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### **1. AGREEMENT BETWEEN ALIYAH AND BOWEN**

The voting agreement between Aliyah and Bowen is not valid because the purpose they are using it for is to improperly control the Board, including the election of new directors and the new company president. Although cumulative voting is permissible, it is not permissible if the shareholders are using it like they are in this case - to frustrate the fundamental purpose of having independent directors that act in the best interests of the company. In order to comply with the voting rights agreement, they would be violating their fiduciary duties as directors.

### **ALIYAH AND BOWEN'S DUTY**

Where shareholders have the ability to control and influence the activities of a closely held company like Aliyah and Bowen (they have the ability to elect themselves as directors) even though they are not majority shareholders, they must act with a duty of care with respect to the company and put the company's interests before their own. Their conduct will be judged by the business judgment rule which requires them to act in a way that puts the company's interests first. Here, it is not the company's best interest to have two people controlling the Board and election of new directors and the new company president rather than have the directors independently elect other directors and the new President.

### **2. DAYA AND THE ALIYAH-BOWEN VOTING AGREEMENT**

The Aliyah-Bowen voting agreement stipulated that it was binding on all subsequent owners of the shares and the share certificates were also stamped on the back that they were "Subject to Agreement". In addition, Daya was also notified of the agreement and all of the facts orally by Bowen. Daya purchased all of Bowen's shares knowing all of these facts. Notwithstanding the multiple forms of notice, Daya will not be obligated by the terms of the voting agreement because it was formed for an improper purpose. Daya would essentially be breaching her duty of care to company as a controlling shareholder if she adhered to the terms of Aliyah-Bowen agreement.

### **3. ESGAR'S MOTION TO ENJOIN**

Esgar is seeking a preliminary injunction in order to enjoin the Corporation for moving into the bu bicycles. There are two types of suits that Esgar, as a shareholder of Corp, can initiate. Edgar can bring either a direct action or a shareholder derivative action. It

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is unclear which suit he has brought. Esgar is seeking injunctive relief that enjoins the company from changing its television business to a motorcycle business. The elements for injunctive relief are that (i) there is irreparable harm - no adequate remedy at law; (ii) there is a likelihood of success on the merits; (iii) the balance of hardships weighs in favor of the injunction; and (iv) the plaintiff is entitled to judgment as a matter of law.

In applying those factors here, there is no question that there is no adequate remedy at law. If Corp completely changes its entire business from manufacturing televisions to manufacturing bicycles it will not be able to undo that action absent significant expenses and effort. The harm will be incalculable to Corp's business, financials and customers. Once Corp loses its current customers, it may not be possible to regain them once there is a switch. There is a likelihood of success on the merits because Palmer was clearly exceeding his authority as president and under his leadership, Corp was violating its own Aol with its significant purchases and secret change of the business without even telling the Directors, much less calling a meeting of all of the shareholders which is what is required for this type of drastic corporate change. There is no question that the balance of hardships weighs in favor of entry of an injunction. Esgar's interest in keeping Corp operating in accordance with the bylaws and proper director disclosures and shareholder voting and with directors and officers properly carrying out their fiduciary duties outweighs and the interest of making a quick shift to an entirely new business to gain profits. Lastly, the likelihood of success factor weighs in favor of entering the injunction. Esgar will succeed and obtain an injunction against Corp.

#### **4. ESGAR'S CLAIM FOR DAMAGES AGAINST PALMER**

Esgar can sue Palmer for breaching his duty of care as measured by application of the Business Judgment Rule. Palmer clearly acted outside his scope of authority and not in the best interests of Corp when he was secretly trying to convert the company into one that manufactures bicycles. While it is acceptable to change the company's business, it needs to be done by following corporate formalities - director investigation, shareholder meeting and vote. This was clearly not done here as evidenced by Bowen's comments to Dara and Palmer's comments that the directors were not aware of anything.

In terms of damages, Esgar can recover from Palmer the monies he had Corp pay for expenses related to switching to the motorcycle business. Palmer would have to repay that money to Corp along with any other related damages suffered by Corp or Esgar related to this change of business. Esgar can also recover any decrease in share value if that occurred and established as a result of Palmer's unauthorized conduct and breach of the duty of care.

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**END OF EXAM**