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Case No. 2369-VCN

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.