Republic of the Philippines
Department of Finance
Securities and Exchange Commission
COMMISSION EN BANC

In the matter of:

LOKAL.PLATE CORPORATION
SEC Company Reg. No. CS202005888

SEC CDO Case No. 03-21-070
Promulgated: 05 January 2023

ENFORCEMENT AND INVESTOR PROTECTION DEPARTMENT (EIPD),

Movant.

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RESOLUTION

For consideration is the *Motion to Lift Cease and Desist Order* dated 22 March 2021 ("Motion to Lift") filed by Lokal.Plate Corporation ("Lokal.Plate"), through counsel, praying that the Commission issue an Order lifting the *Cease and Desist Order* dated 09 March 2021(the "Assailed CDO"), the dispositive portion of which reads, in part, thus:

> "**WHEREFORE,** premises considered, **LOKAL.PLATE CORPORATION**, its owner and CEO BRIAN DY SO, directors, stockholders and officers, CMO SIMON MIGUEL C. DAVID, COO LINUS EMMANUEL V. TAA, CFO CHRISTIAN NATHANIEL C. MAGUNDAYAO, Chairman RALPH NATHANIEL P. RILE and NINAY P. RILE, representatives, salesmen, solicitors, agents, uplines, enablers, influencers, such as SHAIRA SILVESTRE, and any and all persons, conduit entities and subsidiaries claiming and acting for and on its behalf, are hereby directed to **IMMEDIATELY CEASE AND DESIST** from further engaging in, promoting and facilitating selling and/or offering for sale securities in the form on investment contracts and/or other activities/transactions, until the requisite registration statements are duly filed with and approved by this Commission, and the corresponding license and/or permit to offer/sell securities are issued.

> Finally, the Commission hereby **PROHIBITS** Lokal.Plate, its partners, operators, directors, officers, salesmen agents, representatives, promoters, and all persons, conduit entities, and subsidiaries claiming and acting for and on its behalf from transacting any business involving the funds covered by this CDO in its depository banks, and from transferring, disposing, or conveying in any manner, all assets, properties, real or personal, including but not limited to bank deposits, of which the named persons herein may have any interest, claim or participation whatsoever, directly or indirectly, under its/their custody, to forestall grave damage and prejudice to all concerned and to ensure the preservation of the assets for the benefit of the investors."

On 04 March 2021, the EIPD filed before the Commission *En Banc*, through the Office of the General Counsel, a Motion for Issuance of a Cease and Desist Order (the "Motion for Issuance of CDO") against Lokal.Plate.

On 09 March 2021, the Commission *En Banc* issued the Assailed CDO after finding Lokal.Plate is engaged in the unauthorized sale and/or offer of securities in the form of investment contracts.

On 23 March 2021, Lokal.Plate filed a Motion for Production of Documents, praying that an Order be issued requiring the EIPD to produce the reports and complaints it supposedly received showing that the corporation is taking investment activities from the public, invoking Section 1 Rule 27 of the 1997 Rules of Court.

In its Motion to Lift, Lokal.Plate maintained that the execution of franchise agreements is authorized under its Amended Articles of Incorporation ("Amended AoI") which was approved by the Commission,[1] and such franchise agreements are necessary to enable the franchisees to enjoy the benefits and privileges spelled out therein.[2] Lokal.Plate further claimed that it has not falsely or deceptively advertised its business, and argued that there is nothing in its advertising materials that guarantees or ensures profit for any investment.[3] Moreover, Lokal.Plate also maintained that it is not required to secure a License to Operate from the Food and Drugs Administration (FDA) since it is not engaged in the business of manufacturing food products.[4] Finally,

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[1] *Motion to Lift Cease and Desist Order*. Par. 5
[2] *Ibid.* Par. 6
[3] *Ibid.* Par. 12
[4] *Ibid.* Par. 19

Lokal.Plate argued that the National Bureau of Investigation ("NBI") Letter is not sufficient to prove the commission of fraud, which is never presumed but must be established by clear, sufficient, positive, and convincing evidence.

On 14 April 2021, the EIPD filed its Comment/Opposition to the Motion to Lift, where it averred that the evidence it obtained from the conduct of its investigation showed that Lokal.Plate is engaged in the sale/offer of securities in the form of an investment contract,[5] which the latter failed to controvert in its Motion to Lift. Further, the EIPD argued that the online franchising scheme of Lokal.Plate, which has shown signs of being a franchise scam,[6] partakes of the nature of securities which cannot be sold or offered to the public in the absence of the required secondary license from the Commission. Finally, the EIPD belied the claim of Lokal.Plate that it did not guarantee profits by presenting additional evidence consisting of advertising materials and online posts which showed that with a PhP12,888.00 investment, a monthly earning ranging from PhP40,000.00 to PhP80,000.00, plus bonuses is guaranteed.[7]

On 21 April 2021, Lokal.Plate filed its *Reply (Rejoinder)*, where it reiterated its previous arguments that it is not engaged in the sale or offer of securities, as the elements of the Howey Tests are absent. Lokal.Plate specifically claimed that (a) there is no investment of money from the public; (b) there is no pooling of resources; (c) there is no promise of guaranteed profits; (d) the franchisees earn income thru their own efforts; (e) it is not a distributor, repacker, seller or trader of food; and (f) the EIPD's cited online articles are not known legal authorities, and renders the same hearsay evidence.

In its *Comment/Opposition* dated 14 May 2021 *to* Lokal.Plate's *Reply (Rejoinder)*, where it reiterated its previous arguments and added that in its review of the AFS of Lokal.Plate, it was discovered that there is no franchising to speak of.

After a careful consideration of the arguments and the pieces of evidence presented by the parties, the Commission finds no cogent reason to disturb or reconsider the Assailed CDO.

Section 3.1 of the Securities Regulation Code (SRC) defines securities as follows:

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[5] *Comment/Opposition*. Pars. 4, 5, 8 and 9
[6] *Id.* Pars. 25 to 29
[7] *Ibid.* Par. 33

> **"Section 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, instruments,** whether written or electronic in character. It includes:
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> xxx xxx xxx
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> (b) **Investment contracts**, certificates of interest or participation in a profit sharing agreement, certificates of deposit for a future subscription; xxx" (Emphasis and underscoring supplied)

Rule 26.3.5 of the Implementing Rules and Regulations of the SRC (SRC-IRR) defines an "investment contract" as follows:

> "An investment contract means a contract, transaction or **scheme** whereby a person invests his money in a common enterprise and is led to expect profits primarily from the efforts of others. It is **presumed to exist** whenever a person seeks to use the money or property of others on the promise of profits. (Emphasis supplied)

The law considers investment contracts as securities because what the purported issuer is using, or will be using, to further his business, is money put in by the public who expects a return of their investment. From this perspective, and applying the rule on broadly construing the term "securities," the term investment contract should include and cover all forms and varieties thereof which are known or considered, or ought to be known or considered to be such, in the financial world. Thus, in the case of *Gabionza vs. Court of Appeals*[8] ("Gabionza Case"), the Supreme Court ruled 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.

It is in this context that the SRC gave the Commission authority to issue cease and desist orders (CDO) *motu proprio* and without the need for a prior hearing if, based on its evaluation of available information and relevant documents, the same will operate as a fraud or prejudice the investing public, thus:

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[8] G.R. No. 161057, 12 September 2008.

> "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.**"[9] (Emphasis supplied)

The afore-quoted provision crystalizes the policy of the law that in matters relating to the protection of the investing public, proof of the existence of actual fraud is not necessary to warrant the exercise by the Commission of its authority to issue a CDO. Stated otherwise, the law does not expect the Commission to wait until the investing public is actually defrauded before it takes action. Substantial evidence that a scheme, practice, or device is likely to defraud or cause grave or irreparable injury or prejudice to the investing public will suffice to justify the issuance of a CDO. In *Securities and Exchange Commission vs. CJH Development Corp.*,[10] the Supreme Court explained the reason for the grant of such authority, to wit:

> **"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 supplied)

Thus, contrary to the argument of Lokal.Plate that the NBI Letter should not be given credence insofar as it alleged fraud and illegality,[11] this Commission maintains and so holds that such letter, together with the other pieces of evidence presented by the EIPD, amply justifies the issuance of the Assailed CDO. By express provision of the law, a CDO may be validly issued *motu proprio* if the Commission is convinced that there is a likelihood that an act will defraud or prejudice the investing public.

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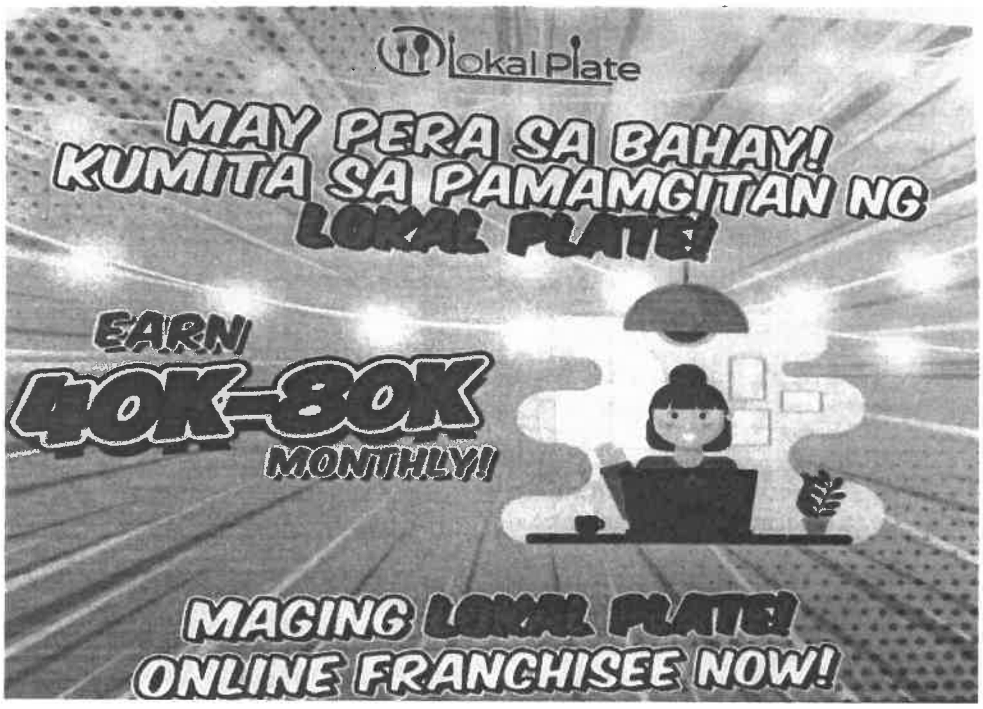
[9] Sec. 64.1 of the SRC
[10] G.R. No. 210316, November 28, 2016
[11] *Verified Motion to Lift Cease and Desist Order*. Pars. 22 to 24

In its Motion, Lokal.Plate maintained that it is not engaged in the sale or offer of unauthorized securities, and that it is mainly implementing its various franchise agreements which are authorized under its Amended AoI.[12] Under the said franchise agreements, for a consideration of PhP12,888.00 representing the one time-franchise fee, Lokal.Plate agreed to grant its franchisees the right to receive the benefits set out in Section VI therein. The evidence on record, however, shows that the benefit that Lokal.Plate is promising to its franchisees specifically consists of a monetary earning in the amount ranging from PhP40,000 to PhP80,000 per month, to wit:



Further, the evidence on record, specifically the advertising materials posted online, shows that Lokal.Plate is selling or offering a variety of investment packages that comes with specific benefits or incentives, which are different from what is in the franchise agreement, to wit:

(1) Php 3,000 Inclusions
- *Authorized dealer of all Lokal.Plate's merchants*
- *10% Profit in Every Purchase*
- *Processing, Packaging, and Distribution*

[12] *Motion to Lift Cease and Desist Order*. Par. 4

- *Php 3,000 Worth of Franchise Initial Stock*
- *Php 12,000 Worth Marketing Fee Lifetime Free*
- *Mobile Application (Soon)*
- *Personal ShopLink*

Note: Monthly maintenance (1,500 worth of food)

(2) Php 9,888 Inclusions
- *Authorized dealer of all Lokal.Plate's merchants*
- *20-25% Profit in Every Purchase*
- *Processing, Packaging, and Distribution*
- *Php 3,000 Worth of Franchise Initial Stock*
- *Php 1,500 Franchise Referral Income*
- *Php 12,000 Worth Marketing Fee Lifetime Free*
- *Mobile Application (Soon)*
- *Personal ShopLink*
- *3-7 Delivery Days (Wed-Sun)*

Note: Monthly maintenance (1,500 worth of food)

(3) Php 4,888 inclusions
- *Authorized dealer of all Lokal.Plate's merchants*
- *10% Profit in Every Purchase*
- *Processing, Packaging, and Distribution*
- *Php 3,000 Worth of Franchise Initial Stock*
- *Php 300.00 Reseller Referral Income*
- *Php 12,000 Worth Marketing Fee Lifetime Free*
- *Mobile Application (Soon)*
- *Personal ShopLink*
- *3-7 Delivery Days (Wed-Sun)*

Note: Monthly maintenance (1,500 worth of food)

(4) Php 12,888 Inclusions

- *15%-20% Profit in Every Purchase*
- *Processing, Packaging, and Distribution*
- *Mobile Application (Soon)*
- *Personal ShopLink*
- *Php 12,000 Worth Marketing Fee (Free)*
- *No Royalty Fee*
- *One-time Payment*

- *Free Training*
- *Fast ROI (Return of Investment)*

The foregoing reveals that under the investment scheme of Lokal.Plate, a person who agrees to part with PhP12,888.00 is assured to earn at least PhP40,000 to a maximum of PhP80,000 per month, even if he/she will only have a minimum monthly purchase of PhP1,500.00.[13] This negates the claim of Lokal.Plate that it did not give any guarantee to the franchisees of a sure profit or return of investment. Verily, an earning of at least PhP40,000.00 per month for a one-time investment of PhP12,888.00 and a monthly purchase of PhP1,500.00 can never qualify as a commission, contrary to the vigorous assertion of Lokal.Plate.

Interestingly, the promise of a monthly return was made in the face of an admission that Lokal.Plate is not engaged in the food manufacturing and/or distribution business, which allegedly dispenses it from the requirement to secure the required License to Operate from the FDA.[14] In fact, Lokal.Plate admitted to have executed franchise agreements, collected franchise fees, and promised its franchisees a monthly return of PhP40,000 to PhP80,000 for the main purpose of *"promoting its affiliate local restaurants and merchants."*[15] Under this scheme, the Commission is convinced that the monthly return of PhP40,000 to PhP80,000 can only come from new investments which Lokal.Plate will get from the investing public since Lokal.Plate does not earn income from the food sales—it not being the manufacturer or distributor thereof. This is bolstered by the absence of any proof that Lokal.Plate is indeed affiliated with the food manufacturers or distributors it identified.

Stripped of its unsupported claims and bare allegations, this Commission holds that the franchise agreements that Lokal.Plate sold or offered to the public are securities in the form of investment contracts, and the PhP12,888.00 franchise fee that it collects from the franchisees are investments. The allegations and arguments presented by Lokal.Plate in support of its Motion to Lift, which includes the franchising scheme, failed to trounce the evidence presented by the EIPD showing that all the elements of the Howey Test are present.

At this juncture, it is important to emphasize that in relation to, and consistent with the broad concept of "securities" under the SRC, the term "security" has evolved to be considered as **any transaction** whose

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[13] *Ibid.* Par. 5 (see Section IV.a.i of the Terms and Conditions of the Franchise Agreement)
[14] *Ibid.* Par. 19
[15] *Ibid.* Par. 18

characteristics distinguish it from the generality of transactions so as to create a need for the special fraud procedures, protections, and remedies under securities laws. Relative thereto, the word "transaction" has also been accorded a broad meaning to cover a series or a nexus of events, such as transfers of money and property, written or oral promises and representations, and even surrounding circumstances. The courts and agencies in foreign jurisdictions have in fact succeeded in finding and confirming that a transaction is endowed with all the distinguishing features of a security by conglomerating a number of events into a composite transaction.[16]

In the United States (US) case of *Hamilton Jewelers vs Department of Corporations,*[17] the California Court of Appeals emphasized that in determining if a transaction is a security, consideration should be made on the reasonable protection that it affords to those who risk their capital, thus:

> "However, as this court pointed out in Sarmento v. Arbax Packing Co. (1964) 231 Cal. App. 2d 421, at page 424 [41 Cal. Rptr. 869], "No hard and fast rule fixes that which constitutes a 'security.' Rather, the question is determined on a case by case basis. The crucial question is whether the [37 Cal. App. 3d 335] transaction comes within the regulatory purpose of the Corporate Securities Law." (Italics added.) In so stating, we cited Silver Hills Country Club v. Sobieski (1961) 55 Cal. 2d 811, at page 814 [13 Cal. Rptr. 186, 361 P.2d 906, 87 A.L.R.2d 1135], where the state Supreme Court pursued the same "crucial question" despite the fact that the transaction there involved came within the literal statutory definition of "security" (former Corp. Code, § 25008).
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> The purpose of the Corporate Securities Law (former Corp. Code, § 25000 et seq.) was explained by the court in Silver Hills Country Club v. Sobieski, supra, 55 Cal. 2d 811, as follows: "**Section 25008 defines a security broadly to protect the public against spurious schemes, however ingeniously devised, to attract risk capital.**" (Id. At p. 814.) (Italics added.) "Since the act does not make profit to the supplier of capital the test of what is a security, it seems all the more clear that its objective is to afford those who risk

[16] Coffey, Ronald., *The Economic Realities of a "Security" Is there a More Meaningful Formula.*, Case Western Reserve Law Review, Article 3, Volume 18, Issue 2 (1967)
[17] Civ. No. 14067. Court of Appeals of California, Third Appellate District. February 15, 1974 (https://law.justia.com/cases/california/court-of-appeal/3d/37/330.html)

> their capital at least a fair chance of realizing their objectives in legitimate ventures whether or not they expect a return on their capital in one form or another." (Emphasis supplied)

We underscore that courts in the US look at the preservation of the buyer's initial investment and the success of the enterprise as an integral part of a transaction, where the fate of the former is considered critically relevant for purposes of determining if securities law apply. Hence, in the case of *SEC vs Latta,*[18] the federal court ruled that "***unless the defendant is successful in that undertaking the contracts will remain scraps of worthless paper.*** This is a situation in which the economic welfare of investors is "inextricably woven" with the ability of the promoter to carry out a common enterprise for the benefit of those whose investments are solicited."

Consistent with the thrust and intent of the SRC to provide safeguards and ample protection to the investing public, our Supreme Court has adopted the doctrine in the US case of *SEC v. W.J. Howey Co.,* and held in *Power Homes Unlimited Corporation vs Securities and Exchange Commission*[19] (Power Homes Case), that the term "investment contract," just like the term "securities," embodies a flexible principle that is intended to cover schemes devised by persons who seek to use the money of others on the promise of profits, thus:

> "It behooves us to trace the history of the concept of an investment contract under R.A. No. 8799. Our definition of an investment contract traces its roots from the 1946 United States (US) case of *SEC v. W.J. Howey Co.* In this case, the US Supreme Court was confronted with the issue of whether the Howey transaction constituted an "investment contract" under the Securities Act's definition of "security." The US Supreme Court, recognizing that the term "investment contract" was not defined by the Act or illumined by any legislative report, held that "Congress was using a term whose meaning had been crystallized" under the state's "blue sky" laws in existence prior to the adoption of the Securities Act. Thus, **it ruled that the use of the catch-all term "investment contract" indicated a congressional intent to cover a wide range of investment transactions**. It established a test to determine whether a transaction falls within the scope of an "investment

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[18] 250 F. Supp. 170 (N.D.Cal.N.Div.1965)
[19] G.R. No. 164182, February 26, 2008

contract." Known as the Howey Test, it requires 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. Although the proponents must establish all four elements, **the US Supreme Court stressed that the Howey Test "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits**." Needless to state, any investment contract covered by the Howey Test must be registered under the Securities Act, regardless of whether its issuer was engaged in fraudulent practices." (Emphasis supplied)

On the basis thereof, this Commission has consistently held that a transaction is considered an investment contract once it is shown by substantial evidence that the proponent is offering to the public an opportunity to contribute money and to share in the profits of the operations. In this regard, the importance of a "common enterprise" managed by the proponent in furtherance of the business comes into play, considering that purchasers who are normally untrained in finance, merely rely on the proponent's knowledge and expertise in carrying out the grand investment scheme.

More importantly, it should be emphasized that in our jurisdiction, a transaction or scheme where a person uses or intends to use money or property of others with a promise of profits is presumed by law to be an investment contract which should be registered with the Commission prior to the sale or offer thereof.

In the instant case, the various investment packages (masked as franchising transactions) that are being sold or offered by Lokal.Plate to the public through its website and social media accounts offer a guaranteed return ranging from PhP40,000.00 to PhP80,000.00 plus bonuses and incentives. This is the main consideration and reason why its so-called member-franchisees and the investing public were enticed to part with their hard-earned PhP12,888.00, and agreed to make a monthly purchase of PhP1,500.00.

The "common enterprise" which Lokal.Plate has operationalized, managed, and maintained consists in the sale or offer of its various investment packages with guaranteed monthly earnings, referral incomes and other incentives. The fortunes of the franchisees of Lokal.Plate are linked to each other, and are clearly essential to the success of the business. In other words, the continued sale of the investment packages (through the franchise agreements which were used as fronts) and the entry of new investors who will in turn become sellers or agents of Lokal.Plate facilitate and ensure the payment of the guaranteed monthly earnings, bonuses and incentives. It is therefore not surprising to see that the earnings of PhP40,000.00 to PhP80,000.00 and bonuses were showcased by Lokal.Plate in all its presentations and marketing materials to facilitate the continued sale or offer of its investment packages to the public, and thus assure its continued operations.

The foregoing establishes and affirms the existence of all the elements of the Howey Test, i.e., investment in money,[20] common enterprise,[21] expectation of profits, which are made possible through the efforts of others,[22] which this Commission exhaustively discussed in the Assailed CDO.

WHEREFORE, premises considered, the *Motion to Lift Cease and Desist Order* dated 22 March 2021 filed by Lokal.Plate Corporation is hereby **DENIED** for lack of merit. The CEASE AND DESIST ORDER issued against Lokal.Plate Corporation, its officers, directors, agents, representatives, conduits, assigns, and any and all persons/entities claiming and acting for and in behalf and under their 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 Lokal.Plate Corporation, and (b) post copies of the *Resolution* at the entrance of the main offices and/or branches, if any, of Lokal.Plate Corporation.

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[20] "An investment of money occurs when an investor commits money to an enterprise or venture in a manner that subjects himself to financial loss." (SEC v. International Mining Exchange, Inc., 515 F. Supp. 1062.)

[21] "A common enterprise is deemed created when two (2) or more investors "pool" their resources. Thus, 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." (Wasnowic v. Chicago Bd. of Trade 352 F Supp 1066.)

[22] The U.S. Supreme Court 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. 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. (*SEC v. Glenn W. Turner Enterprises, Inc.*,474 F. 2d 476, 414 U.S. 821, 94 (1973)

Let a copy of this *Resolution* be also posted in the Commission's website, and furnished to the relevant operating departments of the Commission for their information and appropriate action.

The 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.

Makati City, Philippines.

EMILIO B. AQUINO
Chairperson

JAVEY PAUL D. FRANCISCO*
Commissioner

KELVIN LESTER K. LEE
Commissioner

KARLO S. BELLO
Commissioner

MCJILL BRYANT T. FERNANDEZ
Commissioner

*Commissioner on Leave