IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MAHYAR AMIRSALEH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2822-CC
	)	
BOARD OF TRADE OF THE CITY OF NEW YORK, INC., and INTERCONTINENTAL EXCHANGE, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: July 3, 2008
Date Decided: September 11, 2008

Elizabeth M. McGeever, of PRICKETT, JONES & ELLIOTT, P.A., Wilmington, Delaware; OF COUNSEL: Jonathan S. Shapiro, Robert J. Shapiro, and Kerry C. Foley, of THE SHAPIRO FIRM, LLP, New York, New York, Attorneys for Plaintiff.

Donald J. Wolfe, Jr., Michael A. Pittenger, and Berton W. Ashman, Jr., of POTTER ANDERSON & CORROON LLP, Wilmington, Delaware, Attorneys for Defendants.

CHANDLER, Chancellor

No contract, regardless of how tightly or precisely drafted it may be, can wholly account for every possible contingency. In fact, contracting parties often explicitly defer key decisions when constructing their written agreement, and instead endow one side or the other with the discretion and authority to make those decisions during the course of performance. Such a course of action is undoubtedly a risk-shifting device, but the law presumes that parties never accept the risk that their counterparties will exercise their contractual discretion in bad faith. Consequently, in every contract there exists an implied covenant of good faith and fair dealing. In this case, which arises from a merger, stockholders had the opportunity to elect the form of their compensation, but the merger agreement gave the company the discretion to set the time by which stockholders must have made their choice. Because it is presently unclear whether the company exercised its discretion in good faith when it accepted all late elections but the plaintiff's, there remains a genuine issue of material fact. For this reason and others explained more fully below, the Court grants in part and denies in part defendants' motion for summary judgment.

I. BACKGROUND

Presently before the Court is the motion for judgment on the pleadings or, in the alternative, summary judgment from defendants Board of Trade of the City of New York, Inc. ("NYBOT") and IntercontinentalExchange, Inc. ("ICE"). In

December 2006, NYBOT's predecessor of the same name entered an Agreement and Plan of Merger (the "Merger Agreement") with ICE and ICE's wholly owned subsidiary, CFC Acquisition Co. Pursuant to the Merger Agreement, NYBOT's predecessor, a not-for-profit New York corporation, was merged with and into CFC. The resulting entity was NYBOT in its current form: a Delaware for-profit corporation that is a wholly owned subsidiary of ICE. This merger was effected on January 12, 2007.

Plaintiff Mahyar Amirsaleh owned two membership interests in NYBOT's predecessor. Each of those interests included a right to trade on the NYBOT exchange, and Amirsaleh leased those rights to third parties. The gist of Amirsaleh's complaint is that he lost his right to trade in the merger because he was cashed out and because he did not have a meaningful opportunity to elect to receive equity in the new entity rather than cash. Specifically, Amirsaleh alleges that the defendants breached the Merger Agreement and its implied covenant of good faith and fair dealing.

The Merger Agreement provided that each NYBOT membership interest would be converted into either 17,025 newly issued shares of ICE common stock or $1,074,719 in cash or some combination of shares and cash. Under section 4.1 of the Merger Agreement, each NYBOT member was permitted to elect the form

of consideration he or she would receive in the merger.[1] The Agreement further provides, however, that the substance of one's chosen consideration might be affected if one option or the other is oversubscribed or undersubscribed.[2] Specifically, the aggregate amounts of stock and cash that could be issued as merger consideration were fixed: the total amount of cash to be paid by ICE in connection with the merger was approximately $400,000,000. Consequently, to the extent cash consideration was over or undersubscribed, the Merger Agreement provided for pro rata reallocation. Finally, the agreement provided that if a member failed to make an election he or she would receive whatever type of consideration was undersubscribed.

The process by which members made their elections was governed in detail by section 4.3 of the Merger Agreement. That provision explained that an Election Form "shall be mailed on the same date as the Proxy Statement/Prospectus is mailed to Members or on such other date as ICE and NYBOT shall mutually agree."[3] Importantly, the Merger Agreement specified that "[a]ny Membership Interest with respect to which the Exchange Agent has not received an effective, properly completed Election Form on or before 5:00 p.m. on the fifth day before

[1] Merger Agreement § 4.1(a) ("[E]ach Membership Interest issued and outstanding immediately prior to the Effective Time shall automatically be converted into and constitute the right to receive, at the election of the Member that is the holder of such Membership Interest . . . either: 17,025 shares of newly issued, fully paid and nonassessable shares of common stock . . . of ICE . . . *or* . . . the right to receive an amount of cash equal to $1,074,719").
[2] *See id.* § 4.3(e).
[3] *Id.* § 4.3(a).

the NYBOT Members Meeting (or such other time and date as ICE and NYBOT may mutually agree) . . . shall also be deemed to be No Election Shares."[4] To retain trading rights in the new NYBOT, members were required to own at least 3,162 shares of ICE common stock after the merger and to pledge those shares in accordance with a NYBOT Membership and Pledge Agreement and Pledge Addendum (the "Pledge Agreement"). In sum, NYBOT members desiring to continue in the new enterprise needed to complete and return both an Election Form and a Pledge Agreement.

On November 20, 2006, NYBOT and ICE publically filed with the SEC and mailed to all NYBOT members the definitive joint Proxy Statement and Prospectus. Amirsaleh received this mailing and returned his proxy vote in favor of the merger. The Election Form was not mailed at the same time; the Proxy Statement/Prospectus advised members that it would follow in a subsequent mailing. Furthermore, the Proxy Statement/Prospectus explained that the deadline for making an election would be disclosed in the supplemental mailing. On December 11, 2006, NYBOT held a special meeting at which the members approved the proposed merger transaction. Sometime in early to mid December, Amirsaleh's executive assistant, Donna Stavrinou, inquired as to when the Election

[4] *Id.* § 4.3(b).

Forms would be mailed. She was told by Helene Recco, the Director of NYBOT Member Services, that they would be mailed shortly.[5]

On December 19, 2006, the Election Forms and Pledge Agreements were sent by first class mail, postage prepaid, to all NYBOT members using the addresses the NYBOT had on file.[6] To accomplish the printing and distribution of the forms, NYBOT and ICE contracted with a third party, RR Donnelly & Sons Company. NYBOT provided RR Donnelly with its list of members and addresses—a list that included Amirsaleh and his proper mailing address. RR Donnelly contracted with Apple Direct Mail Services, Ltd., and Apple mailed the Election Forms, which specified that the deadline for making an election was January 5, 2007.

Amirsaleh, however, did not receive an Election Form in the mail. Despite having been told sometime in early December that the materials would be mailed shortly, Amirsaleh did not inquire again. Amirsaleh's next contact with NYBOT regarding the election occurred on January 12, 2007, when Linda Chin of NYBOT Member Services reached Amirsaleh's office to alert him that he had not signed and submitted a Pledge Agreement. Chin did not provide and Amirsaleh's assistant, Stavrinou, did not ask for a copy of the Election Form. Stavrinou asked

[5] *See* Donna Stavrinou Aff. ¶ 8, June 5, 2008.
[6] Pursuant to NYBOT membership rules, members had a duty to immediately notify NYBOT of any change in their addresses.

Chin to send the agreement by fax, and Chin did so that day. Amirsaleh, however, who was traveling at the time, did not sign and return the Pledge Agreement until January 18. When transmitting the Pledge Agreement, Stavrinou asked Chin what else needed to be done. In response, Chin asked if Amirsaleh had completed and returned an Election Form. Amirsaleh, of course, had not, and Chin faxed a copy stating that she "could not guarantee that [the] booklet will be accepted."[7] Amirsaleh elected to receive stock in the new entity and returned the completed form the following morning, but NYBOT and ICE did not accept it as a timely election.

Although the official deadline for making an election disclosed on the Election Form was January 5, 2007, defendants accepted the stock elections of twenty-five other NYBOT members who made elections between January 6 and January 18. Defendants argue that "NYBOT and ICE determined on or about January 17, 2007, that, to accommodate members who had submitted Election Forms after January 5, 2007, late forms submitted to that date would be accepted."[8] In support of this argument, defendants submitted an affidavit from Helene Recco, the Managing Director of Member Services. Recco's affidavit states simply that "[a] determination was made" to accept forms submitted up to

[7] Compl. ¶ 39.
[8] Defs.' Reply Br. 9.

January 17.[9] Although she attached to her affidavit emails she claims support the statement, the exhibit does not offer any evidence that NYBOT and ICE made a determination as to when they would stop accepting late election forms. At best, the emails show that employees in the Member Services department were attempting to assist NYBOT members and were asking their superiors when the company would stop accepting late forms.[10] There is no evidence in the record before the Court that NYBOT and ICE affirmatively set a new deadline; there is merely a single email from Andrew Surdykowski, the Vice President and Assistant General Counsel of ICE, instructing a project manager to "accept the late elections that you have accumulated."[11]

Amirsaleh's form, which was received on January 19, 2007, was not accepted as valid. Because stock consideration was oversubscribed (and, therefore, cash consideration was undersubscribed), members who did not make a valid election were automatically cashed out. Defendants have stated that only two other members submitted signed Election Forms after January 18, 2007 and that neither

[9] June 30, 2008 Aff. of Helene Recco ¶ 12.

[10] *See, e.g.*, *id.*, Ex. 1, at D000916 (email from Donnie Amado asking Andrew Surdykowski to "please confirm the last election we are accepting is Mr. Davis;" there is no evidence in this record that the question was answered). Indeed, the record evidence demonstrates that the internal understanding fluctuated. *Compare id.* at D000227 (email from Andrew Surdykowski stating that "[t]he late items will not be accepted. The deadline remains as publicly disclosed and as originally stated in the Election Forms."), *with id.* at D000994 (email from Donnie Amado stating, "Attached are late items we are going to input," and asking Surdykowski, "When can we cut this off officially?").

[11] June 4, 2008 Aff. of Jonathan S. Shapiro, Ex. W, at D002727 (January 17 email from Andrew Surdykowski to Donnie Amado).

of those was accepted. Those two other members, however, each elected to receive cash consideration and, therefore, received what they wanted anyway. Despite defendants' protestations that ICE and NYBOT set a new deadline of January 18, 2007, plaintiff's check constituting his merger consideration was dated January 12, 2007. The cash consideration amounted to $778,199.20 per membership interest. Members who elected to receive stock were issued 11,067 shares of ICE stock and given a cash payment of $378,208.00 per membership interest. During the election period, the minimum value of those 11,067 shares was $1,153,513.41. In addition to the monetary value discrepancy between the two forms of consideration, those members who received cash consideration faced the loss of their rights to trade on the NYBOT. To continue to have that right going forward, an individual needed to own at least 3,162 shares of publicly held ICE common stock and to pledge those shares in accordance with the Pledge Agreement prior to February 1, 2007.

Amirsaleh filed this suit on March 22, 2007, seeking an order requiring defendants to issue to him "shares of ICE in the same amount, and on the same terms and conditions, as issued to other members of NYBOT who had made an election to receive Stock Consideration" in the merger and to reinstate his two trading memberships.[12] In his complaint, Amirsaleh alleges that the defendants

[12] *See* Compl. ¶¶ 1–2.

breached their obligations under the Merger Agreement and breached the Merger Agreement's implied covenant of good faith and fair dealing. Defendants dispute these claims and argue as a preliminary matter that Amirsaleh lacks the requisite standing to make them. After discussing the standards of review applied to the instant motion, I will address defendants' standing argument first and then each claim made by Amirsaleh.

II. ANALYSIS

On June 29, 2007, defendants filed their opening brief in support of their motion for judgment on the pleadings or, in the alternative, for summary judgment. In the intervening time, plaintiffs conducted discovery and the parties constructed a record of evidence, which they submitted with their briefing. Consequently, the Court will treat this as a motion for summary judgment.[13] This Court will grant a motion for summary judgment only "when a movant can demonstrate that there are no genuine issues of material fact."[14] Moreover, the Court must examine the evidence submitted "in the light most favorable to the non-moving party."[15]

A. Standing

[13] Ct. Ch. R. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .").
[14] *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007); *see also* Ct. Ch. R. 56(c).
[15] *Sun-Times Media Group, Inc. v. Black*, --- A.2d ---, C.A. No. 3518-VCS, 2008 WL 3009116, at *6 (Del. Ch. July 30, 2008).

Generally, "only parties to a contract and intended third-party beneficiaries may enforce an agreement's provisions."[16] Amirsaleh's claims sound in contract, and, therefore, to have standing he must have been a party to the Merger Agreement or an intended third-party beneficiary. The parties agree that the Merger Agreement is a contract between NYBOT and ICE, so the only question for the Court is whether Amirsaleh, as a member of NYBOT, was an intended third-party beneficiary.

This Court has previously bristled at the notion that a stockholder could have "directly enforceable rights as third-party beneficiaries to corporate contracts."[17] Nevertheless, that recalcitrance had more to do with the lack of evidence of the contracting parties' intent to confer a benefit under the contract to the shareholders.[18] Indeed, the key to third-party standing in contract law is the intent to benefit the third party. As then-Vice Chancellor Jacobs originally explained and Vice Chancellor Lamb more recently reiterated, "[t]o qualify as a third party beneficiary of a contract, (i) the contracting parties must have intended that the

[16] *NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417, 434 (Del. Ch. 2007).
[17] *Orban v. Field*, C.A. No. 12820, 1993 WL 547187, at *9 (Del. Ch. Dec. 30 1993).
[18] *See id.* ("The idea of shareholders having directly enforceable rights as third party beneficiaries to corporate contracts is, I think, one that should be resisted. One of the consequences of the limited liability that shareholders enjoy is that the law treats corporations as legal persons not simply agents for shareholders. In any event, even were one inclined to look through corporate contracts and see shareholders as third party beneficiaries, this would not be an appropriate instance to do so since, plainly they were wholly incidentally 'benefited' by the Merger Agreement's supermajority class vote provision, if that provision is deemed a benefit.").

third party beneficiary benefit from the contract, (ii) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (iii) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract."[19]

Here, there is little legitimate question that the members of NYBOT were intended beneficiaries of the Merger Agreement, because the Agreement manifests an unambiguous intent to benefit the NYBOT Members. First, the Merger Agreement provides that "each Membership Interest issued and outstanding immediately prior to the Effective Time shall automatically be converted into and constitute the right to receive" either new ICE shares or cash.[20] The substance of the merger consideration was to be determined "at the election of the Member that is the holder of such Membership Interest."[21] Upon election, shares or a check were issued directly to members, and, "[w]hen a promised performance is rendered directly to the beneficiary, 'it is presumed that the contract was for the beneficiary's benefit.'"[22] Indeed, as the United States District Court for the District of Delaware has ruled, former shareholders of a corporation are intended third party beneficiaries where the merger agreement provided that the

[19] *Madison Realty Partners 7, LLC v. Ag ISA, LLC*, C.A. No. 18094, 2001 WL 406268, at *5 (Del. Ch. Apr. 17, 2001), *quoted in Comrie v. Enterasys Networks, Inc.*, C.A. No. 19254, 2004 WL 293337, at *2 (Del. Ch. Feb. 17, 2004).
[20] Merger Agreement § 4.1(a).
[21] *Id.*
[22] *Comrie*, 2004 WL 293337, at *3.

shareholders would receive compensation for their shares and the merger required shareholder approval.[23]

Defendants' argument to the contrary is unavailing and unsupported, and the authorities on which defendants rely are inapposite. First, although the Merger Agreement contains a general provision disclaiming the existence of any third-party beneficiaries,[24] such disclaimer is belied by the Agreement's specific grant of benefits to NYBOT Members.[25] Second, *Orban v. Field* is off point.[26] In *Orban*, former Chancellor Allen declined to allow shareholders to enforce a provision of a corporate contract that purportedly provided the right to vote as a class because the

[23] *See Hadley v. Shaffer*, No. 99-144-JJF, 2003 WL 21960406, at *5 (D. Del. Aug. 12, 2003) ("The Court concludes that the Hadleys are intended third-party beneficiaries of the Merger Agreement. As consideration for the sale of shares in Kiamichi, the Merger Agreement provided that the shareholders (including the Hadleys) would receive the payments set forth in paragraph 2.3(a). Paragraph 8.6 of the Merger Agreement required the approval of the Hadleys and other shareholders before the Merger Agreement became final. The Hadleys also consented to the stock purchase and merger. The Hadleys, as shareholders, were undoubtedly intended to receive a benefit from the sale of their stock through the Merger Agreement." (citations omitted)).

[24] *See* Merger Agreement § 9.8 ("[t]his Agreement is not intended to, and does not, confer upon any Person other than the parties who are signatories hereto any rights or remedies hereunder.").

[25] *See DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) ("Well-settled rules of contract construction require that a contract be construed as a whole, giving effect to the parties' intentions. Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."); *accord MEA-NEA Local I v. Mount Clemens Cmty. Schools*, No. 248794, 2004 WL 2387650, at *7 (Mich. Ct. App. Oct. 26, 2004) ("Despite the general clause disclaiming any third party beneficiary status, the substantive provisions of the management agreement clearly directly benefit plaintiff by specifically extending bargained-for benefits and other protections to union members assigned to MLK. Plaintiff is an intended third-party beneficiary because the management agreement expressly benefits plaintiff and contains promises on behalf of plaintiff.").

[26] C.A. No. 12820, 1993 WL 547187 (Del. Ch. Dec. 30, 1993).

benefit conferred—if any—was "wholly incidental[]."[27] Third, and similarly, *Tooley v. Donaldson, Lufkin & Jenrette, Inc.* does not stand for the proposition that a shareholder lacks third-party standing to enforce the terms of his compensation under a merger agreement.[28] *Tooley* is more about ripeness of a third-party contract claim than it is about the appropriateness of shareholder standing to enforce an intended benefit under a merger agreement.[29] Finally, defendants' reliance on *Benerofe v. Cha*[30] is hardly helpful. *Benerofe* simply provides that "[p]laintiffs' standing as third-party beneficiaries, rather than as parties, to the Agreement limits their rights under the Agreement to those clearly provided by the Agreement."[31] Here, Amirsaleh seeks to enforce his right to elect the form of his consideration under the Merger Agreement—a right that is specifically and explicitly granted in the contract. In other words, Amirsaleh has standing under *Benerofe* because he seeks to enforce a right "clearly provided by the Agreement."

B. Breach of the Merger Agreement

Amirsaleh alleges that the defendants breached the Merger Agreement in three ways: (1) failing to deliver the Election Form and Pledge Agreement; (2) failing to follow the proper procedures set forth in the Agreement with respect to

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[27] *Id.* at *9.
[28] 845 A.2d 1031 (Del. 2004).
[29] *Id.* at 1034–35 ("[A]ny contractual shareholder right to payment of the merger consideration did not ripen until the conditions of the agreement were met.").
[30] C.A. No. 14614, 1998 WL 83081 (Del. Ch. Feb. 20, 1998).
[31] *Id.* at *6 n.22.

the timing and mailing of the Election Books; and (3) failing to accept his forms as timely. Because there is no genuine issue of material fact with respect to any of these three alleged breaches, the Court may grant summary judgment, and for the reasons explained below, the Court grants summary judgment in favor of defendants on the breach of the merger agreement claims.

1. Delivery

Amirsaleh argues that the defendants breached the Merger Agreement because they failed to deliver to him the requisite forms to make his election and pledge his shares going forward. Implicit in this argument is the assumption that the contract granted him guaranteed delivery. The record is clear enough that Amirsaleh did not receive an Election Booklet prior to the January 5, 2007 deadline. This fact alone, however, certainly does not amount to a breach of the contract because the contract does not require delivery of the Election Forms. The terms of the Merger Agreement provide only that the Election Form "shall be mailed" to NYBOT members "on the same date as the Proxy Statement/Prospectus is mailed to the Members or on such other date as ICE and NYBOT shall mutually agree."[32] The evidence in the record supports that such a mailing took place on December 19, 2006. Plaintiff is unable to point to any evidence that shows the

[32] Merger Agreement § 4.3(a).

existence of a genuine issue of material fact with respect to whether or not the forms were mailed.

Plaintiff cites *Gildor v. Optical Solutions, Inc.*[33] in support of his argument that the defendants were required to ensure his receipt of the Election Forms. In *Gildor*, Vice Chancellor Strine held that a corporation breached its obligations under a stockholder agreement when it failed to provide notice to a preferred stockholder of an opportunity to buy new preferred shares.[34] There, the corporation twice attempted to send notice by FedEx to an address it had for the stockholder. The stockholder agreement's terms, however, provided that a schedule of proper addresses would be attached to the contract, and no such schedule was attached. The corporation instead used one of several addresses it had on file for the preferred shareholder. Vice Chancellor Strine concluded that the corporation breached the stockholder agreement for two related reasons. First, it did not literally comply with its requirement of a schedule of addresses. Second, having failed to create such an authoritative schedule, the corporation used only one of several addresses it had on file for the preferred shareholder.[35] *Gildor*, however, will not help plaintiff here because the record is clear that defendants had only one address for Amirsaleh and it was to that address that they mailed the

[33] C.A. No. 1416-N, 2006 WL 1596678 (Del. Ch. June 5, 2006).
[34] *Id.* at *1.
[35] *Id.* ("When [the mailing] was returned unclaimed for the second time, Optical Solutions did not undertake any further efforts to find Gildor, although it had in its records an alternate address and other contract information previously provided by Gildor.").

Election Forms. There is no genuine issue of material fact with respect to the mailing/delivery of the Election Forms because defendants *did* literally comply with the notice provision in the Merger Agreement.[36] Consequently, I grant summary judgment in favor of defendants on this issue.

2. Timing

Amirsaleh's second explanation for why defendants breached the Merger Agreement is difficult to understand. Simply stated, Amirsaleh argues that the defendants breached the Merger Agreement by mailing the Election Forms early. Leaving aside the issue of how exactly such a breach would have harmed Amirsaleh, the Court may quickly dispose of this claim. In making this argument, Amirsaleh is fundamentally misreading the contract. In support of his contention, plaintiff says that the Merger Agreement prohibited defendants from sending the Election Forms until five business days after the "Record Date."[37] This is simply incorrect. Section 4.3(a) of the Merger Agreement states that the Election Forms "shall be mailed on the same date as the Proxy Statement/Prospectus is mailed to the Members or on such other date as ICE and NYBOT shall mutually agree (the "Mailing Date") to each Member as of the close of business on the fifth business

[36] *See id.* at *7 ("If Optical Solutions had complied with the Stockholder Agreement, even if it knew that the notice did not reach Gildor, it would have been under no further obligation to search for him.").

[37] Amirsaleh's Answering Br. at 21 ("The Merger Agreement dictated that once such date [the Record Date] was set by Defendants, the Election forms (a.k.a. "Election Booklets") were not to be mailed until January 8, 2007—five (5) business days after December 29, 2006 (taking into account the January 1, 2007 holiday).").

day prior to the Mailing Date (the "Election Form Record Date")." Thus, it is readily apparent that Amirsaleh's interpretation is flatly wrong for several reasons. First, the contract sets only two alternative times by which the Election forms "shall be mailed": (1) the same date as the Proxy Statement/Prospectus or (2) such other date as NYBOT and ICE agree. Obviously, neither date references some nebulous "record date." Second, the reference to the Election Form Record Date and the five business days later in the sentence grammatically modifies the members who were entitled to receive the mailing; it does not set the time by which the mailing must occur. Third, even if one could somehow read the "five business days" clause as setting a timing requirement for the mailing, the sentence references five business days *prior to*—not after—the record date. Because plaintiff's argument that defendants breached the merger agreement by failing to comply with the timing provision makes no sense and fails in every respect to raise a genuine issue of material fact, I grant summary judgment in favor of defendants on this issue.

3. Acceptance

Finally, Amirsaleh argues that defendants have breached the merger agreement by improperly declaring his election "untimely." As noted above, Amirsaleh did not submit his completed Election Form until January 19, 2008. According to section 4.3(b) of the Merger Agreement, those forms were due "on or

before 5:00 p.m. on the fifth day before the NYBOT Members Meeting (or such other time and date as ICE and NYBOT may mutually agree)." According to the Election Form, the deadline was set for January 5, 2007.

That clear pronouncement notwithstanding, the record demonstrates that the defendants accepted the apparently late elections of twenty-five NYBOT members between January 5 and 18. Defendants retort with the argument that they set a second, later deadline of January 18, 2007. Although, as noted above, the evidence in the record is far form clear that NYBOT and ICE affirmatively set January 18, 2007, as the authoritative and final deadline, the evidence is clear that no elections were accepted as timely after that date. Thus, there is no genuine issue of material fact as to whether or not ICE and NYBOT "mutually agree[d]" to stop accepting elections pursuant to section 4.3(b) of the Merger Agreement at some point after January 17 but before Amirsaleh submitted his form on January 19. As a result, I grant summary judgment in favor of defendants on the issue of the purported literal breach of the contract. However, for reasons explained below, there is a genuine issue of material fact with respect to the issue of how defendants exercised the discretion granted to them by the Merger Agreement in setting the deadline. Consequently, although I conclude the Court must grant summary judgment in favor of defendants on all of plaintiff's claims alleging literal breaches of

provisions of the Merger Agreement, plaintiff's claim alleging a breach of the implied covenant of good faith and fair dealing must survive.

C. Breach of the Implied Covenant

The Supreme Court has made it explicitly clear that the implied covenant of good faith and fair dealing is "[r]ecognized in many areas of the law" and, indeed, "attaches to every contract."[38] Moreover, "[t]he implied covenant applies even where the contract allows a party to exercise discretion."[39] While the existence and applicability of the implied covenant are well established, its substance and defining contours remain somewhat imprecise. Indeed, plaintiff and defendants have found markedly different authority to support their respective positions. For example, defendants rely heavily on this Court's articulation of the implied covenant in *Bakerman v. Sidney Frank Importing Co.*[40] There, the Court described the implied covenant as "a 'judicial convention designed to protect the spirit of the agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties'

[38] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441–42 (Del. 2005).
[39] *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1016 (Del. Ch. 2004); *see also* Teri J. Dobbins, *Losing Faith: Extracting the Implied Covenant of Good Faith From (Some) Contracts*, 84 OR. L. REV. 227, 244 (2005) ("A common example of the implied covenant of good faith as a gap-filler or interpretive aid is its use in contracts granting discretion to one party with respect to some aspect of the contract. Such discretion might be given in setting price or date of performance, or in assessing the quality or acceptability of performance under the contract ('satisfaction clauses'). Many courts, even those that are reluctant to recognize implied covenants, have embraced the duty of good faith in this context. This uniform acceptance of the implied covenant of good faith in this context reflects its value.").
[40] C.A. No. 1844-N, 2006 WL 3927242 (Del. Ch. Oct. 16, 2006).

bargain.'"[41] Defendants argue that there is no evidence in the record that they engaged in "oppressive or underhanded tactics." Defendants note that they offered plaintiff the opportunity to depose Helene Recco and Linda Chin of NYBOT Member Services to explore the issue of ICE and NYBOT's intent in extending the Election deadline. Plaintiff, however, declined to take the depositions. Defendants suggest that plaintiff's discrimination claim would be undercut by their testimony and argue that plaintiff should be estopped from making his discrimination argument because he squandered his opportunity to develop the record on this point.[42]

Plaintiff, on the other hand, emphasizes the Supreme Court's language in *Dunlap v. State Farm Fire & Casualty Co.*,[43] where the Court defined the implied covenant as protection against "'arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain."[44] Plaintiff argues that defendants' secretive and ambiguously reached decision to extend the election deadline to sometime prior to his submission amounts to "arbitrary or unreasonable conduct" that has deprived him of his ability to elect to receive shares rather than cash. Plaintiff argues that there is a genuine

[41] *Id.* at *19 (quoting *Chamison v. Healthtrust, Inc.*, 735 A.2d 912, 920 (Del. Ch. 1999).
[42] *Cf. Turner v. Bernstein*, 776 A.2d 530, 541 n.17 (Del. Ch. 2000) (granting partial summary judgment in favor of plaintiffs and noting that defendants "forewent the opportunity" to depose a key witness).
[43] 878 A.2d 434.
[44] *Id.* at 442 (quoting *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985)).

issue of material fact in dispute concerning whether the January 18 deadline actually existed or was a post-litigation creation. Plaintiff notes that defendants did not disclose this so-called "extended deadline" prior to the filing of this action, in their Answer to the Complaint, or even in their initial motion. In its earlier decision, this Court explicitly ordered defendants to produce all documents and communications relating to this alleged extended deadline.[45] The record, however, still lacks any evidence that the defendants affirmatively set January 18, 2007, as a second cutoff. In fact, an email from Linda Chin sent on January 18, 2007, compromises defendants argument. In her email to Amirsaleh's assistant, Chin states that she "can not guarantee that his booklet will be accepted."[46] Taking the evidence in the light most favorable to Amirsaleh—as the Court must on this motion—I cannot conclude that the defendants had set January 18, 2007 as an extended deadline when on that very date defendants' representatives were admitting they did not know whether forms were still being accepted.

Each turn of phrase—"oppressive or underhanded tactics" and "arbitrary or unreasonable conduct"—is an attempt to capture what it means to act in contravention of the implied covenant or unfairly and in bad faith. Here there is a genuine question of material fact as to whether ICE and NYBOT acted fairly and

[45] *Amirsaleh v. Bd. of Trade of City of N.Y., Inc.*, C.A. No. 2822-CC, 2008 WL 241616, at *2–3 (Del. Ch. Jan. 17, 2008).
[46] June 4, 2008 Aff. of Jonathan S. Shapiro, Ex. I, at D001971 (Jan. 18, 2007 email from Linda Chin to Donna Stavrinou).

in good faith when they suddenly stopped accepting late Election Forms. The implied covenant is particularly important in contracts that endow one party with discretion in performance; *i.e.*, in contracts that defer a decision at the time of contracting and empower one party to make that decision later. Simply put, the implied covenant requires that the "discretion-exercising party" make that decision in good faith.[47] Here, section 4.3(b) of the Merger Agreement mandated that Election Forms be submitted by "such . . . time and date as ICE and NYBOT may mutually agree." Thus, by contract, the defendants were the discretion-exercising parties. Moreover, because it is abundantly clear that defendants did accept elections after the originally disclosed deadline of January 5, 2007, defendants must have exercised their discretion in setting a different deadline.

As it currently stands, the record is entirely unclear on precisely how, why, or when the defendants determined to stop accepting late election forms. Although defendants have pointed to specific exhibits in support of their contention that a firm decision was made to extend the deadline to January 18, the proffered exhibits offer no such support. Moreover, although defendants argue that it is unfair to permit plaintiff to contend ICE and NYBOT acted in bad faith when plaintiff failed

[47] *See* Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 380–85 (1980); *see also Wilmington Leasing, Inc. v. Parrish Leasing Co., L.P.*, C.A. No. 15202, 1996 WL 560190, at *2 (Del. Ch. Sept. 25, 1996) ("From that implied covenant flows the principle of contract construction that 'if one party is given discretion in determining whether [a] condition in fact has occurred[,] that party must use good faith in making that determination.'") (quoting *Gilbert v. El Paso Co.*, 490 A.2d 1051, 1055 (Del. Ch. 1984)).

to take the depositions of NYBOT Member Services employees, those employees did not have any control over defendants' decision to stop accepting late forms. Indeed, the emails between Recco, Chin, Donnie Amado, and Andrew Surdykowski demonstrate that Surdykowski was calling the shots with respect to late Election Forms. Thus, deposing Recco and Chin would not have illuminated defendants' purpose in ceasing to accept late Election Forms, and plaintiff's failure to do so has not artificially manufactured an issue of fact. Because "parties are liable for breaching the covenant when their conduct frustrates the 'overarching purpose' of the contract by taking advantage of their position to control implementation of the agreement's terms,"[48] and because there is a genuine issue of material fact as to whether ICE and NYBOT's clandestine and unexplained decision to stop accepting late forms frustrated the purpose of the Merger Agreement's election provision, I deny defendant's motion for summary judgment and allow plaintiff's claim for a breach of the implied covenant to go forward.

III. CONCLUSION

Plaintiff—a former member of NYBOT—was not a party to the Merger Agreement, but he nevertheless has standing to bring this action because NYBOT Members were explicitly and intentionally granted meaningful benefits in the contract. Plaintiff's causes of action, however, alleging literal breaches of the

[48] *Dunlap*, 878 A.2d at 442.

Merger Agreement must fail because plaintiff has not demonstrated the existence of any genuine issue of material fact. As a result, the Court grants summary judgment in favor of the defendants on the claims alleged in Count I of the complaint.

Plaintiff has also alleged a breach of the implied covenant of good faith and fair dealing, which protects the "spirit of the agreement" and may, therefore, be offended even when a party has not "violat[ed] an express term of the agreement."[49] Of all the election forms seeking equity compensation submitted after the disclosed deadline, only Amirsaleh's was rejected. Although defendants now claim that a new, second deadline was set and that Amirsaleh's form was rejected because it narrowly missed the deadline, defendants have failed to show uncontroverted evidence that the extended deadline even existed, let alone that it was disclosed. Consequently, there are factual issues of whether the extended deadline was actually set for January 18, 2007 and, if so, whether defendants set this deadline in good faith. Because defendants have failed to meet this burden, their motion for summary judgment on Count II of the complaint is denied.

IT IS SO ORDERED.

[49] *Chamison v. HealthTrust, Inc.*, 735 A.2d 912, 920 (Del. Ch. 1999).