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## BUSINESS ARCHIVE

### Future of Archipelago boss hangs on judge's ruling

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BY [DAVID ROEDER](#) Business Reporter

Since announcing the deal last month to merge his Archipelago Holdings with the New York Stock Exchange, Gerald Putnam has been busy selling it to Wall Street.

At the same time, he's sweating out a judge's decision in a Cook County lawsuit that's unlikely to affect the merger itself, but could decide Putnam's future with the NYSE. It also could cost him millions of dollars.

Putnam, chief executive of Archipelago, stands to become a co-president of the NYSE if the deal closes. But he also stands accused of cheating a former business partner out of a stake in a brokerage in the mid-1990s that evolved into Archipelago, an electronic exchange with a current market value of \$1.6 billion.

The civil case awaits a ruling from Circuit Court Judge Allen Goldberg. If Goldberg scorches Putnam in his ruling, it could force the image-conscious NYSE to drop Putnam from the executive roster.

That's because as part of the merger, the NYSE is reorganizing as a publicly traded company subject to the Sarbanes-Oxley Act passed in 2002. The act imposes on companies an array of tighter standards in corporate governance and financial reporting.

One element of the act requires companies to meet a vague "fitness" standard for its officers and directors. The NYSE or federal regulators might have to decide if a decision against Putnam renders him "unfit" for the NYSE.

Lori Iwan, an attorney for Putnam, said the chances of a ruling harming Putnam to that extent are "on the outer extremes of the bell curve." But she said Goldberg has wide latitude because the case touches many complex issues. "The law of fiduciary duty has just not been clearly defined in this country yet," she said.

Goldberg has told both sides he wants to rule by mid-June. A jury hearing the case issued an advisory ruling in December that Putnam took assets from a business he owned with ex-partner Fane Lozman, and transferred them to a new company, while eliminating Lozman from the deal.

The verdict was a split decision. Jurors ruled in Putnam's favor on separate counts

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of whether he breached written and oral contracts with Lozman.

Iwan said Putnam has prevailed on so many questions within the lawsuit so as to limit his liability. "Usurpation of corporate opportunity is not a criminal action. It's not fraud," she said.

Anne Marchetti, an expert in Sarbanes-Oxley at the firm Parson Consulting LLC, saw potential problems for Putnam, but not from the "fitness" standard in Sarbanes-Oxley. She said the provision is aimed less at moral rectitude than at ensuring directors have appropriate skills so that, for example, accountants serve on the audit committee.

"But I see a lot of ethical issues in this situation," said Marchetti, who has no first-hand knowledge of the lawsuit. She said the NYSE and other companies have been forced to adopt higher ethical standards, and Sarbanes-Oxley raises the possibility of prison for those who fall short.

The NYSE declined to comment, and Putnam did not return calls. When asked about the lawsuit the day the NYSE deal was announced, he said it had no impact on the merger because Archipelago is not a defendant.

Philip Nathanson, an attorney for Lozman, declined to comment.

The suit dates from 1999, and Lozman originally tried to include Archipelago as a defendant. The Illinois Appellate Court ruled against him, but left open the possibility that damages against Archipelago could be pursued later if Putnam lost the case.

Iwan said Putnam has a contract with Archipelago indemnifying the exchange against losses in the Lozman matter.

Putnam owns a 2.5 percent stake in Archipelago worth about \$39.5 million based on its current price of \$33.54 a share.

The shares have risen substantially because of the NYSE deal, giving Putnam about a \$20 million windfall.

In addition, Putnam would be entitled to a \$4 million payout from the NYSE if the merger closes. The merger requires approval of NYSE seatholders.

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