MGE ENERGY INC
Form DEF 14A
April 04, 2005
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UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

SCHEDULE 14A

Proxy Statement Pursuant to Section 14(a) of the Securities

Exchange Act of 1934 (Amendment No.)

Filed by the Registrant x

Filed by a Party other than the Registrant ¨

Check the appropriate box:

¨ Preliminary Proxy Statement
x Definitive Proxy Statement
¨ Definitive Additional Materials
¨ Soliciting Material Pursuant to §240.14a-12

¨ **CONFIDENTIAL, FOR USE OF THE COMMISSION ONLY (AS PERMITTED BY RULE 14a-6(e)(2))**

MGE Energy, Inc.

(Name of Registrant as Specified In Its Charter)

(Name of Person(s) Filing Proxy Statement, if other than the Registrant)

Payment of Filing Fee (Check the appropriate box):

x No fee required.

¨ Fee computed on table below per Exchange Act Rules 14a-6(i)(4) and 0-11.

(1) Title of each class of securities to which transaction applies:

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(2) Aggregate number of securities to which transaction applies:

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(3) Per unit price or other underlying value of transaction computed pursuant to Exchange Act Rule 0-11 (set forth the amount on which the filing fee is calculated and state how it was determined):

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¨ Fee paid previously with preliminary materials.

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(1) Amount Previously Paid:

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(2) Form, Schedule or Registration Statement No.:

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(3) Filing Party:

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SEC 1913 (02-02)

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NOTICE OF THE ANNUAL MEETING OF SHAREHOLDERS

OF MGE ENERGY, INC.

Date:	Tuesday, May 10, 2005
Time:	11:00 a.m., local time
Place:	Marriott Madison West 1313 John Q. Hammons Drive Middleton, Wisconsin
Purpose:	To elect two Class I directors to terms of office expiring at the 2008 Annual Meeting of Shareholders,
	To ratify the selection of PricewaterhouseCoopers LLP as our independent registered public accounting firm for the year 2005, and
	To transact such other business as may properly come before the meeting

Shareholders of record at the close of business on March 4, 2005, are entitled to vote at the meeting. Your vote is important to us. Even if you plan to attend the meeting in person, please sign, date and return your proxy card, call the toll-free number or log on the Internet.

The matters to be acted upon at the meeting are described in the accompanying proxy statement.

By Order of the Board of Directors

TERRY A. HANSON

Vice President, Chief Financial

Officer and Secretary

April 4, 2005

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QUESTIONS AND ANSWERS

Q: When and where will the annual meeting take place?

A: The meeting will be held on Tuesday, May 10, 2005, at 11:00 a.m., local time, at the Marriott Madison West, 1313 John Q. Hammons Drive, Middleton, Wisconsin.

Q: Do I need a ticket to attend the meeting?

A: No; however, if you plan to attend the meeting, please fill out the enclosed reservation form and return it with your proxy card so we may have an indication of the number of shareholders planning to attend the meeting. If your shares are held through a broker or its nominee and you would like to attend the meeting, please see Voting How Street Name Holders May Vote on page 2.

Q: Why am I receiving this proxy statement?

A: We are sending this document to you because our Board of Directors is seeking your proxy to vote your shares at the meeting. The notice of annual meeting, proxy statement, and accompanying proxy card are first being mailed on or about April 4, 2005, to shareholders of record at the close of business on March 4, 2005.

Q: Why did I receive more than one copy of this proxy statement?

A: If you own our common stock in more than one account, such as individually and also jointly with your spouse, you may receive more than one copy of this document. To assist us in saving money and to provide you with better shareholder service, we encourage you to have any duplicate accounts registered in the same name and address. You may do this by contacting our Shareholder Services Department toll-free at (800) 356-6423 if you are calling from within the continental United States, or at (608) 252-4744 if you are calling from the Madison area.

Q: What is MGE Energy, Inc.?

A: We (MGEE) are an investor-owned public utility holding company formed in August of 2002. Our headquarters are in Madison, Wisconsin, and we are the parent company of Madison Gas and Electric Company (MGE), our principal subsidiary. MGE Energy s principal executive offices are located at 133 South Blair Street, Madison, Wisconsin 53703.

Q: What is the purpose of the meeting?

A: The purpose of the meeting is:

To elect two Class I directors to terms of office expiring at the 2008 Annual Meeting of Shareholders;

To ratify the selection of PricewaterhouseCoopers LLP as our independent registered public accounting firm for the year 2005, and

To transact such other business as may properly come before the meeting.

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VOTING

Number of Votes Per Share

Each share of common stock issued and outstanding as of the record date for the meeting is entitled to one vote at the meeting, except as described below for shareholders who own more than a specified percentage of the common stock.

The record date for the meeting is March 4, 2005. Holders of record as of such date can vote in person at the meeting or by proxy. By giving us your proxy, you are authorizing the individuals named on the proxy card (the proxies) to vote your shares in the manner you indicate. On March 4, 2005, there were 20,454,496 shares of our common stock issued and outstanding.

Our Articles of Incorporation contain a provision limiting the voting power of any shareholder who acquires more than 10 percent of our outstanding voting stock. In addition, under the Wisconsin Business Corporation Law, the voting power of shares held by any person in excess of 20 percent of the voting power in the election of directors is limited to 10 percent of the full voting power of the excess shares. To our knowledge, neither of these limitations currently applies to any shareholder.

How Street Name Holders May Vote

If you own shares through a broker, the registered holder of those shares is your broker or its nominee. If you receive our proxy materials from your broker, you should vote your shares by following the procedures specified by your broker. Your broker will tabulate the votes it has received from its customers and submit a proxy card to us reflecting those votes. If you plan to attend the annual meeting and vote your shares in person, you should contact your broker to obtain a broker s proxy card and our Shareholder Services Department (1-800-356-6423) to make a reservation for the meeting.

How Registered Holders May Vote

If you personally hold a certificate for your shares, or have shares held by us in the Dividend Reinvestment and Direct Stock Purchase Plan, then you are the registered holder. Shares you have accumulated in the Dividend Reinvestment and Direct Stock Purchase Plan are held by the administrator under the nominee name of Madge & Co. Those shares, including your certificate shares, will be voted in accordance with the direction given by you on your proxy.

As a convenience to you, we are providing you with the option to vote by proxy via the Internet or via toll-free touch-tone telephone. Refer to your proxy card for more information and instructions. If you prefer, you may cast your vote by returning your signed and dated proxy card. Instructions regarding all three methods of voting are included on the proxy card. The signature on the proxy card should correspond exactly with the name of the shareholder as it appears on the proxy card. Where stock is registered in the name of two or more persons, each of them should sign the proxy card. If you sign a proxy card as an attorney, officer, personal representative, administrator, trustee, guardian, or in a similar capacity, please indicate your full title in that capacity.

In voting for the election of directors in proposal 1, you may vote for the election of all of the nominees or you may withhold your votes as to all or specific nominees. In voting on the ratification of the selection of our independent registered public accounting firm in proposal 2, you can specify whether you approve, disapprove or abstain. If you sign and return the proxy card without specifying any instructions and without indicating expressly that you are not voting some or all of your shares on a particular proposal, your shares will be voted for the proposal.

Holders Needed to Establish a Quorum

A quorum is necessary to hold a valid meeting of shareholders. If holders of a majority of the outstanding shares of common stock are present in person or by proxy for a particular proposal, a quorum will exist for that

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proposal. In order to assure the presence of a quorum, please vote via the Internet, telephone, or sign and return your proxy card promptly in the enclosed postage-paid envelope even if you plan to attend the meeting. Abstentions and broker non-votes are counted as present for establishing a quorum. A broker non-vote occurs when a broker votes on one or more matters on the proxy card, but not on others because the broker does not have the authority to do so.

The Vote Necessary for Action to be Taken

The two persons receiving the greatest number of votes will be elected to serve as Class I directors. More than one-half of the shares present in person or by proxy and entitled to vote at the annual meeting must vote for the ratification of the selection of auditors in order for that proposal to be approved. Accordingly, withholding authority to vote for a director, abstentions and broker non-votes will not affect the outcome of the election of directors or the approval of any proposal.

Revocation of Proxies

If you are a registered holder of our common stock, you may revoke your proxy by giving a written notice of revocation to our Corporate Secretary at any time before your proxy is voted, by executing a later-dated proxy card that is voted at the meeting, or by attending the meeting and voting your shares in person. If your shares are held by a broker, you must contact your broker to revoke your proxy. Attendance at the meeting will not automatically revoke your proxy.

Electronic Access to Proxy Materials and Annual Report

Shareholders can elect to view future proxy statements and annual reports over the Internet instead of receiving paper copies in the mail. If you received a paper copy of the proxy statement and annual report and would prefer to access these via the Internet in the future, call Shareholder Services at 1-800-356-6423 (toll-free) or complete and mail the electronic access sign-up form enclosed with your proxy materials.

PROPOSAL 1 ELECTION OF DIRECTORS

As described below the Board of Directors consists of eight directors divided into three classes, with one class having two directors and two classes having three directors, with one class being elected each year for a term of three years. Accordingly, it is proposed that the two nominees listed below be elected to serve as Class I directors for three-year terms, to expire at the 2008 Annual Meeting and upon the election and qualification of their successors.

All of our directors serve concurrently as directors of MGE. Our Board of Directors has determined that all of our directors, other than Mr. Wolter, are independent as defined in the applicable Nasdaq Stock Market, Inc., listing standards.

Ms. Millner and Ms. Sollenberger are currently Class I directors whose terms expire at the 2005 Annual Meeting of Shareholders and who have been nominated by the Board for reelection.

Each of the nominees has indicated a willingness to serve if elected, and the Board has no reason to believe that any nominee will be unavailable. If any nominee should become unable to serve, it is presently intended that your proxy will be voted for a substitute nominee designated by the Board. Under the Company s retirement guidelines for directors, directors who have served as the chief executive officer or who have been retained as a salaried consultant shall resign from the Board no later than the date and time of the Annual Meeting of Shareholders following their 70th birthday.

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The following table sets forth information about the nominees and the current directors who will continue in office after the meeting.

THE BOARD RECOMMENDS A VOTE FOR ALL NOMINEES.

Names (ages)* and Business Experience	MGE** Director Since
Nominees ***(Class I) Term Expiring in 2008***	
Regina M. Millner (60), Madison, Wisconsin Attorney, analyst and commercial real estate broker for more than 26 years; President, RMM Enterprises, Inc., which specializes in complex real estate projects and provides legal, consulting, and brokerage services for private clients and governmental agencies; director of Meriter Hospital and Meriter Health Services and director of Physicians Plus Insurance Company.	1996
Donna K. Sollenberger (55), Verona, Wisconsin President and Chief Executive Officer of UW Hospital and Clinics since December 1999; Executive Vice President and Chief Operating Officer of City of Hope National Medical Center, Los Angeles, California, January 1997 to December 1999; Vice President for Hospitals and Clinics at M.D. Anderson Cancer Center, Houston, Texas, 1991-96; and director of Inacom, a privately held company.	2000
Members of the Board of Directors Continuing in Office	
Class II Term Expiring in 2006	
H. Lee Swanson (66), Cross Plains, Wisconsin Chairman of the Board and President, SBCP Bancorp, Inc.,	1988

and Chairman of the Board of the State Bank of Cross
Plains, with which he has been associated for more than
39 years; also director and trustee of Cornell College.

John R. Nevin (61), Madison, Wisconsin Executive Director, Center for Branch and Product Management, Executive Director, Grainger Center for Supply Chain Management, and Grainger Wisconsin Distinguished Professor, School of Business, University of Wisconsin-Madison, where he has been a faculty member for 34 years.	1998
Gary J. Wolter (50), Madison, Wisconsin Chairman of the Board of Directors, President and Chief Executive Officer of MGEE and MGE, of which he has been an Officer since 1989 and an employee since 1984; also director of Meriter Hospital and Meriter Health Services and member of the Board of Trustees of the University of Wisconsin Research Park.	2000

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Members of the Board of Directors Continuing in Office	MGE** Director Since
Class III Term Expiring in 2007	
Richard E. Blaney (68), Madison, Wisconsin	1974
Retired President of Richard Blaney Seeds Inc. and Blaney Farms, Inc., retail sales of hybrid seed corn, with which he was associated for more than 26 years; former President of Blaney Agri-Research Foundation and former director of the Wisconsin Agri-Business Council.	
Frederic E. Mohs (67), Madison, Wisconsin	1975
Partner in the law firm of Mohs, MacDonald, Widder & Paradise, of which he has been a member since 1968; also Regent Emeritus of the UW System, retired director of the UW Hospital and Clinics, and retired member of the Board of Trustees of the University of Wisconsin Research Park.	
F. Curtis Hastings (59), Madison, Wisconsin	1999
Chairman of J. H. Findorff & Son, Inc., commercial and industrial general contractors and design builders, with which he has been associated for 34 years; also director of National Guardian Life Insurance Co.	

* Ages as of December 31, 2004.

** Directors of MGE Energy, Inc., since becoming the holding company of MGE in August 2002.

PROPOSAL 2 RATIFICATION OF PRICEWATERHOUSECOOPERS LLP AS OUR INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

The second proposal to be considered at the Annual Meeting is the ratification of our selection of PricewaterhouseCoopers LLP as our independent registered public accounting firm for 2005. If the shareholders do not ratify the selection or if PricewaterhouseCoopers LLP declines to act or otherwise becomes incapable of acting or if their appointment is otherwise discontinued, we will appoint other independent

accountants.

We selected PricewaterhouseCoopers LLP to audit our consolidated financial statements for 2004. PricewaterhouseCoopers LLP, our independent registered public accountant in 2004, is expected to have a representative present at the 2005 Annual Meeting who may make a statement and will be available to respond to appropriate questions.

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Our Audit Committee approves each engagement of the independent registered public accounting firm to render any audit or non-audit services before the firm is engaged to render those services. The Chairman of the Audit Committee or other designated Audit Committee member may represent the entire Audit Committee for purposes of this approval. Any services approved by the Chairman or other designated Audit Committee members are reported to the full Audit Committee at the next scheduled Audit Committee meeting.

Independent Registered Public Accounting Firm Fees Disclosure	2004 Fees	2003 Fees
Audit Fees		
Audit of financial statements and internal controls(1)	$ 824,250	$ 199,000
Review of SEC filings and comfort letters	$ 44,000	$ 43,700
Total Audit Fees	**$ 868,250**	**$ 242,700**
Audit Related Fees		
Financial accounting and reporting standards consultation	$ 40,000	$ 14,000
Fee to access online accounting standards library(2)	$ 1,500	$ 1,400
Total Audit Related Fees	**$ 41,500**	**$ 15,400**
Tax Fees		
Review of federal and state income tax returns	$ 16,000	$ 14,900
Tax advice on financial accounting issues	$ 0	$ 6,400
Total Tax Fees	**$ 16,000**	**$ 21,300**
All Other Fees		
Financial analysis for generation projects	$ 87,500	$ 198,400
Total All Other Fees	**$ 87,500**	**$ 198,400**

(1) The increase in 2004 reflects the increased work that was required in connection with the independent registered public accounting firm s attestation report on our assessment of our internal control over financial reporting, both of which are required under the Sarbanes-Oxley Act of 2002.

(2) Annual license fee to access online library of professional financial reporting and assurance literature maintained by PricewaterhouseCoopers LLP, which library we consult in the preparation of our financial statements.

No de minimis exceptions to this approval process are allowed under the Audit Committee Charter; and thus, none of the services described in the preceding table were approved pursuant to Rule 2-01(c)(7)(i)(C) of Regulation S-X.

THE BOARD RECOMMENDS A VOTE FOR THE RATIFICATION OF PRICEWATERHOUSECOOPERS LLP AS OUR INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM FOR 2005.

TRANSACTION OF OTHER BUSINESS

Our Board of Directors does not intend to present any business for action by our shareholders at the meeting except the matters referred to in this document. If any other matters should be properly presented at the meeting, it is the intention of the persons named in the accompanying form of proxy to vote thereon in accordance with the recommendations of our Board of Directors.

Please complete and sign the accompanying form of proxy whether or not you expect to be present at the meeting and promptly return it in the enclosed postage-paid envelope.

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BENEFICIAL OWNERSHIP

Beneficial Ownership of Common Stock

The following table lists the beneficial ownership of our common stock as of March 4, 2005 (except as otherwise noted) of each director and nominee, the individuals named in the summary compensation table, the directors and executive officers as a group, and each person known by us to be the beneficial owner of more than 5 percent of the outstanding shares of our common stock. In each case, the indicated owner has sole voting power and sole investment power with respect to the shares shown except as noted.

Name	Number of Shares Beneficially Owned	Percent of Outstanding Common Stock
Richard E. Blaney	1,947	*
Kristine A. Euclide	1,509	*
F. Curtis Hastings	3,072	*
Terry A. Hanson	5,499(1)(2)	*
Mark T. Maranger	1,289	*
Regina M. Millner	933	*
Frederic E. Mohs	12,341(3)	*
Scott A. Neitzel	2,679(1)	*
John R. Nevin	1,478	*
Donna K. Sollenberger	1,187	*
H. Lee Swanson	7,000	*
Gary J. Wolter	8,713(1)(2)	*
All directors and executive officers as a group (16 persons)	63,351(2)	*

* Less than 1 percent.

(1) T. Hanson, S. Neitzel, and G. Wolter are directors of Madison Gas and Electric Foundation, Inc., and as such have shared voting and investment power in an additional 12,000 shares of our common stock held by the Foundation. The Foundation was formed by, and receives contributions primarily from, MGE, which contributions are used for charitable purposes.

(2) Includes common stock held under two employee stock ownership plans for the account of executive officers of MGE with respect to which those persons have sole voting but no investment power: T. Hanson, 587 shares; G. Wolter, 121 shares; and directors and executive officers as a group, 5,242 shares.

(3) Includes 628 shares of common stock with respect to which Mr. Mohs is trustee of a trust for the benefit of his children.

Section 16(a) Beneficial Ownership Reporting Compliance

Section 16(a) of the Securities Exchange Act of 1934 requires our directors, executive officers, and persons who own more than 10 percent of our common stock to file reports of ownership and changes in ownership with the Securities and Exchange Commission (SEC). Those persons

are also required to furnish us with copies of all such reports. Based solely on our review of the copies of the reports received by us and written representations from certain reporting persons, we note that our directors and executive officers (we do not have any greater than 10 percent shareholders) filed all required reports during or with respect to the year ended December 31, 2004, on a timely basis.

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BOARD OF DIRECTORS INFORMATION

Meetings and Committees

We have an Audit Committee, a Compensation Committee, an Executive Committee, and a Personnel Committee.

The following table sets forth the current membership of each committee and the number of meetings held during 2004:

Name	Audit Committee	Compensation Committee	Executive Committee	Personnel Committee
Richard E. Blaney	X	X	X	
F. Curtis Hastings	X			X
Regina M. Millner	X			X
Frederic E. Mohs	X	X*	X	X
John R. Nevin	X			X
Donna K. Sollenberger	X			X
H. Lee Swanson	X*	X	X	
Gary J. Wolter			X	
Number of Meetings	4	3	0	0

* Committee Chairperson.

The Boards of Directors of MGEE and MGE each met 12 times during 2004. Each director attended at least 75 percent of the aggregate number of meetings of the Boards and the committees on which the director served.

The function of our Audit Committee is to meet with our internal auditors and independent registered public accounting firm and discuss with them the scope and results of their audits, accounting practices, and the adequacy of our internal controls. Our Board of Directors has determined that Mr. Swanson is an audit committee financial expert, as defined by applicable SEC rules. Mr. Swanson and the other members of the Audit Committee are independent as defined in applicable Nasdaq Stock Market, Inc., listing standards.

The function of the Compensation Committee is to review the salaries, fees, and other benefits of officers and directors and recommend compensation adjustments to the Board. Each of the committee members is independent as defined in applicable Nasdaq Stock Market, Inc., listing standards.

The Executive Committee acts in lieu of the full Board and between meetings of the Board. The Executive Committee has the powers of the Board in the management of our business and affairs, except action with respect to dividends to shareholders, election of principal officers, or the filling of vacancies on the Board or committees created by the Board.

The Personnel Committee is responsible for recommending to our full Board of Directors nominees for election as directors and officers. The committee operates under authority of a Board resolution under which it is charged with responsibility for making those recommendations. It does not have a charter. The committee reviews the composition of our Board and considers the environment in which we operate to determine the qualifications and areas of expertise needed by Board candidates. It considers, among other things, the standing in the community of a prospective candidate; the background and experience of the candidate, including the number of other public, private, and not-for-profit boards on which the candidate serves; other business and professional commitments of the candidate; and our needs for certain skills and experience. It also expects candidates to act in an ethical manner and with integrity in applying their best business judgment when acting on behalf of the Company and its shareholders. Finally, under our Bylaws a director must be a shareholder of the Company. The committee works with our management to identify and attract qualified candidates. Neither the committee nor the Company uses the services of a third party to assist in the identification or evaluation process.

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Each of the committee members is independent as defined in applicable Nasdaq Stock Market, Inc., listing standards.

The Personnel Committee also considers qualified director candidates suggested by our shareholders. Shareholders can suggest candidates by writing to MGE Energy, Inc., Post Office Box 1231, Madison, Wisconsin 53701-1231, Attention: Corporate Secretary. Submissions should describe the candidate s background, experience, and ownership of our shares and otherwise address the factors considered by the committee as described in the preceding paragraph. The Personnel Committee will apply the same standards in considering candidates recommended by shareholders as it applies to other candidates.

Policy Regarding Annual Meeting Attendance

Our policy is to encourage our directors to attend the Annual Meeting of Shareholders. For the past five years, all of our directors were present at each of the annual meetings.

Audit Committee Report

The Audit Committee oversees our financial reporting process on behalf of our Board. The Audit Committee consists of seven independent directors. Its duties and responsibilities are set forth in the Audit Committee Charter adopted by the Board. The Audit Committee Charter was last published in our April 11, 2003, proxy statement as Exhibit A.

In the course of fulfilling its responsibilities, the Audit Committee has:

Reviewed and discussed with management the audited financial statements for the year ended December 31, 2004;

Discussed with the representatives of our independent registered public accounting firm, PricewaterhouseCoopers LLP (PwC), all matters required to be discussed by Statement on Auditing Standards No. 61, *Communication with Audit Committees* (as supplemented);

Received the written disclosures and the letter from PwC required by Independence Standards Board Standard No. 1, *Independence Discussions with Audit Committees;*

Discussed with PwC their independence from the Company and management; and

Considered whether the provision by PwC of non-audit services is compatible with maintaining their independence.

Based on the foregoing, the Audit Committee recommended to the Board that the audited financial statements referred to above be included in our annual report on Form 10-K and the annual report to shareholders for the fiscal year ended December 31, 2004.

Richard E. Blaney	John R. Nevin
F. Curtis Hastings	Donna K. Sollenberger
Regina M. Millner	H. Lee Swanson, Chairperson
Frederic E. Mohs	

Director Compensation

MGEE directors who are not employees of MGE receive an annual retainer of $16,000, plus $1,200 for each Board meeting attended and $750 for each Audit, Compensation, Executive, or Personnel Committee meeting attended. Mr. Wolter receives no additional compensation for serving as a director. The chairperson of the Audit Committee receives an additional $10,000 retainer. The chairperson of the Compensation Committee receives an additional $5,000 retainer.

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EXECUTIVE COMPENSATION

Summary Compensation Table

The following table sets forth compensation information for 2002, 2003, and 2004 for our Chief Executive Officer and our four other most highly compensated executive officers serving as such on December 31, 2004, whose salary exceeded $100,000 for 2004.

		Annual Compensation			Long-Term Compensation			
					Awards		Payouts	
Name and Principal Position	Year	Salary ($)	Bonus ($)	Other Annual Compensation ($)(3)	Restricted Stock Awards($)	Securities Underlying Options (#)	LTIP Payouts ($)	All Other Compensation ($)(4)
Gary J. Wolter (CEO) (1)								
Chairman, President and	2004	389,672	158,000	11,232	0	0	0	40,282
	2003	376,492	140,000	5,578	0	0	0	18,836
Chief Executive Officer	2002	362,252	65,000	2,624	0	0	0	16,566
Mark T. Maranger	2004	195,640	50,000	0	0	0	0	14,209
	2003	190,644	42,000	0	0	0	0	5,819
Senior Vice President	2002	184,200	35,000	0	0	0	0	5,603
Kristine A. Euclide								
Vice President and	2004	180,768	65,000	1,355	0	0	0	6,394
	2003	170,616	61,000	513	0	0	0	6,424
General Counsel	2002	159,652	45,000	104	0	0	0	4,625
Terry A. Hanson								
Vice President, Chief Financial	2004	177,756	60,000	1,289	0	0	0	20,122
	2003	170,080	47,000	560	0	0	0	5,830
Officer and Secretary	2002	164,328	35,000	200	0	0	0	11,007
Scott A. Neitzel (2)								
Vice President-Energy Supply	2004	174,128	65,000	0	0	0	0	18,148
	2003	157,584	57,000	0	0	0	0	7,965
Policy	2002	133,622	40,000	0	0	0	0	6,545

(1) Promoted to Chairman, President and Chief Executive Officer on February 1, 2002.

(2) Vice President-Business Development and Fuels until July 1, 2002, when he was promoted to Vice President-Energy Supply Policy.

(3) Amounts shown are above-market interest rates credited to deferred compensation accounts.

(4) Amounts shown for all other compensation for 2004 are company contributions to a 401(k) defined contribution plan, pay to cover tax on the value of restricted stock distributions, $250 for a holiday bonus, value of corporate logo clothing, and pay for unused vacation. The 401(k) company contribution for 2004 was $6,150 for Mr. Wolter, $5,869 for Mr. Maranger, $4,743 for Ms. Euclide, $5,171 for Mr. Hanson and $5,357 for Mr. Neitzel. Pay for taxes on the distribution of restricted stock was $19,236 for Mr. Wolter and $8,015 for Messrs. Maranger, Hanson, and Neitzel. The taxable value of corporate logo clothing was $75 for Mr. Maranger, $55 for Ms. Euclide, $70 for Mr. Hanson, and $75 for Mr. Neitzel. Pay for unused vacation in 2004 was $14,646 for Mr. Wolter, $1,346 for Ms. Euclide, $6,616 for Mr. Hanson, and $4,451 for Mr. Neitzel.

Pension Plan and Supplemental Retirement Plan

MGE has a noncontributory qualified defined benefit pension plan covering its salaried employees. The amount of pension is based upon years of service and high 60-month average earnings in the ten years prior to retirement.

The following table indicates the estimated maximum retirement benefits payable (unreduced for survivor protection) at the normal retirement age of 65 for specified compensation and years of service classifications. All compensation shown in the salary and bonus columns of the summary compensation table is included in compensation under the pension plan, subject to any statutory restrictions imposed by the Internal Revenue Code.

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Information in this table is based on the pension plan formula for years of service credit earned in 1986 and subsequent years. The retirement benefits are not subject to any reduction for Social Security benefits received by the employees or for any other offset amounts.

Pension Plan Table (1)

	Annual Pension at Normal Retirement Age of 65 After Years of Service Indicated Below(2)				
High Five-Year Average Annual Salary	**10 Years**	**15 Years**	**20 Years**	**25 Years**	**30 Years or More**
$125,000	$ 17,500	$ 26,250	$ 35,000	$ 43,750	$ 52,500
$150,000	$ 21,000	$ 31,500	$ 42,000	$ 52,500	$ 63,000
$175,000	$ 24,500	$ 36,750	$ 49,000	$ 61,250	$ 73,500
$210,000	$ 29,400	$ 44,100	$ 58,800	$ 73,500	$ 88,200

(1) The retirement benefits reflect limits imposed by the Internal Revenue Code on benefit amounts and covered compensation.

(2) The pension plan table does not reflect service credit prior to 1986 when the pension plan required employee contributions. The normal retirement pension for employees with service credits prior to 1986 will exceed the amounts shown in the pension plan table, depending on their years of pre-1986 service and contributions made to the pension plan.

The estimated annual retirement benefit payable at normal retirement age of 65 under the pension plan formula (assuming continuation of 2004 compensation levels through retirement and taking into account employee contributions and service credits for 1985 and prior years) is $110,477 to Mr. Wolter, $36,486 to Mr. Maranger, $45,613 to Ms. Euclide, $98,048 to Mr. Hanson, and $83,884 to Mr. Neitzel.

The full credited years of service under the pension plan are 21 for Mr. Wolter, four for Mr. Maranger, three for Ms. Euclide, 23 for Mr. Hanson, and seven for Mr. Neitzel.

Officers of MGE are covered under separate nonqualified supplemental retirement agreements which provide a supplemental retirement benefit to the pension plan. Under the terms of the agreements covering Mr. Wolter, Mr. Hanson, and Mr. Neitzel, the supplemental retirement benefit is a designated percentage ranging from 55 to 70 percent of the final 60-month average earnings less the benefit payable from the pension plan. Under the terms of the agreements covering Mr. Maranger and Ms. Euclide, the supplemental retirement benefit is a designated percentage ranging from 20 to 40 percent of the final 60-month average earnings in addition to the benefit payable from the pension plan. In all of the agreements, the designated percentage is based on the officer s age at retirement. The estimated supplemental annual retirement benefit payable at normal retirement age of 65 under the supplemental retirement agreements (assuming continuation of 2004 compensation levels through retirement) for MGE s executive officers is $273,069 to Mr. Wolter, $61,870 to Mr. Maranger, $52,794 to Ms. Euclide, $68,556 to Mr. Hanson, and $83,681 to Mr. Neitzel.

Deferred Compensation Plan

Officers of MGE are permitted to defer a portion of their current salary under a nonqualified deferred compensation plan initiated in 1984. Five officers contributed to the plan during 2004. Participants in the plan are entitled to receive deferred compensation upon termination of active employment. Deferred compensation under this plan does not constitute compensation as defined under the pension plan described above, but is considered compensation under the supplemental retirement agreements.

MGE has entered into a trust agreement for the purpose of assuring the payment of its obligations under the supplemental retirement agreements and deferred compensation plan. Under the trust agreement, in the event of a change in control or potential change in control of MGE, MGE will be obligated to deliver to the trustee cash or

marketable securities having a value equal to the present value of the amounts which MGE is obligated to pay under the supplemental retirement agreements and the deferred compensation plan and the costs of maintaining the trust. Change in control is defined generally as the acquisition by any person, subject to certain exceptions, of beneficial ownership of 20 percent or more of our common stock; a change in the majority of the Board of Directors; certain mergers or similar transactions involving MGE s assets where, among other conditions, the current shareholders do not constitute at least 60 percent of the shareholders of the resulting or acquiring entity; or a liquidation of MGE.

Severance Plans

MGE has entered into individual severance agreements with certain key employees, including Mr. Wolter, Mr. Maranger, Ms. Euclide, Mr. Hanson, and Mr. Neitzel. Under these agreements, the employee is entitled to a severance payment following a change in control of MGE as defined above if, within 24 months after the change in control, employment with MGE is terminated by (i) MGE, (ii) the employee for good reason, or (iii) the employee for any reason during the 30-day period commencing one year after the date of the change in control. Each agreement has a three-year initial term, but on the first anniversary of execution and each anniversary thereafter, the agreement is extended for an additional year, unless either MGE or the employee gives notice not to extend the agreement or a change in control of MGE has occurred. Severance payments to Mr. Wolter, Mr. Hanson, or Mr. Neitzel will be equal to three times the employee s annual base salary plus three times the highest bonus paid during any of the five years preceding a change in control. Severance payments to Mr. Maranger will be equal to one times his annual base salary plus one times the highest bonus paid during any of the five years preceding a change in control. Severance payments to Ms. Euclide will be equal to two times her annual base salary plus two times the highest bonus paid during any of the five years preceding a change in control. If the employee receives severance benefits following a change in control, the employee s health, life, and disability benefits are continued for up to one, two, or three years (depending on the individual agreement), and the employee also will be grossed up for any excise taxes the employee may incur. In circumstances not involving a change in control of MGE, Mr. Wolter, Mr. Maranger, Ms. Euclide, Mr. Hanson, and Mr. Neitzel, like other salaried employees, are entitled under MGE s general severance plan to a payment equal to two weeks of compensation plus the employee s weekly compensation multiplied by the number of years of employment, not to exceed 24 years.

Report on Executive Compensation

Compensation Philosophy

The principal goal of the compensation program is to pay employees, including executive officers, at levels which are:

- Reflective of how well we are achieving our corporate mission;
- Consistent with our current financial condition, earnings, rates, and total shareholder return, and the projected Consumer Price Index;
- Reflective of individual performance and experience; and
- Competitive in the marketplace.

We strive to administer our compensation program in a fair and consistent manner.

We periodically hire outside consultants to do compensation studies. Executive salaries are established within a range that reflects competitive salary levels for similar positions in similar-sized gas and electric utilities, similar-sized companies outside of the utility industry, and other Wisconsin utilities. The utilities used for salary comparison are not the same companies included in the performance graph peer group in this proxy statement. When examining compensation peer groups, it was determined more appropriate to consider similar-sized utilities, other similar-sized companies, and other Wisconsin utilities.

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The midpoint (or middle) of an executive s salary range is approximately equal to the median salary level of the surveyed utilities. An executive s position in the range reflects his or her performance over a period of years in that position, the executive s experience in that position, and our performance.

Specific individual or company performance targets are not set. Instead, an executive s salary within the salary range is determined by subjectively evaluating the individual s performance and experience and our performance.

While our current compensation program has functional adequacy to retain and fairly compensate executives, the Compensation Committee and the full Board review the objectives of the executive compensation program on a continuing basis. Each year, the Compensation Committee reviews and recommends to the Board annual salaries, salary grades and ranges, and the overall salary program design for executives.

From time to time the Compensation Committee considers awarding bonuses to executives in the form of cash and/or stock. These bonuses may be made for extraordinary company or individual performance, because of a desire to retain an executive by making that executive s compensation more competitive, to align the long-term interests of executives with shareholders, and for other reasons.

Executive Compensation

Performance factors such as earnings, rates, shareholder return, and other available financial criteria were used in determining the CEO s and other executive officers positions in his or her salary range. Other criteria such as gas and electric reliability, customer service, and responsiveness to industry change were also examined.

Officer salaries were set effective May 1, 2004, and a cash bonus was granted to officers after year-end based on 2004 performance. Among the significant achievements considered in setting the salary and bonuses of the CEO and other senior executives were the following: Continued strong financial performance with record earnings for 2004; the highest bond rating in the country for a combination gas and electric utility from Standard & Poor s; construction progress as planned with the cogeneration facility on the University of Wisconsin-Madison campus; purchased gas costs among the lowest of all the Wisconsin gas utilities; contracts negotiated and completed for purchase of additional wind resources; ISO 14001 certification for environmental management at Blount Generating Station; preparation for MISO Day-2 markets; creative public-private partnerships to protect the quality of the environment within our service territory; an innovative program to involve MGE customers in energy planning; and favorable reliability comparisons to other utilities.

In May of 2004, the CEO s annual salary was set at $394,116. The CEO was awarded a bonus of $158,000 based on 2004 performance. The CEO s total compensation for 2004 remains below the midpoint of the market total compensation for both general industry and similar-sized utilities in the compensation study.

Richard E. Blaney

Frederic E. Mohs, Chairperson

H. Lee Swanson

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Company Performance

The following graph shows a five-year comparison of cumulative total returns for us, Russell 2000, and the EEI Investor-Owned Electrics Index, weighted according to each company s market capitalization as of the beginning of each year.

MGE Energy, Inc.

Financial Performance

Cumulative Five-Year Total Return Comparison

Assumes $100 invested on Dec. 31, 1999, in each of the Company s Common Stock, Russell 2000, and the EEI Index.

Total return assumes reinvestment of dividends.

	MGEE	Russell 2000	EEI Index
1999	$ 100	$ 100	$ 100
2000	$ 120	$ 97	$ 148
2001	$ 148	$ 99	$ 135
2002	$ 158	$ 79	$ 115
2003	$ 194	$ 116	$ 142
2004	$ 232	$ 138	$ 175

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MGE Energy, Inc.

Financial Performance

MGEE versus Wisconsin Peer Group

NOTE: This graph is for comparison purposes only. It is to show how our Five-Year Total Return compares to the other Investor-Owned Wisconsin utilities.

Assumes $100 invested on December 31, 1999, in each of the Company s Common Stock and the Wisconsin Peer Group average.

The Wisconsin Peer Group average is weighted based on market capitalization at the beginning of the year. Total return assumes reinvestment of dividends.

	MGEE	WI Peer Group
1999	$ 100	$ 100
2000	$ 120	$ 124
2001	$ 148	$ 128
2002	$ 158	$ 119
2003	$ 194	$ 167
2004	$ 232	$ 185

Wisconsin Peer Group:

Alliant Energy Corp.

Wisconsin Energy Corp.

WPS Resources Corp.

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OTHER INFORMATION

Expenses of Solicitation

We will bear the cost of soliciting proxies for the annual meeting. Proxies will be solicited by mail and may be solicited personally by our directors, officers, or employees who will not receive special compensation for such services. We have retained Morrow & Co., Inc., to solicit proxies at a fee of $6,000 plus expenses.

Shareholder Proposals for 2006 Annual Meeting

Shareholder proposals intended to be presented at the 2006 Annual Meeting of Shareholders must be received in writing at our principal executive offices (133 South Blair Street, Post Office Box 1231, Madison, Wisconsin 53701-1231, Attention: Secretary) prior to December 5, 2005, in order to be considered for inclusion in our proxy statement and proxy related to that meeting. Any proposal submitted must be in compliance with Rule 14a-8 of Regulation 14A of the SEC.

Our Bylaws set forth additional requirements and procedures regarding the submission by shareholders of matters for consideration at the 2006 Annual Meeting of Shareholders, including a requirement that those proposals be given to the Secretary not later than the close of business on the 75th day and not earlier than the close of business on the 100th day prior to the first anniversary of the preceding year s annual meeting. Accordingly, a shareholder proposal intended to be considered at the 2006 Annual Meeting of Shareholders must be received by the Secretary at the address set forth above after the close of business on January 30, 2006, and on or prior to the close of business on February 24, 2006.

Contacting our Directors

A shareholder who desires to contact members of our Board of Directors may do so by sending an e-mail to directors@mgeenergy.com or by writing to: Board of Directors, MGE Energy, Inc., Post Office Box 1231, Madison, Wisconsin 53701-1231. The correspondence should identify the shareholder and his, her, or its address and shareholdings. That correspondence is received by our Corporate Secretary s office. Our Corporate Secretary s office will forward matters within the Board s purview to them. Ordinary business matters, such as issues relating to customer service, employment, or commercial transactions, will be directed to the appropriate areas within the Company for handling. Comments or concerns regarding financial reporting, legal compliance, or other ethical issues should be directed to EthicsPoint at www.ethicspoint.com or phone 1-866-384-4277, a third party we have selected for receiving and handling such communications from shareholders as well as our employees. Communications to EthicsPoint may be sent anonymously. EthicsPoint will forward those communications directly to the Chairman of our Audit Committee.

By Order of the Board of Directors,

GARY J. WOLTER

Chairman of the Board,

President and Chief Executive Officer

Dated: April 4, 2005

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Mr. Thain, then, resigned from the presidency of Goldman Sachs because he saw an opportunity to help the Exchange work through its problems and make a difference. (Thain Dep. at 8-9). In view of the evidence on Mr. Thain s motivation to join the Exchange, the central theme of plaintiffs allegations against him that he acted in the merger discussions based on the theoretical possibility that the transaction might marginally increase the value of Goldman Sachs stock that may or may not have been held in a blind trust rings hollow.[2] Had Mr. Thain

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[1] All cited deposition transcripts and exhibits are attached to the accompanying Affirmation of Adam J. Wasserman, dated November 11, 2005 (Wasserman Aff.).

[2] In fact, the Archipelago/NYSE announcement on April 20, 2005, had no impact on the price of Goldman Sachs stock.

been motivated by money, he would have never left Goldman Sachs for the NYSE in the first place. (*See* Thain Dep. at 22-23). As one director stated: it is inconceivable to me that Mr. Thain, who I think takes his job very seriously and understands the historical consequences of this merger, would put his reputation, or more importantly, the reputation of the New York Stock Exchange at risk for what fundamentally would not be a great deal of money for someone like John Thain . . . . [It] wouldn t make any sense to me that that any pecuniary interest by John Thain could possibly have been a driver. (Brown Dep. at 137-38). Other directors echoed this theme. *See, e.g.,* Von Der Heyden Dep. at 65 (I had no reason to believe that he [Thain] had any self-interest other than the interests of the members of the New York Stock Exchange in mind when he proposed this transaction.). Moreover, as discussed below, the evidence shows that Mr. Thain acted well within the authority granted him by the Board and took appropriate steps to guard against a conflict of interest.

POINT II

THE BOARD AUTHORIZED THAIN

<u>TO EXPLORE STRATEGIC ALTERNATIVES</u>

From the outset of his tenure as CEO, Mr. Thain was encouraged by the Exchange s board to explore strategic alternatives. As former chairman Reed stated, when John first joined as CEO and he and I had our first conversations, I made it clear to him one of his big jobs was to try to figure out what the future of the Exchange might be, because the existing situation didn t seem sustainable in the long term. (Reed Dep. at 7). The Board had known for years that the Exchange was behind in terms of becoming an electronic marketplace, that there were complications to diversifying its product base, and that . . . it made a lot of sense to buy rather than build . . . . (Brown Dep. at 97). Thus, the Board authorized Mr. Thain to pursue strategic alternatives, and expected and encouraged discussions between John [Thain], and . . . other

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exchanges. (McDonald Dep. at 43). Accordingly, John Reed and John Thain were authorized to pursue in any manner they chose appropriate to ascertain if there was a beneficial relationship with Archipelago or ISE or any other company they thought fit the strategic needs that we had described. (Woolard Dep. at 43).

Several board members confirmed that Mr. Thain s authority extended to the point of negotiating, without specific pre-approval, tentative deals that could then be presented for Board scrutiny. Director Woolard identified strategic alternatives that the board clearly understood and had authorized John Thain to pursue to bring back possible considerations for the board to act on. (Woolard Dep. at 23). Similarly, Alice Rivlin testified that the board has given its blessing to exploring alternatives, to having management explore these alternatives, and come back with what seemed to be the best one. (Rivlin Dep. at 136; *see also* McDonald Dep. at 43; Carter Dep. at 56).

The Board also specifically understood and agreed that the exploration of strategic alternatives would include Archipelago, the first all electronic stock exchange in the United States. Initially, the Board focused on both Archipelago and a then privately held electronic exchange known as ISE. Indeed, McKinsey & Company identified Archipelago as a leading strategic partner as early as August 2004. Likewise, as director Woolard noted, the two most likely marriage partners appeared to be ISE and Archipelago. And so once ISE was no longer a potential partner, the interest turned to Archipelago. (Woolard Dep. at 33; *see also* Reed Dep. at 10). Thus, the record shows unmistakably that, well before the proposed merger agreement was presented to the Board in April 2005, the directors had encouraged Mr. Thain to explore this [Archipelago] option, as well as other options. (Shapiro Dep. at 67).

POINT III

THAIN HAD NO OBLIGATION TO RECUSE

HIMSELF FROM NEGOTIATIONS WITH ARCHIPELAGO

John Thain was not required to recuse himself from the Archipelago merger on the theory that he may have owned, in a blind trust over which he has no control, shares of one of the stockholders of Archipelago. To the contrary, as a leader of the NYSE who was hired and charged by the Board to explore strategic opportunities, it would have been an abdication of his responsibilities to recuse himself from the mission for which he had been recruited.

John Thain and the Exchange s management team negotiated a merger with Archipelago not Goldman Sachs. Mr. Thain never worked for Archipelago. Mr. Thain never owned any shares of Archipelago. Mr. Thain never had any interest in Archipelago. As is discussed in the Independent Directors Pre-Hearing Brief, the conflict allegedly created by the initial holdings of Mr. Thain s trust in shares of Goldman Sachs, which in turn, along with several other leading financial institutions, held shares in Archipelago, is far too attenuated to have required his recusal. For one thing, there was no basis on which Mr. Thain could know whether or not his trust still held stock in Goldman Stock, which was precisely the point of the arrangement. For another, plaintiffs have not provided any evidence suggesting that Goldman s investment in Archipelago had any material effect on the stock price of the investment bank, which throughout 2005 has had a market capitalization of more than $45 billion. To the contrary, in the month after the announcement of the NYSE/Archipelago merger agreement, Goldman Sachs stock traded at prices generally *lower* than the month preceding the announcement, even though the Dow Jones Industrial Average was generally trending *higher* and the price of Archipelago rose dramatically.

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Given the vital importance to the NYSE of pursuing strategic opportunities, it was imperative that Mr. Thain, as CEO, take a leading role (along with Amy Butte and other senior management) in any merger discussions with Archipelago. Yet, under, plaintiffs theory, Mr. Thain would have been prohibited from pursuing strategic initiatives not only with Archipelago, but with any other exchange or entity in which Goldman Sachs either had an investment or played a significant advisory role. Requiring Mr. Thain to abdicate an imperative duty as CEO merely because he had been hired from an investment bank that owned stock in an acquisition candidate would have been contrary to the qualification that led Mr. Reed to hire Mr. Thain in the first place, namely his invaluable experience in the financial community.

Further, John Thain s involvement (as CEO of the NYSE) in negotiating the merger agreement did not violate either the NYSE s Constitution or his employment letter. Article IV, Section 15 of the Constitution states that [n]o director shall participate in the deliberation or adjudication of any matter in which he or she is *personally interested.* (Emphasis added). Even if this provision were applicable to non-regulatory matters, as discussed above, Mr. Thain was not personally interested in the merger with Archipelago.

Nor does Mr. Thain s employment letter support plaintiffs position. In the letter, Mr. Thain stated that [i]n order to avoid any appearance of conflict of interest, I shall recuse myself until otherwise requested by the Board from any particular matters *directly* involving Goldman Sachs or its affiliates[.] (Letter from J. Thain to J. Reed, Jan. 15, 2004, attached as Wasserman Aff. Ex. M; emphasis added). This text illustrates what was apparent to the Board at the time of Mr. Thain s engagement: that as he explored strategic alternatives, indirect contact with Goldman Sachs was altogether possible, if not likely. Moreover, Chairman Reed and ultimately the Board had specifically approved the use of Goldman Sachs both in connection

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with the exploration of strategic alternatives in general and the Archipelago transaction in particular. (*See* Reed Dep. at 10-12). Under these circumstances, plaintiffs tortured attempt to disqualify the Exchange s CEO because his blind trust may hold stock in an investment bank that facilitated merger discussions should be rejected.

POINT IV

THAIN AVOIDED CONFLICTS OF INTEREST WITH GOLDMAN SACHS

Virtually all financial institutions have a relationship with the Exchange in some capacity. Goldman Sachs, like many other investment banks, owns a number of seats on the Exchange. Recognizing that the Exchange, as a regulatory institution, would inevitably have some direct dealings with Goldman Sachs, Mr. Thain took precautionary steps when he joined the Exchange to insulate himself from conflicts with his former employer.

Chief among these steps was the establishment of a blind trust to hold Mr. Thain s investments, thereby assuring that he could not be in a position to assess the effects of the Exchange s actions upon his personal investments. The trust was established under the supervision of director McDonald and the Board s audit committee. The Exchange s Board was well aware of the blind trust and recognized that Mr. Thain s lack of knowledge as to what s in the trust and his inability to influence or know what s in the trust provides significant insulation from . . . a conflict of interest. (Brown Dep. at 137; *see also* Van der Heyden Dep. at 68; Carter Dep. at 40).

A second protective measure was a provision in Mr. Thain s employment agreement with the Exchange requiring him to step aside, until otherwise directed by the Board, from particular matters involving Goldman Sachs or its affiliates[.] (Wasserman Ex. M). This assured that Mr. Thain would not become engaged in a negotiation in which Goldman Sachs was across the table from the Exchange.

Mr. Thain acted consistently with these protective measures when Goldman Sachs surfaced as a marriage broker in discussions with Archipelago. Mr. Thain stepped aside from the negotiation of an engagement agreement with Goldman Sachs, and the Exchange s general counsel and chairman filled that role. In fact, the engagement letter was signed by John Reed, not John Thain. And since the terms of Goldman s engagement had been negotiated by others, Mr. Thain, on behalf of the Exchange, remained free to utilize that firm s services to facilitate the merger discussions with Archipelago.

POINT V

THAIN AGGRESSIVELY NEGOTIATED THE 70/30 SPLIT

AND PLAINTIFFS OTHER ALLEGATIONS ARE WITHOUT MERIT

Although both sides understood the potential benefits of a merger, Archipelago harbored serious concerns about entering an agreement with the Exchange. Putnam thought that the Exchange s financials were horrible, and was concerned, in view of the NYSE s history as a not-for-profit corporation, that the Exchange would not be successful as a for-profit entity. (Putnam Dep. at 87). Similarly, Mr. Putnam assigned little or no value to the Exchange s trading rights.

After the initial meetings with Mr. Thain in January and early February 2005, Mr. Putnam concluded that we [Archipelago] should get 40 percent, and they [NYSE] should get 60. (Putnam Dep. at 94-95). Archipelago s board of directors targeted a one-third interest as the minimum acceptable share in a merger. William Ford, a director of Archipelago and the CEO s of its largest stockholder (General Atlantic), bluntly informed Putnam on March 19, 2005 that we need to own a third of the combined business. (Email from W. Ford to G. Putnam, March 19, 2005, attached as Wasserman Aff. Ex. N).

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But despite Archipelago s adamant views on obtaining no less than a 33% interest, at the meeting of March 21, 2005, Mr. Thain reached tentative agreement with Putnam on a split of 70/30. This accord was the product of over two months of hard bargaining between the management teams of the Exchange and Archipelago, and, by all accounts, more closely approximated the Exchange s negotiating target than Archipelago s. Putnam testified that my board thought we should have gotten more than 30. And I went into that meeting [3/21/05] with a number higher than 30 that was the least I should have walked out with. (Putam Dep. at 120).

After the March 21st meeting, it remained for the Board of Directors of the Exchange to determine whether a 70/30 split was acceptable. As director Carter emphasized, [t]hey [Thain and Putnam] may have shook hands [on the 70/30 split]; but Thain knew that he had to have his board and shareholders approval. (Carter Tr. at 176). In other words, as another director noted, [i]t is the Board that ultimately decided on the 70/30 split, not Thain, and the Board did that on the basis of a very extensive analysis of the overall situation of both companies. (Shapiro Dep. at 70).

Finally, plaintiffs allegations about specific acts or omissions of Thain in the course of negotiating the merger are also unfounded. For example, plaintiffs claim that Thain deliberately delayed bringing in Lazard Freres to render a fairness opinion until April 7, 2005. Yet, April 7th was the day of the first board meeting after a tentative agreement had been reached between the NYSE and Archipelago management. Hence, Thain properly waited to recommend an investment bank for a fairness opinion until that meeting because it was the Board s job to hire their independent financial advisor, and so it would have been inappropriate for Amy [Butte] or [John] to select anyone prior to the Board deciding who they wanted. (Thain Dep. at 157).

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Similarly, plaintiffs assert that Thain should have reviewed with the Board a power point presentation concerning the Exchange s position as a merger candidate that was prepared by HSBC Bank for the Blackstone Group. However, according to Blackstone s own testimony, the presentation merely outlined the thesis, a hypothesis, a supposition that HSBC had, and was too embryonic an idea to discuss or verify[.] (Chu Dep. at 13, 25). Indeed, Blackstone had no expectation that Thain would present the materials to the Board. (Chu Dep. at 46). Even so, out of an abundance of caution, Thain did provide the materials to the Board s chairman, despite the fact that the proposal offered no strategic opportunities whatever for the Exchange. (*See* Thain Dep. at 134-35).

Conclusion

Plaintiffs efforts to vilify Thain in the hope of enjoining a NYSE seatholder vote on the merger are unavailing. For the reasons explained above, as well as those set forth in the opposition papers submitted by Mr. Thain s co-defendants, plaintiffs factual allegations concerning John Thain s role in the merger discussions with Archipelago fail to support their motion for a preliminary injunction.

Dated: New York, New York
November 11, 2005

DECHERT LLP

By: ______________________________

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Annex C

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

-- x

IN RE NEW YORK STOCK EXCHANGE/ : Index No. 601646/05 (Ramos, J.)

ARCHIPELAGO MERGER LITIGATION

-- x

THE NYSE INDEPENDENT DIRECTORS

PRE-HEARING BRIEF IN OPPOSITION TO

PLAINTIFFS MOTION FOR A PRELIMINARY INJUNCTION

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November 11, 2005

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PRELIMINARY STATEMENT[1]

The Independent Directors

The New York Stock Exchange s independent directors approve this historic merger and firmly believe that it is in the best interests of the NYSE and its members. Who are the independent directors? They are a sophisticated group of corporate officers, lawyers, investment bankers, government officials and academics with experience in some of the most high-profile transactions in recent memory. They are:

Chairman Marshall N. Carter, former State Street Bank chairman and CEO,

Herbert M. Allison, Jr., current chairman, president and CEO of TIAA-CREF and former Merrill Lynch president and chief operating officer,

Robert B. Shapiro, former Monsanto chairman and CEO,

James McDonald, Rockefeller & Co. president and CEO,

Shirley Ann Jackson, president of Rensselaer Polytechnic Institute and a director of IBM, FedEx and USX,

Edgar S. Woolard, former DuPont Co. chairman and CEO,

Sir Dennis Weatherstone, former chairman and CEO of J.P. Morgan & Co.,

Karl M. von der Heyden, former PepsiCo vice-chairman and chief financial officer and RJR Nabisco co-chairman and CEO,

Alice M. Rivlin, former Federal Reserve Board Vice-Chair, White House Budget Director and Congressional Budget Office Director;

Ellyn L. Brown, a practicing lawyer, professor of securities law at Villanova and former Maryland Securities Commissioner.

Six of them (Chairman Carter, Allison, Weatherstone, Shapiro, McDonald and Jackson) joined the new, independent board at its inception in December 2003, another (Woolard) in August 2004

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[1] Factual citations herein are to the Affirmation of William J. Sushon in Opposition to Motion for Preliminary Injunction (Sushon Aff.) and attached exhibits. Deposition testimony is cited as [witness] Dep. at__ .

and the remaining three (von der Heyden, Rivlin and Brown) were elected at the most recent annual meeting on April 7, 2005.

They are truly independent. None of them has financial ties to Goldman Sachs (which Plaintiffs erroneously claim engineered the NYSE-Archipelago merger to enrich itself), Archipelago (the merger target that Plaintiffs claim is the conduit for Goldman s wealth transfer), or NYSE CEO John Thain (the former Goldman President who, Plaintiffs maintain, somehow dominated the independent board that hired him). None of them will personally profit from the transaction in any way. The board s independence is central to its mission: it was formed for the sole purpose of restoring public confidence in the Exchange following the controversies of the Grasso era. The key to that goal has been ushering the Exchange into the 21st century, with a new business model and trading platform that would ensure a prosperous and scandal-free Exchange.

This Motion

By this motion, Plaintiffs attempt to supplant the independent directors good faith determination that the Archipelago merger is in the NYSE s and its seatholders best interests. In so doing, they seek to substitute their own meanderings for decades of fiduciary jurisprudence and a factual record of the directors diligence and deliberation.

As this Court recognized in deciding the motions to dismiss, the touchstone for evaluating any directors decision-making is the business judgment rule. That century-old rule forbids shareholders from using lawsuits to second-guess independent directors good-faith determinations. To that end, it imposes a legal presumption that a board s actions were informed and proper. That presumption can only be overcome if Plaintiffs satisfy the burden of demonstrating that the directors breached their fiduciary duties of loyalty or care. Plaintiffs do not even approach satisfying that burden.

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Plaintiffs cannot show board disloyalty, because they cannot prove that the directors (i) would receive a personal benefit from the transaction different from the NYSE members; or (ii) were so beholden to a self-interested party that their independent judgment was eviscerated. Nowhere in their 69-page submission do Plaintiffs cite *any* evidence that any of the ten independent directors is self-interested. Nor is there *any* evidence in more than 300,000 documents produced and 30 depositions that any independent director had financial ties to Goldman or any other interested party. And contrary to Plaintiffs misleading contention, nothing in the record comes close to establishing that the board was beholden to Thain. This is not a case where a domineering CEO packed the board with yes-men and cronies to do his bidding. Rather, the NYSE board is led by its non-executive chairman, Marshall Carter, just as it had been before April 7, 2005, by Carter s predecessor John Reed. The independent directors hired Thain to manage the Exchange and help them formulate and implement a strategic vision. He answers to them.

Nor can Plaintiffs establish a duty of care breach. The directors conduct here is worlds away from the gross negligence Plaintiffs must prove to satisfy their burden. While Plaintiffs intone repeatedly that the independent directors were a rubber stamp, the facts squarely refute this characterization. Among other things, the directors:

- Did not rush to judgment in less than two weeks. Rather, the vote approving this transaction represented the culmination of nearly two years work in carefully considering the Exchange s strategic alternatives;

- Hired their own independent advisors lawyers to advise them on their fiduciary duties and bankers and accountants to provide a fairness opinion and assess Archipelago s financial reporting. What s more, the board did not blithely accept whatever those advisors told them, but probed the bases for the advisors conclusions with thoughtful questions, both orally and in writing;

- Relied on the Exchange s management to prepare financial projections for the NYSE, evaluate Archipelago s projections and analyze Archipelago s technology. Again, even though the directors completely trusted (as they are entitled to trust) the

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Exchange s CFO, Amy Butte, and President, Robert Britz, the directors spent the better part of two lengthy board meetings questioning management s conclusions;

Probed with Thain and their advisors the basis for the 70-30 equity participation ratio, and satisfied themselves that it was fair;

Instructed Thain to get more time for the board to consider the proposed transaction so that the directors could ensure that all their concerns were addressed;

Rejected Thain s suggestion that the Exchange set aside 5% of its equity in the new combined company to fund an ESOP, ultimately approving only a 1.4% set-aside.

Far from being grossly negligent, the independent directors conduct epitomizes responsible board decisionmaking.

Unable to satisfy their burden under the business judgment rule, Plaintiffs simply pretend that it doesn t exist. Remarkably, their brief makes only a single passing reference to the rule in a page 10 parenthetical to a case citation. Plaintiffs never argue, let alone show, that they can satisfy their burden under the rule. Instead, Plaintiffs posit two legal theories in asking this Court to impose exacting entire fairness review, rather than deferential business judgment review. Both theories are frivolous.

First, Plaintiffs argue that the transaction is void, and thus subject to entire fairness review, because Thain was conflicted when he negotiated with Archipelago. But under the very statute Plaintiffs cite, N-PCL § 715, the transaction is not void because the board approved the transaction with knowledge of all the facts regarding Thain s supposed conflict his former Goldman employment, his deposit of his Goldman stock in a blind trust, Goldman s ownership interest in Archipelago, and Goldman s engagement by both the Exchange and Archipelago.

Second, Plaintiffs argue that the transaction was *ultra vires* under the NYSE Constitution because Thain participated in deliberations over the merger. Of course, any alleged interest Thain had in Archipelago was so attenuated that it could not constitute a conflict, especially in view of the blind trust the board imposed on Thain s Goldman holdings. But even if Thain had a

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conflict within the purview of the NYSE Constitution (which he did not), as a matter of law, the independent board s unanimous vote approving the Archipelago merger ratified the otherwise *ultra vires* act. Thus, Plaintiffs are stuck with the business judgment rule presumption they do not even try to overcome.

This case presents a textbook example of why the time-tested business judgment rule is necessary. Plaintiffs admitted in deposition that a NYSE-Archipelago merger is a good idea. But with the benefit of 20/20 hindsight, a team of lawyers and experts, scores of hours of depositions, and the dissection of hundreds of thousands of e-mails and documents, Plaintiffs nitpick and mischaracterize the board s deliberative process and the deal s terms. Although these attempts fail as a matter of law under the business judgment rule, they are also factually inaccurate:

The board did not seek to value the Exchange as a stand-alone, for-profit, public entity because the board had determined that the NYSE s single-product business, with declining revenues and market share, would be an IPO disaster ; but it did review valuation of the Exchange as a private, for-profit entity;

As discussed above, the board tested the projections underlying Lazard s financial model by questioning both Lazard and Butte;

The board considered whether to ask Lazard to analyze the seatholder stock lockup s effect on the merger consideration s value, but determined that the lockup was more likely to *increase* the value seatholders received because it would stabilize the combined companies stock price;

Among the numerous questions Herb Allison posed to management and the board discussed was the likely effect of the SEC s NMS regulation on Archipelago s financial projections;

The NYSE commissioned Towers-Perrin to evaluate the proposed employee stock ownership plan (ESOP) and ultimately approved a much lower set-aside than had originally been proposed;

At bottom, this case is not about any fiduciary duty breach it s about Plaintiffs trying to toot their own horn and squeeze a few more dollars out of the deal. The first paragraph of

Plaintiffs brief reveals as much: they concede that they do not seek an order precluding any business combination between the NYSE and Archipelago. In other words, Plaintiffs acknowledge that their board of directors chose the right transaction, but they are carping about the price. This is precisely the sort of money-grab the business judgment rule is designed to foreclose. The motion should be denied.

ARGUMENT

POINT I

THE BUSINESS JUDGMENT RULE INSULATES THE BOARD S APPROVAL

The business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.[2] Courts long ago adopted the rule in recognition that (i) a corporation s board of directors is in a superior position to make business decisions for a company; (ii) courts are ill-equipped to perform this function;[3] and (iii) imposing liability on directors based on negligence or inattention could induce a board to avoid authorizing risky investment projects to any extent.[4] Under the business judgment rule, a plaintiff cannot ask a court to rethink what a reasonably informed board decided in good faith:

It is the essence of the business judgment rule that a court will not apply 20/20 hindsight to second guess a board s decision, except in

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2 *Levandusky v. One Fifth Avenue Apartment Corp.*, 75 N.Y.2d 530, 537 38 (1990).

3 *See Auerbach v. Bennett,* 47 N.Y.2d 619, 630 (1979) ; *Kamin v. American Express Co*., 86 Misc. 2d 809, 812 (Sup. Ct. N.Y. Co. 1975), *aff d*, 54 A.D.2d 654 (1st Dep t 1976) (The directors room rather than the courtroom is the appropriate forum for thrashing out purely business decision.); *see also Joy v. North*, 692 F.2d 880, 886 (2d Cir. 1982) ([A]fter-the-fact litigation is a most imperfect device to evaluate corporate business decisions.).

4 *Gagliardi v. TriFoods Int l Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996) (Obviously, it is in the shareholders economic interest to offer sufficient protection to directors from liability for negligence, *etc*., to allow directors to conclude that, as a practical matter, there is no risk that, if they act in good faith and meet minimalist proceduralist standards of attention, they can face liability as a result of a business loss.). Because Delaware fiduciary law is substantially identical to New York s fiduciary duty standards, New York courts often rely on Delaware authorities in deciding fiduciary breach issues. *See, e.g.*, *Gray v. Furia Org., Inc.*, 896 F. Supp. 144, 148 (S.D.N.Y. 1995).

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rare cases [where] a transaction may be so egregious on its face that the board approval cannot meet the test of business judgment.[5]

Accordingly, absent the directors breach of their fiduciary duties of loyalty or care, a court may not re-examine the reasons the directors exercised their powers to advance the common and general interests of the corporation.[6] This Court has already recognized these governing legal principles in the law of this case:

In recognition that courts are ill-equipped to evaluate the complexities of directors business decisions, adherence to the business judgment rule bars judicial inquiry into the propriety of actions taken by corporate directors made in good faith on behalf of the corporation. The presumptive applicability of the business judgment rule is rebutted, and judicial inquiry thereby triggered, however, by a showing that a breach of fiduciary duty occurred.[7]

And although Plaintiffs choose not to discuss the business judgment rule in their brief, at least *ten cases they cite* apply it.[8]

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5 *Brehm v. Eisner*, 746 A.2d 244, 261 (Del. 2000) (concluding that business judgment rule protected directors deal approval where they did not know exact amount of severance package but had informed themselves regarding method of calculation) (internal citations and quotations omitted); *Greenwald v. Batterson*, No. 16475, 1999 WL 596276, at *7 (Del. Ch. Jul. 26, 1999) (holding that business judgment rule protected directors approval of a financing transaction that in hindsight proved harmful to the company s value); *see also Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53 (Del. 1989) (holding that the business judgment rule protected board s deliberate and knowledgeable decision to accept one offer over another).

6 *Id.* at 538 (citing *Pollitz v. Wabash R.R. Co.*, 207 N.Y. 113, 124 (1912)). Under N-PCL § 717(a), non-profit entities directors shall discharge [their duties] . . . in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions. This is identical to the fiduciary standard for directors of for-profit entities in New York. *S.H. & Helen R. Scheuer Family Found, Inc. v. 61 Assocs.*, 179 A.D.2d 65, 70 (1st Dep t 1992).

7 *Higgins v. N.Y. Stock Exch., Inc.*, No. 601646/2005, 2005 WL 2140168, at *13 (N.Y. Sup. Sep. 2, 2005).

8 *Amfesco Indus., Inc. v. Greenblatt*, 172 A.D.2d 261, 264 (1st Dep t 1991) (Pl. Br. at 11) ; *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 61 (Del. 1993) (Pl. Br. at 13); *Gimbel v. Signal Cos.*, 316 A.2d 599, 609 (Del. Ch. 1974) (Pl. Br. at 33); *Hanson Trust PLC v. ML SCM Acquisition Inc.*, 781 F.2d 264, 273 (2d Cir. 1986) (Pl. Br. at 14 15); *In re IXC Communications, Inc. S holders Litig.*, No. C.A. 17324, 1999 WL 1009174, at *4 (Del. Ch. Oct. 27, 1999) (Pl. Br. at 33); *S.H. & Helen R. Scheuer Family Found., Inc. v. 61 Assocs.*, 179 A.D.2d 65, 69 (1st Dep t 1992) (Pl. Br. at 11); *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (Pl. Br. at 15); *State of Wisconsin Inv. Bd. v. Bartlett*, No. C.A. 17727, 2000 WL 238026, at *4 (Del. Ch. Feb. 24, 2000) (Pl. Br. at 33); *Stroud v. Grace*, 606 A.2d 75, 83 (Del. 1992) (Pl. Br. at 25); and *Treadway Cos., Inc. v. Care Corp.*, 638 F.2d 357, 382 (2d Cir. 1980) (Pl. Br. at 16).

The record here shows no fiduciary duty breach and, therefore, no basis for Plaintiffs to substitute their judgment for the board s. The business judgment rule that Plaintiffs wish away bars the relief they seek.

A. Plaintiffs Cannot Demonstrate a Likelihood that the Directors Breached Their Duties of Loyalty

While the duty of loyalty requires directors to place the company s and shareholders best interests over any personal interest,[9] courts do not lightly conclude that a director has breached this duty. To establish a duty of loyalty breach, Plaintiffs must show that a majority of the directors (i) stood to receive a personal benefit from the transaction not equally enjoyed by the company s shareholders; or (ii) were dominated by a self-interested party.[10]

Plaintiffs do not even attempt to show that any of the independent NYSE directors stood to reap a personal benefit from the Archipelago merger. It follows therefore that to establish director disloyalty, Plaintiff must show that at least six of the eleven NYSE board members were so beholden to or dominated by an interested party that their discretion was sterilized.[11]

1. Alleged Director Ties to Goldman

Plaintiffs only attempt to satisfy this standard in their 69-page pre-hearing submission is to quote this Court s summary of the original Complaint s allegation that an unspecified majority of the directors had Goldman conflicts. (Pl. Br. at 8.) As the Court acknowledged, the law

9 *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1345 (Del. 1987) (In short, directors must eschew any conflict between duty and self-interest.).

10 *Marx v. Akers*, 88 N.Y.2d 189, 200 (1996) (holding that plaintiffs can show duty of loyalty breach only if the directors will receive a disproportionate personal gain from the transaction or the board is dominated by a self-interested party); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (noting majority must be tainted to establish domination).

11 *See Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993) (noting that a director lacks independence when he is so under [another s] influence that [his] discretion would be sterilized.); *see also Health-Loom Corp. v. Soho Plaza Corp.*, 209 A.D.2d 197, 198 (1st Dep t 1994) (noting plaintiff must demonstrate that a majority of the board is interested to defeat the protections of the business judgment rule); *Stoner v. Walsh*, 772 F. Supp. 790, 801 (S.D.N.Y. 1991) (same); *see also Cede & Co.*, 634 A.2d at 361 (same).

required it to accept as true the Complaint s allegations and construe them liberally in Plaintiff s favor.[12] Now, however, the Plaintiffs must carry an evidentiary burden. They cannot do so, because they simply have no evidence that any independent board member was beholden to Goldman.

In fact, all the evidence establishes the independent directors *disinterest*:

The Amended Complaint alleges absolutely no Goldman connection whatsoever for three directors Weatherstone, Brown and Allison, who led the board in analyzing and questioning the proposed Archipelago merger.[13]

There is not a single allegation that Shapiro currently has either a personal or business relationship with *anyone* at Goldman, and Plaintiffs did not ask a single question on that subject during Shapiro s deposition.

As to Carter and von der Heyden, the evidence shows only that companies in which they years earlier held executive positions engaged Goldman long ago, but that they do not have any financial relationship with Goldman. (Sushon Aff., Ex. 12, Carter Dep. at 189 90; Sushon Aff., Ex. 24, von der Heyden Dep. at 147.) That companies for which they worked hired Goldman in the past demonstrates, if anything, that *Goldman* was beholden to *those directors*.[14]

As to McDonald, he testified that he was actually in an adversarial relationship with Goldman, because it was representing Pell Rudman when McDonald was attempting to lead a management buy-out. (Sushon Aff., Ex. 13, McDonald Dep. at 202 03.)

As for Jackson, the Amended Complaint s only Goldman-relationship allegation is that she was a Medtronic director and William George, a current Goldman director, was once its CEO. (Am. Compl. ¶ 126.) But Jackson testified that William George has not had any participation on the Medtronic board since I have been on the board. (Sushon Aff., Ex. 26, Jackson Dep. at 121.)

With respect to Rivlin, the Amended Complaint alleges that she was beholden to Goldman because she served in the Clinton administration with former Treasury Secretary Robert Rubin between 1994 and 1996, *nearly a decade ago*. Even if that service had occurred in this century, it would still not be probative of any Goldman

12 *Higgins,* 2005 WL 2140168, at *11 ([a]ssuming plaintiffs allegations are true for the purposes of deciding these motions, while liberally construing the complaints in plaintiff s favor).

13 (*See* Am. Compl. ¶¶ 40-41, 46; Sushon Aff., Ex. 47 at NYSE/BOD 0000496 502; Sushon Aff., Ex. 52 at NYSE/BOD 0000465 467; Sushon Aff., Ex. 31, Allison Dep. at 187-92.)

14 *See In re Gen l Motors (Hughes) S holder Litig.*, No. Civ. A. 20269, 2005 WL 1089021, at *8 (Del. Ch. Mar. 7, 2005) (payment must confer material benefit on *director* at expense of corporation or its shareholders to make director beholden.

tie. Rivlin served with Rubin only *after* (i) he had left Goldman and (ii) the Clinton administration required him to place *all* his assets (including any Goldman stock) into a blind trust, and she has had no contact with him or any other Goldman employee concerning Archipelago. (Sushon Aff., Ex. 23, Rivlin Dep. at 15, 184.)

While the Amended Complaint alleges that Woolard once served on the DuPont board with John Weinberg (Goldman s former chairman), Woolard testified that he never spoke to Weinberg or anyone else at Goldman while he was considering the Archipelago merger. (Sushon Aff., Ex. 18, Woolard Dep. at 106.)

Thus, the evidence shows that *none* of the independent directors much less a majority was sterilized by ties to Goldman. Plaintiffs have simply failed to follow through on the Complaint s much heralded promise of showing that the independent directors were beholden to Goldman.[15]

2. Thain s Alleged Domination of the Board

Plaintiffs assert that Thain had a conflict in the NYSE-Archipelago merger because he owned Goldman stock and Goldman, in turn, owns approximately 15% of Archipelago s stock. (Pl. Br. at 7.) Plaintiffs then assert that because of this conflict, Thain used Goldman to dominate the board. Even if Plaintiffs could show that Thain had a disabling personal interest in the Archipelago merger (and they cannot), they do not even attempt to establish that the board was beholden to Thain. Indeed, the Court has already dismissed allegations that Thain somehow coerced a board majority to approve the Archipelago merger.[16] And with good reason: the factual record shows that Thain did not dominate the NYSE board.

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[15] *See Cede & Co.*, 634 A.2d at 363 (To disqualify a director . . . there must be evidence of disloyalty.) (citing *Citron v. Fairchild*, 569 A.2d 53, 65 66 (Del. 1989)); *Beam v. Stewart*, 845 A.2d 1040, 1050 (Del. 2004) ([M]ere personal friendship or a mere outside business relationship, standing alone, are insufficient to raise a reasonable doubt about a director s independence.); *Unocal v. Mesa Petroleum, Inc.*, 493 A.2d 946, 958 (Del. 1985); *In re Compucom Sys., Inc. Stockholders Litig*., No. Civ. A. 499-N, 2005 WL 2481325, at *9 (Del. Ch. Sept. 29, 2005) (personal friends and outside business relationships are each insufficient to raise doubt of director s ability to exercise independent judgment) .

[16] *Higgins*, 2005 WL 2140168, at *16 (holding that the Complaint failed to allege well-pleaded facts sufficient to demonstrate Thain s coercive control of the board.).

In those cases in which a CEO had been found to dominate a board of directors, the CEO has either been the company s controlling shareholder[17] or the company s founder with substantial holdings.[18] And the controlling CEOs in those cases typically hand-picked the boards they dominated.[19]

This case could not be further from the domination cases. Thain, of course, is neither a controlling member of the Exchange nor a founder. Nor did he hand-pick the Exchange s board. To the contrary, the independent NYSE board hired Thain after making the sound corporate governance decision to separate the Exchange s Chairman and CEO roles. (*See* Sushon Aff. ¶ 19.) Thus, the directors do not owe their positions to Thain. Instead, Thain owes his job to the board. This fact, in and of itself, dooms any Thain domination theory.[20]

But there is plenty more. Among the many examples of the board exercising its control over Thain are the following:

The Board took steps to ensure that Thain s Goldman stock holdings would not affect his performance as CEO. Audit Committee Chairman McDonald, after consulting the NYSE s internal audit group and general counsel, supervised PwC in creating a blind trust for Thain s Goldman stock. The trust, modeled after Robert Rubin s trust when he left Goldman to become U.S. Treasury Secretary, ensures that Thain has no knowledge of his holdings or their value. (Sushon Aff., Ex. 11, Thain Dep. at 24.) To this day, the board s audit committee, the NYSE s internal audit function and PwC all continue to monitor the blind trust. (Sushon Aff., Ex. 11, Thain Dep. at 23.)

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17 *See, e.g., Hollinger Int l, Inc. v. Black*, 844 A.2d 1022, 1031 (Del. Ch. 2004), *aff d*, 872 A.2d 559 (Del. 2005) (*per curiam*) (observing that CEO controlled 72.8% of the vote); *In re Emerging Communications, Inc. S holders Litig*., No. Civ. A. 16415, 2004 WL 1305745, at *2 (Del. Ch. Jun. 4, 2004) (observing that CEO owned 52%).

18 *See, e.g., In re eBay Inc. Sec. Litig*., No. C.A. 19988-NC, 2004 WL 253521, at *1, 3 (Del. Ch. Jan. 23, 2004) (noting CEO-founder owned 23% of stock, and together with management controlled over 40% of the vote, sufficient to elect all directors).

19 *See, e.g., Hollinger*, 844 A.2d at 1029 (Black . . . hand-selected the board); *see also Emerging Communications*, 2004 WL 1305745, at *33 35 (discussing CEO s extensive business and personal relationships with each board member).

20 *See In re J.P. Morgan Chase & Co*., No. Civ. A. 531-N, 2005 WL 1076069, at * 9 (Del. Ch. Apr. 29, 2005) (rejecting plaintiffs contention that CEO dominated the board because the outside directors collectively have the power to dismiss [the CEO] and his management team. . . . and [CEO] reports to a board of directors that he cannot fire or remove.).

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Former Chairman John Reed, after consulting with the board, negotiated and signed Goldman s engagement letter, which spelled out precisely what Goldman s role would (and would not) be. (Sushon Aff., Ex. 28, Reed Dep. at 6; Sushon Aff., Ex. 13, McDonald Dep. at 60 61, 79, 80.) Likewise, when the time came to negotiate Goldman s fee, Carter not Thain signed the agreement, and only after the board fully approved it. (Sushon Aff., Ex. 38 at NYSE 00336.)

The board never allowed Thain to bind it to the 70-30 equity participation ratio: [i]t is the Board that ultimately decided on the 30/70 split, not Mr. Thain . . . . (Sushon Aff., Ex. 2, Shapiro Dep. at 70; *accord* Sushon Aff., Ex. 12, Carter Dep. at 99; Sushon Aff., Ex. 13, McDonald Dep. at 102.)

When the board felt that it needed more time to consider the proposed merger, the calendar was extended (Sushon Aff., Ex. 2, Shapiro Dep. at 109 10, 104 ([T]he calendar . . . got extended a couple of times in order to make sure that we had had a chance to do our job.).)

The board did not meekly accept Thain s and his management team s view that the Archipelago merger is in the Exchange s best interests; instead, it analyzed the transaction itself and grilled Thain and other NYSE officers about the merger and its basis, including in the April 18 and 19 board meetings. (*See, e.g.*, Sushon Aff., Exs. 38, 39.)

The board selected its own advisors to help it evaluate the transaction, engaging PricewaterhouseCoopers (PwC), O Melveny & Myers (OMM) and Lazard, none of whom had any relationship with Thain. (Sushon Aff. ¶¶ 67 77.)

The board did not hesitate to excuse Thain from board meetings to discuss matters outside his presence, having done so at least three separate times while considering the NYSE s strategic options, including the Archipelago transaction. (Sushon Aff., Ex. 27 at NYSE 0078; Sushon Aff., Ex. 59 at NYSE 00084; Sushon Aff., Ex. 39 at NYSE 00453.);

When Thain suggested that the Board agree to setting aside 5% of shares in an employee stock option program for management participation, the Board rejected this suggestion, ultimately agreeing only to set aside 1.4% of the NYSE s shares in the combined company. (Sushon Aff., Ex. 12, Carter Dep. at 116 17.)

Under these circumstances, Plaintiffs cannot satisfy the burden of proving that a majority of the board was somehow beholden to or dominated by Thain.[21]

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[21] *See Merchant s Nat l Properties, Inc. v. Meyerson*, No. Civ. A. 13139, 2000 WL 1041229, at *4 6 (Del. Ch. Jul. 24, 2000) (granting defendants summary judgment on plaintiff s duty of loyalty claim, and holding that Meyerson, as CEO, did not control or dominate the board); s*ee Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993) (noting that a director lacks independence when he is so under [another s] influence that [his] discretion would be sterilized).

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Because the record shows that a board majority had no personal interest in the Archipelago merger, nor was beholden to any interested person or entity, Plaintiffs cannot demonstrate a likelihood of success on any alleged duty of loyalty breach.

3. Plaintiffs Baseless Void/*Ultra Vires* Theory

Unable to parlay the Thain-Goldman connection into a duty of loyalty breach, Plaintiffs concoct two legal theories in arguing that the connection renders the Archipelago merger void or *ultra vires*. Both theories are baseless.

Plaintiffs argue that the transaction is void because Thain negotiated it while having a self-interest through his Goldman blind trust holdings. But the merger is not voidable for at least two reasons. *First,* even assuming Thain had a substantial financial interest in Archipelago (which as shown below he does not) the board s April 20 vote sanitized the conflict. N-PCL § 715 provides a safe harbor for transactions in which an officer or director has a substantial financial interest by restoring business judgment rule protection to the transaction through a sanitizing vote of disinterested directors. The statute requires only that the approving independent directors know the material facts as to such officer s or director s interest in such contract or transaction :

(a) No contract or other transaction . . . between a corporation and any other corporation, firm, association or other entity in which one or more of its directors or officers are directors or officers, or have a substantial financial interest, shall be either void or voidable . . . (1) [i]f the material facts *as to such director s or officer s interest* in such contract or transaction . . . are disclosed in good faith or known to the board . . . and the board or committee authorizes such contract or transaction by a vote sufficient for such purpose without counting the vote or votes of such interested director or officer . . . .[22]

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[22] *See* N-PCL § 715(a)(1) (McKinney s 2005) (emphasis added); *Cf. Rapoport v. Schneider*, 29 N.Y.2d 396, 402 (1972) ([W]here interested directors, who have disclosed their interest, vote on a resolution, the resolution is nonetheless valid if a majority of the disinterested directors vote in its favor.) (citing the corporate corollary to § 715, N.Y. B.C.L. § 713(a)(1)); *Park River Owners Corp. v. Bangser Klein Rocca & Blum, LLP*, 269 A.D.2d 313 (1st Dep t 2000) (citing the corporate corollary to § 715); *Freer v. Mayer*, 223 A.D.2d 667, 668 (2d Dep t 1996) (citing the corporate corollary to § 715)).

Thain fully disclosed his Goldman holdings to the board (*see* Sushon Aff., Ex. 10 at NYSE 103155 59), and the wholly independent board unanimously authorized the merger.[23] The board also knew that Goldman owned a 15.6% Archipelago interest. (*See* Sushon Aff., Ex. 20 at 52; Sushon Aff., Ex. 2, Shapiro Dep. at 208 (board knew Goldman was an owner of Archipelago).) Armed with full knowledge concerning Thain s purported Goldman and Archipelago conflicts, the board nevertheless approved the merger in its April 20 vote, satisfying Section 715 s safe harbor.[24]

Second, Thain has no financial interest in Archipelago, the counterparty to the challenged transaction. He merely owns an interest (blindly and, thus, theoretically) in a large entity that owns a minority interest in Archipelago. This indirect, theoretical conflict is too attenuated to be material.[25] Thain himself has no knowledge of his Goldman holdings (Sushon Aff., Ex. 11, Thain Dep. at 19), and the board recognized that, whatever they were, Thain would not materially benefit from an NYSE-Archipelago transaction.[26] (Sushon Aff., Ex. 24, von der Heyden Dep. at 67 ([W]hatever the possible fraction of an ownership indirectly that he might have through his investment in Goldman and Archipelago would be so small . . . in respect to his total net worth that it wouldn t be a factor in whatever he was doing in this transaction.); *accord* Sushon Aff., Ex. 32, Brown Dep. at 137.)

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23 *Cf. Rapoport*, 29 N.Y.2d at 402; *Park River*, 269 A.D.2d at 313; *Freer*, 223 A.D.2d at 668.

24 *Id*.

25 *See Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002) (holding that an interest is only disqualifying if it is material . . . in the context of the director s economic circumstances, as to have made it improbable that the director could perform her fiduciary duties to the . shareholders without being influenced by her overriding personal interest).

26 *See id.* ([I]t is not enough to establish the interest of a director by alleging that he received *any* benefit not equally shared by the stockholders. Such benefit must be alleged to be material to that director.) (emphasis in original).

Plaintiffs alternate legal theory to end-run the business judgment rule is that the merger is void as *ultra vires* because Thain s negotiations with Archipelago violated the NYSE Constitution s prohibitions on self-interested transactions. (Pl. Br. at 9-10.) This contention is wrong for at least three independent reasons.

First, Thain did not violate the NYSE Constitution. Article IV, Section 15 prohibits a director from participating in the deliberation or adjudication of any matter in which he or she is personally interested. As discussed above, Thain s alleged Archipelago interest is too attenuated to render him personally interested.[27]

Second, Thain s negotiations with Archipelago even if they violated the NYSE Constitution (and they do not) were not *ultra vires*. Not all prohibited conduct is *ultra vires*: [u]ltra vires conduct goes to the validity of an action taken by a *de jure* corporation which is beyond the powers granted in its corporate charters.[28] But here, Thain s conduct at most, involve[d] the erroneous exercise of [his] delegated duties, [and thus his] acts are not ultra vires.[29] Plaintiffs do not contend nor could they that the NYSE-Archipelago merger is

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[27] *See* pp. 13 14, s*upra*; *see also Shapiro v. Rockville Country Club, Inc.,* No. 15308-02, 2004 WL 398980, at * 10 (N.Y. Sup. Feb. 23, 2004) (holding that a director is only interested in the challenged transaction when that director receives a direct financial benefit different from the benefit received generally by all shareholders) (citations omitted); *see also Cede & Co. v. Technicolor, Inc*., 634 A.2d 345 (Del. 1993). Likewise, Plaintiffs contention that Thain violated his employment letter is equally misguided. The letter obligates Thain to recuse himself from any particular matters *directly involving* Goldman Sachs or its affiliates. (Sushon Aff., Ex. 10 at NYSE 103159 (emphasis added).) Thain negotiated this transaction with Archipelago, not Goldman. Accordingly, the merger did not directly involve Goldman or its affiliates, and the letter did not require Thain s recusal. (Sushon Aff., Ex. 11, Thain Dep. at 32 33.) Moreover, regardless of the letter s terms, the board specifically empowered Thain to explore all strategic initiatives, including an Archipelago merger. (Sushon Aff., Ex. 11, Thain Dep. at 32 33; *see also* Sushon Aff., Ex. 18, Woolard Dep. at 22-23, 43-45.)

[28] *Lorisa Capital Corp. v. Gallo*, 119 A.D.2d 99, 113 (2d Dep t 1986) ; *see also Staudinger v. Educ. Comm n*, No. 92 Civ. 8071, 1993 WL 138954, at * 7, n.8 (S.D.N.Y. Apr. 28, 1993) (observing that *ultra vires* allegations normally asserted when a corporation exercises powers beyond those granted to it by law or its charter, articles of incorporation, or bylaws); *711 Kings Highway Corp. v. F.I.M. s Marine Repair Service Inc.,* 273 N.Y.S.2d 299, 301 (1966) (defining an *ultra vires* action as one where an act or contract of a corporation is beyond the powers expressly or impliedly conferred upon a corporation.); *see also* 14 N.Y. Jur. 2d Business Relationships § 492.

[29] *Ransom v. St. Regis Mohawk Educ. & Community Fund*, 86 N.Y.2d 553, 564 (1996) (holding that acts by individual directors of nonprofit corporation were not *ultra vires* where they erroneously failed to follow a particular disciplinary process).

beyond the board s substantive constitutional powers. Instead, Plaintiffs merely argue that the merger negotiations were procedurally flawed because of Thain s purported conflict. Such procedural defects in one board member s conduct do not render the entire board s action *ultra vires*.

Third, and most importantly, this issue is academic since the board ratified the negotiations: [e]ven if the [prior] action had been *ultra vires*, it could become validated via ratification by the Board.[30] While Plaintiffs assert (without citation) that the board has no authority to waive an *ultra vires* act, the NYSE Constitution is to the contrary. It grants the board all powers necessary for the governance of the Exchange, the regulation of the business conduct of members . . . and in the exercise of such power may adopt such rules, issue such orders and directions and make such decisions as it may deem appropriate. . . . [including] such other action as may be necessary or proper to carry out the purposes of the Exchange.[31] These powers extend to interpret[ing] this Constitution and all rules adopted pursuant hereto. Such board interpretations shall be final and conclusive.[32]

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30 *Birmingham v. Sogen-Swiss Int l Corp. Retirement Plan*, 529 F. Supp. 86, 90-91 (S.D.N.Y. 1981) ; *Noto v. Satloff*, 239 N.Y.S.2d 324, 328 (N.Y. Civ. Ct. 1963) (holding that because a contract and its provisions were approved and authorized by all the members, officers, and stockholders individually, and could in no sense be considered *ultra vires*); *Bayer v. Beran*, 49 N.Y.S.2d 2 (N.Y. Sup. 1944) (ruling that certain corporate action, although made without resolution at a formal meeting of board of directors, could not be considered to have been *ultra vires*, where they were approved and authorized by members of the board individually); *Cf. Michelson v. Duncan*, 407 A.2d 211, 220 (Del. 1979) (Stockholders or directors may ratify any act or contract of any other body or agency of the corporation that they might have authorized in the first instance.); *Bowers Steel, Inc. v. De Brooke*, 557 S.W.2d 369, 371 72 (Tex. App. 1977) (The principle is well established that the directors or stockholders may ratify any act or contract of any other body or agency of the corporations which they might have authorized in the first instance.) (citations omitted).

31 NYSE Constitution, Article IV, § 1.

32 NYSE Constitution, Article IV, § 11.

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B. Plaintiffs Cannot Demonstrate a Likelihood that the Directors Breached Their Duties of Due Care

Because there has been no duty of loyalty breach, the business judgment rule bars Plaintiffs motion unless Plaintiffs can satisfy their burden of showing that the directors breached the duty of care. This is a very heavy burden. To overcome the business judgment rule s propriety presumption, Plaintiffs must show that a majority of the directors were not reasonably informed when voting on the Archipelago transaction. As a matter of law, a director is reasonably informed unless she committed gross negligence, which is *reckless indifference* to or a *deliberate disregard* of the whole body of stockholders or actions which are without the bounds of reason.[33]

The duty of due care tests only the board s *process* in evaluating a transaction, not the decision s *substantive fairness*.[34] All it demands is *reasonable* diligence in gathering and considering material information, such that the[board s] decisions are informed one[s].[35]

The duty of care does not require that a board understand a transaction s every conceivable nuance. Informed decision-making does not require perfection or even wisdom. As the Delaware Chancery Court recently held in *Disney*, even a stupid board whose decision is egregious or irrational can meet the duty of care standard as long as the board is adequately informed:

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33 *In re Walt Disney Co. Derivative Litig.*, No. Civ. A 15452, 2005 WL 2056651, at *32 (Del. Ch. Aug. 9, 2005) (internal quotations omitted) (emphasis added); *see also Potter v. Pohland*, 560 N.W.2d 389, 392 (Minn. App. 1997) (It is evident from recent Delaware cases that the standard is very high.); *see also Auerbach v. Bennett*, 47 N.Y.2d 619, 631 (1979) (Thus, absent evidence of bad faith or fraud . . . the courts must and properly should respect [the board s] determinations.); *Lippe v. Bairnco Corp.*, 230 B.R. 906, 916 17 (S.D.N.Y. 1999) (applying New York law).

34 *In re Caremark Int l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996) ([C]ompliance with a director s duty of care . . . can never appropriately be judicially determined by reference to the *content* of the board decision . . . apart from consideration of the good faith or rationality of the *process*.) (emphases added).

35 *FDIC v. Abel*, No. 92 cv 9175, 1995 WL 716729, at *8 (S.D.N.Y. Dec. 6, 1995) (internal quotations omitted) (emphasis added).

[W]hether a judge or jury considering the matter after the fact, believes a decision *substantively wrong*, or degrees of wrong extending through *stupid* to *egregious* or *irrational*, provides no ground for director liability, so long as the court determines that the *process* employed was *either* rational *or* employed in a good faith effort to advance corporate interests.[36]

Similarly, as the court in *Disney* made clear, fiduciaries cannot be held liable for mere noncompliance with the aspirational ideal of best practices :

[The] law does not indeed, the common law cannot hold fiduciaries liable for a failure to comply with the aspirational ideal of best practices, any more than a common-law court deciding a medical malpractice dispute can impose a standard of liability based on ideal rather than competent or standard medical treatment practices, lest the average medical practitioner be found inevitably derelict.[37]

Plaintiffs motion fails because the record overwhelmingly shows that the Board s process for approving the merger was employed in a good faith effort to advance corporate interests.[38]

1. The Board Tested and Relied on Information It Received from Management

New York s Not-for-Profit Corporation Law specifically authorizes a board s good faith reliance on the company s officers within their area of competence:

In discharging their duties, directors . . . when acting in good faith, may rely on information, opinions, reports or statements *including financial statements or other financial data*, in each case prepared or presented by . . . one or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented.[39]

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[36] *In re Disney*, 2005 WL 2056651, at *32 (emphases added).
[37] *Id.* at *1.
[38] *Id.* at *32.
[39] N.Y. N-PCL § 717(b) (McKinney s 2005) (emphasis added).

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In evaluating the proposed Archipelago transaction, the board relied on Exchange CFO Amy Butte to prepare reasonable projections for the Exchange and to evaluate Archipelago s projections. As a matter of law, this was an appropriate step in the directors discharge of their duties.[40]

Plaintiffs do not even attempt to impugn Butte s reliability or competence in financial matters. Nor could they. The record shows that Butte and her Archipelago counterpart, Nelson Chai, met on several occasions to agree upon a joint set of assumptions to help drive the business model (Sushon Aff., Ex. 55, Butte Dep. at 106; Sushon Aff., Ex. 22, Chai Dep. at 51, 53, 65), after which Butte developed and tested her own independent model which she kept to herself as a check on Goldman that permitted her to test assumptions, both for [the NYSE] as well as for Archipelago (Sushon Aff., Ex. 55, Butte Dep. at 104; *accord id.* at 106 07 (It was my job to test, if you will, [Archipelago s assumptions and Arca s projections . . . .).) And the directors themselves testified in their depositions that they found Butte reliable and extremely competent. (Sushon Aff., Ex. 34, Weatherstone Dep. at 74 (I think the CFO [Amy Butte] was very knowledgeable in the financial world.); Sushon Aff., Ex. 2, Shapiro Dep. at 134 (I thought Amy was absolutely first rate, and I thought she was about as good at the planning process as anybody I ve encountered in my business career.).)

Plaintiffs contend that the projections Goldman gave to Lazard which in reality were Butte and Chai s joint work product went unchecked and unchallenged by the NYSE board. (Pl. Br. at 23, *accord* Sabella Aff. ¶ 73.) This is demonstrably false. Even though the directors

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[40] N.Y. N-PCL § 717(b) (McKinney s 2005); *see also State of Wisconsin Inv. Bd. v. Bartlett*, No. C.A. 17727, 2000 WL 238026, at *5 (Del. Ch. Feb. 24, 2000) (recognizing reliance on corporation s own due diligence team as factor in finding board met its duty of care); *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963) (finding that directors were fully protected by reliance on management s summaries, reports and corporate records in making decisions); *Litwin v. Allen*, 25 N.Y.S.2d 667, 719 (N.Y. Sup. 1940) (finding that [d]irectors have a right in forming their conclusions to rely upon information furnished and conclusions expressed by the management).

relied on and trusted Butte (as was their statutory right), they did not blindly accept her conclusions. Instead, they questioned her projections underpinnings. For example, several questions Herb Allison prepared relate directly to the financial projections:

NYSE Projections

What s the 3-year plan to increase revenues? ;

What is the market forecast that underlies the growth projections? ;

Is a 176% growth rate in operating income realistic? ;

Do the stand-alone projections include the revenues and costs from building and operating the hybrid model ?

Archipelago Projections

What accounted for the big jump in [Archipelago s] earnings in 04 (any unsustainable window dressing ?) ;

What are the assumptions for market conditions and market shares that underlie the revenue projections? ;

What are the expected sources of growth in market share and revenues (eg products, clients, competitors, geographic regions, market conditions)? ;

Is it realistic to expect net earnings to grow 42% p.a. in such a competitive market?

Combined Company Projections

Include sensitivity of the forecasts to various market conditions and trends in share and pricing ;

What are the projected expenses for locking up managers and employees?

How much stock will be granted to management?

(Sushon Aff., Ex. 46 at NYSE/BOD 0000498 99.)

Even after a lengthy discussion of these and other issues at the board s five-hour April 18 meeting, the directors maintained a healthy skepticism and continued to press issues they felt

management had not adequately addressed. This is demonstrated by board questions summarized before the April 19 meeting:

Why is it not the case that [Archipelago] has peaked /is about to hit a wall ? (Sushon Aff., Ex. 51 at OMM 000702.)

What is the sensitivity of the financial model to competitor reactions and market movements? (*id.*);

The forecasts for [Archipelago s] and [the Exchange s] revenues and profits are highly optimistic, yet the visibility of future trends is especially murky right now given declining prices for execution and low lease values, impending introduction of NMS (which [Archipelago] says could be unfavorable to its business), . . . and our roll-out of the hybrid model. We need to see a sensitivity analysis of alternative scenarios. (Sushon Aff., Ex. 52 at NYSE/BOD 000467.)

Questions such as these which demonstrate that a board is informing itself are the hallmark of due care.[41] Having informed itself concerning the projections bases, the board s business judgment that those projections were reasonable cannot be second-guessed.[42]

2. The Board Retained Experts to Help Inform Itself Concerning the Proposed Transaction

Another hallmark of due care is a board s retaining its own independent advisors to assist in evaluating a transaction.[43] Again, New York s Not-for-Profit Corporation Law specifically authorizes directors in discharging their duties to rely on counsel, public accountants or other persons as to matters which the directors . . . believe to be within such person s professional or

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41 *See, e.g., In re Formica Corp. S holders Litig*., Civil Action No. 10598, 1989 WL 25812, at *11 (Del. Ch. Mar. 22, 1989) (observing that a sophisticated board can be fully capable of making its own independent judgment about a transaction s adequacy and fairness.); *In re The MONY Group, Inc. S holder Litig*., 852 A.2d 9, 22 (Del. Ch. 2004) (pointing to a board s discussions with the company s CEO about strategic alternatives and industry developments as a factor in concluding that the board acted reasonably).

42 *Mentor Graphics Corp. v. Quickturn Design Systems, Inc.*, 728 A.2d 25, 34 (Del. Ch. 1998) (holding that board had grounds to accept management s projections and noting that the issue was not whether the projections were substantively right or wrong, but whether the board had a basis to believe they were reasonable).

43 *See, e.g., In re BHC Communications, Inc. S holder Litig.*, 789 A.2d 1, 11 (Del. Ch. 2001) (citing board s retention of expert financial and legal advisers as factors in dismissing claims alleging breach of the duty of care).

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expert competence.[44] Here, the board retained a full complement of well-respected independent advisors in connection with the proposed Archipelago merger.

a. Legal Counsel

First, the board retained its own independent counsel, O Melveny & Myers LLP (OMM), a prestigious law firm with particular experience advising directors concerning their fiduciary duties in high-stakes mergers and acquisitions. (Sushon Aff. ¶¶ 74 77.) The individual OMM attorneys the board retained included Walter Dellinger (the former Solicitor General), Spencer Klein (head of the firm s mergers and acquisition practice who has more than a decade of experience offering board-room advice to Fortune 500 companies in their most complex transactions), and Mike Masin (who was Citigroup s vice-chairman and chief operating officer and Verizon s vice-chairman and president before returning to OMM in early 2004). (Sushon Aff., Ex. 79 at OMM 000641-48.) Dellinger and Klein sat with the board through its April 15, 18, 19 and 20 meetings and provided advice to the directors about their fiduciary duties. (Sushon Aff., Exs. 37 40.) The OMM lawyers periodically assured the directors that they were acting diligently and appropriately in compliance with their fiduciary duties. The board s decision to retain independent counsel, while not itself dispositive of the due care question, further demonstrates that the board exercised due care.[45]

Plaintiffs attempt to smear OMM s advice by claiming that (i) Thain allegedly arranged for O Melveny & Myers to represent the board ; and (ii) OMM was not independent because it had been representing the NYSE in the Grasso litigation. Neither contention is correct. As the

44 N.Y. N-PCL § 717(b) (McKinney s 2005).

45 *See In re Gaylord Container Corp. S holders Litig*., 753 A.2d 462, 479 (Del. Ch. 2000) (finding that meeting with outside law firm and receiving detailed legal advice supported the conclusion that the board acted in an informed manner); *see also Burghart v. Landau*, 821 F. Supp. 173, 181 (S.D.N.Y. 1993) (citing to approval of outside counsel as one factor in concluding board decision was within its business judgment); *see also* N.Y. N-PCL § 717(b)(1) (McKinney s 2005) (authorizing the board, in discharging its fiduciary duties, to rely on counsel).

directors testimony reveals, Thain had nothing to do with OMM s retention. Rather, Exchange General Counsel Bernard first mentioned Dellinger, and several directors were immediately enthusiastic based on their own personal experiences with him. (Sushon Aff., Ex. 18, Woolard Dep. at 59; Sushon Aff., Ex. 2, Shapiro Dep. at 121; Sushon Aff., Ex. 12, Carter Dep. at 70.) Likewise, OMM s prior engagement for the Exchange concluded in January 2003 (before Thain even joined the Exchange), making the NYSE a former client in an unrelated matter. Under the New York Lawyer s Code of Professional Responsibility DR 5-108(B), that closed matter presents no conflict with OMM s advice to the board concerning Archipelago.[46]

The board also relied on the NYSE s counsel to negotiate a merger agreement with Archipelago that protects the NYSE against material adverse changes following the April 20 approval. The merger agreement, a draft of which the Board reviewed with counsel (Sushon Aff. ¶ 77), does just that (Sushon Aff., Ex. 78 at OMM 001069 71, 001104 05).)

b. Lazard

Second, the board retained Lazard to provide a fairness opinion. While the directors understood that the law does not require them to obtain a fairness opinion to discharge their duty of care,[47] the board nevertheless felt that additional financial advice would aid in its analysis. (Sushon Aff., Ex. 12, Carter Dep. at 15.) Lazard utilized at least three different widely-accepted methodologies to value Archipelago. While acknowledging that the Exchange (a private, not-for-profit entity) was a difficult company to value, Lazard nevertheless valued the Exchange

[46] 22 N.Y.C.R.R. § 1200.27 (forbidding an engagement adverse to a former client only where the new engagement is in the same or a substantially related matter.)

[47] S*ee, e.g, Oberly v. Kirby*, 592 A.2d 445, 472 (Del. 1991) (stating that while a formal fairness opinion may be helpful, it is not required under law); *see also In re Compucom Sys., Inc. Stockholders Litig.*, No. Civ. A 499-N, 2005 WL 2481325, at *7 (Del. Ch. Sep. 29, 2005) (taking fairness opinion into consideration in finding that the board had not breached its duty of care).

using at least two distinct methods. Lazard then calculated the premium range that the Exchange was paying to acquire Archipelago and determined that it was within the range of control premiums paid in similar acquisitions. (Sushon Aff., Ex. 20 at 24.)

The directors questioned Lazard extensively about this opinion at three different meetings and satisfied themselves that it was reasonable. (Sushon Aff., Ex. 38 at NYSE 00337; Sushon Aff., Ex. 39 at NYSE 00452-53; Sushon Aff., Ex. 40 at NYSE 00530.) The law forbids Plaintiffs from second-guessing this informed business judgment.

Plaintiffs nevertheless launch a broadside against Lazard, contending that (i) the board did not consider that Lazard was conflicted because Goldman was an underwriting syndicate member in Lazard s IPO; (ii) Thain pressured the board into retaining Lazard; and (iii) Lazard improperly relied on Goldman s projections. Even if the Court were to consider their arguments and the business judgment rule prohibits such second-guessing none of these contentions undermines the directors due care:

- The alleged Goldman underwriting conflict is no conflict at all.[48] As with the alleged Carter and von der Heyden Goldman conflicts, the fact that Lazard retained Goldman as its underwriter indicates, if anything, that *Goldman* was beholden to *Lazard* not vice versa. Plaintiffs other evidence of this so-called conflict bears this out Goldman lost more than $15 million trying to support Lazard s share prices after the IPO and after the NYSE board approved the Archipelago merger. In any event, underwriting syndication is just a distribution business . . . a distribution and sales model that all the major banks engage in. (Sushon Aff., Ex. 13, McDonald Dep. at 100.)

- The record is unequivocal that the board, not Thain, selected Lazard. As Carter, McDonald and others testified, the directors chose Lazard because they had prior personal experience with Wasserstein and Parr, and Lazard was otherwise one of only two investment banks with sufficient experience and no disabling conflicts. (Sushon Aff., Ex. 12, Carter Dep. at 59; Sushon Aff., Ex. 13, McDonald Dep. at 95 99; Sushon Aff., Ex. 18, Woolard Dep. at 48.)

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[48] *See Kahn v. Caporella*, No. 13248, 1994 WL 89016, at *6 (Del. Ch. Mar. 10, 1994) (concluding that financial advisor to Special Committee was independent, even though it had performed services for company in past, because there was no evidence from which one could conclude that the advisors failed to perform their duties diligently and in good faith).

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The record puts the lie to Plaintiffs third contention that Lazard improperly relied on Goldman s projections for Archipelago and pro forma combined company performance. The undisputed factual record establishes the opposite: that Butte and Chai agreed on the judgments, assumptions and projections underlying the financial model Lazard used. (Sushon Aff., Ex. 55, Butte Dep. at 101, 105; Sushon Aff., Ex. 22, Chai Dep. at 54, 58.) Goldman acted as a number cruncher. (Sushon Aff., Ex. 55, Butte Dep. at 102 03; Sushon Aff., Ex. 22, Chai Dep. at 62.) Importantly, Butte kept her own separate model to help her verify Goldman s work. (Sushon Aff., Ex. 55, Butte Dep. at 104.) In any event, as several directors testified in their depositions, the mere fact that Goldman provided the projections underlying Lazard s analysis, even if true, would have been immaterial to them. (Sushon Aff., Ex. 2, Shapiro Dep. at 144 ([S]hort-term financials were not the basis on which . . . this transaction was either justified or not justified.); Sushon Aff., Ex. 34, Weatherstone Dep. at 42-43; Sushon Aff., Ex. 26, Jackson Dep. at 57; Sushon Aff., Ex. 24, von der Heyden Dep. at 95 96; Sushon Aff., Ex. 23, Rivlin Dep. at 55.)

c. PwC

Third, the board relied on PricewaterhouseCoopers (PwC) to analyze Archipelago s historical financial results. PwC also examined Archipelago s accounting methods and compared them to the Exchange s. While PwC concluded that there were some internal control issues at Archipelago concerning its compliance with Sarbanes-Oxley Section 404 (Sabella Aff. ¶ 83), several directors testified that the board had discussed that material weakness with PwC and arrived at a business judgment that it was immaterial. (Sushon Aff., Ex. 13, McDonald Dep. at 200 ([T]he issue of their historical lack of internal audit . . . actually was remedied by them retaining Deloitte and Touche . . . to play an internal audit role for them.); Sushon Aff., Ex. 23, Rivlin Dep. at 88 89; Sushon Aff., Ex. 12, Carter Dep. at 89; Sushon Aff., Ex. 18, Woolard Dep. at 92.)

Likewise, Plaintiffs contention that the directors were grossly negligent in relying on PwC because PwC was rushed and had outstanding requests to Archipelago (Sabella Aff. ¶ 83) is baseless. The board knew that Archipelago had yet to provide that information and, after considering its impact, reached a business judgment that the missing information was not material. (Sushon Aff., Ex. 26, Jackson Dep. at 65 66; Sushon Aff., Ex. 13, McDonald Dep. at

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199 200.) After all, while PwC s analysis was helpful, Archipelago s financial statements had already been audited by an independent national accounting firm and were approved by an Archipelago board that boasts a former SEC chairman among its members. The board s business judgment to discount a few follow-up issues stemming from PwC s analysis is not subject to challenge here.[49]

3. Plaintiffs Own Legal Authority Only Highlights the NYSE Directors Diligence

Although the voluminous factual record independently demonstrates the directors due care, Plaintiffs defeat their own claims by citing *Treadway v. Care Corp.*[50] as recommending a board s proper procedures: (i) making reasonable inquiries to obtain information, (ii) evaluating financial statements, (iii) taking sufficient time to reflect, and (iv) obtaining a fairness opinion from an unbiased investment banker. (Pl. Br. at 16.) The NYSE board followed all four. As discussed above, the board bombarded NYSE management with demands for information, including a scrubbing of Archipelago s financial statements and the combined company s projections. (*See* pp. 18 21, *supra.*) And as discussed below, the board was never pressured to approve the deal before it had grasped the issues and received the requested information. (*See* p. 29 32, *infra.*) As a check on the entire process, the board also obtained an independent fairness opinion from Lazard, whose experience and acumen were beyond reproach. (*See* pp. 23 25, *supra.*) Thus, the NYSE board satisfied *every one* of the *Treadway* court s aspirations for director performance.

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49 *See In re DeLorean Motor Co*., 56 B.R. 936, 944 45 (Bankr. E.D. Mich.1986) (The retention of independent accountants is not only an exercise of the Board s authority but more significantly an extension of the individual directors acting collectively as a prudent person to retain sound financial or legal advice to exercise its best judgment in making a decision for the corporation.).

50 638 F.2d 357 (2d Cir. 1980).

Plaintiffs also cite *Smith v. Van Gorkom*,[51] *Hanson Trust PLC v. ML SCM Acquisition Inc.*,[52] and *Mills Acquisition Co. v. Macmillan, Inc.*,[53] as support that the NYSE board breached its fiduciary duties. None of these cases facts remotely resemble the factual record here:

Plaintiffs Authorities	**The Record Here**
CEO did not consult board before soliciting takeover offer (*Smith*, 488 A.2d at 866)	The board empowered Thain to explore the NYSE s strategic alternatives (Sushon Aff., Ex. 18, Woolard Dep. at 22; Sushon Aff., Ex. 13, McDonald Dep. at 43, 104, 117-22)
Management solicits buyout proposal without prior board approval (*Mills*, 559 A.2d at 1281)	
Management sabotages other bids in favor of buyout offer that gives management substantial ownership interest in new company (*Mills*, 559 A.2d at 1272)	Thain never received any bona fide alternative proposals (p. 35, *infra*), and Plaintiffs do not dispute that neither Thain nor any directors will receive ownership in combined company
CEO calls special board meeting on 24 hours notice to discuss sale of company (*Smith*, 488 A.2d at 867)	Board had discussed strategic merger candidates, including Archipelago, over several months (p. 29, *infra*)
Board approves merger after one 2-hour meeting (*Smith*, 488 A.2d at 869)	Board holds five formal meetings totaling nearly twenty hours of discussion and analysis (pp. 29 30, *infra*)
Board makes hasty decision after one 3-hour meeting despite having at least a week longer to obtain information (*Hanson Trust*, 781 F.2d at 275)	Board deliberates and obtains information over course of two weeks, formally meeting five times and extending calendar to fully consider all issues (pp. 29 30, *infra*)
Board grants critical asset purchase option without any indication of the assets fair value range (*Hanson Trust*, 781 F.2d at 275)	Board retains outside financial advisor to assess transaction s fairness on multiple grounds (pp. 23 24, *supra*)

Plaintiffs authorities are thus wholly inapposite and only serve to confirm further the NYSE board s proper exercise of its fiduciary duties.[54]

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51 488 A.2d 858 (Del. 1985).

52 781 F.2d 264 (2d Cir. 1986)

53 559 A.2d 1261 (Del. Ch. 1989).

54 In addition to the duties of due care and loyalty, there has been discussion about the so-called third fiduciary duty, that of good faith. *In re Walt Disney Co. Derivative Litig*., No. Civ. A 15452, 2005 WL 2056651, at *31, 35 (Del. Ch. Aug. 9, 2005). While this concept is developing and courts are far from clear with respect to whether there is a separate duty of good faith, *id.* at *35-36, some Delaware courts have found directors liable under this standard if they *consciously and intentionally disregard their responsibilities,* adopting a we don t care about the risks attitude concerning a material corporate decision. *In re Emerging Communications, Inc. S holders Litig.*, No. Civ. A 16415, 2004 WL 1305745, at *43 (Del. Ch. May 3, 2004). As discussed above, the record conclusively shows anything but the board s conscious disregard of their responsibilities. *In re Disney,* 2005 WL 2056651, at *35-36 (describing breach of duty of good faith as [d]eliberate indifference and inaction *in the face of a duty to act*.) (emphasis in the original). Indeed, for the very same reasons Plaintiffs cannot demonstrate that the NYSE board breached its duty of due care or duty of loyalty, they also fail to show that the directors violated any duty of good faith. *Cf. Nagy v. Bistricter Corp.*, 770 A.2d 43, 49 n.2 (Del. Ch. 2000) ([B]y definition, a director cannot simultaneously act in bad faith and loyally towards the corporation and its stockholders.)

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POINT II

PLAINTIFFS ATTACKS ON THESE INFORMED

BUSINESS JUDGMENTS ARE UNAVAILING

Under the business judgment rule, the board s careful consideration of the Archipelago merger (documented above), insulates the board s deliberations and decisions from after-the-fact nit-picking.[55] This should end the Court s inquiry with a denial of Plaintiffs motion. Nevertheless, Plaintiffs seek to pick nits, asserting that the directors failed to discharge their duty of care because they (i) rushed to approve the transaction, (ii) failed to consider several insignificant factors effects on Lazard s valuations and (iii) failed to consider certain non-economic deal terms, such as placing a collar on the transaction. While the business judgment rule forecloses Plaintiffs from even airing these issues, if the Court were to entertain them, it would find that Plaintiffs are wrong.

A. The Board Members Had Adequate Time to Consider the Transaction

Contrary to the misleading portrait that Plaintiffs attempt to paint, the board s consideration of this transaction was not limited to the April 7 20, 2005 period. Rather, the board s deliberations spanned nearly two years, beginning with former Chairman John Reed s evolutionary pathway vision in 2003. (Sushon Aff., Ex. 25 at NYSE/BOD 0000839.)

As several directors stated in their depositions, the board began considering a strategic transaction with Archipelago in 2003, long before Thain had arrived at the Exchange or Goldman began facilitating merger discussions between the two companies. As Chairman Carter and others testified, the Board engaged in strategic discussions at almost every board meeting,

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[55] *Levandusky*, 75 N.Y.2d at 537 38.

discussing all of the major players . . . at virtually all of these strategic discussions including . . . Archipelago. (Sushon Aff., Ex. 12, Carter Dep. at 18; *accord* Sushon Aff., Ex. 13, McDonald Dep. at 34; Sushon Aff., Ex. 26, Jackson Dep. at 34; Sushon Aff., Ex. 2, Shapiro Dep. at 43 44; Sushon Aff., Ex. 18, Woolard Dep. at 22 23.) Among the board s pre-April 2005 Archipelago deliberations were the following:

An October 2004 McKinsey discussion that focused on Archipelago as a strong NYSE competitor and potential partner. (Sushon Aff., Ex. 14 at NYSE 003093 (noting that Archipelago s lean cost structure and especially low non-execution cost base, permitted Archipelago to operate in this difficult pricing environment).)

As Shapiro testified, from sometime in mid-to-late 2004 on, in the ongoing discussions about the future strategic direction of the stock Exchange, Archipelago s name was a prominent part of those conversations. (Sushon Aff., Ex. 2, Shapiro Dep., at 49).

A March 2005 McKinsey presentation emphasizing Archipelago s superior business model and concluding that the only win-win strategy for the NYSE in the increasingly competitive marketplace would be to acquire an OTC company, such as Archipelago, keeping the NYSE and the OTC separate. (Sushon Aff., Ex. 3, at NYSE 002870.)

Thus, by the time that Thain approached the board with a concrete merger proposal in April 2005, the board had already been considering such a transaction for more than eighteen months.

In April 2005, when it came time to consider a concrete proposal, the board devoted significant time to its considerations. The directors met five times for a total of nearly twenty hours, receiving advice from Lazard, OMM, Butte, other Exchange officers (such as President Robert Britz) and PwC. And the board questioned its advisors and management, tested the bases for various financial projections and studied Archipelago s publicly-available financials. (*See* pp. 18 21, *supra*.)

As the directors testimony reflects, they did not feel rushed into their approval of the Archipelago merger: The only basis on which we could vote for this would be if we felt we had

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had enough time to look at this carefully and to discharge our duties, and to be confident this was in the best interests of the Exchange. Otherwise, it wasn t going to happen. (Sushon Aff., Ex. 2, Shapiro Dep. at 109; *accord* Sushon Aff., Ex. 31, Allison Dep. at 189 (I was satisfied at the end of that discussion with the answers I received, satisfied enough to vote in favor without hesitation.); Sushon Aff., Ex. 18, Woolard Dep. at 73.) Even the three directors who only joined the board in April 2005 felt that they had adequate time to consider the proposal:

> [W]e put a lot of time into this, and I spent a lot of time trying to learn about it in these seemingly endless meetings. So that by the time we got to April 20th, I was satisfied that this was a good deal and that it should go forward. (Sushon Aff., Ex. 23, Rivlin Dep. at 71 72);

> Never for one minute did the Board think it was being pushed by the wind toward an April 20th date. (Sushon Aff., Ex. 32, Brown Dep. at 102 03);

> There was a time when we almost lived [at the Exchange], doing our work . . . . (Sushon Aff., Ex. 24, von der Heyden Dep. at 104.)

In fact, when the board determined that it could not meet the original transaction deadline of April 18, the directors instructed Thain to obtain more time for them to consider the proposal, and he complied. (Sushon Aff., Ex. 2, Shapiro Dep. at 109).

Even these April 2005 deliberations, standing alone, far exceed minimum due care requirements. Courts have repeatedly recognized that the directors decision to act under time pressure does not breach their duty to inform themselves.[56] For example, in *Citron v. Fairchild*, the court held that a board s consideration and approval of a takeover bid in one day did not breach its fiduciary duty of care. Recognizing that the bidder had imposed the time constraint, the Court held that the board knew enough . . . concerning the value of the company to make a

[56] *See e.g., Detwiler v. Offenbecher*, 728 F. Supp. 103, 155 (S.D.N.Y. 1989) .

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rational choice.[57] Indeed, the decision whether to comply with a counter-party s deadline is itself a business judgment not subject to review absent some independent fiduciary breach.[58]

Here, the board exercised its business judgment to move quickly on the concrete proposal for several reasons. (*See*, *e.g.*, Sushon Aff., Ex. 23, Rivlin Dep. at 118 19; Sushon Aff., Ex. 12, Carter Dep. at 186 87; Sushon Aff., Ex. 2, Shapiro Dep. at 81 83; Sushon Aff., Ex. 34, Weatherstone Dep. at 66; Sushon Aff., Ex. 18, Woolard Dep. at 83.) *First*, press rumors abounded that Archipelago and other exchanges were considering competing strategic combinations, raising the very real specter of another suitor bidding for Archipelago s proprietary technology and low-cost operations. (Sushon Aff., Ex. 23, Rivlin Dep. at 118-119.) *Second*, there was a risk that information concerning the Exchange s talks with Archipelago might leak to the public, compromising the transaction. (Sushon Aff., Ex. 12, Carter Dep. at 144 ([V]ery quickly on Wall Street the word gets out that there s a deal cooking, which could have an effect on Archipelago s stock. Since Archipelago was a publicly-traded company, we had to be very conscious of any action that negatively or positively impacted their stock.).) In view of the directors well-founded business judgment to move quickly, Plaintiffs quibbling speculation that Archipelago might not find another suitor is irrelevant.[59]

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[57] 569 A.2d 53, 67 (Del. 1989); *see also In re RJR Nabisco Inc. S holder Litig.*, No. 10389, 1989 WL 7036 (Del. Ch. Jan. 31, 1989) (finding no breach of directors duties even though bidder of target gave the board only thirty minutes to accept the offer); *Dynamics Corp. of Am. v. WHX Corp.,* 967 F. Supp. 59, 66 (D. Conn. 1997) ([T]he directors made an informed decision, . . . using the available time to consider their options carefully.).

[58] *British Printing & Commc n Corp. v. Harcourt Brace Jovanovich, Inc.*, 664 F. Supp. 1519, 1530 (S.D.N.Y. 1987) ([Directors] appropriately considered . . . the effects of a failure to act swiftly and availed themselves of the time they reasonably believed they had in which to act.); *Keyser v. Commonwealth Nat l Fin. Corp.*, 644 F. Supp. 1130, 1149 (M.D. Pa. 1986) (concluding that the board properly recognized a substantial risk . . . [that] any further delay might result in [merger partner] walking away).

[59] *See Keyser*, 644 F. Supp. at 1149.

B. The Board Adequately Considered Valuation Issues

Plaintiffs attempt to second-guess the board s valuation efforts are similarly misguided. Plaintiffs claim that the board failed to consider (i) the National Market System (NMS) regulation s effect on Archipelago s value; (ii) the share lock-up s effect on the value of the combined company s equity seatholders will receive; (iii) the NYSE s value as a public, for-profit entity; and (iv) obtaining a bring-down opinion evaluating the merger s fairness as of the closing date.[60] Were the Court to examine these assertions (which the business judgment rule forbids) it would find that Plaintiffs are wrong:

As for NMS, Allison highlighted the issue in his questions for the April 18 meeting (Sushon Aff., Ex. 46, at NYSE/BOD 0000498 502), and the board discussed it. (Sushon Aff., Ex. 26, Jackson Dep. at 96; Sushon Aff., Ex. 31, Allison Dep. at 150 51, 154; Sushon Aff., Ex. 13, McDonald Dep. at 142.)

Likewise, the record shows that the board considered the lock-up restriction on seatholders shares and determined that, in their business judgment, those restrictions would *increase* share values by managing volatility. (Sushon Aff., Ex. 26, Jackson Dep. at 89-90; Sushon Aff., Ex. 32, Brown Dep. at 126; Sushon Aff., Ex. 11, Thain Dep. at 130-31 ([T]he unrestricted distribution of that amount of stock by that number of people has the potential of being very disruptive and very negative to the share price.);

Plaintiffs contention that the board never considered Archipelago s ability to meet its projections is equally baseless. As discussed above, the board questioned Butte extensively on Archipelago s projections bases, and they concluded that the short-term projections were largely irrelevant because this merger was a long-term strategic play. (Sushon Aff., Ex. 2, Shapiro Dep. at 165-66 (It s simply not a question of what Arca s financial performance is going to be. It is what Arca brings to the Stock Exchange and what the combined entities can do.); Sushon Aff., Ex. 18, Woolard Dep. at 67 68; Sushon Aff., Ex. 26, Jackson Dep. at 99; Sushon Aff., Ex. 13, McDonald Dep. at 178.)

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[60] Notably absent from the laundry list is Plaintiffs charge that Lazard miscalculated the seats lease revenues by using 1,000 seats (there are actually 1,366) and estimating $25,000 annual lease revenue per seat (the current lease rate is $60,000), an allegation Plaintiffs caused the Court to rely on heavily in denying Defendants motion to dismiss. The omission of this charge from Plaintiffs list is not surprising in view of the factual record on this issue: (i) Lazard s presentation correctly notes that the NYSE has 1,366 seats and accurately charts historical lease rates through 2005 (Sushon Aff., Ex. 20 at 27); and (ii) Lazard used the 1,000 and $25,000 figures to project *future* revenue from the combined company s sale of trading licenses, because the NYSE had assumed that, because several hundred seats are currently unused, 1,000 licenses auctioned simultaneously would generate $25,000 per license. (Sushon Aff., Ex. 11, Thain Dep. at 78-79.)

For similar reasons, the board concluded that a bring-down opinion is unnecessary. (Sushon Aff., Ex. 24, von der Heyden Dep. at 141-42 (bring-down opinion even less helpful now because this transaction has already been validated in the marketplace).) Short-term numbers were not the basis for what is, at its core, a strategic transaction, so the board determined that a few additional months financial results are irrelevant. (Sushon Aff., Ex. 2, Shapiro Dep. at 165.)

Plaintiffs attempt to fault the directors for not valuing the NYSE as a public, for-profit entity is a naked attempt to substitute Plaintiffs business judgment for the directors . For the Exchange to become a for-profit, public company, it would have to successfully demutualize and launch an IPO. Neither of these steps was guaranteed to succeed. Indeed, as several directors testified, an IPO was particularly difficult for the Exchange to implement successfully because the Exchange s market share and revenues were shrinking. (Sushon Aff., Ex. 2, Shapiro Dep. at 189; Sushon Aff., Ex. 12, Carter Dep. at 23.) And Butte testified the new products that Plaintiffs tout as potentially bolstering the Exchange s value were remote and not likely to be offered any time soon. (Sushon Aff., Ex. 55, Butte Dep. at 188.) Accordingly, the directors decision not to seek valuations based on these remote contingencies was well within their sound business judgment.[61]

C. Plaintiffs Other Board Failure Allegations Contradict the Record

Plaintiffs also criticize numerous non-financial decisions the board reached. Were the Court to ignore the business judgment rule and address these perceived inadequacies, it would find, again, that the record belies Plaintiffs contentions.

First, although Plaintiffs imply some type of wrongdoing through the board s failure to insist on renegotiation attempts (Sabella Aff. ¶ 87), ample testimony reveals that such attempts would have been fruitless. Archipelago simply would not do the deal if the New York Stock Exchange didn t agree on this 70/30 split . (Sushon Aff.,

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[61] *Levandusky*, 75 N.Y.2d at 537-38.

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Ex. 24, von der Heyden Dep. at 71 72.) There had already been an intensive set of negotiations (Sushon Aff., Ex. 13, McDonald Dep. at 155), with each side trying to get the best deal for their organization (Sushon Aff., Ex. 23, Rivlin Dep. at 143). In that regard, the board evaluated the 70/30 split and concluded that 70% was more than fair because, among other reasons, in terms of the prospective combined company, Archipelago was more than 30 percent of revenues, far more than 30 percent of profits, and had a much higher return on equity. (Sushon Aff., Ex. 13, McDonald Dep. at 156.)

Second, Plaintiffs wrongly accuse the board of not fairly considering the equities of the ESOP provision (Sabella Aff. ¶ 76), when in fact the record shows exactly the opposite. The board knew an employee stock grant was necessary to retain and continue to attract the kind of talent that we thought the merged entity would need. (Sushon Aff., Ex. 32, Brown Dep. at 119.) It was unsure, however, how much stock employees should receive. (Sushon Aff., Ex. 13, McDonald Dep. at 164 ([T]here was a lot of discussion and push back from the directors . . . that there should be no preapproval).) Although Plaintiffs distort the record by claiming that the board approved 5% for employees, in fact the board simply used *up to* 5% as a placeholder (Sushon Aff., Ex. 12, Carter Dep. at 116 17) while it delegated responsibility to the board s compensation committee to consider an appropriate amount (Sushon Aff., Ex. 18, Woolard Dep. at 29). In that regard, the board retained Towers Perrin, a consulting firm specializing in compensation, to recommend a suitable percentage. (Sushon Aff., Ex. 18, Woolard Dep. at 29; Sushon Aff., Ex. 68 at NYSE/BOD 0000871 939.) Ultimately, after a lot of feedback and communications with the members, the number was reduced to 1.4 percent. (Sushon Aff., Ex. 12, Carter Dep. at 116 17.) Through careful deliberation and communication with seatholders, the board s decision to approve the ESOP was the paradigm of due care.

Third, Plaintiffs mischaracterize the record by inflating the relevance of a cap or collar to protect seatholders against a rise in Archipelago s stock price (Sabella Aff. ¶ 88). In fact, a collar which protects a seller accepting a buyer s stock from a decrease in the buyer s stock price here would not have made any sense because the seatholders stood to benefit if Archipelago s market value increased:

> It s always better for the New York Stock Exchange seat holders for the Archipelago share price to be higher because they, in the end, are going to end up with 70 percent of the equity. (Sushon Aff., Ex. 11, Thain Dep. at 64);

> [T]he Exchange members were well protected by having 70 percent of a larger and more valuable entity . (Sushon Aff., Ex. 23, Rivlin Dep. at 167);

> And if the Archipelago stock went up, it was to our advantage. (Sushon Aff., Ex. 12, Carter Dep. at 103);

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> What our 70 percent of it is worth increases as Arca s stock price goes up . . . . (Sushon Aff., Ex. 2, Shapiro Dep. at 160). The best thing that could have happened was a substantial rise in the value of Arca s stock. (*Id.* at 155.)

Because the NYSE was acquiring Archipelago by taking 70% ownership of the combined company, the NYSE seatholders not Archipelago stood to benefit from a rise in Archipelago s stock price. [F]rom the point of view of the New York Stock Exchange, a collar would not make any sense. (Sushon Aff., Ex. 11, Thain Dep. at 62.)

Fourth, Plaintiffs complain that the board never sought third-party indications of interest and specifically never considered an alternative proposal to acquire the NYSE brokered by investment bankers at HSBC, on behalf of Bain Capital and the Blackstone Group. (Sabella Aff. ¶ 89.) And with good reason: there was nothing to consider. Even one of the architects of the proposal, Blackstone s Chinh Chu, had no expectation that the NYSE board would see the material they presented to Thain because it was merely a hypothesis, a supposition that HSBC had. (Sushon Aff., Ex. 56, Chu Dep. at 46, 25.) Chu even called it too embryonic an idea to discuss (Sushon Aff., Ex. 56, Chu Dep. at 13), thus corroborating Thain s view that there was no offer and . . . nothing for anyone to review (Sushon Aff., Ex. 11, Thain Dep. at 134). Nonetheless, Thain informed the board so the directors could reach their own conclusions. And they did: the HSBC idea was a rather naive and ill-formed concept that didn t bring technology . . . didn t bring a position; and, therefore, it was not advancing the future of the Exchange. (Sushon Aff., Ex. 2, Shapiro Dep. at 199-200.)

CONCLUSION

This case is not about Goldman Sachs or John Thain s theoretical investment in that company. It is about the NYSE s independent directors and their good faith inquiry to determine whether the Archipelago merger was in the Exchange s and its seatholders best interests. And it is about a legal doctrine, the business judgment rule, that insulates good faith board decisions from shareholder or judicial second-guessing. Plaintiffs cannot alter the legal or factual landscape by arguing that Thain s alleged conflicts render the merger voidable or *ultra vires.* The indisputably loyal, conflict-free board sanitized and ratified the transaction after being informed of Thain s relationship to Goldman and Goldman s relationship to Archipelago.

This board more than fulfilled its fiduciary duties of loyalty and care. Indeed, the directors more than satisfied the standard of care that even Plaintiffs articulate: a number of

procedures directors might take to ensure non-liability for their decisions, including making reasonable inquiries to obtain material information, evaluating financial statements, taking sufficient time to reflect and obtaining a fairness opinion from an unbiased investment banker.[62]

The independent directors did all that and more:

As reflected in Allison s questions for the April 18 and 19 meetings, the other directors questions for the April 19 meetings (that Bernard summarized) and the mountain of testimony about the board s questions for NYSE management and Lazard, the board asked questions to obtain information.

As Allison s questions demonstrate, he personally evaluated Archipelago s financial statements, and the board also relied on NYSE CFO Amy Butte and PwC to perform financial due diligence.

The board considered a strategic transaction for nearly two years before settling on the Archipelago merger, and it held five meetings, lasting nearly 20 hours in all, to consider the proposed merger.

Based on board members own past experiences and personal knowledge, the board engaged Lazard one firm that the board knew had both the substantive capability and no disabling conflicts to provide a fairness opinion.

The board retained OMM to advise the directors concerning their fiduciary duties, and the OMM lawyers sat with the board and advised board members as they considered the transaction.

The directors considered alternative strategies (such as a demutualization and IPO or building a proprietary NYSE electronic trading platform) and alternative merger partners (including Instinet and others) before concluding that the Archipelago merger was a worthy strategy.

Because the Plaintiffs cannot prove that this conflict-free, independent board breached its duty of care, the business judgment rule dooms their motion.

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[62] Pl. Br. at 16 (citing *Treadway*, 638 F.2d at 384).

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Plaintiffs have consistently conceded that the Archipelago merger makes strategic sense and that they do not want to enjoin the transaction. Stripped of the hyperbole, Plaintiffs motion is but dickering over the merger s terms. That is what the business judgment rule forbids shareholders abusing the judicial process as a cudgel to extract a few more dollars. The motion for a preliminary injunction should be swiftly denied.

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