Republic of the Philippines
Department of Finance
Securities and Exchange Commission

In the matter of:
GOLDXTREME TRADING CO.

SEC CDO Case No. 07-15-022

ENFORCEMENT AND INVESTOR PROTECTION DEPARTMENT,
Movant.
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RESOLUTION

"The term 'securities' embodies a flexible rather than static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek to use the money of others on the promise of profits (69 Am Jur 2d, p. 604)."[1]

The Case

This resolves the *Motion to Lift Cease and Desist Order*[2] (**Motion to Lift**) filed on 04 February 2016 by GOLDXTREME TRADING CO. (*for brevity* "**Goldxtreme**") praying that the *Cease and Desist Order* dated 26 January 2016 (**Assailed CDO**) be lifted, the dispositive portion reads:

"WHEREFORE, premises considered and pursuant to the authority vested in the Commission, GOLDXTREME TRADING CO., 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, 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 corporation 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."

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[1] Cited in Gabionza vs. Court of Appeals, et al., G.R. No. 161057, September 12, 2008; SEC vs. Howey Co., 328 U.S. 293 (1946); SEC vs. Glenn W. Turner Enterprises, Inc. et al., 474 F. 2d 476, 414 U.S. 821, 94 (1973).
[2] Goldxtreme's Motion to Lift Cease and Desist Order Dated 04 February 2016.

The Facts

Goldxtreme is a partnership registered with the Commission on 06 March 2015 under Company Registration No. PG201504394 with principal office address at 2nd Floor, Canlubad Bldg., #474 EDSA, Brgy. 87, Caloocan City, Metro Manila. Its primary purpose is: "*To engage in the business of wholesale and retail sales of such products as gold jewelry but not limited to products such as fashion accessories, cellphone loads, prepaid cards, scents and other related products.*"

On 26 January 2016, the Commission issued the Assailed CDO against Goldxtreme directing it to immediately cease and desist from offering/selling securities in the form of investment contracts[3]. Aggrieved, Goldxtreme filed, on 04 February 2016, a *Motion to Lift* praying that the Commission lift the Assailed CDO based on the following substantial and procedural grounds:

> I. THAT THE HONORABLE COMMISSION SHOULD LIFT THE CDO AS THERE IS CLEARLY NO BASIS FOR THE EIPD'S FINDING THAT GTC (GOLDXTREME) IS ENGAGED IN SOLICITING INVESTMENTS OR SELLING SECURITIES FROM THE GENERAL PUBLIC[4];
> II. THE EIPD'S MOTION FOR ISSUANCE OF THE CDO (ASSAILED CDO) WAS BASED ON AN INVESTIGATION OR VERIFICATION THAT IS UNRELIABLE AND INCONCLUSIVE CONSIDERING THAT IT WAS INCOMPLETE, ONE-SIDED AND PREMATURE[5].

During the scheduled hearing on the *Motion to Lift*[6], Goldxtreme reiterated the grounds alleged in its motion and presented for comparison the originals of the documentary and object evidence mentioned therein. After the parties' oral arguments, the Hearing Officer granted EIPD's motion to file its written *Comment* within fifteen (15) days from the date of hearing. Then, Goldxtreme and EIPD were also given the same period to file their respective *Reply/Rejoinder*, if any.

EIPD filed, on 09 March 2016, its *Comment/Opposition*[7] arguing that: 1.) the Commission correctly ruled that Goldxtreme is engaged in selling and/or offering for sale investment contracts as defined under the Securities Regulation Code (SRC)[8]; and 2.) the issuance of the Assailed CDO has factual and legal basis[9].

Goldxtreme, on 30 March 2016, filed a *Reply*[10] refuting EIPD's allegations and arguments in the latter's *Comment/Opposition*. Goldxtreme also presented sworn

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[3] Goldxtreme received the Assailed Order on 28 January 2016, paragraph 12 of Note 2, *Supra*.
[4] Ibid, Page 11.
[5] Id, Page 12.
[6] Held on 18 February 2016.
[7] Dated 08 March 2016.
[8] Id, Paragraphs 8-18.
[9] Id, Paragraphs 19-21.
[10] Dated 26 March 2016.

statements of twenty-one (21) buyers of mini-gold bars, in which they attached receipts and pictures[11].

EIPD, on 15 April 2016, filed a *Rejoinder*[12] rebutting the relevant allegations and arguments in Goldxtreme's *Reply*. Thereafter, Goldxtreme, on 05 May 2016, filed a *Sur-rejoinder* in response to EIPD's *Rejoinder*.

With the submission of Goldxtreme's *Sur-Rejoinder* and with no remaining issues to be clarified, the hearing on the *Motion to Lift* is terminated and submitted for resolution.

Issue

The issue to be resolved is whether or not Goldxtreme presented sufficient grounds or evidence to overcome the findings in the Commission's *Cease and Desist Order*.

Ruling

We find the instant *Motion to Lift* bereft of merit.

The Assailed CDO was issued based on EIPD's findings that Goldxtreme is offering/selling investment contracts. In particular, EIPD's investigation established that Goldxtreme requires its investors to participate in "Gold Swap Program" (GSP) by placing their Php 5,000.00 or the allegedly purchased 3-gram 14-Karat mini-gold bar (worth Php 5,000.00) in Goldxtreme for a promised return of Php 25,000.00 or the allegedly 15-gram 14-Karat mini-gold bar (worth Php 25,000.00), in a matter of days or weeks. Goldxtreme also gives rewards[13] to those who recruit new investors to participate in its GSP.

In support of the said findings, EIPD presented the following evidence: 1.) Certifications from the Commission's Market Securities Regulation Department (MSRD) and Corporate Governance and Finance Department (CGFD) certifying that Goldxtreme or its agents and representatives are not licensed to offer/sell securities[14]; 2.) documents and statements gathered in two (2) surveillance operations[15]; 3.) two (2) video presentations obtained in Goldxtreme's websites (www.GOLDXTREME.com and http://GOLDXTREME.co)[16]; 4.) sworn statements of twenty (20) complainants stating that they have invested in Goldxtreme but they did not receive any return or mini-gold bars[17].

In Goldxtreme's *Motion to Lift*, it challenges EIPD's investigation. It accuses EIPD for conducting an unreliable, haphazard and one-sided investigation. It claims

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[11] Annexes "A" to "A-20" of Goldxtreme's Reply.
[12] Dated 08 April 2016.
[13] Direct Referral Bonus - Php 500.00.
[14] Annexes "Q" and "R" of EIPD's Motion for CDO.
[15] Annexes "K"; "" of EIPD's Motion for CDO.
[16] Annex "P" of EIPD's Motion for CDO.
[17] Annexes "A" to "T" of EIPD's Supplement to its Motion for CDO.

that EIPD confined itself with the self-serving allegations of twenty (20) complainants. It argues that EIPD should have coordinated with the Department of Trade and Industry (DTI) to determine if Goldxtreme's multi-level marketing system is contrary to law that will prejudice the general public. Moreover, Goldxtreme claims that there are on-going Congressional Committee hearings that will define unlawful network marketing. Finally, it avers that EIPD filed the Motion for CDO on 31 July 2005 without first resolving Goldxtreme's request for the lifting of SEC Advisory. Thus, the Assailed CDO is premature.[18]

We do not agree. The Securities and Regulation Code (SRC) clearly provides that a CDO may be issued after proper investigation or verification[19]. The Commission may issue a CDO either *motu proprio* or upon verified complaint without a prior hearing. The essential requirements that must be complied with by the Commission before it may issue, *motu propio*, a CDO are (1) the EIPD must conduct a proper investigation or verification, (2) once an investigation or verification by the EIPD is conducted, the Commission may issue a CDO, 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.

The proceedings mentioned in the previous paragraph has been confirmed by the Supreme Court when it ruled in *Primanila Plans, Inc. vs. Securities and Exchange Commission*[20] that:

> "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**."

In the instant case, EIPD made a thorough and complete investigation by conducting surveillance operations in Goldxtreme's offices. EIPD sent investigators to elicit information and secure documents concerning Goldxtreme's investment-taking activities. These investigators personally witnessed the seminars conducted for the public that promotes Goldxtreme's investment scheme. They obtained documents and videos showing Goldxtreme's investment activities. Aside from that, EIPD obtained sworn statements of 20 witnesses corroborating its findings.

Undeniably, EIPD's investigation is complete as required under Section 64[21] of the SRC. Thus, it cannot be said that EIPD's investigation is premature. The issues

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[18] Paragraphs 37-44, Note 2, *Supra*.

[19] SRC, 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.

[20] G.R. No. 193791, August 6, 2014.

[21] 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**

raised by Goldxtreme such as pending motions and Congressional hearings does not preclude EIPD from completing its investigation by filing a Motion for Issuance of CDO for the reason that the two (2) above-stated requisites provided in the SRC have already been complied with.

As to the substantial arguments, Goldxtreme argues that the elements of an investment contract (Howey Test[22]) are not present in their business model. However, we find no merit in Goldxtreme's arguments and evidence presented because contrary to Goldxtreme's position, the elements of an investment contract are indeed present. The economic reality of Goldxtreme's entire marketing scheme constitute a profit-seeking venture offering an opportunity to share in the profits of the company.

Placement/Investment of money

Goldxtreme claims that there is no placement or investment of money in its GSP because it only deals with mini-gold bars[23]. It maintains that it is not soliciting funds as investment but receives monies as consideration for selling mini-gold bars[24]. Moreover, it claims that investment of money does not extends to precious metals or minerals[25]. In support of these allegations, it presented sworn statements of twenty one (21) of its customers, who stated that they bought mini-gold bars from the company[26].

We do not find merit in such argument. It was clearly established in EIPD's investigation that only money is placed in Goldxtreme's GSP and not mini-gold bars. This was observed by EIPD investigators during their surveillance operations that recruits/investors simply placed the amount of Php 5,000.00 in Goldxtreme without receiving mini-gold bars. This fact is further corroborated by sworn statements of twenty (20) complainants who individually narrated that they invested their money with Goldxtreme but did not received any gold bars nor the promised profit.

Aside from that, merely attaching a nominal product sale to a transaction will not avoid the scope of the first element of the Howey Test[27]. In *Bell vs. Health-Mor, Inc.*[28], the company was selling vacuum cleaners door-to-door. The defendants argued that the distributors' purchase of the machines was the purchase of a product, whereas the plaintiffs argued they were investments. The court rejected the defendant's argument, holding that the mere transfer of a tangible commodity does not preclude the existence of a security. Even purchases where distributors must personally purchase products to participate in the compensation plan will satisfy the first element

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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.

[22] *Power Homes Unlimited Corporation v. Securities and Exchange Commission* G.R. No. 164182, 26 February 2008 - the Supreme Court stated that an investment contract in our jurisdiction, to be a security subject to regulation by the Commission, 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.**

[23] Paragraphs 18-24, Note 2, *Supra.*

[24] Paragraph 19, Note 2, *Supra.*

[25] Paragraph 21, Note 2, *Supra.*

[26] Annexes "A" to "A-20", Note 9, *Supra.*

[27] SEC vs. Diversified Industry Inc., 465 F. Supp. 104, 108 (D.D.C. 1979).

[28] 549 F.2d 342 (5th Cir. 1977).

of the Howey Test. This ruling is in consonance with the flexible principle of investment contracts adopted in *Power Homes* case[29]. Furthermore, in *Gabionza vs. Court of Appeals*, the Supreme Court recognized the Department of Justice's resolution on the flexibility of the definition of securities.

On the other hand, Goldxtreme's evidence, which are *pro-forma* affidavits[30] of the alleged buyers stating that they bought and received mini-gold bars are self-serving.

In *PLDT vs. Tiamson*[31], the Supreme Court ruled that:

> "Although admissible in evidence, affidavits being self-serving must be received with caution. This is because the adverse party is not afforded any opportunity to test their veracity. By themselves, **generalized and *pro forma* affidavits cannot constitute relevant evidence which a reasonable mind may accept as adequate. There must be some other relevant evidence to corroborate such affidavits.**"

Thus, Goldxtreme's evidence should be received with caution as there are no other evidence to support the same. Unlike in EIPD's case, the findings of its investigators are corroborated by the sworn statements of twenty (20) complainants. Therefore, between the evidence presented by the parties, we find weight in EIPD's evidence which consists of detailed findings of EIPD investigators and statements of twenty (20) complainants.

Common enterprise

Goldxtreme alleges that there is no common enterprise but only a depository of gold jewelry products[32]. We also find this argument untenable. Evaluating Goldxtreme's GSP, it states that:

> "The product in focus are fourteen (14) karat mini-gold bars weighing at least three (3) grams each and sold to a buyer at a minimum price P5,000.00 per bar. To join the program, **a buyer must deposit the mini-gold bar with GTC (Goldxtreme).**[33]"

On the other hand, the terms and conditions of GSP provides that:

> "i) A purchaser who applied and was accepted in the "Gold Swap Program" **may not withdraw from the program, and cannot recover the gold product or its value of P5,000.00 from Goldxtreme**, unless and until he was removed as a head by reason of completion of sub-group, under Goldxtreme business process;[34]"

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[29] Note 22, *Supra*.
[30] Note 11, *Supra*.
[31] G.R. Nos. 164684-85, November 11, 2005.
[32] Paragraph 1.6 of Goldxtreme's Reply.
[33] Page 2 of the Motion to Lift.
[34] Page 6, Note 2, *Supra*.

Relative thereto, the rules on deposit in the New Civil Code expressly provides that:

> "Article 1962. A **deposit** is constituted from the moment a person receives a thing belonging to another, **with the obligation of safely keeping it and of returning the same. If the safekeeping of the thing delivered is not the principal purpose of the contract, there is no deposit but some other contract**."

In the instant case, it could not be said that there is deposit of mini-gold bars because the buyer may not withdraw the gold product unless he graduates from the business process. Clearly, the alleged deposit of mini-gold bars is not intended for safekeeping because the buyer may not withdraw the same.

Moreover, the common enterprise, which was established during EIPD's investigation, is the pooling of money (disguise as deposit of mini-gold bars) to complete the Table/Group in order for an investor graduate/exit and receive his profit. In essence, there is no productive enterprise but simply recruiting new investors to fund investment scheme. This fact is admitted in Goldxtreme's *Motion to Lift* wherein the GSP sells positions to recruits/investors and encourages a "shared responsibility" to fill-up the Table/Group[35].

Expectation of profits

Goldxtreme claims that there is no expectation of profits or cash payments, as commonly understood in investment schemes[36]. Its buyer is only rewarded an additional mini-gold bar (12 grams 14 Karat) which cannot be considered as profit but a definite, agreed and fixed remuneration[37].

We disagree. It is clear on the facts and evidence presented that Goldxtreme's investment scheme is primarily designed to attract investors to earn by offering them high yield returns. A recruit/investor who places Php 5,000.00 in the GSP will earn Php 25,000.00 upon completion of the business process. Visibly, Goldxtreme business model is deliberately intended to entice its investors to recruit more people in order to earn more profit. In other words, they are not enticed by the gold bar itself but the opportunity to earn by being enrolled in the GSP. Moreover, the alleged "fixed remuneration" received by buyer are not mere "compensation" but huge profits or return of their investment.

As to the claim of payment of value-added taxes and expanding withholding taxes confirms payment of commissions independent and/or exclusive sales representatives, such is untenable. The alleged payment of taxes does not necessary prove that Goldxtreme is not selling investment contracts. The Howey Test is still the best way to determine if a corporation's business scheme is considered as an

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[35] Page2-4, Note 2, *Supra.*
[36] Paragraph 24, Note 2, *Supra.*
[37] Paragraph 1.7 of Goldxtreme's Reply.

investment contract. And in the instant case, all the elements of an investment contract are present in Goldxtreme's GSP.

Primarily efforts of others

Goldxtreme asserts that the compensation paid to "graduates" of the Goldxtreme's GSP is not derived from the efforts of others but paid from its sales revenue of mini-gold bars[38].

We are not convinced. In *US vs. Turner*[39], 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".

As we have previously ruled in the Assailed CDO, it is Goldxtreme who develops, administers, maintains and promotes the investment scheme. It is the one who operates and maintains an office and online platform which tracks and monitor the progress of an investor as he moves from the bottom of the Goldxtreme supposed table until he exits. The investor, who graduates and exits, does not sell any concrete product but merely relies on Goldxtreme's investment scheme to earn profit. Clearly, the investor simply places his money in Goldxtreme and awaits his profit.

In another issue, Goldxtreme argues that the EIPD has no basis in finding that it is soliciting investments or selling securities to the general public. It claims that its GSP is not open to the public but only offered to its customers, who purchase mini-gold bars[40].

On the other hand, EIPD maintains in its *Comment/Opposition* that Goldxtreme is promoting its GSP to the general public through online advertisements[41], video presentations, and invitations to the public in general, thru meetings, fora, etc., to potential investors. EIPD argues that these acts are intended to entice investors to join the company, hence, constitute public offering[42].

As a rule, "public offering means a random or indiscriminate offering of securities in general to anyone who will buy, whether solicited or unsolicited. Any solicitation or presentation of securities for sale through any of the following modes shall be presumed to be a public offering: x x x ii. **Presentation in any public or commercial place**; iii. **Advertisement or announcement in any radio or television, or any online or e-mail system**; x x x[43]".

Clearly, Goldxtreme's argument is erroneous for the reason that it has been promoting its GSP to the general public through online advertisements. The video

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[38] Supra 18.
[39] 474 F. 2d 476, 414 U.S. 821, 94 (1973).
[40] Paragraph 15-16, Note 2, *Supra*.
[41] www.goldxtreme.com and http://goldxtreme.co.
[42] Paragraph 15 of EIPD's Comment.
[43] Rule 3, paragraph 1, sub-paragraph N of the Amended Implementing Rules and Regulations of the SRC.

presentations in its websites are evidently indicative of the fact that it aims to entice, not only those who already bought gold bars but more importantly, the general public to participate in its investment schemes. Likewise, there is sufficient evidence that Goldxtreme personnel and/or representatives conducts seminars and meetings to potential investors. These promotions and advertisements falls within the definition of public offering.

Lastly, Goldxtreme claims that its business model is a valid network marketing program. It employs the Goldxtreme's GSP to generate more sales. It avers that those entering said program are earning in the form of commissions from the sales of mini-gold bars[44].

Goldxtreme's GSP is not a valid network marketing program. As above-discussed, it is proven that there is no actual sale of mini-gold bars. The alleged selling of mini-gold bars is simply an illusion but in reality it is only investor's money that flows in the company. The mere fact that an investor cannot withdraw his Php 5,000.00 or the alleged mini-gold bar from the GSP is a strong indication that the scheme is a form of investment. Indeed, an investment of money occurs when an investor commits money to an enterprise or venture in a manner that subjects himself to financial loss[45]. In the case at bar, the investor placed his money/gold bar with Goldxtreme with the risk of financial loss if he does not complete the business process by exiting from the group where he belongs.

Moreover, it is apparent that investors/recruits have no desire to purchase mini-gold products but are strongly enticed or attracted by the prospects of a high return of their investment when they participate in Goldxtreme's GSP. This is obvious in Goldxtreme's marketing strategy (videos, seminars, etc.) that they are promoting its GSP rather than selling of gold products. Hence, the primary focus of Goldxtreme's business model is not to market gold products but to recruit investors to fund its investment scheme.

To reiterate, securities are shares, participation or interests in a corporation or in a commercial enterprise or profit-making venture and evidenced by a certificate, contract, instruments, whether written or electronic in character. One of the types of securities are investment contracts[46]. As a rule, all 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[47].

Finally, it is declared in Section 2 of the SRC, that:

> "Section 2. Declaration of State Policy. – The State shall establish a socially conscious, free market that regulates itself, encourage the widest participation of ownership in enterprises, enhance the democratization of wealth, promote the development of the capital market, protect investors, **ensure full and fair disclosure about securities,** minimize if not totally

[44] Paragraphs 34-35, , Note 2, *Supra.*
[45] *SEC v. International Mining Exchange, Inc.*, 515 F. Supp. 1062.
[46] Section 3, (b) of the Securities Regulation Code (SRC).
[47] Section 8.1 of the SRC.

eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market. To achieve these ends, this Securities Regulation Code is hereby enacted."

WHEREFORE, premises considered, the *Motion to Lift Cease and Desist Order* filed by GOLDXTREME TRADING CO. is hereby **DENIED** for lack of merit. The CEASE AND DESIST ORDER issued against the subject partnership, their officers, agents, representatives, conduits, assigns, and any and all persons/entities claiming and acting for and in behalf and under their authority, is hereby **MADE PERMANENT**.

The Enforcement and Investor Protection Department is hereby **DIRECTED** to: (a) serve this *Resolution* to the Partners, General Manager, Corporate Secretary, Treasurer or In-House Counsel of GOLDXTREME TRADING CO. and (b) post copies of the *Resolution* at the entrance of the main offices and/or branches, if any, of GOLDXTREME TRADING CO.

Let a copy of this *Resolution* be also posted in the Commission's website and published in a national newspaper of general circulation and furnished to all operating departments and offices of the Commission for their information and appropriate action.

EIPD, in coordination with other concerned departments, is **FURTHER DIRECTED** to submit a formal compliance report, by way of a pleading, to the Commission *En Banc* WITHIN TEN (10) DAYS from receipt of this *Resolution.*

SO ORDERED.

Mandaluyong City; 28 June 2016.

TERESITA J. HERBOSA
Chairperson

MANUEL GILBERTO B. GAITE
Commissioner

ANTONIETA F. IBE*
Commissioner

EPHYRO LUIS B. AMATONG
Commissioner

BLAS JAMES G. WITERBO
Commissioner

*On Leave