The McGraw-Hill Companies

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BY E-MAIL

November 5, 2012

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

Re: Comments to File No. SR-ISE-2012-22

Dear Ms. Murphy:

I write to follow up on my August 10, 2012 comment letter (the "August 10 Letter") submitted on behalf of The McGraw-Hill Companies, Inc. and its subsidiaries, Standard & Poor's Financial Services LLC and S&P Dow Jones Indices LLC ("McGraw-Hill"). The August 10 Letter responded to the Commission's request for written comments in its June 20, 2012 Order Instituting Proceedings, which concerned the proposal by International Securities Exchange, LLC ("ISE") to list and trade "ISE Max SPY Index" options.

As noted in my prior correspondence, ISE's proposed unauthorized use of the S&P 500 Composite Stock Price Index ("S&P 500") in connection with "ISE Max SPY Index" options violates S&P's intellectual property rights under state law. *See Chicago Board Options Exchange, Incorporated v. International Securities Exchange, LLC*, 2012 IL App (1st) 102228, 973 N.E.2d 390, 408 (May 25, 2012) ("*CBOE*") (affirming permanent injunction against offering unlicensed options based on the S&P 500). In a Memorandum Opinion and Order dated November 2, 2012, the Honorable Franklin U. Valderrama of the Illinois Circuit Court granted the motion brought by McGraw-Hill and its co-plaintiff, Chicago Board Options Exchange, to enforce the injunction in *CBOE* against ISE's proposed listing and trading of "ISE Max SPY Index" options. *See* Mem. Op. at 9. A copy of the opinion is enclosed.

Respectfully submitted,

Kenneth Vittor

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Executive Vice President and General Counsel
The McGraw-Hill Companies, Inc.

Enclosure

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

CHICAGO BOARD OF OPTIONS EXCHANGE, INC., ET AL.,	
Plaintiffs,	No. 06 CH 24798
v.	Calendar 03 Honorable Franklin U. Valderrama
INTERNATIONAL SECURITIES EXCHANGE, ET AL.,	
Defendants.	

MEMORANDUM OPINION AND ORDER

This matter comes to be heard on Plaintiffs, Chicago Board of Options Exchange, Inc.'s, CME Group Index Services, LLC's, and the McGraw-Hill Companies' (collectively, "Plaintiffs") Motion to Enforce Permanent Injunction. For the reasons that follow, Plaintiffs' Motion is granted.

BACKGROUND

Plaintiff, Chicago Board of Options Exchange, Inc. ("CBOE"), is a national securities exchange, located in Chicago, that specializes in the trading of standardized securities options. CBOE is the largest options exchange in the United States. CBOE was the first options exchange to offer trading in index options and holds the exclusive license to offer options based on the S&P 500® Composite Stock Price Index ("S&P 500®").

Plaintiff, the McGraw-Hill Companies ("McGraw-Hill"), through its wholly-owned subsidiary, Standard & Poor's Financial Services, LLC ("Standard & Poor"), are the creators of two widely recognized options indexes: the Dow Jones Industrial Average ("DJIA") and S&P 500®. Standard & Poor's Corp. v. Commodity Exch., Inc., 538 F. Supp. 1063, 1065 (S.D. N.Y. 1982). The S&P 500® is a broad-based, weighted, composite index based on the prices of 500 selected stocks. Id. at 1067. The index is designed to accurately portray movement patterns of common stock prices. Id. Due to its broad base, the S&P 500® is less susceptible to manipulation than an index based on a small number of stocks, and it provides a more accurate barometer of market performance. Id. Of the broad-based stock indexes, the S&P 500® is the best known, the most widely used, and the most accurate indicator of market conditions. Id. The S&P 500® is the most popular stock price index used by institutional investors and investment advisors. Id.

Defendant, International Securities Exchange, LLC ("ISE"), is a national securities exchange that lists and makes an exchange market standardized options on equity securities, exchange traded funds ("ETFs"), and indexes, among other underlying interests. ISE is also a creator and provider of its own indexes and index options products. ISE is a competitor of CBOE. ISE, like CBOE and other options exchanges, derives its principal source of revenue from charging fees on trades that are made on its facilities. ISE's principal place of business is in New York.

Defendant, Options Clearing Corporation ("OCC"), is the sole clearing agency for standardized index options in the United States. Neither ISE, nor CBOE, or any other options exchange in the United States can offer trading in index options without the participation of OCC in clearing and settling such options products.

An option is a contract that gives the buyer the right, but not the obligation, to buy or sell a security at a specified price (i.e., the strike price), on or before a specified date. Dow Jones & Co., Inc. v. Int'l Sec. Exch., Inc., 451 F.3d 295, 298 (2d Cir. 2006). An option, which gives its holder the right to buy, is a "call option." Spicer v. Chicago Bd. Options Exch., Inc., Case No. 88 C 2139, 1990 U.S. Dist. LEXIS 1478, 1, *5 (N.D. Ill. Jan. 30, 1990). The buyer of a call option has the right to buy the optioned security at a specified price at or before a specified date. Dow Jones, 451 F.3d at 298. Unlike options on equities or ETFs index options have no underlying security such as a share of common stock. Chi. Bd. Options Exch., Inc. v. Int'l Sec. Exch., LLC, Case No. 06 C 6852, 2007 U.S. Dist. LEXIS 13007, 1, *4 (N.D. Ill. Feb. 23, 2007). The holder of an option has the right to receive a cash amount based on the difference between the strike price established when the option was purchased and a settlement index level at the expiration of the option. Dow Jones, 451 F.3d at 300, fn. 6. An option is "simply a bet on the future value of the index." Id. An option that is traded on a national options exchange such as the CBOE is known as a "listed option." Cathedral Trading, LLC v. Chi. Bd. Options Exch., 199 F. Supp. 2d 851, 855 (N.D. Ill. 2002).

CBOE and its affiliate, C2 Options Exchange,[1] currently offer two types of S&P 500® options; namely, (1) a.m.-settled options, and (2) p.m.-settled options. The settlement index level for options based on the DJIA and the S&P 500® is known as "Special Opening Quotation" ("SOQ"). (Pl. Mem in Support of Mot. to Enforce Permanent Injunction, p. 5). The SOQ is calculated by the respective index owner and reflects the opening prices of each of the component stocks in the index, weighted according to the methodology devised by the index provider. Id. The settlement index level for CBOE's a.m.-settled option consists of SOQ, which is calculated using the opening prices of each of the component stocks in that index, weighted according to methodology devised by Standard & Poor's. The settlement index level for the p.m.-settled options is the official closing price of the S&P 500® as reported by Standard & Poor's on the last business day before the expiration date. It is calculated using the closing prices of the constituent securities on the primary market on which they trade and the same proprietary methodology.

On November 2, 2006, ISE announced its intention to offer index options based on the DJIA and S&P 500® without obtaining a license from the holders of those indexes. On

[1] Owned by CBOE Holdings, Inc., C2 operates under a separate exchange license.

November 15, 2006, Plaintiffs filed a three-count Complaint against Defendants, alleging that: ISE's proposed use of the indexes would constitute misappropriation under Illinois common law (Count I); ISE's actions tortiously interfere with CBOE's prospective business advantage (Count II); and that ISE's actions would constitute unfair competition under Illinois law (Count III).

The parties subsequently filed cross-motions for summary judgment on Plaintiffs' Complaint. On July 8, 2010, the Court[2] denied ISE's motion for summary judgment, and granted Plaintiffs' motion for summary judgment on Counts I and III, and dismissed Count II as moot (July 2010 Order"). The Court noted that Plaintiffs' claims were not premised upon the copying of published index values from websites and other sources. Rather, the Court found, it is the connection of ISE's proposed financial products to, and association with, the DJIA and S&P 500® that would allow ISE to exploit Plaintiffs' research efforts, skills, expertise, reputation and goodwill that are embedded in the indexes. (July 8, 2010 Order). As a result, ISE was permanently enjoined from providing an exchange market for DJIA or S&P 500® Index Options, and the OCC was permanently enjoined from clearing or settling ISE Index Options based on the DJIA or S&P 500®. Defendants appealed and the appellate court affirmed Court's ruling. See, Chi. Bd. of Options Exch. v. Int'l Sec. Exch., 2012 IL App (1st) 102228.

On March 9, 2012, ISE filed a proposed rule change (hereinafter, referred to as the "Rule Filing") with the Securities and Exchange Commission ("SEC"), seeking its permission to trade options on the Max SPY Index. In order for an options exchange, such as the ISE, to offer an entirely new options product, the exchange must first file a proposed rule change with the SEC. (Monaco Aff. ¶ 28).[3] The SEC publishes the rule change, and gives an opportunity to interested persons to comment. (Id.). A rule change for an index option product typically consists of two parts. (Ferraro Aff. ¶ 12).[4] The first is an operative part, in which the exchange sets forth the specifications for the contract, explains the details of the index (if it is a new index created for the purpose of being a basis for options), and states the basis on which the exercise settlement value of the option will be calculated. (Id.). The second part is policy-based, in which the exchange explains the policy reasons that support SEC approval of a new product. (Id.). ISE's goal was to create a new index to serve as the basis for an options product that will allow investors to benefit from changes in the published prices and value of SPY shares trading in the market. (Monaco Aff. ¶ 20). ISE will only be able to list Max SPY Options for trading if and when the SEC approves the Rule Filing. (Monaco Aff. ¶ 28).

According to the Rule Filing, the Max SPY Options contract specifications state that the Max SPY Index is calculated using the "published values of the SPDR S&P 500® ETF Trust, shares of which are known by their exchange symbol of "SPY." The SPDR S&P 500® ETF Trust, is an exchange traded fund designed to generally correspond to the precise and yield of the S&P 500® Index. The SPDR 500® Trust holds all of the S&P 500® Index's stocks. (SPDR S&P 500® ETF Trust, Prospectus Dated Jan. 5, 2012). The Rule Filing further states that the Max SPY Index equals ten (10) times the published share price of SPY shares, rounded to the nearest tenth (1/10). The value of the Max SPY Options prior to exercise would be calculated using the value of the underlying index. The Rule Filing, however, also states that the Max SPY

[2] Honorable William Maki ("Judge Maki").
[3] Kris Monaco is the Director of New Product Development for ISE.
[4] Joseph Ferraro is the Vice President and Associate General Counsel of ISE.

Options "would provide members and investors with additional opportunities to trade S&P 500® options with a p.m.-settlement feature in an exchange environment." (Rule Filing, p. 15).

Plaintiffs, CBOE and McGraw-Hill, objected to ISE's Rule Filing. On April 11, 2012, McGraw-Hill submitted to the SEC a comment letter in opposition thereto. In particular, McGraw-Hill states that ISE's "unauthorized use of the S&P 500® Composite Stock Price Index, in connection with ISE's proposed product offering, constitutes an unlawful violation of Standard & Poor's intellectual property rights." Similarly, on April 13, 2012, CBOE submitted to the SEC its comment letter opposing ISE's Rule Filing. In the letter, CBOE asserts that the Rule Filing violates the July 2010 Order entered by this Court.

On May 5, 2012, ISE submitted to the SEC its response to McGraw-Hill's and CBOE's comments. In the letter, ISE, amongst other things, informed the SEC that it filed an Amended Rule Filing to correct an "erroneous" statement. The Amended Rule Filing omits the statement that Max SPY Options "would provide members and investors with additional opportunities to trade S&P 500® options with a p.m.-settlement feature in an exchange environment." ISE reiterated to the SEC that the Max SPY Options and the ISE Max Spy Index are not options on the S&P 500®, and thus, not violative of the July 2010 Order.

Plaintiffs now bring a Motion to Enforce Permanent Injunction, alleging that ISE is violating the July 2010 Order. Plaintiffs maintain that the Max SPY Options actually would be S&P 500® Index Options, in direct violation of the July 2010 Order. Plaintiffs note that ISE expressly stated in its Rule Filing that the Max SPY Options would provide its "Members and investors with additional opportunities to trade S&P 500® options in an exchange environment." (Rule Filing, p. 15). Notwithstanding that ISE amended its Rule Filing to remove the aforementioned statement; Plaintiffs argue that the true nature of the Max SPY Options as S&P 500® Index Options is apparent from the way that ISE would calculate their settlement value. Plaintiffs maintain that the Max SPY Options would not be settled on the basis of the ISE Max SPY Index. Rather, the settlement value of the Max SPY Options, assert Plaintiffs, would be based on the S&P 500® Index. Plaintiffs assert that, while the ISE Max SPY Index may purportedly "be calculated based on the traded prices of SPDR S&P 500® ETF Trust shares," ISE, in determining the settlement value of the Max SPY Options, is clearly not using the closing price of the SPY ETF and multiplying it by 10. To the contrary, Plaintiffs argue that ISE would determine the Max SPY Options' settlement value by calculating the closing value of the S&P 500® on the settlement date, using both the closing prices of the exact stocks that S&P has selected for the S&P 500® and S&P's proprietary weightings of those stock prices. Plaintiffs contend that ISE's deliberate connection of the Max SPY Options with the S&P 500® creates the same unauthorized exploitation of S&P's research efforts, skills, reputation, and goodwill that are embodied in the S&P 500® and is the subject of the July 2010 Order.

ISE responds that the Plaintiffs' Motion is not really a motion to enforce an existing injunction. Rather, according to ISE, the Plaintiffs seek relief that they did not ask for in their Complaint and the Court did not grant in its July 2010 Order. ISE notes that Plaintiffs only asked for two forms of relief relevant to Standard & Poor's interest and that the July 2010 Order "permanently restrained and enjoined ISE from listing or providing an exchange market for the trading of DJIA and/or S&P 500® Index Options and from thereby attempting to cause the OCC to issue such options, clear trades in, or settle the exercise of such options."

Notwithstanding the foregoing, ISE asserts that the Max SPY Options are not the same securities product as S&P 500® Index Options. First, ISE argues that the controlling specifications for the two products are different. The underlying interest in the S&P 500® Index Options, alleges ISE, is the S&P 500® Index. By contrast, contends ISE, the underlying interest for Max SPY Options is the Max SPY Index, which is equal to ten (10) times the published shares for Max SPY shares. ISE maintains that the value of a Max SPY Option, prior to exercise, would be calculated using the value of the Max SPY Index. Similarly, ISE argues that the settlement value of an exercised Max SPY Option would not be determined using S&P 500® Index values, but rather, the "last (closing) reported sales price in the primary market for the components of Max SPY on the last business day before the expiration date." In sum, ISE claims that the market price of Max SPY shares, which determines the Max Spy Index and thus the value of Max SPY Options as they trade in the market, is not the same as the S&P 500® Index divided by 10. Second, ISE argues that the Max SPY Options differ from S&P 500® Index Options because the Max SPY Options are not fungible. Fungibility, asserts ISE, is the acid test to determine whether two option products, being traded on separate options exchanges, are the same. When an option is fungible, notes ISE, an investor can buy a contract on one exchange, and then close out the position by selling an offsetting contract on another exchange.

Finally, ISE contends that Plaintiffs are collaterally estopped from arguing that ISE's listing of an option based on prices per-share values of SPY is a misappropriation of Plaintiffs' rights in the S&P 500®, per the Dow Jones litigation. ISE maintains that the elements of collateral estoppel are present in this case; namely, (1) identical parties or privities; (2) a final judgment on the merits in the prior adjudication; and (3) identical issues. First, ISE maintains that the issues are the same. According to ISE, Dow Jones held that Standard & Poor's interest in the S&P 500® Index is not infringed by ISE's use of S&P 500® listed shares in offering an options product. Second, ISE alleges that there was a final judgment on the merits in the Dow Jones case. Third, ISE notes that Standard & Poor's was a party in the Dow Jones case and is a party in this case. Although CBOE was not a party in the Dow Jones case, ISE argues that CBOE was in privity with Standard & Poor's, as CBOE is Standard & Poor's exclusive licensee for options.

DISCUSSION

The issue before the Court is whether ISE, by offering Max SPY Options, is in violation of the Permanent Injunction Order, dated July 8, 2010. The Court begins its analysis, as it must, by examining the language of the Order.

The Order expressly states the ISE is "permanently restrained and enjoined from listing or providing an exchange market for the trading of DJIA and/or S&P 500® Index Options, and from thereby attempting to cause the OCC to issue such options, clear trades in, or settle the exercise of such options." (Court's Order, Wherefore Clause.) The OCC was also "permanently enjoined from clearing or settling ISE Index Options based on the DJIA and/or S&P 500® and from issuing, clearing or settling the exercise of such DJIA and S&P 500® Index Options." (Id.).

As a preliminary matter, the Court finds that ISE's interpretation of the July 2010 Order is too narrow. The clear import of the July 2010 Order was to cover any options that are based on the S&P 500®. CBOE argues that the ISE, in violation of the July 2010 Order, seeks to offer Max Spy Options based upon the S&P 500®. The Court agrees. A review of certain documents produced by ISE, pursuant to this Court's Order dated July 23, 2012, reveals various references to the Max SPY Options as being S&P 500® options; admissions that the Max SPY Options would have the S&P 500® as its "underlying reference;" and acknowledgments that the Max SPY Options would be based on the same index (i.e., the S&P 500®) as the SPXpm options that CBOE offers pursuant to its exclusive license from Standard & Poor's. In addition, the contract specifications for the Max SPY Options reveal that ISE would determine their settlement value by calculating the closing value of the S&P 500® on the settlement date, using both the closing prices of the S&P 500® stocks and Standard & Poor's weightings of those stocks. The settlement value of the Max SPY Options would be ten (10) times the value that ISE calculates at settlement for the net asset value ("NAV") of the SPDR Trust. (Rule Filing, p. 6). The stocks that are used in the SPDR Trust, however, are the same stocks that underlie the options on the S&P 500®. Lastly, the weighting of the component stocks of the SPDR Trust would be identical to the weightings of those same stocks in the S&P 500®.

As for ISE's contention that the NAV of the SPDR Trust is different from the value of the S&P 500®, Plaintiffs retort that the only difference is that ISE's calculated value will include the accrued dividends of the Trust's holdings of the component stocks of the S&P 500® and deduction for the Trust's expenses. In other words, conclude Plaintiffs, ISE's calculation is based upon the S&P 500® value plus a measure of case. The Court again agrees with Plaintiffs. Thus, the Court finds that the Max SPY Options would be based on the S&P 500®.

The Court's conclusion is further supported by ISE's initial Rule Filing, in which ISE stated that the Max SPY Options "would provide Members and investors with additional opportunities to trade S&P 500® options with a p.m.-settlement feature in an exchange environment." (Rule Filing, p.15). ISE claims that the insertion of this statement into the Rule Filing was an "inadvertent error." ISE explains that its Rule Filing used sections of a prior rule filing that had successfully argued for p.m.-settlement, and ISE inadvertently copied an inapplicable sentence from the original Rule Filing that referred to S&P 500® Index Options. ISE's alleged "error," however, is undermined by the fact that there were several senior executives, who reviewed the Rule Filing drafts, and they never deleted said statement before submission. Moreover, ISE's senior executives edited the same paragraph which contained the alleged "error," and did not revise this statement until after the filing of the Motion to Enforce.

The Court next addresses ISE's argument that Plaintiffs are collaterally estopped from bringing the Motion, based on Dow Jones. Collateral estoppel is an equitable doctrine. DuPage Forklift Serv., Inc. v. Material Handling Servs., Inc., 195 Ill. 2d 71, 77 (2001). Collateral estoppel promotes fairness and judicial economy by preventing the relitigation of issues that have already been resolved in earlier actions. Id. There are two types of collateral estoppel: offensive and defensive. Talaricov v. Dunlap, 177 Ill. 2d 185, 191 (1997). Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from litigating an issue the defendant has previously litigated unsuccessfully in another action. Id. at 191. Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from asserting a claim that the plaintiff previously litigated and lost. Id. In this case, ISE raises defensive collateral estoppel.

There are three requirements for the application of collateral estoppel: (1) there must be final judgment on the merits in the prior adjudication; (2) the party against whom estoppel is asserted must have been a party or in privity with a party to the prior adjudication; and (3) the issue decided in the prior adjudication must be identical with the one presented in the suit in question. State Bldg. Venture v. O'Donnell, 239 Ill. 2d 151, 158 (2010). The burden is upon the party who relies upon collateral estoppel to establish its applicability. Chi. Historical Soc. v. Paschen, 9 Ill. 2d 378, 382 (1956). Even when the threshold requirements are satisfied, the doctrine should not be applied unless it is clear that no unfairness will result to the party sought to be estopped. Am. Family Mut. Ins. Co. v. Savickas, 193 Ill. 2d 378, 388 (2000). ISE maintains that Dow Jones & Co., 451 F.3d at 295, bars Plaintiff's instant Motion.

In Dow Jones, the plaintiff, Dow Jones, licensed the creation of the DIAMONDS ETF, which tracks the performance of the DJIA. Id. at 298. Plaintiff McGraw-Hill licensed the creation of an ETF under the name Standard & Poor Depositary Receipts, or SPDR, which tracks the performance of the S&P 500. Id. By purchasing shares in the DIAMONDS ETF and SPDR funds, members of the public are able to buy and sell shares that are backed by the securities, which make up the DJIA and the S&P 500®, and therefore, rise and fall with those indexes. Id. Defendant, ISE announced its intention to offer options trading on shares of DIAMONDS and SPDR. Id. Following said announcement, the plaintiffs filed suit, alleging that by issuing and trading options on the DIAMONDS ETF and SPDR, the defendants will misappropriate plaintiffs' intellectual property interest in the underlying indexes and engage in unfair competition. Id. at 298-99.

The plaintiffs in Dow Jones asserted that they invested time, money and intellectual creativity in the creation and maintenance of the indexes. Id. at 302. The plaintiffs argued that this gave them an intellectual property right in the indexes themselves, as well as in an ETF that tracks the index and in options on shares of such an ETF. Id. The plaintiffs further maintained that because they had an intellectual property right in the index and the ETF that tracks the index, the defendants may not create, list, trade, and clear options on the ETF shares without licenses from the plaintiffs. Id. The court disagreed. Id.

The court reasoned that the plaintiffs, by authorizing the creation of ETFs using their proprietary formula and the sale of the ETF shares to the public, relinquished any right to control resale and public trading of those shares, notwithstanding the fact that plaintiffs' intellectual property may be embedded in the shares. Id. at 302-303. Because plaintiffs permitted the buying and selling of the ETF shares, observed the court, plaintiffs could not prevent exchanges from offering marketplaces for buyers and sellers to come to effectuate their transactions. Id. at 303. The court rejected plaintiffs' misappropriation argument that, "[t]he possibility that, because of their approximate equivalency, defendants might consult the published index values as a substitute for consulting ETF values, does not make it an infringement on the plaintiffs' rights in the indexes for the defendants to create and host the trading of such options." Id. The plaintiffs, noted the court, intentionally disseminate their index values to inform the public, as such, they cannot complain when the defendants do nothing more than draw information from that publication of the index values. Id. The court's ruling did not address the situation where a proprietary index is employed in the creation of a financial instrument. Id. fn 9.

The first requirement that must be met for collateral estoppel to apply is that there was a final judgment on the merits of the prior adjudication. The prior suit relied upon by ISE to collaterally estop Plaintiffs from asserting their instant Motion, Dow Jones, was dismissed pursuant to the defendants' motion under 12(b)(6) of the Federal Rules of Civil Procedure. Dow Jones, 451 F.3d at 301, 308. Dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6) constitutes a final judgment on the merits. Hunter v. County of Cook, Case No. 94-3589, 1995 U.S. App. LEXIS 28213, 1,*6 (7th Cir. Oct. 6, 1995). Thus, the Court finds that there was a final judgment on the merits in Dow Jones. As such, the first element of collateral estoppel is met in this case.

Next, the party against whom estoppel is asserted, which in this case is the Plaintiffs, must have been in a party or in privity with a party to the prior adjudication. Parties need not be identical to be considered the same. Langone v. Schad, Diamond & Shedden, P.C., No. 1-09-2079, 2010 Ill. App. LEXIS 1286, 1, at *27 (1st Dist. Dec. 3, 2010). Litigants are considered the same when their interests are sufficiently similar, even if they differ in name or number. Id. Litigants are privies when a person is so identified in interest with another that he represents the same legal right. Id. The term privy includes "someone who controls a lawsuit though not a party to it, i.e., someone whose interests are represented by a party to the lawsuit." Black's Law Dictionary (9th ed. 2009). Dow Jones involved the same parties or parties in privity with the named parties, namely, ISE, OCC, and McGraw-Hill. Dow Jones, 451 F. 3d at 297. As such, the Court finds that the second element of collateral estoppel is satisfied.

The third and final requirement for collateral estoppel is that the issue decided in the prior adjudication must be identical with the one presented in the suit in question. In Dow Jones, the issue before the court was "whether an options exchange, by creating, listing, and facilitating the trading of options on shares in an exchange traded fund (ETF) designed to track a proprietary market index, misappropriates intellectual property rights of the creator of the index. Id. at 297. In this case, on the other hand, the issue is whether the Max SPY Index Options are based on the S&P 500 and as such, prohibited by the Injunction. For collateral estoppel to apply, a decision on the issue must have been necessary for the judgment in the litigation. Talarico v. Dunlap, 177 Ill. 2d 185, 192 (1997). In Dow Jones, the court did not need to address the issue in this case to render its decision. The Court, therefore, finds that the issues are not identical and doctrine of collateral estoppel does not apply.

CONCLUSION

For the foregoing reasons, the Court finds that ISE's proposed Ruling Filing and/or Amended Rule Filing would violate the Injunction for ISE to list or provide an exchange market for the trading of the Options or to attempt to cause OCC to issue, clear trades in, or settle the exercise of, such Options.

ENTERED
Assoc. Judge Franklin Ulyses Valderrama-1968
NOV 2 - 2012
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

ENTERED:

Franklin U. Valderrama, Judge Presiding

DATED: November 2, 2012