**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| IN RE: CHICAGO BOARD OPTIONS EXCHANGE VOLATILITY INDEX MANIPULATION ANTITRUST LITIGATION<br><br>*This Document Relates to All Actions* | Case No. 1:18-cv-04171<br><br>MDL No. 2842<br><br>Honorable Manish S. Shah |

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY AND TO PARTIALLY MODIFY THE PSLRA DISCOVERY STAY**

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## INTRODUCTION

Despite filing both an opposition to Plaintiffs' discovery motion and a full memorandum in support of its motion to dismiss, CBOE barely challenges that Plaintiffs' Complaint persuasively pleads *what* was manipulated (the VIX SOQ process), *when* it was manipulated (routinely on settlement days in the class period), *how* it was manipulated (through the submission of SPX Options trades and quotes), *where* it was manipulated (via trades and quotes submitted to CBOE in Chicago), and *why* it was manipulated (e.g., to distort the settlement values for VIX Instruments). All that Plaintiffs are missing—and the sole purpose of the proposed discovery requests—is the data required to determine the "*who.*"

CBOE's opposition primarily argues that Plaintiffs' requested discovery should be denied because it is not limited to *specific* quotes for *specific* days. But Plaintiffs have amply pled that the SOQ process was *routinely* manipulated on settlement Wednesdays. The requested discovery—limited to data around that process on those days—is not the type of "fishing expedition" the PSLRA was designed to prevent.

CBOE secondarily argues that Plaintiffs could have avoided this issue altogether by tossing some trading defendants' names into the case caption. That argument ignores the very purpose of the requested discovery to which Plaintiffs otherwise lack access—to identify and plausibly allege claims against the non-CBOE defendants. If such claims were prematurely asserted absent this discovery, it is likely the Court would have summarily dismissed potentially colorable claims on the merits. That is what drove who was named in the Complaint, not (as CBOE alleges) some overwrought strategy to manufacture a crisis.

Because Plaintiffs have amply pled that manipulation routinely took place, and have established that Plaintiffs will face undue prejudice absent the requested discovery, the Court should exercise its discretion to grant their motion.

## ARGUMENT

### I. BECAUSE PLAINTIFFS HAVE ALREADY AMPLY PLED THAT MANIPULATION TOOK PLACE, THIS IS NOT IMPROPER "MERITS DISCOVERY"

The parties agree that the primary policy rationale behind the PSLRA discovery stay is to "prevent plaintiffs from filing a complaint to initiate a 'fishing expedition' in search of sustainable claims." *In re Delphi Corp.*, 2007 WL 518626, at *4 (E.D. Mich. Feb. 15, 2007); *see also In re Comdisco Secs. Litig.*, 166 F. Supp. 2d 1260, 1263 (N.D. Ill. 2001); Dkt. No. 183 ("CBOE Discovery Opp.") at 3.

That concern is not present here, as Plaintiffs are not seeking limited discovery to bolster a frivolous complaint. As a threshold matter, the bulk of CBOE's motion to dismiss is devoted to defenses that are unique to CBOE, and thus irrelevant to the viability of the Doe Defendant claims or the merits of this discovery motion. Notably, Plaintiffs would gain little or no assistance in overcoming these CBOE-specific defenses, such as absolute immunity, by receiving the requested transactional data. Accordingly, Plaintiffs *are not* pursuing the discovery to (needlessly) amend the pleading as against CBOE, but only to identify the additional wrongdoers at issue.

The only factual question the proposed discovery requests could conceivably help resolve is whether the SOQ process was manipulated. But the Complaint already amply alleges that it routinely was, based on numerous studies into market data around the SOQ window. *See, e.g.*, Dkt. No. 164 ("Pl. Discovery Mem.") at 9. And when Plaintiffs allege that the manipulation was

"routine," "systemic," and "systematic," Complaint ¶¶ 10, 73, 91, 172, 177, 209, 249,[1] Plaintiffs mean what they say. In fact, Plaintiffs' econometric analyses flagged *almost every single one* of the relevant settlements as having been manipulated, despite being limited to the publicly available data. Courts have repeatedly relied on such econometric analyses to uphold manipulation claims across long class periods.[2]

Not even the few pages CBOE appends to the very end of its motion to dismiss seriously call into question the plausibility of Plaintiffs' manipulation allegations. Accordingly, the Court need not wait for full motion to dismiss briefing because it is obvious the requests are not trying to "fill . . . factual gaps" in the claims against CBOE. CBOE Discovery Opp. at 4. For instance, CBOE argues in its motion to dismiss that the Complaint fails to adequately plead manipulation because it does not identify the manipulators. CBOE MTD Mem. at 56. On its face, that argument does not challenge the sufficiency of the allegation that *someone* was manipulating the SOQ process. CBOE's argument actually supports Plaintiffs' request for relief: the wrongdoers are unidentified only because CBOE controls the identifying data.

CBOE similarly asserts in its motion to dismiss that the Complaint fails to allege the Doe Defendants acted with the requisite state of mind. CBOE MTD Mem. at 59. CBOE's dismissal

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[1] Such allegations belie CBOE's odd suggestion that the Complaint only discusses hypothetical vulnerabilities. CBOE Discovery Opp. at 1-2. Indeed, CBOE's own motion to dismiss acknowledges that "Plaintiffs allege that 'John Does' manipulated the SOQ." Dkt. No. 185 ("CBOE MTD Mem.") at 5.

[2] *See, e.g.*, *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44, 62-63 (S.D.N.Y. 2016); *In re Commodity Exch., Inc., Gold Futures and Options Trading Litig.*, 213 F. Supp. 3d 631, 645-646 (S.D.N.Y. 2016); *In re London Silver Fixing, Ltd., Antitrust Litig.*, 213 F. Supp. 3d 530, 544 (S.D.N.Y. 2016); *In re Libor-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 679-80, 715-17 (S.D.N.Y. 2013).

argument is wrong.[3] But more to the point here, CBOE fails to explain how the transactional data bears on (or even relates to) the Does' state of mind. Accordingly, again, Plaintiffs are demonstrably not seeking an end-run to get "merits" discovery to fill a supposed gap in their Complaint.

Finally, CBOE's motion to dismiss hypothesizes that some of the data patterns Plaintiffs use to plead manipulation might have been caused by "strategy orders." *Id.* at 57-58. But such speculation does not reasonably call into question the viability of the Complaint when read as a whole.[4] Courts have repeatedly held that it is improper to try to dismiss a data-driven complaint by hypothesizing innocent behaviors that *might* (in the defendants' biased view) provide an alternative explanation for certain statistical anomalies.[5] All the more so here, where CBOE's "strategy order" hypothesis does not even purport to explain many of the patterns seen in the

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[3] Among other reasons, it is unlikely anyone could *accidentally* engage in exploits like filling gaps for the two-zero bid rule. *See, e.g.*, Complaint ¶¶ 112-20 (discussing exploits of that rule), 255 (referring to the Doe Defendants' "intentional misconduct"), 267-69 (Doe Defendants submitted bids and offers "with the intent of sending false market information"; there was "no legitimate justification").

[4] *See generally, e.g., Lane v. Money Masters, Inc.*, 2015 WL 225427 (N.D. Ill. Jan. 15, 2015) (on a motion to dismiss "[t]he court reads the complaint and assesses its plausibility as a whole") (citing *Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011)).

[5] *See Alaska Elec.*, 175 F. Supp. 3d at 55-56 (rejecting defendants' "plausible non-collusive explanations for many of the facts alleged in the Amended Complaint" because "[t]he choice between two plausible inferences . . . is not a choice to be made by the court on a Rule 12(b)(6) motion"); *In re Commodity Exch.*, 213 F. Supp. 3d at 665 (holding that "the Court need not find that Plaintiffs' theory is the only plausible explanation for the observed [statistical anomalies]"); *see also generally, e.g., Anderson News, LLC. v. Am. Media, Inc.*, 680 F.3d 162, 184 (2d Cir. 2012) (the choice between alternative explanations "is one for the factfinder"); *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 801 (N.D. Ill. 2017) (holding that courts are not required "to weigh the plausibility of a plaintiff's . . . claims against the plausibility of the defendants' alternative explanation").

data, most notably the fact that the patterns broke once FINRA started investigating the VIX. *See, e.g.,* Complaint ¶¶ 125-32.

In sum, there is no credible basis on which CBOE can characterize the requested discovery as an improper fishing expedition.

## II. THE PURPOSE OF THE DISCOVERY REQUESTS IS TO PRESERVE THE TIMELINESS OF CLAIMS AGAINST THE DOE DEFENDANTS

### A. Plaintiffs Face Undue Prejudice Because of the Increasing Threat of Timeliness Defenses by the Doe Defendants

Plaintiffs' opening memorandum establishes that claims against the Doe Defendants may be lost each day that passes due to the statute of repose, and face an increased risk of being deemed untimely under the statute of limitations if not brought by May 2019.[6] Pl. Discovery Mem. at 4. CBOE does not dispute these facts. Plaintiffs' memorandum also establishes that claims against the Doe Defendants are thus at risk because of the time required to complete all of the steps necessary to get, then actually use, discovery in the normal course. *Id.* at 8. CBOE also does not dispute those facts. Instead, CBOE argues that concerns about time-based defenses cannot, as a matter of law, constitute undue prejudice for purposes of the PSLRA. *See* CBOE Discovery Opp. at 9.

CBOE primarily relies on *Sarantakis v. Grattudauria*, 2002 WL 1803750, at *3 (N.D. Ill. Aug. 5, 2002). There, however, the court merely found that generic risks such as fading memories do not suffice to establish prejudice. At the same time, it recognized that undue

[6] That evidence may be lost in the meantime is another reason for granting the requested discovery. *See* Pl. Discovery Mem. at 5-6. CBOE argues that only an imminent and particularized concern for spoliation is sufficient when standing alone. *See* CBOE Discovery Opp. at 8. But here the spoliation concern is coupled with the timeliness concerns, as discussed above. As for CBOE's suggestion that preservation letters could be sent to reduce the threat of spoliation, *id.* at 9, that presumes the traders included in other complaints by other counsel were (a) properly identified, and (b) constitute the entire universe of potential Doe Defendants.

prejudice *does* exist where the delay might act as a "shield. . . from liability." *Id.* at *2. Such is the case here, where the delay is increasing the risk of time-based shields from liability.

CBOE also seizes on *SG Cowen Securities Corp. v. U.S. District Court for Northern District of California*, 189 F.3d 909 (9th Cir. 1999). There, the plaintiff alleged that a company's CEO provided an illegal tip regarding the company's earnings to an analyst. *Id.* at 910. The complaint was dismissed for failure to plead facts showing that the CEO received a benefit for the tip, or that the analyst knew the disclosure constituted a fiduciary breach. *Id.* at 911. In such a setting, the Ninth Circuit found lifting the stay expressly "for the purpose of uncovering facts" to fix these pleading flaws would "contravene" the PSLRA's heightened pleading standard. *Id.* at 911, 913. *Cowen* thus says nothing of the propriety of lifting the stay for the limited purpose of identifying, in a timely fashion, those behind wrongdoings that have already been persuasively pled.[7]

More on-point is *Rabin v. John Doe Market Makers*, Case No. 15-cv-00551 (E.D. Pa.), where the plaintiff alleged harm from manipulative trading of options, but was not able to identify the defendants without information from the relevant exchanges. The plaintiff argued that it needed discovery to timely serve the defendants with the complaint, and ensure they preserved relevant documents over and above their supposed regulatory obligations. *See, e.g.*, *id*., Dkt. No. 20 (Feb. 26, 2015) at 5-6. Recognizing that denying the requested discovery could effectively "shield" others from liability, the court allowed the discovery needed to identity the

[7] Respectfully, *In re Rambus, Inc. Securities Litigation*, 2007 WL 1430047, at *2 (N.D. Cal. May 14, 2007) was wrongly decided in suggesting such distinctions were irrelevant. *See generally In re Flir Systems, Inc.*, 2000 WL 33201904, at *2 (D. Or. Dec. 13, 2000) (distinguishing *Cowen* in part because the discovery was to be used against someone other than the party to the action, and because "[t]his distinction is not without importance").

manipulators at issue. *Id.*, Dkt. No. 21 (Apr. 2, 2015) at 1-2. CBOE cannot meaningfully distinguish these or other cases where courts allowed discovery to proceed in order to prevent the stay from becoming, as a practical matter, a "shield" against substantive liability.[8]

**B. The Risk of Undue Prejudice Is Not the Result of a 'Manufactured Crisis'**

Unable to refute that the prejudice Plaintiffs face is real, and relevant under the PSLRA, CBOE argues that Plaintiffs could have avoided it through means other than a discovery request.

First, CBOE suggests that Plaintiffs should have "named specific market participants, just as several of the originally filed class-action complaints did." CBOE Discovery Opp. at 10. But naming *some* additional defendants simply to get *some* claims *nominally* on file was never a viable solution, nor is it appropriate. If there are insufficient facts tying any particular market participant to the wrongdoing, then counsel would be derelict in their duties as officers of the Court to proceed anyway. And this Court would quickly dismiss such claims on the merits, putting Plaintiffs in a far worse position than they are now. Notably, CBOE does not even try to argue that the allegations in the complaints filed by other counsel would have actually withstood scrutiny.[9] Nor does it claim that the trading defendants previously included by other counsel constitute the full universe of those who are responsible.

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[8] CBOE attempts to distinguish *Hufnagle v. Rino International Corp.*, 2011 WL 2650755 (C.D. Cal. July 6, 2011) and *In re China Education Alliance*, 2011 WL 3715969 (C.D. Cal. Aug. 22, 2011) on the basis those courts saw no risk that plaintiff would "find during discovery some sustainable claim not alleged in the complaint." CBOE Discovery Opp. at 10 n.7. As discussed in Section I above, however, that is exactly the situation here too.

[9] The complaint in *Siegel v. CBOE Exchange, Inc.*, No. 1:18-cv-03021 (S.D.N.Y. April 27, 2018), only tied the trader defendants to the case by alleging they were designated or lead market makers. The complaint in *Elich v. CBOE Exchange, Inc.*, No. 1:18-cv-04888 (S.D.N.Y. June 1, 2018), is an almost identical copy of the complaint in *Siegel*, and did likewise. And the complaint in *Quint v. DRW Holdings, LLC and John Does*, No. 1:18-cv-01980 (S.D.N.Y Mar. 5, 2018), tied DRW to the case solely based on "information and belief" because DRW was fined for manipulation in other markets.

Next, CBOE posits that Plaintiffs can avoid undue prejudice by filing their opposition to the motion to dismiss before it is due. *See* CBOE Discovery Opp. at 11. This suggestion ignores a number of critical facts, including that: (i) it would not serve the Class to unduly cut corners in asserting the claims against the only named defendant; (ii) CBOE's reply memorandum is due January 28 no matter when Plaintiffs' opposition is filed; (iii) the Court would still need time to actually decide the motion; and (iv) common sense dictates that Plaintiffs will need time to obtain, analyze, and then actually use the discovery in an amended pleading.

Finally, CBOE argues that Plaintiffs could have avoided prejudice by bringing the discovery issue to the Court's attention faster. *Id.* Of course, certain plaintiffs previously tried to obtain Doe discovery, but were rejected.[10] Cognizant of the Court's desire to see the case move forward substantively before being asked to take up the discovery issue again, Plaintiffs focused their efforts on the complaint-filing process. The Complaint was filed in late September. Dkt. No. 140. The following week, Plaintiffs tried, but failed, to deal with the issue in the context of negotiating an accelerated motion to dismiss schedule. Dkt. No. 161. Plaintiffs' discovery motion was brought just a few weeks later. Dkt. No. 163.[11] Thus, Plaintiffs have

[10] The Court's prior hesitance to allow "early" discovery does not dictate the result here, contrary to CBOE's assertion. CBOE Discovery Opp. at 11-12. Circumstances are now changed, including because: (i) the requests are narrower, as the Court already has recognized, Nov. 1, 2018 Hearing Tr. at 9:11-12; (ii) there is no longer a coordination problem among multiple cases and counsel; (iii) there is a robust Complaint that the Court can test by reviewing the pending motion to dismiss by a named defendant; and (iv) the Court and the parties are now fully informed about the very real timeliness concerns surrounding further discovery delays.

[11] It is true that, at the hearing on November 1, Plaintiffs requested a third week for this reply memorandum. They were driven to do so out of a concern counsel would need to consult with numerous third-party subject-matter experts about the econometric analyses in the Complaint, including over the Thanksgiving holiday. In any event, this memorandum is being filed ahead of the Court-ordered deadline as part of Plaintiffs' continued diligence in this case.

consistently advanced all relevant issues as quickly as possible in light of the Court's preferred order of operations.

In short, as discussed above in Section II.A, Plaintiffs face a real prejudice due to the potentially ticking clock on the Doe Defendant claims. The only way to avoid this risk of prejudice to Plaintiffs is to allow the requested, narrow discovery.

## III. THE REQUESTS ARE PARTICULARIZED TO THE NEED TO IDENTIFY THE DOE DEFENDANTS AND IMPOSE LITTLE, IF ANY, BURDEN ON CBOE

The seven requests at issue are narrowly tailored to transactional data covering a subset of hours on a small subset of days during the class period, and will not require any searches of "custodial" files like emails, paper records, calendars, or phone logs. Thus, the requests are highly particularized to the task at hand: identifying who was behind the manipulation pled in the Complaint. *See* Pl. Discovery Mem. at 6-7. CBOE nonetheless posits that it is "difficult to imagine" how the "incredibly broad" requests could be any "less . . . particularized." CBOE Discovery Opp. at 2, 7. Tellingly, however, while Plaintiffs' opening motion explained how each of the seven requests is targeted specifically to uncovering the identities of the Doe Defendants, CBOE's opposition only discusses *one* of the requests.[12]

CBOE's hyperbole is instead derived from its stance that Plaintiffs should be limited to data necessary to unmask "who placed a *particular* purportedly suspicious quote or order that may have resulted in a trade." CBOE Discovery Opp. at 2 (emphasis added). But the *routine*

[12] CBOE's only discussion of the actual requests is with respect to number four, regarding CBOE's HOSS algorithm. *See* CBOE Discovery Opp. at 4. Plaintiffs' counsel's statement that this is the "least important" of the requests, Nov. 1, 2018 Hearing Tr. at 3:13-14, is not an admission the request is improper. Having the algorithm will help ensure the third-parties identified through the discovery cannot later argue Plaintiffs misinterpreted the data sought by the other six requests, and thus identified the wrong traders.

manipulation here took place through larger *patterns* of activity, meaning a series of requests for a particular transaction or quote would give an incomplete picture.[13] And while the publicly available data shows multiple signs that VIX Instruments were being settled at artificial levels, CBOE does not contend the publicly available data is sufficiently granular to identify all of the specific acts carried out to cause that artificiality. The requests are thus not overbroad merely because Plaintiffs are seeking a full set of the transactional data.[14]

CBOE next argues that the requests are fatally overbroad because they will reveal the names of innocent traders, too. CBOE Discovery Opp. at 5-6. CBOE here relies on case law dealing with a very specific fact pattern: the attempt to unmask viewers of pornography as "a means to improperly leverage settlements" through threats of public shaming. *Guava, LLC v. Does 1-5*, 2013 WL 3270663, at *3 (N.D. Ill. June 27, 2013).[15] Such tactics, which eventually led to criminal guilty pleas by certain of the attorneys involved,[16] plainly have nothing to do with this case.

Relatedly, but more generally, CBOE argues that the requests are overbroad because confidential information will be involved, as evidenced by certain regulations. CBOE Discovery

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[13] *See generally, e.g.*, Complaint ¶¶ 75 (manipulation "took multiple forms because this now-notorious process contained multiple flaws"), 134 (summarizing multiple anomalies), 249 (same).

[14] That the complexity of this case means identification of the Doe Defendants has to come by way of transactional spreadsheets, rather than the name of a police officer on duty at a particular time, CBOE Discovery Opp. at 1, does not change any of these facts.

[15] *See also Purzel Video GmbH v. Does 1-161*, 2013 WL 12310084, at *2 (N.D. Ill. June 4, 2013) (also cited by CBOE; discussing the need for scrutiny given "the embarrassment of being publicly accused of downloading pornography"); *Hard Drive Prods., Inc. v. Doe*, 283 F.R.D. 409, 412 (N.D. Ill. 2012) (same).

[16] *See generally, e.g.*, Prenda 'Porn Troll' Lawyer Pleads Guilty to Federal Fraud Charges, *The American Lawyer* (Aug. 17, 2018), https://www.law.com/americanlawyer/2018/08/17/prenda-porn-troll-lawyer-pleads-guilty-to-federal-fraud-charges/.

Opp. at 5-6. But the obligation to refrain from "publishing" client data, *id.* at 5 n.2, does not render it immune from discovery. It is routine for litigation to involve the exchange of information that is commercially or competitively sensitive, or covered by one or more privacy laws. CBOE's opposition nowhere explains why such concerns could not be addressed in this case as they are in all others: through a Court-approved protective order. Plaintiffs have proposed an order to CBOE that is based largely upon the model protective order for the Northern District of Illinois, and will extend CBOE all reasonable accommodations required to finalize this agreement. CBOE's supposed confidentiality concerns are thus moot.

Finally, CBOE again fails to articulate any actual undue burden arising from Plaintiffs' requests despite now having been asked to identify such burden on multiple occasions.[17] CBOE stresses that the requests span "fourteen years." CBOE Discovery Opp. at 4, 7. But this is misleading, because the requests only call for data from certain hours on a comparatively small subset of the days within that broader time period, i.e., the settlement days. CBOE also argues that there is an "associated time and expense" of having to "assemble and organize this large set of data." *Id.* at 5. But any request has *some* expense associated with it. The pertinent question is of course, *how much*—a question on which CBOE is inappropriately silent.[18] Indeed, while of

[17] Indeed, the failure to provide specifics here is particularly noteworthy given CBOE has known of plaintiffs' needs for many months now, and the Court five months ago gave CBOE "due warning" that it was expecting "very concrete proposals" to get the information needed to amend the pleadings. May 31, 2018 Hearing Tr. at 21:21-25.

[18] *See Jenkins v. White Castle Mgmt. Co.*, 2014 WL 3809763, at *2 (N.D. Ill. Aug. 4, 2014) (noting that "[w]hat is required [to claim undue burden] is affirmative proof in the form of affidavits or record evidence" because "claims of 'undue burden' are not exempt from the basic principle that unsupported statements of counsel, whether in briefs or in oral argument, are not evidence and do not count"); *Fish v. Kobach*, 2016 WL 893787, at *1 (D. Kan. Mar. 8, 2016) ("Objections based on undue burden must be clearly supported by an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request.").

course opposing the motion in its entirety, CBOE takes no specific issue with the requested 14-day deadline for production. This is all likely because the requests seek transactional data that CBOE is required by law to maintain, and that CBOE has already demonstrated an ability to access and analyze at will. *See* Pl. Discovery Mem. at 7-8. Simply put, unlike the gathering of emails or paper files, it matters little in terms of the burden of extraction whether transactional spreadsheets contain hundreds, thousands, or even hundreds of thousands of rows of data.

## IV. THE RESOLUTION OF CBOE'S MOTION TO DISMISS DOES NOT IMPACT AND SHOULD NOT DELAY PLAINTIFFS' RECEIPT OF THIS DISCOVERY

CBOE argues it is not "inevitable" that Plaintiffs will be entitled to discovery because Plaintiffs might lose on the motion to dismiss. CBOE Discovery Opp. at 12-13. While Plaintiffs are confident in the strength of their pleading against CBOE, in the event its motion to dismiss is granted, that dismissal would very likely have no bearing on Plaintiffs' claims against the Doe Defendants. As explained herein, the overwhelming focus of CBOE's pending motion to dismiss is on topics that have nothing to do with the viability of Plaintiffs' claims against the Doe Defendants. This confirms that the Court should not wait to resolve this issue, as the pending motion to dismiss will change nothing of relevance.

## CONCLUSION

For all of the above reasons, the Court should partially modify the PSLRA discovery stay, and require CBOE to produce the Discovery Materials within 14 days of the Court's order granting this motion.

Dated: December 4, 2018 Respectfully submitted,

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