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

In the Matter of:

GRANDTIME AUTOMOBILE INC.

SEC-CDO CASE NO. 10-15-027
FOR: Issuance of Cease and Desist Order

ENFORCEMENT AND INVESTOR PROTECTION DEPARTMENT,
Movant.

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CEASE AND DESIST ORDER

Pending consideration before the Commission *En Banc* is a *Motion for Issuance of a Cease and Desist Order* (Motion for CDO) in the verified Petition for Revocation dated 6 October 2015 filed by the Enforcement and Investor Protection Department (EIPD) of this Commission against GRANDTIME AUTOMOBILE INC. (GTA).[1]

GTA incorporated with the Commission on 24 April 2015 under SEC Registration No. CS201508050.[2] The primary purpose of GTA is "[t]o engage in, carry on and operate the business of DRIVING SCHOOL and other related services which may be deemed incidental to the purpose.[3] The paid up capital of GTA is Php 312,500.00.[4]

FACTS

In its Motion for CDO, the EIPD alleges that an anonymous caller claims that GTA might be engaged in "an illegal form of multi-level marketing".[5]

As a result of which, the EIPD alleges it viewed the Facebook page of GTA, which provides for its marketing plans promising a payout of Php 12,000.00 after the payment of a fixed "entry fee" of Php 1,200.00 when four (4) other persons are recruited.[6]

On 14 July 2015, upon request from the EIPD, the Corporate Governance and Finance Department (CGFD) issued a certification to the effect that GTA is not a

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[1] Motion for CDO filed on 09 October 2015.
[2] *Id.*, par. 1, Annex "A" (Certificate of Incorporation of GTA).
[3] *Id.*, par. 2, Annex "A" (Second Article of the Articles of Incorporation).
[4] *Id.*, par. 3, Annex "A" (Eight Articles of the Articles of Incorporation).
[5] *Id.*, par. 5.
[6] *Id.*, par. 6.

registered issuer of securities under Sec. 8 and 12 of the Securities Regulation Code (SRC)[7] and is not licensed to offer or sell securities to the public.[8]

On 23 July 2015, the investigating team of the EIPD executed a Field Investigation Report stating that it proceeded to the principal office of GTA to conduct an ocular inspection.[9] During the ocular inspection, the investigating team noticed a tarpaulin featuring "different sports cars and luxury cars with words advertising earning opportunity" outside the building of the office of GTA.

Thereafter, Pastor Carlos Nabata introduced himself as one of the Team Leaders to the investigating team and provided a presentation on the business scheme of GTA. He explained that there are four (4) parts of GTA which a joining member may activate his account, namely: (i) "Jumpstart", with an entry fee of Php 1,500.00; (ii) "Booster", with an entry fee of Php 1,800.00; (iii) "Main Turbo", with an entry fee of Php 13,500.00; and (iv) "VIP Nitro", with an entry fee of Php 50,000.00.

He further stated that each of the four (4) parts has three (3) laps. To "graduate" or "exit" each lap, the seven positions must be filled up. In other words, the joining member must enroll two (2) partners and such partners must bring in two (2) partners. Below is an illustration of the foregoing:

<table>
<tr><td>The Recruit of the Joining Member's Partner</td><td>The Recruit of the Joining Member's Partner</td><td>The Recruit of the Joining Member's Partner</td><td>The Recruit of the Joining Member's Partner</td></tr>
<tr><td colspan="2">Joining Member's Partner</td><td colspan="2">Joining Member's Partner</td></tr>
<tr><td colspan="4" align="center">Joining Member</td></tr>
</table>

Moreover, for each direct referral of the partner, the member receives an incentive, the amount of which varies depending of the lap and part of GTA he is enrolled in (e.g. direct referral commission in the amount of Php 1,500.00 is given to the member who is enrolled in the 1st lap of VIP Nitro). The member receives an additional commission when his partner refers an additional partner (e.g. commission in the amount of Php 48,500.00 is given to the member who is enrolled in the 1st lap of VIP Nitro). Once all seven positions are filled, the member advances to the 2nd lap of the respective lap and shall receive an "exit bonus". Further, the member will automatically enter the 2nd lap and shall pay an entry fee, which will be deducted from his commissions he earned from the 1st lap. Lastly, it must be noted that the member may be entitled to the amount of Php 1,390,000.00, which is considered as the total payout after completing the 3rd lap in the VIP NITRO.

On 24 August 2015, the EIPD alleges that it issued a Notice of Conference on the officers of GTA directing them to appear before the latter on 3 September 2015.[10] However, the said officers of GTA failed to appear on date of the conference. Thereafter,

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[7] Republic Act 8799 (2000).
[8] *Id.*, par. 11, Annex "I" (CGFD's Certification dated 25 February 2015).
[9] *Id.*, Annex "B"
[10] *Id.*, par. 18.

the said officers again failed to appear after being given another chance to appear by the EIPD.

Afterwards, the EIPD filed a *Supplement to the Motion for [CDO]* attaching a Certification from the Markets and Securities Regulation Department (MSRD).[11] The Certification stated that GTA has not been issued a Certificate of Registration or Licenses to act as Broker and/or Dealer in Securities, Dealer in Government Securities, Investment Adviser of an Investment Company, Investment House, Transfer Agent. The MSRD further certified that GTA is not, under any circumstance, authorized or licensed to engage in activities and/or solicit investments necessarily connected with or incidental to the pursuit of and carrying on said business or profession which are required to secure certificates of registration/licenses from the Commission.[12]

Hence, the filing of this Motion for CDO.

ISSUE

Whether the issuance of a CDO is justified in this case.

RULING

Concept of securities and investment contract

Securities are "shares, participation or interests in a corporation or in a commercial enterprise or profit-making venture and evidenced by a certificate, contract, instrument, whether written or electronic in character".[13] It includes an investment contract,[14] which is defined as 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."[15] A presumption that a contract is an investment contract arises whenever a person seeks to use the money or property of others on the promise of profits.[16]

Elements of an investment contract

In *Power Homes Unlimited Corporation v. Securities and Exchange Commission*,[17] the Supreme Court stated that an investment contract in our jurisdiction, to be a security subject to regulation by the Commission, must be proved to be (1) an investment of money, (2) in a common enterprise, (3) with expectation of profits, (4) primarily from efforts of others.

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[11] Supplement to the Motion for CDO dated 4 January 2016 and filed on 8 January 2016.
[12] *Id*, Annex "A" (Certification of the MSRD dated 9 November 2015).
[13] Section 3.1., SRC.
[14] Section 3.1.(b), *Id.*
[15] SRC Rule 3(1)(G), Amended Implementing Rules and Regulations of the SRC.
[16] *Id.*
[17] G.R. No. 164182, 26 February 2008.

In the case at bar, the investment scheme of GTA constitutes an investment contract considering all four (4) elements of an investment contract are present.

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.[18] In the instant case, as stated by Pastor Carlos Nabata and as provided for by the flier of GTA, there are four (4) parts of GTA a joining member can choose from, namely: (i) "Jumpstart", with an entry fee of Php 1,500.00; (ii) "Booster", with an entry fee of Php 1,800.00; (iii) "Main Turbo", with an entry fee of Php 13,500.00; and (iv) "VIP Nitro", with an entry fee of Php 50,000.00. In fact, there is no evidence indicating that GTA does not provide driving lessons pursuant to its primary purpose in its Articles of Incorporation for the entry fees paid by its members. Clearly, there is an investment of money when the joining member avails of any of the four (4) parts of GTA by the payment of the entry fee.

As to the *second element*, there is a common enterprise. To reiterate, 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".[19] One of these tests is the horizontal commonality approach. Under this test, the determination of whether a transaction satisfies the commonality element of the modified Howey test involves an inquiry into whether the said transaction involves the joint participation of more than one investor in (i) the investment of funds or (ii) the sharing of profits.[20] 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.[21]

In the case at bar, a common enterprise exists since there is a joint participation by the members and their referrals. As stated by Pastor Carlos Nabata and as provided for by the flier of GTA, at the principal office, in order to "graduate" or "exit" from each lap of any of the four (4) parts of GTA, the seven (7) positions in each table must be filled up. The positions are filled up when the member "enrolls" or recruits two (2) partners. Such partners must then "enroll" or recruit two (2) additional partners. Clearly, there is a pyramid scheme[22] that exists in GTA, which indicates the pooling of funds in a common enterprise.

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[18] *SEC v. International Mining Exchange, Inc.*, 515 F. Supp. 1062.

[19] *In the Matter of Octopus Network, Inc.*, SEC-PED Case No. 98-2220, 22 May 1998.

[20] *Id.*, citing 69 Am Jur 2d citing Stenger v. R.H. Love Galleries, Inc. 741 F2d 144.

[21] *Id.*, citing Wasnowic v. Chicago Bd. of Trade 352 F Supp 1066.

[22] *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.

As to the *third element*, there must be an expectation of profits. By profits, the court has meant either capital appreciation resulting from the development of the initial investment, or participation in earnings resulting from the use of investors' funds. In such cases, the said investors are "attracted primarily by the prospects of a return on his investment."[23] In this case, the members avail of the packages with the view of receiving profits as much as Php 1,390,000.00 from GTA. In other words, the members flocked to GTA primarily for the income opportunity.

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 rests upon GTA and the members do not participate in such operations or management thereof.

Clearly, GTA is engaged in the sale or offering for sale or distribution within the Philippines of securities, i.e., investment contracts, based on the statements made by Pastor Carlos Nabata, and based on the information provided in the flier of GTA.

Requirement of the registration of securities

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.

As securities, the investment scheme of GTA must be registered being offered or sold to the general public, in compliance with Sections 8.1 and 12.1 of the SRC.

In the instant case, the presentation of Pastor Carlos Nabata and the flier of GTA, provided at its principal office, constitutes a public offering under the Amended Implementing Rules and Regulations of the SRC,[24] viz –

> "Public offering means a random or indiscriminate offering of securities in general to anyone who will buy, whether solicited or unsolicited. **Any soliciatation or presentation for sale through any of the following modes shall be presumed to be a public offering**: x x x
>
> ii. **Presentation in any public or commercial place**;
>
> iv. **Distribution and/or making available flyers, brochures or any offering material in a public or commercial place,** or mailing the same to prospective purchasers.x x x" (Emphasis ours)

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[23] *Power Homes Unlimited Corporation v. Securities and Exchange Commission.*
[24] SRC Rule 3(1)(N), Amended Implementing Rules and Regulations of the SRC.

Anent thereto, the Certification issued by the MSRD clearly shows that GTA is not registered issuer of securities pursuant to Sections 8.1 and 12.1 of the SRC, and therefore, not licensed to issue or offer securities to the public.

From the foregoing, there is substantial evidence to show that GTA is engaged in the sale and offer of securities, in form of investment contracts, without the proper registration.

Justification for the issuance of CDO

Consequently, the issuance of the CDO is justified pursuant to Section 64[25] of the SRC since the scheme offered by GTA will operate as a fraud on investors or likely to cause grave or irreparable injury. The Supreme Court, in a case, held that a transaction similar to the case at hand 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 GTA is only Php 312,500.00 while the total payout to an investor for the 3rd lap in the VIP Nitro is Php 1,390,000.00. In which case, it is difficult to sustain over a long period of time because GTA 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.[26] Hence, the issuance of the CDO is justified.

WHEREFORE, premises considered, **GRANDTIME AUTOMOBILE INC.**, its partners, officers, directors, agents, representatives, conduits, assigns, AND ANY AND ALL PERSONS CLAIMING AND ACTING FOR AND IN THEIR BEHALF are hereby ordered to **IMMEDIATELY CEASE AND DESIST**[27]**, UNDER PAIN OF CONTEMPT**, from engaging in activities of selling and/or offering for sale securities in the form of investment contracts or any others of the same nature, as discussed in this *Cease and Desist Order*, until the requisite registration statement is duly filed with and approved by the Commission and the corresponding to offer/sell is issued.

Furthermore, the subject corporation is directed to cease its internet presence relating to above-stated investment activities. The Commission will institute the appropriate administrative and criminal action against any persons or entities found to act as solicitors, information providers, salesmen, agents, brokers, dealers or the like for and in behalf of the subject corporation.

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[25] Section 64.1., SRC. The Commission, after proper investigation or verification, *motu propio*, 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.

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

[27] Section 64.1, SRC, The Commission, after proper investigation or verification, *motu propio,* 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 fraud on investors or is otherwise likely to cause grave or irreparable injury or prejudice to the investing public.

The **Enforcement and Investor Protection Department** of the Commission is hereby **DIRECTED** to: 1) serve this *Order* to GRANDTIME AUTOMOBILE INC., its President, General Manager, Corporate Secretary, Treasurer, In-House Counsel or partners; 2) post copies of the *Cease and Desist Order Order* at the entrance of the main office and/or branches, if any, of GRANDTIME AUTOMOBILE INC.

Let a copy of this *Cease and Desist Order* be also posted in the Commission's website; published in a national newspaper of general circulation and furnished to the Markets and Securities Regulation Department, Company Registration and Monitoring Department, the Corporation Finance Department and the Economic Research and Information Department 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 *Cease and Desist Order.*

In accordance with the provisions of Sec. 64.3[28] of SRC and Sec. 10-3 of the 2006 Rules of Procedure of the Commission, the parties subject of this *Cease and Desist Order* may file a request for the lifting thereof within five (5) days from receipt hereof.

FAIL NOT UNDER PENALTY OF LAW.

SO ORDERED.

Mandaluyong City; 26 January 2016.

TERESITA J. HERBOSA
Chairperson

MANUEL HUBERTO B. GAITE
Commissioner

ANTONIETA F. IBE
Commissioner

EPHYRO LUIS B. AMATONG
Commissioner

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BLAS JAMES G. VITERBO
Commissioner

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[28] SRC, Section 64.3. Any person against whom a cease and desist order was issued may, within five (5) days from receipt of the order, file a formal request for a lifting thereof. Said request shall be set for hearing by the Commission not later than fifteen (15) days from its filing and the resolution thereof shall be made not later than ten (10) days from the termination of the hearing. If the Commission fails to resolve the request within the time herein prescribed, the cease and desist order shall automatically be lifted.

* On Official Business

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Company Registration and Monitoring Department
2nd Floor, Securities and Exchange Commission
SEC Building, EDSA, Greenhills
Mandaluyong City, Metro Manila Philippines

Corporate Governance Finance Department
11th Floor, Securities and Exchange Commission
SEC Building, EDSA, Greenhills
Mandaluyong City, Metro Manila Philippines

Markets and Securities Regulation Department
6th Floor, Securities and Exchange Commission
SEC Building, EDSA, Greenhills
Mandaluyong City, Metro Manila Philippines

Economic Research and Training Department
10th Floor, Securities and Exchange Commission
SEC Building, EDSA, Greenhills
Mandaluyong City, Metro Manila Philippines

Information and Communication Technology Department
7th Floor, Securities and Exchange Commission
SEC Building, EDSA, Greenhills
Mandaluyong City, Metro Manila Philippines