BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO. ORDER/SM/DD/2021-22/12099-12100]

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

In respect of:

Subhashree Hiris Pvt. Ltd. (PAN: AAMCS5112J)
Skylight Distributors Pvt. Ltd. (PAN: AAMCS8390J)

In the matter of Birla Pacific Medspa Limited

BACKGROUND:

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

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

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

3. During the course of investigation, it was observed that BPML had received IPO proceeds amounting to Rs. 64.17 crores in its bank account (Yes Bank, Nariman Point Mumbai-A/c No. 4840000358384) on July 06, 2011. On analysis of the IPO proceed utilization and fund flow from BPML's bank account, it was observed in investigation that BPML had not invested the funds pending utilization as disclosed in the prospectus, but had transferred part of the funds to various other entities including Subhashree Hiris Pvt. Ltd. (hereinafter being referred to as '**Subhashree /Noticee1**') and Skylight Distributors Pvt. Ltd.(hereinafter being referred to as '**Skylight/Noticee 2'**) (both Noticee 1 and Noticee 2 are being collectively referred to as '**Noticees**').

4. Based on the findings of the investigation, SEBI initiated adjudication proceedings against the Noticees under Section 15HA of the Securities and Exchange Board of India Act, 1992 (hereinafter being referred to as '**SEBI Act*'),*** for the alleged violations of provisions of Regulations 3(a), (b), (c), (d) and 4(1) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter being referred to as **"PFUTP Regulations"*)*** read with Section 12A(a), (b) & (c) of the SEBI Act by the Noticees.

APPOINTMENT OF ADJUDICATING OFFICER

5. Vide order dated December 08, 2016, Shri D. Sura Reddy was appointed as the Adjudicating Officer (hereinafter referred to as '**AO**') under Section 15-I of SEBI Act read with Rule 3 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter being referred to as "**AO Rules**") to inquire into and adjudge under the provisions of Section 15HA of the SEBI Act, the aforesaid alleged violations by the Noticees. Subsequent to transfer of Shri D. Sura Reddy, Shri Jeevan Sonaparote was appointed as the AO in the said matter. Subsequent to transfer of Shri Jeevan Sonaparote, Shri B.J. Dilip was appointed as the AO in the matter. Thereafter, on account of transfer of Shri B.J. Dilip to another department, the undersigned was appointed as the AO in the matter by SEBI vide order dated December 29, 2020.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

6. A Show Cause Notice dated April 20, 2017 (hereinafter being referred to as '**SCN**') was issued to the Noticees under Rule 4(1) of the AO Rules to show-cause as to why an inquiry should not be initiated against them and penalty, if any, not be imposed on them under

Section 15HA of the SEBI Act, for the alleged violations of the provisions of Regulations 3(a), (b), (c), (d) and 4(1) of PFUTP Regulations read with Section 12A(a), (b) & (c) of the SEBI Act by the Noticees. The allegations levelled against the Noticees, as observed from the SCN, are given below:

a. *During the investigation, on analysis of the IPO proceed utilization and fund flow from BPML account, it was observed that BPML had not invested funds pending utilizations as disclosed in prospectus. As per the schedule of implementation of BPML as mentioned in the prospectus,15, 15 and 25 Evolve Medspa centers would be completed during the Financial Years 2011-12, 2012-13 and 2013-14 respectively. However, no such clinic was opened. Thus, it is alleged that BPML had failed to utilize the IPO proceeds as per the objects of the issue as stated in the prospectus and instead had diverted the IP.*
b. *BPML received IPO proceeds of Rs. 64,17,63,660 (Rs. 64.17 crores) in its bank account on July 06, 2011. From these IPO funds, on July 6, 2011, funds amounting Rs. 2,00,00,000/- were transferred to the Noticees collectively (Rs. 1 crore to Noticee 1 and Rs.1 crore to Noticee 2) by BPML.*
c. *It is further alleged that Noticee 1 and Noticee 2, who were involved in the IPO fund flow, were related to each other through common directorship. It was observed that the Noticees were West Bengal based, away from Mumbai BPML head office and were not into business of interior or medical equipment's procurement or supply.*
d. *Thus, it is alleged that all these financial transactions, shown by BPML as being advances for the purpose of fulfilling issue objects, were fraudulent in nature and some of them were also used to fund purchase of shares of BPML and support price of the shares on the listing day.*
e. *In view of the above, it is alleged that Noticee 1 and Noticee 2 have aided and abetted in the diversion of proceeds of IPO by BPML and have therefore, violated the provisions of Regulations 3(a),(b),(c),(d) and 4(1) of the PFUTP Regulations read with Section 12A(a),(b)and (c) of the SEBI Act.*

7. I note from the records that the SCN dated April 20, 2017 issued to the Noticees returned undelivered. Thereafter, a newspaper publication was made in terms of AO Rules wherein the Noticees were advised to submit their replies on or before February 05, 2019 and to attend the hearing before the erstwhile AO on February 12, 2019. However, the Noticees did not appear for the hearing and did not seek any further date of hearing. Vide email dated November 04, 2020, another opportunity of hearing was granted to Noticees on November 19, 2020 before the erstwhile AO, which also was not attended by the Noticees.

8. Subsequent to appointment of undersigned as AO, in the interest of natural justice, hearing notice dated March 18, 2021 was sent to the Noticees through digitally signed email/ SPAD/Affixture granting an opportunity of personal hearing before the undersigned on March 30, 2021. From the material available on record, I note that the hearing notice sent through digitally signed email has not bounced back and was duly served on the Noticees. The said hearing notice was also affixed at the last known addresses of the Noticees and further, a newspaper publication was also in made in Times of India, Rajasthan Patrika and Eisammay on March 27, 2021 for granting opportunity of personal hearing in terms of AO Rules. The Noticees again failed to avail of the opportunity of personal hearing.

9. I note that sufficient opportunities have been granted to the Noticees to submit their replies to the SCN and to appear for personal hearing. However, despite service of the SCN and hearing notices, none of the given opportunities were availed of by the Noticees. The Hon'ble SAT in the matter of Classic Credit Ltd. v. SEBI [2007] 76 SCL 51 (SAT - MUM) has, *inter alia,* held that "*the appellants did not file any reply to the second show-cause notice. This being so, it has to be presumed that the charges alleged against them in the show-cause notice were admitted by them*". Similarly, the Hon'ble SAT, in the case of Sanjay Kumar Tayal & Ors. v. SEBI (in appeal No. 68/2013) decided on February 11, 2014, also held that "...*appellants have neither filed reply to show cause notices issued to them nor availed opportunity of personal hearing offered to them in the adjudication proceedings and, therefore, appellants are presumed to have admitted charges levelled against them in the show cause notices*".

10. In view of the above, I am compelled to proceed ex parte in the matter against the Noticees. I am of the view that principles of natural justice have been complied with since sufficient opportunities have been provided to the Noticee to submit their replies and to appear for personal hearing. I, therefore, am of the view that the Noticees have nothing to submit and in terms of rule 4(7) of the AO Rules, the matter can be proceeded ex-parte on the basis of material available on record. Therefore, the present proceedings against the Noticee are undertaken ex-parte on the basis of available documents and information.

CONSIDERATION OF ISSUES

11. I have carefully perused the charges levelled against the Noticees and the documents / material available on record. The issues that arise for consideration in the present case are:

(a) Whether the Noticees have violated Regulations 3(a), (b), (c), (d) and 4(1) of the PFUTP Regulations read with Section 12A(a), (b) & (c) of the SEBI Act?

(b) If yes, then do the violations on the part of the Noticees attract any monetary penalty under Section 15HA of the SEBI Act?

(c) If yes, then what would be quantum of monetary penalty that can be imposed upon the Noticees, taking into consideration the factors mentioned in Section 15J of the SEBI Act read with Rule 5(2) of the Rules?

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

I. **PFUTP Regulations**:

3. Prohibition of certain dealings in securities:

No person shall directly or indirectly—

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

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

II. SEBI Act

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

12A. No person shall directly or indirectly —

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

(b) *Employ any device, scheme or artifice to defraud in connection with issue or dealing in securities which are listed or proposed to be listed on a recognized stock exchange;*

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

13. The first issue to be decided is whether the Noticees have violated Regulations 3(a), (b),(c),(d) and 4(1) of the PFUTP Regulations read with Section 12A(a), (b) ,(c) of the SEBI Act.

14. I note that the objects of the IPO, as disclosed in the prospectus, was to meet the capital expenditure towards establishing 55 outlets of Evolve Medspa across various cities and places, to meet the working capital requirements for running the above centres, to meet expenses towards brand promotion etc. I also note that BPML had received IPO proceeds of Rs. 64.17 crores in its bank account on July 06, 2011.

15. From the records, I note that out of the IPO proceeds of Rs. 64.17 crores, Rs. 2 crores had been diverted to the Noticees on July 06, 2011 i.e. prior to date of listing and this money was not returned to the company i.e. BPML. From the material available on record, I note that the Noticees were West Bengal based and not into business of interior or medical equipment’s procurement or supply. I also note that Noticee 1 and Noticee 2 are both connected to each other through the same set of directors.

16. Therefore, I find that an amount of of Rs. 2 crore out of IPO proceeds, has been diverted to the Noticees and has neither been utilized for the stated object of IPO nor been returned to the company. Further, I find from the records that BPML has not provided any evidence related to these financial transactions. Therefore, it is clear that instead of being utilized for the stated purpose, as disclosed in the prospectus, the money out of the IPO proceeds have been fraudulently diverted to the Noticees who have aided and abetted BPML in diversion of these proceeds of the IPO.

17. In view of the aforesaid, I find that the violation of Regulations 3(a), (b), (c), (d) and 4(1) of the PFUTP Regulations read with Section 12A(a), (b) & (c) of the SEBI Act by the Noticees stands established.

18. The next issue for consideration is whether the violations on the part of the Noticees would attract any monetary penalty under Section 15HA of the SEBI Act? And if yes, then what would be the monetary penalty that can be imposed upon the Noticees, taking into consideration the factors mentioned in Section 15J of the SEBI Act read with Rule 5(2) of the AO Rules?

19. In context of the above, I refer to the observations of the Hon'ble Supreme Court in the matter of Chairman, SEBI vs. Shriram Mutual Fund {[2006] 5 SCC 361} wherein the Hon'ble Court had observed: *"In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must made by the defaulter with guilty intention or not.''*

20. Therefore, the aforesaid violations committed by the Noticees would attract monetary penalty under Section 15HA of the SEBI Act which reads as follows:

SEBI Act

Section 15HA Penalty for fraudulent and unfair trade practices*.*

" If any person indulges In fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty which shall not be less than five

lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher."

21. While determining the quantum of penalty under Section 15HA of the SEBI Act, it is important to consider the factors relevantly as stipulated in Section 15J of the SEBI Act which reads as under:-

    Section 15J - Factors to be taken into account by the adjudicating officer while adjudging quantum of penalty under section 15, the adjudicating officer shall have due regard to the following factors, namely:-

    (a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

    (b) the amount of loss caused to an investor or group of investors as a result of the default;

    (c) the repetitive nature of the default.

22. I find that on the basis of data available on record, the disproportionate gain or unfair advantage enjoyed by the Noticees and the consequent losses suffered by the investors cannot be quantified exactly. Further the amount of loss to an investor or group of investors also cannot be quantified on the basis of available facts and data. Even though the monetary loss to the investors cannot be computed, any manipulation in the volume or price of the stocks caused by vested interests always erodes investor confidence. In the instant matter, by agreeing to participate in illegal routing of IPO funds of BPML through deceptive and fraudulent transactions, the Noticees have facilitated BPML to divert IPO money for purposes other than stated in the prospectus and thereby defrauded investors who have invested in the IPO of BPML. On account of the seriousness of the offence committed by the Noticees, I am inclined to impose an appropriate penalty which would also serve as a deterrent.

ORDER

23. Having considered all the facts and circumstances of the case, the material available on record and the factors mentioned in Section 15J of SEBI Act, as enumerated above, I, in exercise of the powers conferred upon me under Section 15-I of the SEBI Act r/w Rule 5 of the AO Rules, hereby impose a monetary penalty of **Rs. 5,00,000/- (Rupees Five lakh only)** each on Noticee 1 and Noticee 2, i.e., Subhashree Hiris Pvt. Ltd. and SkyLight Distributors Pvt. Ltd.

24. I am of the view that the said penalty is commensurate with the lapse/omission on the part of the Noticees. The Noticees shall remit / pay the said amount of penalty within 45 days of receipt of this order, either by way of Demand Draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai OR by using the web link https://siportal.sebi.gov.in/intermediary/AOPaymentGateway.html.

25. The Noticees shall forward said Demand Draft to the Enforcement Department - Division of Regulatory Action- IV of SEBI. The Noticee shall provide the following details while forwarding the Demand Draft:
    a. Name and PAN of the entity (Noticee)
    b. Name of the case / matter
    c. Purpose of Payment - Payment of penalty under AO proceedings
    d. Bank Name and Account Number
    e. Transaction Number

26. In the event of failure to pay the said amount of penalty by the Noticees within 45 days of the receipt of this Order, recovery proceedings may be initiated against them under Section 28A of the SEBI Act for realization of the said amount of penalty along with interest thereon, inter alia, by attachment and sale of their movable and immovable properties.

27. Copies of this Adjudication Order are being sent to the Noticees and also to SEBI in terms of Rule 6 of the Adjudication Rules.

Date: June 01, 2021
Place: Mumbai

SOMA MAJUMDER
Adjudicating Officer