



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

**IN THE MATTER OF
POWER HOMES
UNLIMITED CORP.**

CED Case No. 20-2486

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CEASE AND DESIST ORDER

Power Homes Unlimited Corp. is a domestic corporation duly registered with the Commission on October 13, 2000 under SEC Reg. No. A200016113. Its primary purpose stated in its articles of incorporation being as follows:

To engage in the transaction of promoting, acquiring, managing, leasing, obtaining options on, development and improvement of real estate properties for subdivision and allied purposes, and in the purchase, sale and/or exchange of said subdivision and properties through network marketing.

The corporation is now the subject of an investigation pursuant to the letters of Noel Manero and Romulo F. Munsayac dated October 20 and November 21, 2000 requesting investigation by the Commission on the alleged pyramid sales schemes of the respondent.

Attached to the letters is a brochure issued by the respondent corporation to its members-investor describing it as a marketing company that promotes and facilitates sales of real properties and other related products of real estate developers through effective leverage marketing. A cursory reading of this description and the primary

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purpose of the corporation will show that respondent is a marketing arm of real estate companies and the business is done through leverage marketing.

After an investigation was conducted by the department, respondent corporation was shown to have violated the Securities Regulation Code (R.A. 8799) particularly Section 8.1 thereof which states, to wit:

Section 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 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.

The term "Securities" include investment contracts as provided in Section 3.1.b of R. A. 8799. On the other hand, the Implementing Rules and Regulations of the Act define **investment contract** as 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.*

The foregoing definition of the investment contract is an adaptation of the modified Howey Test first defined by the US federal Supreme Court in the case of SEC v. Howey as "a contract, transaction or scheme whereby a person invests money in a common enterprise expecting profits to accrue solely from the efforts of the promoter or third parties x x x" and the Howey test was modified later in SEC v. Glenn W. Turner, Enterprises, Inc. In the modified Howey test, the touchstone is the presence of an

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investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial efforts of others. (69 Am Jur 2d S 36 p. 108)

The Investment Contract theory has the following elements:

- 1). A contract, transaction or scheme
- 2.) An investment of money
- 3). Investment is made in a common enterprise
- 4). Expectation of profits
- 5). Profits arise primarily from the efforts of others

A Contract, Transaction or Scheme (collectively "contract")

It is clear that the term "investment contract" as interpreted in the Howey case was not limited to the existence of a mere agreement by and between the promoter and the investor. It was given such broad meaning as to include schemes for as long as it involves the use of the 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)

The scheme of the respondent corporation requires an investor to become a Business Center Owner (BCO) who must fill-up and sign its application form. The Terms and Conditions printed at the back of the application form indicate that the BCO shall mean an independent representative of Power Homes, who is enrolled in the company's referral program and who will ultimately purchase real property from any accredited real estate developers and as such he is entitled to a referral bonus/commission. Paragraph 5

of the same indicates that there exists no employer/employee relationship between the BCO and the Power Homes Unlimited, Corp.

The BCO is required to pay US\$234 as his enrollment fee. His enrollment entitles him to recruit two investors who should pay US\$234 each and out of which amount he shall receive US\$92. In case the two referrals/enrollees would recruit a minimum of four (4) persons each recruiting two (2) persons who become his/her own down lines, the BCO will receive a total amount of US\$147.20 after deducting the amount of US\$36.80 as property fund from the gross amount of US\$184. After recruiting 128 persons in a period of eight (8) months for each Left and Right business groups or a total of 256 enrollees whether directly referred by the BCO or through his down lines, the BCO who receives a total amount of US\$11,412.80 after deducting the amount of US\$363.20 as property fund from the gross amount of US\$11,776, has now an accumulated amount of US\$2,700 constituting as his Property Fund placed in a Property Fund account with the Chinabank. This accumulated amount of US\$2,700 is used as partial/full down payment for the real property chosen by the BCO from any of the respondent's accredited real estate developers

Investment of Money

The modified Howey test for an investment contract requires, inter alia, the investment of money. It generally has been held that the investment of something other

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than money, such as services, is insufficient. x x x And it is clear that such investment must be made by the "investor", not by someone else for the "investors" benefit. (69 Am Jur 2d S37 p. 109). In the case at hand, individuals before they become members (BCOs) of the respondent are required to pay an enrollment fee of US\$234 each. This amount constitutes as an investment of the BCO. The down lines of the BCO who also paid the required fee of US\$234 each are also investors with US\$234 amount of investments each.

Common Enterprise

In determining what constitutes a "common enterprise", several tests or approaches have evolved but the application of those has not been uniform. These three tests are the "horizontal" commonality approach, the "broad vertical" commonality approach and the "narrow vertical" commonality approach. (69 Am Jur 2d S40 p.113)

The commonality element is most often at issue with respect to unconventional types of instruments such as franchises, pyramid distributorship arrangements, and other arrangements whereby the "investor" must participate in some manner other than the mere payment of money in order to benefit from the arrangement. (ibid) The scheme adopted and applied by the respondent corporation is a pyramiding arrangement wherein an investor to become a BCO should pay a certain amount and recruit at least two investors in order to obtain profit from his investment.

Under the "horizontal" commonality approach, the determination of whether a transaction satisfies the commonality element of the modified Howey test, involves an inquiry into whether the transaction involved the joint participation of more than one investor in the investment of funds or the sharing of profits (69 Am Jur 2d S 40 p. 114). The horizontal commonality approach is applicable to the instant case. The pyramiding scheme of the respondent would show that there is horizontal commonality between and among at least two investors recruited by a BCO. There is a joint participation of at least two investors in the investment of funds upon their payment of US\$234 each to the corporation. The test of commonality has been satisfied although these recruited investors do not have joint participation in the sharing of the profits of the BCO.

Moreover, the provisions of Section 3.1.b of the Implementing Rules and Regulation of the Securities Regulation Code clearly state that when two or more investors "pool" their resources, there is a common enterprise, even if the promoter does not do more than receive a broker's commission.

In the case at hand, the investors recruited by the members (BCO) of the respondent corporation pool their resources together by paying US\$234 each to the corporation. The respondent, in turn receives a portion of the enrollment fees paid by

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the investors and the BCO responsible for the recruitment of the investors and his/her up lines receive a portion of the payment as his profit.

As shown by the facts above stated, the investors who paid cash to be Business Center Owners (BCO) entitled to certain benefits and privileges also received the right to recruit other investors as BCO and to receive a portion of the investment of such recruits.

Expectation of Profits

An expectation of profits is one of the elements of an investment contract under the modified Howey test. The expected profits may be derived from capital appreciation resulting from the development of the initial investment or from participation in earnings resulting from the use of the investors' funds (69 Am Jur 2d S38 p.110). The case at bar involves participation of the investor as his profit in the investments of other investors resulting from his investment of US\$234. The investor stands to gain US\$92 under the gold and mega bonus plans of the respondent as a result of the recruitment of at least 2 investors by him or by his down lines or the annual renewal of their investments. Once he meets the total of 256 investors recruited by him and his down lines on the eight month, he expects to have a house and lot initially paid from his participation in the investments of other investors. The benefits and the privileges, particularly the 15MB web space which costs much less than US\$234, are designed to enhance and effectively maintain

the business of the respondent, i.e., to teach its investors on the know-how of its multi level marketing business.

Profits Arise Primarily from the Efforts of Others:

The question under the modified Howey test is whether efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise (69 Am Jur 2d S 39 p.111) In the case at hand, the expected profit of US\$2,700 deposited as property fund plus the amount of US\$11,412.80 from out of the US\$234 investment is clearly a result from the entrepreneurial and managerial skills of the respondent. Firstly, the scheme of multilevel marketing network was conceptualized, promoted and maintained by the respondent corporation. An investor of the respondent has to undergo trainings and seminars on leverage marketing conducted by the respondent. Secondly, the manner by which an investor can avail of the benefits is dictated by the respondent. The percentage of profit, the entitlement to benefits and the plan under which an investor has profit are all imposed by the respondent to its investors.

In addition, the definition of the investment contract does not limit profits arising from the managerial and entrepreneurial skills of the respondent. In fact it may include profits resulting from the efforts of other investors as in the case at bar. An investor enrolls under the scheme of the respondent corporation basically to be entitled to recruit

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other investors and to receive portions of the investments from those directly recruited by him or by his down lines. The investor expects profits from the efforts of his down lines. He need not recruit further after his initial two recruits. If his down lines do not recruit, he does not earn anything, unless he does the recruitment.

In *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir.1973), cert. Denied 414 U.S. 821, 94 S. Ct. 117, 38 L.Ed.2d 53, the court held that a pyramid selling scheme constituted investment contracts notwithstanding the fact that the investors themselves participated in the operation of the enterprise. (950 *The Public Distribution of Securities* Ch. 14)

Thus, a scheme whereunder an investor paid cash to be a distributor of cosmetics, but also received the right to recruit other investors as distributors and to receive a portion of the investment of such recruits, was an investment contract subject to the registration provisions of the Securities Act where the recruitment role of the investor was essentially limited to bringing the prospective recruit to a meeting at which the promoters conducted a high pressure sales campaign to induce the prospect to invest; the promoters retained immediate control over the essential managerial conduct of the enterprise and the investor's realization of profits was inextricably tied to the success of the promotional scheme (69 Am Jur 2d S29 p.112).

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A study on the business scheme of the respondent corporation shows that the investors who paid cash to be Business Center Owners (BCO) entitled to certain benefits and privileges also received the right to recruit other investors as BCO and to receive a portion of the investment of such recruits.

Respondent corporation's pyramid sales scheme is an investment contract which should be registered with the Commission prior to its sales or distribution by filing registration statements as required by the foregoing Section 8 of the Act and under the applicable rules and regulations of the Commission for the registration of securities.

Since the securities offered for sale or distributed by the respondent corporation have not yet been registered with the Commission, there is an imperative need for said corporation to be enjoined from operating as such and from further engaging in the activities of selling, offering for sale or distributing securities in order to protect the interest of the investors and the public in general.

WHEREFORE, pursuant to the authority vested in the Commission, **POWER HOMES UNLIMITED, CORP.**, its officers, directors, agents, representatives and any and all persons claiming and acting under their authority, are hereby ordered to immediately **CEASE AND DESIST** from further engaging in the sale, offer for sale or distribution of the securities upon receipt of this order.

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In accordance with the provisions of Section 64.3 of the Republic Act 8799, otherwise known as the Securities Regulation Code, the parties subject of this Cease and Desist Order may file a request for the lifting thereof within five (5) days from receipt hereof.

SO ORDERED.

Mandaluyong City, Metro Manila.

January 26, 2001.

By Order of the Commission:


EMILIO B. AQUINO

Director

Compliance and Enforcement Department