Republic of the Philippines
Department of Finance
Securities and Exchange Commission

In the matter of:
MYSUPER SAVER COMPANY LIMITED

SEC CDO Case No. 09-16-035

ENFORCEMENT AND INVESTOR PROTECTION DEPARTMENT,
Movant.

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CEASE AND DESIST ORDER

This resolves the *Motion for Issuance of Cease and Desist Order*[1] (**Motion**) filed on 13 September 2016 by the Enforcement and Investor Protection Department (**EIPD**) praying to enjoin MYSUPER SAVER COMPANY LIMITED (**MSS**) and its representatives/agents from selling and/or offering for sale securities in the form of investment contracts until the requisite registration statement is duly filed with, and approved by, the Commission and the corresponding license to offer/sell is issued.

MSS is a partnership created by Nelson Daryl F. Biasura and Rainer Jay J. Juratil and registered with the Commission on 26 February 2014 with Company Registration No. PL201403978.[2] Its principal office is located at 3rd Floor, Unit C, Westgate Tower, Investment Drive, Madrigal Business Park, Ayala Alabang, Muntinlupa City. MSS amended its principal office address to RJML Bldg. KM. 3 South National Highway, Brgy. Tiniguiban, Puerto Princesa, Palawan[3]. Its primary purpose, as stated in its Articles of Limited Partnership, is:

> "To engage in, conduct and carry of (sic) the business of buying, selling, distributing, marketing, importing and exporting at wholesale/retail basis in so far as may be permitted by law, all kinds of goods, wares, merchandise of every kind and description, to enter into all kinds of contracts for the export, import, purchase, acquisition, sale at wholesale/retail basis and other disposition for its own account as principal or in representative capacity as manufacturer's representative, merchandise broker, indentor, commission merchant, factors or agents, upon consignment of all kinds of goods, wares, merchandise or products, whether natural or artificial."[4]

Sometime in February 2016, EIPD received emails[5] from the public inquiring on the legitimacy of MSS' investment-taking activities in Puerto Princesa City, Palawan. The email senders reported that MSS promises its

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[1] Dated 09 September 2016.
[2] Annex "A" of the Motion.
[3] Annex "B" of the Motion.
[4] Ibid.
[5] Annexes "C", "D", "E" of the Motion.

investors that for an entry fee of Php 3,000.00, an investor will earn Php 10,000.00 within 120 days.

This prompted EIPD to conduct an investigation on the operations of MSS. An EIPD team, on 18 March 2016, conducted a surveillance and ocular inspection of MSS' previous principal office in Muntinlupa City. However, they discovered that MSS did not operate in the said address.[6] To confirm the existence of MSS, EIPD requested for certifications from the: 1.) Office of the City Mayor of Puerto Princesa as to MSS' business permit; and 2.) Bureau of Internal Revenue as to the MSS' partners' Tax Identification Numbers (TIN).

On 06 April 2016, EIPD received another email showing what appears to be MSS' "Frequently Asked Questions[7]" which illustrated the latter's investment scheme. Then, on 14 April 2016, EIPD received a certification[8] from the Permits/Licensing Division of the Office of the City Mayor of Puerto Princesa City stating that MSS, which is located at Lacsamana Bldg., South National Highway, Brgy. Tiniguiban, Puerto Princesa City, was issued a Mayor's Permit for CY 2016[9]. The permit authorizes MSS to engage in retail and wholesale business of essential/prime commodities; rice/corn/grains; and non-essential/non-prime commodities.

On 25 April 2016, EIPD received another email[10] reporting that MSS is soliciting investments from the public in Palawan. The email-sender described that MSS entices its investors to place an investment of Php 3,000.00 for 1 account. Upon their investment, they will receive corresponding products. Then, after a period of four (4) months, the investors are entitled to a return of 300% for every Php 3,000.00 worth of investment. Labendia also claims that MSS was able to recruit more than 6,000 investors in Palawan. Some of these investors placed initial investments amounting to Php 300,000.00 and expect to earn more than Php 1,000,000.00.

Thereafter, EIPD was informed by the Criminal Investigation and Detection Group (**CIDG**) Region 4B and the Department of Interior and Local Government (**DILG**) that they were conducting an investigation on MSS's investment taking activities in Palawan.

Then, EIPD received again reports[11] about MSS's investment activities in Palawan. It was reported that MSS continues to solicit investments from the public.

Subsequently, EIPD secured *Certifications*[12] from the Commission's (1) Company Registration and Monitoring Department (CRMD) stating that MySuper

[6] Paragraph 6 of the Motion.
[7] Annex "F" of the Motion.
[8] Annex "H" of the Motion.
[9] Permit Number BP6140 issued on 21 January 2016 and expires on 31 December 2016.
[10] Annex "J" of the Motion.
[11] Annexes "K" and "L" of the Motion.

Savers Company Limited was not issued a secondary license as a Broker and/or Dealer of Securities, Dealer in Government Securities, Investment Adviser of an Investment Company, Investment House and Transfer Agent nor is there any pending application for the said secondary licenses; and (2) Corporate Governance and Finance Department (CGFD) stating that MySuper Savers Company Limited has not registered issuer of mutual funds including exchange traded funds, membership certificates, time shares and registered but unlisted equity securities under Section 17.2 (a) of the Securities Regulation Code (SRC) and therefore not licensed to offer or sell such securities to the public.

Then, an EIPD Team went to Puerto Princesa City, Palawan to further verify and investigate MSS' operations. The EIPD Team was able to interview some investor-complainants of MSS, to wit: Teodolfo S. Azada Jr., Bernadeth C. Ocampo, Maydora S. Pulao, Josephine D. Cabitac, Asah B. Pedoy, and Donald D. Santos.

In their statements, all claim that they were promised by MSS that for every Php 3,000.00-3,500.00 worth of investment, they will receive Php 10,000.00-12,000.00 as a return after 120 days, which was later reduced to 15 days as a promotion. All of the complainants presented to the EIPD Team their MSS Membership Application Forms and receipts of their investment. They also stated that after investing, MSS gave them products such as alkaline drops and rice.

Teodolfo S. Azada Jr. states that he invested Php 3,000 in MSS because of a promise that investors will receive Php 12,000, as a return of investment, within 15 days. However, he was not able to receive the promised return.[13]

Bernadeth C. Ocampo avers that she invested the amount of Php 36,000.00 using the names of her family members. However, after 5 months she has not received the promised return. She claims that she was enticed to invest in MSS when she heard in an orientation that for an investment of Php 3,000.00, the pay-out would be Php 10,000.00.[14]

Maydora S. Pulao asserts that she invested the amount of Php 21,000.00, however she likewise did not receive the promised return.[15]

Josephine D. Cabitac states that she together with some of her family members invested an aggregate amount of Php 96,000.00, however, they were not able to receive any return of their investment.[16]

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[12] Annexes "M" and "N" of the Motion.
[13] Annex "P" of the Motion.
[14] Annex "Q" of the Motion.
[15] Annex "R" of the Motion.
[16] Annex "S" of the Motion, Sinumpaang Salaysay dated 09 August 2016.

Asah B. Pedoy states that when she invested for the first time with MSS, she was able to receive the promised return. This enticed her to place a second investment of Php 9,000.00 with MSS. She also recruited her relatives to join MSS. However, this time she did not receive any return of her investment. She also claims that during a seminar conducted in Balayong Hotel in Puerto Princesa City, she was able to hear Jay Juratil enticing potential recruits to invest in MSS.[17]

Donald D. Santos declared that he invested Php 3,000.00 with MSS. He claims that he paid the said amount and received alkaline drops and 10 kilos of rice. However, he did not also receive any return of his investment.[18]

On 01 September 2016, the EIPD team conducted a conference[19] with Nelson Daryl F. Biasura (**Biasura**), one of MSS partners. Biasura admitted that MSS is requiring as membership fee the payment of Php 3,000.00 which will entitle members to earn Php 10,680.00 within 120 days. The period to earn was reduced to 15 days as an anniversary promotion. He added that the investor will receive a product package comprising of alkaline water drops (5 bottles = 2 of 100 ml & 3 of 30 ml). Biasura also claims that for every investment of Php 3,000.00, the investor-member will be eligible to buy grocery products, such as dishwashing liquid, coffee and soap, at a discounted price.

On 08 September 2016, Biasura filed his position paper which states that he is just a limited partner in MSS. He claims that he provided for the software for MSS and did not participate in the operations, product inventory, marketing and financial management of the company. He declares that it was Rainer Jay Juratil who handles all the affairs of MSS.[20]

Thereafter, on 06 October 2016, the Commission's Market and Securities Regulation Department (MSRD) certified that MSS has not registered any securities pursuant to Section 8 and 12 of the SRC. Likewise, MSRD has not issued a Permit to Sell securities in favor of MSS. Also, MSS has not filed nor has any pending application for registration/permit to sell securities.[21]

The foregoing considered, we now resolve the case on the merits based on the allegations and evidence presented in the *Motion*.

We find merit in the *Motion*.

A judicious examination of the evidence presented by the EIPD indicate that MSS promises investors up to 333% return/profit for an investment/membership fee of Php 3,000.00 per account within 120 days. MSS allegedly gives a product package to its investors comprising of 5 bottles of

[17] Annex "T" of the Motion, Pedoy's Sinumpaang Salaysay dated 09 August 2016.
[18] Annex "U" of the Motion, Santos' Sinumpaang Salaysay dated 09 August 2016.
[19] Annex "V" of the Motion.
[20] EIPD's Ex Parte Manifestation dated 28 September 2016.
[21] MSRD Certification dated 06 October 2016.

alkaline water drops. MSS also allows its investors to purchase their grocery products at a discounted price. Clearly, the payment of Php 3,000 is not commensurate to the value of the product packages that MSS provides to its investors. Hence, the very incentive for an investor to place his money in MSS is the promised high return of 333% of the investment.

Stated otherwise, MSS' scheme can be considered as investment contract. 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**. An *investment* is presumed to exist whenever a person seeks to use the money or property of others on the promise of profits. A *common enterprise*, on the other hand, 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.

The concept of an investment contract in the Philippines is of American origin. It traces its roots from the US Supreme Court cases of *SEC v. W.J. Howey Co.*[22] and *SEC v. Glenn Turner Enterprises, Inc.* [23]. It has since been adopted in the Philippines, in the case of *Power Homes Unlimited Corporation v. Securities and Exchange Commission*[24], where the Supreme Court held that an investment contract in our jurisdiction, to be a security subject to regulation by the Commission, must have the following elements: **(1) an investment of money; (2) in a common enterprise; (3) with expectation of profits; and (4) primarily from efforts of others**.

Under the foregoing elements of an investment contract, 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.[25]

Securities which 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"[26] and includes an **investment contract.**[27] As a rule, securities should not be sold or offered for sale or distribution within the Philippines, without a registration statement duly filed with, and approved by, the Commission[28].

In the instant case, EIPD was able to establish, through sworn statements of complainants and documents, the four (4) requisites of an investment contract, to wit:

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[22] 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244, 163 A.L.R. 1043 (1946).
[23] 474 F. 2d 476, 414 U.S. 821, 94 (1973).
[24] G.R. No. 164182, 26 February 2008.
[25] *Investment Co. Institute v. Camp*, 274 F. Supp. 624 (D. D.C. 1967).
[26] Section 3.1., SRC.
[27] Section 3.1.(b), *Id.*
[28] Section 8.1. of the SRC.

An investment of money occurs when an investor commits money to an enterprise or venture in a manner that subjects himself to financial loss.[29] In the instant case at bar, investors place the minimum amount of Php 3,000.00 in MSS where they expect a profit amounting to 333% after 120 days, which was later reduced to 15 days as a promotion.

Several tests have evolved to determine what constitutes "common enterprise".[30] 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.[31] The 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.[32]

In the instant case, an investor, together with the others, places at least Php 3,000.00 in MSS' business in the hope of earning 333% of the amount invested. There are several complainants[33] who claimed that they pooled their monies to invest in MSS. In short, the common enterprise is the pooling of investors' money in MSS without a productive enterprise. Thus, the source of the promised returns is the monies invested by incoming investors. MSS is dependent upon the influx of new investor's monies to make its payments to current investors.

Profits may be generated from either capital appreciation resulting from the development of the initial investment, or participation in earnings resulting from the use of investors' funds. In MSS' scheme, its investors are "attracted primarily by the prospects of a return on his investment."[34] Investors are enticed to place their monies in MSS because of the high yield returns of 333% of their investment within 120 days, which later reduced to 15 days.

To be considered as an investment contract, the expectation of profits must depend primarily <u>from the efforts of others</u>. In *Turner*[35], the US Supreme Court adopted a more realistic test which is "whether the efforts made by those other than the investors are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise".

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[29] *SEC v. International Mining Exchange, Inc.*, 515 F. Supp. 1062.
[30] *In the Matter of Octopus Network, Inc.*, SEC-PED Case No. 98-2220, 22 May 1998.
[31] Note 27, citing 69 Am Jur 2d citing Stenger v. R.H. Love Galleries, Inc. 741 F2d 144.
[32] Note 27, citing Wasnowic v. Chicago Bd. of Trade 352 F Supp 1066.
[33] Note 13-18, Supra.
[34] Note 13-17, Supra.
[35] Note 28, Supra.

In the instant case, it is MSS, who develops, administers, maintains and promotes the investment scheme.[36] It operates an office in Palawan. It maintains a website - mysupersaver.com.ph, wherein investors can check their accounts. Investors simply place their monies in MSS and wait for the promised return after a period of 120 days or 15 days. Evidently, investors primarily earn from the efforts of others.

Finding all the elements of an investment contract present, MSS is found to be offering/selling investment contracts to the public.

As enunciated in *Power Homes*[37], thus:

> "As an **investment contract that is security under R.A. No. 8799, it must be registered** with public respondent SEC, otherwise the SEC cannot protect the investing public from fraudulent securities. The strict regulation of securities is founded on the premise that the capital markets depend on the investing public's level of confidence in the system."

In the instant case, certifications from CRMD, CGFD and MSRD show that MSS is not authorized to offer/sell securities in the form of investment contracts to the public. Also, it is not licensed as a broker, dealer, salesman or associated person to offer/sell securities to the public.

In view of the above discussions, we see three (3) violations by MSS and the persons acting for it.

First, the non-registration of securities. Under the SRC, unless what is involved are exempt securities or exempt transactions which are not covered by the requirement of registration, 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.[38] Prior to 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.[39] As discussed above, MSS is engaged in the offering and/or selling of securities in the form of investment contracts which need prior registration with the Commission.

Second, the non-registration as broker, dealer, salesman, or associated person of any broker or dealer. The law provides that no person shall engage in the business of buying or selling securities in the Philippines as a broker or dealer, or act as a salesman, or an associated person of any broker or dealer unless registered as such with the Commission.[40] In the instant case, MSS and/or

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[36] Note 19, Supra.
[37] Note 28 Supra.
[38] Section 8.1, SRC.
[39] *Id.*
[40] Section 28.1, SRC.

all persons acting for and on their behalf are acting as either broker or dealer or salesman without being registered as such.

Third, the commission of *ultra vires* acts. No corporation or partnership shall possess or exercise any corporate powers except those conferred by the Corporation Code or by its Articles of Incorporation/Articles of Partnership and except such as are necessary or incidental to the exercise of the powers so conferred.[41] In that instant case, MSS's primary purpose does not authorize to engage in the business of soliciting and accepting investments and money placements from the public.

The violations committed by MSS and its agents should immediately be enjoined pursuant to Section 64 of the SRC which provides that:

> 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**.

From the foregoing, there are two essential requisites before the Commission may issue a cease and desist order: **First**, there must be a proper investigation or verification[42]. In the instant case, EIPD received numerous reports from the public about MSS' investment-taking activities. Thereafter, EIPD conducted a thorough investigation and even went to Palawan to verify these allegations. The EIPD investigating team was able to confirm and verify the reports of MSS' investment scheme when they were able to talk to Teodolfo S. Azada Jr., Bernadeth C. Ocampo, Maydora S. Pulao, Josephine D. Cabitac, Asah B. Pedoy and Donald D. Santos.

Further, EIPD was able to confirm MSS' investment-taking activities when they conducted a conference with Biasura, one of the partners. Biasura admitted to EIPD that MSS is receiving investments from the public with a promised of high returns. EIPD was able to sufficiently establish, through sworn statements and documentary evidence, that MSS is offering/selling securities in the form of investment contracts without a license from the Commission.

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[43]. It should be noted that without a license from the Commission, MSS' investment-taking activities cannot be regulated nor supervised. Thus, it would have a wide latitude in crafting and implementing its investment schemes, and if it remains unregulated or

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[41] Section 45, Corporation Code of the Philippines.

[42] Securities and Exchange Commission vs. Performance Foreign Exchange Corporation, GR No 154131, July 20, 2006.

[43] Ibid.

unsupervised, likely defraud the investing public. And in fact, it has already defrauded several complainants by enticing them to invest without paying the promised profit.

In *Primanila Plans, Inc. vs. Securities and Exchange Commission*[44], the Supreme Court expounded on the Commission's duty on the protection of the investing public, to wit:

> "The law is clear on the point that a cease and desist order may be issued by the SEC *motu proprio*, it being unnecessary that it results from a verified complaint from an aggrieved party. A prior hearing is also not required whenever the Commission finds it appropriate to issue a cease and desist order that aims **to curtail fraud or grave or irreparable injury to investors**. There is good reason for this provision, **as any delay in the restraint of acts that yield such results can only generate further injury to the public that the SEC is obliged to protect**."

WHEREFORE, premises considered and pursuant to the authority vested in the Commission, **MYSUPER SAVER COMPANY LIMITED,** its partners, 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[45], 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 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 partnership 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 corporations.

The **EIPD** is hereby **DIRECTED** to: 1) serve this *Order* to MYSUPER SAVER COMPANY LIMITED, their Partners, General Manager, Treasurer, In-House Counsel or other officers, if any; and 2) post copies of the *Order* at the entrance of the main office and/or branches, if any, of MYSUPER SAVER COMPANY LIMITED.

Let a copy of this *Order* be: 1.) posted in the Commission's website; 2.) published in a national newspaper of general circulation; 3.) furnished to all the Commission's departments for their information and appropriate action.

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44 G.R. No. 193791, August 6, 2014.

45 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.

EIPD is **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[46] 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.

Pasay City, Philippines; 11 October 2016.

TERESITA J. HERBOSA
Chairperson

MANUEL HUBERTO B. GAITE
Commissioner

ANTONIETA F. IBE
Commissioner

EPHYRO LUIS B. AMATONG *
Commissioner

*On Leave

BLAS JAMES G. VITERBO
Commissioner

[46] 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.