Republic of the Philippines
Department of Trade and Industry
Securities and Exchange Commission
SEC Bldg. EDSA, Greenhills, Mandaluyong City

In re:

D 1st CELL PAWNSHOP, INC.

SEC Admin. Case No. 09-07-88
(CED Case No. 07-2859)
For: Revocation of Corporate Registration with Prayer for Issuance of a Cease and Desist Order

Compliance and Enforcement Department,

Petitioner.

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DECISION

For consideration of the Commission *En Banc* is the Petition for Revocation of Corporate Registration of D 1st Cell Pawnshop, Inc. ("D 1st Cell") filed by the Compliance and Enforcement Department[1] ("CED," for brevity) of the Commission.

The pertinent facts of the case are narrated below:

D 1st Cell was registered with this Commission on 18 April 2006 and was issued Certificate of Registration No. CS200606027.[2] D 1st Cell was organized primarily to engage in the business of loaning money upon the security of personal property such as jewelry, precious stones and other personal property and to act as a commission agent and general merchant.[3] Respondent holds office at No. 24 Granada Street, Villa Ortigas II, Barangay Valencia, Quezon City.

Sometime in January 2007, CED received a facsimile letter from one Romuald Paredes requesting assistance in verifying whether the activities of respondent are legal.[4] In said letter, the subject activity of respondent is its act of soliciting investments from the public and offering to these investors

[1] Now known as the Enforcement and Prosecution Department.
2 Annex "A" of the Petition.
3 Annex "B", supra.
4 Annex "D", supra.

4% monthly interest on said investments, which is covered by an investment certificate.

Petitioner conducted its own investigation and it found that there was a *prima facie* evidence that respondent is engaged in the unauthorized offering, solicitation and acceptance of deposits or placement of investments from the public without license to do so. A Cease and Desist Order ("CDO") was then issued on 19 October 2007 ordering respondent D 1st Cell, its respective officers, directors, representatives, agents and any and all persons, conduit entities and subsidiaries claiming and acting for and in behalf of respondent to immediately cease and desist from further offering, soliciting and accepting deposits or placements of investments from the general public. The CDO was rendered permanent by virtue of an Order dated 10 January 2008. In the same order, D 1st Cell was ordered to file its reply to the instant petition. To this date, D 1st Cell has yet to file its reply. Thus, D 1st Cell is declared as in default pursuant to the 2006 Rules of Procedure of the Commission.[5]

The issue in this case is whether there is a valid ground to revoke the certificate of registration of D 1st Cell.

Under the Securities Regulation Code[6] ("SRC"), 'securities' was defined by way of enumeration, namely:

> "SEC. 3. Definition of Terms. — 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; xxx." (Emphasis supplied)

The foregoing provision plainly and broadly defines the term "securities" as "shares, participation or interests in a corporation or in a commercial enterprise or

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[5] Rule III- Commencement of Action

SEC. 3-12. Effect of Failure to Answer. – If the respondent fails to answer the complaint within the abovestated period, he shall be considered as in default.xxx

[6] Republic Act No. 8799 (2000).

profit-making venture and evidenced by a certificate, contract, instrument, whether written or electronic in character."[7]

There are set criteria for a security to fall under the SRC:

(1) it must be a share, participation or interest;
(2) in a corporation, commercial enterprise or profit-making venture; and
(3) evidenced by a written or electronic certificate, contract or instrument.

One of the instruments considered as a security is an investment contract, which is defined in the Amended Implementing Rules and Regulations of the SRC 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."

Another definition of the term investment contract can be found in the U.S. case *SEC v. Howey Co.*, 328 U.S. 293 (1946) where the U.S. Supreme Court defined such term in this manner:

> "... an investment contract, for purposes of the Securities Act, means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise."

The case also laid down the test in determining whether there is an investment contract, that is, whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.

D 1st Cell offers or solicits investments from the public by posting the following advertisement in its website:

> "**Investment Options**
>
> Minimum of P50,000.00-P200,000
>
> Interest rate- 5% Monthly
> Agreement (contract signing), Investment certificate, Postdated checks
> Terms negotiable, maximum of 1 year
> You can be a dealer of our cellphones and accessories

[7]Economic Governance Technical Assistance. Draft Commentary on the Securities Regulation Code, p. 4.

P300,000-up

Insured by South Sea Surety bond. 10% insurance, premium should be shouldered by the investor 5% monthly
Term negotiable, maximum of 1 year
Agreement (contract signing), Investment Certificate, Postdated checks
You can be a dealer of our cellphones and accessories"[8]

Further, D 1st Cell placed a line ad in the 07 January 2007 issue of the Manila Bulletin[9] which reads:

"D 1st CELL PAWNSHOP We are open 4 investors earn as high 4% every mo. for min. P50T-300T "insured" more than 50 Branches Nationwide *SOLID INVESTMENT* Pls. call 4146888; 4144888 loc. 15 0922-5417699- Head Ofc. FREE APPLIANCES"[10]

The above scheme falls within the definition of an investment contract based on the following discussion.

First, there is a contract, transaction or scheme. In the instant case, D 1st Cell entices the prospective investors to part with their money issuing postdated checks representing the corresponding interest and the principal investment. For instance, the investor may opt to invest Php50,000.00 for a fixed term of three (3) months, six (6) months or twelve (12) months, the investor will receive a monthly interest of four percent (4%). Four (4) postdated checks would be issued, three of which represent the monthly interest and the fourth represents the principal investment.[11]

Second, there is an investment of money. The supposed investors would part with their money and give it to D 1st Cell with the expectation of a return in the form of interest. The minimum investment is Php50,000.00 and will earn a 4% monthly interest. D 1st Cell also promises that the money invested to it will be doubled in two years.

Third, there is a common enterprise. From the operation of D 1st Cell , there is a pooling of investor resources. D 1st Cell uses its branches in different parts of the country to solicit investments from the investing public. The proceeds of the investments solicited from the public would be used in furtherance of its purpose, that is, to provide additional capital to pay for the pawned cellphones and to open new branches all over the country.[12] In turn, D 1st Cell was supposed to use the money to make profits for itself and its investors. From this, it can be said that D 1st

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[8] Petition, Annex "G."
[9] Id, Annex "E."
[10] Id, Annex "F."
[11] Investigation Report dated 11 April 2007.
[12] Id, *supra.*

Cell is offering merely opportunities to contribute money, and the success of an investor is dependent on the success of D 1st Cell's business operations.

Fourth, the investor is led to participate in the profits based on the efforts of others. The investors merely contributed money, and after three months or so they would expect to receive profits. The investors would do nothing except wait for a minimum of three months after which they would receive the principal amount of their investments and the interest yield.

Since investment contracts are securities, they must first be registered with the Commission before the same can be offered to the public pursuant to Section 8[13] of the SRC. Otherwise, the issuing corporation, its officers and agents shall be held liable under Section 54 (i) of the SRC, which provides:

> "SEC. 54. Administrative Sanctions. — 54.1. If, after due notice and hearing, the Commission finds that: (a) There is a violation of this Code, its rules, or its orders; xxx
>
> xxx
>
> (i) Suspension or revocation of any registration for the offering of securities."

Based on the certification issued by the Corporation Finance Department of the Commission, D 1st Cell is not a registered issuer of securities under Sections 8 and 12 of the Securities and Regulation Code[14] ("SRC") and is not licensed to offer or issue securities to the public.[15] D 1st Cell also did not secure exemption from the registration requirements under Section 10.2 of the SRC.[16]

Finally, D 1st Cell violated Presidential Decree No. 902-A, as amended, the pertinent portion of which reads as follows:

> "SEC. 6. In order to effectively exercise such jurisdiction, the Commission shall possess the following powers:

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[13] "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 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."

[14] Republic Act No. 8799 (2000).

15 Petition, Annex "C".

16 Id.

l) To suspend, or revoke, after proper notice and hearing, the franchise or certificate of registration of corporations, partnerships or associations, upon any of the grounds provided by law, including the following:

xxx

2. Serious misrepresentation as to what the corporation can do or is doing to the great prejudice of or damage to the general public; xxx"

Based on its Articles of Incorporation, the primary purpose of D 1st Cell is:

"SECOND: A. That the primary purpose of this corporation is

TO ENGAGE IN THE BUSINESS OF LOANING MONEY UPON THE SECURITIES OF PERSONAL PROPERTIES SUCH AS JEWELRY, PRECIOUS STONES AND OTHER PERSONAL PROPERTY AND A COMMISSION AGENT AND GENERAL MERCHANT"

In reality, however, what D 1st Cell has been doing is offering or soliciting investments from the public, which is beyond the scope of its purpose. Such act is also in contravention of the Certificate of Registration of D 1st Cell which clearly states:

"This Certificate grants juridical personality to the corporation but does not authorize it to undertake business activities requiring a Secondary License from the Commission such as, but not limited to acting as: broker or dealer in securities, government securities eligible dealer (GSED), investment advisor of an investment company, close-end or open-end investment company, investment house, transfer agent, commodity/financial futures exchange/broker/merchant, financing company, pre-need plan issuer, general agent in pre-need plans and time shares/club shares/membership certificates issuers or selling agents hereof. Neither does its Certificate constitute as permit to undertake activities for which other government agencies require a license or permit."

WHEREFORE, foregoing premises considered, the instant petition is hereby **GRANTED**. Accordingly, the Certificate of Registration of D 1st Cell Pawnshop, Inc. is **REVOKED**.

Let a copy of this Decision be furnished the Enforcement and Prosecution Department and the Company Registration and Monitoring Department for their appropriate action.

SO ORDERED.

Mandaluyong City, 08 July 2010.

FE B. BARIN
Chairperson

MA. JUANITA E. CUETO
Commissioner

RAUL J. PALABRICA
Commissioner

MANUEL HUBERTO B. GAITE
Commissioner

ELADIO M. JALA
Commissioner

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