Republic of the Philippines
Department of Finance
Securities and Exchange Commission
COMMISSION EN BANC

ROGELIO M. FLORETE
Appellant,

- versus -

SEC En Banc Case No. 11-21-491
(SEC Case No. 02-13-402)

MARCELINO M. FLORETE, JR., and MARIA ELENA FLORETE - MUYCO,
Appellees.

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DECISION

Before the Commission is the *Memorandum of Appeal to Commission En Banc*[1] (the "Appeal") filed by Appellant Rogelio M. Florete on 12 May 2015 assailing the *Decision* dated 25 March 2015 (the "Assailed Decision") issued by the Office of the General Counsel (OGC) authorizing Appellee Marcelino M. Florete, Jr. to call the Annual Stockholders' Meeting of MARSAL & Co., Inc. for the purpose of electing its directors and officers and to preside therein, the dispositive portion of which, in part, reads:

> "**WHEREFORE**, premises considered, the instant petition is hereby **GRANTED.**
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> Petitioner MARCELINO M. FLORETE, JR. is hereby authorized to call the Annual Stockholders' Meeting of MARSAL & Co., Inc. for the purpose of electing the directors and officers of the corporation, among other things. For this purpose, MARCELINO M. FLORETE, JR. is ordered to send notices of said stockholders' meeting in accordance with the By-Laws of MARSAL & Co., Inc. He is likewise authorized to preside at such meeting until at least a majority of the stockholders present have chosen one of their number as presiding officer."

THE RELEVANT FACTS

MARSAL & Co., Inc. (MARSAL) is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, having been incorporated on 27 September 1966 under Registry No. 30496.

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[1] Dated 5 May 2015

The case stemmed from a *Petition*[2] filed on 15 February 2013 by the Appellees before the Commission's Iloilo Extension Office praying that an order be issued directing the calling of the stockholders' meeting of MARSAL pursuant to its By-laws and Sec. 50 of the Corporation Code. The *Petition* alleged, among others, that: (1) Petitioners are incorporators and stockholders of MARSAL; (2) the other incorporators and stockholders include their siblings, Rogelio M. Florete (Appellant herein), Teresita Florete-Menchavez, and their parents, Marcelino Florete, Sr. and Salome M. Florete, and (3) after the demise of their sister and parents, no stockholders' meetings and election of the officers of MARSAL were conducted.

On 8 April 2013, Appellant filed his *Answer*,[3] alleging among others, that: (1) he is the duly elected President and Chairman of the Board of Directors of MARSAL; (2) the meetings of the Board of Directors and stockholders of MARSAL were held in abeyance due to the number of cases filed by the appellees against him before the Regional trial Court (Branch 39) of Iloilo City; and (3) he interposes no objection if the Commission calls for and holds the meeting, and presides over the same, however, he, as Chairman and President, and not Marcelino M. Florete, Jr. should be made presider of the said meeting.

On 6 September 2013, Appellant filed a *Motion for Leave to Amend Answer with Counter-Petition*[4] (the Motion) which was denied during a preliminary conference held on 17 September 2013 on the ground that the motion is similar to a motion for leave to amend pleadings which is a prohibited pleading under the SEC Revised Rules of Procedure.

After the conduct of the Preliminary Conference and the filing by Appellees of their respective Memorandum, the OGC issued the *Assailed Decision* directing Appellee Marcelino, Jr. to call and initially preside over the stockholders' meeting of MARSAL.

On 5 May 2015, Appellant filed the instant *Appeal* therein arguing that the *Assailed Decision* directing appellee Marcelino M. Florete, Jr. to call and preside over the stockholders' meeting of MARSAL is improper. He claims that he is the proper person to call and preside over such meeting since he is the chief executive officer and chairman of the board of MARSAL.

On 12 May 2015, Appellees filed a *Motion to Dismiss and/or Reply Memorandum*[5] (the "Reply Memorandum") praying that the Appeal be dismissed on the ground that Appellant (a) failed to perfect his appeal

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[2] Dated 14 February 2013.
[3] Dated 1 April 2013.
[4] Dated 20 August 2013.
[5] Dated 12 May 2015.

considering that he did not pay the docket fees, (b) failed to submit a certification on non-forum shopping; (c) waived the relief that he should be authorized to call and preside at the meeting considering that he did not raise this defense in his *Answer,* and he should not be allowed to raise this matter for the first time on appeal; and (d) he was not denied of his right to due process.

On 18 May 2015, Appellant filed his *Opposition to Motion to Dismiss* therein alleging that his failure to pay the docket fees was not deliberate but merely due to his reliance on the rules of the Commission dated 1996 and 1999. Nevertheless, he insisted that upon being made aware of the 2003 rules of the Commission, he immediately rectified such omission by paying the docket fee through postal money order. Moreover, Appellant claimed that he has no intent to violate the rule on non-forum shopping as he has clearly stated that the same is an appeal from the decision of the OGC to the Commission En Banc.

On 27 May 2015, Appellees filed their *Reply (to Opposition to Motion to Dismiss)*[6] insisting that the appeal must be dismissed on the ground that the payment of docket fees is jurisdictional and mandatory to perfect an appeal and Appellant's failure to pay the same resulted in the Assailed Decision becoming final and executory. The Appellees maintained that Appellant's failure to file the docket fees constitutes inexcusable negligence considering that the 2006 Rules of Procedure was promulgated ten (10) years ago.

On 20 October 2015, the Commission issued a *Resolution* dismissing the *Appeal* on the ground that Appellant failed to pay the docket fees and file a certificate of non-forum shopping which resulted in the Appeal not having been perfected, and the Commission not having acquired jurisdiction over the same. The Commission however held that even if the Appeal was perfected, the OGC did not commit reversible error in directing that Petitioner Marcelino M. Florete, Jr. presides at the meeting because Section 50 of the Corporation does not provide that the Commission shall direct the chief executive officer and chairman of the company to preside at the meeting.

Aggrieved, Appellant filed a *Petition for Review* under Rule 43 of the Rules of Court before the Court of Appeals (CA) assailing this Commission's *Resolution* which dismissed his *Appeal.*

On 26 September 2017, the CA promulgated a Decision granting Appellant's *Petition for Review* after finding that Appellant did not deliberately intend to defraud the court [the Commission] in the payment of the docket fee as he immediately addressed the same by paying the docket fees via postal order. In a similar manner, the CA likewise found

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[6] Dated 22 May 2015.

that Appellant did not intend to disregard the Rules of the Commission and thus allowed him to cure such defect by directing the file of the certification against forum shopping. Considering the absence of proof that Appellant intended to defraud the government by his initial failure to pay the docket fees, the liberal application of the rules was applied by the CA. The CA then remanded the case to this Commission and directed it to resolve the same on the merits.

On 22 April 2019, Appellees filed their *Motion to Submit Case for Decision* therein manifesting that the CA Decision was appealed to the Supreme Court but was denied with finality in its *Resolution* dated 16 January 2019. Appellees thus pray that the remanded instant *Appeal* be deemed submitted for resolution and be resolved on the merits.

ISSUE

The sole issue presented to this Commission is whether Petitioner-Appellee, Marcelino M. Florete, Jr. can be authorized to call and preside at the Annual Stockholders' Meeting of MARSAL which is directed by the Commission.

RULING

In his Appeal, Appellant maintained that the *Assailed Decision* authorizing Marcelino, Jr. to call for and preside at the Annual Stockholders' Meeting of MARSAL is improper because the corporation has an existing CEO and Chairman of the Board of Directors in his person. Appellant is in effect saying that in implementing Section 50 of the Corporation Code, the Commission is bound to recognize the existing chairman and president of a corporation, and is obliged to direct him, and nobody else, to call and preside at the meeting.

Appellant's argument has no basis in law.

In the Assailed Decision, the OGC directed MARSAL to call a stockholder's meeting pursuant to the mandatory provisions of Section 50 of the Corporation Code after it found that MARSAL has not conducted/held a regular/annual meeting for many years.

Relative thereto, it should be emphasized at the outset that the fact of non-holding of meeting by MARSAL has been expressly admitted by the parties. Thus, in response to Appellees' allegation that MARSAL has not called and conducted a regular meeting and election after the demise of their parents and sister[7], Appellant expressly stated in his Answer that the meeting of the board and stockholders of MARSAL has been held in abeyance due to the pendency of the cases that were filed with the RTC,

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[7] See Par. 8 of the Petition

and that he is amenable that this Commission presides at the meeting that it will be calling in the exercise of its authority under the law[8].

Moreover, it bears emphasis that the admissions made by the parties are considered judicial admissions which established the fact that MARSAL has, for many years, not been complying with the mandatory provisions of Section 50 of the Corporation Code. In *Gonzales-Saldaña vs Niamatali*[9], the Supreme Court explained the legal effect of judicial admissions, to wit:

> "**A judicial admission is an admission, verbal or written, made by a party in the course of the proceedings in the same case, which dispenses with the need for proof with respect to the matter or fact admitted**. It may be contradicted only by showing that it was made through palpable mistake or that no such admission was made.
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> A party who judicially admits a fact cannot later challenge [the] fact as judicial admissions are a waiver of proof; production of evidence is dispensed with. **A judicial admission also removes an admitted fact from the field of controversy. Consequently, an admission made in the pleadings cannot be controverted by the party making such admission and is cannot be controverted by the party making such admission and is conclusive as to such party, and all proofs to the contrary or inconsistent therewith should be ignored, whether objection is interposed by the party or not. The allegations, statements or admissions contained in a pleading are conclusive as against the pleader**. A party cannot subsequently take a position contrary to or inconsistent with what was pleaded. (Emphasis supplied)

Given the foregoing, the only issue that this Commission will determine is whether Appellee, Marcelino M. Florete, Jr., can validly be directed to call and preside at the meeting of MARSAL.

Section 50 of the Corporation Code[10], provides:

> "Whenever, for any cause, there is no person authorized to call a meeting, the Securities and Exchange Commission, upon petition of a stockholder or member on a showing of good cause therefor, **may issue an order to the petitioning stockholder or member directing him to call a meeting of the corporation** by giving proper notice required by this Code or by the by-laws. **The petitioning stockholder or member shall preside thereat** until at least a majority of the stockholders or members present have chosen one of their number as presiding officer." (Emphasis and underscoring supplied)

The afore-quote provision categorically grants the Commission the power and authority to direct the calling of meeting if it determines that

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[8] See Par. 4 and the penultimate paragraph of the Answer
[9] G.R. No. 226587, November 21, 2018
[10] Batas Pambansa Bilang 68.

the persons authorized to call the meeting have been remiss in their obligation, and/or if the petitioning stockholder is able to show that there is good to cause for the same. This rule was affirmed in the case of *Philippine National Construction Corporation vs Pabion*[11], where the Supreme Court categorically recognized the authority of the Commission to compel corporations to call a meeting for purposes, among others, of conducting an election, thus:

> "Prescinding from the above premises, **it necessarily follows that SEC can compel PNCC to hold a stockholders' meeting for the purpose of electing members of the latter's board of directors. This is clearly provided for by Section 50 of the Corporation Code**, which we quote:
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> Sec. 50. *Regular and special meetings of stockholders or members.* — . . . Whenever, for any cause, there is no person authorized to call a meeting, the Securities and Exchange Commission, upon petition of a stockholder or member, and on the showing of good cause therefor, may issue an order to the petitioning stockholder or member directing him to call a meeting of the corporation by giving proper notice required by this Code or by the by-laws. The petitioning stockholder or member shall preside thereat until at least a majority of the stockholders or members present have chosen one of their member[s] as presiding officer.
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> As respondents point out, **the SEC's action is also justified by its regulatory and administrative powers to implement the Corporation Code, specifically to compel the PNCC to hold a stockholders' meeting for election purposes.**" (Emphasis supplied)

With the authority of the Commission to compel the holding of meetings by corporations having been established, the next question that We need to address is whether the Commission is required by law to designate only the chairman and president of a corporation.

Section 50 of the Corporation Code categorically provides the answer by saying that should the Commission issue an order directing the calling of meeting, the petitioning stockholder or member should be directed to call a meeting and to preside thereat until at least a majority of the stockholders or members present have chosen one of their number as presiding officer. Thus, contrary to the argument of Appellant, there is nothing in Section 50 of the Corporation Code that provides that the Commission is required to direct only the chairman and president of a corporation to call and preside at the meeting. The foregoing finds affirmation in *Bernas vs Cinco*[12], thus

> "The case would have been different if the petitioning stockholders went directly to the SEC and sought its assistance to call a special stockholders' meeting citing the previous refusal of the Corporate

[11] G.R. No. 131715, December 8, 1999
[12] G.R. Nos. 163356-57, July 10, 2015

> Secretary to call a meeting. Where there is an officer authorized to call a meeting and that officer refuses, fails, or neglects to call a meeting, **the SEC can assume jurisdiction and issue an order to the petitioning stockholder to call a meeting pursuant to its regulatory and administrative powers to implement the Corporation Code**." (Emphasis supplied)

The directive given to the Commission to direct the petitioning stockholder to call a meeting and preside thereat, Section 50 of the Corporation Code uses the word "shall" which means that the Commission is mandated to comply with the same. This rule was emphasized by the Supreme Court in *Abakada Guro Party List v. Ermita*[13], to wit:

> "No discretion would be exercised by the President. **Highlighting the absence of discretion is the fact that the word shall is used in the common proviso. The use of the word shall connotes a mandatory order. Its use in a statute denotes an imperative obligation and is inconsistent with the idea of discretion**. Where the law is clear and unambiguous, it must be taken to mean exactly what it says, and courts have no choice but to see to it that the mandate is obeyed." (Emphasis supplied)

On the basis of the foregoing disquisitions, the Commission hereby affirms the Assailed Decision, and directs Appellee Marcelino M. Florete, Jr. to call and preside over the stockholders' meeting of MARSAL, pursuant to the express provision of Section 50 of the Corporation Code.

WHEREFORE, premises considered, the Memorandum of Appeal to the Commission En Banc is hereby **DENIED**. The Decision dated 25 March 2015 of the OGC is hereby **AFFIRMED.** Petitioner-Appellee Marcelino M. Florete, Jr. is hereby directed to call the stockholders' meeting of MARSAL and to preside thereat until at least a majority of the stockholders present have chosen one of their number as presiding officer. For this purpose, Petitioner-Appellee Marcelino M. Florete, Jr. is ordered to send the notices of said stockholders' meeting in accordance with the By-Laws of MARSAL & Co., Inc.

SO ORDERED.

Pasay City, Philippines; 16 November 2021.

EMILIO B. AQUINO
Chairperson

[13] G.R. Nos. 168056, 168207, 168461, 168463 & 168730, [September 1, 2005]

EPHYRO LUIS B. AMATONG
Commissioner

JAVEY PAUL D. FRANCISCO
Commissioner

KELVIN LESTER K. LEE
Commissioner

KARLO S. BELLO
Commissioner