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

Office of the General Counsel

In the Matter of:

BORACAY TRANS-PACIFIC PROPERTIES, INC. & PARADISYA LAND, INC.,

SEC CDO CASE NO. 07-14-013

ENFORCEMENT & INVESTOR PROTECTION DEPARTMENT,
Petitioner.

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CEASE AND DESIST ORDER

For consideration of the Commission En Banc is the *Motion for Issuance of Cease and Desist Order*, dated July 11, 2014, filed by the Enforcement and Investor Protection Department (EIPD) of this Commission on July 25, 2014, enjoining the Respondents, Boracay Trans-Pacific Properties, Inc. (BTPI) and Paradisya Land, Inc. (PLI), to cease and desist from selling, or otherwise offering for sale securities in the form of investment contracts in violation of Section 8.1 of Republic Act No. 8799, otherwise known as the Securities Regulation Code.

The records show that the Respondent BTPI is a corporation duly registered with the Commission on November 23, 2006, under SEC Registration No. CS200629652, with principal office located at 101-E Ramon Aboitiz Street, Cebu City. Its primary purpose, as shown in its Articles of Incorporation[1], is "Real Estate –buying, developing and selling real estate properties."

On the other hand, Respondent PLI is a corporation duly registered with the Commission on August 19, 2008, under SEC Registration No. CS200830075, with principal office also located at 101-E Ramon Aboitiz Street, Cebu City. Its primary purpose, as shown in its Articles of Incorporation[2], is likewise "Real Estate –buying, developing and selling real estate properties."

The Petitioner alleges in the *Motion* that sometime in 2008, several British, Irish, American and Belgian complainants filed Complaints-Affidavits before it against BTPI for violation of Section 8.1[3] of the Securities Regulation Code (SRC).

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[1] Annex "B", *Motion for Issuance of Cease and Desist Order.*

[2] Annex "B-1", *Note 1 supra.*

[3] Section 8. Requirement 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 Complainants claim[4], in their Complaints-Affidavits, that BTPI, right after its incorporation, started offering for sale to the general public condominium units in Boracay Beach Condo Hotel[5] (BBCH). Its officers and incorporators carried out intensive domestic and international marketing campaigns.

Paul David Richard Winspear, one of the complainants, specifically avers in his Complaint-Affidavit, dated October 3, 2013[6], that BTPI "is engaged in the sale of securities without proper registration[7]", as shown in the Contract-to-Sell[8] (CTS), dated June 17, 2009, to wit:

> "**CONTRACT TO SELL**
>
> KNOW ALL MEN BY THESE PRESENTS:
>
> This CONTRACT TO SELL executed and entered into at London, England, by and between:
>
> TRANSPACIFIC, a subsidiary of TRANS NATIONAL, a corporation duly organized and existing by virtue of the laws of the Republic of the Philippines with office address at 101-E Ramon Aboitiz Street, Cebu City, Philippines represented in this act by Paul Hewitt (UK sales contract), hereinafter referred to as the SELLER:
>
> -and –
>
> **Mr Paul Winspear**
> **Firbank, Canada Hill, East Ogwell, Devon, TQ12 6AF**
>
> Hereinafter referred to as the PURCHASER
>
> W I T N E S S E T H:
>
> **That the SELLER, for and in consideration of the sum of SEVENTY FIVE THOUSAND POUNDS STERLING (£75,000.00)**, and all the terms and conditions agreed upon herein has contracted to **sell to the PURCHASER** (and who in turn has contracted to buy) that certain lot more particularly described as **Lot N 10 Block No A Phase No 1 of Boracay Beach Condo-Hotel,** Boracay located at Station 1, Boracay**,** with the total area of 73square meters, more or less:

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the Commission. Prior to such sale, information on the securities, in such form and with such substance as the Commission may prescribe, shall be made available to each prospective purchaser.

[4] Complaints-Affidavits attached as Annexes "A" to "J" of the *Supplement to the Motion for Issuance of Cease and Desist Order*, dated September 16, 2014.

[5] Now named as "The Palms of Boracay", stated in Note 6 of the Motion, Note 1, supra.

[6] Annex "A", Note 4, supra.

[7] Paragraph 26,

[8] Annex "A", Note 4, supra.

3 The PURCHASER further agrees to pay, in addition to the purchase price and interest/s thereon mentioned in the Paragraph one (1) hereof, the following:

xxx------------xxx--------------xxx

3.c An annual service charge will be made of £250 commencing from the completion date for the upkeep of the grounds, maintenance of the swimming pool and shuttle bus.

Electricity and water will be the responsibility of the unit owner except where the unit is **made available for rent.** Where the unit is made available the **electricity and water charges will be paid from the rental service charge and all other maintenance and utility charges are covered by the 25% rent retained by the SELLER.** There will be no further charges payable by the PURCHASER. The Development Managing Corporation would invoice the owner on monthly basis for utilities that are the responsibility of the unit owner.

19. The **rental agreement** is attached to this contract as **Appendix 1**.

xxx------------xxx--------------xxx

IN WITNESS HEREOF, the PURCHASER has caused his/her/its signature to be affixed to this contract, and the SELLER has caused its duly authorized representative to sign on its behalf, this **June 17, 2009** at Cebu City

For TransPacific **SGD. Lito Cubillas**

Buyer's Name **SGD. Paul Winspear**"[9]

Attached to the CTS between BTPI and Winspear is the Guaranteed Rental Agreement[10] (GRA), dated May 27, 2009, providing how management guarantees to Winspear occupancy of his condominium unit and the returns he will receive for his investment, to wit:

"GUARANTEE RENTAL AGREEMENT
(APPENDIX 1)
Boracay Beach Condo-Hotel, Station One, Boracay, Philippines

Name	**Paul Winspear**
Apartment and block Number	A10
Foreign Address	Firbank, Canada Hill, East Ogwell, Devon, TQ12 6Af

As the owner of the unit, you will advise the managing corporation when your unit(s) will be available for rent. It is up to you the unit owner to decide

[9] Emphasis supplied.
[10] Mentioned in paragraph 19 of the CTS as Appendix "1". Note 4, supra.

how many weeks of the year the unit will be available for rental use or unavailable due to owner use.

xxx-----------xxx-------------xxx

The owner will receive a monthly statement of the rental occupancy. The balance due to the owner will be remitted to the agreed bank account on a monthly basis.

xxx-----------xxx-------------xxx

Rental Market Returns:

The units will be rented out at between US$60 and US$80 per unit per night depending on the size of the unit. We will also be able to get a premium for Christmas Easter Etc.

Trans Pacific Corporation therefore guarantees <u>65% rental occupancy for all condominiums within Boracay Island Condo-Hotel for the life of the investment.</u>

If we achieve a greater premium or greater occupancy then the returns will be passed on pro-rata (this will also be shown in monthly statement).

<u>The management corporation will retain 25% of the rental payment received to cover administration, water and electricity charges</u>.

By Owner	**On behalf of TransPacific**
SGD. Paul Winspear Date 27 May 2007" [11]	**SGD. Lito To Cubillas**

BTPI, in its letter to Winspear dated March 21, 2011, acknowledged receipt of the amount of £12,880.42 as payment for the latter's unit in BBCH as of March 16, 2011. Subsequently, on March 29, 2011, BTPI acknowledged that Winspear already paid the amount of £27,377.59 as of March 29, 2011 for the latter's unit.

From March 2011 to June 2013 BTPI sent Statements of Account[12] (SOA) to Winspear reporting the latter's Net Rental Income from his unit in BBCH, and giving the latter one year rental return amounting to US $ 10,665.00[13] or £6,616.99. The SOAs also state the amount of utilities and other charges that were deducted from the rental revenue.

In BTPI's letter to Louise Henwood[14], another Complainant, dated October 1, 2012[15], it similarly confirmed that it entered into GRA with unit owners of BBCH and it started paying out unit owners rental income, viz:

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[11] Emphasis supplied.
[12] Annexes "I" to "I-10", Note 1, supra.
[13] Paragraph 13, Note 1, supra.
[14] Paragraph 6, Note 4, supra.
[15] Annex "E" of the Complaint-Affidavit of Paul Winspear and the other Complainants, Note 7, supra.

"Third, the Management has been exerting all its efforts to get The Palms of Boracay through its birth pains. **We have entered into contracts with unit owners** at a time when the economy was still very strong and have provided for guarantees that have proved to be very hard on us when the financial crisis hit that decreased the GBP-PHP foreign exchange rate by at least 30%.xxx

Now that the hotel is operational, the actual results of operation reveal that **the guarantee on rates and occupancy we have previously made cannot be realistically complied**. Xxx

In the meantime, **we have started paying out to unit owners on a quarterly basis**, however, instead of the guaranteed amounts of rental income, the pay-outs shall be based on the actual net income from room revenues after deducting direct costs and share in the hotel's operating expenses. It is in this light that we appeal to you to give us a chance to make this setup work and not to resort to any aggressive and very costly litigations. xxx

Sgd. LITO T. CUBILLAS
President
Boracay Transpacific Properties, Inc."[16]

Acting on the complaints, the Petitioner conducted its own investigation and held several conferences with the complainants for the purpose of asking clarificatory questions. During the conferences, the complainants' lawyer appeared on their behalf.

Subsequently and upon the Petitioner's request, the Corporate Governance and Finance Department (CGFD) issued a Certification, dated March 24, 2014 declaring that:

"This is to certify that based on records on file with this Commission, BORACAY TRANS-PACIFIC PROPERTIES, INC. is not a registered issuer pursuant to Section 8 and 12 of the Securities Regulation Code and therefore not licensed to offer or issue securities (mutual funds including exchange traded funds, membership certificates/shares or time shares) to the public."

In the course of its investigation, Petitioner also discovered that BTPI and **PLI** were using the same letter head[17] to acknowledge the receipt of complainants' payments. Moreover, Petitioner ascertained that BTPI and PLI have the same principal address, the same incorporators and identical primary purpose. Also, BTPI is a subscriber of 500 shares of stock of PLI.[18]

This prompted the Petitioner to investigate the business transaction of PLI. Its investigation revealed that PLI has been offering and selling for sale condotel units of Mactan Blue Coral Resort & Spa/Blue Coral Resort & Spa, Mactan Cebu, with high

[16] Emphasis supplied.
[17] Annex "K", Note 4, supra.
[18] Paragarph 19, Note 1, supra.

rental yields. In support of its claim, Petitioner attached as Annex "L" of the *Motion* a copy of PLI's offer and/or advertisement which declares:

> "**Paradisya Land is a condominium-hotel development company** that focuses on beachfront properties in the Philippines' world famous island locations. To date, we have projects in premier island destinations-Boracay and Mactan, each with first class amenities, the warmth of the Filipino hospitality, **and unique investment opportunities.**
>
> **The business mission of Paradisya Land is – to become a leading provider of holiday/retirement homes** primarily to UK and UK-based Philippine overseas property investors by offering stunning island locations and great investment returns.
>
> xxx------------xxx--------------xxx
>
> THE TWIN TOWER- 8-Storey Condominium to be operated and managed by an International Luxury Hotel Chain.
>
> xxx------------xxx--------------xxx
>
> Prestigious Vacation Home:
>
> - Secondary or holiday home in high-end Mactan
> - **Earns <u>rental pool income</u> when not in use**
> - **Branded international hotel management**
>
> xxx------------xxx--------------xxx
>
> **Return on investment.jpg**
> Download File"[19]

[19] Annex "L", Note 1, supra. The Return on Investment file to be downloaded from the Company's website reveals the following:

"RETURN ON INVESTMENT
(Based on Assumptions)

xxx-----------xxx-----------xxx

III. Computation

Annual Room Rental @ _____ occupancy rate.
No. of Rooms x Room Rate x ____ Days = Gross Revenue

Annual Gross Revenue	-	______________
Less: Operating Expenses	-	______________
Net Profit	-	______________

___% Condotel Owner's Share	______________	
___% Management's Share	______________	
___% Unit Owner's Share	______________	(based on area)"

Petitioner also attached to the *Motion* a print-out of the Asset Property Broker's website advertising[20] and PLI's brochures[21] showing computations on how much an investor/condominium owner earns from his investment and the key investment feature of Blue Coral Mactan, Cebu, viz.:

"BLUE CORAL – SOLD OUT
MACTAN ISLAN – CEBU

Situated on the prestigious eastern side of Mactan Island, Blue Coral Resort and Spa offers visitor the tranquility and beauty of a paradise island combined with the ease and convenience of being located within easy access to Cebu city and Cebu international airport the second largest in Philippines.

Blue Coral Resort & Spa covers approximately 10,000m² with private beach overlooking the crystal clear waters of the Bohol straits and Olango Island in the near distance.

Example 48M² Studio

Example Investment Return based on a 15 year developer finance option

Initial Deposit (40%):	**$46,800.00**
Net Annual Income:	**$21.269.15**
Mortgage Repayment:	$8,601.12
Income after Mortgage:	**$12,668.03**
Annual Return on Investment:	**27.1%**

Example Payment Structure

Purchase Price:	**$117,000**
Reservation Deposit:	$3,500
Deposit:	**40% in 30 days**

Developer Finance: Balance over 10-15 years

Key Investment Feature

- Prices From $83,500
- 60% Non-status Finance Available
- **Guaranteed Rental Yields up to 18.2%**
- 5 Star Beach & Spa Resort

[20] Annex "L-3", Note 1, supra.
[21] Annex "M, Note 1, supra.

- **Guaranteed 80% Occupancy"**[22]

On July 30, 2014, the CGFD issued another Certification that based on the records on file with the Commission, **PLI** is not a registered issuer of securities and is therefore not licensed to offer or sell securities to the public.[23]

We now resolve the Motion.

Sections 3 and 8 of the Securities Regulation Code provide:

> "Section 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-----------xxx-----------xxx
>
> (b) Investment contracts, certificates of interest or participation in a profit sharing agreement, certificates of deposit for a future subscription;
>
> xxx-----------xxx-----------xxx
>
> SEC. 8. Requirement 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. Prior to such sale, information on the securities, in such form and with such substance as the Commission may prescribe, shall be made available to each prospective purchaser."[24]

In this connection, Rule 3 Paragraph 1, subparagraph (G) of the Amended Implementing Rules and Regulation of the SRC (AIRR-SRC) defines an investment contract as:

> "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.
>
> a. An investment contract is **presumed to exist** whenever **a person seeks to use the money of others on the promise of profits**.
>
> b. A common enterprise is deemed created when two 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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[22] Emphasis supplied.
[23] Annex "L", Note 4, supra.
[24] Underlines ours.

The Supreme Court, in *Power Homes Unlimited vs. SEC*[25], held that to be a security subject to regulation of the Commission, 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 the efforts of others.

In a CDO case against *Philippine Landgroup, Inc.*[26] filed by the then Enforcement and Prosecution Department, the Commission had the occasion to rule that:

> "It appears that the business model of PLGI, as supported by the evidence presented, is that a buyer of a unit in Grandview Tower, a project of PLGI, enters into an investment contract, via a Contract to Sell with PLGI, and a Management Agreement with GPMI upon purchase of a unit of Grandview Tower. These documents are contracts which constitute a scheme that takes the nature of an investment contract wherein the vendee invests his money in a common enterprise and is led to expect profits primarily from the efforts of others."

Parenthetically, in *Gabionza vs. Court of Appeals, et al.*[27], the Supreme Court, held that:

> "The term "securities" embodies a flexible rather than static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek to use the money of others on the promise of profits (69 Am Jur 2d, p. 604)."

Applying the above to the circumstances surrounding the business scheme and operations of BTPI and PLI in their sale of the residential units, the Commission ruled that:

1. BORACAY TRANSPACIFIC PROPERTIES, INC.

Substantial evidence on record show that the business model of BTPI is similar to that of the *Philippine Landgroup, Inc.* wherein a buyer of a condominium unit in BBCH, a project of BPTI, enters into an investment contract, via the CTS and a GRA.

The CTA and GRA clearly show that the buyer earns a guaranteed rental return of around US$ 60 per night based on 65% of the rental occupancy, while BTPI, as seller, retains 25% of the rental revenue for the overhead and utilities. BTPI's SOAs and letters to Winspear and Henwood even confirmed not only the terms and conditions of the CTS and GRA but, more importantly, the fact that BTPI is the management corporation of the BBCH. These facts were also admitted by Lito Cubillas in his internet post dated March 16, 2013.

[25] G.R. No. 164182, February 26, 2008.
[26] SEC CDO Case No. 03-12-001, CDO dated July 4, 2013.
[27] G.R. No. 161057, September 12, 2008

In other words, those documents show BTPI's business scheme that takes the nature of an investment contract wherein the buyer invests his money in a common enterprise and is led to expect profits primarily from the efforts of others. Specifically, the elements of an investment contract, as enunciated in *Power Homes*, are present in the scheme being offered by BTPI, thus:

1. An Investment of Money. - Through the purchase of a unit in BBCH, the buyer becomes an investor who enters into a contract with BTPI. The purchase price takes the form of investment of money for which the investor will receive a guaranteed amount of profits which ranges from US$60 to US$ 80 per unit per night depending on the size of his condominium unit.

2. Common Enterprise. - By purchasing a unit, a buyer has the option to enter into a GRA. When the buyer accepted the terms and conditions of the GRA, he shall cede control and management over his condominium unit to BTPI wherein his unit will be pooled together with the units purchased by others. The units pooled will be operated as a hotel enterprise. BTPI manages the hotel enterprise as shown by the Winspear's SOAs and BTPI's letter to Henwood. Effectively, the buyers of the units do not merely invest in a condominium unit. They enter into a common enterprise. The purchase money used to buy a unit is invested in a common enterprise, which is the condotel, BBCH.

3. Expectation of Profits. – The investor expects to derive profit from the management and operation of the pooled units constituting the condotel, described as Guaranteed Rental Return in the CTS.

4. Primarily from the Efforts of Others. - It is clear that the management and operation of the individual condominium units shall rest with BTPI and the unit buyers/investors shall have no participation in the same. In fact, the latter rely solely on the efforts of the BTPI in order to generate any profit. BTPI is the managing corporation. Again, this fact is shown by BTPI's SOAs and letters to Winspear and Henwood.

2. PARADISYA LAND, INC.

PLI, by distributing brochures[28] and placing advertisement[29] in the internet, is engage in the business of offering and selling securities to the general public as defined under Rule 3, Paragraph 1, Subparagraph N[30] of the AIRR-SRC. Otherwise stated, the

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[28] Note 22, supra.

[29] Notes 20 and 21, supra.

[30] **N. Public Offering** means <u>a random or indiscriminate offering of securities in general to anyone</u> who will buy, whether solicited or unsolicited. Any solicitation or presentation of securities for sale through any of the following modes <u>shall be presumed to be a public offering</u>:

documents on record, taken in conjunction with one another and in the absence of evidence to the contrary, is substantial evidence that there is a random or indiscriminate offering of securities in general to anyone who will buy.

As gleaned from Petitioner's allegations and evidence, the investment scheme of PLI is similar to that of BTPI which consists in the following elements:

1. An Investment of Money. – PLI, as developer of Mactan Blue Coral Resort and Spa, offers buyers/investors not only holiday or retirement homes, but also, a **unique investment opportunity**[31] to earn **Guaranteed Rental Yields up to 18.2%**[32] when their condominium units are not in use[33]. Thus, PLI is offering more than condominium units but also the opportunity to contribute money and to share in the profits by leasing their pooled condominium units. The buyers become investors who enter into investment contracts.

2. Common Enterprise. – The condominium units, when not in use, will be pooled together with the units purchased by others. The condominium units pooled will be "**operated and managed by an International Luxury Hotel Chain**". The investors enter into a profit making venture with both PLI and condotel operator.

3. Expectation of Profits. – The buyers enter into this unique investment opportunity with the view of receiving **Guaranteed Rental Yields up to 18.2%** from **an International Luxury Hotel Chain** or a guaranteed return on their investment.

4. Primarily from the Efforts of Others. – This is the apparent in the services being offered by **an International Luxury Hotel Chain** as the managing corporation.

It is clear from the foregoing that the agreements entered into by and between BPTI or PLI and the buyers of residential units in BBCH and Mactan Blue Coral Resort and Spa, respectively, are investment contracts and, are, therefore, securities required to be registered with SEC per Sections 8 and 12 of the SRC, as certified by the CGFD. BTPI and PLI are offering and/or selling unregistered securities to the investing public.

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i. Publication in any 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 in any online or email system; or

iv. Distribution and/or making available flyers, brochures or any offering material in a public or commercial place, or mailing the same to prospective purchasers.

[31] Note 20, supra.

[32] Note 21, supra.

[33] Note 20, supra.

The Commission is duty-bound to protect the interest of the investing public. Thus, it is necessary that a Cease and Desist Order[34] be issued to enjoin BTPI and PLI from further offering and selling unregistered securities to the public. Otherwise, allowing BTPI and PLI to continue its business operation will operate as a fraud on investors or is likely to cause grave or irreparable injury or prejudice to the investing public.

WHEREFORE, premises considered, **BORACAY TRANSPACIFIC PROPERTIES, INC.** and **PARADISYA LAND, INC.** their officers, directors, agents, representatives, assigns, and any and all persons claiming and acting for and in their behalf and under their authority, are hereby ordered to **IMMEDIATELY CEASE AND DESIST, UNDER THE PAIN OF CONTEMPT**, from further offering, soliciting, or otherwise offering or selling unregistered securities to the public, until they have complied with the requirements of the SRC and its AIRR.

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

In accordance with the provisions of Section 64.3 of the SRC and Section 10-3 of the 2006 Rules of Procedure of the Commission, the parties subject of this Cease and Desist Order may file a motion for the lifting thereof within an inextensible period of five (5) days from receipt hereof, otherwise the same shall be made permanent.

FAIL NOT UNDER PENALTY OF LAW.

SO ORDERED.

Mandaluyong City, February 26, 2015.

TERESITA J. HERBOSA
Chairperson

MANUEL HUBERTO B. GAITE
Commissioner

ANTONIETA F. IBE
Commissioner

EPHYRO LUIS B. AMATONG *
Commissioner
*On Official Business.

BLAS JAMES G. VITERBO
Commissioner

[34] **SEC. 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.