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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

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NEXTRADE HOLDINGS, INC.,

Plaintiff,

v.

Case No.:

PHILADELPHIA  
STOCK EXCHANGE, INC.,

8:06-CV-1040-T-26 MSS

Defendant.

COMPLAINT AND DEMAND FOR JURY TRIAL  
(Injunctive Relief Sought)

Plaintiff NEXTRADE HOLDINGS, INC., a Florida Corporation ("NexTrade"), sues Defendant PHILADELPHIA STOCK EXCHANGE, INC. ("PHLX"), and alleges as follows:

Preliminary Statement

1. This action seeks to enjoin PHLX from infringing the patent rights of NexTrade by using and trading patented products known as long dated-options ("LDOs") and expirationless options ("XPOs"). NexTrade is the exclusive licensor of patents covering LDOs/XPOs and possesses the rights to sub-license those rights. NexTrade also seeks to enforce the terms of its April 20, 2005, Sub-License Agreement with PHLX, as amended in June of 2005 (the "License Agreement" contains a confidentiality provision and will attached hereto as Exhibit A and incorporated herein by reference upon consent from PHLX or a court order permitting such filing), pursuant to which NexTrade licensed PHLX rights in patents covering LDOs/XPOs.<sup>1</sup> Further, NexTrade seeks to recover substantial damages for the past

<sup>1</sup> The License Agreement at issue uses the term "Licensed Products" to include the patented XPOs as well as any other product or products within the scope of the applicable patent

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and on-going harm suffered as a result of PHLX infringing its patent rights and breaching the License Agreement.

### **Jurisdiction and Venue**

2. This Court has diversity jurisdiction under 28 U.S.C. §1332 because the parties are citizens of different states and because the matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. §1332.

3. This Court also has jurisdiction under 28 U.S.C. §§1331 and 1338(a) because PHLX's actions constitute patent infringement under the Patent Laws of the United States, Title 35 of the United States Code.

4. Venue properly lies in this District and in this division pursuant to 28 U.S.C. §1391.

5. Defendant PHLX is subject to jurisdiction in Florida pursuant to the Florida Long Arm Statute, Section 48.193, Florida Statutes, and jurisdiction in this Court over the person of Defendants comports with the requirements of due process.

6. Defendant PHLX has committed intentional tortious acts in Florida within the meaning of Florida's Long Arm Statute. Moreover, Defendant PHLX knew that its infringing conduct would cause harm to NexTrade in Florida and within this judicial circuit.

7. This Court has jurisdiction over Defendant PHLX under Florida's Long Arm Statute, Section 48.193, Florida Statutes, as Defendant PHLX conducts, is engaged, and carries on substantial and not isolated activity within the State of Florida, specifically

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protections, which include LDOs. PHLX conceded in the License Agreement that it would not contest, or assist others in contesting, the underlying patents. As set forth below, PHLX's stated intention to sell long dated options (those which carry 5 or 10 year expiration date) violates the License Agreement and the underlying patents because, upon information and belief in accordance with an opinion of patent counsel, such long term options infringe the patent rights of NexTrade.

including business ventures with Florida corporations located in this judicial district, such as Raymond James, Inc. of St. Petersburg, Florida, and OnTrade of Tampa, Florida.

8. Defendant PHLX is also subject to this Court's jurisdiction because it entered into contracts with citizens of Florida, including the License Agreement with NexTrade, which PHLX breached, and performance of which PHLX owes and has failed to provide to NexTrade in Florida.

### **Parties**

9. Plaintiff, NexTrade is Florida Corporation with its principal place of business located at 301 S. Missouri Avenue, Clearwater, Florida 33756.

10. Defendant PHLX is a Delaware corporation with its principal place of business at 1900 Market Street, Philadelphia, Pennsylvania 19103.

### **Facts Common to All Causes of Action**

11. NexTrade is the exclusive life-time licensee of a series of patents relating to the trading of interests in LDOs/XPOs pursuant to a master license with third-party Economic Inventions LLC. NexTrade enjoys the right to sub-license its patent rights relating to LDOs/XPOs.

12. LDOs/XPOs are a novel innovation in securities trading. Unlike common options, which expire within three (3) years or less from the date of their issue, LDOs include any option with a life greater than three (3) years and XPOs never expire.

13. NexTrade has devoted considerable time, money, and other assets into the marketing of LDOs/XPOs to the securities industry. As a consequence of NexTrade's efforts, there now exists a demand among options traders to invest in and trade LDOs/XPOs.

14. Although termed a “stock exchange,” PHLX trades in options, stocks and futures.

NexTrade Sublicenses LDOs/XPOs Patents to PHLX

15. As a direct result of NexTrade’s efforts in promoting LDOs/XPOs, PHLX engaged NexTrade in protracted negotiations, lasting over six months, for PHLX to acquire the right to market, sell, and trade LDOs/XPOs.

16. During these protracted negotiations, NexTrade openly explained to PHLX that rights relating to XPOs also covered LDOs (any option expiring more than 3 years from the date of issue).

17. On April 20, 2005, NexTrade and PHLX entered into a Sub-License Agreement, as amended in June of 2005 (hereinafter, the “License Agreement,” a copy of which is attached hereto as Exhibit A and incorporated herein by reference), pursuant to which NexTrade licensed PHLX rights in patents covering LDOs/XPOs.

18. In paragraphs 1(c) and 5(a) of the License Agreement, PHLX promised to use its commercially reasonable efforts to promote the successful launch and ongoing trade of the Licensed Products.

19. In paragraph 2 of the License Agreement, PHLX conceded that NexTrade is the owner of the Licensed Products and that the patents relating to the Licensed Products are incontestable for purposes of the License Agreement.

20. Pursuant to paragraph 3 of the License Agreement, PHLX agreed to pay NexTrade license fees for all PHLX’ sales of Licensed Products and to permit NexTrade to audit PHLX’ books and records upon request.

21. Under paragraph 8 of the License Agreement, the License Agreement was to

extend for an initial term of two (2) years, which would be automatically extended to a five (5) year term if PHLX listed for trading any product based substantially on the Licensed Technology.

PHLX's Bad Faith Maneuvers

22. After entering into the License Agreement, PHLX, through its Vice-President of Product Development, Dan Carrigan, represented to NexTrade that PHLX could not trade LDOs/XPOs due to the limitations of certain software operated by the Options Clearing Corporation ("OCC"), which required that an expiration date field be completed for options to be traded.

23. NexTrade later learned that Mr. Carrigan's representations were not in accordance with the facts and that the OCC had no issue with the software. Rather, the asserted software deficiencies at the OCC were merely a ruse PHLX employed to conceal its failure to pursue development of LDOs/XPOs as promised. Confronted with this information, PHLX reassured NexTrade that PHLX was on track to launch the LDOs/XPOs as soon as possible.

24. PHLX issued a press release informing the public in general that it had entered into a licensing agreement with NexTrade to trade LDOs/XPOS. A copy of PHLX's press release is enclosed herein as Exhibit B, and incorporated herein by reference.

25. Based upon the License Agreement and PHLX's representations, NexTrade commenced an intense marketing campaign to promote LDOs/XPOs. NexTrade spent thousands of dollars promoting the PHLX as the platform for LDOs/XPOs, by attending national trade shows, conferences, radio and internet webcasts, and other generalized exposure to the market, media, traders, and other financial institutions.

26. Mr. Carrigan of PHLX attended some of the events NexTrade organized, participated, or otherwise attended to market PHLX and the LDOs/XPOs, but PHLX did not participate in the marketing of the LDOs/XPOs.

27. Late October of 2005, PHLX stopped communicating with NexTrade. Mr. Carrigan seemingly disappeared and did not return NexTrade's phone calls.

28. Finally, on or about late December of 2005, after several communications, Mr. Carrigan called John Schaible ("Mr. Schaible"), NexTrade's CEO, and advised him that PHLX was contemplating issuing LDOs with expiration terms of ten (10) years, on Exchange Traded Funds ("ETFs"), per the License Agreement with NexTrade.

29. PHLX explained to NexTrade that PHLX would market, sell, and trade LDOs with expiration terms of ten (10) years to accelerate the process of approval with the Securities and Exchange Commission ("SEC") relative to XPOs, and assured NexTrade that PHLX had no intention not to honor the agreement to pay NexTrade for these LDOs.

30. PHLX specifically identified a particular customer, Susquehanna, as a party interested in the purchase and trading of initially ten (10) year options with a transition from LDOs to XPOs. During these discussions, PHLX's Vice-President of Product Development, Mr. Carrigan, assured NexTrade that PHLX would pay NexTrade for such LDOs according to its obligations under the contract.

31. Prior to selling or trading options with an expiration term longer than three (3) years, PHLX needed to petition the Securities and Exchange Commission (the "SEC") for a rule change permitting such activity.

32. As late as January 29, 2006, PHLX, through Dan Carrigan, assured NexTrade's CEO, Mr. Schaible, that PHLX had not initiated the rulemaking process with the

SEC for LDOs.

33. Unbeknownst to NexTrade, on or about January 20, 2006, PHLX had filed a proposed rule change with the SEC to allow PHLX to trade LDOs options on ETFs with expiration dates ranging up to ten (10) years, rather than the no more than three (3) year expiration term in the then existing rule. A copy of PHLX' petition to the SEC is enclosed as Exhibit C and incorporated herein by this reference.

NexTrade Acts in Good Faith - Obtains Opinion of Counsel

34. This proposed rule change sought by PHLX is critical. Up to that point, all options traded with an expiration date of three (3) years or less. Under U.S. Patent No. 7,024,384 B2 (the " '384 Patent"), which is included within the Licensed Technology in the License Agreement (in that it issued from Patent Application No. 09/906,305), options with an expiration term in excess of three (3) years are the protected intellectual property of NexTrade via its patent rights, which rights, in turn, were sublicensed to PHLX. Thus, PHLX's proposed rule change signaled its intention to trade options covered by the License Agreement.

35. Upon learning of PHLX's proposed rule change despite of its representations to the contrary that no such rule filing had been made, NexTrade became concerned and again sought assurances from PHLX that any options sold or traded under the proposed new rule would result in payments to NexTrade under the terms of the License Agreement.

36. On February 9, 2006, Mr. Schaible, wrote to PHLX's Mr. Carrigan and reminded PHLX of its obligations to NexTrade in no ambiguous terms:

Prior to your signing the contract with us, we specifically discussed how our patents cover all options greater than 3 years and one day (A copy of the patents' claims is part of the

contract). The contract you signed obligates PHLX to pay us a specific per trade rate. Last week when we met in NYC, you assured me that PHLX had no intention of failing to pay.

...

you committed to provide us an answer by Friday Feb. 10. Now you have asked me to provide you with this email so your GC may review the matter. In my opinion, there is little to review. You and your counsel knew very well of our patents' claims covering options over 3 years. We specifically discussed this matter before we shook hands and signed the contract. PHLX will either honor its word and promises, or it will not.

...

Per your previous commitment to me, we expect an affirmative, written answer, by 5PM EST Feb 10, 2006.

A copy of this communication is enclosed as Exhibit D, and incorporated herein by this reference.

37. Rather than provide assurances to NexTrade, PHLX indicated for the first time that it was taking the position that such LDOs are not within the coverage of the License Agreement and advised NexTrade to obtain an opinion of counsel that would verify the assertion that LDOs were, in fact, covered by the patent portfolio to which NexTrade controls the rights.

38. NexTrade never wavered and sought the opinion of intellectual property counsel, who concluded that *"a well-informed court would find expiring options having terms of excess of three years to infringe the patent."* A copy of this Opinion of Counsel is enclosed as Exhibit E, and incorporated herein by this reference.

39. NexTrade sent the Opinion of Counsel to PHLX's CEO. Meyer "Sandy"



Frucher on May 11, 2006, along with a letter requesting assurances that PHLX would honor its License Agreement with NexTrade. In the May 11, 2006, letter, NexTrade reminded PHLX that it had long ago agreed that the patents covered LDOs and that its current tack “shocked and appalled” NexTrade. In pertinent part, Mr. Schaible wrote:

As I discussed with Mr. Carrigan, the patents are broad in coverage and do not merely cover options that never expire, but they in fact cover any option with a lifespan greater than three years. During the final days of negotiation prior to the execution of the agreement, Mr. Carrigan and I extensively discussed the breadth of our patent coverage, both verbally and in writing ... It was a major reason PHLX sought the deal and signed the agreement.

A copy of NexTrade’s May 11, 2006, letter is enclosed as Exhibit F, and incorporated herein by this reference.

40. On or about May 17, 2006, Messers. Schaible of NexTrade and Carrigan of PHLX discussed the letter to Mr. Frucher. Mr. Carrigan represented to Mr. Schaible that the attorneys for PHLX could not “understand” the Opinion of Counsel, a representation NexTrade believes was not made in good faith.

41. On or about May 18, 2006, Mr. Schaible sent a communication to Mr. Carrigan as an attempt to dissuade PHLX from maintaining its assertion that PHLX could not “understand” the opinion provided. In relevant part, Mr. Schaible stated to PHLX:

What part of ‘Accordingly, a well-informed court would find options having terms of excess of three years to infringe the patent’ does the legal team at PHLX not understand? It does not take a rocket scientist to infer that the legal team has marching orders from the business people at PHLX because otherwise their stance falls in an absurd legal position.

A copy of this communication is enclosed as Exhibit G and incorporated herein by this reference.

42. On or about May 23, 2006, Mr. Schaible sent a communication to Mr. Frucher in a final attempt to persuade PHLX to perform in accordance with the License Agreement and honor its promises. Mr. Schaible stated to PHLX:

“While I cannot comprehend how a legal team from a stock exchange fails to ‘understand’ option pricing, I am at a greater loss, Sandy, to comprehend how my recent offer to participate in helping your team ‘understand’ the opinion could, *in good faith*, be declined.

...

I have gone so far beyond the call of duty to resolve this diplomatically that any further inaction on my behalf calls into question my ability to defend our shareholder’s interests.”

A copy of this communication is enclosed as Exhibit H and incorporated herein by this reference.

43. PHLX has manifested its intent to breach its contract with NexTrade and by its acts committed patent infringement.

44. If PHLX’ violations of the License Agreement and subsequent infringing activities described above are not prohibited by this Court, NexTrade’s patent rights and goodwill will be substantially damages and PHLX will unjustly benefit from the use of the Licensed Technology.

45. NexTrade has no adequate remedy at law to prevent the above injuries and to compensate it for the irreparable harm being caused by PHLX’ acts. Due to the continuing

nature of PHLX' actions, and the difficulty in calculating injury to NexTrade's loss of sales, monetary relief alone cannot fully compensate NexTrade.

46. As a result of PHLX' actions described in this Complaint, NexTrade has suffered, and will continue to suffer the irreparable harm described above unless PHLX' unlawful conduct is enjoined by this Court.

47. NexTrade will likely prevail on the merits of this action due to PHLX' intentional, willful and continuing acts of infringement and breach of its License Agreement. In light of the License Agreement and the parties extensive communications, and in further light of PHLX' knowledge of NexTrade's rights, no plausible excuse exists to ameliorate PHLX' actions.

48. The balance of the hardships and the public interest require that PHLX immediately cease its infringing activity and its breaches of the License Agreement, and be enjoined from such activity because PHLX possess the immediate ability to cease such actions.

49. NexTrade has retained the law firms of Fee & Jeffries, P.A. and Caamano & Associates, P.A., to vindicate its rights against PHLX and is obligated to pay its attorneys a reasonable attorneys' fee for their services.

50. All conditions precedent to the maintenance of this action have occurred, have been performed, or have been excused or waived.

**COUNT I -- Breach of Contract**

51. NexTrade adopts and incorporates by reference the allegations contained in paragraphs 1 through 50 above.

52. The License Agreement was and is a binding and enforceable contract between

NexTrade and PHLX.

53. PHLX breached the License Agreement by:

- a. reneging upon its obligation to pay License Fees due to NexTrade under the License Agreement;
- b. failing to develop and commercialize the Licensed Products in a diligent manner as required by the License Agreement;
- c. misappropriating the Licensed Technology for its own benefit, in contravention of the License Agreement and the underlying patents, which PHLX has agreed are incontestable; and
- d. failing to honor its obligations of good faith and fair dealing toward NexTrade.

54. As a result of PHLX's breaches of the License Agreement, NexTrade has been damaged in an amount to be determined at trial.

WHEREFORE, NexTrade respectfully requests this honorable Court to enter judgment in its favor and against PHLX, award NexTrade damages, prejudgment interest, and costs, and grant NexTrade such other relief as this Court deems appropriate.

#### **COUNT II -- Patent Infringement**

55. NexTrade adopts and incorporates by reference the allegations contained in paragraphs 1 through 50 above.

56. NexTrade is the exclusive licensee of United States Patent No. 7,024,384 B2, issued on April 4, 2006 (the " '384 Patent"), and possess the rights to bring actions to remedy infringement of the '384 Patent.

57. The '384 Patent is valid and enforceable patents and was duly issued by the United States Patent and Trademark Office.

58. PHLX has been and still is directly infringing one or more claims of the '384 Patent by, at a minimum, preparing, and/or offering to sell, and/or selling long-term options utilizing apparatuses and processes covered by the claims of the '384 Patent without authority or consent from NexTrade.

59. PHLX is also infringing one or more claims of the '384 Patent by actively inducing its customers to engage in the purchase, sale, and trading of long-term options utilizing apparatuses and processes covered by the claims of the '384 Patent without authority or consent from NexTrade.

60. The activities of PHLX described above constitute willful infringement of NexTrade's federally protected patent rights in the '384 Patent and violate 35 U.S.C. § 271.

61. As a result of the willful infringement of the '384 Patent by PHLX, NexTrade has suffered and continues to suffer damages, and NexTrade is entitled to all remedies provided by Chapter 29 of Title 35, United States Code.

62. NexTrade has complied with the notice provisions of 35 U.S.C. § 287(a) regarding the '384 Patent.

WHEREFORE, NexTrade respectfully requests this Court to (a) enter judgment in favor of NexTrade and against PHLX; (b) grant NexTrade preliminary and permanent injunctive relief barring the activities of PHLX that infringe upon NexTrade's rights in the '384 Patent; (c) award damages to NexTrade and against PHLX for the infringement as well as treble damages due to the willful and deliberate nature of the infringement by PHLX of the

'384 Patent; (d) award NexTrade prejudgment interest, costs, attorneys' fees, and expert fees; and (e) grant to NexTrade all other relief this Court deems appropriate.

**COUNT III -- Declaratory Judgment**

63. NexTrade adopts and incorporates by reference the allegations contained in paragraphs 1 through 50 above.

64. PHLX is claiming that its sale, offering for sale, and trading of LDOs does not breach the License Agreement or infringe NexTrade's rights in the '384 Patent, and has asserted that it will not compensate NexTrade for such activity.

65. PHLX' actions have created a real and reasonable apprehension in NexTrade regarding its rights relative to PHLX' sale, offering for sale, and trading of long-term options.

66. An actual controversy exists between NexTrade and PHLX as to whether PHLX' sale, offering for sale, and trading of long-term options without compensation to NexTrade breaches the License Agreement and/or infringes NexTrade's rights in the '384 Patent.

67. NexTrade and PHLX have opposing interests of such immediacy that a declaration of rights is warranted.

68. A declaration of rights will serve the useful purpose of clarifying and settling the legal relations at issue. A declaration of rights will also afford relief from the uncertainty, insecurity, and controversy giving rise to these proceedings.

69. NexTrade is entitled to a declaration that PHLX' sale, offering for sale, and trading of long-term options without compensation to breaches the License Agreement and/or infringes NexTrade's rights in the '384 Patent.

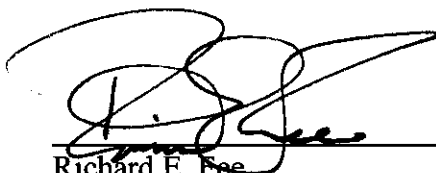
WHEREFORE, NexTrade respectfully requests this Court to (a) enter a declaratory

judgment that PHLX's sale, offering for sale, and trading of long-term options without compensation to breaches the License Agreement and/or infringes NexTrade's rights in the '384 Patent; (b) award to NexTrade the costs of bringing this action; and (c) grant to NexTrade all other relief this Court deems appropriate.

**DEMAND FOR JURY TRIAL**

NexTrade hereby demands a trial by jury on all issues so triable.

Respectfully submitted, this 2nd day of June, 2006.

A handwritten signature in black ink, appearing to read 'R. Fee', is written over a horizontal line.

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