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Managers Not Properly Removed From LLC Despite Sole Members' Intent

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In *Llamas v. Titus*, the Court of Chancery held that, despite the intent of an LLC's sole member, certain managers of the LLC were not removed as such because the sole member did not expressly remove them. In its analysis, the Court applied corporate law principles by analogy because the LLC adopted a corporate-like structure.

Before his death on November 5, 2017, Michael Llamas ("Michael") owned a 90% limited liability company interest in Stone Ash, LLC, a Delaware limited liability company (the "Company"), and served as one of its two managers. Stuart Titus ("Titus") owned a 10% limited liability company interest in the Company and served as its other manager. When Michael died, his status as a member terminated, and the economic rights associated with his interest passed to his estate. Michael's status as a manager also terminated. Titus was left as the sole member and sole manager of the Company under its original LLC agreement (the "Original LLC Agreement").

November 7, 2017, two days after Michael's death, Titus executed a written consent that appointed John Huemoeller ("Huemoeller") and Timothy Scott ("Scott") as additional managers of the Company. On November 13, 2017, Titus executed an amended and restated LLC agreement of the Company (the "Amended LLC Agreement"), under which Titus was named as the sole member and manager of the Company. Later on the same day, Titus executed a written consent (the "November 13 Consent") that purported to name Titus, Steven Llamas (Michael's father, "Steven"), and Jeffrey Llamas (Michael's brother, "Jeffrey") as the managers on the board of managers of the Company.

On November 20, 2017, Titus executed a new amended and restated LLC agreement, and on November 21, 2017, Titus executed a written consent, which purported to remove Steven and Jeffrey as managers and replace them with Huemoeller and Scott.

Steven and Jeffrey sought rulings from the Court of Chancery under Section 18-110(a) of the Delaware Limited Liability Company Act that they were properly appointed, and were never properly removed, as managers of the Company.

Steven and Jeffrey first argued that the Amended LLC Agreement removed Huemoeller and Scott as

managers of the Company because in three different places it referred to Titus as the sole member and manager of the Company. The Court held that two of the references had no substantive effect because they appeared in the introductory clause and the recitals of the Amended LLC Agreement, respectively. The third reference, on the other hand, was found in Section 7 of the Amended LLC Agreement and provided that the "sole Member and Manager may appoint a Board of Managers (the 'Board') at any time." The Court, however, found that no reading of this language would be sufficient to remove Huemoeller and Scott as managers of the Company. According to the Court, one reading of Section 7 was that it was an inaccurate description of the then-existing number of managers. A second reading would have treated this language as empowering a person who was the sole member and manager to appoint a board of managers. At the time the Amended LLC Agreement was entered into, however, no one fit that description because Titus, Huemoeller and Scott were each a manager. A third reading treated "sole" as qualifying "Member" but not "Manager." While Titus was the sole member and a manager, he never took any additional action to remove Huemoeller and Scott as managers of the Company.

Assuming, for the sake of argument, that Section 7 did declare that the Company had only one manager, the Court doubted that it would have effectively removed Huemoeller and Scott. Looking to case law governing Delaware corporations, the Court stated that when an amendment to the bylaws or certificate of incorporation reduces the size of the board below the number of sitting directors, and when the amendment takes place between annual meetings, that act does not remove any of the sitting directors. Per the Court, this reasoning would apply by analogy to this case because the Company adopted a corporate-like structure. The Original LLC Agreement adopted corporate default rules for the managers' terms stating that each "Manager shall hold office until such Manager has resigned or has been removed from office" and "[n]o reduction of the authorized number of Managers shall have the effect of removing any Manager before that Manager's term of office expires." The Amended LLC Agreement maintained the manager-managed structure and repeated the corporate analogy by calling for a board of managers. For these reasons, the Court held that an amendment to the Original LLC Agreement would have been effective to remove the incumbent managers only if it used express language of removal.

Steven and Jeffrey then argued that by entering into the Amended LLC Agreement, Titus reset the Company's governance structure. The Court rejected this argument providing that if the Amended LLC Agreement reset the Company's governance structure, the Company would have been a manager-managed LLC with no managers.

Lastly, Steven and Jeffrey argued that the November 13 Consent removed Huemoeller and Scott by, first, describing Titus in the recitals as the sole manager and, second, by stating that Titus, Steven, and Jeffrey constituted the entire board of managers. The Court rejected the first argument because, similar to the provisions in the Amended LLC Agreement, a recital is a non-substantive provision. The Court then rejected the second argument stating that such a managerial "bump-out" theory lacks support under Delaware law. According to the Court, without a vacancy, there is no room for another individual to be appointed even in the informal context of LLCs.

The Court went on to state that a "stronger version of the plaintiffs' argument would posit that regardless of its application in other settings, a managerial bump-out theory should be recognized for LLCs where the sole member has complete power over the terms of the LLC agreement. Entities of this type, the argument would go, are often run informally by laypersons, and enforcing formalities such as the need to effectuate a removal before an appointment would interfere unnecessarily with effectuating the member's intent." Here, the balance of the contemporaneous evidence and credible witness testimony supported a finding that Titus, as sole Member of the Company, intended to

establish a three-member board of managers consisting of Titus, Steven, and Jeffrey, thereby getting rid of Huemoeller and Scott. Because, however, the parties were represented by counsel, evidence of Titus' intent was insufficient to override the documents themselves.

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