly rules that addressed the qualifications for exchange membership. This motion was fully argued on May 30, 2007, and the Court took the matter under advisement. The Exercise Right Interpretation was pending before the Commission at that time.

Adoption of Continued Membership Interpretation

CME and the Board of Trade announced their intention to proceed to a vote of their memberships and thereafter to consummate their transaction knowing full well that the merits of the Exercise Right Interpretation were under active review and consideration. CBOE recognized that such an event would present CBOE with an immediate need to ascertain who was entitled to trade during the period after consummation of the transaction and before the Commission's final action on the Exercise Right Interpretation. Under the Exercise Right Interpretation, persons who were exerciser members immediately before the consummation of that transaction would lose that status upon the completion of that transaction. On the other hand, the commenters and others were opposing the Exercise Right Interpretation and maintaining that those persons would retain their right to be Exerciser Members after that transaction. To avoid disruption to its markets, it was essential that CBOE have procedures in place that would determine who would be allowed to trade in the event that the Board of Trade proceeded with the CME acquisition notwithstanding the unresolved issues concerning the Exercise Right Interpretation.

To address that situation, CBOE's Board considered and approved the Continued Membership Interpretation at its meeting on June 29, 2007. Once again, the independent directors of CBOE met separately to consider and vote on that interpretation, and these ten independent directors unanimously voted to adopt that interpretation. They then were joined by the remaining eight directors for a meeting of the entire board, which also unanimously approved the interpretation. Accordingly, the Continued Membership Interpretation was filed with the Commission on July 2, 2007 as immediately effective pursuant to Section 19(b)(3)(A) of the Exchange Act.

The Continued Membership Interpretation consists of Interpretation and Policy .01 of CBOE Rule 3.19. Rule 3.19 provides that, if the Exchange "determines that there are extenuating circumstances" surrounding the termination of a person's membership, "the Exchange may permit the member to retain the member's membership status for such period of time as the Exchange deems reasonably necessary to enable the member to obtain a membership." The Continued Membership Interpretation interpreted and applied that rule to the extenuating circumstances created by the Board of Trade's decision to proceed with the CME acquisition while the Exercise Right issues remained open and unresolved. In particular, under that interpretation, persons who were Exerciser Members in good standing as of stated dates before the consummation of the CME acquisition temporarily would retain their membership status, including their trading access to CBOE. Because these extenuating circumstances would exist until the Exercise Right eligibility issues were resolved, the Continued Membership Interpretation provided that this temporary continuation of membership status would continue until the Commission took final action on the Exercise Right Interpretation.

In short, the Continued Membership Interpretation did not make immediately effective the loss of Exercise Right eligibility that the CME acquisition effected. Instead, it preserved the status quo until there could be a definitive resolution about the effect of the CME acquisition on Exercise Right Eligibility. Everyone who was an Exerciser Member on the specified date just before the CME acquisition would be able to continue in that membership status – and enjoy all the rights of membership, including trading access – during the interim period preceding Commission action on the Exercise Right Interpretation. In order to ensure that Exerciser Memberships would continue seamlessly, the Continued Membership Interpretation did not require that the former Exerciser Members maintain any particular Board of Trade property interests to retain their continued CBOE membership status during this interim period. Because these former Exerciser Members were freed of that obligation and to ensure that there was a level playing field between them and the holders of transferable CBOE memberships, the Continued Membership Interpretation required those persons to pay a monthly access fee based on the current monthly lease fees then being paid to lessors of the interest that the Board of Trade denominates as a Board of Trade B-1 membership. Under that interpretation, CBOE would hold these fees in escrow until final action on the Exercise Right Interpretation resolved the Exercise Right eligibility issues.

The commenters objected because the Continued Membership Interpretation made it too easy for the former Exerciser Members to maintain their membership status. The commenters wanted those persons to continue to be required to hold Board of Trade B-1 memberships. In this sense, the commenters were objecting on behalf of those who had leased these B-1 memberships to persons who used them to become Exerciser Members, and these lessors by definition were not themselves then seeking to be Exerciser Members. The commenters asked

the Delaware court to enjoin enforcement of the Continued Membership Interpretation in order to protect those interests, but the Court refused to do so. The commenters now ask the Commission to abrogate that interpretation, and the Commission should refuse to do so for the reasons stated below.

DISCUSSION

I. The Continued Membership Interpretation is Consistent with the Exchange Act and Should Not be Abrogated.

CBOE submitted the Continued Membership Interpretation pursuant to Section 19(b)(3)(A) of the Exchange Act. It therefore was effective upon filing, subject to possible abrogation by the Commission. Under Section 19(b)(3)(C), the Continued Membership Interpretation should be abrogated only if abrogation "is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act]." The commenters are entitled to object to that interpretation by comment letter, but they trigger no special or different procedure by styling their comment letter as a "petition." When properly measured against the standards of Section 19(b)(3)(C), the Continued Membership Interpretation should not be abrogated, because it promotes key interests of the Exchange Act – including protecting CBOE's markets from trading disruptions that would harm the public. Furthermore, given the nature of that rule filing, it was entitled to immediate effectiveness pursuant to Section 19(b)(3)(A).

A. There is no separate procedure for "petitioning" to abrogate a rule filing.

The commenters style their opinions as a "petition" for the Commission to review the Commission staff's alleged decision not to abrogate the Continued Membership Interpretation. (*See* Comment Letter at 6). However, no such procedure exists under the Exchange Act. The commenters invoke Rules 430 and 431 of the Commission's Rules of Practice, which give the Commission the right to review action taken by the Commission staff pursuant to delegated authority. When the Commission staff takes affirmative action pursuant to delegated authority, it does so in the Commission's name, so Rules 430 and 431 allow the Commission to take corrective action if it disagrees with the course of action on which the Commission staff has embarked. However, the Commission staff has taken no action in the present matter, pursuant to delegated authority or otherwise. The fact that the Commission staff has *not* abrogated the Continued Membership Interpretation pursuant to delegated authority does not constitute Commission staff *action* and therefore does not trigger the procedures under Rules 4340 or 431. Indeed, no such procedure is necessary. The right to abrogate is the Commission's, and the Commission certainly can abrogate the Continued Membership Interpretation if it so chooses,

and it need not do so by the indirect means of inventing a Staff "action" that the Commission then can review. Consequently, the "petition" is nothing more than a comment letter improperly dressed up as something more. Just because the commenters purported to file such a "petition" does not trigger any new procedures or any different standards. Instead, the question is the same as it always is under Section 19(b)(3(C) – whether abrogation is necessary in light of the public interest, to protect investors, or to serve the other policies of the Exchange Act.

B. The Continued Membership Interpretation is Consistent with the Exchange Act.

The Continued Membership Interpretation not only is consistent with the policies of the Exchange Act, it is a fair and appropriate way to address a key interest under the Exchange Act – preserving the fairness and orderliness of CBOE's markets under circumstances that CME and the Board of Trade have created and thrust upon CBOE. CME and the Board of Trade chose to proceed with their transaction even though the effect of that transaction on Exercise Right eligibility was unresolved – because the Exercise Right Interpretation was under Commission review. That situation imposed on CBOE a question that required an immediate answer: who would be eligible to trade the day after the CME acquisition? Prior to the CME acquisition, a necessary requirement had been that an Exerciser Member needed to possess a stated number of Board of Trade shares. However, Board of Trade stock was to be extinguished in connection with the CME acquisition, so it no longer would be possible to satisfy that requirement after that transaction, even if such a requirement continued to apply after that transaction.[2] CBOE therefore faced the immediate and sudden loss of more than 200 persons who were trading on CBOE's floor and supplying important liquidity to CBOE's markets. Such a sudden loss of liquidity would have disrupted CBOE's markets, undercut the fair and orderly nature of those markets, and would thereby have hurt the public interest and undermined the protection of investors.

The Continued Membership Interpretation avoided any damage to these key Exchange Act interests. It ensured continuity of access by allowing all persons who had been trading as Exerciser Members before the CME acquisition to maintain that membership status without interruption. In that way, the interpretation avoided disruption of CBOE's markets, prevented

[2] The stock ownership requirement and the requirement to hold a CBOT B-1 membership were contained in an interpretation of Article Fifth(b) that was embodied in an agreement dated August 7, 2001, which was amended by subsequent letter agreements dated October 7, 2004 and February 14, 2005 (collectively, the "2001 Agreement"). As set forth in the Exercise Right Interpretation (at 9), however, the 2001 Agreement no longer applies after the CME acquisition.

any resulting harm to investors and the public interest, and eliminated any hardship on individual traders. The Continued Membership Interpretation therefore served the interests of the Exchange Act and should not be abrogated.

In contrast, abrogation of the Continued Membership Interpretation would throw CBOE into chaos and would put all of those Exchange Act interests in jeopardy. The commenters apparently assume that, if the Continued Membership Interpretation were abrogated, CBOE could continue to provide some sort of trading access to former Exerciser Members even while the Exercise Right Interpretation was pending before the Commission. However, absent authority under the Exchange Act to interpret its rules to achieve that result, CBOE would have no legal basis to offer trading access to persons who, in CBOE's view under the Exercise Right Interpretation, no longer would qualify for such access. Any such authority would have to come pursuant to some rule and, unless effective on filing, would be effective only after Commission approval. Consequently, if the Commission were to abrogate the Continued Membership Interpretation, former Exerciser Members would not simply be automatically entitled to trading access from and after the time of that abrogation. To the contrary, because such former Exerciser Members could not under any circumstances satisfy the Board of Trade stock ownership requirement that pertained under the 2001 Agreement prior to the CME acquisition, CBOE would have no choice but to deny membership to all former Exerciser Members as soon as the Continued Membership Interpretation was abrogated and until some other rule was put into place if the stock ownership requirement continued to be applied on an interim basis. The result of abrogation therefore would be chaos and disruption on CBOE's markets, with all of the resulting harms to the public interest and investors that the Exchange Act is designed to avoid.

C. The Continued Membership Interpretation Was Entitled to Immediate Effectiveness.

The commenters incorrectly claim that the Continued Membership Interpretation is not entitled to immediate effectiveness pursuant to Section 19(b)(3)(A) of the Exchange Act. They claim that this statutory provision is only available for "housekeeping" matters (*see* Comment Letter at 7) and suggest that the Continued Membership Interpretation cannot qualify because of the alleged magnitude of the effect of the Continued Membership Interpretation on lessors of Board of Trade B-1 memberships (*see* Comment Letter at 10-12). The commenters' position is unfounded.

1. The Continued Membership Interpretation is an interpretation of the meaning of Rule 3.19 and therefore is entitled to immediate effectiveness.

Initially, there is nothing in Section 19(b)(3)(A) that limits its reach to "housekeeping" rules. The only support that the commenters offer for that proposition is a statement in a Senate committee report relating to the adoption of that provision. Although that report stated that Section 19(b)(3)(A) would be *available* for rules on "housekeeping" matters, it nowhere stated that the provision was *limited* to such matters.[3]

Moreover, it is the actual language of Section 19(b)(3)(A) that controls, not the text of an informal summary of that statutory language contained in a portion of the legislative history. Section 19(b)(3)(A) provides that it may be invoked with respect to a proposed rule change that is a "stated policy, practice, or interpretation" with respect to, among other things, "the meaning . . . of an existing rule of the self-regulatory organization." According to Commission Rule 19b-4(b)(2)(ii), a "stated policy, practice or interpretation" means, among other things, "[a]ny statement made generally available to the membership of, to all participants in, or to persons having or seeking access . . . to the facilities of [the Exchange] . . . with respect to . . . the meaning . . . of an existing rule."

The Continued Membership Interpretation precisely fits this standard. It is a statement made to the entire membership of CBOE and to those who are "seeking access" to CBOE "with respect to the meaning of an existing rule" – namely, CBOE Rule 3.19. Rule 3.19 provides in general for the temporary continuation of a person's membership status when that membership status is lost under "extenuating circumstances." The Continued Membership Interpretation simply applies those general standards to the present situation. In particular, it essentially interprets, as "extenuating circumstances," the situation with which CME and the Board of Trade confronted CBOE and its then-Exerciser Members when they consummated the CME acquisition before the effect of that transaction on Exercise Right eligibility had been resolved. Such an interpretation of the "meaning of an existing rule" is appropriate under Section 19(b)(3)(A).

The Continued Membership Interpretation also interprets the meaning of another aspect of Rule 3.19 as applied to the current situation – namely, the duration of the temporary continuation of membership status that Rule 3.19 provides. Rule 3.19 provides that such membership status may be continued "for such period of time as the Exchange deems reasonably

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[3] *See Summary of Principal Provisions of Securities Acts Amendments of 1975 (S. 249)*, Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. (1975) at 7.

necessary to enable the member to obtain a membership." In the situation created by CME and the Board of Trade, the period of time that is "reasonably necessary" should take into account the fact that the effect of the CME acquisition on Exercise Right eligibility is not yet resolved. Rather than prejudge that matter, the Continued Membership Interpretation allows former Exerciser Members to defer the acquisition of a substitute membership until at least their legal obligation to do so has been established – through the approval of the Exercise Right Interpretation. In doing so, the Continued Membership Interpretation essentially interprets that period of time as being "reasonably necessary" under the circumstances. In this respect as well, the Continued Membership Interpretation is an interpretation of the meaning of Rule 3.19 and therefore is properly filed pursuant to Section 19(b)(3)(A).

Contrary to the position of the commenters, the Continued Membership Interpretation is entitled to immediate effectiveness even if the consequences of the rule would be significant. The statutory test under Section 19(b)(3)(A) does not change with the consequences of the rule, and the commenters cite no authority in support of their attempt to graft a "significant consequences" test onto the statutory language. Instead, the test is whether the Continued Membership Interpretation is a stated interpretation of the meaning of an existing rule, and the Continued Membership Interpretation satisfies that test.

2. CBOE never admitted that affirmative Commission approval would be needed for such an interim process.

The commenters argue in passing that CBOE has admitted that it is not entitled to proceed under Section 19(b)(3)(A). (*See* Comment Letter at 9-10.) In particular, they quote from the Exercise Right Interpretation, which states that CBOE would seek affirmative SEC approval of "a plan to provide some form of trading access . . . in the absence of the exercise right." (*See* Exercise Right Interpretation at 13-14.) The commenters misconstrue the statement on which they rely.

The Exercise Right Interpretation specifically contemplated that "CBOE is prepared to maintain the status quo for some period of time" after the consummation of the CME acquisition that, in CBOE's view, would terminate Exercise Right eligibility. (*See* Exercise Right Interpretation at 13.) That status quo was to be preserved "by staying, for an interim period of time," the impact of the CME acquisition on Exercise Right eligibility. (*Id.*) The Exercise Right Interpretation provided that this approach would enable those persons to continue "to trade on CBOE in the capacity of CBOE members during that interim period" and the authority for this process would be in the nature of Rule 3.19. (*Id.* at 13-14, n. 4.) This approach is the process that was realized in the Continued Membership Interpretation, and there was no suggestion in the Exercise Right Interpretation that affirmative Commission approval would be sought or needed.

Affirmative Commission approval instead arose in connection with a further step, which was described as a *possibility* – namely, an approach that "*could* involve a plan to provide some form of trading access to such persons in the absence of the exercise right." (*Id.* at 14 (emphasis added).) It was this separate "plan" that the Exercise Right Interpretation contemplated would require a filing with the Commission.

In other words, the Exercise Right Interpretation only stated that affirmative Commission approval would be required for a *subsequent* plan that might be proposed that would create new access points, through a permit plan or some other form of memberships that arose "in the absence of the exercise right," CBOE never stated that affirmative approval would be required to *continue* Exerciser Memberships temporarily pursuant to Rule 3.19.

3. The Continued Membership Interpretation does not prejudge the underlying merits of the Exercise Right dispute.

The commenters argue that the Continued Membership Interpretation represents an effort to "immediately effectuate the changes" in the Exercise Right Interpretation. (*See* Comment Letter at 9.) That accusation is false and is belied by the text of the Continued Membership Interpretation. If CBOE had wanted to "immediately effectuate" the Exercise Right Interpretation, it would have proclaimed that all Exerciser Members ceased to be members and cut off their trading access as soon as the CME acquisition was consummated. Instead, CBOE did the opposite – it *preserved* the membership status of former Exerciser Members until the Commission takes final action on the Exercise Right Interpretation.

The commenters are not actually seeking to preserve the access rights of Exerciser Members, but rather to protect the economic interests of persons who are not Exerciser Members. The heart of the commenters' complaint is that CBOE no longer is requiring former Exerciser Members to hold a Board of Trade B-1 membership in order to preserve their trading access. In short, the commenters complain because CBOE has not made it more difficult for former Exerciser Members to retain their membership status. They complain because the liberality of CBOE's approach to interim access supposedly makes it harder for Board of Trade lessors to command high rents for B-1 memberships.

CBOE owes no fiduciary duty to people who are not its members. If Board of Trade B-1 memberships were required for former Exerciser Members to retain their membership status, those who would lease those B-1 memberships by definition do not even *seek* to become an Exerciser Member. CBOE therefore does not owe any duty to protect the economic goals of these strangers to CBOE membership.

II. The Continued Exercise Interpretation Was Properly Approved.

The commenters claim that the Continued Exercise Interpretation should be abrogated because (1) CBOE's Board supposedly breached its fiduciary duties when it voted to approve that interpretation, (2) the interpretation supposedly violates the requirement in CBOE's Constitution that new memberships must be approved by a membership vote, and (3) the interpretation supposedly amends Article Fifth(b) in violation of Delaware state law. These arguments are without merit because they rest on incorrect factual predicates and mischaracterize the nature of the Continued Exercise Interpretation.

A. CBOE's Board Did Not Breach Its Fiduciary Duties.

The commenters assert that CBOE's directors breached their fiduciary duties because they were "impermissibly conflicted" when they voted to approve the Continued Membership Interpretation. (*See* Comment Letter at 14-15.) The only support they offer for that conclusion is an August 20, 2007 letter provided by Frederick H. Alexander of Morris, Nichols, Arsht & Tunnell LLP (the "Alexander Letter"). The sole point of the Alexander Letter is to critique the process by which CBOE Board approved the Exercise Right Interpretation, not the Continued Membership Interpretation. In attacking the vote on the Exercise Right Interpretation, the commenters claim that "[a] majority of the directors serving on the CBOE Board have a direct financial interest in eliminating the rights of the Exerciser Members prior to CBOE's planned demutualization, which renders them incapable of making an disinterested decision regarding the effect of the CBOT Holdings/CME Holdings merger on the Exercise Rights." (*Id.*) Because of this alleged problem with the vote concerning the Exercise Right Interpretation, the commenters leap to the conclusion that "[f]or all of these same reasons, the Board violated its fiduciary duties in adopting the [Continued Membership] Interpretation." (*Id.* at 15).

This argument suffers from a fundamental and unwarranted leap of logic. To argue their point with respect to the Continued Membership Interpretation, the commenters must demonstrate that a majority of the CBOE directors who voted on the Continued Membership Interpretation had "a direct financial interest in eliminating the rights of the Exerciser Members." The commenters fail to make any such showing, because the Alexander Letter on which they rely instead addressed only the vote six months earlier with respect to the Exercise Right Interpretation. In fact, the Alexander Letter fails even to mention the Continued Membership Interpretation. Accordingly, the commenters' conclusion would not flow logically even if their factual premise were true.

However, the most fundamental problem with the argument of the commenters and their Delaware counsel is that their factual premise is completely false. The Continued Membership

Interpretation, the only interpretation that is subject to abrogation, was approved in a meeting where CBOE's voting disinterested public directors in fact outnumbered the purportedly "interested" voting directors. At the time of the June 29, 2007 Board meeting that considered that interpretation, CBOE's Board consisted of eleven public directors, eleven industry directors (including one Exerciser Member) and William Brodsky, CBOE's Chairman and Chief Executive Officer. (*See* Affidavit of Joanne Moffic-Silver ("Moffic-Silver Affidavit"), a copy of which is attached hereto as Exhibit 1, ¶ 8.) None of the public directors had any membership interest in CBOE, possessed any right to acquire a membership interest or had any affiliation with any entity that owned any CBOE membership. (*Id.*, ¶12.) Thus, at the time of the June 29, 2007 Board meeting, a majority consisting of twelve directors (the eleven public directors and the Exerciser Member industry director) did not have any personal incentive to act to eliminate the rights of Exerciser Members.

Moreover, as the commenters well know, the Continued Membership Interpretation was approved under circumstances in which the disinterested public directors actually outnumbered the industry directors.[4] Specifically, ten public directors were present for the discussion of the Continued Membership Interpretation, and they considered that interpretation in a separate meeting at which no interested director was present. After that separate deliberation, those ten independent, disinterested public directors voted unanimously to approve the Continued Membership Interpretation. (*See Id.*, ¶ 9.) After that separate meeting, nine of the public directors (one public director having left the meeting after the separate session) rejoined the rest of the voting directors, and the Continued Membership Interpretation was then approved by a unanimous vote of the entire Board, consisting of the nine remaining public directors and seven industry directors (with one director who was an Exerciser Member abstaining). (*Id.*, ¶ 10.) In short, contrary to the commenters' unwarranted and unsupported factual assumption, the Continued Membership Interpretation was approved unanimously by *all* directors present, of which a majority consisted of independent, disinterested public directors. Accordingly, there is no factual basis to conclude that interested directors somehow dominated or controlled the vote on the Continued Membership Interpretation, and consequently the commenters have offered no basis to contend that the vote on that interpretation was invalid under Delaware law.

Although the Alexander Letter's factual statements about the role of allegedly "interested" directors in the vote on the earlier Exercise Right Interpretation are not relevant to

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[4] One of the commenters, Michael Floodstrand, requested and was provided minutes of both the December 12, 2006 and June 29, 2007 Board meetings, and those minutes fully described the capacity in which the various directors voted and the nature of their votes on the matters addressed at those meetings.

the validity of the Continued Membership Interpretation, those factual statements nonetheless are false. Contrary to the factual assertions in the Alexander Letter, it is *not* true that a majority of CBOE's Board had a direct financial interest in eliminating the Exercise Right when the Board voted to approve the Exercise Right Interpretation on December 12, 2006. On that date, the CBOE Board was comprised of twenty-one members (rather than twenty-three members, as claimed in the Alexander Letter), and eleven of those directors were public directors who had no membership interest in CBOE, no right to acquire such a membership interest and no affiliation with any entity that owned any CBOE membership. (*Id.*, ¶12.) In addition, one of the industry directors was an Exerciser Member of CBOE, and that director accordingly also would not have had a personal interest in eliminating the Exercise Right. (*Id.*, ¶5.) Thus, twelve of the twenty-one CBOE directors on December 12, 2006 had no interest in supposedly curtailing the rights of Exerciser Members, while only eight CBOE directors were holders, or affiliated with holders, of transferable CBOE memberships.

During the December 12, 2006 Board meeting, the seven voting public directors (four public directors having recused themselves from consideration of the issue) convened a meeting to discuss the Exercise Right Interpretation separately from all other directors, including any industry director who might have an interest in the elimination of the Exercise Right. In that separate meeting, the voting public directors unanimously approved the Exercise Right Interpretation. After the full Board reconvened, the seven voting public directors and the industry director who was an Exerciser Member and each of the five other voting industry directors unanimously approved the Exercise Right Interpretation.

These facts demonstrate that there is simply no factual basis for the assertions by the commenters and their Delaware counsel that the majority of the directors who approved the Exercise Right Interpretation, much less the Continued Membership Interpretation, were tainted by a direct financial interest in eliminating the rights of Exerciser Members. Indeed, the facts prove just the opposite – that the majority of the directors voting on both the Continued Membership Interpretation and the Exercise Right Interpretation were *disinterested public directors*. Therefore, the commenters' breach of fiduciary duty claims are utterly without factual or legal merit.

B. The Continued Membership Interpretation Does Not Violate CBOE's Constitution.

The commenters also incorrectly claim that the Continued Membership Interpretation is invalid because it supposedly violates the membership vote requirement of Article II, Section 2.1 of CBOE's Constitution. Section 2.1 provides that "an affirmative vote of the members shall be required for the issuance of all new memberships." Although Section 2.1 applies only when

"new" memberships are created, the Continued Membership Interpretation by its terms does not create any such "new" memberships. Instead, the Continued Membership Interpretation temporarily preserves the membership rights of certain persons who were *existing* Exerciser Members at the time that interpretation became operative upon the closing of the CME acquisition. Accordingly, although the commenters baldly assert that the interpretation "purports to create 221 new trading permits" for these Exerciser Members (*see* Comment Letter at 13), that assertion is simply false and directly conflicts with the plain language of the Continued Exercise Interpretation. Accordingly, that interpretation does not conflict with Section 2.1 of CBOE's Constitution.

C. The Continued Membership Interpretation Does Not Violate State Law.

The commenters' final argument is that the Continued Membership Interpretation represents an improper amendment of Article Fifth(b). (*See* Comment Letter at 15-18.) Article Fifth(b) provides that "[n]o amendment may be made" with respect to Article Fifth(b) without the prior approval of certain membership classes. However, the Continued Membership Interpretation does not purport to change the terms of Article Fifth(b). The terms of the Continued Membership Interpretation make clear that, far from trying to "'jump the gun' on its efforts to get rid of Article Fifth(b)" (*see* Comment Letter at 17), that interpretation attempts no change to Article Fifth(b) at all. Instead, the Continued Membership Interpretation is designed only to continue the status quo until the underlying meaning of Article Fifth(b) can be determined though final Commission action on the Exercise Right Interpretation. Because it does not purport to change Article Fifth(b), the Continued Membership Interpretation does not violate the membership vote requirement of Article Fifth(b).[5]

The commenters repeatedly claim that the Continued Membership Interpretation represents an attempt to circumvent the Delaware Court's jurisdiction to consider state law issues. The Court will determine the matters, if any, on which it will assert jurisdiction, and the Court would have the power to issue an injunction if its jurisdiction were threatened by action that CBOE was contemplating. In fact, the commenters requested such an injunction against the enforcement of the Continued Membership Interpretation, but the Court declined to interfere with the enforcement of that interpretation. Because the Court saw no need under state law to

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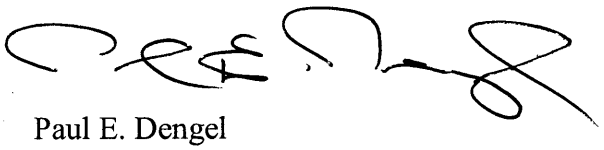
[5] For an explanation of the difference between an "amendment" and an "interpretation" of Article Fifth(b), *see* June 15, 2007 letter from Michael L. Meyer (counsel for CBOE) to Nancy M. Morris at 22, 24-25 (demonstrating that the Exercise Right Interpretation is not an amendment of Article Fifth(b) and that the Exercise Right Interpretation does not terminate the Exercise Right, but instead is an interpretation of the effect of the CME acquisition on Exercise Right eligibility under Article Fifth(b).)

interfere with the Continued Membership Interpretation, the Commission should not rely on alleged concerns about state law jurisdiction as a reason to abrogate that interpretation. It is notable that the Court appears to accept the Commission's exclusive jurisdiction over matters that bear on trading access, a category into which the Continued Membership Interpretation would fall.[6]

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Continued Membership Interpretation, the Commission should not abrogate Interpretation and Policy .01 of CBOE Rule 3.19.

Very truly yours,



Paul E. Dengel
One of the Attorneys for Chicago Board
Options Exchange, Incorporated

PED:mcb

cc: Elizabeth K. King (via electronic mail and Federal Express)
Joanne Moffic-Silver

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[6] *See* August 3, 2007 Memorandum Opinion staying the Delaware action (a copy of which is attached as Exhibit 2) at 23-24 (finding that the SEC has "exclusive jurisdiction over membership in a national securities exchange," that the Exchange Act "established a plenary and pervasive role for the SEC in determining issues relating to exchange membership and, in particular, approving proposed rule changes of . . . self-regulatory organizations" and that "the SEC also plays an exclusive role in reviewing, approving, and interpreting an exchange's internal rules"), 25 (recognizing that matters "going to the heart of the SEC's function to foster stability in the national market system for securities" are "reserved exclusively for the SEC's jurisdiction").

AFFIDAVIT OF JOANNE MOFFIC-SILVER

I, Joanne Moffic-Silver, deposes and states as follows:

1. I am the Executive Vice President, General Counsel and Corporate Secretary at the Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE"). I have personal knowledge of the matters set forth herein and submit this affidavit in support of the Exchange's response to the comment letter, entitled "Emergency Petition for Securities and Exchange Commission Review of Rulemaking Action," submitted by the CME Group, Inc. ("CME"), the Board of Trade of the City of Chicago ("Board of Trade"), Michael Floodstrand and Thomas J. Ward with respect to CBOE rule filing SR-CBOE-2007-77.

December 12, 2006 Board Meeting

2. I was present at the meeting of the Exchange's Board of Directors on December 12, 2006, at which the Board of Directors authorized and directed the preparation and submission of a proposed rule change (SR-CBOE-2006-106) to the Securities and Exchange Commission (the "Commission") to address the impact of the acquisition of the Board of Trade by CME Holdings, Inc., the predecessor of CME (the "CME Holdings Acquisition"), on the eligibility of persons to be exerciser members of CBOE. SR-CBOE-2006-106 includes an interpretation of Article Fifth(b) of CBOE's Certificate of Incorporation that no person will qualify as a CBOT "member" for purposes of Article Fifth(b) after the CME Holdings Acquisition is complete, and therefore no person any longer will qualify to become or remain an exerciser member of CBOE after that transaction.

3. On December 12, 2006, the Exchange's Board of Directors consisted of 21 Directors, including eleven public Directors, nine industry Directors, and CBOE Chairman and CEO William Brodsky.

4. As described in the minutes of the December 12, 2006 meeting of the Board of Directors, a correct copy of which (with irrelevant material redacted) is attached as Exhibit A, the following seven

public Directors of the Exchange were present (in person or by telephone) at the Board of Directors meeting on December 12, 2006, for the discussion of the interpretation of Article Fifth(b) that is set forth in SR-CBOE-2006-106, and these seven public Directors voted unanimously in favor of the interpretation: Robert Birnbaum, Janet Froetscher, Roderick Palmore, Susan Phillips, Samuel Skinner, Carole Stone, and Howard Stone. The members of the Special Committee of Independent Directors, consisting of James Boris, Duane Kullberg, R. Eden Martin, and Eugene Sunshine, were present at the meeting, but recused themselves from, and were not present for, the discussion and vote with respect to the interpretation of Article Fifth(b) that is set forth in SR-CBOE-2006-106. As set forth in the minutes of the December 12 meeting, the seven public Directors met and unanimously voted to approve the interpretation in a separate meeting at which only the Board's legal advisers and outside financial advisers were also present.

5. Following the separate meeting of the public Directors to consider this interpretation, there was a meeting and vote by the entire CBOE Board on this matter at the meeting on December 12, 2006. At this time, the following six industry Directors of the Exchange were present and voted unanimously in favor of the interpretation, as did each of the seven public Directors who had voted at the separate meeting of those Directors, as set forth in paragraph 4 above: Mark Duffy, Jonathan Flatow, Bradley Griffith, Stuart Kipnes, William Power, and John Smollen. The remaining Industry Directors who were present – James MacGilvray, Thomas Patrick, and Thomas Petrone – abstained from the vote with respect to the interpretation of Article Fifth(b) that is set forth in SR-CBOE-2006-106. At the time of this meeting, Mr. Flatow was an exerciser member, while each of the remaining industry Directors held, or was associated with member organizations that held, transferable Exchange memberships.

6. Mr. Brodsky was also present at the Board of Directors meeting on December 12, 2006, for the discussion of the interpretation of Article Fifth(b) that is set forth in SR-CBOE-2006-106, and he voted in favor of the interpretation.

June 29, 2007 Board Meeting

7. I was also present at the meeting of the Exchange's Board of Directors on June 29, 2007, at which the Board of Directors authorized and directed the preparation and submission of a proposed rule change to the Commission (SR-CBOE-2007-77) that would interpret CBOE Rule 3.19, in the event that the CME Holdings Acquisition was consummated before the Commission took final action on SR-CBOE-2006-106, such that certain persons who were exerciser members as of a stated date before the completion of that transaction would continue in that membership status until the Commission had taken such final action.

8. On June 29, 2007, the Exchange's Board of Directors consisted of 23 Directors, including eleven public Directors, eleven industry Directors, and CBOE Chairman and CEO William Brodsky.

9. As described in the minutes of the June 29, 2007 meeting of the Board of Directors, a correct copy of which (with irrelevant material redacted) is attached as Exhibit B, the following ten public Directors of the Exchange were present (in person or by telephone) at the Board of Directors meeting on June 29, 2007, for the discussion of the interpretation of CBOE Rule 3.19 that is set forth in SR-CBOE-2007-77, and these ten public Directors voted unanimously in favor of that interpretation: Mr. Birnbaum, Mr. Boris, Ms. Froetscher, Mr. Kullberg, Mr. Martin, Mr. Palmore, Ms. Phillips, Mr. Skinner, Ms. Stone, and Mr. Sunshine. (Public Director Howard Stone was not present at the June 29, 2007, meeting.) As set forth in the minutes of the June 29 meeting, the public Directors met and voted on this interpretation in a separate meeting at which only the Board's legal advisers were also present.

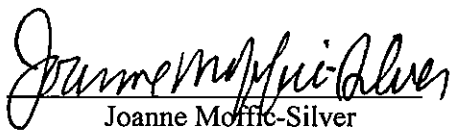
10. Following the separate meeting of the public Directors to consider this interpretation, there was a meeting and vote by the entire CBOE Board on this matter at the meeting on June 29, 2007. At this time, the following seven industry Directors of the Exchange were present (in person or by telephone), and voted unanimously in favor of the interpretation, as did all of the public Directors (except

Mr. Palmore who left the Board meeting following the separate meeting of public directors) who had voted at the separate meeting of those Directors, as set forth in paragraph 9 above: Mr. Duffy, Paul Jiganti, Mr. Kipnes, Mr. MacGilvray, Anthony McCormick, Kevin Murphy, and Mr. Smollen. Mr. Flatow abstained from the vote with respect to the interpretation of Rule 3.19. Industry Director Thomas Patrick was not present at the June 29, 2007, meeting, and the remaining industry Directors – Mr. Griffith and Mr. Power – were not present for the vote with respect to the interpretation. At the time of this meeting, Mr. Flatow was an exerciser member, while each of the remaining industry Directors held, or was associated with member organizations that held, transferable Exchange memberships.

11. Mr. Brodsky was also present at the Board of Directors meeting on June 29, 2007, for the discussion of the interpretation of Rule 3.19 that is set forth in SR-CBOE-2007-77, and he voted in favor of that interpretation.

12. None of CBOE's public Directors has a membership interest in CBOE, possesses a right to acquire such a membership interest or is affiliated with an entity that owns any CBOE membership.

Dated: August 30, 2007



Joanne Moffic-Silver

EXHIBIT A

Chicago Board Options Exchange, Incorporated
Board of Directors Meeting Minutes
December 12, 2006

A meeting of the CBOE Board of Directors was held on December 12, 2006 at 8:00 a.m. at the Willard InterContinental Hotel in Washington, D.C.

The directors present were William Brodsky, Chairman, John Smollen, Vice Chairman, Robert Birnbaum, James Boris, Mark Duffy, Jonathan Flatow, Janet Froetscher, Bradley Griffith, Stuart Kipnes, Duane Kullberg, James MacGilvray, R. Eden Martin, Roderick Palmore, Thomas Patrick, Susan Phillips, William Power, Carole Stone, Howard Stone, and Eugene Sunshine. Samuel Skinner and Thomas Petrone were present by conference telephone. All of the foregoing directors were present for the regular and executive sessions of the meeting, except as noted below.

Alan Dean was present for the first four agenda items during the executive session of the meeting and during the regular session of the meeting.

Richard DuFour, Lita Frazier, Christine Hahn, Edward Joyce, Carol Kennedy, Joanne Moffic-Silver, Donald Patton, Edward Provost, Arthur Reinstein, and Edward Tilly were present for the first three agenda items during the executive session of the meeting and during the regular session of the meeting.

Paul Dengel and Michael Meyer of Schiff Hardin were present for the first three agenda items during the executive session of the meeting and during the regular session of the meeting.

Wendell Fenton of Richards, Layton & Finger; John Gilbertson, Adam Graves, and David Schwimmer of Goldman Sachs; and Kenneth Raisler of Sullivan & Cromwell were present for the first three agenda items during the executive session of the meeting.

Executive Session

CME Holdings/CBOT Holdings Transaction (Tab 1 and Handouts) - Mr. Brodsky informed the Board that the Executive Committee met prior to the opening of the CBOE seat market and determined to declare a suspension of transactions in transferable CBOE memberships. He stated that the suspension was declared in light of the materiality of the issues to be considered by the Board at the meeting in order to allow for the dissemination of information about any decisions that may be made by the Board regarding those issues. He also stated that the Executive Committee delegated to the Office of the Chairman the authority to determine when the suspension would end.

The members of the Special Committee of Independent Directors (Special Committee) consisting of Mr. Boris, Mr. Kullberg, Mr. Martin, and Mr. Sunshine then recused themselves and left the board room.

Mr. Brodsky noted that management had previously briefed all of the directors present regarding management's recommendation about how to proceed with respect to the exercise right in light of CME Holdings' announced acquisition of the Chicago Board of Trade (CBOT). He also noted that proposed resolutions and a proposed rule filing to implement this recommendation were distributed prior to the meeting to the directors present and requested that they read these documents before any vote is taken with respect to them. Mr. Brodsky emphasized that in considering this issue CBOE's directors and management owe a fiduciary duty to all CBOE members and that the role of the Board is to decide the right thing to do and not to take action for the purpose of favoring one group over another.

Mr. DuFour conducted a slide presentation summarizing management's recommendation, and Mr. Meyer summarized the legal analysis that underlies the recommendation. Mr. Brodsky described the content of the proposed resolutions and provided the directors present with additional time to finish reading the proposed resolutions and rule filing.

Mr. Palmore then made a motion, which was seconded by Mr. Birnbaum, that the Board approve the proposed resolutions. The Board discussed the proposed resolutions.

Following this discussion among all of the directors present, the independent directors (other than the Special Committee members) met separately in the board room regarding the proposed resolutions. The independent directors who were present for these separate deliberations were Mr. Birnbaum, Ms. Froetscher, Mr. Palmore, Ms. Phillips, Mr. Skinner (by conference telephone), Ms. Stone, and Mr. Stone. These independent directors requested that CBOE's legal and financial advisors who were present at the meeting also be present for these deliberations. Pursuant to this request, Mr. Dengel, Mr. Fenton, Mr. Gilbertson, Mr. Graves, Mr. Meyer, Ms. Moffic-Silver, Mr. Raisler, Mr. Reinstein, and Mr. Schwimmer were present for these deliberations.

All of the other directors and other persons who were present for the earlier discussion of the proposed resolutions left the board room and continued discussion of the proposed resolutions in a separate adjoining room. The Special Committee members were not present, and Mr. Petrone was not present by telephone, for either of the two separate deliberations.

During their separate deliberations regarding the proposed resolutions, the independent directors (other than the Special Committee members) discussed the proposed resolutions. Following this discussion, Mr. Skinner made a motion, which was seconded by Ms. Phillips, that the independent directors (other than the Special Committee members) approve the proposed resolutions. This motion was then unanimously approved by the independent directors (other than the Special Committee members) consisting of Mr. Birnbaum, Ms. Froetscher, Mr. Palmore, Ms. Phillips, Mr. Skinner, Ms. Stone, and Mr. Stone.

All of the other directors and other persons who were previously present for the earlier discussion of the proposed resolutions and who had left the board room to deliberate separately then returned to the board room and Mr. Petrone rejoined the meeting by conference telephone. Mr. Brodsky and Mr. Meyer described the nature of the interest in this matter possessed by the non-public directors on the Board in light of the interests that they and/or their firms hold in CBOE and/or CBOT memberships. The independent directors (other than the Special Committee members) then announced the vote that they had taken.

A vote of the full Board (other than the Special Committee members) was then taken on the motion to approve the proposed resolutions. All of the directors (other than the Special Committee members) voted to approve this motion, except that Mr. MacGilvray, Mr. Patrick, and Mr. Petrone abstained from the vote. The proposed resolutions that were approved were as follows:

> WHEREAS, Article Fifth, paragraph(b) of the Certificate of Incorporation of CBOE ("Article Fifth(b)") provides that every member of the Board of Trade of the City of Chicago ("CBOT") shall have the right, under stated circumstances, to become and remain a member of CBOE without having to purchase a CBOE membership (this right sometimes being referred to as the "exercise right");
>
> WHEREAS, CBOT Holdings, Inc. ("CBOT Holdings"), the parent company of CBOT, has announced it has entered into a merger agreement with CME Holdings, Inc. ("CME Holdings") that provides for the merger of CBOT Holdings with and into CME Holdings, with CME Holdings as the survivor (the "Merger");
>
> WHEREAS, as a consequence of the Merger and upon its effectiveness, CME Holdings will acquire ownership of CBOT, and CBOT will become a subsidiary of CME Holdings;
>
> WHEREAS, the agreement between CBOT and CBOE dated August 7, 2001, as amended and supplemented by letter agreements among CBOT Holdings, CBOT and CBOE dated October 7, 2004, and February 14, 2005 (collectively, the "2001 Agreement"), which embodies an interpretation of Article Fifth(b) that takes into account the "CBOT Restructuring Transactions" as described in that 2001 Agreement, provides that the interpretation applies only in the absence of any further material

changes to the ownership or structure of CBOT not contemplated in the original CBOT Restructuring Transactions;

WHEREAS, the proposed acquisition of CBOT by CME Holdings constitutes a change in the ownership of CBOT that was not contemplated in the CBOT Restructuring Transactions, with the result that, upon the effectiveness of the Merger, a stated condition to the effectiveness of the 2001 Agreement will no longer be satisfied, and the 2001 Agreement and the interpretation of Article Fifth(b) embodied therein will be of no further force and effect; and

WHEREAS, as a result of the circumstances described above, it is now incumbent upon CBOE to interpret Article Fifth(b) in order to take into account the effect on the exercise right of the 2005 restructuring of CBOT and the subsequent public offering of shares of common stock of CBOT Holdings in light, and upon the effectiveness, of the Merger, and to take into account the effectiveness of the Merger itself;

BE IT RESOLVED, that the Board of Directors of CBOE hereby interpret Article Fifth(b) such that, upon the effectiveness of the Merger, in light of the prior restructuring of CBOT and the subsequent public offering of shares of common stock of CBOT Holdings, and in light of the acquisition of CBOT by CME Holdings, there no longer will be members of CBOT entitled to be or remain a member of CBOE pursuant to Article Fifth(b);

FURTHER RESOLVED, that the appropriate officers of CBOE are hereby authorized and directed to prepare the appropriate form of rule change on Form 19b-4 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), in substantially the same form as the form of rule change provided to the Board of Directors and consisting of the interpretation of Article Fifth(b) stated in the preceding resolution, and to make any changes to CBOE Rule 3.16 and to any other CBOE Rules that may be needed to conform those Rules with such interpretation, and to promptly file said Form 19b-4 with the Securities and Exchange Commission for its review and approval in accordance with Section 19(b) of the Exchange Act, and to take such other action as may be necessary or appropriate to effectuate these resolutions.

Mr. Brodsky stated that he was going to ask the Special Committee members to rejoin the meeting and requested that there be no discussion of the foregoing matters in the presence of the Special Committee after they rejoin the meeting.

Mr. Skinner then left the meeting by ending his telephone connection to the meeting and the Special Committee members returned to the board room.

Mr. Brodsky advised the Special Committee members of the action taken by the Board, and a copy of the resolutions and rule filing approved by the Board were provided to the Special Committee members for their information. Mr. Brodsky explained that management believed that it was likely that the acquisition of CBOT by CME Holdings will occur before the completion of CBOE's demutualization, although he observed that many things could change that timetable.

Mr. Boris, Special Committee Chairman, advised the Board that the Special Committee met prior to the Board meeting in anticipation that the Board would be considering how the CME Holdings/CBOT Holdings merger may impact the exercise right. Mr. Boris stated that the Special Committee did not address that specific issue, does not have an opinion or conclusion with respect to it, and is neutral on it. He informed the Board that the position of the Special Committee is that, given what the Board has decided, the Special Committee should remain in existence, but defer further deliberations until such time as it becomes appropriate to either (i) reinitiate the Special Committee's deliberations, (ii) terminate the Special Committee's existence, or (iii) take such other action as is warranted.

Mr. Brodsky stressed that directors should continue to be cognizant of the fiduciary duty to all CBOE members in the consideration of matters related to the implementation of the decisions made by the Board.

Because of the many factors that could affect whether CME Holdings' acquisition of CBOT is completed before CBOE's demutualization and therefore whether the exercise right will be terminated, Mr. Brodsky stated that it was management's recommendation that CBOE not file its S-4 registration statement with the Securities and Exchange Commission (SEC) during the following six weeks to allow the situation to clarify itself during that time period. Mr. Brodsky indicated that, absent changed circumstances, management expected to recommend to the Board at the January Board meeting that the Board authorize the submission of an S-4 registration statement that management will be working to finalize prior to that meeting and that it reflect the interpretation of the exercise right approved by the Board.

A draft press release regarding the actions taken by the Board was then distributed to the Board for review. The Board discussed the draft press release and provided comments to it.

REDACTED

Exercise Right Rule Filing Update - Mr. Brodsky reported that the rule filing approved by the Board had been submitted to the SEC and reported regarding a call he made to CBOT President and Chief Executive Officer Bernard Dan to inform CBOT of the rule filing.

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

The meeting was adjourned at approximately 12:00 p.m.

REDACTED

EXHIBIT B

Chicago Board Options Exchange, Incorporated
Board of Directors Meeting Minutes
June 29, 2007

A special meeting of the CBOE Board of Directors was held on June 29, 2007 at 9:30 a.m. in the CBOE Board Room.

The directors present were William Brodsky, Chairman, Mark Duffy, Jonathan Flatow, Stuart Kipnes, Anthony McCormick, and John Smollen. Bradley Griffith, Vice Chairman, R. Eden Martin, Lead Director, Robert Birnbaum, James Boris, Janet Froetscher, Paul Jiganti, Duane Kullberg, James MacGilvray, Kevin Murphy, Roderick Palmore, Susan Phillips, William Power, Samuel Skinner, Carole Stone, and Eugene Sunshine were present by conference telephone. Thomas Patrick and Howard Stone were unable to participate in the meeting.

Also present were Richard DuFour, Edward Joyce, Carol Kennedy, Joanne Moffic-Silver, and Arthur Reinstein. Paul Dengel and Michael Meyer of Schiff Hardin and Edward Tilly were present by conference telephone.

Trading Access Plans (Separate Distribution) - Mr. Brodsky briefed the Board regarding the current status of the proposed acquisition of the Chicago Board of Trade (CBOT) by Chicago Mercantile Exchange Holdings (CME/CBOT Transaction), the merger proposal made to CBOT by IntercontinentalExchange, and CBOE's pending rule filing interpretation relating to the impact of the CME/CBOT Transaction on exercise right eligibility (SR-CBOE-2006-106).

Mr. Brodsky noted the nature of the interest in the matters to be discussed at the meeting possessed by the non-public directors on the Board in light of the interests that they and/or their firms hold in transferable CBOE memberships, exerciser memberships, and/or CBOT memberships. For this reason, Mr. Brodsky stated that there would be separate deliberations and votes among all of the directors present and among all of the public directors present.

A distribution was provided to the Board prior to the meeting describing the following three access plans: (i) a proposed access plan for former exerciser members if the CME/CBOT Transaction is consummated before the SEC takes final action on SR-CBOE-2006-106 (Plan A),

REDACTED

REDACTED

Mr. DuFour presented the information included in the distribution to the Board and described the components of each of the Plans. He also noted that proposed Plan A were previously reviewed and endorsed by the Strategy and Implementation Task Force at a meeting earlier in the week. The Board discussed proposed Plan A and various aspects related to these proposed Plans during and following Mr. DuFour's presentation.

Following this discussion among all of the directors present, the public directors present met separately by conference telephone. The public directors who were present by conference telephone for these separate deliberations were Mr. Birnbaum, Mr. Boris, Ms. Froetscher, Mr. Kullberg, Mr. Martin, Mr. Palmore, Ms. Phillips, Mr. Skinner, Ms. Stone, and Mr. Sunshine (Independent Directors). Mr. Martin acted as chairman of these separate deliberations of the Independent Directors. The Independent Directors requested that CBOE's legal counsel who were present at the meeting also be present for these deliberations. Pursuant to this request, Mr. Dengel and Mr. Meyer were present for these deliberations by conference telephone and Ms. Moffic-Silver and Mr. Reinstein were present for these deliberations in the Board Room. All of the other directors and other persons who were present for the earlier part of the meeting left the Board Room or disconnected from the conference telephone line to the meeting. During their separate deliberations, the Independent Directors discussed proposed Plan A and various aspects related to these proposed Plans.

REDACTED

Following the discussion by the Independent Directors, the Independent Directors unanimously approved (i) proposed Plan A

REDACTED

(iii) delegating to the Office of the Chairman (A) the authority to make changes to Plan A consistent with the general principles of those Plans in order to address any comments received from the SEC and (B) the authority to determine the timing of submission to the SEC of rule filings to implement Plan A **REDACTED**

Mr. Palmore left the meeting by disconnecting from the conference telephone line to the meeting.

All of the other directors and other persons who were present for the first portion of the meeting before the Independent Directors met separately (with the exception of Mr. Griffith and Mr. Power) returned to the Board Room or rejoined the conference telephone line to the meeting. Mr. Martin informed the Board of the resolutions approved by the Independent Directors. The Board then further discussed proposed Plan A , various aspects related to the proposed Plans, and the resolutions approved by the Independent Directors. Following this discussion, all of the directors present voted to approve the resolutions that were previously approved by the Independent Directors, as set forth above, except that Mr. Flatow abstained from the vote.

REDACTED

Mr. Power rejoined the conference telephone line to the meeting.

Mr. Brodsky stressed the importance of maintaining the confidentiality of information related to the matters addressed at the meeting until such time that this information is publicly disclosed.

The meeting was adjourned at approximately 10:45 a.m.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CBOT HOLDINGS, INC., a Delaware corporation; THE BOARD OF TRADE OF THE CITY OF CHICAGO, INC., a Delaware corporation; and MICHAEL FLOODSTRAND and THOMAS J. WARD and All Others Similarly Situated,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 2369-VCN**
CHICAGO BOARD OPTIONS EXCHANGE, INC., a Delaware non-stock corporation, WILLIAM J. BRODSKY, JOHN E. SMOLLEN, ROBERT J. BIRNBAUM, JAMES R. BORIS, MARK F. DUFFY, JONATHAN G. FLATOW, JANET P. FROETSCHER, BRADLEY G. GRIFFITH, STUART K. KIPNES, DUANE R. KULLBERG, JAMES P. MacGILVRAY, R. EDEN MARTIN, RODERICK PALMORE, THOMAS H. PATRICK, JR., THOMAS A. PETRONE, SUSAN M. PHILLIPS, WILLIAM R. POWER, SAMUEL K. SKINNER, CAROLE E. STONE, HOWARD L. STONE, and EUGENE S. SUNSHINE,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: May 30, 2007
Date Decided: August 3, 2007

Kenneth J. Nachbar, Esquire of Morris, Nichols, Arsht & Tunnell, LLP, Wilmington, Delaware, Hugh R. McCombs, Esquire, Michele L. Odorizzi, Esquire, Michael K. Forde, Esquire of Mayer, Brown, Rowe & Maw LLP, Chicago, Illinois, Peter B. Carey, Esquire of Law Offices of Peter B. Carey, Chicago, Illinois, and Kevin M. Forde, Esquire of Kevin M. Forde, Ltd., Chicago, Illinois, Attorneys for Plaintiffs CBOT Holdings, Inc. and The Board of Trade of the City of Chicago.

Andre G. Bouchard, Esquire and John M. Seaman, Esquire of Bouchard, Margules & Friedlander, P.A., Wilmington, Delaware, Gordon B. Nash, Jr., Esquire and Scott C. Lascari, Esquire of Drinker Biddle Gardner Carton, Chicago, Illinois, Attorneys for Plaintiffs Michael Floodstrand and Thomas J. Ward.

Samuel A. Nolen, Esquire, Daniel A. Dreisbach, Esquire, Ethan A. Shaner, Esquire, and Rudolf Koch, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware, Paul E. Dengel, Esquire and Paul E. Greenwalt, III, Esquire of Schiff Hardin LLP, Chicago, Illinois, Attorneys for Defendants.

NOBLE, Vice Chancellor

I. INTRODUCTION

This action arose out of the proposed demutualization of interests held by members of the Chicago Board Options Exchange, Inc. (the "CBOE"), an entity formed in 1972 and initially funded by The Board of Trade of the City of Chicago, Inc., ("the Board of Trade" or the "CBOT") and its membership.[1] Since the CBOE's establishment more than thirty years ago, there have been two classes of membership: (i) CBOE "Seat Owners," or "Regular Members," who bought their seats on the CBOE outright, and (ii) "Eligible CBOT Full Members" (at times, "CBOT Full Members") who obtained a right (the "Exercise Right") under CBOE's Certificate of Incorporation (the "Charter"), including those "Exerciser Members" who exercised that right, to become members of the CBOE without cost. With the acquisition of CBOT by Chicago Mercantile Exchange Holdings, Inc. ("CME"), the CBOE has taken the position that CBOT Full Members have lost that status and, more importantly, have lost the opportunity to share in the bounty to be harvested from CBOE's demutualization. Although much effort has been devoted here and elsewhere to consider the right to trade on a national exchange, the dispute in this Court is not so much about trading rights; instead, it is about a familiar topic: great wealth and the realization that those who do not share

[1] Demutualization refers generally to the sale or reorganization of a mutual entity, by its members, into a non-mutual entity whose shares or interests can then be freely traded. A consequence of this process is that members' ownership rights are either dissolved in exchange for cash consideration or replaced by ownership interests (and voting rights) in the surviving entity.

get more of it. The nature and value of Exercise Rights and the continued meaning of CBOT membership in tandem with the Exercise Right are the primary substantive questions before the Court.

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The Exercise Right was conferred upon CBOT members more than thirty years ago in recognition of their "special contribution" to the development of the CBOE. Unlike Regular Members, however, the right to membership in the CBOE by CBOT Full Members came with a condition and a limitation: a CBOT Full Member would have to, at all times, be a full member of the CBOT and a CBOT Full Member lacked any right to transfer his or her membership on the CBOE.

Efforts to limit or clarify the scope of the Exercise Right began as early as 1992 when the CBOE and the CBOT entered into an agreement (the "1992 Agreement") to resolve a number of questions that had arisen since the CBOE's founding. Two decisions that came out of the 1992 Agreement take particular prominence in this action. First, the CBOE agreed to view all CBOT Exerciser Members as having the same rights and privileges of CBOE Regular Members. Under the 1992 Agreement, this principle would apply even where the CBOE made a cash or property distribution—whether in dissolution, redemption, or otherwise—to CBOE Regular Members, if the distribution would have a dilutive effect on the value of a CBOE membership overall (*i.e.*, broadly defined to include

that of a membership arising under the Exercise Right). If such an event were to occur, the agreement made plain that any distribution would be made on the same terms and conditions to Exerciser Members. Second, the CBOE and the CBOT agreed to interpret the Charter provision that created the Exercise Right as inapplicable following any merger, consolidation, or acquisition of the CBOT by or with another entity.

From 2001 to 2005, there would be further efforts to define the scope of the Exercise Right. These efforts were stimulated by the CBOT's own plan to demutualize and eventually restructure itself into CBOT Holdings, Inc. ("CBOT Holdings"), a Delaware for-profit corporation. Several restructuring agreements emerged between the CBOE and the CBOT (or CBOT Holdings). The CBOE agreed, albeit with some reluctance, that the restructuring of the CBOT into CBOT Holdings would not render the Exercise Right inapplicable, a circumstance that would have likely been the case if a provision under the parties' agreement in 1992 had been interpreted strictly. By 2004, however, the CBOE had grown increasingly frustrated with the Exercise Rights held by CBOT members. The rights were viewed as impediments to the flexibility that the CBOE believed it needed in responding to a changing options exchange industry. Demutualization was soon considered in earnest by the CBOE.

In April 2004, the CBOE sought to minimize the thorny issue of how to deal with the Exercise Rights in the context of a yet-to-be disclosed demutualization by initiating a modified Dutch auction to purchase 500 outstanding Exercise Right Privileges. Despite its offer to pay as much as $100,000, most of the Eligible CBOT Full Members balked. Still, even with only about five percent of Eligible CBOT Full Members having taken the CBOE up on its offer, the CBOE forged ahead. In September 2005, the CBOE Board announced its plan to demutualize and convert the CBOE into a for-profit corporation. The CBOE Board would eventually appoint a special committee (the "Special Committee") to have the sole authority to determine the manner in which membership interests held by Exerciser Members and Seat Owners would be converted under the demutualization. Despite the Special Committee's commitment to treat Exerciser Members "fairly," certain statements by CBOE management led CBOT Exerciser Members to believe that, to the CBOE, fair did not necessarily mean equal.

On August 23, 2006, CBOT Holdings, the CBOT, and representative CBOT Full Members (collectively, the "Plaintiffs") initiated this action against the CBOE and members of the CBOE Board (collectively, the "Defendants"), seeking injunctive relief and a declaration that CBOT Full Members, including Exerciser Members, would share equally with the Seat Owners in any distribution of consideration made pursuant to a demutualization of the CBOE (*i.e.*, the

"valuation" issue). The Defendants did not respond until October 2, 2006, when they filed a motion to dismiss on the ground that the Plaintiffs' claims were unripe because both the CBOE Board had yet to approve a form of demutualization and the Special Committee had yet to voice its decision on what consideration, if any, the CBOT Full Members would receive in a demutualization. A far more dramatic development, however, occurred later that October, and one that, independent of any announced demutualization of the CBOE, would have likely brought the parties before this Court.

On October 17, 2006, CBOT Holdings and CME announced a definitive merger agreement between the two entities whereby they would be combined into a company named CME Group Inc., a CME/Chicago Board of Trade Company. The proposed transaction would spark a shift in the CBOE's initial position that the Plaintiffs' "speculations" of unfair treatment did not merit judicial intervention. On December 12, 2006, the CBOE submitted a rule filing with the United States Securities and Exchange Commission (the "SEC" or the "Commission"). Under the proposed rule change, the SEC would view the CBOT-CME merger as having a terminating effect on the Charter-granted Exercise Right, with the rationale that such a transaction fundamentally changes what it means to be a member of the CBOT. The practical significance of this interpretation would be that no CBOT

member could become or remain an Exerciser Member under the Charter. Any CBOT member desiring membership on the CBOE would now have to pay for it.

On the same day the CBOE submitted its rule filing with the SEC, its Board announced in a press release that it was proceeding with the planned demutualization and suspending the work of the Special Committee. CBOE's Board reasoned that there was no need for the Special Committee to value Exerciser Members' interests when the proposed rule change would treat the CBOT-CME merger as eliminating those interests altogether.

Soon after the CBOE submitted its rule filing with the SEC, the Plaintiffs amended their complaint to add new claims to prevent the SEC's adoption of the CBOE's proposed rule change as to the meaning of CBOT membership under the Exercise Right (*i.e.*, the "membership" issue).

The CBOE filed a Form S-4 Registration Statement with the SEC on February 9, 2007. The CBOE assumed two events by the time it demutualized: completion of CBOT-CME deal and approval by the SEC of the proposed rule change.

CME demonstrated that it had successfully thwarted a competing acquisition offer by IntercontinentalExchange, Inc. ("ICE") when, on July 9, 2007, CBOT shareholders approved the merger with CME. In anticipation of this vote, the CBOE had filed with the SEC on July 2, 2007, an interim proposed rule—then

effective immediately unless and until the SEC takes action to the contrary—that eliminates the Exercise Right, but grants Exerciser Members "temporary CBOE membership status" pending the SEC takes final action on CBOE's proposed rule change.

Against this background, the Court concludes that, with the CBOT-CME merger completed, the "valuation" and "membership" issues implicated by the Second Amended Complaint (the "Complaint") are ripe for this Court's review. At bottom, these issues concern the economic or property rights that certain CBOT members have under the Exercise Right, as well as the membership or trading rights of CBOT members for purposes of the Exercise Right. The Court cannot, and shall not, ignore that this Exercise Right arose under—and is governed by—a contractual regime designed by sophisticated parties. Despite the CBOE's urgings to the contrary, the Court retains jurisdiction to determine whether the Defendants' actions have the operative effect of divesting the Plaintiff-class of a vested economic and property interest in CBOE membership conferred through the Exercise Right. Although judicial resolution of the state law claims advanced by the Plaintiffs would not necessarily and unduly intrude on the SEC's exclusive authority to review and approve proposed interpretations of exchange rules, the Court determines 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.

II. BACKGROUND

A. *Chicago's Options Exchanges*

Established in 1848, the CBOT is the oldest futures and options exchange in the world. Today, it is also one of the largest, providing a trading forum for both agricultural (*e.g.*, wheat, soybeans, corn) and financial contracts (*e.g.*, United States Treasury bonds). In 1972, CBOT's membership founded and initially funded the CBOE.[2] The CBOE, a non-stock membership corporation, is regulated under the Securities Exchange Act of 1934 (the "Exchange Act"),[3] which requires the CBOE to establish rules, subject to SEC review, defining and governing its membership.

B. *An "Exercise Right" is Born*

When the CBOE was formed in 1972, members of the CBOT provided seed capital in the form of direct cash expenditures, loan guarantees, and grants of certain intellectual property.[4] Noting the "special contribution" of CBOT's members, the CBOE's Charter created what has become known by the parties, both before and during this litigation, as the "Exercise Right." Article Fifth(b) of the Charter provided:

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[2] Regulatory roadblocks thwarted the CBOT's desire to create a market in listed securities put and call options. CBOT accepted that a separate exchange was necessary and, thus, its members acted to create what is now known as the CBOE. *See* Perce Aff. ¶ 3, Ex. B ("CBOE Proposed Rule Change") at 6.

[3] 15 U.S.C. § 78a, *et seq.*

[4] *See* CBOE Proposed Rule Change at 5.

> In recognition of the special contribution made to the organization and development of the [CBOE] by the members of the [CBOT] . . . every present and future member of the [CBOT] who applies for membership in the [CBOE] and who otherwise qualifies shall, so long as he remains a member of [the CBOT], be entitled to be a member of the [CBOE] notwithstanding any such limitation on the number of members and without the necessity of acquiring such membership for consideration or value from the [CBOE], its members or elsewhere. Members of the [CBOE] admitted pursuant to this paragraph (b) . . . shall otherwise be vested with all rights and privileges and subject to all obligations of membership . . . .

The right was unequivocal. So long as a CBOT member remained a member of the CBOT, he or she could become a member, or "Exerciser Member," of the CBOE without having to pay for that privilege as Seat Owners, or Regular Members, had done. Interestingly, Article Fifth(b) did not define what constituted CBOT membership. That omission would have consequences.

C. *The 1992 Agreement Between CBOT and CBOE*

Besides the Charter, the seminal document governing the Exercise Right is the 1992 Agreement. In the 1992 Agreement, the CBOT and the CBOE resolved several dilemmas—definitional and otherwise—that sprung from the language of Article Fifth(b). First, by clarifying the meaning of certain terms, the parties agreed to limit eligibility under the Exercise Right. Second, the 1992 Agreement reflected the parties' understanding as to how Seat Owners and Exerciser Members would be treated in relation to one another. Third, it acknowledged how a merger, consolidation, or acquisition involving the CBOT would affect the Exercise Right.

1. Limiting the Exercise Right

Article Fifth(b) of the Charter broadly entitled "every present and future member of [the CBOT]" to become a member of the CBOE pursuant to the Exercise Right. Twenty years later, the CBOE sought to limit this permissive grant and, in the 1992 Agreement, the CBOT agreed to define a CBOT member within the meaning of Article Fifth(b) as an individual who was an "Eligible CBOT Full Member" (or his or her "Delegate," or lessee, as defined).[5] This term carries a specific meaning:

> "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 . . . and who is in possession of all trading rights and privileges appurtenant to such CBOT Full Membership . . . .[6]

Thus, the defined term reflects the CBOT's agreement to, among other things, functionally remove the "every . . . future member" language from Article Fifth(b).

2. Treatment of Seat Owners and Exerciser Members of CBOE

a. *Distributions to CBOE's Membership*

An important feature of the 1992 Agreement was the CBOE's commitment to treat Seat Owners and Exerciser Members generally alike in terms of what it meant to be a member of the CBOE:

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[5] Second Am. Compl., Ex. 2 ("1992 Agmt."), § 2(a) (emphasis added).
[6] *Id.*, § 1(a).

> The CBOE acknowledges and agrees, in its own capacity and on behalf of its members, that *all Exerciser Members . . . 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 . . . .[7]

Accordingly, even in the event of a distribution, Exerciser Members would not be treated differently:

> 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*.[8]

The 1992 Agreement, however, is silent as to what constitutes a distribution.

b. *Transferability of CBOE Membership*

The 1992 Agreement's general tenor of equality between Seat Owners and Exerciser Members did not extend to at least one key area. Section 3(b) made clear that CBOE membership pursuant to the Exercise Right was not, in contrast to the membership of a Seat Owner, transferable.[9]

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[7] *Id.*, § 3(a) (emphasis added).

[8] *Id.*; *see also id.*, § 3(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 . . . .").

[9] *See also* CBOE Constitution, § 2.5 ("Memberships acquired pursuant to paragraph (b) of Article FIFTH of the Certificate of Incorporation shall not be transferable.").

c. *Obligations of CBOE Members*

The 1992 Agreement did nothing to alter Article Fifth(b)'s language that Exerciser Members would be "subject to all obligations of membership," including the payment of "fees, dues, assessments and other like charges."[10] For illustration, the Plaintiffs point to Plaintiff Michael Floodstrand, an Exerciser Member since 1990, as having paid hundreds of thousands of dollars in fees and dues to the CBOE since becoming a member.

3. Application of Article Fifth(b) Following Certain CBOT Transactions

Another important aspect of the 1992 Agreement was that it addressed whether the Exercise Right would survive following certain extraordinary transactions involving the CBOT. At Section 3(d), the CBOE agreed that

> in the event the CBOT mergers or consolidates with or is acquired by or acquires another 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 the CBOT Full Memberships are granted in such [transaction] *membership* in the survivor ("Survivor . . . , 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 . . ., then the Exercise Right of Article Fifth(b) *shall* continue to apply and [the 1992 Agreement] shall continue in force and effect (with the words "CBOT Full Membership" being interpreted to mean "Survivor Membership").[11]

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[10] *See also* Second Am. Compl. ("Am. Compl.") ¶ 51.

[11] 1992 Agmt., § 3(d) (emphasis added).

Conversely, if the CBOT were party to a merger, consolidation, or acquisition where these three requirements were not satisfied (*i.e.*, where the surviving entity was not an exchange, where CBOT Full Members were granted no membership in the surviving entity, or where CBOT Full Members lacked full trading rights and privileges), then the Exercise Right would not survive.[12]

D. *The CBOT's Demutualization and Subsequent Restructuring Agreements*

By 2000, Article Fifth(b) and the 1992 Agreement would come to a test. The CBOT proposed a demutualization plan to restructure itself by creating CBOT Holdings, a Delaware stock corporation, and then distributing shares of it to CBOT members.[13] The CBOE's initial response was that such a transaction would result in the Exercise Right being extinguished because the very concept of CBOT "membership," as it had existed under Article Fifth(b), would be no more.[14] Advancing this interpretation, the CBOE made a proposed rule change filing with the SEC. The CBOT then brought suit in Illinois state court. That lawsuit was dismissed, however, on the ground that the SEC had exclusive jurisdiction over matters pertaining to membership on an exchange.[15] The CBOT appealed, but while both its appeal and CBOE's proposed rule change filing were pending, a deal

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[12] *See id.*
[13] *See* Am. Compl. ¶ 46.
[14] *See* CBOE Proposed Rule Change at 7.
[15] *See Bd. of Trade of the City of Chicago v. Chicago Options Exch.*, No. 00-CH-1500 (Cir. Ct. of Cook County, Ill., Chancery Div., Jan. 19, 2001).

was struck between the CBOT and the CBOE. The deal, embodied in the 2001 Agreement, was that Article Fifth(b) would be interpreted as applying to those CBOT members who not only held the trading rights of a full member of the CBOT but also held at least as many shares of stock in CBOT Holdings as had been issued originally to CBOT members in the restructuring.[16]

More of these "restructuring agreements" (the "2001-2005 Restructuring Agreements") would follow. Leading up to one of them, Defendant Mark F. Duffy, CBOE's Vice Chairman and Executive Committee Chairman at the time, even acknowledged to CBOE members that the CBOE "[does] not have the authority to do away with the Exercise [R]ight," because "[i]t was granted to CBOT members in [the Charter] and absent a vote to do away with it or a court determination to do away with it, it will always exist."[17]

The final restructuring agreement came in 2005. In the 2005 Agreement, the CBOT, the CBOE, and CBOT Holdings agreed that after the CBOT's restructuring (*i.e.*, CBOT Holdings' initial public offering), the Exercise Right would continue to apply to CBOT Full Members provided they owned or possessed: (1) at least the same number of shares of Class A Common Stock of CBOT Holdings that they received in the demutualization transaction (27,338 shares); (2) one Series B-1

[16] *See* CBOE Proposed Rule Change at 7.
[17] Perce Aff., Ex. H, at 2.

CBOT membership; and (3) one Exercise Right Privilege, or "ERP," newly-issued by the CBOT.[18]

E. *The CBOE Ponders Demutualization and Later Forms a Special Committee*

In 2004, the CBOE was looking ahead to its own possible demutualization, reorganizing itself into a for-profit stock corporation. The interests of Exerciser Members, however, proved a headache for the CBOE. To help alleviate the problem, the CBOE announced its intent to purchase 500 outstanding ERPs through a modified Dutch auction process. The high end of its offer was $100,000 for each ERP, but there were few takers. Only 69, or five percent, of the 1,402 Eligible CBOT Full Members agreed to sell their ERPs.[19]

On September 14, 2005, the CBOE formally announced that its Board had approved a demutualization plan and acknowledged that the transition to a stock corporation would implicate decisions on what to do with the Exercise Rights held by CBOT Full Members.[20] Almost a year later, on September 25, 2006, the CBOE announced that its Board had delegated this task to a Special Committee of independent directors not having any CBOE membership interest. According to the CBOE Board, one of the functions of the Special Committee was "to ensure

[18] *See, e.g.*, Am. Compl. ¶¶ 47-48; Carey Aff. ¶ 10; CBOE Proposed Rule Change at 8.
[19] Two more ERPs were bought by the CBOE in 2006 and 2007, but for consideration greater than what was offered in the auction. *See* Carey Aff. ¶ 12; Perce Aff., Ex. M.
[20] Perce Aff., Ex. N.

that all CBOE members, including CBOT exercisers, are treated fairly in the CBOE's proposed demutualization."[21] Thus, the Special Committee was given the "sole authority" to determine the manner in which the two classes of CBOE membership should be converted to consideration under the demutualization.[22]

F. *The Plaintiffs Challenge CBOE's Demutualization Plan*

Shortly before the CBOE announced that a Special Committee had been formed to evaluate converting the interests of the CBOE membership classes in a demutualization, the Plaintiffs filed their original complaint, alleging that the proposed demutualization (*i.e.*, that CBOT Full Members would not receive the same consideration as CBOE Regular Members) would, among other things, breach the 1992 Agreement and the fidicuiary duties owed by the CBOE Board to CBOT Full Members. In short, the Plaintiffs sought a declaration that they would be able to participate in any demutualization on equal footing with the CBOE Regular Members.

G. *The CBOT and CME Strike a Deal*

The CBOE's proposed demutualization was not the only development that would call into question what it meant to be an Eligible CBOT Full Member under Article Fifth(b). On October 17, 2006, CBOT Holdings and CME announced an

[21] Perce Aff., Ex. O ("CBOE Information Circular IC06-132"), at 1.
[22] *Id.* at 4-5.

agreement to merge into CME Group Inc., a CME/Chicago Board of Trade Company.[23] Under the terms to the deal, the CBOT would survive the transaction as a subsidiary and CBOT Holdings stockholders would receive 0.3006 shares of CME Class A common stock per share of CBOT Class A common stock or, instead, they could opt for cash.[24]

H. *The CBOE's Take: Say Goodbye to the Exercise Right*

After some silence on the implications of the CBOT-CME deal on Eligible CBOT Full Members' Exercise Right, the CBOE made its view known in a proposed rule change filing with the SEC on December 12, 2006. The crux of the CBOE's proposed interpretation is that consummation of the CBOT-CME deal results in a fundamental and material change to what it means to be a member of the CBOT under Article Fifth(b) and, thus, the Exercise Right does not survive the transaction.[25] Primarily, the CBOE's position is that the requirements set forth by Section 3(d) of the 1992 Agreement[26] would not be satisfied under the merger because, among other reasons, CME is not an exchange. The CBOE also advanced an interpretation that the terms of the 2001-2005 Restructuring Agreements would no longer apply because the transaction would be a "material change[] to the

[23] Perce Aff., Ex. P.
[24] *Id.*
[25] CBOE Proposed Rule Change at 3, 9, 13.
[26] *See supra* Part II.C.3 (noting that the surviving entity must be an exchange, the holders of the CBOT Full Membership must be granted membership in the surviving entity, and members of the surviving entity must be entitled to full trading rights and privileges).

structure or ownership of the CBOT . . . not contemplated in the CBOT [r]estructuring."[27]

When the CBOE filed this proposed rule change with the SEC, it also announced separately that the Board's Special Committee had suspended its work. Members of the Special Committee, who were recused from the Board's discussion on the impact of a CBOT-CME deal on the Exercise Right, came to this conclusion with the rationale that it was unnecessary to ascribe a value to the interests of CBOE memberships under the Exercise Right when the transaction with CME would eliminate those interests (*i.e.*, the transaction would result in the CBOT no longer having "members," as contemplated by Article Fifth(b)).[28]

I. *The Plaintiffs Amend Their Complaint and the CBOE Formalizes its Demutualization Plan*

On January 4, 2007, the Plaintiffs amended their complaint to add new claims based on the CBOE's proposed rule change. Specifically, they challenge the process in which the CBOE Board determined that the CME transaction would terminate the Exercise Right and, additionally, seek injunctive and declaratory

[27] CBOE Proposed Rule Change at 8-10; *see also* Perce Aff. Ex. D, at D-1-1–D-1-2 ("'Eligible CBOT Full Member' 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 . . . .").

[28] *See* Perce Aff., Ex. W. *See also id*, Ex. R ("CBOE Form S-4 Registration Statement"), at 35.

relief to the effect that the Exercise Right would survive and entitle them to equal treatment in the CBOE's demutualization.

In late January 2007, the CBOE Board approved CBOE's demutualization plan and, on February 9, 2007, the CBOE filed a Form S-4 Registration Statement (the "Form S-4") with the SEC outlining its plan to be reorganized as CBOE Holdings, Inc. ("CBOE Holdings"), a for-profit Delaware stock corporation. The Form S-4 assumes that both completion of the CBOT-CME merger and approval of the CBOE's proposed rule filing will have occurred by the time CBOE is demutualized. As expected, the Form S-4 specifies that CBOT members holding membership interests in the CBOE pursuant to the Exercise Right will receive no stock in the CBOE restructuring.

J. *A Bidding War for the CBOT Begins, and Ends*

Shortly after the CBOE's Form S-4 filing, a rival suitor for the CBOT emerged. On March 15, 2007, ICE made an unsolicited bid to merge with CBOT Holdings.[29] By July 9, 2007, however, the bidding war came to an end. CBOT Holdings shareholders approved an $11.3 billion merger agreement with CME,[30] agreeing to receive 0.375 shares of CME Class A common stock per share of

[29] *See* Dengel Aff., Ex. D.

[30] CBOT Holdings shareholders agreed to receive 0.375 shares of CME Class A common stock per share of CBOT Class A common stock, an increase from the 0.3006 of a share in CME that was first offered by CME in October 2006.

CBOT Class A common stock. On July 12, 2007, the CBOT-CME transaction closed.

III. CONTENTIONS

The claims lodged by the Plaintiffs against the CBOE and members of the CBOE Board center primarily on three themes. First, they contend that both the Charter and the 1992 Agreement unambiguously require equal treatment among CBOE Regular Members and Eligible CBOT Full Members in any distribution or, more precisely, in a CBOE demutualization. Second, the CBOT and the Plaintiff-class challenge efforts by the CBOT to extinguish the Charter-granted Exercise Right, arguing that the CBOE proposed rule change filing is a thinly veiled effort to expropriate unilaterally these rights and to contravene contractual obligations to treat Eligible Full CBOT Members equally. Contrary to the CBOE's proposed interpretation filing with the SEC, the Plaintiffs maintain that the CBOT-CME merger does not result in the termination of the Exercise Right because all three requirements set forth in the 1992 Agreement (*i.e.*, the CBOT will continue as an exchange, even though it is indirectly being acquired through a merger of CBOT Holdings and CME; all of the Eligible CBOT Full Members will continue to hold membership in the CBOT following the merger; and the Eligible CBOT Full Members will still have all trading rights and privileges products traded on the CBOT) are satisfied. Finally, the Plaintiffs argue that CBOE Board members

breached their fiduciary duties by limiting the work of the Special Committee and permitting interested directors to dominate the process by which the CBOE Board determined the CBOT-CME transaction would result in the Exercise Right's demise. The Plaintiffs seek partial summary judgment on these three major claims and argue that the Court's consideration of these state law claims is not precluded by pending SEC review of the CBOE's proposed rule interpretation.

Not surprisingly, the Defendants have a different take on all of this. Primarily, they urge dismissal of this action or, more appropriately, a stay in favor of the SEC's consideration of the CBOE's filing, noting that the Exchange Act preempts judicial resolution of the "membership" issues. Responding more substantively to the claims asserted, they raise three major points. First, they dispute a reading of the governing agreements as providing equal treatment in the CBOE's demutualization. They argue that the Charter itself recognizes that Exerciser Members and Regular Members, although entitled to equal treatment in certain circumstances, are not created equally because the memberships acquired under the Exercise Right are nontransferable. The Defendants also contend that, because the CBOE's planned demutualization will occur through a merger, the transaction form of this demutualization does not trigger the 1992 Agreement's "equality provisions" with respect to certain "offers," "distributions," or "redemptions" by the CBOE. Second, the Defendants maintain that the Exercise

Right does not survive the CBOT-CME transaction because it is a "material change" to the CBOT's ownership and structure and one that is not contemplated under the 2001-2005 Restructuring Agreements. Moreover, even if the 1992 Agreement were to somehow have created an independent right to CBOE membership, the Defendants argue that the CBOT-CME transaction fails to satisfy the three requirements for the Exercise Right to continue to apply following a merger or consolidation involving the CBOT. Finally, the Defendants insist the CBOE Board did not improperly limit the Special Committee's role in determining the consideration that Exerciser Members would receive in the demutualization and also note that the Special Committee was recused from deliberations on Exercise Right eligibility following the CME transaction in order to preserve their independence on "valuation" decisions.[31]

IV. ANALYSIS

A. *The SEC's Exclusive Jurisdiction to Approve and Interpret Exchange Rules*

As noted, following CBOT Holdings' announcement that it and CME had agreed to merge, the CBOE filed a proposed rule change with the SEC concerning

[31] Aside from these three major points, the Defendants have also argued, more generally, that the Plaintiffs' "valuation" and "membership" claims have not ripened to merit judicial intervention because, first, the CBOE's demutualization is premised on a pending exchange rule change interpretation and it is uncertain if the CBOE will demutualize in an alternative scenario, and second, the CBOT-CME deal has not yet been consummated. The Court is satisfied, however, not least of all because the CBOT-CME transaction has, in fact, been completed, that these issues are now ripe for consideration.

the interpretation of Article Fifth(b) of the Charter. In its filing, the CBOE urged an interpretation that the CBOT-CME transaction would result in there not being "members" of the CBOT, as that term has come to be interpreted for purposes of Exercise Right eligibility. To the Plaintiffs, the motivation for CBOE's proposed rule change has less to do with *membership* (or trading rights) in the CBOT and more to do with the CBOE's desire to strip Exerciser Members of *property rights* (*i.e.*, economic rights based on duties prescribed by contract and imposed by state law on fiduciaries) linked to CBOE membership based on the Charter and the 1992 Agreement. That may be the case, but the SEC's exclusive jurisdiction over membership in a national securities exchange cannot be ignored.

By the Exchange Act, Congress has established a plenary and pervasive role for the SEC in determining issues relating to exchange membership and, in particular, approving proposed rule changes of such self-regulatory organizations. To illustrate, Section 6 imposes upon the SEC the duty to oversee such matters as to whom an exchange may deny membership;[32] under what circumstances an exchange may deny, suspend, or otherwise limit or condition membership;[33] and the specific procedures an exchange must follow in carrying out such actions.[34] Importantly, the SEC also plays an exclusive role in reviewing, approving, and

[32] *See* 15 U.S.C. § 78f(c)(1).
[33] *See* 15 U.S.C. § 78f(c)(2)-(4).
[34] *See* 15 U.S.C. § 78f(d).

interpreting an exchange's internal rules.[35] To this end, Section 19(b)(2) of the Exchange Act provides that "[n]o proposed rule change shall take effect unless approved by the Commission,"[36] with "proposed rule change" defined generally to include interpretations of an existing exchange rule.[37]

With these provisions of the Exchange Act in mind, the Court turns to the experience of other courts in grappling with the SEC's authority over matters concerning exchange membership. In general, courts have been leery of attempting to resolve disputes relating to exchange membership,[38] and, in particular, they have declined invitations to interpret Article Fifth(b), and to decide how a specific event or transaction might, or might not, affect an interpretation of that provision.[39]

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[35] By definition, an exchange's "rules" include the provisions of its articles of incorporation, or charter. *See* 15 U.S.C. § 78c(a)(27).

[36] 15 U.S.C. § 78s(b)(1).

[37] *See* Exchange Act Rule 19b-4(c), 17 C.F.R. 240.19b-4(c); *see also* Exchange Act Rule 19b-4(d), 17 C.F.R. 240.19b-4(d).

[38] *See, e.g.*, *Buckley v. Chicago Bd. of Options Exch.*, 440 N.E.2d 914, 919 (Ill. App. Ct. 1982) ("[W]e believe that the breadth of the Commission's statutory authority to review exchange decisions relative to membership suggests a Congressional intent to limit judicial interference . . . ."); *id.* at 471-72 ("In light of the importance Congress placed on the concept of 'membership' in the regulatory scheme it established in the 1975 amendments [to the Exchange Act], as well as the possible conflict with that scheme which might arise as a result of a state court membership determination, we conclude that preemption of the Board of Trade's action for specific performance is required here."); *Bond v. Chicago Bd. of Options Exch.*, No. 01-CH-14427 (Cir. Ct. of Cook County, Ill., Chancery Div., Sept. 17, 2001) (Transcript), at 56-57 (noting interpretative questions bearing on who or who is not a member under Article Fifth(b) are "exclusively within the province of the Securities and Exchange Commission").

[39] *See Bd. of Trade of the City of Chicago v. Chicago Options Exch.*, No. 00-CH-1500 (Cir. Ct. of Cook County, Ill., Chancery Div., Jan. 19, 2001) (Transcript), at 58 (declining to hear CBOT's declaratory judgment claim that a proposed transaction would not affect Exercise Right eligibility because, "[i]n light of the comprehensive federal statutory scheme regarding exchange

Together, the Exchange Act's provisions and rules, as well other courts' reluctance to infringe on the regulatory scheme that Congress has established, lead the Court to be sensitive as to how the CBOE's proposed rule change might involve matters reserved exclusively for the SEC's jurisdiction, especially matters going to the heart of the SEC's function to foster stability in the national market system for securities.[40] Accordingly, at this time, it is prudent for the Court to refrain from opining, or appearing to opine, on what effect the CBOT-CME merger may have an the continuation of the Exercise Right.

The Court's hesitancy to delve into the Plaintiffs' claims relating to "membership" issues does not, however, extend automatically to those matters that traditionally fall within the purview of this Court, namely the interpretation and enforcement of contractual provisions.

B. *The SEC's Jurisdiction Does Not Extend to Resolution of State Law Contractual and Fiduciary Duty Claims*

After the creation of the Exercise Right in 1972, disputes arose as to the meaning of certain terms used in that provision. To address these problems, the CBOT and the CBOE, in 1992, sought to clarify "the nature and scope of the entitlement . . . of a CBOT member to be a CBOE member."[41] The CBOT, for

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membership regulation, as well as the possible conflict 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").

[40] *See* 15 U.S.C. § 78b.

[41] 1992 Agmt., at First Whereas Clause.

example, agreed to limit Exercise Right eligibility to only those 1,402 then-existing CBOT Full Members. For its part, the CBOE agreed that Exerciser Members would have all the rights and privileges of CBOE Regular Members, except the right to transfer, and that Exerciser Members would enjoy the benefits of any "distribution" to Regular Members on the same terms and conditions. The CBOE also agreed that the Exercise Right would survive a merger, acquisition, or consolidation of the CBOT so long as certain conditions were satisfied. All of these commitments and all of these obligations have one thing in common: they are grounded in, and are governed by, contract, specifically the 1992 Agreement.

Whether the Plaintiffs are entitled to equal treatment in a demutualization of the CBOE is an issue that is touched upon by the 1992 Agreement and is one that can be resolved judicially. The parties, however, dispute sharply the precise effect of the 1992 Agreement and its current applicability. Briefly put, the CBOT argues that this agreement obligates the CBOE to treat CBOT members equally in a demutualization, an obligation that cannot be unilaterally removed; the CBOE argues, however, that the 1992 Agreement did not create an independent right to equal treatment, but is merely an interpretation of the Exercise Right embodied in the Charter and an interpretation that can be changed through the rule interpretation process with the SEC. At one time, the CBOT shared at least part of the CBOE's premise. In 2001, in the *Bond* case, the CBOT acknowledged that the

1992 Agreement was "simply an interpretation," a "new interpretation [of Article Fifth(b)]," and "not an amendment [of the Charter]."[42] Since 2001, however, there have been several reaffirmations of the 1992 Agreement and its commitment to provide "equal treatment" to Exerciser Members, reaffirmations evidenced by the 2001-2005 Restructuring Agreements. These agreements, taken together, may leave doubt as to the intended consequences following certain transactions, but they do not suggest that the parties did anything to reduce the possibility of a judicial determination of the meaning of certain terms or of a judicial resolution of certain disputes. The CBOE's pending rule change, even if viewed fairly as concerning matters of membership, does nothing to challenge the capacity of a judicial forum to interpret such contractual terms.

Finally, it is worth noting that the parties themselves acknowledged in the 1992 Agreement that judicial intervention could be sought by either party to enforce the Agreement's terms,[43] a task not unfamiliar to the judicial system. No authority has been presented to the Court to suggest that the SEC has been imbued with enhanced jurisdiction or some special mission to resolve matters of private economic rights or the allocation of the fruits of those rights among competing private claimants. Indeed, the general presumption against the federal preemption of claims arising out of state law—*e.g.*, contract claims, fiduciary duty claims—

[42] *See Bond*, *supra* note 38 at 14, 54-55.
[43] 1992 Agmt., § 6(c).

further guides this Court in concluding that it may properly consider at least the economic rights claims grounded in state law and raised by the Complaint.[44]

C. *Efficiency Considerations Militate in Favor of Staying the Consideration of Plaintiffs' Claims*

The CBOE's proposed rule change is now before the SEC. This Court is not absolutely precluded from proceeding concurrently with that process; whether the governing documents afford the Plaintiffs equal (or some lesser) treatment in the CBOE's demutualization is not, after all, the precise issue before the SEC. Such recognition of this Court's authority to proceed, however, does not eliminate the Court's sensitivity to matters of judicial efficiency and case management, as well as an appropriate degree of deference to the SEC. These concerns are, of course, within this Court's discretion.[45]

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[44] *See, e.g.*, *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *cf. Barbara v. N.Y. Stock Exch.*, 99 F.3d 49, 55 (2d Cir. 1996) (stating that claims created by state law are not necessarily swallowed by a pervasive federal scheme). It should also be observed that, although *Buckley* was cited for the general proposition that courts are reluctant to interfere in matters of membership issues, there is an important difference between the facts of *Buckley* and the facts here. In *Buckley*, the court concluded that an award of specific performance relating to a claim arising out of state law would have the operative effect of removing one member in the CBOE and installing another, something which might very well conflict with SEC oversight. 440 N.E.2d at 919. Nothing so drastic would occur here. A determination by this Court on the issue of economic rights is different and arguably distinct from questions of trading rights. Both the Court and the SEC cannot arrive at their own respective determinations and, thereby, discharge their separate functions, without unduly frustrating the mission of either. Whether other concerns are at play, including the conservation of judicial resources, is a different question.

[45] *See, e.g., Parfi Holding AB v. Mirror Image Internet, Inc.*, --- A.2d ---, 2007 WL 1451506, at *3 (Del. May 17, 2007) (acknowledging a "trial court's inherent authority to control its docket"); *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1201 (Del. 1997) (noting "the inherent power of a trial court to control its own docket, manage its affairs, achieve the orderly disposition of its business and promote the efficient administration of justice").

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.[46] 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.[47]

V. CONCLUSION

For the foregoing reasons, the Court will stay this action. A stay is appropriate pending the SEC's determination as to whether the CBOT-CME transaction affects the meaning of "Eligible Full CBOT Member" under Article Fifth(b), as addressed in the 1992 Agreement and as interpreted in the 2001 Agreement and subsequent Restructuring Agreements, in such a manner that the rights of certain CBOT members to become or remain CBOE Exerciser Members have been terminated. In ordering this stay, the Court emphasizes 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

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[46] *Cf., e.g., DeBari v. Nortec, LLC*, 2000 WL 33108393, at *1 (Del. Super. Nov. 8, 2000).
[47] *Cf. Parfi Holding AB v. Mirror Image Internet, Inc.*, 842 A.2d 1245, 1263 (Del. Ch. 2004), *aff'd*, --- A.2d ---, 2007 WL 1451506 (Del. May 17, 2007) (recognizing that a stay permitted later judicial assessment of potential collateral effects arising from another proceeding).

duty law.[48] The decision is rooted less in deference to the SEC's exclusive jurisdiction to review and approve proposed rule changes under the Exchange Act and more in recognition of the practical concerns of conserving judicial resources and avoiding unnecessary speculation about the outcome of the administrative process until such time as the SEC provides its resolution of the question of how, for purposes of its statutory responsibility, the CBOT-CME merger affects the eligibility of CBOT members to qualify for purposes of the Exercise Right.

An implementing order will be entered.

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[48] CBOT membership in the CBOE is unique because it has encompassed both traditional exchange trading rights and contractual or economic rights. The notion that the CBOE Board may unilaterally defeat contractual rights—protected not only by state contract (or corporation) law, but also by state fiduciary duty law—to the exclusive benefit of its Seat Members merely by filing with the SEC is troubling. The SEC is properly and necessarily concerned with the efficient and proper operation of national securities markets and who may trade on those markets is an important aspect of the task. It is not so apparent that the SEC would be concerned about how the rights and obligations between the real parties in this feud—CBOT Full Members and CBOE Seat Members—would matter so much. CBOT members already trade on the CBOE and their continuation of that effort might actually benefit (and would not necessarily be adverse to) the operation of that market by, for example, providing greater liquidity. In short, there may well be an option available to the SEC that would allow it to retain the final say as to who can trade on the CBOE but, at the same time, would allow the state law contractual rights of CBOT members to be resolved in the forum where such rights are routinely resolved—the courts. Moreover, even if it turns out that the SEC's mandate requires that CBOT Full Members be excluded from trading on the CBOE—a point about which the Court expresses no formal view—it does not ineluctably follow that, in these unique circumstances, they are also divested of whatever economic (or contractual) rights they hold as the result of that status. In addition, if the CBOE Board owed fiduciary duties to the Exerciser Members (and arguably others), those duties may well protect the interests of these CBOT members because those decisions which caused the claimed harm to them were made by the CBOE Board while, under any interpretation of the various documents, at least many of the CBOT members were Exerciser Members of the CBOE. In sum, it is not immediately and conclusively obvious why a regulatory act voluntarily (and not necessarily) taken by the CBOE Board can be isolated from the reach of fiduciary duty law, especially when the consequences (great benefits to the Seat Members and great detriment to the CBOT Full Members) were so apparent at the time when the CBOE Board decided to act.