

EXAMINERS' ANALYSIS OF QUESTION NO. 5

How the legal action must proceed

A suit to redress any injury caused to the corporation must generally be brought in the name of the corporation rather than an individual stockholder. *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679 (1989). Therefore, Shemp will have to file a derivative action on behalf of MWC in order to seek damages for Moe's breach of fiduciary duty. Because Shemp was a shareholder at the time the 2017 contract was signed, continues to be a shareholder, and "fairly and adequately represents the interests of the corporation," he is eligible to file a derivative action. MCL 450.1492a. Pursuant to MCL 450.1493a, Shemp cannot commence a derivative action until he makes a written demand upon MWC to take action against Moe, and has either waited ninety days from the date the demand was made or received notice that the demand has been rejected by the corporation.

Recourse against Moe

As an officer and director of the Michigan Widget Corporation, Moe is required to discharge his fiduciary duty to the corporation (1) "In good faith"; (2) "With the care that an ordinarily prudent person in a like position would exercise under similar circumstances"; and (3) "In a manner he or she reasonably believes to be in the best interests of the corporation." MCL 450.1541a(1)(a)-(c). Certainly, Moe could argue that he acted in good faith by entering into the contract because he believed that the price of graphite would increase dramatically, and that the stable pricing that a fixed price contract would provide would benefit the company over the long term. In exercising his business judgment, Moe is entitled to rely upon information provided by "[l]egal counsel, public accountants, engineers, or other persons as to matters the director or officer reasonably believes are within the person's professional or expert competence." MCL 450.1541a(2)(b) (emphasis added). The facts indicate that the International Association of Graphite Miners is a trade organization in the field of graphite mining, and predicted that there would be a shortage of graphite in the coming years. Moe could reasonably believe that the International Association of Graphite Miners is knowledgeable on the topic of graphite mining, and he would be entitled to rely upon the information provided by

that group. Therefore, the shareholders will have no recourse against Moe. However, if a majority of shareholders agree, they could vote to remove Moe as a director. MCL 450.1511(1).

Whether Joe will vote for Curly or Moe

Under the fact pattern each of the five shareholders controls 20% of the stock. Larry and Moe support Moe, while Shemp and Curly support Curly. Thus, Joe will cast the deciding vote. While Joe indicated that he changed his mind about voting for Curly, and announced his intent to vote for Moe instead, he signed a voting agreement expressly agreeing to vote for Curly. Pursuant to MCL 450.1461, two or more shareholders may enter into a signed written agreement to vote "as provided in the agreement" When such a voting agreement is entered into, it shall be "specifically enforceable." Thus, Shemp and Curly will be able to specifically enforce the voting agreement, Joe will be required to vote for Curly, and Moe will be ousted as a director.