**BEFORE THE ADJUDICATING OFFICER**
**SECURITIES AND EXCHANGE BOARD OF INDIA**

**[ADJUDICATION ORDER/SS/AS/2019-20/4025-4038]**

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**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 BY ADJUDICATING OFFICER) RULES, 1995.**

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In respect of:

1. Shri Bakul Ramniklal Parekh (PAN: AACPP5587D)
2. Shri Milan Ramniklal Parekh (PAN: AACPP4073G)
3. Ms. Esha Kedia (PAN: ASEPK4977G)
4. Action Financial Services (India) Limited (PAN: AAACA4423G)
5. Shri Nirav Kirit Sanghvi (PAN: APQPS9418H)
6. Shri Pranav Mahesh Doshi (PAN: AFHPD5002R)
7. Shri Sujir Radhakrishna Nayak (PAN: AAWPN2410P)
8. Shri Atul Anoopchand Zatakia (PAN: AAAPZ0651J)
9. Shri Ketan Himmatlal Mehta (PAN: AAEPM8034E)
10. Shri Harbhajan Singh J Dhillon (PAN: AAGPD3449J)
11. Ms. Yoshita Gupta (PAN: AKFPG0084K)
12. Shri Girish Vyas (PAN: AETPV7027K)
13. Shri Raja Gupta (PAN: ABXPG5515G)
14. Shri Kamalkant Laxmilal Jain (PAN: AFOPJ0547E)

**In the matter of Action Financial Services (India) Limited**

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1. Action Financial Services (India) Limited (hereinafter referred to as "AFSL" or "the Company" or "Noticee No. 4") is a company having its shares listed on the Bombay Stock Exchange Limited (hereinafter referred to as "BSE"). The Company is registered with Securities and Exchange Board of India (SEBI) as Portfolio Manager, category-II Merchant Banker; trading member of National Stock Exchange India Limited (NSE), BSE and Multi Commodity Exchange of India Ltd. (MCX) and depository participant of National Securities Depository Limited (NSDL).

2. SEBI received a reference from Income Tax Department, Delhi vide its letter dated February 02, 2015 alleging that certain entities through stock exchanges mechanism generated bogus Long Term Capital Gain (LTCG) in many scrips including the scrip of the Company. Based on the same, SEBI started investigation during the period March 01, 2009 to July 22, 2015 (hereinafter referred as "investigation period"). The investigation for alleged price manipulation in the scrip of the Company and matters

relating to disclosures regarding change in promoters' shareholding pattern, and for alleged funding, if any, by the Company to preferential allottees were taken up separately.

3. In the course of investigation conducted separately by SEBI for matters relating to funding, if any, by the Company to preferential allottees, following was observed:

   a. Following entities were part of the management of the Company during the investigation period:

**Table 1**

| S.No. | Name of Director | Designation | Appointment Date | Cessation Date, if applicable |
|---|---|---|---|---|
| 1. | Shri Milan Ramniklal Parekh | Chairman & Managing Director | 01.10.1992 | Till date of investigation |
| 2. | Shri Bakul Ramniklal Parikh | Jt. Managing Director | 01.10.1992 | Till date of investigation |
| 3. | Shri Nirav Kirit Sanghavi | Director | 01.10.2009 | 01.08.2012 |
| 4. | Shri Atul Anoopchand Zatakia | Director | 29.01.2010 | 12.11.2014 |
| 5. | Shri Pranav Mahesh Doshi | Director | 21.08.2002 | 29.01.2010 |
| 6. | Shri Sujir Radhakrishna Nayak | Director | 29.11.2005 | 29.01.2010 |
| 7. | Ms Esha Kedia | Whole Time Director | 06.11.2012 | 04.09.2013 |
| 8. | Shri Ketan Himmatlal Mehta | Independent Director | 29.01.2010 | Till date of investigation |
| 9. | Shri Harbhajan Singh J Dhillon | Independent Director | 01.08.2012 | Till date of investigation |
| 10. | Ms Parul Bhavesh Doshi | Independent Director | 20.03.2015 | Till date of investigation |
| 11. | Ms Archana Hemant Andhare | Company Secretary | 01.01.2014 | 30.09.2014 |
| 12. | Ms Jayantilal Raghunathram Suthar | Company Secretary | 01.10.2014 | Till date of investigation |

   b. The investigation authority had sought information from the Company with regard to the bank accounts details of the Company and details of receipt of funds such as Name of the allottees, Number of shares allotted, date and amount of receipt of fund, bank account number of the allottees with bank and branch name. The Company had provided the same to the investigation team vide its letter dated August 20, 2018. As informed by the Company, vide its letter dated August 20, 2018, it had made preferential allotments of its equity shares during the investigation period to the following persons as described in the following table:

**Table 2**

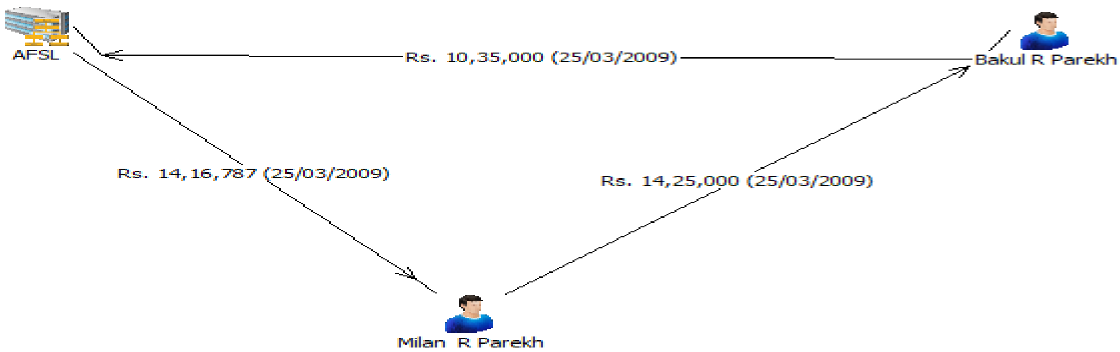
| Date of Allotment | Name of Allottee | No. of shares allotted | Bank Account of Allottee from which funds were paid to AFSL | Amount Paid to AFSL by allottees (in ₹) |
|---|---|---|---|---|
| March 25, 2009 | Shri Bakul R Parekh | 60,000 | 037601501063, ICICI Bank | 10,35,000 |
| April 11, 2009 | Shri Bakul R Parekh | 3,60,000 | 037601501063, ICICI Bank | 62,10,000 |
| October 13, 2010 | Shri Milan R Parekh | 2,67,600 | 037601501064, ICICI Bank | 77,60,400 |
| | Shri Bakul R Parekh | 1,72,400 | 037601501063, ICICI Bank | 49,99,600 |
| | Ns Neeta Hitesh Gandhi | 10,000 | 007610110000029, Bank of India | 2,90,000 |
| | Shri Hitesh K Gandhi (HUF) | 10,000 | 007610100025842, Bank of India | 2,90,000 |
| | Ms Pragati H Shah | 87,000 | 16861930000560, HDFC Bank | 25,30,000 |
| | Shri Hiren L Shah | 87,000 | 16861930000560, HDFC Bank | 25,30,000 |
| | Ms Nirmala L Shah | 87,000 | 002010100005170, Bank of India | 25,30,000 |
| | Shri Nirav Parekh | 50,000 | 01431000127367, HDFC Bank | 14,50,000 |
| | Ms Archana Mittal | 4,00,000 | 05431000022988, HDFC Bank | 1,16,00,000 |

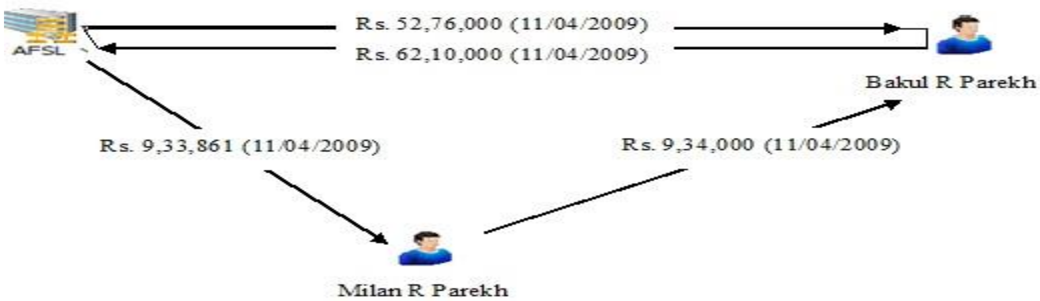
| | | | | |
|---|---|---|---|---|
| January 30, 2012 | Shri Milan R Parekh | 77,200 | 037601501064, ICICI Bank | 22,38,800 |
| December 04, 2012 | Ms Esha Kedia | 90,000 | 03131000017491, HDFC Bank | 34,20,000 |
| | Prime Capital Market Limited | 8,30,000 | 03232000017915, Kotak Mahindra Bank | 78,85,000 |
| | Laxmiramuna Investment Private Limited | 7,30,000 | 415010200000392, Axis Bank | 69,35,000 |
| | Shri Suresh B Jajodia | 3,87,400 | 003389426006, HSBC Bank | 36,80,300 |
| | Ms Pinky S Jajodia | 3,87,400 | 003176468006, HSBC Bank | 36,80,300 |
| | Ms Priti Jain | 3,000 | 012501034168, The Cosmos Co-operative Bank | 1,14,000 |
| | Shri Girish Vyas | 10,000 | 02401140033677, HDFC Bank | 3,80,000 |
| | Ms Yoshita Gupta | 8,500 | 03581000017001, HDFC Bank | 3,23,000 |

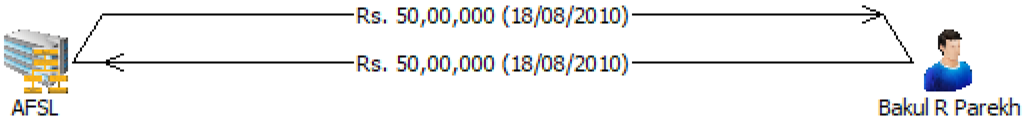
c. On analysis of the bank account statements s of the aforesaid preferential allottees as received from the respective bank, it was observed that funds were trailed to the Company in connection with the respective preferential allotments. From analysis of the fund flows in the bank accounts of the respective allottees following was observed:

I. It was observed from the bank account statements of Shri Bakul Ramniklal Parekh (A/c No. 037601501063, ICICI Bank) and Shri Milan Ramniklal Parekh (A/c No. 037601501064, ICICI Bank) that on the date of preferential allotments dated March 25, 2009 and April 11, 2009 and prior to the date of the preferential allotment dated October 13, 2010, the funds were received in the account of Shri Bakul Ramniklal Parekh and Shri Milan Ramniklal Parekh from the Company as represented below:-

**Shri Bakul Ramniklal Parekh (Joint Managing Director, AFSL)**



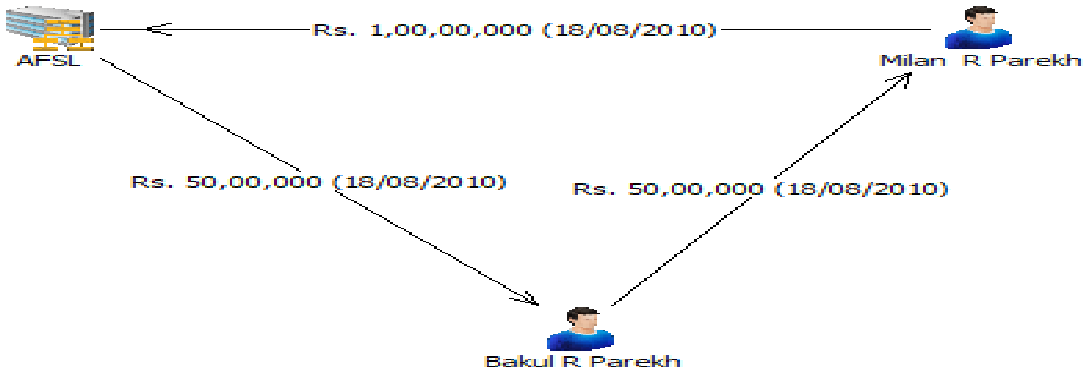






It was observed that credit balance in the said bank account of Shri Bakul Ramniklal Parekh prior to the receipt of funds as aforesaid were ₹3.11 lakhs approx., ₹40,374 and ₹14,821, respectively. Thus, the funds were received by him from the Company either directly or through Shri Milan Ramniklal Parekh, for the purpose of payment towards the aforesaid preferential allotments.

II. It was observed from the bank account statements of Shri Milan Ramniklal Parekh (A/c No. 037601501064, ICICI Bank) and Shri Bakul Ramniklal Parekh (A/c No. 037601501063, ICICI Bank) that prior to the preferential allotments dated October 13, 2010 and January 30, 2012, the funds were received in account of Shri Milan Ramniklal Parekh from the Company as represented below:-

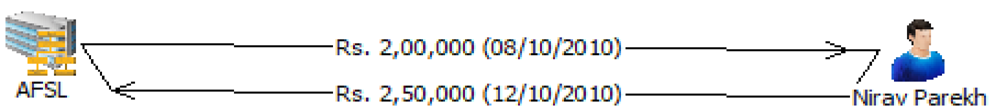
**Shri Milan Ramniklal Parekh (Chairman and Managing Director, AFSL)**




It was observed that credit balance in the bank account of Shri Milan Ramniklal Parekh prior to the aforesaid receipt of funds was ₹36,469. Thus, the funds were received by him from the Company through Shri Bakul Ramniklal Parekh for the purpose of payment towards the aforesaid preferential allotments.

III. It was observed from the bank account statement of Shri Nirav Parikh (A/c No. 01431000127367, HDFC Bank) that prior to the preferential allotment dated October 13, 2010, the funds were received in his account from the Company as represented below:-

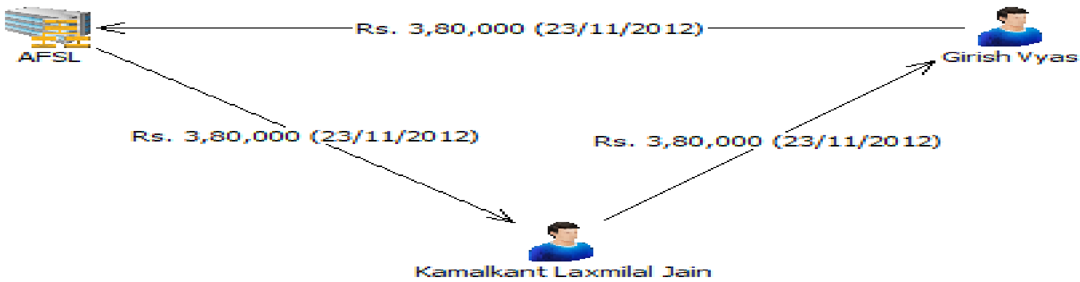
**Shri Nirav Parikh**



It was observed that credit balance in the account of Shri Nirav Parikh prior to the receipt of funds was ₹2.15 lakhs approximately. Thus, the funds were received by him from the Company for the purpose of payment towards the aforesaid preferential allotment.

IV. It was observed from the bank account statements of Shri Girish Vyas (A/c No. 02401140033677, HDFC Bank) and Shri Kamalkant Laxmilal Jain (A/c No. 09941000016176, HDFC Bank) that prior to the preferential allotment dated December 04, 2012, the funds were received in Shri Girish Vyas account from the Company as represented below:-

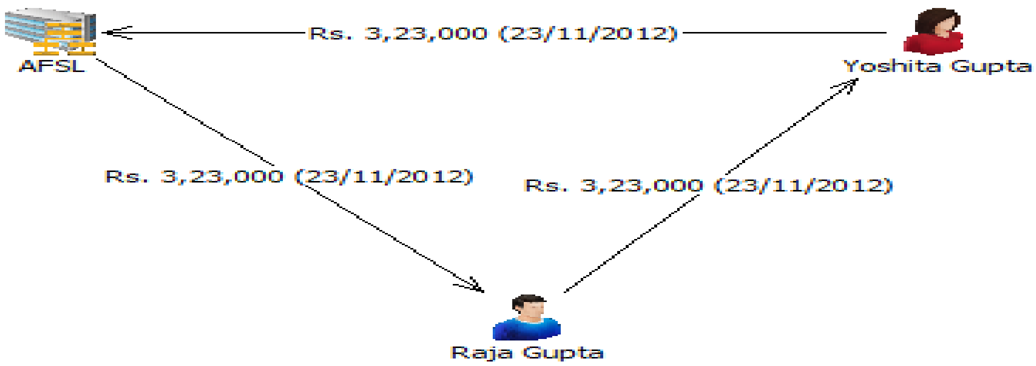
**Shri Girish Vyas**




It was observed that credit balance in the account of Shri Girish Vyas prior to the aforesaid receipt of funds was ₹31,430. Thus, the funds were received by him from the Company through Shri Kamalkant Laxmilal Jain for the purpose of payment towards the aforesaid preferential allotments.

V. It was observed from the bank account statements of Ms. Yoshita Gupta (A/c No. 03581000017001, HDFC Bank) and Shri Raja Gupta (A/c No. 00601050061801, HDFC Bank) that prior to the preferential allotment dated December 04, 2012, the funds were received in Ms. Yoshita Gupta account from the Company as represented hereinafter:-

**Ms. Yoshita Gupta**




It was observed that credit balance in the account of Ms. Yoshita Gupta prior to the said receipt of funds was ₹3,346. Thus, the funds were received by her through Shri Raja Gupta from the Company for the purpose of payment towards the aforesaid preferential allotment.

4. Investigation team had sought information from certain entities namely; Mr. Raja Gupta (Noticee No. 13), Mrs. Yoshita Gupta (Noticee No. 11), Mr. Girish Vyas (Noticee No. 12) and Mr. Kamalkant

Laxmilal Jain (Noticee No. 14) with respect to receipts/ transfers of funds from Noticee No. 4 in all instances, wherein the conduits are present. These Noticees had made submissions citing similar reasons i.e. obtained advance from Noticee No. 4 as they were facing paucity of funds. The investigation team observed that it cannot be a mere coincidence that the same pattern is repeated in all such instances. Further, Mr. Raja Gupta and Mrs. Yoshita Gupta had failed to provide any documentary evidence in support of their claim.

5. The investigation observed that in the aforesaid cases of preferential allotment, the Company had transferred its funds to the preferential allottees (*directly or indirectly through conduits*) to enable them to subscribe to the Company's shares. When a company raises capital through share issuance, it is considered as a capital infusion and ordinary investors may perceive such capital infusion to be essential for strengthening the Company's financial fundamentals. However, in this case, although the listed company publicly gave an impression of such capital infusion through preferential allotment, in reality, the Company's own funds were used by the allottees to subscribe to the shares issued under the respective preferential allotments, thereby limiting genuine capital infusion to that extent. It was also concluded that *"both the company, along with its management, and the allottees, along with the conduits, who received such funds from the company may be considered culpable in* ***perpetuating (?)*** *this fraud on the ordinary investing public who transacted in the securities of the company since this preferential allotment.*" In view of these observations, SEBI *prima facie* felt that following entities have violated section 12A(a),(b),(c) of the SEBI Act read with Regulation 3(a),(b),(c),(d) & 4(1) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to the securities market) Regulations, 2003 (hereinafter also referred to as "PFUTP Regulations"):–

   a. The Company and its non-independent directors at the respective period of the concerned preferential allotment *viz*. Shri Bakul Ramniklal Parekh (Noticee No. 1), Shri Milan Ramniklal Parekh (Noticee No. 2), Ms. Esha Kedia (Noticee No. 3), Shri Nirav Kirit Sanghvi (Noticee No. 5), Shri Pranav Mahesh Doshi (Noticee No. 6), Shri Sujir Radhakrishna Nayak (Noticee No. 7), Shri Atul Anoopchand Zatakia (Noticee No. 8), Shri Ketan Himmatlal Mehta (Noticee No. 9), Shri Harbhajan Singh J Dhillon (Noticee No. 10);

   b. the conduits *viz*. Shri Raja Gupta (Noticee No. 13) and Shri Kamalkant Laxmilal Jain (Noticee No. 14), who received funds from the Company and transferred the same to the preferential allottees *viz*; Noticees No.11 and 12; and

   c. the preferential allottees *viz*. Shri Bakul Ramniklal Parekh (Noticee No. 1), Shri Milan Ramniklal Parekh (Noticee No. 2), Ms. Yoshita Gupta (Noticee No. 11) and Shri Girish Vyas (Noticee No. 12), who have received funds directly/ indirectly from the Company and transferred the same back to the Company for the purpose of purchase of shares allotted on preferential basis.

   *(The aforesaid entities are collectively referred to as "the Noticees").*

6. The competent authority in SEBI felt *prima facie* satisfied that there are sufficient grounds to inquire and adjudicate the alleged violations of the provision of the SEBI Act and PFUTP Regulations by the

Noticees as described hereinabove. Vide a *communication - order* dated February 15, 2019, undersigned was advised to inquire and adjudge under Rule 5 of the SEBI (Procedure for Holding Inquiry and imposing penalties by Adjudicating Officer) Rules, 1995 (Adjudication Rules) and section 15HA of the SEBI Act, the aforesaid alleged violations by the Noticees.

7. Accordingly, in terms of Rule 4(1) of the Adjudication Rules read with section 15I of the SEBI Act and terms of reference as advised in above *communication- order* dated February 15, 2019, the common notice to show cause no. EAD/SS/AKS/9362/1-14/2019 dated April 10, 2019 ('the SCN') was issued to the Noticees, calling upon them to show cause as to why an inquiry should not be held against them in terms of Rule 4 of the Adjudication Rules and penalty be not imposed under section 15HA of the SEBI Act for the aforesaid alleged violations. Apart from the disclosures made by the Company on BSE website, the documents, *i.e.* (a) Company's letter dated August 20, 2018, (b) bank account statements of the Noticees No. 1, 2, 11, 12, 13 and 14; and (c) replies of the Noticees No. 11, 12, 13 and 14 submitted during investigation, are relied upon by SEBI in support of these allegations. The copies of these documents were provided to the Noticee along with the SCN which was duly served upon them *via* speed post acknowledgement due. Vide letters dated May 02, 2019 and May 06, 2019, Noticee No. 1-2 and 4-14 filed their replies to the SCN. However, no reply was received from the Noticee No. 3.

8. The Noticees, were granted an opportunity of hearing in terms of Rule 4 (3) of the Adjudicating Rules on May 30, 2019 and Noticee No. 3 was also allowed to file her reply in the matter on or before the date of hearing as last opportunity. On scheduled date of hearing Mr. Anil Narendra Shah, Advocate, Mr. Kamalkant Jain, Chartered Accountant, Noticee No. 2, Noticee No. 12 and 13 appeared before me on behalf of Noticee No. 1, 2 and 4 to 14 and made submissions on the lines of their replies dated May 02, 2019 and May 06, 2019, respectively and requested for 7 days' time to make additional written submissions which was allowed. The Noticees No. 1, 2 and 4 to 14 submitted their additional submissions vide respective letters dated June 05, 2019 and June 06, 2019. Further, after seeking adjournment, Mr. Balveer Singh Chaudhary, Chartered Accountant and authorized representative of Noticee No. 3 appeared before me on June 17, 2019 and made submissions on the lines of the reply dated June 14, 2019 belatedly filed by this Noticee. The replies/submissions of the Noticees are *inter alia* as following:

**A. <u>Specific Submissions by the respective Noticees</u>**

**<u>Noticee No. 1</u>**

a. He had paid ₹10,35,000/- to the Company on March 25, 2009 towards allotment of 60,000 shares at ₹17.25 per share pursuant to conversion of warrants held by him. He had received ₹14,25,000/- from his brother Mr. Milan Parekh *viz.* Noticee No. 2 on March 25, 2009 as advance. He has a running account with Noticee No. 2 and Noticee No. 2 had a credit balance of ₹18,72,120/- on March 24, 2009 in book of account of Noticee No. 1. After receipt of ₹14,25,000/- from Noticee No. 2, Noticee No. 2 had a net credit balance of ₹32,97,120/- in his book of account.

b. It is a fact that he had paid ₹62,10,000/- to the Company on April 11, 2009 towards allotment of 3,60,000 shares at ₹17.25 per share pursuant to conversion of warrants. He had received ₹9,34,000/- from Noticee No. 2 on April 11, 2009 as advance. Noticee No. 2 had a credit balance of ₹32,97,120/- on April 01, 2009 in book of account of Noticee No. 1. After receipt of ₹9,34,000/- from Noticee No. 2, Noticee No. 2 had a net credit balance of ₹42,31,120/- in book of account of Noticee No. 1.

c. He has a trading and a demat account with the Company and he had received ₹52,76,000/- on April 11, 2009 from the Company as pay out, as he had a credit balance in his trading account.

d. Similarly, he had received ₹50,00,000/- on August 18, 2010 from the Company as he had a credit balance in his trading account. On same date, he had paid ₹50,00,000/- to the Company towards the subscription of 1,72,400 shares on a preferential basis at price of ₹29.00 per share, amounting to ₹49,99,600/-. He received the refund of ₹400/- in his account on October 13, 2010.

e. He had advanced ₹50,00,000/- to Noticee No. 2 on August 18, 2010. Noticee No. 2 had a credit balance of ₹58,26,380/- on August 17, 2010 in his book of account. After the said payment to Noticee No. 2, there remained a net credit balance of ₹8,26,380/- in his book of account.

f. He denied the allegation that he had received funds from the Company towards payment for the subscription of the equity shares in the said preferential allotments and he had not have sufficient funds to subscribe for the said equity shares. At the most it could be concluded that he had received ₹14,25,000/- and ₹9,34,000/- from Noticee No. 2 as advance. Further, Noticee No. 2 had adequately and conclusively established that he had received ₹14,25,000/- and ₹9,34,000/- from the Company on March 25, 2009 and April 11, 2009, respectively, towards his dividend and credit balance in his trading account from the Company. Hence, the conclusion arrived in the SCN that the funds for subscription to the preferential allotment of shares had been transferred to his account through conduits, and then he had paid the amount back to the Company as subscription money for equity shares of the Company allotted to him in the said preferential allotments, is totally devoid of merits and remains grossly unsubstantiated.

g. In support of his claim, he has relied upon a copy of his client account ledger with the Company and also the reply of Noticee No. 2 in the matter.

**Noticee No. 2**

a. He was initially holding 36,600 preference shares (10% preference shares of ₹100/- each) of the Company since March 31, 2005. Subsequently, 1,07,460 preference shares (10% preference shares of ₹100/- each) of the Company were allotted to him on September 30, 2005 and allotment of said preference share was also communicated to BSE. Thus, his holding of said preference shares of the Company became 1,44,060 shares. On March 20, 2008 he redeemed 79,233 preference shares and accordingly his holding was reduced to 64,827 preference shares of the Company. The said preference shares carry fixed rate of 10% dividend per year as per the terms and conditions of the issue with reference to the year 2007-08.

b. He had received ₹14,16,787/- from the Company on March 25, 2009 and he had provided advance of ₹14,25,000/- to his brother Mr. Bakul Parekh *viz.* Noticee No. 1 on the same date. He hold 1,44,060 preference shares (10% preference shares of ₹100/- each) amounting to ₹1,41,06,000/- of the Company. ₹14,16,787/- received from the Company was due to him on account of the dividend on said 1,44,060 preference shares that he hold in the company. The said dividend was for the year ended on March 31, 2008 and represents a gross amount of ₹14,16,787/-.

c. He has a running account with Noticee No. 1 and there was a debit balance of ₹18,72,120/ - on March 24, 2009 against Noticee No. 1 in his book of account. After providing advance of ₹14,25,000/- to Noticee No. 1, the net debit balance was ₹32,97,120/- in his book of account.

d. He is a trading as well as a depository client of the Company and it is a fact that he had received ₹9,33,861/- from the Company on April 11, 2009 as he had credit balance in his trading account. He had provided advance of ₹9,34, 000/- to Noticee No. 1 on same date. After providing advance of ₹9,34,000/- to Noticee No. 1, the net debit balance was ₹42,31,120/- in his book of account.

e. He had received ₹50,00,000/- from Noticee No. 1 on August 18, 2010 towards his repayment of loan/ advance provided by him. There was a debit balance of ₹58,26,380/- in running account on August 17, 2010 against Noticee No. 1, in his book of account. After receiving ₹50,00,000/- from Noticee No. 1, remaining net debit balance was ₹8,26,380/- against Noticee No. 1, in his book of account.

f. With regard to payment of ₹1 ,00,00,000/- to the Company on August 18, 2010, ₹77,60,400/- was paid towards subscription of 2,67,600 equity shares of ₹10/- each, paid up on a preferential basis at ₹29/- per share and the balance of ₹22,39,600/- was paid against the allotment of 77,200 convertible warrants at ₹29/- each amounting to ₹22,38,800/-. The balance amount of ₹800/- was refunded to him on October 13, 2010 by the Company.

g. He denied the allegation that he had received funds from the Company towards payment for the subscription for the preferential allotment of equity shares to him. At the most it could be concluded that he had received ₹50,00,000/- from Noticee No. 1. Further, Noticee No. 1 had adequately and conclusively established that he had received ₹50,00,000/- from the Company on August 18, 2010 towards credit in Noticee No. 1 client ledger with the Company. He crave to rely on Noticee No. 1 statement and written submissions in the matter.

h. It is on record that, he had ₹36,649/- in his account before he received ₹50,00,000/- from Noticee No. 1. It is also on record that he had paid ₹77,60,400/- towards subscription to the preferential allotment for 2,67,600 shares on a preferential basis at ₹29/- per share. It is surprising that the

SCN is totally silent on the balance amount of ₹27,60,400/- and ₹22,38,800 for warrants that has not been allegedly transferred from either Noticee No. 1 or the Company. Therefore, SCN is faulty and misleading to the extent that it observes that he had paid ₹1,00,00,000/- to the Company.

i. He denied the observations that he did not had sufficient funds to subscribe for the equity shares in the said preferential allotment, since he had received ₹50,00,000/- from Noticee No. 1 on August 18, 2010 towards repayment of loan by Noticee No. 1 to him.

j. On June 08, 2009, Ford, Rhodes, Parks & Co., Chartered Accountant of the Company certified the "*compliance with SEBI (DIP) Guidelines and all legal and statutory formalizes*" and stated that there was no circulation of funds or mere passing of book entries had taken place in allotment of conversion of warrants by the Company.

k. He provided the copies of Annual Reports for financial year 2004-05, 2005-06, 2007-08 and 2008-09, the Shareholder's Resolution dated September 29, 2007, Board Resolution dated October 12, 2007 and October 13, 2010, Letters to BSE, certificate from Chartered Accountant of the Company, Preference Dividend Ledger of the Company, dividend calculation sheet, Trading Client account ledger from the Company etc. as supporting documents in respect to his submissions.

**Noticee No. 3**

a. She was appointed as a Whole- Time Director ("WTD") of the Company with effect from December 01, 2012, pursuant to an Extra Ordinary General Meeting ("EGM") held on November 19, 2012. Pursuant to her appointment as WTD, she took charge of the directorship with effect from December 15, 2012.

b. At the time of her appointment as WTD on December 1, 2012, a preferential issue was already in progress and she was not aware about any of the transactions related to the said preferential issue. She was looking after broking operations and was not an authorized signatory to any of the bank accounts of the Company.

c. Thereafter, on September 04, 2013, she resigned from the directorship of the Company and was no more associated with the Company. Hence, references to the alleged violations prior to her appointment as a director i.e. prior to December 01, 2012 and post her resignation i.e. after September 04, 2013 are not applicable to her.

d. The SCN has not attributed any specific role to her to allege any kind of wrongdoing on her part to warrant serious allegations of fraudulent and unfair trade practices.

e. She has denied that in her capacity as a WTD, i.e. after her appointment the Company had transferred the funds in the account of the allottees, either directly or through conduits, and thereafter the allottees paid back the same to the Company in the form of subscription money for the said preferential allotments. Hence, the aforesaid allegation is totally flawed, misconceived and devoid of merit.

f. She has denied all the allegations made in the SCN in her capacity as a WTD in the Company. She had never indulged in any fraudulent practices relating to the securities and had not made any gains or derived unfair advantage as a result of falsely alleged violations. According to her, there is nothing to indicate in the SCN that she had made any gains and that she had not caused any loss to the investors or group of investors. She has contended that she has been wrongly roped in the proceedings since no role has been attributed to her to warrant any kind of violation.

g. It is submitted that charge of fraudulent and unfair trade practices under the provisions of the PFUTP Regulations is a serious charge. In this context she has relied upon the following judgments passed by various Hon'ble Courts/Hon'ble Tribunal:-

i. Order dated June 19, 2012 passed by Hon'ble Securities Appellate Tribunal ("SAT") in the matter of *Networth Stock braking Ltd vs. SEBI (SAT Appeal No 5 of 2012)*:

*"This Tribunal has been consistently holding that violation of PFUTP regulations involves commission of fraud which is indeed a serious market offence and a high degree of probability is required to establish such a charge".*

ii. Hon'ble SAT in the case *Parsoli Corporation Vs SEBI* (*Appeal No 146/2011 order dated 12.08.2011*) observed:- *"...a serious charge like fraud has to be established on preponderance of probabilities and since this charge is serious, higher has to be the degree of probability to establish the same."*

iii. Hon'ble SAT in the case *Sterlite Industries vs. SEBI* (*Appeal No. 20/2001 dated 22.10.2001)* that:- *"...in the absence of reasonably strong evidence, even in a civil proceeding, a person cannot be held guilty and awarded punishment. Mere surmise, conjuncture or suspicion cannot sustain the finding of fault"*

iv. In the matter of *M/s Milkyways Mercantiles Private Limited and M/s SPFL Securities Limited* decided on March 16, 2017, the learned Adjudicating Officer has observed as under:

*"18. The necessity of 'intent' and the element of "fraud" appears to be a pre- requisite in all the parts of Regulations 3 and 4 of the PFUTP Regulations.*

*'Fraud' has been principally defined under Regulation 2(c), though inclusively, to mean such trades which are entered into in order to 'induce others'. Regulation 4(2) are very specific in nature. The test laid down in the regulation demand a manipulative intent to affect market information. Even clause (a) as a strict liability clause, the test is to prove 'misleading appearance of trading"*

v. Hon'ble Supreme Court in *Union of India vs. Chaturbhai* M. *Patel* (AIR 1976 SC 712) holds that fraud, even in civil proceedings, must be established beyond reasonable doubt.

vi. In *Union of India vs. H.C. Goel* (*AIR 1964 SC 364*) the Hon'ble Supreme Court has inter alia held that: "*the principle that in punishing the guilty scrupulous care must be taken to see that the innocent are not punished, applies as much to regular criminal trials as to disciplinary inquiries held under the statutory rules*".

vii. In the case of *Ram Sharan Yadav v/s Thakur Muneshwar Nath Singh [(1984) 4 SCC 649 (AIR 1985 SC 24)]* wherein the Hon'ble Supreme Court opined as under:

"*….Several decisions of this Court have laid down various tests to determine a corrupt practice and the standard of proof required to establish such corrupt practices and it is not necessary for us to repeat the dictum laid down by this Court and the approach to be made in detail because the matter is no longer res integra and is concluded by a large number of authorities. To quote a few recent ones: DauZat Ram Chauhan v. Anand Sharma,(l) Manmohan Kalia v. Yash* & *Ors./2) A. Younus Kunju v.* R.S. *Unni and Ors.(3) as also an earlier decision of this Court in Samant N. Balakrishna etc. v. George Fernandez and Ors. etc. (4) the sum and substance of these decisions is that a charge of corrupt practice has to be proved by convincing evidence and not merely by preponderance of probabilities…*"

h. In view of the above, she has requested to drop the proceedings initiated vide SCN dated April 10, 2019 against her.

**<u>Noticee No. 4</u>**

a. Noticee No. 1, 2 and Mr. Nirav Parikh are its clients and they have their trading account and depository account with it and it maintain the accounts on a running account basis.

b. Shareholders of the Company passed a resolution on September 29, 2007 giving consent and approval to issue/offer and allot convertible warrants of ₹19.25 each, to be converted into equity shares of ₹10/- each at the premium of ₹9.25 per share. Thereafter, the aforementioned was approved in the board resolution of the Company dated October 12, 2007.

c. ₹14,16,787/- was paid to Noticee No. 2 on March 25, 2009 as the dividend amount for the year ended on March 31, 2008 for 1,44,060 preference shares at the rate of 10% for the face value of ₹100/-.

d. It had received ₹10,35,000/- on March 25, 2009 from Noticee No. 1 towards the allotment of 60,000 shares at ₹17.25 per share issued pursuant to conversion of warrants.

e. ₹9,33,861/- was paid on April 11, 2009 to Noticee No. 2 towards his credit balance in its client account. Similarly, ₹52,76,000/- was paid on April 11, 2009 to Noticee No. 1 towards his credit in its client account.

f. It had received ₹62,10,000/- on April 11, 2009 from Noticee No. 1 towards allotment of 3,60,000 shares at ₹17.25 per share issued pursuant to conversion of warrants. It has no means to verify and ascertain the source of funds of ₹62,10,000/- of Noticee No. 1, save and except that ₹52,76,000/- was paid to him on account of his credit in its client account, as explained hereinabove and thus, it is unable to offer any meaningful reply and it deny any participation and involvement in the alleged fund flow, save and except the assumption that the said ₹52,76,000/- could have formed part of the said ₹62,10,000/-.

g. Similarly, ₹50,00,000/- was paid on August 18, 2010 to Noticee No. 1 towards his credit in its client account. It had received ₹50,00,000/- on same date from Noticee No. 1 towards subscription for allotment of 1,72,400 shares at ₹29/- per share issued on a preferential basis. Thus, there remained a balance of ₹400/- in his account which was refunded to him on October 13, 2010.

h. It had received ₹1,00,00,000/- from Noticee No. 2 on August 18, 2010. Out of which ₹77,60,400/- were received towards subscription to the 2,67,600 shares at ₹29/- per share and the balance ₹22,39,600/- were received against the allotment of 77,200 convertible warrants at ₹29/- each amounting to ₹22,38,800/- Thus, there remained a balance of ₹800/- in his accoount which was refunded to him on October 13, 2010.

i. Mr. Nirav Parikh is a broking as well as depository client and it is requested to amend the records and substitute the surname of its client from "Parekh" to "Parikh". ₹2,00,000/- was paid on October 08, 2010 to Mr. Nirav Parikh towards his credit in its client account. It had received ₹2,50,000/- on October 12, 2010 from Mr. Nirav Parikh towards subscription for alottment of 50,000 shares at Rs. 29/- per share issued on a preferential basis. In any event, it deny any participation in the alleged fund flow, save and except the assumption that the said ₹2,00,000/- could have formed part of the said ₹2,50,000/-.

j. Noticee No. 11 and 13 were consultants to it in the areas of branding and advertising services and they were paid professional fees for the same on an assignment basis. Noticee No. 11 had subscribed for 8,500 shares in the preferential allotment made at ₹38/- per share and had paid ₹3,23,000/- to the Company on November 23, 2012 and it had made the allotment accordingly. Noticee No. 13 had requested the Company for an advance of ₹3,23,000/- towards his professional fees on November 23, 2012 and considering the length of relations, it had paid him said amount as advance on November 23, 2012. Further, he had credit balance of ₹78,000/- in its books of account as fees for services rendered by him and his wife and thus, his account was adjusted by a journal entry with ₹78,000/- thus reducing the advance to ₹2,45,000/-.

k. Noticee No. 12 had subscribed 10,000 shares in the preferential allotment made at ₹38/- per share and had paid ₹3,80,000/- to it on November 23, 2012 and it had made the allotment accordingly. Noticee No. 14 was a legal and accounting consultant in the Company since last 10 years and was being paid professional fees for the services provided by him. He had requested to the Company for an advance towards his professional fees. Considering the length of relations, it had paid an advance of ₹3,80,000/- on November 23, 2012 to him. He had repaid

₹1,92,000/- as part of the advance on December 03, 2012, i.e. within 10 days. Since the project in which he was advising got stalled, the balance of ₹1,88,000/- was settled over a period of time against his professional bills.

l. It has neither any means nor the mandate to verify and ascertain the source of funds of the allotees *viz.* Noticee No. 1, 2, Mr. Nirav Parikh, Noticee No. 11 and 12 and thus, it is unable to offer any meaningful reply and it deny any participation and involvement in the alleged fund flow. Copies of the client's ledger of Noticee No. 1, 2 and Mr. Nirav Parikh; and copies of Noticee No. 12 and 14 ledgers have been provided for reference.

**Noticee No. 5**

The SCN alleges the investigation period from March 01, 2009 to July 22, 2015. He was an independent director of the Company from October 01, 2009 to August 01, 2012 and hence references to the alleged violations prior to his appointment as a director i.e. from October 01, 2009, as well as post his resignation i.e. from August 01, 2012 may not apply to him at all. The SCN is silent on this aspect of the alleged violations after he ceased to be a director of the Company. On this ground alone, the SCN needs to be withdrawn against me on account of lack of culpability and applicability.

**Noticee No. 6**

The SCN alleges the investigation period from March 01, 2009 to July 22, 2015. He was an independent director of the Company from August 21, 2002 to January 29, 2010 and hence references to the alleged violations post his resignation i.e. from January 29, 2010 may not apply to him at all. The SCN is silent on this aspect of the alleged violations after he ceased to be a director of the Company. On this ground alone, the SCN needs to be withdrawn against me on account of lack of culpability and applicability.

**Noticee No. 7**

The SCN alleges the investigation period from March 01, 2009 to July 22, 2015. He was an independent director of the Company from November 29, 2005 to January 29, 2010 and hence references to the alleged violations post his resignation from January 29, 2010 onwards may not apply to him at all. The SCN is silent on this aspect of the alleged violations after he ceased to be a director of the Company. On this ground alone, the SCN needs to be withdrawn against him on account of lack of culpability and applicability.

**Noticee No. 8**

The SCN alleges the investigation period from March 01, 2009 to July 22, 2015. He was an independent director of the Company from January 29, 2010 to November 12, 2014 and hence references to the alleged violations prior to his appointment as a director i.e. from January 29, 2010, as well as post his resignation i.e. from November 12, 2014 may not apply to him at all. The SCN is silent on this aspect of the alleged violations after he ceased to be a director of the Company. On this ground alone, the SCN needs to be withdrawn against me on account of lack of culpability and applicability.

**Noticee No. 9**

The SCN alleges the investigation period from March 01, 2009 to July 22, 2015. He was an independent director of the Company from January 29, 2010 and hence references to the alleged violations prior to his appointment as a director i.e. from January 29, 2010 may not apply to him at all. The SCN is silent on this aspect of the alleged violations after he ceased to be a director of the Company. On this ground alone, the SCN needs to be withdrawn against me on account of lack of culpability and applicability.

**Noticee No. 10**

The SCN alleges the investigation period from March 01, 2009 to July 22, 2015. He is an independent director of the Company from August 01, 2012 and hence references to the alleged violations prior to his appointment as a director i.e. from August 01, 2012 may not apply to him at all. The SCN is silent on this aspect of the alleged violations after he ceased to be a director of the Company. On this ground alone, the SCN needs to be withdrawn against me on account of lack of culpability and applicability.

**Noticee No. 11**

Mr Raja Gupta *viz.* Noticee No. 13, is her husband. They were branding and advertising consultants to the Company and they were paid professional fees for the same on an assignment basis. She was desirous of subscribing in the preferential allotment of shares of the Company and thus, she requested Noticee No. 13 for a loan of ₹3,23,000/- and accordingly, she received the amount ₹3,23,000/- from Noticee No. 13 as a loan on November 23, 2012. She understand that Noticee No. 13 had billed the Company for said professional services provided by them.

**Noticee No. 12**

Mr. Kamalkant Jain *viz.* Noticee No. 14 is his friend since a long time and they have running account between them. Whenever he was in need of funds, he request Noticee No. 14 to advance loan to him and the relationship between them was *vice versa*. On November 23, 2012, he was in need of ₹3,80,000/- since he wanted to subscribe for 10,000 shares of the Company and thus, he requested Noticee No. 14 to advance him ₹3,80,000/-. Accordingly, Noticee No. 14 paid him an advance of ₹3,80,000/- on same date to him and thereafter, he had applied for 10,000 shares of the Company.

**Noticee No. 13**

a. Ms. Yoshita Gupta *viz.* Noticee No. 11 is his wife. They both were working as consultants in the Company in the areas of branding and advertising services and they were paid fees on professional basis for the same on assignment basis.

b. He had requested the Company for advance payment towards their fees for professional services. Thus, he received an amount of ₹3,23,000/- from the Company on November 23, 2012 as advance against their future professional services dues. Since, he had ₹78,000/- credit in the books of the Company towards fees for services rendered by them, the amount of ₹3,23,000/- was adjusted *via* journal entry of ₹78,000/-, thus reducing the advance amount to him to ₹2,45,000/-.

c. Since Noticee No. 11 was desirous of subscribing in the preferential allotment of shares of the Company, he had lend her a loan of the amount of ₹3,23,000/- for the subscribing for shares of the Company in the said preferential allotment.

**<u>Noticee No. 14</u>**

a. He is a chartered accountant since last 14 years and a company secretary since last 13 years. He was associated with the Company as Accounting, Financing and Managerial Advisor from July 07, 2006 to March 31, 2019 and was providing all financial and accounting services to the Company and was also looking its legal and compliance requirements from time to time. His fee structure depends upon the work assigned and the time devoted. His bill of professional fees is prepared on monthly basis and his billing to the Company was in range of ₹30,000/- to ₹60,000/- per month.

b. Main business activity of the Company is share broking and depository services. Noticee No. 2 had perceived an innovative broking concept to boost the business. Since, he was associated with the Company for a long period, Noticee No. 2 discussed the project with him and asked to provide his services to make this project viable and successful. He had gone through the project and was of the opinion that it can be successful, if properly executed. He accepted the proposal and agreed to offer his services for the project.

c. As the aforesaid project required a huge investment, he suggested that preferential allotment of equity shares was the best and cost effective way of raising funds. It was mutually agreed by the management and they started approaching investors for preferential issue. One of his close friends, Mr. Girish Vyas *viz.* Noticee No. 12, a qualified CA, showed his interest in subscribing 10,000 shares, as he understood and appreciated the project and its future potential. The management agreed to allot shares to Noticee No. 12, along with the other investors.

d. Noticee No. 12 being his childhood friend had many financial transactions between them and whenever either of them was in need of funds, they supported each other. For the subscription of shares of the Company, Noticee No. 12 was in need of funds temporarily, and hence Noticee No. 12 requested him to provide funds so that Noticee No. 12 can apply for the shares of the Company and he agreed to arrange funds for Noticee No. 12. As he already had some amount due to Mr. Girish Vyas, he transferred the full amount of Rs. 3,80,000/- to him.

e. He had requested for an advance of ₹3,80,000/- from the Company towards his professional fees. Considering the length of relations, the Company had paid him ₹3,80,000/- as advance on

November 23, 2012. He repaid ₹1,92,000/- on December 03, 2012 i.e. within 10 days to the Company. Since the project in which he was advising got stalled, the balance amount of ₹1,88,000/- was settled over a period of time against his professional bills. Noticee No. 12 is still holding these 10,000 shares in his demat account.

**B. Common submissions of the Noticees**:-

**<u>Noticee No. 1, 2, 3, 4, 11, 12, 13 and 14:</u>**

a. They have denied that they have bought, sold or otherwise dealt in securities in a fraudulent manner or used or employed, any manipulative or deceptive device or contrivance in contravention of the provisions of the Act or the rules or the regulations made there under; or employed any device, scheme or artifice to defraud in connection with the preferential allotment in the shares of the Company.

b. They have denied their engagement in act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with the preferential allotment in the shares of the Company in contravention of the provisions of the Act or the Rules and the Regulations made there under.

c. They have denied that they have transferred funds, directly or indirectly through conduits to enable the allottees to subscribe to the Company's shares and that the Company's own funds were used by the allottees to subscribe for the Company's shares thereby limiting genuine capital infusion to that extent, as wrongly alleged. They, further denied that they were culpable in perpetuating the fraud on the ordinary public who transacted in the securities of the Company and may have perceived such capital infusion to be essential for strengthening the Company's financial fundamental on account of the preferential allotments, as wrongly alleged. In any event, the SCN has neither placed on record any convincing material to conclude that the public had transacted and that such transactions did result into any adverse effect on such public nor shown any evidence that we are culpable in perpetuating the fraud.

d. They have denied their indulgence in a fraudulent or unfair trade practices in securities. Being genuine and *bona fide* allottees for consideration to the preferential allotment of shares of the Company, they cannot attract the provisions of the PFUTP Regulations at all.

e. The SCN has failed to produce any credible evidence against them for their alleged violation of Regulation 3 (a), (b), (c), (d) & 4(1) of the PFUTP Regulations. Relying on presumptions and assumptions of the fund flow as highlighted in the SCN could lead to misapplication of facts and grave and serious miscarriage of justice. Therefore, no adverse inference may be drawn from the observations and findings of the SCN.

f. The allegations made in and findings arrived at in the SCN as against them are misconceived and based on incomplete and incorrect assumption of facts. They deny that he had violated section 12A (a), (b), (c) of the SEBI Act read with Regulation 3 (a), (b), (c), (d) & 4(1) of the PFUTP Regulations. Therefore, considering their submissions placed on record, the SCN be withdrawn and/ or discharged as against them particularly in view of the true and correct facts stated therein.

**Noticee No. 5 to 10**

a. There are no specific allegations against them, and their liability have arisen only on account of their limited role as a Director/ Independent Director and as such no allegation against them stands established.

b. Section 2(30) of the Companies Act, 1956 ("Companies Act") provides that an officer includes any Director, Manager, Secretary or any person in accordance with whose directions or instructions, the Board of Directors or any one or more of the directors is or are accustomed to act. Section 2(30) of the Companies Act provides that an officer of the company who is in default shall be liable to punishment or penalty. Section 5 of the Companies Act defines "*officer who is in default*" which shall mean all the following officers of the Company, namely:

*"the Managing Director or Managing Directors;*
*(a) the whole time director or whole time directors:*

*(b) the Manager…*

*(g) where any company does not have any of the officer specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified all the directors;"*

Thus, by aforesaid implication, if a company has any officer specified in clause (a) to (c) above, the other directors could not be held as an officer in default.

c. As per section 5(g) of the Companies Act, they deny that they were in-charge or control of the day-to-day affairs of the Company and hence they can never be held responsible for the acts of omission and commission by the Company. The Hon'ble Supreme Court has held in *Girdhari Lal Gupta's case [1970 SCC (2) 530[FERA Case]* that "*to be in-charge*" would mean that *"the person should be in overall control of the day-to-day business of the company".* The Hon'ble Supreme Court has construed the expression "*a person in-charge and responsible for the conduct of business of the company*" shall mean the "*person in overall control of the day-to-day business of the company*".

d. Further, in *R.K. Khandelwal v State [(2004) 55 SCL 416]* matter, the Hon'ble Supreme Court referred to the judgment in *Girdhari Lal Gupta's case (supra)* and succinctly stated as under:

*"In companies there can be directors who are not in charge of, and responsible to the company for the conduct of the business of the company. There can be directors who merely lay down the policy and are not concerned with the day-to-day working of the company. Consequently the mere fact that the accused person is a director of the company shall not make him criminally liable. To put it different for the offences committed by the company unless the other ingredients are established which make him criminally liable. To put it differently, no director of a company can be convicted of the offence under section 27 of the Act unless it is proved that the sub-standard drug sold with the*

*consent or connivance or was attributable to any neglect on his part, or it is proved that he was a person in charge of, and responsible to the company for the conduct of the business of the company."*

Thus, the analogy of vicarious liability of a Director/ Independent Director squarely applies to the present proceedings, since there was neither any consent nor connivance from their side nor were they attributable to any neglect on their part.

e. The alleged violations were not committed with their consent/knowledge/connivance and that they were not negligent. They wish to quote section 633(1) of the Companies Act, which is an enabling provision for a director to seek relief from the court by proving that he had exercised all due diligence to prevent the commission of an offence and had acted honestly and responsibly and that the director ought to be excused. They state that they were not in charge of the day-to-day affairs of the Company.

f. They were not an officer/(s) in default as per section 5 of the Companies Act, as a consequence of which whether the alleged violation was willful or not did not arise. They place their reliance on judgment in the matter of *C.V. Siva Prasad v Registrar of Companies [(1997) 2 Comp J 205 (AP) and/or 1997 88 CompCas 420 AP]* in support of their contentions. They also place reliance on the judgment in *Smt. G. Vijayalakshmi v SEBI [(2000) 25 SCI 183 (AP) and/or 2000 100 CompCas 726 AP],* wherein it has been settled that criminal liability of ordinary directors would arise only in respect of a company which has no Managing Director. I state that it is an admitted fact in the SCN itself that the Company had two Managing Directors and by implication, they were in charge of management of the day to day affairs of the company. Further, the Noticees were never the Managing Director and thus no liability could be fastened on them. Needless to say that the aforesaid judgment pertains to criminal liability of directors whereas the SCN is for violation of the provisions of SEBI Act and the regulations framed thereunder and the vigor of criminal liability is far more than a civil liability and as such the SCN needs to be withdrawn against them.

g. Ordinarily, courts have inclined to relieve the directors who are not concerned with day to day management of a company unless there is clear evidence to the contrary. In *Mahalderam Tea Estate Pvt Ltd v D.N. Prodhan [1979 49 CompCas 529 Cal][Employees Provident Fund Case]*, wherein all the directors of the company were prosecuted for the offence, the Hon'ble Calcutta High Court held that –

"*Under the said section a company is made primarily liable for an offence committed under Act. The liability may be extended to other persons vicariously only under the conditions laid down in the section. A director of a company may be concerned only with the policy to be necessarily be immune from such prosecution. Thus, it has to be established by placing before the court part in running of the business of the company and a mere bald statement that the accused persons are directors of the company and hence responsible for the conduct of the business and management of the company will not do. All the officers of the company not in direct charge of management of the business are immune from the liability for the offence, unless they have contributed to its commission by consent, connivance or neglect. Thus, all directors or officers of the company do not come within the mischief of subsection (1) of the standard penal provision."*

h. Therefore, only the directors who are concerned with the day to day management of the company could be ordinarily held liable for company's violations and no liability could ever be cast on them as a Director/ Independent Director. The directors who are there on the board by virtue of their special skill, expertise, profession or knowledge or those who are merely for name sake or in advisory capacity would virtually be outside the net of liability for the company's offences except where, of course, it is established that the director concerned was in charge of and responsible to the company for the conduct of its business, which, as already mentioned is a question of evidence and depend upon facts and circumstances of each case. Therefore, it is virtually an impossibility to establish this for the simple reason that as a matter of fact these professional directors have hardly any hand in the day to day functioning and management of the Company. In any event, the SCN has failed to bring out committing of any single specific violation on them but has proceeded on alleging committing a general violation.

i. Circular No. 2/13/2003/CL-V dated March 25, 2011 issued by the Ministry of Corporate Affairs ("MCA") and addressed to all Regional Directors, all Registrars of Companies and all Official Liquidators clarifying that the Registrars of Companies and others should take extra care in examining cases where independent directors are identified as "*officer in default*". The Circular directs that the ROC should examine whether the violation has taken place with the knowledge attributable through Board process, with his consent or connivance and whether he acted diligently or not. Thus, the MCA too has taken a pragmatic view on the role and responsibilities of independent directors and hence, they pray that the same premise should apply to them.

j. Further, Para 3 of the Reserve Bank of India ("RBI") Circular under reference DBR. No. CID. BC.89/20.16.001/2014-15 dated April 23, 2015 on "*Collection and Dissemination of Information on Defaulters*" makes in abundantly clear that a Non-Whole Time Director should not be considered as a defaulter unless it is conclusively established that the default had taken place with consent or connivance. In all fairness, the RBI has also adopted a practical view in labelling defaulters and excluding Non-Whole Time Directors from its purview.

k. They crave leave to rely on Circular no. No. 27 dated 28.02.2002 issued by the Office of the Chief Metropolitan Magistrate, Esplanade Mumbai communicating concern that many a time process is issued against Non-Executive Directors who are not responsible to the company for the conduct of business of the company, which is causing hardship to such Non-Executive Directors in attending courts, engaging lawyers for defense and filing discharge applications. The Circular mandates that the Magistrate should find out prima facie if, the Non-Executive Director is in any manner responsible for the conduct of the business of the company and thereafter consider and decide whether process should be issued or not against such Non-Executive Directors.

l. It may be appreciated that a liberal interpretation has been granted in criminal matters on the responsibility of Non-Executive Directors. I state that the gravity of the issue of the present SCN is far less than fastening of criminal liability.

m. They placed reliance on Order no. *WTM/GA/54/ISD/02/06* dated 16.02.2006 of the WTM, SEBI in the matter of Home Trade Limited, wherein it was held that:

*"5.5 As regard the vicarious liability of the Directors of the ATL for the market manipulations, it has to be satisfied that the persons were (at the time of the contravention) was in charge of and responsible to the company for the conduct of the business. Section 27 of the SEBI Act, 1992 states that a person would be deemed to be guilty of offence only when he was in charge and was responsible to the company during the relevant period. In this regard, Hon'ble SAT in Rahul Shah's case [(2004) 55 SCL 416] (SAT) has observed that no hard and fast rule exists whereby it could be said as to when a director will be vicariously responsible for the acts of directors in charge of day to day affairs of company. However, even non-executive directors shall be made liable where Non-executive directors are commonly appointed so as to watch and keep a check on the whole time directors, to provide a view of an impartial outsider to bring the benefit of their experience to the company, to act as a figure head (particularly in the case of a non-executive chairman), to add credibility to the company with the public and shareholders, though the inference has to be drawn from the facts and circumstances surrounding each case.*
*Thus, the vicarious liability turns on the merits of each case and has to be determined accordingly and the case cited is in context of prosecution proceedings against the company. In any event, there has to be a modicum of evidence linking the said directors with the manipulation and in its absence, complicity cannot be presumed.*

*5.6 Similarly, in State of Haryana v Brij Lal Mittal [(1998) 5 SCC 343], the Hon'ble Supreme Court has observed as follows: "it is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director, a person can be in charge of and responsible to the company for the conduct of its business. From the complaint in question we, however, find that except a bald statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in charge of the company and also responsible to the company for the conduct of its business.*

*5.7 The above judgment was adhered by the Hon'ble Supreme Court in its recent judgment in S.M.S Pharmaceuticals [AIR 2005 SC 3512] where it was held that merely being a director in a company is not sufficient to make a person liable under section 141 of Negotiable Instruments Act, 1881. Director in a company cannot be deemed to be in charge and responsible for conduct of its business at the relevant time, requirement of section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant period.*

*6.1 It is, therefore, concluded that there is no specific evidence against any of these directors that they were in control of the affairs of HTL during the first or seconds phase of manipulations. On the basis of the allegations in the show cause notice, it is clear that no such case has been made out and further there is no evidence to suggest that there is an indication of their duties and obligations or collusion and therefore these directors cannot be held liable for acts of the HTL or acts of the Director Ketan Sheth and other Executive Directors acting for and on behalf of the company.*

*6.2 In the absence of corroborative evidence for their involvement in the manipulation in the scrip of HTL, I am inclined to give them a benefit of doubt and therefore no directions are required. Accordingly, in exercise of the powers delegated to me under Section 19 of the SEBI Act, 1992 read with section 11 and 11B, I hereby dispose of the case against the aforesaid directors without any direction."*

SEBI has taken a liberal interpretation in the matter and has rightly passed the captioned order, relieving Independent Directors from any liability.

n. They also placed reliance on the judgment by the Hon'ble Delhi High Court in the case of *S.S. Thakur v SEBI/MANU/DE/1024/2013*, dealing with the issue of vicarious liability of ordinary director for violation of SEBI Act which has observed as under:

*"22. However, as far as the other appellants are concerned though there is evidence in the form of the reply sent by the Company through Shri. P.S Chaudhary to show that they were directors of the Company, there is no evidence which would show that they were also in charge of and responsible of the appellants other than Shri. P.S. Chaudhary, SEBI was required to prove not only that the persons in charge of and responsible to the Company conduct of its business.*

*No evidence to this effect, however, has been led by SEBI this is also not the case of the SEBI that connivance of the appellants other than Mr. P.S. Chaudhary and is attributable to some neglect on their part. In these circumstances, the conviction of the appellants, Mr. D.S. Thakur, Mr. S.S. Thakur and Mr. Roop Lal Kaundal cannot be sustained."*

o. They further placed reliance on Circular No. List/JJB/DSS/2000 dated April 11, 2000 issued by the Bombay Stock Exchange Limited ("BSE") to all listed companies. On Page 8, reference has been drawn to Clause 49 of the Listing Agreement being the Clause on "*Corporate Governance*" which is reproduced below:

*"I. Board of Directors*

*A. The company agrees that the board of directors of the company shall have an optimum combination of executive and non-executive directors with not less than fifty percent of the board of directors comprising of non-executive directors. The number of independent directors would depend whether the Chairman is executive or non-executive. In case of a non-executive chairman, at least one-third of board should comprise of independent case of an executive chairman, at least half of board should comprise of independent directors.*

*Explanation: For the purpose of this clause the expression 'independent directors' means directors who apart from receiving director's remuneration, do not have any other material pecuniary relationship or transactions with the company, its promoters, its management or its subsidiaries, which in judgment of the board may affect independence of judgment of the director."*

It may be appreciated that the BSE also addressed the expression "Independent Directors" and has expressly excluded Independent Directors and they submit that they fairly fall under the said expression.

p. They also placed reliance upon SEBI Whole Time Member order dated May 27, 2019 in respect of *Jaydev Raja in the matter of Adani Exports Limited* and crave leave to rely on finding at para 4.4 thereof, detailed as under:

*"……Having regard to the aforementioned facts and in the absence of sufficient evidence, I am inclined to believe that the Noticee may not have had an opportunity to get involved in the day–to–day stock broking business of IIL including in the execution and settlement of trades by the Stock Broker for its clients. In view of the aforesaid, I am inclined to give the benefit of doubt to the Noticee and accordingly, no adverse inference is drawn against him in the instant proceedings."*

q. The SCN has failed to produce any credible evidence against them for their alleged violation of Regulation 3(a), (b), (c), (d) & 4(1) of the PFUTP Regulations. Relying on presumptions and assumptions of their role as a Director/ Independent Director could lead to misapplication of facts and grave and serious miscarriage of justice. The allegations made in and findings arrived at in the SCN as against them are misconceived and based on incomplete and incorrect assumption of facts. They denied that they have violated the provisions of section 12A (a), (b), (c) of the SEBI Act and Regulations 3(a), (b), (c), (d) and Regulations 4(1) of the PFUTP Regulations and they are not liable for penalty under the provisions of Section 15HA of the SEBI Act.

r. They have not committed any act in defiance of any regulations or any provisions of law and they are not liable to be proceeded against with an inquiry and penalty. Therefore, considering the aforesaid submissions the SCN be withdrawn and/or discharged as against them particularly in view of the true and correct facts stated therein.

9. I have considered the allegation levelled in the terms of reference, reply / submissions of the Noticees and the relevant material brought on record. The Noticees No. 1, 2, 3, 4, 11, 12, 13 and 14 have raised certain common technical objections on applicability of provisions of section 12A (a), (b), (c) of the SEBI Act read with Regulation 3(a), (b), (c), (d) & 4(1) of PFUTP Regulations alleged to have been violated by the Noticees with regard to the preferential allotments in question. In order to deal with such objections, it is pertinent to refer and examine the scope of those provisions which are reproduced as following:

***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 any securities listed or proposed to be listed on a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations made thereunder;*

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

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

***PFUTP Regulations, 2003***

**Prohibition of certain dealings in securities**

***3****. 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.*

***Prohibition of manipulative, fraudulent and unfair trade practices***

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

10. Under section 12A of the SEBI Act and Regulation 3 of the PFUTP Regulations the expression "*any manipulative or deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations,"* has to be understood in the sense of a term having legal signification (as opposed to its ordinary English or non-legal technical sense). From the provisions in section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations it is clear that prohibition contained therein are wide enough to include all kinds of market misconduct and abuse. Hon'ble Supreme Court in *N. Narayanan v. Adjudicating Officer, SEBI* (2013) 12 SCC 152, held that-

    *"Prevention of market abuse and preservation of market integrity is the hallmark of Securities Law. Section 12A read with Regulations 3 and 4 of the Regulations 2003 essentially intended to preserve 'market integrity' and to prevent 'Market abuse'. The object of the SEBI Act is to protect the interest of investors in securities and to promote the development and to regulate the securities market, so as to promote orderly, healthy growth of securities market and to promote investors protection. Securities market is based on free and open access to information, the integrity of the market is predicated on the quality and the manner on which it is made available to market. 'Market abuse' impairs economic growth and erodes investor's confidence. Market abuse refers to the use of manipulative and deceptive devices, giving out incorrect or misleading information, so as to encourage investors to jump into conclusions, on wrong premises, which is known to be wrong to the abusers. The statutory provisions mentioned earlier deal with the situations where a person, who deals in securities, takes advantage of the impact of an action, may be manipulative, on the anticipated impact on the market resulting in the "creation of artificiality".*

11. When seen in context of prohibitions under section 12A and Regulations 3 and 4 read with definition of the term '*fraud*' under Regulation 2(c), it is deducible that they depend upon '*dealing in securities'* or employing any device, scheme or artifice to defraud *'in connection with dealing in or issue of securities'* or engaging 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.'* Allotment and subscribing to shares is covered within the definition of the expression *'dealing in securities'* under Regulation 2 (b) of the PFUTP Regulations which defines *'dealing in securities'* which 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. The definition of *'dealing in securities'* is broad and inclusive in nature. Regulation 4 (1), prohibits indulgence in *"fraudulent and unfair trade*

*practices"* in securities. In *SEBI v. Kishore R. Ajmera, (2016) 6 SCC 368* Hon'ble Supreme Court has observed that –

> *"the SEBI Act and the Regulations framed there under are intended to protect the interests of investors in the Securities Market which has seen substantial growth in tune with the parallel developments in the economy. Investors' confidence in the Capital/Securities Market is a reflection of the effectiveness of the regulatory mechanism in force. All such measures are intended to preempt manipulative trading and check all kinds of impermissible conduct in order to boost the investors' confidence in the Capital market. The primary purpose of the statutory enactments is to provide an environment conductive to increased participation and investment in the securities market which is vital to the growth and development of the economy. The provisions of the SEBI Act and the Regulations will, therefore, have to be understood and interpreted in the above light."*

12. Hon'ble Supreme Court, while dealing further with the scope of the prohibitions contained in the PFUTP Regulations, while reemphasized its above ruling further held in the matter of *SEBI Vs Kanhaiyalal Baldevbhai Patel (CIVIL APPEAL NO. 2595 OF 2013)* decided on September 20, 2017 held that –

> *"… it can be inferred that as a matter of principle, while interpreting this regulation, the court must weigh against an interpretation which will protect unjust claims over just, fraud over legality and expediency over principle. Once this rule is clearly established, individual cases should not pose any problem."*

13. The aforesaid prohibitions contemplate deployment of a fraudulent or unfair or manipulative '*device*', '*scheme*', '*artifice*' or '*contrivance*' with a design or purpose or plan or motive to '*defraud*', to '*deceive*', to '*manipulate*', to '*induce*', etc. *'in connection with dealing in securities'* and apply even in cases where the acts or omissions or concealments committed, whether in a deceitful manner or not, by any person while dealing in securities to induce any person to deal in securities would amount to *fraudulent* act. Hon'ble Supreme Court in the above referred *Kanhaiyalal Baldevbhai Patel* case also held that – *"The emphasis in the definition in Regulation 2(c) of the 2003 Regulations is not, therefore, of whether the act, expression, omission or concealment has been committed in a deceitful manner but whether such act, expression, omission or concealment has/had the effect of inducing another person to deal in securities."* Hon'ble Supreme Court further held that the definition of "*fraud*" expands beyond what can normally be understood to be a '*fraudulent*' act. The emphasis is on act of inducement. It further held that for scrutinizing the cases under the PFUTP Regulations, mere inference, rather than proof, that the person induced would not have acted in the manner that he did but for the inducement is sufficient. No element of dishonesty or bad faith in the making of the inducement would be required.

14. Accordingly, when the preferential allotment of shares by a listed company is financed by the company itself, then it is also established that it gave false impression to public that there was infusion of funds to its capital through preferential allotment. Such acts and omissions and concealment on their part would induce the investors to deal in securities of the company in manner in which they would not have but for such acts, omission or concealment. Thus, if the allegations in this case are established on facts, it can safely be inferred that the Company, its management, the allottees and the conduits

all employed fraudulent, manipulative and unfair device, plan or artifice in connection with dealing in securities of the Company. I, therefore, do not agree with such contentions of the Noticees and hold that if the allegations in this case are established, it would consequently follow that the acts omissions and concealment of the relevant Noticees would attract the prohibitions under section 12A (a), (b), (c) of the SEBI Act read with Regulations 3(a),(b),(c),(d) and 4(1) of PFUTP Regulations.

15. It is also relevant to mention that the definition of '*fraud*' under Regulation 2(c) of the PFUTP Regulation is a civil fraud as against criminal fraud and the prohibitions under Regulation 3 and 4 and consequent enforcement actions under Chapter VIA of the SEBI Act are also civil in nature. Thus, intention (*mens rea*) and proof beyond reasonable doubt are not indispensable requirements and the correct test to establish the charge under aforesaid provisions of the SEBI Act and PFUTP Regulations is one of preponderance of probabilities. Hon'ble Supreme Court, in above referred *Kanhaiyalal Baldevbhai Patel*, *case*, has held as under :

    *"To attract the rigor of Regulations 3 and 4 of the 2003 Regulations, mens rea is not an indispensable requirement and the correct test is one of preponderance of probabilities. Merely because the operation of the aforesaid two provisions of the 2003 Regulations invite penal consequences on the defaulters, proof beyond reasonable doubt as held by this Court in Securities and Exchange Board of India Vs. Kishore R. Ajmera (supra) is not an indispensable requirement. The inferential conclusion from the proved and admitted facts, so long the same are reasonable and can be legitimately arrived at on a consideration of the totality of the materials, would be permissible and legally justified."*

16. It is also settled position that having regard to the gravity of the wrong doing higher must be the preponderance of probabilities in establishing the charge under the aforesaid provisions of the SEBI Act and PFUTP Regulations. (*Mousam Singha Roy v. State of West Bengal (2003) 12 SCC 377), orders of Hon'ble SAT in the case of Dilip S. Pendse vs. Securities and Exchange Board of India [Appeal no. 80 of 2009 decided on November 19, 2009; Prashant J Patel Order dated August 17, Ess-Ess Intermediaries order dated June 19,2013, etc.]-* It is also settled position as also held in these cases that the allegation of '*fraud*' can be levelled against a person only for good reasons and on the basis of clear and unambiguous evidence. The task of proving such an allegation lies on the person levelling such accusation on the basis of preponderance of probability.

17. Coming to the merits of the case, it is noted that the investigation for the purpose of the charge under these proceedings are limited to the financing of the preferential allotments by the Company. There are no findings/ observations in the Investigation Report that is the basis of SCN, with regard to such fund transfer being as part of any scheme to generate bogus LTCG through stock exchanges mechanism. The charge in the instant proceedings has been levelled solely on the basis of bank account statements of the respective Noticees 1, 2, 11, 12, 13 and 14 and replies of the Noticees No. 4, 11, 12, 13 and 14 corroborating the preferential allotments of shares by Noticee No. 4 to these Noticees No. 11, 12, 13 and 14 and fund transfer from Noticee No. 4 to them.

18. Admittedly, the Company (Noticee No.4) has been charged with regard to alleged fraudulent preferential allotments of equity shares dated March 25, 2009, April 11, 2009, October 13, 2010 and December 04, 2012 by it and other Noticees *viz*; Noticees No. 1-3, 5-10, being the directors of Noticee No. 4, have been charged for its acts and omissions with regard to said preferential allotments. Further, Noticees No 1, 2, 11 and 12 have been charged with regard to the preferential allotments of shares to them from the finances received from Noticee No.4 directly or through conduits and Noticees No. 13 and 14 have been charged with regard to their role and involvements as conduits in alleged fraudulent preferential allotments of shares by the Company to Noticees No. 11 and 12.

19. The merits of the charge have, thus, to be seen in light of the above facts. It is noted that the following facts are admitted in this case –

    (a) Noticee No. 1 and 2, both are promoters/ directors of the Company.

    (b) Preferential allotments of equity shares of the Company ( Noticee No.4) to Noticees No. 1 and 2 on March 25, 2009, April 11, 2009 and January 30, 2012 were pursuant to conversion of convertible warrants already allotted to them;

    (c) The preferential allotments on October 13, 2010 to Noticees No. 1 and 2 and on December 04, 2012 to Noticees No. 3 and 11 and 12 were allotments of equity shares.

    (d) The fund transfers among the Noticees No. 1, 2 and 4; Noticees No. 11, 13 and 4; and Noticees No. 12, 14 and 4, respectively, are admitted by the said Noticees.

    (e) While there is allegation of financing from the Company directly or indirectly through other directors (Notice No. 1 and 2) and conduits (i.e. Noticees No. 13 and 14) for preferential allotment of shares to the respective Noticees No. 1, 2, 11 and 12 on March 25, 2009, April 11, 2009, October 13, 2010 and December 04, 2012, the allotment to Noticee No. 3 was not financed by the Company.

    (f) Noticee No. 1 and 2 have been charged with regard to the preferential allotments to them and, being promoters/ directors of the Company, also for preferential allotment of equity shares to Noticee No. 11 and 12.

    (g) Noticee No. 3, 5, 6, 7, 8, 9 and 10 have been charged only because they were directors of the Noticee No. 4, Company at the time of acts and omissions of the Company.

20. The Noticees No. 1, 2, 11 and 12 have claimed that the funds transfers from the Company to these respective Noticees, directly/ indirectly, who received the preferential allotments were for genuine purposes. Thus, these Noticees were genuine and *bona fide* allottees for consideration to the preferential allotment of shares of the Company as they had used their own funds to subscribe to the equity shares of the Company in the respective preferential allotments. It has also been submitted that the Noticee No. 1, 2 and Mr. Nirav Parikh are trading / depository client of the Company, Noticee No.4.

**Allotment dated March 25, 2009**

21. From the Annual Report, Annual Accounts and Cash Flow statement of the Company for the Financial years 2004-05, 2005-06 and 2007-08, it is noted that the Company had allotted redeemable cumulative preference shares and convertible warrants to its promoters on preferential basis as given in the following table:-

**Table -3**

| FY | Particulars | No. of Preference Shares/ Warrants | Allottees |
|---|---|---|---|
| 2004-05 | 10% redeemable cumulative preference shares | 76,540 | Promoters including Noticee No.2 |
| 2005-06 | 10% redeemable cumulative preference shares | 1,07,460 | Noticee No. 2 |
| 2007-08 | Convertible warrants of ₹10/- per share | 9,10,000 | Noticee No. 1 (6,00,000)<br>Noticee No. 2 (3,10,000) |

22. From the Annual Report, Annual Accounts and Cash Flow statement of the Company for FY 2007-08, that were approved on August 25, 2008 (as per BSE website) it is noted that the Company had announced a dividend of 10% for the aforesaid total 1,84,000 cumulative preference shares for the year ended March 31, 2008 on *pro–rata* basis. It is further noted from the said Annual Report of the Company that due to the redemption of 1,01,200 cumulative preference shares, the preference share capital of the Company had reduced from ₹1,84,00,000/- to ₹82,80,000/- during the said Financial Year. The Noticee No. 2 has submitted that it had redeemed his 79,233 cumulative preference shares on March 20, 2008 out of his total holding of 1,44,060 cumulative preference shares. Thus, Noticee No. 2 was entitled for such dividend for his 79,233 cumulative preference shares till March 20, 2008 and for remaining 64,827 cumulative preference shares till on March 31, 2008. On the basis of dividend declared for financial year 2007-08 towards the aforesaid 1,84,000 cumulative preference shares, the dividend payment obligation of Company towards the Noticee No. 2 for his 1,44,060 cumulative preference shares would be as shown in the following table :

**Table - 4**

| No. of Shares allotted | No. of Shares redeemed | Value per share (₹) | Nominal value of shares redeemed (₹) | Balance | | Dividend for 355 days upto 20.03.2008 on 79233 shares held (₹) | Dividend for 366 days upto 31.03.2008 on 64827 shares (₹) | Total (₹) |
|---|---|---|---|---|---|---|---|---|
| | | | | No. of Shares | Amount (₹) | | | |
| 144060 | 79233* | 100 | 79,23,300 | 64827 | 64,82,700 | 7,68,516.80 | 6,48,270 | 14,16,786.80 |

23. Admittedly, the Company had paid ₹14,16,787/- to the Noticee No. 2 on March 25, 2009. This is the same amount which the Company was under the obligation to pay the Noticee No. 2 as dividend

towards the 1,44,060 cumulative preference shares held by him. Thus, it can be safely inferred that the Noticee No.2 had received said ₹14,16,787/- from the Company towards interest on his 1,44,060 cumulative preference. It also noted from the bank account statement of Noticee No.1 corroborated by the aforesaid Annual Report, Cash flow Statement and ledger of the Company that, on March 25, 2009, the Company had paid ₹3,10,186 to Noticee No.1 also towards dividend on cumulative preference shares held by him. The genuineness of allotment of preference shares and warrants by the Company to its promoters as mentioned above in previous Financial Years has not been questioned by the investigation report. Based on the documents as available in public domain, the Noticee No. 2 has shown on preponderance of probability that he had received said ₹14,16,787/- from the Company on March 25, 2009 towards dividend for his 1,44,060 cumulative preference shares.

24. It is further noted that on March 18, 2009, the Company had disclosed to BSE about meeting of its board of directors on March 25, 2009 to decide the allotment of equity shares to promoters pursuant to conversion of warrants that were allotted in the Financial Year 2007-08 to Noticee No. 1 and 2 on October 12, 2007. It is also noted that on March 25, 2009, board of directors of the Company had decided to issue and allot 60,000 equity shares pursuant to conversion of 60,000 convertible warrants that were allotted to the Noticee No.1, who was allotted warrants in the Financial year 2007-08 as noted hereinabove and was eligible for conversion of warrants into equity shares before March 31, 2009. In this case, from the material on records i.e. Copies of resolution dated October 12, 2007 and March 25, 2009 it is noted that Noticee had paid ₹2/- per convertible warrant to the Company at the time of allotment and balance amount of ₹17.25 per warrant was to be paid by him at the time of conversion of warrants. Thus, it is corroborated that the Noticee No.1, who had been allotted warrants on payment of 10% consideration as per applicable requirements, was entitled for equity shares of the Company on exercise of his option to convert the entire warrants or any part thereof and pay remaining 90% consideration. Thus, it cannot be said that the shares were allotted under any scheme or plan devised on March 25, 2009 unless it is shown and proved that the balance 90% consideration (i.e. ₹10,35,000/- ) was paid by the Company itself.

25. It is undisputed fact that prior to receipt of said ₹14,25,000/- from Noticee No. 2 on March 25, 2009, Noticee No. 1 had only ₹3.11 lac in his account. It is noted that on March 25, 2009, Noticee No. 2 had transferred ₹7,00,000/- and ₹7,25,000/- (total ₹14,25,000/-) to Noticee No. 1. Thereafter, Noticee No. 1 transferred ₹7,00,000/- and ₹10,35,000/- to the Company. The transfer of ₹7,00,000/- to the Company on same date has neither been questioned nor alleged to be part of aforesaid transfers in investigation observations. Further, relying upon ledger of his trading account with the Noticee No.4, Noticee No. 1 has shown that he had paid said ₹7,00,000/ towards his pay-in obligations. Thus, it is only the transfer of ₹10,35,000/- towards balance 90% consideration for subscribing 60,000 equity shares of ₹10/- each at a premium of ₹9.25 per share by the Noticee No. 1, pursuant to conversion of 60,000 convertible warrants that has been questioned in the investigation observations. The facts so observed indicate that Noticee No. 1 had paid balance consideration of ₹10,35,000/- to the Company out of the same funds received from the Noticee No. 2. However, since payment of

₹14,16,787/- from the Company to Noticee No. 2 on March 25, 2009 is shown by them to be towards dividend payable to Noticee No. 2 from the Company it is not possible to conclude on preponderance of probability that the allotment of those 60,000 shares to the Noticee No. 1 pursuant to conversion of his warrants was financed by the Company itself.

26. Noticee No. 1 and 2 have claimed that the transfer of ₹10,35,000/- from Noticee No. 2 to Noticee No. 1 was on account of the loan / advance made by Noticee No. 2 to Noticee No. 1. Though they have failed to prove this claim based upon any documentary evidence, they have shown on preponderance of probability that the Company had not financed the balance consideration payable by Noticee No. 1 for conversion of his 60, 000 warrants on March 25, 2009, rather it was financed by Noticee No. 2 from his dividend amount received from the Company.

**Allotment dated April 11, 2009**

27. From copy of resolution passed in the board meeting of the Company dated October 12, 2007 and letter dated April 11, 2009 to BSE regarding meeting of the board of directors of the Company held on April 11, 2009, relied upon by the Noticees No. 1, 2 and the Company, it is noted that on April 11, 2009, board of directors of the Company decided to issue and allot 3,60,000 equity shares of ₹10/- each at a premium of ₹9.25 per share, pursuant to conversion of 3,60,000 convertible warrants to Noticee No. 1 out of 6,00,000 warrants that were allotted to him in the Financial year 2007-08. The Noticee No. 1 had been allotted warrants on payment of 10% of consideration amount to the Company at the time of allotment of warrants and thus, it cannot be said that the shares were allotted under any scheme or plan devised on April 11, 2009 unless it is shown that the balance 90% consideration (i.e.₹62,10,000/- ) for allotment of said equity shares was paid by the Company itself.
28. As regards payment of aforesaid 90% consideration on April 11, 2009 the Noticees No. 1 and 2 have shown from their respective trading account ledger with the Company; the veracity of which cannot be questioned in view of fact that the trading ledger is maintained by stock brokers as per law(rule 15 of the SCRR) and it has several trade related entry; that Noticee No. 1 had a credit balance of ₹57,72,224/- in his trading account as on March 31, 2009 which he had to receive in form of pay out from the Company. On March 31, 2009 the said amount of ₹52,76,000/- was debited from his trading account and on April 11, 2009 the said amount was credited to his bank account by the Company. Similarly, the Noticee No. 2 had a credit balance of ₹9,33,861/- in his trading account as on March 30, 2009 which he had to receive in form of pay out from the Company. On March 31, 2009 the said amount of ₹9,33,861/ was debited in his trading account and on April 11, 2009 the said amount was credited to his bank account by the Company. Thus, the Noticee No. 1 paid substantial part of said 90% consideration out of his own monies received from the Company and has claimed that remaining ₹9,34,000/- was paid out of monies received from Noticee No. 2 as loan. Although the Noticees No. 1 and 2 have failed to substantiate their claim of any loan between them, in absence of any examination and findings in investigation report with regard to trading activities of these Noticees with the Company and consequential pay out obligation of the later towards them, it is not possible to conclude

on preponderance of probability that the allotment of those 3,60,000 shares to the Noticee No. 1 pursuant to conversion of his warrants was financed by the Company itself.

**Allotment dated October 13, 2010**

29. From the Company's letter dated September 09, 2010 to BSE regarding "*in-principle*" approval prior to issue and allotment of 15,21,000 equity share on preferential basis under clause 24(a) of the Listing Agreement, BSE letter date September 28, 2010 granting "*in-principle*" approval under Clause 24(a) of the Listing Agreement to Company and copy of the minutes of the meeting of the board of directors of the Company dated October 13, 2010, it is noted that on October 13, 2010 the Company had made preferential allotment of 11,71,000 equity shares and 77,200 convertible warrants to its promoters/ investors out of which promoters *viz;* Noticee No. 1 and 2 were allotted 1,72,400 equity shares 2,67,600 equity shares, respectively and said warrants were allotted to Noticee No. 2. In this case, only the aforesaid preferential allotment of equity shares to the Noticees No. 1 and 2, promoters has been questioned in the investigation.

30. It is noted from the bank statement that on August 18, 2010, the Company transferred ₹1,00,00,000/- to the Noticee No. 1 in two transactions of ₹50,00,000/- each. The Noticee No. 1 has shown from his trading account ledger that the said amount of ₹1,00,00,000/- was received by him in form of pay out as against the credit balance of ₹1,29,59,649/- on August 13, 2010 in his trading account. The Noticee No.1 had paid ₹50,00,000/- to the Company on same date for subscription of 1,72,400 equity shares of ₹10/- each at a premium of ₹19 per share and had transferred ₹50,00,000/- to his brother Noticee No.2. It is noted that Noticee has also paid total ₹1,00,00,000/- to the Company on August 18, 2010 for the allotment of 2,67,600 equity shares of ₹10/- each at a premium of ₹19 per share and aforesaid 77,200 convertible warrants with regard to which no fault has been found in the investigation.

31. The Noticees No. 1 and 2 have claimed that this fund transaction amongst them was on account of loan transactions. However, they have not shown any evidence in support of this claim. Be that as it may, in absence of any examination of other relevant facts such as trading activities of the Noticees with the Company and statements/ examinations of the Noticees, etc., such fund transfer from Noticee No. 1 to Noticee No. 2 cannot be said to be culpable as it is not established in investigation that the Company transferred said ₹1,00,00,000/- to Noticee No. 1 necessarily for financing its preferential allotments to the Noticees No. 1 and 2 and on preponderance of probability it is shown that the Noticee No. 1 had credit balance of ₹1,29,59,649/- on August 13, 2010 in his trading account.

32. It is noted that in the preferential allotment dated October 13, 2010 the company had allotted its 50,000 equity shares to another non-promoter entity *viz;* Mr. Nirav Parikh. It has been alleged in the investigation report that on October 08, 2010, the Company had also transferred ₹2,00,000/- to said Mr. Nirav Parikh and on October 12, 2010 he transferred ₹2,50,000/- to the Company. On this basis it has been alleged in the investigation report that – *" the funds transferred by Mr. Nirav Parikh for the purpose of payment towards preferential allotment dated October 13, 2010 were provided by AFSL itself as the bank*

*accounts balance of Mr. Nirav Parikh prior to the receipt of funds was ₹2.15 lakhs approx..".* This allegation is vague as it is unclear as to how the total consideration of ₹14,50,000/ payable towards allotment of 50,000 equity shares was financed by the Company if it had transferred only ₹2,00,000/- to said Mr. Nirav Parikh on October 12, 2010. The investigation report is silent as to on what basis it could be said that the allotment of 50,000 shares was funded by the Company. It is also intriguing that said Mr. Nirav Parikh has not even been made a Noticee in these proceedings nor he has been asked any question during the investigation though his role could also be questionable, if the preferential allotment to him was financed by the Company. On the basis of trading ledger of its client Mr. Nirav Parikh, the Company has shown that Mr. Nirav Parikh had credit balance of ₹2,01,603/- in his trading account on October 08, 2010 and on same date it had paid ₹2,00,000/- to Mr. Nirav Parikh out of the trading account balance in form of pay out.

**Allotment dated December 04, 2012**

33. On December 04, 2012, the Company had made preferential allotment of 24,46,300 shares to 8 promoter/investors wherein 8,500 shares were allotted to Noticee No. 11 and 10,000 shares were allotted to Noticee No. 12. It is only the allotment to these two Noticees that is in question for the instant proceedings.

34. Admittedly, on November 23, 2012, the Company transferred ₹3,23,000/- to Noticee No. 13, which in turn was transferred by Noticee No. 13 to his wife Noticee No. 11 on the same date. Similarly, the Company transferred ₹3,80,000/- to Noticee No. 14, which in turn he transferred to Noticee No.12 on the same date. On the same date, Noticee no. 11 and 12 had paid the said respective amounts of ₹3,23,000/ and ₹3,80,000/- to the Company for preferential allotment of 8,500 shares and 10,000 shares, respectively to them.

35. The Company and the Noticee 13 and 14 have claimed that the funds were provided to them by the Company as advance/ loan on account of advance professional fees. Noticee No. 11 has also claimed that she had received the funds from her husband, the Noticee No. 13 as loan. Noticee No. 12 has also claimed that he had received funds from his friend Noticee No. 14 as loan/ advance. In support of such claim the Company and Noticees No. 13 and 14 have relied upon a copy of their internal ledger of the Company. It is noted that during investigation, these Noticees were questioned by SEBI's investigation team when they had taken the same stand. When the investigation team further asked the Noticee No. 11 and 12 to provide supporting documents in support of their claims, they failed to provide any such supporting documents. They have failed to establish their claim or to justify the receipt of funds for any *bona fide* purpose in these proceedings also.

36. It is relevant to mention that the ledger statements relied upon by these Noticees are prepared by the Company itself and are not corroborated by other material evidence such as the bank account statements of respective Noticees, any document suggesting nature of financing as loan/advance or proof of repayment of loan amounts and interests so as to deduce the claimed nature of financing. In absence of any such corroborative facts the claims of these Noticees are not established.

37. Even if it were to be assumed that the Company had paid the aforesaid amounts to the Noticees No. 13 and 14, in the ledger statement provided by the Company for the funds provided to Noticees No. 13 and 14 following entries are noted:-

**Table 5**

| Account : RAJALOAN RAJA GUPTA - LOAN | | | | | |
|---|---|---|---|---|---|
| Date | Voucher No. | Particulars | Debit | Credit | Balance |
| 23/11/2012 | P002739 | To Beg Paid on Account [927793] | 3,23,000 | | 3,23,000 |
| 30/03/2013 | J001473 | By being amount adjusted against loan | | 78,000 | 2,45,000 |
| **Balance amount as on 30/04/2019** | | | | | **2,45,000** |
| **Account : KAMALLOA KAMALKANT JAIN - LOAN** | | | | | |
| 23/11/2012 | P002738 | To Beg Paid on Account [927792] | 3,80,000 | | 3,80,000 |
| 03/12/2012 | R002524 | By being recd on account | | 1,92,000 | 1,88,000 |
| **Balance amount as on 06/05/2019** | | | | | 1,88,000 |

38. It is seen that while there are entries in the ledger of the Company to the effect that Noticee No. 13 and Noticee No. 14 had repaid ₹78,000/ and ₹1,92,000/ to the Company on March 30, 2013 and December 3, 2012 , respectively the Company has failed to prove any such receipt of the said amounts from the Noticees No. 13 and 14 in its bank account statement. Further, it is observed that as on April 30, 2019, a balance of ₹2,45,000/- is still shown outstanding from Noticee No. 13 and yet not adjusted against any professional fees of Noticee No. 13 or repaid by him. Similarly, a balance of ₹1,88,000/- is shown outstanding from Noticee No. 14 and yet not adjusted against any professional fees of Noticee No. 14. Therefore, I am of the view that Noticee No. 13, 14 and the Company have made false claims regarding repayment of loan/ advance or adjustment of loan/ advance against the professional dues of the Noticee No. 13 and 14.

39. Now coming to the liabilities of the respective Noticees for the possible contraventions by each of them it must be kept in mind that as mentioned hereinabove, the charge of fraud has to be established on higher degree of probability. It is noted that for the allegation of financing of the preferential allotments dated March 25, 2009, April 11, 2009 and October 13, 2010 by the Company, the investigation report has been based upon the bank account statements of the respective parties which can only show the *inter se* fund transfers but cannot prove or even indicate *per se* the purpose of the fund transfers. In order to come to any conclusion as regards the purpose of such fund transfers, even on the basis of probability, the other facts and circumstances must corroborate such assumptions as arrived at in the investigation report. In this case, while the investigation vide letter dated August 07, 2018 had sought information from the Company only with regard to the bank accounts details of the Company and details of receipt of funds such as Name of the allottee, Number of shares allotted, date and amount of receipt of fund, bank account number with bank and branch name. The Company had provided the requisitioned information to the investigation team vide its letter dated August 20, 2018. In the information requisition dated August 07, 2018 and response of the Company there is not even a whisper regarding inquiring about the purpose of fund transfer from the account of the Company to the Noticee No. 1, 2 and Mr. Nirav Parikh, who has not even been made a Noticee in this case. Further information requisitions by investigation vide e-mail dated August 29/30, 2018 and response of the Company thereto vide its letter dated September 04/17, 2018 also do not indicate the purpose of fund transfer from the Company to Noticee No. 1 and 2 as alleged. Also, there is nothing in the

investigation report indicating any other material suggesting alleged purpose of receipt of funds by Noticees No. 1, 2 and Mr. Nirav Parikh from the Company and for *inter se* fund transfers between them unlike in case of Noticees No. 11, 12 13 and 14 who all were not concerned at all for these three preferential allotments. Further, the investigation report has made allegation of financing by the Company in respect of all the above mentioned preferential allotments as the claims of Noticees No. 11, 12, 13 and 14 was not found acceptable by the investigation. It is also relevant to mention that the replies of Noticees No. 11, 12, 13 and 14 being not relevant to these three preferential allotments and thus, it is clear that with regard to these three preferential allotments the conclusions have been arrived solely based on the bank account statements of Noticee No. 1 and 2 and Mr. Nirav Parikh which *per se* do not indicate the alleged purpose of the fund transfer by the Company to them.

40. The Noticee being a SEBI registered stock broker/ portfolio manager/ merchant banker, depository participant and also a listed company is within reasonable access and supervision of SEBI to inspect the documents or compel production of the same. Thus, reasonable and legitimate expectation could be to requisition relevant information/ material from the Company and concerned individuals holding executive/managing positions in such entities also and/or to verify the veracity of such fund transfers from the material and documents maintained and/ or disclosed by such intermediaries to the stock exchange and also from the trading account details and transactions of the respective entities through the Company acting as their stock broker. In this case, it is noted that such attempt has not been made with respect to aforesaid three preferential allotments. The principle of probability in civil proceedings demands the investigation to make allegations based upon clear findings and reliable material which has not been done with regard to these preferential allotments. These aspects being within domain of the investigation/supervision, cannot be left open for the instant proceedings. I am also mindful of the fact that even the circumstantial evidence surrounding the events on which the charges/allegations are founded would be sufficient to draw a reasonable conclusion for the civil proceedings like the instant one. But; as held by Hon'ble Supreme Court in the case of above referred *Kishore R. Ajmera case, the* test would always be that - what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion.

41. Thus, in order to infer fraud, the attendant circumstances and events must be clearly brought out. When the allegation is made as in this case, and the Noticee *prima facie* proves it's *bona fide*, the burden of proof shifts upon the authority levelling the charge. In this case, as mentioned above, the investigation has not clearly brought out any material to show on probability that fund transfer from Noticee No. 4 to Noticee No. 1 and 2 was not genuine on the contrary, these Noticees have been able to *prima facie* show genuineness in transfers of funds by the Company to Noticees No. 1 and 2 on preponderance of probability. In absence of such examination in the investigation report, I am unable to draw any adverse inference against Noticees No. 1, 2 and 4 with regard to preferential allotments dated March 25, 2009, April 11, 2009 and October 13, 2010. As these aspects had to be looked in investigation and cannot be investigated further in the instant proceedings, I leave this matter there.

42. However, with regard to preferential allotment dated December 04, 2012, the investigation has made allegations based upon direct evidence with regard to fund transfers and attendant circumstances for

the purpose of the same. The Noticees No. 4, 11, 12, 13 and 14 have not been able to offer any plausible explanation with regard to this preferential allotment, except for the *ipse dixit* denial. The pattern of fund movements wherein same amount was paid by the Company to conduits, who in turn transferred the said amount to the preferential allottees, who subscribed to the equity shares of the Company in the preferential allotment and all fund transfers from the Company -> conduits -> allottees being made in the garb of loan/advances also shows that such entries were created in ledger to camouflage the actual financing by the Company. In view of these attendant circumstances, the contention of these Noticees that the fund transfers amongst them were towards loans/advances is lame and afterthought; and hence rejected.

43. The rotation of funds in respect of preferential allotment dated December 04, 2012 supported by bank account statements, in absence of any genuine reason of such fund transfers from the Company, clearly indicates that the management of the Company, as an unseen thread, was controlling the whole fund movement back and forth, in what appears to be wizardry of creating an illusion of fund flow, out of nothing. Noticees No. 13 and 14 acting as conduit have equally contributed to the whole plan of the Company and its management. Considering the facts and circumstances as discussed hereinabove, I am of the view that the Company, its management and Noticees No. 11, 12, 13 and 14 had, in a clever subterfuge, put in place a web of transfers and retransfers among themselves in a bid to create a make-believe of fund-rolling in the preferential allotment dated December 4, 2012, when there was actually no infusion of funds for the said allotment. Those fund transfers are nothing but sham transactions without any underlying and the entire exercise of circulating the same funds was part of colorable devise and thus, "*it will be difficult for judicial process to accord its approval to it*". *[McDowell & Co. Ltd v/s. CTO, (1985) 154 ITR 148 (SC)]*. Such sham and fraudulent transactions by way of subscription to preferential allotment without capital infusion in the Company cannot be a legitimate one which law would permit. Being fraudulent, unfair and manipulative the above acts are in contravention of provisions of sections 12A(a), (b) and (c) of the SEBI Act read with Regulation 3 (a), (b), (c) and (d) and 4(1) of the PFUTP Regulations. In this regard, I note that in the matter of *Gammon India Limited vs. SEBI* (Order dated June 20, 2008), the Hon'ble SAT has also held that providing funds to entities by the company for the purpose of buying/subscribing its own shares amounts to violation of the PFUTP Regulations.

44. As regards liability of Noticees No. 1, 2, 3 and 5-10 for the aforesaid acts, omission or concealment by the Company as its directors during relevant period, following facts are worth mentioning–

(a) Notice No. 1 and 2, were admittedly Joint Managing Director and Chairman and Managing Director of the Company ( Noticee No.4), respectively at the relevant time and are holding same position as on date;

(b) Form 32 filed with Ministry of Corporate Affairs (MCA) regarding appointment of Noticee No. 3 as a director in the Company shows that she was appointed as promoter and Additional Director of the Company on November 06, 2012 i.e. much after the first three preferential allotments and approximately one month before the allotment dated December 4, 2012 in respect of which the contravention by the Company has been established.

(c) Noticees No. 5 was director of the Company till August 01, 2012 and Noticees No. 6 and 7 were directors of the Company till January 29, 2010.

(d) Form 32 filed with MCA shows that Noticee 8, 9 and 10 were independent directors of the Company at the time of the preferential allotment dated December 4, 2012.

45. A company being a legal person having separate and independent existence than its shareholders acts through its board of directors who individually and collectively hold the position of trust and have fiduciary duties towards the company, the shareholders and other stakeholders. It is settled position that while alleging vicarious liabilities on the directors, the company should also be proceeded with for its defaults *(U.P. Pollution Control Board vs. Modi Distillary AIR 1998 SC 1128).* Thus, AFSL cannot escape liability of its acts. The term "*managing director*" has been defined in section 2(26) of the Companies Act, 1956 ("the Companies Act") – as applicable at the relevant time -, as "*who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called.*" Further, as per section 5 of the Companies Act, a "*managing director*" is an "*officer who is in default*" for the purpose of making him liable for penalty or punishment, in case the company had committed a default.

46. In case of Managing Director, courts have held that he is, *prima facie*, deemed to be in charge and responsible for the conduct of business and management of the company and, therefore, liable for defaults.{*Garda Chemical Pvt LTD V. R Parthasarthy, Asst. Collector Central Excise [1984] 2 ECC 384 [Bom]*}. As per Section 5(g) of the Companies Act makes it apparently clear that if there is a managing director appointed in a company, he would be an officer in default. Further, in the absence of any managing director, if the board has specified any particular director or manager or any other person as an officer in default in which case only that specified director or manager etc. as the case may be would be an officer in default. In this case, Noticees No. 1 and 2 being Joint Managing Director and Chairman and Managing Director, respectively of the Company, were in-charge of the day-to-day affairs of the business activities/ decisions of the Company during the relevant period. Annual Accounts, Annual Reports, Communication with BSE regarding issuance of convertible warrants and preferential allotments of equity shares, Minutes of Meetings etc. were signed and endorsed by the Noticees No. 1 and 2 in this case. In fact, they were the persons having key and active roles and responsibilities in deciding about the issuance and allotment of the preferential shares/ dividends/ convertible warrants/ equity shares in the Company. Therefore, they are liable for the acts of AFSL with regard to the impugned preferential allotment.

47. It is pertinent to mention that Noticees No. 1 and 2 holding key positions as Managing Directors and Joint Managing Director of the Company were actually the controlling mind for the fraud perpetrated with regard to the preferential allotment dated December 04, 2012. They had to perform their duties

under obligations of trust and confidence to the Company or its shareholders. They are responsible under the duty of trust to the Company and its shareholders while dealing with monies of the Company; but they have brazenly failed in observing such duties by transferring money of the Company for the benefit of Noticee No. 11 and 12. In the instant case the standard of duty of these Noticees is not limited to the standard of ordinary prudence as the Noticees No. 1 and 2 have misappropriated the monies of the Company fraudulently. Further, in cases of fraud, it is settled position of law, the corporate veil can be lifted and the directors can be held liable for the fraud of the Company. Therefore, the Noticees No. 1 and 2 are individually liable for the fraud as found in this case.

48. The Noticees No. 11 and 12 who are beneficiaries of the fraud in this case as they had subscribed to shares of the Company by paying the funds received from it, and the Noticees No. 13 and 14 who acted as conduit in concert and in league with the Company and Noticee No. 1 and 2 in the whole scheme of fraudulent preferential allotment dated December 4, 2012, are also equally responsible for such fraudulent acts.

49. Noticee No. 5, 6 and 7 were not allottees in any of the preferential allotments. They were not the directors of the Company at the time of impugned preferential allotment dated December 04, 2012. As such they cannot be held responsible for the acts or omissions or concealment of the Company as found in this case.

50. It is noted that Noticee No. 3 was appointed on November 06, 2012 as additional director of the Company and she had received 90,000 shares of the Company in preferential allotment dated December 04, 2012. Admittedly, her allotment was not financed by the Company and she has been arrayed as Noticee in these proceedings for vicarious liability for the acts of the Company merely because she was a director of the Company at the time of this allotment. It is relevant to mention that preferential allotment is first conceived by the board of directors through its resolution. Thereafter, the board resolution is disclosed on the concerned stock exchange and then notice under section 173 of the Companies Act read with the provisions of the Securities and Exchange Board of India (Issue of Capital Disclosure Requirements) Regulations, 2009, as applicable at the relevant time, calling for AGM/EGM of the company is given to shareholders and as approved by shareholders in such Generals Meeting, the allotment of equity shares follows thereafter. It is noted from BSE website that the AGM for the purpose of approval of the preferential allotment dated December 04, 2012 was held on September 29, 2012 i.e. much before her appointment as a director of the Company. Thus, it can be safely inferred that she was not privy to the decision making by the management with regard to this preferential allotment.

51. However, when the funds were transferred by the Company to Noticees No. 13 and 14, Noticee No. 3 was a director of the Company. Further, Noticees No. 8, 9 and 10 were independent directors of the Company at all relevant times for the preferential allotment dated December 04, 2012. Therefore, it needs to be examined whether they had failed to exercise due diligence so as to make them vicariously liable for the acts of the Noticee No. 4 in respect of the preferential allotment dated

December 04, 2012. With regard to such liabilities of the directors, I note that vide order No. *WTM/GM/EFD/38/2017-18 dated August 03,2017*, SEBI has taken following position with regard to vicarious liability of directors for the acts of the company-

*"In this connection, I note that there are a number of judicial pronouncements on the liability of directors including K.K Ahuja vs. V.K Vora (2009) 10 SCC 48; National Small Industries … vs. Harmeet Singh Paintal (2010) 3 SCC 330 and S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla and Anr (2005) 8 SCC 89 generally upholding the position that the liability of any director in a company is restricted to actions of omission or commission committed by the company which had taken place with the knowledge and consent, whether explicit or implied, of such director. The array of judicial pronouncements emphasise the need to examine the role and conduct of the directors before fixing the liability on them in respect of any violation committed by the company. I, therefore, am of the view that the broad principle that the liability of a director should flow out of knowledge and consent or connivance in the alleged act is apt to be applied in these situations, to test their liability."*

52. Further in the matter of *Vijay Remedies Ltd. Vs. SEBI (February 11, 2005),* Hon'ble SAT held that there must be some element of lack of due diligence on the part of the director to hold that he was in violation of regulations. Also, in the cases, where the director had nothing to do with the day-to-day affairs of the company, the Hon'ble SAT held that he cannot be fastened with any liability. The same principles have been reinforced by the Parliament by amending section 27 of the SEBI Act by the Finance Act, 2018 (3 of 2018) with effect from March 08, 2019 and consequently, where a contravention of the PFUTP Regulations has been committed by a company, every person who, at the time of the contravention, was in charge of, and was responsible to, the company, shall be deemed to be guilty of the contravention. The spirit of section 27 of the SEBI Act would indicate that if a Noticee is found to have nothing to do with the day–to-day affairs of the Company then he cannot be held guilty of any violation of the Company as there is no such thing as vicarious liability for the purposes of penalty under the SEBI Act. Further, with regard to the independent directors, I note that in the Companies Act, expressly no definition has been provided for independent directors, however, it can be implied through definition provided under section 149(6) of the Companies Act, 2013, that an independent director is not a key managerial person or in day to day in-charge of the business activities of the Company.

53. It is relevant to mention here that in vide its order dated August 09, 2019 in the matter of *Sayanti Sen Vs. SEBI,* Hon'ble SAT held that –

*"The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status."*

54. In this case, nothing specific has been brought on records regarding the involvement/ roles of the Noticees No. 3, 8, 9 and 10. The documents such as the AGM/ board meeting notes dated September

29, 2012, EGM dated November 19, 2012 and general meeting of boards dated December 04, 2012 or any other document related to preferential allotment duly signed/ endorsed by them or document showing their active role in the Company in managing day to day affairs or any other role assigned to them by the Company etc. are not available on record. Nothing has been alleged with regard to their individual role, responsibilities in respect of the decisions taken with regard to fund transfer by the Company to conduits in this case. Therefore, I am inclined to give benefit of doubt to Noticee No. 3, 8, 9 and 10.

55. In view of the above, I hold that the Noticee No. 1, 2, 4, 11, 12, 13 and 14 are liable for penalty under Section 15HA of the SEBI Act as applicable at the relevant time. The said provision of section 15HA reads as under:-

***<u>SEBI Act.</u>***

***Penalty for fraudulent and unfair trade practices***

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

56. While determining the quantum of penalty, it is important to consider the factors stipulated in Section 15J of the Act, 1992 which reads as follows:-

***15J - Factors to be taken into account by the adjudicating officer***

*While adjudging quantum of penalty under section 15-I, 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."*

***Explanation.***—*For the removal of doubts, it is clarified that the power of an adjudicating officer to adjudge the quantum of penalty under sections 15A to 15E, clauses (b) and (c) of section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section;*

57. In this case, from the material available on record, the extent of loss suffered by the investors as a result of the default in this case cannot be computed. Further, as the allegations with regard to only the preferential allotment dated December 04, 2012 has been established and other preferential allotments could not be adjudicated for want of material, the contravention is not treated as repetitive. Noticee No. 11 and 12 were the beneficiary of the fraudulent schemes floated by the Company and its management and Noticee No. 13 and 14 are closely related /connected with the beneficiaries, the Company and its management and they have played integral role in perpetrating such fraud. Further, the value of benefit accrued on account of preferential allotments of 8500 shares and 10,000 shares allotted to Noticees No. 11 and 12, respectively, would be ₹76,500/- and ₹90,000/-, respectively, based on current share price of the scrip of AFSL, which is not substantial.

58. However, it is incumbent upon SEBI to take stern view with regard to the market abuse and fraudulent practices, particularly when persons tasked with protecting the interest of the company and its shareholders are themselves involved in perpetrating fraud. Noticee No. 1 and 2 being the part of management i.e. Managing Director and Chairman and Managing Director of the Company and in-charge of day-to-day affairs of the Company are wholly responsible for fraudulent and unfair practices undertaken by the Company in this case. In my considered opinion the deliberate defiance and indulgence in fraudulent activity by the persons - who being in charge of affairs of the Company holding fiduciary duties towards investors - should be dealt with sternly and the penalty in such cases should serve as effective deterrence. In the facts and circumstances of this case, I deem it worth relying the observations of Hon'ble Supreme Court in its judgment dated April 26, 2013 in the matter of *N. Narayanan v. SEBI*, wherein it specifically cautioned SEBI in the following words – "*SEBI, the market regulator, has to deal sternly with companies and their Directors indulging in manipulative and deceptive devices…… SEBI has, therefore, a duty to protect investors, individual and collective, against opportunistic behavior of Directors and Insiders of the listed companies so as to safeguard market's integrity…..*"

59. It is also to be kept in mind that the misappropriation of the Company's fund is a heinous act, and thus, same need to be dealt sternly and suitably penalized. However, while so holding I am also mindful of the fact that the instant proceedings have been initiated in 2019 much after the preferential allotment in questions i.e. December 04, 2012. Considering the nature of violation in this case such delay in enforcing the provisions of law or such quantity of shares and their market value, in my view, would not hinder imposition of monetary penalty lest it should lead to compromising with the aforesaid purpose of effective deterrence and the perpetrator of such fraud would enjoy the benefits at the peril of the Company and its shareholders. While no direction to refund such monies to the Company or cancellation of shares allotted in the impugned preferential allotment are possible in the instant proceedings, the leniency to exonerate the violators merely on account of delay in initiation of these proceedings be against the very objective of penal provisions under section 15HA of the SEBI Act. Although such delay and quantity / value of shares could be considered as a mitigating factor while adjudging the quantum of penalty.

60. The minimum penalty under aforesaid section 15HA of the SEBI Act was twenty-five crore rupees. For the purpose of adjudication of quantum of penalty it is relevant to mention that under section 15I of the SEBI Act imposition of penalty is linked to the subjective satisfaction of the Adjudicating Officer. The words in the section that "*he may impose such penalty*" are of considerable significance, especially in view of the guidelines provided by the legislature in section 15J. Further, in the explanation appended to section 15J, which was brought vide Part VIII of Chapter VI of the Finance Act, 2017 after Judgement of Hon'ble Supreme Court in the case of *Roofit Industries* wherein it was ruled that minimum prescribed is sacrosanct, the legislative intent has been reinforced that while adjudging the quantum of penalty the adjudicating officer has discretion and such discretion should be exercised having due regard to the factors specified in section 15J. It is also settled position that the words "*shall be liable to*" used in the context of "*penalty*" in any statute, do not convey an absolute imperative; they are merely directory and leave it to the discretion of the authority to impose any

penalty as he deems fit and commensurate with violation. Further, from the ratio of the Judgement of Hon'ble SAT in several matters including in the matter of *M/s. Ushdev Trade Ltd. vs. SEBI (SAT Appeal No 106 of 2010- Order dated 14.9. 10)*, it is noted that the adjudicating officer is not bound to be always within the range specified in respective section while imposing the penalty on a delinquent and he must exercise his discretion in imposing any penalty having regard to the factors listed in section 15J.

61. In view of the above guiding principles, factors under section 15J and striking a balance between the gravity of default and mitigating factors as aforesaid, I deem that a penalty of ₹5,00,000/- which now the minimum prescribed in amended section 15HA on the Noticees No. 1, 2, 4 11, 12, 13 and 14 each would be commensurate with the violation committed by them.

62. Considering all the facts and circumstances of the case including the factors as aforesaid and exercising the powers conferred upon me under section 15I of the SEBI Act read with Rule 5 of the Adjudication Rules, I hereby impose following penalty on the Noticees *viz.* Shri Bakul Ramniklal Parekh, Shri Milan Ramniklal Parekh, Action Financial Services (India) Limited, Ms. Yoshita Gupta, Shri Girish Vyas, Shri Raja Gupta and Shri Kamalkant Laxmilal Jain under section 15HA of the SEBI Act. In my view, the said penalty is commensurate with the violations committed by these Noticees in this case:

| **Noticee** | **Amount of Penalty** |
|---|---|
| Shri Bakul Ramniklal Parekh (Noticee No. 1) | ₹5,00,000/- (Rupees Five Lakh Only) |
| Shri Milan Ramniklal Parekh (Noticee No. 2) | ₹5,00,000/- (Rupees Five Lakh Only) |
| Action Financial Services (India) Ltd (Noticee No. 4) | ₹5,00,000/- (Rupees Five Lakh Only) |
| Ms. Yoshita Gupta (Noticee No. 11) | ₹5,00,000/- (Rupees Five Lakh Only) |
| Shri Girish Vyas (Noticee No. 12) | ₹5,00,000/- (Rupees Five Lakh Only) |
| Shri Raja Gupta (Noticee No. 13) | ₹5,00,000/- (Rupees Five Lakh Only) |
| Shri Kamalkant Laxmilal Jain (Noticee No. 14) | ₹5,00,000/- (Rupees Five Lakh Only) |

63. The Noticee shall remit / pay the said total amount of penalty within 45 days of receipt of this order by way online payment on SEBI website at following tabs on SEBI website www.sebi.gov.in – ENFORCEMENT -> Orders -> Orders of AO -> Pay Online or by way of using the web link https://siportal.sebi.gov.in/intermediary/AOPaymentGateway.html . In case you face any difficulties in payment of penalties, you may contact the support at portalhelp@sebi.gov.in .

64. In the event of failure to pay the said amount of penalty within 45 days of the receipt of this Order, recovery proceedings may be initiated under section 28A of the SEBI Act, 1992 for realization of the said amount of penalty along with interest thereon, inter alia, by attachment and sale of movable and immovable properties.

65. In terms of Rule 6 of the Adjudication Rules, copies of this order are sent to the Noticee and also to SEBI.

**Date: August 21, 2019**
**Place: Mumbai**

**Santosh Shukla**
**Adjudicating Officer**