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

Office of the General Counsel

SEC-OGC Opinion No. 13-06
06 May 2013
Re: Filling-up of Vacancies in the Board of Trustees; Lack of Quorum

Atty. Jeremiah V. Villanueva
PEOPLE'S LAW OFFICE
Suite 511 Victoria Building,
11th Avenue, Caloocan City

Dear Sir;

This refers to your letter of 18 October 2012 inquiring about the authority of the three (3) remaining members of the Board of Trustees of Kabalikat para sa Maunlad na Buhay, Inc. (KMBI) to function legally and conduct the regular business of KMBI as well as to fill-up the vacancies of the Board.

According to KMBI's Articles of Incorporation and By-Laws, the Board of Trustees of KMBI shall consist of nine (9) members who shall serve for a fixed term of one (1) year. However, based on your representation, due to the resignation of five (5) of the trustees and the demise of another, KMBI's Board is currently composed of only three (3) trustees.

As to whether KMBI's three (3)-man Board can legally function and conduct the regular business of the corporation, of relevance is Section 25 of the Corporation Code which states that:

> *"Sec. 25. Corporate officers, quorum.*
>
> *xxx*
>
> *Unless the articles of incorporation or the by-laws provide for a greater majority, a majority of the number of directors or trustees as fixed in the articles of incorporation shall constitute a quorum for the transaction of corporate business, and every decision of at least a majority of the directors or trustees present at a meeting at which there is a quorum shall be valid as a corporate act, xxx"*

The general rule is well settled that the power of a board of directors is not suspended by vacancies in the board unless the number is reduced below a quorum, the rule being that **the number necessary to constitute a quorum** under a by-law which provides that a majority of the directors shall be necessary and sufficient to constitute a quorum, **is a majority of the entire board, notwithstanding there may be vacancies in the board at the time.**[1] (emphasis ours.)

[1] SEC Opinion dated 17 December 1986 addressed to the Asian Brothers Corporation.

Pursuant to said provision, of the nine (9)-member Board of Trustees of KMBI, the presence of five (5) members would be required for a majority. It becomes apparent, therefore, that the three (3) remaining members of the Board of Trustees of KMBI do not constitute the required quorum and, hence, have no authority to transact corporate business on behalf of the KMBI.

In this connection, the three (3) remaining members of the KMBI's Board of Trustees also do not have the authority to fill-up the vacancies of the said Board. Please note paragraph 1 of Section 29 of the Corporation Code which states as follows:

> *"Sec. 29.* **Vacancies in the office of director or trustee.** - *Any vacancy occurring in the board of directors or trustees other than by removal by the stockholders or members or by expiration of term, may be filled by the vote of at least a majority of the remaining directors or trustees, if still constituting a quorum; otherwise, said vacancies must be filled by the stockholders in a regular or special meeting called for that purpose. A director or trustee so elected to fill a vacancy shall be elected only or the unexpired term of his predecessor in office.xxx"*

Based on Section 29 as above-quoted, the remaining directors or trustees can fill-up the vacancies in the Board when: (1) such vacancies were occasioned by reasons other than the removal by the stockholders or trustees or by expiration of term; and (2) such remaining directors or trustees still constitute a quorum of the Board. These conditions must concur; otherwise, the filling-up of the vacancies must be done by the stockholders or members in a regular or special meeting called for the purpose.

In the case of KMBI, while the vacancies arose from the resignation of five (5) of its trustees and the death of one (1) more, still, the three (3) remaining trustees do not constitute a quorum and, hence, cannot fill-up the said vacancies. Therefore, only the second option provided in Section 29 of the Corporation Code shall apply in this instance (i.e. the stockholders or members shall fill-up the vacancy).

In the case *Tan v. Sycip,* G.R. No. 153468, issued on 17 August 2006, it was held that "[t]he phrase '*may be filled*' in Section 29 shows that the filling of vacancies in the board by the remaining directors or trustees constituting a quorum is merely permissive, not mandatory. Corporations, therefore, may choose how vacancies in their respective boards may be filled up -- either by the remaining directors constituting a quorum, or by the stockholders or members in a regular or special meeting called for the purpose."

The above-quoted ruling in *Tan v. Sycip* cannot be interpreted to mean that even in the absence of a quorum, the remaining directors or trustees can fill-up the vacancy. The phrase "may be filled" in Section 29 is, by the very language of the provision, premised on the two (2) conditions above-mentioned for the exercise by the remaining directors or trustees of their authority to fill-up the vacancy (i.e. that the vacancy is not by removal or by expiration of term and that there is still a quorum). Such that if these two (2) conditions are met, the permissiveness spoken of is triggered, meaning, the filling-up may be done by the remaining directors or trustees, or by the stockholders or members, especially so if the latter option is required by the By-Laws. On the other hand, absent any of these two (2) conditions, such as when the remaining directors or trustees do not constitute a quorum, then only the stockholders or members can fill-up the vacancies. This is the import of Section 29 when it says "otherwise, said vacancies must be filled by the stockholders xxx."

From the foregoing, considering that KMBI's three (3) remaining trustees do not constitute a quorum for the conduct of business and, hence, do not have the authority to fill-up the vacancies in the Board of Trustees, it is necessary for the members of KMBI to fill-up the vacancies through an election conducted during a membership meeting held for the said purpose.

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances.[2] If, upon further inquiry and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

Very truly yours,

CAMILO S. CORREA
General Counsel

[2] Paragraph 7, SEC Memorandum Circular No. 15, Series of 2003.