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

In the matter of:
KLIKMART SHOPPING CLUB CORP. and
KLIKMART DRAGON, INC.
(also known as "KLIKMART REWARDS")

SEC CDO Case No. 09-15-023

ENFORCEMENT AND INVESTOR PROTECTION DEPARTMENT,
Movant.
x---x

CEASE AND DESIST ORDER

This resolves the *Motion for Issuance of Cease and Desist Order*[1] filed on 11 September 2015, by the Enforcement and Investor Protection Department (**EIPD**) enjoining KLIKMART SHOPPING CLUB CORP. ("**Klikmart Shopping**") and KLIKMART DRAGON, INC. ("**Klikmart Dragon**"), also known as "KLIKMART REWARDS" and their interlocking directors and officers, representatives, salesmen, agents and any and all persons, conduit, entities and subsidiaries claiming and acting for and in their behalf, to cease and desist from engaging in activities of selling and/or offering for sale securities in the form of investment contracts until the requisite registration statement is duly filed with and approved by the Commission and the corresponding license to offer/sell securities is issued.

Klikmart Shopping is a stock corporation registered with the Commission on 31 March 2015 with Company Registration No. CS201506576[2]. Its principal office address is at Unit 1B, Forab Building, Kamuning Road, Brgy. Kamuning, Quezon City[3]. Its primary purpose is:

> "To engage in the business of marketing and distribution of goods, such as but not limited to soap and perfumes, wares and merchandise of every kind and description in wholesale and retail basis.[4]"

Klikmart Shopping's Authorized Capital Stock is One Hundred Thousand Pesos (Php 100,000.00) divided into One Hundred Thousand (100,000) shares with

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[1] Dated 10 September 2015.
[2] Paragraph 2 and Annex "D" of the Motion,.
[3] Ibid.
[4] Ibid.

par value of One Peso (Php1.00) per share[5]. Its board of directors and officers, as shown in its Articles of Incorporation (AOI), are:

Name	Nationality	TIN No.	Address
Dennis A. Occidental	Filipino	219-657-430	A. Mabini St. Int. Pob. 2 Sta. Cruz, Laguna
Luzvimindo P. Cabaluna	Filipino	459-760-595	P1 Lot 18 Ipil-ipil, Brgy. Tunasan, Muntinlupa
Mary Louiza M. Amacio	Filipino	255-251-190	Lot 18 Ipil-ipil, Brgy. Tunasan, Muntinlupa
Devon T. Garganera	Filipino	459-760-465	UII Pearl Rd. Balibago Complex, Brgy. Balibago Sta. Rosa City, Laguna
Athos C. Garganera	Filipino	119-229-902	UII Pearl Rd. Balibago Complex, Brgy. Balibago Sta. Rosa City, Laguna
Romel L. Juaton	Filipino	239-828-214	UII Pearl Rd. Balibago Complex, Brgy. Balibago Sta. Rosa City, Laguna
Rowen G. Cabaluna	Filipino	434-272-011	P1 B1 L21 II Giardino, Brgy. Buenavista I, General Trias, Cavite

On the other hand, Klikmart Dragon is a stock corporation registered with the Commission on 05 February 2015 with Company Registration No. CS201502022[6]. Its principal office address is at Unit II, Pearl Road, Balibago Complex, Brgy. Balibago, Sta. Rosa, Laguna[7]. Its primary purpose is:

> "To engage in, conduct and carry on the business of buying, selling, distributing, marketing at retail and wholesale insofar as may be permitted by law, all kinds of goods, wares and merchandise of every kind and description; to enter into all kinds of contracts for the export, import, purchase, acquisition, sale at manufacturer's representative, merchandise broker, indentor, commission merchant, factors or agents upon consignment of all kinds of goods, equipments, wares, merchandise or products whether natural or artificial <u>without acting as stock broker or dealer in securities, government securities eligible dealer (GSED), investment house, transfer agent, commodity/financial futures exchange/broker/merchant, financing company, and time shares/club shares/membership certificate issuers or selling agents thereof.</u>[8]"

[5] Seventh paragraph, Klikmart Shopping's AOI, Annex D of the Motion.
[6] Paragraph 1 of the Motion.
[7] Klikmart Dragon's Articles of Incorporation, Annex "B" of the Motion.
[8] Ibid.

Klikmart Dragon's Authorized Capital Stock is Five Hundred Thousand Pesos (Php 500,000.00) divided into Five Thousand (5,000) shares with par value of One Hundred Pesos (Php100.00) per share[9]. Its incorporators, as shown in its AOI, are:

Name	Nationality	TIN No.	Address
Dennis A. Occidental	Filipino	219-657-430	B. Mabini St. Int. Pob. 2 Sta. Cruz, Laguna
Luzvimindo P. Cabaluna	Filipino	459-760-595	P1 Lot 18 Ipil-ipil, Brgy. Tunasan, Muntinlupa
Mary Louiza M. Amacio	Filipino	255-251-190	P1 B1 L21 II Giardino, Brgy. Buenavista I, General Trias, Cavite
Devon T. Garganera	Filipino	459-760-465	UII Pearl Rd. Balibago Complex, Brgy. Balibago Sta. Rosa City, Laguna
Athos C. Garganera	Filipino	119-229-902	UII Pearl Rd. Balibago Complex, Brgy. Balibago Sta. Rosa City, Laguna
Romel L. Juaton	Filipino	239-828-214	UII Pearl Rd. Balibago Complex, Brgy. Balibago Sta. Rosa City, Laguna
Rowen G. Cabaluna	Filipino	434-272-011	P1 B1 L21 II Giardino, Brgy. Buenavista I, General Trias, Cavite

<u>Klikmart Rewards/ Klikmart Shopping</u>

EIPD has been receiving electronic mails (e-mails) from the public inquiring on the legality of the investment scheme carried out by Klikmart Rewards. In one of the inquiries, the email-sender[10] reported that one of her co-workers is recruiting investors to invest in "Klikmart Rewards" with an office address at G/F Unit 1-B Forab Building, Kamuning Road, Quezon City. As reported, Klikmark Rewards promises a weekly pay-out of almost thirty percent (30%) of invested capital without selling any products[11]. In another inquiry, the email-sender asked if Klikmart Rewards company is a legitimate corporation. The email-sender reported that the said company has a website (www.Klikmartrewards.com) and its president is a certain Romel Jualaton[12].

This prompted EIPD to conduct a verification and investigation as to the operations of "Klikmart Rewards". On 25 June 2015, an EIPD team of investigators

[9] Article VII of Klikmart Dragon's Articles of Incorporation, Annex B of the Motion.
[10] Email-sender requested that her identity be kept confidential.
[11] Annex "E" of the Motion.
[12] Annex "F" of the Motion.

(EIPD Team) conducted a surveillance and ocular inspection at the office of Klikmart Rewards located at Unit 1B Forab Building, Kamuning Road, Brgy. Kamuning, Quezon City. The purpose of the surveillance is to ascertain the existence of the corporation and to verify its business operation. The EIPD team reported that when they arrived at the designated place there were around nineteen (19) individuals inside the place. They noticed that there were no groceries or products that were sold to the public. Instead, there was a counter area where the staff of the corporation were positioned to transact with the investors. Thus, the EIPD team decided to elicit information from an investor about Klikmart Rewards's investment schemes, to wit:

> "Accordingly, the team learned some of the investment schemes of the corporation, and how there schemes were carried out. As per discussion with the investor, the corporation used the following programs:
>
> 1. Membership Reward Program – for every Php1,500.00, the investor will earn Php500.00 after twenty-two (22) days. The maximum investment is Php15,000.00 daily. The investor has the option to withdraw his investment plus interest or roll-over his money;
> 2. Click and Win Bonus – an "Online Program" where the investor gets the chance to win prices by clicking an icon. The nitty-gritty of this program was not fully explained to the team;
> 3. Direct Referral - the investor will get Php50.00 for every direct referral who will invest a minimum of Php1,500.00;
> 4. Unilevel Bonus 20/20 – this program was no longer explained to the team; and
> 5. Royalty Bonus – this program was likewise not discussed to the team.
>
> After explaining the program, the investor told the team that he borrowed the money which he initially invested. He further stated that at first he tried to invest Php1,500.00. Fortunately, he was able to get his investment plus interest. Consequently, he invested Php9,000.00 which will mature the following day.[13]"

Records show that Klikmart Rewards' business address is similar to a corporation registered with the Commission which is Klikmart Shopping. Thus, EIPD requested for a Certified True Copy (CTC) of Klikmart Shopping's business permit from the Quezon City Business Permits and License Office (QC BPLO). QC BPLO furnished EIPD with Klikmart Shopping's CTC business permit with no. 15-005844 issued on 14 May 2015[14].

On 16 July 2015, the EIPD team conducted another surveillance and ocular inspection at the office of Klikmart Shopping located at Unit 2 Balibago Commercial Complex, Pearl Road Balibago, Sta. Rosa, Laguna[15]. The EIPD team reported that

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[13] Annex "G" of the Motion.

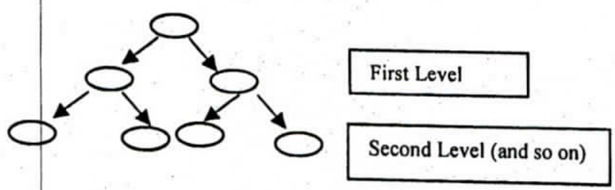
[14] Annex "I" of the Motion.

[15] Klikmart Rewards/Klikmart Shopping's main office as shown in its official website: www.klikmartrewards.com.

when they arrived they observed three (3) persons fixing a signage of KLIKMART REWARDS. When they entered the said place, they noticed that there were products (i.e. medicine, coffee, soap, etc.) on display and intended for sale. There were nine (9) individuals present inside said office. The EIPD team posed as interested investors and they were accommodated by Mr. Athos Garganera, who introduced himself as a Director of Klikmart Shopping. Mr. Garganera explained to the EIPD team the relationship of the following Klikmart entities and their investment schemes, to wit:

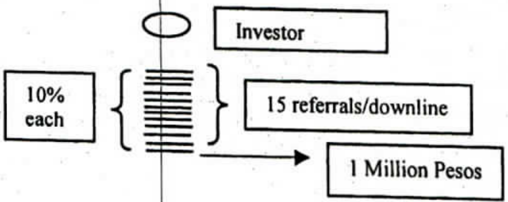
> "Given the foregoing observations, the team had the chance to ask Mr. Garganera the relationship between Klikmart Rewards and Klikmart Shopping Club Corporation. Mr. Garganera told the team that the corporation was registered with SEC under the name Klikmart Shopping Club Corporation. Nonetheless, he clarified that Klikmart Shopping Club Corporation and Klikmart Rewards were one and the same entity.
>
> Afterwards, Mr. Garganera conducted a short discussion with regard to the schemes being carried out by the corporation.
>
> Accordingly, the team learned the investment schemes of the corporation and how these schemes were carried out. As per discussion, the corporation used the following programs:
>
> 1. **Membership Bonus** – the investor will earn 33% interest after a minimum period of twenty-one (21) days to a maximum period of one (1) month. Thus, for a minimum amount of P1,500.00 daily, the investor will earn P500.00. The maximum investment is P15,000.00 daily.
>   The investor has the option to withdraw his investment plus interest or roll-over his money upon maturity.
>   For every P1,500 investment, the investor will be given 2 boxes of coffee (P195.00 per box) and 1 soap (P160.00);
>
> 2. **Raffle Bonus** – an "Online Program" where the investor gets the chance to win prizes by clicking an icon. Under this scheme, an investor can win any of the following:
>   a) Ten (10) Thousand Pesos;
>   b) One Hundred (100) Thousand Pesos;
>   c) One (1) million Pesos;
>   d) House and Lot;
>   e) Car;
>   f) House and Lot plus Car.
>   To date, an investor can only win either a or b. As per Mr. Garganera, 26 investors already won 10 Thousand Pesos and 1 winner of 100 Thousand Pesos;
>
> 3. **Infinite Direct Referral** - the investor will get P50.00 for every direct referral who will invest a minimum of P1,500.00. The corporation imposed no limit as to the number of referrals;

4. **Unilevel Bonus – "POWER OF PISO"** as tagged by Mr. Garganera. Under this scheme, an investor will earn P1.00 for every product (i.e. coffee-P195.00/box, soap-P160.00/piece, rice-P45.00/kilo) that will be purchased by his referrals. In his explanation, Mr. Garganera used a diagram, thus:



When referrals or down line of an investor reach the 20th level, then, he will earn more than 2 million Pesos. However, in order for an investor to claim his money, he must first purchase one product from the corporation; and

5. **Royalty Raffle Bonus** – in others words "BALATO". This scheme depends on Scheme # 2 (Raffle Bonus). Again, Mr. Garganera used a diagram to explain this scheme.



In the above diagram, the corporation has the option to choose how much percentage will be given as a bonus or "balato". If the primary investor loses in the raffle bonus (scheme #2) and the 15th person in his down line wins, then, the 14th person in the down line all the way up to the primary investor will be given a "Balato". Thus, as shown in the above diagram, if the prize won is P1 million and the corporation decides to give 10% royalty bonus, then, all persons above the winner will be given P100,000.00 each.[16]"

After Mr. Garganera's seminar/short lecture, he handed to the EIPD Team a "Sales Registration Form[17]". In the said form, it can be seen that Klikmart Shopping is using another business name which is "KLIKMART DISTRIBUTION AND MARKETING SERVICES" (Klikmart Marketing).

On 21 July 2015, the Commission's Corporate Governance and Finance Department (CGFD), upon request of EIPD, issued a certification that Klikmart Shopping or Klikmart Rewards is not a registered issuer of mutual funds including exchange traded funds, membership certificates, time shares and unlisted securities

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[16] Annex "L" of the Motion.
[17] Annex "N" of the Motion.

under Section 17.2 (a) of the Securities Regulation Code (SRC) and therefore not licensed to offer or issue such securities to the public[18].

On 22 July 2015, the Commission's Markets and Securities Regulation Department (MSRD) issued a certification stating that Klikmart Shopping and/or Klikmart Rewards has not been issued Certificates of Registration or Licenses to act as Broker and/or Dealer in Securities, Dealer in Government Securities, Investment Adviser of an Investment Company, Investment House, Transfer agent and to sale, offer for sale or distribute securities to the public. MSRD further certified that Klikmart Shopping and/or Klikmart Rewards is not, under any circumstance, authorized or licensed to engage in activities and/or solicit investments necessarily connected with or incidental to the pursuit of and carrying on said business or profession which are required to secure certificates of registration/licenses from the Commission.[19]

On 28 July 2015, EIPD received a Memorandum[20] from SEC-Baguio Extension Office reporting to the Commission the alleged investment schemes of Klikmart Shopping and requesting for an evaluation/investigation, to wit:

> "Based on the information sent through electronic mail by Acting Director Rogel Joseph V. Del Rosario of Bangko Sentral ng Pilipinas, La Union Regional Office, Klikmart Shopping Club Corp. is using Klikmart, Klikmart Rewards, Klikmart Distribution and Marketing Services, as business names in its dealings with clients. x x x. Klikmart Distribution and Marketing Services is DTI registered under the name of Romel Lanila Juaton. x x x.
>
> The advertisements of the corporation can be accessed via www.facebook.com/klikmartrewards and https://klikmartrewards.com.
>
> It can be search from the different Facebook accounts that it had opened branches such as the following:
> 1. Cavite Branch (https://facebook.com/pages/Klikmart-Rewards-Dasma-Cavite/992306394126514?fref=ts);
> 2. Kamuning, Quezon City (https://facebook.com/pages/Klikmart-Rewards /1103066769722105?fref=ts);
> 3. Mindoro (https://facebook.com/pages/Klikmart-rewards-mindoro-Cavite/929918333744853?fref=ts);
> 4. La Union which can be accessed at (https://facebook.com/groups/907950365145541/?fref=ts);
> 5. Davao (https://facebook.com/pages/Klikmartdavao?fref=ts).
>
> Going over the Facebook account of Klikmart Kamuning, there is a posting stating that there is **no need to recruit, no selling, 133.33%**

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[18] Annex "J" of the Motion.
[19] Annex "K" of the Motion.
[20] Dated 24 July 2015, Annexes "O" of the Motion.

> **money back guaranteed after 2-4 weeks.** x x x. Announcements of pay outs can also be search through Klikmart Rewards Facebook account, xxx
>
> SECBEO, through Atty. x x x, called Klikmart La Union Branch Office located at 3rd Floor, Paris Building, Rizal Avenue, San Fernando City on July 23, 2015 and acted as poseur-investor. Atty. x x x stated that she was very much interested to invest the amount of Five Hundred Thousand Pesos and stressed to Mr. Jorge A. Natividad, who answered the phone, that she does not want to sell products. She inquired whether or not the principal amount invested will earn interest even without any sales or referrals. Mr. Natividad confirmed that if the she will invest such amount, it will earn interest/profit in the amount of One Hundred and Sixty Six Thousand Pesos (33.20% interest) in just 23 days without any sales or referrals. However, she cannot invest the entire amount using her name alone. She was told to breakdown the amount using five more persons of her choice as investors.
>
> Another call was made on the same day by Atty. x x x, acting again as investor. The same staff, Mr. Natividad, answer the phone. He requested her to visit their office because they are busy giving pay outs to investors. The caller insisted to inquire and was able to get information that the lock up period ranges from 20 to 23 days. The principal amount and the interest will be returned at the same time if demanded by the client after the lock up period. There are no documentary requirements needed to be submitted to become a member. The minimum amount required to invest is Php1,500.00 and the maximum amount is P1,500,000.00. It was also ascertained that Klikmart's Baguio branch office is located at 2nd Floor, Decibar Bldg., Bonifacio Street, Baguio City under the management of Marky Orpilla."

Attached to the said Memorandum are supporting documents such as brochures indicating product packages, sales registrations forms, sales membership agreements and print out of Klikmart's website[21].

On 31 July 2015, the Commission issued an advisory warning the public concerning the investment activities of Klikmart Shopping or Klikmark Rewards[22].

Klikmart Dragon

Similarly, on 14 July 2015, EIPD received an e-mail from the public requesting the Commission to investigate Klikmart Dragon for alleged investment activities.

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[21] Annexes "O-1", "O-2", "O-3", "O-4", "O-5", "O-6", "O-7", "O-8", "O-9", "O-10" of the Motion.

[22] Annex "Q" of the Motion.

On 10 August 2015, the Commission's CGFD, upon EIPD's request, issued a certification that Klikmart Dragon is not a registered issuer of mutual funds including exchange traded funds, membership certificates, time shares and unlisted securities under Section 17.2 (a) of the SRC and therefore not licensed to offer or issue such securities to the public[23].

On 12 August 2015, the Commission's MSRD, upon EIPD's request, issued a certification stating that Klikmart Dragon has not been issued Certificates of Registration or Licenses to act as Broker and/or Dealer in Securities, Dealer in Government Securities, Investment Adviser of an Investment Company, Investment House, Transfer agent and to sale, offer for sale or distribute securities to the public. MSRD further certified that Klikmart Dragon is not, under any circumstance, authorized or licensed to engage in activities and/or solicit investments necessarily connected with or incidental to the pursuit of and carrying on said business or profession which are required to secure certificates of registration/licenses from the Commission.[24]

On 20 August 2015, the EIPD team conducted another surveillance and ocular inspection at the office of Klikmart Dragon located at Unit 2 Balibago Commercial Complex, Pearl Road Balibago, Sta. Rosa, Laguna, which is the same address with Klikmart Shopping. The purpose of the ocular inspection is to ascertain the existence of the corporation and to verify its business operation. The EIPD Team reported that when they arrived at the designated place, they were accommodated by Mr. John Jholeny Lumibao, nephew of Mr. Garganera. Mr. Lumibao explained to the team the following:

> "Accordingly, he mentioned some of the programs of the subject corporation, to wit:
>
> 1. Entry/Re-entry – for every Php1,500.00, the investor will earn Php500.00 after twenty-one (21) days. The maximum investment is Php15,000.00 daily. The investor has the option to withdraw his investment plus interest or roll-over his money upon maturity. The investor can authorize other person to claim his investment upon maturity should he be unavailable at the time;
> 2. Customer's Finder's Fee – the investor will get Php50.00 for every direct referral who will invest a minimum of Php1,500.00. The corporation imposed no limit as to the number of referrals; and
> 3. Cashback – this program was no longer explained to the team;
>
> As can be seen from the white board used by the subject corporation in its seminar, the schemes/programs of the subject corporation were written in this manner:
>
> Pay In – Entry/Re-entry

[23] Annex "R" of the Motion.
[24] Annex "S" of the Motion.

> Pay Out – Rewards
> Direct Referral – Customer Finder's Fee (CFF)
> Unilevel - Cashback
>
> Subsequent to his discussion, the team mentioned that they previously attended a seminar conducted by Mr. Garganera. Likewise, the team told Mr. Lumibao that during the seminar, Mr. Garganera stated that the subject corporation was registered with SEC under the name "Klikmart Shopping Club Corporation".
>
> In response, Mr. Lumibao told the team that the company has been carrying the name "Klikmart International Company" and the name "Klikmart Shopping Club Corporation" was just part of the former.
>
> The team then asked Mr. Lumibao if "Klikart Dragon Corp." was also part of "Klikmart International Company". Mr. Lumibao responded in the negative and told the team that he was not familiar with the company. He added that "Klikmart Dragon, Inc." might have been registered by one of the groups of "Klikmart International Company".
>
> Before the discussion was concluded, the team bought "SALES REGISTRATION FORM" from the subject corporation. Markedly, the name indicated in the said form is "Klikmart Shopping Club Corp." with office address at Unit 2-C G/F Forab Bldg., 121 Kamuning Road, Kamuning Quezon City. x x x"

The EIPD team was able to take photographs of the subject corporation's office and personnel. The team was also given sales registration forms of Klikmart Shopping Club Corp. with office address at Unit 2-C G/F Forab Building, 121 Kamuning Road, Quezon City.

Hence, this *Motion*.

Before we resolve the motion on the merits, it is necessary first to delve into the connection among Klikmart Shopping Club Corp., Klikmart Dragon Inc., Klikmart Rewards and Klikmart Distribution Marketing Services (collectively "**Klikmart**").

EIPD's investigation show the connection between the above-stated entities, to wit:

I. Klikmart Shopping vis-à-vis Klikmart Rewards
   - The address, G/F Unit 1-B Forab Building, Kamuning Road, Quezon City, reported by one of the email-senders[25] is the same address stated in Klikmart Shopping's AOI.

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[25] Notes 10, 11, 12, supra.

- Mr. Athos Garganera, Director of Klikmart Shopping, informed the team that Klikmart Shopping and Klikmart Rewards are one and the same entity[26];
- Mr. Athos Garganera's business card[27] indicating the company's website as, www.Klikmartrewards.com, shows that Klikmart Shopping and Klikmart Rewards are one and the same;
- Mr. John Jholeny Lumibao, nephew of Mr. Garganera, informed the team that Klikmart Shopping is part of the Klikmart group of companies.

II. Klikmart Dragon vis-à-vis Klikmart Rewards

- The address, Unit II, Pearl Road, Balibago Complex, Brgy. Balibago, Sta. Rosa, Laguna, provided in Klikmart Rewards's website as its main office is the same principal address stated in Klikmart Dragon's AOI.
- Mr. John Jholeny Lumibao, nephew of Mr. Garganera, informed the team that Klikmart Dragon is part of the Klikmart group of companies.

III. Klikmart Shopping vis-à-vis Klikmart Dragon

- Both corporations have exactly the same incorporators and officers;
- Both corporations is using the business name "Klikmart Rewards";
- Mr. Athos Garganera's business card indicates that Klikmart Shopping business address, Unit II, Pearl Road, Balibago Complex, Brgy. Balibago, Sta. Rosa, Laguna, is the same principal address indicated in Klikmart Dragon's AOI.

IV. Klikmart Shopping vis-à-vis Klikmart Marketing

- The Sales Registration Form[28] given to the EIPD Team by Mr. Garganera, director of Klikmart Shopping, shows the name of Klikmart Marketing and the website of Klikmart Rewards.

V. Klikmart Dragon vis-à-vis Klikmart Marketing

- In the Sales Registration Form given to the EIPD Team, it is indicated therein Klikmart Marketing' address, Unit II, Pearl Road, Balibago Complex, Brgy. Balibago, Sta. Rosa, Laguna, which is the same as Klikmart Dragon's principal address as stated in the latter's AOI.

Based on the above-discussed similarities, it can be seen that the four (4) Klikmart entities are closely interconnected. Based on the presented evidence, these Klikmart entities are controlled and operated by the same persons.

The foregoing considered, we now resolve the case on the merits based on the allegations contained in the petition and as the evidence presented.

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[26] Note 16, supra.
[27] Annex M of the Motion.
[28] Annex N of the Motion.

We find merit in the motion.

EIPD's motion, as supported by substantial evidence show that Klikmart is selling or offering for sale securities to the public in the form of investment contracts without the necessary license from the Commission.

Securities are "shares, participation or interests in a corporation or in a commercial enterprise or profit-making venture and evidenced by a certificate, contract, instrument, whether written or electronic in character"[29] and includes an investment contract.[30]

Section 8.1 of the SRC provides that securities shall not be sold or offered for sale or distribution within the Philippines, without a registration statement duly filed with and approved by the Commission. In connection therewith, Section 12.1 of the SRC states that all securities required to be registered under Subsection 8.1 shall be registered through the filing by the issuer in the main office of the Commission, of a sworn registration statement with respect to such securities, in such form and containing such information and documents as the Commission shall prescribe.

An "investment contract" has been defined as follows:

> "G. An *investment contract* means a contract, transaction or scheme (collectively 'contract') whereby a person invests his money in a common enterprise and is led to expect profits primarily from the efforts of others.
>
> 1. An investment is presumed to exist whenever a person seeks to use the money or property of others on the promise of profits.
>
> 2. A *common enterprise* is deemed created when two (2) or more investors 'pool' their resources – creating a common enterprise, even if the promoter receives nothing more than a broker's commission."[31]

The concept of an investment contract in the Philippines is of American origin. It traces its roots from the US Supreme Court case *Securities Exchange Commission v. W.J. Howey Co.*[32] where the Court stated that an investment contract is a transaction, contract, or scheme whereby a person (1) makes an investment of money, (2) in a common enterprise, (3) with the expectation of profits, (4) to be derived solely from the efforts of others.

In a subsequent U.S. Supreme Court case, it was held that the element that profits must come "solely" from the efforts of others should be liberally construed because a literal reading of the requirement "solely" would lead to unrealistic results.

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[29] Section 3.1., Securities Regulation Code (SRC).
[30] Section 3.1.(b), *Id.*
[31] SRC Rule 3(1)(G), Amended Implementing Rules and Regulations (IRR) of the SRC.
[32] 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244, 163 A.L.R. 1043 (1946).

It reasoned out that its flexible reading is in accord with the statutory policy of affording broad protection to the public. Because of this, it is no longer necessary that the expected profit accrue solely from the efforts of others. [33]

The concept of an investment contract has since been transported in the Philippines. Thus, for example, in *Power Homes Unlimited Corporation v. Securities and Exchange Commission*[34], the Supreme Court stated that an investment contract in our jurisdiction, to be a security subject to regulation by the Commission, must be proved to be **(1) an investment of money; (2) in a common enterprise; (3) with expectation of profits, (4) primarily from efforts of others**. Under this definition, whenever an investor relinquishes control over his or her funds and submits their control to another for the purpose of deriving profits from them, he or she is in fact investing in a security.[35]

As to the first requisite, an investment of money occurs when an investor commits money to an enterprise or venture in a manner that subjects himself to financial loss.[36] In the instant case, Klikmart requires its investors to be a member by paying a minimum amount of One Thousand Five Hundred (Php 1,500.00) up to a maximum amount of Fifteen Thousand Pesos (Php 15,000.00). In return, the paying investor receives two (2) boxes of coffee and one (1) soap for every investment of Php 1,500.00. The amount paid for these products are far from their fair market value. Evidently, it can be seen that the investor commits his/her money to Klikmart not for the purpose of retailing or personally using these products but more on the expectation of profits or gain (33% of investment) for a period of Twenty-one (21) days to one (1) month. Thus, the first element is present.

As to the second requisite, there is a common enterprise. To reiterate, a common enterprise is deemed created when two (2) or more investors "pool" their resources. Several tests have evolved to determine what constitutes "common enterprise".[37] One of these tests is the horizontal commonality approach. Under this test, the determination of whether a transaction satisfies the commonality element of the modified Howey test involves an inquiry into whether the said transaction involves the joint participation of more than one investor in (i) the investment of funds or (ii) the sharing of profits.[38] Furthermore, joint participation by investors in the same investment enterprise, achieved by pooling the invested funds for a common purpose, is required in order to satisfy the common enterprise element.[39]

In the instant case, EIPD's findings in the course of its investigation show that investors place at least an amount of Php 1,500.00 to become members of Klikmart,

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[33] *SEC v. Glenn W. Turner Enterprises, Inc*, 474 F. 2d 476, 414 U.S. 821, 94 (1973).
[34] G.R. No. 164182, 26 February 2008.
[35] *Investment Co. Institute v. Camp*, 274 F. Supp. 624 (D. D.C. 1967).
[36] *SEC v. International Mining Exchange, Inc.*, 515 F. Supp. 1062.
[37] *In the Matter of Octopus Network, Inc.*, SEC-PED Case No. 98-2220, 22 May 1998.
[38] Note 26, citing 69 Am Jur 2d citing Stenger v. R.H. Love Galleries, Inc. 741 F2d 144.
[39] Note 26, citing Wasnowic v. Chicago Bd. of Trade 352 F Supp 1066.

to be able to receive profit of Php 500.00 in 21 days and participate in other investment-earning schemes. Moreover, the requisite commonality is evidenced in "Infinite Direct Referral" where additional profit of Php50.00 is dependent on recruiting downline who will, in turn, invest at least Php 1,500.00. Thus, the profits of investors in "Infinite Direct Referral" are directly related to the investment of other recruits/investors. It is through constant recruitment of new members in one downline that income is earned. Additionally, the Sales Registration Forms[40] given to recruits/investors, shows the connection/relationship between the sponsor/upline and recruit/downline which is ultimately managed by Klikmart. Stated otherwise, Klikmart investors pool their monies with the corporation in order to earn profit. Thus, they are investing in a common enterprise. Therefore, the second requisite is present.

As to the third requisite, there must be an expectation of profits. Profits is either through capital appreciation resulting from the development of the initial investment, or participation in earnings resulting from the use of investors' funds. In both cases, investors are "attracted primarily by the prospects of a return on his investment."[41] In the instant case, the paying investor, who becomes a member, is promised that his/her investment will earn at least Thirty-three percent (33%) after a minimum period of twenty-one (21) days to a maximum period of one (1) month. For example, for a minimum amount of Php 1,500.00, the investor will earn Php 500.00 within twenty one (21) days to one (1) month. Aside from that, the paying investor will have a chance to earn more from his/her investment through the four (4) other earning schemes such as Raffle Bonus, Infinite Direct Referral, Unilevel Bonus and Royalty Bonus. Ultimately, the investor expects to earn profits from the amounts invested with Klikmart. Thus, the third element is present.

As to the fourth requisite, there must be the expectation of profits primarily from the efforts of others. In *Turner*[42], the US Supreme Court adopted a more realistic test, whether the efforts made by those other than the investors are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise. In the instant case, it can be readily seen that Klikmart solicit investments from its members. It requires its investors to pay Php1,500.00 to Php15,000.00 with a promise of interest/profit after a certain period of time without any further effort or obligation from its investors (Membership Bonus). Also, its investors may also earn by recruiting other investors to be a member of Klikmart (Infinite Direct Referral). Additionally, its investors may also earn for every product purchased by his/her referral (Unilevel Bonus). And finally, its investors may also earn when his/her referrals win the Raffle Bonus (Royalty Raffle Bonus). In these earning schemes, it can be clearly seen that the investor earns, without significant effort or obligation. Klikmart is the one who conceptualized, developed, maintained and promoted these earning schemes, hence the investors efforts, particularly in

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[40] Annex "E" of the Motion.

[41] *Power Homes Unlimited Corporation v. Securities and Exchange Commission.*

[42] Note 33, Supra.

recruiting, are merely minimal or routine. Thus, the investor earns primarily from the efforts of others. Therefore, the fourth element is present.

Finding all the elements of an investment contract present, Klikmart should be considered as to be engaged in selling and/or offering for sale of investment contracts which is considered as securities as provided under the SRC.

In *Power Homes Unlimited vs. Securities and Exchange Commission*[43], the Supreme Court ruled that:

> "As an **investment contract that is security under R.A. No. 8799, it must be registered with** public respondent **SEC**, otherwise the SEC cannot protect the investing public from fraudulent securities. The strict regulation of securities is founded on the premise that the capital markets depend on the investing public's level of confidence in the system."

As above-cited, since Klikmart is engaged in selling and/or offering for sale securities in the form of investment contract, it should be registered with the Commission.

Furthermore, Rule 3, paragraph 1, sub-paragraph N of the SRC provides that:

> "**Public offering means a random or indiscriminate offering of securities in general to anyone who will buy, whether solicited or unsolicited.** Any solicitation or presentation of securities for sale through any of the following modes shall be presumed to be a public offering:
>
> i. Publication in a newspaper, magazine or printed reading material which is distributed within the Philippines or any part thereof;
> ii. Presentation in any public or commercial place;
> iii. Advertisement or announcement in any radio or television, or any online or e-mail system; or
> iv. Distribution and/or making available flyers, brochures or any offering material in a public or commercial space, or mailing the same to prospective purchasers."

In the instant case, evidence adduced by EIPD show that Klikmart is offering for sale its investment schemes publicly through online advertisements and brochures to potential investors without prior registration.

Relative thereto, Section 64 of the SRC provides that:

> Section 64. Cease and Desist Order. – 64.1. **The Commission**, after proper investigation or verification, ***motu proprio*** or upon verified complaint by any aggrieved party, **may issue a cease and desist order without the necessity of a prior hearing if in its judgment the act or**

[43] Note 34 Supra.

practice, unless restrained, will operate as a fraud on investors or is otherwise likely to cause grave or irreparable injury or prejudice to the investing public.

Thus, there are two essential requirements that must be complied with before a cease and desist order is issued: **First**, a proper investigation or verification was conducted; and **Second**, there must be a finding that the act or practice, unless restrained, will operate as a fraud on investors or is otherwise likely to cause grave or irreparable injury or prejudice to the investing public.[44]

As to the first requirement, EIPD conducted three (3) surveillance and ocular inspections as evidenced by its reports as well as records and documents gathered showing Klikmart Corporations' investment schemes. The certifications of MSRD and CGFD were obtained which indicate that Klikmart is not licensed to sell securities. EIPD was also able to obtain certifications relating to Klikmart from the QC BPLO. It is evident therefore that EIPD properly investigated and studied the nature and operations of Klikmart.

As to the second requirement, based on EIPD's investigation, Klikmart Shopping's capitalization amounts only to Php 500,000.00 while that of Klikmart Dragon is only Php 100,000.00. But these corporations promises investors a potential monthly income from its investment schemes (Unilevel Bonus and Membership Rewards) amounting to Php 2,000,000.00[45]. Obviously, Klikmart's business model and capitalization cannot sustain the promised returns of investment, especially if no new investors will come in. Obviously, pay-outs for investors are financed from investments of new entrants. This is clearly a fraudulent scheme which will likely cause grave or irreparable injury or prejudice to the investing public. Moreover, Klikmart is engaged in the offering and selling of securities in the form of investment contracts without the necessary license from the Commission.

Thus, in the absence of a secondary license, Klikmart should be restrained from offering or selling securities in the form of investment contracts.

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[44] Securities and Exchange Commission vs. Performance Foreign Exchange Corporation, GR No 154131, July 20, 2006.
[45] Klikmart Brochures, Annex O-8 of the Motion.

WHEREFORE, premises considered, **KLIKMART SHOPPING CLUB CORPORATION, KLIKMART DRAGON CORPORATION, KLIKMART REWARDS, KLIKMART DISTRIBUTION AND MARKETING SERVICES**, their partners, officers, directors, agents, representatives, conduits, assigns, AND ANY AND ALL PERSONS CLAIMING AND ACTING FOR AND IN THEIR BEHALF are hereby ordered to **IMMEDIATELY CEASE AND DESIST[46], UNDER PAIN OF CONTEMPT**, from engaging in activities of selling and/or offering for sale securities in the form of investment contracts or any others of the same nature, as discussed in this *Order*, until the requisite registration statement is duly filed with and approved by the Commission and the corresponding to offer/sell is issued.

Furthermore, the subject corporations are directed to cease its internet presence relating to above-stated investment activities. The Commission will institute the appropriate administrative and criminal action against any persons or entities found to act as solicitors, information providers, salesmen, agents, brokers, dealers or the like for and in behalf of the subject corporations.

The **Enforcement and Investor Protection Department** is hereby **DIRECTED** to: 1) serve this *Order* to KLIKMART SHOPPING CLUB CORPORATION, KLIKMART DRAGON CORPORATION, KLIKMART REWARDS, KLIKMART DISTRIBUTION AND MARKETING SERVICES, their President, General Manager, Corporate Secretary, Treasurer, In-House Counsel or partners; 2) post copies of the *Order* at the entrance of the main office and/or branches, if any, of KLIKMART SHOPPING CLUB CORPORATION, KLIKMART DRAGON CORPORATION, KLIKMART REWARDS, KLIKMART DISTRIBUTION AND MARKETING SERVICES.

Let a copy of this *Order* be also posted in the Commission's website; published in a national newspaper of general circulation and furnished to the Company Registration and Monitoring Department, the Corporation Finance Department and the Economic Research and Information Department for their information and appropriate action.

EIPD is **FURTHER DIRECTED** to submit a formal compliance report, by way of a pleading, to the Commission *En Banc* WITHIN FIVE (5) DAYS from receipt of this *Cease and Desist Order.*

In accordance with the provisions of Sec. 64.3[47] of SRC and Sec. 10-3 of the 2006 Rules of Procedure of the Commission, the parties subject of this *Cease and*

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[46] Section 64.1, SRC, The Commission, after proper investigation or verification, *motu propio*, or upon verified complaint by any aggrieved party, may issue a cease and desist order without the necessity of a prior hearing if in its judgment the act or practice, unless restrained, will operate as fraud on investors or is otherwise likely to cause grave or irreparable injury or prejudice to the investing public.

[47] SRC, Section 64.3. Any person against whom a cease and desist order was issued may, within five (5) days from receipt of the order, file a formal request for a lifting thereof. Said request shall be set for hearing by the Commission not later than fifteen (15) days from its filing and the resolution thereof shall be made not later than ten (10) days from the

Desist Order may file a request for the lifting thereof within five (5) days from receipt hereof.

FAIL NOT UNDER PENALTY OF LAW.

SO ORDERED.

Mandaluyong City, Philippines; 16 October 2015.

TERESITA J. HERBOSA
Chairperson

ANTONIETA F. IBE
Commissioner

MANUEL HUBERTO B. GAITE
Commissioner

EPHYRO LUIS B. AMATONG*
Commissioner

BLAS JAMES G. VITERBO*
Commissioner

* On Official Business

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termination of the hearing. If the Commission fails to resolve the request within the time herein prescribed, the cease and desist order shall automatically be lifted.