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

In the Matter of:

CJH DEVELOPMENT CORPORATION AND CJH SUITES CORPORATION,

SEC-CDO Case No. 05-12-006

ENFORCEMENT AND PROSECUTION DEPARTMENT

Petitioner.

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ORDER

Pending consideration by the Commission is a *Motion for Issuance of a Cease and Desist Order* (CDO) dated 14 May 2012 by the Enforcement and Prosecution Department (EPD) of this Commission against **CJH DEVELOPMENT CORPORATION** and **CJH SUITES CORPORATION** (hereinafter **CJHD** and **CJHS** respectively).

Respondent **CJHD** is a corporation registered with the SEC on 23 September 1996[1] under SEC Registration No. A199606631[2] with its primary purpose stated in its Articles of Incorporation[3] as follows:

> "To acquire by purchase, lease, donation or otherwise, and/or to own, use, improve, subdivide, manage, sell, mortgage, exchange, lease, engage in high-rise development and construction and hold for investment or otherwise, and otherwise deal in or dispose of real estate of all kinds, classes, description and purpose, and/or any improvements thereon or any interest and right therein, whether as principal agent, or broker, and/or to manage, operate, equip, furnish, alter and otherwise deal in, or dispose of buildings, houses, apartments and other structures and immovable of whatever kind, class, description or purpose, together with their appurtenances whether as principal, agent or broker."[4]

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[1] Motion For Issuance of Cease and Desist Order, p. 1 and Annex "B".
[2] *Id.,* Annex "A".
[3] *Id.,* Annex "A".
[4] *Id.,* Annex "A".

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On the other hand, Respondent **CJHS** was incorporated on 16 December 2002[5] under SEC Registration No. CS200262095[6] and is a **wholly-owned subsidiary of CJHD** with its primary purpose as stated in its Articles of Incorporation[7] as follows:

> "To acquire, own, build, construct, maintain, operation and/or manage hotels, inns, apartments, private clubs, pension houses, convention halls, motor hotels, lodging houses, restaurants, cocktail bars, and any or all other allied business as may be necessary or desirable in connection therewith, and to operate and maintain any and all services and facilities incident thereto, including the operation and maintenance of automobiles, buses and other vehicles of all kinds, motorboats, airplanes, warehouses, barbershops, beauty shops, stores, Turkish and sauna baths, golf courses, tennis courts, swimming pools and other recreational facilities."[8]

According to the factual antecedents as presented by the EPD in its *Motion*, sometime in 1996, the Bases Conversion and Development Authority (BCDA) entered into a Lease Agreement with CJHD for the development of a 247 hectare property located in the John Hay Special Economic Zone (JHSEZ) wherein CJHD shall sub-lease, develop and manage the property for a maximum term of fifty (50) years.

In this connection, CJHD constructed two condotels – "The Manor" and "The Suites" – and subsequently offered the units located in these development sites for sale to the general public.

Because of the eventual difficulty encountered by CJHD in paying the rentals due to BCDA for the property located in the JHSEZ, the parties entered into an agreement for the restructuring of the said obligations. Further, through the said agreement, CJHD transferred, among others, sixteen (16) units from "The Manor" and ten (10) units from "The Suites" to BCDA via dacion en pago with the proviso that these units were subject to a "leaseback" arrangement.

BCDA subsequently discovered that CJHD and its wholly-owned subsidiary, CJHS, have been actively offering the above-mentioned "leaseback" arrangement including a "money-back guarantee" in relation to the units of "The Manor" and "The Suites" to the public. Believing that the "leaseback" and "money-back" arrangements were investment contracts which fell under the definition of a security under Republic Act No. 8799, the "*Securities Regulation Code*" (SRC), BCDA requested, through a letter dated

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[5] *Id.,* Annexes "C" and "D".
[6] *Id.,* Annex "C".
[7] *Id.,* Annex "C".
[8] *Id.,* Annex "C".

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18 November 2011[9] addressed to Chairperson Teresita J. Herbosa, that an investigation into the operations of CJHD and CJHS be conducted by the SEC.

The EPD of the SEC, acting on BCDA's request, sent a team to investigate the operations of the CJHD and CJHS. The said team was able to gather information first hand on the "leaseback" and "money-back" arrangements through their interview with Mr. Frank Delizo, the Director of Sales of CJHD. The team was also able to procure marketing materials utilized by both CJHD and CJHS in their dealings with the public in relation to these specific arrangements as well as samples of their "Contract to Sell", "Leaseback Agreement" and the "Deed of Absolute Sale".[10] These findings were formalized in a Field Investigation Report[11] submitted by the EPD to Chairperson Herbosa on February 1, 2012.

Further, the EPD also invited several buyers of units of "The Manor" and "The Suites" to separate conferences to give information regarding their transactions with CJHD and CJHS. Through these individuals, the EPD was able to compile correspondences[12] and contracts[13] between the said buyers and the respondents further confirming the existence of the "Leaseback Agreements" and the manner in which these were formed and entered into by the parties.[14]

Based on the "leaseback" and/or "moneyback" arrangement, the buyer of the residential unit shall, after payment of the purchase price, surrender the management and possession of the same to either CJHD or CJHS. These corporations shall then consider these units as part of the pooled units in "The Manor" or in "The Suites" offered for billeting. The arrangement shall be for a fifteen (15) year period renewable for another fifteen (15) years or until 2046. Buyers may use their units for thirty days within a year and were exempt from paying the monthly dues and utility fees. Buyers will also be entitled to a proportionate share of seventy percent (70%) of the annual income derived from the hotel's operation of the pooled rooms or a guaranteed eight percent (8%) return on their investment. Lastly, for those buyers who availed of the "money-back" arrangement, they shall receive the purchase price they paid for their units by 2046.

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[9] *Id.,* Annex "E".
[10] *Id.,* par. 14, p. 6-8 and Annexes "F" to "J".
[11] *Id.,* Annex "K".
[12] *Id.,* Annexes "Q", "Q-1", "Q-2", "Q-3", "R", "R-1", "R-2","R-3".
[13] *Id.,* Annexes "N", "S", "T", "T-1", "U", "V".
[14] *Id.,* par. 17-20, p. 8-11.

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Upon request of the EPD, the Corporation Finance Department (CFD), issued a Certificate dated 07 February 2012 to the effect that neither CJHD nor CJHS are registered issuers of securities under Section 8 of the SRC.[15] Also, on 23 April 2012, the CFD issued a Memorandum[16] classifying the "Leaseback Agreements" of CJHD and CJHS as investment contracts and found sufficient evidence to show that these were marketed, offered and sold to the public.

Pursuant to Section 3.1(b) of the SRC, the term "securities" is defined as follows:

> "SEC. 3. *Definition of Terms.* –
>
> 3.1. "*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. It includes:
>
> xxx
>
> (b) Investment contracts, certificates of interest or participation in a profit sharing agreement, certificates of deposit for a future subscription;
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> xxx"

In this connection, an "investment contract" has been defined in Rule 3(G) of the *Implementing Rules and Regulations* of the SRC in this wise:

> "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 contract is presumed to exist whenever a person seeks to use the money or property of others on the promise of profits.
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> 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."

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[15] *Id.*, Annex "M".
[16] *Id.*, Annex "W".

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Also instructive is the case of *"Power Homes Unlimited Corporation v. Securities and Exchange Commission,"*[17] in conjunction with *"Securities and Exchange Commission v. Prosperity.com"*[18] where the Supreme Court held that an investment contract in our jurisdiction 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** in order to be considered as a security properly subject to the registration under and regulation of the SEC.

Applying the above to the circumstances surrounding the operations of CJHD and CJHS in their sale of the residential units, it should be noted that, firstly, it is undeniable that the buyers of units in "The Manor" and "The Suites" entered into Deeds of Absolute Sale with accompanying "Leaseback Agreements" thus proving the existence of a contract, transaction or scheme to satisfy the first element.

Secondly, after payment of the purchase price for the residential units, the buyers shall cede control and management over the same to CJHD and CJHS who will manage the said units together with all the other units under leaseback agreements. This fulfills the element of a common enterprise.

Thirdly, as to the element of expectation of profits, the buyers entered into these "leaseback agreements" with the view of receiving a share in the annual rental income from CJHD's and CJHS' hotel operations or a guaranteed return on their investment.

Lastly, with respect to the fourth element, it is clear that the management and operation of the hotel and the individual residential units shall rest with CJHD and CJHS and the unit buyers shall have no participation in the same. In fact, the latter rely solely on the efforts of the respondents in order to generate any profit.

In connection with the above, it is clear that the agreements entered into by and between CJHD or CJHS and the buyers of residential units in "The Manor" and "The Suites" are investment contracts and, are, therefore, securities required to be registered with SEC.

From the foregoing, there is ample evidence to show that CJHD and CJHS are engaged in the sale of securities without proper registration. Also, from the investigation performed by the EPD, it is apparent that CJHD and CJHS are, at present,

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[17] G.R. No. 164182, 26 February 2008.
[18] G.R. No. 164197, 25, January 2012.

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still actively marketing and offering the units in their hotels under the "leaseback" and/or "moneyback" arrangement without securing the necessary license for such activity.

The SRC is explicit that securities must be registered with the SEC before being offered or sold to the public in order to afford the latter protection from investing in worthless securities as is provided in Section 8 of the said law.[19]

[The dispositive part follows in the next page]

[19] "Sec. 8 – *Requirements of Registration of Securities.* – 8.1. **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**. x x x" (emphasis ours)

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WHEREFORE, premises considered, there being a *prima facie* evidence that respondents **CJH DEVELOPMENT CORPORATION** and its wholly-owned subsidiary, **CJH SUITES CORPORATION**, are enga ged in the business of selling securities without the proper registration issued by this Commission in violation Section 8 of the SRC, the respondents, their respective officers, directors, representatives, salesmen, agents and any and all persons claiming and acting for and in their behalf, are hereby ordered to immediately **CEASE and DESIST**[20] from further engaging in the business of selling securities until they have complied with the requirements of law and its implementing rules and regulations.

Let copies of this Order be posted at the entrance of the main office and/or branches, if any, of the respondents, published in a newspaper of general circulation and posted in the Commission's internet website.

FAIL NOT UNDER PENALTY OF LAW.

SO ORDERED.

Mandaluyong City, 07 June 2012.

TERESITA J. HERBOSA

Chairperson

MA. JUANITA E. CUETO

Commissioner

RAUL J. PALABRICA

Commissioner

MANUEL HUBERTO B. GAITE

Commissioner

ELADIO M. JALA

Commissioner

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[20] **SRC 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 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.