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

22 July 2008
SEC-OGC Opinion No. 08-16
Re: Unknown Stockholders;
Acquisition of Shares

SIME DARBY PILIPINAS, INC.
Malugay Street corner Ayala Avenue Extension
1200 Makati City, Metro Manila, Philippines

Attention: Atty. Ronald E. Javier
Corporate Secretary

Sir:

This refers to your letter dated 21 November 2007 requesting opinion on the queries posed therein.

In the first paragraph of your letter, you mention that *"the company owns 98.75% of the total outstanding share while some 895 stockholders ("the minority") holds the remaining 1.25% ranging from 1-23,199 shares."* In the second paragraph, you speak of a company classified as a public company, it having *"assets of more than 50 million"* and *"more than 200 stockholders holding at least 100 shares"*.

According to you, for more than five (5) years now, you have been sending notices to all the minority stockholders every Annual Stockholders' Meeting but said notices, together with the information sheets and copies of the annual report, have been returned to you for the following reasons: a) *moved out/transferred*; b) *unclaimed*; c) *deceased*; and d) *unknown at the given address.*

You likewise state that you plan to buy out the shares of the minority stockholders but that you can no longer reach them. While you have, for several times, notified these minority stockholders by mail and thru newspaper publication that you are making a tender offer of shares, you have not been successful.

You thus inquire if you can legally acquire the shares of the remaining 1.25% minority stockholders thru notice by publication in a newspaper of general circulation, and deposit the amount due them by constituting a trust fund with a bank which would handle the payment.

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At the outset, we need to point out that it is not sufficiently clear from your letter whether the company referred to in the first paragraph as owning 98.75% of the total outstanding shares is one and the same as, or is distinct and separate from, the company mentioned in the second paragraph as being a public company.

Upon verification, it would appear that the public company is your corporation, *Sime Darby Pilipinas, Inc.* ("Sime Darby"), while the company owning such majority of its shares is *SD Far East (1991) Ltd.* ("SD Far East"), a Malaysian national.[1] It is unclear which between Sime Darby and SD Far East is actually intending to buy out the shares.

At any rate, whether it be Sime Darby or SD Far East, we answer your queries in the negative.

A contract is a meeting of minds between two (2) persons whereby one binds himself, with respect to the other, to give something or to render some service.[2] That there be *"meeting of minds"* indicates that one of the essential elements of a contract is consent, without which there would be no contract at all. For example, a contract of sale is consensual and is perfected at the moment when there is a meeting of minds upon the thing which is the object of the contract and upon the price.[3]

While you admitted having notified the minority stockholders by mail and through publication, you likewise conceded that the same had not been successful. By this it can be reasonably inferred that you still have not heard from any of the minority stockholders. Thus, there can hardly be meeting of the minds.

That your case may fall under the rules on tender offer[4] would not materially change the situation. Under the tender offer rules, if the security holder finds the terms of the tender offer reasonable, he then accepts the same by tendering his securities for them to be accepted for payment, subject to an option to withdraw within a given time frame.[5] In short, while you may have complied with the publication requirement, there must still be a positive act on the part of the security holder to effect an actual sale of the securities.

Further, for shares whose owners cannot be located, a trust relation is impliedly created between the corporation and the unknown stockholders. Such shares may be entered in the corporate book and shall stand in the name of the corporation as *"trustee"* or said holder maybe described as *"trustee"* in the certificate. However, it is an elementary rule that a trustee should not profit out of the handling of the trust estate,

[1] 2007 General Information Sheet of Sime Darby.
[2] Article 1305, New Civil Code.
[3] Article 1475, New Civil Code.
[4] *Tender Offer* means a publicly announced intention by a person acting alone or in concert with other persons to acquire equity securities of a public company as defined in SRC Rule 3. *Issuer Tender Offer* means a publicly announced intention by an issuer to reacquire any of its own class of equity securities, or by an affiliate of such issuer to acquire such securities. (paragraph 1, SRC Rule 19).
[5] Paragraph 9 in relation to paragraphs 7 and 4, SRC Rule 19).

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e.g. the trustee should not himself buy the trust estate. This springs from the fiduciary duty of the trustee of protecting the interest of the beneficiary and not to permit his personal interest to conflict with his duty in this respect.[6]

Thus, you should exhaust all available means in ascertaining the whereabouts of these stockholders, either through publication and/or sending of notices to their next of kin, if known. Should the search prove to be futile, it is still the fiduciary obligation of the corporation to continuously hold the shares in trust for the owners thereof, unless otherwise escheated in accordance with law.[7]

This opinion is based solely on the facts disclosed in the letter and relevant solely to the particular issues raised therein. It shall likewise be understood that the foregoing shall not be used in the nature of a standing rule binding upon the Commission in other cases.[8]

Please be guided accordingly.

VERNETTE G. UMALI-PACO
General Counsel

[6] Letter-Opinion dated 1 December 1988, addressed to Mr. Jose Borromeo, Jr.; Opinion of 10 September 1982 addressed to Candido Dizon of Planters Foundation, Inc.
[7] Ibid.
[8] Paragraph 7, SEC Memorandum Circular No. 15, Series of 2003.

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