EFiled: Apr 26 2012 4:42PM EDT
Transaction ID 43922890
Case No. 6875-VCN

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| JPMORGAN CHASE & CO., a Delaware corporation and JPMAC HOLDINGS INC., a Delaware corporation, | ) | |
| Plaintiffs, | ) | C.A. No. 6875-VCN |
| v. | ) | |
| AMERICAN CENTURY COMPANIES, INC., a Delaware corporation, | ) | |
| Defendant. | ) | |

# MEMORANDUM OPINION

Date Submitted: January 18, 2012
Date Decided: April 26, 2012

Allen M. Terrell, Jr., Esquire and David Schmerfeld, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware, and Dane H. Butswinkas, Esquire, Margaret A. Keeley, Esquire, and Thomas G. Ward, Esquire of Williams & Connolly LLP, Washington, D.C., Attorneys for Plaintiffs.

Andre G. Bouchard, Esquire and Joel Friedlander, Esquire of Bouchard Margules & Friedlander, P.A., Wilmington, Delaware, and Randall E. Hendricks, Esquire of Rouse Hendricks German May PC, Kansas City, Missouri, Attorneys for Defendant.

NOBLE, Vice Chancellor

## I. INTRODUCTION

Plaintiffs JPMorgan Chase and Co. ("JPMorgan Chase") and JPMAC Holdings Inc. ("JPMAC Holdings," and together with JPMorgan Chase, "J.P. Morgan") bring their Verified Complaint (the "Complaint" or "Compl.") asserting claims for breach of contract and breach of the implied covenant of good faith and fair dealing against Defendant American Century Companies, Inc. ("American Century"). J.P. Morgan also asserts a claim for attorneys' fees and costs under an option agreement that J.P. Morgan and American Century entered into on July 21, 2009 (the "Option Agreement"), which is the contract central to this dispute. American Century has moved, pursuant to Court of Chancery Rule 12(b)(6), to dismiss the Complaint for failure to state a claim. For the reasons set forth below, American Century's motion to dismiss is granted as to J.P. Morgan's claim for breach of contract, and denied as to J.P. Morgan's claims for breach of the implied covenant and for attorneys' fees and costs.

## II. PARTIES

Plaintiff JPMorgan Chase is a publicly-traded Delaware corporation with its principal place of business in New York, New York.

Plaintiff JPMAC Holdings is a Delaware corporation and a subsidiary of JPMorgan Chase. JPMAC Holdings is a former shareholder of American Century.

Defendant American Century is a private Delaware corporation with its principal place of business in Kansas City, Missouri.

## III. BACKGROUND[1]

A. *The Settlement Agreement*

In January 1998, JPMAC Holdings purchased an approximately 45% economic interest in American Century for about $900 million. Relations between the two companies eventually soured, and American Century brought a lawsuit against J.P. Morgan and certain affiliated entities, including J.P. Morgan Invest Holdings LLC ("JPM Invest"), in the Circuit Court of Jackson County, Missouri. On July 21, 2009, the parties entered into a Partial Settlement Agreement, Mutual Release of Certain Claims, and Agreement to Arbitrate Remaining Claims (the "Settlement Agreement"). The Settlement Agreement resolved all of American Century's claims against J.P. Morgan and its affiliates for fraud, breach of fiduciary duty, and any claims sounding in tort or seeking punitive damages. Under the Settlement Agreement, the parties agreed to arbitrate the remaining

[1] Unless otherwise noted, the factual background is taken from the Complaint, the well-pled allegations of which, for present purposes, must be taken as true. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011). In certain instances, the Court will rely upon the Option Agreement for facts not alleged in the Complaint. While, as a general rule, the Court is limited to considering only the facts alleged in the complaint when deciding a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court may consider documents both integral to and incorporated into the complaint, and documents not relied upon to prove the truth of their contents. *Orman v. Cullman,* 794 A.2d 5, 15-16 (Del. Ch. 2002). Consideration of the Option Agreement is appropriate in this case, as it is integral to and incorporated into the Complaint.

claims (the "Arbitration Claims"), which included breach of contract claims brought by American Century and claims for unpaid service fees brought by JPM Invest.

B. *The Option Agreement*

The Option Agreement, which J.P. Morgan entered into in connection with the Settlement Agreement,[2] is at the core of this dispute. The Option Agreement granted American Century an irrevocable option (the "Option") to purchase any number of the shares of Class A Common Stock of American Century (the "Shares") owned by JPMAC Holdings; the Option could be exercised for a period of four years.[3] To exercise the Option, American Century was required to deliver to J.P. Morgan a written notice (the "Option Notice") specifying the number of Shares to be purchased, the applicable per share purchase price (the "Per Share Purchase Price"), the aggregate purchase price, and the closing date.[4]

Unless the Shares were traded on a national securities exchange on the date of the Option Notice, the Per Share Purchase Price was defined by Section 1.3(b) of the Option Agreement as:

> the fair market value per share of the Company's Class A Common Stock reflected in the report of an independent financial advisor (the "Independent Advisor") most recently provided prior to the date of the Option Notice to the Retirement Committee of the American Century

[2] Compl., Ex. A ("Option Agreement") at 1 (Recitals Section).
[3] *Id.* at § 1.1.
[4] *Id.* at § 1.2(b).

> Profit Sharing and 401(k) Savings Plan (the "Retirement Committee") (such report to be dated as of a date no more than 40 days prior to the date of the Option Notice).

Duff & Phelps, LLC ("D&P") was the Independent Advisor at all times relevant to this action. D&P performed monthly valuations of American Century. Because American Century was not publicly traded, D&P's monthly valuations were performed primarily to establish a price for American Century's stock to facilitate American Century's repurchase of Shares from employees.

Under Section 1.3(c) of the Option Agreement, a Per Share Purchase Price determined using a valuation provided by an Independent Advisor pursuant to Section 1.3(b) "shall be final, conclusive and binding on the parties for the purposes of the applicable Option Exercise," and "[u]nder no circumstances shall any party to . . . [the Option Agreement] assert or pursue any claim against the Independent Advisor arising out of . . . [the Option Agreement] or any Option Exercise." Section 1.3(d), in turn, requires American Century to deliver a copy of each valuation report to JPMAC Holdings. Section 1.3(d) also speaks to J.P. Morgan's ability to challenge the Independent Advisor's valuation. Specifically, Section 1.3(d) states:

> If . . . [J.P. Morgan] determines in good faith that in its opinion . . . [the Independent Advisor's valuation report] contains a manifest or egregious error in the calculation of the fair market value . . . [of the Shares] (but not, for this purpose, an error in methodology unless the methodology utilized has changed from that previously utilized), it may notify the Independent Advisor thereof and discuss same with the

> Independent Advisor, provided that (i) it first advises . . . [American Century] of its intent to do so and (ii) the notification to the Independent Advisor is made within three days after delivery of the report to JPMAC Holdings. If, following the date of an Option Notice but before the Closing contemplated by that Option Notice, the Independent Advisor in its sole discretion revises the valuation report referred to in the Option Notice to change the fair market value . . . [of the Shares], (x) the revised price . . . shall be the Per Share Purchase Price for purposes of that Option Exercise and (y) . . . [American Century] may rescind the Option Notice and related Option Exercise. Except for . . . [American Century's] right of rescission as provided in the preceding sentence, under no circumstances may either party delay or refuse to complete a Closing of an Option Exercise based on an asserted objection to the calculation of the Per Share Purchase Price.

C. *The Arbitration*

Pursuant to the Settlement Agreement, a subsidiary of American Century initiated arbitration against JPM Invest on July 31, 2009 (the "Arbitration"). In the Arbitration, American Century's subsidiary sought total damages in the amount of $1.011 billion. By May 2011, JPM Invest had conceded liability with respect to American Century's subsidiary's claims concerning a certain financial product at issue in the Arbitration; American Century valued the damages for those conceded claims as between $402 million and $534 million. Therefore, according to J.P. Morgan, American Century knew, as of May 2011, that its subsidiary's claims had substantial value. Moreover, J.P. Morgan alleges that as of June 30, 2011, the parties knew that the arbitration panel would render its decision no later than August 15, 2011. On August 10, 2011, the arbitration panel entered an award of $373,263,652 in favor of American Century's subsidiary.

D. *The Option Exercise and D&P's June 2011 Valuation*

American Century notified J.P. Morgan on July 15, 2011, that it was exercising its right to purchase all of the Shares owned by JPMAC Holdings,[5] and that transaction closed on August 31, 2011 (the "August 31 Transaction").[6] American Century paid a Per Share Purchase Price of $14.40, which was the fair market value, as of June 30, 2011, reported in D&P's June 2011 valuation (the "June 2011 Valuation").

E. *J.P. Morgan's Requests for Additional Information*

American Century sent the June 2011 Valuation to J.P. Morgan on July 6, 2011. Shortly thereafter, J.P. Morgan asked D&P about the extent of the information it received regarding the Arbitration; D&P responded only that it was "generally aware" of the Arbitration.[7] As a result of that conversation, on July 25, 2011, J.P. Morgan inquired, in writing, whether the value of the Arbitration Claims had been factored into the June 2011 Valuation. In response, on July 26, 2011, D&P explained that its obligation to its "client" (referring to American Century)

[5] At this time, JPMAC Holdings owned 58,891,722 Shares, or approximately 40% of American Century's outstanding equity. JPMAC Holdings had previously sold approximately three million Shares pursuant to the Option Agreement over the course of several transactions.

[6] Section 1.2(c) of the Option Agreement provides a process through which American Century can exercise the Option and then resell the Shares acquired through that exercise to a third party. From a public announcement, J.P. Morgan learned that JPMAC Holdings' Shares would be resold to Canadian Imperial Bank of Commerce ("CIBC"). J.P. Morgan alleges that American Century improperly withheld information regarding the CIBC stock sale from J.P. Morgan's director designee on American Century's board of directors. That allegation, however, is not the basis of any of the claims in the Complaint.

[7] Compl. ¶ 23.

required only that it "consider any comments . . . [J.P. Morgan] may have regarding manifest/egregious errors in our . . . analysis or changes in methodology."[8] D&P refused to tell J.P. Morgan whether, with respect to the June 2011 Valuation, American Century had provided it (D&P) with a value for the Arbitration Claims or whether American Century had provided D&P with the requisite information to value the Arbitration Claims itself. Although J.P. Morgan copied American Century's Chief Financial Officer on its July 25, 2011 inquiry to D&P and invited his participation in the discussion, American Century never responded to J.P. Morgan.

## IV. CONTENTIONS

The Complaint consists of three counts. Count I alleges that American Century breached the Option Agreement. Count II alleges that American Century breached the covenant of good faith and fair dealing that Delaware law implies in all contracts, including the Option Agreement. Count III alleges that, under Section 5.11 of the Option Agreement, when an action is brought to enforce or interpret the Option Agreement's terms, the "prevailing party" in that action is entitled to attorneys' fees and costs. Therefore, according to J.P. Morgan, "[i]n the

[8] *Id.* at ¶ 44.

event . . . [it] prevails in this action, it is entitled to recover, in addition to any other appropriate recovery, its reasonable attorneys' fees and costs."[9]

The lynchpin of Counts I and II is J.P. Morgan's contention that the June 2011 Valuation should have assigned, but did not assign, a value to the Arbitration Claims.[10] J.P. Morgan argues that the requirement in Section 1.3(b) of the Option Agreement that "the Per Share Purchase Price shall be the fair market value per share of the Company's Class A Common Stock reflected in the report of an independent financial advisor," mandates that any Shares acquired pursuant to the Option Agreement be purchased at fair market value. Moreover, according to J.P. Morgan, a specific valuation might not actually reflect fair market value—"[w]hile the report of the Independent Adviser may cast light on American Century's fair market value . . . , the parties did not agree that the D&P Report would irrefutably 'set forth' that value."[11] J.P. Morgan argues that American Century did not pay "fair market value" for JPMAC Holdings' Shares because the Per Share Purchase Price did not include a value for the Arbitration Claims, which J.P. Morgan contends had substantial value at the time of the June 2011 Valuation.

---

[9] *Id.* at ¶ 70.

[10] *See id.* at ¶ 40 ("By not including a value for [the Arbitration C]laims that American Century reasonably knew had substantial value in its financial projections, balance sheet, or other information provided to Duff & Phelps or otherwise provid[ing] sufficient information for Duff & Phelps to include an appropriate valuation for these claims, American Century materially understated its financial position, which in turn led to a June 2011 valuation that similarly understated American Century's fair market value.").

[11] Pls.' Answering Br. in Opp'n to Def. American Century Companies, Inc.'s Mot. to Dismiss ("Pls.' Answering Br.") at 21 n.4.

Therefore, according to J.P. Morgan, American Century breached Section 1.3(b) of the Option Agreement.

J.P. Morgan also argues that American Century breached both the Option Agreement as well as the implied covenant of good faith and fair dealing by failing to provide D&P with sufficient information about the Arbitration Claims, and "thereby prevent[ed] D&P from determining the fair market value of JPMAC . . . [Holdings' S]hares."[12] The Complaint alleges that American Century was required to provide D&P with all of the material information about the Arbitration Claims that it (American Century) possessed because D&P's valuations, including the June 2011 Valuation, were "used for transactions between American Century and its other stockholders (most of whom are employees or former employees), [and] the information reflected in . . . [those valuations] is subject to Delaware law and federal law, both of which require that American Century disclose all material information in its possession."[13] The Complaint goes on to allege:

> Given that these monthly valuations had been and continue to be prepared for transactions with shareholders generally, J.P. Morgan had a reasonable expectation that (despite any limited objection to Duff & Phelps' calculation and apart from any direct obligation to provide information under the Option Agreement) American Century would fully comply with all of its obligations under Delaware law and

[12] *Id.* at 12.
[13] Compl. ¶ 36.

> federal law to its other stockholders when providing information for the purposes of the monthly valuation.[14]

J.P. Morgan contends that although American Century "reasonably knew" that the Arbitration Claims had substantial value,[15] American Century failed to provide D&P with enough information in connection with the June 2011 Valuation to allow D&P to value the Arbitration Claims properly. According to J.P. Morgan, that action (or inaction) by American Century breached both the Option Agreement and the implied covenant.

American Century disagrees. It has moved to dismiss the entire Complaint under Rule 12(b)(6), arguing that J.P. Morgan has failed to state a claim for breach of the Option Agreement or the implied covenant. American Century also contends that if it "prevails on this motion, then it is entitled to attorneys' fees as the 'prevailing party' under Section 5.11 of the Option Agreement."[16]

---

[14] *Id.* at ¶ 37. *See also* Pls.' Answering Br. at 12 ("In selecting a valuation report prepared by a financial advisor retained by American Century and provided to the American Century Retirement Committee, the parties necessarily anticipated and agreed that American Century would have the responsibility to provide information to D&P and would, in fact, provide all material information necessary for D&P to determine the fair market value of American Century's shares."); *id.* at 27 ("The parties to the Option Agreement agreed that the purchase price for JPMAC[] [Holdings' S]hares would be fair market value as reflected in the report of an independent financial adviser retained by American Century. Implicit—if not explicit—in this term was a requirement that American Century would both provide all material information to D&P to allow it to determine the fair market value of American Century stock and would refrain from manipulating D&P's valuation through the selective disclosure (or omission) of information.").

[15] Compl. ¶ 40.

[16] Opening Mem. of Law in Supp. of American Century Companies, Inc.'s Mot. to Dismiss ("Def.'s Opening Br.") at 18.

American Century argues that Section 1.3(b) of the Option Agreement does not require American Century "to pay 'fair market value' in the abstract" for JPMAC Holdings' Shares.[17] It also argues that it was not required under the Option Agreement or the implied covenant to provide D&P with information about the Arbitration Claims.[18] According to American Century, Section 1.3 of the Option Agreement provides a comprehensive mechanism for dealing with issues related to the Per Share Purchase Price, which it complied with when it exercised the Option. And because it complied with that comprehensive mechanism, American Century argues that its actions do not violate the Option Agreement or the implied covenant. American Century also contends that the implied covenant only applies to developments that the parties could not reasonably have anticipated, and, therefore, that it is not applicable here "because the parties could reasonably anticipate at the time of contracting that American Century would exercise its option at a time while the arbitration was pending."[19]

[17] *Id.* at 10.
[18] *See id.* at 16-17 ("The parties did not choose to specify in the Option Agreement that the Independent Adviser must be kept informed by American Century as to the status or outlook of the arbitration. In these circumstances, there is no reason to infer any obligation on American Century to do so.").
[19] *Id.* at 15.

## V. ANALYSIS

"[T]he governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[20]

> When considering a defendant's motion to dismiss, a trial court should accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[21]

"'The court . . . need not accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party,' but as long as there is a reasonable possibility that a plaintiff could recover, a motion to dismiss will be denied."[22]

A. *Count I*

Count I alleges that American Century breached the Option Agreement. "Delaware law adheres to an objective theory of contracts. . . ."[23] "The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."[24] American Century is correct that Section 1.3 of the Option Agreement provides a mechanism

---

[20] *Central Mortg.*, 27 A.3d at 537 (citation omitted).
[21] *Id.* at 536 (citation omitted).
[22] *Frank v. Elgamal*, 2012 WL 1096090, at *7 (Del. Ch. Mar. 30, 2012) (quoting *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *6 (Del. Ch. Oct. 13, 2011)).
[23] *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *3 (Del. Ch. Nov. 8, 2007).
[24] *Rhone–Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.,* 616 A.2d 1192, 1196 (Del. 1992) (citation omitted).

for dealing with issues related to the Per Share Purchase Price. If the Shares are not traded on a national securities exchange, Section 1.3(b) provides that "the Per Share Purchase Price shall be the fair market value . . . [of the Shares] reflected in the report of an independent financial adviser . . . most recently provided prior to the date of the Option Notice to . . . [American Century's] Retirement Committee." Section 1.3(c) then provides that "[i]f the Per Share Purchase Price is determined pursuant to Section 1.3(b), the valuation provided by the Independent Adviser shall be final conclusive and binding on the parties for purposes of the applicable Option Exercise." Finally, Section 1.3(d) provides a limited mechanism by which J.P. Morgan may challenge a valuation that would otherwise be "conclusive" under Section 1.3(c).

On July 15, 2011, when American Century exercised the Option, the Shares were not traded on a national securities exchange. Thus, under Section 1.3(b), the Per Share Purchase Price shall be the fair market value of the Shares reflected in the most recent D&P valuation. As of July 15, 2011, the most recent D&P valuation was the June 2011 Valuation. Thus, under Section 1.3(c), the June 2011 Valuation would be "conclusive and binding on the parties for purposes of the applicable Option Exercise," unless J.P. Morgan successfully invoked Section 1.3(d). There is no dispute that J.P. Morgan did not avail itself of 1.3(d).

Thus, under the express terms of the Option Agreement, the June 2011 Valuation is binding on the parties.

J.P. Morgan attempts to avoid this conclusion by advancing two principal arguments as to why the June 2011 Valuation did not meet the requirements of the Option Agreement. J.P. Morgan's first argument is that Section 1.3(b) requires a valuation report to reflect some sort of intrinsic notion of fair market value. That argument fails as a matter of law. Section 1.3(b) provides that "the Per Share Purchase Price shall be the fair market value per share of the Company's Class A Common Stock reflected in the report of an independent financial advisor." The only reasonable interpretation of that language is that the Per Share Purchase Price shall be the price that the independent financial advisor determines is fair market value. Even if J.P. Morgan is correct that "the parties did not agree that the D&P report would irrefutably 'set forth' . . . [fair market] value,"[25] a reasonable person in the position of parties would have thought that, under Section 1.3(b), the June 2011 Valuation would irrefutably set forth fair market value. Therefore, J.P. Morgan is incorrect that Section 1.3(b) required the Per Share Purchase Price to reflect a notion of fair market value that was not tethered to the June 2011 Valuation; under Section 1.3(b), the Per Share Purchase Price is the price that D&P determines is fair market value.

[25] Pls.' Answering Br. at 21 n.4.

J.P. Morgan's second argument is that, under the Option Agreement, American Century was required to provide D&P with information about the Arbitration Claims, and that it failed to do so. As J.P. Morgan explains:

> In selecting a valuation report prepared by a financial advisor retained by American Century and provided to the American Century Retirement Committee, the parties necessarily anticipated and agreed that American Century would have the responsibility to provide information to D&P and would, in fact, provide all material information necessary for D&P to determine the fair market value of American Century's shares.[26]

The problem with this argument is that regardless of what "the parties necessarily anticipated," J.P. Morgan cannot point to any provision of the Option Agreement, which objectively demonstrates that the parties "agreed that American Century would have the responsibility to provide information to D&P." The Option Agreement does not address this issue. As American Century correctly sets forth:

> J.P. Morgan fails to identify any provision of the Option Agreement with which American Century did not comply. The Option Agreement imposes no express obligation on American Century about what amounts or categories of information American Century must provide to Duff & Phelps prior to preparation of its monthly valuation reports, regarding the arbitration or otherwise.[27]

Therefore, under the express terms of the Option Agreement, American Century was not required to provide D&P with information about the Arbitration Claims. J.P. Morgan has failed to state a claim that American Century breached the express

[26] *Id.* at 12.
[27] Def.'s Opening Br. at 13.

terms of the Option Agreement, and therefore, American Century's motion to dismiss is granted as to Count I.[28]

B. *Count II*

Count II alleges that American Century breached the covenant of good faith and fair dealing that is implied in the Option Agreement. "In order to plead successfully a breach of an implied covenant of good faith and fair dealing, the

---

[28] In addition to its two principal arguments, discussed above, J.P. Morgan makes several other arguments in support of Count I. None of those arguments has any merit. For example, J.P. Morgan argues that "Section 1.3 of the Option Agreement is ambiguous with respect to the meaning of 'fair market value . . . reflected in the report of an independent financial adviser. . . .'" Pls.' Answering Br. at 25 (quoting Option Agreement § 1.3(b)). According to J.P. Morgan,

> there can be no question that a reasonable interpretation of Section 1.3(b) is that the value set forth in the D&P Report must reflect "fair market value" in order to establish the purchase price of JPMAC [Holdings' S]hares, that American Century had a duty to provide the material information necessary in connection therewith to D&P, and that all material information regarding the Arbitration should have been provided to D&P.

*Id.* at 26. "[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Rhone-Poulenc*, 616 A.2d at 1196 (citation omitted). As discussed above, the only reasonable interpretation of Section 1.3(b) is that the Per Share Purchase Price shall be the price that D&P determines is fair market value. Moreover, and also as discussed above, J.P. Morgan cannot point to any express provision of the Option Agreement that required American Century to provide D&P with information in connection with the June 2011 Valuation. Thus, Section 1.3 is not ambiguous.

J.P. Morgan also argues:

> D&P's issuance of . . . [a report reflecting fair market value] constitutes a condition precedent to American Century's redemption of JPMAC [Holdings' S]hares. American Century interfered with, and indeed prevented, D&P's ability to determine fair market value—and to fulfill this condition precedent—by withholding material information. Because of such interference, American Century cannot now rely on the D&P Report to argue that it did not breach the contract.

*Id.* at 15. The problem with this argument, as with the argument above, is that Section 1.3 does not require D&P to issue a report that reflects an intrinsic notion of fair market value. To the extent D&P's issuance of a report was a condition precedent to American Century's redemption, D&P issued a report with a determination of what it thought was the fair market value for the Shares. Thus, any condition precedent to American Century's purchase of JPMAC Holdings' Shares was satisfied.

plaintiff must allege a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff."[29] "The implied covenant inheres to every contract, and is 'best understood as a way of implying terms in the agreement.'"[30] Terms will only be implied, however, "when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected."[31] Moreover, "[t]he implied covenant only applies to developments that could not be anticipated, not developments that the parties simply failed to consider. . . ."[32]

The valuation process adopted in Section 1.3(b) of the Option Agreement was in place before the Option Agreement was executed, and J.P. Morgan opted-in to that existing process. J.P. Morgan argues that it knew that that process had been, and would continue to be, used by American Century to value Shares that were repurchased from American Century employees. Because J.P. Morgan knew that the valuation process provided for in Section 1.3(b) was also being used for that purpose, J.P. Morgan alleges that it could reasonably expect that American Century would provide D&P with the information that D&P would need for

---

[29] *Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998) (citation omitted).
[30] *Great-West Investors LP v. Thomas H. Lee Partners, L.P.*, 2011 WL 284992, at *14 (Del. Ch. Jan. 14, 2011) (quoting *E.I. duPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 443 (Del. 1996)).
[31] *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (citation omitted).
[32] *Id.*

accurate valuation of the Shares. Although, as stated above, American Century was not required, under the express terms of the Option Agreement, to provide D&P with information to value the Shares, J.P. Morgan contends that, in connection with the valuation process that is incorporated into Section 1.3(d) of the Option Agreement, American Century was required to provide D&P with that information. In other words, J.P. Morgan alleges that part of the benefit of its bargain in the Option Agreement is Section 1.3(b)'s specification of a valuation process that, because it was also used to value employee Shares, required American Century to disclose sufficient information to D&P to allow D&P to value the Shares properly.[33] Thus, J.P. Morgan alleges that there is a specifically implied contractual obligation carried in the Option Agreement, requiring American Century to provide D&P with enough information to value the Shares accurately.

J.P. Morgan further alleges that American Century breached that implied covenant and thereby frustrated the objectives of J.P. Morgan's bargain. According to J.P. Morgan, American Century failed to provide D&P with enough information about the Arbitration Claims to allow D&P to give those claims a value in the June 2011 Valuation. American Century allegedly knew that the

[33] Compl. ¶¶ 36, 37.

Arbitration Claims had substantial value in May 2011,[34] which was well before the June 2011 Valuation was issued. Nevertheless, American Century neither included a value for those claims in the materials that it provided to D&P for the June 2011 Valuation, nor provided D&P with sufficient information to value those claims on its own.[35]

Although American Century is correct that "the parties could reasonably anticipate at the time of contracting that American Century would exercise its option at a time while the arbitration was pending,"[36] "J.P. Morgan did not expect American Century to withhold material information from D&P relevant to American Century's fair market value . . . ."[37] J.P. Morgan alleges that the parties incorporated an existing valuation system, pursuant to which American Century was required to provide D&P with information, into the Option Agreement.[38] When the parties did that, they could not have anticipated that American Century would fail to provide D&P with the information that D&P needed to value the

---

[34] *Id.* at ¶ 13.
[35] *Id.* at ¶ 40.
[36] Def.'s Opening Br. at 15.
[37] Pls.' Answering Br. at 35.
[38] This is not to say that in order to complete certain valuations, D&P may not have done research on its own, but the valuations, including the June 2011 Valuation, were significantly (if not primarily or exclusively) based on analyses of information that American Century provided to D&P. *See e.g.*, American Century's Mot. for Leave to Supp. the R. on its Mot. to Dismiss, Ex. 1 (June 2011 Valuation). The Court may properly consider the June 2011 Valuation at this procedural stage because it is integral to and incorporated into the Complaint. *See supra* note 1.

Shares accurately.[39] Because American Century failed to provide D&P with information to value the Arbitration Claims, J.P. Morgan alleges that the June 2011 Valuation contained an inaccurately low valuation of the Shares, which damaged J.P. Morgan when American Century exercised the Option. Therefore, American Century's motion to dismiss is denied as to Count II because J.P. Morgan's allegations, taken together, are sufficient to state a claim for breach of the implied covenant.[40]

---

[39] Compl. ¶¶ 36, 37. American Century argues that "J.P. Morgan had the same information throughout the relevant time period as did American Century about the status of the arbitration[, and thus, i]f J.P. Morgan believed that the contingent value of the arbitration for American Century was high, J.P. Morgan could have hedged its arbitration risk by making a presentation to Duff & Phelps about the positive outlook for the arbitration for American Century." Def.'s Opening Br. at 16. The shortcoming of this argument is that J.P. Morgan alleges that American Century was required, in connection with the valuation process that is incorporated into Section 1.3(b), to provide D&P with sufficient information to value the Shares accurately. If that allegation is correct, J.P. Morgan should not have needed (and would not have thought it needed) to provide D&P with information to value the Arbitration Claims.

[40] American Century argues that "[b]y proceeding in this fashion (*e.g.*, failing to challenge the price, then instigating a lawsuit), J.P. Morgan denies American Century the benefit of *its* bargain under the Option Agreement to refuse to proceed with the Option exercise in the event that the Per Share Purchase Price was revised." Reply Mem. of Law in Supp. of American Century Companies, Inc.'s Mot. to Dismiss at 10 (emphasis in original). Count II, however, sufficiently states a claim that American Century breached the implied covenant that Delaware law implies in the Option Agreement. If J.P. Morgan is ultimately able to show that American Century did breach the implied covenant, it will be of no moment that, after that breach, American Century was prevented from enforcing another provision of the Option Agreement. *See TR Investors, LLC v. Genger*, 2010 WL 2901704, at *22 n.147 (Del. Ch. July 23, 2010) ("[A] party that repudiates or breaches a contract cannot then claim the benefits of that contract.") (citing *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1014-15 (Del. Ch. 2004)).

American Century also argues that this Court should dismiss the Complaint under the reasoning of *Julian v. Julian*, 2010 WL 1068192 (Del. Ch. Mar. 22, 2010) and similar cases where, according to American Century, the Court refused to disturb third-party valuations. In *Julian*, the Court stated that when "parties establish a binding dispute resolution procedure similar to arbitration, courts typically should not interfere with the decisions resulting from that procedure other than in the most egregious circumstances." 2010 WL 1068192, at *11. Moreover, in that case, the parties agreed "that an . . . [appraisal performed by a Member of the

C. *Count III*

Count III alleges that, if J.P. Morgan "prevails in this action," it is entitled to recover its reasonable attorneys' fees and costs under Section 5.11 of the Option Agreement. J.P. Morgan could (at least to some extent) eventually be the "prevailing party" in this action. Therefore, American Century's motion to dismiss is denied as to Count III.

## VI. CONCLUSION

For the foregoing reasons, American Century's motion to dismiss is granted as to Count I, but denied as to Counts II and III. An implementing order will be entered.

---

Appraisal Institute] may only be discarded or altered by the Court where there is evidence that the appraisal is the product of fraud, bad faith, partiality, or deception." *Id.* (citation omitted). To the extent *Julian* is applicable to this case, J.P. Morgan's allegations in support of Count II sufficiently plead bad faith. Thus, under the reasoning of *Julian*, Count II survives a motion to dismiss. In *Julian* itself, the Court only determined after a two-day trial that the valuation at issue there was not the result of bad faith. *Id.* at *2.