EFiled: Jan 31 2014 01:13PM EST
Transaction ID 54927360
Case No. 8670-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KEVIN MILLIEN, Petitioner, v. GEORGE POPESCU, Respondent.	)	**C.A. No. 8670-VCN**

MEMORANDUM OPINION

Date Submitted: October 10, 2013
Date Decided: January 31, 2014

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NOBLE, Vice Chancellor

I. INTRODUCTION

This action is fundamentally a dispute between two stockholder-directors over the capital structure of their corporation. One contends, based on current stock ownership, that a custodian is necessary to break a director deadlock; the other seeks specific performance of a purported agreement that would effect their intended stock ownership and thus resolve any alleged deadlock.

Petitioner Kevin Millien ("Millien") filed this action pursuant to 8 *Del. C.* § 226 against Respondent George Popescu ("Popescu") requesting the Court to appoint a custodian to resolve the parties' deadlock as the only two directors of Boston Technologies, Inc. ("BT").[1] In response, Popescu filed four counterclaims against Millien: (i) breach of contract; (ii) breach of the implied covenant of good faith and fair dealing; (iii) reformation; and (iv) fraud in the inducement.[2]

This post-trial memorandum opinion presents the Court's findings of fact and conclusions of law.[3] For the reasons set forth below, the Court concludes that Popescu is entitled to judgment in his favor for his breach of contract claim and that Millien is not entitled to the appointment of a custodian for BT.

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[1] Joint Pretrial Order ("Pre-Trial Order") § IV.A; Am. Verified Pet. for the Appointment of a Custodian Pursuant to 8 *Del. C.* § 226 ("Pet.") ¶¶ 27-33.
[2] Pre-Trial Order § IV.B; Resp't's Answer and Am. Verified Countercl. ¶¶ 46-67.
[3] The parties relied on their pre-trial briefs instead of submitting post-trial briefs. The Court heard closing arguments at the conclusion of the trial in lieu of a separate, post-trial oral argument.

II. THE PARTIES

Millien and Popescu are the current directors of BT.[4] Millien is BT's former Chief Operating Officer ("COO") and Chief Marketing Officer ("CMO").[5] Popescu is BT's current Chief Executive Officer ("CEO").[6] Currently, they are the sole and equal holders of BT's Class B voting stock ("BT Voting Stock"), with each owning 63,000,000 shares.[7]

Although not a party in this action, BT is the Delaware corporation whose capital structure is in dispute. BT is headquartered in Boston, Massachusetts and has several offices outside the United States.[8] It provides software and other services to firms in the foreign exchange market.[9]

Popescu and two associates formed Boston Technologies LLC, the predecessor to BT, in March 2007 to hold the intellectual property rights for brokerage software Popescu was writing.[10] After a co-founder's particularly flippant comment about his control over the company, Popescu took steps to

[4] Pre-Trial Order ¶ 17.
[5] *Id.* ¶ 19.
[6] *Id.* ¶ 18.
[7] *Id.* ¶ 16.
[8] *Id.*¶¶ 1, 4.
[9] *Id.* ¶ 3.
[10] *Id.* ¶ 1; Trial Tr ("Tr.") 224-25.

become its sole owner.[11] On April 11, 2008, Boston Technologies LLC was converted into BT.[12]

III. BACKGROUND

A. *Popescu and Millien Meet*

Popescu and Millien were introduced by a third party between late 2008 and early 2009.[13] At the time, Millien was working in New York as a vice president at FXCM, a growing firm in the foreign exchange trading industry.[14] Popescu pitched BT's software to Millien, and the two discussed adapting BT's software for FXCM's specific needs.[15] A business relationship developed, and FXCM became one of BT's largest customers. Millien and Popescu spent considerable time working together on this project during summer 2009.[16]

B. *The Terms of Millien's Employment at BT*

Eventually, by the end of July 2009, Millien wanted to leave FXCM. Millien informed Popescu about this plan and suggested he might be able to work at BT.[17] Popescu was open to the idea, and the two started negotiations—or, as Millien characterized them, "discussions"[18]—about the terms under which Millien

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[11] Tr. 226-29.
[12] Pre-Trial Order ¶ 1.
[13] Tr. 6, 233.
[14] *Id.* 5-6.
[15] *Id.* 6-9, 233-34.
[16] *Id.* 11-12.
[17] *Id.* 13-15, 234-36.
[18] *Id.* 141-42.

would join BT.[19] They negotiated directly; no lawyers were involved.[20] Popescu likely asked Millien to keep these initial negotiations confidential, at least in the short term, so that neither would have any "problems" with FXCM.[21] Although he lacked experience in the position, Millien proposed to become BT's COO. Popescu was largely indifferent to Millien's title "as long as he was getting the work done [that] he was supposed to do."[22]

The primary issue to be negotiated was Millien's compensation. As a start-up company, BT did not generate the type of cash to pay Popescu, let alone Millien, a large salary.[23] Consequently, Popescu decided to offer to Millien a relatively smaller salary, comparable to his own, along with significant equity in BT. Some sort of relocation package for Millien's move from New York to Boston was also considered.[24]

At the time, BT's charter authorized 3,000 shares of common stock, and Popescu was the sole stockholder, holding 2,000 shares.[25] To persuade Millien to join BT, Popescu initially offered a 25% to 33% interest in BT; Millien countered by proposing they become "50/50 partners."[26] Popescu was open to offering a

[19] *Id.* 235-36
[20] *Id.* 17-18.
[21] *Id.* 236.
[22] *Id.* 237.
[23] *Id.* 238-39.
[24] *Id.* 239-40.
[25] Pre-Trial Order ¶ 2.
[26] Tr. 15-16, 238-39, 285, 336.

larger equity position. But, with his past experience with Boston Technologies LLC in mind, Popescu expressly informed Millien that he wanted to remain in exclusive control of BT, a fact that Millien could not deny at trial.[27]

The pair agreed on certain terms by August 3, 2009. On that day, Millien sent an email to Popescu that stated, in relevant part:

> I'm glad we were able to reach an agreement. I want to be sure that we were clear on the final terms, so here is my understanding of what we have agreed to:
>
> 1) A base salary of $90K per year
>
> 2) A one-time signing bonus of $10K - **question** do you need my bank wire details?
>
> 3) No commission rate or explicit remuneration for business that I personally bring to BT – all such compensation will be reflected in the equity share.
>
> 4) A new corporation or partnership company will be established where we share a 50/50 ownership interest. This corporation will become a 95% shareholder in BT and George Popescu will retain a 1% share, thus making you the majority shareholder in BT.
>
> 5) Anti-dilution provisions protecting the financial interest of our new company as a shareholder in BT (not part of our last discussion but I don't imagine that this would be an issue).[28]

In a prompt response email, Popescu wrote, "I confirm all of the below."[29] The primary provision of this email exchange (the "2009 Email") in dispute here is the

[27] *Id.* 143-44, 240-43, 248.
[28] Joint Exhibit ("JX") 1.
[29] *Id.*

fourth numbered paragraph (the "Control Paragraph"), the substance of which Millien likely first proposed.[30]

Popescu would have been "uncomfortable" had Millien begun working at BT without a written document evidencing the "final" terms of their agreement.[31] He testified that the purpose of the 2009 Email was "to put in writing what we had negotiated and agreed upon verbally, to avoid any misunderstanding." In particular, Popescu wanted to be clear that he would retain voting control over BT.[32] According to Popescu, there were no additional discussions between him and Millien regarding the Control Paragraph or any other term of the 2009 Email because they were "clear" and "agreed upon."[33]

A significant portion of Millien's testimony at trial related to whether he believed the 2009 Email, particularly the Control Paragraph, represented a final agreement. Despite the phrases "reach an agreement," "final terms," and "what we have agreed to," Millien contends that the 2009 Email neither memorialized a prior agreement nor constituted an agreement itself. Instead, Millien claims it was "a summary of the discussions at the time,"[34] something akin to a "working

[30] Tr. 244-45.
[31] *Id.* 244.
[32] *Id.* 246-48.
[33] *Id.* 252-53.
[34] *Id.* 151.

concept."[35] But, Millien also testified that no statement in the 2009 Email was false.[36]

C. *Millien's First Months at BT*

Millien started working at BT on August 4, 2009, the day after the 2009 Email.[37] His employment at BT generally followed the terms of the 2009 Email. Millien earned a salary of $90,000, received a $10,000 signing bonus, and did not earn commission on sales during his time as COO.[38] In addition, Millien conceded that he was never diluted by the issuance to certain BT employees of options for non-voting stock without his approval.[39]

However, as Millien identified at trial, there are certain terms that were not expressly listed in the 2009 Email. Those terms include, for example, the price per share that Millien would pay for his BT stock,[40] the exact number of shares Millien would receive, and whether BT would have different classes of stock.[41] Whether those terms are material to what is reflected by, and contemplated in, the 2009 Email—especially the Control Paragraph—is a central issue in this dispute.

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[35] *Id.* 158.
[36] *Id.* 137.
[37] *Id.* 19.
[38] *Id.* 154-56.
[39] *Id.* 194-95.
[40] Millien claimed that he expected to pay a "significant amount of money" for the stock he would receive in BT. *Id.* 174-75.
[41] *Id.* 111-12.

D. *The Need for Formal Documents Evidencing BT's Capital Structure*

Millien and Popescu also contemplated waiting approximately one year as a "trial period" before Millien would receive his equity interest in BT.[42] By April 2010, a one-year delay no longer seemed necessary or appropriate. First, perhaps because of their collaboration while Millien was at FXCM, they had developed a strong, working relationship.[43] Second, as part of applying for a line of credit at Webster Bank, BT needed to submit formal corporate documents reflecting its capital structure.[44]

At the time, these documents did not exist.[45] Largely out of a concern that a substantial change in BT's capital structure in a few months might have a negative effect on BT's financial relationship with Webster Bank, Popescu deemed it appropriate to issue BT stock to Millien before applying for the line of credit.[46] Webster Bank suggested BT retain the law firm of Gesmer Updegrove LLP ("Gesmer") to draft these documents.[47]

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[42] *Id.* 261-62.
[43] *Id.* 262-63.
[44] *Id.*
[45] BT's then-outside counsel had mentioned, in February 2010, forming a holding company for certain BT assets, of which 50% would be owned by a partnership between Millien and Popescu. JX 7. The following month, the same lawyer circulated a draft partnership agreement providing Popescu with 60% ownership of BT and Millien with 40% ownership. JX 8. No document based on either of these structures was executed.
[46] Tr. 263.
[47] *Id.* 264.

The specifics of how Millien and Popescu worked with Gesmer in drafting these documents are unclear, but it is clear from emails that Millien generally supervised the process.[48] On April 14, 2010, Millien sent an email to Peter Moldave ("Moldave") at Gesmer noting that the line of credit from Webster Bank was "contingent upon our ability to provide corporate documents that describe the ownership structure before the end of the month."[49] That is, BT needed the documents in about two weeks.

1. Popescu's "Reminder" Regarding BT's Capital Structure

Moldave received instructions from Millien and Popescu based on meetings, phone calls, and several email exchanges.[50] Neither party seems to have provided the 2009 Email to him.[51] Rather, the most specific documentary guidance on the proposed BT capital structure was an April 15, 2010, email from Popescu to Moldave, with a copy to Millien, outlining a list of items on the subject (the "2010 Email").[52] Popescu later explained that the 2010 Email was his way both to remind everyone, including Millien, of the terms of BT's capital structure and to ask questions of the lawyers "to understand how that [structure] will work in practice."[53]

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[48] *Id.* 264-65; JX 10, 13.
[49] JX 10.
[50] *See, e.g.*, JX 10, 11, 12, 13, 21, 24.
[51] Moldave Dep. 26, 28-29.
[52] JX 11.
[53] Tr. 272-73.

Some items are explicitly listed as discussion points, but above them is a section titled "Present share standing." There, Popescu stated his understanding of the intended capital structure of BT:

- 5% to Evan Ross (to be documented properly), ex Head of Development
- 2% to Natallia Hunik (instead of employee share plan, to be vested)
- 1% a year to be given to employees as stock options plan
- 1% a year to be given to managers as stock options plan
- 0.05% by Dylan Eklind, ex employee
- 0.1% is owned by Matt Daum, contract and ex employee
- 1% will be owned by me.
- The rest, we thought, will be owned by a Partnership between Kevin and I, Partnership owned 50/50% by Kevin and I. This Partnership can own other businesses.
- And I have the absolute majority to take decisions in BT if need be.[54]

At trial, the parties debated whether the terms proposed in the 2010 Email were similar to those in the 2009 Email. Popescu believed they were equivalent;[55] Millien claimed they were not.[56] At his deposition, Gesmer's Moldave noted that the 2009 Email and 2010 Email were consistent in providing an additional 1% to

[54] JX 11.
[55] *See, e.g.*, Tr. 372-73.
[56] *See, e.g.*, *id.* 180-81.

Popescu separate from the 50/50 position he would share with Millien.[57] Moldave also understood that the "1%" and "absolute majority" structure in the 2010 Email was not meant to be a subject for discussion.[58]

Millien did not deny receiving the 2010 Email, but he could not recall whether he read it or whether he took issue with any part of it.[59] Similarly, Popescu could not recall if Millien ever discussed the 2010 Email with him.[60]

2. The Capital Structure Documents Executed by the Parties

On April 23, 2010, Moldave delivered to Millien and Popescu by email certain documents that would implement the capital structure for BT (the "Gesmer Documents").[61] In his email, Moldave described these documents as putting the pair in their "initial positions (i.e. before the transfer to the LLC holding company)." The focus on these initial positions instead of a limited liability company agreement, according to Moldave, was in the interest of time to secure the line of credit with Webster Bank.[62]

Popescu understood the reference to "initial positions" to mean that the Gesmer Documents were "the first step" to bring about his and Millien's intended

[57] Moldave Dep. 47.
[58] *Id.* 57-59.
[59] Tr. 176-79.
[60] *Id.* 269, 274.
[61] JX 14.
[62] *Id.*; Moldave Dep. 61.

capital structure for BT; he expected that "there will be more steps."[63] Moldave agreed that a "future LLC agreement relating to control," to implement the parties' mutual understanding that Popescu would be in control of BT, still needed to be drafted and executed.[64] By contrast, Millien claimed the phrase "initial positions," even though it appeared in the first sentence of Moldave's email, was not a "material detail."[65] Rather, he testified that he understood the Gesmer Documents to reflect "the structure of the company going forward."[66]

In his email, Moldave noted that the Gesmer Documents included "significant enough changes" from the last version "to warrant a rereading."[67] Millien reviewed the Gesmer Documents and believed they were correct.[68] So too did Popescu review them, but he "did not really read every single line because [he] trusted [Gesmer]."[69] With other BT work to do, Millien and Popescu unceremoniously executed the Gesmer Documents around April 27, 2010.[70]

The Gesmer Documents memorialized BT's capital structure at three distinct moments in time. First, they documented BT's capital structure in April 2008, when Popescu was BT's only director and the holder of all 2,000 issued shares of

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[63] Tr. 281.
[64] Moldave Dep. 61, 64, 124-25, 155.
[65] Tr. 190.
[66] *Id.* 192-93.
[67] JX 14.
[68] Tr. 131-32.
[69] *Id.* 285.
[70] *Id.* 132-34.

BT common stock.[71] Second, the Gesmer Documents elected Millien as a director of BT and documented Millien's purchase of 900 shares of BT common stock from Popescu through a Stock Purchase Agreement in August 2009.[72] Third, and finally, they caused BT's repurchase of 200 shares of BT common stock from Popescu and amended BT's charter to authorize two classes of BT common stock, to increase the number of authorized shares, and to implement a 70,000:1 stock split in April 2010.[73] The net effect of the Gesmer Documents was that Millien and Popescu were both BT directors and each held 63,000,000 shares of BT Voting Stock.[74] According to BT's stock ledger, there has been no change in, or additional issue of, BT Voting Stock since this series of transactions.[75]

Although the Gesmer Documents provide for equal BT Voting Stock ownership, the overwhelming weight of the evidence shows that something akin to the Control Paragraph of the 2009 Email—providing voting control of BT to Popescu—was the intended governing structure of BT. Steve Snyder ("Snyder"),

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[71] Pre-Trial Order ¶ 15(v), (vi); JX 14.

[72] Pre-Trial Order ¶ 15(i), (vii); JX 16, 17.

The three-page Stock Purchase Agreement, dated August 4, 2009, included a representation that Popescu was "not relying on any representations or warranties of any party except as expressly set forth in this Agreement." The Stock Purchase Agreement also included an integration clause that provides: "This Agreement constitutes the entire agreement of the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and undertakings of the parties, both written and oral." Massachusetts law governs the terms of the Stock Purchase Agreement. JX 17. Millien was to pay $900 in exchange for 900 shares, but Popescu recalled not receiving this payment. *Id.*; Tr. 263.

[73] Pre-Trial Order ¶ 15(ii), (iii), (ix), (x), (xi); JX 18, 19.

[74] Pre-Trial Order ¶ 16. Millien explained that the purpose of the stock split was primarily "to have a larger amount of shares." Tr. 64.

[75] Pre-Trial Order ¶ 16.

an attorney at Gesmer and an informal advisor to Popescu and BT, recalled participating in several meetings, most likely with Millien in attendance, during which Popescu described the ownership of BT as "Kevin and George each owning 50 percent of the company, and George own[ing] one more share."[76] Millien could not deny that he participated in conversations in which a 50/50 ownership structure with Popescu in control was discussed.[77]

In fact, Millien never discussed the terms of the 2009 Email with Popescu again. At trial, he claimed that because the 2009 Email was just a "preliminary discussion," he did not expect to have another conversation with Popescu about it.[78] Millien even testified that he would not have executed the Gesmer Documents in April 2010 if they gave to Popescu a majority ownership in BT.[79] Popescu, on the other hand, was adamant that the 2009 Email represented the final terms of his agreement with Millien under which he would retain voting control over BT.[80]

After providing the Gesmer Documents, Moldave also requested that the parties agree to a conflict waiver to allow him "to work on the LLC agreement between the two."[81] However, no one from BT appears to have replied to this request. In the months after executing the Gesmer Documents, Millien and

[76] Snyder Dep. 30-31, 61-62.
[77] Tr. 165.
[78] *Id.* 193.
[79] *Id.* 90.
[80] *See, e.g.*, *id.* 252-53.
[81] JX 15.

Popescu do not appear to have discussed with Gesmer how best to bring about their intended control structure for BT.[82]

E. *Millien and Popescu Continue to Discuss Forming a Holding Company for BT*

Following the execution of the Gesmer Documents in April 2010, Millien and Popescu had intermittent conversations about forming the intended holding company structure for their interests in BT. Millien again appears to have been responsible for this project. For example, in October 2010, Popescu asked Millien whether an LLC had ever been formed; Millien replied that an LLC he identified as KG Hudson Capital Partners was formed.[83] When Moldave informed Millien and Popescu in January 2011 that that LLC did not yet exist, Popescu explicitly told Millien that he had "trust" in him to supervise this process.[84] Two months later, in March 2011, Millien unilaterally informed Moldave that an LLC was no longer necessary because he saw "no benefit to inserting the LLC into the ownership structure of BT."[85]

Even though, in hindsight, the formation of a holding company should have been a high priority, there was no rush to create that structure. The primary reason for the delay was a concern about cost.[86] Popescu hoped to receive a venture

[82] Tr. 281-82.
[83] JX 27.
[84] JX 32.
[85] JX 40.
[86] Tr. 292.

capital investment in the near future and anticipated that the holding company structure would be finalized at that time. Rather than spending BT's limited cash on creating one immediately, after Popescu learned that an LLC structure did not exist, he thought it better to wait until it was "necessary."[87]

Another reason why the implementation of this structure was not a pressing concern may have been the absence of significant disagreements between Millien and Popescu in managing the business and affairs of BT. During this period, there were no business disagreements that they could not resolve amicably—or, at least, without raising the question of who had ultimate control over BT. BT would grow from around $2 million in revenue in 2009 to approximately $14 million in 2012.[88]

F. *The New Roles of Millien and Robert Castle*

The professional relationship between Millien and Popescu began to deteriorate in 2012. By August, Millien had been removed from his position as COO; he then became BT's CMO.[89] On one occasion, Popescu, as CEO, felt it was necessary and appropriate to remind Millien that, as his subordinate, he would be treated on the same terms as "any other employee."[90]

In his new position, Millien spent time in London trying to generate new business for BT. Some of Millien's former operational responsibilities were

[87] *Id.* 291-92.
[88] *Id.* 29-30.
[89] Pre-Trial Order ¶ 19.
[90] JX 77.

handled by Robert Castle ("Castle"), an experienced executive who had already served on BT's board of advisors for several months.[91] In this role, which Popescu described as an "acting COO" position,[92] Castle began to "provide leadership, management assistance, process evolution, and general management consulting."[93]

Castle testified that Popescu told him several times, both in person and by email, that Popescu owned 51%, or a majority, of the BT Voting Stock, with Millien owning the remaining 49%.[94] Although he was copied on a September 2012 email in which Popescu outlined this structure to Castle,[95] Millien never replied to it or otherwise contradicted its substance.[96] This information was important to Castle as he restarted discussions with Gesmer, as early as June 2012,[97] about forming a holding company for BT and various BT affiliates formed by that time.[98] At least four reasons motivated Castle to implement this structure:

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[91] With the help of Gesmer's Snyder, Popescu created a board of advisors for BT. The board of advisors was designed to meet once every few months to "provide advice and guidance" to Popescu and Millien as the senior management of BT. Snyder Dep. 54-55.
[92] Tr. 293.
[93] *Id.* 412.
[94] *Id.* 415-16.
[95] JX 67.
[96] Tr. 206-10, 297, 418-19.
[97] *See, e.g.*, JX 61. Around this time, Popescu noted that Millien and he would "need to rethink the shares and % in the company" when creating a consolidated holding company for BT and several affiliates. JX 62. It is unclear whether Popescu was referring to their ownership or BT's outstanding stock options.
[98] The individuals who oversaw the formation of these affiliates would have reported to Popescu. Tr. 86-87. These affiliates include a Belize entity, BT Trading, which has a UK subsidiary, Boston Prime, and a British Virgin Islands ("BVI") subsidiary, BT Prime; two other BVI entities, Rockwell Capital Management and Rockwell Investments; and a Japanese entity, Boston Technologies Japan KK. *Id.* With the exception of the wholly-owned subsidiaries of BT

(i) outside investors would likely prefer to invest in BT and its affiliates rather than merely BT; (ii) BT's lenders would likely expect stronger protection over the revenue generated by BT's affiliates; (iii) employees would likely want stock options that captured the upside potential of BT and its affiliates; and (iv) BT and its affiliates may have been able to realize more favorable regulatory and tax treatment with a holding company.[99] Castle was not concerned about resolving any control dispute between Millien and Popescu, but he did anticipate that that issue would have been addressed once the holding company was formed.[100]

Throughout this time, Millien claims that he intentionally did not challenge Popescu when he described their ownership in BT as something other than being the sole and equal holders of BT Voting Stock. Millien testified that Popescu asked him "to keep the details of [their] agreement private."[101] Although Millien could not recall if he saw Popescu's email to Castle listing their ownership as 51/49, if he did, Millien would not have said anything to the contrary because of Popescu's earlier request for confidentiality. In other words, Millien simply

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Trading, Millien and Popescu own the other BT affiliates equally. *Id.* Historically, these affiliates generated the majority BT's revenue, and a series of inter-company agreements governed their relationship with BT. *Id.* 88-90.

[99] *Id.* 419-22.

[100] *Id.* 421.

[101] *Id.* 97.

"didn't think it was necessary or productive to openly challenge [Popescu] in front of anyone else on that point."[102]

G. *Representations that Millien and Popescu Own BT Equally*

Between the execution of the Gesmer Documents and the filing of this lawsuit, a number of statements to third parties were made representing that Millien and Popescu were the sole and equal owners of BT Voting Stock. For example, they are listed as each holding the same amount of BT Voting Stock on BT's 2010 federal tax return,[103] its ownership ledger,[104] and capitalization tables.[105] Several of these capitalization tables were submitted to lending institutions for BT to obtain financing.[106] BT also made other representations, outside the financing context, that Millien and Popescu owned an equal amount of BT Voting Stock.[107] Nonetheless, despite these representations, it was clear from the perspectives of Snyder and Castle that BT operated with Popescu having the final word on corporate decisions.[108]

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[102] *Id.* 126-27.
[103] JX 50.
[104] JX 23.
[105] *See, e.g.*, JX 46, 56, 58, 66, 69.
[106] *See, e.g.*, JX 24, 41, 43.
[107] *See, e.g.*, JX 52, 53, 55, 58, 60, 116.
[108] Snyder Dep. 59, 66; Tr. 416-17.

In early 2013, Millien and Popescu retained another law firm to draft a BT stockholders' agreement. A circulated draft of that agreement anticipated a "call right" provision, which could be triggered by Millien or Popescu's separation from BT. JX 84. The specifics of that provision still needed to be discussed and drafted. *Id.* As with the parties' past attempts to address the control of BT, this agreement was never executed.

H. *The Events of June 2013*

From Popescu's perspective, Millien's performance continued to decline even after the reassignment from COO to CMO. Before long, after consulting with BT's board of advisors, Popescu deemed it appropriate to terminate Millien as CMO for several reasons, chief among them being poor performance.[109] On June 6, 2013, Popescu invited Millien to his office to tell him that he "was not going to be an employee of the company anymore."[110] According to Popescu, Millien was surprised and thought it was a "bad decision."[111] The two then discussed "the mechanism to separate," and Millien requested time to think over various proposals Popescu had made.[112] One of these proposals was an offer by Popescu to buy back Millien's BT Voting Stock over time.[113]

After more than two weeks during which they could not find a mutually agreeable time to talk, likely because Millien made himself unavailable on the phone, Popescu terminated Millien as a BT employee by email on June 21, 2013.[114] That same day, Millien initiated this action against Popescu.[115] The

[109] JX 100; Tr. 301-03.
[110] Tr. 303.
[111] *Id.* 303-04.
[112] *Id.* 305-06.
[113] *Id.* 394.
[114] JX 99; Tr. 307; Pre-Trial Order ¶ 20.
[115] Pre-Trial Order ¶ 21.

lawsuit again delayed Castle's work, begun most recently in May 2013, to create a holding company structure for BT and its affiliates.[116]

Approximately two weeks later, on July 3, 2013, Popescu delivered to Millien a proposed unanimous written consent of the board of directors of BT (the "Written Consent") that would "implement [their] agreement" over the voting control of BT as reflected in the Control Paragraph of the 2009 Email.[117] The Written Consent would authorize the issue of 1,260,000 shares of BT Voting Stock, or one percent of the then-issued BT Voting Stock, to Popescu, which would result in Popescu's owning approximately 50.5% of the issued BT Voting Stock and Millien's owning approximately 49.5%.[118] Millien has refused to execute the Written Consent.[119]

I. *The Purported BT Director Deadlock*

Millien claims that he and Popescu, as BT's directors, "are so divided on a number of key issues that affect the nature of the operations of the company and its very strategy and vision for going forward" that the Court must appoint a custodian to break the apparent deadlock.[120] These issues, as Millien described them at trial,[121] include:

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[116] JX 94; Tr. 384.
[117] JX 106.
[118] Pre-Trial Order ¶ 22.
[119] Tr. 44-45; Pre-Trial Order ¶ 23.
[120] Tr. 53-54.
[121] *Id.* 45-51.

- Removing Popescu as BT's CEO;
- Discontinuing BT's development of proprietary software;
- Reducing BT's headcount;
- Closing BT's expansion offices in China and Indonesia;
- Partnering with a third party to provide services to BT's customers;
- Ending BT's consulting relationship with Castle;
- Increasing BT's oversubscribed employee stock option plan;[122]
- Curing potential defaults under BT's loan agreements with Bridge Bank[123] and Gold Hill Capital 2008 L.P. ("Gold Hill");[124] and
- Amending BT's charter to authorize additional non-voting stock to satisfy warrants held by Bridge Bank and Gold Hill.[125]

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[122] JX 29; Tr. 103-04. Castle testified that, although BT's employee stock option plan is oversubscribed, the oversubscription was not as large as Millien suggested and not an immediate concern because most of the options were still underwater. In addition, the oversubscription has existed for more than a year. *Id.* 423-30. Gesmer's Moldave alerted BT to this issue as early as March 2012 and provided corporate documents to resolve this potential problem. JX 59. He again provided additional documents in November 2012. JX 75. Millien and Popescu, as BT's directors, do not appear to have executed the required instruments to amend BT's employee stock option plan. Instead, BT continued to issue additional options throughout the rest of 2012 and 2013. *See, e.g.*, JX 115.

[123] Upon request from Castle, Bridge Bank provided a statement that BT was not in default under the terms of its financing because that obligation had been paid in full. JX 113; Tr. 435.

[124] JX 45. Similarly, Gold Hill provided to BT a statement that it did not currently consider BT to be in default under its loan and security agreement, but it reserved the right to declare a default in the future. JX 114; Tr. 432-33.

[125] JX 43, 44. Castle testified that he expected that Bridge Bank and Gold Hill, consistent with his experience with similar lenders, would not "prematurely" convert their debt to BT stock but instead would "allow the company to repay its full debt." Tr. 434.

Millien conceded that he never raised any of these issues on which he disagrees with Popescu—even those that he considered to be fundamental to BT's continued existence—before their meeting on June 6, 2013.[126]

In addition, even though Millien has the authority to request a board meeting as a director of BT under its bylaws,[127] he never did so. When questioned at trial about why he never requested a BT board meeting, Millien testified, "I didn't have anything that I was ready to discuss with George [Popescu] that required board consent at the time."[128] Like Popescu's offer to Millien, Millien has tried to resolve the apparent dispute by offering to buy Popescu's BT Voting Stock, but Popescu declined that offer.[129]

Popescu denies that there is any BT deadlock,[130] and others agree with his position. Snyder, for one, was not aware of any deadlock.[131] Similarly, although Castle thought a hostile director relationship could be challenging,[132] he never suggested that it would lead to a deadlock. Substantively, Popescu disagrees with

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[126] Tr. 215.
[127] JX 20.
[128] Tr. 217. At his deposition, Millien testified, "I didn't have any issues that I felt required board approval that I needed to have heard by the board." *Id.*
[129] *Id.* 54-55. FXCM, Millien's previous employer, provided to Millien a letter reflecting its possible interest to provide up to $5 million in financing for "the acquisition of a controlling stake in Boston Prime." JX 111. This letter does not refer to BT, although neither party raised this issue at trial.
[130] *See, e.g.*, Tr. 312. Popescu thinks the deadlock is "being manufactured" to use "as leverage for negotiations." *Id.* 312, 317.
[131] Snyder Dep. 57.
[132] Tr. 442.

several of Millien's suggestions, including closing certain BT offices and ending BT's relationship with Castle. But, Popescu did express a willingness to consider other issues, such as downsizing the company and adding directors.[133]

The last regularly scheduled BT board meeting before trial in this action was on July 23, 2013, at BT's offices in Boston.[134] Under BT's bylaws, a majority of the directors then in office is the quorum necessary for a board meeting, and the board may only act by a majority of the quorum.[135] Millien did not appear at the office or dial in to BT's conference line. Accordingly, without a quorum, no BT board meeting was held on July 23, 2013.[136]

IV. CONTENTIONS

A. *Millien's Request for Appointment of a Custodian*

Millien contends he has met his burden for the Court to appoint a custodian to resolve the deadlock between BT's directors.[137] With Millien and Popescu as the only two directors, in light of their disagreements, BT's board is allegedly unable to act by majority vote. Likewise, with Millien and Popescu as the sole and

[133] *Id.* 403-04.
[134] *Id.* 316.
[135] JX 20.
[136] Tr. 316.
[137] Pet'r's Pretrial Answering Br. ("Pet'r's Answering Br.") 3-8; Pet'r's Opening Pretrial Br. ("Pet'r's Opening Br.") 12-21.

equal owners of BT Voting Stock, BT's stockholders cannot terminate the director deadlock.[138]

Millien also argues that BT faces irreparable harm primarily because the deadlock frustrates the board's ability, among other actions, to provide enough shares to meet the employee stock option plan, to cure potential defaults of certain outstanding loans, and to amend the charter to authorize more non-voting stock to satisfy outstanding warrants.[139] According to Millien, the BT board is unable to resolve these issues of potential liability because he cannot agree with Popescu on any resolution. Millien contends that this broad refusal to take even necessary action—described as a "negative veto"—is a sufficient justification for the Court to appoint a custodian.[140]

In response, Popescu argues that, because the 2009 Email is a binding agreement that provides for him to have voting control of BT, the stockholders of BT would be able to terminate any purported director deadlock if he is entitled to judgment in his favor on his counterclaims.[141] Moreover, Popescu contends that BT is not facing any irreparable harm, not only because the oversubscription of stock options has existed for several months with Millien's knowledge, but also because no lender has declared an event of default or expressed an intent to

[138] Pet'r's Opening Br. 14.
[139] Pet'r's Answering Br. 4-6; Pet'r's Opening Br. 14-20.
[140] Tr. 467-68.
[141] Resp't's (Corrected) Pre-Trial Opening Br. ("Resp't's Opening Br.") 33.

exercise its warrant.[142] Finally, Popescu claims that Millien's universal refusal to consider any issue as a BT director while the purported deadlock remains—because there is a deadlock while Millien refuses to consider any issue—cannot be grounds for the Court to appoint a custodian.[143]

B. *Popescu's Counterclaims for Breach of Contract and Reformation*

Central to Popescu's four counterclaims is his contention that the 2009 Email is a valid and binding agreement that Millien has breached, if not by initiating this action, then by refusing to execute the Written Consent.[144] Popescu maintains that at no time did he and Millien ever discuss revising the terms of the 2009 Email, and it was not superseded by the Stock Purchase Agreement.[145] He also argues that his claims are timely because Millien did not breach the 2009 Email until 2013.[146] Accordingly, Popescu claims that he is entitled to specific performance of the 2009 Email by requiring Millien to execute the Written Consent, which would grant additional BT Voting Stock, and thus majority voting control of BT, to Popescu.[147]

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[142] Resp't's Pre-Trial Answering Br. ("Resp't's Answering Br.") 33-37; Resp't's Opening Br. 35-37.
[143] Tr. 495-97; Resp't's Opening Br. 38-39.
[144] Resp't's Answering Br. 7-15; Resp't's Opening Br. 22-26.
[145] Tr. 486, 492.
Popescu further asserts that he is entitled to specific performance because Millien breached the implied covenant of good faith and fair dealing of the 2009 Email.
[146] Resp't's Answering Br. 31-33.
[147] *Id.* 7-17; Resp't's Opening Br. 22-28.

Millien, in response, argues that Popescu's counterclaims all suffer from the same defect—namely, that the 2009 Email is not a valid or enforceable agreement.[148] Specifically, Millien contends that the 2009 Email is unenforceable, not only because it omits purportedly material terms, such as the consideration to paid by Millien to receive BT stock, but also because the parties "continued to negotiate" its terms.[149] He additionally argues that the Control Paragraph is unenforceable because it is "internally inconsistent" and because it is contradicted and superseded by the integration clause of the Stock Purchase Agreement.[150] Finally, Millien argues that Popescu's claims should be barred under laches.[151]

V. ANALYSIS

A. *Millien's Request for Appointment of a Custodian*

The Court of Chancery has statutory authority, pursuant to 8 *Del. C.* § 226 and upon the application of a stockholder, to appoint a custodian to resolve a deadlock among a corporation's stockholders or directors. The Court may exercise this authority to break a stockholder deadlock after "any meeting held for the

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Alternatively, Popescu seeks reformation of certain Gesmer Documents to put the parties in a position consistent with their mutual understanding and intent reflected in the 2009 Email. He argues that reformation is warranted because of mutual mistake, unilateral mistake, and fraudulent inducement. Resp't's Answering Br. 17-26, 29-31; Resp't's Opening Br. 28-32.

[148] Pet'r's Opening Br. 24-26.

[149] Pet'r's Answering Br. 10-21.

[150] Tr. 464-65; Pet'r's Opening Br. 26-27.

For similar reasons, Millien contends that reformation of the Gesmer Documents is inappropriate because Popescu clearly understood their terms, or, alternatively, he acquiesced in or ratified them. *Id.* 39-47.

[151] Pet'r's Opening Br. 47-49.

election of directors [where] the stockholders are so divided that they have failed to elect successors."[152] By contrast, for the Court to appoint a custodian to break a director deadlock, the business of the corporation must be "suffering" or be "threatened with irreparable injury" because "the directors are so divided respecting the management of the affairs of the corporation that the required vote for action by the board of directors cannot be obtained and the stockholders are unable to terminate this division."[153]

Millien, as a BT stockholder, argues that the appointment of a custodian is necessary and appropriate under both 8 *Del. C.* §§ 226(a)(1) and 226(a)(2).[154] A necessary element common to these applications for relief is that BT's voting stockholders—Millien and Popescu as the sole holders of BT Voting Stock—be unable to resolve the stockholder or director deadlock.[155] Were the Court to conclude that Popescu is entitled to judgment in his favor on any of his counterclaims, Popescu would be the holder of a majority of BT Voting Stock, and Millien's claims for the appointment of a custodian would necessarily fail.

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[152] 8 *Del. C.* § 226(a)(1).
[153] 8 *Del. C.* § 226(a)(2).
[154] As a procedural matter, the Court notes that Millien has only expressly submitted an application for a custodian to break the purported director deadlock. Pre-Trial Order § IV.A.; Pet. ¶¶ 27-33. Millien does, however, discuss the appointment of a custodian to break the alleged stockholder deadlock as an alternate request for relief in his briefs. *See, e.g.*, Pet'r's Answering Br. 4 n.10; Pet'r's Opening Br. 12 n.41. But, as Popescu noted, this belated alternate request contradicts Millien's representations, in the context of seeking advancement from BT for defending the counterclaims, that his petition was predicated on breaking BT's director deadlock. Resp't's Answering Br. 37 n.12.
[155] *See Giuricich v. Emtrol Corp.*, 449 A.2d 232, 235-36 (Del. 1982); *see also* 8 *Del C.* § 226(a).

Therefore, before addressing whether Millien has established that the appointment of a custodian is necessary and appropriate, the Court considers whether Popescu is entitled to specific performance for Millien's alleged breach of the 2009 Email.

B. *Popescu's Claim for Specific Performance for Breach of Contract*

1. Choice of Law

The parties disagree on the law that governs Popescu's claims for breach of contract. Millien contends that Delaware law governs "pursuant to the internal affairs doctrine."[156] In contrast, Popescu argues that Massachusetts law applies under Delaware's choice of law principles.[157]

The internal affairs doctrine, under which the law of the state of incorporation governs the internal affairs of the corporation, is typically invoked in "matters peculiar to corporations"—that is, "issues relating to internal corporate affairs."[158] The doctrine is generally inapplicable when considering choice of law

[156] Pet'r's Answering Br. 9 n.30. Even if Massachusetts law applied, Millien suggests that "the Court's analysis would not change." *Id.*

[157] Resp't's Opening Br. 22. Although Popescu asserts that the choice of law question here generally "does not materially affect the [Court's] analysis," he does note that Massachusetts and Delaware approach certain legal issues implicated by his counterclaims differently. Resp't's Answering Br. 6.

[158] *McDermott Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987); *see also VantagePoint Venture P'rs 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) ("The internal affairs doctrine applies to those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders.").

questions for contract-based claims where the subject is unrelated to the corporation's internal affairs.[159]

When deciding a claim based on a contract with no express governing law provision, Delaware courts follow the Restatement approach and apply the law of the jurisdiction with the "most significant relationship."[160] The main factors the Court should analyze under this test are: "(a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties."[161] The Court should weigh these factors "in the unique circumstances of the case at hand."[162]

The Court acknowledges that the 2009 Email appears to include certain terms that may implicate the internal affairs of BT and other terms that may not. For this reason, the 2009 Email does not lend itself to a simple choice of law analysis. Rather, the Court's application of choice of law principles raises questions about the outer limits of the internal affairs doctrine.[163]

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[159] *See McDermott Inc.*, 531 A.2d at 214-15.
[160] *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341-42 (Del. 2013).
[161] Restatement (Second) of Conflict of Laws § 188(2)(a)-(e) (1971); *see also Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 87 (Del. Ch. 2009).
[162] *In re Am. Int'l Gp., Inc.*, 965 A.2d 763, 818 (Del. Ch. 2009), *aff'd sub nom. Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011) (TABLE).
[163] The Delaware Supreme Court has been presented with few opportunities to provide firm guidance on this foundational issue of corporate law. In its seminal decision on the subject, *McDermott Inc. v. Lewis*, the Supreme Court described the internal affairs doctrine as governing "those matters which are peculiar to the relationships among or between the corporation and its

In the present action, the parties raised this choice of law issue, but they did so largely in passing. The Court is cautious about elaborating *sua sponte* on the internal affairs doctrine in the absence of thorough briefing and argument on the pertinent legal and policy questions. For present purposes, it is helpful to note that Delaware's evidentiary standard for specific performance of clear and convincing evidence[164] is higher than Massachusetts's standard of a preponderance of the

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current officers, directors, and shareholders." *McDermott Inc.*, 531 A.2d at 214 (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982)). The use of the adjective "current" may imply that the internal affairs doctrine may not necessarily govern, for example, all situations by which one becomes a stockholder. Under this interpretation, that the first four paragraphs of the 2009 Email, including the Control Paragraph, provide for how Millien *becomes* a BT stockholder rather than his rights and preferences *as* a BT stockholder suggests that Popescu's breach of contract claim may not implicate the internal affairs doctrine.

But, in a subsequent decision, *VantagePoint Venture Partners 1996 v. Examen, Inc.*, the Supreme Court cited *McDermott Inc.* for the proposition that the internal affairs doctrine applies "to those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders." *VantagePoint Venture P'rs 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) (citing *McDermott Inc.*, 531 A.2d at 214). The Supreme Court's most recent discussion of the internal affairs doctrine invokes much of this same language. *See generally Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1081-83 (Del. 2011) (citing *VantagePoint*, 871 A.2d at 1113). The absence of the word "current" from these later decisions implies that the doctrine may not be as limited as what is suggested by the earlier language of *McDermott Inc.*

In both *McDermott Inc.* and *VantagePoint*, the Supreme Court cited certain provisions of the Restatement (Second) of Conflict of Laws as persuasive authority in this area of jurisprudence. *See, e.g.*, *McDermott Inc.*, 531 A.2d at 214 (citing Restatement (Second) of Conflict of Laws § 313, cmt. a (1971)); *see also VantagePoint*, 871 A.2d at 1113 (citing Restatement (Second) of Conflict of Laws §§ 301, 303 cmt. d (1971)). These and other relevant sections of the Restatement teach that it is "important" to have uniform treatment of "all share issues of a corporation" in order that, absent unusual circumstances like inheritance and martial property, the law of the state of incorporation should apply "to determine how one can become a shareholder of a corporation." Restatement (Second) of Conflict of Laws §§ 302 cmt. e, f, 303 cmt. b (1971). This broad language suggests that an agreement by which one *becomes* a stockholder, such as the Control Paragraph of the 2009 Email, may implicate the internal affairs doctrine.

[164] *See, e.g.*, *CertainTeed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6 n.29 (Del. Ch. Jan. 24, 2005) (applying the clear and convincing evidence standard because of the "seriousness of the

evidence.[165] Without deciding whether the internal affairs doctrine should govern the terms of the 2009 Email, the Court will analyze Popescu's breach of contract claim and request for specific performance under the law of the jurisdiction with the higher evidentiary standard; thus, if the Court concludes that Popescu is entitled to specific performance under Delaware law, so too would the Court reach the same conclusion under Massachusetts law.

2. The 2009 Email

(a) *Is Popescu Entitled to Specific Performance of the 2009 Email?*

Under Delaware law, to conclude that an agreement is valid and enforceable, the Court must find that "(1) the parties intended that the contract would bind them, (2) the terms of the contract are sufficiently definite, and (3) the parties exchange legal consideration."[166] Stated differently, the Court should determine

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specific performance remedy"); *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 52 (Del. Ch. 2001) (concluding that the policy supporting the higher evidentiary burden was the "concern that a compulsory remedy is not typical and should not be lightly issued, especially given the availability of the more usual legal remedy of money damages").

[165] *See, e.g.*, *Sytchov v. Eon*, 2006 WL 3492159, at *1 (Mass. Super. Ct. Nov. 13, 2006) (concluding that specific performance was "the only appropriate remedy" where the plaintiff established, by a preponderance of the evidence, the terms of the contract and the defendant's breach); *Corea v. Corea*, 1995 WL 810552, at *5-6 (Mass. Super. Ct. June 1, 1995) (holding that the defendant failed to prove his counterclaim for breach of contract by a preponderance of the evidence).

[166] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010) (concluding from the "face" of a document that it "manifest[ed] the parties' intent to bind one another contractually")

whether a reasonable person[167] would conclude that the parties expressed "[o]vert manifestations of asset" to the "material" terms of the agreement.[168]

The party seeking to enforce a contract must establish its terms by a preponderance of the evidence, but the evidentiary standard for a request of specific performance is clear and convincing evidence.[169] The party seeking this equitable remedy must prove the "essential elements" of the agreement, which does not necessarily require proof of all the terms of the purported agreement.[170] Specific performance is unavailable unless there is no adequate remedy at law,[171] and enforcement of the requested relief must be sufficiently precise to be practicable.[172] Finally, the party requesting specific performance generally must have substantially performed its obligations under the agreement at issue.[173]

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[167] *See Leeds v. First Allied Conn. Corp.*, 521 A.2d 1095, 1101 (Del. Ch. 1986) ("[O]ur inquiry is the 'objective' one: whether a reasonable man would, based upon the 'objective manifestation of assent' and all of the surrounding circumstances, conclude that the parties intended to be bound by contract.") (citation omitted).

[168] *Ramone v. Lang*, 2006 WL 905347, at *10 (Del. Ch. Apr. 3, 2006).

[169] *See United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 834 n.112 (Del. Ch. 2007).

[170] *See Deene v. Peterman*, 2007 WL 2162570, at *5 (Del. Ch. July 12, 2007) ("Uncertainty as to subsidiary contract terms, however, will not defeat a request for this equitable remedy [of specific performance].").

[171] *See Williams v. White Oak Builders, Inc.*, 2006 WL 1668348, at *4 (Del. Ch. June 6, 2006).

[172] *See Prestancia Mgmt. Gp., Inc. v. Va. Heritage Found., II LLC*, 2005 WL 1364616, at *4 (Del. Ch. May 27, 2005).

[173] *See AQSR India Private, Ltd. v. Bureau Veritas Hldgs., Inc.*, 2009 WL 1707910, at *9 (Del. Ch. June 16, 2009) ("A party seeking specific performance must demonstrate, among other things, that it 'was ready, willing, and able to perform under the terms of the agreement.'") (citation omitted).

The Court concludes that Popescu has established by clear and convincing evidence that the 2009 Email, including the Control Paragraph, reflected the "essential" and "sufficiently definite" terms of the parties' agreement.[174] Millien's suggestion that there was no defined consideration for his receipt of BT stock pursuant to the Control Paragraph ignores the consideration given in exchange for all the terms of the 2009 Email—namely, Millien's promise to work at BT. That Millien would be compensated primarily through equity in BT belies his testimony that he expected to pay a material amount for the BT stock.

Millien identified many terms absent from the 2009 Email, but those omitted terms are not essential to either the agreement generally or the Control Paragraph specifically. The disputed Control Paragraph is sufficiently definite because it sets forth the rights and obligations by which Millien would receive stock in BT—the "final terms" of which provided for a structure with Popescu's being, in Millien's own words, "the majority shareholder in BT."[175] Although the parties continued to discuss how best to implement the intent expressed in the Control Paragraph, those discussions did not change the material terms of the 2009 Email that provided voting control of BT to Popescu.[176] The documentary evidence, including the 2010 Email and Popescu's 2012 email to Castle and Millien, along with the testimony of

[174] *See Osborn*, 991 A.2d at 1158.
[175] JX 1.
[176] *See Deene*, 2007 WL 2162570, at *5.

Castle and Gesmer's Moldave and Snyder, all supports the Court's conclusion that the parties entered into a valid and enforceable agreement in the 2009 Email by which they intended for Popescu to have voting control of BT.

This intent is confirmed by the clear and unambiguous language expressed in the 2009 Email.[177] Millien stated that he was "glad" that he and Popescu "were able to reach an agreement."[178] He described the 2009 Email as the "final terms" of "what [they] have agreed to."[179] The Court credits Millien's testimony that no statement in the 2009 Email was false. Accordingly, if Millien's words in the 2009 Email mean anything, especially under the reasonable person standard,[180] they reflected his present intention to be bound to what he expressly termed an "agreement."[181] Millien has not offered any credible evidence demonstrating that he and Popescu revised the terms of the 2009 Email or the Control Paragraph such that Popescu would not have voting control of BT. The evidence is clear and convincing that regardless of whether there was a holding company structure, Popescu would have voting control of BT.

The statements on internal BT documents and in representations to third parties that Millien and Popescu were the sole and equal holders of BT Voting

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[177] *See Osborn*, 991 A.2d at 1158.
[178] JX 1.
[179] *Id.*
[180] *See Leeds*, 521 A.2d at 1101.
[181] *See Osborn*, 991 A.2d at 1158.

Stock do not demonstrate a change in, or novation of, the 2009 Email. As there is no written instrument by which additional BT Voting Stock was issued to Popescu, those representations accurately reflected the then-current capital structure of BT.[182] Any representations to the contrary would have been false. Neither does the execution of the Gesmer Documents change the agreed upon terms of the 2009 Email. Moldave explicitly described the Gesmer Documents as putting the parties in their "initial positions" and as not yet implementing their agreement that provided voting control of BT to Popescu.[183] Nonetheless, that these representations and the Gesmer Documents reflected BT's current capital structure does not mean that these representations displace the intended—and agreed upon—capital structure: that of the 2009 Email, with Popescu's having voting control of BT.

The Court further concludes that Popescu has established that he is entitled to specific performance by clear and convincing evidence.[184] Damages are not an adequate remedy here for Millien's breach of the 2009 Email by his refusal to

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[182] *See, e.g.*, 8 *Del C.* § 151(a); *see also STAAR Surgical Co. v. Waggoner,* 588 A.2d 1130, 1136 (Del. 1991); *Boris v. Schaheen*, 2013 WL 6331287, at *14 (Del. Ch. Dec. 2, 2013).

Based on this conclusion, Millien's argument that Delaware case law may limit the Court's use of equity in disputes related to void stock is inapposite. Pet'r's Opening Br. 21-23. Popescu's request for relief does not implicate whether any BT Voting Stock is void is voidable. That is, rather than seeking a determination that he is the holder of a majority of BT Voting Stock based on BT's current capital structure documents, Popescu seeks specific performance of the Control Paragraph of the 2009 Email in which he and Millien agreed that he would have voting control of BT. Resp't's Answering Br. 27-29.

[183] JX 14.

[184] *See United Rentals, Inc.*, 937 A.2d at 834 n.112.

provide voting control of BT to Popescu because Popescu's lack of voting control cannot be compensated by damages.[185] Finally, Millien does not contest, and the record does not support, that Popescu failed to perform substantially the terms of the 2009 Email.[186] Thus, specific performance is warranted under Delaware law.[187]

(b) *Does the Stock Purchase Agreement Supersede the 2009 Email?*

Where a contract governed by Massachusetts law includes an express term stating that it is the "entire agreement of the parties," the Court should presume that the parties intend for that document "to be a complete and final statement of

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[185] *See Williams*, 2006 WL 1668348, at *4.

[186] *See AQSR India Private, Ltd.*, 2009 WL 1707910, at *9.

[187] Specific performance of the 2009 Email would also be appropriate under Massachusetts law.

To establish a valid and enforceable agreement under Massachusetts law, Popescu would need to establish that he and Millien exhibited a "present intention to be bound" to the "material" terms of the agreement. *See Situation Mgmt. Sys., Inc. v. Malouf, Inc.*, 724 N.E.2d 699, 703 (Mass. 2000). The Court should discern intent from "the words used by the parties, the agreement taken as a whole, and surrounding facts and circumstances." *Basis Tech. Corp. v. Amazon.com, Inc.*, 878 N.E.2d 952, 962 (Mass. App. Ct. 2008). As long as the material terms are "sufficiently complete and definite," an exchange of emails can form a binding agreement. *See Fecteau Benefits Gp., Inc. v. Knox*, 890 N.E.2d 138, 146 (Mass. App. Ct. 2008).

The burden of proof to establish a valid and enforceable contract and to demonstrate that specific performance is warranted is a preponderance of the evidence. *See, e.g.*, *Sytchov*, 2006 WL 3492159, at *1; *Corea*, 1995 WL 810552, at *5-6.

Specific performance of an agreement governed by Massachusetts law may be granted "where damages are an inadequate remedy." *Sanford v. Boston Edison Co.*, 56 N.E.2d 1, 3 (Mass. 1944). Because it is an equitable remedy, specific performance "is not appropriately granted in those special circumstances where it would impose an undue hardship on one party or allow the other to obtain an inequitable advantage." *Greenfield Country Estates Tenants Ass'n, Inc. v. Deep*, 666 N.E.2d 988, 994 (Mass. 1996).

For the reasons set forth in the Court's analysis of Popescu's claim and request for relief under Delaware law, were Massachusetts law to govern Popescu's claim for breach of contract and request for specific performance, the Court would conclude that Popescu has proven that relief is warranted by a preponderance of the evidence.

the whole transaction."[188] This conclusion is particularly appropriate where the integration clause is unambiguous.[189] A term is unambiguous if it is susceptible of only one reasonable interpretation.[190]

The Stock Purchase Agreement, by which Popescu sold 900 shares of BT stock to Millien, is governed by Massachusetts law.[191] It includes an integration clause providing that it is "the entire agreement" of Millien and Popescu "with respect to the subject matter hereof" such that it "supersedes all prior agreements and undertakings of the parties."[192] Millien contends that the "obvious" subject matter of the Stock Purchase Agreement "is the stock ownership of BT."[193] Popescu denies that the integration clause has the broad effect suggested by Millien.[194]

The Court concludes that the phrase "subject matter hereof" is unambiguous, and the only reasonable interpretation is that the subject matter of the Stock Purchase Agreement is Millien's purchase of BT stock from Popescu, not BT's capitalization. Indeed, that the parties simultaneously executed the other Gesmer Documents—which, among other actions, provided for BT's repurchase of 200

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[188] *Bendetson v. Coolidge*, 390 N.E.2d 1124, 1127 (Mass. App. Ct. 1979).
[189] *See Amerada Hess Corp. v. Garabedian*, 617 N.E.2d 630, 634 (Mass. 1993).
[190] *See President & Fellows of Harvard College v. PECO Energy Co.*, 787 N.E.2d 595, 601 (Mass. App. Ct. 2003).
[191] JX 17.
[192] *Id.*
[193] Pet'r's Opening Br. 26-27.
[194] Resp't's Answering Br. 12-15.

shares of its stock from Popescu and implemented a charter amendment authorizing two classes of stock and a stock split—further undermines Millien's argument. The Court thus concludes that the Stock Purchase Agreement does not supersede the 2009 Email.[195]

(c) *Is Popescu's Claim Barred by Laches?*

Millien argues that Popescu's breach of contract claim should be denied as untimely under laches. He contends that Popescu was on notice of the alleged breach on August 4, 2009, the day after the 2009 Email, such that Popescu's delay in asserting this claim has prejudiced him.[196] According to Popescu, laches should not bar his claim because he was not aware of the breach until Millien filed this action on June 21, 2013, or Millien refused to execute the Written Consent in July 2013.[197]

The Court's laches analysis focuses on whether a party's delay in asserting a claim has materially prejudiced the party against whom the claim is asserted.[198] The relevant statute of limitations often guides the Court's analysis.[199] But, where

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[195] In light of the earlier reflection on the appropriate contours of the internal affairs doctrine, the Court notes that it would reach the same conclusion if Delaware law governed the Stock Purchase Agreement.
[196] Pet'r's Opening Br. 47-49.
[197] Resp't's Answering Br. 31-33.
[198] *See Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009).
[199] *See U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996).

a party requests specific performance, "the bar of laches typically will arise earlier than the end of the limitations period."[200]

The applicable statute of limitations under Delaware's borrowing statute for claims arising under foreign law is the shorter limitations period between Delaware and the foreign jurisdiction.[201] Delaware's three-year limitations period for breach of contract claims[202] is shorter than Massachusetts's six-year period.[203] Thus, regardless of whether Delaware or Massachusetts law applies, the analogous period for the Court's laches analysis is three years.

The Court concludes that laches does not bar Popescu's counterclaim for breach of contract. Millien testified several times at trial that he never had a conversation with Popescu before this action in which he refuted the terms of the 2009 Email. No documentary evidence demonstrates that Millien did so.[204] Regardless of whether Millien breached the 2009 Email in June 2013 or July 2013, Popescu's breach of contract claim, filed on July 12, 2013, is well within the

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[200] *Bean v Fursa Capital P'rs, LP*, 2013 WL 755792, at *5 (Del. Ch. Feb. 28, 2013) (citing *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 527 (Del. Ch. 2005)).
[201] *See* 10 *Del. C.* § 8121.
[202] *See* 10 *Del. C.* § 8106.
[203] *See* Mass. Gen. Law ch. 260, § 2 (1992).
[204] One might view the executed Gesmer Documents as putting Millien and Popescu in equal positions, but the Gesmer Documents must be viewed in the context of Moldave's email noting that they were to put Millien and Popescu only in their "initial positions." JX 14. The subsequent internal BT documents and representations to third parties, because they were all premised on the Gesmer Documents, must be viewed in the same context.

relevant statute of limitations. Millien cannot be said to be prejudiced by any delay by Popescu. Thus, Popescu's breach of contract claim is timely.

3. The Equitable Approach to the Court's Award of Specific Performance

Granting specific performance of the intent manifested in the Control Paragraph of the 2009 Email is equitable under these circumstances. The Court, however, is cognizant that it may be economically inequitable to award Popescu more than is necessary to effect that intent. As the value of BT increases—and the parties undoubtedly hope it will—so too does the value of every share of BT Voting Stock held by Millien and Popescu. Because the parties currently hold stock individually, the only way to provide voting control of BT to Popescu is to provide additional BT Voting Stock to Popescu.

The Control Paragraph does provide for Popescu to hold an additional one percent of BT, but an additional one percent is more than what is necessary for him to have voting control. Instead, the more equitable approach to implement the 2009 Email is for Popescu to hold one more share of BT Voting Stock than Millien.[205] Accordingly, the Court concludes that Popescu is entitled to specific performance of the 2009 Email such that Millien, as a party to the agreement and

[205] An alternative would be to require Millien to transfer one share of BT Voting Stock to Popescu, but this relief may be impracticable because the Court is not certain as to the value of one share and because it would provide Popescu with *two* more shares of BT Voting Stock than Millien, which is more than is necessary to implement the intent of the Control Paragraph.

as a director of BT, is to authorize the issue of one additional share of BT Voting Stock to Popescu at par value.[206]

This conclusion makes Popescu the holder of a majority of BT Voting Stock, which renders Millien's application for the appointment of a custodian moot because the stockholders of BT are able to resolve the stockholder or director deadlock.[207]

VI. CONCLUSION

For the reasons stated in this memorandum opinion, the Court concludes that Millien breached the terms of the 2009 Email, and that Popescu is entitled to judgment in his favor on his breach of contract counterclaim. Popescu is entitled to specific performance of the 2009 Email, by which Millien shall authorize the issue of one share of BT Voting Stock to Popescu at par value.

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[206] Millien contends that specific performance of the 2009 Email would require enforcement of all its terms—including requiring BT, a non-party, to pay a $90,000 salary to Millien. Pet'r's Answering Br. 15-16. However, that Popescu terminated Millien as a BT employee on June 21, 2013, means that provision of the 2009 Email, as well as several related ones, is no longer applicable. Millien does not cite any case law support for this proposition that an award of specific performance requires the contracting parties to re-perform terms that have already been performed or have been subsequently modified. The Court declines to adopt such an unsupported principle here.

[207] *See Giuricich*, 449 A.2d at 235-36.

Because the Court concludes that Popescu is entitled to specific performance as the remedy for his breach of contract claim, the Court need not address whether Popescu would also be entitled to specific performance for his breach of the implied covenant of good faith and fair dealing claim or reformation of the Gesmer Documents for his reformation and fraudulent inducement claims.

Because Popescu will be the holder of a majority of BT Voting Stock, the BT stockholders will be able to resolve any deadlock; accordingly, the Court concludes that Millien is not entitled to the appointment of a custodian for BT.

Counsel are requested to confer and to submit an implementing form of order.