In the Matter of:
BORACAY TRANS-PACIFIC PROPERTIES, INC. and PARADISYA LAND, INC.

SEC CDO Case No. 07-14-013

BORACAY TRANS-PACIFIC PROPERTIES, INC. ("BTPI") and PARADISYA LAND, INC.,
Respondents.

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RESOLUTION

This resolves the *Motion to Lift Cease and Desist Order*[1] ("Motion to Lift") filed on 23 December 2015 by the BORACAY TRANS-PACIFIC PROPERTIES, INC. ("BTPI") and PARADISYA LAND, INC. ("PLI") (collectively "Respondents") praying that the Commission lift its *Cease and Desist Order* dated 26 February 2015 ("Assailed CDO"), the dispositive portion reads as follows:

> WHEREFORE, premises considered, BORACAY TRANS-PACIFIC PROPERTIES, INC. and PARADISYA LAND, INC., their officers, directors, agents, representatives, assigns, and all persons claiming and acting for and in their behalf and under their authority are hereby ordered to IMMEDIATELY CEASE AND DESIST, UNDER PAIN OF CONTEMPT, 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.

The facts of the case are as follows:

BTPI is a corporation duly registered with the Commission on 23 November 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, is "Real Estate – buying, developing and selling real estate properties."

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

The Assailed CDO was issued to restrain respondent corporations from offering and selling investment contracts through the *Contract to Sell* and Guaranteed Rental Agreement[2] and the *unique investment opportunity to earn Guaranteed Rental Yields up to 18.2%.*[3]

On 10 December 2015, Respondents received a copy of the Commission's Assailed CDO. Then, on 23 December 2015, they filed a *Motion to Lift* alleging among others, the following:

1. There was a failure to conduct the proper investigation or verification required pursuant to Section 64.1 of the Securities Regulation Code, thus, there is no adequate basis for the issuance of the Assailed CDO;

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[1] Dated 15 December 2015.
[2] In relation to BTPI.
[3] In relation to PLI.

2. Respondents have never been engaged in the sale of securities of any form; and
3. Jurisdiction was never acquired over respondents due to the invalid service of the Assailed CDO.

At the hearing of Respondents' *Motion to Lift*,[4] they reiterated the grounds alleged in their *Motion to Lift*. After the parties' oral arguments, the Commission's Enforcement and Investor Protection Department (EIPD) was given fifteen (15) days to file its *Comment*. Then, Respondents were also given the same period to file their *Reply*.

On 18 March 2016, EIPD filed its *Comment*[5] to Respondents' *Motion to Lift*, arguing, among others:

1. The *Motion to Lift* was filed without authority, being signed by Mr. Lito Cubillas without any authority from the Board of Directors of respondent corporations;
2. The *Motion to Lift* was filed out of time;
3. There was proper service of the Assailed CDO, the same being received by Mrs. Virginia Cubillas, who is the wife of Mr. Feleo Cubillas, who on the other hand is one of the incorporators of the respondent corporations and the brother of Lito Cubillas.
4. Jurisdiction was acquired over the respondents through the respondents' voluntary submission, having filed the *Motion to Lift*;
5. Respondents' allegation as to the failure in conducting the proper investigation and verification is misleading; and
6. Respondents did not present any ground or evidence in the *Motion to Lift* that will merit the lifting of the Assailed CDO.

On 11 April 2016, Respondents filed their *Reply*,[6] to EIPD *Comment*, alleging, among others:

1. Mrs. Cubillas's receipt of the Assailed CDO is not considered as valid service, considering that she is a mere household help;
2. The filing of the *Motion to Lift* cannot be tantamount to respondents' voluntary submission, considering that jurisdiction is assailed in said *Motion*;
3. Mr. Cubillas's filing of the *Motion to Lift* may be made even without a resolution from the Board of Directors; and
4. The filing of the *Motion to Lift* beyond the reglementary period may be permitted to satisfy substantial justice.

Respondents attached to the *Reply* a sample *Homeowner Rental Management Agreement*,[7] to support its claim that respondents do not have participation in what it dubs as "so-called investment contracts."

With the submission of respondents' *Reply* and with no remaining issues to be clarified, the hearing on the *Motion to Lift* is terminated and submitted for resolution.

The issues to be resolved are the following:

1. Whether or not the *Motion to Lift* has been signed and filed by an authorized officer;
2. Whether or not the *Motion to Lift* should be dismissed for being filed out of time;
3. Whether or not jurisdiction was properly acquired over respondents;
4. Whether or not the issuance of the Assailed CDO was proper; and
5. Whether or not respondents have no participation in the rental management agreements.

First Issue:
The Motion to Lift Being Signed and Filed by an Authorized Officer

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[4] Set on 8 March 2016.
[5] Dated 16 March 2016.
[6] Dated 11 April 2016.
[7] Annex "B" of the *Reply*.

With regard to this issue, we answer in the affirmative.

It is observed that indeed, respondents failed to attach a resolution from the Board of Directors authorizing Mr. Lito Cubillas to file the instant *Motion*, which will merit the dismissal of the *Motion*. However, we accept respondents' argument that the position Mr. Lito Cubillas has in the respondent corporations permits him to file the instant *Motion*. In *Cagayan Valley Drug Corporation v. Commissioner of Internal Revenue*,[8] the Court held that:

> In sum, we have held that the following officials or employees of the company can sign the verification and certification without need of a board resolution: (1) the Chairperson of the Board of Directors, (2) the President of a corporation, (3) the General Manager or Acting General Manager, (4) Personnel Officer, and (5) an Employment Specialist in a labor case.
>
> While the above cases do not provide a complete listing of authorized signatories to the verification and certification required by the rules, the determination of the sufficiency of the authority was done on a case to case basis. The rationale applied in the foregoing cases is to justify the authority of corporate officers or representatives of the corporation to sign the verification or certificate against forum shopping, being "in a position to verify the truthfulness and correctness of the allegations in the petition."

In the case at bar, Mr. Lito Cubillas is the Chief Executive Officer/President of respondent corporations.[9] As such, he is in the best position to verify the truthfulness and correctness of the allegations in the instant *Motion*.

Second Issue:
Dismissal of the Motion for Being Filed Out of Time

On the issue of the instant *Motion* being filed outside the reglementary period, the 2006 Rules of Procedure of the Commission is clear that motions for the lifting of Cease and Desist Orders may only be filed within a non-extendible period of five (5) business days from the receipt of the order, thus:

> Sec. 10.3. Lifting of CDO. A party against whom a CDO was issued may, within a non-extendible period of five (5) business days from receipt of the order, file a formal request or motion for lifting thereof with the OGC. x x x

Considering that the *Motion to Lift* was filed outside the five-day period for filing such motion, a dismissal of the *Motion* is already in order. However, in the interest of substantial justice, and in order to fully resolve the *Motion*, we opt to discuss the succeeding issues, which are crucial to this case.

Third Issue:
Jurisdiction Over the Respondents

We find that jurisdiction was properly acquired over the respondents.

Respondents, in asserting that there is no jurisdiction over them, argued that (1) there is improper service of the Assailed CDO, and (2) the filing of the instant *Motion to Lift* is not a voluntary submission on the part of respondents.

Upon review of the records and the pleadings of this case, it is clear that the Assailed CDO was received by Mrs. Virginia Cubillas, the spouse of the driver of Mr. Lito Cubillas.[10] It is in this regard that respondents dispute the proper service of the Assailed CDO and question the acquisition of jurisdiction in the *Motion to Lift*.

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[8] G.R. No. 151413, 13 February 2008.
[9] Based on the General Information Statements of BTPI and PLI filed on 13 February 2015 and 19 September 2014, respectively.
[10] Page 1 of Respondents' *Reply*.

However, records show that on 18 December 2015, the Commission received a letter dated 14 December 2015, in connection with the Assailed CDO, signed by Mr. Lito Cubillas, for and on behalf of respondents, part of which states:

> Considering the gravity of the consequences of the Order and that this affects two Corporations, in the spirit of **DUE PROCESS**, we are appealing to your Office that we be given an extension of **thirty (30) days** to present our side and/or comply with whatever processes that needs to be accomplished in order to resolve this matter. This appeal for an extension is requested in order to afford us enough time to gather our supporting documents, consult with our lawyers, and give appropriate attention to this case. This is not done for any malicious intent to cause unnecessary delay. (underscoring ours)

In *Hongkong and Shanghai Banking Corporation vs. Catalan*,[11] the Court held that:

> It must be noted that HSBANK initially filed a Motion for Extension of Time to File Answer or Motion to Dismiss. HSBANK already invoked the RTCs jurisdiction over it by praying that its motion for extension of time to file answer or a motion to dismiss be granted. The Court has held that the filing of motions seeking affirmative relief, such as, to admit answer, for additional time to file answer, for reconsideration of a default judgment, and to lift order of default with motion for reconsideration, are considered voluntary submission to the jurisdiction of the court. Consequently, HSBANKs expressed reservation in its Answer ad cautelam that it filed the same as a mere precaution against being declared in default, and without prejudice to the Petition for Certiorari and/or Prohibition xxx now pending before the Court of Appeals to assail the jurisdiction of the RTC over it is of no moment. **Having earlier invoked the jurisdiction of the RTC to secure affirmative relief in its motion for additional time to file answer or motion to dismiss, HSBANK, effectively submitted voluntarily to the jurisdiction of the RTC** and is thereby estopped from asserting otherwise, even before this Court. (emphasis ours)

The present circumstances are similar to that of the aforecited case as respondents, in this *Motion to Lift*, questions whether jurisdiction has been properly acquired by the Commission. However, Mr. Lito Cubillas, for and on behalf of the respondents, earlier sought an affirmative relief of extending the time within which to do whatever action may be deemed by respondents as fitting in connection with the Assailed Order. Considering that Mr. Lito Cubillas, as Chief Executive Officer/President of respondent corporations, is permitted to file the necessary pleadings and/or motions on behalf of the respondent corporations even without authorization from the Board of Directors, as discussed earlier, his move binds the respondent corporations. Thus, his request serves as voluntary submission to the jurisdiction of the Commission.

Fourth Issue:
Propriety of the Issuance of the Assailed CDO

Under this issue falls the concern raised by respondents regarding the lack of proper investigation and verification prior to the issuance of the Assailed CDO.

Respondents assert that during the investigations, the EIPD never called any stockholder, officer, or representative of either of respondent corporations to the conferences conducted by the EIPD, nor did the respondent corporations receive any form of communication from the EIPD. According to respondents, they were never afforded the opportunity to address the issues raised against them. Thus, the investigations were done in violations of respondent corporations' right to due process of law.

We do not agree. Section 64.1 of the Securities Regulation Code Provides:

> 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. (emphasis ours)

[11] G.R. No. 159590-91, 18 October 2004.

Additionally, in *Primanila Plans, Inc. vs. Securities and Exchange Commission,*[12] the Supreme Court ruled that:

> The law is clear on the point that a cease and desist order may be issued by the SEC *motu proprio*, it being unnecessary that it results from a verified complaint from an aggrieved party. A prior hearing is also not required whenever the Commission finds it appropriate to issue a cease and desist order that aims to curtail fraud or grave or irreparable injury to investors. There is good reason for this provision, **as any delay in the restraint of acts that yield such results can only generate further injury to the public that the SEC is obliged to protect.**" (emphasis ours)

Finally, it is declared in Section 2 of the SRC, that:

> "Section 2. Declaration of State Policy. – The State shall establish a socially conscious, free market that regulates itself, encourage the widest participation of ownership in enterprises, enhance the democratization of wealth, promote the development of the capital market, protect investors, **ensure full and fair disclosure about securities**, minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market. To achieve these ends, this Securities Regulation Code is hereby enacted." (emphasis ours)

In view of the foregoing provisions of law and pronouncements, it is already established that the participation or involvement of persons or corporations against whom a CDO is issued is not necessary. The right to due process of any respondent in a cease and desist order is not violated, since they are given an opportunity to do so when they seek the lifting of the cease and desist order, during which they may present their factual allegations and arguments.

Moreover, the Assailed CDO was issued after the EIPD gathered sufficient evidence to establish that there is an offering and/or selling of investment contracts, that said investment contracts are not registered, and that respondent corporations do not have a permit or license to sell securities, following the pronouncement of the Supreme Court in the cases of *Primanila vs. SEC,*[13] *SEC vs. Performance Foreign Exchange Corporation,*[14] and *Power Homes Unlimited vs. SEC.*[15]

Thus, the Assailed CDO was properly issued.

Fifth Issue:
Respondent Corporations' Offering and/or Selling of Investment Contracts

Based on the pleadings filed in this case, it has been established that the agreements involved in the sale of condominium units and condotel units by BTPI and PLI, i.e., the sale contract and rental management contract, makes the transaction an investment contract, considering that the transaction satisfies the requisites of investment contracts, as enumerated by the Supreme Court in *Power Homes:*[16]

1. Investment of money
   Through the purchase of a condominium unit, the buyer becomes an investor by entering into a contract with BTPI or PLI, in which the buyer not only gets a condominium or condotel unit, but also the opportunity to earn profits by leasing their condominium or condotel unit.

2. Common enterprise
   The condominium units, when not in use, will be pooled together with the units purchased by others.

3. Expectation of profits

[12] G.R. No. 193791, August 6, 2014.
[13] Ibid.
[14] G.R. No. 154131, 20 July 2006.
[15] G.R. No. 164182, 26 February 2008.
[16] Ibid.

The buyer expects to derive profit from the management and lease of the condominium or condotel units he owns.

4. Primarily from the efforts of others

   It is clear that the buyers will have no participation in the management or operation of the pooled condominium or condotel units, and that the buyers will rely solely on the efforts of the persons managing the pooled condominium or condotel units to generate any profit.

On the part of the respondents, the lone defense presented is that respondents only sell the condominium or condotel units and do not enter into rental management contracts with the buyers of the condominium or condotel units, with the rental management contracts being entered into by a certain PDL Hotel and Resort Management ("PDL"), which, according to respondents, is an entity which has a separate juridical personality from the respondent corporations. Respondents support this argument with a sample of a *Homeowner's Rental Program Management Agreement.*[17]

We do not find the defense of respondents tenable.

First, the document presented by respondents to prove that it is PDL which enters into the rental management contracts with the buyers is unpersuasive, being a mere draft. It does not prove at all that any management contract involving the condominium or condotel units were entered into by PDL and the buyers of the condominium or condotel units. On the other hand, the EIPD has presented a *Guaranteed Rental Agreement*[18] executed by Mr. Paul Winspear and Mr. Lito Cubillas, showing the elements of an investment contract.

Second, records of the Commission do not reflect that PDL is a registered corporation, and that respondents failed to present any proof of PDL's corporate registration with the Commission. Consequently, the allegation of PDL being an entity having separate personality from respondent corporations is without basis. Moreover, a close scrutiny of the draft of the contract shows that PDL is represented by Mr. Lito Cubillas, who is the Chief Executive Officer/President of respondent corporations. This is indicative of an underlying relationship between PDL and respondent corporations.

Third, as held by the U.S. Supreme Court in the case of *SEC vs. Howey*,[19] it is unimportant that the purchase or lease agreement may be literally separate from the service or management contract, since both agreements will be considered as part of an overall scheme to pool funds of a number of individuals in a common venture managed by persons other than investors or "buyers," and thus constitute investment contracts. Consequently, the fact that the party with whom the buyer enters into the management contract is legally distinct from the seller does not alter the character of the investment contract.

Thus, respondent corporations failed to overcome EIPD's findings, which is supported by solid and factual evidence, that Respondent is indeed selling/offering securities to the public without the necessary license from the Commission.

Considering the foregoing discussions, no sufficient reason exists to overturn the Commission's *Cease and Desist Order.*

WHEREFORE, premises considered, the *Motion to Lift Cease and Desist Order dated 26 February 2015*, filed by BORACAY TRANS-PACIFIC PROPERTIES, INC. and PARADISYA LAND, INC. is hereby **DENIED** for lack of merit. The CEASE AND DESIST ORDER issued against the subject corporations, its officers, directors, agents, representatives, conduits, assigns, and any and all persons claiming and acting for and in behalf and under its authority, is hereby **MADE PERMANENT.**

The Enforcement and Investor Protection Department is hereby **DIRECTED** to: (a) serve this *Resolution* to the President, General Manager, Corporate Secretary, Treasurer or In-House Counsel of

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[17] See Note 5.

[18] Annex "B" of the *Supplement to the Motion for the Issuance of a Cease and Desist Order* dated 16 September 2014

[19] 328 U.S. 293, 66 S. Ct. 1100, 163 A.L.R. 1043, 90 L. Ed. 1244 (1946).

BORACAY TRANS-PACIFIC PROPERTIES, INC. and PARADISYA LAND, INC., (b) post copies of the *Resolution* at the entrance of the main office and/or branches, if any, of BORACAY TRANS-PACIFIC PROPERTIES, INC. and PARADISYA LAND, INC..

Let a copy of this *Resolution* be also posted in the Commission's website; and published in a national newspaper of general circulation and furnished to all operating departments and offices of the Commission for their information and appropriate action.

EIPD, in coordination with other concerned departments, is **FURTHER DIRECTED** to submit a formal compliance report, by way of a pleading, to the Commission *En Banc* within TEN (10) days from receipt of this *Resolution.*

SO ORDERED.

Pasay City, Philippines; 8 July 2016.

TERESITA J. HERBOSA
Chairperson

MANUEL HUBERTO B. GAITE
Commissioner

ANTONIETA F. IBE *
Commissioner

EPHYRO LUIS B. AMATONG
Commissioner

BLAS JAMES G. VITERBO
Commissioner

***On Leave**