

Nutrisystem's Director-Removal Bylaw Invalid, Del. Court Says

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* Shareholder persuades Del. court to invalidate Nutrisystem Inc.'s bylaw requiring a supermajority votes to remove directors

* Ruling could prompt companies to amend their bylaws

By Michael Greene

(BNA) -- A Nutrisystem Inc. bylaw that requires a supermajority of stockholder votes to oust directors violates state law, the Delaware Chancery Court ruled Jan. 24 (Frechter v. Zier, 2017 BL 19301, Del. Ch., No. C.A. No. 12038-VCG, 1/24/17).

Only a simple majority of stockholder votes is required to remove board members under the state General Corporation Law's Section 141(k), Vice Chancellor Sam Glasscock III said. "Section 141(k) unambiguously confers on a majority the power to remove directors, and the contrary provision in the Company bylaws is unlawful," he said.

The ruling could spur companies that have similar clauses to amend their bylaws.

'Vaalco' Decision

The chancery court in a December 2015 bench ruling in *In re Vaalco Energy Shareholder Litigation* found that companies with non-classified boards can't have charter or bylaw provisions that allow removal of directors "only for cause" under Section 141(k). The Vaalco ruling caused some companies, including Nutrisystem, to alter their director removal bylaws.

However, when Nutrisystem changed its bylaw, it left in place a provision requiring a two-thirds stockholders' vote to oust board members. Shareholder Harold Frechter filed a lawsuit in February 2016 challenging the provision. Nutrisystem, based in Fort Washington, Pa., provides weight-loss products and services.

Glasscock said while there are no written opinions on this issue, the court's bench ruling in Vaalco is "instructive" on how to determine whether a bylaw is consistent with Section 141(k).

"We are gratified that Vice Chancellor Glasscock agreed with us that bylaws of Delaware corporations must comply with the director removal statute, and that the requirements of the statute are not 'merely permissive,' as defendant argued," Carl L. Stine, a New York-based partner at Wolf Popper LLP who represents Frechter, told Bloomberg BNA.

Meanwhile, Jay Dubow, a Philadelphia-based partner at Pepper Hamilton LLP who represents Nutrisystem, said the company is reviewing the decision and doesn't have any further comment at this time.

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For More Information

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