IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DELAWARE COALITION FOR OPEN GOVERNMENT, INC., Plaintiff, v. **THE HON. LEO E. STRINE, JR.,** **THE HON. JOHN W. NOBLE,** **THE HON. J. TRAVIS LASTER,** **THE HON. DONALD F. PARSONS, JR.,** **THE HON. SAM GLASSCOCK, III,** **THE DELAWARE COURT OF CHANCERY,** and the **STATE OF DELAWARE,** Defendants.	Civil Action No. 11-01015-MAM

MOTION OF NASDAQ OMX GROUP INC.
AND NYSE EURONEXT FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE IN SUPPORT OF
DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

NASDAQ OMX Group, Inc. ("NASDAQ") and NYSE Euronext ("NYSE") (or collectively "amici") hereby move for leave to file the attached brief as amici curiae in support of the defendants' Motion for Judgment on the Pleadings. In support of their motion, NASDAQ and NYSE state as follows:

1. NASDAQ and NYSE operate the principal stock exchanges in the United States, which list the securities of major U.S. and foreign public companies. Both NASDAQ and NYSE are committed to facilitating capital formation for businesses operating in this country. This responsibility, which lies at the heart of the amici's business mission, is what motivates NASDAQ and NYSE's motion for leave to participate as amici in this case. In short, NASDAQ

and NYSE believe that the new Delaware arbitration procedure is good for companies that choose to conduct business and list securities in the U.S.

2. Amici believe that when companies decide where to locate their operations and where and how to raise the needed capital, a key factor is the quality and cost of the various jurisdictions' legal infrastructure. Specifically, one significant issue for these companies is the relative efficiency and fairness of available dispute resolution mechanisms, particularly for commercial disputes. Amici believe that the Delaware Court of Chancery's new confidential, expedited arbitration procedure provides an important new dispute resolution forum for companies – one that affords them the opportunity to contractually agree to have certain commercial matters resolved in a confidential forum by judges nationally recognized for their experience in resolving corporate and commercial disputes. The confidential nature of those proceedings is one significant advantage of this alternative dispute resolution mechanism– it enables businesses to protect sensitive and closely held information, avoid the reputational damage that could flow from a highly adversarial and public dispute, and preserve existing and future relations with other parties.

3. Accordingly, NASDAQ and NYSE seek to participate as amici because they believe that if plaintiff successfully challenges the confidential nature of arbitrations before the Delaware Court of Chancery, it may well significantly reduce the effectiveness of this novel program and cause those businesses to choose other dispute resolution venues outside the United States or which are otherwise not as efficient at resolving disputes. If non-U.S. fora are consistently seen as more hospitable to commercial dispute resolution than any available U.S. venues, this, in turn, becomes another factor pushing global companies away from the U.S.

shores, as tech companies (many of them in technology and other "new economy" businesses) decide where to build or expand their operations or seek new capital.

4. Amici believe they can assist the Court by providing a perspective that is distinct from that of any party. Accordingly, NASDAQ and NYSE respectfully request this Court to grant their motion for leave to file a short brief, in the form attached hereto as Exhibit A, in support of defendants' motion for Judgment on the Pleadings.

5. Amici have met and conferred with plaintiff and plaintiff does not oppose this motion for leave.

Dated: December 29, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2011 a copy of the **Motion of NASDAQ OMX Group Inc. and NYSE Euronext for Leave to File Brief as Amici Curiae in Support of Defendants' Motion for Judgment on the Pleadings** was served upon the following counsel of record in the manner indicated below:

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BRIEF OF AMICI CURIAE NASDAQ OMX GROUP INC. AND NYSE EURONEXT IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Amici curiae NASDAQ OMX Group, Inc. ("NASDAQ") and NYSE Euronext ("NYSE") (or collectively "amici") respectfully submit this brief in support of the defendants' Motion for Judgment on the Pleadings.[1]

INTERESTS OF THE AMICI CURIAE

NASDAQ and NYSE operate the principal stock exchanges in the United States and major exchanges in other countries. The amici's U.S. exchanges list the securities of major public companies in the United States as well the securities of non-U.S. companies seeking to access the U.S. public capital markets. Both NASDAQ and NYSE are committed to facilitating capital formation for businesses operating in this country. This responsibility, which lies at the heart of the amici's business mission, is what is motivating the views expressed in this brief. Simply put, NASDAQ and NYSE believe that the new Delaware arbitration procedure offers an important and beneficial alternative dispute resolution process for companies that choose to conduct business and list securities in the U.S, and as a result this process encourages companies to do business in the U.S.

Amici believe that when companies decide where to locate their operations and where and how to raise the needed capital, a key factor is the quality and cost of the various jurisdictions' legal infrastructure. Specifically, one significant issue for these companies is the relative efficiency, competency, and fairness of available dispute resolution mechanisms, particularly for commercial disputes. Amici believe that the Delaware Court of Chancery's new confidential, expedited arbitration procedure provides a new dispute resolution forum for

[1] No counsel for any party authored this brief in whole or in part. No counsel, party or person other than amici made a monetary contribution intended to fund the preparation or submission of the brief.

companies – one that affords them the opportunity to contractually agree to have certain commercial matters resolved in an alternative forum by judges nationally recognized for their experience in resolving corporate and commercial disputes. If certain businesses are not offered the opportunity to use the Delaware Court of Chancery to resolve their disputes confidentially, they may choose other dispute resolution venues, which may be outside the United States or which are otherwise not as efficient at resolving disputes. If non-U.S. fora are consistently seen as more hospitable to commercial dispute resolution than any available U.S. venues, this, in turn, becomes another factor pushing global companies away from the U.S. shores, as these companies (many of them in technology and other "new economy" businesses) decide where to build or expand their operations or seek new capital.

SUMMARY OF ARGUMENT

Arbitration is globally recognized as having significant advantages over traditional litigation. Among those advantages is that business disputes can be resolved confidentially, thereby allowing a business to 1) protect closely held information, 2) avoid reputational injury, and 3) minimize the potential damage to existing and future relations with other parties. Amici recognize that a number of foreign jurisdictions, including jurisdictions outside the United States and/or that are the headquarters of equities markets that compete with NYSE and NASDAQ for listings, have gone to great lengths to insure that the confidentiality of arbitration proceedings is protected.

The Delaware Court of Chancery's arbitration program contains all of the hallmarks that have led to global acceptance of arbitration as a preferred dispute resolution mechanism, while also offering the benefits of the expertise provided by the judges sitting on the Delaware Chancery Court. The only real question raised by plaintiff's petition is whether these proceedings may be conducted on a confidential basis. Yet to sustain plaintiff's claimed "right

of access" to these otherwise confidential proceedings among contractually assenting parties, plaintiff must show that public access will, among other things, "play[] a significant positive role in the functioning" of Court of Chancery arbitrations.[2] This is simply not the case; indeed, the parties to the arbitration have already contractually agreed that they believe that public access will harm, not help, the functioning of the arbitration. There are numerous alternatives to Delaware Court of Chancery arbitration where business entities can be assured that their disputes will be resolved in public if that is what they wanted, including the Delaware Court of Chancery. What the new procedure offers parties is the benefits of a confidential arbitration process with the Chancery Court judges, something which is not otherwise available. If plaintiff succeeds in overturning the confidentiality of such procedures and compelling public access, it will thus do absolutely nothing to improve the functioning or openness of such arbitrations. Instead, parties seeking a confidential dispute resolution process will simply go elsewhere. A judgment in favor of plaintiff would thus do nothing other than to bring an end to this innovative program, thwarting the State of Delaware's intentions in authorizing the program.

ARGUMENT

A. Arbitration is Recognized Globally as Having Advantages Over Litigation

There are many reasons why private parties favor arbitration over litigation as a means of dispute resolution. Arbitration involves less discovery and therefore significantly reduced potential costs to the involved parties. Arbitration is viewed as less adversarial than litigation and thus potentially better at preserving existing and future business relationships. Arbitration can have a much shorter path to decision, again saving time and expense. Given that arbitration also typically has a limited right of appeal, this means that final resolution of a matter

[2] *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986).

can often be achieved in a fraction of the time that is spent litigating a dispute in court, all at a significant cost savings to parties. In addition, the informality of arbitration as compared to litigation leads to greater flexibility among the parties regarding how a dispute is handled, including the opportunity to decide how issues such as choice of law, discovery and evidentiary rules are handled in the arbitration agreement itself. Further, a hallmark of arbitration is that the proceedings are presumptively confidential. The confidentiality of such proceedings is important to businesses for a host of reasons including protecting sensitive and closely held information, avoiding the reputational damage that could flow from a highly adversarial and public dispute, and preserving existing and future relations with other parties.

The New York Convention of 1958 – which requires nations that have ratified the Convention to recognize and enforce arbitral awards – demonstrates the global preference for arbitration as a dispute resolution mechanism.[3] The New York Convention has been adopted by 121 parties to date including Belgium, Egypt, France, Germany, Japan, Sweden, Switzerland, the United Kingdom and the United States.[4] As a result, whereas the enforcement of a foreign judgment may be fraught with difficulties, arbitration awards are recognized and enforced around the world. Arbitration as a dispute resolution mechanism may be especially appropriate in Asian nations where the culture disfavors the adversarial process of litigation.[5]

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[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), Article III, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

[4] United Nations Commission on International Trade Law, *Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

[5] *See* Julia A. Martin, "Arbitrating in the Alps Rather than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution," 49 STAN. L. REV. 917, 958 (1997).

B. The Delaware Court of Chancery is Uniquely Suited to Arbitrate Business Disputes

The Delaware Court of Chancery's new confidential, expedited arbitration process contains all of the critical elements that have made arbitration a globally attractive dispute resolution mechanism, including limited discovery, the opportunity for flexible handling of disputes, a short path to finality and confidential treatment of the arbitration proceeding.[6] In addition, because the arbitrators under this program are the judges of the Court of Chancery, the program offers unique advantages over other arbitral fora in the United States and abroad. Parties to arbitrations under the Court of Chancery program have the opportunity to have their disputes decided confidentially by judges who are nationally recognized for their experience and sophistication in resolving corporate and commercial disputes. Judges in the Court of Chancery are recognized as experts who specialize in contract, commercial and corporate law. Indeed, the vast experience of judges in the Court of Chancery, the depth of Delaware corporate jurisprudence and the concomitant predictability of outcomes in disputes are among the principal reasons businesses incorporate in Delaware in the first place.[7]

C. Confidentiality of Arbitration Proceedings is the Norm

The expectation that arbitration proceedings are confidential is the historic norm in both the United States and the rest of the world. It is further embedded in the rules of national and international bodies that provide and regulate commercial arbitration. In fact, some countries, such as England and France, hold that even in the absence of any specific agreement regarding confidentiality, confidentiality is nonetheless implied from the very nature of

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[6] *See generally* Del. Code Ann. tit. 10, § 349; Del. Ch. Ct. R. 96-98.

[7] Lewis S. Black, Jr., *Why Corporations Choose Delaware*, Delaware Department of State Division of Corporations 5-8 (2007).

arbitration. Thus, in *Ali Shipping Corp v. Shipyard Trogir*,[8] the English court held that confidentiality is "an essential corollary of the privacy of arbitration proceedings" and that the obligation of confidentiality applies not only to the outcome, but to all "pleadings, written submissions and the proofs of witnesses as well as transcripts and notes of the evidence given in the arbitration." Similarly, in the leading French case, *Aita v. Ojjeh*,[9] the court held that "it is in the very nature of arbitration proceedings to ensure that the highest level of secrecy governs the resolution of private disputes in accordance with the parties' agreement."

Still other jurisdictions, such as New Zealand, have gone even further to protect confidentiality of arbitration proceedings. Section 14 of New Zealand's Arbitration Act of 1996 essentially codifies the confidential nature of arbitration proceedings.[10] It states that "an arbitral tribunal must conduct the arbitral proceedings in private" and that, absent certain exceptions, the parties and the arbitration tribunal "must not disclose confidential information" including any pleadings, evidence, transcripts, and the rulings or awards of the arbitrator.[11]

D. Public Access to Confidential Arbitration Proceedings Would Harm Rather than Benefit those Proceedings

In order to recognize plaintiff's claimed right of access to otherwise confidential Court of Chancery arbitrations, this Court would need to find, among other things, that public access to such proceedings would "play[] a significant positive role in the functioning" of those proceedings.[12] Yet public access will not play a positive role in the proceedings. To the

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[8] 2 All E.R., 1 Lloyd's Rep. 643 (Eng. Ct. App. 1998).

[9] 1986 REVUE DE L'ARBITRAGE 583 (Cour d'Appel de Paris, Feb. 18, 1986).

[10] Arbitration Act 1996 (New Zealand), § 14 at 14A-14I , http://www.legislation.govt.nz/act/public/1996/0099/latest/whole.html#dlm403277.

[11] *Id.*

[12] *Press-Enterprise*, 478 U.S. at 8.

contrary, access will defeat one of the very purposes of arbitration of commercial disputes – the ability of the parties to have disputes resolved efficiently on a full record that is not crimped by concerns about corporate proprietary and other non-public information becoming public by the mere fact that a dispute has arisen. The Delaware procedure allows parties to present their full cases without fear of collateral harm to their businesses through confidential information becoming available to competitors or others who have no stake in the dispute being arbitrated but may unfairly gain an advantage from access to non-public information – a concern that no level of confidentiality protection in a public litigation-style format can erase.

Moreover, because arbitration has gained global acceptance as a dispute resolution mechanism, there are numerous alternatives to arbitration before the Delaware Court of Chancery. Consequently, stripping away the confidentiality protections of the Court of Chancery program would not result in public Court of Chancery arbitrations. Instead, both foreign and United States entities that, for entirely salutary and legitimate reasons, want to preserve a business relationship and do not want the details of a business dispute to be made public, would likely choose to arbitrate their disputes elsewhere, including in foreign countries whose laws and rules continue to recognize and protect the confidentiality of such proceedings. In short, efforts of plaintiff to make arbitrations in the Delaware Court of Chancery public will not only add nothing positive to the functioning of those proceedings, but will affirmatively deter business entities from using this unique forum as a place for the confidential and efficient dispute resolution.

CONCLUSION

For the foregoing reasons, amici NASDAQ and NYSE respectfully request that this Court grant the defendants' Motion for Judgment on the Pleadings.

Dated: December 29, 2011

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