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Re: CBOT Holdings, Inc. v. Chicago Board Options Exchange, Inc.
C.A. No. 2369-VCN
Date Submitted: October 4, 2007

Dear Counsel:

I have Plaintiffs' Motion to Lift Stay to Allow for the Filing of a Third Amended Complaint and the Commencement of Discovery and Mr. Nolen's response of October 5, 2007, on behalf of the Defendants.[1] This matter was stayed on August 3, 2007, pending action by the United States Securities and Exchange

[1] I acknowledge that the Plaintiffs have requested a teleconference regarding their application. Although requests of this nature are regularly accommodated, no useful purpose would be served, in this instance, by gathering counsel together.

Commission with respect to interpretation by the SEC of the effect of the CME Group's acquisition of CBOT.[2] Under the terms of the stay, any party may seek its lifting for cause. Although no action has been taken by the SEC, the Plaintiffs have sought permission to file a third amended complaint and to initiate discovery. They offer, as their principal reason, that the ongoing passage of time will dim memories and make the fact finding process less accurate.

The motion is denied for the following reasons. First, the passage of time, from the granting of the stay, amounts to barely two months. The loss of material evidence (or recall) is unlikely in the near term. Indeed, the potential loss of evidence is a risk associated with any stay. It may be that, at some time, the risk will grow to the extent that relief from the stay would be appropriate. No such showing has yet been made.[3]

Second, although amending the Complaint may not be inappropriate, it would accomplish little. The Complaint, undoubtedly, will be amended at some point to reflect not only the interim developments (or refinements) now advanced by the

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[2] *See CBOT Holdings, Inc. v. Chicago Bd. Options Exch., Inc.*, 2007 WL 2296355, at *12 (Del. Ch. Aug. 3, 2007).

[3] The Plaintiffs seek to reinforce their contentions as to the potential consequences of delay in initiating discovery by speculating as to how long it may be before the SEC announces its decision. That is speculation in which the Court will not engage.

Plaintiffs but also to incorporate the effect of any action taken by the SEC. There is no apparent reason why the modifications cannot be accomplished in one step, instead of the two-step process proposed by the Plaintiffs.

Finally, the Plaintiffs' motion implicitly—if not explicitly—predicts the action that the SEC will take. Perhaps their projections will be proven accurate. In that event, it would likely have been better if this action had moved forward. The parties, of course, are free to forecast the future as they see fit. It is not, however, for the Court, in this instance, to look around those proverbial corners. The future course, if any, of this litigation, including the appropriate scope of any discovery, will likely be influenced in significant part by action of the SEC. This was a reason in August 2007 for deferring to the SEC; this reason remains viable in October 2007.

Accordingly, the Plaintiffs' motion to lift the stay is denied, without prejudice.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Edward P. Welch, Esquire
Register in Chancery-K