DR. ALFREDO R.A. BENGZON,
Complainant-Appellant,

- *versus* - **SEC En Banc Case No. 12-19-466**

FOUNTEL CORPORATION, FELICITAS ANTOINETTE, INC., VIVA HOLDINGS (PHIL.) PTE. LTD. & VIVA HEALTHCARE LIMITED,
Respondent-Appellees.

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FOUNTEL CORPORATION and FELICITAS ANTOINETTE, INC.,
Respondent-Appellants,

- *versus* - **SEC En Banc Case No. 12-19-467**

PSI SPECIAL HEARING PANEL,
Appellee.

x - x

D E C I S I O N

Before this Commission are (a) the *Appeal Memorandum* dated 10 December 2019 (the "Bengzon Appeal")[1] filed by Dr. Alfredo R. A. Bengzon ("Dr. Bengzon") and (b) the *Appeal Memorandum* dated 10 December 2019 (the "Fountel and FAI Appeal")[2] filed by Fountel Corporation ("Fountel") and Felicitas Antoinette, Inc. ("FAI"), both in SEC SHP Case No. PSI-18-02.

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[1] Docketed as SEC En Banc Case No. 12-19-466.
[2] Docketed as SEC En Banc Case No. 12-19-467.

The Bengzon Appeal seeks the modification of the Resolution dated 22 November 2019 (the "Resolution") issued by the Special Hearing Panel (SHP), praying that an Order be issued by the En Banc (a) voiding and nullifying the PSI shares acquired by Fountel, FAI, Viva Holdings (Philippines) PTE LTD. and Viva Healthcare Limited beginning 1 August 2013, (b) declaring Fountel, FAI, Viva Holdings (Philippines) PTE LTD. and Viva Healthcare Limited guilty of fraud under Section 26 of the Securities Regulation Code (SRC), and (c) imposing the appropriate fines commensurate to the damage sustained by Professional Services, Inc. (PSI), and declaring Viva Healthcare liable for violating Rule 19.2.A of the 2003 Amended IRR.

The Fountel and FAI Appeal, on the other hand, assails the Resolution for lack of merit and prays for the reversal of the same.

THE PARTIES

Dr. Bengzon is a Filipino, of legal age, a stockholder and the former Director, President and Chief Executive Officer of PSI.

Fountel Corporation (Fountel) is a corporation duly organized and existing under the laws of the Republic of the Philippines, with principal address at No. 2 Biak na Bato St., Ayala Heights Village, Old Balara, Quezon City.

Felicitas Antoinette, Inc. (FAI) is a corporation duly organized and existing under the laws of the Republic of the Philippines, with principal address at 711 EDSA corner New York St., Pinagkaisahan, Cubao, Quezon City. Fountel owns 99.9% of the shares of FAI.

Jose Xavier B. Gonzales (Mr. Gonzales) is the President of Fountel and Chairman and CEO of FAI.

Viva Holdings (Philippines) PTE LTD. (Viva) is a limited liability corporation organized and existing under the laws of Singapore, with office address at 80 Raffles Place, #46-01 UOB Plaza, Singapore 048624. It is a wholly-owned subsidiary of Viva Healthcare.

Viva Healthcare Limited (Viva Healthcare) is a limited liability corporation duly organized and existing under the laws of the British Virgin Islands, with office address at Woodbourne Hall, PO Box 3162, Road Town, Tortola, British Virgin Islands, VG1110.

The **PSI Special Hearing Panel (the "SHP")** is a panel created by the Commission[3] and was authorized to investigate, hear, resolve and decide at the first instance, the instant case.

STATEMENT OF RELEVANT FACTS

Professional Services, Inc. (PSI) is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines which operates the Medical City, a premier hospital and clinic network in the Philippines and abroad. It is a public company as defined in the SRC which, prior to 2013, had no single stockholder holding more than 18.2% shareholding.

On 23 April 2013, the Executive Committee ("Execom")[4] of PSI met to discuss, among others, the matter of raising funds to implement the corporation's long-term and short-term objectives. In relation thereto, Mr. Gonzales informed the Execom that "*he has effectively found a partner wherein he and his partner will become majority*" and that he will end up owning 43% of the shares of PSI.[5] The records of the case reveal that the directors present in the Execom meeting were made to believe that Mr. Gonzales used the term "partner" as a "strategic investor or partner" who will not take control of PSI.[6]

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[3] SEC Resolution No. 605, Series of 2018.

[4] Attendees of the Execom Meeting were the following:
Augusto P. Sarmiento, M.D. (BOD Chairman)
Manolito S. Soller – Assistant Corp. Secretary (Atty. Soller)
Alfredo R.A. Bengzon, M.D. (BOD)
Jose Xavier B. Gonzales (BOD)
Eugenio F. Ramos, M.D.
Benita J. Macalagay
Gary Cheng (Fortman Cline Capital Market)
Caroline Chu (Fortman Cline Capital Market)
Virginia B. Alano

[5] Annex "C" of the Bengzon Appeal: Minutes of Executive Committee Meeting dated 23 April 2013 (pages 23-24).

[6] SHP Resolution (page 29).

The First and Second Capital Increases

On 24 April 2013, the Board of Directors ("BOD") of PSI met and resolved, among others, to increase the authorized capital stock of PSI from 1,000,000 common shares to 1,400,000 common shares (the "First Capital Increase"). During the meeting, one of the directors emphasized that any capital raising program should give priority to current shareholders and should be very specific to an investment. Mr. Gonzales assured the BOD that he and his partner will act in the best interest of PSI consistent with the company's vision and core values.[7]

On 31 July 2013, the BOD of PSI was convened where it approved and resolved, among others, (a) to further increase PSI's authorized capital stock from 1,400,000 common shares to 1,900,000 common shares (the "Second Capital Increase"), and (b) to allot its unissued common shares as follows:[8]

Subscriber	No. of Common Shares	Source
Viva Holdings	91,363	PSI Unissued Common Shares
Insular Life Assurance Co. Ltd.	29,464	PSI Unissued Common Shares
Viva Holdings	196,054	First Capital Increase
FAI	203,946	First Capital Increase
Viva Holdings	114,369	Second Capital Increase
FAI	114,767	Second Capital Increase
Insular Life Assurance Co. Ltd.	29,464	Second Capital Increase

[7] Annex "D" of the Bengzon Appeal: Minutes of PSI's Board Meeting dated 24 April 2013 (pages 6-7).
[8] Annex "E" of the Bengzon Appeal: PSI Minutes of the Board Meeting dated 31 July 2013.

LA III Medical City Cooperatief UA	117,359	Second Capital Increase
Religious of the Virgin Mary	12,500	Second Capital Increase
Various persons/institutions at the discretion of Management	51,541	Second Capital Increase

As of this date, the total shareholdings of Fountel and FAI was 9.24% of PSI's authorized capital stock.

The Loan Agreement between Viva and New Regency Investments Limited

On 1 August 2013, Viva and New Regency Investments Limited (New Regency) entered into and executed a Loan Agreement (the "Loan") in respect of the subscription funds required by FAI to fund its subscription for PSI Shares pursuant to the FAI Subscription Agreement, where Viva extended to New Regency, loan facilities divided into two (2) tranches[9] under the following terms and conditions:

(a) The Loan was executed exclusively for the purpose of financing (a) FAI's subscription of the FAI Subscription Shares pursuant to the FAI Subscription Agreement and (b)

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[9] "Section 2.1 Facilities

Subject to the terms of this Agreement, the Lender shall lend to the Borrower the Facilities which shall be divided into:

2.1.1 the Tranche A Facility, which is a term loan facility of up to US$24,359,828 (United States Dollars twenty four million three hundred fifty nine thousand eight hundred and twenty eight); and

2.1.2 the Tranche B Facility, which is a term loan facility of up to US$13,534,742 (United States Dollars thirteen million five hundred and thirty four thousand seven hundred and forty two)."

FAI's subscription of common shares in PSI under the Second Capital Increase.[10]

(b) New Regency was under obligation to deliver to Viva, among others, (a) a Board Resolution of Fountel authorizing the performance by Fountel of all its obligations under the Share Pledge; (b) Board Resolution of FAI authorizing the performance by FAI of all its obligations under the Share Pledge and its investment in the shares of PSI; and (c) an executed Share Pledge.[11] The relevant provisions in the Loan covering the foregoing obligations are quoted as follows:

> *"2.3 Initial Conditions Precedent for Advance under Tranche A Facility*
>
> *Section 2.3.4 - copies of the resolution of the Board of Directors of Fountel authorizing the provision of security on the terms and conditions under the share pledge, the performance by Fountel of all its obligations under the Share Pledge and authorizing the signatories on behalf of Fountel to execute the Share Pledge, certified as true and correct and in full force and effect by its Corporate Secretary;*
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> *Section 2.3.5 – copies of the resolution of the Board of Directors of FAI authorizing (i) the performance by FAI of all its obligations under the Share Pledge and authorizing the signatories on behalf of FAI to execute the Share Pledge and (ii) the investment by FAI in the shares*

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[10] Section 2.2 of the Loan provides:

"The proceeds of the Tranche A Facility shall be used exclusively for the purposes of (A) on-lending to FAI, through Fountel, for financing FAI's subscription of the FAI Subscription Shares pursuant to the terms of the FAI Subscription Agreement, and (B) for financing the payment of the professional fees of Fortman Cline Capital Markets in connection with the transactions contemplated under the FAI Subscription Agreement, the Shareholders Agreement and the Finance Documents. The proceeds of the Tranche B Facility shall be used exclusively for the purposed of (A) on-lending to FAI for financing FAI's subscription of common shares in PSI under the Second Capital Increase, and (B) for financing the payment of the professional fees of Fortman Cline Capital Markets in connection with the transactions contemplated under the FAI Subscription Agreement, the Viva Holdings Subscription Agreement, the Shareholders Agreement and the Finance Documents. The Lender is not bound to monitor or verify the application of any amount borrowed pursuant to this Agreement." (Emphasis supplied)

[11] Section 1.1 of the Loan defines "Share Pledge" as a share pledge over the entire issue share capital in FAI granted or to be granted by Fountel in favor of the Lender.

of PSI, and authorizing the signatories on behalf of FAI to execute such subscription agreements and similar instruments as may be necessary for this purpose, certified as true and correct and in full force and effect by its Corporate Secretary;

Section 2.3.9 – the Share Pledge duly executed by all the parties thereto together with all the documents required thereunder and evidence that all steps that are required to be taken to create and perfect the security interest under the Share Pledge and to give such security interest such status and priority as contemplated under the Share Pledge in the assets being secured thereunder have been taken by Fountel and FAI;"

(c) New Regency expressly represented and warranted to Viva that each of the FAI Subscription Agreement and the Shareholders Agreement is in full force and effect; and breach of the said representation and warranty is an event of default.[12] Section 6.1.10 of the Loan provides:

"*6. REPRESENTATIONS AND WARRANTIES*

6.1 The Borrower hereby represents and warrants that:

FAI Subscription Agreement and Shareholders Agreement: each of the FAI Subscription Agreement and the Shareholders Agreement is in full force and effect and has not been terminated by the parties thereto;"

[12] *"EVENTS OF DEFAULT*
xxx xxx xxx

Section 8.1.13 – Subscription Agreements and Shareholders Agreements

(a) any of the FAI Subscription Agreement, the Viva Holdings Subscription Agreement or the Shareholders Agreement is terminated or cease to be valid; and
(b) *the Borrower, Fountel, FAI or PSI fails duly to perform or comply with any undertaking or other obligation owed or assumed by it under any of the FAI Subscription Agreement, the Viva Holdings Subscription Agreement or the Shareholders Agreement in any material respect and, if any such non-performance or non-compliance is, in the opinion of the Lender, capable of remedy, it is not remedied to the satisfaction of the Lender within ten (10) business day of the earlier of the Borrower or the Lender becoming aware of such non-performance or non-compliance."*

(d) The Loan also contains a mechanism (Section 3.1) which converts the Outstanding Loans into Regency Shares[13] resulting in Viva Holdings becoming a shareholder of New Regency after the PSI Amended Articles of Incorporation[14] is issued by the SEC.[15]

The Co-Operation and Shareholders Agreement in respect of Professional Services, Inc.

On the same date, 1 August 2013, Viva Healthcare, Viva, Fountel and FAI (collectively referred to as the "CSA Parties") entered into a Co-Operation and Shareholders Agreement in Respect of Professional Services, Inc.[16] (the "CSA") relating to the acquisition/increase of shares in the Company, and the management, governance and control by the parties of PSI. The relevant provisions in the CSA on the foregoing reads:

"**3. GENERAL UNDERTAKINGS**

Compliance with this Agreement by the Company and the Subsidiaries

3.1 <u>Each of the Fountel Parties and the Viva Parties shall</u> use its best endeavours to <u>procure that the Company and each Subsidiary</u>

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[13] "Regency Share" means one (1) fully paid ordinary share with nominal value of HK$1.00 each in the Borrower.

[14] Section 1.1 of the Loan defines PSI Amended Articles of Incorporation as "*the articles of incorporation of PSI in effect as at the date of this Agreement in a form amended to reflect the following: (i) the ROFR Provisions shall be deleted in their entirety and (ii) no provision having a remotely similar effect to the ROFR Provisions shall be included or substituted in the place of the ROFR Provisions."* The "ROFR Provisions" means the right of first refusal provisions in article TENTH of the articles of incorporation of PSI.

[15] Sections 3.1.1 and 3.1.2 of the Loan Provides:
"3.1.1. The outstanding Loans together with all accrued interest and all other amounts accrued, due and owing under the Finance Documents" shall convert into the Regency Share in accordance with the terms of this Agreement (the "Conversion") if (i) the Lender receives the PSI Amended Articles of Incorporation (as defined below) or (ii) for any reason, if the Parties otherwise mutually agree in writing to the Conversion.
"3.1.2. The Conversion shall be subject to the Lender having received from the Borrower a certified true copy (certified by the Corporate Secretary of PSI) of a Certificate of Filing of the PSI Amended Articles of Incorporation, issued by the Philippine Securities and Exchange Commission to PSI (the "Certificate of Filing"), with the attached PSI Amended Articles of Incorporation being in a form identical to the form of the PSI Amended Articles of Incorporation approved by the Board of Directors and the stockholders of PSI prior to such filing (the "Certified PSI Amended Articles of Incorporation").

[16] Referred to as the "Company" in the CSA.

shall duly and punctually perform, enforce and comply with all the rights of and protections afforded to the Fountel and Viva Parties under this Agreement.

Cooperation in respect of the Business

3.2 Each of the Viva Parties and the Fountel Parties shall:

3.2.1 cooperate with each other on all matters relating to the governance of the Company and the conduct of the Business;

x x x

3.4 For so long as Dr. Alfredo Bengzon ("Dr. Bengzon") has the support and approval of the Fountel parties to act in the role of chief executive officer of the Group as carried out at the date of this Agreement, the Viva parties shall support Dr. Bengzon in such role.

x x x

Further Increases of Share Capital of the Company

3.8 In the event of any future share capital increase of PSI, where Viva Holdings or FAI is not invited to subscribe for PSI shares in accordance with its pro rata PSI shareholder rights pursuant to sub-clause 6.4, each of the Fountel Parties or the Viva Parties, as applicable, shall vote against such share capital increase.

Issue, Re-issue or Transfer of PSI Preferred Shares or PSI Treasury Shares

3.9 Following completion, each of the Fountel or Viva Parties, as applicable, shall use their respective best endeavors to procure that in the event that PSI seeks to issue, re-issue or transfer any PSI Preferred Shares or PSI Treasury Shares, PSI shall only do so provided that Viva Holdings and FAI are entitled to subscribe for the PSI Preferred Shares or PSI Treasury Shares which are the subject of such issue, re-issue or transfer in proportion, as nearly may be, to their respective holdings in PSI.

4. RESERVED MATTERS

Reserved Matters[17]

4.1 In the event that any Reserved Matter is raised for a decision of: (a) the PSI Board or the board of directors of any Subsidiary; (b) any committee of the PSI Board or of the board of directors of any Subsidiary; or (c) the shareholders of the Company or any of the Subsidiaries, each of the Fountel Parties undertakes to use its best endeavours to procure that such Reserved Matter is not carried out by the Company or any subsidiary (as applicable) without the prior unanimous approval of both Viva Healthcare and Fountel (such approval not to be unreasonably withheld by either party).

Amendments to the Reserved Matters

4.2 Any amendment to the Reserved Matters in this Agreement shall require the prior written approval of both Viva Healthcare and Fountel.

Trade Sale or Admission

4.3 In the event that the PSI Shareholders, the PSI Board or the board of directors of any Subsidiary propose(s) to consider or carry out a Trade Sale or an Admission, each of the Fountel parties shall only discuss or consider such Trade Sale or Admission with the PSI Board and/or the other PSI Shareholder and/or board of directors of any Subsidiary after consultation by Fountel with Viva Healthcare on such Trade Sale or Admission.

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[17] Reserved Matters are enumerated in Schedule 2 of the CSA:
Reserved Matters

1. Each of the following matters shall apply to the Company (PSI) and any Subsidiary:
   - 1.1 any amendment of the articles of incorporation, or amendment or repeal of the by-laws, or adoption of new by-laws;
     x x x.
   - 1.3. Any material change in the nature of the business or in the organization of any Group Company or the manner in which they carry on the Business;
     x x x x.
   - 1.11 entry into any investment in or acquisition of any corporate entity, business or assets or any partnership, joint venture, consortium, merger, business combination or any other profit sharing agreement…
   - 1.12 entry into or any material amendment(s) to, any contract, liability, commitment or other transaction with any connected or related party
     of any Group Company;
     x x x x.

5. DIRECTORS

5.1 Each of the Fountel Parties shall use its best endeavours to procure that:

x x x

5.1.4 the quorum of the PSI Board shall include at least one Viva Holdings Director for meetings of the PSI Board to be quorate.

5.2 Each of the Viva parties shall use its best endeavours to procure that:

x x x

5.2.2 any person appointed by FAI to be its representative in the PSI Board in accordance with clause 5.2.1 above is duly elected as a member of the PSI Board.

6. **FUTURE ACQUISITION OF PSI SHARES**

6.1 As soon as reasonably practicable following the Completion Date, each of the Fountel Parties shall use its best endeavours to facilitate

6.1.1 the acquisition of PSI shares by Viva Holdings and the Fountel Parties from the other PSI Shareholders from time to time with the same terms and price per PSI Share for such acquisition offered to any of the Fountel Parties being offered to Viva Holdings; and/or

6.1.2 the subscription by Viva Holdings and the Fountel parties of PSI Shares and with the same terms and price per PSI share for such subscription offered to any of the Fountel parties being offered to Viva Holdings,

such that <u>Viva Holdings and the Fountel parties shall increase their respective holdings in PSI and hold a respective minimum 25% and 25.1% interest in the entire issued stock capital of PSI</u> and further that Viva Holdings and the Fountel Parties shall subsequently continue to work together to increase their respective shareholdings in PSI, provided that (subject to the terms of clauses 6.2 to 6.5).

x x x

6.4 Other than with respect to the PSI Shares issued pursuant to the Second Capital Increase, each of the Fountel Parties shall use its best endeavors to procure that no PSI Share(s) shall be issued whether for cash or otherwise unless such PSI Share(s) have been offered to Viva Holdings in proportion, as nearly as may be to its holding in PSI and provided that following such issue of PSI Share(s), the interest in Viva Holdings in the entire issued stock capital of PSI shall be no less than 21.1% at any time. Each of the Viva Parties shall use its best endeavors to procure that no PSI Share(s) shall be issued whether for cash or otherwise unless such PSI Share(s) have been offered to the Fountel Parties in proportion, as nearly as may be, to their shareholdings in PSI and provided that following such issue of PSI Share(s), the aggregated interest of the Fountel Parties in the entire issued stock capital of PSI shall be no less than 21.2%.

6.5 On the written request of Viva Holdings, each of the Fountel Parties shall use its best endeavors, to seek to procure that PSI will remove the ROFR Provisions set out in the PSI Articles of Incorporation within a reasonable period of time from the request.

For the avoidance of doubt, nothing herein shall be construed as prohibiting any of the Fountel Parties from procuring the removal of the ROFR Provisions set out in the PSI Articles of Incorporation.

Second Capital Increase

6.6 Fountel shall use its best endeavors to procure that upon the approval of the Second Capital Increase by the stockholders of PSI, PSI complies with the following provisions of this Clause 6.6:

6.6.1 Viva Holdings and FAI shall be entitled to subscribe for the purchase in aggregate no less than 229,136 PSI Shares created by the Second Capital Increase (such subscription being the "Second Capital Increase Subscription" and the PSI Shares created pursuant to the Second Capital Increase being the "Second Capital Increase Subscription Shares") in proportion, as nearly as may be, to their respective holdings in PSI and at a subscription price of five thousand pesos (PhP 5,000) per Second Capital Increase Subscription Share;

6.6.2 the only other shareholders of PSI which shall be entitled to participate in the Second Capital Increase Subscription shall be Lombard, the Religious Group, Insular and the Doctor Group and on the following basis:" (Emphasis and underscoring supplied)

Meanwhile, the records show that from July 10-30, 2013, Viva, Mr. Gonzales, Fortman Cline Capital Market, Atty. Soller and Ms. Benita J. Macalagay ("Ms. Macalagay") worked on the drafts of the CSA, Shareholders Pledge ("SP") and the Loan, and negotiated the terms and conditions thereof through email exchanges.[18] The records also show that the Board of Directors of PSI (PSI BOD) granted Dr. Bengzon and Ms. Macalagay the authority to deal and negotiate with the subscribers only on 31 July 2013.[19]

Prior to the actual execution of the foregoing documents, the cover and notarial pages of the same were allegedly mailed electronically to Atty. Soller and Ms. Macalagay on 1 August 2013 by the Fountel Group.[20]

On 26 September 2013, the Commission approved PSI's Amended Articles of Incorporation covering the First Capital Increase. On the same date, Fountel and FAI filed their respective Initial Statement of Beneficial Ownership (SEC Form 23-A) with the Commission, declaring therein their acquisitions in PSI's First Capital Increase.[21] Fountel however, disclosed its beneficial ownership over the shares of FAI, as a controlled corporation.

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[18] Annex "H" of the Bengzon Appeal.

[19] Page 25 of Annex "E" of the Bengzon Appeal provides:
"*RESOLVED FURTHER, that the President and CEO, Dr. Alfredo R.A. Bengzon, MBA and/or the Senior Vice President, Ms. Benita J. Macalagay, be, as they are hereby authorized to deal and negotiate with the subscribers of the said shares issuances under such terms and conditions they deem appropriate in order to comply with the requirements of applicable laws and to sustain the ongoing local and overseas expansion projects of the Corporation; to execute and deliver the said Subscription Agreement for and on behalf of the Corporation; and to perform any and all acts necessary to implement this resolution.*"

[20] Verified Answer Ad Cautelam of Fountel Corporation and FAI dated 22 November 2018, Annex "10".

[21] Paragraph 7 of the Verified Answer dated 22 November filed by Viva Holdings, Viva Healthcare, FAI and Fountel.

On 10 October 2013, Viva subscribed to 91,363 common shares from the unissued capital stock of PSI pursuant to the allocation of shares approved by the PSI BOD on 31 July 2013.

On 23 October 2013, the PSI BOD met and resolved, among others, to amend its Articles of Incorporation by increasing PSI's authorized capital stock from 1,900,000 to 2,000,000 shares. This act of the PSI BOD was presented to, and approved by the shareholders of PSI on 16 December 2013.

On 7 November 2013, PSI filed its General Information Sheet (GIS) with the Commission which showed the resulting shareholdings of Viva, Fountel and FAI in PSI as a consequence of the implementation of the CSA, thus:

	July 5, 2013	**November 7, 2013**
Fountel	80,720 (9.24%)	80,720 (5.77%)
Viva Holdings	0	287,416 (20.53%)
FAI	0	203,946 (14.57%)
Total Subscribed Shares	873,873	1,400,000
Total % of Fountel, Viva Holdings and FAI's Shareholdings in PSI	9.24%	40.87%

On 8 November, 2013, Viva filed its SEC Form 23-B where it disclosed (a) its subscription to the unissued capital stock in PSI on 10 October 2013, and (b) the execution of the CSA, the Loan and the Share Pledge Agreement.

On 13 December 2013, Splash Corporation (Splash) sold its 50,000 PSI shares to Fountel and Viva which resulted in the increase of their shareholdings in PSI by 24,940 and 25,060 shares, respectively.

On 28 February 2014, the Commission approved PSI's Amended Articles of Incorporation increasing the Authorized Capital Stock. Viva and FAI subsequently increased their shareholdings in PSI by subscribing to an aggregate of 255,350 PSI common shares[22] out of the 600,000 increase in capital. This resulted in the increase of their total shareholdings in PSI to 45.66%.

On 15 May 2015, Fountel and Viva purchased 5,636 and 5,614 PSI common shares, respectively, of San Miguel Corporation (SMC) which resulted in the increase of their aggregate shareholdings in PSI to 46.33%.[23] The GIS dated 8 September 2018 which was filed by PSI with the Commission will show that the aggregate shareholdings of Viva, Fountel and FAI in PSI increased to 49.44%. This is attributable to the increase of Viva Holdings' shareholding in PSI from 23.22% in 17 October 2016 to 26.33% in 8 September 2018.

The acquisition, accumulation and steady increase of Viva, Fountel and FAI's collective shareholdings in PSI pursuant to and consistent with the CSA, Loan and Share Pledge Agreement are, based on the records, summarized as follows:

PSI's GIS Submissions	**5 July 2013** (Initial Shareholdings of Offerors)	**7 November 2013** (Shareholdings of Offerors after the First Capital Increase and subscription to the Unissued Shares)	**2 July 2014** (Shareholdings of Offerors after acquisition of Splash shares and Second Capital Increase)	**17 October 2016** (Shareholdings of Offerors after the acquisition of SMC shares)	**8 September 2017** (Shareholdings of Offerors after the undisclosed acquisition of Viva)
Fountel	80,720 (9.24%)	80,720 (5.77%)	132,195 (6.68%)	142,841 (7.15%)	142,841 (7.15%)
Viva Holdings	0	287,416 (20.53%)	452,939 (22.88%)	463,544 (23.22%)	525,981 (26.33%)
FAI	0	203,946 (14.57%)	318,713 (16.10%)	318,713 (15.96%)	318,713 (15.96%)
Total Subscribed Shares	873,873	1,400,000	1,980,008	1,996,631	1,996,687
Group's Total % of Shareholdings	**9.24%**	**40.87%**	**45.66%**	**46.33%**	**49.44%**

Sometime in May 2017, the Finance Committee of the PSI consisting of Mr. Gonzales, Dr. Eugene Ramos, Mr. Albert Buenviaje, Mr. Thomas Smith and Mr. Martin Robinson (Mr. Robinson), nominee director

[22] Viva subscribed to 140,583 shares, while FAI increased its shares by 114,767 out of the 600,000 increase of PSI's capital.
[23] PSI General Information Sheet dated 17 October 2017.

of Viva Holdings, met several times to discuss the entry of Ayala Corporation's subsidiary, Ayala Health, and the need for an increase in capital in order to accommodate the latter. During said meetings, Mr. Gonzales expressed his dismay that he was bound to block Ayala Health's entry with PSI, otherwise he would have to go to arbitration in Hong Kong pursuant to the provisions of the CSA. Moreover, Mr. Robinson, on several instances, also disclosed that he was also opposed to the entry of Ayala Health. Allegedly, this was the first time that the CSA was made known to members of the PSI BOD.[24]

On 25 July 2017, FAI acquired the 62,563 PSI common shares of Insular Life Assurance Co., Ltd. (Insular) which effectively resulted in the increase of the Fountel and FAI's total shareholdings in PSI to 52.57%. During the clarificatory conference conducted by the SHP in relation to the application by the CSA Parties for Exemptive Relief, the latter manifested that the 2018 GIS of PSI does not yet include the foregoing acquisition as the Certificate Authorizing Registration covering the sale of the 62,563 PSI common shares of Insular was not yet presented to the Corporate Secretary of PSI.

On 18 August 2017, the PSI BOD met and resolved to approve the proposal to amend its Articles of Incorporation by increasing PSI's authorized capital stock from 2,000,000 to 4,500,000 shares. Thereafter, Viva subscribed to an additional 71,968 PSI shares on 28 August 2017, while FAI subscribed to an additional 73,275 PSI shares on 29 August 2017. The additional 146,243 PSI common shares that were collectively acquired by Viva and FAI resulted in the increase in the percentage of their shareholdings in PSI to 54.24%.[25]

On 18 October 2017, the Commission approved the amended Articles of Incorporation of PSI increasing its authorized capital stock to 4,500,000 shares**.**

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[24] Affidavit of Fr. Yap dated 23 October 2018.

[25] The SHP found that the aggregate shareholdings of Viva Holdings, Fountel and FAI after the increase of PSI's ACS to 4,500,000 is 2,246,439, which is exactly the same number of shares reflected in the 2018 and 2019 GIS of PSI. (See Par. 1 Page 15 of the Resolution).

STATEMENT OF THE CASE

In the context of the foregoing undisputed factual antecedents borne in the records of the case, the legal battle subject of the instant case which eventually led to the instant Appeal, ensued and developed, the details of which are as follows:

On 17 November 2017, CSA Parties filed with the Commission, through the Corporate Governance and Finance Department (CGFD), an application for an exemptive relief from SRC Rules in relation to its intended Mandatory Tender Offer (MTO) over the shares of PSI.[26] Consequent to the approval of PSI's Amended Articles of Incorporation increasing its authorized capital stock, the CSA Parties filed on January 18, 2018, an amended application for exemptive relief with the CGFD.

On 15 May 2018, Viva Holdings, through a written communication[27] and in the context of the CSA Parties' claimed capacity as the majority shareholders of PSI (together with Fountel and FAI), formally requested and asked for PSI's cooperation in providing information and documentation, and in implementing the right of first refusal provisions in PSI's Articles of Incorporation to facilitate the immediate implementation of the intended MTO, the pertinent portion of the same reads:

> "As previously notified to Professional Services, Inc in December 2017, Fountel Corp., Felicitas Antoinette, Inc. and Viva Holdings Pte. Ltd. are conducting a mandatory tender offer to acquire up to a total of 1,887,951 common shares of PSI, representing 45.59% of the outstanding common shares held by the shareholders other than the Offerers ("PSI Minority Shareholders"), as required under the Securities Regulation Code and the 2015 Implementing Rules and Regulations of the SRC and in compliance with our obligation under Section 19 of the foregoing. The obligation to undertake the MTO was triggered by the acquisition by FAI of 62,563 PSI shares from The Insular Life Assurance Company Ltd. <u>As we are party, as you know, to a co-operation and shareholders agreement with the Fountel Parties, the aggregate shareholding of the Fountel Parties and Viva were aggregated for the purposes of the SRC requirements</u>." (Emphasis supplied)

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[26] Offerors attached to the Request for Exemptive Relief an Updated Tender Offer Report.
[27] Letter of Viva Holdings dated 15 May 2018 to PSI.

On 26 April 2018, CGFD wrote and informed the CSA Parties on the result of their request for exemptive relief, including its preliminary comments to the MTO Report. The records show that pursuant to Rule 19.10 of the SRC,[28] the request for exemptive relief was accorded confidential treatment by the Commission.

On 31 May 2018, Mr. Alberto I. Buenviaje, Ms. Blesilda E. Concepcion, M.D., Ms. Maria Eufemia C. Yap, M.D. (Dr. Yap) and Mt. Halcon Philippines, Inc. (Mt. Halcon) [the "Oppositors"] filed an Opposition with the CGFD praying that an order be issued prohibiting the CSA Parties from conducting the proposed MTO on the alleged ground that their previous acquisitions of PSI shares were void for violation of the SRC.

On 8 June 2018, Dr. Bengzon filed with the Enforcement and Investor Protection Department (EIPD) a Complaint-Affidavit dated 6 June 2018[29] against Viva Healthcare, Viva Holdings, Fountel, FAI, Jose Xavier B. Gonzales (Mr. Gonzales) and Martin Eric Robinson (Mr. Robinson)[30] for violation of Sections 19, 26.1 and 26.3, in relation to 54 and 73, of the SRC. Dr. Bengzon alleged that respondents misrepresented and fraudulently concealed the fact that pursuant to the CSA, they were acting in concert in acquiring their PSI shares which resulted in their acquisition of more than 50% of the entire issued capital stock of PSI.[31] Dr. Bengzon prayed that the Commission imposes the appropriate penalties upon respondents and voids their subscription of shares in PSI.

On 6 September 2018, the Commission created the SHP and authorized the same to conduct investigations, hearings and to resolve and decide matters relative to the instant case.

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[28] SRC Rule 19.10. Transactions Based on Material, Non-Public Information
If a person shall become aware of a potential tender offer before the tender offer has been publicly announced, such person shall not buy or sell, directly or indirectly, the securities of the target company until the tender offer shall have been publicly announced. Such buying or selling shall constitute insider trading under Section 27.4 of the Code.

[29] Annex "L" to the Bengzon Appeal.

[30] Robinson is the representative of the Viva.

[31] Dr. Bengzon declared that "*were it not for respondents misrepresentations, I would never have agreed to the proposed subscriptions*", and that "*the PSI Board of Directors would have had a very different and more informed discussion had Respondents disclosed their arrangement*." (Paragraphs 71 and 72 of the Complaint Affidavit).

On 25 September 2018, Dr. Bengzon and the Oppositors filed their Rejoinder dated 4 July 2018 arguing that (a) the Commission has jurisdiction over the case, (b) the CSA Parties' acquisitions of the PSI shares are not exempt from the MTO rule, and (c) the CSA Parties fraudulently concealed the CSA. On the basis thereof, the Oppositors prayed that the Commission prohibits the CSA Parties from conducting an MTO.

On 23 October 2018, Ronald Arce Vergel De Dios and Patricia Esteban Vergel De Dios who are both shareholders of PSI ("De Dios Shareholders") filed with the EIPD a Complaint-Affidavit[32] against Fountel, FAI, Viva Healthcare, Viva Holdings, Mr. Gonzales, Augusto P. Sarmiento, Mr. Robinson, Joel L. Bodegon, Carlos Alfonso T. Ocampo, PSI Healthcare Development Services Corp. and PSI, for violation of Section 26 of the SRC. The De Dios Shareholders alleged that respondents acted in concert in taking control of PSI through deliberate misrepresentation and concealment which operated as fraud upon minority shareholders. The De Dios Shareholders prayed that a Cease and Desist Order be issued pursuant to Section 64 of the SRC.

On the basis of an initial finding that the CSA Parties have violated Sections 18, 19 and 26 of the SRC, the SHP issued a Formal Charge on 8 November 2018 directing them to show cause why they should not be liable for violations of the said provisions of the SRC and its Implementing Rules and Regulation (IRR).

On November 12 and 23, 2018, Dr. Bengzon filed a Motion for Leave to File the Attached Affidavit and Motion for Leave to File the Attached Manifestation, respectively. He informed the Commission that cases have been filed with the appropriate courts seeking injunctive reliefs; and that criminal complaints have been filed for violation of Section 74 in relation to Section 144 of the Corporation Code, and Article 315(2)(a) of the Revised Penal Code.

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[32] Annex "U" to the Bengzon Appeal.

On November 26, 2018, Fountel and FAI, through counsel, filed their consolidated Verified Answer Ad Cautelam praying for the dismissal of the Complaint for lack of merit.

On November 2018, Viva and Viva Healthcare filed their Answer Ad Cautelam praying for the immediate dismissal of the Formal Charge on the alleged grounds that the Commission has no jurisdiction over the subject matter and for utter lack of merit.

On 22 November 2019, the SHP issued the Assailed Resolution, the dispositive portion of which reads:

> "**WHEREFORE**, in view of the above-stated facts and circumstances, SHP finds the Respondents to have violated the following provisions of the SRC and the Amended IRR, and are hereby penalized as follows:

	For Violation of Section 18 of the SRC (Reports filed by 5% Holders of Equity Securities)
Viva Healthcare Limited	One Million (P1,000,000.00) Pesos plus Two Thousand Pesos (P2,000.00) for each day of continuing violation computed from August 1, 2013[33] up to the time that SEC Form 18-A is filed [34]
Viva Holdings (Philippines) Pte. Ltd.	One Million (P1,000,000.00) Pesos plus Two Thousand Pesos (P2,000.00) for each day of continuing violation computed from August 1, 2013 up to the time that SEC Form 18-A is filed
Felicitas Antoinette, Inc.	One Million (P1,000,000.00) Pesos plus Two Thousand Pesos (P2,000.00) for each day of continuing violation computed from August 1, 2013 up to the time that SEC Form 18-A is filed

[33] Date of the CSA.
[34] Section 54.1(a)(ii) of the SRC.

	For Violation of Rule 19.2.A, in relation to Rule 19.3.A and 19.3.B, of the Amended IRR (Failure to Disclose Intent to Acquire 35% or more of Equity Shares)
Viva Holdings (Philippines) Pte. Ltd.	One Million (P1,000,000.00) Pesos plus Two Thousand Pesos (P2,000.00) for each day of continuing violation computed from July 31, 2013 up to May 15, 2018
Fountel Corporation	One Million (P1,000,000.00) Pesos plus Two Thousand Pesos (P2,000.00) for each day of continuing violation computed from July 31, 2013 up to May 15, 2018
Felicitas Antoinette, Inc.	One Million (P1,000,000.00) Pesos plus Two Thousand Pesos (P2,000.00) for each day of continuing violation computed from July 31, 2013 up to May 15, 2018

	For Violation of Rule 19.12 of the Amended IRR (Omission to State Material Facts, like Respondents' Loan Agreement and Agreement to Act in Concert)
Viva Holdings (Philippines) Pte. Ltd.	One Million (P1,000,000.00) Pesos plus Two Thousand Pesos (P2,000.00) for each day of continuing violation computed from July 31, 2013 up to May 15, 2018
Fountel Corporation	One Million (P1,000,000.00) Pesos plus Two Thousand Pesos (P2,000.00) for each day of continuing violation computed from July 31, 2013 up to May 15, 2018
Felicitas Antoinette, Inc.	One Million (P1,000,000.00) Pesos plus Two Thousand Pesos (P2,000.00) for each day of continuing violation computed from July 31, 2013 up to May 15, 2018

Viva and Viva Healthcare filed a Joint Motion for Partial Reconsideration dated 10 December 2019 praying for the setting aside of the Assailed Resolution, the dismissal of the Formal Charge against them and the reduction of the penalties.

The Bengzon Appeal elevated to the Commission the following matters in the Assailed Resolution which he argued, were not consistent with applicable laws, rules and regulations, to wit: (a) the failure to nullify the acquisition by the CSA Parties of the PSI Shares pursuant to Section 71.2 of the SRC, (b) the failure of the SHP to rule that the acts of the CSA Parties fall within the ambit of fraudulent transactions under Section 26 which warrants the imposition of higher penalties, and (c) the failure to hold Viva Healthcare liable for violation of Rule 19.2.A, in relation to Rule 19.3.A and 19.3.B, and Rule 19.12 of the 2003 Amended IRR on the basis of the fact that it was a party to the CSA.

The Fountel and FAI Appeal, on the other hand, elevated to the Commission the following matters in the Assailed Resolution which they argued, were legally and factually baseless: (a) the finding of violation of Section 18 of the SRC, (b) the finding of violation of Rule 19.3.A of the 2003 Amended IRR, and (c) the finding of violation of Rule 19.12 of the 2003 Amended IRR. Moreover, in the penultimate paragraph of the Fountel and FAI Appeal, they argued that jurisdiction over the matter subject of the instant case is lodged with the proper Regional Trial Court considering that the same involves devices or schemes allegedly employed by, or acts of the board of directors, business associates, officers or partners amounting to fraud and misrepresentation which may be detrimental to the interests of the public and/or stockholders.

ISSUES

The issues presented in the Bengzon Appeal, and the Fountel and FAI Appeal can be summarized as follows:

1. Whether the Commission has jurisdiction over the instant case;

2. Whether Viva Holdings, Fountel and FAI violated Section 18 of the SRC;

3. Whether the Offerors violated Rule 19.2.A in relation to 19.3.A and 19.3.B of the 2003 Amended IRR;

4. Whether Viva Holdings, Fountel and FAI violated Rule 19.12 of the 2003 Amended IRR, and should be held liable for fraudulent transactions under Section 26 of the SRC; and

5. Whether the acquisition by the Offerors of the PSI Shares should be nullified.

DISCUSSION

After a careful review of the factual circumstances, the arguments of the parties and the evidence presented in support thereof, the Commission finds the Bengzon Appeal to be meritorious and the Fountel and FAI Appeal to be bereft of merit. Accordingly, the Commission affirms the Assailed Resolution subject to modifications on grounds set forth in this Decision.

1. The Commission has jurisdiction over the instant case.

Since the inception of their legal battle, the CSA Parties have maintained a position and stood their ground that the Commission has no jurisdiction over the instant case. In support thereof, Fountel and FAI specifically argued that since the matters subject hereof involve devices or schemes allegedly employed by, or acts of the board of directors, business associates, officers or partners amounting to fraud and misrepresentation which may be detrimental to the interests of the public and/or stockholders, jurisdiction over the same is lodged with the proper Regional Trial Court pursuant to Presidential Decree 902-A.[35] CSA Parties also maintained that

[35] Paragraph 71 (page 29) of the Fountel and FAI Appeal.

the dispute subject of the instant case partakes of the nature of an intra-corporate dispute which is within the exclusive jurisdiction of the Regional Trial Court under PD 902-A.

CSA Parties' argument is wrong.

The matters subject of the instant case clearly involve and relate to the interpretation and application of the provisions of the SRC which, under Section 5.1(a), are under the jurisdiction of the Commission, thus:

> "Section 5. *Powers and Functions of the Commission* – 5.1. The commission shall act with transparency and shall have the powers and functions provided by this code, Presidential Decree No. 902-A, the Corporation Code, the Investment Houses Law, the Financing Company Act and other existing laws. Pursuant thereto the Commission shall have, among others, the following powers and functions:
>
> (a) Have jurisdiction and supervision over all corporations, partnership or associations who are the grantees of primary franchises and/or a license or a permit issued by the Government;
>
> xxx xxx xxx
>
> (d) Regulate, investigate or supervise the activities of persons to ensure compliance;
>
> xxx xxx xxx
>
> (n) Exercise such other powers as may be provided by law as well as those which may be implied from, or which are necessary or incidental to the carrying out of, the express powers granted the Commission to achieve the objectives and purpose of these laws."

In the case of *Provident International Resources Corp. v. Venus,*[36] the Supreme Court explained the nature and extent of regulatory powers of this Commission, thus:

> "It can be said that the SEC's regulatory authority over private corporations encompasses a wide margin of areas, touching nearly all of a corporation's concerns. <u>This authority more vividly springs from the</u>

[36] G.R. No. 167041, June 17, 2008.

> fact that a corporation owes its existence to the concession of its corporate franchise from the state. Under its regulatory responsibilities, the SEC may pass upon applications for, or may suspend or revoke (after due notice and hearing), certificates of registration of corporations, partnerships and associations (excluding cooperatives, homeowners' association, and labor unions); compel legal and regulatory compliances; conduct inspections; and impose fines or other penalties for violations of the Revised Securities Act, as well as implementing rules and directives of the SEC, such as may be warranted." (Emphasis supplied)

At the outset, the Commission notes and would like to emphasize that the CSA Parties have, on record, recognized and accepted the Commission's exclusive authority and jurisdiction over matters relating to mandatory tender offer and related transactions. On 17 November 2017, the CSA Parties filed with the Commission an application for an exemptive relief from SRC Rules in relation to its intended MTO over the shares of PSI. When the CSA Parties filed the said application, they were fully aware that the Commission's action on the same will depend on their compliance with the SRC, its IRR, as well as with existing and applicable rules or regulations, and/or on whether the same will be contested by interested parties. The CSA Parties likewise recognized when they filed the application that matters relating to the conduct of MTO, and disputes arising from or relating thereto belong to the exclusive domain and competence of the Commission. Thus, the fact that the CSA Parties' application for exemptive relief was subsequently questioned and opposed by directors and stockholders of PSI did not divest the Commission of jurisdiction over the same.

The determination of whether, based on given set of facts, the MTO rule and/or the disclosure provisions under the SRC applies, or whether transactions are fraudulent under Section 26 of the SRC, is an administrative function the performance of which, is proper and exclusive to the Commission. In the case of *Palawan Council for Sustainable Development v. Ejercito Lim,*[37] the Supreme Court (the "Court") discussed the nature of administrative adjudicatory power, thus:

> "Administrative agencies possess two kinds of powers, the quasi-legislative or rule-making power, and the quasi-judicial or

[37] G.R. No. 183173, August 24, 2016.

> administrative adjudicatory power. The first is the power to make rules and regulations that results in delegated legislation that is within the confines of the granting statute and the doctrine of non-delegability and separability of powers. The issuance of the assailed A.O. No. 00-05, Resolution. No. 03-211 and the other issuances by the PCSD was in the exercise of the agency's quasi-legislative powers. <u>The second is the power to hear and determine questions of fact to which the legislative policy is to apply and to decide in accordance with the standards laid down by the law itself in enforcing and administering the same law. The administrative body exercises its quasi-judicial power when it performs in a judicial manner an act that is essentially of an executive or administrative nature, where the power to act in such manner is incidental to or reasonably necessary for the performance of the executive or administrative duty entrusted to it</u>." (Emphasis ours)

The performance by the Commission of its mandate of developing and regulating the capital market and protecting investors has been recognized by the Court as an important component in the economic growth of the country. The Court has consistently sustained the jurisdiction of the Commission over matters involving the interpretation and implementation of the SRC notwithstanding the presence of an intra-corporate dispute contrary to the vigorous assertion of the CSA Parties. In the case of the *Securities and Exchange Commission v. Subic Bay Golf and Country Club, Inc.*,[38] the Court categorically ruled that allegations of intra-corporate dispute do not deprive the Commission of its administrative and regulatory jurisdiction to determine if administrative violations have been committed, thus:

> "However, even though the Complaint filed before the Securities and Exchange Commission contains allegations that are intra-corporate in nature, it does not necessarily oust the Securities and Exchange Commission of its regulatory and administrative jurisdiction to determine and act if there were administrative violations committed.
>
> The Securities and Exchange Commission is organized in line with the policy of encouraging and protecting investments. It also administers the Securities Regulation Code, which was enacted to "promote the development of the capital market, protect investors, ensure full and fair disclosure about securities, [and] minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market." <u>Pursuant to these</u>

[38] G.R. No. 179047, March 11, 2015.

> policies, the Securities and Exchange Commission is given regulatory powers and "absolute jurisdiction, supervision and control over all corporations, partnerships' or associations …"
>
> x x x
>
> Thus, when Villareal and Filart alleged in their letter-complaint that SBGCCI and UIGDC committed misrepresentations in the sale of their shares, nothing prevented the Securities and Exchange Commission from taking cognizance of it to determine if SBGCCI and UIGDC committed administrative violations and were liable under the Securities Regulation Code. The Securities and Exchange Commission may investigate activities of corporations under its jurisdiction to ensure compliance with the law." (Emphasis supplied)

A survey of the issues presented by the parties in this case will readily show that the same relates to the interpretation, applicability and implementation of the relevant provisions of the SRC and its IRR. It involves the determination of whether the transactions carried out by the CSA Parties are covered by the MTO rules and the applicable disclosure provisions of the SRC and its IRR; and of whether there has been violation of the provisions of the SRC and its IRR that warrants the imposition of appropriate sanctions. These, undoubtedly, are matters that are within the primary and exclusive jurisdiction of the Commission, the cognizance of which is imperative even on the assumption, *ex gratia argumenti*, that the instant case is tainted with intra-corporate disputes.

In *Roman, Jr. v. Securities and Exchange Commission,*[39] the Court categorically ruled that the Commission retains the power to adjudicate on matters involving the implementation of the SRC notwithstanding the fact that an intra-corporate issue was raised in the complaint, to wit:

> "Under the SRC, jurisdiction on matters stated under Section 5 of P.D. No. 902-A, which was originally vested in the SEC, has already been transferred to the RTC acting as a special commercial court. Despite the said transfer, however, the SEC still retains sufficient powers to justify its assumption of jurisdiction over matters concerning its supervisory, administrative and regulatory functions. In *SEC v. Subic Bay Golf and Country Club, Inc. (SBGCCI) and Universal International Group Development Corporation (UIGDC)*, for instance, the Court affirmed

[39] G.R. No. 196329, June 1, 2016.

the SEC's assumption of jurisdiction over a complaint, which alleged that SBGCCI and UIGDC committed misrepresentations in the sale of their shares. The Court held in the said case that nothing prevented the SEC from assuming jurisdiction to determine if SBGCCI and UIGDC committed administrative violations and were liable under the SRC despite the complaint having raised intra-corporate issues. It also ruled that the SEC may investigate activities of corporations to ensure compliance with the law.

In ruling that way, the Court cited Sections 5 and 53 of the SRC as justifications, to wit:

> SECTION 5. *Powers and Functions of the Commission*. — 5.1. The Commission shall act with transparency and shall have the powers and functions provided by this Code, Presidential Decree No. 902-A, the Corporation Code, the Investment Houses Law, the Financing Company Act and other existing laws. Pursuant thereto the Commission shall have, among others, the following powers and functions:
>
> (a) Have jurisdiction and supervision over all corporations, partnerships or associations who are the grantees of primary franchises and/or a license or permit issued by the Government;
>
> x x x
>
> (d) Regulate, investigate or supervise the activities of persons to ensure compliance;
>
> x x x
>
> (n) Exercise such other powers as may be provided by law as well as those which may be implied from, or which are necessary or incidental to the carrying out of, the express powers granted the Commission to achieve the objectives and purposes of these laws.
>
> x x x
>
> SECTION 53. *Investigations, Injunctions and Prosecution of Offenses*. — 53.1. The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this Code, any rule, regulation or order

> thereunder, or any rule of an Exchange, registered securities association, clearing agency, other self-regulatory organization, and may require or permit any person to file with it a statement in writing, under oath or otherwise, as the Commission shall determine, as to all facts and circumstances concerning the matter to be investigated. x x x

> Beyond doubt, therefore, is the authority of the SEC to hear cases regardless of whether an action involves issues cognizable by the RTC, provided that the SEC could only act upon those which are merely administrative and regulatory in character. In other words, the SEC was never dispossessed of the power to assume jurisdiction over complaints, even if these are riddled with intra-corporate allegations, if their invocation of authority is confined only to the extent of ensuring compliance with the law and the rules, as well as to impose fines and penalties for violation thereof; and to investigate even *motu proprio* whether corporations comply with the Corporation Code, the SRC and the implementing rules and regulations." (Emphasis supplied)

On the basis of the foregoing, the Commission finds that the SHP did not commit reversible error in taking cognizance of the instant case as the same was made pursuant to and in compliance with its mandate and duty to effectively administer the SRC.

2. Viva, Viva Healthcare and FAI failed to comply with Section 18 of the SRC as beneficial owners of each other's shares with respect to the PSI Shares.

In their Appeal, Fountel and FAI maintained that the SHP committed reversible error in finding that the CSA covenants effectively transformed the business relationship of the CSA Parties into beneficial ownership over each other's shares with respect to the PSI Shares, and their failure to file SEC Form 18-A constituted a violation of Section 18 of the SRC.[40] In support thereof, the CSA Parties argued that the SHP's conclusion which was allegedly based on selected provisions of the CSA violated the rule

[40] In Par. 32 of the Fountel and FAI Appeal, FAI denied having acquired beneficial ownership, whether directly or indirectly, of Fountel's shares in PSI; neither has Viva Holdings/Viva Healthcare acquired beneficial ownership of Fountel and FAI's shares.

that an agreement should be construed as a whole. The CSA Parties insisted that they never became beneficial owners of each other's shares because the provisions of the CSA used "best endeavors" clauses which gave them the discretion to perform their obligations in good faith. Thus, they were not required to file SEC Form 18-A.

The CSA Parties' arguments fail to convince.

Section 18 of the SRC provides:

> "**In every case** in which an issuer satisfies the requirements of Subsection 17.2 hereof, any person who acquires directly or indirectly the beneficial ownership of more than *five per centum* (5%) of such class or in excess of such lesser per centum as the Commission by rule may prescribe, **shall**, within ten (10) days after such acquisition or such reasonable time as fixed by the Commission, submit to the issuer of the security, to the Exchange where the security is traded, and to the Commission a sworn statement containing the following information as the Commission may require in the public interest or for the protection of investors: xxx" (Emphasis supplied)

The importance of strictly enforcing the reportorial requirement set forth in the afore-quoted provision cannot be overemphasized as it goes into the very performance by the Commission of its mandate of ensuring full and fair disclosure of securities to promote the development of the capital market, protect investors and eliminate fraudulent or manipulative devices and practices. It is in this context that under the SRC and its IRR, the requirement to file reports and disclosures within the prescribed periods is mandatory and absolute. In a case decided by this Commission, We discussed and emphasized the foregoing, thus:

> "Maximum efficiency in the capital markets is achieved when people can make rational investment decisions. And, people make decisions based on what they know. Thus, it is crucial that all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it. The steady flow of timely, comprehensive and accurate information allows investors to make sound decisions that facilitates efficient capital formation that is important to a national economy.
>
> xxx xxx xxx

> Thus, Section 2 of the SRC provides that it is the policy of the State to, among others, ensure full and fair disclosure about securities, minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market.
>
> xxx xxx xxx
>
> Thus, the requirements for timely disclosure are absolute, and do not admit of any exceptions, otherwise, the rationale for the requirements would obviously be defeated, or easily circumvented."[41]

In *SEC v. Universal Rightfield Property Holdings, Inc.*,[42] the Court sustained the Commission's decision of revoking respondent's registration notwithstanding the fact that the imposition of penalties was an option, on the ground of its repeated failure to timely file reports, thus:

> "Therefore, notwithstanding the belated filing of the said reports, as well as the claim that public interest would be better served if the SEC will merely impose penalties and allow it to continue in order to become profitable again, the <u>SEC cannot be faulted for revoking once again URPHI's registration of securities and permit to sell them to the public due to its repeated failure to timely submit such reports. Needless to state, such continuing reportorial requirements are pursuant to the state policies declared in Section 2 of the SRC of protecting investors and ensuring full and fair disclosure of information about securities and their issuer.</u>" (Emphasis supplied)

SRC Rule 3.1.A[43] defines beneficial owner or beneficial ownership, to wit:

> "A. Beneficial owner or beneficial ownership means any person who, <u>directly or indirectly</u>, through any contract, arrangement, understanding, relationship or otherwise, **<u>has or shares voting power</u>**, <u>which includes the power to vote, or to direct the voting of such security;</u> **<u>and/or investment returns or power</u>**<u>; which includes the power to dispose of, or to direct the disposition of such security</u>; provided, however, that <u>a</u>

[41] Decision dated on 10 October 2017. Sumitomo Metal Mining Philippine Holding Corporation vs. Corporation Finance Department (SEC EB Case No. 07-11-241).
[42] G.R. No. 181381, July 20, 2015.
[43] Amended IRR of the SRC.

person shall be deemed to have an indirect beneficial ownership interest in any security which is:

i. Held by members of his immediate family sharing the same household;
ii. Held by a partnership in which he is a general partner;
iii. Held by a corporation of which he is a controlling shareholder; or
iv. Subject to any contract, arrangement or understanding which gives him voting power or investment power with respect to such securities; xxx." (Emphasis supplied)

The Commission notes that in assailing the finding of the SHP that the CSA Parties became beneficial owners of each other's shares in PSI, Fountel and FAI provided a detailed explanation on the provisions that contained "best efforts" clauses to show that the intent of the CSA, taken as a whole, do not support such finding. Fountel and FAI then rebuked the SHP for allegedly failing to read the CSA as a whole. However, a careful examination of the factual circumstances as well as the records will show that the transactions and the actions that were carried out by the CSA Parties from 1 August 2013 (the date when they executed the CSA) onwards were made pursuant to the provisions of, and in compliance with their respective obligations under the CSA; they confirm that the CSA Parties acted as beneficial owners of each other's shares in PSI.

First, the CSA is replete with provisions showing that the CSA Parties undertook and agreed to share, directly and indirectly, voting power and/or investment returns, or directed each other's voting, to wit:

1. Section 3.8. In the event of any future share capital increase of PSI, where Viva Holdings or FAI is not invited to subscribe for PSI shares in accordance with its pro rata PSI shareholder rights pursuant to sub-clause 6.4, each of the Fountel Parties or the Viva Parties, as applicable, shall vote against such share capital increase.

2. Section 3.9. Following completion, each of the Fountel or Viva Parties, as applicable, shall use their respective best endeavors to procure that in the event that PSI seeks to issue, re-issue or transfer any PSI Preferred Shares or PSI Treasury Shares, PSI shall only do so provided that Viva Holdings and FAI are entitled to subscribe for the PSI Preferred Shares or PSI Treasury Shares which are the

subject of such issue, re-issue or transfer in proportion, as nearly may be, to their respective holdings in PSI.

3. Section 4.1. In the event that any Reserved Matter is raised for a decision of: (a) the PSI Board or the board of directors of any Subsidiary; (b) any committee of the PSI Board or of the board of directors of any Subsidiary; or (c) the shareholders of the Company or any of the Subsidiaries, each of the Fountel Parties undertakes to use its best endeavours to procure that such Reserved Matter is not carried out by the Company or any subsidiary (as applicable) without the prior unanimous approval of both Viva Healthcare and Fountel (such approval not to be unreasonably withheld by either party).

4. Section 6.1. As soon as reasonably practicable following the Completion Date, each of the Fountel Parties shall use its best endeavours to facilitate

   6.1.1 the acquisition of PSI shares by Viva Holdings and the Fountel Parties from the other PSI Shareholders from time to time with the same terms and price per PSI Share for such acquisition offered to any of the Fountel Parties being offered to Viva Holdings; and/or

   6.1.2 the subscription by Viva Holdings and the Fountel parties of PSI Shares and with the same terms and price per PSI share for such subscription offered to any of the Fountel parties being offered to Viva Holdings,

   such that Viva Holdings and the Fountel parties shall increase their respective holdings in PSI and hold a respective minimum 25% and 25.1% interest in the entire issued stock capital of PSI and further that Viva Holdings and the Fountel Parties shall subsequently continue to work together to increase their respective shareholdings in PSI, provided that (subject to the terms of clauses 6.2 to 6.5).

5. Section 6.4. Other than with respect to the PSI Shares issued pursuant to the Second Capital Increase, each of the Fountel Parties shall use its best endeavors to procure that no PSI Share(s) shall be issued whether for cash or otherwise unless such PSI Share(s) have been offered to Viva Holdings in proportion, as nearly as may be to its holding in PSI and provided that following such issue of PSI Share(s), the interest in Viva Holdings in the entire issued stock capital of PSI shall be no less than 21.1% at any time. Each of the Viva Parties shall use its best endeavors to procure that no PSI

Share(s) shall be issued whether for cash or otherwise unless such PSI Share(s) have been offered to the Fountel Parties in proportion, as nearly as may be, to their shareholdings in PSI and provided that following such issue of PSI Share(s), the aggregated interest of the Fountel Parties in the entire issued stock capital of PSI shall be no less than 21.2%.

6. Section 6.5. On the written request of Viva Holdings, each of the Fountel Parties shall use its best endeavours, to seek to procure that PSI will remove the ROFR Provisions set out in the PSI Articles of Incorporation within a reasonable period of time from that request.

   For the avoidance of doubt, nothing herein shall be construed as prohibiting any of the Fountel Parties from procuring the removal of the ROFR Provisions set out in the PSI Articles of Incorporation.

7. Section 6.6. Fountel shall use its best endeavors to procure that upon the approval of the Second Capital Increase by the stockholders of PSI, PSI complies with the following provisions of this Clause 6.6:

   6.6.1 Viva Holdings and FAI shall be entitled to subscribe for the purchase in aggregate no less than 229,136 PSI Shares created by the Second Capital Increase (such subscription being the "Second Capital Increase Subscription" and the PSI Shares created pursuant to the Second Capital Increase being the "Second Capital Increase Subscription Shares") in proportion, as nearly as may be, to their respective holdings in PSI and at a subscription price of five thousand pesos (PhP 5,000) per Second Capital Increase Subscription Share;

   6.6.2 the only other shareholders of PSI which shall be entitled to participate in the Second Capital Increase Subscription shall be Lombard, the Religious Group, Insular and the Doctor Group and on the following basis:

8. Section 13.6. Each of the Fountel parties shall use its best endeavours to facilitate the waiver by the other PSI Shareholders and PSI of any restrictions in the PSI Articles of Incorporation or otherwise (including without limitation the ROFR Provisions) which may apply to restrict the transfer of PSI shares in accordance with provisions of this clause 13." (Emphasis supplied)

The afore-quoted provisions of the CSA show not merely an intent, but a categorical agreement between the CSA Parties to "*punctually* *perform, enforce and comply with all the rights of and protections afforded to the Fountel and Viva Parties*",[44] and to "*cooperate with each other on all matters relating to the governance of the Company and the conduct of the Business*",[45] thus affirming the sharing of voting power and/or investment returns over their PSI shares.

Second, in the actual performance of their respective obligations under the CSA, the CSA Parties showed that, as correctly found by the SHP, they were acting as beneficial owners of each other's shares in PSI, and shared with each other, directly or otherwise, voting power and/or investment returns, or directed each other's voting. The foregoing is clear in the following documents:

(a) In its SEC Form 23-B, Viva Holdings declared that pursuant to the CSA, the CSA Parties "*have agreed to arrangement with respect to the transfer and voting of, and put and call options in respect of their shares in PSI*".

(b) In its SEC Form 23-B, Fountel declared that it indirectly owned 203,943 shares held by FAI and that the investment was to facilitate the investment of Viva Holdings to PSI. Fountel likewise declared therein that together with FAI, it "*shall use its best endeavors to procure that Viva Holdings shall be entitled to appoint no less than 2 persons to be members in the PSI Board of Directors*", that the quorum of the PSI Board "*shall include at least one nominee director of Viva Holdings*" and that "*Viva Holdings shall also use its best endeavors to procure that FAI shall be entitled to appoint no less than 2 persons to be members of the PSI Board*."

(c) The Financial Statements of Viva Holdings which was submitted by Dr. Bengzon in evidence in support of his allegations in his Manifestation dated 23 November 2018 clearly indicate that Viva Holdings recognized its funding to New Regency Investments, Limited as part of its investment cost in PSI rather than a loan.

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[44] Section 3.1 of the CSA.
[45] Section 3.2.1 of the CSA.

(d) In applying for exemptive relief from Section 19 of SRC in relation to the mandatory tender offer, the CSA Parties acted as beneficial owners of each other's shares in PSI when, on the basis of their aggregated shares which made them the majority, they announced their intent to acquire the remaining 47.43% of the outstanding common shares held by the minority shareholders of PSI.

(e) Viva Holdings and New Regency executed the Loan Agreement in respect of the subscription funds required by FAI to fund its subscription for PSI Shares pursuant to the FAI Subscription Agreement, a fact that was admitted in the CSA.[46]

<u>Third</u>, in a letter dated 15 May 2018, Viva Holdings formally informed PSI that it was conducting a tender offer together with Fountel and FAI, and formally requested from PSI for information and documentation, and to implement the right of first refusal provisions in PSI's Articles of Incorporation to facilitate the immediate implementation of the intended MTO. In support of the foregoing request, PSI admitted that pursuant to the CSA "*<u>the aggregate shareholding of the Fountel Parties and Viva were aggregated for the purposes of the SRC requirements</u>*", and in doing so, they in effect confirmed that they were acting as beneficial owners, directly or otherwise, of each other's shares in PSI as contemplated in Rule 3.1(a) of the SRC.[47] **In aggregating their shareholdings for purposes of the conduct of mandatory tender offer, the CSA Parties' beneficial ownership in each other's shares in PSI fell squarely with the definition of "beneficial ownership" under Rule 3.1(a) of the 2003 Amended IRR** which provides:

> "All securities of the same class beneficially owned by a person, regardless of the form such beneficial ownership takes, shall be aggregated in calculating the number of shares beneficially owned by such person."

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[46] Page 3, CSA.

[47] "*All securities of the same class beneficially owned by a person, regardless of the form such beneficial ownership takes, shall be aggregated in calculating the number of shares beneficially owned by such person.*"

Taken in their entirety, the foregoing negates the argument of Fountel and FAI that the CSA Parties never became beneficial owners of each other's shares because the CSA merely required them to use their "best endeavors" in relation to the performance of their respective obligations therein. Contrary to their assertions, **the CSA Parties executed transactions, carried out actions and made declarations in the faithful performance of their respective obligations under the CSA to share voting power and/or investment returns, or directed each other's voting**. Fountel and FAI cannot do otherwise because in Section 10.1 of the CSA, they unconditionally and irrevocably guaranteed to Viva the performance of their obligations, thus:

> "Fountel unconditionally and irrevocably guarantees to Viva Holdings the punctual discharge by FAI of its obligations of whatsoever nature under this Agreement (the "Guaranteed Obligations") and promises to pay on demand each sum (together with interests on such sum accrued both before and after the date of demand until the date of payment) which FAI is liable to pay under this Agreement." (Emphasis supplied)

Moreover, a review of the CSA shows that the commission of a material breach of the provisions thereof by any of the CSA Parties shall entitle the non-breaching party to acquire all of the PSI shares of the breaching party[48] and to recover any loss, damage or injury it suffered or incurred as a direct or indirect result of the material breach.[49] These provisions militate against Fountel and FAI's claim that the "best endeavors" clauses under the CSA gave the parties the discretion to comply with the same in good faith. Given the specific consequences of not complying with the provisions of the CSA, no party thereto would dare take lightly its obligations and reason out that its "best endeavors", which fell short and resulted in a material breach, is sufficient to disregard the provisions on the consequences of breach by the breaching party. If the CSA Parties intended that they merely act using their best endeavors as translated to their "best efforts", then, they could have not achieved the very purpose for which they have executed the CSA which is securing the majority stake at PSI without the minority shareholders of PSI suspecting

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[48] Section 13.2.4(a) of the CSA provides that "*the Non-Breaching Party shall, subject to clause 13.5 below, have the right, but not the obligation, to either (a) acquire all of the PSI Shares of the Breaching Party* xxx"
[49] Section 13.4.1 of the CSA.

or becoming aware of it. **The "best endeavors" clauses in the CSA were thus mandatory provisions intended to exact full compliance from the parties of their respective obligations**.

Furthermore, the CSA is explicit under Clause 16.1 that "*(t)his Agreement shall be governed by and construed in accordance with the law of Hong Kong Special Administrative Region of the China*" which requires the interpretation of the meaning of "best endeavors" under Hong Kong jurisprudence i.e. "best endeavors" "under Hong Kong commercial law is *mandatory* in nature and the highest level of compulsion is impressed upon the obligee."[50]

On account of the foregoing, the Commission sees no reason to disturb the finding of the SHP that the CSA Parties are indeed beneficial owners, directly or otherwise, of each other's shares in PSI and were thus required to file their respective SEC Form 18-A with the Commission.[51]

The Commission notes that the CSA Parties were in fact aware and recognized their obligation to file SEC Form 18-A when it required Viva and FAI to file the same in Section 14.2.1 and 14.2.2 of the CSA.[52] This constitutes an admission by the CSA Parties that indeed, they were beneficial owners of each other's shares in PSI. Considering that the CSA Parties did not file their respective SEC Form 18-A, the SHP was correct in holding that they violated Section 18 of the SRC and should be held liable under Section 54 of the SRC.

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[50] Paragraph 12.2 of Dr. Bengzon's Comment.

[51] This is supported by Section 18.5(C) of the 2003 IRR which provides that:

> "5. For purposes of Section 18 of the Code, "beneficial owner" shall have the same definition as set forth in SRC Rule 3, provided that:
>
> xxx xxx xxx
>
> C. When two (2) or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership, for purposes of Section 18 of the Code, as of the date of such agreement, of all equity securities of that issuer beneficially owned by such persons." (Emphasis supplied)

[52] Clause 14.2; 14.2.1 and 14.2.1 of the CSA, page 19.

3. Viva Holdings, Viva Healthcare and FAI violated Rule 19.2.A in relation to 19.3.A and 19.3.B, as well as Rule 19.12 of the 2003 Amended IRR.

3.1 Concept and Purpose of Tender Offer

Rule 19.2.A of the Amended Implementing Rules and Regulations of the Securities Regulation Code (the "2003 Amended IRR")[53] provides:

> Rule 19.2 - Mandatory Tender Offers
>
> A. Any person or group of persons acting in concert, who <u>intends to acquire thirty-five percent (35%) or more of equity shares</u> in a public company <u>shall disclose such intention and contemporaneously make a tender offer</u> for the percent sought to all holders of such class, subject to paragraph (9)(E) of this Rule.
>
> In the event that the tender offer is oversubscribed, the aggregate amount of securities to be acquired at the close of such tender offer shall be proportionately distributed across both selling shareholder with whom the acquirer may have been in private negotiations and minority shareholders. (Emphasis supplied)

The concept of a "tender offer" was discussed by the Supreme Court in the case of *Osmeña III v. Social Security System,*[54] to wit:

> "For perspective, a tender offer is a publicly announced intention by a person acting alone or in concert with other persons to acquire equity securities of a public company, i.e., one listed on an exchange, among others. The term is also defined as "an offer by the acquiring person to stockholders of a public company for them to tender their shares therein on the terms specified in the offer. Tender offer is in place to protect the interests of minority stockholders of a target company against any scheme that dilutes the share value of their investments. It affords such

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[53] Approved on 30 December 2003. This is the Regulation which was in effect at the time of the execution of the CSA.
[54] G.R. No. 165272, September 13, 2007.

> minority shareholders the opportunity to withdraw or exit from the company under reasonable terms, a chance to sell their shares at the same price as those of the majority stockholders."

In *Cemco Holdings, Inc. v. National Life Insurance Co. of the Philippines, Inc.*[55] (Cemco Case), the Supreme Court explained the purpose of tender offer under Section 19 of the SRC, thus:

> "The legislative intent of Section 19 of the Code is to regulate activities relating to acquisition of control of the listed company and for the purpose of protecting the minority stockholders of a listed corporation. Whatever may be the method by which control of a public company is obtained, either through the direct purchase of its stocks or through an indirect means, mandatory tender offer applies. As appropriately held by the Court of Appeals:
>
> > The petitioner posits that what it acquired were stocks of UCHC and not UCC. By happenstance, as a result of the transaction, it became an indirect owner of UCC. We are constrained, however, to construe ownership acquisition to mean both direct and indirect. **What is decisive is the determination of the power of control**. The legislative intent behind the tender offer rule makes clear that **the type of activity intended to be regulated is the acquisition of control** of the listed company through the purchase of shares. Control may [be] **effected through a direct and indirect acquisition** of stock, and when this takes place, irrespective of the means, a tender offer must occur. The bottomline of the law is to give the shareholder of the listed company the opportunity to decide whether or not to sell in connection with a transfer of control." (Emphasis ours)

It is clear from the afore-quoted doctrinal pronouncement of the Court that **what is important for purposes of Rule 19.2.A of the 2003 Amended IRR is to determine at the outset if there will be a change of control in the intended acquisition** of a listed company. If the intended acquisition will result in the change of control, Section 19.2.A of the 2003 Amended IRR applies. The foregoing is clear in the afore-quoted ruling where the Court emphasized that "***(w)hat is decisive is the determination of the power of control***".

[55] G.R. No. 171815, August 7, 2007.

Control is essential for purposes of Section 19 of the SRC because it is intended, *inter alia*, to protect minor investors and to afford them the opportunity to withdraw or exit from the company under reasonable terms should they want to, based on their assessment of the entity intending to acquire control.

3.2 CSA Parties' intent to acquire more than 50% of PSI shares is embodied in the CSA. This triggered the requirement to conduct an MTO.

The CSA Parties maintained that the SHP committed reversible error in holding that they violated Rule 19.2.A in relation to Rules 19.3.A and 19.3.B based on a finding that they adroitly circumvented the IRR in order to avoid the requirements of MTO.[56] The CSA Parties argued that the SHP's finding that they failed to comply with the disclosure requirement under Rule 19.2.B of the Amended IRR is inconsistent with the finding that they are exempted from the MTO requirement.[57] In support thereof, they posited that since they are exempt from MTO as found by the SHP, "intent" to acquire is not material/relevant; what is determinative in such case is whether the acquisition actually results in more than 50% of the equity shares.[58]

The Commission is not persuaded.

In the instant case, the clear intent and agreement of the CSA Parties which is embodied in the CSA, was to work and cooperate with each other to ensure that they acquire more than fifty percent (50%) of PSI shares, thus:

> "Section 3.1. Each of the Fountel Parties and the Viva Parties shall use its best endeavours to procure that the Company and each Subsidiary shall duly and punctually perform, enforce and comply with all the rights of and protections afforded to the Fountel and Viva Parties under this Agreement."

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[56] Par. 29 of the Fountel and FAI Appeal (page 13).
[57] *Id* Par. 30 (page 14).
[58] *Id* Par. 34 (page 15).

> "Section 6.1. As soon as reasonably practicable following the Completion Date, each of the Fountel Parties shall use its best endeavours to facilitate:
>
> > 6.1.1 the acquisition of PSI shares by Viva Holdings and the Fountel Parties from the other PSI Shareholders from time to time with the same terms and price per PSI Share for such acquisition offered to any of the Fountel Parties being offered to Viva Holdings; and/or
> >
> > 6.1.2 the subscription by Viva Holdings and the Fountel parties of PSI Shares and with the same terms and price per PSI share for such subscription offered to any of the Fountel parties being offered to Viva Holdings,
> >
> > such that <u>Viva Holdings and the Fountel parties shall increase their respective holdings in PSI and hold a respective minimum 25% and 25.1% interest in the entire issued stock capital of PSI and further that Viva Holdings and the Fountel Parties shall subsequently continue to work together to increase their respective shareholdings in PSI,</u> provided that (subject to the terms of clauses 6.2 to 6.5)." (Emphasis supplied)

As shown earlier, after they executed the CSA, the CSA Parties who became indirect beneficial owners of each other's shares in PSI, collectively executed transactions, carried out actions and made declarations in the faithful performance of their respective obligations under the CSA, the objective of which was to secure control of PSI by acquisition and accumulation of their shareholdings therein. The foregoing in fact resulted in their acquisition of 52.57% PSI common shares in 25 July 2017 after FAI acquired the 62,563 PSI common shares of Insular, which subsequently increased to 54.24% after Viva Holdings and FAI collectively acquired an additional 146,243 PSI common shares on August 2017. The following summarizes the CSA Parties' acquisition of PSI shares, which they were beneficial owners of, from the time they executed the CSA:

Party	**No. of PSI Shares Acquired**	**Date**	**Source**
Viva Holdings	196,054	26 Sept. 2013	First Capital Increase
FAI	203,946	26 Sept. 2013	First Capital Increase
Viva Holdings	91,363	10 Oct. 2013	Allocation of Unissued shares approved by the BOD on 31 July 2013
Fountel	24,940	13 Dec. 2013	Purchased from Splash Corporation
Viva Holdings	25,060	13 Dec. 2013	Purchased from Splash Corporation
Viva Holdings	140,583	28 Feb. 2014	Second Capital Increase
FAI	114,767	28 Feb. 2014	Second Capital Increase
Fountel	5,636	15 May 2015	Purchased from SMC
Viva Holdings	5,614	15 May 2015	Purchased from SMC
FAI	62,563	25 July 2017	Purchased from Insular
Viva Holdings	71,968	28 Aug. 2017	Third Capital Increase
FAI	73,275	29 Aug. 2017	Third Capital Increase
Viva Holdings	62,437	8 Sept. 2017	Undisclosed Acquisition

Moreover, as earlier shown also, the CSA Parties, through Viva Holdings, admitted in the letter dated 15 May 2018 to PSI, that they are beneficial owners of each other's shares in PSI pursuant to the CSA for which reason, they aggregated such shares for purposes of their application for the conduct of mandatory tender offer with the Commission, thus:

> "As previously notified to Professional Services, Inc in December 2017, Fountel Corp., Felicitas Antoinette, Inc. and Viva Holdings Pte. Ltd. are conducting a mandatory tender offer to acquire up to a total of 1,887,951 common shares of PSI, representing 45.59% of the outstanding common shares held by the shareholders other than the Offerers ("PSI Minority Shareholders"), as required under the Securities Regulation Code and the 2015 Implementing Rules and Regulations of the SRC and in compliance with our obligation under Section 19 of the foregoing. The obligation to undertake the MTO was triggered by the acquisition by FAI of 62,563 PSI shares from The Insular Life Assurance Company Ltd. **As we are party, as you know, to a co-operation and shareholders agreement with the Fountel Parties, the aggregate shareholding of the Fountel Parties and Viva were aggregated for the purposes of the SRC requirements**." (Emphasis supplied)

As pointed out earlier, the foregoing act of aggregating their shareholdings in PSI for purposes of the conduct of mandatory tender offer confirmed that the CSA Parties were beneficial owners, as defined under Rule 3.1(a) of the 2003 Amended IRR, of each other's shares in PSI. Moreover, we agree with the finding of the SHP that the foregoing constituted "acting in concert" in relation to their intent of acquiring 35% or more of the equity shares in PSI contemplated under Rule 19.2.A of the 2003 Amended IRR.

In relation to the Commission, the CSA Parties' application for an exemptive relief from SRC Rules in relation to its intended MTO over the shares of PSI, constituted an admission and formal notice that they were beneficial owners of each other's shares in PSI who have collectively acquired majority shareholdings therein.

On the basis of the foregoing, we thus hold that on 1 August 2013, when the CSA Parties executed the CSA and agreed to ultimately wrest control over PSI, the application of Rule 19.2.A of the 2003 Amended IRR was triggered and their statutory obligation to disclose and to make a tender offer arose. Contrary to the argument of the CSA Parties that "intent" to acquire is not material/relevant in the instant case, we hold that **in the context of the CSA where the CSA Parties intended and agreed to acquire more than fifty percent (50%) of PSI shares**, <u>intent is important because the thirty-five percent (35%) threshold provided under Rule 19.2.A of the 2003 Amended IRR has already been breached</u>.

The failure of the CSA Parties to <u>disclose their intention to acquire PSI shares on the basis of the CSA, and contemporaneously make a tender offer covering the said shares constituted a violation of Rule 19.2.A of the 2003 Amended IRR.</u>

3.3 The CSA Parties' acquisitions of the PSI Shares pursuant to and under the CSA are not exempt. The CSA Parties indirectly, albeit deliberately, circumvented the 2003 Amended IRR to avoid compliance with the required MTO.

In their Appeal, Fountel and FAI argued that since their acquisitions of the PSI shares were exempt as found by the SHP, what is determinative in this case for purposes of MTO is whether their acquisition actually results in more than fifty percent (50%) of the equity shares of PSI.[59] In support of the claim that their acquisitions of PSI shares were exempt transactions, CSA Parties point to the fact that they were either subscriptions from PSI's increase in capital/unissued stock or from PSI's outstanding capital stock which did not breach the required percentage threshold.

The facts and the evidence on record do not support CSA Parties' position.

Rules 19.3.A and 19.3.B of the 2003 Amended IRR provide:

> "Rule 19.3 - Exempt from Mandatory Tender Offer Requirement
>
> A. The mandatory tender offer requirement shall not apply to the following:
>
> i. <u>any purchase of shares from the unissued capital stock</u> provided that the acquisition will not result to a fifty percent (50%) or more ownership of shares by the purchaser;
>
> ii. any purchase of shares from an <u>increase in authorized capital stock</u>; xxx
>
> B. <u>Purchasers</u> of shares in the foregoing transactions <u>shall, however, comply with the disclosure and other obligations under SRC Rule 18.1 and SRC Rule 23.</u>" (Emphasis supplied)

While the acquisitions by the CSA Parties of PSI shares were made from subscriptions from PSI's increase in capital/unissued stock, or from PSI's outstanding capital stock which did not breach the required percentage threshold, the same cannot be considered exempt because they were acquired pursuant to and in compliance with their respective obligations under the CSA with a clear objective, from the execution date thereof, of acquiring the majority shareholdings of PSI, and to cooperate

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[59] Par. 34 of the Fountel and FAI Appeal (page 15).

with each other on all matters relating to its governance and the conduct of the business.[60]

In the instant case, the CSA Parties are telling this Commission that they should be allowed to make an MTO because as beneficial owners of each other's shares in PSI, the amount of their collective shareholdings therein has breached the percentage threshold provided in Rule 19.1.A of the 2003 Amended IRR. However, for purposes of Rule 19.3.B of the 2003 Amended IRR, they should not be required to comply with the reportorial requirements because their acquisitions of the PSI shares, treated separately, are exempt.

We do not agree. The CSA Parties' admission that they aggregated their PSI shareholdings as parties to the CSA for purposes of complying with the requirements of the SRC and its IRR negates their argument that their acquisitions should be considered exempt because they were either subscriptions from the increase in capital/unissued stock or from the outstanding capital stock of PSI which did not breach the required percentage threshold. As beneficial owners of each other's shareholdings in PSI, the total number of PSI shares that CSA Parties acquired pursuant to the CSA is not exempt because at the outset, their intent was to become (indirect) beneficial owners of each other's shares in PSI which will constitute the majority of the equity shares of PSI. More importantly, the records show that CSA Parties' aggregated shareholdings in PSI breached the 35% threshold provided under Rule 19.1.A of the 2003 Amended IRR.

Rule 19.3.1 of the 2015 Amended IRR expressly qualifies the enumeration of the exceptions to the mandatory tender offer rule by the phrase "*unless the acquisition of equity securities is intended to circumvent or defeat the objectives of the tender offer rules*". This qualification is deemed written in Rule 19.3.A of the 2003 Amended IRR based on the doctrine that "*what cannot be legally done directly cannot be done indirectly. This rule is basic and, to a reasonable mind, does not need explanation. Indeed, if acts that cannot be legally done directly can be done indirectly, then all laws would be illusory*".[61]

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[60] Section 3.2.1 of the CSA.
[61] Tawang Multi-Purpose Cooperative v. La Trinidad Water District, G.R. No. 166471, March 22, 2011.

On the basis of the foregoing, and in the context of the purpose of a mandatory tender offer which is to protect minority shareholders, the aggregate acquisitions of CSA Parties of PSI shares of which they were indirect beneficial owners of, are certainly outside the ambit of the exceptions provided under Rule 19.3.A of the 2003 Amended IRR, even by implication.

Moreover, We note how the CSA Parties managed to conceal the CSA from the Board of Directors and shareholders of PSI for a considerable period of time while they pursued their agreed acquisitions of PSI shares pursuant to the CSA. Records of the case reveal that some members of the Board of Directors as well as the shareholders of PSI were totally left in the dark about the CSA Parties' intent to acquire more than 50% PSI's shares and to secure control over the company. The Board of Directors and the shareholders were deliberately misled to believe that the purpose of the increases in capital stock was to finance PSI's long and short-term objectives. The CSA Parties capitalized the exemptions provided in Rule 19.3.A of the 2003 Amended IRR, and used the same to avoid the mandatory tender offer requirements under Rule 19.1.A and the reportorial requirements under Rule 19.3.B. of the 2003 Amended IRR while they were still in the process of accumulating PSI shares and securing the majority status.

Without the disclosures required under Rule 19.3.B of the 2003 Amended IRR being filed, specifically SEC Form 18-A, the Board of Directors and the shareholders of PSI were deprived of the information needed by them to act and decide on corporate matters intelligently. With the concealment of the CSA and the acquisitions made in furtherance thereof, the CSA Parties succeeded to carry out an unannounced takeover and took control over PSI.

No less than the shareholders of PSI categorically stated that they were not aware of the existence of the CSA at the time the increases in the capital stock were approved in 2013. As correctly observed by the SHP, the records show that it was only in 2017 that the CSA was disclosed and discussed after the proposal of AC Health (Ayala) was presented for the consideration of the Board. By this time in 2017, or after four (4) years from the execution of the CSA, the CSA Parties, as indirect beneficial owners of each other's PSI shares, have already increased their shareholdings in PSI to more than 50%.[62] To quote the relevant portion of the SHP's Resolution, thus:

> "On the other hand, the CSA, which is an incontrovertible evidence of Respondents' intention to acquire majority shares, was also kept confidential from PSI directors and stockholders. In fact, it was only discussed in 2017, as a consequence of the negotiation to acquire shares by AC Health (Ayala). Such may be inferred from the submitted minutes of BOD meetings of June 8 and 12, 2018, to wit:
>
> • ***Dr. Bengzon … then said that it was only in 2017 that he came to read the CSA***, when exposed as part of Ayala's due diligence. He added that he was shocked when Mr. Gonzales claimed to not have known that he had to vote with Clermont on the matter of increasing the capital stock to accommodate the Ayala investment. He further stated that it was at such time that he (Dr. Bengzon) demanded to see the agreement, but that Mr. Gonzales initially resisted, claiming that the documents was (sic) confidential, until he eventually reluctantly agreed. Dr. Bengzon said that he requested that the CSA be shared with Atty. Soller, given that it was a legal document and he would need counsel on it. ***Dr. Bengzon added that such was the first time he and Atty. Soller saw the actual document.***
>
> • Dr. Saniel stated that Mr. Robinson had repeatedly made his case about the disclosure matter, but that, as a member of the Board, ***she did not know about the CSA until 2017 when the Ayala investment failed.***
>
> x x x x.
>
> • Dr. Sarmiento requested Mr. Buenviaje to repeat his earlier statement. ***Mr. Buenviaje stated that he learned of the existence of a CSA in 2017 when Dr. Bengzon mentioned it to him, having found it out in the same year***. He mentioned that Dr. Bengzon was accordingly told by Mr. Gonzales ***to keep the agreement confidential***, but was allowed to share the same with Atty. Soller. He further mentioned that when their discussion veered into possible ethical issues, he stated that he wanted to see the CSA but Dr. Bengzon did not want to show it to Mr. Buenviaje, because the former agreed that he will keep it to himself. x x x x.

[62] 52.57% PSI common shares in 25 July 2017 after FAI acquired the 62,563 PSI common shares of Insular.

> • ***Fr. Yap, on the matter of whether the CSA was disclosed, stated that he was a member of the Board in 2013 and knew nothing about it***. He stated that he remembered the meeting regarding the possibility of the Chandler group to come in, wherein Lombard raised objections. He recalled getting the impression that Mr. Gonzales was pressured to reveal that it was Chandler. He continued that ***the first time he heard of a CSA was during a Finance Committee meeting in 2017, during a discussion on the increase in capital stock, and whether Ayala should be allowed in***. He further stated that Mr. Gonzales declared that he was the one who invited Ayala; that in the said meeting, Mr. Gonzales accordingly had said that if it came to a vote in a shareholders' meeting, and Mr. Gonzales had to vote against Clermont, he had to be ready for arbitration in Hong Kong. Fr. Yap mentioned that at such juncture, he realized that a CSA bound him that they had to vote together. He recalled also that, at that time, Mr. Gonzales was for the entry of Ayala, and that it was what the committee was working for. He further added that the matter of the loan came out in the stockholders' meeting, which was mentioned to him by Mr. Buenviaje as he was in Thailand at that time. He reiterated that the first time he heard of the CSA was in2017 that he never heard of it before then, that it was never mentioned in a meeting, and that it was never disclosed.
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> • ***Dr. Concepcion posited that she had been a member of the Board since 2013, and that she never knew about the CSA until late in 2017***.
>
> • ***Dr. Saniel reiterated her declaration that she did not know about the CSA until 2017***. She recalled that Mr. Gonzales sent her an e-mail containing a letter, also sent to other doctors, wherein it was mentioned that he earned a premium, which she assumed was in relation to the CSA and the loan agreement. She pointed out that it was important for the Board to know the nature and the amount of such premium. Fr. Yap inquired, in connection with Dr. Saniel's statement, as to the reason the loan granted, amount, terms, and status of it." (emphasis supplied)

Pursuant to the doctrine in the Cemco Case, if the intended acquisition of shares will result in the change of control of the listed company, tender offer is mandatory and Rule 19.2.A of the 2003 Amended IRR will apply; and **the means by which control is acquired** i.e. direct purchase of stocks or indirect means, **will not matter because both will be subject to and governed by the tender offer rules**. The Court emphasized that the Congress intended that the tender offer rule regulates **the type of activity that will be used in acquiring control** of the listed company, and **such activity may either be direct purchase of stocks or indirect acquisition of stock**.

The acquisition of control should not be confused with the means of achieving the same. The matter relating to the direct or indirect acquisition of stock pertains to the latter, while the resulting control of the target corporation by the prospective purchasers of stock pertains to the former. ***Apriori*, the issue on whether or not there will be change of control must be determined**. If the acquisition will result in the change in control, then the manner of acquisition i.e. direct or indirect acquisition of shares will be perforce subject to the tender offer rule.

In the instant case, it is apparent in the CSA that the CSA Parties intended to and agreed to acquire more than 50% of the authorized capital stock of PSI. The CSA Parties agreed that through the CSA, a change in control over PSA will take place.

The records of the case will show that CSA Parties were aware from the start that through the CSA, they will gain control over PSI. Thus, they specifically acknowledged and undertook to comply with their respective disclosure and filing obligations with the Commission.[63] Their failure to file SEC Form 18-A constitutes a violation of Rule 19.1.B of the 2003 Amended IRR.

The SHP thus correctly dismissed CSA Parties' argument that the filing by Viva Holdings of its SEC Form 23-B on 7 October 2013 where it attached a copy of the CSA does not constitute substantial compliance with the disclosure requirement provided under Rule 19.3.B of the 2003 Amended IRR. The policy of the state in ensuring full, fair and timely disclosure of transactions covering securities mandates that the matters covered by Form 18-A shall be submitted to both the Issuer and the Commission. When Viva Holdings filed its SEC Form 23-B to the Commission, it necessarily deprived PSI of the information disclosed therein because unlike SEC Form 18-A, such form is only required to be submitted to the Commission.

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[63] Sections 14.2.1. and 14.2.2 of the CSA provide:
"In the case of Viva Holdings, to file both the SEC Form 18-A and SEC Form 23-A;" and "In the case of FAI, to file the SEC Form 18-A;"

Moreover, in the context of the fact that the issues in the instant case are all related to the beneficial ownership, direct or otherwise, by the CSA Parties of their PSI shares, the findings of violation necessarily apply to all of them. Thus, the Commission finds that the SHP committed reversible error in not finding Viva Healthcare liable for violation of Rule 19.2.A in relation to Rule 19.3.A and Rule 19.3.B of the 2003 Amended IRR when it failed to comply with the reportorial requirements.

4. The CSA Parties violated Rule 19.12 of the 2003 Amended IRR; and are liable for fraudulent transactions under Section 26 of the SRC.

4.1 The CSA Parties failed to state a material fact in violation of Section 19.2 of the SRC in relation to Rule 19.12 of the 2003 Amended IRR.

In their Appeal, the CSA Parties maintained that the SHP committed reversible error in finding that they violated Rule 19.12 of the 2003 Amended IRR. They argued that since the said rule covers prohibited practices in connection with a tender offer, they cannot possibly violate the same since no tender offer was ever made.

The position and argument of CSA Parties are misplaced.

It is clear in the Assailed Resolution that the basis for the finding of violation and the imposition of penalty was Section 19.2 of the SRC in relation to Rule 19.12 of the 2003 Amended IRR.

Section 19.2 of the SRC provides:

> "**It shall be unlawful for any person to** make any untrue statement of a material fact or **omit to state any material fact necessary in order to make the statements made**, in the light of the circumstances under

> which they are made, **not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any** tender offer or **request** or invitation **for tenders**, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, define and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." (Emphasis supplied)

To effectively implement the afore-quoted provision, Rule 19.12 of the Amended IRR of the SRC defines what constitutes fraudulent, deceptive or manipulative act or practice in connection with, among others, any request or invitation for tender offer, thus:

> "19.12 Prohibited practices
>
> It shall be a fraudulent, deceptive or manipulative act or practice, in connection with any tender offer:
>
> A. To employ any device, scheme or artifice to defraud any person;
>
> B. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
>
> C. To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person" (Emphasis supplied)

At the outset, it should be emphasized that Section 19 of the SRC and its IRR are provisions that are designed to protect the interests of shareholders. The foregoing finds support in the doctrinal pronouncements on the purpose of a mandatory tender offer i.e. to protect the interests of minority stockholders of a target company against any scheme that dilutes the share value of their investments by giving them the opportunity to withdraw or exit from the company under reasonable terms,[64] to wit:

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[64] Osmeña III v. Social Security System, G.R. No. 165272, September 13, 2007.

> "For perspective, a tender offer is a publicly announced intention by a person acting alone or in concert with other persons to acquire equity securities of a public company, i.e., one listed on an exchange, among others. The term is also defined as "an offer by the acquiring person to stockholders of a public company for them to tender their shares therein on the terms specified in the offer."

In the context of the afore-quoted ruling, the primordial and over-arching consideration in ALL mandatory tender offers are the interest and welfare of the minority shareholders. Hence, the SHP was correct in finding that CSA Parties violated Rule 19.12 of the 2003 Amended IRR in relation to Section 19.2 of the SRC as a necessary consequence of their failure to comply with the reportorial requirements under Rule 19.1.B of the 2003 Amended IRR.

In the instant case, the violation of Section 19.2 which constituted fraud, deceit or manipulative act or practice defined in Rule 19.12 of the 2003 Amended IRR resulted or arose from the failure of the CSA Parties to timely, fully and fairly disclose to the Board of Directors and shareholders of PSI their intent and agreement to acquire more than 50% of PSI shares pursuant to the CSA and, as indirect beneficial owners of each other's shares in PSI, to cooperate with each other on all matters relating to its governance and the conduct of the business.

As found earlier, the CSA Parties, as indirect beneficial owners of each other's shares in PSI were required to comply with the reportorial requirements provided under Rule 19.3.B of the 2003 Amended IRR, a fact which they themselves admitted as among their obligations under the CSA. Their failure to comply with the same constituted and/or operated as fraud, deceit and manipulative act/practice upon the Board of Directors and shareholders of PSI who were all dismayed to find out that the CSA Parties are already claiming to be majority holders of and to exercise control over PSI after they were requested to cooperate, provide information and documentation, and implement the right of first refusal provisions in PSI's Articles of Incorporation to facilitate the immediate implementation of their intended mandatory tender offer, which was earlier formalized in their application for exemptive relief filed with the CGFD. The CSA Parties' request for tender offer was not only belatedly made, it was likewise tainted with fraud and deceit as contemplated under Section 19.2 of the SRC in relation to Rule 19.12 of the 2003 Amended IRR.

4.2 CSA Parties violated Section 26 of the SRC.

In the Bengzon Appeal, it was alleged that the SHP committed a reversible error in not finding that the CSA Parties' fraudulent and deceitful acts which violated Section 19.2 of the SRC in relation to Rule 19.12 of the 2003 Amended IRR also constituted fraud under Section 26 of the SRC.

The CSA Parties on the other hand agreed with the SHP that they are not guilty of fraud under Section 26 of the SRC as no evidence was presented to show criminal/fraudulent intent on their part. The SHP posited that a finding of violation of Section 26 of the SRC should be based on the existence of *scienter* or criminal intent.

In relation to the foregoing, the question is whether the act of the CSA Parties in concealing a material fact which violated Section 19.2 of the SRC in relation to Rule 19.12 of the 2003 Amended IRR also constituted fraud under Section 26 of the SRC?

We answer in the affirmative.

Section 26 of the SRC which is under the chapter on "Prohibitions on Fraud, Manipulation and Insider Trading", is the general anti-fraud provision applicable to securities.[65] It reads:

> "***Section 26. Fraudulent Transactions.*** – **<u>It shall be unlawful</u>** for any person, directly or indirectly, <u>in connection with the purchase or sale of any securities **to**</u>:
>
> 26.1. <u>Employ any device, scheme, or artifice to defraud</u>;
>
> 26.2. Obtain money or property by means of any untrue statement of a material fact of any omission to state a material fact necessary in order

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[65] In Re: Rappler, Inc. and Rappler Holdings Corporation, SP Case No. 08-17-001.

> to make the statements made, in the light of the circumstances under which they were made, not misleading; or
>
> 26.3. Engage in any act, transaction, practice or course of business which operates or **would operate** as a fraud or deceit upon **any person**." (Emphasis supplied)

The Merriam-Webster dictionary defines fraud as an intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right.[66] It involves an act or omission which is calculated to create in the minds of those who deal with the author of the fraudulent act(s) a situation which lead them to act or decide in one way which would have been otherwise had they been given the relevant information. It refers to all kinds of deception — whether through insidious machination, manipulation, concealment or misrepresentation — that would lead an ordinarily prudent person into error after taking the circumstances into account.[67] In *Galvez v. Court of Appeals*,[68] the Court defined fraud as follows:

> "We emphasize that fraud in its general sense, is deemed to comprise anything calculated to deceive, including all acts, omissions, and concealment involving a breach of legal duty or equitable duty, trust, or confidence justly reposed, resulting in damage to another, or **by which an undue and unconscientious advantage is taken of another**. It is a generic term embracing all multifarious means which human ingenuity can device and which are resorted to by one individual to secure an advantage over another by false suggestions or by suppression of truth and includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated." (Emphasis supplied)

In the instant case, the records show that the CSA Parties admitted executing the CSA where they agreed to cooperate with each other on all matters to the governance and the conduct of business of PSI considering that by virtue of the CSA, they became indirect beneficial owners of each other's shares in PSI. The CSA apparently contained provisions where the CSA Parties recognized their obligation to file SEC Form 18-A.[69] However, the failure of the CSA Parties to file SEC Form 18-A and comply with Rule

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[66] https://www.merriam-webster.com/dictionary/fraud
[67] See Tankeh v. Development Bank of the Phils., G.R. No. 171428, November 11, 2013.
[68] G.R. Nos. 187919, 187979 & 188030, April 25, 2012.
[69] Sections 14.2.1. and 14.2.2 of the CSA.

19.3.B of the 2003 Amended IRR show an intent on their part to conceal the CSA from the PSI Board of Directors and shareholders. With the BOD and shareholders of PSI being unaware of the CSA, the CSA Parties who became indirect beneficial owners of each other's shares in PSI which has breached the 35% threshold in 2013, were able to avoid disclosing their intent to acquire majority shares and conducting a mandatory tender offer.

Pursuant to the CSA, the CSA Parties arranged and managed their respective acquisition of PSI shares to ensure that they will be able to claim, (as they in fact did in their Appeal) that taken individually, such acquisitions were exempt under Rule 19.3.A of the 2003 Amended IRR. The CSA Parties also used their individual acquisitions of PSI shares to show that they were not indirect beneficial owners of each other's shares in PSI. With the BOD and shareholders of PSI being unaware of the CSA, they approved the series of increase of PSI's authorized capital stock which enabled the CSA Parties to surreptitiously acquire and increase their shareholdings in PSI to 54.24% in August 2017 by capitalizing on the exception provided for under the law when they subscribed the same through the multiple increases in PSI's authorized capital stock.

On the basis of the foregoing, the allegations made by the directors and shareholders of PSI that they were defrauded (which were quoted earlier in this decision) appear to be fully supported and substantiated by the attendant facts and circumstances. The records show that the CSA and the related agreements executed by the CSA Parties embodied the grand plan of the latter to acquire the majority shares of PSI and to eventually wrest control over the management, governance and conduct of the business of PSI. To ensure that they will not be required prematurely to make a mandatory tender offer based on their intent to acquire majority shares of PSI on the basis of the CSA, the CSA Parties adroitly circumvented the IRR[70], and employed deceptive and manipulative acts[71] to convince the PSI Board and shareholders to approve, as they did in fact approve, the series of increases of PSI's authorized capital stocks which enabled and facilitated the subscription and acquisition by the CSA Parties of the intended percentage shareholding in PSI. The CSA Parties succeeded in making it appear and convincing the PSI Board and

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[70] See pages 18-20 of the SHP Resolution.
[71] See pages 21-26 of the SHP Resolution.

shareholders that their acquisitions were independent of each other, and that the same will not be used to wrest control over the management, governance and conduct of business of PSI. By doing so, the CSA Parties secured for themselves the opportunity of subscribing from the increase in capital/unissued stock or from the outstanding capital stock of PSI, protected such acquisitions, and used the same to their advantage by asserting that they were exempt. This scheme afforded and provided the CSA Parties with the time need to acquire majority shareholdings in PSI (which was their intent and plan from the very beginning) without being questioned. It was only after they collectively became the majority shareholders of PSI that the CSA Parties would come forward and openly declare that they intend to comply with the mandatory tender offer rules under the SRC and its IRR.

Taken together, the foregoing acts and/or omissions clearly constituted fraud as contemplated under Section 26 of the SRC. We agree with the finding of the SHP that the CSA Parties deliberately concealed their intention to acquire corporate control (acquisition of majority by acting in concert) to ensure that the objectives and purposes of the CSA are carried out at the expense of PSI, its directors and shareholders. The CSA Parties deliberately concealed the CSA and its related agreements, and the performance of their respective obligations therein which resulted in their acquisition of the majority shares of PSI, and in securing control over the same.

The records will show that as a consequence thereof, a number of directors claimed that they only came to know of the CSA in 2017 or after four (4) years from its execution. These directors likewise declared that had they known of the scheme of the CSA Parties, they would have voted against the proposals to increase the authorized capital stock of PSI. In addition to the directors, some of the shareholders believed that the CSA Parties defrauded them and the PSI for which reason, they filed the appropriate actions against the CSA Parties.[72] The SHP in fact recognized

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[72] See (1) Complaint-Affidavit dated 8 June 2018 filed by Dr. Bengzon against the CSA Parties and Mr. Gonzales before the EIPD for violation, among others, of Section 26 of the SRC; (2) the Resolution dated 19 December 2018 issued by the OCP of Pasig City finding probable cause for the commission of Estafa as punished under Article 315(2) of the Revised Penal Code by Mr. Gonzales and other directors of the CSA Parties; (3) Affidavit dated 23 October 2018 of Fr. Roberto Yap [Annex “M” of the Appeal]; (4)

in the Assailed Resolution the claim of the members of the Board of Directors as well as the shareholders of PSI that they were completely defrauded by the CSA Parties who deliberately concealed their arrangement to act together to acquire more than 50% PSI's shares and to secure control over the company.[73]

Moreover, the position of the SHP that a finding of violation of Section 26 of the SRC should be based on the existence of *scienter* or criminal intent has no basis in law. It should be emphasized that the SRC is a special law, the implementation of the provisions of which, specifically in the punishment of acts which violate the same, is governed by the settled rule that intent is immaterial, thus:

> "The general rule is that acts punished under a special law are *malum prohibitum.* "An act which is declared *malum prohibitum,* malice or criminal intent is completely immaterial."
>
> In the case of *mala in se it is necessary, to constitute a punishable offense, for the person doing the act to have knowledge of the nature of his act and to have a criminal intent;* ***in the case of mala prohibita, unless such words as "knowingly" and "willfully" are contained in the statute, neither knowledge nor criminal intent is necessary***. In other words, a person morally quite innocent and with every intention of being a law-abiding citizen becomes a criminal, and liable to criminal penalties, if he does an act prohibited by these statutes.
>
> Hence, "*[i]ntent to commit the crime and intent to perpetrate the act must be distinguished.* A person may not have consciously intended to commit a crime; but he did intend to commit an act, and that act is, by the very nature of things, the crime itself[.]" **When an act is prohibited by a special law, it is considered injurious to public welfare, and the performance of the prohibited act is the crime itself**."[74] (Emphasis supplied)

Affidavit dated 5 November 2018 of Maria Micaela B. Poe [Annex "N" of the Appeal]; (5) Affidavit dated 6 November 2018 of Maria Eufemia Yap [Annex "O" of the Appeal]; (6) Complaint-Affidavit filed on 23 October 2018 by Ronald Arce Vergel De Dios and Patricia Esteban Vergel De Dios against Fountel, FAI, Viva Healthcare, Viva Holdings, Mr. Gonzales, Augusto P. Sarmiento, Mr. Robinson, Joel L. Bodegon, Carlos Alfonso T. Ocampo, PSI Healthcare Development Services Corp. and PSI, for violation of Section 26 of the SRC.

[73] Page 27 of the Assailed Resolution.

[74] Datu Guimid P. Matalam v. People of the Philippines, G.R. Nos. 221849-50, April 04, 2016. See also SEC versus Oudine Santos, G. R. No. 195542, 19 March 2014.

In the context of the foregoing doctrinal pronouncement, it appears that the acts enumerated in Section 26 of the SRC are *mala prohibita* since nowhere in the said provision can we find the words "knowingly" and "willfully" that qualify the commission of the said acts. The fraudulent transactions covered and contemplated under Section 26 of the SRC were considered by the Congress as injurious and detrimental to the investors and the capital market for which reason, the mere performance or commission of the same, regardless of the intent, constitutes the crime itself.

The implementation and enforcement of Section 26 of the SRC is, in essence, a critical and indispensable function of the Commission primarily because it goes into the very heart of its mandate which is expressed in the state policy of encouraging widest participation of ownership in enterprises, enhancing democratization of wealth, promoting the development of the capital market, protecting investors, and eliminating fraudulent and manipulative devices that compromise the integrity of the market.[75]

After a careful review of the foregoing factual circumstances borne in the records of the case, we hold that the SHP committed reversible error in holding that the CSA Parties did not violate Section 26 of the SRC on the ground that the intent to defraud was not proven. The foregoing acts of the CSA Parties clearly constitute fraudulent transactions as defined under Section 26 of the SRC as they operated (or would operate) as a fraud or deceit upon the members of the Board of Directors and the shareholders of PSI. No less than the members of the Board of Directors and the shareholders of PSI declared that they were defrauded by the CSA Parties. Pursuant to the doctrine in *Matalam v. People*, the intent of the CSA Parties to defraud is immaterial considering that the SRC is a special law, and nothing in Section 26 thereof requires the presence of knowledge or criminal intent.

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[75] Section 2 of SRC.

5. The PSI Shares acquired by the CSA Parties pursuant to the CSA should be nullified.

In his Appeal, Dr. Bengzon maintained that the SHP committed a reversible when it failed to apply Section 71.2 of the SRC based on a finding of violation of the SRC[76] and its IRR[77] by the CSA Parties. Dr. Bengzon argued that the PSI shares acquired by the CSA Parties pursuant to the CSA and its related agreements were made in violation of the SRC and its IRR, and should have thus been voided by the SHP.

The CSA Parties on the other hand insisted that the Commission has no jurisdiction to nullify the acquisition of shares in PSI as the same is lodged with the Regional Trial Court. Considering that the issue on whether the Commission has jurisdiction over the matters presented in the instant case has already been disposed of earlier, We will no longer delve into this matter.

Section 71.2 of the SRC provides:

> "71.2**. Every contract made in violation of any provision of this Code or of any rule or regulation thereunder**, and every contract, including any contract for listing a security on an Exchange heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this Code, or any rule or regulation thereunder, **shall be void**:
>
> (a) **As regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract**, and
>
> (b) **As regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation** of any such provision, rule or regulation." (Emphasis supplied)

[76] Section 18
[77] Rule 19.2.A in relation to Rules 19.3.A and 19.3.B, and Rule 19.12

Section 5(f) of the SRC provides:

> "SECTION 5. Powers and Functions of the Commission. — 5.1. The Commission shall act with transparency and shall have the powers and functions provided by this Code, Presidential Decree No. 902-A, the Corporation Code, the Investment Houses Law, the Financing Company Act and other existing laws. Pursuant thereto **the Commission shall have**, among others, **the following powers** and functions:
>
> (f) **Impose sanctions for the violation of laws and the rules, regulations** and orders issued pursuant thereto;"

Under Section 71.2 of the SRC, the proper sanction for contracts made in violation of any provision of the SRC or of any rule or regulation is the voiding or nullification thereof.[78]

SECTION 71.2 of the SRC is consistent with Article 1409 of the Civil Code of the Philippines which treats contracts entered into in violation of law as illegal and void, to wit:

> "Article 1409. The following contracts are inexistent and void from the beginning:
>
> (1) Those whose cause, object or purpose is contrary to law, morals, good customs, public order or public policy;
>
> xxx xxx xxx
>
> These contracts cannot be ratified. Neither can the right to set up the defense of illegality be waived."

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[78] This provision has a counterpart in the United States Code[78] and United States Securities and Exchange Act of 1934[78], to wit:

> "Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void:
>
> (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and
>
> (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation."

Relative to above-quoted provision of the SRC, Section 19.13 of the 2003 Amended IRR provides for the pertinent sanction in violation of the tender offer rule, to wit:

> "13. Violation
>
> **If there shall be violation of this Rule by pursuing a purchase of equity shares of a public company at threshold amounts without the required tender offer, the Commission, upon complaint, may nullify the said purchase and direct the holding of a tender offer**. This shall be without prejudice to the imposition of other sanctions under the Code." (Emphasis supplied)

In the context of the importance of the state policies which are being implemented in the SRC, and the effects of any violation of the provisions thereof to the market and on investors, Section 71.2 of the SRC and Section 19.3 of the 2003 Amended IRR goes to the extent of categorically declaring "*every contract made in violation of any provision of this Code or of any rule or regulation thereunder*" as void, and expressly authorizing the Commission effect the voiding of the same. In the exercise by the Commission of its regulatory powers to administer and implement the provisions of the SRC,[79] to regulate, investigate and supervise regulated entities to ensure compliance,[80] and to impose sanctions for violation,[81] the determination of whether an act or transaction violates the SRC is a matter that is within the exclusive jurisdiction of the Commission. In relation to the exercise of the foregoing power, Section 71.2 of the SRC and Section 19.3 of the 2003 Amended IRR expressly authorizes and empowers the Commission to declare contracts and transactions void after a determination that the same were made in violation of the SRC.

Moreover, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related

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[79] Section 4 of the SRC.
[80] Section 5(d) of the SRC.
[81] Section 5(f) of the SRC.

thereto.[82] The policies that the securities laws have been said to promote include such socially-directed objectives as the protection of investors, the elimination of manipulative and deceptive practices, the promotion of full disclosure, the encouragement of high ethical standards, and ***the provision of effective sanctions for violation***.[83]

Considering the various novel irregular schemes and devices employed to deceive the public, legislators broadly drew the scope of the securities law, e.g. the Securities Regulation Code, in order to achieve its goal of investor protection.[84] In effect, the Commission, as the regulatory and supervisory agency mandated to ensure compliance with said law is given a wide latitude authority, power and discretion to perform its duties and responsibilities including, among others, the power to declare void a contract entered into in violation of the SRC.

It is thus important to look into the standards and parameters provided under existing jurisprudence, applicable principles and best practices recognized and adopted both locally and by foreign jurisdictions, which will justify the voiding of contracts and/or transactions for having been entered into in violation of the SRC and its IRR.

5.1 The CSA and related agreements were made and carried out in violation of the SRC and its IRR, and in fraud of PSI, its directors and shareholders.

In the instant case, the Commission earlier found that CSA Parties violated Rule 19.1.A of the 2003 Amended IRR for their failure to disclose their intention to acquire majority shares of PSI and to contemporaneously make a tender offer after they executed the CSA which made them indirect beneficial owners of each other's shares in PSI. The Commission likewise found that CSA Parties deliberately concealed the CSA from the Board of

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[82] Section 2 of the Exchange Act expressly sets forth the legislative purpose and perceived need for securities regulation.
[83] Elaine A. Welle, Freedom of Contract and the Securities Laws: Opting Out of Securities Regulation by Private Agreement, 56 Wash. & Lee L. Rev. 519 (1999).
[84] SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943).

Directors and the shareholders of PSI after they failed to file SEC Form 18-A in violation of Rule 19.3.B of the 2003 Amended Rules. On the basis of the foregoing, the Commission consequently found that CSA Parties defrauded the Board of Directors and the shareholders of PSI (a) by their failure to state a material fact in violation of Section 19.2 of the SRC in relation to Rule 19.12 of the 2003 Amended IRR, and (b) by their deliberate concealment of the CSA and their surreptitious implementation of its provisions from the Board of Directors and the shareholders of PSI which enabled them to acquire more than 50% PSI's shares and to secure control over the company in violation of Section 26 of the SRC. The fraud employed by the CSA Parties prejudiced the shareholders of PSI as it resulted in the undervaluation of their shares. The Indicative Terms for Acquisition of Primary Shares in PSI dated 9 May 2017 shows that AC Healthcare was willing to purchase PSI shares at approximately PhP12,621.48 per share, which is significantly higher than what Viva Holdings and FAI paid for their subscription to PSI shares in 2017.

The foregoing acts which constituted violations of the SRC rendered the state policies and principles embodied in the SRC nugatory. With the said violations, the CSA Parties made a mockery of the SRC and rendered the provisions designed to promote the development of the capital market, protect investors, and eliminate fraudulent and manipulative devices that destroy the integrity of the market, inutile.

On the basis thereof, the acquisitions of PSI shares by CSA Parties pursuant to the CSA were clearly made in violation of the SRC and its Rules. The subscription contracts, deeds of assignments and deeds of sale which the CSA Parties executed and entered into to effect such acquisitions were thus tainted with illegality and fraud for which reason, the nullification of the same pursuant to Section 71.2 of the SRC is warranted. The considerable number of violations made by CSA Parties in relation to their acquisitions of their respective PSI shares which they are indirectly beneficial owners of, justifies the nullification of all the PSI shares acquired pursuant to the CSA.

In *Cemco Holdings, Inc. v. National Life Company of the Philippines, Inc.*,[85] the Court recognized and upheld the exercise by the Commission of its powers under the SRC, thus:

> "In taking cognizance of respondent's complaint against petitioner and eventually rendering a judgment which ordered the latter to make a tender offer, the SEC was acting pursuant to Rule 19(13) of the Amended Implementing Rules and Regulations of the Securities Regulation Code, to wit:
>
> > 13. Violation
> >
> > **If there shall be violation of this Rule by pursuing a purchase of equity shares of a public company at threshold amounts without the required tender offer, the Commission, upon complaint, may nullify the said acquisition and direct the holding of a tender offer**. This shall be without prejudice to the imposition of other sanctions under the Code.
>
> The foregoing rule emanates from the SEC's power and authority to regulate, investigate or supervise the activities of persons to ensure compliance with the Securities Regulation Code, more specifically the provision on mandatory tender offer under Section 19 thereof.
>
> xxx xxx xxx
>
> The foregoing provision bestows upon the SEC the general adjudicative power which is implied from the express powers of the Commission or which is incidental to, or reasonably necessary to carry out, the performance of the administrative duties entrusted to it. As a regulatory agency, it has the incidental power to conduct hearings and render decisions fixing the rights and obligations of the parties. In fact, **to deprive the SEC of this power would render the agency inutile, because it would become powerless to regulate and implement the law**. As correctly held by the Court of Appeals:
>
> We are nonetheless convinced that the SEC has the competence to render the particular decision it made in this case. A definite inference may be drawn from the provisions of the SRC that **the SEC has the authority not only to investigate complaints of violations of the tender offer rule, but to adjudicate certain rights and obligations of the**

[85] G.R. No. 171815, August 7, 2007.

> **contending parties and grant appropriate reliefs in the exercise of its regulatory functions under the SRC**. Section 5.1 of the SRC allows a general grant of adjudicative powers to the SEC which may be implied from or are necessary or incidental to the carrying out of its express powers to achieve the objectives and purposes of the SRC. We must bear in mind in interpreting the powers and functions of the SEC that the law has made the SEC primarily a regulatory body with the incidental power to conduct administrative hearings and make decisions. A regulatory body like the SEC may conduct hearings in the exercise of its regulatory powers, and if the case involves violations or conflicts in connection with the performance of its regulatory functions, it will have the duty and authority to resolve the dispute for the best interests of the public." (Emphasis supplied)

Historically, prior to the enactment of the SRC, Supreme Court has confirmed that the Commission can nullify contracts that are violative of the Batas Pambansa Blg. 178 (Revised Securities Act).

In the early case of *Figueroa v. SEC*,[86] the issue posed was whether the Commission can declare null and void a contract entered into between Figueroa and Phil-Finance which was entered into when the latter was placed under receivership of Commission. Figueroa contended that such power and authority is reserved by law only to the regular courts and not to administrative bodies like the SEC. The Supreme Court however held that considering the irregularities attendant in the consummation of the said contract, the Commission, under Section 6 (d), sub-par (2) of PD 902-A, has the power to overrule or revoke previous acts of the management and in nullifying the contract that was entered into, thus:

> "Under paragraph 6(d), sub-par. (2) of P.D. No. 902-A, as amended, as above adverted to, the management committee or receiver may overrule or revoke previous acts of the management as it did in this case. Petitioner may not complain that she was denied due process. Even before the Bengzon Law Offices asked the respondent SEC to nullify the contract, the petitioner was informed of the infirmities in the said contract. Instead of justifying or explaining such infirmities, petitioner insisted that it is valid. And when respondent SEC adopted the resolution of August 19, 1986, thereby nullifying the contract, petitioner was afforded the opportunity to be heard when she filed a request for reconsideration which was duly considered by the SEC sitting en banc but the petition

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[86] G.R. No. 76627, (June 27, 1988).

> was denied and the nullification of the contract was upheld.
>
> What the law prohibits is not the absence of previous notice, but the absolute absence thereof and lack of opportunity to be heard. Where a party was given a chance to be heard with respect to his motion for reconsideration, there is sufficient compliance with the requirements of due process.
>
> **The Court, therefore, finds no grave abuse of discretion on the part of respondent SEC in nullifying the contract that was entered into in this case**." (Emphasis supplied)

Moreover, in *B.H. Chua Securities Corp. v. Sia-Uy*,[87] the Supreme Court also sustained the findings of the SEC En Banc that the transactions between the petitioner and private respondent are void pursuant to Section 53 (b)[88] in relation to Section 19 of the RSA when the private respondent acted as a salesman of securities without the necessary license. In such case, the investment contracts entered into by the parties were considered null and void, thus:

> "**We sustain the findings of the SEC En Banc that the transactions between petitioner and private respondent are void pursuant to Section 53 (b) in relation to Section 19 of the RSA**. Go acted as a salesman of securities without the necessary license as required by Section 19 of the RSA. **The CA correctly held that factual findings of quasi-judicial agencies like the SEC, which have acquired expertise because their jurisdiction is confined to specific matters, are generally accorded not only respect but at times even finality if such findings are supported by substantial evidence**.
>
> xxx xxx xxx
>
> More importantly, we rule that refund of the amounts invested by private respondent is a necessary consequence of the nullity of the Marginal Account executed between petitioner and private respondent. A void or inexistent contract has no force and effect from the very beginning. A

[87] G.R. No. 202485 (Notice), February 22, 2017.

[88] Section 53. Validity of Contracts. —
xxx xxx xxx
(b) Every contract made in violation of any provision of this Act or of any rule or regulation thereunder, and every contract, including any contract for listing a security on an exchange heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this Act, or any rule or regulation thereunder, shall be void: xxx xxx xxx"

> void contract is equivalent to nothing and is absolutely wanting in civil effects. Thus, if a void contract has already been performed, the restoration of what has been given is in order. This principle springs from Article 22 of the New Civil Code which states that "every person who through an act of performance by another, or any other means, acquires or comes into possession of something at the expense of the latter without just or legal ground, shall return the same x x x." Hence, the restitution of what each party has given is a consequence of a void and inexistent contract. The rule is settled that the declaration of nullity of a contract which is void ab initio operates to restore things to the state and condition in which they were found before its execution." (Emphasis supplied)

It bears emphasis that notwithstanding the overall repeal of the RSA by the enactment of the SRC, it can be construed that the principle behind Section 53(b) of the RSA is reenacted in Sec. 71.2 of the SRC. Consequently, it may be concluded that the authority of the SEC to declare a contract void whenever provisions in the SRC or of any rule or regulation are violated is **still in force**, as held in the jurisprudence aforementioned.

It is on the basis of the foregoing that the Commission is exercising the power to nullify the PSI shares acquired by the CSA Parties pursuant to the CSA.

5.2 The established principles on corporate governance and international best practices are recognized under the Revised Corporation Code as basis for the Commission's actions or decisions.

The Revised Corporation Code recognizes the importance of considering and adopting the best practices of company registrars and securities regulators in foreign jurisdictions as a strategy of improving productivity and competitiveness in the capital market, and as a tool in efficiently implementing the objectives of the law.[89] Consistent with the

[89] Section 179(d) of the RCC provides that "*The Commission shall have the power and authority to: xxx (d) Promote corporate governance and the protection of minority investors, through, among others, the issuance of rules and regulations consistent with international best practices*."

foregoing, the Commission took into consideration the policies and best practices of recognized regulators abroad in relation to takeovers.

In Southeast Asia, a number of jurisdictions have adopted a regulatory framework that recognizes that it is impracticable to devise rules in sufficient details to cover all circumstances that may arise in a takeover. Hence, their takeover codes require strict observance of the letter and spirit thereof, especially in circumstances not covered by any rules, demands good faith in the exercise of the rights of control and the provision to the shareholders of sufficient information, advice and time required to reach an informed decision on an offer.[90]

In Australia, the takeover rules[91] reflect and embody the policies, among others, that the acquisition of control of an entity which is subject of the takeover takes place in an efficient, competitive and informed market, and that the target shareholders are given reasonable time to consider a proposed acquisition, and are provided enough information to enable them to assess the merits of the proposal. To ensure that takeovers are conducted in accordance with the said principles, the Australian Takeovers Panel was given the power and authority to declare circumstances in relation to a takeover to be unacceptable and issue an order to ensure that the transaction proceeds as if the unacceptable circumstances have not occurred. One of the recognized unacceptable circumstance is misinformation, a circumstance where the directors and shareholders do not have or are deprived of the information necessary to make an informed decision or are misled about the relevant transaction. The powers of the Panel are broad enough that it is authorized to make a declaration of "unacceptable circumstances", even in circumstances where there is no express breach of the takeovers law, at the instance of Australian Securities

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[90] See (a) The Singapore Code on Take-overs and Mergers (https://www.mas.gov.sg/-/media/MAS/resource/sic/The_Singapore_Code_on_Take_Overs_and_Merger_24-January-2019.pdf?la=en&hash=8DCB4A29BF6DDA17527EC7E54A8CB5CFEDDAEE7D); (b) The Codes on Takeovers and Mergers and Shares Buy-back (https://www.sfc.hk/web/EN/assets/components/codes/files-current/web/codes/the-codes-on-takeovers-and-mergers-and-share-buy-backs/the-codes-on-takeovers-and-mergers-and-share-buy-backs.pdf); (c) Rules on Take-overs, Mergers and Compulsory Acquisition issued by the Securities Commission Malaysia (https://www.sc.com.my/api/documentms/download.ashx?id=72152df0-c094-4ff2-8e5c-989bcd667be5)

[91] See Part 5.1 and Chapter 6 of the Corporations Act of 2001.

and Investments Commission (ASIC) or any person whose interest is affected by the circumstance.[92]

The foregoing shows and affirms the importance and the primacy accorded to the principle of protecting the interests of investors/shareholders by ensuring that they are provided relevant information to enable them to arrive at an informed decision, one that is emphasized in our jurisdiction. More importantly, the foregoing affirms the practice of recognizing, respecting and implementing the spirit of the law in such circumstances. It is based on the equally important principle that what is expressly prohibited by law cannot be done indirectly in deference to the purpose and intent of the law. In the instant case, the CSA Parties made sure that the CSA which embodied their grand plan of taking control over PSI was concealed from the latter, its directors and shareholders to avoid complying with the MTO rules. What is more disturbing is the fact that this concealment which resulted in the directors and shareholders of PSI being defrauded, was capitalized by the CSA Parties who took advantage of the exemptions under the SRC to assert a position that they are not covered by the MTO rules. This is an "unacceptable circumstance" that warrants the voiding of the shares acquired pursuant to the CSA which is sanctioned by Section 71.2 of the SRC.

The Commission has consistently adopted the position that in relation to the performance of its mandate under the SRC, the exercise of its regulatory and administrative powers necessarily carry with it the power to penalize the regulated entity strictly in accordance with and more importantly, in proportion to the offense committed to ensure that the integrity of the market is not compromised and to afford full protection of investors.[93] This is the principle that justifies the nullification of the PSI shares that were acquired by the CSA Parties pursuant to the CSA, as well as the penalties that are imposed herein for violation of the relevant provisions of the SRC and its IRR.

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[92] *The Takeovers Panel and Takeovers Regulation in Australia*., Ian Ramsay, *Ed*., Melbourne University Press (2010).
[93] See Sumitomo Metal Mining Philippine Holdings Corporation vs CFD (SEC En Banc Case No. 07-11-241. October 10, 2017.

Moreover, lest it be forgotten, the parties who elevated the instant case by way of appeal have recognized and accepted the authority of the Commission to investigate, review and pass upon all matters covered in the instant case, even if the same was not formally presented as an issue. This is consistent with the doctrine in *United Coconut Planters Bank v. Sps. Uy*, citing the case of *Heirs of Alcaraz v. Republic of the Phils.*, where the Court categorically ruled that:

> "In any event, when petitioners interposed an appeal to the Court of Appeals, **the appealed case was thereby thrown wide open for review** by that court, **which is thus necessarily empowered to come out with a judgment as it thinks would be a just determination of the controversy**. Given this power, the **appellate court has the authority to either affirm, reverse or modify the appealed decision** of the trial court. **To withhold from the appellate court its power to render an entirely new decision would violate its power of review** and would, in effect, render it incapable of correcting patent errors committed by the lower courts."[94] (Emphasis supplied)

In filing their respective appeals, Dr. Bengzon, the CSA Parties and even the SHP presented the Adverse Resolution for review by the Commission En Banc who may "affirm, reverse or modify the decision, final order or resolution appealed from."[95]

With the nullification of the share acquisitions of the CSA Parties, the Commission finds it necessary and just to effect the following:

First, the Certificates of Filing of Amended Articles of Incorporation increasing the authorized capital stock of PSI on 26 September 2013 and 28 February 2014, and for the issuance of unissued shares on 10 October 2013 shall remain valid; however, the subscriptions Viva Holdings, Fountel and FAI from the said increase in authorized capital stock and the issuance of the unissued shares shall be cancelled for being void.

Second, the PSI shares acquired by Viva Holdings, Fountel and FAI which were held as void subscriptions shall be cancelled from the Stock

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[94] G.R. No. 204039, January 10, 2018.
[95] Section 3-12, Rule III of Part V of the 2016 Rules of Procedure of the Securities and Exchange Commission.

and Transfer Book (STB) of PSI where these shares shall be considered as unsubscribed, and shall be allocated for subscription by any person who intends to buy the same provided that he/she complies with all the legal requirements; and once the subscription is fully paid, PSI shall pay Viva Holdings, Fountel and FAI the price they paid for the subscriptions that were nullified.

Third, the shares acquired from Splash Corporation, San Miguel Corporation and Insular shall likewise be cancelled from the STB of PSI and shall revert to PSI as treasury shares which may be sold by PSI to any person who intends to buy the same provided that he/she complies with all the legal requirements; and once paid, PSI shall pay Viva Holdings, Fountel and FAI the price they paid for the shares purchases that were nullified.

The first and second directives are necessary consequences of the void subscriptions and will fully restore PSI to its position prior to the void subscriptions. The third directive on the other hand is anchored on Section 9 of the Revised Corporation Code which allows the acquisition by the issuing corporation of treasury shares through "some other lawful means" and may be disposed of for a reasonable price fixed by the Board.

In the meantime, pending completion of the foregoing directives, the shareholdings of Viva Holdings, Fountel and FAI that were nullified, including the PSI shares that were acquired from Splash Corporation, San Miguel Corporation and Insular, shall immediately be de-registered by the Corporate Secretary of PSI from the STB of the PSI; and upon de-registration of the same, Viva Holdings, Fountel and FAI shares (or their nominees, assignees or successors-in-interest) shall have no rights and the position held by a director-nominee of Viva Holdings, Fountel and FAI on the basis of those shares shall forthwith be deemed vacated.

The Commission finds it necessary and just to immediate implement and effect the foregoing directives to prevent further damage and economic loss to PSI and its shareholders brought about by the fraudulent acts and the violations committed by the CSA Parties.

The penalties imposed by the SHP in the Assailed Resolution are hereby affirmed.

WHEREFORE, premises considered, the Commission En Banc hereby DENIES the Appeal Memorandum filed by Fountel and FAI and GRANTS the Appeal Memorandum dated 10 December 2019 filed by Dr. Bengzon. The Resolution dated 22 November 2019 of the SHP is hereby AFFIRMED subject to the following MODIFICATIONS:

(1) Viva Holdings, Viva Healthcare, Fountel and FAI violated Rule 19.2.A in relation to 19.3.A and 19.3.B of the 2003 Amended IRR;
(2) Viva Holdings, Viva Healthcare, Fountel and FAI violated Section 19.2 of the SRC in relation to Rule 19.12 of the 2003 Amended IRR;
(3) Viva Holdings, Viva Healthcare, Fountel and FAI violated Section 26 of the SRC;
(4) Viva Holdings, Viva Healthcare, Fountel and FAI are hereby penalized as follows:
    (a) All of their share acquisitions in PSI beginning 1 August 2013 and onwards are null and void with immediate effect; and
    (b) Viva Holdings, Viva Healthcare, Fountel and FAI are solidarily liable for the penalty imposed in the Resolution of the SHP.
(5) With the nullification of the share acquisitions of the Offerors, the Commission finds it necessary and just to effect the following:
    (a) The Certificates of Filing of Amended Articles of Incorporation increasing the authorized capital stock of PSI on 26 September 2013 and 28 February 2014, and for the issuance of unissued shares on 10 October 2013 shall remain valid; however, the subscriptions Viva Holdings, Fountel and FAI from the said increase in authorized capital stock and the issuance of the unissued shares shall be cancelled for being void.
    (b) The PSI shares acquired by Viva Holdings, Fountel and FAI which were held as void subscriptions shall be

cancelled from the Stock and Transfer Book of PSI where these shares shall be considered as unsubscribed, and shall be allocated for subscription by any person who intends to buy the same provided that he/she complies with all the legal requirements; and once the subscription is fully paid, PSI shall pay Viva Holdings, Fountel and FAI the price they paid for the subscriptions that were nullified.

(c) The shares acquired from Splash Corporation, San Miguel Corporation and Insular shall likewise be cancelled from the STB of PSI and shall revert to PSI as treasury shares which may be sold by PSI to any person who intends to buy the same provided that he/she complies with all the legal requirements; and once paid, PSI shall pay Viva Holdings, Fountel and FAI the price they paid for the the shares purchases that were nullified.

In order to give effect to the foregoing, the Office of the General Counsel of this Commission is hereby directed to immediately resolve SEC Case No. 07-18-470 relating to the conduct of meeting and the election of the members of the Board of Directors of PSI.

SO ORDERED.

Pasay City, 13 August 2020.

EMILIO B. AQUINO
Chairperson

EPHYRO LUIS B. AMATONG
Commissioner

JAVEY PAUL D. FRANCISCO
Commissioner

KELVIN LESTER K. LEE
Commissioner

KARLO S. BELLO
Commissioner