Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Building, EDSA, Greenhills, Mandaluyong City

OMICO CORPORATION,
Petitioner,

-versus-

SEC *En Banc* Case No. 11-08-150
SEC-CFD Case No. 2008-03

HON. DIRECTOR JUSTINA F. CALLANGAN,
in her capacity as Director of the Corporation
Finance Department, and ASTRA SECURITIES
CORPORATION,
Respondents.
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DECISION

Before us is a Petition for Review on Certiorari, dated 5 December 2008, filed by petitioner Omico Corporation (Omico) on even date questioning the force and effect of the Cease and Desist Order (CDO) issued by the then Corporate Finance Department[1] (CFD) on 30 October 2008 finding that:

> "There being a prima facie evidence that there is a violation of SRC Rule 20(11)(b)(xviii), which prohibits brokers/dealers from giving any proxy, consent or authorization, in respect of any security carried for the account of a customer, without the express written authorization of such customer, and SRC Rule 20 (2)(B)(ii)(b) with regard to proxy solicitation, respondents OMCO CORPORATION, EMILIO S. TENG, JUANA LOURDES M. BUYSON and MA. ELENA ALQUEZA, in their capacity as members of the Board of Inspectors and TOMMY KIN HING TIA, are hereby ordered to immediately CEASE AND DESIST from accepting and including all the objected proxies issued in favor of Tommy Kin Hing Tia, in determining the quorum and in electing the members of the board of directors during the annual meeting of stockholders of Omico set on 03 November 2008 meeting before the issues relating to the violation of proxies are resolved, to prevent grave and irreparable injury or prejudice to the investing public."

As culled from the records, the facts and proceedings are as follows:

Omico is a company whose shares of stock are listed and traded in the Philippine Stock Exchange, Inc.

Private respondent Astra Securities Corporation (Astra) is one of the stockholders of Omico owning about 18% of the latter's outstanding capital stock.

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[1] Now, Corporate Governance and Finance Department.

Based on Section 1, Article II of Omico's Amended By-Laws, the regular annual meeting of its stockholders shall be held on the last Friday of May of each year. Accordingly, Omico scheduled the 2008 Annual Stockholders' Meeting on 30 May 2008. However, due to lack of quorum the meeting was adjourned.

On 22 August 2008, Omico's Board of Directors approved the setting of the date for the adjourned meeting to 3 November 2008. It set the deadline for submission of proxies on 23 October 2008 and the validation of proxies on 25 October 2008.

Astra objected to the validation of the proxies issued in favor of Tommy Kin Hing Tia (Tia), representing 38% of the outstanding capital stock of Omico. Astra also objected to the inclusion of the proxies issued in favor of Tia and/or Martin Buncio, representing about 2% of the outstanding capital stock of Omico.

Despite the objections of Astra, Omico's Board of Inspectors declared that the proxies issued in favor of Tia were valid.

Thus, due to alleged irregularities during the proxy validation, Astra, on 27 October 2008, filed the complaint before the CFD praying for the (1) invalidation of all the proxies issued in favor of Tommy Kin Hing Tia (Tia), (2) imposition of administrative sanctions against Tia, (3) resolution of the issues relating to the validation of proxies prior to the canvasing of votes for purposes of determining a quorum in the 3 November 2008 meeting, and, (4) issuance of a CDO, enjoining Omico from holding of Omico's Annual Stockholders' Meeting until the Commission had resolved the issues pertaining to the validation of proxies. The complaint was docketed as SEC-CFD Case No. 2008-03.

On 30 October 2008, the Commission issued the assailed CDO enjoining Omico from accepting and including the questioned proxies in determining a quorum and in electing the members of the board of directors during the annual stockholders' meeting on 3 November 2008.

Attempts to serve the CDO on 3 November 2008 failed, and the stockholders meeting proceeded as scheduled with 52.3% of the outstanding capital stock of Omico present in person or by proxy. The nominees for the board of directors were elected upon motion.

Subsequently, various cases were filed by the parties against each other as a result of the issuance of the CDO, as well as the holding of the reconvened stockholders meeting and election contest.

On 5 November 2008, Astra instituted before the Commission a *Complaint for Indirect Contempt*[2] against Omico for disobedience of the CDO. On 18 November 2008, Astra also filed an *Election Contest*[3] against Omico with the Regional Trial Court of Pasig City, Branch 158.

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[2] SEC En Banc Case No. 11-08-147

[3] SEC Case No. 08-111

On the other hand, 12 November 2008, Omico filed before the Court of Appeals (CA) a *Petition for Certiorari and Prohibition*[4] imputing grave abuse of discretion on the part of the Commission for issuing the CDO. Omico asked the CA to enjoin the Commission from implementing and enforcing the questioned CDO. Omico also prayed that the CA prohibit the Commission form acting on or taking cognizance of any and all orders and proceeding in SEC-CFD Case No. 2008-03, such as contempt proceedings and imposition of penalties, for being null and void. The petition was docketed as CA G.R. SP No. 106006.

Then, on 5 December 2008, Omico filed the instant Petition for Review on Certiorari with the Commission raising the sole issue of:

> "WHETHER OR NOT ONCE QUESTIONS ON THE FORCE AND EFFECT OF THE CEASE AND DESIST ORDER (CDO) DATED 30 OCTOBER 2008 ISSUED IN CONNECTION WITH SEC-CFD CASE NO. 2008-03 HAD BEEN ELEVATED TO THE COURT OF APPEALS, THE CORPORATION FINANCE DEPARTMENT, EFFECTIVELY LOST JURISDICTION TO ACT ON THE SAID CASE."

We now resolve the Petition.

On December 4, 2007, the Supreme Court issued A.M. No. 07-7-12-SC[5] amendeding Section 7, Rule 65 of the Rules of Court, among others, which now provides:

> "Sec. 7. Expediting proceedings; injunctive relief. The court in which the petition is filed may issue orders expediting the proceedings, and it may also grant a temporary restraining order or a writ of preliminary injunction for the preservation of the rights of the parties pending such proceedings. **<u>The petition shall not interrupt the course of the principal case, unless a temporary restraining order or a writ of preliminary injunction has been issued, enjoining the public respondent from further proceeding with the case</u>**.
>
> <u>The public respondent shall proceed with the principal case within ten (10) days from the filing of a petition for certiorari with a higher court or tribunal, absent a temporary restraining order or a preliminary injunction, or upon its expiration</u>. Failure of the public respondent to proceed with the principal case may be a ground for an administrative charge."

From the foregoing, it is clear that Omico's mere filing of the Petition for Certiorari under Rule 65 of the Rules of Court does not divest the CFD of its jurisdiction over SEC-CFD CASE NO. 2008-03.

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[4] CA G.R. SP No. 106006
[5] Amendments to Rules 41, 45, 58 AND 65 of the Rules of Court,.

However, during the pendency of this case, the Supreme Court rendered its Decision[6], dated 22 October 2014, affirming the Decision of the Court of Appeals in CA G.R. SP No. 106006 and declaring that the issue raised therein was squarely answered by the Court when it promulgated *GSIS v. Court of Appeals, Rosete, et al.*[7], thus:

> "About a month after the CA issued the assailed Decision, this Court promulgated GSIS v. CA, which squarely answered the above issue in the negative.
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> In that case, we observed that Section 6(g) of Presidential Decree No. (P.D.) 902-A dated 11 March 1976 conferred on SEC the power "[to] pass upon the validity of the issuance and use of proxies and voting trust agreements for absent stockholders or members." Section 6, however, opens thus: "In order to effectively exercise such jurisdiction xxx." This opening clearly refers to the preceding Section 5. The Court pointed out therein that the power to pass upon the validity of proxies was merely incidental or ancillary to the powers conferred on the SEC under Section 5 of the same decree. With the passage of the SRC, the powers granted to SEC under Section 5 were withdrawn, together with the incidental and ancillary powers enumerated in Section 6.
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> While the regular courts now have the power to hear and decide cases involving controversies in the election of directors, it was not clear whether the SRC also transferred to these courts the incidental and ancillary powers of the SEC as enumerated in Section 6 of 'PD 902-A. Thus, in GSIS vs. CA, it was necessary for the Court to determine whether the action to invalidate the proxies was intimately tied to an election controversy. Hence, the Court pronounced:
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>> "xxx Evidently, the jurisdiction of the regular courts over so-called election contests or controversies under Section 5 (c) does not extend to every potential subject that may be voted on by shareholders, but only to the election of directors or trustees, in which stockholders are authorized to participate under Section 24 of the Corporation Code.
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>> xxx However, when proxies are solicited in relation to the election of corporate directors, the resulting controversy, even if it ostensibly raise the violation of the SEC rules on proxy solicitation, should be properly seen as an election controversy within the original and exclusive jurisdiction of the trial courts by virtue of Section 5.2 of the SRC in relation to Section 5(c) of Presidential Decree No. 902-A. "
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> xxx-----------xxx------------xxx
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> The Court explained that the power of the SEC to regulate proxies remains in place in instances when stockholders vote on matters other than the election of directors. The test is whether the controversy relates to such election. All matters

[6] SEC v. Court of Appeals, et al., G. R. No. 187802 and Astra Securities Corporation v. Omico Corporation, et al., G. R. No. 189014

[7] 603 SCRA 676, G.R. No. 183905, April 16, 2009.

affecting the manner and conduct of the election of directors are properly cognizable by the regular courts. Otherwise, these matters may be before the SEC for resolution based on the regulatory powers it exercises over corporations, partnerships and associations.

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Indeed, the validation of proxies in this case relates to the determination of the existence of a quorum. Nonetheless, it is a quorum for the election of the directors, and, as such, which requires the presence – in person or by proxy – of the owners of the majority of the outstanding capital stock of Omico. Also, the fact that there was no actual voting did not make the election any less so, especially since Astra had never denied that an election of directors took place."

On 25 February 2015, the Supreme Court resolved to deny with finality the Commission's Motion for Reconsideration of the Decision dated 22 October 2014.

In view of the foregoing pronouncements of the Supreme Court, the issue in the instant *Petition for Certiorari* questioning the force and effect of the assailed CDO issued by the Commission has become academic. The Supreme Court has already declared that the Commission lost jurisdiction over the instant case for being an election contest in relation to the election of directors cognizable by the regular commercial courts.

WHEREFORE, premises considered, the case is hereby deemed **CLOSED and TERMINATED** in view of the Supreme Court's decision in GR No. 187702, with the title "Securities and Exchange Commission vs. Court of Appeals, et al." and GR No. 189014, with the title "Astra Securities Corporation vs. Omico Corporation, et al".

SO ORDERED.

Mandaluyong City, Philippines; 21 September 2015.

TERESITA J. HERBOSA
Chairperson

MANUEL HUBERTO B. GAITE
Commissioner

ANTONIETA F. IBE*
Commissioner

EPHYRO LUIS B. AMATONG
Commissioner

BLAS JAMES G. VITERBO
Commissioner

* On Official Business