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

In the Matter of:

TVI EXPRESS HOLIDAYS PHILIPPINES, INC.,

SEC-CDO CASE NO. 04-13-011
FOR: Issuance of Cease and Desist Order

ENFORCEMENT AND PROSECUTION DEPARTMENT,

Movant.

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ORDER

Pending consideration before the Commission is a *Motion for Issuance of a Cease and Desist Order* (CDO) dated 8 April 2013 filed by the Enforcement and Prosecution Department (EPD) of this Commission against TVI EXPRESS HOLIDAYS PHILIPPINES, INC. (TVI Express).

TVI Express was incorporated with the Commission on 27 October 2010[1] under SEC Registration No. CS201017609. Its primary purpose is "to engage in an online direct selling business through an automated marketing system, independent distributorship and network marketing by linking access to various booking and search engines that offers high quality travel and leisure, providing business and training tools, and compensation plan package, to the extent permitted by law."[2]

In its Motion for Issuance of Cease and Desist Order, the EPD alleged that on 25 February 2013, it received a *Memorandum* from the Cagayan de Oro Extension Office (CDO Extension Office) of the Commission containing information that TVI Express is allegedly operating a pyramid scheme in Tandag City, Surigao de Sur.[3] The Memorandum came with a *Letter* from the Office of the City Mayor of Tandag City which stated that TVI Express victimized several persons who are teachers in Tandag

[1] *Motion*, par. 1.
[2] *Id.*, Annex "A" (Articles of Incorporation of TVI Express).
[3] *Id.* par. 3, Annex "C" (Memorandum of the CDO Extension Office dated 18 February 2013).

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City.[4] The *Letter* from the Office of the City Mayor of Tandag City was likewise accompanied by a *Handwritten Statement* signed by the eleven (11) teachers.[5]

In the *Handwritten Statement*, the teachers explained that they were encouraged to invest in TVI Express by its promoters, Rey Pedrosa and Dorothea Waje.[6] They were promised that, after six months, their investment will double and that, after more than one (1) year, they will receive more than USD $10,000.00.[7] As a result of which, they invested between Php 13,000.00 to Php 66,000.00 in TVI Express.[8] The teachers stated that, after a more than a year, they have not received anything from TVI Express and they are demanding the return of their investment.[9]

The teachers attached to the *Handwritten Statement* a copy of the Distributor's Application form that was filled out by Rebecca Banggoy Biol, who is one of the teachers.[10] The *Handwritten Statement* likewise attached a deposit slip[11] showing that the amount of Php 117,600.00 was deposited by Rebecca Banggay Biol on 18 October 2011 to TVI Express' BDO bank account no. 1380361611 which represents an investment of money with TVI Express.[12]

On 26 February 2013, the EPD requested the CDO Extension Office for an update on the actions taken by the latter and for assistance in collecting the affidavits of the teachers narrating in detail their experience with TVI Express.[13] In response, the EPD received on 20 March 2013 a *Preliminary Report* from the CDO Extension Office which described the experience of the teachers in investing with TVI Express.[14] Moreover, it was recommended in the Preliminary Report that an Advisory be issued against TVI

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[4] *Id.*, par. 4, Annex "D" (Mayor's Letter dated 7 February 2013 is in response to SEC Office Order No. 680, Series of 2012, directing all Extension Offices to coordinate with Local Government Units, law enforcement offices and non-government organizations in collecting and gathering information regarding the occurrence of investment scams in their area of responsibility).
[5] *Id.*. par. 5, Annex "E" (Handwritten Statement dated 29 January 2013).
[6] *Id.*, Annex "E" (Handwritten Statement dated 29 January 2013).
[7] *Id.*
[8] *Id.*. par. 5, Annex "E" (Handwritten Statement dated 29 January 2013).
[9] *Id.*
[10] *Id.*, Annex "F" (Copy of the Distributor's Application Form).
[11] *Id.*, Annex "G" (Deposit Slip).
[12] *Id.*, par. 21.
[13] *Id.*, par. 7.
[14] *Id.*, par. 10, Annex "I" (Preliminary Report dated 13 March 2013).

Express and a further investigation be conducted to support the potential issuance of a Cease and Desist Order.[15] Moreover, the *Preliminary Report* was accompanied by a *Joint-Affidavit*[16] of the teachers, including Rebecca Banggay Biol, stating their experience with TVI Express.

In their *Joint-Affidavit*, the teachers stated the following:

"We, Rebecca B. Biol, Evelyn R. Berdos, Lilian L. Gabole, Marivic V. Diaz, Yvonne E. Novo, Nelsa E. Bangoy, Susana A. Balubtin and Marivic L. Cabilan, all of legal age, married and residents of Tandag City, Surigao del Sur, after having been duly sworn to in accordance with law, hereby depose and say:

01. Sometimes [sic] on the month of October 2011, Brgy. Kagawad Rey Pedrosa, Dorothea Waje and Shempee Quiñonez introduced themselves as representatives of TVI Express for Mindanao and made a demonstration on how to <u>invest</u> in the TVI Express;

02. During the presentation, they convinced us to <u>invest</u> Php 16,800.00 per share, after six months every share will gain a proceeds [sic] of Php 32,000.00 then, after one year we received 10,000.00 U.S. Dollar [sic];

03. We are convinced to [sic] <u>invest</u> at said TVI Express in cash and received by them. After six months we claimed the proceeds of our share, but they failed to award any amount and they only promised to refund our capital <u>investment</u> in the event that TVI Express failed to award;

04. After one year, we claimed our again our expected 10,000.00 U.S. dollar [sic] and/or return the capital amount we have <u>invested</u>, but they still fails [sic] to award and return, for the reasons [sic] that we have no [sic] recruited <u>new investors</u> submitted to TVI Express [sic];

05. We are [sic] surprised of [sic] the reasons made by them, considering that during their presentation there was no agreement that if we cannot acquire

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[15] *Id.*

[16] *Id.*, Annex "J" (Joint Affidavit).

new investors, the TVI Express will not award the proceeds of the investment [sic];

06. Despite of [sic] repeated demand [sic] made to [sic] return the capital we have invested, they still fail [sic] and refuse [sic] to return the same;

07. Thus we believed that the amount we have invested to [sic] TVI Express which was received by Brgy. Kagawad Rey Pedrosa, Dorothea Waje and Shempee Quiñonez were misappropriated and converted to their own personal use and benefit;

08. We executed this joint affidavit to apprise the proper authorities concerned on the fraudulent act made by Brgy. Kagawad Rey Pedrosa, Dorothea Waje and Shempee Quiñonez. x x x" (underscoring ours.)

On 6 March 2013, the Corporate Finance Department (CFD) issued a Certificate to the effect that TVI Express is not a registered issuer of securities under Sec. 8 and 12 of the Securities Regulation Code (SRC)[17] and is not licensed to offer or sell securities to the public.[18]

In the course of the investigation of TVI Express's activities, the EPD was able to verify that, except for affiant Susana A. Balbutin, all the teachers who executed the Joint-Affidavit, including Rey Pedrosa, Dorothea Waje and Shempee Quiñonez, are indeed members of TVI Express based on its membership list/database which includes thousands of Philippine-based individuals.[19]

Hence, this *Motion for Issuance of a Cease and Desist Order.*

Securities are "shares, participation or interests in a corporation or in a commercial enterprise or profit-making venture and evidenced by a certificate, contract,

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[17] Republic Act 8799 (2000).
[18] *Motion,* par. 9, Annex "H" (CFD's Certification dated 6 March 2013).
[19] *Id.*, par. 12, Annex "K" (TVI Express Membership list).

instrument, whether written or electronic in character"[20] and includes an investment contract.[21]

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 Subsection 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.

An "investment contract" has been defined as follows:

> "G. An *investment contract* means a contract, transaction or scheme (collectively 'contract') whereby a person invests his money in a common enterprise and is led to expect profits primarily from the efforts of others.
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> 1. An investment is presumed to exist whenever a person seeks to use the money or property of others on the promise of profits.
>
> 2. 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."[22]

The concept of an investment contract in the Philippines is of American origin. It traces its roots from the US Supreme Court case *SEC v. W.J. Howey Co.* where the Court stated that an investment contract is a transaction, contract, or scheme whereby a person (1) makes an investment of money, (2) in a common enterprise, (3) with the expectation of profits, (4) to be derived solely from the efforts of others.[23]

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[20] Section 3.1., SRC.
[21] Section 3.1.(b), *Id.*
[22] SRC Rule 3(1)(G), Amended Implementing Rules and Regulations (IRR) of the SRC.
[23] 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244, 163 A.L.R. 1043 (1946).

In another U.S. Supreme Court case, it was held that the element that profits must come "solely" from the efforts of others should be liberally construed because a literal reading of the requirement "solely" would lead to unrealistic results. It reasoned out that its flexible reading is in accord with the statutory policy of affording broad protection to the public. Because of this, it is no longer necessary that the expected profit accrue solely from the efforts of others. [24]

The concept of an investment contract has since been transported in the Philippines, thus, for example, in *Power Homes Unlimited Corporation v. Securities and Exchange Commission*[25] the Philippine Supreme Court stated that an investment contract in our jurisdiction, to be a security subject to regulation by the SEC, 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. Under this definition, whenever an investor relinquishes control over his or her funds and submits their control to another for the purpose of deriving profits from them, he or she is in fact investing in a security.[26]

In the case at bar, the four 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.[27] In the instant case, the teachers entered into an agreement with TVI Express in the latter's investment scheme which involved the use of investment contracts that are marketed as membership packages. The teachers paid a purchase price ranging from Php 13,000.00 to Php 66,000.00. In the case of Rebecca Banggoy Biol, her payment to the investment is proven by her copy of the Distributor's Application form as well as the deposit slip showing that the amount of Php 117,600.00 was deposited in TVI Express' BDO account on 18 October 2011.

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".[28] 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

[24] *SEC v. Glenn W. Turner Enterprises, Inc*, 474 F. 2d 476, 414 U.S. 821, 94 (1973).
[25] G.R. No. 164182, 26 February 2008.
[26] *Investment Co. Institute v. Camp*, 274 F. Supp. 624 (D. D.C. 1967).
[27] *SEC v. International Mining Exchange, Inc.*, 515 F. Supp. 1062.
[28] *In the Matter of Octopus Network, Inc.*, SEC-PED Case No. 98-2220, 22 May 1998.

involves an inquiry into whether said transaction involves the joint participation of more than one investor in (i) the investment of funds or (ii) the sharing of profits.[29] 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.[30] In the case at bar, there is a joint participation by the teachers in the same enterprise (i.e., TVI Express). The teachers pooled their funds by each paying a purchase price ranging from Php 13,000.00 to Php 66,000.00 to TVI Express. The pooling of their funds was for a common purpose, the operations of TVI Express.

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."[31] In this case, there was an expectation of profits on the part of the teachers because they were promised Php 32,000.00 after six (6) months, and $10,000.00 after a year, from their investments. In fact, they claimed these amounts when they fell due, as promised.

Lastly, as to the fourth element, there must be the expectation of profits primarily from the efforts of others. In this case, when the teachers invested their money in TVI Express, they were promised the return on their investments, without conditions. This means that a mere lapse of time guaranteed their receipt of profits. Moreover, the teachers did not participate in the operations of TVI Express or the management of their money. The teachers expected their profits to arise from the efforts of TVI Express since they believed that their expectation of profits is unconditional until they were informed that they have to recruit new members in order to gain profits.

Clearly, TVI Express is engaged in the sale or offering for sale or distribution within the Philippines of securities, i.e., investment contracts, as can be gleaned by the *Joint-Affidavit* of the teachers and the deposit slip to TVI Express BDO bank account, without a registration statement duly filed with and approved by the Commission in violation of Sec. 8.1 of the SRC.

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[29] *Id.*, citing 69 Am Jur 2d citing Stenger v. R.H. Love Galleries, Inc. 741 F2d 144.
[30] *Id.*, citing Wasnowic v. Chicago Bd. of Trade 352 F Supp 1066.
[31] *Power Homes Unlimited Corporation v. Securities and Exchange Commission.*

Consequently, the issuance of the CDO is justified since the act or practice of TVI Express will operate as a fraud on investors or likely to cause grave or irreparable injury. As earlier stated, TVI Express is engaged in the sale of investment contracts to the teachers who were not paid their promised returns. Worse, the reason provided by TVI Express' representatives is that they failed to recruit additional members. This behavior, if unabated, is likely to cause grave or irreparable injury or prejudice to the investing public on a massive scale considering TVI Express already has a membership in the thousands. Further, the manner in which the teachers were defrauded into investing with TVI Express could be repeated on a wider scale unto unsuspecting investors. Hence, the issuance of the CDO is justified.

WHEREFORE, premises considered, TVI Express Holidays Philippines, Inc., its officers, directors, agents, representatives, conduits, assigns, and any and all persons claiming and acting for and in behalf and under their authority are hereby ordered to **IMMEDIATELY CEASE AND DESIST,[32] UNDER PAIN OF CONTEMPT, from further offering, soliciting, or otherwise offering or selling unregistered securities in the form of investment contracts to the public, such as, but not limited to, investment contracts, pooling of funds, investment trusts, or similar forms, and, in connection therewith, soliciting, accepting or receiving from others, money for the purpose of trading in any futures contract.**

The Enforcement and Prosecution Department is hereby **DIRECTED** to: (a) serve this Order on the President, General Manager, Corporate Secretary, Treasurer or In-House Counsel of TVI Express Holidays Philippines, Inc., (b) post copies of the Order at the entrance of the main office and/or branches, if any, of TVI Express Holidays Philippines, Inc. Let a copy of this Order be also posted in the Commission's website and published in a national newspaper of general circulation.

Let a copy of this Order be furnished the Company Registration and Monitoring Department, the Corporation Finance Department and the Economic Research and Information Department for their information and appropriate action.

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[32] 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.

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In accordance with the provisions of Sec. 64.3 of Republic Act 8799, otherwise known as the Securities Regulation Code 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; 11 July 2013.

TERESITA J. HERBOSA*
Chairperson

MA. JUANITA E. CUETO
Commissioner

ANTONIETA F. IBE
Commissioner

MANUEL HUBERTO B. GAITE
Commissioner

ELADIO M. JALA
Commissioner

*On Official Travel

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