IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

MEMORANDUM OPINION

Date Submitted: September 25, 2009
Date Decided: November 9, 2009

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

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

CHANDLER, Chancellor

The sole remaining issue in this litigation is whether defendants the Board of Trade of the City of New York, Inc. ("NYBOT") and IntercontinentalExchange, Inc. ("ICE") breached the merger agreement's implied covenant of good faith and fair dealing by accepting all late elections except for plaintiff's. It remains unclear whether defendants exercised their discretion to accept late elections in good faith. A careful examination of the record reveals that a genuine issue of material fact exists regarding defendants' purpose in deciding to accept late forms. Accordingly, plaintiff's motion for summary judgment is denied.

I. BACKGROUND

Much of the factual background in this case is stated at length in this Court's Memorandum Opinion of September 11, 2008.[1] In this Opinion I restate only those facts from the earlier opinion relevant to the instant ruling. In addition, I discuss new factual assertions which have been raised by the parties and which bear on today's ruling.

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

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

Delaware for-profit corporation that is a wholly owned subsidiary of ICE. This merger was completed on January 12, 2007.

Plaintiff owned two membership interests in NYBOT's predecessor. Each of those interests included a right to trade on the NYBOT exchange. The Merger Agreement provided that each NYBOT membership interest would be converted into either 17,025 newly issued shares of ICE common stock or $1,074,719 in cash, or some combination of shares and cash. Under Section 4.1(a) of the Merger Agreement, each NYBOT member was permitted to elect the form of consideration he or she would receive in the merger. The Merger Agreement further provides, however, that the substance of one's chosen consideration might be affected if one option or the other was oversubscribed or undersubscribed.[2] The aggregate amounts of stock and cash that constituted the merger consideration were fixed. To the extent one form of consideration was over or undersubscribed, the Merger Agreement provided for pro rata reallocation. Finally, the agreement provided that if a member failed to make a timely election he or she would receive whatever type of consideration was undersubscribed.

The process by which members made their elections was governed by Section 4.3 of the Merger Agreement. That section gave the NYBOT and ICE discretion to set the deadline by which NYBOT members had to make their

[2] *See* Merger Agreement § 4.3(e).

elections. To retain trading rights in the new NYBOT, members were required to own at least 3,162 shares of ICE common stock after the merger and to pledge those shares in accordance with a NYBOT Membership and Pledge Agreement and Pledge Addendum (the "Pledge Agreement"). In sum, NYBOT members desiring to continue in the new enterprise needed to timely complete and return both an Election Form and a Pledge Agreement.

On December 19, 2006, the Election Forms and Pledge Agreements were sent by first class mail to all NYBOT members. The Election Forms specified that the election deadline was January 5, 2007. Plaintiff never received the Election Form that was mailed to him. Earlier in December, plaintiff's assistant, Donna Stavrinou, had asked the NYBOT's Director of Member Services, Helene Recco, when Election Forms would be mailed and was told they would be mailed shortly.[3] Neither plaintiff nor Stavrinou followed up, however, and plaintiff failed to make an election by January 5, 2007.

During the initial period after the deadline, the NYBOT Member Services department was keeping track of those members from whom it had not received Pledge Agreements. On January 12, 2007, Linda Chin of NYBOT Member Services reached Stavrinou to alert her that plaintiff had not signed and submitted a Pledge Agreement. Chin did not provide, and Stavrinou did not ask for, a copy of

[3] *See* Donna Stavrinou Aff. ¶ 8, June 5, 2008.

the Election Form. Stavrinou asked Chin to send the Pledge Agreement by fax, and Chin did so that day. Plaintiff signed and returned the Pledge Agreement on January 18. When transmitting the Pledge Agreement, Stavrinou asked Chin what else plaintiff needed to do to complete his election. Chin asked if plaintiff had completed and returned an Election Form. Plaintiff, of course, had not, and Chin faxed a copy stating that she "could not guarantee that [the] booklet will be accepted."[4] Plaintiff elected to receive stock in the new entity and returned the completed form the following day, January 19, but defendants did not accept it as a timely election.

Although the official deadline for making an election was January 5, 2007, defendants accepted the stock elections of twenty-five other NYBOT members who made elections between January 6 and January 18. Defendants' purpose in deciding to accept late elections–and to some extent the process by which late forms were accepted–is in dispute. This is a material factual dispute. Each side has proffered a different story.

Plaintiff contends that the decision to accept late election forms was driven by a desire to accommodate "connected" members of the NYBOT.[5] According to

[4] Compl. ¶ 39. It appears that the reason Chin could not guarantee that plaintiff's late election would be accepted was because she had not been informed by her superiors whether late elections were, in fact, being accepted and, if so, for how long.

[5] Plaintiff identifies three "connected" NYBOT members: John MacIntosh, Eric Bolling, and Kevin Davis. Plaintiff asserts that John MacIntosh had access to—and perhaps a collegial relationship with—Frederick Schoenhut, the former chairman of NYBOT's board. Plaintiff

plaintiff, immediately after the last of the "connected" members (Kevin Davis) submitted his form at 7:38PM on January 18, the late election window was closed and no further elections were accepted. Under plaintiff's theory, late comers who were fortunate enough to submit their forms before Davis were accepted, but plaintiff was rejected solely because he submitted his late form after Davis. Moreover, plaintiff contends that the "connected" members who submitted late forms were given special attention by defendants' staff to ensure that their election forms were submitted properly (albeit late). Plaintiff does not assert that defendants intentionally discriminated against him, but rather that the process for accepting late submissions was arbitrary and unreasonable and that he was not given the same special attention that "connected" members received in submitting their late forms.

Defendants contend that the decision to accept late submissions was made in good faith and driven solely by valid business considerations. Defendants note that all NYBOT members are customers and therefore it was in defendants' interest to accommodate as many late filers as possible to ensure customer satisfaction and

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alleges that MacIntosh personally contacted Schoenhut after he missed the January 5 election deadline and that Schoenhut's subsequent inquiries on MacIntosh's behalf may have influenced the decision to accept late election forms. *See* Pl.'s Br. 12. Plaintiff further contends that Bolling and Davis were connected to ICE Chairman Jeffrey Sprecher; Bolling through prior business dealings with Sprecher and Davis because he was one of ICE's largest customers. Plaintiff alleges that after both individuals contacted Sprecher about missing the election deadline, Sprecher "engaged with the ICE legal staff on their behalf and urged them to find a way to accept [their] late elections." *Id.* 36-37. According to plaintiff, it is no coincidence that Davis's election was the last accepted. *Id.*

good relationships between NYBOT and its members post-merger. Defendants argue that this interest in customer satisfaction had to be balanced against considerations of how much time it would take to calculate and distribute the merger consideration. Per the Merger Agreement, the consideration had to be paid by January 29, 2007. Defendants assert that the late election window was held open as long as possible but was closed when it became apparent that the remaining time before January 29 was needed to prepare the merger consideration payout.

Because stock consideration was oversubscribed, members who did not make a timely election, including plaintiff, were automatically cashed out. The value of the cash-out consideration received by plaintiff was substantially lower than the value of the stock and cash combination received by those with timely elections. In addition to this value discrepancy, members who were cashed out faced losing their trading rights on the NYBOT.

Plaintiff filed this suit on March 22, 2007, seeking an order requiring defendants to issue to him "shares of ICE in the same amount, and on the same terms and conditions, as issued to other members of NYBOT who had made an election to receive Stock Consideration" in the merger and to reinstate his two trading memberships.[6] In his complaint, plaintiff alleged that defendants breached

[6] *See* Compl. ¶¶ 1–2.

the Merger Agreement and its implied covenant of good faith and fair dealing by, *inter alia*, improperly declaring plaintiff's election "untimely."

Defendants moved for summary judgment on all of plaintiff's claims. I granted summary judgment on plaintiff's breach of contract claims, finding that plaintiff had standing as a third-party beneficiary to enforce portions of the Merger Agreement, but that defendants had not technically breached the Merger Agreement. Specifically, I found that defendants had exercised the discretion given them under Section 4.3(b) of the Merger Agreement to stop accepting late elections at some point after January 17 but before plaintiff submitted his form on January 19.[7]

What was unclear then, and remains unclear now, was whether defendants' initial decision to accept late elections and the subsequent decision to stop accepting elections was a good faith effort to further the goals of the Merger Agreement. Plaintiff contends that the decision to accept late submissions was

[7] *Amirsaleh v. Bd. of Trade of City of N.Y., Inc.*, 2008 WL 4182998, at *7 (Del. Ch. Sept. 11, 2008). At the time of the September 2008 opinion, it was unclear whether defendants affirmatively set a second, final deadline of January 18. Now that fact discovery is complete, it is clear that defendants' decision not to accept elections after January 18 was made "in the moment." A second deadline was not affirmatively set. Rather, on or around January 17, a decision was made to begin accepting the late elections that defendants had accumulated since January 5, and a decision was made to stop accepting late elections at some point before plaintiff submitted his election form. *See* Surdykowski Dep. 100:16-18 ("[t]here was not a decision between ICE and NYBOT to set a time and date for [a] new election deadline by which late books would not be accepted."); *see also* Hirschfeld Dep. 137:19-138:13. Because plaintiff must show that defendants acted in bad faith to establish a breach of the implied covenant (as described below), the important question is not whether defendants affirmatively set a second deadline, but whether the decisions to begin accepting late elections and later to stop accepting elections were made in good faith.

driven by certain "connected" members failure to make timely elections, that these "connected" members were given special assistance in submitting late elections, and that the late election window closed immediately after Davis (the last of the "connected" members) had submitted his form. Defendants contend that the decision to accept late submissions was made to increase overall customer satisfaction by accommodating as many late elections as possible and that the late election window closed only after it became apparent that holding the window open any longer would jeopardize their ability to distribute merger consideration on time. This factual dispute must be resolved because, as described below, it will determine whether defendants breached the implied covenant of good faith and fair dealing.

II. ANALYSIS

A. The Summary Judgment Standard

Under Delaware law, summary judgment is granted only if the moving party has established that there are no genuine issues of material fact in dispute and he is entitled to judgment as a matter of law.[8] The moving party bears the burden of establishing the absence of material disputed facts.[9] Where intent or state of mind is material to the claim at issue—as is the case here—summary judgment is not

[8] CH. CT. R. 56(c).
[9] *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 829-30 (Del. Ch. 2007).

appropriate.[10] "In such cases, the court should evaluate the demeanor of the witnesses whose states of mind are at issue during examination at trial."[11]

B. The Implied Covenant of Good Faith and Fair Dealing

As a preliminary matter, I recognize that the exact contours of the implied covenant of good faith and fair dealing are not always easily discernable in the case law. This is partly driven by the "fact-intensive" nature of the doctrine.[12] Courts routinely invoke the specific contours of the covenant that are relevant to the case at hand without attempting to articulate an all-encompassing definition that could be applied to any factual circumstance. I use the same approach today, principally because it is impractical (if not impossible) to capture that elusive, all-encompassing definition of the covenant which could be satisfactorily applied to the facts of this case and used as the definitive standard going forward.[13]

Under Delaware law, the implied covenant of good faith and fair dealing inheres in every contract.[14] It is triggered when the defendant's conduct does not violate the express terms of the agreement but nevertheless deprives the plaintiff of

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[10] *Johnson v. Shapiro*, 2002 WL 31438477, at *4 (Del. Ch. Oct. 18, 2002).
[11] *Id.*
[12] *See* Paul M. Altman & Srinivas M. Raju, *Delaware Alternative Entities and the Implied Contractual Covenant of Good Faith and Fair Dealing Under Delaware Law*, 60 Bus. Law. 1469, 1478 (2005).
[13] *See id.* (observing that "courts have applied the Implied Covenant by fashioning standards on an ad hoc factual basis considering the type of contract claim involved" and noting that the various phrases used to describe conduct prohibited by the covenant (*e.g.*, "arbitrary and unreasonable conduct" or "unfairly taking advantage of the other party") are "broad proclamations" that courts do not define with specificity).
[14] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441-42 (Del. 2005).

the fruits of the bargain.[15] Thus, the implied covenant is "best understood" as a judicial tool used to imply terms in a contract that protect the reasonable expectations of the parties to (or beneficiaries of) the contract.[16] The parties' reasonable expectations are determined by inquiring whether the parties would have bargained for a contractual term proscribing the conduct that allegedly violated the implied covenant had they foreseen the circumstances under which the conduct arose.[17] To prove a breach of the implied covenant, then, the plaintiff must allege an implied contractual obligation not to engage in certain conduct, a breach of that obligation by the defendant, and resulting damage to the plaintiff.[18]

This Court has previously held that breach of the implied covenant of good faith and fair dealing "implicitly indicates bad faith conduct."[19] Plaintiff contends, however, that showing bad faith is unnecessary to establish a breach of the implied covenant. According to plaintiff, all that need be shown is an absence of good faith. I must note that, in support of plaintiff's argument, there are two known instances where the Delaware Supreme Court has suggested that there may be a difference between "bad faith" and "conduct not in good faith" in the context of the implied covenant.

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[15] *Chamison v. HealthTrust, Inc.—Hospital Co.*, 735 A.2d 912, 920 (Del. Ch. 1999), *aff'd*, 748 A.2d 407 (Del. 2000).
[16] *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 443 (Del. 1996).
[17] *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1016 (Del. Ch. 2004); *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986).
[18] *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009).
[19] *Continental Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1234 (Del. Ch. 2000).

The first suggestion was made in *Dunlap v. State Farm Fire and Casualty Insurance Co.* when the Supreme Court stated "the case law frequently (and unfortunately) equates a lack of good faith with the presence of bad faith . . . ."[20] But in the same case the Supreme Court explains that "[d]espite its evolution, the term 'good faith' has no set meaning, serving only to exclude a wide range of heterogeneous forms of bad faith."[21] This latter statement teaches that a party fulfills its obligation to act in "good faith" when it does not engage in any of the heterogeneous forms of "bad faith." Put another way, "good faith" conduct can only be understood by reference to "bad faith" conduct. If no stand-alone definition of "good faith" exists, I admit my inability to understand how the phrase "a lack of good faith" has any ascertainable meaning. How can the plaintiff prove the absence of something that is undefined? In the *Dunlap* opinion the Supreme Court does not develop its suggestion that there might be a substantive difference between "a lack of good faith" and "bad faith." Moreover, it does not appear to base its decision in *Dunlap* on that distinction (i.e., it did not find that the defendant's actions "lacked good faith" without rising to the level of "bad faith"). Accordingly, I conclude that the *Dunlap* opinion did not hold that a breach of the implied covenant can be established by "a lack of good faith."

[20] 878 A.2d 434, 442 (Del. 2005).
[21] *Id.* at 441 (citation omitted) (internal quotation marks omitted).

The second suggestion was made in *25 Massachusetts Avenue Property L.L.C. v. Liberty Property Ltd. Partnership* when the Supreme Court stated "[a]lthough the Vice Chancellor determined that Republic did not act in bad faith, he did not expressly address [defendant's] liability for breach of the implied duty of good faith and fair dealing . . . . The two concepts—bad faith and conduct not in good faith are not necessarily identical. Accordingly, we must remand for the Court of Chancery to consider this claimed breach . . . ."[22] On remand, Vice Chancellor Strine could not find a meaningful distinction between the two concepts and declined to reverse his previous ruling because he had already found that the defendant did not act in bad faith. Analyzing whether there was any meaningful distinction between the concepts, the Vice Chancellor observed: "Given the long-standing use of the concept of good faith to articulate the state of mind appropriate for various actors . . . and the use of the concept of bad faith to label someone whose state of mind is violative of the appropriate standard, one would think this concept of 'neutral faith' would have been embraced in American law before now if it had any logic or utility. I do note that in our corporate law, this court has firmly rejected the notion that the words 'not in good faith' mean something different than 'bad faith,' and has done so on sensible policy, logical, and linguistic

[22] 2008 Del. LEXIS 611, at *5-6 (Del. Nov. 25, 2008).

grounds."[23] Based on all of the foregoing, I agree with Vice Chancellor Strine that there is no meaningful difference between "a lack of good faith" and "bad faith." Accordingly, to prove a breach of the implied covenant plaintiff must demonstrate that defendants acted in "bad faith."

Having established that "bad faith" must be shown to establish an implied covenant breach, I turn to the question of how one proves bad faith. Stated simply, to prove bad faith a plaintiff must demonstrate that the defendant's conduct was motivated by a culpable mental state.[24] In other words, the defendant's conduct must be driven by an improper purpose.

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[23] *Liberty Prop. Ltd. P'ship v. 25 Mass. Ave. Prop. L.L.C.*, 2009 WL 224904, at *5 (Del. Ch. Jan. 22, 2009), *aff'd*, 970 A.2d 258 (Del. 2009). It should be noted that Vice Chancellor Strine (and the Delaware Supreme Court) applied District of Columbia law in this case. This is inconsequential, however, as there is not a concept of "neutral faith" in either Delaware or the District of Columbia. The law of the two jurisdictions is the same in this respect.

[24] *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 101 (Del. 1992) (holding that an employee must prove that the employer acted with "fraud, deceit, or misrepresentation" to establish a breach of the implied covenant in an at-will employment contract); *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992-93 (Del. 1998) (extending the "fraud, deceit, or misrepresentation" requirement to proving a breach of the implied covenant in a limited partnership agreement); *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, L.P.*, 624 A.2d 1199, 1208 (Del. 1993) (noting in the context of the implied covenant that "an allegation of bad faith . . . relates to state of mind"); *Id.* at 1208 n.16 ("The term 'bad faith' is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.") (citing BLACK'S LAW DICTIONARY 337 (5th ed. 1983)); *Cantor Fitzgerald, L.P. v. Cantor*, 2000 WL 307370, at *15, n.51 (Del. Ch. Mar. 13, 2000) (applying the "fraud, deceit, or misrepresentation" formula to breach of the implied covenant in a partnership agreement); *Continental Ins. Co.*, 750 A.2d at 1234 (reasoning that a party's "subjective motivation" is relevant to determining whether the implied covenant has been breached); *Williams Natural Gas Co. v. Amoco Prod. Co.*, 1991 WL 58387, at *11 (Del. Ch. 1991) ("Wrongful intent is an element of a claim based on the implied covenant of good faith doctrine."); *Quadrangle Offshore (Cayman) L.L.C. v. Kenetech Corp.*, 1999 WL 893575, at *10 (Del. Ch. Oct. 13, 1999), *aff'd*,

Finally, I emphasize that the implied covenant of good faith and fair dealing "is particularly important . . . in contracts that defer a decision at the time of contracting and empower one party to make that decision later.[25] In such cases, the discretion-exercising party must exercise its discretion in good faith. If it does not, it will run afoul of the implied covenant. To prove that the defendant has failed to exercise its discretion in good faith, the plaintiff must show that the exercise of discretion was done in bad faith (i.e., that it was motivated by an improper purpose or done with a culpable mental state).[26]

C. Plaintiff Has Failed to Demonstrate the Absence of a Disputed Material Fact

This Court previously found that defendants' discretionary decision to accept late elections and the subsequent decision to stop accepting elections was not a technical breach of the Merger Agreement.[27] Left remaining is the issue of whether the manner in which defendants' exercised their discretion conflicted with the reasonable expectations of the pre-merger NYBOT and the pre-merger ICE

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751 A.2d 878 (Del. 2000) ("To substantiate a breach of [the] implied covenant . . . the [plaintiff] must prove that [the defendant] *intentionally* embarked upon a[n] [impliedly prohibited] course of action . . . and did so in bad faith.") (emphasis added).

[25] *Amirsaleh v. Bd. of Trade of the City of N.Y., Inc.*, 2008 WL 4182998, at *8 (Del. Ch. Sept. 11, 2008); *see also Gilbert v. El Paso Co.*, 490 A.2d 1051, 1055 (Del. Ch. 1984), *aff'd*, 575 A.2d 1131 (Del. 1990).

[26] *Continental Ins. Co.*, 750 A.2d at 1234 (finding that the discretion-exercising party did not breach the implied covenant because it alleged "plausible and reasonable explanations" for the manner in which it exercised its discretion while the party claiming breach failed to allege facts or point to evidence revealing that the discretion-exercising party acted in bad faith).

[27] *Amirsaleh*, 2008 WL 4182998, at *7.

(the "Merger Agreement Parties"). To determine those expectations, the Court must inquire what conduct the Merger Agreement Parties would clearly have agreed to proscribe had they foreseen it.

At the outset, I note that plaintiff would have had no claim for breach of the implied covenant if defendants had declined to accept late elections altogether. Plaintiff missed the formal deadline for making his election and defendants did everything required by the Merger Agreement to give him the opportunity to make his election on time.[28] Any general efforts by defendants to accommodate all late elections would rightly be viewed as *exceeding* the implied covenant's requirements. It is not clear, then, that the Merger Agreement Parties would have agreed to proscribe reasonable efforts to accommodate all late elections had this need been foreseen. This is especially evident when one considers the Merger Agreement Parties' interest in retaining satisfied customers post-merger. In contrast, it is clear that the Merger Agreement Parties would not have agreed to provide preferential treatment to connected members who failed to make their elections by the election deadline. Specifically, 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

[28] For example, defendants mailed the election form to Amirselah in a timely manner. *Id.* at 5-6.

in. Indeed, it is impossible to imagine the Merger Agreement containing such proscriptions because common notions of fair dealing dictate that affording such preferential treatment to connected members would be inappropriate.[29]

On the facts of this case, defendants were subject to an implied contractual obligation not to make a discretionary decision to accept late forms solely based on the fact that certain connected members failed to turn their forms in on time. Similarly, defendants were subject to an implied covenant not to give connected members special treatment in submitting late elections, including holding open the election window just long enough to ensure that all connected members had submitted their late elections. Such conduct by defendants—if it occurred—would plainly amount to bad faith. Plaintiff has a claim for breach of the implied covenant *if* he can demonstrate that defendants breached this implied obligation.[30]

Conversely, *if* defendants' decision to accept late submissions was driven by considerations of customer satisfaction balanced against leaving enough time to calculate and distribute merger consideration—and reasonable efforts were made to give all late filers the same or substantially similar assistance turning in their late forms—then defendants did not have the wrongful intent necessary to breach the

[29] *See Katz v. Oak Indus. Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986) (noting that part of the contractual theory behind the implied covenant is that "parties occasionally have understandings or expectations that were so fundamental . . . they did not need to negotiate about those expectations.") (quoting *Corbin on Contracts* (Kaufmann Supp. 1984), § 570).

[30] To be clear, nothing in this opinion is to be read as suggesting that the Court accepts plaintiff's contention that MacIntosh, Bolling, and Davis were, in fact, "connected" members. That is a disputed fact question that must be resolved at trial.

implied covenant. This is so even if defendants' general efforts to accommodate late comers were disorganized, disjointed, or less than optimal.

III. CONCLUSION

Plaintiff has failed to demonstrate the absence of a genuine issue of material fact. A dispute remains regarding the reason defendants decided to accept late election forms and the timing of the decision to discontinue acceptance. Accordingly, summary judgment is inappropriate and the disputed issue of material fact must be determined at trial. Plaintiff's motion for summary judgment is denied.

IT IS SO ORDERED.