

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under Sections 11(1), 11(4), 11B(1), 11B(2) and 11(4A) of the SEBI Act, 1992, read with Rule 5 of SEBI
(Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995

In Re: SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to the Securities Market) Regulations, 2003

In respect of SCN:

SCN: SEBI/HO/IVD/ID3/OW/P/2019/32851/1 dated December 09, 2019			
Noticee No.	Name of Noticee	Particulars	PAN
1	Mutual Fund Digi Locker (MFDL)	Partnership firm	ABJFM9337L
2	Mr. Pankaj Garg	Partner	AERPG5388J
3	Mr. Jitender Malhotra	Partner	ALRPM2119G

In the matter of Allied Financial Services Pvt. Ltd. – Mutual Fund Digi Locker

BACKGROUND

1. SEBI received the following complaints against Allied Financial Services Pvt. Ltd. (hereinafter referred to as “**Allied/ AFSPL**”), a Depository Participant of NSDL, alleging fraudulent/ unauthorized transfer of mutual fund units (hereinafter referred to as “**MF Units**”):

- 1.1. Complaint dated February 08, 2019, from Finsec Law Advisor on behalf of clients Dalmia Cement East Limited (hereinafter referred to as “**DCEL**”) and OCL India Limited (hereinafter referred to as “**OCL**”) alleging fraudulent transfer of MF Units

worth Rs. 344.07 crores by AFSPL (these complainants are hereinafter collectively referred to as the “**Dalmia Group**”) and

1.2. Complaint dated December 31, 2018, January 18 and 21, 2019 from Novjoy Emporium Private Limited (hereinafter referred to as “**NEPL**”) alleging unauthorized transfer of MF Units worth Rs. 21 crores by AFSPL.

2. Economic Offences Wing (EOW), in its charge sheet filed in the matter, has observed that signature on the DIS used for transferring MF Units from the account of DCEL and OCL were forged. Mr. Subhas Sastri, authorized signatory of NEPL, during his statement on oath submitted that signature on the copy of the DIS used for transferring the MF Units from the account of NEPL were not his and have been forged. Mr. Sastri also submitted that the rubber stamp used on the said DIS was not of NEPL. In view of the same, it is likely that signatures on the DIS used for transferring MF units from the account of NEPL were also forged by AFSPL.
3. SEBI conducted an investigation into the matter for the period February 20, 2017, till February 08, 2019 (hereinafter referred to as the “**Investigation period/ IP**”) to find out violations, if any, of provisions of the SEBI Act, 1992 (“**SEBI Act**”), SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (“**PFUTP Regulations**”) and relevant circulars issued by SEBI. As part of the investigation, SEBI appointed a forensic auditor, Sarath & Associates, CA, to look into the functioning of AFSPL with regard to the alleged fraudulent transfer of securities from accounts of clients.

SHOW CAUSE NOTICE

4. Pursuant to conclusion of the investigation, a Show Cause Notices (SCN) dated December 09, 2019, was issued to Mutual Fund Digi Locker (MFDL) and its partners, Mr. Pankaj Garg and Mr. Jitender Malhotra (hereinafter collectively referred to as the “**Noticees**”). It has been alleged, inter alia, that:

4.1. Noticees were employees of AFSPL and opened demat account for their partnership firm MFDL.

4.2. MF units worth Rs. 21.70 crores were transferred from account of NEPL by AFSPL to the demat account of Mr. Pankaj Garg and Mr. Jitender Malhotra. Subsequently, the units were transferred to the account of Money Mishra Financial Services (“**MMFS**”) and Mr. Awanish Kumar Mishra (“**Awanish**”), Director of AFSPL. The units were then transferred to IL&FS Securities Services Ltd. (“**ISSL**”) by AFSPL for taking exposure in the market. Details are as below:

Entity to whose account MF units were transferred	Name of the client of AFSPL to whose account the MF units were transferred)	Value of MF Received (Rs.)	Value of MF delivered back (Rs.)	Net Value of MF unreturned (Rs.)
Pankaj Garg (Jt holder Jitender Malhotra) pertains to partnership firm MFDL	Money Mishra Financial Services	12,01,50,428	-	12,01,50,428
	Awanish Kumar Mishra	9,68,54,309	-	9,68,54,309
Total		21,70,04,737		21,70,04,737

4.3. Vide interim order dated February 27, 2019, SEBI has restrained the Noticees from accessing the securities market due to their prima facie involvement in the fraudulent transfer of securities from account of NEPL. In confirmatory order dated May 17, 2019, SEBI, inter alia, observed the following:

4.3.1. Noticees submitted that AFSPL was their employer and it set up the firm MFDL. AFSPL opened demat account in the name of MFDL and executed PoA in its favour to operate the said account.

4.3.2. Noticees denied knowledge of the above mentioned transfers. No steps taken to remedy the anomaly.

4.3.3. Noticees claim to have acted under employer-employee relationship on direction of AFSPL and its incumbent directors. They claim they came to

know about transfers only after SEBI order. Despite the purported knowledge vide the interim order, they have not lodged any complaint with any authority, including SEBI.

4.3.4. They appear to conveniently deny knowledge to escape the consequences.

4.4. It was observed during investigation that Noticees had not raised any objection with respect to the anomaly that high value MF units have been transferred to the account from NEPL. Also, they allowed subsequent transfer of said MF units to accounts of MMFS, MMOPL and Awanish.

5. It is alleged that the aforesaid conduct on part of Noticees is fraudulent as it appears that they were part of the fraudulent transfer of MF units from the account of NEPL. Therefore, it is alleged that the Noticees have violated Regulations 3(a) and 4(1) of the PFUTP Regulations.

6. In view of the above allegations, Noticees were called upon to show cause as to why appropriate directions:

6.1. Under Sections 11B(1) and 11(4) read with Section 11(1) of the SEBI Act should not be issued against them for the alleged violations of the aforementioned provisions of the PFUTP Regulations.

6.2. For imposing penalty under Sections 11B(2) and 11(4A) read with Sections 15HA of the SEBI Act should not be issued against them for the alleged violations of the aforementioned provisions of the PFUTP Regulations.

REPLY, WRITTEN SUBMISSION AND ADDITIONAL SUBMISSION:

7. I note that the SCN has been delivered on the Noticees and their written submissions have been received vide letter dated December 15, 2019. The Noticees also sent certain submissions vide email dated June 25, 2020. The Noticees were granted a

personal hearing on October 29, 2020, and their submissions post the hearing have been received vide emails dated November 3 and 4, 2020. The submissions made vide letters dated December 15, 2019, November 3 and 4, 2020, are summarized below:

7.1. They provided the employment details which are as under:

Noticee	Employer	Period	Role	
Pankaj Garg	MMFS	January-June 2017	Dealer	Only worked as a dealer and operated trading terminal. Never dealt with any client or any activity in DP department
	AFSPL	Jul 2017-Feb 2019	Dealer	
Jitender Malhotra	MMFS	Nov 2016-June 2017	Dealer	
	AFSPL	Jul 2017-Feb 2019	Dealer	

7.2. They admitted to signing some blank documents i.e., partnership deed, demat account opening form and two blank DIS under the instruction of their employer, Mr. Mishra and under fear of loss of job and without having any doubt on the intention of Mr. Mishra. These documents were signed in October or December 2018. They never filled up these documents. Later on they came to know that the deed was drafted by Mr. Anil Kumar, CA, for AFSPL, on the instruction of Mr. Awanish Mishra.

7.3. They have not signed or filled documents, such as, KYC documents for MFDL, documents related to bank account of MFDL and application of PAN in the name of MFDL. They were under the impression that before use of the documents, they would be consulted and unless they give the KYC documents, the blank forms cannot be used. Once the purpose would be explained, they would decide what to do.

7.4. They were never aware of the opening of the MFDL account and hence, no question of raising objection of transfer of high value MF units into and from the account arises. They have never received any message/ email with regard to transfer of MF units. They have no role and intent to open the account of MFDL

on the basis of forged and fabricated documents. The account was opened on the direction of Mr. Mishra and the same was suppressed from them by AFSPL and Mr. Mishra.

- 7.5. Bank account mentioned in client master does not exist and does not belong to them. PAN also does not belong to them. The signature on KYC documents for MFDL is forged. The documents submitted by them when they joined MMFS/ AFSPL have been misused by Mr. Mishra.
- 7.6. Phone number and email ID shown in client master of MFDL does not have any connection with them nor have they used the same. They have never submitted these details.
- 7.7. They have never made any transactions for or with MFDL at any time.
- 7.8. They have never contacted NEPL nor received communication from anyone from NEPL before or after the fraud. They were not aware of the opening of the demat account of NEPL.
- 7.9. Only signing of blank forms cannot be taken as fraudulent or our involvement or consent in the conspiracy at all. There is no question of consent/ intent and to receive any gain out of illegal act. Conduct of merely not raising objection cannot conclude that they were involved in fraudulent transfer.
- 7.10. Mr. Mishra has defrauded several of his clients of AFSPL and MMFS and the Noticees by taking their signatures and using the same to illegally open demat account of MFDL and cheat NEPL.
- 7.11. NEPL has filed complaint with EOW, Mumbai, but they have not been called by the EOW. They were called by EOW, New Delhi, for complaint of Dalmia Group but they are not part of the chargesheet.
- 7.12. They filed complaint with EOW, New Delhi, against AFSPL and Mr. Mishra vide letter dated October 23, 2019. They tried to register a complaint on March 04, 2019, with the Noida police but were turned away. They have provided details of how they have tried to get complaints registered with various authorities.
- 7.13. They do not have the forensic auditors report or the EOW chargesheet, which is prejudicial to their interest. They are not aware of any of the forgery, as

mentioned on the DIS slips. They were waiting to submit the facts in their knowledge during investigation but no opportunity was given to them.

8. As the Noticees had submitted that they had not been provided with certain documents, in the interest of natural justice, documents, such as, relevant extract of the forensic auditor's report and Account Opening Form, Client Master List, transaction statement and partnership deed of MFDL were provided to the Noticees. Another opportunity of hearing was also granted on July 30, 2021, wherein the Noticees appeared and made their submissions. Additional submissions have been received vide emails dated July 26, 2021, and August 3, 2021. These submissions are summarized as below:

- 8.1. They have not signed on any documents such as account opening forms for bank account, trading account and demat account and for PAN card.
- 8.2. The AOF has no application number. The photo of Pankaj Garg is pasted on the form and the applicant name should be Pankaj Garg but the applicant name is MFDL. As the name of Pankaj Garg is not mentioned anywhere on the form, hence there is no question of his sign being on the form. Hence, the AOF is fake.
- 8.3. They have no relation with NEPL and have never communicated with them. Hence, there is no question of receiving such high value MF units from NEPL. The entire fraud has been carried out by Mr. Awanish Kumar Mishra.
- 8.4. Address mentioned on the holding statement is G-14 Sector 3, Noida, which is the address of the Noida office of AFSPL. This proves that MFDL belongs to Mr. Awanish Kumar Mishra.
- 8.5. Mr. Awanish Kumar Mishra has used the documents submitted by them at the time of their joining AFSPL.

9. In summary, the replies of the Noticees are as under:

- 9.1. They agree to have signed blank documents viz., partnership deed, demat AOF and DIS on the instruction of Mr. Awanish Mishra.

- 9.2. While initially they have agreed that they signed blank demat account opening form at the instruction of Mr. Awanish Mishra, in their most recent submission, they have denied signing on any account opening forms.
- 9.3. They have submitted that they were never aware of opening of demat account in name of MFDL and of the transfers in this account. They have never signed KYC documents for MFDL and made application for PAN of NEPL.
- 9.4. Bank account mentioned in client master of MFDL does not exist/ belong to them.
- 9.5. Phone number and email ID shown in client master of MFDL does not have any connection with them.
- 9.6. As they never received any message/ email with regard to transfer of MF units, there is no scope of raising any objection to these transfers. They have no connection with NEPL.
- 9.7. They were not aware of the forgery or illegal acts with respect to the Dalmia Group accounts.
- 9.8. Only signing of blank forms cannot be taken as fraudulent and neither does it show their involvement or consent in the conspiracy. There is no question of consent/ intent to receive any gain out of illegal act. Further, the conduct of merely not raising objection cannot conclude that they were involved in fraudulent transfer.
- 9.9. They became aware of these activities only after interim order of SEBI dated February 27, 2019.

ISSUES FOR CONSIDERATION:

10. I have perused the SCNs, replies, written submissions and other materials available on record. In the context of the above mentioned allegations, the following issues arise for consideration in order to examine whether the alleged violations of the PFUTP Regulations are maintainable. They are as follows:

- 10.1. **Issue No. 1: Whether the conduct of the Noticees, as alleged in the SCN, has by being part of the fraud, facilitated the fraudulent transfer of MF units from the demat account of NEPL?**
- 10.2. **Issue No. 2: If Issue No. 1 is determined in the affirmative, whether Noticees have committed fraud/ unfair trade practice, as alleged in the SCN?**
- 10.3. **Issue No. 3: If Issue No. 2 is answered in affirmative, then whether Noticees are responsible for these violations?**
- 10.4. **Issue No. 4: If answer to Issue No. 2 above is affirmative, then whether any directions are required to be issued against the Noticees?**

Issue No. 1: Whether the conduct of the Noticees, as alleged in the SCN, has by being part of the fraud, facilitated the fraudulent transfer of MF units from the demat account of NEPL?

11. Before proceeding further, the use of the demat account of Mutual Fund Digi Locker has to be seen in the context of the fraudulent transfer of MF units from the demat account of NEPL. It has been alleged in the SCN that the conduct of the Noticees is fraudulent as it appears that by being part of the fraud, they have facilitated the fraudulent transfer of MF units from the account of NEPL. The investigation has revealed the following movement of the MF units from the demat account NEPL:

- 11.1. The MF units were first transferred to the demat account of the Noticees held on behalf of MFDL.
- 11.2. From this demat account, the MF units were transferred to demat accounts of Mr. Awanish Kumar Mishra and his associate entity.
- 11.3. Subsequently, the MF units were transferred to ISSL for getting exposure in the market.

12. Vide SEBI order dated July 02, 2021, in the matter of Allied Financial Services Pvt. Ltd., it has been determined that AFSPL and Mr. Awanish Kumar Mishra have fraudulently transferred the MF units from the demat account of NEPL and used them as collateral.
13. The Noticees have submitted that they are not aware of these fraudulent transactions and have no role to play in them. As noted earlier, it is alleged in the SCN that the Noticees, by virtue of their conduct and by being part of the fraud, they have facilitated the fraudulent transfer of MF units from the demat account of NEPL. It is noted that the PFUTP Regulations prevents acts of commission and omission, which are fraudulent or unfair in nature. The facilitation of fraud through an “act” of “omission” or “commission”, itself is treated as fraudulent as per the PFUTP Regulations if it facilitates any other fraud. The objective of the PFUTP Regulations is also to prevent “facilitation” in the same way that it intends to prevent the fraudulent “act” or “omission”. Therefore, independent of whether the facilitated act fructifies or not, it does not make the “facilitating act or omission” legal and/ or permissible. In other words, for a proceeding against the “act” of facilitation, it is not material whether the facilitated act of fraud has fructified or not. Whether the same has fructified is not material for proceeding against the Noticees for an allegation of fraudulent conduct of facilitation. Also, the Noticees, as facilitators, are not required to be aware of the entire gamut of the fraudulent act facilitated by them. However, there should be circumstances that raise red flags requiring further enquiry to be made, which the facilitators chose not to make. Raising of relevant queries would have brought to their actual knowledge the gamut of fraud. The omission to make such enquiry, despite the circumstances of red flags, coupled with the acts of commission, taints the act as facilitation of fraud. As facilitation itself is fraud and is separate from the fraudulent act which is facilitated, the contention of the Noticees that they are not aware of the fraudulent transactions is not sustainable.
14. The short name of this account, as mentioned in the Client Master List (CML), appears to have been chosen to misrepresent that the securities are secure in a digital- locker.

Hence, I note that the demat account of MFDL was opened only to hold temporarily the MF units received from the demat account of NEPL for the purpose of misrepresentation to NEPL that its securities are secured in a digital- locker.

15. It is alleged in the SCN that by virtue of the following conduct of Noticee Nos. 2 and 3 i.e., the partners of MFDL, they are part of the fraud and have facilitated the fraudulent transfer of MF units from the demat account of NEPL:

15.1. They did not raise any objection when high value of MF units was received into the demat account of MFDL.

15.2. They subsequently permitted the transfer of these MF units from the demat account of MFDL to the demat account of MMFS and Mr. Awanish Kumar Mishra.

16. I note here that in their first reply to the SCN dated December 15, 2019, Noticee Nos. 2 and 3 have accepted that they signed blank partnership deed, blank demat KYC/ AOF and blank DIS at the instructions of their employer, Mr. Awanish Kumar Mishra. In their communication sent on June 25, 2020, they have accepted that they signed on certain documents at the instruction of Mr. Awanish Kumar Mishra. However, in their recent submissions made vide emails dated July 26, 2021, and August 3, 2021, the Noticees have denied signing on any document, including the demat AOF. I note that the Noticees have now provided contrary submissions but have not given any explanation for this change in their submissions. The Noticees have also submitted that if their signature on their PAN card is compared with the signatures on the documents, then it is clear that the two are different. However, I note that they have not provided any order from a Competent Court on the aspect of mismatch of signature to the effect that the signatures on the documents, such as, partnership deed, account opening forms, etc., are not the signature of the Noticees. Instead, in their complaint dated October 23, 2019, registered with the EOW, New Delhi, the Noticees have stated that based on the instructions of Mr. Awanish Kumar Mishra, they have signed the partnership deed and other documents. Hence, I am not inclined to accept their

current case of denial of signature on any blank documents such as partnership deed, demat AOF and DIS, as the same appears to be an afterthought. Therefore, I find that there is no contrary material on record, except their claim based on afterthought, which can lead to disregarding their admission that they signed blank partnership deed, blank demat KYC/ AOF and blank DIS at the instructions of their employer, Mr. Awanish Kumar Mishra, both to SEBI and the EOW.

17. Further, the Client Master List (CML) for the demat account obtained from NSDL shows the following particulars:

17.1. The short name of the account is "Mutual Fund Digi".

17.2. Pankaj Garg is the first holder, while Jitender Malhotra is the second holder.

17.3. The mobile number linked with this account is 9315445615, while the bank account is 915020021793409.

18. NSDL further informed that transaction alerts by SMS for debit transfers in the demat account have been sent on the mobile number captured in the demat account. Jio, the service provider for the said mobile number, stated that the mobile number was registered in the name of a certain Mr. Manoj Kumar. I note here that there is no material on record to show any connection of this person with the Noticees. Information provided by Axis Bank regarding the holder of the bank account linked with the demat account, shows that bank account belonged to AFSPL.

19. From the above, it can be construed that the alerts for debit transactions were sent to an entity who, as per material available on record, is not connected to the Noticees. Further, the bank account linked to the demat account belonged to AFSPL and as the KYC available on record does not contain any bank account number, the same implies that the Noticee have failed to make any enquiry after signing on the blank account opening documents and therefore, they have actively facilitated their accounts to be misused.

20. I note from their own submissions that these Noticees have been associated with the securities market for a long time (21 years in the case of Mr. Pankaj Garg and 11 years in the case of Mr. Jitender Malhotra), mostly in the capacity of a dealer. Both are also graduates by education and were aged 46 and 35, respectively, at the time they signed these documents (partnership deed is dated October 23, 2018). Considering these factors, I am of the view that not only were they fully aware about the nature of the blank documents that they were signing, they were also completely aware of the possibility of the potential misuse of the blank documents that they have signed. In fact, I note that these Noticees have submitted that they were under the impression that the purpose of taking their signatures on blank documents would be explained to them and at that point, if required, they would be able to refuse the use of these documents. This implies that these Noticees were aware of the import of the blank documents that they had signed i.e., they were aware of the possibility that a partnership firm could be opened with them as its partners, a demat account for this partnership firm could also be opened and the blank signed DIS slips could be used to effect transfer of securities from/ to this account. Therefore, despite being aware of the possible consequences, the Noticees, by providing their signatures on blank documents, have not only consented to all these activities but in a way have also actively facilitated the same. The submission of the Noticees that they did not provide any KYC documents does not alter the finding that they signed blank documents and are responsible for the potential misuse of these documents for facilitation of a fraud, even if the entire gamut of such fraud is not known by them.

21. As already mentioned above, the mobile number on which debit alerts were sent by NSDL belongs to a person who, as per material available on record, is not connected with the Noticees. The Noticees, by also failing to ensure that their own communication details viz., address, email ID and mobile number were entered in the account opening form so that they would receive transaction alerts as well as transaction/ holding statements directly, have actively facilitated the misuse of the demat account.

22. Apart from failure to exercise prudence when signing on blank documents, I note that the Noticees have also actively facilitated the fraud by neglecting to follow up with Mr. Awanish Kumar Mishra under whose instruction they claimed to have signed the blank documents, regarding how these signed blank documents were used. The Noticees have also actively facilitated the fraud by neglecting to seek transaction/ holding statements for the demat account that would have been opened based on the blank account opening form that they signed. Had they sought such statements, they would have come to know about the transactions in the demat account much earlier and would also have been in a position to prevent further transactions. Hence, in view of the above, their submissions that they were not aware of the transactions in the account cannot be accepted as such ignorance was brought out by their own gross and willful neglect.

23. By their own admission, under fear of loss of their jobs, the Noticees have provided their signatures on blank documents. Noticee Nos. 2 and 3, despite knowing the potential of signed blank documents being misused, have consented to the following:

23.1. Use of their names for being partners in a partnership firm,

23.2. Opening of a demat account for a partnership firm and

23.3. Credit/ debit of securities into this demat account.

24. In view of the above, I hold that due to the acts of commission and omission of Noticee Nos. 2 and 3, i.e., by signing on blank documents, and their further omissions in subsequent follow up with AFSP and Mr. Awanish Kumar Mishra, they have actively facilitated the subsequent misuse of the partnership firm, MFDL, and the demat account of MFDL for facilitation of a fraud, whether or not the entire gamut of such fraud was known to them and therefore they cannot escape the liability for the same. As already noted above, the demat account of MFDL was used to misrepresent to NEPL that its MF units are held in a demat account named 'Mutual Fund Digi Locker' and as such, it was part of the scheme of fraudulent transfer of MF units.

25. Therefore, I hold that the conduct of Noticee Nos. 2 and 3, by virtue of their acts of commission and omission/ neglect resulted into active facilitation of an integral part of the fraudulent transfer of the MF units from the demat account of NEPL by AFSPL and Mr. Awanish Kumar Mishra.

Issue No. 2: If Issue No. 1 is determined in the affirmative, whether Noticees have committed fraud/ unfair trade practice, as alleged in the SCN?

26. In the context of the above findings, it needs to be determined whether the above factual conclusions arrived at are a fraud under PFUTP Regulations, as alleged in the SCN. In this context, the relevant provisions of PFUTP Regulations alleged to have been violated by the Noticees are reproduced below:

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

4. Prohibition of manipulative, fraudulent and unfair trade practices

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 manipulative fraudulent or an unfair trade practice if it involves:—

...

(p) an intermediary predating or otherwise falsifying records

27. Before proceeding further, I also take note of the definitions of as per the PFUTP Regulations, which is reproduced below:

“dealing in securities” includes an act of buying, selling or subscribing pursuant to any issue of any security or agreeing to buy, sell or subscribe to any issue of any security or otherwise transacting in any way in any security by any person as principal, agent or intermediary referred to in section 12 of the Act.”

“(c) “fraud” includes any act, expression, omission or concealment committed whether in a deceitful manner or not by a person or by any other person with his connivance or by his agent

while dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any wrongful gain or avoidance of any loss, and shall also include—

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

And “fraudulent” shall be construed accordingly ...”

28. With regard to the above, a reference is made to the findings of the Hon'ble Supreme Court in the following matters:

28.1. In the matter of SEBI and Ors. vs. Shri Kanaiyalal Baldevbhai Patel and Ors. 2017 SCC Online SC 1148, wherein the Hon'ble Court held as follows:

“31. Although unfair trade practice has not been defined under the regulation, various other legislations in India have defined the concept of unfair trade practice in different contexts. A clear cut generalized definition of the ‘unfair trade practice’ may not be possible to be culled out from the aforesaid definitions. Broadly trade practice is unfair if the conduct undermines the ethical standards and good faith dealings between parties engaged in business transactions. It is to be noted that unfair trade practices are not subject to a single definition; rather it requires adjudication on case to case basis. Whether an act or practice is unfair is to be determined by all the facts and circumstances surrounding the transaction. In the context of this regulation a trade practice may be unfair, if the conduct undermines the good faith dealings involved in the transaction. Moreover the concept of ‘unfairness’ appears to be broader than and includes the concept of ‘deception’ or ‘fraud’

...

60. Coupled with the above, is the fact, the said conduct can also be construed to be an act of unfair trade practice, which though not a defined expression, has to be understood comprehensively to include any act beyond a fair conduct of business including the business in sale and purchase of securities.”

28.2. A similar finding was also made by the Hon'ble Supreme Court in the matter of SEBI vs. Rakhi Trading Pvt. Ltd. and other connected appeals decided on

February 8, 2018 wherein the Hon'ble Court while dealing with provisions of Regulation 4(1) of PFUTP Regulations held as follows:

“35. Having regard to the fact that the dealings in the stock exchange are governed by the principles of fair play and transparency, one does not have to labour much on the meaning of unfair trade practices in securities. Contextually and in simple words, it means a practice which does not conform to the fair and transparent principles of trades in the stock market...”

“...Securities market, as the 1956 Act provides in the preamble, does not permit “undesirable transactions in securities”. The Act intends to prevent undesirable transactions in securities by regulating the business of dealing therein. Undesirable transactions would certainly include unfair practices in trade. The SEBI Act, 1992 was enacted to protect the interest of the investors in securities. Protection of interest of investors should necessarily include prevention of misuse of the market. Orchestrated trades are a misuse of the market mechanism. It is playing the market and it affects the market integrity”.

29. The Noticees have submitted that signing of blank forms cannot be taken as fraudulent and neither does it show their involvement or consent in the conspiracy. Further, they have submitted that it cannot be concluded they were involved in fraudulent transfer merely because they did not raise objections to the transfers.

30. The findings already rendered above shows the nature of conduct of Noticee Nos. 2 and 3 surrounding and involving the fraudulent transfer of MF units from the demat account of NEPL. The Noticees facilitated this state of affairs by consenting to provide their signatures on blank documents, despite being aware of the possible consequences of the same. This facilitation on the part of the Noticees has enabled not only the opening of partnership firm named MFDL and demat account for MFDL, but has also enabled all the subsequent transactions that took place in this demat account. Thus, the Noticees are responsible for facilitation of fraudulent transfer due to their signing blank documents.

31. The test here is to consider the effect of the Noticees signing on blank forms and actively neglecting in ensuring that their own communication details viz., email ID and mobile number, were entered in the account opening form. If this had been ensured,

then they would have received transactions alerts and transaction/ holding statements for the account, which would have not only alerted them to the transactions in the account but they would also have been able to prevent further transfer of the MF units. Similarly, they actively neglected to seek holding/ transactions statements from AFSPL for the demat account that was opened by using the documents signed by them. If the Noticees had sought such statements, then they would have been aware of the transactions in the demat account much earlier. The Noticees then could have not only objected to these transactions but they could have also prevented further transfer of the MF units from account of MFDL to demat accounts of MMFS and Mr. Awanish Kumar Mishra.

32. The above conduct of the Noticees breaches ethical standards and considering all the facts and circumstances surrounding the transactions between NEPL, MFDL and AFSPL, I am of the view that the conduct of the Noticees qualifies as an unfair trade practice and is prohibited under the PFUTP Regulations. Further, this conduct of the Noticees also deserves to be qualified as fraudulent as the same facilitated AFSPL and Mr. Awanish Kumar Mishra in execution of fraudulent transfers of MF units from the demat account of NEPL.

Issue No. 3: If Issue No. 2 is answered in affirmative, then whether Noticees are responsible for these violations?

33. I note here that the Noticees are a partnership firm, MFDL, and its two partners, Mr. Pankaj Garg and Mr. Jitender Malhotra. I have perused the partnership deed and I note that they both are designated as working partners and will share the profit/ loss equally. As already mentioned above, Noticee Nos. 2 and 3 are responsible for all the liabilities that follow due to them both being designated as working partners.

34. Here, it will be appropriate to reproduce the text of Section 25 of the Indian Partnership Act, 1932, which reads as follows:

Indian Partnership Act

Section 25

Liability of a partner for acts of the firm.

Every partner is liable jointly with all the other partners and also severally, for all acts of the firm done while he is a partner

SEBI Act

Offences by companies.

27(1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

27(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Explanation: For the purposes of this section, —

(a) “company” means anybody corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm

35. In the preceding issues, the active facilitation of the Noticees, at the time of signing blank documents, as well as after signing the same, has been brought out. Firstly, the Noticees actively facilitated the fraud by neglecting to ensure that their own communication details were entered in the account opening form that they signed. Secondly, they also actively facilitated the fraud by neglecting to follow up on the use of the blank documents and also did not seek transaction/ holding statements for the demat account. Had they ensured these, then they would have been alerted to the transactions in the demat account immediately. They could have objected to such

transactions and would also have been in a position to prevent further transfer of MF units. Hence, I hold that as per provisions of Section 27(2) of the SEBI Act, the contravention of the PFUTP Regulations is attributable to this neglect on part of Noticee Nos. 2 and 3.

36. Hence, I hold that Noticee Nos. 2 and 3 are responsible for the violations of the provisions of Regulations 3(a) and 4(1) of the PFUTP Regulations.

Issue No. 4: If answer to Issue No. 2 above is affirmative, then whether any directions are required to be issued against the Noticees?

37. I note that in the preceding issues, the following has been held in the affirmative against the Noticees:

37.1. The Noticees, through their act of commission and omission when signing blank documents and their neglect after having signed such documents, have facilitated AFSPL and Mr. Awanish Kumar Mishra in fraudulently transferring MF units from the demat account of NEPL.

37.2. The Noticees have violated the provisions of Regulations 3 (a) and 4(1) of the PFUTP Regulations

38. Therefore, for these violations, the Noticees are liable for:

38.1. Issuance of appropriate directions under Sections 11B(1) and 11(4) read with Section 11(1) of the SEBI Act, 1992, and

38.2. Imposition of monetary penalty under Sections 11B(2) and 11(4A) read with Sections 15HA (penalty for fraudulent and unfair trade practices) of the SEBI Act.

39. Section 15HA of the SEBI Act, 1992, is reproduced below:

SEBI Act

Penalty for fraudulent and unfair trade practices

15HA. If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher.

40. In this context, reference to the law laid down by the Hon'ble Supreme Court in the matter of *M/s. Agrawal Trading Corporation and others vs. The Asstt. Collector of Customs, AIR 1972 SC 648 (Agrawal Trading Corporation)* is apt and important. In the said case, the basis of liability of the "firm" and the "partners" was discussed. The said case involved an interpretation of Section 27C of the FERA, 1947, which is in *pari materia* to Section 27 of the SEBI Act. Section 23-C of FERA, 1947, post repeal of the enactment finds its place as Section 68 of FERA, 1973. It is also relevant to note that contentions were raised that "firm" is not a "person" in order to canvass the argument of non-applicability of Section 23-C of the FERA, 1947. Section 27 of the SEBI Act, as it stood at the relevant point of time reads as follows:

SEBI Act

Offences by companies.

27(1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

27(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Explanation: For the purposes of this section, —

(a) “company” means anybody corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm

41. While discussing the case law laid down in M/s. Agrawal Trading Corporation, the Hon’ble High Court of Bombay, in *Amritlakshmi Machine Works and Ors. vs. The Commissioner of Customs (Import)*, in its decision dated 29.01.2016, observed as follows:

“...section 23-C of the FERA, 1947 thus creates a deeming fiction by which, where a person committing a contravention is a company, every person who, at the time the contravention was committed was in-charge and was responsible to the company as well as the Company shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. The explanation to this section expanded the scope of the provision so as to bring within the ambit of the expression “company” a “firm” or an “association of individuals”, and for the expression “director” a partner of the firm”

*“...The Supreme Court, in repelling the contention firstly that the definition of ‘person’ under the General Clauses Act does not apply to a firm which is not a natural person which has no legal existence and secondly sub-clauses (3), (8) and (37) of Section 167 of the Sea Customs Act were not applicable to the appellant-firm, held that the ‘Explanation’ (supra) clearly provides that a company for the purpose of that Section is defined to mean any body corporate and includes a firm or other association of individuals and a Director in relation to a firm means a partner in the firm. In the context of the said provisions (supra) under the Sea Customs Act and the FERA 1949, which dealt with penalties, the Supreme Court observed that the High Court was right in holding that once it is found that there has been a contravention of any of the provisions of the Sea Customs act read with the Foreign Exchange Regulation Act by a firm, the partners of it who are in-charge of its business or are responsible for the conduct of the same, cannot escape liability, unless it is proved by them that the contravention took place without their knowledge or they exercised all due diligence to prevent such contravention. The explanation under Section 23-C of the FERA Act, 1947 was clearly applied to the penalty provision under the Sea Customs Act. In other words, the Supreme Court applied the deeming fiction under Section 23-C of the FERA, 1947 to the penalty provisions as contained under Section 167 of the Sea Customs Act in confirming **the penalty on the firm and its partners...**”(emphasis supplied)*

42. Further, a question that can arise in this regard is whether the text of Section 27 of the SEBI Act, as it stood at the relevant time is applicable to contraventions which result into monetary liability on the “firm” and its “partners”, as the said section covers “offences”. In this context, reference may be made to Section 68 of FERA which is

pari materia to Section 27 of the SEBI Act. The Hon'ble Supreme Court of India, while dealing with Section 68 of Foreign Exchange Regulation Act, 1973, in the matter of *Standard Chartered Bank vs. Directorate of Enforcement* in its judgment dated February 24, 2006, observed as follows:

"The word 'offence' is not defined in the Act. According to Concise Oxford English Dictionary, it means, 'an act or instance of offending'. Offend means, 'commit an illegal act' and illegal means, 'contrary to or forbidden by law'. According to New Shorter Oxford English Dictionary, an offence is 'a breach of law, rules, duty, propriety, etiquette, an illegal act, a transgression, sin, wrong, misdemeanour, misdeed, fault.' Thus, an offence only means the commission of an act contrary to or forbidden by law. It is not confined to the commission of a crime alone. It is an act committed against law or omitted where the law requires it and punishable by it. In its legal signification, an offence is the transgression of a law; a breach of the laws established for the protection of the public as distinguished from an infringement of mere private rights; a punishable violation of law, a crime, the doing that which a penal law forbids to be done or omitting to do what it commands (see P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edn, 2005 page 3302). This Court in Depot Manager, Andhra Pradesh State Road Transport Corporation Vs. Mohd. Yousuf Miya [(1997) 2 SCC 699] stated that the word 'offence' generally implies infringement of a public duty, as distinguished from mere private rights punishable under criminal law. In Brown v. Allweather Mechanical co. [(1954) 2 QB 443], it was described as "a failure to do something prescribed by a statute may be described as an offence, though no criminal sanction is imposed but merely a pecuniary sanction recoverable as a civil debt."

43. In light of the aforesaid Apex Court order and Section 27 of SEBI Act being *pari materia* to Section 68 of Foreign Exchange Regulation Act, 1973, it is just and fair to apply the same parameters to Section 27 of SEBI Act while interpreting the expression 'offence' for assigning liability on the "firm" and "partners" of the firm.

44. Therefore, in view of the Noticees having committed fraudulent acts and unfair trade practice, they are liable for imposition of monetary penalty under Section 15HA of the SEBI Act. Further, I note that Section 15 J of the SEBI Act, as interpreted by the Hon'ble Supreme Court in the matter of Adjudicating Officer, SEBI, vs. Bhavesh Pabari, decided on February 28, 2019, provides various factors that are to be taken into consideration when determining the quantum of penalty to be levied. Some of these factors are as below:

- 44.1. the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default,
- 44.2. the amount of loss caused to an investor or group of investors as a result of the default and
- 44.3. the repetitive nature of the default.

45. I note that investigation has not brought out the amount of disproportionate gain or unfair advantage that has been made as a result of the default of the Noticees. Further, there is no material to show that the default of the Noticees is repetitive in nature. As regards the quantum of loss in view of the fraud committed by the Noticees, I note that the facilitation of the fraud by the Noticees is a part of the entire gamut of fraud, which also involves the role of AFSPL and Mr. Awanish Kumar Mishra, and that there is no material on record to quantify the amount of loss caused due to the facilitation of the fraud by the Noticees.

46. Considering the above factors, directions and monetary penalty, appropriate to the nature of the violations observed are incorporated in the operative part of this Order.

47. Further, I note that the partnership firm of Mutual Fund Digi Locker has been opened for fraudulent purposes and has no legal use. The name has been chosen in a manner such that the demat account opened for this firm can be used to misrepresent to clients that their securities are secure in a digital locker. Since this entity has been allotted a Permanent Account Number and the same is vulnerable to misuse, I find that it would be appropriate to take steps to ensure that the Permanent Account Number given to this entity is cancelled.

ORDER

48. In view of the above, I, in exercise of the powers conferred upon me under Sections 11(1), 11(4A), 11B(1) and 11B(2) of the SEBI Act, 1992, read with Section 19 of the SEBI Act, 1992, hereby issue the following directions:

48.1. Mutual Fund Digi Locker, Mr. Pankaj Garg and Mr. Jitender Malhotra are restrained from accessing the securities market and from buying, selling or otherwise dealing in securities, either directly or indirectly, in any manner whatsoever, for a period of one (01) year from the date of this Order.

48.2. The following penalty is levied on the Noticees:

Under Section	Mutual Fund Digi Locker	Pankaj Garg	Jitender Malhotra
Section 15HA of the SEBI Act, 1992	Rs. 5,00,000/- (Rs. Five lakhs only)	Rs. 5,00,000/- (Rs. Five lakhs only)	Rs. 5,00,000/- (Rs. Five lakhs only)
Total	Rs. 5,00,000/- (Rs. Five lakhs only)	Rs. 5,00,000/- (Rs. Five lakhs only)	Rs. 5,00,000/- (Rs. Five lakhs only)

49. Needless to say that in view of the prohibition on sale of securities, during the period of restraint, the existing holding, including units of mutual funds, of all the Noticees shall remain frozen.

50. The penalty shall be paid by the Noticees within a period of forty-five (45) days, from the date of receipt of this order. Payment can be made online by following the below path at SEBI website www.sebi.gov.in

ENFORCEMENT → Orders → Orders of Chairman/Members → Click on PAY NOW or at <https://siportal.sebi.gov.in/intermediary/AOPaymentGateway.html> and selecting Type of Category as 11B orders.

51. A copy of this Order shall also be sent to the Income Tax Department to examine the feasibility of cancelation of the PAN allotted to Mutual Fund Digi Locker.

52. If there is a failure to pay the penalty, as mentioned above, SEBI may recover the amount from the Noticee as per applicable law.

53. The Order shall come into force with immediate effect.

54. A copy of this Order shall be sent to the Noticees, the stock exchanges, depositories and RTAs for information and necessary action.

Sd/-

DATE: August 09, 2021

MADHABI PURI BUCH

PLACE: MUMBAI

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA