



REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
SECURITIES & EXCHANGE COMMISSION
SEC Building, EDSA, Greenhills
Mandaluyong City, Metro Manila

In the Matter of
CYBERWEB GROUP, INC.

CED CASE NO. 01-2625

COMPLIANCE AND
ENFORCEMENT DEPARTMENT,
Movant.

X-----X

ORDER

For consideration of the Commission *En Banc* is Cyberweb Group, Inc's (Cyberweb for brevity) *Motion for the Lifting of the Cease and Desist Order Dated 20 February 2002 (the Motion to Lift)* and request for guidelines in amending its marketing plan.

In the Cease and Desist Order (CDO) issued by this Commission against Cyberweb we enjoined the sale of websites and related products finding the marketing scheme for the sale of the same partaking of an **investment contract** and thereafter directed the respondent to get a favorable endorsement of its marketing plan from the Department of Trade and Industry (DTI) before any action can be taken on the request to lift the CDO.

In the initial hearing of the *Motion to Lift*, counsel for the respondent manifested that they are trying to get a favorable endorsement from the DTI as proven by the various correspondence from the said agency¹. However, representatives² of this Commission upon meeting with representatives of DTI³ were apprised that they do not issue favorable endorsements to marketing plans of any entity. The Commission therefore has to decide Cyberweb's *Motion to Lift* absent said DTI clearance.

¹ Marked in the hearing as exhibits 1, 2, 3 & 4 by Respondent's counsel.

² Represented by Commissioner Ma. Juanita Cucto, Director Jose Tomas Syquia & Atty. Adolfo Martin R. Gonzalez.

³ Represented by Undersecretary Adrian S. Cristobal, Jr.

While the issues on the Cease and Desist Order on the websites were pending, counsel for respondent sought guidance from this Commission with regard to the marketing scheme of its Xyberbox (an appliance that will allow a person to surf the internet by using his/her television set and an phone line without a computer) in order for it not to transgress securities laws. It must be noted that the *Cease and Desist Order* did not cover the Xyberbox, but just the same we will consider issues regarding the marketing plan of the same since this Commission was requested to do so.

Ultimately two issues must therefore be resolved in this *Order*. First, should the *Cease and Desist Order* dated February 20, 2002 be lifted or made permanent. Second, what are the guideposts to consider in order to make Cyberweb's present marketing plan of other products compliant with securities laws.

We now deal with the first issue. Respondent avers that this Commission issued the CDO prematurely. A closer look at the rules on the matter, SEC Circular No. 4, s. 2001 allows the issuance of the CDO upon motion of the Compliance and Enforcement Department without an adversarial hearing. At best, the Commission gave an accommodation to the Respondent when it sought to look at the latter's marketing plan late last year. The referral to the DTI was merely to ascertain whether the marketing plan was a Pyramiding Scheme under the Consumer Act⁴, the Commission on its part had a preliminary finding that the marketing scheme as it is pitched is in the rubric of investment contracts.

With regard to Respondent's "value for money" argument with regard to the sale of the website, while indeed there may be elements of personal design, hosting and maintenance and not just hosting alone, this Commission is in great difficulty believing the argument when one considers the web size sold, the sales pitch of *earning while sleeping*

⁴ The Consumer Act tasks the DTI to declare whether a marketing scheme is Pyramiding.

and the amount of commissions one receives when he/she sells the product (which raises one's eyebrows to the inherent worth of the website).

The respondent further stresses that the sale between Cyberweb and the customer is a contract of sale and not an investment contract. They contend that to read beyond the purpose for which the subscription forms were filled up and that the same is an investment contract are erroneous and illogical. But as correctly pointed out by the Compliance and Enforcement Department by quoting a learned writer who stated that: "It was given such a broad meaning as to include schemes for as long as it involves the use of money of others on the promise of profits. Moreover a writing is not essential for an investment contract (1 Loss, Securities Regulation 2d Ed 489)⁵. If one were to follow Respondent's argument that *one should not read beyond the purpose of the contract* would lead to the failure of practically all investment contract litigation.

As correctly pointed out by the Respondent, this Commission did not use the *Howey* Test, as amended by the *Forman* Case but rather the *Turner* and *Koscot* Cases because:

Although *Forman's* mixed signals on "solely" confused rather than clarified the issue, most lower courts have followed the lead of *Turner* and *Koscot* and have concluded an investment contract may exist even though there is some investor participation in the venture.⁶

Furthermore, Respondent further explained that in the *Turner* case the promoter operated the "Dare to be Great" program. Distributors would bring recruits to company functions. The Company would put on a real hype-show, complete with hard sell. After

⁵ See last paragraph, Page 4, Annex A of CED's *Urgent Motion For the Issuance of Cease and Desist Order*.

⁶ Cox et.al, *Securities Regulation: Cases and Materials* (3d ed 2001) p. 145.

looking at the Joint Affidavit dated October 19, 2001⁷ made by members of the CED which talks about Cyberweb's Tita Clemenz who narrated among prospective buyers/recruits that because of the Respondent she was able to buy three cars and a house worth two million pesos and continues to earn even while on vacation. The Commission sees no difference between the two schemes! While the respondent's counsel avers that there is a legitimate product not like *Turner's* self-motivational courses the line in our view between the two is blurred. We must likewise consider that in the *Kosca* case the promoter sold cosmetics, purportedly a legitimate product.

Likewise, even if Respondent claims that one need not buy products in order to make commissions, the apparent difference in the amount of commissions of a member (Webbee) and a non-member would lead a reasonable mind to believe that it will eventually entice the person making the sale to join the marketing scheme.

We therefore stand by our previous findings that there exists an investment contract.

We now go into the second issue and that is providing guideposts for the Respondent to sell its Xyberbox and other products to be compliant with securities laws. This Commission *En Banc*, at least with all those who participated in the deliberation of this case, are unanimous in suggesting "what not to do" rather than "what to do."

Without going into the details of the elements provided in the Implementing Rules and Regulation of the Securities Regulation Code as this Commission did in issuing the CDO, a more fundamental look into the matter would show us the more primordial question. What is Cyberweb actually selling in its present marketing plan? Is it a chance to optimize the World Wide Web through websites and a Xyberbox or is it a chance to

⁷ See paragraph 20 of Joint Affidavit marked as Annex B of Annex A in CED's *Urgent Motion For the Issuance of Cease and Desist Order*.

make good money? If it were the latter it would generally fall under the ambit of investment contracts. If it were the first, then it would be a simple sale of a product albeit through multi-level marketing scheme. To get it out of the ambit of investment contracts, emphasis of sale must therefore be in the product itself and not the idea of making an exorbitant amount of money. The marketing plan submitted to this Commission in itself does not show the actual sales pitch, but if one were to use the annexes used by CED, one can readily see that there is great emphasis in making money rather than the product itself⁸. The marketing plan, its execution through the sales pitch and the elements of an investment contract are therefore inextricably tied. To amend the marketing plan is to take the sales scheme out of the ambit of investment contracts. The very element of an *expectation of profit* in the Implementing Rules and Regulations will largely be diminished.

The following need amendments with regard to marketing the Xyberbox and related products:

1. The elimination of heavy discounts on the products by simply selling the same, which puts the very basic question on how much the sale price is disproportionate to the product's actual price and relative thereto how much recruiting fees are built into the price. Another way of solving the problem is pricing the item more in consonance with the real value of the item along with its realistic mark-up;
2. The sales pitch that for every pair brought in, one gets a substantial and fixed amount of dollars, without diminution of amount of money as the levels (generations) get deeper. This again leads one to suspect again the disproportionate amount of the price with the product sold. Likewise in need of amendment is the projected amount of income without showing the possibility of

⁸ See Annex B of Annex A in CED's Motion For Issuance of Cease and Desist Order dated January 15, 2002.

market saturation. Bonafide multi-level marketing schemes have limits to their commissions as one goes down the line (generations);

3. The lure or marketing of so many perks, which lends itself to the suggestion that the public is buying the purported product in the hopes of earning a downpayment for real property or an additional source of significant income;

WHEREFORE, the Cease and Desist Order dated February 20, 2002 is hereby made PERMANENT in so far as it enjoins the Respondents from selling or enticing its customers to invest in its products, particularly but not limited to, websites and other products related thereto, by promising the possibility that, with minimal investment, they may one day sit back and reap handsome profits through the selling/recruitment efforts of persons he/she directly or indirectly recruited.

SO ORDERED.


Mandaluyong City, Metro Manila.

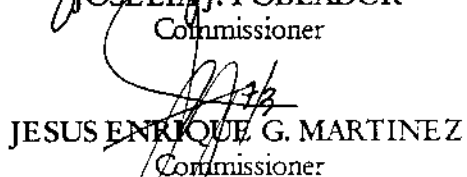
June 13, 2002.


LILIA R. BAUTISTA
Chairman


FE ELOISA C. GLORIA
Commissioner


MA. JUANITA E. QUETO
Commissioner


JOSELLA J. POBLADOR
Commissioner


JESUS ENRIQUE G. MARTINEZ
Commissioner