In re New York Stock Exchange/Archipelago Merger Litigation, 824 N.Y.S.2d 764 (N.Y. Sup., 2005)

A Fairness Opinion Must be Free of Conflicts of Interest If a Shareholder is to Make a Truly Informed Decision

In re New York Stock Exchange/Archipelago Merger Litigation, the fairness opinions prepared by two separate firms were called into question because of various conflicts of interest. The report of a third firm however was deemed truly independent by the Court and a vote by seatholders of the NYSE was allowed to go on as scheduled regarding the contemplated merger. Shareholders can not make a fully informed decision based upon the fairness opinion of a third party, where conflicts of interest exist.

Background of the Court Case

- In late 2003, the NYSE board of directors began to consider strategic combinations;
- In the fall of 2004, Goldman, Sachs & Co. ("Goldman") along with other investment banks first suggested a deal with Archipelago Holdings, Inc. ("Archipelago");
- At the time of the contemplated merger, the NYSE's CEO was a former executive of Goldman;
- Goldman was to act as a facilitator of the deal, receiving fees from both NYSE and Archipelago;
- Goldman recommended an investment banking firm to write a fairness opinion for presentation to the NYSE board of directors;
- Certain of NYSE's seatholders complained on the following basis:
    1. Breach of fiduciary duty and of loyalty
    2. Breach of fiduciary duty of care; and
    3. Aiding and abetting breach of fiduciary duty by Goldman;
- A settlement was reached requiring a second fairness opinion;
- Additionally, a third party performed a report regarding the fairness of the transaction; and
- The Court opined that the report of the third-party firm along with the second fairness opinion provided enough information for NYSE seatholders to make an informed decision and allowed a vote on the merger to go on as scheduled.

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[*1] **In re New York Stock Exchange/Archipelago** Merger Litigation

601646/05

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2005 NY Slip Op 52308U; 2005 N.Y. Misc. LEXIS 3184

December 5, 2005, Decided

NOTICE:
[**1] THIS OPINION IS UNCORRECTED AND WILL NOT BE PUB
LISHED IN THE PRINTED OFFICIAL REPORTS.

JUDGES: Charles E. Ramos, J.

OPINIONBY: Charles E. Ramos

OPINION:

Charles E. Ramos, J.

This dispute arises out of the proposed merger between the New York Stock Exchange, Inc. ("NYSE") and Archipelago Holdings, Inc. ("Archipelago"). n1

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n1 The present action bearing the caption In Re New Stock Exchange/ Archipelago Merger Litigation, filed under index number 6016461/05 is a consolidation of two former actions: William J. Higgins v the New York Stock Exchange, Inc., et al., filed under index number 601646/05 and William T Caldwell, Jr. v the New York Stock Exchange, Inc., et al, filed under index number 106717/05. Consolidation was ordered on September 9, 2005.
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The defendants named in the litigation are (i) the NYSE; (ii) NYSE Directors John A. Thain; Marshall N. Carter; Herbert M. Allison, Jr.; Ellyn L. Brown; Shirley [**2] Ann Jackson; James S. McDonald; Robert B. Shapiro; Alice M. Rivlin; Karl M. Von Der Heyden; Dennis Weatherstone; Edgar S. Woolard, Jr.; and (iii) the Goldman Sachs Group, Inc. and Goldman, Sachs & Co. (collectively, "Goldman"). n2

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n2 Archipelago was a defendant in the Caldwell action, but not in the Higgins action. The parties stipulated to voluntarily discontinue this action against defendant Archipelago, which was "So Ordered" by this Court on July 28, 2005. However, by order to show cause, designated motion 010, Archipelago applied for permission to intervene. That motion was granted and Archipelago is admitted to the action for the purpose of settlement only.
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Plaintiffs, William J. Higgins; William Tipton Caldwell, Jr.; Morton B. Joselson; John F. Horn; Robert Dill; Paul J. Mulcahy; Barbara Lynn DeCicco; Michael J. Quinn Jr.; Mark B. Grumet; and Anthony A. Saridakis, all members of the NYSE, filed their complaint in this action on May 9, 2005 alleging (1) a web of conflicts of interest notably between Mr. [**3] Thain, the CEO of the NYSE, and Goldman, among others, that tainted the terms of the merger; (2) lack of disclosure of the conflicts; and (3) that the merger was against the interest of the NYSE Seatholders because (a) the 70/30 allocation between the NYSE Seatholders and Archipelago shareholders, respectively, is unfair given the NYSE's intrinsic value; and (b) the lock up provision bars the NYSE Seatholders from selling their new shares for five years thereby further diminishing the benefit to the NYSE Seatholders.

In motion 011, plaintiffs moved pursuant to CPLR 6301 for a preliminary injunction enjoining the Seatholders' vote on the merger of the NYSE and Archipelago scheduled for December 6, 2005. n3 On November 15, 2005, the parties agreed to compromise and being that time is of the essence, given the date of the vote, this Court converts this motion to an [*2] application for approval of the settlement pursuant to CPLR 908.

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n3 In motion 010, Seatholders Walter Schubert, Jr. and James K. Rutlege applied for permission to file an amicus brief in opposition to plaintiffs' motion enjoining the vote. Permission was granted.
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Pursuant to the compromise, this Court will evaluate the fairness, reasonableness and adequacy of the proposed settlement. This Court will not opine on the fairness of the merger transaction itself.
Background n4

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n4 A complete summary of plaintiffs' allegations are set forth in this Court's decision in motion sequence 004, defendants' motion to dismiss the complaint. In addition, the Court considered the testimony at the preliminary injunction hearing, affidavits and deposition transcripts submitted in support of this motion for preliminary injunction as well as the proposed settlement, unless otherwise indicated all of which are too numerous to list here, but are available in the Court's file. Plaintiffs' evidence (exhibits, transcripts etc.) is designated with a P while that of defendants' with a D.
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Parties

The NYSE is the world's largest equities market where more than one billion shares are traded in a single day. n5 As a not-for-profit entity incorporated in New York, the [**5] NYSE members hold seats rather than shares of the corporation (the "Seatholders"). Seatholders are entitled to physical access to the NYSE trading floor. The membership of the NYSE is comprised of 1,366 seats. It is governed by an independent board of directors (the "Board") and management consists of the CEO, chief regulatory officer, president and co-Chief Operating Officers and a CFO ("Management").

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n5 Http://www.nyse.com/marketinfo/datalib/1108407157455.html
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Archipelago was founded in late 1996 as a fully automated, electronic stock market, one of the few existing in the world today. Unlike the NYSE, in which brokers physically buy, sell and trade equities in an auction-based market on a trading floor, all trading at Archipelago is conducted online through an automated electronic system. Therefore, Archipelago is a direct competitor of the NYSE.

In September 2003, following controversies and civil litigation concerning specialists' abusive practices and in the wake of SEC investigations, the NYSE assembled [**6] an independent Board. Many key players on Wall Street, including John Thain, Goldman, Merrill Lynch & Co. and JP Morgan & Co. urged the NYSE to increase automated trading at the NYSE and to convert the NYSE's not-for-profit status into a public, for-profit corporation.

During the course of the events at issue, Mr. Thain was CEO of the NYSE and a member of the Board. Previously, he held various executive positions with Goldman as president and chief operating officer. At the time of his departure from Goldman, Mr. Thain had accumulated approximately 23 million shares of Goldman stock worth then an estimated $ 200 million. Thain Depo. P. Exh. 160, p. 14-15 (Oct. 26, 2005). With Goldman's 15.6% stake in Archipelago stock, making Goldman Archipelago's second largest shareholder, this raised the possibility that Mr. Thain had an indirect ownership interest in Archipelago as well. SEC, Form 10K, Archipelago Holdings, Inc., 23, P. Exh. 163 (Dec. 31, 2004). Mr. Thain then joined the NYSE in January 2004. His employment agreement with the NYSE provided, in pertinent part:

> In order to avoid any appearance of conflict of interest, I shall recuse myself until otherwise requested by the [**7] Board from any particular matters directly involving Goldman Sachs or its affiliates. Finally, I will recuse myself, on a case-by-case basis, in any particular matter in which, in my judgment, it is desirable for me to do so in order to avoid the possible appearance of impropriety, despite the lack of any actual conflict.

The Board also instructed Mr. Thain to place all of his investments into a hidden assets trust (the "Trust") as a condition of his employment as CEO. Letter from John A. Thain, D. Exh. 10 (Jan. [*3] 15, 2004).
Time Line Leading to Proposed Merger

In late 2003, the NYSE Board began considering strategic combinations with other market players, including Archipelago. As a result, during a June 3, 2004 Board meeting, the Board authorized Mr. Thain to "talk about any kind of deals with anybody." Carter Depo., D. Exh. 12, p. 29-30 (Oct. 12, 2005).

In the fall of 2004, Goldman, along with other investment banks, first "pitched" or otherwise suggested a deal with Archipelago to the NYSE. The NYSE retained McKinsey & Co., a management consulting firm, on October 6, 2004, to assist in exploring the NYSE's options. The same day, McKinsey made a [**8] presentation to the Board which focused particularly on Archipelago as a key market player among the NYSE's competitive landscape. McKinsey Board Presentation, U.S. Cash Equities Landscape and Competitive Environment, D. Exh. 14 (Oct. 6, 2004). On October 25, 2004, Goldman presented to the NYSE Board "Strategic Alternatives" that included proposed structures for and a financial analysis of the NYSE doing a combination with Archipelago. Goldman Sachs Presentation, Presentation to "North" Strategic Alternatives, P. Exh. 94 (Oct. 25, 2004). n6 By the end of 2004, after the NYSE allegedly gathered information and explored a variety of hypothetical transactions, Archipelago remained at the forefront of a comparison of other potential profitable strategic acquisitions. n7

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n6 Although the parties to the transaction were referred to as Army and Navy, here it appears that North was used to reference the NYSE. The header on the document reads "Presentation to NYSE_including merger plans."

n7 The NYSE allegedly expressed "little interest" in a merger with NASDAQ. Woolard Depo., D. Exh. 18, p. 21-22 (Oct. 11, 2005). The Board disregarded Instinet because it did not "fit [NYSE's] strategic needs." Id. p. 50-51. Further, Instinet's management indicated that it was not interested in being acquired by the NYSE because Instinet had plans to go public. Id. p. 32-33.
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On January 6, 2005, Duncan Niederauer, Goldman's Equities e-Commerce managing director, spoke to Mr. Thain, about the prospect of a deal with Archipelago. E-mail from David Schwimmer, P. Exh. 120 (Jan. 8, 2005). In late January to early February 2005, Amy Butte, the NYSE's CFO, and Nelson Chai, Archipelago's CFO, worked together to develop a financial model of a possible combined company which Butte said he kept separately as a "check" against Goldman's work. Butte Depo., D. Exh. 55, p. 104 (Oct. 21, 2005). On January 20, 2005, Mr. Thain and Gerald D. Putnam, CEO and Chairman of Archipelago, met to discuss merging the two companies. Mr. Thain disclosed this meeting at the next the NYSE Board meeting. Jackson Depo., D. Exh. 26, p. 19-21 (Oct. 24, 2005).

On January 24, 2005, Mr. Thain and David A. Schwimmer, then a Goldman Vice President, now a managing director, discussed a handout prepared by Schwimmer entitled "Discussions Materials." These materials outlined two potential structures for the Archipelago transaction entitled "Acquisition" and "Merger" and listed "Information Necessary to do a Proper Valuation of Navy [NYSE] and noted "Key Issues to Discuss." Goldman Discussion [**10] Materials, P. Exh. 33 (Jan. 22, 2005). The next day, as a result of the meeting, Mr. Niederauer stated in an e-mail that he was going to "talk [Archipelago] into a 65/35 deal if [their proposed structure was] to work." E-Mail from Duncan Niederauer, P. Exh. 70 (Jan. 25, 2005).

On January 31, 2005, Goldman recommended Lazard and Greenhill & Company ("Greenhill") as potential advisors to the deal, which Mr. Thain in turn recommended to the NYSE Board at its meeting on April 7, 2005. The minutes of the April meeting reflect that Mr. Thain advised the NYSE that Greenhill and Lazard would be "well-qualified possibilities" to provide the accompanying fairness opinions to the proposed merger. NYSE Board Minutes, Exh. 134 (April 7, 2005).

On March 3, 2005, Mr. Schwimmer wrote "let's think about what a fairness [*4] presentation should look like, even though we're not giving fairness, because we would have to help the fairness banks." E-mail from David Schwimmer, P. Exh. 38 (Mar. 3, 2005).

On February 10, 2005, the NYSE and Archipelago entered into a separate agreement with Goldman, providing that Goldman would act as a "facilitator" to the deal. Goldman's engagement letter states: [**11]

> It is understood and agreed that the [NYSE] will engage one or more financial advisors. . . to provide a fairness opinion with respect to a Transaction and, if deemed appropriate in the opinion of the [NYSE] in its sole discretion, to negotiate on the [NYSE's behalf] the financial

> aspects of a transaction with Archipelago, perform valuation analyses and provide financial advice . . . This letter does not create any agency relationship between the [NYSE] and Goldman Sachs.

NYSE Board Minutes, Exh. 27(Apr. 18, 2005). n8 On March 10, 2005, McKinsey and the NYSE management developed a new Board presentation responding to various Board requests arising from the October 25, 2004 meeting and proposing financial strategies to the NYSE for the future.

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n8 The engagement letter also states that the NYSE is to pay Goldman a transaction fee, though the amount is not disclosed. In addition, it states that "the [NYSE] understands that Archipelago has similarly authorized Goldman Sachs pursuant to a separate letter."
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On March 21, 2005, a meeting at Goldman's offices at which Mr. Niederauer, Mr. Kraus, Mr. Thain and Mr. Putnam were physically present and Schwimmer participated by telephone, resulted in the agreement of the 70/30 split. While Putnam initially "thought that a 60/40 split was going to be the appropriate outcome and one that ... would be acceptable to [the] company", Mr. Thain insisted on the NYSE receiving at least 70% of the combined entity. Putnam Depo., D. Exh. 70, p. 31 (Oct. 25, 2005); Thain Depo., D. Exh. 11, p. 49 (Oct. 26, 2005).

The Board was informed that the 70/30 ratio "was arrived at looking at the projections for the coming years by each of the two companies, the growth of revenues and the growth and earnings, and that was the preliminary basis for that consideration, subject to analysis and fairness opinion." Dep. Woolard, P. Exh. 162, p. 53 (Oct. 11, 2005). Upon the agreement on the split, Mr. Putnam sent an e-mail to William Ford of General Atlantic, a major shareholder of Archipelago, commenting that Mr. Thain said that 70/30 was the best that he could get past the Seatholders. E-mail from Putnam, P. Exh. 6.(Mar. 21, 2005).

On April 7, 2005, following Mr. Thain's [**13] recommendation, the NYSE authorized retention of Lazard to provide a fairness opinion in connection with the proposed merger. NYSE Board Min., P. Exh. 134, (Apr. 7, 2005); Dep. Carter, P. Exh. 55.

On April 15, 2005, the Board retained outside counsel, O'Melveny & Meyers for legal advice regarding the merger.

On April 17, 2005, the day before the Board's vote on the transaction, Mary Yeager, the Exchange's acting secretary, circulated a list of questions to the Board prepared by Mr. Allison as well as a second list to the Board's legal counsel. E-mail from Spencer Klein, P. Exh. 149 (Apr. 18, 2005). The Board did not interview Putnam or Chai nor did it investigate their backgrounds. Rivlin Depo., P. Exh. 158 (Oct. 13, 2005).

On April 18, 2005, the NYSE Board convened to further consider the proposed Archipelago merger. During the course of the meeting, the Board heard from its experts, O'Melveny & Meyers, Lazard, PricewaterhouseCoopers ("PwC") and the Exchange Management. The Board formally approved PwC, the NYSE's outside auditors, to conduct its due diligence concerning Archipelago's historic, financial controls, and audit procedures. NYSE Board Minutes, D. Exh. 41 (Apr. 18, 2005). [**14] [*5]

The same day, the Archipelago Board met. During the special meeting Schwimmer distributed a 25 five page presentation on "due diligence relating to legal, financial, technology and human resources." Archipelago Board Minutes, Special Meeting, P. Exh. 3 (Apr. 18, 2005). Schwimmer included in the presentation a chart of a recommended Management Team in which Marshall N. Carter n9 and Mr. Thain preserved their positions; Mr. Chai would become CFO and Ms. Butte the "Head of Strategy & Corp. Development." E-mail from David Schwimmer, P. Exh. 92 (Apr. 7, 2005).

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n9 Mr. Carter is the Chairman of the NYSE Board. He previously served as Chairman and CEO of State Street Bank & Trust Company, of which defendant Goldman served as financial consultant in connection with the sale of certain of its operations in 1999.
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On April 20, 2005, during a NYSE Board meeting, PwC presented its due diligence report. PriceWaterCoopers Army/Navy Due Diligence Report, Draft Report, P. Exh. 139, (Apr. 20, 2005). Defendants allege [**15] that after a review of the transaction, a discussion on Goldman's role in the transaction, and Lazard's verbal conclusion n10 that the merger was fair, the deal was announced. n11 NYSE Board Minutes, D. Exh. 40. This spurred a chain of e-mails sent to Goldman's Niederauer expressing gratitude for the transaction as well as congratulating Mr. Niederauer for his active role in the conclusion of the merger. n12

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n10 Mr. Parr, deputy Chairman of Lazard, dialed into the meeting to discuss Lazard's fairness opinion and the transaction's financial terms with the Board. Mr. Parr confirmed for the Board that Lazard had concluded that the transaction was fair to the Seatholders from a financial perspective. NYSE Board Min., D. Exh. 40 (Apr. 20, 2005). In a letter from Parr dated April 20, 2005, he states that Lazard concludes that the transaction is fair to the Seatholders. P. Exh. 128. Lazard did not finalize its report and sign it until early June 2005. Parr Depo., P. Exh. 157, p. 58-59, 78 (Oct. 24, 2005).

n11 Joint Press Release issued April 20, 2005. http://www.nyse.com/pdfs/joint_release.pdf. [**16]

n12 NYSE's Leimkuhler thanked Niederauer for the "helpful steering by a certain individual" that "seem[ed] to make all the difference." E-mail from Courtney Leimkuhler, Exh. 93 (Apr. 20, 2005). In an e-mail entitled "GS taking over the world ... (or NYSE merges with ARCA)", Joyce Thomas briefly states "looks like your baby has finally grown up! I'm not sure how much you influenced this deal but I'm sure you had a major hand in it. Congratulations!" Similarly, asked if the deal was "[his] work", Mr. Schwimmer replied "Yes". E-mail from Rose Shabet, Exh. 124 (Apr. 20, 2005).
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On November 3, 2005, the NYSE filed its Third Amended S-4 with the Securities and Exchange Commission. Goldman's role is described as follows:

> Having considered the relationships that Goldman Sachs had with both Archipelago and the NYSE described above, the NYSE and Archipelago believed that Goldman Sachs could play a role in facilitating a possible transaction, as long as the parties agreed on appropriate limits regarding Goldman Sach's role. To that end, the NYSE and Archipelago asked Goldman Sachs to consider [**17] acting as a facilitator to the transaction, but on the understanding that Goldman Sachs would not act as a financial advisor to either party, would not negotiate on behalf of either party, would not provide any opinion to either party as to the fairness of any potential transaction between the parties.

While this was Goldman's stated role, the testimony and exhibits suggest that Goldman's activities were in fact more far ranging and instrumental to the processes of valuation and negotiation.

*[*6] The Complaint*

Plaintiffs filed the complaint in this action on May 9, 2005. The complaint consists of the following causes of action: (1) breach of fiduciary duty and of loyalty against all defendants except Goldman; (2) breach of fiduciary duty of care against all defendants except Goldman; and (3) aiding and abetting breach of fiduciary duty against Goldman. Specifically, plaintiffs challenge the manner in which the transaction was negotiated as well as the fairness of the merger agreement itself. Plaintiffs allege that the deal was tainted with a spiral of conflicts of interest.

Mr. Thain and Goldman allegedly abused their fiduciary duty by ensuring that Archipelago [**18] received the most favorable terms under the Merger. Their motive was allegedly self interest. Plaintiffs allege that Goldman was conflicted by its 15.6% ownership of Archipelago as well as its representation of both Archipelago and the NYSE in the merger. By virtue of Mr. Thain's ownership of Goldman stock, albeit in a hidden assets trust, he too was conflicted by Goldman's ownership of Archipelago. These conflicts are evidenced, according to plaintiffs, by the stock allocation which was patently unfair to the NYSE Seatholders as it did not accurately reflect the equity value of the NYSE. Under the terms of the merger agreement, the NYSE would be allocated 70% of the aggregate amount of the post merger common stock, whereas former Archipelago shareholders would receive the remaining 30%. Plaintiffs sought a better deal. Also unfair to the NYSE's Seatholders, according to plaintiffs, was the so-called "lock-up" provision of the merger agreement, which precludes the NYSE Seatholders from selling their shares for up to five years, whereas currently, the NYSE seats are freely transferrable.
Defendants' Motion to Dismiss

Instead of answering, defendants filed a motion to [**19] dismiss. By decision dated September 2, 2005, this Court denied defendants' motion with the exception of dismissing part of the breach of duty of loyalty claim which alleged that Mr. Thain dominated the Board.
Plaintiffs' Motion for Preliminary Injunction

In plaintiffs' present motion for a preliminary injunction plaintiffs sought to delay any vote by the Seatholders on a proposed merger between the NYSE and Archipelago until the Seatholders have the ability to cast a free and informed vote. To be successful, plaintiffs' burden was to show under CPLR 6301 probability of success on the merits, irreparable harm and balance of equities in their favor.

Plaintiffs contended that the NYSE Board "rubber-stamped" a transaction that was structured through a process that was rife with conflicts of interests and ultra vires acts, without considering material information that was crucial to determining whether the transaction was fair to the NYSE seatholders. Additionally, plaintiffs argued that Goldman, Archipelago's second largest shareholder, and Mr. Thain, Goldman's former CEO, and still a shareholder of Goldman, abdicated their fiduciary duties in [**20] approving and recommending a transaction specifically designed to maximize their self interest without regard to the true value of the NYSE or its seatholders. Finally, plaintiffs alleged that numerous incorrect and incomplete disclosures in the Proxy Statement render the Proxy Statement false and misleading with regard to Goldman's role in the transaction, the background and negotiation of the deal, and the true economic impact to the Seatholders' ownership interest in the proposed merger.

Defendants opposed this motion and argued that plaintiffs could not be successful on the merits because plaintiffs failed to provide the Court with a valid reason why the Seatholders of the NYSE could not decide for themselves whether to accept or reject the proposed merger. Further, defendants alleged that the NYSE had made available every material fact needed by the Seatholders to cast a fully informed vote by providing voluminous disclosures. Defendants also relentlessly contend that since the announcement of the merger, seats of the NYSE have appreciated and thus, plaintiffs fail to prove that an irreparable harm will be inflicted upon the NYSE and its Seatholders.
A hearing on the motion [**21] began on November 14, 2005 to determine success on the [*7] merits, irreparable injury and whether the balance of equities favor plaintiffs. Two witnesses testified during the course of the preliminary injunction hearing: Goldman's David Schwimmer and Herbert Monroe Allison, former NYSE Board of directors member. n13

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n13 Mr. Allison became a Board member in June 2003 and was a member on April 20, 2005, when the deal was announced.
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At the urging of this Court, on November 15, 2005, during the second day of testimony, the parties agreed to compromise. The settlement was negotiated and agreed upon on the record (the "Settlement").
The Settlement Agreement
From this Court's perspective, the most important aspect of the Settlement was to provide for an independent report and analysis of the pros and cons of the merger before the vote on December 6, 2005. In order for the Settlement to obtain court approval, this Court must be satisfied that the class members receive all the relevant information [**22] needed for an informed vote. Logistically, the Settlement required the NYSE to select an independent financial expert, subject to plaintiffs' consent, to render to the Court by November 23, 2005, an opinion on the fairness of the proposed merger. That opinion was to include a summary of the analytical work forming the basis for the opinion, and to be sent by overnight mail to the NYSE seat holders and posted on the NYSE's website, Http://www.nyse.com.

The Settlement further provides that the Seatholders shall be entitled to vote on the proposed merger without any interference or delay.
Events Subsequent to the Settlement

On November 23, 2005, this Court received "The New York Stock Exchange, Inc. Fairness Opinion and Summary of Analyses" prepared by Citigroup Global Markets, Inc. (the "Citigroup Report"). The Citigroup Report is a forty page document composed of five sections. Following a brief preface summarizing the analytical work forming the basis of the fairness opinion, the Citigroup Report includes the following sections: (1) The Transaction Overview; (2) Archipelago; (3) the NYSE; (4) "Pro Forma Analyses"; and ends with an "Appendix." The Citigroup Report purports [**23] to analyze the proposed merger between the NYSE and Archipelago, but whether the Citigroup Report alone satisfies the goal of providing complete disclosure is debatable.

In a letter to this Court dated November 28, 2005, plaintiffs, challenged Citigroup's analyses. Based on a report by Willamette Management Associates, (the "Willamette Report"), plaintiffs argue that the Citigroup Report is deficient because it failed to address issues agreed upon in the Settlement; that it impermissibly relied on old projections not new ones; that it failed to value the NYSE as a standalone for-profit corporation; that it failed to consider mechanisms to protect Seatholders in the proposed merger or the lockup provision; and that it failed to explain the NYSE's 259% premium to be paid for the Archipelago stock.

On November 29, 2005, during a phone conference with this Court and all parties, plaintiffs requested that the Willamette Report be distributed to all Seatholders along with the Citigroup Report. After first opposing plaintiffs' request as a violation of the Settlement's anti-disparagement provision, defendants agreed to distribute the Willamette Report to all Seatholders as a part of this [**24] settlement process.

This Court has received a number of communications from Seatholders objecting to the settlement of this action. Most of these objections go to the amount of fees to be awarded to plaintiffs' counsel. As the vote on December 6, 2005 is not contingent on the amount of attorneys' fees awarded and the importance and complexity of that issue, this Court will enter a separate order addressing fees.

On Friday, December 2, 2005, this Court received a request from some plaintiffs to delay the vote in order to give Seatholders a sufficient opportunity to study the Citigroup and Willamette Reports. [*8]

The question of what is the rush to conclude the merger has been a question in this Court's mind from the beginning of the action. In communications to this Court from members of the settlement class, and to a lesser extent from defendants' counsel, it is apparent that at least some sentiment exists that this Court and the actions taken are a mere inconvenience to those Seatholders interested only in quick profits. The Seatholders should be reminded that this nation has been, since its founding, a nation of laws. The very body of rules and laws which some of the Seatholders [**25] and defendants now find troublesome, have created a legal and business environment the world considers as its most favored. Rare is the venue that has such a reputation for a favorable and profitable climate for commercial activity as New York does. The Seatholders of the NYSE should be the first to appreciate that only by the strict adherence to business ethical standards, such as conflict disqualification, can it hope to maintain what it contends is the NYSE's role as a market leader. Of all of our financial institutions, the NYSE must be perceived as abiding by the rules of conflicts, complete disclosure and transparency. It should also be noted that the importance of this effort at assuring complete disclosure is not diminished by the alleged probability of Seatholder approval of the proposed merger in its present form.

However, this Court appreciates the importance of voting on December 6, 2005 and on this score, this Court found Mr. Allison's testimony persuasive. After this Court asked whether the Board was informed by any of the advisors or by senior management if there was some reason to press on with speed in this particular transaction, Mr. Allison testified that due to [**26] discussions of other mergers likely to happen with Instinet and NASDAQ, Archipelago could become doubtful about the NYSE's seriousness in participating in the transaction. Mr. Allison stated "there was a feeling that to [his] understanding that [they] needed to move ahead rapidly." Mr. Allison believed that Mr. Thain mentioned that there was a need to conclude deliberations and reach a decision rapidly. Allison Testimony at p. 226-227. Clearly, the Board of the NYSE agreed. The request to delay is denied because this Court finds the Settlement fair and reasonable for the reasons set forth below. The heart of the Settlement is full disclosure in exchange for voting on December 6, 2005. A postponement would be the equivalent of a finding that the Settlement is not fair.

Discussion

CPLR 908 requires this Court's approval of any class actions. It provides:

> A class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs.

Under CPLR 908 [**27] , this Court must analyze the following components of any class action settlement: (1) the likelihood of success, similar to the analysis for a motion for preliminary injunction; (2) the extent of support from the parties, including the number of objectors and nature of objections; (3) recommendation and experience of counsel; (4) bargaining in good faith; (5) the complexity of the issues of law and fact; and (6) expense and duration of litigation. *In re Colt Indus.*, 155 A.D.2d 154, 160, 553 N.Y.S.2d 138 (1st Dept 1990), modified on other grounds, 77 N.Y.2d 185, 566 N.E.2d 1160, 565 N.Y.S.2d 755 (1991); *In re Michael Milken and Associates Securities Litigation*, 150 F.R.D. 57, 64-65 (SDNY 1993). See also *Newberg on Class Actions*, § 11.43 to 11.58 (2002). "The application of these factors [shall not] follow a formalistic approach; rather, it is the circumstance of the case itself which should mold the approach of the court in deciding the weight to be accorded to each of the components." *Klurkfeld v Equity Enterprises, Inc*., 79 A.D.2d 124, 133, 436 N.Y.S.2d 303 (1981)(superseded by statute as to fair value of price offered). In this case, to determine whether the Settlement is fair and [**28] reasonable, this Court will compare the likelihood of success of the action, were it to proceed, analyzing the complexity of the law and difficulty in proving facts, on the one hand, to the settlement's relief, on the other. *In re Colt*, at 160. This Court will not rubber stamp this Settlement (particularly when this is precisely what plaintiffs accuse defendants of doing.) [*9]

It is also significant to the analysis of this Settlement that this case involves the NYSE, whose importance to the financial community cannot be disputed. The manner in which this merger is accomplished must meet a high standard, in part because confidence in our financial markets has been substantially eroded by recent events. This erosion is, largely attributable to the financial reverses of Enron, Worldcom and Adelphia, to name a few. The loss of share value in those companies, which resulted in the virtual evaporation of pension and medical benefits for long term employees, as well as the equally profound losses suffered by individual and institutional investors, has deepened the public's distrust of corporations and capital markets.

In an effort to address the risks to the public, workers as [**29] well as investors, and to reclaim financial market confidence, legislation has been proposed and courts and regulatory agencies are being asked to vigorously enforce existing rules that pertain to corporate governance and particularly officer and director responsibility.

This Court does not suggest equating this transaction with any of the corporate calamities identified above. No party to this lawsuit is accused of criminal or venal behavior. Rather, this action has focused attention on the question of conflicts of interest and the impact of such conflicts on transactions, such as the proposed merger at issue in this action, and what efforts are appropriate to compensate for such conflicts.

Likelihood of Success on the Merits: Proving Conflicts n14

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n14 As to the other components, the Court acknowledges the expertise of counsel on both sides of the action and is convinced that parties were zealously represented in negotiating this settlement. In terms of litigation time, effort and expense, at least 28 depositions were taken, tens of thousands of pages of documents produced and analyzed and two substantive motions briefed and more would be necessary before the parties would be ready for trial. Plaintiffs had yet to move for class certification, another complicated motion. The Court finds persuasive counsel's support of the settlement. The Court acknowledges the objections of all parties, and finds that the parties, and especially the majority of Seatholders, support this Settlement.

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Success in litigation is never a sure thing. Here, plaintiffs face huge challenges. Beginning with defendants' motion to dismiss, this action raised difficult and novel legal issues. Plaintiffs' burden in order to succeed on the merits is substantial. It would require proof of the alleged conflicts between Mr. Thain, Goldman and Archipelago and that the Lazard fairness opinion was not in fact fair or independent because Lazard was likewise conflicted.

In the decision on the motion to dismiss, this Court found that plaintiffs sufficiently alleged conflicts of interest in the complaint.

With regard to Mr. Thain, plaintiffs established the financial ties and the historical relationship between Mr. Thain and Goldman. The impact of the historical ties were illustrated by Schwimmer's testimony. He and Mr. Thain worked closely together on the merger. Indeed, their relationship exhibited signs of mental

convergence that comes with having worked together or being of the same mindset. Schwimmer Transcript, p. 66-67, 81. Their relationship exhibited the informality of professionals who know each other well, not of financial advisor and client. Id. p. 100; 108-109; E-mail dated Apr. 20, 2005, P. [**31] Exh. 78; E-mail dated March 30, 2005, P. Exh. 99. While this relationship is clearly not violative in and of itself, it exemplifies the financial interconnections objected to by plaintiffs.

There is no dispute that Mr. Thain had disclosed a substantial interest in Goldman. Allison Transcript, p. 184 to 185. Indeed, Mr. Thain's trust, was intended to deal with the obvious conflict created by Mr. Thain's interest in Goldman, a NYSE regulated entity, which was clearly prohibited by the NYSE rules.

However, this Court's analysis of the Trust reveals that Mr. Thain's assets were not effectively hidden. The assets placed in the Trust were not required to be sold and the proceeds therefrom invested without Mr. Thain's input or knowledge. Instead, the trustees were given the power to sell and re-invest as they saw fit. The substantial tax consequences to Mr. Thain of a [*10] sale of his stock is, no doubt, a consideration for the trustees as they administer these assets [and suggests a reluctance on their part to sell Mr. Thain's Goldman interests].

The magnitude of Mr. Thain's holdings presents a unique problem with the concept of hidden assets that the Trust does not resolve. The [**32] original trust assets were in the form of Goldman stock and options that are today worth approximately $ 300 million. Notwithstanding the parties best efforts to structure the Trust to avoid Mr. Thain's direct knowledge of the status of his holdings, the Trust does require the trustees to report to Mr. Thain at the end of each year, "information on income, expenses capital gains and capital losses, which is necessary for [Thain] to prepare and file tax returns..."

These circumstances, the partial disclosure necessary for Mr. Thain to file his tax return and the amount of capital gains Mr. Thain would incur in the event of a sale of these assets, render it highly unlikely that he would not be aware that he still had an interest in Goldman.

Mr. Thain's ownership of Goldman also raises the prospect of a secondary or indirect conflict. Clearly, any interest in Archipelago by Mr. Thain would require his recusal from any aspect of this merger transaction under NYSE rules and his employment agreement. Although Mr. Thain has no direct ownership of Archipelago stock, Goldman owns approximately 15% of Archipelago's outstanding shares and Mr. Thain owns a large block of Goldman stock.

In [**33] addition, the various NYSE rules that address the issue of a conflicting interest do speak in indirect as well as direct terms. Generally, a conflict that requires recusal is one that would reasonably be perceived as impairing the impartiality of the director. Objective as well as subjective criteria are applied. An objective disqualifying interest, such as Mr. Thain's ownership of Goldman stock, required him to recuse himself in the hiring of Goldman. Section 15 of the NYSE rules defines conflict of interest for directors and provide that no director shall participate in the deliberation or adjudication of any matter in which he or she is personally interested. This section does not define what the NYSE considers a disqualifying interest to be.

NYSE Rule 21, which provides for the disqualification of directors upon the listing of securities, gives definitive guidance on this issue of whether an indirect interest can be a disqualifying one. Rule 21 prohibits any member of the Board of Directors from voting at any meeting of the Board, or to participate in its deliberations, with respect to the listing of a security if the director has *directly or indirectly a substantial interest* [**34] *in such security*. n15

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n15 In Delaware, transactions between corporations and directors and/or officers were presumptively void or voidable. *Marciano v Nakash*, 535 A.2d 400, 404 (Del. 1987). Section 715 of New York's Not-For-Profit Law provides a safe harbor protecting interested directors involved in a transaction if it is approved by a fully informed vote of disinterested directors. N-PCL § 715(b). New York's Not-For-Profit Law § 715 also requires disclosure of conflicts and provides authority for the Court to analyze conflicted transactions for fairness.
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Pursuant to Rule 21, a director shall be deemed to have such a disqualifying interest if:

> (1) Such security or any other security of the same issuer is one in the distribution of which he or his member organization is participating or to his knowledge has within six months prior thereto participated, as or on behalf of an underwriter or a member of a selling syndicate or group; or
> (2) he or any member, [**35] allied member or approved person in his member organization is an officer or director (or person occupying a similar status or performing similar functions) or a voting trustee of the issuer of such security or of any corporation which to his knowledge controls or is controlled by the issuer or such security; or
> (3) he or his member organization or any member, allied member or approved person therein owns directly or indirectly more than 1% of such security or of any [*11] class of stock of the issuer, or of any corporation which to his knowledge controls the issuer of such security; or
> (4) he or his member organization or any member, allied member or approved person therein to his knowledge holds directly or indirectly any substantial contract, option, or other privilege entitling him to purchase such security; or to his knowledge within six months prior thereto has directly or indirectly purchased (other than through the exercise of a right to subscribe) such security from the issuer or an underwriter thereof at a price below the market price.

As of this date, Goldman's ownership in Archipelago is about $ 420 million in value. In more moderate circumstances, Mr. [**36] Thains's interest in Archipelago, through his ownership of Goldman, would be so remote as not to implicate recusal. However, these large holdings, in Goldman by Mr. Thain and Archipelago by Goldman, raise the specter of an indirect interest of sufficient magnitude to constitute a conflict to warrant Mr. Thain's disqualification in this transaction.

As of November 15, 2005, plaintiffs established a prima facie case of Goldman's conflict of interest. Goldman played a significant role as a financial advisor to both parties, in its direct participation in valuation, and in the negotiation and ultimate completion of the transaction. Goldman owns 21 seats in the NYSE, and leases 92 others. Since Archipelago's creation, Goldman has been heavily invested in it. At one point Goldman was Archipelago's largest shareholder, owning about 24%; today that ownership interest stands at approximately 15.6%. Aside from providing substantial investment capital to Archipelago over the years, Goldman served as the lead underwriter for Archipelago's initial public offering in 2004 for a substantial fee.

As of November 15, 2005, plaintiffs established a prima facie conflict between Goldman and Lazard. Goldman [**37] and Mr. Thain hand picked Lazard to perform the fairness analysis of the NYSE and Archipelago merger. Schwimmer admitted that Goldman was working on Lazard's IPO at the very same time Lazard was suggested to the NYSE. Id. Schwimmer testified that Goldman created and ran the model that generated the data that was relied upon by Lazard. Id. From the beginning of Lazard's employment, Schwimmer provided Lazard with substantial materials including, the [electronic] model itself, paper pages and e-mailed pages of output from the model. Id. p. 130-132. Goldman collected a hefty fee by underwriting Lazard's IPO. Goldman was so entrenched in the Lazard deal, in fact, that when Lazard's price went down, Goldman was alleged to have lost $ 15 million attempting to support the price. n16

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n16 Reported in Smiling through Clenched Teeth, A Week in the Markets, 6/10/05 Euroweek 20, 2005.
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Initially, defendants objected that it would be impossible to find an un-conflicted investment bank since the NYSE is involved. However, [**38] this misses the point. While all financial institutions have some connection to the NYSE, it was Goldman's, as well as Mr. Thain's, ownership interest in Archipelago that had to be neutralized.

Selecting an independent firm to issue the fairness opinion created an opportunity to purge the conflicts. Instead, the problem was multiplied by choosing a conflicted Lazard.
Disclosure as a Remedy

If the action proceeded, the multiple conflicts established by plaintiffs, together with what are alleged to be misleading disclosures in the proxy statement regarding the role played by Goldman, imposed a duty upon this Court to make inquiry as to the fundamental fairness of the transaction itself.

As a consequence of this proposed Settlement, this Court's role will be limited to ensure [*12] that the Seatholder vote on the merger will be made upon adequate disclosure so that the Seatholders themselves can evaluate the impact, if any, of the conflicts on the terms of the transaction as presented. Given the relatively small number of class members and their sophistication in financial matters, this approach appeals to all parties and is acceptable to this Court in principle. [**39] However, as aforesaid, this Court must conclude that this Settlement provides reasonable disclosure of the roles played by the conflicted participants, as well as the pros and cons of the merger itself. That is what the plaintiffs sought from the beginning of this action and that is precisely what the Settlement sets out to do.

It cannot be disputed that full disclosure is essential to the public's confidence in securities markets. Indeed, the NYSE itself has had a long history of shining the light on corporations and their transactions. In 1853, "the NYSE strengthen[ed] its listing standards, requiring companies to provide complete statements of shares outstanding and capital resources." Http://www.nyse.com. In 1895, "the Exchange recommends that all listed companies send their shareholders annual reports with an income statement and balance sheet." Id. In 1899, regular financial statements to the NYSE were required." Id. In 1956, "the NYSE urges listed companies to include at least two outside directors on their Boards to help ensure prompt and full disclosure of corporate information." Id. By 1913, twenty-two states adopted Blue-sky laws which required companies issuing securities [**40] to file a description of their operations and receive a permit before selling stocks. Id. The NYSE also imposed registration requirements on brokers who sell securities. Id.

In addition, the Securities Act of 1933, 15 USC 77a, mandated registering new issues, established federal disclosure requirements and established the Securities and Exchange Commission. The Securities Act of 1934, 15 USC 78a, was enacted to require disclosure. More recently, the Sarbanes Oxley Act, 15 USC 7201, seeks to protect investors by improving the accuracy and reliability of corporate disclosures was enacted. n17 The basic purposes of these and other measures is to provide for full disclosure to investors and to prohibit fraud in connection with the sale of securities.

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n17 The annual cost of compliance with Sarbanes Oxley for a typical large corporation has been estimated at $ 14.3 million. Joseph Nocera, For All Its Costs Sarbanes Law is Working, NY Times, p. C1, Dec. 3, 2005.
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In the Settlement, plaintiffs agreed to withdraw their objection to the December 6, 2005 vote in exchange for a full analysis of the pros and cons in a new fairness opinion issued to this Court. What the parties received was yet another standard fairness opinion.

Fairness opinions have recently come under attack, with good reason. Jeffrey R. Mannig, *The Current State of Fairness Opinions*, 24-7 American Bankruptcy Institute Journal 14 (Sept. 2005); Andrew Ross Sorkin, *You Can Call It Fair, But That Wouldn't Be Fair*, NY Times, Sunday Bus., p. 3 (July 10, 2005); Gretchen Morgenson, *Yes, They Can Say No to a Merger*, NY Times, Sunday Bus., p. 1 (June 19, 2005); Gretchen Morgenson, *Mirror, Mirror Who is the Unfairest?*, NY Times, Sunday Business, p. 1 (May 29, 2005); Andrew Ross Sorkin, *Mergers: Fair Should be Fair*, NY Times, Sunday Bus., p. 6 (March 20, 2005); Andrew Ross Sorkin, *Good Deals for Bank, Both Coming and Going*, NY Times, Sunday Bus., p. 6 (Sept. 5, 2004); Helen Bowers, 2002, *Fairness Opinions and the Business Judgment Rule: An Empirical Investigation of Target Firms' Use of Fairness Opinion*, Northwestern Univ L Rev 567-578; Bill Shaw and Edward [**42] J. Gac, 1995, *Fairness Opinions in Leveraged Buyouts: Should Investment Bankers Be Directly Liable to Shareholders*: Securities Reg. and Rules 293; Charles M. Ellson, 1992, *Fairness Opinions: Are They Fair and Should We Care?*, 53 Ohio State L J 951, 958; Bebchuk, Lucien Arye and Marcel Kahan, 1989, *Fairness Opinions: How Fair Are They, and What Can be Done About It*, Duke L. Rev 29-45.

In the case of Gillette, Massachusetts Secretary of State, William Galvin initiated an action questioning whether Gillette shareholders were receiving a fair price in Proctor & [*13] Gamble's acquisition of Gillette. *Galvin v The Gillette Co.*, 19 Mass. L. Rep. 380 (Mass Super Court 2005)., clarified by 2005 Mass Super LEXIS 248. Specifically, Galvin challenged the integrity of the fairness opinion issued by Goldman, which had also been credited in the Proxy statement with putting the transaction together. n18
A fairness opinion comes in the form of a letter to a board, not the shareholders, opining on the fairness to the shareholders of the financial terms of a proposed transaction. Association of the Bar of the City of New York, Special [**43] Committee on Mergers and Acquisitions ("ABCNY"), Letter to NASD, dated February 5, 2005. In 1985, the Delaware Supreme Court created the obligation for corporate boards of target companies to make informed decisions. *Smith v Van Gorkom*, 488 A.2d 858 (Del), reargument denied, 1985 Del LEXIS 590 (1985). As long as corporate boards are fully informed of all available and relevant information, the "Business judgment rule" will protect board members from liability for the consequences of bad business decisions, made in good faith and in the best interest of the company. *Auerbach v Bennett*, 47 N.Y.2d 619, 629, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979); *Casey v Woodruff*, 49 N.Y.S.2d 625, 643, NOC (Sup Ct, NY County 1944). See also, *Consumers Union of U.S., Inc. v State*, 5 N.Y.3d 327, 360, 840 N.E.2d 68, 806 N.Y.S.2d 99 (2005)(holding that business judgment rule would protect board of nonprofit reorganizing non-profit health insurer as for profit company). Fairness opinions are relied upon by boards to satisfy that duty. Fairness opinions should be viewed as some evidence of the board's care in evaluating transactions. *See e.g. In re Vitalink Communications Corp. Shareholders Litigation*, 1991 Del Ch LEXIS 195, 1991 WL 238816 at 12 (Del Ch 1991); [**44] *Alidina v Internet.com Corp*., 2002 Del Ch LEXIS 156, *31 (2002). They do not bulletproof the board. *Bernstein v Kelso*, 231 A.D.2d 314, 321, 659 N.Y.S.2d 276 (1st Dept, 1997) *Joseph v Shell Oil Co.*, 482 A.2d 335, 342 (1984)(shareholders' preliminary injunction granted where some directors were on both sides of transaction and financial expert not provided full disclosure). The problem is that boards routinely rely without question, investigation or scrutiny. The reliance must be reasonable. 8 Del C § 141e.

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n18 The merger was approved on July 12, 2005. Http://www.pg.com.
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The important purpose of fairness opinions appears to have been lost.*See e.g. Stuchen v Duty Free International Inc.*, 1996 Del Super LEXIS 187 (1985)(rehearing denied 1996 Del Super LEXIS 524 (fairness opinion could not be basis of claim against investment banker since it was issued after parties had agreed to transaction).

The only requirement for providers of fairness opinions [**45] is that they be qualified and independent. Granted, a fairness opinion is not a guarantee of a good deal. Rather, it is a financial review by a disinterested party. However, by definition, the opinion must be fair and independent.

Conflicts between the board and financial experts who issue fairness opinions have become the norm instead of the exception. *Anderson v Booth*, 103 F.R.D. 430 (D. Minn 1984)(shareholders have right to know about investment banker's contingent fee arrangement); *Joseph v. Shell Oil*, 1990 Del Ch LEXIS 1999. Here, the web of relationships between Archipelago and Goldman and Lazard and Goldman illustrate the charge of lack of independence. Indeed, the NASD is considering a new rule 2290 that would require greater disclosure to shareholders about the relationship between the company and the investment bank providing the fairness opinion. NASD Notice to Members 04-83, Request for Comment on Rule 2290 (June 22, 2005); NY State Bar Association letter dated January 26, 2005 commenting on NASD Proposed Rule 2290; ABCNY, Letter dated February 1, 2005 commenting on NASD Proposed Rule 2290.

Fairness opinions have become watered down and [**46] toothless. While financial experts are not expected to repeat their own due diligence, some analysis of the validity of management's assumptions would be a breath of fresh air. Rather, opinions are based on facts, figures and assumptions provided by management. Fairness opinions have devolved so much, in fact, that this is to be expected. *In re AOL Time Warner Inc. Securities and ERISA Litigation*, 381 F. Supp. [*14] 2d 192 (SDNY 2004); *In re Reliance Securities Litigation*, 135 F. Supp. 2d 480, 513 (D Del 2001)(dismissing action against some defendants because financial experts reliance on information provided to them was not subjectively false). The Citigroup Report is illustrative. One part of the Report is entitled "pro forma analysis" and it admittedly adopts the very data relied upon by Lazard which was fed to it by Goldman and to which plaintiffs objected in bringing this action.

It is problematic to this court that only a positive fairness opinion can be rendered. It is worth noting, but not probative, that when asked by this Court if any of assembled counsel were aware of any fairness opinion that opined that a proposed transaction was [**47] in fact unfair, the response was a resounding "NEVER." See ABCNY letter dated February 1, 2005, footnote 4 acknowledging that financial experts privately will advise clients if a positive fairness opinion cannot be rendered.

Given nature of fairness opinions, the long history of both the NYSE and public efforts to insure complete financial disclosure and of the circumstances of Goldman's extensive role and the conflicts of the participants to this transaction, this Court finds plaintiffs' claims seeking further disclosure were likely to be meritorious. The question of whether the new fairness opinion required by the Settlement satisfies this disclosure goal of the Settlement and neutralizes the conflicts has been mooted by the Willamette Report.

The solution agreed to by these parties, the filing of the Citigroup Report together with the critical comments by plaintiffs' expert contained in the Willamette Report, is unique. Unlike relying on a typical fairness opinion, these competing presentations provide a fair and balanced view of the proposed merger and present the NYSE Seatholders with an opportunity to exercise their own business judgment with eyes wide open. The presentation [**48] of such differing viewpoints ensures transparency and complete disclosure in stark contrast to the usual perfunctory fairness opinion.

This Court hereby finds this proposed Settlement to be fair and directs the question of the merger of the NYSE and Archipelago to be presented to and voted upon by the NYSE Seatholders as scheduled and noticed.

The issue of reasonable attorneys' fees is reserved.

Accordingly, it is

ORDERED, that motion 011 is granted.

Dated: December 5, 2005