COURT OF CHANCERY OF THE STATE OF DELAWARE

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July 5, 2013

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Re: *Millien v. Popescu* C.A. No. 8670-VCN

Date Submitted: July 2, 2013

Dear Counsel:

Petitioner Kevin Millien ("Millien") and Respondent George Popescu ("Popescu") each owns fifty percent of the common stock of Boston Technologies, Inc. (the "Company"), a Delaware corporation. They also are the only two members of the Company's board of directors. Popescu is the founder and the Chief Executive Officer ("CEO"). He was joined by Millien in 2009. Millien served as the Chief Operating Officer ("COO") and as the Chief Marketing Officer ("CMO"). In 2012, Popescu removed Millien as COO, an action that Millien did not contest. Recently, Popescu fired Millien as CMO. Popescu attempted to buy out Millien but was

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unsuccessful. Millien has moved pursuant to 8 Del. C. § 226 for the appointment of a

custodian for a deadlocked corporation, and he also seeks a status quo order. The

parties agree that a status quo order to stabilize the governance of the Company is

appropriate. They disagree as to its scope, including the point from which the *status*

quo should be measured. Millien served as COO until sometime in 2012 and he was

transferred to London in early 2013. Apparently, he has recently had less to do with

the Company's day-to-day operations.

The Court's attention has been directed to those aspects of the *status quo* order

about which the parties disagree.

The Company's bylaws provide for advancement. Advancement is 1.

available to those who have been sued; it is not available to those who bring suit.

That latter aspect of the Company's advancement program precludes advancement—

at least for now—for the benefit of Millien. There is no dispute that Popescu is

entitled to advancement, but for Millien's argument that there is no one to approve

the form of Popescu's undertaking, as required by the bylaws, to repay any advanced

¹ Millien was terminated shortly (a little more than an hour) before this action was filed. His motion for a status quo order came about a week later.

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sums that are subsequently determined to have been improvidently advanced.²

Millien is correct that there is no independent board member or officer to approve the

undertaking. If Millien's counsel has no objection to the form of undertaking

submitted by Popescu, there seems to be little reason to deprive Popescu of his right

to advancement. Accordingly, Millien's counsel shall have five days from the date of

this letter opinion to review Popescu's undertaking to repay sums advanced under

certain circumstances. Unless Millien's counsel can set forth appropriate grounds for

rejecting the form of the undertaking, Popescu will be entitled to advancement.

2. Millien was removed as COO and later as CMO. These were positions

for which he was paid (along, apparently, with an apartment in Boston,

Massachusetts for which the Company paid the rent). The question is whether the

status quo order should return him to those positions. Popescu notes that this action

was filed after Millien was fired from his position as CMO, but that is not necessarily

a sufficient reason not to restore him to such position.

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² Decl. of George Popescu ("Popescu Decl.") Ex. F.

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Millien was appointed by the board to be Vice President, Secretary and Treasurer of the Company.³ No effort has been made to remove him from those positions. The question seems to be one of how Millien became COO and CMO—by board action or by action of Popescu as CEO. If appointed to those positions by Popescu, there seems to be little reason why Popescu could not remove him, especially in light of the evolution of his employment and the change where he performed his services.⁴

The better evidence at this early stage is that Millien was hired by Popescu, as CEO, to be COO and CMO.⁵ Accordingly, reinstatement is not appropriate at this time.⁶

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³ Verified Pet. for the Appointment of a Custodian Pursuant to 8 *Del. C.* § 226, Ex. A.

⁴ Article III, § 3 of the Company's bylaws provides that an officer appointed by the CEO may be removed by the CEO.

⁵ Popescu Decl. ¶ 10.

⁶ Millien relies upon *DiNardo v. Renzi*, 1987 WL 10014, 13 Del. J. Corp. L. 286 (Del. Ch. Apr. 24, 1987), which restored an equal shareholder to his employment position with the company during the pendency of the parties' dispute over control. There, the board had adopted a resolution that "limit[ed] the officer's authority to act independently other than in the ordinary course of business." *Id.* at 290. The Court concluded that the firing of a fellow fifty percent stockholder was not in the "normal course." *Id.* Millien, however, has not pointed to any comparable provision among the Company's records that would have limited Popescu's rights as CEO to terminate Millien as either COO or CMO. Thus, the better inference is that Popescu had the power to terminate Millien from those positions. With that authority, a *status quo* order restoring the positions and the associated benefits to Millien on an expedited basis is not warranted.

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- 3. Popescu accuses Millien of meeting with competitors of the Company. Millien's counsel has agreed that it is appropriate for the *status quo* order to limit both Popescu and Millien from activities competitive with or contrary to the interests of the Company. Yet Popescu has developed something of a record to support his allegations.⁷
- 4. The other debate centers around deviation from the broad standards of the *status quo* order. Popescu seeks the ability to avoid the obligations imposed by the *status quo* order through giving five days notice to Millien which would enable him to seek court intervention. Millien, in turn, wants Popescu to obtain his permission or to seek court approval before deviating from the terms of the order. Ordinarily, Millien might well be correct, but, on these facts, admittedly in a

⁷ See Letter of Kenneth J. Nachbar, Esquire to the Court, dated July 3, 2013, at Exs. A-C. This letter was submitted after oral argument on the motion for a *status quo* order, and Millien has asked the Court to postpone any order. *See* Letter of Francis G.X. Pileggi, Esquire to the Court, dated July 3, 2013. Perhaps the letter submitted by Popescu's counsel inaccurately suggests Millien's conduct, but the parties agreed to limitations on activities contrary to the Company's best interests or, more specifically, competitive to it. The order that the Court will enter is intended to reflect those prudent concerns. Matters of this nature move quickly, and the interim results are reached without the benefit of anything approaching a full factual record. Millien is free to apply for modifications of the *status quo* order that will be entered and, at that time, the Court will consider his supplemented factual contentions.

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preliminary stage, where Popescu has been managing the Company for some time

now, there is no reason to impose such a burden on Popescu as Millien now seeks.

5. Millien, at one point, wanted to limit Popescu's decision-making

discretion to items of less than \$50,000; he has now relented and agrees that \$100,000

is an appropriate marker.

An order reflecting those items addressed in this Letter Opinion and otherwise

generally adopting what the parties had agreed to accompanies this Letter Opinion

and will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap

Enc.

cc: Register in Chancery-K