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: December 23, 2009
Date Decided: January 19, 2010

Elizabeth M. McGeever and Melissa N. Donimirski, 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

After careful consideration of the trial testimony, deposition transcripts, and post-trial briefing in this matter I find that defendants' conduct did not amount to bad faith and, accordingly, was not a breach of the implied covenant of good faith and fair dealing. The considerations underlying this factual finding are described below.

I. BACKGROUND

This dispute arose out of the merger, on January 12, 2007, of the New York Board of Trade ("NYBOT") with and into CFC Acquisition Company, a wholly owned subsidiary of IntercontinentalExchange, Inc. ("ICE"). The facts surrounding the merger—and this dispute more generally—are fully delineated in my prior two opinions in this matter.[1] The reader's familiarity with my prior opinions is presumed in the writing of this Opinion.

In connection with the merger, NYBOT owners (known as members) were effectively given the option of being cashed out or receiving a combination of ICE common stock and cash in exchange for their membership interests. NYBOT members had to express their merger consideration preference by completing and timely submitting an election form to a third-party vendor known as

[1] *Amirsaleh v. Bd. of Trade of the City of N.Y., Inc.*, 2008 WL 4182998 (Del. Ch. Sept. 11, 2008); *Amirsaleh v. Bd. of Trade of the City of N.Y., Inc.*, 2009 WL 3756700 (Del. Ch. Nov. 9, 2009).

Computershare.[2] Those members who did not submit a timely election form were cashed out. The ICE common stock and cash option was worth more than the straight cash option, so naturally most members did not wish to be cashed out.

The initial deadline for submitting an election was January 5, 2007. Plaintiff, a NYBOT member, missed this deadline. Many other NYBOT members missed the deadline as well. After the January 5 deadline, however, election forms continued to roll in. Defendants initially decided not to accept late elections, but on January 17, 2007, they changed their minds and began accepting all late elections. Late elections continued to be accepted through January 18, 2007, at which point defendants closed the late election window. Plaintiff submitted his form on January 19, 2007, but it was rejected as untimely and his membership interests were cashed out.

Plaintiff sued defendants as a third-party beneficiary under the merger agreement alleging breach of contract and breach of the implied covenant of good faith and fair dealing. I dismissed plaintiff's breach of contract claims on defendants' motion for summary judgment in September 2008.[3] In the fall of 2009, after additional discovery, plaintiff sought summary judgment on his implied covenant claim. I denied plaintiff's motion because a genuine issue of material

[2] Computershare was responsible for calculating and distributing the merger consideration due each NYBOT member based on the elections made.
[3] *Amirsaleh*, 2008 WL 4182998, at *5-7.

fact was in dispute; namely, was bad faith the driving force behind defendants' decision to open a short, indeterminate window of time during which late elections were accepted?[4] A three-day trial was held from November 16 through November 18, 2009 to resolve this important question of fact.

II. APPLICABLE LAW

My November 2009 Opinion in this matter discusses at length the relevant contours of the implied covenant of good faith and fair dealing under Delaware law.[5] As explained in that opinion, plaintiff bore the burden of proof at trial to prove that defendants' discretionary decision to open a short temporal window for the acceptance of late elections was made in bad faith.[6] To do this, plaintiff had to show that the decision was motivated by an improper purpose, that it was the result of a culpable mental state.[7] Plaintiff could have met this burden by demonstrating that defendants' decision to open the late acceptance window was solely based on the fact that certain "connected" members failed to get their forms in on time.[8] Plaintiff could also have met this burden by demonstrating that certain "connected" members received special treatment in submitting late elections, including holding

[4] *Amirsaleh*, 2009 WL 3756700, at *3.
[5] *Id.* at *4-5.
[6] *Id.* at *6.
[7] *Id.* at *5.
[8] *Id.* at *6.

open the election window just long enough to ensure that all "connected" members late elections were accepted.[9]

My November 2009 Opinion also explained that bad faith would not be found if it appeared that defendants' decision to accept late submissions was driven by considerations of customer satisfaction (i.e., trying to accommodate as many late filers as possible) balanced against leaving Computershare enough time to calculate and distribute merger consideration by January 29, 2007, the distribution deadline under the merger agreement.[10] Moreover, bad faith would not be found if it appeared that defendants made reasonable efforts to give all members making late elections the same or substantially similar assistance turning in their late forms.[11] With the applicable law thus demarcated, we proceeded to trial.

III. FACTUAL FINDINGS

This trial has convinced me that defendants did not act in bad faith in deciding to open a short window of acceptance for late elections. That said, I am also convinced that defendants' process for addressing late elections could have been better organized and executed.

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[9] *Id.*
[10] *Id.*
[11] *Id.*

A. A suboptimal process

When it became apparent that some NYBOT members had missed the January 5, 2007, election deadline, defendants vacillated in deciding whether to accept late forms. Initially, defendants decided against it, unless the member could show that he or she missed the deadline because of an error on defendants' part (e.g., mailing the election booklet to the wrong address). Before deciding not to accept late forms, defendants considered whether the January 5 deadline should be extended to January 8 because the National Day of Mourning on January 2 (recognizing President Ford's passing) had shut down the mail service for a day. On January 9 defendants decided not to extend the deadline because they had not received any election forms in the mail the previous day. As the days progressed, however, defendants began receiving late elections from members who had missed the deadline, some of which were coupled with complaints about the election process and threats to sue if the late election was not honored. Defendants began keeping a record of these complaints, apparently for the purpose of analyzing whether any of them had merit. Defendants eventually decided not to use this list, however, and on January 17, 2007, the ICE legal team concluded that defendants should begin accepting all late submissions, regardless of the reason for the members' tardiness. Defendants' decision to accept all late submissions beginning

January 17 was primarily driven by ICE CEO Jeffrey Sprecher's desire to accommodate as many late elections as possible.[12]

The opening and closing of the late election acceptance window could have been much better organized. Plaintiff spent much of the trial identifying alternative approaches that would have more effectively accomplished the goals of accommodating late elections in an efficient manner. Some of plaintiff's suggestions make a great deal of sense from a "best practices" point of view. For example, when the late acceptance window was opened on January 17 it was unclear how long it would remain open; no firm deadline was set for closing the window. Accordingly, on January 17, when NYBOT's Member Services Department began contacting members who had not submitted an election form, they were unable to provide members with any date or time certain by which late elections needed to be submitted in order to be accepted. Member Services made persistent efforts on January 17 and 18 to contact all members who had missed the January 5 deadline, but could offer no guarantee that late elections would be accepted if submitted in response to Member Services' contact.

No late elections were accepted after January 18, 2007. The decision not to accept any elections that came in after this date was made "in the moment," most

[12] Sprecher's role in the decision to accept late elections was more or less limited to instructing the ICE legal team to research whether late elections could legally be accepted, as described at greater length below. He didn't make the actual decisions to open or close the acceptance window.

likely late in the evening of January 18 or early in the morning January 19.[13] Defendants' reason for closing the window "on the fly" as they did was hotly contested at trial and is an important part of my decision in this case.[14] At any rate, defendants' haphazard opening and closing of the late election window convinces me that the whole process was somewhat disjointed.

Defendants also could have done a better job ascertaining exactly how much time was needed to calculate and distribute the merger consideration by the distribution deadline on January 29, 2007. At trial, email correspondence between defendants' representatives and Computershare regarding the acceptance of late elections were introduced into evidence.[15] This correspondence plainly demonstrates that in defendants' consultations with Computershare it was never determined exactly how much time Computershare needed to perform its duties.[16] Rather, defendants opened the late acceptance window only to close it less than 48 hours later after Computershare voiced concerns about its ability to meet the January 29 deadline.[17] I am left with the impression that defendants' efforts to

[13] Tr. at 214-16. Defendants cannot document when the decision to close the election window actually occurred. The testimony at trial was that it was a decision made after consulting with Computershare over the phone. The exact time of the decision could not be recalled.
[14] As described below, I find defendants' decision to close the election window was not motivated by bad faith.
[15] *See e.g.*, JX 111, JX 136.
[16] Tr. at 231-32.
[17] Tr. at 233.

accommodate late elections could have been better coordinated with Computershare.

The shortcomings in defendants' process do not amount to a breach of the implied covenant of good faith and fair dealing however. In my November 2009 opinion I reasoned that "plaintiff would have had no claim for breach of the implied covenant if defendants had declined to accept late elections altogether."[18] I further reasoned that "general efforts by defendants to accommodate all late elections would rightly be viewed as *exceeding* the implied covenant's requirements."[19] Such general efforts, even if poorly organized and executed, would be devoid of the "bad faith" required to establish a breach of the implied covenant. As discussed below, I find that defendants' efforts were targeted at *all* members who missed the January 5 deadline, rather than a select few. Accordingly, these efforts went beyond what was required by the implied covenant, even though they were less than optimal.

B. The decision to open a late election acceptance window

Plaintiff could have met the burden in this case by demonstrating that defendants' decision to open a short window of acceptance was solely based on the fact that certain "connected" members failed to get their forms in on time.

[18] *Amirsaleh v. Bd. of Trade of the City of N.Y., Inc.*, 2009 WL 3756700, at *6 (Del. Ch. Nov. 9, 2009).
[19] *Id.*

Plaintiff's evidence did not meet this burden, principally because it did not convince me that the three NYBOT members plaintiff characterized as "connected"—John MacIntosh, Eric Bolling, and Kevin Davis—were in fact "connected." Moreover, I find that the decision to open a late election acceptance window was motivated by a desire to accommodate all members who missed the January 5 deadline, rather than any one or all three of these individuals.

During trial plaintiff sought to demonstrate that MacIntosh, Bolling, and Davis had special connections with defendants' key decision makers and that they used these connections to convince defendants to accept their late elections.[20] Plaintiff's fundamental contention is that before MacIntosh, Bolling, and Davis contacted key members of defendants' management defendants had concluded that no late elections would be accepted, but defendants changed their minds solely to permit MacIntosh, Bolling, and Davis to submit late elections. To explain why I don't accept plaintiff's theory of the case, I will discuss the evidence of Bolling, Davis, and MacIntosh's "connectedness" and whether the decision to accept late elections was specifically designed to help these individuals.

I begin with Bolling. Plaintiff sought to prove at trial that Bolling was connected because he was able to place a call directly to ICE CEO Jeffrey

[20] Plaintiff predominantly focused on proving the connectedness of Bolling and Davis at trial, but spent some time focusing on MacIntosh as well. To be thorough, I analyze all three individuals' relationships with, and alleged influence over, defendants.

Sprecher on January 12, 2007, to inform Sprecher that he missed the January 5 deadline and request help with his late election.[21] Plaintiff's theory is that Sprecher had a desire to help Bolling because Bolling was well known as being one of the largest natural gas traders at NYMEX and was, therefore, a potential ICE customer.[22] Plaintiff introduced an excerpt of Sprecher's deposition testimony wherein Sprecher explained that after his conversation with Bolling he asked his legal team "on behalf" of Bolling if Bolling's late election could be accepted.[23] Based on this deposition testimony, plaintiff characterizes Sprecher's conversation with his legal team as being solely aimed at helping Bolling submit a late election form. Plaintiff also introduced evidence during trial that Sprecher called Bolling back and recommended that he submit his form while ICE researched whether it could be accepted.[24]

Sprecher testified at trial, however, that he instructed his legal team to research whether defendants could accept late elections from *anyone* in Bolling's position.[25] Sprecher explained that he gave this instruction because he was aware (or at least became aware) when discussing the matter with his legal team that

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[21] Tr. at 468.
[22] Of course, Bolling was already an ICE customer because he was a NYBOT member, and ICE had just acquired NYBOT. But Bolling was also a potential customer in the sense that he might, in the future, leave NYMEX and begin using an ICE exchange. Tr. at 470-72.
[23] Sprecher Dep. at 40-41; Tr. at 473.
[24] Tr. at 479-80.
[25] Tr. at 448-50.

others besides Bolling had missed the January 5 deadline.[26] As the finder of fact I am responsible for evaluating witness credibility and I find Sprecher's testimony believable. By this testimony, Sprecher concedes that the late election window was opened in part to assist Bolling, but it was also opened to assist over thirty other NYBOT members who had failed to submit their election forms on time. Admittedly, Bolling was the person who first made Sprecher aware that at least one person (Bolling himself) had missed the election deadline. Had Bolling not made this call, we are left to speculate as to when and how Sprecher would have been made aware that NYBOT members had missed the deadline. But we are not left to speculate as to his response. I am persuaded that Sprecher would have requested that his legal team research whether late elections could be accepted if *any* of the other deadline-missing NYBOT members had called him. Thus, the opening of the late election window does not appear to have been driven by a desire to accommodate Bolling alone, but rather by Sprecher's desire to accommodate anyone in Bolling's position.[27]

My finding that Sprecher's concern extended beyond Bolling to all his tardy peers is supported by multiple pieces of evidence introduced during trial. For

[26] Sprecher could not recall whether Bolling informed him during the call that others had missed the election deadline or whether his legal team informed him that others were in Bolling's situation. Tr. at 475 ("[O]nce I heard there were other people, and it might be a bigger universe, I said we should really look hard at this issue."). It doesn't matter whom Sprecher learned this information from, as he sought to accommodate all who had missed the deadline.

[27] Tr. at 459 ("I was aware that there were others in Mr. Bolling's situation, so he became a figurehead for the problem.").

starters, Sprecher did not have a personal, financial, or other relationship with Bolling.[28] Before the January 12 phone call, Sprecher had spoken to Bolling on only two occasions, and then only briefly.[29] At no time did Sprecher promise Bolling special assistance that would not be given to other NYBOT members.[30] Nor did Sprecher promise Bolling that his late election would be accepted; he simply promised Bolling that he would look into the issue and follow up.[31] When Sprecher called Bolling back he recommended that Bolling turn in the form, but cautioned that he could not guarantee its acceptance because defendants were still reviewing whether late forms could be accepted at all.[32] Sprecher also told Bolling to inform any other members on the floor of the NYMEX that if they missed the deadline they should still submit their form.[33] This is hardly the talk of someone who is trying to offer illicit, clandestine help to a favored acquaintance. In fact, before the late acceptance window was opened on January 17, many members who had missed the January 5 deadline were similarly told by defendants' representatives (other than Sprecher) that they could still submit their forms but

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[28] Tr. at 444-47.
[29] *Id.*
[30] Tr. at 447. No evidence was introduced at trial in the form of documents or testimony that directly contradicts Sprecher's testimony on this point. The only possible contradiction would be an inferential one arising from the fact that Bolling received some help from defendants in filling out his form. *See infra* note 57. But I decline to make this inference.
[31] *Id.*
[32] Tr. at 450-51.
[33] *Id.*

had no guarantee of acceptance.[34] Thus, the assurances Sprecher offered to Bolling were no different than assurances offered to other NYBOT members. Finally, there was no testimony suggesting that it was highly unusual for Bolling to be able to contact Sprecher directly; nor was there any testimony that plaintiff could not have contacted Sprecher if he had tried. In fact, Sprecher testified that he regularly takes calls from customers such as Bolling and had plaintiff attempted to contact him he would have taken his call.[35]

Now to Davis. During trial plaintiff introduced evidence that Davis called Sprecher a few days after Bolling.[36] Sprecher knew Davis was a large ICE customer and the CEO of one of the world's largest commodity exchange clearing firms.[37] Davis's call did not concern late election forms but Sprecher brought the topic up.[38] Sprecher asked Davis if he had submitted his election form on time.[39] Davis did not know.[40] Sprecher recommended that he find out and submit it if that hadn't already been done.[41] Plaintiff contends that Sprecher asked Davis about his election because he wanted to ensure a powerful person like Davis was taken care

[34] Tr. at 541-42; 647-54.
[35] Tr. at 492.
[36] Tr. at 482.
[37] Tr. at 484-85.
[38] *Id.*
[39] Tr. at 487.
[40] *Id.*
[41] Tr. at 453.

of. Along with Bolling, plaintiff contends that the late election window was opened to assist Davis, but not everyone else.

I find that Davis did not have a special connection with Sprecher that inappropriately influenced the decision to open the late election acceptance window. Multiple pieces of evidence support this finding. First, Davis and Sprecher had a frosty relationship. They had been adversaries in past business dealings.[42] While there was some overlap in the professional circles they ran in, nothing about their relationship suggests to me that Sprecher would have had any desire to offer aid to Davis to the exclusion of other NYBOT members. This is supported by Sprecher's credible testimony at trial that he never followed up with Davis to learn if Davis's election had been submitted.[43] Moreover, Sprecher testified that he never even mentioned his conversation with Davis to his legal team,[44] so when they made the decision to open the late election window it could not have been because of Davis. According to Sprecher, after his brief phone call with Davis, he did not do a thing further with Davis's election.[45]

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[42] Tr. at 454-56.

[43] Tr. at 452-57. There is a piece of circumstantial evidence that, with the right inference, could be viewed as contradicting this part of Sprecher's testimony; Davis's form was the last accepted before the late election window was closed. From this, plaintiff would have the Court infer that Sprecher instructed his legal team to hold the window open just long enough for Davis to get his form in. In *Section C* of this Opinion I explain why I do not accept this inference.

[44] Tr. at 456. This was consistent with ICE Assistant General Counsel Andrew Surdykowski's testimony that he did not know who Davis was when making the decision to open and close the election window. Tr. at 357, 359, 373.

[45] Tr. at 457.

Finally, to MacIntosh. Plaintiff contends that MacIntosh wielded special influence over defendants' decision to accept late submissions by means of his personal and professional relationship with NYBOT Chairman Frederick Schoenhut. MacIntosh was a NYBOT floor broker who contacted Schoenhut on January 6, 2007, the day after the election deadline, expressing concern that he had failed to turn his form in on time.[46] Schoenhut emailed Audrey Hirschfeld, NYBOT General Counsel, and Helene Recco, Director of NYBOT Member Services, asking if it was possible for MacIntosh's late form to be accepted.[47] Schoenhut suggested that some leniency should be given to MacIntosh because the National Day of Mourning on January 2 had shut down the mail for a day.[48] On January 6, Recco simply responded that it would be "worth a shot" for MacIntosh to submit his form but made no guarantees or assurances that MacIntosh's form would be accepted and made no promises of special assistance.[49] On January 7, Hirschfeld responded:

> They should accept it.— was on the phone with ice and computershare and the fact is that no calculation is made until the day of closing so nobody is harmed if they accept a form that is a day late oir (sic) so. I would not advertise this but I think we can give some comfort to him . . . Truth is the 5th was a date that was set on the assumption that we close on the 12th and because the merger

[46] Tr. at 571.
[47] *Id.*
[48] *Id.*; JX 45.
[49] JX 45.

> agreement said the forms need to be in 5 days in advnce (sic) of closing. But nothing is happening till closing, whenever that is.[50]

At trial Hirschfeld testified that at the time of this email she believed defendants might accept forms that came in on January 8, including MacIntosh's, because of the National Day of Mourning on January 2.[51] Hirschfeld explained that by this email she didn't mean to suggest that leniency would be given to MacIntosh but not to others; she was simply expressing her opinion that MacIntosh's form would be accepted because Computershare did not have to do calculations until January 12th and because she had personally participated in internal discussions about extending the deadline for everyone to the 8th.[52] I found this to be a reasonable explanation of Hirschfeld's response to Schoenhut given that Schoenhut had specifically suggested that leniency be given on the basis of the National Day of Mourning. Moreover, I found Hirschfeld to be a credible witness on this point. In any event, neither Schoenhut, nor Hirschfeld, nor Recco advised anyone at ICE about MacIntosh's plea for help, so his request was not considered by the ICE legal team that decided to open the late election window.[53] Moreover, Hirschfeld's belief that filings submitted January 8th would be accepted turned out to be incorrect. On January 9th, defendants determined not to accept any late

[50] JX 47.
[51] Tr. at 579.
[52] Tr. at 579.
[53] Tr. at 540-41, 648.

forms, including MacIntosh's.[54] MacIntosh's form was not accepted until January 17, when all other late forms that had been submitted up to that point were also accepted.[55]

C. Alleged special treatment of certain members

Plaintiff could also have met his burden by demonstrating that Bolling, Davis, or MacIntosh received special treatment in submitting late elections, including holding open the election window just long enough to ensure that any one or all three of these individuals' late elections were accepted. I find that no special treatment was given to any of these individuals. I have already discussed at length my finding that Bolling, Davis, and MacIntosh were not "connected;" they did not, in fact, enjoy any special privilege or relationship with defendants that set them apart from other NYBOT members. Nevertheless, to be thorough I independently analyze defendants' efforts to assist late filers to demonstrate why I don't believe Bolling, Davis, or MacIntosh received special assistance.[56]

Plaintiff sought to demonstrate at trial that Bolling and Davis were given special assistance because they had access to critical information that was not given to others, particularly during the period between Bolling's January 12, 2007

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[54] *See* Tr. at 329, 540-41; *see also* JX 64.
[55] Tr. at 361, 541; JX 109.
[56] Plaintiff's efforts at trial were focused on demonstrating that Bolling and Davis received special assistance. No special assistance allegedly received by MacIntosh was explored other than the contact he had with Schoenhut (which, as we have seen, did not result in any special assistance).

call to Sprecher and defendants' decision on January 17, 2007 to accept all late elections accumulated. Specifically, plaintiff demonstrated that during this period Bolling and Davis were informed that (1) there was an election deadline that passed, (2) there was an election form (in addition to the pledge form) that had to be submitted, and (3) the late election form should be submitted quickly because there was a chance it might be accepted.[57] I conclude that these are insufficient bases upon which to draw an inference that Bolling and Davis were given preferential treatment that was denied others in this process. As I will explain, the assistance Bolling and Davis received was not identical to the assistance plaintiff received, but it was substantially similar.

The fact that Bolling and Davis may have been told by Sprecher that the election deadline had passed and that an election form (rather than a pledge agreement) needed to be submitted is of no consequence. Bolling already knew he missed the deadline; that's why he called Sprecher. Moreover, the deadline had

[57] Pl.'s Post Trial Br. at 7-8; *see also* Tr. at 692-94, 713-16, 783-88, 792-94. Plaintiff also demonstrated that some help was given to Bolling and Davis in completing and submitting their forms. Specifically, Hirschfeld's assistant helped Bolling complete his election form when he hand delivered it to NYBOT offices with questions about it and Recco forwarded Davis's election to Computershare after he sent it directly to her. Tr. at 585-89, 670-71; JX 144. This assistance does not demonstrate preferential treatment. There was no evidence introduced at trial suggesting that if plaintiff had questions regarding how to complete his form he would have been refused help by defendants. I do not know what alternative Hirschfeld's assistant had other than to help Bolling when he made an *in person* request for help in completing his form. I am convinced the same assistance would have been offered to any person requesting it. Moreover, Recco testified that it was common for members to mistakenly submit their forms to Member Services and that she routinely forwarded them to Computershare, so this was not special assistance that only Davis received. Tr. at 671.

been disclosed in the election booklet that had been previously mailed to every member, including plaintiff. Plaintiff testified that he never received this booklet, but it has already been determined in this case that defendants mailed the booklet to plaintiff's correct address and that, under the merger agreement, this was all defendants were required to do to inform plaintiff of the election deadline.[58] In the first instance, defendants followed a uniform procedure to inform all NYBOT members of the January 5 deadline. Thereafter, Davis was not being treated preferentially simply because Sprecher pointed out the deadline had passed. Plaintiff (and every other NYBOT member) should have known that. Essentially the same thing can be said of Sprecher's informing Bolling and Davis that an election booklet needed to be submitted apart from a pledge agreement. This information had previously been disclosed in a uniform manner to all NYBOT members in the proxy.[59] Everyone should have known this when Sprecher discussed it with Bolling and Davis.

What deserves some consideration is the fact that Bolling and Davis were told a few days earlier than plaintiff and other members that they should submit their late elections. The thrust of plaintiff's argument is that Bolling and Davis were given a significant advantage over other NYBOT members because Sprecher

[58] *Amirsaleh v. Bd. of Trade of the City of N.Y., Inc.*, 2008 WL 4182998, at *5-6 (Del. Ch. Sept. 11, 2008).
[59] Proxy at 79, 93.

personally told them before January 17 that they should take a chance and submit their forms. I do not find that this amounts to special treatment. Bolling and Davis were told to submit their forms solely because they had directly contacted Sprecher, something plaintiff could have done himself. It was not due to some conscious effort on defendants' part to give Bolling or Davis an edge in submitting their late elections. When Sprecher spoke to these individuals no decision had been made as to whether late elections would be accepted; the matter was being researched. Sprecher had no idea whether late elections could legally be accepted.[60] I cannot conclude that defendants had an obligation to begin contacting every member at this point simply because Sprecher recommended to Bolling and Davis that they turn their late forms in. Sprecher's advice in this regard is not extraordinary; he was simply suggesting that Bolling and Davis do what they should have done before the deadline on the off-chance that the forms might still be accepted. During this same period, other members came to the conclusion that submitting a late form would be worth a shot and sent their forms in after January 5 but before January 17 without being told by anyone associated with defendants that they should do so. In addition, before the late acceptance window was opened, other members who had missed the January 5 deadline were told by defendants' representatives (other than Sprecher) that they could still

[60] Tr. at 453.

submit their forms but had no guarantee of acceptance.[61] Plaintiff was as free as anyone to submit an election form at any time after January 5 on the off-chance that it might be accepted.

What is most important is this: as soon as the decision was made to accept late elections on January 17, NYBOT Member Services began contacting *all* members—including plaintiff—who had yet to submit a form.[62] Member Services persisted in their efforts on January 18, making multiple calls to some members who were hard to reach, including plaintiff.[63] This was an appropriate effort to treat all members in a substantially similar manner. I am satisfied that no person associated with defendants was trying to favor one member over another in the general effort to give late filers a second chance. While plaintiff argues that Member Services could have done more to contact members after the decision was made to accept late elections, it can hardly be suggested that Members Services did not make a consistent effort to encourage all unresponsive members to act and to act quickly. Having determined in good faith that calling and leaving messages for each individual member who had not submitted an election was the quickest and most effective way to reach them under the circumstances, defendants did all that was required by the implied covenant of good faith and fair dealing.

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[61] Tr. at 541-42, 647-54.
[62] Tr. at 761-70; JX 112, 114.
[63] JX 112; Tr. at 763-64, 769-70.

I now turn to plaintiff's final major contention regarding special treatment. Plaintiff sought to prove at trial that defendants held the late election window open just long enough to allow Bolling and Davis to submit their forms. Plaintiff introduced evidence that, on the afternoon of January 18, before the election window was closed, ICE Assistant General Counsel Andrew Surdykowski reviewed a list of members prepared by Computershare who had not yet submitted a form.[64] Davis was on this list.[65] Bolling was not, as he had submitted his form the previous day.[66] When Computershare employee Donnie Amado sent the list to Surdykowski he warned Surdykowski that the late election window needed to be cut off "asap" in order to meet the January 29 distribution deadline.[67] Surdykowski had the ultimate authority to decide when to close the late election window.[68] According to plaintiff, Surdykowski decided to keep the election window open longer, despite Amado's warning, so that Davis could submit his form. Plaintiff produced a January 19 email from Amado to Surdykowski seeking confirmation that Davis's form—the last submitted on January 18—was to be the last form accepted.[69] Plaintiff contends that this circumstantial evidence proves the window was only held open long enough for Davis to get his form in.

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[64] Tr. at 226-28.
[65] Tr. at 229; JX 136.
[66] JX 136.
[67] *Id.*; Tr. at 226.
[68] *See* Tr. at 214-15.
[69] JX 152.

Plaintiff's evidence was undermined by the direct testimony of Surdykowski and Sprecher at trial. Sprecher testified that he never mentioned Davis's name to anyone on his legal team and that he never followed up on the status of Davis' election after his brief phone call with him.[70] Surdykowski testified that he did not know who Davis was and did not know Davis had spoken to Sprecher at the time he decided to close the election window.[71] Surdykowski further testified that he closed the window in the face of increasing pressure from Computershare to cut off late acceptances and because he had his own concerns about Computershare's ability to meet the distribution deadline.[72] I found the testimony of Surdykowski and Sprecher to be credible in this regard and accordingly conclude that Surdykowski could not have been watching for Davis's form when the election window was closed. It was coincidence (perhaps an unfortunate one) that Davis's form was the last submitted on January 18. Moreover, I find that the election window was not held open just long enough for Bolling because of the simple fact that the window was held open for more than 24 hours after Bolling had submitted his form.

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[70] Tr. at 456-57.
[71] Tr. at 357, 359, 373.
[72] Tr. at 367-71. As discussed, opening the late election window without some idea as to when it should be closed was a less than optimal approach to handling late elections. But this does not demonstrate that defendants had the bad faith necessary to establish a breach of the implied covenant. Defendants' efforts to assist late elections could have been better organized and executed, but this does not mean such efforts were designed to accommodate Bolling, Davis, or MacIntosh.

IV. CONCLUSION

Plaintiff bore the burden of proof at trial to prove that defendants' discretionary decision to open the late election acceptance window was made in bad faith. Plaintiff failed to produce evidence that convinced me that defendants opened the window for the improper purpose of aiding only Bolling, Davis, and MacIntosh. Moreover, plaintiff's evidence did not convince me that Bolling, Davis, or MacIntosh received special treatment in submitting late elections. Although the late election process could have been better organized and executed, it was nevertheless a good faith (albeit imperfect) attempt to accommodate all NYBOT members who had missed the January 5 deadline. Accordingly, defendants did not breach the implied covenant of good faith and fair dealing.

An order has been entered consistent with this Memorandum Opinion.