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PRELIMINARY STATEMENT

The trial record makes clear that Defendants exercised their discretion to accept late elections in bad faith and, as such, breached the implied covenant of good faith and fair dealing. The fundamental trial inquiry concerns Defendants' intent at the time they decided to accept the late elections. Defendants' decision to accept late elections was driven by ICE CEO Jeffrey Sprecher's interest in assisting well-known industry players, Eric Bolling and Kevin Davis. At the time Mr. Sprecher received Mr. Bolling's call for help with his late election, Defendants' policy was to reject as untimely any election not submitted by the January 5, 2007, 5:00 p.m. election deadline, unless the NYBOT member could demonstrate that it was a NYBOT error that caused the late filing. See (Trial Transcript ("Trial Tr.") 193 & Joint Exhibit ("JX") 64; Trial Tr. at 195-98 & JX 87). In order to permit Messrs. Bolling and Davis to submit late elections, Defendants changed their policy, as these two important NYBOT members did not have legitimate excuses for being late. (Trial Tr. at 203-05 & JX 106).

Moreover, as discussed further below, Defendants provided preferential treatment to Messrs. Bolling and Davis which ensured that *they* would have an opportunity to make late elections. These influential members were assisted by people at every level of seniority at NYBOT and ICE and, even more importantly, these members had disparate access to critical information needed to ensure that their late filings could be made and honored.

Plaintiff received no such assistance and no such information (until it was too late). He did not receive an election form in the December 19, 2006 NYBOT mailing and despite calls with NYBOT's member services department, including on January 4, January 10, and January 12, 2007, was never provided the information given to Messrs. Bolling and Davis, nor was he provided an election form until just before 5:00 p.m. on January 18, 2007. (Trial Tr. at 9, 14-15 & JX 138; Trial Tr. at 85-87, 96-108 & JX 195 at 20). When Plaintiff's assistant finally received the election form, Plaintiff was on a cross-country flight and although his assistant made clear that he was traveling and desperately wanted to make an election, no senior staff at NYBOT, or anyone at ICE or

Computershare was alerted that this “customer” was trying, but likely would be unable to submit his election on January 18. (Trial Tr. at 112-13, 168-69, 174-75, 376, 380).

Once Mr. Davis (a day after Mr. Bolling) finally submitted his election after the close of business on January 18, 2007, Defendants had no reason to hold the “window” open any longer and, thus, it was closed. As discussed below, the trial record shows that Defendants had no legitimate basis to close the window when they did -- no reason to close it as of Mr. Davis’s election on Thursday, January 18, as opposed to, for example, the close of business the following day on Friday, January 19. (*Id.* at 424-28). Defendants closed the window without inquiring whether any other members (not named Davis) were trying to get their late form submitted. (*Id.* at 242-43, 423-27 & JX 135). Unfortunately for Plaintiff, no one at NYBOT, ICE or Computershare, except for NYBOT’s Ms. Chin, knew Plaintiff was trying to get an election form in on January 18 and clearly no one was waiting for his election as they were for Mr. Davis’s form. (Trial Tr. at 674, 731-32; 797-98; Deposition Transcript of Donnie Amado (“Amado Dep.”) at 80-81).¹ Plaintiff was “cashed” out, not because he was late, but because he was just a little later than Mr. Davis.

To be sure, Defendants’ trial witnesses waxed poetically about NYBOT members as “future customers” and about how much they wanted to help all these customers. And, this “accommodate the customer” argument was not first sprung at trial. It first appeared in the form of defense counsel’s prose after discovery revealed the truth about Defendants’ exercise of discretion to accept 25 late stock elections. Yet, recent protestations notwithstanding, there is not a single document, circa January, 2007, to support Defendants’ post-discovery argument that decisions concerning late elections were ever driven by a concern over helping all future “customers.” *See, e.g.* (Trial Tr. at 429-36, 504, 603-04).

¹ All deposition transcripts have been lodged with the Court and, for the Court’s convenience, deposition transcript excerpts cited herein are attached hereto.

ARGUMENT

I. IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The implied covenant of good faith and fair dealing is designed to “protect the reasonable expectations of the parties to (or beneficiaries of) the contract.” Amirsaleh v. Board of Trade of the City of New York, No. 2822-CC, 2009 WL 3756700 (Del. Ch. Nov. 9, 2009) at *4.² The trial issue was “whether the manner in which [D]efendants exercised their discretion conflicted with the reasonable expectations of the pre-merger NYBOT and the pre-merger ICE (the ‘Merger Agreement Parties’).” Id. at *5. Critical to this determination is identifying the “conduct the Merger Agreement Parties would clearly have agreed to proscribe had they foreseen it.” Id. The Court determined that “the Merger Agreement Parties would not have agreed to decline all late elections *unless* certain connected members failed to get their forms in on time. Nor would they have agreed to close the election window as soon as the last of the connected members got their forms in.” Id. at *6 (emphasis in original).

As demonstrated at trial, preferential treatment and policy change driven by assisting certain members is exactly what occurred and, as the Court instructed, “common notions of fair dealing dictate that affording such preferential treatment” is inappropriate and in breach of the implied covenant of good faith and fair dealing. Id.

A. The Decision to Accept Late Elections Was Driven By Messrs. Bolling's and Davis's Failure to Make Timely Elections

1. Election Deadline Was Set and Confirmed Despite Many Failing to Timely Submit

Defendants set the election deadline for 5:00 p.m. on January 5, 2007 and disclosed it only in the election form mailed to NYBOT members on December 19, 2006. (Trial Tr. 184-86 & JX 13). After the passing of President Ford and an unexpected federal holiday, Defendants were purportedly concerned that some members might miss the deadline by one business day and considered extending the deadline until January 8, 2007, if enough elections were received in the mail

² Plaintiff incorporates by reference his Summary Judgment briefing for a complete recitation of Plaintiff's position regarding the applicable legal standards.

on January 8, 2007 to indicate that the one day without mail service caused this delay. (Trial Tr. at 187-88).

Before finalizing the decision not to extend the deadline, ICE Associate General Counsel, Andrew Surdykowski, requested and received a spreadsheet showing the names of members who had not submitted election forms as of January 8, 2007, even though he conceded that the identity of members who failed to submit was not relevant -- he only needed the *number* of members who failed to submit, not their *names*. (*Id.* at 189-90 & JX 57). As it turned out, but was not yet discovered by Defendants, this January 8, 2007 spreadsheet was an incomplete list of members who had failed to submit. It did not, for example, include Messrs. Bolling, Davis or McIntosh (or Plaintiff). (Trial Tr. at 190-92 & JX 57). Mr. Surdykowski was not familiar with any of the members who appeared on this incomplete list, explaining that “none of the names meant anything to [him].” (Trial Tr. at 190; Deposition Transcript of Andrew Surdykowski at 44). Of course, Messrs. Bolling and Davis were also unknown to Mr. Surdykowski at this time, as they had not yet spoken to Mr. Sprecher. (Trial Tr. at 352-55 & JX 106).

Mr. Surdykowski learned that no elections were received by mail on January 8, 2007 and concluded that the additional federal holiday had not affected any members. (Trial Tr. at 192-93). On January 9, 2007, Mr. Surdykowski confirmed that the election deadline would not be extended, late elections would not be accepted and the “deadline remain[ed] as publicly disclosed and as originally stated in the election forms (Friday [1/5/07], 5:00 p.m.)” (Trial Tr. at 192- 93 & JX 64). Late elections were not to be accepted, absent a mistake by NYBOT that caused an election to be late. (Trial Tr. at 196-98). This position continued unchanged until January 17, 2007. The idea of accepting late elections (absent good cause) was not analyzed again until ICE CEO Mr. Sprecher got involved.

2. Policy Is Reversed and Late Elections are Accepted After Mr. Sprecher Seeks to Help Messrs. Bolling and Davis

Mr. Sprecher’s first involvement in the late election issue was a call he received, on January 12, 2007, from Eric Bolling, who was “well known as being one of the largest natural gas traders at the NYMEX.” (Deposition Transcript of Jeffrey Sprecher (“Sprecher Dep.”) at 26-28;

Trial Tr. at 468-72). Mr. Bolling explained to Mr. Sprecher that “the election deadline had passed and he had failed to turn in his forms.” (*Id.*) Mr. Bolling was “really very contrite [and] asking for help.” (Trial Tr. at 476-77). In turn, Mr. Sprecher asked his legal team “on behalf” of Mr. Bolling if *his* late election could be accepted. (Sprecher Dep. at 40-41).³ Mr. Sprecher himself followed up with Mr. Bolling, urging him to submit his election “while [ICE] researched whether they could be accepted.” (Trial Tr. at 479-80; Sprecher Dep. at 48).

A few days later, Mr. Sprecher was on the phone with Kevin Davis, who Mr. Sprecher understood to be the CEO of “the largest clear[ing firm] on most commodity exchanges in the world ... [and] a large customer of ICE in [its] other businesses and [Sprecher] presume[d] of NYBOT[,]” as well. (Sprecher Dep. at 43-46; Trial Tr. at 484-85). These two CEOs were discussing matters unrelated to the merger. (Trial Tr. at 484-85). In light of his recent discussions with Mr. Bolling, Mr. Sprecher was concerned that Mr. Davis might also miss out on the much more valuable stock election and asked him if his election had been submitted. (Trial Tr. at 486-91). Mr. Davis was confused. He did not know whether or not he had submitted an election and was told by Mr. Sprecher to find out and get one in if it had not been submitted because counsel was researching whether late elections could be accepted. (*Id.*)⁴

Once Mr. Surdykowski, through ICE General Counsel Johnathan Short, learned that Mr. Sprecher had intervened on behalf of Mr. Bolling and that Mr. Sprecher assisted Mr. Davis, as well, (*Id.* at 198-200), then the Davis and Bolling names had to “mean something to him.” Messrs. Bolling and Davis had no “legitimate” excuses for being late so the issue, by necessity, became whether Defendants could honor all late elections. (*Id.* at 201-02).⁵ While outside counsel

³ At trial, Mr. Sprecher tried in vain to correct his deposition testimony, by saying that he was asking about *all* late elections and that he had learned that there were other members who had failed to submit their elections too. (Trial Tr. at 472-75). In any event, as described further below, Messrs. Bolling and Davis were never treated like *other* members.

⁴ Defendants tried mightily at trial to highlight business-related disagreements that Messrs. Sprecher and Davis had. (Trial Tr. at 453-56). Regardless of how one characterizes their relationship, Mr. Davis was able to get Mr. Sprecher on the phone and received preferential treatment never given to Plaintiff. See *infra* Section I.B.

⁵ Defendants argue that when the decision was made on January 9, 2007 not to extend the election deadline, that they specifically “denied” the late election of John McIntosh (aka “Tosh”), the member who had a

researched the issue, Mr. Bolling and then Mr. Davis were urged to get their elections in and were assisted in every way. (Trial Tr. at 201-02, 479-80; Sprecher Dep. at 48; see infra Section I.B).

The record is clear that but for the calls by Messrs. Bolling and Davis to Mr. Sprecher, no late elections would have been accepted, save for possibly the late election of Mr. McIntosh who had a special relationship with and access to NYBOT's Chairman. Mr. McIntosh was never treated like an ordinary member, as evidenced by reassurances given to him that his late election should be accepted before there was any basis for doing so. (Trial Tr. at 576-80 & JX 47).

B. Defendants Provided Preferential Treatment to Messrs. Bolling and Davis to Ensure That They Would Be Able to Submit Late Elections

The record is clear that no "reasonable efforts were made to give all late filers the same or substantially the similar assistance turning in their late forms...." Amirsaleh, 2009 WL 3756700 at *6. Moreover, the preferential treatment Defendants afforded to some members cannot be explained away as simply "disorganized, disjointed, or less than optimal" general efforts to help all members. Id.

Had the Merger Agreement Parties considered the need to accept late elections, they would have negotiated a fair and uniform process that gave all who missed the election deadline the same or substantially similar information and opportunity to submit a late election before the "window" closed. This is simply not what happened.

In Mr. Sprecher's calls with Messrs. Bolling and Davis, he provided information (even volunteering information about the election deadline and form) and help that NYBOT's member services never gave to plaintiff. (Trial Tr. at 486-92). To be sure, only two NYBOT members (Bolling and Davis) ever even gained access to Mr. Sprecher in and around January 2007. (Id. at 457-58, 492-93). Mr. Bolling also spoke directly with NYBOT's General Counsel, Ms. Hirschfeld, and was assisted by Ms. Hirschfeld's assistant and other NYBOT employees. (Id. at 585-89 & JX

chummy relationship with NYBOT Chairman Fredrick "Freddie" Schoenhut. See, e.g., (Trial Tr. at 329, 361). There is no evidence in the record, however, that Mr. McIntosh was ever informed that his election would be rejected at this time, even though he was given "comfort" that it would be accepted on or about January 8, 2007. (Id. at 576-80 & JX 47). In any event, it was ICE and Mr. Sprecher that were the dominant players in this transaction and clearly things changed after Mr. Sprecher got involved to help Messrs. Bolling and Davis.

103). Mr. Davis was contacted and assisted by NYBOT member services head, Ms. Recco, who also followed up more than once with Mr. Davis's office to make sure everything was in order with Mr. Davis's late election. (Trial Tr. at 670-71, 730-31 & JX 144, 145). Bolling and Davis were informed about the existence of an election form and of the need to submit a (late) form (and where and how to get one) by no later than January 12 and January 16, respectively. (Trial Tr. at 481-82, 499-501, 590-91, 605-06 & JX 184).

During the same time period, Plaintiff's office was "helped" by NYBOT member services' employee Ms. Chin who did not tell Plaintiff's assistant that there was a document called an "election form" (or that it was past due) -- separate and apart from a "pledge form" -- even though (1) Ms. Stavrinou indicated that she never received NYBOT's mailing and that she "needed everything;" and (2) Ms. Chin thought Ms. Stavrinou was confused about the forms she needed relating to the merger. (Trial Tr. at 104-07, 713-16, 758-60, 783-88).⁶

In sum, a significant aspect of the preferential treatment afforded Messrs. Bolling and Davis was the critical information they were given that was not given to Plaintiff, particularly during the period between Mr. Bolling's January 12, 2007 call to Mr. Sprecher and ICE's decision on the afternoon of January 17, 2007 to accept all late elections accumulated.⁷ Specifically, these members (but not Plaintiff) were told during this period, among other things: (1) that there was an election deadline that passed -- it was January 5, 2007; (2) that there is an election form (as well as a pledge

⁶ Calls by Plaintiff's office to Member Services in December and early January looking for the expected mailing, yielded responses to the effect of it "would be mailed ... soon" or "they were mailed out" already and you should get it soon. (Trial Tr. at 629). Ms. Recco testified on direct examination that her practice, when speaking to members pre-January 5, 2007, was to remind them of the deadline and to get their form in "by Friday" -- even if they were discussing other matters. (*Id.* at 641-42). Ms. Stavrinou spoke to Member Services on January 4, 2007 and recalls speaking to Ms. Recco about the mailing she never received. (*Id.* at 96-101 & JX 195). On cross examination, Ms. Recco contradicted herself, indicating that in the days leading up to January 5, she would not volunteer information about the election deadline and form, see (Trial Tr. at 737-38) -- i.e., the way Mr. Sprecher did for Mr. Davis in mid-January. Of course, even if Ms. Recco's recollection was correct that her discussions with Ms. Stavrinou were only about seat leases, why not volunteer information about the election deadline, as she (initially) stated was her practice, particularly if Defendants' truly sought to help all NYBOT members?

⁷ The record is clear that had Plaintiff received this information and an election form, he would have had ample opportunity to return his form before he left for his business trip on January 18, 2007.

form) that must be submitted; and (3) to get your late election form in quickly while the matter is being researched, as it might be accepted or that there was a “window of opportunity.” See, e.g., (Trial Tr. at 692-94, 713-16, 783-88, 792-94).

C. Defendants Held the Late Election Window Open Only as Long as Was Necessary to Permit Messrs. Bolling and Davis to Submit Late Elections

Defendants’ actions make clear that the election window was held open just long enough to ensure that Mr. Davis’s form was submitted. Even assuming the accuracy of Defendants’ witnesses’ recollections that neither Mr. Sprecher nor Mr. Short spoke words to the effect of “hold open the window until Davis gets his form in,” Defendants’ actions show that this was precisely their objective.

Defendants’ decision to close the late acceptance window was *not* driven by a balance between considerations of customer satisfaction and leaving enough time for the calculation and distribution of merger consideration. These pre-textual arguments surfaced post-discovery. The overriding concern late on January 17, 2007 and continuing late in the day on January 18, 2007, was when Mr. Davis would finally submit his late election.⁸ To be sure, Defendants knew that they had to cut-off the acceptance of late elections at some point soon, but there is simply no other rational justification in the record to explain the reason and timing for “closing the window” when they did, other than it was because Mr. Davis had just submitted his form.

First, despite Defendants’ protestations about what “they understood” or what “members expected,” the Merger Agreement simply does not obligate Defendants to “distribute” merger consideration by January 29, 2007, but rather provides that Defendants will “cause” Computershare to “effect the allocation” of members’ consideration rights by January 29, 2007 and otherwise when speaking of distribution, uses “as soon as practicable” language. Compare (JX3 at

⁸ Despite the preferential treatment, both in terms of access to information and assistance from NYBOT and ICE officials, it still took Mr. Bolling approximately five days (until January 17) and Mr. Davis two to three days (until late on January 18) to submit their late Election Forms. (Trial Tr. at 481-82, 499-501, 590-91, 605-07 & JX 184). If Plaintiff’s diligence were relevant, as Defendants seem to suggest, the record demonstrates that he was far more diligent than Messrs. Bolling and Davis.

4.3(e), 4.4(b) with JX 10 at 2.F, 2.G); see also (Trial Tr. at 219-24, 401-03). More importantly, however, the “as soon as practicable” language is consistent with Defendants’ true contemporaneous understanding (in January 2007) of their obligations regarding the distribution of merger consideration. A January 19, 2007 NYBOT release posted on NYBOT’s website explained that merger consideration would be mailed out to members not “on” or “by” or “not later than,” January 29, but rather “*on or about* January 29, 2007.” (JX 146 (emphasis added) & Trial Tr. at 674-75, 740-41).

Second, Defendants’ post-discovery argument that the “window closing” had nothing to do with Mr. Davis, but rather the dire concerns of missing the alleged January 29, 2007 deadline is again belied by the record facts. If all members were being treated the same and the window was not being held open specifically for Mr. Davis, on January 18, 2007 at 3:53 p.m., Mr. Surdykowski would have had no reason to review the names of members who still had not submitted their elections. Yet, once again Mr. Surdykowski did not just review the *number* of “unreturned booklets,” he reviewed a spreadsheet listing the member names. This time the spreadsheet was complete. This time it included Mr. Davis -- the same Mr. Davis that had been in contact with and assisted by Mr. Sprecher. (Trial Tr. at 226-29, 422-24 & JX 135, 136).

As of 3:53 p.m. on January 18, 2007, approximately 96% of NYBOT members had already submitted elections. (Trial Tr. at 425-26). Computershare’s Donnie Amado told Mr. Surdykowski that acceptance of late elections had to be cut-off “asap,” and if the risk was as dire as Defendants now claim they believed it to be, then why not close the window then and there?⁹ Mr. Surdykowski -- and those with whom he consulted on when to close the window, Messrs. Short and Sprecher -- could see clearly that Mr. Davis was still on the list of members who failed to submit. (JX 135, 136). And they decided they could “leave the window open a little more” -- taking the risk

⁹ Mr. Amado did not recall whether by “asap” he meant a matter of days or a matter of hours. (Amado Dep. at 63-64 & JX 135, 136). Moreover, when asking for confirmation whether Mr. Davis was to be the last late election accepted, Mr. Amado certainly did not indicate that there was no more time or that Mr. Davis had to be the last. Rather, Mr. Amado was waiting on ICE for such confirmation so he knew when to start running the final prorations and because of the possibility that ICE might tell him that there would be other (later) elections accepted. (Amado Dep. at 72-76 & JX 152).

of missing the distribution deadline based on the reward that another member might submit. (Trial Tr. at 425-27). Of course, the only member on the list that they could have been waiting for -- the only member that meant anything to any of these decisionmakers at this point -- was Mr. Davis.

Third, Defendants do not even know when they decided to cut-off the acceptance of late elections. No firm decision was ever documented. There were telephone calls about it. And the only recollection is that it was either late on January 18 or in the morning of January 19, 2007. (Trial Tr. at 214-16, 369-70, 428-29). What was clear, however, was that Mr. Surdykowski knew that Mr. Davis's election had come in, having been copied on an email (from Ms. Recco to Donnie Amado at Computershare) early on January 19, which forwarded the transmittal email from the prior evening evidencing Mr. Davis' submission. (Id. at 234-39 & JX 144, 145, 148). And then Mr. Surdykowski was specifically asked later in the morning on January 19 by Mr. Amado if Mr. Davis would be the last late election accepted.¹⁰ (Trial Tr. 239 & JX 152).

Finally, there is no record evidence that Defendants were ever told that the window had to be closed on January 18, rather than January 19 or January 20. Defendants concede this point. (Trial Tr. at 231-32, 424-25, 506-07, 735). Computershare never gave Defendants a "drop dead" date for closing the window and Defendants never asked for one. (Id.) Computershare never told Defendants specifically how long tasks related to the allocation and distribution of merger consideration would take and Defendants never asked for anything more specific than "ballpark" information. (Id. at 232-34, 428-29). Furthermore, the record is clear that the allocation or "proration" actually took only a few hours and the review and finalizing of the prorations only took a few hours more and were not started until January 20. (Id. at 246-50 & JX 163, 159). Moreover, the actual distribution of merger consideration occurred on January 26, 2007. (Trial Tr. at 421-22 & JX 175). In other words, Defendants could have left the window open longer if their true purpose was to let as many late filers submit as possible.

¹⁰ No one at NYBOT, ICE or Computershare communicated to anyone about the status of Plaintiff's election on January 18 or after it was submitted on January 19. See, e.g. (Trial Tr. at 238, 246, 380, 674, 797-98).

D. Defendants' Post-Discovery Argument That They Wanted to Help All Future Customers Is Belied By the Record Evidence

Defendants conceded at trial that there was no record evidence to support their supposed “customer-based” justification for accepting late elections.¹¹ See, e.g. (Trial Tr. at 429-36, 504, 603-04). And, in fact, mountains of record evidence belie this litigation construct.

First, as of January 9, 2007, Defendants were prepared to reject all late elections. With no mention of the dozens of “future customers” that were going to be shut out, Defendants decided not to extend the election deadline by one business day in light of the federal holiday after President Ford’s death. (Id. at 187-88, 192-95 & JX 64).

Second, through and including the afternoon of January 17, 2007, Defendants were marshalling facts and arguments in support of rejecting late elections, absent “legitimate” excuses that NYBOT made an error. (Trial Tr. at 195-98 & JX 87). Nowhere to be found is any mention of “customer satisfaction” or “accommodation.” Inside and outside counsel were analyzing the “legitimacy” of excuses from late filers in a chart of complaints that took a strong position against members, which was far from embodying “the customer is always right” attitude. See, e.g., (JX 87 at 2 (“A claim that a member did not receive their documentation is *not* a sufficient reason to make an exception to the deadline since the election booklets were sent to the address of record.”) (emphasis added)). Mr. Surdykowski, on January 16, 2007, prepared a timeline related to late filers that detailed reasons why they could be rejected -- again with no mention of “future customer” concern. (JX 93 & Trial Tr. at 429-36). And NYBOT General Counsel, Ms. Hirschfeld, made clear that despite the holiday mailing and many claims that members did not get their forms, that members had “a responsibility” and “burden” to track down the information needed and if they did not or were unable to, then NYBOT was not “under an obligation” to help. (Trial Tr. at 541-44 & JX 53); see also (Trial Tr. at 681-85 (Ms. Recco explaining about a member’s “responsibility” and that “[i]f we don’t

¹¹ Defendants did highlight the references to “customers” that appeared in Mr. Sprecher’s December 6, 2006 remarks at the NYBOT members meeting -- many weeks before Defendants exercised their discretion at issue. (Trial Tr. 442-44, 504-05 & JX 8). The word “customer” does not again appear until becoming part of Defendants’ post-discovery litigation defense mantra.

penalize someone for not paying attention, what does that say to the people who follow the procedures?”)).

Third, Defendants consistently failed to take advantage of the many inexpensive opportunities to provide additional information designed to help all “future customers” timely submit elections, demonstrating that this was not actually their intent. For example:

- Defendants stated the election deadline only in the election booklet. (Id. at 184-87, 260, 602-03);
- Defendants decided to send additional copies of the election form by Federal Express to overseas members out of concern that they might not make the deadline, given the vagaries of holiday mail, yet with minimal additional expense and effort, they could have also overnighted all members (for approximately an additional \$14,000 in a \$1 billion transaction).¹² (Id. at 403-08);
- There was no mention of the election deadline on NYBOT’s website, in press releases or in SEC filings. (Id. at 261-62, 398-401, 601-03, 607-08, 741-44);
- There was no mention of the election deadline in the January 4, 2007 press release -- even though Defendants knew many members had claimed to have never received their forms. (Id. at 389-401 & JX 36); and
- There was no mention of the election deadline in the January 12, 2007 press release announcing that the merger had closed, nor was there mention that if members had not gotten their election in on-time, they should still submit them because the acceptance of late elections was being researched, even though this is what was told to Messrs. Bolling and Davis and a few others. (JX 76 & Trial Tr. at 269-70).

Finally, Defendants adopted inconsistent policies (or followed existing policy) which were contrary to Defendants’ late-proclaimed intent to assist more “future customers” timely submit elections. For example:

- Linda Chin testified that she “had no authorization,” during her January 12, 2007 calls seeking members’ pledge forms, to give information about election forms. Even though Ms. Chin understood Ms. Stavrinou to be confused about what forms she

¹² Defendants were certainly not required by the Merger Agreement to send this additional mailing to overseas members, nor were they required to mention the election deadline anywhere else but in their holiday mailing of the election booklet. Yet, their failure to take any of these simple (and inexpensive) actions -- as with their failure to provide timely and helpful information to all NYBOT members about the potential and then actual “window of opportunity” to submit late elections -- belies their post-discovery claim that they were trying to help all of their future customers submit elections.

needed, Ms. Chin never told her about the election deadline or form. (Trial Tr. at 783-88; Deposition Transcript of Linda Chin at 35-36);¹³

- After the January 17, 2007, determination to accept all accumulated late elections, members were not notified of the time after which late elections would no longer be accepted. (Trial Tr. at 796-97, 806). Members were not told, as Mr. Sprecher testified he instructed Ms. Chin to state, that there was a small “window of opportunity” and to get their forms in quickly. (Id. at 462-63, 491, 501-02, 685-86, 692-93);
- No uniform methods were employed on January 17, 2007, when Ms. Chin and her colleagues set out to call the approximately 30 members who had still not returned an election form, to ensure that all were notified and given the information needed. (Id. at 708-10);
- No group fax or group email, attaching a new form, was sent to members who had a fax number or email on file with member services and no Federal Express of the forms with a note to the 30 members was sent out so they would all have had at least a full day (on January 18) to review, complete and submit their elections. (Id. at 510-12, 725-26, 800-03, 809-10);
- Member services did not follow their protocol on January 17 and 18, as articulated at trial by Ms. Recco, that an alternative method of delivery must be tried -- i.e., fax, email, Federal Express -- after a first failed attempt to reach a member by phone. (Id. at 717-19, 802-03). Defendants undertook no oversight to make sure this policy was followed; and
- If a member never received an election form, and they did not have access to NYBOT or ICE top executives like Messrs. Bolling or Davis did, then the amount of time they would have had to get a late election in before the window closed was arbitrarily determined by when someone at member services happened to reach such member on the phone. (Id. at 719-24 & JX 120, 126, 132, 138).

Defendants accepted late elections and arbitrarily closed the “window” after helping influential members Messrs. Bolling and Davis. Defendants’ “efforts” to “help” *other* members, like Plaintiff, could be described as “disorganized, disjointed ... less than optimal,” Amirsaleh, 2009 WL 3756700 at *6, or even worse. Nonetheless, the preferential treatment Defendants gave to special members like Messrs. Bolling and Davis -- that ensured that their late elections would be submitted and honored -- demonstrates Defendants’ wrongful intent and their clear breach of the implied covenant of good faith and fair dealing.

¹³ Nonetheless, Ms. Chin testified that many of these calls to other members resulted in discussions about the election deadline and her sending another form to a member. (Trial Tr. at 787-88, 792-94). In fact, it appears Mr. Bolling may have learned of the election deadline from Ms. Chin’s January 12, 2007 call. (Id. at 792-94).

II. DAMAGES

Plaintiff is entitled to entry of judgment and to be made whole -- i.e., to be put in as good a position as he would have been had Defendants honored his stock election. See e.g., American General Corp. v. Continental Airlines Corp., 622 A.2d 1, 8 (Del. Ch. 1992) (explaining that “a plaintiff’s damages are generally measured by what is necessary to put it in as good a position as it would have occupied had there been full performance of the contract.”). Plaintiff is entitled to damages which would compensate him for being deprived of the opportunity to sell for a profit the ICE shares (that did not have to be pledged to retain his trading rights) that he should have received in January 2007.¹⁴ Thus, if after judgment, the ICE shares delivered to Plaintiff are priced less than the “highest intermediate price” of \$158.05,¹⁵ then he is entitled to the difference in price for the 15,810 freely tradeable ICE shares (11,067 – 3,162 pledged = 7,905 per membership interest). (Trial Tr. at 26-27, 496-98).

Accordingly, Plaintiff should be awarded (1) the ICE shares (11,067 for each membership interest, for a total of 22,134 ICE shares) and cash (\$378,208 for each membership interest, for a total of \$756,416) that he should have received had his election been accepted; (2) restoration of his trading rights after pledging the requisite number of shares per membership interest; (3) the difference, if any, between the “highest intermediate price” of \$158.05 and the price of ICE shares when delivered post-judgment for 15,810 of the 22,134 ICE shares owed (to capture the lost

¹⁴ “The injury that the plaintiff suffers is the deprivation of his range of elective action, and by applying the conversion measure of damages a court endeavors to restore that range of elective action.” American General, 622 A.2d at 10. The “highest intermediate value” is used by the courts as “a compromise attempt to value the chance that the plaintiff might at some time have profited by a rise in value.” Id. at 13 (internal quotations omitted).

¹⁵ The “reasonable time period” for determining the “highest intermediate value,” began to run on February 1, 2007, when Plaintiff received his “cash out” check. Just days earlier, on January 29, 2007, Plaintiff had made another demand to Defendants, this one by letter, requesting that his stock election be honored. Receipt of the check notified Plaintiff of Defendants’ final decision to deny him the shares to which he was entitled. (Trial Tr. at 23-26 & JX 169, 170).

Plaintiff was out of the country when his office received the check, and returned to the office on February 7, 2007 to three business meetings. See (JX 194 at 6). Thus, the first reasonable opportunity that Plaintiff would have had to evaluate his situation and make a “constructive replacement” would have been February 8, 2007, during which ICE shares reached a high of \$158.05. See (JX 197).

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2009, **Plaintiff's Post Trial Brief** was served through LexisNexis File and Serve upon the following counsel of record:

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