

WTM/AB/IVD/ID4/10994/2020-21

SECURITIES AND EXCHANGE BOARD OF INDIA
FINAL ORDER

Under Sections 11, 11(4) and 11B of the Securities and Exchange Board of India Act, 1992.

In respect of:

Sr. No.	Name of the Noticees	PAN
1.	M/s. Birla Power Solutions Ltd.	AAACB5253D
2.	Mr. P.V.R Murthy	ABRPM1271B
3.	Mr. N. Nagesh	AAQPN1499Q
4.	Mr. Rajesh V. Shah	AAGPS9485D
5.	Mr. Upkar Singh Kohli	AAIPK0833F
6.	Mr. Yashovardhan Birla	AAJPB2505N

The aforesaid entities are hereinafter individually referred to by their respective names/noticee numbers and collectively as “the Noticees”.

In the matter of Birla Power Solutions Limited

1. Present proceedings have emanated from the show cause notice dated May 25, 2018 issued by Securities and Exchange Board of India (hereinafter referred to as “**SEBI**”) to the Noticees no. 1 to 4 and the show cause notice dated June 25, 2019 issued by SEBI to Noticees no. 5 and 6 (both the show cause notices hereinafter referred to as, “**the SCNs**”), alleging violations of Section 12A(a), (b) & (c) of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as, “**SEBI Act, 1992**”) read with Regulations 3(a), (b), (c) & (d) and 4(1), (2)(f), (k) & (r) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to

as ‘**PFUTP Regulations**’) by Birla Power Solutions Limited (hereinafter referred to as “**the Company**” or “**BPSL**”) and violations of Section 12A(a), (b) & (c) of SEBI Act, 1992 read with Regulations 3(a), (b), (c) & (d) and 4(1) of PFUTP Regulations, 2003 by Noticee No. 2 to 6. The Noticees were called upon to show cause as to why suitable directions under Sections 11(1), 11B and 11(4) of the SEBI Act, 1992 should not be issued against them. The SCNs issued to the Noticees, also contained the copies of documents relied upon in the SCNs, which are as detailed below:

Annexure No.	Details
1.	Copies of listing prospectus of BPSL
2.	Major corporate announcements made in respect of two GDRs issues
3.	Corporate announcements made by BPSL on BSE and NSE
4.	Copy of page no. 13 Annual Report for FY 2009-10 of BPSL
5.	Loan Agreement dated December 21, 2009
6	Loan Agreement dated July 05, 2010
7.	Vintage loan account statement
8.	Copy of BPSL’s Board Resolution dated October 29, 2009
9.	Copy of Page No. 18 of Annual Report of BPSL for FY 2009-10
10.	Copy of Pledge Agreements dated December 21, 2009
11.	Copy of Pledge Agreements dated and July 05, 2010
12.	Escrow Account Statement of BPSL
13.	An extract of relevant provisions of alleged violations

- As can be noted from the SCN, the aforesaid SCN came to be issued against the Noticees in view of the fact that SEBI conducted an investigation into the Global Depository Receipts (hereinafter referred to as “**GDR**”) issues of Noticee no. 1 for the

period January 01, 2010 to February 28, 2010 and June 01, 2010 to July 31, 2010 (hereinafter also referred to as 'investigation period') to ascertain whether shares underlying GDRs were issued with proper consideration and whether appropriate disclosures, if any, were made by Noticee no. 1. The details of the said GDR issues are tabulated as below:

GDR issue date	No. of GDRs issued (mn.)	Capital raised (USD mn.)	Local custodian	No. of equity shares underlying GDRs	Global Depository Bank	Lead Manager	Bank where GDR proceeds deposited	GDRs listed on
27 Jan, 2010	5.85 (at USD 3.42 per GDR)	20.01	HSBC Mumbai	29,25,00,000	The Bank of New York Mellon	Pan Asia Advisors Limited	EURAM BANK Bank, Austria	Luxembourg Stock Exchange
09 July, 2010	21.24 (at USD 2.52 per GDR)	53.53		1,06,21,92,350				

3. BPSL (Noticee No. 1) issued GDRs in two tranches in the year 2010. In tranche – 1, 5,850,000 GDRs (USD 20.01 million, approximately Rs. 92.63 crore at RBI exchange rate of Rs. 46.29 per USD on January 27, 2010) were issued on January 27, 2010 (hereinafter referred to as “**GDR ONE**”) and, in tranche – 2, 21,243,847 GDRs (USD 53.53 million, approximately Rs. 250.27 crore at RBI exchange rate of Rs. 46.75 per USD on July 09, 2010) were issued on July 09, 2010 (hereinafter referred to as “**GDR TWO**”). It was observed from the corporate announcements made by the Company on BSE and NSE that no corporate announcement was made by the Company with respect to issuance of GDRs on January 27, 2010 (GDR ONE). However, it was noted that in the Annual Report of the Company for FY 2009-10, it was stated that the Company has issued 5,850,000 GDRs on January 27, 2010 (GDR ONE). In respect of GDR issued on July 09, 2010 (GDR TWO), it was noted that the Company in its corporate announcement made on July 09, 2010 at BSE has mentioned about the issuance and allotment of GDR under GDR TWO.
4. Investigation revealed that the GDRs of the Company were subscribed by only one entity Vintage FZE (hereinafter referred to as “**Vintage**”), now known as Alta Vista International FZE. Vintage opened two loan accounts (a/c no. 540012-025-4 and 540012-040-8) with EURAM Bank, a bank based in Vienna, Austria and obtained loans of USD 20.01 million and USD 53.53 million by entering into two Loan Agreements dated December 21, 2009 (Annexure – 5 to the SCN) and July 05, 2010 (Annexure – 6 to the SCN), respectively,

with EURAM Bank. The Company had provided security for the loan obtained by Vintage from EURAM Bank by pledging the GDR proceeds, through pledge agreements dated December 21, 2009 and July 05, 2010 with the EURAM Bank.

5. The SCN contained *inter alia* the following allegations:

- a) BPSL issued 5.85 million GDRs (amounting to USD 20.01 million) on January 27, 2010 (GDR ONE) and 21.24 million GDRs (amounting to USD 53.53 million) on July 09, 2010 (GDR TWO). Vintage was the only entity to have subscribed to GDR ONE and GDR TWO and the subscription amount for both GDR ONE and GDR TWO was paid by Vintage by obtaining loans, i.e. through loan agreements dated December 21, 2009 for GDR ONE and dated July 05, 2010 for GDR TWO, from EURAM Bank.
- b) Loan Agreement for issue of GDR ONE states that “*Nature and purpose of facility*” is “*To provide funding enabling Vintage FZE to take down GDR issue of 5,850,000 Luxembourg public offering and may only be transferred to Euram account nr. 580010, Birla Power Solutions Ltd.*” It was observed that this account was the same account where BPSL deposited its GDR proceeds for issue of GDR ONE. Similarly, the Loan Agreement for issue of GDR TWO states that “*Nature and purpose of facility*” is “*To provide funding enabling Vintage FZE to take down GDR issue of 21,243,847 Luxembourg public offering and may only be transferred to Euram account nr. 580010, Birla Power Solutions Ltd.*” It was observed that this account was the same account where BPSL deposited its proceeds for issue of GDR TWO.
- c) It was further observed that with regard to securities for the loan, both Loan Agreements reads as under:

“....it is hereby irrevocably agreed that the following securities and any other securities which may be required by the Bank from time to time shall be given to the Bank as provided herein or in any other form or manner as may be demanded by the Bank:

- 1) *Pledge of certain securities held from time to time in the Borrower's a/c no. 540012 at the Bank as set out in a separate pledge agreement which is attached hereto as Annex 2 and which forms an integral part of this Loan Agreement.*

2) Pledge of the account no. 580010 held with the Bank as set out in a separate pledge agreement which is attached hereto as Annex 2 and which forms an integral part of this Loan Agreement.”

- d) On perusal of Vintage’s loan account statements (provided as Annexure – 7 to the SCN), it was observed that loan amount was increased to the extent of USD 0.30 million on January 31, 2011. Hence, total USD 53.83 million were availed by Vintage as loan for subscription of BPSL’s issue of GDR TWO. However, it was observed that although Vintage availed loan of USD 53.83 million for subscribing to the GDR TWO, there was no corresponding credit for the additional USD 0.30 million in the retail account statement of BPSL as subscription amount. From the examination of the above Loan Agreements, it was observed that Vintage had availed loan facility to the extent of USD 20.01 million and USD 53.83 million from EURAM Bank to subscribe to GDRs of BPSL.
- e) It was noted that two Pledge Agreements dated December 21, 2009 (hereinafter referred to as “**1st Pledge Agreement**”) and July 05, 2010 (hereinafter referred to as “**2nd Pledge Agreement**”) for issue of GDR ONE and GDR TWO, respectively, were entered into between BPSL (as Pledgor) and EURAM Bank (as Bank). The Pledge Agreement for issue of GDR ONE was signed by Mr. P.V.R. Murthy (Director of BPSL) (Noticee No. 2) and Mr. N. Nagesh (Company Secretary of BPSL) (Noticee No. 3) whereas, the Pledge Agreement for issue of GDR TWO was signed by Mr. N. Nagesh (Company Secretary of BPSL) (Noticee No. 3). The pledge agreements dated December 21, 2009 and July 05, 2010 *inter-alia* states the following:

The preamble of the 1st Pledge Agreement states:

“By loan agreement K211209-004 (hereinafter referred to as the “Loan Agreement”) dated 21 December 2009, the Bank granted a loan (hereinafter referred to as the “Loan”) to Vintage FZE, AAH-213, Al Ahamadi House, Jebel Ali Free Trade Zone, Jebel Ali, Dubai, United Arab Emirates (the “Borrower”) in the amount of USD 20,007,000. The Pledgor has received a copy of the Loan Agreement No. K211209-004 and acknowledges and agrees to its terms and conditions.”

The preamble of the 2nd Pledge Agreement states:

“By loan agreement K210610-004 (hereinafter referred to as the “Loan Agreement”) dated 5 July 2010, the Bank granted a loan (hereinafter referred to as the “Loan”) to Vintage FZE, AAH-213,

Al Ahamadi House, Jebel Ali Free Trade Zone, Jebel Ali, Dubai, United Arab Emirates (the "Borrower") in the amount of USD 53,534,494.44. The Pledgor has received a copy of the Loan Agreement No. K210610-004 and acknowledges and agrees to its terms and conditions."

The pledge created in the 1st Pledge Agreement is as below:

"2. Pledge

2.1 In order to secure any and all obligations, present and future, whether conditional or unconditional of the Borrower towards the Bank under the Loan Agreement and any and all respective amendments thereto and for any and all other current or future claims which the Bank may have against the Borrower in connection with the Loan Agreement- including those limited as to condition or time or not yet due-irrespective of whether such claims have originated from the account relationship, from bill of exchange, guarantees and liabilities assumed by the Borrower or by the Bank, or have otherwise resulted from business relations, or have been assigned in connection therewith to the Bank ("the Obligations") the Pledgor hereby pledges to the Bank the following assets as collateral to the Bank:

2.1.1 all of its rights, title and interest in and to the securities deposited from time to time at present or hereafter (hereinafter referred to as the "Pledged Securities") and the balance of funds up to the amount of USD 20,007,000 existing from time to time at present or hereafter on the securities account(s) no. 580010 held with the Bank (hereinafter referred to as the "Pledged Securities Account") and all amounts credited at any particular time therein.

2.1.2 all of its right, title and interest in and to, and the balance of funds existing from time to time at present or hereafter on the account(s) no. 580010 kept by the Bank (hereinafter referred to as the "Pledged Time Deposit Account") and all amounts credited at any particular time therein. The interest rate on deposit in the amount of the facility amount of the Loan Agreement will be fixed at 1.00% p.a.

(The pledged Securities Account and the Pledged Time Deposit Account hereinafter referred to as the "Pledged Accounts", the Pledged Securities and the Pledged Accounts hereinafter collectively referred to as "Collateral")

2.2 The Pledgor agrees to deposit with the Bank all dividends, interest and other payments, distributions of cash or other property resulting from the Pledged Securities and funds.

2.3 The Bank herewith accepts the pledges established pursuant to section 2.1 hereof."

The pledge created in the 2nd Pledge Agreement is as below:

"2. Pledge

2.1 In order to secure any and all obligations, present and future, whether conditional or unconditional of the Borrower towards the Bank under the Loan Agreement and any and all respective amendments thereto and for any and all other current or future claims which the Bank may have against the Borrower in connection with the Loan Agreement- including those limited as to condition or time or not yet due-irrespective of whether such claims have originated from the account relationship, from bill of exchange, guarantees and liabilities assumed by the Borrower or by the Bank, or have otherwise resulted from business relations, or have been assigned in connection therewith to the Bank ("the Obligations") the Pledgor hereby pledges to the Bank the following assets as collateral to the Bank:

2.1.1 all of its rights, title and interest in and to the securities deposited from time to time at present or hereafter (hereinafter referred to as the "Pledged Securities") and the balance of funds up to

the amount of USD 53,534,494.44 existing from time to time at present or hereafter on the securities account(s) no. 580010 held with the Bank (hereinafter referred to as the "Pledged Securities Account") and all amounts credited at any particular time therein.

2.1.2 all of its right, title and interest in and to, and the balance of funds existing from time to time at present or hereafter on the account(s) no. 580010 kept by the Bank (hereinafter referred to as the "Pledged Time Deposit Account") and all amounts credited at any particular time therein. The interest rate on deposit in the amount of the facility amount of the Loan Agreement will be fixed at 1.00% p.a.

(The pledged Securities Account and the Pledged Time Deposit Account hereinafter referred to as the "Pledged Accounts", the Pledged Securities and the Pledged Accounts hereinafter collectively referred to as "Collateral")

2.2 The Pledgor agrees to deposit with the Bank all dividends, interest and other payments, distributions of cash or other property resulting from the Pledged Securities and funds.

2.3 The Bank herewith accepts the pledges established pursuant to section 2.1 hereof."

It was further observed that, following conditions were put in both the Pledge Agreements for realization of the pledge:

"6. Realisation of the Pledge

6.1 In the case that the Borrower fails to make payment on any due amount, or defaults in accordance with the Loan Agreement, the Pledgor herewith grants its express consent and the Bank is entitled to apply the funds in the Pledged Accounts to settle the Obligations. In such case the Bank shall transfer the funds on the Pledged Accounts, even repeatedly, to an account specified by the Bank.

6.2 Notwithstanding the foregoing, in the case that the Borrower fails to make payment on any due amount, or defaults in providing or increasing security, the Pledgor herewith grants its express consent and the Bank is entitled to realize the Pledged Securities (i) at a public auction for those items of Pledged Securities for which no market price is quoted or which are not listed on a recognized stock exchange or (ii) in a private sale pursuant to the provisions of Section 376 Austrian Commercial Code unless the Bank decides to exercise its rights through court proceedings. The Pledgor and the Bank agree to realize those items of the Pledged Securities for which a market price is quoted or which are listed on a stock exchange through sale by a broker publicly authorized for such transaction, selected by the Bank.

6.3 The Bank may realize the pledge rather than accepting payments from the Borrower after maturity of the claim if the Bank has reason to believe that the Borrower's payments may be contestable."

- f) The pledge agreements dated December 21, 2009 and July 05, 2010 were an integral part of loan agreement dated December 21, 2009 for GDR ONE and loan agreement dated July 05, 2010 for GDR TWO entered into between Vintage and EURAM Bank. These agreements enabled Vintage to avail loan from EURAM Bank for subscribing GDR ONE and GDR TWO of Noticee no. 1. However, the fraudulent arrangement of loan agreements and pledge agreements which resulted in subscription of GDR issue of the Company was not disclosed to the stock exchange

in India.

- g) The GDR issue would not have been subscribed had the Company not given any such security towards the loans taken by the Vintage.
- h) From perusal of corporate announcements made by BPSL to the stock exchanges in India, it was found that BPSL had not informed with regard to pledge agreement entered into with EURAM Bank for subscription of GDRs and the outcomes of the board meeting dated October 29, 2009 which was price sensitive information and could have impacted the price of the scrip.
- i) From the extracts of minutes of board meeting held on October 29, 2009, investigation observed that Mr. P.V.R. Murthy (Noticee No. 2) and Mr. N. Nagesh (Noticee No. 3) were authorized to sign the pledge agreement which acted as security in connection with the loan availed by Vintage from EURAM Bank, to use funds deposited in BPSL's bank account as security in connection with the loan availed by Vintage. Relevant extracts of the resolution passed in the aforesaid meeting of the Board of BPSL are as under:

"RESOLVED THAT a bank account be opened with Euram Bank ("the Bank") or any branch of Euram Bank, including the Offshore Branch, outside India for the purpose of receiving subscription money in respect of the Global Depository Receipt issue of the Company."

Resolution also states that:

"RESOLVED FURTHER THAT the following executives be and are hereby jointly and severally authorized to sign, execute, any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and other paper(s) from time to time as may be required by the Bank and to carry and affix, Common Seal of the Company thereon, if and when so required."

- 1. Mr. P.V.R. Murthy
- 2. Mr. N. Nagesh

Resolution further states that:

RESOLVED FURTHER THAT the above named executives are jointly and severally authorize to draw cheques and other documents, and to give instructions from time to time as may be necessary to the said Euram Bank or any of branch of Euram Bank, including the Offshore Branch, for the purpose of operation of and dealing with the said bank account and carry out other relevant and necessary transactions and generally to take all such steps and to do all such things as may be required from time to time on behalf of the Company."

Resolution further states that:

“RESOLVED FURTHER THAT the Bank be and is hereby authorized to use the funds so deposited in the aforesaid bank account as security in connection with loans if any as well as to enter into any Escrow Agreement or similar arrangements if and when so required.”

- j) It was observed from the examination of the corporate announcements made by BPSL on BSE and NSE that no corporate announcement was made by BPSL with respect to issuance of GDRs on January 27, 2010 (GDR ONE). However, it was noted that in the Annual Report for FY 2009-10, it was stated that the Company has issued 5,850,000 GDRs on January 27, 2010 (GDR ONE). In respect of GDR issued on July 09, 2010 (GDR TWO), it was noted BPSL (Noticee No. 1) in its corporate announcement made on July 09, 2010 at BSE has mentioned about the issuance and allotment of GDR TWO. However, it did not inform stock exchange about the pledge agreement entered into with EURAM Bank. Information regarding signing of pledge Agreement is material information of contingent liability to the extent of GDR issues. Suppression of such material information shows that the corporate announcement was primarily meant to mislead Indian retail investors that GDRs were fully subscribed, whereas the GDR issue was indirectly funded by the Company itself.
- k) The corporate announcement made by the Company to BSE reported misleading news which contained information in a distorted manner and might have influenced decision of investors.
- l) Directors of BPSL, namely, Mr. P.V.R Murthy (Noticee No. 2), Mr. Rajesh V. Shah (Noticee No. 4), Mr. Upkar Singh Kohli (Noticee No. 5) and Chairman of BPSL Mr. Yashovardhan Birla (Noticee No. 6) who attended the board meeting dated October 29, 2009 and authorized Mr. P.V.R Murthy (Noticee No. 2) and Mr. N. Nagesh (Company Secretary) to sign documents with EURAM Bank, were alleged to have acted as party to the fraudulent scheme.

INSPECTION, REPLY, HEARING AND WRITTEN SUBMISSIONS:

- 6. The SCN dated May 25, 2018 was delivered to Noticees no. 1, 2, 3 and 4. Noticee no. 4 vide letter dated June 09, 2018 sought for inspection of documents in the matter.

Accordingly, vide letter dated June 14, 2018, the Noticee no. 4 was granted inspection of documents during June 25, 2018 to June 26, 2018, wherein, the authorized representative of the Noticee no. 4 appeared and carried out inspection of documents and sought leave to seek copies of complete documents within a week. Thereafter, Noticee no. 4 vide letter dated July 03, 2018 sought complete copies of certain documents and vide letter dated July 10, 2018, SEBI provided copies of the requested documents to Noticee no. 4. Pursuant to completion of inspection of documents by Noticee no. 4, the matter was placed before me on November 02, 2018 for hearing in the matter and accordingly, an opportunity of personal hearing was granted to the Noticees on January 21, 2019. I note that notice of hearing vide letter dated January 10, 2019 was also served upon the Official Liquidator of Bombay High Court as the Company has been directed to be wound up vide Order dated August 28, 2014 of the Hon'ble Bombay High Court. On January 21, 2019, Mr. Arun S. Barapatne appeared from the office of the Official Liquidator for Noticee no. 1 and made submissions and sought for two weeks' time to file written submissions, which was granted to it. Noticee no. 4 appeared through his advocates, filed his reply dated January 18, 2019, made submissions and also sought two weeks' time to file written submissions, which was also granted. Subsequently, Noticee no. 4 filed his written submissions vide letter dated February 05, 2019. No written submissions have been filed by the Official Liquidator for Noticee no. 1 till the date of this order. The notice for hearing vide letter dated November 20, 2018 was served upon Noticees no. 2 and 3 through affixture. However, the Noticees no. 2 and 3 did not avail the opportunity of hearing on January 21, 2019 and also did not file any letter seeking adjournment.

7. Thereafter, SCN dated June 25, 2019 was issued to Mr. Upkar Singh Kohli (Noticee no. 5) and Mr. Yashovardhan Birla (Noticee no. 6). Noticee no. 5 vide letter dated July 19, 2019, sought for inspection of documents and accordingly, inspection of documents was granted to Noticee no. 5 on August 02, 2019, wherein the advocates for Noticee no. 5 appeared and carried out inspection of documents. Thereafter, Noticee no. 5 vide letter dated August 07, 2019 sought for certain other documents and SEBI vide letter dated September 27, 2019 replied to the Noticee no. 5 on the documents sought by him. The matter was again placed before me on June 09, 2020 for hearing in the matter and

accordingly, an opportunity of personal hearing was granted to the Noticees no. 5 and 6 on August 21, 2020 through *inter alia* video conferencing. Noticee no. 6 vide email dated August 18, 2020 sought adjournment of the hearing scheduled for August 21, 2020 citing reasons of difficulty due to the lockdown in Mumbai. The notice of hearing for August 21, 2020 was delivered to Noticee no. 5, however, the Noticee no. 5 did not appear for the hearing on August 21, 2020. Following the principles of natural justice and given the situation due to the lockdown, another opportunity for personal hearing was granted to Noticees no. 5 and 6 on October 12, 2020. On October 12, 2020, advocates on behalf of Noticee no. 5 appeared via video conferencing and made submissions. Subsequently, Noticee no. 5 filed its reply to the SCN vide letter dated October 20, 2020. Advocate for Noticee no. 6 appeared on October 12, 2020 and requested for copies of the Annexures to the SCN and for another date of personal hearing. Accordingly, a final opportunity of personal hearing was granted to Noticee no. 6 on November 09, 2020. As sought by Noticee no. 6, SEBI vide emails dated October 31, 2020 provided copies of the Annexure to the SCN to Noticee no. 6. On November 09, 2020, the advocates for Noticee no. 6 appeared via videoconferencing and made submissions. Further, Noticee no. 6 submitted its reply to the SCN vide letter dated November 07, 2020. Thereafter, on March 11, 2021, Noticee no. 6 has filed his written submissions in the matter.

8. The various submissions made by the Noticees vide their aforesaid replies filed during the course of the hearing and in the written submissions filed, are summarised as hereunder:
 - a) Noticee No. 4 (Rajesh V. Shah) has in his replies dated January 18, 2019, February 05, 2019 and March 22, 2019 has *inter alia* submitted as under:
 - (i) *The Noticee was admittedly an Independent non-executive director of BPSL. He was appointed as an independent director on December 16, 2005 and he resigned as a Director with effect from July 8, 2013. The status of the Noticee as an independent director is also accepted in the SCN at Annexure-9, page 31 wherein details of the directors of BPSL are set out.*
 - (ii) *During his tenure as an independent director the company was managed by full time professionals under the Promoter, Mr. Yashovardhan Birla, who was permanent Chairman who alongwith other Executive Directors and Management*

Professionals looked after the day to day operations of BPSL.

- (iii) As an independent director, the Noticee did not have any role in the day to day operations and management of BPSL. The Noticee merely attended the meeting of the Board of Directors of BPSL and considered issues which were placed before the Board of Directors. All decisions which were taken during these meetings were decisions of the Board and not individually of the Noticee. All day to day operations and managerial tasks including operations of bank accounts, utilization of funds raised by the company and other activities were handled by CEO/WTD, CFO, Company secretary, General Manager, promoter and the Company Management Team. As an independent director, the Noticee was never involved in these activities and was not responsible for the same. The Noticees role was confined to providing an opinion on issues brought for discussions before the Board of Directors of BPSL. Thus, the Noticee did not have any means of ascertaining any information in respect of the company unless the same was placed before the Board of Directors at a duly convened meetings of the Board of Directors.*
- (iv) Furthermore, the Noticee had no reason at any point of time to seek any further information or documents from BPSL other than that placed before the Board at the meeting as during the period when the Noticee was an Independent Director of BPSL there was no apprehension of any wrong doing of BPSL. At every Board meeting, the Noticee insisted on compliance certificate of the CEO as well as of the Company Secretary assuring that all laws are complied with and assurances were obtained from the management about the various compliances. As an independent director, the Noticee is not expected to doubt or verify whether the statements of CEO, WTD or Chairman or secretary is correct or not.*
- (v) Prior to dealing with the allegation made against the Noticee in the SCN, the Noticee repeats and reiterates that inspection of all the documents sought for by the Noticee including all the minutes of the board meeting/investigation report have not been furnished/given to the Noticee. Furthermore, only extracts of certain documents have been provided to the Noticee, which extracts are not sufficient. Illustratively, extracts of the Annual report have been sought to be relied upon by SEBI vis-à-vis the complete Annual report which contains material*

that would support the Noticee as is more particularly articulated hereinafter.

- (vi) *The Noticee believes that if inspection and complete copies of the relevant documents are provided to the Noticee, then not only would the Noticee be exonerated of the allegations in the SCN, the same would also demonstrate that the SCN has been selectively issued, that the actual persons involved in taking the impugned action/decisions set out in the SCN have been excluded for unknown reasons and an independent director has been unfortunately targeted/been discriminated against. In this regard, the judgement of the Hon'ble Supreme Court in SEBI vs. Price Waterhouse & Co. and Ors dated January 10, 2017 passed in civil appeal no. 6003-6004 of 2012 is extremely relevant. In the aforesaid case, the Hon'ble Supreme Court inter alia directed SEBI to provide copies of all statements collected during the course of the investigation to the Respondents with inspection of all documents collected during inspection and only thereupon would it be permissible to reply upon the same. The judgment of the Hon'ble SAT in HB Stockholdings Ltd vs. SEBI decision dated August 27, 2013 reported in Manu/SB/0039/2013 has also been relied upon.*
- (vii) *It is submitted that the present SCN was issued to the Noticee on May 25, 2018 in respect of a meeting of a Board of directors attended almost a decade prior viz October 29, 2009. The aforesaid clearly demonstrates the gross delay by SEBI in the present proceedings. The aforesaid delay is unconscionable and itself defeats the interest of justice. The delay in issuance of the SCN causes significant prejudice to the Noticee as he is deprived of contemporaneous records which would have been available had the SCN been issued promptly or at least within a reasonable time and certainly not after a prolonged delay of 9 years. The judgment of the Hon'ble SAT in HB Stockholdings Ltd vs. SEBI decision dated August 27, 2013 reported in Manu/SB/0039/2013 has also been relied upon.*
- (viii) *It further appears that SEBI has also attempted to selectively target the Noticee as a director who was present at the meeting without actually ascertaining as to who were the directors who were otherwise present at the meeting. In the absence of the actual Board resolution the SEBI has relied on the directors report contained in the Annual Report of the Company for the year ended 2009-10*

wherein the details have been provided in respect of the directors who have attended the meetings of the company. A perusal of the said report itself indicates that while the Noticee attended all the meetings of the company there are other directors who had also attended 6 out of the 7 meetings of the company and there is a director who had also attended all the meetings after he was appointed which also includes the meeting in which the decision was taken for opening of a bank account this itself without demonstrate that there has been no application of mind in identifying the persons who were actually present for the meeting of the board when the decision to issue the SCN was taken.

(ix) Even otherwise, it is startling that no notice has been issued to Mr. Yashovardhan Birla, the promoter, shareholder and director of the company despite the fact that the very certified copy of the resolution on which reliance has been placed by the SEBI shows that the same was also certified by Mr. Birla, thus Mr. Birla was aware of this resolution was at the very least aware of the resolution, even if one assumes that he did not actually participate in the meeting in which the said resolution was passed. Thus this also shows that the Noticee has been targeted selectively without an proper and detailed examination of the complete facts in the present matter. The present SCN fails to set out as to why the Noticee has been discriminated against inspite of being an Independent director. As aforestated, the present SCN has not been issued to Executive Directors or other members of the board, who have been excluded for unknown reasons and the Noticee, who is admittedly an independent director has been unfortunately discriminated against and on these grounds alone it is submitted that the SCN in so far as at Noticee ought to be dropped.

(x) It is reiterated that the only allegation against the Noticee is that he attended all the meetings of the Board of Directors of BPSL in the FY 2009-10 and by virtue of the same, he had also attended the meeting of the Board of Directors of BPSL held on October 29, 2009. Significantly in the SCN, there is no allegation against the Noticee that he was in any manner involved in granting of the loan and/or execution of the pledge agreements or was aware of and/or made aware of and/or even had knowledge of the alleged granting of the loan and/or execution of the pledge agreements. In these circumstances, it is not understood as to how

the mere participation of the Noticee in the meeting of the Board of Directors held on October 29, 2009 where merely the necessary decision to open the bank account (which was required by law to be opened) can amount to any violations of the provisions of the PFUTP Regulations read with the SEBI Act, as alleged in the SCN.

- (xi) Even the purported certified copy of the resolution allegedly signed by the Noticee does not in any manner disclose that the Noticee could have been informed about the manner in which the GDR funds which were deposited with the EURAM bank were proposed to be used. In the absence of access to the BPSL records and inspection as sought for, the Noticee does not remember signing any such certified copy. If such certified copy was signed the same would have been signed on the basis of the representation by the Management Team looking after the day to day business of BPSL and the bonafide belief that the same have constituted a copy of the resolution passed at a meeting of the Board of Directors.*
- (xii) In any event, for assessing the vicarious liability of directors for acts of the company various elements have to be established, which have been recognized in the judgements of the Supreme Court of India from time to time. SEBI is required to establish that the concerned director was in charge of and responsible for the companys business. There are also no provisions under the PFUTP Regulations to impose any vicarious liability on directors for acts of the company and/or its executives or to life the corporate veil. While the SEBI Act, 1992 in section 27 provides for vicarious liability of directors for acts of the company, the aforesaid section 27 has not been invoked at all in the present case. As such, it cannot be contended the Noticee is vicariously liable for the acts of the Company and on this ground alone the SCN requires to be discharged.*
- (xiii) The following Supreme Court cases have been relied upon with regard to the liability of independent directors:*
 - a) SEBI vs. Gaurav Varshney & Anr. Reported in (2016) 14 SCC 430*
 - b) Sunil Bharti Mittal vs. Central Bureau of Investigation, reported in (2015) 4 SCC 609.*

- c) *Pooja Ravinder Devidasani vs. State of Maharashtra & Anr, reported in (2014) 16 SCC 1*
- d) *Alok Sharma & Ords vs. State of Maharashtra & Ors –Judgment dated Feb 10, 2015 of the Bombay HC in WP No. 834 of 2014.*

(xiv) *The Noticee has also relied upon the Order in the matter of Pritha Bag vs. SEBI (SAT Appeal no. 291 of 2017 in Order dated February 14, 2019) – the Hon’ble Tribunal while examining the provisions of Section 5 and Section 73 of the Companies Act, has held that unless and until a finding is given that a Director is an officer in default, the mandate provided in Section 73(2) cannot be invoked. The Noticee submits that the aforesaid judgement is relevant in the facts and circumstances of the present proceedings as well, in as much as, there are no findings or even a single allegation that the Noticee was a Managing Director or Whole Time Director. The Noticee submits that he was admittedly an Independent Director in the company and repeats and reiterates the submissions made in this regard in his reply dated January 18, 2019 and written submissions dated February 05, 2019. The aforesaid judgment further fortifies the Noticees submissions that as an Independent Director he is not liable.*

b) Noticee No. 5 (Upkar Singh Kohli) has in his reply dated October 20, 2020 has *inter alia* submitted as under:

- (i) *At the further outset, we respectfully submit that we are constrained to file the present reply as a preliminary reply as inspection of all the documents sought for by us by our letters dated 19th July, 2019 and 7th August 2019, including the inspection and copies of the Investigation Report and (a) annual report of Birla Power Solutions Ltd for financial year 2009-10 (b) the minutes of the meeting dated October 29, 2010 and (c) prospectus of Birla Power Solutions Ltd have not been furnished/given to our clients. Our client, through us, was provided with inspection of certain limited documents inter alia including as is more particularly recorded in our letter dated August 07, 2019 addressed to you and your minutes dated 2nd August 2019.*
- (ii) *Our client has resigned as independent director of the company on 6th May, 2013,*

which resignation has been duly accepted by the Company and appropriate changes also been made in the statutory records. Our client due to his resignation does not have in his possession or even access to the records of the company including documents of which has inspection has been sought. Our client states that other members of the Board, including executive directors have not been made Noticees and our client has been discriminated against and in spite of our client being an independent director, he has been arrayed as a Noticee. Our client believes that if inspection of the relevant documents is given to our client, then not only would he be exonerated of all the allegations in the SCN, but the same would also demonstrate that the SCN has been selectively issued and that the actual persons involved in taking the impugned action/decisions set out in the SCN have been excluded for unknown reasons and an independent director has been unfortunately targeted/been discriminated against. Our client further believes that BPSL is presently under liquidation.

- (iii) A perusal of the SCN and the Annexures thereto ex facie demonstrates that the only allegation against our client pertains to his attendance of a Board Meeting on October 29, 2009. The entire allegations are based upon contents of a purported Board Resolution dated October 29, 2009 which is at Annexure 8 to the said SCN. A perusal of the said document shows that the same merely records certain resolutions which were purportedly passed at a Board Meeting on October 29, 2009. It is in this context that our client has sought inspection of the Minutes of the Meeting dated October 29, 2009 since the purported Board Resolution at Annexure 8 did not contain the entire discussions which had transpired at the meeting on October 29, 2009. It should be appreciated that the present SCN has been issued almost 10 years after the said Board Meeting and 6 years since our client has resigned as a Director of Birla Power Solutions Ltd. Our client does not have access to the records of the company and after such a long time span, cannot recollect as to what had transpired at the meeting held on October 29, 2009 or whether indeed the resolutions as purportedly recorded in the document at Annexure-8 were indeed passed at the meeting held on October 29, 2009 or the context of the same. In absence of the actual minutes of the Meeting of the meeting being provided to our client, our client is not in a position*

to either confirm or deny the correctness of the purported resolutions recorded in the document at Annexure-8. It is therefore submitted that no further proceedings be initiated against our client until such time the entire minutes of the meeting dated October 29, 2009 are made available to our client.

- (iv) As aforesaid in the present SCN, the only allegation against our client is that upon a perusal of the annual report of the Company for the FY 2009-2010, it was observed that he attended the board meetings held on October 29, 2009, January 28, 2010 and March 25, 2010 and therefore concluded that he attended the Board Meeting held on October 29, 2009, authorizing EURAM bank to use the GDR proceeds in connection with a loan, if any, and authorizing Mr. PVR Murthy and Mr. N. Nagesh to sign the agreements related to the GDR issue of the Company and due to the approval of the purported board resolution, our client was a party to the alleged fraudulent scheme. No allegation of any instance of misfeasance, malfeasance or non-feasance by our client, including his personal involvement in or knowledge of any of the transactions referred to in the SCN has been made. It is respectfully submitted that merely participating in a board meeting and being part of the collective decision making process cannot be the sole ground for raising serious allegations of fraud and malfeasance.*
- (v) An independent and/or non-executive director cannot be proceeded against under statute particularly for bonafide decisions taken during the course of board meetings. The decisions taken at the meeting of the Board of directors of the company is the decision of the company, and individual directors of the company cannot be held responsible for the same. It is required to be established that individual directors had personally perpetrated a fraud or committed violations of any provisions. There is no such allegation in the present SCN against our client.*
- (vi) While the SEBI Act, 1992 in section 27 provides for vicarious liability of directors for acts of the company, the aforesaid section 27 has not been invoked at all in the present case. As such, it cannot be contended the Noticee is vicariously liable for the acts of the Company and on this ground alone the SCN requires to be discharged. In any event, for assessing the vicarious liability of directors for acts of the company various elements have to be established, which have been recognized in the judgements of the Supreme Court of India from time to time.*

SEBI is required to establish that the concerned director was in charge of and responsible for the companys business. There are also no provisions under the PFUTP Regulations to impose any vicarious liability on directors for acts of the company and/or its executives or to life the corporate veil.

- (vii) As an independent director, our client did not have any role in the day to day operations and management of the company. Our client merely attended the meetings of the Board of Directors of the company and considered issues which were placed before the Board of Directors. All decisions which were taken during these meetings were decisions of the Board and not individually of our client. All day to day operations and managerial tasks including operations of bank accounts, utilization of funds raised by the Company and other activities were handled by the Company Management Team consisting of CEO/WTd, CFO, Company Secretary, G.M. & Promoter. As an independent director, out client was never involved in these activities or even overseeing the same.*
- (viii) At this juncture, it is also relevant to note that our client was appointed to the board of the company with effect from September 09, 2009 which was after the GDR issue was approved by the Board of Directors and thereafter unanimously passed by the shareholders on August 08, 2009.*
- (ix) As regards the utilization of funds of GDR as purportedly recorded in the purported resolution at Annexure 8 is concerned, our client believes even if such a resolution was passed, the same must have been passed a normal business practice with consent of the Board for use of proceeds of the GDR which were to be deposited in bank account for obtaining loans etc.*
- (x) This was in line with the disclosure made by the company at the time of issuance of the said GDR of the purposes for the use of the proceeds of the said GDR which was also set out in the offer document for both the GDR issues which are available with you and have been annexed at Annexure 1 to the SCN. Our client further states that as far as he recollects there was no discussions at any meeting of the Board of Directors on the issue of the specific utilization of any part of the proceeds raised pursuant to the issue of GDRs. Only the broad parameters for utilization of those funds as set out above were disclosed to the Board of Directors and proper utilization of the said funds for the purposes which were*

represented to the Board of Directors was the responsibility of the Management Team of the Company.

- (xi) Our client states that the documents produced along with the SCN itself shows that our client had no role or dealings whatsoever with Vintage, the funds obtained through the issuance of GDRs or the creation of security/pledge by the company with EURAM bank. Our client states that none of the documents were executed by our client and our client was neither a party to the documents nor did our client even otherwise have any knowledge of these transaction. Similarly, the authority for use of the funds, if any was granted, was meant to be used for bonafide purpose in line with the use of funds as disclosed in the GDR issue. There was no authorization for any transaction with Vintage at any point of time. Our clients states that these documents were never disclosed to our client at any point of time nor could they have been noticed by our client as an independent director of the company. Our client states that as far as our client recalls, none of these documents were discussed or disclosed in any meetings that our client attended. Our client states that none of these documents were disclosed in the financial statements or announcements by the company.
- c) Noticee No. 6 (Yashovardhan Birla) has in his replies dated November 07, 2020 and March 09, 2021 has *inter alia* submitted as under:
- (i) At the further outset, I submit that I do not have access to records of BPSL as the company is under liquidation and all the records are under possession of official liquidator. I have tried to submit my reply based on the details provided in the SCN and based on my memory.
- (ii) I would like to place on record that I was the Non-executive Chairman of BPSL from June 05, 1987 to December 27, 2012. In view of the same, my role was limited to attending the Board meetings and was not involved in the day to day affairs. A copy of the Form 32 for resignation is hereby attached. Considering that I was only Non-Executive Chairman, I submit that I was never involved in day to day functioning of the company and was not part of any discussion, presentation etc. relating to GDR issue except to the extent whatever was presented at the Board Meeting.

- (iii) *I submit that I was not part of the procedural aspects of GDR issue for any time from the start of the issue, through its execution, till its conclusion, either for execution of agreements, receipt of funds, or any other consequential matters.*
- (iv) *I have never signed any agreement with any of the entities involved in the alleged fraud and was not part of the decision making process. I did not participate in the alleged board meeting of the Company held on October 29, 2009 which authorized P.V.R Murthy and Mr. N. Nagesh to sign, execute, any application, agreement etc. which may be required by Euram Bank. I was also not involved in making any kind of alleged corporate announcements. The only allegation against me is that I only signed certified true copy of the Board resolution which was approved by the Board of Directors on October 29, 2009, wherein, one of the directors viz. Mr. P.V.R Murthy and the company secretary Mr. N. Nagesh were authorized to carry out the aforesaid acts. In this regard, I submit as under:*
- a. A copy of the said resolution was put up to me by the secretarial staff, I certified the same based on the approved minutes and did not have authority to question the Board of Directors who have already approved the same.*
 - b. I only verified whether the alleged resolution was passed in the Board meeting along with approved minutes and other than that I did not have authority to enter into its nuances, as the same was already passed by the Board and my signature on the certified true copy of the same was just a procedural aspect.*
 - c. I as a Chairman had only signed certified copies of the resolution of the alleged Board meeting without any malafide intention, had no discretion in the same and therefore I cannot be held responsible for the contents of the same or any consequences that arise out of it.*
 - d. I did not participate in the alleged board meeting of the company held on October 29, 2009 which authorized Mr. PVR Murthy and Mr. N. Nagesh to do the above acts. I was also not involved in making any kind of alleged corporate announcements.*
 - e. The actions done by the persons authorized by the resolution cannot be lumbered on me if those actions were out of authority and malafide.*

- f. In view of the same, my role in the entire GDR issue was miniscule as detailed above and was not party to the decision to execute any transaction to warrant serious allegation of fraudulent and unfair trade practices.*
- (v) Without prejudice to other submissions in this reply, it is humbly submitted that the concerned GDR issue was raised/undertaken by BPSL in 2010 and the instant proceedings against the same have been initiated in the year 2019. It is pertinent to note that the proceedings against me have been initiated after an inordinate delay of nine long years. It is highly unreasonable for SEBI to expect me to keep all the documents pertaining to the transaction intact after such a long time. Human memory is fragile and tis nearly impossible to remember the details of a transaction after a long time gap of 9 years. Without prejudice to other submissions, I request that the current proceedings may be dropped on the ground that there has been inordinate delay of around 9 years in the initiation of the current proceedings alone.*
- (vi) I repeat and reiterate that the only allegation levelled against me is that I had signed the certified true copy of the board resolution of the meetings held on October 29, 2009 authorizing Mr. PVR Murthy and Mr. N. Nagesh to sign, execute any application, agreement etc. which may be required by Euram bank and the SCN nowhere alleged that I was present in the meeting held on October 29, 2009 and was of the decision making process.*
- (vii) In this regard, I submit that a copy of the said resolution was put up to me by the secretarial staff and I certified the same based on the approved minutes and did not have authority to question the Board of directors who have already approved the same. Further, there was no malafide intention or underlying motive behind the same. I submit that I had discretion in the same and therefore, I cannot be held responsible for the contents of the same or any consequences that arise out of it. The actions done by the persons authorized by the resolution cannot be lumbered on to me if those actions were out of authority and malafide.*
- (viii) With regard to paras 4-9 of the said SCN, it is submitted that the two loan agreements mentioned were entered into between vintage and Euram. It is SEBI's own case that the loan agreements were signed by one Mr. Arun Panchariya on behalf of Vintage. Further, I was not a signatory to the agreement.*

Hence, I cannot be held responsible for the same. I was never aware of the nuances and details of the said agreements, as I was never privy to it. Therefore, any consequential action out of the said agreement cannot be attributed to me. The clauses of the agreement set out by SEBI in the SCN were never in my knowledge and were never framed with my consent or discretion. I submit that since I was not signatory to the said loan agreement, I cannot be held liable for any averments/declaration/statements/conditions mentioned in the agreement. Therefore, any liability of Vintage and/or Euram cannot be lumbered on to me.

- (ix) That from a bare reading of the resolution, it appears that it was never intention of the Board that the funds which are to be deposited to be GDR proceeds are given as security in connection with the loan to be given for the subscription of the GDR issue itself. The resolution only states that the proceeds so deposited in the bank account can be used as security "if and when so required". Nowhere in the resolution, it has been specifically stated that the proceeds are pledged on account of loan availed by Vintage to subscribe to the GDR issue.*
- (x) I reiterate that BPSL had authorized Mr. PVR Murthy and Mr. N. Nagesh for acting vigilantly and in the best interest of the company. They never informed the Board or BPSL that they have entered into pledge agreement with Euram Bank. This enunciates that I am not part of any scheme, device, artifice etc. conceived by Mr. PVR Murthy and Mr. N. Nagesh in connivance with the lead Manager to manipulate the indian investors.*
- (xi) I reiterate that PAAL was the lead manager of the aforesaid GDR issue. They were a very reputable firm in UK. BPSL had relied on them and appointed them as lead manager of the GDR issue and accordingly as per their advice it carried out all the procedure of GDR issue. The list of subscribers was provided to BPSL by the lead manager PAAL and the Board relied upon them which has been the practice over the years. Hence, I deny that I was having knowledge that GDR issue was subscribed by only one entity. I did not have any independent mechanism to verify the same and as per the secrecy laws available in other jurisdictions, it was not possible for me to verify the information. I further submit that the responsibility of marketing the GDR issue was always with the lead manager i.e. PAAL and it was their responsibility to get the issue subscribed.*

- (xii) *In this connection, I wish to rely upon the orders passed by the Hon'ble SAT and SEBI itself wherein onerous responsibility has been cast upon the Merchant Banker and Hon'ble SAT has held that in case of any irregularity, SEBI should first call the Merchant Banker since they are professionals in this field and also registered with the Board. In the instant case, the said Merchant Banker PAAL is registered with overseas regulatory body.*
- (xiii) *It is further submitted that SCN has not brought out any concrete figure of the loss incurred by the Indian Investors due to the announcement made by the Company. SCN is repeating the same allegation again and again only in general allegation has been made without adducing any documentary evidence. This shows that the SCN is based on surmises and conjectures. In view of the same, I submit that I have been roped in wrongfully to broaden the ambit of investigation.*
- (xiv) *Noticee vide letter dated March 09, 2021 has filed a copy of the relevant pages of the Corporate Governance Report for the year 2009-10 which is part of the Annual Report and submitted that it has been clearly stated in the said report that out of a total of 7 board meetings held, he had attended only 6 board meetings and did not attend the board meeting held on October 29, 2009 wherein the decision to open the bank account with Euram bank and to authorize Euram Bank to use the funds so deposited as security in connection with loan etc. was taken.*

CONSIDERATION OF SUBMISSIONS AND FINDINGS:

9. I have considered the SCNs dated May 25, 2018 and June 25, 2019 issued to the Noticees, along with its annexures, the aforementioned replies filed by the Noticees, the submissions made before me during the course of hearing and the written submissions filed thereafter. The question to be determined in the present proceedings is whether the Noticees have violated the provisions of SEBI Act, 1992 and PFUTP Regulations, 2003, as alleged in the SCNs.
10. Before dealing with the issue, it would be appropriate to refer to the relevant provisions

of law which are alleged to have been violated by the Noticees and relevant extract thereof is reproduced hereunder:

Relevant extract of provisions of SEBI Act, 1992

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

Section 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;
- (d)

Relevant extract of provisions of PFUTP Regulations, 2003:

Regulation 3. Prohibition of certain dealings in securities

No person shall directly or indirectly-

- (a) buy, sell or otherwise deal in securities in a fraudulent manner;
- (b) use or employ, in connection with issue, purchase or sale of any security listed or proposed to be listed in a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of the Act or the rules or the regulations made 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.

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

- (1) Without prejudice to the provisions of regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities.
- (2) Dealing in securities shall be deemed to be a fraudulent or an unfair trade practice if it involves fraud and may include all or any of the following, namely:—
 - (a).....
 - (b).....
 - ...
 - (f) publishing or causing to publish or reporting or causing to report by a person dealing in securities any information which is not true or which he does not believe to be true prior to or in the course of dealing in securities;
 - (g)...
 - (h)...
 -
 - (k) an advertisement that is misleading or that contains information in a distorted manner and which may influence the decision of the investors;
 - (l).....
 - (m).....
 -
 - (r) Planting false or misleading news which may induce sale or purchase of securities;
 -”

11. Before proceeding with the merits of the matter, it would be appropriate to first deal with certain preliminary contentions raised by some of the Noticees. The Noticees no. 4 and 6 vide their respective replies, have submitted that the SCN pertains to issuance of GDR by the company in 2010, and there has been an inordinate delay of 9 years in the initiation of the present proceedings against them and it is highly unreasonable for SEBI

to expect them to keep all the documents pertaining to the transaction intact after such a long time. The Noticees have relied upon the observations of the Hon'ble SAT in the case of *Bharat J Patel vs. SEBI (Order dated September 09, 2020)*, *ICICI Bank Ltd. vs. SEBI (Order dated July 08, 2020 in SAT Appeal no. 583 of 2019)*, *Ashok Shivilal Rupani & Ors vs. SEBI (Appeal no. 417 of 2018)*, *Ashlesh Gunvantbhai Shah & Ors vs. SEBI (Order dated Jan 31, 2020 in Appeal no. 169 of 2019)*, *Aditi Dalal vs SEBI (Order dated November 28, 2011 in SAT Appeal no. 143 of 2011)*, *Order dated Feb 28, 2019 of the Supreme Court in Adjudicating Officer, SEBI vs. Bhavesh Pabari (Civil Appeal No. 11311 of 2013)* and *Order dated August 27, 2013 of the Hon'ble SAT in HB Stockholdings Ltd vs. SEBI reported in Manu/SB/0039/2013* to contend that there has been inordinate delay in the initiation of the proceedings. In this regard, I note that in the present case, SEBI investigated issue of GDRs in the overseas markets by the Indian companies on receipt of a complaint, in the year 2009, regarding misuse of GDR route by few companies. The investigation *prima facie* revealed that in many of the GDR issues, money for subscribing to GDR was availed as a loan by the subscribers, from an overseas Bank wherein the issuer company gave security for such loan taken by the subscribers, by pledging/creating charge on the GDR issue proceeds. It was also observed that such subscribers subscribed the GDRs without any valid consideration and sold the underlying shares in the securities market in India. Accordingly, where such *modus operandi* was *prima facie* observed such GDR issues made before the year 2009 were examined. SEBI initiated investigation as soon as SEBI came to know that such companies have adopted the *modus operandi* as referred to above. Since, the GDRs are issued abroad and related transactions were carried out outside India, SEBI had to call information from the various entities situated abroad in such large number of fraudulent GDR issues. Such information *inter alia* included seeking information on diversion of funds and subsequent tracing of proceeds from large number of entities and the details of (a) GDR issuer companies, (b) custodian of securities, (c) overseas depository, (d) overseas banks, (e) subscribers of GDR issue (mostly overseas), (f) lead manager, (g) various layers of transactions, etc. These information were not readily forthcoming. Therefore, SEBI had to collect information and documents from various sources including approaching the foreign regulators for assistance in procuring information and documents from the concerned entities situated outside India from many

jurisdictions. The foreign regulators had also to collect this information from the concerned entities and then to furnish to SEBI. Thus, the process of collection of information in the matter was complex, tedious and time consuming and various dots were to be connected. It is noted from SEBI order dated June 16, 2016 that investigation was initiated in respect of 59 GDR issues made by 51 Indian Companies during the period 2002 to 2014. Birla Power Solutions Limited (Noticee No. 1) was one such GDR issuer where such *modus operandi* was also observed and the investigation was completed in April 2018. I note that after completion of the investigation, the SCN was issued to the Noticees no. 1 to 4 on May 25, 2018 and thereafter, to Noticees no. 5 and 6 on June 25, 2019. From the above facts and circumstances of the case, it cannot be said that there was inordinate and unnecessary delay in the matter as contended by the Noticees. It is further noted that there is no provision in the SEBI Act, 1992 which provides limitation period for taking action for the violation of the provisions of the Act or the Regulations made thereunder. In terms of Section 24(1) of the SEBI Act, 1992, any contravention to the provisions of SEBI Act and the Rules and Regulations framed thereunder is punishable with imprisonment for a term which may extend to the period of ten years and thus there is no limitation for initiating action for the same. In *Ravi Mohan & Ors. v. SEBI* and other connected appeals decided on August 27, 2013, the Hon'ble SAT while referring to its own decision in *HB Stockholdings Ltd. v. SEBI* (Appeal no. 114 of 2012 decided on August 27, 2003) and decision of Hon'ble Supreme Court in *Collector of Central Excise, New Delhi v. Bhagsons Paint Industry (India)* reported in 2003 (158) ELT 129 (S.C.), held as under:

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

12. Further, I note that none of the aforesaid cases referred to by the Noticees deals with GDR issue which involved complex investigation where numerous entities involved were situated outside India and information had to be collected with the help of overseas regulators, whereas, in the matter of *Jindal Cotex Ltd. and others Vs. SEBI (Appeal No. 376 of 2019 decided on 05.02.2020)* while dealing with an appeal emanating from the similar GDR issue wherein a plea of delay was also taken by the appellant therein, Hon'ble SAT observed as under:

".....Arguments on delay in investigation and consequently affecting natural justice are also devoid of any merit in the matter since this Tribunal is aware of the complexity involved in the entire manipulative GDR issue; how long it took SEBI to gain information relating to the various entities from multiple jurisdictions in the matter of PAN Asia Advisors Limited (Supra) and Cals Refineries Limited (Supra) etc....."

Hence, in view of the aforesaid facts and circumstances of the present case, I find that there is no inordinate delay in the present matter, as alleged by the Noticees no. 4 and 6 and the contention of Noticees no. 4 and 6 in this regard is untenable.

13. I note that Noticee no. 4 has submitted that inspection of all the documents sought for by the Noticee including all the minutes of the board meeting/investigation report have not been furnished/given to the Noticee. Further, that only extracts of certain documents, such as the Annual Report, have been provided to the Noticee, which extracts are not sufficient. Further, Noticee no. 5 has submitted that inspection of the relevant documents as sought by him vide letter dated August 07, 2019 have not been provided to him. In this respect, I note that copies of all documents which were relied upon by SEBI in making allegations in the SCN have been provided to the Noticee no. 4 along with the SCN dated May 25, 2018, as detailed in para 1 above and inspection of all these documents have been given to Noticee no. 4 on June 26, 2018. Further, copies of all documents which were relied upon by SEBI in making allegations in the SCN have been provided to the Noticee no. 5 along with the SCN dated June 25, 2019, as detailed in para 1 above and inspection of all these documents have been given to Noticee no. 5

on August 02, 2019. I find that it satisfies the requirement of principles of natural justice. However, Noticees no. 4 and 5 have requested for inspection of various other documents such as all the minutes of the board meetings of the Company held in the FY 2009-10 and the SEBI investigation report in the matter. In this regard, I note that the Company has been directed to be wound up vide Order dated August 28, 2014 of the Hon'ble Bombay High Court and an Official Liquidator has been appointed in this regard. Accordingly, the documents/records of the Company, including the minutes of the board meetings for the FY 2009-10, are not available to the Noticees as directors of the Company, and are also not available with SEBI, as the same are in possession of the Official Liquidator. Further, since the minutes of the board meeting dated October 29, 2009 are not available with SEBI, the same have not been relied upon in the SCN. Accordingly, the request for inspection of all the minutes of the board meetings of the Company in the FY 2009-10, is untenable. Further, I note that the relevant findings of the investigation report have been provided for and captured in the SCNs that have been issued to the Noticees. Inspection of the SCN and Annexures have also been provided to the Noticees no. 4 and 5. Therefore, the request for inspection of the investigation report is untenable. From the SCN and its Annexures, I find that the relevant and relied upon documents in support of the SCN and also the findings of the investigation captured in the SCN have been provided to the Noticees. Therefore, the contention of the Noticees no. 4 and 5 that SEBI has not provided complete documents is untenable.

14. I find that the Noticees were provided with all the relevant documents as relied upon in the SCN as mentioned above. I note that the Noticee No. 4 and 5 have filed detailed replies to the SCN. I, further, note that the copies of some of the documents relied upon, were obtained by SEBI during investigation, through overseas regulators. The contents of these documents have been corroborated from various other documents and transactions, which have been provided as annexures to the SCN, as mentioned in para 1 above, and I note that Noticees no. 4 and 5 have not disputed the contents of these documents for which inspection was also provided to them on June 26, 2018 and August 02, 2019, respectively. As copies of all the documents relied upon by SEBI in the SCNs were already provided to the Noticees in response thereto Noticees have filed detailed replies, thus, I find that no prejudice has been caused to any of the Noticees in defending

their interest and contesting the allegation made against them in the SCN. In this regard, it would be appropriate to refer to the Order of Hon'ble SAT dated February 12, 2020 in **Shruti Vora vs. SEBI (Appeal No. 28 of 2020)** wherein, it was observed that:

“19. The contention that the appellant is entitled for copies of all the documents in possession of the AO which has not been relied upon at the preliminary stage when the AO has not formed any opinion as to whether any inquiry at all is required to be held cannot be accepted. A bare reading of the provisions of the Act and the Rules as referred to above do not provide supply of documents upon which no reliance has been placed by the AO, nor even the principles of natural justice require supply of such documents which has not been relied upon by the AO. We are of the opinion that we cannot compel the AO to deviate from the prescribed procedure and supply of such documents which is not warranted in law. In our view, on a reading of the Act and the Rules we find that there is no duty cast upon the AO to disclose or provide all the documents in his possession especially when such documents are not being relied upon.”

15. I note that the contention on the inspection of documents raised by the Noticees no. 4 and 5 is squarely covered by the decision of the Hon'ble SAT in the aforesaid case, as all the relevant documents relied upon in the SCN have been provided to the Noticees no. 4 and 5 as Annexures to the SCN as stated in para 1 above and inspection of the same was also granted to the Noticees no. 4 and 5 on June 26, 2018 and August 02, 2019, respectively. Thus, in view of the above, I find that the contention made by the Noticees no. 4 and 5 that SEBI has failed to provide inspection of all documents on which it has relied upon is untenable.

16. On the merits of the case, I note that it has been alleged in the SCN that BPSL issued GDR in two tranches in the year 2010, the details of which are as under:

GDR issue date	No. of GDRs issued (mn.)	Capital raised (USD mn.)	Local custodian	No. of equity shares underlying GDRs	Global Depository Bank	Lead Manager	Bank where GDR proceeds deposited	GDRs listed on
27 Jan, 2010	5.85 (at USD 3.42 per GDR)	20.01	HSBC Mumbai	29,25,00,000	The Bank of New York Mellon	Pan Asia Advisors Limited	EURAM Bank, Austria	Luxembourg Stock Exchange
09 July, 2010	21.24 (at USD 2.52 per GDR)	53.53		1,06,21,92,350				

17. It is alleged in the SCN that Vintage entered into Loan Agreements with EURAM Bank on December 21, 2009 for amount of USD 20.01 million for subscribing to GDR ONE issue of BPSL and July 05, 2010 for amount of USD 53.53 million for subscribing to GDR TWO issue of BPSL. Simultaneously, Pledge Agreements dated December 21, 2009 and July 05, 2010 were entered into between BPSL and EURAM Bank for providing security towards the said loans obtained by Vintage from EURAM Bank and the Pledge Agreements were signed by Mr. P.V.R. Murthy (Noticee No. 2) Director of BPSL and Mr. N. Nagesh (Noticee no. 3) Company Secretary of BPSL, as authorized in the Board Meeting of BPSL dated October 29, 2009, wherein, a resolution was also passed authorizing the EURAM Bank to use the GDR proceeds as security against loan if any as well as to enter into any escrow agreement or similar agreements if and when so required. I note that BPSL has not made any corporate announcements with respect to issuance of GDRs on January 27, 2010 (GDR ONE). Further, I note that the Company has made corporate announcement dated July 09, 2010 in respect to issuance of GDRs on July 09, 2010, but did not mention how many allottees/subscribers were there to the said issue of GDRs on July 09, 2010. However, during investigation, it was found that the GDR subscription money (USD 20.01 million for GDR ONE and USD 53.53 million for GDR TWO) was received from only one entity i.e. Vintage. The SCN further alleges that BPSL failed to inform the stock exchanges about the Pledge agreements dated December 21, 2009 and July 05, 2010 and that the GDR issue of BPSL was subscribed by only one entity, i.e., Vintage and it is alleged that BPSL has failed to provide correct information to the stock exchanges about the list of subscribers to the issue. From the account statement of Vintage loan account, it was noted that the Vintage repaid the loan in several instalments from March 2010 to June 2010 for GDR ONE and from July 2010 to July 2011 for GDR TWO. Further, from BPSL's EURAM Bank account statement and Vintage's loan account statement, it was observed that only after Vintage repaid loan instalments, on same day or later equal/ less amount of money was transferred from BPSL's EURAM Bank account to BPSL's bank account in India, in it's UAE subsidiary's bank account and to other certain entities. Further, it is alleged that this misleading information had the potential to influence the decision of investors into believing that the GDRs were successfully subscribed, when in fact it was funded by BPSL itself. Based

on the above, it has been alleged in the SCN that the above acts of concealing and suppressing material facts about the fraudulent arrangement of the Loan and Pledge Agreements by BPSL and its Board of Directors are in violation of provision of SEBI Act, 1992 and PFUTP Regulations.

18. In this regard I note that BPSL in its Board Meeting dated October 29, 2009 had *inter alia* resolved to open a bank account with EURAM Bank for the purpose of receiving the subscription money in respect of GDRs issued by the Company and authorized Mr. P.V.R. Murthy (Noticee No. 2), Director of BPSL and Mr. N. Nagesh (Noticee no. 3), Company Secretary of BPSL, to sign, execute, any application, agreement, escrow agreement, document, undertaking, confirmation, declaration etc. as may be required by the EURAM bank. Further, it was resolved to authorize the EURAM bank to use the funds so deposited in the aforesaid bank account as security in connection with loans, if any, as well as to enter into any escrow agreement or similar agreements, if and when, so required. Thereafter, I note that loan agreements dated December 21, 2009 and July 05, 2010 were signed between Vintage and EURAM Bank for loan of USD 20.01 million for GDR ONE and USD 53.53 million for GDR TWO and it was *inter alia* stated in the loan agreement dated December 21, 2009 that the purpose of the loan was “*To provide funding enabling Vintage FZE to take down GDR issue of 5,850,000 Luxembourg public offering and may only be transferred to Euram account no. 580010, Birla Power Solutions Ltd.*”. Further, in the loan agreement dated July 05, 2010, it was *inter alia* stated that the purpose of the loan was “*To provide funding enabling Vintage FZE to take down GDR issue of 21,243,847 Luxembourg public offering and may only be transferred to Euram account no. 580010, Birla Power Solutions Ltd.*”. Hence, it is clear that the loans taken by Vintage from EURAM Bank were for the purpose of subscribing to GDR ONE and GDR TWO issues of BPSL. Simultaneously, Noticee no. 2 and 3, signed a Pledge Agreement dated December 21, 2009 to secure the loan taken by Vintage for subscribing to the GDR ONE issue of BPSL and Noticee no. 3 signed a Pledge Agreement dated July 05, 2010 to secure the loan taken by Vintage for subscribing to the GDR TWO issue of BPSL. I note that it is clearly stated in the Pledge Agreement dated December 21, 2009 that the “*By loan agreement K211209-004 (hereinafter referred to as the “Loan Agreement”) dated 21 December 2009, the Bank granted a loan (hereinafter*

referred to as the "Loan") to Vintage FZE, AAH-213, Al Ahamadi House, Jebel Ali Free Trade Zone, Jebel Ali, Dubai, United Arab Emirates (the "Borrower") in the amount of USD 20,007,000. The Pledgor has received a copy of the Loan Agreement No. K211209-004 and acknowledges and agrees to its terms and conditions." Further, it is clearly stated in the Pledge Agreement dated July 05, 2010 that *"By loan agreement K210610-004 (hereinafter referred to as the "Loan Agreement") dated 5 July 2010, the Bank granted a loan (hereinafter referred to as the "Loan") to Vintage FZE, AAH-213, Al Ahamadi House, Jebel Ali Free Trade Zone, Jebel Ali, Dubai, United Arab Emirates (the "Borrower") in the amount of USD 53,534,494.44. The Pledgor has received a copy of the Loan Agreement No. K210610-004 and acknowledges and agrees to its terms and conditions."* Hence, it is clear that the Pledge Agreements were entered into between BPSL and EURAM Bank for the purpose of securing the loan taken by Vintage on December 21, 2009 and July 05, 2010 from EURAM Bank for the purpose of subscribing to the GDR ONE and GDR TWO issues of BPSL, and that copy of these loan agreements were received by BPSL. Since the 1st Pledge Agreement was signed on December 21, 2009 and the GDR ONE issue of BPSL took place on January 27, 2010 and the 2nd Pledge Agreement was signed on July 05, 2010 and the GDR TWO issue of BPSL took place on July 09, 2010, it is evident that BPSL was aware of the loan agreements and Pledge Agreements during the time of issue of GDR ONE and GDR TWO. Hence, it is clear that BPSL had proceeded with the GDR issue on January 27, 2010 and July 09, 2010 with the knowledge that Vintage would be the sole subscriber to both the GDR issues. However, I find that BPSL failed to inform the stock exchanges about both the Pledge Agreements or that Vintage was the sole subscriber to both the GDR issues. This fact that BPSL was aware of the loan agreement, Pledge Agreement and that Vintage was the sole subscriber to the GDR issue is evident from BPSL's EURAM Bank account statement and Vintage's loan account statement, wherein, it was observed that only after Vintage repaid loan instalments, on same day or later equal/less amount of money was transferred from BPSL's EURAM Bank account to BPSL's bank account in India, in it's UAE subsidiary's bank account and to other certain entities. Therefore, I find that the Company and its Board of directors who attended Board meeting dated October 29, 2009, had devised a fraudulent scheme of issue of GDRs.

19. At the outset, I note that the Noticees have contended that the SCN is repeating the same allegation again and again and only general allegations have been made without

adducing any documentary evidence. In this regard, I find that the following relevant documentary evidence have been provided to the Noticees along with the SCN:

- a) **Company Resolution dated October 29, 2009:** I find that in the Board Meeting dated October 29, 2009, the Company had resolved that a bank account will be opened with EURAM Bank for the purpose of receiving subscription money in respect of the GDR issues. It was also resolved to authorize the bank to use the funds so deposited in the aforesaid bank account as security in connection with loans if any as well as to enter into any escrow agreement or similar agreements if and when so required. Further, the Board resolved to authorize Mr. P.V.R. Murthy (Noticee No. 2) and Mr. N. Nagesh (Noticee no. 3) to sign, execute, any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and other paper(s) from time to time, as may be required by EURAM Bank and to carry and affix, Common Seal of the Company thereon, if and when so required. Copy of the said Resolution dated October 29, 2009 has been provided to the Noticees as **Annexure – 8** to the SCN
- b) **Pledge Agreements dated December 21, 2009 and July 05, 2010:** The Pledge Agreements were signed between EURAM Bank and BPSL pursuant to the decision taken by BPSL during the Board Meeting held on October 29, 2009. It is through this meeting, that authorization was granted to Mr. P.V.R. Murthy (Noticee No. 2) and Mr. N. Nagesh (Noticee no. 3) to sign the Pledge Agreements dated December 21, 2009 and July 05, 2010 for securing the loans taken by Vintage from EURAM Bank for subscribing the GDR ONE and GDR TWO issues of BPSL. I note that the said Pledge Agreements dated December 21, 2009 and July 05, 2010 have also been provided to the Noticees as **Annexures – 10 and 11** to the SCN.
- c) **Loan Agreements dated December 21, 2009 and July 05, 2010:** Vintage had taken loans from EURAM Bank for the amount of USD 20.01 million for subscribing to the GDR ONE and USD 53.53 million for subscribing to the GDR TWO issues of BPSL. The loan agreements dated December 21, 2009 and July 05, 2010 between Vintage and EURAM Bank have been provided to Noticees as **Annexure – 5 and 6** to the

SCN.

- d) **Bank Account Statements:** These are the bank account statements of BPSL's EURAM Bank account and Vintage's loan account statement for the loan taken from EURAM Bank, wherein, it was observed that only after Vintage repaid loan instalments, on same day or later equal/ less amount of money was transferred from BPSL's EURAM Bank account to BPSL's bank account in India, in it's UAE subsidiary's bank account and to other certain entities. The loan account statement of Vintage have been provided to the Noticees as **Annexure – 7** to the SCN and the account statements of BPSL have been provided by to the Noticees during the inspection granted to them.
- e) **Extracts of Annual Report of BPSL for FY 2009-10:** The details of the number of Board meetings that took place in the FY 2009-10 and the number of Board meetings that each director had attended in the FY 2009-10 is mentioned in the Annual Report of BPSL for FY 2009-10. The extracts of the Annual Report of BPSL for FY 2009-10 where the aforesaid details have been mentioned have been provided as **Annexure – 9** to the SCN.

20. Hence, I find that allegations in the SCNs are clear and the relevant documentary evidence, *inter alia* as listed above, have been provided to the Noticees. Further, from the said documents, I find that the Company had facilitated subscription of its own GDR issues by entering into an arrangement where Vintage, the only subscriber to the GDR ONE and GDR TWO issued by BPSL, obtained loans from EURAM Bank for subscribing the GDR ONE and GDR TWO issue of BPSL, and BPSL pledged the GDR proceeds with EURAM Bank for securing the loans taken by Vintage from EURAM Bank.
21. With regard to the allegations in the SCN, I note that BPSL has not filed any reply to the SCN as the Company is under liquidation. I note that vide Order dated August 28, 2014, Hon'ble Bombay High Court directed that BPSL should be wound up and appointed Official Liquidator of Bombay High Court as the liquidator to BPSL. I note that the personal hearing for BPSL on January 21, 2019 before me was attended by the Official

Liquidator, and at his request, two weeks was granted for filing written submissions. However, written submissions have not been filed on behalf of the Company till date of passing of this order. Hence, I find that no reply or written submissions have been filed by the Company or on behalf of the Company with regard to the allegations in the SCN.

22. However, I note that Noticee no. 4, 5 and 6 have *inter alia* made some submissions with regard to the allegations made against the Company in the SCN. The Noticees have submitted that it was never discussed at any meeting of the Board of Directors that the funds received by issuing GDRs were proposed to be pledged as security for any loan purportedly obtained by Vintage. Further, that nowhere in the resolution, it has been specifically stated that the proceeds are pledged on account of loan availed by Vintage to subscribe to the GDR issue. The said Noticees have also submitted that BPSL had not given any authorization to Noticees no. 2 and 3 to sign the said Pledge agreements or to enter into any such arrangement. Further, that Noticees no. 2 and 3 never informed the Board or BPSL that they have entered into pledge agreements with EURAM Bank.
23. In this regard, I note that the Board Resolution of the Company dated October 29, 2009 reads as under:

"RESOLVED THAT a bank account be opened with Euram Bank ("the Bank") or any branch of Euram Bank, including the Offshore Branch, outside India for the purpose of receiving subscription money in respect of the Global Depository Receipt issue of the Company."

Resolution also states that:

"RESOLVED FURTHER THAT the following executives be and are hereby jointly and severally authorized to sign, execute, any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and other paper(s) from time to time as may be required by the Bank and to carry and affix, Common Seal of the Company thereon, if and when so required."

- 1. Mr. P.V.R. Murthy*
- 2. Mr. N. Nagesh*

Resolution further states that:

RESOLVED FURTHER THAT the above named executives are jointly and severally authorize to draw cheques and other documents, and to give instructions from time to time as may be necessary to the said Euram Bank or any of branch of Euram Bank, including the Offshore Branch, for the purpose of operation of and dealing with the said bank account and carry out other relevant and necessary transactions and generally to take all such steps and to do all such things as may be required from time to time on behalf of the Company."

Resolution further states that:

"RESOLVED FURTHER THAT the Bank be and is hereby authorized to use the funds so

deposited in the aforesaid bank account as security in connection with loans if any as well as to enter into any Escrow Agreement or similar arrangements if and when so required.”

24. From the above, I note that it is clearly mentioned in the Board resolution dated October 29, 2009 of BPSL that “.....*the Bank be and is hereby authorized to use the funds so deposited in the aforesaid bank account as security in connection with loans if any...*”. It does not state that the bank is authorized to use the funds as security in connection with loans only taken by the Company. On the contrary, the Company had authorized the opening of bank account with EURAM Bank for the purpose of receiving subscription money in respect of the GDR issue and authorized the bank to use the funds deposited in the said bank account as security in connection with “*loans if any*”. Further, it is clear that Mr. P.V.R. Murthy (Noticee no. 2) and Mr. N. Nagesh (Noticee no. 3) were jointly and severally authorized to sign, execute, any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and other paper(s) from time to time as may be required by the EURAM Bank and to carry and affix, Common Seal of the Company thereon, if and when so required. Further, they were authorized to draw cheques and other documents, and to give instructions from time to time as may be necessary to the said EURAM Bank or any of branch of EURAM Bank, including the Offshore Branch, for the purpose of operation of and dealing with the said bank account, carry out other relevant and necessary transactions and generally to take all such steps and to do all such things as may be required from time to time on behalf of the Company. Hence, I find that Noticees no. 2 and 3 have acted and signed the Pledge Agreements on the basis of the authority given by BPSL. I find that a company has to be held responsible for all resolutions passed by the board of directors of the Company for actions taken to implement such decisions and the company also reaped the benefit of such GDR issue/subscription money. A Company cannot wriggle out of its obligations with respect to resolutions passed by it in its board meetings, agreements entered into by it with banks and transactions made by them pursuant to such agreements, and simply throw the entire obligation and liability of the company and its directors on the directors/persons authorized to enter into such agreements with the banks. Further, I note that the Pledge Agreements dated December 21, 2009 and July 05, 2010 signed by Noticee no. 2 and 3 *inter alia* states as under:

Pledge Agreement dated December 21, 2009:

"By loan agreement K211209-004 (hereinafter referred to as the "Loan Agreement") dated 21 December 2009, the Bank granted a loan (hereinafter referred to as the "Loan") to Vintage FZE, AAH-213, Al Ahamadi House, Jebel Ali Free Trade Zone, Jebel Ali, Dubai, United Arab Emirates (the "Borrower") in the amount of USD 20,007,000. The Pledgor has received a copy of the Loan Agreement No. K211209-004 and acknowledges and agrees to its terms and conditions.

.....

2. Pledge

2.1 In order to secure any and all obligations, present and future, whether conditional or unconditional of the Borrower towards the Bank under the Loan Agreement and any and all respective amendments thereto and for any and all other current or future claims which the Bank may have against the Borrower in connection with the Loan Agreement- including those limited as to condition or time or not yet due-irrespective of whether such claims have originated from the account relationship, from bill of exchange, guarantees and liabilities assumed by the Borrower or by the Bank, or have otherwise resulted from business relations, or have been assigned in connection therewith to the Bank ("the Obligations") the Pledgor hereby pledges to the Bank the following assets as collateral to the Bank:

2.1.1 all of its rights, title and interest in and to the securities deposited from time to time at present or hereafter (hereinafter referred to as the "Pledged Securities") and the balance of funds up to the amount of USD 20,007,000 existing from time to time at present or hereafter on the securities account(s) no. 580010 held with the Bank (hereinafter referred to as the "Pledged Securities Account") and all amounts credited at any particular time therein.

2.1.2 all of its right, title and interest in and to, and the balance of funds existing from time to time at present or hereafter on the account(s) no. 580010 kept by the Bank (hereinafter referred to as the "Pledged Time Deposit Account") and all amounts credited at any particular time therein. The interest rate on deposit in the amount of the facility amount of the Loan Agreement will be fixed at 1.00% p.a."

Pledge Agreement dated July 05, 2010:

"By loan agreement K210610-004 (hereinafter referred to as the "Loan Agreement") dated 5 July 2010, the Bank granted a loan (hereinafter referred to as the "Loan") to Vintage FZE, AAH-213, Al Ahamadi House, Jebel Ali Free Trade Zone, Jebel Ali, Dubai, United Arab Emirates (the "Borrower") in the amount of USD 53,534,494.44. The Pledgor has received a copy of the Loan Agreement No. K210610-004 and acknowledges and agrees to its terms and conditions.

.....

2. Pledge

2.1 In order to secure any and all obligations, present and future, whether conditional or unconditional of the Borrower towards the Bank under the Loan Agreement and any and all respective amendments thereto and for any and all other current or future claims which the Bank may have against the Borrower in connection with the Loan Agreement- including those limited as to condition or time or not yet due-irrespective of whether such claims have originated from the account relationship, from bill of exchange, guarantees and liabilities assumed by the Borrower or by the Bank, or have otherwise resulted from business relations, or have been assigned in connection therewith to the Bank ("the Obligations") the Pledgor hereby pledges to the Bank the following assets as collateral to the Bank:

2.1.1 all of its rights, title and interest in and to the securities deposited from time to time at present or hereafter (hereinafter referred to as the "Pledged Securities") and the balance of funds up to the amount of USD 53,534,494.44 existing from time to time at present or hereafter on the securities account(s) no. 580010 held with the Bank (hereinafter referred to as the "Pledged Securities Account") and all amounts credited at any particular time therein.

2.1.2 all of its right, title and interest in and to, and the balance of funds existing from time to time at present or hereafter on the account(s) no. 580010 kept by the Bank (hereinafter referred to as the "Pledged Time Deposit Account") and all amounts credited at any particular time therein. The interest rate on deposit in the amount of the facility amount of the Loan Agreement will be fixed at 1.00% p.a."

25. Hence, I note that it has been expressly given in the Pledge Agreement dated December 21, 2009 that BPSL would be depositing in its account an amount not exceeding USD 20,007,000 as security for all the obligations of Vintage under the loan agreement dated December 21, 2009. Further, it has been expressly given in the Pledge Agreement dated July 05, 2010 that BPSL would be depositing in its account an amount not exceeding USD 53,534,494.44 as security for all the obligations of Vintage under the loan agreement dated July 05, 2010. Further, I note that the loan agreement dated December 21, 2009 between Vintage and EURAM Bank states that the purpose of the loan was *"To provide funding enabling Vintage FZE to take down GDR issue of 5,850,000 Luxembourg public offering and may only be transferred to Euram account nr. 580010, Birla Power Solutions Ltd."* and in the loan agreement dated July 05, 2010 that the purpose of the loan was *"To provide funding enabling Vintage FZE to take down GDR issue of 21,243,847 Luxembourg public offering and may only be transferred to Euram account nr. 580010, Birla Power Solutions Ltd."* Further, it has been stated in the Pledge Agreements that copy of the loan agreements have been received by the pledger i.e. BPSL. Hence, it is clear that BPSL who had authorised and instructed Noticees no. 2 and 3 to sign the Pledge Agreements dated December 21, 2009 and July 05, 2010 was well aware of the Pledge Agreements and the loan agreements. In view of the above, I find the contentions of the Noticees that it was not discussed during the Board meeting that the funds received by issuing GDRs were to be pledged as security for any loan purportedly obtained by Vintage or that BPSL had not given any authorization to Noticees no. 2 and 3 to sign the said Pledge Agreements or to enter into any such agreement, as untenable.
26. Noticee no. 6 has further submitted that the SCN has not brought out any concrete figure of the loss incurred by the Indian investors due to the announcement made by the Company. In this regard, I note that BPSL did not make any corporate announcement with respect to issuance of GDRs on January 27, 2010 (GDR ONE). However, it was

noted that in the Annual Report for FY 2009-10 of BPSL, it was stated that Company has issued 5,850,000 GDRs on January 27, 2010. Hence, I find that no corporate announcement was made by BPSL with regard to issuance of GDRs on January 27, 2010 and BPSL also failed to inform the stock exchanges about the execution of its Pledge Agreement dated December 21, 2009 securing the loan availed by Vintage for subscribing of its GDR ONE issue or that the GDR ONE issue was subscribed by only one entity. I note that BPSL had made disclosure to BSE about its issuance of GDRs on July 09, 2010 (GDR TWO) vide its corporate announcement dated July 09, 2010. However, the corporate announcement did not mention about execution of 'Pledge Agreement' dated July 05, 2010 by BPSL securing the loan availed by Vintage for subscribing of its GDR issue or that the GDR issue was subscribed by only one entity. Instead, BPSL in its corporate announcement dated July 09, 2010 stated that, *"...Birla Power Solutions Ltd has informed BSE that the Committee of the Board of Directors of the Company at its meeting duly convened and held on July 09, 2010, have allotted to 'The Bank of New York Mellon' (Depository), 1,062,192,350 fully paid equity shares of Re. 1/- each against underlying 21,243, 847 Global Depository Receipts."* This announcement conveys that there was considerable demand for its GDR in the overseas market and the same were successfully subscribed. Thus, the investors in India were made to believe that the issuer company i.e. BPSL has acquired a good reputation in terms of investment potential and, therefore, foreign investors have successfully subscribed to the GDR issue. Such statements had the potential to induce the investors in India to remain invested in the Company or to invest in the shares of the Company. In fact there was only one subscriber i.e. Vintage which had subscribed to the GDR issue of BPSL by obtaining loans from EURAM Bank and that the loans were further secured by the BPSL itself by pledging the GDR proceeds. I find that all these events were price sensitive information and could have impacted the scrip price of BPSL. Thus, I find that the corporate announcements made by BPSL on July 09, 2010 regarding allotment of GDR issues had the potential to mislead the investors and/ or create a false impression in the minds of the investors that the GDR issue was fully subscribed and that the funds are infused in the Company and utilized for the growth of the Company. Further, that many foreign investors have subscribed the shares and therefore, it is a good Company to remain invested or to invest in the Company.

27. In this regard, it would be appropriate to refer to the Order of the Hon'ble SAT dated October 25, 2016 in ***Pan Asia Advisors Limited vs. SEBI (Appeal No. 126 of 2013)*** wherein, while interpreting the expression of 'fraud' under the PFUTP Regulations, 2003, it was observed that:

"From the aforesaid definition (of 'fraud') it is absolutely clear that if a person by his act either directly or indirectly causes the investors in the securities market in India to believe in something which is not true and thereby induces the investors in India to deal in securities, then that person is said to have committed fraud on the investors in India. In such a case, action can be taken under the PFUTP Regulations against the person committing the fraud, irrespective of the fact any investor has actually become a victim of such fraud or not. In other words, under the PFUTP Regulations, SEBI is empowered to take action against any person if his act constitutes fraud on the securities market, even though no investor has actually become a victim of such fraud. In fact, object of framing PFUTP Regulations is to prevent fraud being committed on the investors dealing in the securities market and not to take action only after the investors have become victims of such fraud."

28. Further, Hon'ble SAT in ***Jindal Cortex Ltd. Vs. SEBI (Appeal No. 376 of 2019 decided on February 05, 2020)*** observed as under:

*"9..... Such judgements include **PAN Asia Advisors Limited and Anr. vs. SEBI (Appeal No. 126 of 2013 decided on 25.10.2016)** and **Cals Refineries Limited vs. SEBI (Appeal No. 04 of 2014 decided on 12.10.2017)**. The modus operandi adopted in all such cases have been similar i.e. the subscriber to the GDR issue (Vintage here) taking a loan from a foreign bank/ investment bank (EURAM here) enabled by a Pledge Agreement signed between the issuer company (JCL here) and the loaner bank. This arrangement itself vitiates the entire issue of GDR as it is through an artificial arrangement supported by the company itself which enables the subscription to the GDR....."*

29. Similarly, in the matter of **SEBI v. Kanaiyalal Baldevbhai Patel (2017) 15 SCC 1**, the Hon'ble Supreme Court has observed as under:

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

30. In view of the above, I find that the act of BPSL in making misleading announcements regarding its GDR issue has resulted in 'fraud' as defined under the PFUTP Regulations, 2003 and SEBI is empowered to take action against any person if his act constitutes fraud on the securities market, even though it may not be possible to identify individual investors who have become the victim of such fraud. Hence, I find the contention of Noticee no. 6 that the SCN has not brought out any concrete figure of the loss incurred by the Indian investors due to the announcement made by the company as untenable.
31. Further, upon examining the bank account statement of Vintage loan account with EURAM Bank, I note that Vintage repaid the loan in several instalments from March 2010 to June 2010 for loan taken for GDR ONE and from July 2010 to July 2011 for loan taken for GDR TWO. Bank statement of BPSL for its account held with EURAM Bank shows that on repayment of loan of EURAM Bank in installments, equivalent amount funds from GDR issue proceeds were released by EURAM Bank in favour of BPSL, its subsidiary and other entities. From the statement of BPSL's bank account with EURAM Bank, I note that, in respect of GDR ONE, out of the GDR proceeds of USD 20.01 million, BPSL transferred USD 19.214 million to its bank account in India and USD 0.85 million to certain other entities. Further, in respect of GDR TWO, out of the GDR proceeds of USD 53.53 million, BPSL transferred USD 17.50 million to its bank account in India and USD 37.29 million to its UAE based subsidiary's bank account and USD 0.10 million to

certain other entities. From BPSL's EURAM Bank account statement and Vintage's loan account statement, I note that only after Vintage repaid loan instalments, on same day or later, equal/ less amount of money was transferred from BPSL's EURAM Bank account to BPSL's bank account in India, in it's UAE subsidiary's bank account and to other certain entities. Hence, from the aforesaid transfer of money by BPSL which was consequent to the repayment of loan instalments by Vintage, I find it is clear that the loans taken by Vintage from EURAM Bank for subscribing to GDR ONE and GDR TWO of BPSL was secured by BPSL.

32. In view of the above, I find that the arrangement of BPSL, in allotting GDR issue to only one entity i.e. Vintage which subscribed to the GDR issue of BPSL by obtaining loan from EURAM Bank and the same was secured by BPSL by pledging its GDR proceeds, seen along with the misleading corporate announcements made by BPSL on October 20, 2006, lead to conclusion that the same were done in pursuance of a fraudulent scheme which had the potential to mislead or induce the investors to sale or purchase of its scrip. Therefore, I find that Noticee No. 1 (Birla Power Solutions Limited) has violated the provisions of Section 12A (a) of SEBI Act, 1992 read with Regulations 3 (b) and 4(1), (2)(f), (k), (r) of PFUTP Regulations, 2003.

33. With regard to the liability of the directors of the Company i.e. Noticees no. 2, 4, 5 and 6, I note that from the Annual Report of BPSL for the FY 2009-10, it was observed that a total of 7 board meetings of BPSL were held in the FY 2009-10 i.e. on April 29, 2009, June 09, 2009, June 29, 2009, July 28, 2009, October 29, 2009, January 28, 2010 and March 25, 2010. The details of director's attendance during the FY 2009-10 as given in the said Annual Report and provided to the Noticees as Annexure-9 to the SCN, are as given under:

Sr. No.	Name and Designation	No. of Board Meetings held in FY 2009-10	No. of Board Meetings attended in FY 2009-10
1	Mr. Yashovardhan Birla Chairman Non-Executive	7	6

2	Mr. Y.P. Trivedi Independent Non-executive Director	7	6
3	Mr. Manish Malani Non-Independent Non-Executive Director (resigned with effect from 29.06.2009)	7	2
4	Mr. P.V.R Murthy Non-Independent Non-Executive Director	7	7
5	Mr. Rajesh V. Shah Independent Non-Executive Director	7	7
6	Mr. Kalyan Bhattacharya Whole Time Director and President	7	0
7	Mr. Upkar Singh Kohli Independent Non-Executive (Appointed with effect from 09.09.2009)	7	3

34. From the above, it was observed that Mr. P.V.R Murthy (Noticee no. 2) and Mr. Rajesh V. Shah (Noticee no. 4) had attended all 7 board meetings of the Company in the FY 2009-10. Thus, it is clear that Noticees no. 2 and 4 attended the meeting of board of directors of BPSL held on October 29, 2009. Pursuant to the appointment of Mr. Upkar Singh Kohli (Noticee no. 5) on September 09, 2009, there have been 3 board meetings and since Noticee no. 5 has attended 3 meetings in the FY 2009-10, it is clear that Noticee no. 5 had attended the board meeting dated October 29, 2009. As noted above, since the Company has been directed to be wound up by Order of the Hon'ble Bombay High Court dated August 28, 2014 and an Official Liquidator has been appointed, the documents/records of BPSL including the detailed Minutes of each board meeting is not available. Since the Minutes for each of the board meetings for the FY 2009-10 are not available, the attendance of some of the directors for each board meeting cannot be ascertained. Accordingly, it cannot be ascertained as to whether Mr. Yashovardhan Birla (Noticee no. 6) and Mr. Y.P. Trivedi have attended the board meeting held on October 29, 2009 because they have attended only 6 out of total 7 meetings held during the FY 2009-10. Further, I note that Mr. Manish Malani has resigned on June 29, 2009 i.e. prior to the board meeting dated October 29, 2009 and Mr. Kalyan Bhattacharya has not attended any of the board meetings for the FY 2009-10. Accordingly, the only directors whose attendance for the board meeting dated October 29, 2009 is confirmed from the

aforesaid disclosure in Annual Report of BPSL for the FY 2009-10, are Mr. P.V.R Murthy (Noticee no. 2), Mr. Rajesh V. Shah (Noticee no. 4) and Mr. Upkar Singh Kohli (Noticee no. 5).

35. With regard to the liability of Mr. P.V.R Murthy (Noticee no. 2), Mr. Rajesh V. Shah (Noticee no. 4) and Mr. Upkar Singh Kohli (Noticee no. 5), I note that Noticees no. 2, 4 and 5, as directors of the Company, attended the Board Meeting dated October 29, 2006, wherein, *inter alia* the following resolutions were passed:

“RESOLVED THAT a bank account be opened with Euram Bank (“the Bank”) or any branch of Euram Bank, including the Offshore Branch, outside India for the purpose of receiving subscription money in respect of the Global Depository Receipt issue of the Company.”

Resolution also states that:

“RESOLVED FURTHER THAT the following executives be and are hereby jointly and severally authorized to sign, execute, any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and other paper(s) from time to time as may be required by the Bank and to carry and affix, Common Seal of the Company thereon, if and when so required.

1. Mr. P.V.R. Murthy
2. Mr. N. Nagesh

Resolution further states that:

RESOLVED FURTHER THAT the above named executives are jointly and severally authorize to draw cheques and other documents, and to give instructions from time to time as may be necessary to the said Euram Bank or any of branch of Euram Bank, including the Offshore Branch, for the purpose of operation of and dealing with the said bank account and carry out other relevant and necessary transactions and generally to take all such steps and to do all such things as may be required from time to time on behalf of the Company.

Resolution further states that:

“RESOLVED FURTHER THAT the Bank be and is hereby authorized to use the funds so deposited in the aforesaid bank account as security in connection with loans if any as well as to enter into any Escrow Agreement or similar arrangements if and when so required.”

36. I note that pursuant to the above Board Resolution dated October 29, 2009, Mr. P.V.R Murthy (Noticee no. 2) and Mr. N. Nagesh (Noticee no. 3), as the authorized representatives of BPSL, had signed the Pledge Agreements dated December 21, 2009 and July 05, 2010 for the purpose of securing the loans taken by Vintage from EURAM Bank for subscribing to the GDR ONE and GDR TWO issue of BPSL. Hence, I find that the Noticees no. 2, 4 and 5, by signing the Board Resolution dated October 29, 2009

have acted as party to the fraudulent scheme of BPSL in violation of the provisions of the SEBI Act, 1992 and PFUTP Regulations.

37. In this regard, I note that Noticee No. 4 vide his replies dated February 05, 2019 and March 22, 2019 submitted that he is an Independent non-executive director of BPSL. He was appointed as an independent director on December 16, 2005 and he resigned as a Director with effect from July 8, 2013. Noticee no. 4 has submitted that as an independent director, he did not have any role in the day to day operations and management of BPSL. That he merely participated in the meeting of the Board of Directors of BPSL on October 29, 2009 where merely the necessary decision to open the bank account was taken and that the purported certified copy of the resolution allegedly signed by him does not in any manner disclose that he could have been informed about the manner in which the GDR funds which were deposited with the EURAM Bank were proposed to be used. Further, that in the absence of access to the BPSL records and inspection sought for, he does not remember signing any such certified copy. Noticee no. 4 has also submitted that he has been targeted selectively as the SCN has not been issued to Mr. Yashovardhan Birla (Noticee no. 6) and other Executive Directors or other members of the board.
38. Noticee no. 5 vide his reply dated October 20, 2020, has submitted that he was an independent director and was appointed on September 09, 2009 and has resigned from the Company on May 06, 2013. The Noticee has submitted that the SCN has been selectively issued and that the actual persons involved in taking the impugned action/decisions set out in the SCN have been excluded for unknown reasons and therefore, submitted that no further proceedings be initiated against him until such time the entire minutes of the meeting dated October 29, 2009 are made available. The Noticee no. 5 has submitted that he has merely participated in the board meeting and that as an individual director he cannot be responsible for the collective decision taken by the Board. That as an independent director, he did not have any role in the day to day operations and management of the Company. The Noticee has submitted that none of the purported documents were executed by him and he was neither a party to the documents nor did he even otherwise have any knowledge of these transactions.

39. Noticee no. 6 vide his reply dated November 07, 2020 has submitted that he was the Non-executive Chairman of BPSL from June 05, 1987 to December 27, 2012 and in view of the same, his role was limited to attending the Board meetings and was not involved in the day to day affairs of the Company. The Noticee has submitted that he did not participate in the alleged board meeting of the Company held on October 29, 2009 which authorized Mr. P.V.R Murthy and Mr. N. Nagesh to sign, execute, any application, agreement etc. which may be required by EURAM Bank and he was also not involved in making any kind of alleged corporate announcements. The Noticee has submitted that he has only signed the certified true copy of the Board Resolution based on the approved minutes and did not have authority to question the Board of Directors who have already approved the same.
40. In this regard, I note that Noticees no. 4 and 5 have not denied that they were part of the Board Meeting on October 29, 2009 when the resolution was passed for opening of account with EURAM Bank, authorizing EURAM Bank to use the funds so deposited in the aforesaid bank account as security in connection with loans if any and also authorizing Noticees no. 2 and 3 to sign, execute any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and other papers from time to time as may be required by the EURAM Bank and to carry and affix common seal of the Company thereon, if and when so required. In this regard, I note that the Board of directors play a key role in balancing the interests of managements and shareholders and the directors including independent directors are expected to, *inter alia*, ensure fairness and transparency in dealings of the Company. Where an act or omission occurs through board processes, then directors including such non-executive directors can be held liable for such acts/omissions of company, if such directors had participated in the relevant board meetings and did not act diligently. In the present case, I note that Noticees No. 4 and 5 had attended the board meeting dated October 29, 2009 of the Company wherein resolution was passed for opening a bank account with EURAM Bank and authorizing EURAM Bank to use the GDR proceeds as security against loan, if any. Thus, Noticees No. 4 and 5 were aware of authorization for pledge as the board resolution dated October 29, 2009 clearly mentioned that “.....the Bank be and is

hereby authorized to use the funds so deposited in the aforesaid bank account as security in connection with loans if any..." and the Noticees no. 4 and 5 did not raise any question as to whether any loan had been taken or proposed to be taken by the Company as the resolution authorised pledging of the funds kept in the bank account of the Company as a security in connections with loans. On the contrary, the Noticees had authorized the opening of bank account with EURAM Bank for the purpose of receiving subscription money in respect of the GDR issue and also authorized the bank to use the funds deposited in the said bank account as security in connection with loans. Further, the Noticees had authorized Noticees no. 2 and 3 to sign, execute any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and other papers from time to time as may be required by the Bank and to carry and affix common seal of the Company therein, if and when so required. Thus, I find that all the decisions pertaining to fraudulent GDR scheme of BPSL were taken at Board level, in the meeting held on October 29, 2009. The said meeting was attended by Noticee no. 4 and 5 also, therefore, the contention of Noticee no. 4 and 5 that they were not involved in the day to day affairs of BPSL, is of no consequence in so far as their liability of fraudulent scheme of GDR issues of BPSL is concerned.

41. With regard to the contention of Noticee no. 4 that he has been targeted selectively as the SCN has not been issued to Mr. Yashovardhan Birla (Noticee no. 6) and other Executive Directors or other members of the board, I note that a separate show cause notice dated June 25, 2019 was also issued to Mr. Yashovardan Birla (Noticee no. 6) and Mr. Upkar Singh Kohli (Noticee no. 5) in the present proceedings. With regard to the other directors/members of the board, as discussed in the above para no. 34, it cannot be ascertained whether Mr. Y.P. Trivedi had attended the board meeting dated October 29, 2009 and hence, proceedings have not been initiated against Mr. Y.P. Trivedi. Further, I note that Mr. Manish Malani has resigned on June 29, 2009 i.e. prior to the board meeting dated October 29, 2009 and Mr. Kalyan Bhattacharya has not attended any of the board meetings for the FY 2009-10, and for the said reasons, Mr. Manish Malani and Mr. Kalyan Bhattacharya do not figure in the SCNs issued by SEBI. In view of the above, I find the contention of Noticee no. 4 that he has been targeted selectively, as untenable.

42. I note that Noticee No. 5 has relied upon Circular dated March 02, 2020 being General Circular No. 1/2020 bearing number F. No. 16/1/2020-Legal issued by the Ministry of Corporate Affairs to Regional Directors and Registrar of Companies, which *inter alia* states that:

“3. Section 149(12) is a non obstante clause which provides that the liability of an independent director (ID) or a non-executive director (NED) not being promoter or key managerial personnel would be only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. In view of the express provisions of section 149(12), IDs and NEDs (non-promoter and non-KMP), should not be arrayed in any criminal or civil proceedings under the Act, unless the above mentioned criteria is met.”

43. In this regard, the Noticee no. 5, while relying upon the aforesaid circular, has contended that Independent Directors should not be arrayed in any civil or criminal proceedings under the Companies Act, 2013, unless the criterial contained in the said Section 149(12) is met. I note that the directions contained in the said circular are applicable for launch of prosecution or internal adjudication by RoC, Regional Directors or Official Liquidators for offences under the provisions of Companies Act, 2013. The said circular has no relevance to the facts and circumstances of the present case, since, the present proceedings are civil proceedings for determining violation of the provisions of securities laws, as alleged in the SCNs. However, even on the parameters laid down in the said circular i.e. such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently, the Noticee no. 5 is liable because he attended the board meeting dated October 29, 2009 and did not raise any objection/question to the resolution so as to show that he acted diligently.

44. I note that Noticees no. 4 and 5 have also referred to Section 149(12) of the Companies Act, 2013 to contend that an Independent Director cannot and ought not to be blamed for a fraud or irregularity, especially when he has no knowledge whatsoever of the same. Further, they have also referred to Regulation 25(5) of the Securities and Exchange

Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015 (hereinafter referred to as “**LODR Regulations**”) to contend that Board processes are vital for determining the role/liability of an Independent Director. In this regard, as discussed in the above paras, I note that the Board of directors plays a key role in balancing the interests of managements and shareholders and the independent directors are expected to, inter alia, ensure fairness and transparency in dealings of the Company. Where an act or omission occurs through board processes, then such non-executive directors can be held liable for such acts/omissions of company, if such directors had participated in the relevant board meetings and did not act diligently. In the present case, I note that Noticees No. 4 and 5 had attended the board meeting dated October 29, 2009 of the Company wherein resolution was passed for opening a bank account with EURAM Bank and authorizing EURAM Bank to use the GDR proceeds as security against loan, if any. Thus, Noticees No. 4 and 5 were aware of authorization for pledge as the board resolution dated October 29, 2009 clearly mentioned that “.....*the Bank be and is hereby authorized to use the funds so deposited in the aforesaid bank account as security in connection with loans, if any,...*”. It is not the case of these Noticees that they did raise any objection to such agenda. Thus, I find that these Noticees failed to act diligently. Accordingly, Noticees No. 4 and 5 are liable for the violations alleged in the SCN. I find that the ingredients of Section 149(12) of the Companies Act, 2013 and Regulation 25(5) of the SEBI (LODR) Regulations, 2015, though not applicable in the present case, are also fulfilled. There are 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* in general 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.

45. Further, I note that Noticees No. 4 and 5 have contended that Section 27 of the SEBI Act, 1992 provides for vicarious liability of directors for acts of the company, but that Section 27 has not been invoked in the present case. The Noticees no. 4 and 5 have contended that mere presence at a Board meeting cannot amount to wrong doing and

have relied upon various judgments of the Hon'ble Supreme Court to contend that they cannot be vicariously liable as Independent Directors of the Company. In this regard, I note that there is no allegation of vicarious liability of the Noticees no 4 and 5 under Section 27 of the SEBI Act, in the SCNs. The Noticees no. 4 and 5 are contending on the presumption that there has been no personal action/involvement on their part. As discussed in previous para, the board resolution dated October 29, 2009, approved by Noticees no. 4 and 5, clearly mentioned that "*.....the Bank be and is hereby authorized to use the funds so deposited in the aforesaid bank account as security in connection with loans, if any,...*" which shows the Noticees no. 4 and 5 had knowledge. It is not the case of Noticees no. 4 and 5 that they did raise any query/objection on offering funds deposited in the bank account as security for loan. It shows that Noticee no. 4 and 5 failed to act diligently. Thus, the personal action and involvement of Noticees No. 4 and 5 is clear from the approval of the board resolution dated October 29, 2009 and the fact that Noticees no. 4 and 5 did not raise any objection during the same. In view of the above, I find the contention of the Noticees no. 4 and 5 that they cannot be vicariously liable as mere presence at a Board meeting cannot amount to wrong doing, is untenable.

46. I note that Noticee no. 4 has filed further submissions vide letter dated March 22, 2019, specifically relying upon the order of the Hon'ble SAT in the matter of *Pritha Bag vs. SEBI (SAT Appeal no. 291 of 2017 in Order dated February 14, 2019)*, submitting that the Hon'ble Tribunal while examining the provisions of Section 5 and Section 73 of the Companies Act, has held that unless and until a finding is given that a Director is an officer in default, the mandate provided in Section 73(2) cannot be invoked. The Noticee submits that the aforesaid judgement is relevant in the facts and circumstances of the present proceedings as well, in as much as, there are no findings or even a single allegation that the Noticee was a Managing Director or Whole Time Director. The Noticee submits that he was admittedly an Independent Director in the Company and repeats and reiterates the submissions made in this regard in his reply dated January 18, 2019 and written submissions dated February 05, 2019. It has been submitted that the aforesaid judgment further fortifies the Noticee's submissions that as an Independent Director he is not liable. In this regard, I note that case of *Pritha Bag vs. SEBI* have been cited by the Noticee no. 4 to contend that only the person who is "officer in default" is

liable for the acts of company. In this regard, it is noted that "officer in default" is responsible for only those acts of company regarding which liability has been fastened on "officer in default" by the provisions of the Companies Act, 1956/2013. Thus, in the case of Pritha Bag, Hon'ble SAT held that liability under Section 73 under the Companies Act, 1956 is not on all the directors of company but is only on those directors of company who are "officer in default". In the present case, liability of the Noticees has to be determined in the context of violation of the provisions of the securities laws as alleged in the SCN. In such case, the concept of "officer in default" has no application and therefore, the reliance placed by the Noticee no. 4 on the order passed by Hon'ble SAT in Pritha Bag case is misplaced. The violation in the present case is attributable to the decision taken in the board meeting dated October 29, 2009 attended by Noticee no. 4 which have been found to be in furtherance of fraudulent scheme and was not objected to/questioned by the Noticee no. 4. Therefore, Noticee no. 4 is liable for the violations which has emanated from the decision taken in the aforesaid board meeting.

47. With regard to Noticee no. 6, I note that the only allegation in the SCN against Noticee no. 6 is that he has signed certified true copy of the Board resolution which was approved by the Board of Directors on October 29, 2009. As discussed in para 34 above, I note that it cannot be ascertained as to whether Noticee no. 6 has attended the board meeting dated October 29, 2009, where the resolution was passed for opening of account with EURAM Bank, authorizing EURAM Bank to use the funds so deposited in the aforesaid bank account as security in connection with loans if any and also authorizing Noticees no. 2 and 3 to sign, execute any application, agreement, etc., as he had attended 6 meetings out of 7 meetings held during FY 2009-10. Further, I note from the Annual Report for the FY 2009-10, as mentioned in para 33, the Noticee no. 6 was the Chairman Non-Executive of the Company. As Chairman, he has merely signed certified true copy of the Board resolution dated October 29, 2009. Further, there is no evidence before me to ascertain that Noticee no. 6 had attended the board meeting dated October 29, 2009 or was involved in the GDR ONE and GDR TWO issues of BPSL. I note that Noticee no. 6 vide letter dated March 09, 2021, has submitted copy of the relevant pages of the Corporate Governance Report which is part of the Annual Report of BPSL for the year FY 2009-10, which states that out of the total 7 board meetings for the FY 2009-10,

Noticee no. 6 has attended only 6 board meetings and Noticee no. 6 has submitted that it is the board meeting on October 29, 2009 that he did not attend. In view of the above, I find that the allegation in the SCN against Noticee no. 6 is not maintainable.

48. I note that Noticees no. 2 and 3 have neither filed any reply to the SCN nor availed the opportunity of hearing granted to them. However, I note that Noticee no. 2 was a director of BPSL and attended the board meeting held on October 29, 2009, wherein, Noticee no. 2 and 3 were authorized by the board to *inter alia* enter into such agreements with EURAM Bank, as discussed in para 18 above. Further, Noticee no. 2 and 3 have signed the Pledge Agreements dated December 21, 2009 (GDR ONE) and July 05, 2010 (GDR TWO) on behalf of the Company and therefore, cannot escape any liability for the fraudulent issue of GDRs on January 27, 2010 (GDR ONE) and July 09, 2010 (GDR TWO) by BPSL. In view of the above, I find that Noticees No. 2, 3, 4 and 5 are liable for the violations alleged in the SCN, particularly Section 12A (a) of SEBI Act, 1992 read with Regulations 3 (b) and 4(1) of PFUTP Regulations.
49. In light of the above, I note that the Noticees no. 2, 4 and 5 had attended the Board meeting dated October 29, 2009, wherein, the Noticees no. 2, 4 and 5 had authorized the opening of bank account with EURAM Bank for the purpose of receiving subscription money in respect of the GDR issue and also authorized the bank to use the funds deposited in the said bank account as security in connection with loans, if any. Further, the Noticees no. 2, 4 and 5 had authorized Noticees no. 2 and 3 to sign, execute, any application, agreement, escrow agreement, document, undertaking, confirmation, declaration etc. as maybe required by the bank. Further, none of the Noticees no. 2, 4 and 5 have produced any material or record reflecting objections raised by them on the proposal that EURAM Bank will use the amounts deposited in its bank account as security to loans which ultimately facilitated Vintage to obtain loan from EURAM Bank for subscribing the GDR issue of the Company. In respect of allegation against the Noticee No. 2 and 3 who had signed the 'Pledge Agreements' dated December 21, 2009 and July 05, 2010 on behalf of BPSL, I find that they were not only having the knowledge but also played an active role and by execution of said 'Pledge Agreements' dated December 21, 2009 and July 05, 2010, actually facilitated the subscription of GDR issue

of BPSL and also authorized EURAM Bank to use the GDR proceeds of BPSL as security to the loans obtained by Vintage.

50. In view of the above, I find that the Noticees no. 2, 4 and 5 had participated in the Board meeting of BPSL on October 29, 2009, wherein, approvals were made to, among others, authorizing the EURAM Bank to use the GDR proceeds as security in connection with the loan and the same was acted upon by BPSL (Noticee No. 1) in which the Noticees No. 2 and 3 had signed and executed the Pledge Agreements dated December 21, 2009 and July 05, 2010 on behalf of BPSL (Noticee No.1). Thus, the Noticees no. 2, 4 and 5 were part of the fraudulent scheme which resulted in facilitating the subscription of GDR issue of BPSL wherein Vintage obtained loan from EURAM Bank for subscribing the GDR issue of BPSL and, BPSL pledged the GDR proceeds with the EURAM Bank for securing the loans taken by Vintage. Further, I note that the Noticees no. 2, 4 and 5 were also directors of the BPSL during the period when the corporate announcement were made by BPSL, which were false and misleading to the extent that its GDR issue was successfully allotted whereas the same was subscribed by only one entity i.e. Vintage by obtaining loans from the EURAM Bank which was again secured by the BPSL (Noticee No.1) by pledging the GDR proceeds. Thus, I find that the directors of BPSL (Noticee No. 1) namely; Mr. P.V.R. Murthy (Noticee No. 2), Mr. Rajesh V. Shah (Noticee No. 4), Mr. Upkar Singh Kohli (Noticee No. 5) and Mr. Yashovardhan Birla (Noticee No. 6) have violated the provisions of Section 12A (a) of SEBI Act, 1992 read with Regulations 3 (b) and 4(1) of PFUTP Regulations. Further, I find that Mr. P.V.R. Murthy (Noticee no. 2) and Mr. N. Nagesh (Noticee no. 3) who had signed the Pledge Agreements as the authorized representative of BPSL (Noticee no. 1) have violated the provisions of Section 12A (a) of SEBI Act, 1992 read with Regulations 3 (b) and 4(1) of PFUTP Regulations.

51. I note that BPSL had signed two Pledge Agreements dated December 21, 2009 and July 05, 2010 with EURAM Bank and pledged GDR proceeds of USD 20.01 million and USD 53.53 million as collateral against loan availed by Vintage. From the account statement of Vintage loan account, I note that Vintage repaid the loan in several instalments from March 2010 to June 2010 for GDR ONE and from July 2010 to July 2011 for GDR TWO.

From the statement of BPSL's bank account with EURAM Bank, I note that, in respect of GDR ONE, out of the GDR proceeds of USD 20.01 million, BPSL transferred USD 19.214 million to its bank account in India and USD 0.85 million to certain other entities. Further, in respect of GDR TWO, out of the GDR proceeds of USD 53.53 million, BPSL transferred USD 17.50 million to its bank account in India and USD 37.29 million to its UAE based subsidiary's bank account and USD 0.10 million to certain other entities.

52. The details of repayment of loan by Vintage and transfer of GDR proceeds by BPSL to its UAE subsidiary and other entities are tabulated for GDR ONE and GDR TWO, respectively, as under:

(a) For GDR ONE:

Date of transfer of funds	Amount repaid by Vintage (USD)	Amount of funds transferred from BPSL's EURAM Bank a/c to 1) BPSL's bank account in India and 2) other entities
09.03.2010	700,000.00	600,000.00
15.03.2010	733,000.00	130,000.00
15.03.2010		700,245.00
06.04.2010	1,000,000.00	1,000,000.00
07.04.2010	1,000,500.00	1,000,000.00
21.04.2010	7,000.00	7,265.00
22.04.2010	2,012,000.00	2,009,690.34
26.04.2010	1,000,000.00	1,000,000.00
06.05.2010	1,000,000.00	1,000,000.00
10.05.2010	1,000,000.00	1,000,000.00
17.05.2010	1,000,000.00	1,000,000.00
21.05.2010		1,000,000.00
25.05.2010	1,000,000.00	
27.05.2010	1,000,000.00	1,000,000.00
31.05.2010	1,000,000.00	1,000,000.00
02.06.2010	1,000,000.00	1,000,000.00
07.06.2010	1,000,000.00	1,000,000.00
09.06.2010	950,000.00	950,000.00
10.06.2010	1,057,000.00	1,054,198.25
15.06.2010	1,000,000.00	1,000,000.00
17.06.2010	1,000,000.00	1,000,000.00
29.06.2010	1,547,500.00	
02.07.2010		1,000,000.00
07.07.2010	700,000.00	540,000.00
Total	20,000,700.00	19,991,398.59

(b) For GDR TWO:

Date of transfer of funds	Amount repaid by Vintage (USD)	Amount of funds transferred from BPSL's EURAM Bank a/c to 1) BPSL's bank account in India 2) BPSL's UAE based subsidiary's bank account and 3) other entities (USD mn)
23.07.2010		12,649.58
27.07.2010	400,000.00	400,000.00
28.07.2010		2,378.35
03.08.2010		50,000.00
20.09.2010	300,000.00	300,000.00
27.10.2010	2,150,000.00	1,050,000.00
		1,100,000.00
02.11.2010	100,000.00	1,000,000.00
11.11.2010	1,000,000.00	
12.11.2010		1,000,000.00
29.11.2010	2,000,000.00	2,000,000.00
30.11.2010	1,000,000.00	1,000,000.00
03.12.2010	1,000,000.00	1,000,000.00
06.12.2010	1,500,000.00	1,500,000.00
14.12.2010	1,000,000.00	1,000,000.00
15.12.2010	500,000.00	500,000.00
29.12.2010	2,000,000.00	2,000,000.00
03.01.2011	1,000,000.00	1,000,000.00
05.01.2011	9,500.00	9,205.47
13.01.2011	1,000,000.00	1,000,000.00
18.01.2011	600,000.00	600,000.00
26.01.2011	50,000.00	50,000.00
27.01.2011	300,000.00	
17.03.2011	2,000,000.00	2,000,000.00
18.03.2011	3,000,000.00	3,000,000.00
23.03.2011	4,500,000.00	4,500,000.00
02.05.2011	72,000.00	
03.05.2011		60,000.00
		11,506.00
11.05.2011	1,800,000.00	1,800,000.00
13.05.2011	3,300,000.00	3,285,000.00
16.05.2011		7,096.50
03.06.2011	1,500,000.00	1,500,000.00
06.06.2011	1,000,000.00	1,000,000.00
14.06.2011	2,500,000.00	2,500,000.00
21.06.2011	1,500,000.00	1,500,000.00
24.06.2011	5,000,000.00	5,000,000.00
29.06.2011	2,000,000.00	2,000,000.00
30.06.2011	1,000,000.00	1,000,000.00
06.07.2011	2,000,000.00	2,000,000.00
07.07.2011	1,275,000.00	1,275,000.00
08.07.2011	1,300,000.00	1,700,000.00
14.07.2011	3,000,000.00	3,000,000.00
19.07.2011	800,000.00	800,000.00
20.07.2011	377,994.44	377,994.77
Total	53,834,494.44	54,890,830.67

53. From the above details of BPSL's EURAM Bank account statement and Vintage's loan account statement with EURAM Bank, I note that only after Vintage repaid loan instalments, on same day or later equal/ less amount of money was transferred from BPSL's EURAM Bank account to BPSL's bank account in India, in it's UAE subsidiary's

bank account and to other certain entities (except at one instance for GDR ONE i.e. on May 21, 2010 and at three instances for GDR TWO i.e. July 23, 2010, July 28, 2010 and August 03, 2010 when money was transferred from BPSL's EURAM Bank account before repayment of loan amount from Vintage since interest earned on GDR proceeds was credited in BPSL's bank account). From the above, I note that the amount transferred from BPSL's EURAM Bank account was dependent on the repayment of the loan by Vintage. In this regard, I note that the amounts arising from the GDR ONE and GDR TWO issues, were transferred by BPSL to its bank account in India, its UAE subsidiary and to other certain entities over a period of time. In terms of Section 177(4) (viii) of the Companies Act, 2013, the audit committee has to monitor the end use of funds raised through public offers. However, I note that vide Order dated August 28, 2014, Hon'ble Bombay High Court directed that BPSL should be wound up and appointed Official Liquidator of Bombay High Court as the liquidator to BPSL and thus, BPSL is under liquidation. Accordingly, the aforesaid information pertaining to proceeds of GDR and its receipt by BPSL may be brought to the attention of the Official Liquidator. Further, in this regard, I find that since BPSL has been ordered to be wound up, directions under Sections 11(1), 11(4) and 11B of the SEBI Act, 1992, against BPSL, at this juncture would not serve any purpose. However, having regard to the nature of violations and conduct of the directors (Noticees no. 2, 4 and 5) and the Company Secretary (Noticee no. 3), issue of regulatory directions under Sections 11(1), 11(4) and 11B of the SEBI Act, 1992, against Noticees no. 2, 3, 4 and 5 are called for in the present matter.

DIRECTIONS:

54. In view of the above, I, in exercise of the powers conferred upon me under Sections 11(1), 11(4) and 11B of the SEBI Act, 1992 read with Section 19 of the SEBI Act, 1992, hereby direct that:
 - a. In view of the findings in para 53 above, that vide Order dated August 28, 2014, Hon'ble High Court of Bombay directed that the Company should be wound up and

appointed Official Liquidator of Bombay High Court as the liquidator to the Company, the present proceedings initiated against Birla Power Solutions Limited (Noticee no. 1) vide SCN dated May 25, 2018, stands disposed of. However, in the event that the order for winding up passed by the Hon'ble High Court of Bombay is reversed in appeal, if any, the Noticee No. 1 shall be restrained from accessing the securities market and also remain prohibited from buying, selling or dealing in securities, directly or indirectly, in any manner whatsoever or being associated with the securities market in any manner, whatsoever, for a period of 3 years from the date of such reversal of winding up order.

- b. Mr. P.V.R Murthy (Noticee No. 2), being Executive Director and signatory to Pledge Agreements, is hereby restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in securities including units of mutual funds, directly or indirectly, or being associated with the securities market in any manner, whatsoever, for a period of 2 years from the date of this order.
- c. Mr. Rajesh V. Shah (Noticee No. 4) and Mr. Upkar Singh Kohli (Noticee no. 5), being Independent Directors, are hereby restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in securities including units of mutual funds, directly or indirectly, or being associated with the securities market in any manner, whatsoever, for a period of 1 year from the date of this order.
- d. The SCN against Mr. Yashovardhan Birla (Noticee no. 6) is disposed of in accordance with findings recorded in para 47 above.
- e. Mr. N. Nagesh (Noticee no. 3), being signatory to the Pledge Agreements, is hereby restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in securities including units of mutual funds, directly or indirectly, or being associated with the securities market in any manner, whatsoever, for a period of 1 year from the date of this order.

55. During the period of restraint, the existing holding of securities including units of mutual

funds of the Noticees no. 1, 2, 3, 4 and 5 shall also remain frozen. However, the obligation of the Noticees no. 1, 2, 3, 4 and 5, restrained/prohibited by this Order, in respect of settlement of securities, if any, purchased or sold in the cash segment of the recognized stock exchange(s), as existing on the date of this Order, are allowed to be discharged irrespective of the restraint/prohibition imposed by this Order. Further, all open positions, if any, of the Noticees no. 1, 2, 3, 4 and 5, restrained/prohibited in the present Order, in the F&O segment of the recognised stock exchange(s), are permitted to be squared off, irrespective of the restraint/prohibition imposed by this Order.

56. This Order comes into force with immediate effect.
57. A copy of this Order shall be forwarded to the Noticees, recognized stock exchanges, depositories and Registrars and Transfer Agents (RTA) of mutual funds for information and necessary action.
58. A copy of this order may also be sent to the Official Liquidator of the Bombay High Court, RBI, Enforcement Directorate and Ministry of Corporate Affairs for information and necessary action, if any.

Place: Mumbai

Date: March 23, 2021

Sd/-
ANANTA BARUA
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA