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Case No. 2369-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

MEMORANDUM OPINION

Date Submitted: December 16, 2008
Date Decided: June 3, 2009

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NOBLE, Vice Chancellor

Before the Court is a motion for approval of a proposed settlement of a putative class action. When the settlement was negotiated, its value approached $1 billion.[1] There is no challenge to the adequacy of the total consideration achieved. Instead, the primary debates concern the means by which the economic benefits of the settlement are to be allocated among the various stakeholders and the procedures imposed to qualify for participation.

In this memorandum opinion, the Court will address several questions, including whether this action should be certified as a class action; whether the settlement is fair and reasonable as between the Plaintiff class and the Defendants; whether the allocation of the settlement proceeds among the putative class members is fair and reasonable; and whether the requirements imposed in order to qualify for receiving distribution of settlement proceeds are fair and reasonable.[2] Of these contentions, the methodology for allocating the settlement proceeds among members of the class and the requirements for participating in the settlement distribution are the most challenging.

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[1] Although the magnitude of the proposed settlement may be unusual, the proposed settlement becomes even more unusual when one learns that it is not accompanied by any application for an award of attorneys' fees.

[2] Also pending are requests by class members for review of the decisions of class counsel that excluded them from participating in the Settlement because of shortcomings in the filing of their claims. Those maters will be addressed separately.

I. BACKGROUND

In 2007, this Court reviewed the history of how this dispute evolved.[3] It is not the only tribunal to have been drawn into this quagmire.[4]

This action was filed to establish the economic and trading rights of members of the Plaintiff Board of Trade of the City of Chicago ("CBOT"), now under the auspices of CME Group, Inc., as successor by merger to CBOT Holdings, Inc., as Exercise Members or Exercise Member Delegates of Defendant Chicago Board Options Exchange ("CBOE").

CBOT established and financed the CBOE, which, as a national securities exchange, is regulated by the Securities and Exchange Commission ("SEC"). Article Fifth (b) of CBOE's Certificate of Incorporation entitles a "member" of CBOT to become a "member" of the CBOE without having to pay separately for that membership. "Exercise Rights" were established by Article Fifth (b) which provided:

> [E]very present and future member of [the] Board of Trade who applies for membership in the [CBOE] and to otherwise qualify shall, so long as he remains a member of the [Board of Trade], be entitled to be a member of the [CBOE] . . . without the necessity of acquiring such membership for consideration or value from [CBOE].[5]

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[3] *CBOT Holdings, Inc. v. Chicago Bd. Options Exch.*, 2007 WL 2296355 (Del. Ch. Aug. 3, 2007).

[4] *See,* notes 6 & 9, *infra*.

[5] Disputes over the Exercise Rights of CBOT members in the CBOE have existed almost since they were created by Article Fifth (b) in 1972.

A Board of Trade member who took advantage of the Exercise Right was known as an Exerciser Member of the CBOE.

Because Article Fifth (b) determines who may trade on a national exchange, it is an exchange rule subject to the jurisdiction of the SEC. Interpretations of exchange rules require the approval of the SEC in order to be effective. As CBOT evolved, interpretations of (or revisions to) Article Fifth (b) became necessary. For example, a major interpretation (or renegotiation of the relationship between CBOT members and the CBOE) occurred in 1992 (the "1992 Agreement") and was approved by the SEC in 1993.

An already difficult relationship became more complex in 2000 when CBOT considered demutualization. CBOE asserted that demutualization would eliminate the Exercise Right and, thus, Exerciser Members of the CBOE. CBOT contested CBOE's attempt to eliminate the Exercise Right in a proceeding in an Illinois state court.[6] That litigation was resolved by yet another agreement (the "2001 Agreement") that has been amended from time to time, most recently in February 2005. The parties agreed—shared interpretation may be the proper term of art—that the Exercise Right, under certain circumstances, could survive CBOT's demutualization. At the risk of oversimplification, a CBOT full member (or full member delegate) would hold the Exercise Right if that person held each of the

[6] *See Bd. of Trade of the City of Chicago v. Chicago Bd. Options Exch.*, Case No. 00 CH 15000 (Cir. Ct. Cook Cty, Ill).

following "Three Parts": (1) 27,338 shares of Class A common stock of CBOT Holdings, Inc.; (2) one Series B-1 membership in the Board of Trade; and (3) one Exercise Right Privilege or "ERP," newly issued by the Board of Trade.

The trend in the industry toward demutualization continued when, in September 2005, CBOE announced that it would demutualize and its members would receive shares in a stock corporation. A special committee was appointed by the CBOE board of directors in July 2006 to consider the relative interests of the Exerciser Members (i.e., those who held rights by virtue of their relationship with CBOT) and the CBOE Seat Owners (i.e., those who had paid for their memberships). This action was filed shortly thereafter by CBOT Holdings, CBOT, and the individual Plaintiffs. The class to be represented was composed of certain "full" Board of Trade members. The goal of that action was to bar the demutualization of CBOE unless the Exerciser Members and the CBOE Seat Owners were treated equally.

A few months later, in October 2006, CBOT Holdings and Chicago Mercantile Exchange Holdings, Inc. ("CME Group") announced that CME Group would merge with CBOT Holdings. CBOT would, following that merger, be a wholly-owned subsidiary of CME Group.

CBOE, in December 2006, reacted to the proposed merger of CBOT Holdings and CME Group by determining that, pursuant to Article Fifth (b), the

merger would extinguish any rights of the class to become (or remain) members of CBOE as a result of their Exercise Rights. At the same time, CBOE sought SEC approval of its interpretation of Article Fifth (b).

At the beginning of 2007, the Plaintiffs in this action filed their Second Amended Complaint. They alleged that the CBOE's proposed interpretation of Article Fifth (b) was both a breach of contract and a breach of the CBOE's board's fiduciary duties. The Plaintiffs sought an injunction barring the CBOE from terminating the Exercise Right (and Exerciser Member status) in the event of a CBOT-CME Group merger. Later that month, CBOE adopted a plan of demutualization. CBOE assumed that the CBOT-CME Group merger would occur first and that the SEC would accept its interpretation of Article Fifth (b) in these circumstances. Thus, CBOE did not make provision for any rights of the Exerciser Members within the context of its demutualization plan. With the announcement that the vote on the CBOT-CME Group merger would be held in early July, CBOE, addressing transitional issues, adopted an interpretation of a rule that allowed for interim status of Exerciser Members ("Temporary Members") until the SEC made its determination. The CBOT-CME Group merger was approved and consummated in July 2007. In August 2007, this Court denied the Plaintiffs' application for interim relief with respect to CBOE's transition rule.[7] On the same

[7] *CBOT Holdings, Inc. v. Chicago Bd. Options Exch.*, 2007 WL 2296356 (Del. Ch. Aug 3, 2007).

day, this action was stayed pending decision by the SEC on whether Article Fifth (b) should be interpreted to the effect that the demutualization of CBOT resulted in the loss of Exerciser Member status.[8]

The SEC approved CBOE's interpretation of Article Fifth (b) that no person could qualify as an Exerciser Member of CBOE after the CBOT-CME Group merger.[9] This order, issued January 15, 2008, in substance resolved the question of who could trade on the CBOE as a result of a previous interest in CBOT. The SEC also indicated that this Court had jurisdiction to decide state law issues. The state law issues were generally understood to involve breach of contract and fiduciary duty claims; more specifically, they addressed the economic rights associated with the interests held by CBOT members in the CBOE.[10]

In early February 2008, Plaintiffs, by now also including the CME Group, filed a Third Amended Complaint against CBOE and certain of its current or former directors. That action raised or reiterated numerous claims, including that CBOE could not eliminate the rights, including trading rights, of Exerciser Members as the result of the consummation of the CBOT-CME Group merger and that Exerciser Members and CBOE Seat Owners should receive the same

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[8] *CBOT Holdings, Inc.*, 2007 WL 2296355.

[9] Securities Exchange Act, Release No. 34-57159 (Jan. 22, 2008), 73 FR 3769-01 (SR-CBOE-2006-106).

[10] Various CBOT-related parties appealed to the United States Court of Appeals for the District of Columbia Circuit, Case No. 08-1116, seeking review of the SEC's approval of the CBOE's interpretation. That appeal has been stayed.

consideration as the result of the CBOE's demutualization. The parties, thereafter, filed various motions for summary judgment and, shortly before the scheduled argument of those motions on June 2, 2008, they reached an agreement in principle resolving this litigation. The Stipulation of Settlement (the "Stipulation") was submitted to the Court for its consideration on August 20, 2008.[11] Two days later, a scheduling order was entered which, *inter alia*, certified a temporary class, directed the sending of notices, and established the procedures for a hearing on the Settlement and for making any objections to the Settlement. In order to qualify for certain benefits under the terms of the Settlement, the Three Parts—at least 27,338 shares of CBOT common stock or, after the merger, at least 10,251.75 shares of CME Group common stock, one ERP, and one CBOT B-1 membership—had to be held simultaneously.[12]

Eventually, the Stipulation was revised to make the qualification process slightly easier. The cutoff date for meeting the qualifying requirements was extended from June 2, 2008, to August 22, 2008. Also, the Eligibility Date[13] was extended from October 8, 2008, to October 14, 2008. Finally, a requirement that the CME Group stock be held lien-free, in book-entry form at Computershare was

[11] The terms of the Settlement are discussed in greater detail below. The Stipulation was revised in filings of September 30, 2008, and October 3, 2008. References to the Stipulation generally are to its final form.
[12] Stipulation ¶ 30FF. The Three Parts were the product of the 2001 Agreement and its requirements to be a Full Member of the CBOT and entitled to an Exercise Right.
[13] Stipulation ¶ 30N.

reduced from a period of seven weeks to a period of seventeen days. Instead of spanning the period between October 14 and December 2, 2008, the shares had to be deposited with Computershare in accordance with the Stipulation only from October 14, 2008, through October 31, 2008.

The class, for purposes of distributing settlement proceeds, has been divided into two groups: Group A and Group B. The Participating Group A Settlement Class Members[14] must have held all Three Parts simultaneously at some time before August 22, 2008, and held those parts from the Eligibility Date of October 14, 2008, through the settlement period (until October 31, 2008). The Participating Group A Settlement Class Members will share in (i) an equity pool consisting of 18% of the equity interest to be issued to both the CBOE Seat Owners and the Participating Group A Settlement Class Members and (ii) a cash pool of $300 million. In addition, some Participating Group A Settlement Class Members, also Temporary Members of the CBOE, may receive payments based on certain access fees that they had paid to CBOE.[15]

The second group—not a separate class or subclass—consists of the Participating Group B Settlement Class Members.[16] They must have owned one

[14] Stipulation ¶ 30T.
[15] Other Participating Group A Settlement Class Members will not be entitled to obtain a rebate of certain access fees which they paid. This distinction is the basis of objections which the Court addresses in Part VI, *infra*.
[16] Stipulation ¶ 30U.

ERP from the Eligibility Date (October 14, 2008) through the end of the settlement period (October 31, 2008) and will receive a payment of $250,000.

Other class members, who are not eligible to receive any settlement proceeds, will be bound by the release to be provided as the result of the Settlement.[17] In order to participate in the Settlement, CBOE insisted upon a dismissal of all the litigation, with prejudice, and a release of all claims which could be tied to prior interests in CBOT, including the holding of one or more of the Three Parts. Proceeds will be paid only to those satisfying the requirements to be a member of either Group A or Group B.

Finally, in order to participate in the Settlement, certain technical requirements were imposed, such as the timely filing of necessary paperwork. One of the technical requirements, the depositing of a necessary minimum number of CME Group shares with Computershare in book entry, lien-free, form has proved to be problematic and is the basis of a challenge to the fairness of the Settlement.

[17] There are approximately 850 Participating Group A Settlement Class Members and 365 Participating Group B Settlement Class Members out of roughly 1,330 who could have qualified, and perhaps as many as 1,200 class members who will be bound by the release but without any entitlement to settlement proceeds. *See* Tr. of Settlement Hrg. at 19; Notice of Hrg., Exs. 3 & 4.

II. THE COURT'S TASK

The Court starts with consideration of whether class certification is appropriate and whether the Settlement in gross should be approved. It then turns its attention to the various specific objections to the terms of the Settlement.[18]

III. CLASS CERTIFICATION

Court of Chancery Rule 23 establishes the requirements for certification of a class.[19] By Court of Chancery Rule 23(a), there are four criteria that must be satisfied: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.

The proposed class has at least 2,500 members and, accordingly, joinder of these potential plaintiffs in one proceeding is impracticable.[20] The numerosity standard is satisfied.[21] The commonality prong requires that the plaintiffs share questions of law or fact in common with other class members.[22] Although the members of the class are not all similarly situated, they share numerous questions of law and fact, including the continuing import of CBOE's certificate of incorporation, the 1992 Agreement, and the 2001 Agreement, as revised. The

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[18] As noted, *supra* note 2, this memorandum opinion does not address the applications of those persons who claim to have been improperly denied the opportunity to participate in the Settlement because, according to class counsel, they failed to satisfy one or more of the Stipulation's procedural requirements, such as, for example, timely filing of a claim.
[19] *See generally Prezant v. DeAngelis*, 636 A.2d 915, 925 (Del. 1994).
[20] *See, e.g.*, *Leon N. Weiner and Assocs., Inc. v. Krapf*, 584 A.2d 1220, 1225 (Del. 1991).
[21] Ct. Ch. R. 23(a)(1).
[22] Ct. Ch. R. 23(a)(2).

focus of the questions common to the class would involve whether CBOE could unilaterally extinguish, as a result of the CME Group merger, the Exercise Right and the corresponding rights and privileges that settlement class members had, or may have had, with respect to CBOE membership. In addition, there are questions of whether members of the CBOE board discharged their fiduciary duties to class members. These common questions predominate over any questions that may confront class members individually.[23] Accordingly, the commonality prong has been satisfied.

With respect to typicality, the class representatives' legal and factual positions are substantially the same as those of other members of the class.[24] Moreover, although it may vary in degree, the harm arising from the elimination of rights with respect to the CBOE that trace back to the CBOT are typical of all members. Thus, the typicality requirement is satisfied.

Finally, the class representatives are knowledgeable, share economic incentives with the class, and have retained sophisticated and experienced counsel to represent the class interest. As further protection for the class members, separate counsel have represented the interests of Group A and Group B.[25] The

[23] *Krapf*, 584 A.2d at 1225 (class members need not be "identically situated").
[24] *See id.* Ct. Ch. R. 23(a)(3).
[25] The individual plaintiffs are both Participating Group A Settlement Class Members. That no plaintiff is a Participating Group B Settlement Class Member is, of course, a source of concern. The presence of independent counsel representing Group B interests exclusively, coupled with

Court finds that class representatives fairly and adequately represented the interests of the class.[26]

In addition to satisfying the requirements of Court of Chancery Rule 23(a), parties seeking certification of a class must also satisfy at least one of the standards of Court of Chancery Rule 23(b). In this instance, certification of a mandatory (i.e., non-op-out) class is appropriate under both Court of Chancery Rules 23(b)(1) and 23(b)(2). Certification under Court of Chancery Rule 23(b)(1) is appropriate because prosecution of separate actions by individual class members would likely result in inconsistent and varying results that would impose inconsistent obligations on opposing parties and because adjudication of individual claims would likely be dispositive of the interests of other potential class members who are not parties. For these reasons, actions challenging the exercise of corporate fiduciary duties are frequently certified under this rule. Court of Chancery Rule 23(b)(2) is routinely relied upon in instances where class-wide injunctive or

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the Court's conclusion that the allocation between the two groups is fair and reasonable, *see*, Part V.C., *infra*, provides confidence that Group B's interests have been adequately represented.

[26] Ct. Ch. R. 23(a)(4). Some of the objections, such as the one based on the difference between consideration for Group A and Group B, the recoupment of certain fees paid to CBOE, and the timing requirements, carry with them suggestions that there may have been conflicts between class representatives and certain class members. The existence of material conflicts between the class representatives and members of the class would limit the Court's ability to conclude that the class representatives' efforts have been adequate within the meaning of Court of Chancery Rule 23(a)(4). A review of those alleged conflicts is best done within the context of assessing the merits of the objections. Because the Court will overrule those objections, *infra*, and conclude that the class representatives and their counsel discharged their responsibilities fairly and adequately and without any adverse consequences from what the objectors have perceived as potential conflicts, the requirements of Court of Chancery Rule 23(a)(4) have been satisfied.

declaratory relief is sought. Although the remedy achieved here is a monetary (or monetary equivalent) settlement, this action was commenced with a firm focus on injunctive relief. This equitable relief was designed to preserve the trading and other rights of CBOT members with respect to the CBOE. It is this aspect of equitable relief that supports certification of a mandatory class.[27]

Accordingly, the class, as defined in the Stipulation, is certified.[28]

IV. ADEQUACY OF THE SETTLEMENT

In determining whether to approve a settlement of this nature, the Court is not in a position to resolve the merits of the dispute. Instead, the Court must assess the nature of the claims asserted and the defenses that might be raised in opposition and then apply its own business judgment to determine whether the proposed settlement is fair and reasonable.[29]

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[27] *See generally Nottingham Partners v. Dana*, 564 A.2d 1089, 1095 (Del. 1989); *Noerr v. Greenwood*, 2002 WL 31720734, at *5 (Del. Ch. Nov. 22, 2002).

[28] Notice in accordance with the Court's scheduling order was duly given, and class members have had ample opportunity to express their views.

[29] *See, e.g.*, *In re Resorts Int'l S'holder Litig.*, *Appeals*, 570 A.2d 259, 266 (Del. 1990); *Rome v. Archer*, 197 A.2d 49, 53-54 (Del. 1964). The Court is informed by the following factors: (1) the probable validity of the claims, (2) the apparent difficulties in enforcing the claims through the courts, (3) the collectibility of any judgment recovered, (4) the delay, expense and trouble of litigation, (5) the amount of the compromise as compared with the amount and collectibility of a judgment, and (6) the views of the parties involved, pro and con. *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986). The critical factor here is the (excellent) benefit achieved when measured against the (very real) risk of litigation. The other factors identified in *Polk* are of little moment in this instance, but they certainly do not counsel against approval of the Settlement.

There is no general opposition to the consideration achieved by the proposed class settlement with CBOE, nor should there be.[30] Based on assumptions made that were reasonable when the Settlement was proposed, the Settlement carries a value of roughly $1 billion. This consists of an equity pool in excess of $700 million and a cash pool of $300 million. Using these numbers, each Participating Group A Settlement Class Member will receive stock and cash valued at approximately $1 million. Each Participating Group B Settlement Class Member will receive $250,000 in cash. This litigation was difficult and complicated. Indeed, the Defendants had many significant arguments running in their favor. The dispute between the CBOT and the CBOE had been ongoing for decades. The various agreements, tied to Article Fifth (b), as the product of several compromised negotiations, were subject to multiple potential interpretations. One assumes that, when the documents establishing the CBOT-CBOE relationship were drafted, demutualization was not high on the list of likely events, and, thus, demutualization did not fit neatly into the structure established by Article Fifth (b). In short, this was a case where litigation risk to the class members was substantial. The risk of getting nothing, especially in light of the SEC's determination that there were no longer any trading rights in the CBOE based on the CBOT interests,

[30] Indeed, no objection has been submitted that challenges the sufficiency of the settlement proceeds. Numerous objections have been filed as to how the settlement proceeds are to be allocated and what must be done in order to qualify to receive those payments.

was substantial. Accordingly, after much work by class counsel, much of it in this Court, this Settlement, on its merits, is a compelling one and, save for the Court's consideration of the more specific objections, will be approved.

V. STRUCTURAL OBJECTIONS

For convenience, the structural objections will be divided into three groups: (1) objections dealing with class membership cutoff and eligibility dates; (2) objections to the verification procedures established to assure that Participating Group A Settlement Class Members satisfied the various requirements; (3) objections to the allocation of value as between the Group A settlement class members and the Group B settlement class members; and (4) an objection to the scope of the release obtained by CBOE.

A. *Timing Issues*

In order to qualify as a Group A settlement class member, the person must have simultaneously held all three parts—10,251.25 shares of CME Group common stock, a CBOT B-1 membership, and an ERP—at some time before August 22, 2008.[31] Twelve objections were filed;[32] these objectors argue that a

[31] If someone had owned all of the parts simultaneously but had sold one or more of the parts, that person had until October to reacquire (or reassemble) all of the parts.

[32] This objection has been raised by DRW Investments, LLC, DRW Securities, LLC, DRW Holdings LLC, Scott A. Hall, Jeffrey Holland, Peter C. Kelly, Tom Mallers, Nickolas J. Neubauer, Louis Panos, Charles Westphal, Barbara J. Whitlow, and A. Alan Zatopa. The record suggests that Mr. Westphal's objection may have been rendered moot by extension of the cutoff date from June 2, 2008, to August 22, 2008.

prospective date should have been set so that they could have assembled the Three Parts for the first time after announcement of the Settlement.[33] Certain objectors argue that portions of the 1992 Agreement should be interpreted as requiring a prospective date. That language, however, addresses "any offer, distribution or redemption." It does not speak to the Court's task here, the review of a proposed settlement of contested litigation. The date chosen precluded a stranger to the litigation or the CBOT membership from assembling the Three Parts for the first time after the Settlement was announced and then participating in the Settlement. The effect of this cutoff date is to protect those persons allegedly directly injured by CBOE's conduct from having to share settlement proceeds with others. This is fair and reasonable.[34] Similarly, the October 14, 2008, Eligibility Date, by which time the Three Parts had to be held together and submitted for compliance

[33] The August 22, 2008, record date was changed from the initial one of June 2, 2008, which was the date that the settlement was initially announced. The new date did not specifically afford an opportunity to satisfy prospectively the simultaneous holding requirement.

[34] Some record date was, of course, necessary. One could argue that an even earlier date would have been sustainable. It is worth noting that this action was initially filed over trading rights, more so than accompanying economic rights. The trading rights were effectively disposed of (subject to appeal) by the SEC in January 2008.

WH Trading, LLC (joined by others) has questioned the setting of the cutoff date. It suggested that discovery into that topic is necessary. The Court fails to see how any such discovery could lead to any relevant or admissible evidence. The initial cutoff date of June 2, 2008, was tied to the announcement of the Settlement. The August date was the product of what amounted to an effort to accommodate some concerns that were troubling the Court and of the filing of the Stipulation only a few days before. Any suggestion that the date was set with some sort of a nefarious purpose of trying to target specific potential class members lacks any foundation and is reminiscent of that proverbial fishing expedition.

purposes, is reasonable. It allowed those who sought to reassemble the parts seven weeks to do so.

B. *Deposit of CME Group Shares with Computershare*

Group A settlement class members were required to hold at least 10,251.25 shares of CME Group common stock (one of the three parts) (or an equivalent number of CBOT Holdings shares in the absence of the merger). In order to confirm accurately those holdings, participants were required to register the shares, lien free, in book entry form, at Computershare during the period from October 14, 2008 through October 31, 2008. Various objections have been lodged with respect to these requirements.[35]

Most Group A participants were apparently able to satisfy this requirement without material difficulty and, indeed, some objectors eventually found ways to comply. Because of the multitude of ways possessory and ownership rights in shares of stock can be divvied up, some procedure was necessary to assure that the Group A proceeds would only be paid to those persons having genuine attributes of

[35] The verification requirements of paragraph 30T of the Stipulation drew objections from William L. Allen, DRW Investments, LLC, DRW Securities, LLC, DRW Holdings LLC, Scott A. Hall, Jeffrey Holland, Peter C. Kelly, Tom Mallers, Thomas M. Marsh, Donald T. McMurray, Ira S. Nathan Revocable Trust, Louis Panos, Brian R. Sherman, Nickolas J. Neubauer, Jamin Nixon, Charles Westphal, UBS Financial Services, Inc., and A. Alan Zatopa. The record suggests that the Neubauer, Hall, Westphal, and Nixon objections may have been rendered moot by their subsequent compliance with the verification requirements.

ownership of the shares.[36] Otherwise, there would be significant risk that the Settlement would not be managed on a fair and consistent basis.

Computershare was chosen because most class members would have already had a relationship as a result of its role as transfer agent for the CBOT demutualization and the CME Group merger.[37] Many class members had accounts there; indeed, full members were issued their CBOT stock following CBOT's demutualization through Computershare. In short, Computershare was a logical choice.

This arrangement was a fair and reasonable means of verifying entitlement to participate in the class recovery. It, of course, was not the only way, but many of the others that might be suggested—relying upon broker's affidavits and other third-party information—would have imposed unnecessary administrative and investigative burdens on class counsel. In addition, the requirement that the shares be lien-free provided significantly greater confidence—again, without the need for extensive investigation—that only genuine owners (those holding the real

[36] The Court recognizes that compliance with this requirement may have imposed economic costs. Certain objectors complain that the deposit with Computershare requirement is atypical of other class action settlement procedures. That fact does not render this requirement unreasonable. The consideration achieved as a result of this Settlement is atypical, and the concomitant increased need for care in verifying that the claimants are, in fact, entitled to participate justifies atypical treatment.

[37] The objectors note that, on June 2, 2008, a class representative suggested that an alternative method of ownership verification might be permissible, instead of forcing all owners to register shares in book form with Computershare. Whether true or not, as of the Stipulation, all parties were on notice of the Computershare requirement and had sufficient time to comply (or shortly thereafter).

economic interest and not some sort of prepaid forward contract holding or short sale holding) were permitted to participate. Again, the requirement is reasonable; as such, it is sustained.

Finally, some holding period to complete the verification process was necessary. The initial period was shortened by almost two months; it ended up being only a little longer than two weeks. Any significantly shorter period likely would have been unworkable and likely would have called into question the accuracy and the fairness of the verification process. Thus, the holding period of seventeen days is also sustained as reasonable.

C. *Allocation of Settlement Proceeds*

Three Group B participants have challenged the disparity of roughly $750,000 between the value of a Group A settlement unit and the value of a Group B settlement unit.[38] The Group B participants, of course, hold one ERP while the Group A participants hold all Three Parts.

"An allocation plan must be fair, reasonable, and adequate."[39] Approval of the allocation is part of the process of approving the Settlement. The standards guiding the Court's exercise of its discretion are the same. As with evaluation of the wisdom of a compromise of litigation claims, there is no mathematical model

[38] Participating Group B Settlement Class Members Thomas Hafner, Jeffrey Holland, and Louis Panos have brought this objection.
[39] *Schultz v. Ginsburg*, 965 A.2d 661, 668 (Del. 2009).

that will yield the proper division of proceeds among the class members when the class members are not situated in exactly the same fashion.

CBOE, through the Settlement, seeks to extinguish the ERPs because in that way it can be sure that no one who had acquired a B-1 membership and sufficient equity in CME Group, or whatever entity may stand in its stead, will appear later and demand trading rights on its exchange. This has been a critical impediment to CBOE's demutualization effort. Of the various parts, the ERP is the most critical to CBOE's efforts to reduce future risk. Thus, it is argued that the key role of the ERP should entitle the holder of an ERP to a greater portion of the settlement, even without the other parts. The history of the CBOT-CBOE relationship and the purpose of the ERP defeat this contention. In order to be able to trade as an Exerciser Member of the CBOE, one needed all Three Parts. The ERP, alone, delivered little, if any, value. Indeed, the ERP was created to allow CBOE a separate mechanism for reducing (by buying up ERPs) the potential number of Exerciser Members.

The Settlement here is driven, as was the commencement of this action, by the loss of trading rights. Those who had, but lost, trading rights on the CBOE held all Three Parts. It follows that those who held all Three Parts should be paid a substantially greater proportion of the settlement than those who held only an ERP.

That it is reasonable to pay substantially more to the holders of Group A settlement units than to the holders of Group B settlement units, of course, does not compel any particular conclusion with respect to a specific number. There is no magic formula that allows a valuation of an ERP at, say, $225,000 or $325,000.

Nonetheless, the Court is satisfied that the allocation between Group A and Group B proposed in the Settlement is fair, reasonable, and adequate. Group A interests and Group B interests were represented by separate, independent, and competent counsel. The amount paid to Group B for the ERP was higher than any price paid for an ERP in the preceding eight months and, in the preceding three years, only twenty-five transactions were recorded with a higher price than $250,000 per ERP.[40] Thus, the amount to be paid to Group B participants is consistent with prevailing market values, although it may be that the uncertainty surrounding the future of the CBOT-CBOE relationship may have depressed the value. More importantly, the amount to be paid to the Group A participants fairly reflects the loss—and in a more global sense, to include trading rights—as the result of CBOE's actions. Although the Court may have differentiated between economic rights and trading rights, it would be unfair to consider trading rights as carrying no economic benefit. The Settlement was also designed to accommodate the economic loss associated with the loss of trading rights that also formed the

[40] Krewer Aff. at ¶ 5, Ex. B.

focus for the breach of contract and fiduciary duty claims and presented a significant litigation risk that CBOE had to confront. Therefore, the allocation of the settlement proceeds was fair and reasonable.

D. *The Release*

As perhaps should be expected of a settlement with so many components, the release sought by CBOE reaches persons who qualify neither as Group A settlement class members nor as Group B settlement class members. Thus, they will be bound by the release but will receive no consideration. That is not necessarily a sound basis for objecting to a settlement,[41] because a party funding a settlement reasonably can expect to put all claims relating to the subject matter of the litigation—real claims and theoretical claims—behind it.[42] One objection, that of Dennis Quinn Cook, highlights this possibility. Mr. Cook held full membership in CBOT from 1966 until March 21, 2006, when he sold his full interest. He claims that he was damaged when CBOE, in September 2005, announced its plans for demutualization and that it would not expect to pay Exerciser Members anything as a result of the restructuring. This claim appears to be related directly to the substance of these proceedings—the consequences of CBOE's predictions of the fate of Exerciser Members after demutualization. Yet, it is a claim detached

[41] *See In re Triarc Cos., Inc. Class and Deriv. Litig.*, 791 A.2d 872, 876 (Del. Ch. 2001).

[42] The reach of the proposed release is determined by reference to the Stipulation at ¶ 30Y (Released Parties), ¶ 30Z (Settled Claims), and ¶ 31 (Release of Unknown Claims).

from any notion of cause and effect. There is no showing that the announcement had any impact on the value of his CBOT interests. All CBOE did was announce its intentions. It took no direct action. Why a mere announcement under these circumstances would give rise to liability on the part of CBOE is not apparent. The relationship between CBOT and CBOE had been relatively strained for many years before Mr. Cook decided to sell his interests. Instead of pursuing his claims, he sold his various CBOT interests and, now, with a substantial settlement fund having been established, he seeks to draw from it. His claim is so general that it is difficult to assess, but, for purposes of approving the scope of the release, it is sufficient to note that the Court, in the exercise of its business judgment, is readily able to conclude that the "probable validity" of his claim is minimal and the "likelihood" of monetary recovery is negligible. In these circumstances, Mr. Cook's objection, and any other like it, must be rejected.

VI. ADDDITIONAL PAYMENTS

As the CBOE reacted to CBOT's demutualization and the CBOT-CME Group merger, various transitional arrangements were implemented. One of these resulted in "Temporary Members" who could trade on the CBOE but with the payment of substantial fees. As part of the Settlement, certain payments are to be

made to some of the CBOE Temporary Members.[43] CBOE takes the position that only "individuals"—not legal entities—can collect Additional Payments. Three entities (the "Entities") that would otherwise qualify for Additional Payments if they are not limited to individuals have objected.[44] They argue that the Stipulation allows them, even as legal entities, to receive Additional Payments. If they are not entitled under the Stipulation to receive those payments, then, they argue, the Settlement should be rejected because there is no rational basis for distinguishing between legal entities and individuals with respect to their entitlement to Additional Payments.[45]

Under paragraph 36F of the Stipulation, CBOE will make a "Fee Based Payment" to "each Participating Group A Settlement Class Member who became a CBOE Temporary Member [pursuant to CBOE Rules 3.19.01 or 3.19.02] . . .". Thus, to receive a fee-based payment, the person must (1) be a Participating Group A Settlement Class Member (i.e., hold the three parts under the necessary conditions which the Entitles did) and (2) have been a CBOE Temporary Member.

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[43] They are designated "Fee Based Payments" and "Supplemental Fee Based Payments" in paragraphs 36F and 36G of the Stipulation. For convenience, they will be referred to, collectively, as "Additional Payments." The Court's focus will be on the Fee Based Payment because, in order to qualify for a Supplemental Fee Based Payment, one must first be entitled to a Fee Based Payment.

[44] The Entities are Quiet Light Securities, LLC, Infinium Capital Management, LLC, and UBS Securities, LLC.

[45] In general, the Court has limited this memorandum opinion to approval of the settlement and not to questions of individual eligibility to participate in the settlement. The question of whether legal entities may receive Additional Payments, is addressed here because, if the Entities qualify under the terms of the Settlement, then they have no quarrel with the Stipulation's handling of Additional Payments.

To understand who could have been a CBOE Temporary Member, it is necessary to review briefly a few CBOE Rules. For present purposes, a "Temporary Member," by CBOE Rule 3.19.01, would include a "person who is a member of CBOE (an 'exerciser member') pursuant to [Article Fifth (b)] as of July 1, 2007."[46] Thus, to be a Temporary Member in order to qualify for Additional Payments, one must first have been an Exerciser Member. CBOE Rule 3.16(b) provides, with respect to Article Fifth (b) that "[f]or the purpose of entitlement to membership on the [CBOE] in accordance with [Article Fifth (b)] the term 'member of [the CBOT] as used in Article Fifth (b) is interpreted to mean an individual, who is either an 'Eligible CBOT Full Member' or an 'Eligible CBOT Full Member Delegate,' as those terms are defined in the [1992 Agreement and the 2001 Agreement] . . . and shall not mean any other person." By the 1992 Agreement, both "Eligible CBOT Full Member" and "Eligible CBOT Full Member Delegate" are defined as "individual[s]."[47] Support for CBOE's position can also be found in other provisions of the 1992 Agreement. For example, at paragraph 2(a), it provides that: "[t]he CBOT agrees, in its own capacity and on behalf of its members, that only an individual who is an Eligible CBOT Full Member or an Eligible CBOT Full Member Delegate is a member of the CBOT within the meaning of Article Fifth (b) eligible to have an Exercise Right and to be

[46] *See also* CBOE Rule 3.19.02 for, in substance, an extension of this rule.
[47] 1992 Agreement § 1(a) & (b).

an Exercise Member." The 2001 Agreement, as revised, may have modified the definitions of Eligible CBOT Full Member and Eligible CBOT Full Member Delegate as a result of CBOT's planned demutualization, yet the notion that only individuals could be Exerciser Members persists. For example, in Section 1 (d) of the Agreement, "an individual shall be deemed to be an Eligible CBOT Full Member if the individual [satisfies the three-part test]."

The Entities, because they held the Three Parts, were able to designate their employees to be Exerciser Members. Those employees were able to be Temporary Members. The Entities, of course, paid all fees related to the employees' status as Temporary Members.[48] Because the Entities were not Temporary Members, they did not satisfy the second requirement necessary to qualify for an Additional Payment under the Settlement.[49]

With the conclusion that the Entities do not quality for Additional Payments under the Stipulation, it becomes necessary to consider whether exclusion of the Entities from those payments impairs the fairness and reasonableness of the settlement. The Entities make the simple and somewhat appealing argument that:

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[48] Although the employees were qualified temporary members, they did not hold the Three Parts, and, thus, they did not qualify for additional payments.

[49] The Entities point to various other factors, such as billing practices, regular conduct, and some arguably less than clear provisions of the CBOE Rules (*see, e.g.*, Rule 3.8(c) which is in accord with the Court's analysis because of its use of his and her for the antecedent CBOT Exerciser.). None of these arguments, however, overcomes the clear tenor set forth through the CBOE rules directly defining who could be an Exerciser Member, and, thus, a temporary member.

if fees are to be rebated, what difference does it make if they are to be paid to individuals or to firms? The answer is that the conditions required to qualify for Additional Payments were intensely negotiated terms.[50] Only individuals were Temporary Members. If rights to Additional Payments were opened up to legal entities generally, the exposure of CBOE would be increased materially. This is but one part of a much larger settlement negotiation process. In the context of the overall settlement and in recognition that many contested lines had to be drawn, the Court concludes that the conditions for qualifying for Additional Payments were established reasonably.[51]

In short, the objections of the Entities to the fairness of the Settlement as to Additional Payments are overruled.

VII. A BRIEF POSTSCRIPT

This was a difficult matter. Class counsel, in the Court's judgment, came to a fair and reasonable balancing of the various interests of all class members. The tension between Group A and Group B was addressed with separate counsel

[50] Discovery has been requested with respect to the adequacy of class counsel and their effort in negotiating Additional Payments, as well as whether the Additional Payments aspect satisfies the typicality requirement of Court of Chancery Rule 23(a)(3). As with the other requests for discovery, *see* note 34, *supra*, a generalized and unfocused effort to discovery into the negotiation process is not likely to result in useful or relevant evidence in these circumstances.

[51] In light of the SEC's approval of the CBOE's interpretation of its rules that would have excluded Exerciser Members from free trading rights on the CBOE, CBOE certainly had a good argument that would have supported its requirement that additional fees be paid. In this sense, that any of the fees that had been paid are being rebated is perhaps a fortuitous product of negotiations.

representing each group. The Court is satisfied that those class members who qualify for neither Group A nor Group B had no material chance of independent recovery. Certain requirements to participate in the Settlement were imposed—such as Computershare registration—as pragmatic solutions to troubling concerns. They were not imposed to create any undue burden on any particular class member. Although there may have been other means available, the path chosen by class counsel was reasonable, and it is far from certain that some other path would not have suffered from yet a different set of potential shortcomings. Class counsel negotiated the best deal—one perhaps better than what should have been expected—that they could. There are, admittedly, some rough edges, but, frankly, it is difficult to see how that could have been avoided. Competent and fair-minded counsel resolved the tough issues in a reasonable and responsible manner.[52] Ultimately, the Court is in no position to reach any conclusion other than that the Settlement, including its allocation plan, was, in the words of *Schultz*, "fair, reasonable, and adequate."

[52] This, together with the Court's review of the substantive objections, resolves any lingering disquiet about the adequacy (and absence of material conflict) of the class representatives and their counsel.

VIII. CONCLUSION

For the foregoing reasons, the class as proposed will be certified, this action may be maintained as a class action, and the Settlement will be approved. An implementing order will be filed.