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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

DEFENDANTS' POST-TRIAL BRIEF

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INTRODUCTION

In its November 9, 2009, Memorandum Opinion denying Plaintiff Mahyar Amirsaleh's motion for summary judgment, this Court set forth the burden to which Plaintiff would be held to succeed at trial. The Court held that for Plaintiff to prove that Defendants IntercontinentalExchange, Inc. ("ICE") and Board of Trade of the City of New York, Inc. ("NYBOT") breached the implied covenant of good faith and fair dealing with respect to their 2006 Agreement and Plan of Merger (the "Merger Agreement"), he would be required to show that Defendants' "conduct was driven by an improper motive." *Amirsaleh v Bd. of Trade of the City of N.Y., Inc.*, 2009 WL 3756700, at *6 (Del Ch.). In particular, this Court charged Plaintiff with establishing that Defendants had either (1) determined to accepted late election forms "***solely*** based on the fact that certain connected members failed to turn their forms in on time" or (2) gave "connected members special treatment in submitting late elections, including holding open the election window just long enough to ensure" their forms had been submitted. *Id.* (emphasis added).

Plaintiff failed to establish either at trial. Rather, the evidence presented shows Defendants' conduct was motivated by what the Court indicated in its Memorandum Opinion were good faith motivations and purposes – namely, Defendants' decision to accept elections submitted after the January 5, 2007 deadline (the "Election Deadline") was "driven by consideration[s] of customer satisfaction"; Defendants took reasonable efforts "to give all late filers the same or substantially similar assistance turning in their late forms"; and Defendants determined to stop accepting late elections to ensure sufficient time to process and distribute the cash and stock merger consideration in accordance with the contractually-determined deadline for doing so (January 29, 2007). *See id.* Thus, Defendants necessarily lacked "the wrongful intent necessary to breach the implied covenant." *Id.*

Plaintiff did not show otherwise at trial. Instead, Plaintiff's trial presentation appeared designed to establish that Defendants, in hindsight, might have pursued the election process differently, perhaps by sending election forms to delinquent Members by "group fax" or by group email – notwithstanding that NYBOT Member Services did not have email addresses for most members – or by reaching out to members (and Mr. Amirsaleh in particular) even more persistently than the record establishes they did. As this Court has already held, even if Defendants' efforts to assist members were "disorganized, disjointed, or less than optimal," such a showing would not suffice to establish a claim for breach of the implied covenant. *Id*.

Furthermore, the record established that the tardiness of Plaintiff's submission was due to his studied inattention to Defendants' entreaties, and while the result is unfortunate, he has only himself to blame.

A. Defendant Made the Decisions to Accept and Thereafter to Cut Off the Acceptance of Late Election Forms in Good Faith

The evidence at trial establishes that Defendants' decision of January 17, 2007 to accept late election forms was the result of a good faith determination to accommodate as many NYBOT members as possible. After the January 5, 2007 Election Deadline, Defendants considered accepting election forms through Monday, January 8, 2007 (one additional business day), in view of post office closings for the unanticipated National Day of Mourning after the death of President Ford. (Trial Transcript (hereafter "Tr. __") 323, 536-37). Because no forms arrived by mail on January 8, and thus none were late because of the National Day of Mourning, Defendants initially decided not to accept late election forms. (Tr. 327-28; JX 64).

In the days that followed, however, Defendants became aware of members who had missed the deadline but desired to make an election. (Tr. 335-36, 339; *see also* JX 74, 84, 85, 87, 92, 94). Defendants thus began to re-evaluate the earlier decision not to accept late elections.

After careful consideration over a period of several days, Defendants decided on January 17, 2007 to accept late elections received to that time. (Tr. 202, 337-48). That determination was informed by the advice of in-house and outside counsel. (Tr. 339, 343-44, 435), and by an evaluation of the practical and business risks involved in such a course of action, including litigation threats from some members who had missed the January 5 deadline and the effect acceptance of late elections would have on members who made timely elections. (Tr. 337-45). Among the most important factors was Defendants' understanding from Computershare that the acceptance of late elections, at that time, would not create undue risk of missing the January 29 deadline for distributing merger consideration. (Tr. 340-41, 344-45). Lacking any independent financial incentive to exclude any members from the elections process (Tr. 342-43, 467), Defendants' evaluation of these factors left them free to pursue their prime motivation: to maintain positive relations with ***all*** NYBOT members and, accordingly, retain as many satisfied customers as possible. (Tr. 340-42 (Surdykowski), 449-50 & 467 (Sprecher), 550 (Hirschfeld)).[1]

As the trial evidence established, Defendants remained motivated to keep the window for accepting late elections open as long as possible – again, seeking to accommodate all members to the extent practicable. (Tr. 340-42, 426-27, 460-63, 549-50). But each additional moment brought Defendants closer to the possibility that the processing and distribution of merger consideration would be delayed beyond the January 29 distribution deadline, an eventuality that could well have spelled disaster. (Tr. 361-65, 414-15, 424, 428, 464-66). Substantially more

[1] Defendants' "commitment to customers," including its exchange members, is not a post-litigation justification for their decision to accept late elections, as Plaintiff has suggested. Rather, a commitment to customers is ICE's distinguishing "business philosophy" and ICE has consistently disclosed that philosophy, including when seeking NYBOT member support for the merger. (*See, e.g.*, Tr. at 443-44; JX 8 ("our commitment to customers, which includes all of you [NYBOT members] here today … is the foundation of our business")).

than half the merger consideration was payable in ICE stock. (JX 5 at 1, 77-78). Had the stock price dropped, even mildly, after January 29 but before the distribution of merger consideration, ICE could have faced potentially enormous financial liability to (or at least lawsuits from) members claiming to have been due that stock as of January 29. (Tr. 339-40, 363-65, 466). That risk was significant and is not a post-litigation justification (as Plaintiff contends).[2]

Thus, in the face of increasing pressure from Computershare to close the window, Surdykowski (who harbored his own personal anxieties about Computershare's ability to meet the distribution deadline) communicated to Computershare that no further elections would be accepted after the last form submitted on January 18, 2007. (Tr. 367-71). By that time, Surdykowski was acutely aware that the time allotted for calculating, processing, and distributing the consideration due each member had been reduced to half that originally allocated under the Merger Agreement (Tr. 340, 365-68, 371-72), and that Computershare's increasingly emphatic expressions of anxiety had escalated to the point that it would not be able to guarantee completion by the distribution deadline if there were further delay. (Tr. 367-71; Amado Dep. 41 (Amado was concerned Computershare would not be able to distribute the consideration by January 29 absent an imminent cut off); JX 135; *see also* Tr. 464-65).

Surdykowski, together with Defendants' other trial witnesses, uniformly testified that ensuring compliance with the January 29, 2007 distribution deadline was the driving force in the

[2] ICE's stock price had doubled in the four months after the parties signed the Merger Agreement. (Tr. 382-83). Meanwhile, ICE had been a publicly traded company for less than a year. (Tr. 279, 438). Given those facts and various impediments to the success of the NYBOT acquisition – including a threat from its competitor, NYMEX, who in a surprise move one month earlier had launched competing online trading for all of NYBOT's flagship products (and had threatened to lock Defendants out of their building, which NYMEX owned, should Defendants launch electronic trading in return), a lawsuit commenced by NYBOT permit holders, and the challenges of convincing the marketplace that the acquisition of an open-outcry agricultural commodities exchange by the energy market's leading electronic exchange would succeed – there existed substantial risk that ICE's stock price could precipitously drop. (Tr. 339-40, 363-65, 465-67).

decision to cut off the acceptance of late elections and that the decision was not motivated by a desire to ensure that any particular member or members were included or excluded from the election process. (Tr. 339-40, 347-48, 362-66, 368, 378-79, 424, 426-28 (Surdykowski), 464-67 (Sprecher), 549, 551-52 (Hirschfeld), 672 (Recco)).[3] Indeed, at the time of the decision, neither Surdykowski nor anyone else at ICE or NYBOT knew whether or when Plaintiff, or any other of the few remaining unresponsive members, would submit an election form. (Tr. 380, 426-27, 553, 674).

B. Defendants Did Not Act to Favor So-Called "Connected" Members

Not only did Plaintiff fail to establish that Defendants were motivated ***solely*** by an interest in accommodating so-called "connected members," or in ensuring the acceptance of election forms from such "connected members," he failed to establish either that the members in question were, in fact, "connected," *see Amirsaleh*, 2009 WL 3756700, at *6 n.30, or that Defendants gave them any special treatment to the exclusion of other members. *Id*. at *6. Plaintiff's "connected member" theory is premised entirely on his request for an inference that three specific NYBOT members – John MacKintosh, Eric Bolling, and Kevin Davis – who contacted ICE's chief executive officer, Jeffrey Sprecher, or NYBOT management directly prior to the decision to accept late forms, must have been "connected" in a way that bespeaks conspiracy or bias on Defendants' part. Such an inference finds no support in the trial record.

[3] At trial, Plaintiff made the odd argument that the Merger Agreement did not require Defendants to distribute merger consideration by January 29, 2009, but rather only to "allocate" it by that date. Plaintiff's position – with which Defendants disagree – is in all events beside the point. As shown at trial, at the time of the events in question, Defendants believed (and had publicly disclosed) that the Merger Agreement required the consideration to be distributed by January 29, 2007. (*See, e.g.*, JX 76 (January 12, 2007 press release announcing Computershare "will deliver the applicable merger consideration to each NYBOT member by January 29, 2007 …"); Tr. 364 (Surdykowski believed and the marketplace expected that consideration would be distributed by January 29). Computershare shared that understanding. (JX 135 (email from Computershare stating "we need to cut this off asap in[ ]order to make the 29th date").

MacKintosh was a NYBOT floor broker who emailed NYBOT's chairman, Fred Schoenhut, on January 6, 2007, to express concern that he had missed the January 5 Election Deadline. (Tr. at 541, 574). Schoenhut, who was not involved in any decisions relating to the acceptance of late elections, forwarded MacKintosh's email to Audrey Hirschfeld, NYBOT General Counsel, and Helene Recco, Director of NYBOT Member Services, asking what the prospects were for acceptance of MacKintosh's late form. Hirschfeld responded that at the time she believed it would be accepted because of the intervening National Day of Mourning (a belief that later proved incorrect). (JX 47). Recco responded – as she did to all similar requests from members – that it would be "worth a shot" for MacKintosh to submit his form (JX 45; Tr. 648, 660, 682). Despite the facts that Defendants thereafter determined ***not to accept any*** late election forms, including MacKintosh's (Tr. 329, 540-41; *see also* JX 64), and that MacKintosh's form was not accepted until January 17, 2007, when it was accepted along with ***all other late forms*** that had been submitted up to that point (Tr. 541; *id.* 361; JX 109), Plaintiff proffers nothing beyond the innocuous email communications involving Schoenhut in support of his requested judicial inference.[4] Moreover, none of Schoenhut, Hirschfeld, or Recco advised anyone at ICE about the communications from MacKintosh or requested that MacKintosh's late election be given any consideration at all, much less special consideration. (Tr. 540-41, 648). Plaintiff's suggested inference is thus defeated by these and the other facts established at trial.

Bolling's supposed "connection" with Defendants is equally illusory. A NYMEX natural gas trader with no personal or business dealings with Defendants other than his NYBOT

[4] That MacKintosh decided to reach out to Schoenhut is not remarkable given that Schoenhut had been a NYBOT floor broker "for decades" and "everyone on the floor knew" him and that NYBOT's CEO and President, Harry Falk, had unexpectedly passed away only days before, so Schoenhut "would have been … someone to reach out to." (Tr. 541).

membership (Tr. 444-47), Bolling wielded no special influence and was treated no differently than any other late member who contacted Defendants about submitting a late form. Sometime at or around the date the merger closed, Bolling called Sprecher to ask if a late election form could be accepted. (Tr. at 444, 447-50). Sprecher's response was not to offer special assistance to Bolling, but rather to offer to look into the issue and get back to Bolling:

> Q: So how did you respond to Mr. Bolling [. . .] ?
>
> A: I was cordial, and I said, "Let me look into it," and I literally didn't know the answer [whether late elections could be accepted], and I said, "Let me look into it and I'll get back to you."
>
> Q: Did he mention that there might be others who had not received forms?
>
> A: Either he suggested that there were others in his situation, or subsequent to that call I walked down the hall and poked my head, I believe, into Jo[h]nathan Short's office, our general counsel, and I mentioned this conversation, and either Jo[h]nathan said there were others in this situation, or I conveyed to him that Mr. Bolling told me there were others in the situation. [. . .]
>
> Q: What did you tell your legal team?
>
> A: I asked if it was possible to accept late forms, and had a conversation, a brief conversation about the sense there was a legal requirement that we could not accept forms. I asked them if they would please research whether or not we could accept forms from late members.
>
> Q: So it was your preference to accept late forms?
>
> A: Yes. Unfortunately, this whole episode we're talking about was driven by my desire to try to accommodate more people.

(Tr. at 448-50).

After receiving the call from Bolling, Sprecher expressed to Johnathan Short, ICE's General Counsel, and Surdykowski his preference that, to the extent feasible, Defendants should seek to accommodate ***all NYBOT members*** who had not submitted an election form by the January 5 deadline. (Tr. 449-50; *id.* 340-42). As explained above, that preference arose out of Sprecher's desire – consistent with ICE's long-standing business philosophy – to keep customers

happy. (Tr. 443-44). When Sprecher got back to Bolling, he told Bolling essentially the same thing NYBOT Member Services was telling other members who had made similar inquiries – submit the form, but we cannot promise it will be accepted. (Tr. 450-51; *see also* Tr. 201).

Thus, Bolling's call did not cause Sprecher to seek to influence the election process in favor of Bolling – an individual Sprecher had met only once in passing – or any other particular member, and Sprecher did not do so. (Tr. 356, 378-80, 436-37, 445). To the contrary, Sprecher expressed his preference that Defendants accept ***any and all*** late elections if legally and practicably permissible. (Tr. 449-50; *see also* Tr. 340-41).

Davis also was not a "connected" member and received no special treatment in the election process. Davis spoke directly with Sprecher sometime after Bolling's call, having called Sprecher regarding an unrelated business matter. (Tr. at 452). But, as Sprecher testified, Davis's relationship with Sprecher was frosty at best, even "adversarial." (*Id.* at 454, 455-56). Indeed, Davis had twice tried to frustrate ICE transactions (*id.* at 453-55). Sprecher, unsurprisingly given these facts, took no special interest in Davis's election. He did not know at the time of his call whether Davis had submitted an election form (even Davis did not know); nor did he subsequently learn or attempt to learn when or if Davis ever submitted an election form:

> Q: How did the subject of election forms arise?
>
> A: I don't specifically recall. I think either he asked me how the closing was going or when he was going to get paid. I said to him – this was after my conversation with Mr. Bolling, and I said to him that there were some late filers and we were researching the question on whether or not we could accept them.
>
> I asked him if he knew whether his firm had gotten their papers in on time, and he said he did not know, he was not involved. I told him, "Well, to the extent you didn't get them in, you should get them in quickly because we are researching this question."
>
> Q: Did you tell him it would be accepted?
>
> A: No.

Q: Did you say anything about whether it would be accepted?

A: No. I didn't know at the time whether it was even legally possible.

[. . .]

[. . .] I would say at the time I had no idea whether Mr. Davis had filed or not filed. I just mentioned this in passing.

Q: Did you, after speaking to Mr. Davis, speak to your legal team about him and his election forms?

A: Not that I recall.

Q: Did you feel it was of particular importance to allow Mr. Davis to get his form in and accepted?

A: [. . .] I frankly just dismissed it and didn't think much about it.

(Tr. at 452-57).

This limited contact, and the limited attention Sprecher gave it, does not support a conclusion that Davis was favorably "connected," let alone that Sprecher directed anyone to give Davis special treatment. In fact, the trial evidence shows that Davis did not submit his form in response to his conversation with Sprecher, as his firm (ED&F Man International) appeared on Computershare's January 17, 2007 list of nonresponsive members – the same list that Member Services used to contact members who had not yet returned their forms. (JX 109, 112). While Davis's election form ended up being the last late form accepted, Surdykowski – who made the decision to cut off the acceptance of late elections – testified that he did not know who Davis was, did not know Davis had spoken to Sprecher, and did not fix the cut off to accommodate Davis or keep the acceptance window open just long enough for Davis's (or any other member's) form to be accepted. (Tr. 357, 359, 373, 378-80, 423-24, 436-38).[5]

[5] Nor did Member Services give Davis any special treatment. As with other forms submitted directly to Member Services, Recco forwarded Davis's form to Computershare (JX 144), and the follow-up inquiries to Davis's firm about submission of the appropriate tax form were no different than the (*continued …*)

Plaintiff tries to make much of a 10:26 a.m., January 19 email from Computershare asking Surdykowski to confirm that Davis's election would be the last accepted. (JX 149). The inference Plaintiff would have the Court draw from that email, however, is not supported by the trial record. The email followed shortly after another Computershare email on which Surdykowski was copied (JX 148) that showed when Davis's election had been submitted on January 18. Surdykowski knew Davis's form was the last received on January 18 (although he did not know who Davis was), and the Computershare email, understood in context, shows only that Computershare was seeking to confirm that the last election received on January 18 – Davis's election – would be the last accepted. (Tr. 374-75).

Plaintiff's contention that Defendants opened and closed the window for accepting late elections to accommodate "connected" members – by ensuring they received stock – at the expense of other members is further belied by other evidence adduced at trial. For example, hundreds of the 695 members (out of total of 748 members) who submitted election forms on or before January 5, 2007, were significant participants in Defendants' markets. (JX 69, 184). Those members, who would be "connected" under Plaintiff's theory, necessarily received less stock with every late election that was accepted, destroying the logic of Plaintiff's contention that Defendants' sole motivation was to accommodate "connected" members. (Tr. 49-51). Moreover, among the 28 members who did not submit an election form on or before January 18, 2007, were several major corporations and important commercial participants in Defendants' markets, including Kraft Food Global, Inc., Nestle Foods Corporation, Nabisco Brands, Inc., and Refined Sugar, Inc. (*See* JX 184; Tr. 555-56). The only reasonable inference that can be drawn

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similar inquiries Member Services made to other members throughout the election process, including the same day Davis's firm was contacted and later. (*See* JX 156; Tr. 638-39, 672-73, 678-80).

from these facts is either that Defendants were not motivated by a desire to favor "connected" members, or that their efforts to do so were so inept as to have been without appreciable effect.

Having failed to establish that MacKintosh, Bolling, Davis, or any other member was "connected" or received special treatment as a result of supposed "connections," Plaintiff's claim that Defendants breached the implied covenant necessarily fails.

C. Defendants Reached Out to Delinquent Members, Including Plaintiff, and Gave Them the Same Opportunity to Submit Late Forms

The trial record establishes that Defendants gave equal attention and treatment to each NYBOT member who had failed to submit an election form by the January 5, 2007 deadline. Members who inquired about the January 5 deadline before that date were advised of the deadline (and its imminence) and were sent an election form if they indicated they did not have one. (Tr. 632-33, 641-42, 646-47; *see also, e.g.*, JX 26, 29). After the Election Deadline (including after the initial decision not to accept any late elections), Member Services continued to send an election form to any member who requested one, but consistently told such members that the deadline had passed and that Member Services could not guarantee late forms would be accepted. (Tr. 660; *see, e.g.*, JX 62). But after the Election Deadline and before January 17, Member Services did not try to contact Members to request they return election forms because, as of that time, a decision had been made ***not to accept*** late election forms. (Tr. 758-60, 786-88).[6]

[6] For the same reason, Linda Chin, Member Services Senior Coordinator, did not ask members about the election form when she called them about the Pledge Agreement beginning on or about January 12. (Tr. 759-60). Unlike the election forms, which were a one-time document used to elect merger consideration and were collected by Computershare, the Pledge Agreements were to be returned to Member Services. (Tr. 530-31; JX 12, 13). Defendants were particularly concerned that Members return their Pledge Agreements because a signed Pledge Agreement was needed for members to retain trading rights after the merger. (Tr. 524-30). Even if a member had not elected stock (*continued …*)

As soon as NYBOT Member Services learned on January 17, 2007 of the decision to accept late election forms, it began calling ***all*** members – including Plaintiff – who had yet to submit a form, using a list of non-submitting members received from Computershare. (Tr. 761-70; JX 109, 112, 114). As Chin testified, "[w]e tried to get to everyone as soon as possible because we d[id not] know how long, how much time we ha[d]. We tr[ied] to reach everyone the quickest way possible." (Tr. at 766) Plaintiff was among the first members Chin tried to contact; she left voice mail messages for him on January 17 and 18 (and had also left a message on January 16 about the Pledge Agreement he had failed to return). (Tr. 763-64, 769-70, 799).

The expedited and extraordinary efforts that Member Services undertook to reach non-submitting members in the two days following the January 17 decision to accept late forms were not only in keeping with the purpose of the department – to assist members – but lend conclusive support to Defendants' good faith motivation in deciding to accept late elections. While Plaintiff argues 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 were did not make extraordinary efforts 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, Chin and others in the Member Services department did their utmost. (Tr. 766, 802-03, 809).[7] It is more than merely noteworthy that the efforts by Member Services to contact

consideration, the member could still purchase ICE stock on the open market and retain trading rights by pledging that stock pursuant to the Pledge Agreement. (*See, e.g.*, Tr. 553, 681).

[7] Member Services did not have email addresses for the majority of members (and did not have one for Plaintiff) and therefore did not use email to make the initial contact with members on the list. (Tr. 770, 625 (Member Services had "maybe 30 percent" of members' email addresses on file and did not, as a rule, maintain those addresses in its files)).

non-electing members to advise them of the short window of opportunity available to them specifically included several efforts to reach Plaintiff. In the end, it was not Defendants' failure to offer to Plaintiff the same chance to act, but rather his own lackadaisical reaction, that ultimately foreclosed his opportunity to elect.

D. Plaintiffs' Inattention and Delay – Not Defendants' Conduct – Is to Blame

Plaintiff's effort to play the victim notwithstanding, his own disregard of the various entreaties he received from numerous sources caused him to squander the fortuitous opportunity to submit a late election form. As shown during trial, Plaintiff delegated responsibility for keeping him apprised of the election process to an assistant who did not understand it. (*See*, *e.g.*, Tr. at 134).[8] His and his assistant's attention to the process were strikingly cavalier. As of January 17, Plaintiff still had not yet returned his signed Pledge Agreement in response to Chin's earlier call and follow-up fax of January 12; nor had he responded to her ensuing message on January 16 (Tr. 753-57; *see also* JX 140). Chin nonetheless called again – twice – on January 17 and 18 to inform Plaintiff that he still had an opportunity to submit an election form; again, she left voicemail messages, expressing the urgency of the matter. (Tr. 167-69, 171, 175-76, 763-64, 769-70).

By the time Plaintiff's assistant finally returned those calls late in the day on January 18 (and simultaneously faxed Plaintiff's signed Pledge Agreement), Plaintiff had boarded a flight to Las Vegas. (Tr. 770). Upon arriving in Las Vegas in the early evening of January 18, Plaintiff

[8] Ms. Stavrinou's claim that she called Member Services on January 4 and asked about the election form is neither credible nor supported by the trial record. Had she called with such a question, she would have been told the Election Deadline was the next day (Tr. 641-42, 644-47). Moreover, there was no "other number" to call about the election form. (Tr. 646). The other number Stavrinou apparently called was that of Patricia Cuti, the Member Services staff member primarily responsible for seat leases. (Tr. 159-61, 622-23; JX 203 at 20). One of Plaintiff's seat leases had expired on January 3 and Ms. Stavrinou was calling to inquire about a new lessee. (Tr. 146-47, 644; JX 7. 40).

had waiting for him an email from Chin attaching the election form for his signature and explicitly reiterating the urgency of returning it promptly "to save [his] Memberships" (JX 138), an email from his assistant indicating that Plaintiff would lose his memberships if he did not attend to the matter promptly (JX 142), and a fax from his assistant (sent to his Las Vegas hotel) providing him another copy of the blank election form. (Tr. 17, 115). His assistant had also left him a voicemail message reiterating the urgency of the situation. (Tr. 17, 170-71). Had Plaintiff acted with the slightest alacrity in response of these pointed warnings, his election form would have been submitted prior to Defendants' decision to close the window. Yet Plaintiff did not return the form that evening. Nor did he do so early the next morning. Instead, he waited until 2:06 p.m. EST on January 19 to fax his signed form to Computershare. (JX 154). By then, the decision to cut off the acceptance of late elections had been made.[9]

Plaintiff has only himself to blame. His strenuous efforts to avoid taking responsibility for his own actions are defeated by the lengths to which others, most specifically Chin, went in conveying the urgency of the matter, and the fact that he disregarded the last clear chance he was given to secure by his own hand the relief he now asks the Court to impose. There can be no better evidence of the urgency of the messages Chin conveyed to him than the email Plaintiff's assistant sent him on the evening of January 18, while the window of acceptance was still ajar:

> Ok. Mahyar you absolutely need to open an email Linda from NYBOT is sending you. ***You will lose your memberships if this is not filled out. It is already late, it was due on the 5th***. I hope there is no problem but you will need to complete this booklet and return it to her – she is sending you it by email. ***Do it***.

JX 142 (emphasis added).

[9] Defendants did not learn until later in January that Plaintiff had submitted his form at all. (Tr. 376, 380-81 (Surdykowski), 553 (Hirschfeld), 674 (Recco)).

CONCLUSION

The evidence adduced at trial shows that Defendants decided to accept late elections and to hold the acceptance window open as long as possible to accommodate as many members as possible, and that they ultimately closed the window only upon concluding that to fail to do so would jeopardize Computershare's ability to distribute the merger consideration by the January 29 deadline. The fact that Plaintiff's election was not submitted until after that window closed is an unfortunate fact, but it is an outcome that Plaintiff chose to risk, and most certainly not a valid legal basis on which to establish a breach of the implied convenient of good faith and fair dealing by Defendants. Accordingly, Defendants urge the Court to dismiss Plaintiff's claim and to enter judgment in Defendants' favor.

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I hereby certify that on December 23, 2009, a copy of the foregoing was served electronically via *LexisNexis File & Serve* upon the following counsel of record:

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