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Re: *Millien v. Popescu*
C.A. No. 8670-VCN
Date Submitted: February 14, 2014

Dear Counsel:

The Court concluded in its post-trial memorandum opinion (the "Opinion") that Popescu had demonstrated by clear and convincing evidence that Millien breached the terms of the 2009 Email.[1] The Court further concluded that Popescu had demonstrated by clear and convincing evidence that he is entitled to specific performance of the 2009 Email, by which Millien is to authorize the issue of one

[1] *See Millien v. Popescu*, 2014 WL 463739, at *12-14 (Del. Ch. Jan. 31, 2014). The Court adopts the definitions used in the Opinion.

share of BT Voting Stock to Popescu at par value in order to assure Popescu's "control" of the enterprise.

In his motion for reconsideration (the "Motion"), filed under Court of Chancery Rule 59(f), Millien petitions the Court to reconsider two issues implicated in the Opinion: first, whether it was appropriate for the Court to consider evidence other than BT's stock ledger to determine whether Popescu was contractually entitled to be the holder of a majority of BT Voting Stock;[2] and second, whether it was appropriate under the 2009 Email, particularly the Control Paragraph, to award specific performance on terms that would require Millien to authorize the issue of one share of BT Voting Stock to Popescu at par value.[3]

The Court may grant a Rule 59(f) motion if the moving party demonstrates that "the Court's decision was predicated upon a misunderstanding of a material fact or a misapplication of the law"[4] that was "outcome determinative of the earlier litigation."[5] It has been said that the moving party "bear[s] a heavy burden on a

[2] Pet'r's Mot. for Recons. ¶¶ 4-17.
[3] *Id.* ¶¶ 18-34.
[4] *Ravenswood Inv. Co. L.P. v. Winmill*, 2011 WL 6224534, at *3 (Del. Ch. Nov. 30, 2011) (quoting *Fisk Ventures, LLC v. Segal*, 2008 WL 2721743, at *1 (Del. Ch. July 3, 2008)).
[5] *Preferred Invs., Inc. v. T & H Bail Bonds, Inc.*, 2013 WL 6123176, at *4 (Del. Ch. Nov. 21, 2013).

Rule 59 motion,"[6] and a Rule 59(f) motion in particular is "not a mechanism for litigants to relitigate claims already considered by the court."[7]

Millien contends that it was inappropriate for the Court to consider evidence beyond BT's stock ledger in deciding Popescu's breach of contract claim related to the ownership of BT Voting Stock. For support, Millien cites to 8 *Del. C.* § 219(c)[8] and several decisions of Delaware courts interpreting this statute.[9] In response, Popescu argues that the statute and case law cited by Millien do not prevent the Court from, as it did in the Opinion, looking to evidence other than BT's stock ledger to determine whether Popescu had a contractual right against Millien to be the holder of a majority of BT Voting Stock.[10]

The Court concludes that the Opinion was not based on a misapplication of 8 *Del. C.* § 219(c) or the related Delaware case law regarding the appropriate use of

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[6] *In re ML/EQ Real Estate P'ship Litig.*, 2000 WL 364188, at *1 (Del. Ch. Mar. 22, 2000).
[7] *Sutherland v. Sutherland*, 968 A.2d 1027, 1028 (Del. Ch. 2008).
[8] 8 *Del. C.* § 219(c) ("The stock ledger shall be the only evidence as to who are the stockholders entitled by this section to examine the list required by this section or to vote in person or by proxy at any meeting of stockholders.").
[9] *See, e.g., Rainbow Navigation, Inc. v. Pan Ocean Navigation, Inc.*, 535 A.2d 1357, 1361 (Del. 1987) ("[A] court may look to evidence which is extrinsic to the stock ledger for the purpose of deciding whether a person possesses record stockholder status only when the corporation does not have a stock ledger or has a blank stock ledger.").
[10] Resp't's Opp'n to Pet'r's Mot. for Recons. ¶¶ 7-13.

a corporation's stock ledger to establish its stockholders of record. The Opinion expressly distinguished this action from case law analogous to that advanced by Millien here.[11] It was not inappropriate for the Court to look beyond BT's stock ledger because Popescu was not seeking a determination that he was the record stockholder of a majority of BT Voting Stock. Rather, Popescu sought specific performance of the 2009 Email by which Millien agreed that Popescu would be the majority stockholder of BT. In other words, the Court did not conclude that, based on BT's stock ledger, Popescu was *presently* the holder of a majority of BT Voting Stock. Instead, the Court concluded that, independent of the stock ledger, Popescu was contractually entitled to *become* the holder of a majority of BT Voting Stock.

Millien also contends that specific performance of the 2009 Email was inappropriate because the operative Control Paragraph purportedly "was not enforceable due to its unintelligible terms."[12] He cites to Delaware case law for the proposition that the Court may not supply the essential terms of a purported

[11] *See Millien*, 2014 WL 463739, at *13 n.182.
[12] Pet'r's Mot. for Recons. ¶ 19.

agreement, such as the 2009 Email, in an award of specific performance.[13] Popescu, in opposition, argues that the Court's awarding of specific performance was consistent with the sufficiently definite, essential terms of the 2009 Email.[14]

Again, the Court concludes that the Opinion was not based on a misapplication of Delaware law related to specific performance. The Court carefully considered and applied Delaware precedent before holding that Popescu had established, by clear and convincing evidence, that the essential terms of the 2009 Email were sufficiently definite to support an award of specific performance for one additional share of BT Voting Stock.[15] By the literal terms of the Control Paragraph, Millien agreed that, other than their contemplated equal ownership of a holding company which was never actually implemented, Popescu would "retain a 1% share" and thus be "the majority shareholder in BT."[16] By necessary implication, in agreeing that Popescu would be the majority stockholder by holding an additional one *percent* more of BT than he effectively would, so too did Millien

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[13] *See, e.g.*, *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("[S]pecific performance will only be granted when an agreement is clear and definite and a court does not need to supply essential contract terms.").
[14] Resp't's Opp'n to Pet'r's Mot. for Recons. ¶¶ 14-18.
[15] *See Millien*, 2014 WL 463739, at *12-14.
[16] *See id.* at *2.

agree that Popescu would be the majority stockholder by holding at least one *share* more of BT Voting Stock than he effectively would.

In summary, Millien has not established that the Opinion was based on a misunderstanding of fact or a misapplication of law that would have been material and dispositive.[17] Therefore, the Motion is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[17] In the Opinion, the Court concluded that, since Popescu was entitled to specific performance of the 2009 Email for his breach of contract claim, Millien's petition for the appointment of a custodian was moot because the BT stockholders would be able to resolve any alleged deadlock. *See id.* at *16 (citing *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 236 (Del. 1982)). To the extent that the Motion seeks reconsideration of the legal or factual grounds of that particular conclusion, the Court notes that the appointment of a custodian pursuant to 8 *Del. C.* § 226 is "discretionary." *Giuricich*, 449 A.2d at 240.

Millien's trial testimony would have strongly supported the conclusion that BT was not suffering or threatened with irreparable injury based on his "specious" contention of a director deadlock. *See Francotyp-Postalia AG & Co. v. On Target Tech., Inc.*, 1998 WL 928382, at *4 (Del. Ch. Dec. 24, 1998) (finding no threat of irreparable injury to a corporation where the purported deadlock among directors related to a stockholder's request for a capital call based on the "specious premise" that the corporation was insolvent). Millien testified that he refused to consider any issue while the deadlock remained, but the deadlock would remain for as long as he refused to consider any issue. This testimony demonstrates that Millien sought to create a deadlock by refusing to consider any issue. This is not the type of conduct that should support the appointment of a custodian.

In sum, there was more than one ground on which to deny Millien's petition.