BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. Order/SM/AE/2022-23/19751-19761]

UNDER SECTION 15 I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF SECURITIES AND EXCHANGE BOARD OF INDIA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 1995 AND UNDER SECTION 23-I OF SECURITIES CONTRACTS (REGULATION) ACT, 1956 READ WITH RULE 5 OF SECURITIES CONTRACTS (REGULATION) (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 2005

In respect of:

Noticee No.	Noticee Name	PAN
1	Birla Pacific Medspa Ltd	AAAFK1583C
2	Mr. Yashovardhan Birla	AAJPB2505N
3	Dr. Abhijit Desai	AEKPD9806M
4	Mr. P V R Murthy	ABRPM1271B
5	Mr. Venkateswaralu Nelabhotla	AADPV8720H
6	Mr. Mohandas Adige	AARPA3809L
7	Mr. Vijay Agarwal	AABPA9526A
8	Mr. Anoj Menon	AHTPM6650N
9	Mr. Rajesh Shah	AAGPS9485D
10	Mr. Upkar Singh Kohli	AAIPK0833F
11	Mr. Tushar Dey	AHEPD2060J

*(hereinafter collectively referred to as “**Noticees**”)*

In the matter of Birla Pacific Medspa Ltd

BACKGROUND

1. Securities and Exchange Board of India (hereinafter being referred to as "**SEBI**") conducted investigation into the initial public offer ("**IPO**") of Birla Pacific Medspa Limited (hereinafter being referred to as "**BPML**/**Company**"*),* for the period from July 7, 2011 to July 15, 2011 (hereinafter being referred to as "**Investigation Period**"*),* since there was high volatility on the day of listing. BPML came out with offer documents, namely, Red Herring Prospectus dated March 18, 2011 and Prospectus dated June 29, 2011 (hereinafter collectively referred to as "**Prospectus**") at the time of its IPO with the following objects of the issue:

   - To meet the capital expenditure towards establishing 55 outlets of Evolve Medspa across various cities and places.
   - To meet expenses towards brand promotion.
   - To meet the working capital requirements for running the above centres.
   - To meet issue related expenses.
   - To enlist Company's shares on Bombay Stock Exchange Limited (hereinafter being referred to as "**BSE**")

2. The BPML issue was graded by M/s Brickworks Ratings India Pvt Ltd and was assigned "**BWR IPO Grade 2**" indicating "**below average fundamentals**".

3. The scrip of BPML was listed on BSE on July 7, 2011, after the IPO which was open for subscription from June 20, 2011 to June 23, 2011. Investigation revealed that the price of the scrip had seen sharp volatility on listing day, closing at Rs. 25.35, i.e., 154% more than the issue price of Rs. 10 per share.

4. During the course of investigation, it was observed that BPML had received IPO proceeds amounting to Rs. 64.17 crores in its bank account (Yes Bank, Nariman Point Mumbai-A/c No. 4840000358384) on July 06, 2011. On analysis of the IPO proceed

utilization and fund flow from BPML's bank account, it was observed in investigation that BPML had *inter alia* diverted / siphoned off funds mounting to Rs. 33.40 crores to various entities under the guise of advance payment for interior work and supply of medical equipment. The said funds (amounting to more than 50% of the IPO proceeds) were never received back by BPML nor were those utilized for the above purposes. Hence the said act was considered as fraud. A part of the said funds was also used to indirectly fund the purchase of BPML's shares on BSE on the day of the listing.

5. Based on the findings of the investigation, SEBI initiated adjudication proceedings against the Noticees as follows -

    i. BPML for the alleged violation of provisions of Section 11C(2) and (3) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the "**SEBI Act**"), Regulation 3(a), (b), (c), (d), 4(1), 4(2) (a), (d), (e), (f) & (k) of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices in Securities Market) Regulations, 2003 (hereinafter referred to as the "**PFUTP Regulations**") read with Section 12A(a), (b) & (c) of the SEBI Act and Section 77 of the Companies Act, 1956 and Clause 43(A) and 43(1) of the Equity Listing Agreement read with Section 21 of the Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as the "**SCRA**").

    ii. Shri Yashovardhan Birla, Shri Venkateshwaralu Nelabhotla, Shri Mohandas Adige, Shri Vijay Agarwal, Shri Anoj Menon, Shri Rajesh Shah, Shri Upkar Singh Kohli and Shri Tushar Dey for the alleged violation of provisions of Regulation 3(a), (b), (c), (d), 4(1), 4(2) (e), (f) & (k) of the PFUTP Regulations read with Section 12A(a), (b) & (c) of the SEBI Act.

    iii. Shri Abhijit Desai for the alleged violation of provisions of Regulation 3(a), (b), (c), (d), 4(1), 4(2) (a), (d), (e), (f) & (k) of the PFUTP Regulations read with Section 12A(a), (b) & (c) of the SEBI Act and Section 77 of the

Companies Act, 1956 and Clause 43(A) and 43(1) of the Equity Listing Agreement read with Section 21 of the SCRA.

iv. Shri P. V. R. Murthy for the alleged violation of the provisions of Regulation 3(a), (b), (c), (d), 4(1), 4(2) (e), (f) & (k) of the PFUTP Regulations read with Section 12A(a), (b) & (c) of the SEBI Act and Clause 43(1) of the Equity Listing Agreement read with Section 21 of the SCRA.

6. Adjudication proceedings in the matter were also initiated against 24 other entities namely, Sanjukta Vanijya Pvt Ltd, Darshan Tradelink Pvt Ltd, Jalan Cement P Ltd, Rupak Trading P Ltd, Orbit Financial Consultants P Ltd, Marutinandan Infosolutions P Ltd, N P Enterprise (Proprietor Narendra Sanghvi), New Fashion (Proprietor Ketan Vora), K V Impex (Proprietor Ketan Vora), J C Enterprise (Proprietor Jigar Vora), Laxmi Trading (Proprietor Malti Sanghvi), Subhashree Hiris P Ltd, Skylight Distributors Pvt Ltd, Gautam Dealers Pvt Ltd, Mayfair Dealcom Pvt Ltd, Drona Distributors Pvt ltd, Aspen Dealcom Pvt Ltd, Transglobal Securities Ltd, Genuine Stock Brokers Pvt Ltd, Rikhav Investments, Rikhav Securities Ltd, Credo India Thematic Fund Ltd (Now Bridge India Fund) and Silver Stallion Ltd for the alleged violations of provisions of SEBI Act, 1992, PFUTP regulations, SEBI (Stock Brokers and Sub Brokers) Regulations, 1992, SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 and SEBI (Prohibition of Insider Trading) Regulations, 1992. Subsequently, Adjudication Orders dated November 27, 2020, December 16, 2020, December 18, 2020, February 04, 2021, February 10, 2021, February 12, 2021, March 31, 2021, May 31, 2021, June 01, 2021, June 15, 2021 and September 21, 2021 were passed in respect of the aforesaid 24 entities in the matter.

APPOINTMENT OF ADJUDICATING OFFICER

7. Vide order dated December 08, 2016, Shri D. Sura Reddy was appointed as the Adjudicating Officer (hereinafter referred to as '**AO**') under Section 15-I of SEBI Act read with Rule 3 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties)

Rules, 1995 (hereinafter being referred to as "**SEBI AO Rules**") and under Section 23I of the SCRA read with Rule 3 of the Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (hereinafter being referred to as "**SCR AO Rules**") (both rules together referred to as "**AO Rules**") to inquire into and adjudge under the provisions of Section 15A(a), 15HA and 15HB of the SEBI Act and Section 23A(a) and 23E of SCRA, the aforesaid alleged violations by the Noticees as applicable and the 24 entities mentioned in paragraph 6 above. Subsequent to transfer of Shri D. Sura Reddy, Shri Jeevan Sonparote was appointed as the AO in the said matter. Subsequent to transfer of Shri Jeevan Sonparote, Shri B.J. Dilip was appointed as the AO in the matter. Thereafter, on account of transfer of Shri B.J. Dilip, the undersigned was appointed as the AO in the matter by SEBI vide order dated December 29, 2020.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

8. A common Show Cause Notice dated April 20, 2017 (**SCN**) was issued to Noticees and 24 other entities named in paragraph 6 above, under Rule 4(1) of the SEBI AO Rules and Rule 4(1) of SCR AO Rules in the matter to show cause as to why an inquiry should not be held against them under Rule 4 of the SEBI AO Rules and Rule 4 of the SCR AO Rules and penalty be not imposed, for the alleged violations specified in the SCN. This Order is in respect of the 11 Noticees mentioned herein.

9. The allegation levelled against the Noticees in the SCN are summarized as follows -

    a. Securities and Exchange Board of India (hereinafter referred to as the SEBI) had conducted an investigation in the matter of Initial Public Offering (IPO) of BPML for the period July 07, 2011 — July 15, 2011. It was observed that the scrip of BPML was listed on BSE on July 07, 2011. The price of the scrip had seen sharp volatility on listing day, closing at 25.35 i.e. 154% more than the issue price of 10 per share. The Investigation, inter alia, revealed that BPML was incorporated on July 15, 2008 as a joint venture agreement between Birla Wellness & Healthcare Pvt. Ltd and Pacific Healthcare Holdings Limited to carry on, in India and abroad, the business of beauty and healthcare treatments, health and fitness resorts, dieticians, yoga ashrams, saloons, hair and skin treatments, Sanitorium centers, and to manufacture soaps, consumables, oils, medicines, body sprays and scents, creams, powders, natural and artificial skin and hair conditioners. It was disclosed in the prospectus that BPML operated healthcare centers under the brand name EVOLVE. As on June 29, 2011, BPML had five self operated EVOLVE centers functioning in Mumbai at Walkeshwar, Bandra, Andheri, Worli & Borivali; and 2 centers on franchise basis at Thane and Chennai. The directors and key managerial personnel at the relevant time were as follows:

Name	Designation	Type
Yashovardhan Birla	Chairman	Non-Independent, Non - Executive
William Lai Leong	Director	Non-independent, Non - Executive
Abhïit Prabhakar Desai	Managing Director	Non-Independent, Executive
P V R Murthy	Director	Non-Independent, Executive
Mohandas Shenoy Adige	Director	Independent
Vijay Agarwal	Director	Independent
Anoj Menon	Director	Independent
Rajesh Shah	Director	Independent
TusharDey	Alternate Director	Alternate Director to Dr. William Leong
VenkateswaraluNelabhotla	Additional Director	Non-Independent, Non - Executive
Upkar Singh Kholi	Additional Director	Independent
Khyati Mashru	Secretary	--

b. It was observed that BPML had issued 6,51,75,000 equity shares of Rs.10/- each at a price of 10/- per equity share, resulting into aggregate issue size of Rs. 65.17 crores through 100% book building. The issue constituted 58.12% of the post issue paid-up capital of BPML. The BPML issue was graded by M/S Brickworks Ratings India Pvt Ltd and was assigned "BWR IPO Grade 2" indicating "below average fundamentals". The issue opened on June 20, 2011 and closed on June 23, 2011. The Issue was subscribed 1.18 times.

Issue Type	**Issue Size**	**Issue Size**	**Face Value**	**Issue Price**	**IPO Grade**
100% Book Built	6,51,75,000 Equity Shares of Rs. 10	Rs.65.17 Crore	Rs.10 per Equity Share	Rs.10 per Share	Grade2 (Brickwork)

c. It was further observed on the listing day (July 07, 2011), 2205 out of the 2966 retail allottees had sold their shares (2,49,81,435 shares in total). All 5 HNI clients had sold all of their shares (16,14,000 shares). 2 of the QIBs had also sold shares (10,90,500 shares) on the listing day. The counterparties to these retail clients were analyzed and the same was compared with the net buyers and loss makers on the listing day. Following are the tabular details of the analysis.

Net buyers/loss makers on listing day/Counterparties to IPO allottees' sell trades

Client Name	Gross Buy	Gross Sell	Net Qty.	Total Buy Qty. from the Allottee	Number of Alottees
Vikabh Securities Pvt Ltd	5849568	500000	53,49,568	19,40,834	150
V P Patel	16308562	11013467	52,95,095	63,39,818	537
Marutinandan Infosolutions Pvt Ltd	2257755	0	22,57,755	14,76,997	112
Orbit Financial Consultants Pvt Ltd	1701001	1000	17,00,001	10,65,908	91
Gateway Financial Services Ltd	1635752	35752	16,00,000	14,68,967	127
Jalan Cement Works Ltd	1600000	0	16,00,000	14,10,159	120
Rupak Trading Pvt Ltd	1152486	0	11,52,486	8,82,628	71
Saumil Bhavnagari Lopa	2168860	1135000	10,33,860	10,83,693	78
Man Mohan Damani	1000000	0	10,00,000	69,464	3
Pradeep Kumar Saraogi	1000000	0	10,00,000	7,11,304	68
Total				1,64,49,772	1,357

d. The fund flow to net buyers and loss makers was analyzed. It was observed that four clients namely Jalan Cement Works Ltd Cr), Marutinandan Infosolutions Pvt. Ltd 2.29 Cr), Orbit Financial Consultants Pvt. Ltd Cr) and Rupak Trading Pvt. Ltd 2.29 Cr) had received funds from BPML IPO proceeds indirectly (1 layer). Further, the counterparties to the purchase of shares by these four entities included the retail allottees and some NIIs. QIBs didn't appear as counterparty to these purchases. It was further observed that, these four entities had traded through broker GRD Securities. It was observed that BPML had transferred 7 Cr each to entities viz. Sanjukta Vanijya Pvt. Ltd and Darshan Tradelink Pvt. Ltd on July 07, 2011. These funds, on the same day were transferred to the above 4 entities. Summary of fund flow is as under:

All numbers in Rs.

Client Name	Gross Buy Value	Funds Received from Sanjukta Vanijya	Funds Received from Darshan Tradelink	Funds transferred to GRD Securities
Jalan Cement Works Ltd	2,12,85,000	1,00,00,000	2,00,00,000	3,00,00,000
Marutinandan Infosolutions Pvt Ltd	3,21,01,843	2,29,00,000	0	2,29,00,000
Orbit Financial Consultants Pvt Ltd	2,38,32,675	0	2,00,00,000	2,00,00,000
Rupak Trading Pvt Ltd	1,56,91,075	2,19,00,000	3,00,00,000	5,23,00,000
Total	**9,29,10,593**	**5,48,00,000**	**7,00,00,000**	**12,52,00,000**

e. It was noted that together, these four entities paid Rs. 12.52 Cr on July 07, 2011 to their broker GRD Securities towards their pay-in obligation against buy trades in the scrip of BPML on listing day. Bank statements of the entities namely Jalan Cement, Marutinandan, Orbit, Rupak Trading, Sanjukta Vanijya and Darshan Tradelink are attached as **Annexure III.**

f. Upon investigation, it was observed that Rupak Trading Pvt. Ltd had purchased other scrips as well in addition to above mentioned purchase of BPML shares. It was observed that Orbit Financial Consultants Pvt. Ltd and Marutinandan Infosolutions Pvt. Ltd had sold their holding in BPML during Aug-Dec 2011, Rupak Trading Pvt. Ltd was trading in the scrip of BPML till January 2012 and Jalan Cement Works Ltd was trading in the scrip of BPML till December 2011.

g. After receiving funds from the proceeds of the IPO from BPML, these four net buyers had acquired a net of 67,11,242 shares (value of approx. Rs. 9.29 crores) i.e. 21.56% of the total delivered quantity of 3,11,08,577 shares on July 07, 2011 and 10.3% of the issue size. Further, they took delivery of 99.98% of their total buy volume against market average of 22.90% on the day. On the day of listing, the price increased and it closed at Rs. 25.35.

h. In view of the above, it is alleged that the four net buyers i.e. Jalan Cement Works Ltd, Rupak Trading Pvt. Ltd, Orbit Financial Consultants Ltd and Marutinandan Infosolutions Pvt. Ltd were the artificial buyers of the shares of BPML and thereby had distorted the market equilibrium of trading. Further, it is alleged that BPML and the entities who aided and abetted BPML in routing / diversion of funds i.e. Sanjukta Vanijya Pvt. Ltd and Darshan Tradelink Pvt.

Ltd had acted in a fraudulent manner and had created a misleading appearance of trading in the scrip of BPML by supporting the demand and thus, the price of the scrip. It is, therefore, alleged that BPML and its non-independent executive director viz. Dr. Abhijit Desai along with Sanjukta Vanijya Pvt. Ltd, Darshan Tradelink Pvt. Ltd, Jalan Cement Works Ltd, Rupak Trading Pvt. Ltd, Orbit Financial Consultants Ltd and Marutinandan Infosolutions Pvt. Ltd. have violated the provisions of Regulation 3(a), (b), (c), (d), 4(1), 4(2)(a), (d) and (e) of the PFUTP Regulations read with Section 12A(a), (b) and (c) of the SEBI Act, 1992.

i. Further, it is alleged that by providing money out of the IPO proceeds to the above entities and these entities buying the shares of BPML with the said proceeds, BPML had facilitated purchase of its own securities out of the IPO proceeds and thus, violated the provisions of Section 77 of Companies Act, 1956. As per Section 77 of the Companies Act, 1956 "No public company, and no private company which is a subsidiary of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company".

<u>Utilization of IPO proceeds and Fund Flow Analysis:</u>
<u>Objects of the Issue:</u>

j. In case of IPO of BPML, the objects of the issue and funds required for the same as disclosed in the prospectus were as under:
   (a) To meet capital expenditure towards establishing 55 outlets of Evolve Medspa across various cities and places
   (b) To meet expenses towards brand promotion
   (c) To meet the working capital requirements for running the above centres.
   (d) To meet Issue related expenses
   (e) To enlist Company's Shares on Bombay Stock Exchange Limited (BSE)

Fund Requirement Table

Sr. No.	Particulars	Amount (in Rs. Crore)
1	Capital Expenditure for Setting up 55 Evolve centers across the country (Rs. 0.9 crore each for one clinic)	49.50
2	Working Capital Requirements	0.70

Sr. No.	Particulars	Amount (in Rs. Crore)
3	Brand Promotion	6.00
4	Issue Expenses	6.50
5	Contingencies	1.23
6	Preliminary and preoperative expenses	1.23
	Total	**65.17**

k. However, on analysis of IPO proceeds' utilization and fund flow from BPML bank account, it was observed that BPML did not invest funds pending utilization as disclosed in prospectus. Also, the schedule of implementation of BPML as disclosed in the prospectus (page 27 of prospectus) mentioned that 15, 15 and 25 centres would be completed during FY 2011-12, 2012-13 and 2013-14 respectively. However, no such clinic was opened. Thus, it is alleged that BPML had failed to utilize the IPO proceeds as per the objects of the issue stated in the prospectus and instead had diverted the IPO proceeds to various entities.

l. It was observed that BPML IPO was of Rs. 65.17 crores. BPML received IPO proceeds of Rs. 64,17,63,660.00 (Rs. 64.17 crores) in its bank a/c (Yes Bank, Nariman Pt Mumbai – A/c No. 4840000358384) on July 06, 2011. From these IPO funds in the said account, on July 6 and July 7, 2011, funds worth Rs. 34.91 Crores were transferred by BPML to various entities namely Laxmi Trading Co, N P Enterprise, New Fashion, K V Impex, J C Enterprise, Vora Associates, Subhshree Hirise Pvt Ltd, Sanjukta Vanijya Pvt Ltd, Darshan Tradelink Pvt Ltd, Skylight Distributors Pvt Ltd. Bank statement of BPML is attached as **Annexure IV**. The details of the 1st layer transfers are given as under:

1st Layer Fund flow out of IPO proceeds from BPML's Yes Bank a/c No. 4840000358384			
Date	**From(Name)**	**To(Name) -1st layer**	**Sum of Amt (Rs. crore)**
July 06, 2011	BPML's Yes Bank a/c No. 4840000358384	Darshan Tradelink	7.00
July 06, 2011		J C Enterprise	2.00
July 06, 2011		K V Impex	2.50
July 06, 2011		Laxmi Trading Co.	3.00
July 06, 2011		N P Enterprise	3.00
July 06, 2011		New Fashion	3.00
July 06, 2011		Sanjukta Vanijya	7.00
July 06, 2011		Skylight Distributors	1.00
July 06, 2011		Subhshree Hiris	1.00
July 06, 2011		Vora Associates	2.16
July 07, 2011		Birla Power	1.50

July 07, 2011		N P Enterprise	0.61
July 07, 2011		New Fashion	0.62
July 07, 2011		Vora Associates	0.53
Total			**34.91**

m. These funds from above mentioned accounts in 1st layer were again transferred to other entities as per following table.

Date	From(Name)	To(Name)	Sum of Amt (Rs. crore)
July 07, 2011	Darshan Tradelink	**Jalan Cement Works**	2.00
		Orbit Financial Consultants	2.00
		Rupak Trading Pvt Lt	3.00
			7.00
July 06, 2011	J C Enterprise	**Jaya Enterprise**	0.30
		Kaveri Enterprise	1.40
		Max Enterprise	0.30
			2.00
July 06, 2011	Laxmi Trading Co	**Charm Enterprises**	0.80
		Kaveri Enterprise	1.60
July 07, 2011	Laxmi Trading Co	**Muskan Trading Co**	0.60
			3.00
July 06, 2011	N P Enterprise	**Charm Enterprises**	0.80
		Jaya Enterprise	0.90
		Max Enterprise	0.40
July 07, 2011	N P Enterprise	**Kiran Enterprises**	0.28
		Mitesh Enterprises	0.50
		Muskan Trading Co	0.50
			3.38
July 06, 2011	New Fashion	**Charm Enterprises**	0.40
		Jaya Enterprise	0.30
		Kaveri Enterprise	0.85
		Max Enterprise	0.30
		Mitesh Enterprises	0.50
			2.35
July 07, 2011	New Fashion	**Charm Enterprises**	0.34
		Eden Financial Service	0.23
		Mitesh Enterprises	0.50
July 06, 2011	Sanjukta Vanijya	**Jalan Cement Works**	1.00
July 07, 2011	Sanjukta Vanijya	**Marutinandan Infosolutions**	2.29
		Rupak Trading Pvt Lt	2.19
			6.55
July 07, 2011	Rupak Trading Pvt Lt	**Grd Securities Ltd**	2.23
Grand Total			**26.51**

n. The detailed fund-flow chart with account numbers and bank names, and bank statements of above entities are attached as **Annexure V**.

o. To examine the fund flow from the bank account of BPML, BPML was asked to explain the same. Vide reply dated July 02, 2012, it was submitted by the company that the amount paid to Sanjukta Vanijya Pvt. Ltd and Darshan Tradelink Pvt. Ltd was for advance against the interior design work at 'Evolve' centers. Similarly, regarding the funds transferred to N P Enterprise, New Fashion, Vora Associates, Laxmi Trading, J C Enterprise, BPML had submitted that these funds were advances for purchase of medical equipments. However, it was observed that BPML had mentioned in the Prospectus that it had not even identified locations for these 'Evolve' centers. BPML in the prospectus on page No. 24 & 25 had mentioned that it had taken quotation from an entity M/S JTCPI Designs. However, as per its own reply, BPML had paid advances to entities namely, Sanjukta Vanijya Pvt. Ltd and Darshan Tradelink Pvt. Ltd against the interior design work at 'Evolve' centers whose names were nowhere mentioned in the prospectus. Further, it was observed that no medical instruments / equipments were purchased by BPML through N P Enterprise, New Fashion, Vora Associates, Laxmi Trading, J C Enterprise (reply of BPML dated August, 06, 2013).

p. Further, it was observed from Bank KYC documents that N P Enterprise, New Fashion, Vora Associates, Laxmi Trading, J C Enterprise are proprietorships dealing in cloth trading, commission agent etc. and have no experience in providing medical equipments. These entities are also related to each other through family members or relatives. It was observed from Income tax returns and related documents submitted by Vora Associates, New Fashion and J C Enterprise that these entities did not have financial worthiness to handle such large funds. Also, the funds received from BPML have not even been shown by these entities in their balance sheet and related documents submitted to Income tax departments. It is further noted that these funds have not yet been received back by BPML (reply of BPML dated August, 06, 2013 and dated November 07, 2014).

q. During the investigation, it was observed that BPML had advanced 14 Crores to Sanjukta Vanijya Pvt. Ltd and Darshan Tradelink Pvt. Ltd from the IPO proceeds, which were further advanced by the said entities to the net buyers on the listing day as mentioned in above paras. Darshan Tradelink Pvt. Ltd had claimed that it had invested the monies so received in shares of Jalan Cement Works Ltd, Rupak Trading Pvt. Ltd and Orbit Financial Consultants Ltd. Sanjukta Vanijya Pvt. Ltd had claimed that it had invested the monies so received in the shares of Jalan Cement Works Ltd, Rupak Trading Pvt. Ltd and Marutinandan Infosolutions Pvt. Ltd. Thus, while BPML had given advance from IPO proceeds to Darshan Tradelink Pvt. Ltd and Sanjukta Vanijya Pvt. Ltd for interior design, these two companies had used the money to invest in other companies shares. Also, Darshan Tradelink Pvt. Ltd and Sanjukta Vanijya Pvt. Ltd had submitted that their business is "trading and investment in listed and unlisted securities, debentures and bonds etc.", which is nowhere related to interior design. It was further observed that while 14 Crores advanced to Darshan Tradelink Pvt. Ltd and Sanjukta Vanijya Pvt. Ltd have been received back by BPML, the said monies were again advanced to entities such as Gautam Dealers Pvt. Ltd and Drona Distributors Pvt. Ltd, etc. Thereafter, it is noted that these funds have not been received back by BPML (reply of BPML dated August, 06, 2013 and dated November 07, 2014)

r. It was observed that following pairs of entities involved in IPO fund flow were related to each other by way of having one or more common directors.
   - Subhshree Hirise and Skylight Distributors
   - Drona Distributors, Aspen Dealcom and Mayfair Dealcom
   - Rupak Trading and Gautam Dealers
   - Marutinandan Infosolutions and Orbit Financial
   - Sanjukta Vanijya and Marutinandan Infosolutions
   - Darshan Tradelink and Sanjukta Vanijya accepted common directorship.

   The directorship details of these companies from MCA portal are attached as **Annexure VI.** All these entities were West Bengal based (Away from Mumbai BPML head office) and not into business of interior or medical equipments procurement or supply. Considering the high amount paid to these entities, any prudent company would ensure that all elementary details like contract, quotation etc are complied forthwith. BPML had failed to provide any such evidence related to these transactions. Thus, it is alleged that all these financial transactions, shown by BPML as being advances for the purpose of fulfilling issue objects, were fraudulent and some of them were also used to fund purchase of shares of BPML and support price of the shares on listing day.

s. In view of the above, it is alleged that the entities namely Gautam Dealers Pvt Ltd, Mayfair Dealcom Pvt Ltd, Drona Distributors Pvt Ltd, Aspen Dealcom Pvt Ltd, N P Enterprise, New Fashion, Vora Associates, Laxmi Trading, J C Enterprise, Skylight Distributors, Subhshree Hirise, K V Impex have aided and abetted in the diversion of proceeds of IPO by BPML and have therefore violated the provisions of Regulations 3 (a), (b), (c), (d) and 4(1)of PFUTP Regulations read with Section 12A (a), (b) and (c) of SEBI Act, 1992.

t. As observed in the paragraphs above, BPML had transferred IPO money immediately after its receipt as advances to various entities on July 6th and 7th of 2011. BPML in its reply dated July 27, 2012 had submitted that the payments were made in advance to avoid any delay in execution of the project. However, in clear contradiction to this, within 4 days of listing, on July 11, 2011, BPML board decided to go slow on setting up of Evolve clinic citing not so good response at existing clinics and decided to deploy the surplus money as ICDs to group companies. Minutes of board meeting dated July 11, 2011 are attached as **Annexure Vll**. The very purpose of IPO i.e. setting up of 55 clinics was defeated by this board resolution within 4 days of listing. Further, it was observed that BPML did not open even a single new clinic and had transferred IPO money to entities who have no experience in interior design or medical equipments supply. BPML later on changed the IPO objectives and invested in Group Company such as Birla Kerala Vaidyashala (reply of BPML dated November 07, 2014). BPML had also failed to provide any evidence of setting up of IVF centres as per changed IPO objects. In its letter dated August 06, 2013, BPML again submitted reply which contained statements claiming capital expenditure through advances to various entities as per new objective without any substantiating evidence of actual completion of work. From the above, it is alleged that BPML had no plans to utilize money as per disclosures made in the prospectus and thus, BPML played fraud on IPO subscribers who had trusted BPML management with their money to be utilized as per objects of the issue. BPML has, thus, deviated from issue objects and diverted money from IPO proceeds worth 33.4 crores (as calculated from BPML reply dated August 06, 2013).

u. It is, therefore, alleged that BPML and its directors who attended the Board meeting dated July 11, 2011 namely, Shri Yashovardhan Birla, Dr. Abhijit Desai, Shri P, V. R. Murthy, Shri Venkateshwaralu Nelabhotla, Shri Mohandas Adige, Shri Vijay Agarwal, Shri Anoj Menon, Shri Rajesh Shah, Shri Upkar Singh Kholi and Shri Tushar Dey have violated the provisions of Regulation 3 (a), (b), (c), (d), 4(1) ,4 (2) (e), (f) and (k) of the PFUTP Regulations read with Section 12A(a), (b) & (c) of the SEBI Act, 1992.

v. It was also observed from the bank account statement of BPML and various replies of BPML, including reply dated July 02, 2012 and August 17, 2012, that BPML had extended Inter Corporate Deposits (ICD) from IPO issue proceeds to its group companies Birla Cotsyn Ltd, Birla Power Solutions Ltd, Birla Infrastructure Ltd etc. As per the disclosure made by BPML in its prospectus regarding interim use of IPO proceeds, it was observed that there was no provision for ICDs to group companies. Pending utilization, the IPO monies were to be invested in interest or dividend bearing liquid instruments, deposits with banks etc. The exact verbatim of BPML's disclosure on Page 28 of prospectus is as follows:

> *"Pending utilization for the purposes described above, we intend to temporarily invest the funds in interest or dividend bearing liquid instruments including deposits with banks and investment in mutual funds and other financial products such as capita/ protected funds, derivative linked debt instruments, other fixed and variable return instruments, listed debt instruments and rated debentures. Such investments would be in accordance with any investment criteria approved by the Board of Directors from time to time. Issue proceeds shall not be utilized for equity/equity related Instruments"*

w. As is evident from above, this disclosure didn't include word corporate deposits and company was also restricted from investing in equity instruments. As already alleged in the above paragraphs, the funds transferred through Sanjukta Vanijya Pvt. Ltd and Darshan Tradelink Pvt. Ltd to Jalan Cement Works Ltd, Rupak Trading Pvt. Ltd, Orbit Financial Consultants Pvt. Ltd and Marutinandan Infosolutions Pvt. Ltd were used by these respective entities towards pay-in obligation of their listing day trades. It is alleged that it is in contrast with BPML's disclosure in prospectus that "*Issue proceeds will not be used for equity instruments.*".

x. Further, BPML in its board meeting dated July 11, 2011 had passed the resolution to issue ICDs to group companies stating that "*as per the prospectus the board has authority to deploy the proceeds received from the Issue in interest or dividend bearing liquid instruments including deposits with banks and investment in mutual funds, corporates and other financial products such as capital protected funds, derivative linked debt instruments, other fixed and variable return instruments, listed debt instruments and rated debentures*".

y. As per the disclosures in the prospectus, the IPO proceeds pending utilization were to be invested only in liquid instruments, which didn't include "corporate deposits". However, in its meeting dated July 11, 2011 i.e. after listing of BPML shares, within 4 days, the board had passed resolution of approval for investment in Birla Group companies through ICDs @ rate of 15 % interest per annum. Notwithstanding, that the deposits were not liquid instruments and were only governed by undertaking provided by the borrowers (group companies of BPML), BPML was not authorized to invest in ICDs as per prospectus. It was also observed that bulk of the 'CDs were not received back, neither interest on these ICDs was received.

z. It was observed that BPML vide its reply dated August 17, 2012 had submitted that it had extended a total of 29.395 crores to various group companies as ICDs between July 07, 2011 - May 31 , 2012. BPML had also submitted that out of 29.395 crores, it received back ICDs totaling only 6 crores as on August 17, 2012. BPML mentioned that it had received interest of only a net of TDS from these ICDs. Further, BPML in its reply dated August 17, 2012 had stated that as per ICD agreement the interest was payable upon return of ICDs. However, it is noted that interest was not received even on ICDs worth Rs. 6 crores in which principle was received back. The summary of the ICDs issued and received back as submitted by BPML in its reply dated November 07, 2014 is as below:

Group Company (Date of ICDs 07/07/2011-31/05/2012)	**ICD Amount in Rs. crore**	**ICD Repayment amount in Rs. crore**	**Interest on ICDs Receivable/received in Rs. crore**
Birla Cotsyn Ind	0.6	NIL	0.1814 (*received 0.0108)
Birla Infrastructure Ltd	1.06	NIL	0.3417
Birla Research & Lifesciences Ltd	5.135	5.135 (*shares of Birla Kerala Vaidyashala received)	0.6582
Birla Surya Ltd	5	4	0.3505
Birla Power Solutions Ltd	19.21	3.82	4.80 (*received 0.065)
Birla Kerala Vaidyashala Pvt Ltd	0.535	0.05	0.06
	31.54	**13.01 ****	**6.39 ***

Out of Rs. 31.54 crores

unpaid ICD Rs. 18.54 crore

**** paid ICD Rs. 13.01 crore - Rs. 5.135 is appropriated towards shares of Birla Kerala Vaidyashala as per new objects of issue.**

*** received interest of Rs. 0.0783 crore only as per reply dated August 17, 2012 - unpaid interest Rs. 6.32 crore**

aa. From the above table, it is alleged that ICDs worth Rs. 18.54 crore, and interest of Rs. 6.32 crore remained unpaid as on November 07, 2014. It is, therefore, alleged that BPML had deviated from IPO objectives, mis-utilized IPO proceeds and acted in contradiction to its disclosures in the prospectus.

bb. During the investigation period, vide summons dated August 06, 2014, BPML was, inter-alia, asked about IPO utilization as on August 05, 2014, details of repayments, if any, from the entities to whom advances were paid from IPO proceeds, details of financial worthiness of such entities, details of ICDs to group companies, bank account statement copy highlighting such transactions, copies of board meeting minutes during July 2013 - July 2014. It was observed that no reply was received from BPML to the said summons. On non-receipt of information in reasonable time, summons dated August 21, 2014 were also sent to BPML seeking the same information as in summons dated August 06, 2014.Thereafter, BPML vide its letters dated August 1 3, 2014, August 1 9, 2014, August 25, 2014 repeatedly sought extra time to submit information which should have been readily available with the company. Vide letter dated September 08, 2014, BPML submitted a partial reply to the above mentioned summons. It was observed that vide the said reply BPML had only furnished the minutes of board meeting and sought more time for submitting other documents and details as required in summons dated August 06, 2014. For failure to submit other documents BPML cited following reasons.

i. that the old management has resigned and the current CEO recently took charge, with no old employee available to hand over the charge.

ii. that accounts personnel, responsible for book keeping also resigned at the same time without handing over the charge and accounting entries were incomplete from December 2013.

iii. that the data is not available at one place and some data has been accessed recently, streamlining the backlog has started and the finalization of balance sheet for FY 2013-14 has been delayed.

iv. that while carrying out data entry, the current staff saw few entries related to IPO proceeds and that they want to provide the authentic data to SEBI after completion of all entries.

v. that only two employees are working in the back office of BPML who incidentally also look after two more Birla companies back office related work; they are working on compiling reply to SEBI summons.

BPML submitted its additional reply vide letter dated November 07, 2014 to the summons dated August 06, 2014 and August 21, 2014 cc. It is, thus, alleged that BPML had failed to submit the information which should have been readily available with the company. Details regarding utilization and related evidence, financial worthiness of entities who were given advances, etc. were of utmost importance for proceedings of the investigation. The same could not be obtained due to BPML's non furnishing of complete reply. BPML had shown that the IPO money utilized as advances to some entities earlier for setting up of clinics and thereafter advances to the same entities again against development of Ayurveda centers. BPML had submitted that it has entered into discussions and negotiations with various parties whom advances were given from IPO funds for development of Ayurveda centres / wellness villages. However, no documents of such correspondence were submitted in support of the claim. Further, the initial objects of issue were for development of Spa ('Evolve') centres and not Ayurveda centres/wellness villages. Thus, it is alleged that negotiations were changed retrospectively which is not possible. It is also alleged that BPML had submitted false and incomplete reply and thereby hampered the investigation process. Submission of incomplete or false reply against summons issued is equivalent to non-submission and it is alleged that BPML has thus violated the provisions of Section 11C (2) and (3) of SEBI Act, 1992.

dd. Further, it was also observed that the company in its quarterly filings to BSE had submitted that the funds were utilized as per the objects of the issue as disclosed in the prospectus. Therefore, it is alleged that BPML along with the directors signing the said filings namely, Shri Abhijit Desai (Managing Director) and Shri P. V. R Murthy have violated Clause 43 of the listing Agreement read with Section 21 of the SCRA. Further, it is alleged that BPML has not filed any disclosure regarding deviation from the objects of the issue and therefore, is alleged that BPML along with Shri Abhijit Desai (Managing Director) have violated the provisions of Clause 43A of the Listing Agreement read with Section 21 of the SCRA.

10. The details of replies filed by the Noticees and the personal hearings availed by them are discussed in the subsequent paragraphs.

<u>Noticee 1 (Birla Pacific Medspa Ltd)</u>

11. The SCN sent to the registered address of Noticee 1 through Speed Post with Acknowledgement Due returned undelivered. Vide email dated October 17, 2018, sent

to Noticee 1's official email id as per the details available in the Ministry of corporate Affairs (**MCA**) website, Noticee 1 was provided with the copy of the SCN. Vide the said email, Noticee 1 was also advised to submit its reply to the SCN within 15 days from the date of the email. It was also stated in the SCN that in case no response was filed within the stipulated time, the proceedings would be carried forward based on the information available on records. However, I note that no reply was received from Noticee 1. From the available records, I note that Noticee 1 had also failed to respond to letter dated 12/06/2017 from Enforcement Department of SEBI, whereby it had been granted inspection of documents in the matter. Vide email dated October 31, 2020, an opportunity of personal hearing was granted to Noticee 1 before the erstwhile AO, Shri B J Dilip on November 09, 2020. However, Noticee 1 did not provide any response to the same nor did it appear for the hearing. Pursuant to the appointment of the undersigned as AO, vide Hearing Notice dated June 04, 2021 an opportunity of personal hearing was granted to Notice 1 on June 17, 2021. Vide the said hearing notice, Noticee 1 was also granted opportunity to submit its reply to the SCN. The aforesaid hearing notice was served on Noticee 1's registered address as well as through digitally signed email dated June 04, 2021. However, no reply was received from Noticee 1 nor did it appear for the hearing. Vide Hearing Notice dated June 03, 2022, Noticee 1 was granted another opportunity of personal hearing on June 22, 2022. The said hearing notice was served on Noticee 1 through speed post at the registered address of Noticee 1 as well as through digitally signed email dated June 03, 2022. Vide the said hearing notice, Noticee 1 was also granted opportunity to submit its reply to the SCN. However, once again, no reply was received from Noticee 1 nor did it appear for the hearing scheduled on June 22, 2022. Thereafter, in the interest of natural justice, vide hearing notice dated June 24, 2022, Noticee 1 was granted a final opportunity of personal hearing on July 05, 2022, which was served at the registered address of Noticee 1 as well as through digitally signed email dated July 24, 2022. Vide the said hearing notice, Noticee 1 was also granted opportunity to submit its reply to the SCN. However, no reply was received from Notice 1 nor did it appear for the hearing.

Noticee 2 (Mr. Yashovardhan Birla)

12. The SCN was delivered to Noticee 2 through Speed Post with acknowledgement Due. Vide letter dated May 17, 2017, Noticee 2 *inter alia* requested for a period of 60 days to file reply in the matter. However, no reply was received from Noticee 2. Vide Hearing Notice dated November 20, 2018, Noticee was granted an opportunity of personal hearing before the erstwhile AO, Shri Jeevan Sonparote on December 04, 2018. Vide the said letter, Noticee 2 was also granted opportunity to file reply to the SCN by November 30, 2018. However, the said hearing notice returned undelivered with the caption "Refused to accept". Thereafter, vide Hearing Notice dated December 06, 2018, Noticee 2 was granted another opportunity of personal hearing on December 21, 2018. Vide reply dated December 17, 2018, Noticee 2 inter alia requested that he be granted one month's time for submitting reply and further requested that the hearing be scheduled thereafter. However, no reply was submitted by Noticee 2. Vide Hearing Notice dated February 04, 2019, Noticee 2 was granted another opportunity of personal hearing on February 21, 2019 and was also advised to submit his reply to the SCN latest by February 15, 2019. Vide letter dated February 18, 2019, Noticee 2 enclosed a copy of letter dated January 25, 2019 sent by Noticee 1 and stated that he and Noticee 1 had requested for inspection of documents relied upon by SEBI and requested the same to be granted. Pursuant to change of AO in the matter, an opportunity of personal hearing in the matter was granted to Noticee 2 by the erstwhile AO, Shri B J Dilip on November 12, 2020. Vide email dated November 10, 2020, Noticee 2 again made a request for inspection of documents and *inter alia*, stated that his authorized representative had availed an opportunity of inspection on September 20, 2019, however SEBI had refused to provide him with the inspection of those documents requested by him, and that SEBI had instead maintained that the documents relied upon have been provided. Vide email dated November 19, 2020,

Noticee 2 also provided the list of documents sought by him. Vide email dated December 11, 2020, the following documents were provided to Noticee 2 – 1) Bank account statements of namely Jalan Cement Works Ltd, Marutinandan Infosolutions Pvt Ltd, Orbit Financial Consultants Pvt Ltd, Rupak Trading Pvt Ltd, J C Enterprises, Laxmi Trading Company, N P Enterprsies, new fashion and GRD Securities, 2) Trading details of Jalan Cement Works Ltd, Marutinandan Infosolutions Pvt Ltd, Orbit Financial Consultants Pvt Ltd and Rupak Trading Pvt Ltd, 3) Bank statement of BPML available on record, 4) MCA details of entities alleged to be connected in para 24 of the SCN, and Bank account statements of certain entities in Annexure II. Vide the said email, Noticee 2 was requested to file his reply to the SCN at the earliest. Thereafter, pursuant to the appointment of the undersigned as AO in the matter, vide hearing notice dated June 04, 2021, Noticee 2 was granted opportunity of personal hearing before the undersigned on June 17, 2021. The said hearing was attended by the authorized representative (**AR**) of Noticee 2. During the hearing, the AR requested for additional time to file his reply. Accordingly, Noticee 2 was granted time till June 30, 2021 to file his reply. Vide letter dated July 03, 2021, Noticee submitted his reply to the SCN. The main contentions made therein are summarized in brief as follows –

i. *The proceedings against me have been initiated after an inordinate delay of six long years. It is nearly impossible to remember the details of a transaction after a long time gap of 6 years. Reliance was placed on the judgements of Hon'ble SAT in the matter of Bharat J Patel vs SEBI (Order dated September 09, 2020), Ashok Shivlal Rupani and Ors Vs SEBI (Appeal No. 417 of 2018), Ashlesh Gunvantbhai Shah & Ors. v SEBI (Appeal No. 169 of 2019), Aditi Dalal vs SEBI, and Morepen Laboratories Ltd. (SAT Appeal No. 62 of 2020, decided on April 15, 2021), and also on the judgement of the Hon'ble Supreme Court in the matter of Adjudicating Officer, Securities and Exchange Board of India vs. Bhavesh Pabari (Civil Appeal No. 11311 of 2013, Order dated February 28, 2019).*
ii. *Noticee provided a list of documents sought in the matter.*

   Role of Non-Executive Director and Chairman

iii. *I submit that I was the Non- Executive Director Non Independent and Chairman of BPML, the Annual Report of the Company at page specifies my designation as a Non-Executive Chairman and Director, a copy of the relevant pages of the Annual Report is hereby attached as Exhibit E. In view of the same, my role was limited to attending the Board meetings and I was not involved in day to day affairs. I resigned from the Board of Directors of BPML on February 14, 2013, a copy of the Form 32 for resignation is hereby attached as Exhibit F. Pursuant to that I had no material/pecuniary relationship with other directors and/ or senior management of BPML.*

iv. *Considering that I was only a Non-Executive Director and Chairman, I submit that was never involved in the day-to-day functioning of the company and was not part of any business dealings etc. I only attended the meetings as and when called upon by the Board & the Company and my role was restricted.*

v. *It is common knowledge that the Non-Executive Directors are not involved in day to day affairs of the company. In the board meetings, broad policy decisions are taken and the actual implementation at ground is done by Whole Time Directors along with the other employees. The Non-Executive Directors do not monitor on daily basis the implementation of the decisions or interfere in the same.*

vi. *I had no role in the transactions leading to the alleged violations. Admittedly. I only participated in the various board meetings of the Company as a routine procedure and had no other role to play in the company.*

vii. *Admittedly, the allegations in the Notice clearly pertain to the day to day activities performed by the Whole Time Directors / Executives/Officials of BPML in utilizing the IPO proceeds, investment in various companies which are duties entrusted to the immediate management of the company. Therefore, I as a Non-Executive Director and Chairman had no role in the same.*

viii. *The SCN is vague and not specific which is one of the pre requisites of the SCN, and reliance is placed the judgment of Hon'ble Supreme Court in the case of Canara Bank VIS. Debasis Das, (200) 4 SCC 557.*

ix. *I only used to attend the Board meetings based on the agenda received and had no role to play in the day to day decision making of the management. I had neither* *played any role in the IPO process nor handled the distribution of the IPO proceeds. I had resigned from the board of BPML way back on February 14, 2013, after which I had no material/pecuniary relationship with other directors and/ or senior management of BPML.*

x. *As regard to paras 17 to 25 of the SCN, it has been alleged that all the financial transactions shown by BPML as being advances were fraudulent and some of them were also used to fund purchase of shares of BPML and support price on listing day. It is further alleged that few entities have aided and abetted in the diversion of proceeds of IPO by BPML, however, no violation of any provision of SEBI Act and/ or PFUTP Regulations has been levied against me. It is submitted that – i) I was only a Non-Executive Non – Independent Director & Chairman of BPML and only attended meetings as and when called upon by the Board & the Company, ii) The allegation of misutilization of funds is in itself contradiction with my factual position and role the process and is also self-contradictory to my role specified in Para 2 of the SCN as "Non-Independent, Non. Executive" Chairman of BPML, iii) I was not the authorised signatory for the transfer of funds or the concerned person for utilization of the proceeds.*

xi. *With regard to paras 26 and 27, it is submitted as follows -*

   a) *I was only a Non-Executive Director and Chairman of BPML, had no role to play in the process of the IPO including the preparation and issuance of the offer document. I also did not have any role to play in the utilization of funds after the IPO. I just attended the meetings of the board and have no role in day to day affairs and management of BPML.*

   b) *The allegation of misutilization of funds is in itself contradiction with my factual position and role the process and is also self-contradictory to my role specified in Para 2 of the SCN as "Non-Independent, Non. Executive" Chairman of BPML. I as the non-executive Chairman of BPML was never concerned with the daily management of the IPO process or the proceeds received therein and also the transfer of funds after IPO*

   c) *I was not the authorised signatory for the transfer of funds or the concerned person for utilization of the proceeds. The day to day management of the*

Company was done by the respective departmental heads and or Whole Time Directors and not by me as a Chairman.

d) *I did not have any control over the practical execution of the IPO processes done by BPML and no allegation can be levelled against me.*

e) *The agenda brought to the Board meetings was approved by me in a bona fide manner without any knowledge of the alleged misuse of the funds so received. Similarly, the persons/ directors who were expert in this field informed us that scenario had changed and we have to go slow on setting up of Evolve centres. Considering that we decided to invest the surplus funds in ICDs.*

f) *SEBI has also failed to appreciate or show any evidence on record that I have any role in the utilization of the funds of the IPO. The allegations levelled in the SCN are nothing more than a figment of imagination which in reality do not hold any ground.*

g) *I deny that purpose of IPO was defeated since the information was in public domain and we did not receive any complaints to that effect.*

h) *As regards transfer of funds to some entities, I relied upon the expertise of the professionals and being Non Executive Chairman I was not involved in day to day affairs. I was not the authorised signatory to transfer the funds to any of the entities.*

i) *As regards investment of funds in group companies, I submit that same was in the form of ICDs which were interest bearing and repayable on demand within a period of seven days of Notice which demonstrates that ICDs liquid instruments.*

j) *SEBI has with a biased and pre-determined mind roped me in even when I had no role to play in the whole process.*

k) *In view of the same, I deny that BPML had no plans to utilise the money as per discourses made in the prospectus and it is further denied that BPML played fraud on IPO subscribers who had trusted BPML management with the money to be utilised as per objects of the issue.*

l) I further deny that BPML has deviated from issue objects and diverted money from IPO proceeds worth Rs 33.4 crores.

xii. In view of the above submissions, I deny that I have violated of Regulations 3(a), (b), (c), (d) and Regulation 4(1), (f) and (k) of PFUTP Regulations read with Sections 12A (b) and (c) of SEBI Act, 1992.

xiii. With regard to Para 29 of the SCN, I submit that BPML had never invested in equity instruments and deny everything contrary thereto. BPML had transferred funds to entities for the purpose of fulfilling objects of the issue, in a bona fide manner and in ordinary course of business. The entities which had received the funds from BPML i.e. Sanjukta Vanijya Pvt. Ltd. and Darshan Tradelink Pvt. Ltd. had never traded in the shares of BPML. It has been alleged that these two entities transferred the funds to some other entities who have traded in the shares of BPML and these funds were used by them towards pay-in obligations. I submit that as a director of BPML it is not within my powers to ask the borrowers as to how they have utilised the funds. I cannot be expected to know usage of funds transferred by BPML to any entity in normal course of business. Every company is entitled to 'Doctrine of indoor Management' and this being a confidential information, it is not possible for us to ask those entities. SEBI with all the wherewithal and investigative powers can unearth the truth. Hence, to allege that I was part of artifice, scheme etc. to carry out fraud is farfetched. Without prejudice, I submit that the two entities had never traded in the shares, hence, the allegation that transfer of funds to these two entitles is in contrast to disclosure in Prospectus for not dealing in equity instruments is devoid of merit.

xiv. With regard to Paras 30 to 33. in so far as the allegation of diversion of IPO proceeds as ICDs to group companies is concerned, I submit as follows :—

(i) Admittedly, as per Para 28 of the SCN the board of BPML had authority to deploy the proceeds in interest or dividend bearing liquid instruments including deposits etc.

(ii) That funds transferred to group companies were in the form of ICD's at a rate of 15% which were repayable on demand within a period of seven days of Notice which demonstrates that that ICD were liquid instruments.

(iii) SEBI has not taken into account that I had no involvement or role to play in the whole process and that the utilisation of proceeds was overseen by the other directors and the concerned staff of BPML.

(iv) As regards specific allegations against me that I had attended the Board Meeting dated July 11, 2011, I hereby submit that I was the Non-Executive Director and Chairman of BPML and in view of the same, my role was limited to attending the Board meetings and was not involved in day to day affairs, I being the non-executive director on the board of BPML was not involved in the day to day management of BPML, only used to attend the Board meetings based on the agenda received and had no role to play in the day to day decision making of the management. I had neither played any role in the IPO process nor handled the distribution of the IPO proceeds.

(v) I had resigned from the board of BPML way back in February 14, 2013 after which I had no material/pecuniary relationship with the other directors and/ or senior management of BPML. The said details have been provided to SEB' by BPML only 2014 for which I cannot be held liable.

(vi) In view of the same, I did not have any active role in the entire IPO and the events that have happened thereafter and was not party to the decision to any transaction to warrant serious allegation of fraudulent and unfair trade practices.

xv. While considering my submissions it may be noted that I have not made any gains or derived any unfair advantage and further the SCN has also not quantified the alleged profit made by me and/ or toss averted by me. It is further submitted that no harm or loss has been caused to any investor. Further, the violation is not repetitive to warrant any kind of imposition of monetary penalty.

xvi. It is submitted that a parallel proceeding in the same matter was initiated by the Ld. WTM vide Show cause Notice dated March 27, 2017, wherein vide order dated October 23, 2020, the Noticees including me were restrained from accessing the securities market and buying, selling in dealing in securities, either directly or indirectly, in any manner, for a period of two years, from the date of the impugned order. I had preferred an appeal against the Sec 11 Order before the Hon'ble SAT and vide Order dated August 26, 2021, Hon'ble SAT was pleased to allow the appeal *and held that the order of the Ld. WTM cannot be sustained and is quashed accordingly.*

13. Vide letter dated August 30, 2021, Noticee 2 also submitted that he had preferred an appeal before Hon'ble Securities Appellate Tribunal (**SAT**) against the Section 11 Order dated October 23, 2020 passed by Ld. Whole Time Member (**WTM**) of SEBI and that Hon'ble SAT vide its order dated August 26, 2021 was pleased to allow the appeal and held that the order of the Ld. WTM cannot be sustained and is quashed accordingly. Considering Noticee 2's request for inspection of documents as made out in his letter dated July 03, 2021, vide letter dated June 15, 2022, Noticee 2 was granted an opportunity for inspection of documents relied upon and relevant to the present adjudication proceedings. The said inspection of documents was carried out on June 21, 2022 by the authorized representative of Noticee 2. The description of documents requested by Noticee 2 and inspected are as follows –

Sl.	Documents Sought	Remarks
1.	Copy of complete investigation report along with its annexures carried out by SEBI for the Investigation period	Relevant portion of Investigation Report (redacted with respect to third party information) and annexures provided.
2.	Copy of statements forming part of the Investigation Report.	Investigation Report and annexures provided in sl. 1 above. No statements as per available record.
3.	Complete of material considered by Board/WTM while ordering of appointment of Designated Authorities in our matter including relevant file notes by SEBI	Investigation Report and annexures provided in sl. 1 above.
4.	Documentary evidence and source of data along with the full data on the basis of which table appearing at Page 9 has been prepared (refer para 10)	Tradelog of 07/07/2011 provided. Annexures to IR provided.
5.	Documentary evidence/ basis of making observations against Jalan,	Investigation Report and annexures provided in sl. 1 above.

	Marutinandan, Orbit and Rupak in para 13 & 14. (refer para 13 & 14)	
6.	Documentary evidence/ basis of alleging that Sanjukta Vinijya Private Limited (hereinafter referred to as "Sanjukta") and Darshan Tradelink Private Limited (hereinafter referred to as "Darshan") had aided and abetted BPML in routing/diversion of funds. (refer para 15)	Documentary evidence/ basis already provided in SCN and annexures as well as IR. Further, bank statements and other details provided to Noticee vide email dated December 11, 2020.
7.	Documentary evidence/ basis of alleging that BPML had facilitated purchase of its own securities out of IPO proceeds. (refer para 16)	Documentary evidence/ basis already provided in SCN and annexures as well as IR. Further, bank statements and other details provided to Noticee vide email dated December 11, 2020.
8.	Documentary evidence/ basis of alleging that BPML had failed to utilize the IPO proceeds as per the objects of the issue and had diverted IPO proceeds to various other entities. (refer para 18)	Documentary evidence/ basis already provided in SCN and annexures as well as IR. Further, bank statements and other details provided to Noticee vide email dated December 11, 2020. RHP and prospectus provided as Annexure 3 to the IR.
9.	A fund flow chart with Account numbers and Bank statements is attached at Annexure V. However, we would like to bring to your kind notice that only a fund flow chart along with the account numbers is enclosed at Annexure V with the heading Annexure 11 "Birla Pacific fund flow details" and no of bank statements has been provided.	Bank statements already provided along with SCN and vide email dated December 11, 2020. Further, bank statements are provided as part of annexures to the IR.
10.	Copy of KYC documents of N P Enterprises as received from the Bank. (refer para 22)	Provided.
11.	Documentary evidence/ basis of alleging that BPML had no plans to utilize the money as per disclosures made in the	Documentary evidence/ basis already provided in SCN and annexures as well as IR.

	prospectus and that BPML played fraud on IPO subscribers who had trusted BPML management with their money to be utilized as per objects of the issue. (refer para 26)	
12.	Documentary evidence/ basis of alleging that Sh. Yashovardhan Birla and BPML have violated the provisions of Regulation 3 (a), (b), (c), (d), 4(1), 4(2) (e), (f) and (k) of the PFUTP Regulations read with Section 12 A(a), (b) & (c) of the SEBI Act, 1992. (refer para 27)	Documentary evidence/ basis already provided in SCN and annexures as well as IR.
13.	Copy of all the correspondences (letters/ emails/ office memos etc.) carried out with Stock Exchanges, Depositories, Banks and any other authority in this regard by SEBI	All relevant documents and information collected already provided.
14.	Copy of the complaints received against us by SEBI / NSE/ Banks in this regard.	No such complaint as per available records. All relevant documents and information already provided.
15.	Copy of all the materials collected by SEBI during the course of Investigation in this regard	Query is too general to act upon. All relevant documents and information already provided.

14. Pursuant to the conclusion of the inspection of documents on June 21, 2022, Noticee 2 was granted time of 14 days i.e. till July 05, 2022 to file additional submissions, if any, in the matter. Vide email dated July 06, 2022, Noticee 2 was granted an opportunity of personal hearing on July 08, 2022. The authorized representatives (**AR**s) of Noticee 2 appeared for the said hearing and reiterated the earlier submissions made by Noticee 2. Further, the ARs requested for time to make additional submissions and in this regard, time till July 11, 2022 was granted. Accordingly, the hearing proceedings were concluded and Noticee 2 sought no further hearing in the

matter. However, I note that subsequently, no further reply was submitted by Noticee 2.

Noticee 3 (Dr. Abhijit Desai)

15. The SCN dated April 20, 2017 was sent to the address of Noticee 3 through Speed Post with Acknowledgement Due. Subsequently, vide letter dated November 14, 2018 it was conveyed to Noticee 3 that although the SCN had been delivered to him, no reply had been received from him. Further, vide the said letter, an opportunity of personal hearing was granted to Noticee 3 before the erstwhile AO, Shri Jeevan Sonparote on November 30, 2018. The said letter was delivered to Noticee 3 through Hand Delivery. However, Noticee 3 did not provide any response to the same nor did he appear for the hearing. Noticee 3 was also served the SCN through newspaper publication in the following newspapers – Times of India (English), Navbharat Times (Hindi) and Maharashtra Times (Marathi) on January 11, 2019 and an opportunity of personal hearing was granted to Noticee 3 before the erstwhile AO, Shri Jeevan Sonparote on February 11, 2019. However, Noticee 3 did not provide any response to the same nor did he appear for the aforesaid hearing.

16. Vide email dated October 31 2020, sent to the email id of Noticee 3, an opportunity of personal hearing was granted to Noticee 3 before the erstwhile AO, Shri B J Dilip on November 12, 2020 through videoconference. Vide email dated November 06, 2020, Noticee 3, *inter alia,* stated that he had not received the SCN. In response, vide email dated November 06, 2020, Noticee 3 was provided with the copy of the SCN. Thereafter, vide email dated November 06, 2020, Noticee 3, *inter alia*, requested for a period of 30 days to file reply in the matter. Accordingly, Noticee 3, was granted time till November 20, 2020 to file reply in the matter. Vide email dated November 17, 2021, Noticee 3 requested for the copies of Annexure II, III and VI and VII to the SCN. Vide email dated December 11, 2020, Annexure III, VI and VII were provided to Noticee 3 and further, Noticee 3 was advised to file reply to the SCN at the earliest. Thereafter,

vide email dated December 28, 2020, Noticee 3 requested for the following documents, viz., Annexure II of the SCN, the quarterly filings to the BSE referred to in para 36 of the SCN, the replies/letters from BPML on various dates as referred in the SCN. Thereafter, vide email dated January 20, 2021, Noticee 3 filed the reply to the SCN and a copy of the reply was received via post by SEBI on January 23, 2021. The main contentions made by Noticee 3 in the said reply are summarized in subsequent paragraphs.

17. Pursuant to the appointment of the undersigned as AO, in the interest of natural justice, vide Hearing Notice dated June 02, 2021, an opportunity of personal hearing was granted to Noticee 3 on June 15, 2021, through videoconference via CISCOWEBEX link on account of the situation of Covid-19. The Hearing Notice was duly served on Noticee 3. Vide email dated June 14, 2021, Noticee 3, *inter alia*, stated that he had preferred Appeal no. 66 of 2021 before the Hon'ble SAT and the issues in the present SCN were identical to the issues involved in the said appeal. Further, Noticee 3 requested that the hearing in the present matter be adjourned till the aforesaid appeal is heard and decided. The aforesaid request was acceded to. Vide Hearing Notice dated June 03, 2022, an opportunity of personal hearing was granted to Noticee 3 before the undersigned on June 22, 2022. In the said hearing, Mr. Shyam Mehta, Senior Advocate along with Mr. Aditya Bapat and Mr. Deepakar Livingston appeared for Noticee 3 as his ARs and reiterated the earlier submissions made by Noticee 3 vide his reply dated January 18, 2021. The aforesaid authorized representatives (ARs) also requested for time to file post hearing submissions and in this regard time till June 28, 2022 was granted. The hearing proceedings were thus concluded and Noticee 3 did not seek further hearing in the matter. Vide email dated June 28, 2022, Noticee 3 made post hearing submissions in the matter and the main contentions made therein are summarized in the subsequent paragraphs. Vide email dated July 06, 2022, the request for documents made by Noticee 3 in paragraph 3 of his written submissions dated June 28, 2022 was referred, and with regard to the same, the documents as

available on record were provided. Vide letter dated July 12, 2022, Noticee 3 submitted additional reply in the matter. The main contentions and relevant submissions of Noticee 3 are summarized in brief as follows –

i. *The SCN was received by the Noticee on 6 November 2020. However, the events mentioned therein allegedly occurred over nine years earlier, on 7-15 July 2011. There has thus been a gross and unexplained delay in issuance of the SCN. The SCN is irredeemably delayed and hit by laches.*

ii. *BPML was the product of a joint venture between the Pacific Health Care Group (Singapore) and Yash Birla Group and me. In the said joint venture company, the shareholding was to be split 50:50 between Birla Wellness and Healthcare Pvt. Ltd. and the Pacific Healthcare Group. Noticee was given a share of 7.5% in BPML which was treated to be part of the share of Pacific Healthcare Group. Noticee did not invest any money in BPML and the said share was given to Noticee for the clinical expertise Noticee was to bring in the operations of BPML.*

iii. *Right from the outset, it was agreed that the Noticee would only be in charge of the medical side of the company, i.e. BPML.*

iv. *"Managing Director" was only a token designation given to the Noticee, and all decisions pertaining to the finance and strategy of the company continued to be the sole prerogative of the Yash Birla group, which acted through its officers Mr. Saharsh Daga, Mr. N. Venkat and Mr. PVR Murthy. The Noticee played no role in the same.*

v. *Right from the time the Joint Venture Agreement was executed from the words and conduct of Yash Birla Group, I was under the bona fide impression that they shared my vision of growing the business of BPML as much as possible. From the time the Joint Venture Agreement was executed till even after the IPO funds were received, the Yash Birla Group continued to represent that they had all intention of expanding the business of BPML and ensuring its financial success. Based on the said words and conduct of Yash Birla Group, I had bona fide belief that the intention was to open more clinics in a phased manner and that the IPO funds would be used for the purposes mentioned in the offer document.*

vi. Although the Noticee was marked on certain emails pertaining to the same, all financial decisions were taken by the Yash Birla group without any consultation with the Noticee whatsoever. The use and transfer of finds was an affair that was fully controlled by the Yash Birla group and the Noticee had absolutely no say whatsoever in the same and no knowledge about the same since that was neither a part of his agreed functions nor within his expertise. In fact, the company was treated as a part of the Yash Birla group.

vii. The Noticee had no authority to sign cheques pertaining to the IPO proceeds. The Noticee never dealt with any part of the IPO proceeds.

viii. By December 2011, when there was very little progress on the opening of new Evolve medspas, at a meeting held on 22 December 2011, the Noticee expressed his frustration to the officers of the Yash Birla group, post which it was communicated to the Noticee that starting 01 January 2012. he should stop looking into the day-to-day activities of the Evolve business, and that it would be explicitly clarified that he would not be responsible for the financial results of the company henceforth. The Noticee could continue working as a doctor at the Evolve medspas. He was told that he could look into the IVF business of BPML, and the extension of its business into other areas like needbased medicine and cosmeceuticals in his capacity as a doctor. A copy of the email dated 29 December 2011 addressed to the Noticee with the attached minutes of the meeting held on 22 December 2011, is enclosed with the Reply.

ix. After the Noticee was segregated from matters relating to Evolve, he focused his energies on other aspects of the business of BPML, such as need-based medicine and cosmeceuticals. He also continued practising at the Evolve centres as a dermatologist. From December 2011 until his resignation from Board of BPML, the Noticee did not look into matters connected with Evolve medspas. On 15 February 2012, it was formally announced by Mr. Venkat that the management structure of Evolve had been changed and all centre managers were to now report to Mr. Saharsh Daga, to the exclusion of the Noticee.

x. On 30 September 2012, he formally resigned as an employee and Managing Director of BPML. Since then, he has had no connection with the said company.

xi. *The Noticee had no role to play in the alleged utilisation or misutilisation of IPO proceeds. The Noticee was always under the bona fide impression that the IPO proceeds would be used for the purposes mentioned in the prospectus and for no others. Despite the fact that the Noticee was the managing director, his actual responsibilities did not include decisions, policies or management of finances of the company, and were restricted to the day-to-day activities of the company.*

xii. *The Noticee never traded in the scrip of the company. He neither bought nor sold any shares of the company, nor has he sold any of the shares issued to him. He continues to hold his entire initial shareholding in the company. He had no knowledge that the disbursal of funds which appeared valid and legal was diverted for illegal purposes and in particular no knowledge of their actual utilisation. There was no question of his being a participant in the misutilisation of funds or in the manipulation or artificial inflation of the price of the said scrip.*

xiii. *He was not even called upon to give his statement during the investigation.*

xiv. *In the present case, there is no evidence linking the Noticee to any of the allegations made in support of the said charges. No allegation or assertion has been made in the SCN to make the Noticee vicariously liable for the violations, if any, of the company. Further, there is no allegation that the Noticee was in charge of or responsible for (he business of the company, and by virtue of the same, he is liable to be penalised. Thus, the Noticee cannot be held liable in this regard.*

xv. *The Noticee was not involved in the selection of the said entities, or in diverting funds to them. There is not even any allegation to this effect. There is no evidence on record to show that the second layer of fund flow was facilitated by the company. The Noticee cannot therefore be held to be vicariously liable for the same*

xvi. *With respect to the allegation of violation of Clause 43 of the Listing Agreement read with Section 21 of the SCRA by signing the quarterly filings to BSE, and also allegation that BPML and the Noticee violated Clause 43A of the Listing Agreement read with Section 21 of the SCRA by not filing any disclosure regarding deviation from the objects of the issue, it is submitted that As has been stated hereinabove, the Noticee was unaware of the financial dealings of the company, and focused on the medical side of the business. As far as the financial transactions of the company* *are concerned, the Noticee was unaware of the same, and trusted the Yash Birla group. As stated earlier, the Noticee was not even called upon to give his statement during the investigation, to clarify his stand on this issue.*

xvii. *If the Noticee signed any quarterly filings relating to the use of funds, the same was in good faith and under the bona fide belief that the said funds were used legitimately by the Yash Birla group, and in accordance with the prospectus. Further, assuming that the Noticee failed to file a disclosure regarding deviation from the objects of the issue when he was required to do so, the same is due to the fact that he was completely unaware of any such deviation, and was under the bona fide impression that the IPO funds were being used in accordance with law. The Noticee was unaware of the entities named in the SCN being a part of any fraud or illegal activity whatsoever.*

xviii. *As can be seen from the response given by BPML to the questionnaire dated 7 June 2012 (Answer to Q. 1), it can be seen that even as per BPML, my only role in the said company was to provide "medical inputs, business development & strategy". On the other hand, as per BPML, Mr. Saharsh Daga looked after finance. Thus, it is once again clear that I had no role to play with regard to the utilisation of the finances of the said company, including the IPO proceeds, and cannot be held liable for illegal acts, if any, carried out using the same. The allegations made in the SCN, insofar as they concern me, are therefore completely invalid and devoid of merit.*

xix. *It is not the case of SEBI in the SCN that I was part of a committee by the name "Project Monitoring Committee". Nonetheless, such an allegation has been made by BPML in its statement to SEBI in response to the questionnaire dated 7 June 2012 (answer to Q. 23, 31). I deny that I was part of such a committee. I have never attended any meeting of such a committee. I put SEBI to strict proof with respect to any such allegation.*

<u>Noticee 4 (Mr. P V R Murthy)</u>

18. The SCN was sent to the address of Noticee 4 as available on records through Speed Post with Acknowledgement Due. However, the same returned undelivered. Accordingly, the copy of the SCN was uploaded on the SEBI website under the heading

"Unserved Summons / Notices". Vide letter dated November 14, 2018, the delivery of the SCN was once again attempted through Hand Delivery, however the same returned undelivered. Noticee 4 was served the SCN through newspaper publication in the following newspapers – Times of India (English), Navbharat Times (Hindi) and Maharashtra Times (Marathi) on January 11, 2019. Vide the said publication, Noticee 4 was also granted an opportunity of personal hearing before the erstwhile AO, Shri Jeevan Sonparote on February 11, 2019. However, no reply was received from Noticee 4 nor did Noticee 4 appear for the hearing. Subsequently, vide email dated October 31, 2020 sent to the email id pvr@yashgroup.com, Noticee 4 was granted an opportunity of personal hearing before the erstwhile AO, Shri B J Dilip on November 12, 2020. Vide the said email, Noticee 4 was also granted opportunity to make submissions in the matter. However, the said email bounced back. Accordingly, the hearing notice was forwarded to yash@yashbirlagroup.com, ipo@birlapacificmedspa.com and royjacobandco@gmail.com with the request that the hearing notice be served on Noticee 4. However, vide email dated November 05, 2020, Noticee 2 stated that they didn't have Noticee 4's email id and requested the AO's office to send the hearing notice at Noticee 4's postal address. Pursuant to the appointment of the undersigned as the AO, vide hearing notice dated June 08, 2021, Noticee 4 was granted an opportunity of personal hearing on June 17, 2021 and further, Noticee 4 was also granted opportunity to file reply to the SCN. The said Hearing Notice was sent through Speed Post, however the same returned undelivered. Thereafter, vide Hearing Notice dated June 03, 2022, Noticee 4 was granted another opportunity of personal hearing on June 22, 2022. Vide the said Hearing Notice, Noticee 4 was also granted opportunity to submit reply to the SCN on or before the hearing date. The said Hearing Notice was sent through Speed Post with Acknowledgement Due and through Hand Delivery. The aforesaid Hearing Notice sent through Speed Post returned undelivered, however the same was served through Hand Delivery. However, no reply was received from Noticee 4 nor did Noticee 4 appeared for the scheduled hearing. Vide Hearing Notice dated June 24, 2022, Noticee

4 was granted a final opportunity of hearing on July 05, 2022 and was also granted opportunity to submit reply to the SCN on or before the hearing date. The said Hearing Notice was served on Noticee 4 through Hand Delivery. However, no reply was received from Noticee 4 nor did he appear for the scheduled hearing.

<u>Noticee 5 (Mr. Venkateswaralu Nelabhotla)</u>

19. The SCN was delivered to Noticee 5 through Speed Post with Acknowledgement Due. Vide letter dated May 04, 2017, Ankit Vijaywargiya, advocate, *inter alia*, informed that he had been appointed as the authorized representative (AR) for Noticee 5 and requested for inspection of documents in the matter. Vide letter dated May 23, 2017, it was inter alia informed to Noticee 5 that all the necessary documents were already provided with the SCN and it was further informed that an opportunity for carrying out inspection of documents was being granted and in this regard, he may contact the Enforcement Department (**EFD**) of SEBI. Vide letter dated June 23, 2017, the AR inter alia stated that he had not received any response from EFD with regard to his request for inspection of documents and hence requested for extension of time to carry out the inspection. From the available records, it is noted that thereafter Noticee 5 was granted an opportunity for inspection of documents by EFD, however he sought for an additional date for inspection and accordingly, he was granted an opportunity of inspection of documents by EFD on August 07, 2017. Subsequently, Shri Jeevan Sonparote was appointed as the AO in the matter, and vide letter dated November 06, 2018 Noticee 5 was once again granted opportunity to inspect documents and it was advised that the said inspection of documents may be completed latest by November 27, 2018. Vide the said letter, Noticee 5 was also granted opportunity to submit his reply latest by December 07, 2018 and an opportunity of personal hearing was granted on December 14, 2018. The said letter was served on Noticee 5 as well on the AR. In response, the AR of Noticee 5, vide letter dated November 21, 2018, *inter alia,* informed that a duly filled Consent Application has been filed by Noticee 5 with SEBI under SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014

and requested that the present proceedings be kept in abeyance till the Consent Application is decided. Thereafter, vide email dated October 31, 2020, an opportunity of personal hearing was granted to Noticee 5 before the erstwhile AO, Shri B J Dilip on November 12, 2020. However, vide email dated November 10, 2020, AR for Noticee 5, *inter alia,* informed that the said email of October 31, 2020 went to junk folder of the Noticee 5 and could be accessed only recently. Further, vide the said email, the AR requested for the copy of the SCN and also requested for time to file reply. The copy of the SCN was provided to Noticee 5 vide email dated November 10, 2020. Vide email dated November 11, 2020, the AR, *inter alia,* requested for time till November 27, 2020 to file reply in the matter and further requested that the hearing may be conducted on November 30, 2020. Vide email dated November 18, 2020, the AR once again reiterated aforesaid request. Vide email dated November 18, 2020, it was communicated to the AR that the reply may be filed at the earliest to enable the AO to decide on the date of hearing. Vide email dated December 08, 2020, a reminder was sent to the AR of Noticee 5 for submitting the reply to SCN and an opportunity of personal hearing was granted to Noticee 5 before the erstwhile AO, Shri B J Dilip on December 14, 2020. However, vide a subsequent email, it was informed to the AR of Noticee 5 that the hearing had been adjourned till further notice. Vide email dated December 12, 2020, Noticee 5's reply to the SCN was filed vide dated December 12, 2020. The main contentions made therein are described in subsequent paragraphs.

20. Pursuant to the appointment of the undersigned as AO, vide letter dated June 02, 2021, an opportunity of personal hearing was granted to Noticee 5 through video conference. Vide email dated June 10, 2021, AR of Noticee 5 requested for an adjournment of the said hearing. Vide Hearing Notice dated June 03, 2022, Noticee 5 was granted another opportunity of personal hearing on June 22, 2022 through video conference. However, vide email dated June 18, 2022, AR of Noticee 5 requested for an adjournment of the hearing. The request was acceded to and another opportunity of personal hearing was granted to Noticee 5 before the undersigned on July 01, 2022 through video

conference. However, the date of personal hearing was again rescheduled to July 04, 2022 upon the request of the AR. On July 04, 2022, AR of Noticee 5 appeared for the hearing and reiterated the earlier submissions filed by Noticee 5. Further, the AR requested for time to make post hearing submissions and in this regard time till July 11, 2022 was granted. Noticee 5 submitted his post hearing submissions dated July 06, 2022 vide email dated July 07, 2022.

21. The main contentions made by Noticee 5 are summarized in brief as follows –

   i. *Proceedings are vitiated by inordinate delay and laches. Although no period of limitation may be prescribed for the purpose of initiation of action by SEBI against any person under the SEBI Act, 1992 or related rules or regulations, it is settled law that any such action or proceedings must be taken within a reasonable period of time. It is settled law that any such action or proceedings must be taken within a reasonable period of time. Reliance is placed on the judgements of the Hon'ble Supreme Court and High Courts in the matter of State of Punjab v. Bhatinda District Co-op Milk P. Union Ltd [(2007) 11 SCC 363], Government of India v. Citadel Fine Pharmaceuticals [(1989 3 SCC 483)], Sambhaji Shripati Bankar and Ganpat Shripati Bankar v. Keshav Rangnath Ekbote, Bhagwandas S. Tolani v. B.C. Aggarwal and others [1983 (12) ELT 44 (Bom)], CCE v. Hari Contrast (P) Ltd., Hindustan Lever Ltd. v. Union of India [2011 (24) STR 97], Universal Generics Pvt. Ltd. v. Union of India, 1993 (68) ELT 27, Bhavnagar University v. Palitana Sugar Mill (2004) Vol.12 SCC 670, State of Punjab v. Bhatinda District Coop. Milk P. Union Ltd (2007) Vol.11 SCC 363 and Joint Collector Ranga Reddy Dist. & Anr. v. D. Narsing Rao & Ors. (2015) Vol. 3 SCC 695, Adjudicating Officer, SEBI v. Bhavesh Pabari [(2019) SCC Online SC 294]. Further reliance was also placed on the judgement. The issuance of Notice and initiation of proceedings against the Noticee cannot be said to have been done within a reasonable time in the facts and circumstances of the case.*

   ii. *During his brief stint at the Board of BPML, the Noticee neither held any executive position nor was part of any of its working committees. Thus, the Noticee was a nonexecutive director of BPML between November, 23, 2010 and July 20, 2012.*

iii. *It may be discerned from records that the decision of raising funds through an IPO was taken by the Board in its meeting of May 11, 2010, subsequent to which the following committees of the Board were formed in the meeting dated June 8, 2010 – Audit Committee, Initial Public Issue Committee, Project Monitoring Committee, along with other committees.*

iv. *Thus, the primary work related to the IPO, including the Red Herring Prospectus ("RHP") / Prospectus, and projects to be undertaken with IPO proceeds was delegated to the aforesaid committees and was not undertaken directly in the Board meetings. The Draft RHP, RHP and Prospectus were approved in the Initial Public Issue Committee meetings dated June 8, 2010; May 26, 2011 and June 29, 2011 respectively.*

v. *The Audit Committee, besides reviewing periodical financial results of the Company, also reviewed the statement of use/application of IPO proceeds and related party transactions which included loans to group companies.*

vi. *It is evident that the Board meeting minutes dated July 11, 2011 noted that the Board was informed by the Chairman that the Prospectus allowed for deployment of IPO proceeds in interest or dividend bearing liquid instruments, which inter-alia included fixed and variable return instruments, including deposits with banks and investment in mutual funds, corporates and other financial products. The Board was also informed by the Chairman that due to adverse macro-economic factors prevailing in the economy, setting up of additional centres was delayed. The ICDs, in which the IPO proceeds were proposed to be temporarily deployed, were informed to bear interest at the rate of 15% per annum and were repayable on demand by giving seven days' notice. It may be noted that besides interest and being repayable on demand, all such agreements provided that as security, a demand promissory note and letter of continuity would be executed by the Borrower in favour of the Lender (Birla Pacific), along with such other additional security as the Lender may require. The agreements also provided that Birla Pacific could recall the entire loan whenever required and cancel the disbursement of the loan amount without assigning any reason. Further, the entire processing fees and transaction costs were payable by* *the Borrower. Thus, it is apparent from the terms thereof that the ICDs as approved by the Board were within the ambit of the disclosures made in the Prospectus.*

vii. *The next Board meeting is shown to have taken place on August 12, 2011. However, the minutes of this meeting specify Board meeting dated June 10, 2011 as the 'previous meeting' and not July 11, 2011. Thus, apparently the minutes of the alleged July 11, 2011 meeting were not approved or confirmed by the Board, which itself raises doubts over the veracity of such minutes and meeting, particularly when all other Board minutes were approved, confirmed or noted by the Board in the following meeting.*

viii. *The Noticee is shown to have attended his last Board meeting on May 25, 2012 and resigned from his position with effect from July 20, 2012. The copies of minutes of Board meetings dated September 8, 2011; November 14, 2011; February 10, 2012 and May 25, 2012 are attached as Annexure to the Reply.*

ix. *It is critical to note that it was only after the Noticee's resignation that the Board was informed in detail about the management's advice to utilize the IPO proceeds in new businesses which was approved by the Board subject to further approval of the shareholders.*

x. *The law relating to the role and liability of directors and particularly non-executive directors has been settled for long and has been clearly elucidated by the Courts in various judgments. Reliance was placed on the judgements of the Hon'ble Supreme Court in the matters of Sunil Bharti Mittal vs CBI [(2015) 4 SCC 609] and Shailendra Swarup vs The Deputy Director, Enforcement Directorate [dated July 27, 2020; Criminal Appeal No. 2463 of 2014], and the judgement of the Hon'ble SAT in the matter of Sayanti Sen v. SEBI (Appeal No. 163/2018, Order dated August 9, 2019). Section 149 (12) of the Companies Act, 2013 also codifies what was already the law relating to liability of independent and non-executive directors. That this was always the position is evident from the circulars issued by the Ministry including Master Circular dated July 29, 2011 (Master Circular No/1/2011) and General Circular No. 1/2020 dated March 2, 2020.*

xi. *From the aforesaid judgments, provisions and circulars, it is evident that a director can be held responsible only when there is sufficient evidence against him or if the* *statute itself provides for vicarious liability of the said director, which must be advanced by specific averments and supported by evidence. Further, a non-executive director cannot be held vicariously responsible for either the actions or omissions of the company or other officers or directors. The Hon'ble SAT has also observed that the law permits division of duties of directors which must be taken into account while fixing liability of directors. Further, even if a non-executive or an independent director is part of a decision in a board meeting which is called into question, he cannot be automatically held liable merely by his presence in the board meeting. Reliance is placed on the judgement of Hon'ble Supreme Court in the matter of Chintalapati Srinivasa Raju v SEBI (2018 (7) SCC 443).*

xii. *Reliance was also placed on the judgement of the Hon'ble SAT in the matters of Adi Cooper vs Securities and Exchange Board of India [dated 5.11.2019; Appeal No. 124 of 2019] and G. Unnikrishnan Nair vs SEBI [dated 27.11.2019; Appeal No. 5 of 2018]*

xiii. *Therefore, it is clear that the distribution of work in a company and the board of directors, as well as different duties of directors, must be taken into account while affixing liability. Any director, particularly a non-executive, is entitled to rely and base his decision on the judgment, information and advice of the other directors and officers, as to whose integrity, skill, and competence he has no reason for suspicion. Thus, a director cannot be held liable merely because his presence is recorded in a meeting.*

xiv. *The extent of duty or liability of a director in general is authoritatively discussed by the Hon'ble Supreme Court in the case of 'Official Liquidator, Supreme Bank Limited vs P.A. Tendolkar (dead) by LRs & Ors.' [(1973) 1 SCC 602]'. From the said judgment by the Hon'ble Court, it may be inferred that a director cannot be held liable for mere errors of judgment:*

- *In discharging his duties, a director must act honestly with some skill and diligence. However, a director need not exhibit in the performance of his duties a greater degree of skill than may reasonably he expected from a person of his knowledge and experience*
- *Directors are not liable for mere errors of judgment; and*
- *it is necessary to consider the manner in which the work of the Company is in fact distributed between the directors and the other officials of the company*

xv. *It must further be noted that in law the fiduciary duties of a director are towards the company or may stretch to the shareholders, but a director has no fiduciary duty towards a third party.*

xvi. *The Noticee cannot be vicariously made liable for the actions or omissions of BPML, it's officers or other directors. Further, if any specific allegation is made against the Noticee, the same is not supported by any averment of fact or evidence. The Show Cause Notice does not exhibit how the Noticee is linked to or liable for 'deviation from issue objects', 'deviation or misutilization of IPO proceeds' or 'investments in ICDs and equity instruments', and mere alleged presence in a board meeting does not automatically prove any wrong doing in the context of any decision taken or material presented in that meeting. As stated earlier, the role of the Noticee was limited to sales and marketing strategic guidance and in all matters, he relied upon the information presented, representations made and work done by Board committees and executive, none of which caused any concerns to be raised by the Noticee. Therefore, the charges as alleged cannot be upheld in law.*

xvii. *As noted aforesaid, the courts have held that the distribution of work between directors inter-se in a board of directors must be given due importance while affixing liability and also that mere presence of a director in a board meeting does not make him culpable of any action or omission or responsible for any material presented in the said meeting. A director is further allowed to rely upon or base his judgment on other directors, executives or experts and cannot be faulted for an error in judgment. It is also settled law that a director cannot be held responsible vicariously for the acts of the company, other directors or executives. In the present case, none of these settled positions in law have been applied or even considered while making allegations in the Notice. The Board of BPML functioned through various committees, especially for all matters relating to the IPO, including Prospectus and utilization of IPO proceeds, and the Noticee is a non-executive director who was neither a member of any of such committees nor participated in the day-to-day affairs of the Company. Thus, the Noticee cannot be held liable of any wrong-doing in BPML, particularly in the absence of any specific averment or evidence against him.*

xviii. It must be noted that the allegation of diversion of IPO proceeds of Rs 33.4 crores in the Notice is mentioned in the context of the alleged advances paid to various entities such as Sanjukta Vanijya Pvt Ltd, Darshan Tradelink Pvt Ltd etc, and does not relate to the ICDs given to group companies. Further, the only issue discussed in the Board meeting dated July 11, 2011 was interim deployment of IPO proceeds as ICDs to group companies, and the issue relating to advances made to various third-party entities was not discussed in any Board meeting shown to have been attended by the Noticee. The change of IPO objectives as alleged was also done much after the Noticee left the Company. During the Noticee's time at the Company's Board, the issue relating to utilization of IPO proceeds or ICDs was purportedly discussed only in meeting dated July 11, 2011 and not at any time thereafter. The 'statement relating to utilization of IPO proceeds' were even though shown to have been laid in Board meetings but no concern with respect thereto was highlighted by the executive or any Board committees. On the contrary, it was seemingly demonstrated that the IPO proceeds were being deployed in business as per the IPO objectives. Thus, the Noticee cannot be held liable for deviation from issue objects, diversion or mis-utilization of IPO proceeds or investments in equity or equity instruments.

xix. The Show Cause Notice wrongly infers that temporary deployment of IPO proceeds in ICDs of group companies was not permitted as per the disclosures made in the Prospectus.

xx. The ICDs as approved by the Board were investment or financial products or instruments which were interest bearing and liquid in nature and thus fell within the parameters as disclosed in the Prospectus. The Noticee cannot be held guilty if the executive of the Company failed to be diligent in granting of ICDs with appropriate security or could not recover the loans when required.

xxi. The Noticee cannot be said to be 'dealing in securities' in the alleged Board decision of temporary deployment of IPO proceeds in ICDs to group companies. The said decision merely related to interim use of IPO proceeds as ICDs to group companies the scope of which was within the ambit of the disclosures made in the Prospectus. If this is not held to be correct, it would mean that directors are deemed to be 'dealing in securities' while sitting in any board meeting and thus could be liable under PFUTP

Regulations for all decisions taken or not taken in a meeting, which would clearly lead to an absurdity in law, and thus cannot be allowed.

xxii. *The second indispensable factor for proving fraud or unfair trade practice under Section 12A of SEBI Act or Regulations 3 or 4 of the PFUTP Regulations, is that the alleged fraud must be proved to have been committed "to induce another person to deal in securities". This is again evident from the plain language of Regulation 2(1)(c) of the PFUTP Regulations. As noted aforesaid, the Hon'ble Supreme Court has held that to show inducement it must be reasonably inferred, if not proved, 'that the person induced would not have acted in the manner that he did but for the inducement'. Further, such inducement must be shown to have been done for the other person to 'deal in securities'. In the present case, there is no averment or evidence against the Noticee that the Noticee even attempted to induce any person to deal in any securities, in any manner. No such inference can also be drawn against the Noticee from the allegations made in the Notice even if the facts stated therein are taken on face value. Thus, Section 12A of the SEBI Act or Regulation 3 or 4 of the PFUTP Regulations have no applicability to the Noticee in the present facts and circumstances of the case.*

xxiii. *For an act or omission to be called a fraud or fraudulent under PFUTP Regulations or Section 12A of SEBI Act, even though an intention or mens rea is held to not have been necessarily required, however it must be shown that the act or omission, alleged to be fraudulent or an unfair trade practice, is the causal link for the eventual harm which is caused due to such act or omission. The same is also evident from use of words such as 'knowing misrepresentation', 'does not believe', 'active concealment', 'without any intention', 'reckless and careless manner', 'deceptive behaviour' etc in illustrative instances of fraud in Regulation 2(1)(c) of PFUTP Regulations. The mere participation of the Noticee in the July 11, 2011 Board meeting's decision as a non-executive director cannot be held to be a fraudulent act or unfair trade practice in itself when it is clear that the Noticee himself could not have been aware of any wrong doing by the Company or the executive. The Noticee cannot be held responsible if the said ICDs were not returned to BPML or the executive failed to enforce repayment. It is already shown that the Chairman informed* *the Board that the IPO proceeds were permitted to be temporarily deployed as ICDs to group companies and the Hon'ble SAT has itself held absence of the word 'corporate deposits' in the Prospectus to be only a technical issue. Thus, in the facts and circumstances of the case, the Noticee cannot be held liable for alleged defaults.*

xxiv. *All allegations made in the context of remittance of IPO proceeds by the Company to third-party entities such as Sanjukta Vanijya, Darshan Tradelink etc and investment of IPO proceeds in equity / equity instruments are directed against the Company and not even a single shred of evidence is presented which would show any link of the Noticee to such actions of the Company. The Noticee cannot be held vicariously liable for the acts of the Company, other directors or the executive. The fundamental flaw in the Show Cause Notice is that it has sought to make the Noticee liable merely by virtue of him being designated as a director of the Company. Such an approach is untenable since the law is well settled that liability depends on the role played by the director in the alleged default and not his designation*

xxv. *The Show Cause Notice puts the Noticee on par with persons who were actively involved and associated with all the actions as alleged in the Notice, including executive and officials of the Company and those entities mentioned in paragraph 25 and 29 of the Show Cause Notice, which cannot be the case even if any wrong doing is found on part of the Noticee. The act of transfer of funds to certain third-parties, even before the Board meeting held on July 11, 2011 and which fact, inter alia, was deliberately suppressed from the Noticee, is a testimony to the Noticee's non-involvement in the entire series of events.*

xxvi. *A director's liability is necessarily co-extensive with his duty and the extent of his knowledge. This is especially true of non-executive and independent directors. Therefore, the Noticee could not have and cannot reasonably be expected to have the same degree of insight, knowledge and control of the day-to-day affairs of a company as an executive or whole-time director. Consequently, as stated above, the law limits the liability of nonexecutive and independent directors to acts or omissions which are attributable to him through Board processes. It is submitted that the Board processes in the present case did not result in the Noticee becoming aware of the fraud, is testimony to the successful efforts of the executive management of the*

Company in concealing the fraud, rather than it becoming evidence of the Noticee's participation in the fraud.

xxvii. *It is submitted that even if some directors are responsible for certain actions, all directors, particularly non-executive ones, cannot be held automatically or vicariously guilty.*

xxviii. *Reliance is placed on the judgements of the Hon'ble SAT in the matters of Mohandas Shenoy Adige & Ors. Vs SEBI" [inter-alia in Appeal Nos. 479& 509 of 2020, Order dated August 26, 2021], Govind Das Pasari & Ors. vs SEBI (order dated April 30, 2021) and Dr. Uppal Devinder Kumar vs SEBI (order dated September 25, 2019)*

Noticee 6 (Mr. Mohandas Adige)

22. Vide letter dated May 18, 2017, Noticee 6 stated that he had received the SCN and further stated that he was an Independent Director of the company from 08/06/2010 and the date of cessation of his directorship was 22/05/2013. In his submissions, Noticee 6 also requested for inspection of documents in the matter. Vide letter dated May 26, 2017, Noticee 6 was granted opportunity of inspection of documents. Vide letter dated June 30, 2017, Noticee 6 *inter alia* stated that he had written to the company to provide him with the documents related to the D & O Insurance Policy to support him financially to engage legal assistance, and in view of the same, he requested to be granted another three months i.e. up to 30.09.2017 to inspect the documents. Thereafter vide email dated July 30, 2017, Noticee 6 requested SEBI to grant him another three months i.e. upto 31.10.2017 to inspect the documents.

23. Vide letter dated October 24, 2017, Noticee 6 submitted his reply to the SCN. The main contentions made therein are summarized as follows –

i. *I would like to submit that initiation of present Adjudication Proceedings on same subject matter when a separate proceedings initiated vide SCN dated March 27, 2017 issued by the Enforcement Department, SEBI is already under progress amounts to "double jeopardy" and is in violation of Article 20(2) of Constitution of India.*

ii. *I have by my letter dated October 24, 2017 to SEBI have inter alia sought inspection of documents referred to and relied upon by SEBI in the subject matter.*

iii. *I was an independent Director of BPML from June 2010 to May 2013 and I had no role to play in the day to day management of the Company. I submit that I was not in charge of and was not responsible for the conduct of business of BPML, particularly pertaining to utilization of IPO proceeds by said Company.*

iv. *I was not involved in any market manipulation in scrip of BPML. Thereby, I submit that I have been wrongly roped in the present proceedings.*

v. *Besides, I strongly deny alleged violation of provisions of Regulation 3 (a), (b), (c), (d), Regulations 4(1), 4(2)(e), (f) and (k) of SEBI (PFUTP) Regulation r/w Section 12 A (a), (b) and (c) of SEBI Act, 1992 and submit as under:*

vi. *I have not bought, sold or otherwise dealt in shares of BPML in fraudulent manner (Ref Regulation 3 (a) of PFUTP Regulations, 2003);*

vii. *I have not used or employed any manipulative or deceptive device or acted in contravention of the provisions of SEBI Act and Rules/ Regulations made thereunder (Ref Regulation 3 (b) of PFUTP Regulations, 2003);*

viii. *I have not employed any device, scheme or artifice to defraud anyone in respect of shares of BPML (Ref Regulation 3 (c) of PFUTP Regulations, 2003);*

ix. *I have not engaged in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in respect of shares of BPML (Ref Regulation 3(d) of PFUTP Regulations, 2003);*

x. *I repeat and reiterate that I have not indulged in fraudulent and unfair trade practice in securities market (Ref Regulation 4 (1) of PFUTP Regulations, 2003);*

xi. *I have not indulged in an act or omission which amounted to manipulation in price of shares of BPML (Ref Regulation (2) (e) of PFUTP Regulations, 2003)*

xii. *I have not published or caused to publish or reported any information which is not true or which I did not believe to be true and which may influence the decision of investors (Ref Regulation 4 (2) (f) of PFUTP Regulations, 2003)*

xiii. *I have not made advertisement which is misleading or that contained information in distorted manner (Ref Regulation (2) (k) of PFUTP Regulations, 2003)*

xiv. *I have not employed any manipulative or deceptive device w.r.t issue, purchase or sale of BPML shares and neither have I acted ire contravention of the provisions of SEBI Act and Rules/ Regulations made thereunder (Ref Section 12 A(a) of SEBI Act, 1992);*

xv. *I have not employed any device, scheme or artifice to defraud anyone in respect of issue or dealing in shares of BPML (Ref Section 12 A (b) of SEBI Act, 1992);*

xvi. *I have not engaged in any act, practice, course of business which operates as fraud or deceit upon any person in connection with issue and dealing in shares of BPML or acted in contravention of provisions of SEBI Act and Rules/ Regulation made thereunder (Ref Section 12 A (c) of SEBI Act, 1992)*

24. Vide email dated October 31, 2020, Noticee 6 was granted an opportunity of personal hearing before the erstwhile AO, Shri B J Dilip on November 12, 2020. In this regard, an email dated November 04, 2020 was received from Visesha Law Services, wherein it was stated that they are representing Noticee 6 and requested for the copy of the SCN, its annexures and the replies filed by Noticee 6, since the relevant files had been misplaced by Noticee 6. Vide the email, an adjournment of the hearing scheduled on November 12, 2020 was also requested. Vide email dated November 04, 2020, the SCN, reply and other communication between AO and Noticee 6 was provided to the aforesaid authorized representatives (ARs) of Noticee 6. Further, as requested, the hearing was adjourned to November 23, 2020. Subsequently, vide email dated November 20, 2020, the ARs of Noticee 6 requested for further adjournment of the hearing scheduled on November 23, 2020. Vide email dated November 20, 2020, the aforesaid request again was acceded to and the hearing was rescheduled to

December 08, 2020, as communicated. Vide email dated December 05, 2020, the ARs of Noticee 6 requested for further adjournment of the hearing to December 17, 2020 on the grounds that they had filed an appeal before the Hon'ble SAT impugning the order dated October 23, 2020 passed by the Learned Whole Time Member of SEBI. In reply, the hearing was rescheduled to December 15, 2020, however the same was adjourned due to certain exigencies. Pursuant to the appointment of the undersigned as AO, vide Hearing Notice dated June 02, 2021, Noticee 6 was granted an opportunity of personal hearing on June 15, 2021. Vide letter dated June 11, 2021, the ARs of Noticee 6 requested for adjournment of the aforesaid hearing and *inter alia*, requested further time of 6 weeks to proceed in the matter. Vide Hearing Notice dated June 03, 2022, Noticee 6 was granted another opportunity of personal hearing on June 22, 2022. The ARs attended the hearing and made submissions denying the allegations in the SCNs. Further, with regard to supply of documents, the ARs stated that they don't require the documents requested earlier by the Noticee in paragraph 5 (page nos. 5 and 6) of Noticee 6's letter dated October 24, 2017. Further, the ARs stated that in view of Hon'ble SAT's judgement dated August 26, 2021 in the same matter, the charges against the Noticee 6 are not established and that brief submissions in this regard shall be filed by them latest by June 30, 2022. Hearing proceedings were thus concluded and Noticee 6 sought no further hearing in the matter. Vide letter dated June 30, 2022, Noticee 6 made post hearing submissions in the matter. The main contentions made therein are summarized as follows –

i. *It was submitted that the captioned proceedings the Noticee raised a preliminary ground that the captioned proceedings are efflux of time and therefore, the SCN must be set aside on this ground alone. The Noticee has placed reliance upon the following judgments of Hon'ble SAT in the matters of Shriram Insight Share Brokers Limited v. SEBI (Appeal No. 559 of 2020) dated January 04, 2022, Parag Sarda v. SEBI (Appeal No. 290 of 2020) dated 12th November 2020, Government of India v. Citadel Fine Pharma [AIR (1989) SC 17711], Rakesh Kathotia & Ors v. SEBI (Appeal No. 7 of 2016) dated May 27, 2019, Ashok ShivIal Rupani & Anr. v. SEBI (Appeal No.417* *of 2018), and Sanjay JethaIaI Soni v. SEBI (Appeal No. 102 of 2019) dated November 14, 2019).*

ii. *It was submitted that there are multi-fold allegations in the captioned Show Cause Notice. Paragraph 8 to 9 of the SCN is pertaining to alleged self-trades, however there is no allegation against the present Noticee. The next allegation is with regards to alleged diversion of funds. It has been alleged in paragraphs 10 to 16 of the SCN, there is no allegation against the present Noticee. Further, in paragraph 25 of the SCN, it has been alleged that there is alleged diversion of funds to distributors, however, there are no allegation against the present Noticee. Lastly, there are certain allegation with regards to nondisclosure of the information in paragraph 36, where nothing has been alleged against the present Noticee. The Noticee submits that there are no allegation against the Noticee, in any of the four broad allegations mentioned above.*

iii. *It is submitted that the only allegation against the present Noticee is in paragraph 27 of the SCN. It is alleged that the present Noticee attended the Board Meeting dated July I l, 201 1 which permitted the board to deploy the proceeds of the IPO in a interest or dividend bearing liquid instrument including deposits with banks and investment in mutual funds. Thus, it has been alleged that since the resolution did not include corporate deposits therefore the Noticee is alleged to have violated Regulation 3(a)(b)(c) & (d) and 4(1), 4(2)(e), (f) & (k) of the PFUTP Regulation, 2002 read with SEBI Act, 1992*

iv. *The Noticee submitted that the Ld. Whole Time Member had passed an order dated October 23, 2020 on basis of the same facts forming subject matter of the captioned SCN. The Ld. WTM had restrained the Noticee for a period of 2 years. The present Noticee had filed an Appeal No. 479 of 2020 before the Hon'ble Securities Appellate Tribunal, challenging this order.*

v. *The Hon'ble SAT was pleased to allow the appeal and passed an order dated August 26, 2021 and placed on the relevant portion of the said Order (i.e. paras 21 to 25).*

vi. *In light of the above, the Noticee submitted that Hon’ble SAT has expressly observed that the resolution passed in the Board Meeting held on July 11, 2011 suffered from no discrepancies. Further, the Hon'ble SAT had allowed the appeal and quashed the order passed by the Ld. WTM.*

vii. *Thus, in the present case too, the Noticee submitted that the Noticee has acted in accordance with law and the resolution passed in the Board Meeting dated July 11, 2011. Therefore, the Noticee submitted that no case is made out against the Noticee in the captioned proceedings.*

Noticee 7 (Mr. Vijay Agarwal)

25. The SCN issued to Noticee 7 was delivered to the Noticee. Subsequent, to issuance of SCN, Noticee 7 sought an inspection of documents vide his letter dated June 02, 2017. Noticee 7 carried out the inspection of documents on July 25, 2017. Vide his letter dated August 24, 2017, Noticee 7 informed that he had filed an application for settlement under SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014. Meanwhile, Noticee 7 submitted his reply to the erstwhile AO vide letter dated September 09, 2017. Vide email dated January 18, 2018, concerned division of SEBI, informed the erstwhile AO to keep the adjudicating proceedings on hold till the disposal of settlement application or till further communication. From the material available on record, I note that the settlement application of Noticee 7 was rejected.

26. Vide email dated October 31, 2020, an opportunity of personal hearing was granted to Noticee 7 on November 12, 2020 before the erstwhile AO. Noticee 7 also made submissions vide letter dated November 04, 2020. Subsequent to appointment of undersigned as AO, in the interest of natural justice, hearing notice dated March 10, 2021 was issued to the Noticee through digitally signed email/ SPAD/Affixture granting an opportunity of personal hearing before the undersigned on March 19, 2021. From the material available on record, I note that the hearing notice was duly served upon the Noticee 7. The authorized representatives (**ARs**) of Noticee 7 attended the

scheduled hearing and reiterated the submission made by Noticee 7. Vide email dated June 07, 2022, Noticee 7 was granted another opportunity of personal hearing on June 22, 2022, wherein the ARs of Noticee 7 appeared for the hearing and reiterated the earlier submissions made by Noticee 7.

27. The replies submitted by Noticee 7 vide his letters dated September 09, 2017 and November 04, 2020 are summarized below:

Letter dated September 09, 2017

a. *Though he was a director of the company, he was not whether he attended the meeting on July 11, 2011 as the attendance register was not available with him and there was no conclusive proof that he was part of the meeting.*
b. *He had resigned as a director of the company with effect from 16.08.2011 and hence he was not responsible for the non-recovery of the ICDs or the interest on the ICDs.*
c. *On carrying out inspection of documents of the company, it was observed that the minutes of the Board Meetings were wrongly recorded and leave of absence had been granted to him for a Board meeting held on September 08, 2011.*

Letter dated November 04, 2020

a. *Post such an investigation, a SEPARATE Show Cause Notice March 27, 2017 ("11B SCN") was issued by the Enforcement Department of SEBU containing the same set of allegations against the Noticee which was duly responded.*
b. *Noticee was an independent director on the board of BPML who was not responsible for the day to day functioning of the company or utilisation of IPO proceeds. BPML, at all relevant times, had an Executive Chairman and had also appointed a managing director who was responsible for the functioning of BPML.*
c. *SCN states that ICD were issued on July 6, 2011 i.e. even prior to the impugned Board Meeting.*

d. *The Noticee resigned from the Board of BPML on August 16, 2011, i.e., within 40 days from the IPO. The Noticee was therefore, not informed or involved in the utilization of the funds pursuant thereto.*

e. *Even prior to his resignation, the Noticee was not a part of Board Meeting (held on August 12, 2011). The same is evident from the minutes of such meeting wherein a leave of absence was granted to him.*

f. *The Noticee was neither involved in the issuance of the ICDs nor a part of the Project Monitoring Committee, constituted by BPML to monitor utilization of the funds of IPO.*

g. *Being an independent director, Noticee name was included in the Audit Committee. However, post the IPO, audit committee met for the first time on September 8, 201 l i.e., after the Noticee had resigned from BPML on August 16,2011*

h. *The only restriction in the Offer Document was that of investing in equity and equity-linked instruments. The Impugned Board meeting did not even stipulate the deployment or end-utilization of funds. In any case, in the P.G. Electroplast case, SAT has ruled that the act of company of not disclosing the lCD is at best a technical violation for which no penalty can be imposed.*

i. *The Noticee had no reason to distrust what the Executive Chairman presented to the Board of Directors about the short-term parking of IPO proceeds pending deployment towards objects of the IPO. An independent director cannot be held vicariously liable for acts and omissions of BPML or any of other directors.*

j. *As a matter of fact, after holistically considering the submissions made by the Noticee, the Whole Time Member ("WTM") of SEBI was of the view that the alleged violations against Noticee are not sustainable and consequently the 11 B SCN was disposed-off without any direction against the Noticee.*

Noticee 8 (Mr. Anoj Menon)

28. The SCN was sent to the available address on record of Noticee 8 through Speed Post with Acknowledgement Due and the same was delivered. Vide letter dated April 28, 2017, Noticee 8 informed that he had received the SCN on April 27, 2017 as he was residing at Flat No. 20, 2nd Floor, Shanti Kunj, Plot No. 279, Road No. 31, Sion East, Mumbai 400022 and not at the address at 8 Gokulam, Plot No. 219, Tamil Sangam Road, Sion East East, Mumbai – 400022 to which the SCN had been sent. Further, Noticee 8 requested for a time of 4 weeks to file the reply to SCN. Vide letter dated May 09, 2017, Noticee 8 requested for inspection of documents in the matter and stated that the reply for SCN will be filed thereafter. Vide letter dated May 23, 2017, it was informed to Noticee 8 that all the necessary documents were already provided with the SCN and it was further informed that he had been granted an opportunity for inspection of documents and in this regard, the contact details of concerned SEBI Official was provided for the same, in the interest of natural justice. Accordingly, Noticee 8 availed the opportunity of inspection of documents. Vide letter dated November 16, 2018, an opportunity of personal hearing was granted to Noticee 8 before the erstwhile AO, Shri Jeevan Sonparote on December 14, 2018. Vide letter dated December 03, 2018, Noticee 8 requested to adjourn the personal hearing fixed on December 14, 2018 and stated that in the meantime, he would be filing his reply in the matter. The request was acceded to and as per the request, the date of personal hearing was rescheduled to January 21, 2019 and the same was informed to the Noticee 8 vide email dated December 17, 2018. Accordingly, Noticee 8 and his authorized representatives (ARs) attended the hearing on January 21, 2019, wherein oral submissions were made and Noticee 8 was granted time till January 31, 2019 to make detailed written submissions. Vide letter dated February 11, 2019, authorized representative of Noticee 8 filed reply to SCN and the written submission pursuant to the hearing conducted on January 21, 2019. The main contentions made therein are summarized in the subsequent paragraphs. Further, vide letter dated March 06, 2019,

an additional reply was submitted by authorized representative of Noticee 8. Therefore, vide email dated October 31, 2020, an opportunity of personal hearing was granted to Noticee 8 before the erstwhile AO, Shri B J Dilip, on November 12, 2020 through video conference. Vide email dated November 10, 2020, authorized representative of Noticee 8 requested for an adjournment of the said personal hearing. The request was acceded to and the hearing was rescheduled to November 25, 2020. The authorized representatives of Noticee 8 appeared for the said hearing and reiterated the earlier submissions made by Noticee 8 and further time upto December 09, 2020 was granted to Noticee 8 to make the post hearing submissions. Vide letter dated December 09, 2020, authorized representative of Noticee 8 submitted the post hearing written submission. Pursuant to the appointment of the undersigned as AO, in the interest of natural justice, an opportunity of personal hearing was granted to Noticee 8 on June 15, 2021, vide letter dated June 04, 2021 which was duly served on Noticee 8. Vide email dated June 14, 2021 and letter dated June 12, 2021, authorized representative of Noticee 8 requested for an adjournment of the hearing fixed on June 15, 2021. Therefore, vide hearing notice dated June 03, 2022, Noticee 8 was granted another opportunity of personal hearing on June 22, 2022 through video conference. Vide letter and email dated June 06, 2022, authorized representative of Noticee 8 requested for another adjournment of the hearing fixed on June 22, 2022. The request was acceded to and the date for hearing was rescheduled to June 27, 2022 and the same was communicated to Noticee 8 vide email dated June 07, 2022. The authorized representatives of Noticee 8 had appeared for the hearing on June 27, 2022 wherein they reiterated the earlier submissions made by Noticee 8 and a time up to July 04, 2022 was granted to the Noticee 8 to make post hearing submissions. Vide letter dated July 14, 2022, post hearing submission was made. The main contentions and submissions of Noticee 8, filed through various letters as detailed above, are summarized in brief as follows –

i. The SCN has been issued with inordinate delay i.e. belatedly, after a period of six *years since the IPO and four years since the Noticee ceased to be an Independent Director in the Company. In view of the lapse of time, the Noticee has limited recollection of what transpired in the July 11, 2011 Board Meeting of the Company which he had attended as an Independent Director. The inordinate delay and laches in initiating proceedings against Noticee has vitiated entire proceedings. Reliance has been placed on the judgement of the Hon'ble Supreme Court in the matters of State of Punjab v. Chaman Lal, (1995) 2 SCC 570, State of A. P. v. N Radhakishan, (1998) 4 SCC 154, P.V. Mahadevan V. MD, T.N. Housing Road, (2005) 6 SCC 636, Mahendra Lal Das v. State of Bihar and Ors., (2002) 1 SCC 149 Further, reliance was also placed on the judgement of Hon'ble SAT in the matters of Subhkam Securities Private Ltd. v. SEBI, in Appeal No. 73 of 2012, HB Stockholdings Ltd v. SEBI, [20131 SAT 44: 2013 SCC OnLine SAT 56, and Libord Finance v. SEBI. It is submitted that the court has to balance and weigh the several relevant factors, i.e. balancing test or balancing process, and determine in each case whether the right to speedy trial has been denied in the given case. In the event that unexplained inordinate delay causes prejudice to the noticee, the said notice must necessarily be quashed as such grave injustice would be in complete violation of the principles of natural justice.*

j. *The Noticee attended meetings as a director in his capacity as an independent director. It is submitted that the position of an Independent Director is very different from a Whole Time Director or an Executive Director. He is not expected to set out on an independent probe of the factual assertions made to him by the Management. He is not expected to suspect every assertion or representation made by the management of the Company. This is even more particularly so, when there is nothing which would put him on notice of any irregularity or illegality.*

k. *Noticee has placed reliance on the contents and the recommendations in the Report of Committee on Regulation of Private Companies and Partnerships dated July 31, 2003 headed by Naresh Chandra (chapters 2 and 5) and J.J. Irani Committee Report on Company Law dated May 31, 2005 (chapter 4). The Noticee has also placed reliance on the Standing Committee on Finance (2011-2012), 57th Report, June 2012 with regard to the suggestions made therein pertaining to Independent*

Directors. The Noticee has placed further reliance on the provisions of Section 149 of the Companies Act, 2013, Regulation 25(5) of the SEBI (Listing Obligations and Disclosure requirements) Regulations, 2015, and the Standing Committee on Finance (2016-2017), 37th Report, December 2016.

l. *It is clear that as for liability of the independent director, he or she shall only be liable for any acts of omission or commission by the company or any officer of the company which constitutes a breach or violation of any provisions of Act, if,*

   a. *It had occurred with his knowledge, attributable through Board processes;*
   b. *With his consent or connivance; and*
   c. *Where he had not acted diligently.*

m. *The business model and road map set out in the Prospectus had been based on facts and circumstances attending in February 2011 or earlier. An Independent Director is not required or expected to second guess or question business plans, projections and assessments. Likewise, if 5 months later, if the professional management as well as the Chairman represented to the Board that the Company considered that the macro economic environment and/or market factors prevailing warrant that the setting up of additional Evolve Medspa Centers in various cities across the country be delayed, an Independent Director cannot be expected to question and/or override the commercial / business decision of the management to be prudent/ cautious and go slow.*

n. *Further, in view of the disclosures made in the Prospectus, the Company was entitled to take decisions of the aforesaid nature with respect to the deployment of the IPO proceeds based on market conditions.*

o. *In the capacity of Independent Director, it is through Board processes that he would need to rely on the information received from the management and presume bona fides.*

p. *In other words, through board process, he appraised the information presented to the Board of Directors at the board meeting held on July 11, 2011.*

q. *It is noteworthy that as per the facts on the record, it has subsequently become evident that even before this Board Meeting, the management of the issuer company had already moved out the funds on July 6 and 7, 2011 [Paragraph 19, SCN], and they had therefore actively misled him and the Board of Directors.*

r. Therefore, penalising members of the Board and in particular an independent director such as the Noticee would amount to victimizing the victim of the alleged fraud by wrongly treating a victim as a perpetrator;

s. As seen from the record, the content of the Prospectus extracted in the SCN, purportedly as a "verbatim" reproduction, misses a vital opening sentence viz. that "The management, in accordance with the policies set up by the Board, will have flexibility in deploying the proceeds received from the Issue…".

t. Therefore, when a proposal was brought before the Board Meeting, it was legitimate for any director including an independent director to presume bona fides particularly when the Prospectus had indicated that pending deployment, short term deployment may be effected.

u. Now, when it is clear that the funds had already been moved out on July 6 and 7, 2011 [Paragraph 19, SCN], well before Board Meeting, the Board was taken for a ride if allegation of diversion stands proven, and directors who attended the meeting cannot be accused of fraud when they are victims of the alleged fraud;

v. In those circumstances, any reasonable interpretation of the evidence would inexorably point to Noticee having participated through board processes and his not having knowledge of the alleged violations, his not having connived in the alleged fraud and his not having consented to perpetration of fraud;

w. In absence of knowledge or connivance of, or consent for any fraud, the participation of an independent director in a Board Meeting that approved a resolution cannot render the directors in such a position to be per se culpable.

x. It is for this reason that Paragraph 15 of the SCN explicitly provides that the action sought to be taken in that regard is purely against non-independent and executive directors. Yet, paragraph 27 of the SCN, in a leap of faith, sweeps within the scope, the Noticee despite his being an independent director. It is precisely such an approach that is clarified as being shunned in the MCA 2020 Circular;

y. As regards the element of diligence, as an Independent Director the Noticee is not required or expected to doubt, second-guess or question every point presented to the Board of Directors. Towards this end, the judgement in Dovey and the Metropolitan Bank (of England and Wales) v. John Cory, [1901] AC 477 is directly *and fully supportive of our client case. It is even more noteworthy that this judgement has been cited with approval by the Hon'ble Supreme Court of India in the case of Chintalapati Raju case, (2018) 7 SCC 443 in the specific context of accounting fraud and insider trading;*

z. *Likewise, if a full five months after the IPO, the professional management as well as the Chairman who is from a reputed industry family, represented to the Board that the macro economic environment and market factors warranted delaying the roll out of the setting up of additional Evolve Medspa Centers in various cities, an Independent Director cannot be expected to convert himself into an auditor or managing director, rendering any logical devolution of work in the governance structure infeasible;*

aa. *There was nothing in the assessment/representation of the Company's professional management, as conveyed to the Board, for an Independent Director to regard it as malevolent. The said conclusion was not arrived at in a mere four days, as alleged in the SCN. In any case, the same is a fact driven exercise. The Independent Directors had no means of ascertaining or evaluating the same;*

bb. *It is in this light that the endorsement of the Hon'ble Supreme Court in Paragraph 24 of its judgement in the Chintalapati Raju case, (2018) 7 SCC 443, of the English case law in Dovey and the Metropolitan Bank (of England and Wales) v. John Cory, [1901] AC 477 gains significance. A director is not expected to become an auditor, or an investigator or a policeman to suspect every matter brought before the Board of Directors;*

cc. *The Noticee's role/duty as an independent director was not to conduct an investigation and he cannot exercise powers akin to those under Section 11C of the SEBI Act to investigate every statement made to the Board of Directors and discover a fraud. This is why to bring objectivity to the assessment that legislation makes reference to board processes. Surely, it cannot be SEBI's case that an independent director, ought to have been able to do what SEBI eventually did, with support of investigating powers and capacity infrastructure, i.e. a fullfledged investigation;*

dd. *This is why, even statutorily, there is not responsibility cast on an independent director to investigate in such a manner. Therefore, in the absence of any specific* *circumstance that could show to an independent director that there is already a fraud that has taken place, absence of diligence too cannot be attributed to an independent director through conduct of board processes.*

ee. *In view of the disclosures made in the Prospectus, the Company was entitled to take short-term decisions with respect to the deployment of the IPO proceeds based on market conditions. The management also represented to the Independent Directors that the Company is authorized to deploy the IPO proceeds as ICDs with group companies. There was no reason whatsoever for an Independent Director to have suspected that the management was lying to the Board of Directors.*

ff. *Reliance is also placed on the judgement passed by Hon'ble SAT in the matter of Pritha Bag v SEBI (Appeal No. 291 of 2017), wherein the Hon'ble SAT examined the issue of regulatory action against directors for default in violation of provisions of the Companies Act, 1956, and ruled that where there is an officer in default designated, and where there is a managing director or a whole time director, they would be officers in default, and it would not be open to move against all directors. It is submitted that the Noticee being a non-executive director, and not charged with the responsibility of looking after the management and affairs of Birla Pacific Medspa Ltd, is not a persona who can be treated as an officer in default, insofar as the offences that have been charged against the company in the SCN.*

gg. *By Finance Act, 2018, with effect from March 8, 2019, under Sections 11(4A) and 11B (2) of the SEBI Act, SEBI was expressly empowered to impose a penalty under Chapter VI-A of SEBI Act and has chosen not to impose any penalty. Having not imposed the penalty, these proceedings have effectively merged into the proceedings already conducted under Sections 11 and 11B and therefore, these proceedings abate.*

hh. *The provisions of Section 149(12) of the Companies Act, 2013 are vital for the instant case and it is explicitly codified that an independent director may be liable for violations by a company only where the acts of omission or commission occurred:-*

a. with his knowledge;
b. with his consent;
c. with his connivance; or
d. without diligence on his part

With regard to the above, Noticee has placed reliance on the Ministry of Corporate Affairs issued a General Circular No. 1/2020 on March 2, 2020 ("MCA 2020 Circular").

ii. *Noticee has placed reliance on the judgements of the Hon'ble SAT in the matters of Yogendra Premkrishna Trivedi v. SEBI (Appeal No. 417 of 2020, Order dated November 23, 2020), Adhesh Jain v. SEBI (Appeal No. 217 of 2020, Order dated November 19, 2020) and Adi Cooper v. SEBI (Appeal 124 of 2019, Order dated November 5, 2019):*

<u>Noticee 9 (Mr. Rajesh Shah)</u>

29. The SCN was sent to the available address on record of Noticee 9 through Speed Post with Acknowledgement Due and the same was delivered to him. Vide letter dated April 28, 2017, Noticee 9 requested for additional time to file the detailed reply as he was in the process of appointing a lawyer for the same, and further he requested for inspection of documents in the matter. Vide letter dated May 23, 2017, it was informed to Noticee 9 that all the necessary documents were already provided with the SCN and it was further informed that he had been granted an opportunity for inspection of documents and in this regard, the contact details of concerned SEBI Official was provided for carrying out the inspection of documents. Accordingly, Noticee 9 availed of the opportunity of inspection of documents. As Noticee 9 had not filed any reply to the SCN despite lapse of considerable time, vide Hearing Notice dated November 20, 2018, an opportunity of personal hearing was granted to Noticee 9 before the erstwhile AO, Shri Jeevan Sonparote on December 04, 2018 and an opportunity was granted to file the reply to SCN by November 30, 2018. Vide letter dated November 30, 2018, M/s Markand Gandhi & Co. filed the reply to SCN on behalf of Noticee 9. Further, a request to adjourn the hearing was also made in the said letter. Therefore, an email dated December 04, 2018 was sent to M/s Markand Gandhi & Co. wherein they were requested to send the letter of authorization and further, on the basis of their request,

another opportunity of personal hearing was granted to Noticee 9 before the erstwhile AO, Shri Jeevan Sonparote on December 21, 2018.

30. Vide letter dated December 18, 2018, Noticee 9 submitted the authorization letter, authorizing Markand Gandhi & Co., Advocates and Solicitors, and their team including Mr. Sahil Gandhi, Mr. Jigar Shah and Mr. Sushil Mishra to act, appear and plead on behalf of Noticee 9. Subsequently, the said authorized representatives (**ARs**) appeared for personal hearing before erstwhile AO, Shri Jeevan Sonparote on January 04, 2019 and reiterated the submissions made vide letter dated November 30, 2018. Further, in the said hearing, oral submissions were made and time of 15 days was granted to Noticee 9 to file written submissions in this regard. Vide letter dated January 21, 2019, written submission along with the compilation of judgments was filed. Further, vide letter dated January 29, 2019, it was informed by the ARs that inadvertently the title of the written submission made vide letter dated January 21, 2019 was incorrectly mentioned as "The Show Cause Notice No. EFD-1/DRA1/BRK/RK/SCN/BPSL/OW/15354/1/2018/4B dated 25th May 2018" instead of "Show Cause Notice dated 20th April 2017 bearing reference no. EAD-2/DSR/RG/9015/9/2017 in the matter of Birla Pacific Medspa Limited".

31. Vide letter dated March 22, 2019, the ARs informed that the Hon'ble SAT had passed a judgement dated February 14, 2019 in the case *Pritha Bag v/s Securities and Exchange Board of India* (Appeal No. 291 of 2017) and the findings in the said case have significant bearing on the present proceedings. Further, it was requested that the aforesaid judgement be considered while passing any order in present proceedings. Further, an additional written submission along with the copy of the aforesaid judgement was also submitted. Vide email dated October 31, 2020, an opportunity of personal hearing was granted to Noticee 9 before the erstwhile AO, Shri B J Dilip on November 12, 2020 through video conference. Vide emails dated November 04 and 05, 2020, an adjournment in personal hearing was requested by the ARs of Noticee 9. Accordingly, personal hearing was rescheduled to November 24, 2020. Vide email

dated November 23, 2020, the ARs once again requested for adjournment. Accordingly, the hearing was rescheduled to December 14, 2020, however the same was not conducted due to certain exigencies. Pursuant to the appointment of the undersigned as AO, vide letter dated June 04, 2021, an opportunity of personal hearing was granted to Noticee 9 on June 16, 2021 through video conference via CISCOWEBEX. However, vide email dated June 14, 2021, the ARs on behalf of Noticee 9 requested for an adjournment in personal hearing. Vide letter dated June 03, 2022, an opportunity of personal hearing was granted to Noticee 9 on June 22, 2022 through video conference. Vide email dated June 21, 2022, the ARs requested for an adjournment in personal hearing. Accordingly, vide email dated June 22, 2022 the request for adjournment in the personal hearing was acceded to and another opportunity for personal hearing was granted on June 28, 2022 through video conference. ARs of Noticee 9 appeared for the said hearing on June 28, 2022 and reiterated the earlier submissions made by Noticee 9. Further, the ARs requested for time to file post hearing submissions and in this regard time till July 04, 2022 was granted. Vide letter dated July 04, 2022, post hearing submission was filed by Noticee 9.

32. The main contentions and submissions made by Noticee 9 through various letters, as detailed above, are summarized in brief as follows –

i. *Our client was appointed as an Independent Director on June 08, 2010 and he resigned as the Independent Director with effect from February 14, 2014. However, company has not filed Form 32 with Registrar of Companies with regard to his resignation, which made Noticee file Form DIR-11 on his own. However, it appears that the ROC has not yet modified its records and our client is still wrongly shown as a current Director of the Company.*

ii. *Our client further submits that despite our client being an Independent Director, he is being discriminated against as other persons who would be directly aware of the wrongful activities as well as responsible for the same, have been not issued with* *any Show Cause Notice, while our client has been singled out on the basis of mere conjuncture and surmises of wrongdoing.*

iii. *When our client joined the Company as an Independent Director, the Company was carrying on a bonafide business and was not an entity established for any fraudulent purpose.*

iv. *Our client therefore trusted the information provided by the executives and the Executive Directors of the Company. No material was ever produced to our client during his tenure as an Independent Director, which could have informed our client about any of the fraudulent actions of the Company as alleged in the SCN. SEBI has also failed to establish that any such material was provided.*

v. *Our client was admittedly a nonexecutive independent director of the company and he did not participate on a day to day basis or otherwise or in an executive capacity in the management and operations of the company. He has no other means of verifying or investigating the facts as SEBI has purported to do nor had he any reason to do so.*

vi. *The allegations in the SCN pertain to utilization of the IPO proceeds by the Company. It appears that according to SEBI, the IPO proceeds were misused by the Company by adopting 2 methods:*

   a. *Deployment of funds received from the IPO to third parties under the guise of making payments for the business of the Company, and the diversion of these funds by the third parties to other entities, who then used these payment to purchase shares of the company.*

   b. *Investment of IPO funds as Inter Corporate Deposits to group companies of the Company.*

vii. *It appears to be the case in the SCN that our client is involved in both the aforesaid activities and has violated the above provisions simply because he attended the Board Meeting dated 11th July 2011, wherein there was a discussion on the proposal of the management's decision deploying surplus IPO proceeds amounting to Rs. 33.4 Crores as Inter Corporate Deposits on a temporary basis in accordance with disclosures made in the IPO, as represented by the Promoter/Chairman of the Company.*

viii. *Our client states that he had no knowledge whatsoever of the alleged diversion of funds by the Company for indirectly financing the purchase of shares by the*

Company. As far as our client recollects, no such transaction was ever brought before our client in his capacity as an Independent Director of the Company or otherwise. Our client does not admit any of the allegations made in the SCN about the said transactions, as he has no knowledge of the same. Our client also recollects that in each and every quarterly which our client attended for these meetings, the internal auditor and external auditor were present and upon enquiry, confirmed the representations made about the affairs of the Company made to Directors at these meetings. The Certificate issued by the CFO and the CEO addressed to the Board of Directors, dated 21st May 2013, and the copy of the Compliance Certificate dated December 19, 2013 from the Managing Director, addressed to the Board of Directors is enclosed as annexures to the reply.

ix. *In any event as alleged in the SCN itself, the first leg of these transactions was allegedly masked as a payment made to third parties for work proposed to be done on the Evolve centers of the Company, and it was these third parties who diverted the funds to certain other parties for purchase of shares. Since our client was not a part of the day to day management of the Company, even the first leg of the transaction would not have been and indeed was not brought to the notice of our client, and our client did not have any role to play in respect of the same. The same was within the purview of the Executives and Executive Directors of the Company. Even if our client were at the relevant time, informed of the first leg of these transactions, based on such information and his limited role as an Independent Director, he would have to accept the explanation given by the Company that the same were payments made for the Evolve centers and would have no reason to suspect any wrongdoing or diversion of funds. You would appreciate that our client would not have had access to the material now available to SEBI after detailed investigation conducted in exercise of its statutory powers including banking statements which are being used by the SEBI to establish the diversions of the said funds.*

x. *Significantly in the Show Cause Notice, there is no allegation against our client that he was in any manner involved in granting of advances to third parties or in the subsequent misuse of the said advances by the third parties or was aware of and/or* *was made aware of and/or had knowledge of the alleged granting advances or misuse of funds. There is also no allegation against our client that he had advanced the ICDs to the Group Companies of BPML.*

xi. *The allegations contained in paragraph 26 of the Show Cause Notice in this regard are incorrect. At the board meeting held on 11th July 2011, it was not the Board which cited the reason of lack of response at the existing clinics nor was any such resolution passed. The minutes of the Board meeting refer to representation made by the Chairman of the Company at the said meeting. Since the representation was made by the management, there was no reason for the Noticee to disbelieve the same or suspect something amiss. It is also incorrectly alleged that the purpose of setting up 55 clinics was defeated by this resolution.*

xii. *As per the prospectus issued by BPML for the said IPO itself, the funds raised by the IPO were proposed to be used in a phase wise manner as per the tabular chart at page 27. This table shows that in the first year only a sum of Rs.23.02 crores of the IPO proceeds were to BE used and the balance proceeds were to be deployed thereafter in a phasewise manner. The Prospectus thereafter expressly provided for interim use of these proceeds. Thus it was clear that funds raised in the IPO were not to be utilized at one go. Further in terms of the prospectus, the Board was to decide the investment criteria for deployment of proceeds. As such, the board meeting on 11th July, 2011 was in line with the disclosure made in the prospectus. Thus the board never "decided to go slow on setting up of evolve centres citing not so good response at existing clinics". There was merely a representation by the Chairman of the Board who stated that the due to adverse macro-economic factors the setting up of the centers had been delayed. He thereafter proposed interim use of funds. The Board collectively resolved to deploy the funds as per the disclosures made in the IPO.*

xiii. *It is also not alleged that the Noticee could have discovered the alleged fraudulent nature of these advances. The said advances which were granted were also duly audited by the statutory auditors of BPML and no adverse findings or observations were given by the said Auditors in respect of the said advances. The Noticee also had no reason to check the credentials or the capability of the parties to whom the* *advances were made and relied upon the representations given by the management and executives of the company that these advances were given for the purposes of setting up the Evolve centers as per the objectives disclosed by the IPO. In fact, no particular contract under which an advance was placed for consideration before the Board of Directors of BPML and only general figures of advances given were disclosed in the accounts submitted to the Board of Directors. The Noticee relied upon the representation of the management and the scrutiny of the information by the Auditors of the company. In the Show Cause Notice, there is no allegation that the Noticee deliberately ignored any information which would have put him to notice about the fraudulent nature of these advances.*

xiv. *Further the utilization of proceeds as disclosed in the annual report itself shows that the funds of Rs. 43.14 crores were in fact used for the objects of the IPO, and in fact in line with the schedule of implementation in the prospectus as reproduced above which contemplated that by 2012-13, Rs. 39. 35 crores would be utilized. This also belies that the decision taken on 11th July, 201 1 permitted the BPML to go slow on setting up the evolve centers since funds were in fact used by the company for objects of the IPO in line with the implementation schedule disclosed in the prospectus*

xv. *It is not the SEBl's case that the details of these advances including the identity of the parties to whom the advances were made, were disclosed to Board of Directors or discussed at any meeting of the board of Directors in which the Noticee was present*

xvi. *Our client also had no linkage with any of the other parties named in the SCN to whom the IPO proceeds were routed for indirectly investing in the shares of the Company. No such linkage has been alleged at any point of time, Thus, even if the allegations are assumed to be correct, it would be apparent that the person who were allegedly involved in these alleged fraudulent transactions had deliberately designed the transactions in such a manner to even mislead Independent Directors like our client who were not involved in the transaction and the day to day working of the Company. If the allegations made by SEBI are found to be correct, our client would himself be a victim of a fraud perpetrated by others.*

xvii. *As reflected in the Minutes of the Meeting dated July 11, 2011 itself, the decision in respect of investments of the surplus proceeds was in fact, in line with the prospectus issued by the Company and based on the advice given by the Promoter/Chairman of the Company in respect of the challenging business circumstances being faced by the Company. In the said Board meeting, the Board did not permit misutilization of funds in any manner whatsoever including for indirectly purchasing shares of the company.*

xviii. *It is also not understood as to how from the minutes of the meeting held on 11th July, 2011 has SEBI drawn the conclusion that the Company did not plan to utilize the money as per the disclosures made in the prospectus or that it had played a fraud on the IPO subscribers. As noted by the SEBI itself, this resolution was passed four days after listing of the Company securities and the subsequent fact that the Company did not open any Evolve clinics or IVF centers cannot in any manner indicate that the Company had intended on 11th July, 2011 to misuse the said funds. In any event no such intention was disclosed to the Board of Directors.*

xix. *As regard the Investment of IPO proceeds as ICDs with group companies, the disclosure in the prospectus itself uses the term "including" while describing the interest or dividend bearing liquid instruments in which the IPO proceeds could be temporarily invested. It is a settled rule of interpretation that the use of the term "including' is a very wide term which takes into its ambit all such instruments. The instruments which are described in the said disclosure would cover ICDs inter alia under the term "Other fixed and variable return instruments".*

xx. *Further, it was also proposed by the Promoter/Chairman that the ICDs were to be deployed to the group companies of the said Company, as far as our client recalls, it was communicated to the Board that the fact that the amounts were to be temporarily parked in group companies was an assurances that these investments would be secured and made available to the Company at short notice and at arm's length terms, which is that interest would be charged at the rate of 15% per annum, which ensured that the transaction was for the benefit of the Company.*

xxi. *Further, no fault can be attributed to our client for non-repayment of the said funds by the group companies. The mere fact that the group companies to whom ICDs* *were issued later defaulted in repayment does not render the entire decision illegal from inception. The decision was taken relying on the Chairman's representations viz. the ICDs were to be placed on interest of 15% which was comparable to the market rates for such instruments and further it was expressly provided that the same would be provided to group companies and that too repayable on demand within 7 days. The Yashovardhan Birla Group was at that time a bona fide industrial group with a great reputation. There was no material available to the Noticee that the group companies would default in their obligation or would not be in position to repay the same. Further it is admitted position that Rs. 13.01 Crores worth of ICDs have been repaid. In these circumstances it cannot be alleged that the decision to invest IPO proceeds in ICDs were not bona fide or were fraudulent. 35. Even otherwise there was no identification of the group companies in the said minutes of the meeting. That decision was delegated by the board to Managing Executive Directors identified in the said minutes.*

xxii. *Without prejudice to the aforesaid, our client submits that from the investigation Report furnished by the SEBI and in particular, the flow chart annexed thereto at page 24, it can be seen that the funds advanced by the company as ICDs have not been used in any manner to buy any securities of the Company from the stock market or to otherwise distort the price of the shares.*

xxiii. *No penalty proceedings can be or ought to be initiated against an erstwhile Independent Director or in respect of transactions/acts or transgressions allegedly committed by the Company and/or any of its employees and/or third parties when it is not even the case as encapsulated in the SCN that such transactions/transgressions have been brought to our client's notice and/or he was a party to the same.*

xxiv. *Our client cannot also be held vicariously liable for the acts of the Company and/or its other executives.*

xxv. *Our client trusted Mr. Abhijit Desai and/or other Directors, the Promoter/Chairman and executives and believed the same to be true and correct based on the guidance of the professionals advising the Board.*

xxvi. our client respectfully submits that no case whatsoever is made out against our client for breach of any provisions of the PFIJTP Regulations including the prohibitions provided under regulations 3 and 4.

xxvii. Our client is astonished and shocked that such sweeping allegations have been made against our client without there being any foundation in the SCN to even demonstrate as to how our client is responsible for contravention of these provisions. You will appreciate that these provisions primarily deal with wrongful or fraudulent acts committed in trading of securities or in course thereof. Our client has not traded in the securities of the said company and there is no observation to that effect even in the show cause notice.

xxviii. In light of the aforesaid, our client states and submits that it is incorrect and imprudent on part of SEBI to charge our client solely on the ground that he attended the Meeting dated 11th July 2011. All other allegations are wholly baseless and misconceived, and our client denies them in toto.

xxix. it is submitted that even otherwise an independent and/or non-executive director cannot be proceeded against by the SEBI under the PFUTP Regulation particularly for bona fide decisions taken by him/her during the course of the board meetings.

xxx. The decision taken at the meeting of the board of directors of BPML is the decision of the Company and individual directors of the BPML cannot be held responsible for the same. The PFUTP regulations do not provide any vicarious liability of the directors for the acts of the Company.

xxxi. SEBI in the present case has not invoked Section 27 at all. As such it cannot contend the Noticee is vicariously liable for the acts of BPML and on this ground alone the Show Cause Notice requires to be discharged.

xxxii. In any event for assessing the vicarious liability of directors for acts of BPML various elements have to be established, which have been recognized in the judgments of the Supreme Court of India from time to time. Reliance is placed on the judgement of Securities and Exchange Board of India v/s Gaurav Varshney & Anr. reported in (2016) 14 SCC 430, Sunil Bharti Mittal v/s Central Bureau of Investigation, reported in (2015) 4 SCC 609 - paras 42 to 45 and Pooja Ravinder Devidasani v/s State of Maharashtra & Anr. reported in (2014) 16 SCC 1 para 6.

xxxiii. *It was submitted that Independent Directors are not liable and that an independent director is a special class of Non- Executive directors and reliance was placed on the judgment dated 10th February 2015 of the Bombay High Court in Writ Petition No. 834 of 2014, Alok Sharma & Ors v/s State of Maharashtra & Ors and the judgement in the case of Bharadwaj Thuiruvenkata Venkatavraghavan v/s Ashok Arora, reported in 2017 SCC OnLine Del 7416. It was also submitted that Non-Executive Director are not liable and reliance was placed on the judgements of a)Dovey and the Metropolitan Bank (of England and Wales), Limited v/s John Cor21y, reported in 1901 A.C. 477, b)In re Denham & Co. reported in 1883 LR 25, Ch D 752, and c)Chintalapati Srinivasa Raju v/s Securities and Exchange Board of India reported in (2018) 7 SCC 443 paras 22 to 24 and d) Decision of the SEBI dated 3rd August 2017 in the case of Amazan Capital Ltd. in respect of limited liability of independent directors.*

xxxiv. While assessing the alleged violation by the Noticee regard must also be had to the delay in issuance of the Show Cause Notice. The allegations pertain to participation of the Noticee in a meeting on 11 June 2011 for which the Show Cause Notice was issued nearly six years thereafter only in 20 April 2017. Reliance was placed on the judgement of Hon'ble SAT in HB Stockholding Ltd. v/s SEBI, reported in Manu/SB/0039/2013 at paragraphs 19 to 28.

xxxv. In considering the penalty to be applied if any regard must also be had to the provisions of Section 15J of SEBI Act, 1992.

xxxvi. Reliance was also placed on the judgement of Pritha Bag v/s Securities and Exchange Board of India (Appeal No. 291 of 2017) wherein the Hon'ble SAT while examining the provisions of Section 5 and Section 73 of the Companies Act, 2013 has held that unless and until a finding is given that a Director is an officer in default, the mandate provided in Section 73(2) cannot be invoked. There are no findings or even a single allegation that the Noticee was a Managing Director or Whole Time Director.

xxxvii. Reliance was also placed on the order dated August 26, 2021 of Hon'ble SAT in the WTM proceedings in the matter of Birla Pacific Medspa Ltd, emanating from the *same facts and investigation, and the said order further fortifies Noticees' submissions that as an Independent Director he is not liable.*

<u>Noticee 10 (Mr. Upkar Singh Kohli)</u>

33. The SCN was sent to the available address on record of Noticee 10 through Speed Post with Acknowledgement Due, however, it returned undelivered. Accordingly, the copy of the SCN was uploaded on the SEBI website under the heading "Unserved Summons / Notices". Thereafter, the SCN was again sent to the address of Noticee 10 by Hand Delivery, however, the SCN could not be delivered to the Noticee 10. Thereafter, Noticee 10 was served the SCN through newspaper publication in the following newspapers – Times of India (English), Navbharat Times (Hindi) and Maharashtra Times (Marathi) on January 08, 2019. Vide the said publication, Noticee 10 was also granted an opportunity of personal hearing before the erstwhile AO, Shri Jeevan Sonparote on February 11, 2019. However, no reply was received from Noticee 10 nor did Noticee 10 appear for the hearing. Vide email dated October 31, 2020, an opportunity of personal hearing was granted to Noticee 10 before the erstwhile AO, Shri B J Dilip on November 12, 2020 through video conference. Vide email dated November 09, 2020, Markand Gandhi & Co., acting on behalf of Noticee 10, *inter alia,* informed that the Noticee 10 was hospitalized and requested to adjourn the said hearing to November 24, 2020. Vide email dated November 20, 2020, the abovementioned authorized representatives (ARs) of Noticee 10 stated that their client was in the process of filing an appeal against Order dated October 23, 2020 passed by the Learned Whole Time Member (WTM), SEBI in the matter and hence no notice of the said order be taken in the present adjudication proceedings. It was further requested that notwithstanding the above, if SEBI is inclined to consider the findings in the aforesaid order, the portions of such order sought to be relied upon be clarified to them. The hearing in the matter was rescheduled to December 14, 2020, however the same was adjourned due to certain exigencies. Pursuant to the transfer of the

matter to the undersigned, in the interest of natural justice, an opportunity of personal hearing was granted to Noticee 10 on June 16, 2021 through video conference via CISCOWEBEX, vide letter and email dated June 04, 2021. However, vide email dated June 14, 2021, the ARs of Noticee 10 requested to adjourn the said hearing fixed on June 16, 2021. Vide letter dated June 03, 2022, another opportunity of personal hearing was granted to Noticee 9 on June 22, 2022 through video conference. Vide email dated June 21, 2022, the ARs requested for an adjournment in personal hearing. The request for adjournment in the personal hearing was acceded to and accordingly, vide email dated June 22, 2022, another opportunity for personal hearing was granted to Noticee 10 on June 28, 2022 through video conference. Vide letter dated June 15, 2022, the ARs of Noticee 10 stated that vide order dated August 26, 2021, the Hon'ble SAT had allowed their appeal against the WTM order dated October 23, 2020, and had also set aside the aforesaid WTM order. It was further requested that accordingly, the SCN in the present adjudication proceedings be discharged *qua* their client. Vide email dated June 21, 2022, the ARs of Noticee 10 requested to adjourn the hearing fixed on June 22, 2022. The request was acceded to and the hearing was rescheduled to June 28, 2022 through video conference and the same was communicated to the Notice 10 vide letter and email dated June 22, 2022. The ARs of Noticee 10 appeared for the hearing before the undersigned on June 28, 2022 and reiterated the submissions of Noticee 10 which was filed vide email dated June 28, 2022. Further, the ARs requested for time to file post hearing submissions and in this regard time till July 04, 2022 was granted. Vide letter and email dated July 04, 2022, Noticee 10 filed post hearing submissions.

34. The main contentions made by AR/ Noticee 10 are summarized in brief as follows -

i. *Our client was initially appointed to the board of Birla Pacific Medspa Limited as an additional Independent Director on 23.11.2010 and by his letter dated 8th May, 2013 resigned as the Independent Director with effect from 08.05.2013.*

ii. Our client further submits that despite our client being an Independent Director, he is being discriminated against as other persons who would be directly aware of the wrongful activities as well as responsible for the same, have been not issued with any Show Cause Notice, while our client has been singled out on the basis of mere conjuncture and surmises of wrongdoing.

iii. When our client joined the Company as an Independent Director, the Company was carrying on a bonafide business and was not an entity established for any fraudulent purpose.

iv. Our client therefore trusted the information provided by the executives and the Executive Directors of the Company. No material was ever produced to our client during his tenure as an Independent Director, which could have informed our client about any of the fraudulent actions of the Company as alleged in the SCN. SEBI has also failed to establish that any such material was provided.

v. Our client was admittedly a nonexecutive independent director of the company and he did not participate on a day to day basis or otherwise or in an executive capacity in the management and operations of the company. He has no other means of verifying or investigating the facts as SEBI has purported to do nor had he any reason to do so.

vi. The allegations in the SCN pertain to utilization of the IPO proceeds by the Company. It appears that according to SEBI, the IPO proceeds were misused by the Company by adopting 2 methods:

a. Deployment of funds received from the IPO to third parties under the guise of making payments for the business of the Company, and the diversion of these funds by the third parties to other entities, who then used these payment to purchase shares of the company.

b. Investment of IPO funds as Inter Corporate Deposits to group companies of the Company.

vii. It appears to be the case in the SCN that our client is involved in both the aforesaid activities and has violated the above provisions simply because he attended the Board Meeting dated 11th July 2011, wherein there was a discussion on the proposal of the management's decision deploying surplus IPO proceeds amounting to Rs. 33.4 Crores as Inter Corporate Deposits on a temporary basis in accordance with *disclosures made in the IPO, as represented by the Promoter/Chairman of the Company.*

viii. *Our client states that he had no knowledge whatsoever of the alleged diversion of funds by the Company for indirectly financing the purchase of shares by the Company. As far as our client recollects, no such transaction was ever brought before our client in his capacity as an Independent Director of the Company or otherwise. Our client does not admit any of the allegations made in the SCN about the said transactions, as he has no knowledge of the same. Our client also recollects that in each and every quarterly which our client attended for these meetings, the internal auditor and external auditor were present and upon enquiry, confirmed the representations made about the affairs of the Company made to Directors at these meetings. The Certificate issued by the CFO and the CEO addressed to the Board of Directors, dated 21st May 2013, and the copy of the Compliance Certificate dated December 19, 2013 from the Managing Director, addressed to the Board of Directors is enclosed as annexures to the reply.*

ix. In any event as alleged in the SCN itself, the first leg of these transactions was allegedly masked as a payment made to third parties for work proposed to be done on the Evolve centers of the Company, and it was these third parties who diverted the funds to certain other parties for purchase of shares. Since our client was not a part of the day to day management of the Company, even the first leg of the transaction would not have been and indeed was not brought to the notice of our client, and our client did not have any role to play in respect of the same. The same was within the purview of the Executives and Executive Directors of the Company. Even if our client were at the relevant time, informed of the first leg of these transactions, based on such information and his limited role as an Independent Director, he would have to accept the explanation given by the Company that the same were payments made for the Evolve centers and would have no reason to suspect any wrongdoing or diversion of funds. You would appreciate that our client would not have had access to the material now available to SEBI after detailed investigation conducted in exercise of its statutory powers including banking *statements which are being used by the SEBI to establish the diversions of the said funds.*

x. *Our client also had no linkage with any of the other parties named in the SCN to whom the IPO proceeds were routed for indirectly investing in the shares of the Company. No such linkage has been alleged at any point of time, Thus even if the allegations are assumed to be correct, it would be apparent that the person who were allegedly involved in these alleged fraudulent transactions had deliberately designed the transactions in such a manner to even mislead Independent Directors like our client who were not involved in the transaction and the day to day working of the Company. If the allegations made by SEBI are found to be correct, our client would himself be a victim of a fraud perpetrated by others.*

xi. *As reflected in the Minutes of the Meeting dated July 11, 2011 itself, the decision in respect of investments of the surplus proceeds was in fact, in line with the prospectus issued by the Company and based on the advice given by the Promoter/Chairman of the Company in respect of the challenging business circumstances being faced by the Company. In the said Board meeting, the Board did not permit misutilization of funds in any manner whatsoever including for indirectly purchasing shares of the company.*

xii. *It is also not understood as to how from the minutes of the meeting held on 11th July, 2011 has SEBI drawn the conclusion that the Company did not plan to utilize the money as per the disclosures made in the prospectus or that it had played a fraud on the IPO subscribers. As noted by the SEBI itself, this resolution was passed four days after listing of the Company securities and the subsequent fact that the Company did not open any Evolve clinics or IVF centers cannot in any manner indicate that the Company had intended on 11th July, 2011 to misuse the said funds. In any event no such intention was disclosed to the Board of Directors.*

xiii. *As regard the Investment of IPO proceeds as ICDs with group companies, the disclosure in the prospectus itself uses the term "including" while describing the interest or dividend bearing liquid instruments in which the IPO proceeds could be temporarily invested. It is a settled rule of interpretation that the use of the term "including' is a very wide term which takes into its ambit all such instruments. The* *instruments which are described in the said disclosure would cover ICDs inter alia under the term "Other fixed and variable return instruments".*

xiv. *Further, it was also proposed by the Promoter/Chairman that the ICDs were to be deployed to the group companies of the said Company, as far as our client recalls, it was communicated to the Board that the fact that the amounts were to be temporarily parked in group companies was an assurances that these investments would be secured and made available to the Company at short notice and at arm's length terms, which is that interest would be charged at the rate of 15% per annum, which ensured that the transaction was for the benefit of the Company.*

xv. *Further, no fault can be attributed to our client for non-repayment of the said funds by the group companies.*

xvi. *Without prejudice to the aforesaid, our client submits that from the investigation Report furnished by the SEBI and in particular, the flow chart annexed thereto at page 24, it can be seen that the funds advanced by the company as ICDs have not been used in any manner to buy any securities of the Company from the stock market or to otherwise distort the price of the shares.*

xvii. *No penalty proceedings can be or ought to be initiated against an erstwhile Independent Director or in respect of transactions/acts or transgressions allegedly committed by the Company and/or any of its employees and/or third parties when it is not even the case as encapsulated in the SCN that such transactions/transgressions have been brought to our client's notice and/or he was a party to the same.*

xviii. *Our client cannot also be held vicariously liable for the acts of the Company and/or its other executives.*

xix. *Our client trusted Mr. Abhijit Desai and/or other Directors, the Promoter/Chairman and executives and believed the same to be true and correct based on the guidance of the professionals advising the Board.*

xx. *our client respectfully submits that no case whatsoever is made out against our client for breach of any provisions of the PFIJTP Regulations including the prohibitions provided under regulations 3 and 4.*

xxi. *Our client is astonished and shocked that such sweeping allegations have been made against our client without there being any foundation in the SCN to even demonstrate as to how our client is responsible for contravention of these provisions. You will appreciate that these provisions primarily deal with wrongful or fraudulent acts committed in trading of securities or in course thereof. Our client has not traded in the securities of the said company and there is no observation to that effect even in the show cause notice.*

xxii. *In light of the aforesaid, our client states and submits that it is incorrect and imprudent on part of SEBI to charge our client solely on the ground that he attended the Meeting dated 11th July 2011. All other allegations are wholly baseless and misconceived, and our client denies them in toto.*

Noticee 11 (Mr. Tushar Dey)

35. The SCN was sent to the address of Noticee 11 as available on records through Speed Post with Acknowledgement Due. However, the same returned undelivered. Accordingly, the copy of the SCN was uploaded on the SEBI website under the heading "Unserved Summons / Notices". Vide letter dated November 15, 2018, the delivery of the SCN was once again attempted, however the same returned undelivered. Thereafter, Noticee 11 was served the SCN through newspaper publication in the following newspapers – Times of India (English), Navbharat Times (Hindi) and Maharashtra Times (Marathi) on January 11, 2019. Vide the said publication, Noticee 11 was also granted an opportunity of personal hearing before the erstwhile AO, Shri Jeevan Sonparote on February 11, 2019. However, no reply was received from Noticee 11 nor did Noticee 11 appear for the hearing. Subsequently, vide email dated October 31, 2020, Noticee 11 was granted an opportunity of personal hearing before the erstwhile AO, Shri B J Dilip on November 12, 2020. Vide the said email, Noticee 11 was also granted opportunity to make submissions in the matter. However, the said hearing was not attended by Noticee 11 nor did Noticee 11 submit any reply to the SCN. Pursuant to the appointment of the undersigned as the AO, vide hearing Notice

dated June 08, 2021, Noticee 11 was granted an opportunity of personal hearing on June 17, 2021 and Noticee 11 was also granted opportunity to file reply to the SCN. The said Hearing Notice was served through Speed Post at the following address of Noticee 11 - B-106, 2nd Floor Rosewood City, Sector 49 South City II, Gurgaon-122018 and also through email at Noticee 11's following email id - tushardey@rediffmail.com. The said hearing was attended by one Mr. Ishaan Mukherjee, however no authorization in this regard had been received from Noticee 11. Vide Hearing Notice dated June 03, 2022, Noticee 11 was granted another opportunity of personal hearing on June 22, 2022. Vide the said Hearing Notice, Noticee 11 was also granted opportunity to submit reply to the SCN on or before the hearing date. Further, for reference, a copy of the SCN and the annexures were also enclosed with the said Hearing Notice. The said Hearing Notice was served on Noticee 11's aforementioned address through Speed Post as well as through Digitally Signed Email at the following email ids - tushardey@rediffmail.com and tushardey@yashbirla.com. However, no reply was received from Noticee 11 nor did Noticee 11 appear for the hearing. Vide Hearing Notice dated June 24, 2022, Noticee 11 was granted a final opportunity of hearing on July 05, 2022, and also granted opportunity to submit reply to the SCN on or before the hearing date. Vide email dated July 05, 2022, Mr. Ishaan Mukherjee, advocate stated that he had been appointed by Noticee 11 to appear on his behalf in the captioned matter and also enclosed the vakalatnama in the email. In the said email, Noticee 11's email id - tushardey@rediffmail.com was also marked in cc. The aforesaid authorized representative (AR) of Noticee 11 appeared in the hearing on July 05, 2022 and made oral submissions, and further requested time of one day i.e. till July 06, 2022 to file written submissions, which was acceded to. Hearing proceedings were thus concluded and Noticee 11 sought no further hearing in the matter. Vide email dated July 05, 2022, the AR of Noticee 11 acknowledged the minutes of the hearing and stated that they would file the written submissions on the next day with supporting affidavit. However, no subsequent reply was received from Noticee 11 till the date of this order.

36. I note that Noticees 1 and 4 have not submitted their reply to the SCN nor have availed the opportunities of personal hearing provided to them. Considering the above, I am of the view that in terms of Rule 4(7) of the SEBI AO Rules and Rule 4(7) of the SCR AO Rules, the matter can be proceeded ex-parte on the basis of material available on record. In absence of any response from the said Noticees to the SCN, I presume that that they have admitted the charges levelled against them. In this regard, it is pertinent to note that the Hon'ble Securities Appellate Tribunal (**SAT)** in the matter of *Classic Credit Ltd. vs. SEBI* (Appeal No. 68 of 2003 decided on December 08, 2006) has, inter alia, held that,

> *"......the appellants did not file any reply to the second show-cause notice. This being so, it has to be presumed that the charges alleged against them in the show cause notice were admitted by them".*

37. Further, the Hon'ble SAT in the matter of *Sanjay Kumar Tayal & Others vs SEBI* (Appeal No. 68 of 2013 decided on February 11, 2014), has also, inter alia, held that:

> *"...appellants have neither filed reply to show cause notices issued to them nor availed opportunity of personal hearing offered to them in the adjudication proceedings and, therefore, appellants are presumed to have admitted charges leveled against them in the show cause notices..."*

38. Further, the same position is reiterated by the Hon'ble SAT in the matter of *Dave Harihar Kirtibhai Vs SEBI* (Appeal No. 181 of 214 dated December 19, 2014), wherein the Hon'ble SAT held as under:

> *"...further, it is being increasingly observed by the Tribunal that many persons/entities do not appear before SEBI (Respondent) to submit reply to SCN or, even worse, do not accept notices/letters of Respondent and when orders are passed ex-parte by Respondent, appear before Tribunal in appeal and claim non-receipt of notice and do not appear and/or submit reply to SCN but claim violation of principles of natural justice due to not being provided opportunity to reply to*

SCN or not provided personal hearing. This leads to unnecessary and avoidable loss of time and resources on part of all concerned and should be eschewed, to say the least. Hence, this case is being decided on basis of material before this Tribunal..."

39. As mentioned above, in the absence of any response from the Noticees 1 and 4 to the SCN, the matter can be proceeded ex-parte on the basis of the material available on record, in terms of Rule 4(7) of the SEBI AO Rules and Rule 4(7) of the SCR AO Rules. In the facts and circumstances of the case, I find no reason to take a different view from the aforesaid judgements of the Hon'ble SAT and therefore, I deem it appropriate to proceed against them ex-parte, based on the material available on record.

CONSIDERATION OF ISSUES AND FINDINGS

40. I have carefully examined the facts and circumstances of the case, the material available on record, and the submissions made by the Noticees, as enumerated in the preceding paragraphs. The issues that arise for consideration in the present case are :

Issue I) **a)** Whether Noticees 1 and 3 have violated the provisions of Regulation 3(a), (b), (c), (d), 4(1), 4(2)(a), (d) and (e) of the PFUTP Regulations read with Section 12A(a), (b) and (c) of the SEBI Act and whether Noticee 1 has violated the provisions of Section 77 of Companies Act, 1956?

b) Whether Noticees 1 to 11 have violated the provisions of Regulation 3 (a), (b), (c), (d), 4(1) ,4 (2) (e), (f) and (k) of the PFUTP Regulations read with Section 12A(a), (b) & (c) of the SEBI Act?

c) Whether Noticee 1 has violated the provisions of Section 11C (2) and (3) of SEBI Act?

d) Whether Noticees 1, 3 and 4 have violated the provisions of Clause 43 of the listing Agreement read with Section 21 of the SCRA?

e) Whether Noticees 1 and 3 have violated the provisions of Clause 43A of the Listing Agreement read with Section 21 of the SCRA?

Issue II) Do the violation(s), if established, attract monetary penalty under Section 15A(a) and 15HA of SEBI Act and Section 23A(a) and 23E of SCRA?

Issue III) If so, what would be the quantum of monetary penalty that can be imposed on the Noticees after taking into consideration the factors mentioned in Section 15J of the SEBI Act and Section 23J of SCRA?

FINDINGS

41. Before I proceed with the matter, it is pertinent to mention the relevant legal provisions alleged to have been violated by the Noticees and the same is reproduced below:

SEBI Act, 1992:

***Investigation**.*

11C. (2) Without prejudice to the provisions of Sections 235 to 241 of the Companies Act, 1956 (I of 1956), it shall be the duty of every manager, managing director, officer and other employee of the company and every intermediary referred to in Section 12 or every person associated with the securities market to preserve and to produce to the Investigating Authority or any person authorized by it in this behalf, all the books, registers, other documents, or record of, or relating to, the company or, as the case may be, of or relating to, the intermediary or such person, which are in their custody or power.

(3) The Investigating Authority may require any intermediary or any other person associated with securities market in any manner to furnish such information to, or produce such books, or registers, or other documents, or record before him or any person authorized by it in this behalf as it may consider necessary if the furnishing of such information or the production of such books, or registers, or

other documents, or records is relevant or necessary for the purpose of its investigation.

Prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control.

12A. No person shall directly or indirectly –

- *(a) use or employ, in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations made thereunder;*
- *(b) employ any device, scheme or artifice to defraud in connection with issue or dealing in securities which are listed or proposed to be listed on a recognised stock exchange;*
- *(c) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognised stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder;"*

PFUTP Regulations, 2003:

Regulation 3: Prohibition of certain dealings in securities

No person shall directly or indirectly—

(a) buy, sell or otherwise deal in securities in a fraudulent manner;

(b) use or employ, in connection with issue, purchase or sale of any security listed or proposed to be listed in a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of the Act or the rules or the regulations made thereunder;

(c) *employ any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange.*

(d) *engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made thereunder.*

Regulation 4: Prohibition of manipulative, fraudulent and unfair trade practices

(1) *Without prejudice to the provisions of regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities.*

(2) *Dealing in securities shall be deemed to be a fraudulent or an unfair trade practice if it involves fraud and may include all or any of the following, namely :—*

(a) indulging in an act which creates false or misleading appearance of trading in the securities market;

…

(d) paying, offering or agreeing to pay or offer, directly or indirectly, to any person any money or money's worth for inducing such person for dealing in any security with the object of inflating, depressing, maintaining or causing fluctuation in the price of such security;

…

(e) Any act or omission amounting to manipulation of the price of the security;

(f) Publishing or causing to publish or reporting or causing to report by a person dealing in securities any information which is not true or which he does not believe to be true prior to or in the course of dealing in securities;

…

(k) An advertisement which is misleading or that contains information in a distorted manner and which may influence the decision of the investors;

<u>Companies Act, 1956</u>:

77. Restrictions on purchase by company or loans by company for purchase, of its own or its holding company's shares.

…

(2) No public company, and no private company which is a subsidiary of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company: Provided that nothing in this subsection shall be taken to prohibit-

(a) the lending of money by a banking company in the ordinary course of its business; or

(b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of, or subscription for, fully paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company, including any director holding a salaried office or employment in the company; or

(c) the making by a company of loans, within the limit laid down in subsection (3), to persons (other than directors, managing agents, secretaries and treasurers or managers) bona fide in the employment of the company with a view to enabling those persons to purchase or subscribe for fully paid shares in the company or its holding company to be held by themselves by way of beneficial ownership

..

Listing Agreement:

43.(a) The company agrees that it will furnish on a quarterly basis a statement to the Exchange indicating the variations between projected utilization of funds and / or projected profitability statement made by it in its prospectus or letter of offer or object/s stated in the explanatory statement to the notice for the general meeting for considering preferential issue of securities, and the actual utilization of funds and / or actual profitability.

(b) The statement referred in clause (1) shall be given for each of the years for which projections are provided in the prospectus/ letter of offer/ object/s stated in the explanatory statement to the notice for considering preferential issue of securities or shall be published in newspapers simultaneously with the unaudited / audited financial results as required under clause 41.

(c) If there are material variations between the projections and the actual utilization / profitability, the company shall furnish an explanation therefore in the advertisement and shall also provide the same in the Directors' Report.

(d) The statement referred to in clause (a) shall also be given for warrants issued along with public or rights issue of specified securities.

Statement of deviation in use of issue proceeds.

43A. (1) The company agrees to furnish to the stock exchange on quarterly basis, a statement indicating material deviations, if any, in the use of proceeds of a public or rights issue from the objects stated in the offer document.

(2) Where the company has appointed a monitoring agency to monitor utilization of proceeds of a public or rights issue and such monitoring agency has pointed out any deviation in the use of the proceeds of the issue from the objects stated in the offer document or has given any other reservations about the end use of funds, the company agrees to intimate the same to the stock exchange, without any delay.

(3) The information mentioned in sub-clause (1) shall be furnished to the stock exchange along with the interim and annual financial results submitted under clause 41 and shall be published in the newspapers simultaneously with the interim and annual financial results, after placing it before the Audit Committee in terms of clause 49.

(4) The information mentioned in sub-clause (2) shall, after review by the Audit Committee, be furnished to the stock exchange as and when received and shall simultaneously be published in the newspapers.

(5) The statement referred to in clause (1) shall also be given for warrants issued along with public or rights issue of specified securities.

<u>Relevant provisions of the SCRA</u>:

Conditions of listing.

21. Where securities are listed on the application of any person in any recognized stock exchange, such person shall comply with the conditions of the listing agreement with that stock exchange.

42. Before moving forward, I note that Noticees have raised a preliminary objection regarding delay in the matter and have contended that the SCN was issued only in the year 2017 after a delay of several years. I note that investigation generally is a detailed process involving analysis of various data, gathering of evidences, etc that shall stand the test of legal scrutiny at various judicial fora and consumes considerable time and effort depending on the number of entities involved, the complexity of the transactions, correspondences with the entities involved etc. In the present case, I note that investigation was initiated by SEBI in April 2012 and it involved examining the following: 1) IPO bidding and Allotment Analysis, 2) Trading Price-Volume Analysis, 3) Broker and Client Concentration Analysis, 4) Analysis for Synchronized trades and Self-trades, 5) LTP, First Trades, Circular or Reversal trade Analysis, 6) Listing Day Trading Analysis and 7) Utilization of IPO Proceeds and Fund Flow Analysis. In order to carry

out the aforesaid tranches of investigation, the following activities were involved: 1) Examination of trades of various entities, 2) collecting data from various sources such as exchanges, depositories, banks, etc. 3) Examination of funds flows, 4) Seeking responses from various delinquent entities, etc. and thereafter, various dots were connected to get the complete picture and thus, after due examination of the aforesaid aspects, investigation was concluded on January 12, 2016. I note that in the instant case, investigation was hampered intermittently sometime in August 2014 when BPML stopped responding to request for information from SEBI, for which adjudication proceedings for non-compliance of summons have also been initiated by SEBI against BPML. After conclusion of investigation, SCN dated April 20, 2017 was issued and served upon 35 entities in the matter which includes the 11 Noticees named in this order and 24 other entities. Further, in the interest of natural justice, the Noticees were provided sufficient opportunities for inspection of documents, to make their submissions and also to avail of hearing in the instant proceeding which has been elaborated in the previous paragraphs. Therefore, I find that there was no inordinate delay in the issuance of SCN as claimed by the Noticees. I note that a similar issue had also came up for consideration before the Hon'ble SAT in the matter of *Rajendra Aggarwal vs. SEBI* (Appeal No 552/2019-DoD –17.09.2021) and while rejecting the said contention, following has been held by the Hon'ble SAT:

> *"On issue of delay, we find that the show cause notice was issued in the year 2013 and the trades were executed in 2009. The investigation was against a large number of entities which apparently took time and ultimately notices were issued to 35 entities. Consequently, we do not find any inordinate delay in the issuance of the show cause notice.................."*

43. Similarly, in the instant matter also, only after the receipt of the information from the stock exchanges, and after analyzing the data collected in the course of investigation, SCN was issued after following the due process. In this regard, I would like to rely upon

the judgement of Hon'ble SAT in the case of *Ravi Mohan & Ors. vs. SEBI* (SAT Appeal No. 97 of 2014, DoD 16/12/2015) wherein it was held that : -

> *"....................Based on decision of this Tribunal in case of HB Stockholdings Ltd. vs. SEBI (Appeal no.114 of 2012 decided on 27.08.2013) it is contended on behalf of the appellants that in view of the delay of more than 8 years in issuing the show cause notice, the impugned order is liable to be quashed and set aside. There is no merit in this contention, because, this Tribunal while setting aside the decision of SEBI on merits has clearly held in para 20 of the order, that delay itself may not be fatal in each and every case. Moreover, the Apex Court in case of Collector of Central Excise, New Delhi vs. Bhagsons Paint Industry (India) reported in 2003 (158) ELT 129 (S.C) has held that if there no statutory bar for adjudicating the matter beyond a particular date, the Tribunal cannot set aside the adjudication order merely on the ground that the adjudication order is passed after a lapse of several years from the date of issuing notice.................."*

44. Considering the foregoing and placing reliance on the aforesaid judgements of the Hon'ble SAT, I am of the view that there has been no unreasonable delay by SEBI in initiating action in the present matter, contrary to the claim made by these Noticees.

45. Having dealt with the preliminary issue raised by the Noticees, I now proceed to deal with the matter on merits.

Issue I

a) Whether Noticees 1 and 3 have violated the provisions of Regulation 3(a), (b), (c), (d), 4(1), 4(2)(a), (d) and (e) of the PFUTP Regulations read with Section 12A(a), (b) and (c) of the SEBI Act and whether Noticee 1 has violated the provisions of Section 77 of Companies Act, 1956?

46. I note that the findings of the investigation as narrated in the SCN can broadly be summarized on the following three fronts:

a. IPO proceeds worth Rs. 14 Crores[1] were diverted and mis-utilized by BPML, to support the price of its own shares on the listing day. The proceeds were channeled through two layers of entities.

b. IPO proceeds worth about 33.4 Crores were disbursed to certain entities under the pretext of advances towards work contracts for IPO objectives, but in fact, no substantial work contracts were executed, rather the funds disbursed remained unreturned to BPML and thus it is alleged that the said proceeds were mis utilized and siphoned off.

c. Proceeds of IPO worth about Rs. 31 Crores were disbursed to group companies as Inter-Corporate Deposits (**ICDs**) which was in stark contrast to the objects of IPO or the interim use of funds as stated in the Prospectus. The Prospectus permitted interim deployment of proceeds as investment in liquid instruments only and did not permit such deployment of funds as ICDs. Thus, it is alleged that the act of approving the deployment of funds as ICDs in the board meeting dated July 11, 2011, amounted to mis-statement in Prospectus and diversion and misutilization of IPO proceeds. Further, out of Rs. 31.54 crore invested in the ICDs of group companies, an amount of Rs. 13.01 crore was not repaid by the group companies to BPML. Also interest on ICDs amounting to Rs. 6.39 crore remained unpaid by the group companies to BPML.

47. I note that in the context of the present adjudication proceedings, the Noticees have been charged with respect to violations emanating from the issues mentioned at para 46 (a) and (b) above. However, no charge has been made against the Noticees w.r.t the issue mentioned at para 46 (c) in the SCN issued for the present adjudication proceedings. Accordingly, the alleged violations, if any, with regards to the misutilization of the IPO proceeds through investments in ICDs of group companies as stated at para 46(c) is not being dealt with in this order.

[1] Rs. 14 crore were received back by BPML.

48. From the facts of the present case, I note that as part of its IPO, BPML had issued 6,51,75,000 equity shares of Rs. 10/- each at a price of Rs. 10/- per equity share, resulting into aggregate issue size of Rs. 65.17 crores through 100% book building. The issue constituted 58.12% of the post issue paid-up capital of BPML. The BPML issue was graded by M/s Brickworks Ratings India Pvt Ltd and was assigned "**BWR IPO Grade 2**" indicating "**below average fundamentals**".

49. The issue opened on June 20, 2011 and closed on June 23, 2011 and was subscribed 1.18 times. The category wise bidding details are as under:

Particulars	**Subscription ratio**	**Applied Qty**	**No. of applicants**	**Allotted Qty**	**% to Total Allotted Qty**	**No. of allottees**
Non Institutional Investors	1.00	16,14,000	5	16,14,000	2.48%	5
Qualified Institutional Buyers	1.00	3,38,12,000	5	3,38,12,000	51.88%	5
Retail Individual Investors	1.39	4,14,41,000	3,249	2,97,50,366	45.65%	2,966
Overall subscription	**1.18**	**7,68,67,000**	**3,259**	**6,51,76,366**	**100.00%**	**2,976**

50. The scrip of BPML got listed on BSE on July 07, 2011. Investigation revealed that the price of the scrip had seen sharp volatility on listing day, closing at Rs. 25.35 i.e.154% more than issue price of Rs. 10 per share. The Price-Volume data of the scrip on BSE for the period during and after the Investigation Period is given below:

Period	**Dates**	**Opening Price on first day of the period (Rs.)**	**Closing price on last day of the period (Rs.)**	**Low price during the period (Rs.)**	**High Price during the period (Rs.)**	**Weighted Average price in the period (Rs.)**	**Avg. no. of shares traded during the period**
During Investigation Period	July 07, 2011 – July 15, 2011	10.1	15.75	10.1	30.7	18.09	2,40,59,598
After Investigation Period	July 18, 2011 – Aug 17, 2011	15.65	19.9	14.2	21.4	18.73	23,83,417

51. The trading volume during the Investigation Period was very high as compared to the trading volume after the Investigation Period. This was due to the high listing day volume of 13,58,59,684 shares registered on July 07, 2011. On the first day of Investigation Period, the scrip price opened at Rs. 10.1 (near the face value) and closed at Rs. 15.75 at the end of Investigation Period.

52. I note that on the listing day (July 07, 2011), 2205 out of the 2966 retail allottees had sold their shares (2,49,81,435 shares in total). All the 5 High Networth Individuals (**HNI**) clients had sold all of their shares (16,14,000 shares). 2 of the Qualified Institutional Buyers (**QIB**s) had also sold shares (10,90,500 shares) on the listing day. During the investigation, the counterparties to these retail clients were analyzed and the same was compared with the net buyers and loss makers on the listing day. Following are the tabular details of the analysis:

Net buyers/loss makers on listing day/Counterparties to IPO allottees' sell trades:

Client Name	Gross Buy	Gross Sell	Net Qty.	Total Buy Qty. from the Allottee	Number of Alottees
Vikabh Securities Pvt Ltd	5849568	500000	53,49,568	19,40,834	150
V P Patel	1,63,08,562	1,10,13,467	52,95,095	63,39,818	537
Marutinandan Infosolutions Pvt Ltd	22,57,755	0	22,57,755	14,76,997	112
Orbit Financial Consultants Pvt Ltd	17,01,001	1,000	17,00,001	10,65,908	91
Gateway Financial Services Ltd	16,35,752	35,752	16,00,000	14,68,967	127
Jalan Cement Works Ltd	16,00,000	0	16,00,000	14,10,159	120
Rupak Trading Pvt Ltd	11,52,486	0	11,52,486	8,82,628	71
Saumil Bhavnagari Lopa	21,68,860	11,35,000	10,33,860	10,83,693	78
Man Mohan Damani	10,00,000	0	10,00,000	69,464	3
Pradeep Kumar Saraogi	10,00,000	0	10,00,000	7,11,304	68
Total				1,64,49,772	1,357

53. I note from the bank statements that BPML had transferred Rs. 7 Crore each to entities named Sanjukta Vanijya Pvt Ltd ('**Sanjukta Vanijya**') and Darshan Tradelink Pvt Ltd ('**Darshan Tradelink**') on July 06, 2011 as pass-through entities from IPO proceeds, which were then advanced to net buyers on listing day namely Jalan Cement Works Ltd (Rs.3 Cr) ('**Jalan Cement**'), Marutinandan Infosolutions Pvt Ltd (Rs. 2.29 Cr) ('**Marutinandan**'), Orbit Financial Consultants Pvt Ltd (Rs. 2 Cr) ('**Orbit**'), Rupak Trading Pvt Ltd (Rs. 2.29 Cr) ('**Rupak Trading**'). Together, these four entities paid Rs. 12.52 Cr on July 07, 2011 to their broker GRD Securities towards pay-in obligation. The Summary of the aforesaid fund flow is presented below:

All numbers in Rs.

Client Name	Gross Buy Value	Funds Received from Sanjukta Vanijya	Funds Received from Darshan Tradelink	Funds transferred to GRD Securities
Jalan Cement	2,12,85,000	1,00,00,000	2,00,00,000	3,00,00,000
Marutinandan	3,21,01,843	2,29,00,000	0	2,29,00,000
Orbit	2,38,32,675	0	2,00,00,000	2,00,00,000
Rupak Trading	1,56,91,075	2,19,00,000	3,00,00,000	5,23,00,000
Total	**9,29,10,593**	**5,48,00,000**	**7,00,00,000**	**12,52,00,000**

54. The above mentioned four net buyers after receiving funds from the proceeds of the IPO from BPML, acquired a net of 67,11,242 shares (value of approx. Rs. 9.29 crores) which accounted for 21.56% of the total delivered quantity of 3,11,08,577 shares on July 07, 2011 and 10.3% of the issue size. Further, they took delivery of 99.98% of their total buy volume as against market average of 22.90% on the listing day. On the day of listing, the price of the scrip of BPML increased and it closed at Rs. 25.35.

55. Perusal of the bank statements of Sanjukta Vanijya and Darshan Tradelink show that prior to receipt of the funds from BPML on July 06, 2011, there was insufficient balance in their accounts. I note that Sanjukta Vanijya and Darshan Tradelink had balances of

Rs 0.10 lacs and Rs. 1.94 lacs respectively prior to receipt of funds from BPML. On July 06, 2011, funds amounting to Rs 7 cr were transferred into each of these accounts from BPML which were then transferred out to the four net buyers viz. Jalan Cement, Rupak Trading, Orbit, and Marutinandan. Thus, it is evident that the funds advanced by Sanjukta Vanijya and Darshan Tradelink to Jalan Cement, Rupak Trading, Orbit, and Marutinandan were not their own funds or funds from other sources, but were rather the funds (Rs. 14 crores) received from BPML out of BPML's IPO proceeds. Similarly, prior to receipt of funds from Sanjukta Vanijya and Darshan Tradelink on 06/07/2011 and 07/07/2011, the four net buyers viz. Jalan Cement, Rupak Trading, Orbit, and Marutinandan had balances of Rs. 0.44 lacs, Rs. 4.52 lacs, Rs. 0.09 lacs and Rs. 0.11 lacs respectively in their bank accounts. It is therefore clear that the funds paid by the above four net buyers to their broker towards their pay-in obligations was actually from the funds received from BPML's IPO proceeds through the pass-through entities viz. Sanjukta Vanijya and Darshan Tradelink.

56. As already noted in previous paragraphs, the major chunk of the retail allottees were seen to have been exiting / disposing of their allotted shares on the day of the listing day itself i.e. 2205 out of 2966 investors sold off 2,49,81,435 shares out of the total allotted 2,97,50,366 shares which is 83.97% of the total allotted quantity in the retail segment. As noted previously, the IPO had been graded as "IPO Grade 2" / "below average fundamentals" by the rating agency. In violation of the principles of fair market where the price of a scrip is to be decided on the demand and supply, the above buyer entities, namely, Jalan Cement, Rupak Trading, Orbit, and Marutinandan were the artificial buyers of shares of BPML who were financed by BPML. The counterparties to the purchase of shares by these four entities included the retail allottees and some Non-Institutional Investors (NIIs). Thus, I find that by indulging in such an act with the funds provided by BPML, these aforesaid four entities distorted the market equilibrium of trading. I thus find that a part the proceeds of the IPO was diverted by BPML and

out of these funds, an amount to the extent of Rs. 9.29 crore was used for operations in the equity market.

57. Thus, I find that BPML routed part of the funds of IPO to the above said four entities who eventually traded in the scrip with the help of these funds received from BPML for providing buying support in violation of the principles of fair market principle. Therefore, I am of the view that aforesaid the act of BPML of diverting the IPO proceeds for the purpose of purchase of its own shares is fraudulent. These trades acted as a fraud on investors by creating a misleading appearance of trading of the scrip in the securities market, by supporting the demand (buy) and therefore, the price of the scrip. In view of the above, I hold that the allegation against BPML and Dr. Abhijit Desai, i.e., Noticee 3, who was its Managing Director at the relevant time, that they have violated the provisions of Regulation 3(a), (b), (c), (d), 4(1), 4(2)(a), (d) and (e) of the PFUTP Regulations read with Section 12A(a), (b) and (c) of the SEBI Act stands established.

58. Considering the above findings, I also find that by providing money out of the IPO proceeds to the above entities (i.e. Jalan Cement, Marutinandan, Orbit and Rupak Trading) which they used to buy the shares of BPML, BPML had facilitated purchase of its own securities out of the IPO proceeds. As per Section 77(2) of the Companies Act, 1956, "*No public company, and no private company which is a subsidiary of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company*". Therefore, I find that the aforesaid acts of BPML are in violation of the provisions of Section 77(2) of Companies Act, 1956.

Issue I

b) Whether Noticees 1 to 11 have violated the provisions of Regulation 3 (a), (b), (c), (d), 4(1) ,4 (2) (e), (f) and (k) of the PFUTP Regulations read with Section 12A(a), (b) & (c) of the SEBI Act?

Utilization of IPO proceeds and Fund Flow Analysis

59. From the facts of the present case, I note that BPML came out with offer documents namely, Red Herring Prospectus dated March 18, 2011 and Prospectus dated June 29, 2011 (hereinafter collectively referred to as '**Prospectus**') at the time of its initial public offer. The objects of the issue and funds required for the same as disclosed in the prospectus were as under:

a) To meet capital expenditure towards establishing 55 outlets of Evolve Medspa across various cities and places;
b) To meet expenses towards brand promotion;
c) To meet the working capital requirements for running the above centres;
d) To meet Issue related expenses;
e) To enlist Company's Shares on Bombay Stock Exchange Limited (BSE).

60. The break-up of the fund requirement as depicted in the Prospectus is as under:

Sr. No.	Particulars	Amount (in Rs. Crore)
1	Capital Expenditure for Setting up 55 Evolve centers across the country (Rs. 0.9 crore each for one clinic)	49.50
2	Working Capital Requirements	0.70
3	Brand Promotion	6.00
4	Issue Expenses	6.50
5	Contingencies	1.23
6	Preliminary and preoperative expenses	1.23
	Total	**65.17**

61. It was disclosed in the Prospectus that BPML operated healthcare centers under the brand name EVOLVE.

62. I note that the schedule of implementation of BPML as disclosed in the Prospectus (page 27 of Prospectus) mentioned that 15, 15 and 25 centers would be completed during financial years (FY) 2011-12, 2012-13 and 2013-14 respectively. However, I note from the records, that no such clinic was opened and this fact has not been disputed by any of the Noticees. Therefore, I conclude that BPML had failed to utilize the IPO proceeds as per the objects of the issue stated in the Prospectus.

63. On perusal of the bank statements placed on record, I note that BPML received Rs. 64,17,63,660.00 (Rs. 64.17 crores) in its bank a/c (Yes Bank, Nariman Pt Mumbai – A/c No. 4840000358384) as IPO proceeds on July 06, 2011. Out of these IPO funds in the aforesaid Yes Bank a/c, on July 6 and July 7, 2011, funds worth Rs. 34.91 Crores were transferred by BPML to various entities, namely, Laxmi Trading Co, N P Enterprise, New Fashion, K V Impex, J C Enterprise, Vora Associates, Subhshree Hirise Pvt Ltd, Sanjukta Vanijya, Darshan Tradelink, Skylight Distributors Pvt Ltd. The details of the 1st layer transfers are given in following table:

1st Layer Fund flow out of IPO proceeds from BPML's Yes Bank a/c No. 4840000358384			
Date	**From(Name)**	**To(Name) -1st layer**	**Sum of Amt (Rs. crore)**
July 06, 2011	BPML's Yes Bank a/c No. 4840000358384	Darshan Tradelink	7.00
July 06, 2011		J C Enterprise	2.00
July 06, 2011		K V Impex	2.50
July 06, 2011		Laxmi Trading Co.	3.00
July 06, 2011		N P Enterprise	3.00
July 06, 2011		New Fashion	3.00
July 06, 2011		Sanjukta Vanijya	7.00
July 06, 2011		Skylight Distributors	1.00
July 06, 2011		Subhshree Hirise	1.00
July 06, 2011		Vora Associates	2.16
July 07, 2011		Birla Power	1.50
July 07, 2011		N P Enterprise	0.61
July 07, 2011		New Fashion	0.62
July 07, 2011		Vora Associates	0.53
Total			**34.91**

64. I note that these funds from above mentioned accounts in 1st layer were again transferred to other entities as given in the table hereunder:

Date	From(Name)	To(Name)	Sum of Amt (Rs. crore)
July 07, 2011	Darshan Tradelink	Jalan Cement Works	2.00
		Orbit Financial Consultants	2.00
		Rupak Trading Pvt Ltd	3.00
			7.00
July 06, 2011	J C Enterprise	Jaya Enterprise	0.30
		Kaveri Enterprise	1.40
		Max Enterprise	0.30
			2.00
July 06, 2011	Laxmi Trading Co	Charm Enterprises	0.80
		Kaveri Enterprise	1.60
July 07, 2011	Laxmi Trading Co	Muskan Trading Co	0.60
			3.00
July 06, 2011	N P Enterprise	Charm Enterprises	0.80
		Jaya Enterprise	0.90
		Max Enterprise	0.40
July 07, 2011	N P Enterprise	Kiran Enterprises	0.28
		Mitesh Enterprises	0.50
		Muskan Trading Co	0.50
			3.38
July 06, 2011	New Fashion	Charm Enterprises	0.40
		Jaya Enterprise	0.30
		Kaveri Enterprise	0.85
		Max Enterprise	0.30
		Mitesh Enterprises	0.50
			2.35
July 07, 2011	New Fashion	Charm Enterprises	0.34
		Eden Financial Service	0.23
		Mitesh Enterprises	0.50
July 06, 2011	Sanjukta Vanijya	Jalan Cement Works	1.00
July 07, 2011	Sanjukta Vanijya	Marutinandan Infosolutions	2.29
		Rupak Trading Pvt Ltd	2.19
			6.55
July 07, 2011	Rupak Trading Pvt Ltd	Grd Securities Ltd	2.23
Grand Total			**26.51**

65. I note that during investigations, BPML was asked to explain the fund flow from its bank account. Vide reply dated July 02, 2012, it had been submitted by the company that the amount paid to Sanjukta Vanijya and Darshan Tradelink was for advance against

the interior design work at 'Evolve' centers. Similarly, regarding the funds transferred to N P Enterprise, New Fashion, Vora Associates, Laxmi Trading, J C Enterprise, BPML had submitted that these funds were advances for purchase of medical equipment. However, I observe that BPML had mentioned in the Prospectus dated June 29, 2011 that it had not even identified all the locations for these 'Evolve' centers. Further, on page no. 24 & 25 of the prospectus, BPML had mentioned that it had taken quotation from an entity, M/S JTCPI Designs. However, as per its own reply, BPML had paid advances to other entities namely, Sanjukta Vanijya and Darshan Tradelink against the interior design work at 'Evolve' centers, whose names were nowhere mentioned in the prospectus. Further, there is no evidence placed before me to show that any medical instruments / equipment were purchased by BPML through N P Enterprise, New Fashion, Vora Associates, Laxmi Trading, J C Enterprise, to whom funds of IPO has been transferred. It was observed from the Bank Know Your Clients (KYC) documents that N P Enterprise, New Fashion, Vora Associates, Laxmi Trading, J C Enterprise are proprietorships dealing in cloth trading, commission agent etc and have no experience in providing medical equipment. I also note that these entities are also related to each other through family members or relatives. It was also observed from Income tax returns and related documents submitted by Vora Associates, New Fashion and J C Enterprise that these entities did not have financial worthiness to handle such large funds and the funds received from BPML have not even been shown by these entities in their balance sheet and related documents submitted to Income Tax Department. Further, it has been observed during the SEBI Investigations that Laxmi Trading Company and N P Enterprise were untraceable. It is further noted that these funds provided under the guise of purchasing medical equipment have not been received back by BPML. I note that no medical equipment were received nor was any clinic opened.

66. With regard to the advance amount paid by BPML to Sanjukta Vanijya and Darshan Tradelink, the said entities had stated during investigation that they had invested the

monies so received from BPML in the shares of Jalan Cement, Rupak Trading, Marutinandan Infosolutions and Orbit Financial Consultants. Sanjukta Vanijya and Darshan Tradelink had also submitted to SEBI that their business is "*trading and investment in listed and unlisted securities, debentures and bonds etc.*". I note that as per their own admission, the entities, viz., Sanjukta Vanijya and Darshan Tradelink, to whom BPML had advanced Rs. 14 crores, were not engaged in any activity related to interior design. Moreover, it has been established earlier in the order that contrary to the claim of BPML that advance was against the interior design work at 'Evolve' centers, the amount of Rs. 14 crores advanced to Sanjukta Vanijya and Darshan Tradelink was actually made to them as first layer for payment to the ultimate net buyers. Similarly, it has also been established that contrary to the claim of BPML, the payment made to N P Enterprise, New Fashion, Vora Associates, Laxmi Trading, J C Enterprise was not for buying any medical instrument.

67. I note from records that investigation had also observed that while the amount of Rs. 14 Crores, advanced to Darshan Tradelink Pvt. Ltd and Sanjukta Vanijya Pvt. Ltd, had been received back by BPML, the said monies were again advanced to entities such as Gautam Dealers Pvt. Ltd and Drona Distributors Pvt. Ltd, etc. Thereafter, it was noted that these funds have not been received back by BPML.

68. It is observed that several entities involved in the IPO fund flow were related to each other by way of having one or more common directors, as per the directorship details from MCA portal:

- Subhshree Hirise and Skylight Distributors
- Rupak Trading and Gautam Dealers
- Marutinandan Infosolutions and Orbit Financial
- Sanjukta Vanijya and Marutinandan Infosolutions
- Darshan Tradelink and Sanjukta Vanijya accepted common directorship

69. Documents placed on record show that all these entities were West Bengal based (away from Mumbai BPML head office) and were not engaged in the business of

interior or medical equipment procurement or supply. I note that although huge sums of money had been transferred to these companies in the second layer, ostensibly for the purpose of interior work for the clinics or related medical equipment procurement or supply, records show that BPML had failed to provide any such evidence related to these transactions such as agreements, contracts, terms of payment etc relating to the work to be carried out by these companies. I find that considering the high amount paid to these entities, any prudent company would ensure that all elementary details like contract, quotation etc are ensured before any money is transferred. However, in absence of any documents to establish that these monetary transactions were on account any bona fide work awarded to these companies and also considering the fact none of these entities were engaged in any activity related to opening of clinics, I am inclined to conclude that all these financial transactions, shown by BPML as being advances for the purpose of fulfilling issue objects, were fraudulent and some of them were also used to fund purchase of shares of BPML.

70. Therefore, it is established that the fund amount of Rs. 34.91 crore advanced by BPML, ostensibly for the purpose of setting of Evolve clinic, was not utilized for the stated purpose at all but was diverted/siphoned off through other entities.

71. I further note from records that BPML in its reply dated July 27, 2012 had submitted that the payments were made in advance on July 06 and 07, 2011 to avoid any delay in execution of the project. However, I find that in clear contradiction to this, within 4 days of listing and within 12 days of signing the prospectus, i.e. on July 11, 2011, BPML board decided to go slow on setting up of Evolve clinic, citing adverse economic factors prevailing in the economy and decided to deploy the funds of IPO proceeds in ICDs of group companies. Thus, the very purpose of IPO i.e. setting up of 55 clinics, was defeated by this board resolution within 4 days of listing and within 12 days from the date of signing the prospectus as well as within 4 days of paying advance. As established in the preceding paragraphs, BPML transferred IPO money to entities who have no experience in interior design or medical equipment supply. Further, BPML did

not open a single “Evovle” clinic, which amounted to a deviation from the stated object of the IPO. The fact that advance payments, amounting to more than 50% of the IPO proceeds, were made on July 06 and 07, 2011 supposedly to avoid any delay in the execution of the projects but immediately thereafter, within a period of 4 days, the board decided to go slow on setting up of the proposed ‘Evolve’ clinics clearly points to *mala fide* and fraudulent intention of the company with regard to dealing with the IPO proceeds.

72. I note that the SCN states that the aforesaid diversion of IPO proceeds was to the extent of Rs. 33.40 crores. However, I find from the table in paragraph 63 that an advance of Rs. 1.50 crores was paid to Birla Power by BPML. Since, the aforesaid advance to Birla Power was not for the stated objects of the IPO, I conclude that funds to the extent of Rs. 34.91 crores, inclusive of funds transferred to Birla Power, was diverted by BPML. In conclusion, I note that funds from the IPO proceeds to the extent of Rs. 34.91 crores were not used by BPML for the stated objects of the IPO but was siphoned off.

73. In respect of the allegations in the SCN, I note that Noticees 2 and 5 to 11 have contended that they were non-executive/independent directors of BPML and were thus not involved in the day to day affairs of BPML. It is contended that while passing the impugned board resolution dated July 11, 2011, they relied on the representations made by the executive management of BPML and they had no means to know the wrongdoing by the executive management of BPML. These Noticees have contended that they are the victims of the fraud perpetrated by the executive management of BPML. In this regard, I note that the allegations made in the SCN pertain to those matters of BPML which are dealt at board level and it is not necessary that a director must be involved in the day to day affairs of the company, in order to be held responsible for such acts. It is true that non-executive directors (NED) and independent directors (ID) cannot be held liable for those acts that form part of day to day activities. However, these directors can be held liable for those acts which come to their

knowledge through board processes. Therefore, the contention of the Noticees that they were not involved in the day to day affairs of BPML is not tenable. Regarding the contention of the Noticees that they had no means to know about the wrongdoings of executive management of BPML, I note the following: -

i. From the quarterly, half yearly and annual financial statements, as disclosed by BPML to the stock exchange i.e. BSE, which are available on the website of BSE, for the FY 2011-12 and 2012-13, I find that each of these financial statements contained a report on the progress of utilization of IPO Proceeds. I note that the prospectus of BPML had stated that the utilization of IPO proceeds shall be disclosed in their financial statements. Accordingly, Statement of Utilisation of IPO Proceeds became part of the financial statements of BPML and as such was required to be approved by the board of directors of BPML, as its financial statement, in accordance with Clause 41 of the Equity Listing Agreement. I note that in the present case, each of the financial statements alongwith the 'Statement on Utilization of IPO Proceeds' therein, was approved by the board of directors in their meetings. I note that in each of the statements of utilization of IPO proceeds, capital expenditure on setting up of Evolve Centers, IVF Centers, Integrated Wellness Centres, etc. was continuously being shown as incurred whereas no new Clinic was set up and no medical equipments were procured. Despite this, the board members approved the statement of utilisation of IPO proceeds without questioning the circumstances or veracity of such statements which were being cited to deviate from the stated objects of the IPO and also without questioning the whereabouts of the advance paid to entities for interior work and procurement of medical equipment. This assumes more seriousness in the wake of the fact that not a single new clinic had been set up by BPML.

ii. From the Annual Report of BPML for the FY 2011-12 and 2012-13, as available on BSE website, I note that Noticees 4, 6 and 9 were members of the Audit Committee of BPML during the said Financial Years. I note that in accordance with Clause 49(II)D of the erstwhile Listing Agreement, it was the specific responsibility of the Audit Committee to review the 'statement of utilization of funds raised through public issue'. I also note that the Prospectus of BPML, signed by all the Noticees, had also stated in the 'Risk Factors' section as well as the 'Monitoring Agency' section, that since there is no outside monitoring agency appointed, among others, the Audit Committee shall be monitoring the utilization of issue proceeds. I note that the Audit Committee had regularly reviewed the quarterly financial results of the BPML of which statement of Utilization of IPO proceeds also forms a part. Hence, I am unable to accept the argument presented by Noticees 6 and 9 that they did not have any knowledge of the diversion of funds committed by the executive management of BPML. Further, I do not find any specific remarks were raised by the members of the Audit Committee regarding IPO proceeds being misutilized.

iii. I note from the Prospectus of BPML, which was signed by all the Noticees, that it had stated in the 'Risk Factors' section as well as 'Monitoring Agency' section, that since there is no outside monitoring agency appointed to monitor the utilization of IPO proceeds, hence, BPML has set up a Project Monitoring Committee consisting of two independent directors and the Managing Director to monitor the implementation of the project as well as utilization of the issue proceeds. From the Annual Report of BPML for the FY 2011-12 and 2012-13, as available on BSE website, I note that Noticees 3, 8 and 9 were members of the Project Monitoring Committee of BPML during the said financial years. I also Noticees 3, 8 and 9 had attended 5, 5 and 3 meetings of the Project Monitoring Committee respectively during FY 2011-12. I note that Noticee 3 ceased to be a member of the Project Monitoring Committee w.e.f. August 9, 2012 and Noticee 8 ceased to be a member w.e.f. from September 30, 2012. I note that two formal meetings of the committee were held during FY 2012-13, and Noticees 3 and 8 were present in both the meetings. In view of the above, I find that it was the specific responsibility of Noticees 3, 8 and 9, apart from the responsibility of Audit Committee, to monitor the deployment of IPO proceeds as well as to monitor the implementation of the setting up of the Evolve Centers. I also note that, in the 'Objects of the Issue' section of the Prospectus, BPML had presented a schedule of implementation of the objects, in which it was scheduled to establish 15 Evolve Centers by March 31, 2012. However, as established earlier in the order, no new Evolve Centers were ever established by BPML after the IPO. I note that it was the specific responsibility of the Projects Monitoring Committee, according to the Prospectus, not just to monitor the utilization of the issue proceeds but also <u>to monitor the implementation of the project</u>. In this regard, I note that Noticees 3, 8 and 9 did not raise any remarks/concerns about the non-establishment of any Evolve Centre, before the board of directors or Audit Committee or the Statutory Auditor or any regulatory authority.

iv. Further, the 'Statement of Utilization of IPO Proceeds' forming part of the quarterly and annual financial statements of BPML, indeed reflected capital expenditure being incurred on setting up of Evolve Centres, but pertinently, no question was raised by the members of the Project Management Committee to the executive management of BPML, as to why not a single Evolve Centres came to be established until the quarter ended June 2012 against the promise of more than 15 such centres by March 2012. I note that it is not the case of Noticees 8 and 9 that they have raised their remarks/concerns about the irregularity in utilization of issue proceeds before the board of directors or Audit Committee or the Statutory Auditor or any regulatory authority. Even the Statutory Auditors in its Audit Report for FY 2011-12 have not mentioned about any concerns being voiced by the members of the Project Management Committee. Hence, I am unable to accept the argument presented by Noticees 8 and 9 that they did not have any knowledge of the diversion of funds committed by the executive management of BPML, especially since it was the specific responsibility of Noticees 8 and 9 along with Noticee 3 to monitor the implementation of schedule of setting up of the Evolve Centers.

v. The statement of utilization of IPO proceeds was vetted by the Audit Committee before being placed to the board for approval. However, in terms of Clause 41(II)(a) and (e) of the Listing Agreement, as applicable at that time, the financial statements including the statement of utilisation of IPO proceeds, were required to be approved by the board of directors. It is a double check mechanism that is contemplated to be followed. So, while the Audit Committee acts as the first level of vetting, the board of directors acts as the second level of scrutiny.

74. In view of the observations made in para 73(i) to (v), I find that statement of utitlisation of IPO proceeds which continued to be approved by the board of directors of BPML, as part of the financial statements, till the quarter ending June, 2012, was showing capital expenses being incurred by BPML for setting up of Evolve Centers whereas not a single Evolve Center was setup. In fact, the said decision of setting up of Evolve Center was already deferred by the decision taken in the board meeting held on July 11, 2011. Despite that, Noticees 2 to 11, as directors of BPML, did not raise their concerns in the meetings of the board nor reported the flaws to the Statutory Auditor or other relevant regulatory authorities but on the contrary continued to endorse the

financials which incorrectly recorded the expenditure showing such clinics being set up. I further note that except Noticee 7, all other director Noticees were members of the board of BPML till quarter ending June, 2012. In view of the aforesaid and considering the observations made in para 73 (i) to (v) above, I am inclined to the view that the fact that the aforesaid Noticees chose to ignore this apparent and glaring anomaly during the board process without raising any objection/ concerns shows that the said Noticees were all acting in furtherance of their common plan to divert the funds of the IPO proceeds. In view of these facts as narrated above, I find that the members of the board of directors of BPML had knowledge of the irregularity and the inconsistency in the deployment of IPO proceeds by BPML. Hence, I am not inclined to accept the contention of Noticees 2 to 6 and 8 to 10 that there were no means that they could have been aware about the irregularity in IPO fund utilization.

75. I note that Noticees 5, 8, 9 and 10 have cited several judgements to emphasize that the liability of non-execute/ independent directors is not the same with that of an executive director. It is their case that non-executive/ independent directors cannot be held vicariously liable for the acts of BPML, unless it is shown that they were in-charge of and responsible for the conduct of the business of BPML. I note that the role of Noticees 2 to 11 has been examined in the preceding paragraphs and such examination is independent of their individual designation as executive/ non-executive/ independent director. The examination is only limited to their role as a member of the board of directors of BPML or its board committee(s), wherein the 'Statement of Utilization of Issue Proceeds' were continuously being approved without any questions being asked or objections being raised during the board processes and no actual diligence was carried out regarding the funds paid to various entities which were never utilized for setting up of clinics nor were received back by BPML. In view of the foregoing, I find that the aforesaid contentions of Noticees 5, 8, 9 and 10 are not tenable.

76. I further note that Noticees 5 and 8 herein have relied upon the Ministry of Corporate Affairs (**MCA**) circular dated March 2, 2020, emphasizing that an independent director / non-executive director can only be held liable in respect of such acts of omission or commission by the company which occur with his knowledge, attributable through board processes, and with his consent or connivance or where he had not acted diligently. I note that the said MCA circular dated March 2, 2020, will not be applicable to the facts of the present case as the present matter relates to the violations that took place in FY 2011-12, at which time the said circular was not in operation. Without prejudice to the argument about inapplicability of the said MCA circular, I note that even if the principles laid out by the said circular were to be applied to the facts of the present case, I find that Noticees 5 and 8 would still be liable. What has been established in the preceding paragraphs is that the members of the board of directors of BPML had knowledge of the irregularities in IPO fund deployment and its resultant misutilization by BPML, <u>through board processes</u> and therefore, the active silence on the part of the members of the board of directors of BPML, the members of the Audit Committee and the members of the Project Management Committee, while consciously approving the Financial Statements of BPML (which also includes the 'Statement of Utilization of IPO Proceeds') without raising any alarm/ concerns/ objections, despite having knowledge of the irregularities in this regard, shows connivance on their part in the scheme to misutilize the IPO proceeds and siphoning off the same by BPML. Therefore, the aforesaid contention is found to be unacceptable.

77. Noticee 5 has submitted that the only issue discussed in the Board meeting dated July 11, 2011 was interim deployment of IPO proceeds as ICDs to group companies, and the issue relating to advances made to various third-party entities was not discussed in any Board meeting attended by Noticee 5. It has also been contended that the act of transfer of funds to certain third-parties done even before the Board meeting held on July 11, 2011 and which fact was deliberately suppressed from him, shows his non-

involvement in the entire series of events. Similarly, it has been contended by Noticee 8 that even before Board Meeting held on July 11, 2011, the management of the issuer company had already moved out the funds on July 6 and 7, 2011, and therefore they had therefore actively misled him and the Board of Directors. Accordingly, it has been contended that the directors who attended the meeting on July 11, 2011 cannot be accused of fraud, as in fact they were victims of the alleged fraud. Noticees 9 and 10 have further contended that as per the minutes of the board meeting held on July 11, 2011, representation was made by the Chairman of the Company about the adverse macro-economic situation, and since the representation was made by the management, there was no reason for them to disbelieve the same or suspect something amiss. However, in light of the facts established in the preceding paragraphs, I find that the aforesaid Noticees 5, 8, 9 and 10, being part of the board of directors of the company and as members of Audit committee or Project management committee of BPML, had knowledge of the fraudulent diversion committed in respect of the IPO funds, through board processes. Thus, I find no merit in the above contentions of Noticees 5, 8, 9 and 10.

78. Noticees 5, 8, 9 and 10 have also contended that their mere participation in the July 11, 2011 board meeting as a non-executive/independent director cannot be held to be a fraudulent act or unfair trade practice. In this regard, I note that Noticees 2 to 11, were in the board of directors of BPML at the time of IPO. Moreover, the subsequent diversion of IPO funds and their role in the fraud carried out in respect of the IPO funds in the capacity of being board members and member of various committees has also been established in the previous paragraphs. Therefore, I do not find any merit in the aforesaid contention of the Noticees.

79. Noticee 5 has further contended that the ‘statement relating to utilization of IPO proceeds’, though were shown to have been laid in Board meetings, no concern with respect thereto was highlighted by the executive or any Board committees, and on the contrary, it was seemingly demonstrated that the IPO proceeds were being deployed

in business as per the IPO objectives. In this regard, Noticee 5 has submitted copies of the minutes of the board meetings of BPML for the FY 2011-12 and FY 2012-13. On perusal of the same, I note that the board of directors had approved the unaudited financial results of BPML for quarters ending on September 30, 2011, December 31, 2011, and the audited financial results for FY 2011-12 in the board meetings held on November 14, 2011, February 10, 2012 and May 25, 2012 respectively. The utilization of IPO proceeds was also part of the notes to the aforesaid financial results which were put up for approval of the board of directors. As per the said financial results specified in the minutes of the board meetings, following utilization of IPO proceeds was shown: -

Financial Results	**Description**	**Total estimated Cost (in Rs. Lacs)**	**Deployed (in Rs. Lacs)**
Unaudited Qtrly Results for Qtr ended September 30, 2011	Capital Expenditure for Setting up of 55 centers across the country	4950.00	3367.31 (Deployed upto 30th September 2011)
Unaudited Qtrly Results for Qtr ended December 31, 2011	Capital Expenditure for Setting up of 55 centers across the country	4950.00	3417.68 (Deployed upto 31st December 2011)
Audited Results for FY 2011-2012	Capital Expenditure for Setting up of 55 centers across the country	4950.00	3417.68 (Deployed upto 31st March 2012)

80. I note that contrary to the figures shown in the financial statements, not a single Evolve center was being set up and therefore, it is clear that the IPO funds were not being used to setup the 55 centers, as has also been also noted earlier in the order. I find from the board minutes submitted by Noticee 5 that he had approved the financial results without raising any alarm in this respect. On account of the representation made in the Board Meeting of July 11, 2011 where it had been decided to delay the setting up of the ‘Evolve ‘clinics, Noticee 5 ought to have questioned this apparent anomaly, however, he failed to do so. Hence, I don’t find merit in the above contentions of

Notice 5 that it was seemingly demonstrated that the IPO proceeds were being deployed in business as per the IPO objectives.

81. I note that Noticee 2 has also raised the contention that being the non-executive director on the board of BPML, he was not involved in the day to day management of the affairs at BPML and that he resigned from the board of BPML on February 14, 2013, after which date he had no material/pecuniary relationship with the other directors, its promoters or senior management of BPML. From the Annual Reports of BPML for the FY 2011-12 and 2012-13, I note that for the FY 2011-12 and 2012-13, Noticee 2 was identified as one of the Key Management Personnel in accordance with AS-18 under the head 'Related Party Disclosures' forming part of the 'Notes to Financial Statements'. The definition of Key Management Personnel as per AS 18 is reproduced below:

> ***Key management personnel* - those persons who have the authority and responsibility for planning, directing and controlling the activities of the reporting enterprise.**

82. Thus, I find that though Noticee 2 was designated as non-executive director of BPML, but considering the authority and control being exercised by Noticee 2 over the affairs of BPML, the Statutory Auditor of BPML and the board of directors of BPML found it appropriate to identify him as one of the Key Management Personnel of BPML. I note that it is also not the case of Noticee 2 that he had objected to such identification as 'Key Management Personnel'. Furthermore, as stated in the "Our Promoters" section in the prospectus, Noticee 2 is also a promoter of BPML. In this regard, I note that at page 80 of the prospectus of BPML, it is stated that *"Our Company is promoted by Mr. Yashovardhan Birla and one of his group companies, Birla Wellness & Healthcare Private Limited"*. I also note that Noticee 2 was the Chairman of BPML during the Financial Years 2010-11, 2011-12 and 2012-13. Further, the role of the members of the board of directors of BPML in approving the 'Statement of Utilization of IPO

Proceeds' and their imputed knowledge about the irregularities in IPO fund deployment by BPML and its resultant misutilization as well as diversion, has already been brought out in the preceding paragraphs. Hence, I am not inclined to accept the above contentions of Noticee 2.

83. The main contention of Noticee 3 is that though he was the Managing Director in BPML, his duties were only limited to the management and operation of Evolve Centre of BPML and aspects related thereto, and that he was not involved in the financial and policy decisions of BPML, which according to him was always handled by the Yash Birla Group. However, I do not find merit in this contention of Noticee 3. In fact, there is ample evidence to show that he was directly involved in the financial functions of BPML. I note that all the financial statements (which also includes the Statement of Utilization of IPO Proceeds) of BPML from quarter ended September 2011 to June 2012 were signed by Noticee 3. I note that Noticee 3 along with Noticee 4 was also a signatory, to the Certificate which is issued by the Chief Executive Officer and the Chief Financial Officer pursuant to Clause 49 of the Listing Agreement on the Audited Financial Statement of BPML for the year 2011-12. I note that he was also the member of the Project Monitoring Committee of the board which was specifically tasked with the responsibility, not just to monitor the utilization of the issue proceeds but also to monitor the implementation of the projects. All of the above clearly indicates his involvement not just in the financial functions of BPML but also in the monitoring and deployment of IPO proceeds. Even though Noticee 3 was not a member of the Audit Committee, it is stated in the Annual Report of BPML for the FY 2011-12 and 2012-13 that the Managing Director attends the meetings of the Audit Committee. I also note that Noticee 3 has not disputed his attendance in any of the board meetings of BPML or the meetings of the Audit Committee, as indicated in the Annual Report of FY 2011-12 and 2012-13. However, Noticee 3 in his reply to the SCN has denied that he was part of the Project Monitoring Committee and further stated that he never attended any meeting of such a committee. In this regard, I note that the Prospectus of BPML names

Notice 3 as member of the Project Monitoring Committee, and the said Prospectus has been signed by him. Further, I note that as per the Annual Reports of BPML, Noticee 3 has attended 5 and 2 meetings of the Project Monitoring Committee, in the FY 2011-12 and 2012-13 respectively. Thus I find no merit in the said contentions of Noticee 3. I also note that Noticee 3 has been classified as a Key Management Personnel along with Noticees 2 and 4 in the Annual Report of BPML for FY 2011-12 and 2012-13.

84. Further, in order to show the specific role and responsibility that was to be assigned to him as Managing Director of BPML, Noticee 3 has annexed along with his reply, a copy of an unsigned Joint Venture Agreement dated April 15, 2008, which purportedly was executed between him, Birla Wellness and Healthcare Pvt. Ltd. and Pacific Healthcare Holdings Pvt. Ltd. In this regard, I note that the charge in the SCN against Noticees 2 to 11 is with respect to their role as members of the board of directors of BPML, regardless of their individual designation as managing director/executive director/independent director and therefore, I do not find any merit in either going into veracity of such an agreement or examining its contents w.r.t role of Noticee 3. As discussed in the preceding paragraphs, in his role as member of the board of directors and as member of the Project Management Committee and also as the Managing Director of BPML and the only executive director on the board of BPML until his resignation in September 2012, I find that Noticee 3 had all the knowledge of the financial irregularities and IPO fund misutilization at BPML. Despite all this, Noticee 3 did not raise any concern before board, audit committee or the statutory auditor which shows connivance on part of Noticee 3 in the scheme to misutilize the IPO proceeds and siphoning off the same by BPML.

85. I note that Noticees 2 and 3 have also contended that they were not the authorized signatory for the transfer of funds or signing of cheques. In this regard, I note that as Chairman and Managing Director, respectively, it is not necessary that they themselves should have the specific role of signing cheques or operating the bank

account. Their knowledge and role regarding the financial irregularities and diversion of the IPO funds by BPML has already been brought out in the previous paragraphs, and hence I find no merits in the above contentions.

86. Noticee 6 has contended that initiation of present Adjudication Proceedings along with a separate proceeding under Section 11B of SEBI Act by SEBI amounts to "double jeopardy" and is in violation of Article 20(2) of Constitution of India. In regard to aforementioned contention of Noticee, I note that principle of double jeopardy as provided under Article 20(2) of the Constitution of India is applicable only to criminal proceedings and not to quasi-judicial proceedings like that of the present adjudication proceedings. Further, in this regard, I note that proceedings under Section 11B and adjudication proceedings are different and can be parallely initiated. In this regard, I note that the Hon'ble SAT, in its order dated April 21, 2017 in the matter of *Sunita Gupta vs. SEBI*, has held as follows:

> *"6. Where a person violates the provisions contained in the SEBI Act and the regulations made thereunder, then, SEBI is empowered to initiate penalty proceedings against that person under Chapter VIA of SEBI Act and also issue directions in the interests of investors or securities market as it deems fit under Chapter IV of SEBI Act. Thus, the powers conferred on the Board under Chapter IV are independent from the powers to impose penalty under Chapter VIA of SEBI Act. Accordingly, in the present case, since the appellant had indulged in synchronized/ circular trades in gross violation of SEBI Act/ PFUTP Regulations and the same was detrimental to the interests of the investors and securities market, the Board deemed it fit to issue direction under Chapter IV in addition to the penalty imposed under Chapter VIA of SEBI Act. Therefore, in the facts of present case, initiation of proceedings under Chapter IV even after initiating proceedings under Chapter VIA cannot be faulted."*

Accordingly, in view of the aforesaid judgement of Hon'ble SAT, the present proceedings are justified and as the above contention of Noticee 6 is devoid of merits.

87. I note that in his reply, Noticee 5 has cast doubt on the veracity of the record of his attendance in the impugned board meeting dated July 11, 2011. According to him, no other corroborating evidence in the form of 'Attendance Register' or 'Meeting Agenda' had been produced in the SCN to prove his attendance in the impugned board meeting. In this regard, I note that, without providing any evidence in support of his contention, Noticee 5 has merely made a bald statement questioning the veracity of the minutes of the board meeting held on July 11, 2011, which clearly shows his attendance in the said board meeting. Further, from the Annual Report of BPML for the FY 2011-12, I find that six board meetings (including the impugned board meeting held on July 11, 2011) were held by BPML in FY 2011-12 and Noticee 5 is shown to have attended all the six board meetings of BPML. I note that Annual Report of BPML is a publicly available record. Further, it is also not the case of Noticee 5 that he has disputed the contents of the Annual Report at any time before the management or the board of directors of BPML. Thus, I find no merit in the said contentions of Noticee 5.

88. I note that Noticee 7 has stated that he had resigned from the board of BPML on August 16, 2011 i.e. about 40 days from the IPO. Thus, Noticee 7 has argued that he was not informed or involved in the utilization of the funds. Noticee 7 has also submitted that even prior to his resignation, he was not part of a board meeting held on August 12, 2011. In this regard, I note from documents placed on record that Noticee 7 was member of the Audit Committee but only upto August 16, 2011. Moreover, post the IPO, the Audit Committee had met for the first time on September 8, 2011 i.e. after Noticee 7's resignation from BPML. In view of the aforesaid facts, I am of the view that the case of Noticee 7 falls on a different footing as compared to the role of other directors of BPML. I note that during the tenure of Noticee 7, post IPO, the financial results had not been presented before the board of directors. Also he had not participated in any board meeting wherein the financial results were considered. Thus, I note that unlike other members of the board of directors of BPML, Noticee 7 cannot be imputed with the conduct of remaining silent despite having the knowledge of the

irregularities in utilization of IPO proceeds by BPML. Hence, the charge against Notice 7 that he has violated the provisions of Regulation 3 (a), (b), (c), (d), 4(1) ,4 (2) (e), (f) and (k) of the PFUTP Regulations read with Section 12A(a), (b) & (c) of the SEBI Act is not established.

89. To sum it up, I conclude that in the Prospectus, around 75% of the IPO proceeds were promised to be utilized in setting of 55 Evolve Centers under the 'Objects of the Issue' section of the Prospectus, however no such Centers ultimately came to be set up. Similarly, while 15 Evolve Centers were promised to be set up by end of March 2012, not even a single Evolve Center was set up by that time. Rather, more than 50% (Rs. 34.91 crore) of the IPO proceeds were siphoned off by BPML as has been established in the previous paragraphs of this order. I also find that Noticees 2, 3, 4, 5, 6, 8, 9, 10 and 11 were the signatories to the Prospectus of BPML and further, as brought out in the preceding paragraphs, were the members of the board of directors of BPML as well as some of the aforesaid Noticees were members of Audit Committee and Project Monitoring Committee, and therefore, they all had the knowledge, through board processes, about the irregularities in IPO fund deployment by BPML and its resultant misutilization, and had played active role in concealment of the same. In view of the above, I find that Noticees 1 to 6 and 8 to 11 have violated the provisions of Regulation 3 (a), (b), (c), (d), 4(1) ,4 (2) (e), (f) and (k) of the PFUTP Regulations read with Section 12A(a), (b) & (c) of the SEBI Act.

<u>Issue I</u>

<u>c) Whether Noticee 1 has violated the provisions of Section 11C (2) and (3) of SEBI Act?</u>

90. In terms of Section 11C (2) and (3) of the SEBI Act, it is obligatory on any person so summoned to produce the necessary documents/information to the Investigating Authority. I note that in the SCN, Noticee 1 has been charged for noncompliance to the summons issued by the Investigating Authority. In this regard, I note that vide

summons dated August 06, 2014 issued by the Investigating Authority, BPML was asked to provide the following information –

1. Certified copies of minutes of all board meetings, for the period July 01, 2013 — August 05, 2014.
2. IPO funds utilization status and details as on August 05, 2014. Also detailed documentary evidence for the claims.
3. Details of repayment from such entities, if any, with regards to utilization of IPO proceeds and the advances given to various parties in July 2011 towards fulfilling objects of the issue.
4. Details of all the ICDs (Inter corporate deposits) extended from IPO proceeds in tabular format.
5. Copies of bank account statement clearly highlighting the transactions mentioned in pt 3 and 4 above
6. Documents substantiating financial worthiness of entities to whom advances from IPO issue proceeds were given in July 2011 for purpose of IPO object fulfillment. Documents such as Income tax returns of previous years, bank account statements also to be provided.
7. The name of the promoter who had pledged the shares as referred at pt 6 of reply dated August 06, 2013. Also, to provide purpose for which the promoters pledged their shares

91. However, it is noted that the information was not received from BPML within the stipulated time. Thereafter, another summons dated August 21, 2014 was sent to BPML, seeking the same information as the previous summons dated August 06, 2014. In this regard, BPML vide its letters dated August 13, 2014, August 19, 2014, August 25, 2014 repeatedly sought extra time to submit the information sought by SEBI. I note that the information sought vide the aforesaid summons should have been readily available with the company. I note that subsequently, vide letter dated September 08, 2014, BPML submitted a partial reply to the above mentioned summons. I observe that

vide the said reply, BPML had only furnished the minutes of board meeting and sought more time for submitting other documents and details as required in summons dated August 06, 2014. The following reasons were cited by BPML in its reply dated September 08, 2014 for failure to submit other documents :

i. that the old management has resigned and the current CEO recently took charge, with no old employee available to hand over the charge.

ii. that accounts personnel, responsible for book keeping also resigned at the same time without handing over the charge and accounting entries were incomplete from December 2013.

iii. that the data is not available at one place and some data has been accessed recently, streamlining the backlog has started and the finalization of balance sheet for FY 2013-14 has been delayed.

iv. that while carrying out data entry, the current staff saw few entries related to IPO proceeds and that they want to provide the authentic data to SEBI after completion of all entries.

v. that only two employees are working in the back office of BPML who incidentally also look after two more Birla companies back office related work; they are working on compiling reply to SEBI summons.

92. BPML submitted its additional reply to the summons dated August 06, 2014 and August 21, 2014, vide its letter dated November 07, 2014. On perusal of the replies of BPML vide letters dated September 08, 2014 and November 07, 2014, I note that as regard the information sought in points 2 and 3 of the queries stated in the summons dated August 06, 2014 (mentioned in points 2 and 3 of paragraph 90 above, i.e. regarding utilization of IPO proceeds and the advances given to various parties in July 2011 towards fulfilling objects of the issue), BPML had submitted as follows –

a. Prior to the IPO it had entered into negotiations with certain parties to develop a “Ayurveda/wellness village complex” for which the land at Dhindori was to be purchased from Birla Bombay Pvt Ltd, who would also be the project developers for the proposed village complex.

b. BPML had paid Rs. 20 crore to Birla Bombay Pvt Ltd against the total negotiated cost of Rs. 45 crore and the remainder amount was to be paid in 3 tranches. BPML had further submitted that though the project was to be completed by December 2015, however there was a delay. The copy of the Development Agreement was also submitted.

c. Simultaneous with the execution of development agreement with Birla Bombay Pvt Ltd, they have entered into a long lease deed for taking the aforesaid land. As per the lease deed they had paid – i) a refundable security deposit of Rs. 1.40 crore, and ii) advance lease rent for 5 years of Rs. 8.40 crore. Further, they have the option to purchase the land at the end of the 5^{th} year at a value of Rs. 40 crore.

93. I note that BPML did not submit its bank statement highlighting the relevant entries regarding the above transactions claimed to have been carried out by it despite specifically being asked to provide the same in the aforesaid summonses. The said information i.e. bank statement as supporting evidence was also specifically sought in point 5 of the queries stated in the summons dated August 06, 2014 (mentioned in point 5 of paragraph 90 above). I find that the claim of BPML before the Investigating Authority that it had carried out negotiations prior to the IPO for creating one single Ayurveda/Wellness village complex at Dhindori with the IPO proceeds, to be contrary to their plan and stated object of IPO to establish 55 clinics across the country as elaborated in the IPO prospectus. I note that the details regarding utilization and related evidence, financial worthiness of entities who were given advances, were of utmost importance for proceedings of the investigation, but were not furnished by BPML. Thus, I note that the investigation in relation to the utilization of the IPO proceeds was critically hampered by such non-compliance by BPML. In view of the above, I hold that BPML has violated the provisions of Section 11C (2) and (3) of SEBI Act.

Issue I

d) Whether Noticees 1, 3 and 4 have violated the provisions of Clause 43 of the listing Agreement read with Section 21 of the SCRA?

and,

e) Whether Noticees 1 and 3 have violated the provisions of Clause 43A of the Listing Agreement read with Section 21 of the SCRA?

94. It was observed during investigation that in its quarterly filings to BSE, the company had submitted that the funds were utilized as per the objects of the issue as disclosed in the prospectus. It was alleged in the SCN that BPML, along with the directors signing the said filings namely, Shri Abhijit Desai (Managing Director) and Shri P. V. R Murthy, have violated Clause 43 of the listing Agreement read with Section 21 of the SCRA. In this regard, I note that Clause 43 of the Listing Agreement requires the company to furnish on a quarterly basis a statement to the stock exchange indicating the variations between projected utlilization of funds made by it in the prospectus and the actual utilization of funds. I note that as per the filings made by BPML to BSE, it was continuously showing fund utilization for setting up of clinics. For e.g., in the unaudited results for the quarter ending December 31, 2011 filed by BPML with BSE, it was *inter alia* stated as follows –

(Rs. In Lacs)

Sr. No.	Description	Total estimated Cost	Deployed upto 31st December 2011
1	Capital Expenditure for setting up of 55 centers across the	4950.00	3417.68

95. The aforesaid statement was signed by Noticee 3 (Dr. Abhijit Desai) on February 10, 2012. Similar reporting is observed for other quarters also wherein the signatories are either Noticee 3 or Noticee 4. However, as already established in the earlier parts of this order, funds received in the IPO proceeds were not utilized for setting up of the 55 'Evolve' clinics across India and funds to the extent of Rs. 34.91 crores were actually siphoned off. Therefore, it is clear that the quarterly filings made to BSE did not correctly portray the variations between projected utlilization of funds made by it in the

prospectus and the actual utilization of funds. In view of the foregoing, I hold that Noticees 1 and Noticees 3 and 4, as signatories to the quarterly filings, have violated the provisions of Clause 43 of the listing Agreement read with Section 21 of the SCRA and.

96. Further, it is alleged that BPML has not filed any disclosure regarding deviation in the use of IPO proceeds from the objects of the issue and therefore, is alleged that BPML along with Shri Abhijit Desai (Managing Director) have violated the provisions of Clause 43A of the Listing Agreement read with Section 21 of the SCRA. In this regard, it has been established in the preceding paragraphs of the order that funds received in the IPO proceeds were not utilized for setting up of the 55 "Evolve" clinics across India and funds to the extent of Rs. 34.91 crores were actually siphoned off. However, I observe that BPML has not filed any disclosure of deviation in the use of IPO proceeds along with its financial results to the stock exchanges. Accordingly, I hold that Noticee 1 has violated the provisions of Clause 43A of the Listing Agreement read with Section 21 of the SCRA. I also note that the filings of the financial results were signed by Noticee 3 on behalf of BPML. Thus, I find that Noticee 3 in the capacity of Managing Director of BPML is also liable for the above alleged violations. Accordingly, I find that allegation that Noticee 3 has violated the provisions of Clause 43A of the Listing Agreement read with Section 21 of the SCRA stands established.

***Issue II)* Do the violation(s), if established, attract monetary penalty under Section 15A(a) and 15HA of SEBI Act and Section 23A(a) and 23E of SCRA?**

97. I note that the violation of the provisions of Regulation 3(a), (b), (c), (d), 4(1), 4(2)(a), (d) and (e) of the PFUTP Regulations read with Section 12A(a), (b) and (c) of the SEBI Act by Noticees 1 and 3 makes them liable for penalty under Section 15HA of SEBI Act. Further, I note that the violation of the provisions of Regulation 3 (a), (b), (c), (d), 4(1) ,4 (2) (e), (f) and (k) of the PFUTP Regulations read with Section 12A(a), (b) & (c) of the SEBI Act by Noticees 1 to 6 and 8 to 11 makes them liable for penalty under

Section 15HA of SEBI Act. Further, the violation of the provisions of Section 11C (2) and (3) of SEBI Act by Noticee 1 makes it liable for penalty under Section 15A(a) of SEBI Act. With regard to applicability of penal provision of Section 23E of SCRA as invoked in the SCN (text of the provision is reproduced below), I note that the same is applicable to Noticee 1 only and not to Noticees 3 and 4. Accordingly, I find that the violation of the provisions of Clause 43 of the listing Agreement read with Section 21 of the SCRA by Noticee 1 makes it liable for penalty under Section 23A(a) and 23E of SCRA, and the violation of the said provisions by Noticees 3 and 4 makes them liable for penalty under Section 23A(a) of SCRA. Further, the violation of the provisions of Clause 43A of the listing Agreement read with Section 21 of the SCRA by Noticee 1 makes it liable for penalty under Section 23A(a) and 23E of SCRA, and the violation of the said provisions by Noticee 3 makes him liable for penalty under Section 23A(a) of SCRA.

98. The provisions of Section 15A(a) and 15HA of SEBI Act and Section 23A(a) and 23E of SCRA read as under –

<u>SEBI Act</u>

Penalty for failure to furnish information, return, etc.

15A. If any person, who is required under this Act or any rules or regulations made thereunder, —

(a) to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

Penalty for fraudulent and unfair trade practices.

15HA. If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher.

SCRA

Penalty for failure to furnish information, returns, etc.

23A. Any person, who is required under this Act or any rules made thereunder, -

(a) to furnish any information, document, books, returns or report to a recognized stock exchange, fails to furnish the same within the time specified therefor in the listing agreement or conditions or bye-laws of the recognized stock exchange, shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

Penalty for failure to comply with provisions of listing conditions or delisting conditions or ground.

23E. If a company or any person managing collective investment scheme or mutual fund, fails to comply with the listing conditions or delisting conditions or grounds or commits a …………………………………..breach thereof, it or he shall be liable to a penalty not exceeding twenty-five crore rupees.

99. With regard to section 23E of SCRA, the Hon'ble SAT in the matter of ***Suzlon Energy Ltd. and Anr. vs. SEBI*** (Appeal No. 201 of 2018) dated May 03, 2021 has held the following:

> *"Section 23E provides that where a Company fails to comply with the listing conditions or delisting conditions or grounds or commits a breach thereof then penalty would be a minimum of Rs. 5 lakh upto maximum of Rs. 25 crore. The words "fails to comply with the listing conditions" cannot mean failure to comply with the conditions in the Listing Agreement. One of the requirements in the Listing Agreement which is required to be complied with is Clause 36 whereas Section 23E refers to the conditions which are imposed upon a Company when it is applying for its shares to be listed on the stock exchange platform. Section 23E has to be read along with Rule 19 of the Securities Contracts (Regulation) Rules, 1957 ('SCRR' for short). Rule 19 of the SCRR provides certain*

<u>requirements with respect to a listing of securities on a recognized stock exchange</u>. Rule 19A provides that a Company has to continuously maintain listing requirements. Rule 21 provides conditions for delisting of securities. <u>Failure to comply with the listing conditions which are stated in Rule 19 would entail a penalty as provided under Section 23E. Thus, in our view violation of Clause 36 of the Listing Agreement will attract Section 23A(a) of the SCRA and will not attract Section 23E.....</u>" (emphasis supplied)

100. I note that a stay application has been filed before the Hon'ble Supreme Court by SEBI with respect to the findings of Hon'ble SAT in paragraphs 17 and 18 of the aforesaid order and an appeal has been filed before the Hon'ble Supreme Court against the aforesaid order vide civil appeal no. 4741 of 2021. I note that the aforesaid stay application and the appeal is pending. I note that vide orders in the matter of M/s NDTV vs. SEBI (Appeal no. 358 of 2015) dated August 07, 2019, and Oasis Securities Ltd. & Ors. Vs. SEBI (Appeal no. 316 of 2018), dated March 17, 2020, the Hon'ble SAT has upheld the imposition of penalty under Section 23E of SCRA on the appellant companies therein for the violation of clauses of the listing agreement. For adjudging under Section 23E of SCRA, the limited purpose of these proceedings qua Noticee 1 is to determine if Noticee 1 has violated Clause 43 and 43A of the listing Agreement read with Section 21 of the SCRA and if so, determine whether penalty should be imposed and assess the quantum of such penalty. However, the enforcement of this order qua Noticee 1 for the penalty imposed under Section 23E of SCRA, shall be subject to the outcome of the aforesaid appeal before the Hon'ble Supreme Court of India.

<u>Issue III)</u> If so, what would be the quantum of monetary penalty that can be imposed on the Noticees after taking into consideration the factors mentioned in Section 15J of the SEBI Act and Section 23J of SCRA?

101. In this regard, the provisions of Section 23J of the SCR Act and Rule 5 of SCR AO Rules and Section 15J of the SEBI Act and Rule 5 of SEBI AO Rules, require that while adjudging the quantum of penalty, the adjudicating officer shall have due regard to the following factors namely; -

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;
(b) the amount of loss caused to an investor or group of investors as a result of the default;
(c) the repetitive nature of the default.

102. From the material available on record, I note that funds to the extent of Rs. 34.91 crore were siphoned off by BPML from the IPO proceeds of worth Rs. 65.17 crores. It has also been observed from the investigations that out of the balance IPO proceeds, funds to the extent of Rs. 31.54 crores were extended to various group companies as ICDs, out of which Rs. 18.54 crores were not paid back by the said companies to BPML, and further BPML also did not receive interest of Rs. 6.39 crores from the said companies. However, I note that the funds invested by BPML in ICDs is not the subject matter in the present adjudication proceedings and accordingly has not been dealt with. It has also been observed that BPML had extended funds to certain entities which were used to support the scrip price on the day of the listing. Accordingly, as established previously, Noticees 1 and 3 have violated the provisions of Regulation 3(a), (b), (c), (d), 4(1), 4(2)(a), (d) and (e) of the PFUTP Regulations read with Section 12A(a), (b) and (c) of the SEBI Act. Further, I note that Noticees 1 to 6 and 8 to 11 have violated the provisions of Regulation 3 (a), (b), (c), (d), 4(1) ,4 (2) (e), (f) and (k) of the PFUTP Regulations read with Section 12A(a), (b) & (c) of the SEBI Act. Further, Noticee 1 has not complied with the summons issued by SEBI and has violated the provisions of Section 11C (2) and (3) of SEBI Act. Further, I note that Noticees 1, 3 and 4 have violated the provisions of Clause 43 of the listing Agreement read with Section 21 of

the SCRA, and Noticees 1 and 3 have violated the provisions of Clause 43A of the listing Agreement read with Section 21 of the SCRA.

ORDER

103. Accordingly, taking into account the aforesaid findings and in exercise of power conferred upon me under Section 15-I of the SEBI Act read with Rule 5 of the SEBI AO Rules, and under Section 23-I of the SCR Act read with Rule 5 of the SCR AO Rules, I hereby impose the following penalties on the Noticees 1 to 6 and 8 to 11 :–

Sl. No.	Noticee	Penal Provisions	Penalty (Rs.)
1	Birla Pacific Medspa Ltd (Noticee 1)	Section 15HA of SEBI Act	Rs. 1,00,00,000/- (Rupees One Crore Only)
		Section 15A(a) of SEBI Act	Rs. 5,00,000/- (Rupees Five Lakh Only)
		Section 23A(a) of SCRA	Rs. 2,00,000/- (Rupees Two Lakh Only)
		Section 23E of SCRA*****	Rs. 2,00,000/- (Rupees Two Lakh Only)
2	Mr. Yashovardhan Birla (Noticee 2)	Section 15HA of SEBI Act	Rs. 25,00,000/- (Rupees Twenty Five Lakh Only)
3	Dr. Abhijit Desai (Noticee 3)	Section 15HA of SEBI Act	Rs. 30,00,000/- (Rupees Thirty Lakh Only)
		Section 23A(a) of SCRA	Rs. 2,00,000/- (Rupees Two Lakh Only)
4	Mr. P V R Murthy (Noticee 4)	Section 15HA of SEBI Act	Rs. 25,00,000/- (Rupees Twenty Five Lakh Only)
		Section 23A(a) of SCRA	Rs. 1,00,000/- (Rupees One Lakh Only)

5	Mr. Venkateswaralu Nelabhotla (Noticee 5)	Section 15HA of SEBI Act	Rs. 25,00,000/- (Rupees Twenty Five Lakh Only)
6	Mr. Mohandas Adige (Noticee 6)	Section 15HA of SEBI Act	Rs. 25,00,000/- (Rupees Twenty Five Lakh Only)
7	Mr. Anoj Menon (Noticee 8)	Section 15HA of SEBI Act	Rs. 25,00,000/- (Rupees Twenty Five Lakh Only)
8	Mr. Rajesh Shah (Noticee 9)	Section 15HA of SEBI Act	Rs. 25,00,000/- (Rupees Twenty Five Lakh Only)
9	Mr. Upkar Singh Kohli (Noticee 10)	Section 15HA of SEBI Act	Rs. 25,00,000/- (Rupees Twenty Five Lakh Only)
10	Mr. Tushar Dey (Noticee 11)	Section 15HA of SEBI Act	Rs. 25,00,000/- (Rupees Twenty Five Lakh Only)

104. ***** As noted above, in light of the fact that an appeal has been before the Hon'ble Supreme Court in the Suzlon Energy (supra) matter, the monetary penalty imposed on the Company under section 23E of the SCRA shall be payable depending upon the outcome of the aforesaid appeal before the Hon'ble Supreme Court.

105. No penalty is imposed on Noticee 7 for the reasons as discussed in the preceding paragraphs of this order.

106. The aforesaid Noticees shall remit / pay the said amount of penalty within 45 days of receipt of this order either by way of Demand Draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, OR through online payment facility available on the website of SEBI, i.e. www.sebi.gov.in on the following path, by clicking on the payment link:

ENFORCEMENT → Orders → Orders of AO → PAY NOW.

107. The aforesaid Noticees shall forward said Demand Draft or the details / confirmation of penalty so paid to "The Division Chief (Enforcement Department - DRA-4), Securities

and Exchange Board of India, SEBI Bhavan, Plot No. C – 4 A, “G” Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.”. The Noticees shall also provide the following details while forwarding DD / payment information:

a) Name and PAN of the Noticee
b) Name of the case / matter
c) Purpose of Payment – Payment of penalty under AO proceedings
d) Bank Name and Account Number
e) Transaction Number

108. In the event of failure to pay the said amount of penalty within 45 days of the receipt of this Order, SEBI may initiate consequential actions including but not limited to recovery proceedings under section 28A of the SEBI Act, 1992 for realization of the said amount of penalty along with interest thereon, *inter alia*, by attachment and sale of movable and immovable properties.

109. In terms of Rule 6 of the SCR AO Rules and Rule 6 of the SEBI AO Rules, copy of this order is sent to the Noticees and also to Securities and Exchange Board of India.

Date: September 28, 2022 **Soma Majumder**
Place: Mumbai **Adjudicating Officer**