IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MAHYAR AMIRSALEH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2822-CC
	)	
BOARD OF TRADE OF THE CITY OF NEW YORK, INC., and INTERCONTINENTALEXCHANGE, INC.,	)	
	)	
Defendants.	)	

DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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NATURE AND STAGE OF PROCEEDINGS

On March 22, 2007, plaintiff Mahyar Amirsaleh ("Plaintiff") filed a complaint (the "Complaint") alleging that defendants Board of Trade of the City of New York, Inc. ("NYBOT") and IntercontinentalExchange, Inc. ("ICE" and, together with NYBOT, "Defendants") breached the Agreement and Plan of Merger, dated as of September 14, 2006, as amended by Amendment No. 1, dated as of October 30, 2006, by and among NYBOT's predecessor, ICE, and ICE's wholly owned subsidiary, CFC Acquisition Co. (the "Merger Agreement"), and that Defendants breached the implied covenant of good faith and fair dealing inherent in that agreement.

On April 23, 2007, Defendants filed their answer to the Complaint. On June 11, 2007, Defendants filed a Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment ("Motion for Judgment"). This is Defendants' Opening Brief in support of the Motion for Judgment.

PRELIMINARY STATEMENT

Through this action, Plaintiff seeks to shift to the Defendants the blame for his own inattentiveness. Plaintiff, a former NYBOT member, was entitled to elect between stock and cash consideration in connection with the merger pursuant to which NYBOT became a wholly-owned subsidiary of ICE. Plaintiff admits that he failed to make a timely election but nevertheless proceeds to complain that his membership interests were converted to cash, even though that treatment was required by the plain terms of the Merger Agreement. Grasping at straws in an effort to resurrect his NYBOT memberships, Plaintiff asserts two contract-based claims. Each suffers from numerous fatal flaws, not the least of which is that Plaintiff is neither a party nor a third-party beneficiary to the Merger Agreement he claims Defendants breached. Beyond that, Plaintiff's claims have no basis in the actual terms of the Merger Agreement and are devoid of factual support.

The centerpiece of Plaintiff's claims is the erroneous assumption that an election form either was not mailed to him or was not mailed to him in a timely manner. That assumption, however, has no factual basis. An election form was mailed to Plaintiff on December 19, 2006, in compliance with the terms of the Merger Agreement and well in advance of the election deadline. That is all the Merger Agreement required. Because the foundational assumption upon which his claims are based is erroneous and untrue, Plaintiff is not entitled to relief under any set of facts that could be proved at trial, and Defendants are entitled to judgment in their favor as a matter of law.

STATEMENT OF FACTS

A. The Parties.

Plaintiff Mahyar Amirsaleh is an individual and resident of the State of New Jersey. Prior to the Merger, Plaintiff owned two membership interests in NYBOT's predecessor, an entity that bore the same name.[1] Each of those interests included a right to trade on the NYBOT exchange. Plaintiff leased those rights to third parties.

NYBOT is a Delaware corporation with its principal place of business in New York. NYBOT operates as a commodity futures exchange and is subject to federal regulation by the Commodity Futures Trading Commission. On January 12, 2007, NYBOT's predecessor, a member-owned, New York not-for-profit corporation, was merged with and into CFC Acquisition Co., a wholly owned ICE subsidiary formed for the purpose of accomplishing the Merger, as a result of which NYBOT became a Delaware for-profit corporation and a wholly owned subsidiary of ICE (the "Merger").

ICE is a Delaware corporation headquartered in Atlanta, Georgia. It operates an electronic marketplace for trading futures and OTC energy contracts.

B. Announcement of the Merger Agreement.

On September 14, 2006, NYBOT and ICE announced through a joint press release that they had entered into a merger agreement pursuant to which NYBOT would become a wholly owned subsidiary of ICE, subject to the approval of NYBOT Members. On September

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[1] For ease of reference, NYBOT's predecessor is also referred to herein as "NYBOT."

20, 2007, ICE filed a copy of the merger agreement with the U.S. Securities & Exchange Commission ("SEC").[2]

The Merger Agreement provided that the aggregate consideration payable to NYBOT members upon conversion of their interests in the Merger would include both a stock component and a cash component. (Compl. ¶ 28). The aggregate stock and cash components were fixed amounts and, as explained further below, the Merger Agreement provided that the two components would be allocated among NYBOT members in accordance with each member's election and certain proration and allocation provisions in the Merger Agreement. (*See* Merger Agreement at § 4.3; Recco Aff. at ¶¶ 2-3).

C. Merger Agreement Provisions Governing the Election and Allocation of Merger Consideration and Member Retention of NYBOT Trading Rights.

Under Section 4.1 of the Merger Agreement, each NYBOT membership interest was to be converted into either 17,025 newly issued shares of ICE common stock or $1,074,719 in cash, or a combination of both, at the election of the NYBOT member holding such interest (a "Member").[3] Each Member's election, however, was subject to adjustment if the cash component of the merger consideration was oversubscribed or undersubscribed. (Merger Agreement §§ 4.1, 4.3). The conversion provisions of Section 4.1 provided that each Member's election would be "as provided in and subject to the provisions of Section 4.3," which governed

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[2] The merger agreement, as amended on October 30, 2006, is referred to and cited herein as the "Merger Agreement." The Merger Agreement, a copy of which is attached as Exhibit 1 to the Affidavit of Helene J. Recco submitted in support of Defendants' Motion for Judgment (hereafter "Recco Affidavit" or "Recco Aff."), was publicly filed and is relied upon and incorporated by reference throughout Plaintiff's Complaint.

[3] The Merger Agreement also provided for *pro rata* payment of additional consideration based on NYBOT's working capital as of the closing date (Merger Agreement §§ 4.1, 4.7) and "Per Interest Additional Consideration" to the extent bonus pool consideration was not allocated to NYBOT directors and employees (Merger Agreement §§ 4.1, 4.6 (as amended)).

the procedures by which Members would make an election and set forth the manner in which merger consideration would be allocated and adjusted. (Merger Agreement § 4.1).

Each Member's election of merger consideration was to be made pursuant to an election form (the "Election Form"). Section 4.3(a) of the Merger Agreement provided for the mailing of the Election Forms to all NYBOT Members prior to the Merger:

> [a]n election form and other appropriate and customary transmittal materials in such form as ICE and NYBOT shall mutually agree (the "Election Form") ***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 day prior to the Mailing Date (the "Election Form Record Date"). Prior to the Mailing Date, ICE shall appoint, with the reasonable consent of NYBOT, a commercial bank or trust company, or a Subsidiary thereof, to act as paying and exchange agent under this Agreement (the "Exchange Agent").

(Merger Agreement at § 4.3(a)) (emphasis added). The Election Form itself, a copy of which is attached as Exhibit 4 to the Recco Affidavit, invited the recipient Member to specify (i) the number of membership interests, or percentage of membership interests, held by such Member as to which the Member elected to receive stock consideration, (ii) the number of membership interests, or percentage thereof, as to which the Member elected to receive cash consideration, or (iii) the number of membership interests, or percentage thereof, as to which the Member elected to make no election of cash or stock (the latter being referred to in the Merger Agreement as "No Election Shares"). (Merger Agreement § 4.3(b)).

Additionally, Section 4.3(b) of the Merger Agreement pointedly stated that membership interests for which elections were not made prior to an election deadline would be deemed "No Election Shares" -- *i.e.*, they would be deemed and treated as membership interests for which no election had been made. (Merger Agreement § 4.3(b)). That section provided in relevant part as follows:

> ... Any Membership Interests 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 the NYBOT Members Meeting (or such other time and date as ICE and NYBOT may mutually agree) (the "Election Deadline") shall also be deemed to be No Election Shares.

(*Id.* at § 4.3(b)). The Merger Agreement further provided that "[a]ny such election shall have been properly made only if the Exchange Agent shall have actually received a properly completed Election Form by the Election Deadline." (*Id.* at § 4.3(d)).

As noted above, the aggregate amounts of stock and cash that could be issued as merger consideration were fixed, and the Merger Agreement specifically provided for allocation, in the event the cash portion was oversubscribed or undersubscribed, to ensure that the total amount of cash paid by ICE in connection with the Merger was approximately $400,000,000. Section 4.3(e) of the Merger Agreement required ICE to cause the Exchange Agent to effect the allocation within ten business days after the effective time of the Merger.

Contrary to Plaintiff's bold and unsubstantiated assertions in paragraphs 7 and 42 of the Complaint, the Merger Agreement did not give ICE and NYBOT discretion as to how consideration would be allocated or as to how the allocation would be made for Members who failed to timely submit an Election Form. Rather, Section 4.3(e) of the Merger Agreement specified the manner in which consideration would be allocated among Members who made a stock election, Members who made a cash election, and Members who made no election or who failed to timely submit an Election Form. (*Id.* at § 4.3(e)). For example, if the cash component were undersubscribed, those Members electing to receive only cash would, of course, receive the full cash consideration of approximately $1,074,719 for each membership interest. Any remaining cash would be allocated, *pro rata*, first among the membership interests of those Members who specified neither stock nor cash for their membership interests, or who failed to

make a timely election (*i.e.*, the "No Election Shares"), such that the aggregate cash amount paid as merger consideration would equal, as closely as practicable, the "Closing Aggregate Cash Consideration" (as defined in the Merger Agreement). If the cash component of the aggregate merger consideration still were not fully exhausted, the remaining cash consideration would be allocated, again *pro rata*, among those Members who had elected to receive only stock consideration for their membership interests, with only the balance of the merger consideration to which they were entitled paid in ICE stock. (Merger Agreement § 4.3 (e)(ii)).

Thus, allocation of merger consideration with respect to "No Election Shares" was not discretionary, but rather was required to be made in the order and manner specified in Section 4.3(e) of the Merger Agreement. The procedures for election of merger consideration and the required manner of allocation were plainly laid out in the Merger Agreement, the Proxy Statement/Prospectus (defined below), and the Election Form sent to all NYBOT Members in advance of the Merger. (*See* Merger Agreement § 4.3(e)(ii); Recco Aff., Ex. 4 at 4).

In addition to the chance to elect cash or stock as merger consideration, each NYBOT Member was given the opportunity to retain rights, associated with NYBOT membership interests prior to consummation of the Merger, to trade on the NYBOT exchange. Section 4.1(c) of the Merger Agreement expressly stated that the post-merger NYBOT Bylaws would govern the effect of the Merger upon -- and the extent to and manner by which Members could retain -- those trading rights. (Merger Agreement § 4.1(c)). Accordingly, the post-merger NYBOT Bylaws mandated that, to retain their trading rights, each NYBOT Member was required (i) to own at least 3,162 shares of ICE common stock, which that Member could have acquired either through stock consideration received in the Merger or by purchasing ICE shares on the open market, and (ii) to pledge those shares in accordance with a NYBOT Membership

and Pledge Agreement and Pledge Addendum ("Pledge Agreement"). (*See* Compl. ¶ 29; NYBOT Bylaws, Annex A, § 1(a)(i)).[4]

D. NYBOT Membership Rules Relevant to the Mailing of Election Forms.

NYBOT Membership Rules in effect at all relevant times prior to the Merger (the "Membership Rules") governed the means and method of communications between NYBOT and its Members. Rule 2.28 of the Membership Rules imposed on each Member the duty to provide NYBOT with a current address and to immediately notify NYBOT should that address change. (*See* Recco Aff., Ex. 2). It further stated that "[t]he most recent address of a Member as is on file in the records of the Membership Department ***shall be deemed to be said Member's current address for all purposes, including service of notices or other documents***." (*Id.*) at R. 2.26(C) (emphasis added). Rule 2.35 set forth the manner in which NYBOT would distribute documents or notices to its Members and provided, in relevant part, as follows:

> **Rule 2.35. Service of Papers**
>
> (a) The service of papers upon a Member, or any written notification to the Exchange from a Member in accordance with the Rules may be made as follows:
>
> (i) By personal delivery to the Member or an officer of the Member ...;
>
> (ii) ***By first class mail, postage prepaid, to the office or address on file with the Exchange*** ...; or
>
> (iii) By facsimile message ("FAX") to a FAX number on file with the Exchange ....

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[4] In the Complaint, Plaintiff relies upon and incorporates by reference the post-merger NYBOT Bylaws (*see* Compl. ¶ 29), a copy of which is attached as Exhibit 1 to the Affidavit of Berton W. Ashman, Jr. ("Ashman Affidavit"), submitted contemporaneously with this Opening Brief.

> (b) Service of papers and written notification in accordance with paragraph (a) of this Rule shall be complete upon delivery, in the case of personal service, or two (2) days after depositing in the U.S. mail or, in the case of a FAX, upon receipt of confirmation of successful transmission from the transmission device.

(*Id.*) (emphasis added).

E. The Joint Proxy Statement and Prospectus and NYBOT Member Approval of the Merger Agreement.

On November 20, 2006, NYBOT and ICE publicly filed the definitive joint proxy statement and prospectus, dated as of November 17, 2006 (the "Proxy Statement/Prospectus"), and, on or about November 20, 2006, they caused its distribution to all NYBOT Members, including Plaintiff. (*See* Compl. at ¶ 19). The Proxy Statement/Prospectus advised Members that an Election Form would follow in a separate, subsequent mailing:

> *Election Form.* The Election Form will be sent to NYBOT members in a separate mailing subsequent to the mailing of this prospectus/proxy statement. Each NYBOT member will use the election form to make the cash election or stock election for his or her NYBOT membership interest or membership interests. To make the stock election or the cash election, NYBOT members must properly complete and sign an election form as specified in the instructions to the election form, and the properly completed and executed election form must be received by the exchange agent at or prior to the election deadline ....
>
> *Election Deadline.* The election deadline for making the stock election or the cash election will be indicated in the separate mailing of the election form and is expected to be 5:00 p.m., New York City time, on a business day that is at least five business days prior to the completion of the merger.

(*See id.* at ¶ 20).

On December 11, 2006, NYBOT held a special meeting at which NYBOT Members approved the proposed merger transaction. (*Id.* at ¶ 22).

F. The December 19, 2006 Mailing of Election Forms to NYBOT Record Members.

To accomplish the printing and distribution of the Election Forms following NYBOT Member approval of the Merger Agreement, ICE and NYBOT contracted with a third party, RR Donnelly & Sons Company ("RR Donnelly"). NYBOT provided RR Donnelly with a list of all NYBOT Members as of the Election Form Record Date ("NYBOT Record Members") reflecting the addresses provided to NYBOT by each member in accordance with NYBOT's Membership Rules.[5] That list included Plaintiff, Mahyar Amirsaleh, and his record address, 25 Enterprise Avenue, Secaucus, New Jersey 07094.[6] (*See* Recco Aff. at ¶ 6 & at Ex. 3; *see also* Supp. Aff. of Mailing, Ex. C to the Mot. for Judgment, at ¶ 3 & at Ex. 1).

On December 19, 2006, the Election Forms were distributed through first class mail, postage prepaid, by RR Donnelly's distribution agent, Apple Direct Mail Services, Ltd. ("Apple"), to all NYBOT Record Members, including Plaintiff. (*See* Recco Aff. at ¶¶ 7-8; Supp. Aff. of Mailing at ¶ 3; and Aff. of Mailing, Ex. B to the Mot. for Judgment).

G. Plaintiff's Failure to Elect Merger Consideration in a Timely Manner or to Avoid the Loss of His Trading Rights.

The Election Form sent to NYBOT Members on December 19, 2006, identified the Election Deadline as January 5, 2007. The Election Deadline was, in fact, disclosed in bold,

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[5] The list of NYBOT Members given to RR Donnelly was inadvertently based upon a compilation of NYBOT Members as of December 14, 2006, rather than December 12, 2006, the Election Form Record Date. The identity of members as of December 14, 2006, however, was identical to the identity of NYBOT Members as of December 12, 2006, as there were no new NYBOT members admitted in the intervening two days. Plaintiff was a NYBOT member on both December 12 and December 14, 2006. (*See* Recco Aff. at ¶ 3 & n.1).

[6] Plaintiff admits that he received the Proxy Statement/Prospectus (Compl. at ¶ 19), which was sent to the same address as was the Election Form that followed several weeks later.

capitalized print near the top of the first page and, again, in bold print near the top of the second page. In addition, Section A.1 of the instructions set forth in the Election Form stated as follows:

> **Election Deadline**. To be effective, an election on this election booklet must be properly completed, signed, delivered to and received by the Exchange Agent no later than the Election Deadline. ... **NYBOT Members and NYBOT Member Firms whose election booklets are not so received will not be entitled to specify their preference as to the form of merger consideration that they may receive and will be deemed to have made "no election" with respect to their NYBOT Membership Interests.**

(Recco Aff., Ex. 4 at 3) (emphasis in original).

The Merger was consummated on January 12, 2007. (Compl. ¶ 23).

Plaintiff first submitted a copy of his completed Election Form to the Exchange Agent by fax on January 19, 2007, seven days after consummation of the Merger.[7] (*Id.* at ¶ 41). Plaintiff admits in the Complaint that he did not make a timely election. (*Id.* at ¶¶ 8, 34).

As admitted in the Complaint, Linda Chin of NYBOT Member Services contacted Plaintiff on January 12, 2007, because Plaintiff had not signed and submitted a Pledge Agreement as was required of NYBOT Members to retain the NYBOT exchange trading rights associated with their membership interests prior to the Merger. (Compl. ¶¶ 35-36; Jan. 12, 2007 Chin fax to Plaintiff).[8] Plaintiff's assistant requested that Ms. Chin send the form of Pledge Agreement by fax and, in response, Ms. Chin sent the necessary papers by fax that same day. (Compl. ¶¶ 35-36). Plaintiff, however, did not sign and return the Pledge Agreement until January 18, 2007 -- six days after consummation of the Merger, at which time Plaintiff's

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[7] Plaintiff sent the original copy of his executed Election Form to the Exchange Agent by federal express on the same date (Compl. ¶ 41), and the federal express shipment was delivered to the Exchange Agent on January 22, 2007. (*Id.* at ¶ 46).

[8] Ms. Chin's January 12, 2007 facsimile to Plaintiff is relied upon and incorporated by reference into the Complaint (*see* ¶¶ 35-36) and is attached as Exhibit 2 to the Ashman Affidavit.

assistant asked "[w]hat else [Plaintiff] had to do." (*Id.* ¶ 37).[9] In response to Plaintiff's question, Ms. Chin inquired whether he had completed an Election Form. (*Id.* at ¶ 38). At Plaintiff's request, she then sent him a copy of the Election Form, specifically stating in her facsimile that she "could not guarantee that [Plaintiff's] booklet will be accepted." (*Id.* at ¶ 39).

Plaintiff acknowledges in the Complaint that "the Stock Election was oversubscribed" (and thus that the cash component was undersubscribed). (*Id.* at ¶ 43). In fact, Plaintiff acknowledges that, as a result of such oversubscription of stock consideration (and undersubscription of cash) by Members who timely submitted their election forms, the merger consideration was allocated such that even Members who elected to receive all stock instead received "11,067 shares of ICE common stock and a cash component of $378,208.00" per NYBOT membership interest. (*Id.*). Because Plaintiff failed to make a timely election, and as a result of the stock oversubscription/cash undersubscription, Section 4.3(e)(ii) of the Merger Agreement mandated that Plaintiff receive only cash merger consideration. (Merger Agreement § 4.3(e)(ii)).

On January 29, 2007, Helene J. Recco, Managing Director of NYBOT Member Services, contacted Plaintiff by fax.[10] In that fax, Ms. Recco specifically advised Plaintiff that, even though he had received cash consideration in the Merger for the two NYBOT membership interests he had owned, he still had an opportunity to retain his NYBOT trading rights. She advised that, to retain those rights, it would be necessary for Plaintiff to obtain on the open market 3,162 shares of publicly-held ICE common stock for each trading right and to pledge

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[9] Contrary to Plaintiff's insinuation that Ms. Chin and NYBOT Member Services were being unhelpful, his assistant went out of her way to add "Thanks for all your help, I do appreciate it." (See Ashman Aff., Ex. 1 at 1).

[10] Ms. Recco's January 29, 2007 facsimile to Plaintiff is relied upon and incorporated by reference in the Complaint (at ¶ 45) and is attached as Exhibit 3 to the Ashman Affidavit.

those shares in accordance with the Pledge Agreement prior to February 1, 2007. (*See* Jan. 29, 2007 Recco fax to Plaintiff; Compl. ¶ 45). Plaintiff refused to do so. Accordingly, on February 1, 2007, Plaintiff's two NYBOT trading rights were extinguished. (Compl. ¶¶ 46, 50).

H. This Litigation.

Plaintiff filed this litigation on March 22, 2007. He seeks 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 requiring NYBOT to reinstate his two trading memberships (Compl. ¶ 1-2). The Complaint contains two counts, one alleging that Defendants breached the Merger Agreement and one alleging that they breached an implied covenant of good faith and fair dealing in connection with that agreement. Plaintiff's claims are predicated on three allegations, none of which have any basis in fact: (i) an Election Form was not mailed or otherwise transmitted to him in compliance with the terms of the Merger Agreement, (ii) an Election Form was not mailed to him in a manner providing sufficient time for him to complete and return the form prior to the Election Deadline, and (iii) the Election Deadline was set for a time impossible for Plaintiff to meet because it preceded the date on which the Election Forms were mailed.

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO JUDGMENT ON THE PLEADINGS BECAUSE PLAINTIFF LACKS STANDING TO PURSUE CONTRACT CLAIMS UNDER THE MERGER AGREEMENT.

A. The Standard for Granting a Motion for Judgment on the Pleadings.

Under Court of Chancery Rule 12(c), the Court may grant judgment on the pleadings if the pleadings "fail to reveal the existence of any disputed material fact and the movant is entitled to judgment as a matter of law". *Parnes v. Bally Entm't Corp.*, 1998 WL 51739, at *1 (Del. Ch.), *rev'd on other grounds*, 722 A.2d 1243 (Del. 1999) (citing *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993)).[11] When considering a motion for judgment on the pleadings, the Court may consider as well any exhibits attached to or incorporated by reference into the pleadings. *See OSI Sys., Inc. v. Instrumentarium Corp.*, 892 A.2d 1086, 1090 (Del. Ch. 2006) (citing *Rag Am. Coal Co. v. AEI Res., Inc.*, 1999 WL 1261376, at *1 (Del. Ch.)).

B. Plaintiff Lacks Standing To Assert Claims For Breach of the Merger Agreement or Breach of the Implied Duty of Good Faith and Fair Dealing Inherent in that Agreement.

Defendants are entitled to judgment in their favor as a matter of law because Plaintiff lacks standing to assert the claims alleged in his Complaint. Plaintiff prosecutes two claims: breach of the Merger Agreement and breach of the implied duty of good faith and fair dealing with respect to that agreement. Both of those claims are contract-based, but Plaintiff is neither a party nor a third-party beneficiary to the contract at issue -- the Merger Agreement. For that reason alone, Plaintiff is without standing to bring the asserted claims, and the Court should dismiss his Complaint. *NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d

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[11] A compendium of unreported decisions is being filed simultaneously herewith.

417, 434 (Del. Ch. 2007) ("only parties to a contract and intended third-party beneficiaries may enforce an agreement's provisions").

That Plaintiff is not a third-party beneficiary entitled to sue for alleged breach of the Merger Agreement is established in Section 9.8 of the agreement. It provides in relevant part that, "[e]xcept as provided in Section 6.13 (Indemnification; Directors' and Officers' Insurance), this Agreement is not intended to, and does not, confer upon any Person other than the parties who are signatories hereto [*i.e.*, NYBOT, ICE and CFC Acquisition Co.] any rights or remedies hereunder...." (Merger Agreement § 9.8). Plaintiff thus has no enforceable rights under the Merger Agreement and cannot sue for injury or damages relating to the alleged breach thereof. *See Tooley v. Donaldson, Lufkin Jenrette, Inc.*, 845 A.2d 1031, 1034 (Del. 2004) (noting that "[t]he merger agreement specifically disclaim[ed] any persons as being third-party beneficiaries to the contract" and holding that stockholders did not have standing to bring valid contract claim under that agreement); *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1386 (Del. Super. Ct. 1990) (if it was not the contracting parties' intention to confer a direct benefit upon a third party, then the third party has no enforceable rights under the contract); *see also Orban v. Field*, 1993 WL 547187, at *9 (Del. Ch.) ("[t]he idea of shareholders having directly enforceable rights as third-party beneficiaries to corporate contracts is ... one that should be resisted").

Because he is neither a party nor an intended third-party beneficiary to the Merger Agreement, Plaintiff also lacks standing to sue for an alleged breach of the implied covenant of good faith and fair dealing relating to the Merger Agreement. Under Delaware law, "the implied covenant of good faith and fair dealing does not provide a separate cause of action but 'arises in relation to the enforcement of contractual conditions when one party has the sole discretion to

determine the scope or occurrence of a condition.'" *McCoy v. Cox*, 2007 WL 1677536, at *9 (Del. Super. Ct.) (quoting *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1055 (Del. Ch. 1984), *aff'd*, 575 A.2d 1131 (Del. 1990)). Lacking standing to pursue a breach of contract claim under the Merger Agreement, Plaintiff is likewise without standing to pursue a claim for alleged breach of the implied covenant of good faith and fair dealing relating to that same contract.

Judgment on the pleadings should, therefore, be found in favor of Defendants as to both of Plaintiff's claims in this action.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFF IS NOT ENTITLED TO RELIEF UNDER ANY FACTS HE COULD PROVE AT TRIAL.

A. The Standard for Granting a Motion for Summary Judgment.

The Court may grant a motion for summary judgment if the moving party has established that no genuine issue of material fact exists with respect to the dispute and that the moving party is entitled to a judgment as a matter of law. Ch. Ct. R. 56(c); *see also Goodwin v. Live Entm't Inc.*, 1999 WL 64265, at *5 (Del. Ch.), *aff'd*, 741 A.2d 16 (Del. 1999) (TABLE) (same); *Gilbert v. El Paso Co.*, 575 A.2d 1131 (Del. 1990). Although the party opposing the motion is entitled to all reasonable inferences, "[i]n the face of a properly supported motion for summary judgment, the nonmoving party must produce evidence that creates a triable issue of fact ...." *McGowan v. Ferro*, 859 A.2d 1012, 1027 (Del. Ch. 2004), *aff'd*, 873 A.2d 1099 (Del. 2005) (TABLE). Here, Plaintiff can produce no such evidence as no material facts relevant to Plaintiff's claims can be genuinely in dispute. For the reasons discussed below, based on the facts admitted in Plaintiff's verified Complaint and the additional facts set forth in the Affidavits submitted in support of Defendants' Motion for Judgment (which facts cannot genuinely be disputed), Defendants are entitled to judgment as a matter of law.

B. Defendants Complied with the Terms of the Merger Agreement.

1. Defendants Mailed an Election Form to Plaintiff in Compliance with the Terms of the Merger Agreement.

The terms of the Merger Agreement govern the manner and method of transmitting the Election Forms and notice of the Election Deadline to NYBOT Members.[12] *See, e.g., Gildor v. Optical Solutions, Inc.*, 2006 WL 1596678, at *5 (Del. Ch.) (where manner of notice is governed by contract, court "will focus solely on the language of the contract"); *JAS Securities, LLP v. Am. Int'l Group, Inc.*, 1999 WL 1441991, at *4 (Del. Ch.), *aff'd*, 755 A.2d 388 (Del. 2000) (TABLE), (looking to prospectus, under New York law, for terms governing manner and method of notice to stockholders). As set forth in the several affidavits submitted in support of Defendants' Motion for Judgment and as detailed below, Defendants satisfied the relevant requirements set forth in the Merger Agreement.

Section 4.3 of the Merger Agreement is the only provision that addresses the method of delivery of the Election Form or notice of the Election Deadline to NYBOT Members. It requires that an Election Form "shall be mailed" to NYBOT Members "on such ... date as ICE and NYBOT shall mutually agree." (Merger Agreement § 4.3(a)). As set forth in the Recco Affidavit, as well as the Affidavit and Supplemental Affidavit of Mailing executed by Apple, an Election Form was sent on December 19, 2006, by first class mail, postage prepaid, to all NYBOT Members who were Members as of the Election Form Record Date, including Plaintiff, at their addresses of record. Thus, Defendants satisfied the terms of the Merger Agreement with respect to mailing the Election Forms and providing notice of the Election Deadline to NYBOT Members.

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[12] Delaware law governs the interpretation, construction and application of the terms of the Merger Agreement. (Merger Agreement § 9.5).

2. Defendants' Mailing of the Election Form to Plaintiff Also Complied with NYBOT's Membership Rules.

The December 19, 2006 mailing of Election Forms also complied in full with the requirements set forth under NYBOT's Membership Rules regarding mailings and notices to NYBOT Members.[13] Rule 2.28(c) of the Membership Rules provides that "[t]he most recent address of a Member as is on file in the records of the Membership Department shall be deemed to be said Member's current address ***for all purposes*** ..." (emphasis added). Furthermore, Rule 2.35(a) states that NYBOT's service of any papers upon a Member is properly completed if made "[b]y first class mail, postage prepaid, to the office or address on file" with NYBOT. (Recco Aff. ¶ 5 & Ex. 2) (emphasis added). As set forth in the several affidavits submitted in support of Defendants' Motion for Judgment, the December 19, 2006 mailing of Election Forms satisfied those conditions. (*See id.* at ¶¶ 5-7; Supp. Aff. of Mailing, Ex. C to the Mot. for Judgment, at ¶ 3; Aff. of Mailing, Ex. B to the Mot. for Judgment).

3. The Election Form Was Mailed to Plaintiff -- and All Other NYBOT Record Members -- Sufficiently Prior to the Election Deadline.

The November 17, 2006 Proxy Statement/Prospectus notified NYBOT Members that the Election Form would be separately mailed, subsequent to the mailing of the Proxy

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[13] To the extent NYBOT's Membership Rules govern, New York law applies. *See Rosenmiller v. Bordes*, 607 A.2d 465, 468 (Del. Ch. 1991) ("internal affairs doctrine requires that the state that has created the corporation be the only state whose law controls the relationships among the corporate entity ... and stockholders"). Under New York law, as in Delaware and other jurisdictions (*see* further discussion *infra*), a mailing is presumed delivered and received upon a showing that it was properly mailed. *See, e.g.,LM K Psyc. Svcs., P.C. v. Liberty Mut. Ins. Co.*, 30 A.D.3d 727, 728 (N.Y. App. Div. 2006) ("proof of proper mailing gives rise to a presumption that the item was received by the addressee"); *Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679, 680 (N.Y. App. Div. 2001) (same). Where the proper means or method of notice are governed by statute, contractual provision or bylaw, that statute, contractual provision or bylaw controls. *See JAS Securities, LLP*, 1999 WL 1441991, at *4; *M&E Luncheonette, Inc. v. Freilich*, 218 N.Y.S.2d 125, 130 (N.Y. Sup. Ct. 1961).

Statement/Prospectus, and that the Election Deadline would be indicated in the separate mailing and set for a date at least five business days prior to the completion of the Merger. (Compl. at ¶ 19). In full accordance with that description, the Election Form mailed to Plaintiff on December 19, 2006, indicated in bold type on the top of the first page, among other places, that the Election Deadline would be January 5, 2007 -- five business days prior to the anticipated January 12, 2007 closing of the Merger.

Plaintiff advances the counterintuitive contention, devoid of any factual basis, that the Election Form was not mailed to NYBOT Members sufficiently in advance of the Election Deadline and that the Election Deadline somehow occurred before the Election Forms were mailed, thus making it impossible, Plaintiff contends, to submit a timely election. Those assertions are predicated on Plaintiff's erroneous assumption that the Election Form Record Date and the record date for determining which NYBOT Members were entitled to submit elections were one and the same. In fact, they are two separate dates that served two unrelated purposes.

The first date, the Election Form Record Date, was December 12, 2006, five days prior to the mailing of the Election Forms. The purpose of that date was to determine the Members *to whom the Election Form would be mailed* in accordance with Section 4.3 of the Merger Agreement. (Merger Agreement § 4.3(a)). The second date, for determining the Members *who were entitled to submit an election*, was December 29, 2006 -- well after both the Election Form Record Date and the December 19 mailing of the Election Forms. As set forth in the Election Form, all NYBOT Members who held NYBOT Membership interests as of 5:00 p.m., New York City time, on December 29, 2006, would be entitled to make an election with respect to merger consideration. (Recco Aff. at ¶ 4; *id.*, Ex. 4 at 1). Thus, even if a person was not a Member on December 12, 2006 (the Election Form Record Date) and thus was not

included in the December 19, 2006 mailing of the Election Forms, that person nevertheless would be entitled to make an election with respect to merger consideration if he or she was a Member as of 5:00 p.m. on December 29, 2006. Election Forms were in fact sent to those persons who became NYBOT Members between the Election Form Record Date and December 29, 2006, and who had not been included in the December 19, 2006 mailing for that reason. (*See* Recco Aff. at ¶ 4).

Based upon his demonstrably erroneous assumption that the Election Form Record Date was December 29, 2006, rather than December 12, 2006, Plaintiff jumps to the convenient but untenable conclusion that the actual date of mailing the Election Forms was sometime after January 8, 2007 (*i.e.*, the date that falls five business days after December 29, 2006). (Compl. ¶¶ 53-55). How, Plaintiff implicitly asks, can the Election Deadline precede the Mailing Date for the Election Form each Member must have completed to make his or her timely election? (*Id.*). The answer, of course, is that the Election Deadline did not precede the Mailing Date. The Mailing Date was December 19, 2006, and the Election Deadline, as disclosed in the Election Form mailed to Plaintiff and all other NYBOT Members, was January 5, 2007. Plaintiff's claim that it was impossible to comply with the Election Deadline -- a claim based entirely on a demonstrably false premise -- is entirely without merit.

C. Delivery of the Election Form and Notice of the Election Deadline May Be Presumed as a Matter of Law.

The Merger Agreement required that Election Forms be mailed to NYBOT Members of record as of the Election Form Record Date. As set forth in the Affidavits submitted in support of the Motion for Judgment, Defendants fulfilled that requirement and fully discharged their duty to mail the Election Forms to NYBOT Members. For that reason alone, judgment should be entered in Defendants' favor. Nevertheless, the facts before the Court justify

the additional judicial conclusion that an Election Form was also properly *delivered* and *timely received* by Plaintiff.

Both Delaware and New York law recognize the generally accepted judicial presumption that "mailed matter, correctly addressed, stamped and mailed, was received by the party to whom it was addressed." *Windom v. Ungerer*, 903 A.2d 276, 282 (Del. 2006) (emphasis omitted); *see also Schneider v. State Farm Mut. Auto. Ins. Co.*, 813 A.2d 1141 (TABLE), 2002 WL 31883042 (Del.) (same); *Haas v. Indian River Vol. Fire Co., Inc.*, 2000 WL 1336730, at *4 (Del. Ch.), *aff'd*, 768 A.2d 269 (Del. 2000) (TABLE); *Mei Yun Li v. Qing He Xu*, 38 A.D.3d 731, 732 (N.Y. App. Div. 2007); *A.B. Med. Svcs., PLLC v. Am. Transit Ins. Co.*, 2007 WL 1003752, at *1 (N.Y. App. Term). The presumption applies with particular force in matters involving a corporation's communications to its members or stockholders. *See Enstar Corp. v. Senouf*, 535 A.2d 1351, 1355 (Del. 1987) (duty to ensure delivery of a mailing or notice to record stockholders fulfilled upon mailing); *Am. Hardware Corp. v. Savage Arms Corp.*, 136 A.2d 690, 692 (Del. 1957); *M&E Luncheonette, Inc.*, 218 N.Y.S.2d at 130; *see also* 9A WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPS. § 4647, at 332 (perm. ed. rev. vol. 2000) (citing *Tisch Family Foundation, Inc. v. Tex. Nat. Petroleum Co.*, 326 F.Supp. 1128 (D.Del. 1978) (applying Delaware law)). Any other rule would place a debilitating burden upon corporations, requiring of them the difficult and likely impossible task of proving receipt by any and all stockholders or members asserting otherwise, and thereby calling into question the effectiveness of any corporate disclosure and the validity of all stockholder action.

Perhaps for this reason, mere denial of receipt of a mailing will not operate to rebut the presumption that the mailing was, in fact, received. *Windom*, 903 A.2d at 282. Moreover, that denial will be rejected as insufficient as a matter of law where, as here, the party

seeking to invoke the presumption submits an affidavit of mailing in its support. *York Fed. Savings and Loan Assoc'n v. Heflin*, 1995 WL 717288, at *3 (Del. Super. Ct.) (applying New York law); *New Hampshire Ins. Co. v. State Farm Ins. Co.*, 1994 WL 125038, at *4 (Del. Ch.) (applying Delaware law); *M&E Luncheonette, Inc.*, 218 N.Y.S.2d at 130 (finding notice given in accordance with bylaw where affidavit of service stated such notice had been mailed and identified the addressee and specific date of mailing); *Mei Yun Li*, 38 A.D.3d 732 ("mere denial of a receipt of notice of sale was insufficient to rebut the presumption of proper mailing and receipt" arising from plaintiff's affidavit of mailing) (citation omitted); *A.B. Med. Svcs., PLLC*, 2007 WL 1003752, at *1 ("lower court erred in implicitly finding that defendant's mere denial of receipt ... was sufficient to rebut the presumption of receipt thereby raising an issue of fact .... Accordingly, plaintiff was entitled to summary judgment") (citations omitted).

NYBOT's Membership Rules in effect at the time of the December 19, 2006 mailing explicitly adopted this very same approach. As set forth in the Recco Affidavit and elsewhere in this brief, Membership Rule 2.35 specifically provided that NYBOT's service of papers and written notifications shall be deemed "complete" two days after the papers or notifications are deposited in first class mail. (*See* Recco Aff. at ¶ 5).

For the foregoing reasons, even if receipt of the mailing of the Election Form were a relevant issue, Plaintiff's bare denial of that receipt is insufficient as a matter of law to rebut a presumption of delivery supported by an affidavit of mailing. Judgment, therefore, should be entered in Defendants' favor.

D. The Merger Agreement Mandated that Plaintiff Receive All Cash in Merger Consideration Because He Failed To Make a Timely Election.

The plain terms of the Merger Agreement belie Plaintiff's absurd proposition (*see* Compl. ¶¶ 7, 42) that the Merger Agreement permitted Defendants to exercise discretion in

allocating merger consideration to Members, such as Plaintiff, who failed to make a timely election. To the contrary, Section 4.3(e) of the Merger Agreement required the merger consideration to be allocated in a particular order and manner among Members who had elected stock consideration for their interests ("Stock Election Shares"), Members who had elected to receive cash consideration for their interests ("Cash Election Shares"), and Members who either elected neither stock nor cash or who failed to make a timely election ("No Election Shares").[14] The required order and manner of allocation in turn depended upon whether cash had been oversubscribed (and stock undersubscribed) or cash had been undersubscribed (and stock oversubscribed). (Merger Agreement § 4.3(e)). Nothing in Section 4.3(e), however, gave Defendants or the Exchange Agent discretion in determining how to allocate merger consideration with respect to Plaintiff's "No Election Shares."

As set forth above, Plaintiff admits in his verified Complaint that he did not make a timely election of Merger consideration. (Compl. ¶¶ 8, 34). He also concedes that the merger consideration election process resulted in there being a significant oversubscription for ICE common stock (and thus a cash undersubscription). (Compl. ¶ 43). Indeed, Plaintiff acknowledges that the stock oversubscription was of such a magnitude that NYBOT Members who elected all stock consideration received, as a result of the required allocation, "11,067 shares of ICE common stock and a cash component of $378,208.00," rather than the full 17,025 shares of ICE common stock they would have received had stock been undersubscribed. (*Id.*) Section

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[14] The terms "Stock Election Shares," "Cash Election Shares," and "No Election Shares" are defined in Section 4.3(b) of the Merger Agreement. Section 4.3(b) specifically provides that "[a]ny Membership Interests 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 the NYBOT Members Meeting (or such other time and date as ICE and NYBOT may mutually agree) (the "Election Deadline") shall also be deemed to be No Election Shares." (Merger Agreement § 4.3(b)).

4.3(e)(ii) of the Merger Agreement required that in the event of such a cash undersubscription (stock oversubscription), cash was to be allocated to Plaintiff's "No Election Shares." Specifically, Section 4.3(e)(ii) provided:

> (ii) Cash Undersubscribed. If the Cash Outlay is less than the Closing Aggregate Cash Consideration, then:
>
> (A) all Cash Election Shares shall be converted into the right to receive the Cash Consideration,
>
> (B) the Exchange Agent shall then determine first, pro rata from among the No Election Shares, and then (if necessary), pro rata from among the Stock Election Shares, a sufficient percentage of Stock Election Shares to receive the Cash Consideration (the "Cash Designated Shares") such that the aggregate cash amount that will be paid in the Merger equals as closely as practicable the Closing Aggregate Cash Consideration, and all Cash Designated Shares shall be converted into the right to receive the Cash Consideration, and
>
> (C) the Stock Election Shares that are not Cash Designated Shares and the No Election Shares that are not Cash Designated Shares shall be converted into the right to receive the Stock Consideration.

(Merger Agreement § 4.3(e)(ii)).

Accordingly, the Merger Agreement plainly required the Exchange Agent to allocate the cash consideration "first, pro rata among the No Election Shares" before any cash was allocated to Members who held Stock Election Shares. To the extent Plaintiff asserts that the Merger Agreement provided Defendants with discretion in allocating merger consideration to him, or that Defendants somehow breached the Merger Agreement by allocating cash consideration to him by reason of his admitted failure to make a timely election, his claims have no factual or legal basis, let alone any basis in the terms of the Merger Agreement.

III. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFF CANNOT, AS A MATTER OF LAW, ASSERT FACTS SUFFICIENT TO SUPPORT A CLAIM FOR BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING.

For the reasons asserted above, even if Plaintiff is found to have standing to pursue his claims under the Merger Agreement, his claim for breach of the implied covenant of good faith and fair dealing inherent in the Merger Agreement should be rejected. Under Delaware law, the implied covenant of good faith and fair dealing "is 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' bargain.'" *Bakerman v. Sidney Frank Importing Co., Inc.*, 2006 WL 3927242, at *19 (Del. Ch.) (quoting *Chamison v. Healthtrust, Inc.*, 735 A.2d 912, 920 (Del. Ch. 1999)). As the facts admitted in the Complaint and set forth in the Affidavits make clear, Plaintiff can show no such tactics here.

To be sure, in the face of facts that cannot genuinely be disputed -- (i) that an Election Form with notice of the Election Deadline was mailed to Plaintiff and all other NYBOT Record Members on December 19, 2006, and (ii) that the mailing of the Election Form provided more than sufficient time for Plaintiff and all other NYBOT Members to submit their forms in advance of the Election Deadline -- Plaintiff cannot genuinely contest Defendants' good faith compliance with the terms of the Merger Agreement. Nor can he seriously continue to contend that Defendants acted in bad faith by allegedly mailing the Election Form to him after the Election Deadline. As discussed above, that assertion is demonstrably false.

Moreover, in view of the long-recognized presumption that properly mailed notices and communications are received by the intended recipient, as well as NYBOT Membership Rule 2.35, which establishes effective delivery of NYBOT communications to its

Members two days after deposit in first class mail, Plaintiff cannot reasonably assert that the Merger Agreement somehow contained an implied duty to ensure not only mailing of the Election Form but also its delivery. Defendants respectfully submit that, if there were such an implied duty for corporations to ensure delivery of corporate mailings to every stockholder or member, the cost and burden of complying with that duty would be disabling, and any action requiring notice to or approval by stockholders or members would be practicably impossible for any corporation with more than a handful of stockholders or members.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that judgment on the pleadings or, in the alternative, summary judgment be entered in their favor.

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