Republic of the Philippines
Department of Finance
Securities and Exchange Commission

In the Matter of:

SUCCESS200 INTERNATIONAL MARKETING CORPORATION

ENFORCEMENT AND INVESTOR PROTECTION DEPARTMENT,
Movant.

SEC-CDO CASE NO. 09-15-024
FOR: Lifting Cease and Desist Order

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RESOLUTION

Pending consideration before the Commission *En Banc* is the *Motion for Reconsideration (vis-à-vis Motion to Lift Cease and Desist Order)* (Motion to Lift CDO)[1] filed on 2 February 2016 by SUCCESS200 INTERNATIONAL MARKETING CORPORATION (Success200) praying that the Cease and Desist Order (CDO) issued by the Commission on 26 January 2016 be lifted.

Success200 incorporated with the Commission on 12 May 2015 under SEC Registration No. CS201509200.[2] The primary purpose of Success200 is to engage in the sale and distribution of food supplements.[3] The incorporators and directors of Success200 include Alberto P. Monzuela, who is also its treasurer,[4] and Kenneth G. Badiola, who is its president.[5] The authorized capital stock and paid up is Php 100,000.00.[6]

STATEMENT OF FACTS

On 23 September 2015, the Enforcement and Investor Protection Department (EIPD) of the Commission filed a *Motion for Issuance of a Cease and Desist Order* (Motion for Issuance of CDO) with the Commission against Success200. The motion was triggered by the EIPD's receipt of various email from the public reporting on the investment scheme of Success200.[7]

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[1] Motion to Lift CDO dated 29 January 2016.
[2] *Motion for Issuance of a Cease and Desist Order* filed by Enforcement and Investor Protection Department dated 9 September 2015, par. 1, Annex "A" (Certificate of Incorporation of Success200).
[3] *Id.*, par. 2, Annex "B" (Second Article of the Articles of Incorporation).
[4] *Id.*, Annex "B" (Tenth Article of the Articles of Incorporation).
[5] *Id.*, par. 10, Annex "C" (General Information Sheet of Success200 for the Year 2015).
[6] *Id.*, par. 3, Annex "B" (Seventh and Eight Articles of the Articles of Incorporation).
[7] *Id.*, par. 6 and Annexes "D" and "E" (Email from the public).

On 26 January 2016, based on the statements made by Alberto P. Monzuela during the surveillance operation of the Investigating Team of the EIPD, the Commission found Success200 to be engaged in the offer and sale of securities, in form of investment contracts, without the proper registration. As a consequence, the Commission issued the assailed CDO enjoining Success200 from selling investment contracts until the requisite registration statement is duly filed with and approved by the Commission and the corresponding authority to offer/sell is issued.[8]

On 2 February 2016, Success200 filed the instant *Motion to Lift CDO* arguing that its system of compensating its members is not an investment scheme, and that it is not an investment company. Success200 further debunks the existence of the four (4) elements of an investment contract. Furthermore, Success200 states that the money it receives from its members is not "in exchange" for an investment, but rather for the purchase of its products. Furthermore, Success200 denies that its officers and Alberto P. Monzuela, who is its treasurer, solicited investments. Additionally, Success200 claims that "there was never a guaranteed profit but only *earnings*", which is based on the sales of its members and the latter's team he or she created in promoting the product.[9]

Success200, further argues that all of its income is based on its product sales, and that it is engaged in the selling, on wholesale or retail, food supplements from its partner manufacturers to its members. Furthermore, Success200 states that its compensation plan is known as the "split matrix", which is allegedly a system used to monitor the sales and promotions of its products. Next, Success200 states that if there are "no sales of product (sic), there will be no corresponding rewards".[10]

Moreover, Success200 alleges that it has made it known to the public that it is not an investment company. It further claims that it "policed [its] ranks" and "made it clear to all [its] members that this (sic) is not part of [its] compensation plan". Furthermore, the promotion of Ann Fevreir SJ Santiago is contrary to its system of promotion.[11]

Lastly, Success200 argues that it was not accorded due process since the investigation was "very arbitrary".[12]

In support of foregoing allegations, Success200 attaches the following in support of its argument that it is not an investment company:

(1) <u>*Testimonials of its members:*</u> In a series of testimonials, the members substantially claimed that Success 200 is not an investment company, and they discussed the

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[8] CDO, pp. 6-7.
[9] Motion to Lift CDO, pars. 3, 8b, 12 and 15.
[10] *Id.*, pars. 10 and 11.
[11] *Id.*, pars. 4-5.
[12] *Id.*, pars. 6-7.

benefits of its products.[13] However, in one testimonial, Jacqueline Fariñas, who is a member and team leader of "Team Snowwhite", stated that Success200 provided her with "extra income".[14] In another testimonial, Reynalyn Soliven, who is another member, claims that Success200 is not an investment company but she acknowledges she has to sell its products and "*invite others* to be a distributor".[15]

(2) <u>*Statement of Ann Fevreir SJ Santiago:*</u> This statement is in support of Success200's allegation that it "policed" its ranks and that it is not engaged in soliciting and selling of investments or securities. However, Ms. Santiago states therein that this was "[her] chance *to earn* while at home". She further states that "after a week I got my first *commission*, after another week I got *another commission*, another week went by I received *another commission*." Furthermore, she states that she *invited* her family, friends and people she personally does not know.

Attached to her statement included her Facebook page, which provided statements such as "[y]ou can start a business for P1,800 buy one of our products and be our distributor. Earn your first P10,000 *commission* upon completing first board sales. Succeeding *guaranteed income* at 9k, not just once but 4 times." Also, a statement providing "Unilevel Bonus: Earn 40 pesos from 1st LEVEL to 10th LEVEL of your team structure".[16]

(3) <u>*Affidavit of Alberto P. Monzuela:*</u> The affidavit is in support of Success200's allegation that Mr. Monzuela never mentioned the solicitation of investments. Mr. Monzuela, in his affidavit stated that he is an officer and a member of the board of directors of Success200. Further, Mr. Monzuela stated broadly the following "*I have never made any mention that our company is offering investments to the public nor have I solicited any person to invest in our company*".[17]

(4) <u>*Facebook Page of Success200*</u>: The Facebook page of Success200 is in support of its allegation that it is not engaged in the solicitation or offering of investments to the public.[18]

(5) <u>*Sales Invoices Issued to the Members of Success2000*</u>: The sales invoices are in support of its allegation that it is offering products, such as food supplements, for sale, and not investments to the public. The sales invoices include sales up to 71 orders of its food supplements in the amount of Php 127,800.[19]

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[13] *Id.*, par. 3(a), and Annex "2-series" (Testimonials of the members of Success200).
[14] *Id.*, Annex "2-AH" (Testimonial of Jacqueline Fariñas dated 29 January 2016).
[15] *Id.*, Annex "2-AP" (Testimonial of Reynalyn Soliven dated 29 January 2016).
[16] *Id.*, Annex "3" (Statement of Ann S.J. Fevreir dated 31 January 2016).
[17] *Id.*, Annex "4" (Affidavit of Alberto Monzuela executed on 29 January 2016).
[18] *Id.*, Annex "5" (Facebook page of Success200).
[19] *Id.*, Annex "6" (Sales Invoices of Success200).

(6) _Brochure of Success200:_ The brochure[20] is likewise in support of its allegation that it is offering products, such as food supplements, for sale, and not investments to the public. It provides for the testimonials of its members and "8 WAYS TO EARN", such as the "split matrix" reward, "Unilevel Bonus" and "Royalty Bonus".

In the "split matrix" reward, the following is provided:

Package	Amount	Board 1	Board 2 – Infinite
Bronze	1,800.00	10,000.00	9,000.00
Silver	3,600.00	20,000.00	18,000.00
Platinum	36,600.00	200,000.00	180,000.00

Next, in the "Unilevel Bonus", the following is provided:

> "Bronze: 1st to 10th level: Php 40 upon exit on Board 1-3"
> "Silver: 1st to 10th level: Php 80 upon exit on Board 1-3"

Lastly, in the "Royalty Bonus", the following is provided:

> "Platinum: Direct Referral (1st level): Php 20,000 upon exit on Board 2"
> "Platinum: 1st to 10th level: Php 2,000 upon exit on Board 3"

(7) _Distributor Application Form:_ The application form[21] is in support of its allegation that its members are not involved in an investment scheme. However, the application form includes a statement such as "*[e]arnings or commissions are paid base (sic) on the production of sales and distribution of products through [its] unique compensation plan. There is no guaranteed income ONLY the opportunity to earn through SUCCESS200 (sic) unique compensation plan*". (Emphasis ours)

(8) _Digital Video Disc (DVD):_ The DVD[22] contains four (4) parts such as: (i) a video presentation of Kenneth G. Badiola and Success200's members driving cars; (ii) a video presentation featuring the products as well as the members' testimonials regarding such products; and (iii) a video and PowerPoint presentation of the marketing scheme of Success200;

In No. (ii), the speaker in the video begins with the opening statement "do you want to *earn* more than enough for your family, while staying fit and healthy; if yes, we will show you *an opportunity* on how to show make this dream into a reality". Thereafter, the speaker mentions that "Success200 was established with the goal of providing Filipinos a *way to earn* without having to sacrifice one's time (sic) for family". Next, as stated in the Brochure, the speaker discusses the "8

[20] *Id.*, Annex "7" (Brochure of Success200).
[21] *Id.*, Annex "8" (Distributor Application Form).
[22] *Id.*, Annex "10" (DVD presentation).

WAYS TO EARN", which includes the "split matrix reward", "unilevel bonus" and "royalty bonus".

The speaker discusses the "split matrix" system by stating that there are five (5) packages a member may choose from as follows: (i) Bronze (with a purchase fee of Php 1,800.00); (ii) Silver (with a purchase fee of Php 3,600.00); (iii) Gold (with a purchase fee of Php 7,200.00); and (i) Diamond (with a purchase fee of Php 14,400.00); (v) Platinum (with a purchase fee of Php 36,000.00).

Once the joining member purchases any of the foregoing packages, which has four (4) levels therein, such joining member is placed in Level 1 of the board. It must be noted that the three (3) other levels are already occupied by other members that has preceded such member. Below is an example of the foregoing based on the video and PowerPoint presentation:

TABLE 1

Ken								Level 4
Marco				Martin				Level 3
Juan		Nilo		Sean		Bea		Level 2
YOU	x	x	x	x	x	x	x	Level 1

After all eight (8) members in Level 1 complete a sale of the products of Success200, the sole member in Level 4, who is named "Ken", will make a "Success Board Complete". Further, Ken will receive a reward based on the respective product package that was availed of. Furthermore, Ken will transfer to the 2nd board in the respective product package.

Thereafter, the board will "split" and the joining member in Level 1 will proceed to Level 2. Below is an example of the board "splitting":

TABLE 2

Marco								Level 4	Martin							
Juan				Nilo				Level 3	Sean				Bea			
YOU		x		x		x		Level 2	x		x		x		x	
x	x	x	x	x	x	x	x	Level 1	x	x	x	x	x	x	x	x

As can be seen below, once the member in Level 4, named "Marco" or "Martin" makes a "Success Board Complete", the board will "split" and the joining member will advance to Level 3 as follows:

TABLE 3

<table>
<tr><td colspan="8">Juan</td><td>Level 4</td><td colspan="8">Nilo</td></tr>
<tr><td colspan="4">**YOU**</td><td colspan="4">x</td><td>Level 3</td><td colspan="4">x</td><td colspan="4">x</td></tr>
<tr><td colspan="2">x</td><td colspan="2">x</td><td colspan="2">x</td><td colspan="2">x</td><td>Level 2</td><td colspan="2">x</td><td colspan="2">x</td><td colspan="2">x</td><td colspan="2">x</td></tr>
<tr><td>x</td><td>x</td><td>x</td><td>x</td><td>x</td><td>x</td><td>x</td><td>x</td><td>Level 1</td><td>x</td><td>x</td><td>x</td><td>x</td><td>x</td><td>x</td><td>x</td><td>x</td></tr>
</table>

Once the member, who is named "Juan" or "Nilo" in Level 4, makes a "Success Board Complete", the joining member will advance to Level 4. Again, when each of the eight (8) members in Level 1 completes a sale of the products of Success200, the joining member in Level 1 will finally make a "Success Board Complete". Below is an example of the foregoing:

TABLE 4

<table>
<tr><td colspan="8">**YOU**</td><td>Level 4</td></tr>
<tr><td colspan="4">x</td><td colspan="4">x</td><td>Level 3</td></tr>
<tr><td colspan="2">x</td><td colspan="2">x</td><td colspan="2">x</td><td colspan="2">x</td><td>Level 2</td></tr>
<tr><td>x</td><td>x</td><td>x</td><td>x</td><td>x</td><td>x</td><td>x</td><td>x</td><td>Level 1</td></tr>
</table>

As in case of the member in Level 1, who is named "Ken", referred in TABLE 1, the joining member is likewise entitled to a reward based on the respective product package that such member purchased, and will proceed to the 2nd board within such product package. For making a "Success Board Complete", the member in Level 1 is entitled to the following rewards: (i) Bronze (Php 10,000.00 for completing the 1st board, and Php 9,000.00 for completing the 2nd board); (ii) Silver (Php 20,000.00 for completing the 1st board, and Php 18,000.00 for completing the 2nd board); (iii) Gold (Php 40,000.00 for completing the 1st board, and Php 36,000.00 for completing the 2nd board); and (i) Diamond (Php 80,000.00 for completing the 1st board, and Php 72,000.00 for completing the 2nd board); (v) Platinum (Php 200,000.00 for completing the 1st board, Php 180,000.00 for completing the 2nd board, Php 180,000.00 for completing the 3rd board and down payment for a car). Thereafter, the "Ladderized System"[23] will take effect.

[23] "Ladderized System" will take effect as follows: (i) for the members who completed the 2nd board in the Bronze product package, the amount of Php 3,600.00 will be deducted from the Php 9,000.00 reward in the 2nd board, and they will transfer to the Silver product package; (ii) for the members who completed the 2nd board in the Silver product package, the amount of Php 7,200.00 will be deducted from the Php 18,000.00 reward in the 2nd board, and they will transfer to the Gold product package; (iii) for the members who completed the 2nd board in the Gold product package, the amount of Php 14,400.00 will be deducted from the Php 36,000.00 reward in the 2nd board, and they will transfer to the Diamond product package; and (iv) for the members who completed the 2nd board in the Diamond product package, the amount of Php 36,000.00 will be deducted from the Php 72,000.00 reward in the 2nd board, and they will transfer to the Silver product package.

Lastly, the speaker in the video mentions other methods of earning, such the "*Unilevel Bonus*" and the "*Royalty Bonus*" as mentioned above in the Brochure.

(9) _USB_: In the USB,[24] Kenneth G. Badiola provided a presentation of the network marketing scheme of Success200, and other various network marketing schemes that are employed by other companies. He compared the "split matrix" system used in Success200 with the other marketing schemes employed by other companies. He also stated that the "split matrix" system ensures that there is no over payment of the commissions.

On 12 February 2016, Paul Eduard A. Siapno, who is the counsel for and a director of Success200, Kenneth G. Badiola, who is its president, and Alberto P. Monzuela, who is its treasurer, as well as the counsels for the EIPD, appeared at the Hearing on the Motion to Lift CDO. During the hearing, Atty. Siapno reiterated that Success200 is not an investment company, and stated that there are erroneous findings in the Field Investigation Report of the EIPD which details the surveillance operation. He stated that the Affidavit of Alberto P. Monzuela, attached to the Motion to Lift CDO, will rebut and belie the findings stated in the Field Investigation Report. In response, the counsel for the EIPD stated that Mr. Monzuela is the person who presented to the EIPD the marketing scheme during the surveillance inspection.[25]

Thereafter, Kenneth G. Badiola provided a presentation of the network marketing scheme of Success200. He began the presentation by stating he has six (6) years experience in network marketing and that there are various network marketing schemes. These schemes include "unilevel", "binary", "force matrix", "paluwagan system", and "split matrix". In Success200, it employs the "split matrix" system in which a member must complete a table before a payout is given. He further states: "Maglalagay ka any amount na gusto mo, kikita. Sa'amin P900.00 lang, P1800.00, may P3,600.00 po kami at yung pinaka-mataas po naming yung P36,000.00 pero never po kami nag-promise na kikita ka ng walang gagwin." However, the counsel for the EIPD responded that the presentation of Mr. Badiola is entirely different from the presentation made to the EIPD during its surveillance operation. The counsel further stated that it is an investment contract that was presented to the EIPD.[26]

Next, Atty. Siapno stated that Success200 is "more of a distribution company", and the products of Success200, which it distributed, were presented before the Hearing Officer. The products include bottles with a label stating therein "Success200", and contains sixty (60) capsules in each bottle of herbal supplements, such as malunggay, turmeric, graviola and guyabano. Atty. Siapno stated that the products are manufactured by a "local manufacturer"[27]

[24] Motion to Lift CDO, Annex "10-a" (USB with video presentation by Kenneth G. Badiola).
[25] TSN, pp. 2, 3, 7 and 10.
[26] *Id.*, pp. 14-17.
[27] *Id.*, pp. 18-19.

After the parties' oral arguments, the counsel for the EIPD requested for time to file a written comment to the Motion to Lift CDO, and Atty. Siapno likewise requested for time to file a response to the written comment of the EIPD. In which case, the EIPD was directed to file its comment on the Motion to Lift CDO within fifteen (15) days from the date of the hearing. Thereafter, Success200 was given a similar period to file its reply on the comment of the EIPD.[28]

On 23 February 2016, the EIPD filed its *Comment/Opposition (to the Motion to Lift Cease and Desist Order)* (Comment to Motion). The EIPD stated the following: (i) the statement of Alberto P. Monzuela, in his Affidavit, is a mere denial; (ii) Ann Fevrier S.J. Santiago admitted inviting people, in order to complete the board and to receive "rewards/commissions"; (iii) the brochure of Success200 features the ways to earn from the company, which confirms the existence of an investment contract; and (iv) the brochure also states that Success200 promises Php 20,000.00 for "direct referral reward" upon exit of Board 2, and other incentives and earnings. Thus, the EIPD prays that the CDO issued by the Commission be made PERMANENT.[29]

In response, Success200 filed, on 29 February 2016, a *Rejoinder to the [Motion to Lift CDO]* (Rejoinder) stating the following: (i) the EIPD should have executed a sworn affidavit to prove the statements of Alberto P. Monzuela during the surveillance operation; (ii) the allegation by the EIPD, that Ann Fevrier S.J. Santiago admitted to inviting people, is not fair, since it would not be fair to shut down a company on the basis of the misrepresentations of "some" members while other members are doing the business legitimately; (iii) it reiterates that its compensation plan is not an investment scheme; and (iv) the "split matrix" is based on the sales by its members, and there is a "continuous wave of *commissions* from the sales of the downlines or *entry* of new members". Thus, it prays for an order lifting the CDO against it.[30]

On 8 March 2016, Success 200 filed a *Supplemental to the Rejoinder* (Supplemental Rejoinder) attaching a verified letter of Alberto P. Monzuela. In his verified letter, he stated the following: (i) Success200 is again not an investment company; (ii) its marketing program is based on sales of the its products; (iii) he never conducted any "business opportunity meeting" or "group seminar/presentation for Success200"; (iii) its members purchase its products for their personal consumption; (iv) its members have the option to earn commissions by endorsing its products to others; and (v) its members will not lose anything since they will receive products equivalent to the amount they paid.[31]

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[28] *Id.*, pp. 11 and 21.
[29] Comment to Motion dated 19 February 2016, pars. 10, 13, and 16.
[30] Rejoinder dated 29 February 2016, pars. 9, 14, 16, and 17.
[31] Supplemental Rejoinder dated 1 March 2016, Annex "A" (Letter of Alberto P. Monzuela dated 29 February 2016).

On 10 May 2016, Success200 filed a *Motion for Immediate Resolution of Case* praying that the Commission resolve the instant case.[32]

On 16 June 2016, Success200 filed a *Second Motion for Immediate Resolution of Case* again praying that the Commission resolve the instant case.[33]

On 25 July 2016, the Commission issued an Order granting both motions for immediate resolution of the case, terminating the proceedings and submitting the case for resolution.

ISSUE

The main issue to be resolved is whether or not Success200 is engaged in the offering and selling of securities, in the form of investment contracts.

RULING

Before proceeding any further, we will dispense with the procedural issue of whether Success200 was denied due process. Success200 alleges that the Commission failed to afford it due process, since the investigation is "very arbitrary" and the said investigation does not provide that there was observance of due diligence. Success200 further claims that the CDO was based on the statements made in the Facebook page of Ann Fevreir SJ Santiago.

Section 64.1 of the Securities Regulation Code (SRC),[34] in providing the requirements for the issuance of a CDO, states the following:

> "**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)

The Supreme Court, in *Securities and Exchange Commission v. Performance Exchange Corporation,* ruled:

> "Under the above provision, there are two essential requirements that must be complied with by the SEC before it may issue a cease and desist order: First, it must conduct proper investigation or verification; 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."

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[32] Motion for Immediate Resolution of Case dated 2 May 2016.
[33] Second Motion for Immediate Resolution of Case dated 15 June 2016.
[34] Republic Act No. 8799 (2000).

Moreover, in *GSIS vs. Court of Appeal, Rosete et al.*,[35] it was held that:

> "The Court of Appeals cited the CDO as having been issued in violation of the constitutional provision on due process, which requires both prior notice and prior hearing. Yet interestingly, the CDO as contemplated in Section 53.3 or in Section 64, may be issued 'ex-parte' (under Section 53.3) or 'without necessity of hearing' (under Section 64.1). Nothing in these provisions impose a requisite hearing before the CDO may be issued thereunder. Nonetheless, there are identifiable requisite actions on the part of the SEC that must be undertaken before the CDO may be issued either under Section 53.3 or Section 64. In the case of Section 53.3, the SEC must make two findings: (1) that such person has engaged in any such act or practice, and (2) that there is a reasonable likelihood of continuing, (or engaging in) further or future violations by such person. In the case of Section 64, the SEC must adjudge that the act, 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."

In short, the Commission may issue a CDO either ***motu proprio*** or upon verified complaint without a prior hearing[36]. The essential requirement that must be complied with by the Commission before it may issue a CDO is that the EIPD must conduct a proper investigation or verification. Once an investigation or verification by the EIPD is conducted, the Commission may issue a CDO, 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.

Thus, the lack of prior hearing notwithstanding, Success200 was not denied due process as argued in its *Motion to Lift CDO*, considering that the CDO was issued by the EIPD after a proper investigation or verification. It must be noted that the investigation was prompted after the EIPD received various email from the public reporting on the investment scheme of Success200.[37] As part of the investigation, the Investigating Team of the EIPD viewed the Facebook page of a certain Ann Fevreir SJ Santiago which describes the marketing plan of Success200.[38]

Thereafter, the Investigating Team executed a sworn Field Investigation Report,[39] which states that, on 15 July 2015, it proceeded to the principal office of Success200 located

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[35] G.R. No. 183905 April 16, 2009

[36] Section 10-2, Rule X of the 2006 Rules provides that the Commission, through the OGC, after proper investigation or verification by the EIPD, *motu proprio*, or upon verified complaint, may issue a CDO 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

[37] *Motion for Issuance of a Cease and Desist Order* filed by Enforcement and Investor Protection Department dated 9 September 2015, par. 6 and Annexes "D" and "E" (Email from the public).

[38] Motion to Lift CDO, par. 9 and Annexes "G-1" and "G-2" (Print-out copy of Facebook page of Ann Fevreir SJ Santiago).

[39] *Id.*, par. 10 and Annex "H" (Joint Affidavit executed on 7 September 2015 by the Investigating Team of the EIPD).

at Unit 605 Fernandina 88 Suites Hotel, 222 P. Tuazon Blvd., Quezon City to conduct a surveillance operation. During the surveillance operation, the Investigating Team was greeted by Alberto P. Monzuela in Unit 605 of Fernandina 88 Suites and the latter confirmed that the unit is the office of Success200. He further stated to the Investigating Team that, for the amount of Php 1,800.00, a member may earn Php 10,000.00 once such member completes one board[40], which consists of fifteen (15) members. In order to complete one board, each member in the board must *refer* at least two (2) people. Such referrals must then *refer* two (2) additional people, which is called a "split matrix". After the completion of one board, such member will "exit" or get a pay-out in the amount of Php 10,000.00. Such member will then transfer to a second board by paying the amount of Php 1,800.00, and will "exit" or get a pay-out in the amount of Php 9,000.00.[41]

Alberto P. Monzuela further stated that the investment amount of Php 1,800.00 is considered as the "low-end" level, and that a member may invest in the "high-end" level for the amount of Php 36,000.00. Such investment in the "high-end" level will allow the member to "exit" or get a pay-out in the amount of Php 200,000.00.[42]

Furthermore, the Investigating Team of the EIPD inquired from Alberto P. Monzuela about investing more, and of the possibility of reselling their products. The latter replied that their members PREFERRED employing a *"split matrix"* or *recruiting*.[43] Clearly, Success200 argument that the Commission failed to afford it due process is misplaced, considering that there was a proper investigation and verification by the EIPD of the Commission on the investment scheme of Success200 prior to the issuance of the assailed CDO, pursuant to Section 64.1 of the SRC. As can be seen, the investigation by the EIPD was conducted through, among others, the surveillance operation at the principal office of Success200 on 15 July 2015.

Next, Success200 denies that neither Alberto P. Monzuela nor its officers solicited investments. In support of its allegation, it attaches the affidavit of Mr. Monzuela in the Motion to Lift CDO, stating broadly, among others, the following *"I have never made any mention that our company is offering investments to the public nor have I solicited any person to invest in our company"*.[44] In another affidavit of Mr. Monzuela, he merely denied that he conducted any "business opportunity meeting" or "group seminar/presentation for Success200". Lastly, Success200 argues that the Field Investigation Report, in which Mr. Monzuela narrates the marketing plan, is not a sworn document.

In the Supreme Court case, entitled *Carpio v. Valmonte*,[45] the court stated:

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[40] As provided in TABLE 1 in page 6 of this Resolution
[41] *Id., Note 38.*
[42] *Id.*
[43] *Id.*
[44] *Id.*, Annex "4" (Affidavit of Alberto P. Monzuela executed on 29 January 2016).
[45] G.R. No. 151866, 9 September 2004.

"Well-settled is the rule that denials, if unsubstantiated by clear and convincing evidence, are negative and self-serving which merit no weight in law and cannot be given greater evidentiary value over the testimony of credible witnesses who testify on affirmative matters."

In the case at bar, the mere denials of Alberto P. Monzuela that he never solicited investments and performed a business presentation are considered negative and self-serving assertions. Success200 failed to substantiate or corroborate such statements by clear and convincing evidence proving that he never solicited investments nor performed a business presentation to the Investigating Team of the EIPD. Indeed, the "split matrix", as extensively discussed in the USB and DVD, not only contradicts Mr. Monzuela's denials but, more importantly, supports the findings of the EIPD. The Investigating Team of the EIPD made positive and categorical assertions in its sworn Field Investigation Report or affidavit[46] by narrating the specific events of the surveillance operation on a particular date (i.e., 15 July 2015). In fact, such assertions by the Investigating Team are corroborated by other evidence, including admissions by Success200, showing that the company is engaged in the offering for sale of investment contracts, to be discussed below. Lastly, contrary to Success200's claim that the Field Investigation Report and the Affidavit were not sworn, such Report and Affidavit were subscribed and sworn before OIC Armando A. Pan, Jr. of the Office of the Commission Secretary and Director Jose P. Aquino of the EIPD on 22 July 2015 and 14 September 2015, respectively. Clearly, the positive and categorical assertions Investigating Team of the EIPD, stated in the Field Investigation Report or affidavit prevail over the mere denial of Mr. Monzuela.

We now go to the main issue, that is, whether or not Success200 is involved in the offering and selling of unregistered securities, in the form of investment contracts.

To recall and as stated in the assailed CDO, the elements of an investment contract, which requires the filing with and approval by the Commission of a registration statement,[47] are the following: (1) an investment of money, (2) in a common enterprise, (3) with expectation of profits, and (4) primarily from efforts of others.[48]

In this case, Success200 argues that it is not an investment company, and its system of compensating its members is not an investment scheme. It claims that all of its income is

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[46] *Motion for Issuance of a Cease and Desist Order* filed by Enforcement and Investor Protection Department dated 9 September 2015, Annex "H" (Joint Affidavit executed on 7 September 2015 by the Investigating Team of the EIPD).

[47] 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 Section 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.

[48] *Power Homes Unlimited Corporation v. Securities and Exchange Commission* G.R. No. 164182, 26 February 2008.

based on the sale of its products, and it is engaged in the selling of food supplements. Further, it avers that its compensation plan is known as the "split matrix".

In the "split matrix", a joining member may avail of the various product packages offered by Success200, which includes the Bronze package (for the purchase price of Php 1,800.00) up to the Platinum package (for the purchase price of Php 36,000.00). Once the joining member avails any of the packages, such member is placed in Level 4[49] which includes eight (8) other members.[50] Thereafter, as provided by Alberto P. Monzuela and Reynalyn Soliven, the joining member must refer or invite others to join Success200 in order to make a "Success Board Complete". After the board splits, the joining member advances to Level 3 and such joining member's recruits must then two (2) additional people.[51] Once the joining member is placed in Level 4, such member will receive a commission or reward after there is a "Success Board Complete".[52]

Clearly, the scheme of Success200, which requires the filing with and approval by the Commission of a registration statement, constitutes an investment contract considering that all four (4) elements thereof are present, to wit –

1. <u>An investment of money</u>

As to the *first element*, an investment of money occurs when an investor commits money to an enterprise or venture in a manner that subjects himself to financial loss.[53] In one U.S. case, *Bell v. Health-Mor, Inc.,*[54] a company was selling vacuum cleaners which entitle the buyers to receive USD $10.00 for the name of each potential customer he submits to the sellers. The defendant company argued that the distributors' purchase of the machines was the purchase of a product, whereas the plaintiffs argued they were investments. The court rejected the defendant's argument, holding that the mere transfer of a tangible commodity does not preclude the existence of a security. <u>Even purchases where distributors must personally purchase products to participate in the compensation plan will satisfy the first prong of the Howey Test</u>.

In *US v. Bowdoin,*[55] a company described itself as a multi-level marketing company that offered online advertising which operated over the internet through various websites. According to these sites, the company's advertisers or members could earn large profits by (1) paying fees to advertise their own webpages, (2) earning rebates by surfing other advertisers' webpages on the company's "rotator," and (3) earning commissions by recruiting more advertisers to do the same. Moreover, the company promoted its advertising program by offering advertisers a rebate of up to 125% on their advertising

[49] Motion to Lift CDO, Annex "10" (DVD presentation).
[50] As provided in TABLE 1 in page 5 of this Resolution.
[51] As can be seen in TABLE 2 in page 5 of this Resolution.
[52] As provided in TABLE 4 in page 6 of this Resolution.
[53] *SEC v. International Mining Exchange, Inc.*, 515 F. Supp. 1062.
[54] 549 F.2d 342 (5th Cir. 1977).
[55] Case No. 10-320 (RMC), United States District Court for the District Of Columbia, 18 March 2011.

costs. The U.S. District Court of Columbia held that the marketing scheme of the company is an investment contract since it promised to pay back 125% of the value paid to the said company by an advertiser. This strongly indicates that the joining of the company via the purchase of an "advertisement" on the rotator in fact constituted an "investment" for a financial return.

In *Klikmart Shopping Club Corp. v. EIPD*[56], the Commission En Banc in resolving Klicmart's Motion to Lift CDO held that:

> "It should be emphasized that on numerous occasions the concept of MLM is exploited to disguise pyramiding schemes. Thus, in the *US Case of FTC vs. Koscot Interplanetary Inc.*, a four (4) part test was formulated to determine whether an MLM business is a pyramid scheme. This is known as the "Koscot test" which comprises of the following: 1.) payment of money to the company; 2.) the participant receives the right to sell a product [or service]; 3.) the participant receives compensation for recruiting others into the program; 4.) the compensation is unrelated to the sale of products [or services] to the ultimate user.
>
> In the instant case, Respondents' business model satisfies the Koscot test. They require their new members to place the amount of Php 1,500.00 to Php 15,000.00 to gain entry in their business scheme. After placement, a new member receives the right to sell their products. In fact, Respondents admit this scheme when they claim to be a MLM company, which awarded rebates or bonuses based on sales of their members. Further, members receive additional compensation when they recruit new investors, through the rewards system [Infinite Direct Referrals or Customer Finder Fee, Unilevel Bonus (Power of Piso) and Royalty Raffle Bonus (Balato)]. Finally, rewards system for recruitment is completely unrelated to the sales of Respondents' products.
>
> Thus, Respondents offer more rewards/benefits from recruitment rather than from selling of their products. Stated otherwise, the rewards emphasize on recruitment over retail sales."

In this case, Success200 argues that it is a distributor which is engaged in the selling of food supplements. It further argues that its members do not invest their money with Success200, but instead purchase its products. The argument is misplaced.

In the "split matrix" system, as provided by Success200,[57] it offers five (5) packages a member may avail of: ranging from the Bronze package, also known as the "low-end" package, in the investment amount of Php 1,800.00 up to the Platinum package, also known as the "high-end" package, in the investment amount of Php 36,000.00.

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[56] SEC CDO Case No. 09-15-023, April 5, 2016.

[57] The description of the "split matrix" system and its product packages are provided by Alberto P. Monzuela during the surveillance operation, the Brochure of Success200, DVD presenting the marketing scheme of Success200, and the statements of Kenneth G. Badiola during the hearing on the lifting of the CDO.

Notwithstanding the tangible products offered and sold (i.e., the food supplements) by Success200, the mere purchase of the foregoing product packages, as evidenced by the issuance of "sales invoices",[58] in the "split matrix" system does not preclude the existence of a security pursuant to the case of *Bell*. Further, the joining of Success200, via the purchase of such product packages allow its members to participate in a compensation plan which also constitutes an investment of money as mentioned in the case of *US v. Bowdoin*. Stated otherwise, the very terms of the "Split Matrix" demonstrates that it favors recruiting since it promises to pay back Php 10,000.00 to Php 200,000.00 when a member makes a "Success Board Complete". As can be seen, the scheme incentivizes recruitment satisfying the Koscot Test. Clearly, the first element is satisfied since there is an investment of money when the members of Success200 avail of the product packages.

2. Common enterprise

As to the second element, a common enterprise[59] exists in this case since there is a joint participation by its members in the same investment enterprise since they are all placed in a board with four (4) levels. After the member joins Success200 by availing of any of the product packages, such joining member must refer or invite others to join Success200, as provided by the statements of Alberto P. Monzuela and Reynalyn Soliven, and such recruits must then refer two (2) additional people. Once all the eight (8) members in Level 1, who are the downlines of the member in Level 4, complete a sale or a make "Success Board Complete", the member in Level 4 will receive the respective reward based on the product package availed of. Clearly, the second element is present since there is a joint participation of the members in the "split matrix" system. Moreover, the commission or earnings which the member in Level 4 may receive depends on the performance or ability of the downlines, or all eight (8) members in Level 1 to make a sale of the product packages.[60]

3. Expectation of profits

As to the third element, there must be an expectation of profits, and that the investors are "attracted primarily by the prospects of a return on his investment."[61] In *Power Homes Unlimited Corporation v. Securities and Exchange Commission*, the Court stated that self-improvement contracts which primarily offer the buyer the opportunity of earning commissions on the sale of contracts to others are "investment contracts". This is regardless of the fact that the buyers, in addition to investing money needed to purchase the contract,

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[58] Motion to Lift CDO, Annex "6" (Sales Invoices of Success200).

[59] 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". One of these tests is the horizontal commonality approach. Under this test, the determination involves an inquiry into whether the transaction involves the joint participation of more than one investor in (i) the investment of funds or (ii) the sharing of profits. 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 (*In the Matter of Octopus Network, Inc.*, SEC-PED Case No. 98-2220, 22 May 1998)

[60] As can be seen in Table 1 in page 6 of this Resolution.

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

were obliged to contribute their own efforts in finding prospects and bringing them to sales meetings. Moreover, the court held that the purchaser is really buying the possibility of deriving money from the sale of the plans. Once an individual has purchased a plan, he turns his efforts toward bringing others into the organization, for which he will receive a part of what they pay.

In the case at bar, even though the members of Success200 purchase tangible products such as the food supplements, they are clearly purchasing the potential of earning commissions or rewards. In its marketing program, Success200 places great emphasis on distributors duplicating themselves and making big money from filling up the "split matrix" board. This based on some of the testimonials and statements of some of its members:

(i) In the testimonial Jacqueline Fariñas, who is a member and team leader of "Team Snowwhite", she stated that Success200 provided her with "*extra income*".[62]
(ii) In the statement of Ann Fevreir S.J. Santiago, she states that this was "[her] chance *to earn* while at home". She further states that "after a week I got my first *commission*, after another week I got *another commission*, another week went by I received *another commission.*" Furthermore, her Facebook page provides "Earn your first P10,000 *commission* upon completing first board sales. Succeeding *guaranteed income* at 9k, not just once but 4 times.[63]
(iii) In the testimonial of Jeriel Morada, who is former OFW in Saudi Arabia, he stated: "Dahil po sa SUCCESS200 buo ko pong pinagmamalaking sabihin na nakapagpatayo na po tayo ng bahay and then maglalabas din po tayo ng isang Nissan Almera in a few days and then naka bayad napo tayo ng mga utang natin."[64]
(iv) In the testimonial of Ed Valdez, he stated "Pero nung dumating itong SUCCESS ah yong *financially freedom* na feel ko talaga ah sa loob lamang ng apat na buwan ay imagine mo yong financially naka pag pundar na nang ah RESORT ng Lupat Bahay ngayon na pinapatayo naming mag asawa." [65]
(v) In the testimonial of Mylene Reyes, she stated "*Nabibili na namin yung mga gusto namin*, nailalabas ko na yung mga pamilya ko nabibili ko yung gusto ng anak ko so napaka laking tulong, tapos sa ngayon in three months na ano ko.. mapapagawa ko na yung bahay naming so nakakapag save na rin ako, dati talaga wala."[66] and
(vi) In the testimonial of Maricon Vibal, he stated "Hindi ako nagdalawang isip na sumali, totoo pala ang dating ano lang ang nasa isip naming eh second hand na sasakyan pero binigay sa amin ni Lord at saka ni SUCCESS is a brand new car tapos nagkaroon din kami ng motor then sisimulan namin yung pagpapatayo ng bahay."[67]

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[62] Motion to Lift CDO, Annex "2-AH" (Testimonial of Jacqueline Fariñas dated 29 January 2016).
[63] *Id.*, Annex "3" (Statement of Ann S.J. Fevreir dated 31 January 2016).
[64] *Id.*, Annex "7" (Brochure of Success200).
[65] *Id.*
[66] *Id.*
[67] *Id.*

In fact, even though Success200 mentions the health benefits of its products, it emphasizes the opportunity of earning commissions or rewards:

(i) In the admission of Alberto Monzuela, during the surveillance operation, he emphasizes the rewards and commissions a member may be entitled to;[68]
(ii) In the Motion to Lift CDO, Success200 states it "never ***guaranteed*** profit but only ***earnings***";[69]
(iii) In the Brochure of Success200 and DVD, it provides the "8 WAYS TO EARN", which includes the "split matrix" reward, "unilevel bonus" and "royalty bonus";[70]
(iv) In the Distributor Application, it mentions "opportunity to earn";[71]
(v) In the video presentation of Success200, the speaker begins by stating "do you want to *earn* more than enough for your family, while staying fit and healthy; if yes, we will show you an *opportunity* on how to show make this dream into a reality";[72]
(vi) Again, in the video presentation the speaker mentions that "Success200 was established with the goal of providing Filipinos a *way to earn* without having to sacrifice one's time (sic) for family".[73]

As can be seen above, the members are attracted to the prospects of a return or the possibility of deriving money from the purchase of the product packages of Success200 considering that the company places much emphasis on earning commissions or rewards. Stated differently, Success200 failed to present evidence that its compensation plan is related to the sale of products to the ultimate consumer. Further, depending on the product package that the member purchases, such member will expect to earn commissions or rewards ranging from Php 10,000.00 for the Bronze package to Php 200,000.00 for the Platinum package. Furthermore, the members may receive a "Unilevel Bonus" or a "Royalty Bonus" as provided in the Brochure, video and PowerPoint presentation.

In fact, the products available in the Platinum package, such as the twenty bottles for the personal consumption of the members (as stated by Alberto P. Monzuela in his verified letter attached to the Supplemental Rejoinder), for the amount of Php 36,000.00, would not be commensurate to the commercial or inherent value of the products. An average reasonable minded Filipino will not pay Php 36,000.00 for twenty bottles for their personal consumption. On the other hand, it is evidently apparent that a member would rather avail of the Platinum package for the prospects or possibility of earning Php 200,000.00 for completing the 1st board, then an additional Php180,000.00 for completing the 2nd board, and another Php 180,000.00 for completing the 3rd board plus downpayment for a car.

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[68] *Id.*, par. 10 and Annex "H" (Joint Affidavit executed on 7 September 2015 by the Investigating Team of the EIPD).
[69] *Id.*, par. 12.
[70] *Id.*, Annexes "7" (Brochure of Success200) and "10" (DVD presentation).
[71] *Id.*, Annex "8" (Distributor Application Form).
[72] *Id.*, Annex "10" (DVD presentation).
[73] *Id.*

Clearly, the third element is satisfied in this case, since there is an expectation of earnings on the part of Success200 members and they are attracted to the prospects of a return of money derived from the payment of the product package.

4. **Primarily from the efforts of others**

Lastly, as to the fourth element, there must be the expectation of profits primarily from the efforts of others. In this case, the operations and management of the "split matrix" rests upon Success200 and the members do not participate in such operations or management thereof.

Issuance of Permanent CDO

Consequently, an order declaring the CDO permanent is warranted since the investment scheme of Success200 falls under the definition of investment contracts. Moreover, it failed to prove that it is not engaged in investment taking activities, and to debunk evidence of the non-registration of the same. Thus, the investment scheme will operate as a fraud on investors or likely to cause grave or irreparable injury. On the hand, records disclose that Success200 is engaged in investment-taking activities akin to a pyramid scheme[74] since the joining of Success200, via the purchase of such product packages, allows its members to participate in a compensation plan which constitutes an investment of money. Thereafter, the members are required to recruit or invite others to join by requiring them purchase its investment contracts in the guise of a product package of health products. Further, the earnings a member receives depends on the performance of the downlines to "voluntarily" recruit or invite others to join.

As stated in the CDO, citing a Supreme Court case, this scheme is not a legitimate investment strategy but a gullibility scheme, which works only as long as there is an ever increasing number of new investors joining the scheme. In fact, the paid up capital of Success200 is only Php 100,000.00 while the "high-end" level investment pay-out in the Platinum Package is Php 200,000.00. It is difficult to sustain over a long period of time because Success200 needs an ever larger pool of later investors to continue paying the promised profits to early investors. The idea behind this type of swindle is that the "con-man" collects his money from his second or third round of investors and then absconds before anyone else shows up to collect. Necessarily, these schemes only last weeks or months at most.[75] Hence, an order making the CDO PERMANENT is warranted.

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[74] *People v. Balasa*, G.R. Nos. 108601-2 (1998), in citing the Consumer Act of the Philippines (RA 7394), defines a pyramid scheme as a sales devices whereby a person, upon condition that he makes an investment, is granted by the manufacturer or his representative a right to recruit for profit one or more additional persons who will also be granted such right to recruit upon condition of making similar investments: *Provided*, That, the profits of the person employing such a plan are derived primarily from the recruitment of other persons into the plan rather than from the sale of consumer products, services and credit; *Provided, further*, That the limitation on the number of participants does not change the nature of the plan.

[75] People v. Romero, et al., G.R. No. 112985, 21 April 1999.

WHEREFORE, premises considered, the *Motion for Reconsideration (vis-à-vis Motion to Lift Cease and Desist Order)* is hereby **DENIED** and the CEASE AND DESIST ORDER issued by the Commission on 26 January 2016 against **SUCCESS200 INTERNATIONAL MARKETING CORPORATION**, its partners, officers, directors, agents, representatives, conduits, assigns, AND ANY AND ALL PERSONS CLAIMING AND ACTING FOR AND IN THEIR BEHALF, is hereby **MADE PERMANENT**.

The Enforcement and Investor Protection Department of the Commission is hereby **DIRECTED** to: (a) serve this Order on the President, General Manager, Corporate Secretary, Treasurer, or In-House Counsel of Success200 International Marketing Corporation, AND (b) post copies of the Order at the entrance of the main office and/or branches, if any, of Success200 International Marketing Corporation.

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 Operating Departments of the Commission for their information and appropriate action.

The **Enforcement and Investor Protection Department of the Commission** is hereby **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 *Order.*

SO ORDERED.

Mandaluyong City; 26 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 Official Business