108022016002824

SECURITIES AND EXCHANGE COMMISSION

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Company Information

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Company Type	Stock Corporation

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COVER SHEET

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S.E.C. Registration Number

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(Company's Full Name)

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(Business Address : No. Street/City/Province)

Raymund S. Aquino
Contact Person

338-5599
Company Telephone Number

1	2

Month

3	1

Day

Fiscal Year

SEC Form 17-C
Reply to PSE request
FORM TYPE

Month of May
Annual Meeting

Secondary License Type, If Applicable

Dept. Requiring this Doc.

Amended Articles Number/Section

Total No. of Stockholders

Total Amount of Borrowings

Domestic

Foreign

To be accomplished by SEC Personnel concerned

File Number

LCU

Document I.D.

Cashier

STAMPS

SECURITIES AND EXCHANGE COMMISSION

SEC FORM 17-C

CURRENT REPORT UNDER SECTION 17
OF THE SECURITIES REGULATION CODE
AND SRC RULE 17.2(c) THEREUNDER

1. July 26, 2016
Date of Report (Date of earliest event reported)

2. SEC Identification Number 0000039121 3. BIR Tax Identification No. 000-141-527-000

4. PHILWEB CORPORATION
Exact name of issuer as specified in its charter

5. Philippines 6. (SEC Use Only)

Province, country or other jurisdiction of incorporation Industry Classification Code:

7. The Penthouse Alphaland Southgate Tower, 2258 Chino Roces cor EDSA, Makati City 1232
Address of principal office Postal Code

8. (+632) 338-5599
Issuer's telephone number, including area code

9. N/A
Former name or former address, if changed since last report

10. Securities registered pursuant to Sections 8 and 12 of the SRC or Sections 4 and 8 of the RSA

Title of Each Class	Number of Shares of Common Stock Outstanding
Common	1,435,451,680 (Exclusive of 81,380,938 shares in treasury) (Par value P1.00)

11. Indicate the item numbers reported herein:

Please see attached letter to PSE dated 26 July 2016.

SIGNATURES

Pursuant to the requirements of the Securities Regulation Code, the issuer has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

PHILWEB CORPORATION
Issuer

July 26, 2016
Date

RAYMUND S. AQUINO
Corporate Information Officer

philweb
CORPORATION

26 July 2016

The Philippine Stock Exchange, Inc.
3rd Floor, Philippine Stock Exchange Plaza
Ayala Triangle, Ayala Avenue
Makati City

Attention: **Ms. Janet A. Encarnacion**
OIC, Issuer Regulation Division

Ladies and Gentlemen:

We write in reply to your letter dated 26 July 2016 requesting PhilWeb Corporation (the "Company") to inform the Exchange what steps the Company has undertaken to comply with the SEC Decision in Case No. 03-15-367 entitled *Roberto V. Ongpin vs Enforcement and Investor Protection Department* (the "SEC Decision").

In reply to your request, please be informed that:

1. Mr. Ongpin received a copy of the SEC Decision on 15 July 2016 and on 22 July 2016 he timely filed a Petition for Review with Urgent Motion for issuance of a Temporary Restraining Order and Writ of Preliminary Injunction with the Court of Appeals to reverse, annul and set aside the SEC Decision. The Appeal is allowed under Section 70 of the Securities and Regulation Code ("SRC") which provides for judicial review of the orders of the SEC. Said section states:

   > SEC. 70. Judicial Review of Commission Orders. - Any person aggrieved by an order of the Commission may appeal the order to the Court of Appeals by petition for review in accordance with the pertinent provisions of the Rules of Court.

   A copy of the Petition for Review filed by Mr. Ongpin is attached to this letter.

2. We have been informed that the case was raffled yesterday by the Court of Appeals. As soon as they receive the *rollo* of the case, the Justices of the division

to which it was raffled will deliberate on the Urgent Motion for Issuance of a Temporary Restraining Order filed by Mr. Ongpin.

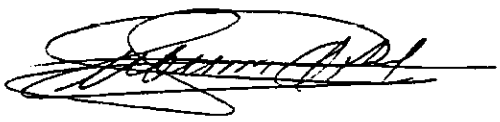
3. Thus, the Court of Appeals has not yet acted on the Urgent Motion for Temporary Restraining Order filed by Mr. Ongpin. Kindly take note of the rule on Judicial Courtesy, as pronounced by the Supreme Court in the case of *Eternal Gardens Memorial Park Corporation vs. CA*[1] which states:

> Although this Court did not issue any restraining order x x x upon learning of the petition, the appellate court should have refrained from ruling thereon because its jurisdiction was necessarily limited upon the filing of a petition for certiorari with this Court questioning the propriety of the issuance of the above-mentioned resolutions. Due respect for the Supreme Court and practical and ethical considerations should have prompted the appellate court to wait for the final determination of the petition before taking cognizance of the case and trying to render moot exactly what was before this court.

4. Thus, in deference to the Court of Appeals and in compliance with the Judicial Courtesy rule, the Company is constrained to wait for the "final determination of the petition" for review filed by Mr. Ongpin before acting on the SEC Decision. It must likewise be noted that the SEC Decision is not yet a final order because the law (Section 70 of the SRC) provides for an appeal to the Court of Appeals.

We trust that the above points sufficiently addressed your request for information.

Very truly yours,



Cliburn Anthony A. Orbe
Corporate Information Officer

[1] G.R. No. L-50054, August 17, 1988

REPUBLIC OF THE PHILIPPINES
COURT OF APPEALS
Manila

ROBERTO V. ONGPIN,
Petitioner,

-versus-

ENFORCEMENT AND INVESTOR PROTECTION DEPARTMENT of the Securities and Exchange Commission,
Respondent.
x----------x

146704

CA-G.R.No. _____

2016 JUL 22 PM 2:23

PETITION FOR REVIEW
(with Urgent *Ex Parte* Motion for issuance of a Temporary Restraining Order and Writ of Preliminary Injunction)

Petitioner ROBERTO V. ONGPIN ("ONGPIN"), by counsel, to this Honorable Court of Appeals, respectfully states:

I.
NATURE AND TIMELINESS OF THE PETITION

1.1 This is a Petition for Review under Rule 43 of the Rules of Court to reverse, annul and set aside the Decision[1] dated 08 July 2016 ("Assailed Decision") of the Securities and Exchange Commission *En Banc* ("SEC") in the case entitled *Roberto V. Ongpin vs. Enforcement and Investor Protection Department, SEC En Banc Case no. 03-15-367).*

1.2 Petitioner ONGPIN received a copy of the Assailed Decision on 15 July 2016. Under Section 4 of Rule 43 of the Rules of Court, petitioner ONGPIN has fifteen days from the said date of receipt, or until 30 July 2016, within which to file this Petition. Thus, this Petition is timely filed.

II.
PARTIES

1

2.1 Petitioner ONGPIN is a Filipino, of legal age, with business address at 5th Floor, Alphaland Makati Place, 7232 Ayala Avenue, Makati City, Philippines. He may be served with notices, orders, resolutions, processes, pleadings, motions and other papers through the undersigned counsel at its address indicated below.

2.2. Respondent Enforcement and Investor Protection Department ("EIPD") is an operating department of the Securities and Exchange Commission ("SEC"), whose functions involve, among others, the surveillance of the trading of securities in the exchanges and ensures compliance of market participants and intermediaries with Sections 24, 26 and 27 of the Securities Regulation Code and its Implementing Rules and Regulations, and the investigation, *motu proprio* or upon complaint or referral, of violations of the law and the rules and regulations of the Commission.

III.
STATEMENT OF THE FACTS

3.01. Petitioner ONGPIN had always believed that PHILEX was greatly undervalued.[2] Thus, in May 2007, he started accumulating PHILEX shares with the objective of later disposing them at a profit.[3]

3.02. On 26 June 2007, petitioner ONGPIN was elected to the Board of Directors of PHILEX on 26 June 2007. He served as and remained a director and officer (Vice Chairman and Chairman of the Executive Committee) of PHILEX until 7 December 2009.[4]

3.03. From an initial 16,773,460 PHILEX shares in 2007, petitioner ONGPIN's shareholdings in PHILEX, directly and through various companies that he beneficially owns, including Goldenmedia Corporation ("Goldenmedia"), gradually increased to 367,774,886 shares by 2009.[5]

3.04. Among these PHILEX shares were 45,964,500 PHILEX shares which Goldenmedia bought from the open market in various transactions on 2 December 2009, and are the subject of the Assailed Decision.[6]

3.05. Previously, on 12 September 2008, PHILEX disclosed to the Philippine Stock Exchange ("PSE") that it had "engaged in intensive negotiations with several foreign strategic investors for the sale of the

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[2] Par. 4 of the Answer dated 3 December 2014 (the "*Answer*"); a certified true copy of which is attached hereto and made integral part hereof as **Annex "B"**.
[3] Id.
[4] Par. 5 of the *Answer*.
[5] Par. 6 of the *Answer*, **Annex "B"** hereof.
[6] Id.

company's treasury shares which then comprised 20% of the issued shares of PHILEX."[7]

3.06. One of these "foreign investors" was First Pacific Company Ltd. ("First Pacific"), a Hong Kong-based investment holding company, of which Mr. Manny V. Pangilinan ("MVP") is the Managing Director and Chief Executive Officer.[8]

3.07. On 21 November 2008, *BusinessWorld* Online published a news article entitled "HK's First Pacific Co. to buy 20% of PHILEX" which stated, in part:[9]

> "... PHILEX Chairman and Chief Executive Officer Walter Brown said ... the transaction with First Pacific would be executed on the stock exchange on Nov. 28, and adding that the Hong Kong-based conglomerate could buy more shares. 'There is an agreement for them to buy more at a future date. *The next sta(g)e would be 30%, and then may be (sic) 40%*,' Mr. Brown said..."[10] Several other online media internet sites had run similar news stories,[11] each quoting Mr. Walter Brown's public statement that it was just a matter of time before First Pacific acquired anywhere from 30% to 40% of the outstanding shares of PHILEX."

3.08. On 28 November 2008, PHILEX informed the PSE that it had sold to First Pacific, through its designee Asia Link B.V., a corporation wholly-owned by First Pacific, 778,620,792 treasury shares, representing 20.06% of the total issued shares of PHILEX, at the price of Php7.92 per share, or for a total purchase price of Six Billion One Hundred Sixty-Six Million Six Hundred Seventy-Six Thousand Six Hundred Seventy-Two and 64/100 Pesos (Php 6,166,676,672.64).[12]

3.09. Consistent with Mr. Brown's public statement (which PHILEX publicly confirmed), First Pacific eventually increased its stake in PHILEX to 31.5%, or a total of One Billion Five Hundred Forty-Two Million Five Hundred Eighty-Nine Thousand Three Hundred Fifty-Two (1,542,589,352) common shares.[13] The increase in First Pacific's stake appears to have happened within a year after 28 November 2008, or any time before 28 November 2009.[14] Any reasonable investor would have known that First Pacific needed PHILEX shares comprising approximately 9% of the latter's total issued

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[7] Par. 7 of the *Answer*, **Annex "B"** hereof.
[8] Id.
[9] Annex "6" of the *Answer*, **Annex "B"** hereof.
[10] Underscoring supplied.
[11] ABS-CBN News and Inquirer.net published a new article from Reuters entitled "First Pac to buy 20% of PHILEX for $123M (http://www.abs-cbnnews.com/business/11/20/08/first-pac-buy-20-PHILEX-123m; http://business.inquirer.net/money/topstories/view/20081121-173479/First-Pacific-to-buy-20-of-PHILEX). Copy of the news article is attached hereto and made integral part hereof as Annex 6-A of the *Answer* **(Annex "B"** hereof).
[12] Annexes "7" and "7-A" of the *Answer* **(Annex "B"** hereof).
[13] Annexes "8" and "8-A" of the *Answer* **(Annex "B"** hereof).
[14] Id.

shares to reach its publicly announced goal of attaining a 40% stake therein.[15]

3.10. In August 2009, it was reported by the press that Ramon S. Ang of San Miguel Corporation was interested in acquiring a 22% stake in PHILEX.[16]

3.11. In a news article dated 19 August 2009, MVP was quoted as saying "[m]y understanding is that anywhere between 20 and 30 percent of shareholders can't be found. So the ability to acquire 51 percent would be limited unless we buy big blocks."[17] In the same news article, MVP reportedly made an offer to the Social Security System ("SSS"), also a shareholder of PHILEX at the time, for its block of shares, but was unfortunately turned down by the head of the said agency, Mr. Romulo Neri.[18]

3.12. On 6 November 2009, it was reported by the press that petitioner ONGPIN bought an additional 50 million shares of PHILEX "apparently in anticipation of a bidding war between (MVP) and (Ramon S. Ang)."[19]

3.13. On 16 November 2009, it was also reported by the press that "GSIS, together with the Ongpin Group, (was) trying to build up a strategic stake in anticipation of another battle royale."[20] On 20 November 2009, the foregoing matters were again reported in another news article.[21]

3.14. In late November 2009, the First Pacific approached petitioner ONGPIN, through his known business partner, Mr. Eric O. Recto, about the possibility of buying out petitioner ONGPIN's stake in PHILEX which, at the time, already comprised approximately 6.5% of the company.[22]

3.15. While negotiations between the parties continued over the next few days, no deal was struck between them.[23] On 1 December 2009 the parties tentatively agreed on a price of Php21.00 per share. However, they had no final and binding agreement on several material terms and conditions of the intended block sale, including: (a) the number of shares to be sold;

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[15] *Answer* (**Annex "B"** hereof), par. 15

[16] Doris Dumlao, Ang eyes 22% stake of SSS in PHILEX, 7 August 2009, available at http://business.inquirer.net/money/topstories/view/20090807-219084/Ang-eyes-22-stake-of-SSS-in-PHILEX

[17] Zinnia B. Dela Paz, *SSS can sell PHILEX stake to anyone – MVP*, 19 August 2009 12:00 A.M., *available at* http://www.philstar.com/business/496819/sss-can-sell-PHILEX-stake-anyone-mvp (*underscoring and emphasis supplied*)

[18] *Id.*

[19] Zinnia B. Dela Paz, *Ongpin group buys more PHILEX shares*, 6 November 2009 12:00A.M., *available at* http://www.philstar.com/business/520321/ongpin-group-buys-more-PHILEX-shares . *See also* Zinnia B. Dela Paz, *First Pacific keen on raising stake in PHILEX mining*, 13 November 2009 12:00 A.M., *available at* http://www.philstar.com/business/522421/first-pacific-keen-raising-stake-PHILEX-mining .

[20] Valentino Sy, *All in!*, 16 November 2009 12:00 A.M., *available at* http://www.philstar.com/business/523320/all (last accessed 22 May 2013).

[21] Mary Ann Ll. Reyes, *Ang hopes to bag SSS stake in PHILEX*, 20 November 2009 12:00 A.M., *available at* http://www.abs-cbnnews.com/business/11/19/09/ang-hopes-bag-sss-stake-PHILEX .

[22] *Answer* (**Annex "B"** hereof), par. 16

[23] Id., par. 17

(b) the manner and timing of payment; and (c) the manner and timing of the delivery of the shares.[24]

3.16. In the morning of 2 December 2009, petitioner ONGPIN, through Goldenmedia, acquired a total of 45,964,500 PHILEX shares from the open market at the then prevailing market price of Php19.25 to Php19.50 per share.[25]

3.17. In the evening of 2 December 2009, after extensive negotiations during the afternoon, the parties finally agreed on all the terms and conditions including the price, the manner and timing of payment, the manner and timing of the delivery of the shares and all the other terms and conditions of the block sale, and the deal between petitioner ONGPIN and First Pacific was finally signed that evening. Petitioner ONGPIN, Goldenmedia, Boerstar Corporation, Elkhound Resources, Inc.,[26] Development Bank of the Philippines[27] and Walter W. Brown (the "Sellers") entered into a *Share Purchase Agreement* ("SPA")[28] with Two Rivers Pacific Holdings Corporation ("Two Rivers"), an affiliate of First Pacific, for the sale to the latter of the Sellers' combined 9.24% stake in PHILEX, i.e., Four Hundred Fifty-Two Million Eighty-Eight Thousand One Hundred Sixty (452,088,160) shares, at Php21.00 per share. (hereinafter, the "Block Sale"). The 9.24% stake in PHILEX sold to Two Rivers is broken down as follows:

SELLERS	*No. of PHILEX Shares*
Roberto V. Ongpin	3,217,562
Boerstar Corporation	175,085,852
Goldenmedia Corporation	123,221,372
Elkhound Resources, Inc.	66,250,000
Development Bank of the Philippines	59,339,000
Walter W. Brown	24,974,374
TOTAL	452,088,160

3.18. The Block Sale to Two Rivers was crossed on 7 December 2009 through the PSE as a special block sale on even date.[29] After the sale to Two Rivers, First Pacific, true to its original well-publicized and publicly known plan, had finally acquired 40.7% of PHILEX, thus consolidating its effective control of the company.[30]

IV.
PROCEEDINGS *A QUO*

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[24] Id.
[25] Id., par. 18
[26] Boerstar Corporation and Elkhound Resources, Inc. are also companies beneficially-owned by petitioner ONGPIN
[27] *Answer* (**Annex "B"** hereof), par. 19; petitioner ONGPIN had invited DBP to join the intended block sale in order to complete the 9% stake that the *First Pacific* group intended to acquire
[28] Attached as Annex "10" of the *Answer* (Annex B hereof)
[29] *Answer* (**Annex "B"** hereof), par. 20
[30] Id.

A. PROCEEDINGS BEFORE RESPONDENT EIPD

4.1 In a Show Cause Order dated 12 November 2014[31], the Enforcement and Investor Protection Department ("EIPD") directed petitioner ONGPIN to show cause why no administrative sanctions should be imposed upon him for allegedly violating his fiduciary duty as director and for committing insider trading in violation of Section 27 (27.1) of the Securities Regulation Code. Although there were several personalities involved in the transaction between the sellers and the buyer, petitioner ONGPIN was singled out as the lone respondent in the *motu proprio* investigation conducted by the EIPD of the SEC thus revealing, even at the outset, the SEC's evident bias against petitioner ONGPIN. The said investigation was docketed as SEC-EIPD Case No. 14-3044, entitled *"In the matter of: PHILEX Mining Corporation"*.

4.2. Specifically, the EIPD accused petitioner ONGPIN of allegedly engaging in 174 counts of insider trading when he, through Goldenmedia Corporation ("Goldenmedia"), acquired a total of 45,964,500 shares of stock of PHILEX Mining Corporation ("PHILEX") from the open market in the morning of 02 December 2009 at the market price of either Php19.25 to Php19.50 per share without disclosing the fact that MVP earlier had tentatively agreed to buy PHILEX shares from petitioner ONGPIN at Php21.00 per share (although note that the other materials terms of the transaction had not yet been agreed).

4.2.1. In effect, what the EIPD wanted petitioner ONGPIN to do was to disclose the price MVP agreed to buy his PHILEX shares to the investing public before the start of trading on 2 December 2009. The EIPD conveniently disregarded the undeniable fact that before the start of trading on 2 December 2009, the agreement between petitioner ONGPIN and the subsidiary of First Pacific **was not yet finalized and signed**. It was finalized and signed only in the evening of 2 December 2009 long after trading was closed in the morning and only after difficult negotiations regarding the terms of the transaction.

4.2.2. As previously stated, there were other elements in the transaction that were not yet agreed upon in the morning of 2 December 2009 such as (a) the number of shares to be sold; (b) the manner and timing of payment; and (c) the manner and timing of the delivery of the shares. Needless to state, to disclose the selling price to the investing public before the deal closed is completely against the rules of disclosure because there is still a chance that the deal will not push through and the disclosing person will end up issuing a false statement to the investing public. This is the reason why parties to a transaction

[31] A certified true copy of the Show Cause Order dated 12 November 2014 is attached hereto and made integral part hereof as **Annex "C"**.

affecting a publicly listed company are required to disclose the terms of the transaction only after they are signed and not when negotiations are still ongoing. The SEC *En Banc* should have dismissed this case at the outset as it knows this elementary rule only too well.

4.2.3. It is also worth noting that as soon as the Share Purchase Agreement between the sellers and the buyer was signed in the evening of 2 December 2009, petitioner ONGPIN, in deference to the disclosure rules, stopped buying shares in the open market although the price of PHILEX shares dropped the day after the transaction and for a few days after.

4.4. Petitioner ONGPIN, in his Answer[32] dated 28 November 2014, denied the accusation with sufficient particularity by discussing that there was no way by which he could have engaged in insider trading:

4.4.1. Assuming for the sake of argument that: (1) the consensus between petitioner ONGPIN and the First Pacific group on the price of Php21.00 per share; and (2) the fact that the block sale would allow First Pacific to control PHILEX, were "material non-public information" when petitioner ONGPIN acquired PHILEX shares from the market in the morning of 2 December 2009, those trades still cannot be considered "insider trading" because petitioner ONGPIN did not obtain such information as a result of his insider relationship with PHILEX.

4.4.2. That on 1 December 2009, petitioner ONGPIN and the First Pacific group had settled on a tentative price of Php21.00 per share for their intended block sale although the other elements of the sale were not yet agreed, was not "material" information to the investing public or those who had sold PHILEX shares to petitioner ONGPIN in the morning of 2 December 2009.

4.4.3. That the block sale to TWO RIVERS would allow First Pacific to acquire up to a 40% stake in PHILEX and control the company was not "non-public information" when petitioner ONGPIN acquired PHILEX shares from the market in the morning of 2 December 2009.

4.5. Despite petitioner ONGPIN's meritorious defenses, the EIPD gave no merit to his Answer as it already prejudged petitioner ONGPIN, and accordingly issued an Order[33] dated 10 March 2015 finding him liable for insider trading.

4.6. The same Order directed petitioner ONGPIN to pay a fine in the amount of P17.4 Million and disqualified him from being an officer, member

[32] Annex "B" hereof.

[33] A certified true copy of the Order dated 10 March 2015 is attached hereto and made integral part hereof as **Annex "D"**.

of the Board of Directors, or person performing similar functions, of an issuer corporation. By reason of his disqualification, he was further directed to relinquish and/or resign from any and all positions he is presently holding as such officer or directors.

B. PROCEEDINGS BEFORE THE SEC *EN BANC*

4.7. Obviously aggrieved by the said Order, petitioner ONGPIN appealed to the SEC *En Banc* through a timely filed Memorandum on Appeal[34].

4.7.1. In his Memorandum on Appeal, petitioner ONGPIN argued, in addition to his other defenses, that the proceeding to hold him administratively liable for insider trading had already prescribed. Section 62.2 of the Securities Regulation Code ("SRC") clearly provides that: "(n)o action shall be maintained to enforce any liability created under any other provision of this Code[35] unless brought **within two (2) years after the discovery of the facts** constituting the cause of action x x x". When the EIPD issued its Show Cause Order on 28, November 2014, the action had already prescribed for almost 3 years already. More of this in the discussion on the first issue on page 10 hereof.

4.8. In an Order dated 29 September 2015 the SEC En Banc ordered petitioner ONGPIN and respondent EIPD to submit their respective Memorandum. In compliance with the Order of the SEC *En Banc*, petitioner ONGPIN submitted his Memorandum.[36] Respondent EIPD likewise submitted its Memorandum.[37] Thereafter, the matter was deemed submitted for decision.

4.9. On 8 July 2016, the SEC *En Banc* issued the Assailed Decision. The said Decision not only affirmed the findings of respondent EIPD but, worse, increased the fine to ten times what the EIPD imposed, from Php17.4 Million to Php174 Million, yet another indication of the clear bias of the SEC against petitioner ONGPIN, and retaining the disqualification.

4.10. Considering that a motion for reconsideration of the Assailed Decision is a prohibited pleading under the SEC Rules of Procedure[38], petitioner ONGPIN is elevating the matter to the Honorable Court by way of a Petition for Review under Rule 43 of the Rules of Court.

As will be discussed hereunder, contrary to the findings of the SEC, petitioner ONGPIN did not engage, and has never engaged in insider trading.

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[34] A copy of this Memorandum on Appeal is attached hereto and made integral part hereof as **Annex "E"**.
[35] Referring to **civil** liability under Sections 56 and 57 of the *SRC*
[36] A certified true copy of the Memorandum dated of petitioner ONGPIN is attached hereto and made integral part hereof as **Annex "F"**.
[37] A certified true copy of the Memorandum of respondent EIPD is attached hereto and made integral part hereof as **Annex "G"**.
[38] Section 3-7 of the SEC Rules of Procedure.

V.
ISSUES

Petitioner ONGPIN submits that the issues to be resolved in this Petition for Review are the following:

1.

WHETHER OR NOT THE ACTION TO HOLD ONGPIN ADMINISTRATIVELY LIABLE HAS ALREADY PRESCRIBED;

2.

WHETHER OR NOT PETITIONER ONGPIN COMMITTED INSIDER TRADING WHEN HE, THROUGH GOLDENMEDIA, PURCHASED PHILEX SHARES FROM THE OPEN MARKET AT P19.25 TO P19.50 PER SHARE ON 2 DECEMBER 2009;

3.

WHETHER OR NOT THE SEC *EN BANC's* IMPOSITION OF A Php 174 MILLION FINE IS VALID

VI.
DISCUSSION

Whether or not the action to hold Ongpin administratively liable has already prescribed

6.1. Section 62.2 of the Securities Regulation Code ("SRC") states that "(n)o action shall be maintained to enforce any liability created under any other provision of this Code[39] unless brought **within two (2) years after the discovery of the facts** constituting the cause of action and within five (5) years after such cause of action accrued."

6.2. The EIPD "**discovered**" the facts supposedly constituting the charge of insider trading in this case **as early as 2009**.

[39] Referring to **civil** liability under Sections 56 and 57 of the *SRC*

6.2.1. On 10 December **2009**, petitioner ONGPIN **disclosed** to the PSE that he had purchased 45,964,500 PHILEX shares from the open market.[40] In accordance with the twin disclosure rule a similar disclosure was likewise submitted to the SEC on 09 December 2009.[41]

6.2.2. On 1 June **2011**, petitioner ONGPIN's letter of even date to Ms. Lala Rimando of ABS-CBN was published on www.abscbnnews.com.[42] Petitioner ONGPIN's 1 June 2011 letter states that MVP first approached petitioner ONGPIN (through Eric Recto) on **30 November 2009**, and that petitioner ONGPIN and MVP "agreed on the price of Php21.00 and closed the transaction **a few days later.**" This is a clear indication that as early as 2011 the SEC already "discovered" the alleged insider trading.

6.2.3. On 13 October **2011**, petitioner ONGPIN issued a **press release** which stated, in part, that "(**a**)**fter two days** of negotiations, we settled at a price of Php 21 share." [43]

6.2.4. Finally, in petitioner ONGPIN's Joint Affidavit with Mr. Eric Recto dated 5 December **2011**, it was stated that Mr. Recto met with MVP in his office in the morning of **December 1st**, and after some discussions, which Mr. Recto cleared with petitioner ONGPIN by telephone, **the parties settled on a price of Php21 per share** (with the other elements such as the number of shares, the manner and timing of payment, and the manner and timing of the delivery of the shares still to be negotiated). [44]

6.3. Applying Section 62.2 of the *SRC*, prescription began to run **on 09 December 2009**, which is the date on which the SEC received a copy of petitioner ONGPIN's SEC Form 23-B. Thus, under Section 62.2 of the *SRC*, the EIPD had only **two years** from **9 December 2009**, or until **8 December 2011**, within which to enforce any so-called administrative liability for insider trading against petitioner ONGPIN.

6.4. Respondent EIPD issued its *Show Cause Order* only on **12 November 2014** or almost **3 years late**. It follows that petitioner ONGPIN **may no longer be held administratively liable** for so-called "insider" trading in relation to his purchase of PHILEX shares from the open market on 2 December 2009. Even if the reckoning period for prescription are the 2011 news reports and affidavits which the EIPD cited in its Show Cause

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[40] The EIPD itself made this finding on page 4 of its Show Cause Order (**Annex "C"** hereof) and on page 3 of the Order dated 10 March 2015 (**Annex "D"** hereof)

[41] A copy of petitioner ONGPIN's SEC Form 23-B dated 09 December **2009** which he submitted to the SEC to disclose that he had purchased 45,964,500 shares PHILEX shares is attached hereto and made integral part hereof as **Annex "H"**.

[42] The EIPD quoted part of the letter on page 7 of its Show Cause Order (**Annex "C"** hereof).

[43] The EIPD cited this press release on page 7 of its Show Cause Order (**Annex "C"** hereof).

[44] The EIPD cited the Joint Affidavit on page 8 of its Show Cause Order (**Annex "C"** hereof).

Order, the action to hold petitioner ONGPIN administratively liable would still be late by almost one year.

6.5. In its Assailed Decision, the SEC *En Banc* cited the Supreme Court case of *Citibank N.A and the Citigroup Private Bank v. Tanco-Gabaldon, et al*[45] (hereinafter referred to as "the *Citibank* case") to hold that the administrative action against petitioner ONGPIN has not yet prescribed. With all due respect to the SEC *En Banc,* a close scrutiny of the Supreme Court's ruling in that case would reveal that the said case is not applicable to this instant case because the said case tackled only the prescription of criminal action.

6.5.1. As the Supreme Court stated in the *Citibank* case: "The issues raised in these petitions are: (1) whether the criminal action for offenses punished under the SRC filed by the respondents against the petitioners has already prescribed; and (2) whether the filing of the action for the petitioner's administrative liability is barred by laches". *The issue of whether the administrative liability has prescribed was never raised in the Citibank case, only the criminal aspect.* It is axiomatic that the Supreme Court will only rule on the issues raised before it. In fact, any pronouncement by the Supreme Court on any issue not raised before it is a mere *Obiter Dictum* which is not authoritative.

6.5.2. The ruling in the *Citibank* case applies strictly to criminal liability. It would be the height of absurdity if the SRC were to be construed as not having specified a prescriptive period for administrative actions when it clearly provided such.

6.5.3. Thus, it is respectfully submitted that the *SEC En Banc* committed a serious error when it used *the Citibank case* as its basis for ruling that the administrative liability of petitioner ONGPIN has not yet prescribed. While it is clear that the criminal liability prescribes in 12 years, not two years, it is respectfully submitted that the administrative liability for violations of the SRC prescribes in two years after discovery as stated in section 62.2 of the SRC.

Whether or not Petitioner Ongpin Committed Insider Trading when he, through Goldenmedia, Purchased Philex shares from the open market at P19.25 to P19.50 per share on 2 December 2009

[45] G.R. 198444, 4 September 2013.

6.6 In its Assailed Decision, the SEC *En Banc* held that petitioner ONGPIN was administratively liable for insider trading because at the time of the subject transactions he obtained the following material information: (i) selling price in the amount of Php 21.00 to the subsidiary of First Pacific; and (ii) the resulting change in control over PHILEX on a definite date (i.e. 2 December 2009) as a consequence of the sale by appellant of his PHILEX shares to First Pacific[46]. Again, with all due respect to the SEC *En Banc*, it failed to consider the indubitable fact that in the morning of 2 December 2009 when the subject transactions occurred, the agreement between petitioner ONGPIN and the subsidiary of First Pacific **was not yet finalized and signed**.

6.6.1. It would have been clearly irresponsible for petitioner ONGPIN if he disclosed the "selling price" of Php 21.00 to the investing public before the start of trading on 2 December 2009 because the purchase by the subsidiary of First Pacific and petitioner ONGPIN was not yet final. Until all the terms and conditions for the purchase of the said shares were finalized, both parties – petitioner ONGPIN and MVP for First Pacific – can still walk away from the negotiating table and cancel the proposed deal. Needless to state, to disclose the selling price to the investing public before the deal closes is completely against the rules of disclosure because there is still a chance that the deal will not push through and the disclosing person will end up issuing a false statement to the investing public. This is the reason why parties to a transaction affecting a publicly listed company are required to disclose the terms of the transaction only after they are signed and not when the negotiations are still ongoing. To emphasize: the SEC *En Banc* should have dismissed this proceeding at the outset as it knows this elementary rule only too well.

6.7. Furthermore, it must likewise be emphasized that when petitioner ONGPIN bought PHILEX shares on 2 December 2009, he bought them from the open market and not from a specific group of sellers. He did not know the sellers he bought the shares from. He was merely exercising his basic right to freely buy and sell shares in the market. He bought the shares at the price they were being freely traded at the stock exchange.

6.8. Going to the elements of Insider Trading, Section 27.1 of the SRC provides:

"SEC. 27. Insider's Duty to Disclose When Trading. - 27.1. It shall be unlawful for an insider to sell or buy a security of the issuer, while in possession of material information with respect to the issuer or the security that is not generally available to the public, unless: (a) The insider proves that the information was not gained from such relationship; or (b) If the other party selling to or buying from the insider (or his agent) is identified, the insider

[46] **Annex "A" hereof, par. 2, page 13.**

proves: (i) that he disclosed the information to the other party, or (ii) that he had reason to believe that the other party otherwise is also in possession of the information. A purchase or sale of a security of the issuer made by an insider defined in Subsection 3.8, or such insider's spouse or relatives by affinity or consanguinity within the second degree, legitimate or common-law, shall be presumed to have been effected while in possession of material non-public information if transacted after such information came into existence but prior to dissemination of such information to the public and the lapse of a reasonable time for the market to absorb such information: Provided, however, That this presumption shall be rebutted upon a showing by the purchaser or seller that he was not aware of the material non-public information at the time of the purchase or sale."

6.9. The elements of insider trading under Section 27.1 of the SRC are:

1. An insider buys or sells a security of the issuer;
2. While in possession of material information;
3. The material information is with respect to the issuer or the security; and
4. Such information is not generally available to the public.[47]

6.10. Save for the 1st element, all the elements of insider trading are absent in Subject Transaction. Even then, as will be discussed below, petitioner ONGPIN's being an insider was neither relevant nor material to the transaction subject of this case.

Petitioner ONGPIN was not in possession of material information that was not available to the public.

6.11. Information is considered "material nonpublic" if (a) it has not been generally disclosed to the public and would likely affect the market price of the security after being disseminated to the public and the lapse of a reasonable time for the market to absorb the information; or (b) would be considered by a reasonable person important under the circumstances in determining his course of action whether to buy, sell or hold a security.[48]

6.12. The SEC ruled that petitioner ONGPIN was in possession of a material nonpublic information by reason of his knowledge of First Pacific's offer to buy the PHILEX shares at P21.00 per share when he bought them from the open market at only P19.25 to 19.50.

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[47] Section 27.1, Securities Regulation Code of the Philippines ("SRC")
[48] Section 27.2, SRC.

6.13. With due respect, the SEC was gravely mistaken. When petitioner ONGPIN purchased the PHILEX shares from the open market, the P21.00 purchase price, together with the significant terms thereof, were yet to be finalized. Thus, it would have been premature for petitioner ONGPIN to disclose such fact to the public as the Share Purchase Agreement has yet to be perfected.

6.13.1. The SRC did not define the meaning of "information". In the absence of a statutory definition, the word may be defined in its ordinary meaning. According to Merriam-Webster dictionary, information means "facts or details about a subject". Fact, on the other hand, is defined as "the truth about events as opposed to interpretation". Can the selling price be considered a matter of fact even before the final agreement for the sale of the thing is finalized and signed? Can there be a truth about an event if the event has not yet taken place? In both questions the answer is NO.

6.13.2. Thus, it is respectfully submitted that in the morning of 2 December 2009, there was still no information about the sale to begin with, because the sale was finalized and signed only in the evening thereof. Until the price became a matter of fact by the signing of the Share Purchase Agreement, the tentative price of Php21.00 can only be classified as a rumor, and the SEC will definitely agree that rumors are not disclosable. Neither can it be considered as "information" much more "material information".

6.14. Thus, in view of the foregoing petitioner ONGPIN was not in possession of material and nonpublic information when he purchased the PHILEX shares.

The information does not pertain to the security or issuer.

6.15. Even assuming *arguendo* that the tentative price of Php 21.00 in the morning of 2 December 2009 can be considered "information" or even "material information", still petitioner ONGPIN is not liable for insider trading because the so-called "material information" does not pertain to the security or issuer. "Material information" has been defined as information that pertains to "corporate information" or "information relating to the intrinsic value of the issuer, primarily its business and operations."[49] By using the information for his personal gain, the insider effectively misappropriates property belonging to the corporation.[50]

6.15.1. To illustrate: if, while performing his function as a director and insider of PHILEX, petitioner ONGPIN came across information pertaining to the company's discovery of a new gold mine site, and

[49] Frank P. Luberti, Jr., *An Outsider Looks at Insider Trading: Chiarella, Dirks and the Duty to Disclose Material NonPublic Information*, 777, 781 Fordham Urban L. J. Vol. XII (1984) (*citations omitted*).
[50] Id.

before PHILEX disclosed the said discovery he began to buy PHILEX shares in the open market, then without a doubt he would be liable for insider trading.

6.15.2. However, in the instant case the "information" subject of this insider trading case is not about PHILEX. It's not about its operation, its financial results, or any other item which petitioner ONGPIN obtained in the course of his service as a director of the company. Therefore this insider trading case must fail because the information subject of this case does not pertain to the security or the issuer.

6.16. In the *Matter of Cady, Roberts & Co.*,[51] the U.S. Supreme Court stated:

> In the United States, the rule has been stated as "that anyone who, for trading for his own account in the securities of a corporation has 'access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone' may not take 'advantage of such information knowing it is unavailable to those with whom he is dealing', *i.e.*, the investing public."[52]

6.17. In *SEC vs. Interport Resources Corporation*,[53] the Supreme Court held that an insider's "duty to disclose or abstain is based on two factors: first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone; and second, the inherent unfairness involved when a party takes advantage of such information knowing it is unavailable to those with whom he is dealing."[54]

6.18. The possible consequences of trading on the information, i.e., that First Pacific would gain control of PHILEX or that there would be a "significant impact on the price," are immaterial in determining whether information is, indeed, "available only for a corporate purpose." This phrase signifies that the information relates to the "intrinsic value" of the company and its "business and operations;" it is the type of information that emanates from within the corporation and is "not for the personal benefit of anyone." The information "belongs" to the corporation and is "misappropriated" by the insider. The "misappropriation" results in a breach of the insider's fiduciary duty to the source of the information (i.e., the corporation).

6.19. The information on the intended *Block Sale* did not relate to the intrinsic value of PHILEX. It likewise could not be considered "corporate information" or "information relating primarily to (PHILEX's) business or operations." The information on the negotiations and transactions between

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[51] 40 SEC 907, 912 (1961)(cited in *Texas Gulf Sulpher Co.*, 401 F.2d 833 (2d Cir. 1968))
[52] Underscoring supplied
[53] G.R. No. 135808, 6 October 2008.
[54] *Citations omitted.*

petitioner ONGPIN and the First Pacific group obviously did not originate or emanate from PHILEX; it was not proprietary information owned by or belonging to PHILEX. PHILEX did not generate or create that information. Even respondent EIPD found that the information "did not emanate internally from PHILEX."[55] Neither was it information from a third person in respect of the business operations of PHILEX, such as a new governmental regulation or action, such as a fine on one of its mines, or opening up the industry or totally prohibiting mining activities.

6.20. The information was simply the result of negotiations between two businessmen. That is why, as found by the SEC in the Assailed Decision, the price of P21.00 was the result of the private agreement between petitioner ONGPIN and MVP. The discussions between petitioner ONGPIN and the First Pacific group were never discussed in any meeting of the PHILEX Board or any of its committees. This was precisely because the negotiations did not concern the corporate affairs of PHILEX, or the corporate benefit that would come to PHILEX; they related solely to the personal benefit of two shareholders negotiating with one another. If petitioner ONGPIN's information pertained to PHILEX itself – such as a newly discovered mine or an imminent acquisition of a subsidiary – then such information could rightfully be considered "information available only for a corporate purpose."

6.21. Equally important is the fact that the agreement on the price was "intended" solely for the benefit of petitioner ONGPIN and the First Pacific group and not for anyone else.[56] This alone negates any possibility that the information was "intended to be available only for a corporate purpose." In a news article dated 19 August 2009, MVP himself said that "anywhere between 20 and 30 percent of shareholders can't be found. So the ability to acquire 51 percent would be limited unless we buy big blocks."[57] The First Pacific group thus chose to deal with petitioner ONGPIN and his group who were able to assemble the balance of PHILEX shares needed by the First Pacific group to gain control of PHILEX.

6.22. Because the information on the intended *Block Sale* did not "belong" to, or was not "sourced" from, PHILEX, petitioner ONGPIN could not possibly have "misappropriated" said information from the company, and neither could petitioner ONGPIN have "breached" any so-called insider "fiduciary duty" to PHILEX. Therefore, it was grave error for respondent

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[55] **Annex "D"** hereof, page 18; Emphasis supplied.

[56] "The test for determining who is an "insider" requires considerations of two elements: first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone; and second, the inherent unfairness involved where a party takes advantage of such information knowing it to be unavailable to those with whom he is dealing. It has been said, however, that the Rule does not make mere "access" to insider information sufficient, in that it speaks of a "relationship giving access" to such information."(SEC vs. Interport Resources Corporation, G.R. No. 135808, 6 October 2008, citing In the matter of Cady, Roberts & Co., 40 SEC 907, File No. 8-3925, 8 November 1961).

[57] Zinnia B. Dela Paz, *SSS can sell PHILEX stake to anyone – MVP*, 19 August 2009 12:00 A.M., *available at*http://www.philstar.com/business/496819/sss-can-sell-PHILEX-stake-anyone-mvp . (*underscoring and emphasis supplied*)

EIPD to rule that the information relating to the intended *Block Sale* (including the consensus on the Php21.00 price and the fact that the transaction, if concluded, would allow the First Pacific group to control PHILEX) was "available only for a corporate purpose."

6.23. Adding the supposed change in PHILEX's management as a result of the deal between petitioner ONGPIN and MVP is facetious, to say the least. Before and after the completion of the deal, MVP and First Pacific have been in full control of the management of PHILEX. There was no change in management control; MVP merely consolidated his control.

Petitioner ONGPIN did not gain the information from his relationship with PHILEX as its director and officer.

6.24. Under Section 27.1 of the SRC, petitioner ONGPIN cannot be held liable for insider trading if he "proves that the information (which he was in possession of when he traded) was not gained from (his insider) relationship" with PHILEX.

6.25. In *SEC vs. Interport Resources Corporation,*[58] the Supreme Court held that an insider's "duty to disclose or abstain is based on two factors: first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone; and second, the inherent unfairness involved when a party takes advantage of such information knowing it is unavailable to those with whom he is dealing."[59]

6.26. An "insider" is defined under Section 3.8(c), of the SRC as "a person whose relationship or former relationship to the issuer gives or gave him access to material information about the issuer or the security that is not generally available to the public."

6.27. The U.S. Supreme Court, in *Chiarella* vs. *United States,*[60] held that the "disclose or abstain" rule in insider trading is premised on the relationship of trust and confidence between the parties.[61]

6.28. There is no dispute that petitioner ONGPIN was an "insider" of PHILEX on 2 December 2009. However, under Section 3.8 of the SRC,

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[58] G.R. No. 135808, 6 October 2008.
[59] *Citations omitted.*
[60] 445 U.S. 222 (1980).
[61] See also, Deborah DeMott, Agency Principles and Large Block Shareholders, Cardozo Law Review, Vol. 19. P. 321 (1997): "Present law does not oblige a large block holder to act as agent on behalf of other shareholders—that is, to take action that furthers other shareholders' interest in preference to its own. x xx. Legal norms presently applicable to shareholding contemplate actors free to act in individualized ways, each attempting to advance its own interests as best as it can. Shareholders conventionally are not each others' agents. They owe no duty to one another in determining whether to buy or sell stock, or in exercising their rights to participate in corporate governance by voting to elect directors or to approve or disapprove fundamental transactions." (at 323, 325)

petitioner ONGPIN was an "insider" of PHILEX only because, as of 2 December 2009, he was a director and officer of the company.

6.29. Did petitioner ONGPIN "gain" the "information" (regarding the tentative price of Php21.00 per share for the intended *Block Sale*; and [b] on the fact that, if the *Block Sale* pushed through, it would allow First Pacific to control PHILEX), from his relationship to PHILEX as its director officer? The answer is "no."

6.30. First Pacific did not approach petitioner ONGPIN because he was a director or officer of PHILEX. Rather, petitioner ONGPIN was approached because he held a 6.5% stake (but not a controlling stake) in the company. Stated otherwise, petitioner ONGPIN would not have been approached even if he was a director, if he had only an insignificant number of PHILEX shares. Even respondent EIPD confirmed that MVP was particularly interested in petitioner ONGPIN's block of PHILEX shares, to wit:[62]

> "The genesis of the Share Purchase Agreement apparently began when (MVP) approached petitioner ONGPIN's business partner (and a director of PHILEX) Eric Recto expressing interest in First Pacific acquiring (petitioner ONGPIN's) bulk PHILEX shares. The reason why (MVP) was interested in this particular block of shares is readily apparent. Given the special circumstances that 30% of PHILEX shareholders were unaccounted for, (petitioner ONGPIN's) shareholdings, amounting to roughly 6.5% stake and equivalent to two (2) seats on the Board of Directors would be sufficient for (MVP) to gain majority control of PHILEX. x x x"[63]

6.31. MVP and the First Pacific group did not care about petitioner ONGPIN's corporate positions in PHILEX, and they would have approached petitioner ONGPIN whether or not he was a director or Vice-Chairman of the company. What mattered to First Pacific was petitioner ONGPIN's stake in PHILEX, not that petitioner ONGPIN was an insider of PHILEX.

6.32. The truth is that petitioner ONGPIN, together with the other sellers and MVP, merely tentatively agreed on the price of Php21.00 per share for the *Block Sale*, in their capacity as sellers of the PHILEX shares subject of the sale, and as a result of the negotiations that lead to that *Block Sale*. Respondent EIPD, however, insists that "even information that is 'created' by the parties may be considered as insider information," "(a)s set forth in the case of U.S. v. Carpenter, a case involving the use of positive and negative information about stocks gained from interview of various corporate officer by the writer of the business column 'Heard on the Street.'"[64]

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[62] **Annex "D" hereof, pages 16 to 17.**
[63] **Underscoring supplied**
[64] **Annex "D" hereof, page 17. Emphasis supplied.**

U.S. vs. Carpenter[65] does not apply because it did not involve insider trading. The case involved certain mail and wire fraud statutes in the U.S. and concerned the illegal use of "confidential business information" (not "insider" information). Moreover, the information in the *Carpenter* case was not created, but simply derived from "interviews of various corporate officers."

6.33. All told, whatever "information" petitioner ONGPIN acquired as result of his dealings with MVP and the First Pacific group (including the tentative Php21.00 per share selling price), was not "gained" from petitioner ONGPIN's relationship to PHILEX as its insider.

6.34. Therefore, under the very terms of Section 27.1 of the *SRC*, petitioner ONGPIN could not possibly have committed insider trading when, in the morning of 2 December 2009, he acquired 45,964,500 PHILEX shares from the open market. This alone is sufficient error to warrant the reversal of the Assailed Decision. But there is so much more.

Petitioner ONGPIN did not have a "fiduciary duty to disclose to his co-shareholders information affecting the prices of their shares."

6.35. In *SEC v. Interport Resources Corporation*,[66] the Supreme Court held that a person may be held liable for insider trading only if he is under a duty to disclose material information. American case law provides that silence, absent a duty to disclose, is not misleading under federal securities laws.[67] In *Chiarella* v. *United States*,[68] the U.S. Supreme Court stated that "the party charged with failing to disclose market information must be under a duty to disclose it."[69]

6.36. Respondent EIPD cited *Cua vs. Court of Appeals*[70] for the proposition that "the board of directors or the majority thereof ... occupies a position of trusteeship in relation to the minority of the stock." As an alleged "majority" director, petitioner ONGPIN supposedly had a "fiduciary duty to disclose to his co-shareholders information affecting the prices of their shares."[71]

6.37. *Cua* obviously does not apply because, petitioner ONGPIN was merely a director and officer of PHILEX on 2 December 2009. He did not and could not (by himself) make up the entire board of directors of PHILEX. He was likewise not a "majority" director of the company. On the contrary,

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[65] 484 U.S. 19, 16 November 1987
[66] G.R. No. 135808, 6 October 2008
[67] Basic v. Levinson, 485 U.S. 224 (1988).
[68] 445 U.S. 222 (1980).
[69] Citing Frigitemp Corp. v. Financial Dynamics Fund, Inc., 524 F.2d 275, 282 (C.A.2 1975).
[70] G.R. No. 182008, 4 December 2009; See Annex "D" hereof
[71] Id., at page 19; Emphasis supplied

petitioner ONGPIN held only 6.5% of the outstanding shares of PHILEX and was entitled to only to two (2) seats in the company's Board of Directors.

6.38. In *Strong vs. Repide*,[72] the Supreme Court stated that "a director (is) not under the obligation of a fiduciary nature to disclose to a shareholder his knowledge affecting the value of the shares."

6.39. petitioner ONGPIN also had no duty to share with the investing public the benefits from his financial analysis of the value of PHILEX shares, or the fruits of his successful negotiation of the intended *Block Sale*. As held in *SEC v. Texas Gulf Sulphur*:[73]

> Nor is an insider obligated to confer upon outside investors the benefit of his superior financial or other expert analysis by disclosing his educated guesses or predictions. 3 Loss, op. cit. supra at 1463. The only regulatory objective is that access to material information be enjoyed equally, but this objective requires nothing more than the disclosure of basic facts so that outsiders may draw upon their own evaluative expertise in reaching their own investment decisions with knowledge equal to that of the insiders.

6.40. In *Green vs. Charterhouse Group*,[74] it was stated that a director's information "developed" through his own financial expertise is not insider information, and the director is entitled to use such information "to his own benefit:"

> ... one must differentiate between a knowledge or expertise developed through experience or financial sophistication about the company or the market of its shares from facts or information which are available to all parties involved and knowledge of specific events or the probability of future events gained through the directors' access to the corporate business or activities which are not available to the other parties with whom the director is dealing or to the public generally. The latter case is inside information. The former only points out the special ability of the director which he is entitled to use to his own benefit and need not pass on the advantage thereof.[75]

6.41. In *Billard vs. Rockwell International Corporation*,[76] it was ruled that "the securities laws do not require traders to disclose the consequences

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[72] 213 U.S. 419, 3 May 1909
[73] 401 F. 2d 833, 1968.
[74] 35 D.L.R. 3d at 224
[75] Underscoring supplied
[76] 683 F.2d 51, 30 June 1982

of their actions. If consequences are inevitable, then everyone may be presumed to contemplate them, and there is no need to announce them.

6.42. In the morning of 2 December 2009, the investing public was already fully apprised of the following basic facts which they could "draw upon in their own evaluative expertise in reaching their own investment decisions," to wit:

(a) The total number of outstanding PHILEX shares;

(b) The First Pacific group was bent on acquiring a 40% stake in PHILEX;

(c) MVP had publicly announced that the First Pacific group was in search of large blocks of PHILEX shares to complete its 40% stake in the company;

(d) The First Pacific group historically acquired its PHILEX shares through block purchases and at premium prices, and the sale of block shares is universally acknowledged to carry premiums as blocks can carry voting or control benefits;[77] and

(e) The closing price of PHILEX shares had been growing daily at roughly Php0.55 per day, from Php14.00 per share on 17 November 2009, to Php19.00 per share on 1 December 2009.

6.43. Petitioner ONGPIN's knowledge "developed" through his "special ability" and expert analysis of the aforementioned "basic facts" did not constitute "insider" information. Thus, petitioner ONGPIN had no duty to disclose such knowledge, and, more importantly, he had the right to use the same "to his own benefit."

6.44. Petitioner ONGPIN clearly had no duty to disclose the details of the intended *Block Sale* to other PHILEX shareholders (including the investors he purchased PHILEX shares from in the morning of 2 December 2009).

6.45. It bears stressing that any premature disclosure of the transaction and the purchase price thereunder could have been considered a misleading statement if the transaction did not push through.[78]

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[77] See for example Luigi Zingales, *What Determines the Value of Corporate Votes?* Quarterly Journal of Economics (1995) 1047: "A growing literature emphasizes that corporate shareholders do not receive benefits in proportion to their fractional ownership, but that holders of large blocks of shares receive a disproportionate amount of corporate benefits (so-called private benefits). Consistent with this view, Barclay and Holderness (1989) find that in private negotiations large blocks of stock trade at a premium to the exchange price, and they convincingly argue that such premiums reflect the value of private benefits of control."

[78] See also Billard v Rockwell Int'l Corp. 526 F. Supp. 218 (1981) : On the other hand, if the consequences of Rockwell's actions were, like most future events, matters of prediction or speculation, then Rockwell surely had no obligation to disclose its predictions — **in fact, had Rockwell done so, it could have faced potential liability for having made a misleading disclosure.** Just as "[i]t would be as serious an infringement ... to overstate the definiteness of ... plans as to understate them," *Electronic Specialty Co. v.*

6.46. If the market price of the PHILEX shares in the morning of 2 December 2009 had dipped, i.e., Php15.00 to Php17.00 per share, the First Pacific group could have easily backed out of its intended deal with petitioner ONGPIN's group.

6.47 By the same token, if the prevailing market price of PHILEX shares had increased beyond Php21.00 per share, petitioner ONGPIN could also have backed out of the intended block sale and demanded a higher price.

6.48. Neither petitioner ONGPIN nor the First Pacific group would have been able to enforce the Php21.00 purchase price if either of them had backed out of the deal, considering that: (a) they had not reached any agreement on all the terms and conditions of the sale in the morning of 2 December 2009; and (b) even assuming that an agreement had been reached, the verbal agreement was unenforceable under the Statute of Frauds.[79]

6.49. Indeed, the premature disclosure of the planned *Block Sale* would have fostered false optimism in the market, and investors who actually relied on such premature disclosure could have argued that it was a form of market manipulation. Thus, if petitioner ONGPIN had publicly disclosed the Php21.00 price for the planned *Block Sale* before the evening of 2 December 2009, he would have exposed himself to criminal liability under the SRC (if the *Block Sale* eventually did not push through).

6.50. This would explain why disclosure to the investing public of any significant share acquisition comes *after*, not before, the acquisition. Several provisions of the SRC and its implementing rules and regulations ("SRC Rules") support this position.

6.51. Under SRC *Rule* 18.1, "any person who directly or indirectly acquires the beneficial ownership of more than five percent (5%) or such lesser per centum as the Commission may prescribe, of any class of equity securities" of a public company (which includes a listed company) must disclose the acquisition "within five (5) business days after such acquisition."

6.52. Similarly, SRC Rule 23 requires "(e)very person who is directly or indirectly the beneficial owner of ten percent (10%) or more of any class

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International Controls Corp., 409 F.2d 937, 948 (2d Cir. 1969), so any disclosure by Rockwell of its predictions might have been as likely to mislead investors as was its failure to disclose such predictions.

[79] The Civil Code provides that "[b]y the contract of sale one of the contracting parties obligates himself to transfer the ownership of and deliver a determinate thing, and the other to pay therefor a price certain in money or its equivalent." Likewise, the Civil Code provides that "an agreement for the sale of goods, chattels or things in action, at a price not less than Five hundred pesos" is **unenforceable by action** unless the same is in writing, or embodied in some note or memorandum.

of any security" of a listed company to disclose any change of his beneficial ownership "within ten (10) days after the close of each calendar month."

6.53. None of the rules of the SEC and PSE requires that block sales (such as the *Block Sale* entered into on 2 December 2009 between petitioner ONGPIN's group and TWO RIVERS), which are privately negotiated and agreed upon prior to their execution through the facilities of the PSE, be disclosed to the investing public before the parties finally conclude the transaction. The parties commonly agree on the terms of the block sale before it is submitted to the PSE for execution. In fact the opposite is true: a disclosure cannot be made while negotiations are ongoing and only after the deal has been finalized and signed will the parties be required to disclose.

6.54. Based on the foregoing, petitioner ONGPIN respectfully submits that there is no basis in finding him administratively liable for 174 counts of insider trading when he purchased PHILEX shares from the open market in the morning of December 2009.

Whether or not the SEC's imposition of a Php 174 million administrative fine is valid

6.55. In the Assailed Decision, the SEC *En Banc* unconscionably increased the fine to ten fold: from P17,400,000.00 to P174,000,000.00 because, according to it, the applicable provision should have been "In the case of a violation of **Section 34**, a FINE of no more than three (3) times the profit gained or loss avoided as result of the purchase, sale or communication proscribed by such Section. Once again showing clear bias against petitioner ONGPIN, the SEC *En Banc* applied the "three times the profit gained" rule to petitioner ONGPIN despite the fact that he was being accused of violation of Section 27.1 and not Section 34 of the SRC! In other words, the SEC En Banc applied an inapplicable provision of the SRC just to justify its malicious increase of the penalty which has no basis in fact and law. The SEC cannot impose an administrative penalty that is not provided by law especially because this involves property rights of petitioner ONGPIN, which if implemented, deprives him of his property without due process of law. To hold otherwise would be outright illegal and confiscatory as the penalty imposed has no legal basis. This only underscores the bias of the SEC against petitioner ONGPIN.

6.56. Assuming without admitting that petitioner ONGPIN is liable for violation of Section 27.1 of the SRC, the total maximum fine imposable should have just been Php1,000,000 since the alleged insider trading was merely one collective act completed in one morning but not a series of individual and discrete acts. In other words, it is a series of acts proceeding from one resolution or intent akin to the concept of *delito continuado* in criminal law, meriting just one penalty instead of multiple counts. (underlined)

VII.
ALLEGATIONS IN SUPPORT OF THE APPLICATION FOR THE ISSUANCE OF TEMPORARY RESTRAINING ORDER AND/OR WRIT OF PRELIMINARY INJUNCTION

7.1. All of the foregoing allegations are reproduced insofar as relevant.

7.2. Petitioner ONGPIN is entitled to injunctive relief consisting of a temporary restraining order and/or a writ of preliminary injunction, enjoining the SEC from implementing the Assailed Decision.

7.3. Petitioner ONGPIN will suffer grave and irreparable injury the Assailed Decision is implemented as it consists of, among other things, his disqualification from holding the position of a director, officer or any other position performing similar functions in any public company or publicly-listed company.

7.4. Damages are irreparable within the meaning of the rule relative to the issuance of injunction where there is no standard by which their amount can be measured with reasonable accuracy. "An irreparable injury which a court of equity will enjoin includes that degree of wrong of a repeated and continuing kind which produce hurt, inconvenience, or damage that can be estimated only by conjecture, and not by any accurate standard of measurement."[1]

7.5. Petitioner ONGPIN's disqualification necessarily creates a negative impact on his reputation as a businessman. If he is made to relinquish and resign from his position as director of officer of any company, his reputation will be completely ruined. Even if the Honorable Court would later reverse the Assailed Decision, it can no longer repair the damage caused to petitioner ONGPIN. Indeed, this kind of damage is not quantifiable and compensable and certainly warrants the issuance of preliminary injunctive reliefs.

7.6. Petitioner ONGPIN further submits that the issuance of a temporary restraining order and a writ of preliminary injunction is of extreme urgency since under Section 12 of Rule 43 of the Rules of Court, the appeal shall not stay the implementation of the Assailed Decision unless restrained by the Honorable Court. It provides:

> **"Section 12.** *Effect of appeal.* — The appeal shall not stay the award, judgment, final order or resolution sought to be reviewed unless the Court of Appeals shall direct otherwise upon such terms as it may deem just."

7.7. Petitioner ONGPIN is willing and able to post a bond in such amount as this Honorable Court may fix, conditioned upon payment of all damages that respondent EIPD may suffer if it is finally adjudged that petitioner was not entitled to the writ of preliminary injunction prayed for.

VIII.
PRAYER

WHEREFORE, petitioner ONGPIN respectfully prays that the Honorable Court of Appeals:

a) Immediately upon filing of this petition, issue a temporary restraining order and/or a writ of preliminary injunction, enjoining the SEC from implementing the Assailed Decision; and,

b) After due proceedings, ultimately render judgment reversing, annulling and setting aside the Assailed Decision and totally releasing petitioner ONGPIN from any liability in connection of his purchase of PHILEX shares on 2 December 2009.

Petitioner ONGPIN further prays for such other relief as may be just and equitable in the premises.

Makati City for Manila, 20 July 2016.

PONFERRADA ORBE AND ALTUBAR
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IBP No. 1022949/01.26.16/Makati City
PTR No. 2091640/1.21.16/Muntinlupa City

VERIFICATION AND CERTIFICATION

I, **ROBERTO V. ONGPIN**, under oath, hereby states:

1. I am the petitioner in the above-entitled case;

2. I have caused the preparation of the foregoing Petition for Review;

3. I have read the allegations therein, and certify that they are true and correct of my own personal knowledge and based on authentic documents made available to me;

4. I further certify that I have not heretofore commenced any action or filed any claim involving the same facts and issues in any court, tribunal or quasi-judicial agency, and to the best of my knowledge, no such other action or claim is pending therein;

5. Should I learn hereafter that the same or similar action or claim has been filed or is pending, I shall report that fact within five (5) days therefrom to the Honorable Court.

ROBERTO V. ONGPIN
Affiant

SWORN AND SUBSCRIBED TO before me this 21 JUL 2016 day of July 2016, affiant exhibiting to me his Passport No.5765525 expiring on 26June2017.

ATTY. HENRY D. ADASA
NOTARY PUBLIC-CITY OF MANILA
UN. [illegible]
S.C. [illegible]
1032 S[illegible] TS MLA.
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[illegible]

Doc. No.: 493
Page No.: 99;
Book No.: XXXVI
Series of 2016.

COPIES FURNISHED:

ENFORCEMENT AND INVESTOR PROTECTION DEPARTMENT
Securities and Exchange Commission
SEC Bldg., EDSA Greenhills
Mandaluyong City

Registry Receipt No. RD627 849 517 ZZ dated 22 July 2016 at REPO Manila.

SECURITIES AND EXCHANGE COMMISSION *EN BANC*
Securities and Exchange Commission
SEC Bldg., EDSA Greenhills
Mandaluyong City

Registry Receipt No. RD627 849 503 ZZ dated 22 July 2016 at REPO Manila.

EXPLANATION

Pursuant to Section 11 of Rule 13 of the Rules of Court on Civil Procedure, copies of this Petition for Review were served on the other parties by registered mail on account of distance constraints and the lack of adequate messengerial personnel to personally serve the same to each and every one of the other parties at the time of filing.

NOELLE S. GAVINO-DUÑGO

AFFIDAVIT OF SERVICE

REPUBLIC OF THE PHILIPPINES)
CITY OF MAKATI)S.S.

I, **RAMON D. TAMARAY, JR.**, of legal age, Filipino with office address at 2258 Chino Roces Avenue ext. corner EDSA, Makati City, being first duly sworn, depose and state that:

1. I am a paralegal of Ponferrada Orbe and Altubar Law Offices.

2. On 22 July 2016, I served a copy of the **Petition for Review** to which this Affidavit is attached, by registered mail to the following addressee at the address stated below:

ENFORCEMENT AND INVESTOR PROTECTION DEPARTMENT
Securities and Exchange Commission
SEC Bldg., EDSA Greenhills
Mandaluyong City 1554

Registry Receipt No. RD627 849 517 22 dated 22 July 2016 at REPO Manila.

SECURITIES AND EXCHANGE COMMISSION EN BANC
Securities and Exchange Commission
SEC Bldg., EDSA Greenhills
Mandaluyong City 1554

Registry Receipt No. RD 627 849 503 ZZ dated 22 July 2016 at REPO Manila.

3. I am executing this affidavit to attest to the truth of the foregoing and for all legal intents and purposes.

IN WITNESS WHEREOF, I have hereunto set my hand this 22 July 2016 at Makati City, Philippines.

RAMON D. TAMARAY, JR.
Affiant

SUBSCRIBED and sworn to before me this 22 July 2016 at Makati City, affiant exhibiting to me his TIN 101-868-134.

Doc. No. 394;
Page No. 80;
Book No. III;
Series of 2016.

CARLO ANTONIO A. BA[illegible]
[illegible]
Notary Public [illegible]
[illegible]
PTR No. [illegible]
IBP No. [illegible] 2016 [illegible]