Republic of the Philippines
Supreme Court
Manila

EN BANC

TOTAL OFFICE PRODUCTS AND SERVICES (TOPROS), INC., *Petitioner,*	**G.R. Nos. 200070-71** Present:
- versus -	GESMUNDO, *C.J.*, PERLAS-BERNABE, LEONEN, CAGUIOA, HERNANDO, CARANDANG, LAZARO-JAVIER, INTING, ZALAMEDA, LOPEZ, M., GAERLAN, ROSARIO, LOPEZ, J., DIMAAMPAO,* and MARQUEZ, *JJ.*
JOHN CHARLES CHANG, JR., TOPGOLD PHILIPPINES, INC., GOLDEN EXIM TRADING AND COMMERCIAL CORPORATION, and IDENTIC INTERNATIONAL CORP., represented by JOHN CHARLES CHANG, JR., HECTOR and CECILIA KATIGBAK, *Respondents.*	Promulgated: December 7, 2021

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DECISION

INTING, *J.*:

A person cannot serve two masters without detriment to one of them.[1] It is from this basic human frailty that the "*doctrine of corporate opportunity*" was recognized and laws were put in place to deter corporate officers from using their position of trust and confidence to further private interests.

* On official leave.

1 *Gokongwei, Jr. v. Securities and Exchange Commission*, 178 Phil. 266, 304 (1979).

Before the Court is a Petition for Review on *Certiorari*[2] praying for the reversal of the Decision[3] dated June 17, 2011 and the Resolution[4] dated January 2, 2012 of the Court of Appeals (CA) in CA-G.R. SP Nos. 103047 and 103119. The CA reversed and set aside the Decision[5] dated March 18, 2008 of Branch 158, Regional Trial Court (RTC), Pasig City in Civil Case No. 68327, and denied the Motion for Reconsideration[6] filed by Total Office Products and Services, Inc. (TOPROS), respectively.

The Antecedents

On November 17, 1998, TOPROS filed before the Securities and Exchange Commission (SEC) a Petition for Injunction, Mandatory Injunction and Damages (With Urgent Motion for Issuance of Writ of Preliminary Attachment),[7] which was later refiled as an Amended Petition for Accounting and Damages with Prayer for the Issuance of a Writ of Preliminary Attachment[8] (Amended Petition) against TOPGOLD Philippines, Inc. (TOPGOLD), Golden Exim Trading and Commercial Corporation (Golden Exim), Identic International Corp. (Identic) (collectively, respondent-corporations), John Charles Chang, Jr. (Chang), Saul Mari Chang, Hector Katigbak (Hector), Cecilia Katigbak (Cecilia), Rosario Sarah Fernando, and Elizabeth Jay (Elizabeth) (collectively, individual respondents), who are all incorporators of the respondent-corporations.[9]

With the passage of Republic Act No. (RA) 8799 or the Securities Regulation Code, which took effect on August 8, 2000, the Amended Petition was transferred from the SEC to the RTC.[10]

According to the Amended Petition, Spouses Ramon (Ramon) and Yaona Ang Ty (Yaona) (collectively, Spouses Ty) wanted to establish a corporation during the latter part of 1982 that would be the sole distributor of Minolta plain paper copiers in the Philippines. Chang, a former employee of Pantrade, Inc., (Pantrade), a company also owned by

2 *Rollo*, pp. 3-55.
3 *Id.* at 78-96; penned by Associate Justice Rodil V. Zalameda (now a Member of the Court) with Associate Justices Ameiita G. Tolentino and Normandie B. Pizarro, concurring.
4 *Id.* at 76-77.
5 *Id.* at 58-75; penned by Presiding Judge Maria Rowena Modesto-San Pedro.
6 CA *rollo*, pp. 376-401.
7 Records, Vol. I, pp. 1-21.
8 *Id.* at 110-129.
9 *Rollo*, pp. 58-59; see also records, Vol. I, p. 110.
10 *Rollo*, p. 84.

the Ty Family, was given the duty to manage the new corporation. The Ty Family gave Chang 10% shares in the corporation with the assurance from Chang that he will render competent, exclusive, and loyal service thereto. On January 31, 1983, TOPROS was incorporated with an authorized capital stock of ₱4,000,000.00. Among the incorporators, Chang was the only one who is not a member of the Ty Family.[11]

The Ty Family elected Chang as President and General Manager and entrusted to him the management as well as the funds of TOPROS. Meanwhile Yaona served as Treasurer and Jennifer Ty (Jennifer) stood as Corporate Secretary. Upon Chang's request, Elizabeth, Hector, and Cecilia, all employees of Pantrade, were transferred to TOPROS.[12]

TOPROS grew into a multi-million enterprise; thus, Spouses Ty increased its authorized capital stock to ₱10,000,000.00 and Chang's share to 20%. TOPROS included in its line of business the distribution of various office equipment and supplies utilizing the brand names Ultimax, Maruzen, Taros, and Intimus.[13]

However, despite its success, no substantial cash dividends were distributed to the stockholders because, according to Chang, the corporation was investing its funds in several real properties in Metro Manila, Visayas, and Mindanao.[14]

In 1998, the Ty Family sensed irregularities in Chang's dealings when their friends and relatives began questioning the manner in which products and services from TOPROS were issued receipts and vouchers from TOPGOLD, Golden Exim, and Identic. The Ty Family requested Chang to return all corporate records of TOPROS. Chang, however, offered to buy them out of their interest at TOPROS. This prompted the Ty Family to conduct an investigation which revealed that while still a Corporate Director and an officer of TOPROS, Chang, together with the individual respondents, incorporated the respondent-corporations to siphon the assets, funds, goodwill, equipment, and resources of TOPROS. According to TOPROS, Chang used its properties in organizing the respondent-corporations and obtained opportunities properly belonging to it and its stockholders to their damage and

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[11] *Id.* at 59-60.
[12] *Id.* at 60.
[13] *Id.*
[14] *Id.*

prejudice. Chang was, thereafter, ousted as Corporate Director and officer of TOPROS; and the instant case was filed against him.[15]

Meanwhile, TOPROS sought an *ex parte* issuance of a writ of preliminary attachment against the respondent-corporations and individual respondents (collectively, respondents) and prayed for: (1) an accounting for all the profits and the refund of the same to TOPROS; (2) the dissolution of the respondent-corporations; (3) the declaration as illegal and fraudulent all the transfers and acquisitions made by Chang in his favor and that of the other respondents; (4) respondents to reconvey to TOPROS the properties which they fraudulently registered in their individual and corporate names; and (5) payment of damages.[16]

The SEC issued a Writ of Preliminary Attachment in favor of TOPROS wherein the latter posted a bond in the amount of ₱90,000,000.00 representing its alleged damage.[17]

For his part, Chang denied the charges and asserted that from TOPROS' inception until his ouster as President and General Manager therein, he alone ran TOPROS and shouldered its liabilities. He further asserted that: (1) even with the absence of assistance from the Ty Family, they received an estimated ₱14,000,000.00 cash dividends spread throughout the 15 years of his incumbency in the corporation; (2) he was able to save TOPROS from the economic crisis in 1983 through personal loans and surety agreements with Chinabank; (3) he registered the trade name and logo of the corporation and was able to develop its goodwill all over the country; (4) he promoted the only Filipino brand of office machine, "Ultimax" and eventually patented it under the name of TOPROS, even though he was the one who coined its name; and (5) it was during the time that he was signing as surety for the loans of TOPROS that he, together with the individual respondents, formed the respondent-corporations.[18]

Chang furthermore alleged that the Ty Family knew that he organized the three corporations during his incumbency as President and General Manager of TOPROS. In 1993, Golden Exim and Identic were exhibitors, together with TOPROS, in the Philippine Office Machine

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[15] *Id.* at 60-61.
[16] *Id.* at 61.
[17] *Id.*
[18] *Id.* at 61-62.

Distributors Association (POMDA), wherein Ramon was a director while his son, Warren Ty (Warren), was a member of the Exhibit Committee. Golden Exim, Identic, together with TOPROS, and Pantrade marketed the product "Green-C Chlorella." In the minutes of the special meeting of Identic in April 1989, Warren signed as a stockholder. Then in April 1989, Warren acquired the shares of Edwin Tan in Identic through a Deed of Assignment.[19]

Chang also explained that: (1) from June 1997 to March 1998, he opened several letters of credit for TOPROS through trust receipt arrangements with Chinabank and before the trust receipts fell due, he took up the matter of repayment with Spouses Ty; (2) Ramon, however, passed the matter to him and told Chang that if repayment was not possible, considering that TOPROS was already heavily in debt, Chang should just let the corporation go bankrupt; (3) he personally guaranteed TOPROS' loans, and, because of his fear of being charged with *estafa*, he was compelled to seek other sources to pay off TOPROS' indebtedness; (4) when the patriarch, Ramon, was no longer interested in rehabilitating TOPROS and Chang wanted to protect his credibility and the welfare of 200 employees who were about to lose jobs, he took it upon himself to serve the clients of TOPROS through TOPGOLD which individual respondents incorporated in 1997; and (5) he alone was able to pay TOPROS' loans including the payment of separation pay of its employees.[20]

In their Answer *Ad Cautelam*[21] dated September 3, 1999, individual respondents, excluding Chang, questioned the jurisdiction of the SEC. They alleged that the case is purely intra-corporate between Chang and TOPROS of which they are not stockholders. They also averred that the SEC has no jurisdiction to order the dissolution of Golden Exim, Identic, and TOPGOLD as there must be a separate proceeding for such purpose.[22]

TOPROS presented, as witnesses, Yaona and Jennifer while respondents presented Chang, Hector, Sheriff Eduardo Grueso, and Manuel Peralta.[23]

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19 *Id.* at 62.
20 *Id.*
21 Records, Vol. II, pp. 409-416.
22 *Id.* at 410-411.
23 *Rollo*, p. 63.

The RTC Decision

In its Decision[24] dated March 18, 2008, the RTC ruled:

> WHEREFORE, premises considered, judgment is hereby rendered in favor of plaintiff Total Office Products and Services (Topros), Inc. and against defendants John Charles Chang, Jr., Topgold Phils., Inc., Golden Exim Trading & [Commercial Corporation] and Identic International Corporation who are hereby ordered, jointly and solidarily, to:
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> 1. Account for all the profits and properties which otherwise should have accrued to Topros and refund the same to Topros;
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> 2. Pay actual damages suffered by Topros in an amount to be determined by the Court upon submission by the Court-appointed Accounting Committee of its Final Report;
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> 3. Pay One Hundred Thousand Pesos (P100,000.00) in exemplary damages to Topros;
>
> 4. Pay One Hundred Thousand Pesos (P100,000.00) as and by way of attorney's fees to Topros; [and]
>
> 5. Pay the costs of suit.
>
> To carry this judgment into effect, a three-man Accounting Committee is hereby ordered formed with the Branch of [*sic*] Clerk of Court, Atty. Romeo Bautista IV, as Chairman, and two other certified public accountants respectively nominated by the parties, as members.
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> This Accounting Committee shall undertake the accounting necessary to determine the amount of actual damages suffered by Topros, the extent of loss of its business opportunities, the extent of gain profited by Chang and the three defendant corporations to the detriment of Topros, the refund of properties registered in the name of the three corporations which property pertains to Topros, and such other matters relevant to the judgment for accounting of all profits and properties properly accruing to Topros. It shall also include in its review the effects of the previously enforced Writ of Preliminary Attachment.
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> Accordingly, the parties are hereby directed to submit to the Court, within fifteen (15) days from receipt hereof, at least two (2) nominees each of certified public accountants from which the Court shall appoint the other two (2) members of the Accounting

[24] *Id.* at 58-75.

Committee.

Meanwhile, let the Petition be dismissed insofar as defendants Saul Mari Chang, Hector Katigbak, Cecilia Katigbak, Rosario Sarah Fernando and Elizabeth Jay are concerned.

SO ORDERED.[25]

The RTC held that the case filed by TOPROS is an intra-corporate controversy between TOPROS and Chang. However, because of allegations of fraudulent utilization and siphoning of resources, opportunities, and contracts belonging to TOPROS by Chang, together with the individual respondents and the respondent-corporations, respondents are indispensable parties to the case who must be joined as party defendants.[26]

The RTC also ruled that Chang violated his fiduciary duties and was guilty of disloyalty to TOPROS for which he must be held accountable under Sections 31 and 34 of The Corporation Code of the Philippines (Corporation Code).[27] Chang established Identic, Golden Exim, and TOPGOLD which are in the same line of business of TOPROS while still an officer and director thereof. He acquired business opportunities which should have belonged to TOPROS.[28]

Chang and the other respondents filed their separate petitions for review which were consolidated and resolved by the CA.[29]

The CA Decision

In its Decision[30] dated June 17, 2011, the CA ruled:

WHEREFORE, the Petitions for Review in CA-G.R. SP No. 103047 and in CA-G.R. SP No. 103119 are GRANTED. The assailed RTC Decision dated 18 March 2011 in Civil Case No. 68327 is REVERSED and SET ASIDE, and accordingly, the Amended Petition is DISMISSED.

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25 *Id.* at 74-75.
26 *Id.* at 64-65.
27 *Batas Pambansa Blg.* (BP) 68, approved on May 1, 1980.
28 *Rollo*, pp. 68-69.
29 *Id.* at 78-79.
30 *Id.* at 78-96.

> Consequently, the writ of attachment and all notices of garnishment issued relative thereto are hereby dissolved.
>
> SO ORDERED.[31]

According to the CA, records do not show that TOPROS even attempted to adduce evidence that Chang and individual respondents have complete control over TOPGOLD, Golden Exim, and Identic as all TOPROS did was to show that Chang and the other individual respondents were incorporators and/or officers of the respondent-corporations and that Chang substantially owned them. It ruled that given that Yaona, Jennifer, and Warren were the Corporate Treasurer, Secretary, and Chairman, respectively, of the Board of Directors of TOPROS, it could not see how Chang could have complete dominion over TOPROS' funds. It further held that TOPROS' mere allegation that Chang and the other individual respondents fraudulently siphoned off its funds and assets based mainly, if not solely, on the latter's establishment of the respondent-corporations does not amount to clear and convincing evidence sufficient to support allegations of fraud. Thus, the RTC had no justifiable reason to pierce the veil of corporate fiction.[32]

The CA furthermore held that there were only mere *innuendos* of disloyalty. Ramon, the patriarch of the Ty Family with whom Chang directly dealt with, was not presented by TOPROS as a witness. Yaona's statements, which were derived from pronouncements of her husband, Ramon, were mere hearsay and of no probative value. The RTC's finding that Chang was guilty of disloyalty because of his subsequent acquisition of the service contract previously entered into by TOPROS and Linde Refrigeration Phils., Inc. (Linde) failed to consider that during that period, TOPROS was either closing down or had already closed down. This was also the scenario with regard to the similar advertisements of TOPROS and TOPGOLD considering that TOPROS did not refute that TOPGOLD started using the advertisements only in 1997.[33]

TOPROS filed a Motion for Reconsideration, but the CA denied it on January 2, 2012.[34]

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[31] *Id.* at 95.
[32] *Id.* at 88-90.
[33] *Id.* at 93-94.
[34] See Resolution dated January 2, 2012 of the Court of Appeals, *id.* at 76-77.

Hence, the petition.

TOPROS is now before the Court asserting that:

> I. The [CA] committed grave abuse of discretion amounting to lack or excess of jurisdiction when: it found petitioner TOPROS[']' allegation of disloyalty against respondent Chang lacking; and it did not hold respondent Chang liable for disloyalty as a director to petitioner TOPROS; and
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> II. The [CA] committed grave abuse of discretion amounting to lack or excess of jurisdiction when it ruled that any similarity in the names of petitioner TOPROS and respondent Topgold cannot be considered as indicia of fraud or of disloyalty in this case.[35]

Petitioner asserts that: (1) Chang is guilty of violating the Corporation Code particularly Section 31, as he brazenly disregarded the director's duty of loyalty; (2) he established the respondent-corporations to acquire and utilize the assets, funds, properties, and resources of TOPROS; and (3) he also violated Section 74 of the Corporation Code in failing to provide the other directors access to the financial records of TOPROS.[36]

According to TOPROS, Chang's acts amounted to violation of the "doctrine of corporate opportunity" which rests on the unfairness, in particular circumstances, of an officer or director taking advantage of an opportunity for his own personal profit when the interest of the corporation calls for protection. If, in such circumstances the interests of the corporation are betrayed, the corporation may elect to claim all the benefits of the transaction for itself and the law will impress a trust in favor of the corporation upon the property interest and profits acquired.[37]

In his Comment,[38] Chang avers that: (1) the doctrine of corporate opportunity does not apply in the case because he was advised to allow the corporation to go under due to its indebtedness; (2) the doctrine of corporate opportunity applies only if the corporation is financially able to undertake its business; (3) TOPROS failed to prove the claim of fraud

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[35] *Id.* at 21-22.
[36] *Id.* at 28-29.
[37] *Id.* at 30.
[38] *Id.* at 136-161.

by preponderance of evidence of fraud; (4) TOPROS' witnesses admitted that Chang and Ramon had always been in close coordination in handling the affairs of TOPROS, while members of the family formed part of the new businesses alleged to be part of the scheme to defraud TOPROS; and (5) when Ramon advised Chang that they were no longer interested to pursue the business and was willing to just have the business go under, TOPROS' witnesses admitted that Chang was in constant communication with Ramon.[39]

Respondent-corporations in their Comment[40] also allege that: (1) their incorporations were with the knowledge, approval, and participation of the Ty Family; (2) there was also no evidence that respondents were "dummies" of Chang; neither was there evidence, such as account books, vouchers, checks, etc., to support the allegation that vast amounts of TOPROS's resources were channeled to, and received by the respondent-corporations; and (3) there is no confusion between the names TOPROS and TOPGOLD. "TOPGOLD" is merely a descriptive name while "TOPROS" is an acronym that stands for Total Office Products and Services.[41]

The Issue

Whether Chang is liable for violation of his fiduciary duties under the Corporation Code.

Batas Pambansa Blg. (BP) 68 or the Corporation Code was enacted in 1980. In 2019, RA 11232, otherwise known as the "Revised Corporation Code of the Philippines" (RCC), was passed and repealed BP 68.[42] As the acts complained of took place under BP 68, the Court shall refer to the provisions under BP 68.

Our Ruling

The Court finds merit in the petition.

Generally, Rule 45 petitions can raise only questions of law, as

[39] *Id.* at 136-138.
[40] See Comment/Opposition to the Petition for Review of TOPROS dated April 24, 2012, *id.* at 163-177.
[41] *Id.* at 165-169.
[42] See Section 187 of Republic Act No. 11232.

this Court is not the proper venue to consider factual issues. However, a departure from the general rule may be warranted where, as in the case, the findings of the CA are contrary to those of the trial court.[43]

Here, the CA had different factual findings from the RTC which necessitates the Court's review of the evidence presented by the parties. After a judicious review of the documentary and testimonial evidence presented, the Court finds that a reversal of the CA ruling is warranted.

Doctrine of Corporate Opportunity

The doctrine of corporate opportunity traces its roots to the general principles on directors' and officers' liabilities.

As a rule, a corporation is a juridical entity that is vested with a legal personality separate and distinct from those acting in its behalf, and in general, from the people comprising it. Following this principle, obligations incurred by the corporation, acting through its directors, officers and employees are the corporation's sole liabilities. A corporate director, trustee, or officer is generally not held personally liable for obligations that are incurred by the corporation. This legal fiction, however, may be disregarded—through the piercing of the corporate veil—if, *inter alia*, it is used as a means to perpetrate fraud or an illegal act, or as a vehicle for the evasion of an existing obligation, the circumvention of statutes, or to confuse legitimate issues.[44]

Section 31 of the Corporation Code (now Section 30 of the RCC) specifies the liabilities of directors, trustees, or officers. It reads:

> Sec. 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.*

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[43] *Palafox v. Wangdali*, G.R. No. 235914, July 29, 2020; *General Milling Corp. v. Casio*, 629 Phil. 12, 27 (2010).

[44] See *I/AME v. Litton and Co., Inc.*, 822 Phil. 610, 618-619 (2017); *Heirs of Fe Tan Uy v. International Exchange Bank*, 703 Phil. 477, 484-485 (2013).

> *When a director, trustee or officer attempts to acquire or acquires, 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.* (Italics supplied.)

Section 34 of the Corporation Code (now Section 33 of the RCC) also states:

> Sec. 34. *Disloyalty of a director.* — Where a director, by virtue of his office, *acquires for himself a business opportunity which should belong to the corporation, thereby obtaining profits to the prejudice of such corporation*, he must account to the latter for all such profits by refunding the same, unless his act has been ratified by a vote of the stockholders owning or representing at least two-thirds (2/3) of the outstanding capital stock. This provision shall be applicable, notwithstanding the fact that the director risked his own funds in the venture. (Italics supplied.)

Legislative History

Through Associate Justice Samuel H. Gaerlan, the Court is reminded of and finds it useful to look at the deliberations of BP 68 or the Corporation Code wherein then Minister Estelito Mendoza highlighted the intent of introducing Sections 31 to 34 to ensure that directors or corporate officers fulfill their fiduciary duties to the corporation.

> MR. MENDOZA. x x x x
>
> x x x [T]his provision — Section 31 — is really no more than a consequence of the requirement that the position of membership in the Board of Directors is a position of high responsibility and great trust. Unless a provision such as this is included, then that requirement of responsibility and trust will not be as meaningful as it should be. For after all, directors may take the attitude that unless they themselves commit the act, they would not be liable. But the responsibility of a director is not merely to act properly. The responsibility of a director is to assure that the Board of Directors, which means his colleagues acting together, does not act in a manner that is unlawful or to the prejudice of the corporation because of personal or pecuniary interest of the directors.[45] (Emphasis omitted.)

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[45] *Ient v. Tullett Prebon (Phils.), Inc.*, 803 Phil. 163, 195 (2017), citing Record of Batasan (RB),

Evidently, the intent of the framers of Section 31 of the Corporation Code was to codify the duty of loyalty of directors and corporate officers that is *to inform and offer to the corporation business opportunities* which, by reason of their office, they acquire or *become aware of.* Only when the corporation, after having been offered the business opportunities, and rejects them, that a director can take advantage thereof.

A look at the legislative records would further reveal the intent of the legislators to make a director or corporate officer liable to account for any profits derived from business opportunities which should have belonged to the corporation, unless his acts were ratified in accordance with Section 34 of the Corporation Code.

> MR. NUÑEZ. x x x
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> May I go now to x x x Section 34.
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> x x x x
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> My question, Your Honor, is: is this not the so-called corporate opportunity doctrine found in the American jurisprudence?
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> MR. MENDOZA. Yes, Mr. Speaker, as I stated many of the changes that have been incorporated in the Code were drawn from jurisprudence on the matter, but even jurisprudence on several matters or several issues relating to the Corporation Code are sometimes ambiguous, sometimes controversial. In order, therefore, to clarify those issues, what was done was to spell out in statutory language the rule that should be applied on those matters and one of such examples is Section 34.
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> MR. MENDOZA. In my opinion it must not only be made known to the corporation; the corporation must be formally advised and if he really would like to be assured that he is protected against the consequences provided for in Section 34, he should take steps whereby the opportunity is clearly presented to the corporation and the corporation has the opportunity to decide on whether to avail of it or not and then let the corporation reject it, after which then he may avail of it. x x x.
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> x x x [N]ow with the statutory rule, any director who comes to

December 4, 1979, p. 1514.

> know of an opportunity that may be available to the corporation would be aware of the consequences in case he avails of that opportunity without giving the corporation the privilege of deciding beforehand on whether to take advantage of it or not.
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> x x x x
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> x x x [A] prudent director, who would assure that he does not become liable under Section 34, should not only be sure that the corporation has official knowledge, that is, the Board of Directors, but must take steps, positive steps, which will demonstrate that the matter or opportunity was brought before the corporation for its decision whether to avail of it or not, and the corporation rejected it.
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> So, under those circumstances narrated by Your Honor, it is my view that the director will be liable, unless his acts are ratified later by the vote of stockholders holding at least 2/3 of the outstanding capital stock.
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> x x x x
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> The purpose of all these provisions is to assure that directors or corporations constantly — not only constantly remember but actually are imposed with certain positive obligations that at least would assure that they will discharge their responsibilities with utmost fidelity.[46] (Emphasis and underscoring omitted.)

Philippine Cases on the Doctrine of Corporate Opportunity

In 1979, the Court through *Gokongwei v. Securities and Exchange Commission*[47] (*Gokongwei*) pronounced that the doctrine on corporate opportunity "is precisely a recognition by the courts that the fiduciary standards could not be upheld where the fiduciary was acting for two entities with competing interests."[48] It "rests fundamentally on the unfairness, in particular circumstances, of an officer or director taking advantage of an opportunity for his own personal profit when the interest of the corporation justly calls for protection."[49]

In 1992, the Court in *Ponce v. Legaspi*[50] reiterated that it is unfair

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[46] *Id.* at 196-199, citing RB, November 5, 1979, pp. 1217-1219.

[47] *Gokongwei, Jr. v. Securities and Exchange Commission, supra* note 1.

[48] *Id.* at 302.

[49] *Id.*, citing *Paulman v. Kritzer*, 74 Ill. App. 2d 284, 291 NE 2d 541 (1966); *Tower Recreation, Inc. v. Beard*, 141 Ind. App. 649, 231 NE 2d 154 (1967).

[50] 284 Phil. 517 (1992).

for a director or any other person occupying a fiduciary position in the corporate hierarchy from engaging in a venture which competes with that of the corporation.[51]

Then in 1993, the Court in *Prime White Cement Corp. v. IAC*,[52] highlighted the duty of loyalty of a director, in this wise:

> A director of a corporation holds a position of trust and as such, he owes a duty of loyalty to his corporation. In case his interests conflict with those of the corporation, he cannot sacrifice the latter to his own advantage and benefit. As corporate managers, directors are committed to seek the maximum amount of profits for the corporation. This trust relationship "is not a matter of statutory or technical law. It springs from the fact that directors have the control and guidance of corporate affairs and property and hence of the property interests of the stockholders." In the case of *Gokongwei v. Securities and Exchange Commission*, this Court quoted with favor from *Pepper v. Litton*, thus:
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> > "x x x He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters x x x He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis. x x x"[53]

In 2009, the Court summarized, through *Strategic Alliance Development Corp. v. Radstock Securities Limited*,[54] the three-fold duty of members of the board of directors: duty of obedience, duty of diligence, and duty of loyalty. This means that directors: (1) shall direct the affairs of the corporation only in accordance with the purposes for which it was organized; (2) shall not willfully and knowingly vote for or assent to patently unlawful acts of the corporation or act in bad faith or with gross negligence in directing the affairs of the corporation; and (3)

[51] *Id.* at 533.

[52] 292-A Phil. 198 (1993).

[53] *Id.* at 205, citing *Gokongwei, Jr. v. Securities and Exchange Commission*, *supra* note 1 at 299-300, further citing *Pepper v. Litton*, 308 U.S. 295-313, 84 L. Ed. 281, 291-292 (1939). Citations omitted.

[54] 622 Phil. 431 (2009).

shall not acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees.[55]

The duty of loyalty in particular prohibits corporate directors, trustees, and officers from acquiring or attempting to acquire any personal or pecuniary interest—or any other interest for that matter—in conflict with or adverse to their duty as corporate fiduciaries.[56]

The recent case of *Ient v. Tullet Prebon (Philippines), Inc.*,[57] also discussed the relationship of the doctrine of corporate opportunity to the duty of loyalty.[58]

Unfortunately, none of the aforementioned cases have set actual parameters to determine what is considered as corporate opportunity that gives rise to a claim of damages. There are still no guidelines as to what factors should be considered by the courts in determining the award of damages under Section 34. Hence, the need at this time for the Court to fill the gaps of jurisprudence.

United States of America (US) Cases

As raised by Associate Justice Estela M. Perlas-Bernabe, and echoed by Associate Justices Alfredo Benjamin S. Caguioa and Amy C. Lazaro-Javier, the Court will look at several US cases to guide us in ascertaining the proper parameters and guideposts that will be useful and appropriate in our jurisdiction.

The corporate opportunity doctrine in US jurisprudence prohibits one who occupies a fiduciary relationship to a corporation from acquiring, in opposition to the corporation, property in which the latter has an interest or tangible expectancy or that is essential to its existence. Varying tests, however, have been established by different State jurisdictions in determining whether such doctrine has been breached.

First, "*the line of business test.*" This test holds that a transaction is a corporate opportunity if it is within the scope of the corporation's

[55] *Id.* at 476-477.
[56] *Id.*
[57] *Ient v. Tullett Prebon (Phils.), Inc.*, *supra* note 45.
[58] *Id.* at 202-203.

own activities and of present or potential advantage to it. Under this test, corporate participants must refrain from taking for themselves the types of transactions in which their corporation normally engages.[59]

Second, "*the interest or expectancy test.*" This test provides that "an opportunity is open to the director unless the corporation has an interest already existing [in the opportunity], or x x x it has an expectancy growing out of an existing right."[60] It does not bar directors from every transaction that appears useful to the corporation in hindsight, but only prevents the acquisition of property that the corporation needs or is seeking.

Third, "*the American Law Institute (ALI) test.*" This provides that a director or senior executive may not take advantage of a corporate opportunity, unless: (a) he first offers the corporate opportunity to the corporation and makes disclosure concerning the corporate opportunity; (b) the corporate opportunity is rejected by the corporation; and (c) the rejection of the opportunity is fair to the corporation, or authorized by disinterested directors in a manner that satisfies the standards of the business judgment rule, or authorized or ratified by disinterested shareholders, and the shareholders' action is not equivalent to a waste of corporate assets. For this purpose, the ALI test defines a corporate opportunity as: (1) any opportunity to engage in any business activity of which a director or senior executive becomes aware either in connection with his functions as director or senior executive or under circumstances that should reasonably lead him to believe that the person offering the opportunity expects him to offer it to the corporation, or through the use of corporate information or property, if the resulting opportunity is one that the director or senior executive should reasonably be expected to believe would be of interest to the corporation; or (2) any opportunity to engage in a business activity—which includes the acquisition or use of any contract right or other tangible or intangible property—of which a senior executive becomes aware, if he knows or reasonably should know that the activity is closely related to the business in which the corporation is engaged or may reasonably be expected to engage.[61]

Common to these three tests is that they all state that "corporate opportunity exists when a proposed activity is reasonably an incident to

[59] Michael Begert, *The Corporate Opportunity Doctrine and Outside Business Interests*, The University of Chicago Law Review, Vol. 56, No. 2, The Federal Court System (Spring, 1989).
[60] *Id.*
[61] *Id.*

the corporation's present or prospective business and is one in which the corporation has the capacity to engage."[62]

In the case of *Guth v. Loft, Inc.*[63] (*Guth*), the Supreme Court of the State of Delaware integrated these tests and elucidated as to when a corporate opportunity exists, when a corporate director or officer breaches his/her fiduciary duty to the corporation that he/she serves, and the consequences of such breach. To quote:

> Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest. The occasions for the determination of honesty, good faith and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standards of loyalty is measured by no fixed scale.
>
> If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, as its election, while it denies to the betrayer all benefit and profit. The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation. Given the relation between the parties, a certain result follows; and a constructive trust is the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty.
>
> The rule, referred to briefly as the rule of corporate opportunity, is merely one of the manifestations of the general rule that demands of an officer or director the utmost good faith in his relation to the

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[62] *Id.*, citing Fletcher's Cyclopedia of the Law of Corporations.

[63] 23 Del. Ch. 255 (1939).

corporation which he represents.

x x x x

x x x if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself. And, if in such circumstances, the interests of the corporation are betrayed, the corporation may elect to claim all the benefits of the transaction for itself, and the law will impress a trust in favor of the corporation upon the property, interests and profits so acquired.[64]

In the latter case of *Broz v. Cellular Information Systems, Inc.*[65] (*Broz*), the *Guth* test on corporate opportunity was synthesized into four aspects, *viz.*:

The corporate opportunity doctrine, as delineated by *Guth* and its progeny, holds that a corporate officer or director may not take a business opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation. x x x[66]

As clarified by *Broz*, however, the *Guth* test only sets guidelines, and that ultimately, "[n]o one factor is dispositive and all factors must be taken into account insofar as they are applicable."[67] Thus, the determination of whether or not a corporate director/officer has violated the doctrine "is a factual question to be decided by reasonable inference from objective facts."[68]

In addition to these cases, Associate Justice Alfredo Benjamin S. Caguioa raises other tests for the *En Banc*'s consideration. First is the "fairness" test, under which the test of whether an opportunity is a corporate one rests on the query of whether a fiduciary's appropriation

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64 *Id.* at 270-274.
65 673 A. 2d 148 (Del. 1996).
66 *Id.* at 154-155.
67 *Id.* at 155.
68 *Id.* at 154.

would fail the "ethical standards of what is fair and equitable in a particular set of facts."[69] It is similar to the line-of-business test in that it may disallow appropriation of not only existing but prospective opportunities of the corporation. While it admittedly poses "line-drawing"[70] problems with respect to delineating between appropriations that are fair to the corporation and those that are not, this test allows for malleability in the appreciation of what constitutes the foundational premise of fairness *vis-à-vis* corporations, consistent with the inclination of our legislative history, as pointed out by Associate Justice Samuel H. Justice Gaerlan, that sought to codify the premium placed on the fiduciary duties of a corporate officer.[71]

Second is *Thorpe v. CERBO, Inc.*[72] (*Thorpe*). The case involved a shareholder who sued the company CERBO and its controlling shareholders who were also its officers and directors for breach of their duty of loyalty through the usurpation of a corporate opportunity. The officers and directors of CERBO objected to a third-party proposal because it would erode the control premium of their stocks. The Chancery Court appreciated the nuanced role of the officers and directors and as controlling shareholders in that while said officers did breach their duty of loyalty for failing to fully disclose the corporate opportunity, it also noted that as controlling shareholders, they could veto any transaction that would have constituted a sale of all or substantially all of the corporation's assets, so that the Court held that while there was a breach of loyalty, there was effectively no injury to the corporation. *Thorpe* would therefore be valuable in the appreciation of whether or not a director or officer of the corporation under fire pursuant to the corporate opportunity doctrine could not also have validly undertaken the same action in a different corporate capacity.[73]

Third is the case of *Benerofe v. Cha*,[74] which offers a defense against the corporate opportunity doctrine. The case involved shareholders who filed a case against their corporation Inorganic Coatings, Inc. (ICI) and its directors for allegedly entering into a stock

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69 Talley, Eric and Mira Hashmall, *The Corporate Opportunity Doctrine*, February 2001, p. 8, available at <https://weblaw.usc.edu/why/academics/cle/icc/assets/docs/articles/iccfinal.pdf> (last accessed on December 1, 2021), citing *Durfee v. Durfee & Canning, Inc.*, 80 N.E. 2d 522, 529 (Mass. 1948), further citing Henry Withrop Ballantine, *Ballantine on Corporation*, 204-05 (rev. ed. 1946).

70 *Id.*

71 Concurring Opinion of Associate Justice Alfredo Benjamin S. Caguioa, p. 3.

72 676 A. 2d 436 (Del. 1996).

73 Concurring Opinion of Associate Justice Alfredo Benjamin S. Caguioa, pp. 3-4.

74 C.A. No. 14614 1998 Del. Ch. LEXIS 28 (1998).

purchase agreement that favored another corporation, designees of which also sat in the ICI's board. The court ruled that the shareholders failed to prove that the board of directors usurped a corporate opportunity of ICI since it failed to prove that ICI was in fact financially capable of exploiting the corporate opportunity that was supposedly usurped. The case would therefore be useful in refining the court's appreciation of the corporate opportunity doctrine, specifically in light of the "incapacity" defense, or the defense that submits that an opportunity is only a corporate one if the corporation itself could have, on its own, been able to exploit or seize the same had it not been appropriated by the fiduciary.[75]

Finally, another possible defense mentioned by Associate Justice Alfredo Benjamin S. Caguioa is the "source" defense, which was acknowledged by the ALI and line-of-business tests. The source defense mainly argues that the opportunity that the fiduciary appropriated was one pertaining to the fiduciary's personal skills and expertise, and not the corporations.[76]

Associate Justice Amy C. Lazaro-Javier also shared that it was common law which originally imposed the duty of a fiduciary upon a director or officer. Slowly, this common law duty has been codified in common law and hybrid common-civil law jurisdictions, such as ours.[77] The content of the fiduciary duty of directors and officers compels undivided loyalty which should be relentless and supreme. The highest standard of behavior is demanded which cannot be lowered even by the courts. This fiduciary duty requires directors and officers to avoid conflicts of interest with the corporation.[78]

The doctrine of corporate opportunity arises out of the fundamental obligation of a fiduciary not to allow a conflict of their duty with their own interests. The doctrine limits the ability of those who owe a fiduciary duty to a corporation to take advantage of business opportunities that might otherwise be available to them in the absence of the fiduciary relationship. According to a branch of common law, these business opportunities refer to those that either already belongs to the company or even for which it has been negotiating.[79]

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[75] Concurring Opinion of Associate Justice Alfredo Benjamin S. Caguioa, p. 4.
[76] *Id.*, citing *Benerofe v. Cha*, *supra* note 74.
[77] Concurring Opinion of Associate Justice Amy C. Lazaro-Javier, p. 1.
[78] *Id.* at 3, citing *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928).
[79] *Id.*, citing *Matic v. Waldner*, 2016 MBCA 60 (CanLII) (Manitoba Court of Appeals, Canada);

As it is now broadly understood, the doctrine of corporate opportunity governs the legal responsibility of directors, officers and controlling shareholders in a corporation, under the duty of loyalty, not to take such opportunities for themselves, without first disclosing the opportunity to the board of directors of the corporation and giving the board the option to decline the opportunity on behalf of the corporation. If the procedure is violated and a corporate fiduciary takes the corporate opportunity anyway, the fiduciary violates its duty of loyalty and the corporation will be entitled to a constructive trust of all profits obtained from the wrongful transaction.[80]

Citing the 1995 case of *Northeast Harbor Golf Club v. Harris*,[81] Associate Justice Amy C. Lazaro-Javier surveyed several tests in determining whether the opportunity belongs or belonged to the corporation.

First are the "line of business," "fairness," and "ALI" tests which were already discussed above. Then, there is the "combined approach" which combines the "line of business test" with the "fairness" test.

Guided by the ruling in *Matic v. Waldner*,[82] Associate Justice Amy C. Lazaro-Javier then suggests that when deciding whether a corporate opportunity exists, that a director or officer has availed of and could be held liable for, all relevant factors must be taken into account, including:

- The maturity of the opportunity;
- Whether it was actively pursued by the corporation;
- Whether the corporation was capable of taking advantage of the opportunity;
- Whether the opportunity was in the corporation's line of business or a related business;

Canadian Aero Service Ltd. v. O'Malley, [1974] SCR 592 (Supreme Court of Canada).

[80] *Id.*, citing Cornell Law School, Legal Information Institute, available at <https://www.law.cornell.edu/wex/Corporate_opportunity> (last accessed: September 30, 2021).

[81] 661 A. 2d 1146 (1995).

[82] 2016 MBCA 60 (CanLII) (Manitoba Court of Appeals, Canada).

- How the opportunity arose or came to the attention of the director or officer;

- Whether the other directors of the corporation had knowledge of the director's pursuit of the opportunity; and

- Whether the other directors gave their fully informed consent to the director's pursuit of the opportunity.[83]

Associate Justice Amy C. Lazaro-Javier explains that the goal of the analysis is to determine whether the opportunity fairly belonged to the corporation in the circumstances. The keystone "fairly belonged" brings together the sense of both the statutory provision which states that the opportunity "should belong" to the corporation[84] and the legislative history[85] of the provision that an opportunity "may be available" to the corporation.[86]

In fine, the above discussion leads to Associate Justice Estela M. Perlas-Bernabe's proposed guidelines which adopted the *Guth* ruling that is appropriate in our jurisdiction.

Thus, a claim of damages under Section 34 of the Corporation Code (now Section 33 of the RCC) arises when a corporate officer or director takes a business opportunity for his own, provided that it is sufficiently shown by the claimant that:

(a) The corporation is financially able to exploit the opportunity;

(b) The opportunity is within the corporation's line of business;

(c) The corporation has an interest or expectancy in the opportunity; and

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[83] Concurring Opinion of Associate Justice Amy C. Lazaro-Javier, p. 9.

[84] See Section 34 of BP 68 or The Corporation Code of the Philippines.

[85] In the deliberations of Sec. 34, Minister Mendoza explained corporate opportunity and mentioned that "with the statutory rule, any director who comes to know of an *opportunity that may be available to the corporation* would be aware of the consequences in case he avails of the opportunity without giving the corporation the privilege of deciding beforehand on whether to take advantage of it or not. (Italics supplied.)

[86] Concurring Opinion of Associate Justice Amy C. Lazaro-Javier, p. 9.

(d) By taking the opportunity for his own, the corporate fiduciary (*i.e.*, corporate director, trustee or officer) will thereby be placed in a position inimicable to his duties to the corporation.

In determining paragraph (b), whether the opportunity is within the corporation's line of business, the involved corporations must be shown to be in competition with one another. They must be engaged in related areas of businesses, producing the same products with overlapping markets.

As pointed out by Associate Justice Marvic M.V.F. Leonen, the test laid down in *Gokongwei* is very much relevant to the instant case. In *Gokongwei*, it was held that "the test must be whether the business does in fact compete."[87] It further defined "competition," as "a struggle for advantage between two or more forces, each possessing, in substantially similar if not identical degree, certain characteristics essential to the business sought."[88] Factors, such as "quantum and place of business, identity of products and area of competition should be taken into consideration." The Court even pointed out that it is "therefore, necessary to show that [the director's] business covers a substantial portion of the same markets for similar products to the extent of not less than 10% of [petitioner] corporation's market for competing products."[89]

Consequently, it is not enough to impute bare acts of transactions in which the claimant subjectively perceives the duty of loyalty to be breached. Sufficient evidence must be presented to show that the claim of damages is indeed premised on a concrete corporate opportunity falling under the parameters above-stated. Only then may actual damages relative to such lost opportunity be awarded.

Chang's Liability

Here, the Court agrees with the RTC that Chang committed several acts showing personal or pecuniary interest that were in conflict with his duties as director and officer of TOPROS.

There is no dispute that Chang established Identic in 1989, Golden

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87 *Gokongwei, Jr. v. Securities and Exchange Commission, supra* note 1 at 311.
88 *Id.*
89 *Id.* at 312.

Exim in 1990, and TOPGOLD in 1998 which were in the same line of business and while still an officer and director of TOPROS.[90] The Articles of Incorporation of Golden Exim and TOPGOLD show that Chang owned 80% of the shares of Golden Exim; and Chang, together with his son, owned 99.76% of the shares in TOPGOLD. The General Information Sheet of Identic also showed that Chang owned 65% of Identic.[91]

The service report of Linde, which was a client of TOPROS, as well as the provisional receipts issued by Golden Exim, showed that Golden Exim entered into a service contract with the same client at the same time that TOPROS was servicing it.[92] In 1998, TOPGOLD published printed advertisements which were strikingly similar to those previously printed by TOPROS in 1997, with the difference that the phrase "now available at TOPROS" was changed to "now available at TOPGOLD."[93]

Chang, as President and General Manager of TOPGOLD, signed a deed of assignment with Hector as Service and Operations Manager of TOPROS which made it appear that TOPROS assigned its rights under several rental agreements with different entities for the lease of various kinds of office equipment to TOPGOLD. It also authorized the corresponding rental payments on the rental agreements to be paid to TOPGOLD.[94]

TOPGOLD uses the same address as TOPROS which not only gives it the opportunity to use TOPROS' resources but leads the public to believe that they are one and the same entity, if not intimately related to each other. The Articles of Incorporation of TOPGOLD show its

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[90] *Rollo*, pp. 142-143; See also TOPGOLD Philippines, Inc. Articles of Incorporation, records, Vol. III, pp. 74-78.

[91] Exhibits "V" and "X," records, Vol. III, pp. 67, 75, 244.

[92] Exhibits "O," "P" and "Q," *id.* at 51-55.

[93] Exhibits "AA" and "AA-1," *id.* at 84-85.

[94] See Deed of Assignment, *rollo*, pp. 104-106.
A portion of the deed of assignment reads:

> "That for and in consideration of the assumption by the ASSIGNEE of the ASSIGNOR'S obligation under the aforesaid rental agreements, the ASSIGNOR by these presents do hereby cede, convey and transfer unto this ASSIGNEE, its rights under the above described rental agreements.
>
> "That by virtue of these presents, the ASSIGNOR hereby relinquishes its right to demand and sue for the rental payments from the above-described lessee-entities in favor of the ASSIGNOR and in furtherance thereof, authorize all the aforesaid lessor-entities to make rental payments under their respective rental agreements payable to the ASSIGNEE;" *id.* at 104-105.

address as 1465 E. Rodriguez, Sr. Ave., Cubao, Quezon City.[95] A printed advertisement of TOPROS shows that it has the same address.[96]

A 1,445-square-meter parcel of land along E. Rodriguez Avenue, Quezon City, on which TOPROS' building stands, was registered in the name of Golden Exim in 1993 even though Golden Exim was incorporated only three years prior to the purchase of the property.[97] When it was incorporated in 1990, Golden Exim only had an authorized capital stock of ₱2,000,000.00.[98]

When asked why he gave the investment opportunity to Golden Exim and not to TOPROS, Chang answered that he had to make his own living.[99]

The Transcript of Stenographic Notes (TSN) reads:

COURT — Why did you not buy the E. Rodriguez property for Topros?

WITNESS
A — Because this is Golden Exim Investment, sir.

ATTY. RIVERA
Q- — Why did you not give the opportunity to Topros? That's the question.

A- — Well, that's my decision.

Q- — So, instead of giving that opportunity to Topros, you decided to [*sic*] Golden Exim because that is your decision?

A- — Of course, I have to have my own living. I have to have my own earning and I have to have my own identity. And Golden Exim and Identic are all my identity.[100]

For his defense, Chang argued that he did most of the work of TOPROS from its incorporation in 1983 until his ouster as President and

[95] Records, Vol. III, pp. 74 and 82.
[96] Exhibit "I," *id.* at 44.
[97] Exhibits "W" Transfer Certificate Title No. 85410, *id.* at 73.
[98] *Id.* at 67.
[99] TSN, January 17, 2003, pp. 110-111.
[100] *Id.*

General Manager in 1998 and that he also paid for the loans of TOPROS with Chinabank in view of his having signed as guarantor or surety for the loans.[101]

In his Comment, Chang states: (1) that he practically shouldered the burden of running the entire business, including bearing its liabilities, without any help from the rest of the board of directors and stockholders and that because of Mr. Ramon Ty's refusal and strict order that Chang sign the surety agreement in his personal capacity, Chang was convinced and applied for and guaranteed TOPROS' loans in his personal capacity since 1986 until the filing of the present action; (2) that in 1988, he talked to Ramon and expressed his intention of leaving TOPROS to further his business and establish a name for himself; (3) that Ramon asked him to remain with TOPROS but encouraged him to organize and establish his own corporations; that he formed Identic, Golden Exim, and TOPGOLD with the full knowledge, consent and approval of the Ty Family; and (4) that as proof, he cited the business ventures entered into by the respondent-corporations with TOPROS and the participation of Warren as incorporator and stockholder of Identic.[102]

However, the fact that Chang risked his own funds in running TOPROS and paying off its obligations will not absolve him of his duties as director and officer of TOPROS.

Even if admitted, the circumstances cited by Chang, which suggest of knowledge, tolerance, or even acquiescence of TOPROS to his establishment of the respondent-corporations which are in the same business as TOPROS, do not amount to the compliance required of Section 34 to absolve a director of disloyalty. The law explicitly requires that where a director, by virtue of his office, acquires for himself a business opportunity which should belong to the corporation, he must account to the latter for all profits by refunding them, unless his act has been ratified by a vote of the stockholders owning or representing at least two-thirds of the outstanding capital stock.

The Court agrees with the RTC that even if the incorporation of the respondent-corporations was with the full knowledge of the members of the Ty Family, this does not equate to consent to the prejudicial

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[101] See Formal Offer of Evidence of Defendant Chang, records, Vol. III, p. 284.
[102] *Rollo*, pp. 141-143.

transfer and acquisition of properties and opportunities of TOPROS which Chang, through his corporations, has shown to have committed.[103]

Chang, to show that the incorporation of Golden Exim and Identic was with the full knowledge of the Ty Family, presented as evidence: (a) the souvenir program of POMDA Exhibit in 1993;[104] (b) advertisement clippings of health product Green-C Chlorella;[105] (c) letter indorsement of Ramon promoting Green-C Chlorella;[106] (d) advertisement clippings of TOPROS and Golden Exim and Identic;[107] and (e) cover of VAT Book of Pantrade for 1997 where Golden Exim and Identic were listed as suppliers of Pantrade.[108] However, Chang failed to show that his actions have been ratified by a vote of the stockholders representing at least two-thirds of the outstanding capital stock of TOPROS.

Chang admitted in open court, *viz.*:

ATTY. RIVERA

Q Then, of course, you have no document showing that Topros authorized your three (3) corporations to do that line of a particular business?

A- I have. x x x

x x x x

These are advertisements in which Golden Exim, Identic, Pantrade, Topgold, Topros. You [c]ould see that we are authorized dealer with the knowledge of Mr. Ramon Ty. You will see everything is here.

x x x x

Q- I'[m] not asking for an advertisement. I'm asking for a specific authority from Topros for you and your [companies] to engaged [*sic*] in that line of business which you admitted to be in direct competition with the business of Topros?

A- These are all with the approval of Mr. Ramon Ty in which, you could [see] that this is part of your exhibits.

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[103] *Id.* at 70.
[104] Records, Vol. III, pp. 272-279.
[105] *Id.* at 280-281.
[106] *Id.* at 282.
[107] *Id.* at 283-291.
[108] *Id.* at 292-294.

> Q- So, in other words, aside from those documents you have no other documents to show?
>
> A- I have no other documents but these documents was back in 1991, 1992, 1993, 1994 which we are already authorized dealer.[109]

In view of the circumstances, TOPROS was correct in pointing out that the doctrine of "corporate opportunity" applies in the case.

To determine the exact liability of Chang, however, the instant case should be remanded to the trial court for the reception of additional evidence and the reevaluation of evidence already submitted, guided by the parameters aforementioned. That is, TOPROS as claimant bears the burden of proving the specific business opportunities that gave rise to its claim of damages under Section 34 of the Corporation Code. In turn, Chang may present evidence to support his claim that: (a) the corporation was already heavily in debt and that TOPROS' patriarch, Ramon Ty, was no longer interested in corporate rehabilitation, so much so that he was already letting Chang to allow TOPROS to go bankrupt; and (b) that the corporation had already closed down prior to respondents' taking of certain corporate opportunities, among others.

Also it should be made clear that the claim for damages under Section 34 of the Corporation Code necessitates factual determinations which—while it may be arrived at with the aid of an accounting committee—must be ultimately made by the RTC itself in the exercise of its judicial functions, embodied in a final judgment.

In closing, it is well to recall that the doctrine of corporate opportunity is not based on theoretical abstractions, but on human experience that a person cannot serve two hostile masters without detriment to one of them. Where a director is so employed in the service of a rival company, he cannot serve both, but must betray one or the other. An officer of a corporation cannot engage in a business in direct competition with that of the corporation where he is a director by utilizing information he has received as such officer, under the established law that a director or officer of a corporation may not enter

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[109] TSN, January 7, 2003, pp. 106-107.

into a competing enterprise which cripples or injures the business of the corporation of which he is an officer or director. It is also established that corporate officers are not permitted to use their position of trust and confidence to further their private interests. Where two corporations are competitive in a substantial sense, it would seem improbable, if not impossible, for the director, if he were to discharge effectively his duty, to satisfy his loyalty to both corporations and place the performance of his corporation duties above his personal concerns.[110]

With the guidelines set forth, the courts will now be able to determine in concrete and quantifiable terms, the liability and accountability of erring directors and officers; thus, finally giving life to the statutory provisions aimed to curb disloyal acts and punish erring corporate directors and officers.

WHEREFORE, the petition is **GRANTED**. The Decision dated June 17, 2011 and the Resolution dated January 2, 2012 of the Court of Appeals in CA-G.R. SP Nos. 103047 and 103119 are **SET ASIDE**. Civil Case No. 68327 is **REMANDED** to Branch 158, Regional Trial Court, Pasig City for resolution of the case, with dispatch, following the guidelines set forth in this Decision.

SO ORDERED.

HENRI JEAN PAUL B. INTING
Associate Justice

WE CONCUR:

ALEXANDER G. GESMUNDO
Chief Justice

[110] *Gokongwei, Jr. v. Securities and Exchange Commission, supra* note 1 at 303.

Please see Concurring Opinion

ESTELA M. PERLAS-BERNABE
Associate Justice

See Concurring Opinion

MARVIC M.V.F. LEONEN
Associate Justice

See Concurring Opinion

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

RAMON PAUL L. HERNANDO
Associate Justice

ROSMARI D. CARANDANG
Associate Justice

p/s. see Concurring Opinion

AMY C. LAZARO-JAVIER
Associate Justice

RODIL V. ZALAMEDA
Associate Justice

MARIO V. LOPEZ
Associate Justice

SAMUEL H. GAERLAN
Associate Justice

RICARDO R. ROSARIO
Associate Justice

JHOSEP Y. LOPEZ
Associate Justice

(On official leave)
JAPAR B. DIMAAMPAO
Associate Justice

JOSE MIDAS P. MARQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, 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.

ALEXANDER G. GESMUNDO
Chief Justice

EN BANC

G.R. Nos. 200070-71 – TOTAL OFFICE PRODUCTS AND SERVICES (TOPROS), INC., *Petitioner, v.* **JOHN CHARLES CHANG, JR., TOPGOLD PHILIPPINES, INC., GOLDEN EXIM TRADING AND COMMERCIAL CORP., and IDENTIC INTERNATIONAL CORP., represented by JOHN CHARLES CHANG, JR., HECTOR and CECILIA KATIGBAK,** *Respondents.*

Promulgated:

December 7, 2021

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CONCURRING OPINION

PERLAS-BERNABE, *J.*:

I concur. At the core of the present controversy is the issue of whether or not the **doctrine of corporate opportunity** was violated. As I have raised during the deliberations on this case, there has been dearth of local case law delineating the more intricate parameters in the application of the corporate opportunity doctrine. Hence, adopting the *Guth* test,[1] the Court has now carried[2] the proposed guidelines for the application of the corporate opportunity doctrine as herein explained.

I. General Concept and Existing Cases on Corporate Opportunity.

The corporate opportunity doctrine widely traces its roots to the general doctrine on corporate director/officer liability. As a basic rule, a corporation is a juridical entity which is vested with a legal personality separate and distinct from those acting for and in its behalf, and in general, from the people comprising it. Following this principle, obligations incurred by the corporation, acting through its directors, officers, and employees, are its sole liabilities. A corporate director, trustee, or officer is generally not held personally liable for obligations incurred by the corporation. Nevertheless, this legal fiction may be disregarded – through the piercing of the corporate veil – if, *inter alia*, it is used as a means to perpetrate fraud or an illegal act, or as a vehicle for the evasion of an existing obligation, the circumvention of statutes, or to confuse legitimate issues.[3]

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1 See *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 270 (1939).

2 See *ponencia*, pp. 23-24 and 29-30.

3 See *Heirs of Uy v. International Exchange Bank*, 703 Phil. 477, 484-485 (2013); citations omitted. See also *International Academy of Management and Economics v. Litton and Company, Inc.*, G.R. No. 191525, December 13, 2017.

Section 31 of the Corporation Code, which has been retained in Section 30 of Republic Act No. 11232, otherwise known as the "Revised Corporation Code of the Philippines" (RCC), embodies the foregoing rule. As crafted, it provides for instances where corporate directors, trustees, or officers may be held personally liable for their acts related to the affairs of a corporation. These are acts which give a right of action for damages not only in favor of third parties, but also in favor of the aggrieved corporation itself:

> 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 acquires, 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.** (emphases and underscoring supplied)

Generally speaking, case law instructs that Section 31 of the Corporation Code reflects the three-fold **duties of obedience, diligence, and loyalty**.[4] The duty of loyalty is of particular significance to this case.

The duty of loyalty prohibits corporate directors, trustees, and officers from acquiring, or attempting to acquire any personal or pecuniary interest – or any other interest for that matter – in conflict with or adverse to their duty as corporate fiduciaries.[5] In *Prime White Cement Corp. v. Intermediate Appellate Court* (*Prime White Cement*),[6] the Court provided for a general characterization of the duty of loyalty:

> A director of a corporation holds a position of trust and as such, he owes a duty of loyalty to his corporation. In case his interests conflict with those of the corporation, he cannot sacrifice the latter to his own advantage and benefit. **As corporate managers, directors are committed to seek the maximum amount of profits for the corporation**. This trust relationship "is not a matter of statutory or technical law. It springs from the fact that directors have the control and guidance of corporate affairs and property and hence of the property interests of the stockholders." x x x.[7] (emphasis and underscoring supplied)

The Corporation Code provides for more specific instances where the duty of loyalty may be breached. These instances are expressed in the ensuing

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4 See *Strategic Alliance Development Corp. v. Radstock Securities Ltd.*, 622 Phil. 431, 476 (2009).

5 See id.

6 292-A Phil. 198 (1993).

7 Id. at 205; citations omitted.

provisions of Sections 31, namely: (*a*) Section 32 (Section 31 of the RCC) on self-dealing conduct; (*b*) Section 33 (Section 32 of the RCC) on interlocking directors; and (*c*) Section 34 (Section 33 of the RCC) on the **acquisition of business opportunities**.

The corporate opportunity doctrine is a facet of the duty of loyalty, which is specifically recognized in Section 34 of the Corporation Code[8] (now Section 33 of the RCC):

> Section 34. *Disloyalty of a Director.* — Where a director, by virtue of his office, **acquires for himself a business opportunity which should belong to the corporation, thereby obtaining profits to the prejudice of such corporation**, he must account to the latter for all such profits by refunding the same, unless his act has been ratified by a vote of the stockholders, owning or representing at least two-thirds (2/3) of the outstanding capital stock. This provision shall be applicable, notwithstanding the fact that the director risked his own funds in the venture. (emphasis and underscoring supplied)

As background, the doctrine of corporate opportunity is of common law origin. In our jurisdiction, the doctrine was first applied in the 1979 case of *Gokongwei, Jr. v. Securities and Exchange Commission* (*Gokongwei*).[9] In *Gokongwei*, the Court explained that the doctrine "is precisely a recognition by the courts that the fiduciary standards could not be upheld where the fiduciary was acting for two entities with competing interests";[10] and "rests fundamentally on the unfairness, in particular circumstances, of an officer or director taking advantage of an opportunity for his own personal profit when the interest of the corporation justly calls for protection."[11]

However, subsequent cases on the corporate opportunity doctrine are few and far between. A quick survey of jurisprudence reveals that aside from *Gokongwei*,[12] only a handful of cases featured the said doctrine. These cases

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8 See *Ient v. Tullett Prebon (Philippines), Inc.*, 803 Phil. 163 (2017). See also Record of Batasan (R.B.), November 5, 1979, pp. 1217-1219, pertinent portions of which read:

> MR. NUÑEZ. x x x
>
> May I go now to page 24, Section 34. x x x
>
> My question, Your Honor, is: is this not the so-called **corporate opportunity doctrine** found in the American jurisprudence?
>
> MR. MENDOZA.
>
> Yes, Mr. Speaker, as I stated many of the changes that have been incorporated in the Code were drawn from jurisprudence on the matter, but even jurisprudence on several matters or several issues relating to the Corporation Code are sometimes ambiguous, sometimes controversial. **In order, therefore, to clarify those issues, what was done was to spell out in statutory language the rule that should be applied on those matters and one of such examples is Section 34.** (emphasis and underscoring supplied)

9 178 Phil. 266 (1979).

10 Id. at 302.

11 Id.

12 In *Gokongwei*: "It is also well established that corporate officers 'are not permitted to use their position of trust and confidence to further their private interests.' In a case where directors of a corporation

are *Ponce v. Legaspi*[13] (1992), *Prime White Cement*[14] (1993), and *Ient v. Tullet Prebon (Philippines), Inc.*[15] (2017).

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cancelled a contract of the corporation for exclusive sale of a foreign firm's products, and after establishing a rival business, the directors entered into a new contract themselves with the foreign firm for exclusive sale of its products, the court held that equity would regard the new contract as an offshoot of the old contract and, therefore, for the benefit of the corporation, as a 'faultless fiduciary may not reap the fruits of his misconduct to the exclusion of his principal.

The doctrine of 'corporate opportunity' is precisely a recognition by the courts that the fiduciary standards could not be upheld where the fiduciary was acting for two entities with competing interests. This doctrine rests fundamentally on the unfairness, in particular circumstances, of an officer or director taking advantage of an opportunity for his own personal profit when the interest of the corporation justly calls for protection." (Id. at 301-302; citations omitted.)

13 In *Ponce*: "True, at that time, the Corporation Law did not prohibit a director or any other person occupying a fiduciary position in the corporate hierarchy from engaging in a venture which competed with that of the corporation. But as a lawyer, Atty. Legaspi should have known that while some acts may appear to be permitted through sheer lack of statutory prohibition, these acts are nevertheless circumscribed upon ethical and moral considerations. And had Atty. Legaspi turned to American jurisprudence which then, as now, wielded a persuasive influence on our law on corporations, he would have known that it was unfair for him or for Porter, acting as fiduciary, to take advantage of an opportunity when the interest of the corporation justly calls for protection. (See Ballantine, Corporations, 204, Callaghan & Co., N. Y. [1946]).

Parenthetically, this lapse in the old Corporation Law is now cured by sections 31 and 34 of the Corporation Code x x x[.]" (284 Phil. 517, 533 [1992].)

14 In *Prime White Cement*: "A director of a corporation holds a position of trust and as such, he owes a duty of loyalty to his corporation. In case his interests conflict with those of the corporation, he cannot sacrifice the latter to his own advantage and benefit. As corporate managers, directors are committed to seek the maximum amount of profits for the corporation. This trust relationship 'is not a matter of statutory or technical law. It springs from the fact that directors have the control and guidance of corporate affairs and property and hence of the property interests of the stockholders.' x x x." (Supra note 6.)

15 In *Ient*: "We agree with petitioners that the lack of specific language imposing criminal liability in Sections 31 and 34 shows legislative intent to limit the consequences of their violation to the civil liabilities mentioned therein. Had it been the intention of the drafters of the law to define Sections 31 and 34 as offenses, they could have easily included similar language as that found in Section 74.

If we were to employ the same line of reasoning as the majority in *United States v. R.L.C.*, would the apparent ambiguities in the text of the Corporation Code disappear with an analysis of said statute's legislative history as to warrant a strict interpretation of its provisions? The answer is a negative.

In his sponsorship speech of Cabinet Bill (C.B.) No. 3 (the bill that was enacted into the Corporation Code), then Minister Estelito Mendoza highlighted Sections 31 to 34 as among the significant innovations made to the previous statute (Act 1459 or the Corporation Law), thusly:

> There is a lot of jurisprudence on the liability of directors, trustees or officers for breach of trust or acts of disloyalty to the corporation. Such jurisprudence is not, of course, without any ambiguity of dissent. Sections 31, 32, 33 and 34 of the code indicate in detail prohibited acts in this area as well as consequences of the performance of such acts or failure to perform or discharge the responsibility to direct the affairs of the corporation with utmost fidelity.

Alternatively stated, Sections 31 to 34 were introduced into the Corporation Code to define what acts are covered, as well as the consequences of such acts or omissions amounting to a failure to fulfil a director's or corporate officer's fiduciary duties to the corporation. A closer look at the subsequent deliberations on C.B. No. 3, particularly in relation to Sections 31 and 34, would show that the discussions focused on the civil liabilities or consequences prescribed in said provisions themselves. x x x.

x x x x

Verily, in the instances that Sections 31 and 34 were taken up on the floor, legislators did not veer away from the civil consequences as stated within the four corners of these provisions. Contrasted with the interpellations on Section 74 (regarding the right to inspect the corporate records), the discussions on said provision leave no doubt that legislators intended both civil and penal liabilities to attach to corporate officers who violate the same, as was repeatedly stressed in the excerpts from the legislative record quoted below:

x x x x

Nonetheless, as may be gleaned from the citations above, these cases basically discuss the relation of the doctrine of corporate opportunity to the duty of loyalty. None of these cases set finer parameters to determine what is considered as a corporate opportunity that gives rise to a claim for damages. None of them also express what factors should the court consider in awarding damages under a Section 34 case.

Cases in the United States (US), however, provide greater insight on these unexplored issues in our jurisprudence. Since our corporate laws were largely patterned after those in the US,[16] these foreign cases are highly instructive.

II. US Cases on Corporate Opportunity.

Similar to our acceptation, the corporate opportunity doctrine in US case law prohibits one who occupies a fiduciary relationship to a corporation from acquiring, in opposition to the corporation, property in which the latter has an interest or tangible expectancy or that is essential to its existence.[17] It is observed, however, that different State jurisdictions have established varying tests to establish whether the said doctrine has been breached.

For one, there is "[t]he **line of business test** [which] holds that a transaction is a corporate opportunity if it is 'within the scope of [the corporation's] own activities and of present or potential advantage to it. x x x.' Under this test, corporate participants must refrain from taking for

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Quite apart that no legislative intent to criminalize Sections 31 and 34 was manifested in the deliberations on the Corporation Code, it is noteworthy from the same deliberations that legislators intended to codify the common law concepts of corporate opportunity and fiduciary obligations of corporate officers as found in American jurisprudence into said provisions. In common law, the remedies available in the event of a breach of director's fiduciary duties to the corporation are civil remedies. If a director or officer is found to have breached his duty of loyalty, an injunction may be issued or damages may be awarded. A corporate officer guilty of fraud or mismanagement may be held liable for lost profits. A disloyal agent may also suffer forfeiture of his compensation. There is nothing in the deliberations to indicate that drafters of the Corporation Code intended to deviate from common law practice and enforce the fiduciary obligations of directors and corporate officers through penal sanction aside from civil liability. On the contrary, there appears to be a concern among the drafters of the Corporation Code that even the imposition of the civil sanctions under Sections 31 and 34 might discourage competent persons from serving as directors in corporations.

x x x x

The Corporation Code was intended as a regulatory measure, not primarily as a penal statute. Sections 31 to 34 in particular were intended to impose exacting standards of fidelity on corporate officers and directors but without unduly impeding them in the discharge of their work with concerns of litigation. Considering the object and policy of the Corporation Code to encourage the use of the corporate entity as a vehicle for economic growth, we cannot espouse a strict construction of Sections 31 and 34 as penal offenses in relation to Section 144 in the absence of unambiguous statutory language and legislative intent to that effect. (Supra note 8, at 193-204.)

16 See *Gokongwei, Jr. v. Securities and Exchange Commission*, supra note 9.

17 "Corporate opportunity doctrine," Fletcher Cyclopedia of the Law of Corporations, 3 Fletcher Cyc. Corp. § 861.10 (2020).

themselves the types of transactions in which their corporation normally engages."[18]

Also, there is "the **interest or expectancy test** [which evokes that] an opportunity is open to the director unless the corporation has an 'interest already existing [in the opportunity], or ... it has an expectancy growing out of an existing right.' This test does not bar directors from every transaction that appears useful to the corporation in hindsight, but only prevents 'their acquisition of property which the corporation needs or is seeking.'"[19]

Moreover, there is the **American Law Institute (ALI) test** which provides that a director or senior executive may not take advantage of a corporate opportunity, unless: (*a*) he first offers the corporate opportunity to the corporation and makes disclosure concerning the corporate opportunity; (*b*) the corporate opportunity is rejected by the corporation; and (*c*) the rejection of the opportunity is fair to the corporation, or authorized by disinterested directors in a manner that satisfies the standards of the business judgment rule, or authorized or ratified by disinterested shareholders, and the shareholders' action is not equivalent to a waste of corporate assets. For this purpose, the ALI test defines a corporate opportunity as: (*1*) any opportunity to engage in any business activity of which a director or senior executive becomes aware either in connection with his functions as director or senior executive or under circumstances **that should reasonably lead him to believe that the person offering the opportunity expects him to offer it to the corporation, or through the use of corporate information or property, if the resulting opportunity is one that the director or senior executive should reasonably be expected to believe would be of interest to the corporation**; or (*2*) any opportunity to engage in a business activity – which includes the acquisition or use of any contract right or other tangible or intangible property – of which a senior executive becomes aware, if he knows or reasonably should know that **the activity is closely related to the business in which the corporation is engaged or may reasonably be expected to engage**.[20]

According to Fletcher's Cyclopedia of the Law of Corporations, the aforementioned tests have one thing in common – they all state that "**corporate opportunity exists when a proposed activity is reasonably incident to the corporation's present or prospective business and is one in which the corporation has the capacity to engage**."[21]

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18 Michael Begert, "The Corporate Opportunity Doctrine and Outside Business Interests," The University of Chicago Law Review, Vol. 56, No. 2, The Federal Court System (Spring, 1989), p. 838.

19 Id.

20 See id.

21 "Corporate opportunity doctrine," Fletcher Cyclopedia of the Law of Corporations, 3 Fletcher Cyc. Corp. § 861.10 (2020).

Thus, in the case of ***Guth v. Loft, Inc. (Guth)***,[22] the Supreme Court of the State of Delaware integrated these tests, and thereafter, elucidated as to when a corporate opportunity exists, when a corporate director or officer breaches his/her fiduciary duty to the corporation that he/she serves, and the consequences of such breach:

> **Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders.** A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest. The occasions for the determination of honesty, good faith and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale.
>
> **If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, at its election, while it denies to the betrayer all benefit and profit.** The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation. Given the relation between the parties, a certain result follows; and a constructive trust is the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty. x x x.
>
> The rule, referred to briefly as the rule of corporate opportunity, is merely one of the manifestations of the general rule that demands of an officer or director the utmost good faith in his relation to the corporation which he represents.
>
> x x x x
>
> x x x **if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself. And, if, in such circumstances, the interests of the corporation are betrayed, the corporation may elect to**

[22] 23 Del. Ch. 255 (1939).

> **claim all of the benefits of the transaction for itself, and the law will impress a trust in favor of the corporation upon the property, interests and profits so acquired**. x x x.[23] (emphases and underscoring supplied)

In the subsequent case of *Broz v. Cellular Information Systems, Inc.*[24] (*Broz*), the ***Guth* test** on corporate opportunity was synthesized into four (4) aspects:

> The corporate opportunity doctrine, as delineated in *Guth* x x x, holds that a corporate officer or director may not take a business opportunity for his own if: **(1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation**. x x x.[25] (emphasis and underscoring supplied)

Broz, however, clarifies that the *Guth* test only sets guidelines, and that ultimately, "[n]o one factor is dispositive and all factors must be taken into account insofar as they are applicable."[26] As such, the determination of whether or not a corporate director/officer has violated this doctrine is "a factual question to be decided by reasonable inference from objective facts."[27]

III. Guidelines for the Application of Corporate Opportunity.

In my view, the ***Guth* test** may be applied in our jurisdiction to help guide our courts in determining whether or not the corporate opportunity doctrine has been breached.

To recapitulate, *Guth* explains that "[c]orporate officers and directors are not permitted to use their position of trust and confidence to further their private interests."[28] Thus, "if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself."[29]

In sum, a claim for damages under Section 34 of the Corporation Code (now Section 33 of the RCC) arises when a corporate officer or director takes

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23 Id. at 270-273.
24 673 A.2d 148 (Del. 1996).
25 Id.
26 Id.
27 Id.
28 *Guth v. Loft, Inc.*, supra at 270.
29 Id. at 273.

a business opportunity for his own, ***provided*** that it is sufficiently shown by the claimant that:

> **(*a*) the corporation is financially able to exploit the opportunity;**
>
> **(*b*) the opportunity is within the corporation's line of business;**
>
> **(*c*) the corporation has an interest or expectancy in the opportunity; and**
>
> **(*d*) by taking the opportunity for his own, the corporate fiduciary, *i.e.*, corporate director, trustee, or officer, will thereby be placed in a position inimicable to his duties to the corporation.**

Necessarily then, it is not enough to impute bare acts/transactions in which the claimant subjectively perceives the duty of loyalty to be breached; rather, sufficient evidence must be submitted to show that the claim for damages is indeed premised on a concrete corporate opportunity falling under the parameters above-stated. Only then should actual damages relative to such lost opportunity be awarded. Of course, it should be made clear that these parameters are general jurisprudential guidelines to be applied on a case-to-case basis.

IV. Application.

In this case, the Regional Trial Court (RTC) found respondent John Charles Chang, Jr. (Chang) to have violated his duty of loyalty as provided under Sections 31 to 34 of the Corporation Code, in relation to the doctrine of corporate opportunity. In particular, the RTC held that Chang, as director and corporate officer of petitioner Total Office Products and Services, Inc., (TOPROS), violated the doctrine of corporate opportunity through, *inter alia*, Chang's involvement in the following:

> (*a*) when respondent Golden Exim Trading and Commercial Corp. (Golden Exim), a corporation where Chang is a majority owner of, entered into a service contract with one of TOPROS's clients, Linde Refrigeration Phils., Inc., while the latter had a subsisting contract with TOPROS;
>
> (*b*) when Chang, as President and General Manager of respondent TOPGOLD Philippines, Inc. (TOPGOLD), signed a deed of assignment with respondent Hector Katigbak, the Service and Operations Manager of TOPROS, which contract

made it appear that TOPROS assigned its rights to TOPGOLD under several rental agreements with different entities for the lease of various kinds of office equipment;

(*c*) when TOPGOLD used the same address as TOPROS, which thus not only gave the former the opportunity to use the latter's resources, but also mislead the public to believe that they are one and the same entity, if not intimately related to one another; and

(*d*) when the land where TOPROS's building stood was registered in the name of Golden Exim, instead of TOPROS for the reason that Chang "had to make his own living."[30]

Accordingly, the RTC ordered Chang "[t]o account for **all the profits and properties which otherwise should have accrued to [TOPROS]** and refund the same."[31] To carry the judgment into effect, the RTC ordered the formation of an Accounting Committee to conduct the following:

> WHEREFORE, premises considered, judgment is hereby rendered in favor of [TOPROS] and against [respondents] who are hereby ordered, jointly and solidarily, to:
>
> 1) Account for all the profits and properties which otherwise should have accrued to [TOPROS] and refund the same to [the latter];
>
> x x x x
>
> To carry this judgment into effect, a three-man Accounting Committee is hereby ordered formed with the Branch of [*sic*] Clerk of Court, Atty. Romeo Bautista IV, as Chairman, and two other certified public accountants respectively nominated by the parties, as members.
>
> **This Accounting Committee shall undertake the accounting necessary to determine the amount of actual damages suffered by [TOPROS], the extent of loss of its business opportunities, the extent of gain profited by Chang and the three defendant corporations to the detriment of [TOPROS], the refund of properties registered in the name of the three coprorations which property pertains to [TOPROS], and such other matters relevant to the judgment for accounting of all profits and properties accruing to [TOPROS]**. It shall also include in its review the effects of the previously enforced Writ of Preliminary Attachment.
>
> x x x x[32] (emphasis and underscoring supplied)

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30 See *ponencia*, pp. 25-29.
31 *Rollo*, pp. 74-75.
32 Id.

On appeal, the Court of Appeals reversed[33] the RTC's ruling due to TOPROS's alleged failure to prove its claim.

Evidently, both courts did not endeavor to first establish the significant parameters in determining if Chang did or did not violate the corporate opportunity doctrine. For its part, the RTC made a sweeping pronouncement ordering Chang "to account for all the profits and properties which otherwise should have accrued to [TOPROS] and refund the same," while the CA reversed the RTC due to the supposed lack of evidence. Without taking into account the significant parameters of corporate opportunity, the resolution of the foregoing issue would lack proper legal basis. While the RTC and CA's omission may be credited to the lack of case law on the more intricate parameters attending the doctrine, the Court now steps in to fill in the jurisprudential lacunae with the approval of the above stated guidelines, adopting the *Guth* test.

Accordingly, as ruled by the *ponencia*, the case must be **remanded** to the trial court to determine the exact liability of Chang, if any, following the new guidelines on corporate opportunity. For this purpose, the reception of additional evidence and reevaluation of existing evidence are necessary. Under the lens of these new guidelines, TOPROS, as claimant, bears the burden of proving the specific business opportunities that gave rise to its claim for damages under Section 34 of the Corporation Code. In turn, evidence may be submitted by Chang in his defense so as to support his argument that (*a*) the corporation was already heavily in debt, and that TOPROS' patriarch, Ramon Ty, was no longer interested in corporate rehabilitation, so much so that he was already letting Chang allow TOPROS to go bankrupt; and (*b*) that the corporation had already closed down prior to respondents' taking of certain corporate opportunities, among other things.[34]

IN FINE, I vote to **PARTIALLY GRANT** the instant petition and **SET ASIDE** the Decision dated June 17, 2011 and Resolution dated January 2, 2012 of the Court of Appeals in CA-G.R. SP Nos. 103047 and 103119. As herein discussed, the case should be **REMANDED** to the court *a quo* in light of the new guidelines on corporate opportunity.

ESTELA M. PERLAS-BERNABE
Senior Associate Justice

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[33] See id. at 95.
[34] See *ponencia*, p. 29.

EN BANC

G.R. Nos. 200070–71 – TOTAL OFFICE PRODUCTS AND SERVICES (TOPROS), INC., *Petitioner*, **v. JOHN CHARLES CHANG, JR., TOPGOLD PHILIPPINES, INC., GOLDEN EXIM TRADING AND COMMERCIAL CORPORATION, and IDENTIC INTERNATIONAL CORPORATION, represented by JOHN CHARLES CHANG, JR., HECTOR and CECILIA KATIGBAK,** *Respondents.*

Promulgated:

December 7, 2021

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SEPARATE CONCURRING OPINION

LEONEN, *J.*:

Directors of a corporation are bound by a three-fold duty: "duty of obedience, duty of diligence, and duty of loyalty."[1] They "(1) shall direct the affairs of the corporation only in accordance with the purposes for which it was organized; (2) shall not willfully and knowingly vote for or assent to patently unlawful acts of the corporation or act in bad faith or with gross negligence in directing the affairs of the corporation; and (3) shall not acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees."[2]

Corporate officials, charged with managing the corporation, occupy a fiduciary position because they "have the control and guidance of corporate affairs and property and hence of the property interests of the stockholders."[3] Having a position of trust and confidence, corporate officers are prohibited from furthering their personal or pecuniary interests and reaping benefits, which rightfully belong to the corporation.[4]

As early as 1929, in *Steinberg v. Velasco*,[5] this Court recognized that a corporation's directors "are bound to care for its property and manage its affairs in good faith, and for a violation of these duties resulting in waste of its assets or injury to the property they are liable to account the same as other

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1 *Strategic Alliance Development Corporation v. Radstock Securities Ltd.*, 622 Phil. 431, 476 (2009) [Per J. Carpio, En Banc].

2 Id. at 476–477.

3 *Gokongwei, Jr. v. Securities and Exchange Commission*, 178 Phil. 266, 299 (1979) [Per J. Antonio, En Banc].

4 Id. at 299–300.

5 52 Phil. 953 (1929) [Per J. Johns, En Banc].

trustees."[6] In *Palting v. San Jose Petroleum*,[7] which was decided prior to the Corporation Code, this Court struck down the corporation's by-laws that allowed directors and officers "to benefit themselves directly or other persons or entities in which they are interested[.]"[8] This Court ruled that these provisions are contrary to the fiduciary relationship between the directors and the stockholders.[9]

A director's duty of loyalty is later reflected in Sections 31 and 34 of the Batas Pambansa Blg. 68, or the Corporation Code of the Philippines. These provisions state:

> 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.
>
> SECTION 34. Disloyalty of a director. — Where a director, by virtue of his office, acquires for himself a business opportunity which should belong to the corporation, thereby obtaining profits to the prejudice of such corporation, he must account to the latter for all such profits by refunding the same, unless his act has been ratified by a vote of the stockholders owning or representing at least two-thirds (2/3) of the outstanding capital stock. This provision shall be applicable, notwithstanding the fact that the director risked his own funds in the venture.

These provisions express what is now called the "doctrine of corporate opportunity," a term directly lifted from American jurisprudence. It was first introduced in *Gokongwei, Jr. v. Securities and Exchange Commission*,[10] citing the American case of *Schildberg Rock Products Co. Inc. v. Brooks*.[11] The doctrine of corporate opportunity "holds personally liable corporate directors found guilty of gross negligence or bad faith in directing the affairs of the corporation, which results in damage or injury to the corporation, its

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6 Id. at 960.
7 125 Phil. 5 (1966) [Per J. Barrera, En Banc].
8 Id. at 25.
9 Id.
10 178 Phil. 266 (1979) [Per J. Antonio, En Banc].
11 140 N.W.2d 132 (1966).

stockholders or members, and other persons."[12] *Gokongwei, Jr.* described the doctrine of corporate opportunity as:

> . . . a recognition by the courts that the fiduciary standards could not be upheld where the fiduciary was acting for two entities with competing interests. This doctrine rests fundamentally on the unfairness, in particular circumstances, of an officer or director taking advantage of an opportunity for his own personal profit when the interest of the corporation justly calls for protection.[13] (Citation omitted)

In *Gokongwei, Jr.*, the petitioner was barred from running as director of San Miguel Corporation. This was in line with the corporation's amended by-laws granting its Board the power by three-fourths votes to bar a stockholder from being elected as director when found to be engaged in a competitive or antagonistic business. The respondents alleged that the petitioner was engaged in businesses competitive and antagonistic to San Miguel Corporation since he owned and controlled a greater portion of his stock through Universal Robina Corporation and Consolidated Foods Corporation, which were allegedly engaged in business directly and substantially competing with allied businesses of San Miguel Corporation.[14]

In upholding the validity of the amended by-laws, this Court held that San Miguel Corporation can determine the qualifications of its directors, and the prohibition was reasonable as directors have a fiduciary relation with the corporation and its shareholders. A corporation can adopt by-laws for its internal government and as measure of self-protection.[15] Said this Court:

> Private respondents contend that the disputed amended by-laws were adopted by the Board of Directors of San Miguel Corporation as a measure of self-defense to protect the corporation from the clear and present danger that the election of a business competitor to the Board may cause upon the corporation and the other stockholders "irreparable prejudice." Submitted for resolution, therefore, is the issue — whether or not respondent San Miguel Corporation could, as a measure of self-protection, disqualify a competitor from nomination and election to its Board of Directors.
>
> It is recognized by all authorities that ["]every corporation has the inherent power to adopt by-laws 'for its internal government, and to regulate the conduct and prescribe the rights and duties of its members towards itself and among themselves in reference to the management of its affairs.'" At common law, the rule was "that the power to make and adopt by-laws was inherent in every corporation as one of its necessary and inseparable legal incidents. And it is settled throughout the United States that in the absence of positive legislative provisions limiting it, every private corporation has this inherent power as one of its necessary and inseparable legal incidents,

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12 *Sanchez v. Republic*, 618 Phil. 228, 239 (2009) [Per J. Abad, Second Division].

13 *Gokongwei, Jr. v. Securities and Exchange Commission*, 178 Phil. 266, 302 (1979) [Per J. Antonio, En Banc].

14 *Gokongwei, Jr. v. Securities and Exchange Commission*, 178 Phil. 266 (1979) [Per J. Antonio, En Banc].

15 Id. at 296.

> independent of any specific enabling provision in its charter or in general law, such power of self-government being essential to enable the corporation to accomplish the purposes of its creation."[16] (Citations omitted)

This Court agreed with the respondents that allowing the petitioner to be elected as director would be detrimental to the corporation because a competitor could easily access its confidential information, such as marketing strategies and pricing policies through the common director.[17] It explained:

> Sound principles of corporate management counsel against sharing sensitive information with a director whose fiduciary duty of loyalty may well require that he disclose this information to a competitive rival. These dangers are enhanced considerably where the common director such as the petitioner is a controlling stockholder of two of the competing corporations. It would seem manifest that in such situations, the director has an economic incentive to appropriate for the benefit of his own corporation the corporate plans and policies of the corporation where he sits as director.
>
> Indeed, access by a competitor to confidential information regarding marketing strategies and pricing policies of San Miguel Corporation would subject the latter to a competitive disadvantage and unjustly enrich the competitor, for advance knowledge by the competitor of the strategies for the development of existing or new markets of existing or new products could enable said competitor to utilize such knowledge to his advantage.[18] (Citation omitted)

Gokongwei, Jr. held that the test must be whether the businesses involved compete with each other. It described competition as "a struggle for advantage between two or more forces, each possessing, in substantially similar if not identical degree, certain characteristics essential to the business sought."[19] To determine whether another corporation is a competitor, factors such as "quantum and place of business, identity of products[,] and area of competition should be taken into consideration."[20] There must be a showing that the other corporation covers a "substantial portion of the same markets for similar products to the extent of not less than 10% of respondent corporation's market for competing products."[21]

In proving that San Miguel Corporation's areas of businesses are in direct competition with the other corporations, the respondents submitted data showing that Universal Robina Corporation and Consolidated Foods Corporation were present in the same product lines as San Miguel Corporation, such as eggs, chicken, poultry and hog feeds, ice cream, coffee,

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16 Id. at 296–297.
17 Id. at 303.
18 Id. at 305.
19 Id. at 311.
20 Id. at 312.
21 Id.

and textile. These products represented San Miguel Corporation's sales amounting to more than ₱849,000,000.00.[22]

Thus, for Sections 31 and 34 to be applicable, involved corporations must compete with each other. They must be present in related areas of businesses, producing the same products, such that their markets overlap. In economic terms, their products must be "substitutes." Substitutes, as the term connotes, are "pairs of goods that are used in place of each other[.]"[23] For instance, movie tickets and film streaming services are substitutes of each other.[24] This is more apparent in similar products with different brand names. When a certain product's price increases, buyers tend to choose a cheaper alternative. This is a measure of price elasticity of demand. Price elasticity shows how much buyers respond to a change in price.[25]

More specifically, cross-price elasticity of demand measures the change in demand of product A in response to the change in price of its substitute product B. When products are in direct competition with each other, the cross-price elasticity of their demands is positive or moving in the same direction.[26] To illustrate, printer A and printer B are products from different brands but which offer the same technical specification. They are substitutes of each other. Hence, when printer A increases its price, the rational choice for a buyer is to buy printer B, which has become relatively cheaper. The same products will occupy the same market and will be in direct competition with each other.

This is precisely what was observed in *Gokongwei, Jr.* San Miguel Corporation, Universal Robina Corporation, and Consolidated Foods Corporation are competitors of each other, producing the same products and occupying the same market. Thus, the petitioner in that case could be barred by San Miguel Corporation from being its director because he was already heavily invested in the competing corporations. This Court noted that directors have access to highly confidential information such as marketing strategies and pricing structures, budget for expansion and diversification, research and development, and sources of funding, among others. San Miguel Corporation will expose itself to danger if its director could take advantage of these pieces of information and leak them to competing businesses to promote his personal interest.

In the same vein, a common director cannot discharge their duty effectively because they would be caught between two corporations that will both demand their loyalty. Inevitably, the common director will have to choose a corporation over the other. In *Gokongwei, Jr.*:

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22 Id. at 295.
23 N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 66 (9th ed., 2019).
24 Id. at 66.
25 Id. at 88.
26 Id. at 96.

> It is obviously to prevent the creation of an opportunity for an officer or director of San Miguel Corporation, who is also the officer or owner of a competing corporation, from taking advantage of the information which he acquires as director to promote his individual or corporate interests to the prejudice of San Miguel Corporation and its stockholders, that the questioned amendment of the by-laws was made. Certainly, where two corporations are competitive in a substantial sense, it would seem improbable, if not impossible, for the director, if he were to discharge effectively his duty, to satisfy his loyalty to both corporations and place the performance of his corporation duties above his personal concerns.[27]

Here, respondent John Charles Chang, Jr., who was elected president and general manager of petitioner Total Office Products and Services, Inc., allegedly organized corporations in the same line of business as petitioner and entered into business opportunities which should be for petitioner, in violation of the doctrine of corporate opportunity.[28]

In his defense, respondent argued that there was no violation of Sections 31 and 34 of the Corporation Code because petitioner could not financially undertake its business. Moreover, he said that there was no fraud since petitioner's owners had been in close coordination in handling the corporation's affairs.[29]

I agree with the *ponencia* that the doctrine of corporate opportunity applies here. In determining the parameters of corporate opportunity, the *ponencia* identified four guidelines:

> a) The corporation is financially able to exploit the opportunity;
> b) The opportunity is within the corporation's line of business;
> c) The corporation has an interest or expectancy in the opportunity; and
> d) By taking the opportunity for [their] own, the corporate fiduciary (*i.e.*, corporate director, trustee or officer) will thereby be placed in a position inimicable to [their] duties to the corporation.[30]

To find a violation of Sections 31 and 34 of the Corporation Code, petitioner must establish that it is in the same market and produces the same products as respondents Identic International Corporation, Golden Exim Trading and Commercial Corporation (Golden Exim), and TOPGOLD Philippines. Moreover, it must show its financial ability to exploit the opportunity and that it has an interest or expectancy in the opportunity. All these factors must be established and considered.

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27 *Gokongwei, Jr. v. Securities and Exchange Commission*, 178 Phil. 266, 303 (1979) [Per J. Antonio, En Banc].

28 *Ponencia*, p. 9.

29 Id. at 9–10.

30 Id. at 23–24.

Here, there is no sufficient evidence that respondent usurped business opportunities which rightfully belonged to petitioner. This is a question of fact that petitioner must clearly establish. There must be proof that petitioner and the other corporations offer the same products and are in the same market. These cannot be merely presumed from the corporations' use of the same address and the registration of petitioner's land in the name of Golden Exim. Thus, I agree that petitioner should bear the burden of establishing the specific business opportunities involved in this case.

Moreover, respondent's contention that he risked his personal funds and that he was successful in keeping petitioner afloat is not a defense. Once a director usurps a business opportunity in prejudice of the corporation, there is cause of action against the director under Sections 31 and 34 of the Corporation Code. The violation is not only based on the financial impact caused but on the mere fact that a director failed to live up to their duty of loyalty to the corporation.

As a final note, the parameters established by the *ponencia* are mere guidelines which should find their standing in our jurisdiction. We have our own laws and rules which can be applied and interpreted based on our distinct circumstances. Thus, we should divorce ourselves from foreign doctrines which should not be treated as instinctively controlling in our jurisdiction. This Court sets its own standards and guidelines in interpreting cases. Foreign doctrines are, at best, merely persuasive and may be introduced only insofar as they are applicable here.

ACCORDINGLY, I vote to **REMAND** the case to the Regional Trial Court to resolve the case with dispatch.

MARVIC M.V.F. LEONEN
Associate Justice

EN BANC

G.R. Nos. 200070-71 — TOTAL OFFICE PRODUCTS AND SERVICES (TOPROS) INC., *petitioner*, ***versus*** **JOHN CHARLES CHANG, JR., TOPGOLD PHILS. INC., GOLDEN EXIM TRADING AND COMMERCIAL CORPORATION AND IDENTIC INTERNATIONAL CORP., REPRESENTED BY JOHN CHARLES CHANG, JR., AND HECTOR AND CECILIA KATIGBAK,** *respondents*.

Promulgated:

December 7, 2021

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CONCURRING OPINION

CAGUIOA, *J.*:

The factual backdrop of this case, in sum, involves a complaint filed by Total Office Products and Services, Inc. (TOPROS) for accounting and damages with prayer for the issuance of a writ of preliminary injunction against respondents John Charles Chang, Jr. (Chang), TOPGOLD Phils. Inc. (TOPGOLD), Golden Exim Trading and Commercial Corporation, Identic International Corporation, and Hector and Cecilia Katigbak (collectively, Chang, *et al.*) TOPROS mainly alleged that Chang, who was president and 20% shareholder of TOPROS, siphoned the assets, funds, goodwill and resources of TOPROS and obtained corporate opportunities that properly belonged to TOPROS, and further directed said opportunities to his own companies (*i.e.*, TOPGOLD, *et al.*). TOPROS added that the violations of Chang's fiduciary duties as the president of TOPROS included establishing companies in the same line of business as TOPROS, pilfering clients of TOPROS and various misrepresentations (including use of TOPROS resources in furtherance of his own companies' clients).[1]

The *ponencia* grants the herein petition, reverses the Court of Appeals (CA) and reinstates the ruling of Branch 158, Regional Trial Court of Pasig City (RTC) which ordered Chang and his companies to account for all profits and properties which should have accrued to TOPROS and refund the same to it, including the payment of actual damages in an amount to be determined by the court-appointed committee, in addition to exemplary damages in the amount of ₱100,000.00 and attorney's fees also in the amount of ₱100,000.00.[2]

In ordering the reinstatement of the RTC Decision, the *ponencia* finds that the RTC was correct in finding several disloyal acts on the part of Chang which prejudiced TOPROS and its shareholders. To determine Chang's exact liability, however, the *ponencia* remands the case to the RTC for reception of

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1 *Ponencia*, pp. 2-4.

2 Id. at 6-7.

additional evidence and re-evaluation of evidence already presented using the parameters suggested by Senior Associate Justice Estela Perlas-Bernabe (Senior Associate Justice Bernabe), namely: (1) the line of business test; (2) the interest or expectancy test; (3) the American Law Institute (ALI) test; and (4) the *Guth* test (as laid down in the case of *Guth v. Loft, Inc.*).[3] Senior Associate Justice Bernabe finally suggests that the *Guth* test, having integrated[4] the three foregoing tests, is the most appropriate for our jurisdiction for purposes of determining breach of corporate opportunity.[5]

The *ponencia* finally cautions that TOPROS, as the claimant, has the burden of proving the specific business opportunities that gave rise to its claim of damages.

I agree with the *ponencia*'s finding against Chang of acts that were clearly violative of the fiduciary duties incumbent upon him pursuant to Section 31[6] in relation to Section 34[7] of the Corporation Code.[8] It is beyond dispute that Chang pilfered clients and appropriated opportunities that should have redounded to the benefit of TOPROS, including the act of establishing two companies which are in the same line of business as TOPROS while he was still a sitting officer and director of the latter,[9] that one of his companies, TOPGOLD, even used the same business address as TOPROS, which not only gave the former access to the latter's resources, but also led the public to believe that they were one and the same when in fact they were not.[10] The *ponencia* also crucially notes that even Chang himself admitted that he gave an investment opportunity to his company, Golden Exim and not to TOPROS on the premise that "he had to make his own living."[11]

However, with the violation of Chang's fiduciary duty being clear enough, the challenge, as acknowledged by the *ponencia*, is in the determination of what may be considered a corporate opportunity on the part of TOPROS which gave rise to a claim of damages against Chang.[12] On this

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3 Concurring Opinion of Senior Associate Justice Estela Perlas-Bernabe dated September 28, 2021, pp. 7-9.

4 Id. at 9.

5 Id. at 10-11.

6 **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.

7 **Section 34.** *Disloyalty of a director.* — Where a director, by virtue of his office, acquires for himself a business opportunity which should belong to the corporation, thereby obtaining profits to the prejudice of such corporation, he must account to the latter for all such profits by refunding the same, unless his act has been ratified by a vote of the stockholders owning or representing at least two-thirds (2/3) of the outstanding capital stock. This provision shall be applicable, notwithstanding the fact that the director risked his own funds in the venture. (n)

8 As has been carried over as Section 33 of the Revised Corporation Code.

9 Supra note 1, at 24-25.

10 Id. at 25.

11 Id. at 25-26

12 *See* id. at 16.

score, I agree with Senior Associate Justice Bernabe that a wholesale reinstatement of the RTC Decision is insufficient as it fails to take into account the distinctions and determinations that must be made for purposes of determining damages.

On this matter of winnowing between profits and properties that have accrued to Chang or his private companies' benefits and those that should have rightly redounded to the benefit of TOPROS, and consistent with Senior Associate Justice Bernabe's suggestion of consulting U.S. jurisprudence for instructive case demonstrations, I wish to offer several other tests in addition to the "line of business" test, the "interest/expectancy" test, the ALI test and the *Guth* test.

The following additional considerations may, as they have been considered by the *ponencia*, assist in fleshing out and further refining the parameters that the RTC may operate within for purposes of determining the breadth and scope of Chang's liability. Although far from a complete canvass of the terrain of the doctrine of corporate opporunity, the following tests nevertheless shed more light on the principle that has become increasingly relevant albeit relatively unexplored in our jurisdiction. Too, I wish to offer possible considerations of defenses that, although perhaps not squarely raised by Chang in this case, nonetheless inform the *ponencia*'s appreciation of the corporate opportunity doctrine.

First, the *ponencia* also correctly considers the "fairness" test, under which the test of whether an opportunity is a corporate one rests on the question of whether a fiduciary's appropriation would fail the "ethical standards of what is fair and equitable in a particular set of facts."[13] Although far from hard and fast, the "fairness" test is similar to the "line of business" test in that it may disallow appropriation of not only existing but prospective opportunities of the corporation. Though it admittedly poses "line-drawing"[14] problems with respect to delineating between appropriations that are fair to the corporation and those that are not, this test allows for malleability in the appreciation of what constitutes the foundational premise of fairness *vis-à-vis* corporations, consistent with the inclination of our legislative history, as raised during the deliberations, that sought to codify the premium placed on the fiduciary duties of a corporate officer.[15]

Second, and in addition to the cases of *Guth v. Loft, Inc.*[16] and *Broz v. Cellular Info. Systems*,[17] similarly instructive are the cases of *Thorpe by Castleman v. CERBCO, Inc.*[18] (*Thorpe*) and *Benerofe v. Cha*[19] (*Benerofe*).

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13 Talley, Eric and Mira Hashmall, THE CORPORATE OPPORTUNITY DOCTRINE, accessed at <https://weblaw.usc.edu/why/academics/cle/icc/assets/docs/articles/iccfinal.pdf>, citing *Durfee v. Durfee & Canning, Inc.*, 80 N.E.2d 522, 529 (Mass. 1948).

14 Id. at 8.

15 Supra note 1, at 12.

16 23 Del. Ch. 255, 270 (1939).

17 673 A. 2d 148 (Del. 1996).

18 676 A.2d 436 (Del. 1996).

19 1998 Del. Ch. LEXIS 28.

In *Thorpe*, the facts involved a shareholder who sued the company CERBCO and its controlling shareholders who were also its officers and directors for breach of their duty of loyalty through the usurpation of a corporate opportunity. Specifically, the officers and directors of CERBCO objected to a third party proposal because it would erode the control premium of their stocks. Here, the Chancery Court appreciated the nuanced role of the officers and directors and as controlling shareholders in that although said officers did breach their duty of loyalty for failing to fully disclose the corporate opportunity, it also noted that as controlling shareholders, they could veto any transaction that would have constituted a sale of all or substantially all of the corporation's assets, so that here, the Court held that although there was breach of loyalty, there was effectively no injury to the corporation. *Thorpe* would thus be valuable in the appreciation of whether a director or officer of the corporation under fire pursuant to the corporate opportunity doctrine could not also have validly undertaken the same action in a different corporate capacity.

Third, on the matter of defense against the corporate opportunity doctrine, the case of *Benerofe* is similarly informative. This case involved shareholders who filed a case against their corporation Inorganic Coatings, Inc. (ICI) and its directors for allegedly entering into a stock purchase agreement that favored another corporation, designees of which also sat in the ICI's board. In this case, the court ruled that the shareholders failed to prove that the board of directors usurped a corporate opportunity of ICI since it failed to prove that ICI was in fact financially capable of exploiting the corporate opportunity that was supposedly usurped. This case, therefore, would be helpful in refining the courts' appreciation of the corporate opportunity doctrine, specifically in light of the "incapacity" defense, or the defense that submits that an opportunity is only a corporate one if the corporation itself could have, on its own, been able to exploit or seize the same had it not been appropriated by the fiduciary.[20]

Finally, yet another possible defense that aptly informs the *ponencia* as well as the courts, one that is acknowledged as a plausible defense by the ALI and the "line of business" tests, is the "source" defense, which mainly argues that the source of the opportunity that the fiduciary approriated was one who was drawn to the fiduciary's personal skills and expertise, and not the corporation's.[21]

As succintly pointed out by Senior Associate Justice Bernabe, the foregoing parameters are, still and all, mere guideposts, with their germaneness to our jurisdiction to be further determined as each suitable case for which arises.

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20 Supra note 13, at 13.
21 Id. at 12.

Bearing the above in mind, I agree with the *ponencia* and vote to GRANT the instant petition and REMAND Civil Case No. 68327 to the Regional Trial Court of origin for its prompt resolution in light of the parameters and considerations outlined by the *ponencia* with respect to the determination of corporate opportunities.

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

EN BANC

G.R. Nos. 200070-71 – *Total Office Products and Services (TOPROS) Inc. v. John Charles Chang, Jr., TOPGOLD Phils. Inc., Golden-Exim Trading and Commercial Corp. and Identic International Corp., represented by John Charles Chang, Jr., Hector and Cecilia Katigbak*

Promulgated:
December 7, 2021

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CONCURRING OPINION

LAZARO-JAVIER, *J.*:

I do agree that the doctrine of corporate opportunity applies in this case based on Section 34,[1] in relation to Section 31,[2] Batas Pambansa Bilang 68, otherwise known as The Corporation Code of the Philippines (Corporation Code). But while the *ponencia* enumerated several foreign tests to determine corporate opportunity and ultimately went with ***Guth v. Loft, Inc.***[3] as synthesized by ***Broz v. Cellular Information Systems, Inc.***,[4] I humbly opine that **Section 34** of the Corporation Code, as worded, and its **legislative history** on **what "belongs to the corporation"** would have to be the **springboard** for determining *which of these tests or a combination of these tests, if any, would bring about the statutory language and purpose*. After all, Section 34 of the Corporation Code recognizes the doctrine not only to demand undivided loyalty from those who occupy a fiduciary relationship toward a corporation **but also to clarify it and clear any ambiguous interpretation**.

A. The Common Law Doctrine of Corporate Opportunity

Originally, it was the common law which imposed the duty of a fiduciary upon a director or officer.[5] Slowly, though, this common law duty has been codified in common law and hybrid common-civil law jurisdictions, including ours. In our ***Revised Corporation Code of the Philippines***, the

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1 **Section 34.** *Disloyalty of a director.*
Where a director, by virtue of his office, acquires for himself a business opportunity which should belong to the corporation, thereby obtaining profits to the prejudice of such corporation, he must account to the latter for all such profits by refunding the same, unless his act has been ratified by a vote of the stockholders owning or representing at least two-thirds (2/3) of the outstanding capital stock. This provision shall be applicable, notwithstanding the fact that the director risked his own funds in the venture. (n) (The Corporation Code of the Philippines, *Batas Pambansa Bilang* 68, Approved, May 1, 1980). (As amended)

2 **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. (The Corporation Code of the Philippines, *Batas Pambansa Bilang* 68, Approved, May 1, 1980). (As amended)

3 23 Del. Ch. 255, 270 (1939).

4 673 A. 2d 148, 154-55 (Del. 1996).

5 *Matic, et al. v. Waldner, et al.*, 2016 MBCA 60 (CanLII), (Manitoba Court of Appeal, Canada).

relevant provisions are found in Sections 29 to 33 thereof,[6] and prior to this repealing statute, the almost identical provisions of Sections 30 to 34[7] of the ***Corporation Code of the Philippines***.

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[6] **Section 29**. *Compensation of Directors or Trustees.*

In the absence of any provision in the bylaws fixing their compensation, the directors or trustees shall not receive any compensation in their capacity as such, except for reasonable per diems: *Provided, however*, That the stockholders representing at least a majority of the outstanding capital stock or majority of the members may grant directors or trustees with compensation and approve the amount thereof at a regular or special meeting.

In no case shall the total yearly compensation of directors exceed ten percent (10%) of the net income before income tax of the corporation during the preceding year.

Directors or trustees shall not participate in the determination of their own per diems or compensation.

Corporations vested with public interest shall submit to their shareholders and the Commission, an annual report of the total compensation of each of their directors or trustees.

Section 30. *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.

A director, trustee[,] or officer shall not attempt to acquire, or acquire any interest adverse to the corporation in respect of any matter which has been reposed in them in confidence, and upon which, equity imposes a disability upon themselves to deal in their own behalf; otherwise, the said director, trustee[,] or officer shall be liable as a trustee for the corporation and must account for the profits which otherwise would have accrued to the corporation.

Section 31. *Dealings of Directors, Trustees[,] or Officers with the Corporation.*

A contract of the corporation with one (1) or more of its directors, trustees, officers[,] or their spouses and relatives within the fourth civil degree of consanguinity or affinity is voidable, at the option of such corporation, unless all the following conditions are present:

(a) The presence of such director or trustee in the board meeting in which the contract was approved was not necessary to constitute a quorum for such meeting;

(b) The vote of such director or trustee was not necessary for the approval of the contract;

(c) The contract is fair and reasonable under the circumstances;

(d) In case of corporations vested with public interest, material contracts are approved by at least two-thirds (2/3) of the entire membership of the board, with at least a majority of the independent directors voting to approve the material contract; and

(e) In case of an officer, the contract has been previously authorized by the board of directors.

Where any of the first three (3) conditions set forth in the preceding paragraph is absent, in the case of a contract with a director or trustee, such contract may be ratified by the vote of the stockholders representing at least two-thirds (2/3) of the outstanding capital stock or of at least two-thirds (2/3) of the members in a meeting called for the purpose: *Provided*, That full disclosure of the adverse interest of the directors or trustees involved is made at such meeting and the contract is fair and reasonable under the circumstances.

Section 32. *Contracts Between Corporations with Interlocking Directors.*

Except in cases of fraud, and provided the contract is fair and reasonable under the circumstances, a contract between two (2) or more corporations having interlocking directors shall not be invalidated on that ground alone: *Provided*, That if the interest of the interlocking director in one (1) corporation is substantial and the interest in the other corporation or corporations is merely nominal, the contract shall be subject to the provisions of the preceding section insofar as the latter corporation or corporations are concerned.

Stockholdings exceeding twenty percent (20%) of the outstanding capital stock shall be considered substantial for purposes of interlocking directors.

Section 33. *Disloyalty of a Director.*

Where a director, by virtue of such office, **acquires a business opportunity which should belong to the corporation**, thereby obtaining profits to the prejudice of such corporation, the director must account for and refund to the latter all such profits, unless the act has been ratified by a vote of the stockholders owning or representing at least two-thirds (2/3) of the outstanding capital stock. This provision shall be applicable, notwithstanding the fact that the director risked one's own funds in the venture. (An Act Providing for the Revised Corporation Code of the Philippines, Republic Act No. 11232, Approved on February 20, 2019).

[7] **Section 30**. *Compensation of Directors.*

In the absence of any provision in the by-laws fixing their compensation, the directors shall not receive any compensation, as such directors, except for reasonable *per diems*. *Provided, however*, That any such compensation other than *per diems* may be granted to directors by the vote of the stockholders representing at least a majority of the outstanding capital stock at a regular or special stockholders'

In its raw and unrestrained sense, the **content** of the **fiduciary duty** of directors and officers compels **undivided loyalty**. In the 1928 case of ***Meinhard v. Salmon***,[8] Justice Benjamin N. Cardozo[9] explained what such fiduciary duty entails:

> **Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this[,] there has developed a tradition that is unbending and inveterate.** Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions (***Wendt v. Fischer***, 243 N.Y. 439, 444). Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It

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meeting. In no case shall the total yearly compensation of directors, as such directors, exceed ten (10%) percent of the net income before income tax of the corporation during the preceding year. (n)

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 acquires, 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. (n)

Section 32. *Dealings of Directors, Trustees[,] or Officers with the Corporation.*

A contract of the corporation with one or more of its directors or trustees or officers is voidable, at the option of such corporation, unless all the following conditions are present:

1. That the presence of such director or trustee in the board meeting in which the contract was approved was not necessary to constitute a quorum for such meeting;
2. That the vote of such director or trustee was not necessary for the approval of the contract;
3. That the contract is fair and reasonable under the circumstances; and
4. That in the case of an officer, the contract with the officer has been previously authorized by the board of directors.

Where any of the first two conditions set forth in the preceding paragraph is absent, in the case of a contract with a director or trustee, such contract may be ratified by the vote of the stockholders representing at least two-thirds (2/3) of the outstanding capital stock or of two-thirds (2/3) of the members in a meeting called for the purpose: *Provided*, That full disclosure of the adverse interest of the directors or trustees involved is made at such meeting: *Provided, however*, That the contract is fair and reasonable under the circumstances. (n)

Section 33. *Contracts Between Corporations with Interlocking Directors.*

Except in cases of fraud, and provided the contract is fair and reasonable under the circumstances, a contract between two or more corporations having interlocking directors shall not be invalidated on that ground alone. *Provided*, That if the interest of the interlocking director in one corporation is substantial and his interest in the other corporation or corporations is merely nominal, he shall be subject to the provisions of the preceding section insofar as the latter corporation or corporations are concerned.

Stockholdings exceeding twenty (20%) percent of the outstanding capital stock shall be considered substantial for purposes of interlocking directors. (n)

Section 34. *Disloyalty of a Director.*

Where a director, by virtue of his office, **acquires for himself a business opportunity which should belong to the corporation**, thereby obtaining profits to the prejudice of such corporation, he must account to the latter for all such profits by refunding the same, unless his act has been ratified by a vote of the stockholders, owning[,] or representing at least two-thirds (2/3) of the outstanding capital stock. This provision shall be applicable, notwithstanding the fact that the director risked his own funds in the venture. (n) (The Corporation Code of the Philippines, *Batas Pambansa Bilang* 68, Approved, May 1, 1980).

8 249 N.Y. 458, 464 (N.Y. 1928), 164 N.E. 545, Decided Dec 31, 1928.

9 Then Chief Judge of the New York Court of Appeals, later Associate Justice of the U.S. Supreme Court.

> will not consciously be lowered by any judgment of this court.[10] (Emphases supplied)
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The undivided loyalty required of a fiduciary has been described as being both **relentless** and **supreme.**[11] It demands the highest standard of behavior that cannot be lowered even by courts. In ***Peoples Department Stores Inc. (Trustee of) v. Wise***,[12] it was said that this fiduciary duty requires directors and officers to act –

> x x x honestly and in good faith *vis-à-vis* the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They **must avoid conflicts of interest with the corporation.** They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly[,] and loyalty.[13]
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The **duty to avoid conflicts of interest** with the corporation includes not only the director or the officer's personal interests but those of any other corporation in which the director or the officer is interested.[14]

The **corporate opportunity doctrine** arises out of this fundamental obligation of a fiduciary not to allow a conflict of their duty with their own interests.[15] This doctrine **limits** the ability of those who owe a fiduciary duty to a corporation **to take advantage of business opportunities** that might, otherwise, be available to them in the absence of the fiduciary relationship.[16] According to a branch of common law, these **business opportunities** are those that either **already belongs** to the company or even for which **it has been negotiating.**[17]

Thus, as it is now **broadly** understood, the **corporate opportunity doctrine** governs the legal responsibility of directors, officers, and controlling shareholders in a corporation, under the duty of loyalty, **not to take such opportunities for themselves** without first disclosing the opportunity to the board of directors of the corporation and giving the board the option to decline the opportunity on behalf of the corporation. If this procedure is violated and a corporate fiduciary takes the **corporate opportunity** anyway, then the

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10 Supra note 8.

11 *Id.* citing *Wendt v. Fischer,* 243 N.Y. 439 [1926]; *Munson et al. v. Syracuse, Geneva & Corning Railroad Company et al.*, 103 N.Y 58, 74 [1886].

12 2004 SCC 68, [2004] 3 SCR 461 (Supreme Court of Canada).

13 *Id*, citing *K. P. McGuinness, The Law and Practice of Canadian Business Corporations* (1999), p. 715

14 See *Canadian Aero Service Ltd v. O'Malley*, [1974] SCR 592 (Supreme Court of Canada); and *Jordan Inc., et al. v. Jordan Engineering Inc. et al.*, [2004] OTC 687 (Ontario Superior Court of Justice, Canada).

15 Supra note 5.

16 Supra note 14.

17 *Id.*

fiduciary has violated its duty of loyalty, and the corporation will be entitled to a constructive trust of all profits obtained from the wrongful transaction.[18]

Please note that the **codified** versions of the **corporate opportunity doctrine** in the Philippines have **consistently retained** the **key phraseology** for the application of this doctrine, *i.e.*, **a business opportunity which SHOULD BELONG to the corporation.**

B. Common-Law Nature of Corporate Opportunity

Key to the analysis on whether this doctrine applies is the determination of **whether the opportunity "belonged" to the corporation. Common law** has developed various overlapping **tests** for this purpose.

In the 1995 case of ***Northeast Harbor Golf Club, Inc. (Northeast) v. Harris, et al.***,[19] the Supreme Judicial Court of Maine elaborated the **tests** for whether the **opportunity belongs** or **belonged** to the corporation:

1) "***Line of business***" test. If there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself. This test was applied by the Delaware Supreme Court in ***Guth v. Loft, Inc.***, 5 A.2d 503 (Del.1939).[20]

2) "***Fairness test.***" The true basis of governing doctrine rests on the unfairness in the particular circumstances of a director, whose relation to the corporation is fiduciary, taking advantage of an

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18 https://www.law.cornell.edu/wex/Corporate_opportunity. (Accessed: September 30, 2021, 7:37am).

19 661 A.2d 1146 (1995). https://law.justia.com/cases/maine/supreme-court/1995/661-a-2d-1146-0.html. (Accessed: September 30, 2021, 7:50am).

20 *Id,* The line of business test suffers from some significant weaknesses. ***First,*** the question whether a particular activity is within a corporation's line of business is conceptually difficult to answer. The facts of the instant case demonstrate that difficulty. The Club is in the business of running a golf course. It is not in the business of developing real estate. In the traditional sense, therefore, the trial court correctly observed that the opportunity in this case was not a corporate opportunity within the meaning of the *Guth test*. Nevertheless, the record would support a finding that the Club had made the policy judgment that development of surrounding real estate was detrimental to the best interests of the Club. The acquisition of land adjacent to the golf course for the purpose of preventing future development would have enhanced the ability of the Club to implement that policy. The record also shows that the Club had occasionally considered reversing that policy and expanding its operations to include the development of surrounding real estate. Harris's activities effectively foreclosed the Club from pursuing that option with respect to prime locations adjacent to the golf course. ***Second,*** the *Guth test* includes as an element the financial ability of the corporation to take advantage of the opportunity. The court in this case relied on the Club's supposed financial incapacity as a basis for excusing Harris's conduct. Often, the injection of financial ability into the equation will unduly favor the inside director or executive who has command of the facts relating to the finances of the corporation. Reliance on financial ability will also act as a disincentive to corporate executives to solve corporate financing and other problems. In addition, the Club could have prevented development without spending $275,000 to acquire the property Harris needed to obtain access to the road.

opportunity for personal profit when the interest of the corporation justly calls for protection. This calls for the application of ethical standards of what is fair and equitable in particular sets of facts. **This test was applied by the Massachusetts Supreme Judicial Court adopted a different test in *Durfee v. Durfee & Canning, Inc.*, 323 Mass. 187, 80 N.E.2d 522 (1948).**[21]

3) **Combined Approach.** It combines the 'line of business' test with the 'fairness' test. It engaged in a two-step analysis, first determining whether a particular opportunity was within the corporation's line of business, then scrutinizing "the equitable considerations existing prior to, at the time of, and following the officer's acquisition." The Minnesota Supreme Court applied this in *Miller v. Miller*, 301 Minn. 207, 222 N.W.2d 71, 81 (1974).[22]

Northeast also included this test which was developed in 1992:

4) "***ALI Test.***" The American Law Institute (ALI)[23] test is centered on a strict requirement of full disclosure prior to taking advantage of any corporate opportunity, *viz.*: A director or senior executive may not take advantage of a corporate opportunity unless: (a) He first offers the opportunity to the corporation and discloses the conflict of interest. It is rejected and the same is fair to the corporation; or (b) The opportunity is rejected in advance, following disclosure by disinterested directors or superior, in a manner that satisfies the standards of the business judgment rule; or (c) The rejection is authorized in advance or ratified, following such disclosure, by disinterested shareholders, and the rejection is not equivalent to a waste of corporate assets. For this purpose, a corporate opportunity means: (1) Any opportunity to engage in business activity of which a director or senior executive becomes aware, either: (a) In connection with the performance of functions as a director or senior executive, or under circumstances that should reasonably lead the director or senior executive to believe that the person offering the opportunity expects it to be offered to the corporation; or (b) Through the use of corporate information or property, if the resulting opportunity is one that the director or senior executive should reasonably be expected to believe would be of interest to the corporation; or (2) Any opportunity to engage in business activity of which a senior executive becomes aware and knows is closely

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21 *Id*, As with the *Guth test*, the *Durfee test* calls for a broad ranging, intensely factual inquiry. The *Durfee test* suffers even more than the *Guth test* from a lack of principled content. It provides little or no practical guidance to the corporate officer or director seeking to measure her obligations.

22 *Id*, The Miller court hoped by adopting this approach "to ameliorate the often-expressed criticism that the [corporate opportunity] doctrine is vague and subjects today's corporate management to the danger of unpredictable liability." In fact, the test adopted in Miller merely piles the uncertainty and vagueness of the fairness test on top of the weaknesses in the line of business test.

23 The American Law Institute is a private, independent, nonprofit organization that publishes Restatements of the Law, Principles of the Law, and Model Codes to further its mission to clarify, modernize, or otherwise improve the law to promote the better administration of justice. https://www.ali.org/about-ali/faq/. (Accessed: October 2, 2021, 5:04pm).

related to a business in which the corporation is engaged or expects to engage.[24]

The foregoing **common law tests** were meant to define the elements of **corporate** or **business opportunity**, the acquisition or attempt to obtain it would be actionable under Sections 31 and 34 of the ***Revised Corporation Code of the Philippines*** or its earlier version. I understand why these tests have been discussed prominently in the *ponencia* – precisely because we would want the public to know **when** a particular *potentially* or *already* **gainful endeavor** amounts to a **corporate** or **business opportunity** that a director or officer is barred from acquiring. For example, if Total Office Products and Services (TOPROS) were procuring and marketing only high-end typewriters, and Mr. John Charles Chang (Mr. Chang) **in the course of his employment** with TOPROS **learned** of computer-enhanced word-processing machines and this new equipment's likelihood of driving the typewriters out-of-business, would he be **barred** by his fiduciary duties from himself procuring and marketing these new machines as this endeavor would fall under a **corporate** or **business opportunity**?

C. Codified Nature of Corporate Opportunity

Inferring from Section 34 of the repealed ***Corporation Code of the Philippines*** and Section 33 of the ***Revised Corporation Code of the***

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[24] Supra note 19.
Taking of Corporate Opportunities by Directors or Senior Executives (a) *General Rule.* A director [§ 1.13] or senior executive [§ 1.33] may not take advantage of a corporate opportunity unless: (1) The director or senior executive first offers the corporate opportunity to the corporation and makes disclosure concerning the conflict of interest [§ 1.14(a)] and the corporate opportunity [§ 1.14(b)]; (2) The corporate opportunity is rejected by the corporation; and (3) Either: (A) The rejection of the opportunity is fair to the corporation; (B) The opportunity is rejected in advance, following such disclosure, by disinterested directors [§ 1.15], or, in the case of a senior executive who is not a director, by a disinterested superior, in a manner that satisfies the standards of the business judgment rule [§ 4.01(c)]; or (C) The rejection is authorized in advance or ratified, following such disclosure, by disinterested shareholders [§ 1.16], and the rejection is not equivalent to a waste of corporate assets [§ 1.42]. (b) Definition of a Corporate Opportunity. For purposes of this Section, a corporate opportunity means: (1) Any opportunity to engage in a business activity of which a director or senior executive becomes aware, either: (A) In connection with the performance of functions as a director or senior executive, or under circumstances *1151 that should reasonably lead the director or senior executive to believe that the person offering the opportunity expects it to be offered to the corporation; or (B) Through the use of corporate information or property, if the resulting opportunity is one that the director or senior executive should reasonably be expected to believe would be of interest to the corporation; or (2) Any opportunity to engage in a business activity of which a senior executive becomes aware and knows is closely related to a business in which the corporation is engaged or expects to engage. (c) Burden of Proof. A party who challenges the taking of a corporate opportunity has the burden of proof, except that if such party establishes that the requirements of Subsection (a)(3)(B) or (C) are not met, the director or the senior executive has the burden of proving that the rejection and the taking of the opportunity were fair to the corporation. (d) Ratification of Defective Disclosure. A good faith but defective disclosure of the facts concerning the corporate opportunity may be cured if at any time (but no later than a reasonable time after suit is filed challenging the taking of the corporate opportunity) the original rejection of the corporate opportunity is ratified, following the required disclosure, by the board, the shareholders, or the corporate decisionmaker who initially approved the rejection of the corporate opportunity, or such decisionmaker's successor. (e) Special Rule Concerning Delayed Offering of Corporate Opportunities. Relief based solely on failure to first offer an opportunity to the corporation under Subsection (a)(1) is not available if: (1) such failure resulted from a good faith belief that the business activity did not constitute a corporate opportunity, and (2) not later than a reasonable time after suit is filed challenging the taking of the corporate opportunity, the corporate opportunity is to the extent possible offered to the corporation and rejected in a manner that satisfies the standards of Subsection (a).

Philippines, a **corporate opportunity** is a **business opportunity** that **"should belong"** to the affected corporation. Unfortunately, however, there is **no definition** in the statutes of what **should belong** means. In the **legislative deliberations** on Section 34, Minister Estelito Mendoza (Minister Mendoza) explained **corporate opportunity** in this manner –

> MR. MENDOZA. In my opinion, it must not only be made known to the corporation; the corporation must be formally advised and **if he really would like to be assured that he is protected against the consequences provided for in Section 34**, he should take such steps whereby the opportunity is clearly presented to the corporation and the corporation has the opportunity to decide on whether to avail of it or not and then let the corporation reject it, after which then he may avail of it. Under such circumstances, I do not believe he would **expose himself to the consequences provided for under Section 34.**
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> **Precisely, the reason we have laid down this ruling in statutory language is that for as long as the rule is not clarified there will be ambiguity in the matter. And directors of corporations who may acquire knowledge of such opportunities would always be risking consequences not knowing how the courts will later on decide such issues. But now with the statutory rule, any director who comes to know of an OPPORTUNITY THAT MAY BE AVAILABLE TO THE CORPORATION would be aware of the consequences in case he avails of that opportunity without giving the corporation the privilege of deciding beforehand on whether to take advantage of it or not.**[25]
> (Emphases and underscoring supplied)
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One would immediately notice the shift from Minister Mendoza's *opportunity that* **may be available** to the corporation **to** the statutory versions of **which should belong** to the corporation. The former *"may"* **connotes** inclusiveness and potentiality. The latter **"should"** connotes **restrictiveness** and **precision** or **certitude**. It is, thus, now up to this Court to **define** the key element of **corporate opportunity** in light of the **identically worded statutory provisions** and the **history** of the ***Corporation Code of the Philippines*** with the guidance of the **common law tests** on what constitutes a corporate opportunity.

D. Working Legal Definition of Corporate Opportunity

I appreciate the *ponencia*'s effort to define what prohibited **corporate opportunity** entails. Quoting ***Broz v. Cellular Information Systems, Inc.***,[26] Associate Justice Henri Jean Paul Inting held that a **corporate opportunity** exists where:

1. the corporation is financially able to exploit the property;
2. the opportunity is within the corporation's line of business;

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25 *James Ient and Maharlika Schulze, v Tullett Prebon Philippines, Inc.*, 803 Phil. 163, 198 (2017).
26 Supra note 4.

3. the corporation has an interest or an expectancy in the opportunity; and
4. by taking the opportunity for [their] own, the corporate fiduciary (*i.e.*, corporate director, trustee, or officer) will thereby be placed in a position [inimical] to his or her duties to the corporation.[27]

I respectfully submit, however, that the elements identified in the *ponencia* do **not** accurately reflect **both** the **statutory provision** that the opportunity **SHOULD BELONG** to the corporation and the **legislative history** of this provision that an opportunity that **MAY BE AVAILABLE** to the corporation would also be a **corporate opportunity**. It appears that the elements are **predisposed** to the **textual** qualification of the corporate opportunity as something that **should already belong** to the corporation to the prejudice of the **intent** behind the text that an opportunity that **may be available** to the corporation could also be **actionable** as a corporate opportunity.

It is true that the views expressed during legislative debates may be resorted to clarify ambiguities in the language of the statute. This is precisely the case here – what **"should belong to the corporation"** means is **ambiguous**. The *ponencia* **admits** this fact. It was for this reason that it had an **extensive** reference to and discussion of the common law tests of what **corporate opportunity** is. Hence, to come up with a **working legal definition of corporate opportunity**, we must **construe together** the **statutory provision** that the opportunity **SHOULD BELONG** to the corporation and the **legislative history** of this provision that an opportunity that **MAY BE AVAILABLE** to the corporation would also be a **corporate opportunity**.

For this reason, when deciding whether a **corporate opportunity** exists that a director or an officer has availed of and could be held liable for, **all** relevant factors must be taken into account, **including**:

- the maturity of the opportunity;
- whether it was actively pursued by the corporation;
- whether the corporation was capable of taking advantage of the opportunity;
- whether the opportunity was in the corporation's line of business or a related business;
- how the opportunity arose or came to the attention of the director or officer;
- whether the other directors of the corporation had knowledge of the director's pursuit of the opportunity; and,
- whether the other directors gave their fully informed consent to the director's pursuit of the opportunity.[28]

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27 *Id.*

28 Supra note 5.

The overall goal of the analysis is to determine **whether the opportunity *fairly belonged* to the corporation** in the circumstances. The keystone **fairly belonged** brings together the **essence** of **both** the **statutory provision** that the opportunity **SHOULD BELONG** to the corporation and the **legislative history** of this provision that an opportunity that **MAY BE AVAILABLE** to the corporation would also be a **corporate opportunity**. More, prohibiting a director or an officer from taking advantage of an opportunity that **fairly belongs** to the corporation is **consistent with** their strict fiduciary ethic. It is only by interpreting the statutory provision in light of the legislative history in this manner of **fairly belongs** that we are able to account for the **true fiduciary nature** of the positions of director or officer.

Maturity of the Opportunity and Active Pursuit by the Corporation

The **maturity of the opportunity** includes both a "mature" or "ripe" or "immediately available" opportunity **and** "potential" opportunities. The latter is **required** by the **strict ethic imposed on fiduciaries**. The **fiduciary duty** does **not** make a director or an officer's liability **solely** to hinge on proof of an **actual conflict** of duty and self-interest" but also on a **potential** of such conflict.[29] Thus:

> To recapitulate, the **corporate fiduciary duty** exacts from directors a **strict ethic** to act honestly and in good faith in the corporation's best interests. In the general terms employed by Canadian Aero, this holds directors to the obligations of acting towards companies on whose boards they sit with "loyalty, good faith[,] and **avoidance of conflict** of duty and self-interest." This involves a duty **not just to avoid actual** conflict of duty and interest, but **also potential** conflict.[30] (Emphases supplied)
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A conflict is a qualifying **"potential"** conflict only if to an **objective** or a **reasonable person** looking at the relevant facts and circumstances of a particular case there is a **real sensible possibility** *and more than a theoretical* conflict.[31] A **"potential"** conflict **excludes** something one "could [only] imagine [as] some situation arising which *might*, in *some conceivable possibility* not objectively or reasonably contemplated, result in a conflict.

Thus, due to the **strict ethic** that is imposed on directors or officers, a breach of fiduciary duty can occur **when the diverted opportunity is a potential, rather than a mature opportunity**, and **even when the corporation is not actively pursuing** the business opportunity.

Nature of the alleged "insider" information and opportunity

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29 See *Sports Villas Resort Inc, Re*, 2000, 185 Nfld. & P.E.I.R. 281 (Newfoundland Court of Appeals Canada).

30 *Id.*

31 Supra note 5.

The **manner** in which the **information** and **opportunity came to the knowledge** of the director or officer is **not** determinative but is a **fact to be taken into account** in the context of the director or officer's **role as a fiduciary**.[32] The information and opportunity need **not** be presented as an **"insider"** event or something that was known or availed by a **director** or **officer qua director** or **officer**.[33] The information or opportunity does **not** have to be acquired while acting as directors or officers and its prohibitory effect is **not** limited to benefits **acquired by reason of** or **during** the holding of those offices.[34]

Limits on Liability of Directors and Officers

Another way to analyze the **extent of the duty of a director or officer** under this doctrine is to examine whether any defenses may be raised by a director or officer to limit their liability. This real limitation upon their liability is nothing short of their **fully informed consent**. As in **our codification** of the corporate opportunity doctrine, the **only defense** available to them is that they made the profits with the knowledge and assent of the corporation. This arises again from their **fiduciary position** *vis-à-vis* the corporation – "a breach of fiduciary duty occurred, not only because the opportunity belonged to the corporation, but because the fiduciary obtained the opportunity either secretly or without the approval of the company."[35]

E. Application of the Corporate Opportunity Doctrine to the Case at Bar

As exhaustively narrated in the *ponencia*, Mr. Chang executed crude acts that brazenly usurped business opportunities that **fairly belonged** to TOPROS. These opportunities had long matured as they were in fact existing and ready to be as they were in fact tapped by Mr. Chang. Had these business opportunities not been hidden by Mr. Chang from TOPROS, the latter could have actively pursued and taken advantage of them as the opportunities were all in its line of business. Mr. Chang learned of these opportunities precisely because of his multiple roles as one of TOPROS' directors and its top officer.

F. Conclusion

As a result, I vote to allow the present petition and return the matter to the trial court to determine the extent of the liability for damages of Mr. John Charles Chang.

AMY C. LAZARO-JAVIER

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32 *Id.*
33 *Id.*
34 Supra note 14.
35 *Id.*