Republic of the Philippines
SUPREME COURT
Manila

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WILFREDO V. LAPITAN
Division Clerk of Court
Third Division
JUL 28 2017

THIRD DIVISION

LUIS JUAN L. VIRATA and UEM-MARA PHILIPPINES CORPORATION (now known as CAVITEX INFRASTRUCTURE CORPORATION),
Petitioners,

- versus -

ALEJANDRO NG WEE, WESTMONT INVESTMENT CORP., ANTHONY T. REYES, SIMEON CUA, VICENTE CUALOPING, HENRY CUALOPING, MARIZA SANTOS-TAN, and MANUEL ESTRELLA,
Respondents.
x----------x

G.R. No. 220926

WESTMONT INVESTMENT, CORPORATION,
Petitioner,

- versus -

ALEJANDRO NG WEE,
Respondent.
x----------x

G.R. No. 221058

MANUEL ESTRELLA,
Petitioner,

- versus -

ALEJANDRO NG WEE,
Respondent.
x----------x

G.R. No. 221109

SIMEON CUA, VICENTE CUALOPING, and HENRY CUALOPING,
Petitioners,

G.R. No. 221135

- versus -

ALEJANDRO NG WEE,
Respondent.

x----------x

ANTHONY T. REYES,
Petitioner,

G.R. No. 221218

- versus -

ALEJANDRO NG WEE, LUIS JUAN VIRATA, UEM-MARA PHILIPPINES CORP., WESTMONT INVESTMENT CORP., MARIZA SANTOS-TAN, SIMEON CUA, VICENTE CUALOPING, HENRY CUALOPING, and MANUEL ESTRELLA,
Respondents.

Present:

VELASCO, JR., *J.*, Chairperson,
BERSAMIN,
REYES,
JARDELEZA, and
TIJAM, *JJ.*

Promulgated:

July 5, 2017

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DECISION

VELASCO, JR., *J.*:

Nature of the Case

For resolution is the consolidated petitions assailing the September 30, 2014 Decision[1] and October 14, 2015 Resolution[2] of the Court of Appeals (CA) in CA-G.R. CV. No. 97817.[3] Said rulings affirmed the trial court

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[1] *Rollo* (G.R. No. 220926), p. 67-142. Penned by Associate Justice Ramon A. Cruz and concurred in by Associate Justices Hakim S. Abdulwahid and Romeo F. Barza.

[2] Id. at 144-152.

[3] Entitled *"Alejandro Ng Wee (plaintiff-appellee) vs. Luis Juan Virata, UEM-MARA Philippines Corporation, Westmont Investment Corporation, Anthony Reyes, Mariza Santos-Tan, Simeon Cua, Vicente Cualoping, Henry Cualoping, and Manuel Estrella (defendants-appellants)."*

judgment declaring petitioners solidarily liable to Alejandro Ng Wee (Ng Wee) in the amount of ₱213,290,410.36, plus interests and damages.

The Facts

Ng Wee was a valued client of Westmont Bank. Sometime in 1998, he was enticed by the bank manager to make money placements with Westmont Investment Corporation (Wincorp), a domestic corporation organized and licensed to operate as an investment house, and one of the bank's affiliates.[4] Offered to him were *"sans recourse"* transactions with the following mechanics as summarized by the CA:

> x x x A corporate borrower who needs financial assistance or funding to run its business or to serve as working capital is screened by Wincorp. Once it qualifies as an accredited borrower, Wincorp enters into a Credit Line Agreement for a specific amount with the corporation which the latter can draw upon in a series of availments over a period of time. The agreement stipulates that Wincorp shall extend a credit facility on "best effort" basis and that every drawdown by the accredited borrower shall be evidenced by a promissory note executed in favor of Wincorp and/or the investor/s who has/have agreed to extend the credit facility. Wincorp then scouts for investors willing to provide the funds needed by the accredited borrower. The investor is matched with the accredited borrower. An investor who provides the fund is issued a Confirmation Advice which indicates the amount of his investment, the due date, the term, the yield, the maturity and the name of the borrower.[5]

Lured by representations that the *"sans recourse"* transactions are safe, stable, high-yielding, and involve little to no risk, Ng Wee, sometime in 1998, placed investments thereon under accounts in his own name, or in those of his trustees: Angel Archangel, Elizabeth Ng Wee, Roberto Tabada Tan, and Alex Lim Tan.[6] In exchange, Wincorp issued Ng Wee and his trustees Confirmation Advices informing them of the identity of the borrower with whom they were matched, and the terms under which the said borrower would repay them. The contents of a Confirmation Advice are typically as follows:

> This is to confirm that pursuant to your authority, we have acted in your behalf and/or for your benefit, risk or account without recourse or liability, real or contingent, to Westmont Investment Corporation in respect of the loan granted to the Borrower named and under the terms specified hereunder
>
> Borrower: _____

Amount	Rate: %	Term:	Value Date:	Due Date:
Yield:	Tax:	Maturity Value:		Instrument:
Payment on Value Date			TO No.	

[4] *Rollo* (G.R. No. 220926), p. 69.
[5] Id.
[6] Id.

> For your convenience but without any obligation on our part, we may act as your collecting and paying agent for this transaction. Kindly note that your receipt hereof is an indication of your conformity to the foregoing terms and conditions of the transaction.[7]

Special Power of Attorneys (SPAs) are also prepared for the signature of the lender investor. The SPAs uniformly provide:

> The undersigned, whose personal circumstances are stated hereunder, hereby, by these presents, appoints, names and constitutes Westmont Investment Corporation (Wincorp), a corporation duly organized and existing under and by virtue of the laws of the Philippines, with office address at 7th Floor, Westmont Bank Building, 411 Quintin Paredes Street, Binondo, Manila, as the Attorney-in-Fact of the undersigned:
>
> To agree, deliver, sign, execute loan documents relative to the borrowing of: _____ ("The Borrower") to whom the undersigned, thru Wincorp, agreed to lend the principal sum of PESOS _____
>
> HEREBY GIVING AND GRANTING unto said Attorney-in-Fact power and authority to do and perform all and every act and thing whatsoever requisite or necessary to be done in and about the premises, HEREBY RATIFYING AND CONFIRMING all that said Attorney-in-Fact shall lawfully do or cause to be done by virtue of these presents.[8]

Ng Wee's initial investments were matched with Hottick Holdings Corporation (Hottick), one of Wincorp's accredited borrowers, the majority shares of which was owned by a Malaysian national by the name of Tan Sri Halim Saad (Halim Saad). Halim Saad was then the controlling shareowner of UEM-MARA, which has substantial interests in the Manila Cavite Express Tollway Project (Cavitex).[9]

Hottick was extended a credit facility[10] with a maximum drawdown of P1,500,908,026.87 in consideration of the following securities it issued in favor of Wincorp: (1) a Suretyship Agreement[11] executed by herein petitioner Luis Juan Virata (Virata); (2) a Suretyship Agreement[12] executed by YBHG Tan Sri Halim Saad; and (3) a Third Party Real Estate Mortgage[13] executed by National Steel Corporation (NSC).

Hottick fully availed of the loan facility extended by Wincorp, but it defaulted in paying its outstanding obligations when the Asian financial crisis struck. As a result, Wincorp filed a collection suit against Hottick,

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[7] Id. at 482.
[8] Id. at 830.
[9] Id. at 156.
[10] Id. at 228.
[11] Id. at 237.
[12] Id. at 242.
[13] Id. at 246.

Halim Saad, and NSC for the repayment of the loan and related costs.[14] A Writ of Preliminary Attachment was then issued against Halim Saad's properties, which included the assets of UEM-MARA Philippines Corporation (UEM-MARA).[15] Virata was not impleaded as a party defendant in the case.

To induce the parties to settle, petitioner Virata offered to guarantee the full payment of the loan. The guarantee was embodied in the July 27, 1999 Memorandum of Agreement[16] between him and Wincorp. Virata was then able to broker a compromise between Wincorp and Halim Saad that paved the way for the execution of a Settlement Agreement[17] dated July 28, 1999. In the Settlement Agreement, Halim Saad agreed to pay USD1,000,000.00 to Wincorp in satisfaction of any and all claims the latter may have against the former under the Surety Agreement that secured Hottick's loan. As a result, Wincorp dropped Halim Saad from the case and the Writ of Preliminary Attachment over the assets of UEM-MARA was dissolved.[18]

Thereafter, Wincorp executed a Waiver and Quitclaim[19] dated December 1, 1999 in favor of Virata, releasing the latter from any obligation arising from the Memorandum of Agreement, except for his obligation to transfer forty percent (40%) equity of UEM Development Philippines, Inc. (UPDI) and forty percent (40%) of UPDI's interest in the tollway project to Wincorp. Apparently, the Memorandum of Agreement is a mere accommodation that is not meant to give rise to any legal obligation in Wincorp's favor as against Virata, other than the stipulated equity transfer.

Alarmed by the news of Hottick's default and financial distress, Ng Wee confronted Wincorp and inquired about the status of his investments. Wincorp assured him that the losses from the Hottick account will be absorbed by the company and that his investments would be transferred instead to a new borrower account. In view of these representations, Ng Wee continued making money placements, rolling over his previous investments in Hottick and even increased his stakes in the new borrower account – Power Merge Corporation (Power Merge).[20]

Incorporated on August 4, 1997, Power Merge[21] is a domestic corporation, the primary purpose of which is to *"invest in, purchase, or otherwise acquire and own, hold, use, sell, assign, transfer, mortgage, pledge, exchange or otherwise dispose of real or personal property of every*

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[14] Id. at 665.
[15] Id. at 70.
[16] Id. at 423.
[17] Id. at 434.
[18] Id. at 70-71.
[19] Id. at 481.
[20] Id. at 71.
[21] Also referred to as *"Powermerge."*

kind and description."[22] Petitioner Virata is the majority stockholder of the corporation, owning 374,996 out of its 375,000 subscribed capital stock.[23]

In a special meeting of Wincorp's board of directors held on February 9, 1999, the investment house resolved to file the collection case against Halim Saad and Hottick,[24] and, on even date, approved Power Merge's application for a credit line, extending a credit facility to the latter in the maximum amount of ₱1,300,000,000.00.[25] Based on the minutes of the special meeting,[26] board chairman John Anthony B. Espiritu, Wincorp President Antonio T. Ong (Ong), Mariza Santos-Tan (Santos-Tan), Manuel N. Tankiansee (Tankiansee),[27] and petitioners Manuel A. Estrella (Estrella), Simeon Cua, Henry T. Cualoping, and Vicente Cualoping (Cua and the Cualopings) were allegedly in attendance. Thus, on February 15, 1999, Wincorp President Ong and Vice-President for Operations petitioner Anthony Reyes (Reyes) executed a Credit Line Agreement[28] in favor of Power Merge with petitioner Virata's conformity.

Barely a month later, on March 11, 1999, Wincorp, through another board meeting allegedly attended by the same personalities, increased Power Merge's maximum credit limit to ₱2,500,000,000.00.[29] Accordingly, an Amendment to the Credit Line Agreement[30] (Amendment) was executed on March 15, 1999 by the same representatives of the two parties.

Power Merge made a total of six (6) drawdowns from the amended Credit Line Agreement in the aggregate amount of ₱2,183,755,253.11.[31] Following protocol, Power Merge issued Promissory Notes in favor of Wincorp, either for itself or as agent for or on behalf of certain investors, for each drawdown. The Promissory Notes issued can be summarized thusly:[32]

Promissory Note No.	**Availment Date**	**Maturity Date**	**Principal**
1411	February 12, 1999	February 12, 2000	₱8,618,877.35
1537	February 10, 1999	February 10, 2000	₱1,124,781,081.10
1538	March 12, 1999	March 11, 2000	₱215,660.99
1539	March 12, 1999	March 11, 2000	₱671,402,608.61
1540	March 17, 1999	March 16, 2000	₱378,381,629.15
1541	March 22, 1999	March 21, 2000	₱355,395.91
Total			**₱2,183,755,253.11**

And pertinently, the template for the Promissory Notes read:

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[22] *Rollo* (G.R. No. 220926), p. 647.
[23] Id. at 648.
[24] Id. at 1015.
[25] Id. at 1013.
[26] Id. at 1011.
[27] Also referred to as "*Tan Kian See.*"
[28] *Rollo* (G.R. No. 220926), p. 385.
[29] Id. at 1018.
[30] Id. at 395.
[31] Id. at 73.
[32] Id. at 411-422.

PROMISSORY NOTE

For value received, I/We _____, hereby promise to pay WESTMONT INVESTMENT CORPORATION (*WINCORP*), either for itself or as agent for and on behalf of certain INVESTORS who have placed/invested funds with *WINCORP* the principal sum of _____ (_____), Philippine Currency, on _____ with interest rate of _____ percent (__%) per annum, or equivalently the Maturity Amount of _____ PESOS (_____) Philippine Currency.

Demand and Dishonor Waived: In case of default in the payment of this Promissory Note, an additional interest on the Maturity Amount at the rate of three percent (3%) per month shall accrue from the date immediately following the Maturity Date hereof until the same is fully paid. In addition, I/We shall be liable to pay liquidated damages in the amount equivalent to twenty percent (20%) of the Maturity amount.

If this Note is placed in the hands of an attorney for collection, or if payment herein is collected by suit or through other legal proceedings, I/We promise to pay WINCORP a sum equal to twenty-five (25%) of the total amount due and payable as and for attorney's fees and cost of collection.[33]

After receiving the promissory notes from Power Merge, Wincorp, in turn, issued Confirmation Advices to Ng Wee and his trustees, as well as to the other investors who were matched with Power Merge. A summary of the said Confirmation Advices reveals that out of the ₱2,183,755,253.11 drawn by Power Merge, the aggregate amount of ₱213,290,410.36 was sourced from Ng Wee's money placements under the names of his trustees:[34]

Serial No.	Name	Principal Amount of Placement	Due Date	Maturity Value
90029	Angel Archangel	1,559,927.96	3/27/2000	1,584,496.83
90821	Robert Tabada Tan	2,300,000.00	3/22/2000	2,336,225.00
90823	Robert Tabada Tan	11,937,401.91	3/23/2000	12,125,415.99
90825	Robert Tabada Tan	2,722,325.59	3/23/2000	2,765,202.22
90827	Robert Tabada Tan	1,857,896.78	3/22/2000	1,885,765.23
90832	Robert Tabada Tan	17,908,989.04	3/29/2000	18,191,055.62
90834	Robert Tabada Tan	2,263,514.95	3/30/2009	2,299,165.31
90835	Robert Tabada Tan	1,970,590.89	3/30/2000	2,001,627.70
90839	Alex Lim Tan	406,825.00	3/24/2000	412,164.58
90844	Alex Lim Tan	1,835,610.44	4/3/2000	1,866,662.85
90860	Alex Lim Tan	2,144,975.50	3/31/2000	2,170,715.21
90861	Alex Lim Tan	8,649,113.51	3/31/2000	8,752,902.87
90864	Alex Lim Tan	2,051,965.81	4/3/2000	2,078,128.37
90866	Alex Lim Tan	8,749,275.96	4/4/2000	8,860,829.23
90869	Alex Lim Tan	4,175,382.61	4/4/2000	4,228,618.74

[33] Id. at 411.
[34] Id. at 482-499.

91319	Elizabeth Ng Wee	1,000,000.00	4/7/2000	1,012,000.00
91337	Robert Tabada Tan	1,587,553.58	4/7/2000	1,606,604.22
91654	Robert Tabada Tan	322,117.07	4/11/2000	326,224.06
91712	Elizabeth Ng Wee	1,610,325.19	4/2/2000	1,630,856.84
91713	Robert Tabada Tan	11,615,297.69	4/12/2000	11,763,392.74
91735	Robert Tabada Tan	28,877,638.89	4/12/2000	29,245,828.79
92673	Elizabeth Ng Wee	1,301,666.89	4/4/2000	1,318,263.14
92761	Elizabeth Ng Wee	2,415,487.78	4/12/2000	2,446,285.25
92804	Robert Tabada Tan	10,635,489.17	3/23/2000	10,691,325.49
92805	Robert Tabada Tan	8,439,180.56	4/12/2000	8,546,780.11
92900	Robert Tabada Tan	652,571.11	4/13/2000	660,891.39
92965	Robert Tabada Tan	39,028,875.33	4/14/2000	39,497,221.83
92980	Robert Tabada Tan	6,799,438.05	4/14/2000	6,881,031.31
93001	Robert Tabada Tan	5,000,000.00	4/14/2000	5,060,000.00
93062	Robert Tabada Tan	1,536,373.70	4/17/2000	1,555,962.46
93073	Robert Tabada Tan	3,447,004.47	4/17/2000	3,490,953.78
93075	Robert Tabada Tan	12,000,000.00	4/17/2000	12,153,000.00
93619	Alex Lim Tan	508,683.02	4/26/2000	515,741.00
93625	Alex Lim Tan	1,933,335.42	4/26/2000	1,960,160.45
93795	Alex Lim Tan	351,157.75	4/28/2000	356,161.75
93308	Elizabeth Ng Wee	1,000,000.00	4/19/2000	1,012,750.00
Total		**210,595,991.62**		**213,290,410.36**

Unknown to Ng Wee, however, was that on the very same dates the Credit Line Agreement and its subsequent Amendment were entered into by Wincorp and Power Merge, additional contracts (Side Agreements) were likewise executed by the two corporations absolving Power Merge of liability as regards the Promissory Notes it issued. Pertinently, the Side Agreement dated February 15, 1999 reads:

> WHEREAS, Powermerge has entered into the Credit Line Agreement with Wincorp as an accommodation in order to allow Wincorp to hold Powermerge paper instead of the obligations of Hottick which are right now held by Wincorp.
>
> x x x x
>
> 1. Powermerge hereby agrees to execute promissory notes in the aggregate principal sum of P1,200,000,000.00 in favor of Wincorp and in exchange therefore, Wincorp hereby assigns, transfers, and conveys to Powermerge all of its rights, titles and interests by way of a sub-participation over the promissory notes and other obligations executed by Hottick in favor of Wincorp; Provided however **that the only obligation of Powermerge to Wincorp shall be to return and deliver to Wincorp all the rights, title and interests conveyed by Wincorp hereby to Powermerge over the Hottick obligations. Powermerge shall have no obligation to pay under its promissory notes executed in favor of Wincorp** but shall be obligated merely to return whatever [it] may have received from Wincorp pursuant to this agreement.
>
> x x x x

> 3. Wincorp confirms and agrees that this accommodation being entered into by the parties is **not intended to create a payment obligation on the part of Powermerge**.[35] (emphasis added)

Save for the amount, identical provisions were included in the March 15, 1999 Side Agreement.[36] By virtue of these contracts, Wincorp was able to assign its rights to the uncollected Hottick obligations and hold Power Merge papers instead.[37] However, this also meant that if Power Merge subsequently defaults in the payment of its obligations, it would refuse, as it did in fact refuse, payment to its investors.

Despite repeated demands,[38] Ng Wee was not able to collect Power Merge's outstanding obligation under the Confirmation Advices in the amount of ₱213,290,410.36. This prompted Ng Wee, on October 19, 2000, to institute a Complaint for Sum of Money with Damages with prayer for the issuance of a Writ of Preliminary Attachment (Complaint),[39] docketed as Civil Case No. 00-99006 before the Regional Trial Court (RTC), Branch 39 of Manila (RTC). Of the seventeen (17) named defendants therein, only Virata, Power Merge, UPDI, UEM-MARA, Wincorp, Ong, Reyes, Cua, Tankiansee, Santos-Tan, Vicente and Henry Cualoping, and Estrella were duly served with summons.[40]

In his Complaint, Ng Wee claimed that he fell prey to the intricate scheme of fraud and deceit that was hatched by Wincorp and Power Merge. As he later discovered, Power Merge's default was inevitable from the very start since it only had subscribed capital in the amount of ₱37,500,000.00, of which only ₱9,375,000.00 is actually paid up. He then attributed gross negligence, if not fraud and bad faith, on the part of Wincorp and its directors for approving Power Merge's credit line application and its subsequent increase to the amount of ₱2,500,000,000.00 despite its glaring inability to pay.

Wincorp officers Ong and Reyes were likewise impleaded for signing the Side Agreements that would allow Power Merge to avoid paying its obligations to the investors. Ng Wee also sought to pierce the separate juridical personality of Power Merge since Virata owns almost all of the company's stocks. It was further alleged that Virata acquired interest in UEM-MARA using the funds swindled from the Wincorp investors.

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[35] Id. at 392.
[36] Id. at 405.
[37] Id. at 73.
[38] Id. at 896-903.
[39] Id. at 193. Entitled "*Alejandro Ng Wee vs. Luis Juan L. Virata, Power Merge Corporation, UEM Development Phils., Inc., UEM-MARA Philippines Corporation, United Engineers (Malaysia) Berhad, Majlis Amanah Rakyat, RenongBerhad, Westmont Investment Corporation, Antonio T. Ong, Anthony T. Reyes, Simeon S. Cua, Manuel N. Tan Kian See, Mariza Santos-Tan, Vicente T. Cualoping, Hentry T. Cualoping, Manuel A. Estrella, and John Anthony B. Espiritu.*"
[40] *Rollo* (G.R. No. 220926), pp. 153-154.

As an annex to the Complaint, Ng Wee cited the May 5, 2000 Cease and Desist Order[41] issued by the Prosecution and Enforcement Department of the Securities and Exchange Commission (SEC) in PED Case No. 20-2378[42] after its routine audit of the operations of the investment house. Data gathered by the SEC showed that, as of December 31, 1999, Wincorp has sourced funds from 2,200 individuals with an average of ₱7,000,000,000.00 worth of commercial papers per month.[43] In its subsequent October 27, 2000 Resolution,[44] the SEC found that the Confirmation Advices that Wincorp had been issuing to its investors takes the form of a security that ought to have been registered before being offered to the public,[45] and that the investment house had also been advancing the payment of interest to the investors to cover up its borrowers' insolvency.[46]

The defendants moved for the dismissal of the case for failure to state a cause of action, among other reasons, moored on the fact that the investments were not recorded in the name of Ng Wee. These motions, however, were denied by the RTC on October 4, 2001, which denial was elevated by way of *certiorari* to the CA, only for the trial court ruling to be affirmed on August 21, 2003. The issue eventually made its way to this Court and was docketed as G.R. No. 162928. The Court however, found no reversible error on the part of the CA when the appellate court sustained the denial of the motions to dismiss.[47]

In their respective Answers, the Wincorp and Power Merge camps presented opposing defenses.[48]

Wincorp admitted that it brokered Power Merge Promissory Notes to investors through *"sans recourse"* transactions. It contended, however, that its only role was to match an investor with corporate borrowers and, hence, assumed no liability for the monies that Ng Wee loaned to Power Merge. As proof thereof, Wincorp brought to the attention of the RTC the language of the SPAs executed by the investors.

"Sans recourse" transactions, Wincorp added, are perfectly legal under Presidential Decree No. 129 (PD 129), otherwise known as the *Investment Houses Law*, and forms part of the brokering functions of an investment house. As a duly licensed investment house, it was authorized to offer the *"sans recourse"* transactions to the public, even without a license to perform quasi-banking functions.

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[41] Id. at 508.
[42] Entitled "*In the Matter of Westmont Investment Corporation.*"
[43] *Rollo* (G.R. No. 220926), p. 508.
[44] Id. at 1030.
[45] Id. at 1041.
[46] Id. at 509-510.
[47] Id. at 77.
[48] Id. at 167-171.

For their part, the Wincorp directors argued that they can only be held liable under Section 31 of *Batas Pambansa Blg.* (BP) 68,[49] the Corporation Code, if they assented to a patently unlawful act, or are guilty of either gross negligence or bad faith in directing the affairs of the corporation. They explained that the provision is inapplicable since the approval of Power Merge's credit line application was done in good faith and that they merely relied on the vetting done by the various departments of the company. Additionally, Estrella and Tankiansee argued that they were not present during the special meetings when Power Merge's credit line application was approved and even objected against the same when they came to know of such fact.

Reyes meanwhile asseverated that the first paragraph of Sec. 31 cannot find application to his case since he is not a director of Wincorp, but its officer. It is his argument that he can only be held liable under the second paragraph of the provision if he is guilty of conflict of interest, which he is not. He likewise claimed that he was duly authorized to sign the side Credit Line Agreements and Side Agreements on behalf of Wincorp.

The Wincorp camp reiterated that Ng Wee's Complaint failed to state a cause of action because the money placements were not registered under his name. It was their postulation then that the alleged trustees should have instituted the case in their own names.

On the other hand, petitioners Virata and UEM-MARA harped on the underlying arrangement between Hottick, Power Merge, and Wincorp. Under the framework, Hottick will issue Promissory Notes to Wincorp, which will then transfer the same to Power Merge. In exchange for the transfer, Power Merge will issue its own Promissory Notes to Wincorp. That way, Wincorp will be holding Power Merge papers, instead of Hottick.

To implement this arrangement, Wincorp and Power Merge entered into a Credit Line Agreement with the understanding that Power Merge and Virata's only obligation thereunder would be to collect payments on the Hottick papers. The Credit Line Agreement and the issuance of the promissory notes, according to Virata, were mere accommodations to help Wincorp enforce the outstanding obligations of Hottick. It was then contrary to their agreement for Wincorp to have offered the Power Merge papers to investors since it was allegedly agreed upon that Power Merge would incur no liability to pay the promissory notes it issued Wincorp.

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[49] **Section 31.** *Liability of directors, trustees or officers.* - Directors or trustees who willfully and knowingly vote for or assent to patently unlawful acts of the corporation or who are guilty of gross negligence or bad faith in directing the affairs of the corporation or acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders or members and other persons.

When a director, trustee or officer attempts to acquire or acquire, in violation of his duty, any interest adverse to the corporation in respect of any matter which has been reposed in him in confidence, as to which equity imposes a disability upon him to deal in his own behalf, he shall be liable as a trustee for the corporation and must account for the profits which otherwise would have accrued to the corporation.

Ruling of the Trial Court

On July 8, 2011, the RTC rendered a Decision[50] in Civil Case No. 00-99006 in favor of Ng Wee. The *fallo* of the Decision reads:

> **WHEREFORE**, premises considered, judgment is hereby rendered in favor of plaintiff, ordering the defendants Luis L. Virata, UEM-MARA Philippines Corporation, Westmont Investment Corporation (Wincorp), Antonio T. Ong, Anthony T. Reyes, Simeon Cua, Vicente and Henry Cualoping, Mariza Santos-Tan, and Manuel Estrella to jointly and severally pay plaintiff as follows:
>
> 1. The sum of Two Hundred Thirteen Million Two Hundred Ninety Thousand Four Hundred Ten and 36/100 Pesos (P213,290,410.36), which is the maturity amount of plaintiff's investment with legal interest at the rate of twelve (12%) percent per annum from the date of filing of the complaint until fully paid;
>
> 2. Liquidated damages equivalent to twenty percent (20%) of the maturity amount, and attorney's fees equivalent to 25% of the total amount due plus legal interest at the rate of twelve (12%) percent per annum from the date of filing of the complaint until fully paid;
>
> 3. P100,000.00 as moral damages.
>
> 4. The complaint against defendant Tankiansee is dismissed for lack of merit.
>
> Defendants' counterclaim (sic) are dismissed for lack of merit, while the crossclaims filed by defendants against each other are likewise dismissed, there being no evidence to support the same.
>
> Cost against the defendants, except defendant Tankiansee.
>
> **SO ORDERED.**[51]

Disposing first the procedural issue, the RTC reminded the parties that whether or not Ng Wee had legal standing had already been settled when the defendants' motions to dismiss were denied with finality. They are then precluded from re-raising the issue in their memoranda.[52]

On the merits, the trial court explained that there was no dispute on the factual circumstances of the case and that, based on these facts, Wincorp and Power Merge colluded, if not connived, to defraud Ng Wee of his investments. The RTC ratiocinated that the *"sans recourse"* transactions were used to conceal Wincorp's direct borrowing; that Wincorp negated its acts and practices under the *"sans recourse"* transactions when it advanced the accrued interest due to the investors to conceal the fact that their borrowers have already defaulted in their obligations; that Wincorp is a

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[50] *Rollo* (G.R. No. 220926), p. 153. Penned by Presiding Judge Noli C. Diaz.
[51] Id. at 191-192.
[52] Id. at 171-172.

vendor in bad faith since it knew that the Power Merge notes were uncollectible from the beginning by virtue of the Side Agreements; and that, in any event, Wincorp violated its fiduciary responsibilities as the investors' agent. The RTC held Power Merge equally guilty because Wincorp could not have perpetrated the fraud without its indispensable participation as a conduit for the scheme.[53]

The RTC likewise ruled that Ng Wee presented sufficient evidence against the individual directors and officers for them to be held liable for fraud and/or bad faith under Sec. 31 of the Corporation Code, except for Tankiansee. The claim against Tankiansee was dropped since his immigration records established that he could not have participated in the special meetings of the Wincorp directors, having been out of the country during the material dates. Moreover, he filed a civil and criminal case against Wincorp, negating any charge of conspiracy.[54]

The RTC further found compelling need to pierce through the separate juridical personality of Power Merge since Virata exercised complete control thereof, owning 374,996 out of 375,000 of its subscribed capital stock. Similarly, the separate juridical personality of UEM-MARA was pierced to reach the illegal proceeds of the funds sourced from the defrauded investors.[55]

The motions for reconsideration from the afore-quoted ruling were denied on September 9, 2011.[56] Separate appeals were then lodged by the following parties: (1) Wincorp, (2) Santos-Tan, (3) Cua and the Cualopings, (4) Virata and UEM-MARA Philippines Corp., (5) Reyes; and (6) Estrella. In due time, the appellants and appellees filed their respective briefs.[57]

Ruling of the Court of Appeals

On September 30, 2014, the CA promulgated the challenged ruling substantially affirming the findings of the trial court, *viz*:

> **WHEREFORE,** the appeal is **DISMISSED**. The Decision dated July 8, 2011 and Order dated September 9, 2011 issued by the Regional Trial Court of Manila, Branch 39 in Civil Case No. 00-99006 are **AFFIRMED with the modification** in that defendants-appellants are jointly and severally liable to pay an interest of twelve percent (12%) per annum of the total monetary awards, computed from the date of the filing of the complaint until June 30, 2013 and six percent (6%) per annum from July 1, 2013 until their full satisfaction.
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> **SO ORDERED.**[58]

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[53] Id. at 172-183.
[54] Id. at 183-187.
[55] Id. at 1887-190.
[56] Id. at 1508-1527.
[57] Id. at 80-95.
[58] Id. at 130.

Preliminarily, the CA upheld the finding of the RTC that Ng Wee is a real party in interest and that the Complaint stated a cause of action despite the money placements being made under the name of Ng Wee's trustees.[59]

The CA likewise found that Wincorp and Power Merge perpetrated an elaborate scheme of fraud to inveigle Ng Wee into investing funds. Ng Wee would not have placed his investments in the "*sans recourse*" transactions had he not been deceived into believing that Power Merge is financially capable of paying the returns on his investments. In sync with the RTC, the CA found that Wincorp misrepresented Power Merge's financial capacity when it accredited Power Merge as a corporate borrower and granted it a ₱2,500,000,000.00 credit facility despite the telling signs that the latter would not be able to perform its obligations, to wit: (1) Power Merge had only been in existence for two years when it was granted the credit facility; (2) Power Merge was thinly capitalized with only ₱37,500,000.00 subscribed capital; (3) Power Merge was not an on-going concern since it never secured the necessary permits and licenses to conduct business, it never engaged in any lucrative business, and it did not file the necessary reports with the SEC; and (4) No security was demanded by Wincorp or was furnished by Power Merge in relation to the latter's drawdowns.[60]

The intent of Wincorp to deceive became even more manifest when it entered into the Side Agreements with Power Merge. The Side Agreements rendered worthless Power Merge's Promissory Notes that Wincorp offered to Ng Wee and the other investors. Meanwhile, the "*sans recourse*" nature of the transactions prevented the investors from recovering their investments from the investment house. [61]

Because of the foregoing fraudulent acts, Wincorp was held liable to Ng Wee as a vendor of security in bad faith, and for acting beyond the scope of its authority as Ng Wee's agent when it knowingly purchased worthless securities for him and his co-investors.[62]

The CA likewise did not find merit in Power Merge's defense that it was a mere accommodation party. Power Merge's participation was indispensable in deceiving Ng Wee into placing more investments and amounted to actionable fraud. Its conduct that led to this conclusion include: (1) setting up the Power Merge borrower account; (2) the laborious execution of Credit Line Agreement, Side Agreements, and promissory notes; (3) allowing Wincorp to sell worthless Power Merge papers/notes; and (4) receiving valuable consideration through its drawdowns.[63]

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[59] Id. at 96-104.
[60] Id. at 110.
[61] Id. at 112.
[62] Id. at 113-115.
[63] Id. at 116-117.

Anent the liability of the directors, the appellate court sustained the trial court's application of the doctrine on the piercing of the corporate veil, and also held that under Sec. 31 of the Corporation Code, corporate officers can be held liable for having assented to patently unlawful corporate acts, and for having acted in gross negligence and/or bad faith in management.[64]

Here, the CA ratiocinated that the perpetrated investment scheme constituted *estafa* under either Art. 315(1)(b) or Art. 315(2)(a) of the Revised Penal Code[65] due to Wincorp's violation of its fiduciary relation with Ng Wee, and its employment of fraud or deceit to the latter's damage and prejudice. Moreover, Wincorp violated various commercial laws when it offered the "*sans recourse*" transactions. For though denominated as "*sans recourse*," Wincorp's actuations reveal that the transactions are actually *with* recourse since Wincorp virtually borrowed from itself, for itself. Assenting to these patently unlawful acts, according to the CA, exposed the corporate directors and officers to liability.

Gross negligence can also be attributed to the Wincorp directors when they approved Power Merge's credit line application and the subsequent increase of its credit limit to ₱2,500,000,000.00 despite Power Merge's evident weak financial structure and poor capitalization, so the CA ruled.

The elaborate scheme of deceit and fraud, and the corresponding liability therefrom, is then imputable to the directors of Wincorp. Meanwhile, Reyes and Virata cannot escape liability since they signed the Side Agreements that rendered the Power Merge papers worthless.

The CA also did not find compelling reason to depart from the RTC's conclusion as regards UEM-MARA's liability. The appellate court saw the need to reach the illegal proceeds of funds sourced from the defrauded investors.

Lastly, the CA held that the appellants are jointly and severally liable pursuant to Art. 1170 of the New Civil Code.[66]

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[64] Id. at 117-127.

[65] **Article 315.** *Swindling (estafa).* - Any person who shall defraud another by any of the means mentioned herein below shall be punished by:

1. With unfaithfulness or abuse of confidence, namely:

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(b) By misappropriating or converting, to the prejudice of another, money, goods, or any other personal property received by the offender in trust or on commission, or for administration, or under any other obligation involving the duty to make delivery of or to return the same, even though such obligation be totally or partially guaranteed by a bond; or by denying having received such money, goods, or other property.

xxxx

2. By means of any of the following false pretenses or fraudulent acts executed prior to or simultaneously with the commission of the fraud:

(a) By using fictitious name, or falsely pretending to possess power, influence, qualifications, property, credit, agency, business or imaginary transactions, or by means of other similar deceits.

[66] **Article 1170.** Those who in the performance of their obligations are guilty of fraud, negligence, or delay, and those who in any manner contravene the tenor thereof, are liable for damages.

The motions for reconsideration from the September 30, 2014 Decision were denied on October 14, 2015 in the following wise:

> **WHEREFORE**, finding no rationally persuasive reasons which would warrant a modification much less, a reversal of our Decision dated September 30, 2014, all the Motions for Reconsideration filed by the defendants-appellants are **DENIED**. The Notice of Change of Name filed by Defendant Manuel Estrella, is hereby **NOTED**.
>
> **SO ORDERED.**[67]

Grounds for the Petitions

Aside from Santos-Tan, defendants-appellants *a quo* appealed the September 30, 2014 Decision and October 14, 2015 Resolution of the CA *via* the instant recourses.

G.R. No. 220926: Petition for Review on Certiorari of Luis Juan L. Virata and UEM-MARA

In their Petition for Review on Certiorari,[68] Virata and UEM-MARA claim that there is no basis in implicating them in the scheme to defraud Ng Wee and the other investors since there was no privity of contract between them; petitioners never interacted with Ng Wee. This is allegedly consistent with the CA finding that Wincorp engaged in direct borrowing with its investors. Thus, petitioners argue that Ng Wee cannot subsequently claim that his funds were lent to Power Merge. Ng Wee likewise allegedly failed to prove that Power Merge derived pecuniary benefits from the investment transactions.

Petitioners add that the Confirmation Advices were issued by Wincorp alone. Wincorp had the sole discretion of selecting which corporate borrower to match with whom. Power Merge, Virata, and UEM-MARA therefore had no control over the matter. Thus, applying the doctrine of *res*

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[67] *Rollo* (G.R. No. 220926), p. 150.

[68] Id. at 18. The issues are:

I.

THE COURT OF APPEALS DECIDED CONTRARY TO LAW WHEN IT FOUND PETITIONERS LIABLE TO RESPONDENT NG WEE DESPITE THE ABSENCE OF ANY PRIVITY OF CONTRACT BETWEEN THEM

II.

THE COURT OF APPEALS DECIDED COTNRARY TO LAW IN RULING THAT THE DOCTRINE OF PIERCING THE VEIL OF CORPORATE FICTION APPLIES TO THIS CASE AND THAT PETITIONER VIRATA, AS DIRECTOR OF POWER MERGE, SHOULD BE PERSONALLY LIABLE TO RESPONDENT NG WEE

III.

THE COURT OF APPEALS DECIDED CONTRARY TO LAW IN RULING THAT UEM-MARA IS LIABLE TO RESPODNENT NG WEE

inter alios acta alteri nocere non debet, third parties like petitioners may not be prejudiced by the act, declaration, or omission of Wincorp.

The propriety of piercing the corporate veil is also challenged by petitioners. They argue that Virata's ownership of almost all of the shares of Power Merge does not automatically justify the application of the doctrine, absent fraud. And according to petitioners, there was no evidence of fraud, bad faith, or gross negligence on the part of Virata in the case at bar. It is the postulation that Virata could not be held liable for acts done in his official capacity, including the execution of the Credit Line Agreement and the Side Agreements, which allegedly are valid arm's length transactions duly authorized by Power Merge, and that bad faith cannot be presumed from the mere failure of Power Merge to pay its obligations.

Petitioners also see no valid reason to hold UEM-MARA liable since there is no evidence of its participation in the allegedly fraudulent act. There is no proof that the grant of the credit line was for the purpose of acquiring interests in UEM-MARA, or that the funds obtained by Power Merge were the same funds used by Virata to acquire interests therein. Petitioner Virata claims that he made use of a ₱600,000,000.00 credit facility from Metrobank to facilitate the acquisition.

G.R. No. 221058: Petition for Review on Certiorari of Wincorp

In its petition, Wincorp attributes reversible error[69] to the CA when it rendered judgment against the investment house. It claims that it merely performed its normal function as an investment house by matching and marrying corporate borrowers with investors. The arrangement it entered into was neither an investment contract between it and Ng Wee nor an exercise of quasi-banking function, but the brokerage of a legitimate loan agreement between Ng Wee and Power Merge. Ng Wee expected a fixed interest income at the end of the term of the loan, and not a participation in the success or loss of the borrower corporation.

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[69] *Rollo* (G.R. No. 221058), p. 25. The issues are:

I.

THE HONORABLE COURT OF APPEALS ERRED IN FINDING THE TRANSACTIONS AMONG THE PARTIES HEREIN AS FRAUDULENT

II.

THE HONORABLE COURT OF APPEALS ERRED IN APPRECIATING THE NATURE OF THE MONEY MARKET TRANSACTION AND THE CORRESPONDING DUTIES AND LIABILITIES OF THE PARTIES, AND HOLDING INSTEAD THAT PETITIONER WINCORP IS INVOLVED IN QUASI-BANKING ACTIVITIES

III.

THE HONORABLE COURT OF APPEALS ERRED IN RULING THAT WINCORP IS LIABLE EVEN IN ITS CAPACITY AS MERE AGENT/BROKER IN THE LOAN TRANSACTION

IV.

THE HONORABLE COURT OF APPEALS ERRED IN RULING THAT WINCORP IS SOLIDARILY LIABLE WITH THE OTHER DEFENDANTS

Wincorp adds that it was clear to Ng Wee that what was involved was a loan agreement, and that Wincorp was merely brokering the transaction. As a mere broker of the transaction, not the beneficiary thereof, Wincorp asserts that it cannot be held liable for the amount borrowed by Power Merge. Wincorp relies on the text of the Confirmation Advices issued to Ng Wee to advance this point.[70]

Based on the language of the Confirmation Advices, Ng Wee knew of and approved the transactions that Wincorp entered into with Power Merge as his agent; that Ng Wee's conformity in the series of Confirmations Advices issued in his favor, and his execution of the corresponding SPAs thereafter, allegedly ratified Wincorp's acts of agency in the execution of the loan agreement; and that Ng Wee had been renewing and rolling over his initial placement, despite knowledge of this setup.

Wincorp further denies violating commercial laws since the transactions are *"without recourse,"* in compliance with the Bangko Sentral ng Pilipinas (BSP) rule that only institutions that are granted license to perform quasi-banking functions can engage in transactions *"with recourse."* Moreover, the agreement with Ng Wee to broker a loan, not being a quasi-banking function, is required to be marked as *"without recourse"* under Sec. 4103N.2 of the BSP Manual of Regulations for Non-bank Financial Institutions.

It is also the contention of Wincorp that it is within its discretion whether or not to approve Power Merge's credit line. It was not an *ultra vires* act, and is instead covered by the business judgment rule. The fact that the business strategy turned out to be unfavorable should not so casually be used to impute liability to the corporation absent showing of bad faith or gross negligence.

G.R. No. 221109: Petition for Review of Manuel Estrella

Petitioner Estrella, one of the directors of Wincorp, instituted a separate petition[71] anchored on the ground that he was a mere nominee in

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[70] Id. at 20. This is to confirm that pursuant to your authority, **we have acted in your behalf and/or for your benefit, risk or account without recourse or liability, real or contingent, to Westmont Investment Corporation in respect of the loan granted to the Borrower** named and under the terms specified hereunder.

x x x x

For your convenience but without any obligation on our part, we may act as your collecting and paying agent for this transaction. Kindly note that your receipt hereof is an indication of your conformity to the foregoing terms and conditions of the transaction. (emphasis added)

[71] *Rollo* (G.R. No. 221109), pp. 115-117. The issues are:

I.

x x x x

THE COURT OF APPEALS GRAVELY ERRED IN RULING THAT THE HEREIN PETITIONER [IS] GUILTY OF GROSS NEGLIGENCE AND BAD FAITH IN DIRECTING THE AFFAIRS OF WINCORP

II.

x x x x

Wincorp of his principals, Eduardo Espiritu and Wincorp board chairperson John Anthony Espiritu; that he did not have any real beneficial interest in Wincorp as his appointment was a mere accommodation to the Espiritus; and that he did not even receive any compensation, salary, *per diem* or benefit of any kind from either the Espiritus or from Wincorp.

As a mere nominee, Estrella is involved solely in setting down company policies and prescribing the general guidelines for the direction of the business and affairs of Wincorp. In the performance of his duties, he relies heavily on the reports, memoranda, and information provided them by management. He contends that he was never involved in the day-to-day management and operations of the company. He then had no knowledge and could not then have approved of the Side Agreements entered into by Ong and petitioner Reyes. The Side Agreements were never presented in any of the meetings Estrella attended, or so he claims.

He also questions the RTC and the CA's reliance on the minutes of the special meetings naming him as one of the directors who approved Power Merge's credit line application and its subsequent amendment. He argues that the minutes have already been discredited when the charges against Tankiansee have been dropped. Estrella reminds the Court that Tankiansee was likewise included in the list of directors in attendance during the February 9, 1999 and March 11, 1999 special meetings, only to be disproved later on by his immigration records that show that he was out of the country during the material dates.

It was admitted that Estrella attended the February 9, 1999 special meeting, but claims that he already left before the *"other matters"* in the agenda, which included Power Merge's application, were discussed. He denies attending the March 11, 1999 special meeting since he accompanied his wife that day to the hospital for her cancer treatment. To substantiate these defenses, he brings to the Court's attention the fact that he did not sign, as he refused to sign, the minutes of the February 9, 1999 and March 11, 1999 special meetings.

G.R. No. 221135: Petition for Review on Certiorari of Simeon Cua, Henry Cualoping, and Vicente Cualoping

For their defense[72] against civil liability in this case, petitioners Cua and the Cualopings claim that Ng Wee failed to prove that they acted in bad

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THE COURT OF APPEALS GRAVELY ERRED IN FAILING TO RULE THAT THE WRIT OF PRELIMINARY ATTACHEMENT AGAINST APPELLANT ESTRELLA'S BEL-AIR PROPERTY WAS IRREGULAR AND CONTRARY TO THE REVISED RULES OF PROCEDURE AND SETTLED LEGAL PRINCIPLES

[72] *Rollo* (G.R. No. 221135), pp. 113-128. The issues are:

I.

THE COURT OF APPEAL'S 30 SEPTEMBER 2014 DECISION AND 26 OCTOBER 2015 RESOLUTION OUGHT TO BE ANNULLED AND SET ASIDE, FOR BEING CONTRARY TO SEC.31.

faith or were grossly negligent in managing the affairs of Wincorp, which is required for directors to be held liable under Sec. 31 of the Corporation Code. They argued that the extent of their participation in the alleged fraudulent scheme was limited to acting favorably on the executive committee's recommendations regarding Power Merge's credit line application and its subsequent amendment. Mere approval of Power Merge's applications, however, cannot be equated with bad faith, for the directors relied on the vetting by the departments responsible for doing so. They point out that Power Merge's applications underwent scrutiny by the credit committee and executive committee prior to their approval. The approval cannot then be considered as unlawful, and neither bad faith nor gross negligence can be attributed to the directors. Rather, it was performed in the legitimate pursuit of Wincorp's business as a duly-licensed investment house.

Moreover, petitioners deny any knowledge and participation in the execution of the Side Agreements with Power Merge, and claim that the execution was performed by Wincorp President Ong and petitioner Reyes without proper authorization from the board and, hence, *ultra vires*. They add that they could not have defrauded Ng Wee since they had no knowledge that the latter was matched with Power Merge.

G.R. No. 221218: Petition for Review on Certiorari of Anthony Reyes

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OF THE CORPORATION CODE AS WELL AS TO THE DOCTRINE IN *CARAG VS. NATIONAL LABOR RELATIONS COMMISSION*, 520 SCRA 28 (2007), *VDA. DE ROXAS VS. ROXAS-CRUZ*, G.R. NO. 182378, MARCH 6, 2013, *HEIRS OF FE TAN UY VS. INTERNATIONAL EXCHANGE BANK*, G.R. NO. 166282, FEBRUARY 13, 2013, AND OTHER CASES, HOLDING THAT BEFORE THE CORPORATE VEIL MAY BE PIERCED, AND THE SEPARATE PERSONALITY MAY BE DISREGARDED SO THAT LIABILITIES ARE ATTACHED TO INDIVIDUAL CORPORATE DIRECTORS/OFFICERS, THERE MUST BE CLEAR AND CONVINCING EVIDECNCE OF ANY WRONGDOING COMMITTED BY SAID CORPROATE DIRECTOR/OFFICER AND THAT SUCH ILL-MOTIVE OR BAD FAITH CANNOT BE PRESUMED.

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(A)

PETITIONERS SHOULD NOT BE HELD JOINTLY AND SOLIDARILY LIABLE WITH THE OTHER DEFENDANTS IN CIVIL CASE NO.00-99006 FOR ANY OF RESPONDENT'S CLAIMS. NO CLEAR AND CONVINCING EVIDENCE EXIST THAT PETITIONERS SIMEON CUA, HENRY CUALOPING, AND VICENTE CUALOPING ASSENTED TO THE PATENTLY UNLAWFUL ACTS OF THE CORPORATION WINCORP WHICH IS REQUIRED TO HOLD DIRECTORS LIABLE FOR CORPORATE ACTS UNDER SECTION 31 OF THE CORPORATION CODE AND APPLICABLE JURISPRUDENCE.

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(B)

NO CLEAR AND CONVINCING EVIDENCE EXIST THAT PETITIONERS SIMEON CUA, HENRY CUALOPING, AND VICENTE CUALOPING WERE GUILTY OF GROSS NEGLIGENCE OR BAD FAITH IN DIRECTING THE AFFAIRS OF THE CORPORATION WINCORP WHICH IS REQUIRED TO HOLD DIRECTORS LIABLE UNDER SECTION 31 OF THE CORPORATION CODE AND APPLICABLE JURISPRUDENCE.

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II.

PETITIONERS SIMEON CUA, VICENTE CUALOPING, AND HENRY CUALOPING SHOULD BE ABSOLVED FROM LIABILITY IN THIS CASE.

Finally, the grounds[73] invoked by petitioner Reyes to support his petition centered on the argument that he had no hand in the approval of the credit line application or its increase since he is not a director of Wincorp. He was merely the Vice-President for Operations of Wincorp, duly authorized as the investment house's signatory for and to all its documents, transactions and accounts. Thus, he alleges that he was under obligation to sign the Credit Line Agreement, its Amendment, and the Side Agreements in favor of Power Merge after the latter's application was approved by Wincorp's board of directors.

Furthermore, he argues that Sec. 31 of the Corporation Code is inapplicable since he is neither a director nor trustee of Wincorp, as required by the provision. And assuming without conceding its applicability, he claims that he cannot be held solidarily liable since he signed the agreements on behalf of the company in good faith.

The issue of whether or not Ng Wee is a real party in interest was again raised as an issue in Reyes' petition.

The Comments

Comments of Wincorp

In G.R. No. 220926, filed by petitioners Virata and UEM-MARA, Wincorp admitted in its Comment[74] that the execution of the Side Agreements is highly irregular, but argues that only Ong and Reyes should be held liable therefor since they acted beyond the scope of their authority.

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[73] *Rollo* (G.R. No. 221218), pp. 13-14. The issues are:

I.

THE COURT OF APPEALS COMMITTED SERIOUS ERROR IN RULING THAT PETITIONER REYES WAS A DIRECTOR OF WINCORP. PETITIONER REYES SIMPLY WAS NOT, AND HAD NEVER BEEN, A DIRECTOR OF RESPONDENT WINCORP.

II.

THE COURT OF APPEALS RULED IN A MANNER NOT IN ACCORD WITH THIS HONORABLE COURT'S APPLICABLE DECISIONS WHEN IT HELD PETITIONER REYES PERSONALLY LIABLE TO RESPONDENT NG WEE SIMPLY FOR BEING RESPONDENT WINCORP'S SIGNATORY IN THE SUBJECT TRANSACTIONS BETWEEEN RESPONDENTS WINCORP AND POWER MERGE. PETITIONER REYES ACTED IN GOOD FAITH AND WITHIN THE SCOPE OF HIS AUTHORITY AS A CORPORATE OFFICER OF RESPONDENT WINCORP.

III.

THE COURT OF APPEALS RULED IN A MANNER NOT IN ACCORD WITH THIS HONORABLE COURT'S APPLICABLE DECISIONS WHEN IT HELD PETITIONER REYES SOLIDARILY LIABLE WITH THE OTHER RESPONDENTS FOR LIQUIDATED AND MORAL DAMAGES AND ATTORNEY'S FEES TO RESPONDENT NG WEE. THE PROVISION ON LIQUIDATED DAMAGES CANNOT APPLY TO PETITIONER REYES, AS HE WAS NOT A PARTY TO THE AGREEMENT. SIMILARLY, HE CANNOT BE HELD LIABLE FOR MORAL DAMAGES WHEN IT WAS NOT ESTABLISHED THAT HE ACTED IN BAD FAITH.

IV.

PETITIONER REYES' CROSS-CLAIMS SHOULD HAVE BEEN GRANTED, INASMUCH AS THE COURT OF APPEALS FOUND COLLUSION BETWEEN RESPONDENTS WINCORP AND VIRATA, AND HELD THEM LIABLE TO RESPONDENT NG WEE

[74] *Rollo* (G.R. No. 220926), pp. 5045-5051.

Wincorp claims that the execution of the Side Agreements releasing Power Merge from its obligations are *ultra vires* acts of the corporate officers, for which the investment house cannot be held liable.

This argument was further amplified in its Comment[75] in G.R. No. 221218, filed by Reyes, wherein Wincorp reiterated that the actions of the two officers (Ong and Reyes) in executing the Side Agreements, and thereby discharging Virata and Power Merge from their obligations, was outside the scope of their authority and was not approved its board of directors. Accordingly, their actions could not legitimately be considered as actions of Wincorp.

Comment of Virata, UEM-MARA

Petitioners Virata and UEM-MARA argued in their Comment[76] in G.R. No. 221218, the only petition where they are impleaded as respondents, that petitioner Reyes' cross-claim has no factual and legal basis. Aside from Reyes' general averments that Wincorp and Power Merge connived and colluded to defraud the investors, he did not cite any specific basis for holding Virata and UEM-MARA liable to him.

Comment of Ng Wee

Respondent Ng Wee filed his Comment[77] on the consolidated petitions but merely refuted petitioner Reyes' claims. Ng Wee emphasized that Reyes did not assail the findings of the CA that the transactions between Wincorp and Power Merge were impressed with fraud. Moreover, Reyes' indispensable participation in the fraud, especially his signing of the Side Agreements, rendered him liable to respondent Ng Wee. His signatures to the Side Agreements meant that he adhered to its contents, including the release of Power Merge from its obligations under the Promissory Notes.

Meanwhile, petitioners Reyes, Estrella, Cua, and the Cualopings did not file their respective comments[78] despite due notice.[79]

The Issues

Succinctly stated, the issues raised in the consolidated petitions boil down to the following:

1. Whether or not the case was prosecuted in the name of the real party in interest;

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[75] *Rollo* (G.R. No. 221218), pp. 1035-1040.
[76] Id. at 935-951.
[77] Id. at 1043-1106.
[78] Cua, Vicente and Henry Cualoping, and Estrella are respondents in G.R. No. 221218, and in G.R. No. 220926 along with Reyes.
[79] *Rollo* (G.R. No. 221218), p. 901; *Rollo* (G.R. No. 220926), p. 5042.

2. Whether or not Ng Wee was able to establish his cause/s of action against Wincorp and Power Merge;

3. Whether or not it is proper to pierce the veil of corporate fiction under the circumstances of the case;

4. Whether or not the counterclaims and cross-claims of the parties should prosper; and

5. Whether or not the award of damages to Ng Wee is proper.

The Court now resolves these issues *in seriatim*.

The Court's Ruling

I.
Ng Wee is the Real Party in Interest

Petitioners present legal issues on both procedure and substance. Resolving first the procedural aspect of the case, the Court rules that Ng Wee is a real party in interest, contrary to the petitioners' claim.

Law of the Case doctrine bars the re-litigation of a settled issue

As a general rule, every action must be prosecuted or defended in the name of the real party in interest.[80] Section 2, Rule 3 of the Rules of Court defines a real party in interest as *"the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit."*

In this case, it is worth recalling that the procedural issue on whether or not Ng Wee is the real party in interest had already been resolved by this Court in G.R. No. 162928. There, the Court found neither abuse of discretion on the part of the RTC nor reversible error on the CA when they ruled that Ng Wee had the legal personality to file the Complaint to recover his investments. The resolutions by the CA and this Court sustaining the October 4, 2001 Order had already attained finality and could no longer be modified. Concomitantly, the parties are barred from re-raising the issues settled therein, pursuant to the *law of the case* doctrine.

The *law of the case* doctrine applies in a situation where an appellate court has made a ruling on a question on appeal and thereafter remands the case to the lower court for further proceedings; the question settled by the appellate court becomes the *law of the case* at the lower court and in any subsequent appeal. It means that whatever is irrevocably established as the

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[80] RULES OF COURT, Rule 3, Section 2.

controlling legal rule or decision between the same parties in the same case continues to be the law of the case, whether correct on general principles or not, so long as the facts on which the legal rule or decision was predicated continue to be the facts of the case before the court.[81]

It is inconsequential that the issue raised in G.R. No. 162928 pertained to the alleged grave abuse of discretion committed by the RTC in denying the motions to dismiss, and not to the merits of the motions to dismiss *per se*. For as the Court has elucidated in *Banco de Oro-EPCI, Inc. v. Tansipek*:

> x x x **there is no substantial distinction between an appeal and a Petition for *Certiorari* when it comes to the application of the Doctrine of the Law of the Case**. The doctrine is founded on the policy of ending litigation. The doctrine is necessary to enable the appellate court to perform its duties satisfactorily and efficiently, which would be impossible if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal.[82] (emphasis added)

We are then constrained to abide by Our prior ruling in G.R. No. 162928 that Ng Wee is a real party in interest in this case.

Ng Wee successfully stated a cause of action based on a hypothetical admission of the allegations in his complaint

To be sure, hornbook doctrine is that when the affirmative defense of dismissal is grounded on the failure to state a cause of action, a ruling thereon should be based on the facts alleged in the complaint.[83] Otherwise stated, whether or not Ng Wee successfully stated a cause of action requires hypothetically admitting and scrutinizing the allegations in his Complaint. A reproduction of its pertinent contents is hence apropos:

> x x x x
>
> 2.5 Relying on said representations, [Ng Wee] placed substantial amounts of money in his own name and in the names of others with defendant Wincorp on several occasions. Some of the outstanding placements of [Ng Wee] with defendant Wincorp, which were loaned to defendant Virata/Power Merge, are in the names of Robert Tabada Tan, Elizabeth Ng Wee, Alex Lim Tan and Angel Archangel who hold said placements in trust for [Ng Wee].[84]

As aptly noted by the trial court in its October 4, 2001 Order denying the motions to dismiss:

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[81] *Vios v. Pantangco, Jr.*, G.R. No. 163103, February 6, 2009, 578 SCRA 129, 143.
[82] G.R. No. 181235, July 22, 2009, 593 SCRA 456, 466-467.
[83] *Clidoro vs. Jalmanzar*, G.R. No. 176598, July 9, 2014, 729 SCRA 350.
[84] *Rollo* (G.R. No. 220926), p. 197.

> In the Complaint, [Ng Wee] has clearly averred that he placed some of his money placements in the names of other persons and that said persons held the said money placements in trust for him (paragraph 2.5 of the complaint). With such allegation of ownership of the funds, [Ng Wee] is clearly the real party in interest as he stands to be benefited or injured by the judgment in the instant case. (Section 2, Rule 3, Rules of Court)
>
> x x x x
>
> Hence, this Court cannot grant the dismissal of the Complaint on this ground, since the allegations in the Complaint show, on the contrary, that [Ng Wee] is the real party in interest.[85] (words in brackets added)

The RTC is correct in its observation that there is sufficient allegation that Ng Wee is the actual injured party in the failed investment. As the alleged owner of the funds placed under the names of Robert Tabada Tan, Elizabeth Ng Wee, Alex Lim Tan and Angel Archangel in Wincorp, Ng Wee lost ₱213,290,410.36 from Power Merge's default and non-payment of its obligations under the credit facility extended by the investment house. This controverts petitioners' claim that Ng Wee is not the real party in interest herein.

Testimonial evidence on record established Ng Wee's ownership over the invested funds; Ng Wee does not lack cause of action

Even the evidence on record would belie petitioners' claim that Ng Wee is not the real party in interest. Elizabeth Ng Wee, Alex Lim Tan and Angel Archangel were straightforward in their testimonies that the funds invested in Power Merge belonged to Ng Wee, albeit recorded under their names. They likewise executed documents denominated as *"Declaration of Trust"* wherein they categorically stated that they merely held the funds in trust for Ng Wee, the beneficial owner.

Angel Archangel admitted the trust relation in the following manner:

> Q: What can you say about the money placement in Wincorp?
> A: It is not my money, sir.
>
> Q: And whose money is it, Madam Witness?
> A: Alejandro Ng Wee.
>
> Q: And what is your participation insofar as that money placement is concerned?
> A: None, sir.[86]

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[85] Id. at 97-98.

[86] TSN, August 17, 2005, pp. 14-33, as cited in the September 30, 2014 Court of Appeals Decision in CA-G.R. CV. No. 97817, pp. 34-35; id. at 100-101.

Elizabeth Ng Wee, meanwhile, testified in the following wise:

Q: Now you said you transacted with this Gilda because you were instructed by your brother to transact with her?
A: Yes, sir.

Q: And why did you follow his instruction?
A: It is his money.

Q: Which one?
A: Those placements, sir.

x x x x

Q: And why are these money placements under your name, Madam Witness, if these are his money?
A: He requested me to handle this money on behalf of him, sir.

Q: And you earlier identified five (5) confirmation advices, what relation do these confirmation advices have to the confirmation which you have identified and said that you surrendered to your brother?
A: They are the same, sir.

Q: I see. Why did you surrender them to your brother?
A: Simply because they are not my money, sir. Those are his, so it is up to him to do something about what will happen.

x x x x

Q: I am holding before me a document introduced by the lawyer of your brother previously marked as Exhibit "JJJ" entitled Declaration of Trust, kindly go over the document.
A: Okay.

Q: There is a signature at the bottom portion of the document, whose signature is that?
A: That is my signature, sir.[87]

And when Alex Lim Tan took the witness stand:

x x x x

A: He [referring to Alejandro Ng Wee] called me up and he requested me if he can use my name in placing his money with Westmont for money placement.

Q: You mentioned Westmont. What is that Westmont?
A: Westmont Investment Corporation, sir.

Q: And what was your response, if any, to the request of Plaintiff?
A: I agreed.

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[87] TSN, August 24, 2005, pp. 40-52, as cited in the September 30, 2014 Court of Appeals Decision in CA-G.R. CV. No. 97817, pp. 35-36; id. at 101-102.

Q: And what happened next after you agreed?
A: He let me sign the documents specifically the Confirmation Advices, sir.

x x x x

Q: And what did you do after he sent these Confirmation Advices to you?
A: I signed it, sir.

Q: And after signing these documents, what else did you do if any?
A: I returned them to Mr. Wee, Sir.

Q: And why did you return these documents to him?
A: Because he owns it, sir.

x x x x

Q: Apart from the Confirmation Advices that you identified today, did you sign any other document in connection with the investment represented by these Confirmation Advices?
A: There was, sir.

Q: Can you tell us what was that document, Mr. Witness?
A: The Declaration of Trust, Sir.[88]

Finally, Wincorp employees Ruben Tobias and Gilda Lucena testified[89] that they were instructed by Ng Wee to rename several of his investments under the Power Merge Account to the names of Alex Lim Tan and Robert Tabada Tan. Effectively, Ruben Tobias and Gilda Lucena corroborated the claim of Ng Wee that the investments in Power Merge that were recorded under those names are actually respondent Ng Wee's.

From the foregoing evidence on record, it can no longer be gainsaid that Ng Wee is the real party in interest in the present case. The allegation in his Complaint that he is the actual owner of the ₱213,290,410.36 infused in Power Merge under the names of Robert Tabada Tan, Elizabeth Ng Wee, Alex Lim Tan and Angel Archangel has been established by preponderant evidence, and, more significantly, has already become the law of the case. The procedural issue raised by petitioners therefore lacks merit.

II.
Liability of the Corporations to Ng Wee

With the procedural issue disposed, the Court will now proceed to ascertain the liability of the parties to Ng Wee, beginning with the major players in this controversy. On this point, worthy of note is that none of the petitioners disputed the fact that Ng Wee is entitled to recover the amount

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[88] TSN, September 7, 2005, pp. 7-32, as cited in the September 30, 2014 Court of Appeals Decision in CA-G.R. CV. No. 97817, pp. 36-37; id. at 102-103.

[89] TSN, July 13, 2005 and January 18, 2006, as cited in the September 30, 2014 Court of Appeals Decision in CA-G.R. CV. No. 97817, p. 37; id. at 103.

that he has invested. What they only required, which they also invoked as the ground for their motions to dismiss, is that Ng Wee prove that the amounts invested actually belonged to him. Thus, having established that Ng Wee is the real party in interest and that he is the beneficial owner of the investments under the names of Robert Tabada Tan, Elizabeth Ng Wee, Alex Lim Tan and Angel Archangel, his entitlement to recover the ₱213,290,410.36 becomes indubitable. The only question that remains now is: from whom can Ng Wee recover the ₱213,290,410.36 investment? To this, petitioners would pose clashing claims, which prompts this Court to elucidate on their respective exposures to civil liability.

Only Wincorp is liable to Ng Wee for fraud; Power Merge is liable based on contract

a. That Wincorp defrauded Ng Wee is a finding of fact that is conclusive on this Court

Axiomatic in this jurisdiction is that, as a general rule, only questions of law may be raised in a Petition for Review on *Certiorari* under Rule 45 of the Rules of Court.[90] The appellate court's findings of fact being conclusive, the jurisdiction of this Court in appealed cases is limited to reviewing and revising the errors of law.[91] As We have emphatically declared in a long line of cases, *"it is not the function of the Supreme Court to analyze or weigh such evidence all over again, its jurisdiction being limited to reviewing errors of law that might have been committed by the lower court."*[92]

Enumerated in *Medina v. Mayor Asistio, Jr.*[93] are the recognized exceptions to the general rule.[94] But insofar as Wincorp is concerned, it failed to establish that any of these exceptions obtain in the present case. Thus, the Court sustains the finding of the trial court, as affirmed by the CA, that Wincorp is liable to Ng Wee for perpetrating an elaborate scheme to defraud its investors. As held by the CA:

> [Ng Wee] would not have placed funds or invested [in] the *"sans recourse"* transactions under the Power Merge borrower account had he not been deceived into believing that Power Merge is financially capable

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[90] RULES OF COURT, Rule 45, Sec.1.

[91] *Far Eastern Surety and Insurance Co., Inc. v. People*, G.R. No. 170618, November 20, 2013, 710 SCRA 358.

[92] *Dihiansan v. Court of Appeals,* No. L-49539, September 14, 1987, 153 SCRA 712, 716.

[93] G. R. No. 75450, November 8, 1990, 191 SCRA 218.

[94] Id. at 223-224: (1) When the conclusion is a finding grounded entirely on speculation, surmises or conjectures; (2) When the inference made is manifestly mistaken, absurd or impossible; (3) Where there is a grave abuse of discretion; (4) When the judgment is based on a misapprehension of facts; (5) When the findings of fact are conflicting; (6) When the Court of Appeals, in making its findings, went beyond the issues of the case and the same is contrary to the admissions of both appellant and appellee; (7) The findings of the Court of Appeals are contrary to those of the trial court; (8) When the findings of fact are conclusions without citation of specific evidence on which they are based; (9) When the facts set forth in the petition as well as in the petitioner's main and reply briefs are not disputed by the respondents; and (10) The finding of fact of the Court of Appeals is premised on the supposed absence of evidence and is contradicted by the evidence on record.

of paying the returns of his investments/money placements. Wincorp accredited Power Merge as a borrower, given it a credit line in the maximum amount of ₱2,500,000,000.00, Philippine Currency, allowed it to make drawdowns up to ₱2,183,755,253.11, Philippine Currency, matched it with [Ng Wee's] investments/ money placements to the extent of ₱213,290,410.36, Philippine Currency, notwithstanding telling signs which immediately cast doubt on its ability to perform its obligations under the Credit Line Agreements, Promissory Notes and [Confirmation Advices], to wit: (1) Power Merge had only been in existence as a corporation for barely two (2) years when it was accredited as borrower by Wincorp; (2) Power Merge is a thinly capitalized corporation with only ₱37,500,000.00 subscribed capital stock; (3) Power Merge is not an on-going concern because (a) Despite the fact that Power Merge's principal place of business is at 151 Paseo de Roxas St., Makati City, it has neither registered nor conducted any business at Makati City as evident from the Certification dated January 3, 2006 issued by the Business Permits Office of Makati City; (b) it is not engaged in any lucrative business to finance its operation; Despite the fact that its primary purpose is to "invest in, purchase, or otherwise acquire and own, hold, use, sell, assign, transfer, mortgage, pledge, exchange, or otherwise dispose of real or personal property of every kind and description...," no proof was adduced to show that it was carrying out or has carried out this mandate in accordance with the law; (c) From the time of its incorporation until the revocation of its Certificate of Incorporation on March 15, 2004, Power Merge has failed to file annual reports required by the SEC such as General Information Sheets and Financial Statements; (4) No security whatsoever was demanded by Wincorp or furnished by Power Merge in relation to its credit line and drawdowns. Indeed, no person in his proper frame of mind would venture to lend hundreds of millions of pesos to a business entity having such a financial setup. x x x

x x x x

The intent to defraud and deceive [Ng Wee] of his investments/ money placements was manifest from the very start. Wincorp and Power Merge entered into a Credit Line Agreement on February 15, 1999 and an Amendment to Credit Line Agreement on March 15, 1999. It is interesting to note that they simultaneously executed two Side Agreements which are peculiar because: (1) The dates of execution of the two Side Agreements coincide with the dates of execution of the credit agreements; (2) [The] two Side Agreements were executed by the same exact parties: Antonio Ong and Anthony Reyes for and on behalf of Wincorp and [Virata] and Augusto Geluz for and on behalf of Power Merge; (3) The Credit Line Agreement dated February 15, 1999 and the First Side Agreement dated February 15, 1999 were both acknowledged before notary public, Atty. Fina De La Cuesta-Tantuico while the Amendment to Credit Line Agreement dated March 15, 1999 and the Second Side Agreement dated March 15, 1999 were both acknowledged before notary public, Atty. Eric R.G. Espiritu; (4) The two Side Agreements have the same exact provisions as the two credit agreements insofar as it purports to extend a credit line and increase the credit line of Power Merge but the two Side Agreements relieve Power Merge from any liability arising from the execution of the agreements and promissory notes.[95]

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[95] *Rollo* (G.R. No. 220926), pp. 110-113.

Jurisprudence defines "fraud" as the voluntary execution of a wrongful act, or a willful omission, knowing and intending the effects which naturally and necessarily arise from such act or omission. In its general sense, fraud is deemed to comprise anything calculated to deceive, including all acts and omissions and concealment involving a breach of legal or equitable duty, trust, or confidence justly reposed, resulting in damage to another, or by which an undue and unconscientious advantage is taken of another. Fraud is also described as embracing all multifarious means which human ingenuity can device, and which are resorted to by one individual to secure an advantage over another by false suggestions or by suppression of truth and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.[96]

Under Article 1170 of the New Civil Code, those who in the performance of their obligations are guilty of fraud are liable for damages. The fraud referred to in this Article is the deliberate and intentional evasion of the normal fulfillment of obligation.[97] Clearly, this provision is applicable in the case at bar. It is beyond quibble that Wincorp foisted insidious machinations upon Ng Wee in order to inveigle the latter into investing a significant amount of his wealth into a mere empty shell of a corporation. And instead of guarding the investments of its clients, Wincorp executed Side Agreements that virtually exonerated Power Merge of liability to them; Side Agreements that the investors could not have been aware of, let alone authorize.

The summation of Wincorp's actuations establishes the presence of actionable fraud, for which the company can be held liable. In *Joson vs. People*, the Court upheld the ruling that where one states that the future profits or income of an enterprise shall be a certain sum, but he actually knows that there will be none, or that they will be substantially less than he represents, the statements constitute an actionable fraud where the hearer believes him and relies on the statement to his injury.[98]

Just as in *Joson*, it is abundantly clear in the present case that the profits which Wincorp promised to the investors would not be realized by virtue of the Side Agreements. The investors were kept in the dark as regards the existence of these documents, and were instead presented with Confirmation Advices from Wincorp to give the transactions a semblance of legitimacy, and to convince, if not deceive, the investors to roll over their investments or to part with their money some more.

b. Power Merge is not guilty of fraud, but is liable under contract nonetheless

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[96] *Republic v. Estate of Alfonso Lim, Sr.*, G.R. No. 164800, July 22, 2009, 593 SCRA 404, 417-418.

[97] *Legaspi Oil Co., Inc. v. Court of Appeals*, G.R. No. 96505 July 1, 1993, 224 SCRA 213.

[98] G.R. No. 178836, July 23, 2008, 559 SCRA 649, 657-658.

The story, however, is different for Power Merge. The circumstances of this case points to the conclusion that Power Merge and Virata were not active parties in defrauding Ng Wee. Instead, the company was used as a mere conduit in order for Wincorp to be able to conceal its act of directly borrowing funds for its own account. This is made evident by one highly peculiar detail – the date of the Power Merge's drawdowns.

It must be remembered that the special meeting of Wincorp's board of directors was conducted on February 9 and March 11 of 1999, while the Credit Line Agreement and its Amendment were entered into on February 15 and March 15 of 1999, respectively. But as indicated in Power Merge's schedule of drawdowns,[99] Wincorp already released to Power Merge the sum of ₱1,133,399,958.45 as of February 12, 1999, before the Credit Line Agreement was executed. And as of March 12, 1999, prior to the Amendment, ₱1,805,018,228.05 had already been released to Power Merge.

The fact that the proceeds were released to Power Merge before the signing of the Credit Line Agreement and the Amendment thereto lends credence to Virata's claim that Wincorp did not intend for Power Merge to be strictly bound by the terms of the credit facility; and that there had already been an understanding between the parties on what their respective obligations will be, although this agreement had not yet been reduced into writing. The underlying transaction would later on be revealed in black and white through the Side Agreements, the tenor of which amounted to Wincorp's intentional cancellation of Power Merge and Virata's obligation under their Promissory Notes.[100] In exchange, Virata and Power Merge assumed the obligation to transfer equity shares in UPDI and the tollway project in favor of Wincorp. An arm's length transaction has indeed taken place, substituting Virata and Power Merge's obligations under the Promissory Notes, in pursuance of the Memorandum of Agreement and Waiver and Quitclaim executed by Virata and Wincorp. Thus, as far as Wincorp, Power Merge, and Virata are concerned, the Promissory Notes had already been discharged.

It was the understanding of the two companies that the Promissory Notes would not be passed on to the hands of third persons and that, in any event, Wincorp guaranteed Virata that he and Power Merge would not be held liable thereon. Driven by the desire to completely settle his obligation as a surety under the Hottick account, Virata took the deal and relied in good faith that Wincorp's officials would honor their gentleman's agreement. But as events unfolded, it turned out that Wincorp was in evident bad faith when it subsequently assigned credits pertaining to portions of the loan and the corresponding interests in the Promissory Notes to the investors in the form

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[99] *Rollo* (G.R. No. 220926), pp. 411-412.
[100] See NEGOTIABLE INSTRUMENTS LAW, Section 119(c).

of Confirmation Advices when it knew fully well of Power Merge's discharge from liability.

Between Wincorp and Power Merge, it is Wincorp, as the assignor of the portions of credit, that is under obligation to disclose to the investors the existence and execution of the Side Agreements. Failure to do so, to Our mind, only goes to show that the target of Wincorp's fraud is not any particular individual, but the public at large. On the other hand, it was not Power Merge's positive legal duty to forewarn the investors of its discharge since the company did not deal with them directly. Power Merge and Virata were agnostic as to the source of funds since they relied on their underlying agreement with Wincorp that they would not be liable for the Promissory Notes issued.

As far as it was concerned, Power Merge was merely laying the groundwork prescribed by Wincorp towards fulfilling its obligations under the Waiver and Quitclaim. Virata was not impelled by any Machiavellian mentality when he signed the Side Agreements in Power Merge's behalf. Therefore, only Wincorp can be held liable for fraud. Nevertheless, as will later on be discussed, Power Merge and Virata can still be held liable under their contracts, but not for fraud.

The "sans recourse" transactions cannot exempt Wincorp from liability for having been offered in violation of commercial laws

Wincorp attempts to evade liability by hiding behind the *"sans recourse"* nature of the transactions with Ng Wee. It argues that as a mere agent or broker that matches an investor with a borrower, it cannot be held liable for the invested amount in case of an unsuccessful or failed match. As evidenced by the Confirmation Advices and SPAs signed by the investors, Wincorp is merely tasked to deliver the amount to be loaned to the borrower, and does not guarantee its borrowers' financial capacity.

The argument deserves scant consideration.

a. The "sans recourse" transactions are deemed "with recourse"

An investment house is an enterprise that engages in the underwriting of securities of other corporations.[101] Securities underwriting, in turn, refers to the process by which underwriters raise capital investments on behalf of the corporation issuing the securities. Thus, aside from performing the regular powers of a corporation under the Corporation Code, a duly licensed

[101] PRESIDENTIAL DECREE NO. 129, Section 2.

investment house is granted additional powers under Sec. 7[102] of Presidential Decree No. (PD) 129.

Conspicuously absent in the enumerated additional powers of an investment house, however, is the authority to perform quasi-banking functions. Even as a financial intermediary, investment houses are not allowed to engage in quasi-banking functions, unless authorized by the Monetary Board through the issuance of a Certificate of Authority.[104]

The Omnibus Rules and Regulations for Investment Houses and Universal Banks Registered as Underwriters defines *"quasi-banking function"* as the function of ***"borrowing funds for the borrower's own account from 20 or more persons or corporate lenders at any one time, through the issuance, endorsement or acceptance of debt instruments of any kind*** *other than deposits which may include but need not be limited to acceptances, promissory notes, participations, certificates of assignment or similar instruments* ***with recourse****, trust certificates or of repurchase agreements for purposes of relending or purchasing of receivables and other obligations."*[105]

Given the definition, it would appear on paper that offering the *"sans recourse"* transactions does not qualify as the performance of a quasi-banking function specifically because it is *"sans recourse"* against Wincorp.

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[102] **Section 7.** ***Powers.*** In addition to the powers granted to corporations in general, an Investment House is authorized to do the following:

1. Arrange to distribute on a guaranteed basis securities of other corporations and of the Government or its instrumentalities;
2. Participate in a syndicate undertaking to purchase and sell, distribute or arrange to distribute on a guaranteed basis securities of other corporations and of the Government or its instrumentalities;
3. Arrange to distribute or participate in a syndicate undertaking to purchase and sell on a best-efforts basis securities of other corporations and of the Government or its instrumentalities;
4. Participate as soliciting dealer or selling group member in tender offers, block sales, or exchange offering or securities; deal in options, rights or warrants relating to securities and such other powers which a dealer may exercise under the Securities Act;
5. Promote, sponsor, or otherwise assist and implement ventures, projects and programs that contribute to the economy's development;
6. Act as financial consultant, investment adviser, or broker;
7. Act as portfolio manager, and/or financial agent, but not as trustee of a trust fund or trust property;
8. Encourage companies to go public, and initiate and/or promote, whenever warranted, the formation, merger, consolidation, reorganization, or recapitalization of productive enterprises, by providing assistance or participation in the form of debt or equity financing or through the extension of financial or technical advice or service;
9. Undertake or contract for researches, studies and surveys on such matters as business and economic conditions of various countries, the structure of financial markets, the institutional arrangements for mobilizing investments;
10. Acquire, own, hold, lease or obtain an interest in real and/or personal property as may be necessary or appropriate to carry on its objectives and purposes;
11. Design pension, profit-sharing and other employee benefits plans; and
12. Such other activities or business ventures as are directly or indirectly related to the dealing in securities and other commercial papers, unless otherwise governed or prohibited by special laws, in which case the special law shall apply.

[104] PD 129, Sec. 12.

[105] Id., Sec. 2(K)

As provided under S4101Q.3 of the Manual of Regulations for Non-Bank Financial Institutions:

> S4101Q.3. Transactions **not** considered quasi-banking. The following shall not constitute quasi-banking:
>
> x x x x
>
> a. **The mere buying and selling without recourse of instruments** mentioned in Sec.4101Q: Provided that:
>
> (1) The institution selling without recourse shall indicate or stamp in conspicuous print on the instrument/s, as well as on the confirmation of sale (COS), the phrase without recourse or sans recourse and the following statement:
>
> (name of financial intermediary)
> assumes no liability for the payment
> directly or indirectly, of the instrument
>
> (2) In the absence of the phrase without recourse or sans recourse and without the above-required accompanying statement, the instrument so issued, endorsed or accepted shall automatically be considered as falling within the purview of the rules on quasi-banking. (emphasis added)

However, the Court affirms the appellate court's finding that the true nature of the *"sans recourse"* transactions contradicts Wincorp's averment. A perusal of the records would show that Wincorp engaged in practices that rendered the transactions to be *"with recourse"* and, consequently, within the ambit of quasi-banking rules.

First, Wincorp did not act as a mere financial intermediary between Ng Wee and Power Merge, but effectively obtained the funds for its own account. To borrow funds for one's own account should not only be taken in its literal meaning to the effect that Wincorp and its beneficial owners literally borrowed the funds invested by Ng Wee. Rather, it should be interpreted in this case while bearing in mind Wincorp's end goal — to assign its rights to the uncollected, if not worthless, Hottick obligations and hold more valuable Power Merge papers in their stead. Without enticing the investors to put up capital for Power Merge, Wincorp would not have been able to facilitate the exchange. Thus, with Power Merge as a conduit, Wincorp's borrowings from its investors redounded to its benefit. This is bolstered by Wincorp's act of executing the Side Agreements releasing Power Merge from its obligation to pay under its Promissory Notes, exposing itself to liability to pay the same.

Second, in PED Case No. 20-2378, the Prosecution and Enforcement Department of the SEC found that as of December 31, 1999, Wincorp has sourced funds from 2,200 individuals with an average of ₱7,000,000,000.00

worth of commercial papers per month. This figure unquestionably exceeds the *"20 or more persons or corporate lenders"* threshold.

Third, the Confirmation Advices that are marked *"sans recourse"* are actually *"with recourse."* On this point, a reproduction of the succeeding paragraphs of S4101Q.3 of the Manual of Regulations for Non-Bank Financial Institutions is in order:

> x x x x
>
> Provided further, that **any of the following practices or practices similar and/or tantamount thereto in connection with a without recourse transaction rendered such transaction as with recourse and within the purview of the rules on quasi-banking.**
>
> x x x x
>
> (iii) **Payment with the funds of the financial intermediary which assigned, sold or transferred the debt instrument without recourse**, unless the financial intermediary can show that the issuer has with the said financial intermediary funds corresponding to the amount of the obligation. (emphasis added)

From the above provision, Wincorp's act of advancing the payment of interests when the corporate borrower is unable to pay despite the borrowing being branded as without recourse, rendered it to be *with* recourse. Coupled with the above-circumstances, offering the *"sans recourse"* transactions should then be categorized as an exercise of a quasi-banking function. The transactions were merely being denominated as *"sans recourse"* by Wincorp to circumvent the license requirement under the law. The alleged *"sans recourse"* nature of the transactions cannot then be used by Wincorp as a shield against liability to Ng Wee.

b. Wincorp engaged in the sale of unregistered securities

There is more to the *"sans recourse"* transactions than meets the eye, so much so that the operations of Wincorp cannot be oversimplified as mere brokering of loans. As discovered by the SEC in PED Case No. 20-2378, and as ruled by the CA, Wincorp was, in reality, selling to the public securities, *i.e.*, shares in the Power Merge credit in the form of investment contracts.

Securities are shares, participation or interests in a corporation or in a commercial enterprise or profit-making venture and evidenced by a certificate, contract, instruments, whether written or electronic in character.[106] As a general rule, securities are not to be sold or offered for sale

[106] REPUBLIC ACT NO. 8799, Section 3; see also BATAS PAMBANSA BLG. 178, Section 2(a).

or distribution without due registration, and provided that information on the securities shall be made available to prospective purchasers.[107]

Included in the list of securities that require registration prior to offer, sale, or distribution are investment contracts.[108] An investment contract refers to a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits primarily from the efforts of others.[109] It is presumed to exist whenever a person seeks to use the money or property of others on the promise of profits.[110]

In this jurisdiction, the Court employs the *Howey* test, named after the landmark case of *Securities and Exchange Commission v. W.J. Howey Co.*,[111] to determine whether or not the security being offered takes the form of an investment contract. The case served as the foundation for the domestic definition of the said security.

Under the *Howey* test, the following must concur for an investment contract to exist: (1) a contract, transaction, or scheme; (2) an investment of money; (3) investment is made in a common enterprise; (4) expectation of profits; and (5) profits arising primarily from the efforts of others. Indubitably, all of the elements are present in the extant case.

First, Wincorp offered what it purported to be *"sans recourse"* transactions wherein the investment house would allegedly match investors with pre-screened corporate borrowers in need of financial assistance.

Second, Ng Wee invested the aggregate amount of ₱213,290,410.36 in the *"sans recourse"* transactions through his trustees, as embodied in the Confirmation Advices.

Third, prior to being matched with a corporate borrower, all the monies infused by the investors are pooled in an account maintained by Wincorp.[112] This ensures that there are enough funds to meet large drawdowns by single borrowers.

Fourth, the investors were induced to invest by Wincorp with promises of high yield. In Ng Wee's case, his Confirmation Advices reveal that his funds were supposed to earn 13.5% at their respective maturity dates.

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[107] REPUBLIC ACT NO. 8799, Sec. 8; see also BATAS PAMBANSA BLG. 178, Sec. 4.

[108] REPUBLIC ACT NO. 8799, Sec. 3.1(b); see also BATAS PAMBANSA BLG. 178, Sec. 2.

[109] *Power Homes Unlimited Corporation v. Securities and Exchange Commission,* G.R. No. 164182, February 26, 2008, 546 SCRA 567, 575-576.

[110] *Securities and Exchange Commission v. Santos,* G.R. No. 195542, March 19, 2014, 719 SCRA 514.

[111] 328 US 293 (1946).

[112] *Rollo* (G.R. No. 220296), p. 1040.

Fifth, the profitability of the enterprise depended largely on whether or not Wincorp, on best effort basis, would be able to match the investors with their approved corporate borrowers.

Apparent then is that the factual milieu of the case at bar sufficiently satisfies the *Howey* test. The *"sans recourse"* transactions are, in actuality, investment contracts wherein investors pool their resources to meet the financial needs of a borrowing company. This does not stray far from the illustration given by former Associate Justice Roberto A. Abad in *Securities and Exchange Commission v. Prosperity.com, Inc.*, to wit:

> An example that comes to mind would be the long-term commercial papers that large companies, like San Miguel Corporation (SMC), offer to the public for raising funds that it needs for expansion. When an investor buys these papers or securities, he invests his money, together with others, in SMC with an expectation of profits arising from the efforts of those who manage and operate that company. SMC has to register these commercial papers with the SEC before offering them to investors.[113]

Likewise, in SEC Admin Case No. 09-07-88 entitled *In Re: D 1st Cell Pawnshop, Inc.,*[114] the SEC ruled that by soliciting investments from ₱50,000.00 up to ₱300,000.00 and promising a return of four percent (4%) per month, D 1st Cell Pawnshop offered investment contracts to the public.

No error can then be attributed to the CA when it designated the *"sans recourse"* transactions as investment contracts. No fault can also be ascribed to the appellate court in finding that Wincorp virtually purchased and resold securities, and not just brokered a loan. The most telling circumstance that negate Wincorp's claim of mere brokerage, as mentioned earlier, is the fact that it paid for the interest payments due from the corporate borrowers that defaulted. This effectively estopped Wincorp from denying liability from its investors in this case.

Wincorp cannot hide behind its license to operate as an investment house when it offered the *"sans recourse"* transactions to the public. For though investment houses are authorized to do the following:[115]

> x x x x
>
> 6. Act as financial consultant, investment adviser, or broker;
> 7. Act as porfolio manager, and/or financial agent xxx;
> 8. Encourage companies to go public, and initiate and/or promote, whenever warranted, the formation, merger, consolidation, reorganization, or recapitalization of productive enterprises, by providing assistance or participation in the form of debt or equity financing or through the extension of financial or technical advice or service;

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[113] G.R. No. 164197, January 25, 2012, 664 SCRA 28, 32.
[114] Dated July 8, 2010.
[115] PRESIDENTIAL DECREE NO. 129, Sec. 7.

x x x

their license to perform investment house functions does not excuse them from complying with the security registration requirements under the law. For clarity, the license requirement to operate as an investment houses is separate and distinct from the registration requirement for the securities they are offering, if any.

In dealing in securities, Wincorp was under legal obligation to comply with the statutory registration and disclosure requirements. Under BP 178, otherwise known as the *Revised Securities Act*, which was still in force at the time material in this case, investment contracts are securities, and their sale, transactions that are not exempt from these requirements.[116] As such, adherence to Sections 4 and 8 of BP 178 must be strictly observed, to wit:

> **Section 4. Requirement of registration of securities. -** (a) No securities, except of a class exempt under any of the provisions of Section five hereof or unless sold in any transaction exempt under any of the provisions of Section six hereof, shall be sold or offered for sale or distribution to the public within the Philippines unless such securities shall have been registered and permitted to be sold as hereinafter provided.
>
> x x x x
>
> **Section. 8. Procedure for registration.** — (a) All securities required to be registered under subsection (a) of Section four of this Act shall be registered through the filing by the issuer or **by any dealer or underwriter interested in the sale thereof,** in the office of the Commission, of a sworn registration statement with respect to such securities, containing or having attached thereto, the following:
>
> x x x x
>
> (8) A statement of the capitalization of the issuer and of all companies controlling, controlled by or commonly controlled with the issuer, including the authorized and outstanding amounts of its capital stock and the proportion thereof paid up; the number and classes of shares in which such capital stock is divided; par value thereof, or if it has no par value, the stated or assigned value thereof; a description of the respective voting rights, preferences, conversion and exchange rights, rights to dividends, profits, or capital of each class, with respect to each other class, including the retirement and liquidation rights or values thereof.
>
> x x x x
>
> (14) The specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts and the sources thereof.
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> x x x x

[116] BATAS PAMBANSA BLG. 178, Secs. 5 and 6.

> (27) A balance sheet as of a date not more than ninety days prior to the date of the filing of the registration statement showing all of the assets of the issuer, the nature and cost thereof, whenever determinable with intangible items segregated, including any loan to or from any officer, director, stockholder or person directly or indirectly controlling or controlled by the issuer, or person under direct or indirect common control with the issuer. x x x All the liabilities of the issuer, including surplus of the issuer, showing how and from what sources such surplus was created, all as of a date not more than ninety days prior to the filing of the registration statement. x x x
>
> (28) A profit and loss statement of the issuer showing earnings and income, the nature and source thereof, and the expenses and fixed charges in such detail and such form as the Commission shall prescribe for the latest fiscal year xxx Such statement shall show what the practice of the issuer has been during the three years or lesser period as to the character of the charges, dividends or other distributions made against its various surplus accounts, and as to depreciation, depletion, and maintenance charges, and if stock dividends or avails from the sale of rights have been credited to income, they shall be shown separately with statement of the basis upon which credit is computed. Such statement shall also differentiate between recurring and nonrecurring income and between any investment and operating income. Such statement shall be certified by an independent certified public accountant.
>
> x x x x
>
> (30) A copy of any agreement or agreements or, if identical agreements are used, the forms thereof made with any underwriter, including all contracts and agreements referred to in subparagraph (19) hereof. (emphasis added)

In the guise of merely brokering loans between an investor and a corporate borrower, that it is not in the business of selling securities, Wincorp conveniently failed to disclose to the investors the necessary information under Section 8 of BP 178. To the mind of the Court, offering the *"sans recourse"* transactions without compliance therewith constitutes fraudulent transactions within the contemplation of Section 29 of the law.[117]

Non-disclosure of the capitalization details and the financial statements of the issuer Power Merge under Secs. 8(8), (27), and (28) resulted in the failure of the investors to pay heed to the red flags that the enterprise was doomed to fail: (1) the fact that it only had an outstanding capital stock of ₱37,500,000.00, of which the total actually paid is only ₱9,375,000.00; (2) that it has not been complying with the reportorial

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[117] Section 29. *Fraudulent transactions.* – (a) It shall be unlawful for any person, directly or indirectly, in connection with the purchase or sale of any securities –

(1) To employ any device, scheme, or artifice to defraud, or

(2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, transaction, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

requirements, including the submission of financial statements to the SEC; (3) and that Power Merge is not an ongoing concern since it does not engage in any legitimate business. In addition, non-compliance with Section 8(14) and (30) prevented the investors from discovering the true intent behind the approval of the Power Merge credit line application and the underlying transactions behind its issuance of Promissory Notes.

Clearly then, because Wincorp had been successful in its scheme of passing off the *"sans recourse"* transactions as mere brokering of loans, it managed to circumvent the registration and disclosure requirements under BP 178, and managed to commit fraud in a massive scale against its investors to the latter's damage and prejudice, for which Wincorp ought to be held liable.

c. Wincorp is liable as a vendor in bad faith and for breach of warranty

Aside from its liability arising from its fraudulent transactions, Wincorp is also liable to Ng Wee for breach of warranty. It cannot be emphasized enough that Wincorp is not the mere agent that it claims to be; its operations ought not be reduced to the mere matching of investors with corporate borrowers. Instead, it must be borne in mind that it not only performed the functions of a financial intermediary duly registered and licensed to perform the powers of an investment house, it is also engaged in the selling of securities, albeit in violation of various commercial laws. And just as in any other contracts of sale, the vendor of securities is likewise bound by certain warranties, including those contained in Article 1628 of the New Civil Code on assignment of credits, to wit:

> **Article 1628.** The vendor in good faith shall be responsible for the **existence and legality of the credit at the time of the sale**, unless it should have been sold as doubtful; but not for the solvency of the debtor, unless it has been so expressly stipulated or unless the insolvency was prior to the sale and of common knowledge.
>
> x x x x
>
> **The vendor in bad faith shall always be answerable** for the payment of all expenses, and **for damages**. (emphasis added)

That the securities sold to Ng Wee turned out to be *"with recourse,"* not *"sans recourse"* as advertised, does not remove it from the coverage of the above article. In fact, such circumstance would even classify Wincorp as a vendor in bad faith, within the contemplation of the last paragraph of the provision. But other than the fraudulent designation of the transaction as "*sans recourse*," Wincorp's bad faith was also brought to the fore by the execution of the Side Agreements, which cast serious suspicion over, if it did not effectively annul, the existence and legality of the credits assigned to

Ng Wee under the numerous Confirmation Advices in the name of his trustees.

Anent the claim that Wincorp allegedly did not warrant the capacity of Power Merge to pay its obligations, the CA had this much to say:

> [Petitioners] argue that the financial capacity of Power Merge has always been a matter of public record. We are not persuaded. The material misrepresentations have been made by Wincorp to [Ng Wee], to the effect that Power Merge was structurally sound and financially able to undertake a series of loan transactions. Even if Power Merge's financial integrity is veritable from the articles of incorporation or other public records, it does not follow that the elaborate scheme of fraud and deceit would be beyond commission when precisely there are bending representations that Power Merge would be able to meet its obligations. Moreover, [petitioners'] argument assumes that there is a legal obligation on the part of [Ng Wee] to undertake investigation of Power Merge before agreeing to the matching of his investments with the accredited borrower. There is no such obligation. It is unfair to expect a person to procure every available public record concerning an applicant for funds to satisfy himself of the latter's financial standing. A least that is not the way an average person takes care of his concerns. **In addition, no amount of investigation could have revealed that the Power Merge papers are rendered worthless and noncollectable (sic) [be]cause of the Side Agreements entered into by Wincorp and Power Merge.**
>
> Wincorp's attempt to shift the blame on [Ng Wee] deserves no credence. Since the transaction involve[s] a considerable sum of money, Wincorp presupposes that [Ng Wee] would have taken great pains to scrutinize and understand all the documents affecting his investment/ money placement. It also presumes that [Ng Wee] was fully aware of the contents and meaning of the [Confirmation Advices] and [Special Power of Attorneys] he signed. He took a calculated risk. As such, he should be estopped from claiming that he suffered damage and prejudice.
>
> The argument is specious. As ruled in *People of the Philippines v. Priscilla Balasa*:
>
> -xxx-
>
> **The fact that the buyer makes an independent investigation or inspection has been held not to preclude him from relying on the representation made by the seller where the seller has superior knowledge and the falsity of such representation would not be apparent from such examination or inspection**, and, *a fortiori*, **where the efforts of a buyer to learn the true profits or income of a business or property are thwarted by some device of the seller, such efforts have been held not to preclude a recovery**. It has often been held that the buyer of a business or property is entitled to rely on the seller's statements concerning its profits, income or rents. The rule — that **where a speaker has knowingly and deliberately made a statement concerning a fact the falsity of which is not apparent to the hearer, and has thus accomplished a fraudulent result, he cannot defend against the fraud by proving that the victim**

> **was negligent in failing to discover the falsity of the statement** — is said to be peculiarly applicable where the owner of the property or a business intentionally makes a false statement concerning its rents, profits or income.
>
> Applying the foregoing to this case, assuming that [Ng Wee] made an investigation, that should not preclude him from relying on the representations of Wincorp because: **(1) It is an investment house which is presumed to conduct an investigation of its borrowers before it matches the same to its investors.** As testified to by its employees, Wincorp has an Investigation Credit Committee and Executive Committee which screen, investigate and accredit borrowers before they are submitted for approval of the board of directors; **(2) It did not only materially misrepresent the financial incapacity of Power Merge to pay, it also failed to disclose that the instruments executed by Power Merge in connection with the investments/ money placements of [Ng Wee] are worthless in view of the Side Agreements executed by the parties.**[118] (emphasis added)

Verily, the same acts of misrepresentations that constituted fraud in Wincorp's transactions with Ng Wee are the very same acts that amounted to bad faith on its part as vendor of securities. Inescapably, liability attaches because of Wincorp's dishonest dealings.

d. Even as an agent, Wincorp can still be held liable

The argument that Wincorp is a mere agent that could not be held liable for Power Merge's unpaid loan is equally unavailing. For even if the Court were to accede to the argument and undercut the significance of Wincorp's participation from vendor of securities to purely attorney-in-fact, the investment house would still not be immune. Agency, in Wincorp's case, is not a veritable defense.

Through the contract of agency, a person binds himself to render some service or to do something in representation or on behalf of another, with the consent or authority of the latter.[119] As the basis of agency is representation, there must be, on the part of the principal, an actual intention to appoint, an intention naturally inferable from the principal's words or actions. In the same manner, there must be an intention on the part of the agent to accept the appointment and act upon it. Absent such mutual intent, there is generally no agency.[120]

There is no dearth of statutory provisions in the New Civil Code that aim to preserve the fiduciary character of the relationship between principal and agent. Of the established rules under the code, one cannot be more basic

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[118] *Rollo* (G.R. No. 220926), pp. 111-112; citations omitted.

[119] NEW CIVIL CODE, Article 1868.

[120] *Tuazon v. Heirs of Bartolome Ramos*, G.R. No. 156262, July 14, 2005, 463 SCRA 408, 414-415.

than the obligation of the agent to carry out the purpose of the agency within the bounds of his authority.[121] Though he may perform acts in a manner more advantageous to the principal than that specified by him,[122] in no case shall the agent carry out the agency if its execution would manifestly result or damage to the principal.[123]

In the instant case, the SPAs executed by Ng Wee constituted Wincorp as agent relative to the borrowings of Power Merge, allegedly without risk of liability on the part of Wincorp. However, the SPAs, as couched, do not specifically include a provision empowering Wincorp to excuse Power Merge from repaying the amounts it had drawn from its credit line *via* the Side Agreements. They merely authorize Wincorp *"to agree, deliver, sign, execute loan documents"* relative to the borrowing of a corporate borrower. Otherwise stated, Wincorp had no authority to absolve Power Merge from the latter's indebtedness to its lenders. Doing so therefore violated the express terms of the SPAs that limited Wincorp's authority to contracting the loan.

In no way can the execution of the Side Agreements be considered as part and parcel of Wincorp's authority since it was not mentioned with specificity in the SPAs. As far as the investors are concerned, the Side Agreements amounted to a gratuitous waiver of Power Merge's obligation, which authority is required under the law to be contained in an SPA for its accomplishment.[124]

Finally, the benefit from the Side Agreements, if any, redounded instead to the agent itself, Wincorp, which was able to hold Power Merge papers that are more valuable than the outstanding Hottick obligations that it exchanged. In discharging its duties as an alleged agent, Wincorp then elected to put primacy over its own interest than that of its principal, in clear contravention of the law.[125] And when Wincorp thereafter concealed from the investors the existence of the Side Agreements, the company became liable for fraud even as an agent.[126]

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[121] NEW CIVIL CODE, Article 1881: The agent must act within the scope of his authority. He may do such acts as may be conducive to the accomplishment of the purpose of the agency.

[122] NEW CIVIL CODE, Article 1882: The limits of the agent's authority shall not be considered exceeded should it have been performed in a manner more advantageous to the principal than that specified by him.

[123] NEW CIVIL CODE, Article 1888: An agent shall not carry out an agency if its execution would manifestly result in loss or damage to the principal.

[124] NEW CIVIL CODE, Article 1878: Special powers of attorney are necessary in the following cases:

x x x x

(4) To waive any obligation gratuitously;

x x x x

[125] NEW CIVIL CODE, Article 1889: The agent shall be liable for damages if, there being a conflict between his interests and those of the principal, he should prefer his own.

[126] NEW CIVIL CODE, Article 1909: The agent is responsible not only for fraud, but also for negligence, which shall be judged with more or less rigor by the courts, according to whether the agency was or was not for a compensation.

Power Merge is liable to Ng Wee under its Promissory Notes

a. Virata is liable for the Promissory Notes even as an accommodation party

A promissory note is a specie of negotiable instruments. Under Section 60 of the Negotiable Instruments Law, the maker of a promissory note engages that he will pay it according to its tenor. In this case, the Promissory Notes executed by Virata in behalf of Power Merge are couched in the following wise:

PROMISSORY NOTE

For value received, I/We _____, hereby promise to pay WESTMONT INVESTMENT CORPORATION (*WINCORP*), **either for itself or as agent for and on behalf of certain INVESTORS** who have placed/invested funds with *WINCORP* the principal sum of _____ (_____), Philippine Currency, on _____ with interest rate of _____ percent (__%) per annum, or equivalently the Maturity Amount of _____ PESOS (_____) Philippine Currency. (emphasis added)

It is crystal clear that Power Merge, through Virata, obligated itself to pay Wincorp and those who invested through it the values stated in the Promissory Notes. The validity and due execution of the Promissory Notes were not even contested. Instead, Virata postulates that he merely executed the Promissory Notes on behalf of Power Merge as an accommodation for Wincorp, and that neither he nor Power Merge received any pecuniary benefit from the credit facility. He thus claims that he and Power Merge cannot be held liable for the Promissory Notes that were executed.

The argument is specious.

On its face, the documentary evidence on record reveals that Power Merge actually received the proceeds from the Credit Line Agreement. But even if We assume for the sake of argument that Power Merge, through Virata, is as a mere accommodation party under the Promissory Notes, liability would still attach to them in favor of the holder of the instrument for value.

In *Gonzales v. Philippine Commercial and International Bank*,[127] the Court held that an accommodation party lends his name to enable the accommodated party to obtain credit or to raise money; he receives no part of the consideration for the instrument but assumes liability to the other party or parties thereto. Prescinding from the foregoing, an accommodation party is one who meets all the following three requisites, *viz*: (1) he must be

[127] G.R. No. 180257, February 23, 2011, 644 SCRA 180, 192.

a party to the instrument, signing as maker, drawer, acceptor, or indorser; (2) he must not receive value therefor; and (3) he must sign for the purpose of lending his name or credit to some other person.[128]

The first element, that Power Merge, through Virata, executed the Promissory Notes as maker cannot be disputed. Meanwhile, petitioners would have the Court hypothetically admit that they did not receive the proceeds from the drawdowns, in satisfaction of the second requisite. And lastly, this was allegedly done for the purpose of lending its name to conceal Wincorp's direct borrowing from its clients.

In gratia argumenti that the above elements are established facts herein, liability will still attach to the accommodation parties pursuant to Sec. 29 of the Negotiable Instruments Law. The provision states:

> **Sec. 29. Liability of accommodation party.** – An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. **Such a person is liable on the instrument to a holder for value, notwithstanding such holder, at the time of taking the instrument, knew him to be only an accommodation party**. (emphasis added)

The basis for the liability under Section 29 is the underlying relation between the accommodated party and the accommodation party, which is one of principal and surety.[129] In a contract of surety, a person binds himself solidarily liable with the principal debtor of an obligation.[130] But though a suretyship agreement is, in essence, accessory or collateral to a valid principal obligation, the surety's liability to the creditor is immediate, primary, and absolute. He is directly and equally bound with the principal.[131]

In a similar fashion, the accommodation party *cum* surety in a negotiable instrument is deemed an original promisor and debtor from the beginning; he is considered in law as the same party as the debtor in relation to whatever is adjudged touching the obligation of the latter since their liabilities are so interwoven as to be inseparable.[132] It is beyond cavil then that Power Merge and Virata can be held liable for the amounts stated in the Promissory Notes. Consequently, they are also liable for the assignment to Ng Wee of portions thereof as embodied in the Confirmation Advices.

b. The Side Agreements do not bind third parties thereto

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[128] *Bautista v. Auto Plus Traders, Incorporated*, G.R. No. 166405, August 6, 2008, 561 SCRA 223, 230.

[129] *Aglibot v. Santia*, G.R. No. 185945, December 5, 2012, 687 SCRA 283, 297-298.

[130] NEW CIVIL CODE, Article 2047.

[131] *Ang v. Associated Bank*, G.R. No. 146511, September 5, 2007, 532 SCRA 244

[132] Id. at 273-274.

Virata and Power Merge cannot invoke the Side Agreements as bases for its alleged exemption from liability to Ng Wee, simply because the latter was not privy to the covenants. Ng Wee cannot be charged with knowing the existence of the Side Agreements, let alone ratify the same.

The basic principle of relativity of contracts is that, as a general rule, contracts take effect only between the parties, their assigns and heirs.[133] The sound reason for the exclusion of non-parties to an agreement is the absence of a *vinculum* or juridical tie which is the efficient cause for the establishment of an obligation.[134]

Needless to state, Ng Wee does not fall under any of the classes that are deemed privy as far as the Side Agreements are concerned. At most, he only authorized Wincorp, through the SPAs, to *"agree, deliver, sign, [and] execute loan documents"* relative to the borrowing of Power Merge. This authority does not extend to excusing Power Merge from paying its obligations under the Promissory Notes that it issued for the benefit of the investors. Thus, even if we were to assume that the execution of the Side Agreements was with the imprimatur of the Wincorp board of directors, Power Merge would still have been able to determine, based on a cursory reading of the SPAs, that Wincorp's acquiescence to the Side Agreements is an *ultra vires* act insofar as its principals, Ng Wee included, are concerned.

c. Power Merge cannot escape liability to Ng Wee under the Credit Line Agreement

That Power Merge did not directly transact with Ng Wee and the other investors does not exonerate it from civil liability, for its liability also finds basis on the language of the Credit Line Agreement.

To recall, Power Merge obtained a ₱2,500,000,000.00 credit facility from Wincorp, as one of the latter's corporate borrowers. Under the terms of the credit facility, Power Merge obligated itself to issue Promissory Notes in favor of Wincorp, for itself *"or on behalf of certain investors"* for each of its drawdowns. The Credit Line Agreement pertinently provides:

CREDIT LINE AGREEMENT

x x x x

WHEREAS, the BORROWER has applied for financial accommodation/credit line from WINCORP.

WHEREAS, WINCORP by itself or on behalf of certain investors, have agreed to extend the financial accommodation/credit

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[133] NEW CIVIL CODE, Article 1311.

[134] *Doña Adela Export International, Inc. v. Trade and Investment Development Corporation (TIDCORP)*, G.R. No. 201931, February 11, 2015, 750 SCRA 429, 448.

line sought by the BORROWER under the terms and conditions hereunder provided.

NOW, WHEREFORE, for and in consideration of the foregoing premises, the parties hereto agreed as follows:

1. GRANT OF CREDIT FACILITY. WINCORP, **either by itself or on behalf of certain investors**, shall extend to the BORROWER a credit facility, on best efforts basis, in the amount of up to but not exceeding the equivalent sum of ONE BILLION TWO HUNDRED MILLION PESOS (₱1,200,000,000.00), Philippine Currency, upon terms and conditions embodied in this Agreement.

x x x x

3. PROMISSORY NOTE. Subject to the availability of funds, the BORROWER may avail all or any portion of this credit facility under the terms and conditions hereunder agreed upon, and the **BORROWER shall execute in favor of WINCORP and/or the investors who have agreed to extend the credit facility to the BORROWER a Promissory Note corresponding to each drawdown to evidence its indebtedness.**

4. INTEREST RATE. **The BORROWER agrees to pay WINCORP, either by itself or on behalf of its investors, interest on the principal** amount of each availment at the rate prevailing on the date of such availment as agreed upon in the corresponding Promissory Note/s. [135] (underscoring supplied, emphasis added)

Virata and Power Merge cannot then deny knowledge that the amounts that were drawn against the credit facility may not necessarily be from Wincorp's own coffers, but may potentially be from the monies pooled by its clients, even though their identities were at that time anonymous to Power Merge. As can be gleaned, Power Merge was informed through the plain text of the Credit Line Agreement that Wincorp may indorse portions of the investment, and the corresponding interest in the Promissory Notes, to its willing clients and act on the latter's behalf. It then matters not that Power Merge and Virata never personally dealt with Ng Wee for given the setup; Ng Wee became privy to the Credit Line Agreement when he was assigned his shares in the investment, and when he expressed his conformity therewith through the Confirmation Advices.

Furthermore, it cannot escape the attention of the Court that this is not the first time for Virata to transact with Wincorp. To refresh, Virata executed a Surety Agreement to answer Hottick's drawdowns from its own credit facility with Wincorp. He is then familiar with the nature of Wincorp's primary functions, whether as a mere financial intermediary or dealer in securities as in this case, rather than its true creditor. Power Merge and Virata cannot then feign ignorance that the money they have been receiving are from the clients that Wincorp attracted to invest.

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[135] *Rollo* (G.R. No. 220926), pp. 385-386.

III.
Piercing the Corporate Veil

Indubitably, Wincorp and Power Merge are liable to Ng Wee for fraud and under contract, respectively. The thrust of majority of the petitioners, however, is that they cannot be held liable for the business judgments of the corporations they are part of given the latter's separate juridical personalities.

G.R. No. 220926: The liabilities of Luis Juan L. Virata and UEM-MARA

a. Virata is liable for the obligations of Power Merge

Petitioner Virata reiterates his claim that piercing the corporate veil of Power Merge for the sole reason that he owns majority of its shares is improper. He adds that the Credit Line Agreements and Side Agreements were valid arm's length transactions, and that their executions were in the performance of his official capacity, which he cannot be made personally liable for in the absence of fraud, bad faith, or gross negligence on his part.

The Court rejects these arguments.

Concept Builders, Inc. v. NLRC instructs that as a fundamental principle of corporation law, a corporation is an entity separate and distinct from its stockholders and from other corporations to which it may be connected. But, this separate and distinct personality of a corporation is merely a fiction created by law for convenience and to promote justice. Thus, authorities discuss that when the notion of separate juridical personality is used (1) to defeat public convenience, justify wrong, protect fraud or defend crime; (2) as a device to defeat the labor laws; or (3) when the corporation is merely an adjunct, a business conduit or an alter ego of another corporation, this separate personality of the corporation may be disregarded or the veil of corporate fiction pierced.[136]

The circumstances of Power Merge clearly present an alter ego case that warrants the piercing of the corporate veil.

To elucidate, case law lays down a three-pronged test to determine the application of the alter-ego theory, namely:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own;

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[136] G.R. No. 108734, May 29, 1996, 257 SCRA 149, 157-158.

> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetuate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal right; and
>
> (3) The aforesaid control and breach of duty must have proximately caused the injury or unjust loss complained of.[137]

In the present case, Virata not only owned majority of the Power Merge shares; he exercised complete control thereof. He is not only the company president, he also owns 374,996 out of 375,000 of its subscribed capital stock. Meanwhile, the remainder was left for the nominal incorporators of the business. The reported address of petitioner Virata and the principal office of Power Merge are even one and the same.[138] The clearest indication of all: Power Merge never operated to perform its business functions, but for the benefit of Virata. Specifically, it was merely created to fulfill his obligations under the Waiver and Quitclaim, the same obligations for his release from liability arising from Hottick's default and non-payment.

Virata would later on use his control over the Power Merge corporation in order to fulfill his obligation under the Waiver and Quitclaim. Impelled by the desire to settle the outstanding obligations of Hottick under the terms of the settlement agreement, Virata effectively allowed Power Merge to be used as Wincorp's pawn in avoiding its legal duty to pay the investors under the failed investment scheme. Pursuant to the alter ego doctrine, petitioner Virata should then be made liable for his and Power Merge's obligations.

b. UEM-MARA cannot be held liable

There is, however, merit in the argument that UEM-MARA cannot be held liable to respondent Ng Wee. The RTC and the CA held that the corporation ought to be held solidarily liable with the other petitioners *"in order that justice can reach the illegal proceeds from the defrauded investments of [Ng Wee] under the Power Merge account."*[139] According to the trial court, Virata laundered the proceeds of the Power Merge borrowings and stashed them in UEM-MARA to prevent detection and discovery and hence, UEM-MARA should likewise be held solidarily liable.

We disagree.

UEM-MARA is an entity distinct and separate from Power Merge, and it was not established that it was guilty in perpetrating fraud against the investors. It was a non-party to the *"sans recourse"* transactions, the Credit

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[137] Id. at 159.
[138] *Rollo* (G.R. No. 220926), p. 4 & p. 647.
[139] Id. at 189.

Line Agreement, the Side Agreements, the Promissory Notes, the Confirmation Advices, and to the other transactions that involved Wincorp, Power Merge, and Ng Wee. There is then no reason to involve UEM-MARA in the fray. Otherwise stated, respondent Ng Wee has no cause of action against UEM-MARA. UEM-MARA should not have been impleaded in this case.

A cause of action is the act or omission by which a party violates a right of another.[140] The essential elements of a cause of action are (1) a right in favor of the plaintiff by whatever means and under whatever law it arises or is created; (2) an obligation on the part of the named defendant to respect or not to violate such right; and (3) an act or omission on the part of such defendant in violation of the right of the plaintiff or constituting a breach of the obligation of the defendant to the plaintiff for which the latter may maintain an action for recovery of damages or other appropriate relief.[141]

The third requisite is severely lacking in this case. Respondent Ng Wee cannot point to a specific wrong committed by UEM-MARA against him in relation to his investments in Wincorp, other than being the object of Wincorp's desires. He merely alleged that the proceeds of the Power Merge loan was used by Virata in order to acquire interests in UEM-MARA, but this does not, however, constitute a valid cause of action against the company even if we were to assume the allegation to be true. It would indeed be a giant leap in logic to say that being Wincorp's objective automatically makes UEM-MARA a party to the fraud. UEM-Mara's involvement in this case is merely incidental, not direct.

G.R No. 221218: The liability of Anthony Reyes

To restate, basic is the rule that a corporation is invested by law with a personality separate and distinct from that of the persons composing it as well as from that of any other legal entity to which it may be related. Following this, obligations incurred by the corporation, acting through its directors, officers and employees, are its sole liabilities, and said personalities are generally not held personally liable thereon.[142]

By way of exception, a corporate director, a trustee or an officer, may be held solidarily liable with the corporation under Sec. 31 of the Corporation Code which reads:

> **Section 31.** *Liability of directors, trustees or officers.* - **Directors or trustees** who willfully and knowingly vote for or assent to patently unlawful acts of the corporation or who are guilty of gross negligence or

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[140] RULES OF COURT, Rule 2, Sec. 2.

[141] *Soloil, Inc. v. Philippine Coconut Authority*, G.R. No. 174806, August 11, 2010, 628 SCRA 185, 190.

[142] *Heirs of Fe Tan Uy vs. International Exchange Bank*, G.R. No. 166282, February 13, 2013, 690 SCRA 519.

> bad faith in directing the affairs of the corporation or acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders or members and other persons.
>
> **When a director, trustee or officer** attempts to acquire or acquire, in violation of his duty, any interest adverse to the corporation in respect of any matter which has been reposed in him in confidence, as to which equity imposes a disability upon him to deal in his own behalf, he shall be liable as a trustee for the corporation and must account for the profits which otherwise would have accrued to the corporation. (emphasis added)

Petitioner Reyes relies on the black letter law in his bid for absolution. He claims that he is not a director of Wincorp, but its Vice-President for Operations. Thus, he can only be held liable under the second paragraph of the provision. As can be read, officers are only precluded from acquiring or attempting to acquire any interest in conflict with that of the company he is serving. There being no allegation of him being guilty of conflict of interest, Reyes argues that he cannot be held liable under the provision.

The argument is bereft of merit.

Ascribing liability to a corporate director, trustee, or officer by invoking Sec. 31 of the Corporation Code is distinct from the remedial concept of piercing the corporate veil. While Sec. 31 expressly lays down specific instances wherein the mentioned personalities can be held liable in their personal capacities, the doctrine of piercing the corporate veil, on the other hand, is an equitable remedy resorted to only when the corporate fiction is used, among others, to defeat public convenience, justify wrong, protect fraud or defend a crime.[143]

Applying the doctrine, petitioner cannot escape liability by claiming that he was merely performing his function as Vice-President for Operations and was duly authorized to sign the Side Agreements in Wincorp's behalf. The Credit Line Agreement is patently contradictory if not irreconcilable with the Side Agreements, which he executed on the same day as the representative for Wincorp. The execution of the Side Agreements was the precursor to the fraud. Taken with Wincorp's subsequent offer to its clients of the *"sans recourse"* transactions allegedly secured by the Promissory Notes, it is a clear indicia of fraud for which Reyes must be held accountable.

G.R. No. 221135: The liabilities of Cua and the Cualopings

On the other hand, the liabilities of Cua and the Cualopings are more straightforward. They admit of approving the Credit Line Agreement and its

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[143] *Sanchez v. Republic,* G.R. No. 172885, October 9, 2009, 603 SCRA 229.

subsequent Amendment during the special meetings of the Wincorp board of directors, but interpose the defense that they did so because the screening committee found the application to be above board. They deny knowledge of the Side Agreements and of Power Merge's inability to pay.

We are not persuaded.

Cua and the Cualopings cannot effectively distance themselves from liability by raising the defenses they did. As ratiocinated by the CA:

> Such submission creates a loophole, especially in this age of compartmentalization, that would create a nearly fool-proof scheme whereby well-organized enterprises can evade liability for financial fraud. Behind the veil of compartmentalized departments, such enterprise could induce the investing public to invest in a corporation which is financially unable to pay with promises of definite returns on investment. If we follow the reasoning of defendants-appellants, we allow the masterminds and profiteers from the scheme to take the money and run without fear of liability from law simply because the defrauded investor would be hard-pressed to identify or pinpoint from among the various departments of a corporation which directly enticed him to part with his money.[144]

Petitioners Cua and the Cualopings bewail that the above-quoted statement is overarching, sweeping, and bereft of legal or factual basis. But as per the records, the totality of circumstances in this case proves that they are either complicit to the fraud, or at the very least guilty of gross negligence, as regards the "*sans recourse*" transactions from the Power Merge account.

The board of directors is expected to be more than mere rubber stamps of the corporation and its subordinate departments. It wields all corporate powers bestowed by the Corporation Code, including the control over its properties and the conduct of its business.[145] Being stewards of the company, the board is primarily charged with protecting the assets of the corporation in behalf of its stakeholders.

Cua and the Cualopings failed to observe this fiduciary duty when they assented to extending a credit line facility to Power Merge. In PED Case No. 20-2378, the SEC discovered that Power Merge is actually Wincorp's largest borrower at about 30% of the total borrowings.[146] It was

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[144] *Rollo*, p. 120.

[145] BATAS PAMBANSA BLG. 68, Section 23: *The board of directors or trustees.* – Unless otherwise provided in this Code, the corporate powers of all corporations formed under this Code shall be exercised, all business conducted and all property of such corporations controlled and held by the board of directors or trustees to be elected from among the holders of stocks, or where there is no stock, from among the members of the corporation, who shall hold office for one (1) year until their successors are elected and qualified.

[146] *Rollo* (G.R. No. 220926), p. 1046:

Borrower	**Amount in ₱**
ACL DEVELOPMENT CORPORATION	547,767,109.56
AZKCON CONSTRUCTION	93,656,152.60

then incumbent upon the board of directors to have been more circumspect in approving its credit line facility, and should have made an independent evaluation of Power Merge's application before agreeing to expose it to a ₱2,500,000,00.00 risk.

Had it fulfilled its fiduciary duty, the obvious warning signs would have cautioned it from approving the loan in haste. To recapitulate: (1) Power Merge has only been in existence for two years when it was granted a credit facility; (2) Power Merge was thinly capitalized with only ₱37,500,000.00 subscribed capital; (3) Power Merge was not an ongoing concern since it never secured the necessary permits and licenses to conduct business, it never engaged in any lucrative business, and it did not file the necessary reports with the SEC; and (4) no security other than its Promissory Notes was demanded by Wincorp or was furnished by Power Merge in relation to the latter's drawdowns.

It cannot also be ignored that prior to Power Merge's application for a credit facility, its controller Virata had already transacted with Wincorp. A perusal of his records with the company would have revealed that he was a surety for the Hottick obligations that were still unpaid at that time. This means that at the time the Credit Line Agreement was executed on February 15, 1999, Virata still had direct obligations to Wincorp under the Hottick account. But instead of impleading him in the collection suit against Hottick, Wincorp's board of directors effectively released Virata from liability, and, ironically, granted him a credit facility in the amount of ₱1,300,000,000.00 on the very same day.

This only goes to show that even if Cua and the Cualopings are not guilty of fraud, they would nevertheless still be liable for gross negligence[147]

CHEVY CHASE	56,978,251.17
EBECAP HOLDINGS	801,394,335.75
EBECOM HOLDINGS	52,211,422.98
EBEDEV, INC.	464,483,827.47
GLOBAL EQUITIES	11,033,800.70
GOLDEN ERA HOLDINGS, INC.	256,402,882.46
LUIS JUAN L. VIRATA	2,003,004.51
MONTEVERDE HOLDINGS, INC.	138,395,178.36
PEARLBANK SECURITIES, INC.	464,829,187.32
PHILMEDIA POST	856,785.18
POWER MERGE CORPORATION	2,500,000,000.00
STA. LUCIA REALTY & DEVELOPMENT, INC.	718,039,235.09
STRAIGHTLINE INTERNATIONAL	132,806,766.18
SUN-O-TELECOM	40,000,000.00
THING ON DEVELOPMENT	183,221,246.80
TIME EXPONENTS	1,200,000.00
UNIOIL RESOURCES A& HOLDINGS CO.	40,927,260.92
WETMONT MAMBURAO BEACH RESORT	14,913,454.79
WINCORP SECURITIES	1,500,000.00
ZIPPORAH REALTY HOLDINGS	289,795,316.86
TOTAL	**₱ 6,812,415,218.70**

[147] Gross negligence is characterized by want of even slight care, acting or omitting to act in a situation where there is a duty to act, not inadvertently but willfully and intentionally with a conscious

in managing the affairs of the company, to the prejudice of its clients and stakeholders. Under such circumstances, it becomes immaterial whether or not they approved of the Side Agreements or authorized Reyes to sign the same since this could have all been avoided if they were vigilant enough to disapprove the Power Merge credit application. Neither can the business judgment rule[148] apply herein for it is elementary in corporation law that the doctrine admits of exceptions: bad faith being one of them, gross negligence, another.[149] The CA then correctly held petitioners Cua and the Cualopings liable to respondent Ng Wee in their personal capacity.

G.R. No. 221109: The liability of Manuel Estrella

To refresh, Estrella echoes the defense of Tankiansee, who was exempted from liability by the trial court. He claims that just like Tankiansee, he was not present during Wincorp's special board meetings where Power Merge's credit line was approved and subsequently amended. Both also claimed that they protested and opposed the board's actions. But despite the parallels in their defenses, the trial court was unconvinced that Estrella should be released from liability. Estrella appealed to the CA, but the adverse ruling was sustained.

We agree with the findings of the courts *a quo*.

The minutes of the February 9, 1999 and March 11, 1999 Wincorp Special Board Meetings were considered as damning evidence against Estrella, just as they were for Cua and the Cualopings. Although they were said to be unreliable insofar as Tankiansee is concerned, the trial court rightly distinguished between the circumstances of Estrella and Tankiansee to justify holding Estrella liable.

For perspective, Tankiansee was exempted from liability upon establishing that it was physically impossible for him to have participated in the said meetings since his immigration records clearly show that he was outside the country during those specific dates. In contrast, no similar evidence of impossibility was ever offered by Estrella to support his position that he and Tankiansee are similarly situated.

Estrella submitted his departure records proving that he had left the country in July 1999 and returned only in February of 2000. Be that as it may, this is undoubtedly insufficient to establish his defense that he was not present during the February 9, 1999 and March 11, 1999 board meetings.

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indifference to consequences insofar as other persons may be affected. See *LBC Express-Metro Manila, Inc. v. Mateo*, G.R. No. 168215, June 9, 2009, 589 SCRA 33.

[148] Under the "business judgment rule," the courts are barred from intruding into the business judgments of the corporation, when the same are made in good faith.

[149] *Republic Telecommunications Holdings, Inc. v. Court of Appeals,* G.R. No. 135074 January 29, 1999, 302 SCRA 403.

Instead, the minutes clearly state that Estrella was present during the meetings when the body approved the grant of a credit line facility to Power Merge. Estrella would even admit being present during the February 9, 1999 meeting, but attempted to evade responsibility by claiming that he left the meeting before the "other matters," including Power Merge's application, could have been discussed.

Unfortunately, no concrete evidence was ever offered to confirm Estrella's alibi. In both special meetings scheduled, Estrella averred that he accompanied his wife to a hospital for her cancer screening and for dialogues on possible treatments. However, this claim was never corroborated by any evidence coming from the hospital or from his wife's physicians. Aside from his mere say-so, no other credible evidence was presented to substantiate his claim. Thus, the Court is not inclined to lend credence to Estrella's self-serving denials.

Neither can petitioner Estrella be permitted to raise the defense that he is a mere nominee of John Anthony Espiritu, the then chairman of the Wincorp board of directors. It is of no moment that he only had one nominal share in the corporation, which he did not even pay for, just as it is inconsequential whether or not Estrella had been receiving compensation or honoraria for attending the meetings of the board.

The practice of installing undiscerning directors cannot be tolerated, let alone allowed to perpetuate. This must be curbed by holding accountable those who fraudulently and negligently perform their duties as corporate directors, regardless of the accident by which they acquired their respective positions.

In this case, the fact remains that petitioner Estrella accepted the directorship in the Wincorp board, along with the obligations attached to the position, without question or qualification. The fiduciary duty of a company director cannot conveniently be separated from the position he occupies on the trifling argument that no monetary benefit was being derived therefrom. The gratuitous performance of his duties and functions is not sufficient justification to do a poor job at steering the company away from foreseeable pitfalls and perils. The careless management of corporate affairs, in itself, amounts to a betrayal of the trust reposed by the corporate investors, clients, and stakeholders, regardless of whether or not the board or its individual members are being paid. The RTC and the CA, therefore, correctly disregarded the defense of Estrella that he is a mere nominee.

IV.
Effect of the Side Agreements

Effect of the Side Agreements on the solidary liability of the petitioners

The courts *a quo* dismissed all counterclaims and cross-claims lodged by petitioners against Ng Wee and each other. However, the Court finds reason to grant the cross-claim of Virata that he be reimbursed by his co-parties of the amount that he and UEM-MARA may be adjudged to be liable for.[152]

The reinstatement and grant of the cross-claim is anchored on the stipulation under the Side Agreements. Worthy of note is that neither the RTC nor the CA nullified the contract, despite their acerbic language towards the same. They merely held that the agreements cannot be used as protection against liability for repayment to the investors, without more. The Side Agreements even served as basis for the courts *a quo* to declare that the confirmation advices being issued to the investors were worthless and uncollectible credit instruments, and to label the *"sans recourse"* transactions as without any economically-valuable object.

As such, the Side Agreements remain to be binding and enforceable on the parties thereto: Wincorp, Virata, and Power Merge. We give credence to the argument of Virata that, as per the language of the Side Agreements themselves, what transpired was an arm's length transaction, wherein in exchange for Wincorp assuming liability for Power Merge's drawdowns and promissory notes, Power Merge obligated itself *"to return and deliver to Wincorp all the rights, title and interests conveyed by Wincorp hereby to [Power Merge] over the Hottick obligations."* It appears then that there is ample consideration for the release.

Indeed, the Court must not only look at the *"sans recourse"* transactions in isolation, but also consider the underlying transactions and ascertain the true intention of the contracting parties. On this score, a narration on the relationship between Hottick, Wincorp, and Power Merge bears reiteration:

On February 21, 1997, Hottick, through a credit facility, borrowed money from Wincorp in the amount of ₱1,500,908,026.00, as evidenced by a Promissory Note issued by Hottick in favor of the investment hosue, and guaranteed by Halim Saad and petitioner Virata. When the Asian financial crisis struck, Hottick experienced financial distress and was unable to pay its obligations. This prompted Wincorp to file a collection case against Hottick and Halim Saad.

Virata was not impleaded in the collection suit, and he would turn out to be instrumental in brokering a settlement agreement between Wincorp and Hottick. But in exchange for his exclusion in the proceedings, he executed a Memorandum of Agreement under which he assumes the obligation to transfer forty percent (40%) of UPDI's outstanding shares and forty percent (40%) of UPDI's interest in the tollway project to Wincorp,

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[152] *Rollo* (G.R. No.220926), p. 536.

among others. It would be clarified in the December 1, 1999 Waiver and Quitclaim, however, that the equity transfers would be Virata's only obligation under the Memorandum of Agreement. Said Waiver and Quitclaim provides:

> This is to confirm that notwithstanding the terms of the Memorandum of Agreement dated July 27, 1999 between our company and yourself, our company hereby irrevocably and unconditionally releases, waives and agrees to forever hold you, your heirs and assigns free and harmless from and against any claim, obligation or liability arising out of or in connection with the Memorandum of Agreement; provided, however, that your undertaking to cause the assignment, transfer and delivery to our company of at least forty percent (40%) of the equity of UEM Development Philippines, Inc. ("UPDI") and at least forty percent (40%) of the interest/share of UPDI in the Manila Cavite Express Tollway Project (the "Project") shall have been fully complied with. **We hereby reiterate that, except for your aforesaid obligation to assign, transfer and deliver to our company at least forty (40%) of UPDI's outstanding shares and at least forty percent (40%) of UPDI's interest/share in the Project, the Memorandum of Agreement is a mere accommodation on your part and does not give rise to any legal rights or consequences in our company's favour as against yourself, your heirs or assigns.**[153] (emphasis added)

As can be gleaned, the significant portions of the Waiver and Quitclaim mirror the content of the Side Agreements. But based on the peculiar transactions between the players herein, the similarity does not end with the content, but extends to the intent. Reproducing the salient provisions of the Side Agreements:

> WHEREAS, Powermerge has entered into the Credit Line Agreement with Wincorp as an accommodation in order to allow Wincorp to hold Powermerge paper instead of the obligations of Hottick which are right now held by Wincorp.
>
> x x x x
>
> 1. Powermerge hereby agrees to execute promissory notes in the aggregate principal sum of P1,200,000,000.00 in favor of Wincorp and in exchange therefore, Wincorp hereby assigns, transfers, and conveys to Powermerge all of its rights, titles and interest by way of a sub-participation over the promissory notes and other obligations executed by Hottick in favor of Wincorp; Provided however **that the only obligation of Powermerge to Wincorp shall be to return and deliver to Wincorp all the rights, title and interests conveyed by Wincorp hereby to Powermerge over the Hottick obligations. Powermerge shall have no obligation to pay under its promissory notes executed in favor of Wincorp** but shall be obligated merely to return whatever may have received from Wincorp pursuant to this agreement.
>
> x x x x

[153] *Rollo* (G.R. No. 220926), p. 481.

3. Wincorp confirms and agrees that **this accommodation** being entered into by the parties is **not intended to create a payment obligation on the part of Powermerge**.[154] (emphasis added)

The above documents, besides the non-suit against Virata, readily convey that the parties did not intend to create a payment obligation on the part of Power Merge; the latter was merely used as a conduit by Wincorp for the acquisition of equity shares. They also confirm that Power Merge was just a mere accommodation party to the issuance of the Promissory Notes that Wincorp sold to its clients, consistent with the findings of the courts *a quo* that Wincorp borrowed the funds for its own account. Though these circumstances do not exculpate Power Merge and Virata from paying a holder for value under the negotiable instruments they issued, they nevertheless entitle Power Merge and Virata, as surety, to indemnification by way of reimbursement from Wincorp and its liable directors and officers, the main debtors, for any amount stated in the note that petitioners Virata and Power Merge would be compelled to defray, pursuant to Art. 2066 of the New Civil Code.[155]

V.
Award of Damages

Beyond doubt, Ng Wee is entitled to recover the investments he infused in Wincorp. This was never the central issue in this case. Other than raising Ng Wee's alleged failure to state a cause of action in his complaint, none of the petitioners questioned his right to be compensated for the losses he suffered in the fraudulent investment scheme. Having ascertained the extent of the liabilities of the petitioners, the Court will now determine the amount to be awarded to Ng Wee.

The trial and appellate court correctly held that Ng Wee should first be recompensed for the maturity amount of the investments he made in Power Merge through Wincorp, which totalled ₱213,290,410.36. Pursuant to our ruling in the seminal case of *Nacar v. Gallery Frames*,[156] the amount shall earn interest at twelve percent (12%) per annum from the date of filing of the Complaint on October 19, 2000 until June 30, 2013, and six percent (6%) from July 1, 2013 until full satisfaction.

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[154] Id. at 392.

[155] Article 2066. The guarantor who pays for a debtor must be indemnified by the latter.
The indemnity comprises:
(1) The total amount of the debt;
(2) The legal interests thereon from the time the payment was made known to the debtor, even though it did not earn interest for the creditor;
(3) The expenses incurred by the guarantor after having notified the debtor that payment had been demanded of him;
(4) Damages, if they are due.

[156] G.R. No. 189871, August 13, 2013, 703 SCRA 439.

Moreover, the Credit Line Agreement provides for a stipulation of three percent (3%) additional monthly interest as penalty, twenty percent (20%) interest of the entire amount due as liquidated damages, and twenty-five percent (25%) of the entire amount due as attorney's fees. These additional rates of interest are likewise reflected in the promissory notes issued by Power Merge for which the liable petitioners can be held responsible. However, unlike the trial court and the CA, the Court finds that these contractual stipulations cannot fully be imposed.

The freedom to contract is not absolute. And one of the more general restrictions thereon is enshrined in Article 1306 of the Civil Code which precludes the contracting parties from establishing stipulations, clauses, terms, and conditions that are contrary to law, morals, good customs, public order, and public policy. In this jurisdiction, the Court has never shied away from striking down iniquitous and unconscionable interest rates for failing to meet this standard.[157] We see no reason to depart from the practice in this case.

That said, the Court herein refuses to impose the three percent (3%) additional monthly penalty interest, and instead affirms the trial and appellate court's nullification of the same. Such exorbitant interest rate is void for being contrary to morals, if not against the law.[158] Being a void stipulation, the monthly penalty interest is deemed inexistent from the beginning.[159] In its stead, the imposition of legal interest pursuant to *Nacar* is deemed sufficient.

Anent the twenty percent (20%) liquidated damages, the Court sees the need to reduce the amount. Liquidated damages are those agreed upon by the parties to a contract, to be paid in case of breach thereof.[160] Although it can conclusively be deduced from the contracts that the parties intended to impose such additional charges, the Court nevertheless, by express provision in Article 2227 of the New Civil Code, has the right to temper them if they are unconscionable.[161] Considering that the base amount of the indebtedness in this case is by itself already staggering, imposing an additional twenty percent (20%) interest against the persons liable would prove to be too cumbersome. The Court therefore sees the need to reduce the amount to only ten percent (10%) of the total maturity value of Ng Wee's investment in Power Merge.

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[157] *Silos v. Philippine National Bank*, G.R. No. 181045, July 2, 2014, 728 SCRA 617.
[158] *Chua v. Timan*, G.R. No. 170452, August 13, 2008, 562 SCRA 146.
[159] *Castro v. Tan*, G.R. No. 168940, November 24, 2009, 605 SCRA 231.
[160] Article 2226, New Civil Code.
[161] Article 2227. Liquidated damages, whether intended as an indemnity or a penalty, shall be equitably reduced if they are iniquitous or unconscionable.

The same downward modification is in order as regards the award of attorney's fees. Although Ng Wee finds justification for the entitlement to the award under Article 2208 of the New Civil Code,[162] the same provision mandates that *"in all cases, the attorney's fees and expenses of litigation must be reasonable."* Just as We have reduced the rate for liquidated damages, the Court likewise tempers the stipulated rate of attorney's fees to five percent (5%) of the total amount due on Ng Wee's investment.

Finally, the Court sees no cogent reason to disturb the RTC's award of moral damages in favor of Ng Wee in the amount of ₱100,000.00, as affirmed by the appellate court. Discussed in the following wise in *Philippine Savings Bank v. Sps. Mañalac, Jr.* is the concept of moral damages:

> Moral damages are meant to compensate the claimant for any physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation and similar injuries unjustly caused. Although incapable of pecuniary estimation, the amount must somehow be proportional to and in approximation of the suffering inflicted. **Moral damages are not punitive in nature and were never intended to enrich the claimant at the expense of the defendant.** There is no hard-and-fast rule in determining what would be a fair and reasonable amount of moral damages, since each case must be governed by its own peculiar facts. **Trial courts are given discretion in determining the amount, with the limitation that it should not be palpably and scandalously excessive.** Indeed, it must be commensurate to the loss or injury suffered. [163] (emphasis added)

Ng Wee's claim for moral damages in the amount of ₱5,000,000.00 is indeed too excessive, even with the principal amount in mind. To reiterate, moral damages were never meant to enrich the claimant. The court therefore upholds the RTC and the CA's grant of the reduced amount of ₱100,000.00.

Finally, the judgment of liability shall earn additional six percent (6%) interest reckoned from finality, also pursuant to the *Nacar* ruling.

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[162] Article 2208. In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except:

x x x x

(2) When the defendant's act or omission has compelled the plaintiff to litigate with third persons or to incur expenses to protect his interest;

x x x x

(5) Where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just and demandable claim;

x x x x

(11) In any other case where the court deems it just and equitable that attorney's fees and expenses of litigation should be recovered.

[163] G.R. No. 145441, April 26, 2005, 457 SCRA 203, 221.

WHEREFORE, premises considered, the Court resolves:

1. To **PARTIALLY GRANT** the Petition for Review on Certiorari of Luis Juan L. Virata and UEM-MARA, docketed as G.R. No. 220926;

2. To **DENY** the Petition for Review on Certiorari of Westmont Investment Corporation, docketed as G.R. No. 221058;

3. To **DENY** the Petition for Review of Manuel Estrella, docketed as G.R. No. 221109;

4. To **DENY** the Petition for Review on Certiorari of Simeon Cua, Henry Cualoping, and Vicente Cualoping, docketed as G.R No. 221135; and

5. To **DENY** the Petition for Review on Certiorari of Anthony Reyes, docketed as G.R. No. 221218.

The September 30, 2014 Decision and October 14, 2015 Resolution of the Court of Appeals in CA-G.R. CV. No. 97817 affirming the July 8, 2011, Decision of the Regional Trial Court, Branch 39 of Manila is hereby **AFFIRMED** with **MODIFICATION**. As modified, the dispositive portion of the trial court Decision in Civil Case No. 00-99006 shall read:

> **WHEREFORE**, premises considered, judgment is hereby rendered in favor of plaintiff, ordering the defendants Luis L. Virata, Westmont Investment Corporation (Wincorp), Antonio T. Ong, Anthony T. Reyes, Simeon Cua, Vicente and Henry Cualoping, Mariza Santos-Tan, and Manuel Estrella to jointly and severally pay plaintiff as follows:
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> 1. The sum of Two Hundred Thirteen Million Two Hundred Ninety Thousand Four Hundred Ten and 36/100 Pesos (₱213,290,410.36), which is the maturity amount of plaintiff's investment with legal interest at the rate of twelve (12%) percent per annum from the date of filing of the complaint on October 19, 2000 until June 30, 2013 and six percent (6%) from July 1, 2013 until fully paid;
>
> 2. Liquidated damages equivalent to ten percent (10%) of the maturity amount, and attorney's fees equivalent to five percent (5%) of the total amount due plus legal interest at the rate of twelve (12%) percent per annum from the date of filing of the complaint until June 30, 2013 and six percent (6%) from July 1, 2013 until fully paid;
>
> 3. ₱100,000.00 as moral damages.
>
> 4. Additional interest of six percent (6%) per annum of the total monetary awards, computed from finality of judgment until full satisfaction.

5. The complaint against defendants Manuel Tankiansee and UEM-MARA Philippines Corporation is dismissed for lack of merit.

The cross claim of Luis Juan L. Virata is hereby GRANTED. Westmont Investment Corporation (Wincorp), Antonio T. Ong, Anthony T. Reyes, Simeon Cua, Vicente and Henry Cualoping, Mariza Santos-Tan, and Manuel Estrella are hereby ordered jointly and severally liable to pay and reimburse Luis Juan L. Virata for any payment or contribution he (Luis Juan L. Virata) may make or be compelled to make to satisfy the amount due to plaintiff Alejandro Ng Wee. All other counterclaims against Alejandro Ng Wee and cross-claims by the defendants as against each other are dismissed for lack of merit.

Cost against the defendants, except defendants Manuel Tankiansee and UEM-MARA Philippines Corporation.

SO ORDERED.

PRESBITERO J. VELASCO, JR.
Associate Justice

WE CONCUR:

LUCAS P. BERSAMIN
Associate Justice

BIENVENIDO L. REYES
Associate Justice

FRANCIS H. JARDELEZA
Associate Justice

NOEL GIMENEZ TIJAM
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARIA LOURDES P. A. SERENO
Chief Justice

CERTIFIED TRUE COPY
WILFREDO V. LAPITAN
Division Clerk of Court
Third Division

JUL 28 2017