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Case No. 9163-VCN

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OF THE
STATE OF DELAWARE

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Re: *Numoda Corporation v. Numoda Technologies, Inc.*
C.A. No. 9163-VCN
Date Submitted: December 31, 2013

Dear Counsel:

Plaintiff Numoda Corporation ("Numoda") brought this action seeking the issuance to it of stock of Defendant Numoda Technologies, Inc. ("NT"). As of now, NT has no issued stock.

This is another action involving companies that are substantially subject to the control of one family. In *Boris v. Schaheen*,[1] the Court concluded that John A. Boris and Ann S. Boris, brother and sister, and not Mary S. Schaheen ("Mary"),

[1] 2013 WL 6331287, at *16-18 (Del. Ch. Dec. 2, 2013), *appeal docketed*, No. 13, 2014 (Del. Jan. 8, 2014).

their sister, controlled Numoda. Mary and John Houriet, Jr. are the only directors of NT[2] and, if NT's stock is issued to Numoda, it is likely that they will be removed by, and replaced by, Mary's brother and sister.

Numoda now seeks a *status quo* order protecting it against improvident actions by the current members of NT's board of directors.[3]

Status quo (or standstill) orders are frequently, if not routinely, entered in actions under 8 *Del. C.* § 225 that address the composition of a company's board of directors.[4] This, of course, is not an action under Section 225. Instead, it is an action seeking the issuance of stock by NT to Numoda. Numoda argues that, because the ultimate objective of this action, after issuance of the stock, is to reconstitute NT's board of directors, then the approach of Section 225 should be followed here.

While Numoda suggests that a *status quo* order should be entered almost as a matter of course, NT responds by pointing out, first, that this is not a Section 225

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[2] Schaheen Aff. ¶¶ 1, 3.

[3] Although the Court cannot predict with any certainty how this litigation will turn out, when NT was created, the various individuals involved all seemed to anticipate that it was to be a subsidiary of Numoda. That forms the core of Numoda's claims in this action.

[4] *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 8.08[f] at 8-198-99 (2013) ("Wolfe & Pittenger").

action and, second, that the relief that Numoda seeks is more properly characterized as a preliminary injunction. To earn a preliminary injunction, a party, of course, must demonstrate a reasonable probability of success on the merits, the likelihood of irreparable harm in the absence of such relief, and a favorable balancing of the equities.[5]

Preservation of NT while its capital structure is resolved is certainly a reasonable objective.[6] Mary is seriously pursuing an appeal of this Court's adverse decision regarding control of Numoda and has, along with some colleagues, filed another action seeking a realignment of Numoda's capital structure.[7] Thus, the likelihood that the current NT board would imminently do something materially and irreparably harmful to NT is not compelling. Although the risk of harmful actions may be minimal, this case was brought to facilitate a determination of who controls NT. Some limited restriction on the power of NT's current board is appropriate in order to reduce the risk of untoward consequences. Yet, these

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[5] *See, e.g.*, *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998).

[6] "[T]he presumably mutual interests of the parties in fostering the effective management of the day-to-day affairs of the corporation while the dispute over control is litigated often cannot be fully addressed by the relatively blunt instrument that is a traditional preliminary injunction." Wolfe & Pittenger, § 8.08[f] at 8-198.

[7] Verified Compl. ¶¶ 41-95, *Houriet v. Numoda Corp.*, C.A. No. 9231-VCN (Del. Ch. Jan. 7, 2014).

circumstances do not support the entry of a *status quo* order that governs the conduct of NT in great detail. This case calls for a balancing of some need for attempting to assure the preservation of NT against an unwarranted restriction on the activities of NT's current board, the effective control of which has not changed since 2006.

Accordingly, the Court will enter a *status quo* order that is limited in scope, but general in its terms. The primary consideration will be limiting activities outside the ordinary course of business. NT's principal function is holding intellectual property licensed to Numoda, and perhaps others. A sale or disposition of those assets could have significant, adverse effects on NT and, although such a transfer would be outside the ordinary course of business, reference to this particular concern is appropriate.[8]

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[8] Defendant Numoda Capital Innovations LLC ("NCI") is another of these related entities and some of NT's assets may be held by it. Because a principal objective is to cabin NT's assets, any assets transferred by NT to NCI in the last twelve months shall also be subject to the terms of the *status quo* order.