Republic of the Philippines
Department of Trade and Industry
Securities and Exchange Commission
SEC Bldg. EDSA, Greenhills, Mandaluyong City

IN THE MATTER OF:

SEC En Banc Case No. 10-08-145
For: Review of CFD Ruling on Violation of the Code of Corporate Governance and Manual on Corporate Governance

ALSONS CONSOLIDATED RESOURCES, INC.
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DECISION

For consideration is the *Appeal* dated 20 October 2008 filed on even date by Alsons Consolidated Resources, Inc. ("Alsons", for brevity) from the *Letter-Ruling* of the Commission's Corporation Finance Department ("CFD") dated 22 September 2008 imposing sanctions on Alsons for violation of its Manual on Corporate Governance ("the Manual") in connection with the Code on Corporate Governance ("CCG")[1].

The facts are:

On 23 April 2008, the CFD communicated to Alsons its comments on the company's Preliminary Information Statement (SEC Form 20-IS) that was filed with the Commission on 14 April 2008 in connection with Alsons's annual stockholders' meeting scheduled to be held on 28 May 2008. In its comments, CFD directed Alsons to explain why Carlos G. Dominguez and Alejandro I. Alcantara were included in the list of nominees for directors despite their having attended less than 50% of the board meetings for the past year, a ground for temporary disqualification under Alsons's Manual.[2]

In reply, Alsons explained that Dominguez figured in an accident on 26 May 2007 and had to undergo a medical operation and a period of recuperation in Davao City where he resides during the board meeting dates in question.[3] Alcantara, on the other hand, was out of the country for strategic meetings on Alsons's behalf.[4]

On 9 May 2008, a copy of the medical certificate executed by Dominguez's attending physician in Davao City was submitted by Alsons.[5]

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[1]SEC Memorandum Circular No. 2, Series of 2002, as amended by SEC Memorandum Circular No. 6, Series of 2009.
[2]CFD's letter to Alsons dated 23 April 2008, Annex "A" of CFD's Reply-Memorandum dated 21 November 2008.
[3]Letter-reply of Alsons dated 28 April 2008, Annex "B" of the Memorandum on Appeal.
[4]Ibid.
[5]Memorandum on Appeal, p. 3.

On 13 May 2008, Alsons filed its Definitive Information Statement (SEC Form 20-IS) without removing Dominguez and Alcantara from such list of nominees.[6]

On 29 May 2008, Alsons filed its Current Report (SEC Form 17-C) disclosing the election of Dominguez and Alcantara as directors.[7]

Hence, on 18 June 2008, the CFD reprimanded Alsons for violating its Manual and directed the latter to replace the said disqualified directors.[8]

Alsons sought reconsideration of the CFD's letter dated 18 June 2008, on, among others, the following grounds: (1) Alcantara has an effective interest of 9.8% in Alsons which entitles him to at least one (1) seat in the Board; (2) Dominguez is a nominee director of the Alcantara family which is entitled to at least eight (8) seats in the Board; (3) their election to the Board is justified under Section 24 of the Corporation Code[9] which, being a statute, takes precedence over a regulation such as the CCG; (4) the absences of Alcantara and Dominguez are justified due to the former's official travels abroad (on Alsons's behalf) and the latter's accident, operation and recuperation; and (5) the CFD's findings were erroneous in that they were based on the Certificate of Attendance for the calendar year 2007, in contravention with the requirement of the Manual that the absences in question must be those during a director's incumbency.[10] In connection with this last ground, Alsons argued that the board meetings covered must be those from 7 June 2007 (or the day Alcantara and Dominguez were elected as directors) to 28 May 2008 (or the day a new Board was elected).[11]

Upon the directive of the CFD, Alsons filed a Sworn Certification dated 15 September 2008 on the attendance of Alcantara and Dominguez during their incumbency from 7 June 2007 to 28 May 2008, according to which, Alcantara incurred two (2), and Dominguez incurred four (4), out of the total of six (6) board meetings.[12]

The CFD then issued its herein assailed letter-ruling of 22 September 2008 which, while finding that Alcantara was compliant with the attendance requirement, still imposed sanctions on Alsons, to wit:

> "Please be advised however, that the reasons advanced on behalf of Mr. Dominguez is (sic) without merit. While it is true that Mr. Dominguez was unable to be physically present in the meetings, said inability did not prevent him from attending the meetings via video/teleconferencing in accordance with the existing rules of the Commission (SEC Memorandum Circular No. 15, Series of 2001).

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[6]CFD's Reply-Memorandum dated 21 November 2008, p. 2.
[7]Ibid.
[8]CFD's 18 June 2008 letter, Annex "C" of the Memorandum on Appeal.
[9]Batas Pambansa Blg. 68 (1980).
[10]Alsons's letter for reconsideration dated 6 August 2008, Annex "D" of the Memorandum on Appeal.
[11]Ibid.
[12]Annex "F", Memorandum on Appeal.

In view thereof, the Commission hereby affirms the imposition of the penalty of reprimand against the company and reiterates its directive for the company to replace Mr. Carlos Dominguez as a director of the Company within five (5) days from receipt of this letter."

Hence, this *Appeal*.

A careful reading of the pleadings filed herein reveals that the issues raised can be simplified into two (2), namely: (1) whether the disqualification of a director for non-attendance in a certain number of board meetings has basis in law; and (2) whether Dominguez's non-compliance with the attendance requirement is justified.

AS TO THE FIRST ISSUE

Alsons points out that: (1) the Corporation Code does not provide absence in board meetings as a reason for disqualifying a director from his re-election to the board; and (2) the basis for the disqualification of Dominguez is the CCG, which is a mere regulatory issuance, in relation to the Manual. In essence, Alsons contends that the CCG, being a mere regulation, does not take precedence over, much less, supersede, a statute like the Corporation Code (which also guarantees stockholders their proportional representation in the board). Ultimately, Alsons argues that the disqualification of a director solely by reason of his absence in more than 50% of the board meetings held has no basis in law.

We disagree.

True, the Corporation Code expressly provides for only the following disqualifications of a director: (1) automatic cessation as a director by reason of his cessation as a stockholder[13]; and (2) conviction of an offense punishable by imprisonment for a period exceeding six (6) years, or of a violation of the Corporation Code, committed within five (5) years prior to the date of his election.[14]

This does not mean, however, that there can be no other disqualifications. The Corporation Code authorizes a corporation to provide in its by-laws other disqualifications of directors, in addition to those stated above.[15] Thus, a by-law provision may validly provide for a disqualification as director of a person who is engaged in any business which competes with or is antagonistic to that of the corporation.[16]

The Corporation Code likewise grants the Commission the power to promulgate rules and regulations reasonably necessary to enable it to perform its

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[13]Section 23, Corporation Code; SEC-OGC Opinion No. 09-06 dated 16 March 2009 addressed to Reyes-Fajardo & Alciso Law Offices.
[14]Section 27, Corporation Code.
[15]Section 47, Corporation Code.
[16]Gokongwei, Jr. vs. SEC, 89 SCRA 336 (1979).

duties under the law, particularly in the prevention of fraud and abuses on the part of the controlling stockholders, members, directors, trustees or officers.[17] For the protection of the investing public, the Securities Regulation Code ("SRC")[18] also grants the same rule-making authority to the Commission.[19] This rule-making power is consistent and pursuant to the Commission's jurisdiction, supervision and control over all corporations, partnerships or associations, who are the grantees of primary franchise and/or a license or permit issued by the government to operate in the Philippines.[20]

In the exercise of this rule-making authority, the Commission issued the CCG to better regulate public or listed companies, those who are issuers of registered securities, and those who are grantees of secondary licenses. The CCG states: "*In accordance with the State's policy to actively promote corporate governance reforms aimed to raise investor confidence, develop capital market and help achieve high sustained growth for the corporate sector and the economy, the Commission, in its Resolution No. 135, Series of 2002 dated April 04, 2002, approved the promulgation and implementation of this Code, which shall be applicable to corporations whose securities are registered or listed, corporations which are grantees of permits/licenses and secondary franchise from the Commission and public companies.*" One way to achieve these objectives is to ensure the faithful performance by those holding the reins of these corporations, the directors, of their fiduciary duty mandated by the Corporation Code[21], through the imposition of additional disqualifications. Thus, the CCG provides:

> "5. Disqualification of Directors
>
> xxx xxx xxx
>
> The Board may also provide for the temporary disqualification of a director for the following reasons:
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> xxx xxx xxx
>
> b. Absence or non-participation for whatever reason/s for **more than fifty percent (50%) of all meetings**, both regular and special, of the Board of directors during his incumbency, or any twelve (12) month period during said incumbency. The disqualification applies for purposes of the succeeding election.
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> xxx xxx xxx." (Emphasis ours)

[17] Section 143, Corporation Code.
[18] Republic Act No. 8799 (2000).
[19] Section 5(g), SRC.
[20] Section 3, Presidential Decree No. 902-A, as amended.
[21] Sections 23 and 31-34, Corporation Code.

Alsons adopted the above-quoted provision of the CCG in its Manual, that it submitted with the Commission on 30 August 2002[22], and wherein it committed to observe the same.[23]

It is clear that the CCG does not supersede the Corporation Code because it merely augments the latter by the provision of additional disqualifications of directors in the covered corporations.

Thus, contrary to Alsons claim, the CCG has basis in law.

AS TO THE SECOND ISSUE

The law is replete with provisions that, while requiring, enjoining, or sanctioning certain actions and/or omissions of man, admit of valid excuses for non-compliance therewith. Indeed, things happen to man that are beyond his foresight and control, and when these prevent him from performing such actions and omissions, reason and logic dictate that he be excused from the law.

Hence, while the disqualification rule above-quoted does not provide for any justifying circumstance, we, nevertheless, should not rigidly interpret the same as absolute. We must admit of certain valid reasons for a director's absence(s) in board meetings. As correctly pointed out by Alsons, it is a principle of statutory construction to interpret rules in a reasonable manner.

Besides, SRC Rule 38(6)(B)(iii) of the Implementing Rules and Regulations of the SRC[24] specifically governing independent directors provides for a similar disqualification based on attendance in board meetings, but admits of justifying causes. There is no substantial reason why the same justifying causes should not be applied to a regular director such as Dominguez.

That said, we now proceed to a determination of whether Dominguez's non-compliance with the attendance rule was for valid reasons.

Dominguez was found non-compliant as he was able to attend only two (2), i.e., 8 February 2008 and 28 April 2008, out of the six (6) board meetings of Alsons during the relevant period. Dominguez missed the four (4) board meetings held on 7 June 2007, 1 October 2007, 26 October 2007, and 20 November 2007.[25]

To stress, the disqualification rule applies only in case the absences amount to "*more than 50% of all (board) meetings*". Thus, in the instant case, had

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[22]Supra, Note 8.
[23]The Manual, p. 1.
[24]The provision reads: "*xxx. He shall likewise be disqualified during his tenure under the following instances or cause: xxx; (iii) Fails, without any justifiable cause, to attend at least 50% of the total number of Board meetings during his incumbency unless such absences are due to grave illness or death of an immediate family.*"
[25]Supra, Note 12.

Dominguez attended at least one (1) more meeting, or, if his absence in at least one (1) meeting was for a justifiable cause, he would not be disqualified.

There is no denying that Dominguez figured in a serious accident on 26 May 2007, resulting in a leg fracture and other related injuries that prevented him from walking. His injuries are described thus: "*Lateral joint dislocation with fractures of fibular and tibial malledli, mallet finger, right thumb, multiple abrasions, right elbow, left arm, both knees.*"[26] **Dominguez underwent surgery to stabilize the fractures and reduce the joint, and stayed in the hospital from 26 May 2007 to 3 June 2007.**[27]

A reasonable period of sound rest is needed by, and in fact advised of, a patient even after he is discharged from the hospital, more so if he has undergone surgery. This, to avoid relapse/remission, or worse, complications. As simple and convenient as it may seem, teleconferencing on 7 June 2007, the first board meeting missed by Dominguez, which is a mere four (4) days from his discharge from the hospital, would have unduly exposed him to strain and stress, against the advice of his physician. Considering the proximity of the board meeting on 7 June 2007 to Dominguez's discharge from the hospital on 3 June 2007, as well as the seriousness of his injuries and the medical procedures he underwent, we believe that his failure to attend the 7 June 2007 board meeting was justified.

Further, Dominguez's absence in the board meeting on 7 June 2007 could not have been reasonably addressed through re-scheduling the said meeting, considering that Alsons was, under the law[28] and even under its by-laws[29], mandated to hold the board meeting on said date, 7 June 2007 itself being the date of the annual stockholders' meeting wherein Dominguez was elected as director.[30] Neither could the 7 June 2007 annual stockholders' meeting have been reasonably re-scheduled, as the Definitive Information Statement (SEC Form 20-IS) therefor can be said to have been already distributed, as required, to the security holders at least fifteen (15) business days from the date of the stockholders' meeting[31], which may very well be before Dominguez's accident on 26 May 2007. Indeed, the corporation can only re-schedule so much, without unduly disrupting the schedules of its stockholders and directors.

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[26]Medical Certificate issued by Dominguez's attending physician in Davao City, Annex "G" of the Memorandum on Appeal.
[27]Ibid.
[28]Section 25 of the Corporation Code states: "***Immediately after their election, the directors of a corporation must formally organize*** *by the election of a president, who shall be a director, a treasurer who may or may not be director, a secretary who shall be a resident and citizen of the Philippines, and such other officers as may be provided for in the by-laws.xxx.*"
[29]Section 5, Article I of Alsons's By-Laws states: "***The Board of Directors shall hold a meeting,*** *as soon as may be practicable* ***after the annual meeting of stockholders*** *and elect officers for the coming year.xxx.*"
[30]Supra, Note 10.
[31]SRC Rule 20(3)(C)(iv).

As to the 1 October 2007 board meeting, records disclose that Dominguez was in the U.S.A. on the same day for physical therapy and medical rehabilitation.[32] With regard to the 26 October 2007 board meeting, he left on that day for the U.S.A. to continue his medical treatment and physical therapy.[33] On 20 November 2007, the fourth board meeting he missed, he was still in the U.S.A. continuing his medical rehabilitation.[34] We note that thereafter, Dominguez already attended the succeeding board meetings on 8 February 2008 and 28 April 2008.

WHEREFORE, premises considered, the instant *Appeal* is hereby **GRANTED**. The *Letter-Ruling* of the Commission's Corporation Finance Department dated 22 September 2008 is hereby **REVERSED** and **SET ASIDE**.

SO ORDERED.

Mandaluyong City, 31 March 2011.

FE B. BARIN
Chairperson

MA. JUANITA E. CUETO
Commissioner

RAUL J. PALABRICA
Commissioner

MANUEL HUBERTO B. GAITE
Commissioner

ELADIO M. JALA
Commissioner

[32]Annex "H", Memorandum on Appeal.
[33]Annex "I", Memorandum on Appeal.
[34]Supra, Note 33.