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

IN THE MATTER OF:

PHI FITNESS GYM INC.

SEC CDO CASE NO. 06-24-113
Promulgated: 13 June 2024

ENFORCEMENT AND INVESTOR PROTECTION DEPARTMENT,
Movant.

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CEASE AND DESIST ORDER

This resolves the *Motion for Issuance of A Cease and Desist Order* dated 27 May 2024 (the "Motion") filed by the Enforcement and Investor Protection Department (EIPD) on 04 June 2024, praying that a Cease and Desist Order (CDO) be issued: (a) directing PHI Fitness Gym Inc. (hereinafter referred to as "PHI Fitness"), its owner, agents, representatives, salesmen, uplines, promoters, influencers, enablers, conduit entities, subsidiaries (collectively referred to as the "Agents"), and all persons acting for and on their behalf, to immediately cease and desist from offering or selling unregistered securities in the form of investment contracts, and to remove or take down their online posts and offerings until the requisite registration statement is duly filed with and approved by the Securities and Exchange Commission (SEC/ the "Commission"), and the corresponding permits to offer/sell securities are issued; and (b) prohibiting PHI Fitness, its Agents, and all persons acting for and on their behalf from transacting any and all business involving the funds in their depository banks, and from transferring, disposing, or conveying in any other manner, any and all assets, properties, real or personal, including bank deposits, if any, of which the named persons herein may have any interest, claim, or participation whatsoever, whether directly or indirectly, under their custody, to forestall grave damage and prejudice to all concerned and to ensure the preservation of assets for the benefit of the investors, unless the same is authorized by the Commission.

PARTIES

Movant EIPD is one of the Commission's operating departments tasked, among others, to investigate *motu proprio* or upon complaint or referral, violations of laws, rules, and regulations administered, implemented, or issued by the Commission, and to seek the issuance of a Cease and Desist Order (CDO) whenever warranted by the circumstance.[1]

PHI Fitness is an entity registered as a sole proprietorship with the Department of Trade and Industry, under the name of Jonathan Canon Sandigan ("Mr. Sandigan"), with Certificate No./Business Name No. 3930069 issued on 13 June 2022 with a national business scope.[2]

RELEVANT FACTS

As early as December 2023, the EIPD started to receive email inquiries from the public[3] on the legitimacy of the "co-ownership" program being offered by PHI Fitness. This prompted the EIPD to conduct a formal investigation to determine if the activities of PHI Fitness constitutes a violation of the Securities Regulation Code ("SRC"), the Revised Corporation Code (RCC) and other rules and regulations administered and/or implemented by the Commission.

The EIPD investigation revealed that PHI Fitness entices the public through video presentations and social media particularly on its Facebook account, to invest in its gym business. The scheme requires an investment of at least Two Hundred Fifty Thousand Pesos (PhP250,000.00), which makes an investor a part owner of PHI Fitness and entitles him/her to a gym membership. In addition to these incentives, PHI Fitness guarantees investors a monthly return of ten percent (10%) with freebies consisting of Gatorade/drinks, coffee, sauna, basketball court use, boxing ring use, among others, for a period of five (5) years.[4]

In support thereof, the EIPD submitted in evidence a Memorandum of Agreement (MOA) executed by PHI Fitness, through its President, Mr. Sandigan, and an actual investor, which specifically embodied the

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[1] SEC Office Order No. 512, series of 2013.
[2] Motion. Annex "F" of Annex "B".
[3] *Ibid.* Annexes "D" to "D-2" of Annex "B".
[4] *Ibid.* Annexes "E" to "E-2" of Annex "B".

foregoing investment scheme. The MOA further provides that the capital contribution of the parties are considered partnership assets, and as such neither party can demand the division of the assets during the five (5) year term.

Moreover, the EIPD substantiated its allegation that PHI Fitness is not authorized to sell/offer securities with the Certifications issued by the Company Registration and Monitoring Department (CRMD),[5] the Corporate Governance and Finance Department (CGFD),[6] and the Markets and Securities Regulation Department (MSRD)[7] of the Commission, which all attested that PHI Fitness is not registered as a corporation, partnership or one person corporation (OPC), has not applied for a primary franchise as a corporation or partnership; has not been issued any secondary license to operate as broker/dealer of securities; and is not a registered issuer of any securities pursuant to Sections 8 and 12 of the SRC, or of mutual funds, including exchange traded funds, proprietary/non-proprietary shares or membership certificates and timeshares.

The EIPD further found that PHI Fitness continues to this day, to carry out its unauthorized investment-taking activities .

ISSUE

Whether the allegations and evidence presented by the EIPD in support of its Motion warrant the issuance of a CDO against PHI Fitness, its President, Mr. Sandigan and its Agents.

RULING

We grant the Motion.

After careful consideration of the allegations and the pieces of evidence presented, the Commission finds that the EIPD sufficiently established that PHI Fitness, Mr. Sandigan, and its Agents, are offering and/or selling unregistered securities in the form of investment contracts to the public without the requisite license from the Commission, in violation of the relevant provisions of the SRC and its IRR.

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[5] *Ibid.* Annex "A".
[6] *Ibid.* Annex "C".
[7] Motion. Annex "D".

Section 3 of the SRC defines "securities" as follows:

> SEC. 3. Definition of Terms. –
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> 3.1. "**Securities**" are **shares, participation or interests** in a corporation or **in a commercial enterprise** or profit-making venture and evidenced by a certificate, contract, instrument, whether written or electronic in character. It **includes**:
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> xxx
>
> (b) **Investment contracts**, certificates of interest or participation in a profit-sharing agreement, certificates of deposit for a future subscription; (Emphasis supplied)

Rule 26.3.5 of the SRC-IRR specifically 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.
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> **A common enterprise is deemed created when two (2) or more investors "pool" their resources, creating a common enterprise,** even if the promoter receives nothing more than a broker's commission. (Emphasis supplied)

In the case of *SEC vs. Howey Co.*, the US Supreme Court defined an investment contract as a contract or scheme for the placing of capital or laying out of money in a way intended to secure income or profit from its employment.[8] Investment contracts have been used and adopted in various situations where individuals were led to invest money in a common enterprise with the expectation that they would earn a profit through the efforts of the promoter or of someone other than themselves.[9] It is in the context of the foregoing that the US Supreme Court came up with and adopted the *Howey Test*[10] in determining if an

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[8] 328 U.S. 293 (1946).
[9] *Ibid.* Although the definition as stated in the Howey Case qualified that the earning of profit was expected to be solely through the efforts of another party, Rule 26.3 of the 2015 IRR of the SRC replaced the qualifier with *"primarily"*, acknowledging that an investment contract may still be present where the individual who placed the money exerted a small amount of effort in an attempt to earn the profits.
[10] *Ibid.*

investment scheme, regardless of the legal terminology used, partakes of the nature of an investment contract.

Our Supreme Court thereafter adopted and consistently applied the Howey Test in determining if a transaction or a scheme is a security in the form of an investment contract, which requires prior registration from the Commission. The case of *Virata vs. Ng Wee,*[11] emphasized this, to wit:

> In this jurisdiction, the Court employs the Howey test, named after the landmark case of Securities and Exchange Commission v. W.J. Howey Co., to determine whether or not the security being offered takes the form of an investment contract. The case served as the foundation for the domestic definition of the said security.
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> **Under the Howey test, the following must concur for an investment contract to exist: (1) a contract, transaction, or scheme; (2) an investment of money; (3) investment is made in a common enterprise; (4) expectation of profits; and (5) profits arising primarily from the efforts of others.** Indubitably, all of the elements are present in the extant case. (Emphasis and underscoring supplied)

Relative thereto, the Supreme Court equally emphasized in the case of *Power Homes Unlimited Corp. v. Securities and Exchange Commission*[12] that in applying the Howey Test, the nature and the entirety of the transaction should be considered, consistent with the broad concept of "securities" in our jurisdiction, 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 contract." Known as the Howey Test, it requires a transaction, contract, or scheme whereby a person (1) makes an investment of money, (2) in

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[11] G.R. Nos. 220926, 221058, 221109, 221135 & 221218, July 5, 2017 [Per J. Velasco, Third Division].
[12] G.R. No. 164182, February 26, 2008 [Per J. Puno, First Division].

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. (Underscoring supplied)

Applying the Howey Test to the instant case, the Commission agrees with the EIPD's finding that PHI Fitness is engaged in the sale and/or offer for sale of unregistered securities in the form of investment contracts in violation of Section 8.1 of the SRC as all its elements are present, to wit:

First, there is an investment of money. The MOA executed by PHI Fitness and its investors required the latter to part with their hard-earned money, i.e. ₱250,000.00, for them to be a co-owner or a partner of PHI Fitness, which entitles them to the guaranteed returns and benefits offered by the latter.

Second, the EIPD was able to show that the investment scheme of PHI Fitness involves the pooling of the amounts invested by its investors who are made to believe that they are "co-owners" of PH Fitness. This pooled fund is actually being utilized by PHI Fitness to pay the guaranteed returns it promises to its "co-owners/ partners". This is the common enterprise that is being sustained by the investments that PH Fitness is receiving from the public;

Third, under the scheme of PHI Fitness, an investor expects to earn a monthly guaranteed return of 10% from his/her investment within a period of five (5) years. Thus, an investment of P250,000.00 has a monthly yield of P25,000; and

Fourth, the profits which co-owners/partners expect to receive are generated through the marketing and managerial efforts of PHI Fitness, its owner and/or its Agents who carry out extensive marketing activities, through video presentations and social media platform, to ensure the continued influx of new investors.

Furthermore, the act of PHI Fitness in carrying out its unauthorized investment-taking activities by conducting public video presentations and using social media platforms, e.g. Facebook, constitute public offering as defined under Rule 3.1.17 of the 2015 SRC IRR, to wit:

> 3.1.17. **Public offering is any offering of securities to the public or to anyone, whether solicited** or unsolicited. Any solicitation or presentation of securities for sale through any of the following modes shall be presumed to be a public offering:
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> x x x
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> 3.1.17.2 Presentation in any **public** or commercial **place**;
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> 3.1.17.3 Advertisement or announcement in radio, television, telephone, **electronic communications, information communication technology or any other forms of communication**; (Emphasis supplied)

Relative thereto, Section 8.1 of the SRC categorically provides that securities cannot be sold or offered for sale within the Philippines if the same are not registered with the Commission in the form of an approved Registration Statement and a Permit to Offer/Sell issued in favor of the applicant, to wit:

> SEC. 8. Requirement of Registration of Securities. – 8.1 **Securities shall not be sold or offered for sale or distribution within the Philippines, without a registration statement duly filed with and approved by the Commission**. Prior such sale, information on the securities, in such form and with such substance as the Commission may prescribe, shall be made available to each prospective purchaser. (Emphasis supplied)

In the instant case, the evidence presented by the EIPD showed that PHI Fitness is bereft of any authority, and has not been issued any license to sell, offer or deal with securities. PHI Fitness' act of offering/selling unregistered securities in the form of investment contract sans the required license from this Commission constitutes a clear and continuing violation of Sections 8 and 28 of the SRC. This justifies the immediate issuance of a CDO for the protection of the investing public.

Relative to the prayer for issuance of a CDO, Section 64.1 of the SRC provides that the Commission may issue a CDO without the necessity of conducting a hearing if, to its mind, the act or practice will operate as a fraud on investors or is otherwise likely to cause grave or irreparable injury or prejudice to the investing public, thus:

> Section 64. *Cease and Desist Order.* — 64.1. *The Commission,* after proper investigation or verification, *motu proprio* or upon verified complaint by any aggrieved party, **may issue a cease and desist order without the necessity of a prior hearing if in its judgment the act or practice, unless restrained, will operate as a fraud on investors or is otherwise likely to cause grave or irreparable injury or prejudice to the investing public**. (Emphasis supplied)

Under the afore-quoted provision, there are two (2) essential requisites that must be complied with before a CDO can be validly issued, to wit:

1) There must be a conduct of a proper investigation or verification; and

2) 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.[13]

The Commission finds and so holds that the EIPD fully complied with the requirements prescribed by law which will justify the valid issuance of a CDO.

First, the EIPD conducted a formal investigation and presented substantial evidence in support of its *Motion* i.e. Certifications from the CRMD, CGFD, MSRD,[14] a screenshot of PHI Fitness' DTI Registration;[15] Affidavit of investigating officer;[16] screenshots of Facebook postings[17], video presentations, sample MOA, and the email complaints of investors.[18]

Second, the EIPD was able to show that the act of PHI Fitness in selling/offering unregistered securities in the form of investment contracts without the requisite license from the Commission operates as a fraud to the public which, if unrestrained, will likely cause grave or

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[13] Securities and Exchange Commission vs. Performance Foreign Exchange Corporation, G.R. No. 154131, July 20, 2006 [Per J. Sandoval-Gutierrez, Second Division].
[14] Motion. Annexes "A", "C", and "D".
[15] Ibid. Annex "F" of Annex "B".
[16] *Ibid.* Annex "B".
[17] *Ibid.* Annexes "E" to "E-2" of Annex "B".
[18] *Ibid.* Annexes "D" to "D-2" of Annex "B".

irreparable injury or prejudice to the investing public.[19] In fact, in one of the complaints filed with the EIPD, We found an investor attesting to PHI Fitness's act of encouraging investors who were not paid their guaranteed 10% monthly return to "market" the company so that it can secure the needed investments/funds which will be used to pay existing investors.[20] In another complaint, PHI Fitness was shown to be representing to the investing public that it has a pending application with the Commission when there is none. The foregoing shows a clear intent on the part of PHI Fitness to defraud the public which, if unrestrained, will likely prejudice them. In this regard, the case of *Securities and Exchange Commission vs. CJH Development Corp.*[21] is instructive and applicable, thus:

> 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.
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> **The act of selling unregistered securities would necessarily operate as a fraud on investors as it deceives the investing public by making it appear that respondents have authority to deal on such securities.** Section 8.1 of the SRC clearly states 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 SEC and that prior to such sale, information on the securities, in such form and with such substance as the SEC may prescribe, shall be made available to each prospective buyer. (Emphasis supplied)

WHEREFORE, premises considered, PHI Fitness Gym Inc., its owner, agents, representatives, salesmen, uplines, promoters, influencers, enablers, conduit entities, subsidiaries and any and all persons claiming and acting for and on their behalf, are hereby ordered to **IMMEDIATELY CEASE AND DESIST** from engaging in the unlawful/unauthorized solicitation, offer and/or sale of securities in the form of investment contracts and/or any other similar or related acts, until the requisite registration statement is duly filed with and approved by the Commission.

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[19] Section 64 of the Securities Regulation Code.
[20] Ibid. Annex "D-2" of Annex "B".
[21] G.R. No. 210316, November 28, 2016 [Per J. Peralta, Third Division].

PHI Fitness Gym Inc., its owner, agents, representatives, salesmen, uplines, promoters, influencers, enablers, conduit entities, subsidiaries and any and all persons claiming and acting for and on their behalf are likewise directed to immediately **CEASE** their internet presence relating to the transactions and investment scheme covered by this *Cease and Desist Order.* 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 their behalf.

Finally, the Commission hereby **PROHIBITS** PHI Fitness Gym Inc., its owner, agents, representatives, salesmen, uplines, promoters, influencers, enablers, conduit entities, subsidiaries and any and all persons claiming and acting for and on their behalf from transacting any business involving funds in its depository banks, and from transferring, disposing, or conveying in any manner, any and all assets, properties, real or personal, including bank deposits, if any, of which the named persons herein may have interest, claim or participation, whether directly or indirectly, under their custody, to ensure the preservation of the assets of the investors.

The **EIPD** of the Commission is hereby **DIRECTED** to cause the posting of this *Cease and Desist Order* in the Commission's website.

The EIPD 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 ***Cease and Desist Order***.

Let a copy of this Order be furnished to the Company Registration and Monitoring Department, Markets and Securities Regulation Department, Corporate Governance and Finance Department and the Information and Communications Technology Department of this Commission, the Bangko Sentral ng Pilipinas, the Department of Trade and Industry, the National Privacy Commission, the Department of Information and Communications Technology, and the relevant local government unit(s) for their information and appropriate action.

In accordance with the provisions of Section 64.3 of the SRC and Part II, Rule IV, Section 4-3 of the 2016 Rules of Procedure of the SEC, the Respondent may file a verified ***Motion to Lift the CDO*** to the Commission En Banc thru the Office of the General Counsel, within five (5) days from receipt of this Order.

FAIL NOT UNDER PENALTY OF LAW.

SO ORDERED.

Makati City, Philippines.

EMILIO B. AQUINO
Chairperson

JAVEY PAUL D. FRANCISCO
Commissioner

KARLO S. BELLO
Commissioner

MCJILL BRYANT T. FERNANDEZ*
Commissioner

*On Official Business