

BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO. Order/SM/AD/2022-23/ 17044]

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

In respect of:

Mr. Nilesh J Dhamecha [PAN: AKZPD4093R]

In the matter of Tirupati Fincorp Limited.

FACTS OF THE CASE IN BRIEF

1. Securities and Exchange Board of India (hereinafter referred to as '**SEBI**') conducted an investigation into the role of certain chartered accountants in certifying that there was no misutilization of the proceeds of preferential issue made by Tirupati Fincorp Limited (hereinafter referred to as "**Tirupati Fincorp/TFL/Company/By Name**") during January 2013. Pursuant to the aforementioned investigation, SEBI observed violation of Section 12A(c) of SEBI Act, 1992 (hereinafter referred to as "**SEBI Act**") read with Regulations 2(1)(c)(5) and 3(d) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2003 (hereinafter referred to as "**PFUTP Regulations**") by Mr. Nilesh J Dhamecha, Partner of KPND & Co (hereinafter referred to as "**Noticee**"). Therefore, SEBI initiated adjudication proceedings against Noticee for aforementioned violations.

APPOINTMENT OF ADJUDICATING OFFICER

2. Vide order dated March 25, 2021, SEBI appointed undersigned as the Adjudicating Officer under Section 19 of SEBI Act read with Section 15I and Rule 3 of SEBI (Procedure for

Holding Inquiry and Imposing Penalties) Rules, 1995 (hereinafter referred to as '**Adjudication Rules**') to inquire into and adjudge under the provisions of Section 15HA of SEBI Act, the aforesaid alleged violations by Noticee

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

3. A show-cause notice dated September 29, 2021(hereinafter referred to as '**SCN**') was issued to Noticee under Rule 4 of the Adjudication Rules to show-cause as to why an inquiry should not be initiated against Noticee and penalty, if any, not be imposed upon him under the provisions of Section 15HA of SEBI Act for the aforesaid violations alleged to have been committed by him.
4. The SCN was sent to Noticee through Speed Post Acknowledgement due (hereinafter referred to as '**SPAD**') as well as through digitally signed email dated September 29, 2021 and was duly served upon Noticee. Noticee was given fifteen (15) days' time to make his submissions in respect of the allegations made in the SCN. Vide email/letter dated February 22, 2022, Noticee submitted his reply to the SCN.
5. Thereafter, in the interest of natural justice, *vide* hearing notice date February 04, 2022, Noticee was granted an opportunity of personal hearing before the undersigned on February 22, 2022. The aforesaid hearing notice was sent to Noticee through SPAD and also through digitally signed email on February 08, 2022, and was duly served upon him. On the scheduled date of the hearing, the Authorised Representative of Noticee, Ms. Surabhi Agrawal appeared on behalf of Noticee and made the following submissions:
 1. *Noticee was not associated with Tirupati Fincorp Limited in any form and was appointed only as an independent auditor. He was not even the statutory auditor of company.*
 2. *The impugned certificate issued by Noticee was based on the documents provided by Tirupati Fincorp Limited.*
 3. *SEBI's case is not about fraud, connivance or collusion. It is only about Noticee's gross negligence or recklessness in adhering to the accounting norms in the course of auditing which can only point out to professional negligence and the same would*

only amount to a misconduct and can be taken up only by Institute of Chartered Accountants of India(ICAI).

- 4. Element of fraud was not brought out in SEBI's examination into the matter. The violation of 12A(c) of SEBI Act was also not made out by SEBI. In this regard, AR highlighted the judgment of Hon'ble Securities Appellate Tribunal dated 18/02/2022 in the matter of Mani Oommen. In the absence of fraud, SEBI has no jurisdiction with respect to Chartered Accountants.*
 - 5. Noticee has not dealt in securities, so SEBI cannot out reach its jurisdiction since, Section 12 A(c) of SEBI Act cannot be made applicable to Noticee as no fraud has been carried out by him. Further, in the absence of connivance, deceit, or manipulation, Regulations 3 and 4 of the PFUTP Regulations cannot be made applicable.*
 - 6. SEBI has not shown any connection with promoters/ directors of company.*
6. Due to difficulties in view of the Covid-19 pandemic, hearing was conducted through video conferencing.

Reply filed by Noticee

7. The relevant extracts of reply filed by Noticee vide his letter/email dated February 22, 2022 are as given under :-
- I have no association with TFL in any manner other than the present engagement which is only for the limited purpose of providing the certificate.*
 - With regard to the allegations levied against my firm in the present SCN, it is humbly submitted that these charges must be dropped with immediate effect as these charges of inadequacy in professional care, negligence, and recklessness do not amount to violation of any provisions of the SEBI laws.*
 - I state that, the said Certificate is issued purely on the basis of perusal of the data provided by the TFL. I have perused the records that were made available to me and have taken due care in analyzing the same while issuing the said Certificate to the best of my knowledge and ability as a Chartered Accountant. I have carried out the requisite due diligence whilst issuing the said Certificate.*

- However, SCN upon considering the documents and statements made by me have framed the charges which are not in the nature of connivance, collusion or fraud but merely of inadequacy of professional care and negligence shown by me in issuing the said Certificate. These charges do not by any stretch of imagination attract any provisions of PFUTP Regulations or SEBI Act.
- It is amply clear that, the pre-requisite to prove fraud under the PFUTP Regulations is that there must be inducement to a person to deal in securities. The present SCN, absent of any allegation of fraud, directly or indirectly, has proceeded to hold me in violation of Section 12A(c) of the SEBI Act and Sections 2(1)(c)(5) and 3(d) of PFUTP Regulations, 2003.
- Section 12A(c) of the SEBI Act cannot be made applicable in the matter because even going by the allegations in the SCN, no fraud has been carried out by me.
- From the bare reading of the aforesaid provisions, it is clear that the primary essence of these provisions is based on act of 'fraud' which entails from mens rea. I had no ill intention to carry out any activity that may be detrimental to the interest of the investors or may amount to any penalty under SEBI laws. Moreover, going by the Show Cause Notice itself, it is apparent that nowhere a charge on fraud is levelled against me. Therefore, in absence of any charge of fraud there is no basis such a SCN against me.
- In light of the decision of Bombay High Court in Writ Petition no. 5249/2010 Price Waterhouse Co. Vs SEBI (13.08.2010), SEBI has no jurisdiction to proceed against the Chartered Accountant who is a member of the ICAI and therefore SEBI lacks inherent jurisdiction to inquire into the conduct of a Chartered Accountant.
- Merely a charge of negligence and recklessness in giving the said Certificate does not invite the provisions as levelled against me in the present SCN.
- The charges framed against me, if at all any, at best may amount to professional lapse on my part in conducting the audit especially with respect to failure to seek direct confirmation from the Bank relating to Bank Balances and fixed deposits or perusing the ledger entries more closely. These lapses amount to negligence. If any action lies, it ought to be taken by ICAI and not by SEBI, that too on the footing of fraud, which by its own SCN is not the charge against me. No violation of any provisions of PFUTP Regulations can be made out against me

CONSIDERATION OF ISSUES, EVIDENCE AND FINDINGS

8. I have carefully perused the charges levelled against Noticee, reply/submissions filed by Noticee and other documents/evidence available on record. The issues that arise for consideration in the present case are:

- I. Whether Noticee has violated the provisions of Section 12A(c) of SEBI Act read with Regulations 2(1)(c)(5) and 3(d) of PFUTP Regulations?
- II. Do the violations, if any, attract monetary penalty under Section 15HA of SEBI Act?
- III. If the answer to issue no. II is in affirmative, then what should be the quantum of monetary penalty?

Issue No. I. Whether Noticee has violated provisions of Section 12A(c) of the SEBI Act read with Regulations 2(1)(c)(5) and 3(d) of the PFUTP Regulations?

9. I note from the available records that TFL had made a preferential allotment of 20,00,000 equity shares on January 07, 2013. The details of the same are as given hereunder:

Sr. No	Date of allotment	No. of allottees	No of shares	Issue Price (in Rs)	Issue Proceeds (in Rs)
1.	January 07, 2013	27	20,00,000	21	4,20,00,000/-

10. The objects of the issue as noted from the Notice dated November 30, 2012 issued by the TFL for the Extra Ordinary General Meeting of its members held on January 05, 2013, which passed the resolution containing details of the allotment and the objects of the preferential issue, are as given hereunder:

- *In order to generate long term resources for implementing future growth plans, it is proposed to issue equity shares on preferential basis;*
- *The proceeds of proposed preferential allotment will strengthen the financial position of the company;*
- *The object of the equity shares on preferential basis is to augment the capital base of the company and also to meet working capital requirement of the company.*

11. I note from available records that BSE Ltd. (hereinafter referred to as “**BSE**”) had carried out an examination of utilization of funds raised by certain companies including TFL. In this regard, I note that BSE during the course of its examination, *inter alia*, had required TFL to submit an Auditor Certificate confirming that funds raised in the aforementioned preferential issue have been utilized as per the objects of issue along with all relevant supporting documents. I note from available records that pursuant to direction of BSE, TFL had submitted to BSE, *inter alia*, certificate dated April 5, 2016 (hereinafter referred to as “**Certificate**”) issued by KPND & Co. (hereinafter referred to as “**Auditor**”) and signed by Noticee stated that there was no mis-utilization of the proceeds of preferential issue. On perusal of Certificate issued by Auditor, I note that Certificate, *inter alia*, states as under:

- *that the Company was able to meet listing criteria for listing on BSE Ltd.,*
- *that there is no mis-utilization of funds raised under preferential basis as fund has been deployed to genuine borrowers as Loan on which interest is charged and received by the company on regular basis. Also, fund is used to make payments to suppliers in the due course of business,*
- *that all the transactions in the aforesaid Company have been done on arm’s length basis in due course of business, otherwise than, money raised as above has not been transferred to the preferential allottees/ promoters/ directly or indirectly.*

12. I note that in order to carry out an independent review, the matter was placed by BSE before its Auditors’ Committee (hereinafter referred to as “**AC**”). From the extracts of the minutes of the meeting of the AC held on June 22, 2017, I note that AC had *prima facie* observed that there appeared to be misutilisation of funds raised by TFL under the preferential issue. I also further note that AC in the aforementioned meeting had observed that certificate issued by the Auditor appeared to be equivocal and faulty.

13. I note that based on observations in the investigation carried out by SEBI in the matter, it has been alleged in the SCN that Noticee has failed to exercise professional care, due diligence and caution in carrying out his engagement as the certification auditor and had issued the Certificate in a reckless and careless manner which amounted to violation of Section 12A(c) of the SEBI Act read with Regulations 2(1)(c)(5) and 3(d) of the PFUTP Regulations

14. On perusal of Certificate issued by Noticee, I note that Noticee had certified that TFL had utilized the sum of Rs.4,20,00,000/- (Rupees four crore twenty lakh only) mobilized through the preferential issue of shares, in the following manner:

S. No.	Purpose	Amount (Rs.)
1.	Utilisation in Loans given to borrowers	1,48,50,599/-
2.	Fixed Deposit with Oriental Bank of Commerce	39,55,000/-
3.	Investment in shares of Tea Exchange Bharat Ltd	40,00,000/-
4.	Utilization in Purchases of Good in due course of business	1,99,50,000/-
	TOTAL	4,27,55,599/-

Utilization in Loans given to borrowers

15. From the perusal of Certificate, I note that an amount of Rs.1,48,50,599/- was certified by Noticee as utilized towards loans given to borrowers out of the funds raised in the preferential issue of shares. I further note that Certificate states that the transactions in TFL have been done on arm's length basis in due course of business, otherwise than, money raised as above has not been transferred back to the preferential allottees/ promoters/ directors directly or indirectly. The details of the loan given by TFL as noted in the Certificate are as given hereunder:

S. No.	Name of the borrowers	Date of Payment	Amount (Rs.)
1.	Dulal P Chowdhary	27/03/2013	200,000.00
2.	Govind Kripa Buildwell Pvt. Ltd.	25/02/2013	700,000.00
3.	Meena Steel	19/12/2012	1000,000.00
4.	Mona Poddar	17/01/2013	800,000.00
5.	Neelam Devi Chopra	12/01/2013	750,000.00
6.	Pawan Natani HUF	12/01/2013	1000,000.00
7.	Santosh Trading Company-Loan	14/12/2012	781,571.00
		15/12/2012	3000,000.00
8.	Tirupati Mahima Infratec Pvt. Ltd.	25/02/2013	1800,000.00
9.	Vinayaka Tea Co.(HUF)-Loan	18/12/2012	2319,028.00
10.	Vinod Kumar Gupta-HUF	05/03/2013	1500,000.00
		07/03/2013	1000,000.00
Total		14,850,599.00	

16. I note from the table above that disbursal of Loan to Vinayaka Tea Co.(HUF), Meena Steel and Santosh Trading Company were made by TFL prior to its preferential allotment of shares, i.e. before January 07, 2013. Thus, I note that several of the loans and advances were made by TFL prior to the preferential allotment. Hence, loan given to the aforementioned entities cannot be considered to be deployed from the fund received from preferential allotment of shares by TFL.
17. Therefore, the statement in the Certificate that out of the funds raised in the preferential issue of shares, an amount of Rs.1,48,50,599/- was utilized towards loans given to the aforementioned borrowers by TFL is clearly incorrect and was made in reckless and careless manner.
18. Noticee further stated in Para (V) of his Certificate that the fund has been deployed to genuine borrowers as Loan to which interest is charged and received by the company on regular basis. However, I observe that for the loans given to Meena Steel (on December 19, 2012) and Dulal P Chowdhary (on March 27, 2013), no such interest has been debited till/at the end of the year i.e., on March 31, 2013, as has been debited to all other borrowers. Therefore, I find that certification made by Noticee in this regard has been made by Noticee in reckless and careless manner.

Fixed Deposit with Oriental Bank of Commerce

19. I note from perusal of Certificate that an amount of Rs.39,55,000/- had been certified by Noticee as utilization of funds raised in the preferential issue, under the head “Fixed Deposit with Oriental Bank of Commerce”. In this regard, I note that Noticee vide his letter dated September 26, 2020, to SEBI, had informed that Fixed Deposit Receipts (FDR) were verified by Noticee and also had enclosed along with the aforementioned letter a copy of statement of account of TFL with Bank of Maharashtra from where a total amount of Rs.39,55,000/- was transferred to Oriental Bank of Commerce, along with the list of FD Receipts created. However, I observe the no copy of FDR Receipts have been enclosed along with the aforementioned letter by Noticee. In this regard, I note that Noticee vide his letter dated November 08, 2020 has stated that Auditor had not kept copy of FD receipts in

their working paper. Further, I note from the statement of Noticee recorded during investigation on December 14, 2020 by SEBI that as regards fixed deposits made with Oriental Bank of Commerce, Noticee had stated that he had verified the same from the copies of FDRs provided by TFL and had not retained the copies of FDR in his records, but obtained a list of FD Account Nos. Further, it was also stated by Noticee in his aforementioned statement that he had not obtained certificate of confirmation of balance from the banks and other parties but only verified from the copy of bank statement furnished by TFL.

20. I note from the statement of Account No. No.60078328285 of TFL with Bank of Maharashtra as provided by Noticee in his letter to SEBI dated that September 26, 2020 that an amount of Rs.28,00,000/- was transferred on January 3, 2013 and another amount of Rs.11,55,000/- was transferred on January 16, 2013 to Oriental Bank of Commerce. The aforementioned amounts were claimed by Noticee to have been transferred for the purpose of creating FDs with Oriental Bank. However, I observe from the list of FDs provided by Noticee that ten(10) FDRs were created for a sum of Rs.40,000/- each and totaling to Rs.40,00,000/- and the date of FDRs were mentioned as January 03, 2013. I further note that Noticee vide his letter dated September 26, 2020, also furnished a copy of statement of bank account No.09975015002001 of TFL with Oriental Bank of Commerce. I note that no specific mention of the aforementioned bank statement or any explanation regarding the same has been provided by Noticee in his aforementioned letter. I also observe that Noticee in his letter dated November 08, 2020 has stated that from the statement of Oriental Bank of Commerce, it is clear that Company had made investment in FDs with Oriental Bank of Commerce. On perusal of the aforementioned bank statement, I observe that the said bank statement for the period "from 01.04.2012 to 31.3.2013" was printed on "27-06-2019" which points out to post facto building up of records by Noticee. I am of the view that providing the bank statement which was printed much after the issuance of the Certificate was done only to portray a seeming exercise of professional care and caution on the part of the Noticee. Further, I note that aforementioned transfer of funds of Rs.28,00,000/- on January 3, 2013 and Rs.11,55,000/- on January 16, 2013 from the bank account of TFL from Bank of Maharashtra, are not appearing in the said statement. Further, I note that Noticee in his letter dated November 08, 2020 has also made contradictory statements with regard to the total amount of FDs created from the funds mobilized from preferential issue of shares by

TFL. In one part of the aforementioned letter, the same was quoted as Rs. 39,55,000/- by him but in other part, the Noticee quoted the amount of FD created as Rs. 40,00,000/-.

21. From the aforementioned observations, I find that there were discrepancies in the information provided by Noticee to SEBI vide his letters dated September 26, 2020 and November 08, 2020, with respect to amount of fixed deposits created. Further, as observed earlier from the list of FDRs, the date of FDRs were mentioned as January 03, 2013. However, the date of allotment of preferential equity shares was on January 07, 2013. Thus, I note that FDs seem to be created before the date of allotment of preferential equity shares.
22. Therefore, in light of observations made in preceding paragraphs, I find that the certification by Noticee that amount of Rs. 39,55,000/- from the funds mobilized from preferential issue of shares were utilized for creation of Fixed Deposits in Oriental Bank is incorrect and was made in a reckless manner without due care.

Investment in the shares of Tea Exchange Bharat Limited (TEBL):

23. I note from Certificate that an amount of Rs.40,00,000/- was certified by Noticee as utilization of funds raised in the preferential issue, under the head "Investment in the shares of Tea Exchange Bharat Limited". In this regard, I note that Noticee vide his letter dated September 26, 2020 informed that he had obtained share certificates in which the company had invested at that time. However, I note from perusal of Noticee's statement recorded during investigation on December 14, 2020 that he had verified only the share certificates of TEBL and the ledger accounts provided by TFL and had not verified any other documents beyond the aforesaid documents for the purpose of Certificate issued by him. I note from available records that the parties to the Share Purchase Agreement through which the investments in TEBL was made by TFL had agreed to take approval of their companies' shareholders under applicable sections of Companies Act, 1956 at their respective extraordinary general meeting to be held and fulfill all the statutory compliances. However, I note from available records that no board resolution was available for the investment in TEBL as required under Section 372 of the Companies Act, 1956.
24. I further note from available records that TEBL was one of the preferential allottees of TFL with 95,238 shares for a value of Rs.19,99,998/- and was also connected with other

allottees in the preferential issue viz., G K Dalmia, Maya Dalmia and others . In light of the aforesaid, I find that the Certification by Noticee that the funds have not been transferred back to the preferential allottees/ promoters/ directors directly or indirectly, has been made without any proper exercise of professional care, and caution on his part.

Utilization in Purchases of Good in due course of business:

25. I further note from Certificate that an amount of Rs.1,99,50,000.00/- was certified by Noticee as utilization of funds raised in the preferential issue, under the head “Utilization in Purchases of Goods in due course of business”. In this regard, I observe that Noticee, vide his letter dated September 26,2020 informed that purchase bills and bank statements and ledgers of respected parties had been verified by Noticee in that regard. I also note that the same reply was furnished to SEBI vide his letter dated November 8, 2020 also. Further, I also note that Noticee in his statement recorded during investigation on December 14, 2020 stated that he was given to understand that the payments to the suppliers were made for purchase of fabrics. From the Noticee’s statement, I note that TFL had utilized a part of the proceeds raised in the preferential issue for purchase of fabrics.
26. I also note that Noticee was asked to state during the aforesaid recording of statement, whether dealing with that kind of goods was included in the Objects Clause of the Memorandum of Association (MoA) of TFL. I observe that to this query, vide his letter dated December 31, 2020, Noticee had informed SEBI that the MoA and Articles of Association of TFL were not found in the working papers so he was not sure about it. Further, I note that Noticee vide the aforementioned letter further confirmed that TFL had purchased fancy fabric. In this regard, I note that TFL is a Non-Banking Finance Company (NBFC) registered with the Reserve Bank of India. However, I note from FAQ section in the RBI website that NBFC is defined as a company which is engaged in the business of loans and advances, acquisition of shares/stocks/bonds/debentures/securities issued by Government or local authority or other marketable securities of a like nature, leasing, hire-purchase, insurance business, chit business but does not include any institution whose principal business is that of agriculture activity, industrial activity, purchase or sale of any goods (other than securities) or providing any services and sale/purchase/construction of immovable property. Therefore, I find that purchase of fancy fabrics amounting to Rs.1,99,50,000.00/- seems to be at variance with its functioning as NBFC. Further, I note from available records

that there is no provision in the ancillary/incidental objects or other objects in the MoA of TFL for it to carry out the activity in the nature of trading in fabrics/fancy fabrics. Therefore, I note that purchase of fabrics as certified by Noticee was not done in the ordinary course of business of TFL or as per its registration as NBFC. In this regard, I note that Noticee in his Certificate has stated that *“fund is used to make payment to the suppliers in due course of business”*. In light of the above observations, I find that aforementioned statement made by Noticee in Certificate was incorrect and made without any basis, seen from the fact that Notice had not perused neither MoA and Articles of Association of TFL.

27. Further, as earlier noted, the following were the objects of the preferential issue made by the TFL:

- *In order to generate long term resources for implementing future growth plans, it is proposed to issue equity shares on preferential basis;*
- *The proceeds of proposed preferential allotment will strengthen the financial position of the company;*
- *The object of the equity shares on preferential basis is to augment the capital base of the company and also to meet working capital requirement of the company.*

28. In light of the above, I find that purchase of fancy fabrics amounting to Rs.1,99,50,000.00/- was at variance with the objects of the preferential issue made by the TFL. Therefore, I find that TFL had not utilized the proceeds of preferential issue for the purposes approved by the shareholders of the Company. In light of the above observations, I find that the certification by the Noticee that there was no misutilisation of funds raised under preferential basis seem to be made in casual and reckless manner.

Non-compliance with “Guidance Note on Audit Reports and Certificates for Special Purposes”

29. Some of the relevant guidance points observed from the “Guidance Note on Audit Reports and Certificates for Special Purposes” issued by the Institute of Chartered Accountants of India (ICAI), and was extant during the period when the impugned Certificate was issued by the Noticee, are as under:

Para 5. Contents of Reports and Certificates for Special Purposes:

5.2.f. The title of the report or certificate should clearly indicate its nature i.e., whether it is a report or a certificate.

30. In this regard, I note that BSE vide its Notice dated December 18, 2015 had mandated that the Company shall produce Auditors Certificate. I However, I find that Noticee had not indicated that the document issued was a “certificate” but issued the same in the manner and format of a letter addressed to the Department of Surveillance & Supervision, BSE. In this context, I note that another guidance contained in the aforesaid Guidance Note stated as follows:

Para 10. Communication of Report or Certificate

10.1. The reporting auditor may address his report or certificate to client or to the public authority or person requiring it, as may be. In appropriate circumstances, a certificate may be issued without reference to any particular person or by using the words, “To whomsoever it may concern”.

10.2. The report or certificate should normally be issued to the client who should be responsible for forwarding the same to the concerned authority, where so required.”

31. In light of aforesaid guideline, I find that Noticee should have issued a Certificate by giving a title “To Whomsoever it may concern” or “Certificate” and not by way of a letter addressed to the Department of Surveillance & Supervision, BSE Ltd.

32. In this context, another guidance contained in the aforesaid Guidance Note stated as follows:

- Para 6.(Extent of Reliance on General Purpose Audit Report)

“6.1. Where a special purpose engagement is undertaken after the statutory audit has been completed, a reporting auditor should invariably review the statutory audit report to ascertain whether there are any matters which have a bearing on his report or certificate.”

- Para 2.2.

“A certificate is a written confirmation of the accuracy of the facts stated therein and does not involve any estimate or opinion.”

“....when a reporting auditor issues a certificate, he is responsible for the factual accuracy of what is stated therein”.

33. In this regard, I note that vide Summons dated August 12, 2020, Noticee was asked whether he had interaction with the statutory/internal auditors of the Company in relation to and during the course of engagement and, if yes, to furnish the details thereof. I note that Noticee vide his reply dated November 8, 2020 stated that he did not make any such interaction with the statutory auditor of the Company because he had a Statutory audit report of the Company for the financial year 2012-13 and hence it was not necessary to have any communication with the auditor of the Company in the same matter again.
34. It has been alleged in the SCN that there had been variations in utilization figures of the funds mobilized through the preferential allotment in the Certificate issued by Auditor and those submitted by TFL, vide its letter dated June 14, 2019, to SEBI and the same had not been brought out by Noticee in his Certificate specifically. I also note that utilization figures of the preferential allotment has not been clearly laid down in the Statutory Audit Report for financial year 2012-2013, which was relied upon by Noticee. I also note Certificate was issued by Noticee on April 05, 2016, i.e. three years before the aforesaid letter of the Company. In light of the above, I find that allegation in the SCN that Noticee had not brought out variations in utilization figures of the funds mobilized through the preferential allotment in his Certificate does not stand established.
35. In light of observations in preceding paragraphs, I find that Noticee has not observed the aforesaid guidance note issued by the ICAI and the same clearly brings out the lack of professional care, caution and the casual and reckless manner in which the Certificate was issued by Noticee.

Further instances of due diligence violations by Noticee

36. I note that Noticee without obtaining and perusing the Explanatory Statements to the “Notice of Extra Ordinary General Meeting” dated November 30, 2012 issued by TFL which contained the objects of the issue from the Company, had certified in para (III) of his

Certificate that the preferential issue of equity shares was made with the object to raise funds for the working capital requirement of the company. In addition, contrary to what had been stated by him as the aforesaid object of meeting working capital needs, I note that Noticee has also certified that utilization of an amount of Rs.40,00,000/- was towards investment in shares of TEBL. In this regard, I note that the said investment in the shares of TEBL was classified as "Non-current Investment" under Note No.8 to the Balance Sheet as on March 31, 2013 forming part of the statutory audit report, a copy of which was furnished by the Noticee from his working papers. Thus, I find that the aforesaid statement of Noticee in the certificate showed Noticee's casual and reckless approach in issuing the Certificate.

37. I further note that while the Certificate was issued/dated on April 5, 2016, the copy of TFL letter addressed to the Auditor, requesting for a certificate with respect to notice from BSE (Department of Surveillance and Supervision) was dated as "April 25, 2016" and the Management Representation Letter of TFL was dated as "April 28, 2016". I note that copies of the aforesaid letters of TFL were furnished by Noticee vide his letter dated September 26, 2020 to SEBI. Further, I note that Noticee in his statement recorded during investigation on December 14, 2020, referring to the copy of letter dated April 25, 2016 informed that a letter dated March 25, 2016 was given to him from TFL requesting to take up the assignment. Going by the dates mentioned on the letters and the statement of Noticee, I am of the view that the documents were manufacture/fabricated in haste after receipt of summons from the SEBI.

38. Further, I note that Noticee vide Summonses dated August 12, 2020 and October 26, 2020, was asked to furnish copies of letters/emails sent to the Company seeking information/documents/records to form the said opinion that there is no mis-utilization of funds raised in the preferential issue. In response, vide his letter dated November 8, 2020, Noticee informed that no such communication was made because the person of the Company visited his office with related documents and replied to his queries, and hence he was not required to make such mail communications. However, I note from Noticee's statement under oath recorded on December 14, 2020 that Noticee was not sure as to whether the person he was interacting/ communicating with in the matters relating to the Certificate issued by him was actually an official/authorized person of the Company/TFL.

39. Moreover, I note that vide Para IV (3) of the Certificate, Noticee had made the following statement *“Company was able to meet listing criteria for listing on BSE Ltd.”* In this regard, I observe from Noticee’s deposition before the SEBI that the said statement was made without placing reliance on any document/working paper and was very open and general in nature.
40. In this regard, Noticee in his submission has contended that he had issued Certificate purely on the basis of perusal of the data provided by the TFL and he had perused the records that were made available to him and had taken due care in analyzing the same while issuing Certificate to the best of my knowledge and ability as a Chartered Accountant. Noticee has also contended that the charges framed against him if at all any, at best may amount to professional lapse on my part in conducting the audit especially with respect to failure to seek direct confirmation from the Bank relating to Bank Balances and fixed deposits or perusing the ledger entries more closely. Noticee has further contended that these lapses amount to only negligence and if any action lies, it ought to be taken by ICAI and not by SEBI, that too on the footing of fraud, which by its own SCN is not the charge against him.
41. With regard to the aforementioned contentions of Noticee, I note that apart from a general denial, Noticee has not specifically denied any of the allegations cast in the SCN. I also note that Noticee has not placed on record any evidence to rebut the allegations cast in the SCN. In light of the same, I find that Noticee had provided Certificate to BSE in a reckless and careless manner in the course of preliminary investigation initiated by the BSE against TFL concerning the fund utilisation of proceeds of preferential allotment made by the TFL.
42. I note that the issue to be determined here is whether the findings observed against Noticee in the preceding paragraphs amount to violation of Section 12A(c) of SEBI Act read with Regulations 2(1)(c)(5) and 3(d) of the PFUTP Regulations. In this regard, Noticee in his submissions, has contended that charges against him are not in nature of connivance, collusion or fraud but merely that of inadequacy of professional care and negligence shown by him in issuing Certificate. Noticee has further contended that charges against him would not attract any provisions of PFUTP Regulations or SEBI Act. Noticee has contended that the pre-requisite to prove fraud under the PFUTP Regulations is that there must be inducement to a person to deal in securities. Noticee has contended that SCN in absent of any allegation of fraud, directly or indirectly, has proceeded to hold him in violation of

Section 12A(c) of the SEBI Act and Sections 2(1)(c)(5) and 3(d) of PFUTP Regulations. Noticee has further contended that Section 12A(c) of SEBI Act cannot be made applicable to him as even going by the allegations in the SCN, no fraud has been carried out by him. Noticee has also contended that in the absence of connivance, deceit, or manipulation Regulations 3 and 4 of the PFUTP Regulations cannot be made applicable. Noticee has further contended that the primary essence of aforementioned provisions is based on act of 'fraud' which entails *mens rea*. Noticee has stated that he had no ill intention to carry out any activity that may be detrimental to the interest of the investors or may amount to any penalty under SEBI laws. I note that in support of his contentions, Noticee has placed reliance on the decisions of Hon'ble SAT in Price Waterhouse & Co. vs. SEBI , Appeal No. 6 & 7 of 2018 , decision dated September 09, 2019 and Mani Oommen vs. SEBI, Appeal No. 183 of 2020, date of decision February 18, 2022 and decision of Bombay High Court in Price Waterhouse & Co. v. Securities and Exchange Board of India , 2010 SCC OnLine Bom 1197.

43. Before proceeding further, I find it relevant to refer to aforementioned provisions of SEBI Act and PFUTP Regulations alleged against Noticee and the same is reproduced hereunder:

SEBI Act

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

12A. No person shall directly or indirectly—

.....
.....

(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

2(1)(b) dealing in securities" includes:

an act of buying, selling or subscribing pursuant to any issue of any security or agreeing to buy, sell or subscribe to any issue of any security or otherwise transacting in any way in any security by any persons including as principal, agent, or intermediary referred to in section 12 of the Act; such acts which may be knowingly designed to influence the decision of investors in securities; and any act of providing assistance to carry out the aforementioned acts

2.(1) In these regulations, unless the context otherwise requires,—

.....
(c) *"fraud" includes any act, expression, omission or concealment committed whether in a deceitful manner or not by a person or by any other person with his connivance or by his agent while dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any wrongful gain or avoidance of any loss, and shall also include—*

- (1) a knowing misrepresentation of the truth or concealment of material fact in order that another person may act to his detriment;*
- (2) a suggestion as to a fact which is not true by one who does not believe it to be true;*
- (3) an active concealment of a fact by a person having knowledge or belief of the fact;*
- (4) a promise made without any intention of performing it;*
- (5) a representation made in a reckless and careless manner whether it be true or false;*
- (6) any such act or omission as any other law specifically declares to be fraudulent,*
- (7) deceptive behaviour by a person depriving another of informed consent or full participation,*
- (8) a false statement made without reasonable ground for believing it to be true.*
- (9) the act of an issuer of securities giving out misinformation that affects the market price of the security, resulting in investors being effectively misled even though they did not rely on the statement itself or anything derived from it other than the market price.*

3. Prohibition of certain dealings in securities

No person shall directly or indirectly—

-
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 there under.*

44. In this context, I find it pertinent to examine the ambit of "fraud" under the PFUTP Regulations as laid down in various judicial pronouncements. I note that Hon'ble Supreme Court of India in the matter of SEBI vs. Shri Kanaiyalal Baldevbhai Patel (CIVIL APPEAL NO. 2595 OF 2013) dated September 20, 2017 while interpreting the definition of fraud specified under section 2(1)(c) of PFUTP Regulations has held as under:

.....28. The definition of 'fraud' under clause (c) of regulation 2 has two parts; first part may be termed as catch all provision while the second part includes specific instances which are also included as part and parcel of term 'fraud'. The ingredients of the first part of the definition are-

- 1. includes an act, expression, omission or concealment whether in a deceitful manner or not;*
- 2. By a person or by any other person with his connivance or his agent while dealing in securities;*
- 3. So that the same induces another person or his agent to deal in securities;*
- 4. Whether or not there is any wrongful gain or avoidance of any loss.*

The second part of the definition includes specific instances-

- (1) a knowing misrepresentation of the truth or concealment of material fact in order that another person may act to his detriment;
- (2) a suggestion as to a fact which is not true by one who does not believe it to be true;
- (3) an active concealment of a fact by a person having knowledge or belief of the fact;
- (4) a promise made without any intention of performing it;
- (5) a representation made in a reckless and careless manner whether it be true or false;
- (6) any such act or omission as any other law specifically declares to be fraudulent,
- (7) deceptive behavior by a person depriving another of informed consent or full participation.
- (8) a false statement made without reasonable ground for believing it to be true.
- (9) The act of an issuer of securities giving out misinformation that affects the market price of the security, resulting in investors being effectively misled even though they did not rely on the statement itself or anything derived from it other than the market price.

45. I note from the aforementioned Order of Hon'ble Supreme Court that that the definition of fraud under Regulation 2(1)(c) of PFUTP Regulations has two parts. The first part of the definition of fraud under Regulation 2(1)(c) of PFUTP Regulations laid down a general definition of fraud. While second part of the definition of fraud under Regulation 2(1)(c) of PFUTP Regulations [starting from sub-clause (1) to (9)] spells out specific instances which can be considered as fraud. I also note that Hon'ble Supreme Court in SEBI vs. Shri Kanaiyalal Baldevbhai Patel (supra) has also held as under:

.....5. *If Regulation 2(c) of the 2003 was to be dissected and analyzed it is clear that any act, expression, omission or concealment committed, whether in a deceitful manner or not, by any person while dealing in securities to induce another person to deal in securities would amount to a fraudulent act. The emphasis in the definition in Regulation 2(c) of the 2003 Regulations is not, therefore, of whether the act, expression, omission or concealment has been committed in a deceitful manner but whether such act, expression, omission or concealment has/had the effect of inducing another person to deal in securities.*

6. *The definition of 'fraud', which is an inclusive definition and, therefore, has to be understood to be broad and expansive, contemplates even an action or omission, as may be committed, even without any deceit if such act or omission has the effect of inducing another person to deal in securities. Certainly, the definition expands beyond what can be normally understood to be a 'fraudulent act' or a conduct amounting to 'fraud'. The emphasis is on the act of inducement and the scrutiny must, therefore, be on the meaning that must be attributed to the word "induce".....*

.....8. *A person can be said to have induced another person to act in a particular way or not to act in a particular way if on the basis of facts and statements made by the first person the second person commits an act or omits to perform any*

particular act. The test to determine whether the second person had been induced to act in the manner he did or not to act in the manner that he proposed, is whether but for the representation of the facts made by the first person, the latter would not have acted in the manner he did. This is also how the word inducement is understood in criminal law. The difference between inducement in criminal law and the wider meaning thereof as in the present case, is that to make inducement an offence the intention behind the representation or misrepresentation of facts must be dishonest whereas in the latter category of cases like the present the element of dishonesty need not be present or proved and established to be present. In the latter category of cases, a mere inference, rather than proof, that the person induced would not have acted in the manner that he did but for the inducement is sufficient. No element of dishonesty or bad faith in the making of the inducement would be required.”

46. I note from above judgement of the Hon'ble Supreme Court of India in SEBI vs. Shri Kanaiyalal Baldevbhai Patel, that one of the essential ingredients of the fraud as defined under Regulation 2(1)(c) of PFUTP Regulations is that it should have the effect of inducing another person to deal in securities. In light of ratio laid down by the Hon'ble Supreme Court of India in SEBI vs. Shri Kanaiyalal Baldevbhai Patel, I note that second part of the definition of fraud under Regulation 2(1)(c) of PFUTP Regulations [starting from sub-clause (1) to (9)] which spells out specific instances which can be considered as fraud does not stand in isolation and has to be read in conjunction with first part of the Regulation 2(1)(c) of PFUTP Regulations. Considering the same, I note that a representation made in a reckless and careless manner whether it be true or false as stated in the clause 2(1)(c)(5) had to have been done in order to induce another person or his agent to deal in securities. In this regard, I note that no evidence is available on record to indicate that act of Noticee in providing Certificate in reckless and careless manner had the effect of inducing another person or his agent to deal in securities. I also note the intent of Certificate was for the purpose of the investigation conducted by the BSE and was intended for BSE only and was not issued to general public and the BSE in its investigation had concluded that proceeds of the preferential issue of shares had been misutilized and Certificate issued by Auditor appeared to be faulty. Considering the above, I find that the reckless manner of issuance of certificate could not be said to have induced another person/his agent to deal in securities. Further, I note that no evidence has been brought on record to indicate connivance/collusion of Noticee with Company or its directors. I also note that other than his engagement for the purpose of issuing Certificate, there is nothing on record to indicate that Noticee was associated with TFL in any manner whatsoever. In absence of connivance or collusion and lack of inducement on another person/ another

person or his agent to deal in securities, I am of view that such reckless manner in issuance of the certificate before BSE amount merely to professional misconduct on part of Noticee as an Auditor and the same cannot be considered as “fraud” as defined under Regulation 2(1)(c) of PFUTP Regulations.

47. In the light of the above observation, I find that the act of Noticee in issuance of Certificate does not fall under the definition of fraud under Regulation 2(1)(c) of PFUTP Regulations. Since no fraud is established against Noticee, I find that charges under Section 12A(c) of SEBI Act read with Regulations 2(1)(c)(5) and 3(d) of PFUTP Regulation is not established. Since the alleged violations are not established against Noticee, I find that Issues No. II and III require no further consideration.

ORDER

48. Accordingly, taking into account the aforesaid findings and in exercise of powers conferred upon me under Section 15I of SEBI Act read with Rule 5 of the Adjudication Rules, the Adjudication proceedings against the Noticee i.e. Mr. Nilesh J Dhamecha initiated vide SCN dated September 29, 2021, stands disposed of without imposition of any penalty.
49. In terms of the provisions of Rule 6 of the Adjudication Rules, copies of this order are being sent to Noticee viz. Mr. Nilesh J Dhamecha and also to the Securities and Exchange Board of India, Mumbai

Place: Mumbai

Date: June 14, 2022

**SOMA MAJUMDER
ADJUDICATING OFFICER**