IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE NYMEX SHAREHOLDER LITIGATION	:	**C.A. No. 3621-VCN**

SHELBY GREENE, on behalf of herself and all others similarly situated,	:	
Plaintiff,	:	
v.	:	**C.A. No. 3835-VCN**
NEW YORK MERCANTILE EXCHANGE, INC., NYMEX HOLDINGS, INC., RICHARD SCHAEFFER, THOMAS GORDON, JAMES NEWSOME, STEPHEN ARDIZZONE, A. GEORGE GERO, NEIL CITRONE, FRANK SICILIANO, WILLIAM FORD, HARVEY GRALLA, WILLIAM MAXWELL, HOWARD GABLER, DANIEL RAPPAPORT, DENNIS SUSKIND, MELVYN FALIS, ROBERT STEELE, JOHN McNAMARA, CME GROUP, INC. and CMEG NY INC.,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: March 17, 2009
Date Decided: September 30, 2009

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NOBLE, Vice Chancellor

These two actions involved challenges to the now-consummated acquisition of Defendant NYMEX Holdings, Inc. ("NYMEX") by an entity controlled by Defendant CME Group, Inc. ("CME"). Some of the claims are brought on behalf of former shareholders of NYMEX.[1] Others are brought on behalf of the Class A Members (i.e., those "seat holders" having contractual trading rights) of the NYMEX Exchange, which was a subsidiary of NYMEX.[2]

In this memorandum opinion, the Court addresses Defendants' motions to dismiss both actions.

I. BACKGROUND

A. *The Parties*

NYMEX (or the "Company"), formerly a publicly traded Delaware corporation, was the largest commodity futures exchange in the world.[3] The Company's principal operations were conducted through its two subsidiaries, the New York Mercantile Exchange, Inc. ("NYMEX Exchange") and Commodity Exchange, Inc. ("COMEX").[4]

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[1] *In re NYMEX S'holder Litig.*, C.A. No. 3621-VCN (the "NYMEX Action").

[2] *Greene v. NYMEX Holdings, Inc.*, C.A. No. 3835-VCN (the "Greene Action"). For convenience, the Third Consolidated and Amended Class Action Complaint in the NYMEX Action will be referred to as the "Complaint," and the Amended Class Action Complaint in the Greene Action will be referred to as the "Greene Complaint."

[3] Compl. ¶ 3.

[4] Compl. ¶ 14.

Plaintiffs Cataldo Capozza, Polly Winters, and Joan Haedrich owned NYMEX common stock.[5] Plaintiff Capozza also was a Class A Member of the NYMEX Exchange from 1983 through sometime in 2008.[6] Plaintiff Shelby Greene, also a Class A Member, brought her action on behalf of the Class A Members of the NYMEX Exchange.

Defendant Richard Schaeffer was the chairman of both NYMEX and NYMEX Exchange and was a member of the NYMEX Board of Directors (the "Board").[7] Schaeffer also had been a Class A Member of the NYMEX Exchange since 1981.[8] Defendant James Newsome was the President, Chief Executive Officer, and a member of the Board of Directors of NYMEX.[9] In addition to Schaeffer and Newsome, all of the other members of the Board are named as individual Defendants (the "Director Defendants").[10]

Defendant CME formed Defendant CMEG NY, Inc. as its wholly-owned subsidiary for the purpose of acquiring NYMEX.[11]

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[5] Compl. ¶¶ 11, 12, 13.
[6] Compl. ¶ 11.
[7] Compl. ¶ 15.
[8] *Id.*
[9] Compl. ¶ 16.
[10] Those Defendants are: Stephen Ardizzone, Neil Citrone, Melvyn Falis, William Ford, Howard Gabler, A. George Gero, Thomas Gordon, Harvey Gralla, William Maxwell, John McNamara, Daniel Rappaport, Frank Siciliano, Robert Steele, and Dennis Suskind. In the various filings, there is a discrepancy as to the number of directors—15 or 16. One director, Defendant Gralla, did not serve on the Board after May 2008, and the Court assumes that the end of service accounts for the disparity.
[11] Compl. ¶ 38.

B. *Pre-Merger Modifications to NYMEX's Structure*

From 1872 until 2000, NYMEX Exchange operated as a New York not-for-profit membership organization. Seemingly anticipating the subsequent trend towards demutualization of exchanges, NYMEX Exchange demutualized in 2000, converting to a Delaware for-profit entity organized as a stock holding company with a subsidiary membership company. In the demutualization, each NYMEX Exchange membership was converted into two pieces—a Class A membership in the subsidiary exchange, representing trading privileges on NYMEX Exchange, and one share of NYMEX Holdings common stock, representing an equity interest in NYMEX Holdings, the surviving parent. NYMEX Holdings' interest in NYMEX Exchange was converted into the sole outstanding Class B membership in the subsidiary Exchange. NYMEX Holdings retained all equity in the Exchange, as well as a right to all dividends and liquidation proceeds.

C. *The Merger*

In July 2007, the Board established the Strategic Initiatives Committee (the "SIC") in order to consider, negotiate, and recommend any significant transactions involving the Company.[12] In or about June or July 2007, John Thain ("Thain"), then Chairman of the New York Stock Exchange ("NYSE"), met with Schaeffer

[12] Compl. ¶ 76.

and expressed NYSE's interest in acquiring NYMEX.[13] As discussions progressed, Thain, on behalf on NYSE, spoke of purchasing NYMEX for $142 per share, reflecting a meaningful premium above the trading price. NYSE ultimately did not make a formal offer to purchase NYMEX. The Complaint alleges that Schaeffer did not inform the SIC or the Board of either his communications with Thain or NYSE's interest in purchasing NYMEX for $142 per share.[14] It further alleges that "NYSE ultimately declined to make a formal proposal for purchasing NYMEX because Schaeffer personally demanded a senior executive position for himself as a pre-condition to the deal."[15]

Sometime in late spring 2007, Schaeffer and Newsome began negotiating the sale of NYMEX to CME with Terry Duffy, CME's Chairman, and Craig Donahue, CME's Chief Executive Officer, but, it is alleged, they did not provide the Board or the SIC any of the details of these negotiations.[16] The Board, however, was made aware that negotiations between the two companies were in progress for the purpose of a business combination.[17] On January 7, 2008, NYMEX and CME entered into a confidentiality agreement in order to discuss more fully a potential acquisition.[18] On January 9, 2008, the Board approved the

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[13] Compl. ¶ 77.
[14] Compl. ¶¶ 81, 83, 85.
[15] Compl. ¶ 82.
[16] Compl. ¶¶ 87, 91, 92, 114.
[17] Compl. ¶ 117.
[18] Compl. ¶ 88.

adoption of a change of control severance plan, "which provide[d] for more than $97 million in change in control payments to senior management."[19]

On January 28, 2008, NYMEX announced that it was in the process of negotiating a potential combination with CME, and that CME had offered to buy NYMEX for approximately $119 per share, which represented a 2.1% premium over the closing price of NYMEX shares on that day and an 11% premium above the closing price of NYMEX shares on the last trading day prior to the announcement.[20] A substantial portion of the merger consideration was to be paid in CME stock.[21] The Company also announced that it had entered into a 30-day exclusive negotiating period with CME.[22] The Complaint alleges that, prior to any formal agreement between CME and NYMEX, "Schaeffer and Newsome committed to Duffy and Donahue that NYMEX would not attempt to renegotiate any of the economic terms of the proposed sale," and that this alleged arrangement was not disclosed to the Board.[23]

On January 24, 2008, only four days before NYMEX announced that it was in exclusive merger discussions with CME, CME stock had closed at $635.14 per

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[19] Compl. ¶ 117. *See also* Compl. ¶¶ 125-28. NYMEX's Compensation Committee first discussed the severance plan on November 19, 2007, and voted to recommend it to the NYMEX Board on December 11, 2007. In July 2008, the Board reduced the overall cost of the severance plan to $67 million.
[20] Compl. ¶¶ 90, 95.
[21] Compl. ¶ 103.
[22] Compl. ¶ 95.
[23] Compl. ¶¶ 93-94.

share, an almost $90 per share increase over its closing price a week earlier.[24] The Complaint alleges that NYMEX timed the announcement of the exclusivity period in order for CME to capitalize on the recent increase in its stock price.[25] One week after the announcement, however, CME stock fell to $485.25 per share.[26] The CME offer did not contain a "collar"—a mechanism that could have offered some protection against market fluctuations in CME stock—on the stock portion of the merger consideration. Accordingly, because a substantial portion of the consideration in CME's offer was CME stock, the loss in value of CME stock had the effect of materially reducing the total merger consideration.

The Complaint alleges that CME offered to "collar" the stock portion of the merger consideration, but such offer was rejected by Schaeffer and Newsome because it would have adversely affected the value of their NYMEX stock options. Accordingly, Schaeffer and Newsome did not inform the board that CME had offered a collar.[27]

Despite the decline in the price of CME stock, the parties extended the 30-day exclusivity period to March 15, 2008.[28] On March 17, 2008, NYMEX announced that it had entered into a merger agreement with CME. Pursuant to the

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[24] Compl. ¶ 100.
[25] *Id. See also* Compl. ¶ 101 (noting that Schaeffer was advised by email that CME stock had risen substantially while the transaction was being negotiated).
[26] Compl. ¶ 102.
[27] Compl. ¶¶ 105, 107-09.
[28] Compl. ¶ 111.

merger agreement, which was unchanged from the terms of CME's original offer, CME was to acquire all of NYMEX's common stock in exchange for $36 per share in cash and 0.1323 shares of CME common stock per NYMEX share.[29] However, based upon the value of CME stock before the capital markets' opening on March 17, 2008, the implied value of the merger consideration had declined to $100.30 per NYMEX share.[30] The Complaint alleges that the Board approved the transaction "without obtaining, soliciting, or attempting to solicit other, higher bids for the Company's shares."[31]

On or about March 16, 2008, the Board obtained fairness opinions on the acquisition from J.P. Morgan Securities, Inc. ("J.P. Morgan") and Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch").[32] Both financial advisors opined that the consideration to be paid to NYMEX shareholders was fair as of the date the fairness opinions were issued.[33] The Complaint alleges that the discounted cash flow analyses performed by both financial advisors were flawed, which resulted in an improperly low implied range of values for NYMEX stock.[34]

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[29] Compl. ¶ 112.
[30] Compl. ¶ 116.
[31] Compl. ¶ 115.
[32] Compl. ¶ 134.
[33] Compl. ¶ 134.
[34] Compl. ¶ 137. The Greene Complaint similarly asserts that the fairness opinions issued by investment banker Sander O'Neill regarding the value of the Class A Memberships were unreliable and unfair. Specifically, the Greene Complaint alleges that Sandler O'Neill "reached its preordained conclusion by employing an unreliable methodology to suppress the true value for a Class A Membership." Greene Compl. ¶ 73.

In addition to the shareholder vote, the Merger Agreement also had a closing condition that required 75% of NYMEX Exchange Class A Members to approve amendments to the governing documents of NYMEX Exchange that curtailed most of their rights as Class A Members. As part of the transaction, Class A Members, who collectively owned between 45 and 47 percent of NYMEX common stock, were also offered a $750,000 "Membership Rights Payment" as a means to compensate them for the reduction in value of their seats and in exchange for the individual waiver of additional rights.[35] The amended merger proxy statement, filed with the Securities and Exchange Commission ("SEC") on July 21, 2008, informed Exchange Class A Members that they would be required to waive all rights and claims as Class A Members against Defendants, as well as their rights and claims as NYMEX shareholders (other than the right to the merger consideration), in order to receive the $750,000 Membership Rights Payment.[36] This included their right to join the class in this case. Specifically, the "Waiver and Release" provision of the Amended Proxy stated in relevant part:

> By executing this Waiver and Release, and effective upon acceptance of the Membership Rights Payment, . . . ("Releasing Parties"),

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[35] Compl. ¶ 131. The Merger Agreement initially contemplated requiring Class A Members to sell their memberships in exchange for a Membership Rights Payment of $612,750, for a total paid by CME of $500 million. After Class A Members voiced opposition to the amount of consideration offered and threatened to block the merger, the revised merger agreement raised the consideration offered to $750,000 and allowed Members to retain their seats, though with sharply curtailed rights. Greene Compl. ¶¶ 70, 83, 96-97.

[36] Compl. ¶¶ 130-31.

> effective as of the Effective Time, hereby absolutely, unconditionally and irrevocably waives any right to and releases and forever discharges . . . (collectively, the "Released Parties") from any and all manner of causes of action, damages, liabilities, obligations, promises, judgments, claims and demands of any nature whatsoever, in law or in equity, of every kind and description, whether known or unknown, suspected or absolute or contingent ("Actions"), which such Releasing Parties (in any capacity whatsoever, including, without limitation, their capacities as stockholders of NYMEX Holdings) ever had, now have or hereafter can, shall or may have against any Released Party . . . .[37]

Subsequently, NYMEX mailed a "Final Waiver & Release" to all Class A Members that deleted any reference to the Effective Time.[38] The Plaintiffs allege that the deletion of reference to the Effective Time gives the Final Waiver & Release a retroactive effect.[39] Among those claims purportedly waived in the Final Waiver & Release are certain rights to a percentage of NYMEX Exchange revenues in perpetuity, subject to certain triggering events, previously stipulated in NYMEX Exchange governing documents ("Section 311(G) rights"). In her complaint, Greene asserts that such rights had already vested and, thus, were not (and could not have been) extinguished by the class vote approving the removal of such provisions.

The Board unanimously approved the merger. In addition, over 95% of the shares voted were voted in favor of the merger. More than 80% of the NYMEX

[37] CME Group, Inc., Form S-4, at L-1 (July 21, 2008) (Pl.'s Mot. for Decl. J., Ex. C).
[38] Compl. ¶ 132.
[39] *Id.*

Exchange Class A Members voted in favor of amending the governing documents of the Exchange in order to satisfy the closing condition. The merger was consummated on August 22, 2008.

D. *Shareholder Class Allegations*[40]

In the NYMEX Action, the shareholder class plaintiffs allege numerous breaches by Defendants of the fiduciary duties of loyalty, due care and candor in the sale of NYMEX to CME, and that, as a result of such breaches, NYMEX shareholders did not receive fair value for their shares. Plaintiffs allege that the Board is controlled by Chairman Richard Schaeffer, and that the Board agreed to sell NYMEX through an unfair process at an inadequate price in order for Schaeffer and NYMEX Chief Executive Officer and President James Newsome to obtain nearly $60 million in severance payments.[41] Plaintiffs point to Schaeffer's alleged scuttling of a more favorable deal with NYSE, his behavior with respect to certain, unrelated transactions involving the Board, as well as his central role in the CME negotiations as evidence that he "rule[d] the Board with an iron hand."[42] The

[40] To some extent, one cannot help but wonder if the Plaintiffs in both actions have sought to present a litany of claims with the hope that in the aggregate they will support a theme that something untoward occurred. In this instance, the Court is not persuaded that it can reasonably infer that the collective whole is greater than the sum of the individual parts.
[41] Of the original $96 million in executive severance payments, Schaeffer would receive $35 million and Newsome would receive $24 million if they were terminated "without cause" or resigned for "good reason" during the eighteen months following the change in control. Compl. ¶¶ 127-28.
[42] Compl. ¶ 66.

fiduciary duty breaches committed by the Board, it is alleged, include omitting or misstating necessary information in NYMEX's proxy statements with respect to the CME deal, agreeing to CME's first and only offer, failing to inquire into other potential transactions, agreeing to a 30-day exclusive negotiating period with CME, allegedly causing investment bankers to understate the value of NYMEX shares in fairness opinions supporting the transaction, and agreeing to a $50 million breakup fee. In addition, Plaintiffs assert that the Board breached its fiduciary duties by agreeing to the $97 million change in control plan with an acquisition agreement imminent. The shareholder Plaintiffs further assert specific breaches of fiduciary duties by Defendants Schaeffer and Newsome in the context of their roles in negotiating the CME transaction, as well as by Schaeffer in his dealings with NYSE in the summer of 2007. Finally, Plaintiffs assert that the CME Defendants aided and abetted the NYMEX Defendants in the breach of these duties.

E. Class A Member Class Allegations

Like the shareholder complaint, the Greene Complaint alleges fiduciary duty breaches by the Board toward the Class A Members of NYMEX in the CME transaction. Specifically, that Defendants inadequately compensated Class A Members for the decline in the value of their memberships and for their loss of certain rights and privileges as a result of the transaction, particularly with respect to future revenue sharing provisions. Greene also asserts that Defendants breached their duties by interpreting the timing of certain of these rights in "self-serving" ways, failing to obtain proper fairness opinions regarding the value of these rights to Class A Members, and actively working to undervalue Class A Member seats. As with the shareholder Plaintiffs, Greene asserts that the process was unfair to Class A Members because of the undue influence of Schaeffer and Newsome in the negotiations. Greene asserts that the CME Defendants aided and abetted in the breach of fiduciary duties owed by the Board to Class A Members and breached their own fiduciary duties owed to the Members.[43] Finally, both Greene and the shareholder Plaintiffs contend that requiring Class A Members to sign a waiver and release of any claims against Defendants in order to receive the Membership Rights Payment from the Company was coercive and, therefore, that the release should be declared unlawful, void and unenforceable.

II. ANALYSIS

A. *Applicable Standard*

Before the Court are motions to dismiss both actions. A motion under Court of Chancery Rule 12(b)(6) to dismiss for failure to state a claim will be granted if it appears with reasonable certainty that the plaintiff could not prevail upon any set

[43] Greene Compl. ¶¶ 128-39.

of facts that can be inferred from the pleadings.[44] In considering a motion to dismiss, the court is required to assume the truthfulness of all well-pleaded allegations of fact in the complaint.[45] The Court must accept the inferences that can reasonably be drawn in favor of the plaintiff from such facts. However, the court must neither blindly accept all allegations as true, nor draw all inferences from them in plaintiff's favor unless they are reasonable inferences.[46] With these principles in mind, the Court turns first to the NYMEX Action.

B. *The NYMEX Action*

Count I of the Complaint alleges that Schaeffer, Newsome, and the Board breached their fiduciary duties of care and loyalty. Count II of the Complaint alleges that the CME Defendants aided and abetted those alleged breaches.

1. <u>Substantive Claims Against the NYMEX Defendants</u>

The Plaintiffs contend that various fiduciary failures by the Defendant Directors resulted in an unfair price obtained through an unfair process.

The parties dispute whether this case should be evaluated under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[47] as involving a fundamental change of

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[44] *Kohls v. Kenetech Corp.*, 791 A.2d 763, 767 (Del. Ch. 2000).
[45] *Gantler v. Stephens*, 965 A.2d 695, 703 (Del. 2009).
[46] *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999).
[47] 506 A.2d 173 (Del. 1986). The *Revlon* Standard has been defined as follows: "When directors propose to sell a company for cash or engage in a change of control transaction, they must take reasonable measures to insure that the stockholders receive the highest value reasonably attainable." *In re Topps Co. S'holders Litig.*, 926 A.2d 58, 64 (Del. Ch. 2007).

corporate control or whether it should be evaluated under the business judgment rule, which may be viewed as granting greater deference to board action.[48] The parties agree—as they must—that *Revlon* scrutiny applies only to transactions "'in which a fundamental change of corporate control occurs or is contemplated.'"[49] They dispute what constitutes a fundamental change of control sufficient to trigger *Revlon* scrutiny. A fundamental change of control does not occur for purposes of *Revlon* where control of the corporation remains, post-merger, in a large, fluid market.[50] Thus, for example, in a transaction where cash is the exclusive consideration paid to the acquired corporation's shareholders, a fundamental change of corporate control occurs—thereby triggering *Revlon*—because control of the corporation does not continue in a large, fluid market. In transactions, such as the present one, that involve merger consideration that is a mix of cash and stock—the stock portion being stock of an acquirer whose shares are held in a large, fluid market—"[t]he [Delaware] Supreme Court has not set out a black line rule explaining what percentage of the consideration can be cash without triggering

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[48] *See, e.g.*, *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1356 (Del. 1985) ("The business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." (internal quotation marks omitted)); 1 Stephen A. Radin, The Business Judgment Rule: Fiduciary Duties for Corporate Directors 11-15 (6th ed. 2009).

[49] *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 46 (Del. 1994) (quoting *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989)).

[50] *See id.* at 47.

Revlon."[51] In *In re Santa Fe Pacific Corp. Shareholder Litigation*, the Supreme Court held that a merger transaction involving consideration of 33% cash and 67% stock did not trigger *Revlon*.[52] In contrast, in *Lukens*, this Court stated that a merger transaction involving consideration of 60% cash and 40% stock likely triggered *Revlon*.[53] Here, the consideration paid to NYMEX shareholders was 56% CME stock and 44% cash, falling between the standards of *Santa Fe* and *Lukens*.[54] The parties therefore argue over whether *Revlon* has been triggered.[55]

The Court, however, need not decide whether *Revlon* scrutiny applies to the present transaction. NYMEX's Certificate of Incorporation contains an exculpatory clause authorized by 8 *Del. C.* § 102(b)(7) that protects the NYMEX directors from personal monetary liability for breaches of the duty of care. Thus, even if *Revlon* applied to this case, application of the exculpatory clause would lead to dismissal unless the Plaintiffs have successfully pleaded a failure to act loyally (or in good faith), which would preclude reliance on the Section 102(b)(7) provision.[56] For the reasons set forth below, they have not. Accordingly, the

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[51] *In re Lukens Inc. S'holders Litig.*, 757 A.2d at 732 n.25.
[52] 669 A.2d 59, 64, 70-71 (Del. 1995).
[53] *In re Lukens, Inc. S'holders Litig.*, 757 A.2d at 732 n.25.
[54] At the time that the Board approved the transaction, the cash component comprised 36% of the total consideration, while CME stock made up 64%.
[55] Plaintiffs also assert that the fact that the severance plan treats the transaction as a change in control additionally mandates that *Revlon*'s scrutiny be applied (citing to *Louisiana Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d at 1172, 1179 n.6 (Del. Ch. 2007)).
[56] *See Lyondell Chemical Co. v. Ryan*, 970 A.2d 235, 239 (Del. 2009) (noting that because "Lyondell's charter include[d] an exculpatory provision, pursuant to 8 *Del. C.* § 102(b)(7), . . .

motion to dismiss the shareholders' substantive merger claims for failure to state a breach of fiduciary duty claim must be granted.

The Plaintiffs argue that that they have sufficiently alleged that Schaeffer, Newsome, and the Board acted disloyally. At the outset, the Court observes that the Plaintiffs must plead sufficient facts to show that *a majority of the Board of Directors* breached the fiduciary duty of loyalty; whether they otherwise would have stated a claim against Schaeffer and Newsome would not be controlling. That two directors may have been conflicted does not, by itself, impinge upon the independence of the remaining members of the Board—all of whom supported the merger.[57] Accordingly, the Court addresses the Board's alleged breach of the duty of loyalty.

In order to state a claim for breach of the duty of loyalty, the Plaintiffs must plead facts from which this Court can reasonably infer that either: "a majority of the Director Defendants either stood on both sides of the merger or were dominated and controlled by someone who did";[58] or failed to act in good faith, i.e., where a "'fiduciary intentionally fails to act in the face of a known duty to act,

th[e] case turn[ed] on whether any arguable shortcomings on the part of the Lyondell directors also implicate[d] their duty of loyalty, a breach of which is not exculpated.").

[57] *See In re Frederick's of Hollywood, Inc.*, 2000 WL 130630, at *7 (Del. Ch. Jan. 31, 2000) (holding that, where "the pleaded facts show[ed] that only one of [] four directors was interested, and as a result, the merger was approved by a majority of disinterested directors . . . , the duty of loyalty claim fail[ed] for lack of a valid premise.").

[58] *In re Lukens Inc. S'holders Litig.*, 757 A.2d at 728.

demonstrating a conscious disregard for his duties.'"[59] The Plaintiffs do not allege that any member of the Board—apart from Schaeffer and Newsome—stood on both sides of the transaction. Instead, the Plaintiffs allege that the fourteen disinterested members of the Board who unanimously voted to approve the transaction were dominated and controlled by Schaeffer and acted in bad faith. In particular, the Plaintiffs argue that the Court should infer domination and control by Schaeffer and an intentional dereliction of duty by the Board from the following allegations: the Board approved the change of control severance plan; it accepted the CME's first offer; it permitted Schaeffer and Newsome to "bypass the SIC"; it failed to obtain a "collar" on the stock portion of the merger consideration; and its members were afraid of being terminated because Schaeffer had "forced" a former board member to resign when that member disagreed with Schaeffer regarding a transaction unrelated to the present one.

That directors acquiesce in, or endorse actions by, a chairman of the board—actions that from an outsider's perspective might seem questionable[60]—does not, without more, support an inference of domination by the chairman or the absence of directorial will. The NYMEX directors were otherwise unquestionably

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[59] *See, e.g.*, *Lyondell*, 970 A.2d at 243 (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006)).

[60] Whether some of the various Board decisions questioned by the Plaintiffs were reasonable is, of course, difficult to assess from the face of a complaint challenging separate conduct. Many of the instances cited by the Plaintiffs are best viewed as little more than disagreements over the directors' exercise of their business judgment.

independent—this is not an instance where certain relationships raised some concern but not sufficient doubt to sustain a challenge to director independence. In short, the Complaint alleges nothing more than a board which relied upon, and sometimes deferred to, its chairman. It does not allege dominance such that the independence or good faith of the board may fairly be questioned. The Court concludes that it would be unreasonable to infer from these allegations that the Board was dominated by Schaeffer or that the Board acted in bad faith.

Because the Plaintiffs' allegations are too conclusory to support an inference of domination, the Plaintiffs, at bottom, must seek to convert into a loyalty claim their aversion to the process the Board employed in negotiating the merger. The most that can be inferred from their allegations is that the Board's process was not perfect. However, the Delaware Courts have repeatedly held that "there is no single blueprint that a board must follow to fulfill its duties."[61] In any event, claims of flawed process are properly brought as duty of care, not loyalty, claims and, as discussed, those claims are barred by the exculpatory clause of NYMEX's Certificate of Incorporation. Moreover, to the extent the Complaint alleges that the Board acted in bad faith, such allegations must fail because, based on the facts in the Complaint, it cannot be said that the Board intentionally failed to act in the face

[61] *Barkan*, 567 A.2d at 1286. *See also Lyondell*, 970 A.2d at 242-43; *In re CompuCom Sys., Inc. S'holders Litig.*, 2005 WL 2481325, at *5 (Del. Ch. Sept. 29, 2005); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 502 (Del. Ch. 2000).

of a known duty to act, demonstrating a conscious disregard for its duties. More precisely, the Complaint has not alleged that the Board "utterly failed to obtain the best sale price."[62] Therefore, the Court must grant the Defendants' motion to dismiss the Complaint as to the breaches of fiduciary duty claims.[63]

2. Claims Against Defendants Schaeffer and Newsome

In addition to the claims brought against them as members of the Board (which are dismissed as failing to state an actionable claim),[64] Defendants Schaeffer and Newsome are alleged to have violated their fiduciary duties through "active participation in wrongdoing"[65] in their joint role as the principal negotiators with CME. Specifically, Plaintiffs allege that Schaeffer and Newsome violated their fiduciary duties by "rejecting and keeping secret CME's secret collar offer, ignoring the SIC, and withholding information regarding strategic opportunities and bids" from fellow directors,[66] as well as in "committing" to CME that NYMEX would not attempt to renegotiate any of the economic terms of the

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[62] *Lyondell*, 970 A.2d at 244; *Wayne County Employees' Ret. Sys. v. Corti*, 2009 WL 2219260, at *14 (Del. Ch. June 24, 2009) (same).

[63] This includes Plaintiffs' claims that NYMEX accepted CME's first and only offer without attempting to raise it, that NYMEX timed the acquisition to capitalize on the high price of CME stock and the low price of NYMEX stock, that NYMEX agreed to a 30-day exclusive negotiating period with CME, that NYMEX entered into a change in control plan in the lead up to the acquisition, and that NYMEX agreed to a $50 million break-up fee (equaling less than 1% of the total deal consideration; *see, e.g.*, *McMillan*, 768 A.2d at 505). In addition, there are insufficient facts surrounding Plaintiffs' claims regarding allegedly improper fairness opinions by the investment banks to establish facially a link between these opinions and the breach of any fiduciary duties by Defendants. All such claims are, accordingly, dismissed.

[64] *See supra* Part II.B.1

[65] Compl. ¶ 124.

[66] Compl. ¶ 142.

proposed sale and failing to advise the Board of such a commitment, and in entering into an agreement with CME to vote their shares in favor of the proposed acquisition. Schaeffer is additionally alleged to have breached his fiduciary duties by "rejecting NYSE's interest in the Company due to NYSE's failure to abide by his personal demands."[67]

The claim that Schaeffer and Newsome breached their fiduciary duties by being the sole negotiators with CME and not involving the SIC in the consideration or negotiation of the acquisition is dismissed.[68] It is well within the business judgment of the Board to determine how merger negotiations will be conducted, and to delegate the task of negotiating to the Chairman and the Chief Executive Officer. Additionally, as the Court has already found that the Board was clearly independent, there was no requirement to involve an independent committee in negotiations, nor does the existence of such a committee mandate its use. The allegation that Schaeffer and Newsome committed to CME that NYMEX would not renegotiate any of the economic terms of the acquisition is similarly not actionable, since Plaintiffs have not put forth any evidence for how Schaeffer and Newsome were capable of binding NYMEX from seeking to modify the terms of the agreement had the Board wanted to. Finally, as the Complaint does not allege

[67] *Id.*

[68] The extent of involvement and awareness of the Board with respect to the merger negotiations between NYMEX and CME is disputed by the parties. The Court assumes the truthfulness of Plaintiffs' allegations for purposes of the motion to dismiss.

why the act of entering into a voting support agreement is a breach of fiduciary duties, particularly where the economic incentives of directors and shareholders are aligned and where the overall percentage of shares locked-up is not material, this claim is additionally dismissed. Because the claim against Schaeffer and Newsome for failing to obtain a collar on the transaction and the claim against Schaeffer with respect to the failed negotiations with NYSE both involve more complex legal issues, the Court discusses each at greater length.

a. *Schaeffer and Newsome's Failure to Obtain a Collar*

Plaintiffs claim that Defendants Schaeffer and Newsome violated their fiduciary duties by rejecting CME's offer to collar the stock portion of the merger consideration and by not communicating CME's offer to their fellow directors, despite the risk—subsequently realized—that shareholders would be harmed by a decline in the value of CME stock.[69] This claim is plead in a speculative and conclusory fashion that fails to satisfy even the "plaintiff friendly" standards of Court of Chancery Rule 12(b)(6).

The mere failure to secure deal protections that, in hindsight, would have been beneficial to shareholders does not amount to a breach of the duty of care.[70] The presumption of deference to the judgment of management is only superseded

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[69] The parties dispute whether or not CME offered NYMEX a collar for the stock portion of the merger consideration. The Court assumes the truthfulness of this fact for purposes of the motion to dismiss.

[70] *See, e.g., In re The Coleman Company, Inc. S'holders Litig.*, 750 A.2d 1202 (Del. Ch. 1999).

by a showing of gross negligence, bad faith or conflicting personal interest. Plaintiffs have failed to plead the facts necessary to overcome this presumption.

Here, Plaintiffs assert that Schaeffer and Newsome rejected the collar because of its potentially adverse effects on their stock options. By pointing to potential consequences for Schaeffer and Newsome, not shared with other shareholders, they seek to convert a duty of care claim into a duty of loyalty claim. However, the Plaintiffs provide no substance for this claim other than the broad assertion that "a collar would have greatly diminished the value of Schaeffer's and Newsome's NYMEX stock options by substantially reducing or eliminating any potential increase in the price of NYMEX stock while any protection against a downward price movement would have had little or no cost to Schaeffer or Newsome."[71] Perhaps that is true, but it does not establish a conflict for either Schaeffer or Newsome. Otherwise, any director with options would be deemed conflicted if no collar were sought.

The Plaintiffs bolster the Complaint with assertions that CME "offered" to collar the stock portion of the consideration, and that Schaeffer and Newsome did not inform the Board of this "offer."[72] The Board, considering the transaction

[71] Compl. ¶ 108.
[72] Compl. ¶ 105.

objectively, never requested a collar, nor found one worth negotiating for.[73] Moreover, it is not reasonable to infer that the Board was unaware of the potential benefits (or costs) that a collar might have. Plaintiffs seemingly choose not to acknowledge that, because contractual terms are the result of negotiations, concessions tend to come at a price.[74] It was well within the Board's judgment, regardless of any views that could be ascribed to Schaeffer or Newsome, to omit a collar while negotiating various merger terms. Whether, in retrospect, such a trade-off was worthwhile "is of no legal moment."[75] Consequently, motion to dismiss the claim is granted.

b. *Schaeffer and the NYSE "Offer"*

Plaintiffs claim that Schaeffer foiled a potential bid by NYSE for considerably greater consideration than the CME transaction by demanding a position for himself and the combined entity. Schaeffer asserts that these allegations are "nonsensical" and should not be credited, since the instant transaction was consummated at a lower price than the NYSE bid and provided

[73] This Court has previously held that the decision to include a collar is within a board's business judgment. *See State of Wisconsin Inv. Bd. v. Bartlett*, 2000 WL 238026, at *9 (Del. Ch. Feb. 24, 2000).
[74] *See, e.g.*, *Dittrick v. Chalfant*, 948 A.2d 400, 407 (Del. Ch. 2007) ("In business dealings . . . the old adage still applies: there is no such thing as a free lunch.").
[75] *Cf. In re Coleman*, 750 A.2d at 1209.

him with no such position, and since there could have been any number of reasons for why a formal bid was never submitted by NYSE to NYMEX.[76]

Plaintiffs' claims with respect to Schaeffer's handling of the potential acquisition by NYSE assert a breach of the duty of loyalty and, thus, are not covered by the exculpatory clause in the NYMEX Certificate. However, because all claims surrounding the proposed acquisition by NYSE are derivative, not direct, in nature, the Plaintiffs lost standing to bring them following NYMEX's merger with CME.[77]

Historically, the question of whether a claim raised by a plaintiff in a merger context was direct or derivative often proved elusive.[78] This debate, of course, is especially important in the context of mergers because its outcome often determines whether or not a plaintiff's claim survives. In deciding whether a claim is direct or derivative, the Court must look at the "nature of the wrong alleged," instead of the plaintiff's characterization of the claim.[79]

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[76] Reply Br. in Further Support of NYMEX Holdings, Inc.'s and the Indiv. Defs.' Mot. to Dismiss Compl. at 6.

[77] *See Lewis v. Anderson,* 477 A.2d 1040, 1049 (Del. 1984) ("A plaintiff who ceases to be a shareholder, whether by reason of a merger or for any other reason, loses standing to continue a derivative suit.").

[78] *See, e.g.*, *Agostino v. Hicks*, 845 A.2d 1110, 1117 (Del. Ch. 2004) ("The distinction between direct and derivative claims is frustratingly difficult to describe with precision.").

[79] *Elster v. American Airlines, Inc.,* 100 A.2d 219, 223 (Del. Ch. 1953); *Kramer v. Western Pacific Indus., Inc.,* 546 A.2d 348, 352 (Del. 1988).

The Court's initial analysis is guided by *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*,[80] which abandoned the previously employed "special injury" test—whether the plaintiff suffered an injury different from that suffered by shareholders in general—and replaced it with a two-part test: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)."[81] In considering the first prong of *Tooley*, the critical question is: "'Looking at the body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation?'"[82]

The particular allegations against Schaeffer—that he rejected a deal with NYSE because he failed to secure a post-merger position for himself and that he withheld this information from his fellow directors, preventing them from making an informed decision about the CME merger—may best be seen as an entrenchment claim. Entrenchment claims are usually viewed as purely derivative in nature.[83]

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[80] 845 A.2d 1031 (Del. 2004).
[81] *Id*. at 1033.
[82] *Id*. at 1036 (quoting *Agostino*, 845 A.2d at 1122).
[83] *See, e.g.*, *In re First Interstate Bancorp Consol. S'holders Litig.*, 729 A.2d 851, 861-62 (Del. Ch. 1998), *aff'd sub nom. Bradley v. First Interstate Bancorp*, 748 A.2d 913 (Del. 2000) (TABLE) ("[C]laims arising from transactions which operated to deter or defeat offers to purchase the subject company's stock, i.e., entrenchment claims, are generally found to be derivative in nature.").

A breach of fiduciary duty that works to preclude or undermine the likelihood of an alternative, value-maximizing transaction is treated as a derivative claim because the company suffers the harm, having been "precluded from entering into a transaction that would have maximized the return on its assets."[84] Additionally, the injury "falls upon all shareholders equally and falls only upon the individual shareholder in relation to his proportionate share of stock as a result of the direct injury being done to the corporation."[85] With respect to the second prong of *Tooley*, any monetary recovery would properly belong to the company, "if only because there is no rational way in which to define a class differing from all of the shareholders at the time the judgment is entered."[86]

However, *Tooley* acknowledges the continuing viability of *Parnes v. Bally Entertainment Corp*.[87] as an exception to this general rule for certain entrenchment claims arising in the merger context. The *Parnes* court held that a "stockholder who directly attacks the fairness or validity of a merger alleges an injury to the

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[84] *Agostino*, 845 A.2d at 1123. *See also Kramer*, 546 A.2d at 353 (citing *Elster*, 100 A.2d at 222) ("[W]here a plaintiff shareholder claims that the value of his stock will deteriorate and that the value of his proportionate share of the stock will be decreased as a result of alleged director mismanagement, his cause of action is derivative in nature.").

[85] *In re Berkshire Realty Co., Inc.,* 2002 WL 31888345, at *4 (Del. Ch. Dec. 18, 2002). *See also Gentile v. Rossette,* 906 A.2d 91, 99 (Del. 2006) ("[Dilution] claims are not normally regarded as direct, because any dilution in value of the corporation's stock is merely the unavoidable result (from an accounting standpoint) of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction.").

[86] *Dieterich v. Harrer*, 857 A.2d 1017, 1028 n.20 (Del Ch. 2004). Because no merger was consummated with the NYSE (or even a formal offer received), it is additionally unclear that damages could have ever been successfully proven with respect to the alleged breach.

[87] 722 A.2d 1243 (Del. 1999).

stockholders, not the corporation, and may pursue such a claim even after the merger at issue has been consummated."[88] In *Parnes*, the complaint alleged that the Chairman and Chief Executive Officer of Bally Entertainment, Arthur Goldberg, had "informed all potential acquirors that his consent would be required for any business combination with Bally and that, to obtain his consent, the acquirer would be required to pay Goldberg substantial sums of money and transfer to him valuable Bally assets."[89] Hilton Hotels, the ultimate acquirer of Bally, allegedly assented to these demands, which amounted to a more than $70 million windfall to Goldberg.

In reversing this Court, the Delaware Supreme Court held that these allegations constituted a direct claim because the plaintiffs had challenged the validity of the merger itself. The decision in *Parnes* was in tension with that Court's earlier decision in *Kramer v. Western Pacific Industries*,[90] where plaintiffs' allegations that directors had breached fiduciary duties in diverting to themselves tens of millions of dollars of merger sale proceeds by way of stock options, golden parachutes and unnecessary fees and expenses were deemed a derivative claim.[91] *Parnes* distinguished *Kramer* on the grounds that the plaintiffs in *Kramer* had only alleged that the wrongful actions reduced the amount of consideration paid and had

[88] *Id.* at 1245.
[89] *Id.*
[90] 546 A.2d 348 (Del. 1988).
[91] *Id.* at 354.

not challenged the underlying fairness of the merger. Specifically, "in order to state a direct claim with respect to a merger, a stockholder must challenge the validity of the merger itself, usually by charging the directors with breaches of fiduciary duty resulting in unfair dealing and/or unfair price."[92]

Seemingly, the Plaintiffs seek to fit the self-dealing allegations against Schaeffer within the exception recognized by *Parnes*. Accordingly, the complaint attempts to link Schaeffer's alleged scuttling of the NYSE deal both with the Board's later decision to revise the change in control payments and with Plaintiffs' ultimate assertion of "an unfair and inadequate price" paid by CME.[93] However, Delaware Courts have interpreted the *Parnes* exception very narrowly. For example, in *Golaine v. Edwards*, this Court held that *Parnes* did not establish the principle that any reduction in the consideration offered to shareholders as a result of inappropriate side payments would give rise to a direct claim. Instead, a direct claim would be found only "[i]f the side transactions are alleged to have reduced the consideration offered to the target stockholders to a level that is unfair, then an attack is labeled as individual because it goes directly to the fairness of the merger."[94]

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[92] *Parnes*, 722 A.2d at 1245.
[93] Compl. ¶ 143.
[94] *Golaine v. Edwards*, 1999 WL 1271882 at *6 (Del. Ch. Dec. 12, 1999). In *Golaine*, the Court dismissed plaintiffs' challenge to $20 million in investment banking fees paid to directors in connection with a merger as failing to state an individual claim.

More importantly, courts have explained that "mentioning a merger [in the complaint] does not talismanically create a direct action."[95] Instead, there must be a causal link between the breach complained of and the ultimate unfairness of the merger. In *Dieterich*, the Chief Executive Officer of Starbase Corporation, which was actively soliciting acquisition bids, was alleged to have aggressively discouraged suitors so that he could represent to the board that a highly dilutive transaction (in which, unbeknownst to the board, he would personally obtain "substantial amounts of Starbase common stock at below-market prices")[96] was the best offer he had been able to find. Further, the Chief Executive Officer was alleged to have intentionally misrepresented to the board that he had included a "fiduciary out" clause in the transaction that would have allowed the board to accept a better offer, if one arose. He then "continued to sabotage other possible transactions"[97] in favor of his own by confidentially disclosing to certain suitors, including Borland Software Corporation, that Starbase was worth considerably less than it appeared to be. After the self-interested transaction ultimately collapsed, Borland came forward with a bid of $24 million, down from its original (rebuffed) offer of $40 to $45 million.

[95] *Dieterich*, 857 A.2d at 1027.
[96] *Id*. at 1021.
[97] *Id*.

The Court reluctantly concluded that these alleged breaches gave rise to a direct claim, but noted that:

> This conclusion is not "free from doubt" because the deal ultimately negotiated with Borland in October 2002 can be seen as being causally unrelated to the fiduciary misconduct alleged in the April – June 2002 timeframe. ***This would even more clearly be the case if the ultimate merger partner was a third party with no connection with the earlier negotiations***.[98]

Viewed in light of *Dieterich*, it is clear that Plaintiffs' allegations regarding the NYSE negotiations fall well outside of the *Parnes* exception, because the alleged breaches of fiduciary duties are far too attenuated from the ultimate CME transaction and the price that CME paid to establish a causal link. As the complaint itself asserts, NYMEX was in serious discussions with NYSE regarding a possible combination between June and August of 2007. A confidentiality agreement was signed on June 8, and Thain allegedly committed to a purchase price of $142 per share on August 1 and "repeatedly said he wanted to have a deal with NYMEX papered within two to three weeks."[99] The Complaint does not allege the specific date at which discussions between NYMEX and NYSE broke down, but asserts that the November approval of the change in control severance plan by the Board occurred "in the aftermath of the aborted NYSE bid."[100] At oral argument, Plaintiffs' counsel noted that "the change in control agreement

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[98] *Id.* at 1029 (emphasis added).
[99] Compl. ¶ 80.
[100] Compl. ¶ 125.

sprung into existence between the collapsed NYSE deal and the nascent CME deal."[101] Indeed, while "discussions" with CME had begun in late spring of 2007, they did not turn serious until the parties signed a confidentiality agreement on January 7, 2008. Exclusive negotiations with CME would not begin until January 28, 2008, nearly six months after NYSE's "commitment" to pay $142 per share and more than two months after Plaintiffs themselves concede the NYSE bid had been aborted. Thus, it cannot be said that the failed negotiations with NYSE are in any way causally linked with the consideration ultimately offered in the CME transaction. More importantly, there is no suggestion that the alleged breach occurred in order to benefit CME. This is not the limited case seemingly countenanced by *Parnes* and its progeny where Schaeffer favored an unfairly low bid from CME against a higher bid from NYSE because CME offered him some personal pecuniary benefit.[102] Indeed, Schaeffer is not alleged to have received anything of value from CME apart from the consideration received by NYMEX shareholders as a whole.[103] As such, the alleged breach of fiduciary duties with respect to the NYSE negotiations could only be the basis for purely derivative actions. Accordingly, the motion to dismiss these claims is granted.

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[101] Tr. of Oral Arg. (Mar. 17, 2009) at 60.

[102] *Cf. In re First Interstate Bancorp*, 729 A.2d at 855-60. Although this opinion was issued before *Parnes*, the Supreme Court later confirmed that the decision that plaintiffs' claims were derivative was consistent with both *Parnes* and *Kramer*. *Bradley v. First Interstate Bankcorp*, 2000 WL 383788, 748 A.2d 913 (Del. 2000) (TABLE).

[103] In fact, the overall value of the severance plan was reduced from the $97 million approved by the Board prior to a signed deal with CME to $67 million in July 2008.

3. Disclosure Claims in the NYMEX Action

The Plaintiffs contend that the Board members also breached their fiduciary duties by "fail[ing] to inform Class members fully on material information relating to the fairness of the proposed sale to CME and the conditions under which the sale was negotiated."[104] In particular, the Plaintiffs claim that the Board should have disclosed the following: more details concerning the NYSE's then-potential offer of $142 per share; Schaeffer's alleged self-interest in connection with an NYSE/NYMEX business combination; the fact that Schaeffer had been negotiating the terms of the transaction with CME; and additional information regarding the underlying assumptions of the fairness opinions, including an explanation for why J.P. Morgan and Merrill Lynch both used two transactions in their precedent transaction analysis that were never consummated.[105] Plaintiffs also assert that these fairness opinions should have been updated to reflect the fact that the change in CME's share price reduced the total consideration by roughly $2 billion from the time opinions were first prepared. For reasons discussed below, the Complaint's disclosure claims must be dismissed.

The fiduciary duty of disclosure is a specific application of the duties of care and loyalty;[106] it "requires that a board of directors 'disclose fully and fairly all

[104] Compl. ¶ 144(c).
[105] Pls.' Opp'n Br. to Defs.' Mot. to Dismiss at 25-31.
[106] *See Wayne County Employees' Ret. Sys. v. Corti*, 954 A.2d 319, 330 (Del. Ch. 2008).

material information within the board's control when it seeks shareholder action.'"[107] Because the fiduciary duty of disclosure is an application of the duties of care and loyalty, the previous discussion of the NYMEX Certificate's Section 102(b)(7) exculpatory provision is necessarily implicated.[108] Specifically, to the extent the Plaintiffs' disclosure claims are rooted in the duty of care, they must be dismissed because they are barred by the exculpatory clause.[109] And, to the extent that the Plaintiffs attempt to tie them to the duty of loyalty, they must also be dismissed. "A mere conclusory allegation that the alleged disclosure violations also constitute a violation of the duty of loyalty is not sufficient to survive a motion to dismiss, particularly in light of the holding that the Complaint fails to otherwise state a non-exculpated claim against the Director Defendants for breach of fiduciary duty."[110] As discussed above, the Plaintiffs' conclusory attempts to convert care claims into loyalty claims failed for that very reason: they were conclusory.

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[107] *Id.* (quoting *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992)).

[108] *See supra* Part II.B.1. *See also Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *15 (Del. Ch. Nov. 30, 2007) ("Section 102(b)(7) applies to violations of a director's duty of disclosure." (citing *Arnold v. Soc'y for Sav. Banc.*, 650 A.2d 1270, 1287 (Del. 1994)); *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 141 n.20 (Del. 1997).

[109] *See Wayne County Employees' Ret. Sys.*, 2009 WL 2219260, at *9 (holding that the plaintiffs' disclosure claims rooted in the duty of care were barred by the § 102(b)(7) exculpatory clause in the corporation's charter). *See also In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 362 (Del. Ch. 2008) (denying monetary and injunctive relief for disclosure violations after the consummation of a merger where there was no evidence of a beach of the duty of loyalty or the lack of good faith by the directors who authorized the disclosures).

[110] *Wayne County Employees' Ret. Sys.*, 2009 WL 2219260, at *9.

Accordingly, the Complaint's claims of breach of the duty of disclosure must be dismissed.

4. Aiding and Abetting Claims Against CME

The Plaintiffs allege that the CME Defendants aided and abetted the NYMEX Defendants' breaches of fiduciary duty. In order to state a claim for aiding and abetting a breach of fiduciary duty, the Plaintiffs must show: (1) the existence of a fiduciary relationship; (2) a breach of the fiduciary's duty; (3) knowing participation in the breach by a non-fiduciary defendant; and (4) damages.[111] With regard to the third element—"knowing participation"—conclusory allegations such as "[aiding and abetting defendant] had knowledge of the [fiduciary d]efendants' fiduciary duties and knowingly and substantially participated and assisted in the [fiduciary d]efendants' breaches of fiduciary duty, and, therefore, aided and abetted such breaches of fiduciary duties" are insufficient as a matter of law.[112] That is the very flaw with the Plaintiffs' allegation that CME knowingly participated in the alleged breaches of fiduciary duty.

The Complaint's only allegation of knowing participation is that:

> CME and CMEG NY have aided an abetted the Director Defendants in their breaches of fiduciary duty. As participants of the Acquisition, CME and CMEG NY are aware of the Director Defendants' breaches

[111] *In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995). *See also In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *23 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006).

[112] *In re Santa Fe*, 669 A.2d at 72.

> of fiduciary duties and in fact actively and knowingly encouraged and participated in said breaches in order to obtain the substantial financial benefits that the Acquisition would provide at the expense of NYMEX's stockholders.[113]

This is precisely the sort of conclusory allegation that failed to state an aiding and abetting a breach of fiduciary duty claim in *In re Sante Fe*.[114]

The Plaintiffs argue that their allegations are not conclusory because the Complaint states that "Schaeffer and Newsome committed to Duffy and Donahue [CME's negotiators] that NYMEX would not attempt to renegotiate the economic terms of the Acquisition."[115] This is insufficient to raise a reasonable inference that Donahue and Duffy (or any CME representative) were knowingly encouraging or participating in breaches by Schaeffer and Newsome. The only reasonable inference from this "commitment" is that Donahue and Duffy were deft negotiators—seeking to "lock-up" a transaction that, presumably, they viewed as favorable to CME.[116] Absent from the Complaint is any allegation that Donahue

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[113] Compl. ¶ 149.

[114] *In re Santa Fe*, 669 A.2d at 72.

[115] Compl. ¶ 56(G). *See also* Compl. ¶ 94 (noting that "Schaeffer and Newsome . . . did not advise the Board that they had given their commitment to Duffy and Donahue").

[116] This Court has consistently held that "evidence of arm's-length negotiation with fiduciaries negates a claim of aiding and abetting, because such evidence precludes a showing that the defendants knowingly participated in the breach by the fiduciaries." *In re Frederick's of Hollywood, Inc. S'holders Litig.*, 1998 WL 398244, at *3 n.8 (Del. Ch. July 9, 1998); *In re Shoe-Town, Inc. S'holders Litig.*, 1990 WL 13475, at *8 (Del. Ch. Feb. 12, 1990) (concluding that the motion to dismiss as to the acquirer, GECC, would be granted because GECC's "involvement in the challenged transaction," was entirely consistent with "GECC as a party engaged in an arms-length negotiation of a business transaction"). "Under [the knowing participation] standard, a bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting . . . ." *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001).

and Duffy *induced* Schaeffer and Newsome to commit not to renegotiate the economic terms of the transaction; the Court's role on a motion to dismiss is not to redraft the Complaint for the Plaintiffs. Accordingly, because the Complaint states only in conclusory fashion that the CME Defendants aided and abetted the alleged breaches of fiduciary duty, the motion to dismiss the shareholder Plaintiffs' aiding and abetting claims is granted.

C. *The Class A Member Claims – the Greene Action*

In the *Greene* Action, Plaintiff Greene maintains for herself and others similarly situated that Defendants also breached the fiduciary duties owed to Class A Members through certain actions taken during the course of the CME merger beyond those asserted in the shareholders' Complaint—including failing to maximize the consideration offered for Class A Memberships and failing to provide a fairness opinion with respect to the purchase price offered for Class A Memberships[117]—and that the CME Defendants aided and abetted the breach of these duties. The Court finds all these claims not actionable. Greene also raises breach of fiduciary claims surrounding Class A Members' Section 311(G) rights, including that Defendants failed to call a special meeting about the Section 311(G) trading rights until after they had sent notices to Class A Members redefining the

[117] In addition, Greene cites the Board's decision to restrict the number of seats each Class A Member was allowed to hold, thereby reducing the seats' market value, as well as certain "misstatements" made by the principals of CME as additional breaches of fiduciary duties owed Class A Members.

terms of these rights, that Defendants failed to investigate concerns raised over the propriety of the Board's calculations on the timing of Section 311(G) rights despite promising to do so, that the modified rights payments came with tax disadvantages, and that Defendants required Class A Members to sign a "coercive"[118] Final Waiver & Release that released Defendants from all past and future claims in order to obtain the $750,000 Membership Rights Payment. Because the Section 311(G) claims raise distinct legal issues, the Court analyzes them separately.[119]

1. Claims for Breach of Fiduciary Duties

In determining whether or not a particular relationship gives rise to fiduciary duties under Delaware law, courts have focused their inquiry on the "nature of the interest or entitlement" at issue.[120] Specifically, "before a fiduciary duty arises, an existing property right or equitable interest supporting such a duty must exist."[121] In this context, the duties grow out of the relationship between the managers of a corporation and its owners, the shareholders. Before NYMEX's 2000 demutualization, such a fiduciary relationship existed between Class A Members

[118] Greene Compl. ¶ 1. The Plaintiffs in the NYMEX Action also bring a claim with respect to the enforceability of the waiver and release on behalf of the shareholders who are also Class A Members.
[119] *See infra* Part II.C.2.
[120] *Simons v. Cogan*, 549 A.2d 300, 303 (Del. 1988).
[121] *Id.* at 304.

and the NYMEX Defendants.[122] However, the demutualization severed Members' equity stake in the Exchange and transferred it into an equity stake in NYMEX Holdings. With that transfer, those fiduciary duties owed Members *qua* members were terminated and the resultant fiduciary relationship existed only by way of their status as NYMEX Holdings shareholders. Consequently, any present rights unique to Class A members arise purely through their trading contract with the Exchange and are limited by the terms of that contract, the Exchange Certificate of Incorporation and Bylaws.

In her complaint, Greene asserts that a variety of sources establish the existence of a fiduciary duty between NYMEX Defendants and Class A Members, including the fact that Members have a vested property right in their seats, and that the Exchange's governing documents appear to countenance certain duties owed to Members. She argues that courts in Delaware and New York have recognized fiduciary duties owed to similarly situated plaintiffs, and that the Delaware General Corporation Law has expanded shareholder rights to members in non-stock corporations.

As a general matter, Greene's assertion that "[m]embers in a non-stock corporation are owed the same fiduciary duties by the corporation's governing

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[122] *See, e.g., CBOT Holdings, Inc. v. Chicago Bd. Options Exch., Inc.*, 2007 WL 2296355 (Del. Ch. Aug. 3, 2007); *Higgins v. NYSE*, 806 N.Y.S.2d 339 (N.Y. Sup. Ct. 2005); *Wey v. NYSE*, 841 N.Y.S.2d 222 (N.Y. Sup. Ct. 2007); *Hyman v. NYSE*, 856 N.Y.S.2d 24 (N.Y. Sup. Ct. 2007).

body as a shareholder in a stock corporation is owed by the corporation's board of directors,"[123] while overbroad, is not unfounded. The inquiry over whether a fiduciary duty exists between Defendants and the Class A Members does not turn on whether the Exchange is a stock or a non-stock corporation. Greene, however, misstates Delaware law in asserting that the "focus is on whether it is governed by a body that is empowered to act on behalf of the 'Corporation [and] its members.'"[124] The relevant question is, instead, whether there is a "separation of legal control from beneficial ownership"[125] with respect to a valid property interest "necessary for the imposition of a trust relationship with concomitant fiduciary duties."[126] The cases that Greene cites in this regard do not help her cause because they involved non-stock corporations and exchanges whose plaintiff members still retained an equity stake *by way of* their memberships, as had been the case with NYMEX before the demutualization.[127]

The assertion by Greene that the existence of a leasing market for seats on the Exchange evidences a vested property interest that carries with it fiduciary duties is also misguided. For a fiduciary duty to be created, there must be both (1)

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[123] Pl. Shelby Greene's Br. in Opp'n to Defs.' Jt. Am. Mot. to Dismiss and Stay Disc. ("Greene Br. in Opp'n") at 18 (citing *Nevins v. Bryan*, 885 A.2d 233, 248 n.53 (Del. Ch. 2005)).
[124] Greene Br. in Opp'n at 19 (citing language in the Exchange's Certificate of Incorporation).
[125] *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998).
[126] *Simons v. Cogan*, 549 A.2d 300, 303 (Del. 1988).
[127] Greene asserts that "a Class A Membership is an equity interest in the Exchange," (Greene Br. in Opp'n at 23 n.7) and ought to be treated in line with this line of cases. However, the fact that CME successfully acquired NYMEX without simultaneously purchasing the Class A seats evidences the untenability of this claim.

a property or other equitable interest; and (2) the ceding of legal control over the property interest, such that the owner "reposes special trust in and reliance on the judgment"[128] of those in control. This second prong is not met with respect to any property interest Class A Members have in their seats. While a given lessee pays rent to the Class A Member-lessor for the "rights, privileges and use" of a Membership,[129] it is the individual Class A Member, not the NYMEX Defendants, who determines whether or not to lease her seat, as well as the scope and terms of any seat leasing arrangement.

Additionally, the Bylaws expressly carve out determinations over the rights of Class A Members, including with respect to seat leasing arrangements, from the Board's power and control. They, instead, place the authority in the self-governance of the Class A Members as a whole. Section 301(A) of the Bylaws states, "Except as set forth in Section[] . . . 311, . . . the Exchange shall be managed by the Board," while Section 301(D) states, "With respect to Section[] . . . 311, . . . the Directors shall (i) not be liable to the Exchange or its Members by reason of the actions or omissions of the Class A Members. . . ." Section 311 includes a list of those matters deemed Special Matters, which require a vote by the owners of Class A Memberships to be changed. Section 311(C)(6) names the following as Special Matters:

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[128] *McMahon v. New Castle Assoc.*, 532 A.2d 601, 604 (Del. Ch. 1987).
[129] Greene Br. in Opp'n at 23 n.7.

> material changes to the Membership, eligibility or capital requirements to become a Member, Member Firm or clearing member, to lease a membership or to exercise the associated trading or clearing rights or privileges;

Accordingly, because the terms of individual leasing contracts were determined by the associated lessor Members and any structural changes to the rights of Members to lease were governed by the Class A Members as a group, it cannot be said that Defendants had control over the Membership seats sufficient to establish a distinct fiduciary duty.

Finally, Greene claims that the Exchange Certificate of Incorporation and Bylaws themselves imply the existence of fiduciary duties to Class A Members, and that these governing documents should be "accorded great deference as long as their provisions do not run afoul of Delaware's corporate statute or public policy."[130] Specifically, she points to Article 3 of the Exchange Bylaws, which states that the Board "is vested with all powers necessary and proper for the government of the Exchange,"[131] and to Article Fifth of the Certificate, which states that the "the business and affairs of the Corporation shall be managed by or under the direction of the Board."[132] Although Greene is correct that this relationship creates a fiduciary duty to the equity holder of the Exchange—

[130] Greene Br. in Opp'n, at 27 (citing *Jones Apparel Group, Inc. v. Maxwell Shoe Co., Inc.*, 2004 WL 5366716, at *8-9 (Del. Ch. May 27, 2004). Greene also cites *Scattered Corp. v. Chicago Stock Exchange, Inc.*, 1996 WL 417507, at *4 (Del. Ch. July 12, 1996), for the doctrine that "a corporate charter will normally be interpreted literally and technically."
[131] NYMEX Exchange Bylaws, Section 300 (Pl.'s Mot. for Decl. J., Ex. B).
[132] NYMEX Exchange Certificate of Incorporation, Article Fifth (Pl.'s Mot. for Decl. J, Ex. A).

NYMEX Holdings—she is incorrect in her inference that it is also enjoyed by Class A Members. Because Class A Members hold no equity in the Exchange they cannot benefit from the existence of this duty.[133]

Additionally, Plaintiff points to Article Ninth in the Exchange Certificate, which states that directors will be not personally liable "to the Corporation or its members" for monetary damages for breach of fiduciary duties except, *inter alia*, "for any breach of the director's duty of loyalty to the Corporation or its members." However, this clause does not function to create or acknowledge the existence of any fiduciary duties, but acts to delineate the rights of directors and the Exchange should a court later find such duties, which this Court declines to do here. Greene's assertions to the contrary, the provision of a means to exculpate the breach of possible fiduciary duties by a managing agent does not operate to create such duties.

Thus, NYMEX Defendants owe no fiduciary duty to Class A Members solely by virtue of their membership. For this Court to hold otherwise would expand the fiduciary relationship far beyond the boundaries previously established

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[133] *See Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1174 (Del. 1998) ("[I]n a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders."). *See also Grace Bros. Ltd v. Unitholding Corp.*, 2000 WL 982401, at *12 (Del. Ch. July 12, 2000) (holding that, where members of a parent company's board of directors also serve on the board of the parent's wholly-owned subsidiary or "have knowledge of proposed action at the subsidiary level that is detrimental to parent company, they have a fiduciary duty, as part of their management responsibilities, to act in the best interests of the parent company and its stockholders.").

by Delaware courts and would unnecessarily impose upon the NYMEX directors competing fiduciary relationships. Accordingly, the motion to dismiss breach of fiduciary duty claims brought on behalf of the Class A Members against the NYMEX Defendants is granted. Furthermore, as any liability that the CME Defendants would have toward the Class A Members would necessarily be derivative of those duties owed by the NYMEX Defendants, the motions to dismiss the aiding and abetting claims and breach of fiduciary duty claims against the CME Defendants are likewise granted.

2. Plaintiff's Section 311(G) Claims

Greene argues that Class A Members are entitled to past due, present, and future payments as a result of the provision in Section 311(G) of the Exchange Bylaws—since amended by Class A Members in conjunction with this merger—that grants Members a percentage of gross Exchange revenues for certain NYMEX Division products once a given percentage threshold of electronic trading in the particular product is met.[134] She further asserts that the Board's recent interpretation of when such Section 311(G) rights would trigger was improper and in violation of their fiduciary duties, and that the Board also breached its duties in failing to investigate and report on shareholder concerns about the propriety of this interpretation, delaying the special meeting with respect to these rights and

[134] Greene Compl., Wherefore Clause, ¶ E.

prohibiting Plaintiff counsel from attending the meeting, as well as in structuring the Membership Rights Payment to be subject to ordinary income tax treatment.[135] Finally, Greene alleges (as do the shareholder Plaintiffs) that both the Class A Member vote and the execution of the Final Waiver & Release waiving the right to these royalties were coerced by Defendants and that the release should be declared unlawful, void and unenforceable by the Court.[136] For their part, Defendants assert that the Section 311(G) rights and Class waivers are contractual disputes subject to the mandatory arbitration provision found in the previous Exchange Bylaws and thus beyond the reach of this Court.[137] Greene counters that the Court should extend its supplemental jurisdiction to hear these claims because the factual issues surrounding the Section 311(G) rights are "directly linked to the unfair process the Defendants' engaged in throughout the course of the merger" and that it would otherwise deny Plaintiff complete justice "as her fiduciary duty claims rest in substantial part on the resolution of the Section 311(G) issue."[138]

The question of whether Class A Members are owed Section 311(G) payments turns on the contractual rights they have by way of the governing documents of the Exchange. As such, they are subject to the arbitration provision

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[135] Greene Compl. ¶¶ 79-95. These fiduciary duty claims (i.e., those not based in contract) have been dismissed previously. *See supra* Part II.C.1.
[136] Greene Compl., Wherefore Clause, ¶ B.
[137] Am. Mot. to Dismiss and to Stay Disc. ¶ 2.
[138] Greene Br. in Opp'n at 48.

delineated in the Exchange Bylaws and outside the purview of this Court.[139] However, the appropriate disposition of Greene's claims as to the fairness of the transaction at issue and the fact that the potential coerciveness of the waiver turns on the availability of any past due, present or future Section 311(G) payments necessitate a more careful analysis of the substance of those claims involving Section 311(G) rights, a task to which the Court now turns.

Prior to its amendment by Class A Members, Section 311(G) of the Exchange Bylaws provided, in relevant part:

> If the exchange determines . . . to terminate permanently all open outcry floor trading for a particular listed product on the NYMEX Division and instead to list such NYMEX Division product for trading only via electronic trading, or at least 90% of contract volume of such applicable NYMEX Division product is from electronic trading, then in such case the owners of Class A memberships shall, at the time of the termination or shift to electronic trading, thereafter be entitled to receive in perpetuity . . . 10% of the gross Exchange revenues attributable to all revenue . . . from the electronic trading of such applicable NYMEX Division product.[140]

Greene's assertion is that this threshold was met for each of the applicable NYMEX Division products by 2007, and that, as a result, she and each Class A Member is entitled to at least $68,000 in past due royalty payments, totaling more

[139] The arbitration provision is found in Section 311(D)(1) of the Exchange's Bylaws and states, in relevant part: "Any dispute as to whether the rights of the owners of the Class A Memberships concerning a Special Matter [all matters set forth in subsections (C) through (H) of Section 311] have been violated . . . will be submitted to mandatory and binding arbitration. . . ." NYMEX Exchange Bylaws, Section 311(D)(1). In addition to Section 311(G), any "material changes to the Membership" are also included within the scope of Special Matters. *Id.*, Section 311(C)(6).
[140] NYMEX Exchange Bylaws, Section 311(G).

than $55.5 million. She disputes NYMEX's recent interpretation of when the rights trigger—only upon two consecutive quarters of more than 90% electronic trading—as "self-serving," contrary to the "clear language of Section 311(G),"[141] and in breach of their fiduciary duties. Greene additionally raises issue with NYMEX's methodology for calculating trading percentages. The Court need not determine the correct trigger for Section 311(G) rights or whether Defendants' interpretation of the Bylaw provision was proper, as any claims for past, current, or future payments were extinguished by the Class A Member vote to amend the Exchange Bylaws and eliminate these rights.

The Bylaws were amended by Class A Members pursuant to Section 500(B)(1) of the document, which states that Section 311(G) may be "amended, modified, eliminated, waived or deleted in any way . . . with the consent of the owners of 75% of all of the Class A Memberships."[142] Section 500(B)(2) of the Bylaws further states that, in addition to the Section 500(B)(1) provision calling for a supermajority vote to modify certain sections, including Section 311(G):

> [A]ny amendment, modification, elimination, waiver, deletion or expansion of or supplement to the certificate of incorporation or bylaws of NYMEX Holdings or the certificate of incorporation of the Corporations which could adversely affect any rights of the Class A Members under or in connection with . . . 311(H), shall require . . . the

[141] Compl. ¶ 86.
[142] NYMEX Exchange Bylaws, Section 500(B)(2).

> concurrence of the owners of 75% of all of the Class A Memberships. . . .[143]

The Bylaws operate as a contract both among its Class A Members as individuals as well as between the Corporation and Class A Members as a group.[144] Accordingly, actions taken by the Class A Members in aggregate, pursuant to procedures delineated in the Bylaws, may successfully bind Members with respect to their individual claims. The vote of a supermajority of Class A Members to amend the Bylaws to eliminate Section 311(G) rights makes Plaintiff's claim for Section 311(G) rights not actionable. Any past claims to Section 311(G) rights by Class A Members were equally waived by the vote.[145] The protection of these individual contractual claims lays in the super-majority vote required by the class to remove them, and in the proper disclosure of the terms of any such amendment proposed.[146] This was certainly met in the instant case. Class A Members understood that a vote in favor of amending the Bylaws would serve to eliminate all claims to Section 311(G) royalties, and the Supplemental Proxy—aided by Plaintiff's compliant—gave class members clear notice of a dispute over the

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[143] *Id.*, Section 500(B)(1).

[144] *See, e.g., Jana Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 338 (Del. Ch. 2008) ("[A] corporation's bylaws and charter are contracts among its shareholders . . . .").

[145] Greene's assertions to the contrary, the Section 311(G) payments are not "vested" rights that would persist despite the Class A Member amendment. Such rights do not arise where a corporation's bylaws give notice that contractual rights provided for in the bylaws may be eliminated by amendment. *See, e.g., Roven v. Cotter*, 547 A.2d 603, 608 (Del. Ch. 1988).

[146] Such protection should have been adequate in this case, given that Class A Members would be expected to have substantially identical interests and there is no indication that a material number of Members held any adverse interests.

potential value of the rights being foregone. Nevertheless, Class A Members voted overwhelmingly to amend the Exchange's Bylaws to eliminate the rights, with more than 80% voting in favor. As is evidenced by their ability to renegotiate the terms of the Revised Proposal in their favor, Class A Members were not coerced into voting in favor of the amendments or in waiving their Section 311(G) rights. Thus, there is no fundamental unfairness to Plaintiff in recognizing the consequences of this vote. As such, the motion to dismiss all Plaintiff's claims involving Section 311(G) rights is granted.

D. *The Final Waiver and Release*

Finally, the plaintiffs in both actions seek to have the Final Waiver & Release that Class A Members were required to sign in order to receive the Membership Rights Payment declared unlawful, void and unenforceable as coercive and overly broad.[147] Defendants argue that the waiver should be viewed in conjunction with the Class A Member vote to amend the Certificate and Bylaws, and that there was no actionable coercion where the Members had veto power over the transaction and could retain the status quo.[148] Because Class A Members have no actionable claims remaining either as Members or as stockholders, the Court

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[147] Greene Compl., Wherefore Clause, ¶ B; Compl., Wherefore Clause, ¶ C.

[148] Reply Br. of Defs. CME Group, Inc. and CMEG NY Inc. in Further Supp. of their Cross-Mot. for Partial Summ. J. at 1-2. Defendants also assert that the shareholder Plaintiffs do not have standing to challenge the waiver. *Id.* at 3.

need not determine whether or not the Final Waiver & Release was coercive, and declines to do so here.[149]

III. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss are granted. Implementing orders will be entered.

[149] Similarly, the Court need not consider the related question of whether removal of the reference to the Effective Date improperly made the waiver retroactive.