

Interpretation fo an LLC Agreement with Respect to the Appointment and Removal of Board Members is Strictly Based on the Plain Language Contained in the Four Corners of the LLC Agreement

Article By:

Scott E. Waxman

Jennifer J. Yeung

Where one fifty-percent owner of a single member LLC wished to remove the existing tiebreaker director, the Delaware Court of Chancery held that he could not do so. A governing LLC agreement's plain language must be strictly construed; and in this case, it did not provide for unilateral removal of a board member.

Before the Delaware Court of Chancery in *Harley V. Franco v. Avalon Freight Services LLC and Doug Houghton*, C.A. No. 2020-0608-MTZ (Del. Ch. Dec. 8, 2020) was the issue of whether a fifty-percent owner of the single member of an LLC could unilaterally remove a tiebreaker director from the LLC's board of directors.

Avalon Freight Services LLC ("Avalon") was a maritime freight transportation services provider with one member, GH Channel Holding LLC ("Holding"). Holding, in turn, was owned and controlled, in equal parts, by Greg Bombard and his affiliates, and Harley Franco and his affiliates. Pursuant to Avalon's governing LLC agreement (the "Avalon LLC Agreement"), Avalon's board of directors (the "Avalon Board") consisted of five members: two aligned with Franco, two aligned with Bombard, and one tiebreaker. With respect to the tiebreaker director, section 3.1 of the Avalon LLC Agreement provided: "*The fifth (5th) director shall be mutually agreed upon and appointed by Bombard and Franco, who shall initially be Doug Houghton.*"

The issue arose when Holding and Avalon were deadlocked and Franco and Bombard could not agree on whether Houghton should continue to serve the role of tiebreaker director. Bombard believed Houghton should continue to serve in the role whereas Franco did not. The Avalon LLC Agreement was silent as to removal of Avalon's board members. Franco filed action in the Delaware Court of Chancery, seeking a declaration that: (1) Houghton's position "must be vacated"; and (2) Franco and Bombard must mutually agree on a new person to fill the position. Avalon and Houghton moved to dismiss for failure to state a claim, arguing that section 3.1 addressed *only* Houghton's initial appointment and the procedure for filling Houghton's seat if or when it became vacant — not

whether Franco or Bombard possessed the unilateral ability to remove Houghton. Franco cross-moved for summary judgment.

The Delaware Court of Chancery granted Avalon and Houghton's motion to dismiss and denied Franco's motion for summary judgment. It explained: "In governance disputes among constituencies in an LLC, the starting (and end) point almost always is the parties' bargained-for operating agreement" Delaware courts interpreting LLC agreements must prioritize the parties' intentions as reflected in the plain language of the four corners of the agreement. Construing section 3.1 of the Avalon LLC Agreement in this manner then, the Delaware Court of Chancery concluded that neither Franco nor Bombard could unilaterally remove Houghton.

First, not only was section 3.1 silent as to the removal of directors on the Avalon Board, but it was also silent on whether Franco and Bombard were required to continually agree on their appointments. Had Franco and Bombard desired, they certainly could have drafted the Avalon LLC Agreement to include language like: the fifth tiebreaker director must be "mutually agreed upon *at all times*" or Franco and Bombard must "*continue to mutually agree*" on director appointments.

Second, while Franco's contention was that permitting Houghton to continue to serve in the tiebreaker role would have the effect of allowing one side to take control of the company by "endearing himself to Houghton," the opposite was in fact true. Franco's ability to remove Houghton unilaterally, if allowed, would force Houghton to bend to the will of Franco, the one threatening removal. As the Court stated, "an unlimited and unilateral removal power would cause the exact problem Franco fear[ed]: a fifth director . . . beholden to one side." Preventing Franco's removal of Houghton thus did not undermine Houghton's independence; but rather, protected it.

Third, interpreting section 3.1 to require Franco and Bombard to agree on Houghton's service *only* at the time of his appointment squared with the practical function of his tiebreaker role — that is, in the event of a deadlock, as was the case here, Houghton could consider the company's best interests without being bound to either side.

Fourth and finally, as the Court noted: "If one party could remove the tiebreaker at any time and without restriction, any particular tiebreaker would not stay in office for long" and substantive disagreements would result in removal of the tiebreaker and selection of a new one, without resolution of the underlying dispute." In sum, to allow Franco's unilateral removal of Houghton would be the equivalent of allowing Franco to rewrite his agreement with Bombard, undermine the parties' chosen governance structure, and expose Avalon to the deadlock its LLC agreement attempted to avoid in the first place.

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[Harley V. Franco v. Avalon Freight Services LLC and Doug Houghton](#)

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