## ANSWER TO QUESTION NO. 9

**The validity of Carolyn's proxy to Tamara:** Michigan law expressly permits shareholders to authorize other persons to act for them by proxy. MCL 450.1421(1). A proxy is generally only valid for 3 years, unless otherwise provided in the proxy. §1421(2). Prior to 1997, the Michigan Business Corporation Act required a signed writing to effectuate a proxy. However, 1997 PA 118 amended §1421, and a signed writing is no longer the exclusive means of effectuating a valid proxy. Section 1421(3) lists two means by which a shareholder can grant authority to a proxy: a writing signed by the shareholder of his agent, §1421(3)(a); or authorization granted by electronic transmission, provided there is sufficient information to determine that the electronic transmission was authorized by the shareholder. §1421(3)(b). However, a shareholder is not limited to those two methods, as the statute specifically declines to "limit[] the manner in which a shareholder may authorize another person" to act as a proxy.

Applying the law to the facts of this case, the video proxy is valid. The statute expressly contemplates alternative means of granting a proxy authorization besides a signed writing or electronic transmission. The facts do not reveal any concerns with Carolyn's identity or status as a shareholder, and Carolyn's authorization to Tamara is clear. Therefore, Carolyn was wrongfully denied the ability to vote her shares by proxy at the annual shareholders' meeting.

**Whether Dan could participate in the shareholders' meeting:** MCL 450.1405(1) specifically provides that "[u]nless otherwise restricted by the articles of incorporation or bylaws, a shareholder may participate in a meeting of shareholders by a conference telephone or by other means of remote communication through which all persons participating in the meeting may communicate with the other participants." In fact, unless otherwise restricted, the board of directors may conduct a shareholders' meeting solely by remote communication. §1405(3).

Thus, the default position in Michigan is that a shareholder may participate in a shareholders' meeting remotely unless it is restricted by the articles of incorporation or bylaws. While the board of directors may adopt guidelines and procedures for the remote participation of shareholders, a shareholder is considered "present in person" and may vote at the meeting if (a) reasonable measures are implemented to verify that the person is a

shareholder; (b) the shareholder is provided a reasonable opportunity to participate in the meeting and vote, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with the proceedings; and (c) a record of the vote or other action is maintained by the corporation. §1405(4)(a)-(c).

Applying the law to the facts of this case, it is irrelevant that Enfoo's bylaws and articles of incorporation do not specifically provide for remote participation; so long as remote participation is not restricted, it is permitted. The facts indicate that Dan and the other participants could readily communicate with each other via speaker phone. The fact that the phone call was placed from Dan's house, as well as Dan's "distinctive falsetto voice," should provide sufficient verification that the person participating remotely is Dan. However, if the corporation wanted to, it could take additional reasonable measures of verification. Dan was wrongfully denied the ability to participate in the annual shareholders' meeting by telephone.

**Actions and remedies available to Carolyn and Dan:** Michigan law specifically provides for both direct actions and derivative actions. A shareholder may file an action to establish that "the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to *the* ***corporation or to the shareholder."*** MCL 450.1489(1) ***(emphasis added).***

Whether a suit is appropriately brought as a direct action or as a derivative action depends on the nature of the claimed injury. Where the injury is caused to the corporation, the suit must be brought in the name of the corporation as a derivative suit. *Michigan Nat Bank v Mudgett,* 178 Mich App 677 (1989). However, where the "wrong done amounts to a breach of duty owed to the individual personally," a direct action may be maintained. *Id.* at 680.

In this case, Carolyn and Dan do not seek to enforce the rights of the corporation. Rather, they seek redress for the violations of Michigan law, resulting in the deprivation of their right as shareholders to vote for the board of directors. Therefore, a direct action is appropriate.

If a shareholder establishes grounds for relief, the circuit court may "make an order or grant relief as it considers appropriate," including an order providing for the "cancellation, alteration, or injunction against a resolution or other act of the

corporation." MCL 450.1489(1)(c). Because the facts indicate that either Carolyn's or Dan's vote would alter the outcome of the election, the judge may cancel the results of the directors' election if the claims of Carolyn and Dan are determined to be meritorious.