WTM/GM/EFD DRA-1/ 12/FEB/ 2017

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA, MUMBAI

ORDER

Under Regulation 28(2) of SEBI (Intermediaries) Regulations, 2008 in the proceedings against D&A Financial Services (P) Ltd. (SEBI Registration No. INM 000011484) in the matter of Brooks Laboratories Ltd.

Background:

1. Hon'ble Securities Appellate Tribunal vide order dated March 3, 2015, in Appeal No. 189 of 2014, set aside SEBI order dated 10th June, 2014 against D & A Financial Services (P) Limited on the following ground:-

   "…..the Appellant was not put to notice regarding some of the issues which are held against the Appellant in the impugned order, the impugned order may be quashed and set aside and the matter may be remanded back for fresh decision to be passed by the WTM of SEBI after issuing a fresh show-cause notice to the Appellant."

2. In compliance with the aforesaid direction of Hon'ble Securities Appellate Tribunal, SEBI issued a fresh Show Cause Notice (SCN) dated March 3, 2016 enclosing a copy of report dated May 15, 2013 submitted by the Designated Authority (DA) against D & A Financial Services Private Limited in the matter of Brooks Laboratories Limited (Brooks / company). D&A Financial Services Private Ltd. **(**hereinafter referred to as **"Noticee")** was the Book Running Lead Manager **("BRLM")** for the IPO of Brooks.

3. In the SCN dated March 3, 2016, it was stated that the DA in his report found that the noticee has violated Regulation 64 (1) of the SEBI (Issue of Capital and Disclosure Requirements)

Regulations, 2009 ('ICDR Regulations') and Regulation 13 read with Clause 4 of the Code of Conduct as specified under Schedule III of SEBI (Merchant Bankers) Regulations, 1992 ('Merchant Bankers Regulations') by relying on the unsigned draft minutes and not independently exercising due care and diligence to verify the same. The DA accordingly recommended that the noticee may be warned not to repeat such irregularity in future.

4. In the said SCN, it was further stated that though the DA has given the benefit of doubt with respect to other allegations contained in the SCN dated December 21, 2012, upon considering the records and the report of the DA, the Competent Authority was of the prima facie view that the recommendation of the DA as given in the report dated May 15, 2013 was not commensurate with the gravity of the alleged lapses and violations of securities laws by noticee and a higher penalty was warranted. In view of the same, it was alleged afresh in the aforesaid SCN that the noticee has violated Regulations 64 (1) and 8 (2) (b), (e) and (f) of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 and regulation 13 read with Clauses 1, 2, 3, 4, 6, 7 & 21 of the Code of Conduct as specified under Schedule III of SEBI (Merchant Bankers) Regulations, 1992.

5. In response to the SCN dated March 3, 2016, the noticee sent a reply dated September 21, 2016 and appeared for personal hearing on December 15, 2016 during which the noticee was represented by Mr. Dinesh Agnani, Senior Advocate alongwith Ms. Leena Tuteja, Advocate, Mr. M. K. Doogar, the Promoter - Director of the noticee, Mr. Dinesh Kaushik, the Representative of the noticee and Mr. Balakrishnan Iyer, the Manager of the noticee.

Charges alleged by DA in the SCN dated December 21, 2012:

6. Primarily the allegations against the noticee in the SCN dated December 21, 2012 are as follows:-

(a) The Noticee as BRLM for the IPO of Brooks prepared the Red Herring Prospectus (RHP) dated August 3, 2011 by relying on the unsigned draft minutes of Brooks in respect of Inter Corporate Deposits (ICDs). It was alleged that the noticee merely relied upon the documents provided by Brooks and failed to independently exercise due care and diligence to verify the facts regarding the issue of ICDs.

(b) The Noticee has disclosed, in the RHP dated August 3, 2011, the names of the suppliers who are based in India. The name of Neo Power, a foreign supplier, to whom the contract was given later on was not mentioned in the RHP. This is despite the fact that Brooks changed the procurement process from indigenous suppliers to a foreign supplier and paid ₹ 13.97 crore in advance before the RHP dated August 3, 2011. The Noticee did not disclose such important information in the RHP / Prospectus which misled the investing public. The Noticee, therefore, had not adopted the established professional way of functioning and failed to exercise due care and diligence.

(c) M/s. Syal & Associates had given a quotation of ₹ 12.20 crores for construction of building and the same was disclosed in the offer document. Despite this quotation being lower, the management of Brooks went ahead and appointed Suryamukhi Projects Pvt. Ltd. (Suryamukhi) as a project contractor in place of Syal & Associates, and paid the whole of ₹ 15.30 crores in advance to it for project work, without the infrastructure being developed at the project site. The Noticee did not disclose such information in the RHP / Prospectus that the project work was awarded to Suryamukhi.

(d) Further it is alleged that the noticee issued three due diligence certificates during the process of IPO which were not in consonance with the aforesaid facts:

(i) The Noticee vide letter dated August 3, 2011 has submitted the due diligence certificate under Regulation 8(2)(b) of ICDR Regulations, stating that - "the

said Red Herring Prospectus contains all the material disclosures in respect of the issuer as on the said date."

(ii) The Noticee vide letter dated August 12, 2011 has submitted the due diligence certificate under Regulation 8(2)(e) of ICDR Regulations, stating that - "This is to certify that all the material disclosures in respect of the issuer as on the date of opening of the issue have been made through the Red Herring Prospectus registered with the Registrar of Companies on August 3, 2011."

(iii) The Noticee vide letter dated August 18, 2011 has submitted the due diligence certificate under Regulation 8(2)(f) of ICDR Regulations, stating that - "This is to certify that all the material disclosures in respect of the issuer as on the date of the issue have been made through the Red Herring Prospectus registered with the Registrar of Companies on August 3, 2011."

In view of the above, it was alleged in the SCN dated December 21, 2012 that the noticee had violated regulations 8 (2) (b), (e) & (f) and 64 (1) of the ICDR Regulations, and regulation 13 read with Clauses 1, 2, 3, 4, 6, 7 & 21 of the Code of Conduct as specified under Schedule III of Merchant Bankers Regulation.

Submissions of the Noticee:

7. In replies dated February 8, 2013, October 31, 2013, September 21, 2016 & December 23, 2016 to the said allegations, the noticee inter alia submitted as below:-

(a) With regard to the disclosures stated to be misrepresentations or concealments, they cannot be held responsible as they have acted purely on the basis of representations made and reconfirmed by Brooks, duly supported by various documents and certificates including auditors certificate made available on the public domain during updation of the Draft Red Herring Prospectus (DRHP), RHP and the prospectus. In the present case, they carried out due diligence on the basis of the information provided by Brooks in the best possible and utmost independent and professional manner.

(b) In this case, it is very apparent that the information of vital nature has been intentionally suppressed/not disclosed to the BRLM for the reasons best known to Brooks. In fact, BRLM is a victim of the demeanor and bad deeds of Brooks.

(c) It is their case that while filing the Prospectus on August 22, 2011, they found that the previous Fund Deployment Certificate was having a cutoff date of June 21, 2011, was more than 2 months old and therefore, in terms of Schedule VIII Part A Clause 2 (VII)(F)(1) of SEBI ICDR Regulations 2009, they requested for a fresh Fund Deployment certificate. A fresh Fund Deployment certificate upto July 31, 2011 was obtained from the Auditor of Brooks.

(d) As per normal practice, the BRLM attends to the SEBI observations made on the DRHP and replies to the same and updates the offer document in the light of the said observations. During the said process of updating the DRHP, the BRLM had written to Brooks vide email dated June 08, 2011 asking for further updations in the information subsequent to filing of DRHP and the copies of the minutes of the board meeting as well as general meetings held after the date of filing of DRHP. The company secretary and compliance officer of Brooks, vide email dated June 11, 2011, through her official email id, forwarded the minutes of the board meeting held till June 08, 2011. No resolutions regarding availing of ICDs were mentioned in the minutes of board meeting dated May 25, 2011. The dealing officer of the BRLM, Mr. Balakrishnan Iyer, Manager was present at the registered office of the Brooks at Chandigarh at the time of approval of RHP by the Board of Directors in their meeting held on August 03, 2011. Their officer had gone through the minutes book of the Brooks which was kept in loose leaf form and there was no mention of ICDs in the board meeting held on May 25, 2011 or on any other subsequent dates.

(e) It was reiterated that they were provided with the copy of minutes of board meeting held on August 03, 2011, wherein the RHP was approved by the members of the Board, DGM Accounts (now CFO) and Company secretary and Compliance Officer, however, neither the board minutes contained any statement/declaration, nor any statement had been recorded regarding the issue of ICDs, change of suppliers/contractor etc, in the interregnum from the date of filing of DRHP till date

of the RHP, which clearly shows that the management of the issuer company intentionally concealed/hid these material transactions and information from the BRLM.

(f) It was only upon reading the ex parte order dated December 28, 2011 passed against the noticee (along with several others) that for the first time, they came to know that the issuer company had taken ICDs between the dates of DRHP and RHP and that the decision to take ICDs was recorded in the minutes of the meeting of the board held on May 25, 2011, July 2, 2011 and July 21, 2011.

(g) As far as the second allegation is concerned, the noticee submitted that the constitution of such alleged core technical team and the details of the so called alleged report dated June 27, 2011 of the said core technical team (as indicated in SEBI findings) which allegedly recommended purchase of imported machineries instead of the indigenous machineries, was not shared with the BRLM nor was the BRLM informed at the time of placing the order for imported plant and machinery or parting with 50% of the price upfront as advance to the foreign supplier i.e Neo Power. The fact that the imported machinery was being purchased at a higher cost than indicated in the DRHP, would have certainly called for updation at the time of filing of the RHP, had the same been shared and disclosed to the BRLM. They further submitted that in the board meeting held on August 03, 2011, Dr. D. S. Maitry, Director (Technical), who was the chairman of Core Technical Committee which recommended procurement of imported machinery, was also present in that board meeting and signed the RHP, but he did not discuss / disclose the same.

(h) It was further submitted that BRLM through SEBI's ad interim ex-parte order, first time discovered that subsequent to filing of the DRHP, Brooks unilaterally without intimating the BRLM, proceeded to award the work to Suryamukhi for consideration of ₹ 15.30 Crores. The alleged agreement with Suryamukhi executed on June 01, 2011, was neither informed to the BRLM nor a copy thereof was supplied to the BRLM post its execution. They reiterated that they have been provided with the copy of minutes of board meeting held on August 03, 2011, wherein the RHP was approved by the members of the Board, DGM Accounts (now CFO) and Company Secretary &

Compliance Officer. However, the board minutes of the meeting held on August 3, 2011 did not contain any statement regarding change of civil contractor.

(i) They had carried out due diligence to the extent possible and ensured that true, fair and adequate disclosures are made, based on the documents and information made available to them by Brooks and its auditors. In view of the above, the Noticee requested for dropping the present enquiry against it.

(j) They have filed a complaint with the Institute of Chartered Accountants of India, against M/s J K Jain and Associates, Chartered Accountants, the statutory auditor of Brooks, who issued various Fund Deployment Certificates with regard to utilization of funds for IPO of Brooks.

(k) Further they have formed an IPO committee with an Independent Director, in order to specifically look after the due diligence process of IPO assignments.

8. Besides the contentions taken in its written replies, as summarized at para 7, the noticee made oral submissions during the personal hearing on 15th December, 2016. During the oral submissions, the Authorised Representatives mainly relied upon the favorable findings in the Enquiry Report dated May 15, 2013 of DA. It was submitted that two Affidavits of Shri Dinesh Kaushik, Director of the noticee and Shri Balakrishnan Iyer, the Manager of the noticee, filed during the Enquiry proceedings were not considered by the DA and submitted that the same may be taken into account while considering the matter. Additionally, the Authorised Representatives of the noticees reiterated the submissions made vide letter dated September 21, 2016. After the personal hearing, written submissions were also submitted by noticee vide letter dated December 21, 2016.

Recommendation of the Designated Authority:

9. In the enquiry report, the DA inter alia noted in paragraphs 9, 12 and 13 as extracted below :-

> " I noticed that there is no material available on records to show that the Noticee was aware or was informed by Brooks about such change of supplier or contractor. It was in fact stated in the investigation report *"During investigation it was observed that there was nothing on record to suggest that D&A was in the knowledge of resolutions passed for raising of ICDs or placement of plants and machineries to Neo Power or awarding project contract to Suryamukhi".*
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> ……
>
> "…..I cannot understand as to how such relevant and important aspect was simply relied by the Noticee upon unsigned and draft minutes only. Even at the today's computer era, wherein most of the correspondence take place in electronic form, but certain crucial aspects which are very essential for discharging the professional duties, always attracts a reasonable consideration or scrutiny. Had the Noticee insisted or verified the original/duly signed minutes, then the situation would have been different. But, unfortunately, such reasonable diligence/care was not adopted by it. Further, the said lack of due diligence is not technical or trivial in nature, rather; the same was very important as discussed above. As contended by the Noticee that there was no malafides on its part during the entire process of IPO, one can assume that, but, the fact of aforesaid lack of due diligence cannot be overlooked in the given circumstances.
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> Therefore, after considering the entire case, I am of the opinion that the Noticee had failed to adopt the independent due diligence / care and relied only on the draft as well as unsigned board minutes provided by the Brooks for its verification, and thereby violated the regulation 64 (1) of the ICDR Regulations, and regulation 13 read with Clause 4 of the Code of Conduct as specified under Schedule III of Merchant Bankers Regulations."

10. Based on the above observations, the DA recommended that "the Noticee may be warned not to repeat such irregularity in future during the course of its business, vide the enquiry report dated May 15, 2013.

Consideration of submissions and Issues:

11. The relevant provisions of ICDR governing the obligation and disclosures of Merchant Bankers alleged to have been violated by the noticee are extracted below:-

Documents to be submitted before opening of the issue.

8. (1).....
(2) The lead merchant bankers shall submit the following documents to the Board after issuance of observations by the Board or after expiry of the period stipulated in sub-regulation (2) of regulation 6 if the Board has not issued observations:
(a).....
(b) a due diligence certificate as per Form C of Schedule VI, at the time of registering the prospectus with the Registrar of Companies;
(c) .....
(d).....
(e) a due diligence certificate as per Form D of Schedule VI, immediately before the opening of the issue, certifying that necessary corrective action, if any, has been taken;
(f) a due diligence certificate as per Form E of Schedule VI, after the issue has opened but before it closes for subscription.

Due diligence.

64. (1) The lead merchant bankers shall exercise due diligence and satisfy himself about all the aspects of the issue including the veracity and adequacy of disclosure in the offer documents.

12. The relevant provisions of the Code of Conduct prescribed under Regulation 13 of Merchant Bankers Regulations 1992 is extracted below:-

Code of Conduct For Merchant Bankers

1. A merchant banker shall make all efforts to protect the interests of investors.
2. A merchant banker shall maintain high standards of integrity, dignity and fairness in the conduct of its business.
3. A merchant banker shall fulfil its obligations in a prompt, ethical, and professional manner.
4. A merchant banker shall at all times exercise due diligence, ensure proper care and exercise independent professional judgment.
5. .....
6. A merchant banker shall ensure that adequate disclosures are made to the investors in a timely manner in accordance with the applicable regulations and guidelines so as to enable them to make a balanced and informed decision.

7. A merchant banker shall endeavour to ensure that the investors are provided with true and adequate information without making any misleading or exaggerated claims or any misrepresentation and are made aware of the attendant risks before taking any investment decision.

8 to 20.....

21. A merchant banker shall maintain an appropriate level of knowledge and competence and abide by the provisions of the Act, regulations made thereunder, circulars and guidelines, which may be applicable and relevant to the activities carried on by it. The merchant banker shall also comply with the award of the Ombudsman passed under the Securities and Exchange Board of India (Ombudsman) Regulations, 2003.

13. I have considered the Enquiry Report dated May 15, 2013, the SCN dated March 3, 2016 issued by SEBI, the replies filed by Noticee, the submissions made by its authorized representatives during the course of the personal hearing, the written submissions dated December 21, 2016 and other relevant materials available on record.

14. It is observed that Brooks received ICDs from certain entities in the form of short-term loans before the date of filing the RHP and Prospectus with SEBI on August 3, 2011 and August 22, 2011 respectively. The resolutions to avail ICDs from the entities had been passed by Brooks during the meeting held on May 25, 2011. The Noticee in its reply to the Report, vide letter dated October 31, 2013 submitted that the minutes dated May 25, 2011, which they had received via e-mail dated June 11, 2011 from Brooks, though unsigned, were not in "*draft form"* as observed by the DA. Moreover, the said minutes were sent to the noticee by Brooks upon its specific request for updation before filing the RHP and therefore it could only be treated as "*extracts of minutes"* of the meeting and not as a draft as alleged.

15. The noticee has further submitted that the dealing officer of the BRLM for the issue, namely, Mr. Balakrishnan Iyer, was present at the registered office of the Brooks at Chandigarh at

the time of approval of RHP by the Board of Directors in their meeting held on August 03, 2011. He had gone through the minutes book of Brooks which was kept in loose leaf form and there was no mention of ICDs in the board meeting held on May 25, 2011 or on any other subsequent dates. In this regard during the Enquiry proceedings before the DA, Shri Balakrishnan Iyer, Manager of the noticee filed an affidavit wherein he had affirmed in para nos. 4 & 5 as below:-

"*That I say that I was present in the registered office of the company on 03.08.2011 when the Board of Directors meeting was held to finalise the RHP. I state that in the board meeting held on 03.08.2011 all the Directors including the independent Directors were present and had accorded their consent for filing of RHP. I further say that on the said date, I had checked and looked into the minutes of the Board of Brooks, which were kept in the loose form. I further say that in the said folder, there were no minutes of 02.07.2011 and 21.07.2011.*

That I further say that the minutes of 25.05.2011, which were available, were the minutes which were forwarded to us by the company Secretary & Compliance Officer Ms. Parvinder Kaur vide email dated June 11, 2011 *and it seems that subsequently, the company Secretary & compliance Officer / Directors of Brooks interpolated the minutes of 25.05.2011 and also inserted the minutes of 02.07.2011 and 21.07.2011, which were not there when the minutes were checked by me."*

16. In view of fact that after receiving the minutes on email on June 11, 2011 from the Company Secretary & Compliance officer, the noticee through the dealing officer got the minutes physically verified, I find that the noticee appears to have put in some efforts to verify the contents of the minutes of Brooks. However, despite the fact that the minutes were not authenticated by the Chairman, I note that the noticee continued to place reliance on the same.

17. As regards the fund deployment, the Noticee, in its reply, vide letters dated January 20, 2014 & December 21, 2016, submitted that the BRLM is mainly concerned with the status of funds deployment towards the object of issue as mentioned in the offer document and the aspect of utilization of funds towards the objects out of short term loans etc. has to be certified by the statutory auditors. The Noticee further submitted that it had considered the "*Fund Deployment Certificates"* and the "*Capitalization Statement Certificate"* given by the Statutory Auditor giving details of loans and equity capital structure pre and post issue. However, the issue of ICDs (₹ 30.40 crores) etc. have not been included by the Auditor in the "*Fund Deployment Certificate"* issued on August 2, 2011. The Noticee further contended that it was neither an international practice nor general practice to go through bank statements of a company in order to authenticate the financial statements of the company audited and certified by statutory auditors, as a part of due diligence process. I am inclined to agree with this part of the submission of the noticee.

18. The expression "Due Diligence" has been interpreted by Hon'ble Supreme Court of India, in the matter of Chander Kanta Bansal V. Rajinder Singh Anand (2008) 5 SCC 117. The relevant extract of the judgment reads as :

> "……According to Oxford Dictionary (Edn. 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's law Dictionary (18th Edn), "Due Diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Pharses by Drain-Dyspnea (Permanent Edn. 13-A) "due diligence", in law, means doing everything reasonable,

not everything possible. "Due Diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs….."

19. Bearing in mind these principles governing 'due diligence', the merchant banker cannot be expected to look at each and every statement and information provided by the issuer with suspicion unless the facts and circumstances at the relevant time so demand. At the same time, the merchant banker is expected not to passively or mechanically disclose whatever is given to it by the issuer but to exercise reasonable diligence to ensure adequate, true and fair disclosures in the RHP/Prospectus. In the instant case, I find that the noticee has counterchecked the contents of the minutes with the minutes book of the company. However, it is relevant to state that the noticee ought to have insisted on a signed and authenticated document before placing reliance upon it for disclosure in the RHP.

20. Though the obligation of verification of financials of the company broadly lies with the Auditors, BRLM being a gateway between the investors and company should have noticed the shortcoming in the "minutes" supplied to them by the company and sought for complete documents before placing reliance on it for disclosing in the prospectus. The obligation to seek complete information from Issuer company before relying on the same is all the more important given the spate of trust issues which have been coming out in the corporate world in the recent past. In the instant matter, in view of the facts that the Merchant Banker could have exercised a higher degree of diligence so as to overrule the possibility of any misrepresentation or fraud from the side of the issuer company, the allegation of violation of Regulations 8 (2) (b), (e) & (f) and 64 (1) of the ICDR Regulations read with the provisions of Code of Conduct prescribed under Regulation 13

of Schedule III of Merchant Bankers Regulations contained in the SCN may be stated to be partly substantiated.

21. With regard to the allegation of non-disclosure of vital information in RHP such as details of foreign suppliers and award of contract to Suryamukhi, I am of the view that the allegation cannot be sustained due to insufficient evidence on records as rightly observed by the DA in the investigation report. In the investigation report, it is stated that *"During investigation it was observed that there was nothing on record to suggest that D&A was in the knowledge of resolutions passed for raising of ICDs or placement of plants and machineries to Neo Power or awarding project contract to Suryamukhi"*. It is difficult to hold the Noticee liable for not updating or disclosing the names of new supplier/contactor in RHP dated August 3, 2011. I do not find that the allegations against the noticee with respect to the non-disclosure of the names of the foreign supplier as well as the awarding of contract to Suryamukhi and payment of 50% of the price upfront as advance to the foreign supplier i.e Neo Power substantiated. Since, the Noticee was not aware of the later developments or aforesaid changes made by Brooks, the charge of issuing wrong due diligence certificate under Regulation 8(2) of ICDR Regulations, cannot be sustained against it.

22. I have also considered the fact that the noticee has filed a complaint against M/s J K Jain and Associates, Chartered Accountants, the statutory auditor of Brooks, who issued various Fund Deployment Certificates with regard to utilization of funds for IPO of Brooks, with the Institute of Chartered Accountants of India. Further, the noticee has formed an IPO committee with an Independent Director, in order to specifically look after the due diligence process related to IPO assignments.

23. I have considered the entire facts and circumstances of the matter before me. I have noted that the Noticee has already been subjected to the restriction from taking up new assignments from December 28, 2011 till February 7, 2013, being the day on which the Hon'ble SAT set aside the confirmatory order against the noticee. In view of the fact that out of the three allegations levelled against the noticee, only one stands partially established and as the noticee has formed an IPO committee by inducting an independent director for the purpose as a remedial measure, I find this to be a fit case wherein the restraint against the noticee may be revoked.

24. Accordingly, I, in exercise of powers conferred upon me by virtue of section 19 read with section 12(3) of the Securities and Exchange Board of India Act, 1992 and regulation 28(2) of the Securities and Exchange Board of India (Intermediaries) Regulations, 2008, hereby dispose of the SCN dated March 3, 2016 by advising the noticee to exercise due care, caution and diligence in future conduct as a Merchant banker.

25. This order shall come into force with immediate effect.

Place: Mumbai

Date: February 9, 2017

G. MAHALINGAM

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA