

BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO. : Order/VV/NK/2021-22/15777]

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

In respect of:
M/s. K Gopalkrishnan & Co.
(Membership No. 200/25421)
(Firm Regn No. 009600S)

IN THE MATTER OF ACROPETAL TECHNOLOGIES LIMITED

BACKGROUND

1. Acropetal Technologies Limited (herein after referred to as “**ATL**” / “**Company**”) came out with an Initial Public Offer (herein after referred to as “**IPO**”) for issue of 1,88,88,889 equity shares of face value Rs. 10/- each at a price of Rs. 90/- per share, aggregating to Rs. 170 Crore during February 2011. The issue was graded by ICRA Limited and assigned a grade of 3/5, indicating average fundamentals. The bidding for the issue was open from 21/02/2011 to 24/02/2011 and the issue was oversubscribed 1.19 times. ATL was listed on the exchanges BSE and NSE on 10/03/2011. The scrip opened at Rs. 92/- and Rs.130/- and touched a high of Rs.140/-and Rs. 150/- on NSE and BSE respectively.
2. Securities and Exchange Board of India (herein after referred to as “**SEBI**”) took up the preliminary investigation in the IPO of Acropetal Technologies Limited on February 08, 2012. During the collection of information, it was noted that the response of the ATL to SEBI’s letter was found to be incomplete/contradictory. ATL failed to submit documentary evidences and certain entities did not reply to SEBI’s letters. Since ATL and other entities did not co-operate during preliminary investigation, a formal investigation was proposed to be carried out in the matter of IPO of ATL. The period of investigation is taken as listing day of the scrip - 10/03/2011 (herein after referred to as “**Investigation Period / IP**”). However,

wherever deemed necessary, reference has also been made beyond the investigation period.

3. SEBI conducted an investigation in the matter to ascertain whether there were any violation(s) of the provisions of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as “**SEBI Act**”), SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (hereinafter referred to as “**ICDR Regulations**”), SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as “**PFUTP Regulations**”), SEBI (Merchant Bankers) Regulations, 1992 (hereinafter referred to as “**Merchant Bankers Regulations**”) and Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as “**SCRA**”) with regard to the following:
 - Bidding process in the IPO of ATL.
 - Examination of disclosures made by the company in the offer documents / prospectus and deviations from objects of issue, if any.
 - Examination of fund flows from IPO proceeds.
4. Pursuant to the Conclusion of Investigation on March 27, 2017, SEBI initiated adjudication proceedings against by M/s Gopalakrishnan & Co. (hereinafter referred to as “Noticee”) for the alleged violation of regulation 3 (b), (c), (d), 4(1), 4(2)(f), (k) and (r) of PFUTP Regulations by Noticee.

APPOINTMENT OF ADJUDICATING OFFICER

5. Shri Sahil Malik (hereinafter referred to as “erstwhile AO”) was appointed as the Adjudicating Officer (**AO**) by SEBI vide communication order dated July 07, 2017 under Section 19 of the SEBI Act read with Section 15-I of the SEBI Act and Rule 3 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (hereinafter referred to as “**Adjudication Rules**”) to conduct adjudication proceedings *inter-alia* in respect of the Noticee, in the manner specified under Rule 4 of the Adjudication Rules read with Section 15-I (1) and (2) of the SEBI Act and if satisfied that penalty is liable, to impose such penalty deemed fit in terms of Rule 5 of the Adjudication Rules in terms of Section 15HA of the SEBI Act. Subsequently upon transfer of Shri Sahil Malik, the undersigned has been appointed as AO by SEBI in the matter vide Order dated August 13, 2019, to inquire into and adjudge,

the adjudge under section 15 HA of SEBI Act for the alleged violation of regulation 3 (b), (c), (d), 4(1), 4(2)(f), (k) and (r) of PFUTP Regulations by Noticee.

6. Based on the findings made during the investigation, A Show Cause Notice dated December 15, 2017 (hereinafter referred to as “**SCN**”) was issued to the Noticee in terms of Rule 4 (1) of the Adjudication Rules read with Section 15-I of the SEBI Act, to show cause as to why an inquiry should not be initiated and penalty should not be imposed under Section 15HA of the SEBI Act, 1992 for the violations alleged to have been committed by Noticee by erstwhile AO.
7. The allegations levelled against the Noticees in the SCNs are summarized as follows: -
 1. *On page 64 of the prospectus, it was disclosed that ATL had taken a bridge loan of Rs. 20 crore, out of which Rs. 7 crore was used towards construction of building and remaining, towards working capital. However, ATL, vide its letter dated 02/05/2016 (placed at Annexure 29), had informed that said amount of Rs. 7 crore was transferred to M/s Equastone Properties Pvt Ltd (Equastone) as advance towards construction of software development center. ATL has further submitted that subsequently said project was cancelled and ATL received back the advance paid to Equastone. In this regard, it was observed that Equastone was a related entity of ATL / Shri Ravikumar.*
 2. *Further, from the bank account statements of ATL (placed at **Annexure 2**), it was observed that the remaining Rs.13 crore was transferred abroad, for which no reason whatsoever could be provided by ATL. Hence, it is observed that entire transaction was not genuine and disclosure as appearing in the prospectus was false.*
 3. *With regard to utilization of Bridge Loan amount of Rs. 20 crore, it was disclosed in the prospectus (at Page 63) that statutory auditor of ATL during the relevant period i.e., the Noticee had certified vide letter dated 24/01/2011 that the loan amount was utilized as follows:-*
 - (a) Advance towards construction of building - Rs. 7.00 Cr*
 - (b) Towards working capital - Rs. 13.00 Cr*
 4. *The Noticee, vide letter dated 10/08/2016, was advised to provide basis/ rationale for certifying the aforementioned transactions relating to utilization of bridge loan. The Noticee vide his reply dated 20/08/2016 (placed at **Annexure 3**) has inter-alia stated that they have given the certification based on the document made available by the Company (ATL) for verification.*

5. *It was observed from the reply letter dated 20/08/2016 that apart from ATL, the Noticee was the auditor for Equastone Properties (to whom Rs. 7 crore of the bridge loan amount was transferred) also at relevant point in time and hence, it is alleged that it is unlikely that the Noticee was unaware of the connection between ATL and Equastone and the genuinity of the transactions.*
6. *Based on the observations, it is alleged that the Noticee had wrongly certified the utilization of bridge loan amount of Rs. 20 crore in the prospectus of ATL. The certification provided by the auditor was part of the prospectus of ATL. Hence, the prospectus of ATL contained misleading information relating to the bridge loan which was based on the certificate provided by the auditor i.e. the Noticee. Further, the wrong certification provided by the auditor leads to misleading information in the prospectus.*
7. *In view of the above, it is alleged that the Noticee, Statutory Auditor of ATL, had wrongly certified the utilization of bridge loan amount of Rs. 20 crore in the prospectus of ATL and violated regulations 3 (b), (c), (d), 4(1), 4(2), (f), (k) & (r) of PFUTP Regulations.*
8. *The Noticee is, therefore, called upon to show cause as to why an inquiry should not be held against it and penalty be not imposed under section 15 HA of SEBI Act for the alleged violation of regulations 3 (b), (c), (d), 4(1), 4(2)(f), (k) and (r) of PFUTP Regulations.*
9. The SCN was served upon the Noticee through Speed Post Acknowledgement Due (hereinafter referred to as “SPAD”) which was duly served to Noticee on December 22, 2017.
10. Vide letter dated January 03, 2018, Noticee requested for one-month time to submit the reply to the SCN. Subsequently vide letter dated February 05, 2018, Noticee made its submission to the SCN.
11. In the interest of natural justice and in terms of Rule 4 of Adjudication Rules, an opportunity of personal hearing was accorded to the Noticee through WebEx platform due to Covid-19 Pandemic on June 28, 2021 vide hearing notice dated May 28, 2021. Hearing notice was duly delivered to Noticee.
12. Noticee vide letter dated June 22, 2021 sought adjournment of hearing. Thereafter, undersigned adjourned the hearing to July 26, 2021.

13. The Authorized Representatives (ARs) of the Noticee appeared on behalf of the Noticee on July 26, 2021 through WebEx and reiterated the submissions made by the Noticee vide its letter dated February 05, 2018 and email dated July 26, 2021. Further, ARs also undertook to submit additional documents discussed during hearing on the same date.

14. The replies of the Noticee are summarized hereunder:

Letter dated February 05, 2018:

At the outset itself, I deny all allegations in the show cause notice. It is submitted, that I have correctly and properly certified the utilisation of the Bridge Loan amount of Rs. 20.00 Crores, as per the books of account and information submitted to me by the Company and there is no violation or contravention of Regulations 3(b), (c), (d), 4(1), 4(2) (f), (k) and (r) of the PFUTP Regulations as alleged in the notice. My submissions in brief:

- i. Show cause notice does not lead any cogent evidence in support of the allegations and is based on presumptions and assumptions.*
- ii. Jurisdiction.*
- iii. No violation of Regulations 3(b), (c), (d) and 4(1), 4(2) (f), 4(2) (k) and 4(2) (r) of SEBI (PFUTP) Regulations, 2003.*
- iv. No wrong disclosure or misleading statement in the Prospectus.*
- v. Not involved in any fraudulent acts.*
- vi. Not involved in the day to day working of the company and not liable vicariously.*
- vii. No complaint from investors of the IPO with respect to non disclosure/wrong disclosure/inadequate disclosure in the Prospectus.*
- viii. No "fraud" committed or "unfair trade practice" resorted to and non applicability of the PFUTP Regulations.*
- ix. No wrong disclosure or misleading statement in the Prospectus.*
- x. Non observance of procedure by SEBI for investigation under the PFUTP Regulations.*
- xi. Penalty-Not deliberately violated law and hence penalty not warranted.*
- xii. No criminal intent, or mens rea, no mala fide intention for imposition of penalty.*

5. Show cause notice does not lead any cogent evidence in support of the allegations and is based on presumptions and assumptions.

It is submitted that factual and legal considerations of the matter have been completely ignored and the Show Cause Notice is based on and proceeds to make allegations, only on assumptions and presumptions and not on cogent and tangible evidence. The allegations are only a bald statement of wrong certification and the show cause notice fails to show how the said information mislead the investors and amounted to "fraud" within the meaning of Regulation 2(1)© of the PFUTP Regulations. Further, the show cause notice does not lead even an iota of evidence in support of the allegations. The ratio of the decision laid down by the Hon'ble Supreme Court in Oudh Sugar Mills Vs UOI reported in 1978 (2) ELT J 172 (SC) is clearly applicable in the facts of this matter, inasmuch as allegations in the show cause notice cannot be sustained based merely on

inferences involving assumptions and presumptions. The Show Cause Notice is liable to be discharged on this ground itself.

6. Jurisdiction.

6.1 The show cause notice lacks jurisdiction. The powers of SEBI to administer certain provisions of the Companies Act, 1956, were specified and enumerated in Section 55A of the erstwhile Companies Act, 1956 and these powers did not include the power to impose penalty on the Statutory Auditor of a company, or on a member of the Institute of Chartered Accountants of India (ICAI). It is also submitted that, in terms of the explanation to Section 55A of the erstwhile Companies Act, 1956, all powers relating to all other matters, including the matters relating to prospectus, return of allotment, issue of shares and redemption of irredeemable preference shares shall be exercised by the Central Government, Tribunal, or the Registrar of Companies, as the case may be. Further, Section 28 of the Companies Act, 2013 or the Act, or Regulations do not empower SEBI to impose penalty on the Statutory Auditor or a Chartered Accountant who is a member of the ICAI. It is submitted that the show cause notice is without jurisdiction, is non est in law and deserves to be dropped.

6.2 The show cause notice lacks jurisdiction for another reason also. It is submitted that I am a member in practice of the Institute of Chartered Accountants of India (ICAI). Only the ICAI is authorised to take any action against a member thereof and the SEBI has no power under the SEBI Act, 1992 and the Regulations framed thereunder, to impose penalty on a member of the ICAI. The show cause notice is liable to be dropped for this reason also.

6.3 It is submitted that I cannot be said to be directly associated with the securities market. SEBI's jurisdiction is limited only to regulate the securities market and not beyond that. It is further submitted that, I am not connected with the securities market in any manner. I am only discharging my duties as a Chartered Accountant and Statutory Auditor of ATL (listed company). It is submitted that SEBI has no jurisdiction to initiate any inquiry against a Chartered Accountant who is a member of the ICAI and a Statutory Auditor of a listed company. The show cause notice deserves to be dropped.

7. No violation of Regulations 3(b), (c), (d) and 4(1), 4(2) (f), 4(2) (k) and 4(2) (r) of SEBI (PFUTP) Regulations, 2003.

7.1 I vehemently deny violation of Regulations 3(b), (c), (d) and 4(1), 4(2) (f), 4(2) (k) and 4(2) (r) of SEBI (PFUTP) Regulations, 2003. I further state and submit that none of the conditions precedent for invoking the aforesaid provisions of the Regulations mentioned above have been, or are satisfied and/or fulfilled, nor any of the ingredients of the aforesaid contraventions are present in this matter and therefore, none of the said provisions could be applied and/or made applicable.

7.2 It is submitted that the certification of utilisation of the Bridge Loan amount of Rs. 20.00 Crores in the prospectus of ATL has been made purely on the basis of the representations made by ATL, the books of account and other documents and information submitted to me by the Company. The Company had represented that: (a) an amount of Rs. 7.00 Crores was advanced to M/s Equastone Properties Private Limited

towards construction of a software development centre, in terms of an agreement dated 15/03/2011 (copy attached-**Annexure 1**), which was subsequently returned by M/s Equastone Properties Private Limited to ATL; and (b) as ATL is an ITES company, providing offsite and on-site services, large sums were remitted for overseas on site working capital expenses and provision of facilities. The remittance of such amounts have been made abroad through normal banking channels and the details of the heads under which such expenses have been incurred, as per the books of accounts and information provided to me are as per **Annexure- 2**.

7.3 It is further submitted that there is no violation, or contravention of Regulations 3(b), (c), (d), 4(1), 4(2) (f), 4(2) (k) and 4(2) (r) of the PFUTP Regulations, as alleged in the notice. It is further submitted that the certification has been done in accordance with the accounting standards, guidance and norms prescribed by the ICAI. It is further submitted that, a full and proper due diligence has been conducted with reference to the said transaction and that in exercise of due diligence, all measures have been undertaken that are ordinarily and reasonably exercised in respect of the certification. The following documents are submitted in support:

- i. Clause 2.1 of the Agreement dated 15/03/2011 between ATL (Company) and M/s Equastone Properties Private Limited (Equastone) for construction of a Software Development Centre for the Company at Plot No. 255B, Bommasandra Village, Atteibele, Anekal Taluk, Bangalore, pursuant to which the advance of Rs. 7.00 Crores was made by ATL to Equastone. (Refer Annexure 1).
- ii. Copy of the General Ledger of ATL for the (FY) 2010-11 showing accounting entries in respect of the advance of Rs. 7.00 Crores to Equastone Properties Private Limited. The financial statements for the period 2010-11 were adopted and approved by the Board of Directors of the Company at their meeting held on 12/08/2011 and were adopted and approved by the shareholders at the Tenth Annual General Meeting held on 28/09/2011.
- iii. Statement of United Bank (Bankers to ATL) for the month of April & May evidencing receipt of an amount of Rs. 7.00 Crores, returned by M/s Equastone Properties Private Limited to ATL.
- iv. Letter dated 05/10/2010 & 19/10/2010 from ATL in regard to the details of overseas remittances made towards onsite expenses of working capital.
- v. Copy of the General Ledger of ATL for the (FY) 2010-11 showing accounting entries in respect of overseas remittances of Rs. 13.00 Crores, made towards onsite expenses of working capital. (Refer Annexure 2)
- vi. Copies of Form A2 submitted by ATL to United Bank (Authorised Dealer) for making the said overseas remittances and from which it may be observed that the remittances have been stated by ATL to be towards working capital requirements.

(All copies **Annexure 3**)

7.4 It would be observed, that a proper due diligence has been undertaken prior to the certification and that I have acted dutifully, honestly and reasonably. In JM Mutual Fund and JM Capital Management Pvt. Ltd. in Appeal no.39/04 and 39A/04 dated 22.11.2004 before SAT, due diligence has been taken as "such a measure of prudence, activity or assiduity, as is properly to be expected, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative acts of the special case- as defined in Black's Law Dictionary. In SEBI vs. Indiabulls Securities

Ltd, due diligence was taken by SEBI from an order of Hon'ble Supreme Court as "due diligence in law, means doing everything reasonable not everything possible. Due diligence means reasonable diligence it means such diligence as a prudent man would exercise in conduct of his own affairs." It is submitted that the due diligence had been carried out properly and it had been ensured that true, fair and adequate disclosures have been made, based on the documents and information made available to me by ATL and Equastone Properties Private Limited. The allegations in the show cause notice are without any basis whatsoever. The show cause notice deserves to be discharged in limine.

7.5 It is submitted that the question of whether the certification has been done in violation of the accounting standards, guidance and norms of the ICAI, does not fall within the purview and jurisdiction of the SEBI. It is further submitted that it is only the members of the ICAI who have expert knowledge of accounting standards, guidance and norms of the ICAI and SEBI cannot be said to have the same expertise. By holding an enquiry, SEBI is illegally usurping and encroaching upon the powers of the ICAI and for this reason also, SEBI cannot proceed to adjudicate the show cause notice.

8. No wrong disclosure or misleading statement in the Prospectus:

8.1 It is vehemently denied that I had submitted wrong disclosures in the Prospectus, leading to misleading information in the Prospectus. It is submitted that the offer documents had been appraised by the Merchant Bankers to the issue, who have after an exhaustive appraisal of the documents, certified that the disclosures are true, fair and adequate. It is submitted that when the offer documents have been appraised and certified by the Merchant Bankers, such appraisal and certification cannot be ignored and brushed away lightly, relying on the decision in HSBC Securities (India) Pvt Ltd. Vs. SEBI [Appeal No. 99/2007] -Order dated 20th February, 2008.

8.2 It is further submitted that the changed utilisation of the IPO proceeds was approved by the Board of Directors at their meeting held on 14.8.2012 and was also intimated to the shareholders of the Company, vide advertisements in English and vernacular, in the "Business Line" and "Vijay Karnataka" respectively, on 15.8.2012, besides intimations to the BSE and NSE. It is further submitted that the revised utilisation of the IPO proceeds was approved by the shareholders of the Company at the 11th AGM held on 28.9.2012, (copies of the notice and proceedings enclosed for ready reference-Annexure 4).It is humbly requested that the changed utilisation of the IPO proceeds be taken on record for adjudicating the show cause notice.

9. Not involved in any fraudulent acts.

It is denied that I was a part of, or I was aware of, or involved in alleged fraudulent acts of the Company, in regard to the certification. It is further submitted, that as the Statutory Auditor, I had consistently emphasized the requirement of utilisation of the IPO proceeds in accordance with the objects of the public issue of the shares. I had received assurances from the Board of Directors, Promoters and the Management, that the proceeds of the IPO would be utilised strictly in accordance with the provisions in the Prospectus. It is also submitted as a Statutory Auditor, I had no control or influence over the actions of the Company. I have not gained anything personally from the actions of the Company. For the said certification, I have received a paltry amount of Rs. 3000/- towards professional fees in support of which I am enclosing a copy of the general

ledger extract for the FY 2010-11 (**Annexure 5**). I have not gained anything from the said certification. The allegations in the show cause notice are rejected as being baseless and unsubstantiated and not supported by any evidence. The show cause notice is liable to be dropped.

10. Not involved in the day to day working of the company and not liable vicariously.

10.1 It is submitted that I was a Statutory Auditor and was never concerned with the day-to-day working of the Company and therefore no liability for the acts of the Company can attach to me as an Auditor. The show cause notice makes an omnibus allegation, but fails to point out any specific instance of wrongdoing, nor does it provide any cogent evidence in support of the allegations of having committed fraud and contravention of the aforesaid provisions. In *B.P. Khaitan Vs Special Director, Enforcement Directorate 1977 Cr. L.J. 1821 (Cal.)*, the Hon'ble High Court held inter alia, that vicarious liability would attach only to a person who was in charge of and responsible to the company for the conduct of its business. It is therefore submitted that I cannot be made liable or responsible for the alleged contraventions of the above provisions by the Company.

10.2 In furtherance to the above, it is submitted that during the relevant period, I was not vested with any executive powers and had nothing to do with the day-to-day management of the company, or its affairs, or any of its departments. I had no control over, or knowledge of day to day working and management of the affairs of the Company, nor was I in charge of, or responsible to the Company, for the conduct of its day-to-day business in any manner whatsoever. I only carried out my duties as a Statutory Auditor and had nothing to do with any of the alleged activities, or violations, or contraventions, which are the subject matter of the extant show cause notice. The show cause notice fails to consider the above factual position and proceeds on the basis of erroneous grounds to allege fraudulent conduct and violation of Regulations 3(b), (c), (d), 4(1), 4(2) (f), 4(2) (k) and 4(2)(r) of the PFUTP Regulations. The show cause notice is liable to be discharged in limine.

11. No complaint from investors of the IPO with respect to non disclosure/wrong disclosure/inadequate disclosure in the Prospectus.

11.1 It is also submitted that the show cause notice has not brought on record, nor alleged any complaint by any investors of the Company, that they have been prejudiced/misguided by any alleged non disclosure/wrong disclosure/inadequate disclosure. Nor does the show cause notice bring on record any complaint by any investor of any fraud committed by the Company upon the investors.

11.2 The revised utilisation of IPO proceeds was approved by the Board of Directors at their meeting held on 14.8.2012 and was also intimated to the shareholders of the Company, vide advertisements in English and vernacular, in the "Business Line" and "Vijay Karnataka" respectively, on 15.8.2012, besides intimations to the BSE and NSE, vide our letters dated 14.8.2012 and by the shareholders of the Company at the 11th AGM held on 28.9.2012. It is submitted that in the absence of any complaint by the investors as aforesaid and in view of the express approval of the shareholders to the revised utilisation of the proceeds of the issue, there is no warrant for invoking the provisions of Section 15 HA of the Act to impose penalty for alleged violation of Regulations 3(b), (c), (d), 4(1), 4(2) (f), 4(2) (k) and 4(2) (r) of the PFUTP Regulations.

12.No “fraud” committed, or unfair trade practice resorted to and non applicability of the PFUTP Regulations.

12.1 I vehemently deny violation of Regulations 3(b), (c), (d), 4(1), 4(2) (f), 4(2) (k) and 4(2) (r) of the PFUTP Regulations. It is submitted that the show cause notice does not bring out any instance whether I have committed any of the acts described and specified in the aforesaid Regulations, which could be termed as a “fraud” within the meaning of the term in Regulation 2 (1) (c) or “unfair trade practice”.

12.2 It is further submitted that Regulation 3 of the PFUTP Regulations has no application, where I have only issued a certificate. Regulation 3 of the aforesaid Regulations prohibits certain “dealings in securities”. The term “dealing in securities” has been defined under Regulation 2(b) thus: “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. It is submitted that a Chartered Accountant issuing a certificate, would not come within the scope of Regulation 3. It is further submitted that Regulation 4(2) which provides for the circumstances in which “dealing in securities shall be deemed to be a fraudulent or an unfair trade practice” would have no application in the present case. My action in issuing a certificate would not amount to “dealing in securities” and hence would not attract Regulation 4(2) also.

12.3 It is further submitted that “Dealing in Securities” as defined under Regulation 2(1) (b) of PFUTP Regulations is an essential ingredient of the definition of “fraud” as defined under Regulation 2 (1)(c) of PFUTP Regulations. In the instant case it cannot be said that any act, omission or concealment was caused by me while “dealing in securities” which would satisfy the definition of “fraud” for the purposes of PFUTP Regulations.

12.4 It is submitted that it has been consistently held by the Hon’ble SAT in various rulings that fraud is to be proved on the basis of cogent, convincing and unimpeachable evidence, only as per the procedure established in the PFUTP Regulations. The Hon’ble SAT in *Ess Ess Intermediaries Anand Saurashtra Society Vs SEBI* 2013 SAT 731 in paragraphs 11 and 12 observed thus:

“11. We now deal with the main issue regarding whether or not the Appellant has violated Regulations 4(1) and 4(2), (a), (b), (e), (g) and (n) of the PFUTP Regulations, 2003. Regulation 4(1), as reproduced above, provides that no person shall indulge in fraudulent and unfair trade practice in securities. Regulation 4(2) provides that dealing in securities shall be deemed to be fraudulent and an unfair trade practice if it involves fraud and may include all or any of the ingredients enumerated in sub-sections (a),(b),(e),(g), and (n) of Regulation 4(2). Regulation 4(2)(a) deals with an act which creates a false impression with respect to trading in the securities market. Regulation 4(2)(b) deals with a situation where the securities are not intended to be transferred but operate only as a device to inflate or depress the price of such securities for wrongful gain or avoidance of loss. Regulation 4(2)(e) deals with manipulation of the price of a security. Regulation 4(2)(g) deals with transactions which are not intended to be performed by taking them to their logical conclusion. Similarly, Regulation 4(2)(n) prohibits circular transactions between intermediaries which are mainly intended

to increase commission and also to provide a false appearance of trading in that 11 security. Paras 12 to 15 of the Impugned Order deal with the allegedly manipulative way in which the trades in question were synchronized.”

“12. Thus, a perusal of the above stated provisions of Regulation 4 and its sub-regulations reveals that the allegation of fraud can be levelled against a person/entity only for good reasons and on the basis of clear and unambiguous evidence. Such an allegation of fraud may shake the very foundation of the business of the entity in question and may adversely affect the same. Therefore, the onerous task of proving such a serious allegation lies on the person levelling such accusation on the basis of preponderance of probability.”

It is submitted that the show cause notice only makes empty allegations, does not lead even an iota of evidence in support of the allegation of fraud and for this reason also the show cause notice deserves to be dropped.

12.5 It is submitted that the allegations in the Show Cause Notice do not attract definition of “fraud” under Regulation 2(1) (c) of the PFUTP Regulations, since the entire edifice of the said Regulations stands on the footing of dealing in securities. Regulations 3 (b), (c) (d), 4(1), 4(2) (f), (k) and (r) of the PFUTP Regulations cannot be invoked, since I have not dealt in securities to attract this provision. Neither is there any allegation in the show cause notice that I (i) have employed any manipulative or deceptive device or contrivance in contravention of the provisions of the Act, Regulations or the Rules (ii) have employed any artifice or scheme to defraud in connection with issue or dealing in securities” which are listed or proposed to be listed on any stock exchange (iii) have engaged 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 in contravention of the Act, or Regulations or the Rules.

12.6 It is further submitted that I have not carried out any fraudulent, or an unfair trade practice as specified in Regulation 4 of the aforesaid Regulations. It is submitted that the issue of share capital is not a practice relating to the carrying on of any trade and further the Company has not carried on trading activity and therefore it cannot be said that I have engaged in any unfair trade practice by issuing a certificate, relying upon the decision in Morgan Stanley Mutual Fund Vs. Kartick Das 1994 (4) SCC 225. The show cause notice only makes bald allegations of the violation of the aforesaid Regulations, unsupported by any evidence and is liable to be dropped.

13. No wrong disclosure or misleading statement in the Prospectus.

The following statements have been made in the Prospectus:

(i) “The fund requirement and deployment are based on internal management estimates.” (Section V-Objects of the Issue at page 62).

(ii) "Our plans are subject to a number of variables, including possible cost overruns; receipt of critical governmental approvals; and changes in management's views of the desirability of current plans, among others". (Section V-Objects of the Issue at page 62).

(iii) "Our management, in response to the dynamic nature of the industry, will have the discretion to revise its business plan from time to time and consequently our funding requirement and deployment of funds may also change. This may also include rescheduling the proposed utilization of Issue Proceeds and increasing or decreasing expenditure for a particular object vis-à-vis the utilization of Issue Proceeds." (Section V-Objects of the Issue at page 75).

(iv)"Future prospects:

While the 2009 outlook for global technology related spending is affected by the recessionary environment ..." (Page 113).

It is submitted that there has not been any wrong disclosure, or misleading statement in the Prospectus, or violation of the PFUTP Regulations. The show cause notice is legally untenable and deserves to be discharged.

14. Non observance of procedure by SEBI for investigation under the PFUTP Regulations.

It is submitted that the procedure for ordering an investigation laid down in Regulations 5, 9 and 10 of the SEBI (PFUTP) Regulations, 2003, has not been followed. It is established by law that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden, relying on the decision in Ramchandra Keshav Adke & Others Vs Govind Joti Chavare & Others 1973 (1) SCC 559. The show cause notice is violative of the principles of natural justice and is liable to be dropped on this ground also.

15. Penalty-Not deliberately violated law and hence penalty not warranted.

15.1 It is further submitted that penalty is imposed for violation of a statutory obligation, or duty, but however the show cause notice fails to show as to which statutory obligation, or duty under the Act or the Regulations has been contravened.

15.2 It is submitted that I have not acted deliberately in defiance of law, or in conscious disregard of my obligations, nor am I guilty of conduct contumacious, or dishonest and for these reasons, penalty cannot be imposed, placing reliance on the decisions in Hindustan Steel Ltd. v. State of Orissa AIR 1970 SC 253 and Grauer & Weil (India) Ltd. Vs. CCE (1995) 1 SCC 77.

15.3 It is further submitted that merely because penalty is proposed in the statute, it must not be mandatorily imposed automatically and the adjudicating authority must act judicially to determine whether penalty should be imposed at all. In State of Madhya Pradesh Vs. Bharat Heavy Electricals reported in 1997 (99) ELT 33 (SC), it was held that merely because a penalty is prescribed under law, the penalty need not be mandatorily imposed.

16.No criminal intent or mens rea, no mala fide intention for imposition of penalty.

16.It is further submitted that there is no criminal intent, or mens rea and no mala fide intention. Criminal intent or 'mens rea' is a necessary constituent to impose penalty relying on the decision in CCE Vs Pepsi Foods Ltd (2011) 1 SCC 601. Inas much as there is no mens rea, it is submitted that penalty under Section 15HA of the Act is unwarranted and illegal.

Wherefore I humbly entreat this Hon'ble Adjudicating Authority to (i) drop all the allegations (ii) drop the inquiry and (iii) discharge the Show Cause Notice, in full, in the interests of justice. I desire to be heard in person and crave a personal hearing.

Letter dated July 26, 2021:

2. At the outset, all allegations made in the SCN against the Noticee are emphatically denied.

- 1.1.** M/s K. Gopalakrishnan & Co. is a firm of chartered accountants registered as a partnership under the Partnership Act, 1932. Mr. K. Gopalkrishnan, a senior citizen aged about sixty-eight (68) years, is a chartered accountant duly registered as a member of the Institute of Chartered Accountants of India ("ICAI") for the last 34 years. The firm holds a clear track record of discharging its professional duties with utmost honesty and integrity for over 19 years, without a single negative remark being received till date.
- 1.2.** The firm was appointed as the statutory auditors of the Company in 2001, its audit assignment with the Company continued until 2017. In February 2011, the Company rolled out its Initial Public Offering ("IPO") for issue of 1,88,88,889 equity shares cumulatively aggregating to INR 170 crore. The issue was assigned a grade of 3/5 by ICRA Limited indicating average fundamentals. The shares were listed on the Bombay Stock Exchange ("BSE") and the National Stock Exchange ("NSE") respectively. Subsequently, SEBI conducted an investigation to determine whether there were any violation(s) of the SEBI Act and the PFTUP Regulations for a period starting from the listing date of the Company, i.e. 10 March 2011.
- 1.3.** SEBI's examination of the Company's prospectus revealed that the Company had taken bridge loan of INR 20 Crore out of which INR 7 Crore were utilised towards construction of a building and the remaining towards the working capital. However, the Company vide its letter dated 02 May 2016 informed that the INR 7 Crore in question were in fact delivered to M/s Equastone Properties Pvt. Ltd. ("Equastone") as advanced towards construction software development centre. The Company further notified that the said project was cancelled and therefore the advance of INR 7 Crore were returned to the Company. It was observed that the remaining INR 13 Crore was transferred abroad, for which the Company could not provide any reason. Contents of the prospectus revealed that the Noticee had certified that INR 7 Crore from the said loan was used towards advance for construction of building and the remaining INR 13 Crore towards working capital requirements. It was noted that the Noticee was also the auditor of Equastone at the relevant time.

- 1.4. *It is pertinent to note that prior to issuing the said certificate, the Noticee had verified the books of accounts of the Company, its service agreements, bills with certification from the Company's authorised persons, discussed with the concerned staff in this regard and obtained explanations from the Company wherever required and then issued the certificate. However, since the said exercise was conducted in 2010, over 10 years back, the Noticee is unable to produce all the document copies verified by it before issuing the certificate in this regard.*
- 1.5. *It was only in August 2016 that the Noticee was advised by SEBI to provide a rationale for certifying the above transaction 5 and a half years after conclusion of Noticee's tenure as statutory auditors of the Company). Despite the significant efflux of time, the Noticee had duly submitted its explanations in this regard to SEBI.*
- 1.6. *However, SEBI proceeded to issue the SCN alleging that the Noticee wrongly certified the utilization of the bridge loan of INR 20 Crore in the prospectus of the Company and violated Regulations 3(b), (c), (d), 4(1), 4(2), 4(2)(f), (k) and (r) of PFUTP Regulations.*

A. Submissions

2. *Given the aforesaid background, the following submissions are made:*
 - (a) **The Proceeding is vitiated by delay and laches:** *At the outset, it is humbly submitted that the SCN issued by SEBI is liable to be quashed and set aside as it suffers from inordinate and unexplained delay. The cause of action of the present matter, if any has long become stale. In the present case, the Company's IPO was rolled out in February 2011, SCN in this respect was issued only on 15 December 2017 i.e., more than six years after the commencement of investigation, therefore, it cannot be said to have been issued within a reasonable period. Such inordinate delay has corroded the Noticee's right to represent his case in a fair and effective manner, owing to limitations of human memory and non-traceability of all documents pertaining to the matter, thereby causing him substantial prejudice. In this regard, it is significant to note that the Hon'ble Securities Appellate Tribunal in **Mr. Rakesh Kathotia & Ors. vs. SEBI (Appeal No. 07 of 2016, dated May 27, 2019)** had quashed proceedings on account of inordinate delay on the basis of the legal position that when no period of limitation is prescribed in a legislation for the purposes of initiating action, the same ought to be exercised within a reasonable period, barring which proceedings initiated would stand vitiated. The Hon'ble Tribunal, held that –*

*" 23. It is no doubt true that no period of limitation is prescribed in the Act or the Regulations for issuance of a show cause notice or for completion of the adjudication proceedings. The Supreme Court in **Government of India vs. Citedal Fine Pharmaceuticals, Madras and Others, [AIR 6(1989) SC 1771]** held that in the absence of any period of limitation, the authority is required to exercise its powers within a reasonable period. What would be the reasonable period would depend*

on the facts of each case and that no hard and fast rule can be laid down in this regard as the determination of this question would depend on the facts of each case. This proposition of law has been consistently reiterated by the Supreme Court in *Bhavnagar University v. Palitana Sugar Mill* (2004) Vol.12 SCC 670, *State of Punjab vs. Bhatinda District Coop. Milk P. Union Ltd* (2007) Vol.11 SCC 363 and *Joint Collector Ranga Reddy Dist. & Anr. vs. D. Narsing Rao & Ors.* (2015) Vol. 3 SCC 695. The Supreme Court recently in the case of **Adjudicating Officer, SEBI vs. Bhavesh Pabari (2019) SCC Online SC 294** held: “There are judgments which hold that when the period of limitation is not prescribed, such power must be exercised within a reasonable time. What would be reasonable time, would depend upon the facts and circumstances of the case, nature of the default/statute, prejudice caused, whether the third-party rights had been created etc.”

The Hon'ble Securities Appellate Tribunal in **Ashlesh Shah v. SEBI (Appeal No. 169 of 2019, decided on January 31, 2020)** has ruled that if the power to adjudicate has not been exercised within a reasonable period, no penalty could be imposed. The Hon'ble Tribunal held:

15. In the light of the aforesaid, we are of the opinion that there has been an inordinate delay in the issuance of the show cause notice. Even though there is no period of limitation prescribed in the Act and Regulations in the issuance of a show cause notice or for completion of the adjudication proceedings the authority is required to exercise its powers within a reasonable period as held recently in *Adjudicating Officer, Securities and Exchange Board of India vs. Bhavesh Pabari* (2019) SCC OnLine SC 294. In the instant case, we are of the opinion that the power to adjudicate has not been exercised within a reasonable period and therefore no penalty could be imposed.

Resultantly, the proceedings ought to be quashed and the SCN be withdrawn on this ground alone.

- (b) **The Noticee is not a person connected with the securities market:** It is most humbly submitted that the SCN issued by SEBI is without jurisdiction as its jurisdiction is limited to regulate the securities market. ICAI and the National Financial Reporting Authority (“NFRA”) are independent, expert bodies specifically established to regulate the auditing profession and lay down accounting standards in accordance with the Companies Act, 2013.

According to Section 132(2)(b) of the Companies Act, 2013 the NFRA shall monitor and enforce compliance with the accounting and auditing standards. Under Rule 7(4) of the National Financial Reporting Authority Rules, 2018 (“NFRA Rules”), the NFRA is empowered to investigate and initiate disciplinary proceedings if it has reason to believe that the accounting standards have or may have been violated. The Noticee is a member of the ICAI and is also governed by the provisions of the NFRA Rules. It is submitted that the certification given by the Noticee was on the basis of the underlying documents provided to it including Agreements, details of bank transfers, invoices etc. Even assuming, without admitting that there was any shortcoming in the process adopted by the

Noticee for providing the certification, SEBI does not have the jurisdiction to decide on the said issue. It is emphatically denied that the Noticee has incorrectly certified the utilisation of the bridge loan.

In this regard, it is submitted that the SAT in *Price Waterhouse v. SEBI* [Appeal No. 6 of 2018] has held that in a case against an auditor, SEBI will have to first establish a “jurisdictional fact” to encroach the powers vested with the ICAI under the CA Act. If the evidence which is available during such enquiry and if any material is found against a CA to the effect that he was instrumental in preparing false and fabricated accounts, only then would the SEBI have the power to take any remedial or preventive measures against the auditor. However, the facts and the accompanying evidence placed on record in the SCN fail to establish any direct involvement or connivance by the Noticee in perpetrating the alleged fraud. In this regard, it is pertinent to note the observations of SAT as under:

“44. From the aforesaid, it becomes apparently clear that Regulation 3 and 4 of PFUTP Regulations applies only on persons dealing in securities. The applicability can be extended to persons who are associated with the securities directly or indirectly. Admittedly, the appellants are not dealing in the securities either directly or indirectly. They are auditors of listed companies. In order to bring them culpable within the four corners of Section 12A and Regulation 3 and 4 of PFUTP Regulations, fraud has to be proved on the basis of evidence.”

In the instant matter, as an auditor, the SCN fails to bring any evidence to light any connivance or involvement in the fraud by the Noticee. In fact, he had no direct and substantial interest in the securities market, itself. Therefore, it is submitted that the SCN is without jurisdiction, is non est in law and deserves to be set aside.

For a person to be charged with violation of the PFTUP Regulations, the SAT in *Videocon International v. SEBI* (Appeal No:23/2001), observed that the following criterion must be fulfilled:

- “(i) a person should have effected, taken part in, or entered into directly or indirectly, transactions in securities
- (ii) the transactions must have been with an intention
- (iii) such transactions must be to artificially raise or depress the prices of securities
- (iv) result of the action must be to induce the sales or purchase of securities by any person.”

In light of the above, it is submitted that the Noticee as an auditor certified the utilization of proceeds on the basis of the documents that were provided by the Company. Therefore, it is reiterated and emphatically denied that the Noticee had incorrectly certified the utilization of a bridge loan of INR 20 crore in the prospectus. It is further submitted that no evidence of fraud has been put on record in the SCN.

- (c) **Noticee performed his duties with due care and caution:** It is submitted that the role of an auditor is limited to exercising reasonable care and skill, he is not bound to perform any act outside the scope of his ordinary duties to detect fraud. It is submitted that the Noticee did not default in performing his professional duties. The Noticee provided certification based upon the assurances of the Board of Directors, promoters, and management regarding the utilisation of the bridge loan. The Noticee had time and again emphasized upon the statutory requirements in relation to the funds obtained through the IPO. For the sake of clarity it is submitted that the certification was made considering the following:
- (i) **Amounts given to Equastone:** The Noticee was informed by the Company that INR 7 Crore, out of the entire loan amount, shall be used for construction of a software development centre. The Noticee verified the claims of the Company by examining the agreement dated 15 March 2011 between the Company and Equastone for construction of the software development centre. Copy of the said agreement is attached herewith as “Annexure – A”. The Noticee relied upon Clause 2.1 of the said agreement which stated that the Company shall pay an advance sum of INR 7 Crores to Equastone for construction of a software development centre in Bangalore and provided his certification accordingly. It is not SEBI’s case that such amounts have not been transferred to Equastone thereby making the certification incorrect.
- (ii) **Amounts transferred towards working capital:** In relation to the remaining amount of the bridge loan, i.e, INR 13 Crore, the auditor was informed by the Company stated that the same was used toward working capital. The Company vide its letters dated 05 October 2010 and 19 October 2010 assured the Bank that due to the nature of its services, it makes large remittances for overseas onsite working capital expenses and provision of facilities. Copies of the letters attached herewith as “Annexure – B Colly”.

The Noticee corroborated the Company’s representations with the General Ledger of the Company the financial year 2010-2011 and the Form A2 submitted by the Company to United Bank of India. We were informed that the Company had identified scope for huge business in the Middle East, Europe and US and were exploring the potential markets there. With this background, expenditure towards working capital did not seem out of the ordinary at the relevant time. In any event, the supporting documents showed that remittances had been made by the Company towards onsite expenses and other working capital requirements to the extent of around INR 6 crore. Further, the remainder amounts were utilised towards purchase of software, repayment of loan, as has been evidenced by “Annexure – C”.

In view of the foregoing, it is humbly submitted that the Noticee undertook all measures necessary to verify the representations of the Company and only provided the certification on satisfaction that the remittances are made through normal banking channels and have been recorded adequately as working capital expenses in the books of accounts.

The Noticee cannot be held liable for violating the PFUTP Regulations since he had no reasonable grounds to believe that the representations made by the Company are false and fictitious. The Noticee exercised reasonable care and caution while examining the prospectus and certifying it and ought not to be penalised for the alleged fraud by the Company. It is submitted that the Noticee has been equally a victim of fraud as the general public. In this regard it is significant that the Bombay High Court in its decision in *Tri-Sure India Ltd v. AF Ferguson & Co.*, [(1986)3CompLJ132(Bom)], noted that,

“it is settled law that auditors must not be made liable for tracking down ingenious and carefully laid schemes of fraud when there is nothing to arouse their suspicion, and where those frauds are perpetrated by trained servants of the company.”

- (d) **Noticee had no involvement in or knowledge of the alleged fraudulent activities:** The Noticee had no knowledge of and no control over the Company's internal decision to utilise the funds, including the monies raised from the bridge loan, in a manner not contemplated disclosed to the auditor and in deviation from the underlying documents. The Noticee has merely certified the usage of the funds as was brought to its notice by the Company on the basis of the underlying documents as has been set forth above.

Notably, the Noticee received a fees of merely INR 3000 for the bridge loan utilization certificate. Apart from that, the Noticee has received no pecuniary interest or benefit from the Company. Further, it is submitted that nothing has been brought on record to suggest that the Noticee was involved in the planning and/or execution of the alleged fraudulent transaction. It is humbly submitted that the Noticee should not be penalised for the wrongs committed by the Company.

- (e) **The Noticee is not liable for commission of fraud:** It is reiterated that the Noticee is not liable under the PFUTP Regulations since he has not indulged in any fraudulent or unfair trade practice. The Hon'ble Bombay High Court, in *Tri-Sure India Ltd v. AF Ferguson & Co.*, [(1986)3CompLJ132(Bom)], noted that, *“it is settled law that auditors must not be made liable for tracking down ingenious and carefully laid schemes of fraud when there is nothing to arouse their suspicion, and where those frauds are perpetrated by trained servants of the company.”*

It is submitted that the documentary trail that the auditor has relied on for providing the said certification bears that the said monies had in fact been transferred to various entities and for activities that they were presumably meant for. It is further submitted that if such funds were siphoned off from the said entities the fault ought not rest on the auditor. Such diversions of funds could not have, in any event, been detected by the Noticee. It now seems that the fraud was meticulously executed by the management of the Company with such precision and complexity that there was no ground for the Noticee to suspect the legitimacy of the documents presented to him by the Company. As the Noticee was not complicit in the activities of the Company, the SCN also correctly does not draw a

nexus between the alleged fraudulent transactions and the involvement of the Noticee in its effectuation.

As stated above, since the Noticee in his ordinary professional capacity did not have knowledge of or control over the Company's activities, the charges levelled against the Noticee under Regulations 3(b), (c), (d), 4(1), 4(2)(f), 4(2)(k) and 4(2)(r) should be dropped and no penalty ought to be imposed under Section 15HA of the SEBI Act.

- (f) **Lack of adequate evidence:** It is most humbly submitted that any allegations levelled by SEBI, if under the PFUTP Regulations a person, must be supported and substantiated with convincing evidence. In this regard, it is significant to note that the Hon'ble Supreme Court of India in **SEBI v. Kanhaiya Lal Baldevbhai Patel and others** [(2017) 15 SCC 1] has observed the following:

38. A crucial aspect which needs to be observed at this point is the element of causation which is embedded under Regulation 2(1)(c) read with Regulations 3 and 4. In order to establish the aforesaid charges in this case, it is required by SEBI to establish that the harm was induced by the materialisation of a risk that was not disclosed because of the tippee's fraudulent practice. Further, the charges under the 2003 FUTP need to be established as per the applicable standards rather than on mere conjectures and surmises.

In the same vein, the Hon'ble SAT in *M/s Ess Ess Intermediaries v. SEBI* [Appeal No. 13 of 2013] observed:

12. Thus, a perusal of the above stated provisions of Regulation 4 and its sub-regulations reveals that the allegation of fraud can be levelled against a person/entity only for good reasons and on the basis of clear and unambiguous evidence. Such an allegation of fraud may shake the very foundation of the business of the entity in question and may adversely affect the same. Therefore, the onerous task of proving such a serious allegation lies on the person levelling such accusation on the basis of preponderance of probability.

This is especially true, when the underlying evidence clearly points to the fact that the certification of the utilisation was undertaken on the basis of sound procedures and adequate documents. In fact the evidence points, contrary to the allegations in the SCN, that the Noticee had in fact acted prudently. Additionally, the SCN also overlooks the fact that the Noticee had no way of knowing that the Company was indulging in fraudulent activities since the transactions followed the regular banking channels and were also approved by the Company's board of directors.

In this regard, it is important to note the following observations of the Bombay High Court in its decision in *Pricewaterhouse & Co. v. SEBI* 2010 SCC OnLine Bom 1197 noted that SEBI could proceed against an auditor that is not associated with securities market only if SEBI has detailed evidence of any mens rea or connivance of such entity in the scheme of fraud.

"39. ...In a given case, if ultimately it is found that there was only some omission without any mens rea or connivance with anyone in any manner, naturally on the basis of such evidence the SEBI cannot give any further directions. If there is available evidence, SEBI can proceed further in the

matter of giving direction against a particular Chartered Accountant as envisaged by Sections 11 and 12 of the SEBI Act and Regulations in this behalf. On the basis of detailed evidence on record, this aspect is required to be considered by SEBI. The question of jurisdictional fact depends upon the facts which may be available at the time of evidence before the SEBI. SEBI will have to answer the question as to whether on the basis of evidence on record, it has any power to give directions as provided under the SEBI Act. This aspect will depend upon the evidence which may be available at the time of inquiry. All these aspects are therefore left to the consideration of SEBI at the time of passing final order in the inquiry.”

- (g) *Breach of principles of natural justice: It humbly submitted that the SAT, in the case of Price Waterhouse v. SEBI, [2011] SAT 58, adjudicated upon the issue of right of a noticee to be provided access to all material examined by SEBI during its investigation. The Hon'ble Presiding Officer, in a separate minority opinion, held that the entire material collected by SEBI during its investigation should be made available to the person whose conduct is in question. He noted that production of such material is necessary to uphold the principles of natural justice. The observations of the Presiding Officer were later upheld by the Hon'ble Supreme Court vide its order dated January 2017.*

It is submitted that SEBI has not provided the Noticee with all documents it has relied upon during its investigation. The Noticee was entitled to inspect every material collected during investigation and not merely the documents which have been referred to in the SCN in order to effectively defend himself. It is submitted that the inaction on the part of SEBI is in contumacious disregard to the well-established principles of natural justice and not just a venial breach. It is therefore prayed, that in the interest of justice, SEBI may be directed to provide all documents it may have examined while investigating the alleged fraudulent transaction.

- (h) *Factors to be considered by the Adjudicating Officer: Without prejudice to anything stated hereinabove, it is submitted that in the event SEBI decides to levy any penalty on Noticee, it is bound to take into account factors specified in Section 15J of the SEBI Act. It is submitted that the findings in the SCN do not allege that Noticee made any disproportionate gain or gained any unfair advantage. Further, there is nothing on record to indicate that any loss whatsoever has been caused to any investor as a result of the bona fide transaction entered into by Noticee, nor has it been alleged in the SCN. It is also submitted that the alleged default was not repetitive and thus the same was an isolated instance, and hence there is no question of repetitive nature of the default.*

Further, the Supreme Court of India in Adjudicating Officer, Securities and Exchange Board of India v. Bhavesh Pabari, (2019) 5 SCC 90, held that the provisions of Clauses (a), (b) and (c) of Section 15-J are only illustrative in nature and have to be taken into account whenever such circumstances exist. The Supreme Court further held that factors other than those enumerated in Clauses (a), (b) and (c) of Section 15-J can also be considered by the Adjudicating Officer. Therefore, in light of the submissions made out by us hereinabove, including that the oversight if any, was bona fide in nature,

with no intention to defraud any person. The Noticee only received a professional fee of INR 3000 for the bridge loan utilization certificate. Apart from which, it did not receive any pecuniary benefit from the Company, nor was it involved in the decision-making process in relation to the alleged fraudulent transaction. Thus, pressing a charge as serious as fraud would be totally disproportionate to the nature of oversight, if any in the present case.

B. Prayer

3. *In light of the submission made hereinabove, it is thus prayed that the SCN be revoked with immediate effect.*
4. *Without prejudice to the above, it is prayed that SEBI should take a lenient view in the matter and no penalty under Section 15HA be imposed on the Noticee. In this respect, the Supreme Court, in Hindustan Steel Ltd. v. State of Orissa (1969 (2) SCC 627), pronounced as follows:*

Under the Act penalty may be imposed for failure to register as a dealer-Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out.”

8. Post hearing, Noticee submitted additional submission vide email dated July 26, 2021 wherein Noticee submitted copy of Adjudication Order in the respect of KR Shah and Associates in the matter of SMS Techsoft (India) Limited.

And also stated that, “Adjudication Order in the respect of KR Shah and Associates in the matter of SMS Techsoft (India) Limited whereby a penalty of INR 2,50,000 was imposed on the auditor. In the said matter, there was ample evidence to suggest that the auditor had connived/colluded with the management of the company in committing the fraud by misstating/inflating financial statements. By contrast, in the instant case, there is nothing to suggest the same.

In addition to the above, please note that any adverse order will significantly and adversely prejudice the firm's capability to conduct its practice, especially when the fee charged for the certification in question was merely INR 3000."

Noticee vide email January 19, 2022 stated as follows:

In addition to our earlier submissions to your good offices in reference to the captioned matter, we humbly request you to kindly consider the orders passed by the Learned Whole Time Member ("WTM") of SEBI in the matter of K Lifestyle and Industries Limited and in the matter of Nu Tek India Limited both dated December 21, 2021. Vide the said orders, the Learned WTM has disposed of the proceedings initiated against the auditor(s) of the respective entities under the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ("PFUTP Regulations") relying on the observations of the High Court of Bombay in Writ Petition No. 5249 of 2010 and Writ Petition No. 5256 of 2010, dated August 13, 2010 in Price Waterhouse & Co v. SEBI, observing that for SEBI to exercise jurisdiction over an auditor, it has to be shown that the auditor acted in connivance and in collusion with the officers or directors of the listed entity in their fraudulent scheme, in absence of the aforesaid, charges under the PFUTP Regulations had not been made out.

In the instant matter, the Noticee had issued the bridge loan utilization certificate on a bona fide belief, relying on evidence-backed due diligence. There is nothing in the SCN to suggest any collusion/connivance of the Noticee in any fraudulent scheme played out by the Company's management / promoters. The Noticee's inability to track down a carefully concocted fraud does not ipso facto establish violation of any provision of the PFUTP Regulations. In light of which, it is humbly prayed that the charges levelled against the Noticee vide the captioned SCN be dropped, and proceedings so initiated against it be disposed without imposition of any penalty.

Noticee vide email March 01, 2022 stated as follows:

In addition to our submissions below, we request you to please also consider the recent order passed by the Hon'ble Securities Appellate Tribunal ("SAT") in Mani Oommen v. SEBI (attached for your ease of reference), which squarely covers the instant matter.

Please take note that the Hon'ble Tribunal has, while relying on the ratio of its earlier order in the matter of Pricewaterhouse Cooper v. SEBI (Appeal No. 6 of 2018 decided on September 9, 2019 (SAT)), reiterated that a chartered accountant can be proceeded against if they are instrumental in preparing false and fabricated accounts otherwise SEBI has no power to proceed against them. The Hon'ble Tribunal has further held that in order to give a finding on collusion, there must be material available on record which could lead to an inference of collusion and therefore if the auditor was not involved in the fabrication and fudging of the books of accounts and had no intention or knowledge of such fabrication, the charge of fraud or collusion or connivance cannot be levied on them, only on the ground that they were not diligent or cautious. The Tribunal has also observed that lack of due diligence, if any, can only lead to professional negligence which would amount to a misconduct which could be taken up only by ICAI.

CONSIDERATION OF ISSUES AND FINDINGS

9. I have carefully perused the charges levelled against the Noticee in the SCN, the material / documents available on record and oral and written submissions of the Noticee. The issues that arise for consideration in the present case are :
- I. **Whether the Noticee has violated regulations 3 (b), (c), (d), 4(1), 4(2), (f), (k) & (r) of PFUTP Regulations.**
 - II. **Do the violations, if any, on the part of the Noticee attract monetary penalty under section 15HA of SEBI Act; and**
 - III. **If so, what would be the quantum of monetary penalty that can be imposed on the Noticee after taking into consideration the factors mentioned in section 15J of the SEBI Act read with respective Adjudication Rules?**
10. Before moving forward, it is pertinent to refer to the relevant provisions of the aforesaid alleged violations committed by the Noticee, which reads as under:

PFUTP Regulations, 2003

3. Prohibition of certain dealings in securities

No person shall directly or indirectly—

(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 there under;*

(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 there under.*

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:—

(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 that is misleading or that contains information in a distorted manner and which may influence the decision of the investors

(r) planting false or misleading news which may induce sale or purchase of securities.

Issue – I:- Whether the Noticee have violated Regulation 3 (b), (c), (d), 4(1), 4(2), (f), (k) & (r) of PFUTP Regulations?

11. On perusal of the material available on record and giving regard to the facts and circumstances of the case and submissions of the Noticee, I record my findings hereunder

FINDINGS

12. I have considered the allegation levelled in the terms of reference, the relevant material brought on record, reply/ submissions of the Noticees, documents produced by the Noticees and oral submissions made during the personal hearing before undersigned. Before dealing the case on merit basis, I would first deal with several preliminary technical/legal contentions raised by the Noticees as under: -

The Proceeding is vitiated by delay and laches:

13. In this matter, I Note that, SEBI took up the preliminary investigation in the IPO of Acropetal Technologies Limited on February 08, 2012. During the collection of information, it was

noted that the response of the ATL to SEBI's letter was found to be incomplete/contradictory. ATL failed to submit documentary evidences and certain entities did not reply to SEBI's letters. Since ATL and other entities did not co-operate during preliminary investigation, a formal investigation was proposed to be carried out in the matter of IPO of ATL. The period of investigation is taken as listing day of the scrip - 10/03/2011 (herein after referred to as "**Investigation Period / IP**"). However, wherever deemed necessary, reference has also been made beyond the investigation period.

14. SEBI conducted an investigation in the matter to ascertain whether there were any violation(s) of the provisions of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "**SEBI Act**"), SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (hereinafter referred to as "**ICDR Regulations**"), SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as "**PFUTP Regulations**"), SEBI (Merchant Bankers) Regulations, 1992 (hereinafter referred to as "**Merchant Bankers Regulations**") and Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as "**SCRA**") with regard to the following:
- Bidding process in the IPO of ATL.
 - Examination of disclosures made by the company in the offer documents / prospectus and deviations from objects of issue, if any.
 - Examination of fund flows from IPO proceeds.
15. An extensive investigation was carried out by SEBI. The said investigation included several entities, including vendors, suppliers, brokers, merchant banker, officials, etc. and detailed analysis carried out of their bills, delivery challans, submissions in Prospectus, bank transactions, trade data, etc. and finding connection amongst them. Further, investigation revealed a *prima facie* non-utilisation of IPO proceeds, deviation from the objects of the issue, 11 entities acting hand-in glove with ATL and also were party to the actions and deeds of ATL to divert the IPO money and not deploying the IPO proceeds for stated objects of issue as disclosed in the prospectus of ATL, wrong disclosure in the prospectus, wrong disclosures to NSE & BSE regarding utilization of IPO proceeds and non-disclosure of material information. Many entities failed to furnish information called for through SEBI summons and some entities failed to appear in person before the Investigating Authority as

per SEBI summons. Investigation was concluded and the action was approved by the Competent Authority on March 27, 2017. The Adjudicating Officer in the matter appointed vide communique dated July 07, 2017 and thereafter, the SCN was issued by erstwhile AO on December 15, 2017. In this regard, I note that, initiating a proceeding under the appropriate provisions of SEBI Act is a regulatory prerogative of SEBI depending upon the outcome of the fact finding exercise, which is the investigation done in this case, and just because the alleged violation was committed in a distant past cannot be a ground to vitiate initiation of these proceedings. Moreover, in this case the SCN makes a serious allegation of fraud under the PFUTP Regulations on ground of non-disclosure of material information and false and mis-leading reporting of sales and purchases in a public issue. I am also of a view that, Hon'ble SAT in past has held that the reasonable period would depend on the facts and circumstances of each case and that no hard and fast rule can be laid down in this regard. I am of the view that present proceedings do not suffer from any infirmity on the ground of delay. I, therefore, hold that there is no protracted delay as contended and hence, the contention of the Noticees in this regard is rejected.

16. Noticee has placed reliance upon various judgements of Hon'ble Securities Appellate Tribunal in *Mr. Rakesh Kathotia & Ors. vs. SEBI* (Appeal No. 07 of 2016, dated May 27, 2019) and The Hon'ble Securities Appellate Tribunal in *Ashlesh Shah v. SEBI* (Appeal No. 169 of 2019, decided on January 31, 2020)
17. I note that, in the matter of *Mr. Rakesh Kathotia, supra* the Appellants were charged for disclosure violations under the SAST Regulations.
However, in the present case, the Noticees are charged for serious violation under the SEBI (PFUTP Regulations) and SEBI Act, 1992 and was a fact finding exercise. In this regard, I note that there is no provision in the SEBI Act which lays down any limitation period for initiating any proceedings/ action under the SEBI Act. Therefore, citing such arguments is flawed in itself. For establishing the delay, if any, in the matter, the date when the violation came to the notice of the SEBI would be the relevant point and not the date of violation. Whether a delay in a particular case is justified or not depends on the facts and circumstances of each case.

18. I observe that, the Hon'ble SAT in the matter of *Ashlesh Gunvantbhai Shah (Supra)* made the following pertinent remarks by reiterating the following decision of Hon'ble SAT in *Mr. Rakesh Kathotia & Ors. vs SEBI in Appeal No. 7 of 2016* decided by Hon'ble SAT on May 27,2019:

“23. It is no doubt true that no period of limitation is prescribed in the Act or the Regulations for issuance of a show cause notice or for completion of the adjudication proceedings. The Supreme Court in Government of India vs, Citedal Fine Pharmaceuticals, Madras and Others, [AIR (1989) SC 1771] held that in the absence of any period of limitation, the authority is required to exercise its powers within a reasonable period. What would be the reasonable period would depend on the facts of each case and that no hard and fast rule can be laid down in this regard as the determination of this question would depend on the facts of each case. This proposition of law has been consistently reiterated by the Supreme Court [..].”

19. I further note that, Hon'ble SAT in the same order has also held that,
“Even though there is no period of limitation prescribed in the Act and Regulations in the issuance of a show cause notice or for completion of the adjudication proceedings the authority is required to exercise its powers within a reasonable period as held recently in Adjudicating Officer, Securities and Exchange Board of India vs. Bhavesh Pabari (2019) SCC OnLine SC 294.”
20. I also note that, in *SEBI vs. Bhavesh Pabari (2019) SCC Online SC 294*, Supreme Court it has itself held that where the period of limitation is not prescribed, such power must be exercised within a reasonable time and what would be reasonable time, would depend upon the facts and circumstances of the case, nature of the default/statute, prejudice caused, whether the third-party rights had been created etc.
21. I am of a view that, Hon'ble SAT has qualified the aforesaid ruling by saying that the reasonable period would depend on the facts and circumstances of each case and that no hard and fast rule can be laid down in this regard. I am of the view that present proceedings do not suffer from any infirmity on the ground of delay. Further, the Noticees have failed to show that, how delay, if any, in the instant matter have caused prejudice to them. It is trite

law that, in order to question an order on the basis of delay and latches, the Noticees must point out cogent and definable prejudice caused to them, as has been held in the judgements of the Hon'ble Tribunal in the matters of *Appeal No. 152 of 2019 Pooja Vinay Jain vs SEBI decided on March 17, 2020* and *Appeal No. 62 of 2006 Bipin R Vora vs SEBI decided on September 13, 2007*.

22. Hon'ble SAT in the matter of *Bipin R Vora v. SEBI dated March 22, 2006*, has held that, *"As regards the plea of delay and latches and submission that the show cause notice is barred by limitation, I do not find any merit in these contentions as the time and efforts involved in an investigation though may vary from case to case, generally investigations per-se is a time consuming process which invariably involve collection, scrutiny and careful examination of voluminous records/order-trade details of all the concerned including the exchanges/recording of statements etc. and therefore no time limit can be fixed in this regard to enable a regulator to take appropriate disciplinary action for the safeguard and improvement of the system/market"*
23. I further place reference to the Order of the Hon'ble SAT in *M/s. Adamina Traders Private Limited vs SEBI* (Order dated December 15, 2021)" wherein it was held that, *"We do not find any evidence to hold that there was an inordinate delay in the issuance of the show cause notice. This contention is accordingly rejected. Further, nothing has been shown as to how this delay has prejudiced the appellant. In the absence of any prejudice the delay, if any, cannot be set aside."*
24. Therefore, in the facts of the present case, merely a plea of delays and latches will not be sufficient to set aside the Impugned Order, especially when the same has not caused any material / definable prejudice to the Noticee. Further, having considered the case laws cited by the Noticee, I don't find the ratio applicable to facts and circumstances of the instant matter. I, therefore, hold that there is no protracted delay as contended and hence, the contention of the Noticee in this regard is not acceptable to me.

Non-furnishing of all documents all documents

25. The Noticee has raised an issue relating to non-furnishing of all documents, SEBI has relied upon during its investigation. In this regard, I note that all the documents relied upon in the SCN has been provided to the Noticee in the instant matter alongwith the SCN as Annexures. Therefore, the request of the Noticee in this regard is not tenable.
26. Noticee has cited observation of Hon'ble SAT in the matter of **Price Waterhouse v. SEBI, [2011] SAT 58**. The observations of which were later upheld by the Hon'ble Supreme Court vide its order dated January 2017.
- having considered the case law cited by the Noticee in this regard, I don't find the ratio applicable to facts and circumstances of the instant matter. Further, reference may be made to the order dated February 12, 2020 passed by Hon'ble SAT in Appeal (L) No. 28 of 2020 – Shruti Vora Vs. SEBI, wherein it was held as under:
- “In the light of the aforesaid, we are of the opinion that concept of fairness and principles of natural justice are in-built in Rule 4 of the Rules of 1995 and that the AO is required to supply the documents relied upon while serving the show cause notice. This is essential for the person to file an efficacious reply in his defence.”*
27. The aforesaid observations made in Shruti Vora's case has been reiterated with confirmation by Hon'ble SAT in its order dated July 17, 2020 passed in *Anant R Sathe Vs. SEBI* wherein it was held as under:
- “.....8. The said principle elucidated in Shruti Vora's judgement is squarely applicable in the instant case. The authority is required to supply the documents that they rely upon while serving the show cause notice which in the instant case has been done and which is sufficient for the purpose of filing an efficacious reply in his defence.....”*
28. In the light of the aforesaid discussion and the available jurisprudence on the issue, I find that the principles of natural justice have been adequately complied with in the present matter as all documents which have been relied upon in the SCN and used against the Noticee has been duly provided to Noticee.
29. I now proceed to deal with the merits of the case. I note that, IPO is initial public offering by a company to raise funds for the purposes as stated in the Red Herring Prospectus (RHP). True and fair disclosures are important in an IPO as the investors rely on the statements

and disclosures made by the Issuer Company while making investment decisions. If the disclosures made by the company / promoter & director later found to be factually incorrect, it will impact the interest of investors, which in turn mislead the investors and Prospectus is the principal medium through which the investors get information of the strength and weakness of the company, its creditworthiness, credence and confidence of Promoters and the company's prospects. The purpose of filing the offer document with SEBI is not a mere ritual or formality. Therefore, the importance of contents of the Prospectus in a disclosure regime cannot be over-emphasised. In this connection, it is pertinent to note that Hon'ble SAT in the matter of *HSBC Securities and Capital Markets (India) Private Ltd. vs. SEBI* decided on February 20, 2008 held that " *an incorrect or wrong information in a letter of offer or other similar documents issued for the benefit of investors in general could lead to serious consequences including loss of credibility for the market operators and for the regulatory system. This kind of failure has to be taken very seriously by the market regulator*"

30. Hon'ble SAT in the matter of *V. Natarajan Vs. SEBI*, Appeal No. 104 of 2011, has observed as follows:

"... We are satisfied that the provisions of Regulations 3 and 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003, were violated... These regulations also prohibit persons from indulging in a fraudulent or unfair trade practice in securities which includes publishing any information which is not true or which he does not believe to be true. Any advertisement that is misleading or contains information in a distorted manner which may influence the decision of the investors is also an unfair trade practice in securities which is prohibited. The regulations also make it clear that planting false or misleading news which may induce the public for selling or purchasing securities would also come within the ambit of unfair trade practice in securities..."

31. Further, Hon'ble SAT in the matter of *Brooks Laboratories Ltd. vs. SEBI* decided on March 21, 2018 has further held that, " *Failure to disclose material information and making false/ misleading statements in the RHP/ Prospectus constitutes serious violation of the PFUTP/ ICDR Regulations. Appellants who are Chairman, Managing Director, Chief Executive Officer, Chief Financial Officer and Company Secretary of the Company cannot escape*

penal liability for the aforesaid violations by merely stating that they had relied on the merchant banker. Appellants were equally responsible to ensure that all material facts were disclosed and further ensure that false and misleading statements were not made in the RHP/ Prospectus.”

32. I note that, SCN has inter-alia stated with regard to utilization of Bridge Loan amount of Rs. 20 crore, it was disclosed in the prospectus (at Page 63) that statutory auditor of ATL during the relevant period i.e., the Noticee had certified vide letter dated 24/01/2011 that the loan amount was utilized as follows:-
- (a) Advance towards construction of building - Rs. 7.00 Cr
 - (b) Towards working capital - Rs. 13.00 Cr
33. it was also stated that, the Noticee was the auditor for Equastone Properties (to whom Rs. 7 crore of the bridge loan amount was transferred) also at relevant point in time and hence, it is alleged that it is unlikely that the Noticee was unaware of the connection between ATL and Equastone and the genuinity of the transactions.
34. Based on the observations, it was alleged in the SCN that the Noticee had violated regulations 3 (b), (c), (d), 4(1), 4(2), (f), (k) & (r) of PFUTP Regulations by wrongly certifying the utilization of bridge loan amount of Rs. 20 crore in the prospectus of ATL. The certification provided by the auditor was part of the prospectus of ATL. Hence, the prospectus of ATL contained misleading information relating to the bridge loan which was based on the certificate provided by the auditor i.e. the Noticee. Further, the wrong certification provided by the auditor leads to misleading information in the prospectus.
35. During the investigation, bank account of ATL was analysed and it was observed by SEBI that amount of Rs. 7 crore was transferred to M/s Equastone Properties Pvt Ltd (Equastone) and remaining Rs.13 crore was transferred abroad.
36. Thus, ATL was asked about the utilization of Bridge Loan amount of Rs. 20 crore during investigation. .in this regard, I note that , ATL, vide its letter dated 02/05/2016, had informed that said amount of Rs. 7 crore was transferred to M/s Equastone Properties Pvt Ltd (Equastone) as advance towards construction of software development center. ATL has

further submitted that subsequently said project was cancelled and ATL received back the advance paid to Equastone. In this regard, it was observed that Equastone was a related entity of ATL / Shri Ravikumar.

37. However, for remaining Rs.13 crore which was transferred abroad, no reason whatsoever could be provided by ATL. Hence, it is observed that entire transaction was not genuine and disclosure as appearing in the prospectus was false.

38. SEBI vide its order no. WTM/MPB/EFD-1-DRA-IV/67/2019 dated September 27, 2019 passed by Whole Time Member, SEBI (hereinafter referred to as "WTM") on the same set of findings against ATL and ors. has held the following with respect to wrong disclosure and non-disclosure made in the prospectus, *"In the extant matter by virtue of making wrong disclosure with respect to utilisation of bridge loan and failure to make disclosure about a related party transaction, the investors were deprived of the important information at the relevant point of time. In other words, by not complying with the regulatory obligation of making true and complete disclosures, the company, Shri Ravikumar, Shri S. Sudheer, Ms. Shobha Sudhakar Acharya and Shri Jamili Jalaiah have misled the investors which is detrimental to the interest of investors in securities market and the same is in violation of Regulations 3 (b), (c), (d), 4(1), 4(2) (f) and (k) of PFUTP Regulations read with Section 12A (a), (b) and (c) of SEBI Act and Regulation 57(1), 60(7)(a) and Clause (2)(IX)(B)(12) (a)(v) Part A of Schedule VIII of ICDR Regulations."*

39. I note that, Noticee during investigation and instant proceedings has *inter-alia* stated that *the certification of utilisation of the Bridge Loan amount of Rs. 20.00 Crores in the prospectus of ATL has been made purely on the basis of the representations made by ATL, the books of account and other documents and information submitted to me by the Company.*

40. Upon Perusal of the documents submitted by Noticee during investigation and instant proceedings, I note the following:

40.1. With respect to an amount of Rs. 7.00 Crores advanced to M/s Equastone Properties, Noticee has *inter-alia* stated that, *an amount of Rs. 7.00 Crores was advanced to M/s*

Equastone Properties Private Limited towards construction of a software development centre, in terms of an agreement dated 15/03/2011 (copy attached-Annexure 1). The Noticee has also stated that, it relied upon Clause 2.1 of the said agreement which stated that the Company shall pay an advance sum of INR 7 Crore to Equastone for construction of a software development centre in Bangalore and provided his certification accordingly.

40.1.1. In this regard, It may be noted that, prospectus was dated February 25, 2011 and the said agreement was dated 15 March, 2011. I also note that Noticee had certified vide letter dated 24/01/2011 stating that, the loan amount was utilized till January 21, 2011 as follows: -

- (a) Advance towards construction of building - Rs. 7.00 Cr
- (b) Towards working capital - Rs. 13.00 Cr

40.1.2. I also note that, no date of payment of advance made to Equastone by ATL was mentioned in the agreement and the fact that agreement date was of later date than prospectus date and said certification date shows that, Noticee has not perused the same, during certifying the utilisation of Loan amount on January 24, 2011. I also note that except submitting an agreement, no other supporting documents viz., correspondences prior and post execution of agreement, board resolution, reason and communication of cancellation etc. was furnished neither by ATL during investigation to strengthen its submission that Rs. 7 crore which was transferred by ATL to Equastone was for construction of a software development centre in Bangalore nor by Noticee.

40.1.3. I note that Noticee has perused the *Copy of the General Ledger of ATL for the (FY) 2010-11 showing accounting entries in respect of the advance of Rs. 7.00 Crores to Equastone Properties Private Limited. The financial statements for the period 2010-11 were adopted and approved by the Board of Directors of the Company at their meeting held on 12/08/2011 and were adopted and approved by the shareholders at the Tenth Annual General Meeting held on 28/09/2011 which were provided to it by ATL.* In this regard, I note that date of adoption and approval of aforesaid financial statements were of later date than prospectus date and said certification date.

40.2. In relation to the remaining amount of the bridge loan, i.e, INR 13 Crore, Noticee in its reply has submitted that, *the auditor was informed by the Company stated that the same was used toward working capital. The Company vide its letters dated 05 October 2010 and 19 October 2010 assured the Bank that due to the nature of its services, it makes large remittances for overseas onsite working capital expenses and provision of facilities. Copies of the letters attached herewith as “Annexure – B Colly”. The Noticee corroborated the Company’s representations with the General Ledger of the Company the financial year 2010-2011 and the Form A2 submitted by the Company to United Bank of India. We were informed that the Company had identified scope for huge business in the Middle East, Europe and US and were exploring the potential markets there. With this background, expenditure towards working capital did not seem out of the ordinary at the relevant time. In any event, the supporting documents showed that remittances had been made by the Company towards onsite expenses and other working capital requirements to the extent of around INR 6 crore. Further, the remainder amounts were utilised towards purchase of software, repayment of loan, as has been evidenced by “Annexure – B Colly provided the certification on satisfaction that the remittances are made through normal banking channels and have been recorded adequately as working capital expenses in the books of accounts.*

40.2.1. In this regard, I note that, Noticee has only relied upon the statements and documents provided by ATL. I note that, there was no seal of bank on the Copies of Form A2 submitted by ATL to United Bank (Authorised Dealer) for making the said overseas remittances. Further, it was not supported by bank account statements but was supported only by General Ledger of ATL for the (FY) 2010-11 showing accounting entries in respect of overseas remittances of Rs. 13.00 Crores, made towards onsite expenses of working capital.

41. It was found during investigation that, Equastone was a related entity of ATL / Ravikumar as wife of Ravikumar was the majority shareholder in Equastone and employees of ATL (viz. Prashanth Kumar and Madhava Reddy) were the directors in Equastone during 2010-11. The aforementioned transactions with Equastone, being a related party was not disclosed by ATL in its prospectus. During investigation it was also observed from

the MCA website that, the authorized signatory to the bank accounts of Equastone was Shri D Vedavyasa Rao, who was Head- Accounts of ATL.

42. At the investigation stage, Ms. Malini Reddy was advised to confirm her role in Equastone. She had submitted that in November, 2006, she had resigned as the Director of Equastone and transferred the entire shareholding in Equastone to Shri Prashanth Kumar. She had also submitted a copy of Annual Return of Equastone for the year 2007 which she claimed to have filed with MCA showing transfer of shares of Equastone in favour of Shri Prashanth Kumar. However, it is observed from the MCA website that the said filing was done only on July 25, 2011. Therefore, the contention of Ms. Malini on the transfer of the share during 2007 is not acceptable. I also note that, as per disclosure in the prospectus in Annexure 18, Ms. Malini Reddy was related party to ATL in the capacity as Promoter Group (Immediate Relative of promoter/CMD).

43. In view of the above facts, Equastone is a related entity of ATL / Shri Ravikumar as wife of Shri Ravikumar was the majority shareholder in Equastone. Therefore, it is held that fund transactions with Equastone is Related Party Transaction, which was not disclosed by ATL in its Prospectus. Additionally, it was also noted that employees of ATL (viz. Shri Prashanth Kumar and Shri Madhava Reddy) were the Directors in Equastone during the period 2010-11.

44. I note from the reply of Noticee during investigation that, Noticee was also statutory auditor of Equastone for the F.Y. 2010-11 & 2011-12 that is during the period, ATL came out with an IPO.

45. Thus, in view of the aforesaid, it shows that, Noticee miserably failed to identify and verify the correctness in utilization of bridge loan despite associated with ATL for a long period i.e., since 2001 till 2017 and also being statutory auditor of Equastone during the time, ATL made an IPO.

46. Noticee has not demonstrated in his reply as to whether independent confirmation was made by Noticee. Considering the materiality and the magnitude of bridge loan and seriousness of the Public issue made by ATL, the auditor should have at least carried

out some independent assessment based on documents other than the statements provided by the Company. I also note that Noticee has not brought any evidence to show in the instant proceedings and during investigation that, it had provided the said certificate with due diligence and care and that he had raised all possible queries expected to be raised by any prudent auditor to the management in the normal course of his work. I find from the replies of Noticee that, it has blindly accepted the documents and statements provided by ATL.

47. I note that, during investigation, ATL has submitted certain documents and made certain claims for which SEBI sought further clarification and documents from ATL. However, ATL was not been able to substantiate its claims with documentary evidence and wherever documentary evidence has been submitted by the ATL, same is either for partial utilisation of the allocated amount or the supporting documents are not adequate. So if adequate / proper documents were not submitted by ATL then it casts a shadow of doubt on the documents submitted by the company to the Noticee and same has also been found out in the order of Hon'ble WTM dated September 27, 2019. I also note that, Prospectus does not disclose that the financial transaction with Equastone was a related party transaction and Clause (IX)(B)(12) (a)(v) Part A of Schedule VIII of ICDR Regulations, places the onus on Issuer to make disclosure of related party transactions.

48. I note that Noticee in its reply has stated that, *"the changed utilisation of the IPO proceeds was approved by the Board of Directors at their meeting held on 14.8.2012 and was also intimated to the shareholders of the Company, vide advertisements in English and vernacular, in the "Business Line" and "Vijay Karnataka" respectively, on 15.8.2012, besides intimations to the BSE and NSE. It is further submitted that the revised utilisation of the IPO proceeds was approved by the shareholders of the Company at the 11th AGM held on 28.9.2012, (copies of the notice and proceedings enclosed for ready reference-Annexure 4). It is humbly requested that the changed utilisation of the IPO proceeds be taken on record for adjudicating the show cause notice."*

49. In this regard, I note that Noticee has submitted only intimation made to BSE by ATL and the same is not sufficed with any acknowledgement from BSE or any newspaper

cutting. Further, with respect to submissions made by ATL on similar lines, I note that Hon'ble WTM in order dated September 27, 2019 has held the following :

"In this regard, it is noted that the company has not submitted the copy of the advertisements made by it on August 15, 2012 or proof of dispatch of the notice to its shareholders for the AGM. In view of the same, the veracity of ATL's claim cannot be ascertained. Further, as held in preceding paragraph, the entire IPO proceeds was diverted within a span of 10 days from the receipt of it. So if the entire IPO proceeds were diverted by March 18, 2011, then the entire episode of taking shareholders' approval after almost 17 months, is an afterthought. It is pertinent to note that the aforesaid AGM was called only after SEBI had started the investigation in the matter. SEBI had vide its letter dated May 18, 2012, had advised ATL to submit the complete details of the utilization of IPO proceeds. Furthermore, it is noteworthy to refer to Section 61 of Companies Act, 1956 and Regulation 24 of ICDR Regulations. Section 61 of Companies Act, 1956 states as follows; "A company shall not, at any time, vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of, or except on authority given by, the company in general meeting." Regulation 24 of ICDR Regulations states as follows; "No issuer shall alter the terms (including the terms of issue) of specified securities which may adversely affect the interests of the holders of that specified securities, except with the consent in writing of the holders of not less than three-fourths of the specified securities of that class or with the sanction of a special resolution passed at a meeting of the holders of the specified securities of that class." It goes without saying that by reallocating the IPO proceeds to the Objects of Issue, the company has altered the terms of the issue which necessitated approval from its shareholders. Even assuming that the company has utilized the IPO proceeds as per the revised utilization, the same was done before getting the requisite approval from its shareholders as laid down under the aforesaid provisions of law as it is company's own submission that AGM was called on September 28, 2012 for seeking approval of revised utilization of IPO proceeds. Therefore, in view of the aforesaid findings and given the facts and circumstances of the case, the submission of the company is not acceptable. Moreover, the diversion of IPO funds have already been concluded as "fraud" within the meaning of FUTP Regulations. An act of fraud does not regain the status of legality or permissibility by virtue of the said

shareholders subsequent sanction. Therefore, the said sanction even if it is there, will not alter the nature of the fraud committed.”

50. With regard to Noticee's submission, *the offer documents had been appraised by the Merchant Bankers to the issue, who have after an exhaustive appraisal of the documents, certified that the disclosures are true, fair and adequate. It is submitted that when the offer documents have been appraised and certified by the Merchant Bankers, such appraisal and certification cannot be ignored and brushed away lightly, relying on the decision in HSBC Securities (India) Pvt Ltd. Vs. SEBI [Appeal No. 99/2007] -Order dated 20th February, 2008.* in this regard, I note from the order of WTM dated June 29, 2021 in respect of *Saffron Capital Pvt. Ltd. (merchant banker to IPO of ATL) in the matter of Acropetal Technologies Limited* that, merchant banker in fact relied upon the certificate from M/s K. Gopalkrishnan & Co., statutory auditor of ATL regarding utilisation of Bridge loan. In this respect, Hon'ble WTM in the said order has held that, *“I note here that except, lapse / flaw in the process of independent judgment by the Appellant, there is no allegation of any collusion of the Appellant with the Issuer Company or Auditor. Noticee in this respect has submitted that they received certificate from M/s K. Gopalkrishnan & Co., statutory auditor of ATL that, company has utilized bridge loan availed from UBI to pay working capital of Rs. 13 crores and Noticee has no red-flags to question auditor's certificate.... Therefore, given the statement by the ATL and Auditor in the prospectus enumerating the purpose for which working capital is needed, it is difficult to conclude on preponderance of probability basis, that there existed red flags on the aspect of whether utilisation of the bridge loan is in the nature of working capital requirement or not. I also note that the Noticee has submitted that the deployment of funds certificate was also provided by the Statutory Auditor which classified the utilization of the funds for working capital.”*

51. It would be apt to refer Section 224 r/w Section 227 of the Companies Act, 1956. In terms of the above-mentioned sections in case of a public listed company, the statutory auditors owe an obligation to the shareholders of a company to report the true and correct facts about its financials since it is not only appointed by the shareholders in the AGM of the company but at the same time required to report true and correct position to the member of the company. Since, auditor is required to function for the betterment of

the company and its member, a duty is cast upon it to do all necessary steps as contemplated and provided under Section 227 of the Companies Act, 1956 so as to ensure that no steps prejudicial to the interest of the Company and its member are taken at any cost. In order to perform their duties towards the shareholders effectively the statutory auditors should plan and perform an audit with an attitude of professional skepticism. While conducting audit, an auditor knows that there could be various circumstances which may cause the financial statements to be materially misstated. Therefore, while performing his job, a statutory auditor should not only comply with the relevant accounting standards prescribed by the ICAI but also should identify and understand major classes of transactions in the entity's operations, how such transactions are initiated and also should examine the significant accounting records, supporting documents and specific accounts in the financial statements, the accounting and financial reporting process, and the significant transactions as well as the extraordinary events that might have taken place during the year which ought to be incorporated in the financial statements of the company. The outstanding loans - short terms as well as long term, availed by a company, and interest and finance charges payable thereon which were not reported in the accounts prepared by the Company and its directors, by all standards had significant financial implications for the Company during the year which could not have been overlooked by a Statutory Auditor, who audits the accounts of a listed corporate entity by following the Accounting Standards prescribed by ICAI.

52. I note that, in the extant proceedings, it has been alleged that, Noticee has been alleged to have violated regulations 3 (b), (c), (d), 4(1), 4(2), (f), (k) & (r) of PFUTP Regulations by wrongly certifying the utilization of bridge loan amount of Rs. 20 crore in the prospectus of ATL and violated. with respect to violation of PFUTP regulation, I note that, to establish the charge of fraud against Noticee in the instant proceedings, there is nothing on record to find that the Noticee has connived or colluded with ATL or its directors, in the absence of which, I am of the view that there is no deceit or inducement by the Noticee.

53. Undoubtedly an auditor is duty bound to be absolutely and completely diligent and cautious while preparing, signing and certifying Annual Accounts and/or any other Audit

report. However, in view of my aforesaid findings, wherein I find that that adequate / proper documents were not submitted by ATL during investigation then it casts a shadow of doubt on the documents submitted by the company to the Noticee. Further, Regulation 60(7)(a) of ICDR Regulations places the onus on the Issuer company to make true and fair disclosure in any advertisement caused to be issued by the Issuer. Moreover, no material or evidence sufficient enough has been brought on record to show that why the transaction with Equastone would have raised red flags for especially when the money was transferred to Equastone. Therefore, in absence of any material available on record, the charge of fraud or collusion or connivance with the ATL and directors of the company cannot be levied on the noticee, only on the ground that he was not diligent or cautious or did not check the utilization of bridge loan through other sources. I am of the view that aforesaid lack of due diligence as mentioned at para 47 above can only lead to professional negligence which would amount to a misconduct which could be taken up only by ICAI.

54. In this connection, before dealing with the liability of the statutory auditor, I have perused the various case laws and judgements produced before me by Noticee. Thus, it would be appropriate to refer to the judgment of Hon'ble Bombay High Court in *Writ Petition No. 5249 of 2010 (filed by Price Waterhouse, Bangalore)* and *Writ Petition No. 5256 of 2010 (filed by 10 CA firms alongwith their partners)*, dated August 13, 2010, wherein Hon'ble Bombay High Court, with respect to SEBI's jurisdiction over auditors has held as follows:

25. In our view, the jurisdiction of SEBI would also depend upon the evidence which is available during such inquiry. It is true, as argued by the learned counsel for the petitioners, that the SEBI cannot regulate the profession of Chartered Accountants. This proposition cannot be disputed in any manner. It is required to be noted that by taking remedial and preventive measures in the interest of investors and for regulating the securities market, if any steps are taken by the SEBI, it can never be said that it is regulating the profession of the Chartered Accountants. So far as listed Companies are concerned, the SEBI has all the powers under the Act and the Regulations to take all remedial and protective measures to safeguard the interest of investors and securities market. So far as the role of Auditors is concerned, it is a very important role under the Companies Act. As posited in Section 227 of the Companies Act, every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the Company, whether kept at the head office of the company or elsewhere, and shall be entitled to require from the officers of the Company such information and explanations as the auditor may think necessary for the performance of his duties. The auditors in the Company are functioning as statutory auditors. They have been appointed by the shareholders by majority. They owe a duty to the shareholders and are required to give a correct picture of the financial affairs of the Company. With a view to safeguard the interests of such investors, in our view, it is the duty of the SEBI to see that maximum care is required

to be taken to protect the interest of such investors so that they may not be subjected to any fraud or cheating in the matter of their investments in the securities market. Normally, an investor invests his money by considering the financial health of the Company and in order to find out the same, one will naturally bank upon the accounts and balance-sheets of the Company. If it is unearthed during inquiry before SEBI that a particular Chartered Accountant in connivance and in collusion with the Officers/Directors of the Company has concocted false accounts, in our view, there is no reason as to why to protect the interests of investors and regulate the securities market, such a person cannot be prevented from dealing with the auditing of such a public listed Company. In our view, the SEBI has got inherent powers to take all ancillary steps to safeguard the interest of investors and securities market.”

55. The Bombay High Court further held that,

SEBI being a quasi-judicial authority, while adjudicating the matter, will look into this aspect and will consider as to whether any particular firm of Chartered Accountants has any role to play or for that reason any of the petitioners had played any role in any manner they may bring the matter to the notice of the SEBI. In a given case, if ultimately it is found that there was only some omission without any mens rea or connivance with anyone in any manner, naturally on the basis of such evidence the SEBI cannot give any further directions. If there is available evidence, SEBI can proceed further in the matter of giving direction against a particular Chartered Accountant as envisaged by Sections 11 and 12 of the SEBI Act and Regulations in this behalf. On the basis of detailed evidence on record, this aspect is required to be considered by SEBI. The question of jurisdictional fact depends upon the facts which may be available at the time of evidence before the SEBI. SEBI will have to answer the question as to whether on the basis of evidence on record, it has any power to give directions as provided under the SEBI Act. This aspect will depend upon the evidence which may be available at the time of inquiry. All these aspects are therefore left to the consideration of SEBI at the time of passing final order in the inquiry.

56. In matter of *Price Waterhouse Co. Vs. SEBI* in appeal no. 6 of 2018 decided on 09.09.2019, Hon'ble SAT while considering the role of the appellant as a firm of the C.A.s and after considering the judgment of the Bombay High Court (supra) found that the scope of the enquiry was only restricted to the charge of conspiracy and involvement in the fraud and not to any charge of professional negligence since the C.A. / C.A. firm were not dealing directly in the securities. The Hon'ble SAT held that in absence of inducement, fraud was not proved nor there was connivance or collusion by the C.A.s and therefore, the provision of section 12 (A) of SEBI Act and Regulation 3 & 4 of SEBI (PFUTP) Regulations are not applicable. The Hon'ble SAT further held that gross negligence or recklessness in adhering to the accounting norms in the course of auditing can only point out to the professional negligence which would amount to a misconduct to be taken up only by ICAI.

57. From the above-mentioned judgment of Hon'ble Bombay High Court and Hon'ble SAT, it is observed that for SEBI to exercise jurisdiction over an auditor, it has to be shown that the case pertains to an auditor who in connivance and in collusion with the officers or directors of a company has concocted false accounts. I note that in the present matter, the SCN alleges that, Noticee has wrongly certified the utilization of bridge loan amount of Rs. 20 crore in the prospectus of ATL which was made on the basis of documents/statements made by ATL to Noticee.

58. Thus, in view of the above, I conclude that, there is no evidence, sufficient enough available on record with clarity and conviction to establish that Noticee was aware of the manipulative and deceptive scheme devised by the ATL or its directors and that the Noticee was in connivance with the ATL or its directors. therefore, in absence of inducement, fraud is not proved nor there was connivance or collusion by the Noticee with the ATL or its directors. Thus, the violation of Regulations 3 (b), (c), (d), 4(1), 4(2) (f) (k) and (r) of SEBI (PFUTP) Regulations, 2003 for wrongly certifying the utilization of bridge loan amount of Rs. 20 crore in the prospectus is not established against Noticee and therefore, Issues II and III also do not merit consideration.

ORDER

59. After taking into consideration all the facts and circumstances of the case and material available on record, the adjudication proceeding initiated against the Noticee i.e. M/s Gopalakrishnan & Co. vide SCN dated December 15, 2017 is disposed of without any penalty.

60. In terms of Rule 6 of the Adjudication Rules, 1995, copy of this Order is sent to the Noticees and also to the Securities and Exchange Board of India.

Date : March 31, 2022

Place : Mumbai

Vijayant Kumar Verma

Adjudicating Officer