DISTRICT COURT HOLDS ANTITRUST LAWS DO NOT APPLY TO EXCHANGES' CONDUCT REGARDING OPTIONS LISTING

In Re: Stock Exchanges Options Trading Antitrust Litigation

February 16, 2001

Earlier this week, the United States District Court for the Southern District of New York held that the antitrust laws do not apply to the listing decisions of options exchanges. (A copy of the Opinion and Order appears below.) Combined with the recent decision in the "flipping" case, Friedman v. Solomon/Smith Barney et al., 2000 WL 1804719 (S.D.N.Y. 2000) (policies discouraging the immediate resale of IPO shares are impliedly immune from the antitrust laws), the court's decision helps to clarify the application of the antitrust laws to the securities industry.

In Re Stock Exchanges Options Trading Antitrust Litigation is a putative class action resulting from a consolidation of twenty-nine lawsuits filed in 1999 following reports of DOJ and SEC investigations into allegations that the options exchanges had conspired to restrict the listing and trading of certain options classes to only one exchange at a time. Although SEC regulations at one time required such exclusive listings, the SEC more recently has permitted the multiple listing of options subject to its oversight. The SEC also has promulgated rules prohibiting the exchanges from agreeing among themselves to refrain from multiple listing.

The defendants moved to dismiss the complaint on the ground that the antitrust laws had been implicitly repealed with respect to the alleged conduct. Congress gave the SEC the authority to regulate the listing of options and the SEC has actively done so. Therefore, the defendants argued, the elements of implied repeal set forth by the Supreme Court in Gordon v. New York Stock Exchange , 422 U.S. 659 (1975), had been met. The district court agreed, holding that "applying the antitrust laws [to the listing of options] may circumscribe the SEC's regulatory authority in this area and hinder the operation of the securities laws."

Wilmer, Cutler & Pickering represented the Pacific Exchange before the district court, and in the related SEC and DOJ investigations; it represented Salomon Smith Barney in the flipping case. If you have any questions about either decision or would like to discuss their significance to the securities industry, please contact Bruce Coolidge at (202) 663-6376 (bcoolidge@wilmer.com), Ali Stoeppelwerth at (202) 663-6589 (astoeppelwerth@wilmer.com), Bill Kolasky at (202) 663-6357 (wkolasky@wilmer.com), or Jeff Ayer at (202) 663-6088 (jayer@wilmer.com).

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: Stock Exchanges Options Trading Antitrust Litigation	MDL No. 1283 Master Docket No. M-21-79 (RCC) 99 Civ. 962 (RCC) **OPINION AND ORDER**

Richard Conway Casey, U.S.D.J.

This case arises from the nation-wide filing of over 21 class action complaints against the American Stock Exchange ("AMEX"), the Chicago Board Options Exchange, Inc. ("CBOE"), the New York Stock Exchange, Inc. ("NYSE"), the Pacific Stock Exchange, Inc. ("PCX") and the Philadelphia Stock Exchange, Inc. ("PHLX"), as well as other market-makers and specialists involved in options trading ("Market-Maker Defendants"). Plaintiffs claim that defendants violated the antitrust laws with respect to the listing and trading of equity options classes on the various exchanges. Specifically, plaintiffs allege that defendants conspired to confine the listing and trading of certain options classes to only one exchange at a time, thereby stifling competition and increasing transaction costs for the sellers and purchasers of such options.

This Court has no jurisdiction to determine whether these allegations have any substantive merit. Because the listing and trading of options classes falls within the purview of the regulatory scheme devised by Congress to govern the securities industry, and the active exercise of that authority by the Securities and Exchange Commission ("SEC") conflicts with the operation of the antitrust laws, the Court cannot proceed to adjudicate this matter. Accordingly, the Court hereby grants summary judgment to defendants as the antitrust laws have been repealed by implication regarding the circumstances at issue here.

I. BACKGROUND

A. Regulation of the Options Market

To begin at the most basic level, an option is the right either to buy or to sell a specified amount or value of a particular underlying interest at a fixed price, provided that the option is exercised before its expiration date. Although options may provide a hedge against adverse price movements, they also involve an element of speculation, including the possibility that the options trader may forfeit all of his investment. See generally The Options Clearing Corp., Characteristics and Risks of Standardized Options (Feb. 1994).

Given the risk, it is no surprise that options trading has come under the scrutiny of the federal government. In the early 1930s, Congressional and private studies revealed widespread fraud with respect to options trading. Consequently, Congress initially drafted Section 9(b) of the Securities and Exchange Act of 1934 (the "Exchange Act") to prohibit options contracts altogether. See SEC Release No. 34-14056, 1977 SEC LEXIS 613, at *5 (Oct. 17, 1977). After consideration, Congress decided to permit the practice subject to regulation by the SEC. See Senate Comm. on Banking & Currency, Federal Securities Exchange Act of 1934, S. Rep. No. 792, 72d Cong., 2d Sess. (1934) at p. 20 ("[T]he subject of options has been left with the Commission for regulation."). Section 9(b) as enacted makes it unlawful for any person to engage in various options transactions "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors ...." 15 U.S.C. § 78(i)(b) (2000). The SEC has described section 9(b) as conferring "broad, plenary authority" on the Commission. See SEC Release No. 34-14056, 1977 SEC LEXIS 613, at *4 (Oct. 17, 1977).

Options were not traded on the national exchanges until 1973. At that time, in response to CBOE's pending registration as a national exchange and the possibility that other exchanges would allow options trading, the SEC exercised its Congressionally-delegated authority and adopted Rule 9b-1. Rule 9b-1 empowered the SEC to review and approve the exchanges' rules regarding options trading, and established a procedure by which the SEC could require the adoption of new rules. Although the exchanges already were required to file proposed rules with the SEC pursuant to Rule 17a-8 , the SEC determined that a more specific rule geared to options trading was needed as "such trading may involve complex problems and special risks to investors and to the integrity of the marketplace." SEC Release No. 9930, 1973 SEC LEXIS 2095, at *1 (Jan. 9, 1973).

Subsequent to the announcement of Rule 9b-1, the SEC approved CBOE's registration as a national options exchange, noting that "we have decided to permit it to test the market for such options within a controlled environment" and under "close surveillance." SEC Release No. 9985, 1973 SEC LEXIS 3257, at *3-4 (Feb. 1, 1973). After two additional exchanges proceeded to institute options trading, the SEC commenced a study on the practice. The SEC requested public comment on a number of issues, including whether trading of the same options class on multiple exchanges should be permitted. See SEC Release No. 10490, 1973 SEC LEXIS 2349, at *9-10 (Nov. 14, 1973). After holding a hearing, the SEC concluded that "progress should be made in several areas prior to expansion of the existing CBOE program or initiation of multiple exchange option trading" by other exchanges. SEC Release No. 11144, 1974 SEC LEXIS 2108, at *4 (Dec. 19, 1974).

On December 19, 1974, pursuant to Rule 9b-1, the SEC permitted AMEX to move forward with its plan to trade options. The SEC noted that AMEX did not intend initially

to undertake the dual trading of options. See id. at *5. On May 15, 1975, the SEC likewise approved options trading by the PWB Stock Exchange (now PHLX) although it too did not intend initially to undertake the dual trading of options. See SEC Release No. 11423, 1975 SEC LEXIS 1605, at *5 (May 15, 1975).

In 1975, Congress amended the Exchange Act to expand the powers of the SEC substantially. For example, Congress required the exchanges to submit all proposed rule changes to the SEC for approval. See 15 U.S.C. § 78s(b). The amendments also authorized the SEC to abrogate exchange rules and to impose various sanctions on exchanges. See id. § 78s(c) & (h). Most importantly, Congress explicitly mandated that the SEC consider competition in its decision-making. Congress made clear that:

> [T]he Commission's responsibility would be to balance the perceived anti-competitive effects of the regulatory policy or decision at issue against the purposes of the Exchange Act that would be advanced thereby and the costs of doing so. Competition would not thereby become paramount to the great purposes of the Exchange Act, but the need for and effectiveness of regulatory actions in achieving those purposes would have to be weighed against any detrimental impact on competition.

Senate Banking, Housing & Urban Affairs Comm., Securities Acts Amendments of 1975, S. Rep. No. 94-75, at 13-14 (1975), reprinted in 1975 U.S.C.C.A.N. 179, 192. Congress also recognized that the SEC's exercise of its expanded authority would be subject to any ultimate judicial reconciliation of the policies of the Exchange Act with those of the antitrust laws. Id. at 35. Following the enactment of the amendments, the SEC rescinded Rule 9b-1 and adopted Rule 19b-4, which implemented a procedure for proposed exchange rule changes.

In February 1976, the SEC permitted CBOE to list options in a security already listed on another exchange. See SEC Release No. 12283, 1976 SEC LEXIS 2040, at *3 n.7 (Mar. 30, 1976). The SEC also permitted PCX to commence options trading, and noted that

PCX planned to list options traded on other exchanges. See id. The following year, the SEC approved the proposals of various exchanges to commence "put" options trading. The SEC found it undesirable to prohibit dual trading in such options, but recognized that inequitable competitive effects may arise given the limited number of authorized put classes. The SEC invited the exchanges to contact its offices to discuss the problem. See SEC Release No. 13401, 1977 SEC LEXIS 2123, at *1 (Mar. 23, 1977).

In any event, these nascent attempts at multiple listing did not last long. The SEC called for a public hearing to discuss the practice, and expressed concern about the increased activity in dually traded options vis-a-vis historic levels of trading in non-dually traded options. See SEC Release No. 13325, 1977 SEC LEXIS 2290 (Mar. 3, 1977); SEC Release No. 13433, 1977 SEC LEXIS 2036, at *1 (Apr. 5, 1977). The SEC noted that "[t]he motivation for this increased trading activity is apparently to induce the purchase or sale of such dually traded options on their options exchanges instead of other exchanges ...." Id. The SEC expressed concern that such trading may violate certain provisions of the Exchange Act. See id. at *2.

On July 18, 1977, the SEC requested that the exchanges voluntarily refrain from listing new options classes pending agency review.[1] This request thus halted the expansion of multiple listing. The SEC then undertook a comprehensive study of the options markets, which was concluded in February 1979. The final SEC report examined several important issue areas, including multiple listing, and recommended a number of proposals to address those points. See Securities and Exchange Commission, Report of the Special Study of the Options Market (Feb.

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[1]The SEC also proposed Temporary Rule 9b-1(T) in order to prevent new listings. However, given the exchanges' voluntary compliance with the SEC's directive, the proposed rule was not implemented. See SEC Release No. 15026, 1978 SEC LEXIS 997, at *2 (Aug. 3, 1978).

15, 1979). The SEC requested that the exchanges continue to honor the voluntary moratorium pending implementation of the report's recommendations.

By 1980, the exchanges had developed plans in response to the report, and the SEC terminated the moratorium. See SEC Release No. 16701, 1980 SEC LEXIS 1784, at *11 (Mar. 26, 1980) (concluding that "the major regulatory deficiencies identified by the Options Study have been addressed responsibly by the SROs"). Although it permitted the resumed expansion of options listing generally, the SEC notably reserved for further consideration a decision with respect to multiple listing. Id. at *14. The SEC noted that it must consider "whether to continue its current policy of restricting multiple trading in exchange-traded options or whether to permit a more unfettered competitive environment in which an options exchange would be free to trade any eligible options class, subject to the adequacy of its surveillance and other self-regulatory capabilities." Id. at *22. The SEC reasoned that:

> The Securities Acts Amendments of 1975 ("1975 Amendments") charged the Commission "with an explicit and pervasive obligation to eliminate all present and future competitive restraints that [can]not be justified by the purposes of the Exchange Act," and directed the Commission "to remove existing burdens on competition and to refrain from imposing, or permitting to be imposed, any new regulatory burden on competition 'not necessary or appropriate in furtherance of the purposes' of the Exchange Act." However, while the Congress recognized the benefits which might result from increased competition in the securities markets, it did not choose to elevate competition above the other goals or purposes of the Act. To the contrary, while the Congress has explicitly required the Commission to consider the competitive effects of its regulatory policies, the Congress has also indicated that competition would not thereby become "paramount to the great purposes of the Exchange Act," such as the protection of investors and the maintenance of fair and orderly markets.

Id. at *23-*24 (footnotes omitted). The SEC added that the 1975 Amendments created an "explicit obligation to balance" competitive implications against other regulatory criteria and considerations. Id. at *25.

The SEC identified a number of possible adverse effects from multiple trading, including (i) market fragmentation; (ii) the likelihood that meaningful competition among market centers may be, at best, transitory because of member firms' automatic order routing practices; and (iii) the potential negative impact on the financial position of the regional exchanges. Id. at *28-*30. The Commission believed that some of its concerns might be alleviated by the development of market integration facilities, and expressed an inclination toward multiple trading. However, the SEC deferred further action, requesting that the exchanges consider "whether, and to what extent, the development of market integration facilities would minimize concerns regarding market fragmentation and maximize competitive opportunities in the options markets." Id. at *32. The SEC then directed the exchanges to formulate and jointly submit an allocation plan to govern the listing of equity options. On May 30, 1980, the SEC approved the joint plan, which provided that newly listed equity options were to be allocated among the exchanges on a rotating basis for exclusive, or single, listing. See SEC Release No. 16863, 1980 SEC LEXIS 1378, *1-*2 (May 30, 1980).

The joint allocation plan remained in effect throughout most of the 1980s with respect to equity options, although the SEC permitted multiple trading with respect to non-equity and over-the-counter securities. The SEC remained concerned that "unlimited multiple trading of equity options at this time might result in significant deleterious structural changes in the markets, with a resultant decrease in competition in other areas such as services relating to the execution and clearing functions." SEC Release No. 17577, 1981 SEC LEXIS 1976, at *17 (footnote omitted).

In 1987, the SEC revisited the issue of multiple trading by proposing Rule 19c-5.[2] The SEC described the new policy embodied in the Rule as follows: "Under Rule 19c-5, an exchange unilaterally could decide, as a business matter, not to multiply trade any particular option. An exchange could not, however, reach an agreement with one or more other exchanges to refrain from multiple trading." SEC Release No. 34-26870, 1989 SEC LEXIS 941, at *39 (May 26, 1989). Although the effective date of Rule 19c-5 was set for January 1990, the SEC requested that the exchanges refrain from multiply listing those options which previously had been singly listed only (the "grandfathered" options). This delay in implementation was intended to allow the exchanges to work together to develop a market-linkage system, in conjunction with the SEC. See, e.g., Letter from Richard C. Breeden, Chairman, Securities and Exchange Commission, to James R. Jones, Chairman, American Stock Exchange (Jan. 9, 1980); Letter from Richard C. Breeden, Chairman, Securities and Exchange Commission, to Alger B. Chapman, Chairman and Chief Executive Officer, Chicago Board Options Exchange (Oct. 17, 1990).

By June 1992, due primarily to cost concerns, the proposed linkage system was still unavailable. Consequently, then-SEC Chairman Richard Breeden proposed a phase-in plan to commence multiple listing, which included a provision that an exchange "would delist any

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[2]Rule 19c-5 requires, in pertinent part, that the rules of each national securities exchange trading standardized put or call options shall provide that:

> On or after January 21, 1991, but not before, no rule, stated policy, practice, or interpretation of this exchange shall prohibit or condition or otherwise limit, directly or indirectly, the ability of this exchange to list any stock options class because that options class is listed on another options exchange.

Rule 19c-5(a)(3), 17 C.F.R. § 240.19c-5(a)(3) (2000).

option where it did not maintain a 10% market share of public volume." Letter from Richard C. Breeden, Chairman, Securities and Exchange Commission, to Alger B. Chapman, Chairman and Chief Executive Officer, Chicago Board Options Exchange (June 30, 1992), at 3. Beginning in November 1992, the exchanges commenced multiple trading with respect to fifty options classes per quarter. By December 31, 1994, all equity options were eligible for multiple listing.

Also during this period, in September 1991, the SEC approved the exchanges' joint plan for selecting, listing, challenging and arbitrating the eligibility of new standardized equity options. Although Rule 19c-5 obviated the need for a new allocation plan, the SEC found that "there is a continued need for joint procedures to facilitate the orderly introduction of new equity options and to ensure that there is a mechanism in place to ensure that only eligible securities are selected for options trading." SEC Release No. 34-29698, 1991 SEC LEXIS 1864, at *14 (Sept. 17, 1991). The joint plan requires each exchange to certify a new option class to the Options Clearing Corporation, to notify all other exchanges and to wait a certain length of time before listing the class for trading. The other exchanges may challenge the listing or may indicate their intent to allow trading in the same class. If an exchange fails to certify its intention within the requisite time period, it may not commence listing until five days after the class is listed on the initial exchange. Id. at *3-6. The SEC emphasized that, despite the plan, it retained ultimate authority over the listings:

> Section 19(h) provides the Commission with the authority to take action against an exchange if the Commission finds that the exchange is in violation of the Act, the rules and regulations thereunder, or its own rules. Accordingly, notwithstanding the Plan, the Commission has the authority to prevent an exchange from listing a new option if the Commission finds that the option does not meet the exchange's initial options listing standards.

Id. at *12.

The SEC again displayed its supervision of options trading in April 1997 when the Commission approved NYSE and CBOE rule changes arising from NYSE's transfer of its options business to CBOE. The SEC rejected complaints that the transfer was monopolistic and constituted an illegal sale of a franchise. The Commission stated that it "would regard any anticompetitive arrangements in the trading of options to be of very serious concern, but after reviewing the proposed transfer closely, the Commission disagrees with these assertions." SEC Release No. 34-38542, 1997 SEC LEXIS 900, at *21 (Apr. 23, 1997) (footnote omitted).

The SEC continues to oversee the options markets and to approve coordinated activity by the exchanges. Pursuant to Rules 12d1-3 and 12d2-2, respectively, the SEC is informed each time an exchange proposes to list or delist an equity options class. The SEC recently authorized the exchanges to act jointly with respect to a number of issues, such as (1) planning strategies for options quote message traffic, (2) developing an inter-market linkage plan for multiply traded options and (3) phasing-in the implementation of decimal pricing. See SEC Release No. 34-41843, 1999 SEC LEXIS 1807, at *1 (Sept. 8, 1999); SEC Release No. 34-42029, 1999 SEC LEXIS 2215, at *1 (Oct. 19, 1999); SEC Release No. 34-42360, SEC LEXIS 114, at *1 (Jan. 28, 2000). Moreover, both the SEC and the Department of Justice ("DOJ") investigated the same allegations of price-fixing raised in the instant case. The SEC issued a Settlement Order on September 11, 2000 which found, inter alia, that the exchanges improperly followed a course of conduct limiting multiple listing.

B. The Multidistrict Litigation

Plaintiffs initially filed suits in various jurisdictions across the country in early 1999, alleging that defendants violated Section 1 of the Sherman Act, 15 U.S.C. § 1 (2000), by agreeing to refrain from multiply listing certain options classes. The Panel on Multidistrict

Litigation transferred the actions to this Court for consolidated pre-trial proceedings by Order dated June 8, 1999. The putative plaintiff class is comprised of individuals and companies who purchased equity options contracts subsequent to December 31, 1994.

The exchanges moved to dismiss plaintiffs' Consolidated Antitrust Class Action Complaint in its entirety on the ground that Congress impliedly repealed the antitrust laws with respect to the conduct at issue by empowering the SEC to regulate options listing.[3] Both the SEC and the DOJ submitted amicus curiae briefs arguing that repeal was not warranted in this instance. Given the important questions of law presented, this Court by Order dated July 11, 2000 converted the motion to dismiss into a limited motion for summary judgment on the implied repeal issue only. The parties submitted additional briefing and oral argument was conducted on November 8, 2000. The Court now grants summary judgment in favor of defendants.

II. DISCUSSION

Summary judgment is appropriate only where no genuine issues of material fact remain for trial, and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The moving party bears the initial burden of proof on such a motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Facts, and all inferences therefrom, must be viewed in a light most favorable to the non-

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[3]The exchanges also moved for dismissal on the grounds that plaintiffs' allegations are factually inconsistent with respect to the alleged class and that the damage claim arising from allegedly inflated transaction costs is barred under Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). In addition, the Member Defendants filed papers pursuant to Fed. R. Civ. P. 12(b)(6) – including separate submissions by Binary Traders, Inc., D.A. Davidon & Co., Inc., LETCO, and Timber Hill L.L.C. – arguing that the allegations of conspiracy in the Complaint are insufficient as against them. The Court need not address these points as the implied repeal issue is dispositive for all defendants.

movant. See Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); American Cas. Co. v. Nordic Leasing, Inc., 42 F.3d 725, 728 (2d Cir. 1994). If the moving party meets its burden, then the non-movant must set forth specific facts showing that there is a genuine issue for trial. See Anderson, 477 U.S. at 250. Mere "metaphysical doubt" is inadequate; sufficient evidence must exist upon which a reasonable jury could return a verdict for the non-movant. Matsushita, 475 U.S. at 587. After an extensive review of the uncontested material facts regarding the SEC's regulation of options listing, the Court believes that the application of the implied repeal doctrine is required here.

A trilogy of Supreme Court cases establishes the basic framework for any analysis of implied repeal issues. See United States v. National Ass'n of Securities Dealers, 422 U.S. 694 (1975) ("NASD"); Gordon v. New York Stock Exch., 422 U.S. 659 (1975) ("Gordon"); Silver v. New York Stock Exch., 373 U.S. 341 (1963) ("Silver"). In Silver, the earliest of the cases, the Supreme Court held, with respect to NYSE's prohibition on certain communications with non-members, that the antitrust laws were not impliedly repealed because the SEC lacked authority to supervise NYSE's rules in that area. Id. at 364-66. In Gordon, by contrast, the Supreme Court found that repeal was warranted because Congress had given the SEC regulatory power over the practice at issue – the fixing of commission rates – and the SEC had actively exercised that authority in that area. Gordon, 422 U.S. at 689. The imposition of the antitrust laws therefore would subject the exchanges to conflicting standards. Id. In NASD, the Supreme Court determined that the grant of regulatory authority to the SEC under Section 22(f) of the Investment Company Act, 15 U.S.C. §80a-22(f) (2000), was "sufficiently pervasive" to confer an implied immunity. NASD, 422 U.S. at 730.

Extrapolating from these cases, courts refer to two situations in which implied repeal is appropriate: (1) when an agency, acting pursuant to a specific Congressional directive, actively regulates the particular conduct challenged (the Gordon scenario), and (2) when the regulatory scheme is so pervasive that Congress must be assumed to have foresworn the paradigm of competition (the NASD scenario). See Northeastern Tel. Co. v. American Tel. & Telegraph Co., 651 F.2d 76, 82 (2d Cir. 1981); Friedman v. Salomon/Smith Barney, No. 98 Civ. 5990, 2000 WL 1804719, at *4 (S.D.N.Y. Dec. 8, 2000). Although the Court is also extremely cognizant of the Supreme Court's cautions that implied antitrust immunity is not favored, and can be justified only by a convincing showing of a "plain repugnancy" between the antitrust laws and the regulatory system, Gordon, 422 U.S. at 682, the Court finds that implied repeal is warranted in this case under the Gordon standard.

The Gordon opinion is particularly instructive, because the factual circumstances are strikingly similar to the case at bar. The plaintiffs in Gordon claimed that the system of fixed brokerage commission rates used by the exchanges violated the antitrust laws. Id. at 661. The Exchange Act authorized the SEC to supervise the exchanges with respect to "the fixing of reasonable rates of commission," and for years the SEC had permitted the exchanges to set such rates. Id. at 662. After conducting hearings on the issue in the 1960s and 1970s, the SEC reconsidered its policy and eventually began a phase-out of non-competitive rates. Id. The SEC then requested that the exchanges voluntarily change their rules in accordance with the new policy. Id. at 667. After receiving a negative response, the Commission adopted Rule 19b-3, which mandated the use of competitive rates. Id. at 675. The Gordon Court noted that the SEC "explicitly declined to commit itself to permanent abolition of fixed rates in all cases: in the

future circumstances might arise that would indicate that reinstitution of fixed rates in certain areas would be appropriate." Id. at 676.

Given these circumstances, the Supreme Court held that implied repeal was necessary to prevent undue interference with the operation of the Exchange Act. Id. at 686. The Court determined that Congress had accorded the SEC regulatory authority over the conduct at issue, and that the SEC actively exercised that authority. Id. at 685. Furthermore, the Court found that the antitrust laws and the Exchange Act scheme could not be reconciled. To deny antitrust immunity, it reasoned, would subject the exchanges and their members to conflicting standards. Id. at 689.

The rationale of Gordon mandates implied immunity in this instance. The SEC regulation of the options trading arena is just as, if not more, extensive than the SEC regulation at issue in Gordon. Plaintiffs here concede that Congress has conferred on the SEC broad, plenary jurisdiction over equity options listing decisions. Moreover, the SEC has actively exercised its jurisdiction in this area. As detailed above, the SEC supervised the introduction of options trading on the exchanges, and continues to oversee listing decisions pursuant to Rules 12d1-3 and 12d2-2. The SEC has undertaken a number of studies addressing whether trading of the same options class on multiple exchanges should be permitted, at times coming to different conclusions regarding the implementation of the practice. With the adoption of Rule 19c-5, the SEC formulated its latest – but possibly not its last – position on multiple listing.[4]

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[4]Defendants argue that the SEC again may change its approach to multiple listing. Under the Regulatory Flexibility Act, the SEC is required to review those rules which have a significant economic impact upon a substantial number of small entities, in order to "determine whether such rules should be continued without change, or should be amended or rescinded ...." 5 U.S.C. § 610(a) (2000). The SEC designated Rule 19c-5 as one of the rules to be reviewed. See SEC Release No. 34-40828, 1998 SEC LEXIS 2787 (Dec. 23, 1998).

Plaintiffs argue that the "repugnancy" required by Gordon is not present here. Plaintiffs and amici maintain that implied repeal is appropriate only where the SEC currently requires the very conduct that the antitrust laws proscribe. In other words, plaintiffs contend that because Rule 19c-5 currently prevents prohibitions on multiple listing, there is no conflict at this moment in time and thus the antitrust laws are applicable. This argument, while at first blush compelling, is contrary to the rationale of Gordon. In Gordon, the Supreme Court analyzed the history of SEC commission rate regulation, and expressly acknowledged that the SEC recently adopted a rule requiring competitive rates. Thus, the Supreme Court faced a situation in which both the SEC and, presumably, the antitrust laws prohibited fixed rates.[5] Nonetheless, the Supreme Court found that the two schemes conflicted and that implied repeal was warranted.[6]

The question, then, is what constitutes a conflict for implied repeal purposes. In Gordon, the Supreme Court determined that a conflict was present because the defendants might find themselves subject to different standards imposed by antitrust courts and the SEC. As the Court explained, "different standards are likely to result because the sole aim of antitrust

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[5]Plaintiffs attempt to distinguish Gordon on the ground that the SEC had permitted fixed rates at the time the case was filed. However, in its opinion, the Supreme Court examined in detail the new SEC rule prohibiting fixed rates and the Congressional legislation adopting it. If the Gordon holding was intended to address only pre-rule change conduct, the Court's extensive discussion of these enactments would be rendered meaningless.

[6]Similarly, the SEC acknowledged in its Gordon amicus brief that current SEC policy prohibited fixed rates but nonetheless argued in favor of repeal. The SEC noted its continuing authority to regulate such rates and its desire to avoid "unwarranted application of antitrust standards and ad hoc judicial decrees affecting the regulatory program." Brief for the United States Securities and Exchange Commission as Amicus Curiae, Gordon v. New York Stock Exch., No. 74-304 (Oct. Term 1974), at 9. In contrast, the DOJ urged against implied repeal on the basis that "[t]here is no danger of duplicative or inconsistent requirements arising from antitrust jurisdiction; the SEC itself has directed the abolition of fixed commission rates." Brief for the United States as Amicus Curiae, Gordon v. New York Stock Exch., No. 74-304 (Oct. Term 1974), at 9. Notably, the DOJ position did not prevail in the Supreme Court.

legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of investors, the exchanges, and the securities industry." Gordon, 422 U.S. at 689. The same danger is apparent here. With respect to the options trading arena, the SEC has adopted different regulatory approaches at different times, sometimes banning multiple listing and more recently permitting multiple listing subject to SEC oversight. In fact, although urging against implied repeal in its amicus brief, the SEC states in its closing line that:

> Finally, we note that the Commission's regulatory authority to revisit the decision embodied in Rule 19c-5 continues, and that a different judgment about the desirability of competition in the future could compel a different result on the implied repeal issue. Any forward looking decree entered by an antitrust court must take account of that authority.

SEC Amicus Brief at 7.

The SEC thus implicitly acknowledges the very real possibility that courts applying the antitrust laws may circumscribe the SEC's regulatory authority in this area and hinder the operation of the securities laws.[7] The Supreme Court was mindful of this prospect in Gordon, noting that "[i]f antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC." Gordon, 422 U.S. at 689; see also NASD, 422 U.S. at 734 (finding repeal to be necessary "to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws"); Finnegan v. Campeau Corp., 915 F.2d 824, 851 (2d Cir. 1990) (repealing antitrust laws with respect to joint takeover bidders under Section 14(e) of the Williams Act, 15 U.S.C. § 78(n)(e), because "to permit an antitrust

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[7]Indeed, plaintiffs seek a permanent injunction enjoining defendants from continuing or renewing the alleged concerted action. See Complaint ¶¶ 182-84.

suit to lie ... would conflict with the proper functioning of the securities laws"); Harding v. American Stock Exch., Inc., 527 F.2d 1366, 1370 (5th Cir. 1976) (dismissing action where "[i]mmunity under the Sherman Act is necessary ... to make the Exchange Act viable").

This understanding of conflict is also apparent in the Second Circuit's decision in Strobl v. New York Mercantile Exch., 768 F.2d 22 (2d Cir. 1985). Plaintiffs rely upon Strobl for the proposition that implied immunity is not appropriate where the regulatory scheme and the antitrust laws both prohibit the challenged conduct. However, in Strobl the conduct at issue was prohibited by the Commodity Exchange Act itself:

> There is no built-in balance in the regulatory scheme of the [Commodity Exchange] Act that permits a little price manipulation in order to further some other statutory goal. Quite the opposite, price manipulation is an evil that is always forbidden under every circumstance by both the Commodity Exchange Act and the antitrust laws. Therefore, application of the latter cannot be said to be repugnant to the purposes of the former.

Strobl, 768 F.2d at 28; see also Northeastern Tel. Co. v. AT&T, 651 F.2d 76 (2d Cir. 1981) (finding no implied repeal where the FCC was not authorized to approve the anti-competitive conduct), cert. denied, 455 U.S. 943 (1982); Jacobi v. Bache & Co., 520 F.2d 1231 (2d Cir. 1975) (finding no implied repeal where the SEC had no jurisdiction to regulate and supervise the NYSE rules at issues). In the case at bar, the SEC at times has exercised its regulatory discretion to prohibit the multiple listing of options, thereby balancing the benefits of competition against other considerations. Indeed, the Strobl court explicitly distinguished the flat prohibition contained in the Commodity Exchange Act from the balancing standard employed under the Securities Exchange Act. Id. at 26-28. The Strobl court also acknowledged the basic proposition that the "antitrust laws may not apply when such laws would prohibit an action that a regulatory scheme might allow." Id. at 27.

Here, as in Gordon, defendants have been and likely will continue to be subject to conflicting standards. With respect to the listing of options, the SEC routinely has required or permitted conduct that might seem suspect when viewed through the prism of the antitrust laws. For example, the SEC repeatedly has instructed the exchanges to work together in connection with options listing, even subsequent to the adoption of Rule 19c-5. In September 1991, the SEC approved the exchanges' joint plan governing the eligibility of options classes. More recently, the SEC authorized the exchanges to act jointly with respect to options quote message traffic, inter-market linkages and decimal pricing. While an antitrust court may find that such joint action violates the antitrust laws, the SEC may – and obviously does – consider such agreements to be permissible cooperation in keeping with its continued directives in this area.

Furthermore, the SEC explicitly signaled its approval of certain agreements between defendants when it entered two formal orders in 1997 approving NYSE's sale of its entire options business to CBOE. In so doing, the SEC disagreed with public comments that the transfer was no more than the purchase of exclusive trading rights in equity options, finding that "there is no agreement between NYSE or CBOE to restrict dual listing of options or to restrict, monopolize or foreclose any market." SEC Release No. 34-38542, 1997 SEC LEXIS 900, at *21 (Apr. 23, 1997). Plaintiffs' allegation that the NYSE-CBOE transfer was improper, see Complaint ¶¶ 147-48, is thus directly contrary to the SEC's conclusion. Plaintiffs are in essence asking this court to second-guess the SEC's determination collaterally, although the SEC's orders were subject to appellate court review pursuant to Section 25(a)(1) of the Exchange Act, 15 U.S.C. § 78y(a)(1). This type of second-guessing is exactly what the implied repeal doctrine was designed to prevent.

Therefore, even during the class period at issue here, the SEC has continued to regulate the options-listing arena. If, as plaintiffs suggest, the conflict inquiry is confined to one moment in time, defendants would be subject to constant uncertainty as to whether the SEC's regulation at any given date is sufficient to support a repeal of the antitrust laws. Such a result would disadvantage both defendants and investors. See, e.g., Davel v. Sullivan, 902 F.2d 559, 563 (7th Cir.1990) ("The benefits of a predictable rule of law are not insignificant.").

Finally, the Court must reject plaintiffs' argument that antitrust immunity covers only the exchanges and not the Member Defendants. The language in Gordon is not so limited; the Supreme Court expressly noted that to deny antitrust immunity with respect to commission rates "would be to subject the exchanges and their members to conflicting standards." Gordon, 422 U.S. at 689 (emphasis added). Moreover, the Supreme Court has made clear that antitrust immunity is determined with respect to the nature of the conduct at issue, not by the status of the party. See Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993). Plaintiffs in Hartford argued that agreements between domestic and foreign insurers were not immune from antitrust scrutiny because the foreign insurers were not subject to regulation under state law as required under the McCarran-Ferguson Act. The Supreme Court unanimously held otherwise, directing that "'the business of insurance' should be read to single out one activity from others, not to distinguish one entity from another." Id. at 781.

Bifurcating antitrust immunity according to the status of the defendant undoubtedly would undermine this Court's holding. Plaintiffs suggest that even if the antitrust laws are impliedly repealed, the exchanges should be subject to joint and several liability for the acts of their non-exempt co-conspirators. If this were so, the application of antitrust immunity

would be rendered nugatory. The Court thus concludes that summary judgment as to all defendants is required here.

The Court does not take the issue of implied repeal lightly. However, repeal will not leave defendants unchecked; the Court fully expects that the SEC will continue to exercise its regulatory authority, balancing the benefits of competition against its other regulatory aims. Indeed, as SEC Chairman Arthur Levitt has emphasized to the options industry: "Rest assured, we will guard the promise of a competitive, free and fair options marketplace." Arthur Levitt, Chairman, Securities and Exchange Commission, Remarks to the Securities Industry Association (Nov. 4, 1999). The Court will take Mr. Levitt at his word.

III. CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted.

Dated: **February 14, 2001**
New York, New York

SO ORDERED:

Richard Conway Casey, U.S.D.J.