August 9, 2007

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

Attn: Nancy M. Morris, Secretary

Re: ***SR-CBOE-2006-106 and SR-CBOE-2007-77***

Ladies and Gentlemen:

On behalf of the CME Group Inc. and its subsidiary the Chicago Board of Trade, Inc. (collectively "CBOT"), we are writing to bring to the attention of the Securities and Exchange Commission ("SEC" or "Commission") an important development that bears directly on the SEC's current consideration of SR-CBOE-2006-106 (the "Proposed Rule Change") and SR-CBOE-2007-77 (the "Interpretation"), both of which have been the subject of CBOT comments.[1] On August 3, 2007, the Delaware Court of Chancery issued two opinions in the Delaware Action pending before it – one deals with the motions argued on May 30, 2007 ("Opinion I"), and one resolves the motion for a temporary restraining order ("TRO") argued on July 31, 2007 ("Opinion II"). These matters have been discussed in our prior comment letters to the Commission on the Proposed Rule Change and the Interpretation, respectively. These opinions are enclosed.

Of particular note in the Opinions is that the Delaware Court ruled unequivocally that it *does* have jurisdiction over, and will rule on, the CBOT plaintiffs' state law "economic rights" claims. The Delaware Court stated:

> "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." Opinion I at 7.

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[1] Capitalized terms used herein have the same meanings given those terms in the CBOT's February 27, 2007 comment letter in opposition to the Proposed Rule Change that is the subject of SR-CBOE-2006-106, and CBOT's July 27, 2007 comment letter on the Interpretation that is the subject of SR-CBOE-2007-77.

> " . . . [T]he 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 duty law." Opinion I at 29-30.

The Delaware Court also found that the CBOT plaintiffs' claims are ripe for consideration at this time. Opinion I at 7.

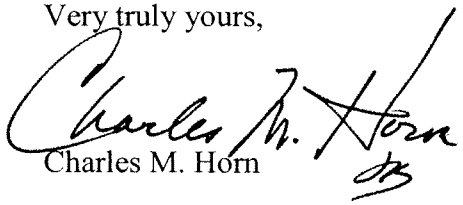
The Court denied the plaintiffs' motion for a TRO. This particular ruling, however, was not based on the merits of the plaintiffs' claims – indeed, the Court described those claims as "stronger than merely colorable" and "worthy of serious consideration." Opinion II at 9, 10. The Court also noted that CBOE could "have adopted a less onerous interim rule that would not have altered the substantive rights of any CBOT members." However, the Court denied the TRO, because it concluded that the plaintiffs have an adequate remedy at law for their claims arising out of CBOE's July 2, 2007 rule submission. Opinion II at 10-13.

Finally, the Court ruled that it will stay the Delaware Action pending the SEC's action on the Proposed Rule Change. The Court explained that the stay was not the result of any concern on its part that it would be intruding on the SEC's jurisdiction over the question of whether the Proposed Rule Change is inconsistent with the Exchange Act. Rather, the stay was made "in recognition of the practical concerns of conserving juridical resources and avoiding unnecessary speculation about the outcome of the administrative process . . . ."

In light of these Opinions, CBOT reiterates its prior request that the SEC (i) institute proceedings under section 19(b)(2) of the Exchange Act to disapprove the Proposed Rule Change, and (ii) promptly abrogate the July 2,2007 self-executing Interpretation filed by CBOE and thereby return the parties to the true *status quo* as it existed on July 1, 2007, prior to the Interpretation's filing. These actions are particularly important at this time in light of the Delaware Court's view that it is for the Delaware Court, rather than the SEC, to decide under state law whether the CME Holdings-CBOT Holdings merger extinguished the Exercise Right.

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

Very truly yours,



Charles M. Horn

Attachments

cc: The Honorable Christopher Cox, Chairman
The Honorable Paul S. Atkins, Commissioner
The Honorable Roel C. Campos, Commissioner

The Honorable Kathleen L. Casey, Commissioner
The Honorable Annette L. Nazareth, Commissioner

Brian G. Cartwright, Esq., SEC General Counsel
Janice Mitnick, Esq., SEC Assistant General Counsel for Market Regulation
Elizabeth King, SEC
Richard Holley, SEC
Johnna Dumler, SEC
Joanne Moffic-Silver, CBOE
Patrick Sexton, CBOE
Gordon Nash, Counsel for Plaintiff Class in the Delaware Action
Jerrold Salzman, Counsel for CME

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CBOT HOLDINGS, INC., a Delaware corporation; THE BOARD OF TRADE OF THE CITY OF CHICAGO, INC., a Delaware corporation; and MICHAEL FLOODSTRAND and THOMAS J. WARD and All 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.

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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.

* * *

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:

[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]

[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

[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

[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.

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: July 31, 2007
Date Decided: August 3, 2007

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NOBLE, Vice Chancellor

I. INTRODUCTION

Plaintiff The Board of Trade of the City of Chicago, Inc. (the "CBOT") and two of its members, Plaintiffs Michael Floodstrand and Thomas J. Ward, seek to enjoin Defendants Chicago Board Options Exchange (the "CBOE") and the CBOE Board from implementing or enforcing a new rule (the "Interim Access Rule") filed with the United States Securities and Exchange Commission (the "SEC" or the "Commission") on July 2, 2007.[1] Proposed one week before shareholders of Plaintiff CBOT Holdings, Inc. gave their blessing to a merger with Chicago Mercantile Exchange Holdings, Inc. (the "CME"), the Interim Access Rule provides CBOT "Exerciser Members," or those CBOT members holding membership on the CBOE pursuant to Article Fifth(b) of the CBOE Articles of Incorporation, with "temporary membership status" on the CBOE until the SEC takes final action on another proposed rule filed by the CBOE on December 12, 2006 (the "Proposed Rule Change").[2]

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[1] *See* Pls.' Verified Mot. for a TRO, Ex. 3 ("CBOE Proposed Interim Access Rule"). Other motions pending in this action are addressed in a separate, simultaneously issued, memorandum opinion. That memorandum opinion develops the background of the pending dispute in greater detail. Reference to that memorandum opinion is encouraged in order to obtain a better understanding of the Court's decision.

[2] The CBOE's prior filed proposed rule urges the SEC to accept an interpretation that consummation of the CBOT-CME transaction results in there no longer being CBOT "members" within the meaning of the rule creating the "Exercise Right" in Article Fifth(b) of the CBOE Charter. *See* Perce Aff. ¶ 3, Ex. B ("CBOE Proposed Rule Change, Dec. 12, 2006"). If adopted, the practical significance of the interpretation would be that no CBOT member could become or remain an Exerciser Member under the CBOE Charter.

In imploring the Court to grant a temporary restraining order, the Plaintiffs argue, among other things, that the Interim Access Rule strips away the ability of CBOT Full Members to lease and, importantly, to collect rents from the leasing of their CBOT B-1 memberships to third parties for the purpose of allowing them to trade on the CBOE. For the reasons set forth below, however, the Court must deny the Plaintiffs the extraordinary relief that they seek because of their failure to demonstrate that the Plaintiffs or the class will be irreparably harmed in the absence of interim relief.

II. BACKGROUND

Almost a year has passed since CBOT Holdings, the CBOT, and representatives of a putative class of certain CBOT members (or "CBOT Full Members" as that term has been defined in agreements between the CBOT and CBOE governing the nature and scope of the Exercise Right) brought suit against the CBOE and the members of its board of directors seeking injunctive and declaratory relief that CBOT Full Members, including those already holding Exerciser Member status, be treated equally alongside those CBOE seat owners, or "regular members," in any demutualization of the CBOE. Shortly thereafter, in October 2006, the CBOT and the CME announced an agreement to merge and to form the CME Group Inc., a CME/Chicago Board of Trade Company (the "CME Group"). According to the Defendants, such a transaction, if consummated, would

extinguish the Exercise Right because membership in the CBOT—a requirement for eligibility under the Exercise Right—would not exist in the manner that had been contemplated by the parties in 1992 (the "1992 Agreement") and in related agreements further defining the contours of the Exercise Right. On December 12, 2006, the CBOE incorporated this view in the Proposed Rule Change, or interpretation, submitted to the SEC.[3] The Plaintiffs later amended their complaint to seek declaratory relief that the merger transaction would not correspondingly deprive them of their state law contract rights under the CBOE Charter, 1992 Agreement, and other related agreements or their right to expect the faithful performance of fiduciary duties owed by the CBOE's board.

With the Proposed Rule Change pending before the SEC, and with a motion to dismiss or stay and a motion for partial summary judgment pending before the Court, the CBOE filed its Interim Access Rule on July 2, 2007. Submitted in advance of a scheduled vote by CBOT Holdings shareholders on July 9, 2007, to approve the CBOT-CME merger, the CBOE's stated motivation was to determine how it should proceed following a CBOT-CME merger and absent approval by the SEC of its Proposed Rule Change. Because the Interim Access Rule was implemented pursuant to Section 19(b)(3)(A) of the Securities Exchange Act (the

[3] Section 19(b)(2) of the Securities Exchange Act of 1934 empowers the SEC to review and approve (or disapprove) an exchange's proposed rule changes. 15 U.S.C. § 78s(b)(2).

"Exchange Act"), it became effective upon filing, although it is, nevertheless, still subject to SEC review.

The Interim Access Rule is cast by CBOE as an interpretation of existing CBOE Rule 3.19, which permits the CBOE to confer temporary membership status on a CBOE member who may have lost membership because of "extenuating circumstances." Specifically, the Interim Access Rule provides, in part:

> If the proposed merger between [CME] and [CBOT Holdings] . . . is consummated and if such consummation occurs *before* the [SEC] takes final action on [the Proposed Rule Change], a person who is a member of CBOE (an "exerciser member") pursuant to paragraph (b) of Article Fifth of the CBOE Certificate of Incorporation ("Article Fifth(b)") as of July 1, 2007 will be granted *temporary membership status* at the [CBOE], until the Commission takes final action on [the Proposed Rule Change], if and only if such person (i) remains an exerciser member in good standing as of the close of business on the trading day immediately before the consummation of the CME/CBOT Transaction, (ii) . . . continues to pay all applicable fees, dues, assessments and other like charges that are assessed against CBOE members, and (iii) *pays to the [CBOE]*, for each month starting in the month after the CME/CBOT Transaction is consummated, a monthly access fee based on the then current monthly lease fees being paid to lessors of the interest that CBOT denominates as a full CBOT membership . . . . (emphasis added)[4]

Thus, under the Interim Access Rule, temporary membership status is not dependent on holding a Series B-1 CBOT Membership. Furthermore, lease payments by third parties who had been leasing CBOT B-1 Memberships are now to be directed to the CBOE instead of to Exerciser Members directly.

[4] CBOE Proposed Interim Access Rule at 3-4.

On July 9, 2007, a week after announcement of CBOE's self-executing Interim Access Rule, CBOT shareholders approved a merger with the CME. The merger closed on July 12, 2007. On July 20, 2007, the Plaintiffs filed their Verified Motion for a Temporary Restraining Order to enjoin the CBOE from implementing or enforcing the Interim Access Rule.

III. CONTENTIONS

Two very different views of what constitutes the status quo are offered to the Court. For the Plaintiffs, they seek a temporary restraining order to preclude the Interim Access Rule from being implemented or enforced. Principally, they argue that the Interim Access Rule is another effort by the CBOE—this time cloaked in the transparent fiction of maintaining market stability—to circumvent the contractual obligations it has to treat CBOT interests fairly. The new rule change would, according to the Plaintiffs, set off a domino-like reaction upsetting the status quo and, correspondingly, causing irreparable harm to the Plaintiff-class. This is because the Interim Access Rule, which does not require a temporary member to hold one of the limited CBOT B-1 Memberships, creates a disincentive for current lessees of CBOT B-1 Memberships to continue making lease payments, as well as an obvious incentive to terminate their leases altogether. They contend that this dynamic (i) renders useless the leasing of CBOT B-1 Memberships and (ii) negatively impacts the trading value of CBOT B-1 Memberships because lease

value (diminished as the result of CBOE's actions) is such an important component part of their overall value.

The Defendants challenge the Plaintiffs' motion on multiple fronts, viewing the CBOT's decision to merge with the CME (before SEC or judicial determination of the consequence of that transaction on the rights of CBOT members to participate in the CBOE) as the triggering event that disrupted the status quo in their relationship and forced the CBOE to determine who should be permitted to trade on the CBOE immediately following the consummation of the CBOT-CME merger. First, they argue that the Plaintiffs have no reasonable likelihood of succeeding on the merits because the SEC has exclusive—and preemptive—jurisdiction over the interpretation (and validation) of the Interim Access Rule. Second, they contend that the Plaintiffs' motion is barren of an explanation as to how the alleged harm could not be remedied by money damages. Finally, the Defendants maintain that a balancing of the equities cuts in their favor because the intended purpose of the Interim Access Rule was to preserve market stability and because the Defendants dawdled for eighteen days after its announcement before seeking emergency injunctive relief from this Court.

IV. ANALYSIS

The purpose of a temporary restraining order is twofold: to protect the status quo and to prevent imminent and irreparable harm from occurring pending a

preliminary injunction hearing or final resolution of a matter. In assessing whether a temporary restraining order is warranted, the Court is generally guided by three factors: (i) the existence of a colorable claim, (ii) the irreparable harm that will be suffered if relief is not granted, and (iii) a balancing of hardships favoring the moving party.[5] These factors are similar to the factors applied in actions involving preliminary injunctive relief,[6] but this Court has recognized that motions for temporary restraining orders may be subject to less exacting merits-based scrutiny, in part because of their duration and limited developed factual background.[7] Thus, greater flexibility accompanies judicial consideration of a motion for a temporary restraining order, enabling the Court to assess the imminent and irreparable injury sought to be avoided.[8] Where, however, the Court has before it a reasonably developed factual record, as here,[9] the traditional temporary restraining order

[5] *See, e.g., Stirling Inv. Holdings, Inc. v. Glenoit Universal, Ltd.*, 1997 WL 74659, at *2 (Del. Ch. Feb. 12, 1997).

[6] *See, e.g., Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 2007 WL 2058733, at *6 (Del. Ch. July 12, 2007).

[7] Two decisions of this Court—*UIS, Inc. v. Walbro*, 1987 WL 18108 (Del. Ch. Oct. 8, 1987) and *Cottle v. Carr*, 1988 WL 10415 (Del. Ch. Feb. 9, 1988)—have provided the foundation for our understanding that the factors to be considered in a motion for a temporary restraining order are different from those considered in a preliminary injunction setting. Practical considerations drive this distinction, *i.e.*, assessing the probability that a claim will ultimately succeed on its merits is generally a more fact intensive inquiry.

[8] *See generally* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 10-3[a], at 10-52–10-52.1 (2007).

[9] Extensive briefing and robust oral argument have been provided by the parties not only in the context of this motion but concerning Defendants' motion to dismiss and Plaintiffs' motion for partial summary judgment.

standard does fully not apply.[10] Instead, the Court looks more in the direction of whether there is a probability of success on the merits.[11]

A. *Plaintiffs' Showing on the Merits*

The Court must first assess the merits of the Plaintiffs' claims. As with their challenge to the Proposed Rule Change which was the subject of their motion for partial summary judgment, the Plaintiffs assert that the Interim Access Rule has the effect of extinguishing certain rights to which the Plaintiffs are entitled under the CBOE Charter, the 1992 Agreement, and various other "agreements."

By the 1992 Agreement, all Exerciser Members were assured of having the same rights in any distribution by the CBOE, which arguably would include the proceeds of a demutualization, as CBOE Regular Members. In the event of a CBOT merger, the Exercise Rights of the CBOT Members would continue if the survivor of any merger was an exchange that provided a certain market, the CBOT Members had membership in the surviving entity, and the surviving members had full trading privileges. This relationship was further refined in a series of

[10] *See Insituform Techs., Inc. v. Insitu, Inc.*, 1999 WL 240347, at *7 (Del. Ch. Apr. 19, 1999); *see also Cochran v. Supinski*, 794 A.2d 1239, 1247 (Del. Ch. 2001) (viewing an application for a temporary restraining order as the equivalent of a motion for a preliminary injunction because "the matter has been fully briefed by the parties").

[11] Such a recognition, however, does nothing to distract the Court from its chief focus when reviewing an application for a temporary restraining order: "the nature and imminence of the allegedly impending injury." *See supra* note 8, § 10-3[a] at 10-53; *see also Gimbel v. Signal Cos.*, 316 A.2d 599, 602 (Del. Ch. 1974) ("An injunction, being the 'strong arm of equity' should never be granted except in a clear case of irreparable injury, and with full conviction on the part of the court of its urgent necessity.").

restructuring agreements culminating in the 2005 Agreement that resulted from the CBOT's demutualization and that provided that CBOT Full Members would continue to hold the Exercise Right as long as they possessed at least the same number of shares of CBOT Holdings as were received in the demutualization, one Series B-1 CBOT membership, and one Exercise Right Privilege ("ERP"). With the CBOT Holdings-CME merger, the CBOT members no longer own stock of CBOT Holdings, but they continue to have an equity interest in the venture, they continue to be able to trade on the CBOT; they hold Series B-1 CBOT memberships, and they hold the ERPs. Thus, the Plaintiffs argue that their status is not materially changed and they should not be deprived of their reasonable expectations to continue with their various rights to participate in the CBOE.

The Plaintiffs' arguments, set forth have perhaps too tersely or simplistically, need not, and should not be, resolved now.[12] The Plaintiffs clearly have advanced claims that are colorable. Indeed, they are stronger than merely colorable. On the other hand, the claims are not compelling in the sense that they are not clearly prevailing contentions.[13] Further refinement is not needed for the

[12] Also, not to be overlooked are other arguments of the Plaintiffs, especially those tied to fiduciary duties of the CBOE Board and the decision to discontinue the Special Committee formed to address the rights of CBOT Members.

[13] Another consideration impeding the Plaintiffs' success on the merits is a concern about improvident judicial trespassing on territory Congressionally assigned to the SEC. The Interim Access Rule—admittedly voluntarily prescribed by the CBOE to achieve what the Plaintiffs argue was a result desired for other reasons—is before the SEC for consideration as part of that agency's jurisdiction over the national securities markets and their membership.

reasons that the Court is about to address. It is sufficient to note that, for purposes of balancing the various considerations that inform the Court's exercise of discretion in considering a motion for temporary restraining order, the Plaintiffs have advanced a claim worthy of serious consideration. That claim, however, cannot lead to relief if the Plaintiffs are not able to demonstrate that irreparable harm will be suffered in the interim without judicial intervention. It is to the question of irreparable harm that the Court turns.

B. *Irreparable Harm*

The Court now addresses what, in this case, is the most important part of the calculus of the temporary restraining order motion: a showing of irreparable harm absent the Court's extraordinary intervention.

The Interim Access Rule, as adopted by CBOE's Board and submitted to the SEC, could arguably be viewed as the latest effort by the Defendants to obliterate the contractual, or economic, rights of the Plaintiff-class and, thus, to avoid having to treat Exerciser Members on equal footing with Seat Owners. As the Plaintiffs allege in their motion, the creation of "temporary memberships" without the concomitant requirement that these members hold CBOT B-1 Memberships encourages existing lessees of these memberships to cancel their leases.[14] As more lessees choose this route, a "lessor-side imbalance" is created, driving down lease

[14] *See* Pls.' Verified Mot. for a TRO, ¶ 5.

rates and diminishing the overall value of the CBOT B-1 Membership.[15] The Plaintiffs' fears are not overly dramatic. As of August 1, 2007, there have been at least 52 30-day notices of terminations.[16]

The Plaintiffs identify three primary ways in which they have been (and will be) damaged by the CBOT's Interim Access Rule of July 1, 2007: (i) the loss of lease payments (*i.e.*, the money that certain Plaintiff-class members previously received from leasing their CBOT B-1 Memberships); (ii) the negative impact on the lease value of CBOT B-1 Memberships (*i.e.*, because a greater number of CBOT B-1 Memberships have returned or will return to the "leasing pool"); and (iii) the negative impact on the overall value of CBOT B-1 Memberships (*i.e.*, because the lease value is a component of the overall value of a CBOT B-1 Membership).[17] Simply listing these harms reveals the fatal flaw of Plaintiffs' motion: each of the alleged injuries is capable of being redressed monetarily.

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[15] *Id.*

[16] The Plaintiffs offer affidavits of C.C. Odum, II, a former CBOT director (and current CME Group director) and chairman of its Lessors Committee. Although these affidavits do not identify with unambiguous precision the number of termination notices that have been received—*see* Second Supplemental Aff. of C.C. Odum, II, at ¶ 3 (stating that on August 1, 2007, CBOT "had received 52 30-Day Notices of Terminations"); Supplemental Aff. of C.C. Odum, II, at ¶ 2 (stating that 51 termination notices have been received as of July 30, 2007)—they do reference records from the CBOT's Member Services Department that reveal several dozen 30-day termination notices as having been received since the Interim Access Rule's issuance.

[17] *See* Pls.' Verified Mot. for a TRO, ¶ 15; *see id.*, ¶ 5(b); *see also* Aff. of C.C. Odum, II, at ¶ 9 (projecting that the Interim Access Rule will drive down the lease value and overall value of CBOT B-1 Memberships because as many as 221 additional CBOT B-1 Memberships will become available for lease).

The loss of revenues from the lessees of CBOT B-1 Memberships, for instance, is an archetypal injury that can readily be quantified. With the first set of lease terminations becoming effective on August 16, 2007, it is difficult to imagine a scenario—and the Plaintiffs offer none—in which the loss of such revenues from that date onward cannot be adequately compensated through an award of money damages.[18]

The Plaintiffs' two other claims concern the Interim Access Rule's adverse effect on both the lease value of CBOT B-1 Memberships and the overall value of those memberships. The parties acknowledge, albeit in differing degrees, that quantifying damage to the lease value and overall value would not be an easy task, possibly involving extensive—and, no doubt, competing—expert testimony and the isolation or discounting of other factors—*e.g.*, exogenous market shifts—affecting these values but bearing no relationship to the Interim Access Rule. Sheer difficulty in formulating a legal, or monetary, remedy, however, does not prompt the Court to select reflexively from among the panoply of equitable remedies available, especially those "extraordinary" interim remedies. The Court is able to assess which factors bear—and which ones do not—on a calculation of monetary damages between certain events or points in time. Moreover, a decline

[18] *See Carson Pirie Scott & Co. v. Gould*, 1995 WL 419980, at *3 (Del. Ch. July 12, 1995) (limiting the extraordinary relief provided by Court of Chancery Rule 65 to those situations where an imminent injury cannot later be effectively remedied by an award of money damages).

in market value here would not constitute irreparable harm because, if the Plaintiffs are successful, the values would likely promptly rebound; if the Plaintiffs do not prevail, the decrease in value would be just one of the adverse consequences that would flow from that failure.[19]

In sum, the Plaintiffs have not demonstrated that they will suffer irreparable harm in the absence of judicial intervention.[20]

C. *Balancing of the Equities*

Finally, it is appropriate to engage in a balancing of the competing harms and benefits associated with a grant or denial of the requested relief. In other words, if the immediate and irreparable harm to be averted by the issuance of a temporary restraining order outweighs the burden to be suffered by the non-moving party through maintenance of the status quo, then the Court is more likely to grant such an equitable remedy.[21]

The parties offer competing considerations. For their part, the Defendants urge the Court to recall their motivation in granting temporary memberships on the exchange: to preserve the stability of CBOE membership following a CBOT-CME

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[19] Recently, the Court recognized in *Gradient OC Master, Ltd.*, 2007 WL 2058733, at *21, that "[t]he loss of market value between two dates seems to be a classic example of the type of injury that is compensable with monetary damages."

[20] The Plaintiffs contend that the CBOT Full Members who now want to employ their Exercise Rights are prevented by the Interim Access Rule. In addition to damages as an adequate remedy for that denial, the Plaintiffs have not identified any CBOT Full Member who has come forward to seek to become an Exerciser Member. *See* Tr. of Oral Arg., at 15-16 (July 31, 2007).

[21] *See, e.g.*, *Stirling*, 1997 WL 74659, at *3; *cf. L&W Ins., Inc. v. Harrington*, 2007 WL 809512, at *13 (Del. Ch. Mar. 12, 2007).

transaction and until the SEC sets forth its views on how CBOT-based rights in the CBOE are affected by the merger. They point to the chaos that would result if the motion were granted and the corresponding burden that would be placed on the CBOE to identify who qualifies—and who does not qualify—for access to the market. Citing to "irreparable" market disruption, they identify a general risk that the requested relief would automatically remove "some number" of interim members from the market for "some amount of time."[22] Yet, the CBOE could also have adopted a less onerous interim rule that would not have altered the substantive rights of any CBOT members.

The Plaintiffs, however, draw the Court's attention to a more particularized harm: the loss of approximately $5,000 per month per lease.[23] The rent to be collected for a leased CBOT B-1 Membership constitutes an important property, or economic, component of the memberships themselves. Moreover, the potential of a lessor-imbalance (*i.e.*, an increase in available leases in the leasing pool) is not entirely speculative when the Court takes into consideration the number of termination notices that have been received already.[24] Finally, the Plaintiffs will, in fact, suffer harm; the Defendants have it in their power to protect their interim interests without causing adverse consequences for the Plaintiff-class. In sum, the

[22] Defs.' Br. in Opp'n to Pls.' Verified Mot. for a TRO, at 30.
[23] *See* Pls.' Verified Mot. for a TRO, ¶ 9.
[24] *See supra* note 16 and accompanying text.

Court is satisfied that a balancing of the equities (and hardships) rests somewhere slightly in the Plaintiffs favor.

D. *The Discretionary Exercise*

The decision to grant the extraordinary relief of a temporary restraining order necessitates the Court's exercise of its discretion. That requires a balancing of the various considerations. In this instance, the Plaintiffs have more than a colorable claim, but their claim falls well short of compelling. The showing of irreparable harm is minimal, as most. A balancing of the equities tends slightly in favor of the Plaintiffs. Yet, it is the reasonable expectation that any material and adverse consequences that may be suffered by the Plaintiffs or the class members can be duly compensated through a monetary award that ultimately persuades the Court that a temporary restraining order is not warranted.

V. CONCLUSION

For the foregoing reasons, the Court denies the Plaintiffs' motion for a temporary restraining order. An order implementing this Memorandum Opinion will be entered.