

Delaware Court of Chancery Upholds Removal of Designated Director Following Amendment to Stockholders Agreement



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On August 8, 2025 in *Kim, et al. v. FemtoMetrix, Inc.*, the Delaware Court of Chancery permitted the amendment of a stockholders agreement without the consent of an adversely impacted investor, even though both the intent and effect of the amendment was to force that investor's director designee to resign from the board.

FemtoMetrix, a private developer of measuring instruments for the chip industry, undertook a capital raise in which Avaco Co. Ltd., a Korean publicly traded equipment manufacturing company, acquired Series B Preferred Stock in FemtoMetrix. In connection with the investment, Avaco, FemtoMetrix and other stockholders of FemtoMetrix entered into a new stockholders agreement—the FemtoMetrix Amended and Restated Voting Agreement—which granted Avaco the right to appoint a “Series B Designee” to the board of directors of FemtoMetrix.

Avaco designated its employee, Charles Kim, as the Series B Designee on the FemtoMetrix board and the two companies initially worked together to develop products. However, after a few years, both Avaco and Kim initiated legal proceedings against FemtoMetrix, in Korea and California, each focused on what the Court called commercial matters unrelated to the voting agreement.

However, as a result of these pending litigations, FemtoMetrix and certain of its stockholders amended the voting agreement without Avaco's consent “to prevent Avaco from obtaining sensitive information while the parties were embroiled in litigation.”

In relevant part, the original voting agreement Avaco entered into provided for certain limitations and protections impacting Avaco's designation rights, including:

- *Section 1.2(a)*, which granted Avaco the right to appoint the Series B Designee, subject to *Section 1.6*, which itself bars “bad actors” from serving as directors;
- *Section 1.4(a)*, which provides that Avaco must consent to the removal of its designee, unless the removal is “for cause” (“cause” was not defined in the voting agreement);
- *Section 7.8*, which provides that the voting agreement can generally be amended with the consent of (i) FemtoMetrix, (ii) certain “Key Holders” (which were not identified in the opinion but which do not include Avaco) and (iii) a majority of the common stockholders, subject to certain exceptions, including the following:

(A) amendments with respect to one investor require that investor's consent “unless the amendment . . . applies to all Investors . . . in the same fashion”; and

(B) amendments to *Section 1.2(a)* expressly require Avaco's consent.

The new amendments, approved without Avaco's consent, prohibit “Conflicted Directors” from serving on the board and clarified that no investor can designate a Conflicted Director or prevent the removal of a Conflicted Director. “A Conflicted Director is defined as a person who is ‘a service provider or otherwise employed by

or an Affiliate of any Person that is engaged in commercial litigation against [FemtoMetrix].”

Following approval of the amendments and demand to remove Kim from the board by stockholders holding over 51% of the Series B Preferred Stock and 70% of the common stock of FemtoMetrix, Avaco brought claims under Section 225 of the Delaware General Corporation Law, which gives the Delaware Court of Chancery authority to hear and determine the validity of a contested director removal. Both Avaco and FemtoMetrix filed motions seeking summary judgment. Recognizing that under Delaware law, “in evaluating cross-motions for summary judgment, the court must . . . only grant a motion for summary judgment to one of the parties when there is no disputed issue of material fact and that party is entitled to judgment as a matter of law”, “pure matters of contractual interpretation . . . [are] . . . readily amenable to summary judgment” by Delaware courts because the “proper interpretation of language in a contract . . . is treated as a question of law.”

Although the Delaware Court of Chancery did not disagree with Avaco that the amendments alter Avaco’s designation rights and were specifically designed to target Avaco and cause Kim’s removal from the board, the Court found that the amendments were approved and adopted by the requisite stockholders and did not violate any provision of the existing voting agreement.

With respect to Section 1.4 (which gave Avaco a consent right on the removal of a designee without cause), the Court noted that Avaco’s “designation right is not absolute or insulated from changes in eligibility criteria imposed elsewhere in the Voting Agreement.” Prior to the amendments, Avaco could not designate a bad actor and could not prevent the removal of a director for cause. The Court noted that the voting agreement did not expressly protect Avaco from any future qualifications or limitations on their designation right. Additionally, the voting agreement did not define “cause.” The Court reasoned that, by permitting FemtoMetrix to remove an Avaco designee that is a Conflicted Director, the amendment “identifies a circumstance in which a designee effectively becomes removable for cause: being a Conflicted Director.”

With respect to Section 7.8 (which prohibits amendments that would adversely affect an investor without its consent unless the amendment applied to all investors “in the same fashion”), the Court took no issue with the fact that, upon its adoption, the amendment solely affected Avaco. The amendment was “facially neutral” and applied equally to all investors. “When Avaco’s California litigation against FemtoMetrix ends, Avaco will be free to redesignate Kim to the Board. And if another Investor with a Board designee sues FemtoMetrix, the designee may be removed as a Conflicted Director.” The Court stressed that “equal application . . . is not the same as equal effect,” so long as the amendment requires objective application to all investors.

Avaco also pointed to language in the voting agreement that required their consent to amend Section 1.2(a). Admitting that Section 1.2(a) itself was not expressly amended, Avaco contended that the amendments had an adverse effect on Avaco’s designation rights granted under Section 1.2(a) and therefore Avaco’s consent was required for the amendments. Noting that Delaware courts will generally stay within the four corners of a contract, the Delaware Court of Chancery held that its “role is not to rewrite the contract between sophisticated market participants, allocating the risk of an agreement after the fact, to suit the court’s sense of equity or fairness. Instead, it is to give meaning and substance to the words the parties have freely chosen.” According to the Court, such an argument by Avaco is more akin to a breach of the implied covenant of good faith and fair dealing, rather than an express contractual claim.

The Court recognized that in its summary judgment brief Avaco alleged that the amendment violated (a) the implied covenant of good faith and fair dealing and (b) an efforts clause in Section 4.1 of the voting agreement. However, neither claim was included in Avaco’s complaint and “amendments in briefs do not serve to amend the pleadings.” By failing to invoke the implied covenant of good faith or required efforts under Section 4.1 until after discovery had concluded, it resulted

not in a “technical foot fault” but a “fundamental failure to give [FemtoMetrix] fair notice of the claim asserted against [it]” or to prepare a defense of such claims.

The FemtoMetrix decision is another reminder for contracting parties to carefully consider the express language of the contract and not rely on what one side may view as the intended rights and obligations provided by an agreement. Going forward, investors should strongly consider clearly securing all rights they want to protect (e.g., prohibiting amendments of any terms that could negatively affect rights and not just specific itemized provisions). As the Delaware Court of Chancery noted, it is not typically the role of the court to protect parties after the fact. “Parties have a right to enter into good and bad contracts, the law enforces both.”

As with its deference to contractual language, in FemtoMetrix the Delaware Court of Chancery refused to entertain an “appeal to equity” or any arguments not firmly grounded in text when no such claims were expressly plead. In order to preserve all potential legal arguments, a litigant should make sure to articulate all arguments in its complaint that it may wish to pursue. Litigants should not expect Delaware courts to permit parties to use motions to raise legal theories later in the case. As noted by the court, “[i]t does not fall upon this court to save a plaintiff from her own deficiencies.”